VOL. 2

INDIAN LAW REPORT (M.P.) COMMITTEE

APRIL 2021

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Hon'ble Shri Justice ATUL SREEDHARAN

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Arbitration and Conciliation Act (26 of 1996), Section 11(6) & 21 and Electricity Act (36 of 2003), Section 86(1)(f) – Commencement of Arbitral Proceeding – Relevant Date – Applicability of Act **– Held – Notice for initiation of arbitration issued on 30.05.2011 – Regarding commencement of arbitral proceeding, material date would be 30.05.2011 when notice was issued – If PPA and notice of termination predate the 2003 Act, it would not constitute material circumstances – Act of 2003 is applicable in present case. [Chief General Manager (IPC) MP Power Trading Co. Ltd. Vs. Narmada Equipments Pvt. Ltd.] (SC)…604**

माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 11(6) व 21 एवं विद्युत अधिनियम (2003 का 36), धारा 86(1)(f) – माध्यस्थम् कार्यवाही का प्रारंभ – सुसंगत तिथि – अधिनियम की प्रयोज्यता – अभिनिर्धारित – मध्यस्थता शुरू करने हेतु नोटिस दिनांक 30.05.2011 को जारी किया गया – माध्यस्थम् कार्यवाही आरंभ करने के संबंध में, सारवान् तिथि 30.05.2011 होगी जब नोटिस जारी किया गया था – यदि विद्युत क्रय करार (पी.पी.ए.) तथा पर्यवसान का नोटिस 2003 के अधिनियम के पूर्व तिथि के हैं, तो वह तात्विक परिस्थितियां गठित नहीं करेंगे – 2003 का अधिनियम वर्तमान प्रकरण में लागू होगा। (चीफ जनरल मैनेजर (आईपीसी) एम पी पॉवर ट्रेडिंग कं. लि. वि. नर्मदा इक्विपमेन्ट प्रा. लि.) **(SC)…604**

Arbitration and Conciliation Act (26 of 1996), Section 11(6) & 21 and Electricity Act (36 of 2003), Section 86(1)(f) – Objection of Jurisdiction **– Held – This Court earlier concluded that if there is inherent lack of jurisdiction, the plea/objection can be taken at any stage and also in collateral proceedings – Defect of jurisdiction cannot be cured even by consent of parties. [Chief General Manager (IPC) MP Power Trading Co. Ltd. Vs. Narmada Equipments Pvt. Ltd.] (SC)…604**

माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 11(6) व 21 एवं विद्युत अधिनियम (2003 का 36), धारा 86(1)(f) – अधिकारिता का आक्षेप – अभिनिर्धारित – इस

न्यायालय ने पूर्व में निष्कर्षित किया है कि यदि अधिकारिता की कमी अंतर्निहित है, किसी भी प्रक्रम पर और संपार्श्विक कार्यवाहियों में भी अभिवाक्/आक्षेप लिया जा सकता है – अधिकारिता की त्रुटि को पक्षकारों की सहमति द्वारा भी सुधारा नहीं जा सकता है। (चीफ जनरल मैनेजर (आईपीसी) एम पी पॉवर ट्रेडिंग कं. लि. वि. नर्मदा इक्विपमेन्ट प्रा. लि.)
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***Arbitration and Conciliation Act (26 of 1996), Section 34 & 37, The Commercial Courts, Commercial Division, Commercial Appellate Division of High Courts Act, 2015 (4 of 2016), Section 13(1A) and Limitation Act (36 of 1963), Article 116 & 117 & Section 5 – Condonation of Delay* – Held – Looking to the object of speedy disposal sought to be achieved both under Arbitration Act and Commercial Courts Act, for appeals filed u/S 37 of Arbitration Act, that are governed by Articles 116 & 117 of Limitation Act, a delay beyond 90 days, 30 days or 60 days respectively, is to be condoned by way of exception and not by way of rule. [Government of Maharashtra (Water Resources Department) Represented by Executive Engineer Vs. M/s Borse Brothers Engineers & Contractors Pvt. Ltd.]** **(SC)…557**

माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 34 व 37, वाणिज्यिक न्यायालय, उच्च न्यायालय वाणिज्यिक प्रभाग और वाणिज्यिक अपील प्रभाग अधिनियम, 2015 (2016 का 4), धारा 13(1A) एवं परिसीमा अधिनियम (1963 का 36), अनुच्छेद 116 व 117 व धारा 5 – विलंब के लिए माफी – अभिनिर्धारित – माध्यस्थम् अधिनियम एवं वाणिज्यिक न्यायालय अधिनियम, दोनों के अंतर्गत शीघ्रता से निपटान प्राप्त करने के चाहे गये उद्देश्य को देखते हुए, माध्यस्थम् अधिनियम की धारा 37 के अंतर्गत प्रस्तुत अपीलें, जो परिसीमा अधिनियम के अनुच्छेद 116 व 117 द्वारा शासित होती हैं, क्रमशः 90 दिन, 30 दिन या 60 दिन से परे विलंब को एक अपवाद के तौर पर और न कि नियम के तौर पर माफ किया जाना चाहिए। (गव्हर्मेंट ऑफ महाराष्ट्र (वॉटर रिसोर्सेज डिपार्टमेन्ट) द्वारा एग्जिक्यूटिव इंजीनियर वि. मे. बोरसे ब्रदर्स इंजीनियर्स एण्ड कान्ट्रेक्टर्स प्रा.लि.)
(SC)…557

***Arbitration and Conciliation Act (26 of 1996), Section 34 & 37, The Commercial Courts, Commercial Division, Commercial Appellate Division of High Courts Act, 2015 (4 of 2016), Section 13(1A) and Limitation Act (36 of 1963), Article 116 & 117 & Section 5 – Condonation of Delay – Sufficient Cause* – Held – In a fit case where a party has otherwise acted *bonafide* and not in negligent manner, a short delay beyond stipulated period can, in the discretion of the Court, be condoned – In CA No. 995/21, there is long delay of 131 days with no sufficient cause, thus appeal is dismissed – In CA No. 996/21 & 998/21, there is a huge delay of 227 days and a 200 day delay in refiling with no sufficient cause, thus appeals dismissed – In CA No. 999/21, there is delay of 75 days without sufficient explanation, thus condonation granted by High**

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THE INDIAN LAW REPORTS M.P. SERIES, 2021

(Vol.-2)

JOURNAL SECTION

Farewell

HON'BLE MR. JUSTICE MOHAMMED FAHIM ANWAR

Born on April 05, 1959. Did M.Sc., LL.B. and joined Judicial Service on November 06, 1985. Appointed as Civil Judge Class-I on July 28, 1992. Posted as Dy. Welfare Commissioner, Bhopal on deputation in November, 1992. Appointed as C.J.M./A.C.J.M on June 05, 1996 and was posted as A.C.J.M, Gadarwara and thereafter as C.J.M., Narsinghpur in the year 1997. Promoted as officiating District Judge in Higher Judicial Service on November 05, 1997 and was posted as II ADJ, Mandsaur. Posted as ADJ, Khurai in the year 2001. Posted as ADJ and Special Judge, N.D.P.S. Act at Gwalior in the year 2004. Was granted Selection Grade Scale w.e.f. 26.02.2006. Posted as President, District Consumer Forum, Rewa in the year 2007. Worked as Additional Welfare Commissioner, Bhopal Gas Victims, Bhopal in the year 2011. Was granted Super Time Scale w.e.f. 15.04.2014. Posted as District & Sessions Judge, Hoshangabad in the year 2015. Appointed as O.S.D., High Court of M.P., Jabalpur on March 01, 2017. Appointed as Registrar General, High Court of M.P., Jabalpur on April 01, 2017. Sworn-in as Judge of the High Court of Madhya Pradesh on June 19, 2018 and demitted Office on April 04, 2021.

We, on behalf of The Indian Law Reports (M.P. Series) wish His Lordship a healthy, happy and prosperous life.

FAREWELL OVATION TO HON'BLE MR. JUSTICE MOHAMMED FAHIM ANWAR, GIVEN ON 01.04.2021, IN THE CONFERENCE HALL OF SOUTH BLOCK, HIGH COURT OF M.P., JABALPUR.

Hon'ble Mr. Justice Mohammad Rafiq, Chief Justice, bids farewell to the demitting Judge :-

We have gathered here to bid an endearing farewell to Shri Justice Mohammed Fahim Anwar, who is demitting office on attaining the age of superannuation after successful tenure of about 35 years.

Shri Justice Anwar was born on 05 April 1959. After obtaining M.Sc. and LL.B. degrees from Bhopal University, Bhopal, Shri Justice Anwar joined Madhya Pradesh Judicial Service on 06 November 1985, when he was appointed as Civil Judge, Class-II. On 28 July 1992, he was promoted as Civil Judge, Class-I and thereafter on 05 June 1996 as C.J.M./A.C.J.M.. He was promoted as officiating District Judge in Higher Judicial Service on 05.11.1997. Shri Justice Anwar was granted Selection Grade Scale with effect from 26.02.2006 and Super Time Scale with effect from 15.04.2014. While posted at Betul as Civil Judge, Class-II, Justice Anwar discharged the duties of Secretary, Sarni Enquiry Commission, Betul which was presided over by the then District & Sessions Judge, Shri S.K. Chawla and Shri S.K. Chandel. In November 1992, Shri Justice Anwar was posted as Deputy Welfare Commissioner, Bhopal. He also held the posts of President, District Consumer Forum, Officiating Registrar and Additional Welfare Commissioner, Bhopal Gas Victims, Bhopal and O.S.D., High Court of Madhya Pradesh at Jabalpur. Shri Justice Anwar also discharged the duties as the Registrar General of the High Court of Madhya Pradesh with effect from 01.04.2017 which position he held till his elevation as Judge of this Court. During his tenure as Judicial Officer, he remained posted at different places in the State namely Sehore, Betul, Bhainsdehi, Khachraud, Bhopal, Jora, Gadarwara, Narsinghpur, Mandsaur, Khurai, Gwalior, Rewa, Hoshangabad and Jabalpur.

Considering the vast experience treasured by Shri Justice Anwar in the Judiciary, he was elevated as Judge of this High Court on 19.06.2018.

During his tenure as a Judge of Madhya Pradesh High Court, Justice Anwar has disposed of large number of cases, which include Writ Petitions, First Appeals, Second Appeals, Criminal Appeals, Criminal Revisions, Misc. Criminal Cases, Misc. Appeals etc.. Justice Mohammed Fahim Anwar has dealt with Civil and Criminal matters with equal proficiency. A number of his judgments are shining the law journals of the State. The decisions rendered by him reflect his knowledge of law and approach in tackling complex issues. Justice Anwar's

contribution on Judicial and Administrative side has been very illustrative. He is known for his soft and polite behavior and pleasant mannerism.

Shri Justice Anwar has successfully completed his tenure as a Judge of this Court and has contributed to dispensation of justice to the real and needy people, which by itself is a great satisfaction to a Judge. Shri Justice Anwar had respect for everyone, be it Judges or lawyers. He will always be remembered as a Judge whose actions were always just, rational and reasonable.

I, on my behalf and on behalf of my esteemed sister and brother Judges and the Registry of the High Court, wish Shri Justice Mohammed Fahim Anwar and Mrs. Kokab Fahim a very happy, prosperous and glorious life ahead.

Shri R.K. Verma, Additional Advocate General, M.P., bids farewell :-

Today, we have assembled here to bid a farewell as well as extending our best wishes to the Hon'ble Justice Shri Mohammed Fahim Anwar, upon his retirement as a Judge of this Hon'ble High Court, who is to demit his office on 04 April 2021.

My Lord was born on 05 April 1959 at Sehore. Your Lordship joined in the Judicial Service on 06 November 1985. My Lord was promoted as Civil Judge Class-I on 28/07/1992 and as C.J.M. on 05.06.1996 and thereafter was promoted as officiating District Judge in Higher Judicial Service on 05.11.1997. Thereafter, My Lord was elevated as Judge of High Court of Madhya Pradesh on 19 June 2018. My Lord held various posts in different capacities in devotion hence, it is not possible to give one's time to other spheres of life, while simultaneously serving the judiciary thus post-retirement, Your Lordship would be having enough time to focus on other aspects of life. We hope and trust that My Lord's long experience of judicial service would be helpful to poor and needy persons awaiting justice, who would visit for legal advice in the future.

I, on behalf of the State Government, Law Officers of the State and my own behalf, convey our best wishes to Your Lordship for future endeavors. We wish him good health and deep contentment with his accomplishments.

Thank you, Sir,

Shri Raman Patel, President, High Court Bar Association, Jabalpur bids farewell :-

आज माननीय मोहम्मद फहीम अनवर हजूरेआला का विदाई समारोह हो रहा है।

आपके द्वारा 06 नवम्बर 1985 से लेकर आज तक न्यायिक सेवा के विभिन्न पदों पर पदारूढ़ होकर जनमानस के बीच अपनी न्यायिक छवि बनाई है।

हमें जजों की उम्र के लिये संतुष्टि नही है, वह जमाना गया जब व्यक्ति साठ साल में बूढ़ा हो जाता था। अब जजों की रिटायरमेंट उम्र 70 वर्ष होना चाहिये। हमारे पूर्व जज स्व. तारणी प्रसन्न नायक जी 103 वर्ष जिये और जीवन के आख़िरी दिन भी मार्निंग वॉक किये, पर हमारे बुजुर्ग कहते थे, साठा तो पाठा पर ''मनुख बड़ा नहि होत है, समय होत बलवान''।

आदरणीय फहीम साहिब मृदुभाषी, मिलनसार व सुलभ व्यक्तित्व के धनी रहे हैं। आपने अपनी कार्यप्रणाली के दौरान जो कुछ भी अर्जित किया है, उसी का परिणाम है कि आप सिविल जज के पद से पदारूढ़ होकर इस हैसियत तक आपने आने का नजारिया पेश किया। आपका समूचा परिवार आपके प्रति कृतज्ञ है।

जहॉ तक आपके प्रति समूचे बार का प्रश्न है, भले और बुरे दोनो पहलू में लोगों का चिंतन है किंतु आपकी वाणी की मिठास से लोगों में आपके प्रति अपनापन रहा।

जहॉ तक अलविदा होने का प्रश्न है, हम किसी भी पद से विरत हो सकते हैं, पर दिलों में सदैव अमिट रहती है ये जीवन है। समसी मीनाई शायर ने लिखा है

कि कितने मासूम खरीदे गये होशियार बिके,
कितने फनकार खरीदे गये
जिगर दार बिके
इसी दुनिया के मेले में बिकते हुये देख है आजाईम हमने।
यहॉ तो यूसुफ भी बिके, यूसुफ के खरीदार बिके,

पदों की महानता को बखूबी निभाना अपने आप में एक शख्सियत है, जो आपने कायम की। मैं और मेरा बार सदैव आपकी अहमियत को अपने कलेजे से लगा कर रखेंगे। इस उम्मीद के साथ कि आप जब भी हमारे बार में प्रवेश करेंगे, आपका स्वागत करेंगे। मैं आपके उज्ज्वल भविष्य की कामना करता हूँ। इस गरिमामयी पद से विरत होने पर अपनी ओर से, समस्त अधिवक्ताओं की ओर से साधुवाद देता हूँ।

कबीर ने कहा है
कि तू जब जग मे पैदा भयो
जग हासे तू रोये
ऐसी करनी छोड़ जा कि
तू हॉसे जग रोय

'धन्यवाद।'

Shri Harpreet Singh Ruprah, Secretary, High Court Advocates' Bar Association, Jabalpur bids farewell :-

It is with a heavy heart that the Bar bids farewell to one of its most adorable Judges, Hon'ble Shri Justice Mohammed Fahim Anwar, who is demitting the office of the Judge of the High Court of Madhya Pradesh on 04th of April 2021.

My Lord joined the Judicial Service on 06 November 1985. After being promoted as Officiating District Judge, owing to Your Lordship's legal acumen and experience, My Lord soon earned a name as one of the most impartial and bold Judge in the Higher Judicial Service. Thereafter, My Lord held several prestigious assignments including Deputy Welfare Commissioner, Bhopal, President, District Consumer Forum, Officiating Registrar and Additional Welfare Commissioner, Bhopal Gas Victims, Bhopal.

We, the lawyers at Jabalpur, had the privilege to come in touch with Your Lordship, when My Lord was posted as O.S.D., High Court of Madhya Pradesh at Jabalpur and subsequently as Registrar General of the High Court of Madhya Pradesh; a position which Your Lordship gracefully held till the elevation as Judge of this Court.

On 19th of June 2018, we all witnessed My Lord being elevated to this Hon'ble Court. Your Lordship has always been a great Judge, who has been gifted with a personality which conquered all who had the privilege to know him. My Lord always maintained the highest standards of dignity and courtesy which was unfailing; an integrity which was unbending; warmth and gentility which was rich and infectious. My Lord displayed reservoirs of courage and persistence, and had a deep and abiding compassion for the poor as well as the downtrodden.

Your Lordship would be missed by each and every one of us. Your Lordship's smile, gentlemanly personality, humanitarian approach, the warmth and responsiveness displayed equally towards the Senior as well as Junior Members of the Bar, shall be fondly remembered for all times to come.

I, on behalf of the High Court Advocates' Bar Association, Jabalpur, and my own behalf extend best wishes to Your Lordship, and hope that My Lord's vast experience and knowledge gained over the last four decades, in the legal field, would be beneficially utilized. Once again I extend my heartfelt good wishes to My Lord as well as respected Madam and family for a healthy, peaceful and happy long life.

Shri Radhelal Gupta, Representative, State Bar Council of M.P., bids farewell :-

With a heavy heart, we all have gathered here to bid farewell to Justice Shri Mohammed Fahim Anwar, who is demitting the office on 04 April 2021. I am privileged to get this rare opportunity to speak about My Lord Justice Shri Mohammed Fahim Anwar who is an embodiment of success earned through sincerity and dedication.

Hon'ble Shri Justice Mohammed Fahim Anwar entered in Judicial Service in the year 1985 and continued till his elevation as Judge of the High Court.

Hon'ble Shri Justice Mohammed Fahim Anwar held the posts of Deputy Welfare Commissioner, Bhopal, President, District Consumer Forum, Officiating Registrar and Additional Welfare Commissioner, Bhopal Gas Victims, Bhopal and O.S.D., High Court of Madhya Pradesh at Jabalpur. Hon'ble Shri Justice Mohammed Fahim Anwar also discharged the duties as the Registrar General of the High Court of Madhya Pradesh in the year 2017.

Hon'ble Shri Justice Mohammed Fahim Anwar was elevated as Judge of High Court of Madhya Pradesh on 19 June 2018.

My Lord's smiling face makes the atmosphere of the Court very congenial and friendly to members of the Bar. We will be missing My Lord on every occasion, as My Lord is humorous who leaves no opportunity of making the Court atmosphere lighter. My Lord leads a simple life and every person who interacts with him wonders how he is not affected by the burden of professional demands. A soft-spoken person, he puts every person interacts whether in Court or outside at ease and one never feels that one is talking to a luminary.

My Lord, I, on behalf of the State Bar Council of Madhya Pradesh, on behalf of advocates of Madhya Pradesh and my own behalf, wish Your Lordship all the best for the days to come and wish you a very happy and healthy retirement life.

At the end I would like to express my feeling :

ऑखो से दूर सही,
दिल से कहा जाओगे।
विदा होने वाले तुम हमे,
याद बहुत आओगे।

Thank You.

Shri Jinendra Kumar Jain, Assistant Solicitor General, bids farewell :-

आज हम श्री मोहम्मद फहीम अनवर के विदाई समारोह हेतु एवं उनके बीते पलों को याद करने एकत्रित हुए हैं। आज का दिन जीवन का वह महत्वपूर्ण दिन है, जो हमें परिवर्तन का अहसास कराता है। इस अवसर पर हम आपकी भावभीनी विदाई के साथ आपका स्वागत, वंदन करते हैं।

आज 1 अप्रैल है। आज के दिन हम आपका स्वागत शब्दों के फूलों से कर रहे है। आने वाला कल कंटक रहित रहे, एवं हर क्षण, हर घड़ी फूलों की खुशबू की तरह महकता रहे।

न्यायामूर्ति श्री फहीम अनवर की जीवन यात्रा के 62 वर्ष पूरे हुये। इन 62 वर्षों में बचपन, मित्रों एवं परिवार के साथ, उसके बाद विकास की सीढ़ी, शैक्षणिक योग्यता के पश्चात् परिवार की जिम्मेदारी के लिये एवं प्रगति के पथ को आगे ले जाने के लिये रास्ते का चयन करना, उसमें सफल होंगे या नहीं, इन सब का सामना करते हुये न्याय मंदिर की ओर अग्रसर होते हुये निरंतर सीढ़ी दर सीढ़ी आगे बढ़ते हुये व्यवहार न्यायाधीश से उच्च न्यायालय के न्यायाधिपति पद पर पदासीन होना निश्चित ही गौरव की बात है, इसके लिये हम आपकी लगन, मेहनत एवं कृतित्व की सराहना करते हैं।

इस अवसर पर मैं अपनी ओर से, भारत सरकार की ओर से, समस्त केन्द्रीय विधि अधिकारियों की ओर से पुनः आपका स्वागत, वंदन करता हूँ, एवं आपके उज्ज्वल भविष्य की कामना करता हूँ।

''धन्यवाद ''

———————————————

Shri Aditya Adhikari, General Secretary, Senior Advocates' Council, Jabalpur bids farewell:-

We have assembled here today to bid farewell to Hon'ble Shri Justice Anwar who shall be demitting the high office of a Judge of this High Court in a few days' time.

My Lord began his career in the Judicial Service in the year 1985. Looking to his exceptional performance and ability, he was granted several promotions in the State Judicial Service. In view of My Lord's unsurpassed administrative and judicial acumen, My Lord was elevated as a Judge of this High Court on 19.06.2018.

My Lord has played a major role in increasing the disposal of cases by deciding several cases. My Lord has also decided many legal issues which shall keep on guiding the legal fraternity for all times to come.

My Lord has played a major role in increasing the disposal of cases by deciding several cases. My Lord has also decided many legal issues which shall keep on guiding the legal fraternity for all times to come.

My Lord played a major role as a Registrar General of this High Court by streamlining the administration and making it efficient. The contribution of My

Lord to the Judiciary shall be remembered by one and all. I wish My Lord all success for the upcoming new assignments.

On behalf of the Senior Advocates' Council and on my own behalf, I wish Your Lordship a very happy retirement, good health and all the best for the future.

Thank you.

Farewell Speech delivered by Hon'ble Mr. Justice Mohammed Fahim Anwar :-

(I) I have no words to express my gratitude for the praise, wishes and blessings showered on me by all of you. I do not know how much do I deserve. I had many shortcomings but still the members of the Bar treated me as good Judge. It is all due to the greatness of the members of the Bar for which, I shall always remain thankful.

(II) I have joined Judicial Service as Civil Judge in the year 1985 and after completion of 33 years of service, I was elevated as Judge of this august institution on 19 June, 2018. Friends, reaching the high Office of the Judge of the High Court is the culmination of the ambition and cherished dreams of a Civil Judge, starting from the lowest rung of the ladder of the State Judicial hierarchy. I am an ardent believer of Allah, the almighty. Without His will, nothing can happen. By His grace, I have completed 35 years of service in the domain of justice quite successfully and to my entire satisfaction within.

(III) I am grateful to Hon'ble Shri Justice Hemant Gupta, the then Chief Justice and presently Judge of Supreme Court of India, who has administered the oath of this pious Office to me and instilled much confidence in me during my tenure as Registrar General and Judge of this Court. I am also grateful to the members of collegium who had nominated me for this prestigious constitutional post.

(IV) At present I want to say, the Judges and the Advocates are the members of the judicial family and without any one of them, adjudication is not possible. Cordial relationship, friendly atmosphere, faith, honesty and other moral values among these two limbs are the basic and necessary ingredients for imparting quick justice in true sense. Everybody expect that we should work together in accordance with law by maintaining decorum and dignity of the Court in a friendly atmosphere.

(V) I convey my thanks to Hon'ble Shri Justice Rajendra Menon, the then Acting Chief Justice and Hon'ble Shri Justice J.P. Gupta, who were very judicious, generous, cordial and helping me, I feel pride and privilege to share the

Bench with Lordships to see their working closely. I can never forget the love and guidance of Hon'ble Shri Justice R.S. Jha and Hon'ble Shri Justice J.K. Maheshwari, the then Senior Judges of this Court with whom I shared the Bench for longest time and they were always helping me at my tenure as Registrar General and Judge of this Court.

(VI) My esteemed brothers at the Bench were always generous and kind to me in providing valuable guidance and share their rich experience at times when the same was most needed. Their helping attitude enabled me to discharge my duties in a confident manner.

(VII) Express my deep sense of gratitude to Hon'ble Justice Mohd. Rafiq Sahab, the Chief Justice, for his love and affection which we has showered upon all the High Court Judges of M.P., subordinate courts and judicial fraternity of High Court of Madhya Pradesh. In my humble opinion, a person who is entrusted to head the huge justice imparting system like High Court of Madhya Pradesh must not only be wise, considerate and administratively strong but he must be humble and generous. I myself have learnt the meaning of generosity and brotherhood from the Hon'ble Chief Justice Shri Mohd. Rafiq Sahab and purpose of calling colleague Judges as brother, otherwise before this, here at Jabalpur we were using it as a formal word. I and other colleague Judges, members of all Bars pray to the almighty to give us the occasion to see his Lordship enthroned on the highest seat of the Indian Judicial System, which he deserves. I am very much inclined to add two lines of Urdu Shaeri in his respect –

"हजारों साल नर्गिस अपनी बेनूरी पर रोती है
बडी मुश्किल से होता है चमन में दीदावर पैदा।"

(VIII) I feel it to be my great privilege that I could get an opportunity to be posted at Jabalpur. Jabalpur Bar has historic past and bright future ahead and has highest of traditions. When I came here, I was stranger to all and when I am leaving today, I visualize that everybody is mine and I belong to all of you. I am not detached but attached to everybody here due to your love and affection. I feel distinctly lucky to have worked at Jabalpur which is known as 'Sanskardhani'.

(IX) I have a word of advice for young lawyers that kindly follow path of senior lawyers. Top is always vacant, it is for you to fix and measure your own goal, to which you have to reach. Work hard with honesty, integrity and utmost respect to the Court. You are going to become senior one day, keep patience in formative years, maintain dignity of highest noble profession. Do not make justice a commodity, respect it. Always remain a learner, this is ocean of law, you cannot swim it in a day, go on and you will find new treasure embedded in deep of ocean.

(X) I am extremely happy that my family always stood with me. I have received constant support from my life partner wife Smt. Kokab Fahim. Without her support and cooperation, I could not have completed this long journey as a Judge. I am also thankful to my son Mohd. Nadir Fahim and Mohd. Sameer Fahim for their support and affection.

(XI) I would like to thank everyone with whom I have been associated with or who have come in contact with me in discharge of my duties. I was extended full coordination by the Registrar General and the Officers of the Registry, I am thankful to them. A special word of thanks goes to my personal staff namely Shri Santosh P. Mathew, Shri Santosh Massey, Shri K.K. Chouksey, Smt. Manju Chouksey, Shri Tajammul Hussain Khan, Shri Mohd. Irfan Siddiqui, Shri Sanjay Soni, Shri Arvind Patel, Shri Rajjan Prasad Kushwaha, Shri Mohan Yadav, Shri Ashish Bhatt, Shri Dilip Singh Sajwan and Shri Ram Janm Yadav for their whole hearted support and assistance.

(XII) I would also like to record my appreciation for the day to day assistance provided by the Protocol Section more particularly by Shri K.K. Pithwe and Shri J.P. Kale. I am also thankful to Dr. Sonkar who has given me full medical assistance and advise. I bid you all an affectionate good bye with the lines from deepest corner of my heart –

''किसी को अपनी खूबियों का अहसास नहीं होता,

सरपरस्त मिलना इत्तिफाक नहीं होता,

अच्छा ही कुछ किया होगा हमने,

वरना आप रहे हैं साथ, विश्वास नहीं होता ।''

Thank you Sir, thank you very much for everything you have done for me.

Jai Hind.

I.L.R. [2021] M.P. 557 (SC)
SUPREME COURT OF INDIA

Before Mr. Justice R.F. Nariman, Mr. Justice B.R. Gavai & Mr. Justice Hrishikesh Roy

CA No. 995/2021 decided on 19 March, 2021

GOVERNMENT OF MAHARASHTRA (WATER RESOURCES DEPARTMENT) REPRESENTED BY EXECUTIVE ENGINEER …Appellant

Vs.

M/S BORSE BROTHERS ENGINEERS & CONTRACTORS PVT. LTD. …Respondent

(Alongwith CA Nos. 999/2021 & 996-998/2021)

***A. Arbitration and Conciliation Act (26 of 1996), Section 34 & 37, The Commercial Courts, Commercial Division, Commercial Appellate Division of High Courts Act, 2015 (4 of 2016), Section 13(1A) and Limitation Act (36 of 1963), Article 116 & 117 & Section 5 – Condonation of Delay* – Held – Looking to the object of speedy disposal sought to be achieved both under Arbitration Act and Commercial Courts Act, for appeals filed u/S 37 of Arbitration Act, that are governed by Articles 116 & 117 of Limitation Act, a delay beyond 90 days, 30 days or 60 days respectively, is to be condoned by way of exception and not by way of rule. (Para 53 & 61)**

क. माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 34 व 37, वाणिज्यिक न्यायालय, उच्च न्यायालय वाणिज्यिक प्रभाग और वाणिज्यिक अपील प्रभाग अधिनियम, 2015 (2016 का 4), धारा 13(1A) एवं परिसीमा अधिनियम (1963 का 36), अनुच्छेद 116 व 117 व धारा 5 – विलंब के लिए माफी – अभिनिर्धारित – माध्यस्थम् अधिनियम एवं वाणिज्यिक न्यायालय अधिनियम, दोनों के अंतर्गत शीघ्रता से निपटान प्राप्त करने के चाहे गये उद्देश्य को देखते हुए, माध्यस्थम् अधिनियम की धारा 37 के अंतर्गत प्रस्तुत अपीलें, जो परिसीमा अधिनियम के अनुच्छेद 116 व 117 द्वारा शासित होती हैं, क्रमशः 90 दिन, 30 दिन या 60 दिन से परे विलंब को एक अपवाद के तौर पर और न कि नियम के तौर पर माफ किया जाना चाहिए।

***B. Arbitration and Conciliation Act (26 of 1996), Section 34 & 37, The Commercial Courts, Commercial Division, Commercial Appellate Division of High Courts Act, 2015 (4 of 2016), Section 13(1A) and Limitation Act (36 of 1963), Article 116 & 117 & Section 5 – Condonation of Delay – Sufficient Cause* – Held – In a fit case where a party has otherwise acted *bonafide* and not in negligent manner, a short delay beyond stipulated period can, in the discretion of the Court, be condoned – In CA No. 995/21, there is long delay of 131 days with no sufficient cause, thus appeal is dismissed – In CA No. 996/21**

& 998/21, there is a huge delay of 227 days and a 200 day delay in refiling with no sufficient cause, thus appeals dismissed – In CA No. 999/21, there is delay of 75 days without sufficient explanation, thus condonation granted by High Court set aside and appeal is allowed – Appeals disposed.

(Paras 56 & 61 to 68)

ख. माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 34 व 37, वाणिज्यिक न्यायालय, उच्च न्यायालय वाणिज्यिक प्रभाग और वाणिज्यिक अपील प्रभाग अधिनियम, 2015 (2016 का 4), धारा 13(1A) एवं परिसीमा अधिनियम (1963 का 36), अनुच्छेद 116 व 117 व धारा 5 – विलंब के लिए माफी – पर्याप्त कारण – अभिनिर्धारित – एक उपयुक्त प्रकरण में जहां एक पक्षकार ने अन्यथा सद्भावपूर्वक और न कि उपेक्षापूर्ण ढंग से कार्य किया है, नियत अवधि से परे थोड़ा विलंब, न्यायालय के विवेकाधिकार में माफ किया जाए – CA No. 995/21 में, बिना पर्याप्त कारण के 131 दिन का लंबा विलंब है, अतः अपील खारिज – CA No. 996/21 व 998/21 में, पुनः प्रस्तुत करने में बिना पर्याप्त कारण के 227 दिन एवं 200 दिन का अत्यधिक विलंब है अतः अपीलें खारिज – CA No. 999/21 में, बिना पर्याप्त स्पष्टीकरण के 75 दिनों का विलंब है अतः उच्च न्यायालय द्वारा प्रदान की गयी माफी अपास्त एवं अपील मंजूर – अपीलें निराकृत।

C. Arbitration and Conciliation Act (26 of 1996), Section 34 & 37, The Commercial Courts, Commercial Division, Commercial Appellate Division of High Courts Act, 2015 (4 of 2016), Section 13(1A) and Limitation Act (36 of 1963), Article 116 & 117 & Section 5 – Condonation of Delay – Sufficient cause – Right of Appellant **– Held – Merely because sufficient cause has been made out in the facts of a given case, there is no right in the appellant to have delay condoned – Similarly, merely because the government is involved, a different yardstick for condonation of delay cannot be laid down – The expression "sufficient cause" is not itself a loose panacea for the ill or pressing negligent and stale claims. (Paras 56, 57 & 60)**

ग. माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 34 व 37, वाणिज्यिक न्यायालय, उच्च न्यायालय वाणिज्यिक प्रभाग और वाणिज्यिक अपील प्रभाग अधिनियम, 2015 (2016 का 4), धारा 13(1A) एवं परिसीमा अधिनियम (1963 का 36), अनुच्छेद 116 व 117 व धारा 5 – विलंब के लिए माफी – पर्याप्त कारण – अपीलार्थी का अधिकार – अभिनिर्धारित – मात्र इसलिए कि एक दिये गये प्रकरण के तथ्यों में पर्याप्त कारण बनता है, विलंब माफ किये जाने के लिए अपीलार्थी का कोई अधिकार नहीं है – इसी प्रकार, मात्र इसलिए कि सरकार समाविष्ट है, विलंब की माफी हेतु एक भिन्न मापदण्ड अधिकथित नहीं किया जा सकता – अभिव्यक्ति ''पर्याप्त कारण'' अपने आप में, उपेक्षापूर्ण एवं बासी दावों का जोर लगाने की बीमारी हेतु एक शिथिल सर्वरोगहर/निवारक नहीं है।

D. Arbitration and Conciliation Act (26 of 1996), Section 37 & 43 and Limitation Act (36 of 1963), Section 5 & 29(2) – Applicability **– Held – Section 37 of Arbitration Act when read with Section 43 thereof, makes it clear that provisions of Limitation Act will apply to appeals that are filed u/S**

37 – Section 5 of Limitation Act will apply to aforesaid appeals both by virtue of Section 43 of Arbitration Act and by virtue of Section 29(2) of Limitation Act. (Para 23)

घ. माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 37 व 43 एवं परिसीमा अधिनियम (1963 का 36), धारा 5 व 29(2) – प्रयोज्यता – अभिनिर्धारित – माध्यस्थम् अधिनियम की धारा 37 को उसकी धारा 43 के साथ पढ़े जाने पर यह स्पष्ट है कि परिसीमा अधिनियम के उपबंध, धारा 37 के अंतर्गत प्रस्तुत की गई अपीलों पर लागू होंगे – परिसीमा अधिनियम की धारा 5, माध्यस्थम् अधिनियम की धारा 43 के कारण से एवं परिसीमा अधिनियम की धारा 29(2) दोनों के कारण से, उपरोक्त अपीलों को लागू होगी।

***E. Constitution – Article 141 – Binding Precedent* – Held – Judgment of N.V. International was passed by two Judges of Supreme Court – Though, the said judgment is overruled in this case, but High Court was bound to follow it on the date of its judgment by High Court, by virtue of Article 141 of Constitution. (Para 50 & 64)**

ङ. संविधान – अनुच्छेद 141 – बाध्यकारी पूर्व निर्णय – अभिनिर्धारित – एन. वी. इंटरनेशनल का निर्णय, उच्चतम न्यायालय के दो न्यायाधिपतियों द्वारा पारित किया गया था – यद्यपि, इस प्रकरण में उक्त निर्णय उलट दिया गया किंतु उच्च न्यायालय द्वारा निर्णय पारित किये जाने की तिथि को उसका अनुसरण करने के लिए, संविधान के अनुच्छेद 141 के कारण उच्च न्यायालय बाध्य था।

***F. The Commercial Courts, Commercial Division, Commercial Appellate Division of High Courts Act, 2015 (4 of 2016), Section 14 – Limitation* – Held – Though the object of expeditious disposal of appeals is laid down in Section 14 of the Act of 2015, the language of Section 14 makes it clear that the period of six months spoken of is directory and not mandatory. (Para 34)**

च. वाणिज्यिक न्यायालय, उच्च न्यायालय वाणिज्यिक प्रभाग और वाणिज्यिक अपील प्रभाग अधिनियम, 2015 (2016 का 4), धारा 14 – परिसीमा – अभिनिर्धारित – यद्यपि अपीलों के शीघ्र निपटान का उद्देश्य, 2015 के अधिनियम की धारा 14 में अधिकथित किया गया है, धारा 14 की भाषा यह स्पष्ट करती है कि बताई गई छः माह की अवधि निदेशात्मक है और न कि आज्ञापक।

***G. The Commercial Courts, Commercial Division, Commercial Appellate Division of High Courts Act, 2015 (4 of 2016), Section 13(1A) –Limitation – Condonation of Delay* – Held – Section 13(1A) only provides for a limitation period of 60 days from date of judgment or order appealed against, without further going into whether delay beyond this period can or cannot be condoned. (Para 33)**

छ. वाणिज्यिक न्यायालय, उच्च न्यायालय वाणिज्यिक प्रभाग और वाणिज्यिक अपील प्रभाग अधिनियम, 2015 (2016 का 4), धारा 13(1A) – परिसीमा – विलंब के लिए

माफी – अभिनिर्धारित – धारा 13(1A) निर्णय या आदेश जिसके विरूद्ध अपील की गई है, की तिथि से 60 दिनों की परिसीमा अवधि उपबंधित करती है, बिना आगे यह वर्णित किये कि क्या इस अवधि से परे विलंब माफ किया जा सकता है अथवा नहीं किया जा सकता।

***H. Legal Maxim – "us res magis valeat quam pereat"* – Discussed and explained. (Para 52)**

ज. विधिक सूत्र – ''अमान्य से मान्य करना अच्छा है'' – विवेचित एवं स्पष्ट किया गया।

Cases referred:

(2020) 2 SCC 109, (2020) 2 SCC 111, (2008) 7 SCC 169, (2018) 14 SCC 715, (2020) 4 SCC 234, (2009) 5 SCC 791, (1963) 1 SCR 70, (2001) 8 SCC 470, (2006) 6 SCC 239, (2019) 4 SCC 401, (2005) 6 SCC 344, (2019) 12 SCC 210, (2016) 16 SCC 152, (2017) 5 SCC 42, (2019) 11 SCC 633, (2017) 15 SCC 133, (2004) 8 SCC 724, (2008) 8 SCC 505, (2019) 13 SCC 445, (2003) 3 SCC 57, (2008) 6 SCC 1, (2004) 7 SCC 381, 2020 SCC OnLine SC 1053, (2013) 14 SCC 81, (2012) 3 SCC 563, (2014) 1 SCC 592, (2014) 2 SCC 422, (2014) 11 SCC 709, (2020) 10 SCC 654, (2020) 10 SCC 667, (1962) 2 SCR 762.

J U D G M E N T

The Judgment of the Court was delivered by : **R.F. NARIMAN, J.** :- Leave granted. Delay condoned in SLP (C) Diary No.18079 of 2020.

2. The substantial question of law which arises in these appeals is as to whether the judgment of a Division Bench of this Court in *N.V. International v. State of Assam,* (2020) 2 SCC 109 **["N.V. International"]** lays down the law correctly. This Court followed its earlier judgment in *Union of India v. Varindera Constructions Ltd.,* (2020) 2 SCC 111 **["Varindera Constructions"]** and held as follows:

> **"3.** Having heard the learned counsel for both sides, we may observe that the matter is no longer res integra. In *Union of India* v. *Varindera Constructions Ltd. [Union of India* v. *Varindera Constructions Ltd.,* (2020) 2 SCC 111] , this Court, by its judgment and order dated 17-9-2018 *[Union of India* v. *Varindera Constructions Ltd.,* (2020) 2 SCC 111] held thus: (SCC p. 112, paras 1-5)
>
> "*1*. Heard the learned counsel appearing for the parties.
>
> *2*. By a judgment dated 19-4-2018 in *Union of India* v. *Varindera Constructions Ltd. [Union of India* v. *Varindera Constructions Ltd.,* (2018) 7 SCC 794], this Court has in near identical facts and circumstances allowed the appeal of the Union of India in a proceeding arising from an arbitral award.

3. Ordinarily, we would have applied the said judgment to this case as well. However, we find that the impugned Division Bench judgment dated 10-4-2013 *[Union of India* v. *Varindera Constructions Ltd.,* 2013 SCC OnLine Del 6511] has dismissed the appeal filed by the Union of India on the ground of delay. The delay was found to be 142 days in filing the appeal and 103 days in refiling the appeal. One of the important points made by the Division Bench is that, apart from the fact that there is no sufficient cause made out in the grounds of delay, since a Section 34 application has to be filed within a maximum period of 120 days including the grace period of 30 days, an appeal filed from the selfsame proceeding under Section 37 should be covered by the same drill.

4. Given the fact that an appellate proceeding is a continuation of the original proceeding, as has been held in *Lachmeshwar Prasad Shukul* v. *Keshwar Lal Chaudhuri [Lachmeshwar Prasad Shukul* v. *Keshwar Lal Chaudhuri,* 1940 SCC OnLine FC 10 : AIR 1941 FC 5] , and repeatedly followed by our judgments, we feel that any delay beyond 120 days in the filing of an appeal under Section 37 from an application being either dismissed or allowed under Section 34 of the Arbitration and Conciliation Act, 1996 should not be allowed as it will defeat the overall statutory purpose of arbitration proceedings being decided with utmost despatch.

5. In this view of the matter, since even the original appeal was filed with a delay period of 142 days, we are not inclined to entertain these special leave petitions on the facts of this particular case. The special leave petitions stand disposed of accordingly.

Pending applications, if any, also stand disposed of."

4. We may only add that what we have done in the aforesaid judgment is to add to the period of 90 days, whhich is provided by statute for filing of appeals under Section 37 of the Arbitration Act, a grace period of 30 days under Section 5 of the Limitation Act by following *Lachmeshwar Prasad Shukul [Lachmeshwar Prasad Shukul* v. *Keshwar Lal Chaudhuri,* 1940 SCC OnLine FC 10 : AIR 1941 FC 5] , as also having regard to the object of speedy resolution of all arbitral disputes which was uppermost in the minds of the framers of the 1996 Act, and which has been strengthened from time to time by amendments made thereto. The present delay being beyond 120 days is not liable, therefore, to be condoned."

3. In two of the three appeals before us, i.e., Civil Appeal arising out of SLP (C) No. 665 of 2021 and Civil Appeal arising out of SLP (C) Diary No.18079 of 2020, the High Courts of Bombay and Delhi vide judgments dated 17.12.2020 and 15.10.2019 respectively, dismissed the appeals filed by the Government of Maharashtra and by the Union of India respectively, refusing to condone the delay in the filing of the appeal under section 37 of the Arbitration and Conciliation Act, 1996 **["Arbitration Act"]** beyond 120 days. So far as the Civil Appeal arising out of SLP (C) No.15278 of 2020 is concerned, the High Court of Madhya Pradesh refused to follow the judgment of this Court in *N.V. International* (supra) stating that there is a conflict between this judgment and the judgment of a larger Bench of this Court reported in *Consolidated Engg. Enterprises v. Irrigation Deptt.,* (2008) 7 SCC 169 **["Consolidated Engg."]**. It was, therefore, held that it was open for the High Court to condone the delay applying section 5 of the Limitation Act, 1963 **["Limitation Act"]** and, as a matter of fact, a delay of what was stated to be 57 days was condoned.

4. Shri Sandeep Sudhakar Deshmukh, learned counsel appearing on behalf of the Government of Maharashtra (Water Resources Department) **["Govt of Maharashtra"],** the appellant in Civil Appeal arising out of SLP (C) No. 665 of 2021, submitted that the Arbitration Act in its original avatar did not include the concept or idea of expeditious resolution of disputes. At best, the Arbitration Act can be treated as a mechanism providing for alternate dispute resolution. This original objective is continued by the Arbitration and Conciliation (Amendment) Act, 2015 **["2015 Amendment"]** which provides a time limit for arbitral awards and for fast track procedure contained in sections 29A and 29B of the Arbitration Act. This being the case, the very foundation of *N.V. International* (supra) is erroneous in law. Shri Deshmukh also argued that section 37 of the Arbitration Act provides for appeals from several orders, including orders made under sections 8, 9, 16 and 17, apart from orders that may be made under section 34 of the Arbitration Act. According to him, the rationale or logic contained in *N.V. International* (supra) would perhaps apply only to appeals from section 34 orders, but not to orders that are passed under any of the other aforesaid sections, as there is no hard and fast application of a 120-day limitation period when it comes to applications that have been filed under any of these sections.

5. Shri Deshmukh also argued that section 33 of the Arbitration Act contemplates correction and interpretation of an award, the arbitral tribunal being clothed with the power to extend time without there being any outer limit. He also stated that vide section 29(2) of the Limitation Act, the period of limitation for filing applications under the Arbitration Act would be governed by Article 137 of the Limitation Act, providing for a much longer limitation period of three years. He further argued that Articles 116 and 117 of the Limitation Act provide different periods of limitation, being 90 days and 30 days respectively. Since these different

prescribed periods lead to arbitrary results, the concept of an "appeal" would have to be read into the definition of the term "application" so that the "appeal" provision under section 37 of the Arbitration Act is uniformly governed by Article 137 of the Limitation Act, which would lead to a uniform limitation period of three years. He also argued that to read the period of limitation contemplated under section 34(3) for an appeal filed under section 37 of the Arbitration Act, would amount to judicial legislation due to the absence of any period of limitation provided in section 37. He placed reliance on a large number of judgments citing cases where the Limitation Act had been held to be applicable to arbitration proceedings and others in which it had not so been held. He also cited a large number of judgments on section 29(2) of the Limitation Act, relating to the meaning of "express exclusion" under the said section. He then cited judgments on the applicability of Article 137 of the Limitation Act and a judgment which eschews judicial legislation.

6. Ms. Aishwarya Bhati, learned Additional Solicitor General appearing on behalf of the Union of India, the appellant in the Civil Appeal arising out of SLP (C) Diary No. 18079 of 2020, read in detail the provisions of the Commercial Courts Act, 2015 **[" Commercial Courts Act"]** and referred to the two Law Commission Reports which led to its enactment, namely the 188th Law Commission Report and the 253rd Law Commission Report. She then referred to this Court's judgments in *Kandla Export Corpn. v. OCI Corpn.,* (2018) 14 SCC 715 **["Kandla Export Corpn"]** and *BGS SGS SOMA JV v. NHPC,* (2020) 4 SCC 234, dealing with the interplay between section 13 of the Commercial Courts Act and section 37 of the Arbitration Act. She argued that a limitation period of 60 days was laid down by section 13(1A) of the Commercial Courts Act, and though section 14 thereof commands that an expeditious disposal of appeals take place within a period of six months from the date of filing such appeal, neither of the two provisions bound appellate courts not to apply section 5 of the Limitation Act to relax the period of limitation in deserving cases. She also relied upon section 12A of the Commercial Courts Act, which speaks of the Limitation Act in the context of the Commercial Courts Act. She then referred to section 16 of the Commercial Courts Act read with the Schedule, and, in particular, the amendment made to Order VIII Rule 1 of the Code of Civil Procedure, 1908 [" **CPC"]** which closes the right of defence after a certain period of limitation is over, which is to be contrasted with section 13 of the Commercial Courts Act, which contains no such provision. She then referred to judgments under different statutes such as the Insolvency and Bankruptcy Code, 2016 **["IBC"]** and the Electricity Act, 2003 in which section 5 of the Limitation Act becomes inapplicable by virtue of either the scheme of the statute in question or by virtue of an "express exclusion" spoken of in section 29(2) of the Limitation Act.

7. Shri Amalpushp Shroti, learned counsel appearing for the respondents in the Civil Appeal arising out of SLP (C) No. 15278 of 2020, broadly supported the arguments of Shri Deshmukh and Ms. Bhati, while citing certain other judgments to buttress the same submissions.

8. Shri Vinay Navare, learned Senior Advocate appearing for M/s Borse Brothers Engineers and Contractors Pvt. Ltd **["Borse Bros."],** the respondent in the Civil Appeal arising out of SLP (C) No. 665 of 2021, was at pains to point out the conduct of the Govt of Maharashtra and added that if a period of 60 days is to be reckoned under the Commercial Courts Act, the appeal filed by the Govt of Maharashtra would be delayed by a period of 131 days for which there is no explanation worthy of the name. He relied heavily on the impugned judgment of the High Court of Bombay which had also stated that though the certified copy of the judgment was applied for and was ready by 27.05.2019, the Govt of Maharashtra wrongly mentioned that it received such copy only on 24.07.2019, as a result of which the Govt of Maharashtra had not appeared before the High Court with clean hands.

9. Further, Shri Navare sought to answer Shri Deshmukh's submission that the rationale of *N.V. International* (supra) can and should apply to an appeal filed against a section 34 order, as several different appeal provisions were all bunched together in one section and could have been the subject matter of different appellate provisions contained in the very original proceeding that was sought to be appealed against. He, therefore, argued that the scheme contained in the Arbitration Act, insofar as appeals from section 8 applications are concerned, is that it is only if a section 8 application is refused that an appeal lies and not otherwise, contrasting it with an appeal against a section 34 order, which lies whether or not the court allows the section 34 application. Hence, according to the learned Senior Advocate, each appellate provision would have its own rationale, appeals in the cases of section 8, 9, 16 and 17 of the Arbitration Act allowing for sufficient cause to be shown beyond the period of 30 days, as opposed to appeals filed under section 34, which ought to allow for sufficient cause being shown upto a period of 30 days, or else the whole object of section 34 would be destroyed. He referred to the Statement of Objects and Reasons of the Arbitration Act and judgments to show that Shri Deshmukh's submission that the Arbitration Act provided only alternate dispute resolution and not speedy disposal was wholly incorrect. He also pointed out that specific timelines are contained in several sections of the Arbitration Act such as sections 9(2), 11(4), 11(13), 13(2)-(5), 29A, 29B, 33(3)-(5) and 34(3), to indicate that the object of speedy disposal was at the heart of the Arbitration Act.

10. Shri Navare then relied upon the Commercial Courts Act and in particular, on sections 13(1A) and 14, to show that the whole object of speedy disposal of appeals contained in the Commercial Courts Act would be given a go-bye if long

periods of delay beyond 30 days are to be condoned, since the appeal itself has to be decided within a period of six months. He also cited a number of judgments and supported the judgment of this Court in *N.V. International* (supra) by arguing that a judge is not helpless when faced with a provision which, when literally read, would result in arbitrary and unjust orders being passed. He also referred to judgments where a *casus omissus* could be supplied, which is what was done in *N.V. International* (supra).

11. Shri Manoj Chouhan, learned counsel appearing on behalf of M/s Swastik Wires, the appellant in Civil Appeal arising out of SLP (C) No.15278 of 2020, supported the impugned judgment dated 27.01.2020 of the High Court of Madhya Pradesh and argued that this Court's judgment in *Consolidated Engg.* (supra), being a judgment of three learned judges, would prevail over the judgment of this Court in *N.V. International* (supra), which is only delivered by two learned judges and, therefore, delay can be condoned. He also added that once section 5 of the Limitation Act applies, the Court cannot impose any limits on the expression "sufficient cause" and even if there are long delays and sufficient cause is made out, such delays can be condoned. Further, he argued that this Court could use Article 142 of the Constitution, which is a veritable *brahmastra* and panacea for all ills, to do justice in individual cases.

12. Dr. Amit George, learned counsel appearing for M/s Associated Construction Co., the respondent in the Civil Appeal arising out of SLP (C) Diary No. 18079 of 2020, argued that section 13 of the Commercial Courts Act, having regard to the object of speedy disposal sought to be achieved, excludes the application of section 5 of the Limitation Act altogether. For this purpose, he relied heavily upon the judgment of this Court in *Kandla Export Corpn* (supra) and the judgment of this Court in *CCE & Customs v. Hongo India (P) Ltd.,* (2009) 5 SCC 791 **["Hongo"]** which dealt with section 35-H(1) of the Central Excise Act, 1944 **["Central Excise Act"]**. He also relied upon other judgments which interpreted section 29(2) of the Limitation Act to state that the scheme of a particular statute may make it clear that there is an "express exclusion" of section 5 of the Limitation Act, which is the case under the Commercial Courts Act. He then relied strongly upon the judgment in *N.V. International* (supra) by supporting its logic and citing judgments which would show that other sections of the Limitation Act were excluded in the context of section 34(3) of the Arbitration Act - such as sections 4 and 17 of the Limitation Act. In any case, he argued that on facts sufficient cause had not been made out, and that the judgment of the High Court of Delhi dated 15.10.2019 ought to be set aside on this ground also.

13. The arguments that have been made in these appeals and the case law cited have gone way beyond the narrow question which arises before us. However, in dealing with these arguments, it is necessary to first set out the relevant statutory

provisions contained in the three statutes that have been strongly relied upon by either side in these appeals.

14. First and foremost, the Arbitration Act has, in its Statement of Objects and Reasons, the following:

> **"4.** The main objectives of the Bill are as under:-
>
> xxx xxx xxx
>
> (ii) to make provision for an arbitral procedure which is fair, efficient and capable of meeting the needs of the specific arbitration;
>
> xxx xxx xxx
>
> (v) to minimise the supervisory role of courts in the arbitral process"

15. As has correctly been pointed out by Shri Navare, the requirement of an arbitral procedure which is efficient and the minimising of the supervisory role of courts in arbitral process would certainly show that one of the main objectives of the Arbitration Act is the speedy disposal of disputes through the arbitral process. Section 5 of the Arbitration Act is important and states :

> **"5. Extent of judicial intervention.**—Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part."

16. The other relevant provisions of the Arbitration Act provide as follows:

> **"8. Power to refer parties to arbitration where there is an arbitration agreement.—**
>
> (1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.
>
> (2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof: 2 [Provided that where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration under sub-section (1), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application along with a copy of the arbitration agreement and a petition praying the Court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that Court.

(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made."

"9. Interim measures, etc., by Court.—

xxx xxx xxx

(2) Where, before the commencement of the arbitral proceedings, a Court passes an order for any interim measure of protection under sub-section (1), the arbitral proceedings shall be commenced within a period of ninety days from the date of such order or within such further time as the Court may determine."

"11. Appointment of arbitrators.—

xxx xxx xxx

(4) If the appointment procedure in sub-section (3) applies and—

(a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or

(b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment,

the appointment shall be made, upon request of a party, by the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court;

xxx xxx xxx

(13) An application made under this section for appointment of an arbitrator or arbitrators shall be disposed of by the Supreme Court or the High Court or the person or institution designated by such Court, as the case maybe, as expeditiously as possible and an endeavour shall be made to dispose of the matter within a period of sixty days from the date of service of notice on the opposite party"

"13. Challenge procedure.—

(1) Subject to sub-section (4), the parties are free to agree on a procedure for challenging an arbitrator.

(2) Failing any agreement referred to in sub-section (1), a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances referred to in sub-section(3) of section 12, send a written statement of the reasons for the challenge to the arbitral tribunal.

(3) Unless the arbitrator challenged under sub-section (2) withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

(4) If a challenge under any procedure agreed upon by the parties or under the procedure under subsection (2) is not successful, the arbitral tribunal shall continue the arbitral proceedings and make an arbitral award.

(5) Where an arbitral award is made under sub-section (4), the party challenging the arbitrator may make an application for setting aside such an arbitral award in accordance with section 34.

(6) Where an arbitral award is set aside on an application made under sub-section (5), the Court may decide as to whether the arbitrator who is challenged is entitled to any fees."

"16. Competence of arbitral tribunal to rule on its jurisdiction.—

xxx xxx xxx

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator."

"29A. Time limit for arbitral award.—

(1) The award in matters other than international commercial arbitration shall be made by the arbitral tribunal within a period of twelve months from the date of completion of pleadings under sub-section (4) of section 23:

Provided that the award in the matter of international commercial arbitration may be made as expeditiously as possible and endeavor may be made to dispose of the matter within a period of twelve months from the date of completion of pleadings under sub-section (4) of section 23.

(2) If the award is made within a period of six months from the date the arbitral tribunal enters upon the reference, the arbitral tribunal shall be entitled to receive such amount of additional fees as the parties may agree.

(3) The parties may, by consent, extend the period specified in sub-section (1) for making award for a further period not exceeding six months.

(4) If the award is not made within the period specified in sub-section (1) or the extended period specified under sub-section (3), the mandate of the arbitrator(s) shall terminate unless the Court has, either prior to or after the expiry of the period so specified, extended the period:

Provided that while extending the period under this sub-section, if the Court finds that the proceedings have been delayed for the reasons attributable to the arbitral tribunal, then, it may order reduction of fees of arbitrator(s) by not exceeding five per cent. for each month of such delay.

Provided further that where an application under sub-section (5) is pending, the mandate of the arbitrator shall continue till the disposal of the said application:

Provided also that the arbitrator shall be given an opportunity of being heard before the fees is reduced.

(5) The extension of period referred to in sub-section (4) may be on the application of any of the parties and may be granted only for sufficient cause and on such terms and conditions as may be imposed by the Court.

(6) While extending the period referred to in sub-section (4), it shall be open to the Court to substitute one or all of the arbitrators and if one or all of the arbitrators are substituted, the arbitral proceedings shall continue from the stage already reached and on the basis of the evidence and material already on record, and the arbitrator(s)appointed under this section shall be deemed to have received the said evidence and material.

(7) In the event of arbitrator(s) being appointed under this section, the arbitral tribunal thus reconstituted shall be deemed to be in continuation of the previously appointed arbitral tribunal.

(8) It shall be open to the Court to impose actual or exemplary costs upon any of the parties under this section.

(9) An application filed under sub-section (5) shall be disposed of by the Court as expeditiously as possible and endeavour shall be made to dispose of the matter within a period of sixty days from the date of service of notice on the opposite party"

"29B. Fast track procedure.—

(1) Notwithstanding anything contained in this Act, the parties to an arbitration agreement, may, at any stage either before or at the time of appointment of the arbitral tribunal, agree in writing to have their dispute resolved by fast track procedure specified in sub-section (3).

(2) The parties to the arbitration agreement, while agreeing for resolution of dispute by fast track procedure, may agree that the arbitral tribunal shall consist of a sole arbitrator who shall be chosen by the parties.

(3) The arbitral tribunal shall follow the following procedure while conducting arbitration proceedings under sub-section (1):—

(a) The arbitral tribunal shall decide the dispute on the basis of written pleadings, documents and submissions filed by the parties without any oral hearing;

(b) The arbitral tribunal shall have power to call for any further information or clarification from the parties in addition to the pleadings and documents filed by them;

(c) An oral hearing may be held only, if, all the parties make a request or if the arbitral tribunal considers it necessary to have oral hearing for clarifying certain issues;

(d) The arbitral tribunal may dispense with any technical formalities, if an oral hearing is held, and adopt such procedure as deemed appropriate for expeditious disposal of the case.

(4) The award under this section shall be made within a period of six months from the date the arbitral tribunal enters upon the reference.

(5) If the award is not made within the period specified in sub-section (4), the provisions of subsections (3) to (9) of section 29A shall apply to the proceedings.

(6) The fees payable to the arbitrator and the manner of payment of the fees shall be such as may be agreed between the arbitrator and the parties."

"33. Correction and interpretation of award; additional award.—

xxx xxx xxx

(3) The arbitral tribunal may correct any error of the type referred to in clause (a) of sub-section (1), on its own initiative, within thirty days from the date of the arbitral award.

(4) Unless otherwise agreed by the parties, a party with notice to the other party, may request, within thirty days from the receipt of the arbitral award, the arbitral tribunal to make an additional arbitral award as to claims presented in the arbitral proceedings but omitted from the arbitral award.

(5) If the arbitral tribunal considers the request made under sub-section (4) to be justified, it shall make the additional arbitral award within sixty days from the receipt of such request."

"34. Application for setting aside arbitral award.—

xxx xxx xxx

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under

section 33, from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter."

"37. Appealable orders.—

(1) Notwithstanding anything contained in any other law for the time being in force, an appeal shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely:—

(a) refusing to refer the parties to arbitration under section 8;

(b) granting or refusing to grant any measure under section 9;

(c) setting aside or refusing to set aside an arbitral award under section 34.

(2) Appeal shall also lie to a court from an order of the arbitral tribunal—

(a) accepting the plea referred to in sub-section (2) or sub-section (3) of section 16; or

(b) granting or refusing to grant an interim measure under section 17.

(3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or takeaway any right to appeal to the Supreme Court."

"43. Limitations.—

(1) The Limitation Act, 1963 (36 of 1963), shall apply to arbitrations as it applies to proceedings in court.

(2) For the purposes of this section and the Limitation Act, 1963 (36 of 1963), an arbitration shall be deemed to have commenced on the date referred to in section 21.

(3) Where an arbitration agreement to submit future disputes to arbitration provides that any claim to which the agreement applies shall be barred unless some step to commence arbitral proceedings is taken within a time fixed by the agreement, and a dispute arises to which the agreement applies, the Court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may on such terms, if any, as the justice of the case may require, extend the time for such period as it thinks proper.

(4) Where the Court orders that an arbitral award be set aside, the period between the commencement of the arbitration and the date of the order of the Court shall be excluded in computing the time prescribed by the Limitation Act, 1963 (36 of 1963),for the commencement of the proceedings (including arbitration) with respect to the dispute so submitted."

17. So far as the Limitation Act is concerned, sections 5 and 29(2) read as follows:

"5. Extension of prescribed period in certain cases.—

Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908 (5 of 1908), may be admitted after the prescribed period if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period. Explanation.— The fact that the appellant or the applicant was missed by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period may be sufficient cause within the meaning of this section."

"29. Savings.—

xxx xxx xxx

(2) Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of section 3 shall apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in sections 4 to 24 (inclusive) shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law."

18. Further, the relevant Articles of the Schedule provide as follows:

"THE SCHEDULE
(PERIODS OF LIMITATION)

xxx xxx xxx

Description of suit	**Period of limitation**	**Time from which period begins to run**
116. Under the Code of Civil Procedure, 1908 (5 of 1908)—		

(a) to a High Court from any decree or order. (b) to any other court from any decree or order.	Ninety days. Thirty days.	The date of the decree or order. The date of the decree or order.
117. From a decree or order of any High Court to the same Court	Thirty days.	The date of the decree or order.
137. Any other application for which no period of limitation is provided elsewhere in this Division.	Three years.	When the right to apply accrues.

19. The Commercial Courts Act states, in its Statement of Objects and Reasons, the following:

"STATEMENT OF OBJECTS AND REASONS

The proposal to provide for speedy disposal of high value commercial disputes has been under consideration of the Government for quite some time. The high vlaue commercial disputes involve complex facts and question of law. Therefore, there is a need to provide for an independent mechanism for their early resolution. Early resolution of commercial disputes shall create a positive image to the investor world about the independent and responsive Indian legal system."

"6. It is proposed to introduced the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Bill, 2015 to replace the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Ordinance, 2015 which inter alia, provides for the following namely:—

xxx xxx xxx

(v) to amend the Code of Civil Procedure, 1908 as applicable to the Commercial Courts and Commercial Divisions which shall prevail over the existing High Courts Rules and other provisions of the Code of Civil Procedure, 1908 so as to improve the efficiency and reduce delays in disposal of commercial cases.

7. The proposed Bill shall accelerate economic growth, improve the international image of the Indian Justice delivery system, and the faith of the investor world in the legal culture of the nation."

20. Section 2(1)(i) of the Commercial Courts Act defines "specified value" as follows:

> **"2. Definitions**.—(1) In this Act, unless the context otherwise requires,—
>
> xxx xxx xxx
>
> (i) "Specified Value", in relation to a commercial dispute, shall mean the value of the subject-matter in respect of a suit as determined in accordance with section 12 which shall not be less than three lakh rupees or such higher value, as may be notified by the Central Government."

21. Chapter II of the Commercial Courts Act sets up commercial courts, commercial appellate courts, commercial divisions and commercial appellate divisions. So far as arbitration is concerned, section 10 is important and states as follows:

> **"10. Jurisdiction in respect of arbitration matters.—**
>
> Where the subject-matter of an arbitration is a commercial dispute of a Specified Value and—
>
> (1) If such arbitration is an international commercial arbitration, all applications or appeals arising out of such arbitration under the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) that have been filed in a High Court, shall be heard and disposed of by the Commercial Division where such Commercial Division has been constituted in such High Court.
>
> (2) If such arbitration is other than an international commercial arbitration, all applications or appeals arising out of such arbitration under the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) that have been filed on the original side of the High Court, shall be heard and disposed of by the Commercial Division where such Commercial Division has been constituted in such High Court.
>
> (3) If such arbitration is other than an international commercial arbitration, all applications or appeals arising out of such arbitration under the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) that would ordinarily lie before any principal civil court of original jurisdiction in a district (not being a High Court) shall be filed in, and heard and disposed of by the Commercial Court exercising territorial jurisdiction over such arbitration where such Commercial Court has been constituted.

22. The other relevant provisions of the Commercial Courts Act are set out as follows:

> **"13. Appeals from decrees of Commercial Courts and Commercial Divisions.—**
>
> (1) Any person aggrieved by the judgment or order of a Commercial Court below the level of a District Judge may appeal to the Commercial Appellate Court within a period of sixty days from the date of judgment or order.
>
> (1A) Any person aggrieved by the judgment or order of a Commercial Court at the level of District Judge exercising original civil jurisdiction or, as the case may be, Commercial Division of a High Court may appeal to the Commercial Appellate Division of that High Court within a period of sixty days from the date of the judgment or order:
>
> Provided that an appeal shall lie from such orders passed by a Commercial Division or a Commercial Court that are specifically enumerated under Order XLIII of the Code of Civil Procedure, 1908 (5 of 1908) as amended by this Act and section 37 of the Arbitration and Conciliation Act, 1996 (26 of 1996).
>
> (2) Notwithstanding anything contained in any other law for the time being in force or Letters Patent of a High Court, no appeal shall lie from any order or decree of a Commercial Division or Commercial Court otherwise than in accordance with the provisions of this Act.
>
> **14. Expeditious disposal of appeals.**—The Commercial Appellate Court and the Commercial Appellate Division shall endeavour to dispose of appeals filed before it within a period of six months from the date of filing of such appeal."
>
> **"16. Amendments to the Code of Civil Procedure, 1908 in its application to commercial disputes.—**
>
> (1) The provisions of the Code of Civil Procedure, 1908 (5 of 1908) shall, in their application to any suit in respect of a commercial dispute of a Specified Value, stand amended in the manner as specified in the Schedule.
>
> (2) The Commercial Division and Commercial Court shall follow the provisions of the Code of Civil Procedure, 1908 (5 of 1908), as amended by this Act, in the trial of a suit in respect of a commercial dispute of a Specified Value.
>
> (3) Where any provision of any Rule of the jurisdictional High Court or any amendment to the Code of Civil Procedure, 1908 (5 of 1908), by the State Government is in conflict with the provisions of the Code of Civil Procedure, 1908 (5 of 1908), as amended by this Act, the

provisions of the Code of Civil Procedure as amended by this Act shall prevail."

"21. Act to have overriding effect.—Save as otherwise provided, the provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law for the time being in force other than this Act."

"SCHEDULE

4. Amendment of First Schedule.—In the First Schedule to the Code,—

xxx xxx xxx

(D) in Order VIII,— (i) in Rule 1, for the proviso, the following proviso shall be substituted, namely:—

"Provided that where the defendant fails to file the written statement within the said period of thirty days, he shall be allowed to file the written statement on such other day, as may be specified by the Court, for reasons to be recorded in writing and on payment of such costs as the Court deems fit, but which shall not be later than one hundred twenty days from the date of service of summons and on expiry of one hundred twenty days from the date of service of summons, the defendant shall forfeit the right to file the written statement and the Court shall not allow the written statement to be taken on record.";"

23. Section 37 of the Arbitration Act, when read with section 43 thereof, makes it clear that the provisions of the Limitation Act will apply to appeals that are filed under section 37. This takes us to Articles 116 and 117 of the Limitation Act, which provide for a limitation period of 90 days and 30 days, depending upon whether the appeal is from any other court to a High Court or an intra-High Court appeal. There can be no doubt whatsoever that section 5 of the Limitation Act will apply to the aforesaid appeals, both by virtue of section 43 of the Arbitration Act and by virtue of section 29(2) of the Limitation Act. This aspect of the matter has been set out in the concurring judgment of Raveendran, J. in *Consolidated Engg.* (supra), as follows:

"40. Let me next refer to the relevant provisions of the Limitation Act. Section 3 of the Limitation Act provides for the bar of limitation. It provides that subject to the provisions contained in Sections 4 to 24 (inclusive), every suit instituted, appeal preferred, and application made after the *prescribed period* shall be dismissed although limitation has not been set up as a defence. "*Prescribed period*" means that *period of limitation* computed in accordance with the provisions of the Limitation Act. "*Period of limitation*" means the period of limitation prescribed for any suit, appeal or application by the Schedule to the Limitation Act

[vide Section *2(j)* of the said Act]. Section 29 of the Limitation Act relates to savings. Sub-section (2) thereof which is relevant is extracted below:

> "29. (2) Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of Section 3 shall apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in Sections 4 to 24 (inclusive) shall apply only insofar as, and to the extent to which, they are not expressly excluded by such special or local law."

41. Article 116 of the Schedule prescribes the period of limitation for appeals to the High Court (90 days) and appeals to any other court (30 days) under the Code of Civil Procedure, 1908. It is now well settled that the words "appeals under the Code of Civil Procedure, 1908" occurring in Article 116 refer not only to appeals preferred under the Code of Civil Procedure, 1908, but also to appeals, where the procedure for filing of such appeals and powers of the court for dealing with such appeals are governed by the Code of Civil Procedure. (See decision of the Constitution Bench in *Vidyacharan Shukla* v. *Khubchand Baghel* [AIR 1964 SC 1099] .) Article 119(*b*) of the Schedule prescribes the period of limitation for filing an application (under the Arbitration Act, 1940), for setting aside an award, as thirty days from the date of service of notice of filing of the award.

42. The AC Act is no doubt, a special law, consolidating and amending the law relating to arbitration and matters connected therewith or incidental thereto. The AC Act does not prescribe the period of limitation, for various proceedings under that Act, except where it intends to prescribe a period different from what is prescribed in the Limitation Act. On the other hand, Section 43 makes the provisions of the Limitation Act, 1963 applicable to proceedings—both in court and in arbitration—under the AC Act. There is also no express exclusion of application of any provision of the Limitation Act to proceedings under the AC Act, but there are some specific departures from the general provisions of the Limitation Act, as for example, the proviso to Section 34(3) and sub-sections (2) to (4) of Section 43 of the AC Act.

43. Where the Schedule to the Limitation Act prescribes a period of limitation for appeals or applications to any court, and the special or local law provides for filing of appeals and applications to the court, but does not prescribe any period of limitation in regard to such appeals or applications, the period of limitation prescribed in the Schedule to the Limitation Act will apply to such appeals or applications and

> consequently, the provisions of Sections 4 to 24 will also apply. Where the special or local law prescribes for any appeal or application, a period of limitation different from the period prescribed by the Schedule to the Limitation Act, then the provisions of Section 29(2) will be attracted. In that event, the provisions of Section 3 of the Limitation Act will apply, as if the period of limitation prescribed under the special law was the period prescribed by the Schedule to the Limitation Act, and for the purpose of determining any period of limitation prescribed for the appeal or application by the special law, the provisions contained in Sections 4 to 24 will apply to the extent to which they are not expressly excluded by such special law. The object of Section 29(2) is to ensure that the principles contained in Sections 4 to 24 of the Limitation Act apply to suits, appeals and applications filed in a court under special or local laws also, even if it prescribes a period of limitation different from what is prescribed in the Limitation Act, except to the extent of express exclusion of the application of any or all of those provisions."

24. When the Commercial Courts Act is applied to the aforesaid appeals, given the definition of "specified value" and the provisions contained in sections 10 and 13 thereof, it is clear that it is only when the specified value is for a sum less than three lakh rupees that the appellate provision contained in section 37 of the Arbitration Act will be governed, for the purposes of limitation, by Articles 116 and 117 of the Limitation Act. Shri Deshmukh's argument that depending upon which court decides a matter, a limitation period of either 30 or 90 days is provided, which leads to arbitrary results, and that, therefore, the uniform period provided by Article 137 of the Limitation Act should govern appeals as well, is rejected. It is settled that periods of limitation must always to some extent be arbitrary and may result in some hardship, but this is no reason as to why they should not be strictly followed. In *Boota Mal v. Union of India,* (1963) 1 SCR 70, this Court referred to this aspect of the case, as follows:

> "Ordinarily, the words of a statute have to be given their strict grammatical meaning and equitable considerations are out of place, particularly in provisions of law limiting the period of limitation for filing suits or legal proceedings. This was laid down by the Privy Council in two decisions in *Nagendranath* v. *Suresh* [AIR(1932) PC 165] and *General Accident Fire and Life Assurance Corporation Limited* v. *Janmahomed Abdul Rahim* [AIR (1941) PC 6] . In the first case the Privy Council observed that "the fixation of periods of limitation must always be to some extent arbitrary and may frequently result in hardship. But in construing such provisions equitable considerations are out of place, and the strict grammatical meaning of the words is the only safe guide". In the latter case it was observed that "a limitation Act ought to receive such a construction as the language in its plain meaning imports ... Great hardship may occasionally be caused by

> statutes of limitation in cases of poverty, distress and ignorance of rights, yet the statutory rules must be enforced according to their ordinary meaning in these and in other like cases"." (pages 74-75)

25. Shri Deshmukh's other argument that since no period of limitation has been provided in section 37 of the Arbitration Act, as a result of which the neat division contained in the Limitation Act of different matters contained in suits, appeals and applications will somehow have to be destroyed, the word "appeals" has to be read into "applications" so that Article 137 of the Limitation Act could apply, is also rejected.

26. Even in the rare situation in which an appeal under section 37 of the Arbitration Act would be of a specified value less than three lakh rupees, resulting in Article 116 or 117 of the Limitation Act applying, the main object of the Arbitration Act requiring speedy resolution of disputes would be the most important principle to be applied when applications under section 5 of the Limitation Act are filed to condone delay beyond 90 days and/or 30 days depending upon whether Article 116(a) or 116(b) or 117 applies. As a matter of fact, given the timelines contained in sections 8, 9(2), 11(4), 11(13), 13(2)-(5), 29A, 29B, 33(3)-(5) and 34(3) of the Arbitration Act, and the observations made in some of this Court's judgments, the object of speedy resolution of disputes would govern appeals covered by Articles 116 and 117 of the Limitation Act.

27. This Court in *Union of India v. Popular Construction Co.,* (2001) 8 SCC 470, put it thus:

> **"14.** Here the history and scheme of the 1996 Act support the conclusion that the time-limit prescribed under Section 34 to challenge an award is absolute and unextendible by court under Section 5 of the Limitation Act. The Arbitration and Conciliation Bill, 1995 which preceded the 1996 Act stated as one of its main objectives the need "to minimise the supervisory role of courts in the arbitral process" [Para 4(v) of the Statement of Objects and Reasons of the Arbitration and Conciliation Act, 1996] . This objective has found expression in Section 5 of the Act which prescribes the extent of judicial intervention in no uncertain terms:
>
> > "5. *Extent of judicial intervention.*— Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part."
>
> **15.** The "Part" referred to in Section 5 is Part I of the 1996 Act which deals with domestic arbitrations. Section 34 is contained in Part I and is therefore subject to the sweep of the prohibition contained in Section 5 of the 1996 Act."

28. Likewise, in *State of Goa v. Western Builders,* (2006) 6 SCC 239, this Court, while stating that the provisions of section 14 of the Limitation Act would apply to applications filed under section 34 of the Arbitration Act, held:

> **"25.** ... It is true that the Arbitration and Conciliation Act, 1996 intended to expedite commercial issues expeditiously. It is also clear in the Statement of Objects and Reasons that in order to recognise economic reforms the settlement of both domestic and international commercial disputes should be disposed of quickly so that the country's economic progress be expedited..."

29. The judgment in *Kandla Export Corpn* (supra) also observed:

> **"27.** The matter can be looked at from a slightly different angle. Given the objects of both the statutes, it is clear that arbitration itself is meant to be a speedy resolution of disputes between parties. Equally, enforcement of foreign awards should take place as soon as possible if India is to remain as an equal partner, commercially speaking, in the international community. In point of fact, the raison d'être for the enactment of the Commercial Courts Act is that commercial disputes involving high amounts of money should be speedily decided. Given the objects of both the enactments, if we were to provide an additional appeal, when Section 50 does away with an appeal so as to speedily enforce foreign awards, we would be turning the Arbitration Act and the Commercial Courts Act on their heads. Admittedly, if the amount contained in a foreign award to be enforced in India were less than Rs 1 crore, and a Single Judge of a High Court were to enforce such award, no appeal would lie, in keeping with the object of speedy enforcement of foreign awards. However, if, in the same fact circumstance, a foreign award were to be for Rs 1 crore or more, if the appellants are correct, enforcement of such award would be further delayed by providing an appeal under Section 13(1) of the Commercial Courts Act. Any such interpretation would lead to absurdity, and would be directly contrary to the object sought to be achieved by the Commercial Courts Act viz. speedy resolution of disputes of a commercial nature involving a sum of Rs 1 crore and over. For this reason also, we feel that Section 13(1) of the Commercial Courts Act must be construed in accordance with the object sought to be achieved by the Act. Any construction of Section 13 of the Commercial Courts Act, which would lead to further delay, instead of an expeditious enforcement of a foreign award must, therefore, be eschewed. Even on applying the doctrine of harmonious construction of both statutes, it is clear that they are best harmonised by giving effect to the special statute i.e. the Arbitration Act, vis-a-vis the more general statute, namely, the Commercial Courts Act, being left to operate in spheres other than arbitration."

30. A recent judgment of this Court in *ICOMM Tele Ltd. v. Punjab State Water Supply and Sewerage Board,* (2019) 4 SCC 401**,** states:

> **25.** Several judgments of this Court have also reiterated that the primary object of arbitration is to reach a final disposal of disputes in a speedy, effective, inexpensive and expeditious manner. Thus, in *Centrotrade Minerals & Metal Inc.* v. *Hindustan Copper Ltd.* [*Centrotrade Minerals & Metal Inc.* v. *Hindustan Copper Ltd.,* (2017) 2 SCC 228 : (2017) 1 SCC (Civ) 593] , this Court held: (SCC p. 250, para 39)
>
> > *"39.* In *Union of India* v. *U.P. State Bridge Corpn. Ltd.* [*Union of India* v. *U.P. State Bridge Corpn. Ltd.,* (2015) 2 SCC 52 : (2015) 1 SCC (Civ) 732] this Court accepted the view [Indu Malhotra, *O.P. Malhotra on the Law and Practice of Arbitration and Conciliation* (3rd Edn., Thomson Reuters, 2014).] that the A&C Act has four foundational pillars and then observed in para 16 of the Report that: (SCC p. 64)
> >
> > > *'16.* First and paramount principle of the first pillar is 'fair, speedy and inexpensive trial by an Arbitral Tribunal'. Unnecessary delay or expense would frustrate the very purpose of arbitration.""

31. Thus, from the scheme of the Arbitration Act as well as the aforesaid judgments, condonation of delay under section 5 of the Limitation Act has to be seen in the context of the object of speedy resolution of disputes.

32. The bulk of appeals, however, to the appellate court under section 37 of the Arbitration Act, are governed by section 13 of the Commercial Courts Act. Sub-section (1A) of section 13 of the Commercial Courts Act provides the forum for appeals as well as the limitation period to be followed, section 13 of the Commercial Courts Act being a special law as compared with the Limitation Act which is a general law, which follows from a reading of section 29(2) of the Limitation Act. Section 13(1A) of the Commercial Courts Act lays down a period of limitation of 60 days uniformly for all appeals that are preferred under section 37 of the Arbitration Act.[1]

33. The vexed question which faces us is whether, first and foremost, the application of section 5 of the Limitation Act is excluded by the scheme of the Commercial Courts Act, as has been argued by Dr. George. The first important

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1. As held in **BGS SGS SOMA JV v. NHPC, (2020) 4 SCC 234**, whereas section 37 of the Arbitration Act provides the substantive right to appeal, section 13 of the Commercial Courts Act provides the forum and procedure governing the appeal (see paragraph 13).

thing to note is that section 13(1A) of the Commercial Courts Act does not contain any provision akin to section 34(3) of the Arbitration Act. Section 13(1A) of the Commercial Courts Act only provides for a limitation period of 60 days from the date of the judgment or order appealed against, without further going into whether delay beyond this period can or cannot be condoned.

34. It may also be pointed out that though the object of expeditious disposal of appeals is laid down in section 14 of the Commercial Courts Act, the language of section 14 makes it clear that the period of six months spoken of is directory and not mandatory. By way of contrast, section 16 of the Commercial Courts Act read with the Schedule thereof and the amendment made to Order VIII Rule 1 of the CPC, would make it clear that the defendant in a suit is given 30 days to file a written statement, which period cannot be extended beyond 120 days from the date of service of the summons; and on expiry of the said period, the defendant forfeits the right to file the written statement and the court cannot allow the written statement to be taken on record. This provision was enacted as a result of the judgment of this Court in *Salem Advocate Bar Assn. (II) v. Union of India,* (2005) 6 SCC 344.

35. In a recent judgment of this Court namely, *SCG Contracts (India) (P) Ltd. v. K.S. Chamankar Infrastructure (P) Ltd.,* (2019) 12 SCC 210, a Division Bench of this Court referred to the aforesaid amendment and its hard and fast nature as follows:

> **"8.** The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 came into force on 23-10-2015 bringing in their wake certain amendments to the Code of Civil Procedure. In Order 5 Rule 1, sub-rule (1), for the second proviso, the following proviso was substituted:
>
> > "Provided further that where the defendant fails to file the written statement within the said period of thirty days, he shall be allowed to file the written statement on such other day, as may be specified by the court, for reasons to be recorded in writing and on payment of such costs as the court deems fit, but which shall not be later than one hundred twenty days from the date of service of summons and on expiry of one hundred and twenty days from the date of service of summons, the defendant shall forfeit the right to file the written statement and the court shall not allow the written statement to be taken on record."
>
> Equally, in Order 8 Rule 1, a new proviso was substituted as follows:
>
> > "Provided that where the defendant fails to file the written statement within the said period of thirty days,

> he shall be allowed to file the written statement on such other day, as may be specified by the court, for reasons to be recorded in writing and on payment of such costs as the court deems fit, but which shall not be later than one hundred and twenty days from the date of service of summons and on expiry of one hundred and twenty days from the date of service of summons, the defendant shall forfeit the right to file the written statement and the court shall not allow the written statement to be taken on record."

This was re-emphasised by re-inserting yet another proviso in Order 8 Rule 10 CPC, which reads as under:

> **"10.** ***Procedure when party fails to present written statement called for by court.***—Where any party from whom a written statement is required under Rule 1 or Rule 9 fails to present the same within the time permitted or fixed by the court, as the case may be, the court shall pronounce judgment against him, or make such order in relation to the suit as it thinks fit and on the pronouncement of such judgment a decree shall be drawn up:
>
> Provided further that no court shall make an order to extend the time provided under Rule 1 of this Order for filing of the written statement."

A perusal of these provisions would show that ordinarily a written statement is to be filed within a period of 30 days. However, grace period of a further 90 days is granted which the Court may employ for reasons to be recorded in writing and payment of such costs as it deems fit to allow such written statement to come on record. What is of great importance is the fact that beyond 120 days from the date of service of summons, the defendant shall forfeit the right to file the written statement and the Court shall not allow the written statement to be taken on record. This is further buttressed by the proviso in Order 8 Rule 10 also adding that the court has no further power to extend the time beyond this period of 120 days.

9. In *Bihar Rajya Bhumi Vikas Bank Samiti* [*State of Bihar* v. *Bihar Rajya Bhumi Vikas Bank Samiti,* (2018) 9 SCC 472 : (2018) 4 SCC (Civ) 387], a question was raised as to whether Section 34(5) of the Arbitration and Conciliation Act, 1996, inserted by Amending Act 3 of 2016 is mandatory or directory. In para 11 of the said judgment, this Court referred to *Kailash* v. *Nanhku* [*Kailash* v. *Nanhku,* (2005) 4 SCC 480], referring to the text of Order 8 Rule 1 as it stood pre the amendment made by the Commercial Courts Act. It also referred (in para 12) to

Salem Advocate Bar Assn. (2) v. *Union of India* [*Salem Advocate Bar Assn. (2)* v. *Union of India,* (2005) 6 SCC 344] , which, like the *Kailash* [*Kailash* v. *Nanhku,* (2005) 4 SCC 480] judgment, held that the mere expression "shall" in Order 8 Rule 1 would not make the provision mandatory. This Court then went on to discuss in para 17 of *State* v. *N.S. Gnaneswaran* [*State* v. *N.S. Gnaneswaran,* (2013) 3 SCC 594 : (2013) 3 SCC (Cri) 235 : (2013) 1 SCC (L&S) 688] , in which Section 154(2) of the Code of Criminal Procedure was held to be directory inasmuch as no consequence was provided if the section was breached. In para 22 by way of contrast to Section 34, Section 29-A of the Arbitration Act was set out. This Court then noted in para 23 as under: *(Bihar Rajya Bhumi Vikas Bank Samiti case* [*State of Bihar* v. *Bihar Rajya Bhumi Vikas Bank Samiti,* (2018) 9 SCC 472 : (2018) 4 SCC (Civ) 387] , SCC p. 489)

> "*23*. It will be seen from this provision that, unlike Sections 34(5) and (6), if an award is made beyond the stipulated or extended period contained in the section, the consequence of the mandate of the arbitrator being terminated is expressly provided. This provision is in stark contrast to Sections 34(5) and (6) where, as has been stated hereinabove, if the period for deciding the application under Section 34 has elapsed, no consequence is provided. This is one more indicator that the same Amendment Act, when it provided time periods in different situations, did so intending different consequences."

10. Several High Court judgments on the amended Order 8 Rule 1 have now held that given the consequence of non-filing of written statement, the amended provisions of the CPC will have to be held to be mandatory. See *Oku Tech (P) Ltd.* v. *Sangeet Agarwal [Oku Tech (P) Ltd.* v. *Sangeet Agarwal,* 2016 SCC OnLine Del 6601] by a learned Single Judge of the Delhi High Court dated 11-8-2016 in CS (OS) No. 3390 of 2015 as followed by several other judgments including a judgment of the Delhi High Court in *Maja Cosmetics* v. *Oasis Commercial (P) Ltd. [Maja Cosmetics* v. *Oasis Commercial (P) Ltd.,* 2018 SCC OnLine Del 6698]

11. We are of the view that the view taken by the Delhi High Court in these judgments is correct in view of the fact that the consequence of forfeiting a right to file the written statement; non-extension of any further time; and the fact that the Court shall not allow the written statement to be taken on record all points to the fact that the earlier law on Order 8 Rule 1 on the filing of written statement under Order 8 Rule 1 has now been set at naught."

36. By way of contrast, there is no such provision contained in section 13 of the Commercial Courts Act. The judgment in *Hongo* (supra), strongly relied upon by Dr. George, is clearly distinguishable. In *Hongo* (supra), section 35-H of the

Central Excise Act provided for a period of 180 days for filing a reference application to the High Court. The scheme of the Central Excise Act was adverted to in paragraph 15 of the judgment, which reads as follows:

> **"15.** We have already pointed out that in the case of appeal to the Commissioner, Section 35 provides 60 days' time and in addition to the same, the Commissioner has power to condone the delay up to 30 days, if sufficient cause is shown. Likewise, Section 35-B provides 90 days' time for filing appeal to the Appellate Tribunal and sub-section (5) therein enables the Appellate Tribunal to condone the delay irrespective of the number of days, if sufficient cause is shown. Likewise, Section 35-EE which provides 90 days' time for filing revision by the Central Government and, proviso to the same enables the revisional authority to condone the delay for a further period of 90 days, if sufficient cause is shown, whereas in the case of appeal to the High Court under Section 35-G and reference to the High Court under Section 35-H of the Act, total period of 180 days has been provided for availing the remedy of appeal and the reference. However, there is no further clause empowering the High Court to condone the delay after the period of 180 days."

37. The Court then went on to observe:

> **"33.** Even otherwise, for filing an appeal to the Commissioner, and to the Appellate Tribunal as well as revision to the Central Government, the legislature has provided 60 days and 90 days respectively, on the other hand, for filing an appeal and reference to the High Court larger period of 180 days has been provided with to enable the Commissioner and the other party to avail the same. We are of the view that the legislature provided sufficient time, namely, 180 days for filing reference to the High Court which is more than the period prescribed for an appeal and revision.
>
> **34.** Though, an argument was raised based on Section 29 of the Limitation Act, even assuming that Section 29(2) would be attracted, what we have to determine is whether the provisions of this section are expressly excluded in the case of reference to the High Court.
>
> **35.** It was contended before us that the words "expressly excluded" would mean that there must be an express reference made in the special or local law to the specific provisions of the Limitation Act of which the operation is to be excluded. In this regard, we have to see the scheme of the special law which here in this case is the Central Excise Act. The nature of the remedy provided therein is such that the legislature intended it to be a complete code by itself which alone should govern the several matters provided by it. If, on an examination of the relevant provisions, it is clear that the provisions of the Limitation Act are necessarily excluded, then the benefits conferred therein cannot be

> called in aid to supplement the provisions of the Act. In our considered view, that even in a case where the special law does not exclude the provisions of Sections 4 to 24 of the Limitation Act by an express reference, it would nonetheless be open to the court to examine whether and to what extent, the nature of those provisions or the nature of the subject-matter and scheme of the special law exclude their operation. In other words, the applicability of the provisions of the Limitation Act, therefore, is to be judged not from the terms of the Limitation Act but by the provisions of the Central Excise Act relating to filing of reference application to the High Court.
>
> **36.** The scheme of the Central Excise Act, 1944 supports the conclusion that the time-limit prescribed under Section 35-H(1) to make a reference to the High Court is absolute and unextendable by a court under Section 5 of the Limitation Act. It is well-settled law that it is the duty of the court to respect the legislative intent and by giving liberal interpretation, limitation cannot be extended by invoking the provisions of Section 5 of the Limitation Act."

38. Unlike the scheme of the Central Excise Act relied upon in *Hongo* (supra), there are no other provisions in the Commercial Courts Act which provide for a period of limitation coupled with a condonation of delay provision which is either open-ended or capped. Also, the period of 180 days provided was one *indicia* which led the Court to exclude the application of section 5 of the Limitation Act, as it was double and triple the period provided for appeals under the other provisions of the same Act. Section 13(1A) of the Commercial Courts Act, by way of contrast, applies an intermediate period of 60 days for filing an appeal, that is, a period that is halfway between 30 days and 90 days provided by Articles 116 and 117 of the Limitation Act.

39. The other judgments relied upon by Dr. George are all distinguishable in that they are judgments which deal with provisions that provide for a period of limitation and a period of condonation of delay beyond which delay cannot be condoned, such as section 125 of the Electricity Act. (See *Suryachakra Power Corpn. Ltd. v. Electricity Deptt.*, (2016) 16 SCC 152 at paragraph 10; *ONGC v. Gujarat Energy Transmission Corpn. Ltd.,* (2017) 5 SCC 42 at paragraphs 5-10).

40. Section 21 of the Commercial Courts Act was also pressed into service stating that the *non-obstante* clause contained in the Commercial Courts Act would override other Acts, including the Limitation Act, as a result of which, the applicability of section 5 thereof would be excluded. This argument has been addressed in the context of the IBC in *B.K. Educational Services (P) Ltd. v. Parag Gupta & Associates,* (2019) 11 SCC 633, as follows:

> **"41.** Shri Dholakia argued that the Code being complete in itself, an intruder such as the Limitation Act must be shut out also by application

of Section 238 of the Code which provides that, "notwithstanding anything inconsistent therewith contained in any other law for the time being in force", the provisions of the Code would override such laws. In fact, Section 60(6) of the Code specifically states as follows:

> **"60.** ***Adjudicating authority for corporate persons***.—(1)-(5) * * *
>
> (6) Notwithstanding anything contained in the Limitation Act, 1963 (36 of 1963) or in any other law for the time being in force, in computing the period of limitation specified for any suit or application by or against a corporate debtor for which an order of moratorium has been made under this Part, the period during which such moratorium is in place shall be excluded."

This provision would have been wholly unnecessary if the Limitation Act was otherwise excluded either by reason of the Code being complete in itself or by virtue of Section 238 of the Code. Both, Section 433 of the Companies Act as well as Section 238-A of the Code, apply the provisions of the Limitation Act "as far as may be". Obviously, therefore, where periods of limitation have been laid down in the Code, these periods will apply notwithstanding anything to the contrary contained in the Limitation Act. From this, it does not follow that the baby must be thrown out with the bathwater. This argument, therefore, must also be rejected."

41. For all these reasons we reject the argument made by Shri George that the application of section 5 of the Limitation Act is excluded given the scheme of Commercial Courts Act.

42. The next important argument that needs to be addressed is as to whether the hard and fast rule applied by this Court in *N.V. International* (supra) is correct in law. *Firstly,* as has correctly been argued by Shri Shroti, *N.V. International* (supra) does not notice the provisions of the Commercial Courts Act at all and can be said to be *per incuriam* on this count. *Secondly,* it is also correct to note that the period of 90 days plus 30 days and not thereafter mentioned in section 34(3) of the Arbitration Act cannot now apply, the limitation period for filing of appeals under the Commercial Courts Act being 60 days and not 90 days. *Thirdly,* the argument that absent a provision curtailing the condonation of delay beyond the period provided in section 13 of the Commercial Courts Act would also make it clear that any such bodily lifting of the last part of section 34(3) into section 37 of the Arbitration Act would also be unwarranted. We cannot accept Shri Navare's argument that this is a mere *casus omissus* which can be filled in by the Court.

43. The difference between interpretation and legislation is sometimes a fine one, as it has repeatedly been held that judges do not merely interpret the law but also create law. In *Eera v. State (NCT of Delhi),* (2017) 15 SCC 133, this Court was faced with the interpretation of section 2(1)(d) of the Protection of Children from Sexual Offences Act, 2012. This provision reads as follows:

> "(2)(1)(d) "child" means any person below the age of eighteen years;"

44. The argument made before the Court was that the age of 18 years did not only refer to physical age, but could also refer to the mental age of the "child" as defined. This Court was therefore faced with the difficulty between interpreting the law as it stands, and legislating. The concurring judgment of Nariman, J. put it thus:

> **"103.** Having read the erudite judgment of my learned Brother, and agreeing fully with him on the conclusion reached, given the importance of the Montesquiean separation of powers doctrine where the judiciary should not transgress from the field of judicial law-making into the field of legislative law-making, I have felt it necessary to add a few words of my own.
>
> **104.** Mr Sanjay R. Hegde, the learned Amicus Curiae, has argued before us that the interpretation of Section 2(1)(*d*) of the Protection of Children from Sexual Offences Act, 2012 cannot include "mental" age as such an interpretation would be beyond the *"Lakshman Rekha"* — that is, it is no part of this Court's function to add to or amend the law as it stands. This Court's function is limited to *interpreting* the law as it stands, and this being the case, he has exhorted us not to go against the plain literal meaning of the statute.
>
> **105.** Since Mr Hegde's argument raises the constitutional spectre of separation of powers, let it first be admitted that under our constitutional scheme, Judges only *declare* the law; it is for the legislatures to *make* the law. This much at least is clear on a conjoint reading of Articles 141 and 245 of the Constitution of India, which are set out hereinbelow:
>
> > **"141.** ***Law declared by Supreme Court to be binding on all courts.***—The law *declared* by the Supreme Court shall be binding on all courts within the territory of India.
> >
> > ***
> >
> > **245.** ***Extent of laws made by Parliament and by the legislatures of States.***—(1) Subject to the provisions of this Constitution, Parliament may *make* laws for the whole or any part of the territory of India, and the

> legislature of a State may make laws for the whole or any part of the State.
>
> (2) No law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation."

(emphasis supplied)

106. That the legislature cannot "declare" law is embedded in Anglo-Saxon jurisprudence. Bills of attainder, which used to be passed by Parliament in England, have never been passed from the 18th century onwards. A legislative judgment is anathema. As early as 1789, the US Constitution expressly outlawed bills of attainder vide Article I Section 9(3). This being the case with the legislature, the counter-argument is that the Judiciary equally cannot "make" but can only "declare" law. While declaring the law, can Judges make law as well?..."

45. The concurring judgment went on to state:

"127. It is thus clear on a reading of English, US, Australian and our own Supreme Court judgments that the *"Lakshman Rekha"* has in fact been extended to move away from the strictly literal rule of interpretation back to the rule of the old English case of *Heydon [Heydon case,* (1584) 3 Co Rep 7a : 76 ER 637] , where the Court must have recourse to the purpose, object, text and context of a particular provision before arriving at a judicial result. In fact, the wheel has turned full circle. It started out by the rule as stated in 1584 in *Heydon case [Heydon case,* (1584) 3 Co Rep 7a : 76 ER 637] , which was then waylaid by the literal interpretation rule laid down by the Privy Council and the House of Lords in the mid-1800s, and has come back to restate the rule somewhat in terms of what was most felicitously put over 400 years ago in *Heydon case [Heydon case,* (1584) 3 Co Rep 7a : 76 ER 637] ."

"139. A reading of the Act as a whole in the light of the Statement of Objects and Reasons thus makes it clear that the intention of the legislator was to focus on children, as commonly understood i.e. persons who are physically under the age of 18 years. The golden rule in determining whether the judiciary has crossed the *Lakshman Rekha* in the guise of interpreting a statute is really whether a Judge has only ironed out the creases that he found in a statute in the light of its object, or whether he has altered the material of which the Act is woven. In short, the difference is the well-known philosophical difference between "is" and "ought". Does the Judge put himself in the place of the legislator and ask himself whether the legislator intended a certain result, or does he state that this must have been the intent of the legislator and infuse what he thinks should have been done had he been the legislator. If the latter, it is clear that the Judge then would add something more than what there is in the statute by way of a supposed intention of the legislator and would

> go beyond creative interpretation of legislation to legislating itself. It is at this point that the Judge crosses the *Lakshman Rekha* and becomes a legislator, stating what the law ought to be instead of what the law is."

46. Ultimately, the judgment concluded:

> **"146.** A reading of the Objects and Reasons of the aforesaid Act together with the provisions contained therein would show that whatever is the physical age of the person affected, such person would be a "person with disability" who would be governed by the provisions of the said Act. Conspicuous by its absence is the reference to any age when it comes to protecting persons with disabilities under the said Act.
>
> **147.** Thus, it is clear that viewed with the lens of the legislator, we would be doing violence both to the intent and the language of Parliament if we were to read the word "mental" into Section 2(1)(*d*) of the 2012 Act. Given the fact that it is a beneficial/penal legislation, we as Judges can extend it only as far as Parliament intended and no further. I am in agreement, therefore, with the judgment of my learned Brother, including the directions given by him."

47. Given the *'lakshman rekha'* laid down in this judgment, it is a little difficult to appreciate how a cap can be judicially engrafted onto a statutory provision which then bars condonation of delay by even one day beyond the cap so engrafted.

48. Shri George, however, relied upon the judgments of this Court in *Chandi Prasad v. Jagdish Prasad,* (2004) 8 SCC 724 (at paragraph 22) and *D. Purushotama Reddy v. K. Sateesh,* (2008) 8 SCC 505 (at paragraph 11), to support the reasoning contained in *Varindera Constructions* (supra) and *N.V. International* (supra). He relied strongly upon paragraph 11 of the judgment in *D. Purushotama Reddy v. K. Sateesh,* (2008) 8 SCC 505, which reads as follows:

> **"11.** We have noticed hereinbefore that whereas the judgment of conviction and sentence was passed on 15-12-2005, the suit was decreed by the civil court on 23-1-2006. Deposit of a sum of Rs 2,00,000 by the appellants in favour of the respondent herein, was directed by the criminal court. Such an order should have been taken into consideration by the trial court. An appeal from a decree, furthermore, is a continuation of suit. The limitation of power on a civil court should also be borne in mind by the appellate court. Was any duty cast upon the civil court to consider the amount of compensation deposited in terms of Section 357 of the Code is the question."

49. From this paragraph, what was sought to be argued was that the limitation of power on a civil court at the initial stage can be read as a limitation onto the appellate court, as was done in the aforesaid judgments. We are afraid that we are unable to agree. This sentence was in the context of a decree passed in a civil suit for a sum of rupees 3.09 lakh with interest, without taking into consideration the fact that an amount of rupees 2.10 lakh had already been deposited by the appellant in criminal proceedings. The Court relied upon section 357(5) of the Code of Criminal Procedure, 1973 to hold that "the court" shall take into account any sum paid or recovered as compensation at the time of awarding compensation in any subsequent civil suit relating to the same matter. "The court" would obviously include an appellate court as well. It was only in this context that the aforesaid observation of limitation of power on a civil court being "borne in mind" by the appellate court, was made.

50. Shri George's reliance upon the judgment of this Court in *P. Radha Bai v. P. Ashok Kumar,* (2019) 13 SCC 445 (at paragraphs 36.2-36.3) on the doctrine of unbreakability when applied to section 34(3) of the Arbitration Act, also does not carry the matter much further, as the question is whether this doctrine can be bodily lifted and engrafted onto an appeal provision that has no cut-off point beyond which delay cannot be condoned.

For all these reasons, given the illuminating arguments made in these appeals, we are of the view that *N.V. International* (supra) has been wrongly decided and is therefore overruled.

51. However, the matter does not end here. The question still arises as to the application of section 5 of the Limitation Act to appeals which are governed by a uniform 60-day period of limitation. At one extreme, we have the judgment in *N.V. International* (supra) which does not allow condonation of delay beyond 30 days, and at the other extreme, we have an open-ended provision in which any amount of delay can be condoned, provided sufficient cause is shown. It is between these two extremes that we have to steer a middle course.

52. One judicial tool with which to steer this course is contained in the latin maxim *ut res magis valeat quam pereat.* This maxim was fleshed out in *CIT v. Hindustan Bulk Carriers,* (2003) 3 SCC 57 as follows:[2]

> **"14.** A construction which reduces the statute to a futility has to be avoided. A statute or any enacting provision therein must be so construed as to make it effective and operative on the principle expressed in the maxim *ut res magis valeat quam pereat* i.e. a liberal construction should be put upon written instruments, so as to uphold

2. Followed in the separate opinion delivered by Pasayat, J. in **Ashoka Kumar Thakur v. Union of India, (2008) 6 SCC 1** (see paragraphs 333-334).

them, if possible, and carry into effect the intention of the parties. [See *Broom's Legal Maxims* (10th Edn.), p. 361, *Craies on Statutes* (7th Edn.), p. 95 and *Maxwell on Statutes* (11th Edn.), p. 221.]

15. A statute is designed to be workable and the interpretation thereof by a court should be to secure that object unless crucial omission or clear direction makes that end unattainable. (See *Whitney* v. *IRC* [1926 AC 37 : 10 Tax Cas 88 : 95 LJKB 165 : 134 LT 98 (HL)] , AC at p. 52 referred to in *CIT* v. *S. Teja Singh* [AIR 1959 SC 352 : (1959) 35 ITR 408] and *Gursahai Saigal* v. *CIT* [AIR 1963 SC 1062 : (1963) 48 ITR 1] .)

16. The courts will have to reject that construction which will defeat the plain intention of the legislature even though there may be some inexactitude in the language used. (See *Salmon* v. *Duncombe* [(1886) 11 AC 627 : 55 LJPC 69 : 55 LT 446 (PC)] AC at p. 634, *Curtis* v. *Stovin* [(1889) 22 QBD 513 : 58 LJQB 174 : 60 LT 772 (CA)] referred to in *S. Teja Singh case* [AIR 1959 SC 352 : (1959) 35 ITR 408].)

17. If the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation, we should avoid a construction which would reduce the legislation to futility, and should rather accept the bolder construction, based on the view that Parliament would legislate only for the purpose of bringing about an effective result. (See *Nokes* v. *Doncaster Amalgamated Collieries* [(1940) 3 All ER 549 : 1940 AC 1014 : 109 LJKB 865 : 163 LT 343 (HL)] referred to in *Pye* v. *Minister for Lands for NSW* [(1954) 3 All ER 514 : (1954) 1 WLR 1410 (PC)] .) The principles indicated in the said cases were reiterated by this Court in *Mohan Kumar Singhania* v. *Union of India* [1992 Supp (1) SCC 594 : 1992 SCC (L&S) 455 : (1992) 19 ATC 881 : AIR 1992 SC 1] .

18. The statute must be read as a whole and one provision of the Act should be construed with reference to other provisions in the same Act so as to make a consistent enactment of the whole statute.

19. The court must ascertain the intention of the legislature by directing its attention not merely to the clauses to be construed but to the entire statute; it must compare the clause with other parts of the law and the setting in which the clause to be interpreted occurs. (See *R.S. Raghunath* v. *State of Karnataka* [(1992) 1 SCC 335 : 1992 SCC (L&S) 286 : (1992) 19 ATC 507 : AIR 1992 SC 81] .) Such a construction has the merit of avoiding any inconsistency or repugnancy either within a section or between two different sections or provisions of the same statute. It is the duty of the court to avoid a head-on clash between two sections of the same Act. (See *Sultana Begum* v. *Prem Chand Jain* [(1997) 1 SCC 373 : AIR 1997 SC 1006] .)

> **20.** Whenever it is possible to do so, it must be done to construe the provisions which appear to conflict so that they harmonise. It should not be lightly assumed that Parliament had given with one hand what it took away with the other.
>
> **21.** The provisions of one section of the statute cannot be used to defeat those of another unless it is impossible to effect reconciliation between them. Thus a construction that reduces one of the provisions to a "useless lumber" or "dead letter" is not a harmonised construction. To harmonise is not to destroy."

53. Reading the Arbitration Act and the Commercial Courts Act as a whole, it is clear that when section 37 of the Arbitration Act is read with either Article 116 or 117 of the Limitation Act or section 13(1A) of the Commercial Courts Act, the object and context provided by the aforesaid statutes, read as a whole, is the speedy disposal of appeals filed under section 37 of the Arbitration Act. To read section 5 of the Limitation Act consistently with the aforesaid object, it is necessary to discover as to what the expression "sufficient cause" means in the context of condoning delay in filing appeals under section 37 of the Arbitration Act.

54. The expression "sufficient cause" contained in section 5 of the Limitation Act is elastic enough to yield different results depending upon the object and context of a statute. Thus, in *Ajmer Kaur v. State of Punjab,* (2004) 7 SCC 381, this Court, in the context of section 11(5) of the Punjab Land Reforms Act, 1972, held as follows:

> **"10.** Permitting an application under Section 11(5) to be moved at any time would have disastrous consequences. The State Government in which the land vests on being declared as surplus, will not be able to utilise the same. The State Government cannot be made to wait indefinitely before putting the land to use. Where the land is utilised by the State Government, a consequence of the order passed subsequently could be of divesting it of the land. Taking the facts of the present case by way of an illustration, it would mean that the land which stood mutated in the State Government in 1982 and which was allotted by the State Government to third parties in 1983, would as a result of reopening the settled position, lead to third parties being asked to restore back the land to the State Government and the State Government in turn would have to be divested of the land. The land will in turn be restored to the landowner. This will be the result of the land being declared by the Collector as not surplus with the landowner. The effect of permitting such a situation will be that the land will remain in a situation of flux. There will be no finality. The very purpose of the legislation will be defeated. The allottee will not be able to utilise the land for fear of being divested in the event of deaths and births in the family of the landowners.

> Deaths and births are events which are bound to occur. Therefore, it is reasonable to read a time-limit in sub-section (5) of Section 11. The concept of reasonable time in the given facts would be most appropriate. An application must be moved within a reasonable time. The facts of the present case demonstrate that redetermination under sub-section (5) of Section 11 almost 5 years after the death of Kartar Kaur and more than 6 years after the order of the Collector declaring the land as surplus had become final, has resulted in grave injustice besides defeating the object of the legislation which was envisaged as a socially beneficial piece of legislation. Thus we hold that the application for redetermination filed by Daya Singh under sub-section (5) of Section 11 of the Act on 21-6-1985 was liable to be dismissed on the ground of inordinate delay and the Collector was wrong in reopening the issue declaring the land as not surplus in the hands of Daya Singh and Kartar Kaur.
>
> **11.** The above reasoning is in consonance with the provision in sub-section (7) of Section 11 of the Act. Sub-section (7) uses the words "where succession has opened after the surplus area or any part thereof has been determined by the Collector ....".The words "determined by the Collector" would mean that the order of the Collector has attained finality. The provisions regarding appeals, etc. contained in Sections 80-82 of the Punjab Tenancy Act, 1887, as made applicable to proceedings under the Punjab Land Reforms Act, 1972, show that the maximum period of limitation in case of appeal or review is ninety days. The appeal against the final order of the Collector dated 30-9-1976 whereby 3.12 hectares of land had been declared as surplus was dismissed on 27-3-1979. The order was allowed to become final as it was not challenged any further. Thus the determination by the Collector became final on 27-3-1979. The same could not be reopened after a lapse of more than 6 years by order dated 23-7-1985. The subsequent proceedings before the Revenue Authorities did not lie. The order dated 23-7-1985 is non est. All the subsequent proceedings therefore fall through. The issue could not have been reopened."
> (emphasis supplied)

55. Nearer home, in *Brahampal v. National Insurance Company,* 2020 SCC OnLine SC 1053, this Court specifically referred to the difference between a delay in filing commercial claims under the Arbitration Act or the Commercial Courts Act and claims under the Motor Vehicles Act, 1988, as follows:

> **"16.** This Court has *firstly* held that purpose of conferment of such power must be examined for the determination of the scope of such discretion conferred upon the court. [refer to *Bhaiya Punjalal Bhagwandin* v. *Dave Bhagwatprasad Prabhuprasad,* AIR 1963 SC 120; *Shri Prakash Chand Agarwal* v. *Hindustan Steel Ltd.,* (1970) 2 SCC 806]. Our analysis of the purpose of the Act suggests that such

discretionary power is conferred upon the Courts, to enforce the rights of the victims and their dependents. The legislature intended that Courts must have such power so as to ensure that substantive justice is not trumped by technicalities.
(emphasis supplied)

"22. Therefore, the aforesaid provision being a beneficial legislation, must be given liberal interpretation to serve its object. Keeping in view the substantive rights of the parties, undue emphasis should not be given to technicalities. In such cases delay in filing and refiling cannot be viewed strictly, as compared to commercial claims under the Arbitration and Concilliation Act, 1996 or the Commercial Courts Act, 2015. In *P. Radha Bai* v. *P. Ashok Kumar,* (2019) 13 SCC 445, wherein this Court while interpreting Section 34 of the Arbitration Act, held that the right to object to an award itself is substantively bound with the limitation period prescribed therein and the same cannot merely a procedural prescription. In effect the Court held that a complete petition, has to be filed within the time prescribed under Section 34 of the Arbitration Act and '*not thereafter'.* The Court while coming to the aforesaid conclusion, reasoned as under:

> **"36.1** First, the purpose of the Arbitration Act was to provide for a speedy dispute resolution process. The Statement of Objects and Reasons reveal that the legislative intent of enacting the Arbitration Act was to provide parties with an efficient alternative dispute resolution system which gives litigants an expedited resolution of disputes while reducing the burden on the courts. Article 34(3) reflects this intent when it defines the commencement and concluding period for challenging an award. **This Court in** Popular Construction case [Union of India *v.* Popular Construction Co., **(2001) 8 SCC 470] highlighted the importance of the fixed periods under the Arbitration Act. We may also add that the finality is a fundamental principle enshrined under the Arbitration Act and a definitive time-limit for challenging an award is necessary for ensuring finality.** If Section 17 were to be applied, an award can be challenged even after 120 days. This would defeat the Arbitration Act's objective of speedy resolution of disputes. The finality of award would also be in a limbo as a party can challenge an award even after the 120 day period."

(emphasis in original)

> **"23.** Coming back to the Motor Vehicles Act, the legislative intent is to provide appropriate compensation for the victims and to protect their substantive rights, in pursuit of the same, the interpretation should not be as strict as commercial claims as elucidated above.
>
> **24.** Undoubtedly, the statute has granted the Courts with discretionary powers to condone the delay, however at the same time it also places an obligation upon the party to justify that he was prevented from abiding by the same due to the existence of "sufficient cause". Although there exists no strait jacket formula for the Courts to condone delay, but the Courts must not only take into consideration the entire facts and circumstances of case but also the conduct of the parties. The concept of reasonableness dictates that, the Courts even while taking a liberal approach must weigh in the rights and obligations of both the parties. When a right has accrued in favour of one party due to gross negligence and lackadaisical attitude of the other, this Court shall refrain from exercising the aforesaid discretionary relief.
>
> **25.** Taking into consideration the facts and circumstances of the present case, we are of the opinion that the delay of 45 days has been properly explained by the appellants, which was on account of illness of the wife of Appellant No. 1. It was not appropriate on the part of the High Court to dismiss the appeal merely on the ground of delay of short duration, particularly in matters involving death in motor accident claims. Moreover, in the present case no *mala fide* can be imputable against the appellants for filing the appeal after the expiry of ninety days. Therefore, we are of the opinion that the strict approach taken in the impugned order is hyper-technical and cannot be sustained in the eyes of law."

(emphasis supplied)

56. Given the object sought to be achieved under both the Arbitration Act and the Commercial Courts Act, that is, the speedy resolution of disputes, the expression "sufficient cause" is not elastic enough to cover long delays beyond the period provided by the appeal provision itself. Besides, the expression "sufficient cause" is not itself a loose panacea for the ill of pressing negligent and stale claims. This Court, in *Basawaraj v. Land Acquisition Officer,* (2013) 14 SCC 81, has held:

> **"9.** Sufficient cause is the cause for which the defendant could not be blamed for his absence. The meaning of the word "sufficient" is "adequate" or "enough", inasmuch as may be necessary to answer the purpose intended. Therefore, the word "sufficient" embraces no more than that which provides a platitude, which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case, duly examined from the viewpoint of a reasonable standard of a cautious man. In this context, "sufficient cause" means that the party

should not have acted in a negligent manner or there was a want of bona fide on its part in view of the facts and circumstances of a case or it cannot be alleged that the party has "not acted diligently" or "remained inactive". However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously. The applicant must satisfy the court that he was prevented by any "sufficient cause" from prosecuting his case, and unless a satisfactory explanation is furnished, the court should not allow the application for condonation of delay. The court has to examine whether the mistake is bona fide or was merely a device to cover an ulterior purpose. (See *Manindra Land and Building Corpn. Ltd.* v. *Bhutnath Banerjee* [AIR 1964 SC 1336] , *Mata Din* v. *A. Narayanan* [(1969) 2 SCC 770 : AIR 1970 SC 1953] , *Parimal* v. *Veena* [(2011) 3 SCC 545 : (2011) 2 SCC (Civ) 1 : AIR 2011 SC 1150] and *Maniben Devraj Shah* v. *Municipal Corpn. of Brihan Mumbai* [(2012) 5 SCC 157 : (2012) 3 SCC (Civ) 24 : AIR 2012 SC 1629] .)

10. In *Arjun Singh* v. *Mohindra Kumar* [AIR 1964 SC 993] this Court explained the difference between a "good cause" and a "sufficient cause" and observed that every "sufficient cause" is a good cause and vice versa. However, if any difference exists it can only be that the requirement of good cause is complied with on a lesser degree of proof than that of "sufficient cause".

11. The expression "sufficient cause" should be given a liberal interpretation to ensure that substantial justice is done, but only *so long as negligence, inaction or lack of bona fides cannot be imputed to the party concerned,* whether or not sufficient cause has been furnished, can be decided on the facts of a particular case and no straitjacket formula is possible. (Vide *Madanlal* v. *Shyamlal* [(2002) 1 SCC 535 : AIR 2002 SC 100] and *Ram Nath Sao* v. *Gobardhan Sao* [(2002) 3 SCC 195 : AIR 2002 SC 1201] .)

12. It is a settled legal proposition that law of limitation may harshly affect a particular party but it has to be applied with all its rigour when the statute so prescribes. The court has no power to extend the period of limitation on equitable grounds. "A result flowing from a statutory provision is never an evil. A court has no power to ignore that provision to relieve what it considers a distress resulting from its operation." The statutory provision may cause hardship or inconvenience to a particular party but the court has no choice but to enforce it giving full effect to the same. The legal maxim *dura lex sed lex* which means "the law is hard but it is the law", stands attracted in such a situation. It has consistently been held that, "inconvenience is not" a decisive factor to be considered while interpreting a statute.

13. The statute of limitation is founded on public policy, its aim being to secure peace in the community, to suppress fraud and perjury, to quicken diligence and to prevent oppression. It seeks to bury all acts of the past which have not been agitated unexplainably and have from lapse of time become stale. According to *Halsbury's Laws of England,* Vol. 28, p. 266:

> "605. *Policy of the Limitation Acts.*—The courts have expressed at least three differing reasons supporting the existence of statutes of limitations namely, (*1*) that long dormant claims have more of cruelty than justice in them, (*2*) that a defendant might have lost the evidence to disprove a stale claim, and (*3*) that persons with good causes of actions should pursue them with reasonable diligence."

An unlimited limitation would lead to a sense of insecurity and uncertainty, and therefore, limitation prevents disturbance or deprivation of what may have been acquired in equity and justice by long enjoyment or what may have been lost by a party's own inaction, negligence or laches. (See *Popat and Kotecha Property* v. *SBI Staff Assn.* [(2005) 7 SCC 510] , *Rajender Singh* v. *Santa Singh* [(1973) 2 SCC 705 : AIR 1973 SC 2537] and *Pundlik Jalam Patil* v. *Jalgaon Medium Project* [(2008) 17 SCC 448 : (2009) 5 SCC (Civ) 907] .)

14. In *P. Ramachandra Rao* v. *State of Karnataka* [(2002) 4 SCC 578 : 2002 SCC (Cri) 830 : AIR 2002 SC 1856] this Court held that judicially engrafting principles of limitation amounts to legislating and would fly in the face of law laid down by the Constitution Bench in *Abdul Rehman Antulay* v. *R.S. Nayak* [(1992) 1 SCC 225 : 1992 SCC (Cri) 93 : AIR 1992 SC 1701] .

15. The law on the issue can be summarised to the effect that where a case has been presented in the court beyond limitation, the applicant has to explain the court as to what was the "sufficient cause" which means an adequate and enough reason which prevented him to approach the court within limitation. In case a party is found to be negligent, or for want of bona fide on his part in the facts and circumstances of the case, or found to have not acted diligently or remained inactive, there cannot be a justified ground to condone the delay. No court could be justified in condoning such an inordinate delay by imposing any condition whatsoever. The application is to be decided only within the parameters laid down by this Court in regard to the condonation of delay. In case there was no sufficient cause to prevent a litigant to approach the court on time condoning the delay without any justification, putting any condition whatsoever, amounts to passing an order in violation of the statutory provisions and it tantamounts to showing utter disregard to the legislature."
(emphasis supplied)

57. Likewise, merely because the government is involved, a different yardstick for condonation of delay cannot be laid down. This was felicitously stated in *Postmaster General v. Living Media India Ltd.,* (2012) 3 SCC 563 **["Postmaster General"],** as follows:

> **"27.** It is not in dispute that the person(s) concerned were well aware or conversant with the issues involved including the prescribed period of limitation for taking up the matter by way of filing a special leave petition in this Court. They cannot claim that they have a separate period of limitation when the Department was possessed with competent persons familiar with court proceedings. In the absence of plausible and acceptable explanation, we are posing a question why the delay is to be condoned mechanically merely because the Government or a wing of the Government is a party before us.
>
> **28.** Though we are conscious of the fact that in a matter of condonation of delay when there was no gross negligence or deliberate inaction or lack of bona fides, a liberal concession has to be adopted to advance substantial justice, we are of the view that in the facts and circumstances, the Department cannot take advantage of various earlier decisions. The claim on account of impersonal machinery and inherited bureaucratic methodology of making several notes cannot be accepted in view of the modern technologies being used and available. The law of limitation undoubtedly binds everybody, including the Government.
>
> **29.** In our view, it is the right time to inform all the government bodies, their agencies and instrumentalities that unless they have reasonable and acceptable explanation for the delay and there was bona fide effort, there is no need to accept the usual explanation that the file was kept pending for several months/years due to considerable degree of procedural red tape in the process. The government departments are under a special obligation to ensure that they perform their duties with diligence and commitment. Condonation of delay is an exception and should not be used as an anticipated benefit for the government departments. The law shelters everyone under the same light and should not be swirled for the benefit of a few."

58. The decision in *Postmaster General* (supra) has been followed in the following subsequent judgments of this Court:

i) *State of Rajasthan v. Bal Kishan Mathur,* (2014) 1 SCC 592 at paragraphs 8-8.2;

ii) *State of U.P. v. Amar Nath Yadav,* (2014) 2 SCC 422 at paragraphs 2-3;

iii) *State of T.N. v. N. Suresh Rajan,* (2014) 11 SCC 709 at paragraphs 11-13; and

iv) *State of M.P. v. Bherulal,* (2020) 10 SCC 654 at paragraphs 3-4.

59. In a recent judgment, namely, *State of M.P. v. Chaitram Maywade,* (2020) 10 SCC 667, this Court referred to *Postmaster General* (supra), and held as follows:

> **"1.** The State of Madhya Pradesh continues to do the same thing again and again and the conduct seems to be incorrigible. The special leave petition has been filed after a delay of 588 days. We had an occasion to deal with such inordinately delayed filing of the appeal by the State of Madhya Pradesh in *State of M.P.* v. *Bherulal* [*State of M.P.* v. *Bherulal,* (2020) 10 SCC 654] in terms of our order dated 15-10-2020.
>
> **2.** We have penned down a detailed order in that case and we see no purpose in repeating the same reasoning again except to record what are stated to be the facts on which the delay is sought to be condoned. On 5-1-2019, it is stated that the Government Advocate was approached in respect of the judgment delivered on 13-11-2018 [*Chaitram Maywade* v. *State of M.P.,* 2018 SCC OnLine HP 1632] and the Law Department permitted filing of the SLP against the impugned order on 26-5-2020. Thus, the Law Department took almost about 17 months' time to decide whether the SLP had to be filed or not. What greater certificate of incompetence would there be for the Legal Department!
>
> **3.** We consider it appropriate to direct the Chief Secretary of the State of Madhya Pradesh to look into the aspect of revamping the Legal Department as it appears that the Department is unable to file appeals within any reasonable period of time much less within limitation. These kinds of excuses, as already recorded in the aforesaid order, are no more admissible in view of the judgment in *Postmaster General* v. *Living Media (India) Ltd. [Postmaster General* v. *Living Media (India) Ltd.,* (2012) 3 SCC 563 : (2012) 2 SCC (Civ) 327 : (2012) 2 SCC (Cri) 580 : (2012) 1 SCC (L&S) 649]
>
> **4.** We have also expressed our concern that these kinds of the cases are only "certificate cases" to obtain a certificate of dismissal from the Supreme Court to put a quietus to the issue. The object is to save the skin of officers who may be in default. We have also recorded the irony of the situation where no action is taken against the officers who sit on these files and do nothing.
>
> **5.** Looking to the period of delay and the casual manner in which the application has been worded, the wastage of judicial time involved, we impose costs on the petitioner State of Rs 35,000 to be deposited with the Mediation and Conciliation Project Committee. The amount be deposited within four weeks. The amount be recovered from the officer(s) responsible for the delay in filing and sitting on the files and certificate of recovery of the said amount be also filed in this Court within the said period of time. We have put to Deputy Advocate General

> to caution that for any successive matters of this kind the costs will keep on going up."

60. Also, it must be remembered that merely because sufficient cause has been made out in the facts of a given case, there is no right in the appellant to have delay condoned. This was felicitously put in *Ramlal v. Rewa Coalfields Ltd.,* (1962) 2 SCR 762 as follows:

> "It is, however, necessary to emphasise that even after sufficient cause has been shown a party is not entitled to the condonation of delay in question as a matter of right. The proof of a sufficient cause is a condition precedent for the exercise of the discretionary jurisdiction vested in the court by s. 5. If sufficient cause is not proved nothing further has to be done; the application for condoning delay has to be dismissed on that ground alone. If sufficient cause is shown then the Court has to enquire whether in its discretion it should condone the delay. This aspect of the matter naturally introduces the consideration of all relevant facts and it is at this stage that diligence of the party or its *bona fides* may fall for consideration; but the scope of the enquiry while exercising the discretionary power after sufficient cause is shown would naturally be limited only to such facts as the Court may regard as relevant. It cannot justify an enquiry as to why the party was sitting idle during all the time available to it. In this connection we may point out that considerations of *bona fides* or due diligence are always material and relevant when the Court is dealing with applications made under s. 14 of the Limitation Act. In dealing with such applications the Court is called upon to consider the effect of the combined provisions of ss. 5 and 14. Therefore, in our opinion, considerations which have been expressly made material and relevant by the provisions of s. 14 cannot to the same extent and in the same manner be invoked in dealing with applications which fall to be decided only under s. 5 without reference to s. 14."
> (page 771)

61. Given the aforesaid and the object of speedy disposal sought to be achieved both under the Arbitration Act and the Commercial Courts Act, for appeals filed under section 37 of the Arbitration Act that are governed by Articles 116 and 117 of the Limitation Act or section 13(1A) of the Commercial Courts Act, a delay beyond 90 days, 30 days or 60 days, respectively, is to be condoned by way of exception and not by way of rule. In a fit case in which a party has otherwise acted *bona fide* and not in a negligent manner, a short delay beyond such period can, in the discretion of the court, be condoned, always bearing in mind that the other side of the picture is that the opposite party may have acquired both in equity and justice, what may now be lost by the first party's inaction, negligence or laches.

62. Coming to the facts of the appeals before us, in the Civil Appeal arising out of SLP (C) No. 665 of 2021, the impugned judgment of the High Court of Bombay, dated 17.12.2020, has found that the Govt of Maharashtra had not approached the court *bona fide,* as follows:

> **"7.** I have carefully gone through the papers. There can be no doubt in view of the documentary evidence in the form of copy of the application tendered by the Advocate representing the applicant for obtaining a certified copy (Exhibit-R1) that in fact, after pronouncement of the judgment and order in the proceeding under Section 34 of the Act, the concerned Advocate had applied for certified copy on 14.05.2019. The endorsement further reads that it was to be handed over to Mr. A.D. Patil of the Irrigation Department, Dhule, who is a staff from the office of the applicant. The further endorsements also clearly show that the certified copy was ready and was to be delivered on 27.05.2019. [In spite] of such a stand and document, the applicant has not controverted this or has not come up with any other stand touching this aspect. It is therefore apparent that the applicant is not coming to the Court with clean hands even while seeking the discretionary relief of condonation of delay"

63. Apart from this, there is a long delay of 131 days beyond the 60-day period provided for filing an appeal under section 13(1A) of the Commercial Courts Act. There is no explanation worth the name contained in the condonation of delay application, beyond the usual file-pushing and administrative exigency. This appeal is therefore dismissed.

64. In the Civil Appeal arising out of SLP (C) No. 15278 of 2020, the impugned judgment of the High Court of Madhya Pradesh dated 27.01.2020 relies upon *Consolidated Engg.* (supra) and thereby states that the judgment of this Court in *N.V. International* (supra) would not apply. The judgment of the High Court is wholly incorrect inasmuch as *Consolidated Engg.* (supra) was a judgment which applied the provisions of section 14 of the Limitation Act and had nothing to do with the application of section 5 of the Limitation Act. *N.V. International* (supra) was a direct judgment which applied the provisions of section 5 of the Limitation Act and then held that no condonation of delay could take place beyond 120 days. The High Court was bound to follow *N.V. International* (supra), as on the date of the judgment of the High Court, *N.V. International* (supra) was a judgment of two learned judges of the Supreme Court binding upon the High Court by virtue of Article 141 of the Constitution. On this score, the impugned judgment of the High Court deserves to be set aside.

65. That apart, on the facts of this appeal, there is a long delay of 75 days beyond the period of 60 days provided by the Commercial Courts Act. Despite the fact that a certified copy of the District Court's judgment was obtained by the

respondent on 27.04.2019, the appeal was filed only on 09.09.2019, the explanation for delay being:

> **"2.** That, the certified copy of the order dated 01/04/2013 was received by the appellant on 27/04/2019. Thereafter the matter was placed before the CGM purchase MPPKVVCL for the compliance of the order. The same was then sent to the law officer, MPPKVVCL for opinion.
>
> **3.** That after taking opinion for appeal, and approval of the concerned authorities, the officer-in-charge was appointed vide order dated 23/07/2019.
>
> **4.** That, thereafter due to bulky records of the case and for procurement of the necessary documents some delay has been caused however, the appeal has been prepared and filed to pursuant to the same and further delay.
>
> **5.** That due to the aforesaid procedural approval and since the appellant is a public entity formed under the Energy department of the State Government, the delay caused in filing the appeal is bonafide and which deserve[s] to be condoned."

66. This explanation falls woefully short of making out any sufficient cause. This appeal is therefore allowed and the condonation of delay is set aside on this score also.

67. In the Civil Appeal arising out of SLP (C) Diary No. 18079 of 2020, there is a huge delay of 227 days in filing the appeal, and a 200-day delay in refiling. The facts of this case also show that there was no sufficient cause whatsoever to condone such a long delay. The impugned judgment of the High Court of Delhi dated 15.10.2019 cannot be faulted on this score and this appeal is consequently dismissed.

68. Appeals disposed of accordingly.

Order accordingly

I.L.R. [2021] M.P. 604 (SC)
SUPREME COURT OF INDIA

Before Mr. Justice Dr. Dhananjaya Y Chandrachud, Mr. Justice M.R. Shah & Mr. Justice Sanjiv Khanna

CA No. 1051/2021 decided on 23 March, 2021

CHIEF GENERAL MANAGER (IPC) MP POWER TRADING CO. LTD. & anr. …Appellants

Vs.

NARMADA EQUIPMENTS PVT. LTD. …Respondent

A. Arbitration and Conciliation Act (26 of 1996), Section 11(6) and Electricity Act (36 of 2003), Section 86(1)(f) & 174 – Special/General Provision – Applicability & Jurisdiction **– Held – Section 86(1)(f) of 2003 Act is a special provision which overrides general provision contained in Section 11 of 1996 Act – Section 86(1)(f) vests a statutory jurisdiction with State Electricity Commission to adjudicate disputes between licensees and generating companies – Order of High Court appointing arbitrator u/S 11 of 1996 Act is set aside – Appeal allowed. (Para 11 & 15)**

क. माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 11(6) एवं विद्युत अधिनियम (2003 का 36), धारा 86(1)(f) व 174 – विशेष/सामान्य उपबंध – प्रयोज्यता व अधिकारिता – अभिनिर्धारित – अधिनियम 2003 की धारा 86(1)(f) एक विशेष उपबंध है जो कि अधिनियम 1996 की धारा 11 में अंतर्विष्ट सामान्य उपबंध पर अभिभावी होता है – धारा 86(1)(f) राज्य विद्युत आयोग को अनुज्ञप्तिधारी और उत्पादक कंपनियों के मध्य विवादों को न्यायनिर्णीत करने की कानूनी अधिकारिता निहित करती है – 1996 के अधिनियम की धारा 11 के अंतर्गत मध्यस्थ नियुक्त करने का उच्च न्यायालय का आदेश अपास्त किया गया – अपील मंजूर।

B. Arbitration and Conciliation Act (26 of 1996), Section 11(6) & 21 and Electricity Act (36 of 2003), Section 86(1)(f) – Commencement of Arbitral Proceeding – Relevant Date – Applicability of Act **– Held – Notice for initiation of arbitration issued on 30.05.2011 – Regarding commencement of arbitral proceeding, material date would be 30.05.2011 when notice was issued – If PPA and notice of termination predate the 2003 Act, it would not constitute material circumstances – Act of 2003 is applicable in present case. (Para 9)**

ख. माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 11(6) व 21 एवं विद्युत अधिनियम (2003 का 36), धारा 86(1)(f) – माध्यस्थम् कार्यवाही का प्रारंभ – सुसंगत तिथि – अधिनियम की प्रयोज्यता – अभिनिर्धारित – मध्यस्थता शुरू करने हेतु नोटिस दिनांक 30.05.2011 को जारी किया गया – माध्यस्थम् कार्यवाही आरंभ करने के संबंध में, सारवान् तिथि 30.05.2011 होगी जब नोटिस जारी किया गया था – यदि विद्युत क्रय करार (पी.पी.ए.) तथा पर्यवसान का नोटिस 2003 के अधिनियम के पूर्व तिथि के हैं, तो

वह तात्विक परिस्थितियां गठित नहीं करेंगे – 2003 का अधिनियम वर्तमान प्रकरण में लागू होगा।

***C. Arbitration and Conciliation Act (26 of 1996), Section 11(6) & 21 and Electricity Act (36 of 2003), Section 86(1)(f) – Objection of Jurisdiction* – Held – This Court earlier concluded that if there is inherent lack of jurisdiction, the plea/objection can be taken at any stage and also in collateral proceedings – Defect of jurisdiction cannot be cured even by consent of parties. (Para 14)**

ग. माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 11(6) व 21 एवं विद्युत अधिनियम (2003 का 36), धारा 86(1)(f) – अधिकारिता का आक्षेप – अभिनिर्धारित – इस न्यायालय ने पूर्व में निष्कर्षित किया है कि यदि अधिकारिता की कमी अंतर्निहित है, किसी भी प्रक्रम पर और संपार्श्विक कार्यवाहियों में भी अभिवाक्/आक्षेप लिया जा सकता है – अधिकारिता की त्रुटि को पक्षकारों की सहमति द्वारा भी सुधारा नहीं जा सकता है।

Cases referred:

(2008) 4 SCC 755, (2019) 17 SCC 82, (2020) 15 SCC 161.

J U D G M E N T

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

2. This appeal arises from a judgment and order of a learned Single Judge of the High Court of Madhya Pradesh dated 30 November 2016 where it appointed an Arbitrator in the dispute between the parties, in an application[1] filed by the respondent under Section 11(6) of the Arbitration and Conciliation Act 1996[2].

3. The genesis of the matter is from when the Madhya Pradesh Electricity Board[3], entered into a Power Purchase Agreement[4] on 20 May 1999 with the respondent. Under the PPA, the respondent was to establish a mini hydro-electric project on a built and operate basis. However, the PPA was terminated on 27 September 2001 by the Board. The respondent initially filed a writ petition[5] challenging the termination of the PPA. The High Court, by its order dated 4 November 2009, declined to entertain the petition in view of an arbitration

1 "AC No 1 of 2015"
2 "1996 Act"
3 "Board"
4 "PPA"
5 "WP No 2642 of 2002"

agreement contained in Clause 12.3[6] of the PPA. Thereafter, the respondent filed a review petition[7] which was dismissed by the High Court by an order dated 10 December 2009.

4. As a consequence of the orders dated 4 November 2009 and 10 December 2009, on 28 December 2009, the respondent issued a notice to the Board under Clause 12.1 of the PPA, seeking to resolve the dispute by mutual discussion. Since the respondent did not receive a reply to the notice dated 28 December 2009 from the Board, on 30 May 2011, the respondent issued another notice to the Board invoking arbitration under Clause 12.3 of the PPA. In the notice, the respondent stated that if the Board did not act upon the notice within 30 days of its receipt, it would approach the High Court under Section 11(6) of the 1996 Act.

5. Having received no reply from the Board, an application[8] was filed under Section 11(6) of the 1996 Act by the respondent seeking the appointment of an arbitrator. The High Court, by its order dated 21 January 2014, recorded that the respondent and the appellant had agreed to nominate their arbitrators, and observed that the two arbitrators would proceed to appoint a third arbitrator, in accordance with the procedure in Clause 12.3(a) of the PPA. The nominated Arbitrators fixed their first meeting on 7 May 2014, when both parties appeared and the Arbitrators' fee was fixed. However, the Arbitrators, by a letter dated 7 July 2014, highlighted their inability to proceed with the arbitration proceedings on the ground that their fees had not been paid.

6. Thereafter, the respondent filed AC No 1 of 2015 on 8 December 2014, seeking the appointment of an arbitrator under Section 11(6) of the 1996 Act. This application was opposed by the appellant on the ground that, in view of the provisions of Section 86(1)(f) of the Electricity Act 2003[9], it was the State Electricity Commission which was vested with the exclusive jurisdiction to

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6 *"12.3 Arbitration:*

(a) If dispute cannot be salted within Thirty (30)days mutual discussions as (sic) by section 12.1 and (sic) to Conciliation is not elected by the Parties pursuant to Section 12.2 of if a Parties so requests in accordance with Section 12.2 the Dispute shall in dally be settled by an Umpire to be appointed by two arbitrators one to be appointed by the Board and other by the Company Provisions of the Indian Arbitration and Conciliation Act 1996 9or any enactment that replaces the said Act) shall apply in such arbitrator. The arbitration proceedings shall be held at head Quarter of the Board i.e. at Jabalpur.

(b) The award rendered shall apportion the costs of the arbitration.

(c) The award rendered in any arbitration commended here under shall be final conclusive and binding upon the Parties and award may be entered in any Court having jurisdiction as darned under article 15.1."

7 "Review Petition No 716 of 2009"

8 "AC No 76 of 2011"

9 "2003 Act"

adjudicate upon disputes between licensees and generating companies. By the impugned judgment and order dated 30 November 2016, the Single Judge of the High Court allowed the application filed by the respondent under Section 11(6) of the 1996 Act. The Single Judge held that the remedies under Section 86(1)(f) of the 2003 Act and under Section 11(6) of the 1996 Act are independent of each other, and it was open to the High Court to exercise its jurisdiction under Section 11(6). The appellant now comes before this Court in appeal.

7. The submission of the appellant, which has been urged before this Court by Mr Varun Chopra, learned counsel, is that the view which has been taken by the High Court is contrary to the law which has been laid down by a two-Judge Bench of this Court in *Gujarat Urja Vikas Nigam Limited v Essar Power Limited*[10].

8. Controverting the submissions, Mr Sanjay K Agrawal, learned counsel appearing on behalf of the respondent, however, urged that the decision in *Gujarat Urja Vikas Nigam Limited* (supra) would not apply to the facts of the present case since the PPA was executed on 20 May 1999 and the termination by the Board was on 27 September 2001; both of these events have taken place before the enforcement of the 2003 Act on 10 June 2003. It was further urged that the appellant did not raise its objection stemming from Section 86(1)(f) of the 2003 Act when the High Court appointed Arbitrators by the consent of both parties in its order dated 21 January 2014 in AC No 76 of 2011 and also before the Arbitrators so appointed, and hence it cannot be raised at this stage.

9. In the present case, the notice for the initiation of arbitration under Clause 12.3 of the PPA was issued by the respondent on 30 May 2011. The commencement of the arbitral proceedings by the invocation of the arbitration agreement would, therefore, relate to 30 May 2011, when the notice invoking Clause 12.3 was issued. Hence, the fact that the PPA and the notice of termination predate the 2003 Act would not constitute material circumstances. Section 21[11] of the 1996 Act specifies that unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute would commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent. Hence, there can be no manner of doubt that 30 May 2011 would be the material date, since it is on this date that the notice invoking Clause 12.3 was issued by the respondent to the appellant.

10. The first issue which is raised in this appeal is governed by *Gujarat Urja Vikas Nigam Limited* (supra). In that case, the power purchase agreement between the parties was entered into on 30 May 1996, and the notice for referring the

10 (2008) 4 SCC 755, hereinafter referred to as "**Gujarat Urja Vikas Nigam Limited**"

11 ***"21. Commencement of arbitral proceedings.***—*Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent."*

dispute to arbitration was sent by one of the parties on 14 November 2005. The other party opposed the notice by stating that the State Electricity Commission had exclusive jurisdiction in accordance with Section 86(1)(f) of the 2003 Act. The Gujarat High Court thereafter appointed an Arbitrator in an application under Section 11(6) of the 1996 Act, which was impugned before this Court. Speaking for the two-Judge bench, Justice Markandey Katju settled the position of law in paragraphs 26, 27 and 28 of the judgment, which are extracted below for convenience of reference:

> "26. It may be noted that Section 86(1)(*f*) of the Act of 2003 is a special provision for adjudication of disputes between the licensee and the generating companies. Such disputes can be adjudicated upon either by the State Commission or the person or persons to whom it is referred for arbitration. In our opinion the word "and" in Section 86(1)(*f*) between the words "generating companies" and "to refer any dispute for arbitration" means "or". It is well settled that sometimes "and" can mean "or" and sometimes "or" can mean "and" (vide G.P. Singh's *Principles of Statutory Interpretation*, 9th Edn., 2004, p. 404).
>
> 27. In our opinion in Section 86(1)(*f*) of the Electricity Act, 2003 the word "and" between the words "generating companies" and the words "refer any dispute" means "or", otherwise it will lead to an anomalous situation because obviously the State Commission cannot both decide a dispute itself and also refer it to some arbitrator. Hence the word "and" in Section 86(1)(*f*) means "or".
>
> 28. Section 86(1)(*f*) is a special provision and hence will override the general provision in Section 11 of the Arbitration and Conciliation Act, 1996 for arbitration of disputes between the licensee and generating companies. It is well settled that the special law overrides the general law. Hence, in our opinion, Section 11 of the Arbitration and Conciliation Act, 1996 has no application to the question who can adjudicate/arbitrate disputes between licensees and generating companies, and only Section 86(1)(*f*) shall apply in such a situation."

This position has subsequently also been approved by two three-Judge benches of this Court in *Hindustan Zinc Limited v Ajmer Vidyut Vitran Nigam Limited*[12] and *NHAI v Sayedabad Tea Company Limited*[13].

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12 (2019) 17 SCC 82; hereinafter, referred to as "**Hindustan Zinc Limited**"

13 (2020) 15 SCC 161

11. From the above judgment, it is evident that this Court has held that Section 86(1)(f) of the 2003 Act is a special provision which overrides the general provisions contained in Section 11 of the 1996 Act. Section 86(1)(f) vests a statutory jurisdiction with the State Electricity Commission to adjudicate upon disputes between licensees and generating companies and to refer any dispute for arbitration. The "and" between "generating companies" and "to refer any dispute for arbitration" is to be read as an "or", since the State Electricity Commission cannot obviously resolve the dispute itself and also refer it to arbitration. Section 86(1)(f) is extracted below:

> "**86.Functions of State Commission.**— (1) The State Commission shall discharge the following functions, namely:-
>
> *** ***
>
> ***
>
> (f) adjudicate upon the disputes between the licensees and generating companies and to refer any dispute for arbitration;"

12. Section 174 of the 2003 Act provides overriding effect to the 2003 Act notwithstanding anything inconsistent contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than the 2003 Act itself. Section 174 provides thus:

> "**174. Act to have overriding effect.** — Save as otherwise provided in Section 173, the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act."

13. We refer now to the second argument raised on behalf of the respondent, that the appellant cannot raise an objection relying on Section 86(1)(f) of the 2003 Act in the second application filed by it under Section 11(6) of the 1996 Act, when it had not raised the same objection in the first application under Section 11(6) of the 1996 Act or before the Arbitrators so appointed. It is pertinent to note that this argument was rejected by the Single Judge of the High Court in the impugned judgment and order dated 30 November 2016 in the following terms"

> "9. I will be failing in my duty if the basic objection raised by Shri Manoj Dubey about maintainability of this application is not dealt with. Merely because in earlier round of litigation, the objection of maintainability was not taken, it will not preclude the other side to raise such objection if it goes to the root of the matter. This is

> trite law that jurisdiction cannot be assumed by consent of the parties. If a statute does not provide jurisdiction to entertain an application/ petition, the petition cannot be entertained for any reason whatsoever. Thus, I am not inclined to hold that since for the reason that in the earlier round of litigation i.e. A.C. No.76/2011 parties reached to a consensus for appointment of Arbitrators, this application is also maintainable. I deem it proper to examine whether because of operation of Section 174 of the Act of 2003, the present application under the Act of 1996 is not maintainable."

14. A similar issue was raised before a three-Judge bench of this Court in *Hindustan Zinc Limited* (supra), where an arbitrator was appointed by the State Electricity Commission under Section 86(1)(f) of the 2003 Act with the consent of the parties. Subsequently, the arbitral award was challenged under Section 34 of the 1996 Act before a Commercial Court, and the Commercial Court's decision was challenged in an appeal under Section 37 of the 1996 Act where it was held that the State Electricity Commission had no jurisdiction to appoint the arbitrator since Section 86(1)(f) refers to disputes only between licensees and generating companies, and not licensees and consumers. When the matter reached this Court, the contention was that the objection to jurisdiction could not have been raised in a proceeding under Section 37 of the 1996 Act once the parties had consented to arbitration earlier. Speaking for the Court, Justice Rohinton F Nariman held that if there is inherent lack of jurisdiction, the plea can be taken at any stage and also in collateral proceedings. He highlighted the well-established principle that a decree passed by a court without subject matter jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon. Such a defect of jurisdiction cannot be cured even by the consent of the parties. The above dictum would apply to the present case.

15. In the above view of the matter, the order of the High Court appointing an arbitrator under Section 11(6) of the 1996 Act is unsustainable. We accordingly allow the appeal and set aside the impugned judgment and order of the High Court dated 30 November 2016 in AC No 1 of 2015. However, this will not come in the way of the respondent in taking recourse to such remedies as are available in law. However, we have expressed no opinion either on the merits or the objections of the appellant which, when urged, would be considered by the appropriate forum. There shall be no order as to costs.

16. Pending application, if any, stands disposed of.

Appeal allowed

I.L.R. [2021] M.P. 611 (DB)
WRIT APPEAL

Before Mr. Justice Mohammad Rafiq, Chief Justice &
Mr. Justice Vijay Kumar Shukla

WA No. 1072/2019 (Jabalpur) decided on 19 January, 2021

SANJANA SOVIYA …Appellant

Vs.

STATE OF M.P. & ors. …Respondents

A. Constitution – Article 226 – Habeas Corpus – Custody of Child – **Held – Adoptive mother seeking custody from natural mother – Respondent No. 4 (natural mother) disputing the genuineness of adoption deed – In such disputed question of fact, writ of habeas corpus cannot be issued against natural mother – Liberty granted to appellant to avail remedy before any other appropriate Court – Appeal dismissed. (Paras 8 to 10)**

क. संविधान – अनुच्छेद 226 – बंदी प्रत्यक्षीकरण – बालक की अभिरक्षा – अभिनिर्धारित – दत्तक माता का नैसर्गिक माता से अभिरक्षा चाही जाना – प्रत्यर्थी क्र. 4 (नैसर्गिक माता) द्वारा दत्तक विलेख की वास्तविकता को विवादित बताया जाना – ऐसे विवादित तथ्य के प्रश्न में, नैसर्गिक माता के विरूद्ध बंदी प्रत्यक्षीकरण की रिट जारी नहीं की जा सकती – अपीलार्थी को किसी अन्य समुचित न्यायालय के समक्ष जाकर उपचार का अवलंब लेने की स्वतंत्रता प्रदान की जाती है – अपील खारिज।

B. Constitution – Article 226 – Scope & Jurisdiction – **Held – Disputed question of fact cannot be adjudicated in writ jurisdiction under Article 226 of Constitution. (Para 9)**

ख. संविधान – अनुच्छेद 226 – विस्तार व अधिकारिता – अभिनिर्धारित – संविधान के अनुच्छेद 226 के अंतर्गत रिट अधिकारिता में विवादित तथ्य के प्रश्न को न्यायनिर्णीत नहीं किया जा सकता।

Cases referred:

AIR 1960 SC 93, AIR 1978 MP 24.

Umesh Shrivastava, for the appellant.
Bramhadatt Singh, G.A. for the respondent Nos. 1 to 3/State.
Pawan Kumar Saxena, for the respondent Nos. 4 & 5.

O R D E R

(Hearing convened through Video Conferencing)

The present intra-Court appeal has been filed under Section 2(1) of the Madhya Pradesh Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam,

2005 being aggrieved by the impugned order dated 03.05.2019 passed by the learned Single Judge in WP No.2790/2019 whereby the learned Single Judge dismissed the writ petition of *habeas corpus* and granted liberty to the appellant/ writ-petitioner to prefer an appropriate application before the trial Court, as the questions of facts are involved and, therefore, no writ would lie.

2. Learned counsel for the appellant submitted that the appellant has adopted the child by a registered adoption deed. Since as per the provisions of Section 16 of the Hindu Adoption and Maintenance Act, 1956 (for short "the Act"), there is presumption of the correctness of the adoption, therefore, the appellant is entitled for custody of the child.

3. The appellant preferred the writ petition seeking custody of the female child, aged about two-and-a-half years, from the respondent No.4. The undisputed fact is that the respondent No.4 is the mother of the child and, therefore, she is the natural guardian. The appellant submits that she had taken the child after execution of a deed of adoption which was executed by the respondent No.4 in favour of the appellant and, thereafter the child was given to the custody of the appellant by the respondent No.4.

4. It is argued that the child was taken by the respondent No.4 from the appellant on the pretext of playing with child but thereafter the child was never returned to the appellant. Therefore, a *writ of habeas corpus* ought to be issued to restore the custody back to the petitioner, who is her adoptive mother. Learned counsel for the petitioner, in support of his submissions, has relied upon the judgment of the Supreme Court in the case of *Gohar Begum vs. Suggi alias Nazma Begum and others,* AIR 1960 SC 93 and a Division Bench decision of this Court in the case of *Smt. Usha Devi and another vs. Kailash Narain Dixit and others,* AIR 1978 MP 24.

5. *Per contra,* learned counsel for the respondent No.4 submitted that the deed of adoption is a fabricated document and the finger printouts of the respondent No.4 were taken by deceit without her knowledge that she was not a willing party to the adoption deed.

6. Contention of the learned counsel for the appellant that by virtue of Section 16 of the Act, presumption of validity of adoption has to be drawn, cannot be countenanced, as admittedly the parties are Christians and the aforesaid Act does not apply to them. Moreover, considering that the respondent No.4 is disputing the genuineness of the adoption deed, such presumption is always rebuttable. The dispute of this nature cannot be entertained in writ jurisdiction under Article 226 of the Constitution of India for issuance of a *writ of habeas corpus* to hand over the custody of the child to the petitioner.

7. The Division Bench judgment of this Court in *Usha Devi's* case (supra) does not in any manner provide any help to the appellant. In that case, the parents of the child i.e. mother and father had jointly filed the petition for *habeas corpus* seeking custody of the child from the grandfather and uncle of the father of the child. In those facts, the Court held that the child aged 4½ years, has no independent volition of his own and will prefer to live with the person in whose custody he is then. The association of a boy with the other relatives will make him dear to them but such relations in preference to the mother and father, have no legal right to the custody of the minor child and the welfare of the child lies in his living with his natural guardians.

8. Another judgment relied upon by the learned counsel for the appellant in *Gohar Begum's* case (supra) also arose out of an appeal filed by an unmarried Sunni moslem woman seeking custody of her illegitimate daughter, aged six years, from the respondent, who was her mother's sister. It was held that under the Muhammedan Law, the appellant was entitled to the custody of the minor illegitimate daughter, no matter who her father was. The respondent had no legal right for the custody of the child. In this case too, the natural mother had approached the Court. The ratio of even this judgment does not in any manner apply to the case of the appellant. In fact, in the present case, the petition has been filed by someone who claims to be adoptive mother seeking custody from the respondent No.4, who is none other than the natural mother of the child and is disputing the genuineness of the adoption deed. *Writ of habeas corpus* in a case involving such disputed questions of fact cannot be issued against natural mother.

9. In view of the aforesaid, the disputed questions of fact cannot be adjudicated in writ jurisdiction under Article 226 of the Constitution of India. We therefore do not perceive any illegality or perversity in the impugned order passed by the learned Single Judge, warranting any interference in this intra-Court appeal, dismissing the writ petition and granting liberty to the appellant/writ-petitioner to avail her remedy before any other appropriate Court.

10. Accordingly, the writ appeal being devoid of merit, is **dismissed.** No order as to costs.

Appeal dismissed

I.L.R. [2021] M.P. 614 (DB)
WRIT APPEAL

Before Mr. Justice Sujoy Paul & Mr. Justice Shailendra Shukla

WA No. 1280/2020 (Indore) decided on 19 January, 2021

STATE OF M.P. & anr. …Appellants

Vs.

VISHNU PRASAD MARAN & anr. …Respondents

A. Civil Services (Classification, Control and Appeal) Rules, M.P. 1966, Rule 10 & 15 – Principle of Natural Justice – **Enquiry report was in favour of employee – Held – In absence of any discordant note being prepared and supplied by disciplinary authority, requirement of principle of natural justice and Rule 15 were not satisfied – Writ Court rightly interfered with punishment – Appeal dismissed. (Para 9)**

क. सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966, नियम 10 व 15 – नैसर्गिक न्याय का सिद्धांत – जांच प्रतिवेदन कर्मचारी के पक्ष में था – अभिनिर्धारित – अनुशासनात्मक प्राधिकारी द्वारा तैयार तथा प्रदान किये गये किसी प्रतिकूल टिप्पण के अभाव में, नैसर्गिक न्याय के सिद्धांत तथा नियम 15 की अपेक्षा की संतुष्टि नहीं हुई थी – रिट न्यायालय ने उचित रूप से दण्ड में हस्तक्षेप किया – अपील खारिज।

B. Service Law – Enquiry Report & Disciplinary Authority – **Held – Apex Court concluded that findings of Enquiry Officer are not binding on disciplinary authority – Authority can disagree with findings of Enquiry Officer on basis of material available on record but it should prepare a note of disagreement on basis of evidence and furnish the same to employee to enable him to show cause against the same. (Para 8)**

ख. सेवा विधि – जांच प्रतिवेदन व अनुशासनात्मक प्राधिकारी – अभिनिर्धारित – सर्वोच्च न्यायालय ने यह निष्कर्षित किया है कि जांच अधिकारी के निष्कर्ष अनुशासनात्मक प्राधिकारी पर बाध्यकारी नहीं हैं – प्राधिकारी अभिलेख पर उपलब्ध सामग्री के आधार पर जांच अधिकारी के निष्कर्षों के साथ असहमत हो सकता है लेकिन उसे साक्ष्य के आधार पर असहमति का एक टिप्पण तैयार करना चाहिए तथा उसे कर्मचारी को प्रदान करना चाहिए ताकि वह उक्त का कारण दर्शा सके।

C. Civil Services (Classification, Control and Appeal) Rules, M.P. 1966, Rule 2(f) & 10 and Civil Services (Pension) Rules, M.P., 1976, Rule 8(1)(b) – Retired Government Servant – Punishment of "Censure" – **Held – Punishment under Rule 10 cannot be imposed on retired government servant – For imposing punishment on retired government servant, Rule 8(1) of Pension Rules is applicable which prescribes punishment of withholding or withdrawing pension – Punishment of "Censure" could not**

have been imposed on petitioner – Further, after retirement of a government servant, only Governor can impose the punishments under Pension Rules – Writ Court rightly interfered with the punishment – Appeal dismissed.

(Para 10 & 11)

ग. सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966, नियम 2(f) व 10 एवं सिविल सेवा (पेंशन) नियम, म.प्र., 1976, नियम 8(1)(b) – सेवानिवृत्त शासकीय सेवक – ''परिनिंदा'' का दण्ड – अभिनिर्धारित – सेवानिवृत्त शासकीय सेवक पर नियम 10 के अंतर्गत दण्ड अधिरोपित नहीं किया जा सकता – सेवानिवृत्त शासकीय सेवक पर दण्ड अधिरोपित करने के लिए, पेंशन नियम का नियम 8(1) लागू होता है जो कि पेंशन रोकने अथवा वापस लेने का दण्ड विहित करता है – याची पर ''परिनिदां'' का दण्ड अधिरोपित नहीं किया जा सकता था – इसके अतिरिक्त, एक शासकीय सेवक की सेवानिवृत्ति के पश्चात् केवल राज्यपाल पेंशन नियमों के अंतर्गत दण्ड अधिरोपित कर सकता है – रिट न्यायालय ने उचित रूप से दण्ड में हस्तक्षेप किया – अपील खारिज।

D. Civil Services (Classification, Control and Appeal) Rules, M.P. 1966, Rule 2(f) & 10 – Retired Government Servant – Punishment **– Held – Definition of "government servant" does not include retired government servant – Statutory punishment listed in Rule 10 can be imposed on existing government servant and not on a retired government servant. (Para 11)**

घ. सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966, नियम 2(f) व 10 – सेवानिवृत्त शासकीय सेवक – दण्ड – अभिनिर्धारित – ''शासकीय सेवक'' की परिभाषा में सेवानिवृत्त शासकीय सेवक सम्मिलित नहीं है – नियम 10 में सूचीबद्ध कानूनी दण्ड विद्यमान शासकीय सेवक पर अधिरोपित किया जा सकता है तथा न कि एक सेवानिवृत्त शासकीय सेवक पर।

E. Service Law – Retiral Dues – Delayed Payment – Interest **– Held – Unnecessary, unexplained and unreasonable delay in conducting enquiry and imposition of punishment became reason for delayed payment of retiral dues – Delay is solely attributable to department and employee cannot be blamed for it – Employer is bound to pay interest. (Para 15)**

ङ. सेवा विधि – सेवानिवृत्ति देयक – विलंबित भुगतान – ब्याज – अभिनिर्धारित – जांच संचालित करने तथा दण्ड अधिरोपित करने में हुआ अनावश्यक, अस्पष्ट तथा अनुचित विलंब सेवानिवृत्ति देयक के विलंबित भुगतान का कारण बना – विलंब का एकमात्र कारण विभाग को माना जा सकता है तथा कर्मचारी को इसके लिए दोषी नहीं ठहराया जा सकता – नियोक्ता ब्याज के भुगतान हेतु बाध्य है।

F. Constitution – Article 21 – Right to Speedy Trial **– Held – Apex Court concluded that principle relating to speedy trial are applicable for departmental enquiry – Unreasonable and unexplained delay in initiating, conducting and concluding the enquiry hits Article 21 of Constitution.**

(Para 12)

च. संविधान – अनुच्छेद 21 – शीघ्र विचारण का अधिकार – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया है कि शीघ्र विचारण से संबंधित सिद्धांत विभागीय जांच के लिए लागू होते हैं – जांच आरंभ करने, संचालित करने तथा निष्कर्षित करने में हुआ अनुचित और अस्पष्ट विलंब, संविधान के अनुच्छेद 21 पर प्रहार करता है।

***G. Interpretation of Statutes – Principle* – Held – If a statute prescribes a thing to be done in a particular manner, it has to be done in the same manner and other methods are forbidden. (Para 11)**

छ. कानूनों का निर्वचन – सिद्धांत – अभिनिर्धारित – यदि एक कानून किसी कार्य को एक विशिष्ट तरीके से किया जाना विहित करता है, तो उसे उसी रीति से किया जाना चाहिए तथा अन्य तरीके निषिद्ध हैं।

Cases referred:

(1998) 7 SCC 84, (1999) 7 SCC 739, (2013) 7 SCC 251, 2021 SCC OnLine SC 4, AIR 1959 SC 93, (2001) 4 SCC 9, (2002) 1 SCC 633, (2011) 2 MPLJ 690, (1992) 1 SCC 225, (1995) 2 SCC 570, (2006) 5 SCC 88, (1994) 2 SCC 240, (2016) 3 SCC 340.

Shrey Raj Saxena, P.L. for the appellants.
A.K. Sethi with *Rahul Sethi*, for the respondent No. 1.

J U D G M E N T

The Judgment of the Court was delivered by :-
SUJOY PAUL, J. :- This intra-court appeal takes exception to the order dated 17.09.2019 passed in W.P. No.9838/2018, whereby learned Writ Court directed the department to open the sealed cover and give effect to the recommendations for promotion. In addition, learned Writ Court directed to grant interest on delayed payment of retiral dues with further direction to pay arrears of 7th Pay Commission.

2. Shri Shrey Raj Saxena, learned Panel Lawyer assailed the order of learned Writ Court on twin grounds. **Firstly,** it is argued that the main reason for interference with the punishment of censure dated 13.03.2018 was that against the Enquiry Officer's report, the petitioner was not given any opportunity by issuance of notice by the disciplinary authority. He submits that the disciplinary authority issued a notice along with the Enquiry Officer's report and therefore, this reason for interference on the punishment cannot sustain judicial scrutiny. **Secondly,** learned Writ Court has committed an error in granting interest on delayed payment of retiral dues.

3. Learned counsel for the appellant urged that the delay in releasing the retiral dues was because of pendency of disciplinary proceedings. On conclusion of such proceedings by imposition of punishment on 13.03.2018 (Annexure-

P/10), the retiral dues were released. Hence, imposition of interest is without there being any justification.

4. Shri A. K. Sethi, learned Senior Counsel supported the impugned order.

5. No other point is pressed by the parties. We have heard the parties at length.

6. Before dealing with the points raised, it is apposite to mention the relevant facts. The employee was served with a charge-sheet on 30.07.2010 under Rule 14 of the M. P. Civil Services (Classification, Control and Appeal) Rules, 1966 (hereinafter called the "CCA Rules"). The employee denied the charges in toto. Hence, enquiry and presenting officers were appointed. After conducting the enquiry, the Enquiry Officer submitted his report on 03.06.2016. The Enquiry Officer exonerated the respondent No.1 from the charges. The said report was communicated to the respondent No.1 with communication dated 22.06.2017. The respondent No.1 filed response stating that the Enquiry Officer's report is in his favour and he does not wish to say anything more. The original petitioner preferred an application on 05.08.2017 requesting the department to conclude the enquiry expeditiously. The same is followed by notice for demand of justice and other representations. The departmental enquiry ended with a punishment of "censure" on 13.03.2018. The employee retired on attaining the age of superannuation on 31.03.2017.

7. Learned Writ Court rightly recorded that the Enquiry Officer's report was indeed supplied to the employee but the disciplinary authority has not taken pains to prepare a discordant note and put the employee to notice along with his reasons for disagreement with the Enquiry Officer's report.

8. In catena of judgments, the Apex Court opined that findings of the Enquiry Officer are not binding on the disciplinary authority. The disciplinary authority can disagree with the findings of the Enquiry Officer on the basis of material available on record. If the disciplinary authority intends to disagree with the findings, the only course open to him is to prepare a note of disagreement on the basis of evidence on record and furnish the same to the applicant to enable him to show cause against the same. The Apex Court in this regard opined as under in the following judgments:-

> ***Punjab National Bank v. Kunj Behari Misra, (1998) 7 SCC 84***
>
> ".....whenever the disciplinary authority disagrees with the enquiry authority on any article of charge, then before it records its own findings on such charge, it must record its tentative reasons for such disagreement and give to the

delinquent officer an opportunity to represent before it records its findings."

(emphasis supplied)

Yoginath D. Bagde v. State of Maharashtra, (1999) 7 SCC 739

"..... The rule does not specifically provide that before recording its own findings, the disciplinary authority will give an opportunity of hearing to a delinquent officer. But the requirement of "hearing" in consonance with the principles of natural justice even at that stage has to be read into Rule 9(2) and it has to be held that before the disciplinary authority finally disagrees with the findings of the enquiring authority, it would give an opportunity of hearing to the delinquent officer so that he may have the opportunity to indicate that the findings recorded by the enquiring authority do not suffer from any error and that there was no occasion to take a different view. The disciplinary authority, at the same time, has to communicate to the delinquent officer the "TENTATIVE" reasons for disagreeing with the findings of the enquiring authority so that the delinquent officer may further indicate that the reasons on the basis of which the disciplinary authority proposes to disagree with the findings recorded by the enquiring authority are not germane and the finding of "not guilty" already recorded by the enquiring authority was not liable to be interfered with."

(emphasis supplied)

S.P. Malhotra v. Punjab National Bank, (2013) 7 SCC 251

"..... in case the disciplinary authority disagrees with the findings recorded by the enquiry officer, he must record reasons for the disagreement and communicate the same to the delinquent seeking his explanation and after considering the same, the punishment could be passed. In the instant case, as such a course had not been resorted to, the punishment order stood vitiated."

(emphasis supplied)

Deputy General Manager (Appellate Authority) and others v. Ajai Kumar Srivastava decided on 5/1/2021 (2021 SCC OnLine SC 4).

"It is well settled that where the enquiry officer is not the disciplinary authority, on receiving the report of enquiry, the disciplinary authority may or may not agree with the findings recorded by the former, in case of disagreement, the disciplinary authority has to record the reasons for disagreement and after

> affording an opportunity of hearing to the delinquent may record his own findings if the evidence available on record be sufficient for such exercise or else to remit the case to the enquiry officer for further enquiry."
>
> (emphasis supplied)

9. In view of settled legal position, it can be safely concluded that in the instant case, in absence of any discordant note being prepared and supplied by the disciplinary authority, the requirement of principles of natural justice and Rule 15 of the CCA Rules were not satisfied. Thus, no fault can be found in the findings of learned Writ Court, whereby punishment was interfered with in absence of any discordant note.

10. This matter may be viewed from another angle. As per Rule 9(2)(a) of The Madhya Pradesh Civil Services (Pension) Rules, 1976 (for short "Pension Rules") if departmental proceeding is instituted while government servant was in service before his retirement, the said proceedings shall continue in the same manner as if government servant had continued in service. A proviso is appended to sub-rule 2(a) which envisages that if enquiry is instituted by an authority subordinate to the Governor, that authority shall submit a report regarding its finding to the Governor. Thus, after retirement of a government servant, only the Governor can impose the punishments prescribed in the Pension Rules. Rule 8(1) (b) prescribes the punishment of withholding or withdrawing a pension or part thereof as punishments. Pertinently, said punishments can be imposed when pensioner is found guilty of *grave misconduct.*

11. The interesting question which cropped up during the hearing is whether after retirement of a government servant, the punishment of "Censure" can be imposed on him ?. For an existing government servant, the punishments are prescribed in Rule 10 of the CCA Rules. Pertinently, Rule 10 of CCA Rules makes it clear that the punishments enumerated in Rule 10 can be imposed on a "government servant". "Government servant" is defined in Rule 2(f) which shows that government servant means a servant who is already in employment. The definition of "government servant" does not include a retired government servant. Thus, the statutory punishments listed in Rule 10 of CCA Rules can be imposed on an existing government servant and not on a retired government servant. For imposing punishment to a retired government servant, a different Rule i.e. Pension Rules is applicable. At the cost of repetition, the pension Rules prescribes punishment of withholding or withdrawing pension and by invoking said Rules, the punishment of "Censure" could not have been imposed on the petitioner. This is trite that if a statute prescribes a thing to be done in a particular manner it has to be done in the same manner and other methods are forbidden (See *Baru Ram v. Prasanni,* AIR 1959 SC 93, *Dhanajaya Reddy v. State of Karnataka,* (2001) 4 SCC 9, *CIT v. Anjum M.H. Ghaswala,* (2002) 1 SCC 633 and *Satyanjay Tripathi v.*

Bansari Devi, (2011) 2 MPLJ 690. In view of this discussion, the punishment of "Censure" even otherwise could not have been imposed. The imposition of "Censure", (the smallest punishment prescribed in CCA Rules) shows that in the opinion of the Governor the misconduct was not "grave" in nature. Hence, as per Pension Rules, there is no question of remitting the matter back to the Governor to pass appropriate punishment under the Pension Rules.

12. In this case, the sword of disciplinary proceedings kept hanging on the head of employee for almost eight years. Ultimately a small punishment of "Censure" was inflicted but its impact was very grave because his fate which was kept in the sealed cover by Departmental Promotion Committee (DPC) was sealed. The Constitution Bench judgment of *Abdul Rehman Antulay v. R.S. Nayak* (1992) 1 SCC 225 was followed by Supreme Court in the case of *State of Punjab and others v. Chaman Lal Goyal* (1995) 2 SCC 570 and it was held that broad principles laid down in *Abdul Rehman Antulay* (supra) will be applicable in cases of departmental proceedings also. It was poignantly held that principles relating to right of speedy trial founded upon Article 21 of the Constitution are applicable for departmental enquiry. Unreasonable and unexplained delay in initiating, conducting and concluding the enquiry hits Article 21 of the Constitution.

13. In the case of *M.V.Bijlani v. Union of India* (2006) 5 SCC 88 the Apex Court interfered with the punishment because there was unreasonable delay in concluding the enquiry. The relevant portion reads as under:-

> "The Tribunal as also the High Court failed to take into consideration that the disciplinary proceedings were initiated after six years and they continued for a period of seven years and, thus, initiation of the disciplinary proceedings as also continuance thereof after such a long time evidently prejudiced the delinquent officer."
>
> (emphasis supplied)

14. In the manner enquiry was kept pending for years together without there being any fault of the delinquent employee, in our view the prosecution became persecution. For this reason also, the punishment order was rightly interfered with. If punishment of "Censure" would have been imposed with quite promptitude, the employee would have suffered the punishment, but would not have been deprived from the fruits of consideration for promotion. The learned Single Judge has rightly followed the decision of *Jagjitsingh Vs. Secretary, MPSEB & Ors.* (WP No.3273/2005 decided on 3/4/2017).

15. So far as challenge to grant of interest on retiral dues is concerned, suffice it to say that unnecessary, unexplained and unreasonable delay in conducting the enquiry and imposition of the punishment became reason for delayed payment of retiral dues. As noticed, the employee cannot be blamed for the same. The delay is

solely attributable to the department. In this backdrop the employer is bound to pay interest in view of judgment of Supreme Court in the matter of *Union of India v. Justice S.S.Sandhawalia* (1994) 2 SCC 240.

16. In view of foregoing analysis, in our view the writ court has taken a plausible view which does not warrant any interference by the division bench. (See *Narendra & Co. (P) Ltd. v. Workmen* (2016) 3 SCC 340). The appeal sans substance and is hereby **dismissed.**

Appeal dismissed

I.L.R. [2021] M.P. 621 (DB)
WRIT APPEAL

Before Mr. Justice S.A. Dharmadhikari & Mr. Justice Anand Pathak

WA No. 1823/2019 (Gwalior) decided on 7 April, 2021

OM TRADING COMPANY (M/S) …Appellant

Vs.

DEPUTY COMMISSIONER OF STATE TAX & ors. …Respondents

Central Goods and Services Tax Rules, 2017, Rule 21(b) & 22 – Cancellation of Registration – Notice & Enquiry – Opportunity of Hearing – **Held – Appellant carrying business of milk products only on papers and goods were not physically transported – Detailed enquiry conducted where discrepancies were found – Appellant failed to prove e-way bill transaction details – Proper opportunity of hearing was also granted – No cogent documentary evidence in favour of appellant – Writ petition rightly dismissed – Appeal dismissed. (Paras 10 to 12)**

केंद्रीय माल और सेवा कर नियम, 2017, नियम 21(b) व 22 – पंजीयन का रद्ददकरण – नोटिस व जांच – सुनवाई का अवसर – अभिनिर्धारित – अपीलार्थी केवल कागजों पर दुग्ध उत्पादों का कारोबार चला रहा था और माल का भौतिक रूप से परिवहन नहीं किया गया था – विस्तृत जांच संचालित की गई जिसमें विसंगतियां पायी गयी – अपीलार्थी, ई–वे **(e-way)** बिल संव्यवहार का विवरण सिद्ध करने में असफल रहा – सुनवाई का उचित अवसर भी प्रदान किया गया था – अपीलार्थी के पक्ष में कोई प्रबल दस्तावेजी साक्ष्य नहीं – रिट याचिका उचित रूप से खारिज की गई – अपील खारिज।

Case referred:

(2020) 38 GSTJ 482 (Ker).

Kamal Kumar Jain, for the appellant.
R.P. Singh Kaurav, G.A. for the respondents/State.

J U D G M E N T

The Judgment of the Court was delivered by :

S.A. DHARMADHIKARI, J. :- In this Writ Appeal preferred under Section 2 (1) of the Madhya Pradesh Uchch Nyayalaya (Khand Nyay Peeth Ko Appeal) Adhiniyam, 2005, challenge has been made to the order dt.27.08.2019 passed by the learned Single Judge in W.P.No.9885/2019, whereby Writ Petition challenging the order dt.18.04.2019 passed by the learned appellate authority has been dismissed.

2. Brief facts leading to filing of the writ petition were that the appellant is a dealer registered under the Central Goods and Services Tax Act, 2017 (hereinafter shall be referred to as the 'Act of 2017') and is engaged in carrying on the business of selling and purchasing of Clarified Butter (Ghee), Butter and other milk products under the name of M/s Om Trading Company Gwalior. On 05.10.2018, a show cause notice was issued to the appellant by the Deputy Commissioner of State Tax Gwalior, in which it was stated that the appellant is carrying on the business only on papers and the e-way bills are downloaded but the concerned vehicles are not transporting any goods in actual. The cause of action arose when the report bearing No.229/Deputy Commissioner's office dt.29.08.2018 was addressed by the Dy. Commissioner, Range-A, Agra to the Joint Commissioner, Gwalior, whereby it transpired that the appellant had carried out business transactions with one M/s Macro International, Kacharighat, Agra and has purchased 8100 kgs. of clarified butter through bill No.53 on 31.07.2018 amounting to Rs.23,49,000/- and again purchased 1000 Tin of clarified butter through bill No.54 amounting to Rs.40,50,000/-. In view of aforesaid, a show cause notice dt.05.10.2018 was issued as it was found that the bills were without supply of goods in violation of stipulations contained in the Act of 2017. The notice was purportedly issued under Rule 21(b) of the Central Goods and Services Tax Rules 2017 (hereinafter shall be referred to as the 'Rules of 2017'), which mandates that the registration granted to the person is liable to be cancelled, if the person issued invoice or bill without supply of goods or services in violation of the provisions of the Act or the rules made thereunder. Since the appellant failed to prove his e-way transaction details, his registration has been cancelled by order dt.09.01.2019. Being aggrieved, the appellant preferred an appeal under Section 107 of the Act of 2017. The Appellate Authority taking into consideration the entire facts on record, affirmed the order passed by the Dy.Commissioner of State Tax. Being aggrieved, the appellant had filed writ petition before this Court bearing W.P.No.9885/2019, which came to finally decided on 27.08.2019, whereby the orders passed by the Dy.Commissioner of State Tax as well as Appellate Authority has been affirmed. Being aggrieved, the present Writ Appeal has been filed.

3. Shri Kamal Kumar Jain, learned counsel appearing for the appellant submitted that the impugned order passed by the learned Single Judge is perverse and contrary to law and therefore the same deserves to be set aside. It is further contended that the order dt.09.01.2019 passed by the appellate authority is completely silent as to the provisions under which the impugned order has been passed and no good reason has been assigned for cancellation of GSTN of the appellant. The appellant further contended that the consignment was being transported by the transporter namely M.R. Road Lines through which the material was physically transported to Gwalior through Vehicle No. UP83T0223 and HR63A3341 and the route taken was from Agra to Kheragarh to Rajakheda, then Dholpur to Morena and then Gwalior and in between there was no toll plaza located. Even though all the requisite documents i.e. e-way bill and invoices were available, therefore, it can not be said that no physical transportation of goods had taken place from Agra to Gwalior. The appellant further contended that the said collection of tax and penalty by the respondents is through coercion and threat inspite of the fact that cancellation is covered by all the documents. It is alleged that it is an inter-State sale and the respondents can not deny the same and demand and collect the tax in the manner in which they have done, which is arbitrary and without jurisdiction. In such circumstances, the impugned order deserves to be set aside.

4. Learned counsel for the appellant in support of his contention has placed reliance on the judgment of High Court of Kerala in the case of *Kannangayathu Metals Vs. Asst. State Tax Officer and others* reported in (2020) 38 GSTJ 482 (Ker) to contend that as per Section 129 of GST Act, there is no mandate for detaining goods merely because driver took an alternate route to reach the destination, if the goods are covered by valid E-way Bill. The writ petition was allowed. He further placed reliance on another judgment of High Court of Kerala in the case of *Relcon Foundations (P) Ltd. Vs. Asstt. State Tax Officer and others* reported in (2020) 38 GSTJ 482 (Ker), in which it is held that detention of the vehicle under Section 129 of GST Act is not justified.

5. *Per contra,* the counter affidavit has been filed by the respondents. Shri R.P.Singh Kaurav, learned Government Advocate appearing for the respondents/State contended that the appellant had failed to bring on record any material before the authorities to show that the bills/e-way bills which were issued and are in question in the present litigation pursuance to which any material physically transferred from Agra to Gwalior or not and therefore there is no infirmity in the order dt.27.08.2019 passed by the writ court. He further contended that even assuming for the sake of argument that the alleged contentions of the appellant are true, in that case there are number of toll plaza between Morena to Gwalior and if the goods had been physically transferred, the appellant ought to have possessed the toll plaza receipts. It is also settled practice that the

transporters used to choose shortest route available to transport the goods in order to save time and money. In the present case, the route used to transport the goods is not only longer route but also takes more time to reach the destination. It is very surprising and strange that instead of using four lane high way, some alternative route, which is longer, has been used by the appellant. Cancellation of registration of GSTN was effected after affording due opportunity of hearing to the appellant.

6. Learned Single Judge came to the conclusion that a detailed enquiry was conducted by the Commercial Department Range Agra and that the fact regarding issuance of invoices/e-way bills without any transportation of physical goods came into picture, therefore, verification in this regard was also done wherein it was actually found that the goods were not physically transported and that before initiating the proceeding against the appellant proper opportunity of hearing/show cause notice was issued and only thereafter the order cancelling the GST registration was passed. The appellant had failed to produce the said documents to prove that the goods in question was physically transferred from Agra to Gwalior. As such finding no error in the judgment rendered by the appellate authority, writ petition was dismissed.

7. Heard learned counsel for the parties.

8. For the purpose of convenience, Rule 21 of the Rules of 2017 is reproduced hereinunder :-

> **"21. Registration to be cancelled in certain cases.-** The registration granted to a person is liable to be cancelled, if the said person -
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> (a) does not conduct any business from the declared place of business; or
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> (b) issues invoice or bill without supply of goods or services or both in violation of the provisions of the Act, or the rules made thereunder; or
>
> (c) violates the provisions of section 171 of the Act or the rules made thereunder.
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> (d) violates the provision of rule 10A.
>
> (e) avails input tax credit in violation of the provisions of section 16 of the Act or the rules made thereunder, or
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> (f) furnishes the details of outward supplies in FORM GSTR-1 under section 37 for one or more tax periods which is in excess of the outward supplies declared by him in his valid return under section 39 for the said tax periods; or
>
> (g) violates the provision of rule 86B."

Rule 22 of the Rules of 2017 is also reproduced hereinunder :-

> **"22. Cancellation of registration. -** (1) Where the proper officer has reasons to believe that the registration of a person is liable to be cancelled under section 29, he shall issue a notice to such person in FORM GST REG-17, requiring him to show cause, within a period of seven working days from the date of the service of such notice, as to why his registration shall not be cancelled.
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> (2) The reply to the show cause notice issued under sub-rule (1) shall be furnished in FORM REG-18 within the period specified in the said sub-rule.
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> (3) Where a person who has submitted an application for cancellation of his registration is no longer liable to be registered or his registration is liable to be cancelled, the proper officer shall issue an order in FORM GST REG-19, within a period of thirty days from the date of application submitted under rule 20 or, as the case may be, the date of the reply to the show cause issued under sub-rule (1) or under sub-rule (2A) of rule 21A, cancel the registration, with effect from a date to be determined by him and notify the taxable person, directing him to pay arrears of any tax, interest or penalty including the amount liable to be paid under sub-section (5) of section 29.
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> (3A) Where a certificate of registration has not been made available to the applicant on the common portal within a period of fifteen days from the date of the furnishing of information and particulars referred to in clause (c) of sub-rule (2) and no notice has been issued under sub-rule (3) within the said period, the registration shall be deemed to have been granted and the said certificate of registration, duly signed or verified through electronic verification code, shall be made available to the registered person on the common portal.
>
> (4) Where the reply furnished under sub-rule (2) or in response to the notice issued under sub-rule (2A) of rule 21A is found to be satisfactory, the proper officer shall drop the proceedings and pass an order in FORM GST REG-20.
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> Provided that where the person instead of replying to the notice served under sub-rule (1) for contravention of the provisions contained in clause (b) or clause (c) of sub-section (2) of section 29, furnishes all the pending returns and makes full payment of the tax dues along with applicable interest and late fee, the proper officer shall drop the proceedings and pass an order in FORM GST-REG 20.

(5) The provisions of sub-rule (3) shall, *mutatis mutandis,* apply to the legal heirs of a deceased proprietor, as if the application had been submitted by the proprietor himself."

9. The appellate authority taking into consideration the entire facts on record had affirmed the order passed by the Dy. Commissioner of State Tax holding that -

''... पाया गया कि संबंधित अधिकारी द्वारा पंजीयन निरस्त किये जाने के पूर्व अपीलार्थी को कारण बताओ सूचनापत्र दिनांक 05–10–2018 को जारी किया गया था। तत्पश्चात दिनांक 09–01–2019 को अपीलार्थी का पंजीयन निरस्त किया गया है। पंजीयन निरस्तीकरण का मुख्य आधार डिप्टी कमिश्नर (वि.अनु.शा.) वाणिज्यिक कर रेंज ए, आगरा कापत्र दिनांक 29–08–2018 है, जिसमें डिप्टी कमिश्नर (वि.अनु. शा.) वाणिज्यिक कर रेंज ए, आगरा द्वारा अपीलार्थी मेसर्स ओम ट्रेडिंग कम्पनी के संबंध में यह प्रतिवेदित किया गया है कि उनके द्वारा मेसर्स मार्को इंटरनेशनल आगरा से माल देशी घी क्रमशः रुपये 2349000/– एवं रुपये 4050000/– बिल क्रमांक 53 दिनांक 31–07–2018 एवं बिल क्रमांक 54 दिनांक 31–07–2018 से क्रय करना दर्शाया है। आगरा के विक्रेता व्यवसाई मेसर्स मार्को इंटरनेशनल आगरा के द्वारा विभागीय पोर्टल पर मुख्य व्यवसाय स्थल के अतिरिक्त तीन अन्य स्थानों पर भी गोदाम घोषित किये गये हैं जिनमें से केवल एक स्थान पर ही फर्म की व्यवसायिक गतिविधियॉ होना पाई गई तथा विक्रेता व्यवसाई मेसर्स मार्को इंटरनेशनल, आगरा की जांच के समय उक्त माह से संबंधित कोई नियमित प्रपत्र नही पाये गये। इसके अलावा मेसर्स आगरा–ग्वालियर पाथवेज प्रा0लि0 जाजव टोलप्लाजा, सैंया, आगरा से डिप्टी कमिश्नर, वाणिज्यिक कर रेंज, आगरा द्वारा सूचना प्राप्त की गई जिसके अनुसार उक्त वाहन जिनके कि वाहन क्रमांक क्रमशः UP 83 T 0223 एवं वाहन क्रमांक HR 63A3341 हैं, निर्धारित तिथि को टोलप्लाजा से पास नही हुए हैं। इससे स्पष्ट है कि क्रेता विक्रेता दोनों व्यवसाइयों द्वारा केवल प्रपत्रों का आदान–प्रदान किया जा रहा है। वास्तव में माल का कोई परिवहन नहीं किया जा रहा है।

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अपीलार्थी द्वारा माल से संबंधित जो कागजात प्रस्तुत किये हैं उनसे माल का वास्तविक आदान–प्रदान किया जाना प्रमाणित नही होता है। सहायक आयुक्त, राज्यकर, ग्वालियर वृत तीन के निर्देश पर राज्यकर निरीक्षक, ग्वालियर वृत तीन द्वारा प्रस्तुत प्रतिवेदन दिनांक 05–12–2018 एवं पंचनामा में दर्शित पते पर अपीलार्थी का व्यवसाय संचालित होना प्रतीत होता है किन्तु उनके द्वारा उक्त संव्यवहार के संबंध में कोई प्रतिवेदन नही दिया गया है। सक्षम अधिकारी द्वारा अपीलार्थी के प्रकरण में डिप्टी कमिश्नर, वाणिज्यिक कर रेंज, आगरा के प्रतिवेदन के आधार पर पंजीयन निरस्त किया गया है। जिसमें उनके द्वारा विक्रेता

व्यवसाई मेसर्स मार्को इंटरनेशनल आगरा के व्यवसाय स्थल की जांच की गई तथा पाया गया कि विक्रेता द्वारा माल का वास्तविक विक्रय नही किया गया है। वास्तविक रूप से माल का आदान–प्रदान न करते हुए केवल प्रपत्रों का आदान–प्रदान किया गया है तथा टोलप्लाजा आगरा–ग्वालियर पाथवेज प्रा0लि0 जाजव सैंया, आगरा के रिकार्ड में भी उक्त वाहनों का निर्धारित तिथि को वहॉ से निकलना नहीं पाया गया है।

10. On going through the order passed by the appellate authority it appears that the detailed enquiry was conducted before passing the impugned order, in which certain discrepancies were found with regard to the business of the appellant. It was found that the appellant had failed to prove e-way bill transaction details, therefore, the registration was cancelled. A proper opportunity of hearing was afforded to the appellant. No cogent documentary evidence is available on record to justify the stand taken by the appellant. The learned Single Judge has rightly come to the conclusion and dismissed the writ petition.

11. The judgments relied on by the learned counsel for the appellant are of no assistance to the appellant inasmuch as the facts of those cases and the present case are altogether different. In the present case, in the detailed enquiry it was found that no material physically transferred from Agra to Gwalior.

12. In view whereof, no fault can be found in the finding recorded by the learned Single Judge as well as learned appellate authority. Accordingly, the writ appeal fails and is hereby dismissed.

Appeal dismissed

I.L.R. [2021] M.P. 627
WRIT PETITION
Before Mr. Justice G.S. Ahluwalia

WP No. 9029/2013 (Gwalior) decided on 13 January, 2021

MADHU MORYA (KU.) …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

A. Service Law – Appointment **– Held – If all candidates were having similar qualification, respondents should have looked into provisions for giving preference – As petitioner was entitled for preference being a spinster of 30 years, respondents should not have looked into the marks obtained by them in Higher Secondary/Inter examination – Appointment of petitioner wrongly cancelled – Impugned order set aside – Petition allowed.**
(Paras 18, 23 & 24)

क. *सेवा विधि – नियुक्ति* – अभिनिर्धारित – यदि सभी अभ्यर्थियों की समान अर्हता थी, अग्रताक्रम देने के लिए प्रत्यर्थीगण को उपबंधों में देखना चाहिए था – चूंकि याची एक 30 वर्षीय अविवाहिता होने के नाते अग्रताक्रम हेतु हकदार थी, प्रत्यर्थीगण को उनके द्वारा उच्च माध्यमिक / इंटर परीक्षा में प्राप्त अंकों को नहीं देखना चाहिए था – याची की नियुक्ति गलत रूप से निरस्त की गई – आक्षेपित आदेश अपास्त – याचिका मंजूर।

B. ***Service Law – Appointment – Policy Guidelines – Applicability*** – **Held – Petitioner appointed on 12.06.2007 when policy dated 27.05.2006 was in force – New policy came on 10.07.2007 – Since appointment of petitioner was made prior to coming into force of new policy dated 10.07.2007, case of petitioner has to be considered as per guidelines dated 27.05.2006. (Para 17)**

ख. *सेवा विधि – नियुक्ति – नीति दिशानिर्देश – प्रयोज्यता* – अभिनिर्धारित – याची की नियुक्ति 12.06.2007 की थी जब नीति दिनांकित 27.05.2006 प्रभावी थी – नयी नीति 10.07.2007 को आयी – चूंकि याची की नियुक्ति, नयी नीति दिनांकित 10.07.2007 प्रभावी होने से पूर्व की गई थी, याची के प्रकरण का विचार 27.05.2006 के दिशानिर्देशों के अनुसार किया जाना होगा।

C. ***Service Law – Policy Guidelines – Retrospective Operation*** – **Held – Guidelines are executive instructions and are always prospective in operation until and unless they are made retrospective specifically – Nothing in the new guidelines to indicate that they were made retrospective in operation. (Para 17)**

ग. *सेवा विधि – नीति दिशानिर्देश – भूतलक्षी प्रवर्तन* – अभिनिर्धारित – दिशानिर्देश, कार्यपालिक अनुदेश होते हैं और प्रवर्तन में सदैव भविष्यलक्षी होते हैं जब तक कि उन्हें विनिर्दिष्ट रूप से भूतलक्षी नहीं बनाया गया है – नये दिशानिर्देशों में यह दर्शाने के लिए कुछ नहीं कि उन्हें प्रवर्तन में भूतलक्षी बनाया गया था।

D. ***Service Law – Limitation for Appeal*** – **Held – In guidelines dated 27.05.2006, no period of limitation was provided for filing an appeal – Appeal filed by respondent-5 should not have been dismissed as time barred. (Para 14 & 15)**

घ. *सेवा विधि – अपील हेतु परिसीमा* – अभिनिर्धारित – दिशानिर्देश दिनांक 27.05.2006 में, एक अपील प्रस्तुत करने हेतु कोई परिसीमा अवधि उपबंधित नहीं की गई थी – प्रत्यर्थी–5 द्वारा प्रस्तुत अपील को समय वर्जित होने के आधार पर खारिज नहीं किया जाना चाहिए था।

E. ***Limitation Act (36 of 1963), Section 3(1) – Bar of Limitation*** – **Held – It is for Court to find out as to whether appeal is within limitation or not – There is no law that in case if question of limitation is not raised at the earliest, then it cannot be considered at a later stage. (Para 10)**

ङ *परिसीमा अधिनियम (1963 का 36), धारा 3(1) – परिसीमा का वर्जन –* अभिनिर्धारित – यह न्यायालय के लिए है कि पता लगाये कि क्या अपील परिसीमा के भीतर है अथवा नहीं – ऐसी कोई विधि नहीं है कि यदि परिसीमा के प्रश्न को शीघ्रता से नहीं उठाया गया है, तब उस पर बाद के प्रक्रम पर विचार नहीं किया जा सकता।

Case referred:

(2004) 11 SCC 425.

J.S. Rathore, for the petitioner.
Ajay Raghuvanshi, P.L. for the respondent Nos. 1 to 4/State.

(Supplied: Paragraph numbers)

O R D E R

(Heard through Video Conferencing)

G.S. AHLUWALIA, J. :- This petition under Article 226 of the Constitution of India has been filed against the order dated 16/04/2013 passed by Additional Commissioner, Gwalior Division, Gwalior in Case No.406/2011-12/Appeal, by which the appeal filed by the petitioner has been dismissed.

2. The necessary facts for disposal of the present petition in short are that the petitioner is a Scheduled Caste candidate and an advertisement was issued for appointment of Anganwadi Worker. The petitioner as well as the respondent No.5 participated in the said recruitment process and by order dated 12/06/2017, the petitioner was appointed on the post of Anganwadi Worker, Anganwadi Centre, Ward No.14/11, Bhitarwar, District Gwalior. The appointment of the petitioner was challenged by respondent No.5 before the Additional Collector, Gwalior. It is submitted by the counsel for the petitioner that at the time of appointment of the petitioner, the policy for appointment on the post of Anganwadi Worker, dated 27/05/2006 was in force, according to which the minimum qualification for recruitment to the post of Anganwadi Worker was Higher Secondary/Inter pass. It was also provided that the candidate belonging to Scheduled Caste and Scheduled Tribe, living Below the Poverty Line, as well as Widow/ Deserted, Spinster of 30 years or more and other women would be given preference. However, thereafter on 10/07/2007, a new policy was formulated and it was provided that the marks would be awarded as per the percentage obtained in respective examinations. It is submitted that thereafter, the Additional Collector, District Gwalior by order dated 29/06/2009 passed in Case No.35/2008-09/Appeal allowed the appeal filed by the respondent no.5 on the basis of the guidelines dated 10/07/2007 and remanded the matter back. It was observed by Additional Collector that the recommendation was made for appointment of the respondent no.5 on the basis that she belongs to Scheduled Caste and is living Below the Poverty Line and is running a Shishu Sikshya Kendra. It was also mentioned that the name of the

respondent no.5 was mentioned in the panel of names which was recommended by the Councillor. It was also observed that although the name of the petitioner was not in the panel of names recommended by the Councillor, but on the basis that she is a spinster, aged about 30 years, she was appointed. It was further observed that although the name of the respondent No.5 was recommended but by ignoring the said recommendation, the petitioner was granted appointment. It was also observed that although the counsel for the petitioner had raised an objection that the appeal filed by the respondent no.5 is barred by limitation but the said objection was rejected on the ground that the objection with regard to delay in filing the appeal should have been raised at the earliest but it was not done, therefore, at this stage, it cannot be decided. Accordingly, the appointment of the petitioner was set aside and the matter was remanded back to the competent authority to consider the application for appointment on the post of Anganwadi Worker, Anganwadi Centre, Ward No.14/11, Bhitarwar, District Gwalior.

3. Being aggrieved by the order of the Additional Collector, the petitioner preferred a revision which was registered as Case No.207/2008-09/Revision, but the said revision was dismissed by order dated 22nd March, 2009 by the Additional Commissioner, Gwalior Division, Gwalior. While dismissing the revision filed by the petitioner, the Additional Commissioner, Gwalior Division, Gwalior considered the marks obtained by the candidates in Higher Secondary/Inter Examination. Thereafter, by order dated 11/05/2010, the Project Officer, Integrated Child Welfare Development Project, Bhitarwar, District Gwalior, cancelled the appointment of the petitioner and by another order dated 11/05/2010, appointed the respondent No.5 on the post of Anganwadi Worker, Anganwadi Centre, Ward No. 14/11, Bhitarwar, District Gwalior.

4. The petitioner, thereafter, preferred an appeal challenging the appointment of the respondent No.5 before the Additional Collector, Gwalior which was registered as Case No.22/2010-11/Appeal and was dismissed by order dated 29/11/2011. The order passed by the Additional Collector, Gwalior was challenged in appeal preferred before the Additional Commissioner, Gwalior Division, Gwalior in Case No. 406/2011-12/Appeal, which too has been dismissed by order dated 16/04/2013.

5. Challenging the orders passed by the authorities below, it is submitted by the counsel for the petitioner that the date on which the advertisement was issued and even on the date on which the petitioner was appointed on the post of Anganwadi Worker, i.e. 12/06/2007, the policy for appointment on the post of Anganwadi Worker dated 27/05/2006 was in vogue and the only requirement was that the candidate must have passed Higher Secondary/Inter Examination. There was nothing in the said policy that the points/marks would be awarded on the basis of percentage of marks of the candidates in the Higher Secondary/ Inter

Examination. This condition was inserted for the first time in the policy dated 10/07/2007. It is submitted that the policy dated 10/07/2007 came into existence subsequent to the appointment of the petitioner and, therefore, the subsequent policy cannot be taken into consideration for deciding pending appeal. It is further submitted that any recommendation of the name of the candidate made by Sector Supervisor was not binding on the competent authority and if the Project Officer, Integrated Child Welfare Development Project was of the view that the recommendation made by Sector Supervisor is not in accordance with rules/ guidelines, then it was not incumbent upon him to blindly act upon the recommendation of the Sector Supervisor and, therefore, the Project Officer, Integrated Child Welfare Development Project, Bhitarwar, District Gwalior rightly appointed the petitioner on the post of Anganwadi Worker, Anganwadi Centre, Ward No.14/11, Bhitarwar, District Gwalior. It is submitted that the guidelines dated 10/07/2007 were not retrospective in operation, therefore, the subsequently enforced policy should not have taken into consideration by the authorities. It is further submitted that the appeal filed by the respondent no.5 against the appointment of the petitioner was barred by limitation.

6. *Per contra,* the petition is opposed by the counsel for the respondents. The counsel for the respondent No.5 submitted that since the orders under challenge were passed by the authorities, therefore, it is for the authorities to support their stand. No other argument with regard to the correctness of the orders passed by the authorities was advanced by the counsel for the respondent No.5. In case if the petition is allowed, then the respondent No.5 would be the sufferer but for the reasons best known to her counsel, no argument was advanced.

7. The counsel for the respondents no.1 to 4 submitted that the authorities have rightly taken into consideration the subsequently implemented policy because on the day when the appeal filed by respondent no.5 was decided by the Additional Collector, the new policy dated 10/07/2007 had come into operation and, therefore, no illegality has been committed by the authorities.

8. So far as the question of limitation is concerned, the counsel for the respondents no.1 to 4 submitted that since the objection with regard to limitation was not raised by the petitioner at the earliest, therefore, the Additional Collector was right in ignoring the question of limitation.

Heard the learned counsel for the parties.

9. From the order dated 29/06/2009 passed by Additional Collector, Gwalior in Case No.35/2008-09/Appeal, it is clear that during the course of argument, a specific objection was raised by the counsel for the petitioner that the appeal filed by the respondent no.5 was barred by limitation, however, the said objection was turned down by the Additional Collector, Gwalior by observing that the objection

with regard to limitation should have been raised by the counsel for the petitioner at the earliest and since that objection was not raised, therefore, the said objection cannot be considered at the time of final arguments.

10. The ground on which the objection with regard to limitation was rejected by the Additional Collector, Gwalior cannot be upheld. So far as the question of limitation is concerned, as per Section 3 of the Limitation Act, it is for the Court to find out as to whether the appeal is within the limitation or not. There is no law that in case if the question of limitation is not raised at the earliest, then it cannot be considered at a later stage.

Section 3 of the Limitation Act reads as under:-

> **"3. Bar of limitation.**— (1) Subject to the provisions contained in sections 4 to 24 (inclusive), every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed, although limitation has not been set up as a defence.
>
> (2) For the purposes of this Act—
>
> (a) a suit is instituted—
>
> (i) in an ordinary case, when the plaint is presented to the proper officer;
>
> (ii) in the case of a pauper, when his application for leave to sue as a pauper is made; and
>
> (iii) in the case of a claim against a company which is being wound up by the court, when the claimant first sends in his claim to the official liquidator;
>
> (b) any claim by way of a set off or a counter claim, shall be treated as a separate suit and shall be deemed to have been instituted—
>
> (i) in the case of a set off, on the same date as the suit in which the set off is pleaded;
>
> (ii) in the case of a counter claim, on the date on which the counter claim is made in court;
>
> (c) an application by notice of motion in a High Court is made when the application is presented to the proper officer of that court."

From the plain reading of Section 3(1) of the Limitation Act, it is clear that whether the question of limitation has been set up as a defence or not, it is for the Court to find out as to whether the proceedings are within the period of limitation

or not and if those proceedings are not within the limitation, then they are to be dismissed as barred by time.

11. The Supreme Court in the case of *Draupadi Devi and Others vs. Union of India and others,* reported in (2004) 11 SCC 425 has held as under:-

> **"72.** That brings us to the issue of limitation. The learned Single Judge held that the plea of limitation not having been taken in the pleadings defendants Nos.1 and 2 should not be allowed to raise the said plea.
>
> **73,** We may notice here that under the Code of Civil Procedure, Order VII Rule 1(e) requires a plaint to state "the facts constituting the cause of action and when it arose". The plaintiff was bound to plead in the plaint when the cause of action arose. If he did not, then irrespective of what the defendants may plead in the written statement, the court would be bound by the mandate of Section 3 of the Limitation Act, 1908 to dismiss the suit, if it found that on the plaintiffs own pleading his suit is barred by limitation. In the instant case, the plaint does not plead clearly as to when the cause of action arose. In the absence of such pleadings, the defendants pleaded nothing on the issue. However, when the facts were ascertained by evidence, it was clear that the decision of the Government of India not to recognise the suit property as private property of the Maharaja was taken some time in the year 1951, whether in March or May. Dewan Jarmanidass, the plaintiff and the Maharaja were very much aware of this decision. Yet, the suit was filed only on 11.5.1960.
>
> **74.** The Division Bench was, therefore, right in applying Article 120 of the Limitation Act, 1908 under which the period of limitation for a suit for which no specific period is provided in the Schedule was six years from the date when the right to sue accrues. The suit was, therefore, clearly barred by limitation and by virtue of Section 3 of the Limitation Act, 1908, the court was mandated to dismiss it.
>
> **75.** As rightly pointed out by the Division Bench, the learned Single Judge ought to have permitted the plea to be raised on the basis of the facts which came to light. The Division Bench has correctly appreciated the plea of limitation, in the facts and circumstances of the case, and rightly came to the conclusion that the suit of the plaintiff was liable to be dismissed on the ground of limitation. We agree with the conclusion of the Division Bench on this issue."

12. Thus, it is clear that the Additional Collector, Gwalior should not have rejected the objection of limitation.

13. Now, the next question for consideration before the Court is that whether the appeal filed by the respondent no.5 was barred by limitation or not ?

In the guidelines dated 27/05/2006, the provision of appeal reads as under:-

> आंगनवाडी कार्यकर्ता/सहायिका की नियुक्ति/सेवा से पृथक करने के किसी भी प्रकरण में विवाद होने की स्थिति में उसके द्वारा कलेक्टर के समक्ष अपील की जा सकेगी, की गई अपील के संदर्भ में जिला कलेक्टर का निर्णय अंतिम होगा।

No period of limitation was provided for filing an appeal.

14. It is contended by the counsel for the petitioner that in the policy dated 10/07/2007, the limitation of ten days has been provided. The petitioner cannot play hot and cool by submitting on one hand, that the appointment of the petitioner is governed by policy dated 27/05/2006 and not by policy dated 10/07/2007 and at the same time, by submitting that the period of limitation provided in the policy dated 10/07/2007 should be imported in the policy dated 27/05/2006.

15. Thus, it is clear that in absence of any period of limitation, the Additional Collector, Gwalior could not have dismissed the appeal filed by the respondent no.5. Under these circumstances, it is held that the appeal filed by the respondent no.5 before the Additional Collector, Gwalior was within time and was not barred by limitation.

16. The next question for consideration is that when the entire selection process was completed prior to 10/07/2007, then whether the conditions provided under the policy dated 10/07/2007 could have been made applicable to the present case or not ?

17. The guidelines dated 27/05/2006 as well as the guidelines dated 10/07/2007 are executive instructions. The guidelines are always prospective in operation until and unless they are made retrospective specifically. There is nothing in the guidelines dated 10/07/2007 to indicate that those guidelines were retrospective in operation or were also made applicable to pending appeals arising out of recruitment made prior to 10/07/2007. Under these circumstances, this Court is of the consideration opinion that since the appointment of the petitioner was made prior to coming into force of policy dated 10/07/2007, therefore, the case of the petitioner has to be considered in the light of the guidelines dated 27/05/2006.

18. As per the guidelines dated 27/05/2006, the only qualification for appointment of Anganwadi Worker was that the candidate must have passed Higher Secondary/ Inter Examination. Preference was also given to the candidates belonging to Scheduled Caste and Scheduled Tribes and living Below the Poverty Line, Widow, Deserted, Spinster aged about 30 years or more and other women. In the guidelines dated 27/05/2006, there was no provision that any marks were to be awarded on the basis of percentage of marks obtained by the candidates in the Higher Secondary/ Inter Examination. Since the minimum qualification was Higher Secondary/Inter Examination, therefore, under these circumstances, where the candidates are at par with each other, then it cannot held that under no circumstance, the respondents were not competent to consider the marks obtained by the candidates in the Higher Secondary/ Inter Examination. However, in the present case, the situation is different. It is submitted that the marks could have been considered only when any candidate who was eligible to get preference, was not available. In this case, the petitioner was entitled for preference being a spinster aged about 30 years and once the candidate having passed Higher Secondary/ Inter Examination was entitled to get preference, then there was no occasion for the respondents to consider the marks obtained by the candidates in the Higher Secondary/ Inter Examination.

19. The counsel for the respondent no.5 has raised his hands by submitting that it is for the respondents/ authorities to justify their orders.

20. The respondents No.1 to 4 have filed their return merely by mentioning that the petitioner is pursuing the litigation since 2007 without any merits and the orders passed by the respondents/ authorities are in accordance with law.

21. The petitioner in paragraph 6 of the writ petition has specifically taken the following grounds:-

> "6.2. That, the appointment of petitioner vide order dt. 12-06-2007 as per direction of circular dated 27-05-2006 because she had requisite qualification and given preference that she was unmarried over 30 years of age living below poverty line as contemplated condition in aforesaid circular.
>
> 6.3. That, the respondent no.3 overlooked circular dt. 27-05-2006 by which the appointment of petitioner was made while respondent no.3 decided appeal no.35/2006-2007 of respondent no.5 as per circular of amended circular dated 10-07-2007 which has no retrospective effect.
>
> 6.4. That, the without amending the rules given retrospective effect the selection of petitioner already made the right vested with the petitioner to obtain employment cannot be taken away.

> 6.5. That, the respondent no.2 also over looked appointment of petitioner which was made according circular dt. 27-05-2006 and passed order as per direction given circular dt.10-07-2007 which was issued after appointment of petitioner dated 12-06-2007.
>
> 6.6. That, the amendment rules dt. 10-07-2007 will not be applicable in case of petitioner who selection order amended rules dt.27-05-2006 has been finalised and appointment of petitioner was made on 12-06-2007."

22. Respondents no.1 to 4 have not cared to meet out the grounds raised by the petitioner. The petitioner and respondent no.5 are candidates belonging to Scheduled Caste.

23. Under these circumstances, this Court is of the considered opinion that when all the candidates were having similar qualification, then the respondents should have looked into the provisions for giving preference and since the petitioner had also passed Higher Secondary/ Inter Examination and was entitled for preference being a spinster of thirty years, the respondents should not have looked into the marks obtained by the candidates in the Higher Secondary/ Inter Examination. Accordingly, it is held that the Project Officer, Integrated Child Welfare Development Project had rightly appointed the petitioner by order dated 12/06/2007 on the post of Anganwadi Worker, Anganwadi Centre, Ward No.14/11, Bhitarwar, District Gwalior and the appointment of the petitioner was wrongly cancelled by Project Officer, Integrated Child Welfare Development Project, by order dated 11/05/2010.

24. Accordingly, the order dated 29/06/2009 passed by Additional Collector, Gwalior in Case No.35/2008-09/Appeal, order dated 22nd March, 2009 passed by Additional Commissioner, Gwalior Division, Gwalior in Case No.207/2008-09/Revision, order dated 11/05/2010 passed by Project Officer, Integrated Child Welfare Development Project, Bhitarwar, District Gwalior by which the appointment of the petitioner was cancelled, order dated 11/05/2010 passed by Project Officer, Integrated Child Welfare Development Project, Bhitarwar, District Gwalior by which the respondent no.5 was appointed on the post of Anganwadi Worker, Anganwadi Centre, Ward No.14/11, Bhitarwar, District Gwalior, order dated 29/11/2011 passed by Additional Collector, Gwalior in Case No.22/2010-11/Appeal and the order dated 16/04/2013 passed by Additional Commissioner, Gwalior Division, Gwalior in Case No.406/2011-12/Appeal, are hereby set aside. The order dated 12/06/2007 issued by Project Officer, Integrated Child Welfare Development Project, Bhitarwar, District Gwalior by which the petitioner was appointed on the post of Anganwadi Worker, Anganwadi Centre, Ward No.14/11, Bhitarwar, District Gwalior is hereby restored.

With the aforesaid observations, the petition succeeds and is hereby **allowed.** No order as to costs.

Petition allowed

I.L.R. [2021] M.P. 637
WRIT PETITION

Before Mr. Justice G.S. Ahluwalia

WP No. 8154/2020 (Gwalior) decided on 21 January, 2021

JAGDISH SINGH JATAV …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

***A. Service Law – Dismissal on Ground of Conviction – Moral Turpitude* – Held – Petitioner was convicted on allegation that he and co-accused wrongfully restrained and assaulted the complainant by fists and blows – Causing bodily injury would not involve moral turpitude – Mere ground of conviction, not sufficient to dismiss him from service – Impugned order set aside – Reinstatement directed – Petition allowed.**

(Paras 7 & 10 to 13)

क. सेवा विधि – दोषसिद्धि के आधार पर पदच्युति – नैतिक अद्यमता – अभिनिर्धारित – याची को इस अभिकथन पर दोषसिद्ध किया गया था कि उसने तथा सह–अभियुक्त ने परिवादी को सदोष अवरूद्ध किया और घूंसो एवं मुक्कों से हमला किया – शारीरिक चोट कारित करने में नैतिक अद्यमता अंतर्ग्रस्त नहीं होगी – मात्र दोषसिद्धि का आधार उसे सेवा से पदच्युत करने के लिए पर्याप्त नहीं – आक्षेपित आदेश अपास्त – बहाल करने के लिए निदेशित किया गया – याचिका मंजूर।

***B. Civil Services (Classification, Control and Appeal) Rules, M.P. 1966, Rule 9(i) – Departmental Enquiry* – Held – Departmental enquiry can be dispensed with in case of the conduct of employee which has led to his conviction on a criminal charge. (Para 4 & 5)**

ख. सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966, नियम 9(i) – विभागीय जांच – अभिनिर्धारित – कर्मचारी के ऐसे आचरण के प्रकरण में, जिसके परिणामतः उसे एक दाण्डिक आरोप पर दोषसिद्ध किया गया है, विभागीय जांच से अभिमुक्त किया जा सकता है।

Cases referred:

C.A. No. 7011/2019 decided on 26.04.2019 (Supreme Court), (1997) 4 SCC 1, (1996) 4 SCC 17.

Vibhor Kumar Sahu, for the petitioner.
Abhishek Singh Bhadoriya, P.L. for the respondents/State.

(Supplied: Paragraph numbers)

O R D E R

G.S. AHLUWALIA, J. :- This petition under Section 226 of the Constitution of India has been filed against the order dated 04/05/2020 passed by the Director, Public Education, MP, Bhopal, by which the appeal filed by the petitioner against the order of dismissal issued by the Joint Director, Public Education, Division Gwalior on 23/01/2020, has been dismissed.

2. The necessary facts for disposal of present petition in short are that the petitioner was working as Upper Division Clerk in Government Girls Higher Secondary School, Gohad, District Bhind. He was convicted by judgment dated 17/06/2019 passed by JMFC, Gwalior in Criminal Case No.166/2016 for offene (sic : offence) under Sections 341, 323/34 of IPC and was sentenced to undergo the rigorous imprisonment of three months and a fine of Rs.500/-. Criminal Appeal filed by the petitioner was dismissed by the Appellate Court by judgment dated 07/09/2019. Being aggrieved by the dismissal of his appeal, the petitioner has filed a Criminal Revision before this Court and by order dated 16/09/2019, his sentence has been suspended. The petitioner also remained in custody from 07/09/2019 to 16/09/2019.

3. Challenging the impugned orders passed by the authorities, it is submitted by the counsel for the petitioner that even if the petitioner has been convicted for offence under Sections 323, 341, 34 of IPC but the offence committed by the petitioner does not involve moral turpitude, therefore, the respondents have committed a mistake by terminating the services of the petitioner.

Considered the submissions made by the counsel for the petitioner.

4. Rule 19 of the M.P. Civil Services (Classification, Control and Appeal) Rules, 1966 (In short Rules 1966), which provides for special procedure in certain cases, to which reliance has been placed by the appellants does not appear to be applicable in the instant case. The said Rule reads thus:

> "19. ***Special procedure in certain cases.***—Notwithstanding anything contained in Rule 14 to Rule 18—
>
> (*i*) where any penalty is imposed on a government servant on the ground of conduct which has led to his conviction on a criminal charge, or
>
> (*ii*) where the disciplinary authority is satisfied for reasons to be recorded by it in writing that it is not reasonably practicable to hold an inquiry in the manner provided in these Rules, or

(*iii*) where the Governor is satisfied that in the interest of the security of the State, it is not expedient to hold any inquiry in the manner provided in these Rules, the disciplinary authority may consider the circumstances of the case and make such orders thereon as it deems fit:

Provided that the Commission shall be consulted where such consultation is necessary, before any orders are made in any case under this Rule."

5. From plain reading of Rule 19(i) of Rules 1966, it is clear that the departmental enquiry can be dispensed with in the case of the conduct of an employee which has led to his conviction on a criminal charge. However, it would be too harsh to hold that the employer is not entitled to consider the circumstances of the criminal case, and in spite of the nature of the offence, the employer has to issue an order of dismissal.

6. The Supreme Court in the case of *The State Bank of India Vs. P. Soupramaniane* by judgment dated 26-4-2019 passed in C.A. NO. 7011 of 2019 has held as under :-

"9. There can be no manner of doubt about certain offences which can straightaway be termed as involving moral turpitude e.g. offences under the Prevention of Corruption of Act,NDPS Act, etc. The question that arises for our consideration in this case is whether an offence involving bodily injury can be categorized as a crime involving moral turpitude. In this case, we are concerned with an assault. It is very difficult to state that every assault is not an offence involving moral turpitude. A simple assault is different from an aggravated assault. All cases of assault or simple hurt cannot be categorized as crimes involving moral turpitude. On the other hand, the use of a dangerous weapon which can cause the death of the victim may result in an offence involving moral turpitude. In the instant case, there was no motive for the Respondent to cause the death of the victims. The criminal courts below found that the injuries caused to the victims were simple in nature. On an overall consideration of the facts of this case, we are of the opinion that the crime committed by the Respondent does not involve moral turpitude. As the Respondent is not guilty of an offence involving moral turpitude, he is not liable to be discharged from service."

7. Thus, it is clear that if an employee has been convicted for an offence involving moral turpitude, then he can be dismissed from his service, but if an employee has been convicted for an offence not involving moral turpitude, then his dismissal is not warranted.

8. Moral Turpitude has been explained by the Supreme Court in the cases of *Allahabad Bank Vs. Deepak Kumar Bhola* reported in (1997) 4 SCC 1 and *Pawan*

Kumar Vs. State of Haryana reported in (1996) 4 SCC 17. In the case of *Pawan Kumar* (Supra) it has been held as under :-

> **"12.** "Moral turpitude" is an expression which is used in legal as also societal parlance to describe conduct which is inherently base, vile, depraved or having any connection showing depravity. The Government of Haryana while considering the question of rehabilitation of ex-convicts took a policy decision on 2-2-1973 (Annexure E in the Paper-book), accepting the recommendations of the Government of India, that ex-convicts who were convicted for offences involving moral turpitude should not however be taken in government service. A list of offences which were considered involving moral turpitude was prepared for information and guidance in that connection. Significantly Section 294 IPC is not found enlisted in the list of offences constituting moral turpitude. Later, on further consideration, the Government of Haryana on 17/26-3-1975 explained the policy decision of 2-2-1973 and decided to modify the earlier decision by streamlining determination of moral turpitude as follows:
>
> > "... The following terms should ordinarily be applied in judging whether a certain offence involves moral turpitude or not;
> >
> > (1) whether the act leading to a conviction was such as could shock the moral conscience of society in general.
> >
> > (2) whether the motive which led to the act was a base one.
> >
> > (3) whether on account of the act having been committed the perpetrator could be considered to be of a depraved character or a person who was to be looked down upon by the society.
>
> Decision in each case will, however, depend on the circumstances of the case and the competent authority has to exercise its discretion while taking a decision in accordance with the above-mentioned principles. A list of offences which involve moral turpitude is enclosed for your information and guidance. This list, however, cannot be said to be exhaustive and there might be offences which are not included in it but which in certain situations and circumstances may involve moral turpitude."

9. In order to find out as to whether the petitioner has committed an offence involving moral turpitude or not, it would be necessary for this Court to consider

the allegations which were levelled against the petitioner. According to the prosecution case, on 27/04/2016 at about 09:00 am, the complainant Radhakrishna Jatav was wrongfully restrained by the petitioner and two other co-accused persons and he was abused and with an intention to cause hurt to the complainant, he was assaulted by fists and blows as well as by a brick. The allegations of assaulting the complainant by brick was against the co-accused Nihal Singh. On the report lodged by the complainant, Crime No.166/2016 was registered at Police Station Thatipur, District Gwalior and after completing the investigation, the police filed the charge sheet against the applicant and other two co-accused persons. Charges under Section 341, 294, 323/34, 506 (II) of IPC were framed and by judgment dated 17/06/2019 passed by JMFC, Gwalior in Criminal Case No.4271/2016, the petitioner and other two co-accused persons were convicted for offence under Sections 323, 341/34 of IPC, whereas, the petitioner and the co-accused persons were acquitted for the charges under Section 294, 506 (II) of IPC.

10. If the allegations which were made against the petitioner are considered, then it is clear that causing bodily hurt would not involve moral turpitude. The allegations of assaulting the complainant by a brick is against co-accused Nihal Singh and the only allegations against the petitioner were that he along with the co-accused persons, had wrongfully restrained the complainant and assaulted him by fists and blows. By no stretch of imagination, the allegation against the petitioner can be considered to be an offence involving moral turpitude.

11. In the light of the judgment passed by the Supreme Court in the case of *P. Soupramaniane* (supra), this Court is of the considered opinion that the authorities failed to consider that the allegation levelled against the petitioner does not involve moral turpitude and merely because the petitioner has been convicted for offence under Sections 323, 341/34 of IPC, it is not sufficient to dismiss him from service.

12. Accordingly, the order dated 04/05/2020 passed by the Director, Public Education, MP, Bhopal and the order 23/01/2020 passed by the Joint Director, Public Education, Division Gwalior are hereby **set aside.**

13. Accordingly, the respondents are directed to reinstate the petitioner in service forthwith. However, the petitioner shall not be entitled for back-wages from the date of his dismissal till today.

14. With aforesaid observations, this petition succeeds and is hereby **allowed.**

Petition allowed

I.L.R. [2021] M.P. 642 (DB)
WRIT PETITION

Before Mr. Justice Sujoy Paul & Mr. Justice Shailendra Shukla

WP No. 4694/2014 (Indore) decided on 9 February, 2021

SATYAM CINEPLEXES LTD. (M/S) …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

***A. Entertainment Duty and Advertisements Tax Act, M.P. (30 of 1936), Section 2(f) – Proprietor – Exemption of Tax – Entitlement* – Held – Definition of "proprietor" covers a person responsible for the time being or an incharge of management of the entertainment – Petitioner/lessee entitled to get benefit of exemption of Entertainment Tax – Impugned order set aside – Petition allowed. (Paras 18, 23 & 26)**

क. मनोरंजन शुल्क और विज्ञापन कर अधिनियम, म.प्र. (1936 का 30), धारा 2(f) – स्वामी – कर से छूट – हकदारी – अभिनिर्धारित – 'स्वामी' की परिभाषा में तत्समय उत्तरदायी व्यक्ति या मनोरंजन के प्रबंधन का प्रभारी आच्छादित है – याची/पट्टाधृति मनोरंजन कर की छूट का लाभ प्राप्त करने के लिए हकदार – आक्षेपित आदेश अपास्त – याचिका मंजूर।

***B. Entertainment Duty and Advertisements Tax Act, M.P. (30 of 1936), Section 2(f) & 7 – Exemption of Tax – Criteria* – Held – Section 7 which empowers government to exercise power of exemption is related to "any entertainment" or "clause of entertainment" and is not aimed towards the "owner" or "applicant" who preferred application for construction of shopping mall or multiplex. (Para 23)**

ख. मनोरंजन शुल्क और विज्ञापन कर अधिनियम, म.प्र. (1936 का 30), धारा 2(f) व 7 – कर से छूट – मापदण्ड – अभिनिर्धारित – धारा 7 जो सरकार को छूट की शक्ति का प्रयोग करने के लिए सशक्त करती है, 'किसी मनोरंजन' या 'मनोरंजन का खंड' से संबंधित है और शॉपिंग मॉल या मल्टीप्लेक्स के निर्माण हेतु आवेदन प्रस्तुत करने वाले 'मालिक' या 'आवेदक' की ओर लक्षित नहीं।

***C. Entertainment Duty and Advertisements Tax Act, M.P. (30 of 1936), Section 2(f) – Proprietor – Executive Instructions* – Held – In absence of any definition of "proprietor/swami" in executive directions/policy, the definition must be traced from main enactment – Definition contained in parent Act of 1936 must be the basis for determination – No executive instructions can prevail or assign a different meaning than the meaning provided in parent Act. (Para 21 & 22)**

ग. मनोरंजन शुल्क और विज्ञापन कर अधिनियम, म.प्र. (1936 का 30), धारा 2(f) – प्रोपराइटर – कार्यपालिक अनुदेश – अभिनिर्धारित – कार्यपालिक निर्देशों / नीति में 'स्वामी' की किसी परिभाषा की अनुपस्थिति में, परिभाषा का मुख्य अधिनियमिती से पता लगाना चाहिए – अवधारण हेतु 1936 के मूल अधिनियम में अंतर्विष्ट परिभाषा एक आधार होना चाहिए – कोई कार्यपालिक अनुदेश अभिभावी नहीं हो सकता या मूल अधिनियम में उपबंधित अर्थ के अलावा एक भिन्न अर्थ नहीं दे सकता।

***D. Practice – Public Orders – Object & Validity* – Held – Validity of order of statutory authority must be judged on basis of grounds mentioned therein and it cannot be supported by assigning different reasons in the Court by filing counter affidavit – Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to language used in the order itself. (Para 25)**

घ. पद्धति – लोक आदेश – उद्देश्य व विधिमान्यता – अभिनिर्धारित – कानूनी प्राधिकारी के आदेश की विधिमान्यता का निर्णय उसमें उल्लिखित आधारों पर आधारित होना चाहिए तथा उसे प्रति शपथपत्र प्रस्तुतीकरण द्वारा न्यायालय में भिन्न कारण देकर समर्थित नहीं किया जा सकता – लोक प्राधिकारियों द्वारा किये गये लोक आदेशों का लोक प्रभाव होना अर्थावित है एवं जिन्हें संबोधित किया गया है, उनके कार्यों एवं आचरण को प्रभावित करना आशयित है तथा स्वयं आदेश में प्रयुक्त भाषा के संदर्भ में वस्तुनिष्ठ रूप से अर्थावयन लगाना चाहिए।

***E. Practice – Act/Rules/Executive instructions – Conflict* – Held – If there exists any conflict between provisions of Act and the provisions of Rules or executive instructions, the former will prevail. (Para 22)**

ङ पद्धति – अधिनियम / नियम / कार्यपालिक अनुदेश – विरोध – अभिनिर्धारित – यदि अधिनियम के उपबंधों एवं नियमों के उपबंधों अथवा कार्यपालिक अनुदेशों के बीच कोई विरोध विद्यमान है, पूर्वकथित अभिभावी होगा।

***F. Official Language Act, M.P., 1957 (5 of 1958) – Hindi Version* – Held – After enactment of M.P. Official Language Act, 1957, the Hindi version published must be relied upon in case of any doubt. (Para 17)**

च. राजभाषा अधिनियम, म.प्र., 1957 (1958 का 5) – हिन्दी संस्करण – अभिनिर्धारित – म.प्र. शासकीय भाषा अधिनियम 1957 की अधिनियमिती पश्चात्, किसी संशय की स्थिति में, प्रकाशित हिन्दी संस्करण पर विश्वास किया जाना चाहिए।

Cases referred :

WPT No. 47/2016 decided on 16.11.2018 (Chhattisgarh High Court), 1986 SCC Online KER 345, (1997) 5 SCC 482, (2005) 6 SCC 292, (2018) 9 SCC Page 1, 1995 MPLJ 969, 1970 (2) SCC 355, 1983 MPLJ FB 254, 2018 (3) MPLJ 588, 1980 MPLJ 221, 2006 (12) SCC 583, 1978 (1) SCC 405.

Sumit Nema with *Gagan Tiwari* and *Piyush Parashar*, for the petitioner.
Pushyamitra Bhargav, Addl. A. G. with *P. Sen,* for the respondent/ State.

O R D E R

The Order of the Court was passed by :
SUJOY PAUL, J. :- The interesting conundrum in this petition filed under Article 226 of the Constitution is whether the benefit of exemption of entertainment tax is available only to the owner of a multiplex or it can be extended to a lessee as well ?

2. Draped in brevity, the relevant facts are that petitioner is a Limited Company duly registered under the provisions of Companies Act, 1956 and is engaged in the business of exhibiting feature films on commercial basis in its various cinema complexes all over the country including at Indore. The multiplexes are situated at C-21 Mall, A.B. Road, Indore. The petitioner company is duly registered under the M.P. Vat Act, 2002 with effect from 12/11/2009.

3. The Government of Madhya Pradesh introduced a policy on Integrated Family Entertainment Centres (Multiplex Complexes) with an object of improving the quality and facility of cinema halls in the State. The said policy came into being with effect from 25/10/2001 which provides for establishment of multiplex complexes within 10 kilometer of municipal limits of four major cities of Madhya Pradesh including Indore. Certain tax exemption and other concessions have been given to encourage the establishment and growth of said multiplexes. The petitioner has filed copy of said policy (Annexure P/1).

4. Shri Sumit Nema, learned Sr. Counsel for the petitioner urged that the government passed entertainment tax exemption policy to attract investment in the multiplex with a view to promote the opening of fully developed multiplexes.

5. The Department of Commercial Tax (Department of Excise), Government of M.P introduced the promotional scheme as per notification dated 7/10/2008 (hereinafter called 'exemption notification') (Annexure P/2). The said notification grants exemption for five years to multiplexes from the date of first exhibition of a movie subject to certain conditions mentioned therein. It is argued that said notification was issued in exercise of power conferred on the government u/S.7 of the M.P. Entertainment Duty and Advertisement Tax Act, 1936 *(hereinafter referred to as "the Act of 1936")* which was repealed and replaced by the M.P. Vilasita, Manoranjan, Amod Evam Vigyapan Kar Adhiniyam, 2011 (Act of 2011) thereby exempting Integrated Family Entertainment Centres/multiplex complexes from payment of entertainment duty. Learned Senior Counsel for the petitioner submits that Sec.3 of the Repealed Act of 1936 is the charging Section whereas Section 7 gives power of general exemption. It is averred that petitioner established five cinema auditoriums at C-21 Mall, Indore and duly received

registration certificate dated 24/11/2009 (Annexure P/3) under M.P. (Regulations) Act 1952 as a cinema operator by the competent authority.

6. The petitioner preferred an application dated 8/4/2010 (Annexure P/4) seeking entertainment tax exemption. In addition, petitioner applied for grant of permission for printing of computerised tickets (Annexure P/5). In due course, the permission was granted by District Collector on 24/12/2009 (Annexure P/6). Every ticket, duly contains a remark 'entertainment tax exempted'.

7. The Assistant Commissioner of Excise, Indore wrote a letter dated 8/7/2011 to Divisional Commissioner (Revenue), Indore informing him that the Act of 1936 stood repealed with effect from 1/4/2011. The Divisional Commissioner was accordingly requested that further action in the petitioner's application needs to be taken by the Department of Commercial Tax. The District Collector (Excise) also wrote a letter to the Divisional Commissioner (Revenue) on 3/2/2011 for the same purpose. The Act of 2011 came into force on its publication in the official gazette on 31/3/2011. The petitioner's application was processed and Dy. Commissioner, Commercial Tax, Indore wrote a letter dated 22/10/2011 to Divisional Commissioner (Revenue), Indore apprising him about joint inspection needs to be carried out at petitioner's premises by a team consisting of Superintendent of Police, Additional Collector, Dy. Commissioner of Municipal Corporation and others. After the inspection, an inspection report dated 22/10/2011 (Annexure P/10) was submitted to Divisional Commissioner (Revenue), Indore. The said authority convened a divisional level meeting by issuing the letter dated 24/12/2011 (Annexure P/11). The meeting was ultimately convened on 4/1/2012 in the office of Dy. Commissioner (Revenue), Indore in the Chairmanship of the Divisional Commissioner (Revenue), Indore. In furtherance of decision taken by the said Divisional Level Committee, the order dated 16/3/2012 (Annexure P/12) was passed whereby exemption was granted to the petitioner from payment of entertainment tax and electricity fee for a period of five years commencing from 24/12/2009. The stand of petitioner is that the problem arose when a letter dated 5/8/2013 (Annexure P/13) was written by learned Commissioner, Commercial Tax. For the first time, in this letter it is stated that it is not clear whether a multiplex cinema operator who operates such cinema in the premises of mall should be the rightful beneficiary of exemption from payment of entertainment tax. The clarification/guidance is sought for from Additional Chief Secretary, Department of Commercial Tax, Government of M.P.

8. The Additional Chief Secretary aforesaid never issued any clarification and doubt so raised in the communication dated 5th August, 2013 (Annexure P/13) remained unanswered.

9. Shri Nema, learned Sr. Counsel submits that the application of petitioner seeking exemption dated 8/4/2010 shows that it was preferred on behalf of Satyam Cineplexes Limited and signed by its owner/Managing Director. A Divisional Level Committee which is much higher in status than the Commercial Tax Officer found the petitioner eligible for grant of entertainment tax exemption. The impugned order dated 5/5/2014 (Annexure P/14) came as a bolt from blue to the petitioner whereby entertainment tax exemption was declined on the ground that there exists no tax exemption certificate in the name of M/s. Satyam Cineplexes Limited TIN No.80949000242. Consequently, the tax, interest and penalty is decided to be imposed on the petitioner.

10. Learned Senior Counsel for the petitioner criticised the impugned order dated 5/5/2014 by contending - (i) exemption notification is applicable qua 'entertainment' and not 'owner' Otherwise, the very purpose for which exemption is decided to be given will be frustrated, (ii) Section 2(f) defines 'proprietor'. The definition shows that it is very wide and includes any person responsible for or for the time being incharge of management of any 'entertainment', (iii) the policy of entertainment tax is an executive instruction/policy guideline which must be read in conformity with the parent statute, (iv) in the event of any ambiguity or contradiction between the parent Act and the policy/guidelines, the parent Act being a statutory provision must prevail, (v) the investment made by the petitioner was for multiplexes and entertainment tax is also paid by the lessee. To bolster the aforesaid submission, learned Senior Counsel placed reliance on a division bench judgment of Chhattisgarh High Court passed in WPT No.47/2016 *(M/s. PVR Ltd. Vs. State of C.G* decided on 16/11/2018). It is urged that in State of Chhattisgarh, Rules of 1982 were applicable. No definition of 'owner' (swami) finds place in the said Rules. The question cropped up before the Division Bench was whether 'swami' means only actual owner or it covers the occupier/licensee of multiplexes also. The Division Bench opined that as per the scheme and object of Act of 1936 and Rules of 1982 the occupier/licensee is also covered and is entitled to get the subsidy.

11. The next reliance is on a Kerala High Court judgment reported in 1986 SCC Online KER 345 *(Deputy Commissioner Vs. Raghavan)* it is urged that the exemption was given by assigning a wide meaning to the provision and owner and lessee were found entitled to get the benefit of exemption. (1997) 5 SCC 482 is relied upon to contend that in the context the word 'owner' is used, it must be given a wide meaning and must include a lessee. Lastly (2005) 6 SCC 292 is relied upon to contend that the Court can go behind the notification to examine the real purpose of the provision.

12. Shri Pushyamitra Bhargav, learned Addl. Advocate General contended that petitioner has an efficacious alternative remedy against the impugned order.

The petitioner may be relegated to avail the said remedy. Apart from this, learned AAG submits that pursuant to the Notification dated 07/10/2008 (issued as per Act of 1936), on the same date a policy was introduced. The policy dated 07/10/2008 is placed on record as Annexure P/2. Great emphasis is laid on the language employed on the subject of covering letter dated 07/10/2008 wherein the Commercial Tax Department mentioned that the policy is meant for construction/establishment of multiplexes in the State of M.P. Shri Bhargav by taking this Court to Clause-1.5.1 of policy submits that applicant is entitled to get exemption from entertainment tax on constructing a multiplex. For the same purpose, reliance is placed on Clause 1.6, 1.6.2, and 1.6.4 of this policy. The 'owner' is treated as 'applicant' and lessee, by no stretch of imagination can get the benefit of exemption of entertainment tax. By placing heavy reliance on a Constitution Bench judgment in the matter of *Commissioner of Customs (Import), Mumbai v. Dilip Kumar and Company & Ors.* reported in (2018) 9 SCC Page 1, Shri Bhargav urged that an exemption Notification should be interpreted strictly. It is for the assessee to show that his case comes within the parameters of exemption clause/exemption notification. If there exists an ambiguity in exemption notification, it must be subject to strict interpretation. The benefit of ambiguity cannot be claimed by the subject/assessee and it must be interpreted in favour of revenue. In view of this authoritative pronouncement by Constitution Bench, Shri Bhargav urged that curtains are finally drawn on the aspect of interpretation of an exemption clause. A conjoint reading of the Notification dated 07/10/2008 and the policy of same date makes it clear that exemption is available to the "owner" or the 'applicant', who has taken permission to construct the multiplex and not to the lessee.

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

14. We have bestowed our anxious consideration on rival contentions and perused the record.

15. Before dealing with rival contentions on merits, it is apposite to decide the question of availability of alternative remedy. Indisputably, an alternative remedy is available to the petitioner against the impugned order. However, it is noteworthy that this petition despite availability of that remedy was entertained by this Court way back on 28.07.2014. The question involved in the present matter is legal in nature and no factual inquiry is required. In our opinion, after almost six years from the date present petition was entertained, it will not be proper to relegate the petitioner to avail the alternative remedy. We find support in our view from the judgment of this Court reported in 1995 MPLJ 969 *(Chambal Ghati Shiksha Prasar Samiti vs. State of M.P.).* After considering the judgment of Supreme Court reported in 1970 (2) SCC 355 *(Hriday Narain vs. ITO Bareilly),* this Court came to hold as under:

"There is no dispute with the proposition that when an alternate remedy is available then normally aggrieved party should be relegated to his ordinary remedy provided under the statute. But there is another well known principle of law enunciated by the Supreme Court. In Hirday Narain v. Income Tax Officer, Bareilly, (1970) 2 SCC 355 : AIR 1971 SC 33, the Supreme Court has held in categoric terms that if a petition is entertained and during the pendency of the petition the remedy for seeking alternate remedy expires then the petitioner should be heard on merits and the parties should not be relegated to remedies under the statute."

(Emphasis Supplied)

In this view of the matter, we are not inclined to relegate the petitioner to avail the alternative remedy.

16. The parties during the course of arguments placed reliance on certain provisions of the Act of 1936. The relevant provisions read as under:

***2(f)** "proprietor " in relation to any entertainment, includes any person responsible for or for the time being incharge of the management thereof;*

3 Entertainment Duty payable by proprietor of an entertainment. —

(1) Every proprietor of an entertainment other than proprietor of an entertainment by Video Cassette Recorder (hereinafter referred to as V.C.R.) or Video Cassette Player (hereinafter referred to as V.C.P.) or a Cable Operator, shall in respect of every payment for admission to the entertainment pay to the State Government a duty at the rate (as prescribed by the State Government not exceeding seventy five percentum thereof:)

(2) They duty payable under sub -section (1) shall be paid to or collected or released by such officer or authority and in such manner as ma y be prescribed.

(3) Where the payment for admission to an entertainment is made by means of a lump sum paid as a subscription or contribution to any person, or for a season ticket or for the right of admission to a series of entertainments or to any entertainment during a certain period of time, or for any privilege, right, facility or thing combined with the right of admission without further payment or at a reduced charge, the entertainments duty shall be paid on the amount of such lump sum:

Provided that where the State Government is of opinion that the payment of a lump sum represents payment for other privileges, rights, or purposes besides the admission to an entertainment, or covers admission to the entertainment during any period for which the duty has not been in operation, the duty shall be charged on such an amount as

papers to the State Government to represent the right of admission to entertainment in respect of which the entertainment duty is payable.

(4) In calculating the entertainments duty payable under sub-section (1)—

(i) where the duty payable is less than fifty paise, the duty shall be rounded off to nearest lower multiple of five paise; and

(ii) where the duty payable is more than fifty paise, the duty shall be rounded off to nearest higher multiple of five paise.

***7 Power of general exemption.**— The State Government may, by general or special order, except—*

(i) any entertainment or class of entertainments from the operation of Section 3;

(ii) any advertisement or class of advertisements from the operation of Section 3-A "

(Emphasis Supplied)

Shri Bhargava placed reliance on following clauses of the policy:

*"**1.3 भूमि की आवश्यकता** :– नये एकीकृत पारिवारिक आमोद–प्रमोद के बहुआयामी मनोरंजन केन्द्र (Multiplexe) की स्थापना के लिए आवास एवं पर्यावरण/नगर तथा ग्राम निवेश संचालनालय द्वारा निर्धारित मापदण्डो एवं भवन निर्माण उपविधियों के अनुसार आवश्यक भूमि आवेदक के पास होना चाहिये।*

***1.4 मल्टीप्लेक्स निर्माण हेतु आवश्यक शर्तें** :–*

1.4.1 आवेदक को आवास एवं पर्यावरण/नगर एवं ग्राम निवेश विभाग द्वारा निर्धारित शर्तों का पालन करना होगा। आवेदक को नगर तथा ग्राम निवेश अधिनियम एवं उसके अंतर्गत बने नियमों को पालन करना होगा। भूमि उपयोग हेतु प्रमुख शर्ते परिशिष्ट–एक पर दी गई है। इनमें राज्य शासन द्वारा समय–समय पर आवश्यक परिवर्तन किये जा सकेगे।

1.4.2 आवेदक को नगर तथा ग्राम निवेश कार्यालय से विकास की अनुज्ञा एवं स्थानीय संस्थाओं यथा–नगर निगम/नगर पालिका/नगर पंचायत/ ग्राम पंचायत से भवन निर्माण की अनुज्ञा के संबंध में समस्त आवश्यक स्वीकृतियां प्राप्त करनी होगी।

***1.5.1 मनोरंजन शुल्क (Entertainment Duty) से छूट** :–*

आवेदक द्वारा समस्त शर्तो की पूर्ति करते हुए मल्टीप्लेक्स का निर्माण करने पर उसे मल्टीप्लेक्स कॉम्पलेक्स में स्थित किसी भी छविगृह में फिल्म का प्रथम प्रदर्शन प्रारंभ होने के दिनांक से मनोरंजन शुल्क से निम्नानुसार छूट दी जा सकेगी :–

क्र.	अवधि	मनोरंजन शुल्क से छूट
1	प्रथम द्वितीय एवं तृतीय (तीन वर्ष)	100 प्रतिशत
2	चतुर्थ वर्ष	75 प्रतिशत
3	पांचवा वर्ष	50 प्रतिशत

1.6 छूट के बारे में शर्तें :–

1.6.4 मनोरंजन शुल्क में देय छूट का लाभ, सम्पत्ति के स्वामी को ही देय होगा। छूट की अवधि की समाप्ति के पश्चात मल्टीप्लेक्स को उक्त समस्त सुविधाओं सहित 5 वर्षो तक अनिवार्य रूप से चलाना होगा। यदि इस शर्त का उल्लघंन किया जाता है तो संबंधित संपत्ति के स्वामी से उसे प्रदान की गयी, करो की छूट की सम्पूर्ण राशि उसके जमा होने के दिनांक तक के लिये 12 प्रतिशत वार्षिक साधारण ब्याज सहित जमा कराई जायेगी तथा उसके द्वारा जमा नही करने पर भू–राजस्व के बकाया की भॉति वसूल की जायेगी।''

(Emphasis Supplied)

The bone of contention of learned Additional Advocate General was that in view of Constitution Bench judgment of Supreme Court in the case of *Dilip Kumar and Company* (supra), exemption notification must be interpreted strictly. In the event of any ambiguity in exemption notification, the benefit of ambiguity cannot be claimed by the subject. It must be interpreted in favour of the revenue. Thus, the pivotal question is as to what is the nature of exemption notification/provision and whether it gives benefit of exemption of Entertainment Tax to a 'lessee'.

17. The notification dated 07.10.2008 was issued in exercise of powers conferred by Section 7 of the Act of 1936. On the same date, an executive instruction in the shape of policy (Annexure P/2) was issued clauses of which were heavily relied upon by Shri Bhargava. Indisputably, neither the notification dated 07.10.2008 nor the policy which is issued as executive fiat contains any definition of 'proprietor' (**स्वामी**). Thus, to ascertain the meaning and definition of proprietor, the Court needs to look into the definition clause contained in the Act of 1936 namely; Section 2(f), reproduced hereinabove. In the considered opinion of this Court, if present petitioner is covered by definition of 2(f), he can certainly claim the benefit of exemption. This will not be out of place to mention here that in the Act of 1936 (Hindi version), the proprietor is defined as 'Swami'. The relevant portion reads as under:

> ''स्वामी में, किसी मनोरंजन के सम्बन्ध में, समाविष्ट से उसके प्रबन्ध के लिये उत्तरदायी अथवा उसके प्रबन्ध का तत्समय प्रभारी कोई भी व्यक्ति;''
>
> *(Emphasis Supplied)*

This will not be out of place to mention here that after enactment of M.P. Official

Language Act, 1957, the Hindi version published must be relied upon in case of any doubt. In the present case, although there exits no doubt, the Hindi version of (Proprietor) makes it further clear that the Legislative intent was to treat the 'proprietor' as 'Swami'. A Full Bench of this Court in *Mangilal vs. Board of Revenue,* 1983 MPLJ FB 254 took the said view regarding prevailing of Hindi version in case of doubt. Same principle is followed in 2018 (3) MPLJ 588 *(C.M.O. vs. Hindustan Copper Ltd.)*.

18. The definition of 'proprietor' became subject matter of consideration in 1980 MPLJ 221 *(State of M.P. vs Narendrasingh Mannalal)*. The relevant portion reads as under:

> *"8. Section 2(f) provides:*
>
> *"Proprietor in relation to any entertainment includes any person responsible for or for the time being in charge of the management thereof."*
>
> *This definition is inclusive and speaks of a person responsible for the time being in charge of the management thereof. This terminology implied in this definition clearly goes to show that those who are in charge of or responsible for the management of the cinema house* ***whether they are strictly proprietors or not shall be included in the definition of the term proprietor.***
>
> *(Emphasis Supplied)*

This pronouncement makes it clear that definition of 'proprietor' is wide enough to include a person who is incharge of or responsible for management of cinema house.

19. It is noteworthy that in the case of *M/s PVR Ltd.*(supra) before the Division Bench of CG High Court, the Rules of 1982 were subject matter of consideration. In those Rules, there was no definition of 'Swami' but an explanation was appended to Rule 5 which reads as under:

> *''स्पष्टीकरण –''स्वामी'' शब्द का तात्पर्य, किसी व्यक्ति विशेष व्यक्तियों के समूह किसी फर्म या सोसाइटी या संयुक्त पूंजी कंपनी से जो सिनेमागृह या (मल्टीप्लेक्स सिनेमाघर) का मालिक हो, से है।''*

20. The CG High Court opined that since 'Swami' is not defined in the Rules of 1982, the definition is to be traced from the Act of 1936. After considering the said definition, the Court opined that it is broader kind of definition and includes a 'lessee'. It was poignantly held that the word 'Swami' would not only include the actual owner but also the 'occupier' or the 'lessee' of the Cinema-hall or the Multiplex. In view of this finding, order impugned was set aside and the matter

was remitted back to the respondents to take a fresh decision in the light of the judgment.

21. The Explanation to Rule 5 which was subject matter of consideration before CG High Court was still pregnant with some description regarding 'Swami' whereas administrative instruction/policy in the instant case is silent on this aspect. In this backdrop, we are of the view that 'definition' contained in the Parent Act of 1936 must be the basis for determining whether petitioner is entitled to get the benefit of exemption.

22. In our country, the hierarchy of laws is as follows:

(1) The Constitution of India.

(2) The Statutory Law which may be either Parliamentary Law or Law made by the State Legislature.

(3) Delegated or subordinate legislation, which may be in the form of Rules made under the Act, Regulations made under the Act, etc.

(4) Administrative orders or Executive Instructions without any statutory backing.

See 2006 (12) SCC 583 *(Ispat Industries Ltd. vs. Commissioner of Customs)*.

This is equally settled that if there exists any conflict between the provisions of the Act and the provisions of Rules or Executive Instructions, the former will prevail. In the instant case, in absence of any definition of 'proprietor/swami' in the executive instructions/policy, the definition must be traced from the main enactment. Even if there would have been a definition of 'Swami' in the Executive Instructions, the same was required to be read as per the definition given in the Parent Act of 1936. No Executive Instructions can prevail or assign a different meaning than the meaning provided in the Parent Act. Thus, we respectfully agree with the view taken by the CG High Court in the case of *M/s PVR Ltd.*(supra).

23. The Apex Court in *Mysore Mineral Ltd.* (supra) considered the term 'owned' occurring in Section 32 of the IT Act, 1961 and held that it must be given a wider meaning. Any one in possession of property in his own title exercising such dominion over the property as would enable others being excluded therefrom and having the right to use and occupy the property and/or to enjoy its usufruct in his own right would be the owner of buildings though a formal and legal deed of title may not have been executed. In *Vadilal Chemicals* Ltd(supra), the Apex Court held that in absence of any statutory definition of the word 'manufacture', object of Government Order needs to be taken into consideration for interpretation. The Kerala High Court in the case of *Raghwan* (supra) considered the question of exemption for 'New Industrial Unit'. It was held that exemption is extended to all

goods produced and sold by the unit. The person running the industrial unit, whether his 'owner' or 'lessee' or even a lessee having completed control over the unit is entitled to exemption so long as goods are produced in the unit and sold by him. In our opinion, the broad definition of 'proprietor' as per Act of 1936 covers a person responsible for the time being or an incharge of the management of the entertainment even if strict interpretation is applied. Hence, the judgment of Apex Court in *Dilip Kumar* (supra) is of no assistance to the department. Section 7 of the Act of 1936, the enabling provision which empowers the government to exercise power of exemption is related to 'any entertainment' or 'clause of entertainment'. The enabling provision is not aimed towards the 'owner' or the 'applicant' who preferred an application for construction of shopping malls or multiplex. For this reason also, we find substance in the argument of Shri Nema that benefit of exemption must be extended in favour of a lessee. Moreso, when indisputably the Entertainment Tax is paid by the lessee only.

24. As per the policy of exemption, the application of exemption needs to be examined by a Committee of high ranking officers. The application dated 08.04.2010 is signed by Shri Gurjeet Singh Chhabra. However, the opening sentence of application shows that it is preferred on behalf of C-21 Mall, Satyam Cineplexes Ltd. Shri Chhabra signed the application as a Proprietor/Managing Director of Satyam Cineplexes Ltd. The Committee constituted as per the policy, examined the various facets and opined as under:

> *''वणिज्यिक कर विभागीय की टीप :– संभागीय उपायुक्त श्री व्ही एस. भदौरिया (पूर्व संभागीय उपायुक्त) वाणिज्यिक कर इन्दौर संभाग–1 के ज्ञापन क्रमांक उपा–1/वाक/मनोरंजन कर/11/9125 इन्दौर दिनांक 22.10.2011 द्वारा सत्यम सिनेप्लेक्सेस लिमिटेड को मनोरंजन कर से मुक्ति हेतु अह प्रतीत होकर अनुशंसा की गई है।''*

In view of the recommendations, the following decision was taken on 16.03.2012 (Annexure P/12):

> *''अतः नवीन पारिवारिक अमोद–प्रमोद के बहुआयामी मनोरंजन केन्द्रो (Multiplexes) के निर्माण के संबंध में प्रोत्साहन नीति की कण्डिका 1.9 के अनुसार गठित संभाग स्तर पर संभागीय आयुक्त (राजस्व) की अध्यक्षता वाली समिति द्वारा श्री गुरजीतसिंह पिता श्री भगतसिंह छाबडा एवं श्रीमती प्रभजोत कोर पति श्री गुरजीतसिंह छाबडा मैनेजिंग डारेक्टर सी–21 सत्यम सिनेप्लेक्स लि. प्लॉट नं. 94 से 104 एवं 300 से 303 पी.यु.–4 स्कीम नं.–54 ए.बी. रोड इन्दौर को मनोरंजन शुल्क एवं विद्युत शुल्क से प्रोत्साहन नीति की कंडिका 1.5.1 एवं 1.5.2 के अनुसार समस्त 5 छविगृहों में फिल्म के प्रथम प्रदर्शन प्रारंभ होने के दिनांक 24.12.2009 से 5 वर्ष की अवधि के लिये निम्न शर्तो के अध्यधीन छूट प्रदान की जाती है''*

A conjoint reading of the recommendations and the consequential order dated 16.03.2012 (Annexure P/12) makes it crystal clear that the exemption was decided to be given to Satyam Cineplexes Ltd. Putting it differently, the exemption order specifically contains the name of Cineplex i.e. Satyam Cineplexes in whose favour the decision to grant exemption was taken.

25. The matter may be viewed from another angle. In the impugned order dated 05.05.2014, the reason for not giving benefit of exemption is mentioned as under:

> *''व्यवसायी द्वारा म0प्र0 विलासिता, मनोरंजन, आमोद एवं विज्ञापन कर अधिनियम 2011 की धारा 15 में किये गये Repeal and Savings के प्रावधानों के अंतर्गत पूर्व अधिनियम की धारा 3 के प्रवर्तन से अधिसूचना क्रमांक 76–बी–5–10–2007–2 दिनांक 07.10.2007 के तहत फिल्म के प्रथम व्यवसायिक प्रदर्शन दिनांक 24.12. 2009 से प्रथम तीन वर्ष हेतु (24.12.2012 तक) 100 प्रतिशत, चतुर्थ वर्ष हेतु (25.12. 2012 से 24.12.2013) 75 प्रतिशत एवं पांचवे वर्ष हेतु 50 प्रतिशत मनोरंजन शुल्क से छूट सम्बन्धी आदेश के तहत दिनांक 01. 04.2012 से 24.12.2012 तक की मनोरंजन से सम्बन्धित प्राप्तियों पर 100 प्रतिशत की छूट चाही गई है एवं दिनांक 25.12.2012 से 31.03.2012 तक की मनोरंजन से संबंधित प्राप्तियों पर 75 प्रतिशत की छूट चाही गई है। परन्तु करमुक्ति पात्रता प्रमाण पत्र श्री गुरजित सिहं पिता श्री भगत सिंह छाबड़ा एवं श्रीमती प्रभजोत कौर पति श्री गुरजित छाबड़ा, मैनेजिंग डायरेक्टर सी–21 मॉल, सत्यम सिनेप्लेक्स लि. प्लॉट नं. 94–104 एवं 300–303 पीयू–4 स्कीम नं. 5 ए.बी. रोड इंदौर को प्राप्त है। मे, सत्यम् सिनेप्लेक्स लि. टिन क्रमांक 80949000242 के नाम से कोई करमुक्ति पात्रता प्रमाण पत्र नहीं है। अतः करदाता द्वारा चाही गई छूट अमान्य की जाती है। इस प्रकार दिनांक 01.04.2011 से 31.03.2013 तक की मनोरंजन एवं विज्ञापन से सम्बन्धित समस्त करयोग्य प्राप्तियां रू. 72588400/– निर्धारित की जाती है।''*
>
> *(Emphasis Supplied)*

The reason for depriving the petitioner from the benefit of exemption is that in the exemption order, the name of M/s Satyam Cineplexes does not find place or the exemption certificate is not a certificate in favour of M/s Satyam Cineplexes Ltd. This finding, in our view, is factually incorrect. The relevant portion of exemption order dated 16.03.2012 Annexure P/12 reproduced hereinabove leaves no room for any doubt that exemption was indeed issued in favour of M/s Satyam Cineplexes Ltd. Pertinently, the impugned order dated 05.05.2014 does not contain any opinion of the Commercial Tax Officer that petitioner being a 'lessee' is not entitled to get exemption and such benefit is confined to 'proprietor/swami' only. The only reason assigned is that the exemption notification/certificate was not issued in favour of M/s Satyam Cineplexes Ltd. This is trite law that validity of an order of a statutory authority must be judged on the basis of grounds mentioned therein and it cannot be supported by assigning different reasons in the Court by filing counter affidavit. See 1978 (1) SCC 405 *(Mohinder Singh Gill and another*

vs. Chief Election Commissioner, New Delhi and others. The Apex Court opined that public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself. Orders are not like old wine becoming better as they grow older.

26. For the aforementioned reasons, the impugned order cannot sustain judicial scrutiny. In view of foregoing analysis, the impugned order dated 05.05.2014 is set aside. The petitioner/lessee is entitled to get the benefit of exemption of Entertainment Tax as per law.

The petition is **allowed.**

Petition allowed

I.L.R. [2021] M.P. 655 (DB)
WRIT PETITION

Before Mr. Justice Mohammad Rafiq, Chief Justice &
Mr. Justice Vijay Kumar Shukla

WP No. 19656/2020 (Jabalpur) decided on 26 February, 2021

YASHWARDHAN RAGHUWANSHI …Petitioner

Vs.

DISTRICT & SESSIONS JUDGE & anr. …Respondents

***A. Arbitration and Conciliation Act (26 of 1996), Sections 2(1)(e), 9, 14, 34 & 36, Civil Courts Act, M.P. (19 of 1958), Section 7 & 15, Commercial Courts Act, 2015 (4 of 2016), Section 10 & 11 and Criminal Procedure Code, 1973 (2 of 1974), Sections 194, 381(1) & 400 – Competent Court* – Held – Court of District Judge as the Principal Civil Court of original jurisdiction would be competent to decide the matters/disputes u/S 9, 14, 34 & 36 of Arbitration Act and also under provisions of Commercial Courts Act regardless of the value of claim – Relevant entry in impugned order being violative of relevant provisions of law is set aside – Petition allowed. (Paras 14 to 16)**

***क. माध्यस्थम् और सुलह अधिनियम (1996 का 26), धाराएँ 2(1)(e), 9, 14, 34 व 36, सिविल न्यायालय अधिनियम, म.प्र. (1958 का 19), धारा 7 व 15, वाणिज्यिक न्यायालय अधिनियम, 2015 (2016 का 4), धारा 10 व 11 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 194, 381(1) व 400 – सक्षम न्यायालय* – अभिनिर्धारित – जिला जज का न्यायालय, मूल अधिकारिता के प्रधान सिविल न्यायालय के रूप में, माध्यस्थम् अधिनियम की धारा 9, 14, 34 व 36 के अंतर्गत और वाणिज्यिक न्यायालय अधिनियम के**

उपबंधों के अंतर्गत भी मामलों / विवादों को, दावे के मूल्य की परवाह किये बिना विनिश्चित करने के लिए सक्षम होगा – आक्षेपित आदेश में सुसंगत प्रविष्टि, विधि के सुसंगत उपबंधों के उल्लंघन में होने के नाते अपास्त – याचिका मंजूर।

***B. Civil Courts Act, M.P. (19 of 1958), Section 7 & 15 and Arbitration and Conciliation Act (26 of 1996), Sections 2(1)(e), 9, 14, 34 & 36 – Distribution of Cases* – Held – District Judge by virtue of Section 7 & 15 of Civil Courts Act would be entitled to distribute such work amongst any of the Additional District Judges under his supervision but not to any Court of Civil Judge Class I or Senior Civil Judge or any Court of Small Causes. (Para 15)**

ख. सिविल न्यायालय अधिनियम, म.प्र. (1958 का 19), धारा 7 व 15 एवं माध्यस्थम् और सुलह अधिनियम (1996 का 26), धाराएँ 2(1)(e), 9, 14, 34 व 36 – प्रकरणों का वितरण – अभिनिर्धारित – सिविल न्यायालय अधिनियम की धारा 7 व 15 के द्वारा जिला जज उसके पर्यवेक्षण के अधीन अतिरिक्त जिला जजों में से किसी को उक्त कार्य वितरित करने के लिए हकदार है किंतु किसी सिविल जज श्रेणी–1 या वरिष्ठ सिविल जज के न्यायालय अथवा किसी लघुवाद न्यायालय को नहीं।

Cases referred:

AIR 2020 Raj 56, 2019 SCC Online Guj 4236, (2018) 14 SCC 715, (2015) 1 SCC 32, Appeal From Order No. 378/2019 decided on 23.09.2019 (Uttarakhand High Court), 2020 (4) MPLJ 353, 2005 Vol. IV WLC 251, 2018 SCC Online Raj 3055, (2014) 11 SCC 619, 2016 SCC Online Guj 5981, R/Special Civil Application No. 13736/2018 decided on 06.09.2018 (Gujarat High Court) (DB), R/Appeal No. 216/2018 decided on 11.02.2019 (Gujarat High Court), 2019 SCC Online Guj 3972.

Deepesh Joshi, for the petitioner.
Swapnil Ganguly, Dy. A.G. for the State.
Anshuman Singh, for the High Court of M.P.

O R D E R

(Hearing convened through Video Conferencing)

The Order of the Court was passed by :

MOHAMMAD RAFIQ, CHIEF JUSTICE :- This writ petition has been filed by Yashwardhan Raghuwanshi, who is an advocate practising law at Bhopal, assailing the validity of order dated 20th October, 2020 passed by the District and Sessions Judge, Bhopal, in exercise of powers conferred upon him by Section 15(1) of the Madhya Pradesh Civil Courts Act, 1958 (for short "the Civil Courts Act") read with Sections 194, 381(1) & 400 of the Code of Criminal Procedure, 1973 (for short "CrPC"), distributing civil and criminal business amongst the various Additional District Judges and Subordinate Judges working under his supervision in the District of Bhopal. Challenge in particular is made to Entry

No.45 of the aforesaid order vide which the disputes/cases filed under the provisions of Sections 9, 14, 34 & 36 of the Arbitration and Conciliation Act, 1996 (for short "the Arbitration Act") involving commercial disputes under the provisions of the Commercial Courts Act, 2015 (further be called as "the Commercial Courts Act") of specified value between Rs.3 lac. to Rs.1 crore, have been assigned to the Court of XX Civil Judge Class-I, Bhopal.

2. Mr. Deepesh Joshi, learned counsel for the petitioner submitted that allocation/distribution of the judicial work by the District Judge with regard to the commercial disputes filed under Sections 9, 14, 34 & 36 of the Arbitration Act to the Court of XX Civil Judge Class-I is wholly incompetent inasmuch as such allocation is based on wrongful interpretation of the legal provisions of the Arbitration Act, the Commercial Courts Act as well as the Civil Courts Act. It is contended that the District Judge has passed the aforesaid order in exercise of the powers conferred upon him under Section 15(1) of the Civil Courts Act read with Sections 194, 381(1) and 400 of CrPC. The work distribution circular numbered as Q/EK-01/2020 dated 20.10.2020 at Paras-(C) & (D) of Entry No.45 assigned power to undertake trial of commercial disputes for a specific category as per the Commercial Courts Act to the Court of XX Civil Judge Class-I, Bhopal, having pecuniary jurisdiction over matters valued between Rs. 3 lac. and Rs.1 crore, which also includes the matter that comes under the purview of the Arbitration Act. Learned counsel submitted that the term "specified value" is defined in Section 2(1)(i) of the Commercial Courts Act. It is evident from the aforesaid provision that "specified value" in relation to a commercial dispute is determined on the basis of the subject matter of the respective suit, appeal or application. Sub-section (3) of Section 10 of the Commercial Courts Act provides that all applications or appeals arising out of arbitration under the provisions of the Arbitration Act shall be tried before any Commercial Court having territorial jurisdiction. It is true that the Court of XX Civil Judge Class-I, Bhopal has been designated as a Commercial Court vide notification dated 02-03.04.2019 (Annexure-P/2), but the Arbitration Act is a consolidated statute for law relating to any form of arbitration dispute. The Legislature in so providing, intended to streamline the commercial disputes arising out of arbitration in speedy manner, for which purpose the Special Courts have been set up. With that end in view, the Parliament has time and again made amendments in tune with modern day developments.

3. Mr. Deepesh Joshi, learned counsel further argued that the term "Court" for the purpose of Arbitration Act has been defined under Section 2(1)(e) of the Arbitration Act which *inter-alia* provides that "Court" means, in cases of an arbitration other than international commercial arbitration, the Principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the

questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any Civil Court of a grade inferior to such Principal Civil Court, or any Court of Small Causes. In view of this provision, it is clear that any commercial dispute involving arbitration shall be tried only by Principal Civil Court of the superior most jurisdiction in the District i.e. the Court of District Judge or at the maximum, it could be assigned to the Court of Additional District Judge in a district as per Section 7 read with Section 15 of the Civil Courts Act but it cannot be assigned to a Court inferior thereto. It is contended that a conjoint reading of two Acts, namely, Arbitration Act and Commercial Courts Act, makes it clear that only such "commercial matters" which do not involve the arbitration matters can be assigned to a notified Commercial Court of the status of a Senior Civil Judge but all matters involving both Commercial Courts Act as well as Arbitration Act can only be tried by the Principal Civil Court of original jurisdiction. The Court of XX Civil Judge Class-I, Bhopal is therefore wholly incompetent to entertain, try and decide the arbitration disputes.

4. Mr. Deepesh Joshi, learned counsel for the petitioner invited attention of the Court towards Section 11 of the Commercial Courts Act which *inter-alia* provides that notwithstanding anything contained in this Act, a Commercial Court or a Commercial Division, shall not entertain or decide any suit, application or proceedings relating to any commercial dispute in respect of which the jurisdiction of Civil Court is either expressly or impliedly barred under any other law for the time being in force. The jurisdiction of Commercial Courts of the status of Senior Civil Judge to entertain any suit, application or proceeding pertaining to Arbitration Act involving commercial disputes is expressly barred. Moreover, as per Section 13 of the Commercial Courts Act, an appeal against the order of Commercial Court (XX Civil Judge Class-I) shall lie to the Commercial Appellate Court (XIX Additional District Judge), which has been designated as Commercial Appellate Court by notification of the Government dated 26.10.2019 with allocation of the work in sub-para (D) and sub-para (E) of Para-23 of the order dated 04.02.2020 and then it has furrther (sic : further) provided appeal to the High Court. On the other hand, the Arbitration Act provides for only one appeal to the High Court under Section 37 of the Arbitration Act against the order of the Principal Civil Court. When the "commercial arbitration matters" are clubbed together, they create an ambiguity and conflict. It is however settled law that when there is conflict between two central enactments, the provision of special law should prevail over the general law. Thus on applying the doctrine of harmonious construction on the provisions of both the statutes, it is clear that they are best harmonized by giving effect to the special statute i.e. the Arbitration Act vis-a-vis the more general statute i.e. the Commercial Courts Act.

5. Mr. Deepesh Joshi, learned counsel for the petitioner in support of his arguments has relied on a Division Bench judgment of Rajasthan High Court in the case of *Ess Kay Fincorp Limited and ors. vs. Suresh Choudhary and others,* reported in AIR 2020 Raj 56; another Division Bench judgment of Gujarat High Court in the case of *Fun N. Fud vs. GLK Associates* reported in 2019 SCC Online Guj 4236; judgments of Supreme Court in *Kandla Export Corporation and another vs. OCI Corporation and another* reported in (2018) 14 SCC 715 and *State of West Bengal and other vs. Associated Contractors* reported in (2015) 1 SCC 32; judgment of Uttarakhand High Court at Nainital passed in Appeal From Order No.378 of 2019, *[M/s. Dalip Singh Adhikari vs. State of Uttarakhand and another]* dated 23.09.2019 and judgment of this Court in the case of *Mold-Tek Packaging Ltd. vs. S.D. Containers, Indore* reported in 2020 (4) MPLJ 353.

6. Mr. Swapnil Ganguly, learned Deputy Advocate General for the State relying upon the judgment of Supreme Court in the case of *Kandla Export Corporation* (supra) submitted that the Supreme Court in that case has held that the Arbitration Act and the Commercial Court Act are both speedy resolution disputes between the parties. These statutes can be best harmonized by giving effect to the special statue (sic : statute) i.e. the Arbitration Act vis-a-vis the more general statute i.e. the Commercial Courts Act, which shall be left over to operate in spheres other than arbitration. It is argued that as per Section 7 of the Civil Courts Act the Principal Civil Court of original jurisdiction in a District is the Court of District Judge. Sub-section (2) of Section 7 of the Civil Courts Act provides that an Additional District Judge shall also discharge any of the functions, of a District Judge, including the functions of a Principal Civil Court of original jurisdiction which the District Judge may, by general or special order, assign to him and in discharge of such functions, he shall exercise the same powers as a District Judge. It is thus clear that it is the Court of District Judge or the Court of Additional District Judge who both are competent to exercise the powers of Principal Civil Court of an original jurisdiction. Since the High Court of Madhya Pradesh does not have the ordinary original civil jurisdiction as far as arbitration matters are concerned, it is the Principal Civil Court of original jurisdiction which has been vested with the powers to entertain disputes under Sections 9 & 34 of the Arbitration Act. Learned Deputy Advocate General argued that as per Section 10(3) of the Commercial Courts Act, applications or appeals under the Arbitration Act, which were earlier filed before the Principal Civil Court of original jurisdiction in a district, are now being adjudicated by the Commercial Courts exercising territorial jurisdiction over such arbitration matters. It is only the Court of District Judge or the Additional District Judge who have the power to exercise the original jurisdiction of a Principal Civil Court. Learned Deputy Advocate General in support of his arguments relied on the judgment of Rajasthan High Court in the case of *Hindustan Copper Limited vs. M/s. Bhagwati Gases Ltd,*

reported in 2005 Vol. IV WLC 251 and another judgment of Rajasthan High Court in *Hindustan Copper Ltd. vs. Paramount Ltd. and another* reported in 2018 SCC Online Raj 3055. As per Section 3 of the Commercial Courts Act there can be one or more Commercial Courts in a district, one comprising of a District Judge or other of a Judge lesser than a District Judge, depending upon the pecuniary limit of the matter involved. However, when it comes to arbitration matters under the Commercial Courts Act, the same are exclusively adjudicable by the Principal Civil Court of original jurisdiction, which is clearly the Court of District Judge or the Court of Additional District Judge. Therefore, the conferment of power on the Court of Civil Judge Class-I is contrary to law.

7. Mr. Anshuman Singh, learned counsel appearing for the Madhya Pradesh High Court has argued that the question raised by the petitioner in the present case stands already answered by the Supreme Court in *State of Maharashtra, through Executive Engineer vs. Atlanta Limited* reported in (2014) 11 SCC 619, wherein, in the context of two Courts having concurrent jurisdiction, it was held that appeal against the award in cases where the District Court as the Principal Civil Court exercises original jurisdiction under the Arbitration Act, would lie to the High Court. It was held from the definition of "Court" as provided under Section 2(1)(e) of the Arbitration Act, it is imperative that within the area of jurisdiction of the Principal District Judge, only the High Court of Bombay is exclusively the competent court under its ordinary original civil jurisdiction to adjudicate upon the matter. The very inclusion of the High Court "in exercise of its ordinary original civil jurisdiction", within the definition of the "Court", will be rendered nugatory, if the above conclusion is not to be accepted. This is because, the "Principal Civil Court of Original Jurisdiction in a district", namely, the District Judge concerned, being a court lower in grade than the High Court, the District Judge concerned would always exclude the High Court from adjudicating upon the matter. Accordingly, the principle enshrined in Section 15 of Code of Civil Procedure cannot be invoked whilst interpreting Section 2(1)(e) of the Arbitration Act, held the Supreme Court.

8. We have given our anxious consideration to the submissions made at the Bar, studied the cited precedents and perused the material available on record.

9. In order to appreciate the question of law raised in the matter, we deem it appropriate to reproduce the provision of Section 2(1)(e) of the Arbitration Act, which reads as under:

> **"2. Definitions.- (1)** In this Part, unless the contest otherwise requires,-
>
> (a) xxxxxx
>
> (b)xxxxxx
>
> (c) xxxxxx

(e) "Court" means,- in the case of an arbitration other than international commercial arbitration, the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes."

Also reproduced hereunder are the provisions of Sections 2(1)(b), 2(1)(e), 3, 10 & 15(2) of the Commercial Courts Act, which read as under:-

"2. Definitions.- (1) In this Act, unless the context otherwise requires,-

(a) xxxxxx

(b) "Commercial Court" means the Commercial Court constituted under sub-section (1) of section 3

(c) xxxxxx

(d) xxxxxx

(e) "District Judge" shall have the same meaning as assigned to it in clause (a) of article 236 of the Constitution of India;

3. Constitution of Commercial Courts.-- (1) The State Government, may after consultation with the concerned High Court, by notification, constitute such number of Commercial Courts at District level, as it may deem necessary for the purpose of exercising the jurisdiction and powers conferred on those Courts under this Act:

Provided that with respect to the High Courts having ordinary original civil jurisdiction, the State Government may, after consultation with the concerned High Court, by notification, constitute Commercial Courts at the District Judge level:

Provided further that with respect to a territory over which the High Courts have ordinary original civil jurisdiction, the State Government may, by notification, specify such pecuniary value which shall not be less than three lakh rupees and not more than the pecuniary jurisdiction exercisable by the District Courts, as it may consider necessary.

(1A) Notwithstanding anything contained in this Act, the State Government may, after consultation with the concerned High Court, by notification, specify such pecuniary value which shall not be less than three lakh rupees or such higher value, for whole or part of the State, as it may consider necessary.

(2) The State Government shall, after consultation with the concerned High Court specify, by notification, the local limits of the area to which the jurisdiction of a Commercial Court shall extend and may, from time to time, increase, reduce or alter such limits.

(3) The State Government may, with the concurrence of the Chief Justice of the High Court appoint one or more persons having experience in dealing with commercial disputes to be the Judge or Judges, of a Commercial Court either at the level of District Judge or a court below the level of a District Judge.

*** *** *** ***

10. Jurisdiction in respect of arbitration matters.- Where the subject-matter of an arbitration is a commercial dispute of a Specified Value and-
(1) If such arbitration is an international commercial arbitration, all applications or appeals arising out of such arbitration under the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) that have been filed in a High Court, shall be heard and disposed of by the Commercial Division where such Commercial Division has been constituted in such High Court.

(2) If such arbitration is other than an international commercial arbitration, all applications or appeals arising out of such arbitration under the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) that have been filed on the original side of the High Court, shall be heard and disposed of by the Commercial Division where such Commercial Division has been constituted in such High Court.

(3) If such arbitration is other than an international commercial arbitration, all applications or appeals arising out of such arbitration under the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) that would ordinarily lie before any principal civil court of original jurisdiction in a district (not being a High Court) shall be filed in, and heard and disposed of by the Commercial Court exercising territorial jurisdiction over such arbitration where such Commercial Court has been constituted.

*** *** *** ***

15. Transfer of pending cases.-

(1)xxxxxx

(2) All suits and applications, including applications under the Arbitration and Conciliation Act, 1996 (26 of 1996), relating to a commercial dispute of a specified Value pending in any civil court in any district or area in respect of which a Commercial Court has been constituted, shall be transferred to such Commercial Court:

Provided that no suit or application where the final judgment has been reserved by the Court prior to the constitution of the Commercial Division or the Commercial Court shall be transferred either under sub-section (1) or sub-section (2)"

10. The Gujarat High Court in *M/s. OCI Corporation vs. Kandla Export Corporation* reported in 2016 SCC Online Guj 5981 was dealing with a case where M/s. OCI Corporation filed application under Section 15(5) of the Commercial Courts Act read with Section 2(1)(e)(ii) and Section 47 of the Arbitration Act, seeking clarification and appropriate direction for transfer of execution petition pending before the District Court, Gandhidham-Kutch either to the High Court of Gujarat or to appropriate Commercial Court/Commercial Division. Gujarat High Court on analysis of provisions of Sections 2(1)(e), 47 of the Arbitration Act and Section 2(1)(i), Sections 6, 10, 15 of the Commercial Courts Act in Para-11 held as under:

> "11. **The sum and substance of the above discussion would be,**
>
> (1) Where the subject matter of an arbitration is a commercial dispute of a specified value and if such arbitration is international commercial arbitration, all the applications or appeals arising out of such arbitration under the provisions of the Arbitration and Conciliation Act, 1996 shall be heard, decided and disposed of by the Commercial Division where such commercial Division has been constituted in the High Court i.e. in the present case High Court of Gujarat.
>
> (2) Where the subject matter of an arbitration is a commercial dispute but not of a specified value and if such arbitration is international commercial arbitration, considering the provisions of Arbitration and Conciliation (Amendment) Act, 2015 the same shall be heard, decided and disposed of by the concerned High Court.
>
> (3) Where the subject matter of an arbitration is a commercial dispute of a specified value and if such arbitration is other than international arbitration, all the applications or appeals arising out of such arbitration under the provisions of the Arbitration and Conciliation Act, 1996 shall be filed in and heard, decided and disposed of by the Commercial Court exercising territorial jurisdiction over such arbitration where such commercial court has been constituted.
>
> Considering section 15 of the Commercial Courts Act, all the applications/appeals in question under the Arbitration and Conciliation Act, 1996, therefore, are required to be transferred to the concerned Commercial Division of the High Court of Gujarat or before the Gujarat High Court or before the concerned commercial court and as observed hereinabove and as the case may be."

The aforesaid judgment was subjected to challenge before the Supreme Court by Kandla Export Corporation, which was dismissed vide order dated 03.03.2017. Similar dispute again arose before Gujarat High Court at Ahmedabad in *Vadodara Mahanag Seva Sadan Formaly known as Municipal Corporation Vs. M S Khurana Engineering Ltd.* (R/Special Civil Application No. 13736 of 2018

decided on 06.09.2018) wherein Division Bench of Gujarat High Court, relying upon its earlier judgment in *M/s. OCI Corporation* (supra), reiterated the same view. The question as to which Court would be competent to exercise jurisdiction for execution of award passed under the Arbitration Act was also answered by the Gujarat High Court in *Vijay Cotton and Fiber Company Vs. Agarwal Cotton Spinning Private Limited,* R/Appeal No. 216 of 2018 decided on 11.02.2019 holding that only the Commercial Court of competent jurisdiction would be the Court to execute the decree and not the ordinary Civil Court constituted under Gujarat Civil Courts Act.

11. The question that cropped up for consideration before the Division Bench of the Rajasthan High Court in the case of *Ess Kay Fincorp Limited* (supra) was as to which of the two Courts, namely, Principal Civil Court having original jurisdiction in a district, as defined under Section 2(1)(e) of the Arbitration Act, or the Commercial Court constituted under Section 3(1) of the Commercial Courts Act, as defined under Section 2 (b) of that Act, would be competent to execute arbitral award on a "commercial dispute" passed under the Arbitration Act. The Rajasthan High Court on analysis of law held as under:

> **"17.** A conjoint reading of Section 10(3) and 15(2) of the Commercial Courts Act makes it clear that an application under Section 36 of the Arbitration Act, seeking execution of award, satisfies the requirement of "being application arising out of such arbitration under the provisions of the Act of 1996". If such application is pending before any Principal Civil Court of original jurisdiction in a district, the same shall be transferred to Commercial Court exercising territorial jurisdiction over such arbitration where such Commercial Court has been constituted. In view of Section 10(3) of the Commercial Courts Act, since the awards in the present set of cases have been rendered in arbitral proceedings, their execution applications filed under Section 36 of the Arbitration Act having regard to provisions of Section 15(3) of the Commercial Courts Act, which contemplates transfer of all such pending applications to Commercial Court, as a legal corollary thereto, would also be liable to be filed and maintained before the Commercial Court and not the ordinary Civil Court/Principal Court of District Judge.
>
> *** *** *** ***
>
> **19.** In view of above, we answer the question of law formulated in the beginning of this judgment in the terms that the Commercial Court constituted under Section 3(i) of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015, as defined in Section 2(b) of that Act, would be the only competent Court to execute an arbitral award on a "commercial dispute" passed under the Arbitration and Conciliation Act, 1996 and not the Principal Civil Court having the original jurisdiction in the District i.e. the Court of District

and Sessions Judge as defined under Section 2(1)(e) of the Arbitration and Conciliation Act, 1996."

12. The Gujarat High Court in the case of *Fun N fud* (supra) was examining the validity of the order passed by the 2nd Additional District Judge, Dahod by which it declined to hear an application preferred by the applicant therein under Section 9 of the Arbitration Act on the ground that it has no jurisdiction to hear and entertain such application and, therefore, returned the application to be presented before the Court of Principal Senior Civil Judge. It was argued that Section 2(1)(e) of the Arbitration Act, expressly excludes any Civil Court of a grade inferior to such Principal Civil Court, or any Court of Small Causes. In view of Section 11 of the Commercial Courts Act, which bars a Commercial Court from deciding any suit, application or proceedings relating to any commercial dispute in respect of which the jurisdiction of the Civil Court is either expressly or impliedly barred under any other law for the time being in force, the Commercial Court which is a Civil Court of a grade inferior to such Principal Civil Court, or any Court of small causes, would be barred from exercising jurisdiction under Section 9 or any provision of the Arbitration Act.

13. In *Kirtikumar Futarmal Jain vs. Valencia Corporation* reported in 2019 SCC Online Guj 3972 challenge was made to the order passed by the Principal District Judge, Surat in the Commercial Appeal preferred by the respondents against the order passed by the Arbitral Tribunal on the application made by the applicant under Section 17 of the Arbitration Act. The Commercial Court allowed the application filed under Section 37(2) of the Arbitration Act. The applicant in those facts approached the Commercial Court at Vadodara by way of application under Section 9 of the Arbitration Act with the prayer that the respondents be restrained from transferring or alienating the properties of the Firm or creating any right in favour of any third party. On behalf of the petitioner it was argued that the impugned order passed by the Principal District Judge was without jurisdiction inasmuch as the Principal District Judge had no power to entertain an application under Section 37 of the Arbitration Act. The Gujarat High Court in Paras- 16.1, 16.2 & 20.6 held as under:

"16.1 Insofar as the jurisdiction of the learned Principal District Judge to entertain the appeal under section 37 of the Arbitration Act is concerned, the learned counsel invited the attention of the court to sub-section (2) of section 37 of the Arbitration Act to submit that the appeal in the present case is preferred under clause (b) of sub-section (2) of section 37, which provides for an appeal to a court from an order of an Arbitral Tribunal granting or refusing to grant an interim measure under section 17 of that Act. It was submitted that the expression employed in sub-section (2) of section 37 is "court". Reference was made to clause (e) of section 2 of the Arbitration Act, which defines "court" to mean, in the case of an arbitration other than international commercial arbitration,

the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the question forming the subject matter of the arbitration if the same had been the subject matter of a suit, but does not include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes. It was submitted that therefore clause (e) of section 2 of the Arbitration Act lays down that "court"shall mean the principal Civil Court of original jurisdiction in a district, and specifically excludes any civil court of a grade inferior to such principal Civil Court or any court of Small Causes.

16.2 Reference was made to section 12 of the Gujarat Civil Courts Act, 2005, which provides for jurisdiction of a court of District Judge and postulates that a court of District Judge shall be the principal Civil Court of original jurisdiction within the local limits of its jurisdiction. It was submitted that the word "court" used under section 37(2)(b) of the Arbitration Act is the District Court. Moreover, section 2(e) of the Arbitration Act, specifically excludes any court of a grade inferior to such principal Civil Court or any Court of Small Causes from the ambit of the expression "court". It was submitted that source of appeal in this case is under section 37 of the Arbitration Act and the right flows from section 37. It was submitted that access to such appeal can be channelised through the concerned section of the Commercial Courts Act, but the right to appeal does not flow from the Commercial Courts Act.

*** *** *** ***

20.5 In this regard it may be noted that section 11 of the Commercial Courts Act provides that a Commercial Court or a Commercial Division shall not entertain or decide any suit, application or proceedings relating to any commercial dispute in respect of which the jurisdiction of the civil court is either expressly or impliedly barred under any law for the time being in force. Clause (i) of section 2(e) of the Arbitration Act which defines the expression 'court' not only vests jurisdiction in the principal Civil Court of original jurisdiction in a district, including the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject matter of the arbitration if the same had been the subject matter of a suit, but it expressly excludes any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes.

20.6 Thus, section 2(e)(i) of the Arbitration Act expressly excludes any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes. Therefore, in view of section 11 of the Commercial Courts Act, which bars a Commercial Court from deciding any suit application or proceedings relating to any commercial dispute in respect of which the jurisdiction of the civil court is either expressly or

> impliedly barred under any other law for the time being in force; read with the provisions of section 37(2)(b) of the Arbitration Act, any Commercial Court which is a civil court of a grade inferior to such principal Civil Court or any Court of Small causes, would be barred from exercising jurisdiction under section 37(2) (b) of the Act. The Supreme Court in State of West Bengal v. Associated Contractors (supra), has held that section 2(1)(e) contains an exhaustive definition marking out only the Principal Civil Court of original jurisdiction in a district or a High Court having original civil jurisdiction in the State, and no other court as 'court' for the purpose of Part 1 of the Arbitration Act, 1996."

14. It would be thus evident from the language employed by the Legislature in the definition clause of "Court" in Section 2(1)(e) of the Arbitration Act that it intended to confer power in respect of the disputes involving arbitration on the highest judicial Court of a District so as to minimize the supervisory role of the Courts in the arbitral process and, therefore, purposely excluded any Civil Court of grade inferior to such Principal Civil Court, or any Court of Small Causes. The Court of superior most jurisdiction in a District is the Court of District Judge as interpreted by the Supreme Court in the case of *Atlanta Limited* (supra). The jurisdiction in respect of arbitration matter is provided in Section 10 of the Commercial Courts Act and Section 15 thereof contemplates transfer of all suits and applications including the application under the Arbitration Act pending in Civil Courts in any district or pending in High Court where Commercial Division is constituted or area in respect of which the Commercial Courts have been constituted. While Section 11 of the Commercial Courts Act bars the jurisdiction of a Commercial Court or a Commercial Division to entertain or decide any suit, application or proceedings relating to any commercial dispute in respect of which the jurisdiction of the Civil Court is either expressly or impliedly barred under any other law for the time being in force, Section 21 of the Commercial Courts Act stipulates that save as otherwise provided, the provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law for the time being in force other than this Act. Segregation of an arbitration matters on the basis of a pecuniary limit is not what the law provides for. All the arbitration matters, irrespective of the value of claim, are required to be adjudicated by Principal Civil Court of original jurisdiction. Therefore, it is clear that in respect of commercial disputes involving an arbitration dispute only the Commercial Court of the status of District Judge or Additional District Judge would be the competent court to entertain the matters under Sections 9, 14, 34 & 36 of the Arbitration Act. Although, the impugned order can be sustained in so far as the distribution of the commercial disputes of the value of the claim in cases other than arbitration matters are concerned. The impugned order to the extent of classifying the commercial disputes having subject matter of arbitration on the

basis of valuation and conferring powers therefor on the Court of XX Civil Judge Class-I, Bhopal, would be violative of relevant provisions of law.

15. In view of the above discussions, the present petition deserves to succeed. The Entry No.45 of the impugned order dated 20.10.2020 is set aside. It is hereby declared that the Court of District Judge as the Principal Civil Court of original jurisdiction would be competent to decide the matters/disputes filed under the provisions of Sections 9, 14, 34 & 36 of the Arbitration Act and also under the provisions of the Commercial Courts Act regardless of the value of claim. However, the District Judge by virtue of Section 7 read with Section 15 of the Civil Courts Act would be entitled to distribute such work amongst any of the Additional District Judges under his supervision, but not to any Court of Civil Judge Class-I or Senior Civil Judge, or any Court of Small Causes.

16. The writ petition is accordingly **allowed.** A copy of this order be endorsed to the Registrar General of the High Court for being circulated amongst all the District & Sessions Judges of the State.

Petition allowed

I.L.R. [2021] M.P. 668 (DB)
WRIT PETITION

Before Mr. Justice Sheel Nagu & Mr. Justice Anand Pathak

WP No. 11693/2020 (Gwalior) decided on 9 March, 2021

SURENDRA KUMAR SHIVHARE …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

***A. Sand (Mining, Transportation, Storage and Trading) Rules, M.P., 2019, Rule 20(2) – Enquiry – Opportunity of Hearing* – Held – Enquiry under Rule 20(2) is necessary with regard to three factors, i.e. mineral being sand or not, whether alleged offender holds valid ETP and quantity transported is more than quantity mentioned in ETP or not – Enquiry cannot be unilateral and reasonable opportunity of hearing has to be afforded regarding above three aspects – Impugned order passed without affording reasonable opportunity of hearing to petitioner, hence quashed – Collector directed to pass a fresh order after affording reasonable opportunity of hearing – Petition allowed. (Paras 7, 8.1, 10 & 11)**

क. रेत (खनन, परिवहन, भण्डारण एवं व्यापार) नियम, म.प्र., 2019, नियम 20(2) – जांच – सुनवाई का अवसर – अभिनिर्धारित – नियम 20(2) के अंतर्गत जांच, तीन कारकों के संबंध में आवश्यक है, अर्थात्, खनिज रेत है अथवा नहीं, क्या अभिकथित अपराधी के पास विधिमान्य ई.टी.पी. (ईलेक्ट्रॉनिक ट्रांसपोर्ट परमिट) है और क्या परिवहन की गई मात्रा, ई.टी.पी. में उल्लिखित मात्रा से अधिक है अथवा नहीं – जांच एकतरफा नहीं हो सकती तथा उपरोक्त तीन पहलुओं के संबंध में सुनवाई का युक्तियुक्त अवसर प्रदान

किया जाना चाहिए – आक्षेपित आदेश, याची को सुनवाई का युक्तियुक्त अवसर प्रदान किये बिना पारित किया गया अतः अभिखंडित – कलेक्टर को सुनवाई का युक्तियुक्त अवसर प्रदान करने के पश्चात्, नये सिरे से आदेश पारित करने के लिए निदेशित किया गया – याचिका मंजूर।

B. Sand (Mining, Transportation, Storage and Trading) Rules, M.P., 2019, Rule 20(2) & 20(3), Proviso – Opportunity of Hearing **– Held – Concept of reasonable opportunity contained in proviso placed at the end of Rule 20(3) is squarely applicable to Rule 20(2) also. (Para 9)**

ख. रेत (खनन, परिवहन, भण्डारण एवं व्यापार) नियम, म.प्र., 2019, नियम 20(2) व 20(3), परंतुक – सुनवाई का अवसर – अभिनिर्धारित – नियम 20(3) के अंत में दिये गये परंतुक में अंतर्विष्ट युक्तियुक्त अवसर की संकल्पना, संपूर्ण रूप से नियम 20(2) को भी लागू होती है।

C. Sand (Mining, Transportation, Storage and Trading) Rules, M.P., 2019, Rule 20(2) & 20(3), Proviso – Opportunity of Hearing – Concept – **Discussed and explained. (Para 7.1)**

ग. रेत (खनन, परिवहन, भण्डारण एवं व्यापार) नियम, म.प्र., 2019, नियम 20(2) व 20(3), परंतुक – सुनवाई का अवसर – संकल्पना – विवेचित एवं स्पष्ट की गई।

D. Sand (Mining, Transportation, Storage and Trading) Rules, M.P., 2019, Rule 20(2) & 20(3), Proviso – Compounding & Penalty – Powers of Collector **– Held – If illegal transporter fails to come forward to seek compounding, despite being intimated about his right to compound the offence, Collector is left with no option but to impose penalty in terms of table in Rule 20 – If illegal transporter comes forward seeking compounding then Collector has to pass a compounding order as per table in Rule 20, without any discretion to refuse compound or to reduce/enhance the compounding fee prescribed. (Paras 6.1 to 6.3)**

घ. रेत (खनन, परिवहन, भण्डारण एवं व्यापार) नियम, म.प्र., 2019, नियम 20(2) व 20(3), परंतुक – शमन व शास्ति – कलेक्टर की शक्तियां – अभिनिर्धारित – यदि अवैध परिवाहक अपराध के शमन हेतु उसके अधिकार के बारे में उसे सूचित किये जाने के बावजूद वह शमन चाहने हेतु सामने आने में असफल होता है, तब कलेक्टर के पास नियम 20 में दी गई तालिका के निबंधनों में शास्ति अधिरोपित करने के सिवाय कोई विकल्प नहीं बचता – यदि अवैध परिवाहक शमन चाहते हुए आगे आता है, तब कलेक्टर को शमन से इंकार करने या विहित शमन शुल्क घटाने/बढ़ाने के किसी विवेकाधिकार के बिना, नियम 20 में दी गई तालिका के अनुसार शमन आदेश पारित करना होगा।

Cases referred:

(2008) 14 SCC 151, (2011) 13 SCC 733.

N.K. Gupta with *S.D. Singh Bhadoriya*, for the petitioner.
Ankur Mody, Addl. A.G. for the State.

O R D E R

The Order of the Court was passed by :

SHEEL NAGU, J. :- The instant petition filed u/Art.226 of the Constitution assails Annexure-P/1 dated 27/7/2020 passed by respondent No.2-Collector, Guna by which while exercising power u/Rule 20(2) of M.P. Sand (Mining, Transportation Storage and Trading) Rule, 2019 (for brevity "2019 Rules"), respondent No.2 confiscated the seized vehicle (Truck bearing registration No.MP33-H-1610) and minerals of petitioner and also imposed penalty of Rs. 50,000/-for having indulged in illegal mining and transportation of sand.

2. Briefly stated facts of the case are that petitioner is the registered owner of the vehicle in question which was seized in connection with illegal mining and transportation of dust of *Gitti* (boulders) on 21/7/2020 and offence was registered u/Ss. 379, 414 IPC & Ss. 4(A), 21 (1) of the Mines & Minerals (Development and Regulation) Act, 1957.

3. Following two questions arise in this case for consideration of this court:-

> *"(i) Despite availability of alternative remedy of appeal u/R.22 of 2019 Rules, should this court in exercise of writ jurisdiction entertain/decide the legality and validity of impugned order P/1 dated 27/7/2020 passed by respondent No.2-Collector Guna inflicting penalty of Rs.50,000/- against petitioner without affording reasonable opportunity of being heard by issuance of show-cause notice by passing of impugned order or not?*
>
> *(ii) Other ancillary question which arises is about interpretation of R.20 of 2019 Rules in particular the proviso placed at the end of sub-rule (3) of R.20 in as much as to whether this proviso relates exclusively to R.20(3) or it also relates to R.20(2) of 2019 Rules ?"*

3.1 It would be appropriate to reproduce R.20 of 2019 Rules *in toto* for answering the aforesaid two questions which is as follows:-

> ***"20. Penalty and Compounding of cases of Illegal Mining.-***
>
> *(1) On receipt of information about illegal mining, the Collector or Officer authorised for this purpose, shall seize mineral, vehicle, machine, tools etc. and case shall be submitted, before the Collector. During the pendency or before taking final decision of the registered case, if any application for compounding the case is received, the Collector may*

dispose of the case after applicant depositing an amount equal to 25 times of royalty of the excavated mineral. During this period, if application/ consent is not received, Collector shall impose penalty, 50 times of the royalty of mineral excavated. On deposit of compounding amount or penalty amount, the seized mineral, vehicle, machines, tools, may be released:

Provided that if penalty amount imposed is not deposited by the illegal extractor, then Collector or Officer authorised for this purpose may confiscate and auction the seized mineral, vehicle, machines and tools.

(2) ***Penalty and compounding of cases of illegal transportation-*** *In case of registered cases of illegal transportation, transportation without valid e-tp and transportation with quantity more than the quantity entered in e-tp, the Collector may dispose off cases after deposit of compounding fees or amount of penalty by the illegal extractor, as under:-*

No.	Type of Vehicle	Transportation without valid Transit Pass		Transport with Transit Pass but quantity is more than quantity entered in Transit Pass	
		Compounding Fees	Amount of Penalty	Compounding Fee	Amount of Penalty
1.	Tractor - trolley	10,000/-	25,000/-	5,000/	10,000/
2.	Two axle (6 wheeler vehicle)	25,000/-	50,000/-	10,000/-	20,000/-
3.	Dumper (hydraulic 6 wheeler vehicle)	50,000/-	1,00,000/-	25,000/-	50,000/-
4.	3 axle (10 wheeler vehicle)	1,00,000/-	2,00,000/-	50,000/-	1,00,000/-
5.	4- 6 axle (More than 10 wheeler vehicle)	2,00,000/-	4,00,000/-	1,00,000/-	2,00,000/-

Provided, compounding fees or amount of penalty in case of transportation of mineral by 4 wheeler vehicle (Matador, 407, 608 etc) carrying mineral more than the quantity of tractor-trolley, shall not be less than 1.5 times of the amount fixed for tractor-trolley.

(3) Compounding and Penalty in cases of Illegal Storage-

The Collector, for disposal of registered cases of illegal storage of sand upon receipt of any application/consent from the date of registration of the case, during the pendency of the case or before taking the final decision, may compound the case after depositing amount equivalent to 25 times of royalty of the stored mineral. If during this period any application/consent is not received then the Collector may impose penalty of amount 50 times of the royalty of the mineral stored:

Provided, no such order shall be passed against the person interested, unless the opportunity of being heard is given to him."

3.2 It is not disputed at the bar by counsel for the rival parties that prior to issuance of impugned order, the Competent Authority i.e. Collector, Guna, while exercising his power u/R.20(2) of 2019 Rules did not issue any show-cause notice to petitioner.

4. The contention of learned counsel for State while defending the impugned order P/1 is that proviso placed at the end of R.20(3) relates exclusively to R.20(3) which is crystal clear by its very placement. Thus, it is submitted by State that if the legislature intended to provide reasonable opportunity of being heard prior to passing of impugned order u/R.20(2) of 2019 Rules then same proviso would have been placed immediately after R. 20(2). Not having done so, the intention of legislature is clear of not providing any such prior opportunity of being heard to the person against whom order u/R. 20(2) of 2019 Rules is being passed.

5. *Per contra,* learned Sr. counsel for petitioner has submitted that proviso placed at the end of R.20(3) is a proviso qualifying all the sub-rules, (1)(2) & (3) of R.20 of 2019 Rules irrespective of its location. More so, it is the contention of learned Sr. Counsel Shri N.K. Gupta that assuming without admitting that legislature did not provide for prior opportunity of being heard before passing the

order of penalty, the said element of prior opportunity ought to be treated to exist by implication since the order of penalty casts consequence of adverse nature.

5.1 Reliance is placed on the decision of Apex Court in case of in *"Sahara India (Firm), Lucknow Vs. Commissioner Of Income Tax, Central-I And Another* [(2008) 14 SCC 151]", where Apex Court has held that :-

> *"19. Thus, it is trite that unless a statutory provision either specifically or by necessary implication excludes the application of principles of natural justice, because in that event the court would not ignore the legislative mandate, the requirement of giving reasonable opportunity of being heard before an order is made, is generally read into the provisions of a statute, particularly when the order has adverse civil consequences for the party affected. The principle will hold good irrespective of whether the power conferred on a statutory body or tribunal is administrative or quasi-judicial."*

5.2 Said decision in *Sahara India (Firm), Lucknow* (supra) has subsequently been followed in *Kesar Enterprises Ltd. Vs. State of U.P. And Others* [(2011) 13 SCC 733].

6. A bare perusal of R.20(2) of 2019 Rules elicits that same relates to the subject of penalty and compounding in cases relating to illegal transportation of sand. This Rule empowers Collector to finally decide cases of illegal transportation of sand either by deposit of compounding fee or amount of penalty.

6.1 Thus, it is obvious by the very terminology used that Collector can pass an order of compounding/refusing to compound depending upon the voluntary act of the illegal transporter of seeking compounding. If illegal transporter does not come forward to seek compounding, then the only option left with Collector is to impose penalty in terms of the table contained in Rule 20.

6.2 So far as cases of compounding are concerned, Collector merely has to inform the illegal transporter about registration of case and right available to him to compound the offence. If illegal transporter comes forward seeking compounding then Collector has to pass an order in terms of the table in Rule 20 with no discretion available to Collector to either refuse compound or to reduce or enhance the compounding fee prescribed .

6.3 However, as regards the cases where illegal transporter fails to come forward despite being intimated about his right to compound the offence, the Collector is left with no option but to pass an order of penalty in terms of the table in Rule 20. Thus, the Collector in such cases where penalty is imposed also does

not have any discretion in regard to imposition of penalty and the quantum thereof.

6.4 Pertinently, there may be cases registered u/R.20(2) of 2019 Rules for illegal transportation of sand where alleged illegal transporter may come forward and contend that the mineral actually being transported was either a mineral other than sand to which 2019 Rules do not apply or the transportation of sand was being done with valid Electronic Transit Pass (ETP in short) within permissible limit of quantity which is not in variance to the quantity shown in ETP.

7. In regard to these three factors i.e. mineral being transported is actually sand or not and whether the alleged offender holds a valid ETP and the quantity being transported is not more than the quantity permissible by the ETP, the Collector has to conduct an enquiry howsoever summary, which necessarily should contain all the trappings of the concept of reasonable opportunity.

7.1 The concept of reasonable opportunity essentially has three ingredients i.e. (i) Communicating the allegations to the person against whom they are made in precise and concise manner to enable him to respond; (ii) To give him reasonable opportunity to respond to the allegation which may be a few days or more depending upon the attending factual scenario; (iii) Reply orally or in writing if submitted by person concerned should be taken into consideration before deciding on the question of seized mineral is sand or not and existence of a valid ETP and that the quantity of sand is not more than the quantity mentioned in the ETP.

8. After following the concept of reasonable opportunity *qua* the said three aspects as explained above, the Collector will be well within his powers u/R.20(2) of 2019 Rules to pass an order of penalty in terms of the contents of the table u/R. 20.

8.1 The fallout of above discussion is that an enquiry u/R. 20 (2) is necessary in regard to the aforesaid three factors i.e. mineral being sand or not and whether alleged offender holds valid ETP and the quantity being transported is more than the quantity mentioned in the ETP or not. Such enquiry cannot be unilateral and has to be subject to affording of reasonable opportunity in regard to these three aspects.

9. Accordingly, this Court holds that concept of reasonable opportunity contained in proviso placed at the end of R. 20(3) is squarely applicable *qua* Rule 20(2) of 2019 Rules also.

10. From the above factual matrix, it is evident that impugned order Annexure-P/1 dated 27/7/2020 passed by respondent No.2-Collector, Guna has been passed without affording reasonable opportunity of being heard in regard to aforesaid three aspects.

11. Consequently, this Court is left with no option but to allow this petition with following directions:-

(1) The impugned order Annexure-P/1 dated 27/7/2020 passed by Collector, Guna/respondent No.2 is quashed.

(2) Competent Authority, respondent No.2-Collector, Guna, is at liberty to pass a fresh order after affording reasonable opportunity to petitioner as explained above.

(3) No cost.

Petition allowed

I.L.R. [2021] M.P. 675 (DB)
WRIT PETITION

Before Mr. Justice Prakash Shrivastava & Mr. Justice Rajeev Kumar Dubey

WP No. 19818/2020 (Jabalpur) decided on 1 April, 2021

D.K. MISHRA …Petitioner

Vs.

HON'BLE HIGH COURT OF M.P. & anr. …Respondents

A. Civil Services (Pension) Rules, M.P., 1976, Rule 42 – Voluntary Retirement – Withdrawal of Application **– Held – A government servant who elected for voluntary retirement can withdraw his election subsequently with specific approval of authority and no absolute right given to employee but discretion given to authority to consider circumstances of the case on objective application of mind – Authority can deny permission to withdraw the application for voluntary retirement by assigning appropriate reasons – No error with impugned order – Petition dismissed. (Para 8 & 9)**

क. सिविल सेवा (पेंशन) नियम, म.प्र., 1976, नियम 42 – स्वैच्छिक सेवानिवृत्ति – आवेदन वापस लेना – अभिनिर्धारित – एक शासकीय सेवक जिसने स्वैच्छिक सेवानिवृत्ति लेना चुना है तत्पश्चात् प्राधिकारी के विनिर्दिष्ट अनुमोदन के साथ अपना चुनाव वापस ले सकता है तथा कर्मचारी को कोई आत्यंतिक अधिकार नहीं दिया गया है परंतु प्राधिकारी को, मस्तिष्क का प्रयोग करते हुए परिस्थितियों को विचार में लेने का विवेकाधिकार दिया गया है – प्राधिकारी समुचित कारण देते हुए स्वैच्छिक सेवानिवृत्ति हेतु आवेदन को वापस लेने की अनुमति से इंकार कर सकता है – आक्षेपित आदेश में कोई त्रुटि नहीं – याचिका खारिज।

B. Constitution – Article 226 – Judicial Review – Scope & Jurisdiction **– Held – While exercising power of judicial review under Article 226, Court does not exercise appellate power against impugned order –**

Judicial review is directed not against the decision but is confined to examining the correctness of decision making process. (Para 10)

ख. संविधान – अनुच्छेद 226 – न्यायिक पुनर्विलोकन – व्याप्ति व अधिकारिता – अभिनिर्धारित – अनुच्छेद 226 के अंतर्गत न्यायिक पुनर्विलोकन की शक्ति का प्रयोग करते समय, न्यायालय आक्षेपित आदेश के विरूद्ध अपीलीय शक्ति का प्रयोग नहीं करता – न्यायिक पुनर्विलोकन विनिश्चिय के विरूद्ध निर्देशित नहीं किया जाता है बल्कि निर्णय लेने की प्रक्रिया की सत्यता का परीक्षण करने तक ही सीमित है।

Cases referred:

1987 (Supp) SCC 228, (2007) 1 MPHT 173 (DB), 1997 (2) MPLJ 665, 2013 (1) MPLJ 396, ILR 2009 MP 3072, 2016 SCC OnLine MP 5796, (1989) 2 SCC 505, (2006) 2 SCC 364, (2019) 4 SCC 500, (2013) 4 SCC 301.

Amit Seth, for the petitioner.
K.N. Fakhruddin, for the respondents.

O R D E R

The Order of the Court was passed by :
PRAKASH SHRIVASTAVA, J. :- By this writ petition under Article 226 of the Constitution of India, the petitioner has challenged the order dated 09.12.2020 whereby the petitioner's application for voluntary retirement has been accepted. The petitioner is also aggrieved with the order dated 09.12.2020 whereby his application for withdrawal of the application for voluntary retirement has been rejected.

2. The case of the petitioner is that he was working as Dy. Registrar (M) and had submitted the application dated 11.09.2020 under prescribed Form No.28 for voluntary retirement w.e.f. 31.12.2020 under Rule 42 of the M.P. Civil Services (Pension) Rules, 1976 (for short **'the Pension Rules').** After filing the application, the petitioner realized that he is in need of continuation of his employment, therefore, he had filed the application dated 12.10.2020 requesting for withdrawal of his earlier application dated 11.09.2020 for voluntary retirement and also seeking permission to continue in service up to the age of superannuation. Further case of the petitioner is that till the submission of the application dated 12.10.2020, no decision was taken on the petitioner's earlier application dated 11.09.2020. By the impugned order, the petitioner's application for withdrawal of application for voluntary retirement has been rejected and the petitioner's application for voluntary retirement has been accepted and he has been retired w.e.f. 31.12.2020 afternoon.

3. Learned counsel appearing for the petitioner submits that the petitioner had submitted the application for withdrawal of the application for voluntary retirement before the acceptance of the application for voluntary retirement,

therefore, the respondents are not justified in rejecting the petitioner's application for withdrawal of the application and accepting the application for voluntary retirement. He also submits that no D.E. is pending and he has a good record, which is reflected from his promotion as Assistant Registrar on 03.08.2019. He also submits that in terms of the judgment of the Supreme Court in the matter of *Balram Gupta Vs. Union of India and another,* reported in 1987 (Supp) SCC 228, the petitioner has the absolute right to withdraw the application for voluntary retirement before its acceptance. He has further placed reliance upon the judgment of the Division Bench of this Court in the matter of *Director General, Employees' State Insurance Corporation and another Vs. Puroshottam Malani,* reported in (2007) 1 MPHT 173 (DB) in support of his submission that the opportunity should have been given to the petitioner before rejection of the application for withdrawal.

4. As against this, learned counsel for the respondents has submitted that in terms of the Pension Rules, the petitioner has no absolute right of withdrawal of application for voluntary retirement and justifiable reason exists for rejecting the petitioner's prayer for withdrawal of the application for voluntary retirement. He further submits that the Rule which has been considered by the Supreme Court in the case of *Balram Gupta* (supra) is differently worded, therefore, the petitioner is not entitled to the benefit of the said judgment.

5. We have heard the learned counsel for the parties and perused the record. Rule 42 of the Pension Rules, which is relevant for the present controversy reads as under :

> **"42. Retirement on completion of [20/25 years] qualifying service. -** [(1) (a) Government servant may retire at any time after completing 20 years qualifying service, by giving a notice in form 28 to the appointing authority at least one month before the date on which he wishes to retire or on payment by him of pay and allowances for the period of one month or for the period by which the notice actually given by him falls short of one month:
>
> Provided that this sub-rule shall not apply to the Government servants mentioned in brackets against each of the following Department, until they have not completed 25 years qualifying service :--
>
> (a) Public Health & Family Welfare Department (Medical, Paramedical & Technical Staff);
>
> (b) Medical Education Department (Teaching Staff, Paramedical & Technical staff):

Provided further that such Government servant shall not be allowed to retire from service without prior permission in writing of the appointing authority under the following circumstances:-

(i) Where the Government servant is under suspension;

(ii) Where it is under consideration of the appointing authority to institute disciplinary action against the Government Servant:

Provided also that if the appointing authority has not taken the decision under clause (ii) of the second proviso, within six months from the date of notice given by the Government servant with regard to such disciplinary action it shall be deemed that the appointing authority has allowed to such Government servant to retire from service on the date after expiry of the period of six months.]

(b) The appointing authority may in the public interest require a Government servant to retire from service at any time after he has completed 20 years qualifying service or he attains the age of 50 years whichever is earlier with the approval of the State Government by giving him three months notice in Form 29:

Provided that such Government servant may be retired forthwith and on such retirement forthwith and on such retirement the Government servant shall be entitled to claim a sum equivalent to the amount of his pay plus allowances for the period of the notice at the same rate at which he was drawing immediately before his retirement or, for the period by which such notice falls short of three months, as the case may be.

NOTE-1.- Before a Government servant service notice of retirement under clause (a) above, he should satisfy himself by means of a reference to the appointing authority that he has in fact, completed [20 or 25 years] qualifying service, as the case may be, for pension. Similarly, the appointing authority, while giving notice of retirement to a Government servant under clause (b), above, should also satisfy itself, that the Government servant has, in fact completed 20 years qualifying service or he attains the age of 50 years.

NOTE-2.- The period of notice of [one month or three months] or the notice period which is short of [one month or three months] as the case may be, shall be reckoned from the date on which it is signed and put in communication under registered post. Where the notice is served personally, the period shall be reckoned from the date of receipt thereof.

NOTE-3.-The Government servant, on submission of an application shall be granted such leave during the period of notice to which he is entitled according to rules:

Provided that no leave shall be granted beyond the expiry of the period of notice.

NOTE-4.- The payment of pension for the period for which pay and allowances have been paid to a Government Servant in lieu of notice, shall be regulated by the provision of sub-rule (2) of rule 33 of these rules.

(2) A Government servant who has elected to retire under clause (a) of sub-rule (1) and has given the necessary intimation to that effect to the appointing authority, shall be precluded from withdrawing his election subsequently except with the specific approval of such authority on consideration of the circumstances of the case to withdraw the notice given by him:

Provided that the request for withdrawal shall be prior to the intended date of his retirement.

(3) Where the notice of retirement has been served by appointing authority on the Government servant, it may be withdrawn, if so desired for adequate reasons, provided that the Government servant concerned is agreeable.]"

6. Sub-rule (2) of Rule 42 makes it clear that a Government servant who had elected for voluntary retirement can withdraw his election subsequently only with the specific approval of the authority on consideration of the circumstances of the case. The Division Bench of this Court in the matter of *NARAYAN PRASAD RAM RATAN KACHHWAHA Vs. DISTRICT AND SESSIONS JUDGE, RATLAM and others,* reported in 1997 (2) MPLJ 665 has considered the effect of sub-rule (2) of Rule 42 of the Pension Rules and has held that the notice of voluntary retirement cannot be withdrawn as of right and the said Rule puts an embargo on the right of the Government servant to do so. It has been further held that the exception gives the discretion to the appointing authority to permit withdrawal of the notice of voluntary retirement and such discretion is to be exercised "on consideration of the circumstances of the case" on the objective application of mind. The Division

Bench of this Court in the case of *NARAYAN PRASAD RAM RATAN KACHHWAHA* (supra) has held that :

> "11. Rule 42(2) further provides that a Government servant who has elected to retire under this rule and has given the necessary intimation to that effect to the appointing authority, shall be precluded from withdrawing his election subsequently except with the specific approval of such authority on consideration of the circumstances of the case to withdraw the notice given by him. Thus the notice of voluntary retirement cannot be withdrawn as of right. The rule puts an embargo on the right of the Government servant to do so. Then it carves out an exception. That exception gives a discretion to the appointing authority to permit withdrawal of the notice of voluntary retirement. That discretion is to be exercised "on consideration of the circumstances of the case". The appointing authority has to apply his mind objectively and take into account the facts and circumstances of the case. The discretion must be exercised rationally and reasonably as laid down by the Supreme Court in *Balram Gupta's* case (supra) while dealing with similar rule in Central Civil Services (Pension) Rules, 1972. On the facts of that case the Supreme Court found that there was no valid reason for withholding the withdrawal. But in the present case the appropriate reasons have been given for refusing the withdrawal."

7. Learned counsel for the petitioner has placed reliance upon the judgment of the Supreme Court in the matter of *Balram Gupta* (supra) but in that case Rule 48-A of the Central Civil Services (Pension) Rules, 1972 was under consideration, which is differently worded. The Division Bench of this Court in the matter of *NARAYAN PRASAD RAM RATAN KACHHWAHA* (supra) has affirmed the judgment of the Single Bench wherein the learned Single Judge had found the judgment in the case of *Balram Gupta* (supra) to be distinguishable. The judgment in the matter of *NARAYAN PRASAD RAM RATAN KACHHWAHA* (supra) has been subsequently followed by the different Benches of this Court in the matter of *S.S.NAFDE Vs STATE OF M.P. & ors.,* 2013 (1) MPLJ 396, in the matter of *RUKSANA BEGUM SIDDIQUI Vs. STATE OF M.P. & ors.,* ILR 2009 MP 3072 and in the matter of *Brajkishore Khare Vs. State of M.P. & Others,* 2016 SCC OnLine MP 5796.

8. Thus, under Rule 42 of the M.P. Civil Services (Pension) Rules, 1976, a Government servant who had elected for voluntary retirement can withdraw his election subsequently with the specific approval of the authority and no absolute right exists in favour of such Government servant but the discretion given to the authority under Rule 42(2) is to be exercised "on consideration of the circumstances of the case" and on the objective application of mind. Hence, the authority can deny the permission to withdraw the application for voluntary retirement by assigning appropriate reasons.

9. The Rule 42(2) requires the competent authority to consider the circumstances of the case while deciding the prayer for withdrawal of the application for voluntary retirement. The reply filed by the respondents reveals that the petitioner had sought the retirement on the ground of personal difficulty and health problems. Annexure R/4 was the application submitted by the petitioner at one point of time mentioning that he was suffering from ophthalmic problem due to dull/low vision. The reply of the respondents also reveals that the petitioner was not sincere towards his duty and was avoiding to take additional burden and work. The Administrative Judge of the Gwalior Bench had also made observation against the petitioner that he is a shirker and had become a liability to the institution and seems to be a deadwood. The reply reflects that while considering the prayer for withdrawal of the application for voluntary retirement, the service record of the petitioner was looked into and thereafter a decision was taken to reject the application for withdrawal of voluntary retirement application.

10. It is settled position in law that while exercising the power of judicial review under Article 226 of the Constitution of India, this Court does not exercise the appellate power as against the decision impugned. The judicial review is directed not against the decision but is confined to examining the correctness of decision making process. The Supreme Court in the matter of *State of U.P. v. Maharaja Dharmander Prasad Singh,* (1989) 2 SCC 505 has held as under :

> **"60.** However, judicial review under Article 226 cannot be converted into an appeal. Judicial review is directed, not against the decision, but is confined to the examination of the decision-making process. In *Chief Constable of the North Wales Police* v. *Evans* [(1982) 1 WLR 1155 : (1982) 3 All ER HL 141] refers to the merits-legality distinction in judicial review. Lord Hailsham said:
>
> > "The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is

> authorised by law to decide for itself a conclusion which is correct in the eyes of the court."

61. Lord Brightman observed:

> "... Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made ..."

And held that it would be an error to think:

> "... that the court sits in judgment not only on the correctness of the decision-making process but also on the correctness of the decision itself."

The scope of judicial review has been reiterated by the Supreme Court in the subsequent judgment also in the matter of *Union of India v. Flight Cadet Ashish Rai,* (2006) 2 SCC 364. The Hon'ble Supreme Court has expressed that there should be judicial restraint while making judicial review in administrative matters and has enumerated the principles in this regard. In the matter of *Sarvepalli Ramaiah v. District Collector, Chittoor,* (2019) 4 SCC 500, it has been held that administrative decisions are subject to judicial review under Article 226 of the Constitution, only on grounds of perversity, patent illegality, irrationality, want of power to take the decision and procedural irregularity. In the matter of *Nirmala J. Jhala v. State of Gujarat,* (2013) 4 SCC 301, it is held that the judicial review is not akin to adjudication on merits by re-appreciating the evidence as an appellate authority.

Having regard to the aforesaid scope of judicial review also, no case is made out for interfering in the impugned order.

11. So far as the judgment in the matter of *Director General, Employees' State Insurance Corporation* (supra) relied upon by the counsel for the petitioner is concerned, in that case the prayer for withdrawal of the application was rejected on the ground that the appellant therein had not indicated his reason for withdrawal, therefore, the issue of opportunity of hearing to disclose the reason came up but that is not so in the present case. Hence, the judgment in the case of *Director General, Employees' State Insurance Corporation* (supra) is distinguishable on its own facts.

12. In view of the above analysis, we are of the opinion that the impugned order rejecting the prayer for withdrawal of the application for voluntary retirement (Annexure P/8) and the impugned order dated 09.12.2020 (Annexure

P/1) accepting the application for voluntary retirement do not suffer from any error. Hence, no case for interference is made out.

13. The writ petition is accordingly **dismissed.**

Petition dismissed

I.L.R. [2021] M.P. 683 (DB)
WRIT PETITION

Before Mr. Justice Prakash Shrivastava & Smt. Justice Anjuli Palo

WP No. 5629/2021 (Jabalpur) decided on 1 April, 2021

MADAN MOHAN SHRIVASTAVA …Petitioner

Vs.

ADDITIONAL DISTRICT MAGISTRATE (SOUTH) BHOPAL & ors. …Respondents

***Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, (54 of 2002), Sections 13(4), 14 & 17 and Constitution – Article 226/227 – Alternate Remedy of Appeal – Maintainability of Petition* – Held – Section 14 is one of the mode of taking over possession of secured asset – Action u/S 14 constitutes an action taken after the stage of Section 13(4) thus, against such action, remedy of appeal u/S 17 before DRT is available – Petition dismissed. (Paras 5 to 7 & 17 to 20)**

वित्तीय आस्तियों का प्रतिभूतिकरण और पुनर्गठन तथा प्रतिभूति हित का प्रवर्तन (SARFAESI) अधिनियम, (2002 का 54), धाराएँ 13(4), 14 व 17 एवं संविधान – अनुच्छेद 226/227 – अपील का वैकल्पिक उपचार – याचिका की पोषणीयता – अभिनिर्धारित – धारा 14, प्रतिभूत आस्तियों का कब्जा लेने की एक रीति है – धारा 14 के अंतर्गत कार्रवाई, धारा 13(4) के प्रक्रम के पश्चात् की गई कार्रवाई गठित करती है अतः, उक्त कार्रवाई के विरूद्ध, ऋण वसूली अधिकरण के समक्ष धारा 17 के अंतर्गत अपील का उपचार उपलब्ध है – याचिका खारिज।

Cases referred :

(2011) 2 SCC 782, 2018 SCC OnLine 55, 2014 (1) MPLJ 396, 2019 (1) MPLJ 471, W.P. No. 19028/2017 decided on 16.04.2018 (DB), W.P. No. 28096/2018 decided on 10.12.2018 (DB), 2011 Legal Eagle (P & H) ESR 5272, 2015 SCC OnLine MP 7053, 2015 SCC OnLine MP 611, 2016 SCC OnLine MP 7436, (2014) 6 SCC 1.

Kapil Duggal, for the petitioner.
Arun Kumar Mishra, for the respondent No. 3.
Anuj Agrawal, for the respondent No. 6

O R D E R

The Order of the Court was passed by :

PRAKASH SHRIVASTAVA, J. :- This writ petition under Article 226/227 of the Constitution of India has been filed by the petitioner aggrieved with the order of the Additional Collector dated 25.01.2021 under Section 14 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short **'the Act')** directing the Tehsildar to ensure delivery of possession of the mortgaged property to the respondent-Bank.

2. Learned counsel for the respondent No.3/Bank has raised the preliminary objection that against such an order the petitioner has remedy of filing an appeal under Section 17 of the Act. He has placed reliance upon certain judgments in support of his submission.

3. The submission of learned counsel for the petitioner is that the remedy of appeal is not available against the order passed under Section 14 of the Act and that in terms of sub-section (3) of Section 14 of the Act, the order under Section 14 is final and it cannot be challenged in any court except in the High Court under Article 226 of the Constitution of India.

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

5. Section 17 of the Act provides for remedy of appeal and reads as under :-

> **"17. Application against measures to recover secured debts** —(1) Any person (including borrower), aggrieved by any of the measures referred to in sub-section (4) of Section 13 taken by the secured creditor or his authorized officer under this Chapter, [may make an application along with such fee, as may be prescribed] to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measure had been taken:"

A bare perusal of above provision indicates that remedy of appeal is available against any of the measures referred to under Section 13 (4). Section 13(4) reads as under :-

> **"13. Enforcement of security interest.-**
>
> (1) xxx xxx xxx
>
> (2) xxx xxx xxx
>
> (3) xxx xxx xxx
>
> (4) In case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:-

(a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset;

(b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset:

Provided that the right to transfer by way of lease, assignment or sale shall be exercised only where the substantial part of the business of the borrower is held as security for the debt:

Provided further that where the management of whole, of the business or part of the business is severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security or the debt;

(c) against any person (hereafter referred to as the manager), to manage the secured assets, the possession of which has been taken over by the secured creditor;

(d) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt."

Section 13(4) of the Act permits the secured creditor to take recourse to measures prescribed therein to recover the secured debt. One such measure is to take possession of the secured asset. Section 14 of the Act gives remedy to the secured creditor to approach the District Magistrate when possession of any secured asset is required to be taken and it further empowers the District Magistrate to take possession of such secured asset. Hence it is clear that action taken by the District Magistrate is in furtherance of the provision contained under Section 13(4).

6. Under Section 17 any person aggrieved by any of the measures referred to in sub-section (4) of Section 13 taken by the secured creditor or his authorized officer can file appeal to DRT. Under sub-section (2) of Section 17, the Debts Recovery Tribunal can consider whether any of the measures referred to in sub-

section (4) of section 13 taken by the secured creditor for enforcement of security are in accordance with the provisions of the Act and the rules. In terms of Section 17 (3), if the Debts Recovery Tribunal finds that any of the measures referred to in sub-section (4) of section 13, taken by the secured creditor are not in accordance with the provisions of this Act and the rules made thereunder, and require restoration of the management or restoration of possession, of the secured assets to the borrower or other aggrieved person, it can pass appropriate order for restoration of management or possession.

7. Section 17 provides for remedy before the Tribunal against any measure to recover secured debt. Under Section 17 any aggrieved person can approach the Tribunal against any measure referred in Section 13(4) and taken under Chapter III of the Act. Securing possession is one of the measure provided under Section 14 of the Act which also falls in Chapter III. Scheme of the Act makes it clear that DRT has jurisdiction to interfere with the action taken by the secured creditor after the stage contemplated under Section 13(4) in respect of any measure referred therein. Section 13(4)(a) provides for taking over the possession of secured asset by the secured creditor and Section 14 is one of the mode of taking over the possession of secured asset. Action under Section 14 of the Act constitutes an action taken after the stage of Section 13(4), therefore, against such an action remedy of appeal under Section 17 is available.

8. The Supreme Court considering Sections 13, 14 and 17 of the Act in the matter of *Kanaiyalal Lalchand Sachdev and others Vs. State of Maharashtra and others,* (2011) 2 SCC 782 has held that the action under Section 14 of the Act constitutes an action taken after the stage of Section 13(4) and, therefore, same would fall within the ambit of Section 17(1) of the Act, therefore, the Act contemplates an efficacious remedy for borrower or any person affected by an action taken under Section 13(4) of the Act by providing for an appeal before the DRT. In that case, the order under Section 14 of the Act was passed by the Chief Metropolitan Magistrate and the High Court had dismissed the petition on the ground that alternative remedy was available under Section 17 of the Act. The Hon'ble Supreme Court has upheld the order of the High Court by holding that :

> "21. In *Indian Overseas Bank & Anr. Vs. Ashok Saw Mill4,* the main question which fell for determination was whether the DRT would have jurisdiction to consider and adjudicate post Section 13(4) events or whether its scope in terms of Section 17 of the Act will be confined to the stage contemplated under Section 13(4) of the Act? On an examination of the provisions contained in Chapter III of the Act, in particular Sections 13 and 17, this Court, held as under :(SCC pp. 375-76, paras 35-36 & 39)

"35. In order to prevent misuse of such wide powers and to prevent prejudice being caused to a borrower on account of an error on the part of the banks or financial institutions, certain checks and balances have been introduced in Section 17 which allow any person, including the borrower, aggrieved by any of the measures referred to in sub-section (4) of Section 13 taken by the secured creditor, to make an application to the DRT having jurisdiction in the matter within 45 days from the date of such measures having taken for the reliefs indicated in sub- section (3) thereof.

36. The intention of the legislature is, therefore, clear that while the banks and financial institutions have been vested with stringent powers for recovery of their dues, safeguards have also been provided for rectifying any error or wrongful use of such powers by vesting the DRT with authority after conducting an adjudication into the matter to declare any such action invalid and also to restore possession even though possession may have been made over to the transferee.

* * *

39. We are unable to agree with or accept the submissions made on behalf of the appellants that the DRT had no jurisdiction to interfere with the action taken by the secured creditor after the stage contemplated under Section 13(4) of the Act. On the other hand, the law is otherwise and it contemplates that the action taken by a secured creditor in terms of Section 13(4) is open to scrutiny and cannot only be set aside but even the status quo ante can be restored by the DRT."

(Emphasis supplied by us)

22. We are in respectful agreement with the above enunciation of law on the point. It is manifest that an action under Section 14 of the Act constitutes an action taken after the stage of Section 13(4), and therefore, the same would fall within the ambit of Section 17(1) of the Act. Thus, the Act itself contemplates an efficacious remedy for the borrower or any person affected by an action under Section 13(4) of the Act, by providing for an appeal before the DRT. "

9. The similar issue came up before the Supreme Court in the matter of *Authorized Officer, State Bank of Travancore and another vs. Mathew K.C.,* 2018 SCC OnLine 55 in reference to challenge to the proceedings under Section 13(4) of the Act and the Supreme Court held that :

> "4. The SARFAESI Act is a complete code by itself, providing for expeditious recovery of dues arising out of loans granted by financial institutions, the remedy of appeal by the aggrieved under Section 17 before the Debt Recovery Tribunal, followed by a right to appeal before the Appellate Tribunal under Section 18. The High Court ought not to have entertained the writ petition in view of the adequate alternate statutory remedies available to the Respondent. The interim order was passed on the very first date, without an opportunity to the Appellant to file a reply. Reliance was placed on *United Bank of India V. Satyawati Tandon,* 2010 (8) SCC 110, and *General Manager, Sri Siddeshwara Cooperative Bank Limited V. Ikbal,* (2013) 10 SCC 83. The writ petition ought to have been dismissed at the threshold on the ground of maintainability. The Division Bench erred in declining to interfere with the same."

10. In the matter of *Standard Chartered Bank vs. V. Noble Kumar and others,* 2014 (1) MPLJ 396, the Supreme Court has held that :

> "30. The "appeal" under Section 17 is available to the borrower against any measure taken under section 13(4). Taking possession of the secured asset is only one of the measures that can be taken by the secured creditor. Depending upon the nature of the secured asset and the terms and conditions of the security agreement, measures other than taking the possession of the secured asset are possible under section 13(4). Alienating the asset either by lease or sale etc. and appointing a person to manage the secured asset are some of those possible measures. On the other hand, section 14 authorises the Magistrate only to take possession of the property and forward the asset along with the connected documents to the borrower. Therefore, the borrower is always entitled to prefer an "appeal" under section 17 after the possession of the secured asset is handed over to the secured creditor. Section 13(4)(a) declares that the secured creditor may take possession of the secured assets. It does not

> specify whether such a possession is to be obtained directly by the secured creditor or by resorting to the procedure under section 14. We are of the opinion that by whatever manner the secured creditor obtains possession either through the process contemplated under section 14 or without resorting to such a process obtaining of the possession of a secured asset is always a measure against which a remedy under section 17 is available."

11. The Division Bench of this Court also in the matter of *Aditya Birla Finance Limited Vs. Carnet Elias Fernandes Vemalayam,* 2019(1) MPLJ 471 has held that :

> "3. Though the learned Single Bench has held that there is no alternative remedy against an order passed by the District Magistrate under Section 14 of the Act, but, a Division Bench of this Court in W.P. No.19028/2017, *Sunil Garg vs. Bank of Baroda and others decided* on 16-4-2018 [2018(3) M.P.L.J. 615] has held that remedy of an aggrieved person against an order passed by the District Magistrate is before the Debts Recovery Tribunal under Section 17 of the Act. Therefore, such finding of the learned Single Bench cannot be sustained."

12. The Division Bench of this Court in the matter of *Sunil Garg Vs. Bank of Baroda and others* in W.P. No.19028/2017 vide order dated 16.04.2018 has considered the issue of availability of alternative remedy against the order under Section 14 of the Act and has held that :

> "08. The invocation of jurisdiction of the District Magistrate under Section 14 of the Act is one of the modes available to the secured creditor to take possession of the secured assets. Therefore, when the District Magistrate under Section 14 of the Act hands over possession to the secured creditor, it is possession as is contemplated under sub-section (4) of Section 13 of the Act. Therefore, for an aggrieved person against an action taken by the secured creditor either under sub-section (4) of Section 13 or under Section 14 of the Act, the remedy is by way of an application under Section 17 of the Act before the Tribunal.

09. In **G.P. Ispat's** case (supra), the attention of the Chhattisgarh High Court was not drawn to the earlier judgment of the Supreme Court in **Transcore's** case (supra). Therefore, we are unable to agree with the reasoning recorded given in **G.P. Ispat's** case (supra). The Full Bench of Allahabad High Court in **N.C.M.L.** case (supra) has examined the judgment of Supreme Court in **Transcore's** case (supra) and held that the said judgment deal with the right of secured creditor to take possession under Section 13 (4) of the Act. Therefore, the same was found not applicable to hold that an order passed by the District Magistrate to take possession under Section 14 of the Act can be challenged by way of an application under Section 17 of the Act. The relevant extract from the judgment in the case of **N.C.M.L.** reads as under :-

> **"19.3.** The judgment in **Transcore (supra)**, as quoted above, needs to be read in the light of the question that fell for consideration. The question in short was whether taking possession contemplated under Section 13 (4) comprehends the power to take actual possession. While dealing with this question, the Supreme Court considered the relevant Rules which prescribe the procedure for taking over possession of secured assets. The Supreme Court did not consider the question whether an application under Section 17(1) of the Act could be filed even before the measures/ possession are/is taken as contemplated under sub-section 4 of Section 13. In other words, the Supreme Court did not consider the question whether an application under Section 17(1) of the Act is maintainable before the measures, such as taking possession as provided for under Section 13(4) (a) is available. A notice under Rule 8 of the Rules, as prescribed with Appendix IV is required to be given to the borrower who has failed to repay the amount informing him and the public that the bank has taken possession of the property under subsection (4) of Section 13, read with Rule 9 of the Rules."

We are unable to agree with the Full Bench judgment of Allahabad High Court in **N.C.M.L.'s** case

(supra), as when the secured creditor invokes jurisdiction of the District Magistrate, it is, in fact, invoking right to take possession under Section 13 (4) of the Act itself.

10. The reliance on the judgment of Supreme Court in **Standard Chartered Bank. Vs. V. Noble Kumar and others** reported as (2013) 9 SCC 620 again does not advance the argument raised by the petitioner. In **Noble Kumar's** case (supra), the High Court in the order under appeal held that when the creditor faces resistance to take possession of the secured assets only then the creditor could resort to the procedure under Section 14 of the Act. The argument raised was that action to take possession under Section 13(4) or Section 14 of the Act are alternate procedures. The Supreme Court set aside the finding recorded and held as under :-

> **"20.** In every case where the objections raised by the borrower are rejected by the secured creditor, the secured creditor is entitled to take possession of the secured assets. In our opinion, such action-having regard to the object and scheme of the Act - could be taken directly by the secured creditor. However, visualising the possibility of resistance for such action, Parliament under Section 14 also provided for seeking the assistance of the judicial power of the State for obtaining possession of the secured asset, in those cases where the secured creditor seeks it.
>
> **21.** Under the scheme of Section 14, a secured creditor who desires to seek the assistance of the State's coercive power for obtaining possession of the secured asset is required to make a request in writing to the Chief Metropolitan Magistrate or District Magistrate within whose jurisdiction, secured asset is located praying that the secured asset and other documents relating thereto may be taken possession thereof. The language of Section 14 originally enacted purportedly obliged the Magistrate receiving a request under Section 14 to take possession of the secured asset and documents, if any, related thereto in terms of the request

received by him without any further scrutiny of the matter.

26. It is in the above-mentioned background of the legal frame of Sections 13 and 14, we are required to examine the correctness of the conclusions recorded by the High Court. Having regard to the scheme of Sections 13 and 14 and the object of the enactment, we do not see any warrant to record the conclusion that it is only after making an unsuccessful attempt to take possession of the secured asset, a secured creditor can approach the Magistrate. No doubt that a secured creditor may initially resort to the procedure under Section 13(4) and on facing resistance, he may still approach the Magistrate under Section 14. But, it is not mandatory for the secured creditor to make attempt to obtain possession on his own before approaching the Magistrate under Section 14. The submission that such a construction would deprive the borrower of a remedy under section 17 is rooted in a misconception of the scope of Section 17.

27. The "appeal" under Section 17 is available to the borrower against any measure taken under Section 13(4). Taking possession of the secured asset is only one of the measures that can be taken by the secured creditor. Depending upon the nature of the secured asset and the terms and conditions of the security agreement, measures other than taking the possession of the secured asset are possible under Section 13(4). Alienating the asset either by lease or sale etc. and appointing a person to manage the secured asset are some of those possible measures. On the other hand, Section 14 authorises the Magistrate only to take possession of the property and forward the asset along with the connected documents to the borrower (*sic* the secured creditor). Therefore, the borrower is always entitled to prefer an "appeal" under Section 17 after the possession of the secured asset is handed over to the secured creditor. Section 13(4)(a) declares that the secured creditor may take possession

> of the secured assets. It does not specify whether such a possession is to be obtained directly by the secured creditor or by resorting to the procedure under Section 14. We are of the opinion that by whatever manner the secured creditor obtains possession either through the process contemplated under section 14 or without resorting to such a process obtaining of the possession of a secured asset is always a measure against which a remedy under Section 17 is available."

11. The finding of the Chhatisgarh High Court and Allahabad High Court that the remedy of the borrower is after taking actual possession of the secured assets, is based upon an observation in Para 27 of the judgment in **Noble Kumar's** case (supra). But, in our view, the Supreme Court declined the right to seek remedy under Section 17 of the Act to the borrower for the reason that the borrower stalled the proceedings for a period of almost four years. The Court in fact held that the borrower would have a right to prefer an appeal under Section 17 of the Act raising objections regarding legality of the decision of the Magistrate. The relevant extract of the judgment reads as under :-

> **"40.** In view of our conclusion on the scope of Section 17 recorded earlier it would normally have been open to the respondent to prefer an appeal under Section 17 raising objections regarding legality of the decision of the Magistrate to deprive the respondent of the possession of the secured asset. But in view of the fact that the respondent chose to challenge the decision of the magistrate by invoking the jurisdiction of the High Court under Article 226 of the Constitution and in view of the fact that the respondent does not have any substantive objection as can be discerned from the record, we make it clear that the respondent in the instant case would not be entitled to avail the remedy under Section 17 as the respondent stalled the proceedings for a period of almost 4 years. It is worthwhile remembering that the respondent did not even choose to raise any objections to the demand issued under Section 13(2) of the Act. However, we make it clear

that it is always open to the respondent to seek restoration of his property by complying with sub-Section 8 of Section 13 of the Act."

12. We may notice that the judgment in **Transcore's** case (supra) has been quoted with approval in a recent judgment of Supreme Court in **Civil Appeal Nos. 2928-2930 of 2018 (ITC Limited Vs. Blue Coast Hotels Ltd. and others)** decided on 19.3.2018. The relevant extract from the judgment reads as under :-

"30. Moreover, this provision provides for communication of the reasons for not accepting the representation/objection and the requirement to furnish reasons for the same. A provision which requires reasons to be furnished must be considered as mandatory. Such a provision is an integral part of the duty to act fairly and reasonably and not fancifully. We are not prepared in such circumstances to interpret the silence of the Parliament in not providing for any consequence for non-compliance with a duty to furnish reasons. The provision must nonetheless be treated as 'mandatory'.

We agree with the view of this Court in this regard in **Mardia Chemicals Ltd. v. Union of India, (2004) 4 SCC 311, Transcore v. Union of India, (2008) 1 SCC 125 and Keshavlal Khemchand & Sons (P) Ltd. vs. Union of India, (2015) 4 SCC 770.**"

13. A Division Bench of this Court in the case of **India Sem Asset Reconstruction Co. Ltd. Vs. State of M.P. and others - Writ Appeal Nos.489/2016** (Indore Bench) decided on 21.12.2017 has held that there is effective remedy to approach the Tribunal under section 17 of the Act in respect of an order passed under Section 14 of the Act. It was held that an order under Section 14 of the Act could be challenged before the Tribunal under Section 17 of the Act. The relevant extract from the judgment reads as under :-

"22. On due consideration of the aforesaid and the law laid down by the Five Judges Bench of this court in the case of **Jabalpur Bus Operators Association & Others Vs. State of**

M.P. & Another, 2003 (1) MPLJ 513, so also the fact that judgment of **United Bank of India, Jagdish Singh V/s. Heeralal & Others, (2014) 4 SCC 479,** were not considered while upholding the view taken in the matter of **M/s. Ambika Solvex Ltd. Vs. State Bank of India and others, (2016) SCC Online MP 5772,** we are more incline to follow the earlier judgment of the Hon'ble Supreme Court where the question of maintainability of writ petition has been considered in great detail, we find that the appellant has an effective alternative remedy to approach the Debt Recovery Tribunal under Section 17 of the SARFAESI Act, the writ appeal filed by the appellant has no merit and is accordingly, dismissed with a liberty to the appellant to avail the remedy of appeal under Section 17 of the SARFAESI Act, in accordance with law."

13. In the matter of *Sunil Garg* (supra), it has been further held that:

"15. In respect of an argument that the order passed by the District Magistrate or the Chief Metropolitan Magistrate, or any other officer authorized by them cannot be called in question in any Court or before any authority is again not tenable. Such provision excludes the jurisdiction of the Civil Court but not of the Tribunal, who has been conferred the jurisdiction to entertain an application under Section 17 of the Act. It is well settled principle of interpretation of statutes that there has to be conjoint and harmonious construction of the various provisions of a Statute. Keeping in view the said principle, if the provision of Sections 13 (4) and 14 (3) and Section 17 of the Act are read together, it is clear that bar under sub-section (3) of Section 14 is not in respect of the remedy before the Tribunal in terms of Section 17 of the Act.

16. In view of the above, the impugned order passed by the Tribunal is set aside, as it has the jurisdiction to decide an application under Section 17 of the Act. Therefore, the Tribunal is directed to decide an application under Section 17 of the Act on merits in accordance with law. It shall be open to the petitioner to seek an interim order from the Tribunal itself, if so advised. It is also clarified that it shall be open to an aggrieved person to seek exclusion of time in filing of an application before the Tribunal in view of the time spent before this Court in writ petition where the question of maintainability of alternative remedy was pending."

Thus, in *Sunil Garg* (supra) it has also been settled that bar under Section 14(3) does not affect the remedy before the Tribunal under Section 17 of the Act.

14. The another Division Bench of this Court in the matter of *Shrikant Jain vs. Additional District Magistrate (North) Bhopal* by order dated 10.12.2018 in W.P. No.28096/2018 has re-examined the position and has held as under :

> **"8.** The invocation of jurisdiction of the District Magistrate under Section 14 of the Act is one of the modes available to the secured creditor to take possession of the secured assets. Therefore, when the District Magistrate under Section 14 of the Act hands over possession to the secured creditor, it is possession as is contemplated under sub-section (4) of Section 13 of the Act. Therefore, for an aggrieved person against an action taken by the secured creditor either under sub-section (4) of Section 13 or under Section 14 of the Act, the remedy is by way of an application under Section 17 of the Act before the Tribunal.
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> **9.** The Division Bench of this court in the case of **Sunil Garg Vs. Bank of Baroda & others, W.P.No.19028/2017, decided on 16-04-2018** examined the validity of the order passed by the Debt Recovery Tribunal in the proceedings under Section 17 of the SARFAESI Act, whereby the application was dismissed on the ground that the same is not maintainable till the actual possession is taken. The Division Bench referring the various judgments of the Apex Court held that the appeal under section 17 of the SARFAESI Act would be maintainable against the order passed under Section 14 of the of the SARFAESI Act.
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> **10.** In a recent judgment passed by the Supreme Court in the case of **Authorized Officer, State Bank of Travancore and another Vs. Mathew K.C. (2018)3 SCC 85,** considering a case under SARFAESI Act, held that discretionary jurisdiction under Article 226 is not absolute but has to be exercised judiciously in given facts of a case and in accordance with law. Normally a writ petition under Article 226 ought not to be entertained if alternative statutory remedies are available, except in cases falling within the well-defined exceptions. Relevant para-16 is reproduced below:
>
> > *"16. The writ petition ought not to have been entertained and the interim order granted for the mere asking without assigning special reasons, and that too without even granting opportunity to the appellant to contest the maintainability of the writ petition and failure to notice the subsequent developments in the interregnum. The opinion of the Division Bench that the counter-affidavit having subsequently been filed, stay/ modification could be sought of the interim order cannot be considered sufficient jurisdiction to have declined interference."*

> **11.** In view of the aforesaid enunciation of law, the present petition is not maintainable as alternative and efficacious remedy is available against the impugned order passed under Section 14 of the SARFAESI Act."

15. The same is the view also taken by Punjab and Haryana High Court in the matter of *United Automobiles Railway Road Vs. Authorised Officer, Indian Overseas Bank, Assets Recovery Department,* 2011 Legal Eagle (P&H) ESR 5272.

16. Learned counsel for the petitioner has placed reliance upon the judgments of the Single Bench of this Court in the matter of *M/s Sri. Ambika Solvex Ltd. Vs. State Bank of India and others,* dated 16th December, 2015 reported in 2015 SCC OnLine MP7053; *Smt. Meera Gupta and another Vs. M/s Anurudh Builders & Developers,* dated 5th May, 2015, reported in 2015 SCC OnLine MP 611; and *M/s Vardhman Solvent Extraction Industries Ltd. Thru. Mr. Mahesh Paliwal Vs. The State of Madhya Pradesh,* dated 4th November, 2016, reported in 2016 SCC OnLine MP 7436 but these are the orders passed by the learned Single Judge, therefore, the petitioner is not entitled to the benefits of these orders in view of the Division Bench judgment in the case of *Sunil Garg* (supra). Counsel for the petitioner has also placed reliance upon the judgment of the Supreme Court in the matter of *Harshad Govardhan Sondagar vs. International Assets Reconstruction Company Limited and Others* (2014) 6 SCC 1 wherein taking note of Section 14 (3) of the Act, the Hon'ble Supreme Court has held that the finality has been attached to the decision under Section 14 as it cannot be challenged before any court or any authority but that will not exclude the jurisdiction of the High Court under Article 226/227 of the Constitution of India. In that judgment, the Hon'ble Supreme Court has not expressed any opinion if the jurisdiction of the Tribunal/DRT is also excluded under sub-section (3) of Section 17 of the Act. The Division Bench of this Court in the case of *Sunil Garg* (supra) has already expressed that the provision excludes the jurisdiction of the civil court and not the Tribunal which has been conferred with the jurisdiction to entertain the application under Section 17 of the Act.

17. Hence, it is clear that against the order passed under Section 14 of the Act, aggrieved person has an alternative effacious (sic : efficacious) remedy available before the Tribunal under Section 17 of the Act.

18. The record further reflects that the co-borrower/respondent No.6 has already approached the DRT by filing an appeal against the impugned order by invoking the provisions of Section 17 of the Act.

19. In view of the above, we are of the opinion that since against the impugned order, the petitioner has alternative effacious (sic : efficacious) remedy of appeal

before the Tribunal under Section 17 of the Act, therefore, no case for interference at this stage is made out.

20. The writ petition is accordingly **dismissed,** however with liberty to the petitioner to avail the remedy of appeal.

Petition dismissed

I.L.R. [2021] M.P. 698 (DB)
WRIT PETITION

Before Mr. Justice Mohammad Rafiq, Chief Justice
& Mr. Justice Atul Sreedharan

WP No. 8914/2020 (Jabalpur) order passed on 19 April, 2021

IN REFERENCE (SUO MOTU) …Petitioner

Vs.

UNION OF INDIA & ors. …Respondents

(Alongwith WP Nos. 8696/2020, 14805/2020, 20889/2020, 2513/2021 & 8753/2021)

A. Constitution – Article 21 – Covid 19 Pandemic – Right to Life – Right to Health **– Held – Right to health forms an integral component of right to life enshrined under Article 21 – Right to health can be secured to citizens only if State provides adequate measures for their treatment, healthcare and takes their care by protecting them from calamities like Corona Virus – Health has its own prerequisites of social justice and equality and it should be accessible to all – It is obligation of State to access to health facilities to citizens inflicted with disease of Corona Virus with life saving means and drugs – Directions issued to Central and State Government regarding infrastructure, medical care and treatment of Covid 19 patients.**

(Paras 14, 25, 27 & 28)

क. संविधान – अनुच्छेद 21 – कोविड–19 महामारी – जीवन का अधिकार – स्वास्थ्य का अधिकार – अभिनिर्धारित – स्वास्थ्य का अधिकार, अनुच्छेद 21 के अंतर्गत प्रतिष्ठापित, जीवन के अधिकार का अभिन्न अंग निर्मित करता है – नागरिकों के लिए स्वास्थ्य का अधिकार केवल तब सुनिश्चित किया जा सकता है जब राज्य, उनके उपचार, स्वास्थ्य सेवा हेतु पर्याप्त उपाय प्रदान करता है तथा कोरोना वायरस जैसी विपत्तियों से उनकी सुरक्षा करते हुए उनका ध्यान रखता है – स्वास्थ्य की अपनी स्वयं की पूर्वापेक्षाऐं सामाजिक न्याय एवं समानता की है और वह सभी की पहुंच में होनी चाहिए – यह राज्य की बाध्यता है कि कोरोना वायरस की बीमारी से ग्रसित नागरिकों को जीवन रक्षक साधनों एवं दवाईयों के साथ स्वास्थ्य सुविधाओं की सुगमता हो – अवसंरचना, चिकित्सा सेवा एवं कोविड–19 रूग्णों के उपचार के संबंध में केंद्र एवं राज्य सरकार को निदेश जारी किये गये।

***B. Constitution – Article 21, Epidemic Diseases Act (3 of 1897) and Disaster Management Act (53 of 2005) – Right to Life – Right to Health – Duty of State* – Held – Apex Court concluded that obligation to provide medical care is an obligation of welfare State – Primary duty of State is to "provide all facilities to make right of a citizen to secure his health meaningful" – Health, besides being a fundamental right, is a basic human right which no popular government can afford to negate – Efforts made by State Government should also reflect on ground can benefit thereof should reach common man, thus State needs to work hard towards that aim and goal – For said purpose, State Government can even invoke the Epidemic Diseases Act, 1897 and Disaster Management Act, 2005. (Paras 18, 23, 24 & 25)**

ख. संविधान – अनुच्छेद 21, महामारी अधिनियम (1897 का 3) एवं आपदा प्रबंधन अधिनियम (2005 का 53) – जीवन का अधिकार – स्वास्थ्य का अधिकार – राज्य का कर्तव्य – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया कि चिकित्सा सेवा प्रदान करने की बाध्यता, कल्याणकारी राज्य की एक बाध्यता है – राज्य का प्राथमिक कर्तव्य ''नागरिक को उसका स्वास्थ्य सुरक्षित करने के अधिकार को अर्थपूर्ण बनाने हेतु सभी सुविधाऐं उपलब्ध कराना'' है – स्वास्थ्य, एक मूलभूत अधिकार होने के अतिरिक्त एक मौलिक मानवाधिकार है जिसे कोई लोकप्रिय सरकार नकारना नहीं सहन कर सकती – राज्य सरकार द्वारा किये गये प्रयास, धरातल पर प्रतिबिंबित होने चाहिए और उसका लाभ सामान्य जन तक पहुंचना चाहिए, अतः, राज्य को उस लक्ष्य एवं उद्देश्य की ओर कठिन परिश्रम करना आवश्यक है – उक्त प्रयोजन हेतु, राज्य सरकार महामारी अधिनियम, 1897 तथा आपदा प्रबंधन अधिनियम, 2005 का अवलंबन भी ले सकती है।

***C. Protection of Human Rights Act, 1993 (10 of 1994), Section 2(d) and Constitution – Article 21 – Human Rights* – Held – Section 2(d) defines "human rights" to mean "the rights relating to life, liberty, equality and dignity of individual guaranteed by Constitution or embodied in International Covenants and enforceable by Courts in India" – Right to health and medical care is one of the facets enshrined under Article 21 of Constitution. (Para 15)**

ग. मानव अधिकार संरक्षण अधिनियम, 1993 (1994 का 10), धारा 2(d) एवं संविधान – अनुच्छेद 21 – मानवाधिकार – अभिनिर्धारित – धारा 2(d) में ''मानव अधिकार'' से ''प्राण, स्वतंत्रता, समानता और व्यक्ति की गरिमा से संबंधित ऐसे अधिकार अभिप्रेत हैं जो संविधान द्वारा प्रत्याभूत किये गये हैं या अंतरराष्ट्रीय प्रसंविदाओं में सन्निविष्ट और भारत में न्यायालयों द्वारा प्रवर्तनीय है'' – स्वास्थ्य एवं चिकित्सा सेवा का अधिकार संविधान के अनुच्छेद 21 के अंतर्गत प्रतिष्ठापित पहलुओं में से एक है।

***D. Constitution – Article 21 & 226 – Scope & Jurisdiction* – Held – Despite being cognizance of its jurisdiction limitations, this Court in an extraordinary situation, when they are brought to its notice, cannot just play a silent spectator – Court has the responsibility to see that faith of people in the system is not eroded and if erosion to some extent has taken place, is**

restored – Court can play the role of a catalyst by reminding the State of its duties, for reassuring people to continue to have faith in the system so as to revive, their confidence. (Para 26)

घ. संविधान – अनुच्छेद 21 व 226 – व्याप्ति व अधिकारिता – अभिनिर्धारित – अपनी अधिकारिता की सीमाओं की संज्ञाता के बावजूद यह न्यायालय, असाधारण स्थिति में, जब उन्हें उसके ध्यान में लाया गया है, वह एक मौन दर्शक की भूमिका नहीं ले सकता – यह देखना न्यायालय का उत्तरदायित्व है कि प्रणाली में लोगों का विश्वास ना घटे और यदि कुछ हद तक घटा भी है तो वह पुनःस्थापित हो – प्रणाली में लोगों का विश्वास बनाये रखने के लिए उन्हें आश्वस्त करने हेतु राज्य को उसके कर्तव्यों की याद दिलाकर न्यायालय एक उत्प्रेरक की भूमिका अदा कर सकता है, जिससे कि उनका भरोसा पुनरूज्जीवित हो सके।

Cases referred:

(1989) 4 SCC 286, (1995) 3 SCC 42, (1996) 4 SCC 37, (1999) 6 SCC 9, (2000) 8 SCC 765, (2019) 8 SCC 607, (2016) 10 SCC 726, (2018) 8 SCC 321, (2018) 10 SCC 1.

Naman Nagrath with *Jubin Prasad*, as *Amicus Curiae* in WP No. 8914/2020.

Shekhar Sharma, for the petitioner in WP No. 8696/2020.

Pawan Dwivedi, for the petitioner in WP No. 14805/2020.

Shashank Shekhar, for the petitioner in WP No. 8753/2021.

Sanjay Kumar Verma, for the petitioner in WP No. 20889/2020.

Jitendra Kumar Jain, Astt. Solicitor General for the Union of India.

P.K. Kaurav, A.G. with *R.K. Verma* and *Pushpendra Yadav*, Addl. A.G. for the respondents/State alongwith *Chhavi Bhardwaj*, Managing Director, National Health Mission (M.P.).

Shivendra Pandey, for the Indian Medical Association (respondent No. 5 in WP No. 8914/2020).

Shreyas Pandit, for the M.P. Nursing Home Association (respondent No. 8 in WP No. 8914/2020).

Vivek Krishna Tankha with *Varun Tankha*, in I.A. No. 4346/2021 (WP No. 8914/2020).

Shashank Shekhar, for the intervenor in WP No. 8914/2020.

Mohd. Vasif Khan, for the intervenor in WP No. 8914/2020.

Subhash Upadhyay, for the intervenor in I.A. No. 4347/2021 (WP No. 8914/2020).

Ajay Raizada, for the intervenor in I.A. No. 4349/2021 (WP No. 8914/2020).

Santosh Sahu and *Rambachan Sahu,* for the intervenor in WP No. 8914/2020.

Akbar Usmani, for the intervenor in WP No. 8914/2020.

O R D E R

The Order of the Court was passed by :

MOHAMMAD RAFIQ, CHIEF JUSTICE :- The present *suo motu* Writ Petition No.8914/2020 was registered on the basis of a letter (dated 08.06.2020) sent by Dr. Ashwani Kumar, Senior Advocate, Supreme Court of India, New Delhi to the Chief Justice of India, which was forwarded to the Registrar General of this Court by the Secretary General of Supreme Court of India (vide his letter dated 11.06.2020) under His Lordship's direction. The said letter dated 08.06.2020 had highlighted a tragic and condemnable sight of an elderly Covid-19 patient, who, as per the story carried out by a media portal with a photograph, was chained to bed in a private hospital at Bhopal, the capital city of the State of Madhya Pradesh, allegedly on his failure to make payment of fees for his treatment. One wonders if the situation has changed much since then when the entire country is struggling to survive the second wave of Covid-19.

This Court has passed number of orders to ensure that the Covid-19 patients in the State are provided timely treatment inasmuch as they are not subjected to harassment and exploitation. When the matter was listed on 07.09.2020, this Court directed the State Government to issue necessary directions to every hospital including the private hospitals to display the rates for treatment of Covid-19 patients at their reception counters and also publish the same for information of people by publication thereof in the newspapers so that any incident of overcharging could be brought to the notice of the District Administration and necessary action be taken. On 09.10.2020 when the matter was next listed, the Coronavirus was at its peak during the first wave, this Court was informed that 262 hospitals in the State of Madhya Pradesh have been declared as Covid Care Centre (CCC), 62 hospitals have been declared as Dedicated Covid Health Centre (DCHC) and 16 hospitals have been declared as Dedicated Covid Hospital (DCH), i.e. in all 347 hospitals, which are providing free treatment and testing to the Covid suspects and patients. This Court was also informed that there is no shortage of life saving medicines for Covid-19 treatment; scrupulous measures are being taken to ensure that no private hospitals/clinics charge exorbitant fee for such treatment and that rates are being duly exhibited on the hospital counters across the entire State of Madhya Pradesh. The State Government was directed to ensure strict compliance of the norms laid down by the Central Government in their Notification dated 07.04.2020 with regard to infrastructure and other requirements for CCCs, DCHCs and DCHs. The Commissioner, Health Services was directed to set up a District Level Cell to receive and attend the complaints, which should be made functional 24x7. Efforts should be made by all the stakeholders to educate one and all to scrupulously follow the norms of social distancing, use of face masks and washing hands etc.

2. When the matter was listed before the Court on 10.12.2020, the State Government filed its response to I.A. No.6360/2020 thereby placing on record copy of the order dated 04.09.2020 issued by the Commissioner, Health Services, Department of Public Health and Family Welfare, Madhya Pradesh issued under the approval of the Additional Chief Secretary of the State Department, directing that under no circumstances the Private Hospitals/Nursing Homes/Clinical Establishments' charges shall exceed by 40% of the rates communicated on or before 29.02.2020 including all expenses such as PPE kits etc. The aforesaid order was addressed to all the Chief Medical & Health Officers of the State, President of the Indian Medical Association, President of the Nursing Home Association and the Additional Director, IDSP (MP). It was assured that the said order shall be prominently published in daily newspapers having wide circulation in the respective Districts of the State after interval of every 15 days. It was also informed on behalf of the State that approximately 1.5 Crore e-cards covering 56% of the beneficiaries families under Pradhan Mantri Jan Arogya Yojana (which is hereinafter referred to as "Ayushman Bharat Yojana", as is commonly known) have been issued; total number of 652 health care providers have been empanelled in the State; the State Government is providing free cashless health facility to all Covid-19 patients at dedicated Covid-19 hospitals and designated Government facilities.

3. Thereafter, the matter was listed before the Court on 07.04.2021 on two Interlocutory Applications filed by the learned *Amicus Curiae.* The first application (IA No.3929/2021) was filed by him on the premise that he has learnt from reliable sources that the District Administration, Jabalpur has orally directed all the private Labs and Hospitals to stop conducting Covid-19 tests from 25.03.2021. The Chief Medical & Health Officer, Jabalpur (CMHO) who was present before the Court along with the Regional Director, Health Services, denied having issued any oral directions and submitted that orders have been issued to regulate the rates of the tests to be charged by the private Labs/Hospitals. IA No.4125/2021 was also filed by learned *Amicus Curiae* that in view of the second wave of Covid-19, all the District Administrations of the State should be directed to ensure strict compliance with the directions of the State Government dated 25.03.2021 and that all hospitals empanelled under Ayushman Bharat Niramayam Yojana should be directed not to deny treatment to Covid-19 suspected/confirmed patients falling under that scheme and should be further required to reserve minimum 20% beds for Covid-19 patients. In response, it was informed on behalf of the State that the Commissioner, Health-cum-Officiating Secretary, Directorate of Health Services, Government of Madhya Pradesh had issued an order on 05.04.2021 thereby prescribing a sum of Rs.700/- as the rate for RT-PCR Covid-19 Test and a sum of Rs.300/- for Rapid Antigen Covid-19 Test, with an additional sum of Rs.200/- if the sample is required to be collected from the home of the patient, by all ICMR & NABL approved Private Labs and NABH

recognised Private Hospitals. Another order dated 05.04.2021 was placed on record whereby the Secretary, Department of Public Health and Family Welfare, Government of Madhya Pradesh, Bhopal taking note of large number of grievances raised by public complaining about exorbitant charges, directed all Private Hospitals/Nursing Homes/Diagnostic Centres to charge a maximum sum of Rs.3,000/- for Chest CT/HRCT Scan from Covid-19 suspects/patients. The aforesaid order was to remain in operation till 30.04.2021.

4. This Court in the aforesaid order dated 07.04.2021 took note of submissions made by Mr. Shivendra Pandey, learned counsel appearing on behalf of Indian Medical Association (*respondent No.5 in WP No.8914/2020*) and Mr. Shreyas Pandit, learned counsel appearing for M.P. Nursing Home Association (*respondent No.8 in WP No.8914/2020*) that in their joint meeting held on 06.04.2021, they have decided to comply the aforementioned orders of the Government with regard to charges for RT-PCR Test, Rapid Antigen Test and Chest CT/HRCT Scan from Covid-19 suspects/patients. However, they informed the Court that there are in the State, approximately 3000 Private Hospitals, which are registered with Indian Medical Association and approximately 3000 Private Nursing Homes having membership with the M.P. Nursing Home Association but only a negligent number of 320 Private Hospitals and Nursing Homes are presently empanelled under Ayushman Bharat Yojana, of which only 81 are approved for treatment of Covid-19. This Court therefore while appreciating the stand taken by both Indian Medical Association and M.P. Nursing Home Association, also observed that their members in the time of current crisis faced by the country following the second wave of Covid-19 should desist from exploiting the situation by overcharging the affected persons. The Court also directed the State Government to give wide publicity to above orders issued by it, in all print and electronic media and by any other means. The State Government was also directed to increase the empanelment of Private Hospitals and Private Nursing Homes in the State in Ayushman Bharat Yojana, which fulfill the relevant criteria prescribed by the Central Government, for treatment of Covid-19 suspects/patients under the scheme.

5. The matters had to be then urgently listed on 15.04.2021 on special mention by number of Advocates, who had filed Interlocutory Applications in the present *suo motu* writ petition inasmuch as **I.A. No.4347/2021** *{regarding passing of directions to all the competent authority to follow the guidelines issued by the State Government regarding Covid-19 with immediate effect)* has been filed by Mr. Subhash Upadhyay, Advocate at Indore; **I.A. No.4349/2021** *(application for permission to intervene in suo motu writ petition)* has been filed by one Dr. M.A. Khan through Mr. Ajay Raizada, Advocate; and **I.A. No.4346/2021** *(subject: Uncontrolled upsurge and serious mismanagement issue in Covid Pandemic control)* has been registered on the basis of a letter addressed

to this Court by Mr. Vivek Krishna Tankha, Senior Advocate. Besides, a fresh Writ Petition by way of public interest litigation bearing W.P. No.8753/2021 has been filed by an NGO, named, 'Srijan Ek Asha'.

6. Mr. Naman Nagrath, learned *Amicus Curiae* has made his submissions and given written suggestions. Mr. P.K. Kaurav, learned Advocate General appearing along with Mr. R.K. Verma, learned Additional Advocate General, Mr. Pushpendra Yadav, learned Additional Advocate General and Ms. Chhavi Bhardwaj, Managing Director, National Health Mission (Madhya Pradesh), aside of making submissions, filed action plan of the State to manage the situation. Apart from learned *Amicus Curiae,* we have also heard Mr. Shashank Shekhar Dugwekar, Mr. Sanjay Kumar Verma, Mr. Shekhar Sharma and Mr. Pawan Kumar Dwivedi, learned counsel appearing for the petitioners in respective writ petitions as well as heard Mr. Jitendra Kumar Jain, learned Assistant Solicitor General for the respondents-Union of India and Mr. Vivek Krishna Tankha, learned Senior Counsel, Mr. Subhash Upadhyay, Mr. Ajay Raizada, Mr. Shivendra Pandey and Mr. Shreyas Pandit, learned counsel appearing for the respective intervenors/respondents on Interlocutory Applications filed in the *suo motu* writ petition. All of them have, more or less, raised similar arguments as to the ongoing crisis faced by the State following the second wave of Covid-19. A gist of what all of them have submitted in the course of hearing can be summarized thus:-

(i) there is an acute medical crisis in the State of Madhya Pradesh due to sudden spread of Covid-19, which has engulfed not only the urban areas but also reached the villages;

(ii) many deaths have been reported during the past few days from various hospitals including the private Hospitals/Nursing Homes across the State due to non- availability of Oxygen. There is an acute shortage of Oxygen in the Government Hospitals as well as Private Hospitals/Nursing Homes not only in the major cities like Bhopal, Indore, Gwalior and Jabalpur but also in District Headquarters and Sub Divisions. Large number of newspaper clippings have been filed to bring home the point;

(iii) there is an acute shortage of Remdesivir- a life saving drug which is quite crucial for saving the life of Covid-19 patients. In most of the Districts of the State including the major cities like Bhopal, Indore, Gwalior and Jabalpur one vial of Remdesivir, which costs approximately Rs.800-1,000, is being sold at an exorbitant price to the extent of Rs.18,000/-. The private hospitals are exploiting the situation by charging arbitrary rates for providing Remdesivir injections. The black-marketing of Remdesivir injection is leading to registration of criminal cases

in some instances. Many newspaper clippings have been produced to substantiate this;

(iv) while dedicated Covid-19 Hospitals have been established in the major cities like Bhopal, Indore, Gwalior and Jabalpur but there are hardly any such hospitals in any other District Headquarters of the State, with the result that all critical Covid patients have to be rushed there;

(v) oral instructions have been issued to all Private Labs/ Private Hospitals/Nursing Homes not to conduct any RT- PCR and Rapid Antigen Tests;

(vi) although the rates have been prescribed by the Government for all private Hospitals/Nursing Homes for being charged from Covid-19 patients but most of them are not abiding by the same;

(vii) the private Hospitals/Nursing Homes are blankly refusing to have availability of beds for Covid-19 patients inasmuch as the beds are being provided to only those who are either ready to pay higher charges or having some kind of influence. Resultantly, middle class, lower middle class and poor are worst hit;

(viii) most of the private hospitals are not providing cashless treatment to the patients having insurance cover, inasmuch as, some private hospitals even though they are approved for CGHS facilities are not accepting the patients under that head. Similarly, the private hospitals empanelled and approved for Covid-19 treatment under Ayushman Bharat Yojana are also not accepting the Covid patients and the patients from Below Poverty Line having BPL cards under Deendayal Antyodaya Upchar Yojana are also not being provided treatment under that scheme by approved Hospitals;

(ix) there are in the State, 51 District Hospitals; 84 Civil Hospitals and 330 Community Health Centres with 30 beds facility each; 1199 Primary Health Centres having 6 bed facility each but most of them, apart from having acute shortage of Medical and Para-Medical Staff, are ill- equipped to deal with the current crisis. As per the Annual Report of 2019-20, there are 3620 sanctioned posts of specialists, as against which nearly 80% of them (2855 posts) are vacant with only 765 presently working and there are 5097 posts of Health Officers, as against which only 3,589 are working and nearly 30% i.e. 1,508 posts are vacant;

(x) there is no system in place whereby it could be known as to how many normal beds, ICU beds and Ventilators are available in

Government and Private Hospitals and that the Covid Portal of the State, namely, "Sarthak" *(https:// sarthak.nhmmp. gov.in.)* is mostly not updated and therefore, does not provide the correct information;

(xi) every second and third home in cities, namely, Bhopal, Indore, Ujjain, Jabalpur and Gwalior has a Covid-19 patient but the correct number of patients are being suppressed inasmuch as the newspapers are widely reporting much higher number of deaths in the Districts of the State due to Coronavirus than what is officially declared by the District Administration which is corroborated by number of funerals taking place in the Cremation grounds as per the Corona Protocol;

(xii) the test report of RT-PCR samples is being received with delay of three to five days in most of the instances. If the patient in the meantime dies, dead body is handed over to the family members and the cremation in such cases is not being conducted as per the Corona Protocol. In some instances, even after the death of declared Covid-19 patients, the dead bodies are being allowed to be taken to home rather than being cremated/buried as per the standard Corona protocol, thus giving rise to spread of Coronavirus amongst the family members and others;

(xiii) as per the data given in W.P. No.8753/2021, ever since the onset of second wave of Covid-19 since February, 2021 till 13th April, 2021, almost 1,38,70,731 Covid-19 cases were detected in India out of which 3,53,632 cases have till date been traced in State of Madhya Pradesh, of which total 8,998 Covid-19 positive cases along with 14 deaths were reported in Madhya Pradesh on 13th April, 2021;

(xiv) not many effective steps are being taken by the State Government to check the citizens who are not wearing face masks and not maintaining social distance, which could be easily witnessed at the market places;

(xv) neither any containment zones are being declared nor any kind of barricading is being done and even the banners or posters are also not being affixed to warn people about the severity of the disease, as was a regular feature in first wave of Covid-19. There are no regular mobile sanitization units to spray the sanitizer in vulnerable places of townships and colonies as was a regular feature in the first wave of Covid-19;

(xvi) there is a crisis of availability of wood in all the funeral grounds and the electric crematoriums wherever they are situated, are mostly out of order;

(xvii) there are no beds available in Government as well as Private Hospitals in cities like Bhopal, Indore, Jabalpur and other places. ICU beds and ventilators are nowhere to be found. The private hospitals are taking exorbitant charges for ICU beds and Ventilators thereby exploiting the situation.

7. Learned *Amicus Curiae* and the learned counsel appearing for the petitioners and the intervenors have submitted that all the newspapers in the State of past ten days are replete with stories pointing out acute medical crisis and total lack of medical facilities and non-availability of Oxygen and Remdesivir injections throughout the State of Madhya Pradesh. The patients are being asked to bring their own Oxygen cylinders with them and manage the vials of Remdesivir on their own. It is submitted that there is demand of advance deposit of huge amount by the private Hospital/Nursing Homes. It is the duty of the Government to ensure that common man is not made to suffer due to non-availability of Oxygen and life saving drug like Remdesivir. The Government has miserably failed to ensure the availability of treatment to poor and needy, especially in semi-urban and rural areas thereby violating the right to life of the citizens enshrined in Article 21 of the Constitution of India. There is state of panic and fear amongst the people who are with every passing day becoming restless. All these circumstances are pointer towards disorganized health infrastructure of the State Government, which has miserably failed to manage this medical emergency despite the advance warning by World Health Organization (WHO) of approaching second wave. The State Government has utterly failed to cope up with the ongoing medical emergency inasmuch as there is huge communication gap and lack of coordination amongst various government functionaries. In fact, the entire State machinery has been caught off-guard and has been found lacking in its efforts to provide basic health care to the citizens.

8. Mr. Naman Nagrath, learned Senior Counsel appearing as *Amicus Curiae* has submitted that already this Court on 07.09.2020 directed the State Government to issue directions to every private Hospitals and Nursing Homes to display the rates for treatment of Covid-19 suspects/patients at their reception counters and give due publicity to the same. In fact, in the order dated 10.12.2020 it was clearly noted that the Commissioner, Health Services, Department of Public Health and Family Welfare has issued an order on 04.09.2020 that under no circumstances the charges of private Hospitals/Nursing Homes/Clinical establishments shall exceed by 40% of the rates communicated by them on or before 29.02.2020 including all expenses such as PPE Kits etc. The direction was also issued that this information should also be brought in the public domain by getting it repeatedly published in the daily newspapers having circulation in the respective districts after interval of every 15 days. Similar direction was issued by this Court on 07.04.2021. The State Government should therefore be required to

mandate all the private Hospitals/Nursing Homes/Clinics and Labs to charge only the notified rates, not only for RT-PCR, Rapid Antigen Tests, Chest CT/HRCT Scan but also all other hospital charges in that regard. All these directions earlier issued by this Court in the *suo motu* writ petition have regained significance in view of the current second wave of Covid-19 and therefore, the State Government should ensure strict compliance of all such directions including about the treatment of poor patients under Ayushman Bharat Yojana reserving 20% beds for Ayushman Bharat Yojana beneficiaries and increase the empanelment of more private hospitals under the said scheme. The State Government should ensure regular and continuous supply of Oxygen not only to the Government Hospitals but also to private hospitals, which are generally denying treatment to Covid-19 patients due to non-availability of Oxygen. Since the State is wholly dependent on supply of Liquid Oxygen from other States for its refueling plants employed for supply of Oxygen cylinders to the hospitals, it should initiate the process of setting up Liquid Oxygen Plant in the State of Madhya Pradesh. In the meantime, the State should maximise its efforts to procure Liquid Oxygen or filled Oxygen cylinders from other States by all means. The State Government must come forward to assist private hospitals in setting up their Oxygen-Concentration Units by providing them soft loan by involving leading Banks and Financial Institutions so that they become self-reliant.

9. Learned *Amicus Curiae* submitted that it has been informed on behalf of the State Government that the price of Remdesivir injection has been capped at Rs.3,500/- but such drug is being sold in the market at an exorbitant price inasmuch as many of the private hospitals are found charging Rs.5,400/- per vial for Remdesivir injection. The State Government should ensure the availability of Remdesivir injection and regulate its supply but such supply should be approved as per the prescription of the treating doctors of Covid-19 patients admitted in the hospitals and should not be denied at the discretion of the Patwari, Tehsildar or any other Administrative Officers. The State Government should be required to restore the facilities of number of Covid Care Centres (CCC), Dedicated Covid Health Centres (DCHC) and Dedicated Covid Hospitals (DCH), which it informed to this Court on 09.10.2020.

10. Mr. P.K. Kaurav, learned Advocate General, Mr. Pushpendra Yadav and Ms. Chhavi Bhardwaj, Managing Director of National Health Mission (MP) have presented the case of the State Government before this Court, which has been supplemented by a written note of submissions and future action plan on its behalf. The relevant extract of the said written note is reproduced as under:-

1. <u>Current Status of Covid in India and Madhya Pradesh and Trends for the last month:</u>

On 14th April, with the total cases 3.63 lacs, which is about 2.5% of national case load, recovered cases 3.09 lacs, the present active cases are 49,551 which constitutes about 13.6 % of total cases in MP and 3.2% of national active case load. The cumulative positivity rate is 5.3%, recovery rate is 85.2% and fatality rate is 1.2% while that for India is 5.3%, 88.9% and 1.2%, respectively. However, the weekly fatality rate for MP is only 0.5% while that for India is 1.3%.

The surge in cases were observed during the month of March and April' 2021. During the 1st, 2nd, 3rd and 4th week of March the average cases per day were 411, 564, 1019 and 1851, respectively. Similarly, Nationally, the cases were 18711, 25557, 43846, 62714. And during the current week the average per day cases in MP were 6477 and nationally 1,84 372. The positivity rate during the same period was 2.6%, 3.6%, 5.3% and 7.1%, respectively and nationally the positivity rate was 2.5%, 3.0%, 3.9% and 5.3%. During the current week the positivity rate is 16.4% and nationally 13%.

2. **Testing Capacity**

The testing capacity has been increased from 20,000 per day during the month of February' 2021 to 40,000 per day during April' 2021. Average per day testing during February was 15,228 which has increased to 39,563 during April' 2021. Rates for testing have been capped for private laboratories. Rs 700/- for RTPCR and Rs. 300/- for RAT.

3. Price Control and Regulating package rates for COVID treatment

3.1 All nursing homes and clinical establishments have been directed that treatment charges of COVID 19 patients availing treatments at their facilities, shall be as per the rate list (Schedule II and III of the Madhya Pradesh Upcharyagriha Tatha Rujopchar Sambandhi Sthapnaye (Registrikaran Tatha Anugyapan) Rules, 1997) communicated to the Chief Medical and Health Officer of the respective district in or on before 29th of February 2020. Under no circumstances the nursing home or clinical establishment's charges exceed by 40% of the rates communicated in or before 29th of February, 2020 including all expenses such as PPE Kits etc.

3.2 The testing charges for COVID-19 or pneumonia suspects/ patients at all private hospital/nursing homes/ diagnostic centers shall be limited to a maximum of Rs 3,000/- for Chest CT/HRCT scan.

3.3 The testing charges for COVID-19 or pneumonia suspects/ patients testing at all private hospital/nursing homes/

diagnostic centers shall be limited to a maximum as detailed below:-

S.No.	Test	Maximum Rate (INR)
1	ABG	600/-
2	D-Dimer	500/-
3	Procalcitonin	1000/-
4	CRP	200/-
5	Serum Ferritin	180/-
6	IL 6	1000/-

3.4 The Government has mandated the display of rate list of treatment, including treatment for COVID-19, at registration counter by Nursing Homes and Clinical Establishments in the state. Additionally, all private clinical establishments treating COVID patients are required to make available their package rates for treatment for upload at the state COVID portal -*www.sarthak. nhmmp.gov.in.* The information pertaining to contact numbers and package rates of COVID treatment the are available in public domain on the state COVID portal.

4. Availability of Oxygen

The current status of supply of medicinal oxygen is as below:

(In Metric Ton)

Supply of Medicinal Oxygen					
Date	**INOX Bhopal**	**INOX Indore**	**PRAX/ Inheart**	**ASU**	**TOTAL**
8/4/2021	75.47	65.53	75	48	264
9/4/2021	79	65	30	44	218
10/4/2021	56.64	52.75	55	55	219.39
11/4/2021	87.36	72.05	21.06	59.63	240.1
12/4/2021	85.92	79.91	37.689	66.24	269.759
13/4/2021	76	60	73.4	66.24	275.64
TOTAL	**460.39**	**395.24**	**292.149**	**339.11**	**1486.889**

Madhya Pradesh is largely dependent for its oxygen supply on sources located outside of the state. With an in-house production capacity of 66 MT (Metric Ton) by way of Air Separation Units (ASUs), MP sources a large part of its daily oxygen required from steel plants located outside of the state and suppliers who source it from diverse sources across the country. With an overall surge in demand and limited supply, the state is making all efforts to be able to meet its daily oxygen requirement. The State is expected to have a demand of 651 MT (Metric Ton) by 30th April, 2021 and is

continuously in talks with GoI regarding our future requirements of LMO (Liquid Medical Oxygen). The GOI has proposed Madhya Pradesh to procure around 747 MT from various sources of LMO (Liquid Medical Oxygen) per the table below -

S. No.	Name of the Supplier	Capacity MT (in Metric Ton)
01	LINDE SAIL BHILAI	72 MT
02	SAIL BHILAI	40 MT
03	GUJARAT HAZIRA	40 MT
04	GUJARAT KARJAN	40 MT
05	GUJARAT DAHEJ	40 MT
06	INOX MODINAGAR	40 MT
07	INOX BHIWADI	40 MT
08	INOX BOKARA	86 MT
09	LINDE JAMSHEDPUR	40 MT
10	JINDALSTEEL ODISHA	20 MT
11	LINDE ROURKELA	40 MT
12	LINDE KALIMNAGAR	40 MT
13	SAIL ROURKELA	21 MT
14	LINDE HALDIA	38 MT
15	LINDE SAIL DURGAPUR	30 MT
16	SAIL BUNPUR	20 MT
17	GUJARAT JAMNAGAR	100 MT
	TOTAL	**747 MT**

Additionally, the State has installed 5 PSA (Pressure Swing Absorption) oxygen generation plants and 3 more will be installed within a week in 8 different districts. The total capacity of these 8 PSA (Pressure Swing Absorption) plants amounts to 8 MT (Metric Ton). Furthermore, Public Works Department has also floated a tender for 13 more PSA (Pressure Swing Absorption) Oxygen plants of 600 LPM capacity each for 13 districts and another tender for 10 other districts will be floated shortly.

5. <u>Availability of Remdesivir -</u>

In accordance with AIIMS' guideline dated April 7, 2021 pertaining to the use of Remdesivir for COVID treatment, the state has initiated for supply of Remdesivir for COVID treatment across medical colleges and district hospitals in the state. Approximately 42000 injections have been supplied in the government sector as on April 14th.

In view of the shortage of Remdesivir in the private sector, state government has also facilitated the private sector by tying up with various suppliers for supply of approximately more than 39000

Remdesivir injections to private health institutions. The state government is also supporting private hospitals by making available part of the government supply from the stores of the district Chief Medical and Health Officer (CMHO) to private hospitals.

Of the total government supply being sourced by the state, approximately 50% is being made available to Government Medical Colleges and the remaining is being made available to the Chief Medical and Health Officer (CMHO) of every district. To support private health institutions, supply available to CMHO is being allotted to government and private facilities under the supervision and control of the District Collector. While the 7 private contracted facilities in Indore, Bhopal, Ujjain and Dewas are being issued Remdesivir free of cost along with the public facilities, other private facilities are being supported with Remdesivir at the purchase cost of Rs 1548 per injection from government supply.

6. <u>Current bed availability and planning for bed capacity:</u>

While Madhya Pradesh has a total of 19948 beds currently available at public health facilities and another 16756 beds are currently available at various private hospitals, going by the current surge in covid cases, the state has planned for expansion of isolation beds, oxygen supported beds and HDU/ICU beds at the 13 medical colleges, 51 District Hospitals, 84 Civil hospitals and 313 CHCs.

It is pertinent to mention here that as on 31st March 2020, 23 district hospitals in the state did not have a single ICU unit. In light of the Covid pandemic, the state government set up **585** ICU beds across 50 district hospitals in the state and **3700** Oxygen supported beds were also put in place by way of medical gas pipeline last year. In wake of the current surge the state plans to further extend the oxygen supported beds infrastructure at the District Hospitals, Civil Hospitals, and CHCs thereby increasing the numbers of oxygen supported beds from 7880 beds to 14770 in the public hospitals next one month. Similarly ICU/HDU beds at Government Medical Colleges are planned to be increased from 3258 beds at present to 4356 beds in the next one month. District administration is also actively engaging with the private hospitals to increase the bed capacity for covid patients at private hospitals.

Below is the current and planned status of beds - isolation beds, oxygen supported beds and ICU/HDU beds across public and private health facilities in the state. Planned bed capacity is basis a projected case load of one lakh active cases on 30th April, where 50% of the active cases continue to be in home isolation and the remaining occupy beds in public and private facilities.

Government	Status As on, 14-Apr-2021, 12:00 PM	
Bed Type	**Current**	**Planned (30-40 days)**
Isolation Beds	8810	25000
O2 Beds	7880	14770
HDU/ICU Beds	3258	4356
Total Govt Beds	**19948**	**44126**
Private		
Isolation Beds	3938	4435
O2 Beds	8965	9767
HDU/ICU Beds	3853	4091
Total Pvt Beds	**16756**	**18293**
Total Beds	**36704**	**62419**

3225 beds have been reserved for free of cost treatment of patients in private facilities by way of a service provider agreement between State government and the private facility. Government of Madhya Pradesh has setup Dedicated COVID Command and Control Centers in each of the 52 districts. The toll free number for this Covid Command and Control center is - (STD code of the District) - 1075. Citizens can directly call at this number to avail of information about bed availability in government and private health facilities. All Government and private health facilities are currently updating their bed occupancy twice a day on the SARTHAK portal (sarthak.nhmmp.gov.in) and this bed availability information is being provided to citizens from the District Covid Command and Control Centre. Further the contact details of nodal persons in all public and private hospitals as well as package rates for covid treatment in private facilities have been made available in the public domain on sarthak.nhmmp.gov.in

7. <u>Additional Human Resource Capacity</u>

In light of the COVID-19 pandemic,472 MBBS doctors who had completed internship from different medical colleges of Madhya Pradesh as on 31st March 2021 have been posted to District Hospitals and other public health facilities of the State. National Health Mission has additionally given sanctions to the District Health Societies to recruit and deploy additional human resource locally as follows:

Cadre	Additional Temporary HR Sanctioned
PGMO	93
MO	276
Ayush MO	1544
Staff Nurse	3007
Support staff/ Ward Boy	1024
Other Health Care Worker	538

Lab Technician	1741
ECG Technician	9
X-Ray Technician	7
Scientist	32
OT Technician	1
Radiographer	18
Lab attendant	13
ICU/Ventilator Technician	9
Pharmacist	127
Oxygen Technician	5
Data Entry Operator	399
Total	**8843**

8. <u>Ayushman Bharat "Niramayam"</u>

Ayushman Bharat Niramayam empanelled healthcare providers under the General Medicine (M2) specialty and having bed capacity of 50 or more have been directed that COVID 19 suspected and confirmed patients falling under Ayushman Bharat Niramayam beneficiary category shall not be denied COVID -19 treatment at healthcare provider's facility at prescribed rates. A minimum of 20% beds are to be reserved at all times for COVID-19 patients. The denial/diverting of COVID 19 patients is being treated as a violation inter alia Memorandum of Understanding, the Disaster Management Act, 2005, the Madhya Pradesh Public Health Act, 1949, the Madhya Pradesh Upcharyagriha Tatha Rujopchar Sambandhi Sthapnaye (Registrikaran Tatha Anugyapan) Adhiniyam, 1973, the Madhya Pradesh Atyavashyak Seva Sandharan Tatha Vichchinnata Nivaran Adhiniyam, 1979, the Madhya Pradesh Upcharyagriha Tatha Rujopchar Sambandhi Sthapnaye (Registrikaran Tatha Anugyapan) Rules, 1997 and the Madhya Pradesh Epidemic Diseases, COVID-19.

Currently, 770 Health Facilities across the State are empanelled under Ayushman Bharat 'Niramayam'. Out of the 770 Health Facilities, 320 are Private Hospitals. Every Ayushman Bharat empaneled hospital is required to reserve 20% of its available beds for treatment of COVID patients.

Last year, Government of Madhya Pradesh had temporarily relaxed the empanelment criteria for Ayushman Bharat in order to broad base the availability of Private Facilities for COVID-19 treatment. Consequently, 111 facilities were empanelled after the relaxation of empanelment norms. Presently, 16834 COVID-19 patients are being treated across Ayushman Bharat empanelled hospitals.

9. <u>COVID Vaccination Status till 15th April 2021:</u>

	1st Dose	2nd Dose	TOTAL
Health Care Worker	**4,27,498**	**3,11,417**	**7,38,915**
Front line Worker	**3,88,660**	**2,38,874**	**6,27,534**
Citizens- 45-59 Years	**27,78,561**	**40,418**	**28,18,979**
Citizens - 60+ Years	**28,14,863**	**1,29,587**	**29,44,450**
TOTAL DOSES ADMINISTERED	**64,09,582**	**7,20,296**	**71,29,878**

11. Mr. Shivendra Pandey, learned counsel appearing for Indian Medical Association and Mr. Shreyas Pandit, learned counsel appearing for the M.P. Nursing Home Association, submitted that howsoever the Government may assert that it is continuously making the Oxygen cylinders available to all the private hospitals in the State but the fact is that many private hospitals are struggling with the acute shortage of Oxygen throughout the State. Some of them may not be in a position to admit the patients infected with Coronavirus for reason of non-availability of Oxygen but when the attendants or family members of the patients are so informed, it results in law and order situation. Apart from Oxygen, there is acute shortage of availability of Remdesivir injection. Many of the private Hospitals/Nursing Homes are in negotiation with the Government authorities to increase their bed capacity by using casualty wards and even the labour rooms for treatment of Covid-19 patients. Even when the beds are not available, they do not refuse admission even if the patients have to be accommodated in the corridors. Learned counsel submitted that the State Government ought to consider either by itself or through the leading Banks/Financial Institutions for providing interest free loan or at the reasonable rate of interest, to major private hospitals, for setting up their own Air Separation Units, which may cost hardly between Rs.50.00 Lac to Rs.1.00 Crore but which takes only 5-7 days to set up such units. The State Government may also make an endeavour to engage the medical students who have recently passed out and have completed their clinical training. The private hospitals can also consider engaging such medical graduates even in their set up. It is contended that a joint meeting of the members of the Indian Medical Association and M.P. Nursing Home Association was convened on 14th April, 2021 and they have decided to honour the rates for treatment of Covid-19 patients fixed by the Government in terms of the order of the Government dated 04.09.2020, which provided that their charges should not exceed 40% of the rates communicated on or before 29.02.2020. The rates of treatment so prescribed by the State Government are being adhered to by the private Hospitals/Nursing Homes and they are displaying such rates on their reception counters prominently. Learned counsel further argued that the gravity of illness of Covid-19 patients

may vary from patient to patient. All Covid patients need not be prescribed same medicines inasmuch as they cannot be subjected to same kind of treatment. Therefore, the charges for critical patients may differ from those who may be having mild symptoms. Thus, there cannot be any uniformity with regard to charges/expenses of the treatment.

12. Mr. Jitendra Kumar Jain, learned Assistant Solicitor General for the respondent-Union of India submitted that the ICMR Laboratories in the State are conducting more than 13,000 RT-PCR tests per day. The Central Government has recently issued licences to five new pharmaceutical companies for manufacturing of Remdesivir and they are likely to commence the production shortly. Thus, there will be no shortage of Remdesivir.

13. We have given our thoughtful consideration to the submissions made by the learned counsel for the parties at the Bar.

14. Article 38, Article 39(e), Article 41 and Article 47 in Part-IV of the Constitution of India as well as the fundamental right guaranteed vide Article 21 of the Constitution of India deal with potent and substantive contents of the right to life which in its broad sweep also includes right to good health. The Supreme Court of India in catena of judgments has given dynamic interpretation to Article 21 of the Constitution of India thereby expanding the meaning of right to life to also include the right to health. Thus, the right to health forms an integral component of right to life enshrined under Article 21 of the Constitution of India. The right to health can be secured to the citizens only if the State provides adequate measures for their treatment, healthcare and takes their care by protecting them from calamities like Coronavirus. A reference in support of this proposition can be made to the judgments of Supreme Court in *Pt. Parmanand Katara vs. Union of India* (1989) 4 SCC 286; *Consumer Education and Research Centre vs. Union of India* (1995) 3 SCC 42; *Paschim Banga Khet Mazdoor Samity vs. State of West Bengal* (1996) 4 SCC 37; *M.C. Mittal vs. Union of India* (1999) 6 SCC 9 *and Murli S. Devda vs. Union of India* (2000) 8 SCC 765. The Supreme Court in all these cases has held that preservation of one's life is the necessary concomitant of the right to life enshrined under Article 21, fundamental in nature, secured, precious and inviolable.

15. Article 25 of the Universal Declaration of Human Rights, ratified by India, which is considered as having the force of customary international law declares that *"Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing, and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control".* Similarly, Article 12 of

the International Covenant on Economic, Social and Cultural Rights (ICESCR), which also has been ratified by India, details out the different facets of the right to health and provides that *"(1) The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health"* and that *"(2) The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: (a).....*; (b).....; *"(c)* ***the prevention, treatment and control of epidemic, endemic, occupational and other diseases*** *"* and *"(d) the creation of conditions which would assure to all medical service and medical attention in the event of sickness'".* The Protection of Human Rights Act, 1993 recognizes all the above conventions as part of human rights law, therefore above referred to international human rights norms, as contained in the Conventions, which have been ratified by India, are binding on India to the extent they are not inconsistent with the domestic law norms. Section 2(d) of the Act of 1993 (supra) defines "human rights" to mean "the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India". In view of above, it must be held that right to health and medical care is one of the facets enshrined under Article 21 of the Constitution of India.

16. The Supreme Court in *Association of Medical Superspeciality Aspirants and Residents and others v. Union of India and others,* (2019) 8 SCC 607 with regard to effect of ratification of the aforementioned declaration/ covenants by the country, made the following observations in para-32 of the judgment:-

> "32. The Universal Declaration of Human Rights (UDHR) recorded in the Preamble its recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family as the foundation of freedom, justice and peace. The International Covenant on Economic, Social and Cultural Rights (ICESCR) recognizes the right of every person to the enjoyment of the highest attainable standard of physical and mental health. ICESCR mandates the States Parties to achieve full realization of the aforementioned right through the creation of conditions which would assure to all, medical service and medical attention in the event of sickness, inter alia."

17. The Supreme Court in *Pt. Parmanand Katara vs. Union of India,* (1989) 4 SCC 286 has recognised the obligation of the Government to preserve life. In the said case, the victim of a scooter accident was denied treatment as the hospital did not attend him and told that he be taken to another hospital, which was authorised to handle medico-legal cases. The failure to receive treatment, eventually led to victim's death. While interpreting the ambit of the right to life under Article 21 of the Constitution, the Supreme held that *"Article 21 of the Constitution casts the obligation on the State to preserve life..... The obligation being total, absolute and*

paramount, laws of procedure whether in statute or otherwise, which would interfere with the discharge of this obligation cannot be sustained and must, therefore, give way'"

18. The Supreme Court in *Paschim Banga Khet Mazdoor Samiti vs. State of West Bengal,* (1996) 4 SCC 37 dealing with a case of member of the petitioner Samiti, who suffered a brain injury after falling from train and was denied treatment at several hospitals due to lack of expertise and non-availability of bed was forced to avail treatment at a private hospital. The Supreme Court way back in the year 1996 made certain observations which continue to be relevant even for the present purpose. While dealing with a claim of compensation and the expenses incurred, the Supreme Court in that case further observed that the obligation to provide medical care was an obligation of welfare State and in para 9 of the report held that *"The Constitution envisages the establishment of a welfare State at the federal level as well as State level. In a welfare State the primary duty of the Government is to secure the welfare of the people. Providing adequate medical facilities for the people is an essential part of the obligation undertaken by the Government in a welfare State. The government discharges this obligation by running hospitals and health centres which provide medical care to the person seeking to avail these facilities. Article 21 imposes an obligation on the State to safeguard the right to life of every person. Preservation of human life is thus of paramount importance. The government hospitals run by the State and the medical officers employed therein are duty-bound to extend medical assistance for preserving human life. Failure on the part of a government hospital to provide timely medical treatment to a person in need of such treatment results in violation of his right to life guaranteed under Article 21. "*.....Their Lordships then in para 16 of the report further held that *"It is no doubt true that financial resources are needed for the providing these facilities. But at the same time it cannot be ignored that it is the constitutional obligation of the State to provide adequate medical services to the people. Whatever is necessary for this purpose has to be done. In the context of the constitutional obligation to provide free legal aid to a poor accused this Court has held that the State cannot avoid its constitutional obligation in that regard on account of financial constraints.... "*

19. The Supreme Court in *Devika Vishwas vs. Union of India,* (2016) 10 SCC 726 while reiterating the settled law held that "right to health" is a facet of the "right to life" guaranteed vide Article 21 of the Constitution. The Court in paras 107, 108 and 109 held as under:-

> "107. It is well established that the right to life under Article 21 of the Constitution includes the right to lead a dignified and meaningful life and the right to health is an integral facet of this right. In **CESC Ltd. V. Subhash Chandra Bose, (1992) 1 SCC 441** dealing with the right to health of workers, it was noted that the right to health must be considered

> an aspect of social justice informed by not only Article 21 of the Constitution, but also the Directive Principles of State Policy and international covenants to which India is a party. Similarly, the bare minimum obligations of the State to ensure the preservation of the right to life and health were enunciated in Paschim Banga Khet Mazdoor Samity v. State of W.B.
>
> 108. **In Bandhua Mukti Morcha v. Union of India, (1984) 3 SCC 161** this Court underlined the obligation of the State to ensure that the fundamental rights of weaker sections of society are not exploited owing to their position in society.
>
> 109. That the right to health is an integral part of the right to life does not need any repetition."

20. The Supreme Court in the case of *Union of India Vs. Moolchand Kharaiti Ram Trust* (2018) 8 SCC 321 held as under:-

> "65. The State has to ensure the basic necessities like food, nutrition, medical assistance, hygiene etc. and contribute to the improvement of health. Right to life includes right to health as observed In **State of Punjab v. Mohinder Singh Chawla** (1997) 2 SCC 83. Right to life and personal liberty under Article 21 of the Constitution also includes right of patients to be treated with dignity as observed by this Court in **Balram Prasad v. Kunal Saha** (2014) 1 SCC 384. Right to health i.e.right to live in a clean, hygienic and safe environment is a right under Article 21 of the Constitution as observed in **Occupational Health and Safety Association v. Union of India** (2014) 3 SCC 547=AIR 2014 SC 1469. The concept of emergency medical aid has been discussed by this Court in **Pt. Parmanand Katara v. Union of India** (1989) 4 SCC 286. In **Paschim Banga Khet Mazdoor Samity and others v. State of W.B.** (1996) 4 SCC 37, right to medical treatment has been extended to prisoners also."

21. The Constitution Bench of the Supreme Court in *Navtej Singh Johar and others Vs. Union of India* (2018) 10 SCC 1, upon survey of previous case law held that right to health and health care is one of the facets of right to life under Article 21 of the Constitution of India. It was held that *"the right to life is meaningless unless accompanied by the guarantee of certain concomitant rights including, but not limited to, the right of health. The right of health is understood to be indispensable to a life of dignity and well-being, and includes, for instance, the right of emergency medical care and the right to the maintenance and improvement of public health"*. (See para 483 of the report).

22. The Supreme Court in *Association of Medical Superspeciality Aspirants and Residents* (supra) held that the primary duty of the State is to "provide all facilities to make right of a citizen to secure his health meaningful." The relevant

discussion is to be found in paras 25 and 26 of the judgment, which are reproduced hereunder:-

> "25. It is for the State to secure health to its citizens as its primary duty. No doubt the Government is rendering this obligation by opening Government hospitals and health centers, but in order to make it meaningful, it has to be within the reach of its people, as far as possible, to reduce the queue of waiting lists, and it has to provide all facilities to employ best of talents and tone up its administration to give effective contribution, which is also the duty of the Government.
>
> 26. Right to health is integral to the right to life. Government has a constitutional obligation to provide health facilities 21. The fundamental right to life which is the most precious human right and which forms the ark of all other rights must therefore be interpreted in a broad and expansive spirit so as to invest it with significance and vitality which may endure for years to come and enhance the dignity of the individual and the worth of the human person. The right to life enshrined in Article 21 cannot be restricted to mere animal existence. It means something much more than just physical survival. The right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter, and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings. Every act which offends against or impairs human dignity would constitute deprivation pro tanto of this right to live and the restriction would have to be in accordance with reasonable, fair and just procedure established by law which stands the test of other fundamental rights."

23. The action plan produced by the State Government before this Court clearly indicates that apart from having an in-house production capacity of 66 Metric Ton by way of Air Separation Units, it has now swung into action to utilize all the resources at its command for arranging the Oxygen to procure 747 Metric Ton of Liquid Medical Oxygen from Steel Plants located in different parts of the country with the assistance from the Government of India to meet the expected demand of 651 Metric Ton by 30th April, 2021. It has installed 5 Pressure Swing Absorption (PSA) Oxygen Generation Plants and is likely to install three more, thus catering to the need of eight different districts to the extent of 5 Metric Ton. The State Government has also floated tenders for 13 more Pressure Swing Absorption Oxygen Plants of 600 LPM capacity for 13 districts and has decided to float another tender for 10 other districts shortly. According to the submission made on behalf of the State, 42,000 injections of Remdesivir have been supplied in government sector as on 14.04.2021 and that it is in negotiation with different manufacturers for supply of more than 39,000 Remdesivir injections to the private Health Care Institutions. Apart from this, the State Government has

promised to ensure supply of Remdesivir injections to the private hospitals from the stores of the district Chief Medical & Health Officers. Of the total supply sourced by the State Government, approximately 50% is being made available to the Government Medical Colleges and remaining 50% is being given to the Chief Medical & Health Officer of every district out of which supply of Remdesivir is also made to the private hospitals under the supervision and control of the District Collector. According to the State, there is availability of 19,948 beds in the Government Hospitals (which includes 7880 Oxygen beds and 3258 ICU beds) and 16,756 beds in various private hospitals (which includes 8965 Oxygen beds and 3853 ICU beds), thus totaling to 36,704 beds whereas it is planning to increase 44,126 beds in Government Hospitals (which would include 14,770 Oxygen beds and 4356 ICU beds) and 18,293 beds in private hospitals (which would include 9767 Oxygen beds and 4091 ICU beds) by next 30-40 days. Apart from this, the State Government has set up Covid Command and Control Centres in each of the 52 districts with 1075 as the toll free number and has submitted that it keeps updating bed occupancy and non-availability twice every day on the Sarthak portal. It has engaged 8843 additional human resource locally, which includes 472 MBBS doctors, who have completed their internships as on 31.03.2021, 93 PGMOs and 276 MOs. It is trying to increase the coverage of Ayushman Bharat Niramayam Yojana to bring many more private hospitals under its umbrella. It has so far administered first dose of Covid vaccine to 64,09,582 and second dose to 7,20,296 citizens. The work undertaken in the State Government within the past month or so is commendable and its preparation for the future is also quite impressive, however, efforts that it is making should also reflect on ground and benefit thereof should reach the common man. It therefore needs to work hard towards that aim and goal.

24. Although it is true that in the past few days there has been a spate of new reports putting all kind of blames on the Private Hospitals and Private Nursing Homes, but at the same time, one should not lose sight of the fact that there are more than 6000 Private Hospitals and Private Nursing Homes in the State and therefore it is of utmost importance and necessity that support and cooperation of the private sector to combat the menace of Covid-19 is enlisted which is why the Ministry of Health and Family Welfare, Government of India recognized the need and importance of seeking their support and for that purpose has issued the "Guidelines for notifying Covid-19 affected persons by Private Institutions" which can be found on the website of the Ministry. The Indian Council of Medical Research has also approved hundreds of the private laboratories to test the suspects/patients of Covid-19. Need of the hour in this time of crisis therefore is to have best of cooperation and coordination with the Hospitals and Nursing Homes in the private sector and seek their support for timely treatment of the Covid-19 patients so as to save their lives. The State Government can in that behalf even

invoke the Epidemic Diseases Act, 1897 and Disaster Management Act, 2005 to the extent necessary.

25. Coronavirus, if not treated timely, may in certain cases prove a deadly disease, especially for those citizens who suffer from different kind of morbidities and are elderly in age. This has had catastrophic effect on the citizens of the country. It has befallen on the countrymen unpredictably more than a year ago. The right of the citizen to adequate healthcare emanates from the dignity and sanctity of the human life which belongs to all of them. Health, besides being a fundamental right, is a basic human right, which no popular government can afford to negate. Health has its own prerequisites of social justice and equality and that it should be accessible to all. It includes the ability to obtain all kind of healthcare services including prevention, diagnosis, treatment and management of diseases, management of health disorders, diseases and illness as also the management of other health impacting conditions. Such health care should not only be accessible but also be conveniently affordable to all the citizens. The core obligation of the State in securing the right to life to all its citizens is non-negotiable. Article 21 of the Constitution of India in this regard clearly casts a duty on the State to take whatever steps are necessary in securing such rights to access to health facilities to the citizens. It also includes an obligation on the State in ensuring access to all the citizens inflicted with disease of Coronavirus with life saving means and drugs such as Oxygen and Remdesivir in this case.

26. Even though we may make it clear that we are not experts in the field of Medicine but at the same time we are also cognizant of the fact that the State of Madhya Pradesh in past few days has faced a crisis like situation never seen before where a lot of hue and cry by the people in different forms is being witnessed when their near and dear ones are infected with Coronavirus and some of them lose their life. The newspapers of the State during last week or so, are replete with the reports of incidents where either the patients are allegedly not being admitted or are being allegedly exploited by exorbitant charges by the private hospitals. The Remdesivir injection is being sold in the black-market and certain arrests have also been made. The attendants and the family members of the Covid patients are being found complaining about non-availability of Oxygen, Remdesivir and beds in the hospitals. Non-availability of ICU beds and Ventilators is also a common complaint. We are inclined to believe that these news items may have reported only part truth and part emotions of those who have gone through such agony. But even if only part of it is true, the situation is really very grim. This is a scenario which is emerging from major cities like Bhopal, Indore, Gwalior and Jabalpur. One can easily imagine the situation of district headquarters, sub-divisions and rural areas where the disease of Coronavirus is said to have made inroads. Ordinarily these matters lie in the domain of the Executive, who has the responsibility to resolve all the identified problematic issues. However,

despite being cognizant of its jurisdictional limitations, this Court, in an extraordinary situation like the present one, when they are brought to its notice, cannot just play a silent spectator. In this scenario, the Court has the responsibility to see that the faith of the people in the system is not eroded and if erosion to some extent has taken place, is restored. Towards that end, the Court can play the role of a catalyst by reminding the State of its duties, for reassuring the people to continue to have faith in the system so as to revive their confidence.

27. In view of the above discussion, we deem it appropriate to issue the following directions to the State Government:-

(i) The State Government shall ensure continuous and regular supply of Oxygen and Remdesivir not only to all the Government Hospitals, City Hospitals, District Hospitals but also to the Private Hospitals/Nursing Homes, which may give Indent of their requirement of Oxygen as well as Remdesivir in advance, depending on the load of the patients and their condition, as per the modalities decided by the State, to the Collector/Chief Medical & Health Officer concerned and/or Officer nominated by the State;

(ii) the State Government shall, if it has already not done so, consider immediately reactivating 262 hospitals Covid Care Centres (CCC), 62 Dedicated Covid Health Centre (DCHC) and 16 Dedicated Covid Hospital (DCH) as per the details furnished to this Court in its order dated 09.10.2020;

(iii) the State Government shall consider strengthening/ augmenting all the District Hospitals and City Hospitals, which generally cater to the medical needs of middle class/lower middle class and poor/below poverty line families, by providing them necessary equipments and the required quantity of Oxygen, Remdesivir injections and other requisite medicines so that considering the spread of Coronavirus, focus of the Covid-19 patients does not entirely remains on major cities like Bhopal, Indore, Jabalpur and Gwalior where due to huge population, the medical facilities are already under immense pressure and rush of the Covid patients to these cities is dissuaded;

(iv) the State Government shall ensure that the District Collectors and Chief Medical & Health Officers in every District shall periodically hold meetings with the Superintendents/ Directors/ Head/Representatives of all Government Hospitals, Private Hospitals/Nursing Homes and Diagnostic Centres/Labs to take stock of the day to day situation of the number of patients, availability of normal beds, ICU beds and Ventilators and also

as per the requirement consider enhancing the capacity to cater to the need of a given place;

(v) the State Government shall, if it has not already notified the rates, fix the rates for being charged by the private Hospitals/ Nursing Homes and private Pathological Labs/ Diagnostic Centres for treatment/tests in consonance with its earlier order dated 04.09.2020, 25.03.2021 and 05.04.2021 by indicating capping of such charges and should ensure that these rates are adhered to by them. In doing so, the State Government should also take note of the concerns of the private Hospitals/Nursing Homes with regard to differentiation of charges based upon seriousness of illness of patients;

(vi) the State Government shall in consultation with representatives of Indian Medical Association and M.P. Nursing Home Association require the private Hospitals/Nursing Homes to refrain themselves from demanding hefty amount as advance deposit for starting treatment of Covid-19 patients;

(vii) the State Government shall ensure displaying of data with regard to availability of normal beds, ICU beds and Ventilators on its Sarthak portal *(https://sarthak.nhmmp.gov.in)* in all the Government Hospitals and Private Hospitals/ Nursing Homes on real time basis. The Chief Medical & Health Officers of the districts concerned should keep a regular watch over such availability and randomly cross-check the same to verify its correctness. On the basis of regular vigil about the availability of normal beds, ICU beds and Ventilators, the District Collector, in consultation with the Chief Medical & Health Officers, should take day to day decision for increase in the number of such beds by procuring additional infrastructure/ hardware/ machines etc. from the State Government to ensure continuous availability of medical health care to the increasing number of Covid patients;

(viii) the State Government should require all the private Hospitals/ Nursing Homes, Chemists/Medical Shops to display the rates of Remdesivir per vial, separately for generic and branded injections, and all of them should be mandated not to charge more than the prescribed rates;

(ix) even though the State Government may regulate the supply of Remdesivir injections and other life saving drugs but the process adopted for this purpose should be so hassle free and should not be cumbersome as to ensure the supply of the drug in such a way that time limit from requisition by the treating doctors and supply of medicines does not exceed an hour;

(x) the State Government, through its representatives, preferably the District Collectors and the Chief Medical & Health Officers shall have regular consultation with the Superintendents/ Directors/Heads of the Government Hospitals and leading private Hospitals/Nursing Homes to resolve the day-to-day problems faced not only by the patients but also by such private Hospitals/Nursing Homes, either by physical or virtual mode;

(xi) the State Government should give due publicity to the **Toll Free Number 1075** (with the STD code number of respective districts) of its Covid Command and Control Centres so that the Covid patients and their family members/attendants having any grievance with any government or private hospital, may immediately lodge their complaint with such Centres. In that event, expeditious remedial action should be taken to redress the grievances by knowing the stand of both the parties;

(xii) the State Government should by taking over the buildings of government and private schools/colleges, Training Centres, Marriage Halls, Hotels and Stadiums etc. wherever needed, set up more number of Covid Care Centres (CCC), Dedicated Covid Health Centres (DCHC) and Dedicated Covid Hospitals (DCH), either by itself or by involving the private hospitals or reputed NGOs;

(xiii) the State Government should take steps to setup more number of Electric Crematoriums, in at-least big cities of the State, and get the Electric Crematoriums repaired, wherever they have gone out of order;

(xiv) the RT-PCR and Rapid Antigen Tests shall be conducted by the Government Laboratories as well as duly approved private Pathological Labs/Diagnostic Centres. The State should consider increasing per day testing number of Covid infected persons for their early detection so as to prevent further spread of Coronavirus. Test reports should be provided to concerned patients positively within 36 hours from the time of collection of sample;

(xv) the State Government ought to consider the suggestions made on behalf of Indian Medical Association and M.P. Nursing Home Association for providing them soft loan to set up their own Air Separation Units so that some of them may become self-reliant with regard to their requirement of Oxygen;

(xvi) the State Government should work out the modalities for ensuring that patients from Below Poverty Line families having BPL Cards under Deendayal Antyodaya Upchar Yojana and those having Ayushman Cards and CGHS coverage facilities

are not dishonoured by the Hospitals/Nursing Homes if they are approved for their treatment;

(xvii) in **W.P. No.8753/2021** purportedly based on the Annual Report 2019-2020 it has been asserted that as against 3620 sanctioned posts of specialists, only 765 are presently working and nearly 2855 are vacant. Moreover, as against 5097 posts of Health Officers, only 3,589 are working and 1,508 posts are vacant. In this respect, the State Government should place on record correct data with regard to number of sanctioned posts and working strength of Senior specialists, Specialists, Medical Officers, Health Officers, PGMOs, Ayush Medical Officers, Staff Nurse, Support Staff/Ward Boy, Other Health Care Workers, Lab Technicians, ECG Technicians, X-ray Technicians, Scientists, OT Technicians, Radiographers, Lab Attendants, ICU/Ventilator Technicians, Pharmacists, and Oxygen Technicians etc., within a period of 15 days. If the furnished data are correct, such huge vacancy position in the Government Hospitals, City Hospitals and District Hospitals poorly reflects on the health care system of the State. The State Government ought to therefore consider engaging the Medical Officers on emergent and short term basis on the basis of walk-in interviews by issuing advertisement for short duration so as to cater to the emergent requirements of Districts & City Hospitals and Primary Health Centres (PHCs) and Community Health Centres (CHCs);

(xviii) looking to the scarcity of adequate number of staff in the emergent situation, the State Government should consider reappointing those Medical Officers, Para Medical and Nursing Staff, who have retired during past two to three years, to cope up with the ongoing crisis; and

(xix) all the hospitals whether government or private, shall not refuse to attend the patients suffering from other serious ailments and provide them timely treatment depending on the seriousness of the ailments.

28. Apart from Madhya Pradesh, this Court can also take judicial cognizance of the fact that similar problem with regard to scarcity of Oxygen and Remdesivir is being faced by several other States. This being a national calamity and country-wide problem, the Central Government should consider stepping in to arrange the Oxygen firstly, by diverting the available stock of Liquid Medical Oxygen from the Steel Plants and other industries located in different parts of the country and secondly, if that is not sufficient, by importing the Oxygen. The Central Government should also consider to step in to ensure increase in the production of Remdesivir and till such time it is not done, it should consider procuring the

Remdesivir by importing it so that by the time the peak of Coronavirus is reached, Oxygen and Remdesivir both remain available to the affected persons in sufficient quantity, to tide over the crisis.

29. In view of the aforesaid, **Interlocutory Application Nos.4346/2021, 4347/2021** and **I.A. No.4349/2021** filed in W.P. No.8914/2020 are **disposed of.** Similarly, **W.P. No.8696/2020, W.P. No.14805/2020, W.P. No.2513/2021 & W.P. No.8753/2021** are also **disposed of** in terms indicated hereinabove. No order as to costs.

30. Action taken report/progress report on the basis of the aforesaid directions shall be filed by the respondents-State, on or before the next date of hearing in *Suo Motu* **Writ Petition No.8914/2020**, which shall come up again for further consideration along with W.P. No.20889/2020, on **10.05.2021.**

Order accordingly

I.L.R. [2021] M.P. 727
MISCELLANEOUS PETITION
Before Mr. Justice G.S. Ahluwalia

MP No. 2692/2020 (Gwalior) decided on 16 February, 2021

RANJIT @ BHAIYU MOHITE …Petitioner

Vs.

SMT. NANDITA SINGH & ors. …Respondents

***A. Land Revenue Code, M.P. (20 of 1959), Section 110 & 178(1) –Mutation on Ground of "Will" – Acquisition of Right & Question of Title – Jurisdiction* – Held – "Acquisition of right" is a crucial aspect to be kept in mind while deciding application u/S 110 of Code – Question of determination of title and adjudication of correctness and genuineness of "Will" is beyond jurisdiction of revenue authorities – It has to be adjudicated by Civil Court – Impugned orders set aside – Petition disposed. (Paras 14, 23, 29, 31 & 32)**

क. भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 110 व 178(1) – ''वसीयत'' के आधार पर नामांतरण – अधिकार का अर्जन व हक का प्रश्न – अधिकारिता – अभिनिर्धारित – ''अधिकार का अर्जन'', संहिता की धारा 110 के अंतर्गत आवेदन का विनिश्चय करते समय ध्यान में रखे जाने वाला एक निर्णायक पहलू है – हक के अवधारण का प्रश्न तथा ''वसीयत'' की सत्यता और वास्तविकता का न्यायनिर्णयन राजस्व प्राधिकारियों की अधिकारिता से परे है – सिविल न्यायालय द्वारा इसका न्यायनिर्णयन किया जाना चाहिए – आक्षेपित आदेश अपास्त – याचिका निराकृत।

***B. Land Revenue Code, M.P. (20 of 1959), Section 31 & 178(1) – "Any Proceedings" – Interpretation* – Held – Words "any proceedings" in**

Section 31 would not include any proceedings involving the question of title of parties. (Para 23)

ख. भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 31 व 178(1) – ''कोई भी कार्यवाहियां'' – निर्वचन – अभिनिर्धारित – धारा 31 में शब्द ''कोई भी कार्यवाहियों'' में ऐसी कोई भी कार्यवाहियां शामिल नहीं होगी जिसमें पक्षकारों के हक का प्रश्न अंतर्ग्रस्त हो।

***C. Constitution – Article 227 and Land Revenue Code, M.P. (20 of 1959), Section 110 – Scope & Jurisdiction* – Held – If revenue authorities have passed orders beyond jurisdiction, this Court will have jurisdiction to set aside the same under Article 227 of Constitution – Further, order passed by Tehsildar was without jurisdiction and thus a nullity – Any order which is a nullity can be challenged in collateral proceedings. (Para 11 & 29)**

ग. संविधान – अनुच्छेद 227 एवं भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 110 – व्याप्ति व अधिकारिता – अभिनिर्धारित – यदि राजस्व प्राधिकारियों ने अधिकारिता से परे आदेश पारित किये हैं, इस न्यायालय को संविधान के अनुच्छेद 227 के अंतर्गत उक्त को अपास्त करने की अधिकारिता होगी – इसके अतिरिक्त, तहसीलदार द्वारा पारित आदेश बिना अधिकारिता का था तथा इसलिए अकृत है – ऐसे किसी भी आदेश को जो कि अकृत है, सांपार्श्विक कार्यवाहियों में चुनौती दी जा सकती है।

***D. Will – Burden of Proof* – Held – Burden of proof is on the propounder of "Will" – Even if "Will" is not challenged by anybody, still the propounder of will has to discharge his burden – No decree can be passed even by Civil Court merely on ground that respondents have chosen not to appear before it or have failed to file their written statement. (Para 26)**

घ. वसीयत – सबूत का भार – अभिनिर्धारित – सबूत का भार ''वसीयतकर्ता'' पर होता है – यद्यपि किसी के द्वारा वसीयत को चुनौती नहीं दी गई है, फिर भी वसीयतकर्ता को उसके भार का उन्मोचन करना होगा – यहां तक कि सिविल न्यायालय द्वारा भी मात्र इस आधार पर कोई डिक्री पारित नहीं की जा सकती कि प्रत्यर्थीगण ने उसके सामने उपस्थित नहीं होना चुना है या वे उनका लिखित कथन प्रस्तुत करने में विफल रहे हैं।

Cases referred :

(2002) 1 SCC 319, MP No. 3281/2019 order passed on 27.08.2019.

Santosh Agrawal, for the petitioner.
Deepak Khot, for the respondent No. 1.
None, for the respondent Nos. 2 & 3.
CP Singh, P.L. for the respondent No. 4/State.

O R D E R

G.S. AHLUWALIA, J. :- Since the contesting party is the respondent No.1, therefore, the case is heard finally.

This miscellaneous petition under Article 227 of Constitution of India has been filed against the order dated 10/10/2002 passed by Tahsildar, Tahsil Gwalior in Case No.89/01-02/A-6, order dated 07/12/2018 passed by SDO, Lashkar, District Gwalior in Case No.68/2016-17/Appeal and order dated 10/06/2020 passed by Additional Commissioner, Gwalior Division, Gwalior in Case No. 109/18-19/Appeal.

2. The necessary facts for disposal of the present petition in short are that the respondent no.1 filed an application under Section 110 of MPLR Code before the Tahsildar for mutation of her name on the basis of Will purportedly executed by Vijay Singh Rao Mohite, son of Late Shankar Rao Mohite, who was also known as "Vijay Singh Rao Ghorpade" in respect of Survey Nos.18, 19, 22, 23, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 162, 163, 164, 165, 166, 167, 168, 169, 173, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188 and 189, total area 49 bigha 6 biswa situated in Village Ghatampur, Tahsil and District Gwalior.

3. It is the case of the respondent No.1 that she was brought up by the testator when she was 10 years old and her marriage was also performed by the testator and out of love and affection, the testator had executed an unregistered "Will" on 04/04/2002. Although the order sheets of the Tahsildar, Tahsil Gwalior have not been placed on record, but it appears from the order dated 10/10/2002 passed by Tahsildar, Tahsil Gwalior (Annexure P3) that a public notice was issued but no objection was received from anybody. Accordingly, the respondent no.1 examined Aditya Patankar and Govinddas Bansal who are the attesting witnesses of the unregistered "Will" (Annexure P5). The statements of Patwari were also recorded by the Tahsildar, who stated that the above-mentioned survey numbers are recorded in the name of Vijay Singh Rao Mohite, in the *Khasra Panchshala* and accordingly, the Tahsildar, Tahsil Gwalior by order dated 10/10/2002 directed for mutation of the name of respondent no.1 on the basis of unregistered "Will" purportedly executed by Vijay Singh Rao Mohite.

4. Being aggrieved by the order of mutation, the petitioner preferred an appeal along with an application for condonation of delay which was registered as Case No.68/2016-17/Appeal. By the order dated 07/12/2018 passed by SDO, Lashkar, District Gwalior, the appeal filed by the petitioner was dismissed as barred by time as well as was also dismissed on merits.

5. Being aggrieved by the order passed by the SDO, Lashkar, District Gwalior, the petitioner preferred an appeal before the Additional Commissioner, Gwalior Division, Gwalior which was registered as Case No.109/2018-19/ Appeal, which too has been dismissed after relying upon the unregistered "Will" relied upon by the respondent No.1.

6. Challenging the orders passed by the authorities below, it is submitted by the Counsel for the petitioner that the revenue authorities are not competent to adjudicate the correctness and genuineness of "Will" and thus, the mutation of the name of the respondent No.1 on the basis of "Will" was without jurisdiction. It is further submitted that even otherwise, it is well-established principle of law that the propounder of "Will" has to remove all suspicious circumstances which are attached to a "Will" and if the evidence led by the respondent No.1 is considered, then it is clear that none of the witnesses had stated that who had got the "Will" typed and whether the "Will" was got typed on the instructions of the testator and whether the "Will" was read over to the testator before signing the same or the testator had himself read that "Will". Even the scribe of the unregistered "Will" was not examined. Accordingly, it is submitted that even otherwise, the "Will" was not proved by the respondent no.1 and, therefore, the Tahsildar should not have mutated the name of the respondent no.1 on the basis of "Will". It is further submitted that the respondent No.1 is not related to the testator in any manner. In the application which was filed under Section 110 of MPLR Code, it was nowhere mentioned as to how the respondent no.1 is the legal heir of the testator. It is merely mentioned that the testator had died issue-less and since the respondent no.1 had looked after the testator and it was a testator, who had arranged for marriage of the respondent no.1, therefore, the respondent no.1 is the legal heir. It is submitted that in the application which was filed under Section 110 of MPLR Code, it is nowhere mentioned that the respondent no.1 was adopted by the testator and in absence of any adoption deed, the respondent no.1 cannot be treated as legal heir of the testator and, therefore, even otherwise, the name of the respondent no.1 was not liable to be mutated in the revenue record.

7. *Per contra,* justifying the order of mutation passed by the authorities below, it is submitted by the Counsel for the petitioner that the respondent no.1 has examined both the attesting witnesses and who have specifically proved that "Will", was signed by the testator in their presence and they had also signed the "Will" in the presence of the testator and, therefore, it is submitted that the "Will" was duly proved by the respondent no.1. It is further submitted that from the "Will", it is clear that the testator had claimed that the mother of the respondent no.1 was residing with him as his wife and after the marriage, the mother of the respondent no.1 also brought the respondent no.1 to the house of the testator and the marriage of the respondent No.1 was performed by the testator and, therefore, the "Will" was executed in her favour. It is further submitted that under Section

110 of MPLR Code, the Tahsildar is competent to adjudicate as to whether the parties have acquired any title or not and, therefore, the Tahsildar or the revenue authorities are competent and have jurisdiction to adjudicate the correctness and genuineness of a "Will". The Counsel for the petitioner has also relied upon the judgment passed by the Supreme Court in the case of *Ouseph Mathai and Others vs. M. Abdul Khadir,* reported in (2002) 1 SCC 319 and submitted that this Court in exercise of power under Article 227 of Constitution of India should not interfere with the concurrent findings of fact recorded by the authorities below.

8. Heard the learned Counsel for the parties.

9. So far as the jurisdiction of this Court to test the correctness of the orders passed by the Tribunals is concerned, the answer lies in the judgment relied upon by the Counsel for the respondent no.1 himself.

10. The Supreme Court in the case of *Ouseph Mathai* (supra) has held as under:-

> "4..... In fact power under this Article casts a duty upon the High Court to keep the inferior courts and tribunals within the limits of their authority and that they do not cross the limits, ensuring the performance of duties by such courts and tribunals in accordance with law conferring powers within the ambit of the enactments creating such courts and tribunals. Only wrong decisions may not be a ground for the exercise of jurisdiction under this Article unless the wrong is referable to grave dereliction of duty and flagrant abuse of power by the subordinate courts and tribunals resulting in grave injustice to any party."

11. One of the contentions of the Counsel for the petitioner is that the revenue authorities do not have any jurisdiction to entertain the application under Section 110 of MPLR Code on the basis of "Will". If this argument is answered in affirmative, then it would be clear that the authorities had acted beyond their jurisdiction and thus, this Court will have a jurisdiction to set aside the orders passed by the authorities while exercising its power under Article 227 of Constitution of India.

12. It is the submission of the Counsel for the respondent No.1 that Section 110 of MPLRC Code gives the jurisdiction to the Tahsildar to mutate the name of the person who has acquired right in the property.

13. Section 110 of MPLRC Code reads as under:-

> **"110. Mutation of acquisition of right in land records.** - (1) The Patwari or Nagar Sarvekshak or person authorised under section 109 shall enter into a register prescribed for the purpose every acquisition of right reported to him under section 109 or which comes to his notice from any other source.

(2) The Patwari or Nagar Sarvekshak or person authorised, as the case may be, shall intimate to the Tahsildar, all reports regarding acquisition of right received by him under sub-section (1) in such manner and in such Form as may be prescribed, within thirty days of the receipt thereof by him.

(3) On receipt of intimation under section 109 or on receipt of intimation of such acquisition of right from any other source, the Tahsildar shall within fifteen days, -

(a) register the case in his Court;

(b) issue a notice to all persons interested and to such other persons and authorities as may be prescribed, in such Form and manner as may be prescribed; and

(c) display a notice relating to the proposed mutation on the notice board of his office, and publish it in the concerned village or sector in such manner as may be prescribed;

(4) The Tahsildar shall, after affording reasonable opportunity of being heard to the persons interested and after making such further enquiry as he may deem necessary, pass orders relating to mutation within thirty days of registration of case, in case of undisputed matter, and within five months, in case of disputed matter, and make necessary entry in the village khasra or sector khasra, as the case may be, and in other land records.

(5) The Tahsildar shall supply a certified copy of the order passed under sub-section (4) and updated land records free of cost to the parties within thirty days, in the manner prescribed and only thereafter close the case :

Provided that if the required copies are not supplied within the period specified, the Tahsildar shall record the reasons and report to the Sub-Divisional Officer.

(6) Notwithstanding anything contained in section 35, no case under this section shall be dismissed due to the absence of a party and shall be disposed of on merits.

(7) All proceedings under this section shall be completed within two months in respect of undisputed case and within six months in respect of disputed case from the date of registration of the case. In case the proceedings are not disposed of within the specified period, the Tahsildar shall report the information of pending cases to the Collector in such Form and manner as may be prescribed.]"

14. "Acquisition of right" is a crucial aspect which has to be kept in mind while deciding the application under Section 110 of MPLR Code.

15. The moot question for consideration is that whether the revenue authorities are competent to go to the extent of deciding the disputed question of title by adjudicating the correctness and genuineness of "Will" or not ?

16. It is submitted by the Counsel for the respondent No.1 that the right can also be acquired by virtue of a "Will". Therefore, once the Tahsildar has a jurisdiction to decide the application under Section 110 of MPLR Code on the basis of acquisition of right of the parties, then the Tahsildar has a jurisdiction to decide the correctness and genuineness of "Will" also.

17. *Per contra,* it is submitted by the Counsel for the State that it is well-established principle of law that the burden to prove the "Will" is on the propounder and he has to remove all suspicious circumstances which are attached to a "Will" and since the "Will" is a departure from the general law of succession, therefore, it necessarily involves the question of title, which cannot be adjudicated by the revenue authorities.

18. Considered the submissions made by the Counsel for the parties.

19. Section 31 of MPLR Code reads as under:-

> **"31. Conferral of Status of Courts on Board and "Revenue Officers.** - The Board or a Revenue Officer, while exercising power under this Code or any other enactment for the time being in force to enquire into or to decide any question arising for determination between the State Government and any person or between parties to any proceedings, shall be a Revenue Court."

20. Thus, from the plain reading of the aforesaid Section, it is clear that the revenue authorities shall be treated as revenue court for the purposes of "any proceedings between the parties". The important question which involves in the interpretation of Section 31 of MPLR Code is as to whether the words "any proceedings" would include a question of title also or the proceedings are confined to the proceedings under the MPLR Code only.

21. If an application under Section 110 of MPLR Code is filed for mutation of the name of all the legal heirs, then it would certainly be a proceeding under the MPLR Code because the question of title is not involved and all the legal heirs of the deceased/owner will be brought on record without any further adjudication but whether the adjudication of the title of the parties on the basis of a "Will" can be said to be a proceeding under the Act or not, is a moot question which requires consideration.

22. Section 178 of MPLR Code reads as under:-

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

23. Proviso to Section 178(1) of MPLR Code specifically provides that in a partition proceedings, if any question of title is raised by any of the parties, then the revenue authorities shall stay the proceedings for a period of three months in order to facilitate the parties for institution of a civil suit for determination of question of title. Proviso to Section 178(1) of MPLR Code makes it clear as noon day that question of determination of title is beyond jurisdiction of the revenue authorities, otherwise the Tahsildar was not required to stay the proceedings so that the party to the partition proceedings may institute a civil suit for determination of question of title. If the words "any proceedings" are read in the light of the proviso to Section 178(1) of MPLR Code, then it is clear that "any proceedings" would not include any proceeding involving the question of title of the parties. Whenever the question of title is raised or is involved, then the matter has to be adjudicated by the Civil Court and not by the revenue authorities.

24. It is submitted by the counsel for the respondent No. 1 that since in the present case, a public notice was issued, but as nobody had raised any objection, therefore, in absence of any challenge to the "Will", the revenue authorities did not commit any mistake by mutating the name of respondent No. 1.

25. Considered the submissions made by the counsel for the respondent No. 1.

26. It is well-established principle of law that the burden is on the propounder of the "Will" to prove that the "Will" was executed in his favour by the testator. Even if the "Will" is not challenged by anybody, but still the propounder of the "Will" has to discharge his burden and no decree can be passed even by the Civil Court merely on the ground that the respondents have chosen not to appear before it or have failed to file their written statement as provided under Order 8 Rule 10 CPC.

27. Under these circumstances, even if nobody had responded to the public notice issued by the Tahsildar, it would not absolve the respondent No.1 for proving the "Will" in accordance with law.

28. This Court in the case of *Dharamveer Singh and Others vs. Rushtum Singh and Others,* by order dated 27/08/2019 passed in MP No. 3281 of 2019 has already held that the question of adjudication of correctness and genuineness of a "Will" is beyond the competence and jurisdiction of the revenue authorities.

29. From the order dated 07.12.2018 passed by the SDO, Lashkar, Gwalior, it is clear that the SDO had rejected the application filed under Section 5 of Limitation Act. After rejecting the application, the SDO should have dismissed the appeal as barred by limitation, but instead of dismissing the appeal as barred by limitation, the SDO has also considered the merits of the case, which was not expected because unless and until, the delay is condoned, it cannot be said that there was any appeal in the eyes of law before the SDO, Lashkar District Gwalior. However, since this Court has already held that the Tahsildar, Tahsil Gwalior had no jurisdiction to entertain an application under Section 110 of MPLR Code on the basis of "Will" therefore, the order passed by the Tahsildar was without jurisdiction and it was a nullity. Any order which is a nullity can always be challenged even in the collateral proceedings. Thus, even if the petitioner had filed time-barred appeal, still it would not confer any right on the respondent No.1 on the basis of an order which was without jurisdiction.

30. At this stage, it is submitted by the counsel for the parties that the petitioner has already instituted a civil suit, in which the respondent No.1 has already entered her appearance. However, it is submitted by the counsel for the petitioner that since the respondent No. 1 has failed to prove the "Will" before the Tahsildar, therefore, the order of mutation should be quashed.

31. So far as the adjudication of the correctness and genuineness of the "Will" by the revenue authorities is concerned, it has already been held to be beyond their jurisdiction and as this petition arises out of the revenue proceedings, therefore, after holding that the revenue authorities have no jurisdiction to adjudicate the correctness and genuineness of "Will", this Court is not expected to make any observation on the merits of the case.

32. Since the civil suit is already pending between the parties, therefore also, even a single word on the merits of the case by this Court will prejudice the parties. Since this Court has already held that the Tahsildar has no jurisdiction to entertain an application for mutation on the basis of a "Will", as a natural consequence, the order dated 10/10/2002 passed by Tahsildar, Tahsil Gwalior in Case No.89/01-02/A-6, order dated 07/12/2018 passed by SDO, Lashkar, District Gwalior in Case No.68/2016-17/Appeal and order dated 10/06/2020 passed by Additional Commissioner, Gwalior Division, Gwalior in Case No.109/18-19/Appeal are hereby set aside.

33. The Tahsildar is directed to delete the name of respondent No. 1 from the revenue record with immediate effect. The Tahsildar, Tahsil Gwalior is directed to mutate the name of the legal heirs of Late Vijay Singh Rao Mohite as per Hindu Succession Act. If the legal heirs are not available, then the Tahsildar, Tahsil Gwalior is directed to record the name of the State Government.

34. The mutation either in the name of legal heir or in the name of State Government shall be subject to the outcome of the civil suit, which is pending between the parties. It is further directed that in case, if the names of the legal heirs of Late Vijay Singh Rao Mohite or the State Government are mutated, then neither the legal heirs nor the State Government would create any third party right in the property and *status quo* shall be maintained till the final adjudication by the Civil Court.

35. With the aforesaid observations, this petition is finally **disposed of.**

Order accordingly

I.L.R. [2021] M.P. 737 (DB)
APPELLATE CIVIL

Before Mr. Justice Sujoy Paul & Mr. Justice Shailendra Shukla

MA No. 2488/2020 (Indore) decided on 16 February, 2021

PRAVEEN MURAKA …Appellant

Vs.

BHAMA ENTERPRISES INDIA PVT. LTD. & anr. …Respondents

A. Designs Act (16 of 2000), Section 2(d) & 4 and Civil Procedure Code (5 of 1908), Order 39 Rule 1 & 2 – Design & Trademark – Determination – **Held – Court below erred in relying on different "Trademarks" when matter was essentially related to "Design" – Real test is based on "look alike" factor – Simple test to determine the design is to keep both products side by side to see if those appear to be similar or different – Applying the parameter of "exact similitude" or "exclusivity" is not correct – Similarity of design found – Injunction granted – Appeal allowed. (Paras 22, 27 to 29, 31 & 32)**

क. डिजाइन अधिनियम (2000 का 16), धारा 2(d) व 4 एवं सिविल प्रक्रिया संहिता (1908 का 5), आदेश 39 नियम 1 व 2 – डिजाईन व व्यापार चिन्ह् – अवधारण – अभिनिर्धारित – जब मामला आवश्यक रूप से ''डिजाईन'' से संबंधित था तो निचले न्यायालय ने भिन्न ''व्यापार चिन्ह्'' में विश्वास करने में त्रुटि की – वास्तविक परीक्षण ''एक समान दिखने'' के कारक पर आधारित है – डिजाईन अवधारित करने हेतु सरल परीक्षण यह है कि दोनों उत्पादों को साथ–साथ रखा जाए ताकि यह देखा जा सके कि वे समान प्रतीत होते हैं अथवा भिन्न – ''सटीक समानता'' अथवा ''अनन्यता'' का मापदण्ड लागू करना सही नहीं है – डिजाईन की समानता मिली – व्यादेश प्रदान किया गया – अपील मंजूर।

B. Designs Act (16 of 2000), Section 4 – Comparison of Designs – **Held – No provision of Act or Rule produced before Court that Controller/ Examiner is under an obligation to examine the design for which registration is applied with all previous designs of same product which have already been registered. (Para 25 & 26)**

ख. डिजाइन अधिनियम (2000 का 16), धारा 4 – डिजाईनों की तुलना – अभिनिर्धारित – न्यायालय के समक्ष अधिनियम अथवा नियम के ऐसे कोई उपबंध प्रस्तुत नहीं किये गये कि नियंत्रक/परीक्षक उस डिजाईन का जिसके रजिस्ट्रीकरण हेतु आवेदन किया गया है, समान उत्पाद की पहले से ही रजिस्ट्रीकृत की जा चुकी पूर्व सभी डिजाईनों के साथ परीक्षण करने हेतु बाध्य है।

Cases referred :

2018 (75) PTC 495 (Del), 2019 (79) PTC 42, 2018 SCC Online Del 9381, 2013 (53) PTC 495, 2018 (73) PTC 591, 2017 (70) PTC 31, 2015 SCC Online

Guj. 6280, 1996 (16) PTC 202 (Cal), (2013) 2 MPLJ 55, 2016 SCC OnLine Bom. 6945, 2013 (55) PTC 61 (Del.)(FB), 2017 (72) PTC 253.

Abhinav Malhotra, for the appellant.
Ajay Bagadia with *Vikas Rathi,* for the respondents.

O R D E R

The Order of the Court was passed by :
SUJOY PAUL, J. :- The subject matter of challenge in this miscellaneous appeal filed under Order XLIII Rule 1 (r) of the Code of Civil Procedure, 1908 (CPC) is the order of learned Commercial Court, Indore dated 05/09/2020, whereby application filed by appellant/plaintiff under Order XXXIX Rule 1 & 2 of CPC is disallowed. The appellant and respondents are manufacturer/proprietors of water bottles branded as "Kool Kommandar" and "Cool Cutie" respectively. They have taken diametrically opposite stand relating to newness and originality of the design of their bottles. Since attempt of appellant to obtain injunction against "Cool Cutie" failed, this appeal is filed assailing the order of Commercial Court and praying that the respondent be restrained from infringing or passing off the appellant's registered design in the interest of justice.

2. Certain facts are not in dispute in the instant case and pertinently, Court below in para-6 onwards of the impugned order mentioned those facts. It is apt to mention those relevant admitted facts:-

i) The appellant/plaintiff manufactures bottle branded as "Kool Kommandar" and defendant No.1 manufactures the bottle branded as "Cool Cutie".

ii) Appellant/Plaintiff is a prior user of design of bottle "Kool Kommandar", whereas defendant's bottle "Cool Cutie" came into being later on.

iii) The design of "Kool Kommandar" was registered under the Designs Act, 2000 (Act of 2000) on 30/11/2015, whereas design of "Cool Cutie" was registered on 08/01/2019.

iv) Before institution of instant suit, the appellant sold 3, 81, 571 bottles of "Kool Kommandar".

v) One of the defendants was employee of appellant/plaintiff.

3. The learned counsel for the parties appearing before us also fairly submitted that the aforesaid facts are not in dispute.

4. Shri Abhinav Malhotra, learned counsel for the appellant reiterated the stand taken by appellant before the Court below and urged that Section 4 of the Act of 2000 is mandatory in nature and protects a new or original design. The

relevant factors for attracting Section 4 of the Act of 2000, aforesaid are in favour of the appellant yet Court below rejected the application preferred under Order XXXIX Rule 1 & 2 of CPC. Attention of this Court is drawn on a comparative chart (Page 45 & 46), to bolster the submission that the bottle "Cool Cutie" does not have any element of "new or original". The Said chart is reproduced herein under :-

	PLAINTIFF'S 'KOOL KOMMANDAR' BOTTLE	**DEFENDANTS' 'COOL CUTIE' BOTTLE**
1	The Plaintiff's **Kool Kommandar Bottle** has a unique shape, configuration and surface pattern.	Identical shape, configuration and surface pattern has been adopted by the Defendants in their **Cool Cutie Bottle.**
2	The Configuration of the **Kool Kommandar Bottle** is such that it appears as if it is a unibody.	The Configuration of the **Cool Cutie Bottle** is such that it appears as if it is a unibody.
3	The surface pattern of the **Kool Kommandar Bottle** has a unique cylindrical cap which looks aesthetically attractive.	The surface pattern of the **Cool Cutie Bottle** has a unique cylindrical cap which looks aesthetically attractive.
4	Clean and bold cartoon graphic elements attractive to kids make **Kool Kommandar Bottle** stand out in cluttered market place / against the competition.	Clean and bold cartoon graphic elements attractive to kids make **Cool Cutie Bottle** stand out in cluttered market place/against the competition.
5	The surface of the bottle has a shining effect which gives elegant effect to the **Kool Kommandar Bottle.**	The surface of the bottle has a shining effect which gives elegant effect to the **Cool Cutie Bottle.**
6	The main body of the **Kool Kommandar Bottle** as also its cap contains a unique unibody design element.	The main body of the **Cool Cutie Bottle** as also its cap contains a unique unibody design element.
7	The Cap of the **Kommandar Bottl**e has a unique thread attached to it which makes it visually attractive.	The Cap of the **Cool Cutie Bottle** has a unique thread attached to it which makes it visually attractive.

5. The contention of appellant is that in view of prior registration of "Kool Kommandar", identical design of both the bottles i.e. visual, look, feature etc, it is clear that "Cool Cutie" has no novelty and cannot be treated as a new design. The Court below has erred in rejecting the application on impermissible grounds. The Court below opined that in absence of "exact similitude" between said 2 bottles,

no case for injunction is made out, whereas the legal test is somewhat different. The test is to keep two bottles side by side to see if those appear to be similar or different. By visual imaging, the Court may even find if impugned product is substantially similar or different. Shri Malhotra criticized the impugned order by contending that Court below has erred in holding that despite similar features of bottles/particular commodity, it is only 'uniqueness' and 'exclusivity' that needs to be recognized. In support of aforesaid contentions, Shri Malhotra placed reliance on certain judgments.

The judgments of Delhi High Court reported in 2018 (75) PTC 495 (Del) *(Dart Industries Inc. & Ors. vs. Polyset Plastics Pvt. Ltd. & Ors.,* 2019 (79) PTC 42 *Pentel Kabushiki Kaisa vs. Arora Stationers,* 2018 SCC Online Del 9381 *(Vega Auto Accessories (P) Ltd. vs. S.K. Bros. Heimt (I) Pvt. Ltd.* and judgments of Bombay High Court reported in 2013(53) PTC 495 *(Asian Rubber Industries & Ors. vs. Jasco Rubbers & Ors.)*, 2018 (73) PTC 591 *Kalpesh R. Jain & Ors. vs. Mandev Tubes Pvt. Ltd.* were relied upon.

For the same purpose, judgment of Madras High Court reported in 2017 (70) PTC 31 *(Maya Appliances Pvt. Ltd. & Ors. vs. Butterfly Gandhimathi Appliances Ltd.)* and judgment of Gujarat High Court reported in 2015 SCC Online Guj. 6280 *(Win Class Ltd. vs. Symphony Ltd.)* were relied upon.

6. On the strength of these pronouncements, it is urged that plaintiff satisfied the legal test for grant of injunction in his favour and Court below has erred in rejecting it on impermissible grounds.

7. During the course of argument, Shri Malhotra produced both the bottles namely "Kool Kommandar" and "Cool Cutie" for the perusal of this Court in support of his submissions.

8. Sounding a *contra* note, Shri Ajay Bagadia supported the impugned order. However, he did not dispute that both the bottles shown by appellant's counsel are "Kool Kommandar" and "Cool Cutie" respectively. The contention of Shri Bagadia is that his bottle "Cool Cutie" does not have any deceptive similarity with "Kool Kommandar". Merely because shapes are almost similar, it cannot be said that "Kool Kommandar" has anything 'new or original'. In the market, number of mineral water bottles are available. Most of them are cylindrical in nature. Their caps are interchangeable. The product in question is marketed to aim the children and, therefore, its lid is wide and it provides a cord to make it handy. Merely because cap of the said bottles are interchangeable and cap is having a cord to carry the bottle conveniently, it does not attract Section 4 of the Act of 2000. The subsequent registration of defendant's product by the Competent Authority under the Act of 2000 itself shows that it has a new and original design. If design of defendant got a statutory registration that itself establishes that Competent

Authority/Controller was satisfied about the 'newness and originality' of "Cool Cutie". For this reason alone, the appellant's appeal deserves rejection. Shri Bagadia submits that although he has filed number of judgments along with an index in MA No.2731/20, he is placing reliance only on two judgments namely 1996 (16) PTC 202 (Cal.) *(Castrol India Ltd. vs. Tide Water Oil Co. (I) Ltd.),* wherein the Court opined that the object of the Designs Act is to protect shape, but not a functional shape. Hence, the aspect that lid of both the bottles are interchangeable is of no importance. (2013)2 MPLJ 55 *(Skol Breweries Ltd., Mumbai vs. Som Distilleries and Breweries Ltd.)* is relied upon to contend that in absence of misrepresentation to public, no passing off can be alleged.

9. In rejoinder submissions, Shri Malhotra placed reliance on the definition of "design" contained in Section 2(d) of Act of 2000 and urged that in the case in hand, this Court is not concerned with "trademark", indeed it is the 'design' and similarity of design which is of significance.

10. The parties confined their arguments to the extent indicated above.

11. We have heard the parties at length and perused the record.

12. Before dealing with rival contentions, we deem it apposite to refer relevant provisions of the Act of 2000.

> **2. (d)** "design" means only the features of shape, configuration, pattern, ornament or composition of lines or colours applied to any article whether in two dimensional or three dimensional or in both forms, by any industrial process or means, whether manual, mechanical or chemical, separate or combined, which in the finished article appeal to and are judged solely by the eye; but does not include any mode or principle of construction or anything which is in substance a mere mechanical device, and does not include any trade mark as defined in clause (v) of sub-section (1) of section 2 of the Trade and Merchandise Marks Act, 1958 (43 of 1958) or property mark as defined in section 479 of the Indian Penal Code (45 of 1860) or any artistic work as defined in clause (c) of section 2 of the Copyright Act, 1957 (14 of 1957);
>
> **4 Prohibition of registration of certain designs.** —A design which—
>
> (a) is not new or original; or
>
> (b) has been disclosed to the public anywhere in India or in any other country by publication in tangible form or by use or in any other way prior to the filing date, or where applicable, the priority date of the application for registration; or

(c) is not significantly distinguishable from known designs or combination of known designs; or

(d) comprises or contains scandalous or obscene matter, shall not be registered.

5. Application for registration of designs. —

(1) The Controller may, on the application of any person claiming to be the proprietor of any new or original design not previously published in any country and which is not contrary to public order or morality, register the design under this Act:

Provided that the Controller shall before such registration refer the application for examination, by an examiner appointed under sub-section (2) of section 3, as to whether such design is capable of being registered under this Act and the rules made thereunder and consider the report of the examiner on such reference.

(Emphasis supplied)

13. The relevant portion of statement of *objects and reasons* which necessitated the lawmakers to introduce the Designs Act, 2000 reads as under:-

"The legal system of the protection of industrial designs required to be made more efficient in order to ensure effective protection to register designs. It is also required to promote design activity in order to promote the design element in an article of production."

14. Section 4 of the Act of 2000 is couched in negative language and makes it very clear that the design which is not 'new or original' then such design cannot be registered.

15. The Apex Court in *Bharat Glass Tube Limited* (supra) has made it clear that "the expression", "new" or "original" appearing in Section 4 means that the design which has been registered has not been published anywhere or it has been made known to the public. The expression, "new" or "original" means that it had been invented for the first time or it has not been reproduced by anyone.

16. The Bombay High Court in 2016 SCC OnLine Bom. 6945, *[M/s Selvel Industries & Another v/s M/s Om Plast (India)]* held that the word *new* obviously means not in existence before. *Originality* speaks to an element of creativity. Novelty is a term that embraces both - something i.e., *new* or *original* is novel.

17. The Court below while rejecting injunction application assigned following reasons:-

(i) The design of defendant's bottle might look to be identical but the same cannot be of "exact similitude" to the product of plaintiff;

(ii) The two products bear different trademarks which differently designed and except for general features, no significant imitation appears;

(iii) The features of utility cannot be protected under the garb of intellectual property;

(iv) There might be several products having similar features in the market in respect of particular commodity but it is only the "uniqueness" and "exclusivity" that needs to be recognized;

(v) There is no striking similarity between both the bottles.

18. The legislative intent behind the expression "new" or "original' was that the product had been invented for the first time or it has not been reproduced by anyone. It is profitable to mention that a Full Bench of Delhi High Court in 2013 (55) PTC 61 (Del.) (FB), *Mohanlal, Proprietor of Maurya Industries v/s Sona Paint & Hardwares* ruled that a plaintiff can institute a suit if registration of other side relating to a class of article qua which registration has been obtained which product is neither new nor significantly distinguishable. It is noteworthy that in order to distinguish product namely "Cool Cutie", Shri Bagadia urged that the product "Kool Kommandar" on its body reflects its name in bold letters, whereas "Cool Cutie" contains certain visual pics / cartoon to attract the children. Thus, his product is significantly distinguishable.

19. This point is no more *res integra.* In 1997 PTC (17) Delhi *(Alert India v/s Naveen Plastics)* the Court opined as under:-

"36. Thus for determining whether two designs are identical or not, it is not necessary that the two designs should be exactly the same. The main consideration to be applied is **whether the broad features of shape, configuration, pattern etc. are same or nearly the same and if they are substantially the same then it will be a case of imitation of the design of one by the other."**

(Emphasis supplied)

20. Similarly, in 2017 (72) PTC 253 (Delhi), *(Apollo Tyre Limited v/s Pioneer Trade Corporation),* the High Court held that "no party can claim proprietary over the shape of a tyre, since all tyres are round in the shape of a wheel, which is functional requirement. No party can claim proprietary over the technique/ practice of providing treads in a tyre, since treads are functional, i.e. they afford that necessary grip between the tyre and the ground during movement of the vehicle to keep it substantially stable. No party can claim proprietary over the technique/practice of having a plurality of ribs, separated by grooves, which create the tread on the tyre. However, *that does not mean that the unique pattern of the tread adopted by a particular manufacturer, which constitutes its unique*

design and shape, would not be entitled to protection as a design-if it is registered, and also as a trademark-if the tread pattern has been exploited as a trademark i.e. a source identifier. What is functional in a tyre are the "treads" and not the "tread pattern."

21. After considering the aforesaid judgments, in *Dart Industries Case* (supra), the test laid down was "to keep two bottles side by side to see if those appear to be similar or different". It was poignantly held that the plaintiff only needs to produce the two products before the Court and by visual imaging, the Court may find if impugned products are substantially similar or different. The litmus test laid down is the "look alike" factor despite minor variation *[see: Maya Appliances Private Limited* (supra)*].*

22. In view of the aforesaid litmus test laid down by various Courts, it is clear that the plaintiff was not required to establish that the impugned product is of "exact similitude" when compared with the other product. After having given a finding that both the products might look to be identical, the Court below was not justified in putting a different test of "exact similitude". This test applied by Court below runs contrary to scheme and object of the Act of 2000.

23. The defendant claimed his design to be *new* or *original* and submits that on the basis of this claim, his product was registered. In our view if design of his product is identical to that of prior registrant, it is no more open to the defendant to contend that there is no newness or novelty in the design of plaintiff *[see: Dart Industries & Another* (supra)*].*

24. In the case of *Dart Industries (supra),* the Court relied upon a previous judgment of Delhi High Court in the case of *Vega Auto Accessories (P) Limited* (supra) and opined that in a case of this nature, the defendant is "estopped" from taking the plea of invalidity of registration in favour of plaintiff.

25. We will be failing in our duty if we won't consider the argument of Shri Bagadia that registration of his product's design under the Act of 2000 itself shows that it is *new* or *original.* During the course of arguments, he urged that the statutory authority / controller under the Act of 2000 is custodian of entire record including the designs which were previously registered and despite that if he has registered the design of defendant namely "Cool Cutie", it clearly establishes that his design is *new* or *original.*

26. We do not see any merit in this contention. Section 5 of the Act of 2000 is an enabling provision for submission of an application for registration of designs. The competent authority / controller, on an application of any person *claiming to be* the proprietor of any new or original design is required to consider the application. In turn, the controller is obliged to refer the application of such person

for examination, by an examiner appointed under sub-section (2) of Section 3. The scope of examination as spelled out in proviso to sub-section (5) is "as to whether such design is capable of being registered under the Act and Rules made thereunder". No provision of act or rule was brought to our notice which shows that either controller or the examiner is under an obligation to examine the design for which registration is applied with all previous designs of same product which have already been registered. Hence this argument deserves rejection.

27. The Court below rejected the application by holding that two products bearing different 'trademark'. In our view, there was no occasion for the Court below to rely on different 'trademark' when matter was essentially related to "design". The definition of "design" reproduced hereinabove leaves no room for any doubt that it relates only to the features of shape, configuration, pattern, ornament or composition of lines or colour applied to any article. For the purpose of deciding/determining a "design", the different trademark is of no significance. For the same reason, name of product "Kool Kommandar" mentioned in bold letter will not make any difference.

28. Lastly, the Court below applied the test of "uniqueness" and "exclusivity". At the cost of repetition, the simple test for the purpose of determining the design is to keep both the products side by side to see if those appear to be similar or different. The Commercial Court was not correct in examining the product by applying the parameter of "exact similitude" or "exclusivity". The real test is based on 'look alike' factor when both the products are placed, before the Court Test of 'exact similitude' or thread splitting of that nature will defeat the purpose of the Act of 2000.

29. Both the products namely "Kool Kommandar" and "Cool Cutie" were produced before us during hearing. In our view, the shape, configuration and pattern of both the bottles are similar. When 'design element' of both the bottles were examined based on 'look alike' test, we find similarity in their design. Thus in our considered view, the Court below has rejected the application by applying impermissible parameters.

30. So far as judgment of Calcutta High Court in *Castrol India Limited* (supra) is concerned, the said judgment does not help the respondents at all. It was clearly held that object of the Designs Act is to protect shape but not a functional shape. In view of foregoing analysis, it is clear that this Court has considered the rival submissions regarding the shape and not the functional shape. Similarly judgment of *Skol Breweries Limited* (supra) is of no assistance in the factual backdrop of this case to the respondents because if subsequently registered product is having similarity, it has potential to mislead / misrepresent the public qua the previous product.

31. As analyzed above, the Court below has clearly erred in rejecting the application filed under Order XXXIX Rule 1 and 2 of the C.P.C.

32. Resultantly, the impugned order of Commercial Court dated 05.09.2020 (Annexure-P/8) is set aside. The application filed under Order XXXIX Rule 1 and 2 of the C.P.C. is allowed.

Miscellaneous Appeal is allowed.

No cost.

Appeal allowed

I.L.R. [2021] M.P. 746
APPELLATE CRIMINAL

Before Mr. Justice Rajendra Kumar Srivastava

CRA No. 5838/2020 (Jabalpur) decided on 1 April, 2021

ANIL PATEL & ors. …Appellants

Vs.

STATE OF M.P. & ors. …Respondents

***A. Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (33 of 1989), Sections 3(1)(r), 3(1)(s), 18 & 18-A and Criminal Procedure Code, 1973 (2 of 1974), Section 41(1)(b)(ii) – Anticipatory Bail Application – Maintainability* – Held – As per FIR, incident alleged to be happened at open farm in public view – Appellants intentionally insulted complainant abusing on his caste – Accused and complainant live in same village, accused were well aware of caste of complainant – *Prima facie,* intention of appellant is to humiliate/insult the complainant – Bar u/S 18 and 18-A is attracted – Anticipatory bail application not maintainable – Direction regarding procedure of arrest enumerated – Appeal disposed. (Paras 14 & 20 to 22)**

क. *अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम (1989 का 33), धाराएँ 3(1)(r), 3(1)(s), 18 व 18–A एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 41(1)(b)(ii) – अग्रिम जमानत का आवेदन – पोषणीयता –* अभिनिर्धारित – प्रथम सूचना प्रतिवेदन के अनुसार, अभिकथित रूप से घटना, लोक दृष्टिगोचर खुले फार्म पर घटित हुई – अपीलार्थीगण ने परिवादी को उसकी जाति पर अशिष्ट शब्द बोलकर आशयपूर्वक अपमानित किया – अभियुक्त और परिवादी एक ही गांव में रहते हैं, अभियुक्तगण, परिवादी की जाति से भलीभांति अवगत थे – प्रथम दृष्ट्या, अपीलार्थी का आशय परिवादी को नीचा दिखाना/अपमानित करना था – धारा 18 व

18–A के अंतर्गत वर्जन आकर्षित होता है – अग्रिम जमानत का आवेदन पोषणीय नहीं – गिरफ्तारी की प्रक्रिया संबंधी निदेश प्रगणित किये गये – अपील निराकृत।

B. ***Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (33 of 1989), Section 18 & 18-A – Anticipatory Bail Application – Maintainability*** **– Held – Apex Court concluded that if complaint does not make out *prima facie* case for applicability of provisions of 1989 Act, bar created by Section 18 and 18-A shall not be applied. (Para 9)**

ख. अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम (1989 का 33), धारा 18 व 18–A – अग्रिम जमानत का आवेदन – पोषणीयता – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया कि 1989 अधिनियम के उपबंधों की प्रयोज्यता हेतु, यदि परिवाद से प्रथम दृष्ट्या प्रकरण नहीं बनता है, धारा 18 व 18–A द्वारा सृजित वर्जन लागू नहीं होगा।

C. ***Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (33 of 1989), Section 3(1)(r) & 3(1)(s) – Intention*** **– Held – Apex Court concluded that under 1989 Act, offence is not established merely on fact that informant is a member of SC/ST unless there is an intention to humiliate a member of such community – Even for offence u/S 3(1)(s), condition precedent is intention of accused to commit offence against person of SC/ST community. (Para 8 & 15)**

ग. अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम (1989 का 33), धारा 3(1)(r) व 3(1)(s) – आशय – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया कि 1989 के अधिनियम के अंतर्गत, अपराध, मात्र इस तथ्य पर स्थापित नहीं होता कि सूचना देने वाला, अ.जा./अ.ज.जा. का एक सदस्य है जब तक कि उक्त समुदाय के सदस्य को नीचा दिखाने का आशय न हो – यहां तक कि धारा 3(1)(s) के अंतर्गत अपराध हेतु, अ.जा./अ.ज.जा. समुदाय के व्यक्ति के विरूद्ध अपराध कारित करने के लिए अभियुक्त का आशय पुरोभावी शर्त है।

D. ***Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (33 of 1989), Sections 3(2)(va), 18 & 18-A and Penal Code (45 of 1860), Sections 294, 323 & 506/34 – Bailable Offences*** **– Held – Offence u/S 3(2)(va) of 1989 Act is punishable with same punishment for offence under IPC – Appellants facing allegation u/S 323 and 506 which are specified in Schedule of offence u/S 3(2)(va) of 1989 Act and which are not having punishment of more than 3 years in IPC, same be treated as bailable in nature – When offences are bailable in nature and need for anticipatory bail does not arise, Section 18 and 18-A is not applicable. (Para 17)**

घ. अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम (1989 का 33), धाराएँ 3(2)(va), 18 व 18–A एवं दण्ड संहिता (1860 का 45), धाराएँ 294, 323 व 506/34 – जमानतीय अपराध – अभिनिर्धारित – 1989 अधिनियम की

धारा 3(2)(va) के अंतर्गत अपराध, समान दण्ड से दण्डनीय है जैसे कि भा.दं.सं. के अंतर्गत अपराध – अपीलार्थीगण, धारा 323 व 506 के अंतर्गत अभिकथन का सामना कर रहे है जो कि 1989 के अधिनियम की धारा 3(2)(va) के अंतर्गत अपराध की अनुसूची में विनिर्दिष्ट किये गये हैं और जिसके लिए भा.दं.सं. में 3 वर्ष से अधिक दण्ड नहीं है, उसे जमानतीय स्वरूप का समझा जाये – जब अपराध जमानतीय स्वरूप के हैं और अग्रिम जमानत की आवश्यकता उत्पन्न नहीं होती, धारा 18 व 18–A लागू नहीं होती है।

***E. Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (33 of 1989), Section 3(1)(r) & 3(1)(s) – Expression "Public Place" & "Public View"* – Discussed and Explained. (Para 12)**

ङ. अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम (1989 का 33), धारा 3(1)(r) व 3(1)(s) – अभिव्यक्ति ''सार्वजनिक स्थान'' व ''लोक दृष्टिगोचर'' – विवेचित एवं स्पष्ट किया गया।

***F. Criminal Practice – Punishment – Special Enactment* – Held – If special enactment is silent regarding punishment, Schedule of IPC will be applicable. (Para 17)**

च. दाण्डिक पद्धति – दण्ड – विशेष अधिनियमिती – अभिनिर्धारित – यदि दण्ड के संबंध में विशेष अधिनियमिती मौन है, भा.दं.सं. की अनुसूची लागू होगी।

Cases referred:

(2020) 4 SCC 427, 2004 Cr.L.J. 2755, MANU/MP/0843/2020, MANU/MP/0071/2020, (2020) 10 SCC 710, (2020) 18 SCC 763, (2008) 8 SCC 435, (2014) 8 SCC 273.

Sankalp Kochar, for the appellants.
Brijendra Singh Kushwaha, P.L. for the respondent No. 1/State.
Vijay Chandra Rai, for the respondent No. 2.

J U D G M E N T

RAJENDRA KUMAR SRIVASTAVA, J. :- This Criminal Appeal under Section 14-A of the SC/ST (Prevention of Atrocities) Act, 1989 has been preferred by the appellants in form of anticipatory bail apprehending their arrest in connection with Crime No.331/2020 registered at Police Station-Pipariya, District-Hoshangabad (M.P.) for the offences punishable under Sections 294, 323 and 506 read with Section 34 of IPC and Section 3 (1)(r), 3 (1)(s) and 3(2)(va) of SC/ST Act, 1989 (hereinafter referred as 'Act, 1989').

2. According to prosecution case, on 01.11.2020, complainant-Raghuveer lodged the FIR against the present appellants stating therein that his agricultural land is situated near the river and construction work of pond was going over there. The soil of said land was sold by the complainant to one Rajeev Bakshi. On

31.10.2020, when complainant was in his field, present appellants came there, being annoyed for the reason of non-supply of soil by the complainant to them, they abused him on his caste. Appellants have also intimidated the complainant for demolishing his house and assaulted him with hosepipe on his backside and appellant-Mahesh Patel bore him down on the ground and trampled his face as a consequence of which, the complainant sustained injuries on his head and right eye.

3. Learned counsel for the appellants submits that the appellants are innocent and they have falsely been implicated in this case. In fact, on account of dispute between the appellants and one Rajeev Bakshi, the complainant has lodged false complaint against them. He submits that as per prosecution, the alleged incident was seen by witnesses, namely, Sita Ram and Halke Sahu, but they have given their affidavits denying the alleged incident. He also submits that there is no iota of evidence to constitute the alleged offences against the present appellants. It is further submitted by the counsel that now it is well settled by the Higher Court of law that only because the complainant belongs to a particular caste, offence under SC/ST Act, would not be attracted, it has to be demonstrated that the crime was committed to victimize the complainant only because he belongs to a particular caste. The appellants have also filed a representation before the concerning S.P. He further submits that incident was nothing but a minor tiff between the parties, however, Rajeev Bakshi and complainant have tried to somehow implicate the present appellants in non-bailable offences under the garb of SC/ST Act. He has further argued that in the aforesaid circumstances as argued above, bar of Section 18 of the SC/ST Act would not be applicable in this case. The appellants have no criminal record and there is no likelihood of their absconding and tempering (sic : tampering) with the evidence of prosecution. The injuries sustained by the complainant are simple in nature. In support of his submissions, he has produced some catena of judgments passed by the Hon'ble Supreme Court as well as the High Courts', some are also mentioned herein under :-

> *"1. Prathvi Raj Chauhan Vs. Union of India* reported in (2020)4 SCC 427.
>
> *2. Vinay Kumar Chouhan Vs. The State (NCT of Delhi)* in Bail Application No.2060/2020, passed by the High Court of Delhi.
>
> *3. Danish Khan @ Saahil Vs. The State (NCT of Delhi)* in Bail Application No.3497/2020, passed by the High Court of Delhi.
>
> *4. Jones Vs. State* reported in 2004 Cr.L.J. 2755 passed by High Court of Madras.
>
> *5. Rajsh Kumar Jain Vs. State of M.P. & Ors.* reported in MANU/MP/0843/2020 passed by this High Court.

6. Balram Vs. State of M.P. in Cr.A.No.4880/2020 passed by this High Court.

7. Ramkumar Shukla Vs. State of M.P. & Ors. reported in MANU/MP/0071/2020 passed by this Bench. "

With the aforesaid, he prays for allowing this appeal.

4. On the other hand, learned P.L. for the State as well as counsel for the objector opposes the submissions of appellants' counsel and submits that under the Act 1989, there is no provision for granting anticipatory bail. Learned counsel for the objector submits that in the alleged incident, the complainant sustained injuries on his body parts which is sufficient to presume that the appellants were involved in the offence. He has also submitted that as far as the affidavits of the witnesses, Sita Ram and Halke are concerned, same have no meaning at this stage and cannot be considered as evidence. In their statements recorded under Section 161 of Cr.P.C. they have supported the case of prosecution. Looking to the seriousness of the offence and on account of restriction in grant of anticipatory bail under the Act 1989, appellants' anticipatory bail application may not be allowed.

5. Heard both the parties and perused the case diary.

6. On perusal, an FIR for the offences under Sections 294, 323 and 506 read with Section 34 of IPC and Section 3 (1)(r), 3 (1)(s) and 3(2)(va) of the SC/ST Act has been registered against the present appellants. The offences of IPC are bailable in nature. The Only obstruction on the way of present appellants to be released on anticipatory bail, is that the offences of Act 1989 levelled against them are non-bailable and further, the Act 1989, prescribes bar in grant of anticipatory bail under Section 18 and 18-A. The learned counsel for the appellants has tried to convince this Court to grant anticipatory bail to the appellants raising the ground of necessity of showing intention of appellants to humiliate the person of SC/ST community. The learned counsel for the appellants has argued that it is necessary to show that the accused committed a crime against the person of SC/ST community because the person belongs to such community and not for the reason that the victim is only a member of SC/ST community. The victim must be humiliated and insulted by the accused intentionally.

7. Before considering the merits of the matter, I would prefer to go into the background of the Act 1989. Before enactment of this act, the members of Scheduled Caste and Scheduled Tribe were subjected to various offences, indignities, untouchability, humiliations and harassment by the dominant castes, thus, the Act is provided by the legislature with the object to deliver justice to these communities through proactive efforts to enable them to live in the society with dignity and self respect and without fear or violence or harassment from the

dominant castes. Another salient feature of this Act is to eliminate casteism and bring equality for the member of SC/ST community. The enactment of Act 1989 was also for freedom of the person of such community from the caste based atrocities. Therefore, the intention of the Legislature for enacting the Act 1989, is to protect the person of SC/ST community from the harassment made by the dominant castes, on their belonging to SC/ST community.

8. In the case of *Hitesh Verma v. State of Uttarakhand* reported in (2020) 10 SCC 710, the Hon'ble Apex Court has reiterated the principle laid down in the case of *Khuman Singh v. State of M.P.* reported in (2020) 18 SCC 763 and held that under the Act 1989 the offence is not established merely on the fact that the informant is a member of Scheduled Castes or a Scheduled Tribes unless there is an intention to humiliate a member of such community. The relevant para is also quoted herein under :-

> ***"17.*** *In another judgment reported as Khuman Singh v. State of M.P., this Court held that in a case for applicability of Section 3(2)(v) of the Act, the fact that the deceased belonged to Scheduled Caste would not be enough to inflict enhanced punishment. This Court held that there was nothing to suggest that the offence was committed by the appellant only because the deceased belonged to Scheduled Caste. The Court held as under:*
>
> > *"15. As held by the Supreme Court, the offence must be such so as to attract the offence under Section 3(2) (v) of the Act. The offence must have been committed against the person on the ground that such person is a member of Scheduled Caste and Scheduled Tribe. In the present case, the fact that the deceased was belonging to "Khangar" Scheduled Caste is not disputed. There is no evidence to show that the offence was committed only on the ground that the victim was a member of the Scheduled Caste and therefore, the conviction of the appellant-accused under Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act is not sustainable. "*
>
> ***18.*** *Therefore, offence under the Act is not established merely on the fact that the informant is a member of Scheduled Caste unless there is an intention to humiliate a member of Scheduled Caste or Scheduled Tribe for the reason that the victim belongs*

to such caste. In the present case, the parties are litigating over possession of the land. The allegation of hurling of abuses is against a person who claims title over the property. If such person happens to be a Scheduled Caste, the offence under Section 3(1)(r) of the Act is not made out."

9. Now, I come to the another point whether anticipatory bail can be entertained for the offence alleged under the Act 1989. On careful reading of Section 18 of Act 1989, there is restriction to avail the remedy of section 438 of Cr.P.C. but, in the case of *Prathvi Raj Chauhan* (supra), the principle is emerged that if the complaint does not make out a *prima facie* case for applicability of the provisions of Act 1989, bar created by Section 18 and 18-A shall not be applied.

10. Therefore, now the only question is to be seen by this Court as to whether the material annexed with the case diary shows any *prima facie* case under the Act 1989, to be made against the appellants or not ?

11. For better adjudication of this bail application, it becomes necessary to read the provision of the Act 1989 of which allegations have been made against the appellants. Same are reproduced herein under :-

"3. Punishments for offences of Atrocities-

(1) Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe,-

(r) intentionally insults or intimidates with intent to humiliate a member of a Scheduled Caste or a Scheduled Tribe in any place within public view,

(s) abuse any member of a Scheduled Caste or a Scheduled Tribe by caste name in any place within public view.

(2) Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe, -

(va) commits any offence specified in the schedule, against a person or property, knowing that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member, shall be punishable with such punishment as specified under the Indian Penal Code (45 of 1860) for such offences and shall also be liable to fine,"

12. Section 3(1)(r) of the Act, 1989 speaks about the intentionally insults or intimidates with an intent to humiliate a member of SC/ST community in any

place within public view. Here, the word "Public View" is very important. In the case of *Swaran Singh & Ors. Vs. State through Standing Counsel & Ors* reported in (2008) 8 SCC 435, the Hon'ble Apex Court observed the distinction between expression "public place" and "public view". Relevant portion of said judgment is also quoted herein under :-

> ***28.*** *It has been alleged in the FIR that Vinod Nagar, the first informant, was insulted by Appellants 2 and 3 (by calling him a "chamar") when he stood near the car which was parked at the gate of the premises. In our opinion, this was certainly a place within public view, since the gate of a house is certainly a place within public view. It could have been a different matter had the alleged offence been committed inside a building, and also was not in the public view. However, if the offence is committed outside the building e. g. in a lawn outside a house, and the lawn can be seen by someone from the road or lane outside the boundary wall, the lawn would certainly be a place within the public view. Also, even if the remark is made inside a building, but some members of the public are there (not merely relatives or friends) then also it would be an offence since it is in the public view. We must, therefore, not confuse the expression "place within public view " with the expression "public place ". A place can be a private place but yet within the public view. On the other hand, a public place would ordinarily mean a place which is owned or leased by the Government or the municipality (or other local body) or gaon sabha or an instrumentality of the State, and not by private persons or private bodies.*
>
> ***(emphasis supplied)***

13. Further, Section 3(1)(s) of Act 1989 makes the abuse given to a member of SC/ST community on his/her caste, to be punishable. In the case at hand, it has been alleged by the complainant that the appellants have abused him saying "Chamra". It has been held in *Swaran Singh's* case that calling a person of SC community "Chamar" is offensive under the Act, 1989. However, the Court observed that whether there was intent to insult or humiliate by using the word "chamar" will of course depend on the context in which it was used.

14. Here in the case, incident alleged to have been occurred at an open farm and seen by some persons too. Therefore, *prima facie,* it can be assumed that the incident was happened in public view.

15. However, the order has been passed by the Hon'ble Apex Court in relation to section 3(1)(x) which subsequently has been substituted vide Amendment Act 1 of 2016 and now it reads as Section 3(1)(r). The said Amendment has also brought section 3(1)(s) which made separate interpretation for abusement to any person of SC/ST community on their caste. Here, the word 'intentionally' has not been used by the law makers as that of Section 3(1)(r) and thus *prima facie,* it is seen that it does not require the intention of person of dominant caste abusing the victim on his/her caste, but on reading both the provisions together, the offence of Section 3(1)(s) seems similar of section 3(1)(r) as both speaks about the distasteful behavior of dominant cast person's towards the member of SC/ST community. Hence, this Court is of the opinion that even for the offence 3(1)(s), the condition precedent is intention of accused to commit offence against the person of SC/ST community and offence is made because the victim belongs to such community.

16. As far as offence of Section 3(2)(va) of Act 1989 is concerned, it makes punishable any offence of IPC specified in the schedule, against a person of SC/ST community or property belongs to them with the punishment as such specified under the IPC. In the present case, section 294, 323, 506 and 34 of IPC has been leveled against the appellants and out of it offence 323 and 506 are specified in the schedule of Section 3(2)(va) of Act 1989 and same are bailable under the IPC. Now therefore, the question arises before the Court if the offences of IPC which are bailable in nature and allegation thereof is made under Section 3(2)(va) of Act 1989, then would it also be considered as bailable or not ?

17. The Act does not contain any provision which states whether the offence of Section 3(2)(va) of SC/ST is bailable or non-bailable. The offence made under Section 3(2)(va) of Act, 1989 is punishable with the same punishment for the offence under the Indian Penal Code. Under the IPC, it is specified in the Schedule that the punishment prescribed for an offence under any law other than IPC is less than 3 years or with fine only, such offence shall be treated as bailable. Here in the case, the appellants are facing allegation of Section 323 and 506 of IPC under Section 3(2)(va) of Act, 1989 which are not having punishment of more than 3 years and thus, same are bailable in nature. It is settled proposition of law that if the special enactment is silent on the above referred point, then Schedule of IPC will be applicable. Section 18 and 18-A of the Act, 1989 restrict the application of Section 438 of Cr.P.C. but when the offences are bailable in nature and need to get anticipatory bail does not arise then Section 18 and 18-A of Act 1989 would not be applicable in the said circumstances. Therefore, this Court is of the opinion that in the present case, the offence of Section 3(2)(va) of Act, 1989 be treated as bailable in nature and the right to bail of a person who is accused of only bailable offence, is absolute and indefeasible as per the Code of Criminal Procedure.

18. Now I come to the merits of the matter.

19. Here, it is not in dispute that the complainant belongs to SC community. Allegations against the present appellants are that on account of their anger against the complainant arose from the dispute of non-supplying of soil, on the day of incident, the appellants abused and assaulted the complainant by means of hosepipe. On perusal of MLC report, it is apparent that the complainant had two injuries on his body parts which were simple in nature. Offences of Sections 323 and 506 of IPC are specified in the Schedule of offence of Section 3(2)(v-a) of SC/ST Act, however, the same would be considered as bailable offence as discussed above.

20. As far as merits of the case in relation to offences of Sections 3(1)(r) and 3(1)(s) is concerned, the FIR shows that the incident was alleged to be happened at farm where presence of public can easily be assumed, therefore, public view is available in the case as the view taken by the Hon'ble Apex Court in the case of *Swarn Singh* (supra). The contention of the FIR clearly indicates that being annoyed from the action of complainant of selling the soil to other person, the appellants have intentionally insulted him in farm abusing on his caste. Accused persons and complainant are living in same village, therefore, it can not be said that the appellants were not aware of the caste of complainant, therefore, *prima facie,* the intention of the appellants to humiliate and insult the complainant is available in the case. However, the appellants have filed some affidavits of witnesses who saw the incident and they have given statement in favour of the appellants but at this stage, while considering the anticipatory bail application, weightage cannot be given to their affidavits over the physical injuries sustained by the complainant and over other investigation of the case. Under which circumstances, the affidavits have been filed by the witnesses, cannot be determined at this stage. Therefore, bar of Section 18 and 18-A of SC/ST Act 1989 would be attracted in the case in relation to grant of anticipatory bail under Section 3(1)(r) and 3(1)(s). The pronouncements relied upon by the appellants have been passed under the different facts and circumstances and do not help the appellants as the circumstances are prevailing. Therefore, this Court is not inclined to allow this anticipatory bail application. Accordingly, the order passed by the Court below is hereby affirmed.

21. Since, the offences involved in the case are not punishable with more than 7 years of imprisonment and Section 41(1) of Cr.P.C. provides that the offences for which punishment prescribed is imprisonment for a term upto seven years, the accused may be kept in custody only if the condition enumerated in Section 41(1)(b)(ii) of Cr.P.C. exist. In *Arnesh Kumar's* case [(2014) 8 SCC 273], the Hon'ble Apex Court has held as under:-

> *". .....the arrest effected by the police officer does not satisfy the requirements of Section 41 of the Code, Magistrate is duty bound not to authorise his further detention and release the accused....".*

22. In view of the observations laid down in the judgment referred above, I deem fit to direct as under :

> *(i) That, the police may resort to the extreme step of arrest only when the same is necessary and the appellants fail to cooperate in the investigation.*
>
> *(ii) That, the appellants should first be summoned to cooperate in the investigation. If the appellants cooperate in the investigation then the occasion of their arrest should not arise.*
>
> *(iii) That, if the appellants-accused are arrested and want to file application for regular bail before trial Court, then they will be produced before the trial Court without any delay subject to prior intimation to the complainant. Trial Court is also directed to consider their bail application as expeditiously as possible, preferably, on the same day after giving an opportunity to the complainant to oppose.*

23. The interim order granted vide order dated 27.01.2021, shall no longer applicable.

24. This appeal is **disposed of** with the aforesaid directions.

25. C.c. as per rules.

Order accordingly

I.L.R. [2021] M.P. 757
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice Subodh Abhyankar

MCRC No. 45017/2020 (Indore) decided on 8 February, 2021

RAMNIWAS ...Applicant

Vs.

STATE OF M.P. …Non-applicant

***A. Criminal Procedure Code, 1973 (2 of 1974), Section 439 and Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Sections 8, 15 & 29 – Bail – Entitlement* – Held – Applicant arrested solely on basis of statement made by co-accused and his own confessional statement, is entitled to be released on bail – Bail granted – Application allowed. (Para 10 & 14)**

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 439 एवं स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धाराएँ 8, 15 व 29 – जमानत – हकदारी – अभिनिर्धारित – सहअभियुक्त द्वारा दिये गये कथन एवं उसके स्वयं के संस्वीकृति कथन के एकमात्र आधार पर आवेदक को गिरफ्तार किया गया, जमानत पर छोड़े जाने हेतु हकदार है – जमानत प्रदान की गई – आवेदन मंजूर।

***B. Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Section 67 – Confessional Statement* – Held – Statement made by co-accused and confessional statement of accused are not admissible in law and cannot be taken into account to convict an accused under NDPS Act. (Para 10)**

ख. स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धारा 67 – संस्वीकृति कथन – अभिनिर्धारित – सहअभियुक्त द्वारा किया गया कथन एवं अभियुक्त का संस्वीकृति कथन विधि में ग्राह्य नहीं है तथा अभियुक्त को स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम के अंतर्गत दोषसिद्ध करने के लिए विचार में नहीं लिये जा सकते।

***C. Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Section 53 & 67 and Evidence Act (1 of 1872), Section 25 – "Officers" – Confessional Statement of Accused* – Held – Apex Court concluded that "Officers" u/S 53 are "Police Officers" within meaning of Section 25 of Evidence Act – Confessional statement made to them would be barred u/S 25 of Evidence Act – Statement recorded u/S 67 cannot be used as confessional statement in the trial under the 1985 Act. (Para 3 & 4)**

ग. स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धारा 53 व 67 एवं साक्ष्य अधिनियम (1872 का 1), धारा 25 – ''अधिकारीगण'' – अभियुक्त का संस्वीकृति कथन – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया कि धारा 53 के

अंतर्गत ''अधिकारीगण', साक्ष्य अधिनियम की धारा 25 के अर्थान्तर्गत ''पुलिस अधिकारीगण'' है – उन्हें दिया गया संस्वीकृति कथन, साक्ष्य अधिनियम की धारा 25 के अंतर्गत वर्जित होगा – धारा 67 के अंतर्गत अभिलिखित कथन का उपयोग संस्वीकृति कथन के रूप में 1985 के अधिनियम के अंतर्गत विचारण में नहीं लिया जा सकता।

***D. Constitution – Article 141 – Binding Precedent – Retrospective/ Prospective Applicability* – Apex Court conclude the matter on 29.10.2020 and incident in present case was of 12.05.2017 – Held – Apex Court has only interpreted the law which was already existing and hence judgment would be binding on all parties and it will be applicable retrospectively. (Para 11 & 12)**

घ. संविधान – अनुच्छेद 141 – बाध्यकारी पूर्व निर्णय – भूतलक्षी/भविष्यलक्षी प्रयोज्यता – सर्वोच्च न्यायालय ने मामले को 29.10.2020 को निष्कर्षित किया और वर्तमान प्रकरण में घटना 12.05.2017 की थी – अभिनिर्धारित – सर्वोच्च न्यायालय ने केवल विधि का निर्वचन किया जो कि पहले से विद्यमान थी और इसलिए सभी पक्षकारों पर निर्णय बाध्यकारी होगा तथा वह भूतलक्षी रूप से प्रयोज्य होगा।

Cases referred:

(2019) 8 SCC 811, 2020 SCC Online SC 882.

Saransh Jain, for the applicant.

Manoj Kumar Soni, for the non-applicant /Narcotics Control Bureau, Indore.

O R D E R

SUBODH ABHYANKAR, J.:- They are heard through **Video Conferencing.** Perused the case diary / challan papers.

This is the applicant's **third** application under Section 439 of Criminal Procedure Code, 1973, as he / she is implicated in connection with Crime No.01/2017 registered at Police Station Narcotics Control Bureau, Zonal Unit, Indore District Indore (MP) for offence punishable under Section 8 read with Section 15 and Section 29 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (herein after referred to as the Act). The applicant is in custody since 26.09.2018.

2. Learned counsel for the applicant has submitted that this is the applicant's third application, as earlier bail application Miscellaneous Criminal Case No.22967/2019 was dismissed as withdrawn vide its order dated 02.07.2019 whereas Miscellaneous Criminal Case No.48085/2019 was dismissed on merits by this Court vide order dated 21.01.2020.

3. Facts in the present case are not disputed that the applicant is facing prosecution under Section 8 read with Section 15 and Section 29 of the Act in

connection with recovery of 1239.765 kilograms of poppy straw from the co-accused Subhash s/o Rajaram Gurjar, who in his statement recorded under Section 67 of the Act, has stated that it was the present applicant who had loaded the aforesaid contraband in the vehicle. Earlier bail application of the applicant Miscellaneous Criminal Case No.48085/2019 was dismissed by this Court while observing that whether the statement recorded under Section 67 of the Act can be treated as confessional statement or not, is pending consideration before the Larger Bench of the Supreme Court; and has further proceeded to hold that "confessional statement is admissible", while relying upon the decision rendered in the case of *Mohammed Farin v. State Represented by the Intelligence Officer* reported as (2019) 8 SCC 811, has dismissed the bail application.

4. Mr. Saransh Jain, counsel for the applicant has submitted that subsequently the Larger Bench of the Supreme Court in the case of *Toofan Singh v. State of Tamil Nadu* reported as 2020 SCC Online SC 882 has clearly held that the 'Officers' under Section 53 of the Act are "Police Officer" within the meaning of Section 25 of the Evidence Act; and the confessional statement made to them would be barred under Section 25 of the Evidence Act and cannot be looked upon; and consequently it is also held that the statement recorded under Section 67 of the Act cannot be used as confessional statement in the trial of an offence under the Act.

5. Relying upon the aforesaid latest dictum of the Supreme Court, counsel has contended that the applicant is entitled to be released on bail, as he has been roped-in in the matter, only on the basis of his statement and the statement of co-accused regarding his involvement.

6. Counsel has submitted that except the confessional statement of the co-accused and the present applicant, there is nothing on record even to remotely connect him with the aforesaid offence; and his plea of being falsely implicated is also corroborated by his medical document, whereby he was hospitalized during the period when the incident took place. It is further submitted that there are no criminal antecedents of the applicant. Thus, it is submitted that the applicant be released on bail.

7. Mr. Manoj Soni, ld. Counsel for the respondent / State, on the other hand, has opposed the prayer; and it is submitted that no case for interference is made out. Although, Mr. Soni has fairly submitted that in the case of *Toofan Singh v. State of Tamil Nadu* (Supra), Larger Bench of the Supreme Court has held that statement recorded under Section 67 of the Act is not admissible in evidence, however, his contention is that the aforesaid decision would be applicable prospectively and hence, would not be applicable in the present facts and circumstances of the case where the incident has taken place on 12th May, 2017. It is however not denied that there are no criminal antecedents of the applicant.

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

9. The Supreme Court, in the case of *Toofan Singh* (supra) delivered by Justice R.F. Nariman has concluded the reference in the following terms:-

> **"158.** We answer the reference by stating:
>
> (i) That the officers who are invested with powers under section 53 of the NDPS Act are "police officers" within the meaning of section 25 of the Evidence Act, as a result of which any confessional statement made to them would be barred under the provisions of section 25 of the Evidence Act, and cannot be taken into account in order to convict an accused under the NDPS Act.
>
> (ii) That a statement recorded under section 67 of the NDPS Act cannot be used as a confessional statement in the trial of an offence under the NDPS Act."

10. A perusal of the same clearly reveals that the statement made by the co-accused as also the confessional statement of an accused are not admissible in law and cannot be taken into account to convict an accused under the NDPS Act. In view of the same, this court has no hesitation to hold that the applicant, who is arrested solely on the basis of the statement made by the co-accused and his own confessional statement, is entitled to be released on bail.

11. So far as the contention of Shri Manoj Soni, that the aforesaid decision would be applicable prospectively is concerned, it has no legs to stand as in the said case of *Toofan Singh* (supra), the Supreme Court has only interpreted the law which was already existing and hence the judgment would be binding on all the parties concerned notwithstanding that the incident has taken place on 12th May, 2017 i.e., prior to the date of the said decision which is 29.10.2020.

12. Thus, it is held that the decision rendered by the Supreme Court in the case of *Toofan Singh v. State of Tamil Nadu* (Supra) would be applicable retrospectively.

13. Having considered the rival submissions, perusal of the case diary, this Court finds it expedient to allow the bail application.

14. Accordingly, without commenting on the merits of the case, the application filed by the applicant is allowed. The applicant is directed to be released on bail upon furnishing a personal bond in the sum of **Rs.1,00,000/- (Rupees One Lakh)** with one solvent surety of the like amount to the satisfaction of the trial Court for his / her regular appearance before the trial Court during trial, with a condition that he / she shall remain present before the court concerned during trial and shall also abide by the conditions enumerated under Section 437 (3) Criminal Procedure Code, 1973.

This order shall be effective till the end of the trial, however, in case of bail jump, it shall become ineffective.

Certified copy as per rules.

Application allowed

I.L.R. [2021] M.P. 761
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice Rajeev Kumar Shrivastava
MCRC No. 4055/2021 (Gwalior) decided on 15 March, 2021

MAKHAN PRAJAPATI …Applicant

Vs.

STATE OF M.P. …Non-applicant

***Mines and Minerals (Development and Regulation) Act (67 of 1957), Section 4(1) & 21(1), Penal Code (45 of 1860), Section 379 and Criminal Procedure Code, 1973 (2 of 1974), Section 451 & 457 – Release of Seized Vehicle* – Held – Unless owner of vehicle permits, no driver can transport sand by owner's vehicle – Petitioner (*registered owner of vehicle*) deposited penalty which *prima facie* reflects his consent rather non-rebuttal by him shows implied consent – Mere submission of royalty cannot absolve petitioner from his liability – Courts below rightly rejected application filed u/S 451 & 457 Cr.P.C. – Application dismissed. (Paras 8 to 10)**

खान और खनिज (विकास और विनियमन) अधिनियम (1957 का 67), धारा 4(1) व 21(1), दण्ड संहिता (1860 का 45), धारा 379 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 451 व 457 – जब्तशुदा वाहन की निर्मुक्ति – अभिनिर्धारित – जब तक वाहन का स्वामी अनुमति न दें कोई वाहन चालक, स्वामी के वाहन से रेत का परिवहन नहीं कर सकता – याची (*वाहन का पंजीकृत स्वामी*) ने शास्ति जमा की, जो प्रथम दृष्ट्या उसकी सम्मति प्रतिबिंबित करता है बल्कि उसके द्वारा खंडन न किया जाना विवक्षित सम्मति दर्शाता है – मात्र रॉयल्टी प्रस्तुत करना, याची को उसके दायित्व से मुक्त नहीं करता – निचले न्यायालयों ने धारा 451 व 457 दं.प्र.सं. के अंतर्गत प्रस्तुत आवेदन को उचित रूप से नामंजूर किया – आवेदन खारिज।

Case referred:

2019 (3) CCSC 1216.

Tapendra Sharma, for the applicant.
Nitin Goyal, P.L. for the non-applicant/State.

O R D E R

RAJEEV KUMAR SHRIVASTAVA, J. :- This petition is preferred under Section 482 of CrPC arising out of the order dated 28.11.2020 passed by Second Additional Sessions Judge, Karera, District Shivpuri in Criminal Revision No. 73/2020, confirming the order dated 9.9.2020 passed by Judicial Magistrate First Class (JMFC), Karea District Shivpuri in Case No.MJCR/63/2020, whereby the application filed by the petitioner under Section 457 of CrPC for releasing the vehicle, has been rejected.

2. The facts, in nutshell, are that one case was registered against the present petitioner under Section 379 of IPC and Sections 4(1) and 21(1) of Mines and Minerals Act and vehicle bearing registration No. MP33-HA-3600 has been seized. The revision preferred against the order dated 28.11.2020 passed by JMFC Karera District Shivpuri has been rejected by order dated 9.9.2020 in Criminal Revision No. 73/2020.

3. Learned counsel for the petitioner has contended that no prima facie case is made out. The petitioner is a registered owner of the vehicle in question and having all the relevant documents of the seized vehicle including permit of mining issued by the Director of Geology and Mining, Uttar Pradesh for inter-state transit pass valid till 5.9.2020. Long custody of the vehicle would destroy the vehicle entirely and seized vehicle is the only livelihood of petitioner's family. It is also submitted that the petitioner has already deposited penalty amount of Rs.50000/- on 28.9.2020, despite the seized vehicle has not been released by the Courts below. Hence, prays that the impugned order be set aside and seized vehicle be released in favour of the petitioner.

4. Per Contra, learned State counsel has submitted that no case is made out for releasing the vehicle in question and prays for dismissal of the petition.

5. Heard learned counsel for the rival parties and perused the available record.

6. On perusal of available record, it is apparent that the petitioner has prayed for releasing the seized vehicle by contending that he is the registered owner and the vehicle in question is insured and was having permit of mining and penalty imposed to the tune of Rs.50000/- has already been deposited by him on 28.9.2020. As per prosecution case, on 4.9.2020 the sand was transported by the seized vehicle. On being stopped the vehicle, driver of the vehicle fled away leaving the vehicle on spot. On account of that, an offence has been registered under Section 379 of IPC and Sections 4(1) and 21(1) of Mines and Minerals Act.

7. In *Madhya Pradesh State vs. Udai Singh,* reported in 2019 (3) CCSC 1216, the Hon'ble Apex Court has observed as under :-

> "Protection of forests against depredation is a constitutionally mandated goal exemplified by Article 48A of the Directive Principles and the Fundamental Duty of every citizen incorporated in Article 51 A(g). By isolating the confiscation of forest produce and the instruments utilised for the commission of an offence from criminal trials, the legislature intended to ensure that confiscation is an effective deterrent. The absence of effective deterrence was considered by the Legislature to be a deficiency in the legal regime. The state amendment has sought to overcome that deficiency by imposing stringent deterrents against activities which threaten the pristine existence of forests in Madhya Pradesh. As an effective tool for protecting and preserving environment, these provisions must receive a purposive interpretation."

8. It is submitted by learned counsel for the petitioner that royalty has been deposited but merely submission of royalty cannot absolve the petitioner from his liability. It is the common feature that unless it is permitted by the owner of the vehicle, no driver can transport the sand by the owner's vehicle. Thereafter, petitioner deposited Rs.50000/- as penalty which prima facie reflects consent of the owner of the vehicle, rather non-rebuttal by the owner shows implied consent of the owner.

9. Considering the allegations, increasing threat and illegal transportation of sand in the locality coupled with the fact that the offence alleged affects echo system, moreover it is harmful to all the living creatures, this Court is of the view that the Courts below did not commit any mistake in rejecting the application filed under Sections 451 and 457 of CrPC.

10. Accordingly, the dated 28.11.2020 passed in Criminal Revision No.73/2020 by Second ASJ, Karera, District Shivpuri as well as the order dated 09/09/2020 passed in MJCR/63/2020 by JMFC, Karera, District Shivpuri are hereby affirmed.

The petition fails and is accordingly **rejected.**

Application dismissed

I.L.R. [2021] M.P. 764 (DB)
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice Atul Sreedharan & Mr. Justice J.P. Gupta
MCRC No. 3013/2019 (Jabalpur) decided on 17 March, 2021

BHUPENDRA SINGH ...Applicant

Vs.

STATE OF M.P. …Non-applicant

***A. Criminal Procedure Code, 1973 (2 of 1974), Section 156(3) & 173(3) and Prevention of Corruption Act (49 of 1988), Sections 13(1)(e), 13(2) & 19 – Police Closure Report – Sanction for Prosecution – Jurisdiction of Magistrate* – Held – If investigation agency files closure report, Magistrate or Special Judge has jurisdiction to accept it or reject it and if material is not sufficient and further investigation is desirable, investigation agency can be directed to make further investigation or complainant may be directed to produce material in support of complaint – If magistrate/Special Judge is of opinion that cognizance can be taken but if there is need of sanction order for prosecution then cognizance cannot be taken and matter would be left on investigation agency for getting sanction for prosecution – Special Judge has not committed any jurisdictional error. (Paras 7 to 10)**

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 156(3) व 173(3) एवं भ्रष्टाचार निवारण अधिनियम (1988 का 49), धाराएँ 13(1)(e), 13(2) व 19 – पुलिस खात्मा प्रतिवेदन – अभियोजन हेतु मंजूरी – मजिस्ट्रेट की अधिकारिता – अभिनिर्धारित – यदि अन्वेषण एजेंसी खात्मा प्रतिवेदन प्रस्तुत करती है, मजिस्ट्रेट या विशेष न्यायाधीश के पास उसे स्वीकार करने अथवा नामंजूर करने की अधिकारिता है और यदि सामग्री पर्याप्त नहीं है तथा आगे अन्वेषण वांछित है, अन्वेषण एजेंसी को आगे अन्वेषण करने के लिए निदेशित किया जा सकता है या परिवादी को परिवाद के समर्थन में सामग्री प्रस्तुत करने के लिए निदेशित किया जा सकता है – यदि मजिस्ट्रेट/विशेष न्यायाधीश की यह राय है कि संज्ञान लिया जा सकता है किंतु यदि अभियोजन हेतु मंजूरी आदेश की आवश्यकता है तब संज्ञान नहीं लिया जा सकता तथा मामले को अभियोजन हेतु मंजूरी प्राप्त करने के लिए अन्वेषण एजेंसी पर छोड़ा जाएगा – विशेष न्यायाधीश ने कोई अधिकारिता की त्रुटि नहीं कारित की है।

***B. Criminal Practice – Police Closure Report – Further Investigation* – Held – If Special Judge was not satisfied with finding of investigating agency, he should have directed for further investigation instead of giving direction to place material before sanctioning authority for granting sanction. (Para 14 & 15)**

ख. दाण्डिक पद्धति – पुलिस खात्मा प्रतिवेदन – आगे और अन्वेषण – अभिनिर्धारित – यदि विशेष न्यायाधीश अन्वेषण एजेंसी के निष्कर्ष से संतुष्ट नहीं था उसे मंजूरी प्रदान किये जाने हेतु मंजूरी प्राधिकारी के समक्ष सामग्री रखने के लिए निदेश देने की बजाए आगे और अन्वेषण हेतु निदेशित करना चाहिए था।

***C. Criminal Procedure Code, 1973 (2 of 1974), Section 156(3) & 173 (3) – Police Closure Report – Jurisdiction of Magistrate* – Held – Order rejecting the closure report must be a speaking order and should contain and indicate shortcoming of investigation including suggestions and guidelines with regard to further investigation – Merely saying that *prima facie* there is suspicion of commission of offence is not sufficient to reject the closure report – Impugned order set aside – Matter sent back to Special Judge to pass a speaking order – Application disposed. (Paras 16, 19 & 20)**

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 156(3) व 173(3) – पुलिस खात्मा प्रतिवेदन – मजिस्ट्रेट की अधिकारिता – अभिनिर्धारित – खात्मा प्रतिवेदन नामंजूर करने का आदेश एक सकारण आदेश होना चाहिए और उसमें अन्वेषण की कमियां अंतर्विष्ट एवं उपदर्शित होनी चाहिए, जिसमें आगे और अन्वेषण के संबंध में सुझावों एवं दिशानिदेशों का समावेश होना चाहिए – मात्र यह कहना कि प्रथम दृष्ट्या अपराध कारित होने का संदेह है, खात्मा प्रतिवेदन नामंजूर करने के लिए पर्याप्त नहीं है – आक्षेपित आदेश अपास्त – विशेष न्यायाधीश को सकारण आदेश पारित करने के लिए मामला वापस भेजा गया – आवेदन निराकृत।

Cases referred:

(2014) 13 SCC 707, (2010) 4 SCC 785, (2009) 9 SCC 219.

Anil Khare with *Priyank Agrawal*, for the applicant.
Satyam Agrawal, for the non-applicant/Lokayukta.

O R D E R

The Order of the Court was passed by :

J.P. GUPTA, J. :- This petition under section 482 of the Cr.P.C has been preferred for quashment of the order dated 23/12/2017 passed by the Special Judge under Prevention of Corruption Act, Jabalpur whereby reports in terms of closure report filed by the respondent in connection with Crime No.96/2011 under sections 13(1)(e), 13(2) of the Prevention of Corruption Act, 1988 (hereinafter refer as PC Act) was rejected and the respondent was directed to submit the material before the sanctioning authority to grant sanction for prosecution of the applicant.

2. In brief, the facts of the case are that on the basis of secret enquiry, it was found that during the check period from 04/04/1988 to 29/08/2011, the applicant who was working as Assistant Engineer, Municipal Corporation, Jabalpur amassed assets disproportionate to his known source of income. Therefore on

30/08/2011 the FIR of Crime No.96/2011 under sections 13(1)(e), 13(2) of the PC Act was registered and investigation was conducted and the respondent raided 6 places relating to the applicant on the basis of 6 search warrants issued by the competent court and the applicant submitted his representations along with relevant documents to demonstrate that his assets are in accordance to his known sources of income. After investigation, the respondent/investigating agency came to the conclusion that the applicant has not possessed disproportionate property in comparison to his income from known sources. The respondent/investigating agency arrived at the conclusion that the income, assets and expenditure of the applicant was as under during the check period:-

INCOME OF THE PETITIONER AS PER INVESTIGATING AGENCY i.e. RESPONDENT

Sr.No.	**Source of Income**	**Amount**
1.	Salary prior to check period	Rs.82,800/-
2.	Income derived from Salary during check period	Rs.34,32,652/-
3.	Income through GPF	Rs.50,000/-
4.	Interest received from Bank	Rs.4,99,674/-
5.	Bank Loan	Rs.70,57,844/-
6.	Income derived from LIC	Rs.4,78,866/-
7.	Income from investment made in post Office Recurrent deposit	Rs.2,35,240/-
8.	Income from renting properties	Nil
9.	Income from Bonds and shares	Rs.82,680/-
10.	Income derived from Agriculture activities	Rs.22,19,966/-
11.	Income from sale of vehicle	Rs.80,000/-
12.	Income from petitioner's wife while being a proprietor of Century Engineering	Rs.1,98,450/-
13.	Income of petitioner's wife through her business of petrol pump, tanker etc.	Rs.1,66,83,433/-
	TOTAL	**Rs.3,11,01,605/-**

EXPENDITURE OF THE PETITIONER AS PER THE INVESTIGATION AGENCY i.e. RESPONDENT

Sr.no	Expenditure	Amount
1.	Expenditure prior to check period	Rs.55,200/-
2.	Household expenditure	Rs.13,73,060/-
3.	Expenditure on payment of GPF	Rs.50,000/-
4.	Amount in bank accounts	Rs.26,32,506/-
5.	Expenditure on payment of bank loan	Rs.3,85,000/-
6.	Expenditure on premium paid in respect of LIC policies	Rs.6,11,398/-
7.	Expenditure on payment in respect to recurring deposits	Rs.1,87,600/-
8.	Expenditure on bonds and shares	Rs.38,500/-
9.	Expenditure made on purchase of immovable assets	Rs.22,98,727/-
10.	Expenditure on agriculture	Rs.11,09,983/-
11.	Expenditure on purchase of vehicle	Rs.4,32,750/-
12.	Inventory	Rs.7,83,500/-
13.	Cash	Rs.1330/-
14.	Expenditure on payment of TV loan by petitioner's wife	Rs.51,600/-
15.	Expenditure of petitioner's wife in respect to her business of petrol pump tanker etc.	Rs.1,70,58,196/-
16.	Expenditure on education of petitioner's son	Rs.1,90,500/-
	Total	**Rs.2,72,59,850/-**

3. Based on the said conclusion of the investigation, after duly considering the explanation given by the applicant, the respondent filed closure report as no case made out against the applicant and the same was submitted before the Special Judge, and learned Special Judge by the impugned order dated 23/12/2017 rejected the prayer with regard to acceptance of the closure report.

4. Learned Special Judge passed the order in the following terms:-

आरक्षी केन्द्र वि.पु.स्था. भोपाल के स्थानीय कार्यालय, जबलपुर के द्वारा प्रस्तुत किये गये अंतिम प्रतिवेदन (खात्मा) क्रमांक 13/16 दिनांकित 10.03.2016 का परिशीलन किया गया।

मामले की प्रथम सूचना रिपोर्ट दिनांक 30.08.2011 से यह प्रकट होता है कि तत्कालीन निरीक्षक राजवर्धन माहेश्वरी को कार्यालय से प्राप्त शिकायत पर निर्देशानुसार गोपनीय जांच की गयी जिसके आधार पर यह पाया गया था कि अभियुक्त ने अपनी शासकीय पदस्थापना (दिनांक 04.04. 1988 से 29.08.2011) अवधि में प्रथम दृष्टया अनुपातहीन सम्पत्तियां अर्जित की गयी हैं। जिस पर अभियुक्त के विरूद्ध भ्रष्टाचार निवारण अधिनियम, 1988 की धारा 13 (1) (ड) सहपठित धारा 13(2) के अन्तर्गत दण्डनीय अपराध का अन्वेषण करने के लिए अपराध क्रमांक 96/11 दिनांकित 30.08.2011 पंजीबद्ध किया गया है।

उक्त अपराध क्रमांक के संबंध में इस न्यायालय में संधारित पंजी सन् 2011 से यह प्रकट होता है कि तत्कालीन पुलिस अधीक्षक , वि.पु.स्था. जबलपुर के द्वारा अपने आवेदन क्रमांक 1835/पु. अ./वि.पु.सीा./2011 जबलपुर दिनांक 27.08.2011 के निबंधनों में अभियुक्त एवं उसके ''कुटुम्ब के सदस्यों से सम्बन्धित'' 06 विभिन्न स्थानों पर तलाशी के लिए वारंट प्रदान करने की प्रार्थना की गयी थी। जिस पर मेरे पूर्व पीठासीन अधिकारी (श्री प्रद्युम्न सिंह) के द्वारा तत्कालीन निरीक्षक वि.पु. स्था जबलपुर श्री राजवर्धन माहेश्वरी को अधिकृत करते हुए 06 नग तलाशी वांरट दिनांक 07.09.2011 जारी किया था। उक्त तलाशी वारंट का निर्वाह प्रतिवेदन क्रमांक 1908/पु.अ./वि.पु.स्था./2011 जबलपुर दिनांकित 07.09.2011 प्रस्तुत किया गया है जिसमें अभियुक्त एवं उसके "कुटुम्ब के सदस्यों" द्वारा तत्समय रूपये 1,43,81,050 के मूल्य की चल एवं अचल सम्पत्ति धारित होना पाया गया था।

अंतिम प्रतिवेदन (खात्मा) क्रमांक 13/16 दिनांकित 10.03.2016 की कण्डिका–8 से यह प्रकट होता है कि मामले में दो अन्वेषणकर्ता नामतः श्री राजवर्धन माहेश्वरी एवं श्री प्रभात शुक्ला, रहे हैं। द्वितीय अन्वेषणकर्ता प्रभात शुक्ला ने अंतिम प्रतिवेदन (चालान) में ''घटना का संक्षिप्त विवरण'' के अंतर्गत अभियुक्त की पत्नी श्रीमती स्नेहलता सिंह की निम्नलिखित अर्जन को अभियुक्त की आय सम्मिलित किया है।–

1. बैंक ऑफ बड़ौदा, शाखा रीवा (म.प्र.) के खाता क्रमांक 25610400000163 की सीमा रूपये 60,00,000 में से रूपये 31,41,162.
2. निजी वित्त कंपनी यथा– टाटा फायनेंस कंपनी लिमिटेड से विभिन्न तिथियों में ली गई ऋण राशि रू. 27,00,000.
3. एल.आई.सी. हाउसिंग फाईनेन्स से भवन के लिये ली गई ऋण राशि रू. 8,50,000.

दूसरी ओर अभियुक्त की पत्नी स्नेहलता सिंह के द्वारा सन् 1994 से सन् 1998 तक जीवन बीमा निगम के अभिकर्ता की रूप में अर्जित की गयी कमीशन राशि रू. 33,666 को अभियुक्त की पत्नी स्नेहलता सिंह की आय के रूप में मान्य कर लिया है।

द्वितीय अन्वेषणकर्ता ने अभियुक्त की पत्नी के विभिन्न व्यवसायों– पेट्रोल पंप, टैंकर, बुटिक (सिलाई, कढ़ाई, बुनाई), बारात घर संचालन आदि को वर्णित किया है। उक्त समस्त व्यवसाय दिनांक 04.04.1998 से 29.08.2011 के बीच किया जाना तात्पर्यित है।

द्वितीय अन्वेषणकर्ता ने श्रीमती स्नेहलता सिंह के उक्त व्यवसाय में विनिवेश की जाने वाली पूंजी के स्रोत के सम्बन्ध में कोई संतोषजनक सामग्री एकत्रित नहीं किया है और उक्त व्यवसाय से प्राप्त आय (रू. 1,98,450+ रू. 1,66,83,433 + रू. 10,44,000=रू.1,79,25,883) को अभियुक्त की आय में समावेश किया है। जबकि मध्यप्रदेश सिविल सेवा (आचरण) नियम 1965 के नियम 16 (3) यह उपबंधित करती है कि यदि कोई शासकीय सेवक के कुटुम्ब का कोई सदस्य किसी करोबार या

व्यापार में लगा हुआ है या उसके कुटुम्ब का कोई सदस्य बीमा कंपनी या कमीशन एजेंसी का स्वामित्व रखता है या उसका प्रबंध करता है, तो वह शासन को रिपोर्ट देगा। प्रस्तुत प्रकरण में यह किंचित दर्शित नहीं होता कि अभियुक्त ने अपनी पत्नी स्नेहलता सिंह के उक्त व्यवसाय यथा पेट्रोल पंप, तेल टेंकर, मकान क्रय, बुटीक, बारात घर संचालन की यथा अपेक्षित रिपोर्ट शासन को दिये जाने के संबंध में कोई साक्ष्य एवं सामग्री प्रकरण के अभिलेख पर नहीं है।

अभियुक्त ने अपनी पत्नी श्रीमती स्नेहलता सिंह के बीमा अभिकर्ता (सन् 1994 सन् 1998) तक की रिपोर्ट शासन को प्रदान नहीं किया और जब अभियुक्त की पत्नी को कमीशन राशि प्रदान की गयी तब अभियुक्त के द्वारा दिनांक 29.12.1997 को आयुक्त, नगर पालिका निगम, रीवा को सूचित प्रेषित कर दी गयी। उक्त सूचना कमीशन प्राप्त करने की सूचना रही है। और व्यवसाय प्रारंभ करने की सूचना नहीं मानी जा सकती।

द्वितीय अन्वेषणकर्ता ने अंतिम प्रतिवेदन (खात्मा) में अभियुक्त की कृषि आय के संबंध में जो विवरण प्रस्तुत किया है, उससे यह दर्शित होता है कि अभियुक्त के पिता एवं माता ने अपने अंश की कृषि भूमि को अभियुक्त के दो सगे भाईयों की सहमति से अभियुक्त को कृषि करने के लिए समय–समय पर प्रदान कर दिया था। प्रकरण के अभिलेख पर यह दर्शित करने के लिए कोई साक्ष्य नहीं है कि अभियुक्त के दो अन्य भाईयों की आय का स्रोत और उनके द्वारा धारित अन्य संपत्तियां तक समय कितनी रही है। इसलिए उक्त तथ्य गंभीर रूप से संदेहात्मक है। और अन्वेषणकर्ता के द्वारा प्रकट की गयी कृषि आय रू. 44,39,932 प्रथम दृष्टयां अस्वीकार किये जाने योग्य है।

द्वितीय अन्वेषणकर्ता के द्वारा अंतिम प्रतिवेदन (खात्मा) क्रमांक–13/16 दिनांकित 10.03.2016 में अभियुक्त एवं उसकी पत्नी श्रीमती स्नेहलता सिंह के द्वारा लिये ऋणों और किये गये विनिधानों के सम्बन्ध में मध्यप्रदेश सिविल सेवा (आचरण) नियम, 1965 के नियम 17 (4) (2) में अन्तर्विष्ट उपबंधों के अनुसार शासन को रिपोर्ट करना और उसके आदेशों के अनुसार कार्य करने के सम्बन्ध में भी कोई साक्ष्य एवं सामग्री एकत्रित नहीं किया है।

अंतिम प्रतिवेदन (खात्मा) क्रमांक– 13/16 दिनांकित 10.03.2016 से यह भी प्रकट नहीं होता कि अभियुक्त एवं उसकी पत्नी स्नेहलता के द्वारा अर्जित की गयी विभिन्न स्थावर सम्पत्तियों के संबंध में अभियुक्त के द्वारा मध्यप्रदेश सिविल सेवा आचरण नियम, 1965 के नियम 19 (2) के निबंधनों में विहित प्राधिकारी की पूर्व जानकारी से उक्त स्थावर सम्पत्तियों अर्जित की गयी थीं।

द्वितीय अन्वेषणकर्ता ने यह भी प्रतिवेदित किया है कि अभियुक्त के अपने अभ्यावेदन में स्वयं के विवाह, पुत्र एवं पुत्री के जन्मदिन एवं अन्य अवसरों पर विभिन्न उपहार अभिप्राप्त किये हैं। उक्त उपहारों के सम्बन्ध में मध्यप्रदेश सिविल सेवा आचरण, नियम 1965 के नियम– 14(2) के पालन में सम्बन्ध में भी कोई साक्ष्य एवं सामग्री प्रस्तुत नहीं किया है।

अभियुक्त के विवाह अवसर पर प्राप्त वस्तुयें मध्यप्रदेश सिविल सेवा आचरण नियम, 1965 के नियम 14–ए और मध्यप्रदेश दहेज प्रतिषेध नियम, 2004 के अन्तर्गत विवाह में प्राप्त वस्तुओं की सूची और ऐसी सूची में समाविष्ट सम्पत्तियों को अभियुक्त के सेवा अभिलेख में प्रविष्ट किए जाने का भी कोई प्रकटीकरण नहीं है।

अभियुक्त के द्वारा Check Period (Dated 04.04.1988 to 29.08.2011) में यथा प्रतिवेदित आय रू. 3,11,01,605 में उक्त समस्त सम्पत्तियां एवं उससे अर्जित आय को समाविष्ट किया गया है। जबकि उक्त अवधि में अभियुक्त को मात्र रू. 34,32,652 वेतन के रूप में प्राप्त हुए थे और यदि चेक

पीरियड के पूर्व आय रू. 82,800 जोड़ा जाए तब अभियुक्त की आय प्रथम दृष्टया मात्र रू. 35,15,452 दर्शित होता है।

उक्त संगणना एवं आय स्रोत की वैधता को दृष्टिगत रखते हुए प्रथम दृष्ट्या यह दर्शित होता है कि अभियुक्त के द्वारा Check Period (Dated 04.04.1988 to 29.08.2011) में अनुपातहीन रही है। इस प्रकार, अभियुक्त के विरूद्ध भ्रष्टाचार निवारण अधिनियम, 1988 की धारा 13 (1) (ड) सहपठित धारा 13(2) के अन्तर्गत दण्डनीय अपराध कारित किया जाना प्रथम दृष्टया गठित होता है कि इसलिए, अंतिम प्रतिवेदन (खात्मा) क्रमांक 13/16 दिनांकित 10.03.2016 अस्वीकार किए जाने योग्य है, इसलिए अस्वीकार किया जाता है।

परिणामतः आरक्षी केन्द्र–वि.पु.स्था. भोपाल के स्थानीय कार्यालय, जबलपुर (म.प्र.) के द्वारा प्रस्तुत अंतिम प्रतिवेदन (खात्मा) क्रमांक 13/16 दिनांकित 10.03.2016 मूलतः इस आदेश की सत्य प्रतिलिपि के साथ वापस किया जाए कि, मामले के समस्त अभिलेख सक्षम प्राधिकारी के समक्ष अभियेाजन स्वीकृति के विचार हेतु तत्काल प्रस्तुत किया जाए।

माननीय सर्वोच्च न्यायालय के न्याय दृष्टांत **डा. सुब्रमण्यम स्वामी विरूद्ध डा. मनमोहन सिंह एवं अन्य ए आई आर 2012 एस सी 1185** में प्रतिपादित विधिक सिद्धांत के आलोक में यह निर्देशित किया जाता है कि अभियोजन स्वीकृति के सम्बन्ध में सक्षम प्राधिकारी द्वारा किये गये विनिश्चय को तीन माह के अंदर इस न्यायालय को सूचित करें।

आदेश की सत्यप्रति के साथ आरक्षी केन्द्र–भोपाल के खात्मा क्रमांक 13/16 दिनांकित 10.03.2016 प्रस्तुत किये गये अभिलेख के साथ स्थानीय कार्यालय, वि.पु.स्था जबलपुर को अग्रिम कार्यवाही हेतु वापस किया जाए। प्राप्ति अभिस्वीकृति पृष्ठांकित एवं हस्ताक्षरित की जाये।

यह प्रकरण परिणाम दर्ज कर समयावधि में अभिलेखागार भेजा जावें।

(अक्षय कुमार द्विवेदी)
विशेष न्यायाधीश
(लोकायुक्त)
जबलपुर (म0प्र0)

5. The aforesaid impugned order has been assailed by the applicant on the following grounds:-

(i) That the order impugned dated 23.12.2017 is totally a non-speaking order, without application to mind and without going into the nitty gritties of the report submitted by the Respondent agency.

(ii) The report submitted by the Respondent dealt with every aspect of the allegations levelled against the accused persons, however, the learned special Judge proceeded to reject the closure on flimsy ground without noticing the fact that the Respondent had duly assigned reasons why the allegations against the accused persons is not made out.

(iii) The petitioner submits that the main reason assigned by the learned Single Judge while refusing to accept the closure report is that the petitioner did not comply with the Conduct Rules 1965, in as much as no intimation was given by him to his department with regard to the business of his wife. While he had duly informed his department in terms of Rule 16(3) informing that petitioner's wife is running a business and the intimations are part of the record.

(iv) The reasoning assigned by the learned Special Judge that the sum of Rs.44,39,932/- cannot be taken into consideration as income derived from agriculture is also incorrect. The Learned Special Judge goes on to state that since there is no evidence as to what is the income of two brothers of the petitioner and how much assets do they possess. The said reasoning is totally unwarranted as the investigating agency after properly examining the said fact came to the conclusion that the income generated by the petitioner under the head of agricultural income is correct and genuine and that his parents duly gave him the piece of land.

(v) The learned Court below is vested with a discretion to either refuse or accept the closure report or direct the investigating officer to further investigate, however, the discretion vested should also be exercised judiciously and cannot be unregulated or unbridled. In the present case, the learned Special Judge if was of the opinion that there is no evidence about the agricultural income of the petitioner, he could have proceeded to direct for further investigation, however the learned special Judge without assigning any cogent reasons proceeded to reject the closure report and directed the investigating agency to seek sanction against the petitioner.

(vi) The Special Judge failed to take other income of the petitioner and opined that the salary received by the petitioner is the sole income received by him during the check period.

(vii) The impugned act on the part of the court below against the petitioner is bad in law, without appreciating proper facts of the present case and thus deserves to be set aside.

(viii) The learned trial court wrongly considered that investigating agency has find the income of the applicant from the agriculture to the tune of Rs.44,39,932/- while in the closure report income from agriculture is considered only Rs.22,19,996/-. This aspect establish that the learned Special Judge has passed the impugned order in erroneous manner without considering the material available on record and did not considered the facts,

evidence and material available in the police report in judicious manner.

(ix) Similarly, the learned Special Judge has wrongly observed that no due information was given to the department with regard to acquiring the property as per M.P Civil Services Conduct Rule while the investigating agency has collected all the information given to the department with regard to acquiring of the properties in due time and the document relating to aforesaid aspects are part of documents submitted with the closure report and also appreciated by the investigating agency in detail in the closure report. Despite of it, learned Special Judge has ignored and arrived at different conclusion arbitrarily.

6. Learned counsel for the respondent has also supported the applicant and also made same prayer and assailed the impugned order on the ground that the learned Special Judge has exceeded its jurisdiction as the impact of the impugned order would amount to direct the Investigating Agency to file charge-sheet and directing the sanctioning authority to grant sanction which is contrary to law. In the light of the aforesaid grounds further prayer is made that the impugned order be quashed and set aside and the learned Special Judge be directed to accept the closure report filed by the respondent.

7. Having heard the contention of learned counsel, in view of this court, the contention that the learned trial court has exceeded its jurisdiction has no substance. It is settled law that when the closure report is not accepted, the Magistrate or the Special Judge has power to direct for further investigation or to take cognizance on the material produced before him, if he is of the opinion that the same is sufficient to prosecute the accused person, but if any sanction for prosecution by the competent authority is required in the law, then such cognizance cannot be taken unless and until the sanctioning authority after considering the material placed before him to grant sanction for the prosecution. In other cases, the Magistrate or the Judge despite of giving direction for further investigation may also direct the complainant to file protest petition and all material to support the allegations, if he desires so and, thereafter, may take cognizance, if the sanction is not required or if any sanction is needed, the cognizance will be taken after granting sanction for prosecution by the competent authority and in case of absence of the sanction, the Magistrate or the Special Judge cannot proceed further as he is left no other option in the matter.

8. In the present case, so far as the aforesaid contention is concerned, it has no substance. Neither the Special Judge has directed to file charge sheet nor has given mandate to the sanctioning authority to grant sanction for prosecution. If Investigation Agency files the closure report, the Magistrate or the Special Judge has jurisdiction to accept it or reject it and if the material is not sufficient and

looking to the facts and circumstances of the case further investigation is desirable to reach on a prudent conclusion then the investigating agency can be directed to make further investigation or the complainant may be directed to produce material in support of the complaint. In a case when the Magistrate / the Special Judge is of the opinion that the cognizance can be taken but if there is need of the sanction order for prosecution then cognizance cannot be taken and the matter would be left on the investigation agency to take action in accordance with law for the purpose of getting sanction for prosecution.

9. In the present case, having rejected the prayer with regard to acceptance of the closure report, the learned Special Judge has observed that in this matter sanction for prosecution will be required, therefore, the material be placed before the sanctioning authority for consideration. Hence, there is no mandate or command to the sanctioning authority to grant sanction for prosecution and it is only *obiter dicta*. It does not amount to direction to sanction authority or to file the charge sheet. This aspect has been considered by Hon'ble the Apex Court in the case of *Arun Kumar Aggrawal vs. State of M.P., and ors* (2014) 13 SCC 707 para 35 to 38 is as under :-

> 35. In the facts and circumstances of the present case, we are of the opinion that the refusal of the learned Special Judge, vide his order dated 26-4-2005, to accept the final closure report submitted by Lokayukta Police is the only ratio decidendi of the Order. The other part of the Order which deals with the initiation of Challan proceedings cannot be treated as the direction issued by the learned Special Judge.
>
> 36. The relevant portion of the Order of the learned Special Judge dealing with Challan Proceeding reads as under:
>
> "Therefore matter may be taken up seeking necessary sanction to prosecute the accused persons Raghav Chandra, Shri Ram Meshram and Shahjaad Khan to prosecute them under Section 13 (1)(d), 13(2) of the Prevention of Corruption Act, 1988 and under Section 120-B I.P.C and for necessary further action, case be registered in the criminal case diary."
>
> 37. The wordings of this Order clearly suggest that it is not in the nature of the command or authoritative instruction. This Order is also not specific or clear in order to direct or address any authority or body to perform any act or duty. Therefore, by no stretch of imagination, this Order can be considered or treated as the direction issued by the learned Special Judge. The holistic reading of this order leads to only one conclusion, that is, it is in the nature of "obiter dictum' or mere passing remark made by the learned Special Judge, which only amounts to expression of his personal view. Therefore,

> this portion of the order dealing with challan proceeding, is neither relevant, pertinent nor essential, while deciding the actual issues which were before the learned Special Judge and hence, cannot be treated as the part of the Judgment of the learned Special Judge.
>
> 38. In the light of the above discussion, we are of the opinion that, the portion of the order of the learned Special Judge which deals with the challan proceedings is a mere observation or remark made by way of aside. In view of this, the High Court had grossly erred in considering and treating this mere observation of the learned Special Judge as the direction of the Court. Therefore, there was no occasion for the High Court to interfere with the order of the learned Special Judge".

10. The aforesaid judgment of Hon'ble the Apex Court squarely covers the aforesaid contention of the learned counsel for the applicant- Lokayukt. Therefore, it is held that learned Special Judge has not committed any jurisdictional error directing the investigating authority accordingly.

11. So far as the factual aspects of this case are concerned, we have examined the record submitted with the closure report in the light of the aforesaid argument, we find that in the impugned order certain observation namely with regard to the amount of the agriculture income and non-furnishing of information with regard to the acquiring of properties and starting business by wife are contrary to the record.

12. Apart from it, learned Special Judge has also observed that the investigating agency has not collected the relevant material with regard to giving information by the applicant to the department as required under Rule 14(2), 14(a), 17(4)(2), 19(2) of the M.P Civil Services Conduct Rulea, 1965. In view of us, if the learned Special Judge was of the opinion that the investigating officer has not collected the aforesaid material, which is necessary for fair investigation, the learned Special Judge has power to direct the investigating agency for further investigation, but this course has not been followed and with a view to ensure fair investigation, it could have been appropriate to direct for further investigation on the aforesaid aspect.

13. From the record, it appears that the applicant has informed to the department about the earning of the property and starting of new business by the family member, but merely collecting the documents allegedly submitted by the applicant to the department, it can't be said that the information given by the applicant was correct and the information was genuinely given in due time or the document has been prepared later on to justify the explanation is also an area to be taking into consideration in the investigation. The income from known sources is not equivalent to information submitted by the accused to the department. The

information with regard to acquiring of the property along with source of the fund is further required to be examined whether the disclosed information about the source of income is correct or fictitious. Unless this exercise is done, no public servant can be held guilty for collecting the assets by adopting undue means. In other words, mere giving information to the department is not sufficient. So far present case is concerned, some explanation which has been considered by the investigating agency are unnatural and at this stage *prima facie* may not be acceptable. It is contended that for starting business of the wife, loan has been taken from so many close relatives and in this regard timely information was given to the Department. In view of this Court, despite of giving information, the investigating agency has not enquired as to whether the persons named were capable and actually parted the loan or not. Similarly, the income from the agriculture has not been shown in the income tax return and the income from the agriculture has been shown from the land, which was not owned by the applicant but owned by the brothers of the applicant and the investigating agency has considered it as income from known sources. *Prima facie* this approach cannot be said to be correct at this stage.

14. In view of the aforesaid discussion and observation, *prima facie* it appears that the closure report is not acceptable and there are few grey areas in the case, which requires further investigation and, at this stage of the case, considering the aforesaid material and aspects of the case with a view to protect the interest of the accused persons this Court has its own reservation as if any clear opinion and detailed observations are given, it would prejudice the accused as the investigating authority or sanctioning authority may take it as mandate despite of performing their duties independently without influencing with the observation and opinion of this Court. Therefore, it would be appropriate to consider the prayer of the applicant that if the learned Special Judge was not satisfied with the finding of the respondent/investigating agency, he should have directed the respondent to make further investigation, despite of giving direction to place the material before sanctioning authority for granting sanction.

15. In view of the circumstances, the impugned order is not sustainable and with a view to strike the balance among the parties and public interest the matter is required to be sent back to the learned Special Judge for considering the closure report afresh and pass the order taking all aspects of the case into consideration in accordance with law.

16. Undoubtedly, at the stage of consideration, the prayer for acceptance of the closure report, very lengthy and analytic order is not required but if the matter is sent back with the direction for further investigation or rejection of the prayer for acceptance of closure report, the order must have such contents which indicate shortcoming of the investigation including suggestions and guidelines with

regard to further investigation, if needed, when the further investigation is not required and the closure report is not acceptable and the prayer is rejected, the order must indicate in brief the material, available with the report, supporting the allegations and the reasons with regard to contrary opinion to the Investigating officer. Merely saying that *prima facie* there is suspicion of the commission of the crime is not sufficient to reject the prayer for the closure report filed by the investigating agency. Brief, indicative and speaking order is required to strike balance and to ensure justice with the investigating agency and accused persons.

17. The requirement of reasoning in judicial order has been emphasised by Hon'ble the Apex Court in the case of *Assistant Commissioner. Commercial Tax Department. Works Contract and Leasing, Kota Vs. Shukla and brothers,* (2010)4 SCC 785 wherein in paragraph 13 it is observed as under :-

> "13. At the cost of repetition, we may notice, that this Court has consistently taken the view that recording of reasons is an essential feature of dispensation of justice. A litigant who approaches the Court with any grievance in accordance with law is entitled to know the reasons for grant or rejection of his prayer. Reasons are the soul of orders. Non-recording of reasons could lead to dual infirmities; firstly, it may cause prejudice to the affected party and secondly, more particularly hamper the proper administration of justice. These principles are not only applicable to the administrative or executive actions, but they apply with equal force and, in fact, with a greater degree of precision to judicial pronouncements. A judgment without reasons causes prejudice to the person against whom it is pronounced, as they litigant is unable to know the ground which weighed with the court in rejecting his claim and also causes impediments in his taking adequate and appropriate grounds before the higher court in the event of challenge to that judgment.

18. In the case of *Secretary. Agricultural Produce Market Committee, Bailhongal Vs. Quasami Janab Ajmatalla Salamulla and another,* reported in (2009)9 SCC 219, the Hon'ble Apex Court in para 9 held as under :-

> "9. Courts, whose judgments are subject to appeal have to remember that the functions of a reasoned judgment are :
>
> (i) to inform the litigant the reasons for the decision;
>
> (ii) to demonstrate fairness and correctness of the decision;
>
> (iii) to exclude arbitrariness and bias; and
>
> (iv) to enable the appellate/revisional court to pronounce upon the correctness of the decision."

19. Considering the aforesaid case laws, we are of the view that the Magistrate and the Special Judge have right to differ from the opinion of the investigating agency but the judicial propriety is also required to indicate the facts and material and reasons compelling the Magistrate or the Judge to arrive at different conclusion. It would also be beneficial for the investigating agency to improve its working and to take disciplinary action or direct for further training of the officer of the investigating wing by the superior officer and to protect people from unnecessary prosecution on the direction of the Magistrate and the Judge by passing such erroneous order.

20. In view of the aforesaid discussion, the impugned order dated 23/12/2017 is set aside and the learned Special Judge is directed to consider afresh the material produced by the investigating agency with closure report and pass a speaking order referring the material with a view to indicate the facts and material available, or which is expected to be collected for fair investigation with regard to different opinion and rejecting the closure report. Accordingly this petition stands disposed of.

Order accordingly

I.L.R. [2021] M.P. 777
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice Sanjay Dwivedi

MCRC No. 16197/2020 (Jabalpur) decided on 15 July, 2020

MANOJ YADAV ..Applicant

Vs.

STATE OF M.P. …Non-applicant

A. Criminal Procedure Code, 1973 (2 of 1974), Section 167(1) & 167(2) – Illegal Detention/Custody – Grant of Bail – Power of Magistrate – **Held – Though right to be released accrues in favour of applicant if he is found to be in illegal detention but application u/S 167(1) Cr.P.C. is not proper remedy for claiming bail from Magistrate – Power can be exercised by Magistrate only u/S 167(2) Cr.P.C. in case of default of not filing charge sheet within prescribed limit of 90 days – Court below rightly dismissed application of bail filed u/S 167(1) as Court do not have power to do so – Application dismissed. (Paras 20 to 22)**

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 167(1) व 167(2) – अवैध निरोध/अभिरक्षा – जमानत प्रदान की जाना – मजिस्ट्रेट की शक्ति – अभिनिर्धारित – यद्यपि छोड़े जाने का अधिकार अपीलार्थी के पक्ष में प्रोद्भूत होता है, यदि वह अवैध रूप से अभिरक्षा में पाया जाता है, परंतु दं.प्र.सं. की धारा 167(1) के अंतर्गत आवेदन, मजिस्ट्रेट से

जमानत का दावा करने के लिए उचित उपचार नहीं है – मजिस्ट्रेट द्वारा शक्ति का प्रयोग, आरोप पत्र, नब्बे दिनों की विहित सीमा के भीतर प्रस्तुत न किये जाने के व्यतिक्रम की दशा में केवल धारा 167(2) दं.प्र.सं. के अंतर्गत किया जा सकता है – धारा 167(1) के अंतर्गत जमानत का आवेदन निचले न्यायालय द्वारा उचित रूप से खारिज किया गया क्योंकि न्यायालय को ऐसा करने की शक्ति नहीं है – आवेदन खारिज।

***B. Criminal Procedure Code, 1973 (2 of 1974), Section 167 – Extension of Remand – Power of Magistrate* – Held – Even in absence of an application or request by Investigating Officer seeking further remand, Magistrate can grant further remand of accused u/S 167 Cr.P.C. (Para 10)**

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 167 – रिमांड बढ़ाना – मजिस्ट्रेट की शक्ति – अभिनिर्धारित – आगे रिमांड चाहते हुए, अन्वेषण अधिकारी द्वारा किसी आवेदन या निवेदन की अनुपस्थिति में भी मजिस्ट्रेट धारा 167 दं.प्र.सं. के अंतर्गत अभियुक्त को आगे रिमांड प्रदान कर सकता है।

***C. Criminal Procedure Code, 1973 (2 of 1974), Section 167 and Constitution – Article 21 – Illegal Detention/Custody – Personal Liberty – Habeas Corpus* – Held – Apex Court concluded that detaining a person without there being a valid order of remand is considered to be illegal detention and is contrary to the personal liberty guaranteed by Constitution under Article 21 and as such, direction for release can be granted but Writ of *habeas corpus* is the only remedy in such cases. (Para 19)**

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 167 एवं संविधान – अनुच्छेद 21 – अवैध निरोध/अभिरक्षा – दैहिक स्वतंत्रता – बंदी प्रत्यक्षीकरण – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया कि बिना एक विधिमान्य रिमांड आदेश के एक व्यक्ति को निरूद्ध करना अवैध निरोध माना गया है तथा संविधान के अनुच्छेद 21 के अंतर्गत प्रत्याभूत दैहिक स्वतंत्रता के विरूद्ध है और इस तरह मुक्त किये जाने हेतु निदेश प्रदान किया जा सकता है परंतु ऐसे प्रकरणों में बंदी प्रत्यक्षीकरण रिट ही एकमात्र उपचार है।

Cases referred:

AIR 1953 SC 277, AIR 1971 SC 178, (2013) 1 SCC 314, (2019) 14 SCC 599.

Vishal Daniel, for the applicant.
A. Rajeshwar Rao, G.A. for the non-applicant/State.
S.K. Mishra, for the objector.

O R D E R

SANJAY DWIVEDI, J.:- On the penultimate date of hearing i.e. 29.06.2020, the Deputy Advocate General Shri Vivek Sharma appeared for the State and sought time to file response as also to argue the matter finally.

Thereafter, on the last date of hearing i.e. 08.07.2020 again time was sought by the Counsel for the State for complying with the earlier order. Today Shri Rao, Government Advocate appearing for the State submits that instead of filing reply he is ready to argue the matter finally by making oral submissions.

In the above circumstance, with the consent of the learned counsel for the parties, the matter is heard finally through oral submissions.

2. This petition under Section 482 of the Code of Criminal Procedure, 1973 (for brevity "Code") has been filed by the applicant seeking quashment of the order dated 27.05.2020 passed by the Special Judge (POCSO Act, 2012) Tikamgarh. By the impugned order, the Court below has rejected the application filed under Section 167 of the Code for grant of bail to the applicant which was filed on the ground that he is in illegal detention of the police as there is no order of remand extended and therefore in absence of any order of remand, he cannot be detained in custody and thus the order be passed to release the applicant on bail.

3. To reach the inevitable conclusion, certain relevant facts are required to be mentioned, which are:-

The applicant was arrested by the police on 01.03.2020 in connection with Crime No.79/2020 registered at Police Station Niwadi, District Tikamgarh for the offence punishable under Sections 305 and 376 of IPC and Section 5/6 of the Protection of Children from Sexual Offences Act, 2012 (in short "POCSO Act, 2012"). The applicant was produced before the Magistrate on 02.03.2020 and the police sought remand of judicial nature which was granted by the Court by order dated 02.03.2020 till 14.03.2020. Again on 14.03.2020 the police sought extension of the order of remand on the basis that the investigation could not be completed and it would take more time. Therefore, the judicial remand was further extended till 30.03.2020. On 04.04.2020, the remand was further extended till 17.04.2020. On 17.04.2020 nobody appeared on behalf of the police and neither the accused was produced nor any application for extending the remand of the accused was presented before the Court. The Court while fixing the case for 30.04.2020 directed the Station House Officer Niwadi that in the respective crime either challan should be filed or by moving an application for remand time be sought. On 30.04.2020 again nobody appeared on behalf of the police and even accused was also not produced before the Court. Thereafter, the Court directed that since the accused is in jail since 02.03.2020, the SHO Niwadi be intimated that challan be filed within the prescribed limit or application for remand be filed for filing the charge-sheet. The matter was fixed on 13.05.2020. On 13.05.2020, the Public Prosecutor appeared on behalf of the State but neither the accused was produced nor any application for extending the remand was presented. Despite no intimation was given to the Court as to why even on earlier occasions nobody appeared and the application for further remand was not moved. Thus, the Court,

therefore, issued memo to the concerning SHO seeking his explanation as to why neither the challan has been filed nor any application for extension of remand was moved. The case was directed to be listed for submitting explanation on 27.05.2020.

On 26.05.2020, the counsel for the applicant moved an application under Section 167 of the Code requesting the Court that the accused is in judicial custody since 02.03.2020 but that remand was not extended for last 3-4 dates and as such the applicant's custody is illegal and due to his illegal detention and also considering the fact that there is no order of remand in force, his application may be considered and he be released on bail. The copy of application was forwarded to the Police Station Niwadi and the matter was directed to be listed on 27.05.2020. On 27.05.2020, the hearing was conducted through video-conferencing. The application was opposed by submitting objection memo mentioning therein that on 27.02.2020, the prosecutrix committed suicide by hanging and the brother of the prosecutrix informed that suicide was committed by the prosecutrix under the fear and shame as she was raped by the present applicant and therefore the applicant was arrested and was sent under judicial custody. The other accused were also being tracked down and due to outbreak of pandemic and lock-down being imposed, the investigation could not be completed. Thus, the application for grant of bail was sought to be rejected.

After hearing the arguments, the Court below has opined that the applicant is in judicial custody since 02.03.2020 and considering the nature of offence registered against him, the Court can grant judicial remand maximum for a period of 90 days and since that 90 days period is not expired and the whole country is facing outbreak of pandemic and lock-down is imposed, in such a condition, if remand was not sought to be extended and even though that has not been extended, the applicant is not entitled to be released on bail under Section 167 of the Code and as such his application was rejected. However, on 27.05.2020, the remand was extended by the Court till 30.05.2020 considering the fact that the investigation was still not complete.

4. The learned counsel for the applicant contends that admittedly the judicial remand was in force till 17.04.2020 but thereafter neither it was requested to be extended nor it was extended by the Court and therefore the custody of the present applicant after 17.04.2020 was illegal and hence the application moved on 26.05.2020 under Section 167 of the Code ought to have been allowed by the Court. To reinforce his contention, the learned counsel for the applicant relies upon two decisions in the case of *Ram Narayan Singh v. State of Delhi and others* (AIR 1953 SC 277) and *Raj Narain v. Superintendent, Central Jail, New Delhi and another* (AIR 1971 SC 178) and submits that the Supreme Court in these cases has clearly laid down that in absence of order of judicial remand by the

Magistrate, custody of the accused even for a single minute is considered to be illegal and therefore on the date of filing the application under Section 167 of the Code in absence of any valid order of the Magistrate for judicial remand, the applicant could not be detained in custody and as such his application ought to have been allowed directing release of the applicant granting him bail as requested before the Court below.

5. Shri A. Rajeshwar Rao, learned Government Advocate appearing for the State submits that though the written reply has not been filed but from the provisions of Section 167 of the Code, it is clear that it is the discretion of the Magistrate to extend the remand for a maximum period of 90 days in the respective crime and the Court below has rightly observed that since 90 days period was not expired on the date of filing the application, the right of the applicant to be released on bail does not accrue and as such the application has rightly been rejected. Thus, he submits that this petition is misconceived and deserves to be dismissed.

6. After hearing the rival contentions of the learned counsel for the parties, the core question emerges to be adjudicated by this Court is **"whether the Magistrate granting judicial remand can direct release of the accused exercising power provided under Section 167 of the Code and grant him bail merely because on the date of moving an application there was no valid order of remand in force".**

7. Before dwelling upon the issue, it is worthwhile to go-through the provisions of Section 167 of the Code, which read as under,-

> **"167. Procedure when investigation cannot be completed in twenty-four hours.- (1)** Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by section 57, and there are grounds for believing that the accusation or information is well-founded, the officer in charge of the police station or the police officer making the investigation, if he is not below the rank of sub-inspector, shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate.
>
> (2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary,

he may order the accused to be forwarded to a Magistrate having such jurisdiction:

Provided that,-

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

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

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

[(b) no Magistrate shall authorise detention of the accused in custody of the police under this section unless the accused is produced before him in person for the first time and subsequently every time till the accused remains in the custody of the police, but the Magistrate may extend further detention in judicial custody on production of the accused either in person or through the medium of electronic video linkage;]

(c) no Magistrate of the second class, not specially empowered in this behalf by the High Court, shall authorise detention in the custody of the police.

[Explanation I.- For the avoidance of doubts, it is hereby declared that, notwithstanding the expiry of the period specified in paragraph (a), the accused shall be detained in custody so long as he does not furnish bail.]

[Explanation II.-If any question arises whether an accused person was produced before the Magistrate as required under clause (b), the production of the accused person may be proved by his signature on the order authorising detention or by the order certified by the Magistrate as to production of the accused person through the medium of electronic video linkage, as the case may be.]

[Provided further that in case of a woman under eighteen years of age, the detention shall be authorised to be in the custody of a remand home or recognised social institution.]

[(2A) Notwithstanding anything contained in sub-section (1) or sub-section (2), the officer in charge of the police station or the police officer making the investigation, if he is not below the rank of a sub-inspector, may, where a Judicial Magistrate is not available, transmit to the nearest Executive Magistrate, on whom the powers of a Judicial Magistrate or Metropolitan Magistrate have been conferred, a copy of the entry in the diary hereinafter prescribed relating to the case, and shall, at the same time, forward the accused to such Executive Magistrate, and thereupon such Executive Magistrate, may, for reasons to be recorded in writing, authorise the detention of the accused person in such custody as he may think fit for a term not exceeding seven days in the aggregate; and on the expiry of the period of detention so authorised, the accused person shall be released on bail except where an order for further detention of the accused person has been made by a Magistrate competent to make such order; and, where an order for such further detention is made, the period during which the accused person was detained in custody under the orders made by an Executive Magistrate under this sub-section, shall be taken into account in computing the period specified in paragraph (a) of the proviso to sub-section (2):

Provided that before the expiry of the period aforesaid, the Executive Magistrate shall transmit to the nearest Judicial Magistrate the records of the case together with a copy of the entries in the diary relating to the case which was transmitted to him by the officer in charge of the police station or the police officer making the investigation, as the case may be.]

(3) A Magistrate authorising under this section detention in the custody of the police shall record his reasons for so doing.

(4) Any Magistrate other than the Chief Judicial Magistrate making such order shall forward a copy of his order, with his reasons for making it, to the Chief Judicial Magistrate.

(5) If in any case triable by a Magistrate as a summons-case, the investigation is not concluded within a period of six months from the date on which the accused was arrested, the Magistrate shall make an order stopping further investigation into the offence unless the officer making the investigation satisfies the Magistrate that for special reasons and in the interests of justice the continuation of the investigation beyond the period of six months is necessary.

> (6) Where any order stopping further investigation into an offence has been made under sub-section (5), the Sessions Judge may, if he is satisfied, on an application made to him or otherwise, that further investigation into the offence ought to be made, vacate the order made under sub-section (5) and direct further investigation to be made into the offence subject to such directions with regard to bail and other matters as he may specify."

8. On perusal of the aforesaid provisions, the basic object thereof is to be seen that "the act of directing remand of an accused is fundamentally a judicial function. The Magistrate does not act in executive capacity while ordering the detention of an accused. While exercising this judicial act, it is obligatory on the part of the Magistrate to satisfy himself whether the materials placed before him justify such a remand or, to put it differently, whether there exist reasonable grounds to commit the accused to custody and extend his remand. The purpose of remand as postulated under Section 167 is that investigation cannot be completed within 24 hours. It enables the Magistrate to see that the remand is really necessary. This requires the investigating agency to send the case dairy along with the remand report so that the Magistrate can appreciate the factual scenario and apply his mind whether there is a warrant for police remand or justification for judicial remand or there is no need for any remand at all. It is obligatory on the part of the Magistrate to apply his mind and not to pass an order of remand automatically or in a mechanical manner.".

9. It is clear from the above provisions and various pronouncements of the Supreme Court and the High Court, the object has been interpreted that remand may be granted to accused only after the Magistrates satisfy themselves that the application for remand by the police officer has been made in a *bona fide* manner and the reasons for seeking the remand mentioned in the case diary are in accordance with the requirements of Sections 41 (1)(b) and 41 A of the Code and there is concrete material in existence to substantiate the ground mentioned for seeking remand.

10. There is no hesitation in saying that even in the absence of an application or request by the Investigating officer seeking further remand, the Magistrate can grant further remand of the accused under section 167 of the Code. As per the learned counsel for the State in the present case it was a discretion of the Magistrate to extend the remand for a maximum period of 90 days considering the respective crime in which remand was sought but here in this case said discretion has not been exercised by the Court after 17.04.2020. Since there was no order after 17.04.2020 by the Magistrate for extending the judicial remand till 27.05.2020 the intervening period of custody of the applicant alleged to be illegal and unauthorised detention.

11. Here in this case, undoubtedly on 26.05.2020 when application under Section 167 of the Code was moved, there was no order of remand in force but a question arose whether concerning Magistrate is empowered to grant bail under the respective provision under which application for grant of bail had been moved.

12. The Supreme Court in the judgment relied upon by the learned counsel for the applicant in the case of *Ram Narayan Singh* (supra) has observed in paragraphs 3 and 4 as under:-

> "3. Various questions of law and fact have been argued before us by Mr. Sethi on behalf of the petitioner, but we consider it unnecessary to enter upon a discussion of those questions, as it is now conceded that the first order of remand dated 6th March even assuming it was a valid one expired on 9th March and is no longer in force. As regards the order of remand alleged to have been made by the trying Magistrate on 9th March, the position is as follows:-The trying Magistrate was obviously proceeding at that stage under section 344, Criminal P.C., which requires him, if he chooses to adjourn the case pending before him, " to remand by warrant the accused, if in custody," and it goes on to provide: Every order made under this section by a court other than a High Court shall be in writing signed by the presiding Judge or Magistrate. The order of the Magistrate under this section was produced before us in compliance with an order of this Court made on 10th March, which directed the production in this Court as early as possible of the records before the Additional District Magistrate and the trying Magistrate together with the remand papers for inspection by counsel for the petitioner. The order produced merely directs the adjournment of the case till 11th March and contains no direction for remanding the accused to custody till that date. Last evening, four slips of paper were handed to the Registrar of this Court at 5-20 p. m. On one side they purport to be warrants of detention dated 6th March addressed to the Superintendent of Jail, Delhi, directing the accused to be kept in judicial lock-up and to be produced in court on 9-3-1953. These warrants contain on their back the following endorsements: "Remanded to judicial till 11-3-53".
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> 4. In a question of *habeas corpus,* when the lawfulness or otherwise of the custody of the persons concerned is in question, it is obvious that these documents, if genuine would be of vital importance, but they were not produced, notwithstanding the clear direction contained in our order of 10th March. The court records produced before us do not contain any order of remand made on 9th March. As we have already observed, we have the order of the trying Magistrate merely adjourning the case to 11th. The Solicitor-

> General appearing on behalf of the Government explains that these slips of paper, which would be of crucial importance to the case, were with a police officer who was present in court yesterday, but after the Court rose in the evening the latter thought that their production might be of some importance and therefore they were filed before the Registrar at 5-20 p. m. We cannot take notice of documents produced in such circumstances, and we are not satisfied that there was any order of remand committing the accused to further custody till 11th March. It has been held by this Court that in *habeas corpus* proceedings the Court is to have regard to the legality or otherwise of the detention at the time of the return and not with reference to the institution of the proceedings. The material date on the facts of this case is 10th March, when the affidavit on behalf of the Government was filed justifying the detention as a lawful one. But the position, as we have stated, is that on that date there was no order remanding the four persons to custody. This Court has often reiterated before that those who feel called upon to deprive other persons of their personal liberty in the discharge of what they conceive to be their duty, must strictly and scrupulously observe the forms and rules of the law. That has not been done in this case. The petitioners now before us are therefore entitled to be released, and they are set at liberty forthwith.

13. Likewise, in the case of *Raj Narain* (supra), the Supreme Court again in paragraph 16 onward has observed as under:-

> "16. When a person under detention has come with a grievance that his detention is illegal and invalid and seeks a writ of Habeas Corpus and is produced before this Court, the prisoner comes directly under the custody of this Court. But no orders would be passed by this Court which would have the effect of detaining a prisoner beyond the period of detention already ordered and which order is complained of. In an appropriate case, during the operation of the detention order under challenge, this Court may release the prisoner on bail or otherwise either with or without conditions pending adjudication of his grievance by this Court.
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> 17. On the letter of August 28, 1970, of the Superintendent, Central Jail, New Delhi, this Court made an order on the same day which has been set out in full in the order of the learned Chief Justice. From that order the following points emerge:
>
> (i) Mr. Raj Narain was remanded to the custody to which he belongs namely, the U.P. authorities;
>
> (ii) The U.P. authorities were at liberty to take the petitioner to Lucknow pending fixation of the further date for the hearing of his writ petition.

(iii) If the Superintendent of the Central Jail, New Delhi, does not receive the fresh order of remand by midnight of August 28, 1970, the petitioner should not be detained as directed by this Court and that he should be set at liberty at midnight.

18. At this stage it may be stated that if the respondents in Writ Petition No. 315 of 1970, who were represented by counsel, had brought to our notice on August 27, 1970 (when this Writ Petition was adjourned to a later date) that the remand order of the City Magistrate was expiring on August 28, 1970 and had sought directions, this Court would have, on that date itself, passed an order similar to the one which was actually passed in the evening of August 28, 1970. In that case the respondents would have had ample opportunity to take the petitioner to Lucknow, for producing him before the City Magistrate for a further order of remand, if he considered it necessary.

19. However, the position is that the petitioner was not taken to Lucknow nor produced before the City Magistrate. Instead, he was kept in the Central Jail, New Delhi. The City Magistrate, Lucknow, passed two orders, viz., one on August 28, 1970 and another on August 29, 1970, Both the orders have been quoted in the order of the learned Chief Justice. By the first order, which is stated to have been communicated by wireless message, the petitioner was remanded to further jail custody upto September 1, 1970. By the second order which was communicated by telegram, he was remanded to further jail custody upto September 10, 1970.

20. The petitioner has in the present writ petition prayed for the issue of a writ of Habeas Corpus directing his release on the ground that his further detention is illegal. He has attacked his detention after midnight of August 28, 1970 as illegal and contrary to the directions given by this Court. He has stated that no orders of remand were communicated to him before midnight of August 28, 1970 and that the two remand orders are quite inconsistent with each other. The more serious ground of challenge in respect of the remand orders is that they are illegal as they have been passed by the City Magistrate, without his being produced before the City Magistrate and behind his back.

21. On August 31, 1970, this Court issued a notice to the Superintendent, Central Jail, New Delhi, to produce before the Court on September 1, 1970, the warrants under which "Mr. Raj Narain is presently detained" On September 1, 1970, on behalf of the jail authorities, the wireless message received on August 28, 1970 and the telegram of August 29, 1970 were brought to our notice.

22. As we were inclined to hold that the remand orders had not been passed according to law and in consequence the further detention of the petitioner was illegal, this Court passed on the same day the following order:

"By majority, we hold that the custody of Mr. Raj Narain is valid and that he is not entitled to release on his fresh petition. We shall give our reasons later."

X X X

39. It stands to reason that an order of remand will have to be passed in the presence of the accused. Otherwise the position will be that a magistrate of court will be passing orders of remand mechanically without having heard the accused for a considerably long time. If the accused is before the magistrate when a remand order is being passed, he can make representations that no remand order should be passed and also oppose any move for a further remand. For instance, he may rely upon the inordinate delay that is being caused by the prosecution in the matter and he can attempt to satisfy the court that no further remand should be allowed. Again it may be that an accused. on a former occasion may have declined to execute bond for getting himself released but on a later occasion when a further remand is being considered, the accused may have reconsidered the position and may be willing to execute bond in which case a remand order will be totally unnecessary. The fact that the person concerned does not desire to be released on bail or that he can make written representations to the magistrate are, in our opinion, beside the point. For instance, in cases where a person is sought to be proceeded against under Chapter VIll of the Criminal Procedure Code, it would 'be open to him to represent that circumstances have materially changed and a further remand has become unnecessary. Such an opportunity to make a representation is denied to a person concerned by his not being produced before the Magistrate. As the Magistrate has to apply his judicial mind, he himself can take note of all relevant circumstances when the person detained is produced before him and decide whether a further remand is necessary. All these opportunities will be denied to an accused person if he is not produced before the Magistrate or the court when orders of remand are being passed.

40. It is no answer that the petitioner was brought to New Delhi under the orders of this Court and hence the City Magistrate had to pass the remand order at Lucknow. We have already mentioned that no representation was made nor any directions asked on August 27, 1970, on behalf of the respondents when Writ Petition No. 315 of 1970 was adjourned. Under orders of August 28, 1970, this Court

> released the petitioner from its custody and restored him to the original custody and even permitted him to be taken to Lucknow, pending fixation of a fresh date of hearing of his case. The Uttar Pradesh authorities concerned did not avail themselves of the opportunity to take him back to Lucknow for being produced before the Magistrate concerned. On the other hand, they were content to have an order of remand of the prisoner in New Delhi passed by the Magistrate sitting in Lucknow. Such an order, as we have held, is illegal and hence the detention of the petitioner on the authority of such an illegal order of remand is also illegal. Such a situation has been brought about by the Uttar Pradesh authorities for which they have to thank themselves.
>
> 41. In the result we hold that the orders of remand dated 28th and 29th August, 1970 passed by the City Magistrate, Lucknow, are illegal. We further hold that the detention of the petitioner in the Central Jail, New Delhi, after the midnight of August 28, 1970 on the authority of the illegal orders of remand is also illegal. In consequence the petitioner should be set at liberty forthwith. The writ petition is allowed."

14. From the aforesaid deliberations, it is clear that in both the cases, the Supreme Court was dealing with the writ of the habeas corpus filed by the accused asking his release as he was under illegal custody. The Supreme Court also dealing with the provision of Article 21 of the Constitution granting personal liberty to the citizen of India has held that detaining a person without there being any valid order of detention is noting (sic : nothing) but a violation of right guaranteed to a person by the Constitution under Article 21 and, therefore, the order of release can be made.

15. Furthermore, the Supreme Court in the case of *Manubhai Ratilal Patel Tr. Ushaben v. State of Gujarat and others* reported in (2013) 1 SCC 314 dealing with the provisions of Section 167 of the Code has held as under:-

> "The writ of the habeas corpus was devised for protection of an individual in case of illegal restraint or confinement. It is of the highest constitutional importance to provide a swift and expedient remedy by determining petitioner's right to freedom and to protect the individual's liberty against arbitrary action of the executive or by private persons. Its main objective is to release persons illegally detained or confined."

16. Likewise, the Supreme Court in the case of *Achpal alias Ramswaroop and another v. State of Rajasthan* reported in (2019) 14 SCC 599 from paragraph 16 onward has observed as under:-

"16. As observed by the Law Commission in Para 14.19 of its 41st Report, a practice of doubtful legal validity had grown up where police used to file before a Magistrate a preliminary or incomplete report and the Magistrate, purporting to act under Section 344 of the Code of Criminal Procedure, 1898 used to adjourn the proceeding and remand the accused to custody. It was observed that such remand beyond the statutory period fixed under Section 167 would lead to serious abuse and therefore some time limit was required to be placed on the power of the police to obtain remand and as such the maximum period for completion of investigation was suggested. The objects and reasons for introduction of new Code voiced similar concern.

17. The letter of and spirit behind enactment of Section 167 of the Code as it stands thus mandates that the investigation ought to be completed within the period prescribed. Ideally, the investigation, going by the provisions of the Code, ought to be completed within first 24 hours itself. Further in terms of sub-section (1) of Section 167, if "it appears that the investigation cannot be completed within the period of twenty-four hours fixed by Section 57" the officer concerned ought to transmit the entries in the diary relating to the case and at the same time forward the accused to such Magistrate. Thereafter, it is for the Magistrate to consider whether the accused be remanded to custody or not. Sub-Section (2) then prescribes certain limitations on the exercise of the power of the Magistrate and the proviso stipulates that the Magistrate cannot authorize detention of the accused in custody for total period exceeding 90 or 60 days, as the case may be. It is further stipulated that on the expiry of such period of 90 and 60 days, as the case may be, the accused person shall be released on bail, if he is prepared to and does furnish bail.

18. The provision has a definite purpose in that; on the basis of the material relating to investigation, the Magistrate ought to be in a position to proceed with the matter. It is thus clearly indicated that the stage of investigation ought to be confined to 90 or 60 days, as the case may be, and thereafter the issue relating to the custody of the accused ought to be dealt with by the Magistrate on the basis of the investigation. Matters and issues relating to liberty and whether the person accused of a charge ought to be confined or not, must be decided by the Magistrate and not by the police. The further custody of such person ought not to be guided by mere suspicion that he may have committed an offence or for that matter, to facilitate pending investigation.

19. In the present case as on the 90th day, there were no papers or the charge-sheet in terms of Section 173 of the Code for the Magistrate concerned to assess the situation whether on merits the

accused was required to be remanded to further custody. Though the charge-sheet in terms of Section 173 came to be filed on 05-07-2018, such filing not being in terms of the order passed by the High Court on 03-07-2018, the papers were returned to the Investigating Officer. Perhaps it would have been better if the Public Prosecutor had informed the High Court on 03-07-2018 itself that the period for completing the investigation was coming to a close. He could also have submitted that the papers relating to investigation be filed within the time prescribed and a call could thereafter be taken by the Superior Gazetted Officer whether the matter required further investigation in terms of Section 173(8) of the Code or not. That would have been an ideal situation. But we have to consider the actual effect of the circumstances that got unfolded. The fact of the matter is that as on completion of 90 days of prescribed period under Section 167 of the Code there were no papers of investigation before the Magistrate concerned. The accused were thus denied of protection established by law. The issue of their custody had to be considered on merits by the Magistrate concerned and they could not be simply remanded to custody dehors such consideration. In our considered view the submission advanced by Mr. Dave, learned Advocate therefore has to be accepted.

20. We now turn to the subsidiary issue, namely, whether the High Court could have extended the period. The provisions of the Code do not empower anyone to extend the period within which the investigation must be completed nor does it admit of any such eventuality. There are enactments such as the Terrorist and Disruptive Activities (Prevention) Act, 1985 and Maharashtra Control of Organised Crime Act, 1999 which clearly contemplate extension of period and to that extent those enactments have modified the provisions of the Code including Section 167. In the absence of any such similar provision empowering the Court to extend the period, no Court could either directly or indirectly extend such period. In any event of the matter all that the High Court had recorded in its order dated 03-07-2018 was the submission that the investigation would be completed within two months by a gazetted police officer. The order does not indicate that it was brought to the notice of the High Court that the period for completing the investigation was coming to an end. Mere recording of submission of the Public Prosecutor could not be taken to be an order granting extension. We thus reject the submissions in that behalf advanced by the learned Counsel for the State and the complainant.

21. In our considered view the accused having shown their willingness to be admitted to the benefits of bail and having filed an appropriate application, an indefeasible right did accrue in their favour.

22. We must at this stage note an important feature. In Rakesh Kumar Paul (supra) {Rakesh Kumar Paul v. State of Assam, (2017) 15 SCC 67}, in his conclusions, Madan B. Lokur, J. observed in para 49 as under:

"49. The petitioner is held entitled to the grant of "default bail" on the facts and in the circumstances of this case. The trial Judge should release the petitioner on "default bail" on such terms and conditions as may be reasonable. However, we make it clear that this does not prohibit or otherwise prevent the arrest or re-arrest of the petitioner on cogent grounds in respect of the subject charge and upon arrest or re-arrest, the petitioner is entitled to petition for grant of regular bail which application should be considered on its own merit. We also make it clear that this will not impact on the arrest of the petitioner in any other case."

23. In his concurring judgment, Deepak Gupta, J. agreed with conclusions drawn and directions given by Madan B. Lokur, J. in paras 49 to 51 of his judgment. According to the aforesaid conclusions, it would not prohibit or otherwise prevent the arrest or re-arrest of the accused on cogent grounds in respect of charge in question and upon arrest or re-arrest the accused would be entitled to petition for grant of regular bail which application would then be considered on its own merit.

24. We, therefore, allow this appeal and direct that the appellants are entitled to be admitted to bail in terms of Section 167(2) of the Code on such conditions as the trial Court may deem appropriate. The matter shall be immediately placed before the trial court upon receipt of copy of this judgment. We also add that in terms of conclusions arrived at in the majority judgment of this Court in *RakeshKumar Paul* (supra), there would be no prohibition for arrest or re-arrest of the appellants on cogent grounds and in such eventuality, the appellants would be entitled to petition for grant of regular bail.

25. The appeal thus stands allowed. "

17. Although the Supreme Court has dealt with the spirit behind the enactment of Section 167 of the Code and finally observed that if there is default in filing the charge-sheet within the prescribed limit, then in any case remand cannot be extended beyond 90 days and if that is done, the right to release the accused on bail can be exercised by the Court. However, here in this case, the applicant is not praying the Court to exercise the powers for grant of bail as given under sub-section (2) of Section 167 of the Code but, the applicant is asking the Court to exercise the power of grant of bail under Section 167(1) of the Code as his

custody is allegedly illegal as there was no order of remand in force at the time of submitting the application.

18. In my opinion, the question would arise as to whether the Magistrate is empowered to exercise the discretion for granting the bail to the accused under Section 167(1) of the Code. Reading the respective provisions, I do not find any such power vested with the Magistrate for granting bail. However, that provision deals in the manner in which judicial remand can be granted by the Magistrate and the requirement under which remand can be granted. It clearly indicates that in Section 167 if ultimately the Court comes to the conclusion that the custody is illegal and there is no order of remand in force or the order of remand is not valid, the Magistrate cannot exercise the power of releasing the accused and to grant him bail. But, power for granting bail is provided under Section 167(2) of the Code.

19. In the cases discussed hereinabove and relied upon by the counsel for the applicant, the Supreme Court has categorically observed that detaining a person without there being a valid order of remand is considered to be illegal detention and it is contrary to the personal liberty guaranteed by the Constitution under Article 21 and as such, direction for release can be granted and especially in the case of *Manubhai Ratilal Patel* (supra) it is categorically observed by the Supreme Court that writ of habeas corpus is the only remedy for production of an individual in case of illegal restraint or confinement. The Delhi High Court in the case of *Nand Ram* (supra), relying upon a full bench decision of Rajasthan High Court in case of *Taju Khan* (supra), has also observed as under:-

> "6 ..... In ***Taju Khan v. State of Rajasthan 1983 Cri. LJ 518,*** the accused sought his release on bail on the ground of his illegal detention inasmuch as the order of remand before the expiry of the period for filing charge-sheet under provisos to sub-section (2) of section 167 of the Code was passed by the Reader of the court and not by the Magistrate. The court held that the accused was not entitled to be released on bail even though at some anterior period his detention was illegal. It was held that in such a case if there was a last valid order of remand, the application for grant of bail was to be considered in the light of the provisions contained in section 437 of the Code. This judgment was sought to be distinguished on the ground that subsequently before hearing on bail application, the detention was authorised by the Magistrate by further order of remand. In a later full bench decision of the Rajasthan High Court in ***Mahesh Chand etc. v. State of Rajasthan 1986(1) Crimes 63-64 (Raj.,*** the view taken in ***Taju Khan's*** case (supra) was approved and **the court further held that the Code did not contain any provision entitling an accused to be released on bail merely on the ground, and without more, that his**

> **detention in prison was illegal.** It was held that in order to obtain his release on bail, the accused must show that his case was either covered by provisos to sub-section (2) of the Code or that he was entitled to be released on bail under the provisions of Chapter XXXIII of the Code. **It was further held that bail was no remedy and had never been conceived or intended in law to be a remedy for illegal detention.** I am in respectful agreement with the views expressed therein. Same was the view expressed by a division bench of the Orissa High court in ***Durei Behera and etc. v. Suratha Behera and another*** **1987 CrLJ 1462**. In this it was also held that an earlier illegal detention was no ground for bail."
>
> **(emphasis supplied)**

20. In view of the aforesaid discussion and considering the enunciation of law, I am of the considered opinion that though the right to be released accrues in favour of the applicant if he is found to be in illegal detention but the application under Section 167 of the Code is not the proper remedy for claiming the relief for grant of bail from the Magistrate. That power can be exercised by the Magistrate only under sub-section (2) of Section 167 of the Code in case of default of not filing the charge-sheet within the prescribed period of 90 days. If the applicant was so advised that he was illegally detained then proper remedy had to be availed for his release. The writ of habeas corpus could be filed not before the Magistrate but before the High Court or the Supreme Court. Accordingly, without making any observation as to whether the Court below has considered this aspect or not; whether in the order passed by the Court below it has rightly dealt with the situation or not, present petition deserves to be dismissed on the ground that granting bail under Section 167 of the code is not the power of the Magistrate and the applicant has availed improper remedy by moving such application instead of availing appropriate remedy as discussed hereinabove.

21. It is apt to note that on the date of moving the application whether there was any valid order of remand or not and the custody was valid or illegal can be examined by the competent court when proper remedy is availed by the applicant.

22. Accordingly, the present petition is **dismissed** mainly on the count that the Court below has not committed any illegality by rejecting the request for grant of bail under Section 167 of the Code because the Court below had no power to grant bail to the applicant under the prevailing circumstances.

Application dismissed