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संविदा अधिनियम (1872 का 9), धारा 2(b) व 5 – मदिरा व्यापार – संविदा – प्रस्ताव व प्रति–प्रस्ताव – सशर्त/अनंतिम स्वीकृति – प्रभाव – अभिनिर्धारित – प्रस्ताव करने वाले की स्वीकृति की शक्ति समाप्त हो सकती है यदि प्रस्ताव करने वाला, प्रस्ताव स्वीकार करने की बजाए प्रति प्रस्ताव करता है, क्योंकि यह एक नया प्रस्ताव है जो कि मूल प्रस्ताव के निबंधनों को परिवर्तित करता है – इसी प्रकार, सशर्त या सापेक्ष/आंशिक स्वीकृति, प्रस्ताव के मूल निबंधनों को बदलती है और प्रति प्रस्ताव के रूप में प्रवर्तित होती है – वर्तमान प्रकरण में, याचीगण को संसूचित स्वीकृति न तो अनंतिम स्वीकृति है न ही सशर्त/सापेक्ष स्वीकृति है – याचीगण को कोई नया प्रस्ताव नहीं किया गया जो मूल प्रस्ताव परिवर्तित करता हो – अनुज्ञप्ति जारी करने की शर्तें जैसे कि बैंक गारंटी के रूप में प्रतिभूति निक्षेप, अतिरिक्त प्रतिभूति के रूप में आगे की तारीख डले चेक या प्रतिलेख करार

definite acceptance thereof – Acceptance of offer was communicated to petitioner and as per Policy, essential requirements have been complied with and mandatory payments in terms of acceptance letters, have been made by many petitioners during lockdown period only – Contract is concluded and is binding on petitioners, they cannot withdraw or revoke the same on pretext that no licence was issued by respondents prior to or on date of commencement of licence period or that the licence was issued without complying conditions stipulated in Excise Policy or Excise Act – Petitions dismissed. [Maa Vaishno Enterprises Vs. State of M.P.] (DB)…1577

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***Contract Act (9 of 1872), Section 56 – Covid-19 Pandemic – Performance of Contract – Unlawful/Frustrated/Unworkable* – Held – It cannot be said that contract between parties had become totally unworkable, impossible, frustrated and unlawful to perform – It was only a case of hardship and interruption in operation of liquor shops for only about two months for which State, vide amendment in policy has given an option to extend the period of licence by two months – State granted several relaxations and waiver of licence fee etc – MRP of liquor was also increased to cover the loss – Petitioners cannot claim that they are excused from performance of contract – For application of Section 56, the entire contract must become impossible to perform. [Maa Vaishno Enterprises Vs. State of M.P.] (DB)…1577**

संविदा अधिनियम (1872 का 9), धारा 56 – कोविड–19 महामारी – संविदा का पालन – विधिविरूद्ध/निष्फल/असाध्य – अभिनिर्धारित – यह नहीं कहा जा सकता कि पक्षकारों के बीच हुई संविदा, पालन हेतु पूर्ण रूप से असाध्य, असंभव, निष्फल एवं विधिविरूद्ध हो गई थी – वह केवल कठिनाई का और लगभग केवल दो माह के लिए मदिरा दुकानों के चलाने में रूकावट का एक प्रकरण है, जिसके लिए राज्य ने नीति में संशोधन द्वारा अनुज्ञप्ति अवधि दो माह के लिए बढ़ाने का विकल्प दिया है – राज्य ने कई

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***Criminal Procedure Code, 1973 (2 of 1974), Section 227 & 228 – Framing of Charge – Charge of Embezzlement of money to be filled in ATM machine* – Held – *Prima facie* sufficient material available against petitioner to proceed with trial – Elaborate discussion of evidence is not necessary at this stage – Accused may put his defence during evidence – No interference required – Revision dismissed. [Rishabh Mishra Vs. State of M.P.] …1774**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 227 व 228 – आरोप विरचित किया जाना – ए टी एम मशीन में भरे जाने वाले रूपयों के गबन का आरोप – अभिनिर्धारित – विचारण में आगे कार्यवाही करने के लिए याची के विरूद्ध प्रथम दृष्ट्या पर्याप्त सामग्री उपलब्ध है – इस प्रक्रम पर, साक्ष्य के विस्तृत विचार–विमर्श की आवश्यकता नहीं है – अभियुक्त, साक्ष्य के दौरान उसका बचाव रख सकता है – कोई हस्तक्षेप अपेक्षित नहीं – पुनरीक्षण खारिज। (ऋषभ मिश्रा वि. म.प्र. राज्य) **…1774**

***Criminal Procedure Code, 1973 (2 of 1974), Section 227 & 228 – Framing of Charge – Consideration* – Held – Apex Court concluded that at stage of framing charge, Court is not required to marshal evidence on record but to see that if *prima facie* material is available against accused or not – Court is not to see whether there is sufficient ground for conviction of accused or whether the trial is sure to end in conviction – It is statutory obligation of High Court not to interfere at initial stage of framing of charge merely on hypothesis, imagination and far-fetched reasons which in law amounts to interdicting the trial. [Rishabh Mishra Vs. State of M.P.] …1774**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 227 व 228 – आरोप विरचित किया जाना – विचार – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया कि आरोप विरचित करने के प्रक्रम पर न्यायालय को अभिलेख के साक्ष्य का क्रमबंधन करना अपेक्षित नहीं किंतु यह देखना है कि क्या अभियुक्त के विरूद्ध प्रथम दृष्ट्या सामग्री उपलब्ध है अथवा नहीं – न्यायालय नहीं देखेगा कि क्या अभियुक्त की दोषसिद्धि हेतु पर्याप्त आधार है या क्या विचारण की समाप्ति निश्चित रूप से दोषसिद्धि में होगी – उच्च न्यायालय की यह कानूनी बाध्यता है कि आरोप विरचित करने के आरंभिक प्रक्रम पर, मात्र अनुमान, कल्पना

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 439 एवं दण्ड संहिता (1860 का 45), धाराएँ 420, 177, 181, 193, 200 व 120–B – जमानत – अभिनिर्धारित – उच्च न्यायालय द्वारा तीन जमानत आवेदनों को अस्वीकार किया गया, अपीलार्थी एक वर्ष से अधिक समय से अभिरक्षा में है – पुलिस द्वारा दो बार समाप्ति प्रतिवेदन प्रस्तुत किया गया था तब भी उच्च न्यायालय ने मात्र इसलिए कि विचारण न्यायालय द्वारा अभी तक उक्त प्रतिवेदन को स्वीकार नहीं किया था, जमानत से इंकार किया – जमानत एक नियम है और जेल एक अपवाद है – जमानत को यांत्रिक ढंग से प्रदान या अस्वीकार नहीं करना चाहिए क्योंकि यह व्यक्ति की स्वतंत्रता से संबंधित है – अभिकथनों के स्वरूप एवं अभिरक्षा में बिताई गयी अवधि को विचार में लेते हुए, अपीलार्थी जमानत पर छोड़े जाने योग्य है – अपील मंजूर। (जितेन्द्र वि. म.प्र. राज्य) **(SC)…1530**

Disaster Management Act (53 of 2005), Section 6(2)(i) & 10(2)(i) – Liquor Trade – Covid-19 Pandemic – Excise Policy 2020-21, Clause 18.3 – General Licence Conditions, Clause 33 – Amendment – Validity – Grant of Licence from Retrospective date **– Held – Period of licence was 01.04.2020 to 31.03.2021 whereas licence was issued on 04.05.2020 – Merely because licence so issued bear the period of licence from 01.04.2020 to 31.03.2021, does not mean that licence is effective from such retrospective date and petitioners would be charged the prescribed fee for period for which they were not allowed to operate liquor vends – State decided to waive off licence fee for the period for which petitioners were unable to run their liquor shops due to lockdown – By amendment State also gave option to extend the period of licence upto 31.05.2021 – Further, petitioners in their affidavit have undertaken that State could carry out amendment in the policy 2020-21 during the currency of licence which would be binding on them – It will operate as promissory estoppel against petitioners. [Maa Vaishno Enterprises Vs. State of M.P.] (DB)…1577**

आपदा प्रबंधन अधिनियम (2005 का 53), धारा 6(2)(i) व 10(2)(i) – मदिरा व्यापार – कोविड–19 महामारी – आबकारी नीति 2020–21, खंड 18.3 – सामान्य अनुज्ञप्ति शर्तें, खंड 33 – संशोधन – विधिमान्यता – भूतलक्षी दिनांक से अनुज्ञप्ति प्रदान की जाना – अभिनिर्धारित – अनुज्ञप्ति की अवधि 01.04.2020 से 31.03.2021 थी जबकि अनुज्ञप्ति 04.05.2020 को जारी की गई थी – मात्र इसलिए कि जारी की गई अनुज्ञप्ति में अनुज्ञप्ति की अवधि 01.04.2020 से 31.03.2021 दी गई है, इसका अर्थ यह नहीं होता कि अनुज्ञप्ति, उक्त भूतलक्षी दिनांक से प्रभावी है और याचीगण पर उस अवधि के लिए विहित शुल्क प्रभारित होगा जिस अवधि में उन्हें मदिरा व्यापार करने की मंजूरी नहीं थी – राज्य ने उस अवधि के लिए अनुज्ञप्ति शुल्क को अधित्यक्त करने का विनिश्चय किया जिस अवधि में लॉकडाउन के कारण याचीगण उनकी मदिरा दुकानें चलाने में असमर्थ रहे थे – संशोधन द्वारा राज्य ने अनुज्ञप्ति की अवधि 31.05.2021 तक बढ़ाने का भी विकल्प दिया – आगे, याचीगण ने उनके शपथपत्र में परिवचन दिया है कि राज्य, अनुज्ञप्ति के चलन के दौरान

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को कोई क्षति कारित करने के लिए कोई प्रयत्न नहीं किया गया था, अतः, अभियुक्त द्वारा स्थिति का अनुचित लाभ उठाया गया – अभियुक्त को चौथे अपवाद के अंतर्गत बचाव उपलब्ध नहीं है। (शैतानबाई वि. म.प्र. राज्य) **(DB)…1720**

***Penal Code (45 of 1860), Section 300, Thirdly & Fourthly – Applicability* – Held – Doctor stated that injuries were such as would cause death in ordinary course of nature – Such statement attracts clause thirdly of Section 300 – "In the ordinary course of nature" would mean that injury is of such nature that death would result without medical intervention – If death results even after medical intervention, then fourthly clause of Section 300 would be applicable. [Shaitanbai Vs. State of M.P.] (DB)…1720**

दण्ड संहिता (1860 का 45), धारा 300, तीसरा व चौथा – प्रयोज्यता – अभिनिर्धारित – चिकित्सक ने कथन किया कि चोटें ऐसी थी जो कि प्रकृति के मामूली अनुक्रम में मृत्यु कारित करती – उक्त कथन, धारा 300 के तीसरे खण्ड को आकर्षित करता है – ''प्रकृति के मामूली अनुक्रम में'' का अर्थ होगा कि क्षतियां ऐसी प्रकृति की है कि चिकित्सीय हस्तक्षेप के बिना मृत्यु परिणामित होगी – यदि चिकित्सीय हस्तक्षेप के पश्चात् भी मृत्यु परिणामित होती है, तब धारा 300 का चौथा खंड लागू होगा। (शैतानबाई वि. म.प्र. राज्य) **(DB)…1720**

***Penal Code (45 of 1860), Section 302/149 – Appreciation of Evidence – Contradictions & Omissions* – Held – There are material contradictions, omissions and improvements in statement of sole eye witness recorded u/S 161 as well as in deposition before Court qua the appellants – Not safe to convict them on basis of such evidence – There was a prior enmity – No other independent witness supported the prosecution case – Appellants entitled for benefit of doubt – Conviction set aside – Appeal allowed. [Parvat Singh Vs. State of M.P.] (SC)…1515**

दण्ड संहिता (1860 का 45), धारा 302/149 – साक्ष्य का मूल्यांकन – विरोधाभास व लोप – अभिनिर्धारित – एकमात्र चक्षुदर्शी साक्षी के धारा 161 के अंतर्गत अभिलिखित किये गये कथन के साथ–साथ न्यायालय के समक्ष अभिसाक्ष्य में, जहां तक अपीलार्थीगण का संबंध है, तात्विक विरोधाभास, लोप और अभिवृद्धि है – उक्त साक्ष्य के आधार पर उन्हें दोषसिद्ध करना सुरक्षित नहीं – पूर्व वैमनस्यता थी – अन्य किसी स्वतंत्र साक्षी ने अभियोजन प्रकरण का समर्थन नहीं किया – अपीलार्थीगण संदेह के लाभ के हकदार हैं – दोषसिद्धि अपास्त – अपील मंजूर। (पर्वत सिंह वि. म.प्र. राज्य) **(SC)…1515**

***Penal Code (45 of 1860), Section 302/149 – Sole Witness* – Held – There can be a conviction relying upon the evidence/deposition of sole witness, provided it is found to be trustworthy and reliable and there are no material contradictions, omissions or improvements in case of prosecution. [Parvat Singh Vs. State of M.P.] (SC)…1515**

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

JOURNAL SECTION

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

THE CITIZENSHIP (AMENDMENT) ACT, 2019

[Received the assent of the President on 12 December 2019, and published in the Gazette of India, Extraordinary, Part II, Section 1, dated 12 December 2019 and republished for general information in Madhya Pradesh Gazette, Part 4 (kha), dated 01 May 2020, page Nos. 625 to 626]

THE CITIZENSHIP (AMENDMENT) ACT, 2019

An Act

further to amend the Citizenship Act, 1955.

BE it enacted by Parliament in the Seventieth Year of the Republic of India as follows:—

1. Short title and commencement. (*1*) This Act may be called the Citizenship (Amendment) Act, 2019.

(*2*) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

2. Amendment of section 2. In the Citizenship Act, 1955 (57 of 1955) (hereinafter referred to as the principal Act), in section 2, in sub-section (*1*), in clause (*b*), the following proviso shall be inserted, namely: —

> "Provided that any person belonging to Hindu, Sikh, Buddhist, Jain, Parsi or Christian community from Afghanistan, Bangladesh or Pakistan, who entered into India on or before the 31st day of December, 2014 and who has been exempted by the Central Government by or under clause (*c*) of sub-section (*2*) of section 3 of the Passport (Entry into India) Act, 1920 (34 of 1920) or from the application of the provisions of the Foreigners Act, 1946 (31 of 1946) or any rule or order made thereunder, shall not be treated as illegal migrant for the purposes of this Act;".

3. Insertion of new section 6B. After section 6A of the principal Act, the following section shall be inserted, namely:—

'6B. Special provisions as to citizenship of person covered by proviso to clause *(b)* of sub-section *(1)* of section 2. (*1*) The Central Government or an authority specified by it in this behalf may, subject to such conditions, restrictions and manner as may be prescribed, on an application made in this behalf, grant a certificate of registration or certificate of naturalisation to a person referred to in the proviso to clause (*b*) of sub-section (*1*) of section 2.

(*2*) Subject to fulfilment of the conditions specified in section 5 or the qualifications for naturalisation under the provisions of the Third Schedule, a person granted the certificate of registration or certificate of naturalisation under sub-section (*1*) shall be deemed to be a citizen of India from the date of his entry into India.

(*3*) On and from the date of commencement of the Citizenship (Amendment) Act, 2019, any proceeding pending against a person under this section in respect of illegal migration or citizenship shall stand abated on conferment of citizenship to him:

Provided that such person shall not be disqualified for making application for citizenship under this section on the ground that the proceeding is pending against him and the Central Government or authority specified by it in this behalf shall not reject his application on that ground if he is otherwise found qualified for grant of citizenship under this section:

Provided further that the person who makes the application for citizenship under this section shall not be deprived of his rights and privileges to which he was entitled on the date of receipt of his application on the ground of making such application.

(*4*) Nothing in this section shall apply to tribal area of Assam, Meghalaya, Mizoram or Tripura as included in the Sixth Schedule to the Constitution and the area covered under "The Inner Line" notified under the Bengal Eastern Frontier Regulation, 1873 (Reg. 5 of 1873).'.

4. Amendment of section 7D. In section 7D of the principal Act, —

(*i*) after clause (*d*), the following clause shall be inserted, namely: —

"(*da*) the Overseas Citizen of India Cardholder has violated any of the provisions of this Act or provisions of any other law for time being in force as may be specified by the Central Government in the notification published in the Official Gazette; or";

(*ii*) after clause (*f*), the following proviso shall be inserted, namely: —

"Provided that no order under this section shall be passed unless the Overseas Citizen of India Cardholder has been given a reasonable opportunity of being heard.".

5. Amendment of section 18. In section 18 of the principal Act, in sub-section (*2*), after clause (*ee*), the following clause shall be inserted, namely: —

"(*eei*) the conditions, restrictions and manner for granting certificate of registration or certificate of naturalisation under sub-section (*1*) of section 6B;".

6. Amendment of Third Schedule. In the Third Schedule to the principal Act, in clause (*d*), the following proviso shall be inserted, namely: —

'Provided that for the person belonging to Hindu, Sikh, Buddhist, Jain, Parsi or Christian community in Afghanistan, Bangladesh or Pakistan, the aggregate period of residence or service of Government in India as required under this clause shall be read as "not less than five years" in place of "not less than eleven years".'.

THE CONSTITUTION (ONE HUNDRED AND FOURTH AMENDMENT) ACT, 2019

[Received the assent of the President on 21 January 2020, and published in the Gazette of India, Extraordinary, Part II, Section 1, dated 22 January 2020 and republished for general information in the Madhya Pradesh Gazette, Part 4 (kha), dated 01 May 2020, page Nos. 597 to 598]

THE CONSTITUTION (ONE HUNDRED AND FOURTH AMENDMENT) ACT, 2019

(AS PASSED BY THE HOUSES OF PARLIAMENT)

An Act

further to amend the Constitution of India.

BE it enacted by Parliament in the Seventieth Year of the Republic of India as follows: —

1. Short title and commencement. (*1*) This Act may be called the Constitution (One Hundred and Fourth Amendment) Act, 2019.

(*2*) It shall come into force on the 25th day of January, 2020.

2. Amendment of article 334. In article 334 of the Constitution, —

(*a*) for the marginal heading, the following marginal heading shall be substituted, namely:—

"Reservation of seats and special representation to cease after certain period";

(*b*) in the long line, after clauses (a) and (b), for the words "seventy years", the words "eighty years in respect of clause (a) and seventy years in respect of clause (b)" shall be substituted.

AMENDMENT IN THE MADHYA PRADESH CIVIL SERVICES (EXTRAORDINARY PENSION) RULES, 1963

[Published in the Madhya Pradesh Gazette (Extra-ordinary), dated 15 June 2020, page No. 387]

No.F 9- /2020/Rule/IV. In exercise of the powers conferred by the proviso to Article 309 of the Constitution of India, the Governor of Madhya Pradesh, hereby makes the following further amendment in the Madhya Pradesh Civil Services (Extraordinary Pension) Rules, 1963, namely: —

AMENDMENT

In the said rules, note (2) of schedule 3 shall be omitted.

मध्यप्रदेश के राज्यपाल के नाम से तथा आदेशानुसार,
अजय चौबे, उपसचिव,

AMENDMENT IN THE MADHYA PRADESH CIVIL SERVICES (PENSION) RULES, 1976

[Published in the Madhya Pradesh Gazette (Extra-ordinary), dated 15 June 2020, page No. 388]

No.F 9-10/2019/Rule/IV. In exercise of the powers conferred by the proviso to Article 309 of the Constitution of India, the Governor of Madhya Pradesh, hereby, makes the following further amendment in the Madhya Pradesh Civil Services (Pension) Rules, 1976, namely: —

AMENDMENT

In the said rules, in rule 15-A, after clause (b), the following clause shall be inserted, namely:—

"(*c*) In case of two or more interruptions in the ad-hoc services, only ad-hoc period immediately preceding the regular appointment shall be deemed to be qualified for Pension.

Further, on the appointment to a regular post from the ad-hoc service, the period between the relinquishment of the ad-hoc post and joining of the regular post shall not be treated as interruption in the service."

मध्यप्रदेश के राज्यपाल के नाम से तथा आदेशानुसार,
अजय चौबे, उपसचिव,

NOTIFICATION REGARDING SECTION 173 (2) (i) OF THE CRIMINAL PROCEDURE CODE, 1973

[Published in the Madhya Pradesh Gazette (Extra-ordinary), dated 29 June 2020, page No. 405]

Notification No. F. 21-56-2020-B-l-Two.—In exercise of the powers conferred under the clause (ii) of sub-section (2) of Section 173 of Criminal Procedure Code, 1973 (l of 1975), the State Government, hereby, prescribes that wherever an officer-in-charge of police station submits a police report under section 173 (2) (i) before a Court, he shall also provide, free of cost, a copy of the same police report along with all annexed documents as being submitted before the Court, to the person/victim, if any who lodged the First Information report in the case.

मध्यप्रदेश के राज्यपाल के नाम से तथा आदेशानुसार,
एस.एन. मिश्रा, प्रमुख सचिव,

AMENDMENTS IN THE HIGH COURT OF MADHYA PRADESH RULES, 2008.

[Published in M.P. Gazette, Part 4(Ga), dated 19 June 2020, page No. 777]

In exercise of the powers conferred by Articles 225 of the Constitution of India, section 54 of the States Reorganisation Act, 1956, clauses 27 and 28 of the Letters Patent, the High Court of Madhya Pradesh, hereby, makes the following amendments in the High Court of Madhya Pradesh Rules, 2008, which shall come into force from the date of notification in the Madhya Pradesh Official Gazette (Extra-ordinary).

Amendments

1. In Rule 4 of chapter -I, after sub-rule (3), the following sub-rule shall be added; namely;

"(3a) "**The Electronic Filing System (EFS)**" means electronic platform through CMIS Software of the High Court / web portal of the High Court (www.mphc.gov.in) for filing of main case, interlocutory application, any other document in main case filed through e-filing system."

2. In chapter X, in sub-rule (7) of Rule 2, for clause (b) and clause (c), the following clauses shall be substituted, namely;

(b) neatly typed or printed on both sides of A4 size paper having not less than 75 GSM, leaving a margin of not less than 4 centimeters on the left and right and 2 centimeters on top and bottom,

(c) It shall be printed using one and half line space, font size of 14 (for quotations and indents – font size 12 in single line spacing) and font face Times New Roman. Copy for opposite party be on white durable paper.

3. In Rule 1 of chapter XI, in the beginning, before the word "Every", the words "Except in cases of e-filing;" shall be added.

Rajendra Kumar Vani, Registrar General.

NOTES OF CASES SECTION

Short Note
**(15)*
Before Mr. Justice G.S. Ahluwalia

W.P. No. 13649/2019 (Gwalior) decided on 21 November, 2019

SANTOSH SINGH RATHORE …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

***Public Trusts Act, M.P. (30 of 1951), Section 3 & 34-A – Powers of Registrar – Delegation of Power* – Held – Unless and until a separate notification u/S 34-A of the Act is issued, powers of Registrar cannot be delegated to SDO by work distribution memo – In instant case, no such notification issued – SDO had no jurisdiction to perform duties of Registrar – Matter transferred to Collector – Petition disposed.**

लोक न्यास अधिनियम, म.प्र. (1951 का 30), धारा 3 व 34–A – रजिस्ट्रार की शक्तियां – शक्ति का प्रत्यायोजन – अभिनिर्धारित – जब तक अधिनियम की धारा 34–A के अंतर्गत एक पृथक अधिसूचना जारी न की गई हो, उपखंड अधिकारी को कार्य वितरण मेमो (ज्ञापन) द्वारा रजिस्ट्रार की शक्तियां प्रत्यायोजित नहीं की जा सकती – वर्तमान प्रकरण में, ऐसी कोई अधिसूचना जारी नहीं की गई – उपखंड अधिकारी को रजिस्ट्रार के कर्तव्यों का निर्वहन करने की कोई अधिकारिता नहीं थी – मामला कलेक्टर को अंतरित – याचिका निराकृत।

Case referred:

M.A. No. 4917/2009 (Principal Bench) decided on 15.02.2018.

SK Yadav, for the petitioner.
Pawan Singh Raghuvanshi, G.A. for the respondent Nos. 1 to 3/State.
Anil Kumar Mishra, for the intervenor.

Short Note
**(16)*
Before Mr. Justice G.S. Ahluwalia

M.P. No. 2922/2019 (Gwalior) decided on 10 December, 2019

VIRENDRA SINGH & ors. …Petitioners

Vs.

KRISHNAPAL SINGH & ors. …Respondents

***Land Revenue Code, M.P. (20 of 1959), Section 178 – Partition Proceedings – Stay Order – Ingredients* – Held – Pendency of civil suit as well as temporary injunction are two necessary ingredients for staying further**

proceedings of partition – In present case, second appeal is pending where there is no interim orders of the Court – In absence of any stay, revenue authorities are not under obligation to stay further proceedings – Petition dismissed.

भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 178 – विभाजन कार्यवाहियां – रोकने का आदेश – घटक – अभिनिर्धारित – सिविल वाद के लंबित रहने के साथ–साथ अस्थायी व्यादेश, विभाजन की आगे की कार्यवाहियों को रोकने के लिए दो आवश्यक घटक हैं – वर्तमान प्रकरण में, द्वितीय अपील लंबित है जहां न्यायालय के कोई अंतरिम आदेश नहीं है – किसी रोक के अभाव में, राजस्व प्राधिकारीगण आगे की कार्यवाहियों को रोकने के बाध्यताधीन नहीं है – याचिका खारिज।

H.K. Shukla, for the petitioners.

I.L.R. [2020] M.P. 1503 (SC)
SUPREME COURT OF INDIA

Before Mr. Justice Dr. Dhananjaya Y. Chandrachud & Mr. Justice Ajay Rastogi

C.A. No. 1809/2020 decided on 25 February, 2020

PUNJAB & SIND BANK & ors. …Appellants

Vs.

MRS. DURGESH KUWAR …Respondent

***A. Service law – Transfer – Grounds – Malafides* – Held – Respondent written repeated communications to authorities regarding serious irregularities in bank and levelled specific allegations of corruption – Her reports of irregularities met with a reprisal – She, being a Scale IV officer, was transferred and posted to a branch which was expected to be occupied by Scale I officer – She was victimized – Order of transfer was an act of unfair treatment vitiated by *malafides* – High Court rightly quashed the transfer order – Appeal dismissed with cost of Rs. 50,000.**

(Paras 24 to 27)

क. सेवा विधि – स्थानांतरण – आधार – कदाशय – अभिनिर्धारित – प्रत्यर्थी ने प्राधिकारियों को बैंक में गंभीर अनियमितताओं के संबंध में बारंबार लिखित संसूचनाएं दी और भ्रष्टाचार के विनिर्दिष्ट आरोप लगाये – अनियमितताओं के उसके प्रतिवेदन के बदले उसे प्रतिशोध मिला – यद्यपि वह एक स्केल IV अधिकारी थी एक ऐसी शाखा में स्थानांतरित एवं पदस्थापित किया गया जिसे एक स्केल I अधिकारी द्वारा उपभोग किया जाना अपेक्षित था – उसे पीड़ित किया गया था – स्थानांतरण का आदेश, कदाशयों द्वारा दूषित अनुचित व्यवहार की एक कार्रवाई थी – उच्च न्यायालय ने स्थानांतरण आदेश को उचित रूप से अभिखंडित किया – रू. 50,000/– व्यय के साथ अपील खारिज।

***B. Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act (14 of 2013), Section 4(2)(c) – Constitution of Committee – Independent Member* – Held – It was established that a lawyer, who has been appointed as a member of Committee as independent member was the panel lawyer of bank itself – Request of respondent for replacing such member with a truly independent third party, should have been considered – No reason or justification on part of bank not to accede to such request of respondent.** **(Para 22)**

ख. महिलाओं का कार्यस्थल पर लैंगिक उत्पीड़न (निवारण, प्रतिषेध और प्रतितोष) अधिनियम (2013 का 14), धारा 4(2)(c) – समिति का गठन – स्वतंत्र सदस्य – अभिनिर्धारित – यह स्थापित किया गया था कि एक वकील जिसे स्वतंत्र सदस्य के रूप में समिति का एक सदस्य नियुक्त किया गया है, बैंक का ही पैनल वकील था – ऐसे सदस्य को एक वास्तविक स्वतंत्र तृतीय पक्षकार से प्रतिस्थापित करने हेतु प्रत्यर्थी के निवेदन पर

विचार किया जाना चाहिए था – प्रत्यर्थी का उक्त निवेदन मान्य न करने हेतु, बैंक की ओर से कोई कारण या न्यायोचित्य नहीं।

C. ***Service law – Transfer – Principles*** **– Held – Transfer is an exigency of service and employee cannot have a choice of posting – Administrative circular may not in itself confer a vested right which can be enforceable by a writ of mandamus unless transfer order is established to be *malafide* or contrary to statutory provisions or has been issued by incompetent authority. (Para 17)**

ग. सेवा विधि – स्थानांतरण – सिद्धांत – अभिनिर्धारित – स्थानांतरण, सेवा की एक आवश्यकता है और कर्मचारी को पसंद की पदस्थापना नहीं मिल सकती – प्रशासनिक परिपत्र अपने आप में एक निहित अधिकार प्रदत्त नहीं कर सकता जिसे एक परमादेश की रिट द्वारा प्रवर्तनीय किया जा सकता हो जब तक कि स्थानांतरण आदेश, असद्भावपूर्ण या कानूनी उपबंधों के विपरीत या अक्षम प्राधिकारी द्वारा जारी किया गया है, स्थापित नहीं किया जाता।

Cases referred:

(1992) 1 SCC 306, (2004) 11 SCC 402, JT 2009 (10) SC 187.

J U D G M E N T

The Judgment of the Court was delivered by : **DR. DHANANJAYA Y CHANDRACHUD, J. :-** Leave granted.

2. A senior officer of a public sector banking institution complains that her reports about irregularities and corruption at her branch and her complaints against an officer who sexually harassed her met with an order of transfer. The case involves the intersection of service law with fundamental constitutional precepts about the dignity of a woman at her workplace.

3. This appeal arises from a judgment of a Division Bench of the Indore Bench of the High Court of Madhya Pradesh dated 18 March 2019 in a Writ Appeal arising out of an order of the learned Single Judge dated 11 February 2019.

4. The respondent was appointed as a Probationary Officer of the Punjab and Sind Bank, the first appellant, on 8 October 1998 in Junior Management Grade Scale I. She was promoted to the post of Chief Manager in Scale IV. On 2 September 2011, the respondent was transferred to the Zonal Office at Mumbai. On 7 October 2011, she was transferred to the Branch Office at Indore. In September 2016, the first respondent was promoted to the post of Chief Manager in Scale IV. On 23 September 2016, the competent authority of the bank decided to continue her at the branch in Indore upon promotion. On 11 December 2017 the respondent was transferred from the Branch Office at Indore to the Branch Office at Sarsawa in the district of Jabalpur. Intimation of the transfer was furnished to

her on 14 December 2017. On 31 January 2018, the respondent submitted a representation to the Zonal Manager, recording a reference to the circulars of the bank governing the posting of women officers. She made .a request for being retained at Indore. Following the earlier representation, she submitted a reminder on 15 February 2018 and a representation on 19 February 2018 to the Executive Director of the bank.

5. In the course of her representations, the respondent submitted that during the course of the previous two years, she had, as a Branch Manager, inquired into the concentration of accounts maintained by liquor contractors at the branch and had detected grave irregularities which were hazardous to the interest of the bank. The respondent had submitted a detailed report to the Zonal Manager, Bhopal on 31 December 2016. In her report, she made several observations about lapses such as the existence of duplicate Bank Guarantee registers. She had recorded that the registers were not identical and some entries are missing from the new register. She observed that limits were sanctioned to parties not having any connection to Indore for the execution of liquor contracts. The Respondent's grievance was that instead of taking steps to rectify the irregularities, she was being pressurized to cover up the misdemeanors at the level of the branch. Moreover, she alleged that this was compounded by the Zonal Manager (who was named) calling her at late hours at home to discuss business which was not of urgent nature. The respondent made a specific allegation against the Zonal Manager. For the purpose of the present proceedings, it would be necessary to extract from the representation which was submitted by the respondent to the Executive Director. It reads thus:

> "I was surprised to observe that within a span of last 2 years during my predecessor time many accounts of liquor contractors had shifted to this branch from local branches as well as from far off places in UP. Many accounts of newly floated firms were opened and fresh limits of substantial amounts were sanctioned in a very haphazard manner, where even KYC norms were not followed. In a very short time concentration of liquor accounts had reached to such a high level that created a suspicion. When I started analyzing these accounts as per banking norms, I found many grave irregularities hazardous to the interest of the Bank. Furthermore, high value BGs were issued where copies of such Bgs were neither available in branch nor at ZO. Guarantees were issued to the liquor contractors in a manner that facilitated the contractors to use the same on different occasion with different Govt. Departments for different tenders, which caused huge revenue loss to the bank. I submitted detailed report to ZM Bhopal vide my letter dated 31.12.2016 (serious irregularities - copy attached) and followed by many subsequent communications and discussions from time to time for taking necessary action and guidance

> It was shocking to observe that ZO instead of taking necessary steps to rectify the irregularities or providing desired guidance and support to me, I was pressurized to keep the things under cover by various nets and communications which are on record. I had difficult road to travel as it is a well-established fact that I have never given up to corrupt practices. When I tried to fix these issues at branch level, first I was offered bribe, on my refusal, efforts were made to malign my image by raising many false complaints. I did my duties honestly unhindered by these events in safeguard the interest of the bank.
>
> **I was regularly bringing this to the notice of my next higher authority Zonal Manager i.e. Mr. Pankaj Dwivedi he started harassing me personally as well as professionally. First he called me at late hours at home to discuss not so important official matters then started insisting me to meet him personally either in Indore or Bhopal unofficially. Seems that my spurring of his advances towards me provoked him into adopting vengeful attitude towards me.**
>
> Finding me not dancing to their tunes for covering up the ill practices going on in the branch. ZO thought it proper to transfer me from P.Y. Indore Branch to a far off (Distance about 600 Kms) small rural branch."
>
> (Emphasis added)

6. The respondent also made a grievance of the fact that she had been transferred to a small rural branch situated at a distance of about 600 kilometers, which would be headed by a Scale I officer and was hence not a posting commensurate with her position as a Scale IV officer of the bank. In response to her representations, the respondent was informed that her transfer was in accordance with administrative and service exigencies and that she should join the place of posting immediately.

7. The order of transfer was challenged before the High Court of Madhya Pradesh under Article 226 of the Constitution. During the pendency of the proceedings, the order of transfer was stayed by a learned Single Judge. After the pleadings were completed, the writ petition was heard and by a judgment dated 11 February 2019, a learned Single Judge quashed the order of transfer. The learned Single Judge was of the view that though, as a matter of principle, transfer orders are ordinarily not interfered with in the exercise of judicial review, the respondent has been transferred in violation of the circulars of the bank as well as the guidelines issued by the Ministry of Finance in the Department of Financial Services. The High Court noted that contrary to the classification which has been made by the bank, the respondent who is a Scale IV officer, was posted to a branch at which only a Scale I officer could be posted. That apart, the learned Single

Judge also observed that no reply had been filed by the fourth respondent controverting the specific allegations which had been levelled by the original petitioner.

8. The judgment of the learned Single Judge has been affirmed in appeal by the Division Bench of the High Court. Among other things, the Division Bench has held that the respondent had levelled serious allegations against the Zonal Manager which were brought to the attention of the Executive Director of the bank. The High Court has taken note of the fact that the respondent had drawn several irregularities to the notice of the higher authorities and the transfer was *mala fide,* as a reprisal to the action which had been initiated by the respondent and the allegations which she had levelled against the Zonal Manager.

9. Proceedings under Article 136 of the Constitution have been instituted before this Court by the bank as well as its General Manager, Zonal Manager and Deputy General Manager. The Zonal Manager against whom allegations have been levelled by the respondent has since been promoted as Deputy General Manager and is presently posted at the head office in New Delhi. The Special Leave Petition under Article .136 of the Constitution has also been filed on his behalf and he is represented as the fourth petitioner.

10. Assailing the judgment of the High Court, Mr Sudhir Chandra, learned senior counsel appearing on behalf of the appellants submitted that the postings of the respondent indicate that she has been in Indore for several years. This was sought to be buttressed by relying on a chart which is annexed to the proceedings and is extracted below:

Place of posting	**W.E.F.**	**Total Tenure**	**Reasons for transfer**
Branch Office, Jaipur Station Road, Jaipur	08.10.1998	2.5 years	Joined the Bank at Jaipur at the place of her domicile.
Zonal Office, Jaipur	11.04.2001	3.1 years	Routine transfer and remained posted at her domicile.
Branch Office, Gandhi Road, Ahmedabad*	11.05.2004	3.1 years	Transferred to spouse's place of posting.
Branch Office, Reid Road, Ahmedabad ,	07.06.2007	1.10 years	Routine transfer. Her husband was also posted at Ahmedabad or nearby.

Branch Office, Pushpak Complex, Ahmedabad	02.04.2009	2.5 years	Routine transfer. Her husband was also posted at Ahmedabad or nearby.
Zonal Office, Mumbai	02.09.2011	01 month	Transfer on promotion from Scale II to Scale III.
Branch Office, PY Road, Indore	07.10.2011	08 months	Transfer on promotion from Scale II to Scale III.
Branch Office, Nanda Nagar, Indore	29.06.2012	4.1 years	Routine transfer to spouse's place of posting.
Branch Office, PY Road, Indore	05.07.2016 as 2nd Man 20.09.2016 as Incharge (on promotion to Scale-IV)	1.5 years	Even after the promotion kept at the same place of posting

11. It is urged that during the pendency of the proceedings before the Division Bench, on 13 March 2019, an offer was made by the bank by which the respondent was proposed to be transferred to a Scale IV branch either in Jabalpur, Jaipur or New Delhi. It was urged that despite the above offer, the respondent did not indicate any choice of posting to one of the three branches which were suitable for a Scale IV officer. During the course of the hearing, it is also urged in the alternative, the bank is willing to accommodate the respondent at a Scale IV branch in Bhopal, should she be willing to proceed to the new place of posting.

12. On merits, it was urged by the learned senior counsel appearing on behalf of the appellants that in the initial representation that was submitted by the respondent on 31 January 2018, there was no reference to either the allegations of irregularities at the branch which had been detected by her or of sexual harassment by the Zonal Manager. It was urged that these allegations were set up in the communication dated 19 February 2018 addressed to the Executive Director. Learned senior counsel submitted that the order of transfer was issued by the Executive Director on the recommendation of three General Manager level officers and, as a consequence, it would be far-fetched to attribute the *malafides* which were urged against the Zonal Manager to the authority which had effected the transfer. Moreover, it was urged that the Internal Complaints Committee[1] of the bank had, upon enquiring into the allegations which were levelled by the respondent, found that there was no substance in those allegations in its report dated 26 February 2019. The bank has submitted that upon the receipt of the

1 "ICC"

complaint of the respondent, the bank had carried out a vigilance and special audit. On these grounds, it was urged that the settled principle of restraint in matters of judicial review, where transfer is an exigency of service, must apply in the facts of this case. In this context, reliance was placed on the decisions of this Court in *Bank of India v Jagjit Singh Mehta*[2], *State of UP v Gobardhan Lai*[3] and *Rajendra Singh v State of UP*[4].

13. Controverting these submissions, Mr Colin Gonsalves, learned senior counsel appearing on behalf of the respondent submitted that there has been a gross suppression of fact on the part of the appellants in moving this Court. It has been urged that four sets of vital documents have not been brought to the attention of this Court. The first set of documents, it has been urged, are those pertaining to the communications by the respondent to the higher authorities outlining in detail the irregularities and corruption that she discovered in the transactions of the bank after she had taken over as a Branch Officer at Indore. It was urged that these letters by the respondent commenced from 31 December 2016 and were followed by communications dated 31 January 2017, 6 February 2017, 1 March 2017, 3 March 2017 and 15 November 2017. On the basis of these communications, it has been submitted that it was as a result of the stringent measures which were suggested by the respondent that she was met with the order of transfer barely a year after her promotion to Scale IV and continued posting as Chief Manager at the Indore branch

14. The second set of documents which, according to Mr Gonsalves, have been suppressed pertain to the report of the Local Complaints Committee[5]. It appears from the record that the respondent was not satisfied with the enquiry which was being conducted by the ICC of the bank. She had moved a complaint before the LCC in terms of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013[6]. According to the submission of the learned senior counsel, the LCC has concluded that the charge of sexual harassment directed against the fourth appellant by the respondent has been established. As regards the ICC, the grievance of the respondent is that the members of the Committee were biased against the respondent and there was an absence of an independent member as mandated by the provisions of the Act. The so-called independent member, it was urged, was a panel counsel drawn from advocates who appear on behalf of the bank.

15. The third set of documents is that, according to Mr Gonsalves, the original order of transfer dated 14 December 2017 had proposed the transfer of the

2 (1992) 1 SCC 306
3 (2004) 11 SCC 402
4 JT 2009 (10) SC 187
5 "LCC"
6 "Act"

respondent from Indore to a branch falling under the Zonal Office at Dehradun. Mr Gonsalves submitted that the original order of transfer was subsequently modified so as to provide for a transfer and posting to a branch at Sarsawa in the district of Jabalpur where the respondent would continue under the administrative control of the same Zonal Office.

16. Finally, it has been submitted that the bank has not apprised this Court fairly of the Office Memorandum of the Central Vigilance Commission in regard to rotation of officers in sensitive posts. Mr. Gonsalves submitted that the manner in which the order of transfer was effected close on the heels of the allegations of corruption levelled by the respondent would indicate a clear case of *malafides.* It was urged that the respondent who was a Scale IV officer, was posted to a Scale I level bank in the teeth of the Board Resolution dated 27 September 2017, approving the policy in regard to the classification of branches. It has been submitted that the list of branches indicates that the branch to which the respondent has been transferred is a rural branch at which Scale I officers are posted. The respondent was functioning as a Chief Manager in Indore at an "exceptionally large branch" (deposits of Rs 250 crores and above) being a Scale IV officer. In the circumstances, Mr Gonsalves submitted that the reason why the respondent is inclined to press ahead with these proceedings instead of accepting one of the suggested places of posting is in order to vindicate her own position as a matter of principle. Mr Gonsalves submitted that, as a matter of fact, one of the suggested places of posting is Jaipur, where her maternal home is situated, but despite this, as a matter of principle, the respondent would request this Court to determine the validity of the order of transfer in the present case.

17. We must begin our analysis of the rival submissions by adverting to the settled principle that transfer is an exigency of service. An employee cannot have a choice of postings. Administrative circulars and guidelines are indicators of the manner in which the transfer policy has to be implemented. However, an administrative circular may not in itself confer a vested right which can be enforceable by a writ of *mandamus.* Unless an order of transfer is established to be *malafide* or contrary to a statutory provision or has been issued by an authority not competent to order transfer, the Court in exercise of judicial review would not be inclined to interfere. These principles emerge from the judgments which have been relied upon by the appellants in support of their submissions and to which we have already made a reference above. There can be no dispute about the position in law.

18. The real issue which the Court needs to enquire into in the present case is as to whether the order of the High Court quashing the order of transfer can be sustained, having regard to the above principles of law. The material on record would indicate that commencing from 31 December 2016 and going up to 15

November 2017, the respondent, who was posted as Chief Manager in her capacity as a Scale IV officer at Indore branch, submitted as many as six communications drawing attention to the serious irregularities which she had noticed in the maintenance of bank accounts and transactions by liquor contractors. The contents of the complaints raised serious issues. The order of transfer was served on the respondent within a month of the last of the above representations, on 14 December 2017. On 19 February 2018, the respondent levelled allegations specifically of sexual harassment against the Zonal Manager. The bank initially constituted an ICC. The respondent raised an objection to the presence of some of the members of the Committee. The Committee as constituted initially consisted of the following persons:

(i)	Ms Havinder Sachdev, GM	(Presiding Officer)
(ii)	Ms Rashmita Kwatra, AGM	(Member)
(iii)	Ms Abha Sharma, CM	(Member)
(iv)	Mr Vimal Kumar Attrey, CM	(Member & Convenor)
(v)	Ms Shountal Singh, SRM	(Member)
(vi)	Ms Seema Gupta, Advocate	(Independent Member)

19. The report of the ICC contains a reference to the objections which the respondent raised to the members at serial numbers (ii), (iv) and (vi) above. These objections were noted in the course of the report of the ICC dated 26 February 2019. The respondent drew the attention of the Presiding Officer of the ICC to the fact that Ms Rashmita Kwatra, AGM is the spouse of a retired General Manager, who was part of the process of the transfer of the respondent. As against Ms Seema Gupta, who was nominated as an independent member, the respondent noted that she was a panel advocate of the bank and was regularly contesting cases in court involving the bank. The respondent also raised an objection in regard to the presence of Mr Vimal Kumar Attrey as a member of the Committee. The report of the Committee contains a reference to the fact that following the objections which were raised by the respondent, the Committee was reconstituted, as a result of which Ms Rashmita Kwatra and Mr Vimal Kumar Attrey were substituted by two other officers of the bank. However, Ms Seema Gupta, Advocate continue to be a member of the ICC.

20. The Act was enacted to provide protection against sexual harassment of women at the workplace as well as for the prevention and redressal of complaints of sexual harassment. Sexual harassment at the workplace is an affront to the fundamental rights of a woman to equality under Articles 14 and 15 and her right to live with dignity under Article 21 of the Constitution as well as her right to

practice any profession or to carry on any occupation, trade or business. Section 3 of the Act provides the following:

> **"3. Prevention of sexual harassment-**
>
> (1) No woman shall be subjected to sexual harassment at any workplace.
>
> (2) The following circumstances, among other circumstances, if it occurs, or is present in relation to or connected with any act or behavior of sexual harassment may amount to sexual harassment :-
>
> (i) implied or explicit promise of preferential treatment in her employment, or
>
> (ii) implied or explicit threat of detrimental treatment in her employment, or
>
> (iii) implied or explicit threat about her present or future employment or status, or
>
> **(iv) Interference with her work or creating an intimidating or offensive or hostile work environment for her; or**
>
> (v) humiliating treatment likely to affect her health or safety."
>
> (Emphasis added)

21. Section 4 of the Act requires the constitution of an ICC at all the administrative units or offices of the work place. Sub-section (2) of Section 4 of the Act provides for the constitution of the ICC. Section 4(2) is extracted below:

> ″4(2). The Internal Committee shall consist of the following members to be nominated by the employer, namely:-
>
> (a) a Presiding Officer who shall be a woman employed at a senior level at workplace from amongst the employees:
>
> Provided that in case a senior level woman employee is not available, the Presiding Officer shall be nominated from other offices or administrative units of the workplace referred to in sub-section (1):
>
> Provided further that in case the other offices or administrative units of the workplace do not have a senior level woman employee, the Presiding Officer shall be nominated from any other workplace of the same employer or other department or organisation;
>
> (b) not less than two Members from amongst employees preferably committed to the cause of women or who have had experience in social work or have legal knowledge:

(c) one member from amongst non-governmental organisations or associations committed to the cause of women or a person familiar with the issues relating to sexual harassment:

Provided that at least one-half of the total Members so nominated shall be women."

22. Clause (c) of Section 4(2) indicates that one member of the ICC has to be drawn from amongst a non-governmental organization or association committed to the cause of women or a person familiar with issues relating to sexual harassment. The purpose of having such a member is to ensure the presence of an independent person who can aid, advise and assist the Committee. It obviates an institutional bias. During the course of hearing, we have received a confirmation from the learned senior counsel appearing on behalf of the bank that Ms Seema Gupta was, in fact, a panel lawyer of the bank at the material time. This being the position, we see no reason or justification on the part of the bank not to accede to the request of the respondent for replacing Ms Seema Gupta with a truly independent third party having regard to the provisions of Section 4(2)(c) of the Act. This is a significant facet which goes to the root of the constitution of the ICC which was set up to enquire into the allegations which were levelled by the respondent.

23. The respondent did not participate in the proceedings before the ICC since, in the meantime, she had moved the LCC in terms of the provisions of Section 6 of the Act. Mr Sudhir Chandra, learned senior counsel urged that the LCC under Section 6 can be set up in a situation where the ICC has not been constituted or if the complaint is made against the employer himself. It has been urged that in the present case there was no complaint against the employer himself and hence the LCC would have no jurisdiction under Section 6 of the Act. Be that as it may, we have a situation in the present case where the appellants did not participate in the proceedings before the LCC and the respondent did not participate in the proceedings before the ICC. What, however, does emerge from the record is that there was a fundamental defect in the constitution of the ICC which was set up by the bank.

24. The material which has been placed on record indicates that the respondent had written repeated communications to the authorities drawing their attention to the serious irregularities in the course of the maintenance of accounts of liquor contractors and in that context had levelled specific allegations of corruption. The respondent was posted on 14 December 2017 to a branch, which even according to the bank, was not meant for the posting of a Scale IV officer. The sanctity which the bank attaches to posting officers of the appropriate scale to a branch commensurate with their position is evident from the Board's Resolution

to which we have adverted earlier. Admittedly, the branch to which the respondent was posted was not commensurate to her position as a Scale IV officer. There can be no manner of doubt that the respondent has been victimized. Her reports of irregularities in the Branch met with a reprisal. She was transferred out and sent to a branch which was expected to be occupied by a Scale I officer. This is symptomatic of a carrot and stick policy adopted to suborn the dignity of a woman who is aggrieved by unfair treatment at her workplace. The law cannot countenance this. The order of transfer was an act of unfair treatment and is vitiated by *malafides.*

25. In view of the above analysis, we are of the view that the High Court cannot be faulted in coming to the conclusion that the transfer of the respondent, who was holding the office of Chief Manager in the Scale IV in Indore branch to the branch at Sarsawa in the district of Jabalpur was required to be interfered with. At the same time, a period of nearly four years has since elapsed. Despite the order of stay, the respondent was not assigned an office at Indore and had to suffer the indignity of being asked to sit away from the place assigned to a Branch Manager. Considering the period which has elapsed, it would be necessary for the Court to issue a direction, which, while sub-serving the interest of the bank, is also consistent with the need to preserve the dignity of a woman employee who, we hold, has been unfairly treated.

26. We accordingly direct that Ms Durgesh Kuwar, the respondent officer, shall be reposted at the Indore branch as a Scale IV officer for a period of one year from today. Upon the expiry of the period of one year, if any administrative exigency arises the competent authority of the bank would be at liberty to take an appropriate decision in regard to her place of posting independently in accordance with law keeping in view the relevant rules and regulations of the bank, in the interest of fair treatment to the officer.

27. While affirming the decision of the High Court, the appeal is disposed of in terms of the above directions. The respondent would be entitled to costs quantified at Rs 50,000 which shall be paid over within one month.

Order accordingly

I.L.R. [2020] M.P. 1515 (SC)
SUPREME COURT OF INDIA

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

Cr.A. No. 374/2020 decided on 2 March, 2020

PARVAT SINGH & ors. …Appellants

Vs.

STATE OF M.P. …Respondent

A. Penal Code (45 of 1860), Section 302/149 – Appreciation of Evidence – Contradictions & Omissions **– Held – There are material contradictions, omissions and improvements in statement of sole eye witness recorded u/S 161 as well as in deposition before Court qua the appellants – Not safe to convict them on basis of such evidence – There was a prior enmity – No other independent witness supported the prosecution case – Appellants entitled for benefit of doubt – Conviction set aside – Appeal allowed.**

(Paras 13 to 15)

क. दण्ड संहिता (1860 का 45), धारा 302/149 – साक्ष्य का मूल्यांकन – विरोधाभास व लोप – अभिनिर्धारित – एकमात्र चक्षुदर्शी साक्षी के धारा 161 के अंतर्गत अभिलिखित किये गये कथन के साथ–साथ न्यायालय के समक्ष अभिसाक्ष्य में, जहां तक अपीलार्थीगण का संबंध है, तात्विक विरोधाभास, लोप और अभिवृद्धि है – उक्त साक्ष्य के आधार पर उन्हें दोषसिद्ध करना सुरक्षित नहीं – पूर्व वैमनस्यता थी – अन्य किसी स्वतंत्र साक्षी ने अभियोजन प्रकरण का समर्थन नहीं किया – अपीलार्थीगण संदेह के लाभ के हकदार हैं – दोषसिद्धि अपास्त – अपील मंजूर।

B. Penal Code (45 of 1860), Section 302/149 – Sole Witness **– Held – There can be a conviction relying upon the evidence/deposition of sole witness, provided it is found to be trustworthy and reliable and there are no material contradictions, omissions or improvements in case of prosecution.**

(Para 13)

ख. दण्ड संहिता (1860 का 45), धारा 302/149 – एकमात्र साक्षी – अभिनिर्धारित – एकमात्र साक्षी के साक्ष्य/अभिसाक्ष्य पर विश्वास करते हुए दोषसिद्धि की जा सकती है, परंतु वह भरोसेमंद और विश्वसनीय पाया जाता हो तथा अभियोजन के प्रकरण में कोई तात्विक विरोधाभास, लोप अथवा अभिवृद्धि नहीं है।

C. Criminal Procedure Code, 1973 (2 of 1974), Section 161 – Scope – Admissibility **– Held – Statement u/S 161 is inadmissible in evidence and cannot be relied upon or used to convict the accused – It can only be used to prove contradictions and/or omissions – High Court erred in relying on statements u/S 161 Cr.P.C. while convicting them. (Para 14.1)**

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 161 – विस्तार– ग्राह्यता – अभिनिर्धारित – धारा 161 के अंतर्गत कथन साक्ष्य में ग्राह्य नहीं है तथा अभियुक्त को दोषसिद्ध करने हेतु उन पर विश्वास अथवा उनका प्रयोग नहीं किया जा सकता – इन्हें केवल विरोधाभासों को एवं/या लोप को साबित करने के लिए उपयोग किया जा सकता है – उच्च न्यायालय ने उन्हें दोषसिद्ध करते समय दं.प्र.सं. की धारा 161 के अंतर्गत कथनों पर विश्वास कर त्रुटि की है।

J U D G M E N T

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

2. Feeling aggrieved and dissatisfied with the impugned judgment and order dated 19.04.2018 passed by the High Court of Madhya Pradesh at Gwalior in Criminal Appeal No.574 of 2006 by which the High Court has confirmed the conviction of the appellants herein - original accused Nos.2 to 5 for the offences punishable under Section 302 r/w Section 149 of the IPC, the original accused nos.2 to 5 have preferred the present appeal.

3. All the accused including the appellants came to be tried by the Learned Trial Court for the offences under Section 302 r/w Section 149 of the IPC for having killed one Bal Kishan s/o the informant Mullo Bai on 01.12.2005 around 4-5 a.m. in the morning at Village Hinotiya Gird.

4. According to the case of the prosecution, the informant Mullo Bai - PW8 was sleeping in the cattle shed. At that time, the appellants and one another accused named Bal Kishan, s/o Diman Singh while sharing common object caused murder of Bal Kishan, s/o Bhagwan Singh. According to the informant there was a dispute going on between the parties. As per the case of the prosecution and according to the informant, when she was sleeping in the cattle shed in the house, around 4-5 a.m. in the morning due to the barking of the dogs she woke up and in the light of torch, she saw that in the cattle shed, accused Bal Kishan with an axe and other original accused Nos. 2 to 5 herein with sticks/lathis in their hands were standing. Thereafter, accused Bal Kishan entered in the cattle shed and with an intention to kill her son Bal Kishan gave a blow of axe. She shouted and the other members of the family and nearby house came there and all the accused ran away from the spot. Investigation was carried out by one Mahesh Sharma -Investigating Officer - PW12. He recorded the statements of concerned witnesses. I.O. also obtained the relevant evidences including the medical evidence and also the postmortem report. That all the accused were charge-sheeted for the offences punishable under Section 302 r/w Section 149 and Section 450 of the IPC. The case was committed to the Court of Sessions. All the accused pleaded not guilty, therefore, all the accused came to be tried by the Learned Trial Court for the aforesaid offences.

5. To prove the case against the accused, the prosecution examined in all 12 witnesses including PW8 Mullo Bai -informant - mother of the deceased who was the sole eyewitness. At this stage, it is required to be noted that mother of the deceased Mullo Bai was the sole eyewitness. At this stage, it is required to be noted that the axe used in the commission of the offence by the original accused no.1 was recovered at the instance of the accused no.1 himself. Ratan Singh -PW1 and Pahalwan Singh - PW2 did not support the prosecution and therefore, they were declared as hostile by the prosecution. In support of the defence two witnesses were examined by the defence to bring home the theory of *alibi* in respect of original accused no.1 - Bal Kishan.

6. After perusing the evidence led by the parties and solely relying upon the evidence of Mullo Bai - PW8 the sole eye-witness, the Learned Trial Court convicted all the accused for the offences under Section 302 r/w Section 149 of IPC.

7. Feeling aggrieved and dissatisfied with the judgment and order of conviction by the Learned Trial Court, the appellants herein - original accused Nos.2 to 5 preferred Criminal Appeal No.574 of 2006 before the High Court. Original Accused No.1 also preferred one separate appeal. By the impugned judgment and order, the High Court has dismissed the appeal preferred by the accused nos.2 to 5 - appellants herein. The High Court also dismissed the appeal preferred by the Accused No.1 - Bal Kishan. It is reported that the SLP against the judgment and order of conviction of the original accused no. 1 - Bal Kishan is dismissed by this Court. Feeling aggrieved and dissatisfied with the impugned judgment passed by the High Court, the original accused nos. 2 to 5 have preferred the present appeal.

8. Shri A.K. Srivastava, learned Senior Advocate appearing on behalf of all the appellants - original accused nos. 2 to 5 has vehemently submitted that in the facts and circumstances of the case, the High Court has materially erred in dismissing the appeal and confirming the judgment and order of conviction passed by the Learned Trial Court and convicting them for the offences under Section 302 r/w Section 149 IPC.

8.1 It is vehemently submitted by Mr. Srivastava, learned Senior Advocate that the High Court has not properly appreciated the fact that the Trial Court convicted the appellants solely relying upon the evidence/deposition of Mullo Bai - PW8.

8.2 It is submitted that the High Court has not properly appreciated the fact that so far as the evidence/deposition of PW8 is concerned, it is full of material contradiction and improvements.

8.3 It is further submitted by Learned Senior Advocate appearing on behalf of the appellants that the High Court has not properly appreciated the fact that it was a black night when the incident took place, there was a dark, and it was not possible for Mullo Bai to recognize/identify the accused - the appellants herein.

8.4 It is further submitted that as such there was material contradiction in the deposition of the PW8 insofar as identifying/recognizing the appellants in the light of torch or from the chimney light. It is further submitted by Learned Senior Advocate appearing on behalf of the appellants that the testimony of Mullo Bai - PW8 suffers from material omissions, which amounts to contradictions as well as material improvements in her statement in Court as regards place of incident where she was sleeping. It is submitted that it was for the first time in the Court that she has stated that accused Santosh and Rakesh caught hold the deceased and that Bal Kishan inflicted axe injury over his neck.

8.5 It is further submitted that in fact there is no recovery of any torch from the place of incident.

8.6 It is further submitted that even the observations made by the High Court that the appellants herein went with the lathis is contrary to the evidence on record. It is submitted that in the deposition of PW8 - Mullo Bai, she has not stated anything that the appellants herein were carrying the lathis. It is submitted that in her statement recorded under Section 161 Cr.P.C. she has stated that the appellants were having lathis, but the statement under Section 161 Cr.P.C. is not admissible in evidence and therefore the High Court has committed a grave error in observing that the appellants were having lathis, solely relying upon the statement of PW8 recorded under Section 161 Cr.P.C.

8.7 It is further submitted by the Learned Senior Advocate appearing on behalf of the appellants that as such there is no cogent material and/or evidence with respect to the common object and/or conspiracy hatched amongst the accused persons to kill the deceased. It is submitted that the appellants are convicted with the aid of Section 149 IPC. It is submitted that, therefore, in absence of theory of common intention/object, the appellants could not have been convicted for the offences under Section 302 IPC with the aid of Section 149 IPC.

8.8 It is further submitted by the Learned Senior Advocate appearing on behalf of the appellants that even as per the deposition of Mullo Bai - PW8 the dispute was going on between the parties. It is submitted that therefore the false implication of the appellants cannot be ruled out. It is submitted that therefore conviction of the accused is solely based upon the evidence - deposition of PW8 and no other independent witness supports the case of the prosecution and that the evidence - deposition of the PW8 is full of contradictions, omissions and improvements, it is not safe to convict the appellants solely relying upon the evidence/deposition of PW8.

8.9 It is further submitted by the Learned Senior Advocate appearing on behalf of the appellants - original accused nos. 2 to 5 that the case of the original accused nos. 2 to 5 is clearly distinguishable on facts, from that of original accused no.1. It is further submitted that there are no much contradictions and/or improvements in the case so far as original accused no.1 is concerned. It is submitted that so far as accused no.1 is concerned, it can be seen that PW8 is consistent with her statement under Section 161 Cr.P.C. as well as her deposition before the Court. It is submitted that even there was a recovery of axe used in the commission of the offence at the instance of the original accused no.1. It is submitted that therefore the dismissal of SLP qua original accused no.1 would not come in the way of appeal. It is further submitted that even otherwise, the SLP was dismissed in limine and therefore it is prayed to consider the present appeal on its own merits.

9. Making the above submissions it is prayed to allow the present appeal.

10. Present appeal is vehemently opposed by Ms. Madhurima Mridul, Learned Advocate appearing on behalf of the respondent - State.

11. It is vehemently submitted by the Learned Advocate appearing on behalf of the State that there are a concurrent finding of facts recorded by both the Courts below while convicting the appellants for the offences under Section 302 r/w 149 IPC. It is submitted that the findings recorded by the Learned Trial Court and the High Court are on appreciation of evidence and therefore the same are not required to be interfered with by this Court in exercise of powers under Article 136 of the Constitution of India.

11.1 It is further submitted by Learned Counsel appearing on behalf of the State that in the present case though the conviction of the appellants is solely based upon the deposition of PW8 - Mullo Bai, however there is no rule that there cannot be any conviction relying upon the sole witness, more particularly an eye-witness. It is submitted that PW8 is a reliable and trustworthy witness. It is submitted that her presence on the spot is natural as the incident has taken place in her house and near the place where she was sleeping. It is submitted that as she is the sole eyewitness to the incident, both the courts are justified in convicting the accused relying upon the deposition/evidence of PW8 - Mullo Bai.

11.2 It is further submitted by the Learned Counsel on behalf of the State that in the present case the presence of appellants herein- original accused nos. 2 to 5 on the spot has been established and proved by the prosecution by examining PW8 who is the eyewitness. It is submitted that presence on the spot at the time of incident and that too between 4-5 a.m. early morning is sufficient to convict the accused for the offence under Section 302 IPC with the aid of Section 149 IPC.

11.3 It is further submitted by the Learned Counsel appearing on behalf of the State that even the accused were recognized and identified by PW8 - Mullo Bai even from their voice, so stated by PW8 in her deposition.

11.4 It is further submitted by the Learned Counsel appearing on behalf of the State that the original Accused no.1 also came to be convicted solely relying upon the deposition of PW8. It is submitted that the conviction of original Accused no.1 has been confirmed upto this Court. It is submitted that therefore there is no reason not to believe PW8 so far as the appellants - original accused nos. 2 to 5 are concerned. It is submitted that therefore both the courts below have rightly convicted the appellants herein for the offences under Section 302 r/w Section 149 IPC. Making the above submissions, it is prayed to dismiss the present appeal.

12. Heard the Learned Counsel for the respective parties at length. We have gone through and considered in detail the entire evidence recorded by the learned Trial Court as well as the High Court. We have also considered in detail the evidence on record more particularly the statement of PW8 - Mullo Bai recorded under Section 161 Cr.P.C. as well as her deposition before the Court.

13. At the outset, it is required to be noted that the appellants herein - original accused nos. 2 to 5 are convicted by the Learned Trial Court and the High Court solely relying upon the evidence/deposition of PW8 - Mullo Bai. It cannot be disputed that there can be a conviction relying upon the evidence/deposition of the sole witness. However, at the same time, the evidence/deposition of the sole witness can be relied upon, provided it is found to be trustworthy and reliable and there are no material contradictions and/or omissions and/or improvements in the case of the prosecution. Therefore, the question which is posed for consideration of this Court is whether in the facts and circumstances of the case, can the appellants herein - original accused nos. 2 to 5 be convicted relying upon the deposition of the sole witness - PW8 and whether PW8 is a reliable and trustworthy witness to convict the appellants herein- original accused nos. 2 to 5?

14. Having heard Learned Counsel appearing for the respective parties and considering the evidence on record, we are of the opinion that the evidence/ deposition of PW8 is full of material contradictions, omissions and improvements.

14.1 It is required to be noted that it was a black night (Amavasya) at the time of incident. It was a dark night as the incident has happened between 4-5 a.m. PW8 in her statement recorded under Section 161 Cr.P.C. has stated that she has seen all the accused in the light of the torch. She has stated that Bal Kishan - original accused no.1 was having an axe and other four were armed with lathis. She had also stated in her statement under Section 161 Cr.P.C. that Bal Kishan - original accused no.1 gave the axe blow on the neck of the deceased due to the enmity and

earlier dispute and other accused were telling to run away immediately and thereafter all the five accused ran away from behind the cattle shed/house. She stated that she had identified all the accused in the light of the torch and also by voice. According to her after she shouted, other persons came. However, there is material improvement in her deposition before the Court. In her deposition, she has stated that accused Santosh and Rakesh caught hold of Bal Kishan - deceased. In her deposition, she has also stated that there was a chimney light in the cattle shed. She has also stated in her deposition that the accused ran away from the nearby agricultural field of sugarcane. Therefore, the deposition of PW8 is full of material contradictions and improvements so far as original accused Nos. 2 to 5 is concerned. It is required to be noted that no other independent witness even named by PW8 has supported the case of the prosecution. Though, according to PW8, she identified the accused in the light of the torch, there is no recovery of torch. There is material improvement so far as the chimney light is concerned. In her deposition, she has not stated anything that the appellants - original accused nos. 2 to 5 were having the lathis, though she has stated this in her statement under Section 161 Cr.P.C. The High Court has observed relying upon her statement recorded under Section 161 Cr.P.C. that the appellants herein - accused nos. 2 to 5 were having lathis. However, as per the settled preposition of law a statement recorded under Section 161 Cr.P.C. is inadmissible in evidence and cannot be relied upon or used to convict the accused. As per the settled proposition of law, the statement recorded under Section 161 Cr.P.C. can be used only to prove the contradictions and/or omissions. Therefore, as such, the High Court has erred in relying upon the statement of PW8 recorded under Section 161 Cr.P.C. while observing that the appellants were having the lathis.

14.2 As observed hereinabove in her statement under Section 161 Cr.P.C., she has never stated that accused Santosh and Rakesh caught hold of Bal Kishan, but stated that the appellants herein told to run away as other persons have woken. In the facts and circumstances of the case, there are material contradictions, omissions and/or improvements so far as the appellants herein - original accused nos. 2 to 5 are concerned and therefore we are of the opinion that it is not safe to convict the appellants on the evidence of the sole witness of PW8. The benefit of material contradictions, omissions and improvements must go in favour of the appellants herein. Therefore, as such the appellants are entitled to be given benefit of doubt.

14.3 Now, so far as the submission on behalf of the State that relying upon the deposition of PW8, the original accused no.1 was convicted and his conviction has been confirmed upto this Court and therefore to dismiss the present appeal qua other accused is concerned from the evidence on record and having observed hereinabove the case of the appellants - original accused nos. 2 to 5, is

distinguishable on facts. There are material contradictions and omissions so far as the appellants - original accused nos. 2 to 5 are concerned. So far as the original accused no 1 is concerned, PW8 is consistent in her statement under Section 161 Cr.P.C. as well as in her deposition before the Court. There was a recovery of axe used in commission of the offence by accused no.1 at the instance of accused no.1. Under the circumstances, the case of the original accused nos. 2 to 5 is clearly distinguishable to that of original accused no.1.

15. For the reasons stated hereinabove, we are of the firm opinion that in view of the material contradictions, omissions and improvements in the statement of PW8 recorded under Section 161 Cr.P.C. as well as deposition before the Court qua the appellants - accused nos. 2 to 5 and that there was a prior enmity and no other independent witness has supported the case of the prosecution, we are of the opinion that the appellants herein - original accused nos. 2 to 5 are entitled to be given the benefit of doubt. Under the circumstances, the present appeal is allowed. The impugned judgment and order of conviction passed by the learned Trial Court and confirmed by the High Court convicting the appellants herein - accused nos. 2 to 5 for the offence under Section 302 r/w Section 149 of the IPC are hereby quashed and set aside and the appellants herein - original accused nos. 2 to 5 are acquitted of the charges for which they were tried. The appellants herein - accused nos. 2 to 5 be released forthwith, if not required in any other case.

Appeal allowed

I.L.R. [2020] M.P. 1522 (SC)
SUPREME COURT OF INDIA

Before Mr. Justice S. A. Bobde, Chief Justice of India, Mr. Justice S. Abdul Nazeer & Mr. Justice Sanjiv Khanna

C.A. No. 1998/2020 decided on 4 March, 2020

M.P. HOUSING & INFRASTRUCTURE DEVELOPMENT BOARD & anr. …Appellants

Vs.

VIJAY BODANA & ors. …Respondents

A. Nagar Tatha Gram Nivesh Adhiniyam, M.P. (23 of 1973) and Bhumi Vikas Rules, M.P, 1984, Rule 49 – Change in Layout Plan – Validity – **Held – Change or modification is permitted under the Act provided the same is in accordance with law and satisfies the development norms and conditions of development plans, zonal plans and town planning schemes – High Court misconstrued and misdirected itself by applying principle of estoppels to hold that once layout plan is prepared, same cannot be modified or changed –**

Modification of layout plan upheld but appellant directed to ensure that the area/land earmarked for primary school and park/garden are not converted into residential plots – Appeal allowed. (Paras 6, 7 & 10)

क. नगर तथा ग्राम निवेश अधिनियम, म.प्र. (1973 का 23) एवं भूमि विकास नियम, म.प्र., 1984, नियम 49 – अभिन्यास योजना में बदलाव – विधिमान्यता – अभिनिर्धारित – अधिनियम के अंतर्गत उपांतरण या बदलाव अनुज्ञेय है, परंतु यह कि वह विधि के अनुसरण में हो और विकास योजनाओं, आंचलिक योजनाओं एवं नगर योजना प्रणालियों के विकास मानकों और शर्तों की संतुष्टि करता हो – उच्च न्यायालय ने यह अभिनिर्धारित करने के लिए कि एक बार अभिन्यास योजना तैयार हो जाने पर उसमें उपांतरण या बदलाव नहीं किया जा सकता, विबंधों का सिद्धांत लागू कर गलत अर्थान्वयन किया एवं स्वयं को अपनिदेशित किया – अभिन्यास योजना के उपांतरण को मान्य ठहराया परंतु अपीलार्थी को यह सुनिश्चित करने के लिए निदेशित किया गया कि प्राथमिक शाला एवं उद्यान/बाग के लिए निश्चित किये गये क्षेत्र/भूमि को आवासीय भूखंडों में संपरिवर्तित नहीं किया जाएगा – अपील मंजूर।

***B. Constitution – Article 226 – Delay & Laches – Effect* – Held – Petition was filed nearly seven years after the approval for modification was granted – Meanwhile 42 out of 52 plots sold and third party interest created – Innocent and *bonafide* plot owners constructed their house and they were not even heard before passing such adverse order – Considerable delay has resulted into change in position – High Court should not have entertained the petition. (Para 8)**

ख. संविधान – अनुच्छेद 226 – विलंब व अतिविलंब – प्रभाव – अभिनिर्धारित – याचिका, उपांतरण हेतु अनुमोदन प्रदान किये जाने के लगभग सात वर्ष पश्चात् प्रस्तुत की गई थी – इस बीच में, 52 में से 42 भूखंडों का विक्रय किया गया तथा तृतीय पक्षकार के हित सृजित किये गये – बेकसूर और सद्भाविक भूखंड स्वामियों ने उनके मकान निर्मित किये तथा उक्त प्रतिकूल आदेश पारित किये जाने के पूर्व उन्हें सुना भी नहीं गया था – अधिक विलंब से स्थिति में बदलाव परिणामित हुआ है – उच्च न्यायालय को याचिका ग्रहण नहीं करनी चाहिए थी।

Cases referred :

(2007) 8 SCC 705, (2015) 10 SCC 400, (2006) 4 SCC 322, (2009) 3 SCC 281, (1986) 4 SCC 566.

J U D G M E N T

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

2. First appellant, Madhya Pradesh Housing and Infrastructure Development Board, is a statutory board established under the Madhya Pradesh Housing and

Infrastructure Development Board Act, 1972 for the purpose of taking measures to deal with and for satisfying the need of housing accommodation in the State of Madhya Pradesh and matters connected therewith.

3. Impugned judgment dated 26th July 2017 by the Indore Bench of the High Court of Madhya Pradesh allows Writ Petition No. 7666 of 2015 preferred by the first and second respondents before us, Vijay Bodana and Ravindra Bhati, by quashing and setting aside the order dated 12th May 2008 of the Commissioner, Ujjain and the order dated 24th September 2008 of the Deputy Director, Town and Country Planning, Ujjain (for short "T&CP") approving the change in the layout plan of Indira Nagar, Ujjain. The lease deeds executed by the appellant-board in favour of third-party purchasers were declared null and void and not to be acted upon. The land in question, it was directed, would be used as per the original layout plan.

4. The appellant-board had developed the colony 'Indira Nagar' over an area of 32 hectares in Ujjain, as per the layout plan sanctioned by the T&CP on 11th September 1981. After the colony had been in existence for about 23 years, in 2004 the appellant-board had made an application for changing the land use of 1.52 hectares earmarked for commercial shopping complex in the original layout plan to residential accommodation. However, the request for amendment was rejected by the Deputy Director, T&CP vide order dated 27.12.2004 and the appeal under Section 31 of the Madhya Pradesh Nagar Tatha Gram Nivesh Adhiniyam, 1973 (for short, "the Adhiniyam") before the Commissioner, Ujjain was also dismissed vide order dated 25th July 2005. On the revision petition under Section 32 of the Adhiniyam, the State Government vide order dated 28th September 2006 clarified the legal position that the appellant-board had not asked for a change in land use and had asked for a modification of the layout plan approved by the T&CP which was permissible under the provisions of the Adhiniyam. The appellant-board, it was directed, could submit the proposal for modification before the Commissioner, Ujjain for reconsideration. Thereupon, the Commissioner, Ujjain vide order 12th May 2008 had directed the Deputy Director, T&CP to re-examine the request for modification and pass appropriate orders. Pursuant to this order, the Deputy Director, T&CP approved the modified layout plan vide order dated 24th September 2008.

5. The impugned judgment allows the writ petition, which was preferred by the first and second respondents after nearly seven years in 2015, *inter alia* holding that the Adhiniyam stands enacted with the object to prevent unplanned and haphazard development and that layout plans for residential schemes are prepared to provide for open spaces for various purposes like roads, gardens, playgrounds and facilities like schools, hospitals, community centres, shopping complex etc. Developers like the appellant-board charge extra money for plots at

preferential locations adjacent to or facing public amenities such as parks, roads, water body, shopping complex, etc. The allottees accordingly pay extra/higher charges at the time of purchase with an expectation to avail and enjoy the advantages of such amenities. Therefore, the developer cannot be permitted to change the status of land to 'deceive' the allottees. Applying the principle of promissory estoppel, it has been held that the appellant-board must develop the land according to the original plan shown to the allottees at the time of purchase. Further, Ujjain Municipal Corporation was not heard and had no opportunity to represent the case as to the change in the layout plan.

6. It is an undisputed position that the State Government vide order dated 28th September 2006, while partly allowing the revision petition, had directed the appellant-board to file a revision application before the Commissioner, Ujjain observing that the application moved by the appellant-board was not for a change in land use but for a change in the 'approved' plan. The appellant-board as permitted had filed the revision application on which the Commissioner, Ujjain vide order dated 12th May 2008 had asked the Deputy Director, T&CP to consider the request for modification of the layout plan. The Deputy Director, T&CP after examination vide order dated 24th September 2008 had allowed the application approving the modified layout plan. Modifications, as noticed below, are in conformity and in accord with the parameters of the development control norms. The impugned judgment does not hold that the procedure prescribed by and under the Adhiniyam was violated. It has not been held, or even contended before us, that the modification of the layout plan as approved by the Deputy Director, T&CP pursuant to the order of the Commissioner, Ujjain, is contrary to the Adhiniyam. This Court in *Chairman, Indore Vikas Pradhikaran v. Pure Industrial Coke & Chemicals Ltd and Others*[1] delineating the legislative scheme of the Adhiniyam had observed that town and country planning involving development of land in towns and cities is achieved through the process of land use, zoning plan and regulating building activities. This is a highly complex exercise undertaken by experts on the basis of study, experience and scientific research, which has to be given due reverence. Urban planning often reconciles varied concerns and interests, both public and private, and thus ensures better living conditions. A clear distinction was drawn amongst the regional development plans, town development or zonal plans and layout plans of a colony. Elucidating the manner in which each plan guides the development and use of land, it was held:

> "37. When a planning area is defined, the same envisages preparation of development plan and the manner in which the existing land use is to be implemented. A development plan in some statutes is also known as a master plan. It lays down the broad objectives and parameters wherewith the development

[1] (2007) 8 SCC 705

> plan is to deal with. It also lays down the geographical splitting giving rise to preparation and finalisation of zonal plans. The zonal plans contain more detailed and specific matters than the master plan or the development plan. Town planning scheme or layout plan contains further details on plotwise basis. It may provide for the manner in which each plot shall be dealt with as also the matter relating to regulations of development.
>
> xxx xxx Xxx
>
> 72. Land use, development plan and zonal plan provided for the plan at macro-level whereas the town planning scheme is at a micro-level and, thus, would be subject to development plan. It is, therefore, difficult to comprehend that broad based macro-level planning may not at all be in place when a town planning scheme is prepared."

Therefore, the development plan, zonal plan and town planning schemes of the land are distinct and each have a different objective and purpose. The difference between the three in terms of the Adhiniyam was highlighted by this Court in *Rajendra Shankar Shukla and Others v. State of Chhattisgarh and Others*[2] in the following words:

> "67. The town development scheme is always subservient to the master plan as well as the zonal plan, as provided under Section 17 of the 1973 Act, which reads as under:
>
> > "17.Contents of development plan. — A development plan shall take into account any draft five year and annual development plan of the district prepared under the Madhya Pradesh Zila Yojana Samiti Adhiniyam, 1995 (19 of 1995) in which the planning area is situated...."
> >
> > 68. Master plan falls within the category of broad development plans and is prepared only after taking into account the Annual Development Reports prepared by constitutionally elected bodies of local panchayats and municipalities, etc. A zonal plan is mandated to be prepared only after the publication of the development plan. Section 20 of the Act reads thus:
> >
> > > "20. Preparation of zonal plans.—The local authority may on its own motion at any time after the publication of the development plan, or thereafter if so required by the State Government shall, within the next six

[2] (2015) 10 SCC 400

> months of such requisition, prepare a zoning plan."
>
> Further, Section 21 of the Act reads thus:
>
> "21. Contents of zoning plan.—The zoning plan shall enlarge the details of the land use *as indicated in the development plan*...."
>
> (emphasis supplied)

Thus, it is evident from the language of Sections 20 and 21 of the Act, that a zonal plan can be prepared only in adherence to the development plan which in the present case is the Raipur Master Plan of 2021.

69. Next, Section 49 of the Act which provides for the provisions for which a town development scheme can be prepared, has to be read along with Section 21 of the Act, which clearly mentions that the land required for acquisition by the Town and Country Development Authority for the purpose of any development scheme has to be laid down in the zonal plan.

70. Therefore, a combined reading of Sections 17, 21 and 49 lays down that the development plan is the umbrella under which a zonal plan is made for the city. The zonal plan in turn allocates the land which could be acquired for town development schemes.

xxx xxx xxx

72. The importance of zonal planning lies in its distinguished characteristic which lays down with sufficient particularity the use to which a particular piece of land could be put. The object and purpose of the 1973 Act itself foresees that zonal plan is necessary for implementation of a town development scheme. The preamble of the Act clearly discloses that a town development scheme is at best a vehicle to implement the development plan and zonal plan. The object and purpose of the Act reads thus:

> "An Act to make provision for planning and development and use of land; *to make better provision for the preparation of development plans and zoning plans with a view to ensuring town planning schemes are made in a proper manner* and their execution is made effective, to.... "
>
> (emphasis supplied)

> Therefore, the object and purpose of the Act also provides that a town development scheme can be prepared in the presence of a zonal plan which in turn has to be prepared for the implementation of the development plan."

If the aforesaid aspects and the difference amongst the plans are kept in mind, it is lucid that the High Court has misconstrued and misdirected itself by relying upon the principle of promissory estoppel to hold that once the layout plan is prepared the same cannot be modified or changed. Change or modification is permitted under the Adhiniyam, provided the modification/ change is in accordance with law i.e., as per the procedure, and satisfies the development norms and conditions of the development plans, zonal plans and town planning schemes. The modification cannot be struck down when the law permits such change which is in terms of the statute and the plans that have the force of law. As long as the layout plans conform to the development control norms, the court would not substitute its own opinion as to what principle or policy would best serve greater public or private interest. It is not the case of the first and second respondents that the procedure prescribed by the Adhiniyam was not followed or the parameters and norms prescribed by the Adhiniyam, the development plan or the zonal plan have been violated. In this background, we fail to understand how the modification in the layout plan which is in accordance with the Adhiniyam could have been struck down.

7. On facts and justification for change of land use from commercial to residential, the impugned judgment ignores and glances over the earlier position that the area was earmarked for development and for construction of a shopping complex with 131 shops and not earmarked as an open area, park or playground. It notices the contention of the appellant-board that as per Rule 49 of the Madhya Pradesh Bhumi Vikas Rules, 1984, the area required to be earmarked for commercial purposes is 0.4 hectares whereas the area reserved in the original layout plan was 1.52 hectares. It is an undisputed position the land earmarked for the shopping complex had not found demand and takers despite efforts. The area was lying idle for more than 20 years, albeit more than 150 shops had already come up in the residential area. As per the appellant-board, construction of 131 shops would have caused congestion and would have adversely impacted the density of people living and using the area. We have highlighted these aspects and facts which are vastly distinct, for the courts normally frown upon, adversely comment and do strike down changes in the land use from residential to commercial or industrial use for obvious reasons.

8. The writ petition challenging the orders dated 12th May 2008 and 24th September 2008 was filed in 2015, nearly seven years after the approval for modification was granted. In the meanwhile, 42 out of 52 plots had been sold to

third parties for consideration. The impugned judgment notices that many of these bonafide owner-purchasers had completed the construction and some houses were in advanced stages of construction. While the High Court has noticed and recorded these facts, it has failed to give due credence to the delay, the change in position and creation of third-party rights by wrongly applying the principle of promissory estoppel and lis pendens. Innocent plot owners on whom the brunt had fallen were not even heard before they were deprived and denied their rights by the adverse order. Considerable delay and laches of nearly seven years in approaching the court had resulted in change in position as third-party rights had been created. In view of delay and laches, the High Court should not have entertained the writ petition as 42 plot owners who had paid money would suffer adverse consequences for no fault of theirs. In *Karnataka Power Corporation Ltd. and Another v. K. Thangappan and Another*[3], this Court, after citing *State of M.P. and Others v. Nandlal Jaiswal and Others*[4], had observed:

> "9. It was stated in *State of M.P. v. Nandlal Jaiswal* that the High Court in exercise of its discretion does not ordinarily assist the tardy and the indolent or the acquiescent and the lethargic. If there is inordinate delay on the part of the petitioner and such delay is not satisfactorily explained, the High Court may decline to intervene and grant relief in exercise of its writ jurisdiction. It was stated that this rule is premised on a number of factors. The High Court does not ordinarily permit a belated resort to the extraordinary remedy because it is likely to cause confusion and public inconvenience and bring, in its train new injustices, and if writ jurisdiction is exercised after unreasonable delay, it may have the effect of inflicting not only hardship and inconvenience but also injustice on third parties. It was pointed out that when writ jurisdiction is invoked, unexplained delay coupled with the creation of third-party rights in the meantime is an important factor which also weighs with the High Court in deciding whether or not to exercise such jurisdiction."

9. The Ujjain Municipal Corporation was not made a party and had no opportunity to represent their stand on the change in the layout plan. If required and felt necessary, the High Court could have issued notice to the Ujjain Municipal Corporation and obtained their opinion. Stand of the State Government of Madhya Pradesh and the authorities under the Adhiniyam, supporting the modification, was on record. Normally opposition and prejudice should not be

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[3] (2006) 4 SCC 322. This judgment was later cited in ***Yunus (Baboobhai) A. Hamid Padvekar v. State of Maharashtra and Others***, (2009) 3 SCC 281.

[4] (1986) 4 SCC 566

presumed, unless there are grounds and reasons. Given the fact that the change in the present case was from commercial to residential, there was no ground and reason that would suggest objection or opposition from the Ujjain Municipal Corporation.

10. During the course of hearing before us, the appellant-board had produced the original layout plan of Indira Nagar in which the land in question was shown as reserved for a major shopping complex. Adjacent to this land is the land earmarked for a primary school. There are areas earmarked for a park/garden. Therefore, while we allow the present appeal and uphold the modification of the layout plan, we deem it proper to direct the appellant-board and the authorities to ensure that the areas/land earmarked for the primary school and park/garden are not converted into residential plots. We also direct the appellant-board and respondent authorities not to allot and sell any unsold residential plots. These plots which are yet to be sold would be utilised for general public amenities like park, garden, playground etc. The appellant-board and the authorities would act accordingly.

11. The appeal is accordingly allowed in the above terms without any order as to costs.

Appeal allowed

I.L.R. [2020] M.P. 1530 (SC)
SUPREME COURT OF INDIA

Before Mr. Justice S.A. Bobde, Chief Justice of India,
Mr. Justice B.R. Gavai & Mr. Justice Surya Kant

Cr.A. No. 408/2020 decided on 18 March, 2020

JEETENDRA …Appellant

Vs.

STATE OF M.P. & anr. …Respondents

***Criminal Procedure Code, 1973 (2 of 1974), Section 439 and Penal Code (45 of 1860), Sections 420, 177, 181, 193, 200 & 120-B – Bail* – Held – Three bail applications rejected by High Court, appellant in custody for more than a year – Closure report was filed twice by police, still High Court declined bail only because trial Court was yet to accept the said report – Bail is rule and jail is exception – Bail should not be granted or rejected in mechanical manner as it concerns liberty of person – Considering nature of allegations and period spent in custody, appellant deserves to be enlarged on bail – Appeal allowed. (Paras 5, 7 & 8)**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 439 एवं दण्ड संहिता (1860 का 45), धाराएँ 420, 177, 181, 193, 200 व 120–B – जमानत – अभिनिर्धारित – उच्च न्यायालय द्वारा तीन जमानत आवेदनों को अस्वीकार किया गया, अपीलार्थी एक वर्ष से अधिक समय से अभिरक्षा में है – पुलिस द्वारा दो बार समाप्ति प्रतिवेदन प्रस्तुत किया गया था तब भी उच्च न्यायालय ने मात्र इसलिए कि विचारण न्यायालय द्वारा अभी तक उक्त प्रतिवेदन को स्वीकार नहीं किया था, जमानत से इंकार किया – जमानत एक नियम है और जेल एक अपवाद है – जमानत को यांत्रिक ढंग से प्रदान या अस्वीकार नहीं करना चाहिए क्योंकि यह व्यक्ति की स्वतंत्रता से संबंधित है – अभिकथनों के स्वरूप एवं अभिरक्षा में बिताई गयी अवधि को विचार में लेते हुए, अपीलार्थी जमानत पर छोड़े जाने योग्य है – अपील मंजूर।

J U D G M E N T

Leave granted.

2. Rejection of third bail application by the High Court of Madhya Pradesh, Indore Bench has prompted the appellant to approach this Court. He has been in custody since 5th January, 2019 in connection with Crime No. 210/2012 registered at Police Station Chhatripura, Indore for offences punishable under Sections 420, 177, 181, 193, 200 and 120-B of Indian Penal Code (for short, 'IPC').

3. Briefly stated, the facts are as follows:

4. Wife of the appellant lodged a case under Sections 498-A, 323 and 506 of IPC against him, registered as Crime No. 96/2008, wherein the appellant was arrested. Later, he was released on bail upon furnishing bail bonds of Rs.7,000/- along with documents of their residential property as a personal bond by his mother. Subsequently, the matrimonial dispute was amicably settled and as a result, the appellant was acquitted on 23rd April, 2010.

5. On 20th May, 2012 , Dileep Borade (appellant's cousin) and his son Vishal Borade lodged a complaint with Police alleging that documents of the residential property furnished as personal bond for appellant's release on bail in the matrimonial case were forged. This led to registration of Crime No. 210/2012 for which the appellant is incarcerated for more than a year.

6. From perusal of the record, we note that a closure report was filed by the Police on 24th May, 2013 in Crime No. 210/2012 but the learned Judicial Magistrate after five years ordered further investigation on 20th June, 2018. Consequently, appellant was arrested on 5th January, 2019 and denied bail by the Additional Sessions Judge. The High Court also vide order dated 22nd January, 2019 declined to release him on bail. Appellant filed a second bail application before the High Court, which was dismissed as withdrawn on 10th April, 2019 with liberty to apply again after examination of certain material witnesses. Meanwhile,

the police re-investigated the case and submitted a second report on 2nd September, 2019 stating that no offence has been committed by the appellant and he deserves to be discharged. After filing of this closure report, appellant approached the High Court for a third time. But he was denied bail yet again vide the impugned order on grounds that the second closure report has not been accepted by the Trial Court and that appellant has failed to point out whether material witnesses have been examined or not. The appellant has thus been left with no other option but to approach this Court. While issuing notice, this Court on 14thNovember, 2019 directed that the appellant be released on interim bail.

7. Having heard learned counsel for the parties as well as the counsel representing the complainant, we are satisfied that the appellant deserves to be enlarged on bail. The High Court ought to have kept in view that *"Bail is rule and jail is exception'.* There is no gainsaying that bail should not be granted or rejected in a mechanical manner as it concerns the liberty of a person. In peculiar circumstances of this case where closure report was filed twice, the High Court ought not to have declined bail only because the trial court was yet to accept the said report. Further, the examination of witnesses would depend upon the fate of 2nd closure report. Considering the nature of allegations attributed to the appellant and the period he has already spent in custody, we are satisfied that he deserves to be released on bail forthwith.

8. The appeal is thus allowed and the impugned order of the High Court dated 16th September, 2019 is set aside. The interim bail order dated 14th November, 2019 is made absolute. The appellant shall stand released on regular bail subject to the bail bonds already furnished by him to the satisfaction of the trial court.

Appeal allowed

I.L.R. [2020] M.P. 1532 (DB)
WRIT APPEAL

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

W.A. No. 593/2020 (Indore) decided on 25 June, 2020

NEERJA SHRIVASTAVA …Appellant

Vs.

STATE OF M.P. & ors. …Respondents

(Alongwith W.A. No. 580/2020)

***A. Civil Services (Classification, Control and Appeal) Rules, M.P. 1966, Rule 9 – Suspension – Scope of Judicial Review* – Held – Apex Court concluded that order of suspension should not ordinarily be interfered with**

unless it has been passed with *malafide* and in absence of *prima facie* evidence connecting the delinquent with misconduct in question – Three charges against R-4 out of which only one relates to death of four persons due to poisonous liquor consumption, other charges relates to dereliction of duty – Looking to nature of charge and role of R-4, suspension not justified and hence rightly quashed. (Paras 7 & 9 to 11)

क. सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966, नियम 9 – निलंबन – न्यायिक पुनर्विलोकन की व्याप्ति – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया कि निलंबन के आदेश में साधारणतः हस्तक्षेप नहीं करना चाहिए जब तक कि उसे असद्भावपूर्वक तथा प्रश्नगत अवचार के साथ अपचारी को जोड़ने वाले प्रथम दृष्ट्या साक्ष्य की अनुपस्थिति में पारित किया गया है – प्रत्यर्थी–4 के विरूद्ध तीन आरोप, जिसमें से केवल एक जहरीली मदिरा के सेवन के कारण चार व्यक्तियों की मृत्यु से संबंधित है, अन्य आरोप कर्तव्य विमुखता से संबंधित हैं – आरोप के स्वरूप एवं प्रत्यर्थी–4 की भूमिका को देखते हुए, निलंबन न्यायोचित नहीं और इसलिए उचित रूप से अभिखंडित किया गया।

***B. Service Law – Suspension – Right of Posting – Principle* – Held – Permitting a delinquent to continue at same place where departmental enquiry is held and misconduct is committed, may not be in interest of administration and public interest – Even if, employee is not suspended, ordinarily it is in interest of fair and transparent enquiry, that he is transferred from that place – It is the exclusive domain of administration to decide as per administrative exigency to post or transfer a particular person at particular place – Direction of Single Judge to post R-4 at same place where he was posted before suspension and transfer, cannot be sustained and is set aside – Appeal partly allowed. (Para 16 & 19)**

ख. सेवा विधि – निलंबन – पदस्थापना का अधिकार – सिद्धांत – अभिनिर्धारित – एक अपचारी को उसी स्थान पर बने रहने की अनुमति दी जाना जहां विभागीय जांच की जा रही है और अवचार कारित किया गया है, प्रशासन एवं लोक हित में नहीं हो सकता – यदि कर्मचारी निलंबित नहीं किया गया हो, तब भी, साधारणतः यह निष्पक्ष एवं पारदर्शी जांच के हित में है कि उसे उस स्थान से स्थानांतरित किया जाए – प्रशासनिक सुविधा के अनुसार, एक विशिष्ट व्यक्ति को किसी विशिष्ट स्थान पर पदस्थ या स्थानांतरित करने का विनिश्चय करना, प्रशासन का अनन्य अधिकार क्षेत्र है – एकल न्यायाधीश का प्रत्यर्थी–4 को उसी स्थान पर पदस्थ करने का निदेश जहां वह निलंबन एवं स्थानांतरण के पूर्व पदस्थ था, कायम नहीं रखा जा सकता और अपास्त किया गया – अपील अंशतः मंजूर।

***C. Constitution – Article 226 – Departmental Enquiry – Scope of Interference* – Held – Findings of Single Judge on merits of charge, in favour of R-4 were not warranted because finding on charge will be recorded by**

enquiry officer/competent authority on conclusion of departmental enquiry – At this stage, R-4 cannot be given clean chit especially when entire material is not before Court – Observation made by Single Judge set aside. (Para 18)

ग. संविधान – अनुच्छेद 226 – विभागीय जांच – हस्तक्षेप की व्याप्ति – अभिनिर्धारित – आरोप के गुणदोषों पर, प्रत्यर्थी के पक्ष में एकल न्यायाधीश के निष्कर्ष आवश्यक नहीं थे क्योंकि आरोप पर निष्कर्ष, जांच अधिकारी/सक्षम प्राधिकारी द्वारा विभागीय जांच की समाप्ति पर अभिलिखित किये जायेंगे – इस प्रक्रम पर, प्रत्यर्थी–4 को दोषमुक्त नहीं किया जा सकता, विशिष्ट रूप से जब न्यायालय के समक्ष संपूर्ण सामग्री नहीं है – एकल न्यायाधीश द्वारा किया गया संप्रेक्षण अपास्त।

Cases referred:

(1993) Supplement 3 SCC 483, (2013) 16 SCC 147, (2015) 7 SCC 291.

Harshwardhan Sharma, for the appellant in W.A. No. 593/2020.

Amol Shrivastava, for the appellants in W.A. No. 580/2020 and for the respondents/State in W.A. No. 593/2020.

Amit Seth, for the respondent No. 4 in W.A. No. 593/2020 and for the respondent in W.A. No. 580/2020.

O R D E R

The Order of the Court was passed by :

PRAKASH SHRIVASTAVA, J:- This order will govern the disposal of WA No.593/2020 and WA No.580/2020 as both these Writ Appeals have been filed against the order of learned Single Judge dated 3/6/2020 passed in WP No.7476/2020.

2. The respondent No.4 (in WA No.593/2020) namely Jagdish Rathi was working as Assistant Commissioner, Excise, District Ratlam. He was placed under suspension by order dated 6/5/2020 and aggrieved with the same he had filed WP No.7476/2020. Meanwhile the appellant in WA No.593/2020 by order dated 13/5/2020 was transferred to the post which had become vacant on account of the suspension of the writ petitioner. Learned Single Judge by the order dated 26/5/2020 had stayed the operation of the order of suspension. The State government had filed the reply dated 30th May, 2020. The appellant in WA 593/2020 had filed the intervention application along with the application for vacating of stay. Learned Single Judge by order under challenge has allowed the writ petition and set aside the suspension order passed against the Respondent No. 4 holding it to be a stigmatic order and also observing that the order does not mention that any departmental enquiry is contemplated against him and also making certain observations on the merits of the charge in favour of the Respondent No. 4.

3. Learned counsel for appellant in WA No.593/2020 has submitted that the appellant has been transferred on the post which fell vacant due to the suspension of the Respondent No.4, therefore, the learned Single Judge is not justified in directing transfer of the appellant to some other place. He further submits that the appellant was not even impleaded in the writ petition, therefore, intervention application was required to be filed. He submits that the appellant is presently working on the post in question.

4. Learned counsel for appellants in WA No.580/2020 which is an appeal preferred by the State has vehemently contended that learned Single Judge is not justified in making observation on the merits of the alleged misconduct in favour of the Respondent No. 4. He further submits that the learned Single Judge has failed to take note of the chargesheet which was already on record while observing that no departmental enquiry was contemplated. He also submits that there is limited scope of judicial review in such matter and Respondent No. 4 cannot be allowed to continue in the present place of posting as there is every possibility of him tampering with the evidence. He has also submitted that the State's power to transfer cannot be curtailed.

5. Learned counsel for respondent No.4 (writ petitioner) has contended that the Respondent No. 4 was wrongly placed under suspension, therefore, learned Single Judge has not committed any error in quashing the order of suspension and that the respondent No.4 could not have been placed under suspension for such a charge. He has further submitted that by virtue of the interim order he is continuing in the present place therefore he has right to continue in the present place of posting.

6. We have heard the learned counsel for parties and perused the record.

7. Before entering the merits of the controversy, we think it appropriate to take note of the scope of judicial review in the matter of suspension. The Supreme Court in the matter of *U.P. Rajya Krishi Utpadan Mandi Parishad and others Vs. Sanjiv Rajan* (1993) Supplement 3 SCC 483 has held that the order of suspension should not ordinarily be interfered with unless it has been passed *mala-fide* and without there being even a *prima facie* evidence connecting the delinquent with the misconduct in question. The Supreme Court has also held that in such matters it is advisable that the concerned employee is kept out of the mischief's range. The Supreme Court in this regard has expressed that:-

> "10. We find from the charge-sheet that the allegations against the 1st respondent are grave in as much as they indicate that the amounts mentioned there in are not deposited in the bank and forged entries have been made in the pass book of the relevant accounts and the amounts are shown as having been deposited. In the circumstances, the High Court should not have interfered with the order of suspension passed by the

authorities. The Division Bench has given no reason for upholding the learned Single Judge's order revoking the suspension order. In matters of this kind, it is advisable that the concerned employees are kept out of the mischief's range. If they are exonerated, they would be entitled to all their benefits from the date of the order of suspension. Whether the employees should or should not continue in their office during the period of inquiry is a matter to be assessed by the concerned authority ordinarily, the Court should not interfere with the orders of suspension unless they are passed mala fide and without there being even a prima facie evidence on record connecting the employees with the misconduct in question. In the present case, before the preliminary report was received, the Director was impressed by the 1st respondent-employee's representation. However after the report, it was noticed that the employee could not he innocent. Since this is the conclusion arrived at by the management on the basis of the material in their possession, no Conclusions to the contrary could be drawn by the Court at the interlocutory stage and without going through the entire evidence on record In the circumstances, there was no justification for the High Court to revoke the order of suspension."

8. In the matter of *Union of India & another Vs. Ashok Kumar Aggarwal* (2013) 16 SCC 147, Hon'ble Supreme Court considering the scope of judicial review in interference of the suspension order has held that it is not ordinarily open to Court to interfere with the suspension order as it is within exclusive domain of competent authority who can review its suspension order and revoke it. Making the scope of interference clear it has been held that where charges are baseless, *mala-fide* or vindictive and are framed only to keep delinquent employee out of the job, a case for judicial review is made out. The Supreme Court in this regard has held that:-

"22. In view of the above, the law on the issue can be summarised to the effect that suspension order can be passed by the competent authority considering the *gravity of the alleged misconduct* i.e. serious act of omission or commission and the *nature of evidence* available. It cannot be actuated by *mala fide, arbitrariness,* or for *ulterior purpose.* Effect on public interest due to the employee's continuation in office is also a relevant and determining factor. The facts of each case have to be taken into consideration as no formula of universal application can be laid down in this regard. However, suspension order should be passed only where there is a strong prima facie case against the delinquent, and if the charges stand proved, would ordinarily warrant imposition of major punishment i.e. removal or dismissal from service, or reduction in rank, etc.

23. In *Jayrajbhai Jayantibhai Patel* v. *Anilbhai Nathubhai Patel* [(2006) 8 SCC 200] this Court explained: (SCC p. 209, para 18)

"*18*. Having regard to it all, it is manifest that the power of judicial review may not be exercised unless the administrative

decision is illogical or suffers from procedural impropriety or it shocks the conscience of the court in the sense that it is in defiance of logic or moral standards but no standardised formula, universally applicable to all cases, can be evolved. Each case has to be considered on its own facts, depending upon the authority that exercises the power, the source, the nature or scope of power and the indelible effects it generates in the operation of law or affects the individual or society. Though judicial restraint, albeit self-recognised, is the order of the day, yet an administrative decision or action which is based on wholly irrelevant considerations or material; or excludes from consideration the relevant material; or it is so absurd that no reasonable person could have arrived at it on the given material, may be struck down. In other words, when a court is satisfied that there is an abuse or misuse of power, and its jurisdiction is invoked, it is incumbent on the court to intervene. It is nevertheless, trite that the scope of judicial review is limited to the deficiency in the decision-making process and not the decision."

24. Long period of suspension does not make the order of suspension invalid. However, in *State of H.P.* v. *B.C. Thakur* [1994 SCC (L&S) 835 : (1994) 27 ATC 567] , this Court held that where for any reason it is not possible to proceed with the domestic enquiry the delinquent may not be kept under suspension.

25. There cannot be any doubt that the 1965 Rules are a self-contained code and the order of suspension can be examined in the light of the statutory provisions to determine as to whether the suspension order was justified. Undoubtedly, the delinquent cannot be considered to be any better off after the charge-sheet has been filed against him in the court on conclusion of the investigation than his position during the investigation of the case itself. (Vide *Union of India* v. *Udai Narain* [(1998) 5 SCC 535 : 1998 SCC (L&S) 1418] .)

26. The scope of interference by the Court with the order of suspension has been examined by the Court in a large number of cases, particularly in *State of M.P.* v. *Shardul* Singh[(1970) 1 SCC 108], *P.V. Srinivasa Sastry* v. *Comptroller & Auditor General* [(1993) 1 SCC 419 : 1993 SCC (L&S) 206 : (1993) 23 ATC 645], *ESI* v.*T. Abdul Razak* [(1996) 4 SCC 708 : 1996 SCC (L&S) 1061], *Kusheshwar Dubey* v. *Bharat Coking Coal Ltd.* [(1988) 4 SCC 319 : 1988 SCC (L&S) 950],*Delhi Cloth & General Mills Ltd.* v. *Kushal Bhan* [AIR 1960 SC 806] ,*U.P. Rajya Krishi Utpadan Mandi Parishad* v. *Sanjiv Rajan* [1993 Supp (3) SCC 483 : 1994 SCC (L&S) 67: (1993) 25 ATC 764], *State of Rajasthan* v. *B.K. Meena* [(1996) 6 SCC 417: 1996 SCC (L&S) 1455], *Prohibition and Excise Deptt.* v. *L. Srinivasan* [(1996) 3 SCC 157: 1996 SCC (L&S) 686 : (1996) 33 ATC 745] and *Allahabad Bank* v. *Deepak Kumar Bhola* [(1997) 4 SCC 1 : 1997 SCC (L&S) 897], wherein it has been observed that even if a criminal trial or enquiry takes a long time, it is *ordinarily* not open to the court to interfere in case of suspension as it is in the exclusive domain of the competent authority who can always review its order of suspension

being an inherent power conferred upon them by the provisions of Article 21 of the General Clauses Act, 1897 and while exercising such a power, the authority can consider the case of an employee for revoking the suspension order, if satisfied that the criminal case pending would be concluded after an unusual delay *for no fault of the employee concerned.* Where the charges are baseless, mala fide or vindictive and are framed only to keep the delinquent employee out of job, a case for judicial review is made out. But in a case where no conclusion can be arrived at without examining the entire record in question and in order that the disciplinary proceedings may continue unhindered the court may not interfere. In case the court comes to the conclusion that the authority is not proceeding expeditiously as it ought to have been and it results in prolongation of sufferings for the delinquent employee, the court may issue directions. The court may, in case the authority fails to furnish proper explanation for delay in conclusion of the enquiry, direct to complete the enquiry within a stipulated period. However, mere delay in conclusion of enquiry or trial cannot be a ground for quashing the suspension order, if the charges are grave in nature. But, whether the employee should or should not continue in his office during the period of enquiry is a matter to be assessed by the disciplinary authority concerned and ordinarily the court should not interfere with the orders of suspension unless they are passed in mala fide and without there being even a prima facie evidence on record connecting the employee with the misconduct in question."

9. Having examined the present case in the light of the limited scope of judicial review, it is noticed that during the lockdown period due to Covid 19 effect, four persons had died by consuming poisonous liquor at Ratlam and the Respondent No. 4 being the in charge of the district has been prima-facie found to be careless in controlling the sale of illicit liquor in the district, therefore, he has been placed under suspension by the order dated 6th May, 2020 passed in the name of the Governor exercising the power under Rule 9 of M.P. Civil Services (Classification, Control and Appeal) Rules, 1965.

10. On examining of the record, we have noticed before the learned Single Judge State government had already filed the reply on 30th May, 2020 disclosing that the departmental enquiry was contemplated against the Respondent No. 4 and the Commissioner, Excise vide note sheet dated 6/5/2020 had recommended suspension of the Respondent No. 4 with immediate effect and had also recommended disciplinary proceedings against him. The reply further reflects that a similar departmental enquiry has also been initiated against Shri Mohanlal Mandare, Assistant District Excise Officer, Ratlam and Shri Surendra Singh Dureyya, Excise Sub Inspector Ratlam. Along with the reply the State government had also filed a copy of the charge sheet dated 10/6/2020 which was issued to the Respondent No. 4 for holding departmental enquiry. A perusal of the charge sheet reveals that there are as many as three charges and only one charge

relates to the death of four persons due to the poisonous liquor consumption. Other two charges relate to the other dereliction of duties by the Respondent No. 4. Learned Single Judge appears to have lost sight of the said charge sheet while passing the order under challenge and observing that no departmental enquiry was contemplated against the writ petitioner.

11. During the course of arguments before this court learned counsel for the appellants though have submitted that respondent no. 4 was rightly suspended but in changed circumstances they have not seriously questioned the direction of the learned single judge quashing the suspension order. Even otherwise we are of the view that having regard to the nature of charge and the role of respondent No.4, suspension was not justified. Therefore, we are not inclined to interfere in that direction.

12. The next issue is that if the Respondent No. 4 is entitled to continue at the same place where he was posted at the time of passing the suspension order and committing the alleged misconduct.

13. In the matter of *Ajay Kumar Choudhary Vs.Union of India and another* reported in (2015) 7 SCC 291 the Supreme Court in a case where there was prolonged suspension has observed that the government can transfer the person concerned to any department in any of its office within or outside the State so as to sever any local or personal contact that he may have and which he may misuse for obstructing the investigation against him. In this regard it has been held that:-

> **"21.**We, therefore, direct that the currency of a suspension order should not extend beyond three months if within this period the memorandum of charges/charge-sheet is not served on the delinquent officer/ employee; if the memorandum of charges/charge-sheet is served, a reasoned order must be passed for the extension of the suspension. As in the case in hand, the Government is free to transfer the person concerned to any department in any of its offices within or outside the State so as to sever any local or personal contact that he may have and which he may misuse for obstructing the investigation against him. The Government may also prohibit him from contacting any person, or handling records and documents till the stage of his having to prepare his defence. We think this will adequately safeguard the universally recognised principle of human dignity and the right to a speedy trial and shall also preserve the interest of the Government in the prosecution. We recognise that the previous Constitution Benches have been reluctant to quash proceedings on the grounds of delay, and to set time-limits to their duration. However, the imposition of a limit on the period of suspension has not been discussed in prior case law, and would not be contrary to the interests of justice. Furthermore, the direction of the Central Vigilance Commission that pending a criminal investigation, departmental proceedings are to

> be held in abeyance stands superseded in view of the stand adopted by us."

14. Similarly in the matter of *UP Rajya Krishi Utpadan Mandi* (supra) it has been held that in such a matter a departmental enquiry it is advisable that the concerned employee is kept out of mischief's range and that whether the employee should or should not continue in their office during the period of enquiry is a matter to be assessed by the authority concerned.

15. The Supreme Court in the matter of *Ashok Kumar Agrawal* (supra) has already expressed that :-

> **"27.** Suspension is a device to keep the delinquent out of the mischief range. The purpose is to complete the proceedings unhindered. Suspension is an interim measure in the aid of disciplinary proceedings so that the delinquent may not gain custody or control of papers or take any advantage of his position. More so, at this stage, it is not desirable that the court may find out as to which version is true when there are claims and counterclaims on factual issues. The court cannot act as if it is an appellate forum de hors the powers of judicial review."

16. From the aforesaid pronouncements it is clear that permitting a delinquent employee to continue at the same place where the Departmental enquiry is held and misconduct is committed, may not be in the interest of the administration or in public interest, therefore, even if the employee concerned is not placed under suspension, then ordinarily it is in the public interest and interest of the administration and also in the interest of fair and transparent enquiry that the employee concerned is transferred from that place. Even otherwise it lies exclusively within the domain of the administration to decide as per the administrative exigency to post or transfer a particular person at a particular place. Hence, we are of the view that the direction of the learned Single Judge to post the Respondent No. 4 at the same place where he was posted prior to suspension and transfer the appellant in WA 593/2020 to some other place cannot be sustained.

17. The third issue is if learned Single Judge is justified in making observation on merits of the charge which is levelled against the Respondent No. 4.

18. The findings given by learned Single Judge on merits of the charge in favour of the Respondent No. 4 were not warranted because the finding in respect of the charge will be recorded by the enquiry officer/competent authority on conclusion of departmental enquiry, therefore, at this stage the Respondent No. 4 cannot be given a clean chit especially when the entire material is not before the court.

19. Having regard to the aforesaid, we allow the writ appeals partially by affirming the direction of the learned Single Judge to the extent it relates to

quashing the order of suspension but we are unable to sustain the direction of the learned Single Judge permitting the delinquent Respondent No. 4 to continue at the present place of posting and to transfer or give posting to the appellant in WA No.593/2020 to some other place, hence it is set aside. We also set aside the observation made by learned Single Judge on merits of the charge levelled against Respondent No. 4. We further make it clear that the departmental enquiry as against the Respondent No. 4 will be conducted without being influenced by any observation made by the learned Single Judge.

20. The appeals are **partly allowed** to the extent indicated above.

21. Original order be kept in WA No.593/2020 and a copy of the order be placed in the record of WA No.580/2020.

Appeal partly allowed

I.L.R. [2020] M.P. 1541
WRIT PETITION

Before Mr. Justice G.S. Ahluwalia

W.P. No. 24058/2019 (Gwalior) decided on 25 November, 2019

BHARAT JAIN (DR.) …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

A. Medical Education (Gazetted) Service Recruitment Rules, M.P., 1987, Rule 4 & 13 and Swashasi Chikitsa Mahavidhyalayein Shekshanik Adarsh Seva Niyam, M.P., 2018, Rules 5.1, 7(6) & 9 – Deputation & Promotion **– Held – Petitioner, holding post of professor, is a State Government employee and has neither disowned his lien on the said post nor has he resigned – Without seeking NOC from State, he accepted new appointment in a autonomous medical college – Such appointment on post of CEO-cum-Dean would not create any right for petitioner to claim himself to be equivalent to post of Dean – Substantive post of petitioner is Professor and State Government can send him on deputation on the said post – Further, petitioner is governed by Rules of 1987 where post of Dean can only be filled by promotion and not by direct recruitment – Petition dismissed.**

(Paras 22 to 27)

क. चिकित्सा शिक्षा (राजपत्रित) सेवा भरती नियम, म.प्र., 1987, नियम 4 व 13 एवं स्वशासी चिकित्सा महाविद्यालयीन शैक्षणिक आदर्श सेवा नियम, म.प्र., 2018, नियम 5. 1, 7(6) व 9 – प्रतिनियुक्ति व पदोन्नति – अभिनिर्धारित – याची, प्रोफेसर के पद पर पदासीन, राज्य सरकार का एक कर्मचारी है और न तो उसने उक्त पद पर अपने

पुनर्ग्रहणाधिकार/लियन का अन–अंगीकरण किया है और न ही उसने पद त्याग किया है – राज्य से अनापत्ति प्रमाण पत्र चाहे बिना उसने एक स्वायत्त चिकित्सा महाविद्यालय में नवीन नियुक्ति स्वीकार की – मुख्य कार्यपालक अधिकारी–सह– संकायाध्यक्ष के पद पर उक्त नियुक्ति, याची को स्वयं को संकायाध्यक्ष के पद के समतुल्य होने का दावा करने के लिए कोई अधिकार सृजित नहीं करेगी – याची का मूल पद प्रोफेसर है और राज्य सरकार उसे उक्त पद पर प्रतिनियुक्ति पर भेज सकती है – इसके अतिरिक्त, याची, 1987 के नियमों द्वारा शासित होता है जहां संकायाध्यक्ष के पद को केवल पदोन्नति द्वारा भरा जा सकता है और न कि सीधी भर्ती द्वारा – याचिका खारिज।

***B. Medical Education (Gazetted) Service Recruitment Rules, M.P., 1987, Rule 4 & 13 and Swashasi Chikitsa Mahavidhyalayein Shekshanik Adarsh Seva Niyam, M.P., 2018, Rules 5.1 – Period of Deputation – Curtailment* – Held – Order of appointment issued by the autonomous medical college cannot be treated as an order of State Government – Petitioner was on deputation in capacity of a Professor – It cannot be said that State Government has curtailed the period of deputation. (Para 26)**

ख. चिकित्सा शिक्षा (राजपत्रित) सेवा भरती नियम, म.प्र., 1987, नियम 4 व 13 एवं स्वशासी चिकित्सा महाविद्यालयीन शैक्षणिक आदर्श सेवा नियम, म.प्र., 2018, नियम 5.1 – प्रतिनियुक्ति की अवधि – कम की जाना – अभिनिर्धारित – स्वायत्त चिकित्सा महाविद्यालय द्वारा जारी किये गये नियुक्ति आदेश को राज्य सरकार का एक आदेश नहीं माना जा सकता – याची, एक प्रोफेसर की हैसियत में प्रतिनियुक्ति पर था – यह नहीं कहा जा सकता कि राज्य सरकार ने प्रतिनियुक्ति की अवधि को कम कर दिया है।

***C. Medical Education (Gazetted) Service Recruitment Rules, M.P., 1987, Rule 4 & 13 and Swashasi Chikitsa Mahavidhyalayein Shekshanik Adarsh Seva Niyam, M.P., 2018, Rules 5.1 & 7(6) – Cadre* – Held – After Medical Colleges were made autonomous, petitioner opted for State Cadre – He cannot shift to employment of Society by seeking appointment to the post of CEO-sum-Dean of autonomous medical College – No infirmity in impugned order. (Para 28)**

ग. चिकित्सा शिक्षा (राजपत्रित) सेवा भरती नियम, म.प्र., 1987, नियम 4 व 13 एवं स्वशासी चिकित्सा महाविद्यालयीन शैक्षणिक आदर्श सेवा नियम, म.प्र., 2018, नियम 5.1 व 7(6) – संवर्ग – अभिनिर्धारित – चिकित्सा महाविद्यालयों को स्वायत्त बनाने के पश्चात्, याची ने राज्य संवर्ग का विकल्प चुना – वह, स्वायत्त चिकित्सा महाविद्यालय का मुख्य कार्यपालक अधिकारी– सह– संकायाध्यक्ष के पद पर नियुक्ति चाहते हुए संस्था के नियोजन में पलायन नहीं कर सकता – आक्षेपित आदेश में कोई कमजोरी नहीं।

Cases referred :

(2005) 8 SCC 394, 2008 (3) MPHT 24 (DB), 2009 (II) MPJR 89.

N.K. Gupta with *D.P. Singh*, for the petitioner.

Ankur Mody, Addl. A.G. for the respondent Nos. 1 & 2/State.
M.P.S. Raghuvanshi, for the respondent No. 3.

O R D E R

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

This petition under Article 226 of the Constitution of India has been filed against the order dated 7-11-2019 passed by respondents no. 1 and 2 by which the services of the Petitioner have been sent on deputation to Medical College, Shahdol on the post Professor-cum-Head of Department (Pathology) with an additional charge of the post of In-charge Dean, Govt. Medical College, Satna.

2. The case of the petitioner in short is that G.R. Medical College, Gwalior is an Autonomous Society registered under the Societies Registrikaran Adhiniyam, 1973 (Adhiniyam 1973). The Society is under the Control of Directorate of Medical Education. The petitioner was initially appointed on the post of Demonstrator by order dated 11-7-1980. Thereafter, in the year 1984, he was appointed on the post of Ad- hoc Professor. The services of the petitioner were regularized in the year 1986. He was further promoted to the post of Professor on 16-5-2005. The petitioner was a Govt. Employee and after the institution was declared as autonomous body, the petitioner opted to remain in the Govt. Cadre and therefore, he was promoted by the State Govt. to the post of Professor-cum-HOD (pathology). It is the case of the petitioner that his services are governed by the Rules which are known as "Madhya Pradesh Shasi Chikitsa Mahavidyalaya Shekshanik Adarsh Niyam, 2018" (In short "Rules 2018"). It is the case of the petitioner that Rule 9 of Rules, 2018 relates to the deputation wherein clause 9.1 and 9.2 gives the power to the Working Committee for filling the posts by way of deputation. It is also claimed by the petitioner that his services can only be sent on deputation by taking consent of the employee after obtaining recommendations of Working Committee of the borrowing department as well as the Parent Department, however, no concurrence has been taken from the borrowing as well as Parent Department.

3. It is the case of the petitioner, that after, he opted for State Govt., his services were deemed to be on deputation to G.R. Medical College, Gwalior. On 16-11-2018. the G.R. Medical College, Gwalior issued an advertisement for appointment on the post of C.E.O. Cum Dean and after obtaining due permission from Dean, G.R. Medical College, the petitioner also participated in the appointment process and got selected on the post of C.E.O.-cum-Dean of G.R. Medical Collage (sic : College) for a period of 5 years or till the age of superannuation, whichever is earlier and accordingly appointment order dated 5-12-2018 was issued. The petitioner assumed the charge of CEO-Cum-Dean, G.R. Medical College on 5-12-2018. It is also claimed that the State Government

created the pressure and the whatsapp message was also sent on 7-10-2019. It is submitted that by the impugned order dated 7-11-2019, the petitioner has been sent on deputation to Govt. Medical College, Shahdol on the post of Professor/H.O.D. Pathology Department with an additional charge of Dean, Govt.Medical College, Satna and by the same order, he was relieved with immediate effect.

4. Challenging the impugned order dated 7-11-2019, it is submitted by the Counsel for the petitioner that the impugned order amounts to repatriation without completing the tenure of 5 years and the impugned order has also been passed, without assigning any reason. It is further submitted that the order dated 5-12-2018 (Annexure P/5) by which he was appointed on the post of C.E.O-. Cum-Dean of G.R. Medical College, Gwalior has not been cancelled. The prior consent of the petitioner has also not been obtained prior to issuance of the impugned order. It is further submitted that the petitioner was appointed on the post of C.E.O.-cum-Dean, G.R. Medical College, Gwalior for a period of 5 years or till the age of superannuation whichever is earlier and since, the petitioner has been sent to Medical College, Shahdol before the completion of tenure of 5 years, therefore, the impugned order amounts to curtailment of deputation period and thus, the impugned order is bad. To buttress his contentions, the Counsel for the petitioner has relied upon the judgment passed by the Supreme Court in the case of *Union of India Vs. V. Ramakrishnan and others* reported in (2005) 8 SCC 394 and judgment passed by this Court in the case of *C.R. Gaur VS. State of M.P. and others* reported in 2008(3) MPHT 24 (DB) and *Samar Bahadur (Dr.) Vs. State of M.P. and others* reported in 2009(II MPJR 89. It is further submitted that the appointment order of the petitioner to the post of C.E.O.-cum-Dean has not been cancelled therefore, he cannot be sent on deputation to Medical College, Shahdol.

5. Per contra, the stand of the respondent no. 1 to 3 is that in the year 1987, M.P. Medical Education (Gaz.) Service Recruitment Rules, 1987 (In short Rules 1987) were enacted and Section (sic: Rule) 4 of the said rules provide that persons already appointed on the substantive post shall constitute members of the service. Thus, it is claimed that the petitioner is governed by Rules, 1987 and not by Rules, 2018. According to Rule 13 of Rules 1987, the post of Dean is to be filled by Promotion and not by Direct Recruitment and the feeding cadre is that of Professor. In the year 1998, the G.R. Medical College was granted the autonomous status and thereafter all the recruitments were made by the G.R. Medical College as per the Autonomous Medical College Rules, 1988. By order dated 16-5-2005, the Govt. Promoted the petitioner to the post of Professor. In the year 2018, the Govt. Vide its circular dated Nil/01/2018 published model service rules, 2018 and the employees whose services were governed by Rules 1987, would be deemed to be on deputation in their respective Medical Colleges. So far as other employees are concerned, they shall be recruited by the Autonomous

Body of Medical College and their services would be amalgamated in the respective Medical College. Even after the Rules 2018 came into force, the petitioner still continued to be the employee of State Govt through Medical Education Department and was working on the Substantive Post of Professor (Pathology). The Executive Council of G.R. Medical College advertised to fill up the post of Dean by direct recruitment and the petitioner also applied for the same and accordingly, he was appointed as Dean. The Dean of Medical College, Shahdol vide its letter dated 17-10-2019 apprised the respondent regarding deficiency in the faculty of Professor (Pathology) and also expressed its concern about the pending inspection by M.C.I. On account of administrative exigency, the petitioner who is on deputation to G.R. Medical College has been sent to Medical College Shahdol on the post of Professor (Pathology). It is submitted that the petitioner is the employee of State Govt. and is holding the substantive post of Professor and is on deemed deputation in G.R. Medical College, and now he has been sent on deputation by his Parent Department to Govt. Medical College, Shahdol. There is no question of repatriation. As per F.R. 110, validity of impugned order cannot be questioned for want of consent. So far as the question of repatriation is concerned, it is the case of the respondents, that the petitioner has not disowned his lien on the post of Professor and still he claims himself to be the employee of State Govt. and at the same time, he is claiming himself to be the employee of G.R. Medical College, by virtue of his appointment on the post of C.E.O.-cum-Dean. There cannot be two employers.

(6) Heard the learned Counsel for the parties.

(7) On the basis of the submissions made by the Counsel for the parties, the following situation would emerge :

1. That in the year 1980, the petitioner was appointed on the post of Demonstrator, in G.R. Medical College, Gwalior.

2. M.P. Medical Education (Gazetted) Service Recruitment Rules, 1987 were enacted and Rule 4 provides that the persons already appointed on the substantive post shall constitute member of the service.

3. Rule 5 of Rules 1987 provides for classification of service and post of Dean is classified as Class I post.

4. As per Rules, 1987, the post of Dean is to be filled by way of promotion for which the feeder post is Professor.

5. In the year 1998, G.R. Medical College was granted autonomous sttaus (sic : status) and thereafter all the recruitments were made by GR Medical College as per Autonomous Medical College Rules, 1998.

6. The Petitioner opted for State Cadre and thus continued to be an employee of the State Govt. and never became the employee of autonomous body.

7. The petitioner was promoted to the post of Professor by the State Govt. by order dated 16-5-2005.

8. Madhya Pradesh Autonomous Medical College Educational Model Service Rules, 2018 were framed and Rule 5.1 reads as under :

आमेलन तथा चयन प्रक्रिया

5.1कार्यकारिणी समिति द्वारा पूर्व से नियुक्त चिकित्सा शिक्षक का जो इन नियमों के आरम्भ होने के अव्यवहित पूर्व से ही धारित किया हुआ हो इन नियमो मे संलग्न अनुसूची एक विनिर्दिष्ट पदों मे से उपयुक्त पद पर एवं वेतनमान पर आमेलित किया जाएगा।
परन्तु ऐसे चिकित्सा शिक्षक जिनकी नियुक्ति राज्य शासन ने म प्र चिकित्सा शिक्षा राजपत्रित सेवा भरती नियम 1987 के तहत की हो, की सेवा राज्य शासन के नियमों के तहत शासित होगी और उसे स्वशासी समिति मे प्रतिनियुक्ति पर लिया गया माना जाएगा।

Since, the petitioner is governed by Rules, 1987 and he had opted State Cadre, therefore, he is deemed to be on deputation in G.R. Medical College, an autonomous College, and he continues to be a State Employee.

9. An advertisement was issued by G.R. Medical College, Gwalior for appointment on the post of C.E.O. -cum-Dean and the petitioner, after taking permission from Dean, G.R. Medical College, Gwalior also applied for the said post and by order dated 5-12-2018, he was appointed on the post of C.E.O.-cum-Dean, G.R. Medical College, Gwalior.

10. By the impugned order dated 7-11-2019, the petitioner has been sent on deputation to Medical College, Shahdol with additional charge of the post of Dean, Govt. Medical College, Satna.

8. Challenging the impugned order dated 7-11-2019, it is submitted by the Counsel for the petitioner, that the said order amounts to repatriation, because the petitioner has been appointed on the post of C.E.O.-cum-Dean, G.R. Medical College, but he has been sent on deputation on the post of Professor (Pathology), Govt. Medical College, Shahdol. Further, before sending him on deputation to Govt. Medical College, Shahdol, no consent of the petitioner was obtained. Even the consent of the Parent Department as well as the Borrowing Department has not been obtained.

9. Heard the learned Counsel for the parties.

10. The first moot question for consideration is that whether the petitioner is a Govt. Employee or is an employee of G.R. Medical College, Gwalior, an autonomous body.

11. It is the case of the petitioner, that in the year 1997, he had opted the State Cadre, and continued to remain the State Govt. employee and accordingly he was promoted to the post of Professor by order dated 16-5-2005 passed by the State Govt. It is also not the case of the petitioner, that he has either disowned his lien on the State Post or he has resigned from the post of Professor before accepting the employment in the autonomous body i.e., G.R. Medical College, Gwalior. The petitioner in para 5.3 of his writ petition has pleaded as under :

> "5.3. That, the petitioner was an employee of State Govt., already been posted at G.R. Medical College, Gwalior, wherein performing his duties and after declaring the institution as autonomous, the petitioner has remained continue in the cadre of and his services were governed by the State Government, therefore, he was promoted in the same cadre and posted at G.R. Medical College over the post of Professor -cum-H.O.D. (Patho) which was as per the order of State Government."

12. Thus, it is clear that the petitioner is still a Govt. Employee and his substantive post is Professor.

13. It appears that on 16-11-2018, the G.R. Medical College, issued an advertisement for recruitment/appointment on the post of C.E.O.-cum-Dean and the petitioner after obtaining NOC from Dean, G.R. Medical College, Gwalior, also participated in the said recruitment process and by order dated 5-12-2018, he was appointed on the post of C.E.O-cum-Dean, G.R. Medical College, Gwalior. As per Model Rules, 2018, the post of Dean is to be filled by Direct Recruitment, whereas according to Rules, 1987, the post of Dean is to be filled by Promotion. Thus, if the petitioner is governed by Rules, 1987, then he cannot be appointed on the post of Dean by direct recruitment and he can only be promoted to the post of Dean. **It is not out of place to mention here that the post of Dean was advertised by G.R. Medical College and thus, the said autonomous body is the employer.**

14. Since, the petitioner is the employee of State Govt., therefore, he cannot accept employment under G.R. Medical College, which is an autonomous body, without either tendering his resignation from the post or without seeking NOC from the State Govt.

15. It is the case of the petitioner, that he had applied for the post of C.E.O.-cum-Dean after obtaining due NOC from State. Accordingly, the Counsel for the

respondent no. 3 has produced the record of recruitment process along with the application of the petitioner. The Petitioner had annexed the NOC obtained from Dean, G.R. Medical College, Gwalior whereas the G.R. Medical College, which is an autonomous body and is not the employer of the petitioner and the petitioner did not obtain NOC from his employer.

16. It is submitted by the Counsel for the petitioner that in fact the petitioner had applied to the State Govt for grant of NOC and the Dean, G.R. Medical College, after obtaining necessary instructions from the State Govt. had granted NOC. Considered the submission made by the Petitioner. From the record, it is clear that the petitioner had never applied to the State Govt. for grant of NOC but he applied to the Dean G.R. Medical College, Gwalior for grant of NOC. The application made by the petitioner for grant of NOC reads as under :

S.No. 1053/Patho/2018 Gwalior 24-11-2018

To,
The Dean,
G.R. Medical College,
Gwalior

Sub:- Regarding No Objection Certificate for applying for the post of Chief Executive Officer and Dean G.R. Medical College Gwalior.

Respected Sir,

Kindly grant me NOC for applying for the post of CEO & Dean of G.R. Medical College, Gwalior M.P.

Thanking You.

Prof.& Head
Dept. Of Pathology

The NOC granted by Dean G.R. Medical College, Gwalior reads as under :

क्रमांक 4730स्था / राज / 2018 दिनांक 26 / 11 / 2018

अनापत्ति प्रमाण पत्र

प्राध्यापक एवं विभागाध्यक्ष पैथोलोजी विभाग के पत्र क्रमांक 1053 दिनांक 24.11.2018 के तारारम्य मे डा भरत जैन, प्राध्यापक पैथोलोजी विभाग गजराराजा चिकित्सा महाविधालय ग्वालियर को चिकित्सा महाविधालय ग्वालियर मे मुख्य

कार्यपालन अधिकारी एवं अधिष्ठाता के पद पर आवदेन करने हेतु अनुमति प्रदान की जाती है।

अधिष्ठाता

गजराराजा
चिकित्सा
महाविधालय
ग्वालियर मध्य
प्रदेश

17. It is no where mentioned in the above mentioned letter, that the Dean had even consulted the State Govt., before issuing NOC. Further the copy of this letter was not even endorsed to the State Govt. Thus, it is clear that the petitioner had participated in the recruitment process for the post of C.E.O. Cum Dean, without obtaining any NOC from the State Govt.

18. In the alternative, it is submitted by the Counsel for the petitioner, that as per the provisions of Rule 7(6) of Rules, 2018, it was not necessary to seek NOC from the employer.

19. Considered the submission made by the Counsel for the petitioner.

20. Rule 7(6) of Rules, 2018 read as under :

> महाविधालय मे सेवारत व्यक्ति जो सीधी भरती के पद के लिए अर्हताधारी हो सीधी भरती के पद के विरूद्व आवेदन देने के लिए स्वतंत्र होगा और ऐसे आवेदन के लिए उसे नियोक्ता से अनापत्ति नही लेना होगी।

21. By the above mentioned provision, exemption has been given to an employee working in the College, from obtaining NOC, however,the benefit of this Rule cannot be extended to an employee who is on deemed deputation in the College. From the plain reading of this Rule, it is clear that all the employees who are working in the same autonomous body would not be required to obtain NOC because the employer would be the same i.e., autonomous body, but the employees who are working on deputation cannot be extended benefit of this rule otherwise, it would amount to encroaching upon the rights of the employer on whom, these rules are not applicable. The employees who are on deputation are not governed by Rules, 2018 but they are governed by Rules, 1987. Therefore, the contention of the petitioner is rejected.

22. Further, it is not the case of the petitioner, that before applying for the post of C.E.O.-cum-Dean, he had already resigned from the post of Professor. Thus, it is clear that without tendering his resignation from the post of Professor and without obtaining NOC from the State Govt., the petitioner accepted the

employment of G.R. Medical College, Gwalior which is an autonomous body. Thus, the present scenario is that the petitioner is an employee of State Govt. and at the same time, by accepting the employment under G.R. Medical College, an autonomous body, the petitioner is working under two employers which is not permissible. Therefore, it is held that the petitioner was not entitled to apply for the post of C.E.O.cum-Dean, G.R. Medical College, Gwalior and therefore, his appointment on the post of C.E.O.-cum-Dean, by G.R. Medical College, an autonomous body, is not binding on the State Govt. Further, the State Govt. had never given any NOC for appointment of the petitioner to the post of C.E.O.-cum-Dean, G.R. Medical College, Gwalior. Thus, the substantive Post of the petitioner is Professor and therefore, the State Govt. can send him on deputation on the said post of Professor.

23. So far as the contention of the petitioner, that the consent of the Parent Department, i.e., G.R. Medical College, an autonomous body, has not been obtained is concerned, this Court has already held that the parent department of the petitioner is State and since, the impugned order dated 7-11-2019 has been issued by the parent department of the petitioner, therefore, the consent of the parent department is implied.

24. So far as the consent of the borrowing department i.e., Govt. Medical College, Shahdol is concerned, the respondents no. 1 to 3 have relied upon the communication dated 17-10-2019 sent by C.E.O-cum-Dean of Govt. Medical College, Shahdol, by which a demand was made for 1 Professor for Pathology Department. Thus, it is clear that the Borrowing Department has already given a consent by raising a demand of one Professor for the Pathology Department.

25. So far as the question of repatriation is concerned, in the considered opinion of this Court, the submission made by the Counsel for the petitioner is misconceived. As already held, the petitioner is holding the post of Professor and he has not disowned his lien on the said post. He has also not resigned from the post of Professor. Further, the Petitioner is a State Govt. employee. However, without seeking NOC from the State Govt., the petitioner accepted a new appointment on the post of C.E.O.-cum-Dean, G.R. Medical College, Gwalior which is an autonomous body. Therefore, the appointment of the petitioner on the post of C.E.O.-cum-Dean would not create any right in favor of the petitioner to claim himself to be equivalent to the post of Dean, because the petitioner is governed by Rules, 1987 and the post of Dean can be filled by promotion only and further, the petitioner has not been appointed by the State on the post of C.E.O.-cum-Dean, but he has been appointed by an autonomous body and thus, the petitioner continues to hold his substantial post of Professor and by the impugned order, he has been sent on deputation to Govt. Medical College, Shahdol on the same post.

26. So far as the question of curtailment of period of deputation is concerned, as per the provisions of Rule 5.1 of Rules, 2018, every employee who has been appointed under Rules, 1987 shall be deemed to be on deputation. No period of deputation has been prescribed. The petitioner was on deputation on the post of Professor. The appointment of the petitioner by the autonomous body, i.e., G.R. Medical College, Gwalior on the post of C.E.O.-cum-Dean cannot be treated as on deputation. The State Govt. never promoted the petitioner to the post of Dean. He was not on deputation in the said capacity but he was on deputation in the capacity of Professor. The appointment order issued by the autonomous body i.e., G.R. Medical College, cannot be treated as an order issued by the State Govt. Thus, in the light of order dated 5-12-2018, it cannot be said that the petitioner was sent on deputation by the State Govt. on the post of C.E.O.-cum-Dean for a period of 5 years or till age of superannuation, whichever is earlier. As already held that the order of appointment of the petitioner on the post of C.E.O.-cum-Dean was not binding on the State Govt., therefore, it cannot be said that by issuing order dated 7-11-2019, the State Govt. has curtailed the period of deputation.

27. So far as the submission, that the State Govt. has not cancelled the appointment order dated 5-12-2018 is concerned, as already held, the petitioner is in the State Cadre, and was working on the post of Professor, whereas the G.R. Medical College, Gwalior has appointed him on the post of C.E.O.-cum -Dean. The petitioner has neither tendered his resignation from the post of Professor nor he has disowned his lien on the post of Professor. Thus, the petitioner, is still treating himself to be an employee of the State Govt. Therefore, it was not necessary for the State Govt. to cancel the order of appointment dated 5-1-2018.

28. Further, after the Medical Colleges were made autonomous, the employees were given the option of either remaining in the State Cadre or to shift to employment of Society. Since, the petitioner had opted the State Cadre, therefore, he cannot shift to the employment of Society by seeking appointment on the post of C.E.O.-cum-Dean, G.R. Medical College, by treating his lien on the post of Professor.

29. No other argument is advanced by the Counsel for the Petitioner.

30. Accordingly this Court is of the considered opinion, that the order dated 7-11-2019 passed by State does not suffer from any infirmity. There is no reason to interfere with the said order.

31. The petition fails and is hereby **Dismissed.**

Petition dismissed

I.L.R. [2020] M.P. 1552
WRIT PETITION
Before Mr. Justice G.S. Ahluwalia
W.P. No. 21834/2019 (Gwalior) decided on 7 January, 2020

VIDHYA DEVI (SMT.) & ors. …Petitioners

Vs.

STATE OF M.P. & ors. …Respondents

(Alongwith W.P. No. 21831/2019)

***A. Co-operative Societies Act, M.P. 1960 (17 of 1961), Section 64 – Recovery of Amount* – Recovery of money, fraudulently deposited in account of petitioners – Held – Dispute u/S 64 filed by Co-operative Society for recovery of said amount, subsequent to impugned notice, when petitioners failed to deposit the same in compliance of said notice – It cannot be said that notice was bad in law as dispute u/S 64 is pending – Petition dismissed.**
(Para 12)

क. सहकारी सोसायटी अधिनियम, म.प्र. 1960 (1961 का 17), धारा 64 – राशि की वसूली – याचीगण के खाते में कपटपूर्ण रूप से जमा रकम की वसूली – अभिनिर्धारित – सहकारी सोसाईटी द्वारा, उक्त राशि की वसूली हेतु, आक्षेपित नोटिस के तत्पश्चात् जब याचीगण उक्त नोटिस के अनुपालन में उसे जमा करने में असफल रहे, धारा 64 के अंतर्गत विवाद प्रस्तुत किया गया – यह नहीं कहा जा सकता कि नोटिस, विधि में अनुचित था क्योंकि धारा 64 के अंतर्गत विवाद लंबित है – याचिका खारिज।

***B. Co-operative Societies Act, M.P. 1960 (17 of 1961), Section 64 – Simultaneous Criminal Prosecution* – Held – It is well settled that criminal prosecution cannot be quashed only on ground that civil suit is pending – Civil suit and criminal proceedings can go simultaneously – If co-operative society decides to launch criminal prosecution against petitioner, same cannot be quashed merely on ground that dispute u/S 64 is pending.**
(Paras 24, 26 & 27)

ख. सहकारी सोसायटी अधिनियम, म.प्र. 1960 (1961 का 17), धारा 64 – एक साथ दाण्डिक अभियोजन – अभिनिर्धारित – यह सुस्थापित है कि दाण्डिक अभियोजन को मात्र इस आधार पर अभिखंडित नहीं किया जा सकता कि सिविल वाद लंबित है – सिविल वाद एवं दाण्डिक कार्यवाहियां एक साथ चल सकती हैं – यदि सहकारी सोसाईटी, याची के विरूद्ध दाण्डिक अभियोजन चलाने का विनिश्चय करती है, उसे मात्र इस आधार पर कि धारा 64 के अंतर्गत विवाद लंबित है, अभिखंडित नहीं किया जा सकता।

***C. Criminal Practice – FIR – Jurisdiction of Police* – Held – There cannot be two FIRs for the same offence – During investigation, if police finds**

involvement of petitioners in the offence, it has the jurisdiction to implicate those persons as accused – In instant case, society is not required to lodge separate FIR against petitioners. (Para 18 & 19)

ग. दाण्डिक पद्धति – प्रथम सूचना प्रतिवेदन – पुलिस की अधिकारिता – अभिनिर्धारित – एक ही अपराध हेतु दो प्रथम सूचना प्रतिवेदन नहीं हो सकते – अन्वेषण के दौरान, यदि पुलिस अपराध में याचीगण की संलिप्तता पाती है, उसे उन व्यक्तियों को अभियुक्त के रूप में आलिप्त करने की अधिकारिता है – वर्तमान प्रकरण में, सोसाईटी को याचीगण के विरूद्ध पृथक प्रथम सूचना प्रतिवेदन दर्ज कराना अपेक्षित नहीं।

***D. Constitution – Article 226 – Scope & Jurisdiction* – Held – Court cannot supervise the investigation. (Para 20)**

घ. संविधान – अनुच्छेद 226 – व्याप्ति व अधिकारिता – अभिनिर्धारित – न्यायालय अन्वेषण का पर्यवेक्षण नहीं कर सकता।

Cases referred :

(2014) 2 SCC 532, 2009 (11) SCC 424, (2009) 7 SCC 495, AIR 1954 SC 397, (2008) 5 SCC 765, (2009) 5 SCC 528, (2013) 7 SCC 622.

MPS Raghuvanshi, for the petitioners in both the writ petitions.
S.N. Seth, for the State in both the writ petitions.
Vivek Jain, for the respondent No. 2.

O R D E R

G.S. AHLUWALIA, J. :- By this common order, WP 21831 of 2019 filed by Mukesh Singh Parihar shall also be disposed of.

2. For the sake of convenience, the facts of **W.P. No.21834 of 2019** shall be taken into consideration.

3. Writ Petition No.21834 of 2019 has been filed under Article 226 of the Constitution of India against the notice/order 28/09/2019 (Annexures P1, P2 & P3) by which the respondent No.3 has directed the petitioner No.1 to deposit an amount of Rs.1,38,000/-, the petitioner No.2 to deposit an amount of Rs.5,18,880/- and the petitioner No.3 to deposit an amount of Rs.7,62,680/-, which were fraudulently credited in their account by the Computer Operator Bhupendra Singh.

4. It is the case of the respondents that one Bhupendra Singh was working on the post of Computer Operator and he is the son of the petitioner No.1 and brother of the petitioner No.3. The petitioners had never sold their crops, however, the said Bhupendra Singh fraudulently entered the names of the petitioners as sellers and deposited the sale proceeds in their account, whereas the names of the actual sellers were not entered in the computer records, as a result of which their

sale proceeds could not be deposited in their account, various complaints were made by actual sellers and accordingly, it was found that Bhupendra Singh along with other employees of the Cooperative Society, have played fraud and had fraudulently shown that the petitioners and other persons have sold their crops and fraudulently transferred the sale proceeds to their account, whereas the names of the actual sellers were not entered in the computer records and, therefore, the sale proceeds were not paid to them.

5. Accordingly, it appears that on the report made by Shri FA Khan, Administrator, Primary Agriculture Credit Cooperative Society Limited, Harsi, District Gwalior, a FIR in Crime No.148/2019 has been registered at Police Station Chinor, District Gwalior for offence under Section 409 r/w Section 34 of IPC against Bhupendra Rawat, Rahul Yadav and Jagdish Yadav. It was found that in fact, 33 actual sellers were defrauded and the fraudulent entries were made by Bhupendra Rawat and Rahul Yadav in the name of those persons who had never sold their crops and fraudulently sale proceeds were transferred in their account, whereas the actual sellers were not paid their sale proceeds. It appears that the respondents issued the impugned notice/order dated 28/09/2019 (Annexures P1, P2 & P3) to the petitioners No.1 to 3, directing them to refund the amount which was fraudulently deposited in their account. Otherwise, it was also mentioned that in case of failure to do so, the Administrator, Primary Agriculture Credit Cooperative Society Limited, Harsi, would be compelled to initiate proceedings for their prosecution.

6. Challenging the impugned notice/order dated 28/09/2019 (Annexures P1, P2 and P3), it is submitted by the Counsel for the petitioners that in fact, the Cooperative Society has raised a dispute under Section 64 of MP Cooperative Societies Act and the impugned notice/order dated 28/09/2011 is nothing, but an attempt to pressurize the petitioners to deposit the amount without adjudication of their liability and thus, the same is bad. It is further submitted that until and unless the liability of the petitioners is adjudicated in a dispute filed by the Cooperative Society under Section 64 of MP Cooperative Societies Act, they cannot be prosecuted. However, when a detailed procedure has been provided under the MP Cooperative Societies Act for recovery of loss sustained by the Cooperative Society, then a threat to launch the criminal prosecution (FIR) is bad in law. Furthermore, it is submitted that the impugned notice/order dated 28/09/2019 (Annexures P1, P2 and P3) has been issued without conducting any enquiry and thus, the same is bad.

7. *Per contra,* it is submitted by the counsel for the respondents that Bhupendra Rawat and Rahul Yadav who were working as Computer Operator, had fraudulently manipulated the computer records and in stead of entering the

names of the actual sellers, they fraudulently entered the names of the petitioners and other thirty more bogus persons, as a result of which the amount of the said crops was transferred in their account, whereas the actual sellers were denied their sale proceeds. It is submitted that when an objection was raised by the actual sellers, then an enquiry was conducted and it was found that a fraud has been committed by Bhupendra Rawat, Rahul Yadav and Jagdish Yadav and in fact, the Society is now making payment of sale proceeds to the actual sellers out of its own funds.

8. In reply to the return filed by the respondent No.3, the petitioners have filed their rejoinder and it is submitted that Bhupendra Rawat and Rahul Yadav have been granted anticipatory bail by this Court. It is further submitted a dispute under Section 64 of MP Cooperative Societies Act is pending before the Deputy Registrar, Cooperative Societies, therefore, the impugned notice/order dated 28/09/2019 (Annexures P1, P2 and P3) requiring the petitioners to deposit the amount as mentioned in the said notice/order as well as a threat to launch criminal prosecution against the petitioners, is completely unwarranted.

9. Heard the learned counsel for the parties.

10. The impugned notice/order dated 28/09/2019 issued to the petitioner No.1 (Annexure P1) is reproduced as under:-

प्रति,

श्रीमति विद्यादेवी रावत पत्नी श्री अजब सिंह (मो 9755948898)
निवासी ग्राम ईटवा तहसील चीनौर
जिला ग्वालियर

विषय : गेहूँ खरीद (उपार्जन) की राशि का भुगतान वापिस करने बावत।

उपरोक्त विषयांतर्गत लेख है कि गेहूँ खरीदी केन्द्र चीनौर के ऑपरेटर श्री भूपेन्द्र सिंह द्वारा आपके नाम पर 75 क्विंटल की ऑनलाइन खरीद बिना माल प्राप्त किये दर्शा कर आपके बैंक खाता क्रमांक 681009794679 सेन्ट्रल बैंक ऑफ इंडिया, शाखा चिनौर मे राशि 1,38,000/– रुपये गेहूँ खरीदी की राशि के जमा करा दिये गये है। राशि आपके द्वारा बैंक से आहरण कर उपयोग कर ली गई है। जबकि आपके द्वारा 75 क्विंटल गेहूँ संस्था मे जमा ही नही कराया गया है। प्रबंधक जगदीश यादव द्वारा अपने कथन मे यह स्पष्ट किया है। राशि 1,38,000/– गलत तरीके से छल व कपट कर आपके द्वारा शासन के धोखाधड़ी ऑपरेटर भूपेन्द्र सिंह के साथ मिलकर की गई है।

संस्था के ऑपरेटर भूपेन्द्र सिंह, राहुल यादव एवं खरीद प्रभारी जगदीश यादव के विरूद्ध उक्त राशि की वसूली हेतु थाना चीनौर, जिला

ग्वालियर दिनांक 27.08.2019 को एफ.आई.आर. दर्ज करा दी गई है। पुलिस आरोपियो को गिरफ्तार करने की कार्यवाही कर रही है आपके खाते मे राशि संस्था ऑपरेटर द्वारा आपसे मिलीभगत कर षड़यत्र पूर्व गलत तरीके से ऑनलाईन खरीद (बिना माल प्राप्त किये) दर्शा कर राशि जमा करा दी गई है। आप तत्काल राशि 1,38,000/– रुपये जिला सहकारी केन्द्रीय बैंक मर्या. ग्वालियर शाखा भितरवार मे जमा कर रसीद प्राप्त करें अन्यथा की दशा मे आपके विरूद्ध भी अभियोजन (एफ.आई.आर) की कार्यवाही करनी होगी। जिसके लिये आप व्यक्तिगत रुप से जिम्मेदार रहेगे।

Similar notice/order has been issued to the petitioner Nos.2 and 3 and except the amount of embezzlement, the remaining contents are same.

11. It is contended by the counsel for the petitioners that the dispute under Section 64 of MP Cooperative Societies Act is pending, therefore, the impugned notice/order is bad in law and is an attempt to pressurize the petitioners to deposit the amount before adjudication of their liability.

12. It is clear from the record that the impugned notice/order was issued on 28/09/2019 and when the petitioners did not deposit the amount as mentioned in the said notice, only thereafter the dispute under Section 64 of MP Cooperative Societies Act was filed on 07/10/2019. Therefore, it is clear that the dispute under Section 64 of MP Cooperative Societies Act was filed subsequent to the impugned notice/order dated 28/09/2019. When the petitioners did not deposit the amount in compliance of the notice/order dated 28/09/2019, then the Cooperative Society was left with no other option, but to raise the dispute under Section 64 of MP Cooperative Societies Act for recovery of the said amount, otherwise, the Cooperative Society had no other mode to recover the amount as mentioned in the impugned notice/order. Therefore, filing of the dispute under Section 64 of MP Cooperative Societies Act would not have any impact on the impugned notice/order dated 28/09/2019. In fact, only after issuing a demand mentioned in the impugned notice/order, a cause of action had arisen in favour of the Cooperative Society to file a dispute under Section 64 of MP Cooperative Societies Act. Accordingly, the first contention of the counsel for the petitioners that the impugned notice/order dated 28/09/2019 is bad in law in the light of pendency of the dispute under Section 64 of MP Cooperative Societies Act is **misconceived and is hereby dismissed.**

13. It is next contended by the counsel for the petitioners that since the notice/order dated 28/09/2019 has been issued without conducting any enquiry, therefore, the same is bad. A demand notice has been issued by the impugned notice/order dated 28/09/2019 which was never challenged by the petitioners by raising a dispute under Section 64 of MP Cooperative Societies Act. In fact, the

dispute has been raised by the Cooperative Society for recovery of the said amount.

14. Furthermore, it is the stand of the respondent No.3 that only after the complaints were received by the original sellers, an enquiry was done and it was found that a fraud has been played by Bhupendra Rawat and Rahul Yadav as well as Jagdish Yadav and the amount mentioned in the impugned notice/order dated 28/09/2019 was fraudulently transferred to the account of the petitioners and other thirty persons and it is the specific stand of the respondent No.3 that neither the petitioners nor other thirty persons had ever sold their crops to the Cooperative Society, but a fraud was committed by Bhupendra Rawat, Rahul Yadav and Jagdish Yadav. Further, the stand of the respondent No.3 is that Bhupendra Rawat is the son and brother of the petitioner No.1 and petitioner No.3 respectively. The relationship of Bhupendra Rawat with the petitioner No.1 and the petitioner No.3 is not disclosed by the petitioners in their petition. Furthermore, since a dispute raised by the Society under Section 64 of MP Cooperative Societies Act is still pending, thus, any finding with regard to the liability of the petitioners to deposit the amount as mentioned in the impugned notice/ order dated 28/09/2019 would be premature. Under these circumstances, it cannot be said that the impugned demand notice/order dated 28/09/2019 is bad in law and accordingly, the contention made by the counsel for the petitioner with regard to the liability of the petitioners to deposit the amount mentioned in the impugned notice/order dated 28/09/2019 is **hereby dismissed.**

15. It is next contended by the counsel for the petitioners that a threat to launch the criminal prosecution in the form of FIR is nothing, but an attempt to put an unwarranted pressure on the petitioners to deposit the amount which has not been embezzled by them. It is submitted that in fact, the petitioners had sold their crops and the crops were also registered with the Society and the allegation of fraudulent transfer of the amount in their account is bad.

16. So far as the correctness of the allegation of fraudulent transfer of the amount in the account of the petitioners is concerned, it is once again clarified that since a dispute under Section 64 of MP Cooperative Societies Act is pending, therefore, it would not be proper for this Court to make any observation in that regard.

17. So far as the question of launching the criminal prosecution in the form of FIR is concerned, this Court is of the considered opinion that it is nothing but an incorrect expression of steps which the Cooperative Society was intended to take against the petitioners. It is an undisputed fact that on a similar allegation, a FIR in Crime No.148/2019 has also been registered at Police Station Chinor,District Gwalior against Jagdish Yadav, Bhupendra Rawat and Rahul Yadav.

18. It is well-established principle of law that there cannot be two FIRs for the same offence. Therefore, if the respondents had mentioned that in case of failure to deposit the amount mentioned in the demand notice/order dated 28/09/2019, a criminal prosecution (FIR) shall also be launched against the petitioners, then the said warning cannot be construed that the respondents shall lodge a fresh FIR against the petitioners.

19. It is well-established principle of law that during the course of investigation if the police finds that some more persons who have not been mentioned in the FIR, have committed an offence, then those persons can always be implicated as an accused in the said investigation. It is not necessary for the Cooperative Society to lodge a separate FIR and at the most, by making a simple application for implicating the petitioners as accused in Crime No.148 of 2019 registered at Police Station Chinor, District Gwalior, a criminal prosecution against the petitioners can be launched. Even if no such application is filed by the concerning Society but still the police has the jurisdiction to implicate of those persons who are involved in the case as accused persons.

20. It is well-established principle of law that this Court cannot supervise the investigation. The Supreme Court in the case of *Manohar Lal Sharma v. Principal Secretary and others* reported in (2014) 2 SCC 532 has held as under:-

> **"24.** In the criminal justice system the investigation of an offence is the domain of the police. The power to investigate into the cognizable offences by the police officer is ordinarily not impinged by any fetters. However, such power has to be exercised consistent with the statutory provisions and for legitimate purpose. The courts ordinarily do not interfere in the matters of investigation by police, particularly, when the facts and circumstances do not indicate that the investigating officer is not functioning bona fide. In very exceptional cases, however, where the court finds that the police officer has exercised his investigatory powers in breach of the statutory provision putting the personal liberty and/or the property of the citizen in jeopardy by illegal and improper use of the power or there is abuse of the investigatory power and process by the police officer or the investigation by the police is found to be not bona fide or the investigation is tainted with animosity, the court may intervene to protect the personal and/or property rights of the citizens.
>
> **26.** One of the responsibilities of the police is protection of life, liberty and property of citizens. The investigation of offences is one of the important duties the police has to perform. The aim of investigation is ultimately to search for truth and bring the offender to book.
>
> **39.** However, the investigation/inquiry monitored by the court does not mean that the court supervises such investigation/inquiry. To supervise would mean to observe and direct the execution of a task

> whereas to monitor would only mean to maintain surveillance. The concern and interest of the court in such "Court-directed" or "Court-monitored" cases is that there is no undue delay in the investigation, and the investigation is conducted in a free and fair manner with no external interference. In such a process, the people acquainted with facts and circumstances of the case would also have a sense of security and they would cooperate with the investigation given that the superior courts are seized of the matter. We find that in some cases, the expression "Court-monitored" has been interchangeably used with "Court-supervised investigation". Once the court supervises an investigation, there is hardly anything left in the trial. Under the Code, the investigating officer is only to form an opinion and it is for the court to ultimately try the case based on the opinion formed by the investigating officer and see whether any offence has been made out. If a superior court supervises the investigation and thus facilitates the formulation of such opinion in the form of a report under Section 173(2) of the Code, it will be difficult if not impossible for the trial court to not be influenced or bound by such opinion. Then trial becomes a farce. Therefore, supervision of investigation by any court is a contradiction in terms. The Code does not envisage such a procedure, and it cannot either. In the rare and compelling circumstances referred to above, the superior courts may monitor an investigation to ensure that the investigating agency conducts the investigation in a free, fair and time-bound manner without any external interference."

21. Thus, this Court by quashing the impugned notice/order dated 28/09/2019 cannot take away the right of the Investigating Officer to implicate the petitioners as accused in the FIR at Crime No.148 of 2019 registered by Police Station Chinor, District Gwalior and also cannot restrain the respondent No.3 from making an application to the Investigating Officer to implicate the petitioners as accused persons.

22. It is next contended by the counsel for the petitioners that since the dispute under Section 64 of MP Cooperative Societies Act is already pending, therefore, launching of criminal prosecution during the pendency of such dispute is unwarranted and the same cannot be done. It is submitted that the MP Cooperative Societies Act provides a complete procedure for recovery of loss sustained by the Cooperative Society and since it is a complete procedure in itself, therefore, launching a criminal prosecution is bad.

23. The Supreme Court in the case of *State of Madhya Pradesh vs. Rameshwar and Others,* reported in 2009(11) SCC 424 has held as under:-

> **"48.** Mr. Tankha's submissions, which were echoed by Mr. Jain, that the M.P. Co-operative Societies Act, 1960 was a complete Code in itself and the remedy of the prosecuting agency lay not

> under the criminal process but within the ambit of Sections 74 to 76 thereof, cannot also be accepted, in view of the fact that there is no bar under the M.P. Co-operative Societies Act, 1960, to take resort to the provisions of the general criminal law, particularly when charges under the Prevention of Corruption Act, 1988, are involved."

24. Thus, merely because a dispute under Section 64 of MP Cooperative Societies Act is pending against the petitioners would not debar the police to investigate the matter and the notice/order dated 28/09/2019 in which it was mentioned that the criminal prosecution would be launched, cannot be quashed.

25. It is next contended by the counsel for the petitioners that since the dispute under Section 64 of MP Cooperative Societies Act is still pending, therefore, until and unless the liability of the petitioners is decided in the said dispute, no criminal prosecution can be launched.

26. It is well-established principle of law that the civil suit as well as the criminal proceedings can go simultaneously. The Supreme Court in the case of *Devendra and Others vs. State of Uttar Pradesh and Another,* reported in (2009) 7 SCC 495 has held as under:-

> **"13**.There cannot, however, be any doubt or dispute whatsoever that in a given case a civil suit as also a criminal proceeding would be maintainable. They can run simultaneously. Result in one proceeding would not be binding on the court determining the issue before it in another proceeding. In P. Swaroopa Rani v. M. Hari Narayana @ Hari Babu [AIR 2008 SC 1884 : (2008) 5 SCC 765], the law was stated, thus (SCC p.769 para 11) :
>
> "13. It is, however, well-settled that in a given case, civil proceedings and criminal proceedings can proceed simultaneously. Whether civil proceedings or criminal proceedings shall be stayed depends upon the fact and circumstances of each case."
>
> [See also Seth Ramdayal Jat v. Laxmi Prasad, 2009 (5) SCALE 527]
>
> ***** ******
>
> **25.** Mr. Das, furthermore, would contend that the order of the High Court dated 17.10.2005 would operate as res judicata. With respect, we cannot subscribe to the said view. The principle of res judicata has no application in a criminal proceeding. The principles of res judicata as adumbrated in Section 11 of the Code of Civil Procedure or the general principles thereof will have no application in a case of this nature."

The Supreme Court in the case of *M. S. Sheriff and Another vs. State of Madras and Others,* reported in AIR 1954 SC 397 has held as under:-

> **"15**.As between the civil and the criminal proceedings we are of the opinion that the criminal matters should be given precedence. There is some difference of opinion in the High Courts of India on this point. No hard and fast rule can be laid down but we do not consider that the possibility of conflicting decision in the civil and criminal Courts is a relevant consideration. The law envisages such an eventuality when it expressly refrains from making the decision of the Court binding on the other, or even relevant, except for certain limited purposes, such as sentence or damages. The only relevant consideration here is the likelihood of embarrassment."

The Supreme Court in the case of *P. Swaroopa Rani vs. M. Hari Narayana alias Hari Babu* reported in (2008) 5 SCC 765 has held as under:-

> **"11.** It is, however, well-settled that in a given case, civil proceedings and criminal proceedings can proceed simultaneously. Whether civil proceedings or criminal proceedings shall be stayed depends upon the fact and circumstances of each case. [See M.S. Sheriff v. State of MadrasAIR 1954 SC 397,Iqbal Singh Marwah v. Meenakshi Marwah (2005) 4 SCC 370 and Institute of Chartered Accountants of India v. Assn. of Chartered Certified Accountants (2005) 12 SCC 226]"

The Supreme Court in the case of *Syed Askari Hadi Ali Augustine Imam and Another vs. State (Delhi Administration) and Another,* reported in (2009) 5 SCC 528 has held as under:-

> **"22.** It is, however, now well settled that ordinarily a criminal proceeding will have primacy over the civil proceeding. Precedence to a criminal proceeding is given having regard to the fact that disposal of a civil proceeding ordinarily takes a long time and in the interest of justice the former should be disposed of as expeditiously as possible. The law in this behalf has been laid down in a large number of decisions. We may notice a few of them.
>
> 23. In M.S. Sheriff & anr. vs. State of Madras & Ors. [AIR 1954 SC 397], a Constitution Bench of this Court was seized of a question as to whether a civil suit or a criminal case should be stayed in the event both are pending; it was opined that the criminal matter should be given precedence. In regard to the possibility of conflict in decisions, it was held that the law envisages such an eventuality when it expressly refrains from making the decision of one Court binding on the other or even relevant, except for certain limited purposes, such as sentence or damages. It was held that the only relevant consideration was the likelihood of embarrassment.

24. If primacy is to be given to a criminal proceeding, indisputably, the civil suit must be determined on its own merit, keeping in view the evidences brought before it and not in terms of the evidence brought in the criminal proceeding. The question came up for consideration in K.G.Premshanker vs. Inspector of Police and anr. [(2002) 8 SCC 87], wherein this Court inter alia held: (SCC p.97, paras 30- 31)

"30. What emerges from the aforesaid discussion is -- (1) the previous judgment which is final can be relied upon as provided under Sections 40 to 43 of the Evidence Act; (2) in civil suits between the same parties, principle of res judicata may apply; (3) in a criminal case, Section 300 CrPC makes provision that once a person is convicted or acquitted, he may not be tried again for the same offence if the conditions mentioned therein are satisfied; (4) if the criminal case and the civil proceedings are for the same cause, judgment of the civil court would be relevant if conditions of any of Sections 40 to 43 are satisfied, but it cannot be said that the same would be conclusive except as provided in Section 41. Section 41 provides which judgment would be conclusive proof of what is stated therein.

31. Further, the judgment, order or decree passed in a previous civil proceeding, if relevant, as provided under Sections 40 and 42 or other provisions of the Evidence Act then in each case, the court has to decide to what extent it is binding or conclusive with regard to the matter(s) decided therein. Take for illustration, in a case of alleged trespass by A on B's property, B filed a suit for declaration of its title and to recover possession from A and suit is decreed. Thereafter, in a criminal prosecution by B against A for trespass, judgment passed between the parties in civil proceedings would be relevant and the court may hold that it conclusively establishes the title as well as possession of B over the property. In such case, A may be convicted for trespass. The illustration to Section 42 which is quoted above makes the position clear. Hence, in each and every case, the first question which would require consideration is -- whether judgment, order or decree is relevant, if relevant -- its effect. It may be relevant for a limited purpose, such as, motive or as a fact in issue. This would depend upon the facts of each case."

25. It is, however, significant to notice that the decision of this Court in M/s Karam Chand Ganga Prasad & anr. etc. vs. Union of India & ors. [(1970) 3 SCC 694], wherein it was categorically held that the decisions of the civil courts will be binding on the criminal courts but the converse is not true, was overruled, stating: (K. G. Premshanker case (2002) 8 SCC 87, SCCp.28para 33)

"33. Hence, the observation made by this Court in V.M. Shah case that the finding recorded by the criminal court stands superseded by the finding recorded by the civil court is not correct enunciation of law. Further, the general observations made in Karam Chand case are in context of the facts of the case stated above. The Court was not required to consider the earlier decision of the Constitution Bench in M.S. Sheriff case as well as Sections 40 to 43 of the Evidence Act."

Axiomatically, if judgment of a civil court is not binding on a criminal court, a judgment of a criminal court will certainly not be binding on a civil court."

The Supreme Court in the case of *Guru Granth Saheb Sthan Meerghat Vanaras s. Ved Prakash and Others,* reported in (2013) 7 SCC 622 has held as under:-

"7. A Constitution Bench of this Court in M.S. Sheriff & Anr. v. State of Madras & Ors. AIR 1954 SC 397 has considered the question of simultaneous prosecution of the criminal proceedings with the civil suit. In paragraphs 14,15 and 16 of the Report, this Court stated as follows:(AIR P.399)

"14.....It was said that the simultaneous prosecution of these matters will embarrass the accused.... but we can see that the simultaneous prosecution of the present criminal proceedings out of which this appeal arises and the civil suits will embarrass the accused. We have therefore to determine which should be stayed.

15. As between the civil and the criminal proceedings we are of the opinion that the criminal matters should be given precedence. There is some difference of opinion in the High Courts of India on this point. No hard and fast rule can be laid down but we do not consider that the possibility of conflicting decisions in the civil and criminal Courts is a relevant consideration. The law envisages such an eventuality when it expressly refrains from making the decision of one Court binding on the other, or even relevant, except for certain limited purposes, such as sentence or damages. The only relevant consideration here is the likelihood of embarrassment.

16. Another factor which weighs with us is that a civil suit often drags on for years and it is undesirable that a criminal prosecution should wait till everybody concerned has forgotten all about the crime. The public interests demand that criminal justice should be swift and sure; that the guilty

> should be punished while the events are still fresh in the public mind and that the innocent should be absolved as early as is consistent with a fair and impartial trial. Another reason is that it is undesirable to let things slide till memories have grown too dim to trust. This, however, is not a hard and fast rule. Special considerations obtaining in any particular case might make some other course more expedient and just. For example, the civil case or the other criminal proceeding may be so near its end as to make it inexpedient to stay it in order to give precedence to a prosecution ordered under S. 476. But in this case we are of the view that the civil suits should be stayed till the criminal proceedings have finished."
>
> **8.** The ratio of the decision in M.S. Sheriff1 is that no hard and fast rule can be laid down as to which of the proceedings - civil or criminal - must be stayed. It was held that possibility of conflicting decisions in the civil and criminal courts cannot be considered as a relevant consideration for stay of the proceedings as law envisaged such an eventuality. Embarrassment was considered to be a relevant aspect and having regard to certain factors, this Court found expedient in M.S. Sheriff1 to stay the civil proceedings. The Court made it very clear that this, however, was not hard and fast rule; special considerations obtaining in any particular case might make some other course more expedient and just. M.S. Sheriff1 does not lay down an invariable rule that simultaneous prosecution of criminal proceedings and civil suit will embarrass the accused or that invariably the proceedings in the civil suit should be stayed until disposal of criminal case."

27. From the above-mentioned well-settled principles of law, it is clear that the criminal prosecution cannot be quashed only on the ground that civil suit is pending. Even otherwise, it is well-established principle of law that the findings of the Criminal Court are neither binding on the Civil Court nor such findings have any relevancy. Accordingly, if the Cooperative Society decides to launch criminal prosecution against the petitioners, then the same cannot be quashed on the ground that a dispute under Section 64 of MP Cooperative Societies Act is pending.

28. No other argument is advanced by the counsel for the petitioners.

29. Accordingly, in the considered opinion of this Court, the impugned demand notice/order dated 28/09/2019 (Annexures P1, P2 and P3) issued to the petitioners does not call for any interference. Accordingly, this petition fails and is **hereby dismissed.**

30. The interim order dated 16/10/2019 is hereby vacated.

31. In view of the above observations, Writ Petition No.21831/2019 filed by Mukesh Singh Parihar is also **dismissed.**

Petition dismissed

I.L.R. [2020] M.P. 1565
WRIT PETITION
Before Mr. Justice S.C. Sharma
W.P. No. 7739/2020 (Indore) decided on 8 June, 2020

ANUSHREE GOYAL …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

***A. Constitution – Article 226 – Habeas Corpus – Custody of Child – Maintainability – Child of 2 years is with grand parents – Mother claiming custody of child* – Held – Petition of habeas corpus maintainable – Welfare of child is of paramount importance – Mother and her parents are well educated – It has been observed that child is more than happy with his mother, showing more affection towards her than the grand parents – Mother, who nurtured the child for nine months in her womb, is certainly entitled for custody of child keeping in view the statutory provisions governing the field – Grand parents directed to hand over custody of child to mother – Petition allowed.**

(Paras 10 to 15)

क. संविधान – अनुच्छेद 226 – बंदी प्रत्यक्षीकरण – बालक की अभिरक्षा – पोषणीयता – दो वर्षीय बालक, दादा–दादी के साथ है – मां, बालक की अभिरक्षा का दावा कर रही है – अभिनिर्धारित – बंदी प्रत्यक्षीकरण याचिका पोषणीय – बालक का कल्याण सर्वोपरि महत्व का है – मां और उसके माता–पिता भली–भांति शिक्षित हैं – यह देखा गया कि बालक उसकी मां के साथ अधिक खुश है और दादा–दादी से अधिक उसकी ओर स्नेह दर्शाता है – मां, जिसने नौ माह तक उसके गर्भ में बालक को पाला, इस क्षेत्र पर शासित कानूनी उपबंधों को दृष्टिगत रखते हुए, बालक की अभिरक्षा हेतु निश्चित रूप से हकदार है – दादा–दादी को बालक की अभिरक्षा मां को हस्तांतरित करने के लिए निदेशित किया गया – याचिका मंजूर।

***B. Constitution – Article 226 and Guardians and Wards Act (8 of 1890) Section 4 – Habeas Corpus – Custody of Child – Jurisdiction – Applicability on Foreign National* – Held – Though child is a USA citizen, but mother is an Indian Citizen and she do have the legal right to file writ petition under Article 226 and pray issuance of writ of Habeas Corpus – Court will**

not throw away the petition on ground of jurisdiction or on ground of alternative remedy available under Guardians and Wards Act, 1890.

(Para 16 & 17)

ख. संविधान – अनुच्छेद 226 एवं संरक्षक और प्रतिपाल्य अधिनियम (1890 का 8), धारा 4 – बंदी प्रत्यक्षीकरण – बालक की अभिरक्षा – अधिकारिता – विदेशी नागरिक पर प्रयोज्यता – अभिनिर्धारित – यद्यपि बालक यू एस ए (संयुक्त राज्य अमेरिका) का नागरिक है, किंतु, मां एक भारतीय नागरिक है और उसे अनुच्छेद 226 के अंतर्गत रिट याचिका प्रस्तुत करने एवं बंदी प्रत्यक्षीकरण की रिट जारी किये जाने की प्रार्थना करने का विधिक अधिकार है – न्यायालय, अधिकारिता के आधार पर या संरक्षक एवं प्रतिपाल्य अधिनियम, 1890 के अंतर्गत वैकल्पिक उपचार उपलब्ध होने के आधार पर याचिका अस्वीकार नहीं करेगा।

***C. Constitution – Article 226 and Hindu Minority and Guardianship Act (32 of 1956), Section 6 – Custody of Minor Child – Power of Attorney* – Held – Child is aged about 2 years, thus in view of Section 6 of Act of 1956, child has to be given in custody of the mother – Power of Attorney given by father of child to grand parents to look after the child – Such procedure/document do not create any right in favour of grand parents. (Para 15 & 19)**

ग. संविधान – अनुच्छेद 226 एवं हिन्दू अप्राप्तवयता और संरक्षकता अधिनियम, (1956 का 32), धारा 6 – अवयस्क बालक की अभिरक्षा – मुख्तारनामा – अभिनिर्धारित – बालक लगभग 2 वर्ष की उम्र का है, अतः 1956 के अधिनियम की धारा 6 को दृष्टिगत रखते हुए, बालक को मां की अभिरक्षा में देना होगा – बालक के पिता द्वारा बालक की देखभाल हेतु दादा–दादी को मुख्तारनामा दिया गया – उक्त प्रक्रिया/दस्तावेज, दादा–दादी के पक्ष में कोई अधिकार सृजित नहीं करते।

Cases referred:

(1981) 2 SCC 277, (2019) 7 SCC 490, AIR (MP) 1976 0 92, AIR (HP) 1987 0 34, 2000 (1) G.L.H. 616.

Hitesh Sharma, for the petitioner.
Pushyamitra Bhargav, Addtional A.G. for the respondent/State.
R.S. Chhabra, for the respondent Nos. 4, 5 & 6.

O R D E R

S.C. SHARMA, J. :- The petitioner before this Court has filed present petition under Article 226 of the Constitution of India for issuance of an appropriate writ in the nature of *Habeas Corpus* directing the respondents No.1 to 5 to produce respondent No.6 before this Court who is allegedly in illegal detention of respondents No.4 and 5. It has been stated in the writ petition that a marriage took place between Shri Ankit Agrawal and the petitioner on 13/05/2013 at Indore. It was an arranged marriage and the petitioner went to United States of

America (Columbus) along with her husband. A child namely Arjun Agrawal was born on 01/01/2018 in America.

2. The petitioner has further stated that the husband as well as respondents No.4 and 5 (the in-laws) made her life miserable and they committed cruelty. She has also stated that she was assaulted on number of occasions, however, as it was a matrimonial dispute she lived with a hope that time will resolve the dispute and continued with her husband in America.

3. The petitioner has further stated that her husband finally has obtained some *ex-parte* order from some American Court and the petitioner was restrained from living in the house belonging to the husband and in those circumstances, she left with no other option except to come back Indore and to reside with her parents on 29/12/2019. She has also lodged a complaint with Police Station -Mahila Thana, Indore on 16/03/2020, however, she came to know that her husband came down from America and left the minor child, who is 02 years in age with her in-laws.

4. The petitioner has further stated that child is a very young child and the old grand parents are senior citizens, they are not able to look after the infant child and inspite of the repeated requests of the petitioner, they have not even permitted the petitioner to meet her child. In those circumstances, the petitioner has filed this present petition. The matter was listed before this Court on 04/06/2020 and the following order was passed:-

> "Parties through their counsel.
>
> Shri Amol Shrivastava, learned government advocate accepts notice on behalf of the respondent Nos.1, 2 and 3.
>
> Let notice be issued to the respondent Nos.4 and 5 by e-mail, fax as well as by any other alternative mode.
>
> In addition, the petitioner shall also be free to serve the respondent Nos.4 and 5 by e-mail, fax or by any other alternative mode.
>
> It has been stated by the petitioner that she is mother of the respondent No.6 - Arjun Agarwal, who is aged about 2 years and being the mother, she is her natural guardian and in those circumstances, present habeas corpus petition has been filed.
>
> The Superintendent of Police, Indore is directed to keep the corpus present before this Court on 08.06.2020.
>
> It is needless to mention that the Superintendent of Police, Indore shall observe all the required protocol while bringing the corpus to this Court. The matter involves the custody of a minor child aged about 2 years and therefore, the Superintendent of Police, Indore shall

take all due precautions in the matter.

The matter is being heard through video conferencing, however, as this is a habeas corpus petition involving the minor child aged about 2 years, for this particular matter, the Superintendent of Police, Indore shall be permitted to enter the premises on 08.06.2020, which is prohibited under the complete lock-down.

The respondent Nos.4 and 5 are also permitted to enter the premises along with the child.

The petitioner shall also be permitted to enter the premises and as an exceptional cases, the hearing of this matter shall take place in Court No.13 and the Registry shall ensure that all the norms relating to social distancing prescribed by Government of India / State of Madhya Pradesh are followed in the matter.

Learned counsel for the petitioner has stated before this Court that there is every possibility of sending the minor child back to the America as his father is residing in America and, therefore, by way of interim relief, it is directed that the respondent No.6 shall not be permitted to leave the country and the respondent Nos.4 and 5 are also restrained from sending the child to America (USA).

The Registry of this Court shall forward the copy of this order through fax, e-mail or by any other alternative mode to the emigration authorities today itself.

List the matter on **08.06.2020."**

In light of the aforesaid order the child has been produced before this Court. The child is present in the Court room and the child has interacted with mother and he is quite comfortable with the mother. In fact he is sitting in the lap of his mother only.

5. A detailed and exhaustive application has been filed by the grand parents for recalling the order on 04/06/2020 and it has been stated by the grand parents that the child was abandoned by the mother seven months back when she came to India. It is not possible for them to comply the order passed by this Court to bring the child to Indore. It has been further stated that the husband has executed a Power of Attorney and Authorization in favour of grand parents to look after the child and on account of strength of Power of Attorney dated 12/03/2020, the grand parents are entitled to keep the child under their guardianship.

6. Reliance has also been placed upon Section 9 of Guardians and Wards Act, 1890 on the issue of jurisdiction. It has been stated that minor is presently residing at Gwalior. He is a citizen of United States of America and therefore, this Court is not having jurisdiction in the matter. It has also been stated that the

injunction has been granted against wife by the Franklin County Common Pleas Court, Division of Domestic Relations, Columbus, Ohio (USA) and in light of the injunction order, the grand parents are entitled to be the guardian of the child. It has been stated that on account of injunction granted on 09/03/2020, the question of handing over the child to the mother does not arise.

7. This Court has carefully gone through the so called injunction order. It is a petition preferred by the husband before the Franklin County Common Pleas Court against the wife. There is no such injunction order granted by any Court situated in United States of America directing custody of child to be with the father. The so called injunction order is also an *ex-parte* order. The injunction order nowhere mentions anything about the child. The husband might have obtained injunction against wife in respect of domestic violence i.e. Domestic Violence Civil Protection Order (CPO *ex-parte)* but it is certainly not an order in respect of the custody of the child and therefore, the so called civil protection order does not help the grand parents in any manner.

8. The respondent has also stated that in light of the judgment delivered in the case of *Tejaswini Gaud vs Shekhar Jagdish Prasad Tewari* passed in Criminal Appeal No.838 of 2019 on **06th May, 2019,** the petition for *Habeas Corpus* is not at all maintainable. It has also been stated that in light of the order dated 30/04/2020 passed in **Writ Petition (Civil) Diary No.11058/2020** *(Tanuj Dhavan Vs. Court In Its Own Motion),* the mother can experience visitation rights through electronic contact. A prayer has been made to recall the order.

9. Heard learned counsel for the parties at length and perused the record. This Court has also heard the respondent father-in-law as he wanted to make certain submissions. The first issue before this Court is whether a *Habeas Corpus* petition is maintainable or not in respect of custody of a minor child, who is with his grand parents at Gwalior.

10. The apex Court in the case of *Capt. Dushyant Somal Vs. Sushma Somal and another* reported in (1981) 2 SCC 277 has dealt with the jurisdictional aspect under article 226 of *Habeas Corpus* writ petition in respect of illegal custody of Child. Paragraphs 3, 5 and 7 of the aforesaid judgment reads as under :-

> "3. There can be no question that a Writ of Habeas Corpus is not to be issued as a matter of course, particularly when the writ is sought against a parent for the custody of a child. Clear grounds must be made out. Nor is a person to be punished for contempt of Court for disobeying an order of Court except when the disobedience is established beyond reasonable doubt, the standard of proof being similar, even if not the same, as in a criminal proceeding. Where the person alleged to be in contempt is able to place before the Court sufficient material to conclude that it is

impossible to obey the order, the Court will not be justified in punishing the alleged contemner. But all this does not mean that a Writ of Habeas Corpus cannot or will not be issued against a parent who with impunity snatches away a child from the lawful custody of the other parent, to whom a Court has given such custody. Nor does it mean that despite the contumacious conduct of such a parent in not producing the child even after a direction to do so has been given to him, he can still plead justification for the disobedience of the order by merely persisting that he has not taken away the child and contending that it is therefore, impossible to obey the order. In the case before us, the evidence of the mother and the grand-mother of the child was not subjected to any cross-examination; the appellant-petitioner did not choose to go into the witness box; he did not choose to examine any witness on his behalf. The evidence of the grand-mother, corroborated by the evidence of the mother, stood unchallenged that the appellant- petitioner snatched away Sandeep when he was waiting for a bus in the company of his grand-mother. The High Court was quite right in coming to the conclusion that he appellant-petitioner had taken away the child unlawfully from the custody of the child's mother. The Writ, of Habeas Corpus was, therefore, rightly issued. In the circumstances, on the finding, impossibility of obeying the order was not an excuse which could be properly put forward.

5. It was submitted that the appellant-petitioner did not give evidence, he did not examine any witness on his behalf and he did not cross-examine his wife and mother-in-law because, he would be disclosing his defence in the criminal case, if he so did. He could not be compelled to disclose his defence in the criminal case in that manner as that would offend against the fundamental right guaranteed by Article 20(3) of the Constitution. It was suggested that the entire question whether the appellant-petitioner had unlawfully removed the child from the custody of the mother could be exhaustively enquired into in the criminal case where he was facing the charge of kidnapping. It was argued that on that ground alone the writ petition should have been dismissed, the submission is entirely misconceived. In answer to the rule nisi, all that he was required to do was to produce the child in Courts if the child was in his custody. If after producing the child, he wanted to retain the custody of the child, he would have to satisfy the Court that the child was lawfully in his custody. There was no question at all of compelling the appellant-petitioner to be a witness against himself. He was free to examine himself as a witness or not. If he examined himself he could still refuse to answer questions, answers to which might incriminate him in pending prosecutions. He was also free to examine or not other witnesses on his behalf and to cross examine or not, witnesses examined by the opposite party. Protection against testimonial compulsion" did not convert the position of a person accused of an offence into a position

> of privilege, with, immunity from any other action contemplated by law. A. criminal prosecution was not a fortress against all other actions in law. To accept the position that the pendency of a prosecution was a valid answer to a rule for Habeas Corpus would be to subvert the judicial process and to mock at the Criminal Justice system. All that Article 20(3) guaranteed was that a person accused of an offence Shall not be compelled to be a witness against himself, nothing less and, certain nothing more. Immunity against testimonial compulsion did not extend to refusal to examine and cross-examine witnesses and it was not open to a party proceeding to refuse to examine himself or anyone else as a witness on his side and to cross examine the witnesses for the opposite party on the ground of testimonial compulsion and then to contend that no relief should be given to. the opposite party on the basis of the evidence adduced by the other party. We are unable to see how Article 20(3) comes into the picture at all.
>
> 7. It was argued that the wife had alternate remedies under the Guardian and Wards Act and the CrPC and so a Writ should not have been issued. True, alternate remedy ordinarily inhibits a prerogative writ. But it is not an impassable hurdle. Where what is complained of is an impudent disregard of an order of a Court, the fact certainly cries out that a prerogative writ shall issue,. In regard to the sentence, instead of the sentence imposed by the High Court, we substitute a sentence of three months, simple imprisonment and a fine of Rupees Five hundred. The sentence of imprisonment or such part of it as may not have been served will stand remitted on the appellant-petitioner producing the child in the High Court. With this modification in the matter of sentence, the appeal and the Special Leave Petition are dismissed. Criminal Miscellaneous Petition No. 677/81 is dismissed as we are not satisfied that it is a fit case for laying a complaint."

In light of the aforesaid judgment, this court is of the opinion that a writ petition for issuance of a writ in nature of *Habeas Corpus* under article 226 of the Constitution of India in the peculiar facts and circumstances of the case is certainly maintainable. Otherwise also, keeping in view the welfare of the child and other factors including interaction with the child, this court is of the opinion that the child has to be in the custody of mother.

11. Undisputed facts also reveal that the husband and wife are having matrimonial dispute between them. The husband has approached the Franklin County Common Pleas Court in the USA and *ex-parte* injunction has been granted in the matter. The *ex-parte* injunction order nowhere restrains the mother from meeting the child or to keep the child with her. No order has been brought to the notice of this Court which directs the custody of the child to be with the father. The father came down to India and after handing over the child to his parents (in-laws

of the petitioner) has gone back to America and now a two year old child is with his grand parents and the mother is claiming custody.

12. The child in question is hardly aged about 02 years. He was born on 01/01/2018 as stated in the application by the respondents i.e. IA.No.1416/2020 and the child in question Arjun Agrawal came to India on 18/02/2020 and since then he is with his grand parents. Though an application was filed for recall of order dated 04/06/2020, however, the respondents No.4 and 5 are present with the child.

13. The child immediately after seeing his mother ran towards the mother and they were observed by this Court. The child is certainly more than happy with the mother. They are playing together inside the Court room, the child later on went out the Court room with the mother and the child in fact has shown more affection towards the mother than the grand parents. He is hardly two years old. The mother is well educated and the parents of the mother are also well educated. There is nothing adverse brought before this Court so far as the parents of the petitioner are concerned, therefore, this Court is left with no other choice except to direct the respondents No.4 and 5 to handover the child to the present petitioner.

14. Nothing equals a mother's love. Mother love for his child cannot be described in words. It is beyond the boundaries provided by law and that is the reason the Hon'ble Supreme Court has held that the welfare of the child is of paramount importance in the matters relating to the custody of children. There can be few exceptions also. The greatest gift by god to mankind are mothers only. The interaction of the child when he saw his mother cannot be described by this Court in words. The child who was having an "iPad", left the "iPad" on the ground and ran towards the mother, both of them were looking like the happiest people on this planet. This Court in light of the totality of the circumstances, keeping in view the statutory provisions and the law laid down by the Hon'ble Supreme Court is of the considered opinion that the petitioner is entitled for the relief prayed for in the present petition.

15. The respondents No.4 and 5 have stated that the father of the child has given a Power of Attorney and Authorization in favour of them (grand parents) to look after the child. In India there is a prescribed procedure for appointment of guardians under the Guardians and Wards Act, 1890. The procedure adopted by the husband of the petitioner, empowering the grand parents to keep the child based upon some Power of Attorney is unheard-of . It does not create any right in favour of respondents No.4 and 5.

16. This Court is not dealing with the application preferred under Section 4 of Guardians and Wards Act, 1890. This Court is dealing with the *Habeas Corpus* writ petition. In the case of *Sheoli Hati Vs. Somnath Das* reported in (2019) 7 SCC 490 the Hon'ble Supreme while deciding the issue relating to custody of a child

has held that the welfare of a child is of paramount importance. While dealing with this *Habeas Corpus* petition again this Court is of the opinion that the welfare of a child is of paramount importance and the mother, who has nurtured the child for nine months in the womb, is certainly entitled for custody of the child keeping in view the statutory provisions governing the field.

17. It is true that the child is a US citizen, however, the mother is an Indian citizen and she does have the legal right guaranteed under the Constitution of India to file a writ petition under Article 226 and to pray issuance of a writ in the nature of *Habeas Corpus*. This Court will not throw away the petitioner on the ground of jurisdiction or on the ground of alternative remedy available under the Guardians and Wards Act, 1890 especially keeping in view the judgment delivered by the Hon'ble Supreme Court in the case of *Capt. Dushyant Somal* (Supra).

18. In the case of *Veena Agrawal Vs. Shri Prahlad Das Agarwal* reported in AIR (MP) 1976 0 92, the Division Bench of this Court in paragraphs No.5 and 6 has held as under:-

> "5. Having heard learned counsel of the parties, we are of opinion that this petition must be allowed. At the outset we would like to mention that in the nature of the present case it is not at all necessary for us to go into the details of allegations and counter-allegations of the parties. We are required to decide this, petition on the sole consideration in whose custody the welfare of the minor lies. Under Section 6(a) of the Hindu Minority and Guardianship Act, 1956, it is provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother. The clause gives legislative sanction to the principle which is now well established that although the father is the natural guardian of the minor child and entitled as such to his custody, the prime and paramount consideration is the welfare of the minor and the custody of a child of tender years should, therefore, remain with the mother unless there are grave and weighty considerations which require that the mother should not be permitted to have the minor with her. For applying the aforesaid rule we will have to look to the facts emerging from the petition and the return filed before us. The fact that the petitioner belongs to a respectable family is not in dispute and also her father is drawing a handsome salary. The petitioner has besides her father, her mother, four sisters but no brother. Out of these four sisters, first two are already married and the 4th and 5th studying in a college. The petitioner is the third daughter of her parents. The petitioner is staying with her parents. She herself is a highly educated lady. Therefore, it cannot be denied that if the custody of the male child is given to her she will not be able to look after him and the welfare of the child would in any manner be in jeopardy. As regards the contention advanced on behalf of the

respondent that even he can look after the child cannot be a ground for depriving the mother of the custody of the child in view of the provisions of Section 6(a) of the Hindu Minority and Guardianship Act, Even the basis stated by the respondent that he would be in a position to look after the child is not convincing. The petitioner is a lecturer and he will have to discharge his official duties by remaining away from his house. He cannot, therefore, feed the child in a manner which is expected of a mother. The contention advanced on his behalf is that he would keep his aged mother with him and also an Ayah who would be able to look after the child properly cannot be equated with the looking after of the child by his own mother. Besides that, looking to the salary a lecturer draws it does not appear feasible that the respondent would be able to keep an Aya. The mother of the respondent is of an old age, as stated before us, and she would not be able to properly look after the child. We are, therefore, not convinced that the respondent-father is in a position to look after his newly born male child in preference to that of the mother.

6. In *Bhagwati Bai v. Yadav Krishna Awadhiya,* AIR 1969 Madh Pra 23, a Division Bench of this Court has held as under :

> "The writ of habeas corpus ad subjic-iendum, i.e., you have the body to submit or answer, is commonly known as the writ of habeas corpus. It is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from an illegal or improper detention. The writ also extends its influence to restore the custody of a minor to his guardian when wrongfully deprived of it The detention of a minor by a person who is not entitled to his legal custody is treated, for the purpose of granting the writ, as equivalent to imprisonment of the minor. It is, therefore, not necessary to show that any force or restraint is "being used against the minor by the respondent. In Gohar Begum v. Suggi Begum, (1960) 1 SCR 597 = (AIR 1960 SC 93) where the mother had, under the personal law, the legal right to the custody of her illegitimate minor child, the writ was issued."

The Division Bench of this Court in the aforesaid case while dealing with a writ petition under Article 226 of the Constitution of India for issuance of a writ in the nature of *Habeas Corpus* has allowed the writ petition with a direction for giving the custody of the child to the petitioner therein Veena Agrawal.

19. In the case of *Kamla Devi Vs. State* reported in AIR (HP) 1987 0 34, the High Court of Himachal Pradesh in paragraph No.25 has held as under:-

> "25. The law, which generally lags behind social advances, has haltingly stepped in by enacting Section 6 of the Hindu Minority and

> Guardianship Act, 1956 and taken a small step in the direction of treating the mother as better suited for custody till the minor attains the age of 5. The relevant portion of Section 6 of the said Act reads as follows : "The natural guardians of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are-
>
> (a) in the case of a boy or an unmarried girl - the father, and after him, the mother:
>
> Provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother."
>
> (Emphasis supplied)
>
> The "tender years rule" has thus found statutory recognition and the legislative policy underlying thereto is based not only on the social philosophy but also in realities and points in the direction that the custody of minor children who have not completed the age of 5 years should ordinarily be with the mother irrespective of the fact that the father is the natural guardian of such minors. When moved for a writ of Habeas Corpus and in exercising the general and inherent jurisdiction in a child custody case, the Court is required to bear this legislative prescription in mind while judging the issue as to the welfare of the child.
>
> Findings Against The Factual Backdrop :"

In the present case the child is aged about two years and this Court keeping in view Section 6 of Hindu Minority and Guardianship Act, 1956 is of the opinion that the child has to be given in the custody of the mother.

20. The Hon'ble Supreme Court in the case of *Sarita Sharma Vs. Sushil Sharma* reported in 2000 (1) G.L.H. 616 in paragraph No.6 has held as under:-

> "6. Therefore, it will not be proper to be guided entirely by the fact that the appellant Sarita had removed the children from U.S.A. despite the order of the Court of that country. So also, in view of the facts and circumstances of the case, the decree passed by the American Court though a relevant factor, cannot override the consideration of welfare of the minor children. We have already stated earlier that in U.S.A. respondent Sushil is staying along with his mother aged about 80 years. There is no one else in the family. The respondent appears to be in the habit of taking excessive alcohol. Though it is true that both the children have the American citizenship and there is a possibility that in U.S.A. they may be able to get better education, it is doubtful if the respondent will be in a position to take proper care of the children when they

> are so young. Out of them one is a female child. She is aged about 5 years. Ordinarily, a female child should be allowed to remain with the mother so that she can be properly looked after. It is also not desirable that two children are separated from each other. If a female child has to stay with the mother, it will be in the interest of both the children that they both stay with the mother. Here in India also proper care of the children is taken and they are at present studying in good schools. We have not found the appellant wanting in taking proper care of the children. Both the children have a desire to stay with the mother. At the same time it must be said that the son, who is elder than daughter, has good feelings for his father also. Considering all the aspects relating to the Welfare of the children, we are of the opinion that in spite of the order passed by the Court in U.S.A. it was not proper for the High Court to have allowed the Habeas Corpus writ petition and directed the appellant to hand over custody of the children to the respondent and permit him to take them away to U.S.A. What would be in the interest of the children requires a full and thorough inquiry and, therefore, the High Court should have directed the respondent to initiate appropriate proceedings in which such an inquiry can be held. Still there is some possibility of mother returning to U.S.A. in the interest of the children. Therefore, we do not desire to say anything more regarding entitlement of the custody of the children. The chances of the appellant returning to U.S.A. with the children would depend upon the joint-efforts of the appellant and the respondent to get the arrest warrant cancelled by explaining to the Court in U.S.A. the circumstances under which she had left U.S.A. with the children without taking permission of the Court, There is a possibility that both of them may thereafter be able to approach the Court which passed the decree to suitably modify the order with respect to the custody of the children and visitation rights."

In the aforesaid case, the appellant Sarita has removed the children from USA despite the order of Court of that country and the Hon'ble Supreme Court has held that the decree passed by the American Court though a relevant factor, cannot override the consideration of welfare of the minor children and therefore, this Court is of the opinion that the writ petition preferred by the petitioner, who is mother, deserves to be allowed and is accordingly allowed.

21. The present petition is under Article 226 of the Constitution of India for issuance of a writ in the nature of *Habeas Corpus* and the order passed by this

Court will not come in way of the parties, in case the parties so desire to approach the Civil Court under the Guardians and Wards Act, 1890. The Civil Court shall be free to decide the matter without being influenced by the order passed by this Court keeping in view the statutory provisions in respect of visitation rights of father / grand parents. The parties shall again be free to approach the Civil Court in accordance with law.

22. The respondent No.6 child in question, who is two years old, is US citizen and his Passport is also on record and therefore, as the child in question is US citizen, the US Embassy be informed about the order passed by this Court today and the Ministry of External Affairs be also informed about the order passed by this Court today. The Ministry of External Affairs, Government of India / Competent Authority shall pass necessary orders from time to time for extension of Visa of the child, if so required, in accordance with law. The petitioner shall make available the whereabouts of the child to the US Embassy as and when required or any other information required by the US Embassy in the matter. With the aforesaid, writ petition stands allowed.

Certified copy as per rules.

Petition allowed

I.L.R. [2020] M.P. 1577 (DB)
WRIT PETITION
Before Mr. Justice Ajay Kumar Mittal, Chief Justice &
Mr. Justice Vijay Kumar Shukla
W.P. No. 7373/2020 (Jabalpur) decided on 22 July, 2020

MAA VAISHNO ENTERPRISES & ors. …Petitioners

Vs.

STATE OF M.P. & anr. …Respondents

(Alongwith W.P. Nos. 7389/2020, 7472/2020, 7473/2020, 7474/2020, 7490/2020, 7520/2020, 7567/2020, 7576/2020, 7577/2020, 7578/2020, 7738/2020, 7764/2020, 7767/2020, 7771/2020, 7804/2020, 7805/2020, 7808/2020, 7810/2020, 7811/2020, 7812/2020, 7815/2020, 7867/2020, 7918/2020, 8016/2020, 8084/2020, 8131/2020, 8137/2020, 8139/2020, 8153/2020, 8159/2020, 8160/2020, 8259/2020, 8260/2020, 8363/2020, 8365/2020 & 8575/2020)

***A. Contract Act (9 of 1872), Section 2(b) & 5 and Disaster Management Act (53 of 2005), Section 6(2)(i) & 10(2)(i) – Liquor Trade – Enforceable Contract – Excise Policy 2020-21 – Covid-19 Pandemic – Validity of Contract* – Held – For an enforceable contract, there must be an offer and an unconditional and definite acceptance thereof – Acceptance of offer was**

communicated to petitioner and as per Policy, essential requirements have been complied with and mandatory payments in terms of acceptance letters, have been made by many petitioners during lockdown period only – Contract is concluded and is binding on petitioners, they cannot withdraw or revoke the same on pretext that no licence was issued by respondents prior to or on date of commencement of licence period or that the licence was issued without complying conditions stipulated in Excise Policy or Excise Act – Petitions dismissed. (Paras 54, 57 & 58)

क. संविदा अधिनियम (1872 का 9), धारा 2(b) व 5 एवं आपदा प्रबंधन अधिनियम (2005 का 53), धारा 6(2)(i) व 10(2)(i) – मदिरा व्यापार – प्रवर्तनीय संविदा – आबकारी नीति 2020–21 – कोविड–19 महामारी – संविदा की विधिमान्यता – अभिनिर्धारित – एक प्रवर्तनीय संविदा हेतु एक प्रस्ताव तथा उसकी एक बिना शर्त एवं निश्चित स्वीकृति होनी चाहिए – याची को प्रस्ताव की स्वीकृति संसूचित की गई थी और नीति के अनुसार, आवश्यक अपेक्षाओं का अनुपालन किया गया तथा केवल लॉकडाउन अवधि के दौरान कई याचीगण द्वारा, स्वीकृति पत्रों के निबंधनों में आज्ञापक भुगतान किया गया है – संविदा पूर्ण हुई है तथा याचीगण पर बाध्यकारी है, वे उक्त को इस बहाने से वापिस या प्रतिसंहृत नहीं कर सकते कि अनुज्ञप्ति अवधि की तिथि को या उससे पूर्व प्रत्यर्थीगण द्वारा कोई अनुज्ञप्ति जारी नहीं की गई थी या यह कि अनुज्ञप्ति को आबकारी नीति या आबकारी अधिनियम में अनुबद्ध शर्तों का अनुपालन किये बिना जारी किया गया था – याचिकाएं खारिज।

***B. Constitution – Article 226 – Auction Process & Contract – Terms & Conditions – Scope of Interference* – Held – Petitioners having participated in auction process being fully aware of the terms and conditions of policy and on acceptance of their bid, legally enforceable contract/agreement having been entered, they cannot turn to say that particular clauses of policy are illegal – No legal infirmity or violation of any statutory or Constitutional provision established – Petitions dismissed. (Para 123)**

ख. संविधान – अनुच्छेद 226 – नीलामी प्रक्रिया व संविदा – निबंधन एवं शर्तें – हस्तक्षेप की व्याप्ति – अभिनिर्धारित – याचीगण ने नीति के निबंधनों एवं शर्तों की पूर्ण रूप से जानकारी होते हुए नीलामी प्रक्रिया में भाग लिया तथा उनकी बोली स्वीकार होने पर, विधिक रूप से प्रवर्तनीय संविदा/करार किया गया, वे पलटकर नहीं कह सकते कि नीति के विशिष्ट खंड अवैध हैं – कोई विधिक कमी या किसी कानूनी अथवा संवैधानिक उपबंध का उल्लंघन स्थापित नहीं – याचिकाएं खारिज।

***C. Contract Act (9 of 1872), Section 2(b) & 5 – Validity of Contract – Offer & Acceptance* – Held – Although an offer does not create any legal obligations but after communication of its acceptance is complete, it turns into a promise and becomes irrevocable – Acceptance of offer of petitioners, (through e-auction or renewal/lottery) were communicated by respondents**

and till that date, there was no withdrawal or any objection regarding revaluation of auction process – Contract concluded. (Para 51 to 53)

ग. संविदा अधिनियम (1872 का 9), धारा 2(b) व 5 – संविदा की विधिमान्यता – प्रस्ताव व स्वीकृति – अभिनिर्धारित – यद्यपि एक प्रस्ताव किसी विधिक बाध्यता को सृजित नहीं करता परंतु उसकी स्वीकृति की संसूचना पूर्ण होने के पश्चात्, वह वचन में परिवर्तित हो जाता है और अप्रतिसंहरणीय बन जाता है – याचीगण के प्रस्ताव की स्वीकृति (द्वारा ई–नीलामी या नवीकरण/लॉटरी) को प्रत्यर्थीगण द्वारा संसूचित किया गया था एवं उस दिनांक तक नीलामी प्रक्रिया के पुनर्मूल्यांकन के संबंध में कोई आक्षेप या वापसी नहीं थी – संविदा समाप्त।

***D. Disaster Management Act (53 of 2005), Section 6(2)(i) & 10(2)(i) – Liquor Trade – Covid-19 Pandemic – Excise Policy 2020-21, Clause 18.3 – General Licence Conditions, Clause 33 – Amendment – Validity – Grant of Licence from Retrospective date* – Held – Period of licence was 01.04.2020 to 31.03.2021 whereas licence was issued on 04.05.2020 – Merely because licence so issued bear the period of licence from 01.04.2020 to 31.03.2021, does not mean that licence is effective from such retrospective date and petitioners would be charged the prescribed fee for period for which they were not allowed to operate liquor vends – State decided to waive off licence fee for the period for which petitioners were unable to run their liquor shops due to lockdown – By amendment State also gave option to extend the period of licence upto 31.05.2021 – Further, petitioners in their affidavit have undertaken that State could carry out amendment in the policy 2020-21 during the currency of licence which would be binding on them – It will operate as promissory estoppel against petitioners. (Paras 68, 69 & 73)**

घ. आपदा प्रबंधन अधिनियम (2005 का 53), धारा 6(2)(i) व 10(2)(i) – मदिरा व्यापार – कोविड–19 महामारी – आबकारी नीति 2020–21, खंड 18.3 – सामान्य अनुज्ञप्ति शर्तें, खंड 33 – संशोधन – विधिमान्यता – भूतलक्षी दिनांक से अनुज्ञप्ति प्रदान की जाना – अभिनिर्धारित – अनुज्ञप्ति की अवधि 01.04.2020 से 31.03.2021 थी जबकि अनुज्ञप्ति 04.05.2020 को जारी की गई थी – मात्र इसलिए कि जारी की गई अनुज्ञप्ति में अनुज्ञप्ति की अवधि 01.04.2020 से 31.03.2021 दी गई है, इसका अर्थ यह नहीं होता कि अनुज्ञप्ति, उक्त भूतलक्षी दिनांक से प्रभावी है और याचीगण पर उस अवधि के लिए विहित शुल्क प्रभारित होगा जिस अवधि में उन्हें मदिरा व्यापार करने की मंजूरी नहीं थी – राज्य ने उस अवधि के लिए अनुज्ञप्ति शुल्क को अधित्यक्त करने का विनिश्चय किया जिस अवधि में लॉकडाउन के कारण याचीगण उनकी मदिरा दुकानें चलाने में असमर्थ रहे थे – संशोधन द्वारा राज्य ने अनुज्ञप्ति की अवधि 31.05.2021 तक बढ़ाने का भी विकल्प दिया – आगे, याचीगण ने उनके शपथपत्र में परिवचन दिया है कि राज्य, अनुज्ञप्ति के चलन के दौरान नीति 2020–21 में संशोधन कर सकता है जो कि उन पर बाध्यकारी होगा – यह याचीगण के विरूद्ध वचन विबंध के रूप में प्रवर्तित होगा।

***E. Excise Act, M.P. (2 of 1915), Section 62 and Disaster Management Act (53 of 2005), Section 6(2)(i) & 10(2)(i) – Liquor Trade – Covid-19 Pandemic – Excise Policy 2020-21 – Validity of Amendment* – Held – Framing of policies is within the domain of employer – Court cannot direct to frame a policy which suits a particular person the most – State has power to amend policy as per Section 62 of Excise Act – Amendment to Excise Policy 2020-21 has been necessitated due to subsequent events occurred due to Covid-19 pandemic following lockdown – Further, State, considering practical difficulties of petitioners granted several concessions for their benefit – Amended policy does not amount to counteroffer. (Para 73 & 74)**

ङ. आबकारी अधिनियम, म.प्र. (1915 का 2), धारा 62 एवं आपदा प्रबंधन अधिनियम (2005 का 53), धारा 6(2)(i) व 10(2)(i) – मदिरा व्यापार – कोविड–19 महामारी – आबकारी नीति 2020–21 – संशोधन की विधिमान्यता – अभिनिर्धारित – नीतियां विरचित करना, नियोक्ता के अधिकार क्षेत्र के भीतर है – न्यायालय, ऐसी नीति विरचित करने के लिए निदेशित नहीं कर सकता जो किसी विशिष्ट व्यक्ति के लिए अधिकतम सुविधाजनक हो – राज्य के पास, आबकारी अधिनियम की धारा 62 के अनुसार नीति संशोधित करने की शक्ति है – आबकारी नीति 2020–21 को संशोधित करने की आवश्यकता, कोविड–19 महामारी के चलते लॉकडाउन के कारण घटित पश्चात्वर्ती घटनाओं के कारण से उत्पन्न हुई है – इसके अतिरिक्त, राज्य ने याचीगण की व्यवहारिक कठिनाईयों को विचार में लेकर उनके लाभ हेतु कई रियायतें प्रदान की – संशोधित नीति, प्रति–प्रस्ताव की कोटि में नहीं आती।

***F. Contract Act (9 of 1872), Section 2(b) & 5 – Liquor Trade – Contract – Offer & Counteroffer – Conditional/Provisional Acceptance – Effect* – Held – Power of acceptance of offeree can be terminated, if offeree, instead of accepting the offer, makes a counteroffer, because it is new offer which varies the terms of original offer – Similarly, conditional or qualified/ partial acceptance changes the original terms of an offer and operates as counteroffer – In present case, acceptance communicated to petitioners was neither a provisional acceptance nor a conditional/qualified acceptance – No new offer made to petitioners which alters the original offer – Conditions of issue of licence such as security deposit in form of bank guarantee, post dated cheques as additional security or execution of counter part agreement, cannot be treated to be a counteroffer. (Para 54 & 56)**

च. संविदा अधिनियम (1872 का 9), धारा 2(b) व 5 – मदिरा व्यापार – संविदा – प्रस्ताव व प्रति–प्रस्ताव – सशर्त/अनंतिम स्वीकृति – प्रभाव – अभिनिर्धारित – प्रस्ताव करने वाले की स्वीकृति की शक्ति समाप्त हो सकती है यदि प्रस्ताव करने वाला, प्रस्ताव स्वीकार करने की बजाए प्रति प्रस्ताव करता है, क्योंकि यह एक नया प्रस्ताव है जो कि मूल प्रस्ताव के निबंधनों को परिवर्तित करता है – इसी प्रकार, सशर्त या सापेक्ष/आंशिक स्वीकृति, प्रस्ताव के मूल निबंधनों को बदलती है और प्रति प्रस्ताव के रूप

में प्रवर्तित होती है – वर्तमान प्रकरण में, याचीगण को संसूचित स्वीकृति न तो अनंतिम स्वीकृति है न ही सशर्त/सापेक्ष स्वीकृति है – याचीगण को कोई नया प्रस्ताव नहीं किया गया जो मूल प्रस्ताव परिवर्तित करता हो – अनुज्ञप्ति जारी करने की शर्तें जैसे कि बैंक गारंटी के रूप में प्रतिभूति निक्षेप, अतिरिक्त प्रतिभूति के रूप में आगे की तारीख डले चेक या प्रतिलेख करार का निष्पादन, एक प्रति प्रस्ताव नहीं माना जा सकता।

***G. Contract Act (9 of 1872), Section 56 and Excise Policy 2020-21, Clause 48 – Applicability – Performance of Contract – "Force Majeure" Event* – Held – Apex Court concluded that Section 56 applies only when parties have not provided for as to what would happen when contract becomes impossible to perform – In present case, consequences of non-performance of contract are clearly depicted in the policy – By virtue of clause 48 "*force majeure*" condition was expressly and impliedly within contemplation of parties and thus Section 56 of Contract Act cannot be invoked.**

(Paras 101, 102 & 104)

छ. संविदा अधिनियम (1872 का 9), धारा 56 एवं आबकारी नीति 2020–21, खंड 48 – प्रयोज्यता – संविदा का पालन – ''अप्रत्याशित घटना'' – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया कि धारा 56 केवल तब लागू होती है जब पक्षकारों ने इस बारे में उपबंध नहीं किया हो कि जब संविदा पालन असंभव हो जाएं तब क्या होगा – वर्तमान प्रकरण में, नीति में स्पष्ट रूप से, संविदा का पालन न होने के परिणाम वर्णित किये गये हैं – खंड 48 के कारण से ''अप्रत्याशित घटना'' की शर्त अभिव्यक्त रूप से तथा विवक्षित रूप से पक्षकारों के चिंतन में थी और इसलिए संविदा अधिनियम की धारा 56 का अवलंब नहीं लिया जा सकता।

***H. Contract Act (9 of 1872), Section 56 – Covid-19 Pandemic – Performance of Contract – Unlawful/Frustrated/Unworkable* – Held – It cannot be said that contract between parties had become totally unworkable, impossible, frustrated and unlawful to perform – It was only a case of hardship and interruption in operation of liquor shops for only about two months for which State, vide amendment in policy has given an option to extend the period of licence by two months – State granted several relaxations and waiver of licence fee etc – MRP of liquor was also increased to cover the loss – Petitioners cannot claim that they are excused from performance of contract – For application of Section 56, the entire contract must become impossible to perform. (Paras 112, 116, 117 & 122)**

ज. संविदा अधिनियम (1872 का 9), धारा 56 – कोविड–19 महामारी – संविदा का पालन – विधिविरूद्ध/निष्फल/असाध्य – अभिनिर्धारित – यह नहीं कहा जा सकता कि पक्षकारों के बीच हुई संविदा, पालन हेतु पूर्ण रूप से असाध्य, असंभव, निष्फल एवं विधिविरूद्ध हो गई थी – वह केवल कठिनाई का और लगभग केवल दो माह के लिए मदिरा दुकानों के चलाने में रूकावट का एक प्रकरण है, जिसके लिए राज्य ने नीति में संशोधन द्वारा अनुज्ञप्ति अवधि दो माह के लिए बढ़ाने का विकल्प दिया है – राज्य ने कई

शिथिलीकरण एवं अनुज्ञप्ति शुल्क इत्यादि का अधित्यजन प्रदान किये – हानि की भरपाई हेतु मदिरा का अधिकतम खुदरा मूल्य भी बढ़ाया गया था – याचीगण, संविदा का पालन करने से उन्हें माफी दिये जाने का दावा नहीं कर सकते – धारा 56 के आवेदन हेतु संपूर्ण संविदा, पालन के लिए असंभव हो जानी चाहिए।

***I. Words & Phrases – Excise Policy 2020-21, Clause 48 – Applicability – Covid-19 Pandemic – "Force Majeure" Event/"Act of God"/"Natural Calamity"* – Held – Clause 48 deals with effect of closure of liquor vends due to liquor prohibition policy or natural calamity – Whether it is called "Act of God" or "natural Calamity" as provided in Clause 48, both are deemed to be a "force majeure" event – Office memorandum of Central Government does indicate that Covid-19 to be a "force majeure" event – Covid-19 pandemic falls within meaning and term of "natural calamity" and being a "force majeure" event expressly covered by Clause 48 of the policy. (Paras 92 to 94)**

झ. शब्द एवं वाक्यांश – आबकारी नीति 2020–21, खंड 48 – प्रयोज्यता – कोविड–19 महामारी – ''अप्रत्याशित घटना''/''दैवकृत''/''प्राकृतिक विपत्ति'' – अभिनिर्धारित – खंड 48, मदिरा प्रतिषेध नीति या प्राकृतिक विपत्ति के कारण मदिरा बिक्री बंद होने के प्रभाव से संबंधित है – चाहे उसे ''दैवकृत'' बोला जाए या ''प्राकृतिक विपत्ति'', जैसा कि खंड 48 में उपबंधित है, दोनों एक ''अप्रत्याशित घटना'' माने गये हैं – केंद्र सरकार का कार्यालय ज्ञापन दर्शाता है कि कोविड–19, एक ''अप्रत्याशित घटना'' है – कोविड–19 महामारी, ''प्राकृतिक विपत्ति'' शब्द के अर्थान्तर्गत आती है और ''अप्रत्याशित घटना'' होने के नाते अभिव्यक्त रूप से नीति के खंड 48 द्वारा आच्छादित है।

***J. Excise Act, M.P. (2 of 1915), Section 28(2) – Words "may require"/"Shall require" – Interpretation* – Held – Words "may require" operates not only for short lifting of quantity but it applies to penalty as well and does not take away the right of parties to meet the said condition if it occurs during course of business – Provision has to be read as a whole and not in isolation – When language is unambiguous, clear and plain, Court should construe it in ordinary sense and give effect to it irrespective of its consequences. (Para 59)**

ञ. आबकारी अधिनियम, म.प्र. (1915 का 2), धारा 28(2) – शब्द ''अपेक्षित हो सकता है''/ ''अपेक्षित होगा'' – निर्वचन – अभिनिर्धारित – शब्द ''अपेक्षित हो सकता है'' न केवल मात्रा के कम उत्थापन हेतु प्रवर्तित होता है बल्कि शास्ति के लिए भी लागू होता है तथा यदि कारबार के क्रम के दौरान ऐसा होता है, उक्त शर्त को पूरा करने के पक्षकारों के अधिकार को नहीं छीनता है – उपबंध को पूर्ण रूप से पढ़ा जाना चाहिए और न कि अलग करके – जब भाषा असंदिग्ध, स्पष्ट एवं साफ है, न्यायालय को उसका साधारण अभिप्राय में अर्थान्वयन करना चाहिए और उसके परिणामों पर ध्यान दिए बिना उसे प्रभावी बनाना चाहिए।

K. ***Constitution – Article 226 and Contract Act (9 of 1872), Section 2(b) & 5 – Writ Jurisdiction – Scope*** **– Held – Apex Court concluded that jurisdiction of High Court under Article 226 was not intended to facilitate avoidance of obligations voluntarily incurred – Once the offer is accepted on terms and conditions mentioned therein, a complete contract comes into existence and offeror cannot be permitted to wriggle out of contractual obligations arising out of the acceptance of his bid by a petition under Article 226 of Constitution. (Para 61 & 62)**

ट. *संविधान – अनुच्छेद 226 एवं संविदा अधिनियम (1872 का 9), धारा 2(b) व 5 – रिट अधिकारिता – व्याप्ति* – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया कि अनुच्छेद 226 के अंतर्गत उच्च न्यायालय की अधिकारिता का आशय स्वेच्छापूर्वक वहन किये गये दायित्वों से बचने की सुविधा देने के लिए नहीं है – एक बार प्रस्ताव को उसमें उल्लिखित निबंधनों एवं शर्तों पर स्वीकार किया गया है, एक संपूर्ण संविदा अस्तित्व में आती है और प्रस्तावकर्ता को संविधान के अनुच्छेद 226 के अंतर्गत एक याचिका द्वारा उसकी बोली की स्वीकृति से उत्पन्न संविदात्मक दायित्वों से बच निकलने के लिए अनुमति नहीं दी जा सकती।

L. ***Constitution – Article 299(1) and Excise Act, M.P. (2 of 1915), Section 18 – Statutory Contract – Scope*** **– Held – State Government u/S 18 has exclusive privilege of manufacturing, selling and possessing intoxicants for consideration – Excise Contract under the Excise Act, which comes into being on acceptance of bid, is a statutory contract falling outside the purview of Article 299(1) of Constitution. (Para 65)**

ठ. *संविधान – अनुच्छेद 299(1) एवं आबकारी अधिनियम, म.प्र. (1915 का 2), धारा 18 – कानूनी संविदा – व्याप्ति* – अभिनिर्धारित – राज्य सरकार को धारा 18 के अंतर्गत, प्रतिफलार्थ, मादक पदार्थों के विनिर्माण, विक्रय एवं कब्जे में रखने का अनन्य विशेषाधिकार प्राप्त है – आबकारी अधिनियम के अंतर्गत आबकारी संविदा, जो कि बोली की स्वीकृति पर अस्तित्व में आती है, एक कानूनी संविदा है जो संविधान के अनुच्छेद 299(1) के कार्यक्षेत्र से बाहर है।

M. ***Contract Act (9 of 1872), Section 2(b) & 5 – Tender Conditions*** **– Apex Court concluded that Court is not the best judge to say which tender conditions would be better and it is left to discretion of authority calling the tender – Petitioner having participated in tender knowing fully provisions of policy cannot subsequently say that those conditions are arbitrary and illegal. (Para 75)**

ड. *संविदा अधिनियम (1872 का 9), धारा 2(b) व 5 – निविदा शर्तें* – सर्वोच्च न्यायालय ने निष्कर्षित किया कि न्यायालय यह बताने के लिए सर्वोत्तम न्यायाधीश नहीं कि कौनसी निविदा शर्तें बेहतर होगी और यह उस प्राधिकारी के विवेकाधिकार पर छोड़ा गया है जिसने निविदा बुलाई है – याची जिसने नीति के उपबंधों का पूर्ण रूप से ज्ञान होते हुए

निविदा में भाग लिया, पश्चात्वर्ती रूप से यह नहीं कह सकता कि वे शर्तें मनमानी एवं अवैध हैं।

Cases referred :

(1988) Supp SCC 722, AIR 1936 PC 253, (2008) 2 SCC 672, (1996) 2 SCC 667, (2001) 8 SCC 491, 2014 SCC Online P&H 12589, SLP (C) No. 32734/2014 decided on 05.03.2020 (Supreme Court), (1863) 3 Best and Smith 826, AIR 1954 SC 44, (1980) 3 SCC 599, (1983) 2 SCC 503, (1984) 3 SCC 634, (2000) 6 SCC 113, (1992) 2 SCC 631, (1999) 1 SCC 492, (2000) 2 SCC 617, 2010 SCC Online MP 110, (2013) 6 SCC 573, (2014) 14 SCC 272, (2015) SCC Online Cal 6867 : AIR 2015 Cal 288, (2017) 14 SCC 380, 1916 (2) AC 397, (2015) 7 SCC 728, (2001) 2 SCC 160, (2016) 13 SCC 561, (1981) 4 SCC 289, (2000) 5 SCC 287, (2004) 3 SCC 553, (2008) 13 SCC 597, (1971) 2 SCC 288, 2020 SCC Online SC 451, (1975) 2 SCC 100, (1875) 1 Ch D 426, AIR 1992 SC 1, (2001) 8 SCC 540, (1975) 1 SCC 737, AIR 1963 MP 352, AIR 1974 MP 101, AIR 1971Ori. 158, AIR 1975 Pat 123, AIR 1968 SC 522.

Mukul Rohatgi, Naman Nagrath with *Rahul Diwakar, Himanshu Mishra, Kapil Wadhwa* and *Anvesh Shrivastava*, for the petitioners in W.P. Nos. 7373/2020, 7472/2020, 7473/2020, 7474/2020, 7738/2020, 7764/2020, 7767/2020, 7771/2020, 7804/2020, 7805/2020, 7808/2020, 7811/2020, 7812/2020, 7815/2020, 8016/2020, 8084/2020, 8153/2020, 8363/2020, 8365/2020 & 8575/2020..

Sanjay Agrawal, for the petitioners in W.P. Nos. 7490/2020, 7520/2020, 8131/2020, 8137/2020, 8139/2020, 8159/2020 & 8260/2020.

Sanjay Kumar Verma, for the petitioner in W.P. No. 8259/2020.

Gunjan Chowksey, Shantanu Srivastava and *Manu Maheshwari*, for the petitioners in W.P. Nos. 7567/2020, 7576/2020, 7577/2020 & 7578/2020.

M.P.S. Raghuvanshi and *Alok Katare*, for the petitioner in W.P. No. 7389/2020.

Siddharth Gulatee, for the petitioner in W.P. No. 7810/2020.

Sanjay Kumar Patel, for the petitioners in W.P. Nos. 7867/2020 & 8160/2020.

Rakesh Dwivedi and *Bhupendra Kumar Mishra*, for the petitioner in W.P. No. 7918/2020.

Tushar Mehta, Solicitor General of India, *P.K. Kaurav,* A.G. with *Saurabh Mishra*, Addl. A.G. and *Swapnil Ganguly*, Dy. A.G. for the respondents-State.

O R D E R

The Order of the Court was passed by :

AJAY KUMAR MITTAL, CHIEF JUSTICE :- This order shall dispose of a bunch of 37 writ petitions preferred by the petitioners under Article 226 of the Constitution of India bearing WP Nos.7373, 7389, 7472, 7473, 7474, 7490, 7520, 7567, 7576, 7577, 7578, 7738, 7764, 7767, 7771, 7804, 7805, 7808, 7810, 7811, 7812, 7815, 7867, 7918, 8016, 8084, 8131, 8137, 8139, 8153, 8159, 8160, 8259, 8260, 8363, 8365 and 8575 of 2020, as learned counsel for the parties are agreed that common questions of fact and law are involved therein. However, the facts are being extracted from WP No.7373/2020 wherein the auction process conducted by the respondents for grant of licence for the retail liquor shops has been called in question by the petitioners and further directions have been sought against the respondents to revalue the same; restrain them to issue licences to the petitioners; refund the money deposited by the petitioners and further to set aside the offers made by the petitioners and acceptance thereof by the respondents-State. In W.P. Nos.7520, 7567, 7576, 7578, 8259 and 8260 of 2020, the petitioners, in addition, apart from assailing the Amended Excise Policy dated 23.05.2020, have also challenged the Excise Policy 2020-21 dated 25.02.2020 specifically Clauses 9.6, 10.1.4, 10.1.5, 10.1.9, 44 and 48 thereof.

2. The marathon pleadings in the form of petition, response, rejoinder, counter-rejoinder, affidavits, additional affidavits and interlocutory applications have been filed, which has necessitated referring to them in detail in succeeding paragraphs.

3. The essential facts for the just decision of the questions involved herein, as narrated in W.P. No.7373/2020 may be noticed. The petitioners, who are 30 in number, are liquor contractors, whose highest offers were accepted or who have opted for renewal of their previous years licences with increased licence fees to run the shops for one year w.e.f. 01.04.2020 to 31.03.2021. The petitioners have been declared as successful bidders to run the respective liquor shops in various districts of State of Madhya Pradesh. In para 5.16 of the petition, a chart has been incorporated showing the districts and groups which have been allotted to the petitioners in respective districts of the State. The price of allotment of such shops/groups has also been enumerated against each petitioner.

4. The retail sale of foreign and country liquor in the State of Madhya Pradesh is done by retail shops for which licences are issued to individuals in accordance with the Excise policy framed by the State Government every year. The State Government formulated the Excise policy for the financial year 2020-21, which was notified in Madhya Pradesh Gazette on 25.02.2020 whereunder,

the licence period of the licensees had to commence from 01.04.2020 and to conclude on 31.03.2021. A perusal of Clause 1 of the policy shows the mode in which the licences for the shops were to be issued. As per clause 1(1) thereof, the entire districts of four metropolitan cities of the State i.e. Indore, Bhopal, Jabalpur and Gwalior were to be geographically divided into two groups having both the nature of liquor shops as far as possible. Clause 1(2) provided the remaining 12 Districts having Municipal Corporations i.e. Sagar, Ratlam, Ujjain, Khandwa, Burhanpur, Dewas, Satna, Katni, Rewa, Singrauli, Chhindwara and Morena to have single group of liquor shops. The execution of the shops referred to in sub-clause (1) and (2), was to be done through e-tendering cum auction and the reserve price for the shops was fixed 25% higher than the previous year's annual value. As per Clause 1(3), except for the districts mentioned in Clause 1(1) and 1(2), in all other districts, the annual price of single groups of liquor shops prevailing in the year 2019-20 will be increased by 25% for the year 2020-21 and will be executed according to previous year's system i.e. through renewal, lottery and e-tender (closed bid and auction). As per Clause 68 thereof, the process of renewal and lottery of the shops other than the four major cities and 12 districts was to commence from 29.02.2020 and this process was to end on 9th March, 2020 with the examination, opening and disposal of such applications for renewal and lottery by the District Committee. The first round for e-tendering (closed bid and auction) for four Metropolitan Cities of the State i.e. Bhopal, Indore, Jabalpur and Gwalior and 12 districts was to commence from 5th March, 2020 with the downloading and submission of e-tender (closed bids) and e-tender (offers). The e-tender (closed bid) and online tender applications were to be opened on 11th March, 2020 and the auction was to be done on 12th March, 2020. In second round, programme of e-tender (closed bid and auction) of four Metropolitan Cities and 12 Districts of Municipal Corporation of first round and other groups of renewal and lottery through e-tender (closed bid and auction) was to commence on 14th March, 2020 and for opening of e-tender (closed bid) on-line applications the date was fixed as 19th March, 2020 and for e-tender (auction), the date was fixed as 20th March, 2020. Similarly, for the groups for which e-tender (closed bid and auction) was to be done and they were left despite second round, the programme of third round was to commence from 21st March and was upto 25th March, 2020 with their e-tender (auction). The fourth round for execution of groups was fixed for the remaining groups from 26th March to 29th March, 2020. Clause 2 of the policy provided that country (domestic)/foreign liquor shops in off categories located in the State were to be converted into on-category through shop bar licence after charging additional price as an option as per rules and licence for shop bars will be given on annual licence fee of 2% of the annual value of the liquor shop. The relevant clauses of the Excise Policy 2020-21 (Annexure P-1), read as under:-

''वाणिज्यिक कर विभाग
मंत्रालय, वल्लभ भवन, भोपाल

कार्यालय आबकारी आयुक्त, मध्यप्रदेश, मोतीमहल, ग्वालियर
देशी/विदेशी मदिरा की फुटकर बिक्री की दुकानों के समूह/एकल समूहों के निष्पादन की व्यवस्था वर्ष 2020–21
ग्वालियर, दिनांक 25 फरवरी 2020

क्रमांक सात–ठेका/2020–21/307 भोपालः– सर्वसाधारण की जानकारी एवं आबकारी के फुटकर ठेकेदारों की विशेष जानकारी के लिये राज्य शासन के आदेशानुसार यह सूचना प्रकाशित की जाती है कि वर्ष 2020–21 के लिये, अर्थात् दिनांक 01 अप्रैल 2020 से दिनांक 31 मार्च 2021 तक की अवधि के लिये, सम्पूर्ण मध्यप्रदेश में वर्ष 2019–20 में संचालित देशी/विदेशी मदिरा की फुटकर बिक्री की दुकानों के समूह/एकल समूहों का निष्पादन निम्न प्रक्रिया एवं शर्तों के अधीन वर्ष 2019–20 के वार्षिक मूल्य में 25 प्रतिशत की वृद्धि कर वर्ष 2020–21 हेतु आरक्षित मूल्य निर्धारित किया जाकर संबंधित जिला कलेक्टर की अध्यक्षता में गठित जिला समिति द्वारा घोषित निष्पादन स्थलों पर किया जाएगा । शासन को यह अधिकार होगा कि वर्ष 2020–21 के लिये स्वीकृत आबकारी व्यवस्था में वर्ष 2020–21 अवधि के दौरान यथा आवश्यक परिवर्तन कर सकेगा ।

1. निष्पादन की प्रक्रिया :–

वर्ष 2020–21 के लिए मदिरा दुकानों का निष्पादन शासन द्वारा निर्धारित प्रक्रिया एवं मापदण्डों के अनुसार निम्न प्रक्रिया के अधीन किया जायेगाः–

(1) 04 बड़े महानगर यथा इन्दौर, भोपाल, जबलपुर एवं ग्वालियर जिलों में भौगोलिक निरन्तरता के आधार पर मदिरा दुकानों के दो–दो समूह बनाये जावे, जिसमें यथासम्भव दोनों स्वरूप की मदिरा दुकानें हों

(2) शेष 12 नगरनिगमों में जिले यथा सागर, रतलाम, उज्जैन, खण्डवा, बुरहानपुर, देवास, सतना, कटनी, रीवा, सिंगरौली, छिंदवाड़ा एवं मुरैना में मदिरा दुकानों का एकल समूह बनाया जावे ।

उक्त बिन्दु (1) एवं (2) के दुकानों का निष्पादन ई–टेण्डर सह नीलामी से होगा एवं आरक्षित मूल्य पूर्व वर्ष के वार्षिक मूल्य से 25 प्रतिशत बढ़ाकर रखा जावे।

(3) उपरोक्त बिन्दु (1) एवं (2) में उल्लेखित जिलों को छोड़कर राज्य के अन्य समस्त जिलों में वर्ष 2019–20 में प्रचलित मदिरा दुकानों के एकल समूहों के वार्षिक मूल्य में वर्ष 2020–21 हेतु 25 प्रतिशत की वृद्धि कर आरक्षित मूल्य निर्धारित किया जाकर, उनका निष्पादन वर्ष 2019–20 में प्रचलित व्यवस्था अनुसार अर्थात् नवीनीकरण, लॉटरी एवं ई–टेण्डर (क्लोज बिड एवं ऑक्शन) के माध्यम से किया जावे ।

(4) इस हेतु प्रथमतः वर्ष 2019–20 के मदिरा दुकानों के एकल समूहों के अनुज्ञप्तिधारियों से नवीनीकरण हेतु प्राप्त आवेदन पत्रों तथा अन्य इच्छुक

पात्र आवेदकों से प्राप्त लॉटरी आवेदन पत्रों को सम्मलित करते हुए समग्र में यदि जिले में संचालित देशी/विदेशी मदिरा दुकानों के एकल समूहों पर वर्ष 2020–21 के लिए निर्धारित आरक्षित मूल्य में निहित राजस्व के 80 प्रतिशत अथवा उससे अधिक राशि के आवेदन पत्र प्राप्त होते हैं तो ऐसी, समस्त आवेदित समूहों का निष्पादन जिले में गठित जिला समिति द्वारा पात्र आवेदकों के हित में किया जायेगा ।

(5) वर्ष 2020–21 के लिए नवीनीकरण आवेदन तथा लॉटरी आवेदन पत्रों के माध्यम से निष्पादन की कार्यवाही उपरान्त निष्पादन से शेष रहे समूहों का निष्पादन शासन द्वारा निर्धारित प्रक्रिया एवं मापदण्डों के अनुसार ई–टेण्डर (क्लोज बिड एवं ऑक्शन) के माध्यम से किया जायेगा ।''

''(36) मदिरा दुकानों से बिक्री का समयः–

मदिरा की फुटकर बिक्री की दुकानों की साफ–सफाई तथा मदिरा के प्रारंभिक संग्रह, आमद, विक्रय एवं अंतिम संग्रह के दैनिक लेखे की पंजियों को पूर्ण/संधारित किये जाने के लिये मदिरा दुकानें प्रातः 8.30 बजे से खोली जायेंगी। प्रातः 8.30 बजे से प्रातः 9.30 बजे तक का समय लेखा संधारण के लिए एवं मदिरा विक्रय का समय प्रातः 9.30 बजे से रात्रि में 11.30 बजे तक रहेगा।

रेस्टोरेन्ट, होटल, रिसोर्ट तथा क्लब बार लायसेंस के अन्तर्गत परिसर में विदेशी मदिरा की बिक्री का समय प्रातः 10.00 बजे से रात्रि 11.30 बजे तक एवं उपभोग का समय रात्रि 12.00 बजे तक रहेगा।''

5. The petitioners participated in the tender process for grant of licences to run the retail licensed shops in various districts across the State of Madhya Pradesh and their highest offers were accepted for their respective shops/groups. A specimen copy of the acceptance letter issued to petitioner No.1 is on record as Annexure P-2, which reads as under:-

''कार्यालय सहायक आबकारी आयुक्त, जिला–जबलपुर (म.प्र.)
(E-mail: deo.mpedjbp@mp.gov.in PH-0761-2624358)

क्रमांक/आब./ठेका/2020/737 जबलपुर दिनांक 16/3/2020

प्रति,

मेसर्स मॉ वैष्णो इंटरप्राईजेज
भागीदार – श्री आशीष शिवहरे
पिता श्री रघुवर दयाल शिवहरे
निवासी–डी–10, बी–ब्लॉक,
आदर्श नगर, नर्मदा रोड, जबलपुर (म.प्र.)

विषयः– वर्ष 2020–21 हेतु देशी/विदेशी मदिरा की फुटकर बिक्री की दुकानों के समूह/एकल समूहों के निष्पादन बाबत्।

संदर्भः– मध्यप्रदेश राजपत्र (आसाधारण) क्रमांक–77 दिनांक 25/02/2020 एवं आबकारी आयुक्त, मध्यप्रदेश ग्वालियर के निर्देश क्रमांक–7– ठेका/2020–21/437 भोपाल दिनांक 24.02.2020

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उपरोक्त विषयांतर्गत लेख है कि जबलपुर जिले की देशी/विदेशी मदिरा की फुटकर बिक्री की दुकानों के एकल समूहों के लायसेंस ई–टेण्डर (क्लोज बिड एवं ऑक्शन) वर्ष 2020–21 की प्रक्रिया में एकल समूह जेबीपी/एफ–1 जबलपुर उत्तर में सम्मिलित देशी/विदेशी मदिरा दुकानों के लिए आपके द्वारा प्रस्तुत उच्चतम ऑफर राशि रूपये 2,95,82,69,590/– के अनुक्रम में दिनांक 16/03/2020 को जिला समिति द्वारा एकल समूह क्रमांक–जेबीपी/एफ–1 जबलपुर उत्तर समूह को वर्ष 2020–21 हेतु अर्थात दिनांक 01 अप्रैल 2020 से दिनांक 31 मार्च 2021 तक वार्षिक मूल्य 2,95,82,69,590/– के प्रतिफल में स्वीकार कर आपके पक्ष में निष्पादित किया गया है।

अतः मध्यप्रदेश राजपत्र (आसाधारण) क्रमांक–77 दिनांक 25/02/2020 में प्रकाशित देशी/विदेशी मदिरा के निष्पादन की व्यवस्था की कंडिका क्रमांक–9.4 के अनुसार आपके द्वारा निष्पादित समूह की निर्धारित 5 प्रतिशत की धरोहर राशि रूपये 14,79,13,480/– के विरूद्ध पोर्टल पर राशि रूपये 3,05,82,700/– जमा की गई थी।

अतः राजपत्र की कंडिका क्रमांक 9.4 के अनुसार अवशेष धरोहर राशि रूपये 11,73,30,780/– निष्पादन की तिथि दिनांक 16 मार्च 2020 से 3 दिवस के अंदर अर्थात दिनांक 19 मार्च 2020 तक साईबर ट्रेजरी में ऑनलाईन जमा किया जाना सुनिश्चित करें साथ ही पोर्टल पर अपलोड किये गये समस्त वांछित अभिलेख निर्धारित प्रारूप में मूलतः तत्काल इस कार्यालय में प्रस्तुत किया जाना सुनिश्चित करें।

मध्यप्रदेश राजपत्र (आसाधारण) क्रमांक–77 दिनांक 25/02/2020 में प्रकाशित देशी/विदेशी मदिरा के निष्पादन की व्यवस्था की कंडिका क्रमांक–10 के अनुसार निर्धारित 11 प्रतिशत् की प्रतिभूति की राशि रूपये 30,91,39,173/– को जबलपुर जिले के सहायक आबकारी आयुक्त के पक्ष में जारी किसी भी राष्ट्रीयकृत/अनुसूचित/क्षेत्रीय ग्रामीण बैंक की स्थानीय शाखा में देय बैंक ड्राफ्ट/बैंकर्स चैक/बैंक कैश आर्डर/साईबर ट्रेजरी में ऑनलाईन जमा/सावधि जमा के रूप में प्रस्तुत की जा सकेगी। प्रतिभूति की राशि के बैंक गारंटी होने की दशा में भारतीय स्टॉम्प अधिनियम के अनुसार 0.25 percent of amount, subject to a maximum of twenty five thousand rupees नान् ज्यूडिशियल स्टाम्प पेपर पर तैयार कर प्रस्तुत की जा सकेगी । बैंक गारंटी/सावधि जमा की परिपक्वता अवधि दिनांक 30 अप्रैल 2021 तक होगी।

मध्यप्रदेश राजपत्र (आसाधारण) क्रमांक–77 दिनांक 25/02/2020 में प्रकाशित देशी/विदेशी मदिरा के निष्पादन की व्यवस्था की कंडिका क्रमांक–21 के अनुसार निर्धारित प्रारूप में प्रतिरूप करार रूपये 500/– के नॉन ज्यूडिशियल

स्टाम्प पेपर पर तैयार कर दिनांक 19/03/2020 तक जमा किया जाना सुनिश्चित करें ।

मध्यप्रदेश राजपत्र (आसाधारण) क्रमांक–77 दिनांक 25/02/2020 में प्रकाशित देशी/विदेशी मदिरा के निष्पादन की व्यवस्था की कंडिका क्रमांक–20 के अनुसार वार्षिक न्यूनतम प्रत्याभूत ड्यूटी के आधार पर एक पक्ष के समानुपातिक न्यूनतम प्रत्याभूत ड्यूटी की राशि के समतुल्य राशि के माह मई 2020 से माह जनवरी 2021 तक प्रत्येक पक्ष की पहली तिथि में वर्तमान में किसी भी राष्ट्रीयकृत/अनुसूचित/क्षेत्रीय/ग्रामीण बैंक में संधारित बचत/चालू खाते से जबलपुर जिले के सहायक आबकारी आयुक्त के पक्ष में जारी अट्ठारह (18) पोस्ट डेटेड चैक अतिरिक्त प्रतिभूति के रूप में दिनांक 25/03/2020 तक प्रस्तुत करना सुनिश्चित करें ।

यदि आपके द्वारा उपरोक्तानुसार वांछित औपचारिकताएँ विहित समयसीमा में पूर्ण नहीं की जाती है तो उक्त निष्पादन को निरस्त करते हुए आपके द्वारा जमा की गई धरोहर राशि को राजसात कर लिया जावेगा तथा पृथक से बिना किसी अन्य पूर्व सूचना के आपको निष्पादित समूह का निष्पादन ई–टेंडर के माध्यम से किया जावेगा व आपके उत्तरदायित्व में उक्त समूह का वर्ष 2020–21 के लिए सार्वजनिक रूप से पुनः निष्पादन करने में यदि कोई खिसारा निकलता है, तो यह खिसारे की राशि आपसे भू–राजस्व की भांति वसूल की जावेगी ।

(कलेक्टर महोदय द्वारा अनुमोदित)
संलग्न–बैंक गारंटी का प्रारूप

सही/
(सत्यनारायण दुबे)
सहायक आबकारी आयुक्त एवं सचिव जिला समिति
जिला–जबलपुर (म.प्र.)''

6. In around 30 districts in Madhya Pradesh, the licence for retail liquor shops were given on renewal/lottery and for remaining districts, excluding the four metropolitan cities i.e. Bhopal, Indore, Jabalpur and Gwalior, the entire district was categorised as one single group and the entire group was auctioned by online auction process. So far as the above four metropolitan cities, the districts were divided geographically into two halves having equal number of shops and these groups were also auctioned by online auction process. As such, in as many as 21 districts the licence for retail liquor shops were given through the process of renewal and in 16 districts, the auction was conducted. The reserve price for all groups of shops whether it was renewal of licence or auction, the same was determined to be 25% higher than the licence fees and minimum duty amount which was paid for the year 2019-20. The structure of taxation is that 5% of entire bids is to be licence fee and 95% of the bid is minimum duty payable by retailer that is divided into 24 fortnightly installments. Payment of duty is mandatory whether or not the retailer lifts the liquor and quantity of duty payable determines

the quantity of liquor to be purchased by the retailer. In terms of Clause 1 of the Excise Policy, the respective petitioners got the renewal of their shops in 21 Districts and Groups whereas in 16 Districts and Groups, they had submitted fresh tenders and were declared as successful bidders. The particulars of the petitioners who got the allotment through the process of renewal and fresh tenders, are given as under:-

Sr.No.	Petitioner No.	District	Amount (in Rs.)
Renewal District & Groups			
1.	Petitioner No.04	Seoni (4 Groups)	34.83 Crore
2.	Petitioner No.05	Seoni (4 Groups)	28.00 Crore
3.	Petitioner No.06	Seoni (1 Group)	08.00 Crore
4.	Petitioner No.07	Narsinghpur (7 Groups)	71.00 Crore
5.	Petitioner No.08	Damoh (3 Groups)	45.00 Crore
6.	Petitioner No.09	Damoh (1 Group)	07.00 Crore
7.	Petitioner No.11	Anuppur (1 Group)	08.21 Crore
8.	Petitioner No.12	Anuppur (1 Group)	03.57 Crore
9.	Petitioner No.13	Anuppur (1 Group)	10.23 Crore
10.	Petitioner No.14	Anuppur (1 Group)	08.17 Crore
11.	Petitioner No.16	Narsinghpur (2 Groups)	10.00 Crore
12.	Petitioner No.17	Narsinghpur (2 Groups)	27.00 Crore
13.	Petitioner No.19	Vidisha (1 Group)	6,32,77,500
14.	Petitioner No.19	Seoni (1 Group)	14,46,25,900
15.	Petitioner No.19	Hoshangabad (1 Group)	8,67,45,000
16.	Petitioner No.19	Shajapur (1 Group)	16,09,27,505
17.	Petitioner No.20	Raisen-Begamganj (1 Group)	11,01,00,002
18.	Petitioner No.21	Shajapur (1 Group)	2,37,81,251
19.	Petitioner No.22	Shajapur (1 Group)	4,53,00,006
20.	Petitioner No.28	Ashok Nagar (1 Group)	-
21.	Petitioner No.29	Guna (1 Group)	-
Tender District & Groups			
22.	Petitioner No.01	Jabalpur (Entire District)	594.00 Crore
23.	Petitioner No.02	Chhindwara (Entire District)	294.00 Crore
24.	Petitioner No.03	Katni (Entire District)	231.00 Crore
25.	Petitioner No.10	Balaghat (Entire District)	268.00 Crore
26.	Petitioner No.15	Ratlam (Entire District)	218.00 Crore
27.	Petitioner No.18	Bhopal (Entire District)	397.46 Crore
28.	Petitioner No.19	Alirajpur (1 Group)	18,42,00,000
29.	Petitioner No.21	Hoshangabad (1 Group)	12,80,00,000
30.	Petitioner No.22	Alirajpur (1 Group)	32,90,70,000
31.	Petitioner No.22	Dhar (1 Group)	41,66,00,000
32.	Petitioner No.23	Shivpuri (Entire District)	204,12,00,000
33.	Petitioner No.24	Dewas (Entire District)	239.00 Crore
34.	Petitioner No.25	Indore A (Half District)	643.32 Crore
35.	Petitioner No.25	Indore B (Half District)	522.34 Crore
36.	Petitioner No.27	Neemuch (16 Country Liquors)	34.20 Crore
37.	Petitioner No.30	Rajgarh (1 Group)	-

7. The case of the petitioners is that the process of completing the auction and declaring the petitioners as successful bidders stood concluded in the first week of March, 2020 for most of the districts and shops in the State. However, prior to completion of the last financial year 2019-2020, which was to conclude on 31.03.2020 and prior to commencement of the next Excise financial year i.e. 2020-21, Coronavirus (COVID-19) disease broke out globally and therefore, it was declared as pandemic by the World Health Organization (WHO) on 11.03.2020. The disease also started affecting the major population of the country, as a result of which, the Central Government, keeping in view the global experiences of countries which had been successful in containing the spread of COVID-19 and the WHO guidelines, took a conscious decision to forcefully impose social distancing to contain the spread of the said pandemic. The Central Government took several proactive preventive and mitigating measures and also issued advisories to the State Governments to contain the spread of the virus. Even the rail and the domestic air traffic services were also suspended temporarily. The State also followed the advisories and as one of such measures, the District Magistrates of various districts from 21st March, 2020 onwards, vide separate orders in their respective districts, which are contained in Annexure P-4, directed for stopping the operation of the shop bars*/Ahatas* attached to liquor shops in order to effectively implement the social distancing.

8. However, in order to maintain uniformity in the measures adopted as well as effective implementation thereof, the National Disaster Management Authority (NDMA) in exercise of the powers under section 6(2)(i) of the Disaster Management Act, 2005 (for short "the Act of 2005"), issued an order dated 24.03.2020 directing the Departments of Government of India, the State/Union Territory Governments to take effective measures to prevent the spread of COVID-19 in the country and announced that the entire country shall be in complete lockdown from 25th March, 2020 for a period of 21 days while ensuring maintenance of essential services and supplies, including health and infrastructure. Accordingly, vide order dated 24th March, 2020 (Annexure P-3), the Ministry of Home Affairs, Government of India in exercise of powers conferred under Section 10(2)(i) of the Act of 2005 also issued the guidelines for their strict implementation.

9. It is averred that no sooner the lockdown of 21 days was to complete on 15.04.2020 than the Central Government vide separate order passed on 14.04.2020 (Annexure P-5) extended the same for a further period till 03.05.2020 as the cases of people getting infected with the virus were constantly increasing. However, the Central as well as the State Government was time and again issuing the directions to operate only the shops and establishments providing essential services for a very limited period of time. Accordingly, vide order dated 28th

March, 2020, the operation of liquor and cannabis shops was also directed to be stopped. The order dated 28th March, 2020 is reproduced as under:-

''मध्यप्रदेश शासन
वाणिज्यिक कर विभाग
मंत्रालय वल्लभ भवन भोपाल

क्र. एफ बी–01–06/2020/पॉच, भोपाल, दिनांक 28 मार्च 2020

प्रति,

समस्त कलेक्टर
मध्यप्रदेश

विषयः– प्रदेश में नोवल कोरोना वायरस (COVID-19) की रोकथाम के लिये घोषित 21 दिवस लॉक–डाउन अवधि के कारण मदिरा/भांग विक्रय की दुकानों को बंद करने के संबंध में ।

–00–

राष्ट्रीय विपदा कोरोना वायरस के फैलाव पर नियंत्रण तथा बचाव के प्रयासों के तहत् दिनांक 28.03.2020 से दिनांक 14.04.2020 तक संपूर्ण प्रदेश में लॉकडाउन रहने से अन्य व्यवसायिक प्रतिष्ठानों की भांति मदिरा एवं भांग दुकानों का संचालन बंद किया जाये। तदनुसार सभी लायसेंसियों को अवगत करावें।

कृपया उपरोक्तानुसार अग्रिम कार्यवाही की जाना सुनिश्चित करें।

मध्यप्रदेश के राज्यपाल के नाम से तथा आदेशानुसार
सही/–
(एस.डी. रिछारिया)
उप सचिव''

On 15.04.2020, the Ministry of Home Affairs, Government of India, issued consolidated guidelines on the measures to be taken by the State Governments for containment of Coronavirus in the country and Annexure 1 appended to the guidelines specifically provided that "there should be strict ban on sale of liquor, gutka, tobacco etc. and spitting should be strictly prohibited". In furtherance thereof, the State Government took a conscious decision not to permit the opening of the liquor shops and accordingly did not issue the licences for the year 2020-21. In this manner, almost a month had elapsed from the scheduled date of commencement of the licence i.e. 01.04.2020 without any business. The lockdown 2.0 is to be lifted on 04.05.2020. The Authorities have informed the petitioners that they shall be allowed to open the liquor shops with certain conditions, such as: the timings to run the shops shall be limited, the shop bars (*Ahatas*) shall not be allowed to be operated, the bars and the bars in the hotels shall be closed. This, in effect, has given rise to the grievance of the petitioners that till the first week of May, 2020, the licences to enable them to run the liquor

shops have not been issued and they have not been permitted to run their shops even for a day. Since the petitioners have not been permitted to sell the liquor for one complete month, they shall not be able to recover the licence fee for the month of April, 2020. The petitioners participated in the tender process calculating and expecting certain amount of revenue by sale of liquor from the licensed premises keeping in view the specific guidelines and mandates of the Excise policy such as shopping hours provided for the liquor shops which are nearly 14 hours per day from 9.30 a.m. to 11.30 p.m. as per Clause 36 of the Excise policy and Rule VIII of the General License Conditions framed in exercise of the powers under Section 62 of the M.P. Excise Act, 1915 (hereinafter referred to as "the Excise Act"); the licence fee to be paid, permission to run the shop bars *(Ahatas),* the upset price of the shops, time period of the licence, the minimum stock which was to be lifted etc. But, the precious time of more than a month out of total period of licence of 12 months has been lost without permission of any business. Moreover, numerous restrictions are being imposed on running of liquor shops for the time being resulting into opening of shops only for 6-7 hours out of allotted 14 hours per day, closures of bars, shop bars, pubs, restaurant and other restrictions on marriages and social events and gatherings etc. The problem of unemployment is generated and there are other uncertainties due to psychological effect for the remaining period of licence in the aftermath of the Covid-19 pandemic. In these circumstances, if the normal conditions which existed at the time of participation in the tender process are not made available to the petitioners and due to such major changes in the conditions at the behest of the respondents, the petitioners are not liable to pay the licence fee; the licence fee and duty amount is required to be revalued and as such it is prayed that the auction process conducted for grant of licence to run the retail liquor shops be quashed and money deposited by the petitioners be refunded to them. In this manner, the present petitions were filed by the petitioners.

10. Thereafter, the petitioners filed an application being **I.A. No.3995/2020** dated 4.5.2020 to bring subsequent events and documents on record to the effect that pursuant to filing of the petition, the State Government vide order dated 02.05.2020 (Annexure A-1) has taken a call to open the liquor shops and now compelling the petitioners to accept the licence on the new conditions on the same rate as were submitted by them at the time of submission of their bids. Simultaneously, the Assistant Commissioner, Excise, Bhopal has issued a letter dated 02.05.2020 (Annexure A-2) to some of the petitioners along with the licence for the year 2020-21, which have been sent through email with the further instructions to collect the original of the licence and complete the remaining formalities for the year 2020-21. It has been further averred that various orders have been issued since 1st May, 2020 pertaining to operation of liquor shops but without any clarity. On 4th May, 2020, the respondents have passed another order

(Annexure A-4) that all the liquor shops in the three Red Zones districts i.e. Bhopal, Indore and Ujjain shall remain closed while in other Red Zone districts the liquor shops are being allowed to open which do not fall in the urban/city area. Similarly, the shops falling in Orange Zone may be opened in all areas except the areas falling in the containment zone whereas the shops lying in green zones have been allowed to run in complete district from 7 a.m. to 7 p.m. The bifurcation done on the basis of such zones in districts is impossible in view of the Excise policy in vogue.

11. The return has been filed on behalf of the respondents-State on 18.05.2020 vide **I.A. No.4497/2020,** and *inter alia* it has been put-forth that the e-bids submitted by the petitioners were accepted. The allotment letters were already issued to the petitioners and consequently, all the mandatory payments required to be made under the Excise Policy 2020-21 have been made by many petitioners during the lockdown period only, which have been accepted. Even the licences have also been issued to all the successful bidders/petitioners and they have started operating the liquor shops. Therefore, the petition has rendered *infructuous.* It is further stated in the return that in pursuance to the Advisory dated 01.05.2020 issued by the Ministry of Home Affairs, Govt. of India, the State Government vide order dated 04.05.2020 has permitted the running of liquor shops from 05.05.2020 subject to certain terms and conditions. As such the social distancing, restricted timings and prohibition of bars/*Ahatas* would not cause any loss to the licencees in terms of sale of liquor. The said advisories are contained in Annexure R-3, which read as under:-

''मध्यप्रदेश शासन
वाणिज्यिक कर विभाग
मंत्रालय वल्लभ भवन भोपाल

क्र.–एफ बी–01–06/2020/2/पांच भोपाल दिनांक 04 मई 2020

प्रति,

समस्त कलेक्टर
मध्यप्रदेश

विषयः प्रदेश में मदिरा/भांग विक्रय की दुकानों का संचालन करने के संबंध में।

संदर्भः– इस विभाग का समसंख्यक पत्र दिनांक 28 मार्च 2020, 14 अप्रैल 2020 एवं 19 अप्रैल 2020

कृपया उपर्युक्त विषयांकित संदर्भित पत्रों का अवलोकन करें, जिसके द्वारा प्रदेश में मदिरा एवं भांग दुकानों को दिनांक 03 मई 2020 तक संचालन बंद किया गया था । उक्त आदेश में संशोधन करते हुए मदिरा एवं भांग दुकानें दिनांक 04 मई 2020 तक बंद रहेंगी ।

2/ प्रदेश में नोबल कोरोना वायरस (COVID-19) के अंतर्गत जोनवार वर्गीकृत जिलों में मदिरा एवं भांग दुकानों का संचालन दिनांक 05 मई 2020 से निम्नानुसार किया जावे :–

(i) प्रदेश में रेड जोन में आने वाले भोपाल, इन्दौर एवं उज्जैन जिले में मदिरा एवं भांग की समस्त दुकानें आगामी आदेश तक बंद रहेंगी ।

(ii) रेड जोन के अन्य जिलों जबलपुर, धार, बड़वानी, पूर्वी निमाड़ (खण्डवा), देवास एवं ग्वालियर जिलों की मुख्यालय की शहरी क्षेत्रों की दुकानों को छोड़कर अन्य क्षेत्रों की मदिरा एवं भांग की दुकानें संचालित की जायें ।

(iii) ऑरेंज जोन के अंतर्गत आने वाले जिले खरगौन, रायसेन, होशंगाबाद, रतलाम, आगर–मालवा, मंदसौर, सागर, शाजापुर, छिंदवाड़ा, अलीराजपुर, टीकमगढ़, शहडोल, श्योपुर, डिण्डोरी, बुरहानपुर, हरदा, बैतूल, विदिशा, मुरैना एवं रीवा के कंटेनमेंट एरिया को छोड़कर, शेष मदिरा एवं भांग दुकाने संचालित की जायें ।

(iv) ग्रीन जोन के अंतर्गत आने वाले जिलों की सभी मदिरा एवं भांग दुकानों का संचालन प्रारंभ की जाये।

3/ भारत सरकार, गृह मंत्रालय एवं इस विभाग द्वारा जारी SOP एवं 2 गज की दूरी आदि का पालन भी सुनिश्चित करें। तदनुसार सभी लायसेंसियों को अवगत करावें।

कृपया उपरोक्तानुसार शीघ्र कार्यवाही की जाना सुनिश्चित करें ।

मध्यप्रदेश के राज्यपाल के नाम से तथा आदेशानुसार

सही/–
(एस. डी. रिछारिया)
उप सचिव''

12. The respondents have also filed a chart Annexure R-2 showing the date of issuance and operation of licences and the status of compliance made by the licensees. The relevant extract of the same, which is in Hindi, on being translated into English, reads as under:-

Sr.No	Name of the Firm/ Licensee (Petitioner)	District	Date of Issue of Licence	Date of commencement of sale of Liquor	Current status of deposit of Earnest money, bank guarantee and post - dated cheques by the licensee as per rules/instructions
1.	Maa Vishno Enterprisee	Jabalpur	4.5.2020	6.5.2020	EM deposited, BG & PDC not deposited
2.	Sundram Traders	Chhindwara	4.5.2020	6.5.2020	-do-
3.	Bhagwati Enterprises	Katni	4.5.2020	6.5.2020	-do-
4.	Maa Narmada Traders	Seoni	1.4.2020	6.5.2020	EM, BG & PDC deposited
5.	M/s Anand Singh Baghel	Seoni	1.4.2020	6.5.2020	-do-
6.	Raj Kumar Rai	Seoni	1.4.2020	6.5.2020	-do-
7.	Vanshika Constructions	Narsinghpur	31.3.2020	5.5.2020	-do-
8.	Sanjeet Rai	Damoh	1.4.2020	5.5.2020	-do-
9.	Ashish Rai	Damoh	1.4.2020	5.5.2020	-do-

10.	M/s Wainganga Enterprises	Balaghat	2.5.2020	6.5.2020	EM deposited, BG & PDC not deposited
11.	Devendra Verma	Anuppur	2.5.2020	6.5.2020	EM & BG deposited PDC not deposited
12.	Manmmet Singh Bhatia	Anuppur	2.5.2020	6.5.2020	-do-
13.	Niti Bhatia	Anuppur	2.5.2020	6.5.2020	-do-
14.	Dharmendra K Bhatt	Anuppur	2.5.2020	6.5.2020	-do-
15.	Chamunda Enterprises	Ratlam	3.5.2020	7.5.2020	EM deposited, BG & PDC not deposited
16.	Manish Jatt	Narsinghpur	31.3.2020	5.5.2020	EM, BG & PDC deposited
		Vidisha	2.5.2020	6.5.2020	-do-
		Hoshangabad	1.5.2020	7.5.2020	-do-
17.	Mukesh Bilwar	Narsinghpur	31.3.2020	5.5.2020	-do-
18.	Alcoactive Retail Traders Pvt. Ltd.	Bhopal	1.4.2020	-	EM deposited, BG & PDC not deposited
19.	Raisen Marketing Pvt. Ltd.	Shajapur	3.5.2020	6.5.2020	EM, BG & PDC deposited
		Vidisha	2.5.2020	6.5.2020	EM deposited, earlier BG deposited but BG of difference amount & PDC not deposited
		Alirajpur	2.5.2020	6.5.2020	EM & BG deposited PDC not deposited
		Hoshangabad	1.5.2020	-	EM, BG & PDC deposited
20.	Raisen Marketing	-	-	-	-
21.	Mandori Traders Pvt. Ltd.	Shajapur	3.5.2020	6.5.2020	EM, BG & PDC deposited
		Hoshangabad	1.5.2020	-	EM & PDC deposited. BG not deposited
22.	Swami Multi Marketing Pvt. Ltd.	Shajapur	3.5.2020	6.5.2020	EM, BG & PDC deposited
		Dhar	1.5.2020	6.5.2020	EM & BG deposited. PDC not deposited
		Alirajpur	2.5.2020	6.5.2020	EM deposited. BG & PDC not deposited
23.	Moonrise Retail Trading Pvt. Ltd.	Shivpuri	2.5.2020	7.5.2020	-do-
24.	Ms/ Wine World	Devas	2.5.2020	7.5.2020	-do-
25.	Indore Liquors Gallery	Indore	1.4.2020	-	-do-
26.	Aldas India Pvt. Ltd.	Tikamgarh	1.5.2020	6.5.2020	-do-
27.	Sunil Sahu	Neemuch	3.5.2020	6.5.2020	-do-
28.	M/s P.N. Group	Guna	7.4.2020	6.5.2020	EM, BG & PDC deposited
		Vidisha	2.5.2020	6.5.2020	-do-
		Ashoknagar	1.5.2020	6.5.2020	-do-
29.	Sangeeta Chauhan	Guna	7.4.2020	6.5.2020	-do-
30.	Shri Dharamveer Rathore	Rajgarh	7.4.2020	6.5.2020	EM deposited, BG & PDC not deposited

***EM** = Earnest Money, **BG** = Bank Guarantee, **PDC** = Post-dated cheques

In the backdrop of the contention that the petitioners have already started operating the liquor shops granted to them, the respondents have denied that any of the relief prayed for in the writ petition can be granted to them.

13. It is further averred in the return that due to outbreak of contagion various economic activities in the country have been disrupted and the State of Madhya Pradesh is also not aloof from the same. Apart from tackling Covid-19 outbreak, the State Government is putting various measures in place to provide financial support to the economy on all fronts. Considering the hardships and difficulties being faced by the liquor licence holders/petitioners due to Covid-19 pandemic and subsequent lockdown, the State vide order dated 31.03.2020 (Annexure R-4) has decided to waive off the licence fee for the period in financial year 2019-20 and 2020-21 during which they were unable to run their shops due to lockdown. The contractors will get waiver for the minimum guarantee amount after adjusting four dry days, which are available at the discretion of the Collector (to the extent available) for the lockdown period in financial years 2019-20 and 2020-21. The contractors who have pending annual licence fee or any other government dues for the financial year 2019-20 can extend their bank guarantees until 30th June, 2020 and can pay the amount due by 30th April, 2020. Liberty has been given to the district level committee to give a further extension in the payment date up to 31st May, 2020 on the request of the Collector. The contractors have been permitted to deposit 20% of the total prescribed bank guarantee within seven days of issue of license, another 20% within 15 days of issue of licence and the remaining 60% within 45 days of issue of licence. As many liquor shops were required to be closed due to lockdown restrictions despite issue of licences, a further relaxation in the conditions has been provided by counting the start of the period 7/15/45 days from the date the shop was legally permitted to be opened rather than from the date of issue of licence. For the year 2020-21, for renewal of the FL-2/FL-3/FL-4 and similar licences, which were in operation in 2019-20, it has been decided to allow submission of such proposals on deposit of only 50% of the prescribed licence fees. The remaining 50% of licence fees can be deposited within 30 days of issue of licence to them. The order dated 31.03.2020 (Annexure R-4) was issued by the Department of Commercial Tax, State of M.P. to the Commissioner Excise, M.P., Gwalior, who in turn has communicated such instructions to all the Collectors in the State vide separate order of even date. The relevant extract of the order dated 31.03.2020 (Annexure R-4) issued by the State, is reproduced as under:-

''मध्यप्रदेश शासन
वाणिज्यिक कर विभाग
मंत्रालय वल्लभ भवन भोपाल

क्रः एफ बी–01–06/2020/2/पांच, भोपाल दिनांक 31 मार्च 2020

प्रति

आबकारी आयुक्त
मध्यप्रदेश ग्वालियर

विषय– प्रदेश में नोबल कोरोना वायरस (COVID-19) की रोकथाम के लिये घोषित 21 दिवस लॉक–डाउन अवधि के कारण वित्तीय वर्ष 2019–20 की समाप्ति एवं नये वित्तीय वर्ष के आरम्भ पर निष्पादित फुटकर मदिरा विक्रय की दुकानों, अनुज्ञप्तियों/प्रक्रियाओं आदि के लिये निर्देशित व्यवस्थाओं के संबंध में।

संदर्भः– आपकी टीप क्रमांक Q/2020 दिनांक 30 मार्च 2020

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कृपया उपर्युक्त विषयांकित संदर्भित टीप का अवलोकन करें।

2/ राष्ट्रीय विपदा कोरोना वायरस के फेलाव पर नियंत्रण तथा बचाव के प्रयासों के तहत् दिनांक 25.03.2020 से 21 दिवस तक संपूर्ण देश में लॉकडाउन घोषित किया गया है । वर्तमान में (COVID-19) की वैश्विक महामारी के कारण आबकारी विभाग के कार्य संचालन में अनेक व्यावहारिक/सैद्धांतिक कठिनाईयां उत्पन्न हुई हैं। वर्ष 2019–20 के दौरान मार्च 2020 में विभिन्न जिलों में स्थाानीय स्तर पर कानून व्यवस्था तथा अन्य आधारों पर शुष्क दिवसों की घोषणा की गई है अथवा दुकानों का संचालन प्रतिबंधित किया गया है। दिनांक 28 मार्च से मध्यप्रदेश शासन द्वारा भी लॉकडाउन अवधि में मदिरा दुकानों का संचालन प्रतिबंधित कर दिया गया है। इस कारण उत्पन्न परिस्थितयो से वर्ष 2019–20 के कतिपय अनुज्ञप्तिधारियों को वर्ष 2019–20 के अंतिम पक्ष की लायसेंस फीस जमा करने में व्यावहारिक परेशानी आ रही है। इस संबंध में अनुज्ञप्तिधारियों द्वारा विभिन्न जिला कलेक्टरों से इस प्रकार की मांग की गई है कि उन्हें वर्तमान में प्रचलित प्रावधानों को शिथिल कर वार्षिक लायसेंस फीस जमा किये जाने हेतु आनुपातिक छूट प्रदान की जाय। उपरोक्त समस्याओं को दृष्टिगत रखते हुए वर्ष 2019–20 के मदिरा दुकानों के संबंध में अनुज्ञप्तिधारियों को निम्नानुसार राहत प्रदान की जाती हैः–

(i) वर्ष 2019–20 में कलेक्टर द्वारा वर्ष 04 दिवस शुष्क दिवस घोषित किये जाने वाले दिवस यदि शेष हो तो उसे पहले समायोजित करते हुए शेष वर्ष 2019–20 के अनुज्ञप्तिधारियों को दिनांक 28 मार्च 2020 से दिनांक 31.03.2020 तक की अवधि की न्यूनतम प्रत्याभूति की राशि की आनुपातिक छूट प्रदान की जाकर शेष न्यूनतम प्रत्याभूति की राशि की वसूली यथा समय सुनिश्चित की जाये। इसके अतिरिक्त अवधि में निर्धारित शुष्क दिवसों के अतिरिक्त बंद रही दुकानों हेतु क्षतिपूर्ति के प्रकरण आवेदकों द्वारा प्रस्तुत किये जाने पर जिला समिति द्वारा सम्यक परीक्षण कर यथोचित कार्यवाही की जाए।

(ii) वर्ष 2020–21 में दिनांक 01 अप्रैल से निरंतर जितने दिन तक मदिरा दुकानों का संचालन प्रतिबंधित रहेगा उक्त अवधि में से जिला कलेक्टर के विवेकाधीन 04 शुष्क दिवसों को समायोजित कर शेष अवधि के दिवस की वार्षिक मूल्य में आनुपातिक छूट प्रदान की जायेगी।

3/ दिनांक 31 मार्च 2020 को मदिरा दुकानों पर अवशेष स्कंध का सामान्य अनुज्ञप्ति की शर्त क्रमांक 25 के अनुरूप विधिवत पंचनामा बनाया जाकर निम्नानुसार कार्यवाही की जाएः–

(A) जिन मदिरा दुकानों का वर्ष 2020–21 हेतु निष्पादन नवीनीकरण के माध्यम से संपन्न हो चुका है, वहॉ उक्त मदिरा स्कंध नवीनीकृत अनुज्ञप्तिधारी को सुरक्षित रखने हेतु सुपुर्दगी में दिया जाये।

(B) जिन मदिरा दुकानों का वर्ष 2020–21 हेतु निष्पादन नवीनीकरण से भिन्न माध्यम से संपन्न हुआ है अथवा जो निष्पादन से शेष है, वहाँ उक्त मदिरा स्कंध वर्ष 2019–20 के अनुज्ञप्तिधारी को सुरक्षित रखने हेतु सुपुर्दगी में दिया जाये।

दोनो ही स्थितियों में वर्ष 2020–21 हेतु मदिरा दुकानों का संचालन प्रारंभ होने पर उक्त स्कंध का निराकरण सामान्य अनुज्ञप्ति शर्तों की शर्त क्रमांक 25 के अनुरूप किया जाये ।

4/ वर्ष 2019–20 के अनुज्ञप्तिधारियों में से जिनकी वार्षिक लायसेंस फीस दिनांक 31 मार्च 2020 की स्थिति में अवशेष है अथवा उन पर अन्य कोई शासकीय राशि की देयता शेष है उनकी वर्तमान बैंक गारंटियों की वैधता अवधि में दिनांक 30 जून तक की वृद्धि करवाई जाये । यदि अनुज्ञप्तिधारी 30 अप्रैल 2020 तक अवशेष राशि जमा कराने में असमर्थ रहता है, तो उक्त स्थिति में उसके अनुरोध पर जिला समिति अपने विवेकानुसार उक्त बैंक गारंटी की विस्तारित अवधि की सीमा के भीतर शेष राशि जमा करने हेतु 31 मई तक समय सीमा में वृद्धि कर सकेगी। इस समयावधि के उपरांत जिला आबकारी बैंक गारंटी से राशि वसूली की जा सकेगी। यदि ऐसा अनुज्ञप्तिधारी 30 जून तक बैंक गारंटी की उपरोक्त वृद्धि बैंक से करवा कर स्वीकृत नहीं करता है तो 30 अप्रैल के पूर्व बैंक गारंटी से बकाया राशि वसूल कर ली जावे ।

5/ वर्ष 2020–21 के अनुज्ञप्तिधारियों द्वारा मदिरा दुकानों का संचालन लॉकडाउन की घोषित अवधि उपरांत ही किया जा सकेगा। वर्ष 2020–21 हेतु नवीन लायसेंस जारी करने के लिए आनुपातिक आकलित वार्षिक मूल्य के अनुसार आवश्यक प्रतिभूति राशि के 20 प्रतिशत की बैंक गारंटी/सावधि जमा या नगद राशि लायसेंस जारी करने के दिनांक (प्रस्तावित 14.4.2020 यदि 15.04.2020 को दुकाने खुलें) से आगामी 07 दिवस (20.04.2020 तक) में, अगली 20 प्रतिशत की बैंक गारंटी/सावधि जमा या नगद राशि लायसेंस जारी करने की दिनांक से आगामी 15 दिवस (28.04.2020 तक) एवं शेष 60 प्रतिशत की बैंक गारंटी/सावधि जमा या नगद राशि लायसेंस जारी करने की दिनांक से आगामी 45 दिवस (28.05.2020 तक) की अवधि में अनिवार्यतः जमा कराई जाये। निर्धारित संपूर्ण प्रतिभूति राशि लायसेंस जारी करने के दिनांक से 45 दिवस के अंतर्गत अनिवार्यतः प्राप्त की जाये ।

6/ वर्ष 2019–20 में संचालित विभिन्न एफ.एल–2/एफ.एल–3/एफ. एल–4 एवं समान प्रकृति के अन्य लायसेंसियों में से जिनके द्वारा अभी तक वर्ष 2020–21 हेतु निर्धारित लायसेंस फीस जमा कर नवीनीकरण के प्रस्ताव प्रस्तुत नहीं किये गये हैं, वे वर्ष 2020–21 हेतु निर्धारित लायसेंस फीस की 50 प्रतिशत की राशि जमा कर नवीनीकरण के प्रस्ताव प्रस्तुत कर सकेंगे एवं शेष 50 प्रतिशत लायसेंस फीस जमा करने हेतु उन्हें लायसेंस जारी करने के दिनांक से 30 दिवस का समय प्रदान किया जाये ।

कृपया उपरोक्तानुसार कार्यवाही की जाना सुनिश्चित करें।

मध्यप्रदेश के राज्यपाल के नाम से तथा आदेशानुसार

सही/–
(एस.डी. रिछारिया)
उप सचिव
मध्यप्रदेश शासन
वाणिज्यिक कर विभाग
भोपाल दिनांक 31 मार्च 2020''

14. Still further, it is submitted in the return that in the financial year 2019-20, revenue of Rs.10,786 Crore was generated from the sale of liquor in the State and in the year 2020-21, revenue of Rs.12,000 Crore was expected. It is estimated that the Government would forego a revenue of around Rs.1,200 Crore in the month of April, 2020 on account of this waiver and in addition, there will be a loss of substantial amount of revenue in the month of May, 2020 but still the State Government is ready to accommodate the licence holders so as to meet the exigencies arisen out of the outbreak of pandemic. The operation of liquor shops with restrictions on shop bars/*Ahatas* would not affect the sale in any manner inasmuch as such total 149 shop bar licences were granted in the year 2017-18 but despite withdrawing the said facility in the year 2018-19, the annual value of the liquor shops in the entire State witnessed rise at an average of 20% in the year 2018-19 whereas overall rise at an average of 14.7% was recorded in the State in the latter. This submission has been tried to be substantiated by filing a comparative chart (Annexure R-5). The contention that due to spread of the disease and extended lockdown the financial capacity of the people to buy liquor would be severely affected and the contract has become impossible to perform, has been termed as mere apprehension of the petitioners looking to the trends of sale of liquor received on the first day of opening of the liquor shops after lockdown. If the petitioners violate any terms of the licence or the Excise policy 2020-21, the respondents reserve their right to cancel the licence, forfeit the bank guarantee and deposits and re-auction the liquor shops.

15. The petitioners have filed preliminary rejoinder on 18.05.2020 to the reply filed by the respondents-State *inter alia* controverting that the licences which were issued to the petitioners cannot be culminated into a valid contract, therefore, in view of Section 56 of the Indian Contract Act, 1872 (hereinafter referred to as "the Contract Act"), the entire proceedings stand frustrated. The assurances which were promised in the Excise policy do not exist in the present scenario as there is an admission in the return that there are various restrictions on opening of the shops including that they have bifurcated the shops in districts which are within the red zones and permitted to open the shops in particular area whereas the auction was not conducted for individual shops. An averment has

been made that the decision to open the liquor shops has been taken by giving a counteroffer that the licences shall be granted under the new conditions which are contrary to the one prescribed in the excise policy and which were available at the time of submission of the bid. The petitioners have declined to accept the licences under new conditions but even though the pre-conditions for issue of licences such as furnishing bank guarantee and post-dated cheques etc. have not been completed by the petitioners yet the respondents are issuing the licences and threatening to operate the shops and submit the mandatory documents else their bids would be cancelled and the shops shall be put to re-auction and difference amount would be recovered from the petitioners. On the representations of the successful bidders, the Excise Commissioner vide order dated 9.5.2020 (Annexure RJ-6) has constituted a committee of the officers of the Excise Department to resolve the difficulties being faced by liquor contractors and to submit a report before 14.05.2020. The petitioners also personally met the Authorities to consider their demands and difficulties. According to the petitioners, the Committee has recommended for giving waiver of 25% of the licence fee and further waiver of the same for the period the shops remained closed. The petition has not rendered infructuous because shops are being opened on the assurances given by the State coupled with the threat of cancelling the bid and recovering the balance amount. The revenue generated from the shops which have been allowed to open in four districts under relaxation in just initial six days cannot be the criteria to assess the sale for rest of the year. It is asserted in the rejoinder that vide Office Memorandum dated 19.02.2020 and 13.05.2020 (Annexure RJ-1), the Government of India, Ministry of Finance has clarified that disruption of the supply chains due to spread of Corona virus in China or any other country should be considered as a case of natural calamity and Force Majeure clause may be invoked wherever considered appropriate, following the due procedure laid down therein.

16. The petitioners also filed an application **(I.A. No.4071/2020)** on 26.05.2020, seeking amendment in the writ petition to challenge the Notification dated 23rd May, 2020 issued by the State published in the Gazette of M.P. (Extraordinary) whereby the State has amended the earlier Excise policy dated 25.02.2020 under which the offers were invited. The revised Clause 16.7 threatening to disqualify any contractor for future tender or renewal in case of non-acceptance of amended conditions and further clauses 12, 70, 70.6 making counteroffers purporting to be novation of contractual terms, have been inserted merely to force the petitioners to succumb to the wishes of the respondents. It is alleged that the respondents have added new clauses which are in terrorem and arbitrary and therefore, cannot be enforced against the petitioners. The relevant offending conditions in the amended Excise Policy dated 23rd May, 2020 and the affidavit appended thereto, read as under:-

''वाणिज्यिक कर विभाग
मंत्रालय, वल्लभ भवन, भोपाल
कार्यालय आबकारी आयुक्त, मध्यप्रदेश, मोतीमहल, ग्वालियर

ग्वालियर, दिनांक 23 मई 2020

क्र.–सात–ठेका–2020–21–789–ग्वालियरः सर्वसाधारण की जानकारी एवं आबकारी के फुटकर ठेकेदारों की विशेष जानकारी के लिये राज्य शासन के आदेशानुसार यह सूचना प्रकाशित की जाती है कि वर्ष 2020–21 के लिये, अर्थात् दिनांक 01 अप्रैल 2020 से दिनांक 31 मार्च 2021 तक की अवधि के लिये, राज्य की देशी/विदेशी मदिरा की फुटकर बिक्री की दुकानों के समूह/एकल समूहों के निष्पादन बाबत मध्यप्रदेश राजपत्र (असाधारण) क्रमांक 77 दिनांक 25.02.2020 में प्रकाशित व्यवस्था में निम्नानुसार संशोधन किये जाते हैं ।

संशोधन

1. कंडिका 16.6 के पश्चात नवीन कंडिका 16.7 निम्नानुसार स्थापित की जाती है :–

''16.7 वर्ष 2020–21 का ऐसा अनुज्ञप्तिधारी, जिसकी निजी स्वामित्व की अथवा फर्म के भागीदार/कम्पनी के संचालक/शेयर होल्डर के रूप में आंशिक स्वामित्व की एक भी मदिरा दुकान/समूह/एकल समूह की अनुज्ञप्ति के निरस्तीकरण अथवा पुनर्निष्पादन के आदेश राज्य के किसी भी जिले में किये गये हों, वह मध्यप्रदेश राज्य के किसी भी जिले में संचालित मदिरा दुकान/समूह/एकल समूह के लिये नवीनीकरण/लॉटरी/ई–टेण्डर अथवा किसी भी अन्य रीति से वर्ष 2020–21 की आबकारी नीति (मूल एवं संशोधित) के अंतर्गत निष्पादन/पुनर्निष्पादन की कार्यवाही में भाग लेने के लिये अपात्र होगा।''

2. कंडिका 25.1 में अंकित ''15 प्रतिशत'' को ''25 प्रतिशत'' से प्रतिस्थापित किया जाता है।

3. कंडिका 25.2 में अंकित ''10 प्रतिशत'' को ''20 प्रतिशत'' से प्रतिस्थापित किया जाता है।

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''6. कंडिका क्रमांक 69 के पश्चात् निम्नांकित कंडिका स्थापित की जाती है:–

''70 वर्ष 2020–21 के अनुज्ञप्तिधारियों को उनकी ठेका अवधि दिनांक 31.05.2021 तक बढ़ायी जाने का विकल्पः–

कोविड–19 के कारण उद्भूत परिस्थितियों को दृष्टिगत रखते हुये वर्ष 2020–21 के अनुज्ञप्तिधारियों को उनकी ठेका अवधि दिनांक 31.05.2021 तक बढ़ाये जाने का विकल्प दिया जाता है । यदि इस

विकल्प के चयन हेतु कोई अनुज्ञप्तिधारी, आबकारी आयुक्त द्वारा निर्धारित प्रारूप में अपना सहमति आवेदन, वांछित दस्तावेजों के साथ संबंधित जिला कलेक्टर को प्रस्तुत करता है, तो ठेका संचालन की अवधि दिनांक 31.05.2021 तक जिला कलेक्टर द्वारा बढ़ायी जा सकेगी। जो अनुज्ञप्तिधारी इस विकल्प का लाभ न लेना चाहे, वे मूल आबकारी नीति वर्ष 2020–21 के अनुसार ठेका संचालित करते रहेंगे। जिन अनुज्ञप्तिधारियों के आवेदन स्वीकार किये जाते है, मात्र उनके लिए इस कंडिका की निम्नलिखित उप कंडिकाऐं लागू होंगी।''

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70.6 इस अधिसूचना के राजपत्र में जारी होने के दिनांक से 05 दिवस की अवधि (अथवा ऐसी अवधि जैसा राज्य शासन नियत करे) में वर्तमान अनुज्ञप्तिधारियों को उपरोक्त विकल्प, यदि वे उचित समझे, चुनना आवश्यक होगा, अन्यथा यह माना जायेगा की वे पूर्व अनुबंध पर कायम हैं तथा वर्ष 2020–21 के लिये प्रावधानित आबकारी व्यवस्था (राजपत्र दिनांक 25.02.2020) के अनुरूप मदिरा दुकानों का संचालन करना उनके लिये बंधनकारी होगा।'''

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प्रारूप कमांकः.....

'कोविड–19 के कारण प्रदेश में उत्पन्न परिस्थितियों के परिप्रेक्ष्य में वर्ष 2020–21 के अनुज्ञप्तिधारियों को नवीन विकल्प चयन किये जाने की स्थिति में सहमति बावत प्रस्तुत शपथ पत्र

शपथ पत्र''

*** *** ***

'(1) ....

'(12) यह विषय मेरे संज्ञान में है कि वर्ष 2020–21 व बढ़ी हुई अवधि (31.5.2021) के लिये स्वीकृत आबकारी व्यवस्था में लायसेंस अवधि के दौरान राज्य शासन यथा आवश्यक परिवर्तन कर सकेगा तथा वह मुझे मान्य होगा।''

17. The petitioners also filed an application **(IA No.4072/2020)** on 26.05.2020 to bring on record subsequent events wherein copies of show cause notice (Annexure A-2), certain correspondences as contained in Annexure A-3, made by the Chief Secretary, Commercial Tax Department, Annexure A-4 to A-6 and Annexure A-17 i.e. the correspondence made between the Office of the Commissioner, Excise, M.P. and the petitioners, report of the Committee dated 14.05.2020 (Annexure A-7) and letters sent by the petitioners (Annexure A-10) have been annexed to show and reiterate that only under coercion and threat from the State Authorities to take penal action followed by the assurances to settle the

matter through meetings and discussions at the highest level, the petitioners had conditionally opened some of their shops under protest pending resolution of the issues with the State Government. All the suggestions made by the delegation of the liquor contractors were categorically rejected. The petitioners have also filed a letter dated 23.05.2020 (Annexure A-16) issued by the Excise Department of Uttar Pradesh admitting that the sales are down by more than 40% as compared to the previous year. The new revised policy dated 23.05.2020 is being challenged by way of fresh writ petition to avoid any technical objection being raised.

18. During the course of hearing on 27.05.2020, the respondents sought time for putting on record the various terms of the Excise policy as well as the agreement entered into with the licensees at the time of auction. Accordingly, they submitted an additional affidavit vide **IA No.4700/2020** on 02.06.2020. According to the respondents, out of 380 successful bidders in the State, 333 have accepted to perform the contract on the same terms and conditions. Only 47 successful bidders have approached this Court on the ground of apprehension of loss and impossibility to perform the contract. They have invited attention of this Court to clause 9.4, 9.6, 48 and 49 of the original Excise policy 2020-21 wherein consequences of non-performance of the contract are clearly provided. According to them, Clause 10 of the Foreign Liquor licence and Clause 15 of the Country Spirit licence oblige the licensee with the compliance of general licence conditions. A copy of sample licence for country made liquor and foreign made liquor have been filed as Annexure R-9. It was also submitted that vide order dated 28.05.2020 (Annexure R-10), the State Government has also allowed opening of liquor shops in red zones. Along with the additional affidavit, the respondents have filed a chart (Annexure R-11) showing the date of issue of licence, starting date of sale and amount of duty deposited by the petitioners after opening of the shops on 05.05.2020, which according to them, demonstrates that people are thronging in huge numbers to liquor shops and mere reduction in two hours would not affect the sale. Under clause 2 of the Excise policy, the bar shop facility is given only on additional licence fee. If such facility is not available due to restrictions post Covid-19, the petitioners need not pay such additional licence fee. Even otherwise, the restrictions are temporary. Once they are lifted, the entire 14 hours period per day would be available to the petitioners. The respondents have placed on record a sample affidavit (Annexure R-16) wherein, in clause 13, the successful bidders have specifically accepted that the State Government could make amendment in the Excise Policy 2020-21 during the licence period, which would be acceptable to the bidder.

19. Sur-rejoinder has been filed by the respondents on 01.06.2020 vide **I.A. No.4658/2020** to controvert the submissions made by the petitioners in their rejoinder dated 18.05.2020. It is denied that Office Memorandum dated 19th

February, 2020 has any application to the facts of the present case. It applies to the Central Government Ministries and Departments and not to the State Governments. Even otherwise, it provides for extension of time rather than permitting avoidance of contract. It is stated that in the scenario which has happened due to Covid-19, the email has become preferred mode of communication, therefore, the licences were issued through email. The security amount in the form of bank guarantee and post-dated cheques were pre-requisite of issuing the licences but since the normal banking working was affected due to lockdown which delayed issuance of bank guarantee and cheque books, therefore, the licensees were given a grace period for depositing the bank guarantees/post-dated cheques. Thus, nothing has been thrust upon the petitioners but the respondents have adopted a considerable approach to meet the challenges faced by the licensees. The liquor shops were permitted to open in terms of relaxation issued by the Central Government vide Advisory issued by MHA dated 17.05.2020 (Annexure R-1), which was issued in pursuance to earlier Advisory dated 01.05.2020 (Annexure R-3). The Committee so constituted vide order dated 09.05.2020 was dissolved on 20.05.2020 as a committee of Ministers was constituted to resolve the issues regarding the contracts that were executed or are to be executed (vide order dated 13.05.2020 Annexure R-2). The Excise Commissioner's letter dated 09.05.2020 was also withdrawn vide letter No.26 dated 09.05.2020. There being a valid and binding contract, the petitioners cannot be permitted to wriggle out of the same.

20. An application, **IA No.4141/2020** has been filed on behalf of the petitioners seeking interim protection and initiating the contempt proceedings against the respondents alleging that during the course of hearing on 27.05.2020, an assurance was made on behalf of the State that no coercive steps shall be taken but the officers of the respondent-Excise Department have breached the said statement and assurance by issuing an order/charge-sheet dated 29.05.2020 (Annexure A-1 to the said application) imposing penalty on the petitioner No.18 for closing the shops. Similarly, letters Annexure A-2 have been issued to the petitioner No.23 pressurising him to open his shops otherwise strict action shall be taken against him. Similar action by issuing charge-sheets and threatening orders alleged to be taken vide documents Annexure A-3 to A-12 was taken against certain other petitioners directing them to complete the remaining formalities of auction process otherwise penal action shall be taken.

21. The respondent-State vide **IA No.5158/2020** has filed reply to the said application and denied that any coercive steps were taken against the petitioners. It has been further submitted that the letters/notices filed by the petitioners with the application are in respect of completion of allotment letter conditions, violation of general licence conditions as some of the petitioners had kept their liquor shops closed and for completing the remaining formalities and that no

penalty has been imposed by the respondents. There is nothing to show that allotment of any liquor shops or licence was cancelled. Neither any amount deposited by the petitioners was forfeited nor has any recovery been directed against any of the petitioners. The said notices were issued to the concerned petitioners as a consequence of violation of Excise policy, licence conditions and terms of allotment by them and would not amount to issuing any threat or pressure. They have filed a letter dated 30.05.2020 (Annexure R-1) stating that the letter dated 29.5.2020 (Annexure A-11 to IA No.4141/2020) was inadvertently written by the District Excise Officer to the Bank for payment of post-dated cheque and for this lapse, the said officer was transferred vide order dated 3.6.2020 (Annexure R-2). It is also a fact that the said cheque bounced for insufficient funds.

22. The respondents-State by filing an application **IA No.4142/2020** have adopted the pleadings filed in WP No.7373/2020 for the purposes of responding in all the connected writ petitions.

23. IA No.4737/2020 dated 03.06.2020 i.e. the Reply to the additional affidavit submitted by the respondents-State has been filed by the petitioners to clarify the facts submitted by the respondents. It is averred that to say the least, the correct factual position has not been stated by the respondents. It is stated that merely 12.17% of the petitioners in terms of revenue have accepted the revised policy due to various reasons. The liquor contractors/groups who have not accepted the changed terms and conditions comprise nearly 75% of the revenue of the State through liquor contracts. Four metros, namely, Indore, Bhopal, Jabalpur and Gwalior itself constitute more than 40% of the revenue through liquor sale and they have not agreed to the changed terms and have kept their shops closed after the time limit for accepting the terms of the amended policy expired. In two major metros namely, Indore and Bhopal the shops were never opened till-date (03.06.2020). The document Annexure R-ll filed by the respondents itself shows that the duty being collected/goods being lifted are only at 33.85% of the licence value in view of the extreme dip in sales. The document Annexure R-15 relied upon by the respondents is a misleading document since it does not reflect the revenue share of the licensees who have accepted the option. In fact, Jabalpur city comprises of 144 shops with revenue of over Rs.600 Crore but in Annexure R-15 the respondents have shown Jabalpur as only two groups. Still further, prior to auction/renewal, the number of groups were 1147 in number out of which 232 groups have accepted the revised policy amounting to 20.05% of the groups. The petitioners have filed chart Annexure A-l with the reply to suggest that across the State, the total revenue impact of non-acceptance of new terms and closing of shops is 73.43% whereas only 26.57% have opted for the changed conditions. As far as the petitioners in W.P. No.7373/2020 are concerned, it is stated that these 30 petitioners comprise of the State revenue of Rs.4,392.66 Crore and out of them,

only 4-5 shops/groups have accepted the terms and opened the shops. They comprise of only 12.17% of revenue, which means that contractors with 88% of revenue involved in the petition have not accepted the amended policy after 28.05.2020.

24. During the course of hearing on 04.06.2020, learned senior counsel for the petitioners sought time that few petitioners were ready and willing to continue with the licences and operate their shops including the cases of renewal of liquor licence. Therefore, liberty was granted that the petitioners those who are willing to continue with their shops, shall file an affidavit within three working days, failing which the State shall be entitled to auction the shops afresh on terms as may be laid down in that behalf. However, to balance the equity between the parties and also to prevent loss of revenue to the State, it was directed that the State shall not take any coercive means against the petitioners during the pendency of the writ petitions till the next date of hearing as the issue relating to the recoveries due to re-auction shall be examined in the petitions. Pursuant to the said order, the respondents have filed an additional affidavit being **IA No.5151/2020** bringing on record that the State Government has cancelled the contract and decided to re-auction the liquor shops of those petitioners/other parties, who have either filed an affidavit expressing unwillingness to continue with the contract or have not filed an affidavit within the stipulated time. It was also apprised that out of total 140 petitioners who have approached this Court, as many as 90 petitioners have submitted their affidavits expressing willingness to continue with the contract while the remaining 50 petitioners have either filed an affidavit expressing their unwillingness to continue with the contract or have not filed any undertaking, which inevitably means that they are also not willing to continue with the contract. Thus, out of total 290 liquor groups for which the auction was conducted, 150 successful bidders have either not come before this Court or have filed affidavits expressing their willingness to continue with the contract. In this manner, 240 liquor groups including as many as 90 petitioners herein who have submitted the affidavits showing their willingness, do not have any grievance with the continuance and performance of the contract.

25. In pursuance to interim order dated 04.06.2020, the petitioners have also filed an application **(IA No.4322/2020)** to bring on record subsequent events inter alia stating that in terms of chart annexed with the application at Annexure A/1, the licensees who have submitted affidavits to run the shops are merely 33% in terms of total revenue of the State whereas the licensees who have kept their shops shut constitute around 66% in terms of total revenue of the State. It is further highlighted that though the number of liquor groups who have opted to surrender and not accepted the changed conditions may be around 50 but they carry a revenue implication of 63% of the entire State inasmuch as from a total yearly

revenue of Rs.1,06,16,46,45,186/- the shops having been surrendered, amounts to Rs.66,91,40,76,598/- as shown in the chart Annexure A-1. After the unwilling licensees have surrendered their licences, the State Government started operating the liquor shops in terms of order dated 06.06.2020 (Annexure A-2) but thereafter, faced with some difficulty to run the shops, the State Government floated an order dated 09.06.2020 (Annexure A-3) thereby making an interim arrangement that till all the shops of which the allotment was cancelled, are re-auctioned, the shops shall be auctioned for a period of seven days, which could be further extended only four times for seven days each. According to the petitioners, the reserve price for auction has been decided as the value of one day of the annual value of the current year and the order dated 09.06.2020 clearly mentions that the provisions of the main Excise policy shall be binding on the bidders. It is stated that in pursuance to the aforesaid order dated 09.06.2020, the State Government invited bids for various groups but could receive the bids for not more than 20% of the shops and even the bids which were submitted by the bidders were quite less than the reserve price. Due to which, the State vide letter dated 12.06.2020 (Annexure A-4) relaxed the mandatory condition of base price/reserve price and thereafter, on same date, vide letter Annexure A-5 directed all the Collectors to keep the bids on standby which were less than the reserve price with a direction to invite fresh bids on the next date and thereafter to allot the tender to the bid, which is higher. Still unable to attract the bidders for all the groups of all the districts, the State Government vide order dated 13.06.2020 (Annexure A-6) has indirectly revalued the tender price which is the main relief of the petitioners and relaxed the condition that no bid shall be accepted which is lesser than the reserve price and directed the Collectors to accept the bids upto 80% of the amount of the reserve price. In this way, the State has accepted that 20% of the total amount has to be reduced from the annual value if the shops are to run smoothly and thus, since the State Government has itself reduced the annual licence value of the year 2020-21 in the re-tender but still not getting the offers, the stand taken by the petitioners that it is extremely difficult to smoothly run the liquor shops if the tender price is not revalued, stands vindicated. It has also been that in pursuance to interim order dated 04.06.2020, one of the petitioner in W.P. No.7472/2020, namely, M/s Tika Ram Kori & Co. had participated in one of the tender in District Ujjain through a Firm in which he was also a Partner, but, the said bid was not even considered as the Authorities were of the view that the Firm and all its partners have been blacklisted as their allotment has been cancelled by the State Government. In the background of these subsequent events, the petitioners vide application **I.A. No.4323/2020** seeking interim relief, prayed that the petitioners may not be treated as defaulters and blacklisted and they may be permitted to participate in the fresh bidding process and the earnest money deposited by the petitioners at the time of earlier tender be directed to be returned/adjusted.

26. Having noticed the pleadings, we now proceed to examine the submissions made on behalf of the learned counsel for the parties.

27. Mr. Mukul Rohatgi, learned senior counsel led the arguments on behalf of the petitioners and broadly raised the following arguments under different heads, which are categorized as under:-

(A) ***The contract is not concluded. Hence, it cannot be enforced upon the petitioners:***

i. Admittedly, no licence was issued upto 01.04.2020 i.e. the date from which the petitioners had to operate the liquor shops as per the Excise policy 2020-21 in pursuance to acceptance of their offers/bids. Thus, the tender process itself had not concluded owing to lockdown imposed by the Government which remained operative from 25.03.2020 to 03.05.2020 and the originally envisaged contract with the Government stood frustrated in view of the Covid-l9 Pandemic. There was no concluded contract entered between the parties. Therefore, the same cannot be enforced upon the petitioners.

ii. Article 299 of the Constitution of India requires a contract with the party to be entered in the name of the Governor. Though vehemently denied but even if this Court ultimately comes to the conclusion that there has been a contract between the parties, the same is void and is not enforceable either against the State or the party as the contract is not in the name of the Governor. Reliance was placed upon the judgment of the Supreme Court in *State of Punjab and others vs. Om Prakash Baldev Krishan*, (1988) Supp SCC 722.

(B) ***Mandatory conditions of the Excise Policy and Excise Act were not completed before issuing the licence. Therefore, the licence is not valid and there is no concluded contract:***

iii. Section 17 of the Excise Act clearly mandates and makes a bar that there shall be no sale of intoxicant without the licence. As per the Excise Policy 2020-21, the licence period is to commence from 01.04.2020 to 31.03.2021. Thus, the licence to operate the liquor vends was to be issued on or before 01.04.2020 but admittedly it had not been issued due to lockdown imposed w.e.f. 25.03.2020. Similarly, there were certain other mandatory requirements of the Excise Policy 2020-21 i.e. security deposit in the form of bank guarantee in terms of Clause 10 and post-dated cheques towards additional security deposit ($1/12^{th}$ of the value of 95% in terms of

Clause 20 of the policy) were also to be deposited by the successful bidders before 31.03.2020. Deposit of security is the pre-requisite for grant of licence. After acceptance of offer, the counterpart agreement was also to be executed in terms of Clause 21 of the policy. An affidavit as per clause 18.3, which was uploaded at the time of the bid by the bidders, was to be submitted in original. All these conditions could not be fulfilled owing to lockdown declared on 24.03.2020. The documentation and the payment taken together as such shall alone constitute entitlement for licence but the respondents themselves were not in a position to complete these mandatory requirements for issue of a licence within the timeline stipulated under the Excise policy. This, in itself, shows that there was no concluded or valid contract between the parties, therefore, question of wriggling out of the same does not arise. It was argued with vehemence that if a statutory contract requires the contract to be made in a particular manner then it has to be made in that manner only and not in any other manner. To bolster this submission, learned counsel relied upon the judgment of the Privy Council in *Nazir Ahmad vs. King Emperor* (AIR 1936 PC 253).

iv. The copies of the licences were unilaterally sent by email on 2nd May, 2020 without fulfilling and completing the mandatory pre-conditions of issue of licences and without relaxing necessary conditions in the policy. The grant of licences through email is a desperate act on behalf of the State. The Statute provides that the licence has to be issued physically and it has to be displayed on the shop. Thus, since the licence has been issued contrary to the Statute, therefore, the issue of licence is unlawful.

v. Under Section 28 of the Excise Act, the respondents are obliged to issue licence on a particular form and conditions only, as may be prescribed by the Excise policy. Thus, the respondents do not have any power to change the conditions, restrictions, period provided under the Excise Policy 2020-21.

vi. The licences so issued to the petitioners are not the valid licences as the same have been issued in arbitrary manner without complying with the provisions of Section 29 of the Excise Act, which envisages that the licensee is required to execute a counterpart agreement in conformity with the tenure of his licence and to give security for the performance of the agreement or to make deposit or to provide both as the authority may think fit.

vii. As per the Excise policy, the licence period was to commence w.e.f. 1st April, 2020 whereas copies of the licences to run the liquor shops were issued much after 2nd May, 2020 and made operative with retrospective effect from 1st April, 2020. During this period of more than a month, the petitioners were not allowed to operate the allotted liquor shops. Therefore, the licences could not have been issued with retrospective effect. Even otherwise, the Excise policy does not give any power for grant of retrospective licence for an effective term of less than 11 months instead of full 12 months term stipulated in the Excise policy.

(C) ***The Excise Policy 2020-21 and conditions of licence could not have been unilaterally amended midway through the contract and that too to the disadvantage of the petitioners. The Amended Policy deserves to be quashed:***

viii. Some shops were directed to be opened on trial basis. Accordingly, the shops were opened by some contractors under the coercion of penalty and assurances that new workable policy shall be issued by the State but without addressing the practical difficulties raised by the petitioners unilateral amendments have been incorporated in the policy. In view of the pandemic, the State Government ought to have first amended the Excise policy in April, 2020 before issuing the licences. Support was gathered from the pronouncement of the Supreme Court in *Delhi Development Authority vs. Joint Action Committee* (2008) 2 SCC 672.

ix. It was urged that some individual officers have also issued threats against the petitioners and shop owners through WhatsApp and by issuing notices to open the liquor shops and to opt for options introduced vide amended policy. This was done despite the assurance given at the bar on 27.05.2020 for not taking any coercive action against the licensees.

x. Clause 16.7 has been added in the fresh policy to coerce the petitioners as it undermines the option of the petitioners to move the court against the arbitrary actions and creates an atmosphere of fear. Vide newly inserted clause 70 in the policy, the State has extended the period of contract upto 31.05.2021. The counter offer given by the respondents is not acceptable and rather the petitioners would seek exit with full refund of their deposits. No penalty can be fastened upon the petitioners.

xi. The State by issuing the amended Excise Policy on 23.05.2020 has given a counteroffer to the petitioners during the pendency of the writ petition and this fact also goes to show that the contract is not concluded and the new policy is a new bargain. Reference was made to the decision in *U.P. Rajkiya Nirman Ltd. vs. Indure Pvt. Ltd. and others,* (1996) 2 SCC 667.

xii. Clause 12 of the affidavit appended to the amended Excise policy dated 23.05.2020 is ex facie illegal and arbitrary as it automatically binds the petitioner to agree to any changes that the State Government makes during the terms of the licence between 01.04.2020 to 31.05.2021.

xiii. Requisite procedures envisaged under Sections 18, 28 and 29 of the Excise Act have not been complied with by the respondents and unilateral alterations have been made in the policy to the detriment of the petitioners, which cannot be enforced in law unless specifically accepted by the petitioners. In terms of Clause 70.6 of the amended policy notified on 23.05.2020, the existing licensees had been given only five days to accept or not to accept the newly added provisions and this shows that the respondents have acted *mala fide* against the petitioners.

xiv. All orders passed by the Excise Office/Collectors attempting to unilaterally change the old policy are *ultra vires* and *void ab initio.* The changes made to the policy are not comprehensive or practicable, thus, the contract is frustrated.

xv. The amendment brought about in the Excise policy 2020-21 is liable to be struck down being arbitrary, without any authority and contrary to the Excise Act. It was contended that even though the Courts are not equipped to question the correctness of a policy decision but it does not mean that the courts have to abdicate their right to scrutinize whether the policy in question is formulated keeping in mind all the relevant facts and vice of discrimination or unreasonableness. In this regard, learned counsel has placed heavy reliance upon the decision of the Apex Court in *Union of India and others vs. Dinesh Engineering Corporation and another* (2001) 8 SCC 491.

xvi. The case of the petitioners is squarely covered by the judgment of a Division Bench of Punjab and Haryana High Court in CWP No.5573/2014 (O&M) *(Karambir Nain and another vs. The State of Haryana and others)* decided on 11.07.2014 *(2014 SCC Online*

P&H 12589) wherein, in identical circumstances, it was opined that no provision under the Punjab Excise Act, 1914 or the Haryana Liquor Licence Rules, 1970 had been shown which would have empowered the State to change the terms of licence during the currency of the licence or change the location of the vends. It was held that the State cannot be permitted to change the rules of the game announced at the time of Excise policy unilaterally. It was further held that though the terms of the licence are statutory in nature, the same cannot be changed by the State in between the licence period, without either seeking consent of the licensees or without giving opportunity to the licensee to repudiate the contract. The judgment as such has been affirmed by the Apex Court in Special Leave to Appeal (C) No.32734/2014 *(State of Haryana and others vs. Karambir Nain and another)* decided on 05.03.2020.

(D) ***If this Court ultimately comes to the conclusion that there is a concluded contract between the parties then, in view of Covid-19 Pandemic and restrictions imposed on sale of liquor, the contract has become frustrated and rendered impossible and unlawful to perform. Therefore, its performance has to be excused under Section 56 of the Indian Contract Act, 1872:***

xvii. Even if this Court comes to the conclusion that there had been a contract between the parties, the change in law by implementation of Act of 2005 and the entailing circumstances initially prohibiting sale of liquor across the country and then ban on liquor shops and bars*/Ahatas* and restrictions on club, restaurants, marriage parties etc. has frustrated the contract and made it unworkable. In these circumstances, there would not be adequate sale and the petitioners have lost the bargain which they had assessed while submitting their bid and/or as on 16th March, 2020. As such the provisions of Section 56 of the Contract Act would come into play as the bidders shall not be able to perform the contract because the same has become impossible to act upon. Reliance was placed upon the judgment by House of Lords in *Taylor & Another vs. Caldwell & Another,* (1863) 3 Best and Smith 826.

xviii. The licence had different duration and timings and restricted physical operation of the shops in green and orange zones excluding containment area. As such the partial opening of the shops was allowed without licence.

xix. The bifurcation done on the basis of the city/urban area and rural areas in few red zone districts is impossible and arbitrary in view of the Excise policy inasmuch as in few districts like Jabalpur, the shops have been auctioned only in two groups and not individually. If only few shops are allowed to run and few shops are prohibited in one group then again the State shall direct to pay the licence fee for the entire group which is per se illegal and arbitrary.

xx. The new conditions and counteroffer cannot be unilaterally imposed upon the petitioners under the garb of loss of revenue. Section 18 of the Excise Act provides for three privileges for grant of licence for (1) retail sale of liquor, (2) wholesale of liquor to bars, restaurants, clubs etc. who have privileges for consumption in their premises and (3) privilege of consumption of liquor in the form of shop bars. The respondents have taken away the latter two privileges and imposed arbitrary restrictions on the former. The new conditions imposed upon them are also not acceptable to them.

xxi. Demand of the petitioners is that the minimum duty/minimum lifting of goods under the licence/contract arrangement i.e. the requirement of lifting of 95% value of the total contract has to be dropped and the duty payable by the shops should be based on an actual consumption basis i.e. amount of duty payable would be calculated on actual sale of liquor and beer from the shops. The highest revenue earning and progressive states of Maharashtra and Karnataka also operate on an actual consumption basis.

xxii. The Covid-19 pandemic has been declared as a "force majeure" condition by the Central Government. Since the "force majeure" event was not within the contemplation of the parties and not provided for in the Excise Policy or Licence and Covid-19 pandemic has been categorized as a disaster which has frustrated the terms and conditions and duration of the licence granted under Section 18 of the Excise Act, therefore, it has to be dealt with under Section 56 of the Contract Act and the performance of the contract has to be excused and security deposits are liable to be refunded. The judgment in the case of *Satyabrata Ghose vs. Mugneeram Bangur and Company,* AIR 1954 SC 44 was cited in support of their contention.

28. Mr. Nagrath, learned senior counsel for the petitioners submitted that the status of the petitioners as on 1st April, 2020 is to be adjudicated. It is to be seen

whether the petitioners assumed the status of a licensee or a prospective licensee as on 1st April, 2020 i.e. the date on which the licence period was to be commenced but due to lockdown imposed by the Government it could not commence. The status of the petitioners is not that of a licensee, therefore, there was no concluded contract and even the subsequent amendment is not binding upon the petitioners. Clause 9.4 of the Excise policy stipulates that if the remaining amount of the earnest money is not deposited within the prescribed period of three days from the date of execution or before 31stMarch, 2020 as the case may be, the offer made by the group/individual group of the liquor shop would stand cancelled and the same will be reauctioned. Thus, the petitioners cannot be unilaterally compelled to complete the contract. Learned counsel further argued that the State Government was insisting upon the cancellation of the bids of the petitioners. The State has not uttered that they shall cancel the licence of the petitioners. Therefore, by no stretch of imagination it can be said that the process was continuing and the contract itself was concluded. Only the bidding process was complete. After acceptance of the bids no further steps were taken by the respondents, as from 20th March, 2020, Section 144 of CrPC was imposed and w.e.f. 25th March, 2020 onwards lockdown was imposed. After acceptance of the offers, the steps which were required to be taken were not ministerial and miscellaneous. It had the penal consequences and non-compliance of the same would have entailed cancellation of the bids. Once the non-fulfillment of the requirements, which were to be completed by the contractors, was to result in cancellation of bids then they cannot be said to be mere ministerial formalities and that the process was complete or the contract was concluded. Sections 3 to 9 of the Contract Act deal with acceptance and counteroffer. The amendment in the Excise Policy is nothing but a counteroffer made by the State Government as it has imposed new conditions and fixed new licence fee with new time schedule etc.

29. Ms. Chouksey, learned counsel appearing in W.P. Nos.7567, 7576, 7577 and 7578 of 2020 also contended that allotment letter provided for completing certain formalities. There was no concluded contract because certain conditions were not fulfilled; therefore, there was no contract at all.

30. Mr. Sanjay Agarwal, learned counsel for the petitioners appearing in W.P. Nos. 7490/2020, 7520/2020, 8131/2020, 8137/2020, 8139/2020, 8159/2020 and 8260/2020 has adopted the arguments advanced by the learned senior counsel for the petitioners in the leading W.P. No.7373/2020. However, he added that Clause 16.7 of the amended policy dated 23.05.2020 provides for penal consequences. Inasmuch as, a licensee for the year 2020-21, whose licence of a particular Firm has been cancelled then such a Partner/Proprietor or Director of such a Firm or Company is prohibited from participating in any future contracts. This is an amendment in substance in the existing clauses of the policy, which is

bad in law. He further submitted that such a clause for blacklisting could not have been added or amended during the currency of the contract.

31. Other counsels for the petitioners also adopted the contentions of learned senior counsel appearing for the petitioners, as noticed hereinbefore.

32. On the other side, besides questioning the maintainability of the writ petitions, in reply to the submissions advanced by the learned counsel for the petitioners, Mr. Tushar Mehta, learned Solicitor General of India, leading the arguments on behalf of the respondents-State has made the following contentions:

(A) ***On the validity of contract between the parties:***

i. Regarding the contention of the petitioners that the contract was not concluded, it was argued that the bids of the petitioners were already accepted for allotment of licence after following the procedure under the Excise Policy 2020-21 and General Licence Conditions. The acceptance/allotment letters were communicated to the petitioners which have been filed by the petitioners themselves as Annexure P-2 and one such acceptance/allotment letter dated 16.03.2020 addressed to M/s Sundaram Trades, Chhindwara (M.P.) has also been placed on record at page 105 of the additional affidavit marked as Annexure R-3 wherein it is specifically mentioned that after accepting the annual value as consideration, the execution is finalized in favour of the said Firm. Under the scheme of the Excise Act, the contract has been concluded; the moment offer/bid was accepted on the terms and conditions as mentioned therein. The acceptance of the offer has culminated into a binding contract in view of catena of judgments of the Supreme Court in *State of Haryana vs. Jage Ram*, (1980) 3 SCC 599, *State of Punjab vs. Dial Chand Gian Chand & Co.* (1983) 2 SCC 503, *State of Haryana and others vs. Lal Chand and others* (1984) 3 SCC 634 (para-9) and *Ghaziabad Development Authority vs. Union of India,* (2000) 6 SCC 113 (para-5). On these premises, it was also argued that the contention of the petitioners that Article 299 of the Constitution was not followed is misconceived.

ii. It was also argued that even looking to the prayer clause (v) of the writ petition, there remains no room for doubt that there is a concluded contract between the parties and the petitioners are bound to comply with the terms and conditions of the statutory contract.

(B) ***On the mandatory conditions of the Excise Policy and the Excise Act not completed before issuing the licences:***

iii. As regards the mandatory conditions for issue of licences to run the liquor shops, it was contended that the petitioners were issued the offer letters and the mandatory payments required to be made under the Excise Policy have been made by the petitioners during the lockdown only. All the petitioners/ successful bidders were also issued the licences to run the liquor shops and they started operating the liquor shops allotted to them, therefore, the petitioners are not entitled to any relief. Once the bid has been accepted, it is not the discretion on the part of the allottees to decide whether to take licence or not and it is also not the discretion of the State whether to grant licence or not.

iv. Clauses 9.4, 10.1.3 and 10.1.4, 20, 21, 44 of the Excise Policy which are relied upon by the counsel for the petitioners operate post concluded contract and therefore, they do not confer any advantage to the case of the petitioners to hold that the contract was not concluded between the parties.

v. Combating the argument with regard to format of the licence it was argued that the provisions for allotment/issue of licence for liquor shops/bars are provided in both the Excise Policy and the General Licence Conditions. The other statutory Rule which governs the licence regime are made under Section 62 of the M.P. Excise Act, 1915, namely, M.P. Foreign Liquor Rules, 1996 and M.P. Country Spirit Rules, 1995. The Licence is issued as per the format prescribed under the aforesaid two statutory Rules.

(C) ***On the power of the State to change its Excise Policy and amend the terms and conditions of licence:***

vi. The State Government in exercise of powers conferred upon it by virtue of Section 62 of the Excise Act has framed the Rules prescribing General License Conditions governing the terms and conditions of the licence granted to the petitioners. In terms of Rule XXXIII of the statutory General License Conditions the State Government is empowered to amend the conditions of licence.

vii. Regarding the unilateral changes made in the conditions of the policy, it was contended that all the successful bidders including

the petitioners herein have also submitted a statutory affidavit wherein, in Clause 13 they have undertaken to abide by the change, if any, made by the State Government in the conditions of the Excise Policy 2020-21during the licence period. Contention of the petitioners was negatived in view of the judgment of the Supreme Court in *Mohd. Fida Karim and Another vs. State of Bihar and others* (1992) 2 SCC 631.

viii. No coercive steps were taken against the petitioners and neither any penalty has been imposed. Letters referred to by the petitioners were issued for completing the remaining conditions in terms of letter of acceptance. There is no violation of any order of this Court.

ix. As regards the insertion of new Clause 16.7 by way of amended policy in relation to blacklisting is concerned, learned counsel submitted that such a clause for debarring certain persons from bidding is already there in Rule III of the Rules of General Application framed in exercise of powers conferred by Section 62 of the Excise Act and therefore, it is wrong to say that a new clause of blacklisting has been added during the currency of the contract.

x. Learned senior counsel for the respondents by inviting our attention to the order dated 31.03.2020 (Annexure R-4) submitted that the State Government has given a fair deal not only to the petitioners but to those also who have not approached this Court. Even before the licence period would have actually commenced, the interest of the successful bidders, which may have been affected due to non-operation of liquor shops during the lockdown period, was protected to some extent thereby waiving the licence fee proportionally for the period they could not operate their shops. Thus, the loss of bargain by the petitioners is only an apprehension.

xi. The State has amended its Excise policy vide Notification dated 23.05.2020 to its own detriment and to the advantage of the successful bidders including the petitioners. It has given three very significant concessions to the successful bidders, which would mitigate the loss if any estimated by the petitioners. They are:

(i) Vide Clause 2 and 3 of the Notification, MRP for sale of "domestic" liquor is increased from 15% to 25% and for

foreign liquor from 10% to 20%, which would give more revenue for the liquor shop owners;

(ii) In clause 6(70) of the Notification, an option is given to petitioners to increase the term of the contract by two months i.e. till 31.05.2021 instead of 31.03.2021. This is expected to compensate the loss occurred in April and May, 2020. Thus, the argument that full 12 months are not available to the petitioners, no longer survives. Here it was also contended that the argument that full 14 hours of sale period was not made available also does not stand as by order dated 31.05.2020, the time for opening the shops is 7 a.m. to 9 p.m. i.e. 14 hours.

(iii) Clause 6(70.2) also gives relaxation for payment to provide immediate relief to the petitioners. Originally for two months i.e. May and June, 10% per month is to be paid, which has been reduced to 7.5% in May and June. The balance payment of these months would be payable subsequently when the sale would increase.

xii. These are not the new conditions or a fresh proposal given by the State. It is only an option, which is clear from Clause 70.6 of the amended policy. It is always open to the petitioners not to accept the same. The State has given better option and the petitioners cannot treat it as a counteroffer.

xiii. It was further contended that even after availing the aforesaid concessions, if the petitioners find that they are at loss in operating the allotted liquor shops, they have an option of invoking clause 49 of the Excise policy which provides that if due to any social political, legal reason any liquor shop is closed and due to lack of sales the licence holder is not able to pay minimum excise duty, the licence holder would be eligible for waiver of excise duty to the extent of loss. Such an application may have to be submitted before the District Committee who would send a fact-finding report to the State Government and on that basis the decision on waiver of excise duty would be taken.

xiv. As per clause 48 of the Excise policy, if due to any policy decision of the Government or due to natural calamity, the licensee/allottee is not able to operate the allotted liquor shops, the licensee shall not be entitled for any compensation/ reimbursement by the Government or authorities.

xv. It was contended that in view of the judgments of the Apex Court in *Raunaq International Ltd. vs. I.V.R. Construction Ltd.* (1999) 1 SCC 492, *Air India Limited vs. Cochin International Airport Ltd. and others* (2000) 2 SCC 617 and *Chingalal Yadav vs. State of M.P.,* 2010 SCC Online MP 110, the Courts should not into interfere in the matters of tenders unless the transaction is found to be *mala fide.* Under the exercise of power of judicial review of the policy decision, the Courts must proceed with great caution while exercising their discretionary powers and should exercise these powers only in furtherance of public interest and not merely on making out a legal point.

xvi. There is also no violation of the provisions of Section 17 of the Excise Act.

(D) ***On the applicability of the judgment in Karambir Nain'***s *case* ***(supra)***

xvii. Denying the applicability of the Division Bench judgment of Punjab & Haryana High Court in *Karambir Nain'*s case (supra), it was contended that the facts of the said case are totally different. In that, the State of Haryana pursuant to its excise policy had auctioned liquor vends and licences were issued to the successful bidders and subsequently, the policy was amended by inserting Clause 2B, which related to shifting and surrender of liquor vends, which was detrimental to the interest of the petitioners therein and moreover, there it became impossible or prohibited in law to perform the contract but here the amendment in the Excise policy by Notification dated 23.05.2020 is entirely to the benefit of the petitioners, which has already been mentioned hereinabove. Secondly, in the facts of the said case, there was no provision in the Punjab Excise Act, 1914 or Haryana Liquor Licence Rules, 1970 enabling the State to change the terms of the licence and excise policy as was held in para 23 of the judgment but in the present case, the State Government has not amended the licence or the contract in any manner.

(E) ***On restrictions imposed on sale of liquor and amended policy:***

xviii. Relying upon the judgment of the Supreme Court in *State of Kerala vs. Kandath Distilleries* (2013) 6 SCC 573 it was urged that a citizen has no fundamental right to trade or business in liquor, as a beverage and the activities, which is res extra commercium, therefore, the State can impose reasonable

restrictions in the sale of liquor which may be different than imposed on other business and even the State could part with this privilege as per its liquor policy.

(F) ***On the applicability of Section 56 of the Indian Contract Act, 1872:***

xix. Apropos the argument of the petitioners that sale of liquor is frustrated or become impossible to perform under Section 56 of the Contract Act, it was vigorously argued that merely because the contract has subsequently become onerous to perform or on grounds of equity it is not frustrated. Out of the whole one year, if the petitioners have not been able to run their shops for two months and that out of 14 hours, the timings for opening of the shops were restricted after lifting the lockdown and certain other restrictions were imposed, is no ground to say that for the whole year it has become impossible to operate the licence. It may have become little less profitable but not impossible to be performed. There is also no question of contract becoming unlawful. Therefore, the case of the petitioners can never fall under Section 56 of the Contract Act as it has neither become impossible nor unlawful to perform.

xx. The restrictions such as liquor shops were directed to remain closed due to lockdown; full timings of 14 hours were not available even after they were permitted to open the shops and that shop bars were not permitted to open, were not imposed by the State Government. These restrictions came into force by virtue of the order of the Central Government under Section 6 of the Act of 2005.

xxi. It was submitted that it is not the case of non-performance of the contractual requirement by the State. There is no violation of any obligation on the part of the State. It was also contended that Section 56 of the Contract Act is not applicable in the present case because of the inbuilt provisions of the Excise Policy.

xxii. It was further argued that it is a settled legal position that a contract is not frustrated or rendered impossible to perform merely because certain circumstances in which it was made are altered.

xxiii. The consequences of non-performance of the contract due to any natural calamity or policy decision of the State are clearly enumerated in Clauses 48 and 49 of the Excise policy, therefore,

also Section 56 of the Contract Act has no applicability. Reliance was placed upon *Mary vs. State of Kerala,* (2014) 14 SCC 272.

xxiv. It was contended that the provisions of Section 56 of the Contract Act do not apply when the parties contemplate the force majeure event and its consequences. Reliance was placed upon the judgment of the Supreme Court in *Satyabrata Ghose* (supra).

xxv. It was also argued that out of 351 total allottees, only 47 allottees initially approached this Court. Once the contract is completely possible to perform by a majority of the successful bidders then it cannot be said to be impossible to be performed by the minority of the contractors. Still further, in pursuance to an interim order dated 04.06.2020, a large number of successful bidders including as many as 90 petitioners herein have submitted the affidavits showing their willingness. Thus, they do not have any grievance with the continuance and performance of the contract. By placing reliance on a single Bench decision of Kolkata High Court in *M/s Besco Limited vs. The West Bengal State Electricity and Distribution Company Ltd.* (2015) SCC Online Cal 6867: AIR 2015 Cal 288, it was submitted that for Section 56 of the Contract Act to be applicable, the entire contract must be impossible to perform.

xxvi. Learned senior counsel relied upon the judgment of the Supreme Court in *Energy Watchdog vs. CERC,* (2017) 14 SCC 380 to contend that for Section 56 to apply, the entire contract must become impossible to perform. The restrictions imposed due to orders of the Central Government under Section 6 of the Act of 2005 are temporary in nature and such temporary restrictions which by efflux of time have already been lifted to a great extent do not render the contract frustrated or impossible to perform. In the said judgment, the Apex Court held that Courts have no general power to absolve a party from the performance of its part of the contract merely because its performance has become onerous on account of an unforeseen turn of events. Attention was also invited to the judgment of House of Lords and Privy Council reported as *F.A. Tamplin Steamship Company Limited vs. Anglo-Mexican Petroleum Products Company Ltd.,* 1916 (2) AC 397.

(G) ***Regarding maintainability of the writ petition*:**

xxvii. Learned senior counsel for the respondents-State has vehemently argued that the petitioners have not approached this Court with clean hands. Their main intention is to avoid the contract and therefore, the petition for avoidance of contract in writ jurisdiction is not maintainable, as held in *Lal Chand* (supra) and *Joshi Technologies International Inc. vs. Union of India,* (2015) 7 SCC 728.

xxviii The petitioners have approached this Court merely on apprehension of loss and impossibility to perform the contract is merely an assumption. Since these are disputed questions of fact, therefore, the writ petition is not maintainable. Reliance was placed upon the judgment in *LIC of India vs. Asha Goel* (2001) 2 SCC 160.

33. By putting a deep dent on the contentions made by the learned senior counsel for the respondents-State, learned senior counsel for the petitioners in his rejoinder arguments put forth the following submissions:-

(i) Although the bid was accepted on 16.03.2020 (Annexure P-2) with the payment of l% earnest money and remaining amount of 4% was also paid on 20.03.2020 in terms of Clause 9.4 of the policy but the documentation and payment taken together in terms of clause 9 and 10 of the policy, shall alone constitute entitlement for licence and when the licence is issued to the petitioners then only the contract would stand concluded. The payment of earnest money was to be followed by bank guarantee of ll% and post-dated cheques, l/12th of the value of 95%, followed by counterpart agreement on Rs.500/- stamp paper as per clause 21 of the policy but admittedly no licence could be issued on 01.04.2020 before commencement of the licence period due to subsequent events. Thus, since there is no concluded contract between the parties, therefore, question of wriggling out of the same does not arise.

(ii) Section 28 of the Excise Act limits the power of the respondents to grant licences only as per the form, duration, fees, restrictions and conditions as prescribed. The payment of fees is the pre-condition of issue of licence and therefore, it is not appropriate on the part of the respondents to say that since the bid was accepted and acceptance letter was issued on 16th March, 2020, therefore, the petitioners have no case to plead that contract was not complete. The words "may require" occurring in sub-section (2) of Section 28, are to be read as "shall require" because the conditions of the policy are mandatory

conditions as the petitioners are also required to pay the penalty on the quantity of liquor short lifted. Rule XXXIII of the General License Conditions and Clause 13 of the affidavit submitted by the petitioners cannot undermine or alter the provisions of Section 28 of the Excise Act. The Rules framed under the said Act by way of General Licence Conditions cannot override the operation of Section 28 of the Act.

(iii) It was further contended that Section 29 of the Excise Act confers power on the authority granting licence to take security from licensee. Although it is prescribed that any authority granting a licence under the Act may require the licensee to execute a counterpart agreement but the words "may require" contained therein have to be read as "shall require" because these are the mandatory conditions for issue of licences as per the requirement of the policy and unless the condition is satisfied, the Authority does not part with the licences.

(iv) With regard to furnishing of affidavit by the bidders as per Clause 18.3 of the Policy, it was urged that only copy of the affidavit was to be uploaded online as a precondition to the bid. The original affidavit was to be submitted along with other documents at the final stage before issue of licences but due to lockdown it could not be done. It was further argued that at any rate such an affidavit would not override or change the effect and requirement of mandatory provisions of the Excise Act and the Excise Policy.

(v) It was contended that unless the conditions prescribed under the provisions of Sections 17, 18, 28 and 29 of the Excise Act and Clause 9.4, 10 (10.1.1, 10.1.3, 10.1.4, 10.1.6 and 10.1.7) and 21 of the Policy are fulfilled, there is no question of issue of licences and under the peculiar facts and circumstances of the case, neither these conditions were fulfilled nor could have been fulfilled. If these provisions are read as a whole, the finalization of acceptance of bid would complete with the issue of licence which will be done only after these conditions are complied with.

(vi) Rule XXXIII of the General Licence Conditions cannot take away the purport of Sections 17 & 28 of the Excise Act.

(vii) It was further contended that it was obligatory upon the respondents to issue the licences and get the remaining formalities completed before commencement of the licence period. The failure on the part of the respondents to provide a clear passage to the petitioners even though beyond their contemplation due to an intervening

circumstance has frustrated implementation of the contract. Reliance was placed upon the judgment in *Delhi Development Authority vs. Kenneth Builders and Developers (P) Ltd. and others,* (2016) 13 SCC 561.

(viii) The terms and conditions of the agreement as existed at the time of auction have been completely altered. The new terms and conditions imposed by the State are akin to a counteroffer. Therefore, reliance placed by the respondents upon the judgments in *Jage Ram*'s case (supra); *Dial Chand Gian Chand's* case (supra); *Lal Chand*'s case (supra) and *Joshi Technologies International*'s case (supra) is misconceived. The petitioners gather strength from the judgment of the Supreme Court in *Syed Israr Masood, Forest Contractor, Ret Ghat, Bhopal vs. State of M.P.*, (1981) 4 SCC 289.

(ix) It was also argued that there is no bar in invoking the writ jurisdiction in contractual matters where on a given set of facts, the State acts in an arbitrary manner. Attention was invited to the decision of the Supreme Court in *Monarch Infrastructure (P) Ltd. vs. Commissioner, Ulhasnagar Municipal Corporation and others,* (2000) 5 SCC 287. It was stated that judgment in the case of *Chingalal Yadav* (supra) relied upon by the respondents itself lists out arbitrary actions as an exception warranting interference in policy matters.

(x) Relying upon the judgment of the Supreme Court in *ABL International Ltd. and others vs. Export Credit Guarantee Corporation of India Ltd. and others,* (2004) 3 SCC 553, learned counsel for the petitioners further urged that in contractual matters there is no absolute bar for entertaining a writ petition even if some disputed questions of fact are involved.

(xi) Clause 13 of the affidavit only provides for the State Government to make changes to the policy and such power has not been vested with the Excise Department and Collectors. The changes cannot be made arbitrarily. Even after amendment, the Excise Policy dated 23.05.2020 remains practically impossible to perform and unworkable.

(xii) Mr. Nagrath, learned senior counsel also made an alternative submission that even if it is assumed though denied that the contract between the parties had been concluded, the amendment made in the policy vide Notification dated 23.05.2020 amounts to novation of contract and as such no change in the terms and conditions of the policy which existed at the time of acceptance of the contract, could

have been made unilaterally. No consent of the petitioners was obtained prior to issuing the amended policy and similarly all subsequent decisions taken by the respondents are arbitrary and without there being any consent of the successful bidders. It was further argued that after communication of acceptance of the offer, the respondents-State should not have taken a different stand by amending the policy.

(xiii) With regard to power to amend the policy, the stand of the petitioners is that Section 63 of the Excise Act provides for mandatory publication of all rules and notification under the Act in the official gazette. The Excise Policy 2020-21 dated 25.02.2020 and the amended policy issued on 23.05.2020 was published by virtue of Section 63 of the Act but all other concessions and things like changing the timings of shops, period of licence, curtailing the *Ahatas* etc. have been done without any Notification published in the Gazette by the Excise Officers, which is not prescribed under the law. All such requirements flowing from the policy could not have been changed without following the due procedure prescribed under Section 63 of the Excise Act. Reliance was placed upon the judgment of the Supreme Court in *Bharat Sanchar Nigam Limited and another vs. BPL Mobile Cellular Limited and others,* (2008) 13 SCC 597.

(xiv) The judgment in *Karambir Nain's* case (supra) is complete answer to the case of the petitioners and it is not at all distinguishable. In the facts of the said case, only the sale of liquor on Highways was prohibited effected by the Court's order and not the other shops. It was a case of sale of liquor becoming partially prohibited during the currency of the licence, whereas, herein by virtue of orders passed under the Act of 2005, the sale of liquor became prohibited and absolutely unlawful. So, in the case of the present petitioners, entire bargain for which the petitioners had made the offers has gone. Still there is a partial opening of the shops and there are certain containment zones. Thus, the case of the petitioners is on much higher footing than *Karambir Nain'*s case (supra) and it is applicable on all fours. Moreover, the respondents have not dealt with the decision in *Karambir Nain'*s case (supra) as the argument of novation has not been dealt with.

(xv) Clause 48 of the Excise Policy 2020-21 does not contemplate the pandemic circumstances and implementation of the Act of 2005, therefore, Section 56 of the Contract Act applies on all fours.

(xvi) Clause 48 of the policy deals with the compensation claimed by the petitioners and it does not provide that refund of the earnest money will not be granted. The petitioners would rather rely upon Clause 54 of the policy, which provides for refund of the amount so deposited in compliance of process fee/conditions for allotment of liquor shop(s) in case any unavoidable circumstance arises due to which the auction process is required to be cancelled.

(xvii) Clauses 48 and 49 of the Excise policy and Clause 33 of the General License conditions are not applicable to the case of the petitioners. Inasmuch as these provisions would be applicable in an ongoing contract whereas no licences were in operation as on 01.04.2020 as admittedly, no licences were issued till the first week of May, 2020. Further, the Clause 49 only deals with closure of shops due to social, political, legal reasons and due to lack of sales if the licence holder is not able to pay minimum excise duty, a waiver could be sought to the extent of loss equivalent to the number of closure days.

(xviii) It was also canvassed that clauses 49 and 54 of the policy of the last year gave benefit to the earlier liquor vends.

(xix) The contention of the respondents that Section 56 of the Contract Act is not applicable because there are inbuilt provisions in the Excise policy is baseless. The scenario which has happened after breaking out of Covid-l9 pandemic, has rendered the contract unlawful, impossible and unworkable. As per the case of the petitioners, due to salient and most profitable aspects of the contract and the actual bargain which the petitioners had expected before submitting their bids having been taken away, it has practically become impossible to perform the contract. As such Section 56 of the said Act would apply. Strength was drawn from the pronouncement of the Supreme Court in the case of *Smt. Sushila Devi and another vs. Hari Singh and others,* (1971) 2 SCC 288 wherein the impossibility has been described as a practical impossibility.

(xx) Admittedly, since no licence was issued or the status of the petitioners was not that of a licensee therefore, clause 48 of the Excise policy would not be applicable.

(xxi) Though it is vehemently denied but even if it is held that the petitioners were licensees then also the licensee is not entitled to claim loss of profit under clause 48 of the policy. The petitioners are not asking for any compensation whether loss of profit or loss of

expenses despite the fact that by virtue of lockdown the operation of licences became impossible because it was an offence to sell the liquor under the Act of 2005. Under the circumstances where the licensee was prohibited from the sale of liquor and operation of the licence either became unlawful or impossible, the petitioners would walk away happily after taking the advances they have given.

(xxii) Even if the stand of the respondents is accepted that Clause 48 of the policy is a force majeure clause then also the agreement stands frustrated and the petitioners are excused from its performance. The said plea has been enumerated in para 14 of reply of the petitioners to additional affidavit.

(xxiii) The judgment in *Energy Watchdog'*s case (supra) has been misunderstood by the respondents. The Supreme Court has clearly observed that insofar as a force majeure event occur *de hors* the contract, it is dealt with by a rule of positive law under Section 56 of the Contract Act.

(xxiv) The Excise policy does not contemplate the possibility of an uncertain event like lockdown, pandemic or ban on operation of bars/restaurants and containment areas etc. Therefore, in view of the judgment in *South East Asia Marine Engineering and Constructions Ltd. vs. Oil India Ltd.,* 2020 SCC Online SC 451 the petitioners are exempted from further performance and the contract becomes void.

(xxv) The piece meal measures adopted by the Government cannot make a frustrated contract workable.

(xxvi) Increase of small amount in MRP is of no help to the petitioners because there are many shops in the city and all have to compete with each other to increase the sales, which is not possible in the current situation. Still there is no likelihood of commencing large scale marriage ceremonies, parties and restaurants with gatherings in near future, which makes the future very uncertain. There were three privileges provided to the petitioners with the contract i.e. (i) sale from a shop, (ii) sale from bar, restaurants etc. and (iii) sale of liquor from *Ahatas.* Out of these three privileges, only one privilege remains i.e. to sell the liquor from shop. The respondents have tried to make up the loss of those two privileges by saying that either the petitioners would earn more profit due to increase in the MRP or by giving extra two months for the loss of two months from 1st April, 2020 and for that also the petitioners would be charged additional licence fee for those extra two months. This is nothing but exchange of offer and counteroffer.

The petitioners have a right to get those privileges because they are conferred by Rule 8 of the M.P. Foreign Liquor Rules, 1996 and Rule 9 of the M.P. Country Spirit Rules, 1995.

(xxvii) The relaxations granted by the respondents are mere restructuring of existing arrangement whereas other States like State of Punjab, State of Uttar Pradesh, State of Haryana and State of Himachal Pradesh are operating on minimum guarantee quota system.

(xxviii) The licensees who have submitted affidavits of their willingness to operate the liquor shops in pursuance to interim order dated 04.06.2020 are merely 37% in terms of total revenue of the State whereas the licensees who have kept their shops shut constitute around 63% in terms of total revenue of the State. Therefore, the higher percentage of the liquor shops constituting total revenue of the State which are unwilling due to obtaining circumstances would shift the balance of convenience in favour of the petitioners and not the higher number of successful bidders agreeing to continue with the contract on new conditions because they are very small shops with meager revenue. In law, the acceptance by majority would make no difference to an individual's right. As on the date of issue of licences on 2nd May, 2020 and even till 24th June, 2020, liquor vends in major cities like Bhopal, Indore and Ujjain were completely closed.

(xxix) After the unwilling licensees have surrendered their shops, the State Government somehow with its own resources started operating the shops and even tried to re-auction them for a period of seven days. The fact that they could not get bids more than 20% of the shops and thereafter, they had to even relax the mandatory conditions of reserve price vide letter dated 12.06.2020 (Annexure A-4 to IA No.4322/2020) and then order dated 13.06.2020 (Annexure A-6 to IA No.4322/2020) was issued to indirectly revalue the tender price upto 80% of the amount of the reserve price. Still they were unable to attract the bidders itself shows that for smooth running of the shops in 2020-21, the annual value of the shops has to be reduced and revalued, which is the main relief of the petitioners for which the petitioners have time and again given appropriate offers to the respondents/State but to no avail. On the contrary, the respondents have started treating the petitioners who have surrendered the shops as the defaulters and blacklisting them.

34. In rebuttal to the arguments advanced by the learned counsel for the petitioners in rejoinder, Mr. Mehta, learned senior counsel for the respondents in the first place submitted that due to subsequent developments, which have taken

place after the interim order dated 04.06.2020, now out of total 380 groups of liquor shops for auction/renewal, 323 groups are continuing with the contract and only 57 groups have abandoned their contracts. Learned counsel further argued that the petitioners have not disputed that all the petitioners uploaded the signed affidavits in the prescribed format online along with their bid in terms of Clause 18.3 of the policy. Merely because they subsequently did not submit the original copy, does not mean that they are not bound by clause 18.3 of the policy. After fulfillment of all the necessary conditions for submission of the bids, the bids were accepted and communication of the same was made to all the petitioners in terms of Sub-clause (6) of Clause 15.27 of the Excise Policy. Regarding the contention that additional licence fee is being charged for extension of contract by two months i.e. April and May, 2021, it was urged that the petitioners have already been provided several other concessions including waiver of licence fee for the loss of two months which has been caused, if the annual value of the contract is Rs.l20.00 Crore, the same would be reduced by Rs.20.00 Crore and the petitioners would be adequately compensated for the lost period. Otherwise also it is an option and not mandatory and the fee that would be charged is proportionate additional licence fee at the same bid rate as was applicable for the year 2020-21. He further submitted that by order dated 28.05.2020 attached to additional affidavit, the State Government also allowed sale of liquor in red zones. Thus, the restriction on sale of liquor in green and orange zone was only for about a month and about two months in the red zones. If any shop has remained closed in any containment zone, then minimum guarantee submitted by the petitioners as per Rule 9(l)(a) of M.P. Country Spirit Rules, 1995 and Rule 8(a) of M.P. Foreign Liquor Rules, 1996 for each shop, in respect of that shop shall proportionally stand reduced in terms of order dated 31.03.2020 of the State Government and thus, no loss would be incurred by the petitioners. Learned counsel further argued that the so-called report of the committee giving recommendations in favour of the petitioners cannot be relied upon because the said report was undated and unsigned and it was never submitted to the Government. In sur-rejoinder, the respondents have already pointed out that the said committee was cancelled in view of constitution of another committee of Group of Ministers. Relying upon the judgment of the Supreme Court in *State of M.P. vs. Tikamdas,* (1975) 2 SCC 100, it was contended that in terms of Section 62 read with 63 of the Excise Act, the State is empowered to make Rules and even amendment can be made retrospectively. Learned counsel further argued that the amended policy was also published in the Gazette, therefore, there is no violation of Section 63 of the Excise Act.

35. We have heard learned counsel for the parties at length.

36. In the present case, on the basis of the pleadings and contentions advanced by the learned counsel for the parties and the obtaining facts and circumstances of the case, the following questions arise for consideration:-

(i) Whether a valid and enforceable concluded contract has come into existence between the parties so as to bind the petitioners to comply with the statutory and legal obligations arising therefrom?

(ii) Whether the State is correct in unilaterally issuing the licenses with changed terms and conditions?

(iii) Whether the amended Excise Policy issued on 23.05.2020 is valid and legal?

(iv) Whether in the facts and circumstances of the present case, if the answer to Question (i) above is in the affirmative, the contract between the parties became impossible to perform or unlawful so as to excuse the petitioners from its performance in terms of Section 56 of the Contract Act?

(v) Whether Clauses 9.6, 10.1.4, 10.1.5, 10.1.9, 44 and 48 of the Excise Policy 2020-21 dated 25.02.2020 are contrary to the provisions of M.P. Excise Act, 1915?

(vi) Whether the writ petition is maintainable in the present facts and circumstances, as raised by the respondents?

37. Before we delve into the arguments advanced by the learned counsel for the parties, it would be essential to examine the material clauses of the Excise Policy 2020-21, Foreign Liquor Licence and the Country Spirit Licence issued to the petitioners, General Licence Conditions and the relevant statutory provisions of the Excise Act, the Contract Act and other ancilliary statutes referred to by the learned counsels.

38. Clause 9 of the Excise policy provides for the earnest money and how it is to be deposited. Clause 9.1 thereof provides for depositing earnest money @ 5% of the reserve price of the liquor shop. The relevant clause 9.4 thereof provides that for the execution of the liquor shops group/single group for the contract period 2020-21, the tenderer has to deposit earnest money @ 2% for groups of reserved value upto Rs.l0 Crore and for groups with a reserve price of more than Rs.l0 Crore @2% upto Rs.l0 Crore + l% of the balance amount of more than Rs.l0 Crore on NIC portal with e-tender (closed bid and auction) and the remaining amount is to be paid within a period of three days from the date of auction or upto 31st March, 2020, whichever is earlier. In case, the remaining amount of the

earnest money is not deposited within the prescribed time limit, the offer shall be cancelled without any notice and the liquor shops will be placed for re-auction. The relevant Clause 9.4 reads as under:-

> ''9. धरोहर राशि एवं उसको जमा कराया जानाः–
>
> *** *** ***
>
> 9.4 ई–टेण्डर (क्लोज बिड एवं ऑक्शन) द्वारा वर्ष 2020–21 की ठेका अवधि के लिए मदिरा दुकानों के समूह/एकल समूहों के निष्पादन हेतु टेण्डरदाता को राशि 10 करोड़ तक आरक्षित मूल्य के समूहों के लिये 2 प्रतिशत तथा 10 करोड़ से अधिक आरक्षित मूल्य वाले समूहों के लिये 10 करोड़ तक 2 प्रतिशत + 10 करोड़ से अधिक शेष राशि का 1 प्रतिशत अर्नेस्टमनी राशि देय होगी। उक्त राशि ई–टेण्डर (क्लोज बिड एवं ऑक्शन) के साथ NIC पोर्टल https://mptenders.gov.in पर ऑन लाईन जमा करानी होगी व शेष राशि निष्पादन की तिथि से 03 दिवस के अंदर अथवा दिनांक 31 मार्च 2020 जो भी पहले हो तक, साईबर ट्रेजरी में ऑन लाईन जमा करानी होगी। 03 दिवसों की गणना में निष्पादन की कार्यवाही का दिन एवं अवकाश के दिन (बैंक बंदी दिवस अथवा बैंक हड़ताल दिवस सहित, यदि कोई हो) को गणना में नहीं लिया जायेगा। धरोहर राशि की शेष राशि उपरोक्त वर्णित अवधि में जमा न किये जाने पर पृथक से बिना किसी अन्य सूचना के संबंधित मदिरा दुकानों के समूह/एकल समूह का ऑफर स्वतः निरस्त मान्य किया जायेगा तथा ऐसी मदिरा दुकानों के समूह/एकल समूह पुनः निष्पादन पर रखे जावेंगे।''

Clause 9.6 of the Excise policy stipulates that in case the earnest money as aforesaid is not deposited within the time prescribed in clause 9.4 then the offer/licence issued in favour of the concerned liquor shop group/single group shall be cancelled and the liquor shop(s) will be again re-auctioned at the risk of the existing highest offerer. The successful bidder who participated in the e-tender process cannot later back out from the process. If he does so, the amount deposited by him shall be forfeited and legal proceedings will be initiated against him. Clause 9.6 is in the following terms:-

> 9.6 वर्ष 2020–21 की ठेका अवधि के लिए ई–टेण्डर (क्लोज बिड एवं ऑक्शन) द्वारा मदिरा दुकानों के समूह/एकल समूहों के निष्पादन की प्रकिया में धरोहर राशि उपरोक्तानुसार जमा न किये जाने पर पृथक से बिना किसी अन्य सूचना के संबंधित मदिरा दुकानों के समूह/एकल समूहों का ओफर/लायसेंस निरस्त किया जायेगा व उसका पुनर्निष्पादन वर्तमान उच्चतम ओफरदाता के उत्तरदायित्व पर किया जावेगा। ई–टेण्डर (क्लोज बिड एवं ऑक्शन) के माध्यम से र्निष्पादन की प्रकिया में भाग लेने वाला सफल भागीदार पीछे नहीं हट सकता है अर्थात बैक–आउट नहीं कर सकता है, ऐसा करने पर सफल भागीदार द्वारा जमा की गई निर्धारित धरोहर राशि राजसात की जा सकेगी तथा उसके विरूद्ध विधि सम्मत कार्यवाही की जायेगी।

Clause 10 of the Excise policy provides for security deposit and how it is to be deposited. It is enumerated therein that for the contract period 2020-21, the security deposit shall be equivalent to 11% of the amount which comes after deducting the earnest money from the total annual value of the liquor shop groups/single groups, which will be submitted in the form of bank guarantee from any authorised and approved Bank/Financial Institution. Clause 10.1.3 thereof specifically enumerates that the bank guarantee as mentioned in clause 10, which shall be valid till 30.04.2021, shall be deposited within 10 days of the offer or before 31.03.2020, whichever is earlier. The relevant clause reads, thus:-

> ''10.1.3 लॉटरी आवेदन पत्र के माध्यम से चयनित आवेदक/ई–टेण्डर (क्लोज बिड एवं ऑक्शन) में सफल टेण्डरदाता द्वारा वर्ष 2020–21 की ठेका अवधि के लिये सम्पूर्ण प्रतिभूति राशि संबंधित जिले के सहायक आबकारी आयुक्त/जिला आबकारी अधिकारी के पक्ष में जारी किसी भी राष्ट्रीयकृत/अनूसूचित/क्षेत्रीय ग्रामीण बैंक की स्थानीय शाखा में देय बैंक ड्राफ्ट/बैंकर्स चैक/बैंक कैश ऑर्डर के रूप में प्रस्तुत की जा सकेगी अथवा संबंधित जिले के सहायक आबकारी आयुक्त/जिला आबकारी अधिकारी के पक्ष में बन्धक किसी भी राष्ट्रीयकृत/अनूसूचित/क्षेत्रीय ग्रामीण बैंक की बैंक गारंटी/सावधि जमा के रूप में, जिसकी परिपक्वता अवधि कम से कम, 30.04.2021 तक की होगी, निष्पादन के दिनांक से 10 दिवस की अवधि में अथवा 31 मार्च, 2020 के पूर्व जो भी पहले आये प्रस्तुत की जा सकेगी। प्रतिभूति की राशि साईबर ट्रेजरी में ऑन लाईन भी नियत अवधि में जमा करायी जा सकेगी।''

Under Clause 10.1.4 of the policy, the licence of the concerned liquor shop shall be issued only after security deposit is made within the time prescribed under Clause 10.1.3 failing which the offer shall stand revoked/cancelled and the shops will be placed for re-auction through e-tender. The said clause is reproduced as under:-

> ''10.1.4 संबंधित मदिरा दुकानों के समूह/एकल समूहों का लायसेंस, प्रतिभूति राशि जमा हो जाने के पश्चात् ही जारी किया जायेगा। ई–टेण्डर (क्लोज बिड एवं ऑक्शन) द्वारा जिन मदिरा दुकानों के एकल समूहों का निष्पादन दिनांक 26 मार्च 2020 के पश्चात की किसी तिथि को अंतिम होता है, तो ऐसी स्थिति में प्रतिभूति की राशि निष्पादन तिथि से 05 दिवस की अवधि में अर्थात दिनांक 31 मार्च 2020 तक के बाद भी जमा करायी जा सकेगी किंतु प्रतिभूति की राशि जमा होने पर ही लायसेंस जारी किया जायेगा । ऐसी स्थिति में मदिरा दुकान का संचालन न होने के लिये वह स्वयं उत्तरदायी होगा, इसके लिये उसे किसी प्रकार की क्षतिपूर्ति की पात्रता नहीं होगी। सफल टेण्डरदाता द्वारा प्रतिभूति की राशि विनिर्दिष्ट अवधि में जमा नहीं कराये जाने पर उसके उत्तरदायित्व पर उक्त मदिरा दुकान के एकल समूह का पुनर्निष्पादन किया जायेगा। पुनर्निष्पादन के फलस्वरूप जो भी खिसारा आयेगा उसकी वसूली संबंधित से भू–राजस्व के बकाया की भांति की जायेगी।''

In terms of Clause 10.1.5, the Bank guarantee or fixed deposit will be accepted from renewal applicant/lottery application form only in the name of the selected applicant/successful tenderer (Individual/Partnership Firm/ Company/ Consortium). Verification of the Bank guarantee at the District level will be mandatory. The said clause is as follows:

> ''10.1.5 प्रस्तुत बैंक गारण्टी अथवा सावधि जमा नवीनीकरण आवेदक/लॉटरी आवेदन पत्र के माध्यम से चयनित आवेदक/सफल टेण्डरदाता (व्यक्ति/ भागीदारी फर्म/कम्पनी/कन्सोर्टियम (Consortium) के नाम से जारी होने पर ही स्वीकार की जायेगी। बैंक गारण्टी का जिला स्तर पर सत्यापन कराया जाना अनिवार्य होगा।''

Clause 10.1.6 of the policy deals with the situation wherein the applicant/successful tenderer selected through lottery does not deposit the entire amount of security within the stipulated time from the date of execution of liquor shops group/single groups and by depositing 50% of the security amount due, online in advance with the cyber treasury within the stipulated time period, and the Bank undertakes to submit the balance 50% amount by 30th April, 2020, so the applicant's licence application will be accepted (subject to the restriction that 50% advance online deposit of security payable, deposited in the main revenue head 0039 State Production Duty, its adjustment will be ordered/validated against the prescribed minimum guaranteed EUT/EMD payable in the month of March, 2021). It is as under:-

> ''10.1.6 लॉटरी द्वारा चयनित आवेदक/सफल टेण्डरदाता मदिरा दुकानों के समूह/एकल समूहों के निष्पादन के दिनांक से निर्धारित समयावधि में यदि प्रतिभूति की सम्पूर्ण राशि जमा नहीं करता है तथा निर्धारित समयावधि में प्रतिभूति की देय राशि की 50 प्रतिशत राशि अग्रिम साईबर ट्रेजरी में ऑन लाईन जमा कर, शेष 50 प्रतिशत राशि की बैंक गारंटी दिनांक 30 अप्रैल 2020 तक प्रस्तुत करने का आवेदन करता है, तो (इस प्रतिबंध के अधीन की देय प्रतिभूति की 50 प्रतिशत अग्रिम ऑन लाईन जमा राशि, मुख्य राजस्व शीर्ष 0039 राज्य उत्पादन शुल्क में जमा करायी जाकर, उसका समायोजन माह मार्च 2021 में देय निर्धारित न्यूनतम प्रत्याभूत ड्यूटी के विरूद्ध आदेशित/मान्य किया जायेगा) आवेदक लायसेंसी के आवेदन को मान्य किया जायेगा।

In the event of the applicant/successful tenderer selected through lottery not presenting the remaining 50% of the security till 30th April, 2020, the approved licence will be cancelled and other arrangements will be made to operate the shops as required. The Clause 10.1.7 reads as under:-

> 10.1.7 लॉटरी द्वारा चयनित आवेदक/सफल टेण्डरदाता द्वारा दिनांक 30 अप्रैल 2020 तक प्रतिभूति की शेष 50 प्रतिशत राशि प्रस्तुत नहीं करने की स्थिति में, उसे स्वीकृत लायसेंस निरस्त किया जायेगा तथा आवश्यकतानुसार दुकानों के संचालन की अन्य व्यवस्था की जायेगी।''

Clause 10.1.9 of the policy states that if the complete bid amount and bank guarantee is not deposited, as required under Clause 9.4 and 10 of the Excise policy by the successful bidder, the amount deposited by the successful bidder shall be forfeited and liquor shops shall be re-auctioned and any difference in the bid amount shall be recovered from him as arrears of land revenue. The said clause is reproduced as under:-

> ''10.1.9 प्रतिभूति की सम्पूर्ण राशि विर्निदिष्ट अवधि में उपरोक्तानुसार जमा न करायी जाने की स्थिति में सफल ठेकेदार द्वारा जमा सम्पूर्ण राशि राजसात की जायेगी तथा उसके उत्तरदायित्व पर मदिरा दुकान के एकल समूह के पुनर्निष्पादन की नियमानुसार कार्यवाही की जायेगी एवं पुनर्निष्पादन के फलस्वरूप जो भी खिसारा आयेगा उसकी वसूली संबंधित से भू–राजस्व के बकाया की भांति की जायेगी।''

Clause 18.3 of the Excise policy relates to submission of an affidavit by the e-tenderer (Closed bid and auction) in prescribed format. Clause (7) of the said affidavit provides that in case the successful bidder fails to deposit the earnest money within three days from the date of execution or upto 31st March, 2020, whichever is earlier and the entire security deposit within the stipulated time, then the earnest money or any other amount so deposited for the contract period 2020-21 be forfeited and the allotted shop be put to public auction. After such auction, in case, the State suffers any loss due to getting offer of lesser amount than the reserve price, the licensee shall be liable to pay the difference, which shall be recoverable from him as an arrear of land revenue and for which he shall have no objection. It is as follows:-

> **''18.3 ई–टेण्डरदाता (क्लोज बिड एवं ऑक्शन) के लिए शपथ पत्र**
>
> देशी/विदेशी मदिरा की दुकानों के समूह/एकल समूहों के ई–टेण्डर (क्लोज बिड एवं ऑक्शन) प्रस्तुत करने पर आवेदक (व्यक्ति/फर्म/कम्पनी/कन्सोर्टियम (Consortium) द्वारा निम्नांकित प्रारूप में नोटराइज्ड शपथ पत्र अपलोड/ प्रस्तुत करना आवश्यक होगा ।
>
> **शपथ–पत्र''**
>
> ''(7) यदि मेरे द्वारा देय धरोहर राशि निष्पादन की तिथि से 03 दिवस के अंदर अथवा 31 मार्च, 2020 जो भी पहले हो, तक एवं सम्पूर्ण प्रतिभूति की राशि विनिर्दिष्ट अवधि में जमा नहीं की जाती है, तो मेरे द्वारा वर्ष 2020–21 के लिये जमा धरोहर राशि एवं अन्य कोई राशि राजसात कर ली जाए तथा मुझे आवंटित मदिरा दुकान के एकल समूह का वर्ष 2020–21 के लिए सार्वजनिक रूप से निष्पादन कर दिया जाए। इस निष्पादन के फलस्वरूप यदि शासन को आरक्षित मूल्य से कम राशि का ऑफर प्राप्त होता है, तो अन्तर की खिसारा राशि मेरे द्वारा देय होगी तथा यह राशि मुझसे भू–राजस्व की बकाया की भांति वसूली योग्य होगी। इसमे मुझे कोई आपत्ति नहीं होगी। ''

Clause 12 of the affidavit prescribed in Clause 18.3 of the Excise policy provides for an undertaking and having no objection by the tenderer of the liquor shop for cancellation of the licence by the Collector and forfeiture of the earnest money, security deposit, additional security deposit on account of false or incomplete declaration of any fact/particular/point in the documents submitted to the District Committee or on failure on his part to comply with any condition of auction. Similarly, the clause 13 of the said affidavit further creates an obligation on the tenderer to be bound by any necessary changes made by the State Government in the approved Excise provisions during the period of licence for the year 2020-21. Clause 12 and 13 of the said affidavit, read as under:-

> ''(12) देशी/विदेशी मदिरा की दुकानों के समूह/एकल समूहों के ई–टेण्डर (क्लोज बिड एवं ऑक्शन) द्वारा निष्पादन के लिए मेरे द्वारा जिला समिति को प्रस्तुत सहपत्रों में उल्लेखित समस्त तथ्य एवं विवरण, सत्य एवं पूर्ण है । उक्त उल्लेखित किसी तथ्य/विवरण/बिन्दु के असत्य अथवा अपूर्ण पाये जाने पर अथवा मदिरा दुकानों के निष्पादन संबंधी किसी शर्त का पालन न करने पर कलेक्टर को लायसेंस को निरस्त करने तथा मेरे द्वारा जमा कराई गयी धरोहर राशि, प्रतिभूति, अतिरिक्त प्रतिभूति की राशि को जप्त/राजसात करने का अधिकार होगा तथा इसके संबंध में मुझे किसी प्रकार की कोई आपत्ति नहीं होगी ।
>
> (13) वर्ष 2020–21 के लिये स्वीकृत आबकारी व्यवस्था में लायसेंस अवधि के दौरान राज्य शासन यथा आवश्यक परिवर्तन कर सकेगा तथा वह मुझे मान्य होगा।''

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Clause 15.27(6) of the Excise Policy provides for acceptance of the bid and communication thereof to the successful bidder. The same is reproduced as under:-

> (6) .....आबकारी आयुक्त द्वारा ऑफर स्वीकार किऐ जाने के निर्देश दिऐ जाने पर, कलेक्टर ई–टेण्डर की स्वीकृति की जानकारी देंगे। .....

Clause 20 of the Excise policy provides for compulsorily depositing post-dated cheques towards additional security deposit by the licensee of the liquor shop group/single groups within 10 days from the date of execution or upto 31st March, 2020, whichever is earlier. The said cheque may be sent to the Bank at any time during the year 2020-21 for realization of duty, if any, becomes due either partly or as a whole towards minimum bank guarantee of 20 days period or more. If the concerned licensee squares off the minimum bank guarantee duty provided for the year, the said cheques shall be returned to the licensee under acknowledgment. In case, the post-dated cheques are bounced, the licensee shall be liable to be proceeded with under Section 138 of the Negotiable Instruments Act, 1881. Likewise, the clause 21 of the said policy deals with execution of a

counterpart agreement by the licensee of the liquor shop group/single groups in the prescribed format (on stamp paper of Rs.500/-) based on the annual value of the allotted liquor shops group/single groups. The licence for concerned liquor shop/shops shall be issued only after execution of counterpart agreement and completion of requisite formalities by the licensee. Clause 20 and 21 of the policy, read, thus:-

"20 अतिरिक्त प्रतिभूति राशि के पोस्ट डेटेड चैक जमा कराया जानाः–

वर्ष 2020–21 की ठेका अवधि हेतु नवीनीकरण/लॉटरी आवेदन पत्र/ई–टेण्डर (क्लोज बिड एवं ऑक्शन) द्वारा निष्पादित मदिरा दुकानों के समूह/एकल समूहों के लायसेंसी को उसकी मदिरा दुकानों के समूह/एकल समूहों के लिये निर्धारित वार्षिक न्यूनतक प्रत्याभूत ड्यूटी राशि के आधार पर, एक पक्ष के समानुपातिक न्यूनतम प्रत्याभूत ड्यूटी राशि के समतुल्य राशि के माह मई, 2020 से माह जनवरी, 2021 तक प्रत्येक पक्ष की पहली तिथि में वर्तमान में किसी भी राष्ट्रीयकृत/अनुसूचित/क्षेत्रीय ग्रामीण बैंक में संधारित बचत/चालू खाते से जारी अट्ठारह (18) पोस्ट डेटेड चैक जो संबंधित जिले के सहायक आबकारी आयुक्त/जिला आबकारी अधिकारी के पक्ष में जारी किये गये हों, अतिरिक्त प्रतिभूति के रूप में मदिरा दुकान के समूह/एकल समूहों के निष्पादन के दिनांक से 10 दिवस अथवा दिनांक 31 मार्च 2020, जो भी पहले हो, जमा करना अनिवार्य होगा। उपरोक्त चेकों को वर्ष 2020–21 में किसी भी समय, 20 दिवस से अधिक अवधि की न्यूनतम प्रत्याभूत ड्यूटी की पूर्ण अथवा आंशिक देयता लंबित होने पर बकाया ड्यूटी राशि की वसूली हेतु बैंक में भेजा जायेगा । यदि संबंधित लायसेंसी द्वारा वर्ष की देय सम्पूर्ण न्यूनतम प्रत्याभूत ड्यूटी राशि को चुका दिया जाता है तो, उपरोक्त पोस्टडेटेड चेकों को लायसेंसी से प्राप्ति रसीद लेकर, मूलतः वापस कर दिया जायेगा।

लायसेंसी इन पोस्ट डेटेड चेकों के संबंध में बैंक को कभी भी यह निर्देशित नहीं करेगा कि इन चेकों का भुगतान न किया जाये। इस संबंध में यह शपथ पत्र में भी उल्लेख करेगा। पोस्टडेटेड चेक्स बाउंस (BOUNCE) होने पर लायसेंसी निगोशिएबल इंस्ट्रूमेंट एक्ट की धारा 138 के अन्तर्गत कार्यवाही योग्य होंगे।

21. प्रतिरूप करार प्रस्तुत किया जानाः–

वर्ष 2020–21 की ठेका अवधि के लिए नवीनीकरण/लॉटरी आवेदन पत्र/ई–टेण्डर (क्लोज बिड एवं ऑक्शन) अथवा अन्य किसी रीति द्वारा निष्पादित मदिरा दुकानों के समूह/एकल समूहों के लायसेंसी को उसकी, मदिरा दुकानों के समूह/एकल समूहों के वार्षिक मूल्य के आधार पर निर्धारित प्रारूप में (रूपये 500/– के स्टाम्प पेपर पर) प्रतिरूप करार करना होगा। प्रतिरूप करार निष्पादन

एवं समस्त वांछित औपचारिकताओं की पूर्ति के उपरान्त ही उसे संबंधित मदिरा दुकान/दुकानों का लायसेंस जारी किया जायेगा।''

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Clause 44 of the Excise Policy prescribes that during the licence period if due to violation of licence conditions, non-depositing minimum bank guarantee or for any other reason, situation arises for cancellation of liquor shop group/single groups then the District Committee shall have power to re-auction the same through e-tender (closed bid and auction) which shall be done at the risk of the original licensee. Till such liquor shop group/single groups are re-auctioned, the same shall be operated by the department through its local officers/employees. In case of operation of liquor shop group/single groups in the contract period 2020-21, either through re-auction or department, whatever lesser amount is received after auction in comparison of its annual value, the same shall be recovered from the original licensee. The District Committee shall have the power to fix the final price of re-auction on the basis of the ground realities. The Clause 44 of the Excise Policy is reproduced as under:-

''**44. लायसेंस अवधि के दौरान दुकान का पुर्ननिष्पादनः–**

लायसेंस अवधि के दौरान लायसेंस शर्तों के उल्लंघन, निर्धारित न्यूनतम प्रत्याभूत ड्यूटी राशि जमा न करने अथवा किसी अन्य कारण से, यदि मदिरा दुकानों के समूह/एकल समूहों का लायसेंस निरस्त किए जाने की स्थिति बनती है तो ऐसी स्थिति में जिला समिति की उस मदिरा दुकानों के समूह/एकल समूहों को पुनः निष्पादित करने के अधिकार होंगे। मदिरा दुकानों के समूह/एकल समूहों की स्थिति में किसी एक मदिरा दुकान का लायसेंस निरस्त किये जाने की स्थिति निर्मित होने पर, उक्त मदिरा दुकानें के समूह/एकल समूहों की सभी मदिरा दुकानों का लायसेंस निरस्त किया जायेगा । लायसेंस निरस्त किए जाने के पश्चात मूल अनुज्ञप्तिधारी के उत्तरदायित्व पर, उस मदिरा दुकानों के समूह/एकल समूहों का पुनः निष्पादन ई–टेण्डर (क्लोज बिड एवं ऑक्शन) के माध्यम से किया जाएगा। मदिरा दुकानों के समूह/एकल समूहों का पुनः निष्पादन होने तक उसका विभागीय संचालन स्थानीय अधिकारियों/कर्मचारियों के माध्यम से किया जाएगा । ई–टेण्डर (क्लोज बिड एवं ऑक्शन) के माध्यम से मदिरा दुकानों के समूह/एकल समूहों के पुनः निष्पादन अथवा विभागीय संचालन में, वर्ष 2020–21 की ठेका अवधि के लिए निष्पादन उपरान्त प्राप्त वार्षिक मूल्य की तुलना में, जो भी राशि कम प्राप्त होगी, यह मूल अनुज्ञप्तिधारी से वसूली योग्य होगी । पुनः निष्पादन किस मूल्य पर अंतिम किया जाए, इसके लिए जिला समिति को मैदानी वास्तविकताओं के आधार पर निर्णय लेने के अधिकार होंगे।''

Under Clause 48 of the policy if due to any policy decision of the Government or due to natural calamity, the licensee is not able to operate the allotted liquor shops, the licensee shall not be entitled for any compensation or rebate by the Government or Authorities. The said clause reads as under:-

''48. मद्य निषेध की नीति तथा प्राकृतिक विपत्तियों के फलस्वरूप दुकान बन्द करनाः—

राज्य में अथवा किसी पड़ोसी राज्य मे मद्य निषेध नीति के फलस्वरूप यदि कोई मदिरा दुकान/दुकानें बन्द की जाती हैं, तो इसके कारण लायसेंसी को शासन द्वारा कोई क्षति पूर्ति देय नहीं होगी। इसी प्रकार यदि पड़ोसी राज्य में मद्य निषेध के कारण अथवा किसी अन्य कारण से भी राज्य की किसी भी दुकान का पुनः निष्पादन करने का निर्णय लिया जाता है, तो ऐसा करने का अधिकार शासन को होगा तथा उस पर किसी लायसेंसी की आपत्ति मान्य नहीं की जायेगी और किसी प्रकार की क्षतिपूर्ति अथवा छूट किसी भी आपत्तिकर्ता को देय नहीं होगी। यदि लायसेंस की अवधि में लायसेंसी को किसी दैवीय प्रकोप या प्राकृतिक आपदा के फलस्वरूप किसी प्रकार की क्षति होती है, तो लायसेंसी को किसी तरह की क्षतिपूर्ति की पात्रता नहीं होगी।''

Clause 49 of the policy lays down that if during the licence period consequent upon any social, political presentations or law and order situations, the licensee of a particular area is unable to take the supply of liquor equivalent to minimum bank guarantee duty fixed for the licence year, in such circumstances of loss of sale of liquor, the concerned licensee shall be entitled to compensation in equal proportion of minimum bank guarantee duty after taking into account all the situations. Such decision to compensation or grant rebate in duty payable shall be taken by the State/Excise Commissioner on the basis of the reasonable and factual proposal sent by the District Committee. It is as under:-

49 सामाजिक, राजनैतिक प्रदर्शनों, कानून व्यवस्था संबंधी कारणों के फलस्वरूप न्यूनतम प्रत्याभूत ड्यूटी में क्षतिपूर्ति स्वीकृत किया जानाः—

लायसेंस अवधि में सामाजिक, राजनैतिक प्रदर्शनों, कानून व्यवस्था संबंधी कारणों के फलस्वरूप किसी क्षेत्र विशेष की मदिरा दुकानें बन्द किये जाने के आदेश के कारण, यदि संबंधित लायसेंसी वर्ष के लिये देय वार्षिक निर्धारित न्यूनतम प्रत्याभूत ड्यूटी के समतुल्य मदिरा का प्रदाय नहीं ले पाता है, तो ऐसी स्थिति में उसको मदिरा विक्रय की ऐसी हानि के संदर्भ में, समस्त स्थितियों का आंकलन कर समानुपातिक न्यूनतम प्रत्याभूत ड्यूटी राशि की क्षतिपूर्ति का पात्र माना जा सकेगा। इस हेतु संबंधित जिले की जिला समिति द्वारा भेजे गये युक्तियुक्त एवं तथ्यात्मक प्रस्ताव पर राज्य शासन/आबकारी आयुक्त द्वारा समानुपातिक न्यूनतम प्रत्याभूत ड्यूटी की क्षतिपूर्ति अथवा देय राशि से छूट दिये जाने का निर्णय लिया जा सकेगा।''

39. The petitioners have further relied upon Clause 54 of the Excise Policy, which provides that in case of unavoidable circumstances, by considering the justification, the State Government shall have power to either wholly or partially cancel the auction process conducted for liquor shop group/single groups in a District or all the Districts and by refunding the amount so deposited in

compliance of the process fee/conditions, may make an arrangement/re-arrangement for retail sale of country/foreign liquor by adopting any process/mode. In such event, no compensation shall be payable. The said clause reads as under:-

> ''54. राज्य शासन को यह अधिकार होगा कि अपरिहार्य स्थिति में, औचित्य को समझते हुये किसी भी जिले में या समस्त जिलों की मदिरा दुकानों के समूह/एकल समूहों के निष्पादन की प्रक्रिया को सम्पूर्ण/आंशिक रूप से समाप्त करते हुए, प्रोसेस फीस/शर्तों के पालन में जमा राशि को वापिस कर किसी भी अन्य प्रक्रिया/व्यवस्था से देशी/विदेशी मदिरा की फुटकर बिक्री की दुकानों के व्यवस्थापन/पुनःव्यवस्थापन की कार्यवाही की जा सकेगी। ऐसी स्थिति में कोई भी क्षतिपूर्ति देय नहीं होगी ''

40. Learned counsel for the respondents-State had also invited our attention to Clause 10 of the Foreign Liquor Licence issued under M.P. Foreign Liquor Rules, 1996 and Clause 15 of the Country Spirit Licence issued under M.P. Country Spirit Rules, 1995, which according to them, binds the licensees with the compliance of general licence conditions. The same are also relevant to be reproduced, which read, thus :-

''प्रारूप एफ.एल.–1

विदेशी मदिरा के फुटकर विक्रय हेतु अनुज्ञप्ति

विदेशी मदिरा नियम, 1996 के नियम 8 के उपनियम (1) के खण्ड (क) के अधीन और वार्षिक मूल्य रूपये 15,49,72,725 के प्रतिफल में मेसर्स सुन्दरम ट्रेडर्स पार्टनर श्री उज्जवल चौहान, संतोषी माता वार्ड पाण्डुर्णा, जिला छिन्दवाड़ा (म.प्र.) की वेदेशी मदिरा के फुटकर विक्रय करने के लिये छिन्दवाड़ा जिले के छिन्दवाड़ा नगर में फव्वारा चौक मार्ग पर स्थित अनुज्ञप्त परिसर में 01.04.2020 से 31.03.2021 तक एतदद्वारा निम्नलिखित शर्तो के अधीन रहते हुये यह अनुज्ञप्ति स्वीकृत की जाती हैः–

शर्तें

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(10) अनुज्ञप्तिधारक, शर्त दो–क और तेरह के सिवाय अनुज्ञप्ति की सामान्य शर्तों से आबद्ध रहेगा।

सही/–

दिनांक 04 मई, 2020 सहायक आबकारी आयुक्त

''प्रारूप सी.एस.–2

सीलबंद बोतलों में देशी स्पिरिट के फुटकर विक्रय के लिये लायसेंस

देशी स्पिरिट नियम, 1995 के नियम 9 के अधीन तथा रूपये 4,90,65,240 फीस के प्रतिफल में एतदद्वारा मेसर्स सुन्दरम ट्रेडर्स पार्टनर श्री उज्जवल चौहान,

संतोषी माता वार्ड पाण्डुर्णा, जिला छिन्दवाड़ा (म.प्र.) को नीचे दी गई अनुसूची 1 में दिये गये वर्णन के अनुसार बुधवारी स्थित दुकान पर तारीख 01.04.2020 से 31.03.2021 तक के लिये निम्नलिखित शर्तो के अध्यधीन रहते हुये देशी स्पिरिट फुटकर विक्रय हेतु एतदद्वारा यह अनुज्ञप्ति मंजूर की जाती हैः–

शर्तें

*** *** ***

(15) अनुज्ञप्तिधारी, इस अनुज्ञप्ति की सामान्य शर्तों (शर्त दो–क एवं तेरह को छोड़कर) विशेष पास नियम और इस अनुज्ञप्ति के मंजूर होने के पूर्व उसे सूचित की गयी, किन्हीं विशेष शर्तों से आबद्ध होगा।

सही/–
दिनांक 04 मई, 2020 सहायक आबकारी आयुक्त''

41. The State enjoys exclusive privileges with regard to liquor trade, as the Seventh Schedule under Article 246 of the Constitution of India in Entry 8 of List-II provides for "production, manufacture, possession, transport, purchase and sale of intoxicating liquors" as a State subject. The liquor trade in the State of M.P. is governed by Excise Act, which regulates the Excise policy and confers the powers and authority with the Excise Department. Learned counsel for the petitioners have laid much emphasis on Section 17 and 18 under Chapter IV and Section 28 and 29 under Chapter VI of the Excise Act. Section 17 of the said Act provides that there shall be no sale of intoxicant without the licence granted in that behalf whereas Section 18 deals with the power of the State Government to grant lease of right to manufacture, etc. Section 28 of the Act prescribes the form and conditions of licence etc. and under Section 29 thereof, the power to take security from licensee and execution of counterpart agreement in conformity with the tenure of licence has been spelt out. The relevant provisions of the Excise Act read, thus:-

> **"17. Licence required for sale of intoxicant.**— (1) No intoxicant shall be sold except under the authority and subject to the terms and conditions of licence granted in that behalf:
>
> Provided that—
>
> (a) a person having the right to the tari drawn from any tree may sell such tari without a licence to a person licensed to manufacture or sell tari under this Act;
>
> (b) a person under Sec. 13 to cultivate the hemp plant may sell without a licence those portions of the plant from which the intoxicating drug is manufactured or produced to any person licensed under this Act to deal in the same, or to any officer whom the Excise Commissioner may prescribe; and

(c) nothing in this section shall apply to the sale of any foreign liquor lawfully procured by any person for his private use and sold by him or on his behalf or on behalf of his representatives interest upon his quitting a station or after his decease.

(2) On such conditions as the Excise Commissioner may determine, a licence for sale under the Excise Law for the time being in force in other States or Union territories may be deemed to be licence granted in that behalf under this Act.

18. Power to grant lease of right to manufacture, etc.— (1) The State Government may lease to any person, on such conditions and for such period as it may think fit, the right—

(a) of manufacturing, or of supplying by wholesale or of both; or

(b) of selling by wholesale or by retail; or

(c) of manufacturing or of supplying by wholesale, or of both, and selling by retail;

any liquor or intoxicating within any specified area.

(2) The licensing authority may grant to a lessee under sub-section (1) a licence in the terms of his lease; and when there is no condition in the lease which prohibits sub-letting, may, on the application of the lessee, grant a licence to any sub-lessee approved by such authority."

*** *** ***

28. Form and conditions of licence etc.— (1) Every permit or pass issued or licence granted under this Act shall be issued or granted on payment of such fees, for such period, subject to such restrictions and conditions and shall be in such form and contain such particulars as may be prescribed.

(2) The conditions prescribed under sub-section (1) may require, inter alia, the licensee to lift for sale, the minimum quantity of country spirit or Indian-made liquor, fixed for his shop and to pay the penalty at the prescribed rate on the quantity of liquor short lifted.

(3) Penalty at the prescribed rate on infraction or infringement of any conditions laid down in sub-section (1) of specifically enumerated in sub-section (2) shall be leviable on and recoverable from the licensee.

29. Power to take security from licensee. - Any authority granting a licence under this Act may require the licensee to execute a counterpart agreement in conformity with the tenure of his licence and to give such security for the performance of such agreement, or to make such deposit or to provide both as such authority may think fit."

42. On the other hand, learned counsel for the respondents-State have taken us through Section 62 of the Excise Act, which empowers the State Government to make rules and in accordance with which, the State Government framed the General License Conditions governing the terms and conditions of the licence granted to the petitioners. Section 62 of the said Act reads as follows:-

> **"62. Power to make rules.** — (1) The State Government may make rules for the purpose of carrying out the provisions of this Act.
>
> (2) In particular, and without prejudice to the generality of the foregoing provision, the State Government may make rules—
>
> (a) prescribing the powers and duties of Excise Officers;
>
> (b) regulating the delegation of any powers or duties by the Chief Revenue Authority, the Excise Commissioner or Collectors under Section 7, clause (g);
>
> (c) declaring in what cases or classes of cases and to what authorities appeal shall lie from orders, whether original or appellate, passed under this Act or under any rule made thereunder, or by what authorities such orders may be revised, and prescribing the time and manner of presenting, and the procedure for dealing with appeals and revisions;
>
> (d) regulating the import, export, transport, manufacture, collection, possession, supply or storage of any intoxicant, or the cultivation of the hemp plant and may, by such rules among other matters—
>
> (i) regulate the tapping of tari-producing trees, the drawing of tan from such trees. the marking of the same and the maintenance of such marks;
>
> (ii) declare the process by which spirit shall be denatured and the denaturisation of spirit ascertained; and
>
> (iii) cause spirit to be denatured through the agency or under the supervision of its own officers;
>
> (d-l) regulating the import, export, transport, collection, possession, supply, storage or sale of Mahua flowers prescribing licences and permit therefor, throughout the State or in any specified areas or for any specified period;
>
> (e) regulating the periods and localities for which, and the persons or classes of persons to whom, licences for the wholesale or retail vend of any intoxicant may be granted, and regulating the number of such licences which may be granted in any local area;

(f) prescribing the procedure to be followed and the matters to be ascertained before any licence for such vend is granted for any locality;

(g) regulation the amount, time, place and manner of payment of any duty or fee or tax or penalty;

(h) prescribing the authority by, the form in which, and terms and conditions on and subject to which any licence, permit or pass shall he granted, any by such rules, among other matters,—

(i) fix the period for which any licence, permit or pass shall continue in force;

(ii) prescribe the scale of fees or the manner of fixing the fees payable in respect of any such licence, permit or pass;

(iii) prescribe the amount of security to be deposited by holders of any licence, permit or pass for the performance of the conditions of the same;

(iv) prescribe the accounts to be maintained and the returns to be submitted by licence-holders; and

(v) prohibit or regulate the partnership in, or the transfer of, licenses;

(i) prescribing the measures for ascertaining local public opinion and prescribing the powers of District Planning Committee constituted under sub-section (1) of Section 3 of the Madhya Pradesh Zila Yojana Samiti Adhiniyam, 1995 (No. 19 of 1995) in respect of advising about opening, closing or shifting of any retail intoxicant shop;

(j) providing for the destruction or other disposal of any intoxicant deemed to be unfit for use;

(k) regulating the disposal of confiscated articles;

(l) regulating the grant of expenses to witnesses and of compensation to persons charged with offences under this Act and subsequently released, discharged or acquitted; and

(m) regulating the power of Excise Officers to summon witnesses from a distance;

(n) regulating the payment of rewards to officers, informers and other persons out of the proceeds of fines and confiscations under this Act.

(3) The power conferred by this section of making rules is subject to the condition that the rules made under sub-section (2) (a), (b), (c), (e), (f), (i), (1) and (m) shall he made after previous publication:

Provided that any such rules may be made without previous publication if the State Government considers that they should be brought into force at one."

43. Our attention was also invited to Rule XXXIII of the General Licence Conditions, which authorises the State Government to amend any condition of licence during the currency of the licence which shall be effective from the commencement of the licence if not otherwise directed and the licensee shall be bound by the same and shall not be entitled to claim any damages on account of any such amendment. Rule XXXIII thereof, reads as under:-

"XXXIII. Power to amend conditions of Licence. - the State Government are authorised to amend any condition of license during the currency of the licence and, unless otherwise directed, such amendment, shall be effective as from the commencement of the licence and licensee shall be bound by the same and shall not be entitled to any damages on account of any such amendment."

44. By Notification No.14-V-SR dated 07.01.1960, the State Government in exercise of the powers conferred by Section 62 of the Excise Act has framed the Rules. These Rules are called as Rules of General Application. Clause III of the said Rules, provides for debarment of certain persons from bidding, which reads as under:-

"III. Certain persons debarred from bidding. - When licences are put to auction the following provisions shall apply:

(1) Former licences who owe arrears of excise revenue to Government, or whose conduct as licensee has been unsatisfactory, or who have been guilty of serious breaches of their licences under the Madhya Pradesh Excise Act, 1915, the Madhya Pradesh Prohibition Act, 1938, the Dangerous Drugs Act, 1930, or the Opium Act, 1878, or the rules made thereunder, and persons who have been convicted by a criminal court, of such offences, as in the opinion of the officer holding the auction, render them undesirable holders of licences, and persons believed to be of bad character shall not be entitled to bid at the auction without the consent of the Collector or District Excise Officer or the officer holding the auction.

*** *** ***

(5) An aggrieved person may appeal to the Excise Commissioner or any officer authorised in this behalf: provided that the time limit allowed for presenting an appeal shall not exceed five days from the date of conclusion of the auction."

45. Section 62 of the National Disaster Management Act, 2005 was cited by the learned counsel for the respondents-State to contend that to facilitate and assist the State Governments in the disaster management, the Central Government can issue necessary direction to the State Governments, and the State Governments shall be bound to comply with the same. Section 62 of the Act of 2005, reads as under:-

> **"62. Power to issue direction by Central Government.—** Notwithstanding anything contained in any other law for the time being in force, it shall be lawful for the Central Government to issue direction in writing to the Ministries or Departments of the Government of India, or the National Executive Committee or the State Government, State Authority, State Executive Committee, statutory bodies or any of its officers or employees, as the case may be, to facilitate or assist in the disaster management and such Ministry or Department or Government or Authority, Executive Committee, statutory body, officer or employee shall be bound to comply with such direction."

46. The learned senior counsel for the petitioners had put forward that apart from the Excise Policy dated 25.02.2020 and amended policy dated 23.05.2020, which were published in the official Gazette of M.P., none of the action taken for change of timings for operation of the shops, period of licence i.e. extending the period by two months i.e. upto 31.05.2020, restricting the operation of *Ahatas* and changing the Maximum Retail Price of the liquor and so on has been notified in the official Gazette and the said action has been taken by the Excise Officers in arbitrary manner and therefore, this action of the respondents is *de hors* the provisions of Section 63 of the Excise Act, which reads as under:-

> **"63. Publication of rules and notifications.** - All rules made and notifications issued under this Act shall be published in the Official Gazette, and shall have effect from the date of such publication or from such other date as may be specified in that behalf."

47. Section 56 of the Contract Act was taken shelter of by the learned counsel for the petitioners to urge that since the contract between the parties stood frustrated due to subsequent events of lockdown and in the aftermath of Covid-19 pandemic and has rendered impossible to perform, therefore, the petitioners are entitled to refund of the money deposited by them by quashing the entire auction proceedings. It is useful to reproduce the said statutory provision for the purposes of the question involved in the case. The same reads as under:-

> **"56. Agreement to do impossible Act.** - An agreement to do an act impossible in itself is void.

> **Contract to do act afterwards becoming impossible or unlawful**. - A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.
>
> **Compensation for loss through non-performance of act known to be impossible or unlawful.-** Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise."

48. Having analysed the legal provisions, we now deal with the submissions arising for consideration in this case, as noticed above.

49. The question No.(i): whether there is concluded contract between the parties and question No.(ii): whether the State is correct in unilaterally issuing the licences with changed terms and conditions, are taken up together as they are overlapping and are based on mixed questions of fact and law.

50. The main contention of the petitioners was that their status was not of a licensee, therefore, there was no concluded contract and even the subsequent Notification dated 23.05.2020 amending the Excise policy 2020-21 is also not valid and legal.

51. Adverting to the first question, certain pleadings in the writ petition may be appreciated. Firstly, the petitioners in para 5.15 of their writ petition by referring to certain letters issued by the Assistant Excise Commissioner of the concerned District (by the order of District Committee) and the letters of the Collector (Excise) of the concerned Districts dated 09.03.2020, 11.03.2020, 16.03.2020, 17.03.2020 and 22.03.2020 which are contained in Annexure P-2, have themselves admitted that after due evaluation of their bids, the petitioners being the highest bidders were communicated the acceptance of their offers by the respondents for the respective liquor vends/groups in pursuance of Excise Policy 2020-21. Secondly, in para 5.17, the petitioners have further admitted that the process of completing the auction and declaring the petitioners as successful bidders stood concluded in the first week of March, 2020 for most of the districts and shops in the State. Thirdly, in relief clause 7(v) also, there is an admission by the petitioners regarding acceptance made by the State Government of their offer inasmuch as the petitioners have prayed for issue of a writ of certiorari thereby quashing the offers made by them and acceptance thereof by the respondents. Lastly, even from the arguments advanced by the learned counsel for the petitioners it is evinced that the bids of the petitioners were accepted and

acceptance thereof was communicated to the petitioners. The relevant paragraphs of the writ petition are reproduced as under:-

> "5.15 It is submitted that on the basis of the conditions detailed in the excise policy and the conditions prevailing at the relevant point of time the petitioners herein had submitted their respective bids and after due evaluation being the highest bidders the petitioners were declared as the successful bidders for their respective shops/groups. Copy of the documents to show that the petitioners have been declared as successful bidders are cumulatively filed herewith and marked as Annexure P/2.
>
> *** *** ***
>
> 5.17 It is pertinent to mention here that the process of completing the auction and declaring the petitioners as successful bidders stood concluded in the first week of March for most of the districts and shops in the State.
>
> *** *** ***
>
> 7. Relief prayed for:
>
> *** *** ***
>
> (v) To issue a writ of certiorari thereby quashing and setting aside the offers made by the petitioners and the acceptance thereof by the respondent state government."

52. Section 2(b) of the Contract Act provides that when the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted and after such acceptance of the proposal, it becomes a promise. Whereas, Section 5 of the Contract Act envisages that a proposal may be revoked at any time before communication of its acceptance is complete as against the proposer, but not afterwards. Likewise, an acceptance may be revoked at any time before the communication of the acceptance is complete as against the acceptor, but not afterwards. Thus, although an offer does not create any legal obligation but after communication of its acceptance is complete and the offer has turned into a promise, it becomes irrevocable. In other words, an offer could be revoked before communication of its acceptance is complete because no legally enforceable right is created till then but after the communication of acceptance of offer is complete, it becomes irrevocable and creates a right between the parties and the same cannot be revoked. It would be apt to reproduce Sections 2(b) and 5 of the Contract Act, which read, thus:

> **"2. Interpretation-clause.** - In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context:-
>
> *** *** ***
>
> (b) When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise;
>
> *** *** ***
>
> **5. Revocation of Proposals and acceptance.** - A proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer, but not afterwards.
>
> An acceptance may be revoked at any time before the communication of the acceptance is complete as against the acceptor, but not afterwards."

53. In the present case, till 16th March or 22nd March, 2020, as the dates of acceptance of the offer by the respondents are different, when acceptance of the offer was communicated to the petitioners vide letters Annexure P-2, there was no withdrawal of the offer by the petitioners nor was there anything that since the petitioners have lost or are going to lose the actual bargain what they had expected while making the offer, therefore, the auction process has to be revalued or they want to withdraw. A representation dated 27.04.2020 (Annexure P-8) has been placed on record wherein the petitioner No.18 - Alcoactive Retail Traders Pvt. Ltd., for the first time, appears to have raised a grievance before the Authorities (although no acknowledgment or receipt thereof is on record) that though the chances are very bleak but even if the liquor shops are allowed to open after the lockdown is lifted on 04.05.2020, it will not give the same revenue as the bidders had calculated at the time of submitting their bids because the customers will hesitate to purchase liquor due to fear and psychological effect of deadly disease. Thereafter, the petitioners have preferred this writ petition on 2nd May, 2020 but all this was done much after the acceptance of the offer was communicated to the petitioners. Thus, after acceptance of the offer made by the petitioners either through e-auction or renewal/lottery, the contract between the parties, stood concluded.

54. In view of the specific admission made by the petitioners with regard to acceptance of their offer, which culminates into a binding contract, the contentions of the learned senior counsel for the petitioners that documentation and payment taken together in terms of Clause 9 and 10 of the policy shall alone constitute entitlement for licence and further that since the mandatory conditions of the Excise Policy 2020-21 such as issue of licence upto 01.04.2020; security deposit in the form of bank guarantee in terms of Clause 10 and post-dated

cheques towards additional security deposit as per Clause 20 of the policy to be submitted before 31.03.2020, were not completed owing to lockdown declared on 24.03.2020; therefore, the contract is not concluded, would be of no great significance. As observed earlier, to have an enforceable contract, there must be an offer and an unconditional and definite acceptance thereof. Even a provisional acceptance cannot itself make a binding contract. If there is a qualified or conditional acceptance of the offer by the offeree, the power of acceptance of the offeree is terminated. The power of acceptance of the offeree can also be terminated if the offeree, instead of accepting the offer, makes a counteroffer. The counteroffer is a new offer by the offeree that varies the terms of the original offer. If the offeree makes a new offer, the original offer is terminated. Similarly, a conditional or qualified/partial acceptance is an acceptance which changes the original terms of an offer and operates as a counteroffer.

55. Lord Roche in *Nazir Ahmad*'s case (supra), following the rule laid down in *Taylor vs. Taylor* [(1875) 1 Ch D 426] that if the manner of doing a particular act is prescribed under any statute, the act must be done in that manner or not at all, stated as under:-

> "Where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all."

56. The principle recognised in *Nazir Ahmad's* case (supra), which was relied upon by the learned senior counsel for the petitioners, is also not in conflict. However, in the present case, the acceptance of the offer communicated to the petitioners vide Annexure P-2 is neither a provisional acceptance nor a conditional or qualified acceptance. Inasmuch as, by the said acceptance of the offer, no new offer has been made to the petitioners so as to alter the original offer or render the original offer as the provisional one. It may be noted that all the petitioners have admitted that after acceptance of the offer made by them, remaining 4% amount of total earnest money of 5% in terms of clause 9.4 of the Excise Policy was deposited by them on 20.03.2020 i.e. before 31.03.2020. This fact is also corroborated by the chart filed by the respondents with their return, which is also reproduced above in paragraph No.12 wherein it is mentioned that the said pre-condition of depositing remaining amount of earnest money was already fulfilled by the petitioners.

57. Now the other conditions of issue of licence such as security deposit in the form of bank guarantee on non-judicial stamp-paper under Clause 10, post-dated cheques towards additional security deposit as per Clause 20, counterpart agreement under Clause 21 of the Excise Policy in terms of Section 29 of the Excise Act which provides for execution of counterpart agreement and to give such security for the performance of such agreement or to make such deposit or to provide both under Section 29 of the Excise Act etc., the mention of which has

also been made in the acceptance letter, cannot be treated to be a counteroffer or conditional or qualified acceptance so as to terminate the offeree's power of acceptance. These are the pre-conditions for issue of licence after the offer has already been accepted and the contract has been concluded. Still further, the aforementioned chart (Annexure R-2) also indicates that out of those 30 petitioners having 40 groups who completely deposited the earnest money as per clause 9.4 of the policy, as many as 18 groups had completed all the remaining conditions of Clauses 10 and 20 of the Policy either before 31.03.2020 or before the date of filing of the writ petition. As further shown in the said chart, 07 groups have also deposited bank guarantee but not deposited post-dated cheques; only 14 groups have not deposited both, the bank guarantee and post-dated cheques; whereas for one -Raisen Marketing, no data appears to be available. Ultimately, all the petitioners have retracted. Thus, it cannot be held that only the auction process was complete and the contract was not concluded.

58. We find force in the argument advanced by the learned senior counsel for the respondents that the remaining conditions prescribed for issue of licences such as making of security deposit in the form of Bank guarantee in terms of Clause 10 to be deposited within 10 days of the offer or before 31.03.2020 as per clause 10.1.3 and 10.1.4, deposit of post-dated cheques towards additional security deposit as per clause 20 and submission of counterpart agreement in view of clause 21 of the Excise Policy 2020-21 would operate post concluded contract. Such conditions attached to issue of licence are only ministerial formalities, which are to be complied with after the bid has been accepted. The respondents have shown by their conduct, such formalities can be relaxed or modified to an extent by the offeree-respondents in the given facts and circumstances. However, the petitioners cannot withdraw or revoke the contract on the pretext that since no licence was issued by the respondents prior to or on the date of commencement of the licence period i.e. 01.04.2020 or that the licence was issued without complying with the conditions stipulated in the Excise Policy or the Excise Act, therefore, the contract has not concluded or the same is not binding on the petitioners. It has come on record that those essential requirements have been complied with and mandatory payments required to be made under the Excise Policy and in terms of the acceptance letters contained in Annexure P-2 have been made by many of the petitioners during the lockdown period only.

59. It was contended on behalf of the petitioners that the words "may require" occurring in Sub-section (2) of Section 28 of the Excise Act are to be read as "shall require" as the said provision envisages penalty in case of minimum quantity of liquor is short lifted, therefore, the conditions for issue of licences are mandatory. The said provision reads that "*the conditions prescribed under sub-section (1) may require, inter alia, the licensee to lift for sale, the minimum quantity of country spirit or Indian-made liquor, fixed for his shop and to pay the penalty at*

the prescribed rate on the quantity of liquor short lifted. Upon reading of the said provision, it can be inferred that the words "may require" occurring therein operates not only for short lifting of quantity but it applies to the penalty as well and does not take away the right of the parties to meet the said condition if it occurs during the course of the business. It is a trite law that the provision has to be read as a whole and not in isolation. When the language is unambiguous, clear and plain, the Court should construe it in the ordinary sense and give effect to it irrespective of consequences and the consideration of hardship and inconvenience should be avoided. Reference is made to the law laid down by the Supreme Court in *Mohan Kumar Singhania and others vs. Union of India and others,* AIR 1992 SC 1 and *Anwar Hasan Khan vs. Mohammad Shafi and others*, (2001) 8 SCC 540. The same analogy applies to Section 29 of the Excise Act whereby the successful bidder is required to execute a counterpart agreement. These conditions operate post the concluded contract and therefore, do not confer any advantage to the petitioners to urge that there is violation of the mandatory conditions envisaged under Sections 28 and 29 of the Excise Act regarding the issue of licences and therefore, the contract is not concluded.

60. We also see no reason to reject the argument of the learned senior counsel for the respondents that since the signed affidavit in terms of clause 18.3 of the policy was already uploaded along with the bid and the State Government having accepted the bid of the petitioners on that basis, merely because affidavit in original was not submitted the petitioners would not be bound by clause 18.3 of the statutory policy. A perusal of clause 18.3 clearly reveals that affidavit is to be uploaded/submitted with the bid. Thus, there remains no doubt that option was available with the bidder to upload the signed affidavit. It is also a fact that out of total 380 groups of liquor vends, as many as 323 groups are continuing with the contract as they have either not approached this Court or have filed an affidavit of their willingness to continue with the contract and only 57 groups have decided to abandon the contract or surrender the licences issued to them. It makes it clear that when the acceptance of the offer was communicated to the petitioners and they were asked to complete the remaining conditions/formalities, the State still could have issued the licences but the petitioners could not have claimed so and they were liable to fulfill the same or face the consequences of non-compliance. In this view of the matter, once the requirement which is said to be essential or mandatory, was relaxed by the respondents and those requirements operate the post concluded contract, the principle laid down in *Nazir Ahmad*'s case (supra) would not help the petitioners. For the same reasons, the argument of learned senior counsel for the petitioners that the licences are not valid and therefore, the status of the petitioners is not as that of a licensee, as the same were issued contrary to the Statute; without completing the pre-conditions of issue of licences; unilaterally sent through email instead of providing the same physically; not

issued on a particular form; non-execution of counterpart agreement and payment of security for the performance, is also stated to be rejected. Otherwise also, even if the status of the petitioners as on the date of commencement of the licence may not have been as that of a licensee but the acceptance of the offer of the petitioners, which was communicated to them vide Annexure P-2, had the effect of binding them to the contract. As such, being the offeror, it is not open to the petitioners to withdraw the offer and it is also not reasonable to force the offeree to accept a changed or modified performance of the contract.

61. Thus, it is held that in the present case, the contract between the parties is a concluded contract. Once the offer is accepted on the terms and conditions as mentioned therein, a completed contract comes into existence and the offeror cannot be permitted to wriggle out of the contractual obligations arising out of the acceptance of his bid by a petition under Article 226 of the Constitution. In this context, the regard can be had to the judgments of the Supreme Court in *Har Shankar v. The Dy. Excise and Taxation Commissioner and others,* (1975) 1 SCC 737, *Lal Chand*'s case (supra) and *Ghaziabad Development Authority*'s case (supra).

62. In *Har Shankar*'s case (supra), the Supreme Court held that one of the important purposes of selling the exclusive right to vend liquor in wholesale or retail is to raise revenue. The licence fee was a price for acquiring such privilege. One who makes a bid for the grant of such privilege with a full knowledge of the terms and conditions attaching to the auction cannot be permitted to wriggle out of contractual obligations arising out of the acceptance of his bid. It was further held that the jurisdiction of the High Courts under Article 226 was not intended to facilitate avoidance of obligations voluntarily incurred. The relevant extract of the judgment is reproduced as under:-

> "16.....The announcement of conditions governing the auctions were in the nature of an invitation to an offer to those who were interested in the sale of country liquor. The bids given in the auctions were offers made by prospective vendors to the Government. The Government's acceptance of those bids was the acceptance of willing offers made to it. On such acceptance, the contract between the bidders and the Government became concluded and a binding agreement came into existence between them..... The successful bidders were then granted licences evidencing the terms of contract between them and the Government, under which they became entitled to sell liquor. The licensees exploited the respective licences for a portion of the period of their currency, presumably in expectation of a profit. Commercial considerations may have revealed an error of judgment in the initial assessment of profitability of the adventure but that is a normal incident of all trading transactions. Those who contract with open eyes must accept the burdens of the contract along with its benefits. The powers of

> the Financial Commissioner to grant liquor licensees by auction and to collect licence fees through the medium of auctions cannot by writ petitions be questioned by those who, had their venture succeeded, would have relied upon those very powers to found a legal claim. Reciprocal rights and obligations arising out of contract do not depend for their enforceability upon whether a contracting party finds it prudent to abide by the terms of the contract. By such a test no contract could ever have a binding force."

63. The aforesaid view has been reiterated in *Lal Chand*'s case (supra) wherein, while dealing with the issue of demand for recovery of the difference between amount from the successful bidder due to reauction of the liquor vend on his failure to pay the security amount and also the defaulted installments of the licence fee payable under the Punjab Excise Act, 1914 and the Rules made thereunder, the Court referred to the judgments in *Har Shankar, Jage Ram* and *Dial Chand Gian Chand's* cases (supra) and observed that under the Punjab Excise Act, 1914 and some other State Excise Acts whereunder once the bid offered by a person at an auction-sale is accepted by the authority competent, a completed contract comes into existence and all that is required is the grant of a licence to the person whose bid has been accepted. The relevant extract of the judgment in *Lal Chand*'s case (supra) is as under:-

> "8. In *Har Shankar v. Deputy Excise & Taxation Commissioner & Ors. [(1975) 1 SCC 737],* this Court held that the writ jurisdiction of the High Courts under Article 226 was not intended to facilitate avoidance of obligations voluntarily incurred. It was observed that one of the important purpose of selling the exclusive right to vend liquor in wholesale or retail is to raise revenue. The licence fee was a price for acquiring such privilege. One who makes a bid for the grant of such privilege with a full knowledge of the terms and conditions attaching to the auction cannot be permitted to wriggle out of the contractual obligations arising out of the acceptance of his bid. Chandrachud, J. (as he then was interpreting the provisions of the Punjab Excise Act, 1914 and of the Punjab Liquor Licence Rules, 1956 said: (SCC pp. 745-46, para 16)
>
> *** *** ***
>
> To the same effect are the decisions of this Court in *State of Haryana v. Jage Ram* and the *State of Punjab v. M/s Dial Chand Gian Chand & Co. (1983) 2 SCC 503* laying down that persons who offer their bids at an auction to vend country liquor with full knowledge of the terms and conditions attaching thereto, cannot be permitted to wriggle out of the contractual obligations arising out of the acceptance of their bids by a petition under Art. 226 of the Constitution.
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> *** *** ***

> 11. ..... In respect of forest contracts which were dealt with by this Court in *K.P. Chowdhary v. State of M.P., AIR 1967 SC 203, Mulamchand v. State of M.P. AIR 1968 SC 1218, State of M.P. v. Rattan Lal, 1967 MPLJ 104, and State of M.P. v. Firm Gobardhan Dass Kailash Nath, (1973) 1 SCC 668 cases,* there are provisions in the Indian Forest Act, 1927 and the Forest Contract Rules framed thereunder for entering into a formal deed between the forest contractor and the State Government to be executed and expressed in the name of the Governor in conformity with the requirements of Article 299(1), whereas under the Punjab Excise Act, 1914, like some other State Excise Acts, once the bid offered by a person at an auction sale is accepted by the authority competent, a completed contract comes into existence and all that is required is the grant of a licence to the person whose bid has been accepted. .....
>
> (emphasis supplied)

64. The Supreme Court in *Ghaziabad Development Authority*'s case (supra), has also noted that once the offer is accepted on the terms and conditions as mentioned therein, the contract stands concluded between the parties. In taking that view, the Court recorded thus:-

> "5. When a Development Authority announces a scheme for allotment of plots, the brochure issued by it for public information is an invitation to offer. Several members of the public may make applications for availing benefit of the scheme. Such applications are offers. Some of the offers having been accepted subject to rules of priority or preference laid down by the Authority result in a contract between the applicant and the Authority. The legal relationship governing the performance and consequences flowing from breach would be worked out under the provisions of the Contract Act and the Specific Relief Act except to the extent governed by the law applicable to the Authority floating the scheme....."

65. Considering the alternative submission of the petitioners that since the contract between the parties is not in the name of the Governor, therefore, the same is not enforceable against either of the parties. There is no dispute with regard to the proposition that a contract which has to be executed in accordance with Article 299(1) of the Constitution becomes void if the same is not executed in conformity with the said provision, as the requirement in relation to contract executed in exercise of executive power of the Union or State under Article 299(1) of the Constitution is mandatory. However, every auction of Excise contract for sale of intoxicants is a leasing of the Government's right of selling intoxicants, as the State Government under Section 18 of the Excise Act has the exclusive privilege of manufacturing, selling and possessing intoxicants for consideration. Therefore, the Excise contract under the said Act, which comes into being on acceptance of the bid, is a statutory contract falling outside the purview of Article 299(1) of the Constitution of India.

66. The distinction between the contracts which are executed in exercise of the executive powers and contracts which are statutory in nature has been explained by the Supreme Court in *Lal Chand*'s case (supra). The Supreme Court has accepted the view expressed by this Court in *Nanhibai vs. Excise Commissioner, State of M.P.* AIR 1963 MP 352 which judgment was also approved by the Full Bench in *Ram Ratan Gupta vs. State of M.P.,* AIR 1974 MP 101. The other High Courts in *Ajodhya Prasad Shaw v. State of Orissa,* AIR 1971 Ori. 158 *and M/s Shree Krishna Gyanoday Sugar Ltd. v. State of Bihar,* AIR 1975 Pat 123 had observed that when the State Government in exercise of its powers under a provision similar to Section 22 of the Punjab Excise Act, 1914 grants the exclusive privilege of manufacturing, or supplying or selling any intoxicant like liquor to any person on certain conditions, there comes into existence a contract made in exercise of its statutory powers and such a contract does not amount to a contract made by the State in exercise of the executive powers under Article 299(1) of the Constitution of India. The relevant paragraph from the judgment in *Lal Chand*'s case (supra) is reproduced as under:-

> "ll. It is well settled that Article 299(1) applies to a contract made in exercise of the executive power of the Union or the State, but not to a contract made in exercise of statutory power. Article 299(1) has no application to a case where a particular statutory authority as distinguished from the Union or the States enters into a contract which is statutory in nature. Such a contract, even though it is for securing the interests of the Union or the States, is not a contract which has been entered into by or on behalf of the Union or the State in exercise of its executive powers. In respect of forest contracts which were dealt with by this Court in *K.P. Chowdhary v. State of M.P., AIR 1967 SC 203, Mulamchand v. State of M.P. AIR 1968 SC 1218, State of M.P. v. Rattan Lal, 1967 MPLJ 104, and State of M.P. v. Firm Gobardhan Dass Kailash Nath, (1973) 1 SCC 668 cases*, there are provisions in the Indian Forest Act, 1927 and the Forest Contract Rules framed thereunder for entering into a formal deed between the forest contractor and the State Government to be executed and expressed in the name of the Governor in conformity with the requirements of Article 299(1), whereas under the Punjab Excise Act, 1914, like some other State Excise Acts, once the bid offered by a person at an auction sale is accepted by the authority competent, a completed contract comes into existence and all that is required is the grant of a licence to the person whose bid has been accepted. It is settled law that contracts made in exercise of statutory powers are not covered by Article 299(1) and once this distinction is kept in view, it will be manifest that the principles laid down in K.P. Chowdhary, Mulamchand, Rattan Lal and Firm Gobardhan Dass' cases are not applicable to a statutory contract e.g. an Excise contract. In such a case, the Collector acting as the Deputy Excise & Taxation Commissioner conducting the auction under Rule 36(22) and the Excise

> Commissioner exercising the functions of the Financial Commissioner accepting the bid under Rule 36(22-A) although they undoubtedly act for and on behalf of the State Government for raising public revenue, they have the requisite authority to do so under the Act and the rules framed thereunder and therefore such a contract which comes into being on acceptance of the bid, is a statutory contract falling outside the purview of Article 299(1) of the Constitution."
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> (emphasis supplied)

67. To bolster his submission that the contract is void for non-compliance of Article 299 of the Constitution of India as it was not entered in the name of the Governor, the learned senior counsel for the petitioners relied upon the judgment In *M/s Om Prakash Baldev Krishan* (supra). The sole question for consideration in the said case was whether the acceptance of allotment of work of construction of high level bridge over river Tangri on Patiala-Pehewa Road in favour of the respondent-contractor was issued on behalf of the Governor of Punjab or not. The stand of the respondent therein was that his tender was not accepted by the Governor of Punjab as it was mandatory under the Constitution in order to amount to a valid acceptance. On an application filed by respondent under Section 33 of the Arbitration Act, 1940, the Sub-Judge observed that in the tender itself it was laid down that the tender together with acceptance thereof would constitute a valid and binding contract between the parties and after analysing the evidence on record, came to the conclusion that the tender form was duly signed by the respondent and the appellant and accordingly held that there was a valid contract and dismissed the application. The High Court reversed the order on the ground that in the acceptance letter, the Executive Engineer had required the respondent at the end to sign the agreement, which was under preparation within ten days. It remained undisputed that no such agreement was ever signed. Hence, it was held that no contract in conformity with Article 299(1) of the Constitution, which was a constitutional requirement in the case, had been entered into between the parties. Before the Supreme Court, it was contended on behalf of the State that in terms of Clause 2.76 of the Public Works Department Code, the Executive Engineer of the buildings and roads was authorised to enter into such contracts. The Supreme Court affirmed the order of the High Court and held that Article 299(1) of the Constitution is based on public policy. The Executive Engineer had signed the contract but nowhere in the contract it was offered and accepted or expressed to be made in the name of the Governor. Though the parties were to attend the office within 10 days to sign the agreement which was under preparation but no such agreement was signed. Therefore, there was no valid and binding contract between the parties. The relevant extract of the judgment reads as under:-

"10. Shri Nayar further sought to urge that Article 299 was for the Governments' protection in order to protect it against unauthorised contracts being entered on behalf of the Government. In the instant case, according to Shri Nayar, the Executive Engineer had issued the tender and had accepted the tender, authority to accept the tender on behalf of the Governor, is thus established. Shri Nayar submitted that once that authority is established and it is made clear from the evidence that the authorities have acted on that basis, then it must be presumed that the contract had been entered into in accordance with the provisions of Article 299 of the Constitution. ln view of the clear position in law, it is, however, not possible to accept this submission.

11. Clause (1) of Article 299 of the Constitution provides as follows:

> (1) All contracts made in the exercise of the executive power of the Union or of a State shall be expressed to be made by the President, or by the Governor of the State, as the case may be, and all such contracts and all assurances of property made in the exercise of that power shall be executed on behalf of the President or the Governor by such persons and in such manner as he may direct or authorise.

12. In this case, the Executive Engineer has signed the contract but nowhere in the contract it was offered and accepted or expressed to be made in the name of the Governor. The constitutional requirement enjoined in Clause (1) of Article 299 of the Constitution is based on public policy. This position has been made clear by this Court in *The State of Bihar v. M/s. Karam Chand Thapar & Brothers Ltd.,* [1962] 1 S.C.R. 827. There a dispute between the respondent and the Government of Bihar over the bills for the amount payable to the company in respect of the construction works carried out by it for the government was referred to arbitration. Section 175(3) of the Government of India Act, 1935 provided as follows:

> Subject to the provisions of this Act with respect to the Federal Railway authority, all contracts made in the exercise of the executive authority of the Federation or of a province shall be expressed to be made by the Governor- General, or by the Governor of the Province. as the case may be, and all such contracts and all assurances of property made in the exercise of that authority shall be executed on behalf of the Governor-General or Governor by such persons and in such manner as he may direct or authorise.

13. This Court reiterated that under that section a contract entered into by the Governor of a Province must satisfy three conditions, namely, (i) it must be expressed to be made by the Governor; (ii) it must be executed; and (iii) the execution should be by such persons and in such manner as the Governor might direct or authorise. These three conditions are required to be fulfilled. This position was reiterated by

this Court again in Seth Bikhraj Jaipuria v. Union of India, [l962] 2 S.C.R. 880. This Court explained that three conditions as mentioned in State of Bihar v. M/S. Karam Chand Thapar (supra) had to be fulfilled, and further reiterated that the object of enacting these provisions was that the State should not be saddled with liability for unauthorised contracts and, hence, it was provided that the contracts must show on their faces that these were made by the Governor- General and executed on his behalf in the manner prescribed by the person authorised. It is based on public policy. No question of waiver arises in such a situation. If once that position is reached, and that position is well settled by the authorities over a long lapse of time, no question of examining the purpose of this requirement arises. In Union of India v. A.L. Rallia Ram, [1964] 3 S.C.R. 164 this Court again reiterated that the agreement under arbitration with the Government must be in accordance with section 175(3) of the Government of lndia Act, 1935. These principles were again reiterated by this Court in Timber Kashmir Pvt. Ltd. etc. etc. v. Conservator of Forests, Jammu & Ors. etc., [1977] 1 S.C.R. 937. There, the Court was concerned with section 122(1) of the Jammu & Kashmir Constitution which corresponded to Article 299(1) of the Constitution of India. In that case all the three applications filed by the respondent State for a reference to an arbitrator under section 20 of the Jammu & Kashmir Arbitration Act, were dismissed by a single Judge of the Jammu & Kashmir High Court on the ground that the arbitration clause was, in each case, a part of an agreement which was not duly executed in accordance with the provisions of section 122(1) of the Jammu & Kashmir Constitution which corresponded to those of Article 299(1) of the Constitution of India. But the Division Bench allowed the appeals holding that if contracts were signed by the Conservator of Forests in compliance with an order of the Government, the provisions of section 122(1) of the Jammu & Kashmir Constitution could not be said to have been infringed. This Court held that the contract could not be executed without the sanction. Nevertheless, if the sanction could be either expressly or impliedly given by or on behalf of the Government, as it could, and, if some acts of the Government could fasten some obligations upon the Government, the lessee could also be estopped from questioning the terms of the grant of the sanction even where there is no written contract executed to bind the lessee. But, once there has been a valid execution of lessee by duly authorised officers, the documents would be the best evidence of sanction. In that case, the contracts were executed on behalf of the Government of Jammu & Kashmir. The only question with which the Court was concerned in that case was whether the contracts executed by duly authorised officials had been proved or not. lt was held that it was so proved.

14. In Bihar Eastern Gangetic Fishermen Co-operative Society Ltd. v. Sipahi Singh and others, [1978] 1 S.C.R. 375 where this Court relied

on a previous decision in Mulamchand v. State of Madhya Pradesh, [1968] 3 S.C.R. 214 and reiterated that there cannot be any question of estoppel or ratification in a case where there is contravention of the provisions of Article 299(1) of the Constitution. The reason is that the provisions of section 175(3) of the Government of India Act and the corresponding provisions of Article 299(1) of the Constitution have not been enacted for the sake of mere form but they have been enacted for safeguarding the Government against unauthorised contracts. The provisions are embodied in section 175(3) of the Government of India Act and Article 299(1) of the Constitution on the ground of public policy-on the ground of protection of general public.....and these formalities cannot be waived or dispensed with. This Court again reiterated the three conditions mentioned hereinbefore. The same principle was again reiterated by this Court in Union of India v. M/s. Hanuman Oil Mills Ltd., and others, [1987] Suppl. S.C.C. 84.

15. In the instant case, we have referred to letter dated 31st August, 1976 which towards the end stated that the parties to attend the office within 10 days to sign the agreement which is under preparation. It is common ground that no such agreement was signed.

16. In the aforesaid view of the matter the High Court was right in the view it took and the submissions made on behalf of the appellants cannot be entertained. The appeal fails and is accordingly dismissed with costs."

Apparently, the decision in *M/s Om Prakash Baldev Krishan*'s case (supra), does not relate to excise contract but relates to works contract and therefore, the same is distinguishable and is not applicable in the present case. Thus, the said alternative submission also is of no assistance to the petitioners.

68. Another contention was put forth with regard to validity of the licence as the Excise policy nowhere gives any power for grant of licence from a retrospective date. In this regard, the background of the entire case, will have to be seen. The offer of the respective petitioners for allotment of liquor vends was accepted on different dates prior to 22nd March, 2020 as is evident from the acceptance/allotment letters contained in Annexure P-2. From 21st March, the liquor vends were directed to be closed to maintain social distancing to flatten the curve of Covid-19 pandemic. A nationwide lockdown for 21 days was declared on 24.03.2020, which was extended by issuing fresh guidelines till 03.05.2020. Till then, there was restriction on liquor shops and bars. On 01.05.2020, the Government further extended the lockdown for another two weeks from 4.5.2020 but the guidelines permitted the opening of liquor shops in orange and green zones but there was restriction on movement from 7.00 p.m. to 7.00 a.m. It was then the Department started issuing the licences from 2nd May, 2020 for operation of allotted liquor shops and vide separate letters asked the licensees to complete the

remaining formalities of the policy. No doubt, the licences issued vide Annexure R-9 dated 04.05.2020, were approved for the period 01.04.2020 to 31.03.2021, which the petitioners have alleged to be a retrospective date. It appears that the licences have been issued in accordance with the policy and acceptance of bid, which provided the period of licence to commence from 01.04.2020 to 31.03.2021. Even if the licences had been issued on or before 01.04.2020, the petitioners neither could have operated the liquor shops from the said date nor could have complied with the remaining requirements of the policy due to lockdown and operation of the Act of 2005. The orders for closure of liquor shops and restrictions in operation of liquor shops, all were passed in public interest. The circumstances, in which the licences have been issued, clearly reveal that it cannot be equated with the date of implementation of the licence or issue of licence from any retrospective date. Merely because the licences so issued to the petitioners bear the period of licence from 01.04.2020 to 31.03.2021 does not mean that the licence has been made effective from such retrospective date and the petitioners would be charged the prescribed fee for the period for which they were not allowed to operate the liquor vends. The licences have been issued as per the requirement of the policy rather than fastening any liability upon the petitioners on that count. The State Government vide order dated 31.03.2020 (Annexure R-4) has decided to waive off the licence fee for the period in financial year 2019-20 and 2020-21 during which the licensees were unable to run their liquor vends due to lockdown. There are several other concessions given to the licensees, which have been discussed and reproduced in para 13 of this order and we would eschew to repeat the same here for the sake of brevity. By amending the policy, the State Government has also extended the period of licence upto 31.05.2021. We have already held above that even though the status of the petitioners as on 01.04.2020 was not that of licensee but by virtue of acceptance of their offer, they were bound by the contract. In regard to absence of power to issue licence from retrospective effect, it is seen that Clause XXXIII of the General Licence Conditions authorizes the State Government to amend any condition of licence during the currency of the licence, which shall be effective from the commencement of the licence if not otherwise directed and the licensee shall be bound by the same. Similarly, in an affidavit submitted in terms of clause 18.3 of the policy, the validity of which has been upheld in the preceding paragraph, in para 13 of the affidavit the petitioners have undertaken that the State Government could carry out amendment in the policy 2020-21 during the currency of the licence and that would be binding on the petitioners. That apart, out of 380 liquor groups, the licensees of as many as 323 liquor groups have accepted the licences which have been allegedly issued with retrospective effect.

69. In view of the aforesaid, as noticed earlier, the inevitable conclusion is that in the present case, the contract between the parties is a valid and concluded

contract and the same is binding upon the petitioners and no error, which may warrant interference with the contract, has been committed by the respondents-State in issuing the licences.

70. We now proceed to examine the question No.(iii): as to whether the amended Excise policy issued on 23.05.2020 is valid and legal. On behalf of the petitioners, it was collectively argued that the amendment dated 23.05.2020 brought in the Excise Policy 2020-21 is not only contrary to the Excise Act but it also suffers from the vice of arbitrariness. It was claimed that it is a fit case for quashing the Notification dated 23.05.2020 whereby the policy has been amended by adding Clause 16.7 thereby threatening to blacklist the contractor for future tender or renewal in case of non-acceptance of amended conditions and further clauses 12, 70, 70.6 making counteroffers purporting to be novation of contractual terms. Various other submissions, as noted above, have been made to support the said argument and the petitioners relied upon the judgments of the Supreme Court in *Syed Israr Masood* and *Monarch Infrastructure'*s cases (supra). It was further urged that even the decision in *Chingalal Yadav'*s case (supra) relied upon by the respondents, runs contrary to their own argument on the point of arbitrariness.

71. Before we advert to each of the arguments advanced by the learned counsel for the parties with regard to validity of the amended policy dated 23.05.2020, it is to be borne in mind that the said amendment to the Excise Policy 2020-21 has been necessitated in view of the subsequent events occurred on account of Covid-l9 pandemic whereby a strict lockdown was imposed to restrain the spread of the disease. Inasmuch as, in the peculiar and unavoidable circumstances, it was difficult for the petitioners to operate the liquor vends as also to the respondents to get the remaining necessary requirements of the Excise Policy 2020-21 completed. A perusal of the new insertions to the policy, namely, Clauses 70 and 70.6, shows that for extension of the licence period upto 31-05-2021 an option has been given to the licensees whether to opt for the same or not. Thus, wherever it was required, the consent of the licensees has been sought.

72. It was alleged that the State has unilaterally amended the Excise Policy without the consent of the petitioners and that the amendment to the policy, if any, was to be made before issuing the licences. The changes made in the policy are not comprehensive or practicable and are *de hors* the provisions of the Excise Act. Reliance was placed upon the judgment in *Joint Action Committee'*s case (supra). However, a careful reading of the said judgment shows that the Supreme Court has held that the terms and conditions of the contract cannot be unilaterally altered or modified unless there exists any provision either in contract itself or in law. The relevant paragraph of the said decision is as follows:

> "66. ..... Terms and conditions of the contract can indisputably be altered or modified. They cannot, however, be done unilaterally unless there exists any provision either in contract itself or in law. Novation of contract in terms of Section 60 of the Contract Act must precede the contract making process. The parties thereto must be ad idem so far as the terms and conditions are concerned."

73. In our considered view, the said judgment does not assist the case of the petitioners. In the present case, Section 62 of the Excise Act *inter alia* empowers the State to make rules for the purposes of carrying out the provisions of the Act. The State is authorised to make rules prescribing the powers and duties of Excise Officers; regulating the import, export, transport, manufacture, collection, possession, supply or storage of any intoxicant; regulating the period and localities for which the licences for the wholesale or retail vend of any intoxicant may be granted; prescribing the procedure to be followed and matters to be ascertained before granting licence for liquor vend in any locality; regulation of amount, time, place and manner of payment of any duty or fee or tax or penalty; prescribing the authority by, the form in which, and terms and conditions on and subject to which any licence, permit or pass shall be granted and all other matters connected therewith. The proviso attached to Section 62 of the Excise Act specifically provides that any such rules may be made without previous publication if the State Government considers that they should be brought into force at once. In view of the specific provision contained in Section 62 of the Act, the State has the power to make rules. The last two lines of the opening paragraph of the Excise Policy 2020-21, which was published for the knowledge of common public and special information of retail contractors of the Excise also reads that the State reserves its right to make necessary changes in the regime/arrangement approved for the year 2020-21 during the currency of the period 2020-21. Still further, the petitioners while submitting the statutory affidavit with the offer in terms of Clause 18.3 of the Excise policy, in Clause 13 thereof have specifically agreed to the power of the State Government to make amendment in the Excise Policy 2020-21 during the licence period. Thus, it would debar them from raising such a plea and operate as promissory estoppel against them. Moreover, even in the absence of filing of original affidavit, the said condition would not lose its efficacy. Therefore, no interference is called for on any grounds, namely, the unilateral amendments have been incorporated in the policy; or that the policy should have been amended before issuing the licences; or that the petitioners were given only five days to accept or not to accept the newly added provisions. Even before amending the policy on 23.05.2020, considering the practical difficulties of the licensees, the State Government granted several concessions to the licensees to compensate them and enable them to run the liquor shops even before the licence period had actually commenced. As stated by the respondents, not only the petitioners but all the successful bidders' interest has been taken care of to

some extent. The argument with regard to sustaining the loss in the operation of licence for the period 2020-21 is not one-sided. Both the parties may have sustained some loss, which cannot be compensated to each other, except within the modes available in the policy itself especially Clauses 49 and 54 incorporated therein. Framing of the policies is within the domain of the employer. The Court cannot direct to frame a policy which suits a particular person the most. Therefore, the judgment in *Joint Action Committee'*s case (supra) is of no help to the petitioners.

74. Relying upon the judgment in *UP Rajkiya Nirman Ltd.'*s case (supra), it was contended on behalf of the petitioners that the amended policy issued on 23.05.2020 was brought as a counteroffer. We are not inclined to accept this submission as well. It has already been held above that the State has the power to amend the policy by virtue of Section 62 of the Excise Act and Clause 13 of the affidavit submitted by them in terms of Clause 18.3 of the policy. Moreover, a perusal of the clauses enumerated in the amended policy clearly shows that clause 16.7 which has been added regarding debarring a person from participating in the tender process already exists in Clause III of the Rules of General Application. Further by clause 70 of the amended policy, the State has only extended the policy for a further period of two months till 31.05.2021, which is to benefit the petitioners. While answering the first question involved in the case, we have already held that by the communication of acceptance of the offer by the respondents, no new offer has been made. Thus, the amended policy dated 23.05.2020 does not tantamount to a counteroffer. The decision in *UP Rajkiya Nirman Ltd'*s case (supra) holding that where an offer is given by a party to the other side and the other side introduces material alteration therein, it would amount to a counteroffer, was rendered in the circumstances, where the source of the contract between the parties had not transformed into a contract. Therefore, the same does not provide support to the case of the petitioners. The relevant extract of the judgment reads as under:-

> "16. Since the tenders - the source of the contract between the parties -had not transformed into a contract, even if the proposal and counter proposal are assumed to be constituting an agreement, it is a contingent contract and by operation of Section 32 of the Contract Act, the counter proposal of the respondent cannot be enforced since the event of entering into the contract with the Board had not taken place.
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> *** *** ***
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> 18. As found earlier, there is no signed agreement by a duly competent officer on behalf of the appellant. The doctrine of "indoor management" cannot be extended to formation of the contract or essential terms of the contract unless the contract with other parties is duly approved and signed on behalf of a public undertaking or the

> Government with its seal by an authorised or competent officer. Otherwise, it would be hazardous for public undertakings or Government or its instrumentalities to deal on contractual relations with third parties."

75. Now examining the judgment in *Syed Israr Masood*'s case (supra), the Supreme Court held that the substantial variance between the particulars of quantity and quality of the material stated at the time of auction and which was actually found to be available on the site, would substantially alter the very foundation of the contract and therefore, the contractor was entitled to repudiate the contract and claim refund of the amount deposited by him but in view of incorporation of a specific clause in the contract disentitling the contractor to claim compensation, no compensation would be payable. The relevant extract is as follows:

> "9. We may at this stage refer to Condition 3 in the sale-notice (Ex.D/l) on which strong reliance was placed on behalf of the respondent. That Condition reads:
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> > The details of quantities of forest produce announced at the time of auction are correct to the best of the knowledge of the Divisional Forest Officer but are not guaranteed to any extent. The intending bidders are, therefore, advised to inspect on the spot the contract area and the produce they intend to bid for with a view to satisfy themselves about its correctness. No claim shall lie against the State Government for compensation or any other relief, if the details of the quantities are subsequently found to be incorrect.
>
> In our opinion, the trial court was perfectly right in its view that, while the said condition will operate to prevent the contractor from claiming any damages or compensation from the State Government on the ground that the details of the quantity of the forest produce were subsequently found to be incorrect, it will not preclude him from repudiating the contract on its being found that there was substantial variance between the particulars furnished at the time of the auction regarding the quantity and quality of timber that will be available for extraction in the concerned coupes and the quantity etc. of tree growth actually found to be available on the site. It has been clearly established by the evidence in this case that a very substantial quantity of timber standing on the bank of Nalla had been marked for extraction and numbered and the auction-sale had been held on the basis that the highest bidder would be entitled to fell and remove all those trees. But by the time the coupes were allowed to be inspected by the auction-purchaser, that area was declared to be "reserved", with the result that there was a complete prohibition against the felling of any timber

> therefrom. This has substantially altered the very foundation of the contract and hence it was perfectly open to the plaintiff to repudiate the contract and claim a refund of the amount deposited by him as a part payment of the purchase price.
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> 10. We are unable to agree with the view expressed by the High Court that the plaintiff cannot succeed unless he proved that, even after excluding the trees standing on the reserved area, the rest of the forest did not have sufficient number of trees which would satisfy the assurance given at the time of the auction. The subject-matter of the auction-sale was the totality of the trees which were marked for cutting in the two coupes. Since a substantial number of the marked trees was contained in the area which was subsequently declared as "reserved", it is inevitable that there was a corresponding diminution in the total quantity of timber which was announced as available for cutting at the time of the auction-sale.
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> 11. We do not, therefore, find it possible to agree with the reasons stated by the High Court for refusing the plaintiff's prayer for refund of the amount paid by him by way of the first installment of the sale price. The conclusion recorded by the trial court on this issue was perfectly correct and the High Court was in error in interfering with the said finding."

In the present case also the consequences of non-performance of the contract due to any policy decision of the State are provided in Clauses 48 and 49 of the Excise Policy, therefore, the said decision does not render any help to the case of the petitioners. Similar provisions in Clauses 9.6, 10.1.3, 10.1.6, 10.1.7, 10.1.9, 44, 48 and 49 are also contained in the policy in case the successful bidder chooses not to comply with the terms and conditions of acceptance letter and licence conditions. Thus, the petitioners having participated in the tender with full knowledge of these provisions, cannot be subsequently heard to say that these conditions are arbitrary and illegal in any manner.

76. The petitioners also relied upon the judgment of the Supreme Court in *Monarch Infrastructure'*s case (supra) and Full Bench decision of this Court in *Chingalal Yadav'*s case (supra) to contend that the court may interfere with the contract if the acts of the Government are arbitrary or contrary to public interest or even if some disputed questions of fact are involved. There is no dispute with regard to the legal position enumerated therein. However, it is noted that in *Monarch Infrastructure'*s case (supra), the Supreme Court has made it clear that the court is not the best judge to say that which tender conditions would be better and it is left to the discretion of the authority calling the tender and therefore, reliance placed by the petitioners on the said decision is misplaced. The relevant extract of the decision is as under:-

"10. There have been several decisions rendered by this Court on the question of tender process, the award of contract and have evolved several principles in regard to the same. Ultimately what prevails with the courts in these matters is that while public interest is paramount there should be no arbitrariness in the matter of award of contract and all participants in the tender process should be treated alike. We may sum up the legal position thus:

(i) The Government is free to enter into any contract with citizens but the court may interfere where it acts arbitrarily or contrary to public interest.

(ii) The Government cannot arbitrarily choose any person it likes for entering into such a relationship or to discriminate between persons similarly situate.

(iii) It is open to the Government to reject even the highest bid at a tender where such rejection is not arbitrary or unreasonable or such rejection is in public interest for valid and good reasons.

11. Broadly stated, the courts would not interfere with the matter of administrative action or changes made therein, unless the Government's action is arbitrary or discriminatory or the policy adopted has no nexus with the object it seeks to achieve or is mala fide.

12. If we bear these principles in mind, the High Court is justified in setting aside the award of contract in favour of Monarch Infrastructure (P) Ltd. because it had not fulfilled the conditions relating to clause 6(a) of the Tender Notice but the same was deleted subsequent to the last date of acceptance of the tenders.....

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14. Now we will turn to the last question formulated by us. The High Court had directed the commencement of a new tender process subject to such terms and conditions, which will be prescribed by the Municipal Corporation. New terms and conditions have been prescribed apparently bearing in mind the nature of contract, which is only collection of octroi as an agent and depositing the same with the Corporation. In addition, earnest money and the performance of bank guarantee are insisted upon; collection of octroi has to be made on day-to-day basis and payment must be made on a weekly basis entailing, in case of default, cancellation of the contract. We cannot say whether these conditions are better than what were prescribed earlier for in such matters the authority calling for tenders is the best judge....."

77. In *Chingalal Yadav*'s case (supra), the issue before the Full Bench of this Court was with regard to scope of interference with the Excise policy of the State

in respect of grant of licence for manufacture and sale of liquor. The Court declined to exercise the power of judicial review unless the same was shown to be contrary to any statutory provision. The conclusions recorded by the Bench read, thus:

> "37. Scope of interference in policy matters in exercise of powers of judicial review is well settled by a catena of decisions. In *T.N. Education Deptt., Ministerial and General Subordinate Services Assn. vs. State of T.N., (1980) 3 SCC 97* the Supreme Court while noticing the jurisdictional limitation to analyse and to find fault with the policy held that the Court in exercise of its power of judicial review cannot sit in judgment over the policy matters except on limited grounds, namely, whether the policy is arbitrary, mala fide, unreasonable or irrational. Each State is empowered to formulate its own liquor policy.
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> 38. In *Nandlal Jaiswal and others (supra)* the Supreme Court held that while considering the applicability of Article 14 of the Constitution in case pertaining to trade or business in liquor, the Court would be slow to interfere with the policy laid down by the State Government for grant of license for manufacture and sale of liquor.....
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> 40. In a recent decision of Supreme Court rendered in case of *Villianur Iyarkkai Padukappu Maiyam vs. Union of India and others, (2009) 7 SCC 561,* the Supreme Court once again reiterated that in the matters of economic policy the scope of judicial review is very limited and the Court will not interfere with economic policy of the State unless the same is shown to be contrary to any statutory provision of the Constitution. The Court cannot examine the relative merits of different economic policies and cannot strike down a policy merely on the ground that another policy would have been fairer and better. Wisdom and advisability of economic policy are ordinarily not amendable to judicial review. It was further held that in matters relating to economic issues, the Government while taking the decision was right to 'trial and error' so long it is bona fide and within the limits of the authority. For testing the correctness of a policy the appropriate forum is Parliament and not the Courts. It was further held that there is always a presumption that Governmental action is reasonable and in public interest and it is for the party challenging its validity to show that it lacks reasonableness and is not in public interest. The onus is heavy one and has to be discharged to the satisfaction of the Court by bringing proper and adequate material on record.
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> 41. From the aforesaid decisions of the Supreme Court the principles of law which can be culled out can be summarized as follows:
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> (i) Grant of licence for manufacture and sale of liquor is a matter of economic policy where the Court would be slow to interfere unless the policy is plainly arbitrary, irrational or mala fide.

(ii) The Court must while adjudging the constitutional validity of an executive decision relating to economic matters grant certain measure of freedom or 'play in joint' to the executive.

(iii) The Court cannot strike down a policy merely because it feels that another policy would have been fairer or wiser or more scientific or logical.

(iv) Parting of privilege exclusively vests with the Government and the same can be questioned only on the ground of bad faith, based on irrational or irrelevant consideration, violation of any constitutional or statutory provision.

(v) It is not normally within the domain of the Court to weigh the pros and cons of the policy. In case of policy decision on economic matters the Court should be very circumspect and must be most reluctant to impugn the judgment of experts who have arrived at a conclusion.

(vi) Court cannot examine relative merits of different economic policy. In a democracy it is a prerogative of each elected Government to formulate its policy. Wisdom and advisability of economic policy are ordinarily not amenable to judicial review.

(vii) In matters relating to economic issues, the Government has while taking a decision right to "trial and error" as long as both trial and error are bona fide and within limits of the authority.

(viii) Normally there is a presumption that governmental action is reasonable and in public interest and it is for the party challenging its validity to show that it is wanting in reasonableness and the burden is a heavy one which has to be discharged to the satisfaction of the Court by bringing proper and adequate material on record.

57. In view of preceding analysis our answer to the questions referred for opinion are as follows:

(1) Under rule 8(1)(a) of the M.P. Foreign Liquor Rules, 1996 and rule 9 of the M.P. Country Spirit Rules, 1995, it is open to the State Government to renew the licence of existing licensee on such condition, which it may prescribe or invite applications for grant of licence, or deal with grant of licence in such other manner as it may determine.

(2) We agree with the conclusion recorded by the Division Bench of this court in Madan Mohan Chaturvedi (supra) however, for different reasons which have already been referred to in preceding paragraphs. The expression "or in any such other manner as the State Government may direct from time to time"

will qualify the powers of the Government in granting the licence, and is not required to be read in relation to disposal of applications which cannot be disposed of by draw of lottery.

(3) The new liquor policy which provides for renewal of existing licence with further condition that renewal will take place only when the said renewal will generate more than 80% of the estimated revenue for the year 2010-11 at the district level is a valid policy and does not create any monopoly.

(4) The new policy is a valid policy as the same is not in contravention with rule 8(1) of M.P. Foreign Liquor Rules, 1996. Requirement of inviting the application has not been dispensed with under the new policy. Licence in respect of each shop is being granted by inviting the application. Renewal of licence is a mode of allotment which is permissible under rule 8(1)(a) of M.P. Foreign Liquor Rules,1996.

(5) The judgment rendered by the Division Bench in Madan Mohan Chaturvedi (supra) does not decide the question of vires of policy and this Court has jurisdiction to consider the constitutional validity/statutory validity of the policy. In our view the New Policy is neither violative of Article 14 of the Constitution of India nor contrary to and ultra vires Rule 8(1)(a) of M.P. Foreign Liquor Rules, 1996 and Rule 9 of M.P. Country Spirit Rules, 1995 and Section 62 of the Excise Act, 1915."

Considering the aforesaid two judgments vis-a-vis the facts of the present case, the decision to amend the policy and the conditions of licence was taken in the circumstances, which called for the necessity to synchronize the economic activities and health care issues, which were completely getting disrupted due to pandemic and in a way, both reached at the verge of becoming dependent upon each other. All decisions relating thereto were/are taken in public interest and therefore, there is no element of arbitrariness much less specifically pointed out by the petitioners. No provision has been shown by the learned counsel for the petitioners which does not empower the State to amend the policy. Thus, the decisions in the cases of *Monarch Infrastructure* and *Chingalal Yadav* (supra) do not come to the rescue of the petitioners.

78. Having bowed down to the power of the State by submitting an affidavit with the bid bearing Clause 13 in terms of Clause 18.3 of the policy that the petitioners would be bound by any changes in the arrangement of Excise policy during the period 2020-21, it shall not be open for the petitioners to claim that their prior consent was required for making changes to the policy and terms and conditions of the licence. While answering the first question involved in the case, we have already found that there was no fault in the fulfillment of condition of submitting affidavit merely because its original was not submitted.

79. Relying upon the decision in *Bharat Sanchar Nigam Limited*'s case (supra), learned senior counsel for the petitioners had vehemently argued that the respondents failed to notify the orders pertaining to change of timings of shops, period of licence, curtailing the facilities of *Ahatas* etc. in the official gazette in terms of Section 63 of the Excise Act. The reference was made to paras 43, 46, 51 and 56, which read as under:-

> "43. In view of the aforementioned law laid down by this Court, there cannot be any doubt whatsoever that the circular letters cannot ipso facto be given effect to unless they become part of the contract. We will assume that some of the respondents knew thereabout. We will assume that in one of the meetings, they referred to the said circulars. But, that would not mean that they are bound thereby. Apart from the fact that a finding of fact has been arrived at by the TDSAT that the said circular letters were not within the knowledge of the respondents herein, even assuming that they were so, they would not prevail over the public documents which are the brochures, commercial information and the tariffs.
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> 46. The respondent had two options. They were asked to choose one. Thus, a representation was made that they would be entitled to obtain lease of the equipments (resources) on R&G basis. Payments have been made on that basis. The question which would arise for consideration is as to whether the basis of making a demand itself can be changed. The answer to the said question, in our opinion, must be rendered in the negative.
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> 51. In the instant case, the resources to be leased out were subject to agreement. The terms were to be mutually agreed upon. The terms of contract, in terms of Section 8 of the Contract Act, fructified into a concluded contract. Once a concluded contract was arrived at, the parties were bound thereby. If they were to alter or modify the terms thereof, it was required to be done either by express agreement or by necessary implication which would negate the application of the doctrine of 'acceptance sub silentio'. But, there is nothing on record to show that such a course of action was taken. The respondents at no point of time were made known either about the internal circulars or about the letters issued from time to time not only changing the tariff but also the basis thereof.
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> 56. Why publication is necessary so as to enable the parties to take recourse thereto has been considered by this Court in B.K. Srinivasan v.

State of Karnataka [(1987) 1 SCC 658] in the following terms (SCC pp.672-73, para-15):

> "15. There can be no doubt about the proposition that where a law, whether parliamentary or subordinate, demands compliance, those that are governed must be notified directly and reliably of the law and all changes and additions made to it by various processes. Whether law is viewed from the standpoint of the "conscientious good man" seeking to abide by the law or from the standpoint of Justice Holmes's 'unconscientious bad man' seeking to avoid the law, law must be known, that is to say, it must be so made that it can be known. We know that delegated or subordinate legislation is all-pervasive and that there is hardly any field of activity where governance by delegated or subordinate legislative powers is not as important if not more important, than governance by parliamentary legislation. But unlike parliamentary legislation which is publicly made, delegated or subordinate legislation is often made unobtrusively in the chambers of a Minister, a Secretary to the Government or other official dignitary. It is, therefore, necessary that subordinate legislation, in order to take effect, must be published or promulgated in some suitable manner, whether such publication or promulgation is prescribed by the parent statute or not. It will then take effect from the date of such publication or promulgation. Where the parent statute prescribes the mode of publication or promulgation that mode must be followed. Where the parent statute is silent, but the subordinate legislation itself prescribes the manner of publication, such a mode of publication may be sufficient, if reasonable. If the subordinate legislation does not prescribe the mode of publication or if the subordinate legislation prescribes a plainly unreasonable mode of publication, it will take effect only when it is published through the customarily recognised official channel, namely, the Official Gazette or some other reasonable mode of publication. There may be subordinate legislation which is concerned with a few individuals or is confined to small local areas. In such cases publication or promulgation by other means may be sufficient."

80. With due regard to the law laid down by the Supreme Court in *Bharat Sanchar Nigam Limited*'s case (supra), we find the argument that there is violation of the terms and conditions of the Excise policy by not notifying the orders pertaining to change of timings of shops, period of licence, curtailing the facilities of *Ahatas* etc. in the official gazette unlike the Excise Policy and amended policy dated 23.05.2020 in terms of Section 63 of the Excise Act, is only in the realm of submission having not much force of law. A perusal of Section 63 itself shows that the requirement of such publication is only with respect to the rules and

notifications. The Excise policy is a subordinate legislation, which has been notified in the official Gazette. There is no dispute that the Excise Policy dated 25.02.2020 and the Amended Excise Policy dated 23.05.2020 were duly notified in the official Gazette. If the State by issuing the circulars is giving certain options, concessions and reliefs to the petitioners to tide over their difficulties in running their trade and making compliance of terms and conditions of the contract, the action of the State cannot be faulted with on that score. It is not the case of the petitioners that without publishing such circulars in the official Gazette in terms of Section 63 of the Excise Act, the benefits which were otherwise available through the Acts, Rules and policies, have been taken away from the licensees. As observed earlier, the amendement/change in the policy has not been made by the Excise Department or the Collectors, the amended policy has been duly notified under Section 63 of the Excise Act.

81. Mr. Sanjay Agarwal, learned counsel for the petitioners specifically contended that in terms of Clause 16.7 of the amended policy dated 23.05.2020, a licensee for the year 2020-21 whose licence has been cancelled, would be blacklisted from participating in any future contracts. In our opinion, the said clause has been misunderstood. Clause 16.7 of the amended policy reads that for the year 2020-21, in the case of any licensee in respect of whose licence for the liquor shop/group/single group be it fully owned by him or having partial ownership in the capacity as Partner of a Firm/Director of Company/Share Holder, orders for cancellation or re-auction in any of the District of the State has been passed, shall be ineligible to participate in the process of allotment of liquor shops in any of the District of the State in the Excise Policy of 2020-21 (both main and amended) through any of the modes prescribed therein. A perusal of the said clause clearly shows that the licensee for the year 2020-21 is not prohibited from participating in the tender process in any future contracts but the prohibition as such is only for the year 2020-21. Secondly, a clause in respect of debarment of a person from bidding is not brought by the respondents for the first time. The said clause does exist in the Rules of General Application framed under Section 62 of the Excise Act. Clause III of the Rules of General Application provides that former licences (sic: licensees) who owe arrears of excise revenue to Government, or whose conduct as licensee has been unsatisfactory, or who have been guilty of serious breaches of their licences under the Excise Act and other Acts or the rules made thereunder, shall not be entitled to bid at the auction without the consent of the Collector or District Excise Officer or the officer holding the auction. There is no dispute that these Rules are part of the terms and conditions of the Excise Policy.

82. A juxtapose reading of Clause III of the Rules of General Application and Clause 16.7 of the amended policy makes no distinction between the two, as under the said Rules, the respondents are authorised to decide the location of shops,

period of licence, debarring certain persons from bidding and power of confirmation of auction sale or acceptance/rejection of bid which has been conferred upon the Excise Commissioner or Collector, as the case may be. In view of the said fact, we do not find that by adding clause 16.7 through amended policy dated 23.05.2020, the respondents have given any counteroffer to the petitioners or that it has been added to coerce the petitioners or to undermine their option to move the Court.

83. The blacklisting of a commercial Firm has serious civil consequences as it affects the reputation of the Firm and therefore, before any such decision is taken the principles of natural justice must be adhered to. However, in the present case, whether it is Rule III of the Rules of General Application or Clause 16.7 of the amended policy, the purport of the language used therein clearly suggests that it is an eligibility clause to participate in the tender process rather than the order of blacklisting a Firm. In any case, under Sub-Rule (5) of Rule III of the Rules of General Application, an appeal is provided to the Excise Commissioner or any officer authorised in this behalf. Thus, we do not find any ground to hold that Clause 16.7 of the amended policy is illegal in any manner.

84. Challenge to the amended policy was also made on the ground that it could not have been changed during the currency of the contract or the licence period. Strong support was drawn from the judgment in *Karambir Nain'*s case (supra) wherein it was held that though the terms of the licence are statutory in nature, the same cannot be changed by the State in between the licence period, without either seeking consent of the licensees or without giving opportunity to the licence (sic : licensees) to repudiate the contract. The State has denied the applicability of the said decision on the ground that the facts of the said case are different. Inasmuch as, during currency of the licence period after the licences had been issued, Clause 2B relating to shifting and surrender of liquor vends on the National and State Highways to the detriment of the licensees was inserted; it became prohibited in law to perform the contract and further there was no provision in the Punjab Excise Act, 1914 or Haryana Liquor Licence Rules, 1970 to change the terms of the licence and excise policy.

85. As it was urged by the petitioners that law laid down in *Karambir Nain'*s case (supra) squarely governs the facts of the present case, it would be imperative to examine the same in detail. In the case of *Karambir Nain* (supra), the petitioners therein were allotted composite licence for group of liquor vends for the period from 01.04.2013 to 31.03.2015 under the Excise Policy 2013-14 which was made for two years. The liquor vends on National Highways were also auctioned in spite of the direction of the National Highways Authority of India and Government of India. One society, namely, Arrive Safe filed a PIL challenging the policy of the State bearing CWP No.25777 of 2012 *(Arrive Safe Society of Chandigarh v.*

National Highway Authority of India). On 22.12.2012, notice of motion was issued for 23.1.2013 but the petition ultimately came to be decided on 18.3.2014 directing that no liquor vend shall be permitted to be opened on the National or State Highway w.e.f. 01.04.2014. The State, instead of curtailing the policy for one year issued amended policy for remaining year of 2014-15. Accordingly, the petitioners were asked to close down or shift retail liquor vends on the National or State Highway and continue with the other liquor vends of the group which did not fall on highways. The Court found that no provision was shown under the Punjab Excise Act, 1914 or the Haryana Liquor Licence Rules, 1970 empowering the State to change the terms of the licence during the currency of the licence or change the location of the vends and further, the problem itself was aggravated by the State by bringing the policy for two years for the first time when the lis against opening of the liquor vends on the highways was already pending before the Court, which should have been avoided by the State. It was, in these circumstances, the Court held that the State cannot be permitted to change the rules of the game announced at the time of Excise policy unilaterally. However, in the present case, in terms of Section 62 of the Excise Act, the State is not only empowered to make the rules but a perusal of last two lines of the opening paragraph of the Excise Policy dated 25.02.2020 and Clause 13 of the affidavit uploaded by the petitioners with the bid in terms of Clause 18.3 of the policy also shows that the petitioners would be bound by any changes to be made in the policy. Moreover, in that case, the sale of liquor on Highways was strictly prohibited in compliance of the Court's order during the entire period of the policy but here, even on the own showing of the petitioners, the sale of liquor was prohibited during the lockdown period and it remained affected for a period of two months though there may be still red and containment zones and restrictions but it is not the case of complete prohibition on sale of liquor or case of total unlawfulness of sale of liquor. The period of licence which has been lost by the petitioners, has been tried to be adjusted by the respondents by providing two extra months for continuation of the licence upto 31.05.2021, if the licensees may choose to do so. Thus, it can be said that the sale of liquor in the present case was partially prohibited unlike in the case of *Karambir Nain'*s case (supra). Thus, the judgment in *Karambir Nain'*s case (supra) is distinguishable on facts and does not inure to the benefit of the petitioners.

86. Ancillary question that arises in the present facts and circumstances relates to the scope of judicial review in policy decisions. The Supreme Court in catena of pronouncements had the occasion to consider this issue. In *Mohd. Fida Karim'*s case (supra), amendment to the existing policy with regard to settlement of liquor vends which was to be made by auction-cum-tender method framed under Bihar Excise Act, 1915, was called in question. The Court observed, thus:-

> "5. Similar contentions have been raised before us on behalf of the appellants, which were made before the High Court. The challenge to the new policy has been made on the following three grounds. Firstly, it has been submitted that there is no provision in the Excise Act or the Rules to review or revoke the grant of licence or to curtail or reduce the period of licence except as provided under Sections 42 and 43 of the Excise Act. The licence already granted for a period of five years from 1990 to 1995 cannot be made ineffective by the so-called new policy of auction-cum-tender. A further limb of this ground is that the period cannot be curtailed without compliance of the mandatory provisions of Sections 42 and 43 of the Excise Act. The second ground of challenge is that the Government is estopped from doing so on the principle of promissory estoppel. The third ground is that in any event, the exercise of power, in the facts of the case is arbitrary, irrational and patently unreasonable and as such is violative of Article 14 of the Constitution. The High Court has dealt with all these contentions in detail and has rejected the same by giving cogent reasons. We fully agree with the view taken by the High Court.
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> 6. It is important to note that the Memorandum dated 25th January, 1990 and the letter dated 8th February, 1990 and the sale Notification on the basis of which the appellants are claiming the right to continue the licence for a period of five years, clearly mentioned that the grant of licence was on annual basis and such renewal after every year was subject to the conditions mentioned therein and also subject to any change in policy. Thus, the Government was fully competent to change its policy under the terms of the grant of licence itself. It is also well settled that the right of vend of excisable articles is exclusively and absolutely owned by the State Government."
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> (emphasis supplied)

87. Before the Supreme Court in *Raunaq International Ltd*'s case (supra), the order passed by the Bombay High Court on the writ petition of the respondent M/s I.V.R. Construction Ltd. granting interim stay on the operation of the letter of intent dated 20.07.1998 issued to M/s Raunaq International Ltd. for commissioning the power project of State Electricity Board accepting its offer in view of the price advantage to the Board and adequate experience having completed similar type of work for other units, was assailed by the appellant. The Supreme Court held that the High Court was not justified in granting stay. Under the scope of judicial review, the Court should weigh the competing public interests to find if there is overwhelming public interest as against public detriment in granting the stay. It was held as under:-

> "11. When a writ petition is filed in the High court challenging the award of a contract by a public authority or the State, the court must be satisfied that there is some element of public interest involved in entertaining

such a petition. If, for example, the dispute is purely between two tenderers, the court must be very careful to see if there is any element of public interest involved in the litigation. A mere difference in the prices offered by the two tenderers may or may not be decisive in deciding whether any public interest is involved in intervening in such a commercial transaction. It is important to bear in mind that by court intervention, the proposed project may be considerably delayed thus escalating the cost far more than any saving which the court would ultimately effect in public money by deciding the dispute in favour of one tenderer or the other tenderer. Therefore, unless the court is satisfied that there is a substantial amount of public interest, or the transaction is entered into mala fide the court should not intervene under Article 226 in disputes between two rival tenderers.

12. When a petition is filed as a public interest litigation challenging the award of a contract by the State or any public body to a particular tenderer, the court must satisfy itself that the party which has brought the litigation is litigating bona fide for public good. The public interest litigation should not be merely a cloak for attaining private ends of a third party or of the party bringing the petition. The court can examine the previous record of public service rendered by the organisation bringing public interest litigation. Even when a public interest litigation is entertained, the court must be careful to weigh conflicting public interests before intervening. Intervention by the court may ultimately result in delay in the execution of the project. The obvious consequence of such delay is price escalation. If any re-tendering is prescribed, cost of the project can escalate substantially. What is more important is that ultimately the public would have to pay a much higher price in the form of delay in the commissioning of the project and the consequent delay in the contemplated public service becoming available to the public. If it is a power project which is thus delayed, the public may lose substantially because of shortage in electric supply and the consequent obstruction in industrial development. If the project is for the construction of a road, or an irrigation canal, the delay in transportation facility becoming available or the delay in water supply for agriculture being available, can be a substantial set back to the country's economic development. Where the decision has been taken bona fide and a choice has been exercised on legitimate considerations and not arbitrarily, there is no reason why the court should entertain a petition under Article 226.

13. Hence before entertaining a writ petition and passing any interim orders in such petitions, the court must carefully weigh conflicting public interests. Only when it comes to a conclusion that there is an overwhelming public interest in entertaining the petition, the court should intervene.

> 14. Where there is an allegation of mala fides or an allegation that the contract has been entered into for collateral purposes, and the court is satisfied on the material before it, that the allegation needs further examination, the court would be entitled to entertain the petition. But even here, the court must weigh the consequences in balance before granting interim orders.
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> 15. Where the decision-making process has been structured and the tender conditions set out the requirements, the court is entitled to examine whether these requirements have been considered. However, if any relaxation is granted for bona fide reasons, the tender conditions permit such relaxation and the decision is arrived at for legitimate reasons after a fair consideration of all offers, the court should hesitate to intervene."

88. In *Air India Limited*'s case (supra), the Supreme Court has held that the State can choose its own method for award of contract but it should comply with the norms, standard and procedure. The decision has to be on the basis of overall view of the transaction after weighing various relevant factors and having regard to commercial viability. The Court shall not interfere with the decision but it can interfere with the decision-making process on grounds of *mala fide,* unreasonableness or arbitrariness. The relevant paragraph of the said decision is reproduced as under:-

> "7. The law relating to award of a contract by the State, its corporations and bodies acting as instrumentalities and agencies of the Government has been settled by the decision of this Court in *Ramana Dayaram Shetty v. International Airport Authority [(1979) 3 SCC 489], Fertilizer Corporation Kamgar Union v. Union of India [(1981) 1 SCC 568], CCE v. Dunlop India Ltd. [(1985) 1 SCC 260], Tata Cellular v. Union of India [(1994) 6 SCC 651], Ramniklal N. Bhutta v. State of Maharashtra [(1997) 1 SCC 134], and Raunaq International Ltd. v. I.V.R. Construction Ltd. [(1999) 1 SCC 492].* The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that

> decision is not amendable to judicial review, the Court can examine the decision making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness. The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision making process the Court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The Court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the Court should intervene."
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> (emphasis supplied)

It may be noticed here that in the present case, there is no challenge to the decision-making process of the respondents but the decision itself has been impugned on the ground of arbitrariness and unreasonableness.

89. Relying upon para 12 of the judgment in *Dinesh Engineering Corporation*'s case (supra), learned counsel for the petitioners had urged that though the Courts would not normally interfere with the policy decision but if the material on record indicates that such policy decision reeks of discrimination and unreasonableness, the scope of judicial review cannot be curtailed. The Court does not always have to abdicate their right to scrutinise whether the policy in question is formulated keeping in mind all the relevant facts. The relevant paragraph of the judgment reads, thus:-

> "12. A perusal of the said letter shows that the Board adopted this policy keeping in mind the need to assure reliability and quality performance of the governors and their spare parts in the context of sophistication, complexity and high degree of precision associated with governors. It is in this background that in para (i) the letter states that the spares should be procured on proprietary basis from EDC. This policy proceeds on the hypothesis that there is no other supplier in the country who is competent enough to supply the spares required for the governors used by the Indian Railways without taking into consideration the fact that the writ petitioner has been supplying these spare parts for the last over 17 years to various Divisions of the Indian Railways which fact has been established by the writ petitioner from the material produced both before the High Court and this Court and which fact has been accepted by the High Court. This clearly establishes the fact that the decision of the Board as found in the letter dated 23.10.1992 suffers from the vice of non-application of mind. On behalf of the appellants, it has been very seriously contended before us that the decision vide letter dated 23.10.1992 being in the nature of a policy decision, it is not open to courts to interfere since policies are normally formulated by experts on

the subjects and the courts not being in a position to step into the shoes of the experts, cannot interfere with such policy matters. There is no doubt that this Court has held in more than one case that where the decision of the authority is in regard to a policy matter, this Court will not ordinarily interfere since these policy matters are taken based on expert knowledge of the persons concerned and courts are normally not equipped to question the correctness of a policy decision. But then this does not mean that the courts have to abdicate their right to scrutinise whether the policy in question is formulated keeping in mind all the relevant facts and the said policy can be held to be beyond the pale of discrimination or unreasonableness, bearing in mind the material on record. It is with this limited object if we scrutinise the policy reflected in the letter dated 23.10.1992, it is seen that the Railways took the decision to create a monopoly on proprietary basis on EDC on the ground that the spares required by it for replacement in the governors used by the Railways required a high degree of sophistication, complexity and precision, and in the background of the fact that there was no party other than EDC which could supply such spares. There can be no doubt that an equipment of the nature of a spare part of a governor which is used to control the speed in a diesel locomotive should be a quality product which can adhere to the strict scrutiny/standards of the Railways, but then the pertinent question is : has the Board taken into consideration the availability or non-availability of such characteristics in the spare parts supplied by the writ petitioner or, for that matter, was the Board alive to the fact that like EDC the writ petitioner was also supplying the spare parts as the replacement parts for the GE governors for the last over 17 years to the various Divisions of the Railways? A perusal of the letter dated 23.10.1992 does not show that the Board was either aware of the existence of the writ petitioner or its capacity or otherwise to supply the spare parts required by the Railways for replacement in the governors used by it, an ignorance which is fatal to its policy decision. Any decision, be it a simple administrative decision or a policy decision, if taken without considering the relevant facts, can only be termed as an arbitrary decision. If it is so, then be it a policy decision or otherwise, it will be violative of the mandate of Article 14 of the Constitution."

(emphasis supplied)

We have carefully gone through the said decision as well and in our considered opinion, the law laid down in the said decision is not attracted to the present case. In *Dinesh Engineering Corporation*'s case (supra), the writ petitioner-Corporation was a manufacturer of certain spare parts of GE governors used by the Railways to control the speed in diesel locomatives (sic : locomotives). The Railways invited tenders for supply of certain items of spare parts for use in GE governors. Though there was another competitor company "EDC", it was only the writ petitioner who submitted its tender. The Railway

Authorities informed the writ petitioner that in the context of the sophistication, complexity and high degree of precision associated with the governor and keeping in view the need to assure their reliable and quality performance, the Railway Board has taken a policy decision that GE/EDC governor spares should be procured on proprietary basis from EDC, who were the only equipment manufacturers till alternative sources of supply were available. The High Court quashed the order of the Railways rejecting the tender of the writ petitioner and the letter dated 23.10.1992 reflecting the said policy decision. On behalf of the respondent, it was contended that EDC being a manufacturer of complete governors, should be considered as the supplier of spares for the original equipment and was better than a manufacturer of only a spare part and further, under the guidelines, the Railways was entitled to reject any tender offer without assigning any reasons. It was in these circumstances, the Supreme Court held that the policy of the Board proceeded on hypothesis that there was no other competent supplier but the material on record revealed that the writ petitioner was supplying these spare parts for the last over 17 years to various divisions of the Railways and therefore, the policy decision so taken had suffered from non-application of mind and arbitrariness and was subject to judicial review on that ground. Whereas, in the present case, as already observed hereinbefore, the State Government has made a reasonable decision to extend the period of licence by further two months to continue upto 31.05.2021 as the initial period of licence of about two months in April and May, 2020 has been lost without much business due to pandemic. The insertion of Clause 16.7 is also not a new condition. In clause 13 of the affidavit submitted by the petitioners, the petitioners have given consent for any change to be made in the policy. Similar clause also exists in Rule III of the Rules of General Application. Thus, there is no element of arbitrariness or unreasonableness attached to the amended policy dated 23.05.2020 so as to warrant exercise of judicial review of the policy decision of the State.

90. The petitioners had put strong emphasis on Section 56 of the Contract Act. Thus, question No.(iv) concerning as to whether in the facts and circumstances of the case, the contract between the parties has become so impossible or unlawful as to excuse the petitioners from its performance in terms of Section 56 of the Contract Act, assumes great significance. A plain reading of second paragraph of Section 56 of the Contract Act, shows that the said provision applies only to the cases where there is existence of contract between the parties. As such the doctrine of frustration can be applied only after the formation of the contract. Since we have come to the conclusion that there has been an existence of a valid concluded contract between the parties, therefore, on the argument raised on behalf of the petitioners invoking Section 56 of the Contract Act, question No.(iv) has been framed. The said question would require an answer on further three issues:

(1) Whether the outbreak of Covid-19 Pandemic, due to which the dispute has arisen between the parties, qualify as "force majeure" condition in the context of Excise Policy 2020-21?

(2) Whether by virtue of Clause 48 of the Excise Policy 2020-21, the "force majeure" condition was expressly or impliedly within the contemplation of the parties so as to exclude the applicability of Section 56 of the Contract Act?

(3) Whether the contract between the parties can be said to have become unworkable, frustrated, impossible and unlawful to perform?

91. The first two issues formulated in the preceding paragraph are interrelated, therefore, taken up together. Before we look into the question "whether the Covid-19 Pandemic can be regarded as the "force majeure" event in the context of Excise Policy 2020-21 or not, the first thing which is to be taken note of is that the petitioners initially in their rejoinder themselves referred to memorandum dated 19.02.2020, which was followed by Office Memorandum dated 13.05.2020 (both Annexure RJ-1) to claim that the Government has clarified that disruption of supply chains due to spread of Coronavirus should be considered as a case of natural calamity and force majeure clause may be invoked. On that basis, it was argued that since the Excise Policy has not taken care of the force majeure event, therefore, the performance of contract has to be excused in terms of Section 56 of the Contract Act. The State denied the applicability of the said office memoranda on the ground that they do not apply to the State. But, when the State raised the defence that Clause 48 of the policy does refer to a force majeure event, the petitioners did not emphasize on the said office memoranda. Instead, it was argued that the Clause 48 of the Excise Policy 2020-21 does not contemplate the pandemic circumstances and implementation of the Act of 2005, therefore, Section 56 of the Contract Act applies on all fours.

92. Clause 48 of the Excise Policy, deals with the effect of closure of the liquor vends as a consequence of liquor prohibition policy or natural calamities. It is provided that in case any liquor shop/shops are closed due to any liquor prohibition policy in the State or in any neighbouring State, the licensee shall not be entitled to any compensation by the State. Clause 48 of the policy further proceeds to lay that the right to re-auction/re-execute any liquor vend in the State shall vest with the State in case any such decision is taken on account of prohibition of liquor in the neighbouring State or even due to any other reason and no objection by the licensee shall be entertained thereon and the objector shall also not be entitled to any compensation or rebate in that regard. Still further, the said clause expressly provides that in case during the period of licence, any loss is caused to the licensee as a consequence of any act of God or natural calamity, the licensee shall not be entitled to any compensation.

93. Firstly, whether it is called "act of God" or "natural calamity" as provided in Clause 48, both are deemed to be a "force majeure" event and the intention of the Central Government while issuing the office memorandum dated 19.02.2020 and 13.05.2020 (Annexure RJ-1) does indicate the Covid-19 to be a force majeure event. However, the petitioners have failed to show how the said memoranda would apply to statutory contract under the Excise Act and its policy. Otherwise also, under office memorandum dated 13.05.2020 force majeure event is only for extension of contract period in view of the restrictions due to lockdown. There is nothing to indicate that the parties can invoke force majeure clause for completely absolving themselves from performance of the contract. The memorandum dated 13.05.2020 reads thus:-

> "4. ..... Therefore, after fulfilling due procedure and wherever applicable, parties to the contract may invoke FMC for all construction/ works contract, goods and services contract and PPP contracts with Government agencies and in such event date for completion of contractual obligations which had to be completed on or after 20th February, 2020 shall extend for a period of not less than three months and not more than six months without imposition of any cost or penalty on the contractor/concessionaire....
>
> 5. ..... It is further clarified that invocation of FMC does not absolve all non-performance of a party to the contract, but only in respect of such non-performance as is attributable to a lockdown situation or restrictions imposed under any Act or executive order of the Government/s on account of Covid-19 global pandemic. It may be noted that, subject to above stated, all contractual obligations shall revive on completion of the period."

Under the Contract Law, an act of God is seen as a defence to excuse the performance of contractual obligations arising out of infringement of conditions of contract or impossibility or impracticability to perform the contract. Thus, even though words "pandemic" and "implementation of Act of 2005" are not specifically mentioned in Clause 48 but the purport of the said clause where it speaks about "implementation of liquor prohibition policy", "act of God", "natural calamity" or for "any other reason" leading to closure of liquor vends in the State lends a wide scope for the applicability of Clause 48 of the policy in the pandemic circumstances. In other words, Clause 48 of the policy expressly saves the compliance of the contract against the breach of the policy on account of "act of God" and also against "natural calamities". In this view of the matter, it would not be out of place to hold that the Covid-19 pandemic or epidemic falls within the meaning and term of "natural calamity" and hence, being a "force majeure" event expressly covered by Clause 48 of the Policy, which in the present case was impliedly within the contemplation of the parties and so its consequences. Thus,

we do not find any force in the argument advanced on behalf of the petitioners that the force majeure event was neither within the contemplation of the parties and nor expressly or impliedly provided for in the Excise Policy.

94. It was also argued on behalf of the petitioners that in order that Clauses 48 and 49 of the policy and Clause XXXIII of the General Licence Conditions are made applicable to the petitioners, such event of "act of God" or "natural calamity" must have occurred during the licence period but since no licence was issued to the petitioners as on the date of declaration of Covid-19 as pandemic or before the commencement of the licence period i.e. 01.04.2020, therefore, the said clauses shall not be applicable to the case of the petitioners. As already observed, strictly even if the status of the petitioners as on the date of commencement of the licence as per the policy period i.e. 01.04.2020, may not have been as that of a licensee but the acceptance of the offer of the petitioners, which was communicated to them vide Annexure P-2, had the effect of binding them to the contract. Thus, Clause 48 of the policy is squarely applicable in the present case.

95. Now, what needs to be seen is the applicability of Section 56 of the Contract Act to the facts and circumstances of the present case. The issue regarding performance of the contract becoming impossible or unlawful, covered under Section 56 of the Contract Act, has been subject matter of interpretation in various pronouncements. We proceed to examine the case law.

96. In the decision in *Taylor vs. Caldwell* (supra), which has been referred to by the learned senior counsel for the petitioners, it has been held that the contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance. The relevant paragraphs of the said decision reads as under:-

> "After the making of the agreement, and before the first day on which a concert was to be given, the Hall was destroyed by fire. This destruction, we must take it on the evidence, was without the fault of either party, and was so complete that in consequence of the concerts could not be given as intended. And the question we have to decide is whether, under these circumstances, the loss which the plaintiffs have sustained is to fall upon the defendants. The parties when framing their agreement evidently had not present to their minds the possibility of such a disaster, and have made no express stipulation with reference to it, so that the answer to the question must depend uon the general rule of law applicable to such a contract.
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> *** *** ***

> .....The principle seems to us to be that, in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance.
>
> In none of these cases is the promise in words other than positive, nor is there any express stipulation that the destruction of the person or thing shall excuse the performance; but that excuse is by law implied, because from the nature of the contract it is apparent that the parties contracted on the basis of the continued existence of the particular person or chattel. In the present case, looking at the whole contract, we find that the parties contracted on the basis of the continued existence of the Music Hall at the time when the concerts were to be given, that being essential to their performance.
>
> We think, therefore, that the Music Hall having ceased to exist, without fault of either party, both parties are excused, the plaintiffs from taking the gardens and paying the money, the defendants from performing their promise to give the use of the hall and Gardens and other things.
>
> Consequently the rule must be absolute to enter the verdict for the defendants."

The ratio laid down in *Taylor vs. Caldwell* (supra) relied upon by the learned senior counsel for the petitioners is not applicable in the present case. In the said case the parties when framing their agreement had made no express stipulation with reference to possibility of any disaster. However, in the present case, the consequences of non-performance of the contract are clearly depicted in Clause 48, 49 and 54 of the policy. In the said decision, apart from absence of express stipulation in the contract, Music Hall for which the agreement was entered, had been completely perished and there was no continued existence of the thing contracted for, whereas, here, the liquor vends for which the contract has been entered into between the parties, temporarily, for about two months, ceased to operate due to Covid-19 pandemic. Thus, the decision in *Taylor vs. Caldwell'*s case (supra) is distinguishable on facts.

97. The judgment in the case of *Satyabrata Ghose'*s case (supra) has been relied upon by the petitioners and respondents both, wherein, the Court has considered the word "impossible" occurring in Section 56 of the Contract Act and held that it is to be considered in its practical sense and not in literal sense. The relief is given by the court on the ground of subsequent impossibility when it finds that the whole purpose or basis of a contract was frustrated by the occurrence of an unexpected event which was beyond what was contemplated by the parties at the time when they entered into the agreement. It was, however, made clear that if the parties do contemplate the possibility of an intervening circumstance which might

affect the performance of the contract, but expressly stipulate that the contract would stand despite such circumstance, there can be no case of frustration because the basis of the contract being to demand performance despite the happening of a particular event. The relevant extract of the judgment reads as under:-

> "16. In the latest decision of the House of Lords referred to above, the Lord Chancellor puts the whole doctrine upon the principle of construction. But the question of construction may manifest itself in two totally different ways. In one class of cases the question may simply be, as to what the parties themselves had actually intended; and whether or not there was a condition in the contract itself, express or implied, which operated, according to the agreement of the Parties themselves to release them from their obligations; this would be a question of construction pure and simple and the ordinary rules of construction would have to be applied to find out what the real intention of the parties was. According to the Indian Contract Act, a promise may be express or implied *(vide Section 9)*. In cases, therefore, where the court gathers as a matter of construction that the contract itself contained impliedly or expressly a term, according to which it would stand discharged on the happening of certain circumstances, the dissolution on of the contract would take place under the terms of the contract itself and such cases would be outside the purview of section 56 altogether. Although in English law these cases are treated as cases of frustration, in India they would be dealt with under section 32 of the Indian Contract Act which deals with contingent contracts or similar other provisions contained in the Act. In the large majority of cases however the doctrine of frustration is applied not on the ground that the parties themselves agreed to an implied term which operated to release them from the performance of the contract. The relief is given by the court on the ground of subsequent impossibility when it finds that the whole purpose or basis of a contract was frustrated by the intrusion or occurrence of an unexpected event or change of circumstances which was beyond what was contemplated by the parties at the time when they entered into the agreement. Here there is no question of finding out an implied term agreed to by the parties embodying a provision for discharge, because the parties did not think about the matter at all nor could possibly have any intention regarding it. When such an event or change of circumstance occurs which is so fundamental as to be regarded by law as striking at the root of the contract as a whole, it is the court which can pronounce the contract to be frustrated and at an end. The court undoubtedly has to examine the contract and the circumstances under which it was made. The belief, knowledge and intention of the parties are evidence, but evidence only on which the court has to form its own conclusion whether the changed circumstances destroyed altogether the basis of the adventure and its underlying object *(vide Morgan v. Manser, 1947 AER Vol. II, p.666)*. This may be called a rule of construction by English Judges but it is

certainly not a principle of giving effect to the intention of the parties which underlies all rules of construction. This is really a rule of positive law and as such comes within the purview of section 56 of the Indian Contract Act.

17. It must be pointed out here that if the parties do contemplate the possibility of an intervening circumstance which might affect the performance of the contract, but expressly stipulate that the contract would stand despite such circumstances, there can be no case of frustration because the basis of the contract being to demand performance despite the happening of a particular event, it cannot disappear when that event happens. As Lord Atkinson said in *Matthey v. Curling (1922) 2 AC 180 at 234,* "a person who expressly contracts absolutely to do a thing not naturally impossible is not excused for nonperformance because of being prevented by the act of God or the King's enemies.....or vis major". This being the legal position, a contention in the extreme form that the doctrine of frustration as recognised in English law does no come at all within the purview of section 56 of the Indian Contract Act cannot be accepted."

"(emphasis supplied)"

However, examining the disturbing element, which alleged to have substantially prevented the performance of the contract as a whole, the Court held as under:-

"23. The company, it must be admitted, had not commenced the development work when the requisition order was passed in November, 1941. There was no question, therefore, of any work or service being interrupted for an indefinite period of time. Undoubtedly the commencement of the work was delayed but was the delay going to be so great and of such a character that it would totally upset the basis of the bargain and comercial object which the parties had in view? The requisition orders, it must be remembered, were; by their very nature, of a temporary character and the requisitioning authorities could, in law, occupy the position of a licensee in regard to the requisitioned property. The order might continue during the whole period of the war and even for some time after that or it could have been withdrawn before the war terminated. If there was a definite time limit agreed to by the parties within which the construction work was to be finished, it could be said with perfect propriety that delay for an indefinite period would make the performance of the contract impossible within the specified time and this would seriously affect the object and purpose of the venture. But when there is no time limit whatsoever in the contract, nor even an understanding between the parties on that point and when during the war the parties could naturally anticipate restrictions of various kinds which would make the carrying on of these operations more tardy and difficult

> than in times of peace, we do not think that the order of requisition affected the fundamental basis upon which the agreement rested or struck at the roots of the adventure."

98. In *Mary'*s case (supra), referred to on behalf of the respondents, the Supreme Court observed that Rule 5(15) of the Rules in question i.e. Kerala Abkari Shops (Disposal in Auction) Rules 1974, clearly provided that on the failure of the auction-purchaser to execute the agreement, the deposit already made towards earnest money and security money shall be forfeited. The relevant paragraphs of the said decision read as under:-

> "17. In view of second paragraph of Section 56 of the Contract Act, a contract to do an act which after the contract is made, by reason of some event which the promissory could not prevent becomes impossible, is rendered void. Hence, the forfeiture of the security amount may be illegal. But what would be the position in a case in which the consequence for non-performance of contract is provided in the statutory contract itself? The case in hand is one of such cases.
>
> 18. The doctrine of frustration excludes ordinarily further performance where the contract is silent as to the position of the parties in the event of performance becoming literally impossible. However, in our opinion, a statutory contract in which party takes absolute responsibility cannot escape liability whatever may be the reason. In such a situation, events will not discharge the party from the consequence of non-performance of a contractual obligation. Further, in a case in which the consequences of non-performance of contract is provided in the statutory contract itself, the parties shall be bound by that and cannot take shelter behind Section 56 of the Contract Act, 1872. Rule 5(15) in no uncertain terms provides that "on the failure of the auction-purchaser to make such deposit referred to in sub-rule 10" or "execute such agreement temporary or permanent" "the deposit already made by him towards earnest money and security shall be forfeited to Government". When we apply the aforesaid principle we find that the appellant had not carried out several obligations as provided in sub-rule (10) of Rule 5 and consequently, by reason of sub-rule (15), the State was entitled to forfeit the security money."

99. Thus, in *Satyabrata Ghose* (supra), which has been relied upon by both the parties and *Mary'*s case (supra) relied upon by the respondents it has been made clear in so many words that if the parties do contemplate the possibility of an intervening circumstance which might affect the performance of the contract, but expressly stipulate that the contract would stand despite such circumstance, there can be no case of frustration because the basis of the contract was to demand performance despite the happening of a particular event. The same principle has been reiterated by the Supreme Court in its recent pronouncements in *Energy*

Watchdog and *South East Asia Marine Engineering and Constructions Ltd.*'s cases (supra).

100. In the case of *Energy Watchdog* (supra), which has been relied upon by both the parties, the Supreme Court reiterating its earlier judgment in *Satyabrata Ghose*'s case (supra), has given exhaustive consideration to the doctrine of frustration and when it can be invoked. The relevant extracts of the said decision, read as under:-

> "34. "Force Majeure" is governed by the Contract Act, 1872. Insofar as it is relatable to an express or implied clause in a contract, such as the PPAs before us, it is governed by Chapter III dealing with the contingent contracts, and more particularly, Section 32 thereof. Insofar as a force majeure event occurs dehors the contract, it is dealt with by a rule of positive law under Section 56 of the Contract Act.....
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> *** *** ***
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> 37. In Alopi Parshad & Sons Ltd. v. Union of India, (1960) 2 SCR 793, this Court, after setting out Section 56 of the Contract Act, held that the Act does not enable a party to a contract to ignore the express covenants thereof and to claim payment of consideration, for performance of the contract at rates different from the stipulated rates, on a vague plea of equity. Parties to an executable contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate, for example, a wholly abnormal rise or fall in prices which is an unexpected obstacle to execution. This does not in itself get rid of the bargain they have made.....
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> *** *** ***
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> 47. ..... Consequently, we are of the view that neither Clause 12.3 nor 12.7, referable to Section 32 of the Contract Act, will apply so as to enable the grant of compensatory tariff to the respondents. Dr. Singhvi, however, argued that even if Clause 12 is held inapplicable, the law laid down on frustration under Section 56 will apply so as to give the respondents the necessary relief on the ground of force majeure. Having once held that clause 12.4 applies as a result of which rise in the price of fuel cannot be regarded as a force majeure event contractually, it is difficult to appreciate a submission that in the alternative Section 56 will apply. As has been held in particular, in Satyabrata Ghose v. Mugneeram Bangur & Co., AIR 1954 SC 44, when a contract contains a force majeure clause which on construction by the Court is held attracted to the facts of the case, Section 56 can have no application. On this short ground, this alternative submission stands disposed of."
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> (Emphasis supplied)

101. In the judgment relied upon on behalf of the petitioners rendered in *South East Asia Marine Engineering'*s case (supra), the contract between the parties was for well drilling and other auxiliary operations in Assam. When the prices of High Speed Diesel, which was essential material for carrying out the said work, increased, the appellant claimed that it triggered the "change in law" clause under the contract and the respondent became liable to reimburse them for the same. The dispute was referred to an arbitral tribunal and ultimately, travelled to the Supreme Court. Relying upon the decision in *Satyabrata Ghose* (supra), the Supreme Court held as under:-

> **"23.** When the parties have not provided for what would take place when an event which renders the performance of the contract impossible, then Section 56 of the Contract Act applies. When the act contracted for becomes impossible, then under Section 56, the parties are exempted from further performance and the contract becomes void...

102. Thus, the reliance placed by the petitioners upon the judgment in *South East Asia Marine Engineering'*s case (supra), is misconceived as the said decision also spells out that Section 56 of the Contract Act applies only when the parties have not provided for as to what would happen when the contract becomes impossible to perform.

103. Relying upon the judgment of the Supreme Court in *Kenneth Builders and Developer'* case (supra), it was contended on behalf of the petitioners that the respondents had not provided a clear passage to the petitioners even though beyond their contemplation due to an intervening circumstance and therefore, it had frustrated the implementation of the contract. The said judgment casts light upon the words "impossibility" and "impossible" in relation to Section 56 of the Contract Act, wherein, the Supreme Court relying upon *Satyabrata Ghose'*s case (supra) held as under:-

> "31. Insofar as the present case is concerned, DDA certainly did not contemplate a prohibition on construction activity on the project land which would fall within the Ridge or had morphological similarity to the Ridge. It is this circumstance that frustrated the performance of the contract in the sense of making it impracticable of performance.
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> *** *** ***
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> 33. It is one thing for DDA to now contend before us that Kenneth Builders could have applied to the Ridge Management Board for permission to carry out development activity and also approached this Court for necessary permission but it is another thing to say that these requirements were not within the contemplation of DDA and certainly not within the contemplation of Kenneth Builders. For a statutory body like DDA to contend that in the face of the legal position (with which

> DDA obviously does not agree), Kenneth Builders ought to have persisted and perhaps initiated or invited litigation cannot be appreciated.
>
> 34. When DDA informed Kenneth Builders that the project land was available on an "as is where is basis" and that it was the responsibility of the developer to obtain all clearances, the conditions related only to physical issues pertaining to the project land and ancillary or peripheral legal issues pertaining to the actual construction activity, such as compliance with the building bye-laws, environmental clearances etc. The terms and conditions of "as is where is" or environmental clearances emphasized by the learned counsel for DDA certainly did not extend to commencement of construction activity prohibited by law except after obtaining permission of the Ridge Management Board and this Court. On the contrary, it was the obligation of DDA to ensure that the initial path for commencement of construction was clear, the rest being the responsibility of the developer. The failure of DDA to provide a clear passage due to an intervening circumstance beyond its contemplation went to the foundation of implementation of the contract with Kenneth Builders and that is what frustrated its implementation."
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> (emphasis supplied)

In our view, the judgment in *Kenneth Builders and Developer'* case (supra) is not applicable to the case of the petitioners for the reason that in the facts of the said case, in the agreement, the DDA had not contemplated a prohibition on construction activity on the project land, which circumstance had frustrated the performance of the contract.

104. Thus, it can be safely held that by virtue of Clause 48 of the Excise Policy 2020-21, the "force majeure" condition was expressly and impliedly within the contemplation of the parties and therefore, Section 56 of the Contract Act cannot be invoked, as in the present case, the petitioners have agreed to their obligations by submitting an affidavit that they would be bound by the terms and conditions of the Excise Policy 2020-21.

105. Learned senior counsel for the petitioners then contended that Clause 48 of the policy only relates to compensation and rebate not being available to the licensees in the event of closure of their shops due to liquor prohibition policy, natural calamities or for any other reason but it does not even remotely states that the refund of the earnest money will not be granted. In the first place, Clause 48 not only speaks about the compensation but also about not extending any rebate to the objector/licensee on account of decision, if any, taken for re-auctioning the liquor shop. Secondly, the said argument would not help the cause of the petitioners as the provision in respect of earnest money is separately provided in

Clause 9.6 of the policy, which stipulates that the successful bidder, who participated in the e-tender process, cannot later draw back from the process of auction otherwise, the amount deposited by him shall be forfeited and legal proceedings will be initiated against him. Clause 9.4 of the policy also provides for the manner and time in which the earnest money was to be deposited and in case there is default in depositing remaining amount of earnest money within the prescribed time limit, the offer shall be cancelled and such liquor shops group/single group re-auctioned. Undoubtedly, in terms of Clause 54 of the policy, there is no impediment for the petitioners to seek refund of the amount so deposited towards process fee/conditions for allotment of liquor shop in case any unavoidable circumstance arises due to which the auction process is required to be cancelled. Similarly, Clause 49 also provides for seeking waiver by the licensee in case he is unable to pay the minimum excise duty on account of closure of shop due to social, political, legal reasons and lack of sales. It was contended on behalf of the petitioners that the policy of the previous year had provided certain benefits to the earlier liquor vends under Clauses 49 and 54 of the policy. However, there is nothing to indicate that any such steps had been taken by the petitioners but the request was not considered.

106. Again an alternative submission of the learned senior counsel for the petitioners was that even if Clause 48 of the policy is taken to be as a "force majeure" clause, then also the agreement stood frustrated and therefore, the petitioners are excused from its performance. This submission was tried to be substantiated by raising various arguments. Although in view of the finding recorded hereinabove that the provisions under Section 56 of the Contract Act do not apply in the present case, the question whether the contract between the parties had rendered unworkable, frustrated, impossible and unlawful to perform has lost its significance but in all fairness, the controversy involved in the petition may be viewed from that angle as well.

107. Similar aspect of the matter received consideration by the House of Lords in *F.A. Tamplin Steamship Company'*s case (supra) wherein, by a time charter-party, a tank steamship was chartered for sixty months to be employed in lawful trades for voyages but after the outbreak of the war, when the charter-party had nearly three years to run, the steamer was requisitioned by the Admiralty and was employed in the transport of troops. The charterers who were willing to continue the agreed freight, contended that the charter-party was still subsisting. The majority view was that the interruption was not of such a character as that the Court ought to imply a condition that the parties should be excused from further performance of the contract and that the requisition did not determine or suspend the contract. The relevant paragraph of the said judgment reads, thus:-

> "Applying the principle to the present case, I find that these contracting parties stipulated for the use of this ship during a period of five years,

which would naturally cover the duration of many voyages. Certainly both sides expected that these years would be years of peace. They also expected, no doubt, that they would be left in joint control of the ship, as agreed, and that they would not be deprived of it by any act of State. But I cannot say that the continuance of peace or freedom from an interruption in their use of the vessel was a tacit condition of this contract. On the contrary, one at all events of the parties might probably have thought, if he thought of it at all, that war would enhance the value of the contract, and both would have been considerably surprised to be told that interruption for a few months was to release them both from a time charter that was to last five years. On the other hand, if the interruption can be pronounced, in the language of Lord Blackburn already cited, "so great and long as to make it unreasonable to require the parties to go on with the adventure," then it would be different. Both of them must have contracted on the footing that such an interruption as that would not take place, and I should imply a condition to that effect. Taking into account, however, all that has happened, I cannot infer that the interruption either has been or will be in this case such as makes it unreasonable to require the parties to go on. There may be many months during which this ship will be available for commercial purposes before the five years have expired. It might be a valuable right for the charterer during those months to have the use of this ship at the stipulated freight. Why should he be deprived of it? No one can say that he will or that he will not regain the use of the ship, for it depends upon contingencies which are incalculable. The owner will continue to receive the freight he bargained for so long as the contract entitles him to it, and if, during the time for which the charterer is entitled to the use of the ship, the owner received from the Government any sums of money for the use of her, he will be accountable to the charterer. Should the upshot of it all be loss to either party—and I do not suppose it will be so - then each will lose according as the action of the Crown has deprived either of the benefit he would otherwise have derived from the contract. It may be hard on them as it was on the plaintiff in Appleby v. Myers L.R.2 C.P. 651. The violent interruption of a contract always may damage one or both of the contracting parties. Any interruption does so. Loss may arise to some one whether it be decided that these people are or that they are not still bound by the charterparty. But the test for answering that question is not the loss that either may sustain. It is this: Ought we to imply a condition in the contract that an interruption such as this shall excuse the parties from further performance of it? I think not, I think they took their chance of lesser interruptions and the condition I should imply goes no further than that they should be excused if substantially the whole contract became impossible of performance, or in other words impracticable, by some cause for which neither was responsible. Accordingly I am of the opinion that this charterparty did not come to an end when the steamer

was requisitioned and that requisition did not suspend it or affect the rights of the owners or charterers under it, and that the appeal fails."

(emphasis supplied)

Analysing the judgment in *F.A. Tamplin Steamship Company's* case (supra) it may be noted that it was held therein that if the interruption in the performance of a contract can be pronounced so as to make it unreasonable to require the parties to go on with the adventure then it may excuse the parties from further performance of the contract but in the facts of the said case it was found that the interruption was not of such a character as that the Court ought to imply that condition.

108. In *Satyabrata Ghose's* case (supra), the Supreme Court held that the word "impossible" occurring in Section 56 of the Contract Act is to be considered in its practical sense and not in literal sense. The Court was of the view that the subsequent impossibility to perform the contract should mean that whole purpose or basis of a contract is frustrated by the occurrence of an unexpected event which was beyond the contemplation of the parties at the time of agreement. The relevant paragraph of the said judgment reads, thus:-

"9. The first paragraph of the section lays down the law in the same way as in England. It speaks of something which is impossible inherently or by its very nature, and no one can obviously be directed to perform such an act. The second paragraph enunciates the law relating to discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done. The wording of this paragraph is quite general, and though the illustrations attached to it are not at all happy, they cannot derogate from the general words used in the enactment. This much is clear that the word "impossible" has not been used here in the sense of physical or literal impossibility. The performance of an act may not be literally impossible but it may be impracticable and useless from the point of view of the object and purpose which the parties had in view; and if an untoward event or change of circumstances totally upset the very foundation upon which the parties rested their bargain, it can very well be said that the promisor found it impossible to do the act which he promised to do.

*** *** ***

15. These differences in the way of formulating legal theories really do not concern us so long as we have a statutory provision in the Indian Contract Act. In deciding cases in India the only doctrine that we have to go by is that of supervening impossibility or illegality as laid down in section 56 of the Contract Act, taking the word "Impossible" in its practical and not literal sense. It must be borne in mind, however, that

> section 56 lays down a rule of positive law and does not leave the matter to be determined according to the intention of the parties."
>
> (emphasis supplied)

109. The judgment in *Smt. Sushila Devi'*s case (supra) was relied upon by the learned counsel for the petitioners to contend that the impracticability to perform or uselessness of the contract should be determined on the basis of the object and purpose the parties had in view at the time of entering into the contract. In the said judgment, the question for consideration relatable to the present case, was that whether the doctrine of frustration of contract was limited to cases of physical impossibility. In the facts of the said case, on account of criminal disturbances following partition of India, after agreement of lease with the respondent-highest bidder, who as per the agreement, was liable to execute and register the lease deed in favour of Vidyawati, it was not possible for either party to give effect to the lease agreement for the lands situated in Gujranwala, which became part of Pakistan. The respondent sued the appellants - legal heirs of Vidyawati, for return of the amount deposited and damages. The suit was decreed and the High Court also affirmed the decree. The matter travelled to the Supreme Court. In para-11, it was held that the performance of the contract has become impossible because having regard to the object and purpose the parties had in view the contract became impracticable or useless. However, the Court made it clear that the supervening events should be such that take away the very basis of the contract and it should be of such a character that it strikes at the root of the contract. This finding completely ousts the stand of the petitioners that the impossibility should be determined on the basis of the object and purpose the parties had in view at the time of agreement. The relevant paragraph of the said judgment, reads as under:

> "11. In our opinion, on this point the conclusion of the appellate court is not sustainable. But in fact, as found by the trial court as well as by the appellate court, it was impossible for the plaintiffs to even get into Pakistan. Both the trial court as well as the appellate court have found that because of the prevailing circumstances, it was impossible for the plaintiffs to either take possession of the properties intended to be leased or even to collect rent from the cultivators. For that situation the plaintiffs were not responsible in any manner. As observed by this Court in Satyabrata Ghose v. Mugneeram Bangur and Company, AIR 1954 SC 44, the doctrines of frustration is really an aspect or part of the law of discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done and hence comes within the purview of Section 56 of the Indian Contract Act. The view that Section 56 applies only to cases of physical impossibility and that where this section is not applicable recourse can be had to the principles of English law on the subject of frustration is not correct. Section 56 of the Indian Contract Act lays down a rule of positive law and does not leave the

> matter to be determined according to the intention of the parties. The impossibility contemplated by Section 56 of the Contract Act is not confined to something which is not humanly possible. If the performance of a contract becomes impracticable or useless having regard to the object and purpose the parties had in view then it must be held that the performance of the contract has become impossible. But the supervening events should take away the basis of the contract and it should be of such a character that it strikes at the root of the contract."
>
> (emphasis supplied)

110. In *Energy Watchdog'*s case (supra) which has been relied upon by both the parties, the Supreme Court in view of its earlier judgment in *Naihati Jute Mills Ltd. vs. Khyaliram Jagannath,* AIR 1968 SC 522 has held that Courts have no general power to absolve a party from the performance of its part of the contract merely because its performance has become onerous on account of an unforeseen turn of events. For Section 56 to apply, the entire contract must become impossible to perform. The Court held as under:-

> "38. Similarly, in Naihati Jute Mills Ltd. vs. Khyaliram Jagannath, AIR 1968 SC 522, this Court went into the English law on frustration in some detail, and then cited the celebrated judgment of Satyabrata Ghose v. Mugneeram Bangur & Co. Ultimately, this Court concluded that a contract is not frustrated merely because the circumstances in which it was made are altered. The courts have no general power to absolve a party from the performance of its part of the contract merely because its performance has become onerous on account of an unforeseen turn of events.
>
> *** *** ***
>
> 47. We are, therefore, of the view that neither was the fundamental basis of the contract dislodged nor was any frustrating event, except for a rise in the price of coal, excluded by Clause 12.4, pointed out. Alternative modes of performance were available, albeit at a higher price. This does not lead to the contract, as a whole, being frustrated....."

111. In *Joshi Technologies'* case (supra), the Supreme Court in very unambiguous terms has held that it cannot ever be that a licensee can work out the license if he finds it profitable to do so and challenge the conditions under which he agreed to take the license, if he finds it commercially inexpedient to conduct his business. The relevant observations read, thus:-

> "70.5. Writ petition was not maintainable to avoid contractual obligation. Occurrence of commercial difficulty, inconvenience or hardship in performance of the conditions agreed to in the contract can provide no justification in not complying with the terms of contract

> which the parties had accepted with open eyes. It cannot ever be that a licensee can work out the license if he finds it profitable to do so: and he can challenge the conditions under which he agreed to take the license, if he finds it commercially inexpedient to conduct his business."

112. Thus, in all the above referred cases i.e. *F.A. Tamplin* (supra), *Satyabrata Ghose* (supra), *Smt. Sushila Devi* (supra), *Energy Watchdog* (supra) and *Joshi Technologies'* case (supra) so far as they have dealt with the issue pertaining to frustration of the contract, it has been commonly held that the impossibility to perform a contract must be a practical impossibility so much so that the whole purpose or basis of a contract or the entire contract gets frustrated and the impossibility or frustration should strike at the root of the contract.

113. Keeping the said unanimous principles laid down in the aforesaid decisions, we shall now examine whether the contract between the parties had become unworkable, impossible, frustrated and unlawful to perform as was contended by the learned counsel for the petitioners. The direction to shutdown the liquor vends in the respective Districts was initially issued through the District Magistrates in the entire State w.e.f. 21st March, 2020. This was done to avoid the spread of Covid-19 by maintaining social distancing and it marginally affected the licensees for the previous year 2019-20 while did not allow the successful bidders, whose offers were accepted against the Excise Policy 2020-21, to operate their liquor vends w.e.f. 01.04.2020 when the period of licence was to commence. It was a common ground that even the licences could not be issued to the successful bidders before 01.04.2020 after the communication of the acceptance letters was already made to them. Thereafter, Nation-wide lockdown was effected from 25th March, 2020, which was extended till 03rd May, 2020. On 02nd May, 2020, the State Government took a decision to open the liquor vends and started issuing the licences to the successful bidders in whose favour the allotment/acceptance letters had already been issued in the month of March, 2020 before declaration of the Nation-wide lockdown. This was the time when the present petitions were filed on 02nd May, 2020. Since the lockdown was still in force, as it was further extended, therefore, the respondents provided the licences on the email IDs provided by the successful bidders, which is nowadays a preferred mode of official communication and is in vogue in all the Government Departments as well.

114. While issuing the licences to all the petitioners vide letter dated 02nd May, 2020 (Annexure A-2 to IA No.3995/2020), the petitioners were also asked to collect the original licences and complete the remaining formalities for the licence period 2020-21. As is apparent from letter dated 04th May, 2020 (Annexure A-4 to IA No.3995/2020) issued by the Department of Commerce, State of M.P., all the liquor shops in the three red-zones districts i.e. Bhopal,

Indore and Ujjain were directed to remain close while in other red-zone districts i.e. Jabalpur, Dhar, Badwani, East Nimar (Khandwa), Dewas and Gwalior, the liquor shops, which did not fall in the urban/city area, were allowed to open. The shops falling in orange zones i.e. Khargone, Raisen, Hoshangabad, Ratlam, Aagar-Malwa, Mandsaur, Sagar, Shajapur, Chhindwara, Alirajpur, Tikamgarh, Shahdol, Sheopur, Dindori, Burhanpur, Harda, Betul, Vidisha, Morena and Rewa were allowed to run in all areas except the areas falling in the containment zones whereas the shops of green zone Districts were allowed to run in complete districts from 7.00 a.m. to 7.00 p.m. with certain restrictions like social distancing, restricted timings and prohibition on opening of bars/*Ahatas*, receptions/marriages etc. having more than 20 people were also directed to be imposed under the SOPs issued by the Department of Home, Govt. of India and the Excise Department as mentioned in the said letter. The same order dated 04th May, 2020 has been placed on record by the respondents with their return as Annexure R-3.

115. The aforesaid exercise was continued and ultimately, from 02nd June, 2020 onwards, all the liquor vends falling in red zones have also been allowed to be operated, however, while the timings for closing the shops have been intermittently extended upto 9 p.m. but the restrictions as before have been directed to be continued. In this view of the matter, it is clear that in the red-zone districts i.e. Indore, Bhopal and Ujjain the shops remained completely closed for about two months till 01st June, 2020 while in other red zone districts including Jabalpur and Gwalior, the shops in the urban/city areas have remained closed upto 01st June, 2020 but the shops which did not fall in the urban/city areas, had been allowed to be opened from 04th May, 2020. After an interim order was passed on 04th June, 2020, except the petitioners in this batch of writ petitions, who are 57 liquor groups as stated by the learned counsel for the respondents, and have surrendered their licences, as many as 323 liquor groups for the policy year 2020-21 have continued with their licences and have been operating the liquor vends. The plea of the petitioners seeking avoidance of the performance of the contract on the basis of revenue involved rather than the number of allottees/licensees who are operating the liquor vends does not depict that it has become impossible or unlawful to carry on the trade of liquor for the remaining period. In this manner, there has been closure of liquor business in red zone districts Indore, Bhopal and Ujjain and other red zone districts like Jabalpur, Dhar, Badwani, East Nimar (Khandwa), Dewas and Gwalior in the urban/city areas for about two months and five days for the liquor vends which were allotted by way of renewal and just about two months for the liquor vends which were allotted through auction. In other zones, the liquor vends were allowed to run in urban/city areas except containment zones and rural areas with restrictions and some of the petitioners have run the liquor vends from the date of permission granted in that behalf i.e.

04th May, 2020 on the basis of the licences issued to them and under the protective orders and assurance given by the learned counsel for the respondents at the bar during pendency of the petitions that no coercive steps shall be taken against the petitioners.

116. Thus, the overall operation of the liquor vends could be said to be in disarray for only about two months during which period also the liquor shops of red zones were also allowed to be opened from 04th May, 2020 except for the urban/city areas and three red zones of Bhopal, Indore and Ujjain. Therefore, it is not the case where the whole contract had got frustrated and become impossible to perform. It is to be borne in mind that the contract is for the period 01.04.2020 to 31.03.2021 and about three quarters of business is still left. Further, vide amended Notification, an option was also given to the licensees to extend the period of licence by two months i.e. till 31.05.2021, which would in the long run also compensate the petitioners to make up the loss caused in the initial two months of the policy period. Thus, the point raised by the learned counsel for the petitioners that full 12 months are not available to the petitioners, no longer survives. The argument that full 14 hours of sale period was not made available to the petitioners also does not stand as by order dated 31.05.2020, the time for opening the shops was fixed as 7.00 a.m. to 9.00 p.m. i.e. 14 hours.

117. There are other mitigating circumstances conversed to so-called frustration of the contract, as the respondents have placed on record that the State vide order dated 31.03.2020 (Annexure R-4) has granted several relaxations and waivers of licence fee etc. and this fact has already been noted above in paragraph 13 of this order. It was also placed on record that the revenue of Rs.12,000 Crore was expected for the year 2020-21 and the State would forego a revenue of around Rs.1,200 Crore in the month of April, 2020 and similar substantial loss in the following month on account of those waivers being given to the petitioners but still the State was trying to accommodate the licensees so as to meet the exigencies occurred due to pandemic. It was submitted that the maximum retail price of the domestic as well as foreign liquor was increased, which would benefit the licensees to overcome the loss caused to them.

118. Additionally, as regards the restrictions on opening of shop bars*/Ahatas,* on the basis of a chart produced as Annexure R-5, it was submitted by the respondents that in the year 2017-18, total 149 shop bar licences were given. The said facility was withdrawn in the year 2018-19 but still the annual value of liquor shops in the entire State rose to at an average of 20% and overall rise in the State was recorded at an average of 14.7%. Even otherwise, in terms of Clause 2 of the Excise Policy 2020-21, the licences for the shop bars*/Ahatas* facility are given after charging additional licence fee as an option as per the rules. The Clause 2 of the Excise Policy 2020-21 is reproduced as under:-

''2. **शॉपबार** – राज्य में स्थित ऑफ श्रेणी की देशी/विदेशी मदिरा की दुकानों को नियमानुसार पात्रता होने पर, विकल्प के रूप में अतिरिक्त मूल्य प्रभारित कर शॉप बार लाइसेंस के माध्यम से ऑन श्रेणी में परिवर्तित किया जायेगा।

देशी/विदेशी मदिरा दुकानों में शॉप बार हेतु निर्धारित फीसः–

वर्ष 2020–21 हेतु शॉपबार लायसेंस हेतु वार्षिक लायसेंस फीस मदिरा दुकान के वार्षिक मूल्य का 2 प्रतिशत रखा जायेगा एवं इस वार्षिक लायसेंस फीस के विरूद्ध मदिरा का प्रदाय अनुमत नहीं किया जायेगा ।''

''(1) विदेशी मदिरा दुकानेां में शॉपबार हेतु निर्धारित मापदंडः–''

1..... से 11. .....

(2) देशी मदिरा दुकानों में शॉपबार हेतु निर्धारित मापदंडः–''

1..... से 10. .....''

119. The shop bars/*Ahata* facility is given on payment of additional licence fee and is optional, therefore, merely because restriction has been imposed on such facility, it would not mean that for the lack of such facility the entire contract stands frustrated, rather the Excise Policy 2020-21 and the General Licence Conditions also empower the State to change the conditions of the policy and the licence during the currency of the policy and licence period. The petitioners have not offered any explanation to the submissions advanced by the learned counsel for the respondents relating to the aforesaid waivers and relaxations granted by the State to accommodate the licensees and to enable them to operate the licences.

120. Still further, learned counsel for the petitioners had vehemently argued that due to spread of Covid-19 pandemic, extended lockdown and severe restrictions imposed in the aftermath of the lockdown, the object which the licensees had in view before entering into the contract has defeated as many buyers would keep away from liquor due to health reasons. In our considered opinion, such a ground may be good ground for suggesting about the hardships to perform a contract but not for claiming that the entire contract has become impossible, unworkable and practicable to perform. Similarly, the argument that since the opening of liquor vends during the lockdown was declared as an offence, therefore, the contract had become unlawful to perform has also no merit. As discussed above, only for about two months the liquor vends in major cities like Indore, Bhopal, Gwalior, Jabalpur and Ujjain where the petitioners claim that in terms of revenue the assessment should be done, remained closed. Thus, it is not a case that substantially the entire contract has become impossible to perform.

121. The Supreme Court in *Kandath Distilleries'*s case (supra) has held that a citizen has no fundamental right to trade or business in liquor as a beverage. Such activities are res extra commercium and therefore, cannot be carried on by any citizen as a matter of right. The State can impose restrictions and limitations on trade or business in liquor as a beverage. The relevant paragraphs of the said decision are reproduced as under:-

> "24. Article 47 is one of the Directive Principles of State Policy which is fundamental in the governance of the country and the State has the power to completely prohibit the manufacture, sale, possession, distribution and consumption of liquor as a beverage because it is inherently dangerous to human health. Consequently, it is the privilege of the State and it is for the State to decide whether it should part with that privilege, which depends upon the liquor policy of the State. State has, therefore, the exclusive right or privilege in respect of portable liquor. A citizen has, therefore, no fundamental right to trade or business in liquor as a beverage and the activities, which are res extra commercium, cannot be carried on by any citizen and the State can prohibit completely trade or business in portable liquor and the State can also create a monopoly in itself for the trade or business in such liquor. This legal position is well settled. The State can also impose restrictions and limitations on the trade or business in liquor as a beverage, which restrictions are in nature different from those imposed on trade or business in legitimate activities and goods and articles which are res commercium. Reference may be made to the judgments of this Court in Vithal Dattatraya Kulkarni and Others v. Shamrao Tukaram Power SMT and Others (1979) 3 SCC 212, P. N. Kaushal & Others v. Union of India & Others (1978) 3 SCC 558, Krishna Kumar Narula etc. v. State of Jammu & Kashmir & Others AIR 1967 SC 1368, Nashirwar and Others v. State of Madhya Pradesh & Others (1975) 1 SCC 29, State of A. P. & Others v. McDowell & Co and Others (1996) 3 SCC 709 and Khoday Distilleries Ltd. & Others v. State of Karnataka & Others (1995) 1 SCC 574.
>
> 25. Legislature, in its wisdom, has given considerable amount of freedom to the decision makers - the Commissioner and the State Government since they are conferred with the power to deal with an article which is inherently injurious to human health."

122. Thus, keeping in view the ratio laid down by the Supreme Court in the series of decisions and after analysing the entire gamut of facts and circumstances, noted hereinabove, it cannot be said that the contract between the parties had become totally unworkable, impossible, frustrated and unlawful to perform. At the most it was a case of hardships and interruption in the operation of

the liquor shops for about two months and therefore, the petitioners cannot claim that they are excused from the performance of the contract.

123. Coming to question No.(v), though in W.P. Nos.7520, 7567, 7576, 7578, 8259 and 8260 of 2020, Clauses 9.6, 10.1.4, 10.1.5, 10.1.9, 44 and 48 of the Excise Policy 2020-21 dated 25.02.2020 have been challenged but no legal infirmity has been substantiated or violation of any statutory or Constitutional provision has been shown by the learned counsel for the petitioners appearing therein. Even otherwise, the petitioners having participated in the auction process being fully aware of the terms and conditions of the policy and on acceptance of their bids, legally enforceable contract/agreement having been entered, they cannot be heard to say that the particular clauses of the policy are illegal.

124. The question No.(vi) relates to the preliminary objections raised by the learned senior counsel for the respondents regarding maintainability of the writ petition and also that disputed questions of fact cannot be adjudicated in exercise of writ jurisdiction under Article 226 of the Constitution of India. Suffice it to notice that in view of our answers on merit to various issues involved in the writ petition, these points have been rendered academic and as such, are left open without expressing any opinion in the facts and circumstances of the case at this stage.

125. In view of the totality of the facts and circumstances of the case, we do not find that any illegality has been committed by the respondents which may warrant interfere in these writ petitions.

126. At this stage, it would be just to refer to the alternative plea raised by the parties on the strength of Clauses 48, 49 and 54 of the Excise Policy.

127. Clause 48 of the Policy does not provide any benefit to the petitioners if decision to close the liquor vends or re-auctioning the liquor vends is taken on account of any liquor prohibition policy or any loss is caused to the licensees on account of act of God or natural calamity. However, Clause 49 provides that consequent upon any social, political presentations or law and order situations, loss of sale of liquor can be compensated in equal proportion of minimum bank guarantee after taking into account all the situations if the licensee of a particular area was unable to take the supply of liquor equivalent to minimum bank guarantee duty fixed for the licence year. Such decision to compensate or grant rebate in duty payable shall be taken by the State/Excise Commissioner on the basis of reasonable and factual proposal sent by the District committee. Under Clause 54 of the policy, there is no impediment for the petitioners to seek refund of the amount so deposited towards process fee/conditions for allotment of liquor shop in case any unavoidable circumstance arises due to which the auction process is required to be cancelled. However, no compensation is payable.

128. In view of the stand of the State that if the petitioners find that they are at a loss in operating the allotted liquor shops, they can opt to invoke Clause 49 of the Excise Policy to seek remission/waiver of Excise duty to the extent of loss, file an application to the District Committee provided thereunder who shall send a fact finding report to the State Government whereupon decision on waiver of Excise duty shall be taken, it shall be open for the petitioners to approach the competent Authority of the respondents invoking Clauses 49 and 54 of the Excise Policy 2020-21 and due to changed scenario and the fact and circumstances, the said Authority shall consider the claim of the petitioners sympathetically and take decision in accordance with law.

129. IA No.4141/2020 has been filed seeking action against the respondents for contempt of Court for violating the assurance given to this Court on 27.05.2020. In view of the reply filed controverting the claim of the petitioners, no action against the respondents is called for. The said IA stands *disposed of* accordingly.

130. In view of the aforesaid, all the writ petitions stand **disposed of.** Let a signed order be placed in the file of W.P. No.7373/2020 and copy whereof be placed in the file of connected cases.

Order accordingly

I.L.R. [2020] M.P. 1704
APPELLATE CIVIL
Before Mr. Justice Sanjay Dwivedi

F.A. No. 279/2017 (Jabalpur) decided on 15 May, 2020

SHUBHALAYA VILLA (M/S) & ors. …Appellants

Vs.

VISHANDAS PARWANI & ors. …Respondents

***A. Civil Procedure Code (5 of 1908), Order 7 Rule 11 & 13 – Subsequent Suit on Same Cause of Action – Maintainability* – Held – If plaint is rejected on any grounds mentioned under Order 7 Rule 11 CPC, plaintiff can file subsequent suit on same cause of action as per provisions of Order 7 Rule 13 CPC – Provision(Statute) under Order 7 Rule 13 has not provided any distinction – Court cannot re-write the provision and carve out a distinction which is not available under the provision, making it redundant and equivocal – Impugned order set aside – Appeal allowed. (Paras 18 to 21)**

***क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 7 नियम 11 व 13 – समान वाद हेतुक पर पश्चात्वर्ती वाद – पोषणीयता* – अभिनिर्धारित – यदि सि.प्र.सं. के आदेश 7 नियम 11 के अंतर्गत उल्लिखित किये गये किन्हीं भी आधारों पर वाद नामंजूर किया जाता है, वादी सि.प्र.सं. के आदेश 7 नियम 13 के उपबंधों के अनुसार समान वाद हेतुक पर एक**

पश्चात्वर्ती वाद प्रस्तुत कर सकता है – आदेश 7 नियम 13 के अंतर्गत उपबंध (कानून) ने कोई अंतर उपबंधित नहीं किया है – न्यायालय उपबंध पुनर्लिखित नहीं कर सकता तथा न ही ऐसा कोई अंतर निकाल सकता है जो कि उपबंध में उपलब्ध न हो, एवं उसे अनावश्यक तथा अस्पष्ट बना दे – आक्षेपित आदेश अपास्त – अपील मंजूर।

***B. Civil Procedure Code (5 of 1908), Order 7 Rule 11 – Suit Barred by Time – Cause of Action – Pleading & Evidence* – Held – Cause of action as pleaded in plaint is correct or not, cannot be decided at the threshold and being a question of fact, can only be determined after recording of evidence – Court below holding the suit as barred by time, is without any foundation or reasoning and based on presumption – Court below erred in deciding such issue while deciding application under Order 7 Rule 11 – Impugned order set aside – Appeal allowed. (Para 23)**

ख. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 7 नियम 11 – समय द्वारा वर्जित वाद – वाद हेतुक – अभिवचन व साक्ष्य – अभिनिर्धारित – वाद–पत्र में किया गया अभिवाक् सत्य है अथवा नहीं, आरंभ में विनिश्चित नहीं किया जा सकता तथा तथ्य का प्रश्न होने के कारण, केवल साक्ष्य अभिलिखित करने के पश्चात् ही अवधारित किया जा सकता है – निचले न्यायालय द्वारा वाद को समय द्वारा वर्जित ठहराया जाना, आधारहीन या तर्कहीन है तथा उपधारणा पर आधारित है – आदेश 7 नियम 11 के अंतर्गत आवेदन विनिश्चित करते समय निचले न्यायालय ने उक्त विवाद्यक का विनिश्चय करने में त्रुटि की है – आक्षेपित आदेश अपास्त – अपील मंजूर।

***C. Civil Procedure Code (5 of 1908), Order 2 Rule 2(3) & Order 7 Rule 11 – Maintainability of Suit* – Held – Objections under Order 2 Rule 2(3) are technical bar and do not fall under Order 7 Rule 11 CPC and can only be considered while deciding issues on merits during trial – Plaint cannot be rejected at threshold while deciding application under Order 7 Rule 11 CPC because such application is decided on basis of averments made in plaint and not the defence taken in written statement. (Para 24 & 25)**

ग. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 2 नियम 2(3) व आदेश 7 नियम 11 – वाद की पोषणीयता – अभिनिर्धारित – आदेश 2 नियम 2(3) के अंतर्गत आपत्तियां तकनीकी वर्जन हैं तथा सि.प्र.सं. के आदेश 7 नियम 11 के अंतर्गत नहीं आती हैं एवं विचारण के दौरान गुणदोषों के आधार पर विवाद्यकों का विनिश्चय करते समय केवल विचार में ली जा सकती हैं – सि.प्र.सं. के आदेश 7 नियम 11 के अंतर्गत आवेदन का विनिश्चय करते समय वाद–पत्र आरंभ में खारिज नहीं किया जा सकता क्योंकि उक्त आवेदन का विनिश्चय वाद–पत्र में किये गये प्रकथनों के आधार पर किया जाता है तथा न कि लिखित कथन में लिये गये बचाव के आधार पर।

***D. Civil Procedure Code (5 of 1908), Order 2 Rule 2(3) – Maintainability of Suit* – Held – Object of provision is not frustrated because there is no multiplicity of suit pending, vexing defendants in multiple litigation. (Para 25)**

घ. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 2 नियम 2(3) – वाद की पोषणीयता – अभिनिर्धारित – उपबंध का उद्देश्य विफल नहीं होता क्योंकि प्रतिवादीगण को अनेक मुकदमों में तंग करने वाले लंबित वाद की बहुलता नहीं है।

Cases referred:

(2019) 6 SCC 621, (2013) 1 SCC 625, (2007) 5 SCC 614, (2005) 5 SCC 548, (2004) 3 SCC 137, (1998) 2 SCC 70, (1977) 4 SCC 467, 2009 ILR (MP) 2965=2009 (3) MPWN 105, AIR 2003 SC 759, (2005) 7 SCC 510, 2015 (3) CTC 259.

M.P.S. Chuckal, for the appellants.
Sankalp Kochar, for the respondents.

J U D G M E N T

SANJAY DWIVEDI, J.:- This appeal is filed under Section 96 of the Code of Civil Procedure against the order dated 27.02.2017 passed by the District Judge, Bhopal in CS No.579-A/2016 thereby decided four applications filed by the defendants separately. Dealing with those applications, the District Judge has finally arrived at a conclusion that the application filed under Order VII Rule 11 read with Section 151 of CPC deserves to be allowed as the suit was not found maintainable in view of the provisions of Order VII Rule 11 (d) of CPC. The court below has found that the suit was barred by time and was also not maintainable in view of the provisions of Order II Rule 2 (3) of CPC.

2. The impugned order has been assailed by the appellants mainly on the ground that the Court below has failed to take note of the fact that the present suit is not hit by the provisions of Order II Rule 2 of CPC inasmuch as relief(s) claimed in the present suit are the same relief(s) which were claimed in the earlier suit and the cause of action is also same.

3. It is submitted by the learned counsel for the appellants that the trial Court has erred in holding that the present suit is hit by Order II Rule 2(3) of CPC and as such exercised the power under Order VII Rule 11(d) of CPC. It is also submitted by the learned counsel for the appellants that the Court below has failed to see that the suit could not have been dismissed because it is not barred as per the provisions of Order VII Rule 13 of CPC. It is further submitted by the learned counsel for the appellants that the Court below erred in holding that the suit is barred by limitation and as such misread and misinterpreted the Article 54 of the Limitation Act. As per the appellants, the cause of action for filing the present suit accrued on 17.01.2014 that is the date on which the plaintiff received summons of Civil Suit No.17-B/2014 filed by the defendants/respondents. As per the appellants, the limitation begins to run from 17.01.2014 and the question of

limitation is mixed question of law and facts and that could have been decided only after recording the evidence.

4. *Per contra,* the learned counsel for the respondents submitted that the impugned order has been rightly passed by the Court below and the benefit of Order VII Rule 13 of CPC has rightly been refused to the appellants because the same is available only under the circumstance when the previous suit is dismissed for curable defects and the subsequent suit can be maintained provided the defect is cured. It is contended by him that since in the present case, the previous suit is dismissed being barred by law, the subsequent suit for the same cause of action was not maintainable. Learned counsel for the respondents further submits that it is rightly held by the Court below that the instant suit was barred by law in terms of Order II Rule 2(3) of CPC because earlier suit i.e. CS No.439-A/2015 was in relation to specific performance of contract for the same subject matter of the property, between the same parties and compromise agreement dated 23.11.2012 was very much in existence at the time of filing earlier suit i.e. CS No.439-A/2015 but in the said suit no claim was made on the basis of agreement dated 23.11.2012 and as such, it was relinquished/waived by the plaintiffs and those subsequent suits on the basis of agreement dated 23.11.2012 was rightly held not maintainable and the application under Order VII Rule 11 (d) of CPC has rightly been allowed by the Court below. He relied upon various judgments reported in (2019) 6 SCC 621 (*Pramod Kumar and another Vs. Zalak Singh and others*); (2013) 1 SCC 625 (*Virgo Industries (Eng.) Private Limited Vs. Venture Retech Solutions Private Limited*); (2007) 5 SCC 614 (*Hardesh Ores (P) Ltd. Vs. Hede and Company*); (2005) 5 SCC 548 (*N.V. Srinivasa Murthy and others Vs. Mariyamma and others*); (2004) 3 SCC 137 (*Sopan Sukhdeo Sable and others Vs. Assistant Charity Commissioner and others*); (1998) 2 SCC 70 (*ITC Limited Vs. Debts Recovery Appellate Tribunal and others*) and (1977) 4 SCC 467 (*T. Arivandandam Vs. T.V. Satyapal and another*).

5. The relevant facts are briefly stated hereinunder to appreciate the rival legal contentions urged on behalf of the parties in this appeal.

The plaintiff Nos.1 and 2 (appellants herein) are partnership firm with the partners namely plaintiff No.3 (respondent No.3 herein) and his wife Smt. Nanda Khare. The suit land is described in paras 2 to 5 of the plaint and was recorded in the name of the defendants. The suit land is described in three parts as blocks 'A', 'B' and 'C'. On 22.10.2006 a partnership firm was created with partners namely plaintiff No.3 and defendants No.1 to 4 (respondents No.1 to 4 herein) in respect of 3.29 acres of land detailed in block 'C'.

On 14.12.2006 an agreement to sale was executed in between plaintiff No.3 and defendants No.1 to 5 for purchase of the land detailed in block 'A' admeasuring 13.63 acres @ Rs.40 lac per acre. On 01.01.2007, the plaintiff No.1

entered into property development agreement with defendants No.1 to 4 in respect of the land detailed in block 'B' admeasuring 8.37 acres. There were five suits filed between the parties for different reliefs and cause of action.

CS No.109-B/2012 was filed by plaintiff No.1 for recovery of amount of Rs.8,54,42,529/- with interest.

CS No.1089-A/2012 was filed by plaintiff No.3 seeking relief of specific performance of contract in respect of 13.63 acres of the land detailed in block 'A'.

The aforesaid two suits have been withdrawn pursuant to compromise dated 23.11.2012.

On 17.01.2014 the plaintiffs received summons of CS No.17-B/2014 filed by the defendants seeking recovery of amount of Rs.4.22 crore relating to the property given under compromise dated 23.11.2012. This suit is still pending.

On 05.05.2015 plaintiff No.3 filed a CS No.439-A/2015 seeking relief of specific performance of contract in respect of the land detailed in block 'A' admeasuring 13.63 acres on the basis of agreement dated 14.12.2006. This civil suit was dismissed by the trial Court on an application under Order VII Rule 11 of CPC on the ground that the same was barred in terms of Order XXIII Rule 1(4) of CPC.

On 27.06.2016 the instant suit has been filed by the plaintiffs which has given rise to the impugned order bearing CS No.579-A/2016 for the same cause of action as was involved in CS No.439-A/2015.

In the suit, defendants filed four separate applications under Order VII Rule 11 of CPC seeking rejection of plaint on various grounds mainly that the suit is hit by Order II Rule 2(3) of CPC and is barred by limitation.

6. While deciding the applications, the Court below vide impugned order amounting to decree has dismissed the suit as barred by Order II Rule 2(3) of CPC and also on the ground of limitation.

7. From the impugned order, it reveals that the Court below has dismissed the suit holding that the same is not maintainable as it is not tenable in view of the provisions of Order II Rule 2(3) of CPC and has also held that the same is barred by time. The applications submitted by the defendants have been decided analogously as in all those applications defendants have made a request that the suit is liable to be dismissed in view of the provisions of Order VII Rule 11(d) of CPC.

8. As per the application submitted by defendant Nos.1 and 5 it is claimed that the plaintiffs in para 5(1) of the plaint claimed the relief regarding specific performance of contract and in addition to that they have claimed recovery of an

amount of Rs.48,00,504/- and Rs.4,22,32,529/-. The defendants have submitted that same relief was claimed in CS No.1089-A/2012 which got withdrawn on 23.11.2012 on an application submitted by plaintiff No.3. No relief was granted, therefore, for the same relief on the basis of same cause of action, no subsequent suit could be filed. As per the defendants, the suit was barred by the provisions of Order XXIII Rule 1(4) of CPC. It is further claimed that the plaintiffs again filed a CS No.439-A/2015 on the basis of agreement dated 14.12.2006 which got dismissed on the ground that the same could not have been filed under Order XXIII Rule 1(4) CPC. It is also claimed that the instant civil suit which is based upon agreement dated 14.12.2006 and compromise agreement dated 23.11.2012 is also not maintainable as the same is hit by the provisions of Order XXIII Rule 1(4) and Order II Rule 2 of CPC.

9. Defendant No.2 moved an application saying that the suit i.e. CS No.439-A/2015 was filed in which in paragraph 20, the date for arising of the cause of action was pleaded in the instant suit for the same cause of action and the same date is mentioned since the suit CS No.439-A/2015 was dismissed vide order dated 18.01.2016 in view of the provisions of Order VII Rule 11 of CPC. It is further mentioned in the application that the document dated 23.11.2012 has been pleaded to be proved as cause of action but the earlier suit i.e. CS No.439-A/2015, the part of the claim was made but remaining claim was relinquished and as such present suit is barred by limitation of Order II Rule 2(3) of CPC. It is also claimed that the suit should have been filed within a period of three years i.e. from 23.11.2012 but it has been filed on 27.06.2016, therefore, the said suit was not maintainable as barred by time.

10. In the application submitted by defendant Nos.3 and 6, they have claimed that the suit is barred by the provisions of Order XXIII Rule 1(4) of CPC and also claimed that earlier suit i.e. CS No.439-A/2015 was dismissed in view of the provisions of Order VII Rule 11 of CPC and in the said suit, the agreement dated 23.11.2012 was the foundation and in the present case i.e. CS NO.579-A/2016 the foundation is of the agreement dated 23.11.2012. Since the subject matter of both the suits was same and, therefore, the same is not maintainable.

11. Likewise, in the application submitted by defendant Nos.4 and 7, it is stated that the suit i.e. CS No.1089-A/2012 based upon the agreement dated 14.12.2006 was withdrawn without any leave on an application submitted under Order XXIII Rule 1 of CPC and, therefore, after that no suit could have been brought on the basis of agreement dated 14.12.2006.

12. The plaintiffs have filed a reply of all the applications separately but the Court below has considered the same and decided analogously because the stand of the plaintiffs in all those reply was almost same. In a nutshell, the plaintiffs have taken the stand that CS No.439-A/2015 though was rejected on the ground that the

same was not maintainable in view of the provisions of Order VII Rule 11 (d) of CPC as the suit was based upon agreement dated 14.12.2006 and earlier suit was also filed for the specific performance of the said agreement and was withdrawn without the leave of the Court and, therefore, subsequent suit was not maintainable for the same subject matter. But, under the provisions of Order VII Rule 13 of CPC the plaintiffs had right to file fresh suit for the same cause of action and could not have been dismissed as per the provisions of Order VII Rule 11 (d) of CPC. So far as the limitation is concerned, it is stated by the plaintiffs that the limitation begins w.e.f. 17.04.2014 but not from 23.11.2012. It is also stated by the plaintiffs that the issue regarding relinquishment of claim and the suit was barred under the provisions of Order II Rule 2(3) of CPC can only be considered by the Court after recording the evidence because as per the plaintiffs, application under Order VII Rule 11 of CPC has to be decided on the basis of averments made in the plaint.

13. Considering the stand of the defendants in their separate applications and the stand taken by the plaintiffs in reply to those applications, the Court below has formulated as many as seven questions to be adjudicated and finally held that the suit was barred by time and also not maintainable under the provisions of Order II Rule 2(3) of CPC. The Court below has also considered the fact regarding benefit of Order VII Rule 13 of CPC and has held under the circumstances when suit is already dismissed exercising the power under Order VII Rule 11 of CPC as barred by law then provisions of Order VII Rule 13 of CPC would not be applicable and no benefit of the respective provisions can be granted to the plaintiffs.

14. I have heard the arguments advanced by the learned counsel for the parties and perused the record.

15. As per arguments advanced by the learned counsel for the appellants the core question involved in the case which is to be adjudicated as to whether the Court below has rightly considered the applications of Order VII Rule 13 of CPC or not and whether question of limitation and applicability of provision of Order II Rule 2(3) of CPC at the threshold while deciding the application under Order VII Rule 11 of CPC. As such, I am confining myself to adjudicate the issue as to whether under the present facts and circumstances of the case, the instant suit i.e. CS No.579-A/2016 was maintainable as per the provisions of Order VII Rule 13 of CPC or not and whether the Court below has rightly considered the application submitted by the defendants under Order VII Rule 11 of CPC.

16. Indisputably, from the impugned order the Court below has observed that the present suit was barred as per the provisions of Order VII Rule 11(d) of CPC as the same was not maintainable as per the provisions of Order II Rule 2(3) of CPC and the same was also barred by time. It is required to see the provisions of Order VII Rule 11 of CPC under which the Court below has exercised the power and dismissed the suit. The respective provision is quoted hereinbelow:-

> **11. Rejection of plaint.**-The plaint shall be rejected in the following cases:-
>
> (a) where it does not disclose a cause of action;
>
> (b) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;
>
> (c) where the relief claimed is properly valued but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;
>
> **(d) where the suit appears from the statement in the plaint to be barred by any law;**
>
> (e) where it is not filed in duplicate;
>
> (f) where the plaintiff fails to comply with the provisions of rule 9: Provided that the time fixed by the Court for the correction of the valuation or supplying of the requisite stamp-paper shall not be extended unless the Court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature for correcting the valuation or supplying the requisite stamp-paper, as the case may be, within the time fixed by the Court and that refusal to extend such time would cause grave injustice to the plaintiff.

17. The Court below has exercised the power under Order VII Rule 11 of CPC and dismissed the suit as per the provisions of Order VII Rule 11(d) of CPC as the suit was found barred by law.

18. In assessing the merits of rival submissions, it would, at the outset, be necessary to advert to the provisions of Order VII Rule 13 of CPC and hence for the purpose of convenience it is quoted hereinbelow:-

> **13. Where rejection of plaint does not preclude presentation of fresh plaint**.-The rejection of the plaint on any of the grounds hereinbefore mentioned shall not of its own force preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action.

19. From a bare reading of the provisions of Order VII Rule 13 of CPC, it is clear that the statute has not provided any distinction as to under what circumstances, the plaintiffs cannot present the fresh plaint in respect of the same cause of action if the earlier plaint has been rejected exercising the power provided under Order VII Rule 11 of CPC. On the contrary, it enables the plaintiffs to present fresh plaint if the earlier one was rejected on any of the grounds mentioned under Order VII Rule 11 of CPC.

20. The Court below in paragraph 38 of the order has carved out the distinction under which the provision of Order VII Rule 13 of CPC is applied and has described as under:-

> 38. आदेश 7 नियम 13 व्य.प्र.सं. में यद्दपि यह स्पष्ट रूप से कहा गया है कि ''किसी भी कारण से'' वाद यदि अस्वीकार किया गया है तो भी नया वाद प्रस्तुत किया जा सकता है। परन्तु यदि वाद विधि द्वारा वर्जित होना पाया जा चुका है तो यह वर्जना सतत् रूप से कायम रहेगी, जो नया वाद प्रस्तुत करते समय भी आकृष्ट होने के कारण उक्त वाद को अस्वीकार योग्य बनायेगी। अतएव आदेश 7 नियम 13 व्य.प्र. सं. का लाभ वादीगण को प्राप्त नहीं हो सकता।

21. As per the aforesaid explanation given by the Court, it indicates that if the plaint is rejected under the provisions of Order VII Rule 11(d) of CPC then the provisions of Order VII Rule 13 would not be applicable and the plaintiffs cannot take advantage of the same. I am not convinced with the interpretation of the Court below in regard to the provisions of Order VII Rule 13 of CPC because such interpretation has no foundation and is completely contrary to the intention of the statute. The Court cannot rewrite the provision and carve out a distinction which is not available under the provisions and which makes the provision redundant or equivocal. The learned counsel for the respondents has submitted that as per the settled principle of law, the provision of Order VII Rule 13 of CPC applies to the cases where the previous plaint is dismissed for curable defects and thus in such cases the subsequent suit on the same cause of action can be maintained provided the defect is cured. He further submits that looking to the factual matrix of the previous suit which has been dismissed being barred by law, the present suit on the same cause of action is clearly barred by law and as such rightly held by the Court that the same is not maintainable and further denied to give any benefit of the provision of Order VII Rule 13 of CPC saying that the same is not attracted in the present factual matrix. However, as discussed hereinabove, I am not convinced with the submissions made by the learned counsel for the respondents. Even otherwise, as per the law laid down in the case of *Sopan Sukhdeo Sable* (supra), the Supreme Court has considered the provisions of Order VII Rule 13 of CPC and has held that the said provision does not preclude the presentation of a fresh plaint even though the earlier one is rejected on a legal ground. Accordingly, the view taken by the Court below by not applying the provisions of Order VII Rule 13 of CPC is not sustainable and the order passed by the Court below deserves to be set aside on this ground also as the Court has misconstrued the said provision. The Division Bench of High Court in the case of *Har Prasad Sharma v. Smt. Nisha Sharma and others* 2009 ILR (MP) 2965 = 2009 (3) MPWN 105, has considered the application filed under the provision of Order VII Rule 13 of CPC and allowed the appeal setting aside the order of the Court below as the same has not considered the applicability of Order VII Rule 13 of CPC. Accordingly, the order

impugned is also not sustainable and deserves to be set aside because the Court below has wrongly interpreted the provision of Order VII Rule 13 of CPC.

22. Here in this case, the Court below has also dismissed the suit on the ground that the same was barred by time and has held in paragraph 13 of the impugned order that the limitation starts for filing the suit w.e.f. 23.11.2012. This finding is given in paragraph 31 of the order but the Court below has not assigned any reason as to why, the limitation would not start from the date of acquiring the cause of action by the plaintiffs as pleaded in the plaint. As per the facts and circumstances of the case when the plaintiffs have pleaded in paragraph 18 of the plaint that they acquired the cause of action from the date i.e. 17.11.2014 when they received summons of CS No.17-B/2014. It is settled principle of law that application under Order VII Rule 11 of CPC is decided only on the basis of averments made in the plaint. It has nothing to do with the stand taken by the defendants in their written-statement and the pleadings made by them in this regard. The Supreme Court in the following cases has laid down such a legal position:-

(i) *Saleem Bhai v. State of Maharashtra* AIR 2003 SC 759; and

(ii) *Popat and Kotecha Property v. State Bank of India Staff Association* (2005) 7 SCC 510.

23. Under such circumstances when cause of action is pleaded w.e.f. 17.11.2014 it was a question of fact as to whether the said date was correct date for acquiring the cause of action or not and that could have been determined only after recording the evidence by the parties. As such, finding as given by the Court below in paragraph 31 which is quoted hereinunder is also not sustainable as the Court has not assigned any reason as to on what basis, he arrived at a conclusion that limitation begins from the date of agreement and, therefore, application under Order VII Rule 11 of CPC could not have been allowed at the threshold holding that the suit is barred by time.

> "31. समयावधि की बाधा के आधार पर वाद अस्वीकार किया जा सकता है अथवा नहीं, यह प्रश्न इस बात पर निर्भर करता है कि क्या वाद पत्र के अभिवचनों के अवलोकन से ही यह स्पष्ट ज्ञात किया जा सकता है अथवा नहीं कि वाद समयावधि बाह्य है। वादीगण ने समयावधि की गणना उस दिनांक से होनी बताई है जबकि उन्हें व्यवहार वाद क्र.17–ए/2016 का नोटिस प्राप्त हुआ था। परन्तु यह स्पष्ट है कि इस नोटिस की दिनांक से समयावधि की गणना नहीं की जायेगी। ऐसी स्थिति में यह वाद समयावधि बाह्य भी होना पाया जाता है क्योंकि यह वाद 05.07.2016 को प्रस्तुत किया गया है जो 23.11.2012 के तीन वर्ष के अंदर का नहीं है। **एन. व्ही. श्रीनिवास** (पूर्वोक्त) के न्यायदृष्टांत में माननीय सर्वोच्च न्यायालय ने यह अवधारित किया है कि आदेश 7 नियम 11 व्य.प्र.सं. के आवेदन के स्तर पर न्यायालय द्वारा यह देखा जा सकता है कि समयावधि के आधार पर वाद क्या वर्जित है?

Accordingly, the finding given by the Court below in paragraph 31 of the impugned order holding that the suit was barred by time is also without any foundation and based on presumption ignoring the fact that the cause of action as pleaded by the plaintiff in paragraph 18 of the plaint is correct or not can only be determined after recording the evidence but at the threshold it cannot be considered that the same cause of action is not correct. Thus, in my opinion, the Court below erred in deciding the said issue while deciding the application under Order VII Rule 11 of CPC.

24. The Court below in paragraph 29 of the impugned order has held that the suit is also not maintainable as the same is barred by the provisions of Order II Rule 2(3) of CPC. The Court below has relied upon the decision of the Supreme Court in case of *Virgo Industries* (supra). The learned counsel for the appellants submitted that earlier civil suit i.e. CS No.439-A/2015 was rejected by the Court below allowing the application under Order VII Rule 11 of CPC holding that the suit is barred under the provisions of Order XXIII Rule 1(4) of CPC. It is submitted by the learned counsel for the appellants that the plaintiffs have submitted the fresh plaint as per the provisions of Order VII Rule 13 of CPC. The subsequent suit was objected by the respondents on the ground that the additional relief claimed by the plaintiffs in the instant suit could have been claimed in earlier suit but that was not claimed and suit was dismissed by the Court below by allowing the application of Order VII Rule 11 of CPC, therefore, the subsequent is barred under the provisions of Order II Rule 2(3) of CPC. The Supreme Court in the case of *Virgo Industries* (supra) has considered the object of the provisions of Order II Rule 2 & 3 of CPC and observed as under:-

> "The object behind the enactment of Order 2 Rules 2(2) and (3) CPC is not far to seek. The Rule engrafts a laudable principle that discourages/ prohibits vexing the defendant again and again by multiple suits except in a situation where one of the several reliefs, though available to a plaintiff, may not have been claimed for a good reason. A later suit for such relief is contemplated only with the leave of the court which leave, naturally, will be granted upon the satisfaction and for good and sufficient reasons."

The Supreme Court in the same case has also considered whether the provision of Order II Rule 2 of CPC is attracted in a situation when first suit is disposed of or even in a case which is pending and second suit is filed during the pendency of first one. The Supreme Court has also laid down that for applicability of such provision, it is not required that the suit has to be disposed of but even during pendency of first suit in which in relief is relinquished, for the same relief second suit is not maintainable.

25. I have perused the law laid down by the Supreme Court in the case of *Virgo Industries* (supra) which has been further considered by the Bench of

Madras High Court in case of *P. Shyamla v. Ravi* 2015 (3) CTC 259. The Madras High Court taking into consideration all relevant judgments on this aspect, has observed that the objection regarding maintainability of suit under the provision of Order II Rule 2 (3) of CPC is a technical bar and the same will not fall under Order VII Rule 11 of CPC. It is further held by Madras High Court that the said aspect can be considered at the time of trial by framing appropriate issues but the plaint cannot be rejected at the threshold stage that too at the stage of application under Order VII Rule 11 of CPC because the said application is decided on the basis of averments made in the plaint and not the defence taken by the defendants. Even in my opinion, the Court below has erred in deciding the application of Order VII Rule 11 of CPC by dismissing the suit as barred by the provision of Order II Rule 2 of CPC because the relief claimed in CS No.439-A/2015 though not claimed, cannot be claimed by the plaintiffs/appellants in a subsequent suit i.e. instant CS No.579-A/2016. If the facts of the present case are seen, it is clear that the object of the said provision as has been quoted hereinabove is not frustrated because there is no multiplicity of suit pending vexing defendants in multiple litigation. In the facts of the present case, the earlier suit was dismissed by the Court at the threshold deciding the application of Order VII Rule 11 of CPC. The plaintiff therefore filed a subsequent plaint i.e. CS No.579-A/2016 as per the provisions of Order VII Rule 13 of CPC on the same cause of action as is permissible. The additional relief said to have been claimed and the plea has been raised by the defendants, the said additional relief could have been claimed in earlier suit i.e. CS No.439-A/2015 or not is an issue needed to be determined at the time of trial. The additional relief which is said to have been claimed, could have been claimed by the plaintiffs/appellants if that would have been pending and continued, even by way of amendment but the said suit has been dismissed at the threshold, the present suit has been filed and in view of the law laid down by the Madras High Court in case of *P. Shyamala* (supra), the suit could not have been dismissed allowing the application of Order VII Rule 11 of CPC on technical bar of Order II Rule 2(3) of CPC. The facts of the case of *Virgo Industries* (supra) are altogether different than that of present one. In the said case, two suits were pending and relief claimed in first one could have been claimed in the subsequent suit. Here in this case, the suit filed by the plaintiffs/appellants i.e. CS No.439-A/2015 was dismissed and rejected by the Court below at the threshold then subsequent suit was filed. In the case of *Virgo Industries* (supra), the Supreme Court has not considered this issue as to whether while considering the application under Order VII Rule 11 of CPC at the threshold the technical bar like bar for filing the subsequent suit under the provision of Order II Rule 2(3) of CPC can be decided. But, this aspect has been considered in case of *P. Shyamala* (supra) and has observed by the Madras High Court that said issue has to be decided by the Court during trial framing appropriate issue. The view taken by Madras High Court in case of *P. Shyamala* (supra) also persuaded me to take similar view.

Accordingly, in my opinion, the finding given by the Court below in paragraph 29 holding that the suit is barred is also not sustainable and is hereby set aside. The counsel for the respondents relied upon several decisions as quoted hereinabove, but in none of the decisions this aspect has been considered by the Court except in a case of *P. Shyamala* (supra) that while deciding the application under Order VII Rule 11 of CPC filed at the intitial stage of suit, the suit can be dismissed at the threshold on the ground that the same is not maintainable under the provisions of Order II Rule 2(3) of CPC, as has already been observed hereinabove that deciding such a technical bar by the Court, an application under Order VII Rule 11 of CPC is not the appropriate stage and the Court below has not considered this aspect. Therefore, in my opinion, the said finding as given in paragraph 29 is also not sustainable and is hereby set aside.

26. In view of the aforesaid, it is clear that the Court below has erred in deciding the application of Order VII Rule 11 of CPC in appropriate manner and has further not considered the provisions of Order VII Rule 13 of CPC in an appropriate manner. Accordingly, in view of the reasons aforesaid, the impugned order passed by the Court below is hereby set aside.

27. The appeal is **allowed.** The applications filed under Order VII Rule 11 of CPC are rejected and the matter is remitted back to the Court below for further adjudication. The respondents have liberty to raise their objection at an appropriate stage and same will be decided by the Court below in accordance with law.

Appeal allowed

I.L.R. [2020] M.P. 1716
APPELLATE CRIMINAL
Before Mr. Justice Vivek Rusia

Cr.A. No. 1085/2020 (Indore) decided on 30 June, 2020

MOHD. FIROZ & anr. …Appellants

Vs.

STATE OF M.P. …Respondent

***Penal Code (45 of 1860), Section 379 & 392 – Theft & Robbery – Chain Snatching* – Appellant No. 1 convicted u/S 392 for chain snatching – Held – Section 392 is an aggravated form of theft – To charge the accused u/S 392, prosecution required to establish that while committing theft, offender has voluntarily caused hurt or attempted to cause death or hurt or wrongful restrain or fear of instant death etc. – No such allegation against appellant No. 1, thus wrongly convicted u/S 392 – Conviction altered from Section 392 to Section 379 IPC – Appeal partly allowed. (Para 10)**

दण्ड संहिता (1860 का 45), धारा 379 व 392 – चोरी व लूट – चेन छीनना – अपीलार्थी क्र. 1 को चेन छीनने हेतु धारा 392 के अंतर्गत दोषसिद्ध किया गया – अभिनिर्धारित – धारा 392, चोरी का एक गुरूतर स्वरूप है – अभियुक्त को धारा 392 के अंतर्गत आरोपित करने के लिए अभियोजन को स्थापित करना अपेक्षित है कि चोरी कारित करते समय अपराधी ने स्वेच्छापूर्वक उपहति कारित की है अथवा मृत्यु या उपहति या सदोष अवरोध या तत्काल मृत्यु का भय इत्यादि कारित करने का प्रयास किया है – अपीलार्थी क्र. 1 के विरूद्ध ऐसा कोई अभिकथन नहीं, अतः, गलत रूप से धारा 392 के अंतर्गत दोषसिद्ध किया गया – दोषसिद्धि को धारा 392 से धारा 379 भा.दं.सं. में परिवर्तित किया गया – अपील अंशतः मंजूर।

Akash Rathi, for the appellants.
Prabal Jain, P.L. for the respondent/State.

(Supplied: Paragraph numbers)

J U D G M E N T

VIVEK RUSIA, J. :- Heard through video conferencing.

2. Today the appeal is listed on an application (IA No.3405/2020) filed by appellant No.1 seeking suspension of sentence. The sentence of appellant No.2 has already been suspended vide order dated 12.02.2020.

3. With the consent of parties instead of hearing the argument on the above application, the appeal itself is heard finally.

4. Appellants have filed the present appeal under section 374 of the Cr.P.C against the judgment dated 16.01.2020 passed by learned A.S.J, Indore in S.T.No.648/2017 whereby the appellant No.1 has been convicted under section 392 IPC and sentenced to undergo RI for 5 years with fine of Rs.2000/-; in default of payment of fine 3 months SI and the appellant No.2 has been convicted under section 411 IPC and sentenced to undergo RI for 2 years with fine of Rs.1000/-; in default of payment additional one-month S.I.

5. As per the prosecution story on 07.01.2016 near about 8.10 P.M complainant was parking her Activa (MP09 SL 6983) then one person came on a white Activa and snatched a gold chain from her neck weighing 15 gm. valued at Rs.40,000/- and fled away towards *Usha Raje Parisar.* She gave this information to the police which was registered in Police Station Annapurna as Crime No.11/16 under sections 392 of the IPC against unknown persons. After investigation, it was found that the appellant No.1 did snatch the gold chain and gave it to his wife who is appellant No.2. The police recovered the gold chain from the possession of the house of the appellants vide seizure memo Ex.P/7 and arrested the appellant No.2 on 13.07.2017. The appellant No.1 was already in custody in connection with some other offence, therefore, he was formally arrested on 13.07.2017. After

completing the investigation the police filed Challan against the appellants. Learned ASJ framed the charges under section 392 IPC against appellant No.1 and under section 411 against appellant No.2. The appellants abjured the guilt and prayed for trial.

6. In order to prove the charges against the appellants, the prosecution examined as many as 7 witnesses. After appreciating the evidence came on record vide judgment dated 16.01.2020 the appellants have been convicted and sentenced as mentioned hereinabove.

7. Learned counsel for the appellants submits that the appellant No.1 is in custody since last more than 3 years. He was in jail during the trial also. He was also convicted under section 392 IPC and sentenced to 5 years RI with a fine of Rs.2000/- in S.T No.649/2017. Against the said judgment he preferred a criminal appeal No.3684/19 and vide judgment dated 28.06.2019 this court has reduced the sentence from 4 years to 2 years and maintained the fine amount. Shri Rathi further submits that learned trial Court has wrongly framed the charge under section 392 IPC against the appellant. At the most, he has committed the offence under section 379 IPC. According to him section 392 is made out only if the offender of the theft commits the offence voluntarily and causes or attempts to cause to any person death or hurt or wrongful restraint or fear of instant death or instant hurt otherwise it is a simple case of theft punishable under section 379 IPC. In the present case, as per the version of the complainant PW/1 an unknown person came and simply snatched the gold chain from her neck without causing any hurt, wrongful detention, or threat. Under section 379 IPC the maximum punishment is only 3 years which he has already undergone, therefore, this appeal may be finally disposed of by converting the charge from section 392 to section 379 of the IPC. He further submits that so far as appellant No.2 is concerned, she is the wife of appellant No.1. In her statement under section 313 of the Criminal Procedure Code she has stated that her husband runs a grocery shop and she was called as a witness but she has been arrested in this case. Learned counsel Shri Rathi further submits that she was under impression that her husband bought the gold chain for her. She was not aware that it is a stolen property. Under section 411 IPC no minimum sentence is prescribed, therefore, the period of 2 years sentence may kindly be reduced to the period already undergone in jail. She has no criminal antecedents.

8. Learned Govt. Advocate opposes the above arguments, argued in support of the judgment and prayed for dismissal of the appeal.

9. It is correct that in criminal appeal No.3684/2019 this Court has reduced the sentence of 4 years into 2 years by maintaining the fine amount of Rs.2000/- for the offence punishable under section 392 of the IPC while maintaining the

findings given by the learned trial court. During the same period, the appellant No.1 was implicated in this case also and he was formally arrested.

10. I find substance in the ground raised by Shri Rathi that the appellant No.1 has committed the theft and not the robbery, therefore, he has wrongly been tried under section 392 of IPC instead of section 379 IPC. PW/1 complainant lodged an FIR in the police station on 7.1.2016 narrating the incident that while parking her Activa in the parking lot an unknown person came on a white Activa, snatched the gold chain from her neck and fled away. She has improved the aforesaid version slightly by adding that he kept his hand on her shoulder and thereafter snatched the gold chain. Section 392 IPC is an aggravated form of theft. In order to charge the accused under section 392, the prosecution is required to establish that while committing the theft the offender has voluntarily caused the hurt or attempted to cause death or hurt or wrongful restraint or fear of instant death etc. In the present case, there are no such allegations against the appellant No.1, therefore, at most the appellant No.1 is liable to be convicted under section 379 of the IPC. Since the appellants are not challenging the findings of the theft of the gold chain, therefore, the same are not liable to be re-appreciated hence they are hereby affirmed. Hence, the trial Court has committed a mistake in finding the appellant No.1 guilty for the offence under section 392 instead of section 379 IPC. Hence, the appeal is partly allowed and the conviction of the appellant No.1 is altered from section 392 to section 379 IPC and while maintaining the conviction the jail sentence is reduced from 5 years to 3 years RI with a fine of Rs.2000/-.

11. So far as appellant No.2 is concerned being a wife of appellant No.1 she was found in possession of the stolen article i.e. gold chain. After the theft, the appellant No.1 has kept the said gold chain in his house which was recovered by the police vide seizure memo Ex.P/7 from the house of the appellants. As per PW/2, the police have recovered the gold chain from the house of appellants, therefore, it cannot be said that the chain was recovered from the possession of appellant No.2 alone. Being a wife she was residing in the house and it is not the case of the prosecution that the appellant No.2 was wearing the chain at the time seizure but it was known to her that stolen chain has been kept by appellant No.1 in the house. In view of the above, while maintaining the conviction, the sentence of the appellant No.2 jail sentence is reduced from 2 years to the period already undergone. Both appellants be released after depositing the fine amount, if they are not required in any other offence.

12. The appeal is partly allowed. Trail (sic: Trial) court record be sent back.

C.c as per rules.

Appeal partly allowed

I.L.R. [2020] M.P. 1720 (DB)
APPELLATE CRIMINAL

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

Cr.A. No. 484/2007 (Indore) decided on 7 July, 2020

SHAITANBAI & anr. …Appellants

Vs.

STATE OF M.P. …Respondent

***A. Penal Code (45 of 1860), Sections 302, 450 & 34 – Eye Witness – Injury* – Held – Minor inconsistencies in statement of eye witness (daughter of deceased) – It is established that she was present in the room at the time of incident, accused came to the house of deceased and was quarreling with deceased and dead bodies of deceased was found in the house of deceased which proves that accused attacked the deceased – Eye witness is reliable – Further, it is also established that injuries were sufficient in ordinary course of nature to cause death – Apex Court concluded that even one injury on vital part of body may result in conviction u/S 302 – Conviction and sentence upheld – Appeal dismissed. (Paras 30, 33, 36, 45 & 47)**

क. दण्ड संहिता (1860 का 45), धाराएँ 302, 450 व 34 – प्रत्यक्षदर्शी साक्षी – क्षति – अभिनिर्धारित – प्रत्यक्षदर्शी साक्षी (मृतिका की पुत्री) के कथन में गौण असंगतियां – यह स्थापित है कि वह घटना के समय कमरे में उपस्थित थी, अभियुक्त, मृतिका के घर आयी और मृतिका से झगड़ा कर रही थी तथा मृतिकाओं के शव, मृतिका के मकान में पाये गये थे जो साबित करता है कि अभियुक्त ने मृतकाओं पर हमला किया – प्रत्यक्षदर्शी साक्षी विश्वसनीय है – इसके अतिरिक्त, यह भी स्थापित किया गया है कि चोटें, प्रकृति के मामूली अनुक्रम में मृत्यु कारित करने के लिए पर्याप्त थी – सर्वोच्च न्यायालय ने निष्कर्षित किया कि शरीर के महत्वपूर्ण भाग पर एक चोट भी, धारा 302 के अंतर्गत दोषसिद्धि में परिणामित हो सकती है – दोषसिद्धि एवं दण्डादेश कायम रखा गया – अपील खारिज।

***B. Penal Code (45 of 1860), Section 300, Thirdly & Fourthly – Applicability* – Held – Doctor stated that injuries were such as would cause death in ordinary course of nature – Such statement attracts clause thirdly of Section 300 – "In the ordinary course of nature" would mean that injury is of such nature that death would result without medical intervention – If death results even after medical intervention, then fourthly clause of Section 300 would be applicable. (Para 37 & 38)**

ख. दण्ड संहिता (1860 का 45), धारा 300, तीसरा व चौथा – प्रयोज्यता – अभिनिर्धारित – चिकित्सक ने कथन किया कि चोटें ऐसी थी जो कि प्रकृति के मामूली अनुक्रम में मृत्यु कारित करती – उक्त कथन, धारा 300 के तीसरे खण्ड को आकर्षित करता है – ''प्रकृति के मामूली अनुक्रम में'' का अर्थ होगा कि क्षतियां ऐसी प्रकृति की है कि

चिकित्सीय हस्तक्षेप के बिना मृत्यु परिणामित होगी – यदि चिकित्सीय हस्तक्षेप के पश्चात् भी मृत्यु परिणामित होती है, तब धारा 300 का चौथा खंड लागू होगा।

***C. Penal Code (45 of 1860), Section 300, Fourth Exception – Applicability* – Held – It is established that accused herself same to house of deceased with a daranta which rules out absence of premeditation – Prior to attacking the deceased, a quarrel was going on for a long while, thus no sudden fight and no sudden quarrel – Deceased was defence-less whereas accused was armed with daranta and there was no attempt on part of deceased to cause any injury to accused, thus accused has taken undue advantage of situation – Defence under Fourth Exception is not available to accused. (Para 43)**

ग. दण्ड संहिता (1860 का 45), धारा 300, चौथा अपवाद – प्रयोज्यता – अभिनिर्धारित – यह स्थापित है कि अभियुक्त स्वयं मृतिका के घर दरांता लेकर आयी थी, जो पूर्व चिंतन की अनुपस्थिति को खारिज करता है – मृतकों पर हमला करने के पूर्व लंबे समय तक झगड़ा चल रहा था अतः, अचानक लड़ाई एवं अचानक झगड़ा नहीं – मृतक रक्षाहीन थी जबकि अभियुक्त दरांते के साथ सुसज्जित थी और मृतक की ओर से अभियुक्त को कोई क्षति कारित करने के लिए कोई प्रयत्न नहीं किया गया था, अतः, अभियुक्त द्वारा स्थिति का अनुचित लाभ उठाया गया – अभियुक्त को चौथे अपवाद के अंतर्गत बचाव उपलब्ध नहीं है।

***D. Evidence Act (1 of 1872), Section 106 – Burden of Proof* – Held – It is established that deceased were killed inside their house – As per statement of witnesses and neighbours, accused was seen quarreling with deceased prior to incident – Onus was upon accused u/S 106 of Evidence Act to explain how both ladies were killed. (Para 30)**

घ. साक्ष्य अधिनियम (1872 का 1), धारा 106 – सबूत का भार – अभिनिर्धारित – यह स्थापित है कि मृतकों को उनके मकान में मार डाला गया था – साक्षीगण एवं पड़ोसियों के कथन अनुसार, घटना के पूर्व अभियुक्त को मृतिका से झगड़ा करते देखा गया था – साक्ष्य अधिनियम की धारा 106 के अंतर्गत यह स्पष्ट करने का भार कि कैसे दोनों महिलाओं को मार दिया गया, अभियुक्त पर था।

***E. Penal Code (45 of 1860), Section 300, First Exception – Applicability* – Held – The fact that incident occurred inside house of deceased does away with the defence of grave and sudden provocation given to accused by deceased ladies, thus assailants could not claim benefit of first exception of Section 300 IPC. (Para 33 & 41)**

ङ. दण्ड संहिता (1860 का 45), धारा 300, प्रथम अपवाद – प्रयोज्यता – अभिनिर्धारित – यह तथ्य कि घटना मृतिका के घर के भीतर घटित हुई, मृतक महिलाओंद्वारा घोर एवं अचानक प्रकोपन के बचाव को रद्द करता है अतः, हमलावर धारा 300 भा.दं.सं. के प्रथम अपवाद के लाभ का दावा नहीं कर सकते।

Case referred:

AIR 2019 SC (Supp.) 78.

Geetanjali Chourasia, for the appellants.
Abhishek Tugnawat, P.P. for the respondent-State.

J U D G M E N T

The Judgment of the Court was delivered by :
SHAILENDRA SHUKLA, J. :- The present appeal under Section 374 of the Cr.P.C. has been filed against the judgement of conviction and sentence pronounced by the Sessions Judge, Shajapur in S.T. No.10/2006 vide judgement dated 28.12.2006, whereby each of the appellants have been convicted and sentenced as under :-

S. No.	Conviction under Section	Sentence		
		Imprisonment	Fine Amount	Imprison -ment in lieu of fine
1	302/34 of IPC	Life imprisonment	Rs.1,000/-	3 months RI
2	450/34 of IPC	3 years RI	Rs.500/-	1 month RI

2. The prosecution story in short was that on 27.11.2005, Sub-Inspector A. K. Singh (PW-11) of Police Station Barodia, District Shajapur received a telephonic message from Kumer Singh, Sarpanch of Village Lasudiya-Jagmal that a murder had been committed in the village. A. K. Singh (PW-11) arrived at the spot. The witness Jaikunwarbai (PW-9), who is daughter of the deceased Tejubai and who was a married lady, narrated the incident to him and as per her statements on the morning of 27.11.2005, appellant Shaitanbai who lives in neighbourhood and who is aunt of Jaikunwarbai came rushing to the house of Jaikunwarbai who was sitting with her mother Tejubai. Shaitanbai started abusing Tejubai saying that son of Tejubai namely, Mohan had quarrelled with Radheshyam, son of Shaitanbai. At that moment, Jagdish, another son of Shaitanbai also came and started using filthy and abusive language. Tejubai told them not to abuse but Shaitanbai wielding sharp edged weapon daranta and Jagdish wielding a knife entered the house of Tejubai. Shaitanbai inflicted daranta blow on the chest of Tejubai, who started bleeding and fell on the floor. Babitabai, daughter of Tejuabai then came to rescue but Jagdish stabbed Babitabai with knife and Babitabai also fell upon Tejubai. Then both mother and son duo lunged forward to attack Jaikunwarbai but she fled from her house and then both the assailants also went away. The information of the incident was given to Mohan, brother of Jaikunwarbai who was working in the field. Mohan came to spot and immediately went to inform Kumer Singh, Sarpanch who in turn made telephone call to Sub-Inspector A. K. Singh.

3. The Sub-Inspector, after recording Dehati Nalishi, drew Panchnama, spot-map and recorded statements of the witnesses and arrested both the assailants/ appellants and on the basis of their memorandum, seized daranta from Shaitanbai and a knife from Jagdish. The blood stained soil was collected from the spot and blood stained clothes of the appellants were also seized. Both these items were sent to FSL. However, FSL report could not be obtained till the conclusion of the trial and pronouncement of judgement.

4. After investigation, charge-sheet was filed and the Trial Court read over the charges under Sections 302/34 and 450/34 of IPC to the appellants. Both of them abjured their guilt and have stated that they have been falsely implicated due to prior enmity.

5. Learned Trial Court went on to examine prosecution witnesses and in all, 11 witnesses were examined and no defence evidence was led and after conclusion of trial, both the appellants have been convicted and sentenced as aforementioned.

6. In the appeal, it has been mentioned that due to prior enmity, the appellants have been falsely implicated, that independent witnesses have not supported the prosecution story. The statements of witnesses are self-contradictory and there are many important omissions and contradictions which have been overlooked, that medical report also does not corroborate statements of witnesses, that compliance of Section 157 of Cr.P.C. has not been made and the prosecution was unable to prove spot of the incident and on these grounds, acquittal has been sought.

7. The question for consideration before this Court is whether in view of the grounds taken by the appellants, conviction and sentence imposed upon the appellants is liable to be set aside and the appellants deserve to be acquitted?

8. The prosecution has examined eye-witnesses namely, Smt. Jaikunwarbai (PW-9), Dulesingh (PW-2), Shankarlal (PW-3), Sitaram (PW-4) and Smt. Ghisibai (PW-6). However, barring Jaikunwarbai (PW-9), all other eye-witnesses have turned hostile. Jaikunwarbai (PW-9) being the daughter of deceased Tejubai is the interested witness. Hence, her statements need to be appreciated with circumspection.

9. This witness states that about 2 months prior to her deposition at about 8.00 AM in the morning, the witness was at her home and at that time her mother Tejubai, sister-in-law Babitabai, Sandeep, Rachna and Deepak were all present. She states that about a month back her brother Mohan had a quarrel with Radheysham (s/o accused Shaitanbai). She states that Shaitanbai who is her Badi Maa (wife of elder brother of witness's father) came to her house and started abusing Tejubai. At that point of time, Jagdish, son of Shaitanbai also came wielding knife whereas Shaitanbai was wielding daranta. She states that

Shaitanbai inserted daranta in the stomach of Tejubai, the witness's mother, then Jagdish also stabbed Babitabai on her chest. Both of them fell down and then her brother Mohan came to the spot and went away to inform Sarpanch. She states that she recorded lodged Exhibit-P/21. She further states that police came and drew spot map, police seized blood stained soil and ordinary soil and exhibited documents on which she appended her thumb impression. She reiterates that incident occurred due to previous incident of assault. Between Mohan, son of deceased Tejubai and Radheshyam.

10. This witness in her cross-examination states that she is married and her husband's village is Khoria - Ema and she had come to her parental house on the occasion of Diwali. She states that after arriving at her parental house, she used to stay for about 8 days. In her cross-examination, she has been asked question relating to the earlier incident. She states that at the time of earlier incident, also she was in her parental house and the dispute occurred because the irrigation pipe going to her parental agriculture field was severed.

11. Reverting back to the incident which culminated in death of her mother and sister-in-law, she states in para-9 that incident of stabbing took place inside the house. She states that for quite sometime Shaitanbai, wielding daranta in her hand was shouting and abusing Tejubai and due to such shouts the neighbours had gathered and that the incident of stabbing happened when Shaitanbai and Jagdish both entered the house. At first her mother was dealt daranta blow and on hearing her cries, Babitabai came rushing but she was stabbed by Jagdish and when this incident occurred the witness was nearby at a distance not more than one hand. The witness states that there are 3 rooms in house and the incident happened in the first room.

12. Dulesingh (PW-2), Shankarlal (PW-3), Sitaram (PW-4) and Ghisibai (PW-6) have turned hostile. However, they have supported the prosecution story in as much as they stated that they had heard and seen the quarrel taking place. Dulesingh (PW-2) states that while he was going from his house to the tube well and passed by the house of the deceased he heard children crying and then he asked a villager namely, Narayan as to what has happened then Narayan told him that Tejubai has been done to death by Jagdish. He states that Jaikunwarbai told this witness to send Jaikunwarbai uncle from agriculture field. This witness has been declared hostile and denies that he himself had seen stabbing incident. However, this witness admits that quarrel between two families had taken place about 8 to 10 days earlier. He is also the witness of seizure of ordinary and blood soaked soil whose memo is Exhibit-P/2. He is also the witness of Safina form Exhibit-P/3 and Naksha Panchnama of the bodies Exhibit-P/4.

13. Thus, this witness has stated to have heard shouts at the time of incident.

14. Shankarlal (PW-3) also states that he had seen quarrel between the two ladies and that Shaitanbai was having a daranta in her hand and Jagdish was having a knife and both of them have entered the house of the deceased. He is also the witness of Exhibit-P/3 Safina form Exhibit-P/3 as also Exhibit-P/4 and Exhibit-P/6 both Naksha Panchnama of Tejubai and Babitabai. However, in para-11 he admits the suggestion that he had not seen both women quarreling and that when he arrived the incident had already taken place. Thus, there is variations in the cross-examination of this witness from that of examination in chief.

15. Sitaram (PW-4) states that he had seen Shaitanbai abusing wife of Dungaji when he was going to fetch water. However, he denies to have seen the act of stabbing. He is declared hostile but only supports the prosecution story to the extent that Shaitanbai was abusing Tejubai and Babitabai and when he came back he saw Tejubai and Babitabai dead. These statements have not been challenged by the prosecution.

16. Ghisibai (PW-6) has also stated that she saw both the ladies talking with each other when the witnesses had gone out to tie her goat at the well. She further states that when she came back she saw Tejubai and Babitabai both dead near the door of their house and Jaikunwarbai was telling that her mother and sister-in-law have been killed. She has been declared hostile but she denies to have seen the whole incident herself. In her cross-examination, she admits that she did not hear the abuses. However, in her statements she has stated that she had seen both the ladies talking to each other and then Babitabai and Tejubai lying dead has not been challenged in the cross-examination.

17. Thus, it emerges that Jaikunwarbai (PW-9) is the only witness who states that the whole incident occurred between her own eyes. Other eye witnesses support the prosecution story only to the extent that they have seen them quarreling and further that they had seen two ladies namely; Tejubai and Babitabai lying dead but they do not state that they saw the incident of stab injury.

18. Jaikunwarbai (PW-9) has been tried to be shown as unreliable. She in para-14 admits that walls of the room where the incident took place were splattered with human blood due to the incident. However, in the spot map Exhibit-P/25, there is no mention of any blood on the walls.

19. This discrepancy has been properly dealt with by the Trial Court in para-14 of its judgment. It has been mentioned that although the blood may not have been found on the walls but there was blood lying on the floor of the room which was collected by Investigating Officer and the same has been supported by other witnesses which shows that the incident occurred in the room of the house.

20. It is quite clear that the witnesses referred to earlier have stated that they saw both the ladies inside the room. In Exhibit-P/25, which is spot map, spot 'A'

has been shown as the place where the body of Tejubai was lying and spot 'B' is the place where the body of Babita was lying and both the places have been shown to be inside the room. There is nothing in evidence to controvert this position which has emerged.

21. The second aspect on which Jaikunwarbai (PW-9) has been challenged is that in para-6 she states that on the day of incident no food was cooked but Dr. Z. Iqbal (PW-7) who conducted the postmortem has stated in his examination-in-chief that he had found semi-digested food in the small intestines of both the ladies which shows that they had taken meals sometimes earlier.

22. Regarding this discrepancy, it emerges that the incident occurred between 7:00 AM to 8:00 AM which means that both the ladies may have eaten their breakfast sometimes earlier and when the incident occurred the menfolk of the house had gone to their agricultural field. In the villages people generally tend to consume breakfast early because the menfolk have to go to their agricultural fields early in the morning. It may be that both the ladies partook of their breakfast which may have been the previous night's left over meal. Thus, the aforesaid discrepancy is explainable. The Trial Court in its judgment has rightly stated that there was no reason to implant Jaikunwarbai (PW-9) who is an eye witness in the incident.

23. If the prosecution wanted to implant the witnesses, it could very well have implanted Mohan the son of Tejubai as an eye-witness. However, Mohan (PW-1) has stated that at the time of incident he was in his agricultural field and at that time Dulesingh came and apprised him about the incident.

24. This witness states that he came running to his house and found his wife Babitabai and mother Tejubai soaked in blood and both had died. His sister Jaikunwarbai was present in the house and other villagers as well who had assembled. Jaikunwarbai told him that at first Shaitanbai struck daranta blow on Tejubai and when Babitabai came to rescue, accused Jagdish inflicted knife injury on her chest. The witness states that he then rushed to inform Sarpanch Kumer Singh and told him to intimate the police station. Regarding the cause of the incident, this witness states that about 15 days before the incident, there was a quarrel between the witness and Radheshyam, who is cousin of the witness and elder brother of accused Jadgish and the quarrel was regarding irrigating the agricultural field. Radheshyam had lodged a report against the witness and the witness has been released on bail. This witness has been asked as to whether he saw accused Shaitanbai and Jagdish himself. He replies in affirmative that he had seen both the accused fleeing from the spot of the incident and Shaitanbai was wielding daranta in her hand and Jadgish was wielding a knife.

25. Although, Jaikunwarbai (PW-9) also states in para-9 that Mohan had arrived at the scene when Shaitanbai was abusing. However, immediately

thereafter, she makes a statement that Mohan arrived at the scene when the whole incident had occurred and then she had narrated the incident to Mohan. Thus, there appears an attempt on the part of Mohan to be an eye-witness who at first is supported by Jaikunwarbai (PW-9) also but she immediately makes a statement to the effect that Mohan came after the incident. It has been found that Mohan (PW-1) has earlier stated in examination-in-chief that Dulesingh had informed him that his wife and mother had already been attacked by accused persons. The witness Jaikunwarbai (PW-9) has also stated in her statement that Mohan came after the incident. Learned Trial Court was absolutely correct in concluding that Mohan was not an eye-witness and came to the spot later on.

26. From the evidence of Mohan (PW-1), it becomes clear that reason for Shaitanbai to quarrel with Tejubai was because of the previous fight between her son Radheshyam and witness Mohan in which Radheshyam lodged a report against him.

27. Regarding proximity of both houses of Shaitanbai and the witness, the witness stated in cross-examination that there is only one wall which exists between two houses. He has been asked as to whether Jaikunwarbai comes to her parents house very often. This witness in para-9 makes exaggerated statement that he knew that murder is going to take place and therefore, he had brought her sister. However, such exaggerated statements can simply be ignored as overzealous person's statement. The parts of the statements of this witness which are reliable are that there was a earlier quarrel between him and Radheshyam, brother of Jadgish and son of Shaitanbai and on the date of the incident, on receiving information, he rushed to the spot, saw his wife and mother already dead and Jaikunwarbai narrated the sequence of events to him and then he rushed to inform Kumer Singh, Sarpanch.

28. Statement of Mohan that Jaikunwarbai told him that both the ladies were done to death by Shaitanbai and Jadgish are relevant statements under Section 7 of the Evidence Act and would be read against both the accused persons.

29. Kumer Singh (PW-5) states that Mohan came to his house in the morning of 27.11.2005 and told him that her mother and wife had been murdered by Jagdish and her mother Shaitanbai. He has also told him that Shaitanbai was wielding daranta and Jadgish was wielding knife. This witness states that he immediately rushed to the spot with Mohan and saw both the ladies lying there dead thereafter, he went to his house and called up police at Dupada Chowki and also called at police station Mohan Barodia and told that two murders have taken place. Thus, as per this witness, the information was not only narrated to the police chowki but also to police station at Mohan Barodia. As per this witness, at first, police from Dupada Chowki had arrived at the spot and 45 minutes later, police from Mohan Barodia came. He was asked as to why he did not immediately

inform the police station even before arriving at the spot. This witness states that he considered it appropriate to inform the police only after arriving at the spot. In his police statement (Exhibit-D/2), there is no mention of this witness being told by Mohan that Shaitanbai was wielding daranta and Jagdish a knife.

30. The reliable part of the evidence of this witness is that Mohan informed him in person about the incident and then this witness came to the spot and from the spot, he called up at police chowki and also at police station. However, what we see in this case is that lodging of report, initiation of investigation was also done by police at police station Mohan Barodia. Jaikunwarbai (PW-9) in para-13 has stated that at first police from police chowki had arrived at but no incident was narrated to them however, she denies that incident was not narrated as it was being considered at that time name of which accused should be taken. Despite the fact that there are some minor inconsistencies in the statement of Jaikunwarbai (PW-9), she is a reliable eye-witness, who was present in the house when the incident occurred. It is found proved that Jaikunwarbai (PW-9) was in the house when the incident had taken place and incident occurred before her own eyes. Her presence at the time of the incident has been affirmed by other witnesses namely, Ghisibai (PW-6), Dulesingh (PW-2) and Sitaram (PW-4). Jaikunwarbai (PW-9) has stated that after witnessing the incident, as accused lunged towards her, she rushed out of the house and hence was saved. Jaikunwarbai (PW-9) is thus a reliable eye-witness. It has already been found proved that Tejubai and Babitabai were killed inside their house. It has further been found proved from the statements of other witnesses and her neighbours that Shaitanbai was seen talking/quarreling with Tejubai prior to the incident. The onus was upon the accused under Section 106 of the Evidence Act to explain how both the ladies were killed.

31. The Investigating Officer A. K. Singh (PW-11) states that on the basis of memorandum of Jagdish, a knife was recovered from Jagdish and on the basis of memorandum of Shaitanbai (Exhibit-P/10), a daranta was recovered from her. The blood stained clothes of Shaitanbai and Jadgish were also seized as per Exhibit-P/13 and P/14. However, these weapons have not been produced before the Court. These articles and the FSL report have not even been produced from the FSL and thus, very vital piece of evidence has been missing in this matter.

32. Learned Trial Court has put the whole blame on the Investigating Officer and has even suggested departmental action against him. However, perusal of order-sheets does not show any endeavour on the part of the Presiding Officer directing availability of FSL report and the articles. The Presiding Officer very well knew that he was dealing with a very serious case involving double murder. However, order-sheets did not display any concern on the part of the Presiding Officer regarding non-availability of FSL report. Such indifference and apathy on the part of the Presiding Officer is reprehensible and the Presiding Officer deserves to account for such lapse.

33. Although, vital piece of evidence, which is FSL report is not available, it has been found proved that Jaikunwarbai (PW-9) is a reliable eye-witness and also that Shaitanbai had come to the house of Tejubai and was quarreling with her. It has further been found proved that bodies of both ladies were found in the house of Tejubai. This proves that the assailants had attacked Tejubai and Babitabai. There are no injuries on the person of both the accused. The fact that incident occurred inside the house of Tejubai does away with defence of provocation given to the assailants by the deceased ladies. Thus, assailants could not claim the benefit of first Exception of Section 300 of IPC. They have not discharged the onus on them under Section 106 of the Evidence Act.

34. From the evidence of Dr. Z. Iqbal (PW-7), it is clear that only one injury on each of the deceased was found. The witness states that in the post-mortem report of Tejubai, there was only one incised wound on her chest, size - 1 x ½ x 6 cms on the left side between 5 th and 6th ribs. The death had occurred due to excessive bleeding resulting stoppage of breathing. As per the witness, injury was sufficient to cause death in the ordinary course of nature, the post-mortem report is Exhibit-P/17. Regarding Babitabai, this witness states that he had found one injury on the right side of her chest, size - 1 x ½ x 7 cms deep and the death had occurred due to excessive bleeding, the report is Exhibit-P/18. The witness states that both the injuries could have been caused by a knife. In the cross-examination, this witness states that injuries caused were not of such nature which could have caused immediate death and if both had been given treatment, their death could have been prevented.

35. Learned counsel for the appellants has pointed that the death had occurred due to non-availability of medical treatment and the doctor himself states that the injuries were of such nature as would have not caused instant death.

36. A comment needs to be made regarding the submissions of Dr. Z. Iqbal (PW-7) when he says that timely medical intervention would have prevented death. It is seen that after the incident of stabbing occurred, death had taken place within a span of half an hour. By the time, Mohan rushed to the spot, both ladies were already dead. The incident had occurred at about 7.30 AM. Mohan (PW-1) in para-14 of his cross-examination states that he had come out of his house at 7.00 AM and was sitting in his field (goha) for 10 to 15 minutes when he received the information and as he reached the spot, both ladies were dead. Jaikunwarbai (PW-9) also states that immediately on being attacked, both ladies had fallen down at the spot only. This also shows that blow was also severe that the deceased ladies could not even make an attempt to run. It also shows that the injuries were sufficient in the ordinary course of nature to cause death.

37. The doctor in his examination-in-chief has stated that injuries were such as would cause death in the ordinary course of nature. Such statements attract clause thirdly of Section 300 of IPC showing that culpable homicide amounted to

murder. "In the ordinary course of nature" word would mean that injury is of such nature that death would result without medical intervention. If death results even after medical intervention, then fourthly clause of Section 300 of IPC would be applicable. Section 300 (Fourthly) of IPC reads as under :-

> *300. Murder.—Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or—*
>
> (Fourthly)—*If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.*

38. It is already seen that above clause would not be applicable in the present case. Thus, statement of Dr. Z. Iqbal (PW-7) would not be read in favour of the accused when he says that death could have been prevented with timely medical intervention. Rather, his statement that injury was sufficient in the ordinary course of nature to cause death is a proper statement and thirdly clause of Section 300 of IPC would be applicable, which means that it was a culpable homicide amounting to murder.

39. Learned counsel for the appellants submits that the doctor has stated that both injuries could have been caused due to knife. He also states that Shaitanbai was not carrying a knife but was carrying a daranta and daranta has neither been produced before this Court nor its FSL report is available and there is a difference between the nature of injuries caused by daranta and knife.

40. This submission was considered. The witness Dr. Z. Iqbal (PW-7) has not been asked in cross-examination as to whether the injury to Tejubai could have been caused by daranta or not. It is clear that daranta and knife, both are sharp edged weapons. It has also been found proved that evidence of Jaikunwarbai (PW-9) is reliable. It has further been found proved that Shaitanbai herself had come to the house of Tejubai at first and was quarreling with Tejubai for a very long while and she was wielding a daranta. It has also been found proved that only after she attacked Tejubai, Babitabai was attacked by Jagdish when Babitabai tried to rescue her mother-in-law. Other witnesses have also stated to have seen daranta in the hands of Shaitanbai. Hence, it cannot be stated that injury caused to Tejubai could not have been caused by a daranta. Thus, conclusion drawn by the Trial Court that death of Tejubai due to infliction of injury on her with daranta by Shaitanbai does not warrant any intervention.

41. The only question is whether any exception under Section 300 of IPC is applicable or not which would favour the appellants? It has been found that there

was no grave and sudden provocation given to Shaitanbai by Tejubai and therefore Exception 1 of Section 300 of IPC would not be applicable. The only question is whether benefit of Exception 4 of Section 300 of IPC can be given to Shaitanbai or not?

Exception 4 of Section 300 of IPC is as under :

> *Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner.*

42. In order to attract above exception, following ingredients have to be proved :

a) There was no premeditation.

b) Fight was sudden

c) Injury was inflicted in the heat of passion upon sudden quarrel.

d) Offenders did not take undue advantage or acted in cruel or unsual manner.

43. It is found proved that Shaitanbai had herself come to the house of Tejubai with a daranta which rules out that the absence of premeditation. Secondly, it has been found that prior to attacking Tejubai, a quarrel was going on for a long while. Thus, there was no sudden fight and no sudden quarrel. It was also seen that Tejubai was defense-less wheres, Shaitanbai was armed with daranta and there was no attempt on the part of Tejubai to cause any injury to Shaitanbai thus, Shaitanbai had taken undue advantage of the situation. Hence, defence under Exception 4 of Section 300 of IPC would also not be available to Shaitanbai.

44. Learned counsel for the appellants has submitted that only one injury has been caused which does not show intention on the part of Shaitanbai to cause death.

45. Regarding this submission, the Apex Court in the case of *State of Rajasthan vs. Leela Ram @ Leela Dhar*, AIR 2019 SC (Supp.) 78 has held that even one injury on the vital part of the body may result in conviction under Section 302 of IPC. As per facts of this case, accused has inflicted axe injury on the skull of the deceased. The doctor had found that injury was so imminently dangerous as in all probability would have caused death. The Apex Court has held that the injury was caused on the vital part, that the deceased was un-armed hence, accused was liable to be convicted under Section 302 of IPC. The Apex Court has also considered whether benefit of Exception 4 of Section 300 of IPC could be

afforded to the accused but gave a negative opinion. The High Court in this case had convicted the accused under Section 304-II of IPC instead of Section 302 of IPC. The State had gone in appeal seeking enhancement. Para-13 of the aforesaid judgement of the Apex Court is of specific relevance, which reads as under :-

> ***13.*** *The High Court has, in our view, proceeded entirely on the basis of surmise in opining that the death was caused without pre-meditation and on the spur of the moment. In arriving at that inference, the High Court has evidently ignored the evidence, bearing upon the nature of the incident, the consistent account that it was the respondent who had inflicted the blow, the weapon of offence and the vital part of the body on which the injury was inflicted. The fact that the co-accused, Rajesh and Jagdish, have been acquitted by the Trial Court, is in our view no reason to doubt the testimony of all the eye-witnesses which implicated the respondent. The death was attributable to the assault by the respondent on the deceased, during the course of the incident. Having regard to the above facts and circumstances of the case, it is evident that the injury which was caused to the deceased was [within the meaning of Section 300 (Fourthly)] of a nature that the person committing the act knew that it was so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death.*

46. The only difference in the Apex Court judgement and the present case is that in the Apex Court judgement, Section 300 (Fourthly) of IPC was applicable whereas, in the present case, Section 300 (Thirdly) of IPC applies and in both instances, culpable homicide would be amounting to murder. As far as accused Jagdish is concerned, same reasoning would apply as has been applied in the case of Shaitanbai. There was no reason for him to get provoked. It was his mother Shaitanbai who had first attacked Tejubai and Babitabai had only rushed to rescue her mother-in-law and at that point of time, Jagdish inflicted single knife injury on her vital part resulting in her death. The provisions of Section 300 (Thirdly) of IPC would apply in his case as well.

47. After duly considering the evidence, it is proved beyond reasonable doubt that appellants - Shaitanbai and Jagdish were liable to be convicted for causing murder of Tejubai and Babitabai and their conviction under Sections 302/34 and 450/34 of IPC by the Trial Court was appropriate. The sentences which have been imposed upon the appellants are also affirmed as being appropriate. The conclusion drawn by the Trial Court needs no intervention. Consequently, present criminal appeal stands dismissed.

48. A copy of this order along with the record of the Trial Court be sent back to the Trial Court for perusal and compliance.

Appeal dismissed

I.L.R. [2020] M.P. 1733
COMPANY APPEAL

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

Comp.A. No. 6/2020 (Indore) decided on 22 May, 2020

LAKHANI FOOTCARE PVT. LTD. …Appellant

Vs.

THE OFFICIAL LIQUIDATOR & anr. …Respondents

***A. Company Court Rules, 1959, Rule 272 & 273 – Confirmation of Sale – E-Auction – Adequate Price – Company Judge confirmed sale in favour of R-2* – Held – As amount offered by R-2 was less that the initial reserve price and which was again less than amount offered by appellants, cannot be accepted as the difference is about 2.79 Crores – On mere technicalities, that appellant has not participated in process of tender, such an offer cannot be thrown in dustbin – Prayer of Official Liquidator for entire fresh e-auction is allowed – Company appeal allowed. (Paras 30 to 32)**

क. कंपनी न्यायालय नियम, 1959, नियम 272 व 273 – विक्रय की पुष्टि – ई–नीलामी – पर्याप्त मूल्य – कंपनी न्यायाधीश ने प्रत्यर्थी क्र. 2 के पक्ष में विक्रय की पुष्टि की – अभिनिर्धारित – चूंकि प्रत्यर्थी क्र. 2 द्वारा प्रस्तावित राशि आरंभिक आरक्षित मूल्य से कम थी और जो कि अपीलार्थीगण द्वारा प्रस्तावित की गई राशि से भी पुनः कम थी, को स्वीकार नहीं किया जा सकता क्योंकि अंतर लगभग 2.79 करोड़ का है – मात्र तकनीकी आधारों पर, कि अपीलार्थी ने निविदा की प्रक्रिया में भाग नहीं लिया, उक्त प्रस्ताव को अनदेखा नहीं किया जा सकता – संपूर्ण ई–नीलामी नये सिरे से करने के लिए शासकीय समापक की प्रार्थना मंजूर – कंपनी अपील मंजूर।

***B. Company Court Rules, 1959, Rule 272 & 273 – Confirmation of Sale – Duty of Court* – Held – It is bounden duty of Court to see that price fetched at auction is an adequate price even though, there is no suggestion of irregularity or fraud – If Court feels that price offered in auction is not adequate price, it can order for re-auction – In present case, appellant offered Rs. 2.79 crores more, thus fresh auction is inevitable. (Para 27 & 28)**

ख. कंपनी न्यायालय नियम, 1959, नियम 272 व 273 – विक्रय की पुष्टि – न्यायालय का कर्तव्य – अभिनिर्धारित – यह देखना न्यायालय का बाध्यकारी कर्तव्य है कि नीलामी में प्राप्त मूल्य एक पर्याप्त मूल्य हो भले ही, अनियमितता अथवा कपट का कोई संकेत न हो – यदि न्यायालय को यह प्रतीत होता है कि नीलामी में प्रस्तावित मूल्य पर्याप्त मूल्य नहीं है, तो वह पुनः नीलामी का आदेश कर सकता है – वर्तमान प्रकरण में, अपीलार्थी ने और 2.79 करोड़ रूपये का प्रस्ताव किया, अतः नये सिरे से नीलामी अपरिहार्य है।

Cases referred:

(1969) 3 SCC 537, (2000) 6 SCC 79, (2010) 16 SCC 94, (2005) 126 Company Cases 554.

Vijayesh Atre, for the appellant.
H.Y. Mehta, for the Official Liquidator.
Abhinav Malhotra, for the respondent No. 2.

O R D E R

The present Company Appeal is arising out of order dated 02.03.2020 as well as by order dated 04.05.2020 passed by the learned Company Judge in Company Petition No.08/2014.

2. The facts of the case reveal that a Company Petition was preferred for winding up of Lakhani Footcare Private Limited and an order was passed by the learned Company Judge on 09.09.2016 in respect of winding up and an Official Liquidator was appointed.

3. The learned Company Judge vide order dated 17.12.2018 permitted the Official Liquidator to take appropriate steps in respect of sale of Company's property i.e. Lot No.1 through e-auction and the reserve price was fixed at Rs.31,00,00,000/-.

4. In the first round of auction against the reserve price of Rs.31,00,00,000/-, no buyer came forward and the learned Company Judge vide order dated 17.12.2018 permitted the Official Liquidator to take appropriate steps for fresh e-auction of the assets under Lot No.1 consisting of freehold land, buildings, office machineries, stocks etc. situated at 39-A, Devguaradia Road, 5/2, Milestone on Nemawar Road, next to Flyover, Indore at a reduced reserve price of Rs.27,90,00,000/.

5. In light of the direction issued by the learned Company Judge in the Company Petition on 09.03.2019, the Official Liquidator published a fresh advertisement of sale notice inviting tenders in respect of Lot No.1 in the Economic Times, Dainik Bhaskar and the e-auction sale notice was also uploaded on the MCA Portal.

6. Pursuant to the sale notice, four parties participated in the e-auction and on 16.04.2019, a meeting of the Asset Sale Committee was held and the respondent No. 2 in the present appeal / Seabright Landmark Projects LLP was declared to have made the highest offer.

7. The appellant No.2 / M/s Om Gurudev Enterprises, a sole proprietorship concern, was also interested in purchasing Lot No.1 of the Company under liquidation and on 10.06.2019, wrote a letter to the Official Liquidator giving an offer of Rs.30,69,00,000/- and in order to establish its *bonafide,* a cheque of

Rs.3,06,90,000/- was also submitted to the Official Liquidator. One more offer was received by the Official Liquidator for an amount of Rs.29,00,00,000/-.

8. The present appellant has stated in their appeal that they were not able to participate in the second round of e- auction held on 04.04.2019 on account of their preoccupation, and therefore, submitted a letter to the Official Liquidator offering a much higher price than the reserve price. The reserve price was Rs.27,90,00,000/- and the offer made by the present appellants was Rs.30,69,00,000/-. It was certainly more than the highest bid received, as the highest bid received was for Rs.28,15,00,000/-.

9. The Official Liquidator, after an offer was made by the appellant and by one M/s Aviral Buildcon Private Limited, submitted an OLR i.e. OLR No.31/2019 dated 25.06.2019 for confirmation of sale and I.A. No.6678/2019 was filed on 04.09.2019 for approval of sale in favour of Seabright Landmark Projects LLP.

10. The learned Company Judge has passed an order on 02.03.2020 confirming the sale in favour of respondent No.2.

11. An application was also preferred by learned counsel for respondent No.2 i.e. I.A. No.2294/2020 for extension of time to deposit the amount and time, up to 30.06.2020 and extension has been granted to deposit the balance consideration. The respondent No.2 has also been directed to deposit the 20% balance consideration by 31.05.2020.

12. Shri Vijayesh Atre, learned counsel has vehemently argued before this Court that initially a reserve price was fixed at Rs.31,00,00,000/- and no buyer came forward to participate in the e-auction. The reserve price was reduced in the second round because there was no participant in the first round, however, no fresh evaluation was carried out before reducing the reduced price, and therefore, in all fairness, a fresh auction should have been ordered by the learned Company Judge order and the offer of the present appellants, which is more than the offer of respondent No.2, should have been accepted.

13. To buttress his submission, learned counsel for the appellants has placed heavy reliance upon a judgment delivered in the case of *Navlkha & Sons v/s Shri Ramanya Das & Others reported in* (1969) 3 SCC 537 and a prayer has been made to set aside both the orders passed by the learned Company Judge and to direct a fresh e-auction in the matter.

14. Shri Atre, learend counsel under insturction of the appellant has also submitted an undertaking of the appellant, wherein he has given an undertaking that in case a fresh auction is held, he will not quote the price less than the price already quoted before this Court as well as quoted before the Official Liquidator i.e. less than Rs.30,69,00,000/-

15. The offers made by the persons, who have participated in the auction as well as other competitors in a tabular form, are as under:-

Sr. No.	Name of the Head	Amount (Rs.)	Difference (Rs.)
1	Reserve price in first round	31,00,00,000/-	
2	Reserve price in second round (10% Reduction)	27,90,00,000/-	3,10,00,000/-
3	Offer of the highest bidder	28,15,00,000/-	25,00,000/-
4	Offer of Aviral Buildcon Pvt. Ltd.	29,00,00,000/-	1,10,00,000/-
5	Offer of the Appellant	30,69,00,000/-	2,79,00,000/-

The aforesaid chart makes it very clear that the difference between the price offered by the present appellants and the respondent No.2 is Rs.2,79,00,000/- which is certainly a big amount.

16. Shri Abhinav Malhotra, learned counsel for respondent has argued before this Court that the present appellants, who were not the participants in the process of auction, are not entitled for any relief of whatsoever kind. Otherwise also, it is going to be a never ending process. He has also stated that in case, the present appellants were interest in buying the Company's property i.e. Lot No.1, they should have deposited earnest money, they should have participated in the auction process and at this juncture, merely by submitting a letter along with a cheque of Rs.3,00,00,000/-, will not entitled them to participate in the auction process which has attained finality.

He has also stated that he has also preferred a Company Appeal for extension of time to deposit the remaining amount which is likely to listed in near future. He has categorically stated before this Court that the appellant has no locus in respect of the auction in question, as he was not a participant and the orders passed by the learned Company Judge are very exhaustive and the learned Company Judge has taken into account the law laid down on the subject by the Hon'ble Supreme Court.

17. On the other hand, the Official Liquidator has fairly stated before this Court that they shall be abiding any order passed by this Court and the present appellant was certainly not a participant in the process of auction and with the great difficulties, the auction has been finalized.

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

19. The present Company Appeal is arising out of the order dated 02.03.2020 as well as order dated 04.05.2020 passed by the learned Company Judge in Company Petition No.08/2014.

20. The undisputed facts makes it very clear that a winding up petition was filed in respect of Lakhani Footcare Private Limited and an order was passed by the learned Company Judge on 09.09.2016 in respect of winding up and an Official Liquidator was appointed in order to clear the dues and in order to pay the work force. An order was passed by the learned Company Judge on 17.12.2019 in respect of e-auction of Lot No.1, which included free, buildings, office machineries, stocks etc. The reserve price was fixed at Rs.31,00,00,000/-, however, no buyer came forward and the learned Company Judge vide order dated 17.12.2018 permitted the Official Liquidator to take appropriate steps for e-auction, however, this time the reserve price was reduced to Rs.27,90,00,000/-. No cogent reason is reflected from the orders passed by the learned Company Judge in respect of grant of permission relating to reduction in the reserve price and re-auction was held. A meeting took place on 16.04.2019 of the Asset Sale Committee and respondent No.2 / M/s Seabright Landmark Projects LLP was declared to have made the highest offer.

21. The appellant before this Court has submitted a cheque to the official liquidator giving an offer of Rs.30,69,00,000/-, meaning thereby, offered Rs.27,90,00,000/- more than the amount offered by the respondent No.2. The learned Company Judge has confirmed the sale by an order dated 02.03.2020 and the order passed by the learned Company Judge reads as under:-

> "OLR No.31/19 has been field by the OL with a prayer to confirm the sale of the properties of the Company-in- Liquidation in Lot No. 1 in favour of the highest bidder M/s Seabright Landmark Projects LLP, Indore (M.P.). IA No.7202/19 has been filed by the highest bidder M/s Seabright Landmark Projects LLP for confirmation of sale and direction to the OL to execute the sale deed and IA No.6678/19 has been filed by one M/s.Om Gurudev Enterprises with a prayer to accept its offer, which is more than the offer made by the highest bidder and sale the assets in Lot No. 1 to it.
>
> The brief facts are that this Court had passed the winding up order in the matter on 9.9.2016. Thereafter the attempts were made to sale the assets of Lot No.1 but since no buyer had come forward to purchase the said assets, therefore, in the meeting of the assets sale committee dated 28.8.2018 it was decided to sale the assets of Lot No. 1 at a price of Rs.27.90 Crores and EMD of Rs.2.80 Crores. Hence the OLR No.29/2018 was filed before this Court seeking permission to sale the assets of Lot No.1 at the reserved price of Rs.27.90 Crores and the same was allowed by

this Court by order dated 17.12.2018. Thereafter the advertisement of sale notice was issued in Dainik Bhaskar, All M.P. Edition and the Economic Times, All India Edition on 9.3.2019 and inspection of the assets/properties was given to the interested buyers on 18.3.2019. In order to give wide publicity of sale of the aforesaid assets, the sale notice was uploaded on MCA portal. The e-auction was held on 4.4.2019. The meeting of the assets sale committee/secured creditors was held on 16.4.2019. The E-auction agency M/s e-Procurement Technologies Ltd., Ahmedabad had submitted the final report in respect of the tender and highest offer received in the e-auction. As per the report of e-auction against the reserved price of Rs.27.90 Crores, the highest offer of Rs.28,15,00,000/- was received from M/s Seabright Landmark Projects LLP, Indore (M.P.). After receipt of the highest offer, on 12.4.2019 an offer of Rs.29 Crore was received from one M/s Aviral Buildcon Pvt. Ltd. vide email dated 12.4.2019. During the meeting the representative of the Bank of India had requested the assets sale committee to consider the highest offer of Rs.28,15,00,000/- from M/s Seabright Landmark Projects LLP, Indore (M.P.). This is duly reflected in the minutes of the meeting of the assets sale committee dated 16.4.2019. Thereafter on 10.6.2019 the ffer of M/s. Om Gurudev Enterprises of Rs.30.69 Crores was received and on 18.6.2019 one offer of Shri Girish Panchal without disclosing any amount was received. Hence the OL has filed the report OLR No.31/19 mentioning the details of all these offers and making alternate prayers of confirming the sale in favour of highest bidder or in favour of the subsequent offeree M/s Om Gurudev Enterprises, Indore.

The submission of learned counsel for the highest bidder is that the bid of the highest bidder M/s Seabright Landmark Projects LLP,Indore (M.P.) was already found to be highest and accepted by the assets sale committee and it had deposited the EMD at that time and thereafter almost an year was passed, therefore, subsequent offers may not be considered at this stage.

As against this, the submission of counsel for M/s Om Gurudev Enterprises, Indore (M.P.) is that he is offering the amount higher than the amount offered by

the highest bidder and the object of the auction by this Court is to fetch the maximum possible price, therefore, its bid should be accepted.

The submission of counsel for the OL is that no proper explanation for submitting the bid at the time of e-auction has been given by M/s Om Gurudev Enterprises, Indore.

Counsel for the Bank of India, secured creditor has also submitted that the offer made by the highest bidder be accepted and the subsequent offer may not be considered as that will effect the credibility of auction sale and in other matters after making such offers, subsequently similar applicants have later on backed out creating complications.

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

The law in regard to considering the offers after approval of the highest bid at the stage of confirmation of sale is now well settled. It has been held that a subsequent higher offer is not a valid ground for refusing confirmation of sale or offer already made. It is also well settled that if the price offered is adequate and the court is satisfied about the market value of the property and that the price offered is reasonable, then it would be appropriate to exercise the judicial discretion of confirming the sale. The Supreme Court in the matter of *Vedica Procon Pvt. Ltd. Vs. Balleshwar Greens Pvt. Ltd. and others* reported in (2015) 10 SCC 94 after considering the earlier judgments on this issue has held that:-

> "35. In Navalkha & Sons v. Sri Ramanya Das & Others,(1969) 3 SCC 537, certain movable and immovable properties of a company in liquidation were brought to sale. The Company Court directed the sale to be conducted by three persons jointly appointed as Commissioners for the conduct of sale. The sale was conducted. The appellant before this Court was the only offeror. The offer was accepted by the Commissioners. The Commissioners made an application to the Company Court for the confirmation of sale. At that stage, a third party made an application claiming that he was

willing to offer a higher price. The Company Court then decided to put the property once again for auction but only between the original offeror and the objector. In such a process, the original offeror once again became the highest bidder. That bid was accepted by the Company Judge. At that stage, another third party came forward objecting to the procedure adopted by the High Court for confining the auction only between the two parties without any fresh advertisement. Such an objection was rejected by the Company Judge. Aggrieved by the same, the objector carried the matter in an intra court appeal to the Division Bench successfully. Hence the appeal before this Court by the original offeror. This Court dismissed the appeal approving the view of the Division Bench that the procedure adopted by the learned single Judge was not legally sustainable.

36. In the process, this Court indicated the principles governing the confirmation of sales conducted by the Company Courts by the official liquidators. (Navlakha case, SCC pp. 540-41, para 6)

> "6. The principles which should govern confirmation of sales are well-established. Where the acceptance of the offer by the Commissioners is subject to confirmation of the Court the offeror does not by mere acceptance get any vested right in the property so that he may demand automatic confirmation of his offer. The condition of confirmation by the Court operates as a safeguard against the property being sold at inadequate price whether or not it is a consequence of any irregularity or fraud in the conduct of the sale. In every case it is the duty of the Court to satisfy itself that having regard to the market value of the property the price offered is reasonable. Unless the Court is satisfied about the adequacy of the price the act of confirmation of the sale would not be a proper exercise of

judicial discretion. In Gordhan Das Chuni Lal Dakuwala v. T. Sriman Kanthimathinatha Pillai, it was observed that where the property is authorised to be sold by private contract or otherwise it is the duty of the Court to satisfy itself that the price fixed 'is the best that could be expected to be offered. That is because the Court is the custodian of the interests of the Company and its creditors and the sanction of the Court required under the Companies Act has to be exercised with judicial discretion regard being had to the interests of the Company and its creditors as well. This principle was followed in Rathnasami Pillai v. Sadapathy Pillai and S. Soundararajan v. M/s. Roshan & Co. In A. Subbaraya Mudaliar v. K. Sundararajan, it was pointed out that the condition of confirmation by the Court being a safeguard against the property being sold at an inadequate price, it will be not only proper but necessary that the Court in exercising the discretion which it undoubtedly has of accepting or refusing the highest bid at the auction held in pursuance of its orders, should see that the price fetched at the auction, is an adequate price even though there is no suggestion of irregularity or fraud. It is well to bear in mind the other principle which is equally well- settled namely that once the court comes to the conclusion that the price offered is adequate, no subsequent higher offer can constitute a valid ground for refusing confirmation of the sale or offer already received. (See the decision of the Madras High Court in Roshan & Co. case)."

37. Divya Mfg. Co. (P) Ltd. v. Union Bank of India & Others, (2000) 6 SCC 69 was a case where the assets of the company in liquidation

were sold in favour of the appellant before this court and the sale was confirmed by the Company Court. Within a week thereafter, an application came to be filed by one of the participants in the auction proceedings praying that the order of confirmation be recalled and the applicant was willing to offer an amount higher than what was offered by the appellant before this Court. Subsequently, more number of applications came to be filed before the Court offering higher amounts. Therefore, the Company Court recalled the order confirming the sale. Hence, the appeal before this Court.

38. This Court, while reiterating the principles laid down in Navalkha case, declined to interfere with the order of the court and held as follows: (Divya Mfg. Co. case, SCC p. 79, Para 16)

> "16 .... As stated above, neither the possession of the property nor the sale deed was executed in favour of the appellant. The offer of Rs.1.30 crore is totally inadequate in comparison to the offer of Rs.2 crores and in case where such higher price is offered, it would be in the interest of the Company and its creditors to set aside the sale. This may cause some inconvenience or loss to the highest bidder but that cannot be helped in view of the fact that such sales are conducted in Court precincts and not by a business house well versed with the market forces and price. Confirmation of the sale by a Court at a grossly inadequate price, whether or not it is a consequence of any irregularity or fraud in the conduct of sale, could be set aside on the ground that it was not just and proper exercise of judicial discretion. In such cases, a meaningful intervention by the Court may prevent, to some extent, underbidding at the time of auction through Court. In the present case, the Court has reviewed its exercise of

> judicial discretion within a shortest time."

39. We cannot help pointing out that their Lordships came to such a conclusion placing reliance on para 6 of Navalkha case. Their Lordships failed to take note of the last sentence of the paragraph but placed reliance on the penultimate sentence of the paragraph. No doubt, the penultimate statement of the paragraph recognises the discretion of the Company Court either for accepting or refusing the highest bid at the auction, it also emphasizes the obligation of the Court to see that the price fixed at the auction is adequate price even though there is no irregularity or fraud in the conduct of the sale. However, the penultimate sentence restricts the scope of such discretion in the following words: (Navalkha case, SCC p.541, para 6)

> "6 .. It is well to bear in mind the other principle which is equally well settled namely that once the court comes to the conclusion that the price offered is adequate, no subsequent higher offer can constitute a valid ground for refusing confirmation of the sale or offer already received. (See the decision of the Madras High Court in Roshan & Co. case."

> 40. In other words, in Navalkha case, this Court only recognized the existence of the discretion in the Company Court either to accept or reject the highest bid before an order of confirmation of the sale is made. This Court also emphasized that it is equally a well-settled principle that once the Company Court recorded its conclusion that the price is adequate, subsequent higher offer cannot be a ground for refusing confirmation.

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47. A survey of the abovementioned judgments relied upon by the first respondent does not indicate that this Court has ever laid down a principle that whenever a higher offer is received in respect of the sale of the property of a company in liquidation, the Court would be justified in reopening the concluded proceedings. The earliest judgment relied upon by the first respondent in Navalkha & Sons laid down the legal position very clearly that a subsequent higher offer is no valid ground for refusing confirmation of a sale or offer already made. Unfortunately, in Divya Mfg. Co. this Court departed from the principle laid down in Navalkha & Sons. We have already explained what exactly is the departure and how such a departure was not justified."

In the present case the record reflects that in the earlier round the attempt to sale the properties of Lot No.1 had failed, therefore, a decision was taken by the assets sale committee to fix the reserved price of Rs.27.90 Crores and considering the circumstances of the case, this Court had approved it by order dated 17.12.2018. After wide publicity the e-auction was held on 4.4.2019, in which as against the reserved price of Rs.27.90 Crores, the highest bid of Rs.28.15 Crores has been received from M/s Seabright Landmark Projects LLP, Indore (M.P.). The explanation furnished by the subsequent applicant M/s Om Gurudev Enterprises for not submitting the bid in e-auction on the ground that the marriage of his daughter was to be performed at a subsequent date on 17.4.2019, does not inspire confidence. No other subsequent offerer has approached this Court pressing his claim for its alleged highest bid, therefore, their claim before the OL are not found to be bonafide. The record further reflects that the highest bid of M/s Seabright Landmark Projects LLP, Indore (M.P.) has been considered by the assets sale committee and has been accepted. Before this Court also counsel for the Bank of India has supported the confirmation of sale in favour of the highest bidder M/s Seabright

Landmark Projects LLP, Indore and has opposed the consideration of the bid of M/s Om Gurudev Enterprises. It is not disputed by any party that the price which has been offered by M/s Seabright Landmark Projects LLP, Indore (M.P.), the highest bidder, is the adequate market price having regard to the value of the Lot No. 1 at the time of auction and this Court is also satisfied that the price which has been offered by M/s Seabright Landmark Projects LLP, Indore is reasonable and adequate. Therefore, having regard to the law which is laid down in the case of *Vedica Procon Pvt. Ltd.* (supra), the OLR No.31/19 and IA No.7202/19 are **allowed** by confirming the sale in favour of the highest bidder M/s Seabright Landmark Projects LLP, Indore and the **IA No.6678/19** filed by M/s Om Gurudev Enterprises is **rejected.**

The highest bidder M/s Seabright Landmark Projects LLP, Indore is directed to deposit the balance sale consideration amount of Rs.25,35,00,000/- in respect of Lot No.1 after adjustment of EMD amount of Rs.2.80 Crores within a period of 60 days from today. On receipt of the full consideration amount, the OL is directed to execute the sale deed in favour of M/s Seabright Landmark Projects LLP, Indore and handover the possession of the assets."

22. Undisputedly, the respondent No.2 was not able to deposit the amount in question within the time framed work and an application i.e. I.A. No.2294/2020 was preferred for extension of time to deposit the balance consideration and the learned Company Judge has granted time up to 30.06.2020 to deposit the balance consideration. The order passed by the learned Company Judge dated 04.05.2020 reads as under:-

"Heard.

This IA has been filed seeking extension of time to deposit the amount which was directed by this Court by order dated 2/3/2020. This Court by order dated 2/3/2020 while confirming the bid of applicant M/s Seabright Landmark Projects LLP Indore (MP) in respect of lot no. 1 containing the properties of the company in liquidation, had directed the applicant to deposit the balance consideration amount of Rs. 25,35,000,00/- after adjustment of EMD amount of Rs. 2.80 crore within a period of 60 days from the date of that order.

Learned counsel for applicant submits that applicant had received the communication from OL dated 24th March 2020 on 7th

April 2020 for depositing the balance consideration amount but by that time the lockdown was already declared on account of spread of COVID 19, therefore, the applicant could not deposit the balance consideration amount. He submits that on account of restriction of movement and restriction on business operations there is liquidity crunch in the market and banks are also functioning with 10%-15% staff at the minimal level therefore, the applicant has difficulty in depositing the balance consideration amount within the period granted by this Court. He further submits that EMD amount of Rs. 2.80 crore has already been deposited by the applicant and the applicant is ready to deposit the balance consideration amount but at- east 3 month's time be granted to applicant to deposit the same.

Shri H.Y. Mehta learned counsel for OL submits that the IA has been filed after expiry of the time granted by this court to deposit and now the prayer for extension of time cannot be considered. He further submits that the offer of the applicant was objected by another party by offering higher amount and that applicant has not shown the bonafides by depositing any amount in pursuance to the order of this Court. He further submits that value of the assets are going up.

Shri D.S. Panwar learned counsel for worker's union submits that there is no explanation for not depositing the amount between 2nd March i.e. the date of order of this Court till 25th March i.e. the date of imposition of lockdown. He further submits that workers are loosing interest on said amount which otherwise would have been earned by the OL and disbursed.

Shri G.S. Patwardhan learned counsel for original promoter has submitted that the sale of the assets of the company in liquidation should be expedited and the matter should not be unnecessarily delayed.

Heaving heard the learned counsel for the parties and on perusal of the record it is noticed that bid of applicant has already been approved by this court by previous order and that the applicant was required to deposit the balance consideration amount within a period of 60 days. The order to deposit the aount was passed by this court on 2/3/2020 and lockdown throughout the state was directed on 25/3/2020 I.e. within a period of 23 days of passing of the order. After the order of this court the applicant has not been able to deposit the balance consideration amount due to imposition of lockdown and restriction of movement on account of widespread COVID 19. Hence I am of the view that in the prevailing circumstances, the interest of justice will be served if some more reasonable time is granted to applicant to deposit the balance consideration amount subject to certain condition to ascertain that the applicant is ready and willing to deposit the balance consideration amount.

In these circumstances, IA No.2294/2020 is disposed off by modifying the order dated 2/3/2020 to the following effect:-

i. The applicant is granted time upto 30th June, 2020 to deposit the balance consideration amount,

ii. The applicant will deposit 20% of the balance consideration amount by 31st May 2020 and remaining consideration amount will be deposited by applicant in on or before 30th June 2020."

23. The Official Liquidator has brought all the facts before the learned Company Judge. The prayer made by the Official Liquidator in OLR No.31/2019 reads as under:-

"(i) The report of the Official Liquidator may kindly be taken on record.

(ii) In view of Para 7 (a) of this report, if this Hon'ble Court would pleased to accept highest offer of Rs.28,15,00,000/- received in e-auction, in respect of Lot No.1 (Land (Freehold), Buidings, Office Machineries, Stocks and Trees) of M/s Seabright Landmark Projects LLP, 295, Shree Krishna Paradise, Rau, Indore-453331, as recommended by Asset Sale Committee in the meeting held on 16.04.2019, sale may be confirmed in their favour with necessary directions to them, to deposit the balance sale consideration amount of Rs.25,35,00,000/- in respect of Lot No.1, after adjustment of EMD amount of Rs.2.80 Crores, within a period of 60 days as per terms & Conditions of sale of within such time as decided by this Hon'ble Court.

OR

(iii) In view of Para 7 (b) of this report, in view of aforesaid highest offer of rs.30.69 Crores, along with cheque Bi,325994 of Rs.3,06,90,000/- EMD (10% of Rs.30.69 Crores), received after e-auction, as detailed at Para No.6 above, if this Hon'ble Court deem fit and proper, necessary directions may kindly be issued to Highest bidder of e-auction M/s Seabright Landmark Projects LLP to raise their offer more or equal to Rs.30.69 crores, in order to meet the highest offer for subject assets / properties of the company (In-Liqn.), if M/s Seabright Landmark Projects LLP raised the offer, sale may be confirmed in their favour with necessary directions to them, t deposit the confirmed in their favour with necessary directions to them, to deposit the balance sale consideration amount in respect of Lot No.1, after adjustment of EMD amount of Rs.2.80 Crores, within a period of 60 days as per terms & Conditions of sale or within such time as decided by this Hon'ble Court.

OR

(iv) In view of Para 7 (c) of this reprot, if in case, M/s Sunbright Landmark Projects LLP, is not ready to raise the offer, the dale may be confirmed in the favour of M/s OM Gurudev Enterprises, Indore (M.P.)

with necessary directions to them, to deposit the balance sale consideration amount of Rs.27,62,10,000/- in respect of Lot No.1, after realisation of Cheque No.325994 or Rs.3,06,90,000/-, within a period of 60 days as per terms & conditions of sale or within such time as decided by this Hon'ble Court.

OR

(v) In view of Para 8 of this report, if this Hon'ble Court would pleased to allow prayer as mentioned in Para No.7 (a) or (b) or (c), necessary permission may kindly be granted to the Official Liquidator to handover the possession of the assets of Lot No.1 to such successful purchaser, in favour of whom this Hon'ble Court confirm the sale, after receipt of entire sale consideration.

OR

(vi) In view of Para 9 of this report, if this Hon'ble Court deem fit and proper necessary direction may kindly be issued for re-auction of assets / properties of Lot No.1, to fetch maxumum sale price / realization, in the interest of all stakeholder of the company (In-Liqn.) and Reserve Price and EMD may be kindly fixed for mentioning in the sale notice.

OR

(vii) In view of Para 18 of this report, if prayer no.(vi), is allowed, necessary permission may kindly be granted for wide publication of e-auction Sale Notice by inviting e-tender in two newspaper (one is in English Daily and other one in Hindi Daily), as detailed in Para 10 above i.e.

1) The Economic Times (English Daily)- -All India Edition

2) Dainik Bhaskar (Hindi)- M.P. Edition

(viii) In view of Para 11 of this report, necessary permission may also be granted to release the advertisement expenses to the advertising agency and fes for online auction to M/s e-Procurement Technoligies Ltd, Ahmedabad in respect of Re- Auction, out of the fund available in the amount of the company (In-Liqn.).

And

Such other order(s) as this Hon'ble Court deem fit and proper may kindly be passed in the circumstances of the case."

24. The Official Liquidator, after bringing all facts, has certainly made a prayer for grant of permission of re-auction of assets / properties to fetch maximum sale price in the interest of stakeholder of the Company in liquidation and even a prayer was made for issuance of appropriate direction to respondent

No.2 / M/s Seabright Landmark Projects LLP to raise their offer to Rs.30,69,00,000/- in order to meet the highest offer and even a prayer was made to sell of the property to appellant / M/s Om Gurudev Enterprises, however, the learned Company Judge has disposed of the OLR by an order dated 02.03.2020 confirming sale in favour of respondent No.2 / M/s Seabright Landmark Projects LLP.

25. The Hon'ble Supreme Court in the case of *LICA (P) Limited v/s Official Liquidator & Another* reported in (2000) 6 SCC 79 in paragraph - 5 has held as under:-

> "5. The purpose of an open auction is to get the most remunerative price and it is the duty of the court to keep openness of the auction so that the intending bidders would be free to participate and offer higher value. If that path is cut down or closed the possibility of fraud or to secure inadequate price or underbidding would loom large. The court would, therefore, have to exercise its discretion wisely and with circumspection and keeping in view the facts and circumstances in each case. One of the terms of the offer in this case is that even confirmation of the sale is liable to be set aside by the High Court as per Clause 11 of the conditions of offer. The sale conducted was subject to confirmation. Therefore, mere acceptance of the offer of Mr. Shantilal Malik does not constitute any finality of the auction nor would it he automatically confirmed. The appellant offered a higher price even now at Rs. 45,00,000. Keeping in view the interest of the company and the creditors and the workmen to whom the sale proceeds would he applied, the learned company judge was right in exercising her discretion to reopen the auction and directing Mr. Shantilal Malik as well to make a higher offer than what was offered by the appellant. In every case it is not necessary that there should be fraud in conducting the sale, though on its proof the sale gets vitiated and it is one of the grounds to set aside the auction sale. Therefore, the discretion exercised by the learned single judge cannot be said to be unwarranted. Under the circumstances, we are satisfied that the Division Bench of the Calcutta High Court-committed manifest illegality in interfering with the order of the learned single judge. The appeal is allowed. The order of the Division Bench is set aside. The clear action of the learned single judge are also expunged. The offer of the appellant of Rs. 45,00,000 shall be minimal. It is open to the second respondent Shantilal Malik to participate in the auction and the learned single judge is directed to conduct the auction in the open court between the parties and the highest offer may be accepted as per law and action be taken thereof as per law. The appeal is accordingly allowed but in the circumstances parties are directed to bear their own costs."

In light of the aforesaid judgment, once the reserve price was fixed to Rs.31,00,00,000/-, all the more there was no reason to reject the offer made by the

present appellants on a technical ground that the appellant was not a participant. If the present appellant was not a participant, the prayer made by the Official Liquidator for re-auctioning the entire properties should have been allowed.

26. The Hon'ble Supreme Court in the case of *Navlkha & Sons* (supra) in paragraph - 6 has held as under:-

> "6. The principles which should govern confirmation of sales are well-established. Where the acceptance of the offer by the Commissioners is subject to confirmation of the Court the offeror does not by mere acceptance get any vested right in the property so that he may demand automatic confirmation of his offer. The condition of confirmation by the Court operates as a safeguard against the property being sold at inadequate price whether or not it is a consequence of any irregularity or fraud in the conduct of the sale. In every case it is the duty of the Court to satisfy itself that having regard to the market value of the property the price offered is reasonable. Unless the Court is satisfied about the adequacy of the price the act of confirmation of the sale would not be a proper exercise of judicial discretion. In Gordhan Das Chuni Lal v. T. Sriman Kanthimathinatha Pillai(1) it was observed that where the property is authorised to be sold by private contract or otherwise it is the duty of the Court to satisfy itself that the price fixed 'is the best that could be expected to be offered. That is because the Court is the custodian of the interests of the Company and its creditors and the sanction of the Court required under the Companies Act has to be exercised with judicial discretion regard being had to the interests of the Company and its creditors as well. This principle was followed in Rathnaswami Pillai v. Sadapathi Pillai(2) 'and S. Soundajan v. M/s. Roshan & Co.(1). In A. Subbaraya Mudaliar v. K.Sundarajan(4) it was pointed out that the condition of confirmation by the Court being a safeguard against the property being sold at an inadequate price, it will be not only proper but necessary that the Court in exercising the discretion which it undoubtedly has of accepting or refusing the highest bid at the auction held in pursuance of its orders, should see that the price fetched at the auction, is an adequate price even though there is no suggestion of irregularity or fraud. It is well to bear in mind the other principle which is equally well-settled namely that once the court comes to the conclusion that the price offered is adequate, no subsequent higher offer can constitute a valid ground for refusing confirmation of the sale or offer already received. (See the decision of the Madras High Court in Roshan & Co's case (supra)."

In the considered opinion of this Court, keeping in view the law laid down by the Apex Court in the case of *Navlakha & Sons* (supra), fresh auction became a necessity.

27. In the case of *Vedica Procon Private Limited v/s Balleshwar Greens Private Limited & Others* reported in (2010) 16 SCC 94, the Hon'ble Supreme Court in paragraphs - 47 and 48 had held as under:-

> "47. In our opinion, in the case on hand, the High Court was not justified in recalling the order dated 17.12.2013 for following reasons:
>
> 48. The highest bid of the appellant herein was accepted by the Company Court and all the stake-holders of the company in liquidation were heard before such an acceptance. Nobody ever objected including the first respondent herein at that stage on any ground whatsoever, such as, that there was any fraud or irregularity in the sale nor was there any objection from any one of them that the price offered by the appellant herein was inadequate. No doubt, the property in question became more valuable in view of the subsequent development. In our opinion, it is not a relevant consideration in determining the legality of the order dated 17.12.2013. Imagine, if instead of increasing the floor space index for construction from 1.0 to 1.8 the State of Gujarat had decided to reduce it below 1.0 subsequent to 17.12.2013, could the appellant be heard to argue that it would be legally justified in resiling from its earlier offer which was accepted by the Court and not bound by the contractual obligation flowing from such an offer and acceptance? "

In the aforesaid case, the property in question became more valuable in view of subsequent development (i.e. increased FSR), however, in the present case, in the first round of sale, the offered reserve price was Rs.31,00,00,000/-, which was certainly much more than the reserved price offered by respondent No.2 i.e. Rs.28,15,00,000/-. The price offered by respondent No.2 is again much lower than the price offered by the appellant.

28. Keeping in view the judgments delivered by the Hon'ble Supreme Court, it is the bounden duty of the Court to see that the price fetched at the auction is an adequate price, even though, there is no suggestion of irregularity or fraud. In the case of *Punjab Wireless Systems Limited v/s Indian Overseas Bank & Others* reported in (2005) 126 Company Cases 554**,** the Punjab & Haryana High Court has held as under:-

> **"22.** Rejecting the argument that mere inadequacy of price cannot demolish every Court sale based on the earlier judgment of the Supreme court in Kayjay Industries (P) Ltd., v. Asnew Drums (P) Ltd., (1974) 2 SCC 213, their Lordships observed as under:-
>
> > "In our view, this submission requires to be rejected on the ground that in the said case, the Court has reproduced the paragraph which we have quoted above from the decision in Navalkha and Sons wherein the Court has specifically held that the condition of

> confirmation by the Court operates as safeguard against the property being sold at inadequate price whether or not it is a consequence of any irregularity or fraud in the conduct of the sale; the Court is required to satisfy itself that having regard to the market value of the property the price offered is reasonable; unless the Court is satisfied about the adequacy of the price the act of confirmation of sale would not be proper exercise of judicial discretion. This aspects reiterated by the Court by holding that the aforesaid principles must govern every Court sale. The Court has also observed that failure to apply its mind to the material factors bearing on the reasonableness of the price offered may amount to material irregularity in conduct of sale."

23. It is thus obvious that the power of the Court to set aside even confirmed sale if unassailable. The judgment of the Supreme Court in Navalkha and Sons's case (supra) has not dealt with such a power. However, in Union Bank of India's case (supra), the view taken in Navalkha and sons's case (supra) has been considered. Emphasising that the object of sale is to apply the sale proceeds to meet the claims of the creditors of the Company, the Supreme Court in the case of Allahabad Bank v. Bengal Paper Mills Co. Ltd. (1999)4 S.C.C. 383 (supra) has held that it is duty of the Courts to ensure that the best possible price is realised by sale of the assets and the properties of the Company in liquidation as it is obliged to the creditors for undertaking such a course. It was noticed that the learned Company Judge had ordered possession to be delivered to the Official Liquidator hastily and concluded that the auction purchasers should have realised that the order of sale could be set aside when any expenditure incurred by the auction purchaser was at his own risk. It was also observed that the interest of the creditors of the Company, particularly those of the unsecured creditors over weighed such equities. The observations of their Lordships in this regard read as under:-

> "The second respondent knew that the appeals were pending and that they could end in the order of sale being set aside. Such expenditure as it incurred withthis knowledge was at its risk. In the third place, and most important, the interests of the creditors of the Company, particularly the unsecured creditors, overweighed such equities, if any, as might have been considered to be in favour of the second respondent. It was, in our view, the obligation of the Division Bench to have struck down the order of sale having regard to what it found wrong with it.

> 25 .... The second respondent knew that the appeals were pending. It should have appreciated that the order of sale was very vulnerable, given what the Division Bench of the High Court had to say about it. It consciously took the risk of incurring the expenditure and obligations and it cannot take shelter behind him."

24. The judgment in the case of Divya Manufacturing Company (P) Ltd. (supra) has clarified any doubt about setting side a sale even after confirmation holding that a subsequent higher offer can constitute a valid ground for doing so. In that case, the sale was confirmed for price of Rs. 1.30 crores but subsequently before possession of the property could be handed over or sale deed could be executed in favour of the auction purchaser, some interveners came and pointed out that the assets of the Company could fetch Rs. 2 crores. Both the interveners deposited Rs. 40 lacs each and also undertook to pay damages to the auction purchaser. The Division Bench of the High Court after taking into consideration all the relevant facts, ordered resale of the assets of the Company. The order of the Division Bench was upheld by the Supreme Court after referring to the judgments in Navalkha and Sons's case (supra) and LICA (P) Ltd. (1) (supra) and LICA (P) Ltd. (2) (supra). Relying and explaining various earlier judgments of the Supreme Court, it was held as under:-

> "16.....The offer of Rs. 1.30 crores is totally inadequate in comparison to the offer of Rs. 2 crores and in case where such higher price is offered, it would be in the interest of the Company and its creditors to set-aside the sale. This may cause some inconvenience or loss to the highest bidder but that cannot be helped in view of the fact that such sales are conducted in Court precincts and not by a business house well versed in the market forces and prices. Confirmation of the sale by a court at a grossly inadequate price, whether or not it is a consequence of any irregularity or fraud in the conduct of sale, could be set aside on the ground that it was not just and proper exercise of judicial discretion. In such cases, a meaningful intervention by the Court may prevent, to some extent, underbidding at the time of auction through Court. In the present case, the Court has reviewed its exercise of judicial discretion within the shortest time."

25. The aforementioned survey of case law clearly lays down that this Court is clothed with the powers to set aside even a confirm sale provided its comes to the conclusion that the price offered by the auction purchaser in fact was inadequate. Such powers is not dependent on any finding that there was material irregularity or commission of fraud in the

> process of sale, adopted by the Official Liquidator. It is also significant to notice that Dr. Singhvi appearing for the auction purchaser has also conceded such a power of the Court. The question which arises is whether in the facts and circumstances of the case, the sale confirmed in favour of the auction purchaser should be set aside or the plea raised by the interveners should be rejected."

Thus, in short, if the Court feels that the price offered in the auction is not the adequate price, the Court can certainly order for re-auction and in the present case, a person i.e. present appellant has offered Rs.2,80,00,000/-more in the matter, and therefore, fresh auction is inevitable.

29. Another important aspect of the case is that the sale was confirmed on 02.03.2020 in presence of advocate of respondent No.2 with a direction to deposit entire sale consideration within a period of 60 days from the date of the order i.e. by 01.05.2020, however, respondent did not deposit any amount by 03.05.2020 and taking shelter of pandemic COVID - 19, a prayer was made for extension of time.

30. In the considered opinion of this Court, as the amount offered by respondent No.2, which is less than the initial reserve price of Rs.31,00,00,000/- and which is again less than the amount offered by the appellants, cannot be accepted as the difference is about Rs.2,79,00,000/-. The Official Liquidator is receiving almost 2.80 crore extra amount and on technicalities, such an offer cannot be thrown in a dustbin. It is certainly true that the present appellant has not participated in the process of tender but at the same time, assets of the Company, as the initial price was fixed at Rs.31,00,00,000/-, cannot be given to a person, who has offered Rs.28,15,00,000/- only.

31. In the considered opinion of this Court, the prayer made in the OLR for fresh e-auction should have been allowed and not further extension could have been granted keeping in view the peculiar facts and circumstances of the case to respondent No.2 to deposit the amount.

32. Resultantly, all the Interlocutory Application stand disposed of. The orders dated 02.03.2020 and 04.05.2020 are hereby set aside and the prayer made by the Official Liquidator in OLR No.31/2019 for holding fresh e-auction is allowed. It is needless to mention that the present appellants, keeping in view the undertaking given by them before this Court, in case, a fresh auction is held will not quote the price less than the price already quoted before this Court as well as quoted before the Official Liquidator i.e. less than Rs.30,69,00,000/-. The present appellant shall also bear the cost for conducting fresh e-auction. The exercise of concluding fresh e-auction be concluded within a period of 60 days from the date of receipt of certified copy of this order.

With the aforesaid, the present Company Appeal stands allowed. No order as to costs.

This matter has been disposed of through video conferencing and keeping in view the present scenario on account of pandemic COVID - 19, in case, a certified copy is not made available (physical copy), the e-copy obtained through the High Court Website or even the copy uploaded on the website of the High Court shall be treated as certified copy for all purposes.

Appeal allowed

I.L.R. [2020] M.P. 1755
CRIMINAL REVISION

Before Mr. Justice B.K. Shrivastava

Cr.R. No. 1431/2018 (Jabalpur) decided on 26 June, 2020

BADRI PRASAD JHARIA …Applicant

Vs.

KU. VATSALYA JHARIA …Non-applicant

***A. Criminal Procedure Code, 1973 (2 of 1974), Section 125(1)(b) – Entitlement of Child – Paternity of Child – DNA Test* – Held – In respect of paternity of child, trial Court dismissed the application of husband for DNA test, although wife has not refused for the same – Wife's refusal for DNA test in another divorce matter cannot be considered in present case filed u/S 125 Cr.P.C. for drawing presumption against her – Adverse inference against wife cannot be drawn – DNA test is not mandatory in proceeding u/S 125 Cr.P.C. because u/S 125(1)(b), both legitimate and illegitimate children are entitled for maintenance – Revision dismissed. (Paras 21 to 24 & 32)**

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 125(1)(b) – संतान की हकदारी – संतान का पितृत्व – डी एन ए परीक्षण – अभिनिर्धारित – संतान के पितृत्व के संबंध में न्यायालय ने डी एन ए परीक्षण हेतु पति का आवेदन खारिज किया यद्यपि पत्नी ने उक्त के लिए मना नहीं किया है – विवाह विच्छेद के अन्य मामले में पत्नी द्वारा डी एन ए परीक्षण हेतु इंकार किये जाने को, धारा 125 दं.प्र.सं. के अंतर्गत प्रस्तुत वर्तमान प्रकरण में उसके विरूद्ध उपधारणा किये जाने हेतु विचार में नहीं लिया जा सकता – पत्नी के विरूद्ध विपरीत निष्कर्ष नहीं निकाला जा सकता – धारा 125 दं.प्र.सं. के अंतर्गत कार्यवाही में डी एन ए परीक्षण आज्ञापक नहीं क्योंकि धारा 125(1)(b) के अंतर्गत, धर्मज एवं अधर्मज दोनों संताने, भरणपोषण हेतु हकदार हैं – पुनरीक्षण खारिज।

***B. Criminal Procedure Code, 1973 (2 of 1974), Section 125 and Evidence Act (1 of 1872), Section 112 – Paternity of Child – Presumption & Proof* – Held – U/S 125, it is sufficient to prove the child to be legitimate child of husband, if relationship of husband and wife is in existence, child is born during such relationship, marriage between parties is not dissolved and**

husband was having access to wife – Husband failed to establish that he was not having access to his wife during the period, when she became pregnant – Presumption u/S 112 of Evidence Act rightly drawn against husband.

(Paras 24, 27 & 30)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 125 एवं साक्ष्य अधिनियम (1872 का 1), धारा 112 – संतान का पितृत्व – उपधारणा व सबूत – अभिनिर्धारित – धारा 125 के अंतर्गत, यदि पति–पत्नी का संबंध विद्यमान है, उक्त संबंध के दौरान संतान का जन्म हुआ है, पक्षकारों के मध्य विवाह का विघटन नहीं हुआ है और पति की पत्नी तक पहुँच है, संतान को पति की धर्मज संतान होना साबित किया जाना पर्याप्त है – पति स्थापित करने में असफल रहा कि उस अवधि के दौरान पत्नी तक उसकी पहुंच नहीं थी जब वह गर्भवती हुई – साक्ष्य अधिनियम की धारा 112 के अंतर्गत पति के विरूद्ध उचित रूप से उपधारणा निकाली गई।

***C. Criminal Procedure Code, 1973 (2 of 1974), Section 125 – Quantum – Income of Husband & Wife – Burden of proof* – Held – U/S 125 Cr.P.C., burden lies on husband to prove his income and liability – Wife's income is Rs. 34,707 p.m. whereas husband's income is Rs. 26,127 p.m. – Husband and wife both earning member are responsible for maintenance of daughter – Trial Court granted Rs. 5000 to daughter which, looking to present status of economy, is justified – No interference required.**

(Para 31 & 32)

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 125 – मात्रा – पति व पत्नी की आय – सबूत का भार – अभिनिर्धारित – धारा 125 दं.प्र.सं. के अंतर्गत पति पर उसकी अपनी आय व दायित्व साबित करने का भार होता है – पत्नी की आय रू. 34,707 प्रति माह है जबकि पति की आय रू. 26,127 प्रति माह है – पति व पत्नी दोनों उपार्जन करने वाले सदस्य, पुत्री के भरणपोषण हेतु जिम्मेदार हैं – विचारण न्यायालय ने पुत्री को रू. 5000 प्रदान किये जो अर्थव्यवस्था की वर्तमान स्थिति को देखते हुए न्यायोचित है – कोई हस्तक्षेप अपेक्षित नहीं।

Cases referred:

(2015) 1 SCC 365, 2014 [3] MPHT 326 = (2014) 2 SCC (Civ) 145 = (2014) 4 SCC (Cri) 65 [S.C.] = (2014) 2 SCC 576, AIR 1934 PC 49, 1954 SCR 424 : (AIR 1954 SC 176), (1993) 3 SCC 418 : AIR 1993 SC 2295 : 1993 AIR SCW 2325, AIR 2001 SC 2226 : 2001 AIR SCW 2100 = (2001) 5 SCC 511, (2005) 4 SCC 449, (2009) 12 SCC 454 = AIR 2009 SC 3115=2009 AIR SCW 5006, (2010) 8 SCC 633 = AIR 2010 SC 2851 = 2010 AIR SCW 4603, (2014) 2 SCC 576 = AIR 2014 SC 932 = 2014 AIR SCW 506 = 2014 {4} MPHT 326 (SC) = (2014) 2 SCC (Civ) 145 = (2014) 4 SCC (Cri) 65 [S.C.], (1993) 3 SCC 418, (2010) 8 SCC 633, (2001) 5 SCC 311 [AIR 2001 SC 2226 = 2001 AIR-SCW 2100], AIR 2015 S.C. 418 = [2015] 1 SCC 365, (2009) 12 SCC 454 : AIR 2009 SC 3115 : 2009 AIR SCW 5006.

Ashok Lalwani, for the applicant.
None, for the non-applicant.

O R D E R

B. K. SHRIVASTAVA, J.:- This Criminal Revision has been preferred by the Petitioner / Husband Badri Prasad Jharia on 26.03.2018 U/s. 397 of Cr.P.C read with S.19 of Family Court against the order dated 26.02.2018 passed by Principal Family Court Mandla passed in MJC No.310/2014.

2. It is an admitted fact that the Petitioner Badri Prasad was married with Sita Jhariya, on 23.06.1999 at Village Bhua Bichhiya, District Mandla. The wife is working as teacher and the husband is working as clerk in the Government I.T.I. Chindwada. Out of their wedlock, daughter named Vatsala Jharia [Respondent] was born on 09.06.2009.

3. The wife Sita Jharia filed an application under Section 125 of Cr.P.C before the Family Court on 27.11.2012 for seeking maintenance for her daughter Vatsala aged about 3 years. Husband appeared in the case on 26.02.2013 and filed reply on 02.07.2013. On 26.02.2018 the Court passed the impugned order and granted the maintenance to Vatsala Jharia @ Rs.5000/- P.M. from the date of her entitlement to get the maintenance.

4. It is submitted by the petitioner that the wife was living in adulterous life, having illicit relationship with a person named Vinod Singore. The wife of the aforesaid Vinod Singore (named Kiran Singore) has also initiated the proceedings under Section 494 of IPC against her husband. The petitioner also filed an application against the wife under Section 13 of Hindu Marriage Act for divorce upon the ground of adultery. In that petition the petitioner filed an application for DNA test, but the wife refused it, therefore, Family Court dismissed the application. The petitioner preferred a Writ Petition No.15345/2016 in which order Annexure A/5 was passed and the direction was also given that after adducing evidence the applicant may prefer fresh application for DNA test. The applicant preferred an application in MJC No.310/2014 (U/s 125 Cr.P.C.) for DNA test, but the Family Court dismissed the aforesaid application. It is submitted that the trial Court should draw the presumption against the wife because of her refusal for DNA test. The trial Court misrepresented the evidence of both the parties. The petitioner having no access to her wife Sita Jhariya for 5 years. The petitioner also relied upon the *Dipanwita Roy Vs. Ronobroto Roy* (2015) 1 SCC 365. Upon the aforesaid ground it is requested to set aside the impugned order and dismiss the petition filed under Section 125 of Cr.P.C.

5. After service of the summon, on behalf of the respondent, 7 Advocates have filed their joint Vakalatnama on 04.02.2019, but thereafter on 20.11.2019,

04.12.2019 and 05.12.2019, no one was appeared on behalf of the respondent. Therefore, matter has been heard ex-party against the respondent.

6. The main grievance of the petitioner is that the trial Court failed to draw the presumption under Section 114 of Evidence Act against the wife, while wife was not agreed for the DNA test. Because the wife refused to DNA test, therefore, her refusal should be taken for the purpose of presumption against her.

7. It necessary to understand about the DNA test and its accuracy. It has been said in *Nandlal Wasudeo Badwaik Vs. Lata Nandlal Badwaik & Anr.* 2014[3] MPHT 326 = (2014) 2 SCC (Civ) 145 = (2014) 4 SCC (Cri) 65 [S.C.] = (2014) 2 SCC 576}. that all living beings are composed of cells which are the smallest and basic unit of life. An average human body has trillion of cells of different sizes. DNA (Deoxyribonucleic Acid), which is found in the chromosomes of the cells of living beings, is the blueprint of an individual. Human cells contain 46 chromosomes and those 46 chromosomes contain a total of six billion base pair in 46 duplex threads of DNA. DNA consists of four nitrogenous bases adenine, thymine, cytosine, guanine and phosphoric acid arranged in a regular structure. When two unrelated people possessing the same DNA pattern have been compared, the chances of complete similarity are 1 in 30 billion to 300 billion. Given that the Earth's population is about 5 billion, this test shall have accurate result. It has been recognized by the Court that the result of a genuine DNA test is scientifically accurate.

8. Section 112 of the Indian Evidence Act says:

> ***"112. Birth during marriage, conclusive proof of legitimacy** - The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, **shall be conclusive proof** that he is the legitimate son of that man, **unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten."***

9. Based on the aforesaid provision, the Privy Council in *Karapaya Servai v. Mayandi,* AIR 1934 PC 49, was held, that the word **'access'** used in Section 112 of the Evidence Act, connoted only the existence of an opportunity for marital intercourse, and in case such an opportunity was shown to have existed during the subsistence of a valid marriage, the provision by a fiction of law, accepted the same as conclusive proof of the fact that the child born during the subsistence of the valid marriage, was a legitimate child. The determination of the Privy Council in *Karapaya Servai*'s case (supra) **was approved by** Apex Court in *Chilukuri Venkateshwarly v. Chilukuri Venkatanarayana,* 1954 SCR 424 : (AIR 1954 SC 176). In *Goutam Kundu v. State of West Bengal and another* (1993) 3 SCC 418 : AIR 1993 SC 2295 : 1993 AIR SCW 2325, supreme Court, held that this section

requires the party disputing the paternity to prove non-access in order to dispel the presumption. "Access" and "non-access" mean the existence or non-existence of opportunities for sexual intercourse; it does not mean actual "cohabitation". In *Kamti Devi and another v. Poshi Ram,* AIR 2001 SC 2226 : 2001 AIR SCW 2100 = (2001) 5 SCC 511, the Apex Court said :-

> ***"10.*** *But* ***Section 112 itself provides an outlet*** *to the party who wants to escape from the rigour of that conclusiveness. The said outlet is,* ***if it can be shown that the parties had no access to each other at the time when the child could have been begotten the presumption could be rebutted.*** *In other words, the party who wants to dislodge the conclusiveness has the burden to show a negative, not merely that he did not have the opportunity to approach his wife but that she too did not have the opportunity of approaching him during the relevant time. Normally, the rule of evidence in other instances is that the burden is on the party who asserts the positive, but in this instance the burden is cast on the party who pleads the negative. The raison d'etre is the legislative concern against illegitimatizing a child. It is a sublime public policy that children should not suffer social disability on account of the laches or lapses of parents.*
>
> ***12****.....Its corollary is that the* ***burden of the plaintiff-husband should be higher than the standard of preponderance of probabilities.*** *The standard of proof in such cases must at least be of a degree in between the two as to ensure that there was no possibility of the child being conceived through the plaintiff-husband."*

10. Now we see the importance and applicability of DNA Test in family matters. In *Goutam Kundu v. State of West Bengal and another* (1993) 3 SCC 418 : AIR 1993 SC 2295 : 1993 AIR SCW 2325, supreme court, held as under:

> *"26. From the above discussion it emerges—*
>
> ***(1)*** *That courts in India cannot order blood test as a matter of course;*
>
> ***(2)*** *wherever applications are made for such prayers in order to have roving inquiry, the prayer for blood test cannot be entertained.*
>
> ***(3)*** *there must be a strong prima facie case in that the husband must establish non-access in order to dispel the presumption arising under Section 112 of the Evidence Act.*
>
> ***(4)*** *the court must carefully examine as to what would be the consequence of ordering the blood test; whether it will have the effect of branding a child as a bastard and the mother as an unchaste woman.*

(5) *no one can be compelled to give sample of blood for analysis."*

11. In *Kamti Devi and another Vs. Poshi Ram,* AIR 2001 SC 2226 = 2001 AIR SCW 2100 = (2001) 5 SCC 511, following observations made by the Apex Court :-

> ***"11.*** *We may remember that Section 112 of the Evidence Act was enacted at a time when the modern scientific advancements with Dioxy Nucleric Acid (DNA) as well as Ribonucleic Acid (RNA) tests were not even in contemplation of the legislature. The result of a genuine DNA test is said to be scientifically accurate. But even that is not enough to escape from the conclusiveness of Section 112 of the Act, e.g., if a husband and wife were living together during the time of conception but the DNA test revealed that the child was not born to the husband, the conclusiveness in law would remain unrebuttable. This may look hard from the point of view of the husband who would be compelled to bear the fatherhood of a child of which he may be innocent. But even in such a case the law leans in favour of the innocent child from being bastardized if his mother and her spouse were living together during the time of conception. Hence the question regarding the degree of proof of non-access for rebutting the conclusiveness must be answered in the light of what is meant by access or non-access as delineated above." (Underlined by me)*

12. The aforesaid case of *Kamti Devi* (Supra) has been followed in the case of *Banarsi Dass v. Teeku Dutta,* (2005) 4 SCC 449.

13. In ***S****ham Lal alias Kuldeep Vs. Sanjeev Kumar and others* (2009) 12 SCC 454 = AIR 2009 SC 3115 = 2009 AIR SCW 5006, the Supreme Court held as under:

> *"Once the validity of marriage is proved then there is strong presumption about the legitimacy of children born from that wedlock. The presumption can only be rebutted by a strong, clear, satisfying and conclusive evidence. The presumption cannot be displaced by mere balance of probabilities or any circumstance creating doubt. Even the evidence of adultery by wife which though amounts to very strong evidence, it by itself, is not quite sufficient to repel this presumption and will not justify finding of illegitimacy if husband has had access. In the instant case, admittedly the plaintiff and Defendant 4 were born to D during the continuance of her valid marriage with B. Their marriage was in fact never dissolved. There is no evidence on record that B at any point of time did not have access to D." (Underlined by me)*

14. In *Bhabani Prasad Jena v. Convenor Secretary, Orissa State Commission for Women and another* (2010) 8 SCC 633 = AIR 2010 SC 2851 = 2010 AIR SCW 4603, Supreme Court held as under:

*"21. **In a matter where paternity of a child is in issue** before the court, the use of DNA test is an extremely delicate and sensitive aspect. **One view is** that when modern science gives the means of ascertaining the paternity of a child, there **should not be any hesitation to use** those means whenever the occasion requires. **The other view** is that the **court must be reluctant in the use** of such scientific advances and tools **which result in** invasion of right to privacy of an individual and may not only be prejudicial to the rights of the parties* but may have devastating effect on the child. ***Sometimes the result of such scientific test may bastardise an innocent child even though his mother and her spouse were living together during the time of conception.***

***22. In our view,** when there is apparent conflict between the right to privacy of a person not to submit himself forcibly to medical-examination and duty of the court to reach the truth, the court must exercise its discretion only after balancing the interests of the parties and on due consideration whether for a just decision in the matter, DNA test is eminently needed. **DNA test in a matter relating to paternity of a child should not be directed by the court as a matter of course or in a routine manner, whenever such a request is made. The court has to consider diverse aspects including presumption under Section 112 of the Evidence Act;** pros and cons of such order and the test of "eminent need" whether it is not possible for the court to reach the truth without use of such test.*

23.** There is no conflict in the two decisions of this Court, namely, **Goutam Kundu v. State of West Bengal (1993) 3 SCC 418 : (AIR 1993 SC 2295 : 1993 AIR SCW 2325) and Sharda v. Dharmpal (2003) 4 SCC 493**. In **Goutam Kundu,** it has been laid down that courts in India cannot order blood test as a matter of course and such prayers cannot be granted to have roving inquiry; there must be strong prima facie case and the court must carefully examine as to what would be the consequence of ordering the blood test. In **Sharda,** while concluding that a matrimonial court has power to order a person to undergo a medical test, it was reiterated that the court should exercise such a power if the applicant has a strong prima facie case and there is sufficient material before the court. **Obviously, therefore, any order for DNA test can be given by the court only if a strong prima facie case is made out for such a course.

***24.** ..... High Court overlooked a very material aspect that the matrimonial dispute between the parties is already pending in the court of competent jurisdiction and all aspects concerning matrimonial dispute raised by the parties in that case shall be adjudicated and determined by that court. Should an issue arise before the matrimonial court concerning the paternity of the child, obviously that court will be competent to pass an appropriate order at the relevant time in*

accordance with law. In any view of the matter, it is not possible to sustain the order passed by the High Court." (Underlined by me)

15(i). In *Nandlal Wasudeo Badwaik Vs. Lata Nandlal Badwaik and another* (2014) 2 SCC 576 = AIR 2014 SC 932 = 2014 AIR SCW 506 = 2014 {4} MPHT 326 (SC) = (2014) 2 SCC (Civ) 145 = (2014) 4 SCC (Cri) 65 [S.C.] , Petitioner was the husband of respondent no.1, Lata Nandlal Badwaik and alleged to be the father of girl child Netra alias Neha Nandlal Badwaik, respondent no.2. The marriage between them was solemnized on 30th of June, 1990 at Chandrapur. Wife filed an application for maintenance under Section 125 of the Code of Criminal Procedure, but the same was dismissed by the learned Magistrate by order dated 10th December,1993. Thereafter, the wife resorted to a fresh proceeding under Section 125 of the Code of Criminal Procedure, claiming maintenance for herself and her daughter, inter alia, alleging that she started living with her husband from 20th of June, 1996 and stayed with him for about two years and during that period got pregnant. She was sent for delivery at her parents' place where she gave birth to a girl child (respondent no. 2). Petitioner-husband resisted the claim and alleged that the assertion of the wife that she stayed with him since 20th of June, 1996 is false. He denied that respondent no. 2 is his daughter. According to the husband, After 1991, he had no physical relationship with his wife. The learned Magistrate accepted the plea of the wife and granted maintenance to the wife and daughter. The challenge to the said order in revision has failed. Thereafter, Husband filed a petition under Section 482 of the Code, against those orders.

15(ii). Court by order dated 10th of January,2011, allow the petitioner's prayer for conducting DNA test for ascertaining the paternity of the child. In the light of the aforesaid order, the Regional Forensic Science Laboratory, Nagpur has submitted the result of DNA testing and opined that appellant ***"Nandlal Vasudev Badwaik is excluded to be the biological father of Netra alias Neha Nandlal Badwaik",*** respondent no. 2 . Wife, not being satisfied with the aforesaid report, made a request for re-test. The said prayer of the wife was accepted and Court by order dated 22nd of July, 2011, said that prayer may be allowed having regard to the serious consequences of the Report which has been filed. Accordingly, Court direct that a further DNA Test be conducted at the Central Forensic Laboratory, Ministry of Home Affairs, Government of India at Hyderabad. The Central Forensic Science Laboratory, Hyderabad submitted its report and on that basis opined that the appellant, ***"Nandlal Wasudeo Badwaik can be excluded from being the biological father of Miss Neha Nandlal Badwaik".***

15(iii). The respondents submits before the Supreme Court that the appellant/ Husband having failed to establish that he had no access to his wife at any time when she could have begotten respondent no.2, the direction for DNA test ought not to have been given and the result of such a test is fit to be ignored. In support of the submission wife placed reliance on a judgment of this Court in *Goutam Kundu*

v. State of W.B., (1993) 3 SCC 418 , *Banarsi Dass v. Teeku Dutta.* (2005) 4 SCC 449, and *Bhabani Prasad Jena v. Orissa State Commission for Women,* (2010) 8 SCC 633. Appellant / Husband submits that the Court twice ordered for DNA test and, hence, the question as to whether this was a fit case in which DNA profiling should or should not have been ordered is academic. After taking in to consideration the arguments of both parties , the Court said that the respondents, in fact, had not opposed the prayer of DNA test when such a prayer was being considered. It is only after the reports of the DNA test had been received, which was adverse to the respondents, that they are challenging it on the ground that such a test ought not to have been directed. Therefore court declined to go into the validity of the orders passed by a coordinate Bench and said that it has attained finality and also said that "when the order for DNA test has already been passed, at this stage, we are not concerned with this issue and we have to proceed on an assumption that a valid direction for DNA test was given." As regards the *Goutam Kundu* (supra), *Banarsi Dass* (supra) and *Bhabani Prasad Jena* (supra), the court said that same have no bearing in the facts and circumstances of the case. In all these cases, the court was considering as to whether facts of those cases justify passing of an order for DNA test.

15(iv). Counsel for Husband submits that in view of the opinions, based on DNA profiling that appellant is not the biological father, he cannot be fastened with the liability to pay maintenance to the girl-child born to the wife. Counsel for wife however, submits that the marriage between the parties has not been dissolved, and the birth of the child having taken place during the subsistence of a valid marriage and the husband having access to the wife, conclusively prove that the girl-child is the legitimate daughter of the appellant. According to him, the DNA test cannot rebut the conclusive presumption envisaged under Section 112 of the Evidence Act. According to him, respondent no. 2, therefore, has to be held to be the appellant's legitimate daughter. In support of the submission, reliance was placed on *Kamti Devi v. Poshi Ram,* (2001) 5 SCC 311 [AIR 2001 SC 2226 = 2001 AIR-SCW 2100].

15(v). The Court Consider the question as to whether the DNA test would be sufficient to hold that the appellant is not the biological father of respondent no.2, in the face of what has been provided under Section 112 of the Evidence Act, and said that From a plain reading of the aforesaid, it is evident that a child born during the continuance of a valid marriage shall be a conclusive proof that the child is a legitimate child of the man to whom the lady giving birth is married. The provision makes the legitimacy of the child to be a conclusive proof, if the conditions aforesaid are satisfied. It can be denied only if it is shown that the parties to the marriage have no access to each other at any time when the child could have been begotten. The Court said that in such circumstance, which would give way to the other is a complex question, and further observed :-

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

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

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

18. *We must understand the distinction between a legal fiction and the presumption of a fact. Legal fiction assumes existence of a fact which may not really exist. However, a presumption of a fact depends on satisfaction of certain circumstances. Those circumstances logically would lead to the fact sought to be presumed. Section 112 of the Evidence Act does not create a legal fiction but provides for presumption.*

> ***19. The husband's plea that he had no access to the wife when the child was begotten stands proved by the DNA test report and in the face of it, we cannot compel the appellant to bear the fatherhood of a child, when the scientific reports prove to the contrary. We are conscious that an innocent child may not be bastardised as the marriage between her mother and father was subsisting at the time of her birth, but in view of the DNA test reports and what we have observed above, we cannot forestall the consequence.*** *It is denying the truth. "Truth must triumph" is the hallmark of justice."*

15(vi). Court also said that in the case of *Kamti Devi v. Poshi Ram,* (2001) 5 SCC 311 = AIR 2001 SC 2226 = 2001 AIR-SCW 2100, on appreciation of evidence the court came to the conclusion that the husband had no opportunity whatsoever to have liaison with the wife. There was no DNA test held in the case. In the said background i.e. non-access of the husband with the wife, Court held that the result of DNA test **"is not enough to escape from the conclusiveness of Section 112 of the Act".** The judgment has to be understood in the factual scenario of the said case. The said judgment has not held that DNA test is to be ignored. In fact, Court has taken note of the fact that DNA test is scientifically accurate.

16. In *Dipanwita Roy v. Ronobroto Roy* , AIR 2015 S. C. 418 = [2015] 1 SCC 365 the court said that in matrimonial dispute, DNA test to be avoided as such test puts legitimacy of child at peril. Depending on the facts and circumstances of the case, it would be permissible for a Court to direct the holding of a DNA examination, to determine the veracity of the allegation(s), which constitute one of the grounds, on which the concerned party would either succeed or lose, There can be no dispute, that **if the direction to hold such a test can be avoided, it should be so avoided. The reason, is that the legitimacy of a child should not be put to peril.**

17. In the aforesaid *Dipanwita Roy* (Supra) case, marriage was solemnised on 25.01.2003 which was registered on 09.02.2003. Husband filed the petition under Section 13 of the Hindu Marriage Act, 1955 seeking dissolution of the marriage. **One of the grounds for seeking divorce was, based on the alleged adulterous life style of the petitioner-wife and her extra marital relationship with Mr. Deven Shah,.** In order to substantiate his claim, **in respect of the infidelity of the petitioner-wife, and to establish that the son born to her was not his,** the respondent-**husband moved an application on 24.07.2011 seeking a DNA test of himself** (the respondent-husband) **and the male child born to the petitioner-wife.** In the written statement **wife expressly asserted the factum of cohabitation** during the subsistence of their marriage, and **also denied the accusations leveled** by the respondent-husband of her extra marital relationship, as absolutely false, concocted, untrue, frivolous and vexatious. She also asserted, that she had a continuous matrimonial relationship with the respondent-husband, and that, the respondent-husband had factually performed all the matrimonial obligations with her, and had

factually cohabited with her. The Family Court by an order dated 27.08.2012 **dismissed the prayer** made by the husband, for conducting the DNA test. Husband approached the High Court at Calcutta. The **High Court allowed** the petition filed by the respondent-husband vide an order dated 6.12.2012.

17(i). Before the Supreme Court appellant-wife, in the first instance, invited attention of the Cort (sic : Court) to Section 112 of the Indian Evidence Act and also place the reliance upon *Goutam Kundu v. State of West Bengal and another* (1993) 3 SCC 418 : AIR 1993 SC 2295 : 1993 AIR SCW 2325, *Kamti Devi and another v. Poshi Ram*, AIR 2001 SC 2226 : 2001 AIR SCW 2100 = (2001) 5 SCC 511, & *Sham Lal alias Kuldeep v. Sanjeev Kumar and others* (2009) 12 SCC 454 : AIR 2009 SC 3115 : 2009 AIR SCW 5006. But Court said that all the judgments relied upon by the learned counsel for the appellant were on the pointed subject of the legitimacy of the child born during the subsistence of a valid marriage. The court observed **that question which arises for consideration in the appeal, pertains to the alleged infidelity of the appellant-wife. It is not the husband's desire to prove the legitimacy or illegitimacy of the child born to the appellant. The purpose of the respondent is, to establish the ingredients of Section 13(1)(ii) of the Hindu Marriage Act,** 1955, namely, that after the solemnisation of the marriage of the appellant with the respondent, the appellant had voluntarily engaged in sexual intercourse, with a person other than the respondent. **There can be no doubt, that the prayer made by the respondent for conducting a DNA test of the appellant's son as also of himself, was aimed at the alleged adulterous behavior of the appellant. In the determination of the issue in hand, undoubtedly, the issue of legitimacy will also be incidentally involved. Therefore, insofar as the present controversy is concerned, Section 112 of the Indian Evidence Act would not strictly come into play.**

17(ii). Court also referred para 21 to 24 of *Bhabani Prasad Jena v. Convenor Secretary, Orissa State Commission for Women and another* (2010) 8 SCC 633 : AIR 2010 SC 2851 : 2010 AIR SCW 4603 and said that it is apparent, that despite the consequences of a DNA test, this Court has concluded, that **it was permissible for a Court to permit the holding of a DNA test, if it was eminently needed, after balancing the interests of the parties.** The court again refereed (sic : referred) para 15 to 19 of *Nandlal Wasudeo Badwaik v. Lata Nandlal Badwaik and another* (2014) 2 SCC 576 : AIR 2014 SC 932 : 2014 AIR SCW 506 : 2014 {4} MPHT 326 (SC) **and said that the Court has clearly opined, that proof based on a DNA test would be sufficient to dislodge, a presumption under Section 112 of the Indian Evidence Act**. Court said in Para 10 :-

> **"10.** It is borne from the decisions rendered by this Court in **Bhabani Prasad Jena (supra), and Nandlal Wasudeo Badwaik (supra)**, that

depending on the facts and circumstances of the case, it would be permissible for a Court to direct the holding of a DNA examination, to determine the veracity of the allegation(s), which constitute one of the **grounds, on which the concerned party would either succeed or lose.** There can be no dispute, that **if the direction to hold such a test can be avoided, it should be so avoided.** The reason, as already recorded in various judgments by this Court, is that **the legitimacy of a child should not be put to peril**." The Apex Court disposed of the petition by saying in Para 11 and 12:-

> **"11.** The question that has to be answered in this case, is in respect of the alleged infidelity of the appellant-wife. The respondent-husband has made clear and categorical assertions in the petition filed by him under Section 13 of the Hindu Marriage Act, alleging infidelity. He has gone to the extent of naming the person, who was the father of the male child born to the appellant-wife. It is in the process of substantiating his allegation of infidelity, that the respondent-husband had made an application before the Family Court for conducting a DNA test, which would establish whether or not, he had fathered the male child born to the appellant-wife. **The respondent feels that it is only possible for him to substantiate the allegations levelled by him** (of the appellant-wife's infidelity) through a DNA test. **We agree with him.** In our view, but for the DNA test, **it would be impossible for the respondent-husband to establish and confirm the assertions made in the pleadings.** We are therefore satisfied, that the direction issued by the High Court, as has been extracted hereinabove, was to told DNA test in circumstances is fully justified. **DNA testing is the most legitimate and scientifically perfect means, which the husband could use, to establish his assertion of infidelity. This should simultaneously be taken as the most authentic, rightful and correct means also with the wife, for her to rebut the assertions made by the respondent-husband, and to establish that she had not been unfaithful, adulterous or disloyal.** If the appellant-wife is right, she shall be proved to be so.
>
> **12.** We would, however, while upholding the order passed by the High Court, **consider it just and appropriate to record a caveat, giving the appellant-wife liberty to comply with or disregard the order passed by the High Court, requiring the holding of the DNA test.** In case, she accepts the direction issued by the High Court, the DNA test will determine conclusively the veracity of accusation levelled by the respondent-husband, against her. **In case, she declines** to comply with the direction issued by the High Court, the allegation would be determined by

the concerned Court, by drawing a presumption of the nature contemplated in Section 114 of the Indian Evidence Act, especially, in terms of illustration (h) thereof. Section 114 as also illustration (h), referred to above, are being extracted hereunder:

> ***"114. Court may presume existence of certain facts*** *- The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.*
>
> ***Illustration (h)*** *- That if a man refuses to answer a question which he is not compelled to answer* by law, the answer, if given, would be unfavourable to him."

This course has been adopted to preserve the right of individual privacy to the extent possible. Of course, without sacrificing the cause of justice. By adopting the above course, the issue of infidelity alone would be determined, without expressly disturbing the presumption contemplated under Section 112 of the Indian Evidence Act. Even though, as already stated above, undoubtedly the issue of legitimacy would also be incidentally involved."

18. Various dates are important in this case. The application under Section 125 of Cr.P.C. was filed by the non-applicant / wife on 27.11.2012, which was registered as MJC No.310/2014. Petitioner/ husband was appeared in the aforesaid case on 26.02.2013. He filed the reply of the application for interim maintenance on 10.04.2013 and reply to the original application on 02.07.2013. Thereafter final order was passed on 26.02.2018. During the pendency of aforesaid application, Case No.33/2015 was filed by the husband on 17.03.2015 under Section 13 of Hindu Marriage Act.

19. The petitioner mainly relied on the proceedings of aforesaid case under Hindu Marriage Act. In that case No.33/2015, an application under Order XXVI Rule 10(A) read with Section 151 of CPC for conducting DNA test was filed on 13.04.2016. The wife filed the reply of the aforesaid application on 28.07.2016. The Court heard arguments on 24.08.2016 and passed the order and dismissed the aforesaid application. It is also mentioned in the aforesaid order that refusal of the wife will be taken into consideration at the time of passing of the judgment. The aforesaid order dated 24.08.2016 shows that wife submitted before the Court that she is not agreed for DNA test. In the margin of the order sheet she written in her handwriting that "Main DNA nahi Karana Chahati Aanavedika". The husband preferred Writ Petition No.15345/2016 before the High Court against the aforesaid order. A Single Bench of the High Court dismissed the aforesaid petition

on 21.04.2017. It may be useful to quote para 17, 18 and 19 of the aforesaid order which are as under:-

> ***"17.*** *In the light of para 18 of the judgment passed by the Apex Court in* ***Dipanwita Roy Vs. Ronobroto Roy,*** *(supra) the impugned order cannot be held to be illegal. It has been held by the Apex Court that a person cannot be compelled for the DNA test, though, the DNA test is most legitimate and scientifically perfect means which the husband can use to establish and ascertain the paternity and infidelity, but at the same time the Court has evolved the principle of balance by directing for preservation and the right of individual privacy to the extent possible and, therefore, the Court itself has held that in case, the wife declines for the DNA test, the Court can draw presumption as contemplated in Section 114 of the Evidence Act, without disturbing the presumption envisaged in Section 112 of the Evidence Act.*
>
> ***18.*** *However, as discussed above in the light of facts and the law in respect of directions for DNA test and also taking into consideration the submission of respondent that the petitioner can file an application for DNA test after recording of evidence, the petitioner will have an opportunity to make a request for DNA test after recording of evidence or, to request the Court to draw adverse inference against the respondent for refusing the DNA test in terms of Section 114 of the Indian Evidence Act.*
>
> ***19.*** *Thus, in view of the aforesaid enunciation of law discussed in preceding paragraphs, I do not find any illegality and perversity of approach in the impugned order warranting interference of this Court in exercise of jurisdiction under Article 227 of the Constitution of India and the arguments advanced by the counsel for the petitioner cannot be countenanced at this stage."*

20. The petition for divorce is still pending before the Family Court. During the pendency of the MJC No.310/2014, filed by the wife under Section 125 of Cr.P.C., an application under Order XXVI Rule 10(A) read with Section 151 of CPC was filed by the husband on 07.12.2016. The wife filed the reply on 16.12.2016 thereafter Family Court decided the aforesaid application on 04.01.2017. It is mentioned in the aforesaid order that the revision against the order of Family Court refused for DNA test is pending before the High Court and in this case DNA test is not only way to decide the paternity. Relationship of mother and father may be proved by oral evidence also and it may be proved that when the wife became pregnant at that time the husband was in the position to make the relationship with his wife.

21. The aforesaid order was not challenged by the petitioner. Thereafter, trial Court recorded statement of both the parties. Petitioner / wife Sita Jharia, examined herself as [PW-1], Savitri Jharia [PW-2] and Pramodani Soni [PW-3]. Respondent also examined himself as DW-1 and witness Kiran Singore [DW-2].

When the case was listed for final arguments on 16.01.2018, the application under Order XXVI Rule 10(A) of CPC was filed by the husband. The wife filed reply on the same day. The Family Court dismissed the aforesaid application on 18.01.2018. The Court said that as per provision of Section 125(1)(B) of Cr.P.C the legitimate and illegitimate child both are entitled to get the maintenance, therefore, DNA test is not necessary.

22. It appears from the aforesaid discussion that the wife filed the application under Section 125 of Cr.P.C for granting the maintenance for her daughter aged about 3 years. During the pendency of the application the husband filed the petition for divorce under Section 13 of the Hindu Marriage Act. There is no any refusal by the wife for DNA test, in the case of MJC under Section 125 of Cr.P.C. The proceedings of 125 are quasi-judicial proceedings. In this case first application was dismissed by the trial Court on 04.01.2017, but the petitioner did not challenge the aforesaid order before any superior Court. The wife refused the DNA test in the another case filed under Section 13 of Hindu Marriage Act, therefore, her refusal in that case cannot be taken into consideration in this case. In the present case the reply dated 16.01.2018 filed by the wife shows that in her reply she did not refuse to face the DNA test. She opposed the application upon the ground that the application has been filed upon the baseless grounds and the applicant was having the intention to linger on the case. Sufficient opportunity for adducing the evidence has been granted. Daughter is a minor girl, therefore, adverse effect may be caused upon her mind.

23. The position of law is different in the case of Section 13 of Hindu Marriage Act and the application filed under Section 125 of Cr.P.C. "Adultery" is a ground for "Divorce" under Section 13 of Hindu Marriage Act. For proving adultery, the DNA test will definitely be useful as per the established law discussed above. If the wife is refusing for DNA test, then her refusal may be considered as a ground for drawing adverse inference against her. But the position under Section 125 of Cr.P.C is different. Section 125 (1)(b) of Cr.P.C. provides that the person is also liable to grant the maintenance to his illegitimate minor child. The section says -

> ***"125 - Order for maintenance of wives, children and parents-***
>
> *(1) If any person having sufficient means neglects or refuses to maintain-*
>
> *(a) .....*
>
> *(b) .....his* ***legitimate or illegitimate minor child,*** *whether married or not,unable to maintain itself, or.."*

24. In the case filed under Section 125 of Cr.P.C the DNA test is not mandatory in each and every case. For proving paternity under Section 125 of Cr.P.C, it is sufficient to prove that the child is the legitimate child of the husband if :-

(i) Relationship of husband and wife is in existence,

(ii) During their relationship the child was born.

(iii) If the marriage between the parties has not been dissolved.

(iv) The birth of the child having taken place during the subsistence of valid marriage and the husband having access to his wife.

In this case the application was dismissed by the Court and the order was not challenged by the husband. Wife did not refuse in this case and her refusal in Hindu Marriage Act case cannot be considered in this case for drawing presumption against her.

25. Pleadings and evidence are also relevant in this case. In the reply dated 07.09.2017, the husband / petitioner mentioned in para-1 that he is not in contract (sic : contact) with Sita Jhariya since 26.04.2006. The scope of interference in the case of revision is limited. If the findings of the trial Court is based upon the proper appreciation of evidence, then this Court cannot interfere upon the ground that another view may be possible. The interference can only be done in the case of improper Marshalling of the evidence and ignorance of the important evidence. In this case, it appears that the trial Court discussed the entire evidence and no any infirmity is found in the appreciation of the evidence.

26. The trial Court mentioned in para-15 that the application under Section 125 of Cr.P.C was filed on 27.11.2012. The husband appeared in the case on 26.02.2013, who filed the reply of interim application on 10.04.2013 and the main application on 02.07.2013, therefore, the husband was having the knowledge of the fact that the application has been filed by showing him as the father of Vatsala Jharia, but the husband did not made any complaint or not initiated any proceedings against the aforesaid status alleged by her wife. The observation is supported by the record of the case, which shows that the husband was appearing before the trial Court on 26.02.2013 while he filed application (Annexure A/2) under Section 13 of Hindu Marriage Act on 17.03.2015.

27. The trial Court also mentioned in para-16 that the respondent/ husband did not specifically deny the fact that Vatsala Jharia is his daughter. The trial Court also observed that previously the husband mentioned the date 26.04.2007, but thereafter he filed an application for amendment and corrected the date as 26.04.2006 in place of 26.04.2007. The trial Court observed that non-applicant husband filed his reply on 02.07.2013 in which he mentioned that he is living

separately since 5 years back, therefore, if counting of 5 years is started from 02.07.2013 then it is clear that the husband is showing that he is separated from his wife since July 2008, while the daughter Vatsala Jharia was born on 09.06.2009. Therefore, prima facie, it appears from the aforesaid pleadings and evidence that *when the child could have been begotten* at that time the husband was having access to her. Trial Court further mentioned the evidence of husband in which he admitted that he did not take any step for correcting the aforesaid mistake in his reply.

28. The wife Sita Jharia (PW-1) stated in her evidence that the daughter Vatsala Jharia was born during the wedlock of their marriage and the petitioner Badri Prasad is the father of the aforesaid girl. The statement of wife is also supported by the evidence of PW-2 and PW-3. The trial Court also discussed the aforesaid fact in para-12 of the judgment.

29. For showing the adultery of wife the petitioner / husband examined the witness Smt Kiran Singore who is wife of Vinod Singore. If we see the reply of the husband then it appears that in para-2, husband mentioned that Kiran Singore made a complaint against his husband then he came to know the fact. There is no any specific allegation in the written statement of husband that the wife having any illicit relationship with Vinod Singore. Husband only said that the wife of Vinod Singore made a complaint against Sita Jharia (wife of the petitioner). The aforesaid pleading is not sufficient. The petitioner said in para-3 of his statement that Kiran Singore filed a petition under Section 13 of Hindu Marriage Act (Ex.D/1) against her husband Vinod Singore. Ex.D/2 is the affidavit, Ex.D/3 is the written statement and Ex.D/4 is the affidavit supported to the written statement. But it appears that the aforesaid document has not been proved by Smt Kiran Singore (DW-2) herself. Documents were related to Kiran Singore, therefore, they should be proved by Kiran Singore herself. Kiran Singore said in Para-3 of her statement that her husband was having illicit relationship with Sita Jharia and he arranged a rented house for Sita Jharia. She said that she also made complaint to Rajya Mahila Ayog and Superintendent of Police, Mandla and Mandla Police recorded her statement.

30. In the light of the statement of Kiran Singore, if we examine the documents, then it appears that Vinod Singore filed a petition under Section 13 of Hindu Marriage Act (Ex. D/1) against his wife Kiran Singore. Kiran Singore filed reply / written statement (Ex.D/3) in which in para-10 it is mentioned that Vinod Singore is having illicit relationship with the woman named Sita Jharia. No evidence has been produced to prove the aforesaid fact. Only upon the basis of suspicion, the aforesaid allegation has been made. The petitioner also did not produce any sufficient evidence for showing the illicit relationship of the wife with another person. During arguments the learned Advocate for husband also said that there

are various photographs showing the illicit relationship, but it appears from the record that no any photo graphs have been produced by the husband and no any positive evidence has been led by the husband showing the fact that he was not in the position to met her wife at the time when she became pregnant. Therefore, the presumption under Section 112 of Evidence Act rightly applied by the trial Court against the husband.

31. As far as the amount is concerned, the petitioner draws attention towards para-26 of the judgment and submit that Ex.D/12 is the pay slip of the wife, while the Court treated it as pay slip of husband / petitioner. It is true that the aforesaid document is related to Sita Jharia showing her pay for the month of January, 2017 as Rs.34,707/-. But it is also appeared that the husband is also working as Assistant Grade-II in ITI. In the case of 125 of Cr.P.C the burden lies upon the husband to prove his income and liability, but the husband did not proved any document for showing his monthly pay and deduction etc. In para-6, husband said that he produced Ex.D/12, which is the pay slip of Sita Jharia. In para-7 he said that he is working as Assistant Grade-II in the Government ITI and he gets Rs.26,127/- P.M. He did not produce any pay slip, therefore, it cannot be ascertained that what is the total income of the husband and which deductions have been made from the pay. But looking to the amount of Rs.26,127/- it can be said that Rs.5,000/- is not a higher amount for the maintenance of the daughter. Husband and wife both are earning member, therefore, both are responsible for maintenance of their daughter. Trial Court also considered this aspect and granted maintenance of Rs.5,000/- P.M. In view of this Court that amount is not higher, therefore, no any interference is required.

32. Therefore, it appears that in this case no any adverse inference against wife can be drawn because in this case wife did not refuse for DNA Test. In addition, DNA is not mandatory in proceeding of 125 of Cr.P.C., because, **legitimate** and **illegitimate** both type of children are entitled to get the maintenance under section 125 of Cr.P.C. Husband was unable to prove the fact that he is not having asses (sic : access) the wife at the time when she become pregnant. Looking to the present status of the economy, amount granted by the trial Court is also not higher.

33. Therefore, this revision having no force, hence dismissed.

Revision dismissed

I.LR. [2020] M.P. 1774
CRIMINAL REVISION

Before Mr. Justice B.K. Shrivastava

Cr.R. No. 1032/2019 (Jabalpur) decided on 30 June, 2020

RISHABH MISHRA …Applicant

Vs.

STATE OF M.P. …Non-applicant

***A. Criminal Procedure Code, 1973 (2 of 1974), Section 227 & 228 – Framing of Charge – Charge of Embezzlement of money to be filled in ATM machine* – Held – *Prima facie* sufficient material available against petitioner to proceed with trial – Elaborate discussion of evidence is not necessary at this stage – Accused may put his defence during evidence – No interference required – Revision dismissed. (Para 34 & 35)**

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 227 व 228 – आरोप विरचित किया जाना – ए टी एम मशीन में भरे जाने वाले रूपयों के गबन का आरोप – अभिनिर्धारित – विचारण में आगे कार्यवाही करने के लिए याची के विरूद्ध प्रथम दृष्ट्या पर्याप्त सामग्री उपलब्ध है – इस प्रक्रम पर, साक्ष्य के विस्तृत विचार–विमर्श की आवश्यकता नहीं है – अभियुक्त, साक्ष्य के दौरान उसका बचाव रख सकता है – कोई हस्तक्षेप अपेक्षित नहीं – पुनरीक्षण खारिज।

***B. Criminal Procedure Code, 1973 (2 of 1974), Section 227 & 228 – Framing of Charge – Consideration* – Held – Apex Court concluded that at stage of framing charge, Court is not required to marshal evidence on record but to see that if *prima facie* material is available against accused or not – Court is not to see whether there is sufficient ground for conviction of accused or whether the trial is sure to end in conviction – It is statutory obligation of High Court not to interfere at initial stage of framing of charge merely on hypothesis, imagination and far-fetched reasons which in law amounts to interdicting the trial. (Paras 7 to 26)**

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 227 व 228 – आरोप विरचित किया जाना – विचार – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया कि आरोप विरचित करने के प्रक्रम पर न्यायालय को अभिलेख के साक्ष्य का क्रमबंधन करना अपेक्षित नहीं किंतु यह देखना है कि क्या अभियुक्त के विरूद्ध प्रथम दृष्ट्या सामग्री उपलब्ध है अथवा नहीं – न्यायालय नहीं देखेगा कि क्या अभियुक्त की दोषसिद्धि हेतु पर्याप्त आधार है या क्या विचारण की समाप्ति निश्चित रूप से दोषसिद्धि में होगी – उच्च न्यायालय की यह कानूनी बाध्यता है कि आरोप विरचित करने के आरंभिक प्रक्रम पर, मात्र अनुमान, कल्पना एवं अवास्तविक कारणों पर हस्तक्षेप न करें, जो कि विधि में, विचारण बाधित करने की कोटि में आता है।

Cases referred:

(2009) 8 SCC 751, AIR 1977 SC 2018, (1977) 2 SCC 699, 1979 CRI.L.J. 154 [S.C.]=AIR 1979 SC 366 = 1979 SCR (2) 229, AIR 1980 SC 52 = 1979 Cri.L.J. 1390, AIR 1990 SC 1962, 1993 CRI.L.J. 368, AIR 1966 SC 1744 = 1996 AIR SCW 1977, AIR 1997 S.C. 2041 = 1997 AIR SCW 1833 = [1997] 4 SCC 393, AIR 1999 SC 2071 = 1999 AIR SCW 1793, AIR 2000 SC 665 = 2000 AIR SCW 189 = 2000 CRI.L.J. 944, (2000) 6 SCC 338, 2000 (1) SCC 722, 2001 Cri.LJ 1723, (2009) 3 SCC 850, (2010) 9 SCC 368, AIR 2011 SC 1103 = 2011 CRI.L.J. 1654, 2012 AIR SCW 5139, (2013) 11 SCC 476, ILR [2013] M.P. 2029, AIR 1980 SC 52, 2014 (II) MPJR 124 (DB), ILR 2016 M.P. 259, 2019 SCC online SC 734.

Siddharth Singh, for the applicant.
Sheshraj Kushwaha, P.L. for the non-applicant/State.

O R D E R

B.K. SHRIVASTAVA, J.:- This revision petition has been filed on 18.2.2019 under section 397/401 of CrPC by petitioner Rishabh Mishra S/o Dinesh Mishra, who is an accused in Sessions Trial No.578/2018 pending before the 22 nd Additional Sessions Judge, District Bhopal, against the order dated 24.11.2018 framing of charges under sections 468/34, 420/34, 120-B, 471/34 and 409 of IPC against the petitioner.

2. The Additional Sessions Judge framed the charges against the petitioner on 24.11.2018 as under:-

> ''मैं संदीप शर्मा, बाइसवें अपर सत्र न्यायाधीश, भोपाल (म0प्र0) आप आरोपी ऋषभ मिश्रा पुत्र श्री दिनेश मिश्रा पर निम्नलिखित आरोप लगाता हूँ कि –
>
> 1. आपने माह जून 2015 से लेकर विभिन्न दिनांकों में माह अक्टूबर 2017 तक आपराधिक षडयंत्र के अधीन अन्य सह अभियुक्तों के साथ सामान्य आशय के अग्रसरण में लॉजिकेश सॉल्यूशन प्रा0लि0मि0 में कार्यरत होते हुए ए.टी.एम. मशीन में रखी जाने वाली बैंकों की राशि की धोखधड़ी किए जाने के उद्देश्य से एटीएम मशीन की एडमिन स्विच रिपोर्टो में इस आशय से कूटरचना की, कि उसको छल के प्रयोजन से उपयोग में लाया जायेगा और इस प्रकार वह अपराध कारित किया, जो भारतीय दंड संहिता की धारा **468/34** के अधीन दंडनीय होकर इस न्यायालय के संज्ञान में है।
>
> 2. इसी दिनांक स्थान व समय पर आपने आपराधिक षडयंत्र के अधीन अन्य सह अभियुक्तों के साथ सामान्य आशय के अग्रसरण में लॉजिकेश सॉल्यूशन प्रा0लि0मि0 में कार्यरत् होते हुए ए.टी.एम. मशीन में रखी जाने वाली बैंकों की राशि की धोखाधड़ी किए जाने के उद्देश्य से एटीएम मशीन की एडमिन स्विच रिपोर्टो में इस आशय से कूटरचना कर छल करने हेतु बेईमानी से उत्प्रेरित होते हुए लगभग 83,81,400/– रू. की राशि को परिदत्त किया और इस प्रकार वह अपराध किया,

जो भा0दं0सं0 की **420 / 34** के अधीन दंडनीय होकर इस न्यायालय में संज्ञान में है।

3. इसी दिनांक स्थान व समय पर आपने आपराधिक षडयंत्र के अधीन अन्य सह अभियुक्तों के साथ सामान्य आशय के अग्रसरण में लॉजिकेश सॉल्यूशन प्रा0लि0मि0 में कार्यरत् होते हुए एटीएम मशीन में रखी जाने वाली बैंकों की राशि की धोखाधड़ी किए जाने के उद्देश्य से एटीएम मशीन की एडमिन स्विच रिपोर्टो में इस आशय से कूटरचना एवं छल करने हेतु बेईमानी व कपट पूर्वक अपवंचित करने हेतु आपराधिक षडयंत्र किया, जो भारतीय दण्ड संहिता की धारा **120 बी** के अधीन दंडनीय होकर इस न्यायालय के संज्ञान में है।

4. इसी दिनांक स्थान व समय पर आपने आपराधिक षडयंत्र के अधीन अन्य सह अभियुक्तों के साथ सामान्य आशय के अग्रसरण में लॉजिकेश सॉल्यूशन प्रा0लि0मि0 में कार्यरत् होते हुए ए.टी.एम. मशीन में रखी जाने वाली बैंकों की राशि की धोखाधड़ी किए जाने के उद्देश्य से एटीएम मशीन की एडमिन स्विच रिपोर्टो में यह जानते हुये कि उक्त एडमिन स्विच रिपोर्ट कूटरचित है, को असली के रूप में उपयोग किया, और इस प्रकार वह अपराध किया, जो भा0द0सं0 की धारा **471 / 34** के अधीन दंडनीय होकर इस न्यायालय के संज्ञान में है।

5. इसी दिनांक, समय व स्थान पर आपराधिक षडयंत्र के अधीन अन्य सह अभियुक्तों के साथ सामान्य आशय के अग्रसरण में लॉजिकेश सॉल्यूशन प्रा0लि0मि0 में कार्यरत् होते हुए ए.टी.एम. मशीन में रखी जाने वाली बैंकों की राशि की धोखाधड़ी किए जाने के उद्देश्य से एटीएम मशीन की एडमिन स्विच रिपोर्टो में इस आशय से कूटरचना कर छल करने हेतु बेईमानी से उत्प्रेरित होते हुए लगभग 83,81,400 / – रू. का गबन कर उक्त राशि को अपने स्वयं के लिए उपभोग कर आपराधिक न्यासभंग किया और इस प्रकार वह अपराध कारित किया जो भा0दं0स0 की धारा–**409** के अधीन दण्डनीय होकर इस न्यायालय के संज्ञान में है।

अतएव मैं इसके द्वारा निर्देश देता हूं कि आपका इस न्यायालय द्वारा उक्त आरोप पर विचारण किया जाए।''

3. `It is submitted by the counsel for petitioner that the FIR dated 18.03.2018 was lodged only against 2 accused named Pooran Pandey and Navneet Singh Arora. During the course of investigation, upon the basis of memorandum of Pooran Pandey under section 27 of Evidence Act, the petitioner has been wrongly implicated in this case along with other co-accused. No complaint was made against the petitioner. No specific and general allegations were made against the petitioner. The ATM in which such misappropriation of cash is reported were never under the domain or control of the petitioner. The petitioner had never been allotted the said route of ATM during his service to the company as an employee. No any ingredients have been found in the entire evidence submitted along with the charge-sheet related to the offence alleged. It is also argued that even if it is presumed that the petitioner received some money from the main accused, then he

may be prosecuted only for the offence under section 411 of IPC. The petitioner was terminated by the company in July, 2017. Therefore, it is requested to set aside the order dated 24.11.2018 related to framing of the charges against the petitioner. The petitioner placed reliance upon the case of *Mohammed Ibrahim and others Vs. State of Bihar and another* (2009) 8 SCC 751.

4. On the other side, the counsel for State strongly opposed the revision. It is submitted by the State that challan has been filed and as per the evidence collected, sufficient material is available against the present petitioner. He was entered into conspiracy with two main accused. All accused persons are involved in the same type of crime. They helped each other by giving the money, therefore, the trial court did not commit any mistake by framing the charges against the petitioner.

5. The law regarding **"framing of charges"** and the power of Revisional Court in the **"revision against the charge"** is well settled by Catina of decisions.

6. In *State of Bihar v. Ramesh Singh,* AIR 1977 SC 2018 it has been said that at that stage the Court is not to see whether there is sufficient ground for conviction of the accused or whether the trial is sure to end in his conviction. The Apex court said :-

> *"Reading Ss. 227 and 228 together in juxtaposition, as they have got to be, it would be clear that at the beginning and the initial stage of the trial the truth, veracity and effect of the evidence which the prosecutor proposes to adduce are not to be meticulously judged. Nor is any weight to be attached to the probable defence of the accused. It is not obligatory for the Judge at that stage of the trial to consider in any detail and weigh in a sensitive balance whether the facts, if proved, would be incompatible with the innocence of the accused or not. The standard of test and judgment which is to be finally applied before recording a finding regarding the guilt or otherwise of the accused is not exactly to be applied at the stage of deciding the matter under S. 227 or S. 228 of the Code. At that stage the Court is not to see whether there is sufficient ground for conviction of the accused or whether the trial is sure to end in his conviction ".*

7. In *State of Karnataka v. L. Muniswamy,* (1977) 2 SCC 699 the court said at the stage of framing the charge the court has to apply its mind to the question whether or not there is any ground for presuming the commission of offence by the accused. The Court has to see while considering the question of framing the charge as to whether the material brought on record could reasonably connect the accused with the trial. Nothing more is required to be inquired into.

8. In *Union of India v. Prafulla Kumar Samal and another,* 1979 CRI.L.J. 154[S.C.]= AIR 1979 SC366 = 1979 SCR(2) 229, after taking into consideration the various authorities, the following principles laid down by the Apex Court :-

> ***"(1)*** *That the Judge while considering the question of framing the charges under Section 227 of the Code has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out;*
>
> ***(2)*** *Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained the Court will be fully justified in framing a charge and proceeding with the trial.*
>
> ***(3)*** *The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large however if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused."*

9. **Three Judges Bench** of Supreme Court *in Supdt. and Remembrancer of Legal Affairs, West Bengal v. Anil Kumar Bhunja and others*, AIR 1980 SC 52 = 1979 Cri.L.J. 1390 said that :-

> *"At the stage of framing charges, the prosecution evidence does not commence. The Magistrate has therefore, to consider the question as to framing of charge on a general consideration of the materials placed before him by the investigating Police Officer. The standard test, proof and judgment which is to be applied finally before finding the accused guilty or otherwise is not exactly to be applied at the stage of S.277 or 228. At this stage, even a very strong suspicion founded upon materials before the Magistrate, which leads him to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged, may justify the framing of charges against the accused in respect of the commission of that offence".*

10. Again in *Niranjan Singh Karam Singh Punjabi, Advocate v. Jitendra Bhimraj Bijja and others,* AIR 1990 SC 1962*,* the court said that it seems well settled that at the stage of framing the charge, the Court is required to evaluate the material and documents on record with a view to finding out if the facts emerging there from taken at their face value disclose the existence of all the ingredients constituting the alleged offence. The Court may for this limited purpose sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case.

11. In *Tulsabai v. State of M.P.,* 1993 CRI.L.J. 368 [M.P.] the M.P. High Court relied on *Ramesh Singh* (supra) and *Anil Kumar* (supra) and said :-

"Though guidelines as to the scope of inquiry for the purpose of discharging of an accused are contained in Section 227, Cr. P.C. itself. It provides that "the Judge shall discharge when he considers that there is no sufficient ground for proceeding against the accused." The ground in the context is not a ground for conviction, but a ground for putting the accused on trial. It is in the trial that the guilt or innocence of the accused will be determined and not at the time of framing of charge. Therefore, the Court need not undertake an elaborate inquiry. The power conferred by S. 227 to discharge an accused is designed to prevent harassment to an innocent person by the arduous trial or the ordeal of prosecution. The power has been entrusted to the Sessions Judge to bring to bear his knowledge and experience in criminal trials. If the Sessions Judge after hearing the parties frames a charge and also makes an order in support thereof, the law must be allowed to take its own course".

12. **Three Judges Bench** of Supreme Court in *State of Maharashtra v. Som Nath Thapa*, AIR 1996 SC 1744 = 1996 AIR SCW1977 said that at the stage of framing the charge there must exist ground for presuming that accused has committed the offence. The court said that word **"presume"** means probable consequence. If there is ground for presuming that the accused has committed the offence, a Court can justifiably say that a prima facie case against him exists, and so, frame charge against him for committing that offence. In Black's Law Dictionary word **'presume'** has been defined to mean **"to believe or accept upon probable evidence"**. Legal Dictionary has quoted in this context a certain judgment according to which **"A presumption is a probable consequence drawn from facts (either certain, or proved by direct testimony) as to the truth of a fact alleged."** The aforesaid shows that if on the basis of materials on record, a Court could come to the conclusion that commission of the offence is a probable consequence, a case for framing of charge exists. To put it differently, if the Court were to think that the accused might have committed the offence it can frame the charge, though for conviction the conclusion is required to be that the accused has committed the offence. It is apparent that at the stage of framing of charge, probative value of the materials on record cannot be gone into; the materials brought on record by the prosecution has to be accepted as true at that stage.

13. In the case of *State of Maharashtra v. Priya Sharan Maharaj and others,* AIR 1997 S.C. 2041 = 1997AIR SCW1833 = [1997]4SCC393, the Apex court said that High Court cannot seek independent corroboration at stage of framing of charge and quash charge and discharge accused. At the state (sic : stage) of framing of the charge the Court has to consider the material with a view to find out if there is ground for presuming that the accused has committed the offence or that there is no sufficient ground for proceeding against him and not for the purpose of arriving at the conclusion that it is not likely to lead to a conviction.

14. Again in *Arun Vyas and another v. Anita Vyas,* AIR 1999 SC 2071 = 1999 AIR SCW 1793*,* the Apex court observed that Section 239 has to be read along with S. 240 Cr. P. C. If the Magistrate finds that there is prima facie evidence or the material against the accused in support of the charge (allegations) he may frame charge in accordance with S. 240 Cr. P. C. But if he finds that the charge (the allegations or imputations) made against the accused do not make out a prima facie case and do not furnish basis for framing charge, it will be a case of charge being groundless, so he has no option but to discharge the accused. Where the Magistrate finds that taking cognizance of the offence itself was contrary to any provision of law, like S. 468 Cr. P. C., the complaint being barred by limitation, so he cannot frame the charge, he has to discharge the accused.

15. Further in the case of *State of M.P. Vs. S. B. Johari and others,* AIR 2000 SC 665 = 2000AIR SCW189 = 2000 CRI.L.J. 944, court also said that quashment of charge by appreciating materials produced by prosecution at the stage of framing of charge is not justified. At stage of framing charge, Court is not required to marshal materials on record but only has to prima facie consider whether there is sufficient materials against accused. Court observed :-

> *"It is settled law that at the stage of framing the charge, the Court has to prima facie consider whether there is sufficient ground for proceeding against the accused. The Court is not required to appreciate the evidence and arrive at the conclusion that the materials produced are sufficient or not for conviction the accused. If the Court is satisfied that a prima facie case is made out for proceeding further then a charge has to be framed. The charge can be quashed if the evidence, which the prosecutor proposes to adduce to prove the guilt of the accused, even if fully accepted before it is challenged by cross-examination or rebutted by defence evidence if any, cannot show that accused committed the particular offence. In such case there would be no sufficient ground for proceeding with the trial".*

16. In *State of M.P. v. Mohanlal Soni,* (2000) 6 SCC 338 the court observed that the crystallized judicial view is that at the stage of framing charge, the court has to prima facie consider whether there is sufficient ground for proceeding against the accused. The court is not required to appreciate evidence to conclude whether the materials produced are sufficient or not for convicting the accused. In *Kanti Bhadra Shah v. State of West Bengal,* 2000 (1) SCC 722 the Court said if the trial court decides to frame a charge, there is no legal requirement that he should pass an order specifying the reasons as to why he opts to do so. Framing of charge itself is *prima facie* order that the trial judge has formed the opinion, upon consideration of the police report and other documents and after hearing both sides, that there is ground for presuming that the accused has committed the offence concerned.

17. In *Om Wati v. State, Through Delhi Admn.,* 2001 Cri.LJ 1723 the Apex court has observed that we would again remind the High Courts of their statutory obligation to not to interfere at the initial stage of framing the charges merely on hypothesis, imagination and far-fetched reasons which in law amount to interdicting the trial against the accused persons. Unscrupulous litigants should be discouraged from protracting the trial and preventing culmination of the criminal cases by having resort to uncalled for and unjustified litigation under the cloak of technicalities of law.

18. In *Palwinder Singh v. Balvinder Singh,* (2009) 3 SCC 850 it has been said that Charges can also be framed on the basis of strong suspicion. Marshaling and appreciation of evidence is not in the domain of the court at that point of time. In *Sajjan Kumar v. Central Bureau of Investigation,* (2010) 9 SCC 368 the Supreme court also said that at the stage of framing of charge under section 228 Cr.P.C. or while considering the discharge petition filed under Section 227, it is not for the Magistrate or the Judge concerned to analyse all the materials including pros and cons, reliability or acceptability, etc. It is at the trial, the Judge concerned has to appreciate their evidentiary value, credibility or otherwise of the statement, veracity of various documents and is free to take a decision one way or the other.

19. In the case of *R. S. Mishra v. State of Orissa,* AIR 2011 SC1103 = 2011 CRI.L.J. 1654, the court took notice of the expression in S. 228 "if after such consideration" and said that it provide an interconnection between S.227 and S.228. While dropping or diluting charge under particular section, although accused is not discharged, Court is expected to record reasons. The court observed :-

> *"As seen from Section 227 while discharging an accused, the Judge concerned has to consider the record of the case and the documents placed therewith, and if he is so convinced after hearing both the parties that there is no sufficient ground to proceed against the accused, he shall discharge the accused, but he has to record his reasons for doing the same. Section 228 which deals with framing of the charge, begins with the words "if after such consideration." Thus, these words in Section 228 refer to the 'consideration' under S. 227 which has to be after taking into account the record of the case and the documents submitted therewith. These words provide an interconnection between Sections 227 and 228. That being so, while Section 227 provides for recording the reasons for discharging an accused, although it is not so specifically stated in Section 228, it can certainly be said that when the charge under a particular section is dropped or diluted, (although the accused is not discharged), some minimum reasons in nutshell are expected to be recorded disclosing the consideration of the material on record.*

This is because the charge is to be framed 'after such consideration' and therefore, that consideration must be reflected in the order. "

20. In the case of *Central Bureau of Investigation, Hyderabad Vs. K. Narayana Rao,* 2012 AIR SCW 5139, the Apex Court considered its earlier authorities about the scope of Sections 227 and 228 of Cr.P.C., and held that for framing of charge, a roving inquiry in pros and cons of matter and weighing of evidence as is done in trial is not permissible at this stage. The charge has to be framed if Court feels that there is strong suspicion that accused has committed offence. Thus, even if there is a strong suspicion which leads the Court to think that there is ground for presuming that the accused has committed an offence, a charge can be framed.

21. Again in *Sheoraj Singh Ahlawat v. State of U.P.,* (2013) 11 SCC 476 the court said that while framing charges, court is required to evaluate materials and documents on record to decide whether facts emerging there from taken at their face value would disclose existence of ingredients constituting the alleged offence. At this stage, the court is not required to go deep into probative value of materials on record. It needs to evaluate whether there is a ground for presuming that accused had committed offence. But it should not evaluate sufficiency of evidence to convict accused. Even if, there is a grave suspicion against the accused and it is not properly explained or court feels that accused might have committed offence, then framing of charge against the accused is justified. It is only for conviction of accused that materials must indicate that accused had committed offence but for framing of charges if materials indicate that accused might have committed offence, then framing of charge is proper. Materials brought on by prosecution must be believed to be true and their probative value cannot be decided at this stage. The accused entitled to urge his contentions only on materials submitted by prosecution. He is not entitled to produce any material at this stage and the court is not required to consider any such material, if submitted. Whether the *prima facie* case made out, depends upon fact and circumstances of each case. If two views are possible and materials indicate mere suspicion, not being grave suspicion, against accused then he may be discharged. The court has to consider broad probabilities of case, total effect of evidence and documents produced before it. The court should not act as mouthpiece of prosecution and it is impermissible to have roving enquiry at the stage of framing of charges.

22. Again in *Prem Sharma @ Shiv Prasad Mishra Vs. Shivprakash Mishra,* ILR [2013] M.P. 2029, the Court referred *the Supdt. & Remembrancer of Legal Affairs, West Bengal, v. Anil Kumar Bhunja and others,* AIR 1980 SC 52, and *Niranjan Singh Karam Singh Punjabi v. Jitendr Bhimraj Bijja and others,* AIR 1990 SC 1962 and said that according to the provisions of Sections 227 and 228 of Cr.P.C., it is for the Trial Court to consider the material available on record with the object that if it is not rebutted, then whether the accused can be convicted for a

particular offence or not. By considering such material, if the accused is convicted for that offence, then charge for that offence shall be framed.

23. In *Ashok Sharma (Dr.) v. State of M.P.,* 2014 (II) MPJR 124 (DB), the Division Bench of this court observed that at the stage of framing of charge, appreciation of evidence produced before it is non- required. The court observed :-

> *"It is true that at the time of framing of charge, the court has not required to appreciate the evidence to conclude whether the material produced before the court are sufficient or not for convicting the accused. There is difference between the evaluation of materials produced before the court and appreciation of evidence produced before the court at the time of framing of the charge. For evaluation, the court is allowed to look into the material only prima facie be satisfied about the existence of sufficient ground for proceeding against the accused".*

24. Also in the case of *Devendra Singh & Ors. Vs. State Of M.P.,* ILR 2016 M.P. 259, the high court observed that the material and quality of evidence cannot be gone into and the Revisional Court has limitations which don't empower to intervene at an interlocutory stage. All that has to be looked into at the time of framing of charge, is existence of *prima facie* case.

25. Recently in *State By Karnataka Lokayukta v. M. R. Hiremath,* 2019 SCC online SC 734 the court again said that at this stage, considering an application for discharge, the Court must proceed on the assumption that the material which has been brought on record by the prosecution is true and evaluate the material in order to determine whether the facts emerging from the material, taken on its face value, disclose the existence of the ingredients necessary to constitute the offence.

26. It appears that FIR dated 18.3.2018 has been lodged upon the basis of written report submitted by Shri Pawan Waman, Branch Manager, Logicash Solutions Private Limited, Saket Nagar, Bhopal. The company was taken the contract of filling the currency in various ATMs. The company having a Branch at 2A/268, Saket Nagar, Bhopal, was also having the contract with the State Bank of India and Bank of Baroda. Pooran Pandey and Navneet Arora both are the employees of the company and were responsible to fill the money in various ATMs. Both were having the code number and the key for opening the lock, and without their assistance any ATM could not be opened.

27. It is also appeared that surprise audit was conducted through Arun Kumar. Two ATMs of State Bank of India, situated at Sarnath Complex, Indrapuri and one ATM of SBI situated at J.K.Road were audited by Arun Kumar as per the instructions of the company. During audit it has come into the notice that the amount which was given to fill in the ATM was not filled and the lesser amount was filled. Rs.24,35,900/- found shortage in the aforesaid ATM; while both

accused generated the forged admin switch report of ATM in which it was shown that the entire money has been filed. After taking the money from company, they did not fill the entire money in the concerned ATM. Total 31 ATMs were given for maintenance to the aforesaid accused; out of them 28 ATMs were audited and Rs.85,95,900/- were found short in the aforesaid ATM; while in the ATM of Jahangirabad Rs.2,14,500/- were found excess. Therefore, after deducting the aforesaid amount, it is found that the amount of **Rs.83,81,400/- was embezzled** by the accused persons.

28. upon the basis of written report dated 18.03.2018, submitted by Shri Pawan Waman, Branch Manager, Logicash Solutions Private Limited, Saket Nagar, Bhopal, the police registered FIR No.131/2018, Annexure A-2. During investigation, petitioner Rishabh Mishra was also arrested on 23.3.2018.

29. Main accused Pooran Pandey interrogated by the police from time to time. Upon the information given by Pooran Pandey, total 4 memos under section 27 of the Evidence Act were prepared on 18.3.2018, 22.3.2018, 23.3.2018 and 26.3.2018. Accused Navneet Arora also interrogated and his memo was prepared on 18.3.2018. Pooran Pandey gave the information that he gave the money to other co-accused. He also said that the aforesaid amounts were given to fulfill the shortage of money, which was found short in their ATMs. They were also doing the same job and also committed embezzlement in the same manner in their ATMs. In the memo dated 22.3.2018 Pooran Pandey gave the information that he gave the amount of Rs.5.50.000/- to petitioner Rishabh Mishra in August. 2017 for the same purpose to fulfill the shortage of money in his ATM.

30. In furtherance to the aforesaid information given by Pooran Pandey. the police interrogated the present petitioner Rishabh Mishra on 22.3.2018. The accused himself gave the information as under:-

> ''मैं अपनी मर्जी से बताया हूँ कि माह जून वर्ष 2015 से माह अक्टूबर 2017 तक लोजीकेश सॉल्यूशन प्रा0लि0 में कस्टोडियन के पद पर काम किया मेरा दूसरा पार्टनर कस्टोडियन विपिनदास था मेरा काम कम्पनी के ब्रांच ऑफिस साकेत नगर से बैंक डिमांड के आधार पर रूपये लेकर एटीएम में रूपये रखना था हम लोग एटीएम में रूपये कम रखकर ज्यादा (इंडेट के आधार) रूपयों की स्लिप एटीएम से निकाल लेते थे। वर्ष 2017 में हमारे अन्डर के एटीएम का आडिट होना था जिसमें रूपये शार्ट हो रहे थे तो मैंने अपने साथी पूरन पान्डे से 5,50,000/– रूपये लिये थे इसके बाद कम्पनी ने एमपीनगर की घटना होने के बाद कम्पनी ने हमें नौकरी से निकाल दिया था तथा विपिन दास जो मेरे साथ था उसने भी जो एटीएम में हेरा फेरी करके रूपये लिये थे उसके हिस्से में 2,50,000/– रूपये आ रहे थे यह रकम भी पूरन पान्डे ने विपिन दास को दी थी मुझे जो रूपये पूरन पान्डे ने दिये थे उसमें से 1,50,000/– रूपये खाने पीने में खर्च हो गये है शेष 4,00,000/– रूपये मेरे कमरे साकेत नगर में रखे हैं चलो चलकर दे देता हूँ पूरन पान्डे व नवनीत अरोरा मैं तथा विपिनदास सभी ने मिलकर एटीएम में हेराफेरी कर रूपये बचायें है।''

31. After the information given by the petitioner. the police recovered an amount of Rs.4,00,000/- on 23.3.2018 from the possession of petitioner Rishabh Mishra.

32. Various amounts have also been seized from the other co-accused persons. Main accused Pooran Pandey and Navneet Arora gave the entire information and as per their information other accused interrogated and various amounts have been recovered. Rs.25.00.000/- recovered from Pooran pandey, Rs.4,82,500/- recovered from Navneet Singh Arora, Rs.4,00,000/- from Ankit Shrivastava, Rs.1,50,000/- from Vipin Das, Rs.4,00,000/- from petitioner Rishabh Mishra, Rs.15,000/- from Rahul Meena, Rs.60,000/- and 25,000/- from Harsh Parate, Rs.7,000/- from Amit Shukla were recovered. The statement of Auditor Arun Kumar is also on the record.

33. The petitioner was also serving with the company and some other ATMs were allotted to him for the purpose of filing the currency. He also committed embezzlement in the same manner like Pooran Pandey and Navneet Arora. They gave the money to each other for fulfilling the shortage found in their ATMs. Therefore, *prima facie,* it may be presumed that all the accused persons entered into the conspiracy of committing the theft / embezzlement of amount, which was given by the company for filling the ATM. In the aforesaid situation, Charge U/s 120-B has been framed and charges under sections 468, 420 and 471 have been framed with the help of section 34 of IPC.

34. In view of this Court, the trial court did not commit any mistake by framing the aforesaid charges. *Prima facie* sufficient material is available against the petitioner to proceed further. Elaborate discussion of evidence is not necessary at this stage. The accused may submit his defence before the trial court during the evidence and he is free to establish that he was not involved in the conspiracy or he was only bona-fide receiver of the amount.

35. Therefore, no interference is required in the impugned order. Hence, the petition is **dismissed.**

Revision dismissed

I.LR. [2020] M.P. 1786
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice Atul Sreedharan

M.Cr.C. No. 19283/2020 (Jabalpur) decided on 29 June, 2020

SAURABH SANGAL ...Applicant

Vs.

STATE OF M.P. …Non-applicant

***A. Criminal Procedure Code, 1973 (2 of 1974), Section 438 – Transit Bail – Grounds* – Held – Nowadays in India, looking to advancement in Information and Communication Technology, emails, use of smart phones etc., contacting a lawyer in another state, sending documents to lawyer or payment of fee of lawyer etc, is no longer a harrowing experience, thus practice of transit bail is of no relevance and have ceased to have any utility – Application not maintainable and is dismissed. (Paras 5 to 9)**

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 438 – अस्थायी जमानत – आधार – अभिनिर्धारित – आजकल भारत में सूचना एवं संचार प्रौद्योगिकी, ई–मेल, स्मार्ट फोन इत्यादि में अभिवर्धन को देखते हुए, दूसरे राज्य में वकील से संपर्क, वकील को दस्तावेज भेजना या वकील की फीस का संदाय इत्यादि अब परेशान कर देने वाला अनुभव नहीं रहा अतः अस्थायी जमानत की पद्धति की कोई सुसंगतता नहीं है और कोई उपयोगिता नहीं रही – आवेदन पोषणीय नहीं एवं खारिज किया गया।

***B. Criminal Procedure Code, 1973 (2 of 1974), Section 438 – Transit Bail – Concept & Object* – Held – A transit bail is an anticipatory bail for a limited duration which enables an individual residing within territorial jurisdiction of High Court to seek such bail to avoid arrest by police of another state where FIR has been registered against him so that he will get time to move to that particular state seeking regular bail. (Para 2)**

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 438 – अस्थायी जमानत – संकल्पना एवं उद्देश्य – अभिनिर्धारित – अस्थायी जमानत, एक सीमित अवधि हेतु एक अग्रिम जमानत है जो उच्च न्यायालय की क्षेत्रीय अधिकारिता के भीतर निवासरत एक व्यक्ति को अन्य राज्य, जहां उसके विरूद्ध प्रथम सूचना प्रतिवेदन पंजीबद्ध किया गया है, की पुलिस द्वारा गिरफ्तारी से बचने हेतु उक्त जमानत चाहने के लिए समर्थ बनाती है जिससे कि उस विशिष्ट राज्य में जाकर नियमित जमानत चाहने के लिए उसे समय मिलेगा।

Sankalp Kochar, for the applicant.
P. Bhatnagar, P.L. for the State.

O R D E R

(Through Video Conferencing)

ATUL SREEDHARAN, J.:- Heard.

The present application has been filed on behalf of the for grant of transit bail. The Applicant is the Director of Finance at Marriot Hotels & Spa, Jaipur. He is presently residing at Bungalow No.8, Empire Theatre Road, Jabalpur. Six weeks time is prayed for by way of transit bail.

2. The Concept of transit bail owes its genesis to judicial pronouncements. The Criminal Procedure Code, 1973 (hereinafter referred to as Cr.P.C) does not provided for it. In operation, a transit bail is an anticipatory bail for a limited duration. It enables an individual residing within the territorial jurisdiction of a High Court to seek the relief of an anticipatory bail for a limited period, to avoid arrest by the police of another State where the FIR is registered, under the pretext of seeking a regular order of anticipatory bail or bail, from the High Court or the Sessions Court within whose territorial jurisdiction, the FIR is registered.

3. In the past, this relief was evolved as an equitable procedure, where an individual did not have to suffer the ignominy of an arrest by the police, only because it would take an inordinately long time to approach the Court vested with the territorial jurisdiction to entertain an application for anticipatory bail or bail. Therefore, it was felt necessary by the various courts in India to protect the individual with an anticipatory bail of limited duration so as to enable him to approach the appropriate court vested with territorial jurisdiction to pass a regular order under section 438 or 439 Cr.P.C.

4. In the past, a person against whom an FIR was registered in a State where he was not residing, faced a multitude of problems ranging from (1) contacting a lawyer in the State where the FIR was registered, (2) making copies of the relevant documents required by the lawyer, (3) dispatching the same by post or courier, (4) arranging for the lawyers' fees which, if it had to be paid in cash, had to be sent either by money order or by delivering it by hand in person, or through another, or pay the lawyer by cheque or demand draft, in which case the lawyer may not discharge his professional duty till such time that he received his fee in his bank account and (5) personally meeting the lawyer in that State in order to give him instructions relating to his defence. If he did not have the protection of a transit bail, the chances of him being arrested by the Police of the State where the FIR was filed, was very high as all the processes referred to above was time consuming. This brings me to the question if the practice of transit bail continues to have any relevance in present day India.

5. The Covid pandemic has taught us that much can be done effectively without physical movement and personal interaction. The advances in

Information and Communication Technology has ensured that contacting a lawyer in another States is no longer a harrowing experience. Bar Associations in most States and even the districts, have directories listing the names of lawyers and websites of lawyers, also disclose their proficiencies. This too, only in a situation where it is not possible to get the reference of a lawyer through word of mouth.

6. Copies of relevant documents in the possession of the accused which are required by the lawyer, can be made with the assistance of a smartphone and dispatched immediately by e-mail or instant messaging services which would be received by the lawyer in a matter of seconds. No more the drudgery of going to the post office or the courier office just to dispatch the documents to the lawyer.

7. As regards the payment of fees, with the availability of internet banking, RTGS, NEFT and mobile enabled digital wallets, it takes no more than a few minutes to ensure the satisfaction of the lawyer that his fee has been paid in advance.

8. As regards the instructions that the client must give to his counsel in the other State, the plethora of video conferencing applications available to the common man today enable him to give effective instructions to his Counsel of the internet through these video conferencing applications, with some of them even having the capability to record and preserve the consultation with the lawyer for future reference. Expensive devices are not required and even a smart phone with moderate capabilities can ensure effective video conferencing with the lawyer.

9. Thus, this Court is of the firm opinion, that the practice of entertaining applications for "Transit Bail" is passe. It was a procedure having no statutory sanction, yet justifiable in a bygone era when poor logistics, transportation and dismal communication saw persons being arrested by the police of another State even before such a person could move the Sessions Court or the High Court having territorial jurisdiction to entertain his application for anticipatory bail. It is no longer so. The practice of "Transit Bail" by which the High Court or the Sessions Court could pass an order of anticipatory bail for a limited duration to enable the person to approach the appropriate court to seek an proper order of anticipatory bail or bail, has ceased to have any utility in the present day India. The Applicant herein can effectively pursue his remedy by moving an application before the appropriate Court in the State of Rajasthan from the comfort of his home in Jabalpur requiring nothing more than a rectangular device called a 'Smart Phone'.

10. In view of what has been stated and discussed hereinabove. The application is not maintainable before this Court and is dismissed.

Application dismissed