VOL. 2

INDIAN LAW REPORT (M.P.) COMMITTEE

MAY 2020

PATRON

Hon'ble Shri Justice AJAY KUMAR MITTAL

Chief Justice

– – – –

CHAIRMAN

Hon'ble Shri Justice SUJOY PAUL

– – – –

MEMBERS

Shri Purushaindra Kaurav, Advocate General, *(ex-officio)*
Shri Umakant Sharma, Senior Advocate
Shri Kishore Shrivastava, Senior Advocate
Shri Aditya Adhikari, Senior Advocate
Shri Ritesh Kumar Ghosh, Advocate, Chief Editor, *(ex-officio)*
Shri Avanindra Kumar Singh, Principal Registrar (ILR)
Shri Manoj Kumar Shrivastava, Principal Registrar (Judicial), *(ex-officio)*

– – – –

SECRETARY

Shri Alok Mishra, Registrar (Exam)

– – – –

CHIEF EDITOR

(Part-time)

Shri Ritesh Kumar Ghosh, Advocate, Jabalpur

– – – –

EDITORS

(Part-time)

JABALPUR

Shri Siddhartha Singh Chauhan, Advocate, Jabalpur

INDORE

Shri Yashpal Rathore, Advocate, Indore

GWALIOR

Smt. Sudhha Sharrma, Advocate, Gwalior

– – – –

ASSISTANT EDITOR

Smt. Deepa Upadhyay

– – – –

REPORTERS

(Part-time)

JABALPUR

Shri Sanjay Seth, Adv.
Shri Nitin Kumar Agrawal, Adv.
Shri Yogendra Singh Golandaz, Adv.

INDORE

Shri Sameer Saxena, Adv.

GWALIOR

Shri Ankit Saxena, Adv.
Shri Rinkesh Goyal, Adv.
Shri Gopal Krishna Sharma (Honorary)

– – – –

PUBLISHED BY

SHRI AVANINDRA KUMAR SINGH, PRINCIPAL REGISTRAR (ILR)

TABLE OF CASES REPORTED

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

..*.*.*.*.*.*.*.

INDEX

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

पी ए की तिथि से 24 माह थी परंतु संविदा का 24 माह की बाहरी सीमा समाप्त होने के पूर्व ही पर्यवसान किया गया – संविदा का पर्यवसान पूर्णतः अन्यायपूर्ण एवं मनमाना है – वैकल्पिक उपचार के अभिवाक् में कोई गुणदोष नहीं – आक्षेपित आदेश अभिखंडित – याचिका मंजूर। (स्काई पॉवर साउथईस्ट सोलर इंडिया प्रा. लि., न्यू देहली (मे.) वि. एम.पी. पॉवर मेनेजमेन्ट कं. लि.) **(DB)…1128**

Constitution – Article 226 and Civil Procedure Code (5 of 1908), Section 60 – Re-payment of Loan – Attachment of Pension Account – Pension account of petitioner attached by Bank for repayment of loan **– Held – Petitioner and his family members cheated various banks and obtained loan by playing fraud and has not repaid the loan amount – He who seeks equity must do equity – Conduct of petitioner disentitles him for equitable relief under Article 226 of Constitution – Petition dismissed. [Nirmal Singh Vs. State Bank of India] …*11**

संविधान – अनुच्छेद 226 एवं सिविल प्रक्रिया संहिता (1908 का 5), धारा 60 – ऋण का प्रतिसंदाय – पेंशन खाते की कुर्की – ऋण के प्रतिसंदाय हेतु बैंक द्वारा याची के पेंशन खाते की कुर्की – अभिनिर्धारित – याची एवं उसके परिवार के सदस्यों ने विभिन्न बैंको के साथ छल किया तथा कपट करके ऋण अभिप्राप्त किया एवं ऋण राशि का प्रतिसंदाय नहीं किया है – जो साम्या चाहता है उसे भी साम्या करनी चाहिए – याची का आचरण, उसे संविधान के अनुच्छेद 226 के अंतर्गत साम्यापूर्ण अनुतोष के हक से वंचित करता है – याचिका खारिज। (निर्मल सिंह वि. स्टेट बैंक ऑफ इंडिया) **…*11**

Constitution – Article 226 and Contract Act (9 of 1872), Section 23 – Jurisdiction of Court **– Held – There is a valid contract between parties where they agreed to submit suits or legal actions to Courts at Nagpur – Even though a part of cause of action has arisen within jurisdiction of this Court, *lis* would be amenable to jurisdiction of Courts at Nagpur – Petition dismissed for want of territorial jurisdiction. [AKC & SIG Joint Venture Firm (M/s.) Vs. Western Coalfields Ltd.] (DB)…1134**

संविधान – अनुच्छेद 226 एवं संविदा अधिनियम (1872 का 9), धारा 23 – न्यायालय की अधिकारिता – अभिनिर्धारित – पक्षकारों के मध्य एक विधिमान्य संविदा हुई है जिसमें उन्होनें वादों या विधिक कार्यवाहियों को नागपुर के न्यायालयों में प्रस्तुत करने के लिए सहमति दी – यद्यपि वाद हेतुक का एक भाग इस न्यायालय की अधिकारिता के भीतर उत्पन्न हुआ है, मुकदमा, नागपुर के न्यायालयों की अधिकारिता के अध्यधीन होगा – क्षेत्रीय अधिकारिता के अभाव के कारण याचिका खारिज। (एकेसी एण्ड एसआईजी ज्वाईन्ट वैंचर फर्म (मे.) वि. वेस्टर्न कोलफील्डस् लि.) **(DB)…1134**

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**

INDEX

INDEX

***Penal Code (45 of 1860), Sections 302, 363, 366, 376(2)(f) & 377 and Protection of Children from Sexual Offences Act (32 of 2012), Sections 4, 5 & 6 – 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

* * * * *

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

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

THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019

[Received 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. 603 to 609]

THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019

An Act

to provide for protection of rights of transgender persons and their welfare and for matters connected therewith and incidental thereto.

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

CHAPTER I

PRELIMINARY

1. Short title, extent and commencement. *(1)* This Act may be called the Transgender Persons (Protection of Rights) Act, 2019.

(2) It extends to the whole of India.

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

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

(a) "appropriate Government" means, —

(i) in relation to the Central Government or any establishment, wholly or substantially financed by that Government, the Central Government;

(ii) in relation to a State Government or any establishment, wholly or substantially financed by that Government, or any local authority, the State Government;

(b) "establishment" means—

(i) any body or authority established by or under a Central Act or a State Act or an authority or a body owned or controlled or aided by the Government or a local authority, or a Government company as defined in section 2 of the Companies Act, 2013 (18 of 2013), and includes a Department of the Government; or

(ii) any company or body corporate or association or body of individuals, firm, cooperative or other society, association, trust, agency, institution;

(c) "family" means a group of people related by blood or marriage or by adoption made in accordance with law;

(d) "inclusive education" means a system of education wherein transgender students learn together with other students without fear of discrimination, neglect, harassment or intimidation and the system of teaching and learning is suitably adapted to meet the learning needs of such students;

(e) "institution" means an institution, whether public or private, for the reception, care, protection, education, training or any other service of transgender persons;

(f) "local authority" means the municipal corporation or Municipality or Panchayat or any other local body constituted under any law for the time being in force for providing municipal services or basic services, as the case may be, in respect of areas under its jurisdiction;

(g) "National Council" means the National Council for Transgender Persons established under section 16;

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

(i) "person with intersex variations" means a person who at birth shows variation in his or her primary sexual characteristics, external genitalia, chromosomes or hormones from normative standard of male or female body;

(j) "prescribed" means prescribed by rules made by the appropriate Government under this Act; and

(k) "transgender person" means a person whose gender does not match with the gender assigned to that person at birth and includes trans-man or trans-woman (whether or not such person has undergone Sex

Reassignment Surgery or hormone therapy or laser therapy or such other therapy), person with intersex variations, genderqueer and person having such socio-cultural identities as *kinner, hijra, aravani* and *jogta.*

CHAPTER II

PROHIBITION AGAINST DISCRIMINATION

3. Prohibition against discrimination. No person or establishment shall discriminate against a transgender person on any of the following grounds, namely: —

(a) the denial, or discontinuation of, or unfair treatment in, educational establishments and services thereof;

(b) the unfair treatment in, or in relation to, employment or occupation;

(c) the denial of, or termination from, employment or occupation;

(d) the denial or discontinuation of, or unfair treatment in, healthcare services;

(e) the denial or discontinuation of, or unfair treatment with regard to, access to, or provision or enjoyment or use of any goods, accommodation, service, facility, benefit, privilege or opportunity dedicated to the use of the general public or customarily available to the public;

(f) the denial or discontinuation of, or unfair treatment with regard to the right of movement;

(g) the denial or discontinuation of, or unfair treatment with regard to the right to reside, purchase, rent, or otherwise occupy any property;

(h) the denial or discontinuation of, or unfair treatment in, the opportunity to stand for or hold public or private office; and

(i) the denial of access to, removal from, or unfair treatment in, Government or private establishment in whose care or custody a transgender person may be.

CHAPTER III

RECOGNITION OF IDENTITY OF TRANSGENDER PERSONS

4. Recognition of identity of transgender person. *(1)* A transgender person shall have a right to be recognised as such, in accordance with the provisions of this Act.

(2) A person recognised as transgender under sub-section *(1)* shall have a right to self-perceived gender identity.

5. Application for certificate of identity. A transgender person may make an application to the District Magistrate for issuing a certificate of identity as a transgender person, in such form and manner, and accompanied with such documents, as may be prescribed:

Provided that in the case of a minor child, such application shall be made by a parent or guardian of such child.

6. Issue of certificate of identity. *(1)* The District Magistrate shall issue to the applicant under section 5, a certificate of identity as transgender person after following such procedure and in such form and manner, within such time, as may be prescribed indicating the gender of such person as transgender.

(2) The gender of transgender person shall be recorded in all official documents in accordance with certificate issued under sub-section *(1)*.

(3) A certificate issued to a person under sub-section *(1)* shall confer rights and be a proof of recognition of his identity as a transgender person.

7. Change in gender. (*1)* After the issue of a certificate under sub-section *(1)* of section 6, if a transgender person undergoes surgery to change gender either as a male or female, such person may make an application, along with a certificate issued to that effect by the Medical Superintendent or Chief Medical Officer of the medical institution in which that person has undergone surgery, to the District Magistrate for revised certificate, in such form and manner as may be prescribed.

(2) The District Magistrate shall, on receipt of an application along with the certificate issued by the Medical Superintendent or Chief Medical Officer, and on being satisfied with the correctness of such certificate, issue a certificate indicating change in gender in such form and manner and within such time, as may be prescribed.

(3) The person who has been issued a certificate of identity under section 6 or a revised certificate under sub-section *(2)* shall be entitled to change the first name in the birth certificate and all other official documents relating to the identity of such person:

Provided that such change in gender and the issue of revised certificate under sub-section *(2)* shall not affect the rights and entitlements of such person under this Act.

CHAPTER IV

WELFARE MEASURES BY GOVERNMENT

8. Obligation of appropriate Government. *(1)* The appropriate Government shall take steps to secure full and effective participation of transgender persons and their inclusion in society.

(2) The appropriate Government shall take such welfare measures as may be prescribed to protect the rights and interests of transgender persons, and facilitate their access to welfare schemes framed by that Government.

(3) The appropriate Government shall formulate welfare schemes and programmes which are transgender sensitive, non-stigmatising and non-discriminatory.

(4) The appropriate Government shall take steps for the rescue, protection and rehabilitation of transgender persons to address the needs of such persons.

(5) The appropriate Government shall take appropriate measures to promote and protect the right of transgender persons to participate in cultural and recreational activities.

CHAPTER V
OBLIGATION OF ESTABLISHMENTS AND OTHER PERSONS

9. Non-discrimination in employment. No establishment shall discriminate against any transgender person in any matter relating to employment including, but not limited to, recruitment, promotion and other related issues.

10. Obligations of establishments. Every establishment shall ensure compliance with the provisions of this Act and provide such facilities to transgender persons as may be prescribed.

11. Grievance redressal mechanism. Every establishment shall designate a person to be a complaint officer to deal with the complaints relating to violation of the provisions of this Act.

12. Right of residence. *(1)* No child shall be separated from parents or immediate family on the ground of being a transgender, except on an order of a competent court, in the interest of such child.

(2) Every transgender person shall have —

(a) a right to reside in the household where parent or immediate family members reside;

(b) a right not to be excluded from such household or any part thereof; and

(c) a right to enjoy and use the facilities of such household in a non-discriminatory manner.

(3) Where any parent or a member of his immediate family is unable to take care of a transgender, the competent court shall by an order direct such person to be placed in rehabilitation centre.

CHAPTER VI

EDUCATION, SOCIAL SECURITY AND HEALTH OF TRANSGENDER PERSONS

13. Obligation of educational institutions to provide inclusive education to transgender persons. Every educational institution funded or recognized by the appropriate Government shall provide inclusive education and opportunities for sports, recreation and leisure activities to transgender persons without discrimination on an equal basis with others.

14. Vocational training and self-employment. The appropriate Government shall formulate welfare schemes and programmes to facilitate and support livelihood for transgender persons including their vocational training and self-employment.

15. Healthcare facilities. The appropriate Government shall take the following measures in relation to transgender persons, namely: —

(a) to set up separate human immunodeficiency virus Sero-surveillance Centres to conduct sero-surveillance for such persons in accordance with the guidelines issued by the National AIDS Control Organisation in this behalf;

(b) to provide for medical care facility including sex reassignment surgery and hormonal therapy;

(c) before and after sex reassignment surgery and hormonal therapy counselling;

(d) bring out a Health Manual related to sex reassignment surgery in accordance with the World Profession Association for Transgender Health guidelines;

(e) review of medical curriculum and research for doctors to address their specific health issues;

(f) to facilitate access to transgender persons in hospitals and other healthcare institutions and centres;

(g) provision for coverage of medical expenses by a comprehensive insurance scheme for Sex Reassignment Surgery, hormonal therapy, laser therapy or any other health issues of transgender persons.

CHAPTER VII

NATIONAL COUNCIL FOR TRANSGENDER PERSONS

16. National Council for Transgender Persons. *(1)* The Central Government shall by notification constitute a National Council for Transgender

Persons to exercise the powers conferred on, and to perform the functions assigned to it, under this Act.

(2) The National Council shall consist of —

(a) the Union Minister in-charge of the Ministry of Social Justice and Empowerment, Chairperson, *ex officio*;

(b) the Minister of State, in-charge of the Ministry of Social Justice and Empowerment in the Government, Vice-Chairperson, *ex officio*;

(c) Secretary to the Government of India in-charge of the Ministry of Social Justice and Empowerment, Member, *ex officio*;

(d) one representative each from the Ministries of Health and Family Welfare, Home Affairs, Housing and Urban Affairs, Minority Affairs, Human Resources Development, Rural Development, Labour and Employment and Departments of Legal Affairs, Pensions and Pensioners Welfare and National Institute for Transforming India Aayog, not below the rank of Joint Secretaries to the Government of India, Members, *ex officio*;

(e) one representative each from the National Human Rights Commission and National Commission for Women, not below the rank of Joint Secretaries to the Government of India, Members, *ex officio*;

(f) representatives of the State Governments and Union territories by rotation, one each from the North, South, East, West and North-East regions, to be nominated by the Central Government, Members, *ex officio*;

(g) five representatives of transgender community, by rotation, from the State Governments and Union territories, one each from the North, South, East, West and North-East regions, to be nominated by the Central Government, Members;

(h) five experts, to represent non-governmental organisations or associations, working for the welfare of transgender persons, to be nominated by the Central Government, Members; and

(i) Joint Secretary to the Government of India in the Ministry of Social Justice and Empowerment dealing with the welfare of the transgender persons, Member Secretary, *ex officio.*

(3) A Member of National Council, other than *ex officio* member, shall hold office for a term of three years from the date of his nomination.

17. Functions of Council. The National Council shall perform the following functions, namely: —

(a) to advise the Central Government on the formulation of policies, programmes, legislation and projects with respect to transgender persons;

(b) to monitor and evaluate the impact of policies and programmes designed for achieving equality and full participation of transgender persons;

(c) to review and coordinate the activities of all the departments of Government and other Governmental and non-Governmental Organisations which are dealing with matters relating to transgender persons;

(d) to redress the grievances of transgender persons; and

(e) to perform such other functions as may be prescribed by the Central Government.

CHAPTER VIII

OFFENCES AND PENALTIES

18. Offences and penalties. Whoever, —

(a) compels or entices a transgender person to indulge in the act of forced or bonded labour other than any compulsory service for public purposes imposed by Government;

(b) denies a transgender person the right of passage to a public place or obstructs such person from using or having access to a public place to which other members have access to or a right to use;

(c) forces or causes a transgender person to leave household, village or other place of residence; and

(d) harms or injures or endangers the life, safety, health or well-being, whether mental or physical, of a transgender person or tends to do acts including causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse,

shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to two years and with fine.

CHAPTER IX

MISCELLANEOUS

19. Grants by Central Government. The Central Government shall, from time to time, after due appropriation made by Parliament by law in this behalf, credit such sums to the National Council as may be necessary for carrying out the purposes of this Act.

20. Act not in derogation of any other law. The provisions of this Act shall be in addition to, and not in derogation of, any other law for the time being in force.

21. Protection of action taken in good faith. No suit, prosecution or other legal proceeding shall lie against the appropriate Government or any local authority or any officer of the Government in respect of anything which is in good faith done or intended to be done in pursuance of the provisions of this Act and any rules made thereunder.

22. Power of appropriate Government to make rules. *(1)* The appropriate Government may, subject to the condition of previous publication, by notification, make rules for carrying out the provisions of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely: —

(a) the form and manner in which an application shall be made under section 5;

(b) the procedure, form and manner and the period within which a certificate of identity is issued under sub-section *(1)* of section 6;

(c) the form and manner in which an application shall be made under sub-section *(1)* of section 7;

(d) the form, period and manner for issuing revised certificate under sub-section *(2)* of section 7;

(e) welfare measures to be provided under sub-section *(2)* of section 8;

(f) facilities to be provided under section 10;

(g) other functions of the National Council under clause *(e)* of section 17; and

(h) any other matter which is required to be or may be prescribed.

(3) Every rule made by the Central Government under sub-section *(1),* shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

(4) Every rule made by the State Government under sub-section *(1),* shall be laid, as soon as may be after it is made, before each House of the State Legislature where it consists of two Houses, or where such legislature consists of one House, before that House.

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

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

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

THE CHIT FUNDS (AMENDMENT) ACT, 2019

[Received 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. 610 to 611]

THE CHIT FUNDS (AMENDMENT) ACT, 2019

An Act
further to amend the Chit Funds Act, 1982.

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 Chit Funds (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 Chit Funds Act, 1982 (40 of 1982) (hereinafter referred to as the principal Act,), in section 2, —

(i) in clause *(b)*, after the word *'kuri,"* the words ", fraternity fund, Rotating Savings and Credit Institution" shall be inserted;

(ii) clause *(d)* shall be omitted;

(iii) clause *(h)* shall be omitted;

(iv) after clause *(j),* the following clauses shall be inserted, namely: —

'(ja) "gross chit amount" means the sum-total of the subscriptions payable by all the subscribers for any instalment of a chit without any deduction of discount or otherwise;

(jb) "net chit amount" means the difference between the gross

chit amount and the discount, and in the case of a fraction of a ticket means the difference between the gross chit amount and the discount proportionate to the fraction of the ticket, and when the net chit amount is payable otherwise than in cash, the value of the net chit amount shall be the value at the time when it becomes payable;';

(v) clause *(m)* shall be omitted.

(vi) after clause *(p),* the following clause shall be inserted, namely: —

'(pa) "share of discount" means the share of the subscriber in the amount of discount available under the chit agreement for rateable distribution among the subscribers at each instalment of the chit;'.

3. Substitution of words to certain expressions by certain other expressions. Throughout the principal Act, —

(i) for the words "chit amount", the words "gross chit amount" shall be substituted;

(ii) for the word "dividend", the words "share of discount" shall be substituted; and

(iii) for the words "prize amount", the words "net chit amount" shall be substituted.

4. Substitution of new section for section 11. For section 11 of the principal Act, the following section shall be substituted, namely: —

"**11. Use of words "chit", "chit fund",** ***"chitty", "kuri",*** **"fraternity fund" or "Rotating Savings and Credit Institution".** *(1)* No person shall carry on chit business unless he uses as part of his name any of the words "chit", "chit fund", *"chitty,"kuri,"*"fraternity fund" or "Rotating Savings and Credit Institution" and no person other than a person carrying on chit business shall use as part of his name any such word.

(2) Where at the commencement of this Act, —

(a) any person is carrying on chit business without using as part of his name any of the words specified in sub-section *(1)*; or

(b) any person not carrying on chit business is using any such word as part of his name,

he shall, within a period of one year from such commencement, add as part of his name any such word or, as the case may be, delete such word from his name:

Provided that the State Government may, if it considers necessary in

the public interest or for avoiding any hardship, extend the said period of one year by such further period or periods not exceeding one year in the aggregate.".

5. Amendment of section 13. In Section 13 of the principal Act, —

(i) in sub-section *(1),* for the words "rupees one lakh", the words "rupees three lakhs" shall be substituted;

(ii) in sub-section *(2)*, —

(a) in clause *(a),* for the words "rupees six lakhs", the words "rupees eighteen lakhs" shall be substituted;

(b) in clause *(b),* for the words "rupees one lakh", the words "rupees three lakhs" shall be substituted.

6. Amendment of section 16. In section 16 of the principal Act, in sub-section *(2),* after the words "two subscribers", the words "present in person or through video conferencing duly recorded by the foreman" shall be inserted.

7. Amendment of section 17. In section 17 of the principal Act, in sub-section *(1),* —

(a) after the words "at least two other subscribers who are present", the words "in person or through video conferencing" shall be inserted;

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

"Provided that where two subscribers required to be present under sub-section *(2)* of section 16 are present through video conferencing, the foreman shall have the minutes of the proceedings signed by such subscribers within a period of two days of the date of the draw.".

8. Amendment of section 21. In section 21 of the principal Act, in sub-section *(1),* —

(i) in clause *(b),* for the words "five per cent.", the words "seven per cent." shall be substituted;

(ii) in clause *(f),* the word "and" shall be omitted;

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

"(fa) to exercise his right to lien against the credit balance in other non-prized chits; and".

9. Amendment of section 85. In section 85 of the principal Act, in clause *(b),* for the words "one hundred rupees", the words "such amount as may be specified, by notification in the Official Gazette, by the State Government" shall be substituted.

NOTES OF CASES SECTION

Short Note

****(11)***

Before Mr. Justice G.S. Ahluwalia

W.P. No. 1533/2013 (Gwalior) decided on 18 September, 2019

NIRMAL SINGH …Petitioner

Vs.

STATE BANK OF INDIA & anr. …Respondents

A. Constitution – Article 226 and Civil Procedure Code (5 of 1908), Section 60 – Re-payment of Loan – Attachment of Pension Account – Pension account of petitioner attached by Bank for repayment of loan **– Held – Petitioner and his family members cheated various banks and obtained loan by playing fraud and has not repaid the loan amount – He who seeks equity must do equity – Conduct of petitioner disentitles him for equitable relief under Article 226 of Constitution – Petition dismissed.**

क. संविधान – अनुच्छेद 226 एवं सिविल प्रक्रिया संहिता (1908 का 5), धारा 60 – ऋण का प्रतिसंदाय – पेंशन खाते की कुर्की – ऋण के प्रतिसंदाय हेतु बैंक द्वारा याची के पेंशन खाते की कुर्की – अभिनिर्धारित – याची एवं उसके परिवार के सदस्यों ने विभिन्न बैंको के साथ छल किया तथा कपट करके ऋण अभिप्राप्त किया एवं ऋण राशि का प्रतिसंदाय नहीं किया है – जो साम्या चाहता है उसे भी साम्या करनी चाहिए – याची का आचरण, उसे संविधान के अनुच्छेद 226 के अंतर्गत साम्यापूर्ण अनुतोष के हक से वंचित करता है – याचिका खारिज।

B. 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.**

ख. वृत्तिक अवचार – अधिवक्ता – अभिनिर्धारित – पक्षकार से अनुदेश चाहे बिना रियायती कथन न केवल न्यायालय को भ्रमित करने की कोटि में आता है बल्कि वृत्तिक अवचार की कोटि में भी आता है – अधिवक्ता को पक्षकार से उचित अनुदेश चाहे बिना, वचनबंध के रूप में कोई कथन नहीं करना चाहिए।

Cases referred:

2005 (2) MPLJ 500, W.P. No. 7387/2012 order passed on 12.04.2013, (1994) 2 SCC 481, (2005) 6 SCC 454, AIR 2003 SC 2889, AIR 1994 SC 2151, AIR 1984 SC 1888, W.P. (C) No. 5511/2019 order passed on 30.05.2019 (Delhi High Court).

RK Soni, for the petitioner.

Raju Sharma, for the respondents/Bank.

NOTES OF CASES SECTION

Short Note

**(12)*

Before Mr. Justice G.S. Ahluwalia

F.A. No. 87/2002 (Gwalior) decided on 29 August, 2019

RAMWATI (SMT.) …Appellant

Vs.

PREMNARAYAN & anr. …Respondents

A. Practice – Advocate – **Held – Advocate is an agent of the party, his acts and statements should always be within the limits of the authority given to him – Whenever a counsel wants to appear as a witness for his client, he must withdraw his Vakalatnama and then appear as a witness, not as an Advocate registered under the Advocate Act.**

क. पद्धति – अधिवक्ता – अभिनिर्धारित – अधिवक्ता, पक्षकार का एक अभिकर्ता है, उसके कृत्य एवं कथन सदैव उसे दिये गये प्राधिकार की सीमाओं के भीतर होने चाहिए – जब भी एक अधिवक्ता अपने पक्षकार के लिए साक्षी के रूप में उपस्थित होना चाहता है, उसे अपना वकालतनामा वापस लेना होगा तथा फिर वह साक्षी के रूप में उपस्थित होगा, न कि अधिवक्ता अधिनियम के अंतर्गत पंजीकृत एक अधिवक्ता के रूप में।

B. Specific Relief Act (47 of 1963), Section 16(c) & 20 – Readiness & Willingness – **Held – Defendant admitted the execution of agreement to sell – Plaintiffs, by their conduct, failed to prove their readiness and willingness to perform their part of contract – Discretionary decree of specific performance of contract in favour of plaintiffs denied – However, since payment of Rs. 1,00,000/- by plaintiffs to defendant is not disputed, instead of decree for specific performance of contract, plaintiffs entitled for refund of the advance amount paid by them, with hike in price – Appeal disposed.**

ख. विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 16(c) व 20 – तैयारी और रजामंदी – अभिनिर्धारित – प्रतिवादी ने विक्रय के करार का निष्पादन स्वीकार किया – वादीगण अपने आचरण द्वारा संविदा के उनके भाग का पालन करने की उसकी तैयारी और रजामंदी साबित करने में विफल रहे – वादीगण के पक्ष में संविदा के विनिर्दिष्ट पालन करने की वैवेकिक डिक्री अस्वीकार की गई – तथापि, चूंकि वादीगण द्वारा प्रतिवादी को रू. 1,00,000/– का भुगतान विवादित नहीं है, संविदा के विनिर्दिष्ट पालन की डिक्री के बजाय, वादीगण मूल्य में हुई वृद्धि के साथ, उनके द्वारा भुगतान की गई अग्रिम राशि वापस किये जाने के हकदार हैं – अपील निराकृत।

Cases referred:

(1989) 1 SCC 76, (2019) 3 SCC 704, (2008) 12 SCC 145, (2015) 7 SCC 373, AIR 2019 SC 1280, (1997) 7 SCC 89.

D.D. Bansal, for the appellant.

V.K. Bhardwaj with *M.L. Sharma,* for the respondents.

I.L.R. [2020] M.P. 1011 (SC)
SUPREME COURT OF INDIA

Before Mr. Justice Uday Umesh Lalit, Ms. Justice Indu Malhotra & Mr. Justice Krishna Murari

Cr.A. Nos. 62-63/2014 decided on 18 December, 2019

ANOKHILAL …Appellant

Vs.

STATE OF M.P. …Respondent

***A. 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.**

(Paras 13 to 16 & 19 to 21)

क. 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 हुई – आक्षेपित निर्णय अपास्त – मामले का नये सिरे से विचारण किया जाना निदेशित – अपील निराकृत।

***B. Penal Code (45 of 1860), Sections 302, 363, 366, 376(2)(f) & 377 and Protection of Children from Sexual Offences Act (32 of 2012), Sections 4, 5 & 6 – 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. (Para 22)

ख. 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।

Cases referred:

(1969) 1 SCR 32 : AIR 1968 SC 1313, (2012) 9 SCC 408, AIR 1957 AP 505, AIR 1959 Kerala 241, (1980) 1 SCC 98, (2012) 8 SCC 553, (1981) 1 SCC 627, (1986) 2 SCC 401, AIR 1955 SC 792 : (1955) 2 SCR 524, AIR 1959 SC 609 : 1959 Crl.L.J. 782, 1994 Supp (3) SCC 321, (1986) 1 SCC 654, (1992) 1 SCC 225, (1980) 1 SCC 81, (1980) 1 SCC 93, (1986) 4 SCC 481, (1994) 3 SCC 569, (2004) 4 SCC 158, (2009) 6 SCC 667, (2018) 14 SCALE 730 = (2018) 18 SCC 788, 2019 SCC Online SC 317, (2018) 9 SCC 160, (2018) 9 SCC 163, (2012) 9 SCC 771.

J U D G M E N T

The Judgment of the Court was delivered by :

UDAY UMESH LALIT, J. :- These appeals by special leave challenge the final judgment and order dated 27.06.2013 passed by the High Court[1] in Criminal Reference No.4 of 2013 and Criminal Appeal No.748 of 2013.

2. The relevant facts for the purposes of these appeals, in brief, are as under:

> (A) On 30.01.2013 a missing report was lodged by one Ramlal that his daughter (hereinafter referred to as 'the victim') aged about nine years was missing since 6 pm and that the appellant, his neighbour had sent the victim to get a *bidi* from a *kirana* shop but the victim never returned back. Pursuant to this reporting, FIR No.38 of 2013 was registered on 30.01.2013 with Police Station Chaigaon Makhan, Khandwa for offences under Sections 363, 366 of the Indian Penal Code.1860 ('IPC', for short) against the appellant.

[1] The High Court of Madhya Pradesh at Jabalpur

(B) The body of the victim was found in an open field on 01.02.2013.

(C) The appellant was arrested on 04.02.2013, and after completion of investigation charge-sheet was filed on 13.02.2013 in the concerned court and the case was committed to Sessions Court on 18.2.2013. The case was posted for 19.02.2013 to consider whether charges be framed or not.

(D) It appears that since no Advocate had entered appearance on behalf of the appellant, on 18.02.2013 a learned Advocate was appointed by the Legal Aid Services Authority to represent the appellant on 19.02.2013. That learned Advocate, however, did not appear on 19.02.2013 when the case was taken up, and as such another learned Advocate came to be appointed through Legal Aid Services to represent the appellant. Such appointment was done on 19.02.2013 and on the same day the charges were framed against the appellant for the offences punishable under Sections 302, 363, 366, 376(2)(f) and 377 IPC and under Sections 4, 5 and 6 of Protection of Children from Sexual Offences Act, 2012.

(E) In the next seven days i.e. by 26.2.2013, all thirteen prosecution witnesses were examined.

(F) Thereafter, the case was dealt with on 27.2.2013, 28.2.2013, 1.3.2013, 2.3.2013 and 4.3.2013 and the orders passed by the Trial Court were :-

> **"(i) 27.02.2013**
>
> State through Shri B.L. Mandloi P.P.
>
> Accused Anokhilal present from judicial custody. Shri D.S. Chauhan advocate present on his behalf.
>
> The prosecution filed application together with letter of District Prosecution Officer and with copy of warrant etc documents. Copies are supplied. The defense has no objection in taking above documents on record, hence considering the reasons of as explained for delay the application is liable to be accepted and above documents are taken on record.
>
> The prosecution stated that it does not want to produce any other oral evidence it has been requested that DNA report and FSL report will

be placed on record as and when they are received, which is immediately to be received, not any other oral evidence are to be adduced and besides placing on record above report, rest of evidence was declared to be ended.

It would be just and proper to examine accused under Section 313 Cr.P.C. for evidence available. Hence, accused examined under Section 313 Cr.P.C. On entering in defense, the accused stated that he does not want to adduce any evidence in defense. Not any written statement under Section 232 (2) Cr.P.C. has been filed.

Put up on 28.02.2013 for placing on record DNA report etc and final arguments.

Sd/- (illegible)
Sessions Judge and Special Judge
Under Protection of Children from Sexual
Offences Act, Khandwa

(ii) <u>28.02.2013</u>

State through Shri B.L. Mandloi P.P.

Accused Anokhilal present from judicial custody. Shri D.S. Chauhan advocate present on his behalf.

An application was filed on behalf of prosecution with FSL reports. Copies supplied. Heard arguments.

Since there is no effective objection regarding allowing above application and taking on record above FSL report and even otherwise these may be helpful in providing justice, hence reports are taken on record.

Above reports may be acceptable under Section 293 Cr.P.C., on this basis it was requested to mark exhibit on above reports. Defense has not raised any objection in this regard, hence with consent of both the parties above reports presented by Regional Forensic Science Laboratory Jhumarghat Rau Indore (M.P.) are marked as ext. C-1, C-2 and C-3.

The prosecution has not yet received DNA report, the same will be placed on record as and when it is received, saying such like earlier it was stated that any other evidence is not to be

produced, hence hearing final arguments in case started, which remained incomplete.

Put up on 01.03.2013 for placing on record DNA report and rest final arguments.

Sd/-
Sessions Judge Khandwa

(iii) <u>01.03.2013</u>

State through Shri B.L. Mandloi P.P.

Accused Anokhilal present from judicial custody. Shri D.S. Chauhan advocate present on his behalf.

The prosecution has not received DNA report, same will be placed on record on receipt.

Hearing of rest of final arguments started which remained incomplete.

Put up on 02.03.2013 for placing on record DNA report and rest of final arguments.

Sd/-
Sessions Judge
Khandwa

(iv) <u>02.03.2013</u>

State through Shri B.L. Mandloi P.P.

Accused Anokhilal present from judicial custody. Shri D.S. Chauhan advocate present on his behalf.

The accused is being tried under Section 9 of Protection of Children from Sexual Offences Act, 2012 and according to Provisions of Section 5 (f) of above Act, the situation of previous conviction for the sexual offence under Section 377 IPC is also clear and above fact has found mention in charge No.8 framed in earlier with intention that despite being previously convicted for sexual offence under Section 377 IPC but in above charge date time and place etc is not mentioned regarding conviction according to provisions of Section 211 (7) Cr.P.C. Hence, as is provided under Section 211 (7) Cr.P.C. the Court before passing order of conviction may add statement of fact, date and place of conviction,

hence in this regard both the parties were heard. In earlier the copy of judgment of previous conviction was not filed due to which date, place etc were not mentioned in charge and during examination under Section 313 Cr.P.C. in question No.14 in this regard by giving reference of copy of judgment together with date, time and place etc conviction was passed and appeal was filed or not in this regard clear questions were asked, hence it also does not reflect that any prejudice has been caused to accused nevertheless to avoid technical fault, according to provisions of Section 211 (7) Cr.P.C. charge was modified and amended charge was read over and explained to accused and his plea was recorded.

Giving opportunity of additional evidence/ cross examination to both parties regarding amended charge would be just and proper, in this regard both the parties were intimated.

Prosecution today by placing on record certain additional documents articles etc. led additional evidence and application under Section 311 Cr.P.C. has been filed. Besides this, he stated not to adduce any other additional evidence in regard to amendment in charge. On the other hand defense also in this regard stated not to conduct cross examine any witness already examined and also stated not to furnish any additional evidence or evidence in defense.

The prosecution presented articles relating to case in sealed condition and an application with documents was filed under Section 311 Cr.P.C. Copy supplied. Arguments heard.

It is proposed to file received DNA report and correspondent of FSL/DNA and in above regard also request has been made to re-examine Investigating Officer K.K. Mishra (PW-13) and Head Constable Harikaran PW-12 and accordingly, permission has been sought.

It has been stated that concerned document and report since were received in delay and it was filed as earliest and by virtue of this correspondence relating to above are being filed now. It is mentioned

that DNA report was received on 01.03.2013 itself hence considering the reason so disclosed during arguments defense has not raised any effective objection hence, application stands allowed and concerned documents are taken on record and witness K.K. Mishra PW-13 and Hari Karan PW-12 are permitted to be re-examined.

It has been stated by the public prosecutor that above witnesses are present today, hence, above both the witnesses were additionally examined with consent of defense and they were discharged after re-examination. Prosecution stated not to adduce any other evidence as such closed its evidence.

The packet of article so filed is in sealed condition, which was opened in presence of both the parties. After evidence let same be deposited in malkhana by duly sealing with memo of property.

In regard to additional evidence so adduced accused was re-examined under Section 313 Cr.P.C. and again on entering in defense, the accused stated not to adduce any evidence in defense nor any written statement was filed under Section 232(2) Cr.P.C. and as such defense closed its evidence. Put up again for final arguments.

Sd/-
Sessions Judge and Special Judge
Under Protection of Children from Sexual
Offences Act, Khandwa

Again

State through Shri B.L. Mandloi P.P.

Accused Anokhilal present from judicial custody. Shri D.S. Chauhan, Advocate present on his behalf.

Heard final arguments. Put up on 04.03.2013 for judgment.

Sd/-
Sessions Judge and Special Judge
Under Protection of Children from Sexual
Offences Act, khandwa

(v) 4.3.2013

State through Shri B.L. Mandloi P.P.

Accused Anokhilal present from judicial custody. Shri D.S. Chauhan, advocate present on his behalf.

The judgment pronounced and signed separately in open court, according to which accused was convicted under Section 363, 366, 377, 376(2)(f) and Section 302 IPC read with Section 6 of Protection of Children from Sexual Offences Act, 2012.

Arguments were heard on the question of sentence. It was informed to both the parties that if they wish, they may adduce evidence regarding order of sentence.

It was stated by the prosecution that due to framing charge under Section 211(7) Cr.P.C. regarding previous conviction of accused, it has already adduced evidence at evidence stage regarding previous conviction of accused and his previous criminal conduct, hence now he does not want to adduce evidence regarding conviction.

On the other hand, learned counsel for the defense Shri D.S. Chauhan he has stated that during whole trial not any member of family of accused has appeared and in regard to his conduct in jail the prosecution itself has already adduced certificate etc. hence he stated not to adduce any evidence regarding order of sentence, nevertheless both the parties were informed that if they wish to adduce any evidence in this regard, then they may do so. By giving above information to both the parties, detailed arguments were heard regarding order of sentence.

Put up again after some time for order of sentence.

Sd/-
Sessions Judge and special Judge
Under Protection of Children from Sexual
Offences Act, Khandwa

Again

State through Shri B.L. Mandloi P.P.

Accused Anokhilal present from judicial custody. Shri D.S. Chauhan, Advocate present on his behalf.

Both the parties again stated not to adduce any evidence regarding order of sentence, hence order of sentence was pronounced separately in open court according to which accused is convicted and sentenced as follows regarding charges:

No.	Offence U/s	Sentence of rigorous imprisonment	Fine	In default of payment of fine, additional sentence of rigorous imprisonment
1.	302 IPC	Death Sentence	-	-
2.	363 IPC	Seven years	1000/-	One month
3.	366 IPC	Seven years	1000/-	One month
4.	377 IPC	Seven years	1000/-	One month
5.	376(2) IPC	Life imprisonment	1000/-	One month

Due to being similar act, no separate sentence is being awarded for the offence under Section 6 of Protection of Children from Sexual Offences Act, 2012.

By preparing warrant of conviction in this regard let accused be sent to jail.

The accused has been sentenced to death also and in above regard according to Section 366 Cr.P.C. it has also been directed that death penalty be not executed so long as it is not confirmed by the Hon'ble High Court, hence in that regard according to provision of Section 366(2) Cr.P.C. warrant of handing over accused sentenced to death to taken in custody of jail, is attached separately with warrant. Copy of judgment is given to accused and according to provisions of section 363 (4) Cr.P.C. accused is informed that he has right to appeal and period of appeal.

Let entire record of this case be sent for placing before the Hon'ble High Court forthwith for confirmation of death penalty as per provisions of Section 366 Cr.P.C.

Sd/-
Sessions Judge and Special Judge
Under Protection of Children from Sexual
Offences Act, Khandwa

(G) In its judgment and order dated 4.3.2013, the Trial Court accepted the case of the prosecution and stated:-

"65. From above analysis it is clear that present case having similar facts like judicial citation of Rajendra Prahladrao Vasnic is in the category of 'rarest of rare' case and excess to that in the present case accused is previous convict in sexual offence of similar nature. Hence, in view of above analysis imposing punishing of only imprisonment for life cannot be adequate and death sentence is necessary.

66. Accused Anokhilal son of Sitaram has been convicted in charge of offence punishable under Section 363, 366, 376(2)(f), 377 and 302 IPC and Section 6 of Protection of Children from Sexual Offences Act, 2012 hence, according to analysis so done:

(one) for the offence under Section302 IPC accused Anokhilal son of Sitaram is awarded 'death sentence'. By tying knot in neck, he be hanged till his death. It is also directed that above death sentence be not executed unless it is confirmed by the Hon'ble High Court.

(two) For the offence under Section 363 IPC the accused is sentenced to seven years rigorous imprisonment with fine of Rs.1000/-, in default of payment of fine, he is directed to undergo another one month rigorous imprisonment.

(three) For the offence under Section 366 IPC, the accused is sentenced to seven years rigorous imprisonment with fine of Rs.1,000/-, in default of payment of fine, the accused is directed to undergo another one month rigorous imprisonment.

(four) For the offence under Section 376 (2)(f) IPC the accused is sentenced to imprisonment for life with fine of Rs.1000/-, in default of payment of fine, he is directed to undergo another one month rigorous imprisonment.

(five) For the offence under Section 377 IPC the accused is sentenced to imprisonment for seven years with fine of Rs.1,000/- in default of payment of fine, he is directed to undergo another one month rigorous imprisonment.

(Six) Considering the provisions of Section 42 of Act, where for similar act the accused has been convicted under the sections of Act and IPC, then he should be sentenced for the offences having larger punishment and in this regard principle of Section 71 IPC is also perusable and in Section 376(2)(f) IPC and in Section 6 of the Act, there is provision of punishment for imprisonment for life and minimum sentence of 10 yrs rigorous imprisonment and for similar act, order of sentence is being passed for the offence under Section 376(2) (f) and Secton 377 IPC also, hence separate order of sentence for the offence under Section 6 of Protection of Children from Sexual Offences Act, 2012 is not being passed.

All the sentences of imprisonment shall run concurrently.

67. The accused is in detention since 04.02.2013 hence, let certificate of the period undergone by him in detention during trial be attached with warrant as per provisions section 428 Cr.P.C. which may be used for setting off under Section 428 Cr.P.C. or as per requirement for computing sentence as provided in Section 433 Cr.P.C.

68. On payment of fine, entire amount of fine means Rs.4000/- unless otherwise directed, after expiry of period of appeal be paid to Shantubai PW-3 mother of deceased as compensation.

69. According to provisions of Section 366 Cr.P.C. let entire records and proceeding of the case be placed before the Hon'ble High Court, Jabalpur for confirmation of death sentence and death sentence be not executed till it is confirmed

> by the Hon'ble Madhya Pradesh High Court and for keeping accused in custody in above period let he be handed over with warrant in above regard for jail custody.
>
> 70. I appreciate for assistance of all where in regard to incident which happened in mid night of 30-31 January, after arrest of accused on 04.02.2013, completing investigation immediately charge-sheet was submitted on 18th February and to prosecution which ensured quick trial by placing entire evidence from 19 February to 02 March, 2013 and specially for assistance of defence because disposal of case is ensured within only 1 month of incident only because of above assistance and completing trial only in 12 working days could be possible."

(H) Criminal Reference No.4/2013 was accordingly registered in the High Court for confirmation of death sentence. The appellant also preferred Criminal Appeal No.748 of 2013 challenging his conviction and sentence. The High Court by its judgment and order presently under appeal, affirmed the view taken by the Trial Court and upheld the death sentence and other sentences imposed by the Trial Court. It was observed by the High Court as under:-

> "8. .....The victim was, thus, last seen alive with the accused by Kirti Bai whose evidence discloses that the victim and accused were seen together at the point of time in proximity with the time and date of the commission of crime. Also after the incident no one saw the accused alone because he had absconded. We are, therefore, of the view that the prosecution has successfully established the last seen theory beyond any reasonable doubt against the accused.
>
> 9. We also find that the report, Ex.58, of the DNA Finger Printing Unit completely connects the accused with the commission of crime. The report clearly states that the hairs seized from the fist of victim and the skin found in the cut-nails of victim belonged to the accused. The report further states that the semen found on the paijama of victim was of the accused. Not only this, according to the report, blood found on the underwear of accused was of the victim. The cremation of the body of victim was done on

> 1.2.2013 whereas the accused was arrested on 4.2.2013. There was, therefore, no possibility of the blood of victim having been put on the seized underwear of the accused.
>
> ... ...
>
> 11. The evidence on record clearly establishes that the accused was close to the family of Ramlal and the victim trusted him. She, therefore, on his asking immediately rushed to buy "bidi" for him from a kirana shop. The accused then followed the victim with a premeditated mind to commit the crime. The accused, taking advantage of the trust of victim, after kidnapping and subjecting her to brutal rape and carnal sex most gruesomely throttled her to death. The numerous injuries on the body of victim testify this fact. He even dumped the body of victim in the field. Earlier also, the accused was convicted vide judgment dated 21.10.2010, Ex.49, for committing carnal sex with a small boy. Thus, an innocent hapless girl of nine years was subjected to a barbaric treatment showing extreme depravity and arouses a sense of revulsion in the mind of a common man. We feel that the crime committed satisfies the test of "rarest of rare" cases. We, therefore, uphold the death sentence and also other sentences imposed by the trial court."

3. During the pendency of these appeals in this Court, it was observed by this Court in its Order dated 12.12.2018 as under:-

> "One of the issues that has arisen in the present case is compliance with the statutory timeframe fixed by proviso to Section 309(1)of the Cr.P.C.(as amended in 2018). That Section provides a time limit of 60 days within which the trial is supposed to be completed. In this context, we consider it appropriate to explore the possibility of using video-conferencing for the purpose of recording evidence since it is believed that such use will eliminate the time taken for summoning the witnesses to Court.
>
> However, an apprehension is expressed at the Bar that the video-conferencing facility is not always available throughout the trial in various

> parts of the country and in the present state of the art, it cannot be wholly relied on. Since, this appears to be surmountable, we consider it appropriate to hear National Informatics Centre (NIC) and Department of Justice in the matter. Accordingly, issue notice ... ..."

4. When these appeals came up for final hearing, certain issues were highlighted by Mr. Siddharth Luthra, learned Senior Advocate who appeared for the appellant on behalf of the Supreme Court Legal Services Authority. According to him, the way the trial was conducted, there was no fairness at all and the interest of the appellant-accused was put to prejudice on more than one count. The principal submission was recorded in the order dated 10.12.2019 passed by this Court as under:-

> "In the submission of the learned Senior Counsel, following aspects are, therefore, very clear:
>
> a) The learned Amicus Curiae came to be appointed the same day when the charges were framed, which effectively means that the learned Amicus Curiae did not have sufficient opportunity to study the matter nor did he have any opportunity to have any interaction with the accused to seek appropriate instructions;

The other issues noted in the Order dated 12.12.2018 were referred to but it was observed:-

> "As presently advised, we will deal first with the issue pertaining to the present trial and whether the approach adopted by the Trial Court in the present matter could be accepted or whether there was any infraction or error on the part of the Trial Court in adopting the approach in the present matter. Other issues, namely applicability of Section 309 and advisability of having video-conferencing in the matter will be dealt with at a later stage and the consideration of these issues, for the time being, is deferred."

5. The consideration at present is thus confined to the issue as stated above.

6. In support of his submissions, Mr. Sidharth Luthra, learned Senior Advocate, relied upon certain decisions of this court and, particularly, in *Bashira*

vs. State of U.P.[2] and *Mohd. Hussain Alias Julfikar Ali vs. State (Government of NCT of Delhi)*[3]. Mr. Varun Chopra, Deputy Advocate General appearing for the State, however, submitted that the evidence on record, without any doubt, pointed towards the guilt of the accused and as such the order of conviction recorded by the Courts below was correct and did not call for any interference.

7. In *Bashira*[2], the Trial Court had fixed 28th February, 1967 as the date for starting the actual trial and, on that very day, before beginning the trial, an *Amicus Curiae* was appointed to represent the accused. On that very day, the Trial Court amended the charge to which the accused pleaded not guilty and two principal prosecution witnesses were examined. The other witnesses were examined on 1st March, 1967 and the accused was also examined under Section 342 of the Code of Criminal Procedure, 1898 (equivalent to Section 313 of the Code of Criminal Procedure, 1973 or "the Code", for short). The case was thereafter fixed on 10th March, 1967 for arguments, on which date the Amicus Curiae presented an application for recall of one of the prosecution witnesses for further cross-examination. The application was rejected. Arguments were then heard on the same day and the judgment was delivered on 13th March, 1967 convicting the accused for the offence under Section 302 IPC and sentencing him to death. In the backdrop of these facts, the submissions of the *Amicus Curiae* appearing in this Court were recorded as under:-

> "2. In this case, the principal ground urged on behalf of the appellant raises an important question of law. Learned counsel appearing for the appellant emphasised the circumstance that the amicus curiae counsel to represent the appellant was appointed by the Sessions Judge on 28th February, 1967, just when the trial was about to begin and this belated appointment of the counsel deprived the appellant of adequate legal aid, so that he was unable to defend himself properly. It was urged that the procedure adopted by the court was not in accordance with law, so that, if the sentence of death is carried out, the appellant will be deprived of his life in breach of his fundamental right under Article 21 of the Constitution which lays down that no person shall be deprived of his life or personal liberty, except according to procedure established by law."

[2] (1969) 1 SCR 32 : AIR 1968 SC 1313
[3] (2012) 9 SCC 408

The submissions were dealt with as under:-

> "8. There is nothing on the record to show that, after his appointment as counsel for the appellant, Sri Shukla was given sufficient time to prepare the defence. The order-sheet maintained by the Judge seems to indicate that, as soon as the counsel was appointed, the charge was read out to the accused and, after his plea had been recorded, examination of witnesses began. The counsel, of course, did his best to cross-examine the witnesses to the extent it was possible for him to do in the very short time available to him. It is true that the record also does not contain any note that the counsel asked for more time to prepare the defence, but that, in our opinion, is immaterial. The Rule casts a duty on the court itself to grant sufficient time to the counsel for this purpose and the record should show that the Rule was complied with by granting him time which the court considered sufficient in the particular circumstances of the case. In this case, the record seems to show that the trial was proceeded with immediately after appointing the amicus curiae counsel and that, in fact, if any time at all was granted, it was nominal. In these circumstances, it must be held that there was no compliance with the requirements of this Rule.
>
> 9. In this connection, we may refer to the decisions of two of the High Courts where a similar situation arose. In *Re: Alla Nageswara Rao, Petitioner*[4] reference was made to Rule 228 of the Madras Criminal Rules of Practice which provided for engaging a pleader at the cost of the State to defend an accused person in a case where a sentence of death could be passed. It was held by Subba Rao, Chief Justice as he then was, speaking for the Bench, that:
>
> "a mere formal compliance with this Rule will not carry out the object underlying the Rule. A sufficient time should be given to the advocate engaged on behalf of the accused to prepare his case and conduct it on behalf of his client. We are

[4] AIR 1957 AP 505

> satisfied that the time given was insufficient and, in the circumstances, no real opportunity was given to the accused to defend himself".

This view was expressed on the basis of the fact found that the advocate had been engaged for the accused two hours prior to the trial. In *Mathai Thommen* v. *State*[5] the Kerala High Court was dealing with a Sessions trial in which the counsel was engaged to defend the accused on 2nd August, 1958, when the trial was posted to begin on 4th August, 1958, showing that barely more than a day was allowed to the counsel to get prepared and obtain instructions from the accused. Commenting on the procedure adopted by the Sessions Court, the High Court finally expressed its opinion by saying:

> "Practices like this would reduce to a farce the engagement of counsel under Rule 21 of the Criminal Rules of Practice which has been made for the purpose of effectively carrying out the duty cast on courts of law to see that no one is deprived of life and liberty without a fair and reasonable opportunity being afforded to him to prove his innocence. We consider that in cases like this counsel should be engaged at least some 10 to 15 days before the trial and should also be furnished with copies of the records."

In our opinion, no hard and fast rule can be laid down as to the time which must elapse between the appointment of the counsel and the beginning of the trial; but, on the circumstances of each case, the Court of Session must ensure that the time granted to the counsel is sufficient to prepare for the defence. In the present case, when the counsel was appointed just before the trial started, it is clear that there was failure to comply with the requirements of the rule of procedure in this behalf.

(Emphasis by us)

It was also stated that the violation of the mandate of the concerned Rule would amount to breach of rights conferred by Article 21 of the Constitution as under:

> "In these circumstances, conviction of the appellant in a trial held in violation of that Rule and the award of sentence of death will result in

[5] AIR 1959 Kerala 241

> the deprivation of his life in breach of the procedure established by law."

The operative part of the decision was :-

> "As a consequence, we set aside the conviction and sentence of the appellant. Since we are holding that the conviction is void because of an error in the procedure adopted at the trial, we direct that the appellant shall be tried afresh for this charge after complying with the requirements of law, so that the case is remanded to the Court of Session for this purpose."

8. In *Hussainara Khatoon and others (IV) v. Home Secretary, State of Bihar, Patna*[6] it was observed as under:

> **"7.** We may also refer to Article 39-A the fundamental constitutional directive which reads as follows:
>
> > "39-A. *Equal justice and free legal aid.*—The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities."
> >
> > (emphasis added)
>
> This article also emphasises that free legal service is an unalienable element of "reasonable, fair and just" procedure for without it a person suffering from economic or other disabilities would be deprived of the opportunity for securing justice. The right to free legal services is, therefore, clearly an essential ingredient of "reasonable, fair and just", procedure for a person accused of an offence and it must be held implicit in the guarantee of Article 21. This is a constitutional right of every accused person who is unable to engage a lawyer and secure legal services on account of reasons such as poverty, indigence or

[6] (1980) 1 SCC 98

> incommunicado situation and the State is under a mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so require, provided of course the accused person does not object to the provision of such lawyer. ....."

9. The developments in the matter of providing free Legal Aid as translated in various schemes and dealt with in the decisions of this Court, were noted in *Rajoo Alias Ramakant v. State of Madhya Pradesh*[7] as under:

> **"6.** By the Forty-second Amendment to the Constitution, effected in 1977, Article 39-A was inserted. This article provides for free legal aid by suitable legislation or schemes or in any other manner, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.
>
> **7.** Article 39-A of the Constitution reads as follows:
>
> > **"39-A.** ***Equal justice and free legal aid.***—The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities."
>
> **8.** Subsequently, with the intention of providing free legal aid, the Central Government resolved (on 26-9-1980) and appointed the "Committee for Implementing the Legal Aid Schemes". This Committee was to monitor and implement legal aid programs on a uniform basis throughout the country in fulfilment of the constitutional mandate.
>
> **9.** Experience gained from a review of the working of the Committee eventually led to the enactment of the Legal Services Authorities Act, 1987 (for short "the Act").

[7] (2012) 8 SCC 553

10. The Act provides, inter alia, for the constitution of a National Legal Services Authority, a Supreme Court Legal Services Committee, State Legal Services Authorities as well as Taluk Legal Services Committees. Section 12 of the Act lays down the criteria for providing legal services. It provides, inter alia, that every person who has to file or defend a case shall be entitled to legal services, if he or she is in custody. Section 13 of the Act provides that persons meeting the criteria laid down in Section 12 of the Act will be entitled to legal services provided the authority concerned is satisfied that such person has a prima facie case to prosecute or defend.

11. It is important to note in this context that Sections 12 and 13 of the Act do not make any distinction between the trial stage and the appellate stage for providing legal services. In other words, an eligible person is entitled to legal services at any stage of the proceedings which he or she is prosecuting or defending. In fact the Supreme Court Legal Services Committee provides legal assistance to eligible persons in this Court. This makes it abundantly clear that legal services shall be provided to an eligible person at all stages of the proceedings, trial as well as appellate. It is also important to note that in view of the constitutional mandate of Article 39-A, legal services or legal aid is provided to an eligible person free of cost.

Decisions of this Court

12. Pending the enactment of the Legal Services Authorities Act, the issue of providing free legal services or free legal aid or free legal representation (all terms being understood as synonymous) came up for consideration before this Court.

13. Among the first few decisions in this regard is *Hussainara Khatoon (4)* v. Home Secretary, *State of Bihar, Patna*[6]. In that case, reference was made to Article 39-A of the Constitution and it was held that (SCC p. 105, para 7) free legal service is an inalienable element of '"reasonable,

fair and just', procedure for a person accused of an offence and it must be held implicit in the guarantee of Article 21 [of the Constitution]". It was noted that: "This is a constitutional right of every accused person who is unable to engage a lawyer and secure [free] legal services on account of reasons such as poverty, indigence or incommunicado situation." It was held that the State is under a mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so require, subject of course to the accused person not objecting to the providing of a lawyer.

14. The essence of this decision was followed in *Khatri and others (II)* v. *State of Bihar*[8]. In that case, it was noted that the Judicial Magistrate did not provide legal representation to the accused persons because they did not ask for it. This was found to be unacceptable. This Court went further and held that it was the obligation of the Judicial Magistrate before whom the accused were produced to inform them of their entitlement to legal representation at State cost. In this context, it was observed that the right to free legal services would be illusory unless the Magistrate or the Sessions Judge before whom the accused is produced informs him of this right. It would also make a mockery of legal aid if it were to be left to a poor, ignorant and illiterate accused to ask for free legal services thereby rendering the constitutional mandate a mere paper promise.

15. *Suk Das* v. *Union Territory of Arunachal Pradesh*[9] reiterated the requirement of providing free and adequate legal representation to an indigent person and a person accused of an offence. In that case, it was reiterated that an accused need not ask for legal assistance—the Court dealing with the case is obliged to inform him or her of the entitlement to free legal aid. This Court observed that (SCC p. 407, para 5) it was now

[8] (1981) 1 SCC 627
[9] (1986) 2 SCC 401

> "settled law that free legal assistance at State cost is a fundamental right of a person accused of an offence which may involve jeopardy to his life or personal liberty and this fundamental right is implicit in the requirement of reasonable, fair and just procedure prescribed by Article 21 [of the Constitution]".

16. Since the requirements of law were not met in that case, and in the absence of the accused person being provided with legal representation at State cost, it was held that there was a violation of the fundamental right of the accused under Article 21 of the Constitution. The trial was held to be vitiated on account of a fatal constitutional infirmity and the conviction and sentence were set aside.

17. We propose to briefly digress and advert to certain observations made, both in *Khatri (2)*[8] and *Suk Das*[9] In both cases, this Court carved out some exceptions in respect of grant of free legal aid to an accused person. It was observed that: (SCC p. 632, para 6)

> "6. ... There may be cases involving offences such as economic offences or offences against law prohibiting prostitution or child abuse and the like, where social justice may require that free legal services need not be provided by the State."

We have some reservations whether such exceptions can be carved out particularly keeping in mind the constitutional mandate and the universally accepted principle that a person is presumed innocent until proven guilty. If such exceptions are accepted, there may be a tendency to add some more, such as in cases of terrorism, thereby diluting the constitutional mandate and the fundamental right guaranteed under Article 21 of the Constitution. However, we need not say anything more on this subject since the issue is not before us.

> **18.** The above discussion conclusively shows that this Court has taken a rather proactive role in the matter of providing free legal assistance to persons accused of an offence or convicted of an offence."

10. In *Mohd. Hussain @ Julfikar Ali v. State (Government of NCT of Delhi)*[3] one of the submissions advanced on behalf of the accused was that he was denied right of a counsel and thus was not given fair and impartial trial. H.L. Dattu, J. (as the learned Chief Justice then was) in para 7 of his decision quoted orders passed by the Trial Court and in paras 10 to 12 observed that the evidence of 56 witnesses was recorded by the Trial Court without providing a counsel to the appellant-accused. It was stated: -

> **"18.** Section 311 of the Code empowers a criminal court to summon any person as a witness though not summoned as a witness or recall and re-examine any person already examined at any stage of any enquiry, trial or other proceeding and the court shall summon and examine or recall and re-examine any such person if his evidence appears to be essential to the just decision of the case.
>
> **19.** If the appellate court in an appeal from a conviction under Section 386 orders the accused to be retried, on the matter being remanded to the trial court and on retrial of the accused, such trial court retains the power under Section 311 of the Code unless ordered otherwise by the appellate court.
>
> **20.** In *Machander* v. *State of Hyderabad*[10], it has been stated by this Court that while it is incumbent on the court to see that no guilty person escapes but the court also has to see that justice is not delayed and the accused persons are not indefinitely harassed. The Court further stated that the scale must be held even between the prosecution and the accused.
>
> **21.** In *Gopi Chand* v. *Delhi Admn*[11], a Constitution Bench of this Court was concerned with the

[10] AIR 1955 SC 792 : (1955) 2 SCR 524
[11] AIR 1959 SC 609 : 1959 Crl. L.J. 782

criminal appeals wherein plea of the validity of the trial and of the orders of conviction and sentence was raised by the appellant. That was a case where the appellant was charged for three offences which were required to be tried as a warrant case by following the procedure prescribed in the Criminal Procedure Code, 1898 but he was tried under the procedure prescribed for the trial of a summons case. The procedure for summons case and warrants case was materially different. The Constitution Bench held that having regard to the nature of the charges framed and the character and volume of evidence led, the appellant was prejudiced; the trial of the three cases against the appellant was vitiated and the orders of conviction and sentence were rendered invalid. The Court, accordingly, set aside the orders of conviction and sentence. While dealing with the question as to what final order should be passed in the appeals, the Constitution Bench held as under: (AIR pp. 619-20, para 29)

> "29. ... The offences with which the appellant stands charged are of a very serious nature; and though it is true that he has had to undergo the ordeal of a trial and has suffered rigorous imprisonment for some time that would not justify his prayer that we should not order his retrial. In our opinion, having regard to the gravity of the offences charged against the appellant, the ends of justice require that we should direct that he should be tried for the said offences de novo according to law. We also direct that the proceedings to be taken against the appellant hereafter should be commenced without delay and should be disposed as expeditiously as possible."

22. A two-Judge Bench of this Court in *Tyron Nazareth* v. *State of Goa*[12], after holding that the conviction of the appellant was vitiated as he was not provided with legal aid in the course of trial, ordered retrial. The brief order reads as follows: (SCC p. 322, para 2)

> *2*. We have heard the learned counsel for the State. We have also perused the decisions of this Court in *Khatri (2)* v. *State of Bihar*[8] and *Sukh Das* v. *UT, Arunachal Pradesh*[9]. We find that the appellant was not assisted by any lawyer and perhaps he was not aware of the fact that the minimum sentence provided under the statute was 10 years' rigorous imprisonment and a fine of Rs 1 lakh. We are, therefore, of the opinion that in the circumstances the matter should go back to the tribunal. The appellant if not represented by a lawyer may make a request to the court to provide him with a lawyer under Section 304 of the Criminal Procedure Code or under any other legal aid scheme and the court may proceed with the trial afresh after recording a plea on the charges. The appeal is allowed accordingly. The order of conviction and sentence passed by the Special Court and confirmed by the High Court are set aside and a de novo trial is ordered hereby."

23. This Court in *S. Guin* v. *Grindlays Bank Ltd.*[13] was concerned with the case where the trial court acquitted the appellants of the offence punishable under Section 341 IPC read with Section 36-AD of the Banking Regulation Act, 1949. The charge against the appellants was that they had obstructed the officers of the Bank, without reasonable cause, from entering the premises of a branch of the Bank and also

[12] 1994 Supp (3) SCC 321
[13] (1986) 1 SCC 654

obstructed the transaction of normal banking business. Against their acquittal, an appeal was preferred before the High Court which allowed it after a period of six years and remanded the case for retrial. It was from the order of remand for retrial that the matter reached this Court. This Court while setting aside the order of remand in para 3 of the Report held as under: (SCC pp. 655-56)

> "*3*. After going through the judgment of the Magistrate and of the High Court we feel that whatever might have been the error committed by the Magistrate, in the circumstances of the case, it was not just and proper for the High Court to have remanded the case for fresh trial, when the order of acquittal had been passed nearly six years before the judgment of the High Court. The pendency of the criminal appeal for six years before the High Court is itself a regrettable feature of this case. In addition to it, the order directing retrial has resulted in serious prejudice to the appellants. We are of the view that having regard to the nature of the acts alleged to have been committed by the appellants and other attendant circumstances, this was a case in which the High Court should have directed the dropping of the proceedings in exercise of its inherent powers under Section 42 of the Criminal Procedure Code even if for some reason it came to the conclusion that the acquittal was wrong. A fresh trial nearly seven years after the alleged incident is bound to result in harassment and abuse of judicial process."

24. The Constitution Bench of this Court in *Abdul Rehman Antulay* v. *R.S. Nayak*[14] considered right of an accused to speedy trial in

[14] (1992) 1 SCC 225

light of Article 21 of the Constitution and various provisions of the Code. The Constitution Bench also extensively referred to the earlier decisions of this Court in *Hussainara Khatoon (1)* v. *State of Bihar*[15], *Hussainara Khatoon (3)* v. *State of Bihar*[16], *Hussainara Khatoon (4)* v. *State of Bihar*[6] and *Raghubir Singh* v. *State of Bihar*[17] and noted that the provisions of the Code are consistent with the constitutional guarantee of speedy trial emanating from Article 21. In para 86 of the Report, the Court framed guidelines. Sub-paras (9) and (10) thereof read as under: *(Abdul Rehman Antulay case*[14], SCC p. 272)

> "*86. (9)* Ordinarily speaking, where the court comes to the conclusion that right to speedy trial of an accused has been infringed the charges or the conviction, as the case may be, shall be quashed. But this is not the only course open. The nature of the offence and other circumstances in a given case may be such that quashing of proceedings may not be in the interest of justice. In such a case, it is open to the court to make such other appropriate order— including an order to conclude the trial within a fixed time where the trial is not concluded or reducing the sentence where the trial has concluded —as may be deemed just and equitable in the circumstances of the case.
>
> (*10*) It is neither advisable nor practicable to fix any time-limit for trial of offences. Any such rule is bound to be qualified one. Such rule cannot also be evolved merely to shift the burden of proving justification on to the shoulders of the prosecution. In every case of complaint of denial of right to speedy trial, it is primarily for

[15] (1980) 1 SCC 81
[16] (1980) 1 SCC 93
[17] (1986) 4 SCC 481

> the prosecution to justify and explain the delay. At the same time, it is the duty of the court to weigh all the circumstances of a given case before pronouncing upon the complaint. The Supreme Court of USA too has repeatedly refused to fix any such outer time-limit in spite of the Sixth Amendment. Nor do we think that not fixing any such outer limit ineffectuates the guarantee of right to speedy trial."
>
> **25.** In *Kartar Singh* v. *State of Punjab*[18], it was stated by this Court that no doubt liberty of a citizen must be zealously safeguarded by the courts; nonetheless the courts while dispensing justice should keep in mind not only the liberty of the accused but also the interest of the victim and their near and dear and above all the collective interest of the community and the safety of the nation so that the public may not lose faith in the system of judicial administration and indulge in private retribution. In that case, the Court was dealing with a case under the TADA Act."

It was thus held that the impugned judgment was required to be reversed and the matter was to be remanded for fresh trial. C.K. Prasad, J. concurred with H.L. Dattu, J. and accepted that the Judgments of conviction and sentence be set aside as the appellant-accused was not given assistance of a lawyer to defend himself during trial. However, in his view, the case was not required to be remanded for fresh trial and the benefit of complete acquittal be given to the appellant-accused.

On this difference of opinion, the matter went to a Bench of three Judges which accepted the view taken by H.L. Dattu, J. and directed *de novo* trial. It was observed[3]:-

> **"15.** Section 304 of the Code mandates legal aid to the accused at State's expense in a trial before the Court of Session where the accused is not represented by a pleader and where it appears to the court that the accused has not sufficient means to engage a pleader.
>
> ... ...

[18] (1994) 3 SCC 569

38. In *Best Bakery case*[19], the Court also made the following observations: (SCC p. 187, paras 38-40)

> "*38*. A criminal trial is a judicial examination of the issues in the case and its purpose is to arrive at a judgment on an issue as to a fact or relevant facts which may lead to the discovery of the fact issue and obtain proof of such facts at which the prosecution and the accused have arrived by their pleadings; the controlling question being the guilt or innocence of the accused. Since the object is to mete out justice and to convict the guilty and protect the innocent, the trial should be a search for the truth and not a bout over technicalities, and must be conducted under such rules as will protect the innocent, and punish the guilty. The proof of charge which has to be beyond reasonable doubt must depend upon judicial evaluation of the totality of the evidence, oral and circumstantial, and not by an isolated scrutiny.
>
> *39*. Failure to accord fair hearing either to the accused or the prosecution violates even minimum standards of due process of law. It is inherent in the concept of due process of law, that condemnation should be rendered only after the trial in which the hearing is a real one, not sham or a mere farce and pretence. Since the fair hearing requires an opportunity to preserve the process, it may be vitiated and violated by an overhasty, stage-managed, tailored and partisan trial.
>
> *40*. The fair trial for a criminal offence consists not only in technical observance of the frame and forms of law, but also in

[19] Zahira Habibulla H. Sheikh vs. State of Gujarat - (2004) 4 SCC 158

> recognition and just application of its principles in substance, to find out the truth and prevent miscarriage of justice."

The Bench emphasised that: *(Best Bakery case*[19]*,* SCC p. 192, para 52)

> "*52.* Whether a retrial under Section 386 of the Code or taking up of additional evidence under Section 391 of the Code [in a given case] is the proper procedure will depend on the facts and circumstances of each case for which no straitjacket formula of universal and invariable application can be formulated."

40. "Speedy trial" and "fair trial" to a person accused of a crime are integral part of Article 21. There is, however, qualitative difference between the right to speedy trial and the accused's right of fair trial. Unlike the accused's right of fair trial, deprivation of the right to speedy trial does not per se prejudice the accused in defending himself. The right to speedy trial is in its very nature relative. It depends upon diverse circumstances. Each case of delay in conclusion of a criminal trial has to be seen in the facts and circumstances of such case. Mere lapse of several years since the commencement of prosecution by itself may not justify the discontinuance of prosecution or dismissal of indictment. The factors concerning the accused's right to speedy trial have to be weighed vis-a-vis the impact of the crime on society and the confidence of the people in judicial system. Speedy trial secures rights to an accused but it does not preclude the rights of public justice. The nature and gravity of crime, persons involved, social impact and societal needs must be weighed along with the right of the accused to speedy trial and if the balance tilts in favour of the former the long delay in conclusion of criminal trial should not operate against the continuation of prosecution and if the right of the accused in the facts and circumstances of the case and exigencies of situation tilts the balance

> in his favour, the prosecution may be brought to an end. These principles must apply as well when the appeal court is confronted with the question whether or not retrial of an accused should be ordered."

11. In *Ankush Maruti Shinde and others vs. State of Maharashtra*[20] the High Court had upheld the conviction and death sentence imposed upon accused nos. 1, 2 and 4 while accused nos. 3, 5 and 6 were sentenced to imprisonment for life. The appeals were preferred by accused nos. 1, 2 and 4 against their conviction and sentence while Criminal Appeal Nos. 881-882 of 2009 were preferred by the State seeking enhancement of sentence of life imprisonment to death sentence in respect of accused nos. 3, 5 and 6. In the Appeals preferred by the State, notice was served upon accused nos. 3, 5 and 6 only on 6.12.2008. However, even before service of such notice, the hearing in respect of all the appeals had begun on 04.12.2008. On 10.12.2008 the learned counsel who was appearing for the accused nos. 1, 2 and 4 was appointed as *Amicus Curiae* to represent accused nos. 3, 5 and 6. The hearing was concluded the same day and the judgment was reserved. By its decision dated 30.04.2009 this Court allowed the Appeals preferred by the State and imposed death sentence upon accused nos. 3, 5 and 6 while confirming the death sentence in respect of accused nos. 1, 2 and 4. All six accused were thus sentenced to death.

Thereafter, Review Petition (Crl.)Nos.34-35 of 2010 were preferred by accused nos. 1, 2 and 4 while Review Petition (Crl.)Nos.18-19 of 2011 were preferred by accused nos. 3, 5 and 6. While allowing Review Petitions by its Order dated 31.10.2018[21], this Court observed:-

> "From the above narration of facts, it is evident that Accused Nos.3, 5 and 6 had no opportunity to be heard by the Bench, before the appeals filed by the State of Maharashtra for enhancement of sentence were decided. They have been deprived of an opportunity of engaging counsel and of urging such submissions as they may have been advised to urge in defence to the appeals filed by the State for enhancement."

This Court, therefore, recalled the Judgment and order dated 30.04.2009 and the Criminal Appeals were restored to the file of this Court to be considered on merits.

---

[20] (2009) 6 SCC 667

[21] Ambadas Laxman Shinde and others vs. State of Maharashtra - (2018) 14 SCALE 730 = (2018) 18 SCC 788

Subsequently, a Bench of three Judges by its decision dated 05.03.2019[22] acquitted the concerned accused of the charges levelled against them. This Court also dismissed the appeals preferred by the State for enhancement of sentence *qua* accused Nos.3, 5 and 6.

12. In *Imtiyaz Ramzan Khan vs. State of Maharashtra*[23] it was observed by this Court:-

> "4. We now come to the common feature between these two matters. Mr. Shikhil Suri, learned advocate appeared for the accused in both the matters. On previous dates letters were circulated by the learned advocate appearing for the petitioners that the matters be adjourned so as to enable the counsel to make arrangements for conducting videoconferencing with the accused concerned. The letter further stated that this exercise was made mandatory as per the directions of the Supreme Court Legal Services Committee. This Court readily agreed[24] and adjourned the matters. On the adjourned date, we enquired from Mr. Shikhil Suri, learned advocate whether he could successfully get in touch with the accused concerned. According to the learned advocate he could not get in touch with the accused in the first matter but could speak with his sister whereas in the second matter he could have video conference with the accused.
>
> 5. In our view such a direction on part of the Supreme Court Legal Services Committee is quite commendable and praiseworthy. Very often we see that the learned advocates who appear in matters entrusted by the Supreme Court Legal Services Committee, do not have the advantage of having had a dialogue with either the accused or those who are in the know of the details about the case. This at times seriously hampers the efforts on part of the learned advocates. All such attempts to facilitate dialogue between the counsel and his client would further the cause of justice and make legal aid meaningful. We, therefore, direct all Legal Services Authorities/Committees in every

[22] 2019 SCC Online SC 317 - Ankush Maruti Shinde and others vs. State of Maharashtra
[23] (2018) 9 SCC 160
[24] (2018) 9 SCC 163-Imtiyaz Ramzan Khan vs. State of Maharashtra

State to extend similar such facility in every criminal case wherever the accused is lodged in jail. They shall extend the facility of videoconferencing between the counsel on one hand and the accused or anybody in the know of the matter on the other, so that the cause of justice is well served."

13. The following principles, therefore, emerge from the decisions referred to hereinbove:-

a) Article 39-A inserted by the 42nd amendment to the Constitution, effected in the year 1977, provides for free legal aid to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. The statutory regime put in place including the enactment of the Legal Services Authorities Act, 1987 is designed to achieve the mandate of Article 39-A.

b) It has been well accepted that Right to Free Legal Services is an essential ingredient of *'reasonable, fair and just'* procedure for a person accused of an offence and it must be held implicit in the right guaranteed by Article 21. The extract from the decision of this Court in *Best Bakery case*[19] (as quoted in the decision in *Mohd. Hussain*[3]*)* emphasizes that the object of criminal trial is to search for the truth and the trial is not a bout over technicalities and must be conducted in such manner as will protect the innocent and punish the guilty.

c) Even before insertion of Article 39-A in the Constitution, the decision of this Court in *Bashira*[2] put the matter beyond any doubt and held that the time granted to the *Amicus Curiae* in that matter to prepare for the defense was completely insufficient and that the award of sentence of death resulted in deprivation of the life of the accused and was in breach of the procedure established by law.

d) The portion quoted in *Bashira*[2] from the judgment of the Madras High Court authored by Subba Rao, J., the then Chief Justice of the High Court, stated with clarity that mere formal compliance of the rule under which sufficient time had to be given to the counsel to prepare for the defense would not carry out the object underlying the rule. It was further stated that the opportunity must be real

where the counsel is given sufficient and adequate time to prepare.

e) In *Bashira*[2] as well as in *Ambadas*[21], making substantial progress in the matter on the very day after a counsel was engaged as *Amicus Curiae,* was not accepted by this Court as compliance of *'sufficient opportunity'* to the counsel.

14. In the present case, the *Amicus Curiae,* was appointed on 19.02.2013, and on the same date, the counsel was called upon to defend the accused at the stage of framing of charges. One can say with certainty that the *Amicus Curiae* did not have sufficient time to go through even the basic documents, nor the advantage of any discussion or interaction with the accused, and time to reflect over the matter. Thus, even before the *Amicus Curiae* could come to grips of the matter, the charges were framed.

The concerned provisions viz. Sections 227 and 228 of the Code contemplate framing of charge upon consideration of the record of the case and the documents submitted therewith, and after *'hearing the submissions of the accused and the prosecution in that behalf'*. If the hearing for the purposes of these provisions is to be meaningful, and not just a routine affair, the right under the said provisions stood denied to the appellant.

15. In our considered view, the Trial Court on its own, ought to have adjourned the matter for some time so that the *Amicus Curiae* could have had the advantage of sufficient time to prepare the matter. The approach adopted by the Trial Court, in our view, may have expedited the conduct of trial, but did not further the cause of justice. Not only were the charges framed the same day as stated above, but the trial itself was concluded within a fortnight thereafter. In the process, the assistance that the appellant was entitled to in the form of legal aid, could not be real and meaningful.

16. There are other issues which also arise in the matter namely that the examination of 13 witnesses within seven days, the examination of the accused under the provisions of the Section 313 of the Code even before the complete evidence was led by the prosecution, and not waiting for the FSL and DNA reports in the present case. DNA report definitely formed the foundation of discussion by the High Court. However, the record shows that the DNA report was received almost at the fag end of the matter, and after such receipt, though technically an opportunity was given to the accused, the issue on the point was concluded the very same day. The concluding paragraphs of the judgment of the Trial Court show that the entire trial was completed in less than one month with the assistance of the prosecution as well as the defense, but, such expeditious disposal definitely left glaring gaps.

17. In *V.K Sasikala vs. State Represented by Superintendent of Police*[25] a caution was expressed by this Court as under:-

> "23.4 While the anxiety to bring the trial to its earliest conclusion has to be shared it is fundamental that in the process none of the well-entrenched principles of law that have been laboriously built by illuminating judicial precedents are sacrificed or compromised. In no circumstance, can the cause of justice be made to suffer, though, undoubtedly, it is highly desirable that the finality of any trial is achieved in the quickest possible time."

18. Expeditious disposal is undoubtedly required in criminal matters and that would naturally be part of guarantee of fair trial. However, the attempts to expedite the process should not be at the expense of the basic elements of fairness and the opportunity to the accused, on which postulates, the entire criminal administration of justice is founded. In the pursuit for expeditious disposal, the cause of justice must never be allowed to suffer or be sacrificed. What is paramount is the cause of justice and keeping the basic ingredients which secure that as a core idea and ideal, the process may be expedited, but fast tracking of process must never ever result in burying the cause of justice.

19. In the circumstances, going by the principles laid down in *Bashira*[2], we accept the submission made by Mr. Luthra, the learned *Amicus Curiae* and hold that the learned counsel appointed through Legal Services to represent the appellant in the present case ought to have been afforded sufficient opportunity to study the matter and the infraction in that behalf resulted in miscarriage of justice. In light of the conclusion that we have arrived at, there is no necessity to consider other submissions advanced by Mr. Luthra, the learned A*micus Curiae.*

All that we can say by way of caution is that in matters where death sentence could be one of the alternative punishments, the courts must be completely vigilant and see that full opportunity at every stage is afforded to the accused.

20. We, therefore, have no hesitation in setting aside the judgments of conviction and orders of sentence passed by the Trial Court and the High Court against the appellant and directing *de novo* consideration. It shall be open to the learned counsel representing the appellant in the Trial Court to make any submissions touching upon the issues (i) whether the charges framed by the Trial Court are required to be amended or not; (ii) whether any of the prosecution

[25] (2012) 9 SCC 771

witnesses need to be recalled for further cross-examination; and (iii) whether any expert evidence is required to be led in response to the FSL report and DNA report. The matter shall, thereafter, be considered on the basis of available material on record in accordance with law.

21. It must be stated that the discussion by this Court was purely confined to the issue whether, while granting free Legal Aid, the appellant was extended real and meaningful assistance or not. The discussion in the matter shall not be taken to be a reflection on the merits of the matter, which shall be considered and gone into, uninfluenced by any observations made by us.

22. Before we part, we must lay down certain norms so that the infirmities that we have noticed in the present matter are not repeated:-

i) In all cases where there is a possibility of life sentence or death sentence, learned Advocates who have put in minimum of 10 years practice at the Bar alone be considered to be appointed as *Amicus Curiae* or through legal services to represent an accused.

ii) In all matters dealt with by the High Court concerning confirmation of death sentence, Senior Advocates of the Court must first be considered to be appointed as *Amicus Curiae.*

iii) Whenever any learned counsel is appointed as *Amicus Curiae,* some reasonable time may be provided to enable the counsel to prepare the matter. There cannot be any hard and fast rule in that behalf. However, a minimum of seven days' time may normally be considered to be appropriate and adequate.

iv) Any learned counsel, who is appointed as *Amicus Curiae* on behalf of the accused must normally be granted to have meetings and discussion with the concerned accused. Such interactions may prove to be helpful as was noticed in *Imtiyaz Ramzan Khan*[23].

23. In the end, we express our appreciation and gratitude for the assistance given by Mr. Luthra, the learned *Amicus Curiae* and request him to assist this Court for deciding other issues as noted in the Orders dated 12.12.2018 and 10.12.2019 passed by this Court, for which purpose these matters be listed on 18.02.2020 before the appropriate Bench.

24. With the aforesaid observations, the substantive appeals stand disposed of, but the matter be listed on 18.02.2020 as directed.

Order accordingly

I.L.R. [2020] M.P. 1047 (SC)
SUPREME COURT OF INDIA

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

C.A. No. 4658/2009 decided on 29 January, 2020

STATE OF M.P. & anr. …Appellants

Vs.

M.P. TRANSPORT WORKERS FEDN. …Respondent

(Alongwith C.A. No. 7613/2009(IV-A))

***A. Labour Laws (Amendment) and Miscellaneous Provisions Act, M.P. 2002 (26 of 2003) and Constitution – Article 14 & 21 – Validity of Amendment* – Held – In the wisdom of legislature, the process would be better served by maintaining regular criminal courts as a forum for adjudication of such disputes which have a criminal aspect, relating to identical 16 labour law statutes – System is working in Criminal Courts for last more than a decade and no grievance has been made out – Impugned order strucking down the amendment is set aside – Amendment Act of 2002 upheld – Appeals allowed. (Paras 7 to 10)**

क. श्रम विधियां (संशोधन) और प्रकीर्ण उपबंध अधिनियम, म.प्र., 2002 (2003 का 26) एवं संविधान – अनुच्छेद 14 व 21 – संशोधन की विधिमान्यता – अभिनिर्धारित – विधायिका के विवेक में, 16 समरूप श्रम विधि कानूनों के संबंध में, ऐसे विवाद जिनके दाण्डिक पहलू हैं, के न्यायनिर्णयन हेतु नियमित दाण्डिक न्यायालयों को एक फोरम के रूप में बनाए रखने से कार्यविधि बेहतर सफल होगी – दाण्डिक न्यायालयों में प्रणाली पिछले एक दशक से अधिक समय से कार्यरत है और कोई शिकायत सिद्ध नहीं की गई है – संशोधन अभिखंडित करने वाला आक्षेपित आदेश अपास्त किया गया – 2002 का संशोधन अधिनियम कायम रखा गया – अपीले मंजूर।

***B. Labour Laws (Amendment) and Miscellaneous Provisions Act, M.P. 2002 (26 of 2003) and Constitution – Article 14 & 21 – Challenge to Legislation – Scope* – Held – The scope is within a limited domain i.e. on the twin test of lack of Legislative competence and violation of any of Fundamental Rights guaranteed in Part III of Constitution. (Para 6)**

ख. श्रम विधियां (संशोधन) और प्रकीर्ण उपबंध अधिनियम, म.प्र., 2002 (2003 का 26) एवं संविधान – अनुच्छेद 14 व 21 – विधान को चुनौती – व्याप्ति – अभिनिर्धारित – व्याप्ति एक सीमित अधिकार क्षेत्र के भीतर है अर्थात्, विधायिकी सक्षमता की कमी तथा संविधान के भाग III में सुनिश्चित मूलभूत अधिकारों में से किसी के उल्लंघन के दोहरे परीक्षण पर।

Cases referred:

(2007) 6 SCC 236, (1996) 3 SCC 709, (2005) 12 SCC 752.

J U D G M E N T

The Judgment of the Court was delivered by : **SANJAY KISHAN KAUL, J. :-** The Labour Bar Association, Satna and M.P. Transport Workers Federation sought to assail the provisions of the Madhya Pradesh Labour Laws (Amendment) and Misc. Provisions Act, 2002 (for short 'the Amendment') enforced by Notification dated 5.8.2005 as *ultra vires* the provisions of Article 14 of the Constitution. The history to the dispute is that the power to try offences under labour laws was conferred on the Labour Courts vide Madhya Pradesh Amendment Act No.43 of 1981, as against the regular criminal Courts. That process was sought to be reversed by the Amendment which was assailed. The rationale was stated to be that the Labour Courts were already burdened and thus, did not have time to adjudicate even the disputes arising out of the Industrial Disputes Act, 1947 and the M.P. Industrial Relations Act, I960. On the other hand, the parties assailing the said Amendment canvassed that the object of shifting the trial of criminal cases relating to labour disputes to Labour Courts had been conferred by Legislation for promoting industrial harmony.

2. In terms of an elaborate judgment of over fifty pages this Amendment was struck down primarily on the ground that Article 21 gave a right for speedy justice and the Amendment in a way took away this right of speedy justice.

3. We have heard learned counsel for the State and since none appeared for the respondents, we deemed it appropriate to appoint Mr. V. Giri, learned senior counsel as Amicus Curiae to assist us in the matter. Thus, we have the benefit even of his submissions.

4. We may note the fact that such criminal offences relating to labour laws of almost 16 statutes were being tried by the criminal Courts till 1981. Thus, the experiment of assigning these cases to the Labour Courts was carried from that year till 2002. The matters were transferred to the criminal Courts as a sequitur to the Amendment of 2002, till the said Amendment was struck down by the impugned order dated 01.08.2008.

5. On the appellant-State approaching this Court, notice was issued on 06.01.2009 and the operation of the impugned order was stayed. Leave was granted on 20.07.2009 and the interim order was made absolute. The result is that the criminal Courts continued to try the offences relating to labour disputes even during the last 11 years.

6. We have to be conscious of the fact that we are debating the legality of a Legislation which has passed the muster of the elected Legislative Assembly and

has received the assent of the President of India. The scope of challenge to such a Legislation is within a limited domain i.e. on the twin test of (1) lack of Legislative competence and (2) violation of any of Fundamental Rights guaranteed in Part III of the Constitution of India. This principle of law has been repeatedly emphasized by this Court in *Greater Bombay Co-operative Bank Ltd. v. United Yarn Tex (P) Ltd*[1]. In the facts of the present case, there is no doubt about the Legislative competence and thus, it is only the second aspect which has to be examined. The impugned judgment seeks to bring the challenge within the window of Article 21 of the Constitution of India, under the right to speedy trial.

7. Actually what has been done is that the cases which ought to have been tried by the regular criminal Courts were sought to be transferred to the Labour Courts by the Amendment of 1981 and only that process was sought to be reversed by the impugned Amendment of 2002. Thus, in the wisdom of the Legislature, the process would be better served by maintaining the regular criminal Courts as a forum for adjudication of such disputes which have a criminal aspect, relating to the identical 16 labour law statutes. It is not the function of this Court to test the wisdom of the Legislature and substitute its mind with the same, as has been reiterated in the cases of *State of Andhra Pradesh & Ors. v. McDowell & Co. & Ors.*[2]. *& Mylapore Club v. State of Tamil Nadu*[3]. It is for the Legislature to weigh this aspect as to what would be the appropriate method for providing expeditious justice to the common man - an aspect which would be common both to the wisdom of the Legislature and of the judiciary.

8. The process as evolved shows that the system, as it is, is working in the criminal Courts for the last more than a decade and no grievance has been made about the same. The absence of any representation on behalf of the respondent(s) further gives credence to this reasoning.

9. We are of the view that it is really not possible to sustain the impugned order which is accordingly set aside and the provisions of Madhya Pradesh Labour Laws (Amendment) & Misc. Provisions Act, 2002 are upheld.

10. The appeals are accordingly allowed leaving the parties to bear their own costs.

11. We appreciate the assistance rendered by Mr. V. Giri, learned Amicus Curiae.

Appeal allowed

[1] (2007) 6 SCC 236
[2] (1996) 3 SCC 709
[3] (2005) 12 SCC 752

I.L.R. [2020] M.P. 1050 (SC)
SUPREME COURT OF INDIA

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

Cr.A. No. 238/2011 decided on 6 February, 2020

CHHOTA AHIRWAR …Appellant

Vs.

STATE OF M.P. …Respondent

***A. Penal Code (45 of 1860), Section 307 r/w 34 – Appreciation of Evidence – Common Intention* – Held – Prosecution failed to establish any common, premeditated or prearranged intention jointly of appellant and main accused to kill the complainant, on the spot or otherwise – Appellant neither carried arms nor opened fire – It is also not proved that pistol was fired by main accused at exhortation of appellant – Conviction set aside – Appeal allowed. (Paras 16 to 20, 28 & 29)**

क. दण्ड संहिता (1860 का 45), धारा 307 सहपठित 34 – साक्ष्य का मूल्यांकन – सामान्य आशय – अभिनिर्धारित – अभियोजन, संयुक्त रूप से अपीलार्थी एवं मुख्य अभियुक्त के घटनास्थल पर या अन्यथा परिवादी की हत्या करने के किसी सामान्य, पूर्व चिंतित अथवा पूर्वायोजित आशय को स्थापित करने में विफल रहा – अपीलार्थी ने न तो शस्त्र उठाए न ही गोली चलाई – यह भी साबित नहीं हुआ कि मुख्य अभियुक्त द्वारा अपीलार्थी की प्रेरणा पर पिस्तौल चलाई गई थी – दोषसिद्धि अपास्त – अपील मंजूर।

***B. Penal Code (45 of 1860), Section 307 r/w 34 – Appreciation of Evidence – Previous Enmity* – Held – In respect of previous enmity and pre-existing family disputes between appellant and complainant, there are notable discrepancies between evidence of complainant and prosecution witness, raising serious doubt about the same – Previous enmity not established. (Para 28)**

ख. दण्ड संहिता (1860 का 45), धारा 307 सहपठित 34 – साक्ष्य का मूल्यांकन – पूर्व वैमनस्यता – अभिनिर्धारित – अपीलार्थी और परिवादी के मध्य पूर्व वैमनस्यता तथा पहले से मौजूद पारिवारिक विवादों के संबंध में परिवादी के साक्ष्य तथा अभियोजन साक्षी के मध्य उल्लेखनीय विसंगतियां हैं, जो कि उक्त के बारे में गंभीर संदेह उत्पन्न करती हैं–पूर्व वैमनस्यता स्थापित नहीं होती।

***C. Penal Code (45 of 1860), Section 34 – Common Intention* – Held – Section 34 lays down a principle of joint liability in a criminal act but mere participation in crime with others is not sufficient to attribute common intention – It is absolutely necessary that intention of each one of the accused should be known to the rest of the accused. (Paras 21 to 27)**

ग. दण्ड संहिता (1860 का 45), धारा 34 – सामान्य आशय – अभिनिर्धारित – धारा 34 एक आपराधिक कृत्य में संयुक्त दायित्व का सिद्धांत प्रतिपादित करती है परंतु अन्य के साथ अपराध में सहभागिता मात्र, सामान्य आशय आरोपित करने के लिए पर्याप्त नहीं है – यह आत्यंतिक रूप से आवश्यक है कि हर एक अभियुक्त का आशय बाकी अभियुक्तगण को ज्ञात होना चाहिए।

Cases referred:

AIR 1958 SC 672, AIR 1960 SC 289, (2005) 9 SCC 195, AIR 2007 SC 2274, (2010) 3 SCC 381, (2003) 1 SCC 268, (2010) SCC 660 (669), AIR 1925 Privy Council 1.

J U D G M E N T

The Judgment of the Court was delivered by :

INDIRA BANERJEE, J. :- This appeal is against a judgment and order dated 5th November, 2008 passed by the High Court of Madhya Pradesh at Jabalpur, dismissing Criminal Appeal No.1050 of 1994 filed by the appellant, and upholding the judgment dated 26th August, 1994 passed by the Additional Sessions Judge, District Panna, Madhya Pradesh in Sessions Case No. 13/1993, *inter alia,* convicting the accused appellant of offence under Section 307 read with Section 34 of the Indian Penal Code.

2. The accused appellant was tried by the Sessions Court, on charges under Section 307/34 of the Indian Penal Code, for attempt, with common intent along with the main accused Khilai, to murder the complainant and for instigating the said accused Khilai to fire at the complainant with a country made pistol, in furtherance of a common intent to kill the complainant.

3. In a nutshell, the case of the Prosecution is that, on 22nd October, 1992 at about 11.00 a.m., there was a quarrel between the accused appellant and the complainant, in which the said accused Khilai intervened. The said accused Khilai who had joined the accused appellant and the complainant, took out a country made pistol from the pocket of his trousers, pointed it towards the complainant and fired at the instigation of the accused appellant, who urged the said accused Khilai to kill the complainant. The complainant, therefore, sustained injuries on his forehead near his eye and on his lips and shoulder with splinters from the pistol and started bleeding. It is the further case of the Prosecution, that after the firing, the accused Khilai fled the scene of occurrence and the accused appellant followed him. Immediately thereafter, the complainant reported the incident at the Mohandra Chowki. The report was forwarded to the Simariya Police station where Crime No.110/1992 was registered.

4. After investigation, Chargesheet was filed against the accused appellant and the main accused Khilai, both of whom pleaded 'Not Guilty" and claimed to be tried. To establish the charges framed against the accused, the Prosecution examined 11 witnesses. The accused appellant did not examine any witness nor did the main accused, Khilai.

5. By a judgment dated 26th August, 1994, the Additional Sessions Judge, Panna held the accused appellant guilty of offence under Section 307/34 of the Indian Penal Code and the main accused Khilai guilty of offence under Section 307 of the Indian Penal Code. By an order of sentence passed on the same day the accused appellant was sentenced to undergo rigorous imprisonment for five years in addition to fine of Rs.1000/-.

6. Being aggrieved by the aforesaid judgment of conviction and order of sentence, the accused appellant appealed to the High Court. The said appeal being Criminal Appeal No. 1050 of 1994 has been dismissed by the judgment and order impugned in this appeal.

7. The accused appellant, the main accused, Khilai, and the complainant were all related. Sunder Lal, father of the main accused Khilai and uncle of the complainant, had given his share of land to the accused appellant for cultivation. There were land disputes between members of the family and in particular between the complainant and the accused appellant.

8. Of the eleven witnesses examined by the Prosecution, the first Prosecution Witnesses (PW-1) only gave evidence of preparation of a sketch map at the place of occurrence and the second Prosecution Witness (PW-2) testified to the receipt of case records in the office of the District Magistrate. The Sixth Prosecution Witness (PW-6) only witnessed the preparation of the site map of the place of occurrence, recovery of an iron splinter and some blood stained clothes and articles. Three witnesses, that is, the 5th, 9th and 10th witnesses (PW-5, PW-9, PW-10) did not support the case made out by the Prosecution and were declared hostile. The ninth and tenth Prosecution Witnesses who were produced to testify to the confession allegedly made by the main accused Khilai in their presence, leading to recovery of the weapon, categorically denied their presence at the time of recovery of the pistol and were declared hostile. They also denied that the main accused Khilai had made any confession. The 11th Prosecution Witness (PW-11) only testified to the arrest of the accused appellant. The evidence of these witnesses is of no relevance to the guilt of the accused appellant.

9. The 8th Prosecution Witness (PW-8) who had been working as Assistant Surgeon at the Primary Health Centre, Mohandra described the wounds found on the body of the complainant and opined that the injuries were caused by splinters from a firearm. In cross examination he said that no splinters were found from the

injury during examination. The evidence of this witness suggests that the injuries could have been caused by firing a pistol. He ruled out the possibility of the injury having been caused as a consequence of explosion of stone. At the highest, the evidence of PW-8 establishes that a pistol was fired, as a result of which the complainant sustained injuries. The possibility of the injuries being sustained while cleaning the pistol was not ruled out by this witness. This witness has also not said anything relevant to the guilt of the accused appellant.

10. The 7th Prosecution Witness (PW-7) was the Investigating Officer, who deposed that he had sent the report of the incident to the Simaria Police Station on the basis of which criminal case No.110/1992 under Section 307/34 of the Indian Penal Code had been registered and had examined the complainant, Prem Shankar Kateha (PW-4), Sabbu Chourasia and Bharat and had seized blood stained clothes, articles etc. from the place of occurrence.

11. There is nothing in the evidence of PW-1, PW-2, PW-5, PW-6, PW-7, PW-8, PW-9, PW-10 and PW-11 to establish the guilt of the accused appellant. The complainant, a cousin of the main accused Khilai, and an injured witness deposed as the 3rd Prosecution Witness (PW-3). PW-3 stated that on 22nd October, 1992, at about 11.00 O'Clock, when he was going to Khareja from his house, the accused appellant stopped him on the way and told him not to cultivate his land. The main accused Khilai also came and intervened, whereupon the complainant told the main accused Khilai, not to interfere and to go home, as he was in no way concerned with the dispute between the complainant (PW-3) and the accused appellant.

12. The complainant (PW-3) deposed that on being told to go home, the main accused Khilai took out a pistol from the right pocket of his pants and pointed it at him. The complainant (PW-3) told the main accused Khilai not to open fire, whereupon the accused appellant urged the main accused Khilai to kill the complainant (PW-3). Thereafter, the main accused, Khilai fired the pistol, causing injury to the complainant with the splinters. The complainant (PW-3) further stated that the incident took place in the presence of Prem Shankar Kateha who desposed as the fourth witness for the Prosecution (PW-4) who was there at the place of occurrence and also in the presence of Sabbu Chourasia who had been selling oil and Bharat Kateha who had been helping in arranging the cans of oil.

13. According to the complainant (PW-3), the aforesaid three persons, Prem Shankar Kateha (PW-4), Sabbu Chourasia and Bharat Kateha challenged the main accused Khilai, whereupon Khilai fled towards the bus stand and the accused appellant followed him running.

14. From the evidence of the complainant (PW-3), it transpires that when heated arguments were going on and the complainant (PW-3) urged the main accused not to interfere as he was in no way concerned, the main accused Khilai took out a pistol from the pocket of his trousers and pointed it towards the complainant (PW-3). When the complainant (PW-3) told the main accused Khilai not to fire, the accused appellant exhorted the accused Khilai to kill the complainant. The complainant (PW-3) said that the main accused Khilai, thereafter, fired at him.

15. The evidence of the complainant (PW-3) indicates the existence of serious disputes between the appellant and the accused, and/or the immediate members of their respective families. In his cross-examination the complainant (PW-3) admitted that one year before the incident his uncle Sunder Lal, that is, father of the main accused Khilai, had filed an application against the complainant (PW-3) and his father Asha Ram at Tehsil office, Pawai regarding the land in dispute. The complainant (PW-3) deposed that at the time of the incident his uncle Sunder Lal had given his share to the accused appellant on 'Batai' for cultivation. He stated that the share of his uncle Sunder Lal, which was given to the accused appellant on 'Batai', was adjacent to his share of land. The complainant (PW-3) also admitted in cross-examination that on the basis of a report filed by the main accused, Khilai, and his father Sunder Lal, a case has been registered under the complainant (PW-3) and his younger brother Buttu in the court of Judicial Magistrate, Pawai under Sections 379 and 447 of the Indian Penal Code. The case was filed before the incident. The complainant (PW-3) also admitted that there were several other cases between the complainant (PW-3) and/or members of his immediate and the accused appellant as also members of the accused appellant's family which were still pending at the time of the incident.

16. It is not in dispute that the accused appellant neither carried arms nor opened fire. The accused appellant is alleged to have instigated the opening of fire. In cross-examination the complainant (PW-3) admitted that he had not in his statement to the police under Section 161 of the Cr.PC stated anything about any instigation by the accused appellant to the main accused Khilai.

17. The Sessions Court has apparently proceeded on the basis that PW-4, eye witness to the incident had corroborated the evidence of the complainant (PW-3). The Sessions Court however overlooked certain serious discrepancies between the evidence of PW-4 and the evidence of the complainant (PW-3) with regard to the alleged role of the accused appellant. While the complainant (PW-3), himself the injured witness, has deposed that the accused appellant exhorted the main accused Khilai to kill him, after the main accused Khilai had pointed the pistol at the complainant (PW-3), PW-4 had deposed that on being told by the accused

appellant to beat the complainant (PW-3), the main accused Khilai took out the pistol from the right pocket of his pant and fired.

18. From the evidence of PW-4 it also transpires that the accused-appellant and the complainant (PW-3) were quarrelling over a land related dispute. The accused appellant asked the complainant (PW-3) not to go to the field, whereupon the complainant retorted that the land belonged to his grandparents, and that no one could stop him from going there. The heated quarrel, with raised voices, attracted attention and about 50/60 villagers gathered at the place of occurrence. The main accused, Khilai, who was cycling by the place of occurrence, stopped and asked the complainant, PW-3 why he was going to the field whereupon the accused appellant told the main accused Khilai that the complainant would not easily give up and urged the main accused to beat him. At this point, the main accused Khilai took out the pistol from his pocket.

19. PW-5, who was declared hostile has confirmed that there was an altercation between the complainant and the accused appellant. According to this appellant, the main accused Khilai came and intervened. The main accused Khilai hurled abuses at the complainant, took out his pistol from his pocket and threatened to kill the complainant if he went to the field. Thereafter the main accused went to the back of the house, after which the sound of firing was heard. PW-5 did not say that the accused appellant instigated the main accused Khilai to shoot.

20. It is not in dispute that the accused appellant did not open fire. The Prosecution has alleged that it was the main accused Khilai who had fired from his pistol and injured the complainant. The question is whether, having regard to the facts established by the Prosecution, the appellant could have been held guilty of offence under Section 307 by invocation of Section 34 of the Indian Penal Code.

21. It is a settled principle of criminal law that only the person who actually commits the offence can be held guilty and sentenced in accordance with law. However, Section 34 lays down a principle of joint liability in a criminal act, the essence of which is to be found in the existence of common intention, instigating the main accused to do the criminal act, in furtherance of such intention. Even when separate acts are done by two or more persons in furtherance of a common intention, each person is liable for the result of all the acts as if all the acts had been done by all of these persons.

22. Section 34 is only a rule of evidence which attracts the principle of joint criminal liability and does not create any distinct, substantive offence as held by this Court in *B.N. Srikantiah vs. Siddiah* reported in AIR 1958 SC 672; *Bharwad Mepa Dana and Anr. Vs. State of Bombay* reported in AIR 1960 SC 289 and other

similar cases. To quote Arijit Pasayat, J. in *Harbans Kaur and Another vs. State of Haryana* reported in (2005) 9 SCC 195; the distinctive feature of Section 34 is the element of participation in action.

23. Common intention can only be inferred from proved facts and circumstances as held by this Court in *Manik Das & Ors. vs. State of Assam* reported in AIR 2007 SC 2274. Of course, as held in *Abdul Mannan vs. State of Assam* reported in (2010) 3 SCC 381, the common intention can develop during the course of an occurrence.

24. Section 34 is only attracted when a specific criminal act is done by several persons in furtherance of the common intention of all, in which case all the offenders are liable for that criminal act in the same manner as the principal offender as if the act were done by all the offenders. This Section does not whittle down the liability of the principal offender committing the principal act but additionally makes all other offenders liable. The essence of liability under Section 34 is simultaneous consensus of the minds of persons participating in the criminal act to bring about a particular result, which consensus can even be developed at the spot as held in *Lallan Rai & Ors. vs. State of Bihar* reported in (2003) 1 SCC 268. There must be a common intention to commit the particular offence. To constitute common intention, it is absolutely necessary that the intention of each one of the accused should be known to the rest of the accused.

25. Mere participation in crime with others is not sufficient to attribute common intention. The question is whether, having regard to the facts and circumstances of this case, it can be held that the Prosecution established that there was a common intention between the accused appellant and the main accused Khilai to kill the complainant. In other words, the Prosecution is required to prove a premeditated intention of both the accused appellant and the main accused Khilai, to kill the complainant, of which both the accused appellant and the main accused Khilai were aware. Section 34 of the Indian Penal Code, is really intended to meet a case in which it is difficult to distinguish between the acts of individual members of a party and prove exactly what part was played by each of them.

26. To attract Section 34 of the Indian Penal Code, no overt act is needed on the part of the accused if they share common intention with others in respect of the ultimate criminal act, which may be done by any one of the accused sharing such intention [see *Ashok Basho* (2010) SCC 660 (669)]**.** To quote from the judgment of the Privy Council in the famous case of *Barendra Kumar Ghosh* reported in AIR 1925 Privy Council 1, "they also serve who stand and wait".

27. Common intention implies acting in concert. Existence of a prearranged plan has to be proved either from the conduct of the accused, or from circumstances or from any incriminating facts. It is not enough to have the same intention independently of each other.

28. The question in this case is, whether the Prosecution has been able to establish a pre-arranged common intention between the accused appellant and the main accused Khilai to kill the complainant in pursuance of which the accused Khilai open fired from his pistol. The answer to the aforesaid question has to be in the negative for the following reasons:

(i) A quarrel broke out between the accused appellant and the complainant. When the accused appellant tried to prevent the complainant from going to the field, the complainant insisted on doing so. While the quarrel was going on, the main accused Khilai arrived at the spot and intervened whereupon the complainant told him off, saying he should go home as he was in no way concerned with the dispute. At this, the main accused Khilai brought out a pistol from his right pant pocket and aimed it at the complainant.

(ii) There is no evidence to establish any pre-arrangement to converge at the place of occurrence. The circumstances established suggest that intervention by the main accused Khilai was by chance. The main accused Khilai chanced to stop as he was passing by the place of occurrence when the accused appellant and the complainant were quarrelling.

(iii) As per the evidence of the complainant, who is a injured witness, when the complainant told the main accused Khilai not to intervene and to go home, Khilai reacted by taking out the pistol from his right pant pocket and pointing it at the complainant. The pistol was taken out by the main accused and pointed at Khilai, without any instigation from the accused appellant.

(iv) Even if it is accepted that the accused appellant uttered the words attributed to him by the complainant (PW-3) in his evidence, this seems to have been done on the spur of the moment. Pre- arrangement is not established.

(v) As observed above, there are some notable discrepancies between the evidence of the complainant (PW-3) and PW-4 which raise serious doubts with regard to the truth and/or accuracy of their evidence particularly in view of the enmity and pre-existing family disputes between the parties.

(vi) Even though PW-5 may have been declared hostile, his evidence is not to be rejected with in its entirely. This witness also confirmed that there was an altercation between the accused appellant and the complainant, in which the main accused Khilai intervened, took out his pistol and aimed it at the complainant. These facts are corroborated by PW-3 (the Complainant) and PW-4. This witness

however stated that the main accused Khilai took out his pistol and threatened to kill the complainant. He did not say that the accused appellant urged the main accused, Khilai to shoot.

29. Even though there may be some evidence that the main accused took out a pistol and opened fire, the Prosecution has miserably failed to establish any common, premeditated or prearranged intention jointly of the accused appellant and the main accused Khilai to kill the complainant, on the spot or otherwise. The Prosecution has also failed to prove that the pistol was fired at the exhortation of the accused appellant. In our considered view, the Sessions Court and the High Court both fell in error in convicting the accused appellant.

30. For the reasons discussed above, the appeal is allowed. The judgment and order of the High Court under appeal, confirming the judgment and order of the conviction of the Sessions Court as also the judgment and order of the Sessions Court are set aside, as against the accused appellant. The accused appellant is acquitted and directed to be set free forthwith. It is made clear that this Court has not considered the merits of the conviction of the main accused Khilai and the appeal, if any, filed by the main accused Khilai shall be decided on its own merits.

Appeal allowed

I.L.R. [2020] M.P. 1058 (SC)
SUPREME COURT OF INDIA

Before Ms. Justice R. Banumathi & Mr. Justice A.S. Bopanna

C.A. No. 1215/2020 decided on 7 February, 2020

NITESH KUMAR PANDEY …Appellant

Vs.

STATE OF M.P. & ors. …Respondents

(Alongwith C.A. Nos. 1216/2020 & 1217-1218/2020)

***A. Service Law – Recruitment/Selection Process – Alteration of Requirement* – Held – Additional criteria introduced after selection process has commenced – Such additional requirement not indicated in guidelines, issued for the entire state – High Court rightly concluded that alteration of requirement after commencement of selection process is not justified – Petition dismissed. (Para 12)**

क. सेवा विधि – भर्ती/चयन प्रक्रिया – आवश्यकता का परिवर्तन – अभिनिर्धारित – चयन प्रक्रिया आरंभ होने के पश्चात्, अतिरिक्त मानदंड पुरः स्थापित किया गया – उक्त अतिरिक्त आवश्यकता, संपूर्ण राज्य के लिए जारी किये गये दिशानिर्देशों में

इंगित नहीं की गई है – उच्च न्यायालय ने उचित रूप से यह निष्कर्षित किया है कि चयन प्रक्रिया के आरंभ हो जाने के पश्चात् आवश्यकता में परिवर्तन किया जाना न्यायानुमत नहीं है – याचिका खारिज।

B. ***Service Law – Recruitment/Selection Process – Alteration of Requirement for Particular District*** **– Held – When the scheme applicable to entire state is made under a common guideline, the alteration of requirement by prescribing additional criteria only in respect of one district without such authority to do will not be sustainable. (Para 11 & 12)**

ख. *सेवा विधि – भर्ती/चयन प्रक्रिया – विशिष्ट जिले के लिए आवश्यकता में परिवर्तन* – अभिनिर्धारित – जब संपूर्ण राज्य पर लागू स्कीम एक सामान्य दिशानिर्देश के अंतर्गत बनाई गई है, तब बिना ऐसे किसी प्राधिकार के केवल एक जिले के संबंध में अतिरिक्त मानदंड विहित करते हुए आवश्यकता में परिवर्तन किया जाना कायम रखे जाने योग्य नहीं होगा।

C. ***Service Law – Recruitment/Selection Process – Approbate and Reprobate*** **– Held – Although it is well settled that a person who acceded to a position and participated in the process cannot be permitted to approbate and reprobate but in instant case, revised time schedule issued by Collector is a schedule prescribed pursuant to recruitment process as provided in guidelines – Mere indication of date of computer efficiency test in time schedule and participation therein cannot be considered as if candidate has acceded to the same so as to estop such candidate from challenging action of respondent – Present case is not a case of approbate and reprobate. (Para 14 & 15)**

ग. *सेवा विधि – भर्ती/चयन प्रक्रिया – अनुमोदन तथा निरनुमोदन* – अभिनिर्धारित – यद्यपि यह सुस्थापित है कि एक व्यक्ति जो किसी पद पर आसीन है तथा प्रक्रिया में भाग लेता है, उसे अनुमोदन करने या निरनुमोदन करने की अनुमति नहीं दी जा सकती परंतु वर्तमान प्रकरण में, कलेक्टर द्वारा जारी की गई पुनरीक्षित समय अनुसूची, भर्ती प्रक्रिया के अनुसरण में विहित की गई एक अनुसूची है जैसा कि दिशानिर्देशों में उपबंधित है – समय अनुसूची में कम्प्यूटर दक्षता परीक्षण की तिथि के उपदर्शन मात्र को तथा उसमें भाग लेने को विचार में नहीं लिया जा सकता, कि मानों अभ्यर्थी ने उक्त को ग्रहण कर लिया है ताकि ऐसे अभ्यर्थी को प्रत्यर्थी की कार्रवाई को चुनौती देने से विबंधित किया जा सके – वर्तमान प्रकरण अनुमोदन करने तथा निरनुमोदन करने का प्रकरण नहीं है।

Cases referred:

(2017) 4 SCC 357, (2009) 15 SCC 458.

J U D G M E N T

The Judgment of the Court was delivered by : **A. S. BOPANNA, J. :-** Leave granted.

2. The appellant in the appeal arising out of SLP No.27200 of 2018 was the appellant in WA No. 509/2018 before the High Court of Madhya Pradesh. In the said writ appeal, the appellant was assailing the order passed by Learned Single Judge dated 02.04.2018 in W.P.No. 1494/2017 and W.P.No. 21425/2016. The appellant in the appeal arising out of SLP No. 28123 of 2018 was the appellant in WA No. 533/2018 in the High Court of Madhya Pradesh. The said appeal was filed assailing the order of Learned Single Judge dated 29.07.2016 in W.P.No.12689 of 2016. The appellant in the appeal arising out of SLP(C) D.No. 41845, was the appellant in W.A No. 207/2017 before the High Court of Madhya Pradesh. The said appeal was disposed of by order dated 28.08.2018 in terms of the order dated 06.08.2008 in R.P.No. 682/2018. Though two separate orders dated 06.08.2018 passed in WA Nos. 509 and 533/2018 and order dated 28.08.2018 in W.A.No.207/2017 are assailed in these appeals, since the issue is common and all the writ appeals have been disposed of by the High Court relying upon its earlier orders, these appeals were taken up together, heard and are being disposed of by this common judgment.

3. The issue relates to the selection to the post of Gram Rojgar Sahayak in the Panchayat of the Rewa District in Madhya Pradesh. Though the issue presently pertains to the method adopted in the selection process in Rewa District, the scheme applicable to the entire state of Madhya Pradesh for such recruitment of Gram Rojgar Sahayak for implementation of the Mahatma Gandhi National Rural Employment Guarantee Scheme ('MGNREGS' for short) is to be taken note and the matter is to be decided in that background. As noted, the issue presently being limited to the selection process in Rewa District assailing the method that was followed therein, it is seen that a batch of writ petitions relating to the same process were earlier considered by a Learned Single Judge through the order dated 15.07.2016 and had allowed the writ petitions bearing W.P.No.17183/2014 and the analogous matters. Challenge to the said order had concluded through the order passed by the Division Bench in W.A.No.479/2016 and the second Review Petition in R.P.No.682/2018. In that circumstance, since in the present case the contentions put forth by the appellants herein before the Division Bench of the High Court was similar to the said cases, the Division Bench of the High Court had dismissed the said writ appeals bearing W.A.Nos.509/2018, 533/2018 and W.A.No.207/2017. The appellants claiming to be aggrieved are, therefore, before this court in these appeals.

4. At the outset, it is to be noted that though the orders dated 06.08.2018 and 28.08.2018 passed in the Writ Appeals relating to the appellants herein are

assailed, the relied upon order which contains the reasoning adopted by the High Court is not assailed in these appeals. That apart the SLP against the earlier order is already dismissed. Be that as it may, since the issue urged herein is to assail the relief granted to the writ petitioners by the High Court, the consideration of the correctness or otherwise is to be made in that regard.

5. Heard Mr. Anoop G. Chaudhari, Ms. June Chaudhari and Mr. Satyam Reddy, respective learned Senior Advocates for the appellants, Mr. Santosh Paul, learned Senior Advocate for the private respondent and Mr. Rahul Kaushik, learned Advocate for the State of Madhya Pradesh. In that light we have also perused the appeal papers.

6. The brief facts are that the official respondents invited applications for appointment to the post of Gram Rojgar Sahayak. The said appointment was to be made in terms of the fresh guidelines dated 02.06.2012 issued by the Madhya Pradesh State Employment Guarantee Parishad which is a registered institution constituted under the Panchayat and Rural Development Department. As per the same, one Gram Rojgar Sahayak per panchayat was to be appointed under the MGNREG scheme. The said guidelines provided for the qualifications which were classified as (a) Compulsory qualifications and (b) Desired qualifications. The compulsory qualifications specified was with regard to the basic education qualifications and under the Desired qualifications it referred to computer exam pass from any one institution mentioned in the memo of General Administration Department. Clause (8) of the said guidelines also provided with regard to the Selection process whereunder sub-Clause (8) therein further provided for the assignment of maximum marks under each of the criteria stated therein. In so far as the computer examination, the pass certificate from the different Universities are named therein and the maximum marks of '50' is provided thereunder.

7. Though the selection process was to be conducted based on the criteria and the method of assessment provided under the guidelines dated 02.06.2012, the office of Collector, Rewa, Madhya Pradesh issued a Revised Time Schedule for recruitment of Gram Rojgar Sahayak, dated 17.06.2014 and the date for initiation of recruitment was indicated as ... 'before 20th June, 2014'. Similarly, the schedule for the different stages in the selection process was indicated. At serial No.9 of the Revised Time Schedule, the outer date was indicated for holding of computer efficiency test of selected candidates and those at the top of the merit list, which was to be held before 18th September. Pursuant to the same, the process was conducted but the writ petitioners were removed from the select list based on the result of the computer efficiency test. Since the computer efficiency test was not contemplated as a criteria for selection under the fresh guidelines dated 02.06.2012, the writ petitioners assailed the same before the Learned Single Judge, in the said batch of writ petitions.

8. The Learned Single Judge after taking note of the above facts arrived at the conclusion that the reading of the scheme shows that the selection procedure and methodology of giving marks do not include the computer efficiency test and the marks arising out of such test. The writ petitioners were meritorious and their names were in the merit list, but for the marks of the computer efficiency test being included. In view of that position, the writ petitioners were taken out of the select list which was held, not justified. In that regard, the Learned Single Judge had taken note that the method was altered after the selection process had commenced which is not permissible. It was held that the introduction of the computer efficiency test mid-way was contrary to the settled legal position and as such disapproved the action of the respondents in prescribing the computer efficiency test, dehors the common guidelines. Accordingly, the writ petitions were allowed. The candidates who had benefitted in the selection process due to the holding of computer efficiency test preferred the writ appeals claiming to be aggrieved. The Division Bench of the High Court having taken note of the factual aspects had agreed with the reasons assigned by the Learned Single Judge and dismissed the writ appeals. The review petitions in R.P.No.611/16, 612/16 and connected matters were also rejected through order dated 17.10.2016, save certain observations made relating to the protection of meritorious candidates who had also appeared for the computer efficiency test. The Special Leave Petitions filed before this Court by some of the appellants had also been dismissed.

9. The learned senior Advocate for the appellants while assailing the order passed by the High Court would contend that the implementation of the MGNREG Scheme required skill in computer application as the entire process was computerised and the various functions relating to the same could only be implemented by a person having efficiency in handling the computers. In that view it was contended, when the Gram Rojgar Sahayak was to undertake such work, the computer efficiency was an aspect to be tested, which was a part of the selection process and, therefore, in that circumstance when the office of the Collector had chosen to include the computer efficiency test as a criteria, the High Court ought not to have accepted the contention put forth by the writ petitioners. It is contented that the Revised Time Schedule was issued on 17.06.2014 and the process was commenced on 20.06.2014, therefore, the change had not been introduced after the commencement of the process. It is, in that view, contended that the writ petitioners being aware of the schedule, had appeared in the computer efficiency test and having failed to qualify cannot thereafter turn around to challenge the same. It is contended that the law is well settled in that regard, which has been ignored by the High Court. Therefore, the order passed is to be treated as per incuriam.

10. The learned senior Advocate for the private respondent would seek to justify the order passed by the High Court. It is contended that the Collector, Rewa District had exceeded his powers and had introduced a criteria which was not contemplated in the fresh guidelines dated 02.06.2012. It is pointed out that the guidelines dated 02.06.2012 provided that the Desired qualification relating to computer course should be from the institutions specified and had also provided for assigning marks under that criteria which alone is the prescribed norm for selection under the guidelines and did not provide for efficiency test. The selection process had commenced pursuant to the said guidelines and the Revised time Schedule, whereunder the computer efficiency test was introduced is in alteration of the process which had already commenced. Hence the High Court was justified in its conclusion is the contention. It is further contended that the writ petitioners were not estopped from challenging the action inasmuch as the Revised Time Schedule had only indicated that the computer efficiency test was for the selected candidates and those at the top of the merit list. It was submitted that the revised time schedule did not specify the qualification in computer efficiency test to be a pre-condition to secure inclusion in the select list. The writ petitioners were already in the select list. The exclusion from the merit list is also not indicated therein and, therefore, the writ petitioners in that light had not acceded to any criteria while appearing for the computer efficiency test as the same was shown only as a process subsequent to the selection list. In any event the High Court has taken note of the said aspect, addressed the contentions and thereafter arrived at its conclusion and, therefore, the order cannot be termed as per incuriam as contended.

11. In the light of the contention, a perusal of the order passed by the learned single judge as also the order passed in the writ appeal and the review petition in the relied upon cases relating to Amit Kumar Mishra and Others would indicate that a detailed discussion has been made by the High Court and we see no reason to differ from the same. In this regard we have noticed the fresh guidelines dated 02.06.2012. Though the said guidelines refer to the requirement of computer knowledge as a Desired qualification, the same also provides for such qualification in computer exam from the institutions depicted therein and the selection process provides for the assignment of marks which has been extracted and taken note by the Learned Single Judge. The said guidelines are applicable to all the Districts in the entire state of Madhya Pradesh as confirmed by the learned Advocate for the State of Madhya Pradesh. The Revised Time Schedule dated 17.06.2014 issued by the Collector, Rewa, Madhya Pradesh is only in respect of one District namely District Rewa.

12. Therefore, at the outset when the scheme applicable to the entire State is made under a common guideline, the alteration of the requirement by prescribing

an additional criteria only in respect of one District without such authority do so will not be sustainable. Furthermore, the application for the post of Gram Rojgar Sahayak was to be made in terms of the revised guidelines dated 02.06.2012. By the Revised Time Schedule dated 17.06.2014 what is provided for essentially is the time frame for carrying out each of the requirement relating to the initiation of the recruitment till the selected candidate joins the post. It is under the said time schedule, a date has been fixed for holding the computer efficiency test. Therefore, it would indicate that the additional criteria has been introduced after the selection process has commenced and when such requirement was not indicated in the fresh guidelines dated 02.06.2012 issued in respect of the entire State. Therefore, the conclusion reached by the High Court that the requirement has been altered after the commencement of the selection process is justified and unassailable.

13. The learned senior Advocate for the appellants while contending that the writ petitioners having participated in the computer efficiency test are estopped from raising any grievance subsequently has placed strong reliance on the decision of the Supreme Court in the case of *Ashok Kumar and Another vs. State of Bihar and Others* (2017) 4 SCC 357 wherein it is held as hereunder:-

> 13. The law on the subject has been crystallised in several decisions of this Court. In Chandra Prakash Tiwari v. Shakuntala Shukla, this Court laid down the principle that when a candidate appears at an examination without objection and is subsequently found to be not successful, a challenge to the process is precluded. The question of entertaining a petition challenging an examination would not arise where a candidate has appeared and participated. He or she cannot subsequently turn around and contend that the process was unfair or that there was a lacuna therein, merely because the result is not palatable. In Union of India v. S. Vinodh Kumar, this court held that:
>
> > "18. It is also well settled that those candidates who had taken part in the selection process knowing fully well the procedure laid down therein were not entitled to question the same. (See Munindra Kumar v. Rajiv Govil and Rashmi Mishra v. M.P. Public Service Commision.)"

In that light it is further contended that the Supreme Court in the case of *Subhash Chandra and Another vs. Delhi Subordinate Services Selection Board and Others* (2009) 15 SCC 458 has held that a decision rendered in ignorance of a binding precedent will have to be held as a decision rendered per incuriam.

14. Having taken note of the decisions cited, we have no doubt in our mind that the well accepted position in law is that the person who has acceded to a

position and participated in the process cannot be permitted to approbate and reprobate. It is a norm that if a person/candidate having taken note of a requirement in the notification and even if it is objectionable does not challenge the same but despite having knowledge of the same participates in the said process and takes a chance, on failing in the process such person/candidate cannot turn around and assail the same. Though that is the position in law, the said position of law will not be applicable to the present case as the facts in the case on hand is not the same. In the cited case of Ashok Kumar, it was a situation where the subsequent notification for written examination was issued after nullifying the result of the earlier written examination. The petitioner therein who had appeared for the examination earlier, having knowingly participated in the process by once again appearing for the examination which was notified had thereafter challenged, which was a clear case of approbate and reprobate. On the other hand in the instant case, firstly, the Revised Time Schedule issued by the Collector, Rewa cannot be termed as the recruitment notification indicating all the criteria for selection; but can only be termed as a time schedule prescribed pursuant to the recruitment process as provided under the fresh guidelines dated 02.06.2012. Therefore, a candidate already in selection list who has appeared in the computer efficiency test on the date depicted in the revised time schedule cannot be considered to have appeared after having knowledge that the same will also be a part of the assessment for selection and cannot be put on the same pedestal. This is more so in a circumstance wherein the schedule for "18th December" as prescribed reads "....holding of computer efficiency test of selected candidates and those at the top of merit list". A perusal of the same would indicate that the entire selection would be based on the criteria prescribed and the marks as assigned under the fresh guidelines dated 02.06.2012 and appearance for the computer efficiency test would be treated as a requirement which would enable the authorities to assess a person who has otherwise qualified and has been found fit to be in the selected list or is at the top of the merit list.

15. Therefore, in that circumstance the mere indication of the date for computer efficiency test in the time schedule and the participation therein cannot be considered as if the candidate has acceded to the same so as to estop such candidate from challenging the action of the respondent if the name of such candidate is removed from the select list thereafter treating the same as the basis. Hence in the instant case it cannot be considered as a typical case of approbate and reprobate. In that view since the high court has addressed this issue taking note of the decision which was cited before it and has thereafter arrived at its conclusion, the decision relied on by the learned senior counsel for the appellants, in the case of *Ashok Kumar and Another vs. State of Bihar and Others* will not be of any assistance. Hence it cannot be held that the decision of the High Court is per incuriam as contended.

16. Further what cannot escape the attention is also that certain other persons who were similarly placed as that of the petitioners have already approached this court in SLP Nos.3239-3242/2017 wherein the relied upon decision in the review petition was assailed but this court has dismissed the special leave petitions. Therefore, taking into consideration all the aspects of the matter we see no reason to interfere with the orders impugned herein.

17. During the course of the argument, the learned senior Advocate for the appellants also referred to certain observations contained in the order dated 17.10.2016 passed by the Division Bench in the review petition where certain protection is provided to the meritorious candidates who have been selected under the policy dated 02.06.2012. In that regard we do not find it appropriate to advert and make any comment since we have already arrived at conclusion that the orders impugned do not call for interference.

18. The appeals are accordingly dismissed without any order as to costs. Pending applications if any, shall also stand disposed of.

Appeal dismissed

I.L.R. [2020] M.P. 1066 (DB)
WRIT APPEAL

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

W.A. No. 1657/2018 (Gwalior) decided on 19 February, 2020

STATE OF M.P. & anr. …Appellants

Vs.

PRADEEP KUMAR SHARMA …Respondent

***A. Municipal Service (Executive) Rules, M.P., 1973, Rule 31, 33 & 34 – Disciplinary Proceedings – Competent Authority* – Held – Rules of 1973 do not apply to a substantively appointed Revenue Sub-Inspector (petitioner) even if he holds the officiating charge of higher post of CMO – Rules of 1973 do not govern the service condition of Revenue Sub-Inspector – Single Judge rightly quashed the charge-sheet issued to respondent by Additional Director, Urban Administration holding it as an incompetent authority – Appeal dismissed. (Para 7.1)**

***क. नगरपालिका सेवा (कार्यपालन) नियम, म.प्र., 1973, नियम 31, 33 व 34 – अनुशासनिक कार्यवाहियां – सक्षम प्राधिकारी* –** अभिनिर्धारित – 1973 के नियम एक मूल रूप से नियुक्त किये गये राजस्व उप–निरीक्षक (याची) पर लागू नहीं होते भले ही वह मुख्य नगरपालिका अधिकारी के उच्चतर पद का स्थानापन्न भार धारण करता हो – 1973 के नियम राजस्व उप–निरीक्षक की सेवा शर्त निर्धारित नहीं करते – एकल न्यायाधीश ने

अतिरिक्त निदेशक, नगरीय प्रशासन को एक अक्षम प्राधिकारी धारित करते हुए उसके द्वारा प्रत्यर्थी को जारी किये गये आरोप–पत्र को उचित रूप से अभिखंडित किया – अपील खारिज।

***B. Municipal Employees (Recruitment and Conditions of Service) Rules, M.P. 1968, Rule 51 – Initiating Disciplinary Proceedings – Competent Authority* – Held – Rule 51 deals with competence of disciplinary authority to inflict minor or major penalty but does not relate to competence to initiate disciplinary proceedings. (Para 7.3)**

ख. नगरपालिका कर्मचारी (भर्ती तथा सेवा की शर्तें) नियम, म.प्र., 1968, नियम 51 – अनुशासनात्मक कार्यवाहियां आरंभ करना – सक्षम प्राधिकारी – अभिनिर्धारित – नियम 51 अनुशासनिक प्राधिकारी के लघु एवं दीर्घ शास्ति से दण्डित करने की सक्षमता से संबंधित है, परंतु अनुशासनात्मक कार्यवाही आरंभ करने की सक्षमता से संबंधित नहीं है।

***C. Service Law – Initiating Disciplinary Proceeding – Competent Authority – Principle of Service Jurisprudence* – Held – In absence of any provisions in any Act or Rules, vesting any particular authority with power to initiate disciplinary proceedings in specific terms, trite principle of service jurisprudence will follow whereby any authority senior to or having administrative control over employee will be competent to initiate disciplinary proceedings or issue charge-sheet. (Para 8)**

ग. सेवा विधि – अनुशासनात्मक कार्यवाही आरंभ करना – सक्षम प्राधिकारी – सेवा विधि शास्त्र का सिद्धांत – अभिनिर्धारित – अधिनियम अथवा नियमों में किन्हीं उपबंधों के अभाव में, किसी विशेष प्राधिकारी को विनिर्दिष्ट शर्तों में अनुशासनात्मक कार्यवाहियां आरंभ करने की शक्ति निहित करने के लिए, सेवा विधिशास्त्र का पुराना सिद्धांत लागू होगा जिसके अनुसार कोई भी प्राधिकारी जो कि कर्मचारी से वरिष्ठ हो अथवा जिसका उस पर प्रशासनिक नियंत्रण हो, अनुशासनात्मक कार्यवाहियां आरंभ करने अथवा आरोप–पत्र जारी करने के लिए सक्षम होगा।

***D. Municipalities Act, M.P. (37 of 1961), Section 70 and Municipal Employees (Recruitment and Conditions of Service) Rules, M.P. 1968, Rule 51* – Held – Mayor-in-Council is appointing authority of petitioner – Additional Director/Additional Commissioner, Urban Administration is not vested with any power under Act of 1961 nor is a superior/controlling authority for post of Revenue Sub-Inspector (petitioner) enabling it to initiate disciplinary proceedings – Charge-sheet issued was bereft of jurisdiction. (Para 12 & 13)**

घ. नगरपालिका अधिनियम, म.प्र. (1961 का 37), धारा 70 एवं नगरपालिका कर्मचारी (भर्ती तथा सेवा की शर्तें) नियम, म.प्र., 1968, नियम 51 – अभिनिर्धारित – परिषद् का महापौर/मेयर–इन–काउंसिल, याची का नियुक्ति प्राधिकारी है – अतिरिक्त निदेशक/अतिरिक्त आयुक्त, नगरीय प्रशासन को 1961 के अधिनियम के अंतर्गत न तो कोई शक्ति निहित की गई है, न ही वह राजस्व उप–निरीक्षक (याची) के पद के लिए एक

वरिष्ठ/नियंत्रक प्राधिकारी है जो कि अनुशासनात्मक कार्यवाहियां आरंभ करने हेतु उसे सामर्थ्यकारी बनाती हो – जारी किया आरोप–पत्र बिना किसी अधिकारिता के था।

***E. Service Law – Initiation of Disciplinary Proceedings & Imposing Penalty – Competent Authority* – Held – Concept of initiating disciplinary proceedings and imposing penalty at end of disciplinary proceedings are distinct especially from the point of view of competence of authority to initiate and punish – Issuance of charge-sheet/initiation of disciplinary proceedings is not a punishment. (Para 9)**

ङ. सेवा विधि – अनुशासनात्मक कार्यवाहियां आरंभ की जाना व शास्ति अधिरोपित की जाना – सक्षम प्राधिकारी – अभिनिर्धारित – अनुशासनात्मक कार्यवाहियां आरंभ करने की संकल्पना तथा अनुशासनात्मक कार्यवाहियों की समाप्ति पर शास्ति अधिरोपित करना दो भिन्न चीजें हैं विशेष रूप से प्राधिकारी की आरंभ करने तथा दण्डित करने की सक्षमता के दृष्टिकोण से – आरोप–पत्र जारी किया जाना/अनुशासनात्मक कार्यवाही का आरंभ किया जाना, एक दण्ड नहीं है।

Cases referred:

(1970) 1 SCC 108, (1993) 1 SCC 419, (1996) 2 SCC 145, [2013 (III) MPJR 131].

Pratip Visoriya, G.A. for the appellants/State.
M.P.S. Raghuvanshi, for the respondent.

O R D E R

The Order of the Court was passed by :

SHEEL NAGU, J. :- The instant intra-court appeal preferred u/S.2(1) of the Madhya Pradesh Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, 2005 assails the final order dated 23.02.2018 passed by learned Single Judge exercising writ jurisdiction under Article 226 of Constitution of India allowing W.P. No.5699/2017 preferred by the respondent/employee by quashing the charge-sheet dated 16.06.2017 (Annexure P/1) on the ground of having been issued by an incompetent authority i.e. Additional Director, Urban Administration and Development, Bhopal (M.P.), by holding that in terms of Rule 51 of Madhya Pradesh Municipal Employees (Recruitment and Conditions of Service) Rules, 1968 (for brevity "1968 Rules"), the Municipal Council/Standing Committee of Municipal Council alone is competent to initiate disciplinary proceedings.

2. Learned counsel for the rival parties are heard on the question of admission.

3. Undisputed facts are that for the period when the respondent/employee who substantively holds the post of Revenue Sub-Inspector of Municipality, was officiated as Chief Municipal Officer, Municipal Council Vijaypur, District

Sheopur, was proceeded again on disciplinary side by issuance of impugned charge-sheet dated 16.06.2017 (Annexure P/1) by Additional Director/Additional Commissioner, Urban Administration and Development, Bhopal under Rules 31, 33 and 34 of Madhya Pradesh State Municipal Service (Executive) Rules, 1973 (for brevity "1973 Rules").

4. Challenge in W.P. No.5699/2017 was to the charge-sheet, Annexure P/1 alone, at the stage when disciplinary proceedings were pending

5. Learned Single Judge quashed the charge-sheet on the following two grounds: -

(i) 1973 Rules are not applicable to the petitioner and thus reference of Rules 31, 33 and 34 of 1973 Rules in the impugned charge-sheet is uncalled for.

(ii) 1968 Rules alone govern the disciplinary proceedings taken against the petitioner since petitioner substantively holds the post of Revenue Sub-Inspector and thus is municipal employee and not the employee of the State.

(iii) Appointment of petitioner as Revenue Sub-Inspector which is the post specified u/S.94 of M.P. Municipalities Act, 1961 (for brevity "1961 Act") and such appointment is made with concurrence of State Government and since the Additional Director/Additional Commissioner, Urban Administration and Development, Bhopal, is not the Government as defined in Rule 2(e) of 1968 Rules, the charge-sheet issued by Additional Director/Additional Commissioner is untenable.

(iv) Additional Director/Additional Commissioner, Urban Administration and Development, Bhopal, is not the disciplinary authority as contemplated by Rule 51 of Rules, 1968.

6. In the backdrop of aforesaid factual scenario the question that falls for consideration is as follows:-

> *"Whether for deciding the competence of the authority to initiate disciplinary proceedings, can Rule 51 of 1968 Rules or Rule 31, 33 and 34 of 1973 Rules be invoked?"*

7. For ready reference and convenience Rules, 31, 33 and 34 of Rules, 1973 and Rule 51 of Rules, 1968 are reproduced below:-

Rules of 1973

31. Penalties.- *The following penalties may, for good and sufficient reasons and as hereinafter provided be imposed on a member of the service, viz :-*

(i) censure;

(ii) withholding of increments or promotion;

(iii) recovery from pay of the whole or part of any pecuniary' loss caused to the Council by negligence or breach of orders;

(iv) reduction in rank including reduction to a lower grade or post or to a lower time scale or to a lower stage in a time scale;

(v) removal from service which shall not be a disqualification for future employment;

(vi) dismissal from service which shall be disqualification for future employment.

Explanation.- (i) The discharge-

(a) of a probationer during or at the end of the period of probation on grounds arising out of the specific conditions laid down by the appointing authority e.g., want of vacancy, failure to acquire prescribed special qualifications to pass prescribed test; or

(b) of a person appointed otherwise in or under contract to hold a temporary appointment, on the expiration of the period of the appointment; or

(c) of a person engaged under contract in accordance with the terms of his contract, does not amount to removal or dismissal within the meaning of this rule.

(ii) The discharge of a probationer, whether during, or at the end the period of probation for some specific fault or on account of his unsuitability for the service does not amount to removal or dismissal within the meaning of this rule.

(iii) The stoppage of a member of the service at the efficiency bar in the time scale of his pay on the ground of his unfitness to cross the bar does not amount to withholding of increments or promotion within the meaning of this rule.

(iv) A refusal to promote a member of the service after due consideration of his case to a post or grade to which promotions are made by selection, docs not amount to withholding of a promotion within the meaning of this rule.

(v) The reversion to a lower post of a member of the service who is officiating in a higher post, after a trial in the higher post or for administrative reasons (such as the return of the permanent incumbent from leave or deputation, availability of a more suitable officer and the like) docs not amount to reduction in rank within the meaning of this rule.

33. Procedure for imposing certain penalties. *- (1) Without prejudice to the provisions of the Public Servants Enquiry Act, 1850. no order shall be passed imposing any of the penalties specified in clauses (iv) to (vi) of Rule 31 on a member of the service unless he has been*

informed in writing of the grounds on which it is proposed to take action and has been afforded an adequate opportunity of defending himself.

(2) The grounds on which it is proposed to take action shall be reduced to the form of a definite charge or charges which shall be communicated to the member of the service charged together with a statement of allegations on which each charge is based and on any other circumstances which it is proposed to take into consideration in passing orders on the case.

(3) The member of the service shall be required within such time, as may be specified by the appointing authority, to submit a written statement of his defence and to state whether he desires to be heard in person and produce witness.

(4) The member of the service charged may request for an access to municipal record for the purpose of preparing his written statement provided that the appointing authority may, for reasons, to be recorded in writing, refuse him such access, if in its opinion such records are not strictly relevant to the case or it is not desirable in the public or municipal interest to allow him access thereto.

(5) After the written statement is received from the member of the service in accordance with sub-rule (3) or if no such statement is received within the time specified, the appointing authority may, if it considers it necessary, appoint an Enquiry Officer to inquire into the charges framed against the member of the service and shall have the charges inquired into as provided in sub-rule (6).

(6) If the member of the service desires to be heard in person, he shall be so heard. If he desires that an oral inquiry be held or if the appointing authority so directs, an inquiry shall be held by the Enquiry Officer. At such enquiry, evidence shall be heard as to such of the allegations as arc not admitted and the member of the service charged shall be entitled to cross-examine the witness who gives evidence in person and to have such witness called as he may wish ;

Provided that the Enquiry Officer may, for reasons to be recorded in writing refuse to call a witness whose evidence is, in the opinion of the Enquiry Officer, not relevant or material.

(7) At the conclusion of the enquiry, the authority inquiring into the charges shall prepare a report of the inquiry, recording its findings on each of the charges together with the reasons therefor. If in the opinion of such authority the proceeding of the inquiry establishes charges different from those originally framed, it may record its findings on such charges :

Provided that findings on such charges shall not be recorded unless the member of the service, charge has admitted the facts constituting them or has had an opportunity of defending himself against them.

(8) The record of the inquiry shall include :-

(i) the charges framed against the member of the service and the statement of allegations furnished to him under sub-rule (2);

(ii) his written statement of defence, if any;

(iii) the evidence recorded in the course of inquiry;

(iv) the orders, if any, made by the State Government and the report of the authority making the inquiry, in regard to the inquiry; and

(v) a report setting out the findings on each charge and the reasons therefor.

(9) The appointing authority shall consider the record of the enquiry and determine which of the findings of the Enquiry Officer, it accepts.

(10) If the appointing authority having regard of the findings recorded or accepted, has arrived at any provisional conclusion in regard to one of the penalties specified in clauses (iv) to (vi) of Rule 31 to he imposed, it shall-

(a) furnish to the member of the service concerned, a copy of the report of the enquiry' together with a statement of such findings; and

(b) give him a show-cause notice stating the action proposed to be taken in regard to him and calling upon him to submit within a specified time, such representation as he may wish to make against the proposed action.

(11) The appointing authority shall determine having regard to the findings recorded or accepted by it, and the representation, if any, made by the member of the service under sub-rule (10), what penalty, if any, should be imposed on the member of the service and subject to Rule 32 pass appropriate orders on the case and the orders so passed shall be communicated to the member of the service.

34. Procedure for imposing certain penalties. *- (1) No order shall be passed imposing any of the penalties specified in clauses (i) to (iii) of Rule 31 on a member of the service except after :-*

(a) the member of the service is informed in writing of the proposal to take action against him and of the allegations on which such action is proposed to be taken and he is given an opportunity to make a representation which he may wish to make; and

(b) such representation, if any, is taken into consideration by the appointing authority or officer authorised under Rule 32 (1) and the order so passed shall be communicated to the member of the service.

(2) The record of the proceedings in such a case shall include-

(i) a copy of the intimation to the member of the service of the proposed punishment against him;

(ii) a copy of the statement of allegations communicated to him;

(iii) his representation, if any;

(iv) the order of the case together with the reasons therefor.

Rules of 1968

"51. Disciplinary authorities. *-Subject to the provisions of the Act and these rules the Municipal Council shall have the powers to impose any of the penalties specified in rule 49 on any municipal employee holding post specified in sub-section (4) of section 94 of the Act and in the case of other municipal employees the Standing Committee shall have the power to impose any of the said penalties on him."*

7.1 Taking up 1973 Rules first, it is seen that these rules are applicable alone to the members of M.P. State Urban Administrative Services comprising of the following posts:- (a) Additional Director, Urban Administration, (b) Joint Director, Urban Administration, (c) Chief Municipal Officer, Class-A, (d) Chief Municipal Officer, Class-B, and (e) Chief Municipal Officer, Class-C. Thus, 1973 Rules do not apply to a substantively appointed Revenue Sub-Inspector (petitioner) even if he holds the officiating charge of higher post of CMO. Pertinently, the petitioner at the time when the alleged misconduct as per the charge-sheet was committed was holding the officiating charge of the post of CMO. The said rules thereafter are not attracted since they do not govern the service condition of a Revenue Sub-Inspector. Findings of learned Single Judge in this regard are thus upheld.

7.2 Now coming to 1968 Rules, it is seen that Rule 51 of 1968 Rules which has been heavily relied upon by learned Single Judge deals with disciplinary authority. Providing that any penalty specified in Rule 49 of 1968 Rules can be imposed by Municipal Council on a municipal employee holding the post specified u/S.94 (3/4) of 1961 Act and in case of other municipal employee by the Standing Committee of the Council.

7.3 Thus, Rule 51 deals with competence of disciplinary authority to inflict minor or major penalty but does not relate to the competence to initiate disciplinary proceedings.

7.4 Neither the 1961 Act nor 1973 Rules nor 1968 Rules provide or prescribe any particular authority to be competent to initiate disciplinary proceedings against a municipal employee.

7.5 The provision akin to Rule 13 of M.P. Civil Services (CCA) Rules, 1966 which exclusively deals with authority competent to initiate disciplinary proceedings, does not exist either in the 1961 Act or 1968 Rules or 1973 Rules.

8. In the absence of any provision in 1961 Act, 1968 Rules or 1973 Rules, vesting any particular authority with the power to initiate disciplinary proceedings in specific terms, the trite principle of service jurisprudence would come into play i.e. any authority senior to or having some administrative control over the employee concerned is competent to initiate disciplinary proceedings or issue charge-sheet. In this regard the view of this Court is bolstered by the decision of Apex Court in *State of M.P. Vs. Shardul Singh,* (1970) 1 SCC 108, *P. V. Srinivasa Sastry & Others Vs. Comptroller and Auditor General & Others:* (1993) 1 SCC 419, Transport Commissioner, Madras-5 Vs. A. Radhakrishna Moorthy, (1995) 1 SSC 332, *Inspector General of Police and another Vs. Thavasiappan,* (1996) 2 SCC 145, the relevant portion of which is reproduced below for ready reference and convenience.

P. V. Srinivasa Sastry & Others (supra)

> ***4.*** *Article 311 (1) says that no person who is a member of a civil service of the Union or an all- India service or a civil service of a State or holds civil post under the Union or a State 'shall be dismissed or removed by an authority subordinate to that by which he was appointed'. Whether this guarantee includes within itself the guarantee that even the disciplinary proceeding should be initiated only by the appointing authority? It is well known that departmental proceeding consists of several stages: the initiation of the proceeding, the inquiry in respect of the charges levelled against that delinquent officer and the final order which is passed after the conclusion of the inquiry. Article 311 (1) guarantees that no person who is a member of a civil service of the Union or a State shall be dismissed or removed by an authority subordinate to that by which he was appointed. But Article 311 (1) does not say that even the departmental proceeding must be initiated only by the appointing authority. However, it is open to Union of India or a State Government to make any rule prescribing that even the proceeding against any delinquent officer shall be initiated by an officer not subordinate to the appointing authority. Any such rule shall not be inconsistent with Article 311 of the Constitution because it will amount to providing an additional safeguard or protection to the holder of a civil post. But in absence of any such rule, this right or guarantee does not flow from Article 311 of the Constitution. It need not be pointed out that initiation of a departmental proceeding per se does not visit the officer concerned with any evil consequences, and the framers of the Constitution did not consider it necessary to guarantee even that to holders of civil posts under the Union of India or under the State Government. At the same time, this will not give right to authorities*

having the same rank as that of the officer against whom proceeding is to be initiated to take a decision whether any such proceeding should be initiated. In absence of a rule, any superior authority who can be held to be the controlling authority, can initiate such proceeding.

Transport Commissioner. Madras-5

8. *Insofar as initiation or enquiry by an officer subordinate to the appointing authority is concerned, it is well settled now that it is unobjectionable. The initiation can be by an officer subordinate to the appointing authority. Only the dismissal/removal shall nor be by an authority subordinate to the appointing authority. Accordingly it is held that this was not a permissible ground for quashing the charges by the Tribunal*

Inspector General of Police (supra)

8. The learned counsel also drew our attention to P.V. Srinivasa Sastry v. Comptroller and Auditor General : (1993) 1 SCC 419 wherein this Court in the context of Article 311 (1) has held that in absence of a rule any superior authority who can be held to be the controlling authority can initiate a departmental proceeding and that initiation of a departmental proceeding per se does not visit the officer concerned with any evil consequences. Transport Commr. v. A. Radha Krishan Moorthy : (1995) 1 SCC 332 was next relied upon. Therein also this Court has held that initiation of disciplinary enquiry can be by an officer subordinate to the appointing authority. These decisions fully support the contention of the learned counsel for the appellants that initiation of a departmental proceeding and conducting an enquiry can be by an authority other than the authority competent to impose the proposed penalty."

8.1 The Division Bench of this Court in *'Arun Prakash Yadav Vs. State of M.P. & Ors.* [2013 (III) MPJR 131]" also had an occasion to deal with the issue of competence of authority to initiate disciplinary proceedings in context of M.P. Police Regulations, relevant portion of which is reproduced below for ready reference and convenience:-

25. The Apex Court in the case of P. V. Srinivasa Sastry and Others Vs. Comptroller and Auditor General and Others:(1993) 1 SCC 419 has further held thus:

4. Article 311 (1) says that no person who is a member of a civil service of the Union or an all-India service or a civil service of a State or holds civil post under the Union or a State 'shall be dismissed or removed by an authority subordinate to that by which he was appointed'. Whether this guarantee includes within itself the guarantee that even the disciplinary proceeding should be initiated only by the appointing

authority? It is well known that departmental proceeding consists of several stages: the initiation of the proceeding, the inquiry in respect of the charges levelled against that delinquent officer and the final order which is passed after the conclusion of the inquiry. Article 311 (1) guarantees that no person who is a member of a civil service of the Union or a State shall be dismissed or removed by an authority subordinate to that by which he was appointed. But Article 311 (1) does not say that even the departmental proceeding must be initiated only by the appointing authority. However, it is open to Union of India or a State Government to make any rule prescribing that even the proceeding against any delinquent officer shall be initiated by an officer not subordinate to the appointing authority. Any such rule shall not be inconsistent with Article 311 of the Constitution because it will amount to providing an additional safeguard or protection to the holder of a civil post. But in absence of any such rule, this right or guarantee does not flow from Article 311 of the Constitution. It need not be pointed out that initiation of a departmental proceeding per se does not visit the officer concerned with any evil consequences, and the framers of the Constitution did not consider it necessary to guarantee even that to holders of civil posts under the Union of India or under the State Government. At the same time, this will not give right to authorities having the same rank as that of the officer against whom proceeding is to be initiated to take a decision whether any such proceeding should be initiated. In absence of a rule, any superior authority who can be held to be the controlling authority, can initiate such proceeding.

26. The Apex Court in the case of Inspector General of Police & Another Vs. Thavasiappan reported in (1996) 2 SCC 145 has held thus:

8. The learned counsel also drew our attention to P.V. Srinivasa Sastry v. Comptroller and Auditor General : (1993) 1 SCC 419 wherein this Court in the context of Article 311 (1) has held that in absence of a rule any superior authority who can be held to be the controlling authority can initiate a departmental proceeding and that initiation of a departmental proceeding per se does not visit the officer concerned with any evil consequences. Transport Commr. v. A. Radha Krishan Moorthy : (1995) 1 SCC 332 was next relied upon. Therein also this Court has held that initiation of disciplinary enquiry can be by an officer subordinate to the appointing authority. These decisions fully support the contention of the learned counsel for the appellants that initiation of a departmental proceeding and conducting an enquiry can be by an authority other than the authority competent to impose the proposed penalty.

> *27. From the abovesaid decisions of the Apex Court, it is clear that unless Rules provide and empower any particular authority to institute disciplinary proceedings/issue chargesheet, the delinquent officer cannot insist that such a power can be exercised only by the appointing/disciplinary authority.*

9. Thus, the issue before the writ Court was the competence of a particular authority to issue charge-sheet/initiate disciplinary proceedings but the provision (Rule 51 of 1968 Rules) relied upon by learned Single Judge relate only to disciplinary authority competent to impose penalty. The concept of initiating disciplinary proceedings and imposing penalty at the end of disciplinary proceedings, are distinct especially from the point of view of competence of the authority to initiate and punish. The reason is not far to see. The protection giving to an employee at the time of punishment is much stricter than at the time of initiation of disciplinary proceedings. Since issuance of charge-sheet/initiation of disciplinary proceedings is not a punishment. Thus, the safeguards and protection available under law to delinquent employee at the time of initiation of disciplinary proceedings are comparatively diluted when compared to the safeguards and protection available at the time of imposing of penalty.

10. From the above discussion what comes out loud and clear is that learned Single Judge misdirected himself by relying upon Rule 51 of 1968 Rules (which exclusively provides competence of disciplinary authority to punish), for the purpose of adjudicating the issue of competence of authority to initiate disciplinary proceedings.

11. Testing the impugned charge-sheet (Annexure P/1) on the anvil of discussion above, it is now to be seen whether the Additional Director/ Additional Commissioner, Urban Administration and Development, Bhopal was competent enough to issue charge-sheet to a municipal employee i.e. petitioner.

12. Going by the said trite principle of service jurisprudence in the absence of specifying provision as explained above, it is to be now decided as to whether Additional Director/Additional Commissioner, Urban Administration and Development, Bhopal, can be treated to be an authority superior to or in control of services of petitioner.

12.1 The petitioner substantively holds the post of Revenue Sub-Inspector, and therefore is a municipal employee as defined in Rule 2(e) of 1968 Rules and thus renders him a member of municipal service as defined in 2(e) of 1968 Rules. 1961 Rules or 1968 Rules though do not define the expression "appointing authority" but Sec.94 (v) of 1961 Act provides that for municipal officers/servants other than those mentioned in sub-section 3 of Sec.94 of 1961 Act, the power of appointment is vested in the President-in-Council. The post of Revenue Sub-Inspector is not mentioned in Sec.94(3) of 1961 Act and therefore, it follows that President-in-

Council as defined in Sec.70 of 1961 Act is the appointing authority of the petitioner/respondent herein who substantively holds the post of Revenue Sub-Inspector.

12.2 Now, in the face of the aforesaid findings that Mayor-in-Council of the Municipality is the appointing authority of the petitioner/respondent herein, can Additional Director/Additional Commissioner, Urban Administration, be treated as a superior/controlling authority of the petitioner/respondent herein or not is the question which begs for an answer.

12.3 Additional Director/Additional Commissioner, Urban Administration, is not vested with any power under the 1961 Act or 1968 Rules. It is trite law that the municipal council is creature of a statute i.e.1961 Act and is a local body of urban administration which has received constitutional sanction by the Constitution (74 amendment) Act, 1992 which introduce part IX-A in the Constitution. The statutory autonomy enjoyed by a municipality which has now received constitutional flavour would stand diluted if the Additional Director/Additional Commissioner, Urban Administration is allowed to meddle with the affairs of municipality especially in the absence of any statutory or constitutional enabling provision. Thus, this Court has no hesitation to hold that the Additional Director/Additional Commissioner, Urban Administration is not a superior/ controlling authority for the post of Revenue Sub-Inspector for enabling it to initiate disciplinary proceedings against Revenue Sub-Inspector who is a municipal employee.

13. From the above discussion what comes out loud and clear is that the order impugned dated 16.06.2017 (Annexure P/1) issuing charge-sheet to the petitioner/respondent herein is bereft of jurisdiction inasmuch as having been issued by an authority incompetent to do so.

14. Accordingly, findings of learned Single Judge rendered in this regard while quashing the charge-sheet are upheld, for reasons aforesaid.

15. Consequently, present appeal preferred by the State against the order of learned Single Judge passed on 23.02.2018 in W.P. No.5699/2017 is dismissed with the same liberty as extended by the learned Single Judge.

Appeal dismissed

I.L.R. [2020] M.P. 1079 (DB)
WRIT APPEAL

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

W.A. No. 190/2020 (Gwalior) decided on 4 March, 2020

OMPRAKASH SINGH NARWARIYA …Appellant

Vs.

STATE OF M.P. & anr. …Respondents

***A. Service Law – Promotion – Sealed Cover Procedure – Crucial Date* – Held – For deciding the question whether sealed cover procedure is to be adopted or not, the crucial date is the date of holding DPC when consideration is made for promotion and not the eligibility date which may be a prior date than the date of holding DPC – Appeal dismissed. (Para 12)**

क. सेवा विधि – पदोन्नति – सील बंद लिफाफा प्रक्रिया – निर्णायक तिथि – अभिनिर्धारित – इस प्रश्न का विनिश्चय करने के लिए कि क्या सीलबंद लिफाफा प्रक्रिया अंगीकृत की जानी चाहिए अथवा नहीं, विभागीय पदोन्नति समिति की बैठक की तिथि ही निर्णायक तिथि होती है जब पदोन्नति के लिए विचार किया जाता है तथा पात्रता की तिथि नहीं जो कि विभागीय पदोन्नति समिति की बैठक की तिथि से पहले की तिथि हो सकती है – अपील खारिज।

***B. Service Law – Promotion – Sealed Cover Procedure – Principle & Object* – Held – Principle behind concept of sealed cover procedure is that any employee/officer against whom disciplinary proceedings or criminal prosecution has commenced should not be promoted – Concept further discussed and explained. (Paras 10 to 12)**

ख. सेवा विधि – पदोन्नति – सील बंद लिफाफा प्रक्रिया – सिद्धांत व उद्देश्य – अभिनिर्धारित – सील बंद लिफाफा प्रक्रिया संकल्पना के पीछे यह सिद्धांत है कि कोई भी कर्मचारी/अधिकारी जिसके विरूद्ध अनुशासनात्मक कार्यवाहियां अथवा आपराधिक अभियोजन आरंभ किया गया है, उसे पदोन्नत नहीं किया जाना चाहिए – संकल्पना की और अधिक विवेचना एवं व्याख्या की गई।

Cases referred:

(1991) 4 SCC 109, (1998) 3 SCC 394, AIR 1993 SC 1488, (1999) 5 SCC 762, (2007) 6 SCC 704.

S.K. Sharma, for the appellant.
Pratip Visoriya, G.A. for the respondents/State.

O R D E R

The Order of the Court was passed by :

SHEEL NAGU, J.:- The instant intra-court appeal filed u/S 2(1) of the Madhya Pradesh Uchcha Nyayalaya (Khand Nyayapeeth Ko Appeal) Adhiniyam, 2005, assails the final order passed on 10.12.2019 in WP.7320/2016 by the learned Single Judge while exercising writ jurisdiction u/Art.226 of the Constitution dismissing the petition in question by which challenge was made to Annexure P-1, an order rejecting representation of petitioner preferred against the decision to adopt sealed cover procedure by DPC dated 27.02.2016 on account of petitioner having been issued charge-sheet on 08.02.2016 i.e. prior to holding of the said DPC but subsequent to 01.01.2015 which was the eligibility date for consideration by the said DPC.

2. Learned counsel for the rival parties are heard on the question of admission.

3. Learned Single Judge by relying upon the decisions of Apex Court in the case of *"Union of India and others Vs. K.V. Jankiraman and others* [(1991) 4 SCC 109] and *Union of India and others Vs. Dr. Sudha Salhan (Smt)* [(1998) 3 SCC 394]" dismissed the petition in question by holding that for the purpose of adoption of sealed cover the crucial date is the date when consideration for promotion takes place and not any other prior date.

4. The seminal question which begs for an answer in the instant case is as to whether it is the date of eligibility fixed by DPC for consideration or the date of holding DPC, which will form the crucial date for deciding as to whether sealed cover procedure is to be adopted?

5. The undisputed facts of the case relevant for deciding the said question are that DPC in question met on 27.02.2016 which considered the eligible persons including the petitioner for promotion to the post of Joint Director, Kisan Kalyan Tatha Krishi Vikas. Pertinently, the said DPC prescribed 01.01.2015 as the eligibility date for consideration of candidates in the zone of consideration. Clause 8 of the minutes of DPC filed by the petitioner vide document 2032/2020 on 14.02.2020 is to the following extent:

> **"8– पदोन्नति की पात्रता अर्जित करने का दिनांक अर्थात वर्ष की 1 जनवरी, का जिन अधिकारियों के विरूद्ध अनुशासनात्मक कार्यवाही प्रगति पर थी या आपराधिक प्रकरण पंजीबद्ध कर चालान प्रस्तुत कर दिया गया था, उन अधिकारियों के संबंध में, ऐसी कथित विभागीय जांच/ आपराधिक प्रकरण से अप्रभावित रहते हुए पदोन्नति की उपयुक्तता जांची गई किन्तु अपनी सिफारिशों को प्रश्नास्पद कार्यवाईयों के परिणामों के अध्यधीन मानते हुए सील बंद लिफाफे में रखा गया।"**

6. The petitioner was considered for promotion but the recommendations were put in sealed cover despite charge-sheet having been issued on 08.02.2016 (after the eligibility date of 01.01.2015).

7. Learned counsel for the petitioner primarily submits that since the crucial date for eligibility to be considered for promotion by the DPC was fixed as 01.01.2015, the decision to adopt sealed cover or not should also be taken in view of the situation prevailing on 01.01.2015, without being affected by any subsequent development, meaning thereby as urged that since the petitioner on 01.01.2015 was not under any cloud of disciplinary proceedings [charge-sheet having been issued subsequently on 08.02.2016] the DPC held on 27.02.2016 could not have taken into account the subsequent event of issuance of charge-sheet on 08.02.2016 while considering petitioner for promotion in DPC dated 27.02.2016. It is, thus, submitted that the adoption of sealed cover by the said DPC was by taking into account extraneous consideration which ought to have been ignored. On this premise, learned counsel for the petitioner prayed for quashing of the impugned order before the writ court and as well as this court.

8. The concept of adoption of sealed cover is not statutorily provided. The said concept is governed by executive instructions and judicial pronouncements. The Apex Court in the case of *K.V. Jankiraman* (supra) has explained the concept of sealed cover, its sweep and limitation in detail. Relevant extract of the said judgment is reproduced below for ready reference and convenience:

> *8. The common questions involved in all these matters relate to what in service jurisprudence has come to be known as "sealed cover procedure."Concisely stated, the questions are:--(1) what is the date from which it can be said that disciplinary/criminal proceedings are pending against an employee? (2) What is the course to be adopted when the employee is held guilty in such proceedings if the guilt merits punishment other than that of dismissal? (3) To what benefits an employee who is completely or partially exonerated is entitled to and from which date? The "sealed cover procedure"is adopted when an employee is due for promotion, increment etc. but disciplinary/criminal proceedings are pending against him at the relevant time and hence, the findings of his entitlement to the benefit are kept in a sealed cover to be opened after the proceedings in question are over. Hence, the relevance and importance of the questions.*
>
> *16. On the first question, viz., as to when for the purposes of the sealed cover procedure the disciplinary/ criminal proceedings can be said to have commenced, the Full Bench of the Tribunal has held that it is only when a charge-memo in a disciplinary proceedings or a charge-sheet in a criminal prosecution is issued to the employee that it can be said that the departmental proceedings/criminal prosecution is initiated against*

the employee. The sealed cover procedure is to be resorted to only after the charge-memo/charge-sheet is issued. The pendency of preliminary investigation prior to that stage will not be sufficient to enable the authorities to adopt the sealed cover procedure. We are in agreement with the Tribunal on this point. The contention advanced by the learned counsel for the appellant-authorities that when there are serious allegations and it takes time to collect necessary evidence to prepare and issue charge-memo/charge-sheet, it would not be in the interest of the purity of administration to reward the employee with a promotion, increment etc. does not impress us. The acceptance of this contention would result in injustice to the employees in many cases. As has been the experience so far, the preliminary investigations take an inordinately long time and particularly when they are initiated at the instance of the interested persons, they are kept pending deliberately. Many times they never result in the issue of any charge-memo/charge-sheet. If the allegations are serious and the authorities are keen in investigating them, ordinarily it should not take much time to collect the relevant evidence and finalise the charges. What is further, if the charges are that serious, the authorities have the power to suspend the employee under the relevant rules, and the suspension by itself permits a resort to the sealed cover procedure. The authorities thus are not without a remedy. It was then contended on behalf of the authorities that conclusions nos. 1 and 4 of the Full Bench of the Tribunal are inconsistent with each other. Those conclusions are as follows: (ATC p.196, para 39)

> *"(1) consideration for promotion, selection grade, crossing the efficiency bar or higher scale of pay cannot be withheld merely on the ground of pendency of a disciplinary or criminal proceedings against an official;*
>
> *(2) * * *
>
> *(3) * * *
>
> *(4) the sealed cover procedure can be resorted only after a charge memo is served on the concerned official or the charge sheet filed before the criminal court and not before; "*

17. There is no doubt that there is a seeming contradiction between the two conclusions. But read harmoniously, and that is what the Full Bench has intended, the two conclusions can be reconciled with each other. The conclusion no. 1 should be read to mean that the promotion etc. cannot be withheld merely because some disciplinary/criminal proceedings are pending against the employee. To deny the said benefit, they must be at the relevant time pending at the stage when charge-memo/charge-sheet has already been issued to the employee. Thus read, there is no inconsistency in the two conclusions."

9. It is undisputed at the bar by learned counsel for the rival parties that the law laid down by the Apex Court in *K.V. Jankiraman* (supra) has been followed till date which is evident by subsequent decisions of the Apex Court i.e. *Delhi Development Authority Vs. H.C. Khurana* [AIR 1993 SC 1488], *Union of India and others Vs. Dr. Sudha Salhan (Smt)* [(1998) 3 SCC 394], *Bank of India and Another. Vs. Degala Suryanarayana* [(1999) 5 SCC 762], *Union of India and others Vs. Sangram Keshari Nayak* [(2007) 6 SCC 704].

10. The underlying principle behind the concept of sealed cover is that no employee/officer against whom disciplinary proceedings or criminal prosecution has commenced should be promoted. This reasoning is in turn founded on fair play and good conscience and that such an employee/officer who comes under cloud by disciplinary proceedings cannot be treated at par with a contemporary employee/officer who has unblemished career. Unequals cannot be treated equals. Therefore, to prevent employees/officers under cloud by disciplinary proceedings, the concept of sealed cover procedure was invented. This procedure not only takes care of the problem which may arise by treating an officer with blemish and an officer without blemish equally during course of consideration for promotion but also takes care of the apprehended breach of fundamental right of a civil post holder being considered for promotion enshrined u/Art. 16 of the Constitution of India. The government has taken care while invoking unique concept of adoption of sealed cover by laying down that while considering an employee/officer who is under cloud of disciplinary proceedings, the consideration of such officer would take place including pending disciplinary proceedings and the recommendations so arrived at of fit/unfit as the case may be would be put in a sealed cover, meaning thereby that recommendations would not be disclosed. The sealed cover would be opened after the recommendations kept therein would be given effect to if the disciplinary proceedings culminate in exoneration. If on the other hand proceedings culminate even in minor imposition of penalty of censure then the sealed cover would never be opened and the case for promotion of such officer under cloud of the disciplinary proceedings would be considered in the next DPC as and when held on regular basis.

11. Thus, a very reasonable and rational approach is adopted by the executive instructions of the State which shall take care of both the aspects i.e. avoiding treating of unequals as equals and of preventing breach of fundamental right of consideration for promotion u/Art.16.

12. From the verdict of the Apex Court, as extracted above, it is obvious that the crucial stage of invoking the concept of sealed cover is the stage of consideration. If this crucial stage is preponed to any previous date fixed by the DPC for eligibility of consideration for promotion then an incongruous situation may arise in cases of the nature in hand where an employee/officer will have to be

considered and if found fit to be promoted despite the said employee/officer being under cloud of disciplinary proceeding which were though commenced prior to the holding of DPC but subsequent to the eligibility date. This would amount to award of premium to default by promoting an officer who is facing disciplinary proceedings arising out of a major misconduct committed during period prior to the eligibility date i.e. 01.01.2015. Our view finds support by the decision of Apex Court in *K.V. Jankiraman and others* (supra), relevant extract of which is reproduced below for ready reference and convenience:

> *"46. The peculiar facts in this case are that at the relevant time the respondent-employee was working as Superintending Engineer since July 1986. When earlier he was working as Garrison Engineer in Bikaner Division, there was a fire in the Stores in April 1984 and there were also deficiencies in the Stores held by: the Store-keeper during the period between 1982 and 1985. Hence, disciplinary proceedings were commenced in February 1988 and the respondent was served with a charge-sheet on February 22, 1988. By an order of August 19, 1988 a penalty of withholding of increment for one year was imposed on the respondent as a result of the said disciplinary proceedings.*
>
> *47. On June 3, 1988, the DPC met for considering the promotion to the Selection Grade. Pursuant to this meeting, by an order of July 28, 1988 some juniors were given the Selection Grade with retrospective effect from July 30, 1986. The respondent-employee's name was kept in a sealed cover and was, therefore, not included in the list of the promotee officers.*
>
> *48. The Tribunal has found fault with the authorities on two grounds. The Tribunal has observed that although when the DPC met in June 1988, the employee was already served with a charge-sheet on February 22, 1988 and, therefore, the sealed cover procedure could not be faulted, since admittedly his juniors were given promotion with retrospective effect from July 30, 1986, the DPC should not have excluded the respondent's name from consideration when it met on June 3, 1988. The second fault which the Tribunal has found is that since the penalty of stoppage of increment was imposed at the end of the disciplinary proceedings, it was not open for the authorities to deny the respondent his promotion to the Selection Grade as that amounted to double penalty. Having taken this view, the Tribunal has directed that a Review DPC should consider the respondent's case for promotion w.e.f. July 1986 when his juniors were given promotion taking into account his performance and confidential records up to 1986. We are afraid the Tribunal has taken an erroneous view of the matter. Admittedly, the DPC met in June 1988 when the employee was already served with the charge-sheet on February 22, 1988. The charge-sheet was for misconduct for the period between 1982 and 1985. Admittedly further, the employee was punished by an order of August 19, 1988 and his one increment was withheld. Although, therefore, the promotions to his juniors were given with*

retrospective effect from July 30, 1986, the denial of promotion to the employee was not unjustified. The DPC had for the first time met on June 3, 1988 for considering promotion to the Selection Grade. It is in this meeting that his juniors were given Selection Grade with retrospective effect from July 30, 1986, and the sealed cover procedure was adopted in his case. If no disciplinary proceedings were pending against him and if he was otherwise selected by the DPC he would have got the Selection Grade w.e.f. July 30, 1986, but in that case the disciplinary proceedings against him for his misconduct for the earlier period, viz., between 1982 and 1985 would have been meaningless. If the Tribunal's finding is accepted it would mean that by giving him the Selection Grade w.e.f. July 30, 1986 he would stand rewarded notwithstanding his misconduct for the earlier period for which disciplinary proceedings were pending at the time of the meeting of the DPC and for which again he was visited with a penalty. We, therefore, allow the appeal and set aside the finding of the Tribunal. There will, however, be no order as to costs."

13. The petitioner in his petition did not assail the executive instructions governing the field of adoption of sealed cover by a DPC and therefore there is no need to go any further into that aspect. Dismissal of the petition by learned Single Judge cannot, thus, be found fault with.

14. Consequently, writ appeal stands dismissed, *sans* cost.

Appeal dismissed

I.L.R. [2020] M.P. 1085
WRIT PETITION

Before Mr. Justice G.S. Ahluwalia

W.P. No. 14187/2019 (Gwalior) decided on 20 August, 2019

ROSHNI @ ROSHAN (SMT.) …Petitioner

Vs.

STATE OF M.P. …Respondent

***A. Constitution – Article 226 – Habeas Corpus – Custody of Minor Son* – Held – Apart from custody, welfare of the minor child has to be considered – Wife (petitioner) left the matrimonial house leaving her minor child of 1½ yrs. old in company of sister of her friend, which does not amount to abandoning the child – Petitioner returned immediately after receiving information that her husband has consumed some poisonous substance – She being the natural guardian, is the best person to look after the child – Custody of minor child handed over to petitioner – Petition disposed.**

(Paras 18, 19, 21 & 23)

क. संविधान – अनुच्छेद 226 – बंदी प्रत्यक्षीकरण – अप्राप्तवय पुत्र की अभिरक्षा – अभिनिर्धारित – अभिरक्षा के अलावा, अप्राप्तवय बालक के कल्याण को विचार में लिया जाना चाहिए – पत्नी (याची) ने उसके 1½ वर्षीय अप्राप्तवय बालक को उसके मित्र की बहन के साथ छोड़कर दाम्पत्य निवास छोड़ा जो कि बालक के परित्याग की कोटि में नहीं आता – याची, यह सूचना प्राप्त होने के पश्चात् कि उसके पति ने विषैले पदार्थ का प्राशन किया है, तुरंत लौटी थी – वह नैसर्गिक संरक्षक होने के नाते बालक की देखभाल हेतु सबसे अच्छी व्यक्ति है – याची को अप्राप्तवय बालक की अभिरक्षा सौंपी गई – याचिका निराकृत।

***B. Constitution – Article 226 – Habeas Corpus – Scope – Custody of Minor Child* – Held – In a petition of Habeas Corpus, it was incumbent upon Court to decide the question of custody of the child – Personal allegations made against each other by the petitioner and respondents are not being taken into consideration because they are beyond the scope of Habeas Corpus petition. (Para 13)**

ख. संविधान – अनुच्छेद 226 – बंदी प्रत्यक्षीकरण – व्याप्ति – अप्राप्तवय बालक की अभिरक्षा – अभिनिर्धारित – बंदी प्रत्यक्षीकरण की याचिका में, न्यायालय के लिए बालक की अभिरक्षा के प्रश्न को विनिश्चित करना आवश्यक था – याची एवं प्रत्यर्थीगण द्वारा एक दूसरे के विरूद्ध किये गये व्यक्तिगत अभिकथनों को विचार में नहीं लिया जा रहा है क्योंकि वह बंदी प्रत्यक्षीकरण याचिका की व्याप्ति के परे है।

Cases referred :

(2017) 8 SCC 454, (2018) 2 SCC 309, (2018) 9 SCC 578, Cr.A. No. 838/2019 decided on 06.05.2019 (Supreme Court).

Ayub Khan, for the petitioner.
S.N. Seth, G.A. for the respondent Nos. 1 to 5/State.
S.S. Kushwaha, for the respondent No. 6.
Deepak Khot, for the intervenor.

(Supplied: Paragraph numbers)

O R D E R

G.S. AHLUWALIA, J. :- Corpus Mohsin aged about 1 ½ years is produced by her grand mother Shajadi Begum.

2. This petition under Article 226 of the Constitution of India has been filed in the nature of habeas corpus for the custody of the minor child Mohsin aged about 1 year and 6 months and the petitioner is the mother of this child.

3. It is mentioned in the writ petition that since the husband of the petitioner

namely Moinuddin was harassing the petitioner, therefore, on 13.03.2019 she left her matrimonial house along with Vishal Kannojiya and on 18.03.2019 when she came to know that her husband has consumed poison, accordingly, she came back on 18.03.2019 to see her husband at SSIMS Hospital and on 19.03.2019 her husband expired. Thereafter, the petitioner went to her matrimonial house to attend the last ceremony and while she was about to come back along with her minor son Mohsin aged about 1 ½ years, respondent No. 6 forcibly kept her son with him and forced the petitioner to go back. It is further mentioned that the petitioner had made an application to the Police Station Madhauganj for the custody of her child but the respondent No. 6 is working on the post of Constable and also posted in the Police Station Madhauganj, therefore, the application of the petitioner was not taken and in spite of her repeated efforts, custody of her child was not given back. On 03.06.2019 the petitioner had given an application to the Superintendent of Police, Gwalior for the custody of her child but no action was taken. On 27.06.2019 respondent No. 6 met the petitioner and offered that in case, if she wants the custody of her child, then she should spent a night with him in a hotel and when she refused then he openly threatened that he would not give back her child and, accordingly, on 28.06.2019 the petitioner moved an application before the Inspector General of Police, Gwalior Range, Gwalior for the custody of the child. It is further mentioned that one social organization namely *Rashtriya Alpsankhyak Muslim Kalyan Sanghathan* had also given a memorandum for the custody of the child but no action was taken. On 12.07.2019 also the petitioner went to the office of Additional Superintendent of Police, Gwalior who instructed the petitioner to take the custody of her child from Police Station Madhauganj and when the petitioner went to the Police Station Madhauganj, then the respondent No. 6 called 20-25 persons in the Police Station and she was abused and custody of the child was not given. Accordingly, this petition in the nature of habeas corpus has been filed for the custody of minor child Mohsin aged about 1 ½ years.

4. Though the respondent No. 6 is served and represented but he has not filed any return.

5. One Shajadi Begum, who is claiming to be grand mother of the child Mohsin aged about 1½ years has filed an application for intervention, which has been registered as I.A. No. 3911/2019. It is mentioned in the application that the minor child Mohsin is in her custody. Her Son Moinuddin had committed suicide by consuming poison because of harassment by the relatives including the parents and siblings of the petitioner. Accordingly, Crime No. 243/2019 has been registered at Police Station Kampoo District Gwalior against the parents and siblings of the petitioner for offence under Section 306/34 of IPC. It is further submitted that the petitioner had left her matrimonial house on 13.03.2019 at 10:30 AM and, accordingly, Late Moinuddin had lodged a Guminsan report on 13.03.2019 at 17:32 hours. It is further submitted that on 18.03.2019 the petitioner

came back and accordingly, her recovery memo was prepared and she was given to the custody of her mother. The statement of the petitioner under Section 164 of Cr.P.C. was also recorded in which she had stated that on 13.03.2019 she had gone with Vishal Kannojiya after leaving her child in the custody of sister of Vishal Kannojiya. She went to Morena from where she went to Agra. On 18.03.2019 sister of Vishal Kannojiya informed that her husband has consumed some substance, therefore, she came back to Gwalior along with Vishal Kannojiya. It is further submitted that on the statement of the petitioner, the offence under Sections 376, 506, 366 of IPC has been registered against Vishal Kannojiya in Crime No. 131/2019 at Police Station Kampoo District Gwalior and, accordingly, on 25.03.2019 the ornaments belonging to the petitioner were recovered from the possession of Vishal Kannojiya (Rajak).

6. It is submitted by the counsel for the petitioner that since the petitioner herself had abandoned her child by leaving him in the custody of sister of her friend, therefore, it would not be in the interest and welfare of the child to handover his custody to the petitioner.

7. As the intervenor had not stated anything about her family background, therefore, certain questions with regard to the family background of the intervenor were asked to Shri Deepak Khot, who submitted that the intervenor herself is present in the Court. Accordingly, in the presence of the counsel, this Court has inquired from the intervenor about her family background. It is submitted by the intervenor that her husband has expired. She has three sons. Out of which, Moinuddin (husband of the petitioner) has already committed suicide. Respondent No. 6 Nasiruddin, who is working as a Constable in the Police Department is residing separately along with his family and third son Tajuddin is a labourer by profession and with great difficulty, he can earn his livelihood and her third son is having three children and is residing with his wife and children separately. It was further stated by the intervenor that she is residing all alone along with the minor child Mohsin aged about 1 ½ years and submitted that she is getting the family pension to the tune of Rs.20,000/- per month.

8. Refuting the information given by the intervenor, counsel for the petitioner has drawn attention of this Court towards the return filed by the State Government. By referring to the proceedings which had taken place before *Parivar Parmarsh Kendra* on 04.06.2019, it is submitted by the counsel for the petitioner that it is incorrect to say that the minor child Mohsin aged about 1 ½ years is in the company/custody of the intervenor, but in fact respondent No. 6 is keeping the said boy with him which is apparent from the proceedings. By referring to the last paragraph of the proceedings of *Parivar Parmarsh Kendra* held on 04.06.2019, it is submitted that the custody of the child was given to the respondent No. 6 Nasiruddin, therefore, it is clear that the intervenor has not come

before this Court with clean hands and incorrect facts have been narrated in the application.

9. It is submitted by the counsel for the State that since an offence under Section 376 of IPC has been registered against Vishal Kannojiya, therefore, the Court may consider the welfare of the child. However, it is submitted that since the petitioner is a natural guardian of the child, therefore, the custody should be given to her.

10. Heard the learned counsel for the parties.

11. Several personal allegations have been made in the petition against respondent No. 6, whereas several personal allegations have been made by the intervenor against the counsel for the petitioner.

12. Counsel for the respondent No. 6 had sought time to file return to the writ petition.

13. Since the child was already produced before the Court and it was incumbent upon the Court to decide the question of custody, therefore, the Court has decided not to dwell upon any personal allegations made by the petitioner against respondent No. 6. Similarly, the personal allegations made against the petitioner are also not being taken into consideration because they are beyond the scope of the habeas corpus writ petition.

14. It is submitted by the counsel for the petitioner that while entertaining the petition under Article 226 of the Constitution of India in the nature of habeas corpus, this Court can consider the question of welfare of the child. To buttress his contentions, counsel for the petitioner has relied upon the judgment passed by the Supreme Court in the case of *Nithya Anand Raghavan Vs. State (NCT of Delhi) and another* reported in (2017) 8 SCC 454, *Prateek Gupta Vs. Shilpi Gupta and others* reported in (2018) 2 SCC 309 and *Kanika Goel Vs. State of Delhi through Station House Officer and another* reported in (2018) 9 SCC 578. It is submitted that this Court has jurisdiction to decline the relief of return of the child if it is found that the child is now settled in its new environment or if it would expose the child to physical or psychological harm or otherwise place the child in an intolerable position or if the child is quite mature and objects to its return. It is submitted that the petitioner herself has abandoned the child and went along with her friend Vishal Kannojiya and did not file the petition for the custody of the child at the earliest available opportunity, therefore, it is clear that welfare of the child is not in the hands of the petitioner although she is the natural guardian of the minor child.

15. The Supreme Court by judgment dated 06.05.2019 passed in the case of *Tejaswini Gaud and others Vs. Shekhar Jagdish Prasad Tewari and others* in Criminal Appeal No. 838/2019 has held as under:-

"13. Writ of habeas corpus is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from an illegal or improper detention. The writ also extends its influence to restore the custody of a minor to his guardian when wrongfully deprived of it. The detention of a minor by a person who is not entitled to his legal custody is treated as equivalent to illegal detention for the purpose of granting writ, directing custody of the minor child. For restoration of the custody of a minor from a person who according to the personal law, is not his legal or natural guardian, in appropriate cases, the writ court has jurisdiction.

18. Habeas corpus proceedings is not to justify or examine the legality of the custody. Habeas corpus proceedings is a medium through which the custody of the child is addressed to the discretion of the court. Habeas corpus is a prerogative writ which is an extraordinary remedy and the writ is issued where in the circumstances of the particular case, ordinary remedy provided by the law is either not available or is ineffective; otherwise a writ will not be issued. In child custody matters, the power of the High Court in granting the writ is qualified only in cases where the detention of a minor by a person who is not entitled to his legal custody. In view of the pronouncement on the issue in question by the Supreme Court and the High Courts, in our view, in child custody matters, the writ of habeas corpus is maintainable where it is proved that the detention of a minor child by a parent or others was illegal and without any authority of law.

19. In child custody matters, the ordinary remedy lies only under the Hindu Minority and Guardianship Act or the Guardians and Wards Act as the case may be. In cases arising out of the proceedings under the Guardians and Wards Act, the jurisdiction of the court is determined by whether the minor ordinarily resides within the area on which the court exercises such jurisdiction. There are significant differences between the enquiry under the Guardians and Wards Act and the exercise of powers by a writ court which is of summary in nature. What is important is the welfare of the child. In the writ court, rights are determined only on the basis of affidavits. Where the court is of the view that a detailed enquiry is required, the court may decline to exercise the extraordinary jurisdiction and direct the parties to approach the civil court. It is only in exceptional cases, the rights of the parties to the custody of the minor will be determined in exercise of extraordinary jurisdiction on a petition for habeas corpus.

25. Welfare of the minor child is the paramount consideration:- The court while deciding the child custody cases is

not bound by the mere legal right of the parent or guardian. Though the provisions of the special statutes govern the rights of the parents or guardians, but the welfare of the minor is the supreme consideration in cases concerning custody of the minor child. The paramount consideration for the court ought to be child interest and welfare of the child."

16. In the present case, the State has filed a detailed return and along with that return, certain documents including statement of the petitioner have been placed on record. The petitioner had alleged that she was being maltreated by her husband and according to her statement recorded under Section 164 of Cr.P.C., she had gone to the hospital, where she met with Vishal Kannojiya and after leaving the child in the custody/company of his sister, she went to Morena, where she stayed for two days and from thereafter she went to Agra and on 18.03.2019 she was informed by sister of Vishal that her husband has consumed some substance, therefore, on the same day, she came back to Gwalior along with Vishal. From her recovery memo Ex. IA-3 filed along with intervention application, it is clear that the recovery memo of the petitioner was prepared on 18.03.2019 at 18:10 hours and it is mentioned as under:-

''उपरोक्त पंचानों के समक्ष गुमशुदा रोशनी को उसकी मां रहीसा उपस्थित थाना आए। दस्तयाब किया कथन लिए कोई जुर्म दस्तयाबी अपराध घटित होना नहीं बताया। बाद उक्त गुमशुदा से पूछने पर उसकी इच्छा माता के घर जाने का कहने से उसकी मां रहीसा के सुपुर्द किया। दस्तयाबी सुपुर्दगी पंचनामा तैयार किया गया।''

Thus, it is clear that on 18.03.2019 no allegation of rape was made by the petitioner against Vishal Kannojiya. Thereafter, it appears that on 25.03.2019 the police registered an offence under Sections 376, 366 and 506 of IPC against Vishal Kannojiya on the statement made by the petitioner. Thereafter, her statement under Section 164 of Cr.P.C. was recorded on 28.03.2019, in which she did not make any allegation of physical harassment by Vishal Kannojiya.

17. When a question was put to the counsel for the petitioner as to whether the petitioner has made any allegation of sexual harassment against Vishal Kannojiya or not, then he fairly conceded that the petitioner is present in the Court and he can answer this query after taking instructions from her. Accordingly, the petitioner personally stated that although she has made allegation of sexual harassment against Vishal Kannojiya, but it was under the pressure of respondent No. 6, who is posted as a Constable in the Police Station Madhauganj. Thus, it is clear that both the parties are making serious allegations against each other, therefore, in order to verify the fact that whether the petitioner had abandoned the child or not, it would be essential to consider her conduct.

18. In her statement recorded under Section 164 of Cr.P.C., she has fairly stated that after leaving her child in the company/custody of sister of Vishal Kannojiya, she went to Morena and from thereafter, she went to Agra and came back on 18.03.2019 after getting an information that her husband has consumed some substance. In a statement filed by the State in its return, she has alleged that she was being harassed by her husband, however, she did not lodge any complaint against her husband. Although it is clear that the petitioner left her child in the company/custody of sister of Vishal Kannojya, but whether it was under compulsion because of harassment/ maltreatment of her husband or whether it was voluntary, is a question which has to be *prima facie* assessed and, therefore, the conduct of the petitioner assumes importance. In the statement recorded under Section 164 of Cr.P.C., it is stated by the petitioner that after receiving an information that her husband has consumed something then she immediately came back to Gwalior on 18.03.2019 itself and went to the Police Station, where recovery memo on 18.03.2019 was prepared. Thus, it is clear that the petitioner had not disassociated herself completely from her husband or matrimonial house, but the moment, she got the information that her husband has consumed something, she immediately came back to Gwalior.

19. It is not out of place to mention here that by that time, she was not aware that whether her husband is alive or he has expired, therefore, attachment of the petitioner with her in-laws or husband or the child was still subsisting and it cannot be said that the petitioner had completely abandoned her child and it can be held that because of certain reasons, she left her matrimonial house by leaving the child in the company of sister of Vishal Kannojiya, which does not amount to abandoning the child. The petitioner before leaving her matrimonial house or going to Morena along with Vishal had taken care of the fact that her child shall remain in the company of a lady so that he can be taken care of.

20. At this stage, it is submitted by the counsel for the respondent No. 6 that the State has filed a copy of the statement of the sister of Vishal Kannojiya, which was recorded under Section 161 of Cr.P.C., according to which the petitioner had handed over her child on a false pretext and thereafter she did not come back.

21. It is sufficient to mention that since the allegations and counter allegations are being made by each of the parties and since two criminal cases have also been registered, i.e., Crime No. 243/2019 at Police Station Kampoo for offence under Sections 306/34 of IPC and another Crime No. 131/2019 at Police Station Kampoo District Gwalior for offence under Sections 376, 366 and 506 of IPC, therefore, it would not be appropriate for this Court to consider the allegations in detail. Since the petitioner had returned back immediately to Gwalior after receiving the information about the consumption of some substance by her husband clearly indicates that she had not abandoned the child for the purposes of this petition under Article 226 of the Constitution of India.

22. So far as the intervenor is concerned, it is her statement that she is living in the house all alone along with the minor child aged about 1½ years. The intervenor is aged about 60 years, therefore, she can be said to be an old person. When according to the intervenor herself, her one son Nasiruddin respondent No. 6 and another son Tajuddin are residing separately with their respective families, then it is clear that it is not possible for an old lady aged about 60 years to look after the welfare of the minor child aged about 1 ½ years. Further from the proceedings of *Parivar Parmarsh Kendra* dated 04.06.2019, it appears that the custody of the child was given to respondent No. 6 Nasiruddin. Thus, it is clear that intervenor has not placed correct facts before this Court.

23. Under these circumstances, this Court is left with no other option but to hold that the petitioner being the natural guardian of the minor child aged about 1½ years, is a best person to look after the child and, accordingly, the custody of the child is handed over to the petitioner in the Court itself. The petitioner is free to keep the child with her, but she is advised to ensure that the welfare of the child is not hampered in any manner.

24. With aforesaid observations, the petition is finally disposed of.

Order accordingly

I.L.R. [2020] M.P. 1093 (DB)
WRIT PETITION

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

W.P. No. 25000/2019 (Indore) decided on 6 February, 2020

INDERMANI MINERAL (INDIA) PVT. LTD. …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

***A. Constitution – Article 226/227 – Notice Inviting Tender – Terms & Conditions – Interference – Scope & Jurisdiction* – Held – Looking to tender 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.**

(Paras 60, 81 & 82)

क. 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।

***B. 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. (Paras 61 to 80)**

ख. 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 को मनमाना नहीं कहा जा सकता – सरकार को संविदा के निबंधन तय करने की पूरी छूट होनी चाहिए।

Cases referred :

(2007) 11 SCC 32, (2007) 8 SCC 1, (2000) 2 GLR 1814, (2016) 16 SCC 818, (1975) 1 SCC 70, 1991 AIR 1579, (2009) 6 SCC 178, (2012) 8 SCC 216, (2005) 1 SCC 679, (1993) 3 SCC 499, (1994) 6 SCC 651, (2014) 3 SCC 760, (2018) 5 SCC 462, (2002) 5 SCC 287, (2004) 4 SCC 19, (1990) 2 SCC 488, (2005) 6 SCC 138, (2017) 4 SCC 243, (2017) 4 SCC 269, 1974 AIR 366, (1967) 1 SCR 1012, (1997) 9 SCC 495, (2005) 4 SCC 435, (2018) 8 SCC 243, 2009 (6) SCC

171, 2012 (8) SCC 216, 2000 (5) SCC 287, 2003 (3) SCC 186, 2018 (5) SCC 287, (2000) 2 SCC 617, (1974) 1 SCC 468.

Arvind Nayar with *Jerry Lopez*, for the petitioner.

Shashank Shekhar, A.G. with *R.S. Chhabra,* Addl. A.G. and *Vinay Gandhi,* G.A., for the respondents/State.

O R D E R

The Order of the Court was passed by :

S.C. SHARMA, J: - The petitioner before this Court, a Company registered under the Companies Act, 1956 having Coal Washeries in different districts of Chhatisgarh, has filed this present petition being aggrieved by the Notice Inviting Tender (NIT) issued by the Madhya Pradesh Power Generating Company Limited inviting bids for ROM Coal Beneficiation and Managing Associated Logistics for SSTPP, Khandwa and STPS, Sarni for the year 2019 - 20.

2. It has been stated that earlier two different tenders, in respect of supply of coal to the Power Generating Plant i.e. STPS, Sarni and SSTPP, Khandwa for the year 2018 -19, were floated independently, and now, one common tender has been issued for both the Power Generating Plants for the purposes of coal lifting, beneficiation (through wet process), liaisoning and movement of coal.

3. The petitioner / Company is aggrieved with certain terms and conditions of the tender issued by respondent No.2. During the pendency of the writ petition various amendments have also been made in the tender (NIT). The petitioner / Company has challenged the NIT on various grounds and the main clauses, which are under challenge, are as under:-

> (a) As per Clause - II of the Technical Qualification of the NIT 2019 - 20, the requisite washing technology required for the coal beneficiation plant should not be less than 35 Lakh Metric Tonne per annum.
>
> (b) As per Clause - II of the said NIT, a bidder should possess experience in coal lifting, beneficiation (through wet process), liaisoning with coal companies and railways for any State owned Power Generating Companies / NTPC / Captive Power Utility of any PSU in India for a total quantity of not less than 2.8 Million Tonne in span of 12 month from SECL command in last five years.
>
> (c) As per Clause - III (i) of the said NIT, a bidder should possess turnover (average annual turnover of preceding three financial years) of Rs.175 crores to showcase his strong financial ability.
>
> (d) As per Clause - II (I) of the said NIT, a bidder should possess a spare capacity of the washery not less than 3.5 Metric Tonne per annum.

4. The petitioner / Company has stated in the writ petition that for the preceding years i.e. for the year 2018 -19, a separate NIT was issued in respect of Khandwa Power Plant and the requirements were that the washing technology, required for the coal beneficiation plant, should not be less than 14 Lakh Metric Tonne per annum. It further provided that the bidder should possess prior experience of coal lifting, beneficiation (through wet process), liaisoning and movement of coal by road and railways for one or more State Power Generating Companies / NTPC / Independent Power Producers (IPPs) / Steel / Cement / Aluminium Utilities / PSU's in India (as the case may be) for a total quantity of not less than 1.40 Million Tonne per annum in 12 months' period in single stretch from SECL commant (sic: command) area in the last seven years. The Other conditions in respect of SSTPP, Khandwa NIT for the year 2018 - 19 provided that a bidder should possess turn over (average annual turn over of preceding three financial years) of Rs.39.50 crores. One of the prerequisites was also that a bidder should further possess a spare capacity of the washery of not less than 1.40 Metric Tonne per annum.

5. The petitioner / Company has provided comparison between the NIT, which is subject matter of the dispute and NIT of the year 2018 - 19 in respect of SSTPP, Khandwa in form of a chart and the same reads as under:-

Sl. No.	Technical Requirement	Clause as amended on 31.03.2018	Tender dated 04.11.2019
1	Minimum Bid Quality	14.00 Lakh Metric Tonne	35 Lakh per year (both plants)
2	Spare Capacity of washery	1.40 Metric Tonne per annum	Clause No.II (i) - 3.5 Metric Tonne per annum
3	Past Experience	The Intending Bidder should have executed the work of coal lifting beneficiation (through wet process), liaisoning and movement of coal by road and railways for one or more State Power Generating Companies / NTPC/Independent Power Producer(IPPs)/Steel/ Cement/Aluminium Utilities/ PSUs in India (as the case may be) for a total quantity of not less than 1.40 Million Tonne	Clause - II (ii) - Bidder should have executed the work of coal lifting beneficiation (through wet process), liaisoning with coal companies and railways for any State owned Power Generating Companies/ NTPC/Captive Power Utility of any PSU in India for a total quantity of not less than 2.8 Million Tonne in span of 12 monhts from SECL command in last 5 years, ending with bid opening date in case of

		per annum in 12 months period in single stretch from SECL command area in last 7 years ending with bid opening date i.e. 20.02.2018.	consortium, lead member should meet the experience criteria.
4	Turnover (average annual turnover of preceding three financial years)	39.50 Cr.	Clause- III -175 Cr.

6. The petitioner / Company, in respect of STPS, Sarni, has furnished details of the NIT for the year 2018 -19 and the petitioner's contention is that in respect of NIT for STPS, Sarni, the requirements were that the washing technology required for the coal beneficiation plant should not be less than 11.00 Lakh Metric Tonne per annum. It has been further contended by the petitioner / Company that one of prerequisites was that bidder should possess prior experience of coal lifting, beneficiation (thourgh (sic:through) wet process), liaisoning and movement of coal by road and Railways for one or more State Power Generating Companies / NTPC / Independent Power Producers (IPPs) / Steel / Cement / Aluminium Utilities / PSU's in Public Sector Undertaking in India (as the case may be) for 1.10 Million Tonne per annum in 12 months' period in single stretch from SECL command area in the last seven years. It has been further stated that another prerequisite was that a bidder should possess turnover (average annual turnover of preceding three financial years) of Rs.30.74 crores. One of the prerequisite was also that a bidder should further possess a spare capacity of the washery of not less than 1.10 Metric Tonne per annum.

7. The petitioner/Company has also furnished a detail in form of comparative chart in respect of the NIT, which is impugned in the present writ petition and NIT of the year 2018 - 19 in respect of STPS, Sarni and the chart reads as under:-

Sl. No.	Technical Requirement	Clause as amended on 31.03.2018	Tender dated 04.11.2019
1	Minimum Bid quantity	11.00 Lakh Metric Tonne	35 Lakh per year (both plant)
2	Spare Capacity of washery	1.10 Metric Tonne per annum	Clause No.II (i) - 3.5 Metric Tonne per annum

3.	Past experience	The intending bidder should have executed the work of coal lifting beneficiation (through wet process), liaisoning and movement of coal by road and railways for one or more State Power Generating Companies/ NTPC / Independent Power Producers (IPPs)/ Steel/Cement/Aluminium Utilities/PSU's in India (as the case may be) for a total quantity of not less than 1.10 Million Tonne per annum in 12 months' period in single stretch from SECL command area in last 7 years, ending with bid opening date i.e. 20.02.2018.	Clause No.II (i) - Bidder should have executed the work of coal lifting, beneficiation (through wet process), liaisoning with coal companies for any State owned Power Generating Companies / NTPC / Captive Power Utility of any PSU in India for a total quantity of not less than 2.8 Million Tonne in span of 12 months from SECL command in last five years, edning with bid opening date. In case of consortium, lead member should meet the experience criteria.
4.	Turnover (average annual turnover of preceding three financial years)	30.74 Cr.	175 Cr.

8. The petitioner's contention is that the NIT, which has been issued, is a tailor-made NIT and has been floated with a *malafide* intent to cheat the honest bidders and to avoid *bonafide* competition and also to cause heavy loss to the State Exchequer by modifying and personalising the tender conditions. The petitioner's contention is that impugned unreasonable and arbitrary change in the terms and conditions of the impugned NIT dated 02.11.2019 are in contravention to the settled law and practice, which in turn defeats the competitive spirit of bidding, which is the object behind issuing the public NIT. The petitioner has challenged the NIT on various grounds and the main contention of the petitioner is that it is a tailor-made NIT eliminating large number of bidders with an oblique and ulterior motive.

9. The petitioner has also raised a ground that as per Clause - II of the Technical Qualification, a condition has been imposed and the same requires that

washing technology required for the coal beneficiation plant should not be less than 35 Lakh Metric Tonne per annum as compared to the preceding NIT year, which requires a capacity of 14 Lakh Metric Tonne per annum in SSTPP, Khandwa and 11.00 Lakh Metric Tonne per annum in STPS, Sarni. The aforesaid shift, in capacity, is more than the double as required under the previous NIT without any rhyme and reason and is against the nature of fair contractual terms as contended by the petitioner.

10. The petitioner has further contended that as per Clause - II (ii) of the said NIT, it is provided that a bidder should possess experience in coal lifting, beneficiation (through wet process), liaisoning with coal companies and railways for any State Owned Power Generating Companies / NTPC / Captive Power Utility of any PSU in Public Sector Undertaking in India for a total quantity of not less than 2.8 Million Tonne in span of 12 months from SECL command in last five years, which is exorbitantly high as compared to the NIT issued in the preceding year for which coal lifting, beneficiation (through wet process), liaisoning and movement of coal by road and railways for one or more State Power Generating Companies / NTPC/ Independent Power Producers (IPPs) / Steel / Cement / Aluminium Utilities / PSU's in the Public Sector Undertaking in India (as the case may be) for a total quantity of not less than 1.40 Million Tonne per annum in 12 months' period in single stretch from SECL command area in last 7 years in SSTPP, Khandwa and 1.10 Million Tonne per annum in 12 months' period in single stretch from SECL command area in last 7 years in STPS, Sarni was required.

11. It has further been contended that the work experience being a decisive factor in a bid process wherein the experience of the Independent Power Producers was included in the preceding year, which got subsequently, being a reasonable litmus test, has been removed with a *malafide* intention to favour few companies in the bidding process. The aforesaid changes have been incorporated with a malice intent to avoid the *bonafide* competition and to favour few individuals.

12. The petitioner has further contended that as per Clause - III (i) of the said NIT, the requirement is that a bidder should possess turnover (average annual turnover of preceding three financial years) of Rs.175 crores, which is thrice the amount as compared to the preceding NIT, which required an annual turnover of Rs.39.50 crore in SSTPP, Khandwa and Rs.30.74 crores in STPS, Sarni. The aforesaid amounts to exorbitant increase and cannot be shadowed under the garb of reasonable hike and is an unfair contractual term in the eyes of law.

13. It has further been contended that as per Clause - II (i) of the said NIT, a condition has been imposed that a bidder should possess a spare capacity of the washery not less than 3.5 Metric Tonne per annum as compared to the preceding

NIT of 1.40 Metric Tonne per annum in SSTPP, Khandwa and 1.10 Metric Tonne per annum in STPS, Sarni. The spare capacity is increased to an extent whereby the companies like the petitioner and the similar situated companies have no scope to comply with and has been hiked so exorbitantly to avoid the fair bidding process and is against the basic structure of the contractual law.

14. The petitioner has contended that the exorbitant hike in various terms and conditions of the NIT as compared to the preceding year is very well within the garb of unfair contractual terms and is liable to be set aside.

15. It has been contended that it is, apparently and unequivocally, clear upon a bare perusal of the terms and conditions of the NIT that the same have been incorporated in collusion with a handful of individual / corporate with a sole view to favour these handful of individuals / corporate, thereby encouraging cartelization. The petitioner has contended that the aforesaid onerous terms and conditions of the NIT, which have encouraged cartelization in favour of a handful of individual / corporate lies in the teeth of fair bidding process and providing a 'level playing field' to all bidders and the petitioner's contention is that the aforesaid change in the terms and conditions of the present NIT with that of the preceding NIT only portrays the reason to avoid the fair bidding process and is arbitrary in nature and is liable to be set aside.

16. It has been contended that the present NIT has been floated with a *malafide* intent to cheat the honest bidders and to avoid the *bonafide* competition and cause heavy loss to the State Exchequer by modifying and personalising the tender conditions so as to only suit or make eligible a handful of individual / corporate and is liable to be set aside.

17. The petitioner has placed reliance upon a judgment delivered in the case of *Caterpillar India (P) Limited v/s Western Coalfields Limited & Others* reported in (2007) 11 SCC 32. Reliance has also been placed upon a judgment delivered in the case of *Reliance Energy Limited & Another v/s Maharashtra State Road Development Corporation Limited & Others* reported in (2007) 8 SCC1.

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

> (i) That, this Hon'ble Court may kindly be pleased to quash the NIT dated 02.11.2019 (Annexure-P/3) issued by respondent No.2.
>
> (ii)Respondents may kindly be directed to issue fresh NIT with just and fair conditions as were prevalent in past NITs and in consonance with judicial pronouncement.
>
> (iii) Any other relief / reliefs order / orders, direction / directions which this Hon'ble Court may deems feet and proper may kindly be granted to the petitioner.

19. The respondents have filed a reply in the matter and it has been stated that the respondent No.2 is a Company Limited by share and owned and controlled by the Government of Madhya Pradesh. It has been stated that as per the norms of the the Ministry of Environment & Forest, Government of India, the coal containing more than 34% of ash cannot be supplied to Power Plants exceeding 500 km unless it is routed through washery circuit to reduce the ash content. The distance from SECL, mines to SSTPP- 1, SSTPP-II & STPS is more than 500 km and the ROM coal supplied to these power houses generally contains more than 34% ash, which required coal beneficiation. This coal beneficiation is mandatory for the coal being used at these Thermal Power Stations to reduce ash content up to or below 34%. Since, the SECL has no washery unit in the mine area, tenders are being invited from the nearby private washery operators located in SECL area for the work of ROM Coal beneficiation along with its associated logistics for reduction in ash content for compliance of MOEF norms. The contention of the respondents is that the impugned tender dated 02.11.2019 is an outcome of the aforesaid requirement.

20. The respondents have stated that petitioner's main challenge to the NIT is on the basis of alleged tailor-made conditions to favour certain persons. The respondents have stated that the prerogative to determine the minimum 'Technical and Financial Criteria for Qualification' in any particular NIT lies exclusively in the hands of the tendering authority and the tendering authority is the best judge to ensure bidders' capacity, capability and resource to execute the work and cannot compromise with the pre-qualification requirement, which is best suited to the interest of the tendering authority as generation of electricity requires regular and uninterrupted supply of coal in the instant tender. In respect of the aforesaid contention, the respondents have placed reliance upon the judgments delivered in the cases of *Larsen & Toubro Limited v/s Gujarat State Petroleum* reported in (2000) 2 GLR 1814, *Air India Limited v/s Cochin International Airport Limited* reported in (2016) 16 SCC 818 and *Eurasian Equipment & Chemicals Limited v/s The State of West Bengal* reported in (1975) 1 SCC 70.

21. It has been further contended by the respondents that in the preceding year 2018 - 19, individual tender of alike nature for SSTPP-I, Khandwa only, was issued by the respondents wherein the tendered quantity was only 28.269 Lakh Metric Tonne and the period of work was only for one year. Whereas, in the instant impugned tender dated 02.11.2019, the tendered quantity has been raised from 28.269 Lakh Metric Tonne to 280 Lakh Metric Tonne, which is ten times of the earlier one and for a period of four years in total. The respondents have stated that the earlier NIT for the year 2018 - 19 invited e-tenders from reputed established Washery Operators only for one Power Plant i.e. SSTPP-I, Khandwa, whereas, the instant NIT has been called for three Power Plants altogether i.e. SSTPP-I,

SSTPP-II and STPS, Sarni. The said amalgamation has been done looking into various peculiarities and certain problems as well to ensure regular, unhindered supplies by the prospective bidders, who can assure and guarantee the same, based on the prerequisite as published in Tender Notice. Therefore, in order to provide an effective set up to deal with the same, the instant amalgamation has been done. The decision of amalgamating the projects and to call under the single NIT has been taken on the basis of past experience and difficulties faced by the respondents which are as under:-

> 1. Previously, each power house issued separate tenders with required separate publication and tendering process. The said tasks were to be taken up individually by an evaluation team which ultimately resulted in additional expenditure and cost which was to be borne by the tenderer out of and from the State Exchequer.
>
> 2. Previously, dealing with number of cases of a respective in nature, had an additional financial impact and as well as nature as well as it lacked to wastage of valuable resources such as manpower and time. Since similar nature of work was required to be carried out repetitively.
>
> 3. Separate tenders resulted in prevalence of different rates with wide variation. This resulted into discrepancies and casted shadows of doubt upon the tenderers.

22. The respondents have further stated that the petitioner has further levelled allegation in the Writ Petition alleging that the prequalifying criteria, which was basically incorporated to assess the technical and Financial capability of bidder, is tailor-made in order to benefit certain blue eyed tenderers and to eliminate genuine and *bonafide* tenderers such as the petitioner. In this regard, the respondents have stated that the technical qualification and financial qualification fall under the head of prequalification requirements prescribed in the tender, which consists of primarily five major components i.e. first is Requisite Washing Technology / Spare Capacity of Washery; second is Requisite Past Experience for Bidder; third is Arrangement of Railway Siding for Transportation of Coal; fourth is Location of Washery and fifth is Requisite documents to be submitted by the bidder.

23. In respect of contract period, the respondents have stated that it was the need of the hour to extend the contract period. Such a need has arisen on account of the following factors:-

> (i) Availability of coal varies as per the production of SECL. It has been the experience of the answering respondents that if coal production or availability suddenly increased then contractors failed to lift coal due to non-availability of sufficient infrastructure like fleet, spare washing capacity etc.

(ii)During discussions and conferences with bidders, who have been previously engaged and with those who are interested, suggestions have come up that if long term associations are made with them on account of long term contracts, they can develop sufficient infrastructure to serve the organization in a better way to fulfill its requirement.

(iii) The long term associations, on account of long term contracts, are more sustainable, viable and beneficial to the interest of the answering respondents ans as well as to the interest of contractors.

(iv) Other power utilities like Maharashtra State Mining Department (For Mahagenco), GSECL & RVUNL are also issuing tenders with contract period of more than one year i.e. from 2 - 5 years.

24. In respect of the financial criteria incorporated in the NIT, the respondents have stated that it is the standard practice of the respondents to keep the turnover criteria variable as per the estimated cost of the Tender. It has been stated that in the previous tenders for SSTPP-I and STPS, Sarni, where tendered quantities were 28.269 and 21.67 Lakh Metric Tonne respectively for one year, the financial capability (average annual turnover) of bidders were kept as 39.5 crore and 44 crore (total 83.5 crore). Whereas, in the instant tender, where the contract is for a period of four years with tendered quantity of 280 Lakh Metric Tonne (@ 70 Lakh Metric Tonne per year) for three power houses i.e. SSTPP-I, SSTPP-II and STPS, Sarni, the average annual turnover of the bidder for the preceding three financial years is kept as Rs.175 crore. The respondents have mentioned that if the earlier practice for determining the financial criteria would have been taken into account for the proportionate quantity then the average annual turnover required in the instant tender, would have been Rs.470 crores. Whereas, in order to provide relaxation and invite maximum bidders and to keep the healthy competition and to provide level playing field, the criteria has been reduced to Rs.175 crores (i.e. less than 40%) and also to ensure sufficient experience and capabilities of the prospective bidders to meet out the requirement of the tender work, and therefore, the stand of the petitioner is false and baseless.

25. In respect of not taking into account the work experience done with independent power producers, which was earlier in existence in previous tender, the respondents have stated that in the previous tender, the experience of Independent Power Plant / Steel / Cement / Aluminium Companies have also been considered. The respondents have further contended that placing reliance on aforesaid, the petitioner has alleged that leaving out / discarding the experience of work done in IPPs is a tailor-made condition incorporated to suit the interest of certain blue eyed persons. In this regard, the respondents have stated that leaving out / discarding the experience of IPPs in the instant tender for calculating the work experience is an outcome of deliberation, consideration and application of mind in considering the past experience of the respondents in dealing with the

contractors whose work experience was in IPPs. The respondents have brought to the notice of this Court that earlier they issued a tender for Road-cum-Rail Transport (RCR) of coal bearing No.MPPGCL / EDFM / NCL / TS / 72 / 9471 / 2018 wherein, experience of IPP was considered. However, a lot of difficulties were faced in corroboration of credential of one of the bidders due to misleading information provided by the IPP. The respondents have also stated that in the year 2019, various tenders have been issued following this bad experience and having learnt the said lesson.

26. The respondents have further contended that the exclusion of consideration of experience of work done in respect of Independent Power Producer (IPP) cannot be said to be an essential condition of the contract. Work experience is a criteria, which is necessary to arrive to a satisfaction that the contractor / bidder has undertaken work of similar nature previously and has successfully completed the same. Such credential of a contractor / bidder at the stage of technical evaluation of the bid needs to be verified from the authority who has provided him with the work experience certificate. The respondents have stated that so far as IPPs are concerned, the verification of work performed in an IPP can be quite deceptive and depends solely on the information provided by the IPP. The veracity and authenticity of the information provided by the IPP is solely based upon the information supplied by IPP and is very difficult to be cross checked. Thus, the decision taken by the respondents, in order to eliminate / discard the work experience of an IPP, is a well reasoned decision on account of due deliberation and consideration of their past experiences.

27. The respondents have further contended that the pre-qualification requirement as per the Tender provides for certain technical qualifications as well as Financial Qualifications which are essential or mandatory requirements in terms of the dictum of the Supreme Court in *Poddar Steel Corporation v/s Ganesh Engineering Works & Another* reported in 1991 AIR 1579, wherein a distinction has been made regarding essential and non-essential conditions existing in the pre-qualification requirement. So far as the non-essential conditions are concerned, the said conditions can be done away with while awarding the contract to any bidder but, the essential conditions are *sine qua non* and they cannot be dispensed with at any cost. The respondents have stated that allegation of the petitioner with regard to the tender conditions as tailor-made are only in respect of the essential conditions and hence, in view of the dictum of the Hon'ble Supreme Court, it is evident that such conditions cannot be dispensed with. In view of the said submissions, the respondents have stated that the stand taken by the petitioner cannot be sustained.

28. In respect of the representation submitted by the petitioner to Additional Chief Secretary, Energy, the respondents have stated that the representation

submitted by the petitioner is merely an eyewash and no time was given to the respondents for considering the grievances raised by the petitioner and without waiting for the reply, the present petition has been filed. It has also been stated that the corrigendum was issued on 21.11.2019, however, the corrigendum does not permit the persons, who were having experience with Independent Power Producer.

29. The respondents have further stated that the scope of scrutiny with regard to terms of the invitation to tender is in the realm of contract and the decision to accept the tender or award the contract is reached through several tiers and such decisions are made qualitatively by experts. They have stated that the terms of invitation to tender cannot be opened to judicial scrutiny.

30. In support of the aforesaid contention, the respondents have placed reliance upon the judgments delivered in the cases of *Meerut Development Authority v/s Association of Management Studies & Others* reported in (2009) 6 SCC 178, *Michigan Rubber (India) Limited v/s The State of Karnataka & Others* reported in (2012) 8 SCC 216, *Assn. of Registration Plates v/s Union of India* reported in (2005) 1 SCC 679, *Union of India v/s Hindustan Development Corporation* reported in (1993) 3 SCC 499, *Tata Cellular v/s Union of India* reported in (1994) 6 SCC 651 and *Maa Binda Express Carrier & Another v/s North Eastern Frontier Railway & Others* reported in (2014) 3 SCC 760 and they have stated that the only criteria, which can warrant interference of this Court is the presence of arbitrariness, unreasonableness and absence of fair play, which in the instant case, is not at all present and as such, the terms and conditions of the tender, which has been issued by the respondents, are not open for judicial scrutiny, and therefore, the petition filed by the petitioner deserves to be dismissed.

31. The respondents have stated that in the cases of *Meerut Development Authority* (supra) and *Michigan Rubber (India) Limited* (supra), it has been held that the terms of invitation of tender cannot be opened for judicial scrutiny because the invitation of tender is in the realm of contract which favours only the respondents.

32. The respondents have further stated that placing reliance upon a judgment delivered in the case of *Tata Cellular* (supra), it has been held in Para-46 of the judgment delivered in the case of *Municipal Corporation, Ujjain & Another v/s Bvg India Limited & Others* reported in (2018) 5 SCC 462 that the terms and conditions of the tender are not open to judicial scrutiny as the invitation to tender is a matter of contract.

33. The respondents have further stated that in the judgment delivered in the case *Monarch Infrastructure (P) Limited v/s Commissioner, Ulhasnagar*

Municipal Corporation & Another reported in (2002) 5 SCC 287, the Hon'ble Apex Court has held that judicial review in the matter of Tenders is limited to the same if found discriminatory in nature between similarly situated persons and is arbitrary and restriction of Courts in interfering in the matters of administrative action or changes made therein unless the same is arbitrary of (sic: or) discriminatory. It has been stated that present case is a case where, there is no substance in the allegations which can demonstrate any discriminatory or arbitrary action and mere allegation as such, is of no assistance to the petitioner.

34. The respondents have further stated that in the case of *Directorate of Education & Others vs Educomp Datamatics Ltd. & Others* reported in (2004) 4 SCC 19, it has been held by the Hon'ble Apex Court that the terms of initiation of tender are not open to judicial scrutiny. It has been held that Government must have a free hand in setting the terms of the tender. It must have reasonable play in its joints as a necessary concomitant for an administrative body in an administrative sphere. It has further been observed that the Court can scrutinize the award of the contracts by the Government or its agencies in exercise of their powers of judicial review to prevent arbitrariness or favourtism. It is entitled to pragmatic adjustments which may be called for by the particular circumstances. The Apex Court has further observed that the Courts cannot strike down the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical.

35. The respondents have further stated that in the case of *Air India Limited* (supra), the Apex Court has held that the award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations, which are of paramount, are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for *bonafide* reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the Court can examine the decision making process and interfere, if it is found vitiated by *malafides,* unreasonableness and arbitrariness.

36. The respondents have further stated that in the case of *G.J. Fernandez v/s State of Karnataka & Others* reported in (1990) 2 SCC 488, it was reaffirmed that the party issuing the tender (the employer) has the right to punctiliously and

rigidly enforce the terms of the tender. If a party approaches a Court for an order restraining the employer from strict enforcement of the terms of the tender, the Court would decline to do so. It was also reaffirmed that the employer could deviate from the terms and conditions of the tender if the change effected all intending applicants alike and were not objectionable. Therefore, deviation from the terms and conditions is permissible so long as the level playing field is maintained and it does not result in any arbitrariness or discrimination in the Ramana Dayaram Sheety sense.

37. The respondents have stated that the Hon'ble Apex Court in the case of *M/s Master Marine Services (P) Limited v/s Metalfe & Hodgkinson (P) Limited & Another* reported in (2005) 6 SCC 138, has reiterated the principles that (a) State can choose its own method to arrive at a decision; (b) the State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned; (c) even when some defect is found in decision making process, Court must exercise its extraordinary writ jurisdiction with great caution and that too in furtherance of public interest; and (d) larger public interest is passing an order of intervention is always a relevant consideration.

38. The respondents have stated that if the State or its instrumentalities act reasonably, fair and in public interest in awarding the contract, the interference by this Court is very restrictive since no person can claim Fundamental Right to carry on business with the Government. They have stated that principles stand reiterated in the cases of *Haryana Urban Development Authority & Others v/s Orchid Infrastructure Developers Private Limited* reported in (2017) 4 SCC 243 and *Reliance Telecom Limited & Another v/s Union of India & Another* reported in (2017) 4 SCC 269.

39. The respondents have stated that reasonableness of a restriction is to be determined in an objective manner and from the stand point of interests of the general public and not from the stand point of the interest of person upon whom the restrictions have been imposed or upon abstract consideration. A restriction cannot be said to be unreasonable, merely because, in a given case, it operates harshly, in determining, whether there is any unfairness involved; the nature of the right alleged to have been infringed the underlying purpose of the restriction imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition and the prevailing condition at the relevant time, enter into judicial verdict. Canalization of a particular business in favour of even a specified individual is reasonable where the interests of the country are concerned or where the business affects the economy of the country. In this regard, the respondents have placed reliance upon judgments delivered in the cases of *Shree Meenakshi Mills Limited v/s Union of India* reported in 1974 AIR 366, *Hari Chand Sarda v/s Mizo District Council* reported in (1967) 1 SCR 1012 and *Krishnan Kakkanth v/s Government of Kerela* reported in (1997) 9 SCC 495.

40. The respondents have further stated that in the case of *Global Energy Limited & Another v/s Adani Exports Limited & Others* reported in (2005) 4 SCC 435, it has been held that unless terms of a tender notice are wholly arbitrary, discriminatory or actuated by malice are not subjected to judicial review. It was observed that the principle is, therefore, well settled that the terms of the invitation to tender are not open to judicial scrutiny and the Courts cannot whittle down the terms of the tender as they are in the realm of contract unless they are wholly arbitrary, discriminatory or actuated by malice. This being the position of law, settled by a catena of decisions of this Court, it is rather surprising that the learned Single Judge passed an interim direction on the very first day of admission hearing of the writ petition and allowed the appellants to deposit the earnest money by furnishing a bank guarantee or a bankers' cheque till three days after the actual date of opening of the tender. The order of the learned Single Judge being wholly illegal, was, therefore, rightly set aside by the Division Bench.

41. A rejoinder has also been filed by the petitioner in the matter and it has been stated that the tailor-made NIT deserves to be quashed in light of the Judgment delivered by this Court in the case of *Caterpillar India Private Limited* (supra). Reliance has also been place upon a judgment delivered in the case of *Reliance Energy Limited & Another v/s Maharashtra State Road Development Corporation Limited & Others* reported in (2007) 8 SCC1 and a prayer has been made for quashment of terms and conditions of the NIT which is under challenge.

42. The respondents have placed reliance upon a judgment delivered in the case of *National Highway Authority of India v/s Gwalior Jhansi Expressway Limited* reported in (2018) 8 SCC 243 and the contention of learned Advocate General is that keeping in view the judgment delivered by the Hon'ble Supreme Court, a company, who never chose to participate in a particular tender, cannot challenge the tender conditions incorporated in the tender.

43. Reliance has also been placed upon a judgment delivered in the case of *Meerut Development Authority v/s Association of Management Studies* reported in 2009 (6) SCC 171 and the contention of the learned Advocate General is that in case, there is no vagueness, uncertainty or confusion with regard to reserved prices, there is no scope for judicial review.

44. The respondents have placed reliance upon a judgment delivered in the case of *Michigan Rubber (India) Limited v/s The State of Karnataka & Others* reported in 2012 (8) SCC 216 and it has been argued before this Court that scope of interference by Courts is quite restricted and no person can claim Fundamental Right to carry on business with the Government.

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

46. The undisputed facts reveal that the petitioner / Company is aggrieved by the certain terms and conditions of the NIT dated 02.11.2019 (Annexure-P/3), Tender ID.2019_MPPGC_61325_1 issued by the Madhya Pradesh Power Generating Company Limited. The petitioner / Company has challenged the following clauses of the NIT:-

> (a) As per Clause - II of the Technical Qualification of the NIT 2019 - 20, the requisite washing technology required for the coal beneficiation plant should not be less than 35 Lakh Metric Tonne per annum.
>
> (b) As per Clause - II of the said NIT, a bidder should possess experience in coal lifting, beneficiation (through wet process), liaisoning with coal companies and railways for any State owned Power Generating Companies / NTPC / Captive Power Utility of any PSU in India for a total quantity of not less than 2.8 Million Tonne in span of 12 month from SECL command in last five years.
>
> (c) As per Clause - III (i) of the said NIT, a bidder should possess turnover (average annual turnover of preceding three financial years) of Rs.175 crores to showcase his strong financial ability.
>
> (d) As per Clause - II (I) of the said NIT, a bidder should possess a spare capacity of the washery not less than 3.5 Metric Tonne per annum.

47. Learned senior counsel for the petitioner has argued before this Court that in order to favour blue eyed persons tailor-made tender conditions have been inserted in the contract. The work experience in respect of Independent Power Producers has been deleted in the impugned NIT whereas, the same was in existence since time immemorial and for the first time, the condition of work experience in respect of Independent Power Producers has been deleted. It has also been argued that keeping in view the privatization and modernization of power projects, large number of Independent Power Producers have established their power plant and the persons like the petitioner are carrying out similar kind of work with the Independent Power Producers, and therefore, deletion of work experience criteria with Independent Power Producer is an arbitrary decision on the part of the respondents.

48. Learned senior counsel has also argued that earlier experience of Independent Power Plant, Steel Plant, Cement / Aluminium Companies were also considered. He has further argued that in case, the aforesaid condition is not declared to be an arbitrary condition, a person in whose favour the contract is awarded by a government owned company, will be receiving the work in perpetuity because a person, who does not have experience to work with the Government or with the Public Sector Undertaking will never be able to enter in the field to gain experience with Government Sector and Public Sector Undertaking. He has also argued that certain blue eyed persons were invited by

respondent No.2 and after discussing the matter of contract, and terms and conditions to be formulated with those persons, tailor-made conditions have been made in respect of quantity of work experience and in respect of period of work.

49. Learned senior counsel has drawn the attention of this Court towards the return filed by the respondents and paragraph - 13 of the return, which is duly supported by an affidavit reads as under:-

> 13.That, if contract period is taken into account, it was the need of the hour to extend the contract period. Such need has arisen on account of the following factors:-
>
> (i) Availability of coal varies as per the production of SECL. It has been the experience of the answering respondents that if coal production or availability suddenly increased then contractors failed to lift coal due to non-availability of sufficient infrastructure like fleet, spare washing capacity etc.
>
> (ii) During discussions and conferences with bidders, who have been previously engaged and with those who are interested, suggestions have come up that if long term associations are made with them on account of long term contracts, they can develop sufficient infrastructure to serve the organization in a better way to fulfill its requirement.
>
> (iii) The long term associations, on account of long term contracts, are more sustainable, viable and beneficial to the interest of the answering respondents ans as well as to the interest of contractors.
>
> (iv) Other power utilities like Maharashtra State Mining Department (For Mahagenco), GSECL & RVUNL are also issuing tenders with contract period of more than one year i.e. from 2 - 5 years."

50. The return which is filed along with an affidavit of a Senior Officer of MPPGCL reflects that bidders, who were previously engaged with respondent No.2, were called, deliberations were made and then terms and conditions of contract were decided. This process of calling bidders to frame terms and conditions is unheard of. In all fairness, the respondents should have issued a public notice inviting all interested parties to give their suggestions, however, the action appears to be an action taken in a close room with certain individuals.

51. This Court does not approve such an action taken by respondent No.2 of discussion and conferences with elimination of other players of the field, however, the conditions in the contract are required to be looked into independently on merits to find out whether they are arbitrary, illegal or actuated with *malafide.*

52. The first ground raised by the petitioner / Company is that the tender has been issued in respect of two power plants namely SSTPP, Khandwa and STPS, Sarni in the year 2019 - 20, whereas earlier in the year 2019 - 20, separate tenders were issued for two power plants. It is again an undisputed fact that both the power plants are owned and controlled by the State of Madhya Pradesh and they are being managed by the Madhya Pradesh Power Generating Company Limited. One tender for two power plants can always be issued and the decision of the State Government, by no stretch of imagination, can be treated as wholly arbitrary, discriminatory or actuated by malice, hence, the decision of the State Government on this ground cannot be subjected to judicial review.

53. The second ground raised by the petitioner is in respect of qualification as provided under Clause - II, which provides that the requisite washing technology required for coal benificiation plan will not be less than 35.00 Lakh Metric Tonne per annum. The petitioner has given a comparative statement in the same condition for the year 2018 - 19 in respect of two power plants and its contention is that in respect of SSTPP, Khandwa it was earlier 14.00 Lakh Metric Tonne per annum and in respect of STPS, Sarni, it was 11.00 Lakh Metric Tonne. The respondents have now issued a tender for both the power plants and have provided the capacity to be 35.00 Lakh Metirc Tonne, and therefore, in the considered opinion of this Court, the technical qualification prescribed, as it is for two power plants of 35.00 Lakh Metric Tonne, can again be never said to be an arbitrary condition.

54. In respect of requisite past experience, keeping in view the fact that the supply of coal is being made to two power plants, it has been provided that the intending bidder should have executed the work of coal lifting beneficiation (through wet process), liaisoning and movement of coal by road and railways for any State owned Power Generating Company / NTPC / Captive Power Utlities of any Public Sector Undertaking in India for a total quantity of not less than 28 Lakh Metric Tonne in span of 12 months for SECL command area in last five years.

55. In respect of the aforesaid condition, the respondents have stated that the aforesaid tender conditions has been inserted in the tender after great discussions and deliberations to ensure regular supply of coal to power plants and the condition of having experience of supply of coal with State owned Power Generating Company / NTPC / Captive Power Utilities of any Public Sector Undertaking can never be termed as unreasonable condition. The respondent No.2, being an instrumentality of State, has to protect the interest of the State and if in the tender a condition has been imposed in respect of past experience with the Government or Government owned company or Public Sector Undertakings, it can never be termed as arbitrary condition.

56. The petitioner has also raised a ground in respect of the contract period. In the present case, the contract period is of four years and it is for supply of 280 Lakh Million Tonne i.e. 70.00 Lakh Million Tonne per year.

57. The respondents have stated that other power utilities like Maharashtra State Mining Department, SGECL & RVUNL have also issued tender with contract period of more than one year ranging 2 to 5 year.

58. The tenure of contract depends upon the nature of work and in the present case, supply of coal is the subject matter of the contract, which is required constantly for power generation. The process of tender consumes 3 to 4 months and at times, it is delayed also, and therefore, in order to ensure that same exercise is not carried out every year, the respondents have arrived at a conclusion to award the work to successful bidder for a period of four years. Fixing a time period in a contract can never be again an arbitrary condition.

59. Much has been argued on the issue of exclusion of parties, who have done work with Independent Power Producer (private company). The present case is not a case where the respondents have inserted a tender condition, which provides that a contractor should have work experience only with Power Generating Company owned by the State of Madhya Pradesh. The bidder, if he is having experience in respect of supply of coal for any State owned Power Generating Company / NTPC / Captive Power Utilities of any Public Sector Undertaking in India is eligible to participate. The aforesaid condition, in no way, be illegal and arbitrary condition as argued.

60. Keeping in view the facts and circumstances of the case, it can never be said that the tender conditions are tailor-made and they have been framed with a *malafide* intention to avoid *bonafide* condition and to favour few individual. The copies of various tenders issued by the electricity companies of Maharashtra and Gujarat are also on record as Annexure-R/2. They are also having similar conditions in respect of similar tenders and the petitioner has not been able to establish before this Court that the NIT has been floated with a *malafide* intention and to cause heavy loss to the State Exchequer merely because conditions are not favourable to the petitioner, they cannot be termed as arbitrary conditions.

61. The scope of judicial scrutiny has been considered by the Hon'ble Apex Court time and again. In the case of *Afcons Infrastructure Limited v/s Nagpur Metro Rail Corporation Limited* reported in 2016 (16) SCC 818, the Apex Court has held as under:-

> "We may add the owner or the employer of a project, having authored the tender documents, is the best persons to understand and appreciate its requirements and interpret its documents. The constitutional Courts must defer to this understanding and appreciation

> of the tender documents, unless there a *malafide* or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner of employer of a project may give an interpretation to the tender documents that is no acceptable to the constitutional Courts but that by itself is not a reason for interfering with the interpretation given".

62. The Apex Court in the case of *Reliance Telecom Limited & Others v/s Union of India & Others* reported in 2017 (4) SCC 269 has again dealt with scope of interference in respect of the tender.

63. In the case of *Tata Cellular v/s Union of India* reported in 1994 (6) SCC 651 again the scope of judicial review has been looked into by the Hon'ble Apex Court. In the aforesaid case, it has been held that the terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract and the Government must be allowed to have a fair play in the joints as it is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere.

64. The Apex Court in the case of *Monarch Infrastructure (P) Limited v/s Ulhasnagar Municipal Corporation & Others* reported in 2000 (5) SCC 287 was again dealing with the N.I.T. and it has been held that it cannot say whether the conditions are better than what were prescribed earlier, for in such matters, the authority calling the tenders is the best judge. The Court declined to restore *status quo ante.*

65. In the case of *Cellular Operator Association of India & Others v/s Union of India & Others* reported in 2003 (3) SCC 186, the Apex Court has held that in respect of the matters affecting policy and those that require technical expertise, the Court should show deference to, and follow the recommendations of the Committee which is more qualified to address the issues.

66. The Apex in the case of *Association of Registration Plates v/s Union of India & Others* reported in 2005 (1) SCC 679 has held that formulating conditions of a tender document and awarding a contract of the nature of those for supply of HSVRPs, greater latitude is required to be conceded to the state authorities.

67. In the case of *Union of India v/s Hindustan Development Corporation* reported in 1993 (3) SCC 499, again the scope of judicial interference has been dealt with.

68. In the case of *Tata Cellular v/s Union of India* reported in 1994 (6) SCC 651, it has been held that mere power to choose cannot be termed arbitrary. The Government has an interest in selecting the best and use of such power for collateral purpose is interdicted by Article 14 of the Constitution of India.

69. In the case of *Maa Binda Express Carrier & Another v/s Northeast Frontier Railway & Others* reported in 2014 (3) SCC 760, it has been held that the bid / tender, in response to a NIT, is only an offer which State or its agencies are under no obligation to accept. It has been further held that bidders participating in the tender process cannot insist that their bids should be accepted simply because a bid is highest or lowest.

70. In the case of *Municipal Corporation, Ujjain & Others v/s BVG India Limited & Others* reported in 2018 (5) SCC 287, it has been held that the terms of the tender are not open for judicial scrutiny as the invitation to tender is a matter of contract.

71. In the case of *Monarch Infrastructure (P) Limited v/s Commissioner, Ulhasnagar Municipal Corporation & Others* reported in 2000 (5) SCC 287, it has been held that the best judge to determine, whether the revised terms and conditions of the tender process were better than the earlier ones, is the authority who has invited the tender and not the Court.

72. In the case of *Directorate of Education & Others v/s Educomp Datamatics Limited & Others* reported in 2004 (4) SCC 19, it has been held that the terms of initiation to tender are not open to the judicial scrutiny the same being in the realm of contract. It has been further held that the Government must have a free hand in setting the terms of the tender.

73. In the case of *Air India Limited v/s Cochin International Airport Limited* reported in (2000) 2 SCC 617, it has been held that award of a contract, whether it is by a private party or by public body or the State, is essentially a commercial transaction. It has further been held that commercial decision considerations, which are paramount, are commercial considerations and the State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny.

74. In the case of *Master Marine Services (P) Limited v/s Metcalfe & Hodkinson (P) Limited & Another* reported in (2005) 6 SCC 138, it has been held that the State can choose its own method to arrive at a decision and the State and its instrumentalities have duty to be fair to all the concerned. It has been further held that even when some defect is found in decision making process, Court must exercise its extraordinary writ jurisdiction with great caution and that too in furtherance of public interest and larger public interest in passing an order of intervention is always a relevant consideration.

75. In the case of *Haryana Urban Development Authority & Others v/s Orchid Infrastructure Developers Private Limited* reported in (2017) 4 SCC 243, it has been held that if the State or its instrumentalities act reasonably, fairly and in public interest in awarding the contract, the interference by the Court is very

restrictive since no person can claim Fundamental right to carry on business with the Government.

76. In the case of *Reliance Telecom Limited & Another v/s Union of India & Another* reported in (2017) 4 SCC 269, it has been held that in the matter relating to complex auction procedure having enormous financial ramification, the interference by the Courts based upon any perception, which is though to be wise or assumed to be fair, can lead to a situation which is not warrantable and may have unforeseen adverse impact.

77. In the case of *Meenakshi Mills Limited v/s Union of India* reported in (1974) 1 SCC 468, it has been held whether there is any unfairness involved in determining, the nature of the right alleged to have been infringed the underlying purpose of the restriction imposed, the extent and urgency of the evil sought to be remedied thereby the disproportion of the imposition, the prevailing condition at the relevant point of time, enter into judicial verdict. It has further been held that the unreasonableness of the legitimate expectation has to be determined with respect to the circumstances relating to the trade of business in question.

78. In the case of *Lala Hari Chand Sarda v/s Mizo District Council & Another* reported in (1967) 1 SCR 1012, it has been held that canalization of a particular business in favour of even a specified individual is reasonable where the interests of the country are concerned or where the business affects the economy of the country.

79. In the case of *Krishnan Kakkanth v/s Government of Kerela & Others* reported in (1997) 9 SCC 495, it has been held that a citizen has no Fundamental Right to insist on Government or any other individual to do business with him and the Government is entitled to enter into business with any person or class of persons to the exclusion of others.

80. In the case of *Global Energy Limited & Another v/s Adani Exports Limited & Others* reported in (2005) 4 SCC 435, it has been held that unless terms of a tender notice are wholly arbitrary, discriminatory or actuated by malice, are not subject to judicial review. It has further been held that principle is, therefore, well settled that the terms of the invitation to tender are not open to judicial scrutiny and the Courts cannot whittle down the terms of the tender as they are in the realm of contract unless they are wholly arbitrary, discriminatory or actuated by malice.

81. This Court does not find any reason to interfere with the tender in the peculiar facts and circumstances of the case. The Governments and their undertakings do have free hand in setting terms of the tender and unless the terms and conditions are arbitrary, discriminatory, *malafide* or actuated by bias, the scope of interference by Courts does not arise as held in the case of *Michigan Rubber (India) Limited* (supra).

82. In light of the aforesaid judgment, in the present case, as the petitioner has failed to establish that criteria adopted by the respondents is contrary to public interest, discriminatory or unreasonable, the question of interference by this Court does not arise.

Accordingly, the present Writ Petition stands dismissed.

Certified copy, as per rules.

Petition dismissed

I.L.R. [2020] M.P. 1116
WRIT PETITION

Before Mr. Justice Vivek Rusia

W.P. No. 27794//2019 (Indore) decided on 20 February, 2020

BASANT SHRAVANEKAR & ors. …Petitioners

Vs.

STATE OF M.P. & ors. …Respondents

A. Municipalities Act, M.P. (37 of 1961), Section 47 – Recall of President – Proposal – Verification of Signatures **– Held – Out of 15 Councilors, only 10 present for verification of signatures/identity – For remaining Councilors, application for adjournment filed by their counsel, same being not supported by any affidavit or documentary evidence – No provision u/S 47 for appearance of Councillor through a counsel – Collector rightly turned down the proposal as not supported by 3/4th councilors – Petition dismissed. (Para 8)**

क. नगरपालिका अधिनियम, म.प्र. (1961 का 37), धारा 47 – अध्यक्ष को पुनः बुलाना – प्रस्ताव – हस्ताक्षरों का सत्यापन – अभिनिर्धारित – पंद्रह पार्षदों में से, केवल दस ही हस्ताक्षरों के सत्यापन/पहचान के लिए उपस्थित हुए – शेष पार्षदों के लिए, उनके अधिवक्ता द्वारा स्थगन हेतु आवेदन प्रस्तुत किया गया, जो कि किसी शपथ–पत्र अथवा दस्तावेजी साक्ष्य द्वारा समर्थित नहीं था – धारा 47 के अंतर्गत अधिवक्ता के माध्यम से पार्षद की हाजिरी हेतु कोई उपबंध नहीं – तीन–चौथाई पार्षदों द्वारा समर्थित न होने के कारण कलेक्टर ने उचित रूप से प्रस्ताव को अस्वीकार किया – याचिका खारिज।

B. Municipalities Act, M.P. (37 of 1961), Section 47 – Recall of President – Proper Party **– Proposal for recall of president rejected by Collector, which is challenged in present petition – Petitioners seeking quashment of order passed in favour of president – Right has been created in favour of president and he has not been made a party to present petition – Petition liable to be dismissed on this ground alone. (Para 10)**

ख. नगरपालिका अधिनियम, म.प्र. (1961 का 37), धारा 47 – अध्यक्ष को पुनः बुलाना – उचित पक्षकार – अध्यक्ष को पुनः बुलाने के प्रस्ताव को कलेक्टर द्वारा अस्वीकार किया गया, जिसे कि इस याचिका में चुनौती दी गई है – याचीगण, अध्यक्ष के पक्ष में पारित किये गये आदेश का अभिखंडन चाहते हैं – अध्यक्ष के पक्ष में अधिकार सृजित किया गया है तथा वर्तमान याचिका में उसे पक्षकार नहीं बनाया गया है – याचिका एकमात्र इस आधार पर खारिज करने योग्य है।

***C. Municipalities Act, M.P. (37 of 1961), Sections 47, 331 & 332 – Recall of President – Revision & Review* – Held – Rejection of proposal u/S 47 by Collector is final in nature – Petitioner ought to have availed the remedy of revision but since they have given up their right of revision, approached this Court and argued the matter on merits, they cannot be relegated to revisional authority. (Para 11)**

ग. नगरपालिका अधिनियम, म.प्र. (1961 का 37), धाराएँ 47, 331 व 332 – अध्यक्ष को पुनः बुलाना – पुनरीक्षण व पुनर्विलोकन – अभिनिर्धारित – कलेक्टर द्वारा धारा 47 के अंतर्गत प्रस्ताव की अस्वीकृति अंतिम स्वरूप की है – याची को पुनरीक्षण के उपचार का लाभ उठाना चाहिए था परंतु चूंकि उन्होनें पुनरीक्षण के अपने अधिकार का त्यजन कर दिया है तथा इस न्यायालय के समक्ष आये हैं और गुणदोषों के आधार पर मामले में तर्क दिये है, उन्हें पुनरीक्षण प्राधिकारी के पास नहीं भेजा जा सकता।

Cases referred:

2005 (3) MPLJ 578, 2005 (2) MPLJ 306, 2008 (4) MPLJ 316.

Pushyamitra Bhargava, for the petitioners.
Mayank Purohit, G.A. for the respondent/State.
Kamal Airen, for the respondent No. 2.

O R D E R

VIVEK RUSIA, J.:- Petitioners, ten in numbers, have filed the present petition being aggrieved by the order dated 19.11.2019 (Annexure P/1) passed in Case No.C-144/2019-20 passed by Collector Khargone whereby the motion moved by the Councilors of Municipal Council, Maheshwar under section 47 of the Municipalities Act (hereinafter referred to as 'the Act') has been turned down.

Facts of the case in short are as under:

2. Petitioners are elected Councilors of Municipal Council, Maheshwar in the general election held in the year 2017. The result was published in the gazette notification dated 24.08.2017. After completion of duration of two years, ¾th Councilors invoked the provision of section 47 of the Municipalities Act by submitting a proposal to the Collector for recalling of the elected President of the Municipality. According to the petitioners, the proposal was signed and supported with the affidavits of 15 Councilors. Under the provision of section 47 of the Act,

the Collector was required to verify the signatures and affidavits of the Councilors before forwarding it to the State Election Commission. Vide order dated 21.10.2019 the Collector, Khargone has directed all the Councilors to remain present on 25.10.2019 at 4.00 P.M along with their ID cards for verification of the signatures. On 25.10.2019 the Councilors appeared through their counsel but the Collector was busy in administrative work, therefore, the verification could not be done and the next date of 04.11.2019 was given. On 04.11.2019 the Collector was not in the office, therefore, the next date was given by the Reader. On 18.11.2019 ten Councilors appeared along with the counsel and signed the order sheet before the Collector and he also verified and certified them on the basis of photos and ID cards. For verification of other Councilors the counsel sought time till 19.11.2019. On 19.11.2019 an application was moved by counsel Shri Lakhan Yadav seeking adjournment on the ground that a death took place in the family of Councilor Dilip and Councilors Ravi, Ruvina Bee and Ritu are unable to appear due to illness. Since the application was not supported by any documentary evidence, therefore, the Collector has rejected the application and also turned down the proposal for want of quorum. According to the Collector, out of 15 Councilors, ¾th Councilors i.e. 12 were required to verify their signatures but only ten have verified, hence the proposal of recall is not supported by 3/4th Councilors, hence the same is liable to be rejected.

3. Being aggrieved by the aforesaid order, ten Councilors have filed the present petition before this Court on the ground that the Collector has unnecessarily insisted for verification of the signatures by personal presence of the Councilors which is beyond the scope of section 47 of the Act. The proposal was moved by 3/4th Councilors and section 47 does not contemplate that proposal should be presented by 3/4th Councilors in person or that for the purpose of verification of their signatures the personal presence is necessary.

4. Shri Pushyamitra Bhargava, learned counsel appearing for the petitioners has placed heavy reliance over the judgment passed by the Full Bench of this Court in the case of *State of M.P vs. Mahendra Kumar Saraf* reported in 2005 (3) MPLJ 578 and another judgment passed by the Full Bench in the case of *Smt.Naravadi Bai Choudhary vs. State of M.P* reported in 2005 (2) MPLJ 306 in which it has been held that the provision of section 47 no where mandates that the verification shall be made in presence of the signatories. The verification of signatures by way of personal presence is not the only or exclusive mode provided in section 47 of the Act. If the physical presence of the Councilor concerned is made a *sine qua non* for verification of the signatures, at times it may defeat the purpose. If the Councilors are unable to present due to old age, infirmity or serious illness etc. in such a situation the verification can be done by other mode, hence the impugned action of the respondent is arbitrary and in violation of the provisions of the Act and liable to be set aside.

5. Per contra, Shri Mayank Purohit, learned Govt. Advocate appearing for the respondents No.1 & 3 submits that the impugned order has been correctly passed by the Collector in conformity with the provisions of Section 47 of the Act. Out of 14 Councilors, ten appeared and got verified their signatures on 18.11.2019 and the remaining 4 Councilors sought time to appear but on 19.11.2019 none of them appeared and their counsel filed an application for adjournment which was not duly supported by any document, therefore, the Collector has rightly turned down the proposal for want of verification by 3/4th Councilors. In support of his contention he has placed reliance over the judgment passed by the Division Bench of this Court in the case of *Madanlal Narvariya vs. Smt.Satya Prakashi Parsedia and others* reported in 2008 (4) MPLJ 316 in which after considering the aforesaid two Full Bench judgments it has been held that under section 47 of the Act the Collector is required to record its satisfaction which means the act of satisfying or the state of feeling being satisfied in respect of the proposal moved by 3/4th members of the council. The subjective satisfaction of the Collector is necessary before forwarding the proposal to the State Election Commission. The degree of application of mind in the case of satisfaction is greater than the word approval. If the Collector is not satisfied subjectively then he is competent to reject such proposal. Shri Purohit, learned Govt. Advocate submits that against the impugned order the petitioners are having alternate remedy of revision before the State Govt. under section 331 of the Act and thereafter a remedy of review under section 332 of the Act.

6. Shri Kamal Airen, learned counsel appearing for the respondent No.2 submits that at this stage there is no role of M.P State Election Commission because the Collector did not find it satisfactory to forward it to the Election Commission and turned down the proposal.

7. Section 47 of the Municipalities Act reads as under:

> ***47. Recalling of President.*** *- (1) Every President of a Council shall forthwith he deemed to have vacated his office if he is recalled through a secret ballot by a majority of more than half of the total number of voters of the municipal area casting the vote in accordance with the procedure as may be prescribed:*
>
> *Provided that no such process of recall shall be initiated unless a proposal is signed by not less than three fourth of the total number of (he elected Councillors and presented to the Collector :*
>
> *Provided further that no such process shall be initiated :-*
>
> *(i) within a period a two years from the date on which such President is elected and enters his office;*
>
> *(ii) if half of the period of tenure of the President elected in a by-election has not expired:*

Provided also that process for recall of the President shall be initiated once in his whole term.

(2) The Collector, after satisfying himself and verifying that the three fourth of the Councillors specified in sub-section (1) have signed the proposal of recall, shall send the proposal to the State Government and the State Government shall make a reference to the State Election Commission.

(3) On receipt of the reference, the State Election Commission shall arrange for voting on the proposal of recall in such manner as may be prescribed.]

8. Undisputedly, 15 Councilors have signed a proposal and presented it before the Collector, Khargone for recalling of the President of the Municipal Council, Maheshwar. The Collector registered it as case No.C-144/2019-20 and directed all the 15 Councilors to remain present on 25.10.2019 at 4.00 P.M for verification of the signatures. They have also been directed to keep their ID cards with them. The verification could not take place on 25.10.2019 and 04.11.2019. On 18.11.2019 out of 15 Councilors only ten were present for verification of their signatures and identity and that was done by the Collector. For verification of the remaining four Councilors, the counsel appearing on their behalf sought time till 19.11.2019. On 19.11.2019 the counsel on his own signature submitted an application for adjournment on the ground that Councilsor (sic : Councilor) Dilip is unable to appear due to demise in the family and the remaining 3 Councilors viz. Ravi, Ruvina Bee and Ritu are unable to appear due to sickness. The application was not supported by any affidavit or any documentary evidence. Even the counsel has not filed any Vakalatnama or there is no provision under section 47 of the Act for appearance of a Councilor through a counsel, therefore, the counsel was not authorized to file an application for adjournment, hence on 18.11.2019 out of 15 Councilors only ten remained present before the Collector and on 19.11.2019 none of them were present and only the counsel Mr.Lakhan Yadav had appeared on their behalf, therefore, the Collector has rightly turned down the proposal as it was not supported by 3/4th Councilors.

9. Even otherwise, all those four Councilors who did not remain present on 18.11.2019 and 19.11.2019 have not filed the writ petition before this Court and the only ten Councilors who remained present on 18.11.2019 have approached this Court by way of this writ petition, therefore, still those four Councilors have no grievance against the impugned order passed by the Collector. In this petition nothing has been produced to justify their non-appearance on 19.11.2019. Even if it is held as per the Full Bench judgment that personal presence is not required for verification of proposal, even then not a single document has been filed to verify their signature before the Collector, therefore, the Collector had no option but to turn down the proposal.

10. Under section 47 of the Act the process for recall of the President shall be initiated once in its whole term. By the impugned order the proposal of recall has been rejected by the Collector, therefore, a right has been created in favour of the President and if that order is quashed in this petition that would go against the elected President who has not been made respondent in this petition, therefore, the petitioners are seeking quashment of the impugned order which is passed in favour of the President. The writ petition is liable to be dismissed on this ground alone.

11. Learned Govt. Advocate has raised an objection that the petitioners are having alternate remedy to file a revision against the impugned order. A specific query was made to Shri Pushyamitra Bhargava, learned counsel appearing for the petitioners as to whether the petitioners are willing to avail the remedy of revision at this stage. He submits that they want an order on merit in this petition because the said order is not revisable under section 323 of the Act as held by the Full Bench in the case of *Mahendra Kumar Saraf* (supra) and *Smt.Naravadi Bai Choudhary* (supra). In the matter before the Full Bench a writ petition was filed against the proposal sent by the Collector to the State Govt. and hence it has been held that forwarding of the proposal by the Collector is not an order as contemplated under section 331 of the Act, therefore, the petitioners therein cannot be relegated to the revisional authority. In the present case, the Collector has turned down the proposal under section 47 of the Act which is final in nature because the proposal of recall has been dropped for ever, hence it is an order under section 47 of the Act for which the petitioners ought to have available the remedy of revision. Since they have given up their right of revision and approached this Court and argued the matter on merit, therefore, at this stage they cannot be relegated to the revisional authority.

12. In view of the foregoing discussion, the petition is dismissed accordingly.

Petition dismissed

I.L.R. [2020] M.P. 1122 (DB)
WRIT PETITION

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

W.P. No. 2408/2020 (Jabalpur) decided on 25 February, 2020

SOWMYA R. & anr. …Petitioners

Vs.

STATE OF M.P. & ors. …Respondents

***Real Estate (Regulation and Development) Act (16 of 2016), Sections 12, 14, 18, 19 & 71 and Real Estate (Regulation and Development) Rules (M.P.) 2017, Rules 26(2), (3) & (5) – Admissibility & Adjudication of Complaints – Authority* – Held – "Admissibility" of complaint and "adjudging" the compensation are different stages – If "authority" finds that complaint is not liable to be rejected on ground of *prima facie* case or jurisdiction or *locus standi,* it shall be forwarded to Adjudicating Officer appointed u/S 71 for adjudicating compensation – Conferral of such power to examine admissibility of complaint is not inconsistent with Section 71 – Thus, Rules 26(2), (3) & (5) are not inconsistent or *ultra vires* to Section 71 of the Act – Petition dismissed. (Para 8)**

भू–संपदा (विनियमन और विकास) अधिनियम (2016 का 16), धाराएँ 12, 14, 18, 19 व 71 एवं भू–संपदा (विनियमन और विकास) नियम, म.प्र., 2017, नियम 26(2), (3) व (5) – परिवादों की ग्राह्यता व न्यायनिर्णयन – प्राधिकारी – अभिनिर्धारित – ''परिवाद'' की ग्राह्यता एवं प्रतिकर ''न्यायनिर्णीत'' करना भिन्न प्रक्रम हैं – यदि ''प्राधिकारी'' यह पाता है कि परिवाद, प्रथम दृष्ट्या प्रकरण अथवा अधिकारिता अथवा सुने जाने के अधिकार के आधार पर अस्वीकार किये जाने योग्य नहीं है, तो इसे प्रतिकर न्यायनिर्णीत करने हेतु धारा 71 के अंतर्गत नियुक्त न्यायनिर्णायक प्राधिकारी को अग्रेषित किया जाएगा – परिवाद की ग्राह्यता का परीक्षण करने के लिए ऐसी शक्ति का प्रदान किया जाना धारा 71 के असंगत नहीं है – अतः, नियम 26(2), (3) व (5) अधिनियम की धारा 71 के असंगत या अधिकारातीत नहीं है – याचिका खारिज।

Petitioner No. 1 in person.
H.S. Chhabra, G.A. for the respondents/State.

O R D E R

The Order of the Court was passed by :
VIJAY KUMAR SHUKLA, J.:-The petitioners, who are Advocates by profession, have invoked the writ jurisdiction of this Court under Article 226 of the Constitution of India as Public Interest Litigation, challenging the validity of Rule 26(2), 26(3) and 26(5) of 'the Madhya Pradesh Real Estate (Regulation and

Development) Rules, 2017' (hereinafter referred as 'Rules, 2017') as amended vide amendment dated 20.9.2019 on the ground that the aforesaid provisions are *ultra vires* to the parent Act called 'the Real Estate (Regulation and Development) Act, 2016' (hereinafter referred as 'Act').

2. The petitioners urged that the aforesaid Rules, 2017 are inconsistent with the provisions of Section 71 of the Act. It is contended that parent Act empowers only Adjudicating Officer to receive complaints, issue summons, inquire and adjudicate the complaints filed under Sections 12, 14, 18 and 19 of the Act. By the impugned provisions the Authority established under Section 20 of the Act has been empowered to receive, issue summons and inquire and adjudicate the complaints filed under Sections 12,14, 18 and 19. It is argued that Section 71 of the Act categorically provided the Adjudicating Officer to receive and inquire the complaint, therefore, the provisions of Rule 26(2), 26(3) and 26(5) of the Rules, 2017 are inconsistent to the Act and are liable to be struck down as *ultra vires*.

3. To appreciate the aforesaid contentions, it would be apt to reproduce Rule 26 of the Rules 2017 :-

> *"**26. Manner of filing a complaint with the adjudicating officer and inquiry by the adjudicating officer** :- (1) Any aggrieved person may file a complaint for compensation under Sections 12, 14, 18 and 19 to be decided by the adjudicating officer, in Form 'N' which shall be accompanied by payment in the manner prescribed of a fee of rupees one thousand.*
>
> *(2) Upon receipt of the complaint the Authority shall examine it for admissibility; if it is prima facie found to be without substance or beyond jurisdiction or without locus standi, the Authority may reject it or decline to accept it, for the reason to be recorded in the form of a written order.*
>
> *Provided that no complaint receive under sub-rule(1) shall be rejected without giving an opportunity of hearing the complainant or his authorised agent an opportunity to be heard.*
>
> *(3) if the Authority finds the complaint to be prima facie admissible as a case for compensation under Sections 12,14,18 or 19, it shall transfer it to the concerned adjudicating officer for further action.*
>
> *(4) The adjudicating officer shall for the purposes of adjudging compensation follow summary procedure for inquiry in the following manner, namely,*
>
> *(a) upon receipt of the complaint the adjudicating officer shall issue a notice along with particulars of the alleged contravention and the relevant documents to the promoter;*
>
> *(b) If the respondent is a promoter of a registered project, then issue of notice by e-mail to the up-dated e-mail address given by him in the*

record of the Authority shall be sufficient and proof of his having been validly served;

(c) the notice shall specify a date and time for further hearing.

(d) If the respondent chooses to be represented by an authorized person as per the provisions of Section 56, written authorization to act as such and the written consent thereto by such authorized person, both in original, shall be presented to the adjudicating officer on or before the time fixed for hearing;

(e) On the date so fixed, the adjudicating officer shall explain to the respondent or his authorized agent, as the case may be, about the contravention alleged to have been committed in relation to any of the provisions of the Act or the rules and regulations made there under and if the respondent -

(i) pleads guilty, the adjudicating officer shall record the plea, and award such compensation as he thinks fit in accordance with the provisions of the Act or the rules or the regulations, made there under ;

(ii) does not plead guilty and contests the complaint the adjudicating officer shall require the respondent to submit an explanation in writing.

(f) in case the adjudicating officer is satisfied on the basis of the submissions made that the complaint does not require any further inquiry he may dismiss the complaint;

(g) in case the adjudicating officer is satisfied on the basis of the submissions made that the there is need for further hearing into the complaint he may order production of documents or other evidence on a date and time fixed by him;

(h) the adjudicating officer shall have the power to carry out an inquiry into the complaint on the basis of documents and submissions;

(i) the adjudicating officer shall have the power to summon and enforce the attendance of any person acquainted with the facts and circumstances of the case to give evidence or to produce documents which in the opinion of the adjudicating officer, may be useful for or relevant to the subject matter of the inquiry and in taking such evidence the adjudicating officer shall not be bound to observe the provisions of the Indian Evidence Act, 1872 (11 of 1872)

(j) On the date so fixed, the adjudicating officer upon consideration of the evidence produced before it and other records and submissions is satisfied that -

(i) the respondent is liable to pay compensation, the adjudicating officer may, by order in writing, order payment of such compensation as deemed fit, by the respondent to the complaint; or;

(ii) the respondent is not liable to pay any compensation, the adjudicating officer, may by order in writing, order payment of such compensation as deemed fit, by the respondent to the complainant; or;

(k) If any person fails, neglects or refuses to appear, or present himself as required before the adjudicating officer, the adjudicating officer shall have the power to proceed with the inquiry in the absence of such person or persons after recording the reasons for doing so.

(5) The time limit for disposal of the case prescribed in sub-section (2) of Section 71 shall be calculated from the date of transfer of the case by the Authority to the adjudicating officer."

4. It would also be apposite to reproduce relevant provisions of the Act, which reads thus :-

"The Real Estate (Regulation And Development) Act, 2016:

"2.(a) "adjudicating officer" means the adjudicating officer appointed under sub section *(1)* of section 71;

(i) **"Authority"** means the Real Estate Regulatory Authority established under sub-section *(1)* of section 20;

... ...

71. Power to adjudicate :- *(1)* For the purpose of adjudging compensation under sections 12, 14, 18 and section 19, the Authority shall appoint in consultation with the appropriate Government one or more judicial officer as deemed necessary, who is or has been a District Judge to be an adjudicating officer for holding an inquiry in the prescribed manner, after giving any person concerned a reasonable opportunity of being heard:

Provided that any person whose complaint in respect of matters covered under section 12, 14, 18 and section 19 is pending before the Consumer Disputes Redressal Forum or the Consumer Disputes Redressal Commission or the National Consumer Redressal Commission, established under section 9 of the Consumer Protection Act, 1986, on or before the commencement of this Act he may, with the permission of such Forum or Commission, as the case may be, withdraw the complaint pending before it and file an application before the adjudicating officer under this Act.

(*2*) The application for adjudging compensation under sub-section (*1*), shall be dealt with by the adjudicating officer as expeditiously as possible and dispose of the same within a period of sixty days from the date of receipt of the application:

Provided that where any such application could not be disposed of within the said period of sixty days, the adjudicating officer shall record his reasons in writing for not disposing of the application within that period.

(3) While holding an inquiry the adjudicating officer shall have power to summon and enforce the attendance of any person acquainted with the facts and circumstances of the case to give evidence or to produce any document which in the opinion of the adjudicating officer, may be useful for or relevant to the subject matter of the inquiry and if, on such inquiry, he is satisfied that the person has failed to comply with the provisions of any of the sections specified in sub-section (*1*), he may direct to pay such compensation or interest, as the case any be, as he thinks fit in accordance with the provisions of any of those sections."

5. After receiving the assent of the President on 25th March, 2016, the Act called "The Real Estate (Regulation And Development) Act, 2016" was enacted. The purpose is to establish the Real Estate Regulatory Authority for regulation and promotion of the real estate sector and to ensure sale of plot, apartment of building, as the case may be, or sale of real estate project, in an efficient and transparent manner and to protect the interest of consumers in the real estate sector. It also covers the adjudicating mechanism for speedy dispute redressal for which it provides for the establishment of the Appellate Tribunal to hear appeals from the decisions, directions or orders of the Real Estate Regulatory Authority and the adjudicating officer in relation to the matters connected therewith or incidental thereto. As per the provisions of Section 2(a) 'adjudicating officer' means the adjudicating officer appointed under sub section (*1*) of section 71. The 'Authority' is defined under Section 2(i) means 'the Real Estate Regulatory Authority (hereinafter referred to in short as 'RERA') established under sub-section (*1*) of section 20. The 'adjudicating officer' is appointed by the 'Authority' in consultation with the appropriate Government as per sub section (1) of Section 71.

6. The basic essential features are contained in various statutoruy provisions which are referred hereinafter. The functions of the Authority are prescribed under Section 32 of the Act. Whereas, *definition* of 'Authority' is engrafted under Section 34. Section 35 empowers the 'Authority' to call for information, conduct investigations on a complaint or suo motu. The Real Estate Appellate Tribunal is constituted under Section 43 of the Act. Section 53 confers power on the Tribunal and an appeal lies to the High Court. Thus, there are three forums under the Act for

adjudication of the dispute namely 'adjudicating officer' RERA ('Authority') thereafter, the Appellate Tribunal and the High Court.

7. As per Section 71 power to adjudicate for the purpose of adjudging compensation under Section 12, 14, 18 and 19, the authority shall appoint in consultation with the appropriate Government 'adjudicating officer' for holding an inquiry in the 'prescribed manner' after giving any person concerned a reasonable opportunity of being heard. In exercise of the powers conferred under Section 84 of the Act read with sub clause (iv) of clause (g) of Section 2 of the Act, the State Government has made the rules and the manner has been prescribed for filing a complaint with the adjudicating officer and inquiry by the adjudicating officer. Sub rule (2) of Rule 26 provides that upon receipt of the complaint, the 'Authority' shall examine it for admissibility if it is *prima facie* found to be without substance or without jurisdiction or without *locus standi*, the Authority may reject it or decline to accept it for the reasons to be recorded in the form of a written order. It is further provided that no complaint under sub section (1) of Rule 26 shall be rejected without giving any opportunity of hearing the complainant or his authorized attendant. As per sub rule (3) of Rule 26, if the authority finds the complaint to be *prima facie* admissible as the case for compensation under Section 12, 14, 18 or 19, it shall transfer it to the concerned 'Adjudicating Officer' for further action. Sub rule (4) of Rule 26 engrafts procedure for inquiry by the Adjudicating Officer. Sub rule (5) of Rule 26 speaks about time limit for disposal of the case prescribed under sub section (2) of Section 71 shall be calculated from the date of transfer of the case by the Authority to the adjudicating officer.

8. On a conjoint reading of the above statutory provisions we do not find that sub rules (2), (3) and (5) of Rule 26 are inconsistent or *ultra vires* to Section 71 of the Act. Before adjudging the compensation under Section 12, 14, 18 and 19, the 'authority' has been conferred power to examine the admissibility of a complaint, if the authority *prima facie* finds that the complaint is without substance or beyond jurisdiction or beyond *locus standi* at this stage itself the authority may reject the complaint. The said power to the authority is with a rider by way of proviso of giving opportunity of hearing to the complainant or his authorized agent. If the Authority finds that compliant is not liable to be rejected on the ground of *prima facie* case or jurisdiction or *locus standi*, the complaint shall be forwarded to the Adjudicating Officer, appointed by the authority under Section 71 for the purpose of adjudicating compensation under the aforesaid provision. The conferral of power to the Authority to examine the admissibility of a complaint is not inconsistant (sic: inconsistent) with the provisions of Section 71 of the Act. The 'admissibility' of a complaint and 'adjudging' the compensation are different stages. The authority has been conferred the said power to find out the maintainability of the complaint itself and in case if the complaint is frivolous or without jurisdiction or without *locus standi*, the same can be rejected at the

threshold without transferring it to the adjudicating officer for the purpose of adjudging the compensation. The determination of compensation would be at the subsequent stage if the complaint is found to be admissible by the authority. The power conferred to the 'authority' is well guided by the proviso to afford opportunity of hearing to the complainant or his attendant and further the said order is subject to the provisions of the appeal to the higher authorities. Thus, the impugned Rules are not inconsistant (sic : inconsistent) with the provisions of the Act.

9. In view of the aforesaid, we do not find any merit in the writ petition. The petition is **dismissed**.

Petition dismissed

I.LR. [2020] M.P. 1128 (DB)
WRIT PETITION

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

W.P. No. 4205/2019 (Jabalpur) decided on 27 February, 2020

SKY POWER SOUTHEAST SOLAR INDIA PVT. LTD., NEW DELHI (M/S) …Petitioner

Vs.

M.P. POWER MANAGEMENT CO. LTD. & ors. …Respondents

A. Constitution – Article 226 – Termination of Contract – Grounds **– Held – Petitioner invested about 350 Crores in project, the unit is ready for commissioning and only some statutory sanctions are required – Period to commission the project was 24 months from date of PPA but contract was terminated even before expiry of outer limit of 24 months – Termination of contract is wholly unjustified and arbitrary – Plea of alternative remedy has no merits – Impugned order quashed – Petition allowed. (Para 13 &15)**

क. संविधान – अनुच्छेद 226 – संविदा का पर्यवसान – आधार – अभिनिर्धारित – याची ने परियोजना में लगभग 350 करोड़ का निवेश किया, ईकाई कार्यादेश हेतु तैयार है तथा केवल कुछ कानूनी मंजूरियां अपेक्षित हैं – परियोजना के कार्यादेश के लिए अवधि, पी पी ए की तिथि से 24 माह थी परंतु संविदा का 24 माह की बाहरी सीमा समाप्त होने के पूर्व ही पर्यवसान किया गया – संविदा का पर्यवसान पूर्णतः अन्यायपूर्ण एवं मनमाना है – वैकल्पिक उपचार के अभिवाक् में कोई गुणदोष नहीं – आक्षेपित आदेश अभिखंडित – याचिका मंजूर।

B. Constitution – Article 226 – Contractual Matters – Scope & Jurisdiction **– Held – Apex Court concluded that interference in contractual**

matters depends upon prevailing circumstances – There is no absolute bar to exercise jurisdiction under Article 226 in contractual matters – Jurisdiction to interfere is discretion of Court which depends upon facts of each case.

(Para 14)

ख. संविधान – अनुच्छेद 226 – संविदात्मक मामले – व्याप्ति व अधिकारिता – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया कि संविदात्मक मामलों में हस्तक्षेप, वर्तमान परिस्थितियों पर निर्भर करता है – संविदात्मक मामलों में अनुच्छेद 226 के अंतर्गत अधिकारिता के प्रयोग हेतु पूर्ण वर्जन नहीं है – हस्तक्षेप हेतु अधिकारिता, न्यायालय का विवेकाधिकार है जो कि प्रत्येक प्रकरण के तथ्यों पर निर्भर करता है।

Cases referred:

W.P. No. 12432/2017 decided on 18.08.2017, (2004) 3 SCC 553, (2015) 9 SCC 433.

Naman Nagrath with Manpreet Lamba, for the petitioner.

Shashank Shekhar, A.G. with *Bhupesh Tiwari*, G.A. for the respondents/ State.

Amit Kumar Jaiswal, for the respondent Nos. 4 & 5.

O R D E R

The Order of the Court was passed by :

VIJAY KUMAR SHUKLA, J,:- In the instant petition filed under Article 226 of the Constitution of India the petitioner has challenged the legality and validity of the letter, dated 7-7-2018 by which the respondent No.1 has terminated the Power Purchase Agreement (for brevity, 'the PPA'], dated 18-9-2015 which was executed between the petitioner and the respondent No.7.

2. The petitioner is a power generating company under the provisions of the Electricity Act, 2003 [hereinafter referred to as "the Act"] and the respondent No.1 is a Trading Licensee under the provisions of the Act and is responsible for power procurement in the State of Madhya Pradesh. A solar policy was introduced by the New and Renewable Energy Department, Govt. of Madhya Pradesh, respondent No.2 herein, on 20-7-2012 for encouraging generation of power through Solar Power Projects. A Request for Proposal (for short, 'RFP'] was issued by the respondent No.2 on 18-8-2015 inviting interested parties to submit their RFP. A Letter of Intent (LoI) dated 18-8-2015 for procurement of solar power from grid connected solar projects was issued on 18-8-2015 in favour of M/s Sky Power Southeast Asia Holding Ltd. by the respondent No. 1.

3. A Power Purchase Agreement (PPA) was entered into between the respondent No.1 and the petitioner on 18-8-2015 for setting up a 50 MW solar photovoltaic (PV) power plant at Village, Bedhsya, District Khandwa and sale of

power from the said plant exclusively to the respondent No.1. In January, 2016 the petitioner requested the respondent No.1 to approve acquisition of private land for the Project on the leasehold basis and to issue necessary amendment to the PPA to this effect. A letter dated 20-4-2016 was issued to the petitioner amending Clause 2.1.1(f) of the PPA. The respondent No.2 issued a letter dated 16-11-2016 for approval for registration of the Project.

4. According to the petitioner despite delay on the part of the respondents, it achieved the condition subsequent and intimated to the respondent on 10-3-2017. A notice dated 4-7-2017 was issued to the petitioner informing commissioning of project and for inspection by the Chief Engineer (Electricity Safety) & Chief Electrical Inspector to Government (CEIG). It is further pleaded that the CEIG granted approval for inspection, certifying physical commissioning of project on 9-8-2017. It is the case of the petitioner that between 22-02-2017 to 10-8-2017, no objection regarding delay was received from the respondent and the petitioner invested about 330 crores to commission project during this period. Despite that, order was issued by the respondent No.1 on 11-8-2017 terminating the PPA for the alleged failure of the petitioner to fulfil the conditions. A writ petition forming the subject-matter of W.P. No.12880/2017 was filed seeking quashment of the termination notice dated 11-8-2017 which was allowed on 20-6-2018 and the termination notice dated 11-8-2017 was set aside. The petitioner has also averred that it has also lodged an FIR on 12-9-2017 and 19-03-2018 about the theft of the inverters. It is also claimed that the stolen parts were immediately replaced and the Unit was ready for commissioning, still the impugned communication dated 7-7-2018 has been issued terminating the PPA pursuant to Article 2.5.1(d) and Article 9.1 of the PPA for alleged failure to commission the Project within the time period allowed under the agreement.

5. The respondents raised preliminary objection regarding maintainability of the writ petition on the ground of availability of alternative remedy. It is contended that if the petitioner had any grievance regarding grant of Short Term Open Access (STOA) they could have exercised alternative remedies available under Regulation 8.31 of the M.P. Electricity Regulatory Commission (Terms and Conditions for Intra-state Open Access in Madhya Pradesh) Regulation - 2005 framed by the Madhya Pradesh Electricity Regulatory Commission (MPERC) providing Monitoring, Dispute Resolution and Decision Review Committee to resolve any grievance regarding STOA.

6. On 13-01-2020 after hearing the learned counsel appearing for the parties, this Court passed the following order :

> "Learned counsel for the petitioner submitted that the Chief Electrical Inspector (hereinafter referred to as 'CEI') had given a report in favour of the petitioner on 9.8.2017, vide

Annexure P/11. It was urged that the respondents had carried out inspection on 21.4.2018, vide Annexure P/19, where the report of the CEI was not controverted, but it was reported that certain parts were missing.

It was further argued that parts were stolen in respect of which First Information Reports were duly registered. Still further the petitioner has already removed the deficiency of the stolen parts; and, the Project is ready for commissioning on any day as may be directed by this Court. On the aforesaid premises it was argued that the termination of the contract on the part of the respondents was not justified.

Keeping in view the huge investment made by the petitioner, learned counsel for the respondents pray for time to seek instructions in the matter. "

7. The case came up for further hearing on 28-01-2020. After receiving the instruction, the learned Advocate General produced a communication issued by Chief General Manager (Regional Office), M. P. Power Management Company Limited, Bhopal addressed to the petitioner asking him to attend a meeting on 6-02-2020. It is apt to reproduce the order passed by this Court on 28-01-2020 :

"Learned Advocate General has produced a communication issued by the Chief General Manager (Regional Office), M.P. Power Management Company Limited, Bhopal, addressed to the petitioner fixing the date for attending a meeting at Regional Office of MPPMCL at Bhopal on 6th February, 2020 at 15:00 hrs. to discuss issues with respect to the termination of the Power Purchase Agreement dated 18-9-2015 for 50 MW Solar Power Project regarding which this writ petition has been filed. The same is taken on record."

8. It was urged by the learned counsel for the petitioner that the dispute could not be resolved in the meeting, as the respondent No.1 asked the representative of the petitioner for exploring the option of a "Third Party Sale" and that any permits/approval which may be required for commissioning of the petitioner's Project in relation to "Third Party Sale" would be expedited by the respondent No.1. The said proposal was not acceptable to the petitioner, as according to him it would amount to petitioner's giving-up and relinquishing all its rights under the PPA. Since the parties could not arrive at an amicable settlement, therefore, the matter has been heard on merit.

9. From the pleadings the following undisputed facts have emerged :

"1. The total permissible period to commission the Project is 24 months from the date of Power Purchase Agreement (PPA), i.e. from 18-9-2015 to 17-09-2017.

2. The PPA was terminated on 11-8-2017 (within 1 month and 6 days), that is before expiry of the outer limit of 24 months.

3. The Project involves two milestones namely, (i) to achieve Condition Subsequent after signing of PPA (permissions, procurement of land etc.); and (ii) actual commission of project.

4. The earlier termination of PPA by order dated 11-8-2017 on the ground of 54 days delay in achieving first milestone was set aside by this Court in W.P. No.12880/2017.

5. Admittedly, the Project was certified to be complete much prior to 24 months ending on 17-9-2017. Notice of Commissioning was issued on 4-7-2017, vide Annexure-P/10 and the CEIG approval on 9-8-2017 (Annexure-P/11).

10. Learned counsel for the petitioner vehemently argued that the petitioner has invested about 350 crores and the Unit is ready for commissioning. It is also urged that the CEIG had given a report in favour of the petitioner on 9-8-2017, Annexure-P/11 and the respondents had also carried out inspection on 21-4-2018, Annexure-P/19. Further, the report of the CEIG was not controverted, whereas only deficiency was reported that certain inverters/parts were missing. A report regarding theft was duly reported and registered and the petitioner has already removed the deficiency of stolen parts which is not disputed.

11. In view of the aforesaid factual scenario, it is contended that termination of the contract on the part of the respondent is not justified and the same is contrary to the Solar Policy of the State Government which has been framed for encouraging generation of power through Solar Power Project. He also placed reliance on the judgment passed by a Co-ordinate Bench of this Court in *Re New Clean Energy Private Limited vs. M.P. Power Management Company Limited and another* (W.P. No.12432/2017, decided on 18-8-2017) where under similar circumstances termination of the contract was set aside and the petition was allowed.

12. Learned counsel for the respondents submitted that the petitioner has failed to carry out the contract as per terms and conditions and, therefore, contract has been rightly terminated. However, the report of the CEIG and the factum of removal of deficiency of stolen inverters/parts could not be disputed.

13. We have heard the learned counsel appearing for the parties and bestowed our anxious consideration on the arguments advanced. In view of narration of facts of the present case and the undisputed facts floating on record, we do not perceive any merit in the arguments raised by the learned counsel for the respondents that the petitioner should be relegated to avail alternative remedy when there is no dispute on facts that the petitioner has invested 350 crores for

establishing the Unit and after replacing the stolen parts the Unit is ready for commissioning on any day. From the facts on record, it is axiomatic that the period to commission the Project was 24 months i.e. from 18-9-2015 to 17-9-2017 from the date of PPA. The contract was terminated on 11-8-2017 even before expiry of the outer limit of 24 months. Earlier, PPA was terminated vide order dated 11-8-2017 on the ground of delay of 54 days in achieving the first milestone which was set aside by this Court in W.P. No.12880/2017. It is apt to mention that the Project involves two milestones, namely, (i) to achieve Condition Subsequent after signing of PPA (Permissions, Procurement of land etc.); and (ii) actual commission of Project. It is not in dispute that the Project was certified to be completed much prior to 24 months ending on 17-9-2017 and notice of commissioning was issued on 4-7-2017. The CEIG approval was also granted on 9-8-2017. Another inspection was done on 21-4-2018 after nine months of notice of commissioning and CEIG approval, in spite thereof the impugned order has been passed.

14. Thus, in view of the obtaining factual matrix, it is undisputedly established that both the milestones of the Project were complete whereas only some of the inverters were stolen for which an FIR was also lodged. It is also not in dispute that the aforesaid parts have been replaced by the petitioner. In the case of *RENew Clean Energy Private Limited* (supra) this Court after referring to the judgments rendered by the Apex Court in the case of *ABL International Ltd. Vs. Export Credit Guarantee Corpn. of India Ltd.,* (2004)3SCC 553 and *State of Kerala and others vs. M.K. Jose,* (2015) 9 SCC 433 held that inference in contractual matters depends upon prevailing circumstances and there is no absolute bar to exercise of jurisdiction under Article 226 of the Constitution of India in contractual matters. Jurisdiction to interfere is the discretion of the Court which depends upon facts of each case.

15. In view of our preceding analysis, we find that the decision taken by the respondent terminating the contract of the petitioner is wholly unjustified and arbitrary. We accordingly allow the writ petition and quash the impugned order dated 7-7-2018, Annexure-P/1, considering the statement that the Unit is ready for physical commissioning and only some statutory sanctions are required. Consequently, it is directed that the petitioner shall submit necessary applications for statutory sanction for operation of the Unit and the respondent/State shall decide those applications expeditiously in accordance with law in quite promptitude.

16. With the aforesaid observation and direction, the **writ petition is allowed**. No order as to costs.

Petition allowed

I.L.R. [2020] M.P. 1134 (DB)
WRIT PETITION

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

W.P. No. 10545/2019 (Jabalpur) decided on 3 March, 2020

AKC & SIG JOINT VENTURE FIRM (M/S.) & ors. …Petitioners

Vs.

WESTERN COALFIELDS LTD. & ors. …Respondents

***A. Constitution – Article 226 and Contract Act (9 of 1872), Section 23 – Jurisdiction of Court* – Held – There is a valid contract between parties where they agreed to submit suits or legal actions to Courts at Nagpur – Even though a part of cause of action has arisen within jurisdiction of this Court, *lis* would be amenable to jurisdiction of Courts at Nagpur – Petition dismissed for want of territorial jurisdiction. (Para 18 & 19)**

क. संविधान – अनुच्छेद 226 एवं संविदा अधिनियम (1872 का 9), धारा 23 – न्यायालय की अधिकारिता – अभिनिर्धारित – पक्षकारों के मध्य एक विधिमान्य संविदा हुई है जिसमें उन्होनें वादों या विधिक कार्यवाहियों को नागपुर के न्यायालयों में प्रस्तुत करने के लिए सहमति दी – यद्यपि वाद हेतुक का एक भाग इस न्यायालय की अधिकारिता के भीतर उत्पन्न हुआ है, मुकदमा, नागपुर के न्यायालयों की अधिकारिता के अध्यधीन होगा – क्षेत्रीय अधिकारिता के अभाव के कारण याचिका खारिज।

***B. 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. (Para 14)**

ख. संविधान – अनुच्छेद 226 एवं संविदा अधिनियम (1872 का 9), धारा 23 – क्षेत्रीय अधिकारिता – करार/संविदा – अभिनिर्धारित – जहां वाद हेतुक का भाग, वहां उत्पन्न होने के परिणामस्वरूप एक से अधिक न्यायालय की अधिकारिता है, परंतु जहां पक्षकार, संविदा में, एक विनिर्दिष्ट न्यायालय को विवाद प्रस्तुत करने के लिए अनुबद्ध है और यदि संविदा विधिमान्य है और संविदा अधिनियम की धारा 23 के विरूद्ध नहीं है, उस न्यायालय में वाद प्रस्तुत होगा जिसके लिए पक्षकारों ने करार किया है और किसी अन्य न्यायालय को नहीं, भले ही उस न्यायालय की अधिकारिता के भीतर वाद हेतुक का भाग उत्पन्न हुआ है।

Cases referred:

C.A. No. 5654/2019 decided on 29.07.2019 (Supreme Court), (2007) 11 SCC 335, (2014) 9 SCC 329, (2004) 6 SCC 254, (1985) 3 SCC 217, (2002) 1 SCC 567, MANU/SC/0001/1989, (1989) 2 SCC 163, (1995) 4 SCC 153.

Sidharth Gupta and *Amit Garg*, for the petitioners.
Greeshm Jain and *Vivek Shukla*, for the respondents.

O R D E R

The Order of the Court was passed by:

VIJAY KUMAR SHUKLA, J.:- The petitioners have filed the present petition under Article 226 of the Constitution of India, challenging the order dated 08-05-2019, passed by the respondent no.2, whereby the work order issued in favour of the petitioners has been terminated, security amount has been forfeited and the joint venture of the petitioners has been debarred from participation in tenders of the respondent Western Coalfields Limited (for short WCL) for a period of 12 months from the date of issuance of the impugned order dated 08-05-2019.

2. The necessary facts are that the petitioners were the successful bidder in the NIT No.24/2014-15, issued by the respondent WCL in September, 2014. In pursuance thereof, a work order was issued to the petitioners on 08-12-2014 in their favour by the WCL. It is submitted that the petitioners had completed the work at an extremely fast pace in the initial period. According to the petitioners because of the hindrances created by the respondents and due to departmental failure, some delay occurred in the execution of the contract. The respondents also did not extend the period of execution of the contract.

3. Learned counsel for the respondents raised preliminary objection regarding territorial jurisdiction of this court in view of Clause 32.1 of the contract and urged that the parties have specifically agreed that any dispute arising between them shall be dealt with exclusively by the Nagpur Court only. It was further submitted that where cause of action arises within the territorial jurisdiction of various Courts and the parties to the contract have agreed for forum at a particular place only having territorial jurisdiction then that Court alone shall exercise jurisdiction. Elaborating further, it was urged that though the letter of acceptance was issued by the office of General Manager Contract Management Cell of WCL at Nagpur, the agreement was entered with the WCL Management and on behalf of the General Manager Pench Area and the agreement was signed in respect of the work which was to be executed at Pench Area in district Chhindwara, yet, the Courts at Nagpur alone would have jurisdiction in view of clause 32.1 of the agreement. According to the learned counsel this territorial jurisdiction of the Courts at Madhya Pradesh to entertain the petition relating to dispute between the parties would not be there.

4. Per contra, learned counsel for the petitioners argued that this court has jurisdiction under Article 226 of the Constitution of India, as part of cause of action has arisen in district Chhindwara within the territorial jurisdiction of this court. In support of his submissions, he placed reliance on the judgment of the Supreme Court in *Maharashtra Chess Association Vs. Union of India* (UOI) and others (Civil Appeal No.5654 of 2019) (arising out of Special Leave Petition (C) No.29040 of 2018), decided on 29-07-2019. Further, reference was also made to the decisions in *Alchemist Ltd. And another Vs. State Bank of Sikkim and others*, (2007) 11 SCC 335, *Nawal Kishore Sharma Vs. Union of India and others* (2014) 9 SCC 329. Judgment reported as *Kusum Ingots & Alloys Ltd. Vs. Union of India and another*, (2004) 6 SCC 254 was relied to contend that the forum convenience is with the plaintiff/petitioner.

5. The preliminary issue that arises for consideration herein is whether in the facts and circumstances of the present case where there is specific exclusion clause in the contract regarding territorial jurisdiction of Courts other than Nagpur Court only, the territorial jurisdiction would still vest in the Courts at Madhya Pradesh.

6. It would be apposite to refer to Clause 32.1 of the agreement, to appreciate the controversy, which reads thus :-

> **"<u>Clause 32: Legal Jurisdiction:</u>**
>
> 32.1 : Mater relating to any dispute or difference arising out of this tender and subsequent contract awarded based on the bid shall be subject to jurisdiction of Nagpur Court only."

7. We proceed to examine Section 20 of the Code of Civil Procedure (In short, 'the Code') which provides for institution of suits where defendants reside or cause of action arises. It reads thus :-

> *20.* ***Other suits to be instituted where defendants reside or cause of action arises****- Subject to the limitations aforesaid, every suit shall be instituted in a Court within the local limits of whose jurisdiction-*
>
> *(a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or*
>
> *(b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or*

> *(c) the cause of action, wholly or in part, arises.*
> *Explanation - A corporation shall be deemed to carry on business at its sole or principal office in India or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place"*

8. Section 20 of the Code deals with the issue of jurisdiction of a Court. It lays down in no uncertain terms that a Court within the jurisdiction of which the cause of action wholly or in part arises or where the defendant resides or carries on business shall have the jurisdiction to try a matter.

9. Article 226 of the Constitution of India needs to be noticed for effective adjudication of the controversy, which is in the following terms :-

> ***"226. Power of the High Courts to issue certain writs*** *- (1) Notwithstanding anything in Article 32,every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.*
>
> *(2) The power conferred by Clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories.*
>
> *(3) xxxxx*
>
> *(4) xxxxx*

10. Clause (2) of Article 226 of the Constitution of India provides that the power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories.

11. The issue relating to the territorial jurisdiction of a Court to entertain writ petition was elaborately discussed in *Nawal Kishore Sharma vs. Union of India and ors,* 2014 (9) SCC 329. The relevant observations recorded therein are reproduced as under:

"10. The interpretation given by this Court in the aforesaid decisions resulted in undue hardship and inconvenience to the citizens to invoke writ jurisdiction. As a result, Clause 1(A) was inserted in Article 226 by the Constitution (15th) Amendment Act, 1963 and subsequently renumbered as Clause (2) by the Constitution (42nd) Amendment Act, 1976. The amended Clause (2) now reads as under:-

> ***" 226. Power of the High Courts to issue certain writs*** *- (1) Notwithstanding anything in Article 32,every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus,mandamus, prohibition, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.*
>
> *(2) The power conferred by Clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories.*
>
> *(3) xxxxx*
>
> *(4) xxxxx*

11. On a plain reading of the amended provisions in Clause (2), it is clear that now High Court can issue a writ when the person or the authority against whom the writ is issued is located outside its territorial jurisdiction, if the cause of action wholly or partially arises within the court's territorial jurisdiction. Cause of action for the purpose of Article 226(2) of the Constitution, for all intent and purpose must be assigned the same meaning as envisaged under Section 20(c) of the Code of Civil Procedure. The expression cause of action has not been defined either in the Code of Civil Procedure or the Constitution. Cause of action is bundle of facts which is necessary for the plaintiff to prove in the suit before he can succeed.

12. xxxxx

12. In *State of Rajasthan and Others vs. M/s Swaika Properties and Another*, (1985) 3 SCC 217, the Apex Court was concerned with the meaning to be assigned

to the expression "cause of action". The facts therein were that the respondent-Company having its registered office in Calcutta owned certain land on the outskirts of Jaipur City. It was served with notice for acquisition of land under Rajasthan Urban Improvement Act, 1959. Notice was duly served on the Company at its registered office at Calcutta. The Company, first appeared before the Special Court and finally filed a writ petition before the Calcutta High Court challenging the notification of acquisition. The matter ultimately travelled before the Supreme Court where the question that arose for discussion was whether the service of notice under Section 52(2)of the Act at the registered office of the Respondent in Calcutta was an integral part of cause of action and was it sufficient to confer jurisdiction upon the Calcutta High Court to entertain the petition challenging the impugned notification. Answering the question it was held:-

> *7. xxxxx*
>
> *8. The expression "cause of action" is tersely defined in Mulla s Code of Civil Procedure:*
>
> > *"The 'cause of action' means every fact which, if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the court."*
>
> *In other words, it is a bundle of facts which taken with the law applicable to them gives the plaintiff a right to relief against the defendant. The mere service of notice under Section 52(2)of the Act on the respondents at their registered office at 18-B, Brabourne Road, Calcutta i.e. within the territorial limits of the State of West Bengal, could not give rise to a cause of action within that territory unless the service of such notice was an integral part of the cause of action. The entire cause of action culminating in the acquisition of the land under Section 52(1)of the Act arose within the State of Rajasthan i.e. within the territorial jurisdiction of the Rajasthan High Court at the Jaipur Bench. The answer to the question whether service of notice is an integral part of the cause of action within the meaning of Article 226(2) of the Constitution must depend upon the nature of the impugned order giving rise to a cause of action. The notification dated February 8, 1984 issued by the State Government under Section 52(1) of the Act became effective the moment it was published in the Official Gazette as thereupon the notified land became vested in the State Government free from all encumbrances. It was not necessary for the respondents to plead the service of notice on them by the Special Officer, Town Planning Department, Jaipur under Section 52(2) for the grant of an appropriate writ, direction or order under Article 226 of the Constitution for quashing the notification issued by the State Government under Section 52(1)of the Act. If the respondents felt aggrieved by the acquisition of their lands situate at Jaipur and wanted to challenge the validity of the notification issued by*

the State Government of Rajasthan under Section 52(1)of the Act by a petition under Article 226 of the Constitution, the remedy of the respondents for the grant of such relief had to be sought by filing such a petition before the Rajasthan High Court, Jaipur Bench, where the cause of action wholly or in part arose."

14. xxxxx

13. Clause (2) of Article 226 of the Constitution of India came for discussion in *Kusum Ingots & Alloys Ltd. vs. Union of India and Another*, (2004) 6 SCC 254. The Supreme Court elaborately delving into clause (2) of Article 226 of the Constitution, with reference to the expression 'cause of action' viz-a-viz Section 20(c) and Section 141 of the Code of Civil Procedure observed thus :-

'9. Although in view of Section 141 of the Code of Civil Procedure the provisions thereof would not apply to writ proceedings, the phraseology used in Section 20 (c) of the Code of Civil Procedure and clause (2) of Article 226, being in pari materia, the decisions of this Court rendered on interpretation of Section 20(c) CPC shall apply to the writ proceedings also. Before proceeding to discuss the matter further it may be pointed out that the entire bundle of facts pleaded need not constitute a cause of action as what is necessary to be proved before the petitioner can obtain a decree is the material facts. The expression material facts is also known as integral facts.

10. Keeping in view the expressions used in clause (2) of Article 226 of the Constitution of India, indisputably even if a small fraction of cause of action accrues within the jurisdiction of the Court, the Court will have jurisdiction in the matter.

'Their Lordships further observed as under:-

'29. In view of clause (2) of Article 226 of the Constitution of India, now if a part of cause of action arises outside the jurisdiction of the High Court, it would have jurisdiction to issue a writ. The decision in Khajoor Singh has, thus, no application.

30. We must, however, remind ourselves that even if a small part of cause of action arises within the territorial jurisdiction of the High Court, the same by itself may not be considered to be a determinative factor compelling the High Court to decide the matter on merit. In appropriate cases, the Court may refuse to exercise its discretionary jurisdiction by invoking the doctrine of forum conveniens."

14. In *Union of India and others vs. Adani Exports Ltd. and another*, (2002) 1 SCC 567, it was laid down that in order to confer jurisdiction on a High Court to entertain a writ petition, the petition must disclose the integral facts in support of the cause of action so as to constitute a cause to empower the court to decide the dispute as the entire or a part of it arose within its jurisdiction. It was concluded

that each and every fact pleaded by the respondents in their application does not ipso facto lead to the conclusion that they give rise to a cause of action within the Court's territorial jurisdiction unless those facts are such which have a nexus or relevance with the lis involved in the case. The relevant observation reads thus :-

> *"17. It is seen from the above that in order to confer jurisdiction on a High Court to entertain a writ petition or a special civil application as in this case, the High Court must be satisfied from the entire facts pleaded in support of the cause of action that those facts do constitute a cause so as to empower the court to decide a dispute which has, at least in part, arisen within its jurisdiction. It is clear from the above judgment that each and every fact pleaded by the respondents in their application does not ipso facto lead to the conclusion that those facts give rise to a cause of action within the court's territorial jurisdiction unless those facts pleaded are such which have a nexus or relevance with the lis that is involved in the case. Facts which have no [pic] bearing with the lis or the dispute involved in the case, do not give rise to a cause of action so as to confer territorial jurisdiction on the court concerned. If we apply this principle then we see that none of the facts pleaded in para 16 of the petition, in our opinion, falls into the category of bundle of facts which would constitute a cause of action giving rise to a dispute which could confer territorial jurisdiction on the courts at Ahmedabad."*

15. In *A.B.C. Laminart (P) Limited Vs. A.P. Agencies, Salem* MANU/SC/ 0001/ 1989, (1989) 2 SCC 163, the Apex Court was considering the validity of the exclusionary clause in the agreement regarding jurisdiction of the Court, after discussing the issue, it was held that it is well settled principle of contract law that the parties cannot by contract exclude the jurisdiction of all courts. Such a contract would constitute an agreement in violation of provisions of Section 28 of the Indian Contract Act, 1972. However, where parties to a contract confer jurisdiction on one amongst multiple courts having proper jurisdiction, to the exclusion of all other courts, the parties cannot be said to have ousted the jurisdiction of all courts . Such a contract is valid and will bind the parties to a civil action. The relevant para-16 of the pronouncement reads as under :

> "16. So long as the parties to a contract do not oust the jurisdiction of all the Courts which would otherwise have jurisdiction to decide the cause of action under the law it cannot be said that the parties have by their contract ousted the jurisdiction of the Court. If under the law several Courts would have jurisdiction and the parties have agreed to submit to one of these jurisdictions and not to other or others of them it cannot be said that there is total ouster of jurisdiction. In other words, where the parties to a contract agreed to submit the disputes arising from it to a particular jurisdiction which would otherwise also be a proper jurisdiction under the law their agreement to the extent they agreed not to submit to other

> jurisdictions cannot be said to be void as against public policy. If on the other hand the jurisdiction they agreed to submit to would not otherwise be proper jurisdiction to decide disputes arising out of the contract it must be declared void being against public policy."

16. The view in *A.B.C. Laminart (P) Limited* (supra) has been reiterated in subsequent decisions as well. In the case of *Angile Insulations Vs. Davy Ashmore India Ltd. and another* (1995) 4 SCC 153, after referring to the provisions of Section 20 of CPC, it was concluded that the territorial jurisdiction of court normally lies where cause of action arises, but it will be subject to terms of a valid contract between the parties. Where jurisdiction vests upon more than one Court, consequent upon a part of the cause of action arising therewith, if parties stipulate in the contract to vest jurisdiction in one such court to try the disputes arising between themselves and if the contract is unambiguous, explicit and clear and is not pleaded to be void and opposed to section 23 of the Contract Act, then suit would lie in the court agreed to by the parties and the other court will have no jurisdiction even though cause of action arose partly within the territorial jurisdiction of that court. Relevant para-5 reads as under :

> "So, normally that Court also would have jurisdiction where the cause of action, wholly or in part, arises, but it will be subject to the terms of the contract between the parties. In this case, Clause (21) reads thus:
>
> "This work order is issued subject to the jurisdiction of the High Court situated in Bangalore in the State of Karnataka. Any legal proceeding will, therefore, fall within the jurisdiction of the above Court only."
>
> A reading of this clause would clearly indicate that the work order issued by the appellant will be subject to the jurisdiction of the High Court situated in Bangalore in the State of Karnataka. Any legal proceeding will, therefore, be instituted in a Court of competent jurisdiction within the jurisdiction of High Court of Bangalore only. The controversy has been considered by this Court in A.B.C. Laminart Pvt. Ltd. & Anr. v. A.P. Agencies. Salem. [1989] 2 SCC 163. Considering the entire case law on the topic, this Court held that the citizen has the right to have his legal position determined by the ordinary Tribunal except, of course, subject to contract (a) when there is an arbitration clause which is valid and binding under the law, and (b) when parties to a contract agree as to the jurisdiction to which dispute in respect of the contract shall be subject. This is clear from s.28 of the Contract Act. But an agreement to oust absolutely the jurisdiction of the Court will be unlawful and void being against the public policy under s.23 of the Contract Act. We do not find any such in validity of Clause (21) of the Contract pleaded in this case. On the other hand, this Court laid that where

> there may be two or more competent courts which can entertain a suit consequent upon a part of the cause of action having arisen therewith, if the parties to the contract agreed to vest jurisdiction in one such court to try the dispute which might arise as between themselves, the agreement would be valid. If such a contract is clear, unambiguous and explicit and not vague, it is not hit by ss.23 and 28 of the Contract Act. This cannot be understood as parties contacting against the statute. Mercantile law and practice permit such agreements."

17. Great emphasis was placed on the pronouncement in M*aharastra Chess Association* (supra) by the petitioner. The principle of law enunciated therein is that the parties cannot by agreement confer jurisdiction on a court which lacks the jurisdiction to adjudicate. However, where more than one Court has jurisdiction to entertain the subject matter of the dispute, it can be agreed that a suit shall be brought exclusively before one of the several courts, to the exclusion of the others. Interpreting Clause 21 therein, it was recorded that it does not oust the jurisdiction of all courts. Rather, the Appellant and the second Respondent had agreed to submit suits or legal actions to the courts at Chennai. So long as the courts at Chennai had proper jurisdiction over a dispute involving the Appellant and the second Respondent, Clause 21 was not in violation of the principle set out in A B C Laminart. The Apex Court in the said judgment considering the factual matrix therein, particularly clause 21, held that mere existence of alternate forum does not create a legal bar of a High Court to exercise its jurisdiction. The factual matrix being different, it does not advance the case of the petitioner.

18. Thus, in view of aforesaid enunciation of law and taking into consideration Clause 32.1 of the agreement, it is concluded that the territorial jurisdiction of court ordinarily lies where cause of action arisen but it will be subject to terms of a valid contract between the parties. Further, where more than one court has jurisdiction consequent upon a part of the cause of action arising therewith, but if parties stipulate in the contract to submit to the jurisdiction into a specified Court to try the dispute arising between them and the contract is unambiguous, explicit and clear which is not pleaded to be void and opposed to Section 23 of the Contract Act, then suit would lie in the court agreed to by the parties and any other court will have no jurisdiction even though cause of action had arisen partly within the territorial jurisdiction of that court. Adverting to the factual matrix herein, there is a valid contract between the petitioner and the respondents whereby they have agreed to submit suits or legal actions to the courts at Nagpur. The principles enunciated above would apply to a writ filed under Article 226 of the Constitution of India, in view of the provisions of Article 226(2) as held in the cases of *Nawal Kishore Sharma and Kusum Ingots & Alloys Ltd.* (supra). In other words, even though in the present case part of cause of action

may arise within territorial jurisdiction of this court, keeping in view Clause 32.1 of the contract, the lis would be amenable to the jurisdiction of the courts at Nagpur or High Court within whose jurisdiction the cases relating to Nagpur are filed.

19. In view of the aforesaid, the writ petition is dismissed on the ground of lack of territorial jurisdiction. No order as to costs.

Petition dismissed

I.L.R. [2020] M.P. 1144
WRIT PETITION

Before Mr. Justice Sanjay Dwivedi

W.P. No. 20898/2013 (Jabalpur) decided on 19 March, 2020

VENISHANKAR …Petitioner

Vs.

SMT. SIYARANI & ors. …Respondents

***A. Land Revenue Code, M.P. (20 of 1959), Section 185 & 190 and Land Revenue Code, M.P. (II of 1954) – Bhumiswami Rights – Jurisdiction of Tehsildar* – Held – Section 190 deals with conferral of right of Bhumiswami on occupancy tenant – Occupancy tenant in Mahakoshal region can only be a person who is in possession of land before coming into force of the Code of 1954 – Respondent was in possession since 1973-74 and her name was never recorded as occupancy tenant – Applying provision of Section 190 and declaring her to be bhumiswami is absolutely illegal and without jurisdiction – Impugned order set aside – Revenue Authority directed to record name of petitioner in revenue records as owner – Petition allowed.**

(Paras 10, 16, 17, 21 & 22)

क. भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 185 व 190 एवं भू राजस्व संहिता, म.प्र. (1954 का II) – भूमिस्वामी के अधिकार – तहसीलदार की अधिकारिता – अभिनिर्धारित – धारा 190 मौरूसी कृषक को भूमि स्वामी के अधिकार प्रदान किये जाने से संबंधित है – महाकौशल क्षेत्र में मौरूसी कृषक केवल वही व्यक्ति हो सकता है जिसके पास 1954 की संहिता के प्रवर्तन में आने के पूर्व से भूमि का कब्जा रहा हो – प्रत्यर्थी 1973–74 से कब्जे पर थी तथा उसका नाम मौरूसी कृषक के रूप में कभी भी अभिलिखित नहीं किया गया था – धारा 190 का उपबंध लागू किया जाना तथा उसे भूमिस्वामी घोषित करना पूर्ण रूप से अवैध है तथा बिना अधिकारिता के है – आक्षेपित आदेश अपास्त – राजस्व प्राधिकारी को याची का नाम राजस्व अभिलेखों में भूमिस्वामी के रूप में अभिलिखित करने हेतु निदेशित किया गया – याचिका मंजूर।

***B. Land Revenue Code, M.P. (20 of 1959), Section 185 & 190 – Limitation* – Held – It is settled law that order without jurisdiction can be**

assailed at any point of time – Since order of Tehsildar was without jurisdiction, it can be challenged at any point of time – SDO should not have dismissed the appeal on ground of limitation and should have decided the same on merits. (Paras 16, 20 & 21)

ख. भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 185 व 190 – परिसीमा – अभिनिर्धारित – यह सुस्थापित विधि है कि बिना अधिकारिता वाले आदेश को किसी भी समय चुनौती दी जा सकती है – चूंकि तहसीलदार का आदेश बिना अधिकारिता के था, उसे किसी भी समय चुनौती दी जा सकती है – उपखंड अधिकारी को परिसीमा के आधार पर अपील खारिज नहीं करना चाहिए था तथा गुणदोषों पर उक्त का विनिश्चय करना चाहिए।

C. Practice & Procedure – New Facts/Grounds **– Held – At this stage, correctness of order of Revenue Authority cannot be tested on basis of facts which were not considered by authorities as not placed before them. (Para 12 &13)**

ग. पद्धति व प्रक्रिया – नये तथ्य/आधार – अभिनिर्धारित – इस प्रक्रम पर, राजस्व प्राधिकारी के आदेश की शुद्धता की जांच उन तथ्यों के आधार पर नहीं की जा सकती जो कि प्राधिकारीगण के समक्ष न रखे जाने के कारण उनके द्वारा विचार में नहीं लिये गये थे।

D. Practice & Procedure – Defects of Jurisdiction **– Held – A defect of jurisdiction whether pecuniary or territorial or whether it is in respect of the subject matter of action, strikes at the very authority of Court to pass any decree – Such defect cannot be cured even by consent of parties. (Para 17)**

घ. पद्धति व प्रक्रिया – अधिकारिता की त्रुटि – अभिनिर्धारित – अधिकारिता की त्रुटि चाहे वह धनसंबंधी हो या क्षेत्रीय या कार्य की विषय वस्तु के संबंध में, न्यायालय की किसी डिक्री को पारित करने की वास्तविक अधिकारिता को प्रभावित करती है – उक्त त्रुटि को पक्षकारों की सहमति द्वारा भी सुधारा नहीं जा सकता।

Cases referred :

2005 (2) M.P.L.J. 457, 1987 JLJ 500, 2009 (9) J.T. 591, AIR 1954 SC 340, (2004) 12 SCC 568, (2004) 8 SCC 706.

Sanjay Agrawal, for the petitioner.
Umesh Trivedi, for the respondent Nos. 1 to 3.
Deepak Kumar Singh, Dy. G.A. for the respondent Nos. 4 & 5/State.

O R D E R

SANJAY DWIVEDI, J.:-This petition is against the order dated 15.07.2013 passed by the Board of Revenue, filed under Article 227 of the Constitution of India.

2. Since the pleadings are complete and the parties agreed to argue the matter finally, therefore, it is heard finally.

3. By the instant petition, the petitioner is questioning the validity, legality and propriety of the order dated 15.07.2013 (Annexure-P/4) passed by the Board of Revenue in a revision preferred by the respondents against the order passed by the Additional Commissioner. The Board of Revenue set aside the order of Additional Commissioner and maintained the order of Sub Divisional Officer and also of Tahsildar.

4. The facts, in brief, are that the suit property was purchased by the petitioner by a registered sale-deed dated 16.04.1972. The property belongs to Khasra No.231/1 area measuring 5.888 hectares situates at Village-Rahlikhas, Tahsil and District-Sagar.

4.1 As per the petitioner, at the time of purchase, late Siyarani was staying in a small hut situated over the land in question and as per the request made by her and her husband, they were not removed from the hut, but were allowed to take care of the land as they assured that as and when the petitioner requires the land, they would vacate the same.

4.2 Subsequently, respondent-Siyarani with ill-intention got the land mutated in her name by moving an application to the Tahsildar, who happened to be her brother. In the application, it is stated by respondent-Siyarani that she has been in uninterrupted possession of the land in question for almost 20 years. Therefore, she became entitled to get the land mutated in her favour as per Section 190 of the Madhya Pradesh Land Revenue Code, 1959 (in short 'the Code, 1959'). The application was allowed by the Tahsildar holding that as per the revenue entries, undisputedly respondent-Siyarani who was the applicant before the Tahsildar, was in possession of the land since 1973-74 and as such, acquired Bhumiswami right as per the provisions of Section 190 and allowed the application filed by applicant-Siyarani under Sections 109 and 110 read with Section 190 of the Code, 1959. The Tahsildar-Rahli vide order dated 20.05.1993, has very categorically observed that as per the revenue entries from 1976-77, the possession of applicant-Siyarani was uninterrupted and, therefore, as per Section 190 of the Code, 1959, she became Bhumiswami and as such, her name was recorded in the revenue record deleting the name of the present petitioner who purchased the land by a registered sale-deed dated 16.04.1972.

4.3 The order of Tahsildar was assailed by the petitioner by filing an appeal under Section 44 of the Code, 1959, in the year 2010, mentioning therein that he is the owner of the land and also in possession of the said land which was purchased by him from Draupadi Bai. It is also stated in the memo of appeal that Siyarani and her husband were residing over the said land by making a hut and were allowed to be continued as they assured to lookafter the land and further assured that as and

when the petitioner would ask them to remove, then they would leave the possession of the land. However, by making a false case, Siyarani got her name mutated in the revenue record with the collusion of Tahsildar, who was alleged to be her brother. It is also stated by the petitioner in the memo of appeal filed before the Sub Divisional Officer that he has never been served any notice of the application for mutation moved by Siyarani and without there being any knowledge of the said proceeding and the order passed by the Tahsildar on 20.05.1993, he could not file any appeal within the prescribed time, but he got the knowledge about the order only when Siyarani constructed a *Pakka* house over there. Then only, he inquired about the revenue record and obtained the copy of the order passed by the Tahsildar. As per the petitioner, since he had no knowledge about the proceeding pending before the Tahsildar, therefore, limitation starts only from the date of knowledge and as such, his appeal was within time. It is also stated by the petitioner that the order of Tahsildar is without jurisdiction because he passed the order of mutation only on the basis of entries of possession in the revenue record, whereas Siyarani could never become a Bhumiswami as per the requirement of Section 190 of the Madhya Pradesh Land Revenue Code,1954 (Amended Code, 1959).

4.4 The Sub Divisional Officer although held that the Tahsildar was competent to pass the order under Section 190 of the Code, 1959, but dismissed the appeal on the ground that the appeal has been preferred after almost 17 years and there was no application filed for condoning the delay, accordingly, the appeal was dismissed as barred by time.

4.5 The order passed by the Sub Divisional Officer was further assailed by filing an appeal before the Additional Commissioner, Sagar, Division Sagar. The Additional Commissioner has allowed the appeal and observed that the notice of proceeding pending before the Tahsildar, was served upon the petitioner through Tahsildar Sehora, though the petitioner resides at Village-Sohasa, which comes under Majholi Tahsil, and he has also not signed the notice said to have been served upon him. The Additional Commissioner has also observed that it is undisputed that the land in question is of Venishankar and late Siyarani used to reside over there, but nowhere it is determined that deceased Siyarani was the occupancy tenant (marusi krishak) and recorded as Bhumiswami over the same, the order of Tahsildar was, therefore, without any jurisdiction. It is also observed by the Additional Commissioner that the notice of the proceeding pending before the Tahsildar was never served upon the petitioner and the order has been passed behind his back. The Additional Commissioner has further observed that the petitioner's interest is involved in the land in question and, therefore, his appeal cannot be dismissed only on the ground of limitation and as such, the appeal was allowed. The order passed by the Sub Divisional Officer was set aside. The appeal preferred before the Sub Divisional Officer was held to be in time and the Sub Divisional Officer was directed to decide the said appeal on merit.

4.6 The order of Additional Commissioner was further assailed before the Board of Revenue in a revision by the respondents. The Board of Revenue by the order impugned dated 15.07.2013 (Annexure-P/4), has set aside the order of Additional Commissioner and restored the order of Sub Divisional Officer dated 27.10.2010 (Annexure-P/2). The Board of Revenue has found that the appeal before the Sub Divisional Officer was preferred after almost 17 years and that too without the application of Section 5 of the Limitation Act. Therefore, the said appeal was rightly dismissed by the Sub Divisional Officer.

5. Learned counsel for the petitioner has contended that the Tahsildar has not issued any notice to the petitioner and there is nothing available on record to substantiate that the notice got served upon the petitioner, otherwise there was no reason for the petitioner for not attending the hearing of the case because he purchased the land by a registered sale-deed and the same was owned and possessed by him and got mutation done accordingly. It is also stated by the petitioner that it is unacceptable that a person who owned the property and if any application for mutation of name in the revenue record is made by some other person asking deletion of the name of actual owner i.e. the petitioner, he would not contest the case and appear before the authority. He submits that the application under Section 5 of the Limitation Act was not filed for the reason that the appeal was well within time and limitation starts from the date of knowledge of the order and according to the petitioner, he acquired the knowledge about the order passed by the Tahsildar only when he came to know from one Raj Kumar Singh about raising *Pakka* construction over his land by respondent-Siyarani. He submits that the petitioner after coming to know about the order passed by the Sub Divisional Officer, obtained certified copy and filed the appeal, therefore, limitation starts from the date of knowledge and as such, the appeal was within time. He further submits that even otherwise the order passed by the Tahsildar was without jurisdiction and the Tahsildar without considering the fact that Siyarani was never recorded as occupancy tenant, cannot be conferred the right of Bhumiswami as per requirement of Section 190 of the Code, 1954 and amended Code, 1959, held her to be Bhumiswami and as such, decided the title in her favour which was purely without jurisdiction. He relies upon a decision reported in 2005(2) M.P.L.J. 457 parties being *Mohammad Khan and another vs. State of M.P.,* saying that the revenue authority cannot usurp the jurisdiction of civil Court and cannot determine the title of the party.

6. *Per contra*, Shri Trivedi appearing for the respondents submits that so far as the order passed by the Sub Divisional Officer is concerned, the same has been further affirmed by the Board of Revenue considering the fact regarding service of notice over the petitioner of the proceeding initiated before the Tahsildar. Therefore, said finding in a petition filed under Article 227 of the Constitution of India, cannot be disturbed and interfered with. He also submits that the Tahsildar

is competent to consider the application filed under Sections 109 and 110 of the Code, 1959, and also competent to declare respondent-Siyarani Bhumiswami as per requirement of Section 190 of the Code, 1959. He also submits that even otherwise as per Section 169 (ii) (b), the respondent can also be declared Bhumiswami and her name is rightly directed to be recorded in the revenue record deleting the name of the petitioner. Shri Trivedi submits that the appeal preferred by the petitioner before the Sub Divisional Officer was barred by time as had been filed after a delay of 17 years and in view of the finding of fact regarding service of notice, the starting point of limitation cannot be the date of knowledge, but it would be from the date of order. He relied upon the decisions reported in 1987 JLJ 500 parties being *Pooran Singh v. Mangalia & another* and 2009(9) J.T. 591.

7. Arguments heard and record perused.

8. As per the pleadings and arguments advanced by the parties, two questions emerged for adjudication; first, whether the order passed by the Tahsildar, was well within his jurisdiction or not; and second, whether the appeal preferred before the Sub Divisional Officer by the petitioner against the order of Tahsildar was time barred or not?

9. So far as the first question regarding jurisdiction of Tahsildar is concerned, indisputedly, the application by late Siyarani was moved under Sections 109 and 110 of the Code, 1959. In the said application, Siyarani has claimed that since 1974-75, she is in possession of the land in question and the petitioner has never interrupted her possession. She has claimed that since last 17 years, she has been in possession of the property uninterrupted and, therefore, the name of the petitioner be removed from the revenue record and her name should be recorded. The Tahsildar although issued a notice of the said application to the petitioner, who was the owner of that property and his name was also recorded in the revenue record because undisputedly he purchased the said land by registered sale-deed dated 16.04.1972. According to the record, the notice got served upon the petitioner through Tahsildar, Sehora, but the petitioner did not appear in the proceeding and the Tahsildar finally held that as per the requirement of Section 190 of the Code, 1959, Siyarani became Bhumiswami of the land and is entitled to get her name recorded over the land in question, but, I am not satisfied with the observation made by the Tahsildar for the following reasons. As per Section 190 of the Code, 1959, which is quoted hereinbelow:-

> **"190. Conferral of Bhumiswami rights on occupancy tenants.-**(1) Where a Bhumiswami whose land is held by an occupancy tenant belonging to any of the categories specified in sub-section (1) of Section 185 except in items (a) and (b) of clause (i) thereof fails to make an application under sub-section (1) of Section 189 within the period laid down therein, the rights of a Bhumiswami shall accrue to the

occupancy tenant in respect of the land held by him from such Bhumiswami with effect from the commencement of the agricultural year next following the expiry of the aforesaid period.

(2) Where an application is made by a Bhumiswami in accordance with the provisions of sub-section (1) of Section 189, the rights of a Bhumiswami shall accrue to the occupancy tenant in respect of the land remaining with him after resumption if any allowed to the Bhumiswami with effect from the commencement of the agricultural year next following the date of which the application is finally disposed of.

(2-A) Where the land of a Bhumiswami is held by an occupancy tenant other than an occupancy tenant referred to in sub-section (1), the rights of a Bhumiswami shall accrue to the occupancy tenant in respect of such land-

(a) in the case of occupancy tenants of the categories specified in items (a) and (b) of clause (i) of sub-section (1) of Section 185 with effect from the commencement of the agricultural year next following the commencement of the Principal Act;

(b) in any other case, with effect from the commencement of the agricultural year next following the date on which the rights of an occupancy tenant accrue to such tenant.

(3) Where the rights of a Bhumiswami accrue to an occupancy tenant under sub-section (1), sub-section (2) or sub-section (2-A) such occupancy tenant shall be liable to pay to his Bhumiswami compensation equal to fifteen times the land revenue payable in respect of the land in five equal annual installments, each installment being payable on the date on which the rent payable under Section 188 for the corresponding year falls due and if default is made in payment, it shall be recoverable as an arrear of land revenue:

Provided that if from any cause the land revenue is suspended or remitted in whole or in part in any area in any year, the annual installment of compensation payable by an occupancy tenant holding land in such area in respect of that year shall be suspended and shall become payable one year after the last of the remaining installments.

(4) Any occupancy tenant may at his option pay the entire amount of compensation in a lump sum and where an occupancy tenant exercise this option, he shall be entitled to a rebate at the rate of ten per cent.

(5) The amount of compensation, whether paid in lump sum or in annual installments, shall be deposited in such manner and from as

may be prescribed by the occupancy tenant with the Tahsildar, for payment to the Bhumiswami.

(6) Where the rights of a Bhumiswami in any land accrue to an occupancy tenant under this section, he shall be liable to pay the land revenue payable by the Bhumiswami in respect of such land with effect from the date of accrual of such rights."

it is clear that the said section deals with the conferral of right of Bhumiswami on occupancy tenant. The occupancy tenant has been defined under Section 185 of the Code, 1959, which provides as under:-

"185. Occupancy Tenants.-(1) Every person who at the coming into force of this Code holds-

(i) in the Mahakoshal region-

(a) any land, which before the coming into force of the Madhya Pradesh Land Revenue Code, 1954 (II of 1955), was malik-makbuza and of which such person had been recorded as an absolute occupancy tenant; or

(b) any land as an occupancy tenant as defined in the Madhya Pradesh Land Revenue Code, 1954 (II of 1955); or

(c) any land as an ordinary tenant as defined in the Madhya Pradesh Land Revenue Code, 1954 (II of 1955); or

(ii) in the Madhya Bharat region-

(a) any Inam land as a tenant, or as a sub- tenant or as an ordinary tenant; or

Explanation.- The expression "Inam Land" shall have the same meaning as assigned to it in the Madhya Bharat Muafi and Inam Tenants and sub-Tenants Protection Act, 1954 (32 of 1954).

(b) any land as ryotwai sub-lessee as defined in the Madya Bharat Ryotwari Sub-Lessees Protection Act, 1955 (29 of 1955); or

(c) any Jagir land as defined in the Madhya Bharat Abolition of Jagirs Act, 1951 (28 of 1951), as a sub-tenant or as a tenant of a sub-tenant; or

(d) any land of a proprietor as defined in the Madhya Bharat Zamindari Abolition Act, 1951 (13 of 1951), as a sub tenant or as a tenant of a sub-tenant;

(iii) in the Vindhya Pradesh Region any land as a sub-tenant of a pachpan paintalis tenant, pattedar tenant, grove holder or holder of a tank as defined in the Vindhya Pradesh Land Revenue and Tenancy Act, 1953 (III of 1955); or

(iv) in the Bhopal region-

(a) any land as a sub-tenant as defined in the Bhopal State Sub-tenants Protection Act, 1952 (VII of 1953); or

(b) any land as a shikmi from an occupant as defined in the Bhopal State Land Revenue Act, 1932 (IV of 1932); or

(v) in the Sironj region-

(a) any land as a sub-tenant of a khatedar tenant or grove holder as defined in the Rajasthan Tenancy Act, 1955 (III of 1955); or

(b) any land as a sub-tenant or tenant of Khudkasht as defined in the Rajasthan Tenancy Act, 1955 (III of 1955);

shall be called an occupancy tenant and shall have all the rights and be subject to all the liabilities conferred or imposed upon an occupancy tenant by or under this Code.

(2) where any land referred to in items (c) or (d) of clause (ii) of sub-section (1) is at the time of coming into force of this Code, in actual possession of a tenant of a sub-tenant, then such tenant and not the sub-tenant shall be deemed to be the occupancy tenant of such land.

(3) Nothing in sub-section (1) shall apply to a person who at the coming into force of this code, holds the land from a Bhumiswami who belongs to any one or more of the classes mentioned in sub-section (2) of Section 168.

(4) Nothing in this section shall affect the rights of a sub-tenant belonging to any of the categories specified in terms of (c) and (d) of clause (ii) of sub-section (1) to acquire the rights of a pakka tenant in accordance with the provisions Madhya Bharat Abolition of Jagirs Act, 1951 (28 of 1951), or of the Madhya Bharat Zamindari Abolition Act, 1951 (13 of 1951), as the case may be."

Since the land situates within Sagar region, accordingly, Section 185 (1) (i) and (a)(b) and (c) would be applicable.

10. It is clear from the aforesaid provisions that the occupancy tenant in Mahakoshal region can only be a person who is in possession of the land before coming into force of the Madhya Pradesh Land Revenue Code, 1954. In the present case, admittedly, the possession over the land in question of late Siyarani (respondent herein) was recorded only with effect from 1973-74. Thus, applying the provision of Section 190 of the Code,1959, declaring Siyarani to be a Bhumiswami treating herself to be an occupancy tenant in pursuance to her uninterrupted possession over the land from last 17 years with effect from 1973-74, is absolutely illegal and without jurisdiction of the Tahsildar.

11. From the aforesaid provisions, it is clear that there is no applicability of Section 185 of the Code, 1959, in the present case and as per Section 190, there cannot be any declaration of Bhumiswami in favour of late Siyarani. Accordingly, allowing the application for mutation making declaration of Bhumiswami as per Section 190 of the Code, 1959, is not sustainable and it was clear that the Tahsildar exceeded its jurisdiction while making such declaration.

12. Learned counsel for the respondents has also contended that Section 169 (ii)(b) of Code, 1959, makes Siyarani entitled to get the status of Bhumiswami and as such, the application filed by her under Sections 109 and 110 of the Code, 1959, has rightly been allowed by the Tahsildar. But, I am not convinced with the said contention of learned counsel for the respondents for the reason that none of the revenue authorities has considered that aspect as to whether Siyarani acquired the status of Bhumiswami in pursuance to the provisions of Section 169(ii)(b), therefore, at this stage, when the correctness of the order of revenue authority is to be tested, the same cannot be tested on the basis of facts which were not considered by the authorities as not placed before them, therefore, said contention of the respondents is without any foundation and is hereby rejected.

13. Learned counsel for the respondents has relied upon the decision of *Pooran Singh* (supra), but, in view of the discussion made hereinabove, that judgment has no applicability in the present case for the reason that respondent-Siyarani has not claimed herself to be a Bhumiswami by virtue of the said provisions of Section 169 of the Code, 1959, but has claimed herself to be a Bhumiswami by virtue of provisions of Section 190 of the Code, 1959 and the same have been considered and benefit of the said provisions has been granted by the revenue authorities treating respondent-Siyarani as Bhumiswami as the said right has been conferred to her by virtue of Section 190 of the Code, 1959. The learned counsel for the respondents has also placed reliance upon a decision reported in **2009(9) J.T. 591**, but I do not find any judgment and that citation appears to be incorrect.

14. In view of the aforesaid, so far as question No.1 which emerged for adjudication, I have no hesitation to say that the order passed by the Tahsildar is without jurisdiction.

15. So far as question No.2 whether the appeal preferred before the Sub Divisional Officer, was well within time or not, is concerned, apparently, the appeal was preferred before the Sub Divisional Officer on 26.08.2010 that too after 17 years challenging the order dated 20.05.1993, but as per the petitioner that order was passed by the Tahsildar without giving any notice to him, who was the affected person as his name was recorded in the revenue record as the owner of the property.

16. From the record available, it reflects that the Tahsildar got served the notice upon the petitioner through Tahsilar (sic : Tahsildar), Sehora, but it is not mentioned as to why the said mode of service of notice was adopted by Tahsildar Rahli. The Additional Commissioner although in its order, has observed that the residence of the petitioner was at Majholi and it is also observed by the Additional Commissioner that the said notice did not contain any dispatch number. The Additional Commissioner has further observed that the petitioner has assailed the order of Tahsildar on the ground of jurisdiction. The Sub Divisional Officer instead of deciding the appeal on limitation, should have decided the same on merit. The Additional Commissioner has rightly observed that the name of Siyarani was never recorded in any of the revenue record as an occupancy tenant (marusi krishak) and, therefore, treating her to be Bhumiswami as per Section 190 of the Code, 1959, was without jurisdiction and, therefore, the said order can be challenged at any point of time and there is no limitation prescribed for challenging the order which is without jurisdiction. The Additional Commissioner has rightly held that the appeal preferred by the petitioner was within time. However, the Board of Revenue in a revision preferred before it, has not given any specific reason as to why the order passed by the Additional Commissioner was not proper, but only on the ground that the Sub Divisional Officer dismissed the appeal on limitation as the same was not filed within time and was also not supported with an application of Section 5 of the Limitation Act, the order passed by the Board of Revenue, therefore, cannot be said to be a reasoned one.

17. The learned counsel for the petitioner has placed reliance in the case of *Mohammad Khan* (supra), in which, the High Court has held that in absence of any pleading that the applicant was tenant or sub-tenant immediately before coming into force of the Madhya Pradesh Land Revenue Code, she cannot be treated to be an occupancy tenant and Bhumiswami thereafter. It is further observed by the High Court that merely because long possession over the said land that too of 60 years would not automatically make her Bhumiswami on coming into force of the Madhya Pradesh Land Revenue Code. It is also observed by the Court that in absence of any pleading about adverse possession over the land, no declaration of Bhumiswami can be made considering the long possession over the said land. Here in this case, almost similar facts are involved as

respondent-late Siyarani has not pleaded that she was in possession of the land prior to coming into force of the Code, 1954, but on the contrary, she has submitted that since 73-74 for continuous period of 20 years she was in possession of the land. She has also not claimed adverse possession and no pleading in her application was made, therefore, the Tahsildar has rightly conferred the Bhumiswami right to her as per Section 190 of the Code, 1959, the order passed by the Tahsildar was, therefore, without jurisdiction. It is also settled principle of law that the order without jurisdiction can be assailed at any point of time. The said order can be considered to be a nullity and that its invalidity could be set-up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings and further a defect of jurisdiction whether it is pecuniary or territorial or whether it is in respect of the subject-matter of the action, strikes at the very authority of the court to pass any decree, and such a defect cannot be cured even by consent of parties.

18. Further, the view which has been taken by Supreme Court in case of *Kiran Singh and others v. Chaman Paswan and others* reported in AIR 1954 SC 340, is being followed continuously. The same is as under:-

> "**6.** The answer to these contentions must depend on what the position in law is when a Court entertain a suit or an appeal over which it has no jurisdiction and what the effect of Section 11 of the Suit Valuation Act is on that position. It is a fundamental principle well-established that a decree passed by a Court without jurisdiction is a nullity and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial or whether, it is in respect of the subject-matter of the action, strikes at the very authority of the Court to pose any decree, and such a defect cannot be cured even by consent of parties. If the question now under consideration fell to be determined only on the application of general principles governing the matter, there can be no doubt that the District, Court of Monghyr was coram non judice, and that its judgment and decree would be nullities. The question is what is the effect of Section 11 of the Suits Valuation Act on this position."

19. The same view has been taken by the Supreme Court in case of *Gaon Sabha and Another Vs. Nathi and others* reported in (2004) 12 SCC 568. The Supreme Court in case of *Balvant N. Viswamitra and others Vs. Yadav Sadashiv Mule (dead) through LRS. and others*, reported in (2004) 8 SCC 706, has further reiterated the same analogy and observed as under:-

> ".....Where a court lacks inherent jurisdiction in passing a decree or making an order, a decree or order passed by such court would be without jurisdiction, *non est and void ab initio*. A defect of jurisdiction of

> the court goes to the root of the matter and strikes at the very authority of the court to pass a decree or make an order. Such defect has always been treated as basic and fundamental and a decree or order passed by a court or an authority having no jurisdiction is a nullity. Validity of such decree or order can be challenged at any stage, even in execution or collateral proceedings..... "

20. Accordingly, I am also of the opinion that the Sub Divisional Officer has committed wrong by dismissing the appeal on the point of limitation without considering the fact and also without examining the fact that the order passed by the Tahsildar is without jurisdiction and can be assailed at any point of time. The Board of Revenue again ignored that aspect and affirmed the order of the Sub Divisional Officer.

21. This petition is under Article 227 of the Constitution of India. The object of superintendence under Article 227, both administrative and judicial, is to maintain efficiency, smooth and orderly functioning of the entire machinery of justice in such a way as it does not bring it into any disrepute. The power of interference under Article 227 is to be kept to the minimum to ensure that the wheel of justice does not come to a halt and fountain of justice remains pure and unpolluted in order to maintain public confidence in the functioning of the tribunals and courts subordinate to the High Court. Thus, in view of the above, as already held that the order passed by the Tahsildar was without jurisdiction, therefore, the same can be assailed at any time and the Sub Divisional Officer instead of deciding the appeal on technical ground of limitation should have decided the appeal on merits, but this Court has examined the order of Tahsildar in all angles and observed that the Tahsildar has exceeded its jurisdiction granting status of Bhumiswami to the respondent-Siyarani which was not proper and, therefore, remitting the matter to the Sub Divisional Officer for deciding the appeal on merits would be a futile exercise. Accordingly, to maintain justice and exercising the power of superintendence under Article 227 of the Constitution of India, the order of Tahsildar is, therefore, set aside. The application submitted by respondent-Siyarani under Sections 109 and 110 read with Section 190 of the Code, 1959 is also hereby rejected.

22. Accordingly, the petition filed by the petitioner is **allowed**. The revenue authority is directed to restore the earlier position and record the name of the petitioner in the revenue record as the owner of the property.

Petition allowed

I.L.R. [2020] M.P. 1157 (DB)
WRIT PETITION

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

W.P. No. 19792/2019 (Jabalpur) decided on 8 May, 2020

RAVI SHANKAR SINGH …Petitioner

Vs.

MPPKVVCL & ors. …Respondents

***A. Prevention of Corruption Act (49 of 1988), Sections 7, 13(1)(d), 13(2) & 19 – Removal from Service – Competent Authority* – Held – *Prima facie* it is established that by way of delegation, Sanctioning Authority was vested with power of removing petitioner from his service, thus he was the competent authority – Petition dismissed. (Paras 34)**

क. भ्रष्टाचार निवारण अधिनियम (1988 का 49), धाराएँ 7, 13(1)(d), 13(2) व 19 – सेवा से हटाया जाना – सक्षम प्राधिकारी – अभिनिर्धारित – प्रथम दृष्ट्या यह स्थापित है कि प्रत्यायोजन के माध्यम से मंजूरी प्राधिकारी को, याची को उसकी सेवा से हटाने की शक्ति निहित की गई थी, अतः वह सक्षम प्राधिकारी था – याचिका खारिज।

***B. Prevention of Corruption Act (49 of 1988), Sections 7, 13(1)(d), 13(2) & 19 and Criminal Procedure Code, 1973 (2 of 1974), Section 311 – Sanctioning Authority – Examination of – Stage of Trial* – Enumerating the benefits, it is held/directed that with prospective effect, while trying a case under Act of 1988, Trial Court shall examine the sanctioning authority exercising powers u/S 311 Cr.P.C. before framing charge, even if it is not challenged by accused because validity of sanction order can go to the root of case and can render the very act of taking cognizance itself *void ab initio*. (Para 33)**

ख. भ्रष्टाचार निवारण अधिनियम (1988 का 49), धाराएँ 7, 13(1)(d), 13(2) व 19 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 311 – मंजूरी प्राधिकारी – का परीक्षण – विचारण का प्रक्रम – लाभों को प्रगणित करते हुए यह अभिनिर्धारित / निदेशित किया गया कि भविष्यलक्षी प्रभाव से, 1988 के अधिनियम के अंतर्गत एक प्रकरण का विचारण करते समय विचारण न्यायालय, आरोप विरचित करने के पूर्व, धारा 311 दं.प्र.सं. के अंतर्गत शक्तियों का प्रयोग करते हुए, मंजूरी प्राधिकारी का परीक्षण करेगा, भले ही उसे अभियुक्त द्वारा चुनौती न दी गई हो, क्योंकि मंजूरी आदेश की विधिमान्यता प्रकरण के मूल तक जा सकती है तथा संज्ञान लेने के कृत्य को ही अपने आप में आरंभ से शून्य बना सकती है।

***C. Prevention of Corruption Act (49 of 1988), Section 19 and Criminal Procedure Code, 1973 (2 of 1974), Section 311 & 319 – Examination of Sanctioning Authority* – Held – Section 311 Cr.P.C. empowers trial Court to examine sanctioning authority as a witness at pre-charge stage itself and**

record his statement and also subject to cross-examination if needed, to ascertain whether he was competent to grant sanction and the sanction was granted with due application of mind to the record of the case. (Para 31)

ग. भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 19 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 311 व 319 – मंजूरी प्राधिकारी का परीक्षण – अभिनिर्धारित – धारा 311 दं.प्र.सं. विचारण न्यायालय को विचारण–पूर्व के प्रक्रम पर ही मंजूरी प्राधिकारी को एक साक्षी के रूप में परीक्षण कर उसके कथन अभिलिखित करने और साथ ही प्रतिपरीक्षण, यदि आवश्यक हो, करने के लिए सशक्त करती है, यह सुनिश्चित करने हेतु कि क्या वह मंजूरी प्रदान करने के लिए सक्षम था तथा प्रकरण के अभिलेख हेतु मस्तिष्क के सम्यक् प्रयोग के साथ मंजूरी प्रदान की गई थी।

***D. Prevention of Corruption Act (49 of 1988), Sections 7, 13(1)(d), 13(2) & 19 – Sanction Order – Validity* – Held – If trial Court finds the sanction order to be defective, it shall discharge the accused and return the charge-sheet to prosecution which shall be at liberty to file charge-sheet once again after seeking a fresh sanction u/S 19 of the Act. (Para 33)**

घ. भ्रष्टाचार निवारण अधिनियम (1988 का 49), धाराएँ 7, 13(1)(d), 13(2) व 19 – मंजूरी आदेश – विधिमान्यता – अभिनिर्धारित – यदि विचारण न्यायालय मंजूरी आदेश को दोषयुक्त पाता है, वह अभियुक्त को आरोपमुक्त करेगा तथा अभियोजन को आरोप पत्र लौटा देगा जिसे अधिनियम की धारा 19 के अंतर्गत नयी मंजूरी चाहने के पश्चात् एक बार पुनः आरोप पत्र प्रस्तुत करने की स्वतंत्रता होगी।

***E. Criminal Procedure Code, 1973 (2 of 1974), Section 311 & 319 – Stage of Trial – Term "inquiry"* – Held – Apex Court concluded that legislative intent of the term "inquiry" used in Section 311 is identical to the use of term "inquiry" in Section 319 – As per Section 319, term "inquiry" relates to a stage preceding the framing of charge and is an inquisitorial proceeding – Powers u/S 319 cannot be whittled down to mean that same can only be used in the course of trial and not at the stage of an inquiry which precedes the trial. (Para 28 & 29)**

ङ. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 311 व 319 – विचारण का प्रक्रम – शब्द ''जांच'' – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया कि धारा 311 में प्रयुक्त शब्द ''जांच'' का विधायी आशय, धारा 319 में प्रयुक्त शब्द ''जांच'' के समरूप है – धारा 319 के अनुसार, शब्द ''जांच'', आरोप विरचित करने पूर्वतर प्रक्रम से संबंधित है और एक समीक्षणात्मक कार्यवाही है – धारा 319 के अंतर्गत शक्तियों को यह अर्थ लगाने के लिए कम नहीं किया जा सकता कि उसे केवल विचारण के दौरान ही प्रयोग किया जा सकता है और न कि एक जांच के प्रक्रम पर जो विचारण के पूर्व होती है।

***F. Criminal Trial – "Facts in Issue" & "Relevant Facts"* – Discussed & Explained. (Para 25)**

च. दाण्डिक विचारण – ''विवाद्यक तथ्य'' व ''सुसंगत तथ्य'' – विवेचित एवं स्पष्ट किये गये।

Cases referred:

(2015) 16 SCC 163, (2016) SCC Online Del 214, (2005) 8 SCC 130, 1991 Cri.L.J. 1964, (2015) 14 SCC 186, AIR 1957 SC 494 : 1957 Cri LJ 597, (1979) 2 SCC 179, (2008) 10 SCC 109, (2014) 3 SCC 92.

Vijay Raghav Singh and *Ajay Kumar Nanda*, for the petitioner.
Anoop Nair, for the respondent Nos. 1 to 3.
Richard Rahul Rajoor, for the respondent No. 4.

O R D E R

The Order of the Court was passed by :
ATUL SREEDHARAN, J. :-The present petition has been filed, invoking the plenary powers of this Court under Article 226 of the Constitution, *inter-alia* praying for the quash of order granting sanction for prosecution dated 07/02/2019 (Annexure P/13) and 29/05/2019 (Annexure P/14).

2. The Petitioner was appointed on 09/09/2013 as an Assistant Engineer (Electrical-Contract) in the Madhya Pradesh Poorvi Kshetra Vidyut Vitaran Company Limited (MPPKVVCL) (hereinafter referred to as "the Company") on contractual basis. The said order of appointment is Annexure P/1 at page 27 of the petition. The Petitioner is at S. No. 14. The said order also deputed the Petitioner along with others for institutional training from 09/09/2013 to 23/09/2013. Clause 3 of the order fixes the contract period of the Petitioner for a term of two years from 09/09/2013, subject to successful completion of one month's training. It also provided that if the appointee does not complete the training successfully, his/her contract shall be terminated immediately. Clause 4 mentions that the engagement was on a contractual basis as per terms & conditions published for the purpose, and the agreement executed between them. It also provided that these appointees shall be discontinued with effect from the afternoon of 08/09/15.

3. Annexure P/2, at page No.29, is an order dated 25/09/13 by which the candidates were deputed for field training for fifteen days at such places noted against their names, on the same terms & conditions as stipulated in the order of their appointment dated 09/09/13. The Petitioner is at S.No. 4 and was posted to (O&M) Circle Chhindwara. Annexure P/3 at page 30 of the petition is an order dated 01/10/16 passed by the Respondents, by which new contract was executed with the Petitioner and others similarly situated, extending their contract from 03/10/16, which would stand terminated on its own, after the lapse of three years.

4. The Petitioner was caught red-handed accepting a bribe of Rs. 15,000/- (Rupees Fifteen Thousand Only) resulting in Crime No. 109/2018 being

registered against him on 17/05/18, at Police Station Special Police Establishment, Bhopal, for offences punishable under sections 7, 13(l)(d) and 13(2) of the Prevention of Corruption Act, 1988 (hereinafter referred to as "the PC Act"). The charge-sheet against him was submitted before the Court of the Ld. Special Judge, Chhindwara, on 03/07/19. In the entire petition, there is no mention of cognizance having been taken by the Ld. Trial Court of the offences charged against the Petitioner. The sanction order has admittedly been issued by the Chief Engineer of the Company at Jabalpur. In paragraph No.4 of the sanction order, the authority has held that it is the Chief Engineer who is the appropriate authority to grant sanction under section 19 of the PC Act. Both the impugned orders are identical.

5. The Petitioner has contended that as Mr. Prakash Dubey, the officer who had granted sanction as per section 19 of the PC Act, was only holding the post of Chief Engineer in current charge and so, could not exercise disciplinary authority over the Petitioner, as he was not empowered to remove the Petitioner from his post.

6. The Respondents in their reply have held that though Mr. Prakash Dubey was posted on current charge, he was given the complete powers of the Chief Engineer of the Company as per delegation of powers, which according to the Respondents is evident from Annexure P/9 at page number 184 of the petition.

7. Ld. Counsel for the Respondents has drawn our attention to the reply filed by them according to which, full power of appointment on posts up to the rank of Assistant Engineer on contract basis has been given by the resolution of the Board of Directors of the Company dated 24/01/13, to the Managing Director of the Company.

8. At page No. 184, is the order dated 7.1.2019 issued by the DGM (Admn.) of the Company, which reads as follows:

> *'Shri Prakash Dubey, G.M./R.R.C. Corporate Office, Jabalpur, is hereby transferred and posted as Additional Chief Engineer (JR), Jabalpur, on current charge basis with full powers of Chief Engineer of the Company as per DOP issued vide letter No.AS/PK/Ado/9838, dated 24.1.2013.*
>
> *The current charge is being given as per administrative convenience without prejudice to seniority and will not attract any financial bearing."*

9. The said order reveals that though he was given current charge, it was accompanied by full powers of the Chief Engineer. Thereafter, Ld. Counsel for the Respondents has drawn our attention to the delegation of authority. Even otherwise, Ld. Counsel for the Respondents has stated that the contract period of the Petitioner came to an end on 02/10 /19 and therefore, the Petitioner is no

longer in service of the Respondent organization. Neither the Petitioner nor the Respondents have stated if the Ld. Trial Court has taken cognizance of the offence against the Petitioner based on the impugned sanction order and if so, on what date?

10. Heard the Ld. Counsel for the parties and perused the documents filed along with the pleadings. The crux of the Petitioner's case is that the sanction order is *non-est and void ab initio* on account of the same having been passed by a person who was not authorised to pass the order of sanction, as the Petitioner could not have been removed from service by the authority that had passed the sanction order. To buttress his contention, the Petitioner has placed before us the judgment passed by the Hon'ble High Court of Delhi in *G. S. Matharaoo v. CBI* [Crl. M.C. No. 2695/2010 and Crl. M.A. No. 13999/2010 (stay)], wherein the High Court of Delhi held, that it was no longer *res integra* that, a defective sanction order, on account of the incompetence of the sanctioning authority, goes to the root of the case and in such a situation, the High Court, in exercise of its powers under section 482 Cr.P.C or Article 227 of the Constitution, is bound to examine and decide the same. However, in that case, the Ld. Single Judge of the High Court of Delhi held that there are no disputed questions of fact for which evidence was required to be adduced.

11. Ld. Counsel for the Petitioner has also drawn our attention to another judgment, yet again of the High Court of Delhi, passed in Crl.M.C.3137/2017 (*Sandeep Silas v. CBI and others*). The same issue once again cropped up before the Ld. Single Judge of the Hon'ble High Court of Delhi. The Counsel for the CBI in that case, had referred to a judgment of the Supreme Court passed in *Director, Central Bureau of Investigation and another v. Ashok Kumar Aswal and another* (2015) 16 SCC 163, where a two-judge Bench of the Supreme Court, in paragraph No. 15 held, that time and again the Supreme Court has held that the validity of a sanction order has to be tested on the touchstone of prejudice caused to the accused, which is essentially a question of fact and therefore, should be determined in the course of the trial and not by the High Court in exercise of jurisdiction, either under section 482 Cr.P.C or under Articles 226/227 of the Constitution. The Ld. Single Judge of the High Court of Delhi, however, relied upon another judgment of the High Court of Delhi in *Ashok Kumar Aggarwal v. CBI and others* (2016) SCC Online Del 214, where the High Court, while dealing with the issue of the validity of a sanction order at the pre-evidence stage, rejected the contention of the Respondents therein that aforesaid issue can only be determined after evidence is adduced at trial. Likewise, in *G. S. Matharaoo v. CBI*, cited hereinabove, the High Court of Delhi High Court had taken note of the judgments passed by the Supreme Court in *State of Goa v. Babu Thomas* (2005) 8 SCC 130 and *Virender Pratap Singh v. State of U.P.,* 1991 Cri.L.J. 1964 to hold that the High Court, in exercise of its jurisdiction under Article 227 of the

Constitution and section 482 Cr.P.C, will quash the order of cognizance as the same is *void ab initio*. It is pertaining to mention here that none of these judgements examined whether, the Sanctioning Authority could be examined as a witness u/s. 311 CRPC at the pre-charge stage.

12. The dilemma with regard to the scope of adjudicating upon the validity of the sanction order by the High Court in exercise of its plenary powers under S. 482 Cr.P.C or Article 226 of the Constitution, especially where the State has strongly disputed the stand of the Petitioner that the sanction order has been passed by an authority not empowered to remove the Petitioner from service, compels us to examine if it is permissible, under the existing law, to record the evidence of the Sanctioning Authority before framing of charges.

13. The question whether sanction has been granted by the appropriate authority u/s. 19 of the PC Act or whether, there were any defects in the sanction order that could render it a nullity, has presented itself before the Courts earlier also. The same is no longer *res integra*, in view of the Supreme Court's decision in *Nanjappa's* case, that a defect in the sanction order can be appreciated and acted upon by the Trial Court at any stage and that the bar of section 19(3) of the PC Act was only applicable on the Appellate or Revisional Court, which could not set aside a conviction, only on the ground of defective sanction, unless it arrived at the finding that there occasioned a failure of justice, or that the same, prejudiced the case of the accused. In *Nanjappa's* case, the Appellant before the Supreme Court, was a bill collector with the Gram Panchayat. The allegation against him was that he demanded rupees five hundred to issue a copy of the Panchayat resolution, by which it was decided to convert the road in front of the complainant's house into sites for allotment to third parties. The Appellant was caught taking bribe and tried. The Trial Court acquitted the Appellant only on the ground that sanction was not taken from the competent authority. *Inter alia*, the Trial Court also recorded a finding questioning the credibility of the demand for bribe. On appeal by the State of Karnataka to the High Court, the High Court found that the validity of sanction was not questioned at the appropriate stage and so, the Appellant was not entitled to raise the same at the conclusion of the trial. Thus, the High Court reversed the finding of acquittal recorded by the Trial Court and convicted Nanjappa under section 7 and 13 r/w section 13(2) of the PC Act and sentenced him to undergo a sentence of six months for the offence u/s. 7 and one year for the offence u/s. 13 of the PC Act.

14. On appeal to the Supreme Court by Nanjappa, the State argued that the validity of the sanction order had to be raised at the earliest point of time and not at the fag end of the trial. The Supreme Court held **"The legal position regarding the importance of sanction under Section 19 of the Prevention of Corruption Act is thus much too clear to admit equivocation. The statute forbids taking**

of cognizance by the court against a public servant except with the previous sanction of an authority competent to grant such sanction in terms of clauses *(a)*, *(b)* and *(c)* to Section 19(1). The question regarding validity of such sanction can be raised at any stage of the proceedings. The competence of the court trying the accused so much depends upon the existence of a valid sanction. In case the sanction is found to be invalid the court can discharge the accused relegating the parties to a stage where the competent authority may grant a fresh sanction for the prosecution in accordance with law. If the trial court proceeds, despite the invalidity attached to the sanction order, the same shall be deemed to be non-est in the eyes of law and shall not forbid a second trial for the same offences, upon grant of a valid sanction for such prosecution"[1].

15. As regards the argument put forth by the State of Karnataka that in view of section 19(3) of the PC Act, the plea of defective sanction has to be taken at the earliest point of time and the same cannot be taken by the accused, or looked into by the Trial Court at the fag end of the trial more so, when there was no miscarriage of justice. The Supreme Court held **"A careful reading of sub-section (3) to Section 19 would show that the same interdicts reversal or alteration of any finding, sentence or order passed by a Special Judge, on the ground that the sanction order suffers from an error, omission or irregularity, unless of course the court before whom such finding, sentence or order is challenged in appeal or revision is of the opinion that a failure of justice has occurred by reason of such error, omission or irregularity. Sub-section (3), in other words, simply forbids interference with an order passed by the Special Judge in appeal, confirmation or revisional proceedings on the ground that the sanction is bad save and except, in cases where the appellate or revisional court finds that failure of justice has occurred by such invalidity. What is noteworthy is that sub-section (3) has no application to proceedings before the Special Judge, who is free to pass an order discharging the accused, if he is of the opinion that a valid order sanctioning prosecution of the accused had not been produced as required under Section 19(1)"[2].** Thereafter, the Supreme Court goes on to hold that the Trial Court had fallen in error in acquitting the Appellant on arriving at the finding that the sanction was defective and instead held in the following words that **"In the case at hand, the Special Court not only entertained the contention urged on behalf of the accused about the invalidity of the order of sanction but found that the authority issuing the said order was incompetent to grant sanction. The trial court held that the authority who had issued the sanction was not competent to do so, a fact which has not been disputed before the High Court or before us. The only**

[1] **Nanjappa Vs. State of Karnataka - (2015) 14 SCC 186, Paragraph 22**
[2] **Nanjappa Vs. State of Karnataka - (2015) 14 SCC 186, Paragraph 23.2**

error which the trial court, in our opinion, committed was that, having held the sanction to be invalid, it should have discharged the accused rather than recording an order of acquittal on the merit of the case. As observed by this Court in *Baij Nath Prasad Tripathi case* [*Baij Nath Prasad Tripathi v. State of Bhopal,* AIR 1957 SC 494 : 1957 Cri LJ 597] , the absence of a sanction order implied that the court was not competent to take cognizance or try the accused. Resultantly, the trial by an incompetent court was bound to be invalid and non-est in law"[3]

16. After taking cognizance, the earliest point of time where the Trial Court can examine the validity of an order of sanction u/s. 19 of the PC Act, is at the stage of framing charges. At this stage, the Trial Court can discharge the accused if it finds that cognizance has been taken based on an invalid sanction and return the charge sheet to the investigating agency. It is trite law that a discharge does not clothe the accused with the protection of *autrefois acquit* u/s. 300 Cr.P.C. Thus, the investigating agency can file the charge sheet again with a fresh order of sanction, if need be. However, if the Trial Court frames charges and proceeds to the stage of evidence and, upon examination of the sanctioning authority, material comes out that he was not the authority vested with power to issue the order of sanction then, in such a situation, there is no provision in the CRPC that would enable the Trial Court to truncate further proceedings. The Trial Court would necessarily have to go through the process of trial by recording the entire gamut of prosecution evidence before it and then pass its final orders which, must be one of discharge and not acquittal, as held by the Supreme Court in *Nanjappa* supra and, the investigating authority can thereafter seek a fresh sanction to prosecute the accused and put him to trial once again.

17. Experience reveals that offences under the PC Act can be long drawn and may even stretch over a decade before conclusion. If the prosecution can seek a fresh sanction and put the accused to trial again, after the accused is discharged at the end of the trial stretching over a decade, several question are raised with regard to the loss of precious time of the Trial Court, the hardship placed upon the witnesses who would have to be called and examined all over again, the violation of the right to speedy trial of the accused and lastly, the financial loss caused to the State in conducting the trial all over again.

18. The trial of a criminal case in India is Accusatorial /Adversarial in procedure. The prosecution presses the charge against the accused and must prove the guilt of the accused beyond reasonable doubt, and the accused defends his innocence (where the burden of proof has been shifted upon the accused). In all this, the Trial Court plays the role of an impartial arbiter without any involvement on behalf of prosecution or the defence. This aloofness of the Trial Court, has been

[3] **Nanjappa Vs. State of Karnataka - (2015) 14 SCC 186, Paragraph 24**

qualified by various judgements of the Supreme Court that it does not mean that the Trial Court act like an unconcerned observer and instead, participate in the trial process to ensure that the cause of justice is served without stepping into the shoes of either the prosecution or the defence. Thus, the Trial Court should participate without being partisan, in the trial process.

19. Once the charge has been framed, as a rule, the Trial Court cannot discharge an accused. Instead, it must necessarily record an acquittal or a conviction. A three judge bench of the Supreme Court in *Ratilal Bhanji Mithani's* case held that a trial in a criminal case, commences after the framing of charges and held **"Once a charge is framed, the Magistrate has no power under Section 227 or any other provision of the Code to cancel the charge, and reverse the proceedings to the stage of Section 253 and discharge the accused. The trial in a warrant case starts with the framing of charge; prior to it, the proceedings are only an inquiry. After the framing of the charge if the accused pleads not guilty, the Magistrate is required to proceed with the trial in the manner provided in Sections 254 to 258 to a logical end. Once a charge is framed in a warrant case, instituted either on complaint or a police report, the Magistrate has no power under the Code to discharge the accused, and thereafter, he can either acquit or convict the accused unless he decides to proceed under Section 349 and 562 of the Code of 1898 (which correspond to Sections 325 and 360 of the Code of 1973).**[4] The Supreme Court unequivocally laid down that **(a)** Once charge if framed, the Magistrate/Court has no power to discharge the accused, **(b)** the trial in a warrant case commences with the framing of charge and the proceedings prior to that are only an enquiry and **(c)** after charges are framed, the Magistrate can only acquit or convict the accused. The proposition of law that after the framing of charge, the Magistrate has no power to discharge the accused and that he must either acquit or convict accused, has been followed by the Supreme Court in *Bharat Parikh Vs. Central Bureau of Investigation*[5].

20. At first blush, the judgement of the two-judge bench of the Supreme Court in *Nanjappa's* case appears to conflict with the judgement of the Supreme Court, passed by the three-judge bench in *Ratilal Bhanji Mithani's* case. However, the three-judge bench in *Ratilal Bhanji Mithani's* case had examined the power of the Magistrate to discharge an accused after charges had been framed. The three-judge bench never examined the effect of framing charges where the cognizance taken itself was defective in law on account of a statutory prerequisite which was not satisfied. In *Nanjappa's* case, though the two-judge bench had not referred to the judgement of the three-judge bench in *Ratilal Bhanji Mithani's* case, there is no conflict between the two judgements. The decision of the three-judge bench in

[4] **Ratilal Bhanji Mithani Vs. State of Maharashtra & Ors. - (1979) 2 SCC 179 - Paragraph 28**
[5] **(2008) 10 SCC 109**

Nanjappa's case examined whether, the trial court had the power to discharge an accused after the entire trial was concluded on account of the sanction under section 19 of the PC Act, being defective. In *Nanjappa's* case, the Supreme Court held that the very cognizance taken by the learned trial court was defective and *non-est* which rendered the entire trial *void ab initio*. Thus, there is no conflict between the two judgements of the Supreme Court, both having been passed in appreciation of different circumstances.

21. In *Hardeep Singh Vs. State of Punjab and others*, a reference was made to a Constitution bench of the Supreme Court which framed five queries to be answered by it. Primarily, the Supreme Court was concerned with the stage at which the power under section 319 CRPC could be invoked and secondly, the material on the basis on which such power could be invoked and thirdly, the manner in which such power could be exercised. The Supreme Court held that **"The stage of inquiry commences, in so far as the court is concerned, with the filing of the chargesheet and the consideration of the material collected by the prosecution, that is mentioned in the chargesheet for the purpose of trying the accused. This has to be understood in terms of section 2(g) CRPC, which defines an inquiry as follows: 2 (g) inquiry means every inquiry, other than a trial, conducted under this code by a Magistrate or court"[6].** The Supreme Court further held **"trial is distinct from an inquiry and must necessarily succeed it. The purpose of the trial is to fasten the responsibility upon a person based on facts presented and evidence led in this behalf. In *Moly v. State of Kerala*, this court observed that though the word "trial" is not defined in the code, it is clearly distinguishable from enquiry. Inquiry must always be a forerunner to the trial".**[7] Thereafter, the bench examines several case laws and holds **"In view of the above, the law can be summarised to the effect that as "trial" means determination of issues at judging the guilt or the innocence of a person, the person has to be aware of what is the case against him and it is only at the stage of framing of the charges that the court informs him of the same, the "trial" commences only on charges being framed. Thus, we do not approve the view taken by the courts that in a criminal case, trial commences on cognizance being taken"[8].** The bench goes on to hold that an inquiry envisaged U/S 319 CRPC is a procedure adopted by the court after the chargesheet is filed, in the following words **"Section 2(*g*) CRPC and the case laws referred to above, therefore, clearly envisage inquiry before the actual commencement of the trial, and is an act conducted under CRPC by the Magistrate or the court. The word "inquiry" is, therefore, not any inquiry relating to the investigation of the case by the investigating agency but is an inquiry after the case is brought to the notice of the court on the filing of the**

[6] **Hardeep Singh Vs. State of Punjab and Others - (2014) 3 SCC 92 - Paragraph 27**
[7] **Hardeep Singh Vs. State of Punjab and Others - (2014) 3 SCC 92 - Paragraph 29**
[8] **Hardeep Singh Vs. State of Punjab and Others - (2014) 3 SCC 92 - Paragraph 38**

charge-sheet. The court can thereafter proceed to make inquiries and it is for this reason that an inquiry has been given to mean something other than the actual trial"[9]. The Constitution bench, *inter-alia* holds that the power U/S 319 CRPC can be exercised by the trial court even at the stage of an inquiry, which precedes a trial. Where the Trial Court is satisfied, that on the basis of the material gathered in the course of the investigation, a person who ought to have been arraigned as an accused and sent up for trial, has erroneously or deliberately been left out from the chargesheet, and also, where it appears to the trial court that a person, who was never arraigned as an accused, nor mentioned in the FIR, but who, after the conclusion of investigation, appears to be *Particeps Criminis*, can also be arraigned as an accused at the stage of the inquiry itself, as envisaged U/S 319 CRPC.

22. Under the circumstances, we thought it necessary to examine the Code of Criminal Procedure, 1973, to ascertain if the trial court can examine the sanctioning authority as a witness before the framing of charge? If the code permits such a procedure, valuable time and resources of the court would be saved. On the other hand, the right to a speedy trial of the accused would also be protected. If the CRPC does not proscribe the examination of the sanctioning authority before framing of charge, the trial court, can discharge the accused where it arrives at a finding that the order of sanction is bad in law either on account of the same having been passed by an authority who was incompetent or, on account of non-application of mind on the part of the sanctioning authority. In such a situation, the trial court can return the chargesheet to the police or the investigating authority who, then may seek a fresh sanction from the competent authority and file the chargesheet afresh before the learned trial court. This would ensure that the accused does not get the benefit of escaping a second chance at assessing his guilt, only on the ground of a delayed trial, as has been seen in *Nanjappa's* case.

23. Section 311 Cr.P.C. falls under Chapter XXIV (General Provisions as To Enquiries and Trials). The said section is being extracted herein for the sake of convenience:

> *'**311. Power to summon material witness, or examine person present.**- Any Court may, at any stage of gnu inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined, and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case."*

[9] **Hardeep Singh Vs. State of Punjab and Others - (2014) 3 SCC 92 - Paragraph 39**

Though the provision is usually used in the course of a trial to re-examine a witness or to call a witness who has never been called before, the first part of this provision is extremely significant as it reads that "any court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness.....". There are two parts to section 311 Cr.P.C. The first part, which is discretionary, and the second part, which is mandatory. Where the trial court arrives at the conclusion that the evidence of a person appears to be essential to the just decision of the case, the trial court must examine, recall and re-examine such a witness. The first part that grants the Court discretion is extremely wide. It is not merely a power that can be exercised only during the course of trial, viz., after the framing of charge and commencement of evidence, but can be exercised by the Court even at the stage of "inquiry" or "other proceedings" under the CRPC.

24. Section 2(g) of the CRPC defines "inquiry" as follows:

> *"inquiry"means every inquiry, other than a trial, conducted under this Code by a Magistrate or Court.*

From the definition, it is clear that inquiry is that part of the proceeding before a trial court, which is other than a trial, which is conducted by a Magistrate or a court. Thus, the Cr.P.C. vests the trial court with inquisitorial powers also, though the trial which commences after the framing of charge, is adversarial. Under the circumstances, the legislative intent in 311 Cr.P.C. is to empower the trial court to deal with a situation that arises from a case like the one at hand. The stage between the taking of cognizance and the framing of charge is an inquisitorial stage before the trial court. Therefore, can it be laid down as a proposition of law that section 311 CRPC enables Trial Court to examine the sanctioning authority before framing the charge?

25. The testimony of the Sanctioning Authority has no relevance to an **Adjudicative Fact. "An adjudicative fact is a fact which is either a fact in issue or is relevant to a fact in issue.....In the case of adjudicative facts, the doctrine of judicial notice has restricted scope, for in the common law system the facts are appropriately determined on the evidence presented by the parties unless the fact is of such notoriety that to call for evidence would be a waste of time"**[10]. Simply put, adjudicative facts are **"Facts in Issue" or "Relevant Facts".** A Fact in Issue in a criminal trial, is a fact relating to a charge against the accused, which the prosecution must prove beyond reasonable doubt to establish the guilt of the accused. A Relevant Fact is a fact which is relevant, on account of its relation to a fact in issue. In other words, Fact in Issue and Relevant Facts are seminal to the merits of the case against the accused. The testimony of the Sanctioning Authority, however, has no bearing on a fact in issue or a relevant

---

[10] **Cross on Evidence, 10th Edition by J D Heydon, Page 162**

fact and, its only relevance is as a **fact of procedural fulfilment**. His testimony will reveal whether the requirement of section 19 of the PC Act, has been complied with and that the Sanctioning Authority **(a)** is competent to issue the order of sanction and **(b)** the sanction order reflects the application of mind by the Sanctioning Authority. Witnesses testifying to a fact in issue or a relevant fact, are **material witnesses** and those testifying to fulfilment of procedural requirement are **formal witnesses**. Thus, the Sanctioning Authority would fall in the category of a formal witness.

26. At this juncture, we feel it essential to refer to an order passed by a co-ordinate bench of this Court in Criminal Revision No. 797/2015 (Prabhu Lai Tatwal Vs. State of Madhya Pradesh). A similar proposition was considered by the co-ordinate bench. The Petitioner had moved an application for discharge before the Trial Court on the ground of defective order of sanction. The Trial Court dismissed the application. The order of the Trial Court was challenged by the Petitioner before this Court by way of a Cr.R 96/2005. This Court dismissed Cr. 96/2005. Against the order of dismissal passed by this court, the Petitioner approached the Supreme Court by way of Special Leave Petition (Crl.) No. 9999/2011. The Supreme Court disposed of the SLP with a direction to the Trial Court, to conduct a "proper inquiry" as to whether all the relevant materials had been placed before the competent authority and whether, the competent authority had referred to the same. Armed with the order from the Supreme Court, the Petitioner approached the Trial Court once again and moved an application U/S 311 CRPC praying that the Sanctioning Authority be examined as a witness before framing charges. The application was dismissed by the Trial Court. Against the order of the Trial Court, the Petitioner preferred the Cr. R No. 797/2015 before this Court.

27. The co-ordinate bench of this Court disposed of Cr. R 797/2015, directing the Ld. Trial Court to arrive at a finding, whether there was application of mind on the part of the Sanctioning Authority, based on the record of the case. The Court however did not accede to the prayer of the Petitioner to direct the Trial Court to examine the Sanctioning Authority before framing of charge. In paragraph 8 of the order, the co-ordinate bench held, **"it is true that in general provisions as to inquiries and trials under section 311 CRPC, court has power to summon material witnesses, or to examine a person present at "any stage" of "any enquiry", or "trial", or "any other proceedings" under the Code, if his evidence appears to be essential for the just decision of the case. Sections 239 and 240 of CRPC which speak regarding trial of warrant cases by a Magistrate and powers of court to summon any witness at any stage is essential for just decision of the case; in our considered opinion, it does not intend the recording of statement of prosecution witness before framing of charge".** In paragraph 9 of the judgement, this court further elaborates **"as**

discussed above, in our opinion, recording of statement of prosecution witness, prior to framing of charge, is not warranted, nor is it is permissible as per the scheme in the CRPC. Proper enquiry is very well possible without recording oral evidence also.....". Thus, it is seen that the coordinate bench of this court has held that the enquiry envisaged U/S 311 CRPC is to be done on the basis of the record of the case and oral testimony of the witness is not only not required, but the same is not provided for in the scheme of the CRPC as evidence is to be recorded only after framing charge.

28. The interpretation given by the coordinate bench of this Court, appears to be in conflict with the opinion of the Supreme Court with regard to the term "inquiry" as used in section 319 CRPC in *Hardeep Singh's* case, which is the same as the term "inquiry" used in section 311 CRPC. Paragraphs 42, 43 and 44 of the Supreme Court judgement in *Hardeep Singh's* case is extremely relevant and the same are being reproduced by us in their entirety. The said paragraphs, read as under.

> **"42. To say that powers under Section 319 CrPC can be exercised only during trial would be reducing the impact of the word "inquiry" by the court. It is a settled principle of law that an interpretation which leads to the conclusion that a word used by the legislature is redundant, should be avoided as the presumption is that the legislature has deliberately and consciously used the words for carrying out the purpose of the Act. The legal maxim a *verbis legis non est recedendum* which means, "from the words of law, there must be no departure" has to be kept in mind.**
>
> **43. The court cannot proceed with an assumption that the legislature enacting the statute has committed a mistake and where the language of the statute is plain and unambiguous, the court cannot go behind the language of the statute so as to add or subtract a word playing the role of a political reformer or of a wise counsel to the legislature. The court has to proceed on the footing that the legislature intended what it has said and even if there is some defect in the phraseology, etc., it is for others than the court to remedy that defect. The statute requires to be interpreted without doing any violence to the language used therein. The court cannot rewrite, recast or reframe the legislation for the reason that it has no power to legislate.**
>
> **44. No word in a statute has to be construed as surplusage. No word can be rendered ineffective or purposeless. Courts are required to carry out the legislative intent fully and completely. While construing a provision, full effect is to be given to the language used therein, giving reference to the context and other provisions of the statute. By construction, a provision should not be reduced to a**

"dead letter" or "useless lumber". An interpretation which renders a provision otiose should be avoided otherwise it would mean that in enacting such a provision, the legislature was involved in "an exercise in futility" and the product came as a "purposeless piece" of legislation and that the provision had been enacted without any purpose and the entire exercise to enact such a provision was "most unwarranted besides being uncharitable".

The paragraphs recited from *Hardeep Singh's* judgement make it noticeably clear, that no word or phrase used in a statute can be considered a surplusage and discarded. Every word has to be construed harmoniously with the entire statute and the unequivocal meaning of the word used by the legislature must be given effect to. Thus, the Supreme Court, held very clearly in *Hardeep Singh's* judgement that the powers under section 319 CRPC cannot be whittled down to mean that the same can be used only in the course of the trial and not at the stage of an inquiry which precedes the trial.

29. The legislative intent in using the term "inquiry" in S. 311 CRPC is identical to the use of the term "inquiry" in section 319 CRPC, the effect of which was examined by the Supreme Court in *Hardeep Singh's* case. Under the circumstances, we feel bound to give effect to the law laid down by the Supreme Court in *Hardeep Singh's* case and ascribe the same meaning to the term "inquiry" as used in S. 311 CRPC as has been interpreted by the Supreme Court in *Hardeep Singh's* case. In *Hardeep Singh's* case, the Supreme Court held that "inquiry" as used in section 319 CRPC relates to a stage preceding the framing of charge and is an inquisitorial proceeding. The Supreme Court held that an accused who is kept in column 2 of the charge sheet or person not proceeded against as a suspect during investigation, against whom there is material to proceed against in the chargesheet, can be called to stand trial by the court by exercising power under S. 319 CRPC. However, where a person has been discharged or such persons against whom there is no *prima facie* evidence, cannot be proceeded against till evidence is adduced during the trial against them. The Supreme Court also held in *Hardeep Singh's* case that there would be no necessity to adduce evidence before framing charge, to exercise jurisdiction under S. 319 CRPC and the Court can do so if the charge sheet reveals sufficient evidence to proceed against such individuals.

30. Here, we see a distinction with regard to the scope of application of S. 311 CRPC and 319 CRPC. While section 319 CRPC, which was elaborately examined by the Constitution Bench of the Supreme Court in *Hardeep Singh's* case, related to the power of the Trial Court to add a person as an accused **"....in the course of any inquiry into, or trial...."**, For this purpose, the Supreme Court held that it was not necessary to examine any witness before framing charge and that the Trial Court could proceed against such person(s) based upon the material collected in the course of the investigation itself. However, as regards the scope and

application of S. 311 CRPC, the provision is for the purpose of adducing the evidence of a witness **"....at any stage of any inquiry, trial or other proceeding under this code....".** The meaning and scope of the term "inquiry" is no longer *res integra* in view of the judgement of the Supreme Court in *Hardeep Singh's* case. Thus, even though the Supreme Court had held that there was no necessity to record the evidence of any witness before framing charge, in order to arraign a person as an accused, even before the framing of charges, for the purpose of S. 319 CRPC, S. 311 CRPC specifically empowers the Trial Court to adduce evidence of a witness even at the stage of an inquiry viz., before the framing of charge if need be.

31. Thus, we have no hesitation in holding that section 311 CRPC empowers the trial court to examine the sanctioning authority as a witness at the pre-charge stage itself and record his statement and also subject him to cross-examination, if need be, to ascertain whether he was competent to grant sanction or where the authority was competent to grant sanction, the same was granted without due application of mind to the record of the case. Where, after recording the statement of the competent authority, the Trial Court is of the opinion that the sanction has indeed been given by a person who was not authorized to remove the accused from office or that the sanction order was passed without an application of mind, it can discharge the accused and return the file to the prosecution to seek fresh sanction from the appropriate authority. As this recording of evidence would have taken place at a pre-charge stage, subject to the exception U/S. 300(5} CRPC, the defence of autrefois acquit/convict will not come to the aid of the accused, as the trial itself has not commenced.

32. In our considered opinion, the advantage of recording the evidence of the Sanctioning Authority U/S. 311 CRPC, before framing of charge, are as follows.

(a) The Court saves precious time if the evidence of the Sanctioning Authority reveals that the Sanction is bad either on account of it being passed by an incompetent authority or passed without application of mind in which case, the accused can be discharged and the chargesheet returned to the investigating agency.

(b) The investigating agency has the opportunity of seeking fresh sanction and refiling the chargesheet before the Trial Court.

(c) The accused does not get the benefit of *autrefois acquit/convict* as charge has not been framed, and

(d) The accused cannot get the benefit of a seeking quashment of the case on the ground of delayed trial, which he may otherwise get if he is discharged by the Trial Court at the end of the trial after a protracted trial spanning over a decade.

33. In view of what we have discussed and held hereinabove; we propose to lay down the following guidelines to be followed by the learned trial court while trying a case under the prevention of corruption act.

(a) The trial court shall examine the sanctioning authority exercising powers under section 311 CRPC before framing charge, even if there is no challenge to the same by the accused, as the validity of the sanction order can go to the root of the case and can render the very act of taking cognizance itself void ab initio.

(b) If the trial court finds that the sanction passed is in consonance with the provisions of section 19 of the PC act on both the parameters of competence of the sanctioning authority and application of mind on the part of the sanctioning authority, then the trial court shall proceed to the next stage and decide whether charges should be framed against the accused after hearing the prosecution and the defence.

(c) If, the trial court is of the opinion that the sanction order under section 19 of the PC act is fundamentally defective on either of the parameters, it shall discharge the accused and return the chargesheet to the investigating agency, which shall be at liberty to file the chargesheet once again after seeking a fresh sanction under section 19 of the PC act.

(d) These directions are prospective in nature and shall not affect the proceedings in those cases where the charges have been framed and evidence has commenced before the trial court. It goes without saying that these directions shall have no effect on the inherent powers of the High Court under section 482 CRPC or its powers of revision under section 397 read with 401 CRPC.

34. In this case, the issue whether the sanction has been granted by the appropriate authority is not an accepted fact by the Respondents. The Respondents have *prima facie* established in paragraph 9 *supra* that by way of delegation, the Sanctioning Authority, in this case was vested with the power of removing the Petitioner from his service and, therefore, was the competent authority. Thus, in view of the law laid down by us hereinabove, the petition filed by the Petitioner must fail.

35. Under the circumstances, this petition is **dismissed**. No Costs.

Petition dismissed

I.L.R. [2020] M.P. 1174
APPELLATE CIVIL
Before Mr. Justice Sanjay Dwivedi
F.A. No. 615/2018 (Jabalpur) decided on 8 May, 2020

T.P.G. PILLAY …Appellant

Vs.

MOHD. JAMIR KHAN & anr. …Respondents

***A. Specific Relief Act (47 of 1963), Section 16(c) & 20 – Readiness & Willingness – Burden of Proof* – Held – For decree of specific performance, plaintiff has to proves his readiness to perform his part of contract – Except oral submission, no evidence (income tax return/bank statement) substantiating his readiness and willingness and his financial capacity to pay remaining sale consideration – Even no reference of readiness in notice sent by him – Even full remaining sale consideration not deposited in CCD by Plaintiff – He has to discharge his obligation to deposit remaining amount even though, has not been directed by Court – Plaintiff only entitled for refund of amount and not for a decree of specific performance – Judgment and decree set aside – Appeal allowed. (Paras 14 to 16 & 18)**

क. विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 16(c) व 20 – तैयारी व रजामंदी – सबूत का भार – अभिनिर्धारित – विनिर्दिष्ट पालन की डिक्री हेतु वादी को संविदा के उसके भाग का पालन करने के लिए उसकी तैयारी साबित करनी होती है – उसकी तैयारी एवं रजामंदी तथा शेष विक्रय प्रतिफल की अदायगी हेतु वित्तीय सामर्थ्य सिद्ध करने के लिए, मौखिक निवेदन के सिवाय कोई साक्ष्य (आयकर रिटर्न/बैंक विवरण) नहीं – यहां तक कि उसके द्वारा भेजे गये नोटिस में भी तैयारी का कोई संदर्भ नहीं – वादी द्वारा सी सी डी में शेष पूर्ण विक्रय प्रतिफल भी जमा नहीं किया गया – उसे शेष रकम जमा करने की बाध्यता का निर्वहन करना होगा, यद्यपि न्यायालय द्वारा ऐसा निदेशित नहीं किया गया है – वादी, केवल रकम के प्रतिदाय हेतु हकदार और न कि विनिर्दिष्ट पालन की डिक्री हेतु – निर्णय एवं डिक्री अपास्त – अपील मंजूर।

***B. Specific Relief Act (47 of 1963), Section 16(c) & 20 – Conditional Agreement* – Held – Condition in agreement regarding demarcation of land by seller and then sale deed be executed, is not mandatory because even at that time, when sale deed was got executed by Court in plaintiff's favour, he did not perform his part of contract nor got the land demarcated. (Para 13)**

ख. विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 16(c) व 20 – सशर्त करार – अभिनिर्धारित – करार में विक्रेता द्वारा भूमि के सीमांकन संबंधी शर्त और तब विक्रय विलेख को निष्पादित किया जाए, आज्ञापक नहीं है क्योंकि उस समय भी, जब

न्यायालय द्वारा वादी के पक्ष में विक्रय विलेख निष्पादित कराया गया था, उसने संविदा के उसके भाग का पालन नहीं किया और न ही भूमि का सीमांकन करवाया था।

Cases referred:

(1995) 5 SCC 115, (1999) 7 SCC 303, (1999) 6 SCC 337, (2018) 9 SCC 805, (2018) 3 SCC 658, (2019) 8 SCC 575, (2019) 9 SCC 132, AIR 2011 CHHATTISGARH 66, AIR 2014 GUJARAT 12, (1996) 4 SCC 526.

A.K. Jain, for the appellant/defendant.
None present, for the respondent No. 1/Plaintiff.
Anvesh Shrivastava, P.L. for the respondent No. 2/State.

J U D G M E N T

SANJAY DWIVEDI, J.:- By the instant appeal filed under Section 96 of the Code of Civil Procedure, the appellant/defendant is challenging the judgment and decree dated 14.02.2018 passed in Civil Suit No.12-A/2015 by Third Additional District Judge, Jabalpur which was preferred by respondent No.1/plaintiff for specific performance of contract.

2. The facts leading to the present appeal in brief are that the defendant/appellant executed an agreement to sale in favour of the plaintiff/respondent No.1 on 19.07.2011 in respect of the land situated over Mouza Gurda Har Khajari, Bandobast No.600, Patwari Halka No.20, Block Maharajpur, Tahsil and District Jabalpur, agriculture land survey No.38/8 area measuring 4600 square feet and survey No.38/18 area measuring 4450 square feet total area 9050 square feet.

At the time of execution of the agreement to sale (Ex.P/1), an amount of Rs.10,00,000/- was paid in advance by respondent No.1 to the appellant out of total sale consideration of Rs.25,00,000/-. As per the agreement, the remaining amount i.e. Rs.15,00,000/- had to be paid by respondent No.1 to the present appellant within the period of three months from the date of agreement and thereafter, the present appellant would execute the sale-deed in favour of respondent No.1. In the said agreement, it was also mentioned that before getting the sale-deed registered, the appellant would get the land demarcated at his own expenses and the document in respect of the same would be made available to respondent No.1. According to the terms and conditions of the agreement to sale (Ex.P/1), the appellant was required to get the land demarcated till first week of August, 2011 and further to get the sale-deed executed in favour of respondent No.1.

3. As per respondent No.1, in the month of August, 2011, he requested the appellant to get the land demarcated and then to get the sale-deed executed in his favour but he did not do so. As per respondent No.1, he repeatedly asked the appellant to get the land demarcated so that the sale-deed could be executed but

the appellant was delaying the matter for one or the another reason. Thereafter, respondent No.1 sent a notice on 24.10.2011 to the present appellant but the same was neither replied nor the sale-deed got executed in favour of respondent No.1.

4. Thereafter, a suit was filed by the plaintiff/respondent No.1 seeking a decree of specific performance of the contract mentioning in the plaint that the cause of action arose on 19.07.2011 when the agreement to sale got executed and thereafter, on 24.10.2011, despite issuance of notice to the defendant/appellant he did not appear in the suit then *ex parte* decree dated 26.06.2012 was passed against the defendant/appellant and in pursuance to the said *ex parte* decree, the sale-deed got executed by the Court- below and the possession over the disputed land was also handed over to the decree holder/respondent No.1. However, the said *ex parte* decree dated 26.06.2012 was set-aside by the Court-below vide order dated 31.01.2014 on an application moved by the present appellant filed under Order IX Rule 13 of the Code of Civil Procedure but in the meantime, an execution proceeding initiated by respondent No.1 in which the sale-deed got executed by the Court-below in favour of respondent No.1 and he was also put in possession over the disputed land.

5. However, after setting-aside the *ex parte* decree, written statement was filed by the defendant/appellant mentioning therein that the plaintiff/respondent No.1 has never shown any readiness and willingness on his part. It is also stated in the written statement that as per the terms of the contract, the remaining amount of Rs.15,00,000/- was to be paid by the plaintiff to the defendant within the period of three months from the date of agreement, as such the time was the essence of the contract but remaining amount of Rs.15,00,000/- was not paid by the plaintiff within the aforesaid period, therefore, the suit cannot be decreed and it deserves to be dismissed. It is also stated by the defendant/appellant that the condition for getting the land demarcated was not the mandatory requirement because in pursuance to execution of the *ex parte* decree, the sale-deed got executed without getting the land demarcated. It is also stated that even after execution of the sale-deed the plaintiff/respondent No.1 had not deposited the full amount of sale consideration of Rs.15,00,000/- but deposited only Rs.13,00,000/- in the CCD which further indicates that the plaintiff was never ready and willing to get his part done, therefore, the suit deserves to be dismissed.

6. The trial Court on the basis of pleadings of the parties, framed as many as seven issues; recorded the evidence of the parties and finally decreed the suit vide impugned judgment and decree dated 14.02.2018 directing the defendant/ appellant to get the disputed land demarcated within the period of two months from the date of passing the judgment and decree and further directed that within 15 days from getting the report of demarcation, the plaintiff would pay the remaining amount of sale consideration i.e. Rs.15,00,000/- to the defendant/

appellant and then the sale-deed will be executed in favour of the plaintiff/ respondent No.1.

7. Learned counsel for the appellant at the time of arguments has contended that the trial Court erred while decreeing the suit of the plaintiff holding that he was ready and willing to perform his part of the contract. It is contended by learned counsel for the appellant that the Court-below ignored the admission made by respondent No.1 that he did not have the money to complete the transaction. It is also contended by him that the Court-below has failed to consider that the time was the essence of the contract and if the remaining consideration i.e Rs.15,00,000/- was not paid by the plaintiff to the defendant within the aforesaid period, the decree of specific performance of contract could not be granted and as such, the Court-below had not exercised its discretion properly while decreeing the suit of specific performance in favour of the plaintiff. It is also contended by him that the condition contained in the agreement to sale (Ex.P/1) casting obligation upon the defendant /appellant to get the land demarcated before execution of the sale-deed was not the mandatory condition and the same cannot be read with first part of the agreement which binds the plaintiff/respondent No.1 to perform his part of the contract and to pay Rs.15,00,000/- within the period of three months from the date of agreement and as such, he assailed the impugned judgment and decree passed by the Court-below and prays that the same be quashed. To reinforce his stand, learned counsel for the appellant has placed reliance upon the judgments reported in (1995) 5 SCC 115 parties being *N.P. Thirugnanam (Dead) by Lrs. Vs. Dr. R. Jagan Mohan Rao & others*; (1999) 7 SCC 303 parties being *Ram Kumar Agarwal & another Vs. Thawar Das (Dead) Through Lrs.;* (1999) 6 SCC 337 parties being *Syed Dastagir Vs. T.R. Gopalakrishna Setty;* (2018) 9 SCC 805 parties being *Jagjit Singh (Dead) Through Legal Representatives Vs. Amarjit Singh;* (2018) 3 SCC 658 parties being *Kalawati (Dead) Through Legal Representatives & others Vs. Rakesh Kumar & others*; (2019) 8 SCC 575 parties being *Surinder Kaur (Dead) Through Legal Representatives Jasinderjit Singh (Dead) Through Legal Representatives Vs. Bahadur Singh (Dead) Through Legal Representative*s; (2019) 9 SCC 132 parties being *Ritu Saxena Vs. J.S. Grover & another*; AIR 2011 CHHATTISGARH 66 parties being *Shankarlal Bijreja Vs. Ashok B. Ahuja* and AIR 2014 GUJARAT 12 parties being *Mangabhai Jadavbhai Makwana Vs. Tekchand Chhangalal & others.*

8. Despite service of notice on respondent No.1, nobody appeared on his behalf, therefore, on the basis of contention made by learned counsel for the appellant as well as on the basis of available record, this appeal is being decided.

9. As per submission made by learned counsel for the appellant, he is mainly attacking the impugned judgment and decree pointing out perversity in the

finding given by the trial Court in regard to issue No.3 which relates to performance of the contract on the part of respondent No.1/plaintiff whether he had shown his readiness and willingness to perform his part of the contract?

10. The trial Court after appreciating the evidence adduced by the parties and considering the recital of Ex.P/1, has observed that the time was not the essence of the contract but the condition casting obligation upon the defendant/appellant to get the land demarcated was the mandatory one which entails the performance on the part of the plaintiff/respondent No.1 to pay the amount of Rs.15,00,000/-. The trial Court further observed that the defendant since did not get the land demarcated, no adverse inference can be drawn against the plaintiff for not performing his part of the contract showing his readiness and willingness to pay the amount of Rs.15,00,000/- within the period of three months from the date of the agreement and further the trial Court answered the said issue in paragraph-16 of the judgment saying that in pursuance to the statement made by the elder brother of the plaintiff (PW/3) that in the family of the plaintiff, there was a joint business of transportation and they were operating 20 to 25 trucks jointly and had also paid Rs.10,00,000/- in advance then it would not be difficult for the appellant to pay the remaining amount of Rs.15,00,000/- and observed that it was not acceptable that the plaintiff/respondent No.1 had no arrangement to pay Rs.15,00,000/-.

11. As per the arguments advanced by learned counsel for the appellant that on a bare perusal of document Ex.P/ 1, it is clear that the same is in two parts. In first part, there is a mandatory condition under which the plaintiff was to pay Rs.15,00,000/-, the remaining amount of total sale consideration to the defendant/appellant, within the period of three months from the date of sale agreement and according to the plaintiff, this condition very clearly indicates that the time was the essence of the contract. As per learned counsel for the appellant, the second condition for getting the land demarcated by the defendant/appellant was not the mandatory one and that cannot be read together with condition No.1. Although, the same should be read separately as the same was an isolated condition. As per counsel for the appellant, admittedly, even at the time of execution of the sale-deed in pursuance to the *ex parte* decree passed, the plaintiff has deposited only Rs.13,00,000/- in the CCD but not the total remaining amount of Rs.15,00,000/- which also indicates that the plaintiff did not perform his part of the contract and, therefore, the finding of the trial Court showing the readiness and willingness of the plaintiff was erroneous and perverse.

12. I have heard the arguments advanced by learned counsel for the appellant and also perused the record.

13. Looking to foundation of the finding given by the Court-below in paragraph-16 of the judgment wherein the Court-below assigned the reasons and

opined that the plaintiff/respondent No.1 was ready and willing to perform his part of the contract as he had arrangement to pay Rs.15,00,000/-, in my opinion is vulnerable and is not sustainable for the reason that the same was based upon the presumption and assumption as no cogent and strong evidence was adduced by the plaintiff to substantiate that he had arrangement to pay the amount of Rs.15,00,000/- to the defendant within the period of three months from the date of agreement. I also find substance in the contention made by learned counsel for the appellant that the condition for getting the land demarcated is not a mandatory one because at the time of execution of *ex parte* decree, the Court-below got the sale-deed executed in favour of respondent No.1/plaintiff but even at that time, the defendant did not perform his part of the contract and got the land demarcated otherwise, the plaintiff should have asked the Court that firstly the defendant should have performed his part and thereafter would execute the sale-deed and then only he would pay the amount.

14. As per the requirement of Section 16(c) of the Specific Relief Act, 1963 which reads as under:-

> 16(c) who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant.
>
> *Explanation*.-For the purposes of clause (c),-
>
> (i) where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in court any money except when so directed by the court;
>
> (ii) the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction.

the plaintiff is under an obligation to plead and prove his readiness and willingness to perform his part of the contract. I find force in the submission made by learned counsel for the appellant as the Supreme Court in the case of *Kalawati* (supra) in paragraph-18 relying upon a judgment reported in (1996) 4 SCC 526 parties being *Acharya Swami Ganesh Dasji Vs. Sita Ram Thapar*, has observed as under :-

> "18. In Acharya Swami Ganesh Dassji v. Sita Ram Thapar-(1996) 4 SCC 526 this Court drew a distinction between readiness to perform the contract and willingness to perform the contract. It was observed that by readiness it may be meant the capacity of the plaintiff to perform the contract which would

include the financial position to pay the purchase price. As far as the willingness to perform the contract is concerned, the conduct of the plaintiff has to be properly scrutinised along with the attendant circumstances. On the facts available, the Court may infer whether or not the plaintiff was always ready and willing to perform his part of the contract. It was held in para 2 of the Report: (SCC p. 528)

> "2. There is a distinction between readiness to perform the contract and willingness to perform the contract. By readiness may be meant the capacity of the plaintiff to perform the contract which includes his financial position to pay the purchase price. For determining his willingness to perform his part of the contract, the conduct has to be properly scrutinised. ... The factum of readiness and willingness to perform the plaintiffs part of the contract is to be adjudged with reference to the conduct of the party and the attending circumstances. The court may infer from the facts and circumstances whether the plaintiff was ready and was always ready and willing to perform his part of the contract. The facts of this case would amply demonstrate that the petitioner/plaintiff was not ready nor had the capacity to perform his part of the contract as he had no financial capacity to pay the consideration in cash as contracted and intended to bide for the time which disentitles him as time is of the essence of the contract.""

further, the Supreme Court in the case of *Ritu Saxena* (supra) while dealing with the material produced by the plaintiff to show his readiness and willingness has observed that the statement of the plaintiff and his witnesses in the nature of *ipse dixit* and without support of any corroborating evidence is not enough to show the financial condition to perform his part of the contract. The Supreme Court in the case of *Ritu Saxena* (supra) has observed as under:-

> "15. Coming to the facts of the present case, the sole document relied upon by the appellant to prove her readiness and willingness is the approval of loan on 30-7-2004 by ICICI. Such approval was subject to two conditions viz. furnishing of income tax documents of the appellant and the property documents. M/s ICICI has sent an email on 12-5-2005 to the husband of the appellant requiring an agreement to sell on a stamp paper of Rs 50 to be executed between the parties, as per the legal opinion sought from the empanelled lawyer, without which ICICI will not be able to disburse the loan. Admittedly, no agreement was executed on stamp paper, therefore, the appellant could not avail loan of Rs 50 lakhs from ICICI. Independent of such loan, there is mere statement that the appellant and her husband have income of Rs 80 lakhs per annum

> unsupported by any documentary evidence. Such statement will be in the nature of *ipse dixit* of the appellant and/or her husband and is without any corroborating evidence. Such self-serving statements without any proof of financial resources cannot be relied upon to return a finding that the appellant was ready and willing to perform her part of the contract. The appellant has not produced any income tax record or the bank statement in support of her plea of financial capacity so as to be ready and willing to perform the contract. Therefore, mere fact that the bank has assessed the financial capacity of the appellant while granting loan earlier in respect of another property is not sufficient to discharge of proof of financial capacity in the facts of the present case to hold that the appellant was ready and willing to perform her part of the contract. Such is the finding recorded by both the courts below as well."

15. In the present case, the plaintiff did not produce any evidence except the oral evidence to substantiate his readiness, willingness and his financial capacity to pay the remaining sale consideration of Rs.15,00,000/-. He did not produce any income tax return, bank statement and financial business condition of his family on the basis of which, the trial Court has presumed in paragraph-16 of the judgment that it was not difficult for the plaintiff to pay Rs.15,00,000/-. In absence of any cogent evidence and also taking note of the fact that in the judgment of the trial Court, there was no answer about the contention of the appellant/defendant by the Court that at the time of execution of the sale-deed, the plaintiff has deposited only Rs.13,00,000/- but not total remaining sale consideration of Rs.15,00,000/-. Thus, in absence of any denial of the said fact, this Court has not hesitation to hold that the plaintiff has not paid the remaining sale consideration of Rs.15,00,000/- but paid only Rs.13,00,000/-. Accordingly, I am of the opinion that the trial Court was not right in holding and deciding the issue No.3 in favour of the plaintiff in respect of his readiness and willingness. The Supreme Court in the case of *Surinder Kaur* (supra) has observed as under:-

> "6. The aforesaid provisions have to be read along with Section 16(c) of the Specific Relief Act, 1963 which clearly lays down that the specific performance of a contract cannot be enforced in favour of a person who fails to prove that he has performed or was always ready and willing to perform the essential terms of the contract which were to be performed by him.
>
> 7. We shall also have to take into consideration that the specific performance of contract of an immovable property is a discretionary relief in terms of Section 20 of the Specific Relief Act as it stood at the time of filing of the suit.
>
> 8. Section 20 of the Specific Relief Act lays down that the jurisdiction to decree a suit for specific performance is a discretionary jurisdiction and the court is not bound to grant such relief merely because it is lawful.

9. The first issue is whether the promises were reciprocal promises or promises independent of each other. There can be no hard-and-fast rule and the issue whether promises are reciprocal or not has to be determined in the peculiar facts of each case. As far as the present case is concerned, the vendor, who was a lady received less than 20% of the sale consideration but handed over the possession to the defendant, probably with the hope that the dispute would be decided soon, or at least within a year. Therefore, Clause 3 provided that if the case is not decided within one year, then the second party shall pay to the first party the customary rent for the land. It has been urged by the respondents that the High Court rightly held that this was not a reciprocal promise and had nothing to do with the sale of the land. One cannot lose sight of the fact that the land had been handed over to Bahadur Singh and he had agreed that he would pay rent at the customary rate. Therefore, the possession of the land was given to him only on this clear-cut understanding. This was, therefore, a reciprocal promise and was an essential part of the agreement to sell.

10. Admittedly, Bahadur Singh did not even pay a penny as rent till the date of filing of the suit. After such objection was raised in the written statement, in replication filed by him, he instead of offering to pay the rent, denied his liability to pay the same. Even if we were to hold that this promise was not a reciprocal promise, as far as the agreement to sell is concerned, it would definitely mean that Bahadur Singh had failed to perform his part of the contract. There can be no manner of doubt that the payment of rent was an essential term of the contract. Explanation (ii) to Section 16(c) clearly lays down that the plaintiff must prove performance or readiness or willingness to perform the contract according to its true construction. The only construction which can be given to the contract in hand is that Bahadur Singh was required to pay customary rent.

11. It has been urged that no date was fixed for payment of rent. Tenancy can be monthly or yearly. At least after expiry of one year, Bahadur Singh should have offered to pay the customary rent to the vendor which could have been monthly or yearly. But he could definitely not claim that he is not liable to pay rent for 13 long years.

12. The learned counsel for the respondents urged that in case of non-payment of rent the plaintiff was at liberty to file suit for recovery of rent. We are not impressed with this argument. A party cannot claim that though he may not perform his part of the contract he is entitled to specific performance of the same.

> 13. Explanation (ii) to Section 16(c) of the Specific Relief Act lays down that it is incumbent on the party, who wants to enforce the specific performance of a contract, to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract. This the plaintiff miserably failed to do insofar as payment of rent is concerned.
>
> 14. A perusal of Section 20 of the Specific Relief Act clearly indicates that the relief of specific performance is discretionary. Merely because the plaintiff is legally right, the court is not bound to grant him the relief. True it is, that the court while exercising its discretionary power is bound to exercise the same on established judicial principles and in a reasonable manner. Obviously, the discretion cannot be exercised in an arbitrary or whimsical manner. Sub-clause (c) of sub-section (2) of Section 20 provides that even if the contract is otherwise not voidable but the circumstances make it inequitable to enforce specific performance, the court can refuse to grant such discretionary relief. Explanation (2) to the section provides that the hardship has to be considered at the time of the contract, unless the hardship is brought in by the action of the plaintiff."

16. In view of the above, it is clear that a person who seeks a decree of specific performance of contract then the same cannot be enforced in his favour unless he proves that he was always ready to perform the essential terms of the contract which was to be performed by him. Here, in this case, the plaintiff did not give any notice to the defendant showing that he had an arrangement to pay Rs.15,00,000/-, the remaining sale consideration. Even in notice i.e Ex.P/4 dated 24.10.2011, he has asked the defendant to perform his part to get the land demarcated and then execute the sale-deed but in the said notice even there was no reference of readiness of the plaintiff that he had an arrangement of Rs.15,00,000/-. Further, despite the notice served upon respondent No.1, he did not turn up to contest the case, therefore, in absence of any specific observation in the impugned judgment and decree passed by the trial Court as to whether, the plaintiff had deposited Rs.15,00,000/- at the time of execution of the sale-deed, the submission made by learned counsel for the appellant has to be accepted because the said fact was referred by the trial Court in paragraph-8 of its judgment but remained unanswered, therefore, it is infact undisputed that the plaintiff has not paid Rs.15,00,000/-but has deposited only Rs.13,00,000/- at the time of execution of the sale-deed in the CCD. The Supreme Court in the case of *Syed Dastagir* (supra) has observed as under:-

> "11. Section 16(c) of the Specific Relief Act, 1963 is quoted hereunder:

"16. Personal bars to relief.—Specific performance of a contract cannot be enforced in favour of a person—

(a)-(b) * * *

(c) who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant.

Explanation.-For the purposes of clause (c),-

(*i*) where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in court any money except when so directed by the court;

(*ii*) the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction."

It is significant that this explanation carves out a contract which involves payment of money as a separate class from Section 16(c). Explanation (*i*) uses the words "it is not essential for the plaintiff to actually tender to the defendant or to deposit in court any money except when so directed by the court". (emphasis supplied) This speaks in a negative term what is not essential for the plaintiff to do. This is more in support of the plaintiff that he need not tender to the defendant or deposit in court any money but the plaintiff must [as per Explanation (*ii*)] at least aver his performance or readiness and willingness to perform his part of the contract. This does not mean that unless the court directs the plaintiff cannot tender the amount to the defendant or deposit in the Court. The plaintiff can always tender the amount to the defendant or deposit it in court, towards performance of his obligation under the contract. Such tender rather exhibits the willingness of the plaintiff to perform his part of the obligation. What is "not essential" only means need not do but does not mean he cannot do so. Hence, when the plaintiff has tendered the balance amount of Rs 120 in court even without the Court's order it cannot be construed adversely against the plaintiff under Explanation (*i*). Hence, we do not find any merit in the submission of the learned counsel for the respondents."

[Emphasis Supplied]

Now it is clear that the plaintiff had to discharge his obligation to deposit the remaining amount of sale consideration even though he has not been directed by the Court to deposit the said amount. The Supreme Court in the case of *Jagjit Singh* (supra) has observed as under:-

> "4. It is settled law that a plaintiff who seeks specific performance of contract is required to plead and prove that he was always ready and willing to perform his part of the contract. Section 16(c) of the Specific Relief Act mandates that the plaintiff should plead and prove his readiness and willingness as a condition precedent for obtaining relief of grant of specific performance. As far back as in 1967, this Court in Gomathinayagam Pillai v. Palaniswami Nadar [Gomathinayagam Pillai v. Palaniswami Nadar, (1967) 1 SCR 227 : AIR 1967 SC 868] held that in a suit for specific performance the plaintiff must plead and prove that he was ready and willing to perform his part of the contract right from the date of the contract up to the date of the filing of the suit. This law continues to hold the field and it has been reiterated in J.P. Builders v. A. Ramadas Rao [J.P. Builders v. A. Ramadas Rao, (2011) 1 SCC 429 : (2011) 1 SCC (Civ) 227] and P. Meenakshisundaram v. P. Vijayakumar [P. Meenakshisundaram v. P. Vijayakumar, (2018) 15 SCC 80 : (2018) 5 Scale 229]. It is the duty of the plaintiff to plead and then lead evidence to show that the plaintiff from the date he entered into an agreement till the stage of filing of the suit always had the capacity and willingness to perform the contract."

17. In the case of *Shankarlal Bijreja* (supra), the High Court of Chhattisgarh while dealing with the similar issue has also observed that since there was no forfeiture clause in the agreement and it is found that the plaintiff failed to prove his readiness and willingness and it is settled law that in proper cases where specific performance is refused, the Court may direct refund of amount which has been paid by the plaintiff even though it is not claimed in the plaint.

18. Thus, I am also of the opinion that at the most the plaintiff is entitled to get the refund the amount of Rs.10,00,000/- which the plaintiff had paid to the defendant as advance and Rs.13,00,000/- which the plaintiff had deposited in the CCD. The decree passed by the Court below for specific performance of the contract is not found proper because the plaintiff failed to show performance on his part of the contract and failed to prove any readiness and willingness on his part, therefore, the judgment and decree dated 14.02.2018 passed by the Court-below is hereby set-aside. The appellant is directed to refund the amount of Rs.10,00,000/- to respondent No.1 and if the possession over the disputed land is with respondent No.1 then the same be given to the appellant. The amount so

deposited by the plaintiff in the CCD during the course of execution of the sale-deed in pursuance to the ex parte decree and if it has not been withdrawn by respondent No.1 then the said amount be also refunded to him.

19. In the result, the appeal filed by the appellant/defendant is **allowed** and the suit filed by respondent No. 1 /plaintiff is accordingly dismissed.

Appeal allowed

I.L.R. [2020] M.P. 1186
CRIMINAL REVISION
Before Mr. Justice Vivek Rusia

Cr.R. No. 1101/2020 (Indore) decided on 12 March, 2020

DILIP KUMAR …Applicant

Vs.

STATE OF M.P. …Non-applicant

A. Criminal Procedure Code, 1973 (2 of 1974), Section 197 – Sanction for Prosecution **– Held – Apex Court concluded that previous sanction is required for prosecuting only such public servants who could be removed by sanction of Government – Petitioner, an employee of Housing Board – No material to show that regarding such employees, for removal from service, any prior sanction from Government is required – Petitioner not entitled for protection u/S 197 Cr.P.C. – Revision dismissed.**

(Para 15 & 16)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 197 – अभियोजन हेतु मंजूरी – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया है कि केवल उन लोक सेवकों को अभियोजित करने के लिए पूर्व मंजूरी आवश्यक है जिन्हें की सरकार की मंजूरी द्वारा हटाया जा सकता है – याची, हाउसिंग बोर्ड का एक कर्मचारी है – यह दर्शाने हेतु कोई सामग्री नहीं है कि उक्त कर्मचारीगण के संबंध में, सेवा से हटाने के लिए, सरकार से कोई पूर्व मंजूरी लेना आवश्यक है – याची दं.प्र.सं. की धारा 197 के अंतर्गत संरक्षण हेतु हकदार नहीं है – पुनरीक्षण खारिज।

B. Penal Code (45 of 1860), Sections 419, 420, 467, 468, 471, 120-B r/w 34 – Quashment – Grounds **– Sale of plot by forged documents and further mutation – Held – Petitioner with other co-accused jointly committed act of forgery – Petitioner has done the work of mutation as per his duty which is a part of entire chain of commission of offence – Without approval of petitioner, offence could not have been completed – *Prima facie* criminal conspiracy established against petitioner – Revision dismissed.**

(Para 11 & 14)

ख. दण्ड संहिता (1860 का 45), धाराएँ 419, 420, 467, 468, 471, 120–B सहपठित 34 – अभिखण्डन – आधार – कूटरचित दस्तावेजों द्वारा भूखंड का विक्रय एवं आगे नामांतरण किया जाना – अभिनिर्धारित – याची ने अन्य सह–अभियुक्तों के साथ मिलकर कूटरचना का अपराध कारित किया – याची ने अपने कर्तव्य के अनुसार नामांतरण का कार्य किया जो कि अपराध कारित होने की संपूर्ण कड़ी का एक भाग था – याची के अनुमोदन के बिना, अपराध पूर्ण नहीं हो सकता – याची के विरूद्ध प्रथम दृष्ट्या आपराधिक षड्यंत्र स्थापित होता है – पुनरीक्षण खारिज।

Cases referred:

(2006) 1 SCC 557, 2016 CRI.L.J. 371, 2020 (1) JLJ 542 (SC), (2013) 15 SCC 552.

A.V. Khare, for the applicant.
V.J. Hardie, for the non-applicant/State.

O R D E R

VIVEK RUSIA, J.:-Heard on the question of admission.

The petitioner has filed the present revision petition under Section 397 read with Sec.401 of Cr.P.C. against the order dated 07.02.2020 passed by the VI Additional Sessions Judge-Ratlam, whereby application filed by him under Section 197 of Cr.P.C has been rejected.

2. Facts of the case, in short, are as under.

3. As per the prosecution story, complainant Premlata Kothari wife of Vijay Kothai made a written complaint to the S.P. Ratlam against Lalit, Ashok and Ramesh Sharma alleging that they illegally sold the plot No.D-196 of M.P. Housing Board Colony to her in Rs.6,61,000/- and also with the help of officials of Madhya Pradesh Housing & Infrastructure Development Board (hereinafter referred to as 'Housing Board')got mutated her name. Later on she came to know that one Lalit Kumar is the owner of the said plot, who never executed the sale deed in her favour and in his place one Jitender Sharma impersonated as Lalit Kumar hence a forgery and cheating has been committed with her. The S.P. has handed over the complaint to Police Station for enquiry and investigation. The Investigating Officer has collected the documents from the 'Housing Board' and also recorded the statement of real owner Lalit Kumar. Lalit Kumar in his statement has disclosed that in the year 1989, a plot No.D-196 was allotted to him by Housing Board, and he never sold the said plot to Premlata Kothari. The Investigating Officer took his specimen signature and collected relevant documents. Ashok Kumar and Ramesh Chand were arrested on 29.01.2016 and their memorandum statements were recorded.

4. After investigation, it revealed that Jitendra Sharma impersonated Lalit Kumar and got prepared forged documents in respect of allotment and ownership of the said plot by editing photograph of Lalit Kumar in the official documents and for doing this, certain employees of Housing Board viz Manohar Sharma, (Cartographer) Clerk, Suhas Chittal (Assistant Manager), Pawan Dabhade (Treasury Manager), Vishnuedutt Nagar (Assistant Treasury Manager) and the present petitioner Dilip Kumar Batham, (Treasury Officer/State Officer) helped them. The amount of Rs.6,61,000/- was distributed between them. The Police recovered Rs.22,000/-from Manohar Sharma, Rs.500/- from Suhas Chittal, Rs.25,000/- from Pawan Dabhade, Rs.20,000/- from the present petitioner, Rs.47,000/-from Ramesh Sharma and Rs.15,000/- from Ashok.

5. After completing the investigation, the prosecution has filed the challan on 27.04.2016 against petitioner and all others under Sections 419, 420, 467, 468, 471, 120-B r/w 34 of IPC. The summons were issued to the present petitioner and other accused persons and they appeared before the Session Court and now, the trail (sic : trial) is fixed for argument before the charge.

6. At this stage, the present petitioner made an unsuccessful attempt for quashing of the entire criminal proceedings on the ground that before his prosecution sanctioned has not been taken from the Housing Board as required under Section 197(1) (D) of IPC.

7. Vide order dated 07.02.2020, the trial Judge has been dismissed the application and fixed the case for argument on charge. Hence, the present revision petition before this Court.

8. Shri Khare, learned counsel for the petitioner argued that the petitioner while working as State Officer had duly mutated the name of Premlata Kothai on the basis of registered sale deed produced by her. Even, if the aforesaid sale deed was executed on forged documents even by an imposter, the petitioner while acting as state officer has mutated the name, therefore it was an official act performed in discharging of official duties, therefore, it was essential for the prosecution to obtain a prior sanctioned before prosecuting the present application (sic : applicant). The learned Session Judge did not decide the application correctly, hence, the impugned order is liable to be set aside, and consequently entire criminal proceedings are liable to be dropped. In support of his contention, learned counsel has placed reliance over the judgment passed by the Supreme Court in the case of *Rakesh Kumar Mishra vs. State of Bihar and others* (2006) 1 SCC 557 and *Prof. N.K. Ganguly vs. C.B.I., New Delhi* 2016 CRI.L.J, 371.

9. Learned counsel for the petitioner elaborated above ground by submitting that in the case of *Prof. N.K. Ganguly* (supra), the apex Court has held that the

petitioner (therein) did agree to commit an illegal act which is punishable an under Section 120-B IPC, therefore, the provision of Section 197 Cr.P.C. is squarely applicable to the facts of the case prior and sanction of the Central Government was required to be taken by the respondent before the learned Special Judge took cognizance of the offence. The apex court has finally held that to obtain the previous sanction from the appropriate Government u/S. 197 Cr.P.C., it is imperative that the alleged offence is committed in the discharge of official duties by accused. In the present case, the petitioner while acting as State Officer believing upon the sale did mutate the name of complainant Premlata Kothari. Therefore, the prior sanctioned under Section 197 Cr.P.C. is mandatory before prosecuting him. Learned Session Judge has not correctly decided the application, hence the prosecution against the petitioner be dropped.

10. I have heard the learned counsel and peruse the record. The facts of the present case are different from the case of *Prof. N.K. Ganguly* (supra) .In the case, before the Supreme Court, petitioner and other unknown persons had entered into a criminal conspiracy by abusing their official position as a public servant and had unauthorisedly and illegally transferred the aforesaid plot from ICPO to ICPO-ICMR Housing society at a consideration of Rs.4,33,90,337/- which was much lower than the then prevailing sector rate of Rs.18,000/- per sq. mtrs. of Noida. It was also revealed in the enquiry that membership of ICPO-ICMR Housing Society was granted to such persons who were otherwise not eligible for getting the membership, hence the Criminal case was registered under Section 120-B of IPC read with Section 13(1)(d) and 13 (2) of the Prevention of Corruption Act, 1988. In these premises, the Apex court has held that it is also important for the trial court to examine the allegations contained in the Final Report against the petitioner to decides whether the previous sanction is required to be obtained by the respondent from the appropriate Government before taking cognizance of the alleged offence against the accused because the allegation in the final report against the petitioner is that the alleged offence was committed by him in the discharge of his official duties.

11. In the present case, there is no charge under the provision of the Prevention of Corruption Act, 1988.against the petitioner. The challan has been filed for alleged commission of offence u/s. 419, 420, 467, 468, 471, 120-B r/w 34 of IPC. By way of criminal conspiracy, Ajit Chattar edited the photograph of Lalit Kumar and got verified from the other accused persons and executed the sale deed and thereafter got mutated the name of the complainant Premlata Kothari. As per the allegations in the complaint the conspiracy was alleged between all the accused persons. The allegation against the petitioner is that being one of the conspirer without verifying the forged documents, he mutated the name of the complainant in the record by missing (sic :misusing) his official position. Earlier occasion the State Officers, Pawan Dhavade, B.D. Nagar, and the present

petitioner twice returned note sheet as the photo of Lalit Kumar which was not matching with the original photograph, but on the third time ignoring all these objections approved the mutation which prima- facie established the criminal conspiracy with the private persons. When the complainant came to know about the forgery against her then she made a complaint to the present petitioners and other officers but no action was taken in this matter. This prima facie establishes criminal conspiracy with the other private persons, apart from his official duty.

12. In the case of *State of M.P. vs. Yogendra Singh Jadon, reported* in 2020(1)JLJ 542(SC) the Apex Court has considered the scope of u/S.420 and 120-B IPC r/w Sec.13 (1)(D) 13(2) of the Prevention of Corruption Act, 1988 and set aside the order passed by this Court quashing the criminal prosecution. The apex court has held that the charge u/S.420 of IPC is not an isolated offence but, has to be read along with the offence under the act to which accused may liable with the aid of u/S.120-B of the IPC. The manner in which the loan was advanced without any proper documents and the fact that the accused are the beneficiaries, therefore, prima facie discloses an offence u/S.420 & 120-B of IPC. In the present case also apart from other there are charges under section 420 and 120-B against the petitioner and allegation of conspiracy is liable to be examined independently which could not have been done while discharging in the official capacity. Therefore, the facts of the present case are different from the case of *Prof. N.K. Ganguly* (supra).

13. In the case of *Rakesh Kumar Mishra* (supra) the Apex Court has held that once any act or omission has been found to have been committed by the public servant in discharge his duty then it must be given a liberal construction so far its official nature is concerned. For example, a public servant is not entitled to indulge in criminal activities. To that extend section has to be construed narrowly and in a strict manner. If some officer commits an act in course of service but, not in discharge of its duties, then the bar under section 197 of Cr.P.C. would not attract.

14. In the present case, the official duty of the present petitioner was to verify the documents and pass the order of mutation but, by way of criminal conspiracy with the other accused he said to have been cheated not only the complainant but also Lalit Kumar by transferring his property on the basis of forged documents. Not only the petitioner but other employees of Housing Board connected with this work have acted in connivance with the private party and allegedly committed forgery. Therefore, as per the allegations, the petitioner along with the other co-accused has jointly committed the act of forgery, and the petitioner has done the work as per his duty which is the one part of the entire chain of commission of the offence. The entire series of offenses (sic : offences) has been concluded by putting a final approval by the present petitioner and without his approval the

offense (sic : offence) would not have been committed or completed. Therefore, he has acted not in his official capacity but, acted in criminal conspiracy with other persons to cheat the complainant Premlata Kothari.

15. That the petitioner is an employee of the Housing Board which is a body established and controlled by the state therefore he is a public servant. Even if it is assumed that he said to have committed the offense (sic : offence) while discharging his official duty but the issue is whether before his removal from service any sanction of government is required. The petitioner has not produced any material to show that in case of the petitioner or other employees of Housing Board prior sanction is required before removal from service. A similar issue came before the Supreme Court of India in the case of *Fakhruzamma v. State of Jharkhand*, reported in (2013) 15 SCC 552 in which it has been held that language of sec. 197 of Cr.P.C. indicates that previous sanction is required for prosecuting only such public servants who could be removed by the sanction of the Government.

> *6. The scope of Section 197 CrPC has to be examined in the light of the Jharkhand Police Manual. Section 197 CrPC is extracted herein below for an easy reference:*
>
> *"197. Prosecution of Judges and public servants.—(1) When any person who is or was a Judge or Magistrate or a public servant not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no court shall take cognizance of such offence except with the previous sanction—*
>
> *(a) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of the Union, of the Central Government;*
>
> *(b) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of a State, of the State Government:*
>
> *Provided that where the alleged offence was committed by a person referred to in clause (b) during the period while a Proclamation issued under clause (1) of Article 356 of the Constitution was in force in a State, clause (b) will apply as if for the expression 'State Government' occurring therein, the expression 'Central Government'were substituted.*
>
> *(2) No court shall take cognizance of any offence alleged to have been committed by any member of the Armed Forces of the*

Union while acting or purporting to act in the discharge of his official duty, except with the previous sanction of the Central Government.

(3) The State Government may, by notification, direct that the provisions of sub-section (2) shall apply to such class or category of the members of the Forces charged with the maintenance of public order as may be specified therein, wherever they may be serving, and thereupon the provisions of that sub-section will apply as if for the expression 'Central Government' occurring therein, the expression 'State Government' were substituted.

(3-A) Notwithstanding anything contained in sub-section (3), no court shall take cognizance of any offence, alleged to have been committed by any member of the Forces charged with the maintenance of public order in a State while acting or purporting to act in the discharge of his official duty during the period while a Proclamation issued under clause (1) of Article 356 of the Constitution was in force therein, except with the previous sanction of the Central Government.

(3-B) Notwithstanding anything to the contrary contained in this Code or any other law, it is hereby declared that any sanction accorded by the State Government or any cognizance taken by a court upon such sanction, during the period commencing on the 20th day of August, 1991 and ending with the date immediately preceding the date on which the Code of Criminal Procedure (Amendment) Act, 1991, receives the assent of the President, with respect to an offence alleged to have been committed during the period while a Proclamation issued under clause (1) of Article 356 of the Constitution was in force in the State, shall be invalid and it shall be competent for the Central Government in such matter to accord sanction and for the court to take cognizance thereon.

(4) The Central Government or the State Government, as the case may be, may determine the person by whom, the manner in which, and the offence or offences for which, the prosecution of such Judge, Magistrate or public servant is to be conducted, and may specify the court before which the trial is to be held."

The abovementioned provision clearly indicates that previous sanction is required for prosecuting only such public servants who could be removed by sanction of the Government.

7. Rule 824 of the Jharkhand Police Manual prescribes different departmental punishments, including the punishment of dismissal and removal,

to be inflicted upon the police officers up to the rank of Inspector of Police. The relevant rule for our purpose is Rule 825, which is given below:

> "825. Officers empowered to impose punishment.—(a) No police officer shall be dismissed or compulsorily retired by an authority subordinate to that which appointed him.
>
> (b) The Inspector General may award to any police officer below the rank of Deputy Superintendent any one or more of the punishments in Rule 825.
>
> (c) * * *
>
> (d) A Superintendent may impose on any police officer subordinate to him and of and below the rank of Sub-Inspector any or more of the punishments in Rule 824 except dismissal; removal and compulsory retirement in the case of Sub-Inspector or Assistant Sub-Inspector. It shall be kept in mind that if any enquiry has been initiated by the District Magistrate, a report of the result shall be sent to him for information. If required, the file of departmental proceeding shall also be sent with it.
>
> (e) - (f) * * * "

Rule 825 clauses (a) and (b) confers power on the Inspector General of Police or the Deputy Inspector General of Police to pass orders for removal of police officers up to the rank of Inspector. Before passing the order of removal, the Inspector General of Police or the Deputy Inspector General of Police need not obtain prior approval of the State Government.

8. A similar issue came up for consideration before this Court in *Nagraj Vs State of Mysore* (AIR1964SC269), wherein this Court was called upon to examine the scope of Section 197 CrPC read with Sections 4(c), 8, 26(1) and 3 of the Mysore Police Act, 1908. Interpreting the abovementioned provisions, a three-Judge Bench of this Court held that an Inspector General of Police can dismiss a Sub-Inspector and, therefore, no sanction of the State Government for prosecution of the appellant was necessary even if he had committed the offences alleged while acting or purporting to act in discharge of his official duty.

9. The judgment referred to by the appellant, such as, *Rakesh Kumar Mishra Vs State of Bihar* (2006)1SCC557 is not applicable to the case in hand. The question raised, in our view, is directly covered by the judgment of this Court in *Nagraj* case(supra) and the High Court was right in applying the ratio laid down in that case while interpreting the provisions of the Jharkhand Police Manual and we fully endorse the view of the High Court.

16. Therefore being an employee of Housing Board petitioner is not entitled to the protection of the provisions of Sec. 197 of Cr.P.C. Therefore, the Court

below has not committed any error in rejecting the application filed u/S.197 of Cr.P.C. Hence, I do not find any ground to interfere in the present revision.

Accordingly, the present revision petition is dismissed.

Revision dismissed

I.L.R. [2020] M.P. 1194
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice G.S. Ahluwalia

M.Cr.C. No. 34370/2018 (Gwalior) decided on 3 September, 2019

USHA MISHRA (DR.) ...Applicant

Vs.

STATE OF M.P. …Non-applicant

A. Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, (57 of 1994), Section 23 & 28(1)(b) – Complaint – "Appropriate Authority" – **Held – As per Section 28, complaint can be filed not only by Appropriate Authority but also by a person, who fulfills requirement of Section 28(1)(b) – SDO (Revenue) is not "Appropriate Authority" to file complaint, but such mistake can only be termed as irregularity which can be rectified and not such an illegality which would result in dismissal of complaint – Appropriate authority can join the complaint at later stage – Application disposed. (Paras 7, 10, 15, 19 & 20)**

क. गर्भधारण पूर्व और प्रसव पूर्व निदान तकनीक (लिंग चयन का प्रतिषेध) अधिनियम, (1994 का 57), धारा 23 व 28(1)(बी) – परिवाद – ''समुचित प्राधिकारी'' – अभिनिर्धारित – धारा 28 के अनुसार, परिवाद केवल समुचित प्राधिकारी द्वारा नहीं बल्कि एक व्यक्ति जो कि धारा 28(1)(बी) की अपेक्षाओं की पूर्ति करता हो, द्वारा भी प्रस्तुत किया जा सकता है – उपखंड अधिकारी (राजस्व), परिवाद प्रस्तुत करने हेतु ''समुचित प्राधिकारी'' नहीं है, परंतु उक्त भूल को केवल अनियमितता माना जा सकता है जिसे सुधारा जा सकता है तथा न कि एक ऐसी अवैधता जिसके परिणामस्वरूप परिवाद की खारिजी होगी – समुचित प्राधिकारी पश्चात्वर्ती प्रक्रम पर परिवाद में जुड़ सकता है – आवेदन निराकृत।

B. Interpretation of Statute - Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, (57 of 1994) – **Held – Act of 1994 is a special enactment for the benefit of mankind, thus the interpretation should be purposive. (Para 13)**

ख. कानून का निर्वचन–गर्भधारण पूर्व और प्रसव पूर्व निदान तकनीक (लिंग चयन का प्रतिषेध) अधिनियम, (1994 का 57) – अभिनिर्धारित – 1994 का अधिनियम मानव जाति के लाभ हेतु एक विशेष अधिनियमिति है, अतः निर्वचन प्रयोजनात्मक होना चाहिए।

Cases referred:

M.Cr.C. No. 4393/2013 order passed on 04.07.2013, (2016) 10 SCC 265, (2002) 1 SCC 234.

Himanshu Pandey, for the applicant.
Vijay Sundaram, P.L. for the State.

(Supplied: Paragraph numbers)

O R D E R

G.S. AHLUWALIA, J.:- This application under Section 482 of Cr.P.C. has been filed for quashing the proceedings of Criminal Case No. 710 of 2014 pending before the Court of Chief Judicial Magistrate, Bhind for offence under Section 23 of Pre-Conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 [in short "the Act, 1994"].

2. The necessary facts for the disposal of the present application in short are that a Criminal Complaint has been filed by S.D.O. (Revenue), Bhind against the applicant and other co-accused persons on the allegations that on 14-3-2014, an inspection was carried out in the Sonography Centre of the applicant, which is being run in the name and style "Purna Multi-specialty Nursing Home", Gwalior Road, Bhind, and it was found that the Centre was being run in violation of the provisions of Act, 1994 and The Pre-Conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Rules, 1996 (in short "Rules, 1996"). It was further alleged that by order dated 15-5-2014, S.D.O. (Revenue), Bhind has been appointed as OIC by District Magistrate, Bhind to file the complaint.

3. It is submitted that the Public Health and Family Welfare Department, by order dated 4-4-2007, have appointed the District Magistrates as Appropriate Authority and it was also mentioned that for the monitoring of the implementation of the provisions of Act, 1994, the Appropriate Authority may nominate any Executive Magistrate. It is submitted that in the light of the above mentioned order, the S.D.O. (Revenue) was appointed as OIC for filing the complaint before the Court of C.J.M., Bhind and accordingly, the complaint was filed. It is submitted that order dated 4-4-2007 was considered by a coordinate Bench of this Court in the case of *Dr. Manvinder Singh Gill Vs. State of Madhya Pradesh* by order dated 4-7-2013 passed in M.Cr.C. No. 4393 of 2013, it was held, that the order dated 4-4-2007 does not authorize the nominated Executive Magistrate to file the complaint.

4. *Per contra*, it is submitted by the Counsel for the State that although the question of competency of S.D.O.(Revenue) to file the complaint has already been decided but, the Appropriate Authority may be granted liberty to file a fresh complaint.

5. Heard the learned Counsel for the parties.

6. So far as the competence of S.D.O (Revenue) to file the complaint under Section 23 of Act, 1994 is no more *res Integra*. A Co-ordinate Bench of this Court in the case of *Dr. Manvinder Singh Gill* (Supra) has held as under :

> **"14.** As per the discussion made herein above and looking to the notifications and the orders filed by the State Government, it is clear that the notification dated 4-4-2007 issued by the State Government declaring the District Magistrate, Indore as appropriate authority for the purposes of District Magistrate is in consonance to the provisions contained under Section 17(3)(b) of the PC & PNDT Adhiniyam. The orders passed by the Collector, District Indore, nominating Smt. Renu Pant and Anand Sharma, Additional Collectors to help in monitoring on 12-4-2007 and 28-7-2010 are not the orders of appointment of appropriate authority or the officers authorized to maintain the compliant. As discussed herein above the appointment of appropriate authority or officer authorized shall be as per the provisions of the Adhiniyam by the Central or the State Government. The order of nomination passed by the District Magistrate cannot be termed the order of appointment of appropriate authority or the officers authorized for the purpose of Section 17(2)(3)(b) and for the purpose of Section 28(1)(a) of the PC & PNDT Adhiniyam. Thus, it is to be held that the aforesaid private complaints filed by Smt. Renu Pant and Shri Anand Sharma, Additional Collectors are not filed by the appropriate authority or the office authorized, therefore, the said complaint is not maintainable."

7. The facts of the case in hand are identical. Therefore, it is held that the complaint filed by S.D.O. (Revenue), under Section 28 of Act, 1994 cannot be said to be filed by the Appropriate Authority.

8. The next question for consideration is that what would be the consequence of filing of complaint by a person other than an Appropriate Authority.

9. Section 28 of Act, 1994 reads as under :

> **28. Cognizance of offences.**—(1) No court shall take cognizance of an offence under this Act except on a complaint made by—
>
> (*a*) the Appropriate Authority concerned, or any officer authorized in this behalf by the Central Government or the State Government, as the case may be, or the Appropriate Authority; or

> (*b*) a person who has given notice of not less than fifteen days in the manner prescribed, to the Appropriate Authority, of the alleged offence and of his intention to make a complaint to the court.
>
> *Explanation*.—For the purpose of this clause, "person" includes a social organization.
>
> (2) No court other than that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under this Act.
>
> (3) Where a complaint has been made under clause (*b*) of sub-section (1), the court may, on demand by such person, direct the Appropriate Authority to make available copies of the relevant records in its possession to such person."

10. From the plain reading of Section 28 of the Act, 1994, it is clear that the Court can take cognizance of offence only on the complaint of Appropriate Authority or a person who has given notice of not less than 15 days to the Appropriate Authority, of alleged offence and of his intention to make a complaint to the Court. Thus, it is clear that the complaint can be filed either by Appropriate Authority or by a person who has given 15 days notice to the Appropriate Authority of alleged offence with an intention to make a complaint to the Court. Therefore, it is clear that in a given case, the complaint can be filed by a person, other than Appropriate Authority also.

11. The Act, 1994 is a special statute introduced with an object to prohibit the sex selection, before or after conception, and for regulation of pre-natal diagnostic techniques for the purposes of detecting genetic abnormalities or metabolic disorders or chromosomal abnormalities or certain congenital malformations or sex-linked disorders and for the prevention of their misuse for sex determination leading to female foeticide and for matters connected therewith or incidental thereto. Therefore, stringent provisions have been made and procedure has also been specified.

12. The Supreme Court in the case of *Voluntary Health Assn. of Punjab v. Union of India*, reported in (2016) 10 SCC 265 has held as under :

> **"40.** It needs no special emphasis that a female child is entitled to enjoy equal right that a male child is allowed to have. The constitutional identity of a female child cannot be mortgaged to any kind of social or other concept that has developed or is thought of. It does not allow any room for any kind of compromise. It only permits affirmative steps that are constitutionally postulated. Be it clearly stated that when rights are conferred by the Constitution, it has to be understood that such rights are recognised regard being had to their naturalness and universalism. No one, let it be repeated, no one,

endows any right to a female child or, for that matter, to a woman. The question of any kind of condescension or patronisation does not arise.

41. When a female foetus is destroyed through artificial means which is legally impermissible, the dignity of life of a woman to be born is extinguished. It corrodes the human values. The legislature has brought a complete code and it subserves the constitutional purpose. We may briefly refer to the scheme of the Act and the Rules framed thereunder:

41.1. Section 2 of the Act is the dictionary clause and it defines "foetus", "Genetic Counselling Centre", "Genetic Clinic", "Genetic Laboratory", "prenatal diagnostic procedures", "prenatal diagnostic techniques", "prenatal diagnostic tests", "sex selection", "sonologist or imaging specialist".

41.2. Section 3 provides for Regulation of Genetic Counselling Centres, Genetic Laboratories and Genetic Clinics. Section 3-A imposes prohibition of sex selection. Section 3-B prohibits the sale of ultrasound machine, etc., to persons, laboratories, clinics, etc., not registered under the Act.

41.3. Section 4 regulates prenatal diagnostic techniques.

41.4. Section 5 stipulates written consent of pregnant woman and prohibition of communicating the sex of foetus.

41.5. Section 6 prohibits determination of sex. Chapter IV of the Act deals with the Central Supervisory Board.

41.6. Sections 7 to 16-A deal with the constitution of the Board, meetings of the Board, functions of the Board, which includes reviewing and monitoring implementation of the Act and the Rules made thereunder. Section 16-A commands the States and Union Territories to have a Board to be known as the State Supervisory Board or the Union Territory Supervisory Board, as the case may be, to carry out the functions enumerated therein. Chapter V provides for the appropriate authority and Advisory Committee.

41.7. Sub-section (4) of Section 17 deals with the powers of the appropriate authority. The said provision being significant is extracted hereunder:

"17. (4) the appropriate authority shall have the following functions, namely—

(*a*) to grant, suspend or cancel registration of a Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic;

(*b*) to enforce standards prescribed for the Genetic Counselling Centre, Genetic Laboratory and Genetic Clinic;

(*c*) to investigate complaints of breach of the provisions of this Act or the rules made thereunder and take immediate action;

(*d*) to seek and consider the advice of the Advisory Committee, constituted under sub-section (5), on application for registration and on complaints for suspension or cancellation of registration;

(*e*) to take appropriate legal action against the use of any sex selection technique by any person at any place, suo motu or brought to its notice and also to initiate independent investigations in such matter;

(*f*) to create public awareness against the practice of sex selection or prenatal determination of sex;

(*g*) to supervise the implementation of the provisions of the Act and Rules;

(*h*) to recommend to the Board and State Boards modifications required in the Rules in accordance with changes in technology or social conditions;

(*i*) to take action on the recommendations of the Advisory Committee made after investigation of complaint for suspension or cancellation of registration."

41.8. Section 17-A enumerates the powers of the appropriate authorities. The said provision reads as follows:

"17-A. ***Powers of appropriate authorities.***—The appropriate authority shall have the powers in respect of the following matters, namely—

(*a*) summoning of any person who is in possession of any information relating to violation of the provisions of this Act or the Rules made thereunder;

(*b*) production of any document or material object relating to clause (a);

(*c*) issuing search warrant for any place suspected to be indulging in sex selection techniques or prenatal sex determination; and

(*d*) any other matter which may be prescribed."

41.9. Section 18 deals with the registration of Genetic Counselling Centres, Genetic Laboratories or Genetic Clinics.

41.10. Sections 19 and 20 provide for certificate of registration and cancellation or suspension of registration. Chapter VII deals with offences and penalties.

41.11. Section 22 stipulates prohibition of advertisement relating to pre-conception and prenatal determination of sex and punishment for contravention and Section 23 deals with offences and penalties.

41.12. Section 24 which has been brought into the Act by way of an amendment with effect from 14-2-2003 states with regard to presumption in the case of conduct of prenatal diagnostic techniques.

41.13. Section 26 provides for offences by companies.

41.14. Section 28 provides that no court shall take cognizance of an offence under the Act except on a complaint made by the appropriate authority concerned, or any officer authorised in this behalf by the Central Government or State Government, as the case may be, or the appropriate authority; or a person who has given notice of not less than fifteen days in the manner prescribed.

41.15. Section 29 occurring in Chapter VIII which deals with miscellaneous matters provides for maintenance of records.

41.16. Section 30 empowers the appropriate authority in respect of search and seizure of records. The rule framed under Section 32 of the Act is not comprehensive. Various forms have been provided to meet the requirement by the Rules.

42. On a perusal of the Rules and the forms, it is clear as crystal that attention has been given to every detail.

43. Having stated about the scheme of the Act and the purpose of the various provisions and also the Rules framed under the Act, the dropping of sex ratio still remains a social affliction and a disease.

44. Keeping in view the deliberations made from time to time and regard being had to the purpose of the Act and the far-reaching impact of the problem, we think it appropriate to issue the following directions in addition to the directions issued in the earlier order:

44.1. All the States and the Union Territories in India shall maintain a centralised database of civil registration records from all registration units so that information can be made available from the website regarding the number of boys and girls being born.

44.2. The information that shall be displayed on the website shall contain the birth information for each district, municipality, corporation or gram panchayat so that a visual comparison of boys and girls born can be immediately seen.

44.3. The statutory authorities, if not constituted as envisaged under the Act shall be constituted forthwith and the competent authorities shall take steps for the reconstitution of the statutory bodies so that they can become immediately functional after expiry of the term. That apart, they shall meet regularly so that the provisions of the Act can be implemented in reality and the effectiveness of the legislation is felt and realised in the society.

44.4. The provisions contained in Sections 22 and 23 shall be strictly adhered to. Section 23(2) shall be duly complied with and it shall be reported by the authorities so that the State Medical Council takes necessary action after the intimation is given under the said provision. The appropriate authorities who have been appointed under Sections 17(1) and 17(2) shall be imparted periodical training to carry out the functions as required under various provisions of the Act.

44.5. If there has been violation of any of the provisions of the Act or the Rules, proper action has to be taken by the authorities under the Act so that the legally inapposite acts are immediately curbed.

44.6. The courts which deal with the complaints under the Act shall be fast tracked and the High Courts concerned shall issue appropriate directions in that regard.

44.7. The judicial officers who are to deal with these cases under the Act shall be periodically imparted training in the judicial academies or training institutes, as the case may be, so that they can be sensitive and develop the requisite sensitivity as projected in the objects and reasons of the Act and its various provisions and in view of the need of the society.

44.8. The Director of Prosecution or, if the said post is not there, the Legal Remembrancer or the Law Secretary shall take stock of things with regard to the lodging of prosecution so that the purpose of the Act is subserved.

44.9. The courts that deal with the complaints under the Act shall deal with the matters in promptitude and submit the quarterly report to the High Courts through the Sessions and District Judge concerned.

44.10. The learned Chief Justices of each of the High Courts in the country are requested to constitute a committee of three Judges that can periodically oversee the progress of the cases.

44.11. The awareness campaigns with regard to the provisions of the Act as well as the social awareness shall be undertaken as per Direction 9.8 in the order dated 4-3-2013 passed in *Voluntary Health Assn. of Punjab*.

44.12. The State Legal Services Authorities of the States shall give emphasis on this campaign during the spread of legal aid and involve the para-legal volunteers.

44.13. The Union of India and the States shall see to it that appropriate directions are issued to the authorities of All-India Radio and Doordarshan functioning in various States to give wide publicity pertaining to the saving of the girl child and the grave dangers the society shall face because of female foeticide.

44.14. All the appropriate authorities including the States and districts notified under the Act shall submit quarterly progress report to the Government of India through the State Government and maintain Form H for keeping the information of all registrations readily available as per sub-rule (6) of Rule 18-A of the Rules.

44.15. The States and Union Territories shall implement the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) (Six Months Training) Rules, 2014 forthwith considering that the training provided therein is imperative for realising the objects and purpose of this Act.

> **44.16.** As the Union of India and some States framed incentive schemes for the girl child, the States that have not framed such schemes, may introduce such schemes."

13. Thus, it can be safely said that the Act, 1994 is not only a special enactment, but it has been promulgated for prohibiting the sex selection and to stop female foeticide. Therefore, the Act, 1994 is for the benefit of mankind and thus, the interpretation should be purposive.

14. The Supreme Court in the case of *M.M.T.C. Ltd. Vs. Medchl Chemicals and Pharma (P) Ltd.*, reported in (2002) 1 SCC 234 has held as under :

> **"11.** This Court has, as far back as, in the case of *Vishwa Mitter v. O.P. Poddar* held that it is clear that anyone can set the criminal law in motion by filing a complaint of facts constituting an offence before a Magistrate entitled to take cognizance. It has been held that no court can decline to take cognizance on the sole ground that the complainant was not competent to file the complaint. It has been held that if any special statute prescribes offences and makes any special provision for taking cognizance of such offences under the statute, then the complainant requesting the Magistrate to take cognizance of the offence must satisfy the eligibility criterion prescribed by the statute. In the present case, the only eligibility criteria prescribed by Section 142 is that the complaint must be by the payee or the holder in due course. This criteria is satisfied as the complaint is in the name and on behalf of the appellant Company.
>
> **12.** In the case of *Associated Cement Co. Ltd. v. Keshvanand* it has been held by this Court that the complainant has to be a corporeal person who is capable of making a physical appearance in the court. It has been held that if a complaint is made in the name of an incorporeal person (like a company or corporation) it is necessary that a natural person represents such juristic person in the court. It is held that the court looks upon the natural person to be the complainant for all practical purposes. It is held that when the complainant is a body corporate it is the de jure complainant, and it must necessarily associate a human being as de facto complainant to represent the former in court proceedings. It has further been held that no Magistrate shall insist that the particular person, whose statement was taken on oath at the first instance, alone can continue to represent the company till the end of the proceedings. It has been held that there may be occasions when different persons can represent the company. It has been held that it is open to the de jure complainant company to seek permission of the court for sending any other person to represent the company in the court. Thus, even presuming, that initially there was no authority, still the company can, at any stage, rectify that defect. At a subsequent stage the company can send a person who is competent to represent the company. The complaints could thus not have been quashed on this ground."

15. If a purposive interpretation is given to Section 28 of Act, 1994, then it is clear that not only an Appropriate Authority is competent to file the complaint, but any person who fulfils the requirement of Section 28(1)(b) of the Act, 1994, can also file the complaint. Thus, anybody can set the criminal law in motion. Therefore, it is clear that where the complaint is filed by an authority under the nomination of Appropriate Authority, and if the nomination cannot be said to be an order of appointment of complainant as Appropriate Authority, then this Court is of the view that the mistake of filing complaint by a non-competent person, cannot be said to be an illegality, but at the most, it can be said to be an irregularity.

16. At this stage, it is submitted by the Counsel for the applicant, that the proposition of law laid down by the Supreme Court in the case of *M.M.T.C. Ltd* (Supra) would not apply, because Section 28 of the Act, 1994 prohibits the Court from taking cognizance in absence of complaint by an Appropriate Authority, and therefore, the entire proceedings drawn by the Court, would be a nullity which cannot be rectified by sending a proper person as a complainant at the later stage.

Considered the submissions made by the Counsel for the applicant.

17. The Supreme Court in the case of *M.M.T.C. Ltd* (Supra) was dealing with a complaint filed by a person who was not duly authorized by the Company. Section 142 of Negotiable Instruments Act, reads as under :

> **"142. Cognizance of offences**.— (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),—
>
> (*a*) no court shall take cognizance of any offence punishable under Section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque;
>
> (*b*) such complaint is made within one month of the date on which the cause of action arises under clause (c) of the proviso to Section 138:
>
> "Provided that the cognizance of a complaint may be taken by the court after the prescribed period, if the complainant satisfies the court that he had sufficient cause for not making a complaint within such period.".
>
> (*c*) no court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under Section 138.
>
> (2) The offence under Section 138 shall be inquired into and tried only by a court within whose local jurisdiction,—
>
> *(a)* if the cheque is delivered for collection through an account, the branch of the bank where the payee or holder in due course, as the case may be, maintains the account, is situated; or
>
> *(b)* if the cheque is presented for payment by the payee or holder in due course otherwise through an account, the branch of the drawee bank

where the drawer maintains the account, is situated.

Explanation.— For the purposes of clause *(a)*, where a cheque is delivered for collection at any branch of the bank of the payee or holder in due course, then, the cheque shall be deemed to have been delivered to the branch of the bank in which the payee or holder in due course, as the case may be, maintains the account.

(2) The offence under Section 138 shall be inquired into and tried only by a court within whose local jurisdiction,—

(*a*) if the cheque is delivered for collection through an account, the branch of the bank where the payee or holder in due course, as the case may be, maintains the account, is situated; or

(*b*) if the cheque is presented for payment by the payee or holder in due course, otherwise through an account, the branch of the drawee bank where the drawer maintains the account, is situated.

Explanation.—For the purposes of clause (*a*), where a cheque is delivered for collection at any branch of the bank of the payee or holder in due course, then, the cheque shall be deemed to have been delivered to the branch of the bank in which the payee or holder in due course, as the case may be, maintains the account."

18. Thus, it is clear that for offence under Section 138 of Negotiable Instruments Act, the Court cannot take cognizance except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque. The Supreme Court in the case of *M.M.T.C. Ltd* (Supra) has held that if the complaint is filed by a person, who is not authorized by the Company, then it is merely an irregularity and can be corrected by the Company at a later stage by sending the correct/authorized person.

19. In the case in hand, the situation is more or less similar. The complaint under Section 28 of Act, 1994 can be filed either by Appropriate Authority or by a person who fulfills the requirement of Section 28 (1)(b) of Act, 1994. Thus, it can be said that any body can set the criminal law in motion subject to fulfillment of certain conditions. Therefore, this Court is of the considered opinion, that in case if the complaint is filed by a person, who is not properly authorized under the Act, 1994, then it is merely an irregularity, which would not result in dismissal of the complaint. On the contrary, the Appropriate Authority may join the complaint at any stage. Thus, this Court is of the considered opinion, that although the complaint filed by S.D.O. (Revenue) cannot be said to be filed by an Appropriate Authority, but the said defect would not result in dismissal of complaint, but the Appropriate Authority can join the complaint at a later stage.

20. The Complaint was filed in the year 2014 and the present application for quashment was filed on 23-8-2018, i.e., after 4 years of institution of complaint.

An interim order of stay was passed on 1-2-2019 i.e., after near about 5 years of institution of complaint. However, the applicant has not disclosed the stage of complaint in the application. As per the information available on web site, the charges were framed in the year 2017 and the case is being listed for prosecution evidence after framing of charges. Thus, it appears that the Trial must have reached to an advance stage. The applicant has also approached this Court after a considerable long time without any explanation of delay. Under these circumstances, it would not be in the interest of justice to quash the proceedings on the basis of an irregularity. Therefore, it is held that although the S.D.O. (Revenue) is not competent to file the complaint under Section 28 of the Act, 1994, but the said irregularity can be rectified by the Appropriate Authority by joining the complaint. Therefore, liberty is granted to the District Magistrate, Bhind to join the complaint as a complainant and S.D.O. (Revenue) can appear as a witness.

21. With aforesaid observations, the application is **finally disposed of**.

22. The interim order dated 13-2-2019 passed by this Court is hereby vacated.

23. The Trial Court is directed to conclude the Trial within a period of **6 months** from the date of receipt of the Copy of this Order. The Registry is directed to send the copy immediately.

24. The District Magistrate, Bhind is also directed to move an application for substituting him as the complainant. The said application be moved within a period of one month from today. The Public Prosecutor is directed to inform the District Magistrate, Bhind. Let a copy of this order be also sent to the District Magistrate Bhind for necessary compliance.

Order accordingly

I.L.R. [2020] M.P. 1205
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice Shailendra Shukla

M.Cr.C. No. 9324/2016 (Indore) decided on 20 February, 2020

HARISH CHANDRA SINGH …Applicant

Vs.

STATE OF M.P. & ors. …Non-applicants

***A. Essential Commodities Act (10 of 1955), Section 11 and Fertilizer (Control) Order, 1985, Clause 24 – Complaint – Competent Person & Forum* – Held – Section 11 nowhere states that complaint be made only to Court, all it says that complaint is to be made by concerned competent**

person – Complainant is Fertilizer Inspector who has submitted written complaint and FIR was lodged – No illegality in the procedure adopted – Application dismissed. (Para 21)

क. आवश्यक वस्तु अधिनियम (1955 का 10), धारा 11 एवं उर्वरक (नियंत्रण) आदेश, 1985, खंड 24 – परिवाद – सक्षम व्यक्ति एवं फोरम – अभिनिर्धारित – धारा 11 कहीं भी कथित नहीं करती कि परिवाद केवल न्यायालय में ही किया जा सकता है, वह केवल यह बताती है कि परिवाद केवल संबंधित सक्षम व्यक्ति द्वारा ही किया जा सकता है – परिवादी उर्वरक निरीक्षक है जिसने लिखित परिवाद प्रस्तुत किया है एवं प्रथम सूचना प्रतिवेदन दर्ज किया था – अपनाई गई प्रक्रिया में कोई अवैधता नहीं – आवेदन खारिज।

***B. Criminal Procedure Code, 1973 (2 of 1974), Section 482 and Essential Commodities Act (10 of 1955), Section 11 – Mishandling of Sample* – Held – Issue of mishandling of samples by authorities is a matter of evidence which cannot be looked into at this stage. (Para 23)**

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 एवं आवश्यक वस्तु अधिनियम (1955 का 10), धारा 11 – नमूने का गलत रख रखाव – अभिनिर्धारित – प्राधिकारियों द्वारा नमूनों के गलत रख रखाव का मुद्दा, साक्ष्य का एक मामला है जिसे इस प्रक्रम पर नहीं देखा जा सकता।

***C. Essential Commodities Act (10 of 1955), Section 10 & Fertilizer (Control) Order, 1985, Clause 24 – Complaint* – Held – Petitioner is a compliance officer of the Company – FIR can be lodged against him as per clause 24 of the Fertilizer (Control) Order, 1985 – Apex Court concluded that complaint can be filed against company alone, or officer-in-charge alone or against both. (Paras 14 to 18)**

ग. आवश्यक वस्तु अधिनियम (1955 का 10), धारा 10 एवं उर्वरक (नियंत्रण) आदेश, 1985, खंड 24 – परिवाद – अभिनिर्धारित – याची, कंपनी का एक अनुपालन अधिकारी है – उर्वरक (नियंत्रण) आदेश, 1985 के खंड 24 के अनुसार उसके विरूद्ध प्रथम सूचना प्रतिवेदन दर्ज किया जा सकता है – सर्वोच्च न्यायालय ने निष्कर्षित किया कि परिवाद, अकेले कंपनी अथवा अकेले प्रभारी अधिकारी या दोनों के विरूद्ध प्रस्तुत किया जा सकता है।

Cases referred:

(2015) 12 SCC 781, (2009) 3 SCC 264.

Piyush Mathur with *P.M. Bhargava and Akash Vijayvargiya*, for the applicant.

Anil Ojha, P.P. for the State.

O R D E R

SHAILENDRA SHUKLA, J.:- The petitioner has filed the present petition under Section 482 of Code of Criminal Procedure, 1973 (for short 'Cr.PC') seeking quashment of FIR dated 31.08.2016 in Crime No.493/2016, registered at Police Station Industrial Area, Jaora, District-Ratlam (MP), under E.C. Act.

2. The facts contained in the petition are that the petitioner is the Quality Compliance Officer of Paradeep Phosphate Ltd., a company registered under Companies Act, 1956, having its registered office at Bhubaneswar at Orissa. The petitioner is responsible for quality of fertilizer.

3. That, the Paradeep Phosphate Ltd., Company is into the business of manufacturing, storing, packing, distributing, transporting of fertilizers, chemicals. The company manufacturers and supply Di Ammonium Phosphates, Several Grades of N.P. and N.P.K. fertilizers. Company is one of the leading company and has been issued ISO 9001 :2008 certificate which is valid upto 24.07.2018. Copy of the ISO certificate is submitted herewith and marked as Annexure P/2.

4. That since fertilizers fall into the Union list of the Constitution of India; therefore the Central Government had promulgated the Fertilizer (Control) Order, 1985 in exercise of its powers available to it under the provision of the Essential Commodities Act, 1955, (hereinafter referred as 'the E.C. Act') for the purposes of regulating the Manufacture, Sale and Distribution of the Fertilizers, in the entire Territories of the country.

5. That, the company applied for the registration and authorization in the state of Madhya Pradesh for entitling the company to carry on the business related to the fertilizers. The State of M.P. vide its order dated 25.6.2014, issued the letter of authorization in accordance with the provisions of Control Order 1985.

6. That the company is having the manufacturing plant at Orissa where the different grades of N.P.K. are manufactured in accordance with the Schedules of Control Order, 1985. It is pertinent to mention that the company sales the fertilizer through the authorized dealer in different states who in turn sales the fertilizer through dealer. In the present case also the company is having the authorized dealer at District Ratlam namely Kothari Agencies and Jaora Fertilizer Company.

7. That during the process of manufacturing of the Fertilizers, the company takes absolute care in adhering to the prescribed Standards and dispatches the Fertilizer, from out of the Factory premises, in the shape of properly Sealed and Stitched Bags, for avoiding any possibilities of Fertilizer being spoiled, however when the Bags sometimes gets opened up in loose shunting and/or get exposed to the Moisture, it changes the Phosphorous Contents of the Fertilizer, being Water Soluble.

8. That, the company vide the dispatch dated 4.6.2015 sent the N.P.K. Fertilizer 20:20:0:13 through Railway Racks for sale in State of Madhya Pradesh. To (sic : Two) consignments from the said rack were sent to Ratlam, which were received on 4.7.2015. The company operates through the authorized dealers therefore, the required quantity was delivered to Kothari Agencies as well as the Jaora Fertilizer Company.

9. The petitioner submits that the samples were collected from Agency Arvind and Company which was after analysis found to be sub-standard. The other sample was sent to Hamirpur at Uttar Pradesh which also showed that the sample was sub-standard. Samples were also collected from one more agency called Atlas Iron Works, Jaora. Its first sample was found to be sub-standard and the second sample was sent to Ratlam where the same was found on reanalysis as conforming to the prescribed standards.

10. In view of the fact that both the samples drawn from Arvind and Company Agency gave adverse reports, an order was issued by the respondent No.2 to stop sale and action was directed to be initiated against the concerned persons by the respondent No.2 to respondent No.3. Despite clarification offered by the petitioner, FIR was registered on 31.8.2016 bearing crime no.493/2016.

11. The petitioner submits that the very fact that the sample of Atlas Iron Works, Jaora which was sent for reanalysis was found to be proper, itself shows that the adverse report in respect of other samples was a result of mishandling by the agent or the dealers to which fertilizers got exposed to the moisture and therefore the sample failed. It is further stated that police was not authorized to take action and that the court could have taken cognizance only if a written complaint by Inspector was filed before the court. Only the Inspector was empowered to take action under Section 11 of the E.C. Act in view of the clause 26, 27 and 28 of the F.C.O, that there was huge delay of six months of lodging of FIR, that action at the instance of respondent No.2 ie., Deputy Director was illegal and the respondent No.3 was only a responsible for taking action and that the petitioner had no mens rea in the commission of the alleged offence. On these grounds the criminal investigation and the FIR bearing crime no.439/16 has been sought to be quashed.

12. In their reply, respondents have submitted that as regard the objection pertaining to not complying with Clause 24 of the Fertilizer Control Order, the applicant and the manufacturing company has never informed the answering respondents about their appointed officers (compliance officer) and first time in the present application the name of the compliance officer has been disclosed and therefore the petitioner cannot seek shelter under Clause 24. Regarding delay in lodging FIR, it has been stated that after collecting of sample, the same is analyzed by the State Laboratory and thereafter the second sample was sent for the analysis

and the delay is attributable to such long drawn procedure which takes substantial time. The deficiency was found in the manufacturing process. Hence, the persons responsible in manufacturing and in maintaining quality control have been made accused. The petition has been sought to be rejected on the aforesaid ground.

13. The question before this court is whether in view of the grounds contained in petition, the desired relief of quashment can be afforded to the petitioner or not.

14. Clause 24 of the Fertilizer (Control) Order, 1985, is reproduced as below :-

> ***"24. Manufacturers/[importers]/Pool handling agencies to appoint officers responsible with compliance of the order*** *:- Every manufacturing organization [importer] and pool handling agency shall appoint in that organization and in consultation with the Central Government, an officer, who shall be responsible for compliance with the provisions of this order. "*

15. The petitioner himself has admitted that he is a compliance officer of Paradeep Phosphate Ltd. Hence FIR could be lodged against him as per Section 24 of FCO which has been done in this case.

16. Learned counsel during the course of his oral submissions has laid stress on the fact that in view of the express language of Section 10 of the E.C. Act, the company ought to have been included as an accused and the prosecution could not have lied only against the petitioner. In support, a citation of *Sharad Kumar Sanghi vs. Sangita Rane*, (2015) 12 SCC 781 has been referred to, in which it has been laid down that where company has not been arrayed as a party, criminal proceedings against the Managing Director alone were not maintainable.

17. This citation was considered. The facts reveal that the complainant had purchased a vehicle. It was later found by him that the engine number inscribed on the engine was different from the engine number written on the papers given to him. It was further revealed that the car had got damaged while being brought after its manufacture from factory due to accident and its engine had to be changed. In such circumstances, it was held that the car company ought to have been impleaded as accused apart from the petitioner.

18. The present case is in respect of Essential Commodities Act and a citation in respect of such act would have precedence over the citation submitted by the learned counsel. Learned counsel for the State has brought court's attention towards the citation of *State (Govt. of NCT of Delhi) vs. D.A.M. Prabhu & Anr.*, (2009) 3 SCC 264 in which in para 13 it has been laid down that if the contravention of the order made under Section 3 of the E.C. Act is by a company,

the persons who may be held guilty and punished are one the company itself. Para 13 of the judgment reads as under :-

> *"**8.** The section appears to our mind to be plain enough. If the contravention of the order made under Section 3 is by a company, the persons who may be held guilty and punished are (1) the company itself, (2) every person who, at the time the contravention was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company whom, for short, we shall describe as the person-in-charge of the company, and (3) any director, manager, secretary or other officer of the company with whose consent or connivance or because of neglect attributable to whom the offence has been committed, whom, for short, we shall describe as an officer of the company. Any one or more or all of them may be prosecuted and punished. The company alone may be prosecuted. The person-in-charge only may be prosecuted. The conniving officer may individually be prosecuted. One, some or all may be prosecuted. There is no statutory compulsion that the person-in-charge or an officer of the company may not be prosecuted unless he be ranged alongside the company itself. Section 10 indicates the persons who may be prosecuted where the contravention is made by the company. It does not lay down any condition that the person-in-charge or an officer of the company may not be separately prosecuted if the company itself is not prosecuted. Each or any of them may be separately prosecuted or along with the company. Section 10 lists the person who may be held guilty and punished when it is a company that contravenes an order made Section 3 of the Essential Commodities Act. Naturally, before the person in-charge or an officer of the company is held guilty in that capacity it must be established that there has been a contravention of the order by the company.*
>
> *8. The above position was highlighted in **Sheoratan Agarwal v. State of M.P.,*** (1984) 4 SCC 352. "

19. In respect of the ground that Inspector only could have lodged the prosecution under Section 11 shall not be considered.

20. FIR Annexure P/13 was perused. The complainant is Fertilizer Inspector, who has submitted written complaint. Section 11 of E.C. Act is reproduced below :-

> *"**11. Cognizance of offences.**- No Court shall take cognizance of any offence punishable under this Act except on a report in writing of the facts constituting such offence made by a person who is a*

public servant as defined in Section 21 of the Indian Penal Code (45 of 1860) [or any person aggrieved or any recognised consumer association, whether such person is a member of that association or not]. "

21. This section nowhere states that the complaint be made only to the court. All it says is the complaint in writing is to be made by the concerned competent person which in this case is Inspector who has filed written complaint and Section 154 of Cr.P.C provides that on receiving information relating to cognizable offence FIR shall be registered. This has been done in this case and there is no illegality in the procedure adopted.

22. Regarding the delay in FIR, the respondents have explained the cause for delay and the cause shown is appropriate. Other submissions do not strike at the root of prosecution which has been initiated against the petitioner. These submissions can be raised at the time of final arguments.

23. Regarding submission that the sample collected from Atlas Iron Works conformed to the specifications on reanalysis and therefore the error had occurred in respect of sample collected from Arvind Steel Agency due to mishandling, is a subject matter of evidence which cannot be looked into at this stage.

24. After due consideration, the grounds contained in petition filed under Section 482 of Cr.P.C. seeking quashment of investigation and FIR are rejected as being without any basis.

25. Consequently, the petition filed under Section 482 of Cr.P.C is dismissed.

26. It can be seen that Harischandra Singh was appointed as compliance officer in the year 2016 whereas, the manufacture of fertilizer in question and its sampling dates back to the year 2015. Hence, the investigating agency will be required to see as to who was the quality control officer of the Paradeep Phosphate Company at that point of time. He shall also be required to be impleaded as an accused. Shri Harishchandra Singh is accused by virtue of being compliance officer. However, if he was not responsible for the quality control in the year 2015 then apart from him the concerned officer shall also be required to be impleaded.

Application dismissed

I.L.R. [2020] M.P. 1212
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice Shailendra Shukla
M.Cr.C. No. 51140/2019 (Indore) decided on 20 February, 2020

LOKESH SOLANKI …Applicant

Vs.

STATE OF M.P. …Non-applicant

***A. Criminal Procedure Code, 1973 (2 of 1974), Section 173(8) & 482 – Investigation During Trial* – Held – During trial, vide impugned order, mobile phone sent to FSL to retrieve its recording – For ends of justice, in appropriate cases, Court can order further investigation even at the stage of trial – Presiding Officer exercised his right for further collection of evidence – No legal impediment in exercising such right – Application dismissed. (Paras 11 to 13)**

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 173(8) व 482 – विचारण के दौरान अन्वेषण – अभिनिर्धारित – विचारण के दौरान, आक्षेपित आदेश द्वारा, मोबाईल फोन को उसकी रिकार्डिंग पुनः प्राप्त करने हेतु एफ एस एल भेजा गया – न्याय के उद्देश्य के लिए, समुचित प्रकरणों में न्यायालय, विचारण के प्रक्रम पर भी अतिरिक्त अन्वेषण आदेशित कर सकता है – पीठासीन अधिकारी ने अतिरिक्त साक्ष्य एकत्रित करने के लिए उसके अधिकार का प्रयोग किया – उक्त अधिकार का प्रयोग करने में कोई विधिक अड़चन नहीं – आवेदन खारिज।

***B. Criminal Procedure Code, 1973 (2 of 1974), Section 2(h) – Investigation* – Held – Sending the mobile phone to FSL in order to retrieve its recording is a part of investigation. (Para 13)**

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 2(h) – अन्वेषण – अभिनिर्धारित – मोबाईल फोन को उसकी रिकार्डिंग को पुनः प्राप्त करने हेतु एफ.एस.एल. भेजा जाना, अन्वेषण का ही एक हिस्सा है।

***C. Criminal Practice – Seizure Memo – Mobile Phone/Memory Card* – Held – Seizure memo is not expected to show the contents of the memory card i.e. recording – Submission that seizure memo does not state that it contains recording, is of no consequence. (Paras 15 & 16)**

ग. दाण्डिक पद्धति – जब्ती पत्र – मोबाईल फोन/मेमोरी कार्ड – अभिनिर्धारित – जब्ती मेमो में मेमोरी कार्ड की अंतर्वस्तु अर्थात् रिकार्डिंग को दर्शाया जाना अपेक्षित नहीं – निवेदन कि जब्ती मेमो यह उल्लेखित नहीं करता कि उसमें रिकार्डिंग अंतर्विष्ट है, कोई महत्व नहीं रखता।

Cases referred:

AIR 1955 SC 196, 2007 1 SCC 536, 1997 Vol. 1 SCC 361, 2017 4 SCC 177, 2019 SCC Online SC 1346.

S.K. Vyas with *Sonali Goyal*, for the applicant.
Anil Ojha, P.P. for the non-applicant-State.

O R D E R

SHAILENDRA SHUKLA, J.:- The petitioner has filed the petition under Section 482 of Code of Criminal Procedure, 1973 (for short 'Cr.PC') seeking quashment of order dated 18.11.2019 passed by learned 02nd Additional Sessions Judge, in Sessions Trial No.632/2016 by which the learned Judge has allowed the application filed by the prosecution to send the seized mobile phone for data recovery to Regional Forensic Science Laboratory, Hyderabad.

2. The facts of the case in nutshell was that accused persons had conspired to kill Jai Singh, a lawyer practicing at Mhow, District-Indore. The plan was to be carried out while Jai Singh would proceed in his Verna car and modus-operandi would be to strike his car with Dumper driven by one of the co-accused persons. Such conspiracy was hatched by co-accused-Mangilal who was inside the jail and who was the chief conspirator at whose behest such conspiracy was hatched. He had given telephonic instructions through mobile phone from inside the jail. On 29.03.2016, accused-Ramsingh drove the dumper and struck the Verna car carrying Jai Singh Thakur. While Jai Singh escaped with injuries, two motorcycles were struck by the Dumper and one occupant of each of these motorcycles succumbed to their injuries. Initially offence under Sections 304-A, 337, 279 IPC was registered but after investigation offence under Sections 302, 307, 120-B IPC were added.

3. During investigation, a CD allegedly containing the conversations between witness Hirasingh and Umabai was seized. As per prosecution story, the conversation threw light on the conspiracy which was hatched. This CD was prepared by witness-Banesingh. The mobile from which the CD was burnt was seized from Hirasingh. However, this mobile phone when tried to be used at the time of examination of Hirasingh, the same did not get activated despite charging the same. Therefore, the prosecution filed an application to send the mobile to FSL in order to retrieve the recording. Vide impugned order, the Presiding Officer has sent the mobile to Forensic Science Laboratory (FSL) so that recording contained therein can be retrieved.

4. The impugned order has been challenged on the ground that Hirasingh has refused to identify the mobile phone as his own, that Umabai in her Court deposition has denied to have been spoken to Hirasingh, that it was not the part of

duty of learned trial Court to send the mobile phone to regional Forensic Science Laboratory, that once Hirasingh had made statements disowning the mobile belonging to him, the recording if any, in the aforesaid mobile phone has ceased to be of any relevance. Hence the order has been sought to be set-aside.

5. During submissions, learned senior counsel for the petitioner has submitted that seizure memo also does not show that the mobile phone carries any recording and Investigating Officer (IO) himself never heard any recording of the mobile phone and thus, there is no evidence that the aforesaid mobile phone contained any recording.

6. Learned public prosecutor for the State has submitted that witness-Banesingh who provided the CD to the Investigating Officer (IO) contained conversations which would throw light on the conspiracy hatched which is extremely relevant and that the conversation was recorded from the seized mobile only and it is extremely important to retrieve the recording from the mobile phone which would have primary evidence and therefore for just decision of the case, it was appropriate on the part of the Presiding Officer of trial Court to send the mobile phone to the FSL.

7. Heard learned counsel for the parties.

8. The documents were perused.

9. No attempt was made by the Investigating Officer (IO) to see as to whether the CD provided by the witness-Banesingh was infact made from the mobile phone seized from Hirasingh.

10. It can be seen that after investigation was over, trial ensued and such an application was filed. What is aimed to obtain is collection of evidence at the trial stage. The only question is whether the evidence can be allowed to be collected during the course of trial.

11. As per the provisions of Criminal Procedure Code, after completion of investigation in cognizable offence, the police files final report under Section 173(8) of Criminal Procedure Code, commonly known as chargesheet. After such report has been forwarded to the Magistrate, at times, the police conducts further investigation as well, under Section 173(8) of Criminal Procedure Code. However, whether such exercise can be gone into at the post cognizance stage was a matter which needed to be thrashed out. The Hon'ble Apex Court in number of citations such as in the case of *H.N. Rishbud vs State of Delhi* AIR 1955 SC 196 paved the way for further investigation even after the Magistrate had taken the cognizance. In the case of *Hemant Dhasmana vs CBI and Another* 2007 1 SCC 536, it was held that power of police to conduct further investigation can be triggered out at the instance of the Court. In the case of *Randhir Singh Rana vs*

State (Delhi Administration) 1997 Vol.1 SCC 361, it was held that Magistrate cannot suo motu direct further investigation or direct reinvestigation but an application has to be filed before him. In the case of *Amrutbhai Shambhubhai Patel vs Sumanbhai Kantibhai Patel* 2017 4 SCC 177, it was held that after cognizance has been taken, further investigation under Section 173(8) of Criminal Procedure Code, cannot be directed either suo motu or at the behest of complainant. However, recently the three Judges Bench of Hon'ble Apex Court in the case of *Vinubhai Haribhai Malviya vs State of Gujarat* in 2019 SCC Online SC 1346 has held as under:

> ***" It does not stand to reason that the legislature provided power of further investigation to the police even after filing a report, but intended to curtail the power of the Court to the extent that even where the facts of the case and ends of justice demanded, the Court can still not direct the investigating agency to conduct further investigation, which it could do on its own."***

Hence no doubt remains that for the ends of justice, in appropriate cases, the Court can order further investigation even at the stage of trial.

12. The word investigation as defined in Section 2(h) of the Code of Criminal Procedure, 1973 reads as under:

> ***" Investigation" includes all the proceedings under this Code for the collection of evidence conducted by a police office or by any person (other than a Magistrate) who is authorized by a Magistrate in this behalf.***

13. Sending the mobile phone to FSL in order to retrieve its recording is a part of investigation. In the case in hand, the Presiding Officer vide impugned order has exercised his right to order for further collection of evidence which has been recognized by the Hon'ble Apex Court. Hence, there is no legal impediment in exercising such right in view of the *Hon'ble Apex Court citations* (supra).

14. Now the question is whether it was proper to exercise such rights in this particular case ?

15. Learned senior counsel for the petitioner submits that witness-Hirasingh from whom the mobile phone has been shown to be recovered by the prosecution, has denied its ownership in his deposition and that seizure memo itself does not state that it contains such recording.

16. This submission in my view is a feeble attempt made by the learned senior counsel for the petitioner to thwart the aforesaid action taken by the trial Court. The mobile phone has been shown to be seized from witness-Hirasingh and the concerned seizure witnesses shall be deposing regarding its seizure from

Hirasingh. The seizure memo is not expected to show the contents of the memory card i.e. recording. Hence the submission that seizure memo does not show such recording is of no consequence.

17. After due consideration of the aforesaid and for the ends of justice, the impugned order has been passed by learned Presiding Officer and there is no impropriety therein. Accordingly, the petition filed under Section 482 of Code of Criminal Procedure, 1973, stands rejected. With the disposal of this petition, the interim stay stands vacated automatically.

18. A copy of this order be dispatched immediately to the trial Court for perusal and compliance.

Application dismissed

I.L.R. [2020] M.P. 1216
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice Anand Pathak
M.Cr.C. No. 5621/2020 (Gwalior) decided on 12 May, 2020

BALVEER SINGH BUNDELA ...Applicant

Vs.

STATE OF M.P. …Non-applicant

***A. Criminal Procedure Code, 1973 (2 of 1974), Section 438 and Penal Code (45 of 1860), Sections 376, 386 & 506 – Anticipatory Bail* – Held – On false promise of marriage, initially physical intimacy developed between applicant and complainant, later both entered into wedlock and lived together comfortably for some days – No criminal antecedents of applicant – Presence of applicant can be ensured by marking his attendance before investigating officer for investigation – Application allowed. (Para 34 & 36)**

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 438 एवं दण्ड संहिता (1860 का 45), धाराएँ 376, 386 व 506 – अग्रिम जमानत – अभिनिर्धारित – विवाह के मिथ्या वचन पर, आरंभ में, आवेदक एवं परिवादी के मध्य शारीरिक संबंध बने, तत्पश्चात् दोनों ने विवाह किया तथा कुछ दिनों तक आराम से साथ रहे – आवेदक का कोई आपराधिक पूर्ववृत्त नहीं – अन्वेषण के लिए अभियुक्त की उपस्थिति अन्वेषण अधिकारी के समक्ष उसकी हाजिरी दायर कर सुनिश्चित की जा सकती है – आवेदन मंजूर।

***B. Criminal Procedure Code, 1973 (2 of 1974), Section 438 – Anticipatory Bail – Maintainability of Application – Filing of Charge-Sheet – Effect* – Held – Application u/S 438 Cr.P.C. is maintainable even after filing of charge-sheet or till person is not arrested. (Para 24)**

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 438 – अग्रिम जमानत – आवेदन की पोषणीयता – आरोप पत्र प्रस्तुत किया जाना – प्रभाव – अभिनिर्धारित – दं. प्र.सं. की धारा 438 के अंतर्गत आवेदन, आरोप–पत्र प्रस्तुत किये जाने के बाद भी अथवा जब तक व्यक्ति गिरफ्तार नहीं हो जाता, पोषणीय है।

***C. Criminal Procedure Code, 1973 (2 of 1974), Sections 82, 83, 84, 85, 86 & 438 – Anticipatory Bail – Proclaimed Offender – Effect* – Held – Proceedings u/S 82 & 83 Cr.P.C. are transient/interim/provisional in nature and subject to proceedings u/S 84, 85 & 86 Cr.P.C. – On basis of transient provision, valuable right of personal liberty of an individual at least to seek anticipatory bail cannot be curtailed – Application u/S 438 is maintainable even if person has been declared proclaimed offender u/S 82 Cr.P.C.(Para 31)**

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 82, 83, 84, 85, 86 व 438 – अग्रिम जमानत – उद्घोषित अपराधी – प्रभाव – अभिनिर्धारित – दं.प्र.सं. की धारा 82 व 83 के अंतर्गत कार्यवाहियां अस्थायी/अंतरिम/अनंतिम स्वरूप की हैं तथा दं.प्र.सं. की धारा 84, 85 व 86 के अंतर्गत कार्यवाहियों के अधीन हैं – अस्थायी उपबंध के आधार पर, एक व्यक्ति की दैहिक स्वतंत्रता के बहुमूल्य अधिकार को कम से कम अग्रिम जमानत लेने के लिए समाप्त नहीं किया जा सकता – धारा 438 के अंतर्गत आवेदन पोषणीय है यद्यपि व्यक्ति को दं.प्र.सं. की धारा 82 के अंतर्गत उद्घोषित अपराधी घोषित किया गया हो।

***D. Criminal Procedure Code, 1973 (2 of 1974), Section 438 – Anticipatory Bail – Maintainability of Application – Farari Panchnama & Police Declaring Award – Effect* – Held – Even if police has declared award or prepared farari panchnama even then application u/S 438 for anticipatory bail is maintainable – However, it is to be seen on merits that whether application deserves to be considered and allowed as per factors enumerated in Section 438 Cr.P.C. itself. (Para 32 & 33)**

घ. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 438 – अग्रिम जमानत – आवेदन की पोषणीयता – फरारी पंचनामा व पुलिस द्वारा पुरस्कार घोषित किया जाना – प्रभाव – अभिनिर्धारित – यद्यपि पुलिस द्वारा पुरस्कार घोषित अथवा फरारी पंचनामा तैयार किया गया है तब भी धारा 438 के अंतर्गत अग्रिम जमानत के लिए आवेदन पोषणीय है – तथापि, यह गुणदोषों के आधार पर देखा जाना चाहिए कि क्या आवेदन दं.प्र.सं. की धारा 438 में प्रगणित कारकों के अनुसार विचार किये जाने तथा मंजूर किये जाने योग्य है।

***E. Criminal Procedure Code, 1973 (2 of 1974), Section 438 and Constitution – Article 21 – Personal Liberty* – Held – Personal liberty of individual as ensured by Section 438 Cr.P.C. is embodiment of Article 21 of Constitution in Cr.P.C., therefore scope and legislative intent of Section 438 Cr.P.C. is to be seen accordingly. (Para 25)**

ङ. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 438 एवं संविधान – अनुच्छेद 21 – दैहिक स्वतंत्रता – अभिनिर्धारित – दं.प्र.सं. की धारा 438 द्वारा सुनिश्चित की गई व्यक्ति की दैहिक स्वतंत्रता दं.प्र.सं. में संविधान के अनुच्छेद 21 का स्वरूप है, अतः दं.प्र.सं. की धारा 438 के विस्तार एवं विधायी आशय को तद्नुसार देखा जाना चाहिए।

Cases referred:

AIR 2019 SC 4010, AIR 2019 SC 327, (2012) 8 SCC 73, (2014) 2 SCC 171, AIR 1980 SC 1632, SLP (Criminal) Nos. 7281-7282/2017 order passed on 29.01.2020 (Supreme Court), (2012) 11 SCC 205, 2013 Cr.L.J. 3140, 1977 Cri.L.J. 1708, AIR 2011 SC 312, (2003) 8 SCC 77, (2010) 1 SCC 684, (1996) 1 SCC 667, (2005) 4 SCC 303, 2003 (1) MPLJ 513.

Ankur Maheshwari, for the applicant.
R.S. Bansal, P.P. for the non-applicant/State.
Awdhesh Singh Tomar and *Sangeeta Pachori*, for the complainant.
V.K. Saxena with *Rajesh Kumar Shukla, Atul Gupta* and *S.K. Shrivastava* as well as *V.D. Sharma*, as *amicus curiae*.

O R D E R

ANAND PATHAK, J.:-This is first bail application preferred by the applicant under Section 438 of Cr.P.C. wherein he is apprehending his arrest in a case registered vide Crime No.448/2019 at Police Station Vishwavidyalaya, District Gwalior for alleged offence punishable under Sections 376, 386, 506 of IPC.

2. It is submitted by learned counsel appearing for the applicant that police has registered a false case against him. As per FIR, date of incident appears to be 27-10-2019 whereas FIR lodged on 15-12-2019, apparently delayed in nature. Applicant and prosecutrix entered into wedlock through Hindu rites and rituals and copy of marriage certificate and photographs in this regard are attached with the application.

3. As per allegations on the pretext of marriage, alleged rape has been committed by applicant. Some amount has been transferred in favour of the prosecutrix by the applicant which reveals that both were in relationship. Even otherwise, on the pretext of marriage if physical intimacy developed then the same does not constitute offence of rape. In support of his submission, he relied upon the judgments of Apex Court in the case of *Pramod Suryabhan Pawar Vs. State of Maharashtra and others*, AIR 2019 SC 4010 and *Dr. Dhruvaram Murlidhar Sonar Vs. State of Maharashtra and others*, AIR 2019 SC 327.

4. It is further submitted that after registration of offence both tried to settle the matter and therefore, petition has been preferred under Section 482 of Cr.P.C. for compromise bearing M.Cr.C.No. 930/2020 which was dismissed as withdrawn on 28-01-2020 because the allegations were of Section 376 of IPC also (in light of various judgments of Apex Court), therefore, compromise could not be given effect to. This itself indicates that domestic nature of relationship and incompatibility into it has been tried to be converted into offence of rape. Applicant is aged 41 years of age and prosecutrix is around 41-42 years of age. Therefore, at such matured stage, if two adults enter into wedlock and thereafter their domestic relationship is severed for any reason then the same does not amount to commission of offence of rape. He is reputed citizen of locality and chance of absconsion is remote. Confinement would bring social disrepute and personal inconvenience. He undertakes to cooperate in investigation and would make himself available as and when required by the investigating officer and also undertakes that he would not be source of harassment and embarrassment to the complainant party in any manner. Consequently, he prayed for bail of anticipatory nature.

5. Learned counsel for the applicant further responded to the queries raised by this Court about maintainability of the application for anticipatory bail under Section 438 of Cr.P.C. in view of the legal position that when any person has been declared as absconder and award of Rs.5,000/- has been declared by the Superintendent of Police as per Police Regulation 789 (as per case diary of instant case) then his prospects to get anticipatory bail gets extinguished, learned counsel for the applicant submits that it is not correct application of law because here in the present case the applicant has not been declared absconder so far as per Sections 82 and 83 of Cr.P.C. Therefore, legal bar created by the judgments of Apex Court in the matter of *Lavesh Vs. State (NCT Of Delhi)*, (2012) 8 SCC 73 as well as in the matter of *State of M.P. Vs. Pradeep Sharma*, (2014) 2 SCC 171 is not applicable in the present set of facts.

6. It is submitted by learned counsel for the applicant that police is at liberty to declare award over any person for apprehension who is not available for investigation but this may be their device to deny the applicant (or other similarly situated persons) a chance to get anticipatory bail.

7. On the other hand, learned PP for the respondent/State opposed the prayer and on the basis of case diary submits 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 (arrest

memos) 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).

8. Learned counsel for the complainant also matched the vehemence of counsel for the State and submitted that the applicant developed physical intimacy with the prosecutrix under the pretext of solemnization of marriage and on the promise of giving land and flat to the prosecutrix. On 16-11-2019 he solemnized marriage with the prosecutrix without giving divorce to his first wife and committed rape on 11-12-2019. Previously also he committed rape over her on 26/27-10-2019. He is a proclaimed offender under Section 82 of Cr.P.C. therefore, as per the judgments of *Lavesh* (supra) and *Pradeep Sharma* (supra), he cannot be given the benefit of grant of anticipatory bail. Learned counsel for the complainant also raised the question of maintainability of the application under Section 438 of Cr.P.C. in view of the above referred judgments. According to learned counsel, once a person is declared as absconder by way of cash award then application under Section 438 of Cr.P.C. is not maintainable. Since the applicant also extended threat to the complainant, therefore, on this count also bail application be dismissed.

9. This Court requested Shri V.K. Saxena, learned senior counsel and Shri V.D. Sharma counsel to assist the Court as amicus curiae and resultantly they addressed this Court on following questions raised in this case:

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 ?

10. Shri Saxena, learned senior counsel was ably assisted by Shri Rajesh Kumar Shukla, Shri Atul Gupta and Shri S.K. Shrivastava, Advocates.

11. Learned senior counsel referred the judgment of Constitution Bench of Apex Court in the case of *Gurbaksh Singh Sibbia etc. Vs. The State of Punjab*, AIR 1980 SC 1632 and submitted that the concept of anticipatory bail has been elaborately discussed by the Hon'ble Apex Court as incorporated in Cr.P.C. by virtue of 41st report of Law Commission. It is still holding the field, as reiterated

by the Constitution Bench of Apex Court in its recent pronouncement in the case of *Sushila Aggarwal and others Vs. State (NCT of Delhi) and another* in SLP (Criminal) Nos.7281-7282/2017 passed on 29-01-2020.

12. He submits that different facets of Section 438 of Cr.P.C. have been elaborately dealt with in these judgments and therefore, law is well settled that personal liberty is such sacrosanct that it cannot be sacrificed at the whims and fancies of Investigating Officer. He referred the solemn duty and its constant violation by the Investigating Officer and other officers to curtail the prospects of personal freedom of person by declaring him absconder by issuing cash reward or preparing Farari Panchnama.

13. According to him, such instances render the affected person at the mercy of Police Officer and his personal freedom is compromised. Therefore, personal liberty cannot be curtailed and in support of his submission he referred various judgments to bring home the fact that personal liberty of an individual by way of seeking anticipatory bail can be considered even after filing of charge-sheet.

14. Shri V.D. Sharma, learned amicus curiae also placed his submission while taking history of Section 438 of Cr.P.C. by referring Law Commission of India report 41st of year 1969 which categorically recommended for insertion of provision of anticipatory bail in the old Cr.P.C. of 1898 (earlier provision Section 497-A) and by virtue of same, Section 438 of Cr.P.C. of 1973 is offspring of said report. He referred Law Commission of India report No.203 of the year 2005 and Law Commission of India report No.268 of the year 2017 which deal with the developments, difficulties and proposed amendments in respect of anticipatory bail. He referred definition of 'Absconder' and relied upon the judgments in support of his submissions rendered by Apex Court in the matter of *Sunil Clifford Daniel Vs. State of Punjab*, (2012) 11 SCC 205, *Sujit Biswas Vs. State of Assam*, 2013 Cr.L.J. 3140 and the judgment rendered by Madras High Court in the matter of *KTMS Abdul Kader Vs. Union of India*, 1977 Cri.L.J. 1708. Through various judgments relied upon, he tried to bring home the fact that mere abscondence is not sufficient to deny the valuable right of personal freedom of an individual. This is to be seen in the facts and circumstances of each case and he also relied upon the judgment of Apex Court in the matter of *Gurbaksh Singh Sibbia etc.* (supra) and *Siddharam Satlingappa Mhetre Vs. State of Maharashtra*, AIR 2011 SC 312 to submit that anticipatory bail is maintainable at any stage till accused is not arrested but with the only caveat/condition that each case bears different factual matrix, therefore, merit of the case has to be dealt with accordingly.

15. Heard learned counsel for the parties as well as learned Amicus Curiae at length and perused the case diary.

16. Here, the factual contours of case indicates that the applicant and prosecutrix are in their forties (aged 41-42 years) and as per the allegations, the applicant was already married and interestingly on the false promise of marriage, he committed rape and as per contents of FIR itself, he solemnized marriage with the prosecutrix on 16-11-2019 and thereafter continued to live as her husband for some time. As per submission of learned counsel for the applicant, the application under Section 482 of Cr.P.C. for compromise by way of M.Cr.C.No.930/2020 was also filed earlier by the parties to settle their dispute but since the allegation was under Section 376 of IPC also, therefore, the said prayer for settlement was rejected by this Court.

17. Here, the main objection of counsel for the respondent/State and complainant is preparation of Farari Panchnama and declaration of award of Rs.5,000/- over the applicant to secure his arrest and therefore, the respondent/ State and complainant sought dismissal of this application on this ground mainly.

18. Constitution Bench judgment of Apex Court in the matter of *Gurbaksh Singh Sibbia etc.* (supra) takes all possible contours into its ambit. Full Bench judgment of Punjab & Haryana High Court from which case originates, rejected the application for bail after summarizing eight legal propositions and all those legal propositions were considered and repelled by the Constitution Bench in very categorical terms. Some of the paras of the judgment are worth reproduction in the present case also; to consider the importance given by the Apex Court to the Personal Liberty of an individual:

> *"**15.** Judges have to decide cases as they come before them, mindful of the need to keep passions and prejudices out of their decisions. And it will be strange if, by employing judicial artifices and techniques, this Court cuts down the discretion so wisely conferred upon the Courts, by devising a formula which will confine the power to grant anticipatory bail within a strait-jacket. While laying down cast-iron rules in a matter like granting anticipatory bail, as the High Court has done, it is apt to be overlooked that even Judges can have but an imperfect awareness of the needs of new situations. Life is never static and every situation has to be assessed in the context of emerging concerns as and when it arises. Therefore, even if this Court were to frame a 'Code for the grant of anticipatory bail', which really is the business of the legislature, it can at best furnish broad guidelines and cannot compel blind adherence. In which case to grant bail and in which to refuse it is, in the very nature of things, a matter of*

discretion. But apart from the fact that the question is inherently of a kind which calls for the use of discretion from case to case, the legislature has, in terms express, relegated the decision of that question to the discretion of the Court, by providing that it may grant bail "if it thinks fit." The concern of the Courts generally is to preserve their discretion without meaning to abuse it. It will be strange if the Court exhibits concern to stultify the discretion conferred upon the Courts by law.

21. *..... A wise exercise of judicial power inevitably takes care of the evil consequences which are likely to flow out of its intemperate use. Every kind of judicial discretion, whatever may be the nature of the matter in regard to which it is required to be exercised, has to be used with due care and caution. In fact, an awareness of the context in which the discretion is required to be exercised and of the reasonably foreseeable consequences of its use, is the hall mark of a prudent exercise of judicial discretion. One ought not to make a bugbear of the power to grant anticipatory bail.*

26. *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 overgenerous 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 that in order to meet the challenge of Article 21of 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 be found therein."*

19. Similarly, the Apex Court in the case of *Bharat Chaudhary and another Vs. State of Bihar and another*, (2003) 8 SCC 77 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. Relevant extract is reproduced as under:

> *"**7.** From the perusal of this part of Section 438 of the Crl. 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 Section 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 Section 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."*

20. Later on in 2010, the Apex Court in the case of *Ravindra Saxena Vs. State of Rajasthan*, (2010) 1 SCC 684 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. Relevant extract for ready reference is reproduced as under:

> *" 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 vs. State of Punjab. 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 Sessions it must apply its own mind on the question and decide when the case is made out for granting such relief."*

21. Recently, the Constitution Bench of Hon'ble Apex Court in the matter of *Sushila Aggarwal and others* (supra) has considered the question in respect of Section 438 of Cr.P.C. and question centered around to the extent of period of protection granted to a person under Section 438 of Cr.P.C. and life of anticipatory bail. Questions were as follows:

> *" (1) Whether the protection granted to a person under Section 438 CrPC should be limited to a fixed period so as to enable the person to surrender before the Trial Court and seek regular bail.*
>
> *(2) Whether the life of an anticipatory bail should end at the time and stage when the accused is summoned by the court."*

22. Although questions were having mixed trappings vis a vis present set of facts but reason and conclusion drawn by the Constitution Bench appears to be of great over this Court, relevant extract are reproduced as under:

> *"**47.** At this stage, it would be essential to clear the air on the observations made in some of the later cases about whether Section 438 is an essential element of Article 21. Some judgments, notably Ram Kishna Balothia & Anr. (supra) and Jai Prakash Singh v State of Bihar held that the provision for anticipatory bail is not an essential ingredient of Article 21, particularly in the context of imposition of limitations on the discretion of the courts while granting*

> *anticipatory bail, either limiting the relief in point of time, or some other restriction in respect of the nature of the offence, or the happening of an event. We are afraid, such observations are contrary to the broad terms of the power declared by the Constitution Bench of this court in Sibbia (supra). The larger bench had specifically held that 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*.'"

23. Constitution Bench took note of 203rd report of Law Commission along with other previous reports and considered the judgment rendered by Apex Court in the case of *Salauddin Abdulsamad Shaikh v. State of Maharashtra ,* (1996) 1 SCC 667 *and Adri Dharam Das Vs. State of West Bengal*, (2005) 4 SCC 303 and thereafter overruled those judgments which lay down restrictive conditions or terms limiting grant of anticipatory bail to the period of time.

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.

26. So far as submission of parties regarding judgments rendered by the Apex Court in the case of *Lavesh* (supra) and *Pradeep Sharma* (supra) is concerned, reconciliation of Justiciability and Justifiability is to be reached. Close scrutiny of judgment of Apex Court in the case of *Lavesh* (supra) nowhere bars maintainability of an application under Section 438 of Cr.P.C. if a person is absconding. In fact it takes care of Justifiability (or merit of the case) of any application under Section 438 of Cr.P.C. as per factors provided in Section 438 of Cr.P.C. itself. For ready reference Section 438 of Cr.P.C. is reproduced as under:

> ***"438. Direction for grant of bail to person apprehending arrest.***
>
> *(1) Where any person has reason to believe that he may be*

arrested on accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section that in the event of such arrest he shall be released on bail; and that Court may, after taking into consideration, inter-alia, the following factors, namely—

i- the nature and gravity of the accusation;

ii- the antecedents of the applicant including the fact as to whether he has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;

iii- the possibility of the applicant to flee from justice; and.

iv- where the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested,either reject the application forthwith or issue an interim order for the grant of anticipatory bail;

Provided that, where the High Court or, as the case may be, the Court of Session, has not passed any interim order under this Sub-Section or has rejected the application for grant of anticipatory bail, it shall be open to an officer in-charge of a police station to arrest, without warrant the applicant on the basis of the accusation apprehended in such application.

(1A) Where the Court grants an interim order under Sub-Section (1), it shall forthwith cause a notice being not less than seven days notice, together with a copy of such order to be served on the Public Prosecutor and the Superintendent of Police, with a view to give the Public Prosecutor a reasonable opportunity of being heard when the application shall be finally heard by the Court,

(1B) The presence of the applicant seeking anticipatory bail shall be obligatory at the time of final hearing of the application and passing of final order by the Court, if on an application made to it by the Public Prosecutor, the Court considers such presence necessary in the interest of justice.

(2) When the High Court or the Court of Session makes a direction under subsection (1), it may include such conditions in such directions in the light of the facts of the

particular case, as it may thinks fit, including—

(i) a condition that the person shall make himself available for interrogation by a police officer as and when required;

(ii) a condition that the person shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer;

(iii) a condition that the person shall not leave India without the previous permission of the Court;

(iv) such other condition as may be imposed under Sub-Section (3) of section 437, as if the bail were granted under that section.

(3) If such person is thereafter arrested without warrant by an officer in charge of a police station on such accusation, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, he shall be released on bail, and if a Magistrate taking cognizance of such offence decides that a warrant should issue in the first instance against that person, he shall issue a bailable warrant in conformity with the direction of the Court under Sub-Section (1).

(4) Nothing in this section shall apply to any case involving the arrest of any person on accusation of having committed an offence under sub-section (3) of Section 376 or section 376AB or section 376DA or section 376DB of the Indian Penal Code."

27. In addition to above referred provision, relevant para of judgment passed in *Lavesh* (supra) is reproduced for ready reference:

"From these materials and information, it is clear that the present appellant was not available for interrogation and investigation and 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 is

not entitled the relief of anticipatory bail."

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.

30. Full Bench decision of this Court in the case of *Jabalpur Bus Operators Association Vs. State of Madhya Pradesh and others*, 2003 (1) MPLJ 513 has dealt with law of precedent and rule of stare decisis. One can suitably take guidance from the said Full Court decision of this Court which is based upon several judgments rendered by the Apex Court from time to time in this regard. This Court can profitably rely upon the ratio of the said judgment as delineated in penultimate para.

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 of personal 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.

32. Therefore, 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 in the present case, proceedings under Section 82 of Cr.P.C. are not given effect to yet (as per case-diary) 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.

33. 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).

34. So far as present set of facts are concerned from the case diary and submissions, it appears that on false promise of marriage, initially physical intimacy developed and later on both entered into wedlock but it is grievance of prosecutrix that he is already a married person. Certain bank transactions have already been referred and documented which indicate that they were in proximity. As submitted, both the parties earlier tried to settle the matter by filing petition under Section 482 of Cr.P.C. bearing No.930/2020. Therefore, both matured individuals waited the consequences of their decisions and both lived some days

together comfortably. Cumulatively, it appears that the principle enumerated by the Apex Court in the matter of *Pramod Suryabhan Pawar* (supra) and *Dr. Dhruvaram Murlidhar Sonar* (supra) as well as facts and circumstances of the case, applicant deserves consideration for anticipatory bail. Even otherwise the police nowhere referred criminal antecedents of the applicant and his presence can be ensured by marking his attendance before the Investigating Officer for investigation purpose.

35. Consensual proximity of Body and Soul cannot be used as a weapon to wreak vengeance at a later point of time when Body and Soul drift apart.

36. Considering the submissions of learned counsel for the applicant as well as fact situation of the case, without expressing any opinion on the merits of the case, I intend to allow this bail application. It is directed that applicant shall be released on bail in case of his arrest on his furnishing personal bond in the sum of **Rs.1,00,000/- (Rs. One Lac Only)** to the satisfaction of Arresting Authority/ Investigating Officer and **he shall download the Arogya Setu App**. Bail bond shall be furnished within one and half month as and when situation moves out of Lock-down.

This order will remain operative subject to compliance of the following conditions by the applicant:-

1. The applicant will comply with all the terms and conditions of the bond executed by him;

2. The applicant will cooperate in the investigation/trial, as the case may be;

3. The applicant will not indulge himself in extending inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or to the Police Officer, as the case may be.

4. The applicant will not commit an offence similar to the offence of which he is accused;

5. The applicant will not seek unnecessary adjournments during the trial; and

6. The applicant will not leave India without previous permission of the trial Court/Investigating Officer, as the case may be.

7. Applicant would not be source of harassment and embarrassment to the prosecutrix or her family members and would not move in her vicinity in any manner.

37. Before parting, the assistance provided by Shri V.K. Saxena, Senior Advocate, ably assisted by Shri Rajesh Kumar Shukla, Shri Atul Gupta and Shri S.K. Shrivastava as well as Shri V.D. Sharma Advocate as Amicus Curiae deserves appreciation and acknowledgment.

A copy (E-copy) of this order be sent to the trial Court concerned for compliance.

Certified copy/E-copy as per rules.

Application allowed