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INDIAN LAW REPORT (M.P.) COMMITTEE

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

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***Constitution – Article 226 and Contract Act (9 of 1872), Section 23 – Territorial Jurisdiction – Agreement/Contract* – Held – Where more than one Court has jurisdiction consequent upon a part of cause of action arisen therewith, but where parties stipulate in contract to submit disputes to a specified Court and if contract is a valid one and not opposed to Section 23 of Contract Act, suit would lie in the Court agreed by parties and not to any other Court even though a part of cause of action has arisen within jurisdiction of that Court. [AKC & SIG Joint Venture Firm (M/s.) Vs. Western Coalfields Ltd.] (DB)…1134**

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***Constitution – Article 226 and Electricity Act (36 of 2003), Section 126 – Review – Error Apparent on Face of Record* – Held – Non consideration of binding decision of superior Court, hearing of matter by Division Bench which was required to be heard by Single Bench, entertaining a petition challenging the same orders for which an earlier petition has already been decided; for levy of penalty u/S 126 of Act, applying principle of *mens rea* and giving directions contrary to statutory provisions are the errors apparent on face of record – Case of review made out – Order passed in writ petition reviewed and recalled, whereby petition is dismissed. [The Superintending Engineer (O & M) M.P. Paschim Kshetra Vidyut Vitran Co. Vs. National Steel & Agro Industries Ltd.] (DB)…1375**

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conditions, it cannot be said that they are tailor-made with *malafide* intention to avoid *bonafide* competition and to favour few individual – Government and their undertakings have free hand in setting terms of tender and unless same are wholly arbitrary, discriminatory, *malafide* or actuated by bias & malice, scope of interference by Courts does not arise – Petitioner failed to establish that, terms are contrary to public interest, discriminatory or unreasonable – Merely because conditions are not favourable to petitioner, they cannot be termed as arbitrary conditions – Petition dismissed. [Indermani Mineral (India) Pvt. Ltd. Vs. State of M.P.] (DB)…1093

संविधान – अनुच्छेद 226/227 – निविदा आमंत्रण सूचना – निबंधन व शर्तें – हस्तक्षेप – व्याप्ति व अधिकारिता – अभिनिर्धारित – निविदा की शर्तों को देखते हुए, यह नहीं कहा जा सकता कि वे आवश्यकतानुसार, सद्भावपूर्ण प्रतियोगिता से बचने के लिए तथा कुछ व्यक्तियों को अनुग्रहित करने के असद्भावपूर्ण आशय के साथ बनायी गयी है – सरकार तथा उसके उपक्रमों को निविदा के निबंधनों को तय करने की पूरी छूट है और जब तक कि वे पूर्णतः मनमाने, विभेदकारी, असद्भावपूर्ण या पक्षपात व विद्वेष द्वारा प्रवृत्त नहीं है, न्यायालयों द्वारा हस्तक्षेप की व्याप्ति उत्पन्न नहीं होती – याची यह स्थापित करने में विफल रहा कि निबंधन, लोक हित विरोधी, विभेदकारी या अयुक्तियुक्त हैं – मात्र इसलिए कि शर्तें याची के अनुकूल नहीं है, उन्हें मनमानी शर्तें नहीं कहा जा सकता – याचिका खारिज। (इंद्रमणी मिनिरल (इंडिया) प्रा.लि. वि. म.प्र. राज्य) **(DB)…1093**

***Constitution – Article 226/227 – Notice Inviting Tender – Terms & Conditions – Judicial Review – Scope & Jurisdiction* – Held – Apex Court concluded that if state and its instrumentalities act reasonably, fairly and in public interest in awarding contract, interference by Court is very restrictive since no person can claim fundamental right to carry on business with government – State can choose its own method to arrive at a decision – Invitation to tender are not open to judicial scrutiny and Court cannot whittle down the terms of tender as they are in realm of contract unless they are wholly arbitrary, discriminatory or actuated by malice – Mere power to choose cannot be termed arbitrary – Government must have a free hand in setting terms of contract. [Indermani Mineral (India) Pvt. Ltd. Vs. State of M.P.] (DB)…1093**

संविधान – अनुच्छेद 226/227 – निविदा आमंत्रण सूचना – निबंधन व शर्तें – न्यायिक पुनर्विलोकन – व्याप्ति व अधिकारिता – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया कि यदि राज्य एवं उसके साधन, संविदा प्रदान करने में युक्तियुक्त रूप से, निष्पक्ष रूप से तथा लोक हित में कार्य करते है, न्यायालय द्वारा हस्तक्षेप अति निर्बंधनात्मक है चूंकि कोई व्यक्ति सरकार के साथ मूलभूत अधिकार के रूप में कारबार करने का दावा नहीं कर सकता – एक विनिश्चय तक पहुंचने के लिए राज्य अपनी स्वयं की पद्धति का चुनाव कर सकता है – निविदा के आमंत्रण की न्यायिक संवीक्षा नहीं की जा सकती तथा न्यायालय निविदा के निबंधनों को काट नहीं सकता क्योंकि वह संविदा की प्रभुता में है जब तक कि वह पूर्णतः मनमाने, विभेदकारी या विद्वेष द्वारा प्रवृत्त न हो – चुनने मात्र की शक्ति

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दाण्डिक पद्धति – बचाव साक्षीगण – अभिनिर्धारित – अभियुक्त किसी विशिष्ट विवाद्यक पर चुप्पी बनाए रख सकता है, परंतु एक बार वह बचाव साक्षी के रूप में प्रस्तुत हो गया, तो उसे प्रत्येक परिस्थितियों को स्पष्ट करना होगा – वह, उन सभी उन्मुक्तियों को खो देता है जो अभियुक्त के लिए उपलब्ध हैं। (रामजीलाल उर्फ मुन्ना वि. म.प्र. राज्य) **…*9**

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– *Appointment of Amicus Curiae* – Held – In cases, if there is possibility of life/death sentence, only advocates having minimum 10 yrs. practice be considered for *amicus curiae* or through legal services to represent the accused – In matters regarding confirmation of death sentence before High Court, only Senior Advocates must be first considered for *amicus curiae* – For preparation of case, reasonable and adequate time, a minimum of seven days be provided to *amicus curiae* – He may be granted to have meetings and discussions with accused. [Anokhilal Vs. State of M.P.] (SC)…1011

दण्ड संहिता (1860 का 45), धाराएँ 302, 363, 366, 376(2)(f) व 377 एवं लैंगिक अपराधों से बालकों का संरक्षण अधिनियम (2012 का 32), धाराएँ 4, 5 व 6 – न्याय मित्र की नियुक्ति – अभिनिर्धारित – यदि प्रकरणों में आजीवन/मृत्यु दंड की संभावना है, न्यायमित्र के लिए अथवा विधिक सहायता के माध्यम में अभियुक्त का प्रतिनिधित्व करने हेतु केवल उन अधिवक्तागण पर विचार किया जाएगा जिनके पास न्यूनतम 10 वर्ष की वकालत का अनुभव है – उच्च न्यायालय के समक्ष मृत्यु दंड की पुष्टि के संबंध में, न्यायमित्र के लिए केवल वरिष्ठ अधिवक्तागण के नाम पर पहले विचार किया जाना चाहिए – प्रकरण की तैयारी के लिए, न्यायमित्र को न्यूनतम सात दिनों का युक्तियुक्त एवं पर्याप्त समय प्रदान किया जाना चाहिए – उसे अभियुक्त के साथ बैठकें और विचार–विमर्श करने की अनुमति प्रदान की जा सकती है। (अनोखीलाल वि. म.प्र. राज्य) **(SC)…1011**

***Penal Code (45 of 1860), Sections 302, 363, 366, 376(2)(f) & 377, Protection of Children from Sexual Offences Act (32 of 2012), Sections 4, 5 & 6 and Constitution – Article 21 & 39-A – Trial – Procedure – Amicus Curiae* – Held – The day *amicus curiae* was appointed, charges were framed, and entire trial concluded within a fortnight thereafter – 13 witnesses examined within 7 days – Fast tracking of process must not result in burying cause of justice – While granting free legal aid to accused, real and meaningful assistance should be granted – Sufficient opportunity not granted to *amicus curiae* to study the matter and infraction in that behalf resulted in miscarriage of justice – Impugned judgments set aside – *De-novo* consideration of matter directed – Appeal disposed. [Anokhilal Vs. State of M.P.] (SC)…1011**

दण्ड संहिता (1860 का 45), धाराएँ 302, 363, 366, 376(2)(f) व 377, लैंगिक अपराधों से बालकों का संरक्षण अधिनियम (2012 का 32), धाराएँ 4, 5 व 6 एवं संविधान – अनुच्छेद 21 व 39–ए – विचारण – प्रक्रिया – न्यायमित्र – अभिनिर्धारित – जिस दिन न्याय मित्र नियुक्त किया गया था, आरोप विरचित किये गये थे तथा तत्पश्चात् दो सप्ताह के भीतर संपूर्ण विचारण समाप्त किया गया – सात दिनों के भीतर तेरह साक्षीगण का परीक्षण किया गया – प्रक्रिया में तेजी लाने के परिणामस्वरूप न्याय का कारण नष्ट नहीं होना चाहिए – अभियुक्त को निःशुल्क विधिक सहायता प्रदान करते समय, वास्तविक एवं सार्थक सहायता प्रदान की जानी चाहिए – मामले का अध्ययन करने के लिए न्याय मित्र को पर्याप्त अवसर प्रदान नहीं किया गया तथा इस संबंध में व्यतिक्रम के परिणामस्वरूप न्याय की हानि

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***Prevention of Food Adulteration Act (37 of 1954), Section 2(ix)(g) & 13(2) – Ingredient* – Held – The word "adulterated" in section 13(2) would have to be read as including "misbranded" in so far as it relates to ingredient of food article and clause of Section 13 have to be complied with in its entirety. [Alkem Laboratories Ltd. (M/s) Vs. State of M.P.] (SC)…779**

खाद्य अपमिश्रण निवारण अधिनियम (1954 का 37), धारा 2(ix)(g) व 13(2) – संघटक – अभिनिर्धारित – धारा 13(2) में शब्द ''अपमिश्रित'' को जहां तक वह खाद्य पदार्थ के संघटक से संबंधित है ''मिथ्या छापवाला'' सहित पढ़ा जाना होगा तथा धारा 13 के खंड का संपूर्णता के साथ अनुपालन किया जाना चाहिए। (अल्केम लेबोरेट्रीज लि. (मे.) वि. म.प्र. राज्य) **(SC)…779**

***Professional Misconduct – Advocate* – Held – Making concessional statements without seeking instructions from client, not only amounts to misleading the Court but also amounts to professional misconduct – Counsel should not make any statement in form of undertaking, without seeking proper instructions from party. [Nirmal Singh Vs. State Bank of India] …*11**

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THE INDIAN LAW REPORTS M.P. SERIES, 2020
(Vol.-2)

JOURNAL SECTION

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

THE PROHIBITION OF ELECTRONIC CIGARETTES (PRODUCTION, MANUFACTURE, IMPORT, EXPORT, TRANSPORT, SALE, DISTRIBUTION, STORAGE AND ADVERTISEMENT) ACT, 2019

[Received the assent of the President on 05 December 2019, published in Gazette of India Extraordinary, Part-II, Section I, dated 05 December 2019 and republished for general information in Madhya Pradesh Gazette, Part 4 (kha), dated 01 May 2020, page Nos. 612 to 615]

THE PROHIBITION OF ELECTRONIC CIGARETTES (PRODUCTION, MANUFACTURE, IMPORT, EXPORT, TRANSPORT, SALE, DISTRIBUTION, STORAGE AND ADVERTISEMENT) ACT, 2019

An Act

to prohibit the product production, manufacture, import, export, transport, sale, distribution, storage and advertisement of electronic cigarettes in the interest of public health to protect the people from harm and for matters connected therewith or incidental thereto.

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 Prohibition of Electronic Cigarettes (Production, Manufacture, Import, Export, Transport, Sale, Distribution, Storage and Advertisement) Act, 2019.

(2) It shall be deemed to have come into force on the 18th day of September, 2019.

2. Declaration as to expediency of control by Union. It is hereby declared that it is expedient in the public interest that the Union should take under its control the electronic cigarettes industry.

3. Definitions. In this Act, unless the context otherwise requires, —

(a) "advertisement" means any audio or visual publicity, representation or pronouncement made my means of any light, sound, smoke, gas, print, electronic media, internet or website or social media and includes through any notice, circular, label, wrapper, invoice or other document or device;

(b) "authorized officer" means—

(i) any police officer not below the rank of sub-inspector; or

(ii) any other officer, not below the rank of sub-inspector, authorized by the Central Government or the State Government by notification;

(c) "distribution" includes distribution by way of samples, whether free or otherwise and the expression "distribute" shall be construed accordingly;

(d) "electronic cigarette" means an electronic device that heats a substance, with or without nicotine and flavours, to create an aerosol for inhalation and includes all forms of Electronic Nicotine Delivery Systems, Heat Not Burn Products, e-Hookah and the like devices, by whatever name called and whatever shape, size or form it may have, but does not include any product licensed under the Drugs and Cosmetics Act, 1940.

Explanation. — For the purposes of this clause, the expression "substance" includes any natural or artificial substance or other matter, whether it is in a solid state or in liquid form or in the form of gas or vapour;

(e) "export" with its grammatical variations and cognate expressions, means taking out of India to a place outside India;

(f) "import" with its grammatical variations and cognate expressions, means bringing into India from a place outside India;

(g) "manufacture" means a process for making or assembling electronic cigarettes and any part thereof, which includes any sub-process, incidental or ancillary to the manufacture of electronic cigarettes and any part thereof;

(h) "notification" means a notification published in the Official Gazette;

(i) "person" includes—

(i) any individual or group of individuals;

(ii) a firm (whether registered or not);

(iii) a Hindu Undivided Family;

(iv) a trust;

(v) a limited liability partnership;

(vi) a co-operative society;

(vii) any corporation or company or body of individuals; and

(viii) every artificial juridical person not falling within any of the preceding sub-clauses;

(j) "place" includes any house, room, enclosure, space, conveyance or the area in the like nature;

(k) "production" with its grammatical variations and cognate expressions, includes the making or assembling of electronic cigarettes and any part thereof;

(l) "sale" with its grammatical variations and cognate expressions, means any transfer of property in goods (including online transfer) by one person to another, whether for cash or on credit, or by way of exchange, and whether wholesale or retail, and includes an agreement for sale, and offer for sale and exposure for sale.

4. Prohibition on production, manufacture, import, export, transport, sale, distribution and advertisement of electronic cigarettes. On and from the date of commencement of this act, no person shall, directly or indirectly, —

(i) produce or manufacture or import or export or transport or sell or distribute electronic cigarettes whether as a complete product or any part thereof; and

(ii) advertise electronic cigarettes or take part in any advertisement that directly or indirectly promotes the use of electronic cigarettes.

5. Prohibition on storage of electronic cigarettes. On and from the date of commencement of this act, no person, being the owner or occupier or having the control or use of any place shall, knowingly permit it to be used for storage of any stock of electronic cigarettes:

Provided that any existing stock of electronic cigarettes as on the date of the commencement of this act kept for sale, distribution, transport, export or advertisement shall be disposed of in the manner hereinafter specified—

(a) the owner or occupier of the place with respect to the existing stock of electronic cigarettes shall, *suo motu,* prepare a list of such stock of electronic cigarettes in his possession and without unnecessary delay submit the stock as specified in the list to the nearest office of the authorized officer; and

(b) the authorized officer to whom any stock of electronic cigarettes is forwarded under clause (*a*) shall, with all convenient dispatch, take such measures as may be necessary for the disposal according to the law for the time being in force.

6. Power to enter, search and seize without warrant. *(1)* an authorized officer, if he has reason to believe that any provision of this act has been, or is being contravened, may enter and search any place where—

(a) any trade or commerce in electronic cigarettes is carried on or electronic cigarettes are produced, supplied, distributed, stored or transported; or

(b) any advertisement of the electronic cigarettes has been or is being made.

(2) After completion of the search referred to in sub-section *(1)*, the authorised officer shall seize any record or property found as a result of the search in the said place, which are intended to be used, or reasonably suspected to have been used, in connection with any matter referred to in sub-section *(1)* and if he thinks proper, take into custody and produce, along with the record or property so seized, before the Court of Judicial Magistrate of the first class, any such person whom he has reason to believe to have committed any offence punishable under this Act.

(3) Where it is not practicable to seize the record or property, the officer authorised under sub-section *(1)*, may make an order in writing to attach such property, stocks or records maintained by the producer, manufacturer, importer, exporter, transporter, seller, distributer, advertiser or stockist about which a complaint has been made or credible information has been received or a reasonable suspicion exists of their having been connected with any offence in contravention of the provisions of this Act and such order shall be binding on the person connected with the said offence.

(4) All searches, seizures and attachment under this section shall be made in accordance with the provisions of the Code of Criminal Procedure, 1973 (2 of 1974).

7. Punishment for contravention of section 4. Whoever contravenes the provisions of section 4, shall be punishable with imprisonment for a term which may extend to one year or with fine which may extend to one lakh rupees, or with both, and, for the second or subsequent offence, with imprisonment for a term which may extend to three years and with fine which may extend to five lakh rupees.

8. Punishment for contravention of section 5. Whoever contravenes the provisions of section 5, shall be punishable with imprisonment for a term which may extend to six months or with fine which may extend to fifty thousand rupees or with both.

9. Jurisdiction and trial of offences. *(1)* Any person committing an offence under section 4 or section 5 shall be triable for such offence in any place in which he is liable to be tried under any law for the time being in force.

(2) All offences under this Act shall be tried by the Court of Judicial Magistrate of the first class in accordance with the procedure provided for trials in the Code of Criminal Procedure, 1973 (2 of 1974).

10. Power to dispose of stock seized. After completion of the proceedings before the Court and if it is proved that the stock seized by the authorised officer under the provisions of this Act are stocks of electronic cigarettes, such stocks shall be disposed of in accordance with the provisions contained in Chapter XXXIV of the Code of Criminal Procedure, 1973 (2 of 1974).

11. Offences by companies. *(1)* Where an offence under this Act has been committed by a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of, the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

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

(2) Notwithstanding anything contained in sub-section *(1)*, where an offence under this Act has been committed by a company, and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

Explanation. — For the purpose of this section—

(a) "company" means any body corporate and includes a firm or other association of individuals; and

(b) "director" means a whole-time director in the company and in relation to a firm, means a partner in the firm.

12. Cognizance of offences. No court shall take cognizance of an offence punishable under this Act, except upon a complaint in writing made by an authorised officer under this Act.

13. Offences to be cognizable. Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), an offence under section 4 shall be cognizable.

14. Act to have overriding effect. Save as otherwise expressly provided in this Act, the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

15. Application of other laws not barred. The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force prohibiting production, manufacture, import, export, transport, sale, distribution, storage and advertisement of electronic cigarettes.

16. Protection of action taken in good faith. No suit, prosecution or other legal proceeding shall lie against the Central Government or any State Government or any officer of the Central Government or any State Government for anything which is in good faith done or intended to be done under this Act.

17. Power to remove difficulties. *(1)* If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by an order published in the Official Gazette, make such provision not inconsistent with the provisions of this Act, as may appear to be necessary or expedient for removing the difficulty:

Provided that no order shall be made under this section after the expiry of two years from the date of the commencement of this Act.

(2) Every order made under this section shall be laid, as soon as may be after it is made, before each House of Parliament.

18. Repeal and savings. *(1)* The Prohibition of Electronic Cigarettes (Production, Manufacture, Import, Export, Transport, Sale, Distribution, Storage and Advertisement) Ordinance, 2019 Ord. 14 of 2019 is hereby repealed.

(2) Notwithstanding such repeal, anything done or any action taken under the said Ordinance shall be deemed to have been done or taken under the corresponding provisions of this Act.

THE ARMS (AMENDMENT) ACT, 2019

[Received the assent of the President on 13 December 2019, published in Gazette of India Extraordinary, Part-II, Section I, dated 13 December 2019 and republished for general information in Madhya Pradesh Gazette, Part 4 (kha), dated 01 May 2020, page Nos. 627 to 630]

THE ARMS (AMENDMENT) ACT, 2019

An Act

further to amend the Arms Act, 1959.

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 Arms (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 Arms Act, 1959 (54 of 1959) (hereinafter referred to as the principal Act), in section 2, after clause (*e*), the following clause shall be inserted, namely: —

> '(*ea*) "licence" means a licence issued in accordance with the provisions of this Act and rules made thereunder and includes a licence issued in the electronic form;'.

3. Amendment of section 3. In section 3 of the principal Act, in sub-section (*2*), —

(*i*) for the words "three firearms", the words "two firearm" shall be substituted;

(*ii*) for the proviso, the following provisos shall be inserted, namely: —

"Provided that a person who has in his possession more firearms than two at the commencement of the Arms (Amendment) Act, 2019, may retain with him any two of such firearms and shall deposit, within one year from such commencement, the remaining firearm with the officer in charge of the nearest police station or, subject to the conditions prescribed for the purposes of sub-section (*1*) of section 21, with a licensed dealer or, where such person is a member of the armed forces of the Union, in a unit armoury referred to in that sub-section after which it shall be delicensed within ninety days from the date of expiry of aforesaid one year:

Provided further that while granting arms licence on inheritance or heirloom basis, the limit of two firearms shall not be exceeded.".

4. Amendment of section 5. In section 5 of the principal Act, in sub-section (*1*), in clause (*a*), for the word "manufacture,", the words "manufacture, obtain, procure," shall be substituted.

5. Amendment of section 6. In section 6 of the principal Act, after the words "convert an imitation firearm into a firearm", the words and figures "or convert from any category of firearms mentioned in the Arms Rules, 2016 into any other category of firearms" shall be inserted.

6. Amendment of section 8. In section 8 of the principal Act, in sub-section (*1*), for the word "firearm", the words "firearm or ammunition" shall be substituted.

7. Amendment of section 13. In section 13 of the principal Act, in sub-section (*3*), in clause (*a*), in sub-clause (*ii*), for the words and figures "point 22 bore rifle or an air rifle", the word "firearm" shall be substituted.

8. Amendment of section 15. In section 15 of the principal Act, in sub-section (*1*), —

(*a*) for the words "period of three years", the words "period of five years" shall be substituted;

(*b*) after the proviso, the following proviso shall be inserted, namely:—

"Provided further that the licence granted under section 3 shall be subject to the conditions specified in sub-clauses (*ii*) and (*iii*) of clause (*a*) of sub-section (*1*) of section 9 and the licensee shall produce the licence along with the firearm or ammunition and connected document before the licensing authority after every five years from the date on which it is granted or renewed.".

9. Amendment of section 25. In section 25 of the principal Act, —

(*i*) in sub-section (*1*), —

(*a*) in clause (*a*), for the word "manufactures,", the words "manufactures, obtains, procures," shall be substituted;

(*b*) in clause (*b*), after the words "convert an imitation firearm into a firearm", the words and figures "or convert from any category of firearms mentioned in the Arms Rules, 2016 into any other category of firearms" shall be inserted;

(c) in the long line, for the words "three years but which may extend to seven years", the words "seven years but which may extend to imprisonment for life" shall be substituted;

(*ii*) in sub-section (*1A*), —

(*a*) for the words "five years but which may extend to ten years", the words "seven years but which may extend to fourteen years" shall be substituted;

(*b*) the following proviso shall be inserted, namely: —

"Provided that the Court may, for any adequate and special reasons to be recorded in the judgment, impose a sentence of imprisonment for a term of less than seven years.";

(*iii*) after sub-section (*1A*), the following sub-section shall be inserted, namely: —

"(*1AB*) Whoever, by using force, takes the firearm from the police or armed forces shall be punishable with imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life and shall also be liable to fine.";

(*iv*) in sub-section (*1AA*), for the words "seven years", the words "ten years" shall be substituted;

(*v*) in sub-section (*1B*), —

(*a*) in the long line, for the words "one year but which may extend to three years", the words "two years but which may extend to five years and shall also be liable to fine" shall be substituted;

(*b*) in the proviso, for the words "one year", the words "two years" shall be substituted;

(*vi*) after sub-section (*5*), the following sub-sections shall be inserted, namely: —

'(*6*) If any member of an organised crime syndicate or any person on its behalf has at any time has in his possession or carries any arms or ammunition in contravention of any provision of Chapter II shall be punishable with imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life and shall also be liable to fine.

(*7*) Whoever on behalf of a member of an organised crime syndicate or a person on its behalf, —

(*I*) manufactures, obtains, procures, sells, transfers, converts, repairs, tests or proves, or exposes or offers for sale or transfer, conversion, repair, test or proof, any arms or ammunition in contravention of section 5; or

(*ii*) shortens the barrel of a firearm or converts an imitation firearm into a firearm or converts from any category of firearms mentioned in the Arms Rules, 2016 into any other category of firearms in contravention of section 6; or

(*iii*) brings into, or takes out of India, any arms or ammunition of any class or description in contravention of section 11,

shall be punishable with imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life and shall also be liable to fine.

Explanation. —For the purposes of sub-sections (*6*) and (*7*), —

(*a*) "organised crime" means any continuing unlawful activity by any person, singly or collectively, either as a member of an organised

crime syndicate or on behalf of such syndicate, by use of violence or threat of violence or intimidation or coercion, or other unlawful means, with the objective of gaining pecuniary benefits, or gaining undue economic or other advantage for himself or any person;

(*b*) "organised crime syndicate" means a group of two or more persons who, acting either singly or collectively, as a syndicate or gang indulge in activities of organised crime.

(*8*) Whoever involves in or aids in the illicit trafficking of firearms and ammunition in contravention of sections 3, 5, 6, 7 and 11 shall be punishable with imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life and shall also be liable to fine.

Explanation.—For the purposes of this sub-section, "illicit trafficking" means the import, export, acquisition, sale, delivery, movement or transfer of firearms and ammunition into, from or within the territory of India, if the firearms and ammunition are not marked in accordance with the provisions of this Act or are being trafficked in contravention of the provisions of this Act including smuggled firearms of foreign make or prohibited arms and prohibited ammunition.

(*9*) Whoever uses firearm in a rash or negligent manner or in celebratory gunfire so as to endanger human life or personal safety of others shall be punishable with an imprisonment for a term which may extend to two years, or with fine which may extend to rupees one lakh, or with both.

Explanation. —For the purposes of this sub-section, "celebratory gunfire" means the practice of using firearm in public gatherings, religious places, marriage parties or other functions to fire ammunition.'.

10. Amendment of section 27. In section 27 of the principal Act, in sub-section (*3*), for the words "shall be punishable with death", the words "shall be punishable with imprisonment for life, or death and shall also be liable to fine" shall be substituted.

11. Amendment of section 44. In section 44 of the principal Act, in sub-section (*2*), in clause (*f*), —

(*a*) for the words "firearm shall be stamped or otherwise shown thereon", the words "firearm or ammunition shall be stamped or otherwise shown thereon for the purposes of tracing" shall be substituted;

(*b*) the following Explanation shall be inserted, namely: —

'Explanation. —For the purposes of this clause, "tracing" means the systematic tracking of firearms and ammunition from manufacturer to purchaser for the purpose of detecting, investigating and analysing illicit manufacturing and illicit trafficking;'.

NOTES OF CASES SECTION

Short Note

**(13)*

Before Mr. Justice G.S. Ahluwalia

W.P. No. 20361/2019 (Gwalior) decided on 15 November, 2019

ASHISH WADHWA …Petitioner

Vs.

SMT. NIDHI WADHWA & anr. …Respondents

A. ***Practice – Courts & Litigants* – Held – No litigant can choose or say to a Judge that who should be on Bench to decide a case on a particular issue – Litigant must maintain decorum and is not allowed to pressurize Presiding Judge by creating nuisance in Court and if it is done, the Presiding Judge, instead of rescuing himself must tackle the situation with all firmness – He can also initiate proceedings for Contempt of Court.**

क. *पद्धति – न्यायालय व मुकदमेबाज* – अभिनिर्धारित – कोई भी मुकदमेबाज न किसी न्यायाधीश को चुन सकता अथवा न ही यह कह सकता कि किसी विशिष्ट विवाद्यक पर एक प्रकरण को विनिश्चित करने हेतु पीठ पर किसे होना चाहिए – मुकदमेबाज को शालीनता बनाए रखनी चाहिए तथा उसे न्यायालय में न्यूसेंस (उपताप) उत्पन्न करते हुए पीठासीन न्यायाधीश पर दबाव डालने की अनुमति नहीं है तथा यदि यह किया जाता है, तो पीठासीन न्यायाधीश को स्वयं जांच से हटने के बजाए परिस्थिति के साथ पूरी दृढ़ता से निपटना चाहिए – वह न्यायालय की अवमानना के लिए कार्यवाही भी आरंभ कर सकता है।

B. ***Practice – Counsel* – Held – Where litigant is represented by Counsel, it is the duty of Counsel also to ensure that litigant maintains the decorum in Court – If litigants creates nuisance without knowledge and permission of Counsel, the counsel must discharge himself from the case, otherwise it can be presumed that such nuisance is being created after due permission from counsel.**

ख. *पद्धति – अधिवक्ता* – अभिनिर्धारित – जहां मुकदमेबाज का प्रतिनिधित्व अधिवक्ता द्वारा किया जाता है, यह सुनिश्चित करना अधिवक्ता का भी कर्तव्य है कि मुकदमेबाज न्यायालय में शालीनता बनाये रखे – यदि मुकदमेबाज अधिवक्ता के ज्ञान तथा अनुमति के बिना न्यूसेंस (उपताप) उत्पन्न करता है, तो अधिवक्ता को प्रकरण से स्वयं को उन्मुक्त कर लेना चाहिए, अन्यथा यह उपधारित किया जा सकता है कि अधिवक्ता की सम्यक् अनुमति के पश्चात् उक्त न्यूसेंस (उपताप) उत्पन्न किया जा रहा है।

C. ***Practice – Order Sheets* – Held – Order sheets are sacrosanct documents and facts mentioned therein should be treated as *prima facie* true.**

ग. *पद्धति – आदेश पत्रिकाएँ* – अभिनिर्धारित – आदेश पत्रिकाएँ परम पवित्र दस्तावेज हैं तथा उनमें उल्लिखित तथ्यों को प्रथम दृष्ट्या सत्य माना जाना चाहिए।

Case referred :

SLP (C) No. 90369038/2016 order passed on 23.10.2019 (Supreme Court).

RK Shrivastava, for the petitioner.

Short Note
**(14)*
Before Mr. Justice Vishal Dhagat

Cr.A. No. 9613/2019 (Jabalpur) decided on 1 May, 2020

BHAGWATI STONE CRUSHER (M/S) …Appellant

Vs.

SHEIKH NIZAM MANSOORI …Respondent

***Criminal Procedure Code, 1973 (2 of 1974), Section 204(4) & 378(4) – Dismissal of Private Complaint – Appeal or Revision* – Held – Dismissal of private complaint for non-payment of process fee will not amount to acquittal of accused, thus appeal u/S 378(4) is not maintainable – Proper remedy is to file revision – Appeal Dismissed.**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 204(4) व 378(4) – निजी परिवाद की खारिजी – अपील या पुनरीक्षण – अभिनिर्धारित – आदेशिका शुल्क के गैर–भुगतान हेतु निजी परिवाद की खारिजी अभियुक्त की दोषमुक्ति की कोटि में नहीं आयेगी, अतः धारा 378(4) के अंतर्गत अपील पोषणीय नहीं है – पुनरीक्षण दायर करना ही उचित उपचार है – अपील खारिज।

Abhijeet Awasthi, for the appellant.

None, for the respondent.

I.L.R. [2020] M.P. 1233 (SC)
SUPREME COURT OF INDIA

Before Ms. Justice Indira Banerjee & Mr. Justice S. Ravindra Bhat

C.A. No. 106/2010 decided on 20 January, 2020

FAIR COMMUNICATION &
CONSULTANTS (M/S) & anr. …Appellants

Vs.

SURENDRA KERDILE …Respondent

***A. Benami Transactions (Prohibition) Act (45 of 1988), Section 3 & 4* – Held – Appellant during his cross-examination admitted a document (*although a photocopy*), showing real consideration amount, thus once it is admitted, respondent/plaintiff seeking consequential amendment was purely formal – Further, suit is not based on any plea involving examination of a *benami* transaction – Plaintiff not asserting any claim as *benami* owner nor urging a defense that any property or amount claimed by him is a *benami* transaction – Plea of plaintiff regarding real consideration amount is not barred – Appellants did not prove that transaction *(to which they were not parties)* was *benami* – Appeal dismissed. (Paras 15 to 18 & 21)**

क. बेनामी संव्यवहार (प्रतिषेध) अधिनियम (1988 का 45), धारा 3 व 4 – अभिनिर्धारित – अपीलार्थी ने अपने प्रतिपरीक्षण के दौरान वास्तविक प्रतिफल राशि दर्शाते हुए एक दस्तावेज को *(यद्यपि एक छायाप्रति)* स्वीकार किया, इसलिए एक बार इसके स्वीकार किये जाने के पश्चात्, प्रत्यर्थी / वादी द्वारा परिणामिक संशोधन चाहा जाना विशुद्ध रूप से औपचारिक था – इसके अतिरिक्त, वाद बेनामी संव्यवहार का परीक्षण अंतर्वलित करने वाले किसी अभिवाक् पर आधारित नहीं है – वादी न तो बेनाम स्वामी के रूप में किसी दावे का प्राख्यान कर रहा है न ही बचाव की विनती कर रहा है कि उसके द्वारा दावा की गई कोई संपत्ति अथवा राशि, एक बेनामी संव्यवहार है – वास्तविक प्रतिफल राशि के संबंध में वादी का अभिवाक् वर्जित नहीं है – अपीलार्थीगण यह साबित नहीं कर पाये कि संव्यवहार *(जिसके वे पक्षकार नहीं थे)* बेनामी था – अपील खारिज।

***B. Benami Transactions (Prohibition) Act (45 of 1988), Section 3 & 4 – Benami Transaction – Onus of Proof* – Held – Apex Court concluded that the onus of establishing that a transaction is benami is upon one who assert it. (Para 20)**

ख. बेनामी संव्यवहार (प्रतिषेध) अधिनियम (1988 का 45), धारा 3 व 4 – बेनामी संव्यवहार – सबूत का भार – अभिनिर्धारित – सर्वोच्च न्यायालय ने यह निष्कर्षित किया है कि यह साबित करने का भार कि एक संव्यवहार बेनामी है उस पर है जो इसका प्राख्यान करता है।

Cases referred:

(2004) 7 SCC 233, 2007 (6) SCC 100.

J U D G M E N T

The Judgment of the Court was delivered by :
S. RAVINDRA BHAT, J. :- This appeal by Special Leave challenges a decision of the Madhya Pradesh, High Court, by which a suit for recovery of ₹ 80,000/- was decreed in appeal. The impugned judgment set aside the judgment and decree of the XIII Additional District Judge, Indore (hereafter "trial court").

2. The plaintiff (respondent in the present case, referred to hereafter as "Surendra") is the maternal uncle of the defendant-second appellant (hereafter referred to by his name as "Sanjay"). Sanjay is also the sole proprietor of first appellant/defendant (M/s Fair Communication & Consultants). Surendra filed a suit for claiming recovery of ₹ 1,08,000/- alleging that Sanjay and his proprietorship firm owed money lent. Surendra apparently was a resident of Nashik, but had completed his education at Indore. He was an Engineer employed at Nashik and owned some land and a flat (MIG Scheme No. 54, Indore). As Surendra wished to settle eventually in Nashik, he appointed Sanjay who used to reside in Indore as Power of Attorney and executed a deed of General Power of Attorney (GPA) in favour of Sanjay on 30.09.1989 for that purpose. Sanjay entered into an agreement to sell the property to one Niranjan Singh Nagra ("buyer") on 30.11.1989 and received a sum of ₹ 50,000/- as earnest money. Surendra alleged that Sanjay called him to Indore on 29.01.1990 and requested that the agreement to sell ought to be executed in favour of the buyer directly and that at the time of executing the agreement, the buyer had paid ₹ 80,000/-. This amount was returned by Sanjay. Surendra also alleged that the buyer requested for cancellation of the Power of Attorney which was given to Sanjay. Sanjay requested Surendra for an advance in the sum of ₹ 80,000/- for the expansion of his business, which he was carrying on under the style of the first respondent proprietorship concern. Sanjay assured the plaintiff that he would return the amount shortly. Accordingly, ₹ 80,000/- was given by the plaintiff (Surendra) to Sanjay.

3. Sanjay issued three post-dated cheques for the sum of ₹ 16,500/-, ₹ 3,500/- and ₹ 60,000/- all dated 16.02.1990, drawn on the State Bank of India, Indore Branch. Before the due date, Sanjay requested the plaintiff (Surendra) not to present the cheques for collection for a few months; this request was complied with. The cheques, when presented, were returned by the banker to the plaintiff (Surendra). In these circumstances, the suit for recovery of a sum of ₹ 80,000/- (together with interest @ 12% till the date of the filing of the suit and for future interest, consequently, was instituted.

4. Sanjay, in his written statement denied the suit allegations. However, the written statement did not dispute the execution of the GPA or that he had entered - on behalf of the plaintiff, into the agreement to sell with Niranjan Singh Nagra and obtained ₹ 50,000/- as earnest money. The written statement also did not deny that Sanjay requested Surendra for a loan of ₹ 80,000/- which was given to him. However, in the defense, Sanjay alleged that Surendra asked him to return the amount on the same day i.e. 30.01.1990, which he did. The written statement then alleged that Sanjay repeatedly asked for the return of the three cheques but being the maternal uncle, the plaintiff insisted on keeping the three instruments, and prevailed upon him as the elder relative. It was also alleged in the written statement that Sanjay was assured that the cheques would be returned on the next day; however they were never returned.

5. After framing issues and recording evidence, the trial court dismissed this suit. The trial court was of the opinion that the evidence clearly showed that a sum of ₹ 80,000/- had been deposited by Surendra in his bank account and that this circumstance, supported Sanjay's plea that the amount was returned immediately. The trial court was also of the opinion, that the discrepancy in the amount received towards the sale consideration, casts doubt regarding the veracity of the plaintiff's claim. Aggrieved by the dismissal of the suit, Surendra appealed to the High Court. During the course of appeal, two applications seeking to amend the pleading and relief clause in the plaint were sought.

6. The High Court after an overall reading of the evidence framed three points for consideration, while dealing first with the applications, and then the merits: they were firstly, the consideration of the sale of the suit property - if it was for ₹ 2,30,000/- and not ₹ 1,30,000/-; secondly, whether such fact had to be pleaded by the plaintiff in the suit and lastly, whether in the absence of such pleading, it was necessary to allow the application for amendment. The High Court after analyzing the nature of evidence led, concluded that since Sanjay had admitted the signature on the agreement to sell, as well as the plaintiff's GPA, even though the document was a photocopy, it could not be ignored.

7. The impugned judgment also reasoned that there was no dispute that another agreement to sell was executed on 30.01.1990 by the plaintiff (Surendra) in favour of Niranjan Singh Nagra, where the sale consideration was showed to be ₹ 1,30,000/-. The sale was also undisputedly completed on 31.01.1990. It was held that in these circumstances, the plaintiff had ₹ 1,80,000/- as on 30.01.1990, which clearly showed that the real consideration for the transaction was ₹ 2,30,000/-, though the document subsequently executed showed a lesser value as ₹ 1,30,000/-. The court noted that Surendra had not relied upon these circumstances to seek relief on the basis of the contract (for sale). The High Court then reasoned that these documents were needed only to consider their impact *vis-a-vis* the defendants' claim for return of ₹ 80,000/-.

8. The High Court in its impugned judgment upheld the plaintiff's contention that he possessed sufficient amount to advance ₹ 80,000/- to Sanjay. He also had sufficient funds to deposit amounts in the bank account, for which statement of account, Ex. D/1 was on the record. Given that the real consideration for the transaction was ₹ 2,30,000/-, the fact that some amount was deposited in the bank account, did not in any way detract from the suit claim. The court, therefore, held that the deposit by itself could not be relied on, that the amount was paid to Sanjay who issued three cheques. The High Court then concluded and held as follows:-

> *"15. Since it is not disputed by the respondents that the loan amount of Rs 80,000/- was given by the appellant on 30/01/90 and the dispute is only whether the amount was returned by the respondent no. 2 to the appellant on that very day on not, the important documents are Ex. P/1 to P/3, the cheques and the receipt of Rs 60,000/- Ex. P/9, which was issued by the respondent no. 2 in favour of appellant. When the amount was given back by the respondent no. 2 to the appellant on that very day then it is surprising why the receipt Ex. P/9 and the cheques Ex. P/1 to P/3 were not taken back by the respondent no. 2 from the appellant and why the receipt of refund of the amount was not taken. Apart from this there is nothing on record to show that why the cheque of Rs. 30,000/- Ex. P/8 was given by the respondent no. 2 to the appellant. These all documents goes to show beyond doubt that the appellant who is maternal-uncle of the respondent no. 1 lent a sum of Rs 80,000 to the Respondent no. 2, in lieu of which the cheques EX. P/1 to P/3 were not taken back by the respondent no. 2 as proprietor of respondent no. 1 and the amount was returned by the respondents to the appellant.*
>
> *16. In view of this appeal stands allowed. The judgment and decree dated 22/07/95 passed by learned XIIIth Additional District Judge, Indore in Civil Suit No. 98-B/93 is set aside. Respondents are directed to pay Rs 80,000/- alongwith interest @ 6% p.a w.e.f. 16/02/90 with a period of two months, failing which the respondents shall be liable to pay the interest on the aforesaid amount @ 12% per annum. Respondents shall also be liable for the costs through out."*

9. It is argued by Mr. Santosh Kumar, learned counsel for the appellant that the high court committed an error in appreciation of the evidence and that the plaintiff had come forward with an entirely new case, in the cross-examination which was not backed by the pleadings. He further submitted that the impugned judgment was in error because it placed reliance on inadmissible documents and rendered findings exclusively based upon their appreciation. It was highlighted,

that the impugned judgment was conjectural inasmuch as the court connected the receipt issued by Sanjay with the agreement, showing the sale consideration to be ₹ 2,30,000/-. It was emphasized that the original agreement was never produced or made part of the record.

10. Mr. Santosh Kumar next submitted that being a prohibited transaction, the story put forward by the plaintiff that the real value of the sale of ₹ 2,30,000/- as against the declared value of ₹ 1,30,000/- could not be countenanced by the court as it was contrary to the public policy. He also relied on the Benami Transactions (Prohibition) Act, 1988 (hereafter "the Benami Act") to submit that any plea based on *benami* transactions could not be canvassed in courts. It was argued that as on 30.01.1990 or soon thereafter, the plaintiff did not have any amount in his bank account. Counsel lastly argued that consistent position of the defendant, Sanjay was that the three cheques were issued to the plaintiff at the latter's insistence and that despite repeated requests, they were not returned. This was clearly stated in the written statement and was consistently reiterated during the course of the oral deposition. The high court, it was urged, fell into error in completely overlooking this aspect.

11. It is submitted on behalf of the plaintiff/respondent that the basis for dismissal of the suit by the trial court was that the amount in question was part of the sale consideration of a sum of ₹ 1,30,000/- for the plot belonging to the respondent which has been sold and from which ₹ 50,000/- had been received earlier, and the remaining ₹ 80,000/- was received on the day when the loan had been given to the appellants. The trial court observed that the sum of ₹ 80,000/- was received by the plaintiff and was deposited in the bank account on the next day, i.e. 31.1.1990. It is further argued that when this question was put to the plaintiff, it was explained that the entire transaction was for a consideration of ₹ 2,30,000/- and not ₹ 1,30,000/- and therefore, the amount deposited in the bank account had nothing to do with the loan advanced to the appellants.

12. It is argued that the first agreement dated 03.7.1989 was executed for a sum of ₹ 2,30,000/- by the first appellant himself on behalf of the plaintiff, and in fact that agreement was put to the first appellant/defendant in cross-examination where he stated that:

> *" .....it is corrected that my signature appears below at page no. 3 of stamp papers purchased on 3rd July. Witness himself stated that no any such agreement had been executed. Stamp paper only had been purchased in the name of fair communication. My signature appears for A to A on the page no. two and three annexed with the stamp paper dated 3rd July 1989' (Copy of the said agreement dated 3.7.1989 is Annexed herewith and marked as Annexure R-2)*

13. It is urged that the first appellant admitted his signature on the said document in his cross-examination; thus, clearly, the fact was established. The original of the document was with the buyer of the property and this fact was admitted by the appellant in his statement; therefore, its photocopy was produced. The document was relevant only to show that the plaintiff had the funds to advance to Sanjay and when extension of the loan to the appellant was admitted, the document is of no consequence.

14. What can be gleaned from the above narrative and submissions is that the plaintiff wished to dispose of his property at Indore, where the second defendant, nephew resided and carried on business. Since the parties were related, the plaintiff relied on the defendant and constituted him as his attorney. An agreement to sell was entered into for the sale of the said property (a flat) on 03.07.1989: this fact is not disputed; equally, it is undisputed that the consideration for the flat in terms of this agreement was ₹ 2,30,000/-. This was admitted by Sanjay, the defendant in his deposition. It is also not disputed that the original agreement with the purchaser (who ultimately finalized the transaction), is dated i.e. 03.07.1989. A second agreement was entered into on 30.11.1989. However, this showed a lesser consideration of ₹ 1,30,000/-. It is also not disputed that Sanjay, the second appellant received ₹ 50,000/- from the buyer and handed over that amount to Surendra. Furthermore, on 29.01.1990, Surendra went to Indore at Sanjay's behest to conclude the transaction directly with the purchaser, Niranjan Singh Nagra. He also received the amount agreed. Also, there is no dispute that Sanjay wanted ₹ 80,000/- and was given it, by his uncle, the plaintiff, Surendra, for the purpose of expansion of his business. This is where the version of the two parties diverges: Sanjay alleged that the amount was returned the next day and that Surendra did not return the post dated cheques issued by him; Surendra alleges that Sanjay in fact never returned the amount. The trial court was persuaded by arguments on behalf of Sanjay and the circumstance that the sum of ₹ 80,000/- was deposited in Surendra's account on the same day. The High Court, however, took note of the plaintiff's stand, with respect to the real consideration, which was ₹ 2,30,000/- as against what was shown in the document, to say that the amount deposited in Surendra's account had nothing to do with the money lent to Sanjay.

15. The defendant/appellants arguments are two-fold: one, that the document on which the High Court returned its findings was a photocopy and was therefore, inadmissible; and two, that the question whether the sale consideration was ₹ 2,30,000/- or ₹ 1,30,000/- could not have been gone into, since that argument was based on a prohibited transaction, outlawed by the Benami Act.

16. As far as the first question goes, this court notices that the plaintiff had put the matter, during the course of cross examination, to the appellant/defendant. The latter, unsurprisingly, admitted the document, *despite the fact that it was a*

photocopy. The plaintiff had argued that the original of that document was with the purchaser: this was not denied. Once these were admitted, the plaintiff could not be faulted for seeking a consequential amendment, that was purely formal, to back his argument that there was sufficient money, after lending ₹ 80,000/- to the defendant, which was deposited in his account. The appellant's argument, in the opinion of this court, is insubstantial: the impugned judgment cannot be faulted on this aspect.

17. Now as to the second argument by the appellant, which is that the plaintiff's plea that the real consideration for the sale was ₹ 2,30,000/- entails returning findings that would uphold a plea based on a *benami transaction,* this court is of the opinion that the argument is unmerited. *Benami* is defined by the Act as a transaction where

(a) where a property is transferred to, or is held by, a person, and the consideration for such property has been provided, or paid by, another person; and

(b) the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration.

Benami transactions are forbidden by reason of Section 3; no action lies, nor can any defense in a suit be taken, based on any *benami* transaction: in terms of Section 4 of the Act.

18. In the opinion of this court, the argument that the plaintiff's plea regarding the real consideration being barred, has no merit. The plaintiff did not claim return of any amount from the buyer; the suit is not based on any plea involving examination of a benami transaction. Besides, the plaintiff is not asserting any claim as *benami* owner, nor urging a defense that any property or the amount claimed by him is a *benami* transaction. Therefore, the defendant appellant's argument is clearly insubstantial.

19. The relevant provisions of law, i.e. Sections 3 and 4 of the Benami Act, read as follows:

> *"Prohibition of benami transactions.*
>
> *3. (1) No person shall enter into any benami transaction.*
>
> *(2)Whoever enters into any benami transaction shall be punishable with imprisonment for a term which may extend to three years or with fine or with both.*
>
> *(3) Whoever enters into any benami transaction on and after the date of commencement of the Benami Transactions (Prohibition) Amendment Act, 2016, shall, notwithstanding anything contained in sub-section (2), be punishable in accordance with the provisions contained in Chapter VII.]*

(4) [***]

Prohibition of the right to recover property held benami.

4. (1) No suit, claim or action to enforce any right in respect of any property held benami against the person in whose name the property is held or against any other person shall lie by or on behalf of a person claiming to be the real owner of such property.

(2) No defence based on any right in respect of any property held benami, whether against the person in whose name the property is held or against any other person, shall be allowed in any suit, claim or action by or on behalf of a person claiming to be the real owner of such property..."

20. In *Valliammal (D.) by L.Rs v Subramaniam & Ors.* (2004) 7 SCC 233, this Court held that the onus of establishing that a transaction is *benami* is upon one who asserts it:

"13. This Court in a number of judgments has held that it is well established that burden of proving that a particular sale is benami lies on the person who alleges the transaction to be a benami. The essence of a benami transaction is the intention of the party or parties concerned and often, such intention is shrouded in a thick veil which cannot be easily pierced through. But such difficulties do not relieve the person asserting the transaction to be benami of any part of the serious onus that rests on him, nor justify the acceptance of mere conjectures or surmises, as a substitute for proof. Refer to Jaydayal Poddar v. Bibi Hazra, Krishnanand Agnihotri v. State of M. P., Thakur Bhim Singh v. Thakur Kan Singh, Pratap Singh v. Sarojini Devi and Heirs of Vrajlal J. Ganatra v. Heirs of Parshottam S. Shah. It has been held in the judgments referred to above that the question whether a particular sale is a benami or not, is largely one of fact, and for determining the question no absolute formulas or acid test, uniformly applicable in all situations can be laid. After saying so, this Court spelt out the following six circumstances which can be taken as a guide to determine the nature of the transaction :

(1) the source from which the purchase money came ;

(2) the nature and possession of the property, after the purchase ;

(3) motive, if any, for giving the transaction a benami colour;

(4) the position of the parties and the relationship, if any, between the claimant and the alleged benamidar ;

(5) the custody of the title deeds after the sale; and

(6) the conduct of the parties concerned in dealing with the property after the sale. (Jaydayal Poddar v. Bibi Hazral, SCC p 7, para 6).

14. The above indicia are not exhaustive and their efficacy varies according to the facts of each case. Nevertheless, the source from where the purchase money came and the motive why the property was purchased benami are by far the most important tests for determining whether the sale standing in the name of one person, is in reality for the benefit of another. We would examine the present transaction on the touchstone of the above two indicia.

*** *** ***

18. It is well-settled that intention of the parties is the essence of the benami transaction and the money must have been provided by the party invoking the doctrine of benami. The evidence shows clearly that the original Plaintiff did not have any justification for purchasing the property in the name of Ramayee Ammal. The reason given by him is not at all acceptable. The source of money is not at all traceable to the Plaintiff. No person named in the plaint or anyone else was examined as a witness. The failure of the Plaintiff to examine the relevant witnesses completely demolishes his case."

These observations were reiterated in *Binapani Paul vs. Pratima Ghosh & Ors.* 2007 (6) SCC 100.

21. In the present case, the appellants did not prove that the transaction (to which they were not parties) was *benami;* on the contrary, the appellant's argument was merely that the transaction could not be said to be for a consideration in excess of ₹ 1,30,000/-: *in the context of a defense in a suit for money decree.* The defendant/appellants never said that the plaintiff or someone other than the purchaser was the real owner; nor was the interest in the property, the subject matter of the recovery suit. Therefore, in the opinion of this court, the conclusions and the findings in the impugned judgment are justified.

22. For the foregoing reasons, this court is of opinion that there is no merit in the appeal; it is accordingly dismissed, without order on costs.

Appeal dismissed

I.L.R. [2020] M.P. 1242 (SC)
SUPREME COURT OF INDIA

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

Cr.A. No. 175/2020 decided on 31 January, 2020

STATE OF M.P. …Appellant

Vs.

YOGENDRA SINGH JADON & anr. …Respondents

A. Criminal Procedure Code, 1973 (2 of 1974), Section 482 and Penal Code (45 of 1860), Section 420 & 120-B – Quashment of Charge **– Held – Manner in which loan was advanced without any proper documents and the fact that respondents are beneficiary of benevolence of their father who was President of Bank, *prima facie* discloses an offence u/S 420 & 120-B IPC – High Court erred in examining the entire issue at pre-trial stage and quashing the charges – Impugned order set aside – Appeal allowed. (Para 5)**

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 एवं दण्ड संहिता (1860 का 45), धारा 420 व 120–B – आरोप का अभिखंडन – अभिनिर्धारित – वह तरीका जिसमें बिना किसी उचित दस्तावेजों के ऋण प्रदान किया गया था तथा यह तथ्य कि प्रत्यर्थीगण उनके पिता जो कि बैंक के अध्यक्ष थे, की परोपकारिता के हिताधिकारी हैं, प्रथम दृष्ट्या भा.दं.सं. की धारा 420 व 120–B के अंतर्गत अपराध प्रकट करते हैं – उच्च न्यायालय ने पूर्व–विचारण के प्रक्रम पर संपूर्ण विवाद्यक का परीक्षण करने में तथा आरोपों को अभिखंडित करने में त्रुटि की है – आक्षेपित आदेश अपास्त – अपील मंजूर।

B. Penal Code (45 of 1860), Section 420 & 120-B and Prevention of Corruption Act (49 of 1988), Section 13(1)(d) & 13(2) – Scope **– Held – Other officials of Bank charge-sheeted u/S 13(1)(d) & 13(2) of 1988 Act – Charge u/S 420 IPC is not an isolated offence but it has to be read along with offences under the Act of 1988 to which respondents may be liable with aid of Section 120-B IPC. (Para 5)**

ख. दण्ड संहिता (1860 का 45), धारा 420 व 120–B एवं भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 13(1)(d) व 13(2) – विस्तार – अभिनिर्धारित – बैंक के अन्य अधिकारीगण के विरूद्ध 1988 के अधिनियम की धारा 13(1)(d) व 13(2) के अंतर्गत आरोप पत्र दायर किया गया – भा.दं.सं. की धारा 420 के अंतर्गत अपराध एक अलग–थलग अपराध नहीं है बल्कि इसे 1988 के अधिनियम के अंतर्गत अपराधों के साथ पढ़ा जाना चाहिए जिसके लिए प्रत्यर्थीगण भा.दं.सं. की धारा 120–B की सहायता से दायी हो सकते हैं।

C. Criminal Procedure Code, 1973 (2 of 1974), Section 482 – Scope & Jurisdiction **– Held – Power u/S 482 cannot be exercised where the allegations are required to be proved in Court of law. (Para 5)**

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – विस्तार व अधिकारिता – अभिनिर्धारित – धारा 482 के अंतर्गत शक्ति का प्रयोग वहां नहीं किया जा सकता जहां अभिकथनों को न्यायालय में साबित किया जाना अपेक्षित है।

J U D G M E N T

The Judgment of the Court was delivered by :
HEMANT GUPTA, J. :- The State is aggrieved against an order passed by the High Court of Madhya Pradesh on 2nd May, 2016 whereby the proceedings against the respondents, both sons of late Manohar Singh Jadon, for an offence under Sections 420, 120-B of the Indian Penal Code, 1860[1] were quashed.

2. A charge sheet for the offences under Sections 420, 406, 409, 120B IPC and 13(1)(d) and 13(2) of the Prevention of Corruption Act, 1988[2] was filed on 9th July, 2008 consequent to registration of FIR No. 3 of 2007 on 23rd June, 2007. The allegation was that Manohar Singh Jadon, deceased father of the respondents in connivance with other employees of District Cooperative Kendriya Bank Maryadit, Shajapur[3] committed financial irregularities on the basis of forged documents by misusing his post and by providing fake loan to the relatives. Manohar Singh Jadon was President of the Bank from 5th February, 1997 to 26th March, 2002 and from 27th March, 2002 to 7th May, 2004. Harshvardhan Singh Jadon (accused-respondent No. 2) is the proprietor of M/s. Harshvardhan & Brothers whereas Yogendra Singh (accused-respondent No. 1) is the proprietor of M/s. Sarohar Trading Company. Ghanshyam Sharma, General Manager, Ramanlal Acharya, Manager, Ram Singh Yadav, General Manager were also arrayed as accused. It was alleged that accused Harshvardhan Singh Jadon submitted an application on 2nd November, 2000 for grant of cash credit limit of Rs.25 lakhs and that the cash credit limit was sanctioned without following the due procedure. It was also alleged that mortgage deed was not registered nor signature of original loanee was found on the mortgage paper. It is also pointed out that an amount of Rs.59,88,327/- was balance on 1st December, 2001 even after depositing Rs.25 lakhs and that the President has done the renewal of cash credit limit at his own level and its confirmation was got done later on from the loan Sub-Committee, while the case was of the son of the President alone. In respect of Yogendra Singh, again the allegation is that cash credit limit of Rs.25 lakhs was sanctioned on the basis of his application dated 30th July, 2001 without completing any of the procedural requirements and without mortgage of any of the property. Smt. Saroj Singh mortgaged the land but without any valuation. The surety of Ishwar Singh was taken. The same person mortgaged land as in the case of Harshvardhan. Similar is the assertion in respect of registration of mortgage. It

[1] for short, 'IPC'
[2] for short, 'Act'
[3] for short, 'Bank'

was also alleged that a sum of Rs.25,65,894/- is the balance as on 31st March, 2002 even after withdrawal beyond the approved credit limit of Rs.25 lakhs.

3. The Special Judge passed an order of framing of charges against Harshvardhan Singh Jadon and Yogendra Singh Jadon apart from other accused on 24th February, 2014. Such order was challenged by the respondents by way of a criminal revision.

4. The High Court in the Revision Petition found that the offences under Sections 420 and 120-B IPC are not made out against the respondents. The Court held that there is no assertion that the cash credit facility obtained with a knowledge that they will not repay the loan amount. The Court held as under:

> "12. It may be that the Officers of the Bank, because of the fact that father of the applicants was President of the Bank, had acted in disregard of the relevant rules and regulations in that behalf of confer benefit upon the applicants, but that will give rise to liability against the officers of the bank who failed to discharge their duties in accordance with prescribed norms and regulations. However, that may not be a ground to proceed against a person who has been granted cash credit facility.
>
> xx xx xx
>
> 14. In the instant case, the uncontroverted allegations taken in their entirety do not prima facie establish that the applicants deceived the Bank Authorities or fraudulently or dishonestly induced them to sanction cash credit facility. Thus, the basic ingredient to constitute the offence of 420 of IPC is totally missing in the chargesheet."

5. We find that the High Court has examined the entire issue as to whether the offence under Sections 420 and 120-B is made out or not at pre trial stage. The respondents are beneficiary of the grant of cash credit limit when their father was the President of the Bank. The power under Section 482 of the Code of Criminal Procedure, 1973 cannot be exercised where the allegations are required to be proved in court of law. The manner in which loan was advanced without any proper documents and the fact that the respondents are beneficiary of benevolence of their father *prima facie* disclose an offence under Sections 420 and 120-B IPC. It may be stated that other officials of the Bank have been charge sheeted for an offence under Sections 13(1)(d) and 13(2) of the Act. The charge under Section 420 IPC is not an isolated offence but it has to be read along with the offences under the Act to which the respondents may be liable with the aid of Section 120-B of IPC.

6. Consequently, we find that the order of the High Court quashing the charges against the respondents is not sustainable in law and the same is set aside. The appeal is allowed. It shall be open to the respondents to take such other action as may be available to them in accordance with law.

Appeal allowed

I.L.R. [2020] M.P. 1245 (SC)
SUPREME COURT OF INDIA

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

C.A. No. 800/2020 decided on 5 February, 2020

MOHAMMADE YUSUF & ors. …Appellants

Vs.

RAJKUMAR & ors. …Respondents

***Registration Act (16 of 1908), Section 17(1)(b) & 17(2)(vi) – Unregistered Compromise Decree – Admissibility in Evidence* – Held – A compromise decree comprising immovable property other than which is the subject matter of suit, requires registration – In present case, compromise decree was with regard to property which was the subject matter of the suit, hence not covered by exclusionary clause of Section 17(2)(vi), thus did not require registration – Such unregistered compromise decree is admissible in evidence, hence Trial Court directed to exhibit the same – Impugned order set aside – Appeal allowed. (Paras 6, 11, 13 & 14)**

रजिस्ट्रीकरण अधिनियम (1908 का 16), धारा 17(1)(b) व 17(2)(vi) – अरजिस्ट्रीकृत समझौता डिक्री – साक्ष्य में ग्राह्यता – अभिनिर्धारित – वाद की विषय वस्तु से भिन्न स्थावर संपत्ति समाविष्ट करती समझौता डिक्री का रजिस्ट्रीकरण अपेक्षित है – वर्तमान प्रकरण में, समझौता डिक्री उस संपत्ति से संबंधित थी जो कि वाद की विषय वस्तु थी, अतः 17(2)(vi) के अपवर्जनात्मक खंड द्वारा आच्छादित नहीं होती, इसलिए रजिस्ट्रीकरण की आवश्यकता नहीं थी – उक्त अरजिस्ट्रीकृत समझौता डिक्री साक्ष्य में ग्राह्य है, अतः विचारण न्यायालय ने उक्त को प्रदर्शित करने हेतु निदेशित किया – आक्षेपित आदेश अपास्त – अपील मंजूर।

Cases referred:

(2014) 1 SCC 669, (1995) 5 SCC 709, (2019) 8 SCC 729, (2006) 10 SCC 788.

J U D G M E N T

The Judgment of the Court was delivered by :

ASHOK BHUSHAN, J. :- This appeal has been filed against the judgment of High Court of Madhya Pradesh at Indore Bench dated 13.02.2017 dismissing the writ

petition of the appellant challenging the order of the trial court dated 07.01.2015 whereby the trial court has held that the compromise decree sought to be filed by the appellant is not admissible in evidence for want of registration.

2. The brief facts of the case are: -

2.1 A Suit No. 250-A of 1984 was filed by one Habib Kha, the father of the appellant for declaration and injunction. The Suit was filed for 7 biswa area of survey No.203 situated at Village Kitvani, Kasba Mandsaur, which was attached in east with the land of plaintiff being survey No.223. The plaintiff was in possession of suit land, which was recorded in the names of defendant. A compromise decree was passed in the suit dated 04.10.1985 declaring the right of plaintiff on 7 biswa area and it was declared that remaining land belong to defendant.

2.2 The appellants, who were son of Habib Kha claimed to be in possession, continued to be in possession of the aforesaid area. A Suit No.90-A of 2006 was filed on 16.09.1998 by respondent Nos. 1 and 2 against the appellants for perpetual injunction in respect of two areas admeasuring 825 sq. ft. and 1650 sq. ft. bearing survey No.203. The respondent Nos. 1 and 2 sold the above said two areas to respondent Nos. 4 to 7 and they were impleaded as plaintiffs in the above said suit. A written statement was filed by the appellants in Civil Suit No. 260A of 1998 pleading that respondents have forcefully took the possession of area admeasuring 1650 sq. ft. being the part of survey No.203, which was in actual, peaceful and uninterrupted possession of the appellant and their ancestral since 1951. Along with the written statement, a counter claim was filed by the appellant for recovery of possession of the area.

2.3 During evidence of Mohammade Hafiz, one of the appellants, he tried to exhibit the decree dated 04.10.1985 passed in Civil Suit No.250A of 1984, which was objected by the plaintiff. Plaintiff's objection to the admissibility of the decree was that decree being not registered cannot be accepted in evidence. Learned Civil Judge heard the parties and passed order dated 07.01.2015 on issue regarding admissibility of the above document. Civil Judge took the view that decree dated 04.10.1985 is required to be registered as per provision of Section 17(1) (e) of the Registration Act, hence it is not admissible in evidence. A Writ Petition No.2170 of 2015 was filed by the appellant challenging the order dated 07.01.2015. The High Court by the impugned judgment has dismissed the writ petition taking the view that decree was required to be registered. The High Court held that the very fact that the suit was based on the plea of adverse possession reflects that plaintiff of Suit No.250-A of 1994 had no

pre-existing title in the suit property. Relying on the judgment of this Court in *Gurdwara Sahib Vs. Gram Panchayat Village Sirthala and Another,* (2014) 1 SCC 669, High Court held that it is settled that declaratory decree based on plea of adverse possession cannot be claimed and adverse possession can only be used as a shield by the defendant. Aggrieved with the judgment of High Court, this appeal has been filed.

3. The only question to be considered in this appeal is as to whether the above noted compromise decree dated 04.10.1985 was required to be registered under Section 17 of the Registration Act, 1908 or not?

4. Part III of the Registration Act contains a heading "of Registrable Documents" in which Section 17 finds place, which contains a heading "Documents of which registration is compulsory". Section 17(1) deals with documents of which registration is compulsory. Section 17(2) provides that nothing in clauses (b) and (c) of sub-Section (1) applies to various documents as enumerated therein. Sections 17(1) and 17(2)(vi), which are relevant for the present case are as follows: -

> **"17. Documents of which registration is compulsory**.-(1) The following documents shall be registered, if the property to which they relate is situate in a district in which, and if they have been executed on or after the date on which, Act No. XVI of 1864, or the Indian Registration Act, 1866, or the Indian Registration Act, 1871, or the Indian Registration Act, 1877, or this Act came or comes into force, namely:—
>
> (a) instruments of gift of immovable property;
>
> (b) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property;
>
> (c) non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest; and
>
> (d) leases of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent;

(e) non-testamentary instruments transferring or assigning any decree or order of a Court or any award when such decree or order or award purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property:

Provided that the State Government may, by order published in the Official Gazette, exempt from the operation of this sub-section any lease executed in any district, or part of a district, the terms granted by which do not exceed five years and the annual rents reserved by which do not exceed fifty rupees.

(2) Nothing in clauses (b) and (c) of sub-section (1) applies to—

XXXXXXXXXXXX

(vi) any decree or order of a Court except a decree or order expressed to be made on a compromise and comprising immovable property other than that which is the subject-matter of the suit or proceeding; or"

5. Under Section 17(1)(b), non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property requires registration. The word "instrument" is not defined in Registration Act, but is defined in the Indian Stamp Act, 1899 by Section 2(14).

6. A compromise decree passed by a Court would ordinarily be covered by Section 17(1)(b) but sub-section(2) of Section 17 provides for an exception for any decree or order of a Court except a decree or order expressed to be made on a compromise and comprising immovable property other than that which is the subject-matter of the suit or proceeding. Thus, by virtue of sub-section(2)(vi) of Section 17 any decree or order of a Court does not require registration. In sub-clause(vi) of sub-section (2), one category is excepted from sub-clause(vi), i.e., a decree or order expressed to be made on a compromise and comprising immovable property other than that which is the subject-matter of the suit or proceeding. Thus, by conjointly reading Section 17(1)(b) and Section 17(2)(vi), it is clear that a compromise decree comprising immovable property other than which is the subject matter of the suit or proceeding requires registration,

although any decree or order of a Court is exempted from registration by virtue of Section 17(2)(vi). A copy of the decree passed in Suit No.250-A of 1984 has been brought on record as Annexure P-2, which indicates that decree dated 04.10.1985 was passed by the Court for the property, which was subject matter of the suit. Thus, the exclusionary clause in Section 17(2)(vi) is not applicable and the compromise decree dated 04.10.1985 was not required to be registered on plain reading of Section 17(2)(vi). The High Court referred to judgment of this Court in *Bhoop Singh Vs. Ram Singh Major and Others,* (1995) 5 SCC 709, in which case, the provision of Section 17(2)(vi) of Registration Act came for consideration. This Court in the above case while considering clause (vi) laid down following in paragraphs 16, 17 and 18:-

> **"16.** We have to view the reach of clause (vi), which is an exception to sub-section (1), bearing all the aforesaid in mind. We would think that the exception engrafted is meant to cover that decree or order of a court, including a decree or order expressed to be made on a compromise, which declares the pre-existing right and does not by itself create new right, title or interest in *praesenti* in immovable property of the value of Rs 100 or upwards. Any other view would find the mischief of avoidance of registration, which requires payment of stamp duty, embedded in the decree or order.
>
> **17.** It would, therefore, be the duty of the court to examine in each case whether the parties have pre-existing right to the immovable property, or whether under the order or decree of the court one party having right, title or interest therein agreed or suffered to extinguish the same and created right, title or interest in *praesenti* in immovable property of the value of Rs 100 or upwards in favour of other party for the first time, either by compromise or pretended consent. If latter be the position, the document is compulsorily registrable.
>
> **18.** The legal position qua clause (vi) can, on the basis of the aforesaid discussion, be summarised as below:
>
> (1) Compromise decree if bona fide, in the sense that the compromise is not a device to obviate payment of stamp duty and frustrate the law relating to registration, would not require registration. In a converse situation, it would require registration.
>
> (2) If the compromise decree were to create *for the first time* right, title or interest in immovable property of the value of Rs 100 or upwards in favour of any

party to the suit the decree or order would require registration.

(3) If the decree were not to attract any of the clauses of sub- section (1) of Section 17, as was the position in the aforesaid Privy Council and this Court's cases, it is apparent that the decree would not require registration.

(4) If the decree were not to embody the terms of compromise, as was the position in *Lahore case*, benefit from the terms of compromise cannot be derived, even if a suit were to be disposed of because of the compromise in question.

(5) If the property dealt with by the decree be not the "subject-matter of the suit or proceeding", clause (vi) of sub-section (2) would not operate, because of the amendment of this clause by Act 21 of 1929, which has its origin in the aforesaid decision of the Privy Council, according to which the original clause would have been attracted, even if it were to encompass property not litigated."

7. In the facts of that case, this Court held that the first suit cannot really be said to have been decreed on the basis of compromise, as the suit was decreed "in view of the written statement filed by the defendant admitting the claim of the plaintiff to be correct". Further, the earlier decree was held to be collusive. Two reasons for holding that the earlier decree in the above said case required registration have been mentioned in paragraph 19 of the judgment, which is to the following effect:-

"19. Now, let us see whether on the strength of the decree passed in Suit No. 215 of 1973, the petitioner could sustain his case as put up in his written statement in the present suit, despite the decree not having been registered. According to us, it cannot for two reasons:

(1) The decree having purported to create right or title in the plaintiff for the first time that is not being a declaration of pre-existing right, did require registration. It may also be pointed out that the first suit cannot really be said to have been decreed on the basis of compromise, as the suit was decreed "in view of the written statement filed by the defendant admitting the claim of the plaintiff to be correct". Decreeing of suit in such a situation is covered by Order 12 Rule 6, and not by Order 23 Rule 3, which

> deals with compromise of suit, whereas the former is on the subject of judgment on admissions.
>
> (2) A perusal of the impugned judgment shows that the first appellate court held the decree in question as 'collusive' as it was with a view to defeat the right of others who had bona fide claim over the property of Ganpat. Learned Judge of the High Court also took the same view."

8. Following the above judgment of *Bhoop Singh* (supra), the High Court held that since the compromise decree dated 04.10.1985 did not declare any pre-existing right of the plaintiff, hence it requires registration. The High Court relied on the judgment of *Gurdwara Sahib Vs. Gram Panchayat Village Sirthala and Another* (supra) and made following observations in paragraphs 11, 12 and 13: -

> **"11.** In the present case, in the earlier suit CS No.250-A/1984 the petitioner had claimed declaration of title on the plea of adverse possession and the compromise decree was passed in the suit. The very fact that the suit was based upon the plea of adverse possession reflects that the petitioner had no pre-existing title in the suit property. Till the suit was decreed, the petitioner was a mere encroacher, at the most denying the title of lawful owner.
>
> **12.** The Supreme Court in the matter of **Gurudwara Sahib Vs. Gram Panchayat Village Sirthala** reported in **2014(3) MPLJ 36** has settled that declaratory decree based on plea of adverse possession cannot be claimed and adverse possession can be used only as shield in defence by the defendant. It has been held that:-
>
> > "7. In the Second Appeal, the relief of ownership by adverse possession is again denied holding that such a suit is not maintainable. There cannot be any quarrel to this extent the judgments of the courts below are correct and without any blemish. Even if the plaintiff is found to be in adverse possession, it cannot seek a declaration to the effect that such adverse possession has matured into ownership. Only if proceedings filed against the appellant and appellant is arrayed as defendant that it can use this adverse possession as a shield/defence."
>
> **13.** The plea of the petitioner based upon Sec.27 of the Limitation Act is found to be devoid of any merit since it relates to the extinction of the right of the lawful owner after expiry of the Limitation Act, but in view of the judgment of the supreme court in

> the matter of **Gurudwara Sahib** (supra), the petitioner cannot claim himself to be the owner automatically after the expiry of the said limitation."

9. The judgment of *Gurdwara Sahib Vs. Gram Panchayat Village Sirthala and Another* (supra) has now been expressly overruled by a Three Judge Bench judgment in *Ravinder Kaur Grewal and Others Vs. Manjit Kaur and Others,* (2019) 8 SCC 729. This Court held in the above case in paragraph 62 that once 12 years' period of adverse possession is over, even owner's right to eject him is lost and the possessory owner acquires right, title and interest possessed by the outgoing person/owner. In paragraph 62, following has been laid down:

> **"62.** We hold that a person in possession cannot be ousted by another person except by due procedure of law and once 12 years' period of adverse possession is over, even owner's right to eject him is lost and the possessory owner acquires right, title and interest possessed by the outgoing person/owner as the case may be against whom he has prescribed. In our opinion, consequence is that once the right, title or interest is acquired it can be used as a sword by the plaintiff as well as a shield by the defendant within ken of Article 65 of the Act and any person who has perfected title by way of adverse possession, can file a suit for restoration of possession in case of dispossession. In case of dispossession by another person by taking law in his hand a possessory suit can be maintained under Article 64, even before the ripening of title by way of adverse possession. By perfection of title on extinguishment of the owner's title, a person cannot be remediless. In case he has been dispossessed by the owner after having lost the right by adverse possession, he can be evicted by the plaintiff by taking the plea of adverse possession. Similarly, any other person who might have dispossessed the plaintiff having perfected title by way of adverse possession can also be evicted until and unless such other person has perfected title against such a plaintiff by adverse possession. Similarly, under other articles also in case of infringement of any of his rights, a plaintiff who has perfected the title by adverse possession, can sue and maintain a suit."

10. In paragraph 61, this Court has expressly overruled the *Gurdwara Sahib Vs. Gram Panchayat Village Sirthala and Another* (supra).

11. In view of the pronouncement of this Court by Three Judge Bench judgment in *Ravinder Kaur Grewal and Others Vs. Manjit Kaur and Others* (supra), the very basis of the High Court for holding that compromise deed dated 04.10.1985 requires registration is knocked out. The present is not a case where there is any allegation that the decree dated 04.10.1985 is a collusive decree. The

decree dated 04.10.1985 was in favour of the plaintiff of 7 biswa land, survey No.203 and for remaining land of survey No.203, it was held that it belonged to defendants.

12. In *Bhoop Singh* (supra), this Court held that the earlier decree required registration for the reasons as mentioned in paragraph 19. The reasons given in paragraph 19 of the above case has no application in the facts of the present case.

13. This Court in *Som Dev and Others Vs. Rati Ram and Another,* (2006) 10 SCC 788 while explaining Section 17(2)(vi) and Section 17(1)(b) and (c) held that all decree and orders of the Court including compromise decree subject to the exception as referred that the properties that are outside the subject matter of the suit do not require registration. In paragraph 18, this Court laid down following: -

> **"18.** ..... But with respect, it must be pointed out that a decree or order of a court does not require registration if it is not based on a compromise on the ground that clauses *(b)* and *(c)* of Section 17 of the Registration Act are attracted. Even a decree on a compromise does not require registration if it does not take in property that is not the subject-matter of the suit..... ."

14. In facts of the present case, the decree dated 04.10.1985 was with regard to property, which was subject matter of the suit, hence not covered by exclusionary clause of Section 17(2)(vi) and present case is covered by the main exception crafted in Section 17(2)(vi), i.e., "any decree or order of a Court". When registration of an instrument as required by Section 17(1)(b) is specifically excluded by Section 17(2)(vi) by providing that nothing in clause (b) and (c) of sub-section (1) applies to any decree or order of the Court, we are of the view that the compromise decree dated 04.10.1985 did not require registration and learned Civil Judge as well as the High Court erred in holding otherwise. We, thus, set aside the order of the Civil Judge dated 07.01.2015 as well as the judgment of the High Court dated 13.02.2017. The compromise decree dated 04.10.1985 is directed to be exhibited by the trial court. The appeal is allowed accordingly.

Appeal allowed

I.L.R. [2020] M.P. 1254 (SC)
SUPREME COURT OF INDIA

Before Mr. Justice Uday Umesh Lalit & Mr. Justice Vineet Saran

Cr.A. Nos. 367-368/2020 decided on 2 March, 2020

SAMTA NAIDU & anr. …Appellants

Vs.

STATE OF M.P. & anr. …Respondents

***Criminal Procedure Code, 1973 (2 of 1974), Section 200 & 203 – Second Complaint – Maintainability* – Held – Earlier complaint not disposed on any technical ground but was dismissed u/S 203 Cr.P.C. on merits, as Magistrate found no *prima facie* case – Core allegation in both complaints were identical – Second complaint filed not on any new facts but only with additional documents as supporting material, which could have been procured earlier also – Second complaint not maintainable – Impugned order set aside – Complaint dismissed – Appeals allowed.**

(Paras 14, 15, 17 & 18)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 200 व 203 – द्वितीय परिवाद – पोषणीयता – अभिनिर्धारित – पूर्वतर परिवाद का किसी तकनीकी आधार पर निपटारा नहीं किया गया था बल्कि गुणदोषों पर धारा 203 दं.प्र.सं. के अंतर्गत खारिज किया गया था क्योंकि मजिस्ट्रेट ने कोई प्रथम दृष्ट्या प्रकरण नहीं पाया – दोनों परिवादों में मूल अभिकथन समरूप थे – द्वितीय परिवाद को किन्हीं नये तथ्यों पर प्रस्तुत नहीं किया गया था बल्कि केवल समर्थक सामग्री के रूप में अतिरिक्त दस्तावेजों के साथ प्रस्तुत किया गया था जिन्हें पूर्व में भी उपाप्त किया जा सकता था – द्वितीय परिवाद पोषणीय नहीं – आक्षेपित आदेश अपास्त – परिवाद खारिज – अपीलें मंजूर।

Cases referred:

AIR 1962 SC 876 = (1962) Supp 2 SCR 297, AIR 1960 SC 1113, AIR 1930 Lah 879, AIR 1949 Pat 256, AIR 1949 Bom 384, AIR 1918 Mad 484, ILR 28 Cal 211, ILR 28 Cal 652 (FB), (1997) 1 SCC 57, (1986) 2 SCC 709, (2001) 2 SCC 570, (2009) 9 SCC 642, (2010) 2 SCC 631, AIR 2003 SC 702, (2009) 11 SCC 89, (2013) 2 SCC 435, (2010) 8 SCC 775, (2013) 9 SCC 245, (2012) 1 SCC 130, (2004) 13 SCC 269, (1982) 1 SCC 466.

J U D G M E N T

The Judgment of the Court was delivered by : **UDAY UMESH LALIT, J. :-** Leave granted.

2. These appeals arise out of the common judgment and order dated 12.02.2019 passed by the High Court[1] in Criminal Revision No.2996 of 2015 and Criminal Revision No. 2556 of 2016.

3. One G. S. Naidu, who owned a Maruti-800 vehicle of 1995 make, passed away on 12.12.2001 leaving behind his widow, three sons and a daughter (who was unmarried and has since then passed away). His second son (Complainant in the present matter) filed a complaint against his brother (the third son of G. S. Naidu) and his wife, submitting as under:-

> "3. It is submitted that the father of the complainant namely Late G.S. Naidu passed away on 12.12.2001. A copy of the death certificate in this regard is enclosed herewith as Annexure A/1 with this complaint.
>
> 4. It is submitted that on 2.11.2010, the aforesaid vehicle has been sold by the respondent by putting forged signatures of the complainant's father on the Form 29 and 30 and also put forged signature on the affidavit annexed with Form No.29 and 30 knowing fully well that Late G.S. Naidu has passed away on 12.12.2001. A true copy of Form No.29 and 30 and the affidavit is being filed herewith as Annexure A/2. It is submitted that on the date when the vehicle was sold which was being owned by G.S. Naidu, the father of the complainant was no more.
>
> 5. It is submitted that respondent Nos. 1 and 2, in order to sell the vehicle, has forged the signature of Late G.S. Naidu knowing fully well that he has passed away. It is also submitted that the documents which have been forged by the respondents have been subsequently used for getting the benefit in the form of sale consideration of the vehicle. The act of the respondents squarely covers the offences punishable under Sections 409, 420, 467, 468 and 471 of the IPC and therefore, the respondents

[1] High Court of Madhya Pradesh, Principal Bench, Jabalpur

> are liable to be punished accordingly. Hence, the present complaint is being filed before this Hon'ble Court."

4. The Complaint came up before the Judicial Magistrate First Class, Jabalpur, who, by his order dated 05.07.2013 concluded as under:-

> "On the basis of evidence and document produced on behalf of complainant it appears that no prima facie case is made out against accused Samta Naidu and Dilip Naidu.
>
> Hence complaint under Section 203 Criminal Procedure Code is rejected and thereby dismissed."

5. The complainant being aggrieved, filed Revision before the VIII Additional Sessions Judge, Jabalpur. On 05.03.2014 the Counsel for the Complainant submitted that he wished to withdraw the Revision with liberty to file a fresh complaint on the basis of certain new facts, which request was opposed. After perusing the record and considering the submissions, the Revisional Court observed as under:-

> "This is well settled position that new complaint can be filed any time on the basis of new facts and for which purposes there is no need of permission of this Court or permission of any court. Because revisionist does not wish to press instant revision any more, hence instant revision is dismissed on this ground alone. Revision Petition is thus disposed of accordingly."

6. Thereafter, Complaint Case No. 9226 of 2014 was preferred by the Complainant on same allegations but relying on additional material adverted to in paragraphs 5, 6 and 7 of said Complaint, the material was:-

> a) The credit note in the sum of Rs.37,500/- issued upon request of the Appellants by the representatives of Standard Auto Agency, Jabalpur after valuing the vehicle.
>
> b) The fact that said amount of Rs.37,500/- was thereafter adjusted towards purchase of a new vehicle in the name of the first Appellant.

c) The Registration Certificate of the new vehicle issued in the name of first Appellant.

d) Certified copies of said documents received from the office of RTO, Jabalpur.

Based on the aforesaid documents, it was submitted that cognizance be taken of the offences punishable under Sections 201, 409, 420, 467, 468 and 471 of the Indian Penal Code, 1860 (for short, "IPC").

7. On 02.08.2014, the Judicial Magistrate First Class Jabalpur took cognizance in respect of offence punishable under Section 420 IPC but rejected the Complaint with respect to other offences, which order was challenged by the Complainant by preferring Criminal Revision No.288 of 2014. Said Revision was allowed by the 9th Additional Sessions Judge, Jabalpur, by his order dated 02.11.2015 directing the Magistrate to reconsider the documents available on record and to pass appropriate order for taking cognizance in regard to appropriate offences. This order was challenged by the Appellants by filing Criminal Revision No.2996 of 2015 in the High Court.

8. During the pendency of the aforesaid Revision in the High Court, the matter was taken up and the Judicial Magistrate First Class, Jabalpur took cognizance of all offences alleged in the complaint. Thereafter, the Additional Sessions Judge - X by his order dated 20.09.2016 framed charges against the Appellants in respect of offences punishable under Sections 120-B, 420, 467, 468 and 471 of the IPC. This order led to the filing of Criminal Revision No.2556 of 2016 by the Appellants in the High Court. Both the aforesaid Criminal Revisions were heard together by the High Court.

9. On the question, whether the second complaint was maintainable or not, the High Court relied upon the decision of this Court in *Pramatha Nath Taluqdar vs. Saroj Ranjan Sarkar*[2] and observed:-

> "12. However, in the context of the instant case, when we compare the two complaints, it is obvious that at the time of filing the first complaint, the complainant seems to be aware only of the fact that accused persons Dilip and Samta had unilaterally sold a car belonging to G. Shankar Naidu and which, after his death, had become joint family property. The complainant seems to have acquired the knowledge of details of the

[2] AIR 1962 SC 876 = (1962) Supp 2 SCR 297

> transaction later. Therefore, subsequent complaint provides the particulars of the transaction in far greater details."

The High Court, thus, found no infirmity warranting interference and dismissed both the Revision Petitions.

10. While issuing notice in the present matters this Court directed the Appellants to deposit a sum of Rs.45,000/- (Rupees Forty Five Thousand Only) in the Registry of this Court within two weeks. Said sum stands deposited in the Registry. This direction was passed so that if any of the heirs of G. S. Naidu felt that his share in the property left behind by the deceased was not being given to him, the internal disputes/difference between the members of the family could be sorted out. But such suggestions were not acceptable to the Complainant.

11. The parties thereafter exchanged pleadings and the matter was heard. Mr. Devadatt Kamat, learned Senior Advocate, appeared in support of the Appeal. Relying on the decision of this Court in *Taluqdar*[2], he submitted that the High Court was in error in rejecting the Revision Applications. Ms. Meenakshi Arora, learned Senior Advocate for the respondent-complainant also relied upon the same decision and other decisions referred to by the High Court, to submit that as new material was found, the second Complaint was rightly considered and taken cognizance of.

12. The principal decision relied upon by both sides is one rendered by a Bench of three Judges of this Court in *Taluqdar*[2]. Para 35 of the majority decision authored by Kapur, J. discloses that a Complaint under Sections 467 and 471 read with Section 109 of the IPC was preferred on the allegations that an unregistered deed of agreement purportedly executed on 19.01.1948, a transfer deed in respect of 1000 shares purportedly executed on 05.02.1951 and the minutes of proceedings of the Board meetings purporting to bear the signature of late Sri Nalini Ranjan Sarkar were stated to have been forged. The Chief Presidency Magistrate dismissed the complaint against which Revision was preferred before the High Court of Calcutta. Said Revision Petition was dismissed and the matter was carried before this Court but the Appeal was dismissed as withdrawn. Thereafter, another complaint was brought under very same Sections. The Chief Presidency Magistrate took cognizance of second Complaint against which order, Revision was preferred in the High Court of Calcutta. The matter came up before the Division Bench and the additional material projected in support of the submission that the second Complaint was maintainable was dealt with by the Division Bench. The matter in that behalf was adverted to this Court as under:-

> "In regard to the filing of a second complaint it held that a fresh complaint could be entertained after the dismissal of previous complaint under

> Section 203 Criminal Procedure Code when there was manifest error or manifest miscarriage of justice or when fresh evidence was forthcoming. The Bench was of the opinion that the fact in regard to the City Telephone Exchange was a new matter and because Pramode Ranjan Sarkar was not permitted to take a photostat copy of the minutes-book, it was possible that his attention was not drawn to the City Telephone Exchange which was not in existence at the relevant time and that there was sufficient reason for Pramode Ranjan Sarkar for not mentioning the matter of City Exchange in his complaint. It also held that the previous Chief Presidency Magistrate Mr Chakraborty had altogether ignored the evidence of a large number of witnesses who were competent to prove the handwriting and signature of N.R. Sarkar and he had no good reasons for not accepting their evidence. It could not be said therefore that there was a judicial enquiry of the matter before the previous Chief Presidency Magistrate; the decision was rather arbitrary and so resulted in manifest miscarriage of justice. The Court was of the opinion therefore that there was no reason to differ from the finding of the Chief Presidency Magistrate Mr Bijoyesh Mukerjee and that there was a prima facie case against the appellants."

12.1 The issue was considered by the majority judgment of this Court as under:-

> "48. Under the Code of Criminal Procedure the subject of "Complaints to Magistrates" is dealt with in Chapter 16 of the Code of Criminal Procedure. The provisions relevant for the purpose of this case are Sections 200, 202 and 203. Section 200 deals with examination of complainants and Sections 202, 203 and 204 with the powers of the Magistrate in regard to the dismissal of complaint or the issuing of process. The scope and extent of Sections 202 and 203 were laid down in *Vadilal Panchal* v. *Dattatraya Dulaji Ghadigaonker*[3]. The scope of

[3] AIR 1960 SC 1113

enquiry under Section 202 is limited to finding out the truth or otherwise of the complaint in order to determine whether process should issue or not and Section 203 lays down what materials are to be considered for the purpose. Under Section 203 Criminal Procedure Code the judgment which the Magistrate has to form must be based on the statements of the complainant and of his witnesses and the result of the investigation or enquiry if any. He must apply his mind to the materials and form his judgment whether or not there is sufficient ground for proceeding. Therefore if he has not misdirected himself as to the scope of the enquiry made under Section 202, of the Criminal Procedure Code, and has judicially applied his mind to the material before him and then proceeds to make his order it cannot be said that he has acted erroneously. An order of dismissal under Section 203, of the Criminal Procedure Code, is, however, no bar to the entertainment of a second complaint on the same facts but it will be entertained only in exceptional circumstances, e.g., where the previous order was passed on an incomplete record or on a misunderstanding of the nature of the complaint or it was manifestly absurd, unjust or foolish or where new facts which could not, with reasonable diligence, have been brought on the record in the previous proceedings, have been adduced. It cannot be said to be in the interests of justice that after a decision has been given against the complainant upon a full consideration of his case, he or any other person should be given another opportunity to have his complaint enquired into. *Allah Ditto v. Karam Baksh*[4]*; Ram Narain Chaubey v. Panachand Jain*[5]*; Hansabai Sayaji Payagude v. Ananda Ganuji Payagude*[6] *Doraisami* v. *Subramania*[7]. In regard to the adducing of new facts for the bringing of a fresh

[4] AIR 1930 Lah 879
[5] AIR 1949 Pat 256
[6] AIR 1949 Bom 384
[7] AIR 1918 Mad 484

> complaint the Special Bench in the judgment under appeal did not accept the view of the Bombay High Court or the Patna High Court in the cases above quoted and adopted the opinion of Maclean, C.J. in *Queen Empress* v. *Dolegobinda Das*[8] affirmed by a Full Bench in *Dwarka Nath Mandal* v. *Benimadhas Banerji*[9]. It held therefore that a fresh complaint can be entertained where there is manifest error, or manifest miscarriage of justice in the previous order or when fresh evidence is forthcoming."

12.2 It was observed in para 50 as under:-

> "50. Taking first the question of fresh evidence, the view of some of the High Courts that it should be such that it could not with reasonable diligence have been adduced is, in our opinion, a correct view of the law. It cannot be the law that the complainant may first place before the Magistrate some of the facts and evidence in his possession and if he fails he can then adduce some more evidence and so on. That in our opinion, is not a correct view of the law."

12.3 The majority judgment thus accepted the challenge, allowed the Appeal and dismissed the Complaint with following observations:-

> "61. In these circumstances, we are of the opinion that the bringing of the fresh complaint is a gross abuse of the process of the Court and is not with the object of furthering the interests of justice.
>
> ... ...
>
> 63. For these reasons we allow the appeals, set aside the order of the High Court and of the learned Chief Presidency Magistrate and dismiss the complaint."

12.4 The dissenting opinion was expressed by S.K. Das, J.

13. The law declared in *Taluqdar*[2] has consistently been followed, for instance, in *Bindeshwari Prasad Singh vs. Kali Singh*[10] it was observed:

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[8] ILR 28 Cal 211
[9] ILR 28 Cal 652 (FB)
[10] (1997) 1 SCC 57

"It is now well settled that a second complaint can lie only on fresh facts or even on the previous facts only if a special case is made out". The view taken in *Bindeshwari*[10] was followed in *Maj. Genl. A.S. Gauraya and another vs. S.N. Thakur and another*[11].

13.1 In *Jatinder Singh and Others vs. Ranjit Kaur*[12] the issue was whether the first complaint having been dismissed for default, could the second complaint be maintained. The matter was considered as under:-

> "9. There is no provision in the Code or in any other statute which debars a complainant from preferring a second complaint on the same allegations if the first complaint did not result in a conviction or acquittal or even discharge. Section 300 of the Code, which debars a second trial, has taken care to explain that "the dismissal of a complaint, or the discharge of the accused, is not an acquittal for the purposes of this section". However, when a Magistrate conducts an inquiry under Section 202 of the Code and dismisses the complaint on merits, a second complaint on the same facts cannot be made unless there are very exceptional circumstances. Even so, a second complaint is permissible depending upon how the complaint happened to be dismissed at the first instance.
>
> ... ...
>
> 12. If the dismissal of the complaint was not on merit but on default of the complainant to be present there is no bar in the complainant moving the Magistrate again with a second complaint on the same facts. But if the dismissal of the complaint under Section 203 of the Code was on merits the position could be different. There appeared a difference of opinion earlier as to whether a second complaint could have been filed when the dismissal was under Section 203. The controversy was settled by this Court in *Pramatha Nath Talukdar v. Saroj Ranjan Sarkar*[2]. A majority of Judges of the three-Judge Bench held thus:

[11] (1986) 2 SCC 709
[12] (2001) 2 SCC 570

> "An order of dismissal under Section 203, Criminal Procedure Code, is, however, no bar to the entertainment of a second complaint on the same facts but it will be entertained only in exceptional circumstances, e.g., where the previous order as passed on an incomplete record or on a misunderstanding of the nature of the complaint or it was manifestly absurd, unjust or foolish or where new facts which could not, with reasonable diligence, have been brought on the record in the previous proceedings, have been adduced. It cannot be said to be in the interest of justice that after a decision has been given against the complaint upon a full consideration of his case, he or any other person should be given another opportunity to have his complaint inquired into."
>
> S.K. Das, J. (as he then was) while dissenting from the said majority view had taken the stand that right of a complainant to file a second complaint would not be inhibited even by such considerations. But at any rate the majority view is that the second complaint would be maintainable if the dismissal of the first complaint was not on merits."
>
> (Emphasis supplied)

13.2. In *Ranvir Singh vs. State of Haryana and Another*[13] the issue was set out in para 23 of the decision and the discussion that followed thereafter was as under:-

> "23. In the instant case, the question is narrowed down further as to whether such a second complaint would be maintainable when the earlier one had not been dismissed on merits, but for the failure of the complainant to put in the process fees for effecting service.
>
> 24. The answer has been provided firstly in *Pramatha Nath Talukdar case*[2], wherein this Court had held that even if a complaint was

[13] (2009) 9 SCC 642

> dismissed under Section 203 CrPC, a second complaint would still lie under exceptional circumstances, indicated hereinbefore. The said view has been consistently upheld in subsequent decisions of this Court. Of course, the question of making a prayer for recalling the order of dismissal would not be maintainable before the learned Magistrate in view of Section 362 CrPC, but such is not the case in these special leave petitions.
>
> 25. In the present cases, neither have the complaints been dismissed on merit nor have they been dismissed at the stage of Section 203 CrPC. On the other hand, only on being satisfied of a prima facie case, the learned Magistrate had issued process on the complaint.
>
> 26. The said situation is mainly covered by the decision of this Court in *Jatinder Singh case*[12], wherein the decision in *Pramatha Nath Talukdar case*[2] was also taken into consideration and it was categorically observed that in the absence of any provision in the Code barring a second complaint being filed on the same allegation, there would be no bar to a second complaint being filed on the same facts if the first complaint did not result in the conviction or acquittal or even discharge of the accused, and if the dismissal was not on merit but on account of a default on the part of the complainant."

13.3. In *Poonam Chand Jain and Another vs. Fazru*[14] the issue whether after the dismissal of the earlier complaint had attained finality, could a second complaint be maintained on identical facts was considered as under:-

> "14. In the background of these facts, the question which crops up for determination by this Court is whether after an order of dismissal of complaint attained finality, the complainant can file another complaint on almost identical facts without disclosing in the second complaint the fact of either filing of the first complaint or its dismissal.

[14] (2010) 2 SCC 631

15. Almost similar questions came up for consideration before this Court in *Pramatha Nath Talukdar* v. *Saroj Ranjan Sarkar*[2]. The majority judgment in *Pramatha Nath*[2] was delivered by Kapur, J. His Lordship held that an order of dismissal under Section 203 of the Criminal Procedure Code (for short "the Code") is, however, no bar to the entertainment of a second complaint on the same facts but it can be entertained only in exceptional circumstances. This Court explained the exceptional circumstances as:

> *(a)* where the previous order was passed on incomplete record, or
>
> (b) on a misunderstanding of the nature of the complaint, or
>
> (c) the order which was passed was manifestly absurd, unjust or foolish, or
>
> *(d)* where new facts which could not, with reasonable diligence, have been brought on the record in the previous proceedings.

16. This Court in *Pramatha Nath*[2] made it very clear that interest of justice cannot permit that after a decision has been given on a complaint upon full consideration of the case, the complainant should be given another opportunity to have the complaint enquired into again. In para 50 of the judgment the majority judgment of this Court opined that fresh evidence or fresh facts must be such which could not with reasonable diligence have been brought on record. This Court very clearly held that it cannot be settled law which permits the complainant to place some evidence before the Magistrate which are in his possession and then if the complaint is dismissed adduce some more evidence. According to this Court, such a course is not permitted on a correct view of the law. (para 50, p. 899)

17. This question again came up for consideration before this Court in *Jatinder Singh* v. *Ranjit Kaur*[12]. There also this Court by relying on the principle in *Pramatha Nath*[2] held that there is no provision in the Code or in any

other statute which debars a complainant from filing a second complaint on the same allegation as in the first complaint. But this Court added when a Magistrate conducts an enquiry under Section 202 of the Code and dismisses a complaint on merits a second complaint on the same facts could not be made unless there are "exceptional circumstances". This Court held in para 12, if the dismissal of the first complaint is not on merit but the dismissal is for the default of the complainant then there is no bar in filing a second complaint on the same facts. However, if the dismissal of the complaint under Section 203 of the Code was on merit the position will be different.

18. Saying so, the learned Judges in *Ranjit Kaur*[12] held that the controversy has been settled by this Court in *Pramatha Nath*[2] and quoted the observation of Kapur, J. in para 48 of *Pramatha Nath*[2]*:* (AIR p. 899, para 48)

> *"48.* ... An order of dismissal under Section 203 of the Criminal Procedure Code, is, however, no bar to the entertainment of a second complaint on the same facts but it will be entertained only in exceptional circumstances e.g. where the previous order was passed on an incomplete record or on a misunderstanding of the nature of the complaint or it was manifestly absurd, unjust or foolish or where new facts which could not, with reasonable diligence, have been brought on the record in the previous proceedings, have been adduced. It cannot be said to be in the interest of justice that after a decision has been given against the complainant upon a full consideration of his case, he or any other person should be given another opportunity to have his complaint enquired into."

19. Again in *Mahesh Chand* v. *B. Janardhan Reddy*[15]*,* a three-Judge Bench of this Court

considered this question in para 19 at p. 740 of the Report. The learned Judges of this Court held that a second complaint is not completely barred nor is there any statutory bar in filing a second complaint on the same facts in a case where a previous complaint was dismissed without assigning any reason. The Magistrate under Section 204 of the Code can take cognizance of an offence and issue process if there is sufficient ground for proceeding. In *Mahesh Chand*[15] this Court relied on the ratio in *Pramatha Nath*[2] and held if the first complaint had been dismissed the second complaint can be entertained only in exceptional circumstances and thereafter the exceptional circumstances pointed out in *Pramatha Nath*[2] were reiterated. Therefore, this Court holds that the ratio in *Pramatha Nath*[2] is still holding the field. The same principle has been reiterated once again by this Court in *Hira Lal* v. *State of U.P.*[16] In para 14 of the judgment this Court expressly quoted the ratio in *Mahesh Chand*[15] discussed hereinabove.

20. Following the aforesaid principles which are more or less settled and are holding the field since 1962 and have been repeatedly followed by this Court, we are of the view that the second complaint in this case was on almost identical facts which was raised in the first complaint and which was dismissed on merits. So the second complaint is not maintainable. This Court finds that the core of both the complaints is the same. Nothing has been disclosed in the second complaint which is substantially new and not disclosed in first complaint. No case is made out that even after the exercise of due diligence the facts alleged in the second complaint were not within the of the first complainant. In fact, such a case could not be made out since the facts in both the complaints are almost identical. Therefore, the second complaint is not covered within exceptional circumstances explained in *Pramatha Nath*[2]. In that view of the matter the

[15] AIR 2003 SC 702
[16] (2009) 11 SCC 89

> second complaint in the facts of this case, cannot be entertained."
>
> (Emphasised supplied)

13.4. In *Udai Shankar Awasthi vs. State of Uttar Pradesh and Another*[17], where the earlier complaint was dismissed after the examination of witnesses on behalf of complainant, the matter was dealt with as under:-

> "47. The instant appeals are squarely covered by the observations made in *Kishan Singh*[18] and thus, the proceedings must be labelled as nothing more than an abuse of the process of the court, particularly in view of the fact that, with respect to enact the same subject-matter, various complaint cases had already been filed by Respondent 2 and his brother, which were all dismissed on merits after the examination of witnesses. In such a fact situation, Complaint Case No. 628 of 2011 filed on 31-5-2001 was not maintainable. Thus, the Magistrate concerned committed a grave error by entertaining the said case, and wrongly took cognizance and issued summons to the appellants."

13.5. In *Ravinder Singh vs. Sukhbir Singh and Others*[19] the matter was considered from the standpoint whether a frustrated litigant be permitted to give vent to his frustration and whether a person be permitted to unleash vendetta to harass any person needlessly. The discussion was as under:-

> "26. While considering the issue at hand in *Shivshankar Singh* v. *State of Bihar*[20] this Court, after considering its earlier judgments in *Pramatha Nath Talukdar* v. *Saroj Ranjan Sarkar*[2], *Jatinder Singh* v. *Ranjit Kaur*[12], *Mahesh Chand v. B. Janardhan Reddy*[15] and *Poonam Chand Jain* v. *Fazru*[21] held: *(Shivshankar Singh case*[20]*,* SCC p. 136, para 18)
>
> > *"18.* ... it is evident that the law does not prohibit filing or entertaining of the second complaint even on the

[17] (2013) 2 SCC 435
[18] (2010) 8 SCC 775 (Kishan Singh Vs.Gurpal Singh)
[19] (2013) 9 SCC 245
[20] (2012) 1 SCC 130
[21] (2004) 13 SCC 269

> same facts provided the earlier complaint has been decided on the basis of insufficient material or the order has been passed without understanding the nature of the complaint or the complete facts could not be placed before the court or where the complainant came to know certain facts after disposal of the first complaint which could have tilted the balance in his favour. However, second complaint would not be maintainable wherein the earlier complaint has been disposed of on full consideration of the case of the complainant on merit."

27. In *Chandrapal Singh* v. *Maharaj Singh*[22] this Court has held that it is equally true that chagrined and frustrated litigants should not be permitted to give vent to their frustration by enabling them to invoke the jurisdiction of criminal courts in a cheap manner. In such a fact situation, the court must not hesitate to quash criminal proceedings.

... ...

33. The High Court has dealt with the issue involved herein and the matter stood closed at the instance of Respondent 1 himself. Therefore, there can be no justification whatsoever to launch criminal prosecution on that basis afresh. The inherent power of the court in dealing with an extraordinary situation is in the larger interest of administration of justice and for preventing manifest injustice being done. Thus, it is a judicial obligation on the court to undo a wrong in course of administration of justice and to prevent continuation of unnecessary judicial process. It may be so necessary to curb the menace of criminal prosecution as an instrument of

[22] (1982) 1 SCC 466

> operation of needless harassment. A person cannot be permitted to unleash vendetta to harass any person needlessly. *Ex debito justitiae* is inbuilt in the inherent power of the court and the whole idea is to do real, complete and substantial justice for which the courts exist. Thus, it becomes the paramount duty of the court to protect an apparently innocent person, not to be subjected to prosecution on the basis of wholly untenable complaint."

14. The application of the principles laid down in *Taluqdar*[2] in *Jatinder Singh*[12] shows that "a *second complaint is permissible depending upon how the complaint happened to be dismissed at the first instance"*. It was further laid down that *"if the dismissal of the complaint was not on merit but on default of the complainant to be present there is no bar in the complainant moving the Magistrate again with a second complaint on the same facts. But if the dismissal of the complaint under Section 203 of the Code was on merits the position could be different"*.

To similar effect are the conclusions in *Ranvir Singh*[13] and *Poonam Chand Jain*[14]. Para 16 of the *Poonam Chand Jain*[14] also considered the effect of para 50 of the majority judgment in *Talukdar*[2]. These cases, therefore, show that if the earlier disposal of the complaint was on merits and in a manner known to law, the second complaint on *"almost identical facts"* which were raised in the first complaint would not be maintainable. What has been laid down is that *"if the core of both the complaints is same",* the second complaint ought not to be entertained.

15. If the facts of the present matter are considered in the light of these principles, it is clear that paragraphs 3, 4 and 5 in the first complaint contained the basic allegations that the vehicle belonging to the father was sold after the death of the father; that signatures of the father on Form 29 and 30 were forged; that signatures on the affidavit annexed with Form 29 and 30 were also forged; and that on the basis of such forged documents the benefit of *"sale consideration of the vehicle"* was derived by the accused. The order dated 5.7.2013 passed by the Judicial Magistrate First Class, shows that after considering the evidence and documents produced on behalf of the complainant, no *prima facie* case was found and the complaint was rejected under Section 203 of the Code of Criminal Procedure, 1973. The stand taken before the Revisional Court discloses that at that stage some new facts were said to be in possession of the complainant and as such liberty was sought to withdraw the Revision with further liberty to file a fresh complaint. The liberty was not given and it was observed that if there were new facts, the complainant, in law would be entitled to present a new complaint and as such there was no need of any permission from the Court. The Revisional Court

was definitely referring to the law laid down by this Court on the basis of the principles in *Taluqdar*[2]. Thereafter a complaint with new material in the form of a credit note and Registration Certificate was filed. The core allegations, however, remained the same. The only difference was that the second complaint referred to additional material in support of the basic allegations. Again, in terms of principle laid down in para 50 of *Taluqdar*[2] as amplified in para 16 in *Poonam Chand Jain*[14], nothing was stated as to why said additional material could not be obtained with reasonable diligence.

16. Reliance was, however, placed by Ms. Meenakshi Arora, learned Senior Advocate, on para 18 of the decision of this Court in *Shivshankar Singh*[20]. In that case a Protest Petition was filed by the complainant even before a final report was filed by the police. While said Protest Petition was pending consideration, the final report was filed, whereafter second Protest Petition was filed. Challenge raised by the accused that the second Protest Petition was not maintainable, was accepted by the High Court. In the light of these facts the matter came to be considered by this Court as under:-

> **"7.** Shri Gaurav Agrawal, learned counsel appearing for the appellant has submitted that the High Court failed to appreciate that the so-called first protest petition having been filed prior to the filing of the final report was not maintainable and just has to be ignored. The learned Magistrate rightly did not proceed on the basis of the said protest petition and it remained merely a document in the file. The second petition was the only protest petition which could be entertained as it had been filed subsequent to the filing of the final report .....
>
> **18.** Thus, it is evident that the law does not prohibit filing or entertaining of the second complaint even on the same facts provided the earlier complaint has been decided on the basis of insufficient material or the order has been passed without understanding the nature of the complaint or the complete facts could not be placed before the court or where the complainant came to know certain facts after disposal of the first complaint which could have tilted the balance in his favour. However, the second complaint would not be maintainable wherein the earlier complaint has been disposed of on

full consideration of the case of the complainant on merit.

19. The protest petition can always be treated as a complaint and proceeded with in terms of Chapter XV CrPC. Therefore, in case there is no bar to entertain a second complaint on the same facts, in exceptional circumstances, the second protest petition can also similarly be entertained only under exceptional circumstances. In case the first protest petition has been filed without furnishing the full facts/particulars necessary to decide the case, and prior to its entertainment by the court, a fresh protest petition is filed giving full details, we fail to understand as to why it should not be maintainable."

(Emphasis supplied)

17. As against the facts in *Shivshankar*[20], the present case stands on a different footing. There was no legal infirmity in the first complaint filed in the present matter. The complaint was filed more than a year after the sale of the vehicle which meant the complainant had reasonable time at his disposal. The earlier complaint was dismissed after the Judicial Magistrate found that no *prima facie* case was made out; the earlier complaint was not disposed of on any technical ground; the material adverted to in the second complaint was only in the nature of supporting material; and the material relied upon in the second complaint was not such which could not have been procured earlier. Pertinently, the core allegations in both the complaints were identical. In the circumstances, the instant matter is completely covered by the decision of this Court in *Taluqdar*[2] *as explained in Jatinder Singh*[12] and *Poonam Chand Jain*[14]. The High Court was thus not justified in holding the second complaint to be maintainable.

18. In the aforesaid premises, we allow these appeals, set aside the decision of the High Court and dismiss Complaint Case No.9226 of 2014 as not being maintainable. The amount deposited by the appellants shall now be returned to them along with any interest accrued thereon.

Appeal allowed

I.L.R. [2020] M.P. 1273 (DB)
WRIT APPEAL

Before Mr. Justice Sheel Nagu & Mr. Justice Rajeev Kumar Shrivastava

W.A. No. 1125/2017 (Gwalior) decided on 6 March, 2020

JMFC JAURA, DISTT. MORENA & anr. …Appellants

Vs.

SHYAM SINGH & ors. …Respondents

(Alongwith R.P. No. 579/2017)

***A. Constitution – Article 226 and Judges (Protection) Act (59 of 1985), Section 3* – Directions for Registration of Offence & Conducting Disciplinary Enquiry – Misappropriation of seized/sealed article (gold) preserved in Sub-Treasury – Held – Single Judge was well within his jurisdiction directing for a fact finding enquiry by disciplinary authority and registration of offence by CID. (Paras 7.3 & 10.2 to 10.5)**

क. संविधान – अनुच्छेद 226 एवं न्यायाधीश (संरक्षण) अधिनियम (1985 का 59), धारा 3 – अपराध पंजीबद्ध किये जाने हेतु व अनुशासनात्मक जांच संचालित करने हेतु निदेश – उप–कोषागार में परिरक्षित जब्त/मोहरबंद वस्तु (सोना) का दुर्व्यपदेश – अभिनिर्धारित – अनुशासनात्मक प्राधिकारी द्वारा तथ्य का पता लगाने हेतु जांच करने एवं सी.आई.डी. द्वारा अपराध पंजीबद्ध करने के लिए निदेशित करते हुए एकल न्यायाधीश भलीभांति अपनी अधिकारिता के भीतर था।

***B. Constitution – Article 226 – Scope & Jurisdiction – Term "Any Other Purpose"* – Held – High Court as Superior Court while exercising writ jurisdiction under Article 226 has powers to issue writ, order or any direction which are either directly or indirectly related to subject matter – Expression "any other purpose" expands jurisdiction to reach all those places or causes where injustice is found and do everything possible within its power to remedy the same – Powers of issuing direction can be exercised not only by curative but also by punitive means, as the case may be, without stepping into shoes of disciplinary authority. (Para 10.3)**

ख. संविधान – अनुच्छेद 226 – विस्तार व अधिकारिता – शब्द ''कोई अन्य प्रयोजन'' – अभिनिर्धारित – उच्च न्यायालय को एक वरिष्ठ न्यायालय होने के नाते अनुच्छेद 226 के अंतर्गत रिट अधिकारिता का प्रयोग करते समय रिट, आदेश अथवा कोई निदेश जो कि प्रत्यक्ष अथवा अप्रत्यक्ष रूप से विषय वस्तु से संबंधित हो, जारी करने की शक्तियां प्राप्त हैं – अभिव्यक्ति ''कोई अन्य प्रयोजन'' उन सभी स्थानों अथवा कारणों तक पहुंचने के लिए जहां अन्याय पाया जाता है तथा उक्त का उपचार करने के लिए अपनी शक्ति के भीतर हर संभव कार्य करने हेतु अधिकारिता का विस्तार करती है – निदेश जारी करने की शक्तियों का प्रयोग अनुशासनात्मक प्राधिकारी का स्थान लिए बगैर, प्रकरण के

अनुसार, न केवल उपचारात्मक माध्यम द्वारा बल्कि दण्डात्मक माध्यम द्वारा भी किया जा सकता है।

Cases referred:

(1993) 2 SCC 56, (1999) 6 SCC 464, (2002) 2 MPLJ 401, (2003) 4 SCC 21, (2006) 6 SCC 581 (63), (2011) 3 SCC 573.

Ankur Mody, Addl. A.G. for the appellant in W.A. No. 1125/2017.

Prashant Sharma, for the petitioner in R.P. No. 579/2017.

S.S. Bhadoriya, for the respondent No. 1 in W.A. No. 1125/2017 and for the respondent in R.P. No. 579/2017.

Ankur Mody, Addl. A.G. for the respondent in R.P. No. 579/2017.

O R D E R

The Order of the Court was passed by :

SHEEL NAGU, J. :- Present common order shall dispose of W.A. No.l 125/2017 *(JMFC Jaura, District Morena and Anr. Vs. Shyam Singh and others)* and R.P. No.579/2017 *(Shriram Sharma Vs. Shyam Singh and others).*

2. Instant intra Court appeal assails the final order passed by learned Single Judge on 27.06.2017 while exercising writ jurisdiction u/A.226 of Constitution disposed of W.P. No.5831/2011 by holding the action of JMFC Jaura, District Morena to be suspicious and thus directing the Registrar General of this Court to conduct an enquiry against JMFC Jaura as to what compelled JMFC Jaura on 14.02.1994 to insert a slip as to the purity of article (gold) which was recovered in a case of theft and sealed after being seized on 10.11.1978. A further direction has been issued by learned Single Judge to the CID to register appropriate offence against accused persons to investigate into the role of each of the persons including respondent No.l herein (the alleged owner of seized gold) involved in the alleged replacing of gold items with artificial items as revealed by order sheet dated 16.03.2011 of ACJM Jaura, District Morena.

3. Learned AAG on behalf of appellant in W.A. No. l125/2017 and Shri Prashant Sharma, learned counsel on behalf of review petitioner in R.P. No.579/2017 are heard at length.

4. Learned Additional Advocate General for the writ appellant submits that aspersions cast upon the conduct of JMFC Jaura by the learned Single Judge arc perverse as there was no material for expressing grave suspicion at the conduct of JMFC Jaura. It is submitted that JMFC Jaura in due discharge of his official administrative duties carried out inspection of items preserved in the Malkhana at the Sub-Treasury Jaura and on finding one of the articles which was labelled as gold, to be artificial gold, JMFC Jaura rightly noted the observation of gold being artificial by inserting an endorsement to that effect on a chit and placing it in the

packet containing seized gold on 14.02.1994. It is thereafter submitted that with utmost promptitude on 17.02.1994, JMFC Jaura informed District Judge, Morena in writing about the said revelation during inspection. It is also submitted that District Judge, Morena thereafter vide letter dated 26.03.1994 directed the concerned Police Station to register offence which led to lodging of FIR on 29.03.1994 bearing Crime No.90/97 registered at Police Station Jaura, District Morena alleging offences punishable u/S.409 r/w.l20-B of IPC. In the aforesaid factual background, it is submitted that JMFC Jaura, District Morena right from the inspection carried out by him on 14.02.1994 till the matter was reported by him to the District Judge, Morena, on 17.02.1994 acted in due discharge of his administrative duties without transgressing his jurisdictional limits or violating any law. Reliance is placed on Sec.3 of Judges Protection Act, 1985 and the decision of Apex Court in *Union of India and Ors. Vs. K.K. Dhawan*, (1993) 2 SCC 56 to finally contend that direction contained in operative para 1 and 2 of the impugned judgment are not only perverse, unjustified but have also been passed exceeding the limits set by Article 226 of Constitution. Therefore, it is submitted that the impugned directions issued in para 1 and 2 of the impugned order be set aside.

5. Learned counsel for the writ appellant and review petitioner have also contended that the learned Single Judge has travelled beyond his brief in W.P. No.5832/201 1.

6. Similar grounds as raised in writ appeal are canvased (sic : canvassed) by the review petitioner, Shriram Sharma, who was the JMFC Jaura when the incident took place but is presently retired.

7. For ready reference and convenience, relevant directions contained in para 1 and 2 of order impugned are reproduced below:-

> *"1) What was the occasion for JMFC to prepare a slip and insert in the sealed envelope on 14.02.1994 when the said articles were admittedly seized on 10.11.1978. Therefore, the role of JMFC, who was holding the office at Jaura on 14.02.19994, becomes suspicious. In this regard, the Registrar General of this High Court is directed to conduct an enquiry against said JMFC and enquire as to what was the occasion for him on 14.02.1994 to insert a slip as to purity of the article and on what basis he had put that slip in the sealed envelope on 14.02.1994. Let a copy of this order for this purpose be forwarded to the Registrar General of the High Court immediately.*
>
> *2) As far as the role of Sub-Registry, Jaura is concerned, that also needs to be investigated and for this purpose, this Court is of the opinion that let appropriate case be registered by the Crime Investigation Department of Police against the accused persons and let CID enquire into*

the role of each of the persons including the petitioner in replacement of the gold items with artificial items as have been mentioned in ordersheet dated 16.03.2011 by the Court of AC JM Jaura, District Morena. "

7.1 Taking up direction contained in para 1, it is seen that the same relates to direction to the disciplinary authority (the High Court of M.P.) of the then JMFC Jaura, to conduct enquiry into his conduct to ascertain real reason for JMFC Jaura to have inserted a slip (mentioning that article gold is artificial) in the sealed packet containing seized gold.

7.2 Thus, the aforesaid direction has been given by the learned Single Judge after perusing the record and findings that the conduct of JMFC Jaura of inserting the said slip mentioning the gold item to be artificial raises suspicion that gold which was allegedly pure at the time of its seizure on 10.11.1978 could have been replaced by an artificial look alike metallic object between the date of seizure i.e.10.11.1978 till 14.02.1994 when the appellant /JMFC/ review petitioner carried out the inspection and inserted a slip. Arising of this suspicion in the mind of learned Single Judge was truly understandable. When the learned Single Judge found from the record that gold which was allegedly real at the time of seizure has been misappropriated by replacing the same with artificial gold the least that was expected of the learned Single Judge was to direct conduction of deeper probe by way of fact finding enquiry to ascertain the truth. Since a fact finding enquiry ordinarily is not conducted during exercise of writ jurisdiction, the learned Single Judge obviously and most appropriately directed the disciplinary authority (the High Court of M.P.) to enquire into the conduct of the then JMFC Jaura by means of a preliminary enquiry which is ordinarily conducted by any disciplinary authority to ascertain as to whether the employee has prima facie committed any misconduct or not?

7.3 Thus, the learned Single Judge was well within his jurisdiction to have directed for a fact finding enquiry by the disciplinary authority.

7.4 However, by doing so the learned Single Judge has cast serious suspicion on the conduct of the then JMFC/appellant/review petitioner. This grave suspicion expressed by the learned Single Judge has the potentiality to prejudice the mind of the disciplinary authority preventing it from acting in a free, fair and impartial manner while conducting the fact finding preliminary enquiry.

7.5 It is in the interest of the employer and as well as the employee that whenever a preliminary enquiry is conducted to ascertain whether a misconduct on a prima facie basis is made out or not and whether such misconduct is serious enough to enable initiation of disciplinary proceeding or not, that the employer/disciplinary authority ought to be left unprejudiced and uninfluenced by any factor which may dissuade it to act in free, fair, impartial and unprejudiced manner.

8. In terms of above discussion, this Court is of the considered view that the observations in page 2, para 1 of the impugned order from "What was the occasion ..... at Jaura on 14.02.1994, becomes suspicious", can adversely prejudice the mind of disciplinary authority obstructing in the free and fair conduction of fact finding preliminary enquiry to ascertain as to whether any misconduct has been committed by the then JMFC Jaura or not?

9. Consequently, this Court is inclined to interfere in the matter so far as direction No.l is concerned to the extent indicated above.

10. Coming to direction No.2 of the impugned order, it is seen that since the seized gold was preserved at Sub-Treasury Jaura, ever since it was seized in 1978, the learned Single Judge directed the CID to investigate by registering an offence against accused persons to enquire into the role of each of the accused persons including Shyam Singh (the alleged owner of the seized gold).

10.1 The direction to register an offence and conducting investigation is based on the order sheet dated 16.03.2011 of ACJM Jaura, District Morcna. None of the rival parties herein objected to direction No.2 in the impugned order on the ground that they are not the true reflection of the contents of the order dated 16.03.2011 of ACJM Jaura, District Morena. Thus, this Court treating the said order dated 16.03.2011 of ACJM Jaura to be true proceeds to decide the tcnability of the direction contained in para 2.

10.2 The objection raised against direction in para 2 is primarily founded on the ground that there was no occasion for the writ Court to have directed for registration of offence, as W.P. No5831/2011 was filed for quashing the order dated 16.03.2011 (Annexure P/l) wherein ACJM Jaura, District Morena had noted the contents of packet containing the seized gold including the chit inserted by the then JMFC/review petitioner/appellant and therefore the alleged owner of the seized gold, Shyam Singh, had declined to accept the fake gold despite earlier judicial order of releasing the seized gold in favour of the owner. W.P. No.5831/2011 besides seeking quashment of Annexure P/l as aforesaid sought a direction that the real gold which was stolen from the owner, (Shaym Singh) and recovered by the police, seized and sealed, should be returned to the owner or the owner be paid adequate suitable compensation equal to market price of the seized gold. It is thus submitted that on the anvil of subject matter of W.P. No.5831/2011 and relief claimed the direction for conduction of enquiry into the conduct of JMFC and also of registration of offence were de hors the brief in W.P. No.5831/2011.

10.3 The aforesaid objection of the review petitioner and as well as the writ appellant of learned Single Judge having transgressed his jurisdiction, is heard to be dismissed at the very outset. The High Court as a superior Court while

exercising writ jurisdiction under Article 226 of Constitution has the powers to issue writ, order or any direction which are either directly or indirectly related to the subject matter in question. More so, the High Court under Article 226 of Constitution does so not only for enforcement of any fundamental right but also for any other purpose. The expression "any other purpose" is generic enough to expand the jurisdiction of the High Court under Article 226 of Constitution so as to reach all those places or causes where injustice is found and do everything possible within its powers to remedy the same by issuing suitable writ, order or direction of any nature. Thus, the power of issuing direction with the High Court under Article 226 can be exercised not only by curative, but also by punitive means as the case may be. The High Court cannot be a silent spectator by turning a Nelson's Eye to injustice by hesitating to pass complete and composite orders and directions not only by striking at injustice but also ensuring that the perpetrators of injustice are brought to the book by giving suitable direction without stepping into the shoes of the executive disciplinary authority.

10.4 These plenary powers of the High Court u/A.226 of Constitution have been succinctly described and elaborated by the decision of the Apex Court in and this Court M.I. Builders Pvt. Ltd. Vs. Radhey Shyam Sahu and others, (1999) 6 SCC 464, Gram Panchayat Parei Vs. State of M.P, (2002) 2 MPLJ 401 (para 17), Sri Justice S.K. Ray Vs. State of Orissa and others, (2003) 4 SCC 21, Employees' State Insurance Corpn. and Ors. Vs. Jardine Henderson Staff Association and Ors., (2006) 6 SCC 581 (63) and RBF RIG Corporation, Mumbai Vs. Commissioner of customs (Imports), (2011) 3 SCC 573, relevant portions of which are reproduced below for ready reference and convenience:-

M.I. Builders Pvt. Ltd. (supra)

44. Reference was made to Wade on Administrative Law, 7th Edition, page 720 and to De Smith on Judicial Review of Administrative Action, 5th Edition, page 271 to support the contention that relief could be moulded in law. In Wade's treatise the following part is relevant: -

> *"The freedom with which the court can use its discretion to mould its remedies to suit special situations is shown by two decisions already encountered. One was the case where the House of Lords refused mandamus to a police probationer wrongly induced to resign, although he made out a good case for that remedy, in order not to usurp the powers of the chief constable, and instead granted him an unusual form of declaration to the effect that he was entitled to the remedies of unlawful removal from office except for reinstatement. The other was the case of the Take-over Panel, where in fact no relief was granted but the Court of Appeal explained the novel way in which remedies should be employed in future cases, with the emphasis on declaration rather than certiorari and on 'historic rather than contemporaneous' relief. The same freedom to mould remedies exists in European Community law, where the European Court of Justice may declare non-retroactivity when holding some act or regulation to be void. "*

Gram Panchayat Parei (supra)

17. .....It is apposite to state here that in the aforesaid case reference was made in the decisions rendered in the cases of Charanjit Lal Chowdhury vs. The Union of India and others, AIR 1951 SC 41; Satya Narain Singh vs. District Engineer, P.W.D., Ballia and another. AIR 1962 SC 1161; the State of Haryana vs. The Haryana Co-operative Transport Ltd. and others, AIR 1977 SC 237; and B.R. Ramabhadriah vs. Secretary, Food and Agriculture Department, Andhra Pradesh and others, AIR 1981 SC 1653. I may also hasten to add that here the moulded relief does vary from for the prayer made in the petition in any manner and it cannot be said that by any stretch of imagination that if prayer is allowed it would be in excess of what has been prayed for. I am conscious that a writ Court can mould the relief but should not transgress the territories for grant of relief which, if fact, does not flow from the pleadings and if granted, would be in excess of the prayer made. Quite apart from the above, learned counsel for the parties have fairly agreed before this Court that final adjudication should be by this Court and in my considered opinion the finality can only be attained if the inter se rights of the parties are determined keeping the submissions in view.

Sri Justice S.K. Ray (supra)

11. The learned counsel for the respondents further submitted that the appellant had not presented his case or claimed compensation for loss of future employment but has claimed only the loss for the present tenure and, therefore, we should not grant any relief to him. A writ petition, which is filed under Article 226 of the Constitution, sets out the facts and the claims arising thereto. May be in a given case, the reliefs set forth may not clearly set out the reliefs arising out of the facts and circumstances of the case. However, the courts always have the power to mould the reliefs and grant the same.

Employees' State Insurance Corpn. (supra)

63. The High Court under Article 226 and this Court under Article 136 read with Article 142 of the Constitution of India have the power to mould the relief in the facts of the case.

RBF RIG Corporation, Mumbai (supra)

"19. Article 226 of the Constitution confers powers on the High Court to issue certain writs for the enforcement of fundamental rights conferred by Part-III of the Constitution or for any other purpose. The question, whether any particular relief should be granted under Article 226 of the Constitution, depends on

the facts of each case. The guiding principle in all cases is promotion of justice and prevention of injustice.

20. In Comptroller and Auditor-General of India v. K.S. Jagannathan, (1986) 2 SCC 679, this Court has held:

> *"20. There is thus no doubt that the High Courts in India exercising their jurisdiction under Article 226 have the power to issue a writ of mandamus or a writ in the nature of mandamus or to pass orders and give necessary directions where the government or a public authority has failed to exercise or has wrongly exercised the discretion conferred upon it by a statute or a rule or a policy decision of the government or has exercised such discretion mala fide or on irrelevant considerations or by ignoring the relevant considerations and materials or in such a manner as to frustrate the object of conferring such discretion or the policy for implementing which such discretion has been conferred. In all such cases and in any other fit and proper case a High Court can, in the exercise of its jurisdiction under Article 226, issue a writ of mandamus or a writ in the nature of mandamus or pass orders and give directions to compel the performance in a proper and lawful manner of the discretion conferred upon the government or a public authority, and in a proper case, in order to prevent injustice resulting to the concerned parties, the court may itself pass an order or give directions which the government or the public authority should have passed or given had it properly and lawfully exercised its discretion."*

21. In Dwarkanath v. ITO, AIR 1966 SC 81, this Court pointed out that Article 226 is designedly couched in a wide language in order not to confine the power conferred by it only to the power to issue prerogative writs as understood in England, such wide language being used to enable the High Courts "to reach injustice wherever it is found" and "to mould the reliefs to meet the peculiar and complicated requirements of this country."

22. In Halsbury's Laws of England, 4th Edn., Vol. I, para 89, it is stated that the purpose of an order of mandamus

> *89. Nature of mandamus.— ....is to remedy defects of justice; and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual."*

10.5 Testing direction No.2 on the anvil of the aforesaid discussion, this Court is of the firm view that direction No.2 has been rightly issued and does not need any interference.

11. In view of above analysis, W.A. No. 1125/2017 and R.P. No.579/2017 arc disposed of with the following directions:-

(i) Direction No. l at page 2 of the impugned order dated 27.06.2017 (W.P. No.5831/2011) stands amended by deleting the sentence from "What was the occasion..... at Jaura on 14.02.1994, becomes suspicious". Thus, direction No.l shall be read in its modified form as under:-

> *"In this regard , the Registrar General of this High Court is directed to conduct an enquiry against said JMFC and enquire as to what was the occasion for him on 14.02.1994 to insert a slip as to purity of the article and on what basis he had put that slip in the sealed envelop on 14.02.1994. Let a copy of this order for this purpose be forwarded to the Registrar General of the High Court immediately. "*

(ii) As regards direction No.2 at page 2-3 in the impugned order, this Court rejecting the contention of petitioner upholds the said direction and leaves it intact.

(iii) Remaining part of the impugned order dated 27.06.2017 passed in W.P. No.5831/2011 shall remain intact.

No cost.

Order accordingly

I.L.R. [2020] M.P. 1281 (DB)
WRIT APPEAL

Before Mr. Justice Ajay Kumar Mittal, Chief Justice & Mr. Justice Vijay Kumar Shukla

W.A. No. 630/2016 (Jabalpur) decided on 12 March, 2020

ABDUL HAKEEM KHAN @ PAPPU BHAI …Appellant

Vs.

STATE OF M.P. & ors. …Respondents

A. Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 36(1)(A)(ii) – Election – Disqualification – Term "Release" – **Held – Term "release" would mean where the convict is released after undergoing the entire sentence – Temporary release on bail would not fall within the domain of Section 36(1)(a)(ii) of the Act – Appellant was not eligible to contest the elections – Appeal dismissed. (Para 8 & 10)**

क. पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 36(1)(A)(ii) – निर्वाचन – निरर्हता – शब्द ''छोड़ा जाना'' – अभिनिर्धारित – शब्द ''छोड़े जाने'' का अर्थ उससे होगा जहां दोषी को संपूर्ण दण्डादेश भुगतने के पश्चात् छोड़ दिया गया है – जमानत पर अस्थायी रूप से छोड़ा जाना, अधिनियम की धारा **36(1)(a)(ii)** की परिधि में नहीं आयेगा – अपीलार्थी निर्वाचन लड़ने का पात्र नहीं था – अपील खारिज।

***B. Interpretation – Conviction & Sentence – Suspension of* – Held – Suspension of sentence and suspension of conviction are different in nature and are distinct – Suspension of sentence would not mean that conviction has also been stayed or suspended. (Para 11)**

ख. निर्वचन – दोषसिद्धि एवं दण्डादेश – का निलंबन – अभिनिर्धारित – दण्डादेश के निलंबन एवं दोषसिद्धि का निलंबन भिन्न स्वरूप के हैं तथा सुभिन्न हैं – दण्डादेश के निलंबन का अर्थ यह नहीं होगा कि दोषसिद्धि को भी रोक दिया गया अथवा निलंबित कर दिया गया है।

Cases referred:

(2008) 3 SCC 279, (2008) 2 MPLJ 573, 2011 (1) MPLJ 245, (2007) 2 SCC 574.

K.C. Ghildiyal, for the appellant.
Himanshu Mishra, G.A. for the State.

J U D G M E N T

The Judgment of the Court was delivered by :
VIJAY KUMAR SHUKLA, J. :- The present intra-court appeal is filed under Section 2(1) of the M.P. Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, 2005, being aggrieved by the order dated 31-8-2016 passed in W.P. No.6174/2015, whereby the learned Single Judge has allowed the writ petition filed by the respondent No.5/writ-petitioner.

2. Shorn of unnecessary details : the present appellant and the writ petitioner contested election of Member, Ward No.16, of the Janpad Panchayat, Berasia, wherein the appellant was declared elected and he also contested the election of the President of the said Janpad Panchayat. The writ petitioner - respondent No. 5 in this appeal, preferred a writ petition seeking a writ of *quo warranto* against the appellant on the ground that the appellant was not eligible to contest the election of the Member of the Janpad Panchayat, as he was convicted and sentenced in respect of the offence punishable under sections 307, 323, 436, 435 and 148 read with section 149 of the Indian Penal Code, vide judgment dated 16-6-2005 passed by the IX Additional Sessions Judge, Bhopal in S.T. No.114/2002. The appellant was convicted and sentenced to undergo rigorous imprisonment for six months for the offence under Section 148 of IPC; 5 years rigorous imprisonment for the

offence under Section 307/149 IPC with fine of Rs.1000/-; rigorous imprisonment of six months under Section 323/149 IPC; and rigorous imprisonment of 2 years under Section 435/149 IPC and fine of Rs.500/-, with further stipulation that the substantive sentences would run concurrently.

3. The order of sentence and judgment of conviction was assailed in Criminal Appeal No.1218/2005 wherein the jail sentence was suspended, vide order dated 16-8-2005. Learned counsel for the appellant strenuously urged that as per the provisions of Section 36(1)(a)(ii) of the M.P. Panchayat Raj Evam Gram Swaraj Adhiniyam, 1993 [hereafter referred to as "the Adhiniyam, 1993] the appellant could not have been held disqualified.

4. In order to appreciate the aforesaid submission, it is condign to refer the provisions engrafted under Section 36(1)(a)(ii) of the Adhiniyam 1993, the relevant portion of which is extracted hereunder :

> ***"36. Disqualification for being office-bearer of Panchayat.-***
>
> *(1) No person shall be eligible to be an office-bearer of Panchayat who. -*
>
> *(a) has, either before or after the commencement of this Act, been convicted.-*
>
> *(i) of an offence under the Protection of Civil Right Act, 1955 (No.22 of 1955) or under any law in connection with the use, consumption or sale of narcotics or any law corresponding thereto in force in any part of the State, unless a period of five years or such lesser period as the State Government may allow in any particular case has elapsed since his conviction; or*
>
> *(ii) of any other offence and had been sentenced to imprisonment for not less than six months, unless a period of five years or such less period as the State Government may allow in any particular case has elapsed since his release;... "*

5. The question which cropped up before the learned Single Judge was - "whether the term "release" means a person discharged and released, or released having undergone the entire term of sentence or released on bail".

6. Delving into the issue, it is observed that the object for introduction of the provisions like Section 36 in the statute is to keep the tainted person away from body politic. Discussing the rules of interpretation of Statutes the Supreme Court in *New India Assurance Co.Ltd. vs. Nusli Neville Wadia* (2008) 3 SCC 279 observed as under :

> "51. Except in the first category of cases, as has been noticed by us hereinbefore, Section 4 and 5 of the Act, in our opinion, may have to be construed differently in view of the decisions rendered by this Court. If the landlord being a State within the meaning of Article 12 of the Constitution of India is required to prove fairness and reasonableness on its part in initiating a proceeding, it is for it to show how its prayer meets the constitutional requirements of Article 14 of the Constitution of India. For proper interpretation not only the basic principles of natural justice have to be borne in mind, but also principles of constitutionalism involved therein. With a view to read the provisions of the Act in a proper and effective manner, we are of the opinion that literal interpretation, if given, may give rise to an anomaly or absurdity which must be avoided. So as to enable a superior court to interpret a statute in a reasonable manner, the court must place itself in the chair of a reasonable legislator/author. So done, the rules of purposive construction have to be resorted to which would require the construction of the Act in such a manner so as to see that the object of the Act fulfilled; which in turn would lead the beneficiary under the statutory scheme to fulfil its constitutional obligations as held by the court inter alia in Ashoka Marketing Ltd."
>
> *(Emphasis supplied)*

7. In the present context since the object of the legislature is to keep the democratic set up free from criminalization, reference can be had to the observation of this Court in *Shiv Singh Rawat vs. State of M.P.* (2008) 2 MPLJ 573 :

> "11. It is condign to state here that the politics neither at the grass root level nor at any level can be allowed to have any nexus with criminalization. Criminalization requires to be ostracized from the periphery of body polity. The citizens in democratic set up should not be compelled to suffer criminalization on the ground that they are helpless. A convict cannot be allowed to occupy an elected post where a statute clearly prohibits. In this context, we may refer with profit to the decision rendered in Ram Udgar Singh v. State of Bihar, wherein Their Lordships have stated thus:
>
> > 'Politics, which was once considered the choice of noble and decent persons is increasingly becoming a haven for law breakers. The 'Nelsons' eye' turned by those wielding power to criminalisation of politics by their solemn and determined patronage and

> blessings by vying with each other has been encouraging and facilitating rapid spread and growth with rich rewards and dividends to criminals. The alarming rate of social respectability such elite gangsterism gaining day by day in the midst of people who chose and had given unto themselves the right to elect their rulers, mostly guided by misdirected allegiance to party politics and self oriented profit making endeavours seem to provide the required nectar for its manifold and myriad ways of ventilation with impugnity. Though it is an irony, yet accepted truth is that the 'Home rule' we could achieve by 'non- violence' has become the root cause for generating 'homicidal' culture of political governance effectively shielded by unprincipled mass sympathies and highly profit-oriented selfish designs of unscrupulous 'people' who have many faceted images to present themselves at times to the extent of their deification. Forsome it brings seal for respectability and for some others, it is intended to be used as a shield for protection against law enforcing agencies and that is how reports of various Commissions and Committees have become sheer cry in wilderness.'

We have referred to the aforesaid passage to highlight that the criminalization of politics by any form is impermissible in democracy which is the basic feature of our Constitution. We would have thought of directing prosecution against him for filing a false affidavit before this Court but we restrain ourselves from doing so. We only deprecate the conduct of the respondent No. 9."

8. The expression "release" has to be understood in the context in which it has been incorporated and keeping in view the Purposive Interpretation it is held that "release" would mean where the convict is released after undergoing the entire sentence. The relevant observations in *Shiv Singh Rawat* (supra) may be reproduced with advantage which is in the following terms :

> "8. In view of the aforesaid, the concept of 'release' that was endeavoured to be scanned by Mr. Bhati remains in the realm of much ado about nothing as the said respondent has remained in custody for a period of three years and was not released. It is worth-noting here that the respondent No. 9 was convicted by the judgment dated 28-9-2000. The same is perceptible from the judgment passed in Criminal Appeal. We would be failing in our duty if we do not state that, as it was mentioned before us

that the appeal of the respondent No. 9 was dismissed, we called for the record and perused the order.

9. The election was held for the post of member in the year 2004 and that of President in 2005. On a bare reading of Section 36(1)(a)(ii) it is quite clear that a person will not be eligible to hold a post for a period of 5 years if he has been sentenced for not less than six months. In the case at hand the respondent No. 9 was sentenced for a period of three years. He remained in custody, as is patent, till 2003. He could not have contested till 2008. Yet, for unexplainable reasons, he was allowed to contest and also got elected. Thus, indubitably he is disqualified to be in the office in question."

9. Similar view has been expressed by a Coordinate Bench in *Virendra Tyagi vs. State of M.P.* 2011 (1) MPLJ 245 :

"10. As per the aforesaid section 36(a)(ii), a person shall be ineligible to be an office-bearer of the Panchayat, if he had been sentenced to imprisonment for less than six months. In the present case, the respondent No.4 was sentenced and convicted for offence punishable under section 302 of Indian Penal Code and sentenced for life imprisonment. He has already undergone the aforesaid sentence. In such circumstances, the respondent No.4 has illegally suppressing the fact has been holding the post of Sarpanch, which is a public office."

10. In view of the aforesaid discussion, release of the appellant on bail on 16-8-2005, will not tantamount to undergoing the sentence and temporary release on bail would not fall within the domain of Section 36(1)(a)(ii) of "Adhiniyam 1993". Therefore, the learned Single has rightly held that he was not eligible to contest the election on 22-02-2015.

11. Further, we are equally not impressed with the submissions of the learned counsel for the appellant that the jail sentence of the appellant has already been suspended in Criminal Appeal No.1218/2005 by order dated 16-8-2005, and therefore, the provisions of Section 36 of the Adhiniyam, 2013 would not be attracted. Suspension of sentence and suspension of conviction are different in nature and are distinct. The law relating to suspension of conviction is well settled as held by the Apex Court in the case of *Navjot Singh Sidhu vs. State of Punjab and another,* (2007) 2 SCC 574 that suspension of conviction can be resorted to only in rare cases depending upon special facts of the case. Thus, the suspension of sentence would not mean that the conviction of the appellant has also been stayed or suspended.

12. In view of our preceding analysis and enunciation of law, we do not perceive any error in the impugned order passed by the learned Single Judge warranting any interference in the present intra-court appeal in allowing the writ petition filed by the respondent No.5.

13. Accordingly, the **writ appeal** deserves to and is hereby **dismissed.** There shall be no order as to costs.

Appeal dismissed

I.L.R. [2020] M.P. 1287
WRIT PETITION

Before Mr. Justice G.S. Ahluwalia

W.P. No. 18191/2019 (Gwalior) decided on 5 November, 2019

GYAN SINGH …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

***A. Loktantra Senani Samman Adhiniyam, M.P. (30 of 2018), Section 9(1) and Lok Nayak Jai Prakash Narayan (MISA/DIR Rajnaitik Ya Samajik Karno Se Nirudh Vyakti) Samman Nidhi Niyam, 2008, Rules 4, 4.1, 4.2 & 6 – Sanction of Honour Money – Withholding/Cancellation* – Held – Order of sanction of honour money may be withheld or cancelled u/S 9(1) – It cannot be said that order/executive instruction withhelding the honour money *de hors* the statutory provisions of law or it amounts to amending or superseding, supplementing any statutory provisions – If respondents decided to restore honour money only after physical verification of each and every beneficiary, same cannot be held to be arbitrary or bad in law – Further, *prima facie*, petitioner failed to produce adequate documents to establish his entitlement – Orders were well within jurisdiction – Petition dismissed. (Paras 8, 12, 13 & 21)**

क. लोकतंत्र सेनानी सम्मान अधिनियम, म.प्र. (2018 का 30), धारा 9(1) एवं लोक नायक जय प्रकाश नारायण (मीसा/डी.आई.आर. राजनैतिक या सामाजिक कारणों से निरूद्ध व्यक्ति) सम्मान निधि नियम, 2008, नियम 4, 4.1, 4.2 व 6 – सम्मान राशि की मंजूरी – रोका जाना/निरस्त किया जाना – अभिनिर्धारित – सम्मान राशि की मंजूरी का आदेश धारा 9(1) के अंतर्गत रोका/निरस्त किया जा सकता है – यह नहीं कहा जा सकता कि सम्मान राशि रोकने वाला आदेश/कार्यपालक अनुदेश विधि के कानूनी उपबंधों से असंबद्ध है अथवा यह किसी भी कानूनी उपबंधों को संशोधित करने या अधिक्रमण करने, अनुपूरक करने की कोटि में आता है – यदि प्रत्यर्थीगण ने प्रत्येक हिताधिकारी के केवल भौतिक सत्यापन के पश्चात् ही सम्मान राशि वापस देने का विनिश्चय किया, उक्त को मनमाना अथवा विधि की दृष्टि में अनुचित नहीं ठहराया जा सकता – इसके अतिरिक्त,

प्रथम दृष्ट्या, याची अपनी हकदारी स्थापित करने के लिए पर्याप्त दस्तावेजों को प्रस्तुत करने में विफल रहा – आदेश भलीभांति अधिकारिता के भीतर था – याचिका खारिज।

***B. Loktantra Senani Samman Adhiniyam, M.P. (30 of 2018), Section 9(1) & 9(2) – "Suo Motu" Exercise of Powers* – Held – Section 9(2) provides that powers u/S 9(1) can be exercised not only on any relevant complaint or representation but can also be exercised "*suo motu*". (Para 16)**

ख. लोकतंत्र सेनानी सम्मान अधिनियम, म.प्र. (2018 का 30), धारा 9(1) व 9(2) – ''स्वप्रेरणा'' से शक्तियों का प्रयोग – अभिनिर्धारित – धारा 9(2) यह उपबंधित करती है कि धारा 9(1) के अंतर्गत शक्तियों का प्रयोग न केवल किसी सुसंगत परिवाद अथवा अभ्यावेदन में किया जा सकता है बल्कि स्वप्रेरणा से भी प्रयोग किया जा सकता है।

***C. Loktantra Senani Samman Adhiniyam, M.P. (30 of 2018), Section 9(3) – Refund of Honour Money* – Held – If after verification, it is found that petitioner has wrongly received honour money, then in view of Section 9(3) of the Adhiniyam, he shall be liable to refund the same. (Para 22)**

ग. लोकतंत्र सेनानी सम्मान अधिनियम, म.प्र. (2018 का 30), धारा 9(3) – सम्मान राशि लौटाना – अभिनिर्धारित – यदि सत्यापन के पश्चात्, यह पाया जाता है कि याची ने गलती से सम्मान राशि प्राप्त की है, तो अधिनियम की धारा 9(3) को दृष्टिगत रखते हुए, वह उक्त राशि को लौटाने हेतु दायी होगा।

Cases referred:

2018 (4) M.P.L.J. 405, (2000) 1 SCC 644, (2002) 2 SCC 507.

C.P. Singh, for the petitioner.
P.S. Raghuwanshi, G.A. for the respondents/State.

O R D E R

G.S. AHLUWALIA, J. :- This petition under Article 226 of the Constitution of India has been filed seeking following reliefs:-

> "i) The impugned order dated 15.1.2019 annexure-P-1 may kindly be quashed as the same is against the interest of petitioner and overriding the legal provisions of Adhiniyam 2018;
>
> ii) The Government kindly be permanently prevented not to interfere in the Samman Nidhi or honour money which the petitioner was receiving, in the future without compliance of principles of natural justice and legal procedure as contemplated under the Adhiniyam 2018;

iii) The petitioner may be allowed to receive Samman Nidhi or honour money continuously till their existence which has given by the enactment.

iv) The physical verification of the petitioner has been completed despite this release of due Samman Nidhi with arrears has not been made to the petitioner;

v) Any other relief which this Hon'ble Court deem fit in the facts and circumstances of the case may kindly be granted to the petitioner. "

2. The necessary facts for the disposal of the present petition, in short, are that on 26.3.2012 the petitioner filed an application for grant of honour money under the provisions of Lok Nayak Jai Prakash Narayan (MISA/ DIR Rajnaitik Ya Samajik Karno Se Nirudh Vyakti) Samman Nidhi Niyam, 2008 (in short "the Rules 2008") claiming that he remained in Central Jail, Gwalior, from 24th January, 1976 to 3rd March, 1976 in the capacity of DIR prisoner, however, the petitioner is not in possession of the detention certificate/record and no certificate granted by the Jail Superintendent, Central Jail, Gwalior, is available with the petitioner. However, the petitioner submitted an application along with affidavit of two persons, namely Devi Singh Suryawanshi and Suryabhan Singh Jadaun, who claimed that they had remained in detention during emergency period from July, 1775 and 13 th March, 1977 and the petitioner was also detained along with them. It appears that on the basis of the application/affidavit as of the petitioner as well as affidavits of two beneficiaries of the honour money, the office of the Accountant General (A& E) II MP Gwalior issued pension payment order on 14.9.2012 directing for payment of Rs.10,000/- per month w.e.f. 17.8.2012. It appears that the petitioner was receiving the honour money without any interruption, however, by order dated 15.1.2019, Annexure P/1, the General Administration Department, withheld the honour money by passing the following order:-

''मध्यप्रदेश शासन''
सामान्य प्रशासन विभाग
मंत्रालय वल्लभ भवन, भोपाल – 462004

क्रमांकः 34/516/2018/1/13 भोपाल, दिनांक 15.01.2019

प्रति,

समस्त आयुक्त,
समस्त कलेक्टर,
मध्यप्रदेश।

विषयः–लोकतंत्र सेनानियों का सत्यापन एवं उन्हें दी जाने वाली सम्मान निधि के भुगतान की प्रक्रिया का पुनर्निर्धारण बाबत्।

संदर्भः—इस विभाग का पत्र क्रमांक 592/2018/1/13 दिनांक 29.12.2018

———000———

कृपया विषयातंर्गत सदंर्भित पत्र का कृपया अवलोकन करें।

2. सदंर्भित पत्र के द्वारा लोकतंत्र सैनानियों के भौतिक सत्यापन की आवश्यकता प्रतिपादित की गई थी।

3. अतः राज्य शासन द्वारा निर्णय लिया गया है कि लोकतंत्र सैनानियों एवं दिवगंत लोकतंत्र सैनानियों के आश्रित पत्नी/पति का भौतिक सत्यापन की कार्यवाही स्थल पर जाकर कराई जाए। यह कार्यवाही राजस्व निरीक्षक से अनिम्न स्तर के कर्मचारी से करायी जाए।

4. उक्त सत्यापन के दौरान स्थानीय व्यक्तियों से पूछताछ की जाए। सत्यापन उपरांत पात्र लोकतंत्र सैनानियो/ उनके आश्रितों को सम्मान निधि राशि के वितरण की कार्यवाही की जाए।

(धरर्णेन्द कुमार जैन)
उप सचिव
मध्यप्रदेश शासन
सामान्य प्रशासन विभाग"

3. At this stage, it is submitted by Shri Singh that in fact the earlier counsel who had filed the petition has not annexed the correct order and has filed a wrong order dated 15.1.2019 and has wrongly prayed for quashment of the said order, but in fact correct order is order dated 29.12.2018. Although Shri Singh has accepted the brief on behalf of the petitioner, but he did not choose to file an application for amendment of the writ petition by filing and challenging the said order. However, in the interest of justice, the order dated 29.12.2018 is taken on record as provided by Shri Singh. The order dated 29.12.2018 reads as under:-

"मध्यप्रदेश शासन
सामान्य प्रशासन विभाग
मंत्रालय
वल्लभ भवन, भोपाल — 462004

क्रमांकः 591/2018/1/1 भोपाल, दिनांक 29.12.2018

प्रति,

समस्त आयुक्त,
समस्त कलेक्टर,
मध्यप्रदेश।

विषयः लोकतंत्र सेनानियों का सत्यापन एवं उन्हें दी जाने वाली सम्मान निधि के भुगतान की प्रक्रिया का पुननिर्धारण बाबत्।

———000———

विगत वित्तीय वर्षों में प्रदेश में लोकतंत्र सेनानी सम्मान निधि के भुगतान में बजट प्रावधान से अधिक व्यय की स्थितियां महालेखाकार के लेखा परीक्षण प्रतिवेदनों के माध्यम से संज्ञान में आई हैं। बजट प्रावधान से अधिक व्यय के लिए लोक लेखा समिति के समक्ष विभाग को स्थिति स्पष्ट करने में कठिनाई आती है, साथ ही लोक लेखा समिति की अनुसंशा पर बजट से अधिक व्यय की राशि के नियमन के लिए विधानसभा में पुनः विधेयक प्रस्तुत करने की आवश्यकता हो जाती है।

2. उपरोक्त स्थिति की पुनरावृति न हो, को दृष्टिगत रखते हुए लोकतंत्र सेनानी सम्मान निधि भुगतान की वर्तमान प्रक्रिया को ओर अधिक सटीक, पारदर्शी बनाया जाना आवश्यक है, साथ ही लोकतंत्र सैनिकों का भौतिक सत्यापन कराया जाना भी आवश्यक है। इस हेतु पृथक से विस्तृत दिशा निर्देश प्रेषित किए जाएगें।

3. उपर्युक्त के परिपेक्ष्य में निर्देशानुसार अनुरोध है कि आगामी माह से लोकतंत्र सेनानी सम्मान निधि राशि का वितरण उपरोक्तानुसार कार्यवाही होने के पश्चात किया जाए। इस हेतु जिला कोषालय एवं लोकतंत्र सेनानी सम्मान निधि वितरण करने वाली सभी सबंधित बैक शाखाओं को तत्काल अपने स्तर से निर्देशित करने का कष्ट करें।

(धरर्णेन्द कुमार जैन)
उप सचिव
मध्यप्रदेश शासन
सामान्य प्रशासन विभाग
निरंतर.....

पृष्ठांकन क्रमांकः 592/2018/1/13 भोपाल, दिनांक 29.12.18

प्रतिलिपिः

1. प्रमुख सचिव, मध्यप्रदेश शासन, वित्त विभाग।
2. आयुक्त कोष एवं लेखा, पर्यावास भवन, भोपाल।
3. संचालक पेंशन, पर्यावास भवन, भोपाल।
4. महाप्रबंधक, भारतीय रिजर्व बैंक होशंगाबाद रोड, भोपाल।
5. आंचलिक बैंक, ऑफ इण्डिया परिचालक विभाग, जेल रोड, अरेरा हिल्स, भोपाल।
6. महाप्रबंधक, स्टेट बैंक आफ इण्डिया, स्थानीय, मुख्य कार्यालय होशंगाबाद रोड, भोपाल।

की ओर सूचनार्थ एवं उपरोक्तानुसार अनुगामी निर्देश जारी करते हुए आवश्यक कार्यवाही सुनिश्चित करें।

उप सचिव
मध्यप्रदेश शासन
सामान्य प्रशासन विभाग"

4. It is submitted by the counsel for the petitioner that since the honour money is being paid to the petitioner by virtue of the Rules, 2008, therefore, the respondents by issuing an executive order cannot withheld or withdraw the honour money which has been sanctioned in favour of the petitioner. It is further submitted that since the honour money has been sanctioned in favour of the petitioner, therefore, it has to be presumed that petitioner had remained in detention during the emergency period and thus the same cannot be withheld unless and until it is found that petitioner was wrongly granted honour money. It is further submitted that the Rules 2008 were amended in the year 2012 and a provision was inserted that in case if the record of jail, police, police Station and District Magistrate with regard to the detention during the emergency period is not available, then affidavit given by those two detenues who had remained in jail, can be accepted and the applicant/aspirant can be granted honour money. It is further submitted that in the year 2016 the Rules, 2008 were further amended and detenues were called as Loktrantra (sic : Loktantra) Senani. In the year 2017, the Rules, 2008 were further amended and the amount of honour money was revised. It is further submitted that certain executive instructions have been issued for giving felicitations to Loktantra Senani. However, it is also conceded by the counsel for the petitioner that Madhya Pradesh Loktantra Senani Samman Adhiniyam, 2008 has been promulgated and it received the assent of Governor on 9th August, 2018 and it came into existence with effect from the date of its publication in the M.P. Gazette. It is further submitted that it is well established principle of law that any statutory provision cannot be superseded/overruled by issuing any executive instructions, and therefore, the executive instructions dated 29.12.2018 are bad in law and are liable to be quashed on the said ground.

5. It is further submitted that a Coordinate Bench of this Court in case of *Krishna Gandhi vs. State of M.P. and others* reported in 2018(4) M.P.L.J. 405 has held that executive instructions cannot amend or supersede statutory rules or add something therein and orders cannot be issued in contravention of statutory rules for reason that an administrative instruction is not a statutory rule nor does it have any force of law, and therefore, this Court is bound by the proposition of law laid down by the Coordinate Bench of this Court in case of *Krishna Gandhi* and by placing reliance on the decision of the Supreme Court in case of *Sub-Inspector Rooplal and another vs. Lt. Governor Through Chief Secretary, Delhi and others* reported in (2000) 1 SCC 644 submitted that a subordinate Court is bound by the precedent of the superior Court, and a Bench in a Court is bound by the precedent of a Coordinate Bench and thus it is submitted that judgment passed by the Coordinate Bench in case of *Krishna Gandhi* is binding on this Court. It is further submitted by the counsel for the petitioner that the decision to grant honour money was taken by Government of a different political party which has been withdrawn by Government of another political party and the decisions of outgoing Government should not be withdrawn in a casual manner. To buttress his

contention, counsel for the petitioner has relied upon the judgment of the Supreme Court in case of *State of Haryana vs. State of Punjab and another* reported in (2002) 2 SCC 507.

6. Heard learned counsel for the petitioner.

7. At the very beginning of the hearing of the case, this Court had expressed that since the circular dated 29.12.2018 is not a part of the writ petition and the said circular has been passed by the respondents pointing out the need of verification of entitlement of each of the beneficiaries, therefore, instead of giving any judgment on merits, this Court is inclined to direct the respondents to complete the verification proceedings within a period of three months, however, the said suggestion given by this Court was not accepted by the counsel for the petitioner and he insisted that order dated 29.12.2018 is bad, therefore, it should be quashed and the respondents cannot verify the entitlement of the beneficiaries because such order is contrary to the statutory provisions and it is well established principle of law that executive instructions cannot override the statutory provisions. Under these circumstances, this Court is left with no other option, but to decide the entitlement of the petitioner at this stage only.

8. In the year 2008, Rules, 2008 were framed and Rules 4, 6 and 7 read as under:-

> "4. मीसा/डी.आई.आर. के अधीन राजनैतिक एवं सामाजिक कारणों से निरूद्ध रहने संबंधी प्रमाण–पत्र, व्यक्ति जहां निरूद्ध रहा हो, यथा–जेल/पुलिस थाना का प्रमाण–पत्र प्रस्तुत करना होगा, जेल की दशा में जेल अधीक्षक तथा पुलिस थाने की दशा में जिला पुलिस अधीक्षक का प्रमाण–पत्र आवेदन के साथ संबंधित जिला मजिस्ट्रेट को प्रस्तुत करना अनिवार्य होगा.
>
> 6. इन नियमों के अधीन प्राप्त आवेदनों का परीक्षण कर सम्मान निधि की पात्रता/अपात्रता के संबंध में अनुशंसा जिलास्तर पर निम्न समिति द्वारा की जाएगीः–
>
> | | |
> |---|---|
> | (1) जिला के प्रभारी मंत्री | अध्यक्ष |
> | (2) जिला मजिस्ट्रेट | सदस्य सचिव |
> | (3) जिला पुलिस अधीक्षक | सदस्य |
> | (4) जिला जेल अधीक्षक | सदस्य |
>
> समिति यह सुनिश्चित करेगी कि सम्मान निधि केवल उन व्यक्तियों को ही प्राप्त हो जो मीसा या डी.आई.आर. कानून के अधीन राजनैतिक या सामाजिक कारणों से निरूद्ध हुए थे तथा उनका तत्समय पुलिस रिकार्ड में कोई पृथकतः आपराधिक/असामाजिक गतिविधियों का इतिहास नहीं था अर्थात् सम्मान निधि देते समय यह ..... जाएगा कि यह निधि मूलतः ऐसे व्यक्तियों को दी जाए जो राजनैतिक या सामाजिक कारणों से मीसा/डी.आई.आर काननू के अधीन निरूद्ध हुए थे तथा वे मूलतः आपराधिक चरित्र के नही थे।

7. इन नियमों के अधीन समिति द्वारा की गई अनुशंसा के आधार पर जिला मजिस्ट्रेट द्वारा स्वीकृति/अस्वीकृति आदेश जारी किया जाएगा।"

From the plain reading of Rules 4 and 6, it is clear that only those persons were entitled for grant of honour money who had produced the certificates from the Superintendent of Jail or the Superintendent of Police. However, these rules were later on amended and by amendment No.F 2-1-2008-1-13 dated 4th January, 2012, the following provisions were inserted:-

"4.1 ''जहाँ जेल, पुलिस, थाना जिला मजिस्ट्रेट का निरूद्धि संबंधी शासकीय रिकार्ड उपलब्ध नहीं है केवल उन्ही प्रकरणों में आवेदक के साथ जेल में निरूद्ध रहे किन्ही दो मीसा/डी.आई. आर. के अधीन राजनैतिक एवं सामाजिक कारणों से निरूद्ध व्यक्तियों के शपथ–पत्र/प्रमाणीकरण को मान्यता दी जाएगी, शपथ–पत्र में प्रमाणीकरणकर्ता द्वारा घोषणा की जावेगी कि वे व्यक्तिगत ज्ञान एवं स्मृति के आधार पर यह प्रमाणीकरण कर रहें है इस प्रमाणीकरण के असत्य होने के वैधानिक परिणामों से वे अवगत है.''

4.2 ''यदि जेल में जाने या छूटने का एक रिकार्ड उपलब्ध है और जेल प्रमाणित करता है कि शेष रिकार्ड जेल में उपलब्ध नही है ऐसी स्थिति में कम से कम एक माह का निरोध माना जा कर तद्नुरूप सम्मान निधि स्वीकृत की जा सकेगी. इन प्रकरणों में निरूद्ध होने की पुष्टि करने हेतु दो अन्य निरूद्ध व्यक्तियों के प्रमाणीकरण की शर्त लागू नहीं होगी''

However, the counsel for the petitioner could not point out any amendment by which the provisions of Rule 6 of the Rules, 2008 were repealed or modified. Thus, after 2012 any person who fulfills the qualification as provided under Rule 4, 4.1 and 4.2 of Rules, 2008 was entitled for receiving the honour money provided his case was scrutinized by the District Level Committee and an order is passed by the District Magistrate. In the writ petition, there is no document or any averment to the effect that the affidavit/application filed by the petitioner was ever scrutinized by the District Level Scrutiny Committee or any order was passed by the District Magistrate. Earlier counsel for the petitioner had submitted that after the application along with the affidavit is submitted, then it was the duty of the Treasury Officer to suo motu sanction pension. However, after going through the Rules, 2008 it was fairly conceded by the counsel for the petitioner that pension cannot be sanctioned unless and until an order is passed by the District Magistrate on the basis of recommendation of District Level Scrutiny Committee. In the writ petition, no such recommendation of the District Level Scrutiny Committee or the order of the District Magistrate has been placed on record. Only the pension payment order issued by the office of Accountant General (A& E) II MP Gwalior, has been placed on record, in which also there is no reference to the recommendation made by the district level scrutiny committee or the order passed by the District Magistrate. However, in the letter dated 23.10.2012 there is a reference of order dated 26.12.2011 issued by the District

Magistrate, Gwalior, therefore, it appears that some order was passed by the District Magistrate for payment of pension but since the order dated 26.12.2011 issued by the District Magistrate, Gwalior, has not been placed on record, therefore, it is not known that whether the said order was passed on the recommendations of District Level Scrutiny Committee. However, the petitioner has filed affidavits of two persons who claimed that they had remained in detention alongwith the petitioner and they are being paid the pension, but, neither in the affidavit nor in any document filed along with the writ petition there is any reference to the certificate of detention issued by the competent authority. Thus, it appears that *prima facie* petitioner has failed to provide adequate documents to establish that he was rightly awarded the pension and further verification is not required.

9. The next contention of the petitioner is that since the respondents by issuing an executive order cannot amend the statutory provisions, therefore, the letter dated 29.12.2018 is bad in law and thus it is liable to be ignored and the honour money is liable to be restored with immediate effect.

10. Considered the submissions made by the counsel for the petitioner.

11. This Court is of the considered opinion that above-said submission is misconceived for the following reason:-

> The Madhya Pradesh Loktantra Senani Samman Adhiniyam, 2018 (in short "the Adhiniyam of 2018") has been promulgated and came into existence from the date of its publication in the M.P. Gazette and it received the assent of Governor on 9th August, 2018. Section 9 of the Adhiniyam of 2018 reads as under:-
>
> > "9. (1) The order of sanction of honour money under this Act may be withheld or cancelled on the following grounds:-
> >
> > > (a) participation in any crime of moral turpitude and in anti-national activity;
> > >
> > > (b) punishment in any offence;
> > >
> > > (c) receiving the honour money despite any ineligibility under the Act;
> >
> > (2) On the basis of grounds mentioned in sub-section (1) or any relevant complaint or representation or suo motu information received, the Committee after giving

> reasonable opportunity of hearing may enquire the case of concerned person whose hounur money has been sanctioned. After recommendation of the Committee, the right to cancel order of sanction shall vest with the District Magistrate. The concerned person aggrieved by this order may submit his representation that may be disposed as per provisions of Section 8.
>
> (3) If any person who received honour money or facilities on the basis of false documents shall be recoverable as arrears of land revenue.

12. Thus, it is clear that the order of sanction of honour money may be withheld or cancelled on the grounds mentioned in Section 9(1) of the Adhiniyam of 2018. If the respondents by issuing the letter dated 29.12.2018 have withheld the honour money, then it cannot be said that said executive instruction is de hors the statutory provisions of law or it amounts to amending or superseding any statutory provisions. The respondents are well within their rights to withhold the payment of honour money on the ground that the said honour money was received on submitting the false information and false affidavit or the beneficiary has received the honour money despite ineligibility under the Act, therefore, this Court is of the considered opinion that order dated 29.12.2018 is without the jurisdiction of the respondents and under the provisions of Section 9 of the Adhiniyam of 2018 the respondents are well within their jurisdiction to withhold the honour money payable to the beneficiaries. Thus, contention of counsel for the petitioner that respondents by issuing an executive order cannot supersede the provisions of law is misconceived, and therefore, it is rejected.

13. So far as judgment passed by the Coordinate Bench of this Court relied upon by the counsel for the petitioner is concerned, in view of the fact that respondents are well within their rights to withhold the honour money, therefore, it is held that the proposition of law laid down by the Coordinate Bench of this Court in the case of *Krishna Gandhi* (supra) is not applicable to the facts of the case because by issuing the order dated 29.12.2018 the respondents have neither modified nor superseded or supplemented any statutory provision. Similarly, the judgment in the case of *Sub-Inspector Rooplal and another* (supra) does not require any further consideration.

14. The next contention of counsel for the petitioner that although the respondents may be empowered to withheld or withdraw the honour money in exercise of power under Section 9 of the Adhiniyam of 2018, but the same cannot be done unless and until any complaint is made or any representation is made, therefore, issuance of general order dated 29.12.2018 is bad in law and in excess of the powers conferred on the respondents.

15. Considered the submissions made by the counsel for the petitioner.

16. Section 9(2) provides that the power under Section 9(1) can be exercised not only on any relevant complaint or representation but can also be exercised **"suo motu"**. If the order dated 29.12.2018 is tested on the anvil of the provisions under Section 9(2) of the Adhiniyam of 2018, then it is clear that the respondents had disclosed the information, and therefore, the respondents have taken suo motu decision to verify each and every case of the beneficiary because it is specifically mentioned in order dated 29.12.2018 that certain reports from the office of Accountant General have been received and in order to make the provisions of Adhiniyam of 2018 more transparent, therefore, it is necessary to physically verify the entitlement of each Loktantra Senani. Thus, the source of information has been disclosed in order dated 29.12.2018 and therefore if order dated 29.12.2018 is passed under the provisions of Section 9(2) of the Adhiniyam, 2018, then it is held that it is not beyond the jurisdiction of the respondents, but power has been exercised within the four corners of the Act.

17. It is next contended by counsel for the petitioner that Rules, 2008 were promulgated by the Government of a different ruling party and now the Government of another ruling party is in power, therefore, the decision to make payment of honour money has been withdrawn and such action cannot be allowed to be taken and for that purpose he has relied upon the judgment of the Supreme Court in case of *State of Haryana* (supra). In that case, the Supreme Court has held as under :-

> "16.....The decisions taken at the governmental level should not be so easily nullified by a change of government and by some other political party assuming power, particularly when such a decision affects some other State and the interest of the nation as a whole. It cannot be disputed that so far as the policy is concerned, a political party assuming power is entitled to engraft the political philosophy behind the party, since that must be held to be the will of the people. But in the matter of governance of a State or in the matter of execution of a decision taken by a previous government, on the basis of a consensus arrived at, which does not involve any political philosophy, the succeeding government must be held duty bound to continue and carry on the unfinished job rather than putting a stop to the same."

18. When a specific question was put to Shri Singh that whether any pleading with regard to vulnerability of order dated 29.12.2018 only on the basis of change of Government has been taken or not, then it is submitted by Shri Singh that it is a pure question of law which does not require any pleading and same can be considered even in absence of pleading.

19. In the considered opinion of this Court, the submission made by the counsel for the petitioner is misconceived and is liable to be rejected. If a person is

of the view that decision has been changed merely because the Government of another political party had taken the said decision, then it is necessarily a disputed question of fact and amounts to attributing malafide or arbitrariness to the authority who had taken the decision to withhold the payment of honour money which was taken by the earlier Government, therefore, unless and until the foundation is laid down by the petitioner, this Court cannot look into the verbal submissions which have been made by the petitioner. Further more, even if this contention is considered, still this Court is of the considered opinion that the submission made by the petitioner is misconceived. It is submitted by Shri Singh that election of State Legislative Assembly took place in the November, 2018 and thereafter the Government of another political party came into power. The submission made by the counsel for the petitioner also appears to be factually incorrect. If the submission made by the petitioner is considered in the light of the fact that Adhiniyam 2018 came into force from the date of its publication in the M.P. Gazette and it received the assent of the Governor on 9th August, 2018, then it is clear that the Adhiniyam, 2018 was promulgated by the earlier Government and not by the present Government. Section 9 is part of Adhiniyam of 2018 provides for withholding or cancelling the honour money. Thus, it is clear that allegation of withholding of honour money merely because change in the Government is completely misconceived. By Section 12 of Adhiniyam of 2018 the Rules, 2008 have been repealed.

20. No other arguments is advanced by the counsel for the petitioner.

21. Under these circumstances, this Court is of the considered opinion that the order dated 29.12.2018 passed by the GAD, Bhopal, as well as order dated 15.1.2019 passed by the GAD, Bhopal, are not beyond their jurisdiction and they are within the powers conferred under Section 9 of the Adhiniyam of 2018, therefore, the same cannot be quashed. Since the honour money of the petitioner has been withheld and the respondents have decided to verify the entitlement of each and every beneficiary and in absence of complete document to show that petitioner was eligible for the honour money, this Court is of the considered opinion that if the respondents have decided to restore the honour money only after the physical verification of each and every beneficiary, then same cannot held to be arbitrary or bad in law.

22. Accordingly, it is held that after due verification, if the respondents come to a conclusion that the petitioner has wrongly received the honour money, then in view of Section 9(3) of Adhiniyam, 2018, the petitioner shall be liable to refund the honour money already received by him. Accordingly, this petition fails and is dismissed.

Petition dismissed

I.L.R. [2020] M.P. 1299 (DB)
WRIT PETITION

Before Mr. Justice Ajay Kumar Mittal, Chief Justice & Mr. Justice Vijay Kumar Shukla

W.P. No. 19126/2019 (Jabalpur) decided on 29 April, 2020

PINKI ASATI …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

(Alongwith W.P. Nos. 19630/2019, 19643/2019, 19644/2019, 19831/2019, 19942/2019, 19952/2019, 20106/2019, 20170/2019, 20212/2019, 20218/2019, 20375/2019, 20384/2019, 20418/2019, 20421/2019, 20538/2019, 20544/2019, 20586/2019, 20983/2019, 21169/2019, 21236/2019, 21276/2019, 21319/2019, 21473/2019, 21477/2019, 21482/2019, 21529/2019, 21993/2019, 22024/2019, 22840/2019, 22847/2019, 23510/2019, 24711/2019, 19300/2019, 19108/2019, 20208/2018, 24914/2018, 22237/2019 & 1567/2020)

A. Civil Services (Special Provision for Appointment of Women) Rules, M.P., 1997, Rule 3 – Horizontal & Vertical Reservation – Migration from One Category to Another **– Held – Rule 3 prescribes horizontal and compartment-wise reservation for each category (Gen/OBC/SC/ST) – Allotment of earmarked seats would be made in strict sensu, in case of horizontal reservation, categorywise – There cannot be any migration on basis of merit in Horizontal reservation as what is permissible in vertical reservation – Revised list quashed – Petitions disposed. (Paras 40 to 43)**

क. सिविल सेवा (महिलाओं की नियुक्ति हेतु विशेष उपबंध) नियम, म.प्र., 1997, नियम 3 – क्षैतिज व उर्ध्व आरक्षण – एक श्रेणी से अन्य श्रेणी में प्रव्रजन – अभिनिर्धारित – नियम 3, प्रत्येक श्रेणी (सामान्य/अ.पि.व./अ.जा./अ.ज.जा.) हेतु क्षैतिज एवं कम्पार्टमेंट–वार आरक्षण विहित करता है – चिन्हित की गई सीटों का आबंटन कड़े अर्थ में किया जाएगा, क्षैतिज आरक्षण के मामले में श्रेणीवार – क्षैतिज आरक्षण में योग्यता के आधार पर कोई प्रव्रजन नहीं हो सकता जैसा कि उर्ध्व आरक्षण में अनुज्ञेय है – पुनरीक्षित सूची अभिखंडित – याचिकाएं निराकृत।

B. Civil Services (Special Provision for Appointment of Women) Rules, M.P., 1997, Rule 3 – "Placement in Merit List" & "Allotment of Earmarked Seats" – Distinction **– Held – Placement in merit list is one thing and the allotment of earmarked seat/post is a distinct process – A woman candidate of OBC category if scores higher marks than a General category candidate, she has to be allotted a seat in OBC(female) in her own category and not a seat in unreserved female category. (Para 40 & 41)**

ख. सिविल सेवा (महिलाओं की नियुक्ति हेतु विशेष उपबंध) नियम, म.प्र., 1997, नियम 3 – ''योग्यता सूची में स्थानन'' व ''चिन्हित की गई सीटों का आबंटन'' – विभेद – अभिनिर्धारित – योग्यता सूची में स्थानन एक बात है और निश्चित की गई सीट/पद का आबंटन एक भिन्न प्रक्रिया है – यदि अ.पि.व. श्रेणी की एक महिला, एक सामान्य श्रेणी के अभ्यर्थी से उच्चतर अंक प्राप्त करती है, उसे अ.पि.व. (महिला) की उसकी स्वयं की श्रेणी की सीट आबंटित करनी होगी और न कि अनारक्षित महिला श्रेणी की सीट।

***C. Lok Seva (Anusuchit Jatiyon, Anusuchit Jan Jatiyon aur Anya Pichhade Vargon Ke Liye Arakshan) Adhiniyam, M.P. (21 of 1994), Section 4(4) Proviso – Migration* – Held – In view of the proviso to Section 4(4) of the Act, migration of reserved category candidate on basis of merit for allotment of seat of General category is applicable/permissible to vertical reservation.**

(Para 26 & 40)

ग. लोक सेवा (अनुसूचित जातियों, अनुसूचित जनजातियों और अन्य पिछड़े वर्गों के लिए आरक्षण) अधिनियम, म.प्र. (1994 का 21), धारा 4(4) परंतुक – प्रव्रजन – अभिनिर्धारित – अधिनियम की धारा 4(4) के परंतुक को दृष्टिगत रखते हुए, सामान्य श्रेणी की सीट के आबंटन हेतु, आरक्षित श्रेणी के अभ्यर्थी का योग्यता के आधार पर प्रव्रजन, उर्ध्व आरक्षण के लिए प्रयोज्य/अनुज्ञेय है।

Cases referred:

1992 Supl (3) SCC 217, (1995) 5 SCC 173, (2007) 8 SCC 785, (2010) 12 SCC 204, W.P. No. 18475/2013 decided on 18.11.2013, W.P. No. 5256/2017 decided on 24.10.2017, R.P. No. 1572/2018 decided on 18.10.2010, 2002 (4) MPLJ 380, 2014 (2) MPLJ 86, 2019 SCC Online All 2674 : (2019) 5 All LJ 466, W.P. No. 21091/2018 decided on 26.06.2019, (2017) 12 SCC 680, (2010) 3 SCC 119, (1985) 1 SCC 591.

Suyas Mohan Guru, Kailash Chandra Ghildiyal, Manas Mani Verma, Amit Seth, Bramha Nand Pandey, Shailesh Tiwari, Jubin Prasad, Sanjay Kumar Agrawal, L.C. Patne, Swapnil Ganguly, Brijesh Kumar Mishra, Ashish Choubey, Brijendra Kumar Mishra, Praveen Kumar Pandey, Arun Kumar Singh, Ashok Kumar Gupta, Amit Khatri, Anshuman Singh, Chandra Kant Patne, Harshmeet Hora, Pawan Kumar Dwivedi, Nitin Singh Bhati, Gopi Chourasiya, Rajneesh Sharma and *Brahmendra Prasad Pathak*, for the petitioners.

Himanshu Mishra, G.A. for the respondents/State.

Prashant Singh assisted by *Anshul Tiwari*, for the M.P. Public Service Commission.

Shobha Menon with *Rahul Choubey, Naman Nagrath* with *Jubin Prasad, Kailash Chandra Ghildiyal, Akash Choudhary, Sanjeev Kumar Mishra, A.S. Raizada, Manish Kholia, Shivam Mishra, Aditya Narayan Shukla, Kabeer Paul, Parag S. Chaturvedi, Pramod Kumar Thakre, Rahul Rawat, Ashish Shroti,*

Vibudhendra Mishra, Amit Seth, K.S. Jha, Rakesh Pandey, Avinash Zarger, Himanshu Chouhan, Bharat Kumar Dubey, Kamalnath Nayak and *Saurabh Singh Sengar*, for other respondents and intervenors.

O R D E R

The Order of the Court was passed by :

VIJAY KUMAR SHUKLA, J. :- In this batch of writ petitions, invoking writ jurisdiction under Article 226 of the Constitution of India, the petitioners have assailed the legality of the revised Select List issued by the M.P. Public Service Commission, Indore [for short, "the MPPSC"], whereby private respondents, who submitted their candidature against reserved category in Other Backward Class Female (OBCF) for the post of Assistant Professors in different subjects, have been selected and allotted Unreserved Female (UNRF) posts/seats, however the petitioners have been kept in waiting list denying selection. Thus, in the obtaining factual matrix, the petitioners have agitated their grievance in the present batch of writ petitions, wherein the following issue has cropped up for consideration :

> *Whether a candidate having opted to participate in a competitive examination as a reserved category candidate, can be permitted to migrate to General Category in UNRF category ? In other words, a candidate who opts to take up a competitive examination not as a General Category, but as a reserved category candidate belonging to Scheduled Castes (SC)/Scheduled Tribes (ST)/Other Backward Classes (OBC) falling under special category of female (horizontal seat) competing amongst the candidates of her category, if obtains marks higher than the candidate of a General Category, whether such candidates can be permitted to be allotted "Open Category - UNRF" Seat/post ?*

2. Regard being had to the commonality of controversy, the writ petitions were heard together and are being disposed of by common order. For the sake of convenience, the facts from W.P. No.19126/2019 *(Pinki Asati vs. State of M.P.)* are adumbrated herein. Before adverting to the issue, it is condign to refer the pleadings and submissions canvassed on behalf of the petitioners, respondents and interveners as well, in W.P. No.19126/2019.

3. The Madhya Pradesh Public Service Commission issued an advertisement, dated 12-12-2017, called as **"Assistant Professor Examination - 2017"** for the post of Assistant Professors in various disciplines. Three types of vacancies were advertised. We have taken example of post in the subject of Geography from the case of Pinki Asati (W.P. No.19126/2019). The first was of backlog posts, in which there was no post for the "unreserved category". The second type of posts were the

posts which fell vacant due to promotion/ superannuation, in which there were total 36 posts, out of which 16 posts were meant for unreserved category and 5 posts out of said 16 posts of unreserved category were reserved for Female Unreserved Category (UNRF) under the 33% reservation provided in the *M.P. Civil Services (Special Provision for appointment of Women) Rules, 1997* [hereinafter referred to as "1997 Rules"]. The third type of posts were newly created posts in which there were total 40 posts out of which 20 posts were for unreserved category and 7 posts out of said 20 posts of unreserved category were reserved for Female Unreserved Category (UNRF). Thus, out of total 36 posts of Unreserved Category (UNR), 12 posts were reserved for the UNRF, as mandated in the 1997 Rules. At this juncture it is useful to refer the relevant part of the advertisement which is extracted hereunder :

एक भारत के नागरिकों तथा भारत के संविधान के तहत मान्य अन्य श्रेणियों के आवेदकों से उच्च शिक्षा विभाग, मध्य प्रदेश शासन, के अन्तर्गत निम्न पद हेतु आवेदन आमंत्रित किए जाते हैंः–

बैकलाग पदः–

क्रमांक	विषय	रिक्त पदों की संख्या				रिक्तयों में से मध्य प्रदेश की मूल निवासी महिला अभ्यर्थियों हेतु आरक्षित पदों की संख्या			रिक्तयों में से मध्य प्रदेश के मूल निवासी निःशक्त अभ्यर्थियों हेतु आरक्षित पदों की संख्या		
		SC	ST	OBC	कुल	SC	ST	OBC	अ.बा.	दृ.बा.	श्र.बा.
1	2	3	4	5	6	7	8	9	10	11	12
1	वनस्पति शास्त्र	0	9	0	9	0	3	0	0	0	0
2	रसायन शास्त्र	4	36	0	40	1	12	0	0	3	2
3	वाणिज्य	37	53	0	90	12	17	0	3	5	4
4	नृत्य	1	1	1	3	0	0	0	0	0	0
5	अर्थशास्त्र	24	62	4	90	8	20	1	2	4	3
6	अंग्रेजी	24	58	17	99	8	19	6	2	5	5
7	भूगोल	3	3	0	6	1	1	0	0	0	0
8	भूगर्भ शास्त्र	4	4	1	9	1	1	0	0	0	0
9	हिंदी	30	40	5	75	10	13	2	2	5	5
10	गृह विज्ञान	11	16	0	27	4	5	0	2	2	2
11	विधि	13	14	2	29	4	5	1	1	1	1
12	गणित	9	38	0	47	3	13	0	1	2	2
13	सैन्य विज्ञान	1	1	0	2	0	0	0	0	0	0
14	संगीत	2	2	0	4	1	1	0	0	0	0
15	दर्शन शास्त्र	3	4	1	8	1	1	0	0	0	0
16	भौतिक शास्त्र	4	2	0	6	1	1	0	2	2	2
17	राजनीति शास्त्र	24	47	8	79	8	16	3	0	4	4
18	मनोविज्ञान	0	6	0	6	0	2	0	0	0	0
19	लोक प्रशासन	0	1	0	1	0	0	0	0	0	0
20	समाज शास्त्र	24	33	0	57	8	11	0	1	3	3
21	उर्दू	3	3	0	6	1	1	0	0	0	0
22	प्राणी शास्त्र	0	14	0	14	0	5	0	0	2	0
	योग	221	447	39	707	72	147	13	17	38	33

पदोन्नति/सेवा निवृत्ति से रिक्त पद :–

क्रमांक	विषय	रिक्त पदों की संख्या					रिक्तियों में से मध्य प्रदेश की मूल निवासी महिला अभ्यर्थियों हेतु आरक्षित पदों की संख्या				रिक्तियों में से मध्य प्रदेश के मूल निवासी निःशक्त अभ्यार्थियों हेतु आरक्षित पदों की संख्या		
		UR	SC	ST	OBC	कुल	UR	SC	ST	OBC	अ.बा.	दृ.बा.	श्र.बा.
1	2	3	4	5	6	7	8	9	10	11	12	13	14
1	एक्वाकल्चर	1	0	0	0	1	0	0	0	0	0	0	0
2	अरबी	1	0	0	0	1	0	0	0	0	0	0	0
3	जीव रसायन	1	0	1	1	3	0	0	0	0	0	0	0
4	वनस्पति शास्त्र	17	0	24	33	74	6	0	8	11	3	4	5
5	रसायन शास्त्र	4	4	15	47	70	1	1	5	16	2	5	6
6	वाणिज्य	25	2	9	28	64	8	1	3	9	3	5	4
7	अपराध शास्त्र	1	0	0	0	1	0	0	0	0	0	0	0
8	नृत्य	1	0	1	0	2	0	0	0	0	0	0	0
9	चित्र कला	1	0	3	3	7	0	0	1	1	0	0	0
10	अर्थशास्त्र	15	3	8	38	64	5	1	3	13	0	4	3
11	अंग्रेजी	4	5	11	36	56	1	2	4	12	3	4	4
12	भूगोल	16	3	6	11	36	5	1	2	4	2	3	3
13	भूगर्भ शास्त्र	0	0	0	3	0	0	0	0	1	0	0	0
14	हिंदी	0	4	2	45	51	0	1	1	15	3	3	5
15	इतिहास	27	1	10	30	68	9	0	3	10	1	2	5
16	इतिहास (प्राचीन)	1	0	0	0	1	0	0	0	0	0	0	0
17	गृह विज्ञान	0	0	0	10	10	0	0	0	3	1	2	2
18	ज्योतिष	1	0	0	0	1	0	0	0	0	0	0	0
19	विधि	58	1	13	10	82	19	0	4	3	1	2	2
20	गणित	20	5	8	17	50	7	2	3	6	0	3	2
21	सैन्य विज्ञान	3	1	2	2	8	1	0	1	1	0	0	0
22	दर्शन शास्त्र	1	0	2	3	6	0	0	1	1	0	0	0
23	भौतिक शास्त्र	22	0	34	29	85	7	0	11	10	2	3	3
24	राजनीति शास्त्र	17	11	7	41	76	6	4	2	14	2	4	4
25	मनोविज्ञान	0	0	0	4	4	0	0	0	1	0	0	0
26	संस्कृत	16	0	0	11	27	5	0	0	4	0	2	1
27	संस्कृत ज्योतिष	1	0	0	0	1	0	0	0	0	0	0	0
28	संस्कृत प्राच्य	1	1	1	1	4	0	0	0	0	0	0	0
29	संस्कृत साहित्य	1	1	1	1	4	0	0	0	0	0	0	0
30	संस्कृत व्याकरण	1	1	1	1	4	0	0	0	0	0	0	0
31	समाज शास्त्र	0	11	16	32	59	0	4	5	11	2	3	3
32	सांख्यिकी	0	0	1	1	2	0	0	0	0	0	0	0
33	उर्दू	10	4	6	2	22	3	1	2	1	0	1	1
34	वेद	2	0	1	0	3	1	0	0	0	0	0	0
35	प्राणी शास्त्र	21	8	15	42	86	7	3	5	14	3	3	3
36	संगीत गायन	0	1	1	2	4	0	0	0	1	0	0	0
	योग	290	67	199	484	1040	91	21	64	162	28	53	56

नवीन सृजित पद –

क्रमांक	विषय	रिक्त पदों की संख्या					रिक्तियों में से मध्य प्रदेश की मूल निवासी महिला अभ्यर्थियों हेतु आरक्षित पदों की संख्या				रिक्तियों में से मध्य प्रदेश के मूल निवासी निःशक्त अभ्यर्थियों हेतु आरक्षित पदों की संख्या		
		UR	SC	ST	OBC	कुल	UR	SC	ST	OBC	अ.बा.	दृ.बा.	श्र.बा.
1	2	3	4	5	6	7	8	9	10	11	12	13	14
1	वनस्पति शास्त्र	48	15	19	13	95	16	5	6	4	2	5	4
2	रसायन शास्त्र	92	29	37	26	184	30	10	12	9	4	6	5
3	ऑर्गेनिक रसायन	2	0	1	0	3	1	0	0	0	0	0	0
4	भौतिक रसायन	2	0	0	0	2	1	0	0	0	0	0	0
5	वाणिज्य	48	15	19	13	95	16	5	6	4	4	4	4
6	अर्थशास्त्र	34	11	13	9	67	11	4	4	3	1	2	3
7	अंग्रेजी	54	17	22	15	108	18	6	7	5	2	2	2
8	भूगोल	20	6	8	6	40	7	2	3	2	1	1	1
9	हिंदी	52	16	20	14	102	17	5	7	5	2	2	3
10	इतिहास	39	12	15	11	77	13	4	5	4	2	2	2
11	विधि	29	9	12	8	58	10	3	4	3	1	1	1
12	गणित	35	11	14	10	70	12	4	5	3	0	3	3
13	भौतिक शास्त्र	65	21	26	18	130	21	7	9	6	3	4	5
14	राजनीति शास्त्र	30	9	12	8	59	10	3	4	3	1	2	3
15	समाज शास्त्र	22	7	9	6	44	7	2	3	2	1	3	3
16	प्राणी शास्त्र	44	14	17	12	87	15	5	6	4	4	3	3
	योग	616	192	244	169	1221	205	65	81	57	28	40	42

4. The petitioner appeared in the Assistant Professor Examination - 2017 conducted by the MPPSC for the post of Assistant Professor (Geography) as an unreserved candidate. The petitioner has arraigned respondent Nos.3 to 5 as party, who were selected against the post reserved for female unreserved category (UNRF), though they were the candidates of OBCF category.

5. Earlier, the petitioner assailed the select list, dated 14-8-2018 published by the respondent No.2 in **W.P. No.21091/2018** which was disposed of on 26-6-2019 considering the undertaking given by the State and the Union Public Service Commission, that they would examine all the issues as regards reservation and appointment made for the women categories and publish a final list afresh in accordance with law.

6. Thereafter, the respondent No.2 issued another corrigendum, dated 19-8-2019 which demonstrates that 12 posts are reserved for UNRF in the subject of Geography. It is asserted that instead of revising the list for the UNRF, the same was published by the respondent No.2 on 4-9-2019. It is vehemently submitted that the action of the respondent No.2 in selecting the respondents No.3 to 5 as against the OBC Category (Non-creamy Layer) against the vacancies meant for special reservation of UNRF is illegal and violative of principles of law. It is argued that special reservation in favour of women under Article 15(3) of the Constitution of India is horizontal reservation and creates a compartment-wise reservation, where no women candidates of another category can be inducted in the quota prescribed for women candidate of a specific category. It is strenuously

urged that the respondents No. 3 to 5 were entitled for selection against the quota prescribed for OBC (female) category only. It is further argued that Clause 4 of the advertisement specifically provides that OBC candidates, who come under creamy layer, are required to submit their online application forms under unreserved category. However, the respondents No.3 to 5 have applied under the OBC Female category (Non-creamy layer) and thus, they are not entitled to selection against the quota prescribed for UNRF. Further, in view of Notification dated 07-11-2000 candidates of reserved category are not entitled to be selected towards the seats reserved for UNRF.

7. According to the petitioner she being fully qualified and eligible for the post of Assistant Professor applied in the subject of Geography under UNRF category. There were total 36 posts of Assistant Professor (Geography) for unreserved category (UNR), out of which, 12 posts were reserved for the UNRF, as per the mandate of the 1997 Rules. Similarly, reservation for women candidates was provided for other categories also. For delineation we have taken an example of the post of Assistant Professor (Geography). It is not in dispute that the same reservation was provided in other subjects as well.

8. Select list of Assistant Professor Examination, 2017 for Geography subject was published by the respondent No.2 in its official website. In the select list the petitioner was placed at overall Sr. No.11 of the waiting list and at Sr. No.2 in the list of General Category Female (UNRF). It is contended that select list shows that out of 12 posts reserved for the UNRF, 10 candidates belonging to OBC (female) category were selected and only 2 General female candidates were selected against the said post. It is assiduously urged that the select list is bad in law, as the posts reserved for UNRF were filled by the candidates belonging to OBCF. It is the contention of the petitioner that the select list also contravenes the mandate envisaged in the 1997 Rules.

9. A reference is made to the Notification dated 7-11-2000 issued by the General Administration Department of the State of M.P., which prescribes that only those candidates of reserved category can be selected for unreserved (open) category - (UNR) seat in order of merit, who attained the merit at their own and without any relaxation. It is asserted that the candidates belonging to SC, ST and OBC categories can be selected only against unreserved category (open) posts and not against the posts reserved for female candidates - (UNRF), which falls within the purview of special reservation and such reservation is horizontal and compartment-wise. It is asseverated that even as per the advertisement, certain relaxations were provided viz. minimum qualifying marks, examination fees and travelling allowance conferred on the candidates belonging to SC, ST and OBC categories etc.. Thus, they are not entitled to be selected towards the seats reserved for unreserved women candidates - (UNRF) against unreserved category.

10. In substance, the argument is that when a reservation is horizontal, then the candidates selected on the basis of reservation in any category has to be assigned a seat/post in the said category and cannot be allowed to migrate to other category. The concept of migrating from one category to another category on the basis of merit is permissible in vertical reservation, but in horizontal reservation the same is not applicable. In support of his submissions learned counsel referred to Rule 3 of the "1997 Rules" which would be considered in detail at later stage.

11. In order to substantiate the arguments on behalf of the petitioner, reliance is placed on the verdicts of the Apex Court rendered in the cases of *Indra Sawhney vs. Union of India,* 1992 Supl (3) SCC 217; *Anil Kumar Gupta vs. State of U.P.*, (1995) 5 SCC 173; *Rajesh Kumar Daria vs. Rajasthan Public Service Commission and others,* (2007) 8 SCC 785; and *Public Service Commission, Uttranchal vs. Mamta Bisth and others,* (2010) 12 SCC 204. Besides, reference is also made to the order passed by this Court in *Bhavna Lakher vs. State of M.P. and others* (W.P. No.18475/2013, dated 18-11-2013); *Sita Prajapati vs. State of M.P.* (W.P. No.5256/2017, decided on 24-10-2017); *M.P. Public Service Commission vs. Dr. Nabhikishore Choudhary & others* (W.A. No.414/2017); *State of M.P. vs. Uday Sisode and others,* (R.P. No.1572/2018, decided on 18-10-2010); *Shruti Sharma vs. State of M.P.,* 2002 (4) MPLJ 380; and *Sunita Thakre vs. State of M.P. and others,* 2014 (2) MPLJ 86.

12. Shri Himanshu Mishra, learned Govt. Advocate for the State assiduously argued that in view of the provisions of Rule 3 of the 1997 Rules, women reservation is overall reservation and, therefore, the procedure prescribed by the respondents while allotting a seat of UNRF to reserved categories women - SC(F), ST(F) and OBC(F) is valid. To buttress his submission he has placed reliance on the judgment passed by the Allahabad High Court in the case of *Ajay Kumar vs. State of U.P. and others* 2019 SCC Online All 2674 : (2019) 5 All LJ 466.

13. It was also argued on behalf of the respondents No. 1 and 2 that pursuant to the directions issued by this Court in **W.P. No.21091/2018,** dated 26-6-2019 the respondent wrote a letter dated 7-7-2019 to the Department of General Administration and requested for issuance of appropriate instructions, so that the issue raised by the writ petitioner regarding reservation and appointment for the Women Category, may be properly complied with. On 25-7-2019 the State Government has approved method of reservation pertaining to women reservation and thereafter after due consultation the revised list, dated 4-9-2019 was published.

14. A reference is made to Circular dated 12-5-1999 issued by the State Government, wherein it is clarified that neither under the provisions of Madhya Pradesh Lok Seva (Anusuchit Jatiyon, Anusuchit Jan Jatiyon Aur Anya Picchade

Vargon ke Liye Arakshan) Adhiniyam, 1994 [hereinafter referred to as "the Act 1994"] nor under the Reservation Rules 1998 framed under Section 13 of the Act 1994, there is mention of "General Category" rather, term "Unreserved" is used for "General Category". By the aforesaid Circular, clear direction has been issued by the State Government that in the official work, term "General Category" shall not be used and in the light of Act 1994 and Rules 1997, term "Unreserved" category shall be used. Further, in Circular dated 7-11-2000, it is clarified by the State Government in the light of Section 4(4) of the Act 1994, that whenever reserved class candidates competes on merit, then such candidates shall be selected under the vacancies of UNR category, provided that such reserved class candidates have not availed any relaxation on acquiring the eligibility criterion. It is asseverated that "Unreserved category" is not reservation and it is open category for all candidates, who acquired position in the Select List on the basis of merit.

15. Support was also gathered from the notification dated 17-11-2015 issued by the State Government by referring to Rule 3(1) of the 1997 Rules which provides 33% special reservation for women and the same is horizontal and compartmentalwise. In the said rules, in rule 3, for sub-rule (1), it was substituted as under :

> *"(1) Notwithstanding anything contained in any Service rules, there shall be reserved thirty three percent of all posts in the service under the State (except Forest Department) in favour of women at the stage of direct recruitment and the said reservation shall be horizontal and compartment-wise. "*

Thus, after application of Rule 3(1) of the Rules, 1997 out of 36 posts of UNR, 12 posts were reserved for UNRF category. In SC category out of total 13 posts 4 posts were reserved for SC Female (SCF). In Scheduled Tribe (ST) category out of 18 posts 6 posts were reserved for ST Female (STF) and in OBC category out of 17 posts, 6 posts were reserved for OBC Female (OBCF) candidates. Thus, it is categorically stated that 33% reservation for SC, ST, OBC and UNR category has been given by the answering respondent and, therefore, Special Reservation for Women category is 12 posts under UNRF; 4 posts under SC female; 6 posts under ST Female; and 6 posts under OBC Female candidates.

16. A reference is also made to the Circular dated 30-6-2014 issued by the State Government wherein it is clarified that 6% horizontal reservation shall be given to Orthopaedically Handicapped, Visually Handicapped and Hearing Impaired candidates and 2%-2% each reservation is to be provided for all above three handicapped categories. Thus, after applying 2% reservation to

Handicapped Category-wise, out of about 84 posts of Assistant Professor (Geography), as many as 6 posts are reserved for the Handicapped candidates.

17. Further argument was advanced on behalf of the MPPSC (respondent No.2) clarifying various quotas for reservation that UNR is the 'Unreserved Category" and the same is not reserved compartment and the same is open for all candidates, provided the reserved category candidates have not availed any relaxation in acquiring minimum eligibility qualification. In order to assure 33% reservation, the minimum representation of women under UNR category, the answering respondent has started counting female candidates from the top of the merit list, so as to fill up 12 posts of UNRF Category from amongst 35 posts under UNR category. The topper in the select list was a female candidate belonging to OBC category and she has not availed any benefit of relaxation in acquiring minimum qualification and thus, she has also been selected under UNRF category. Likewise, the respondents No.3 to 5 and other candidates have also been rightly selected under UNRF category, as they have acquired position in the Select List on the basis of merit.

18. It is argued that the object of Rule 3(1) of the 1997 Rules is to ensure minimum 33% representation of women in SC, ST, OBC and UNR categories. The UNR is "Unreserved Compartment" open for all candidates who are selected on the basis of merit without availing any benefit of reservation in terms of acquiring minimum qualification. It is asserted that in order to fill up 12 posts of female under UNR category, the answering respondent has selected number of female candidates from the top of the Merit List for exhausting the quota of 12 posts of female category under UNR category. It is stated that a candidate who is not domicile of State of Madhya Pradesh and as such outside State candidate, if acquired position in the Merit List on the basis of merit, irrespective of category to which she belongs, she is liable to be accommodated under UNR category. Similarly, if Handicapped Category candidates are found under UNR category, then they are also to be inncluded (sic : included) under UNR category, but female handicapped category candidate, if selected under Handicapped Category candidate and not under UNR category, then 12 posts of female under UNR category will not be disturbed, merely because the female handicapped candidate has been selected. Thus, refuting the arguments advanced on behalf of the petitioner, the respondent No.2, MPPSC has asseverated that there is no illegality in the revised select list, dated 4-9-2019. It is argued that 12 posts of UNRF category is to be counted from the top of the select list so as to ensure minimum representation of women under the UNR category. It is reiterated that the Unreserved Category is a category open for all and it is not reserved for any category, much less, 'General Category' as claimed by the petitioner. The Circular, dated 7-11-2000 specifically provides that a reserved class category candidate who has not availed any benefit of relaxation in acquiring minimum qualification,

shall be treated as Unreserved category candidate. It is stated that horizontal reservation has been applied for women category while preparing the revised select list. It is putforth that the seats under the UNR category are filled-up from amongst the candidates who have acquired position on the basis of merit and those candidates, who belong to reserved class category, but they have not availed any benefit of reservation in acquiring minimum qualification and acquiring position in the select list on the basis of merit, are also included in the UNR category. It is vehemently argued that as regards horizontal reservation under UNRF category, the female candidates who are domicile of State of Madhya Pradesh are included under UNRF category. The female candidates belonging to SC, ST and OBC categories, if acquire position on the basis of merit, then they are accommodated under UNR category and not under UNRF category. It is strenuously urged that the respondents No.3 to 5 have acquired position on the basis of their merit and they have not availed any benefit of reservation and, therefore, they have been rightly accommodated under UNRF category.

19. Learned counsel appearing for the respondents No.3 to 5 controverting the arguments canvassed by the petitioner strenuously urged that once it is established that they have not availed any benefit and their names feature in the UNRF category, then in terms of the judgment of the Supreme Court in *Deepa E.V. vs. Union of India and others,* (2017) 12 SCC 680, the same is justified as it has categorically been held that there is an express bar for the candidates belonging to the SC/ST/OBC candidates who have availed relaxation for being considered for general category candidates. Further, they have relied upon the verdict of the Apex Court in *Jitendra Kumar Singh vs. State of U.P.,* (2010) 3 SCC 119, wherein it is observed that a candidate who has attained higher marks without availing benefit of reservation in open competition, such person shall be deemed to have been adjusted against unreserved vacancies.

20. Number of interlocutory applications seeking intervention have been filed, espousing the common cause on behalf of the OBC (female) candidates, who found place in the merit list and were allotted UNRF seats. It is contended that because of the interim order passed by this Court, these interveners have not been permitted to participate in the counselling either as UNRF candidate or OBC(female) and they have not been given appointment order. It is contended that OBC candidates who are lower in merit, have been allotted the seats in OBC (female) and thus, they have been deprived from participating in the counselling for appointment, despite the fact that they had secured more marks than General category candidates. Considering the aforesaid submissions, all the **intervention applications are allowed** and the interveners named in the applications, are directed to be treated as party in the present case.

21. A common rejoinder has been filed by the petitioner to the reply of the respondents contending inter alia, that the respondents have completely misunderstood the concept of horizontal reservation or special reservation provided to woman, physically handicapped etc. enshrined under Articles 15(3) and 16(1) of the Constitution of India. The horizontal reservation under Article 16(1) and Article 15(3) of the Constitution is completely different than that of vertical reservation or social reservation provided under Article 16(4) of the Constitution of India to the candidates belonging to SC, ST and OBC categories. It is assiduously urged that the provisions envisaged in the 1997 Rules specifically provide that the reservation for women is horizontal and compartment wise reservation. In the present case OBC or any other candidates not belonging to the unreserved category, cannot be selected for the post vacant for unreserved female category (UNRF), if they do not belong to that category.

22. Referring to Act of 1994 it is argued that the stand of respondent No.2 is misplaced that provisions of the Act of 1994 shall only be applicable, when a candidate belonging to SC/ST/OBC category is selected on the basis of merit in an open competition with general category candidates. In that eventuality he/she shall be adjusted against the vacancies reserved for general category i.e. unreserved (UNR). It is vehemently argued that in the instant case the candidates are adjusted against the vacancies belonging to unreserved female (UNRF) which is specifically reserved for women as per 1997 Rules in terms of Special Reservation, provided under Articles 15(3) and 16(1) of the Constitution of India.

23. It is assiduously argued by the learned counsel for the petitioner that the issue in hand has been answered by a Co-ordinate Bench of this Court in the case of *Uday Siside and other* (supra) and the observations made therein, squarely cover the obtaining factual matrix of the present case. It is vehemently put forth that the respondents have completely misunderstood the concept of horizontal reservation or special reservation provided to women, physically handicapped etc. under Articles 15(3) and 16(1) of the Constitution of India vis-a-vis vertical reservation or special reservation provided under Article 16(4) of the Constitution of India.

24. We have bestowed our anxious consideration on the arguments advanced on behalf of the parties *in extenso*. In order to appreciate the facts and circumstances of the case in proper perspective, it is apt to delve into the concept of reservation and law governing the field, as the factual matrix in the present batch of writ petitions revolves around the propriety of the applicability of principles of reservation.

25. In view of the aforesaid submissions, the issue which has crystallized for consideration is that - ***"Whether the OBC (Female) who scored more marks than the General Category woman candidates would secure a seat /post in***

unreserved female category; and whether in a case of horizontal reservation, reserved-category candidates scoring higher marks than General Category candidates would be entitled to get a seat/post of unreserved categories ?"

26. The main plank of submissions on behalf of the petitioners rests on the provisions of Rule 3 of the 1997 Rules and subsequent circulars of the Government that the concept of migration from one category to another on the basis of merit is prescribed in vertical reservation, but in the horizontal reservation the same is not applicable. To appreciate the aforesaid submission it is apt to refer to the relevant provisions of the M.P. Lok Sewa (Anusuchit Jatiyon Jan Jatiyon Aur Anya Pichhada Vargon ke liye Arakshan) Adhiniyam, 1994 [in short "the Act 1994"], which is an Act to provide for reservation of vacancies in public services and posts in favour of the persons belonging to the Scheduled Castes, Scheduled Tribes and other Backward Classes of citizens and for matters connected therewith or incidental thereto. Sub-section (4) of Section 4 of the Act 1994 stipulates that percentage of posts reserved in service in favour of persons belonging to Scheduled Castes, Scheduled Tribes and Other Backward Classes which is reproduced as under :

> ***"4***. *xx xx xx*
> *(1) xx xx xx*
>
> *(4) - if a person belonging to any of the categories mentioned in sub-section (2) gets selected on the basis of merit in an open competition with general candidates, he shall not be adjusted against the vacancies reserved for such category under sub-section (2). "*

Thus, if a candidate who opts to take up a competitive examination not as General Category but as reserved category candidate belonging to SC,ST and OBC gets selected on the basis of merit, he shall not be adjusted against the vacancies reserved for such category. In other words, a candidate having opted to participate in the competitive examination as reserved category candidate can be permitted to migrate to General Category. This would be the position in the vertical reservation.

27. Before adverting to the case law in relation to reservation of vertical and horizontal reservations, it would be appropriate to refer to the provisions of the M.P. Civil Services (Special Provision for appointment of Women) Rules, 1997 [for short, "the 1997 Rules], which were framed in exercise of powers conferred by proviso to Article 309 of the Constitution of India, to provide reservation of post in direct recruitment for women in public service and post in connection with affairs of the State. Rule 3 of the 1997 Rules is reproduced hereunder :

> ***"3. Reservation of posts for women*** *- Notwithstanding anything contained in any service Rules, there shall be reserved thirty per cent of all posts in the service under the State in favour of women at the stage of direct recruitment and the said reservation shall be horizontal and compartment wise.*
>
> *Explanation - for the purpose of this rule "Horizontal and compartment wise reservation" means reservation in each category, namely, Scheduled Castes, Scheduled Tribes, Other Backward Classes and General. "*

The aforesaid rule was amended in the year 2000 vide notification dated 23-9-2000 and the amended Rule 3 of the 1997 Rules reads :

> ***"3. Reservation of posts for women*** *- (1) Nothwithstanding anything contained in any service Rules, there shall be reserved thirty percent of all posts in the service under the State in favour of women at the stage of direct recruitment and the said reservation shall be horizontal and compartment-wise.*
>
> *Explanation . - For the purposes of this rule "horizontal and compartmentwise reservation" means reservation in each category, namely, Scheduled Castes, Scheduled Tribes, Other Backward Classes and General.*
>
> *(2) Subject to the provisions of sub-rule (1) in the said appointments preference shall be given to the widow of divorced women."*

In the year 2015, Rule 3 was again amended whereby sub-rule (1) of Rule 3 was substituted, which is re-quoted for ready reference :

> *"(1) Notwithstanding anything contained in any Service rules, there shall be reserved thirty three percent of all posts in the service under the State (except Forest Department) in favour of women at the stage of direct recruitment and the said reservation shall be horizontal and compartment-wise."*

28. A plain reading of the aforesaid clearly shows that the only amendment in the year 2015 was in respect of percentage of reservation by enhancing it from 30% to 33% and the applicability of the Rule to all the departments of the State, except Forest Department. On behalf of the respondents it was argued that explanation is no more a part of Rule 3(1) of the 1997 Rules, and therefore, in absence of explanation the word "General Category" along with Scheduled

Castes, Scheduled Tribes and Other Backward Class categories, cannot be read and the reservation is "overall reservation" and not horizontal and compartment-wise.

29. Combating the aforesaid submissions the counsel for the petitioners vehemently argued that it cannot be accepted, as by the amendment dated 17-11-2015 it is only substitution of Sub-rule (1) of Rule 3 and the intention of the State was not to omit the explanation which explains the word "horizontal and compartment-wise". It is further submitted that even in the absence of an explanation, the words 'horizontal' and 'compartment-wise' stand explained by the judgments of the Apex Court in various cases and, therefore, the procedure for allotment of seats/posts in a horizontal reservation cannot be adopted differently.

30. Upon perusal of the Rule 3 of the 1997 Rules and the subsequent amendments, we are of the considered view that the Rule-making Authority had no intention to delete/omit the explanation appended to Rule 3. It may be noted that initially there was no sub-rule (1) and sub-rule (2) of Rule 3. In a subsequent amendment Rule 3 of the 1997 Rules was divided into sub-clauses (1) and (2) and by modification dated 17-11-2015 the sub-rule (1) of Rule was substituted to the extent of enhancement of percentage from 30% to 33% and exclusion of Forest Department relating to reservation. The words 'horizontal' and 'compartment-wise' still finds place after substitution in the substantive provision. The explanation clause explaining the words "horizontal and compartment-wise" remained unamended. Therefore, we are constrained to repel the argument of the learned counsel for the State that the words 'General Category' stand omitted by virtue of substitution of Rule 3 of 1997 Rules, vide notification dated 17-11-2015.

31. The role and impact of an explanation in a statute has been elaborately discussed in the case of *S. Sundaram Pillai and others vs. V.R. Pattabiramana and others,* (1985) 1 SCC 591, wherein it has been held that the object of an explanation is to understand the Act in the light of the explanation. It does not ordinarily enlarge the scope of the original section which it explains, but only makes the meaning clear beyond dispute. After referring to various books on the interpretation of statutes the Apex Court in para 53 ruled :

> "53. Thus, from a conspectus of the authorities referred to above, it is manifest that the object of an Explanation to a statutory provision is -
>
> (a) to explain the meaning and intendment of the Act itself,
>
> (b) where there is any obscurity or vagueness in the main enactment, to clarify the same so as to make it consistent with the dominant object which it seems to subserve,

(c) to provide an additional support to the dominant object of the Act in order to make it meaningful and purposeful.

(d) an Explanation cannot be in any way interfere with or change the enactment or any part thereof but where some gap is left which is relevant for the purpose of the Explanation, in order to suppress the mischief and advance the object of the Act it can help or assist the Court in interpreting the true purport and intendment of the enactment, and

(e) it cannot, however, take away a statutory right with which any person under a statute has been clothed or set at naught the working of an Act by becoming an hindrance in the interpretation of the same."

Thus, it is luminescent from Rule 3 of the 1997 Rules that the reservation of woman in SC/ST/OBC/General categories are horizontal and compartment-wise. The posts/seats are earmarked, therefore, there cannot be migration from one category to another category.

32. Now, we advert to the law governing the field of reservation - vertical and horizontal. In the case of *Indra Sawhney and others* (supra), in paragraph 812 distinction between vertical and horizontal reservation has been drawn and horizontal reservation cutting across the vertical reservation is termed as "interlocking reservations", by holding as under:-

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

> necessary adjustments; similarly, if he belongs to open competition (O.C.) category, he will be placed in that category by making necessary adjustments. Even after providing for these horizontal reservations, the percentage of reservations in favour of backward class of citizens remains - and should remain - the same. This is how these reservations are worked out in several States and there is no reason not to continue that procedure."

33. In the case of *Anil Kumar Gupta* (supra) a distinction between horizontal and vertical reservation has been elaborated and it has been clarified, as to when the horizontal reservation is overall reservation or compartmentalised reservation. Compartmentalised reservation is one where the seat reserved for horizontal reservations are proportionately divided among the vertical (social) reservations and are not inter-transferable. In compartmentalised reservation, social reservation is watertight compartment in each of the vertical reservation class (OC, OBC, SC and ST). In this regard in the case of *Anil Kumar Gupta* (supra) it has been laid down as under:-

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

> (56 out of 373) are available in O.C. category or not; the special reservation would be a water tight compartment in each of the vertical reservation classes (O.C.,O.B.C.,S.C. and S.T.). As against this, what happens in the over-all reservation is that while allocating the special reservation students to their respective social reservation category, the over-all reservation in favour of special reservation categories has yet to be honoured. This means that in the above illustration, the twenty remaining seats would be transferred to O.C. category which means that the number of special reservation candidates in O.C. category would be 56+20=76. Further, if no special reservation candidate belonging to S.C. and S.T. is available then the proportionate number of seats meant for special reservation candidates in S.C. and S.T. also get transferred to O.C. category. The result would be that 102 special reservation candidates have to be accommodated in the O.C. category to complete their quota of 112. The converse may also happen, which will prejudice the candidates in the reserved categories. It is, of course, obvious that the inter se quota between O.C., O.B.C., S.C. and S.T. will not be altered."

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

> "17. It would have been better - and the respondents may note this for their future guidance - that while providing horizontal reservations, they should specify whether the horizontal reservation is a compartmental one or an overall one. As a matter of fact, it may not be totally correct to presume that the Uttar Pradesh Government was not aware of this distinction between "overall horizontal reservation", since it appears from the judgment in Swati Gupta that in the first notification issued by the Government of Uttar Pradesh on 17-5-1994, the thirty percent reservation for ladies was split up into each of the other reservations. For example, it was stated against backward classes that the percentage of reservation in their favour was twenty seven percent but at the same time it was stated that thirty percent of those seats were reserved for ladies. Against every vertical reservation, a similar provision was made, which meant that the said horizontal reservation in favour of ladies was to be a "compartmentalised horizontal reservation". We are of the opinion that in the interest of avoiding any complications and intractable problems, it would be better

> that in future the horizontal reservations are comparmentalised in the sense explained above. In other words, the notification inviting applications should itself state not only the percentage of horizontal reservation(s) but should also specify the number of seats reserved for them in each of the social reservation categories, viz., S.T., S.C., O.B.C. and O.C. If this is not done there is always a possibility of one or the other vertical reservation category suffering prejudice as has happened in this case. As pointed out hereinabove, 110 seats out of 112 seats meant for special reservations have been taken away from the O.C. category alone - and none from the O.B.C. or for that matter, from S.C. or S.T. It can well happen the other way also in a given year."

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

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

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

37. In *Rajesh Kumar Daria* (supra) it has been made clear that in case of vertical reservations, candidate of SC, ST, OBC are allowed to compete and appoint against the non-reserved post, but that is not so in the case of horizontal reservation. Taking the example of women seats it has been held that proper procedure is to fill up the quota for SC in order of merit and then find out the number of candidate among them who belong to special reservation group of Scheduled Caste Woman and then meet the shortfall. In this regard, the relevant portion reads as under:-

> "8. We may also refer to two related aspects before considering the facts of this case. The first is about the description of horizontal reservation. For example, if there are 200 vacancies and 15% is the vertical reservation for SC and 30% is the horizontal reservation for women, the proper description of the number of posts reserved for SC, should be : "For SC : 30 posts, of which 9 posts are for women". We find that many a time this is wrongly described thus : "For SC : 21 posts for men and 9 posts for women, in all 30 posts". Obviously, there is, and there can be, no reservation category of 'male' or 'men'.
>
> 9. The second relates to the difference between the nature of vertical reservation and horizontal reservation. Social reservations in favour of SC, ST and OBC under Article 16(4) are 'vertical reservations'. Special reservations in favour of physically handicapped, women etc., under Articles 16(1) or 15(3) are 'horizontal reservations'. Where a vertical reservation is made in favour of a backward class under Article 16(4), the candidates belonging to such backward class, may compete for non-reserved posts and if they are appointed to the non-reserved posts on their own merit, their numbers will not be counted against the quota reserved for the respective backward class. Therefore, if the number of SC candidates, who by their own merit, get selected to open competition vacancies, equals or even exceeds the percentage of posts reserved for SC candidates, it cannot be said the reservation quota for SCs has been filled. The entire reservation quota will be intact and available in addition to those selected under Open Competition category. [Vide -Indira Sawhney (1992 Supp(3 SCC 217, R. K. Sabharwal vs. State of Punjab (1995 (2) SCC 745), Union of India vs. Virpal Singh Chauhan

(1995 (6) SCC 684 and Ritesh R. Sah vs. Dr. Y. L. Yamul (1996 (3) SCC 253)]. But the aforesaid principle applicable to vertical (social) reservations will not apply to horizontal (special) reservations. Where a special reservation for women is provided within the social reservation for Scheduled Castes, the proper procedure is first to fill up the quota for scheduled castes in order of merit and then find out the number of candidates among them who belong to the special reservation group of 'Scheduled Castes-Women'. If the number of women in such list is equal to or more than the number of special reservation quota, then there is no need for further selection towards the special reservation quota. Only if there is any shortfall, the requisite number of scheduled caste women shall have to be taken by deleting the corresponding number of candidates from the bottom of the list relating to Scheduled Castes. To this extent, horizontal (special) reservation differs from vertical (social) reservation. Thus women selected on merit within the vertical reservation quota will be counted against the horizontal reservation for women. Let us illustrate by an example:

> *'If 19 posts are reserved for SCs (of which the quota for women is four), 19 SC candidates shall have to be first listed in accordance with merit, from out of the successful eligible candidates. If such list of 19 candidates contains four SC women candidates, then there is no need to disturb the list by including any further SC women candidate. On the other hand, if the list of 19 SC candidates contains only two woman candidates, then the next two SC woman candidates in accordance with merit, will have to be included in the list and corresponding number of candidates from the bottom of such list shall have to be deleted, so as to ensure that the final 19 selected SC candidates contain four women SC candidates. [But if the list of 19 SC candidates contains more than four women candidates, selected on own merit, all of them will continue in the list and there is no question of deleting the excess women candidate on the ground that 'SC- women' have been selected in excess of the prescribed internal quota of four.] '*

10. In this case, the number of candidates to be selected under general category (open competition), were 59, out of which 11 were earmarked for women. When the first 59

> from among the 261 successful candidates were taken and listed as per merit, it contained 11 women candidates, which was equal to the quota for 'General Category - Women'. There was thus no need for any further selection of woman candidates under the special reservation for women. But what RPSC did was to take only the first 48 candidates in the order of merit (which contained 11 women) and thereafter, fill the next 11 posts under the general category with woman candidates. As a result, we find that among 59 general category candidates in all 22 women have been selected consisting of eleven women candidates selected on their own merit (candidates at Sl.Nos.2, 3, 4, 5, 9, 19, 21, 25, 31, 35 & 41 of the Selection List) and another eleven (candidates at Sl. Nos. 54, 61, 62, 63, 66, 74, 75, 77, 78, 79 & 80 of the Selection List) included under reservation quota for 'General Category-Women'. This is clearly impermissible. The process of selections made by RPSC amounts to treating the 20% reservation for women as a vertical reservation, instead of being a horizontal reservation within the vertical reservation.
>
> 11. Similarly, we find that in regard to 24 posts for OBC, 19 candidates were selected by RPSC in accordance with merit from among OBC candidates which included three woman candidates. Thereafter, another five women were selected under the category of 'OBC - Women', instead of adding only two which was the shortfall. Thus there were in all 8 women candidates, among the 24 OBC candidates found in the Selection List. The proper course was to list 24 OBC candidates as per the merit and then find out number of woman candidates among them, and only fill the shortfall to make up the quota of five for women."

38. Next, in the case of *Mamta Bisht and others* (supra) the Apex Court reiterated the view taken in *Rajesh Kumar Daria* (supra) and held :

> "12. The High Court decided the case on the sole ground that as the last selected candidate, receiving the benefit of horizontal reservation had secured marks more than the last selected general category candidate, she ought to have been appointed against the vacancy in general category in view of the judgment of this Court in Indra Sawhney Vs. Union of India, AIR 1993 SC 477, and the Division Bench judgment of High Court of Uttaranchal in Sikha Agarwal Vs. State of Uttaranchal, WP No.816 of 2002 (M/B), decided on 16.4.2003, and respondent no.1 ought to have

appointed giving benefit of reservation thus, allowed the writ petition filed by respondent No.1.

13. In fact, the High Court allowed the writ petition only on the ground that the horizontal reservation is also to be applied as vertical reservation in favour of reserved category candidates (social) as it held as under:

> *"In view of above, Neetu Joshi (Sl.No.9, Roll No.12320) has wrongly been counted by the respondent No.3/Commission against five seats reserved for Uttaranchal Women General Category as she has competed on her own merit as general candidate and as 5th candidate the petitioner should have been counted for Uttaranchal Women General Category seats."*

Admittedly, the said Neetu Joshi has not been impleaded as a respondent. It has been stated at the Bar that an application for impleadment had been filed but there is nothing on record to show that the said application had ever been allowed. Attempt had been made to implead some successful candidates before this Court but those applications stood rejected by this Court.

14. The view taken by the High Court on application of horizontal reservation is contrary to the law laid down by this Court in Rajesh Kumar Daria Vs. Rajasthan Public Service Commission & Ors. AIR 2007 SC 3127, wherein dealing with a similar issue this Court held as under: (SCC pp.790-91, para 9)

> "9. The second relates to the difference between the nature of vertical reservation and horizontal reservation. Social reservations in favour of SC, ST and OBC under Article 16(4) are "vertical reservations". Special reservations in favour of physically handicapped, women, etc., under Articles 16(1) or 15(3) are "horizontal reservations". Where a vertical reservation is made in favour of a Backward Class under Article 16(4), the candidates belonging to such Backward Class, may compete for non- reserved posts and if they are appointed to the non-reserved posts on their own merit, their number will not be counted against the quota reserved for respective Backward Class. Therefore, if the number of

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

39. Now we proceed to examine the facts of the present case on the anvil of the aforesaid enunciation of law. In the selection process of Assistant Professors of the year 2017, it emerges from the facts that not only in the subject of Geography, but in all subjects the merit of OBC (female) category was overflowing. As per the revised select list, a candidate who is at serial number 1 of the select list, is a candidate of the OBC(F) category and she has been allotted a UNRF seat. Likewise, out of 12 unreserved female seats (UNRF) 10 seats have been allotted to OBC (female) on the basis of merit alone, and due to fallout, 2 seats have been allotted to unreserved female of General Category woman. Respondents have

allotted 10 URF seats/posts to OBC (female) and then 6 seats earmarked for OBC (female) which have been further allotted to the OBC (female) candidates thereby completely destroying the allocation of seats in horizontal reservation. The distribution of 33% women reservation horizontal was 12 UNRF; 4-SC(F); 6-ST(F); and 6 - OBC (F). To elaborate, the same is reproduced in the form of chart :

"Subject : Geography

total Seats - 36 UNR + 13 SC + 18 ST + 17 OBC = 84

Unreserved UNR (36)		Schedule Caste SC (13)		Schedule Tribe ST (18)		Other Backward Class OBC (17)	
Unreserved or Open Seats	33% women reservation as per rules of 1997	Reserved as per Act of 1994	33% women reservation as per Rules of 1997	Reserved as per Act of 1994	33% women reservation as per Rules of 1997	Reserved as per Act of 1994	33% women reservation as per Rules of 1997
Category UNR	Category UNR (F)	Category SC	Category SC(F)	Category ST	Category ST(F)	Category OBC	Category OBC(F)
24	12	9	4	12	6	11	6

Total Seats - 84

Selected - 83

1 post of UNR carry forwarded for PH

	Total Seats - 84							
	Unreserved 36		SC-13		ST - 18		OBC - 17	
	UNR	UNR(F)	SC	SC(F)	ST	ST(F)	OBC	OBC(F)
Seats	24	12	9	4	16	6	11	6
Selected	23	2	9	4	12	6	11	16
Short fall	1 seats carry forwarded	10	0	0	0	0	0	Excess Selection of 10 candidates
	17 UNR 2 SC 1 OBC 3 PH 1Post kept vacant							6 Under OBC (F) (46, 47, 48, 52, 53, 59, 10 under UNR (F) (1, 19, 27, 30, 31, 36, 37, 38, 39, 43)

40. In the result, we cannot appreciate the procedure adopted by the respondent - MPPSC while drawing the list in respect of woman category in all

subjects. As discussed hereinabove, the law relating to vertical and horizontal reservations is clear that the migration of reserved category candidate on the basis of merit for allotment of seat of General category is applicable to vertical reservation, in view of the proviso engrafted in sub-section (4) of Section 4 of the Act 1994. But, in view of the specific provisions of Rule 3 of the 1997 Rules and the law laid down by the Apex Court, the horizontal reservation is compartmentalised and watertight and there cannot be any migration on the basis of merit. At this juncture, it is also condign to appreciate another submission advanced in this regard by the learned counsel for the respondents, that the candidate who has obtained higher marks than a General category candidate, cannot be made to suffer to lose his merit position and seniority. If a candidate who is an OBC (female) and has competed against a reserved category, cannot be placed in the merit list lower than the General Category candidate, because of being a candidate of reserved category - OBC(female). We do not perceive any merit in the aforesaid submission. Placement in the merit list is one thing and the allotment of the earmarked seat/post is distinct process from placement in the merit list. A candidate who has secured higher marks, certainly gets a place in the merit list above than the candidates having obtained less marks, but the allotment of earmarked seats would be made in *stricto sensu,* in a case of horizontal reservation, category-wise. For example in the present case, one of the interveners, a candidate who has scored highest marks in the subject of Geography, shall remain at serial number 1 in the overall merit list, but she will be allotted a seat against an OBC (female), being a candidate of reserved category - OBC (female) and not a seat earmarked for General/Unreserved Female (UNRF).

41. The seniority is governed by the Rules, namely, *M.P. Civil Services (General Conditions of Services) Rules, 1961* and the seniority of a selected candidate shall be fixed in order of merit and in the select list and, therefore, when the seniority of Assistant Professor in the subject of Geography shall be drawn, and the same will be considered above all other candidates lower in merit and there will be no loss to his/her seniority. However, such candidate shall be allotted a seat of OBC(F) only to maintain 33% reservation to female candidates of SC/ST/OBC/General Category, being horizontal and compartment-wise under Rule 3 of the 1997 Rules. It is interlocking and watertight reservation as held by the Apex Court in the judgements discussed hereinabove. Thus, a distinction has to be made between the placement in the merit list/select list and the allotment of seats. A woman candidate of OBC category if scores higher marks than a candidate of General category, she has to be allotted a seat against an OBC (female) in her own category and not a seat against the unreserved female. The same procedure has to be adopted for drawing a merit list and allotment of earmarked seats in a case of horizontal reservation as per the judgment in the case of *Rajesh Kumar Daria* (supra). However, it is made clear that this procedure is

applied only in the case of special reservation in favour of physically handicapped, woman etc., which are horizontal reservation.

Thus, it is held that a candidate not falling in the merit list of unreserved category - UNRF cannot be brought from any other candidates belonging to OBC(F), SC(F) and ST(F) in order to accommodate against the horizontal quota of UNRF. The interveners who are OBC (F) candidates and have secured place in the merit list and have been allotted UNRF seats because of merit, will occupy a place in overall merit list, but they will be allotted seats of OBC(F) in their OBC category; and a candidate having merit lower than these interveners has to give way/passage to these interveners so that they do not suffer.

42. We further hold that the procedure adopted by the respondents regarding these 92 interveners not allotting them a seat against OBC, SC and ST - females in their own category, cannot be given a stamp of approval, and we do not approve the allotment of seats granted to the candidates of different reserved categories for women, who have been allotted seats of SC, ST and OBC - females, ignoring the claims of the interveners. It was stated on behalf of the respondents/State, that 92 seats for reserved category women, who have secured place in merit, have been kept vacant, though they have been deprived of the appointment. Initially they were not permitted to participate in the counselling but after subsequent interim order passed by this Court to allow them to participate in the counselling by extending the date, they have participated in the counselling and 92 seats/posts have been kept reserved, subject to final outcome of these petitions. It is also stated that all appointments made during the pendency of these petitions are subject to final decision of these petitions.

43. In view of the aforesaid discussion and clear enunciation of law by the Apex Court in the cases of *Rajesh Kumar Daria* (supra) and *Mamta Bisht and others* (supra), we are of the considered opinion that the impugned select list is vulnerable and deserves to be lanceted in exercise of extraordinary jurisdiction of this Court. Therefore, we quash the revised select list prepared by the respondents and direct that a merit list will be drawn afresh by making fresh allotment of seats keeping in view the provisions of Rule 3 of the 1997 Rules, which prescribes horizontal and compartment-wise reservation for each category, i.e. General/OBC/SC/ST, meaning thereby 33% reservation will be made for 4 - SC(F); 4-ST(F), 6-OBC(F) and 12-UNRF categories. Exercise in that regard, shall be carried out in quite promptitude, preferably within a period of two months from the date of receipt of certified copy of this order.

44. *Ex-consequenti,* the **writ petitions are disposed of,** as indicated hereinabove. However, in the facts and circumstances of the case there shall be no order as to costs.

Order accordingly

I.L.R. [2020] M.P. 1326
WRIT PETITION
Before Mr. Justice Sanjay Dwivedi
W.P. No. 6095/2020 (Jabalpur) decided on 8 May, 2020

MEENA DEVI (SMT.) …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

A. ***Service Law – Appointment – Aanganwadi Sahayika*** **– Held – Circular dated 15.05.2017 is clarificatory in nature and clarifies that benefit of 10 marks of BPL can be granted to candidate whose name finds place in said list of BPL before date of advertisement for appointment and remains in the list – Advertisement issued on 07.07.2015 whereas name of petitioner's husband included in BPL list on 20.07.2015 (last date of submission of application) – Petitioner not entitled for 10 marks as per policy – Appointment rightly cancelled – Petition dismissed. (Paras 11, 12, 14 & 19)**

क. *सेवा विधि – नियुक्ति – आंगनवाड़ी सहायिका* – अभिनिर्धारित – परिपत्र दिनांक 15.05.2017 स्पष्ट स्वरूप का है तथा यह स्पष्ट करता है कि बी.पी.एल. के 10 अंकों का लाभ उस अभ्यर्थी को प्रदान किया जा सकता है जिसका नाम, नियुक्ति के लिए विज्ञापन की तिथि से पूर्व बी.पी.एल. की कथित सूची में आया हो तथा सूची में बना रहा हो – विज्ञापन दिनांक 07.07.2015 को जारी हुआ जबकि याची के पति का नाम बी.पी.एल. सूची में दिनांक 20.07.2015 (आवेदन जमा करने की अंतिम तिथि) को शामिल किया गया – याची नीति अनुसार 10 अंकों के लिए हकदार नहीं है – नियुक्ति उचित रूप से रद्द की गई – याचिका खारिज।

B. ***Service Law – Nature of Circular – Retrospective Effect*** **– Held – Main policy is dated 10.07.2007 and selection process concluded in the year 2015 whereas circular is dated 15.05.2017 – Since the circular is clarificatory in nature, the same would have retrospective effect and would be operative from the date of very inception of the policy. (Para 16)**

ख. *सेवा विधि – परिपत्र का स्वरूप – भूतलक्षी प्रभाव* – अभिनिर्धारित – मुख्य नीति दिनांक 10.07.2007 की है एवं चयन प्रक्रिया का समापन वर्ष 2015 में हुआ जबकि परिपत्र दिनांक 15.05.2017 का है – चूंकि परिपत्र स्पष्ट स्वरूप का है, उक्त का भूतलक्षी प्रभाव होगा तथा नीति के प्रारंभ होने की तिथि से प्रभावशील होगा।

Cases referred:

AIR 1999 SC 1638, (1999) 156 CTR (Kar) 327.

Manish Kumar Soni, for the petitioner.
Vikalp Soni, G.A. for the respondent Nos. 1 to 4/State.
Himanshu Shukla, for the respondent No. 5.

O R D E R

SANJAY DWIVEDI, J. :- Since the parties are ready to argue the matter finally on the basis of record available, therefore, it is heard finally.

2. By the instant petition filed under Article 226 of the Constitution of India, the petitioner is challenging the order dated 28.02.2020 (Annexure-P/1) passed by the Commissioner setting-aside the order of the Collector dated 22.01.2018 (Annexure-P/10) and also set-aside the order of the Selection Committee whereby the petitioner has been appointed on the post of Anganwadi Sahayika as she was found meritorious and was granted 10 marks of BPL card.

3. Learned counsel appearing for respondent No.5 submits that against the selection of the petitioner, respondent No.5 preferred an appeal before the Collector challenging the same on the ground that the petitioner was not eligible to get the marks of BPL card as on the date of issuance of advertisement i.e. 07.07.2015, her name was not in the BPL list, but was included in it on 20.07.2015. However, on a complaint made against the said inclusion, an order has been passed on 03.08.2015 whereby her name was directed to be deleted from the list of BPL card holder and against which an appeal was preferred before the Commissioner, which was decided in the year 2016 and the inclusion of the name of the petitioner in the BPL list was found valid and accordingly, said inclusion was allowed. He further submits that as per the circular issued on 16.03.2018 clarifying the earlier position, the petitioner was not entitled to get the marks of BPL card because that circular which is at page No.44 of the petition, clarifies that if the name of the candidate is recorded in the list of BPL card holder before the issuance of the advertisement and her name continues to be in the list till final selection-list is published, then only the candidate is entitled to get the marks of BPL card. He also submits that in view of the aforesaid, admittedly, on the date of advertisement, the name of the petitioner was not in the BPL list, therefore, in view of the said circular, she was not entitled to get marks of BPL and accordingly the order passed by the Commissioner is proper. The selection of the petitioner made on the post of Anganwadi Sahayika is invalid and accordingly, the same may be cancelled.

4. Learned counsel for respondent No.5 further submits that if the object of the scheme of Anganwadi Worker is seen, then it can be easily gathered that the basic object to provide appointment on the post of Anganwadi Worker and Anganwadi Sahayika was to provide the same to the BPL card holder, but if a candidate get the said qualification at the verge of advertisement, then the said benefit should not be granted to her because that would frustrate the very object of the policy dated 10.07.2007.

5. After hearing the contentions of both the parties and perusal of record, the question which emerges for adjudication is that, as to whether clarificatory circular issued at a later point of time, will have retrospective effect or not and if so, then what would be it's effect in the present case.

6. To answer the question emerged, brief facts of the case which are required to be taken note of, are that the applications were invited for the post of Anganwadi Sahayika for the Anganwadi Centre-Chamradol No.4 through an advertisement dated 07.07.2015. Seven applications were submitted in July, 2015. As per the facts that came on record, the last date of submitting the applications was 20.07.2015 and final list was to be published on 31.07.2015. After deciding the objections raised by the parties, a final list was published, in which the present petitioner was placed at Sr.No.1 and appointment order was issued in her favour on 20.02.2017 (Annexure-P/7).

7. The said appointment was challenged by respondent No.5 by filing an appeal before the Additional Collector mainly on the ground that the petitioner is not entitled to get the marks of BPL as she has included her name in the list only on the last date of submitting the applications i.e. 20.07.2015 whereas the name of the candidate should have been included in the BPL list before the date of issuance of the advertisement and the same should be continued till the publication of final select-list.

8. The Additional Collector although dismissed the appeal holding therein that indisputably, the last date of submitting the applications was 20.07.2015 and the name of husband of the petitioner was included in the BPL list on 20.07.2015, therefore, the marks of BPL has rightly been awarded to the petitioner and the appeal was dismissed.

9. Moreover, another selection took place during the pendency of the appeal before the Collector and the Collector also took note of the inclusion of name of the petitioner's husband in the BPL list, a complaint was made and the Tehsildar vide order dated 03.08.2015, deleted his name from the said list, but that order was assailed before the Commissioner, who set-aside the said order and finally held that the name of husband of the petitioner has rightly been included in the BPL list.

10. The order of the Collector was again assailed before the Additional Commissioner, Rewa Division, Rewa, by respondent No.5 and the said appeal was decided vide order dated 28.02.2020. The Additional Commissioner took note of the Circular dated 15.05.2017, in which, it was clarified that Clause-2 of the Policy dated 10.07.2007 provides guidelines for selection of Anganwadi Worker and Anganwadi Sahayika. Clause-2 of the said Policy deals with the allotment of marks and also provides for ten marks to the candidate whose name finds place in the BPL list.

11. The Circular dated 15.05.2017 is clarificatory in nature and has clarified that the benefit of ten marks of BPL can be granted to a candidate whose name finds place in the said list before issuance of an advertisement for appointment on the post and remains in the list. The Circular dated 15.05.2017 (Annexure-P/14) has direct significance in the issue involved herein, therefore, it is quoted hereinbelow:-

''मध्यप्रदेश शासन,
महिला एवं बाल विकास विभाग,
मंत्रालय, वल्लभ भवन,

क्रमांक 1114/1489/2017/50–2 भोपाल, दिनांक 15/05/2017
प्रति,

1. आयुक्त, एकीकृत बाल विकास सेवा, मध्यप्रदेश, भोपाल
2. संभागायुक्त, समस्त संभाग, मध्यप्रदेश,
3. कलेक्टर, जिला समस्त मध्यप्रदेश,
4. संयुक्त संचालक, एकीकृत बाल विकास सेवा, जिला समस्त, म.प्र.
5. जिला कार्यकम अधिकारी, एकीकृत बाल विकास सेवा, जिला समस्त, म.प्र.
6. मुख्य कार्यपालन अधिकारी, जिला पंचायत जिला समस्त, मध्यप्रदेश,
7. परियोजना अधिकारी, एकीकृत बाल विकास परियोजना समस्त मध्यप्रदेश,
8. समस्त मुख्य कार्यपालन अधिकारी, जनपद पंचायत, मध्यप्रदेश,
9. समस्त सचिव, ग्राम पंचायत, मध्यप्रदेश,

विषयः– आंगनवाडी कार्यकर्ता/सहायिका के चयन एवं नियुक्ति हेतु बी.पी.एल. के अंक प्रदान/पात्रता के संबंध में।

वर्तमान में प्रचलित आंगनवाडी कार्यकर्ता एवं सहायिका के चयन एवं नियुक्ति निर्देश दिनांक 10/07/2007 में कंडिका अ–2 की उपकंडिका 2 एवं कंडिका ब–2 की उपकंडिका 2 के अनुसार ''गरीबी रेखा के नीचे रहने वाले परिवार की महिला के लिए 10 अंक'' दिये जाने का प्रावधान किया गया है।

समय–समय पर जिलों से प्राप्त विभिन्न शिकायतों में उल्लेख किया जाता है कि आवेदकों द्वारा गरीबी रेखा के अंकों का लाभ लेने हेतु विज्ञप्ति जारी होने के उपरांत गलत तरीके से बी.पी.एल. सूची में नाम जोडा गया है।

उक्त स्थिति को दृष्टिगत रखते हुए गरीबी रेखा के नीचे रहने वाले परिवार की महिला आवेदिका को बी.पी.एल. के 10 अंकों का लाभ उसी स्थिति में दिया जावे जबकि उसका/परिवार का नाम विज्ञप्ति जारी होने की तिथि के पूर्व से निरन्तर सूची में विद्यमान हो।

उक्त निर्देश तत्काल प्रभाव से लागू होगा।

मध्यप्रदेश के राज्यपाल के नाम से
तथा आदेशानुसार
(पंकज शर्मा)
अवर सचिव,
मध्यप्रदेश शासन,
महिला एवं बाल विकास विभाग''

12. The Commissioner, vide order dated 28.02.2020, has finally decided the appeal and set-aside the order of the Collector holding that the petitioner is not entitled to get the ten marks of BPL because admittedly, the name of her husband was not there in the BPL list before the date of issuance of the advertisement, but it was added only on the last date of submitting the applications i.e. 20.07.2015, whereas the advertisement was issued on 07.07.2015. The Commissioner, therefore, observed that if the ten marks of BPL card are deleted from the total marks awarded to the petitioner, then her total marks adds up-to 61, whereas respondent No.5 secured 64.50 marks and as such, she secured first position in the list and the Commissioner directed the Project Officer, Integrated Child Development, Sidhi, to issue order of appointment in favour of respondent No.5 cancelling the appointment order of the present petitioner.

13. Learned counsel for the petitioner submits that in view of the law laid-down by Division Bench of this Court in the case of *Renu Vishwakarma Vs. Tulsi Vishwakarma & Others* in W.A. No.1158/2018, in which it is held by the Division Bench that a candidate must possess requisite qualification on the last date fixed for the purpose of submitting the application forms.

14. However, that analogy is not applicable in the present case for the reason that here in this case, the Policy very categorically provides that the BPL marks would be granted to the candidate whose name finds place in the BPL list before the date of issuance of the advertisement and that particular object and Circular has not been considered by any of the authorities even the Division Bench of this Court while deciding the case of *Renu Vishwakarma* (supra).

15. The petitioner has also not assailed the provisions of the Policy saying that the same is contrary to law because if the candidate acquires the requisite qualification on the last date of submitting the application, he should be given the benefit of the same and as such, selection of Anganwadi Sahayika had to be made

strictly in accordance with the guidelines contained in the Policy dated 10.07.2007. The Circular dated 15.05.2017 which is also available on record as Annexure-P/14, is otherwise and reads in different manner as has been quoted hereinabove.

16. Learned counsel for the petitioner although submits that this Circular is dated 15.05.2017 and it would not be applicable in the process of selection for the reason that the same concluded in the year 2015, but I am not convinced with the said contention for the reason that the law is very specific in this regard and from perusal of the Circular dated 15.05.2017, it is clear that the same is clarificatory in nature clarifying Clause-2 of the Policy dated 10.07.2007 and therefore, the same would have retrospective effect and would be operative from the date of very inception of the Policy dated 10.07.2007.

17. The Supreme Court in the case of *Stonecraft Enterprises Vs. Commissioner of Income Tax* reported in AIR 1999 SC 1638, has laid-down a law in respect of the Circular which is in the nature of explanatory circular and has held that-

> "....if the Circular is explanatory and can, therefore, relate back to the year in question, the assessee cannot derive any assistance therefrom."

18. The Karnataka High Court in the case of *Commissioner of Income Tax Vs. God Granites* reported in (1999) 156 CTR (Kar) 327 relying upon the decision of the Supreme Court in the case of *Stonecraft Enterprises* (supra), has held as under:-

> "....Clarificatory amendments in law are always retrospective unless the statute provides otherwise. In view of the subsequent circular the earlier circulars ceases to exist and it cannot be said that the earlier circular shall apply to the assessment years till the issuance of the subsequent circular and that the subsequent circular would apply to the assessment years after it was issued...."

19. Thus, in view of the aforesaid enunciation of law, I have no hesitation to say that the Circular dated 15.05.2017 has retrospective effect and would be operative from the date of Policy i.e. 10.07.2007 and the same has rightly been considered by the Commissioner while deciding the appeal vide order impugned dated 28.02.2020 (Annexure-P/1). Therefore, in my opinion, the petitioner was not entitled to get the benefit of marks of BPL as admittedly, the name of petitioner's husband was included in the BPL list on the last date of submission of the applications i.e. 20.07.2015. The order passed by the Commissioner, therefore, is a reasoned one and does not suffer from any illegality and infirmity and does not warrant interference by this Court.

20. The direction issued by the Commissioner in respect of giving order of appointment in favour of respondent No.5 is hereby held to be proper and the same should be given effect to, if the same has not been implemented so far.

21. In view of the above, this petition being without any substance, is hereby **dismissed.**

Petition dismissed

I.L.R. [2020] M.P. 1332 (DB)
WRIT PETITION

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

W.P. No. 7399/2020 (Indore) decided on 18 May, 2020

CHANDA AJMERA …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

A. Constitution – Article 21, 22(2) & 226 and Criminal Procedure Code, 1973 (2 of 1974), Section 57 & 167 – Habeas Corpus – Illegal Detention – **Held – Husband of petitioner was in jail and was formally arrested for a subsequent crime but was not produced before Court within 24 hrs. of such formal arrest – No reasonable explanation by State – In respect of such subsequent offence, detention was illegal as it was violative of Article 21 & 22(2) of Constitution – Detenue directed to be released – Petition allowed.**

(Paras 13, 14 & 18 to 20)

क. संविधान – अनुच्छेद 21, 22(2) व 226 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 57 व 167 – बंदी प्रत्यक्षीकरण – अवैध निरोध – अभिनिर्धारित – याची का पति कारागृह में था और एक पश्चात्वर्ती अपराध हेतु औपचारिक रूप से गिरफ्तार किया गया था, किंतु उक्त औपचारिक गिरफ्तारी के 24 घंटों के भीतर न्यायालय के समक्ष प्रस्तुत नहीं किया गया था – राज्य द्वारा कोई युक्तियुक्त स्पष्टीकरण नहीं – उक्त पश्चात्वर्ती अपराध के संबंध में निरोध अवैध था क्योंकि वह संविधान के अनुच्छेद 21 व 22(2) के उल्लंघन में था – बंदी को मुक्त करने के लिए निदेशित किया गया – याचिका मंजूर।

B. Constitution – Article 21, 22(2) & 226 and Criminal Procedure Code, 1973 (2 of 1974), Section 57 & 167 – Habeas Corpus – Illegal Detention – **Detenue formally arrested in jail on 04.03.2020, petition of *habeas corpus* filed on 11.05.2020 and State was heard on 13.05.2020 – After notice taken by State, detenue was produced before Magistrate on 15.05.2020 – Held – Date on which petition was filed and date on which hearing took place, detention of detenue was unlawful and was violative of Article 21 & 22(2) of Constitution.** **(Paras 14, 17 & 18)**

ख. संविधान – अनुच्छेद 21, 22(2) व 226 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 57 व 167 – बंदी प्रत्यक्षीकरण – अवैध निरोध – बंदी को 04.03.2020 को औपचारिक रूप से कारागृह में गिरफ्तार किया गया, बंदी प्रत्यक्षीकरण की याचिका 11.05.2020 को प्रस्तुत की गई तथा 13.05.2020 को राज्य को सुना गया था – राज्य द्वारा नोटिस लिये जाने के पश्चात्, 15.05.2020 को बंदी को मजिस्ट्रेट के समक्ष प्रस्तुत किया गया – अभिनिर्धारित – जिस तिथि पर याचिका प्रस्तुत की गई थी तथा जिस तिथि पर सुनवाई हुई थी, बंदी का निरोध विधिविरूद्ध एवं संविधान के अनुच्छेद 21 व 22(2) के उल्लंघन में था।

***C. Constitution – Article 21, 22(2) & 226 and Criminal Procedure Code, 1973 (2 of 1974), Section 57 & 167 – Illegal Detention – Practice & Procedure* – Held – Even if a person has been formally arrested in jail, he has to be produced before the nearest Magistrate within 24 hrs, physically or through video conferencing – After formal arrest, Police Officer shall make an application before Jurisdictional Magistrate for issuance of PT Warrant without delay. (Para 13 & 16)**

ग. संविधान – अनुच्छेद 21, 22(2) व 226 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 57 व 167 – अवैध निरोध – पद्धति एवं प्रक्रिया – अभिनिर्धारित – यद्यपि एक व्यक्ति को औपचारिक रूप से कारागृह में गिरफ्तार किया गया है, उसे 24 घंटों के भीतर नजदीकी मजिस्ट्रेट के समक्ष व्यक्तिशः अथवा वीडियो कॉन्फ्रेंसिंग के जरिए प्रस्तुत किया जाना चाहिए – औपचारिक गिरफ्तारी पश्चात्, पुलिस अधिकारी क्षेत्राधिकारिता के मजिस्ट्रेट के समक्ष पी टी वारंट जारी किये जाने हेतु बिना विलंब एक आवेदन प्रस्तुत करेगा।

Cases referred:

1999 (3) SCC 715, 1993 MPJ (Crl), 1969 (1) SCC 292, 1966 (2) SCR 427, AIR 1971 SC 813.

Vivek Dalal, for the petitioner.
Amol Shrivastava, for the respondent-State.

O R D E R

The Order of the Court was passed by :

S. C. SHARMA, J. :- The petitioner before this court, wife of one Pawan Kumar, has filed this present petition under Article 226 of the Constitution of India (habeas corpus). The contention of the petitioner is that the husband of the petitioner was arrested in respect of Crime No. 1410/19, registered at P.S. Lasudiya. He was granted bail in respect of the aforesaid Crime Number on 24/2/2020. The bail was furnished, a release warrant was issued. However, he was not released as he was an accused in other criminal case, registered at Crime No. 526/2016. He again applied for bail in respect of Crime No. 526/2016 and he was granted bail by Addl. Sessions Judge, Indore on 5/3/2020 in respect of Crime No.

526/2016 and a release warrant was issued by the Judicial Magistrate First Class, Indore on 6/3/2020 but the husband of the petitioner was not released and he was informed that there is a third criminal case also at Crime No. 1435/2019 and as no bail has been granted in respect of Crime No. 1435/2019, the question of releasing him does not arise.

2. The undisputed facts reveal that the detenu when he was in Jail in respect of Crime No. 1410/2019 and 526/2016, was arrested formally inside the Jail only in respect of Crime No. 1435/2019.

3. Learned counsel for the petitioner has argued before this Court that the petitioner's detention in respect of Crime No. 1435/2019 is illegal as he has not been produced before the Magistrate within 24 hours of arrest and, therefore, the petition preferred by his wife deserves to be allowed. It has been argued that the husband of the petitioner is aged about 68 years, he is not well and as the detention is illegal, the respondents be directed to release him forthwith. It has also been argued that the petitioner was a Director of the Company, he has resigned in the year 2011 and, therefore, he has been falsely implicated in the Crime ie., No. 1435/2019 and at the time the crime was registered, he was no longer a Director as he has resigned on 10/2/2011. It has been stated that he was Director of the Company since 30/9/2008 to 10/2/2011. It has been argued before this Court that keeping in view the statutory provisions as contained under Sec. 57 and 167 of the Code of Criminal Procedure, 1973 as well as the Constitutional provisions as contained under Article 21 and 22(2) , as the husband of the petitioner was not produced before the Magistrate within 24 hours, the detention is illegal and an application was also preferred for grant of bail in respect of Crime No. 1435/2019. However, the learned Judge has orally informed the learned counsel that as the detenu is not in judicial custody, the question of entertaining the bail petition does not arise and in those circumstances the bail petition preferred in Crime No. 1435/2019 was withdrawn.

4. Learned counsel for the respondent State has opposed the prayer made by the learned counsel for the petitioner. His contention is that the husband of the petitioner was arrested in respect of Crime No. 1410/2019 and 526/2019. He has fairly stated that in both the cases bail orders has been passed and release warrant has been issued. However, his contention is that in respect of the Crime No. 1435/2019, the accused was arrested formally on 4/3/2020. He has also fairly accepted that the present petition was filed as Habeas Corpus petition on 11/5/2020 and the matter was heard on 13/5/2020 and the police has produced the accused detenu before the Magistrate on 15/5/2020 and, therefore, now the detention is not an illegal detention. His contention is that the accused was already in Jail, formal arrest was done on 4/3/2020 and merely because he was not produced within 24 hours, the detention cannot be termed as an illegal detention.

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

6. In the present case, the husband of the petitioner is in Jail in respect of Crime No .1435/2019. He is aged about 68 years, suffering from various ailments, as argued by the learned counsel for the petitioner.

7. As per the prosecution case, he was a Director of a Company - Phonenix Devcon Pvt. Ltd., The crime in question has been registered against the present applicant in the year 2019. He was a Director from 30/9/2008 to 10/2/2011 and he has resigned as a Director and the documents are also on record. There is no dispute in respect of the aforesaid factual averment.

8. This court is not dealing with a bail petition preferred u/S. 439 of the Code of Criminal Procedure, 1973. Whether he was a Director or not, whether he was involved in a crime or not, can be looked into only in a bail petition or in the criminal trial, that too when he is heard on merits. In the present Writ Petition which has been filed as a habeas corpus petition, the contention of the learned counsel for the petitioner is that the detention of the detenu is illegal. His contention is that even if formal arrest was made in Crime No. 1435/2019 on 4/3/2020, he should have been produced before the Magistrate within 24 hours or without delay at the earliest.

9. Undisputedly, in the State of Madhya Pradesh all the Jails are equipped with Video Conferencing equipments. Nothing prevented the State to produce the detenu before the Magistrate through Video Conferencing. They have realised their mistake only after notice was accepted by the State Government and after filing of the Writ Petition. The petition was filed before this Court on 11/5/2020. The State was heard on 13/5/2020 and instead of filing reply and arguing the matter on merits and obtaining instructions, the police has produced the detenu before the Magistrate on 15/5/2020.

10. This Court is of the considered opinion that as the Police has failed to produce the detenue / accused before the Magistrate within 24 hours, which is the Constitutional mandate, his custody in Jail on the date the matter was heard ie., on 13/5/2020 was illegal.

11. According to Article 21 of the Constitution of India, no person shall be deprived of his life or personal liberty, except according to the procedure established by law. This Article is very important because it is *Magna Carta* for human rights. Article 21 of the Constitution of India embodies the Constitutional value of supreme importance in a democratic society. The right has been held to be the heart of the Constitution, the most organic and progressive provision in our living constitution, the foundation of our laws. The relevant statutory provisions relating to the present case reads as under :

Article 21 of the Constitution of India :

21. Protection of life and personal liberty No person shall be deprived of his life or personal liberty except according to procedure established by law.

Article 22(2) in The Constitution Of India 1949

(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

Section 57 in The Code Of Criminal Procedure, 1973.

57. Person arrested not to be detained more than twenty-four hours. No police officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate under section 167, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate' s Court.

Section 167 in The Code Of Criminal Procedure, 1973

167. Procedure when investigation cannot be completed in twenty four hours.

(1) Whenever any person is arrested and detained in custody and it appears that the investigation cannot be completed within the period of twenty- four hours fixed by section 57, and there are grounds for believing that the accusation or information is well- founded, the officer in charge of the police station or the police officer making the investigation, if he is not below the rank of sub- inspector, shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate.

(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction: Provided that-

(a)[1] the Magistrate may authorise the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days; if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this paragraph for a total period exceeding,-

(i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years;

1. subs. by Act 45 of 1978, s, 13, for paragraph (a) (w, e, f, 18-12-1978).

2. Ins. by act 10 of 1990, s. 2 (w. e. f 19- 2- 1990)

(ii) sixty days, where the investigation relates to any other offence, and, on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this sub- section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter;]

(b) no Magistrate shall authorise detention in any custody under this section unless the accused is produced before him;

(c) no Magistrate of the second class, not specially empowered in this behalf by the High Court, shall authorise detention in the custody of the police. [1] Explanation I.- For the avoidance of doubts, it is hereby declared that, notwithstanding the expiry of the period specified in paragraph (a), the accused shall be detained in custody so long as he does not furnish bail;]. [2] Explanation II.- If any question arises whether an accused person was produced before the Magistrate as required under paragraph (b), the production of the accused person may be proved by his signature on the order authorising detention.]

(2A)[1] Notwithstanding anything contained in sub- section (1) or sub- section (2), the officer in charge of the police station or the police officer making the investigation, if he is not below the rank of a sub- inspector, may, where a Judicial Magistrate is not available, transmit to the nearest Executive Magistrate, on whom the powers of a Judicial Magistrate or Metropolitan Magistrate have been conferred, a copy of the entry in the diary hereinafter prescribed relating to the case, and shall, at the same time, forward the accused to such Executive Magistrate, and thereupon such Executive Magistrate, may, for reasons to be recorded in writing, authorise the detention of the accused person in such custody as he may think fit for a term not exceeding seven days in the aggregate; and, on the

> expiry of the period of detention so authorised, the accused person shall be released on bail except where an order for further detention of the accused person has been made by a Magistrate competent to make such order; and, where an order for such further detention is made, the period during which the accused person was detained in custody under the orders made by an Executive Magistrate under this sub- section.

12. The person who is arrested and detained in custody has to be produced before the nearest Magistrate within a period of 24 hours of such arrest excluding the time necessary for journey from the place of arrest to the Court of Magistrate and no person shall be detained in custody beyond the said period without the authority of Magistrate.

13. Sec. 57 of the Code of Criminal Procedure, 1973 also mandates that no police officer shall detain in custody a person without warrant for a longer period than under all circumstances of the case is reasonable, and such period shall not, in absence of a specific order of a Magistrate u/S. 167 exceed 24 hours exclusive of the time necessary for the journey from the place of arrest to the Magistrates Court. Sec. 167 of the Code of Criminal Procedure, 1973 empowers the Magistrate to authorise the detention of the accused either in police custody or in judicial custody, as the case may be. Thus, it is evident that a person who is arrested has to be produced before the nearest Magistrate within a period of 24 hours. In the State of Madhya Pradesh all the Jails are having Video Conferencing facility and, therefore, in the present case also the accused should have been produced physically or through Video Conferencing before the Magistrate within 24 hours.

14. The undisputed facts of the case reveals that the accused was arrested on 4/3/2020 while he was in Jail and a Habeas Corpus petition was filed before this Court on 11/5/2020. Learned Government Advocate took time to seek instructions and on 15/5/2020, as informed by the learned Government Advocate, he has been produced before the Magistrate, meaning thereby, after the mistake was brought to the notice of the Police, they have hurriedly produced him on 15/5/2020. No reasonable explanation has been offered in the matter as to why he was not produced within 24 hours of the arrest, ie., within 24 hours from 4/3/2020.

15. The Division Bench of Madras High Court has dealt with a similar controversy in the case of *State Vs. K. N. Nehru* Crl. O. P. (MD) No. 13683 of 2011. Paragraphs, 10, 11, 12, 14, 18, 19, 31 and 42 reads as under :

> 10. Personal liberty is one of the cherished objects of the Indian Constitution and the deprivation of the same can only be in accordance with the procedure established by law and in conformity with the provisions thereof, as stipulated in Article

21 of the Constitution of India. Article 22 (2) of the Constitution mandates that every person who is arrested and detained in custody shall be produced before the nearest Magistrate within a period of 24 hours of such arrest excluding the time necessary for journey from the place of arrest to the Court of the Magistrate and no such person shall be detained in custody beyond the said period without the authority of a Magistrate. Similar provision is found in Section 57 of the Code of Criminal Procedure, which also mandates that no police officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate under Section 167, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court. These two provisions came up for consideration on several occasions before the Hon'ble Supreme Court, as well as this Court and the Courts have in no uncertain terms held that without the authorisation of a Magistrate, no arrestee shall be detained in the custody of the police beyond 24 hours from the time of arrest excluding the time taken for the journey from the place of arrest to the Court. In this regard, there could be no controversy that when an accused is detained in the custody of the police after arrest beyond 24 hours excluding the time taken for the journey from the place of arrest to the Court, such detention beyond the said period is surely illegal.

11. As is mandated under Article 22(2) of the Constitution of India and under Section 57 of the Code of Criminal Procedure, for getting the authorisation from the Court for detention, either in judicial custody or police custody, the accused has to be physically produced before the Magistrate under Section 167 Cr.P.C. Section 167(1) of Cr.P.C. is the law which regulates and empowers a Magistrate to authorise the detention of the accused either in police custody or in judicial custody, as the case may be. It is too well settled that while passing an order of remand, either judicial custody or police custody, as mandated in Section 167(1) of Cr.P.C., since the said detention deprives the personal liberty guaranteed under Article 21 of the Constitution of India, such order of remand shall not be passed in a mechanical fashion. The learned Magistrate is required to apply his mind into the entries in the Case Diary, representation of the accused and other facts and circumstances, and only on satisfaction that such remand is justified, the learned Magistrate shall pass such order of remand. [vide Elumalai vs. State of Tamil Nadu reported in 1983 LW (Crl) 121].

12. At this juncture, we may point out that in a case where an accused is arrested and detained in physical custody of the police, as mandated in Article 22(2) of the Constitution of India and Section 57 of the Code of Criminal Procedure, undoubtedly the accused cannot be detained in police custody for more than 24 hours. But in the case on hand, the contention of the learned Public Prosecutor is that though the respondents were formally arrested, the same cannot be equated to an arrest as adumbrated under Section 46 of the Code of Criminal Procedure. The learned Public Prosecutor would submit that when only a formal arrest is effected in prison, the arrestee does not get into the custody of the police, and therefore, there is no question of detention in police custody beyond 24 hours. The learned Public Prosecutor would submit that if only the accused has been arrested and detained in custody, then such custody shall not be for beyond 24 hours from the time of arrest. But, in the case of a formal arrest, according to the learned Public Prosecutor, since there is only a formal arrest, the accused does not get into the physical custody of the police, and therefore, there is no police custody either for 24 hours or beyond that.

14. Since the rival contentions of the learned counsel centers around Section 46(1) of the Code of Criminal Procedure, let us have a cursory look into the same which is thus:-

"46.Arrest how made.-(1) In making an arrest the police officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action. Provided that where a woman is to be arrested, unless the circumstances indicate to the contrary, her submission to custody on an oral intimation of arrest shall be presumed and, unless the circumstances otherwise require or unless the police officer is a female, the police officer shall not touch the person of the woman for making her arrest."

A reading of the above provision would make it undoubtedly clear that the term "arrest" denotes confinement of the body of the person either by a physical act or by words or action. Section 46 does not indicate any other mode of arrest. Therefore, as per Section 46(1) , the arrest necessarily involves the taking of the accused into physical custody by the person who effects the arrest.

18. Now, this debate leads us to examine the question as to whether the terms "arrest" and "custody" are synonymous. For this, it would be useful to refer to the judgment of the Full Bench of this Court in Roshan Beevi vs. Joint Secretary, Government

of Tamil Nadu reported in 1983 MLW (Cri) 289, wherein this Court had to examine the meaning of the word "arrest". After reference to various law Dictionaries and various judgments on this aspect, the Full Bench took the view that custody and arrest are not synonymous terms. The Full Bench further held that though custody may amount to arrest in certain circumstances, but not under all circumstances. The said judgment came to be considered before the Hon'ble Supreme Court in Directorate of Enforcement vs. Deepak Mahajan and Another, reported in (1994) 3 SCC 440. While confirming the stand taken by the Full Bench in Roshan Beevi's case, the Hon'ble Supreme Court in paragraph 48 of the judgment, has held as follows:-

"48. Thus the Code gives power of arrest not only to a police officer and a Magistrate but also under certain circumstances or given situations to private persons. Further, when an accused person appears before a Magistrate or surrenders voluntarily, the Magistrate is empowered to take that accused person into custody and deal with him according to law. Needless to emphasize that the arrest of a person is a condition precedent for taking him into judicial custody thereof. To put it differently, the taking of the person into judicial custody is followed after the arrest of the person concerned by the Magistrate on appearance or surrender. It will be appropriate, at this stage, to note that in every arrest, there is custody but not vice versa and that both the words 'custody' and 'arrest' are not synonymous terms. Though 'custody' may amount to an arrest in certain circumstances but not under all circumstances. If these two terms are interpreted as synonymous, it is nothing but an ultra legalist interpretation which if under all circumstances accepted and adopted, would lead to a startling anomaly resulting in serious consequences, vide Roshan Beevi."

19. A perusal of the above Supreme Court judgment would make it clear that in every arrest there is custody and not vice-versa. The question as to when a person gets into the custody of the Court for the purpose of exercising the power by the Magistrate under Section 167(1) of the Code of Criminal Procedure came up for consideration before the Hon'ble Supreme Court in Niranjan Singh vs. Prabhakar Rajaram Kharote, reported in (1980) 2 SCC 559. Speaking for the Bench, Hon'ble Justice V.R.Krishna Iyer has declared the law as follows:- "He can be in custody not merely when the police arrests him, produces him before a Magistrate and gets a remand to judicial or other custody. He can be stated to be in judicial custody when he surrenders before the Court and submits to its directions."

31. In a case where the police officer deems it necessary to arrest when the accused is already in judicial custody in connection with a different case, in our considered opinion, there are two modes available for him to adopt. The first one is that, instead of effecting formal arrest, he can very well make an application before the Jurisdictional Magistrate seeking a P.T.Warrant for the production of the accused from prison. If the conditions required under 267 of the Code of Criminal Procedure, are satisfied, the Magistrate shall issue a P.T. Warrant for the production of the accused in Court. When the accused is so produced before the Court, in pursuance of the P.T.Warrant, the police officer will be at liberty to make a request for remanding the accused, either to police custody or judicial custody, as provided in Section 167(1) of the Code of Criminal Procedure. At that time, the Magistrate shall consider the request of the police, peruse the case diary and the representation of the accused and then, pass an appropriate order, either remanding the accused or declining to remand the accused.

42. From the above discussions, the following conclusions emerge:-

1). When an accused is involved in more than one case and has been remanded to judicial custody in connection with one case, there is no legal compulsion for the Investigating Officer in the other case to effect a formal arrest of the accused. He has got discretion either to arrest or not to arrest the accused in the latter case. The police officer shall not arrest the accused in a mechanical fashion. He can resort to arrest only if there are grounds and need to arrest.

2). If the Investigating Officer in the latter case decides to arrest the accused, he can go over to the prison where the accused is already in judicial remand in connection with some other case and effect a formal arrest as held in Anupam Kulkarni case. When such a formal arrest is effected in prison, the accused does not come into the physical custody of the police at all, instead, he continues to be in judicial custody in connection with the other case. Therefore, there is no legal compulsion for the production of the accused before the Magistrate within 24 hours from the said formal arrest.

3). For the production of the accused before the Court after such formal arrest, the police officer shall make an application before the Jurisdictional Magistrate for issuance of P.T.Warrant without delay. If the conditions required in Section 267 of the

Code of Criminal Procedure are satisfied, the Magistrate shall issue P.T. Warrant for the production of the accused on or before a specified date before the Magistrate. When the accused is so transmitted from prison and produced before the Jurisdictional Magistrate in pursuance of the P.T.Warrant, it will be lawful for the police officer to make a request to the learned Magistrate for authorising the detention of the accused either in police custody or in judicial custody.

4). After considering the said request, the representation of the accused and after perusing the case diary and other relevant materials, the learned Magistrate shall pass appropriate orders under Section 167(1) of the Code of Criminal Procedure.

5). If the police officer decides not to effect formal arrest, it will be lawful for him to straightaway make an application to the Jurisdictional Magistrate for issuance of P.T.Warrant for transmitting the accused from prison before him for the purpose of remand. On such request, if the Magistrate finds that the requirements of Section 267 of the Code of Criminal Procedure are satisfied, he shall issue P.T.Warrant for the production of the accused on or before a specified date.

6). When the accused is so transmitted and produced before the Magistrate in pursuance of the P.T.Warrant from prison, the police officer will be entitled to make a request to the Magistrate for authorising the detention of the accused either in police custody or in judicial custody. On such request, after following the procedure indicated above, the Magistrate shall pass appropriate orders either remanding the accused either to judicial custody or police custody under Section 167(1) of the Code of Criminal Procedure or dismissing the request after recording the reasons.

7). Before the accused is transmitted and produced before the Court in pursuance of a P.T.Warrant in connection with a latter case, if he has been ordered to be released in connection with the former case, the jail authority shall set him at liberty and return the P.T.Warrant to the Magistrate making necessary endorsement and if only the accused continues to be in judicial custody, in connection with the former case, he can be transmitted in pursuance of P.T.Warrant in connection with the latter case.

16. The Division Bench of Madras High Court has taken into account the judgment delivered by the Hon. Supreme Court in the case of *Manoj Vs. State of MP* reported in 1999 (3) SCC 715; *T. Mohan Vs. State* reported in 1993 MPJ (Crl);

Madhu Limaye reported in 1969 (1) SCC 292; *A. K. Gopalan Vs. Government of India* reported in 1966 (2) SCR 427; *Saptawna Vs. The State of Assam* reported in AIR 1971 SC 813; *Sadhwi Pragya Singh Thakur Vs. State of Maharashtra* reported in SC 1101/2011 as well as other cases relating to life and personal liberty and the Division Bench has arrived at a conclusion that in case a person who is already in Jail, the Investigating Officer, in a later case decides to arrest the accused, he can go to the prison where the accused is already in judicial custody and when such a formal arrest is effected in person, the accused does not come into the physical custody of the police at all and, therefore, there is no legal compulsion for production of the accused before the Magistrate within 24 hours from the said formal arrest. However,for production of the accused before the Court, after such formal arrest, the Police Officer shall make an application before the jurisdictional Magistrate for issuance of PT Warrant without delay.

17. In the present case, the formal arrest was made in prison and no request was made before the jurisdictional Magistrate for producing the accused before him and only after a Habeas Corpus petition has been filed, unholy haste has been shown to render the petition infructuous by producing him on 15/5/2020, that too after a hearing has already taken place in the matter.

18. It has also been argued by the learned counsel for the respondent State that once the accused was detained in connection with a criminal case in Jail, the writ of Habeas Corpus is not maintainable. This Court is of the considered opinion that the date on which the petition was filed and the day on which hearing took place, the detention was certainly unlawful as it was violative of Article 21 and 22 (2) of the Constitution of India. The writ of Habeas Corpus has been described as a great constitutional privilege or the security of civil liberty, it provides for prompt and effective remedy against illegal detention and once this Court has arrived at a conclusion that the detention was illegal, the writ of habeas corpus was certainly maintainable.

19. This Court is of the considered opinion that keeping in view the judgment delivered by the Madras High Court in the case of *K. N. Nehru* (supra), the detention of the accused was certainly illegal and the accused deserves to be set at liberty forthwith.

20. Resultantly, the Writ Petition is allowed. The respondents are directed to release the detenu - Pawan Kumar Ajmera, who has been arrested in Crime No. 1435/2019, PS Lasudiya, Indore, forthwith. However, the State shall be free to proceed ahead in accordance with law. No order as to costs.

Petition allowed

I.L.R. [2020] M.P. 1345
ELECTION PETITION

Before Mr. Justice Anand Pathak

E.P. No. 20/2019 (Gwalior) decided on 16 June, 2020

RASAL SINGH …Petitioner

Vs.

DR. GOVIND SINGH …Respondent

***A. Representation of the People Act (43 of 1951), Sections 81, 86, 100 & 123 and Civil Procedure Code (5 of 1908), Order 7 Rule 11(a) – Election Petition – Maintainability – Cause of Action* – Held – Respondent (returned candidate) has disclosed/furnished all property and asset details – Criminal Case against respondent was way back dismissed in 2015, three years prior to election of 2018 – No omission or violation of any statutory provision – No material facts have been alleged or substantiated by petitioner – Definition of "Corrupt Practice" and "Undue Influence" not attracted – No triable cause of action exist against respondent – Application under Order 7 Rule 11(a) CPC allowed – Petition dismissed. (Paras 36, 56 & 58 to 61)**

क. लोक प्रतिनिधित्व अधिनियम (1951 का 43), धाराएँ 81, 86, 100 व 123 एवं सिविल प्रक्रिया संहिता (1908 का 5), आदेश 7 नियम 11(a) – निर्वाचन याचिका – पोषणीयता – वाद हेतुक – अभिनिर्धारित – प्रत्यर्थी (निर्वाचित प्रत्याशी) ने सभी संपत्ति और आस्ति का विवरण प्रकट / प्रस्तुत किया है – प्रत्यर्थी के विरूद्ध आपराधिक प्रकरण को वर्ष 2018 के निर्वाचन के तीन वर्ष पूर्व, 2015 में ही खारिज कर दिया गया था – किसी कानूनी उपबंध का कोई लोप अथवा उल्लंघन नहीं – याची द्वारा कोई तात्विक तथ्य अभिकथित अथवा सिद्ध नहीं किये गये – ''भ्रष्ट आचरण'' एवं ''अनुचित प्रभाव'' की परिभाषा आकर्षित नहीं होती – प्रत्यर्थी के विरूद्ध कोई विचारणीय वाद हेतुक विद्यमान नहीं – आवेदन अंतर्गत आदेश–7 नियम 11(a) सि.प्र.सं. मंजूर – याचिका खारिज।

***B. Representation of the People Act (43 of 1951), Section 83 & 87 and Civil Procedure Code (5 of 1908), Order 7 Rule 11 – Election Petition – Cause of Action* – Held – Election petition can be dismissed at the threshold by way of application under Order 7 Rule 11 CPC if material facts lack "Cause of Action". (Para 34)**

ख. लोक प्रतिनिधित्व अधिनियम (1951 का 43), धारा 83 व 87 एवं सिविल प्रक्रिया संहिता (1908 का 5), आदेश 7 नियम 11 – निर्वाचन याचिका – वाद हेतुक – अभिनिर्धारित – यदि तात्विक तथ्यों में ''वाद हेतुक'' की कमी है तो सि.प्र.सं. के आदेश 7 नियम 11 के अंतर्गत आवेदन के माध्यम से आरंभ में ही निर्वाचन याचिका खारिज की जा सकती है।

Cases referred :

(2002) 5 SCC 294, (2003) 4 SCC 399, 2016 (2) Mah.LJ 613, 2011 (2) Mah.LJ 851, AIR 1977 SC 2421, (2018) 4 SCC 699, (2006) 3 SCC 100, (2018) 14 SCC 1, (2016) 14 SCC 49, (2018) 16 SCC 228, AIR 1972 SC 515, AIR 1986 SC 1253, (1999) 3 SCC 267, (1999) 2 SCC 217, (2009) 9 SCC 310, (1969) 3 SCC 238, (2014) 14 SCC 189, (2015) 3 SCC 467, 2015 (1) MPLJ 160.

Prakash Upadhyay and *Jitendra Sharma*, for the petitioner.
Sameer Kumar Shrivastava, for the respondent.

O R D E R

ANAND PATHAK, J. :- Heard on I.A. 3632/2019.

The instant application under Order VII Rule 11(a) and (d) read with Order VI Rule 16 and Section 151 of CPC has been preferred at the instance of respondent for dismissal of election petition.

2. The petitioner has preferred instant election petition, whereby he challenged the election of respondent, who has been declared as returned candidate from 11 -Lahar Assembly Constituency, Madhya Pradesh in the Assembly Election conducted on 28-11-2018. Petition is preferred under Section 100(1)(b)(d) of the Representation of People Act, 1951 (hereinafter referred to as 'the Act of 1951') seeking the relief to declare the respondent to be disqualified for contesting election for a period of 6 years for adopting corrupt practice with a further direction to the competent authority to reconduct the election to the seat from 11 -Lahar Constituency District Bhind Madhya Pradesh.

3. The election petitioner is a candidate of Bhartiya Janta Party whereas answering respondent is candidate of Indian National Congress.

4. The election petition has been filed mainly on two grounds;

(a) the respondent (returned candidate) concealed the information of clause 5/6 of the affidavit about his criminal antecedents whereby the private complaint bearing no. 544/2006 was pending before the Court of Additional Chief Judicial Magistrate (ACJM), Lahar district Bhind; wherein, cognizance against the accused persons including the respondent for the offence punishable under Sections 148, 323, 149, 427, 294 of IPC vide order dated 02-09-2006 had been taken but despite having knowledge, respondent did not disclose the information about the said case which amounts to undue influence as per Section 100(1)(b) of the Act of 1951.

(b) Another ground (cumulatively) of election petition was that the respondent suppressed various important informations regarding his assets and liability (alongwith his family members) as candidate, which every candidate is

required to disclose and thus given false affidavit which amounts to undue influence as defined under Section 123(2) of the Act of 1951 and case under corrupt practice is contemplated under the said Section and election on account of use of such undue influence can be held to be void under Section 100(1)(b) of the Act of 1951. Under this ground; petitioner in **para 11(a) to 11 (m)** and thereafter in **para 12 and 13(i) to (iii)** mentioned and alleged different properties and accounts to contend that non disclosure of those properties render the election void.

5. Respondent after receiving the notice, moved an application as referred above which is the present subject matter and through this application, the respondent has raised the ground that election petitioner did not disclose cause of action as per Order VII Rule 11 (a)(d) of CPC, therefore, election petition be dismissed in limine.

6. Another relief through this application sought was in respect of striking out of pleadings under Order VI Rule 16 of CPC.

7. Learned counsel appearing for the respondent pressed the application by making submission that petitioner did not narrate the correct facts and it was the petitioner who tried to conceal the facts for pursuing this election petition on flimsy pretext. Regarding ground No.(a) in respect of **Criminal Antecedents,** it is the submission of respondent that answering respondent has not at all violated Section 33A of the Act of 1951 nor has submitted any incorrect information in the affidavit filed as per rule 4 (a) of the Conduct of Elections Rules, 1961 (hereinafter referred to as 'the Rules of 1961'). He referred Section 33A of the Act of 1951 to bring home the arguments that respondent is not accused of any offence punishable with imprisonment of 2 years or more in pending case (in which charge has been framed by the Court of competent jurisdiction nor he has been convicted for an offence and sentenced to imprisonment for 1 year or more).

8. It is submitted that private complaint on which, election petitioner is placing reliance has already been dismissed on 30-11-2015 by JMFC, Lahar Bhind and copy of the said order is placed as Annexure R/A with the application by which the same has been dismissed under Section 204(4) of Cr.P.C. Therefore, on the date of filing of nomination there was no case pending against the respondent and petitioner deliberately suppressed the fact that the respondent has been acquitted. This fact was in the knowledge of election petitioner because on 05-01-2019 vide application bearing No.51/2019, certified copy of private complaint and its order-sheet were applied by petitioner or his agent. Certified copy of proceedings, final order etc., which was granted on the basis of that application dated 05-01-2019 (bearing No.51/2019) has been filed by the petitioner as Annexure P/6(A) and from perusal of the said document, it is clear

that all the proceedings were taken out by election petitioner including final order dated 30-11-2015 but for obvious reason, the election petitioner did not annex the order dated 30-11-2015 by which private complaint was dismissed. Petitioner tried to project the case as if private complaint is still pending.

9. Learned counsel appearing for respondent placed and referred those documents vide Annexure R-A, R-B and R-C respectively and on the basis of those documents vehemently submitted that on the date of filing of nomination papers, there was no case pending against the respondent and therefore, the respondent rightly did not disclose details of any criminal case in his affidavit. Even otherwise as per the order-sheet annexed by the election petitioner along with Annexure P/6-A it is clear that no notice was ever served upon the respondent, therefore, the respondent did not have any knowledge about filing of complaint and no such pleading has been made regarding framing of charge in private complaint against the respondent or regarding any conviction order. Therefore, the petitioner has no cause of action to challenge the election of the respondent on the basis of alleged non disclosure of criminal case as referred in private complaint and since no criminal case is pending against the petitioner, therefore, filing of election petition on this ground is a futile exercise and does not bear any cause of action.

10. So far as another ground i.e. ground No.(b) is concerned, sheet-anchor of election petition is non disclosure of movable or immovable assets by the respondent in his affidavit.

In that ground, learned counsel for the petitioner submits that neither the Act of 1951 nor the Rules of 1961 provide about requirement for disclosure of assets by a candidate in the nomination form. It is only by virtue of order dated 27-03-2003 (Annexure -R-D) issued by Election Commission, candidate is required to furnish the details regarding his assets. In the said order, direction No.4 pertains to giving of information by a candidate regarding his assets, has been made effective. As such there is no rule or substantive provision in the Act of 1951 to disclose the assets along with affidavit and it is submission of learned counsel for the respondent that even if there are some errors in disclosing assets by the respondent in his affidavit, same cannot be a ground to declare the election as null and void under the purview of Section 100 of the Act of 1951.

11. As submitted, in the year 2002 vide Amendment Act 72 of 2002, Section 33A was inserted in the Act of 1951. By virtue of said provision, a prospective candidate is required to furnish the details of criminal case in which charges have been framed or cognizance has been taken. However, when this section was inserted, no corresponding Section regarding disclosure of assets on affidavit was inserted. Therefore, even if proposed candidate does not disclose its property correctly, at the most it can be an election offence for which punishment has been

prescribed under Section 125 A of the Act of 1951. But the same cannot be a ground to declare the election void either under Section 100 or Section 123 of the Act of 1951. It is further submitted that when in year 2002 this amendment regarding Right to Information was inserted, no corresponding amendment was made in Section 100 of the Act of 1951 that failure to disclose assets and liability in affidavit can be a ground to declare election null and void. Further, as per Section 98 of the Act of 1951, no power has been given to the High Court to punish any person filing false affidavit. Remedy lies somewhere else.

12. It is further submitted by learned counsel for the respondent that petitioner has not stated material facts as to how non disclosure of certain assets has affected the result of election and petitioner has not pleaded material facts that how and in what manner, result has been effected. Failure to plead essential facts is a fatal defect in the election petition and therefore, consequence of the same is dismissal of election petition. Since there will be no cause of action available with the petitioner to maintain this election petition, therefore, election petition filed by the petitioner deserves to be dismissed for want of cause of action.

13. Even otherwise on merits, the respondent submits that he has given disclosure of every property which respondent is in possession in proper manner. Right from para 11(a) to 11(m) every objection has been dealt with by the respondent in details in his application which is part of record and submitted that no objection in the said paras deserves consideration because he already disclosed such information. In **para 11(a), (b), (c), (d), (f), (j) and (k)** of election petition, the main allegation of election petitioner is that; the respondent has not referred the details of members having share in the HUF (Hindu Undivided Family) and extent of their holding and in response thereof, respondent referred the legal position that in Vidhan Sabha Election of 2018, no separate column regarding details of HUF existed, even then, the respondent referred the details of HUF but individual extent of holding of members in HUF; cannot be disclosed because there cannot be any particular share of any individual in HUF and it is not joint property or property of co-ownership in which extent of share is to be mentioned. In HUF, no specific share exists of any family member unless and until family is divided. Therefore, on this count, plea regarding HUF taken by the election petitioner, has no meaning and deserves to be rejected being frivolous and vexatious.

14. Regarding objection raised in **para 11(e),** the respondent disclosed the details of 4 shops in his ownership and disclosed the income received from rent and he referred the same in the affidavit filed by the respondent annexed by the petitioner in election petitioner as Annexure P/6, therefore, no cause of action arises on the basis of allegation contained in **para 11(e)** of the election petition. As far as **para 11(g)** of election petition is concerned, since no ancestral commercial

property was received by the petitioner, therefore, he mentioned "NIL" in the affidavit and election petitioner has nowhere referred any property which may fall under Ancestral Commercial Property, therefore, on this count also, the allegation levelled in **para 11(g)** is wild and without any affidavit and it is not disclosing any cause of action.

15. Regarding **para 11(h)** of the election petition, it is submitted by learned counsel for the respondent that the respondent has furnished the details; year of purchase, year of sale deed, market value of the property etc. Without going through affidavit, election petitioner in casual manner has raised this ground whereas details have been disclosed categorically. According to counsel for the respondent, it is clear act of perjury done by election petitioner. Therefore, no cause of action arises for already disclosed details and for not disclosing the details which were not required by law to be disclosed.

16. Regarding objection contained in **para 11(i)** of election petition, the respondent submitted that he disclosed the details of house in the ownership of respondent's father which is also mentioned as residential address in the nomination form. In clause 7(b)(iv) of affidavit, there is no column to disclose about the house belonging to father of the candidate and since the house situated in Baishpura is not owned by petitioner, therefore, the same could not have been mentioned by the respondent in his affidavit.

17. Regarding **para 11(l)** of election petition is concerned, it is submitted by the petitioner that his son Amit Pratap Singh is not dependent on the respondent and there is no pleading in the election petition that Amit Pratap Singh is dependent on respondent. In the affidavit, only property of self, spouse and dependents are required to be mentioned and there is no column provided in the affidavit to disclose the property of other family member. Therefore, this ground is also bereft of any cause of action.

18. Regarding objection raised in **para 11(m)** of the election petition, through different documents, the respondent submits that survey numbers have been mentioned and one survey number i.e. survey No.351 is neither the property of respondent nor his dependent which is required to be disclosed and other property vide survey number 350 (ancestral property) and survey No.358 (self-owned property) have been referred.

19. Not only this, regarding objection contained in **para 12** of election petition, it is submitted by learned counsel for the respondent that it discloses all the property and every assets and properties have been disclosed and only wild allegations have been levelled as per para 10 of the election petition because para 10 mainly deals in respect of criminal antecedents and not in respect of disclosure of property.

20. **Regarding para 13(i) to (iii),** it is submitted by learned counsel for the respondent that all the properties referred in para 13(i) have been disclosed and explained and if as per para 13(i) if he has not disclosed the property of his son - Amit Pratap Singh then he is not required to disclose the property of his son who is not dependent over him because Amit Pratap Singh does not fall under the definition of dependent as per Section 75-A of the Act of 1951. Therefore, even if property of son Amit Pratap Singh has not been disclosed, same will not give any cause of action.

21. Regarding **para 13(iii)** of election petition is concerned, it is submitted by learned counsel for the respondent that he disclosed the property of his late father Mathura Singh and he referred that certain survey numbers have been given new survey numbers by the Government and some survey numbers have been converted into different survey numbers after settlement and one property as alleged to have been purchased by father of respondent from Devnarayan in 2011 but father of respondent died way back in year 1998, therefore, in year of 2011, no property could have been purchased by him. Death certificate of father attached in support of submission.

22. It is further submitted that on same set of facts, petitioner earlier filed the election petition bearing No.10/2014 challenging earlier election of respondent (Vidhan Sabha Election, 2013) raising all the grounds in respect of properties mentioned in the present election petition. The respondent in response thereof filed an application under Order VII Rule 11 of CPC raising the ground of non disclosure of cause of action and this Court vide order dated 04-09-2014, allowed the application preferred by the respondent and election petition was dismissed. Besides other ground, election petition does not provide any triable cause of action.

23. Therefore, according to the respondent, the instant election petition is repetition of allegations contained in earlier election petition and when the said election petition was dismissed for want of cause of action and election petitioner did not prefer any SLP and accepted the said order then this case does not have any cause of action and suffers from Res judicata. Learned counsel for the respondent seeks dismissal of election petition on this ground also.

24. Learned counsel for the respondent referred the judgment of Hon'ble Apex Court in the case of *Union of India Vs. Association for Democratic Reforms and another*, (2002) 5 SCC 294 (referred as ADR Case) and referred para 48 of the judgment whereby certain directions have been given to the Election Commission of India to call for information on affidavit by every candidate while filing the nomination form. He also referred the judgment rendered by Apex Court in the case of *Peoples' Union of Civil Liberties vs. Union of India and another* (2003) 4 SCC 399 (referred as PUCL Case) wherein Section 33(A) and Section 33(B) of

the Act of 1951 was challenged and Apex Court declared Section 33 (B) to be ultra vires. It was held that if the candidate is discharged or acquitted, he is not required to disclose the said information. He further referred the judgment of Bombay High Court passed in the case of *Satish Mahadeorao Uke Vs. Devendra Gangadhar Fadnavis***,** reported in 2016 (2) Mah.LJ 613 and judgment passed in the case of *Narayan Gunaji Sawant Vs. Deepak Vasant Kesarkar,* 2011 (2) Mah.LJ 851.

25. Learned counsel for the respondent even alleged the conduct of petitioner to the extent that he submitted an affidavit without going into the record of the case and has levelled false allegations and some facts have been suppressed by the election petitioner about the particulars of some of the properties. Knowing fully well the outcome of private complaint, election petitioner tried to project the case as if the respondent facing trial in a criminal case. He further relied upon the judgment of Hon'ble Apex Court in the case of *T. Arivandandam Vs. T.V. Satyapal and Another*, AIR 1977 SC 2421 and submits that frivolous law suit ought to be dismissed at the threshold.

26. On the other hand, learned counsel for the petitioner who lost election to respondent (returned candidate) matched the vehemence and submitted that in the light of the judgment rendered by Hon'ble Apex Court in the case *Lok Prahari and another Vs. Union of India and others*, (2018) 4 SCC 699; wherein, it has been held that suppression of information or incomplete disclosure would amount to undue influence and in the present case respondent did not provide information in the nomination form about pending criminal case and about immovable assets and properties, therefore, he tried to exert undue influence over the voters and constitute offence of Section 123 of the Act of 1951.

27. Learned counsel submits that explanation furnished by the respondent in his instant application and the documents filed along with it, cannot be seen at this stage because election petition is a trial and respondent has an opportunity to submit reply/written statement and therefore, plaint cannot be rejected on the basis of allegations made by defendant in his written statement. He relied upon the judgment of Hon'ble Apex Court passed in the case of *Mayar (H.K.) Ltd. and others v. Owners & Parties, Vessel M.V. Fortune Express and others*, (2006) 3 SCC 100. It is further submitted that petitioner must be given opportunity to prove his case and the averments made in the petition are required to be taken into consideration. He relied upon *Madiraju Venkata Ramana Raju vs Peddireddigari Ramachandra Reddy,* (2018) 14 SCC 1.

28. So far as the plea regarding res-judicata is concerned, it is submitted by learned counsel for the petitioner that earlier election petition was in respect of 2013 elections whereas present election petition is in relation to 2018 elections, therefore, new election proceeding is new cause of action and affidavit which is

under challenge is different affidavit and disclosure of information is also different and therefore, when the subject matter is totally different thus, res-judicata would not apply. He relied upon the judgment of Hon'ble Apex Court in the case of *Satyendra Kumar and Ors. Vs. Raj Nath Dubey and Ors.,* (2016) 14 SCC 49. He further submits that if there is change of legal position then res judicata cannot apply. He relied upon the judgment of Hon'ble Apex Court in the matter of *Canara Bank vs. N.G. Subbaraya Setty,* (2018) 16 SCC 228.

29. In short, counsel for the petitioner pressed for rejection of application and continuation of election petition as per law.

30. Heard learned counsel for the parties at length and perused the documents available on record.

31. In the election petition, allegation of petitioner is that the respondent/ returned candidate has not disclosed the information about pendency of criminal case (private complaint) before JMFC, Lahar and not disclosed particulars of immovable assets and liabilities correctly.

32. The main ground raised in the application by respondent is in relation to 'Cause of Action'. It is the case of respondent that there are no material facts in the election petition which constitute a triable Cause of Action. Hon'ble Apex Court in the case of *Hardwari Lal v. Kanwal Singh* AIR 1972 SC 515 and in *Azhar Hussain Vs. Rajiv Gandhi* AIR 1986 SC 1253 categorically held that a suit (election petition) which does not furnish cause of action can be dismissed summarily. The mandate of Apex Court is categorical that all the facts which are essential to clothe the petition with complete cause of action must be pleaded and failure to plead even a single material fact would amount to disobedience of the mandate of Section 83 (1) (a) of the Act of 1951. Election petition therefore can be and must be dismissed if it suffers from any such defect. (See: *Azhar Hussain Vs. Rajiv Gandhi* AIR 1986 SC 1253). The Apex Court in this case considered inter play between Sections 83 and 86 of Act of 1951.

33**.** Not only this in the case of *D. Ramachandran Vs. R.V. Janakiraman,* (1999) 3 SCC 267, the Apex Court opined that in all cases of preliminary objection, the test is to see whether any of the reliefs prayed for could be granted to the appellant if the averments made in the election petition are proved to be true. For the purpose of considering a preliminary objection, the averments in the petition should be assumed to be true and the Court has to find out whether those averments disclose a cause of action or a triable issue as such. (Para 8)

In (1999) 2 SCC 217 [*H.D. Revanna Vs. G. Puttaswamy Gowda and others*], the Apex Court opined that Section 86 does not refer to Section 83 and non-compliance with Section 83 does not lead to dismissal under Section 86. It was held that non-compliance with Section 83 may lead to dismissal of the

petition if the matter falls within the scope of Order VI Rule 16 or Order VII Rule 11 CPC.

In (2009) 9 SCC 310 [*Anil Vasudev Salgaonkar Vs. Naresh Kushali Shigaonkar*], the Apex Court opined that election petition can be summarily dismissed if it does not furnish the cause of action in exercise of the power under the Code of Civil Procedure. Appropriate orders in exercise of the powers under the Code can be passed if the mandatory requirements enjoined by Section 83 of the RP Act to incorporate the material facts in the election petition are not complied with (Para 50). It was further held that there is no definition of "material facts" either in the R.P. Act, nor in CPC. Thus, after taking stock of a plethora of judgments, the Apex Court opined that all facts necessary to formulate a complete cause of action should be termed as "material facts". All basic and primary facts which must be proved by a party to establish the existence of cause of action or defence are material facts. **"Material facts"** in other words mean the entire bundle of facts which would constitute a complete cause of action (Para 58)."

34. Therefore, as per Section 87 of the Act of 1951 and the mandate of Apex Court from time to time, it is clear that election petition can be dismissed at the threshold by way of application under Order VII Rule 11 of CPC if material facts lack 'Cause of Action'. Now, this Court will deal the allegations accordingly.

Regarding allegation of criminal case.

35. According to election petitioner one criminal case is pending in the Court of JMFC, Lahar against the respondent in which trial Court vide order dated 02-09-2006 took cognizance and despite having the said case, respondent suppressed this fact in affidavit which is required to be filed under form 26 in compliance of Rule 4(A) of Conduct of Election Rules, 1961. It is worth mentioning the fact that Section 33(A) of the Act of 1951 is substantive provision under which a candidate is required to disclose the details about criminal antecedents. Section 33-A reads as under:

> ***"33A. Right to information.**—(1) A candidate shall, apart from any information which he is required to furnish, under this Act or the rules made thereunder, in his nomination paper delivered under sub-section (1) or section 33, also furnish the information as to whether -*
>
> *(i) he is accused of any offence punishable with imprisonment for two years or more in a pending case in which a charge has been framed by the court of competent jurisdiction; (ii) he has been convicted of an offence [other than any offence referred to in sub-section (1) or sub-section (2), or covered in sub-section (3), of section 8] and sentenced to imprisonment for one year or more.*

(2) The candidate or his proposer, as the case may be, shall, at the time of delivering to the returning officer the nomination paper under sub-section (1) of section 33, also deliver to him an affidavit sworn by the candidate in a prescribed form verifying the information specified in sub-section (1).

(3) The returning officer shall, as soon as may be after the furnishing of information to him under sub-section (1), display the aforesaid information by affixing a copy of the affidavit, delivered under sub-section (2), at a conspicuous place at his office for the information of the electors relating to a constituency for which the nomination paper is delivered."

36. From bare perusal of provision {Section 33(A)(1) of the Act of 1951}, it is clear that a candidate is required to disclose in his affidavit that he is accused of any offence punishable with imprisonment for two years or more in a pending case in which charge has been framed by the Court of competent jurisdiction. Interestingly, petitioner has filed the certified copy of the proceedings of the case in which reference of criminal case No.544/2006 has been referred but apparently the said fact does not represent the correct facts because the respondent has also placed and referred certified copy of the order dated 30-11-2015 by which the said complaint has been dismissed under Section 204(4) of Cr.P.C. This fact has not been placed on record by the petitioner, whereas the case was dismissed more than 3 years back (in year 2015) from election in 2018.

37. Not only this, election petitioner applied for certified copy on 05-01-2019 in which he sought final order dated 30-11-2015 and copy of the application which is filed as Annexure R/B indicates that petitioner knew this fact very well that complaint has been finally disposed of because application was a typed proforma in which those documents have been categorically mentioned which were sought and final order dated 30-11-2015 was sought. Therefore, petitioner knew very well about the fact that private complaint bearing No.544/2006 has already been decided and got dismissed. Therefore, allegation of petitioner regarding criminal antecedent lacks credence. The respondent was not required to submit details of that private complaint which was already dismissed under Section 204(4) of Cr.P.C.

38. As per Section 33(A) (1) of the Act of 1951 a candidate has to submit details of criminal cases in which charge has been framed by the Court of competent jurisdiction in a case where candidate is accused of any offence punishable with imprisonment for two years or more. This is not a pending case in which such eventualities existed, therefore, the respondent was not required to submit such details. Therefore, this allegation of petitioner had no merit. When respondent was not at all required to furnish the details of that criminal case (Private Complaint No. 544/2006) as per Section 33(A) of the Act of 1951 as well

as the mandate of Apex Court, thus no triable cause of action exists for the petitioner to agitate. It does not constitute 'Material Fact' as per Section 123 of the Act of 1951. Therefore, on both counts, this allegation has no triable cause of action.

Regarding allegations of immovable assets/properties.

39. Election petitioner in **para 11(a) to 11(m)** as well as **para 12 and 13** have raised the allegations regarding non disclosure or inadequate disclosure of certain informations and particulars regarding immovable properties and assets (of respondent) furnished by the respondent. Although petitioner has nowhere stated material facts as to how non disclosure of certain assets has affected the result of election and petitioner has not pleaded material facts that how and in what manner result has been affected. It is consistent view of Apex Court right from *Samant N. Balkrishna v. George Fernandez and others* (1969) 3 SCC 238 to *Azher Hussain* (supra) that election petitioner has to plead specifically material facts and the prejudice caused due to non disclosure of it and manner in which prejudice has been caused. Here no such pleading exists, only reiteration of language of statutory provision has been made, which cannot be treated as sufficient pleadings and material facts.

40. Nevertheless, even on close scrutiny, if the allegations would have been substantiated on merits, election petitioner could have survived a chance but on merits also it appears that petitioner has a very tight rope to walk. **In para 11(a), (b), (c), (d), (f), (j) and (k) of election petition,** the main allegation of petitioner is non reference of details of members and their share in HUF and extent of their holdings but neither the Vidhan Sabha Elections of 2018 contained any separate column regarding details of HUF (because this provision of HUF came into being w.e.f. 2019 General Elections) nor the fact that HUF does not carry extent of share of an individual and it is undivided fund, therefore, no percentage or extent of share of an individual member is required to be referred and cannot be referred. Therefore, no such allegation stands to legal scrutiny and it does not state any material fact and on this basis no triable cause of action exists.

Regarding objection raised in para 11 (e):

41. Regarding objection raised in **para 11(e),** the respondent disclosed the details of 4 shops in his ownership and disclosed the income received from rent and he referred the affidavit filed by the respondent annexed by the petitioner in election petitioner (sic : petition) as Annexure P/6, therefore, no cause of action arises on the basis of allegation contained in **para 11(e)** of the election petition.

42. As far as **para 11(g)** of election petition is concerned in since no ancestral commercial property was received by the petitioner, therefore, mentioned "NIL" in the affidavit and election petitioner has nowhere referred any property which may fall under Ancestral Commercial Property, therefore, on this count also, the

allegation levelled in **para 11(g)** is wild and without any affidavit and it is not disclosing any cause of action.

43. Regarding **para 11(h)** of the election petition, the respondent furnished the details; year of purchase, year of sale deed, market value of the property etc. Without going through affidavit, election petitioner in casual manner has raised this ground whereas details have been disclosed categorically. In fact, according to counsel for the respondent, it was a clear act of perjury done by election petitioner but that aspect is not subject matter of controversy in this petition.. Therefore, no cause of action arises for already disclosed details and for not disclosing the details which were not required by law to be disclosed.

44. Regarding objection contained in **para 11(i)** of election petition, he disclosed the details of house in the ownership of respondent's father which is also mentioned as residential address in the nomination form. In clause 7(b) (iv) of affidavit, there is no column to disclose about the house belonging to father of the candidate and further since the house situated in Baishpura is not owned by petitioner, therefore, the same could not have been mentioned by the respondent in his affidavit.

45. Regarding **para 11(l)** of election petition is concerned, son of respondent - Amit Pratap Singh is not dependent on the respondent and there is no pleading in the election petition that Amit Pratap Singh is dependent on respondent. In Section 75A of Act of 1951 and affidavit, only property of self, spouse and dependents are required to be mentioned and there is no column provided in the affidavit to disclose the property of other family members. Therefore, this ground is also bereft of any cause of action.

46. Regarding objection raised in **para 11(m)** of the election petition, through different documents, the respondent submits that survey numbers have been mentioned and one survey number i.e. survey No.351 is neither the property of respondent nor his dependent which is required to be disclosed and other property vide survey number 350 (ancestral property) and survey No.358 (self-owned property) have already been referred and part of record.

47. Not only this, regarding objection contained in **para 12** of election petition, it discloses all the property and every assets and properties have been disclosed and only wild allegations have been levelled as per para 10 of the election petition because para 10 mainly deals in respect of criminal antecedents and not in respect of disclosure of property.

48. Regarding **para 13(i) to (iii),** all the properties referred in **para 13(i)** have been disclosed and explained and if as per **para 13(i)** if he has not disclosed the property of his son -Amit Pratap Singh then he is not required to disclose the property of his son who is not dependent over him because Amit Pratap Singh

does not fall under the definition of dependent as per Section 75(A) of the Act of 1951. Therefore, even if property of son Amit Pratap Singh has not been disclosed, same will not give any cause of action.

49. Regarding **para 13(iii)** of election petition is concerned, respondent has disclosed the property of his late father Mathura Singh and he referred that certain survey numbers have been given new survey numbers by the Government and some survey numbers have been converted into different survey numbers after settlement and one property as alleged to be purchased by father of respondent from Devnarayan in 2011 whereas father of respondent already died in 1998, therefore, in year 2011, no property could have been purchased by him and his death certificate testifies this fact.

50**.** So far as legal position is concerned, Apex Court considered the fact that the voters have a fundamental right irrespective of any statutory right to know about antecedents of the candidate for which they are voting. Therefore, in the celebrated case of *Union of India Vs. Association for Democratic Reforms* (ADR case) held that jurisdiction of the Election Commission is wide enough to include all powers necessary for smooth conduct of election and the word "election" is used in a wide sense to reduce the entire process of election which consist of several stages and embraces many steps. It was a detailed judgment in which certain directions were given to the Election Commission of India in Paragraph 48 to call for information on affidavit from every candidate while filing the nomination form. Paragraph 48 is reproduced as under:

> *"48. The Election Commission is directed to call for information on affidavit by issuing necessary order in exercise of its power under Article 324 of the Constitution of India from each candidate seeking election to Parliament or a State Legislature as a necessary part of his nomination paper, furnishing therein, information on the following aspects in relation to his/her candidature:*
>
> *(1) Whether the candidate is convicted/acquitted/ discharged of any criminal offence in the past- if any, whether he is punished with imprisonment or fine.*
>
> *(2) Prior to six months of filing of nomination, whether the candidate is accused in any pending case, of any offence punishable with imprisonment for two years or more, and in which charge is framed or cognizance is taken by the Court of law. If so, the details thereof;*
>
> *(3) The assets (immovable, movable, bank balance, etc.) of a candidate and of his/her spouse and that of dependents.*

(4) Liabilities, if any, particularly whether there are any overdues of any public financial institution or Government dues.

(5) The educational qualifications of the candidate."

51. After the judgment in ADR case, four provisions were inserted in the Representation of People Act, 1951 vide Section 33A, 33B, 75A and 125A.

52. Validity of Section 33A and 33B of the Act of 1951 was again challenged in the case of *People's Union for Civil Liberties (PUCL) Vs. Union of India and Anr.,* (2003) 4 SCC 399 (referred as PUCL case) and Apex Court in the said case declared Section 33B of the Act of 1951 to be *ultra vires.* However, Apex Court upheld Section 33A of the Act of 1951 and further held that cases, in which the candidate is discharged or acquitted, is not required to be disclosed. It has been held by the Apex Court that right to know the candidate is a fundamental right and not a derivative fundamental right and is a separate right irrespective of the provisions of Representation of People Act. Later on, Rule 4 (A) of Conduct of Election Rule, 1961 was inserted and Form No. 26 was included in the Act of 1951, which is a format of affidavit, which a candidate is required to submit alongwith the nomination form.

53. In the case of *Resurgence India Vs. Election Commission of India and Anr.,* (2014) 14 SCC 189, Apex Court again upheld the fundamental right of voter to know full particulars of a candidate and discuss the different facets of affidavit and particulars contained into it. Conclusions are drawn in para 29 and are reproduced as under:-

"29. *What emerges from the above discussion can be summarized in the form of the following directions:*

29.1. *The voter has elementary right to know full particulars of a candidate who is to represent him in Parliament/Assemblies and such right to get information is universally recognized. Thus, it is held that right to know about the candidate is a natural right flowing from the concept of democracy and is an integral part of Article 19 (1) (a) of the Constitution.*

29.2. *The ultimate purpose of filing of affidavit along with the nomination paper is to effectuate the fundamental right of the citizens under Article 19 (1)(a) of the Constitution of India. The citizens are supposed to have the necessary information at the time of filing of nomination paper and for that purpose, the Returning Officer can very well compel a candidate to furnish the relevant information.*

29.3. *Filing of affidavit with blank particulars will render the affidavit nugatory.*

> ***29.4.*** *It is the duty of the Returning Officer to check whether the information required is fully furnished at the time of filing of affidavit with the nomination paper since such information is very vital for giving effect to the 'right to know' of the citizens. If a candidate fails to fill the blanks even after the reminder by the Returning Officer, the nomination paper is fit to be rejected. We do comprehend that the power of Returning Officer to reject the nomination paper must be exercised very sparingly but the bar should not be laid so high that the justice itself is prejudiced.*
>
> ***29.5****. We clarify to the extent that Para 73 of* ***People's Union for Civil Liberties case (supra)*** *will not come in the way of the Returning Officer to reject the nomination paper when the affidavit is filed with blank particulars.*
>
> ***29.6.*** *The candidate must take the minimum effort to explicitly remark as 'NIL' or 'Not Applicable' or 'Not known' in the columns and not to leave the particulars blank.*
>
> ***29.7.*** *Filing of affidavit with blanks will be directly hit by Section 125-A(i) of the RP Act. However, as the nomination paper itself is rejected by the Returning Officer, we find no reason why the candidate must be again penalized for the same act by prosecuting him/her."*

54. Spree of election reforms continued. In *Krishnamoorthy Vs. Sivakumar and Ors.,* (2015) 3 SCC 467, Apex Court concluded in para 94 as under:-

> ***"94****. In view of the above, we would like to sum up our conclusions:*
>
> ***94.1.*** *Disclosure of criminal antecedents of a candidate, especially, pertaining to heinous or serious offence or offences relating to corruption or moral turpitude at the time of filing of nomination paper as mandated by law is a categorical imperative.*
>
> ***94.2****. When there is non-disclosure of the offences pertaining to the areas mentioned in the preceding clause, it creates an impediment in the free exercise of electoral right.*
>
> ***94.3.*** *Concealment or suppression of this nature deprives the voters to make an informed and advised choice as a consequence of which it would come within the compartment of direct or indirect interference or attempt to interfere with the free exercise of the right to vote by the electorate, on the part of the candidate.*

> ***94.4.*** *As the candidate has the special knowledge of the pending cases where cognizance has been taken or charges have been framed and there is a non- disclosure on his part, it would amount to undue influence and, therefore, the election is to be declared null and void by the Election Tribunal under Section 100 (1)(B)of the 1951 Act.*
>
> ***94.5*** *The question whether it materially affects the election or not will not arise in a case of this nature."*

55. Later on, in the case of *Lokprahari Vs. Union of India and Ors.,* (2018) 4 SCC 699, the Apex Court reiterated the logic adopted by it in the case of *Krishnamoorthy* (supra) and given the opinion that non disclosure of assets and sources of income of the candidates and their associates would constitute a corrupt practice falling under heading **"Undue Influence"** as defined under Section 123 (2) of the Act of 1951. In short, information about the assets, liabilities and income of candidate are required to be given and this is the voters' fundamental right.

56. Considering the law laid down by Apex Court from time to time and testing it over the facts of the present case, it appears that all such information as alleged by the petitioner against the respondent regarding suppression are in fact disclosed by the returned candidate (respondent), therefore, respondent followed the mandate of Apex Court in letter and spirit. When returned candidate followed the mandate of Apex Court and directions of Election Commission and disclosed all his immovable properties and assets in affidavit then how the cause of action exists for petitioner to challenge the same in election petition. It would be a futile exercise to conduct election petition all throughout especially when pleadings of the election petition do not impute returned candidate regarding any omission or violation of any statutory provision.

57. The details of properties were earlier subject matter of Election Petition No. 10/2014 and this Court vide order dated 4/9/2014 reported in the case of *Rasal Singh Vs. Election Commission of India and Ors.,* 2015 (1) MPLJ 160, rejected the contentions of then election petitioner. Although, the ground of rejection was different so far as disclosure of immovable assets is concerned but properties as referred in the said election petition are almost the same vis-a-vis present election petition. After dismissal of the said election petition, petitioner did not move further to challenge the said order nor petitioner preferred to move any criminal case as per Section 125A of the Act of 1951; wherein, penalty is prescribed for filing false affidavit etc., therefore, it appears that petitioner is more interested in keeping the returned candidate entangled than to vindicate his stand on legal grounds.

58. Cumulatively, from the discussion made above, it appears that no material facts have been alleged or substantiated by the petitioner and no triable cause of action exists against the respondent. **Election is Festival of Democracy** and festivity of returned candidate cannot be diluted on such flimsy pretext because it may pollute democratic spirit and pious purpose for which elections are being held. Popular will of Sovereign (Read People) cannot be toppled at the drop of a hat or with wild allegations, surmises or conjectures. It should have some foundation for some corrupt practice or for non compliance of any statutory provision as referred in the Act of 1951. When facts are already mentioned in affidavit regarding immovable properties, then how Section 100 (1)(b) or Section 100 (1) (d) (iv) of Act of 1951 are attracted as Grounds for declaring election to be void has not been explained by petitioner. Definitions of "Corrupt Practice" or "Undue Influence" as per Section 100 or Section 123 of Act of 1951 are not applied and attracted in the present case.

59. So far as the ground of **Res-judicata** is concerned, from the nature of allegations contained in previous Election Petition No.10/2014 vis a vis present election petition, criminal cases mentioned in that petition were different and in that election petition question of educational qualification was also raised. Although the allegation of immovable properties/assets were same but said ground was decided on different basis. Other grounds also existed in the said case, therefore, regarding Res judicata, contention of petitioner deserves acceptance because subject matter of election petition bearing No.10/2014 was different although some of the grounds may be the same. Therefore, principle of Res judicata does not apply and therefore, the said submission of respondent that petition suffers from principle of res-judicata deserves to be rejected.

60. Here no such material facts exist to proceed against the respondent hence the application under Order VII Rule 11 of CPC is hereby allowed to the extent that it does not disclose any cause of action and prayer of respondent on the basis of Order VII Rule 11 (a) of CPC deserves to be allowed and is hereby allowed. So far as contents of application under Order VI Rule 16 of CPC is concerned it does not require consideration in the given set of facts because application is allowed on the basis of Order VII Rule 11 CPC, and therefore, the said contention is hereby rejected.

61. Cumulatively, after due consideration, this Court is of the considered opinion that respondent has made out his case on the basis of grounds contained in the application by way of Order VII Rule 11 (a) of CPC and petitioner could not plead material facts in election petition to proceed further. Lingering of election petition amounts to hanging of **The Sword of Damocles** over the respondent and he would not able to serve the people of constituency wholeheartedly for which he is elected and obliged to perform.

62. *Resultantly,* application (I.A.No.3632/2019) is allowed. Consequently, the election petition is hereby dismissed. In addition, election petition is liable to be dismissed for non compliance of Section 83(1) of the Act of 1951.

Petition dismissed

I.L.R. [2020] M.P. 1363
MISCELLANEOUS PETITION
Before Mr. Justice Sanjay Dwivedi
M.P. No. 4671/2018 (Jabalpur) decided on 8 May, 2020

MANISH TIWARI …Petitioner

Vs.

DEEPAK CHOTRANI & ors. …Respondents

A. Civil Procedure Code (5 of 1908), Order 21 Rule 68 & 69(2), Form No. 29 – Auction Proceedings – Jurisdiction & Discretion of Court – **Court has discretion and is competent to adjourn sale proceeding for a specified date or for specified time – As per order 21 Rule 69(2) CPC, if sale is adjourned for more than 30 days then fresh proclamation under Rule 68 shall be made – Executing Court on 08.02.2018 adjourned sale proceeding as an objection/ application was pending and later on 27.06.2018 the same was decided – As matter was adjourned for more than 30 days, Court rightly ordered for re-auction – Petition dismissed. (Paras 8 to 10)**

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 21 नियम 68 व 69(2), फार्म क्र. 29 – नीलामी की कार्यवाहियां – न्यायालय की अधिकारिता व विवेकाधिकार – विक्रय की कार्यवाही को एक विनिर्दिष्ट तिथि अथवा विनिर्दिष्ट समय के लिए स्थगित करने के लिए न्यायालय को विवेकाधिकार है तथा वह सक्षम है – सि.प्र.सं. के आदेश 21 नियम 69(2) के अनुसार, यदि विक्रय 30 दिनों से अधिक अवधि के लिए स्थगित किया जाता है तो नियम 68 के अंतर्गत नई उद्घोषणा की जायेगी – निष्पादन न्यायालय ने एक आपत्ति/आवेदन लंबित होने के कारण दिनांक 08.02.2018 को विक्रय की कार्यवाही स्थगित कर दी तथा तत्पश्चात् दिनांक 27.06.2018 को उक्त का विनिश्चय किया था – चूंकि मामला 30 दिनों से अधिक अवधि के लिए स्थगित किया गया था, न्यायालय ने पुनः नीलामी के लिए उचित रूप से आदेश किया – याचिका खारिज।

B. Civil Procedure Code (5 of 1908), Order 21 Rule 65 & 69(2), Form No. 29 and Contract Act (9 of 1872), Section 6 – Auction Proceedings – Acceptance/Declaration – **Executing Court adjourned the case and declined to accept bid/offer of petitioner – Sale not concluded – As per Order 21 Rule 65, there must be declaration about highest bidder as purchaser which gives right to claim acceptance of bid – There is no such order accepting bid of**

petitioner thus no right accrued in his favour – Proposal of petitioner quoting highest bid in auction stands revoked as the same was not accepted.

(Paras 12, 14 & 16)

ख. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 21 नियम 65 व 69(2), फार्म क्र. 29 एवं संविदा अधिनियम (1872 का 9), धारा 6 – नीलामी कार्यवाहियां – स्वीकृति/घोषणा – निष्पादन न्यायालय ने प्रकरण स्थगित किया तथा याची की बोली/प्रस्ताव को स्वीकार करने से इंकार किया – विक्रय समाप्त नहीं हुआ – आदेश 21 नियम 65 के अनुसार, सबसे ऊंची बोली लगाने वाले के बारे में क्रेता के रूप में घोषणा होनी चाहिए, जो बोली की स्वीकृति का दावा करने का अधिकार प्रदान करती है – याची की बोली स्वीकार करने का ऐसा कोई आदेश नहीं है अतः उसके पक्ष में कोई अधिकार प्रोद्भूत नहीं होता – नीलामी में सबसे ऊंची बोली लगाने का याची का प्रस्ताव प्रतिसंहृत क्योंकि उक्त को स्वीकार नहीं किया गया था।

Cases referred:

AIR 1967 SC 608, (2001) 6 SCC 213, AIR 1925 CALCUTTA 557, AIR 1942 MADRAS 776, AIR 1950 (ALLAHABAD) 450, AIR 1923 Pat 525.

Sankalp Kochar, for the petitioner.
Ravish Agrawal with *Ashish Shroti,* for the respondent Nos. 1 to 5.
S.K. Sharma, for the respondent Nos. 6 & 7.

O R D E R

SANJAY DWIVEDI, J.:-This Misc. Petition has been filed under Article 227 of the Constitution of India against the order dated 10.08.2018 and 13.08.2018 passed by the Court below whereby the Executing Court has ordered for initiation of fresh auction proceeding. Being aggrieved by the said orders, the petitioner filed this petition raising grievance that in pursuance to the execution proceedings in respect of the award passed by the Arbitrator, auction proceeding in which the petitioner has participated and his bid being highest one was accepted and, therefore, there was no occasion for the Executing Court to pass the orders impugned and to issue direction for initiating fresh auction.

2. The relevant facts are briefly stated here-in-under to appreciate the legal rival contentions urged on behalf of the parties in this petition.

"Respondent Nos.1 to 5 / decree-holders got an award dated 01.12.2011 in their favour from the sole Arbitrator. As per the said award, the decree-holders were entitled to 1/4th share of the property i.e. Sargam Cinema Hall, M.P. Nagar, Bhopal. To realize the said share, the award dated 01.12.2011 was put into execution. In furtherance to the execution proceeding, Sargam Cinema Hall was put to auction on the basis of the order passed by the Executing Court in which the petitioner participated and quoted the highest price i.e. an amount of Rs.14.16 Crore. On 08.02.2018, the counsel for the decree-holders has requested to finalize

the auction proceeding but on an objection raised by the counsel for the judgment-debtor for deciding his objection as one of their objections was pending, the Court refused to proceed further in the interest of justice and considering the fact that the application/objection filed by the judgment debtor is pending, accepted the request of judgment- debtor to decide his objection first and proceeding was adjourned for submitting reply to the pending application.

The objection submitted by the judgment-debtor under Order XXI Rule 66 of the CPC was finally decided by the Executing Court vide order dated 27.06.2018 and the same was rejected. However, on 10.08.2018, the Executing Court passed an order mentioning therein that on earlier occasion matter was fixed for auctioning the attached property, yet directed the decree-holders to pay the fresh process so that auction proceedings be re-initiated. On 13.08.2018, the Executing Court has fixed the date for auction i.e. 24.09.2018, 25.09.2018 and 26.09.2018.

The petitioner has filed this petition challenging the orders dated 10.08.2018 and 13.08.2018 passed by the Executing Court mainly on the ground that in view of the order dated 08.02.2018 when auction proceeding took place, the petitioner's bid was highest one and that was not finally accepted by the Executing Court. Merely because one objection was pending and it was required to decide, therefore, for that purpose only proceeding was extended but after deciding the objection there was no reason for the Court to pass an order for re-auction.

3. It is contended by learned counsel for the petitioner that in the impugned order, the Executing Court has not given any reason as to why in the earlier auction proceeding the bid submitted by the petitioner could not be accepted. It is claimed by the petitioner that the auction proceeding earlier held was already completed and he being highest and successful bidder was entitled to be declared as successful auction purchaser and without granting any opportunity to the petitioner, who had a vested right in the property in question, the impugned orders cannot be passed. As per the petitioner in pursuance to the highest bid submitted by him, his request for finalizing the auction was kept in abeyance only for the reason that the objection submitted by the judgment-debtor had to be decided and after the decision of the said objection, no reason was available with the Executing Court directing fresh auction proceeding without cancelling the earlier one. It is also contended by the learned counsel for the petitioner that unless the previous auction proceeding is cancelled for any justifiable reason, fresh auction proceeding cannot be initiated and, therefore, the petitioner by the instant petition is seeking quashment of the orders dated 10.08.2018 and 13.08.2018 passed by the Executing Court and further seeking direction that the Executing Court be directed to finalize the auction proceeding held on 08.02.2018 by accepting the

bid submitted by the petitioner. In support of his contentions, the learned counsel for the petitioner has placed reliance on the decisions reported in AIR 1967 SC 608 (*Janak Raj Vs. Gurdial Singh and another*) and (2001) 6 SCC 213 (*Rajendra Singh Vs. Ramdhar Singh and others*).

4. *Per contra,* Shri Ravish Agrawal, learned Senior Counsel appearing for respondent Nos.1 to 5 has submitted that the order dated 08.02.2018 is very clear and would amount to refusal for declaring the petitioner as successful bidder and further it indicates that the Court has rightly not accepted the bid offered by the petitioner. It is also contended by the learned Senior Counsel that the order dated 08.02.2018 clearly reveals that the Executing Court has refused the proposal submitted by the petitioner and as such refused to make declaration in favour of the petitioner considering him to be a successful bidder and has also not finalized the auction proceeding. He further submits that as per Section 6 of the Indian Contract Act, 1872 the offer submitted by the petitioner since not accepted, therefore, it is treated to be revoked. He further submits that in view of the provisions of Rule 84 of Order XXI of CPC, it was obligatory for the petitioner to deposit 25% of the amount of purchase money but that was not done by the petitioner, therefore, the order for re-sale in such default was automatic and cannot be said to be illegal. In support of his contention, he has placed reliance on the decisions AIR 1925 CALCUTTA 557 (*Tularam Bhutunia Vs. Purnendra Narain Rai and others*); AIR 1942 MADRAS 776 (*The Raja Of Bobbili Vs. A. Suryanarayan Rao Guru and four others*) and AIR 1950 (ALLAHABAD) 450 (*Ebadullah Khan Vs. Municipal Board and another*).

5. I have heard the factual and rival contentions urged by the learned counsel for the parties and answered the same as discussed below.

6. In my opinion, the following questions emerge to be adjudicated:

(I) Whether the order dated 08.02.2018 and the language used therein would amount to refusal of petitioner's proposal and not accepting his bid by the Executing Court?

(II) As to whether the order passed by the Executing Court on 10.08.2018 and 13.08.2018 directing re-auction, without canceling the earlier auction proceeding, can be said to be legal or proper?

7. From the order-sheets submitted by the petitioner, it reflects that on 24.01.2018, the Executing Court as per the required provision of Rule 65 of Order XXI of CPC has fixed the date for auction i.e. 06.02.2018, 07.02.2018 and 08.02.2018 and thereafter, as per order-sheet dated 08.02.2018, it reveals that the auction proposal was submitted before the Executing Court by the office of Nazarat, Bhopal. As per the said proposal, the maximum bid was offered

amounting to Rs.14.16 Crore by the petitioner. The counsel for the decree-holders had requested to finalize the auction bid, however, the counsel for judgment-debtor had raised an objection and had submitted that the application filed by him under Section 151 of the CPC be decided first and then only the proceeding in furtherance to the auction proposal submitted, be initiated. The Court, thereafter passed the order saying that since the application is pending, therefore, it is not in the interest of justice to proceed further in pursuance to the proposal of auction submitted. For the purpose of convenience the operative part of the order passed by the Executing Court on 08.02.2018 is reproduced here-in-under:-

> ''डिक्रीधारी अभिभाषक ने नीलाम बोली अंतिम किये जाने का भी निवेदन किया, जिस पर निर्णितऋणी क्र.01 अभिभाषक ने आपत्ति प्रस्तुत कर आवदेन के निराकरण के उपरांत ही नीलाम प्रतिवेदन के आधार पर कोई कार्यवाही किये जाने का निवेदन किया।
>
> जहां आवेदन लंबित है तब नीलाम बोली के संबंध में प्राप्त प्रतिवेदन के आधार पर आज कोई कार्यवाही की जाना न्यायोचित प्रतीत नहीं होता। अतः निर्णितऋणी क्र. 01 का निवेदन स्वीकार किया गया।
>
> प्रकरण आज प्रस्तुत दोनों आवेदन पत्रों के जवाब हेतु दिनांक 16/2/18 को पेश हो।''

8. From the aforesaid order and the language used therein although it is not clear and the Executing Court not in so many words has disclosed its intention that the proposal and the offer of the petitioner has not been accepted and auction proceeding is not being finalized but considering the statutory position, it can be gathered that the Court was not inclined to accept the proposal or offer submitted by the petitioner and to conclude the auction proceeding treating him to be a successful bidder. From the aforesaid order, it is also clear that the counsel for the decree-holders though made a request for concluding the auction proceeding but the Court has refused to pass any order in respect of the said proposal which was placed before the Court. For ready reference the provisions of Order XXI Rule 69 of the CPC are reproduced hereinunder:-

> **"69. Adjournment or stoppage of sale.-** (1) The Court may, in its discretion, adjourn any sale hereunder to a specified day and hour, and the officer conducting any such sale may in his discretion adjourn the sale, recording his reasons for such adjournment:
>
> Provided that, where the sale is made in, or within the precincts of, the court-house, no such adjournment shall be made without the leave of the Court.
>
> (2) Where a sale is adjourned under sub-rule (1) for a longer period than thirty days a fresh proclamation under rule 67 shall be made, unless the judgment-debtor consents to waive it.

> (3) Every sale shall be stopped if, before the lot is knocked down, the debt and costs (including the costs 4 of the sale) are tendered to the officer conducting the sale, or proof is given to his satisfaction that the amount of such debt and costs has been paid into the Court which ordered the sale."

9. If the aforesaid provisions are seen, it is clear that the Court is competent to adjourn the sale proceeding for a specified date or for specified time. Simultaneously, sub-rule (2) of Rule 69 of Order XXI further makes it clear that if the sale is adjourned for a period longer than 30 days then fresh proclamation under Rule 68 shall be made.

10. Likewise, it is necessary to go-through the conditions contained in Form No.29 which is issued under the requirement of Order XXI Rule 66 seen wherein condition Nos.3 and 4 are relevant, which are quoted hereinunder:-

> "3. The highest bidder shall be declared to be the purchaser of any lot, provided always that he is legally qualified to bid, and provided that it shall be in the discretion of the Court or officer holding the sale to decline acceptance of the highest bid when the price offered appears so clearly in adequate as to make is advisable to do so.
>
> 4. For reasons recorded, it shall be in the discretion of the officer conducting the sale to adjourn it subject always to the provisions of rule 69 of Order XXI."

As per condition No.4, it is clear that the Court has complete discretion to adjourn the sale proceeding subject to provision of Rule 69 of Order XXI. Thus, it is clear that the order passed by the Court on 08.02.2018 assigning reason that it would not be in the interest of justice to finalize the proceeding when application/objection is pending and adjourned the case. It is clear that the Court has exercised its discretion as per the requirement of Order XXI Rule 69. The Court has declined to accept the bid/offer of the petitioner. It is further clear that the proceedings since adjourned for more than 30 days and application/objection was decided vide order dated 27.06.2018, the Court has rightly ordered for re-auction or for initiating fresh proceedings by issuing fresh process fee.

11. However, I am not convinced with the argument advanced by the learned counsel for the respondents that as per Rule 84 of Order XXI, the petitioner was under obligation to deposit 25% of the bid amount and if the same was done re-sale was properly ordered. Here it is not a case of non-compliance of the provisions of Rule 84. Such a situation arises only when offer or bid of the auction purchaser is accepted declaring the same to be a successful bidder then he would be required to deposit 25% of the bid amount immediately. Here in this case there was no order of acceptance of offer submitted by the petitioner, therefore, no

question arises for complying with the provisions of Rule 84 and due to failure of which re-sale is ordered.

12. From the aforesaid discussion it is clear that in the present case, the Court has exercised its discretion as per the requirement of condition of sale contained in form No.29 which is in consonance with the requirement of provisions of Order XXI Rule 69 of CPC assigning reason that acceptance of bid in the fact and situation when objection of the judgment-debtor is pending, the same would amount to refusal of accepting the amount of offer and as such in my opinion no right is accrued in favour of the petitioner. In this regard it is apt to consider the amendment of our High Court made in Rule 65 of Order XXI of CPC, which reads as under:-

> "Madhya Pradesh,- In order XXI, in rule 65, at the end, insert the following words,-
>
> "Such officer or person shall be competent to declare the highest bidder as purchaser at the sale, provided that, where the sale is made in, or within the precincts of the Court-house, no such declaration shall be made without the leave of the Court."
>
> [Vide Madhya Pradesh Gazette, dated 16th Sepember, 1960]"

Now, the aforesaid provision makes it clear that there must be declaration about highest bidder as purchaser which gives right to claim acceptance of bid but admittedly in the present case required declaration is missing.

13. It is also not a case of the petitioner that the Court has not judiciously exercised its discretion. The petitioner has not objected and assailed the order dated 08.02.2018 but has assailed the order whereby the Executing Court has directed for fresh auction proceeding on 10.08.2018 and 13.08.2018 whereas the Executing Court on 08.02.2018 has infact refused to accept the bid of the petitioner and as such he was not considered and declared to be a successful bidder and further it can be seen that the request for concluding the auction proceeding made by the counsel for the decree-holders was also made, but not accepted. The said order could have been challenged on the ground that the Court cannot adjourn the proceeding and there was no reason for exercising the discretion as there was no reason available with the Court for not accepting the highest bid of the petitioner. Moreover, the order dated 08.02.2018 is not under challenge.

14. The learned Senior Counsel for the respondents has also submitted that in view of Section 6 of the Contract Act, the proposal made by the petitioner has been treated to be revoked by the lapse of reasonable time. Section 6 of the Contract Act is accordingly taken into account and is quoted here-in-under:-

> **"S.6 Revocation how made,-** A proposal is revoked -
>
> (1) by the communication of notice of revocation by the proposer to the other party;
>
> (2) by the lapse of the time prescribed in such proposal for its acceptance, or, if no time is so prescribed, by the lapse of the reasonable time, without communication of the acceptance;
>
> (3) by the failure of the acceptor to fulfill a condition precedent to acceptance; or
>
> (4) by the death or insanity of the proposer, if the fact of his death or insanity comes to the knowledge of the acceptor before acceptance."

From the aforesaid provisions, it is clear that with the lapse of time if proposal is not accepted, the said proposal is treated to be revoked. The provision of Section 6 of the Contract Act is read with the provision of Order XXI Rule 69 of CPC and the condition contained in form No.29 especially condition No.4. It is clear that in the existing facts and circumstances of the case, the proposal submitted by the petitioner quoting the highest bid in auction proceeding was revoked as the same was not accepted.

15. In this regard, the judgment relied by the learned counsel for the respondents in the case of *Ebadullah Khan* (supra), paragraph 6 onward the Court has observed as under:-

> **"6.** To take the first question first, it would be useful to refer to Rr. 65 and 81 of O. 21 and also to para 3 of the 'conditions of sale' in Form 29, Appendix E, Code of Civil Procedure Under S. 65, every sale in execution of a decree has to be
>
> > "conducted by an officer of the Court or by such other person as the Court may appoint in this behalf and shall be made by public auction *in manner prescribed."* Rule 81(1) lays down that "on every sale of immovable property the person declared to be the purchaser shall pay *immediately* after such declaration a deposit of twenty-five per cent, on the amount of his purchase-money to the officer or other person conducting the sale, *and in default of such deposit, the property shall forthwith be re-sold."*
>
> **7.** On the plain reading of this rule, it would be manifest that the sale of the property, the payment of twenty-five per cent, of the purchase money and, in case of default in this behalf, the re-sale of the property shall all take place *in the same continuation and as parts of the same proceeding.* There is nothing to suggest here that there can be any break or interval of time between any one and another of the three stages herein mentioned. I

emphasise this, because the argument of the learned counsel for the applicant was that the word "declared" in the Rule meant 'declared by the Court" and not by the Amin; that is to say, after the last highest bid has been made, there should, in every case, be a reference to the Court which alone can accept that bid, and it is after the same has been accepted that the purchaser is to pay twenty-five percent of the purchase money, and it is after he has failed to pay this that the property can be 're-sold.' This argument obviously ignores the word 'immediately' and the word 'forthwith' appearing in the Rule. These words, in my view, wholly negative the idea of any break or interval of time between one process and another, and they do unmistakeably point that the various stages form an unbroken and continuous proceeding.

8. The same point was sought to be made out from para 3 of the "conditions of sale in Appendix B" to which I have already referred. This reads:

> "The highest bidder shall be declared to be the purchaser of any lot, provided always that he is legally authorised to bid and provided that it shall be in the discretion of the Court or *officer holding the sale to decline acceptance of the highest bid,* when the price offered appears so clearly Inadequate as to make it advisable to do so." The word 'declared' here also was interpreted by the learned counsel as 'declared by the Court' and not by the officer conducting the sale. There is, in my opinion, even a clearer answer to the argument in this paragraph than what we have seen in R. 84(1) of O. 21 of the CPC. The words "or officer holding the sale to decline acceptance of the highest bid" clearly authorise the said officer to 'decline acceptance' of that bid, and, if he is entitled to decline, he is, by parity of reasoning, also entitled to accept such a bid. I put this again and again to the learned counsel, and I confess that I got no answer. Indeed, on the clear language of the paragraph, no answer was possible.

9. As I read the word 'declared' in this para-graph as well as in R. 84(1), it simply implies and has reference to a necessary consequence that should follow a bidder having made the highest bid. As soon as that stage has arrived, namely, as soon as it has been found that no higher bidder is forthcoming, the Amin conducting the sale has to take cognizance of the fact and his mere recognition of the position that so and so and none other is the higher bidder by itself constitutes a 'declaration' of the fact that he is the highest bidder. No formal or separate order, not even by the Amin himself, is necessary to constitute a 'declaration' that so and so is the highest bidder. In *Nurdin* v. *Bulaqi Mal & Sons,* A.I.R. 1931 Lah. 78: (131 I.C. 227) and *Hoshnak Ram* v. *Punjab National Bank Ltd.,* A.I.R. 1936 Lah. 555 : (166 I.C. 603), it was held that after the knock by the

Amin, the highest bidder would be 'deemed' to be 'declared' as the purchaser.

10. In many cases it may happen that the sale is conducted not in the court compound but far away from it, so that an immediate reference to the Presiding Officer to 'declare' the highest bidder as the purchaser or to accept the sale may not be feasible. In such cases, the requirement enjoined by R. 84(1) of O. 21 of the CPC that, in case of the purchaser's failure to deposit the: twenty-five per cent, of the purchase money, the property shall be 'forthwith re-sold' may go altogether unheeded. The anomaly between this provision and the contention that in every case the Amin should make a reference to the Court for the acceptance of the sale was clearly pointed out in *Maung Ohn Tin* v. *P.R. Chettyar Firm*A.I.R. 1929 Rang. 311 : (7 Rang. 425) and *Lokman Chhabilal* v. *Motilal Tulshi Ram,* A.I.R. 1939 Nag. 269 (I.L.R. (1941) Nag. 485). It was there held that the possibility of time intervening between the making of the highest bid and an order by the Court accepting the bid, where the Court was sitting far away could not have been within the contemplation of the framers of R. 84(1) of O. 21 of the CPC, for, otherwise, the language of the Rule would have been far different. As regards the power of the Amin to declare the highest bidder and accept and conclude the sale, other cases, *Munshi Lal* v. *Ram Narain,* 35 ALL. 65 : (17 I.C. 783), *Abdullah Khan* v. *Ganpat Rai,* A.I.R. 1930 Lah. 41 : (118 I.C. 900); *Mt. Khairan* v. *Alliance Bank Simla Ltd.,* A.I.R. 1919 Lah. 809 : (50 I.C. 914) and *Mannu Lal* v. *Nanhe Lal,* A.I.R. 1933 Nag. 123 : (29 N.L.R. 62) may also be cited.

11. Learned counsel for the applicant invited my attention to a number of cases in support his argument that it was only the Court and not the Amin who could accept and conclude a sale in favour of the highest bidder. I would notice these now.

12. The first was *Radhey Lal* v. *Mt. Janki Devi,* A.I.R. (22) 1935 ALL. 204 : (153 I.C. 477). There is nothing in that case showing that the Amin bad really accepted the bid. The purchaser, Mt. Janki was allowed to withdraw her deposit as she was found to have made her bid under a misapprehension. This case, therefore, is not in point.

13. The second was *Fazil Meah* v. *Prosanna Kumar Roy,* A.I.R. (10) 1923 Cal. 316 : (68 I.C. 305). This was a single Judge case following an unreported decision of the same Court and it, no doubt, held that, under para 3 of the 'Conditions of Sale' in Form No. 29 of Appendix E, Code of Civil Procedure, the Court had a discretion to direct a re-sale of the property. With respect, I find it impossible to reconcile this view to the clear language of the said paragraph, which in terms confers a parallel jurisdiction on the Court and the officer conducting the sale to decline to accept the bid, and, therefore, naturally also to accept the bid.

> **14**. The third was *Jaibahadar Jha* v. *Matukdhari Jha,* A.I.R. 1923 Pat. 626 : (2 Pat. 518). There also the sale had not been accepted by the Amin, the Munsif himself having undertaken to accept the bid, asking the Amin to 'close' the auction. The learned Judges pointed out:
>
> "By his order 'close' he (Munsif) mere; meant the officer conducting the sale to stop the action and put up for the Court's signature the order knocking down the property and declaring the purchaser under O. 21, R. 84. The sale in his view would be completed only after the Court's signature was obtained."
>
> No one denies the power of the Court to accept the sale, where it has not already be accepted by the officer conducting the sale. This case also, therefore, is not in point."

16. From the observation made by the Court, it is clear that there must be an order by the Court accepting the bid. Admittedly, here in this case there is no order accepting the bid of the petitioner, therefore, no right accrues in his favour unless the order not accepting the bid is held illegal. Indisputably, the order for not accepting the bid is not under challenge i.e. 08.02.2018. Thus, the order passed by the Court for re-auction can also not be held illegal.

17. In view of the above enunciation of law as held by the Allahabad High Court, it is clear that as per the provision of Order XXI Rule 69 and conditions contained in form No.29, the Court has discretion to direct re-sale. The Court has further observed, relying upon a decision of Patna High Court in AIR 1923 Pat 525 (*Jaibahadar Jha Vs. Matukdhari Jha*) that the sale was completed only after the Court's signature was obtained. Here in this case, it is clear that the proposal submitted before the Executing Court was not accepted by the Court and therefore the sale cannot be considered to be concluded as per the requirement of Rule 82 of Order XXI.

18. The learned Senior counsel for the respondents has placed reliance on the decision of Madras High Court in case of *The Raja of Bobbilli* (supra) saying it is the discretion of the Court to accept or not to accept the highest bid. Although learned counsel for the petitioner has contended that in the case of Madras High Court it is also observed by the Court that as per Section 6 of the Indian Contract Act, the lapse of time before acceptance of a proposal whether arising from the adjournment of the auction proceeding or otherwise is ground for presuming revocation only when it is unreasonably long. The learned counsel for the petitioner submitted that here in this case there was no reason assigned and thus, not accepting the bid of the petitioner cannot be held to be proper. But I am not convinced with the contention raised by the learned counsel for the petitioner for the reason that if we see the order dated 08.02.2018 it clearly reveals that the Executing Court has found that it would not be proper to accept the bid when the application/objection of the judgment-debtor is pending. Unfortunately the order

dated 08.02.2018 is not under challenge and it is not contended by the learned counsel for the petitioner that the said order of the Court is illegal and reason assigned therein was not sustainable.

19. The learned counsel for the petitioner has also placed reliance upon the judgment in the case of *Janak Raj* (supra) but in my opinion that judgment is not applicable in the facts and circumstances of the present case because the Supreme Court in the said case has dealt with the question "whether a sale of immovable property in execution of a money decree ought to be confirmed when it is found that the *ex parte* decree which was put into execution has been set aside subsequently.". However, it is clear from the aforesaid discussion that here in this case the offer of the petitioner was not accepted by the Court and there was no question for concluding the sale and as such the aforesaid case and law laid down therein is not applicable.

20. Likewise in the case of *Rajendra Singh* (supra) the same situation arose as the Court was dealing with the question for setting aside the sale by the Court exercising the provision of Order XXI Rule 90. The Supreme Court in the said case in paragraph 17 has observed as under:-

> "17. The other ground for setting aside the same is the inadequacy of the price. The respondents have not alleged any fraud or material irregularity in the conduct of the court's auction-sale, whereby they suffered injustice. Mere inadequacy of the price is not a ground for setting aside the court sale. That finding of the learned judge also is not sustainable in the law."

21. However, as already made clear, in the present case the issue involved is whether re-auction ordered by the Court is proper or not and question for scrutinizing the reason for setting aside the sale by the Court is not involved, therefore, said aspect is not required to be considered and has no significance.

22. In view of the aforesaid discussion, the questions emerged for adjudication, are accordingly answered. The petition, therefore, is found without any substance, and the orders impugned passed by the Court for fresh auction cannot be said to be illegal as the same does not suffer from any material irregularity and can also not be said that while exercising the discretion, the Court has exceeded its jurisdiction as the said discretion is exercised by the Court judiciously.

23. In the result, the petition being without any substance, is hereby **dismissed.**

Petition dismissed

I.L.R. [2020] M.P. 1375 (DB)
REVIEW PETITION

Before Mr. Justice Prakash Shrivastava & Mr. Justice S.K. Awasthi

R.P. No. 1765/2018 (Indore) decided on 13 May, 2020

THE SUPERINTENDING ENGINEER (O & M) M.P. PASCHIM KSHETRA VIDYUT VITRAN CO. & ors. …Petitioners

Vs.

NATIONAL STEEL & AGRO INDUSTRIES LTD. & ors. …Respondents

***A. Constitution – Article 226 and Electricity Act (36 of 2003), Section 126 – Review – Error Apparent on Face of Record* – Held – Non consideration of binding decision of superior Court, hearing of matter by Division Bench which was required to be heard by Single Bench, entertaining a petition challenging the same orders for which an earlier petition has already been decided; for levy of penalty u/S 126 of Act, applying principle of *mens rea* and giving directions contrary to statutory provisions are the errors apparent on face of record – Case of review made out – Order passed in writ petition reviewed and recalled, whereby petition is dismissed.**

(Paras 12, 14, 18, 19, 23 & 25 to 29)

क. संविधान – अनुच्छेद 226 एवं विद्युत अधिनियम (2003 का 36), धारा 126 – पुनर्विलोकन – अभिलेख पर प्रकट त्रुटि – अभिनिर्धारित – वरिष्ठ न्यायालय के बाध्यकारी विनिश्चय को विचार में न लिया जाना, खण्ड न्यायपीठ द्वारा मामले की सुनवाई, जिसे एकल न्यायपीठ द्वारा सुना जाना अपेक्षित था, समान आदेशों को चुनौती देते हुए एक याचिका को ग्रहण किया जाना, जिसके लिए पूर्वतर याचिका पहले ही विनिश्चित की जा चुकी है; अधिनियम की धारा 126 के अंतर्गत शास्ति उद्ग्रहित करने हेतु आपराधिक मनःस्थिति के सिद्धांत को लागू किया जाना एवं कानूनी उपबंधों के विपरीत निदेश देना, अभिलेख पर प्रकट त्रुटियां है – पुनर्विलोकन का प्रकरण बनता है – रिट याचिका में पारित आदेश पुनर्विलोकित एवं वापस लिया गया, जिससे याचिका खारिज।

***B. Constitution – Article 226 & 227 and Electricity Act (36 of 2003), Section 126(6) – Scope & Jurisdiction* – Held – Jurisdiction of High Court under Article 226/227 cannot be invoked to direct statutory authorities to act contrary to law – As per Section 126(6), assessment has to be made at a rate equal to twice the tariff applicable – Direction of Court is contrary to Section 126(6) of the Act, which is not permissible in law. (Paras 20, 21 & 23)**

ख. संविधान – अनुच्छेद 226 व 227 एवं विद्युत अधिनियम (2003 का 36), धारा 126(6) – व्याप्ति व अधिकारिता – अभिनिर्धारित – अनुच्छेद 226/227 के अंतर्गत उच्च न्यायालय की अधिकारिता का अवलंब कानूनी प्राधिकारियों को विधि के विपरीत कार्य करने हेतु निदेश देने के लिए नहीं लिया जा सकता – धारा 126(6) के अनुसार, निर्धारण,

प्रयोज्य टैरिफ के दोगुने के बराबर की दर से किया जाना होगा – न्यायालय का निदेश, अधिनियम की धारा 126(6) के विपरीत है जो कि विधि में अनुज्ञेय नहीं है।

C. Electricity Act (36 of 2003), Section 127(6) – Rate of Interest – **Held – As per Section 127(6), interest @ 16% p.a. is chargeable, hence Court could not have issued directions for charging interest at the rate contrary to statutory provisions – It is error apparent on face of record. (Paras 24 & 25)**

ग. विद्युत अधिनियम (2003 का 36), धारा 127(6) – ब्याज की दर – अभिनिर्धारित – धारा 127(6) के अनुसार, 16% प्रति वर्ष की दर से ब्याज प्रभार्य है अतः न्यायालय, कानूनी उपबंधों के विपरीत दर पर ब्याज प्रभारित करने हेतु निदेश जारी नहीं कर सकता – यह अभिलेख पर प्रकट त्रुटि है।

D. Constitution – Article 226 – Review – Grounds – **Held – For review there must be error apparent on face of record – Re-appraisal of entire evidence on record for finding error would amount to exercise of appellate jurisdiction which is not permissible – Mere fact that two views on a subject are possible is not a ground of review of earlier judgment passed by a bench of same strength – When remedy of appeal is available, power of review should be exercised by Court with great circumspection. (Para 27)**

घ. संविधान – अनुच्छेद 226 – पुनर्विलोकन – आधार – अभिनिर्धारित – पुनर्विलोकन हेतु अभिलेख पर प्रकट त्रुटि होनी चाहिए – त्रुटि का पता लगाने हेतु अभिलेख के संपूर्ण साक्ष्य का पुनर्मूल्यांकन, अपीली अधिकारिता के प्रयोग की कोटि में आयेगा जो कि अनुज्ञेय नहीं है – मात्र यह तथ्य कि एक विषय पर दो दृष्टिकोण संभव हैं, समान संख्याबल की एक न्यायपीठ द्वारा पारित किये गये पूर्वतर निर्णय के पुनर्विलोकन का आधार नहीं है – जब अपील का उपचार उपलब्ध है, न्यायालय द्वारा पुनर्विलोकन की शक्ति का प्रयोग अति सतर्कता के साथ किया जाना चाहिए।

E. Constitution – Article 226 – Constructive Res-Judicata – **Held – When an earlier petition has already been decided by Division Bench and further approved by Supreme Court, this Court should not entertain a successive petition challenging the same orders adding some additional grounds and ancillary relief. (Para 14)**

ङ. संविधान – अनुच्छेद 226 – आन्वयिक पूर्व न्याय – अभिनिर्धारित – जब एक पूर्वतर याचिका को पहले ही खंड न्यायपीठ द्वारा विनिश्चित किया जा चुका है और आगे उच्चतम न्यायालय द्वारा अनुमोदित किया जा चुका है, इस न्यायालय को कुछ अतिरिक्त आधारों को और अनुषंगी अनुतोष को जोड़ते हुए, उन्हीं आदेशों को चुनौती देने वाली एक उत्तरवर्ती याचिका ग्रहण नहीं करनी चाहिए।

Cases referred:

(2012) 2 SCC 108, (2006) 5 SCC 361, (2006) 8 SCC 294, AIR 1998 SC 1344, LAWS (ALL) 2007-11-42, (2015) 13 SCC 50, (2014) 1 GLH 483, AIR

1965 SC 1150, (1996) 6 SCC 665, (2007) 7 SCC 269, (2008) 14 SCC 171, AIR 1970 SC 253, (2002) 1 SCC 279, (1996) 4 SCC 453, (2017) 7 SCC 729, (2017) 8 SCC 47, (1995) 1 SCC 170, (2000) 6 SCC 224, (2006) 4 SCC 78, (2013) 8 SCC 337, (2014) 14 SCC 77, (2017) 4 SCC 692, (2018) 4 SCC 587.

Piyush Mathur with *D.S. Panwar* & *Akash Vijayvargiya*, for the petitioner.

A.K. Sethi with *S. Chandravanshi*, for the respondent No. 1.

Vinay Saraf with *Rizwan Khan*, for the intervenor.

Ambar Pare, G.A. for the respondent/State.

O R D E R

The Order of the Court was passed by :

PRAKASH SHRIVASTAVA, J:- Petitioner is seeking review of the order dated 22/10/2018 passed by the division bench in WP No.22734/2017 allowing the writ petition by holding that instead of penalty, writ petitioner (respondent No.1 herein) is liable to pay interest on the amount of actual maximum demand charges and actualTMM charges and further issuing a direction to raise fresh demand for the period of unauthorised use at the rates equal to the tariff rules applicable to actual minimum demand charges along with interest thereon at agreement rate of interest.

2. The respondent No.1 runs a steel industry. On 4/4/2015 a team of officers of the review petitioner MPPKVVCL had visited the premises of respondent No.1 and had found unauthorised use of electricity by respondent No.1. The provisional assessment order dated 16/4/2015 was passed and demand of Rs.49,30,64,654/- was raised. Objections were submitted by respondent No.1 against provisional assessment order and thereafter final assessment order dated 13/5/2015 determining the liability of Rs.49,30,64,654/- for the period May 2009 to February 2015 was passed. These orders were subject matter of challenge in WP No.2814/2015 which was initially allowed by the learned Single Judge by order dated 28/7/2015 but WA No.494/2015 was allowed by the division bench and order of single bench was set aside and writ petition was dismissed. SLP against this order was also dismissed. The respondent No.1 then submitted representation for fixing the instalments to pay the amount and the prayer to that extent was allowed and respondent No.1 was allowed to pay the balance amount in 36 instalments. The respondent No.1 filed second writ petition being WP No.22734/2017 again challenging the assessment order and demand note and also challenged the constitutional validity of Sec.126(6) of Electricity Act and questioning imposition of penalty and levy of compound interest @ 16% per annum. Since constitutional validity of a statutory provision was challenged, therefore, writ petition was listed before the division bench but at the time of final

hearing, respondent No.1 did not press the constitutional validity of Sec.126(6) and division bench by the judgment under review had allowed the writ petition.

3. Learned counsel for review petitioner submits that the division bench had no jurisdiction to hear the petition once challenge to the *vires* of Sec.126(6) of the Electricity Act was given up. He further submits that after dismissal of earlier writ petition second writ petition on the same ground could not be entertained. He has also submitted that there is error apparent on the face of record as this court has held the provision u/S.126(6) of the Act as penal provision and in this regard the judgments of the Supreme Court in the case of *Executive Engineer southern Electricity Supply Co. of Orissa Vs. Sitaram Rice Mills* (2012) 2 SCC 108 and *The Chairman. SEBI Vs. Shri Ram Mutual Funds & another* (2006) 5 SCC 361 have not been noticed by this court. He has also submitted that direction to levy interest at the agreed rate runs counter to provisions contained u./S.127(6) of the Act which has not been considered by this court and the direction to raise fresh demand at the rate equal to the tariff rules applicable to actual minimum demand charges runs counter to the provisions contained u/S.126(6) of the Act which has also not been noticed by this court and while invoking the principles of *mens rea* for levy of penalty the law settled by the Hon'ble Supreme Court in the matter of *Executive Engineer southern Electricity Supply Co. of Orissa Vs. Sitaram Rice Mills* (2012) 2 SCC 108 has not been taken note of, hence there is error apparent on the face of record which requires review and recall of the order.

4. Learned counsel for respondent No.1 submits that the scope of review is limited and the argument which the counsel for petitioner has raised do not furnish any ground for review and it is not a case of *res judicata* because the division bench of this court has only set aside the penalty and interest levied which was not challenged in the first writ petition. He has also submitted that objection relating to *res judicata* has been expressly overruled by the division bench, therefore, the ground which the petitioner is raising can be a ground for appeal and not for review.

5. Shri Vinay Saraf, learned counsel for intervener workers has supported the respondent No.1.

6. Having heard the learned counsel for parties and on perusal of the record, it is noticed that the respondent No.1 had earlier filed WP No.2814/2015 challenging the provisional assessment order dated 16/4/2015 and by amending the writ petition final assessment order dated 13/5/2015 was also challenged.

7. Learned Single Judge by order dated 28th July, 2015 had allowed the writ petition and quashed the provisional assessment order dated 16/4/2015 and final assessment order dated 13/5/2015. In WA No.494/2015 the entire matter was

examined and by a detailed order dated 22/6/2016 the order of the learned Single Judge was set aside and writ petition was dismissed by holding as under:-

> "47. From the above mentioned reasons, we are of the view that there has been a clear case of unauthorised use of electricity by the respondent within the meaning of section 126 of the Electricity Act and the action of appellant No.1 is justified to initiate a proceeding under the said provision for assessment for such unauthorised use and for consequential compensation to be recovered from the National Steel. Accordingly the appellant No.1 rightly initiated the proceedings against the National Steel and passed final Assessment Order dated 13/05/2015."

8. The SLP No.18678/2016 against the order passed in WA No.494/2015 was dismissed by the Hon'ble The Supreme Court by order dated 16/8/2016 by holding as under:-

> "Heard learned counsel for the parties.
>
> No ground for interference is made out in exercise of our jurisdiction under Article 136 of the Constitution of India.
>
> The special leave petition is accordingly dismissed.
>
> Interlocutory Applications, if any, shall stand disposed of."

9. The respondent No.1 again filed the second writ petition being WP No.22734/2017 challenging the same provisional and final assessment order dated 13/5/2015 (Annexure P/2) and consequential demand notice (Annexure P/3) and assessment order dated 16/4/2015 (Annexure P/1) and further challenging the constitutional validity of Sec.126(6) of the Electricity Act and questioning levy of penalty in the form of compound interest @ 16%.

10. Paragraph 1 of the order passed by the division bench of this court dated 22nd October, 2018 in WP No.22734/2017 reveals that when the petition was taken up for hearing, the writ petitioner (respondent No.1 herein) at the outset gave up the challenge to the constitutional validity of Sec.126 of the Electricity Act. After giving up challenge to the *vires* of the provision, for remaining issues roster for hearing the writ petition was with Single Judge as per Rule 1 of Chapter IV of the High Court of M.P. Rules 2008 and it could not have been heard by the division bench, but it appears that nobody brought it to the notice of the division bench, hence the division bench proceeded to hear the WP No.22734/2017 and passed the order dated 22nd October 2018.

11. Hon'ble Supreme Court in the matter of *Jasbir Singh Vs. State of Punjab* (2006) 8 SCC 294 after taking note of its earlier judgment in the matter of *State of Rajasthan Vs. Prakash Chand* AIR 1998 SC 1344 has held that Hon'ble The Chief Justice alone has the power to decide as to how the benches of the High Court are

to be constituted and it is not within the competence of a single or division bench of the High Court to get the matter listed before it contrary to the direction of the Hon'ble The Chief Justice. The division bench of Allahabad High Court in the matter of *Pandit Jagdish Narain Mishra Vs. State of U.P.* LAWS (ALL) 2007-11-42 has held that hearing of a matter by a single bench or division bench contrary to Roster is not within their competence.

12. Hon'ble The Supreme Court in the matter of *PGF Ltd.Vs. Union of India* (2015) 13 SCC 50 has taken note of the frivolous or vexatious litigation raising constitutional validity of the provision only to avoid compliance and has laid down general principles/guidelines/precautions, but the said judgment was not brought to the notice of this court and the division bench could not consider this aspect that by raising the issue of constitutional validity and giving up the challenge at the time of hearing, the respondent No.1 had avoided the hearing by the learned single bench and persuaded the division bench to hear the matter which otherwise could not be heard by it as per the Roster and the High Court Rules. In view of the legal position that a Single or Division Bench only has the jurisdiction to hear the case as per Roster or Rules or assigned by the Hon'ble Chief Justice, the division bench was not competent to hear the matter which was required to be heard by the Single bench as per Roster. Hence, this is the first error apparent on the face of record.

13. The above facts also reveal that the constitutional validity of Sec.126(6) of the Electricity Act was challenged so that the matter could straightaway go to the division bench. The division bench of Gujarat High Court by the judgment dated 30th November, 2013 in the matter of *Satish Babubhai Patel Vs. Union of India* (2014) 1 GLH 483 had already upheld constitutional validity of section 126(6).

14. The second error on the face of record is that the same provisional assessment order dated 16/4/2015 and final assessment dated 13/5/2015 were under challenge in WP No.2814/2015 and the said writ petition was dismissed by the division bench and the order was affirmed by Hon'ble Supreme Court, yet WP No.22734/2017 was filed challenging these very orders alongwith some ancillary reliefs which could not have been entertained in view of the judgment of the Supreme Court in the matter of *Devilal Modi Vs. STO Ratlam* AIR 1965 SC 1150 wherein it has been held that a citizen should not be allowed to challenge the validity of the same order by successive petition under Article 226 as the earlier order becomes final and no one should be made to face the same kind of litigation twice as it would be contrary to consideration of fair play and justice. This also escaped the attention of this court that issue of penalty and interest could be raised in earlier round of litigation but not raised, therefore, second writ petition challenging the same orders raising additional ground could not be entertained. The issue of constructive resjudicata escaped the attention of this court.

15. The third error apparent on the face of the record is that this court in Para 13 of the order under review has invoked the principle of *mens rea* in setting aside the penalty u/S.126 of the Act whereas the Hon'ble Supreme Court in the matter of *Executive Engineer Southern Electricity Supply Co. of Orissa Vs. Sitaram Rice Mills* (2012) 2 SCC 108 has settled that Sec.126 primarily fall under the civil law and does not involve *mens rea.* It has been held that:-

> "28. Section 135 of the 2003 Act deals with the offence of theft of electricity and the penalty that can be imposed for such theft. This squarely falls within the dimensions of criminal jurisprudence and mens rea is one of the relevant factors for finding a case of theft. On the contrary, Sec.126 of the 2003 Act does not speak of any criminal intendment and is primarily an action and remedy available under the civil law. It does not have features or elements which are traceable to the criminal concept of *mens rea* .

16. The above judgment of the Hon'ble Supreme Court has binding effect under Article 141 of the Constitution, but the said judgment was not brought to the notice of this court. Hence, this court could not have taken a contrary view.

17. The view of Hon'ble Supreme Court in the case of *Executive Engineer Southern Electricity* (supra) is in continuation of its earlier view in the matter of *J.K. Industries Vs. The Chief Inspector (1996) 6 SCC 665 and Guljag Industries Vs. CTO* (2007) 7 SCC 269.

18. It is settled that non consideration of binding decision of superior court deciding the issue is an error apparent on the face of the record. [See judgment of Hon. Supreme Court in the matter of *Assistant Commissioner of Income-tax, Rajkot Vs. Saurashtra Kutch Stock Exchange Ltd*, (2008)14 SCC 171]. Thus, this Court committed an error apparent on the face of record in not noticing the binding judgment of the Supreme Court on the issue involved.

19. The division bench of this court while passing the order under review and invoking the principles of *mens rea* has relied upon the judgment of the Hon'ble Supreme Court in the case of *Hindustan Steel Ltd. Vs. State of Orissa* AIR 1970 SC 253 which was a case of levy of penalty under Sales Tax Act whereas the Hon'ble Supreme Court in the matter of *The Chairman SEBI Vs. Shriram Mutual Fund & Anr.* (2006) 5 SCC 361 while considering the similar provision contained in SEBI Act 1992 has found penalty under Chapter VI A as consequence of breach of civil obligation and had therefore found error in the judgment of the tribunal which had relied upon the judgment in the case of *Hindustan Steel Ltd* (supra) pertaining to criminal/quasi criminal liability, but the said judgment was also not brought to the notice of division bench of this court. Thus this court committed error apparent on the face of record in attracting principle of *mens rea* in a case of breach of civil obligation.

20. Another error apparent on the face of record is that the division bench of this court has held that the liability for assessment at a rate equal to twice the tariff is excessive and harsh and accordingly has directed to issue fresh demand at the rate equal to the tariff rules applicable to actual minimum demand charges, but at that stage the provisions contained in Sec.126(6) of the Act were not noticed which reads as under:-

> "126(6)-- The assessment under this section shall be made at a rate equal to [twice] the tariff applicable for the relevant category of services specified in sub-section (5).
>
> Explanation.-- For the purposes of this section,--
>
> [a] "assessing officer" means an officer of a State Government or Board or licensee, as the case may be, designated as such by the State Government;
>
> [b] "unauthorised use of electricity" means the usage of electricity--
>
> (i) by any artificial means; or
>
> (ii) by a means not authorised by the concerned person or authority or licensee; or
>
> (iii) through a tampered meter; or
>
> (iv) for the purpose other than for which the usage of electricity was authorised; or
>
> (v) for the premises or areas other than those for which the supply of electricity was authorised."

21. U/S.126(6), there is no option but to make the assessment u/S.126 at a rate equal to twice the tariff applicable.

22. Hon.Supreme Court in the matter of *State of Rajasthan Vs. D.P. Metals* (2002) 1 SCC 279 while considering Sec.178(5) of the Rajasthan Sales Tax Act 1974 has held that the legislature is competent to specify a fixed rate of penalty and not give any discretion in lowering the rate of penalty and there is nothing wrong in providing such deterrent penalty.

23. In the matter of *Prem Chand Garg Vs. Excise Commissioner, U.P; Allahabad* AIR 1963 996 the Hon'ble Supreme Court has held that even the order under Article 142 of the Constitution cannot be passed inconsistent with the substantive provisions of the relevant statutory law. In the matter of *Union of India & Another Vs. Kirloskar Pneumatic Co. Ltd.* (1996) 4 SCC 453 it has been held that the jurisdiction of the High Court under Article 226/227 of the Constitution cannot be invoked to direct the statutory authorities to act contrary to law. Hence, direction of this Court to issue fresh demand equal to the tariff rate

applicable to actual minimum demand charges is contrary to Sec.126(6) of the Act, which is not permissible in law.

24. There is also error apparent on the face of record inasmuch as this Court in the order under review has directed for charging interest on the demand and actual TMM charges on the agreements rate of interest but at that time the provisions contained in Sec.127(6) of the Act escaped the attention of this court which provides as under:-

> "127(6)-- When a person defaults in making payment of assessed amount, he, in addition to the assessed amount, shall be liable to pay, on the expiry of thirty days from the date of order of assessment, an amount of interest at the rate of sixteen per cent per annum compounded every six months."

25. As per the aforesaid provision, interest @ 16% per annum is chargeable, hence, this court could not have issued direction for charging the interest at the rate contrary to what has been provided statutorily.

26. In the order under review the division bench of this court has relied upon judgment of the Hon'ble Supreme Court in the matter of *Shivashakti Sugars Ltd. Vs. Shree Renuka Sugar Limited and others* (2017)7 SCC 729 but in that judgment it was made clear that first duty of the court is to decide the case by applying statutory provision but this part of the judgment of supreme Court escaped the attention of this court. Similarly judgment in the matter of *Excel Crop Care Limited Vs. Competition Commission of India* (2017) 8 SCC 47 could be attracted by the division bench in case if another view was possible.

27. Learned counsel for respondent has relied upon the judgments of the Supreme Court in the matter of *Meera Bhanja Vs. Nirmal* (1995) 1 SCC 170, *Lily Thomas Vs. Union of India* (2000) 6 SCC 224, *Haridas Das Vs. Usha Rani* (2006) 4 SCC 78, *Union of India Vs. Sandur* (2013) 8 SCC 337, *State of Rajasthan Vs. Surendra* (2014) 14 SCC 77, *Sasi Vs. Aravindakshan Nair* (2017) 4 SCC 692 and *Sivakami Vs. State of Tamil Nadu* (2018) 4 SCC 587 on the scope of power of review. In these judgments the principles already settled have been reiterated that for review there must be error apparent on the face of record, re-appraisal of the entire evidence on record for finding the error would amount to exercise the appellate jurisdiction which is not permissible, mere fact that two views on the same subject are possible is not a ground for review of the earlier judgment passed by a bench of the same strength, where the remedy of appeal is available the power of review should be exercised by the court with greater circumspection.

28. In the present case, there are errors apparent on the face of record, therefore, a case for review in exercise of the limited review jurisdiction as settled by the aforesaid judgments is made out.

29. Having regard to the reasons assigned above, the Review Petition is **allowed** and order dated 22/10/2018 passed in WP No.22734/2017 is reviewed and recalled and WP No.22734/2017 is dismissed.

Petition allowed

I.LR. [2020] M.P. 1384
APPELLATE CIVIL
Before Mr. Justice G.S. Ahluwalia

S.A. No. 1567/2019 (Gwalior) decided on 18 September, 2019

GWALIOR DEVELOPMENT AUTHORITY …Appellant

Vs.

NAGRIK SAHAKARI BANK MARYADIT, GWALIOR …Respondent

A. Real Estate (Regulation and Development) Act (16 of 2016), Section 58 & 43(5) – Interlocutory Order – Second Appeal – Maintainability – **Held – Order rejecting application u/S 43(5) of the Act is not an order executable as a decree of Civil Court, it is merely a interlocutory order – Second appeal against interlocutory order is not maintainable – Appeal dismissed. (Para 14 & 16)**

क. भू–संपदा (विनियमन और विकास) अधिनियम (2016 का 16), धारा 58 व 43(5) – अंतर्वर्ती आदेश – द्वितीय अपील – पोषणीयता – अभिनिर्धारित – अधिनियम की धारा 43(5) के अंतर्गत आवेदन नामंजूर करने का आदेश, सिविल न्यायालय की डिक्री की भांति निष्पादन योग्य एक आदेश नहीं है, यह एक अंतर्वर्ती आदेश मात्र है – अंतर्वर्ती आदेश के विरूद्ध द्वितीय अपील पोषणीय नहीं है – अपील खारिज।

B. Real Estate (Regulation and Development) Act (16 of 2016), Section 57 & 58 – "Orders" – **Held – Perusal of Section 57 shows that only those orders are included in Section 58 which are executable as a decree of Civil Court and not all orders including interlocutory orders. (Para 12)**

ख. भू–संपदा (विनियमन और विकास) अधिनियम (2016 का 16), धारा 57 व 58 – ''आदेश'' – अभिनिर्धारित – धारा 57 का परिशीलन यह दर्शाता है कि धारा 58 में मात्र वे आदेश शामिल हैं, जो कि सिविल न्यायालय की डिक्री की भांति निष्पादन योग्य हैं तथा न कि सभी आदेश जिसमें अंतर्वर्ती आदेश भी शामिल हैं।

C. Real Estate (Regulation and Development) Act (16 of 2016), Section 43(5) – Mandatory Provision – **Held – There is no provision giving any discretion to Appellate Authority to waive mandatory provision of deposit of 30% of the penalty. (Para 13)**

ग. भू–संपदा (विनियमन और विकास) अधिनियम (2016 का 16), धारा 43(5) – आज्ञापक उपबंध – अभिनिर्धारित – अपीली प्राधिकारी को, शास्ति का तीस प्रतिशत जमा के आज्ञापक उपबंध का अधित्यजन करने का विवेकाधिकार प्रदान करने वाला कोई उपबंध नहीं है।

Case referred:

S.A. (ST) No. 25167/2018 order passed on 04.09.2018 (Bombay High Court).

Raghvendra Dixit, for the appellant/GDA.
Praveen Niwaskar, for the respondent.

(*Supplied*: Paragraph numbers)

O R D E R

G.S. AHLUWALIA, J.:- Heard on the question of admission.

This Second Appeal under Section 58 of Real Estate (Regulation and Development) Act, 2016 [in short "the Act, 2016"] has been filed against the order dated 16-4-2019 passed by M.P. Real Estate Appellate Tribunal, Bhopal in Appeal No.32/2019 by which the application filed by the appellant from exemption from deposit of 30% of the amount as required under Section 43(5) of the Act, 2016 has been rejected.

2. The necessary facts for the disposal of the present appeal in short is that the respondent had filed a complaint before the M.P. Real Estate Regulatory Authority [in short " the RER Authority"] under Section 31 of the Act, 2016 read with Rule 25 and 26 of Real Estate (Regulation and Development) Rules, 2017 [in short "the Rules, 2017"] on the ground that in response to an advertisement, the respondent Bank had submitted its tender for showroom/shop ad-measuring 128.27 Sq. Mtr. situated at first floor of **Madhav Plaza Shopping Complex.** The tender submitted by the respondent/Bank was accepted and accordingly, prescribed amount was deposited, but in spite of the fact that entire amount has been deposited, the appellant has failed to deliver the possession of the property nor the registration of shop No.FS-5 has been made in favour of the respondent/Bank.

3. The RER Authority allowed the complaint and by order dated 26-7-2018 directed the appellant to refund the entire amount deposited by the respondent/Bank along with interest and further forwarded the matter to the adjudicating authority to determine the value of interest on entire amount as ordered to be refunded.

4. Being aggrieved by the order of the RER Authority, the appellant has filed an appeal under Section 44 of the Act, 2016.

5. The appellant also filed an application under Section 43(5) of the Act, 2016 seeking exemption from depositing 30% of the mandatory amount as required under Section 43(5) of the Act, 2016.

6. The Tribunal has rejected the application by the impugned order dated 16-4-2019.

7. Challenging the order of the Tribunal, the present Second Appeal has been filed.

8. Before hearing on the question of admission, the Counsel for the appellant was directed to argue on the question of maintainability of this appeal.

9. It is submitted by the Counsel for the appellant, that even against an interlocutory order, Second Appeal would lie before the High Court under Section 58 of the Act, 2016.

10. *Per contra,* it is submitted by the Counsel for the respondent, that the Second Appeal against the interlocutory order is not maintainable. To buttress his contentions, the Counsel for the respondent has relied upon the order passed by Bombay High Court in the case of *Nirman Realtors & Developers Ltd. Vs. Danish Ansari* passed on 4-9-2018 in Second Appeal (ST) No.25167 of 2018.

11. Heard the learned Counsel for the parties.

12. Section 58 of the Act, 2016 reads as under :

> **"58. Appeal to High Court.**— (1) Any person aggrieved by any decision or order of the Appellate Tribunal, may, file an appeal to the High Court, within a period of sixty days from the date of communication of the decision or order of the Appellate Tribunal, to him, on any one or more of the grounds specified in Section 100 of the Code of Civil Procedure, 1908 (5 of 1908):
>
> Provided that the High Court may entertain the appeal after the expiry of the said period of sixty days, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal in time.
>
> *Explanation.*—The expression "High Court" means the High Court of a State or Union Territory where the real estate project is situated.
>
> (2) No appeal shall lie against any decision or order made by the Appellate Tribunal with the consent of the parties."

Now the centripetal question for determination is that whether the word "order" mentioned in Section 58 of the Act, 2016 would include interlocutory order(s) or not?

Although the "Word" has not been defined in the Act, 2016 but Section 57 of the Act, 2016 would throw sufficient light to interpret the word "Word".

Section 57 of the Act, 2016 reads as under :-

> **"57.Orders passed by Appellate Tribunal to be executable as a decree.**— (1) Every order made by the Appellate Tribunal under this Act shall be executable by the Appellate Tribunal as a decree of civil court, and for this purpose, the Appellate Tribunal shall have all the powers of a civil court.
>
> (2) Notwithstanding anything contained in subsection (1), the Appellate Tribunal may transmit any order made by it to a civil court having local jurisdiction and such civil court shall execute the order as if it were a decree made by the court."

From the plain reading of Section 57 of the Act, 2016, it is clear that only those orders are included in Section 58 of the Act, 2016, which are executable as a decree of Civil Court, and not all orders including interlocutory order(s).

13. In the present case, the Tribunal has rejected the application filed by the appellant under Section 43(5) of the Act, 2016 which reads as under :-

> **"43. Establishment of Real Estate Appellate Tribunal** (1) The appropriate Government shall, within a period of one year from the date of coming into force of this Act, by notification, establish an Appellate Tribunal to be known as the ------ (name of the State/Union Territory) Real Estate Appellate Tribunal.
>
> (2) The appropriate Government may, if it deems necessary, establish one or more benches of the Appellate Tribunal, for various jurisdictions, in the State or Union Territory, as the case may be.
>
> (3) Every Bench of the Appellate Tribunal shall consist of at least one Judicial Member and one Administrative to *(sic* or) Technical Member.
>
> (4) The appropriate Government of two or more States or Union Territories may, if it deems fit, establish one single Appellate Tribunal:
>
> Provided that, until the establishment of an Appellate Tribunal under this section, the appropriate Government shall designate, by order, any Appellate Tribunal functioning under any law for the time being in force, to be the Appellate Tribunal to hear appeals under the Act:
>
> Provided further that after the Appellate Tribunal under this section is established, all matters pending with the Appellate Tribunal designated to hear appeals, shall stand transferred to the Appellate Tribunal so established and shall be heard from the stage such appeal is transferred.

(5) Any person aggrieved by any direction or decision or order made by the Authority or by an adjudicating officer under this Act may prefer an appeal before the Appellate Tribunal having jurisdiction over the matter:

> Provided that where a promoter files an appeal with the Appellate Tribunal, it shall not be entertained, without the promoter first having deposited with the Appellate Tribunal at least thirty per cent of the penalty, or such higher percentage as may be determined by the Appellate Tribunal, or the total amount to be paid to the allottee including interest and compensation imposed on him, if any, or with both, as the case may be, before the said appeal is heard.

Explanation.—For the purpose of this sub-section "person" shall include the association of allottees or any voluntary consumer association registered under any law for the time being in force."

Thus, in view of proviso to Section 43(5) of the Act, 2016, the promoter has to first deposit atleast thirty percent of the penalty or such higher percentage as may be determined by the Appellate Tribunal, however, there is no provision, giving any discretion to the Appellate Authority to waive the mandatory deposit of thirty percent of the penalty.

14. The order rejecting the application under Section 43(5) of the Act, 2016 seeking exemption from compulsory deposit of thirty percent is not an order executable as a decree of Civil Court. Thus, it is merely an interlocutory order and no Second Appeal would lie against the said order.

15. Furthermore, the Supreme Court in the case of *M/s Technimont Pvt. Limited Vs. State of Punjab and others* decided on in C.A. No. 7358 of 2019 has held as under :

> **"24.** If the inherent power the existence of which is specifically acknowledged by provisions such as Section 151 of the CPC and Section 482 of the Cr.P.C. is to be read with the limitation that exercise of such power cannot be undertaken for doing that which is specifically prohibited, same limitation must be read into the scope and width of implied power of an appellate authority under a statute. In any case the principle laid down in *Matajog Dobey* states with clarity that so long as there is no express inhibition, the implied power can extend to doing all such acts or employing such means as are reasonably necessary for such execution. The reliance on the principle laid down in *Kunhi* cannot go to the extent, as concluded by the High Court, of enabling the Appellate Authority to override the limitation

prescribed by the statute and go against the requirement of pre-deposit. The High Court was clearly in error in answering question (c)."

16. Thus, this Court is of the considered opinion, that the Second Appeal filed by the appellant against the interlocutory order dated 16-4-2019 is not maintainable.

17. Accordingly, this Second Appeal fails and is **hereby dismissed as not maintainable.**

18. The Record of the Tribunal be sent back immediately.

Appeal dismissed

I.L.R. [2020] M.P. 1389
APPELLATE CIVIL
Before Mr. Justice Rohit Arya
F.A. No. 647/2008 (Indore) decided on 16 March, 2020

SATISH KUMAR KHANDELWAL …Appellant

Vs.

RAJENDRA JAIN & ors. …Respondents

***A. Specific Relief Act (47 of 1963), Section 34 – Agreement – Ingredients – Validity* – Held – Plaintiff described himself by different names – Detail of sale deeds have been left blank and even area, dimension and location of individual survey nos. not mentioned in agreement – Agreement not signed by R-4 & R-5 and no record to show that agreement was with their consent and knowledge – No map attached with agreement – Agreement was vague, uncertain and thus not enforceable – Appeal dismissed.**

(Para 11 & 12)

क. विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 34 – करार – घटक – विधिमान्यता – अभिनिर्धारित – वादी ने भिन्न–भिन्न नामों से स्वयं का विवरण दिया – विक्रय विलेखों का विवरण रिक्त छोड़ा गया है यहां तक कि करार में पृथक–पृथक सर्वेक्षण संख्यांको का क्षेत्रफल, आकार एवं अवस्थान भी उल्लिखित नहीं – करार, प्रत्यर्थी क्र. 4 व प्रत्यर्थी क्र. 5 द्वारा हस्ताक्षरित नहीं तथा यह दर्शाने के लिए कोई अभिलेख नहीं कि करार, उनकी सहमति एवं जानकारी के साथ किया गया था – करार के साथ कोई नक्शा संलग्न नहीं – करार अस्पष्ट, अनिश्चित था और इसलिए प्रवर्तनीय नहीं है – अपील खारिज।

***B. Civil Procedure Code (5 of 1908), Order 12 Rule 3 and Evidence Act (1 of 1872), Section 114(g) – Identity – Adverse Inference* – Held – Non-production of PAN card, school record or mark sheet, driving license despite**

notice issued under Order 12 Rule 3 CPC upon plaintiff, certainly leads to adverse inference against him in view of Section 114(g) of Evidence Act. (Para 11)

ख. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 12 नियम 3 एवं साक्ष्य अधिनियम (1872 का 1), धारा 114(g) – पहचान – प्रतिकूल निष्कर्ष – अभिनिर्धारित – आदेश 12 नियम 3 सि.प्र.सं. के अंतर्गत नोटिस जारी किये जाने के बावजूद PAN कार्ड, शाला अभिलेख या अंकसूची, चालक अनुज्ञप्ति प्रस्तुत न किया जाना, साक्ष्य अधिनियम की धारा 114(g) की दृष्टि में निश्चित रूप से उसके विरूद्ध प्रतिकूल निष्कर्ष की ओर ले जाता है।

***C. Specific Relief Act (47 of 1963), Section 34 and Benami Transactions (Prohibition) Act (45 of 1988), Section 2(a) & 4 – Agreement – Bonafide Purchaser* – Held – Plaintiff was not a *bonafide* purchaser with no financial capacity – He also failed to prove genuineness of transactions for preparation of pay orders and bank drafts from accounts of other persons – None of such other persons were got examined in Court – No agreement in writing between plaintiff and such other persons/companies – Plaintiff acted as a front man to purchase suit land for benefit/gain of companies – Entire details of flow of money/transactions are not genuine and tantamount to benami transaction prohibited u/S 2(a) of Act of 1988. (Para 13)**

ग. विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 34 एवं बेनामी संव्यवहार (प्रतिषेध) अधिनियम (1988 का 45), धारा 2(a) व 4 – करार – सद्भाविक क्रेता – अभिनिर्धारित – वादी, एक सद्भाविक क्रेता नहीं था जिसकी कोई वित्तीय क्षमता नहीं थी – वह, अन्य व्यक्तियों के खातों से संदाय आदेश, बैंक ड्राफ्ट तैयार करने हेतु संव्यवहारों की वास्तविकता सिद्ध करने में भी विफल रहा – ऐसे अन्य व्यक्तियों में से किसी का भी न्यायालय में परीक्षण नहीं कराया गया – वादी एवं उक्त अन्य व्यक्तियों/कंपनियों के बीच लिखित में कोई करार नहीं – वादी ने कंपनियों के लाभ/अभिलाभ हेतु एक प्रधान व्यक्ति के रूप में कार्य किया – धन का प्रवाह/संव्यवहार के संपूर्ण विवरण वास्तविक नहीं है और 1988 के अधिनियम की धारा 2(a) के अंतर्गत प्रतिषिद्ध बेनामी संव्यवहार की कोटि में आता है।

***D. Specific Relief Act (47 of 1963), Section 34 and Evidence Act (1 of 1872), Section 91 – Agreement – Contents – Amendment – Practice & Procedure* – Held – Terms of entire agreement has to be read as whole to ascertain intention of parties and working out its conclusions, so that on fulfillment of requisite conditions, agreement could be enforced under law – Clauses of agreement neither can be supplemented, supplanted or substituted by extensive description in plaint or in oral testimony – No amendment in pleadings can be either permitted or read in conjunction with various clauses of agreement – Section 91 of Evidence Act also prohibits proving of contents of document. (Para 12)**

घ. विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 34 एवं साक्ष्य अधिनियम (1872 का 1), धारा 91 – करार – अंतर्वस्तु – संशोधन – पद्धति एवं प्रक्रिया – अभिनिर्धारित – संपूर्ण करार के निबंधनों को, पक्षकारों का आशय सुनिश्चित किये जाने एवं उसके निष्कर्षों को निकालने हेतु पूर्णतः पढ़ा जाना चाहिए जिससे कि अपेक्षित शर्तों के पूरा करने पर करार को विधि अंतर्गत प्रवर्तित किया जा सके – करार के खंडों को, वादपत्र में विस्तृत वर्णन या मौखिक परिसाक्ष्य द्वारा न तो अनुपूरक जोड़ा जा सकता है न ही हटाया या प्रतिस्थापित किया जा सकता है – अभिवचनों में किसी संशोधन की न तो अनुमति दी जा सकती है न ही करार के विभिन्न खंडों के साथ संयोजन में पढ़ा जा सकता है – साक्ष्य अधिनियम की धारा 91 भी, दस्तावेज की अंतर्वस्तु साबित किया जाना प्रतिषिद्ध करती है।

***E. Benami Transactions (Prohibition) Act (45 of 1988), Section 2(a) and Contract Act (9 of 1872), Section 23* – Held – If an agreement to sale suffers from vice of benami transaction, the same falls in category of contracts, forbidden u/S 23 of Contract Act. (Para 13)**

ङ. बेनामी संव्यवहार (प्रतिषेध) अधिनियम (1988 का 45), धारा 2 (a) एवं संविदा अधिनियम (1872 का 9), धारा 23 – अभिनिर्धारित – यदि विक्रय करने का एक करार बेनामी संव्यवहार के दोष से ग्रसित है, वह संविदा अधिनियम की धारा 23 के अंतर्गत निषिद्ध संविदाओं की श्रेणी में आता है।

***F. Specific Relief Act (47 of 1963), Section 34 – Agreement – Readiness & Willingness* – Held – Payments made by plaintiff are not as per the schedule of payment agreed by the parties – Default in schedule of payment shall certainly attract the clause of automatic termination of agreement. (Para 14)**

च. विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 34 – करार – तैयारी व रजामंदी – अभिनिर्धारित – वादी द्वारा किये गये संदाय, पक्षकारों द्वारा करार किये गये संदाय अनुसूची के अनुसार नहीं है – संदाय अनुसूची में व्यतिक्रम, निश्चित रूप से करार के अपने आप समाप्ति के खंड को आकर्षित करता है।

***G. Specific Relief Act (47 of 1963), Section 34 – Agreement – Terms and Conditions – Burden of Proof* – Held – The burden that the stipulations and terms of contract and mind of parties *ad idem* is always on plaintiff and if such burden is not discharged and stipulation and terms are uncertain, and parties are not *ad idem*, there can be no specific performance, for there was no contract at all. (Para 12)**

छ. विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 34 – करार – निबंधन व शर्तें – सबूत का भार – अभिनिर्धारित – यह भार कि संविदा के निबंधन एवं शर्तें और पक्षकारों के मन एक विचार हैं, सदैव वादी पर होता है और यदि उक्त भार का निर्वहन नहीं किया गया है तथा शर्तें एवं निबंधन अनिश्चित है और पक्षकार एक विचार नहीं हैं, कोई विनिर्दिष्ट पालन नहीं हो सकता क्योंकि वह कोई संविदा थी ही नहीं।

Cases referred:

1990 (3) SCC 1, AIR 2003 SC 2418, (2008) 5 SCC 58, 1978 (1) MPWN 135, AIR 2004 MP 74, 2013 (1) MPHT 388, 2000 (1) MPLJ 79, (2016) 1 SCC 567, 1999 AIR SCW 1420, AIR 1957 SC 49, AIR 1949 FC 88, (1977) 1 SCC 60, (1995) 5 SCC 598, (2004) 8 SCC 614, AIR 1996 SC 116, AIR 2010 SC 577.

A.K. Sethi assisted by *Harish Joshi*, for the appellant.

S.C. Bagadia assisted by *Nitin Phadke* and *D.K. Chabra*, for the respondent Nos. 1 & 2.

Sunil Jain assisted by *Kushagra Jain*, for the respondent Nos. 4 & 5.

Brajesh Pandya, for the respondent No. 8.

O R D E R

ROHIT ARYA, J.:- This first appeal by plaintiff under section 96 CPC is directed against the judgment and decree dated 28/08/2008 passed in civil suit No.1A/2006 by the District Judge, Indore.

Plaintiff's suit for specific performance of an agreement dated 27/04/2005 (exhibit P/9) has been dismissed.

2. Plaintiff; Satish Kumar Khandelwal son of Shankarlal Khandelwal, resident of 78A Parshanand Nagar, R.T.O. Road, Indore as described in the plaint *inter alia* contended that the defendants No.1 and 2 agreed to sell 08 acres of land out of the remaining area after sale to other persons falling in survey Nos.208/12, 208/9, 213/1, 213/238, 214, 216/4, 219/2, 220, 221/1 and 221/2 situated in village Talavali Chanda tehsil and district Indore. In addition, it was also agreed that the defendants No.1 and 2 shall purchase 04 acres of land from its owners falling in survey Nos. 213/1, 216/4 & 213/238; Surendra Dilliwal and Sudha Dilliwal (defendants No.4 and 5) and in turn shall sell the same to the plaintiff fulfilling his requirement of 12 acres of land.

Total consideration amount was Rs.1,68,50,000/- at the rate of Rs.14.00 lakhs per acre.

Consideration amount was payable in installments and the last installment was payable on or before 27/03/2006. Thereafter, the sale deed to be executed in favour of plaintiff or any other person, plaintiff would suggest. Schedule of payment agreed to was as under:

(a) 27/04/2005 : Rs.18.00 lakhs : Cash

(b) 16/05/2005 : Rs.30.00 lakhs : Cash

(c) 27/10/2005 : Rs.50.00 lakhs : Cash

(d) Remaining amount of Rs.14.00 lakhs to be paid prior to 27/03/2006 in cash.

A public notice was to be issued by defendants, two months prior to the date of sale but, in any case not before 27/01/2006 with the permission of plaintiff.

However, total amount of Rs.66.00 lakhs only was paid by the plaintiff to the defendants No.1 and 2; breakup is as under:

Sl.No.	Amount (Rs.)	Date	Details
(a)	18.00 lakhs	27/04/2005	Cash
(b)	03.00 lakhs	29/04/2005	Cash
(c)	09.00 lakhs	07/05/05	Cash
(d)	07.50 lakhs	16/05/2005	Pay Order No.26001 of U.T.I. Bank
(e)	07.50 lakhs	16/05/2005	Pay Order No.26002 of U.T.I.Bank
(f)	06.00 lakhs	16/05/2005	Cash
(g)	15,.00 lakhs	31/10/2005	Cash

Besides, on 26/10/2005 three pay orders, viz., 594016, 594017 & 594019; each of an amount of Rs.7.00 lakhs; total **Rs.21.00 lakhs** in favour of Rajendra Jain (defendant No.1) and two pay orders, viz., 594020 and 594021; each Rs.7.00 lakhs; **total 15.00 lakhs** in the name of defendant No.2 Rachna Jain (defendant No.2) were prepared from Bank of Rajasthan Limited, Branch Palasiya. On 27/10/2005, pay orders of Rs.35.00 lakhs and cash of Rs.15.00 lakhs were tendered to defendant No.1, however, he accepted cash of Rs.15.00 lakhs but, declined to take pay orders of Rs.35.00 lakhs with a request to pay in cash as per agreement. The date for payment of amount was extended upto 05/11/2005.

It is further contended that the plaintiff surrendered the pay orders with the bank and thereafter, though tendered cash to defendants No.1 and 2 but, they refused to accept the same.

Land falling in survey Nos.208/9, 214, 219/2, 220, 221/1, 213/1 & 208/12 is of the joint ownership of defendants No.1 & 2.

Land falling in survey No.219/2 is of the ownership of Smt. Rachna Jain (defendant No.2), Palak and Subham (daughter and son of defendant No.1).

Likewise land falling in survey Nos.213/238 & 216/4 is of the joint ownership of Rajendra Jain (defendant No.1), Rachna Jain (defendant No.2), Surendra Dilliwal & Sudha Dilliwal (defendants No.4 & 5).

Out of total area from survey Nos.213/238 & 216/4 after reducing the land sold earlier, the remaining land available for sale is 04.03 acres. In survey

Nos.208/9, 214, 219/2 & 221/1 after reducing the area sold out of total area; 8.00 acres of land is available for sale. Likewise, after reducing the land sold earlier, the remaining land available is 1.31 acres out of survey No.213/1. The land falling in survey Nos.221/2 and 208/12 is of the joint ownership of defendants No.1 and 2.

The defendants No.1 and 2 have half share of the land falling in survey Nos.213/1, 213/238 and 216/4. However, they have agreed to purchase the remaining half share from Surendra Dilliwal & Sudha Dilliwal (defendants No.4 & 5). In turn, shall sell four acres of land to the plaintiff.

However, defendants No.4 and 5 are not party to the agreement.

Since beginning of March, 2006 the plaintiff was willing and ready to pay the remaining amount of consideration. On 25/03/2006, the plaintiff got prepared bank drafts in the names of following persons :

(i) Rachna Jain : Rs. 11.00 lakhs;

(ii) Subham Jain : Rs.02.50 lakhs;

(iii) Rajendra Jain : Rs.43.00 lakhs

(Rs.2.50 + 17.50 + 12.50 + 10.50 lakhs each) total; Rs.65.50 lakhs

(iv) Besides; cash of Rs.37,22,500/- was available in his savings bank account.

The defendants were bound to execute the sale deed on or before the cut off date, 27/03/2006. Therefore, the plaintiff sent a telegram on 26/03/2006 to the defendants to remain present at the office of Registrar for registration of sale deed but, they failed to appear. On 27/03/2006, again the plaintiff sent a telegram to receive the remaining amount and execute the sale deed.

Thereafter, the plaintiff sent a notice on 31/03/2006 and also published a notice in daily news papers Dainik Bhaskar & Nai Duniya on 17/04/2006. In response to public notice, one Nandkumar Dalal replied that he has purchased land falling in survey No.216. One Smt. Rajashree w/o Ajay Chaudhary has also replied that she has purchased land falling in survey Nos.213/1 & 213/238.

Defendants denied agreement to sell in their reply on 24/06/2006.

The details of sale deeds executed by defendants No.1 and 2 in favour of various persons are detailed in paragraphs 11 and 12 of the impugned judgment.

In the backdrop of the aforesaid facts pleaded, the plaintiff prayed for following reliefs:

(a) defendants No.1 and 2 be called upon to execute the sale deed for 08 acres of land. Besides, after

obtaining lease / NOC or sale of land from the defendants No.4 and 5, execute the sale deed in favour of plaintiff for additional 04 acres of land, as agreed to;

(b) possession of land be delivered to the plaintiff of 08 acres of the ownership of defendants No.1 and 2. And possession of 04 acres of land after purchase or obtaining NOC from the defendants No.4 and 5 be also delivered to the plaintiff.

(c) in default, let the sale deed be executed through the Court.

3. Defendants No.1 and 2 have filed written statement *inter alia* contending that some time back discussion took place between broker Babusingh Sisodiya and the defendant No.1, Rajendra Jain for sale of land. Thereafter, he placed an agreement to sell dated 27/04/2005 (Annexure P/9) already signed by plaintiff in relation to available remaining land of 08 acres in the aforesaid survey numbers. Besides, another stipulation thereunder was to make available additional 04 acres of land of the ownership and in possession of Surendra Dhilliwal and Sudha Dhilliwal after purchase from them by defendants No.1 and 2. However, condition of payment of Rs.35.00 lakhs by plaintiff to defendants No.1 and 2 was precedent thereto.

Defendants No.1 and 2 never met Satish Khandelwal. The broker Babusingh Sisodiya had never organized meetings with Satish Khandelwal. Even the agreement was not signed by Satish Khandelwal in front of defendants No.1 and 2.

Defendants though admitted receipt of two pay orders of Rs.7.50 lakhs each; total Rs.15.00 lakhs but, denied receipt of cash. On enquiry, broker Sisodiya told them that the plaintiff's name is imaginary (fictitious) and not real person (benami). The sale deed shall be executed in the name of different person on strength of terms of the said agreement. It is also pleaded that upon further enquiry after 26/05/2006, it has come to knowledge of defendants that though Satish Kumar Khandelwal is a fictitious person but, the agreement was actually signed by one Satish Kumar Sharma who was an employee of A.R. Infrastructure.

That apart, the aforesaid suspicion also got precipitated as later on, it has come to the knowledge of defendants No.1 and 2 that pay orders handed over to them were not prepared from the account of plaintiff, Satish Kumar Khandelwal (fictitious person) but from the accounts of different persons/institutions indicating A.R.Infrastrcutre. Therefore, the instant suit is not maintainable and deserves to be dismissed for the reason that the agreement was entered in the name of a fictitious person and is sought to be enforced through judicial intervention.

It is denied that the agreement for sale of 8 acres of land and that of 04 acres of land was entered into with the plaintiff, Satish Kumar Khandelwal. In fact, it is Satish Sharma resident of 78-A, Parasnath Nagar, R.T.O. Road, Indore. Hence, the plaintiff is not same person signing the plaint and alleged to have executed the agreement to sell with the defendants No.1 and 2. Defendants also denied receipt of Rs.21.00 lakhs on 16/05/2005. There was no agreement that an additional amount of Rs.30.00 lakhs shall be paid before sale or release of land admeasuring 04 acres of land first in favour of defendants No.1 and 2 by defendants No.4 and 5 and thereafter in favour of plaintiff. The said amount was never advanced by plaintiff. Therefore, it was denied to have entered into an agreement for 04 acres of land. Even otherwise, there was no description of boundaries and specification of area defined either for 08 acres of land or for that of 04 acres of land in the alleged agreement.

The amendment incorporated in the plaint related to description of land has been denied. The amendment runs contrary to or inconsistent with the averments in the plaint (paragraph 17 of the judgment)

Besides, defendants No.1 and 2 submitted that there is no description of 08 acres of land in the alleged agreement to sell except mentioning survey numbers and no map attached thereto as well to make it specific how much land of each survey number was included to make total 8 acres of land with description of boundaries. Hence, the agreement to sell (document) is ambiguous or defective on its face. There was no explanation in the plaint averments for substituting the contents of agreement. As such, in the light of provisions of section 93 of the Evidence Act which contemplates that when the language used in the agreement on its face, ambiguous, defective and vague, no amount of evidence can be given on facts which would show its meaning or cure its defects. Therefore, no such amendment in the plaint can either substitute, explain or cure the defect of vagueness and non-description of land in the agreement. Hence, the agreement is not enforceable under section 29 of the Specific Relief Act. The plaintiff also did not abide by the schedule and mode of payment of consideration under the agreement.

It is also submitted that even assuming cash payment alleged to have been made by plaintiff on 30/10/2005 to the tune of Rs.15.00 lakhs but, he failed to pay Rs.35.00 lakhs upto the extended period of 05/11/2005. Therefore, the agreement stands repudiated by itself due to non-compliance of clauses thereof.

Besides, it is also contended that the plaintiff did not have financial capacity to purchase the suit land. The alleged pay orders and bank drafts were not prepared from the account of the plaintiff. The plaintiff was called upon by defendants to produce details of preparation of pay orders and name of bank and

surrender thereof as well as the income tax returns to reflect the said amount. No such details have been furnished.

In Bank of Rajasthan, an account was opened in the name of plaintiff Satish Kumar Khanelwal on 27/03/2006. In fact, Satish Kuamr Sharma is an ordinary employee and has no financial resources to enter into an agreement to purchase the suit land by payment of consideration of more than 01.00 crore.

None of the pay orders or bank drafts were prepared from the account of Satish Sharma / Satish Khandelwal.

It is denied that defendants were not ready and willing to perform their part of agreement / contract. In fact, the funds were not available with the plaintiff at any time, muchless; on 27/03/2006. Parties had never agreed that the remaining amount of sale consideration shall be paid to defendants No.1 and 2 at the office of Registrar during the time of registration of sale deed on 27/03/2006. Plaintiff did not purchase stamp papers on 27/03/2006. He also did not handover the draft sale deed on or before 27/03/2006 to defendants No.1 and 2. Hence, the story coined by plaintiff is hypothetical. It is a frivolous litigation. Hence, the suit deserves to be dismissed.

4. Defendants No.4 and 5 have filed separate written statement. It is stated that they are not party to the agreement dated 27/04/2005. They neither have knowledge of the said agreement nor the same was entered by defendants No.1 and 2 with their consent. They have never permitted defendants No.1 and 2 to sell the land of their ownership falling in survey Nos.213/1, 213/238, 216/4 to the plaintiff. As such, there is no privity of contract between the plaintiff and the defendants No.4 and 5. They have been wrongly added as party by way of amendment after two years of filing the suit for no justification. The sale deed executed in favour of defendant No.8 on 28/03/2007 registered on 31/03/2007 was legal and valid. The amended paragraphs 4 and 5 of the plaint have been specifically denied. Therefore, they prayed for dismissal of the suit against them with cost of Rs.50,000/-.

5. Defendants No.6 and 7 have filed joint written statement. Defendant No.6 is company and defendant No.7 is director of the company *inter alia* pleaded that 2.50 acres of land falling in survey No.208/12 has been transferred vide registered sale deed dated 06/03/2007 by defendant No.1 in favour of defendants No.6 & 7.

Likewise, defendant No.2 has transferred 1.790 acre of land falling in survey No.208/9 vide registered sale deed dated 06/03/2007.

Answering defendants were appraised of rejection of injunction by the trial Court vide order dated 05/07/2006. There was no restriction on the sale of land. Besides, the land falling in survey No.208/9 was not included in the

agreement to sell. Instead, interpolation was done including the said survey numbers. The figures were forged in agreement by interpolation and fabricated the agreement.

The land admeasuring 2.5 acres is not part of the land falling in survey No.208/12 indicated in the agreement and the same is conceded by the plaintiff himself. Hence, no relief whatsoever can be granted to the plaintiff against the land transferred in favour of defendants No.6 and 7 falling in survey No.208/12.

6. Defendant No.8 had also filed separate written statement and denied plaint averments. It is contended that the land admeasuring 0.405 hectare falling in survey No.216/4 has been transferred in her name by defendants No.1 and 2 & defendants No. 4 and 5 by registered sale deed for a consideration of Rs. 4,80,000/-. Defendant No.8 had no knowledge or notice of such agreement dated 27/04/2005. Besides, the land purchased by her is not part of the agreement to sell. She is a *bona fide* purchaser. There was no agreement between the plaintiff and the defendants No.4 & 5 for sale of the land. The alleged agreement was without consent and knowledge of defendants No.4 and 5. The suit deserves to be dismissed.

7. On the aforesaid pleadings, trial Court framed as many as 20 issues and allowed parties to lead evidence. Upon critical evaluation of the entire evidence on record returned the following findings:

> (i) agreement to sale dated 27/04/2005 (exhibit P/9) was entered between the plaintiff and defendants No.1 and 2 in respect of 08 acres of suit land for an amount of Rs.1.120 crores. The entire consideration was to be paid in cash;
>
> (ii) the plaintiff is a fictitious person;
>
> (iii) plaintiff failed to prove and explain the source of cash flow of Rs.50.00 lakhs allegedly paid to defendants No.1 and 2;
>
> (iv) admittedly, he was an employee of A.R. Infrastructure and part-time employee in M/s. Aditya Marcon Company Pvt. Ltd., who has acted as a front man / name lender with meager earning of Rs.3.00 to Rs.5.00 lakhs per annum;
>
> (v) the pay orders and bank drafts were found to be prepared directly in the name of defendants No.1 and 2 from the accounts of Arun Dagaria, A.R. Infrastructure and M/s Ansal Housing and Construction Ltd., whereas there was no stipulation in the agreement to sale in that behalf. Hence, the transaction in question fell within four corners of benami transaction as defined under

section 2(a) of the Act and, therefore, it was a prohibitory transaction under section 3(1) of the said Act;

(vi) there is no agreement between the plaintiff and such companies related to cash transaction of such huge amount as to purpose and on what terms and conditions such amount was advanced to him;

(vii) plaintiff has failed to adhere to the schedule of payment as per agreement. He has paid only Rs.66.00 lakhs upto 16/05/2005 whereas Rs.98.00 laks remained to be paid. Therefore, in terms of clause under the agreement related to automatic rescinding of the agreement, the agreement automatically came to an end;

(viii) the plaintiff claimed to have tendered Rs.35.00 lakhs cash on 30/10/2005 after surrendering and encashment of pay orders prepared earlier prior to 05/11/2005 but, the defendants No.1 and 2 avoided to accept the same. The aforesaid statement stands falsified in the wake of paragraph 3 of the statement of P.W.6 Satya Kumar Kasliwal, Assistant Branch Manager of Bank of Rajasthan, New Palasiya Indore wherein he has stated that pay orders (exhibits P/63, P/65, P/69 and P/71) prepared from the account holder A.R. Infrastructure were submitted for cancellation on 26/11/2005 and after cancellation the amount was deposited in that account. Hence, there was no cash amount available on 05/11/2005 with the plaintiff to tender Rs.35.00 lakhs to defendants No.1 and 2 though the plaintiff tried to explain that the aforesaid amount was advanced for consultancy service he had rendered with A.R. Infrastructure and M/s Ansal Housing and Construction Limited. But, there was no documentary evidence that such consultancy service was rendered by the plaintiff;

(ix) the bank drafts were prepared by U.T.I.Bank from account of Ansal Housing and Construction Limited as per request received on 23/03/2006 for preparation of 09 demand drafts against a cheque for total amount of Rs.71.00 lakhs as is evident from the statement of P.W.7 Sumit Sani; Bank manager (exhibit P/83). Accordingly, the bank had prepared and released drafts on 25/03/2006. Besides, on 02/05/2006, the aforesaid company had filed an application for cancellation of 09 drafts prepared on 23/03/2006 (exhibit P/84).

The demand drafts were cancelled and credited in the account of Ansal Housing and Construction Limited. The certified copies of originals filed as exhibits P/85 to P/93. As such, the entire amount of Rs.65.50 lakhs in the form of demand drafts were not prepared from the account of the plaintiff. That apart, Ansal Housing and Construction Limited is not party to the agreement.

Ansal Housing and Construction Limited did not transfer the funds to the plaintiff for purchase of land instead, prepared the demand drafts through bank in the names of defendants No.1 and 2. Hence, the transaction is apparently benami transaction;

(x) plaintiff admitted in paragraph 61 of his statement that he had not prepared the draft sale deed and in paragraph 62 that he had not purchased the stamp papers;

(xi) as the agreement (exhibit P/9) was not signed by defendants No.4 and 5, there was no privity of contract between the plaintiff and defendants No.4 and 5. Besides, the agreement does not specify the description of 4 acres of land of the ownership and in possession of defendants No.4 and 5 to be sold to the plaintiff by defendants No.1 and 2 after obtaining release of the same by defendants No.4 and 5;

(xii) neither there was any consent nor knowledge of defendants No.4 and 5. That apart, the plaintiff has not adhered to payment of Rs.30.00 lakhs as condition precedent for purchase of 4 acres of land;

(xiii) as regards the sale deeds executed by defendants No.1, 2 in favour defendants No.6 & 7 on 06/03/2007 (exhibits P/47 & P/48) and sale deed executed by defendants No.4 & 5 in favour of defendant No.8 on 28/03/2007 (exhibit P/49), it has been held that after rejection of injunction on 05/07/2006; the same have been executed; For want of details of survey numbers, area, dimensions, locations and map of 08 acres of land and 04 acres of land in the agreement to sell, the said sale deeds were legal and valid as a result no interference is warranted.

With the aforesaid dismissed the suit of the plaintiff with a direction to the defendants No.1 and 2 to refund an amount of Rs.66.00 lakhs to the plaintiff.

8. In the backdrop of aforesaid factual matrix and findings of the trial Court, following questions are framed for disposal of this appeal:

(i) **Whether the plaintiff is a fictitious person?;**

(ii) **Whether, the agreement to sell dated 27/04/2005 is vague, uncertain and not capable of execution?**

(iii) **Whether the agreement to sell is hit by the prohibition under section 3 of the Benami Transactions (Prohibition) Act, 1988 and, therefore, not enforceable under law? and**

(iv) **Whether the plaintiff was ready and willing to perform his part of the agreement?**

(v) **Whether defendants No.4 and 4 (sic : 5) are entitled for cost?**

9. **Question (I)** :

(i) **Whether the plaintiff is a fictitious person?**

(a) In the agreement to sell dated 27/04/2005 (exhibit P/9), the second party is described as under:

Shri Satish Kumar Khandelwal
Son of Shri Shankarlal Ji Khandelwal
Resident: 216, Banshi Trade Centre, Indore (M.P.)

(b) whereas the plaintiff in the plaint is described as under:

Satish Kumar Khandelwal
S/o Shri Shankarlal Khandelwal
Aged about 42 years
Occupation: Businessman
Resident of 78A Parshanand Nagar,
RTO Road, Indore M.P.

As such, there is mark difference in the description of the second party.

10. Shri A.K.Sethi, learned senior counsel contends that Satish Kumar Khandelwal and Satish Kumar Sharma are one and the same person. 'Khandelwal' surname is also used by 'Brahmins'. Hence, no exception thereto can be taken with the description of 'Khadelwal' in the agreement to sell and plaint, nevertheless; no motive can be attributed thereto. Moreover, the plaintiff and the second party in the agreement are found to be same person by the Court itself while ordering for refund of an amount of Rs.66.00 lakhs to the plaintiff granting alternate relief.

11. *Per contra,* Shri Bagadiya, learned senior counsel for the contesting respondents contends that there is no explanation forthcoming for different

address in the agreement to sell and in the plaint. There is no evidence on record that the second party is residing at 216, Banshi Trade Centre, Indore (M.P.) instead it is a commercial place of M/s Baldev Chadda.

The address in the plaint with evidence on record unequivocally suggests that Satish Sharma resides at 78A Parshanand Nagar, RTO Road, Indore M.P but not Satish Khandelwal. The wrong description of second party in the agreement is with ulterior motive to hide identity of plaintiff. In fact, the plaintiff is an employee of A.R. Infrastructure and to achieve collateral purpose entered into the agreement to sell in fictitious name for the benefit and gain of the company. Therefore, it is a benami transaction. As the plaintiff has not come with clean hands before the Court, equitable relief cannot be granted.

The plaintiff is a fictitious person: for following reasons:

(a) the address shown in the agreement (exhibit P/9) is one of Balwant Singh Chadda; a commercial establishment. Therefore, the second party cannot be said to be residing there;

(b) Satish Sharma resident of 78A Parshanand Nagar, RTO Road, Indore and his wife, Meena Sharma are known to the defendant No.1 whereas the agreement to sell and the plaint is In the name of Satish Kumar Khandelwal;

(c) plaintiff has admitted in his cross-examination that his father's surname is 'Sharma' and his wife's name is Meena Sharma.

In every document, viz., bank account (exhibit P/127), insurance premium receipts, bank loan statement, etc., (exhibits P/128, P/134, P/139, P/141, P/149 & P/152) appears the name of Satish Sharma & also bank account statement (exhibit P/50);

Likewise, In the power of attorney (exhibit P/116) executed between Rajendra Kumar & others and Atul Surana, the plaintiff signed as a witness with name of Satish Sharma s/o Shankarlal R/o 78A Parashnand Nagar, Indore.

In the sale deed dated 12/12/2005 (exhibit P/122) between Rajendra Kumar & others and A.R. Infrastructure Pvt., Ltd., the plaintiff signed as a

witness with name of Satish Sharma s/o Shankarlal R/o 78A Parashnand Nagar, Indore.

(d) during trial in response to the application filed under Order 12 rule 3 CPC dated 09/08/2007, the plaintiff filed reply on 16/08/2007 and admitted his signature thereon as Satish Sharma;

(e) in his affidavit under Order 18 rule 4 CPC his name is written as Satish Kumar;

(f) however, in the bank account opened on 27/03/2006 (exhibit P/30) with the Bank of Rajasthan Limited, his name mentioned as Satish Shankarlal Khandelwal which is the only document;

(g) besides, the plaintiff admitted his signature as Statish Sharma mentioning his address as 79 Parshanand Nagar in exhibit D/1 sale deed dated 03/09/2005 executed by A.R. Infrastructure; exhbit D/2 sale deed and map attached therewith dated 23/04/1999 executed by Panchwati Sahkari Grih Nirman Sanstha in favour of Satish Sharma, exhibit D/3, a power of attorney executed by Satish Sharma on 03/05/2006 in favour of Manoharlal Dixit mentioning his address as 70 Lodhi Mohalla, Halmukam 78-A Parshanand Colony;

(h) exhibit D/4, motorcycle bearing registration No.MP09 LL 2484 dated 27.10.2005 is also in the name of Satish Sharma;

(i) further, during trial the plaintiff was given a notice on 29/05/2006 calling upon to produce the income tax return, PAN card, driving licence and Voter ID. But, he chose not to produce the aforesaid documents except Voter ID without disclosing his surname mentioning the address as Lodhi Mohalla, Indore;

(j) besides, for the first time, the plaintiff used the name Satish Shankarlal Khandelwal R/o 78A Parasnath Colony, Indore while he opened the account in Bank of Rajasthan Limited on 27/03/2006 (exhibit P/30). However, in the

statement of account issued by the Bank on 02/08/2007 (exhibit P/50), he was described as Satish Sharma (Khandelwal) after institution of the instant suit.

These documents were discussed in paragraphs 39 and 40 of the judgment by the trial Court.

Finding:

There is no explanation, muchless; plausible explanation forthcoming from the record as to why the plaintiff described himself differently.

Address in agreement:	Address in plaint:
Shri Satish Kumar Khandelwal S/o Shankarlal Ji Khandelwal Resident: 216 Banshi Trade Centre Indore (M.P.)	Satish Kumar Khandelwal S/o Shri Shankarlal Khandelwal Aged about 42 years Occupation: Businessman Resident of 78A Parshanand Nagar, RTO Road, Indore M.P

The address of Banwant Singh Chadda, a commercial place and not a place of residence whereas the 78A Parshanand Nagar, R.T.O. Road, Indore is a residential place of Satish Sharma.

There is no document, muchless; official document on record to indicate that plaintiff Satish Kumar Khandelwal is resident of 78A Parshanand Nagar, R.T.O. Road, Indore. For the first time, opened bank account in the Bank of Rajasthan Limited on 27/03/2006 (exhibit P/30) in the name of Satish Shankarlal Khandelwal. Besides, in his affidavit dated 24/04/2007, he has used the surname Satish Sharma (Khandelwal). Non-production of PAN card, school record or marks sheet, driving licence despite notice issued under Order 12 rule 3 CPC upon the plaintiff certainly shall lead to adverse inference against him in view of section 114(g) of the Evidence Act.

The aforesaid unnatural conduct of the plaintiff points needle of suspicion towards him and his *bona fides* are questionable. For want of explanation of genesis of cash flow, preparation of pay orders and bank drafts from the accounts of persons / companies, i.e., Arun Dagariya, A.R. Infrastructure & Ansal Housing and Construction Ltd., with whom there was no agreement by the plaintiff to provide consideration amount. Further, those persons were not examined in the Court. Such sequence of facts suggest that the plaintiff with ulterior motive described himself differently to act as a front man / name lender for the collateral purpose to benefit them.

In view of the aforesaid, the finding of the trial Court that only for the purpose of agreement to sell (exhibit P/9), the plaintiff used the name of Satish Kumar Khandelwal, resident of 216, Banshi Trade Centre, Indore as prior thereto the documents placed on record admitted by plaintiff himself describe him as Satish Sharma resident of 78A Parshanand Nagar, RTO Road, Indore M.P., cannot be faulted.

12. **Question (ii):**

Whether, the agreement to sell dated 27/04/2005 is vague, uncertain and not capable of execution?

Shri Sethi, learned senior counsel for the appellant would contend that the defendant No.1 in his deposition has clearly admitted that out of the above referred survey numbers, 08 acres of land was available. Hence, even if the details of survey numbers, details of sale deeds, location, dimensions and map of 08 acres of land are not attached thereto, that by itself; shall not render the agreement as uncertain and not capable of execution. In any case, the amendment application allowed by the trial Court contains all such details as regards the ownership of different survey numbers, area, location, dimensions etc., Besides, the defendant No.1 (D.W.1) in paragraphs 23 and 27 of his cross-examination has admitted that 8 acres of land was left in various survey numbers mentioned in the agreement (exhibit P/9) after transfer of remaining land to different persons and the same was available. The defect, if any in the agreement stands cured. Hence, incomplete details in the agreement, shall not enure any benefit to defendants.

Per contra, Shri Bagadia, learned counsel for the defendants No.1 and 2 controverts the same with the submission that in a suit for specific performance of an agreement to sell, unless; the agreement spelt out a specific area of survey numbers, its exact dimensions / location with map attached, such agreement is not capable of enforcement for specific performance of the contract. As such, non-description of aforesaid details alongwith map hit by the provisions of Order 7 rule 3 CPC. He placed reliance on judgments in cases of *Smt. Mayawanti Vs. Smt. Kaushlyadevi*, 1990 (3) SCC 1, *Roopkumar Vs. Mohan*, AIR 2003 SC 2418, *Vimlesh Kumari Kulshretha Vs. Sambhajirao and another* (2008) 5 SCC 58, *Kanhaiyalal Vs. Bhura* 1978 (1) MPWN 135, *Sambhajirao Vs. Vimlesh*, AIR 2004 MP 74 and *Kasihram Vs. Mitthulal*, 2013(1) MPHT 388 to bolster his submissions.

FINDING:

Agreement to sell (exhibit P/9) indicates the agreement between defendants No.1 & 2 and plaintiff for sale of 8 acres of land.

A bare perusal of relevant clauses of the agreement suggest that:

(a) there is no description of details of land *qua* each survey number, its location, dimensions and area to make the clauses capable of enforcement as the then survey numbers indicate total area 17.110 acres and out of it, major portion of the land had already been sold prior to execution of the agreement to sell;

(b) likewise, under clause (ii) there is no description of survey numbers with the area of land or bhumi swami rights of defendants No.4 and 5, out of which 4 acres of land allegedly agreed by defendants No.1 and 2 to be purchased by them and transfer the same to the plaintiff;

(c) agreement is not signed by defendants No.4 and 5;

(d) there is nothing on record to suggest that agreement was with the consent and knowledge of defendants No.4 and 5;

(e) there is no mention of the details of the person in whose favour the sale deeds have already been executed with specific areas, dimensions and boundaries;

(f) there is no map attached with the agreement indicating either 8 acres or 4 acres of land in terms of clauses (i) and (ii) of the agreement;

(g) in the legal notice dated 31/03/2006 (exhibit P/34), Jahir Suchana dated 17/04/2006 (exhibits P/44 and P/45) and in the plaint as originally filed, the plaintiff had claimed to have entered into an agreement for purchase of 08 acres of land plus 04 acres of land falling in aforesaid 10 survey numbers.

The details of sale deeds have been left blank and even the area, dimension and location of individual survey numbers have not been mentioned in the agreement. However, in the amendment application dated 19/05/2007, the plaintiff sought to improve upon clauses of the agreement to contend that 08 acres of land

compraised in survey Nos.208/9, 214, 219/2, 220 and 221/1 as evident from paragraph 79 of the statement of plaintiff (P.W.1).

(h) the aforesaid objections were specifically raised in the written statement dated 08/08/2006 by the defendants No.1 and 2;

(i) the trial Judge while rejecting the prayer for injunction vide order dated 5/07/2006 has also made an observation that the contract was void being uncertain.

The land falling in survey no.219/2 total area 1.40 acres of land has been jointly recorded in the names of Rajendra Jain, Rachna Jain, Palak and Subham Jain (exhibit P/94). Land falling in survey Nos.221/2 & 208/12 are recorded in the name of Shantilal (exhibit P/96 & P/99). Land falling in survey no.213/1 is recorded in the name of Surendra Dilliwal and Rajendra Jain (exhibit P/98) Land falling in survey No.216/4 is recorded in the name of Surendra Dilliwal, Sudha Dilliwal, Rajendra Jain & Rachna Jain (exhibit P/101). Therefore, the same lands were in the names of the aforesaid persons. There is no evidence that at any point of time, partition has taken place for apportionment of shares of defendants No.1, 2 and their heirs and rights conferred upon the defendants No.1 and 2 to deal with the lands of joint ownership.

Under such circumstances, the finding of the trial Court cannot be faulted that the agreement was uncertain and not enforceable.

Besides, the handwritten insertion under clause (2) in exhibit P/9 indicates that only on a condition of payment of Rs.30.00 lakhs on 16/05/2005, the defendant No.1 shall purchase 4 acres of land recorded in the names of defendants No.4 and 5 and transfer the same to the plaintiff. For ready reference, clause (1) and handwritten portion of clause (2) quoted below:

Clause(1):

'' प्रथमपक्ष के एकमात्र स्वामित्व अधिकारी एवं आधिपत्य की कुल 8 एकड़ भूमि ग्राम तलावली चांदा तहसील एवं जिला इंदौर के पटवारी हल्का क्रमांक 18 पर स्थित सर्वे क्रमांक निम्नानुसार हैः–

क्र. सर्वेनम्बर

1. 208/12	2. 208/9	3. 213/1
4. 213/238	5. 214	6. 216

7. 219/2 8. 220/ 9. 221/1

10. 221/2 पेकि आठ एकड

यह संपत्ति प्रथमपक्ष में..... से पंजीकृत विक्रय लेख 1अ/ग्रंथ...../पृष्ट...../क्रमांक...../दिनांक..... के अनुसार विधिवत रूप से क्रय की है। इस प्रकार प्रथमपक्ष उपरोक्त वैधानिक आधारों पर कुल भू–भाग पर एकमात्र मालिक एवं कब्जेधारी नाते काबिज है। सदर भूमि भू–राजस्व अभिलेखों में ऋण पुस्तिका क्रमांक..... के अनुसार प्रथमपक्ष के नाम दर्ज है। प्रथमपक्ष को उपरोक्त वर्णित कृषि भूमि में से पैकी 8 एकड़ को विक्रय कर रहे है के विक्रय अनुबंध लेख के निष्पादन का पूर्ण वैधानिक अधिकार प्राप्त है।

अनुबंधित कृषि भूमि को लेख में आगे सुविधा की दृष्टि से **सदर संपत्ति** से संबोधित किया गया है।

handwritten portion of clause (2):

''.....

यह कि विक्रित कृर्षी भूमि 8 एकड विक्रेता गण कि है व एवमं 4 चार एकड भूमि अन्य नाम कि है सुरेन्द्र दिल्लीवाल व सुधा दिल्लीवाल के नाम कि है। चार एकड भूमि खरीदने की जवाबदारी विक्रेता पक्ष की रहेगी। 16/5/2005 को 3000000 (तीस लाख) प्राप्त होने पर ही चार एकड भूमि खरीदकर देने की शर्त लागू होगी नहीं तो आठ एकड की रजिस्ट्री विक्रता पक्ष इन खसरो में से करेगा।

आज दिनांक को 27/4/05 1800000(अठारह लाख) कृषी भूमि का सोदा चोदह लाख प्रति एकड के मान से हुआ। आज दिनांक 16–05–2005 का पे आर्डर यु.टी.आई बैक न. 26001 रचना जैन के नाम से सात लाख पचास हजार 750000/– एवं पे आर्डर यू. टी.आई बैक न 26002 राजेन्द्र जैन 750000/– अक्षरी सात लाख पचास हजार प्राप्त हुए। इसीदीन नगद छः लाख 600000/– प्राप्त हुए। इस प्रकार आज दिनांक 16–5–05 को दोनों मिलाकर टोटल इक्कीस लाख प्राप्त हुआ है। चार एकड क्रय करने की जवाबदारी मेरी रहेगी। तथा प्रथम पक्ष उसकी मालकीन एवम कब्जे की उपरोक्त खसरा इन्ट्री की जमीन अन्य व्यक्तियों को विक्रय कर चुका है यह अनूबंध शेष बची जमीन बाबद है। ''

However, 8 acres of land is part of land spread over in 10 survey numbers in village Talwali Chand tehsil and district Indore with total area of 17.110 acres of the ownership of defendant No.1 Rajendra Jain, defendant No.2 Rachna Jain

and Palak & Subham (daughter & son of defendant No.1), Surendra Dilliwal and Sudha Dilliwal as well as father of defendant No.1 Shantilal Jain as well discussed in paragraphs 74 and 76 of the judgment.

The Hon'ble Supreme Court in the case of *Vimlesh Kumari Kulshrestha Vs. Sambhajirao and another* (2008) 5 SCC 58. In paragraph 25 has held as under:

> "An agreement of sale must be construed having regard to the circumstances attending thereto. The relationship between the parties was that of the landlord and tenant. Appellant was only a tenant in respect of a part of the premises. It may be that the boundaries of the house have been described but a plan was to be a part thereof. We have indicated hereinbefore that the parties intended to annex a plan with the agreement only because the description of the properties was inadequate. It is with a view to make the description of the subject matter of sale definite, the plan was to be attached. The plan was not even prepared. It has not been found that the sketch of map annexed to the plaint conformed to the plan which was to be made a part of the agreement for sale. The agreement for sale, therefore, being uncertain could not be given effect to.

This Court in the case of *Laxman Singh s/o Meharban Singh Vs. Jagannath s/o Mansaram*, 2000(1) MPLJ 79, it has been held as under:

> "10. The purpose of Order 7 Rule 3 of the Code, is that unless the plaintiff indicates the identity of the property claimed by him either by means of boundaries or by means of map as required by Order 7, Rule 3 of the Code, it would be difficult for the Court to find whether the plaintiff has title to the property claimed and whether any encroachment or dispossession has been made by the defendant. Thus the duty of the party is to give description sufficient to identify the property in dispute. If such decree is passed, it shall be unworkable. The Court can only pass a decree which can be executed under Order 21 of the Code.

The Hon'ble Supreme Court in the case of *Hemanta Mondal & Ors vs Sri Ganesh Chandra Naskar* (2016) 1 SCC 567, it has been held in paragraphs 8 and 16 as under:

> 8. The description of the schedule property for which advance is taken, gives following details at the end of the terms mentioned in the agreement (Annexure P-8) :-

> "Description Of Schedule Property For Which Advances Taken
>
> Under District-Howrah, District Registrar Office-Howrah, Sub-Registry Office- Domjur, P.S. Domjur and within Mouza-Pakura mentioned in old 'Parcha' (record) in Khatian No. 177 (one hundred seventy seven) in Dag No. 271 (Two hundred seventy one), high land measuring 33 (thirty three) shataks under permanent tenancy right, half portion from the western side which is according to Revisional Settlement's 'Parcha' (record) in Khatian No. 746 (seven hundred forty six), Dag No. 271 (two hundred seventy one) and in Parcha (Record) of present Revisional Settlement it is recorded in Khatian No. 602 (six hundred two), Dag No. 273 (two hundred seventy three) under permanent tenancy right as high land measuring 16 (sixteen) shataks".
>
> 16. In the present case, it appears that possession was not given to the plaintiff at the time of execution of the agreement, nor the area of land agreed to be sold was clear, as such, it cannot be said that the plaintiff has done substantial acts or suffered losses due to the expenditure in constructions, etc., in consequence of a contract capable of specific performance. The direction given by the High Court in the impugned order shows that the measurements of land actually agreed to be sold, are not final.

It is settled law that terms of an agreement for specific performance have to be read and understood as it is and the entire agreement to be read as a whole to ascertain the intention of the parties and working out its conclusions thereof so that upon fulfillment of the requisite conditions, the agreement could be enforced under law. No external aid can be allowed for appreciating the provisions of the agreement. Therefore, no amendment in the pleadings can be either permitted or read in conjunction with various clauses of the agreement. Moreover, the contents of written agreement cannot be proved otherwise than by writing itself. Section 91 of the Evidence Act prohibits proving of contents of a document.

The Hon'ble Supreme Court in the case of *Roop Kumar Vs. Mohan Thedani,* AIR 2003 SC 2418, it has been held as under:

> "It is likewise a general and most inflexible rule that wherever written instruments are appointment, either by the requirement of law or by the contract of the parties, to be the repositories and memorials of truth,

> any other evidence is excluded form being used either as a substitute for such instruments, or to contradict or alter them. This is a matter of both of principle and policy. It is of principle because such instruments are in their own nature and origin, entitled to a much higher degree of credit than parol evidence. It is of policy because it would be attended with great mischief if those instruments, upon which men's rights depended, were liable to be impeached by loose collateral evidence."

The Hon'ble Supreme Court in the case of *Manawanti Vs. Kaushalya Devi* (1990) 3 SCC 1, it has been held as under:

> "19. The specific performance of a contract is the actual execution of the contract according to its stipulations and terms, and the courts direct the party in default to do the very thing which he contracted to do. The stipulations and terms of the contract have, therefore, to be certain and the parties must have been *consensus ad idem.* The burden of showing the stipulations and terms of the contract and that the minds were ad idem is, of course, on the plaintiff. If the stipulations and terms are uncertain, and the parties are not *ad idem,* there can be no specific performance, for there was no contract act all."

Besides, the clauses of the agreement neither can be supplemented, supplanted or substituted by extensive description in the plaint or in the oral testimony (*Roop Kumar Vs. Mohan Thendani*, AIR 2003 SC 2418, referred to).

The specific performance of a contract is the actual execution of the contract according to its stipulations and terms, the Courts direct the party in default to do the very thing which he contracted to do. Therefore, unless; the stipulations and terms of the contract are certain and parties must have been *consensus ad idem,* the specific performance cannot be ordered. The burden that the stipulations and terms of contract and the minds of parties *ad idem* is always on the plaintiff. If such burden is not discharged and the stipulations and terms are uncertain, and the parties are not ad idem, there can be no specific performance, for there was no contract at all. [*Smt. Mayawanti Vs. Smt. Kaushlyadevi*, 1990 (3) SCC 1 referred to].

Therefore, this Court is of the view that the agreement to sale (exhibit P/9) is vague, uncertain and is not capable for execution under law.

13. **Question (iii):**

Whether the agreement to sell hit by the prohibition under section 3 of the Benami Transactions (Prohibition) Act, 1988 and, therefore, not enforceable by law?

Shri Sethi, learned senior counsel contends that the plaintiff/appellant has arranged amount from different companies and none of these companies or persons claimed any right over the suit property.

In modern days, most of the properties are purchased on loan taken from various financial institutions, corporations, banks, societies, etc., and those institutions directly make payment to the seller. If the understanding and reasoning of the trial Court is accepted, all such transactions where funds have been mobilized from different sources shall be rendered *benami* transactions. Therefore, the real intention of the parties needs to be looked into before declaring any transaction as benami transaction.

Learned senior counsel relying upon the judgment of Hon'ble Supreme Court in the case of *Pawan Kumar Gupta Vs. Rochiram Nagdeo*, 1999 AIR SCW 1420 (paragraphs 29 & 30) contends that the word "provided" in section 2(a) of the Act cannot be construed in relation to the source or sources which the real transferee made funds available for paying the sale consideration. The words "paid"or "provided"are disjunctively employed in the clause and each has to be understood with the word consideration. Therefore, if the sale consideration has been provided by different sources, the same shall not render the transaction of sale under the agreement to sell as *benami* transaction within the meaning of section 2(a) of the Act.

Per contra, Shri Bagadia, learned senior counsel for the contesting defendants referred to paragraphs 48 and 49 of the judgment of the trial Court to contend that the plaintiff was an employee of A.R. Infrastructure & M/s Aditya Marcon Pvt. Limited with a meager monthly salary with an aggregate amount of Rs.3.00 lakh to Rs.5.00 lakhs per annum. The plaintiff had no capacity to enter into an agreement to purchase property worth Rs.1.12 crore.

He has not disclosed the source of cash flow of Rs.51.00 lakhs. Besides, the pay orders and bank drafts were from the accounts of Arun Dagaria, A.R. Infrastructure and Ansal Housing and Construction Limited, New Delhi directly in the names of defendants No.1 and 2.

He used the fictitious name for entering into an agreement (exhibit P/9). The passbook of Bank of Rajasthan (exhibit D/11) coupled with the statement of P.W.1 in paragraph 59 reflects that the cash amount of Rs.28.45 lakhs was deposited on 27/03/2006 in his account by A.R. Infrastructure but, he does not remember three entries of deposit in his account. Besides, cash deposited on

19/04/2007 (exhibit D/10) does not reflect the source of deposit. Later on, he stated that the the said amount was transferred from M/s Ansal Housing and Construction Limited and the amount was automatically deposited in the form of fixed deposit account. He, however, claimed that the said amount was advanced to him but, nowhere, he has disclosed this income. Hence, the entire details of flow of money suggests that it was a benami transaction. There is no agreement or terms and conditions in writing between the plaintiff and these companies for transfer of lakhs of rupees for purchase of the suit land.

All these factors cumulatively indicate that the plaintiff has acted as a front man for purchase of the suit land for the benefit and gain of companies, A.R. Infrastructure and Ansal Housing and Construction Ltd.,

Learned senior counsel placed reliance on the judgment of Hon'ble Supreme Court in the case of *Union of India Vs. Moksh Builders and Financiers Ltd., and others*, [(1977) 1 SCC 60. paras 13, 15 and 18].

FINDING:

Before adverting to rival contentions, it is expedient to discuss ratio of the judgment of Hon'ble Supreme Court in the case of *Pawan Kumar Gupta* (supra), while interpreting section 2(a) of the Act has ruled that the word "paid" and the word "provided" used in the section must be understood disjunctively. To be precise, the correct interpretation shall be "consideration paid" or "consideration provided". If consideration was paid to the transferor then the word provided has no application for the said sale. If the consideration was not paid in regard to a sale transaction, a question of proving consideration would arise. In some cases of sale transaction ready payment of consideration might not have been effected then provision would be made for consideration. Therefore, the word "provided" as used in section 2(a) of the Act has to be read in that context. Any other interpretation shall harm the interest of persons involved in genuine transaction, i.e., if a purchaser availed himself of loan facility from bank to make up purchase money, such sale cannot be said to be a *benami* transaction as the bank has provided the consideration.

The aforesaid proposition of law in the context of the word "provided" used in section 2(a) of the Act is certainly beyond cavil of doubt. Nevertheless; its applicability shall depend upon the nature of transaction and facts and circumstances of each case to ascertain the genuineness of the transaction. Otherwise, the very purpose of the enactment shall frustrate.

The facts in hand as discussed above unambiguously and unequivocally lead to a conclusion that the plaintiff was not a *bona fide* purchaser with no financial capacity whatsoever. Besides, the plaintiff also failed to prove genuineness of the transaction for preparation of pay orders and bank drafts from the accounts of such persons with whom plaintiff had no privity in terms of the

agreement for providing the consideration and unexplained cash flow. None of the persons providing consideration amount were examined in the Court. Under such circumstances, the transaction in question in the considered opinion of this Court tantamount to *benami* transaction prohibited within the meaning of section 2(a) of the Act, the same cannot be termed genuine transaction as conceptualized by the Hon'ble Supreme Court in the judgments quoted above.

The Hon'ble Supreme Court in the case of *Meenakshi Mills, Madurai Vs. Commissioner of Income-tax, Madras*, AIR 1957 SC 49 relying upon the judgment of Federal Court in the case of *Gangadara Ayyar Vs. Subramania Sastrigal*, AIR 1949 FC 88, it has been ruled that in a case where it is asserted that an assignment in the name of one person is in reality for the benefit of another, the real test is the source wherefrom the consideration came. It is also necessary to examine in such cases actually who has enjoyed the benefit of the transfer.

Plaintiff (P.W.1) has admitted in his cross-examination (paragraph 33) that he was an employee in A.R. Infrastructure and Aditya Marcon Company Private Limited wherefrom he had annual income of Rs.70,000/- & Rs.1,28,000/- respectively. Therefore, his total income was Rs.2,00,000/-. He has also admitted in his cross-examination that his income tax return reflects income ranging from Rs.3,00,000/- to Rs.5,00,000/- Per annum. Besides, the plaintiff in paragraphs 23, 27 & 33 has stated that he rendered consultancy services to A.R. Infrastructure and Ansal Housing and Construction Limited. However, he has not submitted a single document either in respect of alleged consultancy services or income tax return to reflect income from consultancy services.

The plaintiff in paragraph 64 of his statement has stated that the witnesses list submitted by him include the names of A.R.Infrastructure, Arun Dagariya, Ansal Housing and Construction Limited, etc., Whereas, none of the aforesaid witnesses have been produced and examined. However, two pay orders (Rs.15.00 lakhs); each of Rs.7.50 lakhs dated 16/05/2005 vide Nos.26001 and 26002 of UTI Bank were prepared from the account of Arun Dagariya. 05 demand drafts of each Rs.5.00 lakhs (total Rs.35.00 lakhs) were prepared from the account of A.R. Infrastructure and handed over to the plaintiff by Arun Dagariya. It is to be noted that these pay orders and bank drafts were in the names of defendants No.1 and 2 and not in the name of plaintiff. There is no privity of contract between defendants No.1 & 2 either with Arun Dagariya or A. R. Infrastructure or Ansal Housing and Construction Limited, there is also no document on record that loan agreement was entered between the plaintiff and these persons. There is no provision under the agreement (exhibit P/9) contemplating payment of consideration to defendants No.1 and 2 by any person other than the plaintiff.

That apart, Rs.51.00 lakhs cash was already paid on different dates between 27/04/2005 to 31/10/2005 but not withdrawn from the account of plaintiff as there is

no evidence on record. The plaintiff failed to establish the source of cash flow of Rs.51.00 lakhs.

Besides, 05 drafts for an amount of Rs.65.50 lakhs were prepared from the account of Ansal Housing and Construction Limited, Delhi in the names of defendants No.1 and 2.

The above discussed facts clearly suggests that the plaintiff with meager earning (Rs.3.00 to Rs.5.00 lakhs per annum) as an employee of A. R. Infrastructure was not a person of sufficient means to enter into an agreement for purchase of 8 acres of land for a consideration of Rs.1.120 crores. Using the name of Satish Kumar Khandelwal with address of 216, Banshi Trade Centre, Indore (M.P.); a fictitious name and address, the plaintiff entered into the agreement (exhibit P/9) as second party and acted as a front man / name lender to achieve collateral purpose for the benefit and gain of A.R. Infrastructure. Unexplained genesis or source of flow of Rs.51.00 lakhs (cash) allegedly paid to defendants No.1 and 2 coupled with preparation of pay orders and bank drafts from the accounts of Arun Dagaria, A.R. Infrastructure and Ansal Housing and Construction Limited, Delhi in the names of defendants No.1 and 2 gives rise to important questions of law:

> "(i) Whether such transaction on the anvil of agreement (exhibit P/9) can be classified as *benami* transaction within the meaning of section 2(a) of the Act and, therefore, prohibited under section 3 (1) of the said Act?
>
> **If Yes**
>
> (ii) Whether *benami* transaction as defined under section 2(a) of the Act shall include 'an agreement to sell' regard being had to be clubbed definition of sale and contract for sale defined under section 54 of the Transfer of Property Act?"
>
> **If Yes**
>
> (iii) Whether such an agreement forbidden by law is hit by section 23 of the Contract Act as the object of the agreement is vulnerable rendering the agreement as *void?"*

Before adverting to questions, it is expedient to quote unamended sections 2(a); ***'benami transaction'*,** relevant for the present purpose:

> "(a) **"benami** transaction" means any transaction in which property is transferred to one person for a consideration paid or provided by another person."
>
> and

Section 3. **Prohibition of benami transactions** :- (1) No person shall enter into any *benami* transaction."

... ..."

Transfer of Property Act, 1882:

Section 4, 5 and 54 are relevant and relevant part thereof quoted below:

"4. Enactments relating to contracts to be taken as part of Contract Act and supplemental to the Registration Act.- The Chapters and sections of this Act which relate to contracts shall be taken as part of the Indian Contract Act, 1872 (9 of 1872).

... ..."

5. **"Transfer of Property" defined.-** In the following sections "transfer of property" means an act by which a living person conveys property, in present or in future, to one or more other living persons; and "to transfer property" is to perform such act."

"54. "Sale" defined.' "Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.

... ...

Contract for sale.- A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties.

It does not, of itself, create any interest in or charge on such property."

The Indian Contract Act, 1872:

"Section 23: What consideration and objects are lawful, and what not.- The consideration or object of an agreement is lawful, unless-

it is forbidden by law; or

is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or

....; or

the Court regards it as immoral, or opposed to public policy.

> In case of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is *void.*
>
> (Emphasis supplied)

Section 4:

Section 4 of the Transfer of Property Act provides for Chapters and sections of Transfer of Property Act which relates to contracts to be taken as part of the Indian Contract Act. Thus, an 'agreement to sell' as occurs in section 54 of the Transfer of Property Act is to be understood in the same sense as in the Indian Contract Act.

Section 5:

The word "transfer" is defined with reference to the word "conveys". The word 'conveys' in section 5 is used in wider sense. The transfer of property may take place not only 'in present' but, also 'in future' as the the word 'in present' or 'in future' qualify the word 'conveys. An agreement to sell though does not create interest in the proposed vendee in the suit property but, definitely, creates an enforceable right in the parties [*Namdeo Vs. Collector, East Meemar, Khandwa and others* (1995) 5 SCC 598 and *Rambhau Mamdeo Gajre Vs. Narayan Bapuji Dhotra (dead) through LRs.*,(2004) 8 SCC 614, referred to].

Therefore, a person having an agreement to sell in his favour though does not get any right to the property but, has a right of litigation for title to the property on that basis.

Benami transaction involves transaction in relation to a property defined in section 2(c) of the Act. **"Property"** means property of any kind, whether movable or immovable, tangible or intangible, and includes any right or interest in such property."

Black's Law dictionary defined 'transaction' as performance or discharge of contract; a business agreement. Something performed or carried out. The agreement to sell property creates an enforceable right upon a proposed vendee. Of course, upon fulfillment of conditions under the agreement/contract. Therefore, it is in the realm of transaction for sale of immovable property. The word 'transaction' used in section 2(a) of the Act is in fact a generic term. Therefore, benami transaction defined in section 2(a) of the Act shall not only include transaction in which property is transferred to one person but, also agreement to transfer the property to one person as the intendment of the legislature is to prohibit *benami* transaction.

Sale and agreement to sale defined under section 54 of the Transfer of Property Act being part of the Indian Contract Act, as contemplated under section 4 of the Transfer of Property Act are subject to prohibition contained thereunder.

If an agreement to sale suffers from the vice of benami transaction within the meaning of section 2(a) of the Act, the same falls in the category of contracts forbidden by law as contemplated under section 23 of the Indian Contract Act, the object whereof is unlawful. Hence, inexecutable in an action for specific performance.

14. **Question (iv):**

Whether the plaintiff was ready and willing to perform his part of the agreement?

Shri Sethi, learned senior counsel contends that the plaintiff/appellant was always ready and willing to perform and has offered the entire consideration as per schedule of payment of agreement but, the defendants No.1 and 2 failed to adhere to the same as a result committed breach of agreement. Therefore, there is perversity of approach by the trial Court in recording the finding that plaintiff was not ready and willing to perform his part of agreement. Hence, the impugned judgment and decree be set aside by allowing the appeal.

Per contra, Shri Bagadia, learned senior counsel contends that the agreement contains schedule of payment, default clause and admission of the plaintiff in that behalf in paragraph 68 of his cross-examination. The plaintiff in his notice dated 31/03/2006 (exhibit P/34) and in the plaint originally filed has not pleaded that he tendered Rs.35.00 lakhs to defendants No.1 and 2. The plaintiff for the first time on 19/05/2007 pleaded that he had tendered demand drafts/pay orders for an amount of Rs.35.00 lakhs Moreover, the pay orders for an amount of Rs.35.00 lakhs were not prepared from the account of plaintiff but, from the account of A.R. Infrastructure. In paragraph 8 of examination-in-chief, the plaintiff pleaded that he has encashed the pay orders and offered cash prior to 05/11/2005 in presence of Atul Surana but, he was not examined though cited in the list of witnesses. The aforesaid statement falsified in the wake of statement of Satya Kumar Kasliwal (P.W.6) bank manager that the aforesaid pay orders were submitted for cancellation only on 26/11/2005 by A.R. Infrastructure and after cancellation, the amount has been credited in the account holder. The plaintiff has not tendered the draft sale deed and straightaway sent a telegram on 27/03/2006 for registration of sale deed without complying terms and conditions of the agreement.

It is settled law that the plaintiff has to plead and prove his continuous readiness and willingness to perform each and every condition of the agreement right from the date of agreement upto the date of decree (*N.P.Thirugnanam Vs. Dr. R. Jagan*, AIR 1996 SC 116, referred to).

FINDING:

The agreement (exhibit P/9) specifically mentions the dates on which payments were to be made in respect of sale of 08 acres of land.

(a) 27/04/2005 : Rs.18.00 lakhs : Cash

(b) 16/05/2005 : Rs.30.00 lakhs : Cash

(c) 27/10/2005 : Rs.50.00 lakhs : Cash

(d) Remaining amount of Rs.14.00 lakhs to be paid prior to 27/03/2006 in cash.

Besides, the clause of handwritten recital stipulates the responsibility upon the defendants No.1 to 2 to purchase 04 acres of land from Dr. Surendra Dilliwal and Smt. Sudha Dilliwal subject to payment of Rs.30.00 lakhs by the plaintiff on or before 27/10/2005. The said amount was never paid.

By 27/10/2005 and / or the extended period, 16/05/2005, the plaintiff was required to make payment of Rs.98.00 lakhs in respect of 8 acres of land.

The plaintiff has failed to adhere to the aforesaid terms and conditions of payment. The details whereof are as under:

(i)	27/04/2005 : Rs.18.00 lakhs Cash	
(ii)	29/04/2005 : Rs.03.00 lakhs Cash	
(iii)	07/05/2005 : Rs.09.00 lakhs Cash	
(iv)	16/05/2005 : Rs.06.00 lakhs Cash &	
	Rs.15.00 lakhs Pay Orders	
(v)	30.10.2005 : Rs.15.00 lakhs Cash	
	Total	:: Rs.66.00 lakhs

The payments made are not as per the schedule of payment agreed by the parties.

Besides, though upto 27/10/2005, Rs.98.00 lakhs was to be paid whereas upto 30/10/2005, Rs.66.00 lakhs was paid. In fact, on 27/10/2005, Rs.50.00 lakhs was to be paid but, only Rs.15.00 lakhs was paid. The period for payment was extended upto 05/11/2005. Though, it is alleged that Rs.35.00 lakhs was offered in the form of pay orders but, the same was not agreed to by defendants No.1 and 2 as in terms of the agreement, only cash was to be paid to which the plaintiff agreed to pay the entire remaining consideration amount in cash. However, neither in the

notice dated 31/10/2006 (exhibit P/34) nor in the original plaint, averment was made that bank drafts for Rs.35.00 lakhs were tendered to defendants No.1 and 2 on 30/10/2005 but, the same were refused on the premise that they shall accept cash only. Be that as it may. At this stage, it is relevant to point out that the plaintiff though has deposed that he has encashed bank drafts from the bank and offered cash of Rs.35.00 lakhs prior to 05/11/2005 but the defendants No.1 and 2 avoided to accept the same in presence of Atul Surana (paragraph 8 of his deposition). However, Atul Surana has not been examined by the plaintiff. The aforesaid statement stands falsified in the wake of paragraph 3 of the statement of P.W.6 Vimalchand wherein he has deposed that the aforesaid demand drafts were submitted in the bank by A.R.Infrastructure on 26/11/2005 and credited its account. Therefore, Rs.35.00 lakhs cash was not available with the plaintiff on that date. Therefore, is a factual incorrect statement.

The default clause as admitted by the plaintiff in his examination in chief and paragraph 68 of his cross-examination are quoted below:

Clause in agreement:

> ''अठारह लाख बयाने के पश्चात द्वितीय पक्ष द्वारा पेमेन्ट नहीं किये जाने पर यह अनुबंध स्वतः निरस्त माना जावेगाा।

Court Statement of plaintiff:

> ''साथ ही ऐसा तय किया था कि अठारह लाख रूपये बयाने के पश्चात यदि मेरे द्वारा भुगतान नहीं किया जाता है तो अनुबंध स्वतः निरस्त माना जावेगा।''

Under such circumstances, the reliance on the judgment of Hon'ble Supreme Court in the case of *A.K.Lakshmipathy (D) & Ors., Vs. Rai Saheb Pannalal H. Lahoti Charitable Trut & Ors.,* AIR 2010 SC 577 is found to have substantial bearing on the proposition that the plaintiff was not ready and willing to perform his part of the agreement in the matter of payment of consideration. It has been ruled in that case, if particular dates are stipulated for payment of amount under the agreement then time would be essence even if the agreement is related to sale of immovable property. The default in the schedule of payment shall certainly attract the clause of automatic termination of the agreement, quoted above.

Hence, the plaintiff could not be said to be ready and willing to perform his part of the contract. Due to default of payment schedule as agreed to, the agreement stands rescinded on its own.

The subsequent conduct of the plaintiff is also unnatural. He sent two telegraphs for taking the remaining amount and presence of defendants No.1 and

2 on 27/03/2006 for registration of sale deed whereas neither he had purchased the stamp paper nor handed over the draft sale deed to defendants No.1 and 2.

Therefore, the plaintiff found to have not made the payment of consideration as agreed to between the parties and on the contrary, has made a factual incorrect statement discussed above regarding cash payment of Rs.35.00 lakhs before 05/11/2005.

Law is well settled that the plaintiff has to plead and prove each and every condition of the agreement right from the date of the agreement upto the date of decree (*N.P.Thirugnanam Vs. Dr. R.Jagan*, AIR 1996 SC 116, referred to).

15. **Question (v):**

Whether the defendants No.4 and 5 are entitled for cost?

Originally the suit was filed in the year 2006 but, the defendants No.4 and 5 were not party to the suit. It was only by way of amendment allowed on 19/05/2007, they were made as party to the suit. Even otherwise, the agreement to sell dated 27/04/2005 (exibit P/9) itself suggest that the plaintiff shall pay an amount of Rs.35.00 lakhs to the defendants No.1 and 2 on or before 16/05/2005 who in turn purchase 04 acres of land or obtain consent from defendants No.4 and 5 and thereafter, the same shall be made available for sale to the plaintiff. Undisputedly, Rs.35.00 lakhs was never paid by the plaintiff to the defendants No.1 and 2 for purchase of 04 acres of land from the defendants No.4 and 5 [Statements of P.W.1 Satish Khandelwal, D.W.1 Rajendra Jain and D.W.4 Dr. Surendra Dilliwal, referred to].

The trial Court has elaborately discussed the aforesaid facts in its judgment and discussed in preceding paragraphs of this judgment. As such, the defendants No.4 and 5 found to have been unjustifiably dragged into the instant litigation. Therefore, they are entitled for cost of Rs.50,000/- (Rupees fifty thousand only) payable by the plaintiff within four weeks from the date of pronouncement of this judgment.

For the above detailed discussion; the question Nos.(i), (ii), (iii) and (v) are answered affirmative and against the plaintiff / appellant & question No.(iv) is answered in the negative and against the plaintiff/appellant.

16. Appeal sans merit and is hereby dismissed. No order as to cost.

Appeal dismissed

I.L.R. [2020] M.P. 1422 (DB)
CRIMINAL REFERENCE

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

Cr.Ref. No. 12/2019 (Indore) decided on 3 March, 2020

STATE OF M.P. …Applicant

Vs.

HONEY @ KAKKU …Non-applicant

(Alongwith Cr.A. No. 8818/2019)

***A. Penal Code (45 of 1860), Sections 302, 363, 366, 376-A, 376-AB & 201 and Protection of Children from Sexual Offences Act (32 of 2012), Section 5(n) & 6 – Rape and Murder – Minor Girl of 4½ years – Circumstantial Evidence – DNA Test* – Held – Existence of motive, last seen theory and recovery of body and clothes of deceased were established beyond reasonable doubt – DNA found on clothes and body of deceased matched with the one of appellant – Circumstantial evidence forming a complete chain, proving that it was appellant who committed the offence – Appellant rightly convicted – Appeal on point of conviction dismissed.**

(Paras 24, 26, 28, 44, 45, 49, 50 & 57)

क. दण्ड संहिता (1860 का 45), धाराएँ 302, 363, 366, 376–A, 376–AB व 201 एवं लैंगिक अपराधों से बालकों का संरक्षण अधिनियम, (2012 का 32), धारा 5(n) व 6 – बलात्संग एवं हत्या – 4½ वर्षीय अवयस्क बालिका – परिस्थितिजन्य साक्ष्य – डी.एन.ए. परीक्षण – अभिनिर्धारित – हेतु का होना, अंतिम बार देखे जाने का सिद्धांत एवं मृतिका के शव तथा कपड़ो की बरामदगी, युक्तियुक्त संदेह से परे स्थापित किये गये थे – मृतिका के शव तथा कपड़ो में प्राप्त डी.एन.ए. का मिलान अपीलार्थी के डी.एन.ए. के साथ – परिस्थितिजन्य साक्ष्य एक पूर्ण कड़ी बनाते हैं, जो यह साबित करता है कि वह अपीलार्थी था, जिसने अपराध कारित किया था – अपीलार्थी उचित रूप से दोषसिद्ध – दोषसिद्धि के बिंदु पर अपील खारिज।

***B. Penal Code (45 of 1860), Sections 302, 363, 366, 376-A, 376-AB & 201 and Protection of Children from Sexual Offences Act (32 of 2012), Section 5(n) & 6 – Death Sentence – Aggravating and Mitigating Circumstances – Crime/ Criminal/Rarest of Rare Test* – Held – Rape and murder for revenge and lust committed by appellant in a brutal manner with 30 injuries on minor girl – Case fully satisfy Crime Test i.e. 100% meaning thereby that aggravating circumstances of murder involves exceptional depravity – In respect of mitigating circumstances, prosecution failed to prove criminal antecedents of appellant, thus case fails to achieve yardstick of 0% Criminal Test.**

(Paras 69, 72, 73, 74)

ख. दण्ड संहिता (1860 का 45), धाराएँ 302, 363, 366, 376–A, 376–AB व 201 एवं लैंगिक अपराधों से बालकों का संरक्षण अधिनियम, (2012 का 32), धारा 5(n) व 6 – मृत्यु दण्डादेश – गुरूतरकारी एवं लघुतरकारी परिस्थितियां – अपराध/अपराधी/विरल से विरलतम परीक्षण – अभिनिर्धारित – अपीलार्थी द्वारा बदला लेने और वासना पूर्ण करने हेतु अवयस्क बालिका को तीस चोटें पहुंचाकर क्रूर तरीके से बलात्संग किया गया तथा हत्या कारित की गई – प्रकरण, अपराध परीक्षण को पूरी तरह से अर्थात् सौ प्रतिशत संतुष्ट करता है जिसका अर्थ है कि हत्या की गुरूतरकारी परिस्थितियों में आपवादिक दुराचारिता शामिल है – लघुतरकारी परिस्थितियों के संबंध में, अभियोजन अपीलार्थी के आपराधिक पूर्ववृत्त को साबित करने में विफल रहा, अतः प्रकरण शून्य प्रतिशत आपराधिक परीक्षण के मापदंड को हासिल करने में विफल रहता है।

***C. Penal Code (45 of 1860), Sections 302, 363, 366, 376-A, 376-AB & 201 and Protection of Children from Sexual Offences Act (32 of 2012), Section 5(n) & 6 – Death Sentence – Rarest of Rare Case – "Standard of Residual Doubt"* – Held – Few lapses in evidence gathered by prosecution and obtained circumstances – Although prosecution succeeded in proving the case beyond reasonable doubt but "standard of residual doubt" not satisfied – No case of "rarest of rare case" category – Death Sentence imposed u/S 376-A IPC reduced to life imprisonment for remainder of appellant's natural life – Appeal partly allowed on quantum of sentence. (Paras 78, 79 & 81)**

ग. दण्ड संहिता (1860 का 45), धाराएँ 302, 363, 366, 376–A, 376–AB व 201 एवं लैंगिक अपराधों से बालकों का संरक्षण अधिनियम, (2012 का 32), धारा 5(n) व 6 – मृत्यु दण्डादेश – विरल से विरलतम् प्रकरण – ''अवशिष्ट संदेह का मानक'' – अभिनिर्धारित – अभियोजन द्वारा एकत्रित किये गये साक्ष्य तथा प्राप्त परिस्थितियों में कुछ खामियां/चूक – यद्यपि अभियोजन प्रकरण को युक्तियुक्त संदेह से परे साबित करने में सफल रहा परंतु ''अवशिष्ट संदेह के मानक'' की संतुष्टि नहीं होती – ''विरल से विरलतम् प्रकरण'' श्रेणी का प्रकरण नहीं – भा.दं.सं. की धारा 376–A के अंतर्गत अधिरोपित मृत्यु दण्डादेश को घटाकर अपीलार्थीगण के शेष प्राकृतिक जीवन के लिए आजीवन कारावास किया गया – दण्डादेश की मात्रा पर अपील अंशतः मंजूर।

***D. Criminal Procedure Code, 1973 (2 of 1974), Section 313 – Statement of Accused – Adverse Inference* – Held – Apex Court concluded that if accused give evasive and untrustworthy answers u/S 313 Cr.P.C. then it would be a factor indicating his guilt – False denial made by accused of established facts can be used as incriminating evidence against him – Manner in which appellant has answered the questions u/S 313 Cr.P.C., it raises adverse inference against him. (Para 51)**

घ. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 313 – अभियुक्त का कथन – प्रतिकूल निष्कर्ष – अभिनिर्धारित – सर्वोच्च न्यायालय ने यह निष्कर्षित किया है कि यदि अभियुक्त दं.प्र.सं. की धारा 313 के अंतर्गत कपटपूर्ण तथा अविश्वसनीय उत्तर देता है तो यह उसकी दोषिता का संकेत देने वाला एक कारक होगा – अभियुक्त द्वारा

स्थापित तथ्यों से मिथ्या इंकार किये जाने को उसके विरूद्ध अपराध में फंसाने वाले साक्ष्य के रूप में उपयोग में लाया जा सकता है – वह तरीका जिसमें अपीलार्थी ने दं.प्र.सं. की धारा 313 के अंतर्गत प्रश्नों का उत्तर दिया है, उसके विरूद्ध प्रतिकूल निष्कर्ष प्रकट करता है।

***E. Evidence Act (1 of 1872), Section 106 – Onus of Proof* – Held – Onus u/S 106 of Evidence Act was not discharged by accused who needed to explain the whereabouts of deceased whom he had accompanied at the relevant period. (Para 33 & 50-iv)**

ङ. साक्ष्य अधिनियम (1872 का 1), धारा 106 – सबूत का भार – अभिनिर्धारित – अभियुक्त द्वारा साक्ष्य अधिनियम की धारा 106 के अंतर्गत भार का उन्मोचन नहीं किया गया था, जिसे मृतिका का पता ठिकाना स्पष्ट करने की आवश्यकता थी, सुसंगत अवधि पर वह जिसके साथ रहा था।

***F. Evidence Act (1 of 1872), Section 27 – Discovery of Fact* – Held – It is established that on basis of memorandum of appellant, clothes of deceased hidden beneath the soil and stones were recovered – This amounts to discovery of fact u/S 27 of Evidence Act. (Para 39)**

च. साक्ष्य अधिनियम (1872 का 1), धारा 27 – तथ्य का प्रकटीकरण – अभिनिर्धारित – अपीलार्थी के ज्ञापन/विवरण के आधार पर यह स्थापित हुआ है कि मृतिका के कपड़े मिट्टी तथा पत्थर के नीचे छिपे बरामद हुए थे – यह साक्ष्य अधिनियम की धारा 27 के अंतर्गत तथ्य के प्रकटीकरण की कोटि में आता है।

Cases referred:

AIR 1947 PC 67, 2017 (6) SCC 1, 1984 (4) SCC 116, (2015) 4 SCC 739, AIR 2012 SC 2470, 1980 (2) SCC 684, 2019 (4) JLJ 258, 1983 (1) SCC 470, 2013 (5) SCC 546.

R.S. Chhabra, Addl. A.G. with *L.S. Chandiramani*, P.P. for the applicant/State in Cr.Ref. No. 12/2019 and for the non-applicant/State in Cr.A. No. 8818/2019.

Avinash Sirpurkar with *B. Patel*, for the non-applicant, as *amicus curiae* in Cr.Ref. No. 12/2019 and for the applicant in Cr.A. No. 8818/2019 as *amicus curiae.*

J U D G M E N T

The Judgment of the Court was delivered by:-

SHAILENDRA SHUKLA, J.:-The present reference and appeal arise out of judgment dated 30.9.2019, pronounced in Special Case No.2147/2018 by the 15th A.S.J. and Special Judge, Indore whereby, appellant - Honey @ Kakku has been convicted for the offence punishable under Sections 363, 366, 376AB, 302, 201, 376A of IPC and under Section 5(n) read with Section 6 of POCSO Act. The accused has not been sentenced separately under Section 5(n) read with Section 6 of POCSO Act, in view

of Section 42 of POCSO Act which provides for sentencing under the provisions of IPC, if such provision provides for stiffer sentence and therefore was sentenced under Section 376AB in place of Section 5(n) read with Section (6) of POCSO Act. Ultimately, the appellant has been sentenced under various provisions as under :-

Provision of IPC	Sentence
Section 363 IPC	5 years RI with fine of Rs.2000/-. In default of payment of fine 2 months additional RI.
Section 366 of IPC	7 years RI with fine of Rs.3000/-. In default of payment of fine 2 months additional RI.
Section 376 AB of IPC	Life Imprisonment till natural death with fine of Rs.4000/-. In default of payment of fine 3 months additional RI.
Section 5(n) read with Section 6 of POCSO Act.	Life Imprisonment with fine of Rs.4000/-. In default of payment of fine 3 months additional RI.
Section 302 of IPC	Life Imprisonment with fine of Rs.4000/-. In default of payment of fine 3 months additional RI.
201 of IPC	3 years RI with fine of Rs.2000/-. In default of payment of fine 2 months additional RI.
376A of IPC	Capital punishment with fine of Rs.5000/-. In default of payment of fine 4 months additional RI.

2. The prosecution story in short was that on 25.10.2018 Ashu (PW2) had left his daughter 'A' aged about 4½ years to the coaching classes run by Anamika (PW7) at Sudama Nagar, Indore at about 5.00 PM and when he came back to fetch his daughter he was told by Anamika (PW7) that appellant - Honey has already taken his daughter half hour back. Ashu (PW2) came back and he along with his wife Nitika (PW1) searched for their daughter but when they could not find her, a missing person report Ex.P/2 and FIR Ex.P/1 were lodged. The FIR was registered as Crime No.539/2018 under Section 363 of IPC. Next day, ie., 26.10.2018 witness Premnath (PW12) discovered body of a girl child at a spot where Premnath (PW12) had gone to relieve himself. Premnath (PW12) gave an intimation, in M.G. Road Police Station which is Ex.P/24. Police arrived at the spot and prepared spot map Ex.P/25. The body of the girl child was found in naked condition. Its hands and legs were visible but trunk was covered with stones. Merg was registered. On receiving such information, the scientific officer Dr. B.L. Mandloi (PW30) arrived at the spot along with photographer and prepared a report Ex.P/70 and photographs of the spot and the deceased were taken. The identification proceedings were initiated and the father Ashu (PW2) identified the body as that of his daughter. The identification memo was drawn and a panel of doctors performed postmortem in order to determine the cause of death. As per their report, the death was on account of culpable homicide and the girl child was found to have been sexually violated. Appellant - Honey was nabbed on the basis of statements of Anamika (PW7). He was arrested on 29.10.2018 and his memorandum statements were recorded on the basis of which his clothes, clothes of the deceased girl child and the stone piece which was allegedly used by the

appellant to bludgeon the girl child to death were recovered. Further evidence was collected which involves CCTV footages showing appellant along with the deceased girl child at about the time when the deceased went missing. The investigating agency thereafter went on to establish as to whether the clothes of deceased contained DNAs of appellant and whether other specimen of the deceased also contained the DNAs of appellant. For this purpose the blood sample of appellant was taken and its DNA was isolated in FSL and the same was sought to be matched with DNAs present in the source of the deceased and it was revealed that the clothes of the deceased and her specimen samples show presence of DNA of appellant. The age of the deceased was also determined by the prosecution. Her school bag was also recovered by the prosecution. After investigation charge sheet was filed under the provisions of Section 363, 366, 366A, 367A, 376AB, 376E, 376(3), 302, 201 of IPC as also under Section 3/4, 5(n) read with Section 6, 5(m) read with Section 6, 5i and 5t of POCSO Act. The presiding officer framed the charges under the provisions of Section 363, 366, 376AB of IPC, Section 5(n) read with Section 6, Section 5(m) of POCSO Act, Section 302, 201 and Section 376A of IPC.

3. The accused abjured his guilt and pleaded innocence in his accused statement and showed inclination to lead defence evidence. However, no defence evidence has been led by him.

4. The appellant in his appeal filed under Section 374(2) of Cr.P.C has controverted the impugned judgment passed by the learned trial court and has stated that the appellant has no nexus with the aforesaid alleged offence and he has been falsely implicated, that there was a time gap between the last seen and the recovery of dead body and on this ground itself the judgment passed by the learned trial court deserves to be set aside. It is further stated that even though the body of the prosecutrix was recovered on 27.10.2018, the police while seizing the school bag of the deceased girl child one day earlier, ie., 26.10.2018 has written all these sections such as Section 376, 302 of IPC etc. thereby pointing out that the police already knew that the girl child had been raped and murdered one day prior to the discovery of her body and this itself shows false implication of appellant, that the motive for killing the prosecutrix has not been established by the investigators, that the prosecution story is not corroborated with the medical evidence, that the prosecution did not prove the memorandum statements and seizure memo of the appellant, that the prosecution did not examine any independent witness residing near the place of incident and the material omissions and contradictions have not been considered by the learned trial court while convicting the appellant. It is stated that the witnesses are interested witnesses and no independent witnesses have been examined and on these grounds judgment of conviction and sentence has been challenged and it is prayed that the appellant be given the benefit of doubt and be set at liberty.

5. The questions for consideration are whether in view of the ground contained in the appeal, the appellant deserves to be acquitted.

6. There are various stages of investigation which though considered by the trial court will have to be perused and deliberated upon by us in order to see as to whether the conclusion arrived at by the trial court in respect of each of these stages are appropriate or not.

7. The first question is whether the girl child was below 12 years or not. The prosecution has examined parents of the girl child Ashu (PW2) and Nitika (PW1). Both of whom have stated that the daughter was 4 ½ years old. Her date of birth has been shown as 27.6.2014 by Nitika (PW1). The prosecution has also examined Pratibha (PW6) who was the principal of Prime Academy School, Vidur Nagar, Indore on 5.11.2018. She states that daughter 'A' of Ashu (PW2) was got admitted in her school on 21.6.2018 in KG-I Class by her father Ashu (PW2) only and the date of birth was recorded as 27.6.2014 and she has also brought scholar register along with herself showing that at Serial No.A 1074, the date of birth of 'A' has been recorded. The concerned entry is Ex.P/14. The birth certificate is Ex.P/15. This witness further states that the police had seized these documents from her and had also sought the date of birth of the deceased in writing from her which she had given to police on her letter pad which is Ex.P/13. These documents have been seized by investigating officer by Sunil Sharma (PW36) and the seizure memo is Ex.P/16. Dr. A.K. Langewar (PW16) who had conducted the postmortem has also found the deceased to be of 4 years old. There are no discrepancies or contradictions found in the cross examination of Pratibha (PW6), Nitika (PW1) and Ashu (PW2) regarding the age of the deceased 'A' at the time of incident and thus, it was rightly found proved by the trial court that the deceased was below 12 years of age at the time of incident.

8. The next question is whether the daughter 'A' of Nikita (PW1) and Ashu (PW2) had gone missing and was taken out of the lawful guardianship of her parents by the appellant. Ashu (PW2) has stated that his daughter used to study in the coaching class of Anamika Madam (PW7) and on 25.10.2018, he had left his daughter at the house of Anamika Madam (PW7) at around 5.00 PM and time of coaching was from 5.00 PM t o 7.00 PM and when he came to fetch his daughter at 7.00 PM, he was told by Anamika Madam (PW7) that 'A' had already been taken away by the appellant -Honey at about 6.30 PM. Ashu (PW2) states that Anamika knew appellant who used to bring his daughter to the coaching classes and used to take her back also from the classes. Anamika (PW7) has corroborated these statements of Ashu (PW2). She states that on 25.10.2018, Ashu (PW2) had brought his daughter 'A' to her house for coaching at 5.00 PM and thereafter at 5.30 PM, appellant came to fetch the daughter of Ashu (PW2) to which the witness refused saying that the daughter had come just now and the appellant left

her house and then came again at 6.30 PM and at that point of time Anamika sent the daughter of Ashu with appellant and thereafter Ashu (PW2) came at 7.00 PM and Anamika (PW7) told him that appellant Honey had already taken his daughter. This witness has been cross examined and asked question as to why she did not call the parents of 'A' when appellant had come to fetch her at 5.30 PM. The witness responds that appellant - Honey usually would bring 'A' to the coaching class and take her back as well and therefore, she did not inform. The explanation of witness Anamika (PW7) have not been found to be unreliable by the trial court and correctly so. The question as to why Ashu (PW2) himself brought his daughter to the coaching class of Anamika and came back to fetch her as well when this task was usually performed by the appellant only, has been answered by Nitika (PW1). She states that the appellant earlier used to stay in her house only and used to work with her husband and was also used to run errands such as carrying her daughter to the coaching and fetching her from there but on the morning of the incident, ie., 25.10.2018, appellant - Honey had come in inebriated condition and had cast an evil eye upon her which disturbed the witness and the witness then told her husband to take the appellant out of the house and then her husband took appellant to the house of the sister of the appellant namely Bhoomi. Although these statements have not been recorded in FIR Ex.P/1 but as has already been laid down by the Apex court in various judgments, FIR is not an encyclopedia of facts and is barely a means to initiate investigation. The prosecution has not examined the sister - Bhoomi of the appellant. As far as Ashu (PW2) is concerned, he has also corroborated the statements of his wife Nitika (PW1). Ashu (PW2) states that on 25.10.2018 appellant - Honey had come to his house in inebriated condition and did not exhibit hon'ble intentions towards his wife which trend was being displayed by him since last 2-3 days and his wife told him that the appellant should be made to leave the house and then the witness took the appellant and left him at the house of his sister - Bhoomi. The witness also states that prior to this the appellant was residing in the house of the witness. As per this witness also, the appellant used to perform house hold chores which also involved carrying the daughter of witness to the coaching class and school and bringing her back from there. The reason for keeping appellant in the house of the witness was that appellant belonged to the community of the witness (both were Sweepers) and used to work with him because the appellant had been turned out by his Aunt. These statements of the appellant have not been controverted in cross examination. In para 14, the witness has been cross -examined as to whether the witness has received any complaint against the appellant during the period appellant stayed with him. The witness has given the answer in negative.

9. Thus, from the evidence of Ashu (PW2) and Nitika (PW1), it is proved that the reason for Ashu (PW2) to leave his daughter at the coaching class and also coming back to fetch her was due to the reason that the appellant had been turned

out by Ashu (PW2) due to dishonorable intention of the appellant towards Nitika (PW1).

10. Thus, it is proved that on the date of the incident there was a bad blood created between the appellant and the parents of the deceased 'A' and despite such circumstances, the appellant had come to fetch 'A' not once but twice ie., at 5.30 P.M. and at 6.30 PM which again points out at some ominous planning of appellant.

11. As already pointed out, when Ashu (PW2) came to know that his daughter had been taken away by appellant and after searching he could not found her, Ashu (PW2) and Nitika (PW1) got panicked and lodged missing person report as also FIR. The missing person report Ex.P/2 and FIR Ex.P/1 were recorded by Ankit Sharma (PW33). A perusal of FIR Ex.P/1 shows that it contains the name of the appellant as person who had taken the daughter 'A' from the coaching class. Thus from the very inception the appellant has become the chief suspect. The missing person report carries the photograph of minor daughter of Ashu. In cross examination this witness admits that the missing person report has not been typed by him but by computer operator and also admits that missing persons report generally carries the scanned photo of the person in question whereas in Ex.P/2 the original passport photograph of the daughter 'A' has been affixed. However, these discrepancies are very unsubstantial in nature. It can be seen that the missing person report was lodged soon after the daughter went missing and time record in Ex.P/2 and Ex.P/1 is 9.17 PM and 9.23 PM on 25.10.2018 respectively. The statements of these witnesses have already been corroborated by Anamika (PW7) whose statements are to the effect that the appellant had come to fetch 'A' at 5.30 PM and then at 6.30 PM and that on the second occasion 'A' was allowed to be taken by the appellant by the witness and such statements have not been challenged and thus, it is found proved that the appellant had taken 'A' out of lawful guardianship of her parents on 25.10.2018 and thereby kidnapped her. The fact of appellant taking 'A' from the coaching classes has been verified by corroborative evidence in the form of CCTV footage showing deceased 'A' accompanying appellant from near the coaching class in the evening of 25.10.2018. The witness to this effect is Nilesh Patidar (PW5) who had CCTV cameras installed in his office situated above his house. During investigation it was found that the CCTV footage has depicted appellant accompanying 'A' at the relevant point of time and the police sought these CCTV footages from the witness and the witness asked Shekhar Patidar (PW4) to prepare DVDR from DVD and the CCTV footages were given to the investigating officer vide seizure memo Ex.P/8 and Ex/P/9. Ex.P/10 is the certificate under Section 65-B and CCTV footages were seized by Sunil Sharma (IO) (PW36) whose signatures are on Ex.P/9 from 'd' to 'd'. Witness Shekhar Patidar (PW4) though admits that the DVDR was prepared from the pen drive in which the CCTV footages were first

uploaded from DVR and he also admits that the aforesaid pen drive has not been seized. However, the lapse on the part of the prosecution in not seizing the pen drive has been admitted to be not major lapse by the trial court in view of the evidence of Ashu (PW2) and Nitika (PW1) who, in their depositions have stated that they saw the CCTV footage from the shop of Nilesh Patidar (PW5). Such conclusion arrived at by the trial court is appropriate and calls for no interference. The witnesses of CCTV footage have ofcourse stated that when the footage was recorded it was evening time but Nilesh Patidar (PW5) denies the suggestions that the faces of two persons shown in the CCTV footage could not been seen. He states that on zooming one could see the faces of both. He again is asked in para 7 that on zooming also both the faces cannot be identified clearly. The witness responds in affirmative but again states that one can make out that it was the appellant and 'A' only. (Ashu PW2) and Nitika (PW1) have also stated that they have identified both in CCTV footage. Nitika (PW1) denies that she could not identify both and no question in cross examination has been posed to Ashu (PW2).

12. It is clear that while Nilesh Patidar (PW5) did not know 'A' and appellant, both Ashu (PW2) and Nitika (PW1) had already known the appellant and 'A' was their daughter only. Hence, they would have immediately identified these two shown in CCTV footage which may not have been possible for Nilesh Patidar (PW5). Hence, apart from previous evidence of Ashu (PW2) and Anamika (PW7), appellant was also seen along with 'A' in CCTV footages which corroborates the prosecution story that Ashu (PW2) only had kidnapped 'A'.

13. After the daughter 'A' of Ashu (PW2) went missing and it was found that she was taken away by the accused Honey, her search continued.

14. The next day ie., on 26.10.2018 the school bag which was seen in the CCTV footage carried by the girl child was discovered from Kanji compound. SHO police station Dwarkapuri Ram Narayan Bhadoriya (PW34) states that he had been searching for girl child along with her parents and on 26.10.2018 when they reached Kanji compound they found school bag of daughter 'A' which has been identified by his father. Inside the bag there was handbook on which name of 'A' was written and her photograph along with photograph of her parents was also found in the handbook. The seizure memo of the same was made in presence of Ashu (PW2) and Nitin (PW8) which carry the signatures of the witnesses. Nitin (PW8) has corroborated this statement and has identified his signatures on Ex.P/12 from B to B part. Ashu (PW2) has also identified his signatures of Ex.P/12 from A to A part. Ex.P/12 contains mention of Section 302, 376 and 201 of IPC whereas the body of the child was discovered on 27.10.2018. The witness has been asked as to how he could write these section on 26.10.2018 when there was no knowledge that the girl child has been murdered. No proper explanation has been afforded by the witness.

15. While Ram Narayan Bhadoriya (PW34) states in examination - in - chief that the bag was discovered when he along with the parents of the deceased were searching for daughter 'A' but in para 12 he states that father of 'A' had called him on telephone and stated that he had found the bag.

16. Whereas Ram Narayan Bhadoriya (PW34) has stated in cross examination that Ashu (PW2) informed him on phone that the bag of 'A' has been found, Ashu (PW2) himself has stated in para 18 that the bag of 'A' was found by the police and then he was called. Nitin (PW8) also states that it was police who had intimated Ashu (Pw2) that the bag was found.

17. Thus, there are discrepancies between the statements of Ashu (PW2) and Ram Narayan Bhadoriya (PW34) as to whether Ashu (PW2) first found the bag or police found the bag in the first place. Further, it has not been explained as to how seizure memo Ex.P/12 contained the particulars of provision of IPC a day prior to the discovery of the body of the deceased. Due to these discrepancies, evidence pertaining to finding of bag of deceased is not found proved.

18. The next piece of evidence is the recovery of body of the deceased. On 27.10.2018, Premnath (PW12) saw hands and legs of a girl child, whose trunk was covered with stones. Such sighting was a chance discovery by witness when he had gone to relieve himself at a *'Bogda'* which is a cave like place below a culvert. Witness Premnath (PW12) states that he intimated police at M.G. Road police station which is Ex.P/24. This witness states that police thereafter came and prepared spot map Ex.P/25 which also carries his signatures. Ex. P/24 was recorded by ASI Jaiprakash Choubey (PW24). Shri R.K. Chaturvedi (PW35) SHO, Indore states that it was he who had prepared the spot map Ex. P/25. After recording of merg which is Ex.P/24, Suryaprakash Sharma (PW27) who was posted as a Head Constable in control room at Indore and was assigned the job of photography reached the spot along with Dr. B.L. Mandloi (PW30) who was a scientific officer posted at scene of crime mobile unit. This witness states that he found a naked body of a girl child and he took the photographs which are Ex.P/54 to Ex.P/57. He has also exhibited the certificate under Section 65 of the Evidence Act, which is Ex. P/58. Dr. B.L. Mandloi (PW30) has corroborated these statements. He states that on inspection of the dead body, he found that blood like liquid had emitted from the private part of the deceased and a piece of stone (*'Pharsi')* was lying besides the private part on which a spot likely that of semen was visible. There was a deep gash on the right cheek extending up to chin through which jaw bone was visible. Blood also oozed out of nostrils. As per this witness, signs of sexual assault followed by murder were visible and an attempt had been made to hide the body with stones. The report is Ex.P/70.

This witness also prepared a spot map Ex. P/71. He also drew the outlines of the *'Bogda'* on a paper which is Ex.P/72. The instructions which he passed on to S.I. were recorded vide Ex.P/73. This witness further states that later on he prepared draft of the seized items to be sent to FSL which is Ex. P/57. He also had prepared a draft in relation to the items seized from the accused for being sent to FSL as per Ex.P/74. This witness admits that no blood trail was found on way to *'Bogda'* No.19 where the body was found and no foot prints of animals were also found in the vicinity of the body. Such statements in cross examination show that a child was done to death at *'Bogda'* No.19 only as there was no blood trail.

19. What followed next was the identification of the body. R.K. Chaturvedi (PW35) who was S.I. at M.G. Road on 27.10.2018 states that he issued Safina Form Ex.P/4 and the body was identified by Ashu (PW2). Such identification memo is Ex.P/3. Ashu (PW2) states that he identified the body of his daughter and has appended his signature from A to A part in Ex.P/3. His signatures on Safina Form which is in fact the notice for identification ie., Ex.P/4 from A to A part has also been admitted by Ashu (PW2).

20. R.K.Chaturvedi (PW35) states that a Naksha Panchnama of the body intending to note injuries and status of body was then carried out by him. This is Ex.P/5. In this document the injuries on body as described by Dr. B.L. Mandloi (PW30) have been noted. This witness further states that he prepared an application for conducting postmortem of the body which is Ex.P/34 which carries his signatures and then the body was sent to M.Y. Hospital, Indore through constable Ramkrishna (PW19). Ramkrishna (PW19) states that on application Ex.P/34 his signatures are from A to A part and he had brought the dead body to M.Y. Hospital as per instructions received.

21. Dr. A.K. Lanjewar (PW16) states that he was posted in MGM Medical College at Indore in Department of Forensic Medicine as a guide on 27.10.2018 and on that day constable Ramkrishna had brought the body of 'A' D/o. Ashu (PW2) aged 4 years for postmortem. The body was identified by Ashu (PW2) and Ramkrishna (PW19). The postmortem was conducted by a penal (sic: panel) consisting of the witness Dr. S.K. Soni (PW17) and Dr. Swati Bhargava. The outer examination show that the rigor mortis had passed off and there was hypo- stasis on the back of the body. There was coagulated blood on the whole body and the face and soil particles were also visible and red blood had oozed out of the nostrils and the right eye had turned black. Following injuries were noted on the body vide Ex.P/35 :-

> "1. Contused lacerated wound of size 9.0 x 3.5 cm x bone deep present over right side of chin situated 1.7 cm below the mid of lower lip & 4.2 cm front of right ear.

2. Contused lacerated wound of size 1.5 x 1.2 cm present over root of nose situated 3.0 cm below to the glabella, just below the mentioned injury nasal cartilage was found crushed, flattened & exposed.

3. Contused lacerated wound of size 1.0 x 0.5 cm present over lateral side of upper eyelid of right eye.

4. Reddish colour Contusion of size 6.4 x 6.0 cm present in and around right eye.

5. Contused abrasion of size 3.0 x 1.5. cm present over right shoulder joint, situated 3.0 cm front of tip of right shoulder joint.

6. Contused abrasion of size 1.4 x 0.7. cm present over antero-lateral aspect of right shoulder joint, situated 3.5 cm from tip of right shoulder joint.

7. Contused abrasion of size 3.5 x 1.7 cm present over right side of chest over anterior axillary line, situated 10.0 cm below to the right axilla.

8. Contused abrasion of size 3.0 x 0.9. cm present over extensor aspect of right forearm situated 10.0 cm below right elbow joint.

9. Lacerated wound of size 5.7 x 1.6 cm x bone deep present over postero-medial aspect of left elbow joint.

10. Reddish abrasion of size 2.3 x 1.0 cm present over anterior aspect of right side of abdomen, situated just above to the right anterior superior iliac spine.

11. Contused abrasion of size 4.0 x 2.2 cm present over anterior aspect of left thigh situated 4.0 cm above left knee joint.

12. Multiple abrasion present over back of chest on right side in an area of 5.5 x 4.0 cm of size varying from 1.8. x 1.0 cm to 0.7 x 0.5 cm.

13. Reddish contused abrasion of size 4.5 x 0.8 cm placed obliquely situated 8.5. cm below to the C6 vertebrae & 5.5 cm right lateral to midline.

14. Multiple scratch mark as abrasion (04 in number) present over lateral aspect of right arm nearly horizontal line in an area of 3.5 x 3.0 cm varying from 0.5 to 0.1 cm to 0.3 to 0.1 cm curvilinear in shape with concavity upward appeared to be nail marks.

15. Contused abrasion of size 6.0 x 0.5 cm present over right side of neck situated 5.0 cm below to tip of right mastoid process.

16. Contused abrasion of size 2.0 x 1.0 cm present over right side of neck situated 5.2. cm anterior to the above mentioned injury no.15.

17. Scratch mark contused abrasion of size 0.7 x 0.1 cm present over left side of neck situated 2.7 cm below to tip of left mastoid process, curvilinear in shape with concavity downward obliquely appeared to be nail mark.

18. Scratch mark contused abrasion of size 0.8. x 0.1 cm present over left side of neck situated 1.8 cm back to the above mentioned (injury No.17) wound, curvilinear in shape with concavity downward obliquely placed, appeared to be nail mark.

19. Scratch mark contused abrasion of size 0.3 x 0.1 cm present over left side of neck situated 9.0 cm below to tip of left mastoid process, horizontal idented mark appeared to be nail mark.

20. Scratch mark contused abrasion of size 0.7 x 0.1 cm situated 7.4 cm below tot he mid of chin, obliquely placed indented mark appeared to be nail mark.

21. Lacerated wound of size 2.0 x 2.3 cm present over left side of forehead situated 4.0 cm above lateral canthus of left eye, underneath contusion of size 4.0 x 2.0 cm was found.

22. Contusion of size 4.0 x 4.0 cm present over left parietal region of scalp situated just left lateral to midline.

23. Meninges was found tense & congested, on opening the meninges, SDH & SAH present all over brain at places. Brain was found soft.

24. Compound fracture of size 3.0 x 1.7 cm present over left parieto-occipital junction situated 4.2 cm left lateral to midline, effusion of blood present surrounding the fracture.

25. Contusion of size 6.0 x 2.0 present over right side of anterior peritoneal fold near urinary bladder, surrounding perineal muscles & tissue was found ecchymosed.

26. Multiple reddish colour abrasion present over back in an area of 21.0 x 17.5 cm situated 10.0 cm below to the C6 vertebrae, on cut ecchymosis was found.

27. Pale multiple abrasion present over buttock region & over upper part of sacrum in an area of 25.0 x 19.0 cm, appeared to be ant bite mark, margins of wounds and base found irregular & crenated at places. Injury was postmortem in nature.

28. Pale abrasion of size 3.7 x 2.5 cm present over left shoulder joint situated 3.0 cm below to the tip of left shoulder joint. Injury was postmortem in nature.

29. Pale abrasion of size 10.0 x 4.0 cm present over left shoulder joint situated 8.5 cm below to the tip of left shoulder joint. Injury was postmortem in nature.

30. Pale lacerated wound of size 1.8 x 1.0 cm present over antero-medial aspect of left forearm situated 4.0 cm below to the left elbow joint. Injury was postmortem in nature."

22. Witness states that he also conducted examination of vagina of the body and found that :-

"31. Vagina:- In whole of the vaginal opening circumference reddish colour contusion of size 4.0 x 2.0 cm was found with torned hymen, edema was found surrounding the tissue, contused abrasion with bruise present over posterior fouchette and posterior junction of labia majora and labia minora. Tearing of skin present over right perineal region. Vaginal opening was widened & patuluos, hymen was found torn and destructed in posterior half & remnant on anterior part visible. Urethral orifice displaced upward. Dust particle found adherent all over the perineal region at places."

23. He also examined anus of the body and found that :-

"Anus:- In whole of circumference of anus reddish colour contusion of size 3.6 x 3.0 cm was found with torn anal sphincter. Tearing of skin present over anal region, anal opening was widened & patulous, dust particle found adherent all over the anal region at places."

24. The witness states that he conducted internal examination of the body and gave his opinion as follows :-

Opinion :-

1. Death was due to shock and hemorrhage as a result of head injury.

2. Evidence of penetrative sexual assault present.

3. Evidence of throttling present.

4. injuries which are found on body of deceased are homicidal in nature and can cause death in ordinary course of nature.

5. Duration of death was within 24-48 hours since post mortem examination.

25. The report Ex.P/35 carry the signatures of the members of the penal (sic: Panel) doctors including that of the witness. His evidence has been corroborated by doctor Sunil Kumar Soni (PW17) who has made identical statements.

26. Dr. A.K. Lanjewar (PW16) states that the internal organs of the body called viscera were preserved in two bottles. The vaginal smear swab and 3 vaginal smear slides were also preserved. The swab of the internal thighs were also preserved for histological examination. These items were sealed and labelled and given to constable Ramkrishna (PW19). It is thus proved from the evidence of Dr. A.K. Lanjewar (PW16) and Dr. Sunil Kumar Soni (PW17) opined that death of daughter 'A' of Ashu (PW2) was a result of culpable homicide. It was also proved that 'A' had been subjected to penetrative sexual assault.

27. Ramkrishna (PW19) states that sealed and labelled items were given to him by doctor at M.Y. Hospital which he handed over to Head Constable Shri Brajmohan Singh Bais (PW21) who drew the seizure memo Ex.P/35 which carries his signature from A to A part. Brajmohan Singh Bais (PW21) states that after seizure memo Ex. P/39, he had handed over the same to ASI Malkhana. Sham Sunder Tiwari (PW31) states that while he was posted as Head constable in police station Rajendra Nagar, he received a sealed packet containing the internal organs of the deceased along with letters Ex.P/74 and Ex.P/75 and he deposited these at FSL Rau, Indore and receipt of which Ex.P/76 and Ex.P/77.

28. Having found proved that daughter 'A' was kidnapped by the appellant and also having found proved that her death was on account of culpable homicide and was subjected to penetrative sexual assault, the next question was identification of the person responsible for committing such ghastly act. The needle of suspicion was already on the appellant. The investigating agencies were collecting further evidence and the agency came by such evidence against the appellant in the form of last seen evidence, memorandum statements of the appellant on the basis of

which the clothes of the daughter 'A' were recovered and lastly on the basis of DNA examination and matching of body fluids of the deceased with that of the appellant.

29. As far as last seen evidence is concerned, the witnesses are Deepak Yadav (PW22) and Indu (PW11). Deepak Yadav (PW22) states that on 25.10.2018 at about 6.30 PM while he was carrying the passengers in his Magic vehicle, a person accompanied by a small girl aged about 4 to 5 years boarded his vehicle and these passengers disembarked at Municipality at about 7.30 PM and he had charged them Rs.15. The witness states that 4 to 5 days later, he read in the news-paper about the incident of kidnapping and murder of a girl child. He saw the photograph of the child and found that it was the same child who had boarded his vehicle along with the person and the person's photo in the news paper also was same as that of the appellant. The witness has been shown the appellant via video conferencing and has identified him to be the same person. The witness has been shown the news paper cutting Ex.P/41 and states that he had read this news paper cutting as well. The witness has been cross examined and he admits that on a given date he transports 100 to 150 passengers and he does not recollect the facial features of such passengers. Regarding appellant he states that he had seen him when the appellant was sitting in his vehicle and further when appellant given him the fare.

30. It is true that in general a passenger is not likely to be recognized by such a person who carries 100 to 150 passengers every day. However, the witness was able to recollect the appellant and the deceased girl child as having sat in his vehicle. When he saw the news-paper report 4 to 5 days afterwards, he could place them. It cannot be stated that Deepak Yadav (PW22) is a planted witness. He also states that he knows police posted at Dwarkapuri police station, but he is not shown as pocket witness of police. There is no reason to discredit this witness who is having no enmity with the appellant.

31. Dinesh Sharma (PW3) states that he knows appellant -Honey as appellant works as a sweeper at Surya Center situated nearby his restaurant which he runs in the name of Mauji Hot Food. He states that on 25.10.2018 at about 10.00 PM to 10.30 PM, appellant - Honey had come to his shop along with a girl child who was about 4 to 5 years old and had purchased a *'Samosa'* and then went towards Municipality and 4 to 5 days later he read in news paper that appellant - Honey had murdered a girl after committing rape upon her and has thrown the body in the *'Bogda'*. He states that police has come to his shop and had shown him the photo of the girl child and he had recognized the child's photo as the same who had been brought by appellant - Honey to his shop. The identification memo was drawn by police which is Ex.P/8 which carries his signatures. The photograph Article A/1 has also been identified by this witness. In cross examination this witness states

that he knows Honey as he had come to his shop 4 to 5 times and he used to come alone to his shop. He admits that he did not himself go to the police station but police had come to his shop. He states that police had been carrying the photograph of the girl child and were asking persons about her whereabouts from number of persons from the locality. Sunil Sharma (PW36) states in para 14 that he had shown the photograph of the girl child to Dinesh Sharma (PW3) and Dinesh Sharma (PW3) after seeing this photograph, told him that sweeper Honey had come with a girl child to his shop on 25.10.2018 and the photograph is of the same girl child. Witness states that thereafter, he executed an identification memo in the presence of Kapil and Manoj. Kapil Kadam (PW14) has corroborated the statements of Sunil Sharma (PW36) and states that he has appended his signatures on the Ex.P/8 from B to B part. In para 16 he denies the suggestion that he and the police men never went to Mauji Food run by Dinesh Sharma (PW3) and also denies that Ex.P/8 was made in police station.

32. There is no cause of suspicion on the statement of Dinesh Sharma (PW3), Sunil Sharma (PW36) and Kapil Kadam (PW14).

33. Thus, the trail of accused being seen with deceased from 5.30. PM to 6.30 PM to 10.00 PM has been found proved from the above statements. It was within specific knowledge of the appellant as to what happened to girl child 'A'. Thus, onus was upon him under Section 106 of the Evidence Act.

34. Indu (PW11) states that she resides in a *'Bogda'* along with a husband Premnath and on the date of incident at about 11.00 PM, she saw appellant - Honey roaming with a girl child aged about 4 to 4½ years. She asked the appellant as to where he was roaming and appellant did not give any reply and went towards the petrol pump. The witness states that appellant - Honey used to sell socks at Sanjay Sethu Bridge about a year and a half ago and therefore, she knows him. She states that the child is body was found by her husband Premnath (PW12). In her cross - examination she admits that appellant - Honey used to work as sweeper but had started selling socks about a year and half ago. She denies the suggestion that it was dark in the night when she saw appellant - Honey. She states that she could see in light. A perusal of the evidence shows that she knew appellant from before and her statements to have seen appellant and 4 to 5 years girl child in the night of the date of the incident has not been challenged successfully in cross examination. The prosecution story is that somewhere in the intervening night between 25.10.2018 and 26.10.2018 a girl child 'A' was done to death. Witness Indu (PW11) can thus be credited as witness of last seen. As already found that few hours earlier Deepak Yadav (PW22) has also found the appellant and 4 to 5 years old girl child in his magic van as passengers and so has Dinesh Sharma (PW3).

35. A sequence of evidence is found to be proved which pertains to appellant moving along with the deceased girl child from the evening of 25.10.2018.

36. As far as the evidence pertaining to memorandum and seizure from memorandum of the appellant and seizure of items in pursuance to such disclosure are concerned, Sunil Sharma (PW36) is relevant witness. He states that on 28.10.2018, he was posted as SHO in police station Rajendra Nagar and he was assigned to conduct investigation of the case on 28.10.2018. The then Superintendent of Police constituted a team to look into the investigation. He states that accused - Honey was arrested by Shri R.N.S. Bhadoriya and then he questioned the appellant in presence of the witness Vikas Kadam and Nikhil Haade.

37. The accused - Honey was arrested by Ramnarayan Singh Bhadoriya (PW34) whose arrest memo is Ex.P/35. Sunil Sharma (PW36) states that Honey told him that on the date of the incident the clothes which he had been wearing were the same clothes he was wearing on the date of incident also. His memorandum Ex.P/19 was recorded which carries signatures of Sunil Sharma (PW36) from B to B part. The clothes of appellant - Honey were thereafter seized. The seizure of T-shirt and pants carrying some stains is as per seizure memo Ex.P/20 carrying the signatures of Sunil Sharma (PW36) from B to B part and both Ex. P/19 and Ex.P/20 also carries signatures of appellant - Honey. The witness states that Honey revealed that he had committed the offence and identified the place where such offence was committed. The place was *'Bogda'* No.9. On the basis of this information a Tasdik Panchnama Ex.P/22 was prepared and a spot map Ex.P/23 was also prepared by the witness. Witness further states that thereafter appellant - Honey was sent for medical examination to District Hospital at Indore and the medical report Ex.P/18 was received thereafter. Witness further states that the police remand of appellant - Honey was sought from the court and on 30.10.2018 appellant - Honey was questioned further. He thereafter gave information regarding the place where the clothes of girl child were hidden by him. The memorandum statements are Ex.P/27 carrying signatures by the witness and on the basis of such memorandum a light pink color T-shirt, a black capri, a violet underwear and a pair of sandals blue color were taken out from below the stones and soil inside *'Bogda'* No.9 by appellant - Honey in presence of the witnesses. The same was seized as per Ex.P/28 and the appellant signatures were also taken by the witness. The witness Sunil Sharma (PW36) states that he prepared the spot map of ' *Bogda'* No.9 which is Ex.P/29. He thereafter wrote a letter to SDM Rau for conducting identification of the clothes of the deceased. Witness Vikas Kadam (PW10) and Kapil Kadam (PW14) have corroborated the statements of Sunil Sharma (PW36). They have appended their signatures on Ex.P/27, Ex.P/28 and Ex/P29. These witnesses have been extensively examined and there are no statements in their cross examination which would impeach their credibility. Sunil Sharma (PW36) has also been cross examined. He states in para 45 that when appellant - Honey took out his clothes,

he was given other clothes to wear. Although he admits that no bill showing purchase of other clothes has been presented by him, but he states that in seizure memo, it has been mentioned that he was given other clothes to wear. This witness has already stated that as per this witness the clothes of the deceased were subjected to identification.

38. Manish Shrivastava (PW13) states that he, in his capacity as Naib Tehsildar, had received a letter sent by SHO Rajendra Nagar, Indore requesting for identification of certain items and such letter is Ex.P/26. Witness states that thereafter he conducted identification proceedings on 31.10.2018 at Prashaskiya Sankul Bhawan Indore in room No.G-7 and in the identification proceedings, Ashu S/o. Gopi Krishna has identified the clothes, ie., T-shirt, black capri, underwear and sandals as those of his daughter. The identification memo is Ex.P/7. In cross examination Manish Shrivastava (PW13) states that he had called other clothes from his Reader for the purpose of mixing them along with the clothes sent to him. Ex.P/7 contains remark that seized clothes were mixed with similar looking other clothes and sandals and that Ashu (PW2) had identified correctly by picking up his daughter's clothes. There are no discrepancies in these statements of Manish Shrivastava (PW13). Ashu (PW2) has also corroborated these statements and has also admitted his signatures on Ex.P/7 at A to A part. In para 22, he has been given a suggestion that the police had shown him the clothes of his daughter even before the identification proceedings were conducted. Such suggestions have been denied by him.

39. It is thus found proved that on the basis of the memorandum of the appellant the clothes of daughter 'A' hidden beneath soil and stones were recovered and this would amount to discovery of fact under Section 27 of the Evidence Act.

40. In the case of *Pulukuri Kottaya vs King-Emperor,* AIR 1947 PC 67*,* it has been observed as under :-

> "It is fallacious to treat the 'fact discovered' within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. "

41. As already stated, Sunil Sharma (PW36) had sent appellant - Honey for his medical examination to the District Hospital at Indore, Dr. Prabodh Joshi (PW32) stated that while he was posted in District Hospital on 29.10.2018, appellant - Honey S/o. Rajesh Atwal was brought before him for medical examination by constable K.C. Sharma and he conducted examination of

appellant - Honey and found him capable of performing intercourse. His pubic hairs were sealed and his underwear was also sealed. MLC report is Ex.P/78. He admits that he could not collect the semen from appellant as he has not been able to ejaculate and in cross examination he states that a person affected with anxiety neurosis may not be able to ejaculate.

42. From the evidence of this witness it is found proved that the appellant was capable of performing sexual intercourse. Sunil Sharma (PW36) states that on 30.10.2018, S.P. West Indore sent a letter to ADG, Indore seeking permission to conduct DNA examination of the appellant and the permission was given vide letter which is Ex. P/91. The witness states that thereafter the police remand of accused -Honey was again taken and he was sent to M.Y. Hospital for conducting DNA examination. Dr. R.S. Chouhan (PW15) stated that on 1.1.2018, he was posted as CMO in M.Y. Hospital at Indore and had received a letter sent by SHO Rajendra Nagar for taking blood samples of accused Honey Atwal for conducting his DNA examination. The letter's carbon copy is Ex.P/30. As per this witness, an OPD Ticket was drawn (Ex.P/31) in order to conduct blood sampling of accused - Honey who had been produced by the constable Krishna Chandra and SHO Sunil Sharma. Thereafter 3 Ml. Blood of accused - Honey was drawn and was collected in E.D.T.A. Tube and Identification Form Ex.P/32 was filled up which carried the photograph of accused - Honey, verified by the witness, signed by the witnesses and thumb impressions of both the hands of accused - Honey were taken on it along with his signatures. The blood sample was then preserved in Ice Thermal Box and a seizure memo of the same was drawn by SHO Sunil Sharma, which is Ex.P/33 which carries signatures. The Identification Form Ex.P/32 also carries signatures of Sunil Sharma (PW36) from F to F part so also the seizure memo Ex.P/33, which shows that EDTA vial was sealed.

43. Witness Pradeep Singh (PW26) states that while he was posted as constable in police station Rajendra Nagar on 1.11.2018. T.I. Sunil Sharma (PW36) had taken accused -Honey to M.Y. Hospital for conducting DNA sampling and in hospital CMO Dr. Chouhan collected the blood sample of accused - Honey and had prepared Identification Form Ex.P/32 on which the signature of the witnesses are from E to E part. This witness further states that the blood sample was seized vide seizure memo Ex.P/33 and it was stored in Thermocol Ice Box.

44. Sunil Sharma (PW36) has stated that DNA analysis report was received from State Forensic Science Laboratory, Sagar which is Ex.P/99 and the same was submitted before the court vide letter of SHO Dwarkapuri Ex.P/98. This DNA analysis report runs into 8 pages and the ultimate analysis is recorded in last page which is as follows :-

(i) The DNA profile of male 'Y' chromosome developed from the vaginal smear swab of the victim (Article 'F') was found to be consistent with

DNA profile of male 'Y' chromosome found in blood sample of accused (Article 'Q').

(ii) The DNA profile of male 'y' chromosome developed from the anal smear swab and slide of the victim (Article 'G') was found to be consistent with DNA profile of male 'Y' chromosome found in blood sample of accused (Article 'Q').

(iii) The DNA profile of male 'y' chromosome developed from the thigh smear swab and slide of the victim (Article 'H') was found to be consistent with DNA profile of male 'Y' chromosome found in blood sample of accused (Article 'Q').

(iv) The DNA profile of male 'Y' chromosome developed from the underwear smear swab and slide of the victim (Article 'P') was found to be consistent with DNA profile of male 'Y' chromosome found in blood sample of accused (Article 'Q').

(v) The autosomal STR DNA profile was found to be done in victim clothes and blood sample of the accused.

(vi) The autosomal STR DNA profile was found to be same in the T-shirt of accused ('L') and victim source (Article 'R').

(vii) The DNA profile of victim developed from the T- shirt of the appellant matched with DNA profile of victim developed from the blood soil.

45. Summarily speaking, the vaginal smear swab, anal smear swab, thigh swab and underwear swab of the victim contained DNA of a male and the DNA profile of 'Y' chromosome found in these items were found to have matched with the DNA profile of the appellant drawn from his blood sample. Thus, the DNA profile of the appellant was found on the clothes of the victim and that the DNA profile of the victim found on the T-shirt of the accused had matched with the DNA profile of the blood soil.

46. The Hon'ble Supreme Court in the case of *Mukesh & Anr. vs. State for NCT of Delhi & Ors.,* 2017 (6) SCC 1, discussed about the efficacy of DNA examination has quoted a judgment of the Supreme Court of United States in the following para :-

> "212. After the above judgment, the DNA Test has been frequently applied in the United States of America. In District Attorney's Office for the Third Judicial District et al. v. William G. Osborne[86], Chief Justice Roberts of the Supreme Court of United States, while referring to the DNA Test, stated as follows: -

> "DNA testing has an unparalleled ability both to exonerate the wrongly convicted and to identify the guilty. It has the potential to significantly improve both the criminal justice system and police investigative practices. The Federal Government and the States have recognized this, and have developed special approaches to ensure that this evidentiary tool can be effectively incorporated into established criminal procedure-usually but not always through legislation.
>
> ... ...
>
> Modern DNA testing can provide powerful new evidence unlike anything known before. Since its first use in criminal investigations in the mid-1980s, there have been several major advances in DNA technology, culminating in STR technology. It is now often possible to determine whether a biological tissue matches a suspect with near certainty. While of course many criminal trials proceed without any forensic and scientific testing at all, there is no technology comparable to DNA testing for matching tissues when such evidence is at issue."

47. The Apex court in the case of *Mukesh & Anr.* (supra) has further observed as under :-

> "213. DNA technology as a part of Forensic Science and scientific discipline not only provides guidance to investigation but also supplies the Court accrued information about the tending features of identification of criminals. The recent advancement in modern biological research has regularized Forensic Science resulting in radical help in the administration of justice. In our country also like several other developed and developing countries, DNA evidence is being increasingly relied upon by courts. After the amendment in the Criminal Procedure Code by the insertion of Section 53A by Act 25 of 2005, DNA profiling has now become a part of the statutory scheme. Section 53A relates to the examination of a person accused of rape by a medical practitioner."

48. As far as the FSL report is concerned, Rama Shankar Singh Tomar (PW28) has stated that while posted as constable in police station - Dwarkapuri, he had deposited various articles concerning Crime No.539/2018 registered in police station - Dwarkapuri draft copy of which is Ex.P/59 and he had been given

receipt Ex.P/60 and Ex.P/61 from FSL Sagar. This witness further submits that he deposited these receipts in police station and his Roznamchasana is Ex.P/82. Witness Sunil Sharma (PW36) submits that the report which has been received from FSL Sagar was received on 30.11.2018 and this report is Ex.P/81. In this report, it has been found that Article F/1, which is the slide drawn from the victim's fluids, contained sperms and the same was the situation in the underwear of the deceased which is Article P. The piece of stone which is Article D was also found to have contained human blood. This FSL report is Report No.1776/18. The same witness states that he also received analysis report from FSL Rau, Indore on 26.12.2018 which is report No.269/18 which is Ex.P/83. As per this report, in the underwear of accused - Honey, semen and sperms were found.

49. Thus, FSL report Ex.P/81 substantiates the evidence of doctor Dr. A.K. Lanjewar (PW16) who had stated that the deceased was subjected to sexual assault. The DNA report conclusively proves that it was the accused only who had committed penetrated sexual assault on the deceased.

50. In this case, which is based on circumstantial evidence, following circumstances have been found proved against the appellant :-

(i) Existence of motive :- On the date of incident itself there was a spat between the parents of the deceased 'A' and the accused - Honey on account of behavioral complaint against the appellant and the appellant was turned out by complainant from his house.

(ii) It has been found proved that the appellant went to the coaching class where 'A' used to study and took her away from the coaching class at 6.30 PM and the evidence of Anamika (PW7) and CCTV footage is important in this regard.

(iii) Appellant and 'A' were seen together at 6.30 PM, 10.00 PM and 11.00 PM by witnesses which has been found proved.

(iv) The onus under Section 106 of Evidence Act was not discharged by the accused who needed to explain the whereabouts of 'A' whom he had accompanied from 6.30 PM onwards on 25.10.2018.

(v) The body of the deceased was found absolutely naked and the clothes of daughter 'A' identified by her father were recovered at the instance of appellant which amounts to discovery of fact.

(vi) The blood stained stone was also recovered at the instance of the appellant which as per FSL report was found to have contained human blood.

(vii) The deceased was found to been raped and the DNA of her fluids containing male 'Y' chromosomes were found to be those of the appellant.

(viii) From the clothes of the appellant, DNA of deceased were isolated and these DNA also matched with blood soil at the spot where the body of 'A' was found. All these circumstantial evidence have rightly been found to be forming a complete chain which only pointed to the guilt of the accused.

51. The judgment passed in the case of *Sharad Birdhi Chand Sarda vs. State of Maharashtra*, 1984 (4) SCC 116 is relevant for the purpose. It has also been found that the accused in his statement recorded under Section 313 of Cr.P.C has barely stated "do not know" to number of questions regarding which he had specific knowledge. In the case of *Nagraj vs. State of (Tamil Nadu);* (2015) 4 SCC 739, the Supreme Court has observed that if the accused give evasive and untrustworthy answers under Section 313 of Cr.P.C then it would be a factor indicating his guilt. In the case of *Munna Kumar Upadhyay @. Munna Upadhyay vs. State of Andhra Pradesh;* AIR 2012 SC 2470, it has been laid down that false denial made by the accused of established facts can be used as incriminating evidence against him. Thus, the manner in which the appellant has answered the questions post to him under Section 313 of Cr.P.C also raises adverse inference against him.

52. It has already been found that the death of deceased 'A' was on account of culpable homicide. Dr. A.K. Langewar (PW16) has found that the injuries were sufficient in the ordinary course of nature to cause death. The case squarely falls in the purview of "Murder" as defined in Section 300 of IPC. Consequently, the offence under Section 302 of IPC is found to be proved beyond reasonable doubt.

53. **Section 5(n) read with Section 6 of POCSO Act** reads as under :-

> **"Section 5 (n)** :- whoever being a relative of the child through blood or adoption or marriage or guardianship or in foster care or having a domestic relationship with a parent of the child or **who is living in the same or shared household with the child,** commits penetrative sexual assault on such child; or"
>
> **Section 6. - Punishment for aggravated penetrative sexual assault. -** Whoever, commits aggravated penetrative sexual assault, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life and shall also be liable to fine."

54. In view of the evidence found proved the ingredients of the aforesaid sections are also attracted and thus offence is also found proved.

55. Section 376A of IPC has already been quoted. Section 376AB of IPC is reproduced as under :-

> **Section 376 AB of IPC** :- Whoever, commits rape on a woman under twelve years of age shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and with fine or with death."

56. All the ingredients of the aforesaid section is also found to be proved in the present case.

57. Thus, after due consideration of the evidence and the material on record, it is found that the trial court had rightly convicted the appellant under Sections 363, 366, 376 AB, 302, 201 and 376A of IPC and under Sections 5(n) read with Section 6 of POCSO Act.

58. Coming to the question of reference send under Section 366 of Cr.P.C, it is to be seen by this court as to whether the death sentence imposed upon the appellant was proper in the given circumstances or not. It has already been seen that the punishment of death of sentence has to be given only in rarest of rare circumstances.

59. In the case of *Bachan Singh vs. State of Punjab,* 1980 (2) SCC 684, the Apex Court has observed as under :-

> "(a) The normal rule is that the offence of murder shall be punished with the sentence of life imprisonment. The court can depart from that rule and impose the sentence of death only if there are special reasons for doing so. Such reasons must be recorded in writing before imposing the death sentence.
>
> (b) While considering the question of sentence to be imposed for the offence of murder under Section 302 of the Penal Code, the court must have regard to every relevant circumstance relating to the crime as well as the criminal. If the court finds, but not otherwise, that the offence is of an exceptionally depraved and heinous character and constitutes, on account of its design and the manner of its execution, a source of grave danger to the society at large, the court may impose the death sentence."

60. The aggravating circumstances suggested by the counsel read as follows:

> "Aggravating circumstances: A court may, however, in the following cases impose the penalty of death in its discretion:

(a) if the murder has been committed after previous planning and involves extreme brutality; or

(b) if the murder involves exceptional depravity; or

(c) if the murder is of a member of any of the armed forces of the Union or of a member of any police force or of any public servant and was committed—

(i) while such member or public servant was on duty; or

(ii) in consequence of anything done or attempted to be done by such member or public servant in the lawful discharge of his duty as such member or public servant whether at the time of murder he was such member or public servant, as the case may be, or had ceased to be such member or public servant; or

(d) if the murder is of a person who had acted in the lawful discharge of his duty under Section 43 of the Code of Criminal Procedure, 1973, or who had rendered assistance to a Magistrate or a police officer demanding his aid or requiring his assistance under Section 37 and Section129 of the said Code." After reproducing the same, the Court opined:

"Stated broadly, there can be no objection to the acceptance of these indicators but as we have indicated already, we would prefer not to fetter judicial discretion by attempting to make an exhaustive enumeration one way or the other."

61. Thereafter, the Court referred to the suggestions pertaining to mitigating circumstances:

"Mitigating circumstances.—In the exercise of its discretion in the above cases, the court shall take into account the following circumstances:

(1) That the offence was committed under the influence of extreme mental or emotional disturbance.

> (2) The age of the accused. If the accused is young or old, he shall not be sentenced to death.
>
> (3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.
>
> (4) The probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused does not satisfy the conditions (3) and (4) above.
>
> (5) That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence.
>
> (6) That the accused acted under the duress or domination of another person.
>
> (7) That the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct." The Court then observed:
>
> "We will do no more than to say that these are undoubtedly relevant circumstances and must be given great weight in the determination of sentence."

In the said case, the Court has also held thus:

> "It is, therefore, imperative to voice the concern that courts, aided by the broad illustrative guide-lines indicated by us, will discharge the onerous function with evermore scrupulous care and humane concern, directed along the highroad of legislative policy outlined in Section 354 (3) viz. that for persons convicted of murder, life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed."

62. The aforesaid case pertained to circumstances where murder had been committed and therefore, in tabulating aggravating circumstances, the word "murder" has been used. However, in the present case, only life imprisonment has been imposed by the Trial Court while convicting the appellant under Section 302 of IPC. Thus, clearly, the Trial Court has not found it to be rarest of rare case in respect of charge under Section 302 of IPC. The Court has found it to be rarest of rare case while imposing sentence under Section 376A of IPC. It is pertinent to

note that under Section 376A of IPC, sentence of death can be imposed even though murder has not been committed. It would be appropriate to reproduce Section 376A of IPC as under :-

> **376A Punishment for causing death or resulting in persistent vegetative state of victim** — Whoever, commits an offence punishable under sub-section (l) or sub-section (2) of section 376 and in the course of such commission inflicts an injury which causes the death of the woman or causes the woman to be in a persistent vegetative state, shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, or with death.

63. The Three-Judge Bench judgment of the Apex Court in the case of *Ravishankar @. Baba Vishwakarma vs. State of Madhya Pradesh,* 2019 (4) JLJ 258 has observed as under :-

> ".....a bare perusal of Section 376A of IPC shows that only factum of death of the victim during the offence of rape is required and such death need not be with any guilty intention or be a natural consequence of the act of rape only. It is worded broadly enough to include death by any act committed by the accused if done contemporaneously with the crime of rape. Any other interpretation would defeat the object of ensuring safety of women and would perpetuate the earlier loophole of the rapists claiming lack of intention to cause death to seek a reduced charge under Section 304 of I.P.C. as noted in the Report of the Committee on Amendments to Criminal Law, headed by Justice J.S. Verma, former Chief Justice of India....."

64. Thus, even though murder may not have been proved, sentence of death can still be imposed if the impugned act falls under Section 376A of IPC. A bare perusal of this provision itself shows that sentence of death has been mentioned in the last, which is preceded by sentence of "not less than 20 years", followed by "imprisonment for life" which shall mean "imprisonment for the remaining part of person's natural life" and lastly with "death". The principles of "rarest of rare" for awarding death sentence as evolved in *Bachan Singh's* case would be attracted in respect of Section 376A of IPC as well.

65. The case of *Bachan Singh* (supra) was followed by yet another important judgement of *Macchi Singh vs. State of Punjab*, 1983 (1) SCC 470. The law laid

down in *Macchi Singh* (supra) has been succinctly reflected upon by the Apex Court in the much talked about *Nirbhaya* case judgement, which is titled as *Mukesh & another vs. State (NCT of Delhi) & others*; 2017 (6) SCC 1, as under :-

> 335. In the case of **Machhi Singh (supra),** a three-Judge Bench has explained the concept of 'rarest of rare' by observing thus:
>
> "The reasons why the community as a whole does not endorse the humanistic approach reflected in 'death sentence-in-no-case' doctrine are not far to seek. In the first place, the very humanistic edifice is constructed on the foundation of 'reverence for life' principle. When a member of the community violates this very principle by killing another member, the society may not feel itself bound by the shackles of this doctrine. Secondly, it has to be realised that every member of the community is able to live with safety without his or her own life being endangered because of the protective arm of the community and on account of the rule of law enforced by it. The very existence of the rule of law and the fear of being brought to book operates as a deterrent for those who have no scruples in killing others if it suits their ends. Every member of the community owes a debt to the community for this protection."
>
> 336. Thereafter, the Court has adverted to the aspects of the feeling of the community and its desire for self-preservation and opined that the community may well withdraw the protection by sanctioning the death penalty. What has been ruled in this regard is worth reproducing: "But the community will not do so in every case. It may do so 'in the rarest of rare cases' when its collective conscience is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty."
>
> 337. It is apt to state here that in the said case, stress was laid on certain aspects, namely, the manner of commission of the murder, the motive for commission of the murder, anti-social or socially abhorrent nature of the crime, magnitude of the crime and personality of the victim of murder.

338. After so enumerating, the propositions that emerged from Bachan Singh (supra) were culled out which are as follows:

"The following propositions emerge from Bachan Singh case:

"(i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.

(ii) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the 'crime'.

(iii) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

(iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.

339. The three-Judge Bench further opined that to apply the said guidelines, the following questions are required to be answered: "(a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?

(b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?" In the said case, the Court upheld the extreme penalty of death in respect of three accused persons.

66. The Apex Court, in the *Nirbhaya's* case thereafter referred to yet another judgement of the Apex Court in the case of *Haresh Mohandas Rajput vs. State of Maharashtra*, 129 SC Reported 2308 in the following manner :-

340. "while dealing with the situation where the death sentence is warranted, referred to the guidelines laid down in Bachan Singh (supra) and the principles culled out in Machhi Singh (supra) and opined as follows:

"19. In Machhi Singh v. State of Punjab this Court expanded the "rarest of rare" formulation beyond the aggravating factors listed in Bachan Singh to cases where the "collective conscience" of the community is so shocked that it will expect the holders of the judicial power centre to inflict the death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining the death penalty, such a penalty can be inflicted. But the Bench in this case underlined that full weightage must be accorded to the mitigating circumstances in a case and a just balance had to be struck between the aggravating and the mitigating circumstances." After so stating, the Court ruled thus:

"20. The rarest of the rare case" comes when a convict would be a menace and threat to the harmonious and peaceful coexistence of the society. The crime may be heinous or brutal but may not be in the category of "the rarest of the rare case". There must be no reason to believe that the accused cannot be reformed or rehabilitated and that he is likely to continue criminal acts of violence as would constitute a continuing threat to the society. The accused may be a menace to the society and would continue to be so, threatening its peaceful and harmonious coexistence. The manner in which the crime is committed must be such that it may result in intense and extreme indignation of the community and shock the collective conscience of the society. Where an accused does not act on any spur-of-the- moment provocation and indulges himself in a deliberately planned crime and [pic]meticulously executes it, the death sentence may be the most appropriate punishment for such a ghastly crime. The death sentence may be warranted where the victims are innocent children and helpless women. Thus, in case the crime is committed in a most cruel and inhuman manner which is an extremely brutal, grotesque, diabolical, revolting and dastardly manner, where his act affects the entire moral fibre of the society e.g. crime committed for power or political ambition or indulging in organised criminal activities, death

> sentence should be awarded.(See C. Muniappan v. State of T.N[172]., Dara Singh v. Republic of India[173], Surendra Koli v. State of U.P.[174], Mohd. Mannan[175] and Sudam v. State of Maharashtra [176].)
>
> 21. Thus, it is evident that for awarding the death sentence, there must be existence of aggravating circumstances and the consequential absence of mitigating circumstances. As to whether the death sentence should be awarded, would depend upon the factual scenario of the case in hand."

67. Thus, when it comes to deciding as to whether the sentence of death, be inflicted or not, principles as enunciated in the two judgements above have to be kept in mind and the interest of society vis-a-vis interest of individual also need to be weighed.

68. Needless to say, appropriate sentence does become a vexed question in such matters.

69. The Apex court in the case of *Shankar Kisan Rao Khade vs. State of Maharashtra,* 2013 (5) SCC 546, has held that for awarding death penalty, the Crime Test, Criminal Test and R.R. Test have to be satisfied. Crime Test has to be 100%, Criminal Test 0% and R.R. Test, ie., Rarest of Rare Test is also required to be proven. Crime Test is 100% when no iota of doubt remains regarding commission of offence by the accused. Criminal Test is 0% when there are no such mitigating circumstances in favour of the accused, which may call for a lenient view in his favour.

70. The following excerpts from *Shankar Kisan Rao Khade's* (supra) are relevant :-

> **50**.....In my considered view that the tests that we have to apply, while awarding death sentence, are "crime test", "criminal test" and the R-R Test and not "balancing test". To award death sentence, the "crime test" has to be fully satisfied, that is 100% and "criminal test" 0%, that is no Mitigating Circumstance favouring the accused. If there is any circumstance favouring the accused, the 'crime test' made favoured the accused to avoid the capital punishment. Even if both the test are satisfied, ie., the aggravating circumstances, fullest extent and no mitigating circumstances favouring the accused, still we have to apply finally the Rarest of Rare Case test (R-R Test). R-R Test depends upon the perception of the society that is "society centric" and

> not "Judge centric" that is, whether the society will approve the awarding of death sentence to certain types of crimes or not. While applying that test, the Court has to look into variety of factors like society's abhorrence, extreme indignation and antipathy to certain types of crimes like sexual assault and murder of minor girls intellectually challenged, suffering from physical disability, old and infirm women with those disabilities etc.. Examples are only illustrative and not exhaustive. Courts award death sentence since situation demands so, due to constitutional compulsion, reflected by the will of the people and not the will of the judges.

71. The Apex court in the case of *Shankar Kisan Rao Khade* (supra) took into account a number of Apex court judgments in which the offence of rape and murder of children had been committed by the accused and in some of which the extreme penalty of death was imposed and in others life imprisonment had been imposed and observed that the reason for such variance was not considering the mitigating circumstances, ie., Criminal Test. The Apex Court in para 47 has observed as under :-

> "47. Bachan Singh is more than clear that the crime is important (cruel, diabolic, brutal, depraved and gruesome) but the criminal is also important and this, unfortunately has been overlooked in several cases in the past (as mentioned in Santosh Kumar Satishbhushan Bariya v/s. State of Maharashtra, (2009) 6 SCC 498) and even in some of the cases referred to above. It is this individualized sentencing that has made this Court wary, in the recent past, of imposing death penalty and instead substituting it for fixed term sentences exceeding 14 years (the term of 14 years or 20 years being erroneously equated with life imprisonment) or awarding consecutive sentences. Some of these cases, which are not necessarily cases of rape and murder, are mentioned below."

72. In the case in hand, the appellant was driven by twin feelings of revenge and lust and perpetrated acts of murder and rape in extremely brutal manner. This case is fully satisfied on the aspect of crime test, which is 100%, meaning thereby, that the aggravating circumstances of murder involves exceptional depravity. There are as many as 30 injuries on the small frame of the girl-child which include crushing of her skull bone and throttling her as well. The question regarding the "criminal test" now remains to be deliberated upon. For the criminal test to be 0%, it has to be shown that there are no mitigating circumstances in favour of the criminal i.e. the appellant. The mitigating circumstance would encompass his criminal background and if there is no criminal background, it would be a

mitigating circumstance. The prosecution has filed newspaper cutting, which is Exhibit-P/41 exhibited by Deepak Yadav (PW22). As per this report, the appellant had earlier committed rape and murder of a seven year old girl-child and had spend three years in jail. Sunil Sharma (PW36) in para-11 of his statement has also exhibited paper cutting of daily "Patrika" and "Dainik Bhaskar", which are Exhibits-P/89 and P/90, in which it has been mentioned that appellant Honey had spent three years in jail as a juvenile. However, the prosecution was required to establish the factum of appellant's criminal background by submitting relevant substantive pieces of evidence which has not been done.

73. The Apex Court in the case of *Bachan Singh* (supra) has held that the State was required to prove that the accused would not commit criminal acts of violence as would constitute a continuing threat to society and that there is no probability that the accused can be reformed and rehabilitated by leading evidence to that effect.

74. In the case in hand, the prosecution has failed to prove the criminal antecedents of the appellant for which Investigating Officer Sunil Sharma (PW36) and Ram Narayan Bhadoriya (PW34) are responsible. Hence, in absence of such proof, as ordained in the case of *Bachan Singh* (supra), it cannot be proved that the appellant had criminal antecedents and therefore, the present case fails to achieve the yardstick of 0% criminal test, as formulated in the Apex Court judgment of *Shankar Kisan Rao Khade* (supra).

75. Moreover, recently the three-Judge Bench judgment of the Apex Court, in the case of *Ravishankar* (supra) has laid down that before awarding death sentence, the Court has to record its satisfaction that there are no residual doubt as to the culpability of the appellant, which is stiffer standard than "proof beyond reasonable doubt". In the aforesaid case, the Apex Court has observed as under :-

> 55.....This Court has increasingly become cognizant of 'residual doubt' in many recent cases which effectively create a higher standard of proof over and above the beyond reasonable doubt' standard used at the stage of conviction, as a safeguard against routine capital sentencing, keeping in mind the irreversibility of death.
>
> 56. In Rameshbhai Chandubhai Rathod vs.State of Gujarat, 12 this 12 (2011) 2 SCC 764 Court noted that reliance on merely 'plausible' evidences to prove a circumstantial chain and award death penalty would be "in defiance of any reasoning which brings a case within the category of the "rarest of rare cases"." Further, various discrepancies in other important links in the circumstantial chain as well as lack of any cogent reason by the High Court for not accepting the retraction of the confession statement of the accused was noted. Acting upon such

various gaps in the prosecution evidence as well as in light of other mitigating circumstances, like the possibility that there were others involved in the crime, this Court refused to confirm the sentence of death despite upholding conviction.

57. Such imposition of a higher standard of proof for purposes of death sentencing over and above 'beyond reasonable doubt' necessary for criminal conviction is similar to the "residual doubt" metric adopted by this Court in Ashok Debbarma vs. State of Tripura13 wherein it was noted that:

> "in our criminal justice system, for recording guilt of the accused, it is not necessary that the prosecution should prove the case with absolute or mathematical certainty, but only beyond reasonable doubt. Criminal Courts, while examining whether any doubt is beyond reasonable doubt, may carry in their mind, some "residual doubt", even though the Courts are convinced of the accused persons' guilt beyond reasonable doubt."

58. Ashok Debbarma (supra) drew a distinction between a 'residual doubt', which is any remaining or lingering doubt about the defendant's 13 (2014) 4 SCC 747 guilt which might remain at the sentencing stage despite satisfaction of the 'beyond a reasonable doubt' standard during conviction, and reasonable doubts which as defined in Krishan v. State14 are "actual and substantive, and not merely imaginary, trivial or merely possible". These 'residual doubts' although not relevant for conviction, would tilt towards mitigating circumstance to be taken note of whilst considering whether the case falls under the 'rarest of rare' category.

59. This theory is also recognised in other jurisdictions like the United States, where some state courts like the Supreme Court of Tennessey in State vs. McKinney15 have explained that residual doubt of guilt is a valid non-statutory mitigating circumstance during the sentencing stage and have allowed for new evidence during sentencing proceedings related to defendant's character, background history, physical condition etc.

76. In the aforesaid case of *Ravishankar* (supra), facts were quite akin to the case in hand. The Trial Court had convicted and sentenced the accused under

Section 302 and 201 of IPC as also under Sections, 363, 366, 376(2(i), 376 (2)(n), 376 (2)(j), 376 (2)(na) and 376A of IPC. The appellant was sentenced to death in respect of Section 376A of IPC. The case was based on circumstantial evidence such as, last seen theory, recovery of incriminating articles on the basis of memorandum of accused as also DNA analysis etc. The various circumstances were found to be forming a complete chain in arriving at the conclusion of conviction. However, when it came to sentencing the accused, the Court observed as under :-

> 61. In the present case, there are some residual doubts in our mind. A crucial witness for constructing the last seen theory, P.W.5 is partly inconsistent in cross-examination and quickly jumps from one statement to the other. Two other witnesses, P.W.6 and P.W.7 had seen the appellant feeding biscuits to the deceased one year before the incident and their long delay in reporting the same fails to inspire confidence. The mother of the deceased has deposed that the wife and daughter of the appellant came to her house and demanded the return of the money which she had borrowed from them but failed to mention that she suspected the appellant of committing the crime initially. Ligature marks on the neck evidencing throttling were noted by P.W.20 and P.W.12 and in the postmortem report, but find no mention in the panchnama prepared by the police. Viscera samples sent for chemical testing were spoilt and hence remained unexamined. Although nails' scrappings of the accused were collected, no report has been produced to show that DNA of the deceased was present. Another initial suspect, Baba alias Ashok Kaurav absconded during investigation, hence, gave rise to the possibility of involvement of more than one person. All these factors of course have no impact in formation of the chain of evidence and are wholly insufficient to create reasonable doubt to earn acquittal.
>
> 62. We are cognizant of the fact that use of such 'residual doubt' as a mitigating factor would effectively raise the standard of proof for imposing the death sentence, the benefit of which would be availed of not by the innocent only. However, it would be a misconception to make a cost-benefit comparison between cost to society owing to acquittal of one guilty versus loss of life of a perceived innocent. This is because the alternative to death does not necessarily imply setting the convict free.

> 63. As noted by the United States Supreme Court in Herrera v. Collins,16 "it is an unalterable fact that our judicial system, like the human beings who administer it, is fallible." However, death being irrevocable, there lies a greater degree of responsibility on the Court for an in-depth scrutiny of the entire material on record. Still further, qualitatively, the penalty imposed by awarding death is much different than in incarceration, both for the convict and for the state. Hence, a corresponding distinction in requisite standards of proof by taking note of 'residual doubt' during sentencing would not be unwarranted.
>
> 64. We are thus of the considered view that the present case falls short of the 'rarest of rare' cases where the death sentence alone deserves to be awarded to the appellant. It appears to us in the light of all the cumulative circumstances that the cause of justice will be effectively served by invoking the concept of special sentencing theory as evolved by this Court in *Swamy Shraddananda* (supra) and approved in *Sriharan* case (supra).

77. Applying the principles and the law laid down in the aforesaid judgment of *Ravishankar* (supra) as also other judgments, it shall now be considered as to whether there are any residual doubts in the case in hand.

78. On revisiting the evidence available on record, it appears that there are few lapses in the evidence gathered by the prosecution and the circumstances obtained in the case and these are as follows :-

> a) While sending the appellant for his examination, a query was made to the concerning physician to see as to whether there are any injuries on the person of the appellant or not. It was necessary to enquire because sexually violating a four year old girl-child would probably have caused injuries to the appellant at specific places, which would have further substantiated the prosecution case. However, the concerning physician Dr. Prabodh Joshi (PW32) has not answered the aforesaid query.
>
> b) It can be seen that the last seen theory hinges upon the statement of witness Indu (PW11). It is quite strange that this witness is the wife of Premnath (PW12) who on the next day has seen body of the girl-child. Such coincidence is quite providential and a lingering doubt arises as to whether the last seen witness has been roped in by the Investigating Officer in order to substantiate prosecution case.

c) The Trial Court has not considered the factum of murder of the girl-child as rarest of rare case and only imposed life imprisonment and no appeal has been preferred by the State seeking enhancement of sentence to that of death.

d) As already stated, the prosecution has failed to substantiate the newspaper cuttings regarding the criminal antecedents of the appellant by submitting proper proof thereof.

79. In view of the above, "standards of residual doubt" has not been satisfied by the prosecution although, the prosecution has been able to prove the case "beyond reasonable doubt". Hence, we are of the opinion that 0% criminal test has not been satisfied and there are residual doubts as indicated above and these factors consequently, would result in the case falling short of "rarest of rare" category. The sentence of death imposed upon the appellant is thereby reduced from death sentence to imprisonment for life, which shall mean, imprisonment for the remainder of appellant's natural life for committing offence under Section 376A of IPC. The sentences imposed in respect of rest of other proved penal provisions stand affirmed and consequently, the sentences as imposed against the appellant in final analysis would be as under :-

Provisions of IPC	Sentence
Section 363 of IPC	5 years RI with fine of Rs.2,000/-. In default on payment of fine, 2 months additional RI.
Section 366 of IPC	7 years RI with fine of Rs.3,000/-. In default on payment of fine, 2 months additional RI.
Section 376 -AB of IPC	Life imprisonment till natural death with fine of Rs.4,000/-. In default of payment of fine, 3 months additional RI.
Section 5(n) r/w Section 6 of the POCSO Act	Life imprisonment with fine of Rs. 4,000/-/In default of payment of fine, 3 months additional RI.
Section 302 of IPC	Life imprisonment with fine of Rs. 4,000/-. In default of payment of fine, 3 months additional RI.
Section 201 of IPC	3 years RI with fine of Rs.2,000/- In default of payment of fine, 2 months additional RI.
Section 376-A of IPC	Life imprisonment for the remainder of his natural life.

80. All jail sentences to run concurrently.

81. The appeal filed by the appellant/accused consequently, stands dismissed on the point of conviction. However, the appeal is partly allowed on the quantum of sentence only in respect of Section 376-A of IPC. The reference is answered in above terms.

82. The order of the trial court regarding disposal of the property is maintained.

83. Let a copy of this judgment be retained in the record of Criminal Appeal No.8818/2019.

84. Office is directed to send a copy of this judgment immediately to the concerned trial court along with the record of trial court to take appropriate steps as per law.

Order accordingly

I.L.R. [2020] M.P. 1460
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice G.S. Ahluwalia

M.Cr.C. No. 39588/2019 (Gwalior) decided on 20 September, 2019

ARIF KHAN ...Applicant

Vs.

STATE OF M.P. & anr. …Non-applicants

A. Penal Code (45 of 1860), Section 375-Sixthly & 376 and Criminal Procedure Code, 1973 (2 of 1974), Section 482 – Quashment – Consent & Compromise **– Held – Where prosecutrix is minor, consent is immaterial – When consent is immaterial at the time of commission of offence then under no circumstances, her consent would become relevant for compromise – Submission of applicant that he has married the prosecutrix and thus prosecution should be quashed, cannot be accepted under any circumstances – Honour of woman cannot be put to stake by compromise or settlement – Application dismissed. (Paras 14, 22 & 25)**

क. दण्ड संहिता (1860 का 45), धारा 375–छटवां व 376 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – अभिखंडित किया जाना – सहमति व समझौता – **अभिनिर्धारित – जहां अभियोक्त्री अप्राप्तवय है, सहमति तत्वहीन है – जब अपराध कारित किये जाते समय सहमति तत्वहीन है तब समझौते हेतु उसकी सहमति, किन्हीं परिस्थितियों में सुसंगत नहीं होगी – आवेदक का निवेदन कि उसने अभियोक्त्री से विवाह कर लिया है और इसलिए अभियोजन अभिखंडित किया जाना चाहिए, किसी परिस्थिति के अंतर्गत स्वीकार नहीं किया जा सकता – महिला के सम्मान को समझौते द्वारा दांव पर नहीं लगाया जा सकता – आवेदन खारिज।**

***B. Protection of Children from Sexual Offences Act (32 of 2012), Section 3/4 and Criminal Procedure Code, 1973 (2 of 1974), Section 482 – Quashment – Compromise* – Held – Applicant facing trial under Act of 2012 which is a special statute and any offence under Special Statute cannot be quashed on ground of compromise – What cannot be done directly, cannot also be done indirectly. (Paras 10, 12, 14 & 15)**

ख. लैंगिक अपराधों से बालकों का संरक्षण अधिनियम (2012 का 32), धारा 3/4 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – अभिखंडित किया जाना – समझौता – अभिनिर्धारित – आवेदक 2012 के अधिनियम के अंतर्गत विचारण का सामना कर रहा है, जो कि एक विशेष कानून है तथा विशेष कानून के अंतर्गत किसी अपराध को समझौते के आधार पर अभिखंडित नहीं किया जा सकता – जो प्रत्यक्ष रूप से नहीं किया जा सकता वह अप्रत्यक्ष रूप से भी नहीं किया जा सकता।

***C. Criminal Procedure Code, 1973 (2 of 1974), Section 482 – Quashment – Stage of Trial* – Held – For exercising power u/S 482 Cr.P.C. for quashing criminal prosecution, stage of trial is material/crucial – Petition as well as submissions are silent about stage of trial, pending since 2017 – Petition liable to be rejected on this ground. (Para 33)**

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – अभिखंडित किया जाना – विचारण का प्रक्रम – अभिनिर्धारित – धारा 482 दं.प्र.सं. के अंतर्गत, दाण्डिक अभियोजन अभिखंडित किये जाने हेतु शक्ति के प्रयोग के लिए, विचारण का प्रक्रम तात्विक/निर्णायक है – याचिका के साथ–साथ निवेदन भी, 2017 से लंबित विचारण के प्रक्रम के बारे में मौन है – याचिका, इस आधार पर अस्वीकार किये जाने योग्य है।

***D. Penal Code (45 of 1860), Section 376 – Prosecutrix turning Hostile – Effect* – Held – Even if prosecutrix turns hostile, accused can be convicted on basis of scientific and other circumstantial evidence. (Para 30)**

घ. दण्ड संहिता (1860 का 45), धारा 376 – अभियोक्त्री का पक्ष विरोधी हो जाना – प्रभाव – अभिनिर्धारित – यदि अभियोक्त्री पक्ष विरोधी हो गई हो तब भी अभियुक्त को वैज्ञानिक एवं अन्य परिस्थितिजन्य साक्ष्य के आधार पर दोषसिद्ध किया जा सकता है।

Cases referred:

(2017) 9 SCC 641, (2012) 10 SCC 303, (2014) 6 SCC 466, M.Cr.C. No. 6904/2019 order passed on 10.04.2019, (2015) 7 SCC 681, (2019) 5 SCC 688, M.Cr.C. No. 11891/2016 order passed on 30.11.2016, Crl.M.C. No. 2763/2017 order passed on 01.08.2017 (Delhi High Court), (2014) 13 SCC 318 : (2014) 5 SCC (Cri) 651, Cr.A. No. 913/2016 decided on 28.09.2018 (Supreme Court).

M. Khan, for the applicant.
Purushottam Rai, P.L. for the non-applicant No. 1/State.
SS Sikarwar, for the complainant/non-applicant No. 2.

O R D E R

G.S. AHLUWALIA, J.:- This petition under Section 482 of CrPC has been filed for quashment of Crime No.656/2017 registered at Police Station Bahodapur, District Gwalior for offence under Section 376 of IPC and Section 3/4 of Protection of Children from Sexual Offences Act 2012 [in short "the POCSO Act"] as well as Sessions Trial No.221/2017 pending before the Court of Tenth Additional Sessions Judge, Gwalior.

2. It is submitted by the Counsel for the applicant that during pendency of Sessions Trial, the parties have resolved their dispute with the intervention of elderly members of the society and the applicant has married the respondent No.2 and thus, now there is no dispute between them and they want to live their life peacefully. As the applicant has married the respondent No.2, therefore, the respondent No.2 does not want to proceed further with the case and accordingly, both the parties have amicably compromised the matter. It is further submitted that this Court has extra-ordinary jurisdiction to quash the proceedings on the basis of compromise. The counsel for the applicant has relied upon the judgments passed by the Supreme Court in the case of *Parbatbhai Aahir v. State of Gujarat,* reported in (2017) 9 SCC 641, *Gian Singh vs. State of Punjab* reported in (2012) 10 SCC 303 and *Narinder Singh & Ors. vs. State of Punjab & Anr.* reported in (2014) 6 SCC 466.

3. It is submitted by the Counsel for the applicant that the respondent No.2 had lodged a report 05/10/2017 on the allegations that she is aged about 17 years and about a year back, she had gone to her sister's house. The applicant, who is nephew of her sister, used to visit the house. Thereafter, she came back to her parents' home. The applicant continued to visit her parent's home and started convincing her that he would marry her. About six months back, physical relations were developed on the promise of marriage. Thereafter, the applicant continued to have physical relations with her on the promise of marriage. For the last time, he had done wrong work with her on 03/10/2017 and on the said day when she insisted to marry, then he refused to do so. Thereafter, she informed this incident to her sister Chandni and grand-mother Mustari Devi. Accordingly, the FIR was lodged on 05/10/2017.

4. It is submitted by the Counsel for the applicant that the police, after completion of investigation, filed the charge sheet and the applicant is facing trial for offence under Section 376 of IPC and under Section 3/4 of POSCO Act, 2012. It is further submitted that during pendency of trial, due to intervention of elderly members of society, both the parties have entered into compromise and accordingly, the applicant has married the respondent No.2 on 13/04/2019. *Nikahanama* has also been annexed with the petition. It is submitted that since

both the parties are residing together peacefully, therefore, the prosecution of the applicant may be quashed on the ground of compromise.

5. Apart from the above judgments, the counsel for the applicant has also relied upon the order dated 10/04/2019 passed by a Coordinate Bench of this Court in the case of *Pankaj Parmar and Others vs. State of MP* in MCRC No. 6904/2019 (Gwalior Bench) and submitted that in the said case the offence under Section 363, 376, 120-B of IPC and under Section 5/6 of the POSCO Act was registered, and the Coordinate Bench of this Court after considering the compromise has quashed the proceedings.

6. *Per contra,* it is submitted by the Counsel for the State that the order passed by the Coordinate Bench of this Court passed in the case of *Pankaj Parmar* (supra) is *per incuriam* and it has not taken note of the judgments passed by the Supreme Court in the case of *State of M.P. vs. Madanlal,* reported in **(**2015) 7 SCC 681 and *State of M.P. v. Laxmi Narayan,* reported in (2019) 5 SCC 688.

7. Heard the learned Counsel for the parties.

8. The Supreme Court in the case of *Narinder Singh* (supra) has held as under:-

> **"29.** In view of the aforesaid discussion, we sum up and lay down the following principles by which the High Court would be guided in giving adequate treatment to the settlement between the parties and exercising its power under Section 482 of the Code while accepting the settlement and quashing the proceedings or refusing to accept the settlement with direction to continue with the criminal proceedings:
>
> 29.1. Power conferred under Section 482 of the Code is to be distinguished from the power which lies in the Court to compound the offences under Section 320 of the Code. No doubt, under Section 482 of the Code, the High Court has inherent power to quash the criminal proceedings even in those cases which are not compoundable, where the parties have settled the matter between themselves. However, this power is to be exercised sparingly and with caution.
>
> 29.2. When the parties have reached the settlement and on that basis petition for quashing the criminal proceedings is filed, the guiding factor in such cases would be to secure:
>
> (i) ends of justice, or
>
> (ii) to prevent abuse of the process of any Court.
>
> While exercising the power the High Court is to form an opinion on either of the aforesaid two objectives.
>
> 29.3. Such a power is not be exercised in those prosecutions which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature

and have a serious impact on society. Similarly, for offences alleged to have been committed under special statute like the Prevention of Corruption Act or the offences committed by Public Servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender.

29.4. On the other, those criminal cases having overwhelmingly and pre-dominantly civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family disputes should be quashed when the parties have resolved their entire disputes among themselves.

29.5. While exercising its powers, the High Court is to examine as to whether the possibility of conviction is remote and bleak and continuation of criminal cases would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal cases.

29.6. Offences under Section 307 IPC would fall in the category of heinous and serious offences and therefore is to be generally treated as crime against the society and not against the individual alone. However, the High Court would not rest its decision merely because there is a mention of Section 307 IPC in the FIR or the charge is framed under this provision. It would be open to the High Court to examine as to whether incorporation of Section 307 IPC is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would lead to proving the charge under Section 307 IPC. For this purpose, it would be open to the High Court to go by the nature of injury sustained, whether such injury is inflicted on the vital/delegate parts of the body, nature of weapons used etc. Medical report in respect of injuries suffered by the victim can generally be the guiding factor. On the basis of this prima facie analysis, the High Court can examine as to whether there is a strong possibility of conviction or the chances of conviction are remote and bleak. In the former case it can refuse to accept the settlement and quash the criminal proceedings whereas in the later case it would be permissible for the High Court to accept the plea compounding the offence based on complete settlement between the parties. At this stage, the Court can also be swayed by the fact that the settlement between the parties is going to result in harmony between them which may improve their future relationship.

29.7. While deciding whether to exercise its power under Section 482 of the Code or not, timings of settlement play a crucial role. Those cases where the settlement is arrived at immediately after the alleged commission of offence and the matter is still under investigation, the High Court may be liberal in accepting the settlement to quash the criminal proceedings/investigation. It is because of the reason that at this stage the

> investigation is still on and even the charge sheet has not been filed. Likewise, those cases where the charge is framed but the evidence is yet to start or the evidence is still at infancy stage, the High Court can show benevolence in exercising its powers favourably, but after prima facie assessment of the circumstances/material mentioned above. On the other hand, where the prosecution evidence is almost complete or after the conclusion of the evidence the matter is at the stage of argument, normally the High Court should refrain from exercising its power under Section 482 of the Code, as in such cases the trial court would be in a position to decide the case finally on merits and to come a conclusion as to whether the offence under Section 307 IPC is committed or not. Similarly, in those cases where the conviction is already recorded by the trial court and the matter is at the appellate stage before the High Court, mere compromise between the parties would not be a ground to accept the same resulting in acquittal of the offender who has already been convicted by the trial court. Here charge is proved under Section 307 IPC and conviction is already recorded of a heinous crime and, therefore, there is no question of sparing a convict found guilty of such a crime."

9. From the plain reading of paragraph 29.3, it is clear that the power under Section 482 of CrPC should not be exercised in those prosecutions which involve heinous and serious offences like murder, **rape,** dacoity etc. as such offences are not private in nature and have a serious impact on the society. However, for the offence alleged to have been committed under "Special Statute" like the Prevention of Corruption Act, the prosecution cannot be quashed merely on the basis of compromise between the victim and the offender.

10. In the present case, the applicant is also facing trial for offence under Section 3/4 of POCSO Act, 2012. The POSCO Act 2012 is, undisputedly, a "Special Statute" and any offence under the "Special Statute" cannot be quashed on the basis of compromise.

11. This Court in the case of *Monu @ Ranu Kushwah & Others vs. State of M.P. & Another* by order dated 30.11.2016 passed in M.Cr.C.11891/2016 has held as under:-

> **"20.** In the light of the judgments passed by the Supreme Court in the cases of *Gian Singh* (supra) and *Narinder Singh* (supra) while deciding the application for quashing of FIR on the ground of compromise, the Court is under obligation to consider the nature and gravity of the offence. It was submitted by the counsel for the applicants that so far as the observation given by the Supreme Court in the cases of *Gian Singh* (Supra) and *Narinder Singh* (supra) in paragraph 29.3 is concerned the same cannot be applied to the offences punishable under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. In *Narinder Singh*

(supra), the Supreme Court in paragraph 29.3 has observed as under:-

> "(29.3). Such a power is not to be exercised in those prosecutions which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society. Similarly, for the offences alleged to have been committed under special statute like the Prevention of Corruption Act or the offences committed by public servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender."

21. It was contended by the counsel for the applicants that since the Supreme Court has referred to Prevention of Corruption Act and for offences committed by public servants working in that capacity, therefore, word the "special statutes" should be interpreted in the light of these two acts only. So far as the reference to Prevention of Corruption Act and offences of public servant is concerned, the same is merely illustrative in nature and is not exhaustive. As it has already been observed that the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 has been enacted to check the tendency of untouchability in the society which is also prohibited under Article 17 of the Constitution of India, it is held that the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 is a **Special Statute** and, therefore, the power to quash the proceedings on the basis of compromise cannot be exercised. Furthermore, the orders on which the counsel for the applicants has placed reliance, the co-ordinate Bench of this Court has nowhere decided that whether proceedings for offences under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 can be quashed on the basis of compromise or not?....."

12. Thus, where the applicant is facing Trial for an offence punishable under the Special Statute, then the prosecution cannot be quashed on the basis of compromise.

13. Section 375 Sixthly of IPC is relevant, which reads as under:-

> **"Sixthly —With or without her consent, when she is under eighteen years of age."**

14. Thus, it is clear that where the prosecutrix is a minor below 18 years of age, then her consent would be immaterial. When an offence is made out against the accused irrespective of the fact that whether the prosecutrix was a consenting party or not, then certainly, the prosecution cannot be quashed merely on the ground that at a later stage the prosecutrix has entered into a compromise. Once the consent of the minor prosecutrix is immaterial for registration of offence, then

such consent shall still remain immaterial for all practical purposes at all the stages including for compromise. Merely because, the minor prosecutrix has later on agreed to enter into a compromise with the applicant, would not be sufficient to quash the proceedings. Since the POCSO Act, 2012 is a Special Act, therefore, in view of the provisions of Sections 375 Sixthly of IPC, the consent of the prosecutrix is material. Thus, this Court is of the considered opinion that the prosecution of the accused for offence under Section 3/4 of POCSO Act, 2012 cannot be quashed merely on the ground that the prosecutrix has compromised the matter with the accused.

15. There is another aspect of the matter. When the consent of a minor girl is immaterial, then unscrupulous persons after the registration of offence, can get the investigation quashed on the basis of compromise. When the legislature has specially provided that the consent of a minor girl is immaterial, then the Courts cannot become an instrumentality in bypassing the specific provisions of law. The POCSO Act, 2012 is a Special Statute enacted with the object of protecting the children from sexual offences. Thus, this Court is of the considered opinion that "what cannot be done directly, cannot also be done indirectly. Further, the POCSO Act, 2012 was enacted to provide a robust legal framework for the protection of children from offences of sexual assault, sexual harassment and pronography while safeguarding the interest of the child at every stage of the judicial process. Protection of children from Sexual Offences (Amendment) Bill, 2019 provides for enhanced stringent punishment. Under these circumstances, this Court is of the considered opinion that if an accused is facing trial under the provisions of POCSO Act 2012, then his prosecution cannot be quashed in exercise of power under Section 482 of CrPC on the ground that the prosecutrix has entered into a compromise with the accused, and application for compromise is not maintainable.

16. It is next contended by the Counsel for the applicant that the applicant is also facing trial for an offence under Section 376 of IPC and since the applicant has married the respondent No.2/prosecutrix, therefore, now there is no possibility of conviction of the applicant and thus, the trial of the applicant would be nothing, but a sheer wastage of valuable time of Court. Thus, the prosecution of the applicant for offence under Section 376 of IPC be quashed.

17. Heard the learned Counsel for the parties.

18. The moot question for consideration is that when the accused has married the respondent No.2/prosecutrix, then whether the prosecution of the accused for offence under Section 376 of IPC can be quashed or not ?

19. The Supreme Court in the case of *State of M.P. vs. Madanlal,* reported in (2015) 7 SCC 681, has held as under :

"18. The aforesaid view was expressed while dealing with the imposition of sentence. We would like to clearly state that in a case of rape or attempt to rape, the conception of compromise under no circumstances can really be thought of. These are crimes against the body of a woman which is her own temple. These are the offences which suffocate the breath of life and sully the reputation. And reputation, needless to emphasise, is the richest jewel one can conceive of in life. No one would allow it to be extinguished. When a human frame is defiled, the "purest treasure", is lost. Dignity of a woman is a part of her non-perishable and immortal self and no one should ever think of painting it in clay. There cannot be a compromise or settlement as it would be against her honour which matters the most. It is sacrosanct. Sometimes solace is given that the perpetrator of the crime has acceded to enter into wedlock with her which is nothing but putting pressure in an adroit manner; and we say with emphasis that the courts are to remain absolutely away from this subterfuge to adopt a soft approach to the case, for any kind of liberal approach has to be put in the compartment of spectacular error. Or to put it differently, it would be in the realm of a sanctuary of error.

19. We are compelled to say so as such an attitude reflects lack of sensibility towards the dignity, the *elan vital,* of a woman. Any kind of liberal approach or thought of mediation in this regard is thoroughly and completely sans legal permissibility. It has to be kept in mind, as has been held in *Shyam Narain* v. *State (NCT of Delhi)* (2013) 7 SCC 77 that: (SCC pp. 88-89, para 27)

> *"27.* Respect for reputation of women in the society shows the basic civility of a civilised society. No member of society can afford to conceive the idea that he can create a hollow in the honour of a woman. Such thinking is not only lamentable but also deplorable. It would not be an exaggeration to say that the thought of sullying the physical frame of a woman is the demolition of the accepted civilised norm i.e. 'physical morality'. In such a sphere, impetuosity has no room. The youthful excitement has no place. It should be paramount in everyone's mind that, on the one hand, society as a whole cannot preach from the pulpit about social, economic and political equality of the sexes and, on the other, some perverted members of the same society dehumanise the woman by attacking her body and ruining her chastity. It is an assault on the individuality and inherent dignity of a woman with the mindset that she should be elegantly servile to men."

20. At this juncture, we are obliged to refer to two authorities, namely, *Baldev Singh* v. *State of Punjab* (2011) 13 SCC 705 and *Ravindra* v. *State of M.P.* (2015) 4 SCC 491 *Baldev Singh* was considered by the three-Judge Bench in *Shimbhu* (2014) 13 SCC 318 and in that case it has

been stated that: (*Shimbhu case,* SCC pp. 327-28, para 18)

> *"18.1* . In *Baldev Singh* v. *State of Punjab* though the courts below awarded a sentence of ten years, taking note of the facts that the occurrence was 14 years old, the appellants therein had undergone about 3½ years of imprisonment, the prosecutrix and the appellants married (not to each other) and entered into a compromise, this Court, while considering peculiar circumstances, reduced the sentence to the period already undergone, but enhanced the fine from Rs 1000 to Rs 50,000. In the light of a series of decisions, taking contrary view, we hold that the said decision in *Baldev Singh* v. *State of Punjab* cannot be cited as a precedent and it should be confined to that case."

21. Recently, in *Ravindra,* a two-Judge Bench taking note of the fact that there was a compromise has opined thus: (SCC p. 497, paras 17-18)

> *"17.* This Court has in *Baldev Singh* v. *State of Punjab,* invoked the proviso to Section 376(2) IPC on the consideration that the case was an old one. The facts of the above case also state that there was compromise entered into between the parties.
>
> *18.* In light of the discussion in the foregoing paragraphs, we are of the opinion that the case of the appellant is a fit case for invoking the proviso to Section 376(2) IPC for awarding lesser sentence, as the incident is 20 years old and the fact that the parties are married and have entered into a compromise, are the adequate and special reasons. Therefore, although we uphold the conviction of the appellant but reduce the sentence to the period already undergone by the appellant. The appeal is disposed of accordingly."

22. Placing reliance on *Shimbhu,* we also say that the judgments in *Baldev Singh* and *Ravindra* have to be confined to the facts of the said cases and are not to be regarded as binding precedents."

(underline supplied)

20. The Supreme Court in the case of *State of M.P. vs. Laxmi Narayan,* reported in (2019) 5 SCC 688 has held as under :-

> **"11.** At the outset, it is required to be noted that in the present appeals, the High Court in exercise of its powers under Section 482 CrPC has quashed the FIR for the offences under Sections 307 and 34 IPC solely on the basis of a compromise between the complainant and the accused. That in view of the compromise and the stand taken by the complainant, considering the decision of this Court in *Shiji vs. Radhika (2011) 10 SCC 705,* the High Court has observed that there is no chance of recording

conviction against the accused persons and the entire exercise of a trial would be exercise in futility, the High Court has quashed the FIR.

11.1. However, the High Court has not at all considered the fact that the offences alleged were non-compoundable offences as per Section 320 CrPC. From the impugned judgment and order, it appears that the High Court has not at all considered the relevant facts and circumstances of the case, more particularly the seriousness of the offences and its social impact. From the impugned judgment and order passed by the High Court, it appears that the High Court has mechanically quashed the FIR, in exercise of its powers under Section 482 CrPC. The High Court has not at all considered the distinction between a personal or private wrong and a social wrong and the social impact. As observed by this Court in *State of Maharashtra* v. *Vikram Anantrai Doshi* (2014) 15 SCC 29*,* the Court's principal duty, while exercising the powers under Section 482 CrPC to quash the criminal proceedings, should be to scan the entire facts to find out the thrust of the allegations and the crux of the settlement. As observed, it is the experience of the Judge that comes to his aid and the said experience should be used with care, caution, circumspection and courageous prudence. In the case at hand, the High Court has not at all taken pains to scrutinise the entire conspectus of facts in proper perspective and has quashed the criminal proceedings mechanically. Even, the quashing of the FIR by the High Court in the present case for the offences under Sections 307 and 34 IPC, and that too in exercise of powers under Section 482 CrPC is just contrary to the law laid down by this Court in a catena of decisions."

21. The Supreme Court in the case of *Parbatbhai Aahir v. State of Gujarat,* reported in (2017) 9 SCC 641 has held as under :-

"16. The broad principles which emerge from the precedents on the subject, may be summarised in the following propositions:

16.1. Section 482 preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the ends of justice. The provision does not confer new powers. It only recognises and preserves powers which inhere in the High Court.

16.2. The invocation of the jurisdiction of the High Court to quash a first information report or a criminal proceeding on the ground that a settlement has been arrived at between the offender and the victim is not the same as the invocation of jurisdiction for the purpose of compounding an offence. While compounding an offence, the power of the court is governed by the provisions of Section 320 of the Code of Criminal Procedure, 1973. The power to quash under Section 482 is attracted even if the offence is non-compoundable.

16.3. In forming an opinion whether a criminal proceeding or complaint should be quashed in exercise of its jurisdiction under Section 482, the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power.

16.4. While the inherent power of the High Court has a wide ambit and plenitude it has to be exercised *(i)* to secure the ends of justice, or *(ii)* to prevent an abuse of the process of any court.

16.5. The decision as to whether a complaint or first information report should be quashed on the ground that the offender and victim have settled the dispute, revolves ultimately on the facts and circumstances of each case and no exhaustive elaboration of principles can be formulated.

16.6. In the exercise of the power under Section 482 and while dealing with a plea that the dispute has been settled, the High Court must have due regard to the nature and gravity of the offence. Heinous and serious offences involving mental depravity or offences such as murder, rape and dacoity cannot appropriately be quashed though the victim or the family of the victim have settled the dispute. Such offences are, truly speaking, not private in nature but have a serious impact upon society. The decision to continue with the trial in such cases is founded on the overriding element of public interest in punishing persons for serious offences.

16.7. As distinguished from serious offences, there may be criminal cases which have an overwhelming or predominant element of a civil dispute. They stand on a distinct footing insofar as the exercise of the inherent power to quash is concerned.

16.8. Criminal cases involving offences which arise from commercial, financial, mercantile, partnership or similar transactions with an essentially civil flavour may in appropriate situations fall for quashing where parties have settled the dispute.

16.9. In such a case, the High Court may quash the criminal proceeding if in view of the compromise between the disputants, the possibility of a conviction is remote and the continuation of a criminal proceeding would cause oppression and prejudice; and

16.10. There is yet an exception to the principle set out in propositions 16.8. and 16.9. above. Economic offences involving the financial and economic well-being of the State have implications which lie beyond the domain of a mere dispute between private disputants. The High Court would be justified in declining to quash where the offender is involved in an activity akin to a financial or economic fraud or misdemeanour. The

> consequences of the act complained of upon the financial or economic system will weigh in the balance."

22. Thus, it is clear that where the accused is facing trial for the offence of rape, then conception of compromise under no circumstances can really be thought of. These are crimes against the body of a woman. When a woman is violated, then "purest treasure" is lost. The dignity of a woman is an essential part of her non-perishable and immortal self and no one should ever think of painting it in clay. The honour of a woman cannot be put to stake by compromise or settlement. The Supreme Court in the case of *Madanlal* (supra) has further held that "sometimes solace is given that the perpetrator of the crime has acceded to enter into wedlock with her which is nothing but putting pressure in an adroit manner; and we say with emphasis that the Courts are to remain absolutely away from this subterfuge to adopt a soft approach to the case, for any kind of liberal approach has to be put in the compartment of spectacular error or to put it differently, it would be in the realm of a sanctuary of error". Thus, it is clear that even if the accused come forward with the case that now since he has married the prosecutrix, therefore, the prosecution should be quashed, then such prayer cannot be accepted under any circumstances.

23. Further, Delhi High Court in the case of *Vikash Kumar @ Sonu Vs. The State by* order dated 1-8-2017 passed in Crl.M.C. No. 2763 of 2017 has held as under :-

> **"20.** The two decisions relied upon by learned Senior Advocate for the petitioner in Mr. Manteshwar Hanumantrao Kattimani Vs. State of Maharashtra and Anr. (Supra) and Jaya D.Ovhal Vs. State of Maharashtra (Supra) are not binding precedents. Otherwise also, while considering prayer of the petitioner for quashing the FIR and consequential proceedings emanating therefrom, guiding principles are laid down in Gian Singh's case (Supra).
>
> > "21. The petitioner could not seek any assistance by placing reliance on Deeapk Gulati vs. State of Haryana (Supra) as it was an appeal against conviction for committing the offence punishable under Section 365/366/376IPC wherein by giving benefit of doubt, the appellant/accused was acquitted.
> >
> > 22. It would also be apposite to mention here that in a decision dated 3rd August, 2015 by Co-ordinate Bench of this Court in Crl.M.C. No.1824/2015, the petition under Section 482 CrPC filed by the petitioner for quashing of FIR registered under Section 376 IPC on the ground that complainant has got married to the petitioner, has been dismissed by passing the following order:-

"This is a petition seeking quashing of the FIR No.163/2015 registered under Section 376 of the IPC at the behest of respondent No.2. Respondent No.2 is present. She is an adult stated to be 27 years of age. Her presence has been identified by the Investigating Officer. She states that she in fact wishes to marry the petitioner and the FIR has been got registered under a misunderstanding. She does not wish that any action should be taken against the petitioner. The petitioner is stated to be a Government servant.

In view of this factual matrix, the petitioner be not arrested till the time when the statement of the prosecutrix is recorded before the Sessions Judge.

Learned Public Prosecutor for the State under instructions from the Investigating Officer states that challan is almost ready and shall be filed positively within two weeks. The trial Judge will endeavour to record the statement of the prosecutrix as early as possible.

This Court is otherwise not inclined to entertain a quashing petition under Section 376 of IPC in view of the judgment of the Apex Court reported as 10 SCC 303 Gian Singh Vs. State of Punjab and Anr., With these directions, petition disposed of.

Order dasti under the signatures of the Court Master."

23. The above order passed in Crl.M.C. No.1824/2015 declining the prayer for quashing of the criminal proceedings despite the fact that the parties got married, was challenged by filing a Special Leave to Appeal No.... /2016 (Crl.M.P. No.1865/2016) before the Supreme Court. The SLP also stands dismissed vide order dated 8th February, 2016."

(underline applied)

24. The Supreme Court in the case of *Shimbhu vs. State of Haryana,* reported in (2014) 13 SCC 318 : (2014) 5 SCC (Cri) 651, has held as under :-

"20. Further, a compromise entered into between the parties cannot be construed as a leading factor based on which lesser punishment can be awarded. Rape is a non-compoundable offence and it is an offence against the society and is not a matter to be left for the parties to compromise and settle. Since the court cannot always be assured that the consent given by the victim in compromising the case is a genuine consent, there is every chance that she might have been pressurized by the convicts or the trauma undergone by her all the years might have compelled her to opt for a compromise. In fact, accepting this proposition will put an additional burden on the victim. The accused

> may use all his influence to pressurize her for a compromise. So, in the interest of justice and to avoid unnecessary pressure/harassment to the victim, it would not be safe in considering the compromise arrived at between the parties in rape cases to be a ground for the court to exercise the discretionary power under the proviso of Section 376(2) IPC.
>
> **21.** It is imperative to mention that the legislature through the Criminal Law (Amendment) Act, 2013 has deleted this proviso in the wake of increasing crimes against women. Though, the said amendment will not come in the way of exercising discretion in this case, on perusal of the above legislative provision and catena of cases on the issue, we feel that the present case fails to fall within the ambit of exceptional case where the Court shall use its extraordinary discretion to reduce the period of sentence than the minimum prescribed."

25. So far as the order passed by the Coordinate Bench of this Court in the case *Pankaj Parmar* (supra) is concerned,it has not taken note of the judgments passed by the Supreme Court in the case of *Madanlal* (supra), *Laxmi Narayan* (supra), *Shimbhu* (supra) as well as the order passed by Supreme Court and the Delhi High Court in the case of *Vikash Kumar @ Sonu* (supra). The Coordinate Bench of this Court has also not taken note of the fact that the POCSO Act, 2012 is a "Special Act" and thus, in the light of the judgments passed by the Supreme Court in the case of *Gian Singh* (supra) and *Narinder Singh* (supra), the compromise cannot be accepted where the accused is facing trial for offence punishable under the Special Act. The Coordinate Bench of this Court has also not taken note of the provisions of Sections 375 Sixthly of IPC which provides that sexual intercourse with or without consent of a girl below 18 years of age would be ' **'rape''.** Thus, when the consent of minor prosecutrix is immaterial at the time of commission of offence, then under no circumstances, her consent would become relevant for the purpose of compromise.

26. Thus, with great respect, it is held that the order passed by the Coordinate Bench of this Court in the case of *Pankaj Parmar* (supra) has rendered *per incuriam* as the above-mentioned judgments and aspects have not been taken note of.

27. It is further submitted by the counsel for the applicant that once the prosecutrix has entered into a compromise, then there is no possibility of conviction as she may not support the prosecution case in the trial.

28. The submission made by the counsel for the applicant is misconceived and is hereby rejected.

29. The Supreme Court in the case of *Hemudan Nanbha Gadhvi vs. State of Gujarat* passed vide order dated 28th September, 2018 in Criminal Appeal No.913 of 2016 has held as under:-

10. It would indeed be a travesty of justice in the peculiar facts of the present case if the appellant were to be acquitted merely because the prosecutrix turned hostile and failed to identify the appellant in the dock, in view of the other overwhelming evidence available. In *Iqbal vs. State of U.P.,* 2015 (6) SCC 623, it was observed as follows:

> "15. Evidence of identification of the miscreants in the test identification parade is not a substantive evidence. Conviction cannot be based solely on the identity of the dacoits by the witnesses in the test identification parade. The prosecution has to adduce substantive evidence by establishing incriminating evidence connecting the accused with the crime, like recovery of articles which are the subject matter of dacoity and the alleged weapons used in the commission of the offence."

11. The corroboration of the identification in T.I.P is to be found in the medical report of the prosecutrix considered in conjunction with the semen found on the clothes of the prosecutrix and the appellant belonging to the Group B of the appellant. The vaginal smear and vaginal swab have also confirmed the presence of semen. A close analysis of the facts and circumstances of the case, and the nature of the evidence available unequivocally establishes the appellant as the perpetrator of sexual assault on the prosecutrix. The serologist report was an expert opinion under Section 45 of the Evidence Act,1872 and was therefore admissible in evidence without being marked an exhibit formally or having to be proved by oral evidence.

12. The contention on behalf of the appellant that the serological report was not put to him by the court under Section 313 Cr. P.C. and therefore, he has been prejudiced in his defence, has been raised for the first time before this court. The serological report being available, it was a failure on the part of the trial court to bring it to the attention of the appellant. The prosecution cannot be said to be guilty of not adducing or suppressing any evidence. In view of the nature of the evidence available in the present case, as discussed hereinbefore, we are of the opinion that no prejudice can be said to have been caused to the appellant for that reason, as held in *Nar Singh vs. State of Haryana,* (2015) 1 SCC 496:

> "32 ..... When there is omission to put material evidence to the accused in the course of examination under Section 313 CrPC, the prosecution is not guilty of not adducing or suppressing such evidence; it is only the failure on the part of the learned trial court. The victim of the offence or the accused should not suffer for laches or omission of the court. Criminal justice is not one-sided. It has many facets and we have to draw a balance between conflicting rights and duties.

> 33. Coming to the facts of this case, the FSL report (Ext. P-12) was relied upon both by the trial court as well as by the High Court. The objection as to the defective Section 313 CrPC statement has not been raised in the trial court or in the High Court and the omission to put the question under Section 313 CrPC, and prejudice caused to the accused is raised before this Court for the first time. It was brought to our notice that the appellant is in custody for about eight years. While the right of the accused to speedy trial is a valuable one, the Court has to subserve the interest of justice keeping in view the right of the victim's family and society at large."

30. Thus, it is clear that even if the prosecutrix turns hostile but still the accused can be convicted on the basis of scientific and other circumstantial evidence. Thus, it cannot be said that in case if the prosecutrix turns hostile, then there is no possibility of conviction of the accused at all.

31. The stage of trial is also crucial.

32. The Supreme Court in the case of *Narinder Singh* (supra) in paragraph 29.7 has held as under:-

> **"29.7.** While deciding whether to exercise its power under Section 482 of the Code or not, timings of settlement play a crucial role. Those cases where the settlement is arrived at immediately after the alleged commission of offence and the matter is still under investigation, the High Court may be liberal in accepting the settlement to quash the criminal proceedings/investigation. It is because of the reason that at this stage the investigation is still on and even the charge sheet has not been filed. Likewise, those cases where the charge is framed but the evidence is yet to start or the evidence is still at infancy stage, the High Court can show benevolence in exercising its powers favourably, but after prima facie assessment of the circumstances/material mentioned above. On the other hand, where the prosecution evidence is almost complete or after the conclusion of the evidence the matter is at the stage of argument, normally the High Court should refrain from exercising its power under Section 482 of the Code, as in such cases the trial court would be in a position to decide the case finally on merits and to come a conclusion as to whether the offence under Section 307 IPC is committed or not. Similarly, in those cases where the conviction is already recorded by the trial court and the matter is at the appellate stage before the High Court, mere compromise between the parties would not be a ground to accept the same resulting in acquittal of the offender who has already been convicted by the trial court. Here charge is proved under Section 307 IPC and conviction is already recorded of a heinous crime and, therefore, there is no question of sparing a convict found guilty of such a crime."

33. Thus, it is clear that for exercising power under Section 482 of CrPC for quashing the criminal prosecution on the basis of compromise, the stage of trial is also material. The applicant is facing trial from 2017. It has not been clarified that whether the prosecutrix has already been examined in the trial or not; and whether the prosecutrix has supported the prosecution case or not. It was necessary for the applicant to clearly plead about the stage of Trial. Since the petition as well as the submissions made by the parties are completely silent with regard to the stage of trial, therefore, this Court is of the considered opinion that on this ground also, the petition is liable to be rejected.

34. Accordingly, this petition fails and is **hereby dismissed.**

Application dismissed

I.L.R. [2020] M.P. 1477
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice B.K. Shrivastava
M.Cr.C. No. 13325/2020 (Jabalpur) decided on 17 June, 2020

RAJNI PURUSWANI & anr. ...Applicants

Vs.

STATE OF M.P. …Non-applicant

***A. Criminal Procedure Code, 1973 (2 of 1974), Section 82 & 438, Penal Code (45 of 1860), Section 306 & 498-A and Dowry Prohibition Act (28 of 1961), Section 3/4 – Anticipatory Bail – Entitlement* – Challan filed by prosecution showing applicants as "absconded accused" – Held – Applicants are mother-in-law and father-in-law of deceased – Husband has already been granted bail – Allegations against all accused are the same – Ground of parity available to applicants – No proceedings u/S 82 & 83 Cr.P.C. initiated by Police or trial Court against applicants – Neither any custodial interrogation required nor they have any criminal background – Applicants entitled for bail – Application allowed. (Paras 20 to 25)**

***क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 82 व 438, दण्ड संहिता (1860 का 45), धारा 306 व 498–A एवं दहेज प्रतिषेध अधिनियम (1961 का 28), धारा 3/4 – अग्रिम जमानत – हकदारी* – अभियोजन द्वारा आवेदकगण को ''फरार अभियुक्त'' के रूप में दर्शाते हुए चालान प्रस्तुत किया गया – अभिनिर्धारित – आवेदकगण, मृतिका के सास ससुर हैं – पति को पहले ही जमानत प्रदान की जा चुकी है – सभी अभियुक्तगण के विरूद्ध अभिकथन समान हैं – आवेदकगण के लिए समानता का आधार उपलब्ध है – पुलिस अथवा विचारण न्यायालय द्वारा आवेदकगण के विरूद्ध धारा 82 व 83 दं.प्र.सं. के अंतर्गत कोई कार्यवाहियां आरंभ नहीं की गई – न तो अभिरक्षा में किसी पूछताछ की अपेक्षा है न ही उनकी कोई आपराधिक पृष्ठभूमि है – आवेदकगण जमानत हेतु हकदार – आवेदन मंजूर।**

***B. Criminal Procedure Code, 1973 (2 of 1974), Section 82 & 438 – Absconding Accused – Anticipatory Bail Application – Maintainability* – Held – Even if a person/accused is declared absconder u/S 82 Cr.P.C., anticipatory bail application is maintainable – There is no restriction in law about tenability of application of accused who is absconded or against whom challan has been filed by showing him as "absconded accused". (Para 19)**

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 82 व 438 – फरार अभियुक्त – अग्रिम जमानत आवेदन – पोषणीयता – अभिनिर्धारित – भले ही एक व्यक्ति/अभियुक्त को धारा 82 दं.प्र.सं. के अंतर्गत फरार घोषित किया गया हो, तब भी अग्रिम जमानत आवेदन पोषणीय है – अभियुक्त, जो फरार है अथवा जिसे ''फरार अभियुक्त'' के रूप में दर्शाते हुए चालान प्रस्तुत किया गया है, के आवेदन की मान्यता के बारे में विधि में कोई निर्बंधन नहीं।

***C. Criminal Procedure Code, 1973 (2 of 1974), Section 438 – Anticipatory Bail – "Tenability of Application" & "Entitlement"* – Held – "Tenability of application" and "Entitlement to get bail" are different – If application is not tenable, Court cannot consider the facts of the case and bound to reject the application outright on ground of tenability but if application is tenable, then Court will consider the merits, facts and other circumstances of the case. (Para 18)**

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 438 – अग्रिम जमानत – ''आवेदन की मान्यता'' व ''हकदारी'' – अभिनिर्धारित – ''आवेदन की मान्यता'' एवं ''जमानत मिलने की हकदारी'' भिन्न है – यदि आवेदन मान्य किये जाने योग्य नहीं है, न्यायालय प्रकरण के तथ्यों को विचार में नहीं ले सकता और मान्यता के आधार पर, आवेदन को सीधे अस्वीकार करने के लिए बाध्य है परंतु यदि आवेदन मान्य किये जाने योग्य है तब न्यायालय प्रकरण के गुणदोषों, तथ्यों एवं अन्य परिस्थितियों को विचार में लेगा।

Cases referred:

2018 (II) MPJR 252 = 2017 Supreme (M.P.) 1139, AIR 2014 S.C. 626 = [2014] 2 SCC 171 = [2013] 8 Supreme 699, (2012) 8 SCC 730, (2012) 8 SCC 730 = (2012) 3 SCC (Cri) 1040, M.Cr.C. No. 20105/2016 decided on 29.11.2016, M.Cr.C. No. 9654/2016 decided on 18.11.2016, AIR 2014 SC 626, AIR 2003 S.C. 4662 = MANU/SC/0787/2003 = (2003) 8 SCC 77, 1996 (1) SCC 667, AIR 2010 S.C. 1225 = (2010) 1 SCC 684, AIR 1980 SC 1632, 1986 CRI.L.J. 1303, 1995 CRI.L.J. 3317, MANU/MP/0830/2020 [MCRC No. 5621/2020 decided on 12.05.2020 – Gwalior Bench], SLP (Criminal) Nos. 7281-7282/2017 order passed on 29.01.2020 (Supreme Court), (2003) 8 SCC 77, (2010) 1 SCC 684.

Manish Datt with *Nishant Verma*, for the applicants.
Gaurav Tiwari, P.L. for the non-applicant/State.

O R D E R

B.K. SHRIVASTAVA, J.:- This order shall govern the disposal of application under Section 438 of the Cr.P.C. filed on 11.05.2020 on behalf of (1) Rajni Puruswani wife of Shri Ashok Puruswani, and (2) Ashok Puruswani S/o late Shri Nanakram Puruswani. The applicants are under apprehension of their arrest in connection with the Crime No. 1014/2019 registered at Police Station, City Kotwali, District Rewa for the offences punishable under Sections 306, 498-A of the Indian Penal Code and Section 3 / 4 of Dowry Prohibition Act.

2. It is an admitted fact that the marriage of Jitendra @ Jitu Puruswani was solemnized with deceased Khushbu Gyanchandani @ Vanshika Puruswani on 29.06.2012. Out of their wedlock a daughter named Kavya was born on 11.11.2014. Applicant Rajni Puruswani is the Mother-in-law of the deceased and Ashok Puruswani is the father-in-law of deceased. The deceased Khushbu @ Vanshika committed suicide by hanging herself on 05.12.2019. Crime No. 1014/2019 was registered under Sections 498-A and 3 / 4 of Dowry Prohibition Act. After investigation, the police filed the challan against Jitendra @ Jitu Puruswani under Sections 498-A, 306 of IPC and 3/4 of Dowry Prohibition Act. This challan was filed against husband Jitendra @ Jitu Puruswani by showing the present applicants as "absconded accused". The Magistrate committed the case to the Court of Sessions and at present Sessions Trial No. 101/2020 is pending before the IX A.S.J. Rewa.

3. Both applicants moved an application for anticipatory bail before the IX ASJ, Rewa, but the same was dismissed by order dated 18.03.2020.

4. It is submitted by the applicant's counsel that the applicants have been falsely implicated in this case. When the deceased committed suicide by hanging, applicant Rajni Puruswani herself lodged the complaint to the police. All the allegations against the applicants are frivolous, false and vexatious. Only after the death of deceased, omnibus type allegations of demand of dowry, harassment and cruelty have been leveled by the family members of the deceased. The provisions of law have been mis-utilized for harassment to the applicants. The necessary ingredients of the offence alleged, are completely missing so far as the present applicants are concerned. The learned lower Court dismissed the application without appreciating the facts and circumstances of the case in proper perspective. It is also submitted that the Son of the applicants has filed an application under Section 9 of Hindu Marriage Act before the Family Court, Rewa on 09.10.2018 (Annexure A/3). No custodial interrogation is required. Therefore, the applicants are entitled to get the anticipatory bail.

5. On the other side, the State strongly opposed the application. It is submitted by the State that applicants are absconded since the date of commitment

of trial. Challan has been filed in their absence by showing them as an absconded accused. Therefore, the learned trial Court rightly dismissed the application as **not-tenable** in the light of *Sobran Batham Vs. State of M.P.* 2018 (2) MPJR 252.

6. It will be proper to mention that husband Jitendra Puruswani was arrested on 09.12.2019 and he was enlarged on bail by order dated 04.03.2020 passed by this Court in M.Cr.C. No. 03/2020.

7. It is transpired from the impunged order dated 18.03.2020, passed by the 9th A.S.J. Rewa, that without considering the facts on merit, he dismissed the application only upon the ground of tenability in the light of *Sobran Batham v. State of Madhya Pradesh,*2018 (II) MPJR 252 = 2017 Supreme (M.P.) 1139 [02.05.2017]. In the aforesaid case, the Single Bench of High Court (at Gwalior) considered the case of *State of Madhya Pradesh Vs. Pradeep Sharma,* AIR 2014 S.C. 626 = [2014] 2 SCC 171 = [2013] 8 Supreme 699 and held in para 10 as under :-

> *"10. In the openion of this court, the issuance of proclamation under section 82 of Cr.P.C. is not very material but in fact the sprit of the law is that if a person is absconding and is running away from the law enforcement agencies and the court, than he is not entitled for anticipatory bail under section 438 of Cr.P.C. When the investigation is pending and if the person is running away from the Investigating Agency, then it can be said that he has a reasonable apprehension of his arrest and, therefore, during the pendency of the investigation, the application under Section 438 of CrPC for grant of anticipatory bail would be maintainable but once the charge-sheet is filed invoking Section 299 of CrPC and the Magistrate has issued the warrants against the accused, then in the considered opinion of this Court, the application for grant of anticipatory bail would not be maintainable in the light of the judgment passed by the Supreme Court in the case of State of M.P. v. Pradeep Sharma, (2014) 2 SCC 171"*

8. S. 438 of Cri. P.C. says:

> *"When any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for direction under this section; and that Court may, if it thinks fit, direct that in the event of such arrest he shall be released on bail."*

9. In the case of *Lavesh Vs. State (NCT of Delhi)* (2012) 8 SCC 730, The Supreme Court considered the scope of granting relief under Section 438 vis-a-vis to a person who was declared as an absconder or proclaimed offender in terms of Section 82 of the Code. In para 12, this Court held as under:

> *"12. From these materials and information, it is clear that the present appellant was not available for interrogation and investigation and was*

declared as "absconder". Normally, when the accused is "absconding" and declared as a "proclaimed offender", there is no question of granting anticipatory bail. We reiterate that when a person against whom a warrant had been issued and is absconding or concealing himself in order to avoid execution of warrant and declared as a proclaimed offender in terms of Section 82 of the Code he is not entitled to the relief of anticipatory bail."

10. In the case of *State of Madhya Pradesh Vs. Pradeep Sharma*, AIR 2014 S.C. 626 = [2014] 2 SCC 171 = [2013] 8 Supreme 699, Accused Pradeep Sharma moved an application for anticipatory bail by before the High Court which was rejected on 01.08.2012 on the ground that custodial interrogation is necessary in the case. On 26.08.2012, charge-sheet was filed in the court of C.J.M., Chhindwara against four person, whereas the investigation in respect of Pradeep Sharma, Sudhir Sharma and Gudda alias Naresh Raghuvanshi (absconding accused) continued since the very date of the incident. On 21.11.2012, arrest warrants were issued against Pradeep Sharma, Sudhir Sharma and Gudda alias Naresh Raghuvanshi but the same were returned to the Court without service. Since the accused persons were not traceable, on 29.11.2012, a proclamation under Section 82 of the Code of Criminal Procedure, 1973 (in short 'the Code') was issued against them for their appearance to answer the complaint. Instead of appealing the order dated 01.08.2012, Pradeep Sharma filed another application for anticipatory bail before the High Court. Vide order dated 10.01.2013, the High Court granted anticipatory bail to Pradeep Sharma . Similarly, another accused-Gudda alias Naresh Raghuvanshi was granted anticipatory bail by the High Court vide order dated 17.01.2013. The only question was before the Supreme Court for consideration "whether the High Court was justified in granting anticipatory bail under Section 438 of the Code to the respondents / accused when the investigation is pending, particularly, when both the accused had been absconding all along and not co-operating with the investigation". The Supreme Court in para 16 (of SCC), referred the para 12 of *Lavesh Vs. State* (NCT of Delhi) (2012) 8 SCC 730 = (2012) 3 SCC (Cri) 1040, and said that "it is clear from the above decision that if anyone is declared as an absconder / proclaimed offender in terms of Section 82 of the Code, he is not entitled to the relief of anticipatory bail". Again in para 17 the court said that :-

".....warrants were issued on 21.11.2012 for the arrest of the respondents herein. Since they were not available / traceable, a proclamation under Section 82 of the Code was issued on 29.11.2012. The documents (Annexure-P13) produced by the State clearly show that the CJM, Chhindwara, M.P. issued a proclamation requiring the appearance of both the respondents / accused under Section 82 of the Code to answer the complaint on 29.12.2012. All these materials were neither adverted to nor considered by the High Court while granting anticipatory bail and the High Court, without indicating any reason

except stating "facts and circumstances of the case", granted an order of anticipatory bail to both the accused. It is relevant to point out that both the accused are facing prosecution for offences punishable under Sections 302 and 120B read with Section 34 of IPC. In such serious offences, particularly, the respondents/accused being proclaimed offenders, we are unable to sustain the impugned orders of granting anticipatory bail. The High Court failed to appreciate that it is a settled position of law that where the accused has been declared as an absconder and has not co-operated with the investigation, he should not be granted anticipatory bail."

11. In *Ghanshyam Vs. The State of Madhya Pradesh*, MCRC-20105 / 2016 dt. 29-11-2016 [Jabalpur] the Objector had placed the order dated 6.10.2016 by which a proclamation U/s.82 of Cr.P.C. was issued by the C.J.M. The applicant on the other hand had challenged the said order by way of oral submissions stating that the said order was passed without even issuing notice requiring the presence of the applicant on the designated day before the Court without which such a proclamation U/s.82 cannot even be passed. The Single Bench said that 30 days period or proclamation requiring his presence at such specified place and time has not been given to the applicant therefore said order, prima-facie is not a proclamation as per law U/s.82 of the Cr.P.C. The Court observed as under :-

"On perusing the said order, I find that the application to have the applicant proclaimed as an absconder U/s.82 was moved by the Police on 6.10.2016 itself and on the basis of the submission of the Police alone, on the same day, the learned Court below had issued the proclamation against the applicant and thereafter given him an opportunity of appearing before the Court to oppose the proceeding U/s.83 which relate to the attachment of the property of a person so absconding. Section 82 sub-section (1) is a pre-condition which has to be followed by the Court below before passing an order U/s.82 which would require the Court to publish a written proclamation requiring such an absconder to appear at a specified place at a specified time which would not be less than 30 days from the date of publishing the proclamation and if the absconder does not respond to the same then as per Section 82(4) the Court may, after making such enquiry as it thinks fit, pronounce such a person as a proclaimed offender and make a declaration to that effect. However, while going through the order, it is evident that 30 days period or proclamation requiring his presence at such specified place and time has not been given to the applicant herein. Under the circumstance, I am inclined to agree with the submissions made by learned counsel for the applicant that the said order, prima-facie is not a proclamation as per law U/s.82 of the Cr.P.C. Under the circumstances, the judgments of the Supreme Court in ***Lavesh Vs. State (NCT of Delhi),*** *(2012) 8 SCC 730 and* ***State of M.P. Vs. Pradeep Sharma*** *(2014) 2 SCC 171, which*

prohibits the grant of anticipatory bail to proclaimed offender will not apply in the facts and circumstances of this case."

12. In the case of *Om Prakash Agrawal Vs. The State of M.P.,* MCRC No. 9654 of 2016 decided by Indore Bench on 18.11.2016**.** The State opposes the application on the ground that the applicant was absconding. Even after filing of charge-sheet, he could not be arrested by the police and for this purpose, reliance was placed on the judgment of Hon'lbe Apex Court in case of *State of Madhya Pradesh vs. Pradeep sharma ;* AIR 2014 SC 626. The Court give the benefit of provision under section 438 of Cr.P.C., and observed that the respondent could not point out a single paper by which it is apparent that when any attempt was made to arrest the present applicant, he was not found by the arresting officer. He was never declared proclaimed offender by the competent court, and therefore, merely because the police did not arrest him during the investigation, it cannot be assumed that he was avoiding his arrest during this period.

13. In reference to section 438 of Cr.P.C., in *Bharat Chaudhary and another Appellants v. State of Bihar and another,* AIR 2003 S.C. 4662 = MANU/SC/0787/2003 = (2003) 8 SCC 77 [8.10.2003], the Apex Court has held in categorical terms that even after taking cognizance of complaint by the trial Court or after filing of charge-sheet by the Investigating Agency, a person can move an application for anticipatory bail and Section 438 of Cr.P.C., nowhere prohibits the Court concerned from grant of anticipatory bail in appropriate case. The Court observed in para 7 that :-

"7. From the perusal of this part of S. 438 of the Cr. P.C., we find no restriction in regard to exercise of this power in a suitable case either by the Court of Sessions, High Court or this Court even when cognizance is taken or charge-sheet is filed. The object of S. 438 is to prevent undue harassment of the accused persons by pre-trial arrest and detention. The fact, that a Court has either taken cognizance of the complaint or the investigating agency has filed a charge-sheet, would not by itself, in our opinion, prevent the concerned Courts from granting anticipatory bail in appropriate cases. The gravity of the offence is an important factor to be taken into consideration while granting such anticipatory bail so also the need for custodial interrogation, but these are only factors that must be borne in mind by the concerned Courts while entertaining a petition for grant of anticipatory bail and the fact of taking cognizance or filing of charge-sheet cannot by themselves be construed as a prohibition against the grant of anticipatory bail. In our opinion, the Courts i.e. the Court of Sessions, High Court or this Court has the necessary power vested in them to grant anticipatory bail in non-bailable offences under S. 438 of the Crl. P.C. even when cognizance is taken or charge-sheet is filed provided the facts of the case require the Court to do so. "

The Court again referred the case of *Salauddin Abdulsamad Shaikh v. State of Maharashtra* (1996 (1) SCC 667), and said in 9 :-

> ***"9.*** *From a careful reading of the said judgment we do not find any restriction or absolute bar on the concerned Court granting anticipatory bail even in cases where either cognizance has been taken or a charge-sheet has been filed. This judgment only lays down a guideline that while considering the prima facie case against an accused the factum of cognizance having been taken and the laying of charge-sheet would be of some assistance for coming to the conclusion whether the claimant for an anticipatory bail is entitled for such bail or not."*

14. In *Ravindra Saxena v. State of Rajasthan*, AIR 2010 S.C. 1225 = (2010) 1 SCC 684 [15.12.2009], the High Court dismissed the application with the observations that in the facts and circumstances, the case of the petitioner cannot said to have improved with the filing of the challan against him when prima facie case has been found against the accused. But the Apex Court said that the approach adopted by the High Court is wholly erroneous. The application for anticipatory bail has been rejected without considering the case of the appellant solely on the ground that the challan has now been presented. The Apex Court in categorical terms held that anticipatory bail can be granted at any time so long as the applicant has not been arrested, meaning thereby maintainability of an application under Section 438 of Cr.P.C. does not lie at the mercy of any Investigating Agency / Officer or any other consideration including provisions of Cr.P.C. as tried to be projected by the respondent. The Court said :-

> ***"8.*** *We may notice here that the provision with regard to the grant of anticipatory bail was introduced on the recommendations of the Law Commission of India in his 41st Report dated 24.09.1969. The recommendations were considered by this Court in a Constitution Bench decision in the case of* ***Gurbaksh Singh Sibbia and others v. State of Punjab,*** *(1980) 2 SCC 565 : (AIR 1980 SC 1632). Upon consideration of the entire issue this Court laid down certain salutary principles to be followed in exercise of the power under Section 438 Cr.P.C. by the Sessions Court and the High Court. It is clearly held that the anticipatory bail can be granted at any time so long as the applicant has not been arrested. When the application is made to the High Court or Court of Session it must apply its own mind on the question and decide when the case is made out for granting such relief..... "*

The Apex Court further said in para 10 that the salutary provision contained in Section 438 Cr.P.C. was introduced to enable the Court to prevent the deprivation of personal liberty. It cannot be permitted to be jettisoned on technicalities such as "the challan having been presented anticipatory bail cannot

be granted". The Court noticed the following observations made by Court in the case of *Gurbaksh Singh* (AIR 1980 SC 1632, Para 26)(supra) :

> *"We find a great deal of substance in Mr. Tarkunde's submission that since denial of bail amounts to deprivation of personal liberty, the court should lean against the imposition of unnecessary restrictions on the scope of Section 438, especially when no such restrictions have been imposed by the legislature in the terms of that section. Section 438 is a procedural provision which is concerned with the personal liberty of the individual, who is entitled to the benefit of the presumption of innocence since he is not, on the date of his application for anticipatory bail, convicted of the offence in respect of which he seeks bail. An over-generous infusion of constraints and conditions which are not to be found in Section 438 can make its provisions constitutionally vulnerable since the right to personal freedom cannot be made to depend on compliance with unreasonable restrictions. The beneficent provision contained in Section 438 must be saved, not jettisoned. No doubt can linger after the decision in Maneka Gandhi (AIR 1978 SC 597), that in order to meet the challenge of Article 21 of the Constitution, the procedure established by law for depriving a person of his liberty must be fair, just and reasonable. Section 438, in the form in which it is conceived by the legislature, is open to no exception on the ground that it prescribes a procedure which is unjust or unfair. We ought, at all costs, to avoid throwing it open to a Constitutional challenge by reading words in it which are not to be found therein."*

15. In *Smt. Sheik Khasim Bi vs. The State*,1986 CRI. L. J. 1303, the Full Bench of Andhra Pradesh High Court also said in para 13 that filing of a charge sheet by the police and issuing of a warrant by the Magistrate do not put an end to the power to grant bail u/S.438(1). On the other hand, the High Court or the Court of Session has power to grant anticipatory bail u/S.438(1) to a person after the criminal court has taken cognizance of the case and has issued process viz., the warrant of arrest of that accused person.

16. In *Nirbhay Singh and another Applicants v. The State of M.P.* , 1995 CRI. L. J. 3317, [*Full Bench of M.P. High Court*] the police registered a case against two accused on the information furnished by the complaint (sic: complainant). After investigation, charge-sheet was filed against the two accused. Thereafter, the first informant filed a private complaint before the Court concerned alleging that he had laid information with the police against seven persons, but information was recorded only against two persons and this was done so to help the other persons to escape the process of law. The complaint was, therefore, directed against the remaining five persons. The learned Magistrate recorded the sworn statement of the complaint (sic: complainant) and the statement of other witnesses produced, took cognizance and directed issue of non-bailable warrant against the

five accused under Sec. 204, of the Code of Criminal procedure, 1973 (for short 'the code'). Thereafter, two among the five accused had filed the application under Section 438, Cr. P.C. The Full Bench held that anticipatory bail can be granted even after Magistrate issued process or at stage of committal of to Sessions Court or even at subsequent stage. An application under Section 438, Cr. P.C. would be maintainable even after the Magistrate issued process under Section 204 or at the stage of committal of the case to the Sessions Court or even at a subsequent stage, if circumstances justify the invocation of the provision. However, it cannot be said that the jurisdiction under Section 438 of the Code is to be freely exercised without reference to the nature and gravity of the offence alleged, the possible sentence may be ultimately imposed, the possibility of interference with the investigation or the witnesses and public interest.

17. In *Balveer Singh Bundela Vs. State of Madhya Pradesh,* MANU / MP /0830 / 2020 [MCRC No. 5621/2020 Decided on 12.05.2020 - Gwalior Bench] the accused was declared as absconder and award of Rs. 5,000/- was declared by the Superintendent of Police as per Police Regulation 789. It was argue by the State that the applicant is required for investigation. Rs.5,000/- as award has been declared by the Superintendent of Police, Gwalior over his arrest vide proclamation dated 30-01-2020 as per M.P. Police Regulations, para 80 and the fact that several Farari Panchnamas are being prepared against him for ensuring his appearance but he did not submit, therefore, he is absconding and therefore his bail application be dismissed accordingly. He relied upon the judgment of Hon'ble Apex Court in the matter of *Lavesh* (supra) and *Pradeep Sharma* (supra). The Court heard the arguments upon the following two questions :-

> *"(i) Whether after being declared as an absconder under Section 82/83 of Cr.P.C. or by police through Farari Panchnama or through declaration of cash award for apprehension of accused, his application under Section 438 of Cr.P.C. seeking anticipatory bail before High Court or Sessions Court is maintainable or not ?*
>
> *(ii) Whether application for anticipatory bail is barred even after filing of charge-sheet ?"*

The single bench referred the various judgments and held that anticipatory bail application is maintainable even after filing of charge-sheet, till the person is arrested as per the mandate of Apex Court in the cases of *Gurbaksh Singh Sibbia etc. Vs. The State of Punjab, AIR 1980 SC 1632, Sushila Aggarwal and others Vs. State (NCT of Delhi) and another in SLP (Criminal) Nos.7281-7282 / 2017 passed on 29-01-2020, Bharat Chaudhary and another Vs. State of Bihar and another, (2003) 8 SCC 77 and Ravindra Saxena Vs. State of Rajasthan, (2010) 1 SCC 684.* The Court said that so far as maintainability of anticipatory bail is concerned, it is maintainable even the person is declared absconder under Section 82 of Cr.P.C. but on merits case would be governed by the judgment of Apex Court rendered in

the case of *Lavesh Vs. State (NCT Of Delhi), (2012) 8 SCC 73.* Section 82/83 Cr.P.C. is transient provision subject to finality of proceedings as provided under Sections 84, 85 and 86 of Cr.P.C. In para 24 and 25 the Court said :-

> ***"24.*** *From the discussion of judgments of Constitution Bench in the case of Gurbaksh Singh Sibbia etc. and Sushila Aggarwal (supra) as well as judgment of Apex Court in the case of Bharat Chaudhary and Ravindra Saxena (supra), it is apparently clear that no bar can exist against a person seeking anticipatory bail. In other words application under Section 438 of Cr.P.C. is maintainable even after filing of charge-sheet or till the person is not arrested.*
>
> ***25.*** *It is to be kept in mind that Personal Liberty of an individual as ensured by Section 438 of Cr.P.C. is embodiment of Article 21 of Constitution of India in Cr.P.C. Therefore, scope and legislative intent of Section 438 of Cr.P.C. is to be seen from that vantage point."*

The single bench quoted the para 12 of *Lavesh Vs. State (NCT of Delhi)* (2012) 8 SCC 730, and said in para 28,29 & 31 as under :-

> ***"28.*** *The word* ***'Entitled'*** *used in the above referred para of Lavesh (supra) itself suggests that it talks mainly about entitlement on merits and not about maintainability. Perusal of Section 438 of Cr.P.C. makes it very clear that four factors as enumerated into Section 438(1) of Cr.P.C. contemplates four different exigencies in which factor (iii) refers the "possibility of the applicant to flee from justice" and consequence to this factor is 'Abconsion of person' or 'his Concealment' from Investigating Agency.*
>
> ***29.*** *In other words if chance of fleeing from justice exists then application under Section 438 of Cr.P.C. can be rejected and when a person is declared as proclaimed offender as per Section 82 of Cr.P.C. it means that factor (iii) of Section 438 (1) of Cr.P.C. manifested in reality or in other words possibility of applicant to flee from justice converted into reality. To put it differently, Section 82 of Cr.P.C. is manifestation of "Apprehension" as contained in Section 438 (1) factor (iii) of Cr.P.C. The judgments pronounced by the Apex Court in the case of Lavesh and Pradeep Sharma (supra) nowhere bar the maintainability of the application under Section 438 of Cr.P.C. in wake of person being declared as absconder under Sections 82 and 83 of Cr.P.C. and understandably so because this would not have been in consonance with letter and spirit of Constitution Bench judgment of Apex Court pronounced in the case of Gurbaksh Singh Sibbia etc. (supra) and Sushila Aggarwal and others (supra) as well as two Judge Bench of Apex Court in the case of Bharat Chaudhary and another (supra) as well as Ravindra Saxena (supra) because these judgments categorically held that anticipatory bail is maintainable even after filing of charge-sheet and till the person is not arrested.*

> ***31.*** *Therefore, Apex Court in the case of Lavesh and Pradeep Sharma (supra) impliedly referred the factor (iii) of Section 438 (1) of Cr.P.C. and its different fallouts because according to Apex Court, a person who is proclaimed offender under Sections 82 and 83 of Cr.P.C. loses the sheen on merits to seek anticipatory bail. His application deserves dismissal on merits if he is declared as absconder under Section 82 of Cr.P.C. but application is certainly maintainable. Even otherwise, because the proceedings under Sections 82 and 83 of Cr.P.C. are transient/interim/provisional in nature and subject to proceedings under Section 84 (at the instance of any person other then proclaimed offender having interest in the attach property), Section 85 (at the instance of proclaimed offender himself) and Section 86 [Appeal against the order (under Section 85 rejecting application for restoration of attach property]. Even Section 84 (4) of Cr.P.C. gives power to the objector to institute a suit to establish the right which he claims in respect of property in dispute. Therefore, all these provisions render the proceedings under Section 82/83 of Cr.P.C. transient or intermediary and on the basis of transient provision, valuable right ofpersonal liberty of an individual at least to seek anticipatory bail cannot be curtailed. Therefore, on this count also, application under Section 438 of Cr.P.C. is maintainable even if a person has been declared as proclaimed offender in terms of Section 82 of Cr.P.C. ".*

The Court again said that submission of learned counsel for the complainant lacks merits so far as maintainability of application under Section 438 of Cr.P.C. qua Section 82 of Cr.P.C. is concerned. Even otherwise proceedings under Section 82 of Cr.P.C. are not given effect to yet and only cash award of Rs.5,000/- by Superintendent of Police has been declared. Said factor can certainly be an important consideration while deciding anticipatory bail application but not having overriding effect to create a bar for filing anticipatory bail application. Therefore, in the considered opinion of this Court, even if the police authority has declared award or prepared Farari Panchnama even then anticipatory bail application is maintainable, however, it is to be seen on merits that whether that application deserves to be considered and allowed as per the factors enumerated in Section 438 of Cr.P.C. itself and if any of those factors are not satisfied then the Court certainly has discretion to reject it. The said discretion has been given by Constitutional Bench decision of Hon'ble Apex Court in the case of *Gurbaksh Singh Sibbia* etc. (supra)

18. The word **'Entitled'** used in the case of *Lavesh and Pradeep Sharma (supra).* Therefore, it is clear from the aforesaid discussion of laws that **"Tenability of application"** and **"Entitlement to get the bail"** are different. If an application is "not-tenable' then the Court cannot considered the facts of the case and bound to reject the application outright upon the ground of tenability. If

the application is tenable, then the Court will consider the merits ,facts and other circumstances of the case. In the aforesaid situation, the Court may grant or refused the anticipatory bail.

19. So far as maintainability of anticipatory bail is concerned, it is maintainable even the person is declared absconder under Section 82 of Cr.P.C. but on merits case would be governed by the judgment of Apex Court rendered in the case of *Lavesh Vs. State (NCT Of Delhi),* (2012) 8 SCC 73. There is no any restrictions in the law about the tenability of the application by the accused, who is absconded or against whom the challan has been filed by showing him as an 'absconded accused'. In the aforesaid situation, it may be presumed that the investigation is going on against the aforesaid absconded accused. When he will arrest, then supplementary charge-sheet in the shape of additional evidence will be filed.

20. In this case the trial Court dismissed the application only upon the ground of tenability, while as per aforesaid law, application was tenable. Trial Court was required to see the merits of the case. If the accused is absconded than definitely it may be a ground for dismissal of application, but it cannot be treated as a bar for the purpose of tenability of application in the light of settled law of Hon'ble Apex Court.

21. So far as present set of facts are concerned from the case Diary and the submissions it appears that the applicants are the father-in-law and the mother-in-law of the deceased. His son was married with the deceased on 29.06.2012. The deceased committed suicide after seven and half years on 05.12.2019. Allegations against all the accused persons are the same. The husband has been enlarged on bail under Section 439 of Cr.P.C. by this Court.

22. In reference to the present applicants, by order dated 02.06.2020, information was called from the trial Court. In compliance of the aforesaid direction, the trial Court seeks the information from the JMFC, Rewa (Sweta Parte) who give the information by letter No. 58/2020 dated 06.06.2020. As per the aforesaid information, no any proceedings under Sections 82 and 83 of Cr.P.C. has been initiated against the present applicants. Only permanent arrest warrant No. 01/20 has been issued on 28.02.2020. Thereafter, the case committed to the Court of the Sessions.

23. Therefore, it appears that when the challan was filed at that time the applicants were not arrested. Therefore, the challan was filed against the accused Jitendra who was under custody. The Magistrate took the cognizance and issued the permanent arrest warrant against present applicants because their names were shown in the challan as an "absconded accused". Neither the police nor the Court initiated any proceedings under Section 82 and 83 of Cr.P.C. Therefore, if the

police was unable to arrest the accused persons then only upon the aforesaid facts, it cannot be said that the applicants were absconded.

24. Because the husband has been enlarged on bail and the allegations are same against all persons, then applicants are also entitled to get the bail upon the ground of parity. It is also appears that the husband was arrested and granted bail under Section 439 of Cr.P.C. while the applicants are preying (sic: Praying) for anticipatory bail U/s 438 of Cr.P.C.. In this case it appears that no custodial interrogation is required. The Substantive evidence has been collected in the shape of statements of parents of the deceased and other witnesses. The applicants having no any criminal background.

25. Therefore, in the overall circumstances of the case in view of this Court applicants are entitled to get the anticipatory bail. Therefore, **application is allowed.** It is ordered that :-

(i) Both applicants will surrender before the Trial Court within 20 days from the order of this Court.

(ii) Thereafter, the court shall release them upon their furnishing a bail bond **Rs.30,000/- (Rupees Thirty Thousand Only) each** and a **personal bond** of the **same amount** to the satisfaction of the trial Court.

(iii) The Trial Court will also inform the Investigation Officer and will give the proper opportunity to submit the additional evidence (if any) against present applicants as per section 173(8) of Cr.P.C..

26. Accordingly, this petition is disposed of.

Application allowed

I.LR. [2020] M.P. 1490
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice Vivek Rusia
M.Cr.C. No. 5316/2020 (Indore) decided on 27 June, 2020

PRATAP ...Applicant

Vs.

STATE OF M.P. …Non-applicant

A. Criminal Procedure Code, 1973 (2 of 1974), Section 451 & 457 Penal Code (45 of 1860), Section 379, Mines and Minerals (Development and Regulation) Act (67 of 1957), Section 21 and Minor Mineral Rules, M.P., 1996, Rule 53 – Release of Seized Vehicle – Supurdnama – Jurisdiction of Court – **Held – Although there is no provision for temporary release of vehicle to**

registered owner under Act of 1957 or Rules of 1996, the Act/Rules nowhere bars or put an embargo on jurisdiction of trial Court to entertain application u/S 451 Cr.P.C. – Vehicle seized by police, Magistrate has jurisdiction to release vehicle u/S 451 Cr.P.C. – Impugned orders quashed, trial Court directed to decide application in accordance with law and if meanwhile order under Rule 53 is passed by competent authority, CJM will not have jurisdiction to decide the application – Application allowed.

(Paras 9, 12 & 15)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 451 व 457, दण्ड संहिता (1860 का 45), धारा 379, खान और खनिज (विकास और विनियमन) अधिनियम (1957 का 67), धारा 21 एवं गौण खनिज नियम, म.प्र., 1996, नियम 53 – अभिगृहित वाहन की निर्मुक्ति – सुपुर्दनामा – न्यायालय की अधिकारिता – अभिनिर्धारित – यद्यपि 1957 के अधिनियम या 1996 के नियमों के अंतर्गत, पंजीकृत स्वामी को वाहन को अस्थायी निर्मुक्ति हेतु कोई उपबंध नहीं है, अधिनियम/नियम कहीं भी विचारण न्यायालय को धारा 451 दं. प्र.सं. के अंतर्गत आवेदन ग्रहण करने से वर्जित नहीं करते या प्रतिबंध नहीं लगाते – वाहन को पुलिस द्वारा अभिगृहित किया गया, मजिस्ट्रेट को धारा 451 दं.प्र.सं. के अंतर्गत, वाहन निर्मुक्त करने की अधिकारिता है – आक्षेपित आदेश अभिखंडित, विचारण न्यायालय को विधि के अनुसरण में आवेदन विनिश्चित करने के लिए निदेशित किया गया और यदि इस बीच सक्षम प्राधिकारी द्वारा नियम 53 के अंतर्गत आदेश पारित किया गया, तब मुख्य न्यायिक मजिस्ट्रेट को आवेदन का विनिश्चय करने की अधिकारिता नहीं होगी – आवेदन मंजूर।

***B. Criminal Procedure Code, 1973 (2 of 1974), Section 451 & 457 and Minor Mineral Rules, M.P., 1996, Rule 53 & 57 – Release of Seized Vehicle – Jurisdiction of Court* – Held – Even after temporary release of vehicle to applicant u/S 451 Cr.P.C., competent authority under Rules of 1996 would be competent to pass orders under Rule 53 – Ouster of jurisdiction of criminal Court would only occur if proceedings of forfeiture is completed under Rule 53 after which only an appeal will lie under Rule 57. (Para 14)**

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 451 व 457 एवं गौण खनिज नियम, म.प्र., 1996, नियम 53 व 57 – अभिगृहित वाहन की निर्मुक्ति – न्यायालय की अधिकारिता – अभिनिर्धारित – आवेदक को धारा 451 दं.प्र.सं. के अंतर्गत वाहन की अस्थायी निर्मुक्ति के पश्चात् भी, 1996 के नियमों के अंतर्गत सक्षम प्राधिकारी, नियम 53 के अंतर्गत आदेश पारित करने के लिए सक्षम होगा – दाण्डिक न्यायालय की अधिकारिता के बाहर केवल तब होगा, यदि नियम 53 के अंतर्गत समपहरण कार्यवाहियां पूर्ण हो गयी हो, जिसके पश्चात् नियम 57 के अंतर्गत केवल एक अपील प्रस्तुत होगी।

***C. Maxim – "Generalia Specialibus Non Derogant" – Special law overrides general law* – Jurisdiction over the Courts to deal with the matter**

and pass orders under Cr.P.C. should be presumed and to hold contrary, there must be specific bar in any special law. (Para 12)

ग. सूत्र – ''साधारण कथन विशेष कथन का अल्पीकरण नहीं करते'' – विशेष विधि, साधारण विधि पर अभिभावी होती है – न्यायालय को दं.प्र.सं. अंतर्गत मामले के निपटान करने एवं आदेश पारित करने की दी गई अधिकारिता की उपधारणा की जानी चाहिए और इसके विपरीत धारणा हेतु किसी विशेष विधि में विनिर्दिष्ट वर्जन होना चाहिए।

Cases referred:

2018 (4) MPLJ-193, 2019 (2) MPLJ-438, 1998 Cr.L.J. 4264.

Nilesh Sharma, for the applicant.
Sudhanshu Vyas, P.L. for the non-applicant/State.

O R D E R

VIVEK RUSIA, J.:- The applicant has filed the present petition u/s. 482 of the Cr.P.C. against the order dated 20.12.2019 passed by Chief Judicial Magistrate, (in short 'CJM'), Barwani, rejecting the application 451 & 457 of Cr.P.C. and also against the order dated 23.1.2020 passed by 1st Addl. Sessions Judge, Barwani dismissing the criminal revision.

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

(i) The applicant is the owner of Mahindra & Mahindra Tractor bearing Registration No.MP-46-A-3400. As per the prosecution story, Sub Inspector Lakhansingh Baghel received discrete information about the transportation of sand illegally by red colour tractor without a permit. On the basis of such information, he reached Pati Naka, Bomya Road with the police force and found a red colour tractor attached with trolley coming towards check post. After seeing the police force, the driver of the tractor- Mithun S/o. Lalsingh Nigwal ran away from the spot. During checking, black sand was found in the trolley attached to the tractor. The FIR under Crime No. 795/2019 was registered for the so-called commission of offence u/s. 379 of the I.P.C. and u/s. 21 of the **Mines and Minerals (Development and Regulation) Act, 1957** (hereinafter referred to as **"the MMDR Act of 1957"** for short) for illegally transporting the minor mineral against the driver - Mithun Nigwal. Later on driver was arrested and sent to jail. The police have seized the vehicle involved in illegal transportation of mineral.

(ii) The applicant being the owner of the tractor and trolley applied u/s. 451 and 457 of the Cr.P.C. before the CJM, Barwani for release of the vehicle on 'Supurdiginama'. Vide order dated 20.12.2019 learned CJM has rejected the application for want of jurisdiction because the Superintendent of Police,

Barwani has sent the report to the District Magistrate, Barwani for the confiscation of the tractor and the collector is the competent authority to deal with the application.

(iii) Being aggrieved by the aforesaid order passed by the learned CJM, the applicant preferred a criminal revision before the Sessions Judge, Barwani. Vide order dated 23.11.2020, learned Addl. Sessions Judge has dismissed the revision, hence the present petition u/s. 482 of Cr.P.C. before this Court.

3. Shri Nilesh Sharma, learned counsel appearing for the applicant, submits that once an offence u/s. 379 of IPC has been registered and Final Report has been filed before the court of Magistrate by the police therefore, learned CJM is competent court to release the vehicle on 'Supurdiginama'. Learned courts below have wrongly rejected the application as well as the revision.

4. On the other hand, learned Panel Advocate appearing for respondent/State submits that in view of amended Rule 53 of **M.P. Minor Mineral Rules** , the applicant is not entitled to the release of the vehicle on 'Supurdiginama' till the penalty imposed is not paid off. As per rule 53, the Collector/ Additional Collector/ Dy. Collector, as the case may be, is the competent authorities to pass an order of discharge of the vehicle found involved in illegal mining or transportation of the mineral. Hence, no interference is called for and this petition u/s. 482 of Cr.P.C. is liable to be dismissed.

5. The police have found the tractor in question involving the transportation of the mineral (black sand) hence registered the criminal case u/s. 379 of IPC and u/s. 21 of **the MMDR Act of 1957** against the driver - Mithun Nigwal. The applicant being the owner of the tractor applied for release of the vehicle on 'Supurdiginama' before the CJM before whom the police have filed the final report. According to the applicant, he gave the tractor on lease to the driver - Mithun Nigwal and he was not aware of the transportation of the mineral without any permit and licence from said tractor.

6. Section 21 of the MMDR Act of 1957 provides a penalty of imprisonment or fine or both on those who contravenes the provisions of sub-section (1) or sub-section (1A) of section 4. As per sub-section (4) of Section 21, the tool, equipment, vehicle, or any other thing found used in the transportation of any mineral without any lawful authority shall be liable to be seized by an officer or authority specially empowered in this behalf. Under sub-section (4A), any mineral, tool, equipment, vehicle or any other thing seized under sub-section (4), shall be liable to be confiscated by an order of the court competent to take cognizance of the offence under sub-section (1) and

shall be disposed of in accordance with the directions of such court. Sub-section (4) and (4A) of Section 21 of the MMDR Act of 1957 are reproduced below :

> "(4) Whenever any person raises, transports or causes to be raised or transported, without any lawful authority, any mineral from any land, and, for that purpose, uses any tool, equipment, vehicle or any other thing, such mineral tool, equipment, vehicle or any other thing shall be liable to be seized by an officer or authority specially empowered in this behalf.
>
> (4A) Any mineral, tool, equipment, vehicle or any other thing seized under sub-section (4), shall be liable to be confiscated by an order of the court competent to take cognizance of the offence under sub-section (1) and shall be disposed of in accordance with the directions of such court."

Section 15 of the MMDR Act of 1957 gives authority to the State Government to make rules in respect of minor minerals for regulating the grant of quarry leases, mining leases or other mineral concessions in respect of minor minerals. In exercise of aforesaid powers conferred u/s. 15, the Government of M.P. has framed the Rules called **"M.P. Minor Mineral Rules, 1996".** As per rule 2(viii), "Competent Authority" means a competent authority appointed by the State Government to carry out the provisions of these rules. Rule 53 of Chapter X of the "M.P. Minor Mineral Rules, 1996" provides penalties for unauthorised extraction and transportation. For ready reference, entire rule 53 is reproduced below :

> **"53. Penalty for un-authorised extraction and transportation.** - Whenever any person is found extracting or transporting minerals or on whose behalf such extraction or transportation is being made otherwise then in accordance with these rules, shall be presumed to be a party to the illegal mining/transportation, then the Collector or any officer authorized by him not below the rank of Deputy Collector shall after giving an opportunity of being heard determines that such person has extracted/ transported the minerals in contravention of the provisions of these rules, then he shall impose the penalty in the following manner, namely :-
>
> (a) on first time contravention, a penalty of minimum 30 times of the royalty of illegally extracted/ transported minerals, shall be imposed but it shall not be less than ten thousand rupees.
>
> (b) on second time contravention a penalty of minimum 40 times of the royalty of illegally extracted/transported minerals,

shall be imposed but it shall not be less than twenty thousand rupees.

(c) on third time contravention, a penalty of minimum 50 times of the royalty of illegally extracted/transported minerals shall be imposed but it shall not be less than thirty thousand rupees.

(d) on third time or subsequent contravention, a penalty of minimum 70 times of the royalty of illegally extracted/ transported minerals, shall be imposed but it shall not be less than fifty thousand rupees.

(2) Forfeiture of minerals in cases of illegal extraction and transportation. - In respect of the forfeiture/discharge of the mineral extracted/transported illegally the Collector or any other officer authorized by him not below the rank of the Deputy Collector shall take an appropriate decision. Provided that seized minerals shall not be discharged till the penalty imposed as above is not paid. In case of forfeiture', the seized mineral shall be disposed of through a transparent auction/ tender procedure as prescribed by the State Government,

(3) Forfeiture/Discharge of the seized tools, machines and vehicles etc. and disposal of forfeited material through Auction/Tender. - (a) In case of illegal extraction, the Collector or any other officer not below the rank of a Deputy Collator, authorized by him shall take an appropriate decision in respect of forfeiture/discharge of tools, machines and vehicles used. Provided that the tools, machines, vehicles and other material so seized shall not be discharged till the penalty imposed as above is not paid. In case of forfeiture, the seized materials shall be disposed of through a transparent auction/tender procedure as prescribed by the State Government.

(b) In respect of Forfeiture/Discharge of vehicle carrying mineral extracted/transported without any transit pass the Collector or any other officer not below the rank of Deputy Collector authorised by him shall take an appropriate decision. Provided that tools, machines, vehicles and other materials shall not be discharged till the penalty imposed as above is not paid.

In case of forfeiture the seized material shall be disposed off through a transparent auction/tender procedure as prescribed by the State Government:

Provided that the vehicle carrying minerals in excess as mentioned in transit pass, shall not be forfeited on doing so for

first three times but the vehicle shall only be discharged on payment of penalty as imposed above. On repetition for the fourth time vehicle shall be liable to be forfeited.

(4) Action and compounding cases of un-authorized extraction/transportation. - Whenever any person is found involved extracting/transporting of the minerals in contravention of provisions of these rules, the Collector/ Additional Collector/Deputy Collector/Chief Executive Officer of Zilla Panchayat/Chief Executive Officer of Janpad Panchayat/ Deputy Director (Mineral Administration)/Officer in charge (Mining section)/Assistant Mining Officer/Mining Inspector/ officer in charge (Flying Squad)/Sub Divisional Officer (Revenue) /Tehsildar /Naib Tehsildar and any other officer not below the rank of Class-III executive authorized by the Collector from time to time shall proceed to act in the following manner:-

(a) to initiate case of unauthorized extraction/transportation by preparing Panchnama on spot;

(b) to collect necessary evidences (including video-graphy) relevant to un-authorized extraction/transportation;

(c) to seize all tools, devices, vehicles and other materials used in excavation of miner mineral in such contravention and to handover all material so seized to the persons or lessee or any other person from whose possession, such material was seized on executing an undertaking up to the satisfaction of the officer seizing such material, to this effect that he shall forthwith produce such material as and when may be required to do so :

Provided that where the report is submitted under sub-rule (3) above to the Collector or any other officer not below the rank of a Deputy Collector authorized by him, the seized property shall only be discharged by the order of the Collector or the officer authorized by him.

(d) officer as mentioned above shall inform the Collector or any other officer not below the rank of Deputy Collector, authorised by him about the incident within 48 hours of coming in to notice of the same.

(e) officers as mentioned above shall make a request in writing to the concerning police station/seeking police assistance, if necessary and police officer shall provide such assistance

as may toe necessary to prevent unlawful excavation/ transportation of tine mineral

(5) Rights and powers of the investigating officer. - During the investigation of the cases of illegal extraction/transportation of the minerals, in contravention of these rules, the investigation officer shall have the following rights and powers, namely :-

(a) to call for person concern to record statements;

(b) to seize record and other material related to the case;

(c) to enter into place concern and to inspect the same;

(d) all powers as are vested in an in-charge of a police station while investigation any cognizable offence under Code of Criminal Procedure; and

(e) all other powers as are vested under Code of Civil Procedure to compel any person to appear or to be examined on oath or to produce any document.

(6) Submitting application by illegal extractor/transporter to compound and its disposal. -

Before initiating or during the operation of the case, if the extractor/transporter is agree to compound the case, he shall have to submit an application of his intention to do so before the Collector/Additional Collector/Deputy Collector/Sub Divisional Officer (Revenue)/Deputy Director (Mineral Administration)/ Mining Officer/Officer-in-charge (Mining section)/Assistant Mining Officer/Officer in charge (Flying Squad) and he shall proceed to compound in the case.

Provided that to avail the benefit of compounding the violator shall have to deposit the amount as determined here under as fine, namely :-

(a) For the first time violation 25 time of royalty of unlawfully excavated/transported minerals or rupees 10,000/- (Ten Thousand) whichever is more.

(b) For the Second time violation 35 time of royalty of unlawfully excavated/transported minerals or rupees 20,000/- (Twenty thousand) whichever is more.

(c) For the third time violation 45 time of royalty of unlawfully excavated/transported minerals or rupees 30,000/- (Thirty Thousand) whichever is more, and

(d) for the fourth time or subsequent violation minimum 65 time of royalty of unlawfully extracted/transported. Provided that it should not be less than rupees 50,000/- (Fifty thousand).

On being compounded, the seized mineral, tools machinery/ and other materials shall be discharged.

(7) Action against contravention of conditions of extract trade quarry/quarry lease/permit or the provisions of this rule. - If during the enquiry of any illegal extraction/ transportation a fact comes into the knowledge that any lease holder/contractor/permit holder, in order to evade the royalty from any sanctioned quarry lease/trade quarry/permit, area is involved in dispatching/selling of minerals in excess quantity by showing less quantity of minerals in transit pass/defective transit permit/blank transit permit, then the Collector of the concerned district may suspend the quarrying operation in such quarry lease/trade quarry permit by issuing show cause notice for violating the conditions of the agreement and after providing an opportunity of being heard may cancel the such lease/ trade quarry/permit. The additional royalty may be recovered after making the assessment of the quantity dispatched or sold in order to evade the royalty :

Provided that during the inspection if it is found that illegal minerals transporter by securing the transit pass from the lease holder in order to evade the royalty has made overwriting or tempered the pass then the officer of the minerals department/ Mineral Inspector may registered a case against the person concerned."

7. Rule 53 of "M.P. Minor Mineral Rules, 1996" empowers the Collector or any other officer authorised by him, not below the rank of the Dy. Collector to determine that any such person has extracted or transported the minerals in contravention of the provisions of these rules, then he shall impose the penalty in the manner prescribed in sub-rule (1) of rule 53.

Sub-rule (2) provides for forfeiture of minerals in case of illegal extraction and transportation and as per proviso, the seized mineral shall not be discharged till the penalty imposed is not paid.

Sub-rule (3) provides forfeiture/discharge of the seized tools, machines, and vehicles, etc. and disposal of forfeited material through auction and according to which, the Collector or any other officer authorised by him shall take appropriate decision in respect of forfeiture/discharge of tools, machines, and

vehicles used and as per proviso, the tools, machines, vehicles and other material so seized shall not be discharged till the penalty imposed is not paid.

As per sub-rule 3(b) of rule 53, in case of forfeiture/discharge of vehicle carrying mineral extracted/transported without any transit pass, the Collector or any other officer not below the rank of Dy. Collector authorised by him shall take an appropriate decision and as per proviso, the same shall not be discharged till the penalty imposed is not paid.

Sub-rule 4 of rule 53 provides for compounding of offence in case of unauthorised extraction/transportation.

Sub-rule 6 of rule 53 gives an authority to the extractor/transporter to apply for compounding before initiating or during the operation of the case and on being compounded, the seized mineral, tools, machinery, and any other material shall be discharged.

Thus, it is clear from the aforesaid provisions that when the vehicle is found illegally transporting the mineral without transit pass, the Collector or any other officer authorised by him shall take an appropriate decision for forfeiture/discharge of the vehicle, tool, machinery, etc. and the vehicle or machinery shall not be discharged till the penalty as imposed under sub-rule (2) of rule 53 is not paid.

8. Learned Addl. Sessions Judge in para 10 of the impugned judgment dated 3.1.2020 has observed that vide letter dated 17.12.2019, the Superintendent of Police, Barwani has sent Crime No.795/2019 to the District Magistrate for confiscation/forfeiture of the tractor with trolley. But, nothing is on record to show as to whether the Collector or any other officer authorised by him has initiated the proceedings against the applicant under rule 53 of "M.P. Minor Mineral Rules, 1996" for the imposition of penalty. The Collector or any other officer authorised by him gets the jurisdiction to release/discharge the vehicle only after the imposition of penalty and payment of the same. In rule 53, the words "forfeiture" and "discharge" have been used. Either the vehicle is liable to be forfeited or discharged after the penalty imposed by the officer is paid.

9. In the present case, the FIR has been registered against the driver - Mithun Nigwal for commission of offence u/s. 379 of the IPC and Section 21 of the MMDR Act of 1957 and Final Report (Challan) has been filed before the CJM . Under sub-section (4A) of Section 21 of MMDR Act of 1957, any mineral, tool, equipment, vehicle or any other thing seized under sub-section (4) shall be liable to be confiscated by an order of the court competent to take cognizance of the offence under subsection (1) and shall be disposed of in accordance with the

directions of such court. Once the final report has been filed by the police before the CJM, then the CJM would also be the competent authority to decide such a criminal case and also in regard to the confiscation of the vehicle. Therefore, the CJM alone is competent to decide for the temporary release of the vehicle u/s. 451 & 457 of the IPC.

10. So far as proceedings under rule 53 of the "M.P. Minor Mineral Rules, 1996" are concerned, it is for the forfeiture/discharge of the vehicle after payment of fine/penalty. Such proceedings are independent proceedings in which the Collector any other officer authorised by him is competent to impose the penalty for the use of vehicle for illegal transportation/extraction of the mineral without any transit pass. The constitutional validity of rule 53 was under challenge before this court in the case of *Naresh Rathore & Ors Vs. State of Madhya Pradesh* [2018(4)MPLJ-193]. Hon'ble FB of this court has upheld the validity of rule 53 of "M.P. Minor Mineral Rules, 1996", did not find in conflict with and is in addition to the provisions of the Act or any other provisions of the Indian Penal Code, validly framed by the State in exercise of powers conferred under Section 15 read with Section 23C of the MMDR Act of 1957. It has also been held that that powers of forfeiture under Rule 53 (2) and 53(3) of "M.P. Minor Mineral Rules, 1996" can be exercised only in those cases were a penalty in terms of Rule 53(1) is not paid and that the benefit of default on the first three occasions which is provided to those transporting mineral in excess of the quantity mentioned in the transit pass under Rule 53(3)(b) is also available even to those who are transporting mineral without any transit pass.

11. A writ petition filed by *Rajkumar Vs State of M.P.* (WRIT PETITION No. 20831/2018) was referred to Special Bench (Five Judges) to reconsider the law laid down in case of *Naresh Rathore* (supra). That in the case of *Rajkumar Vs. State of M.P.* reported in 2019(2)MPLJ-438 Special Bench did not touch the validity of rule 53 already been upheld but overruled the full bench judgment passed in *Naresh Rathore* (supra). Hon'ble Special Bench has held that the proceedings for imposition of penalty and confiscation contained in Rule 53 of the "M.P. Minor Mineral Rules, 1996", have been validly enacted and are not in conflict with and are in addition to and apart from the provisions of criminal prosecution and punishment of the offender indulging in illegal extraction or transportation of mineral as contemplated and provided under the Indian Penal Code, the Indian Forest Act, the Wild Life Protection Act, the M.P. Van Upaj (Vyapar Viniyaman) Adhiniyam, 1969, the M.P. Land Revenue Code, 1959 or any other statutory provisions that provide for penalty and forfeiture in such cases. It has been further held that orders of forfeiture can be passed independently or in

isolation in all cases of illegal extraction or transportation of mineral irrespective of and apart from proceedings of penalty and orders of forfeiture can be passed even in cases where no penalty order is passed or imposed and the power of forfeiture/confiscation can be exercised by the competent authority as and when it takes an appropriate decision in this regard under Rule 53(2) or 53(3) of the "M.P. Minor Mineral Rules, 1996" irrespective of the fact that the contravention is made by the defaulter for the first time.

However, the issue of temporary release of the vehicle found involved in the transportation of minerals by the Magistrate or by the competent authority under the rules of 1996 was not under consideration either before the full bench of the special bench.

12. Undisputedly there is no provision for the temporary release of the vehicle to the registered owner either in the MMDR Act of 1957 by the Magistrate or in the "M.P. Minor Mineral Rules, 1996",. The MMDR Act of 1957 and rules ("M.P. Minor Mineral Rules, 1996") made thereunder nowhere bars or put an embargo on the jurisdiction of the trial court/ Magistrate to entertain an application filed under section 451 of the Cr.P.C. In the case, in hand, the vehicle belonging to the petitioner has been seized by police in crime no. 795/2019 and must have produced before the learned Magistrate, therefore, the magistrate alone has jurisdiction to release the vehicle under section 451 of the Cr.P.C. in absence of any provision in "M.P. Minor Mineral Rules, 1996". That the FIR has been registered for the offence u/s. 379 of the I.P.C. and u/s. 21 of the **MMDR of 1957,** and being tried under the provisions of the Code of Criminal Procedure particularly the offence under the Indian Penal Code. The doctrine of exclusion of jurisdiction of the regular courts to deal with a matter and to pass appropriate orders in such criminal proceedings is founded in the maxim *'Generalia Specialibus Non Derogant'* (special law overrides general law). In other words, jurisdiction over the Courts to deal with the matter and pass orders under the provisions of the Code of Criminal Procedure should be presumed and to hold the contrary, there must be a specific bar in any special law concerning certain matters under the Criminal Procedure Code and by necessary implication by making such similar provisions to deal with a matter in the special enactments.

13. The Full Bench of this court in the case of *State of Madhya Pradesh Vs Rakesh Kumar Gupta* reported in 1998 Cr.L.J.4264 while dealing the issue of release of the vehicle under section 451 of Cr.P.C. by the Magistrate, which was confiscated due to non-payment of tax under MP Motoryan Karadhan Adhiniyam 1991, has held that section 451 of the Code gets attracted only when the property is

produced before any criminal court during any enquiry or trial and sec (sic: section) 457 of Cr.P.C comes into play when the seizure is by the police officer who reports to the Magistrate under the Code.

14. Needless to say that even after the temporary release of the vehicle to the applicant, the competent authority under the "M.P. Minor Mineral Rules, 1996" would be competent to pass the order under the provisions of rule 53. The ouster of jurisdiction of the criminal court would only occur if the proceeding of forfeiture is completed under Rule 53 of the "M.P. Minor Mineral Rules, 1996" after which, only an appeal would lie under rule 57. Besides, the "M.P. Minor Mineral Rules, 1996" does not contemplate physical custody over the vehicle for an order of forfeiture to be passed and that even if the vehicle is released under 451 Cr.P.C by the Magistrate Court, the Collector could proceed under rule 53 for forfeiture and once the order of forfeiture is passed, it would be incumbent on the owner to hand over possession of the Vehicle to the concerned department unless the appellate authority (u/r 57) stays the order of the Collector or finally sets it aside.

15. In view of the above discussion the impugned order dated 20.12.2019 passed by Chief Judicial Magistrate, (CJM), Barwani, rejecting the application 451 & 457 of Cr.P.C. and also against the order dated 23.1.2020 passed by 1st Addl. Sessions Judge, Barwani dismissing the criminal revision are hereby quashed with the direction to the Chief Judicial Magistrate, (CJM), Barwani to decide the application filed under section 451 of Cr.P.C. in accordance with the law. It is important to mention here that if meanwhile, the competent authority has already passed the order under rule 53 of the "M.P. Minor Mineral Rules, 1996" then learned CJM would not have jurisdiction to decide the application because the petitioner shall have the remedy of appeal/ revision in "M.P. Minor Mineral Rules, 1996" or the vehicle is liable to be released upon payment of fine as per the order of the competent authority.

No order as to cost.

Order accordingly