VOL. 3

INDIAN LAW REPORT (M.P.) COMMITTEE

AUGUST 2021

PUBLISHED BY

SHRI AVANINDRA KUMAR SINGH, PRINCIPAL REGISTRAR (ILR)

TABLE OF CASES REPORTED

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

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

INDEX

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

INDEX

impermissible – No interference required – Petition dismissed. [Piyush Kumar Sheth Vs. State of M.P.] (DB)…1521

संविधान – अनुच्छेद 226 – संविदात्मक मामले – निविदा का रद्दकरण – अभिनिर्धारित – प्रशासन, संविदा के मामलों में निर्णय लेने के लिए सबसे उपयुक्त है – निविदा रद्द करने से पूर्व याची के पक्ष में कोई विधिक निहित या संवैधानिक अधिकार स्पष्ट नहीं किया गया था – याची के पक्ष में कोई प्रवर्तनीय अधिकार सृजित नहीं किया गया था – इसके अतिरिक्त, एकल निविदा का रद्दकरण एवं परिणामिक निविदा आमंत्रण सूचना जारी की जाना, प्रतिस्पर्धा को बढ़ावा देगा तथा बेहतर दरें/परिणाम ला सकता है – यह नहीं कहा जा सकता कि निविदा का रद्दकरण पूर्णतः अननुज्ञेय है – कोई हस्तक्षेप अपेक्षित नहीं – याचिका खारिज। (पियूष कुमार सेठ वि. म.प्र. राज्य) **(DB)…1521**

***Constitution – Article 226 – Contractual Matters – Judicial Review – Scope of Interference* – Held – In matters of contract, scope of interference by this Court is limited – Court cannot sit in appeal on the decision of department unless such a decision is shown to be arbitrary, capricious or malicious in nature or it attracts wednesbury principles – Interference can also be made if decision runs contrary to public interest. [Piyush Kumar Sheth Vs. State of M.P.] (DB)…1521**

संविधान – अनुच्छेद 226 – संविदात्मक मामले – न्यायिक पुनर्विलोकन – हस्तक्षेप का विस्तार – अभिनिर्धारित – संविदा के मामलों में, इस न्यायालय द्वारा हस्तक्षेप का विस्तार सीमित है – न्यायालय, विभाग द्वारा किये गये विनिश्चय की अपील के रूप में सुनवाई नहीं कर सकता जब तक कि ऐसा विनिश्चय मनमाना, अनुचित या द्वेषपूर्ण स्वरूप का प्रतीत नहीं होता हो अथवा यह वेडनसबरी सिद्धातों को आकर्षित न करता हो – यदि विनिश्चय लोक हित के प्रतिकूल जाता है तो भी हस्तक्षेप किया जा सकता है। (पियूष कुमार सेठ वि. म.प्र. राज्य) **(DB)…1521**

***Constitution – Article 226 – Delay and Laches* – Held – Order of 2007 challenged in 2020 – Held – No specific pleading when and how petitioner learnt about the order of 2007 – Petitioner fails to explain delay and laches. [Ravi Shanker Chouksey Vs. State of M.P.] …1557**

संविधान – अनुच्छेद 226 – विलंब एवं अनुचित विलंब – अभिनिर्धारित – 2007 के आदेश को 2020 में चुनौती दी गई – अभिनिर्धारित – कोई विनिर्दिष्ट अभिवचन नहीं कि कब और कैसे याची को 2007 के आदेश के बारे में ज्ञात हुआ – याची विलंब एवं अनुचित विलंब को स्पष्ट करने में विफल रहा। (रवि शंकर चौकसे वि. म.प्र. राज्य) **…1557**

***Constitution – Article 226 – Locus Standi* – Held – Petitioner has no direct and substantial interest in challenging compassionate appointment of R-5 – Only incidental or indirect interest will not give *locus* to petitioner to file writ petition. [Ravi Shanker Chouksey Vs. State of M.P.] …1557**

संविधान – अनुच्छेद 226 – सुने जाने का अधिकार – अभिनिर्धारित – प्रत्यर्थी क्र. 5 की अनुकंपा नियुक्ति को चुनौती देने में याची का कोई प्रत्यक्ष एवं सारभूत हित नहीं है –

पुनर्विलोकन की शक्ति के अधीन इसमें हस्तक्षेप करना न्यायानुमत नहीं होगा। (सृष्टी इन्फ्रास्ट्रक्चर डव्हेलपमेन्ट कारपोरेशन लि. वि. म.प्र. राज्य) **(DB)…1525**

***Constitution – Article 226 – Tender – Language of Terms & Conditions – Interpretation* – Held – Words used in terms and conditions have to be construed in the way, employer has used them while formulating them – Court cannot substitute the opinion of employer by its own unless interpretation of such conditions suffers from *malafides* or perversity or it is so obnoxious that it defies reason and logic and is not a possible interpretation – Decision of employer has to be respected by Court unless it is shown to be *ex-facie* arbitrary, outrageous and highly unreasonable. [Shrishti Infrastructure Development Corporation Ltd. Vs. State of M.P.]**
(DB)…1525

संविधान – अनुच्छेद 226 – निविदा – निबंधन व शर्तों की भाषा – निर्वचन – अभिनिर्धारित – निबंधन और शर्तों में प्रयुक्त शब्दों का अर्थ उस तरह से लगाया जाना चाहिए जैसे नियोक्ता ने उन्हें विनिर्मित करते समय उनका उपयोग किया है – न्यायालय नियोक्ता की राय को अपने आप से प्रतिस्थापित नहीं कर सकता जब तक कि उक्त शर्तों का निर्वचन असद्भावना या विपर्यस्तता से ग्रसित न हो या इतना घृणाजनक न हो कि कारण और तर्क की उपेक्षा करता हो एवं एक संभाव्य निर्वचन नहीं है – नियोक्ता के निर्णय का न्यायालय द्वारा सम्मान किया जाना चाहिए, जब तक यह स्पष्टतः मनमाना, अपमानजनक एवं अत्यधिक अनुचित दर्शित न हो। (सृष्टी इन्फ्रास्ट्रक्चर डव्हेलपमेन्ट कारपोरेशन लि. वि. म.प्र. राज्य) **(DB)…1525**

***Constitution – Article 226 – Tender – Pre-requisite Conditions* – Held – It was the pre-requisite condition of NIT that bidder was required to have experience of having successfully (i) executed (ii) completed and (iii) commissioned, one similar work – Partially completed work even if its value exceeds the total value of the work for which tenders are being invited, cannot be treated as completed work – Treating the bid of petitioner as technically non-responsive cannot be said to be *malafide* nor it was done to favour someone – Petition dismissed. [Shrishti Infrastructure Development Corporation Ltd. Vs. State of M.P.]** **(DB)…1525**

संविधान – अनुच्छेद 226 – निविदा – पूर्वापेक्षित शर्तें – अभिनिर्धारित – यह निविदा आमंत्रण सूचना की पूर्व अपेक्षित शर्त थी कि बोलीदाता को एक समान कार्य को सफलतापूर्वक **(i)** निष्पादित **(ii)** पूर्ण और **(iii)** आरंभ करने का अनुभव होना अपेक्षित था – आंशिक रूप से पूरे किये गये कार्य को, यद्यपि उसका मूल्य उस कार्य के कुल मूल्य से अधिक हो जिसके लिए निविदाएं आमंत्रित की जा रही हैं, पूर्ण कार्य नहीं माना जा सकता – याची की बोली को तकनीकी रूप से अप्रतिक्रियाशील मानने को असद्भाविक नहीं कहा जा सकता है और न ही यह किसी के पक्ष में किया गया था – याचिका खारिज। (सृष्टी इन्फ्रास्ट्रक्चर डव्हेलपमेन्ट कारपोरेशन लि. वि. म.प्र. राज्य) **(DB)…1525**

INDEX

INDEX

Appellant served actual sentence of 20 years, 4 months and 11 days and has also earned remission of 9 years, 5 months and 15 days – Competent authority of State directed to consider release of appellant in accordance with law by granting benefit of remission. [Karan Singh Vs. State of M.P.] (DB)…1596

दण्ड संहिता (1860 का 45), धारा 45 व 53 – आजीवन कारावास – दण्डादेश की अवधि – परिहार – अभिनिर्धारित – आजीवन कारावास का दण्डादेश, सिद्धदोष के संपूर्ण जीवनकाल तक चलेगा जब तक कि विधि के अनुसार परिहार प्रदान नहीं किया गया है – अपीलार्थी ने 20 वर्ष, 4 माह व 11 दिनों का वास्तविक दण्डादेश भुगता है और 9 वर्ष, 5 माह व 15 दिनों का परिहार भी अर्जित किया – राज्य के सक्षम प्राधिकारी को, विधि के अनुसार परिहार का लाभ प्रदान करते हुए अपीलार्थी को छोड़े जाने पर विचार करने के लिए निदेशित किया गया। (करण सिंह वि. म.प्र. राज्य) **(DB)…1596**

Penal Code (45 of 1860), Section 302 – Last Seen Theory **– Held – Apex Court concluded that last seen together itself would not be sufficient, prosecution has to complete the chain of circumstances to bring home the guilt of accused – It is not prudent to base conviction solely on "last seen theory". [Pappu @ Dayaram Vs. State of M.P.] (DB)…1571**

दण्ड संहिता (1860 का 45), धारा 302 – अंतिम बार देखे जाने का सिद्धांत – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया कि अंतिम बार साथ देखा जाना अपने आप में पर्याप्त नहीं होगा, अभियोजन को अभियुक्त की दोषिता साबित करने के लिए परिस्थितियों की श्रृंखला पूरी करनी होती है – मात्र ''अंतिम बार देखे जाने के सिद्धांत'' पर दोषसिद्धि आधारित करना प्रज्ञायुक्त नहीं है। (पप्पू उर्फ दयाराम वि. म.प्र. राज्य) **(DB)…1571**

Penal Code (45 of 1860), Section 302 – Last Seen Theory **– Held – As per evidence, appellant took deceased with him on 26.04.2011 and later deceased was found injured in a well on 28.04.2011 – No iota of material to show what happened during these two days – On basis of this theory alone, appellant cannot be convicted – Benefit of doubt given to appellant. [Pappu @ Dayaram Vs. State of M.P.] (DB)…1571**

दण्ड संहिता (1860 का 45), धारा 302 – अंतिम बार देखे जाने का सिद्धांत – अभिनिर्धारित – साक्ष्य के अनुसार, 26.04.2011 को मृतक को अपीलार्थी अपने साथ ले गया और बाद में, 28.04.2011 को मृतक को कुऐं में आहत पाया गया था – यह दर्शाने के लिए किंचित भी सामग्री नहीं कि इन दो दिनों के दौरान क्या हुआ था – अकेले इस सिद्धांत के आधार पर अपीलार्थी को दोषसिद्ध नहीं किया जा सकता – अपीलार्थी को संदेह का लाभ दिया गया। (पप्पू उर्फ दयाराम वि. म.प्र. राज्य) **(DB)…1571**

Penal Code (45 of 1860), Section 302 – Multiple Oral Dying Declaration – Effect **– Held – First dying declaration given to PW-1 who is independent witness and was not declared hostile – Second dying declaration given to PW-**

2, who is real brother of deceased – Serious and glaring inconsistencies and contradiction in two dying declarations, making the second one doubtful – First dying declaration was worthy of credence and could not have been ignored and discharged – Court below erred in convicting appellant on basis of such second dying declaration – Fit case for giving benefit of doubt to appellant – Conviction set aside – Appeal allowed. [Pappu @ Dayaram Vs. State of M.P.] (DB)…1571

दण्ड संहिता (1860 का 45), धारा 302 – अनेक मौखिक मृत्युकालिक कथन – प्रभाव – अभिनिर्धारित – प्रथम मृत्युकालिक कथन, अ.सा. 1 को दिया गया जो कि स्वतंत्र साक्षी है और पक्ष विरोधी घोषित नहीं किया गया था – द्वितीय मृत्युकालिक कथन, अ.सा. 2 को दिया गया जो मृतक का सगा भाई है – दोनों मृत्युकालिक कथनों में गंभीर एवं प्रखर असंगतियां तथा विरोधाभास हैं जो द्वितीय मृत्युकालिक कथन को संदेहास्पद बनाता है – प्रथम मृत्युकालिक कथन विश्वास योग्य था और अनदेखा एवं अमान्य नहीं किया जा सकता – निचले न्यायालय ने ऐसे द्वितीय मृत्युकालिक कथन के आधार पर अपीलार्थी को दोषसिद्ध करने में गलती की – अपीलार्थी को संदेह का लाभ देने के लिए उपयुक्त प्रकरण – दोषसिद्धि अपास्त – अपील मंजूर। (पप्पू उर्फ दयाराम वि. म.प्र. राज्य) **(DB)…1571**

***Penal Code (45 of 1860), Section 302 and Evidence Act (1 of 1872), Section 32 – Multiple Oral Dying Declaration* – Held – If there are multiple dying declarations, trial Court was under obligation to examine each one with accuracy and precision – Adequate reasons were required to be given if any dying declaration is given preference over the other, which was not done in present case – Trial Court miserably failed to undertake aforesaid exercise and mechanically relied on second dying declaration. [Pappu @ Dayaram Vs. State of M.P.] (DB)…1571**

दण्ड संहिता (1860 का 45), धारा 302 एवं साक्ष्य अधिनियम (1872 का 1), धारा 32 – अनेक मौखिक मृत्युकालिक कथन – अभिनिर्धारित – यदि अनेक मौखिक मृत्युकालिक कथन हैं, विचारण न्यायालय, प्रत्येक का यथार्थता एवं सूक्ष्मता से परीक्षण करने के लिए बाध्यताधीन था – यदि किसी मृत्युकालिक कथन को दूसरे पर अधिमान दिया गया है, पर्याप्त कारण दिये जाना अपेक्षित था, जो कि वर्तमान प्रकरण में नहीं किया गया – विचारण न्यायालय, उपरोक्त कार्य करने में बुरी तरह विफल रहा और यांत्रिक रूप से द्वितीय मृत्युकालिक कथन पर विश्वास किया। (पप्पू उर्फ दयाराम वि. म.प्र. राज्य) **(DB)…1571**

***Penal Code (45 of 1860), Section 302 and Evidence Act (1 of 1872), Section 32 – Oral Dying Declaration* – Held – Conviction can be recorded solely on basis of dying declaration or even on basis of oral dying declaration, provided it should be free from any doubt and must pass scrutiny of reliability. [Pappu @ Dayaram Vs. State of M.P.] (DB)…1571**

दण्ड संहिता (1860 का 45), धारा 302 एवं साक्ष्य अधिनियम (1872 का 1), धारा 32 – मौखिक मृत्युकालिक कथन – अभिनिर्धारित – मात्र मृत्युकालिक कथन के आधार

पर या यहां तक कि मौखिक मृत्युकालिक कथन के आधार पर दोषसिद्धि अभिलिखित की जा सकती है, परंतु यह कि, उसे किसी संदेह से मुक्त होना चाहिए तथा विश्वसनीयता की संवीक्षा पास करनी चाहिए। (पप्पू उर्फ दयाराम वि. म.प्र. राज्य) **(DB)…1571**

Penal Code (45 of 1860), Section 302/34 & 307/34 – Common Intention **– Held – A-2 carrying an axe, but did not participated in any manner to cause injuries to deceased – Eye witness also did not attributed any act against A-2 – Seizure of axe not proved – No previous enmity between A-2 and deceased – No instigation by A-2 towards A-1 to fire at deceased – Common intention and pre-arranged plan not proved – Conviction of A-2 set aside and appeal filed by him is allowed. [Indu @ Indrapal Singh Vs. State of M.P.]**

(DB)…1602

दण्ड संहिता (1860 का 45), धारा 302/34 व 307/34 – सामान्य आशय – अभिनिर्धारित – अ.क्र. 2 कुल्हाड़ी लिये हुए था, लेकिन मृतक को चोटे कारित करने में किसी भी तरीके से सम्मिलित नहीं हुआ – चक्षुदर्शी साक्षी ने भी अ.क्र. 2 के विरूद्ध कोई कृत्य आरोपित नहीं किया – कुल्हाड़ी की जब्ती साबित नहीं – अ.क्र. 2 एवं मृतक के बीच कोई पूर्व वैमनस्यता नहीं – मृतक पर गोली चलाने के लिए अ.क्र. 1 को अ.क्र. 2 के द्वारा कोई उकसाहट नहीं – सामान्य आशय एवं पूर्वायोजित योजना साबित नहीं – अ.क्र. 2 की दोषसिद्धि अपास्त एवं उसके द्वारा प्रस्तुत अपील मंजूर। (इन्दु उर्फ इंद्रपाल सिंह वि. म.प्र. राज्य) **(DB)…1602**

Penal Code (45 of 1860), Section 302 & 307 and Arms Act (54 of 1959), Section 25 & 27 – Eye Witness Turning Hostile – Effect – Appreciation of Evidence **– Held – Direct evidence of eye witness found reliable – Seizure of weapon from A-1 duly proved by evidence – It was also established that A-1 used the fire arm to commit the crime – Medical evidence corroborated the ocular evidence – FIR within half an hour from incident – Offence by A-1 proved beyond reasonable doubt – Conviction of A-1 affirmed – Appeal filed by A-1 dismissed. [Indu @ Indrapal Singh Vs. State of M.P.] (DB)…1602**

दण्ड संहिता (1860 का 45), धारा 302 व 307 एवं आयुध अधिनियम (1959 का 54), धारा 25 व 27 – चक्षुदर्शी साक्षी का पक्षद्रोही हो जाना – प्रभाव – साक्ष्य का मूल्यांकन – अभिनिर्धारित – चक्षुदर्शी साक्षी का प्रत्यक्ष साक्ष्य विश्वसनीय पाया गया – अ.क्र. 1 से शस्त्र की जब्ती साक्ष्य द्वारा सम्यक् रूप से साबित – यह भी स्थापित किया गया था कि अ. क्र. 1 ने अपराध कारित करने के लिए अग्न्यायुध का प्रयोग किया – चिकित्सीय साक्ष्य ने चाक्षुष साक्ष्य की संपुष्टि की – घटना के आधे घंटे के भीतर प्रथम सूचना प्रतिवेदन – अ.क्र. 1 का अपराध युक्तियुक्त संदेह से परे साबित – अ.क्र. 1 की दोषसिद्धि अभिपुष्ट – अ.क्र. 1 द्वारा प्रस्तुत अपील खारिज। (इन्दु उर्फ इंद्रपाल सिंह वि. म.प्र. राज्य) **(DB)…1602**

Penal Code (45 of 1860), Sections 363, 366 & 376 – Appreciation of Evidence **– Held – Doctors who examined the prosecutrix and the X-Ray report, concluded that prosecutrix was subjected to sexual intercourse – Statement of prosecutrix duly corroborated by other witnesses – Trial Court**

सेवा विधि – पिछली मजदूरी – सिद्धांत – अभिनिर्धारित – पिछली मजदूरी की संकल्पना कर्मकार को उस अवधि के लिए प्रतिकर प्रदान करने के मूलभूत सिद्धांत पर आधारित है, जब वह सेवा के पर्यवसान के कारण बेरोजगार रहा जो कि पश्चात्वर्ती समय में विधि विरूद्ध पाया गया था। (महीप कुमार रावत वि. श्री अश्विनी कुमार राय)
(DB)…1560

Service Law – Compassionate Appointment – Belated Claim **– Held – Compassionate appointment is carved out as exception to general rule – Its basic purpose is to provide immediate helping hand to the family in distress – Appointment cannot given after more than two decades – There cannot be a reservation of vacancy till a candidate becomes major after number of years – Writ Court wrongly directed consideration of R-1 on compassionate ground after almost 24 years from date of death of his father – Impugned order set aside – Appeal allowed. [Managing Director, M.P. Paschim Kshetra Vidyut Vitaran Co. Vs. Ashiq Shah]** **(DB)…1485**

सेवा विधि – अनुकंपा नियुक्ति – विलंबित दावा – अभिनिर्धारित – अनुकंपा नियुक्ति को सामान्य नियम के अपवाद के रूप में परिकल्पित किया गया है – इसका मूल प्रयोजन संकट में परिवार को तत्काल सहायता प्रदान करना है – दो दशक से अधिक हो जाने के पश्चात् नियुक्ति नहीं दी जा सकती – अनेक वर्षों के पश्चात् अभ्यर्थी के वयस्क हो जाने तक, रिक्ति को आरक्षित नहीं किया जा सकता – रिट न्यायालय ने प्रत्यर्थी क्र. 1 के पिता की मृत्यु के लगभग 24 वर्षों के पश्चात् अनुकंपा के आधार पर उसको विचार में लिये जाने हेतु गलत रूप से निदेशित किया – आक्षेपित आदेश अपास्त – अपील मंजूर। (मेनेजिंग डायरेक्टर, एम.पी. पश्चिम क्षेत्र विद्युत वितरण कं. वि. आशिक शाह)
(DB)…1485

Service Law – Compassionate Appointment – Contingency **– Held – Two recognized contingency for grant of compassionate appointment are – (i) appointment on compassionate ground to meet sudden crisis occurring in a family on account of death of bread winner while in service and (ii) appointment on compassionate ground to meet crisis in family on account of medical invalidation of bread winner. [Managing Director, M.P. Paschim Kshetra Vidyut Vitaran Co. Vs. Ashiq Shah]** **(DB)…1485**

सेवा विधि – अनुकंपा नियुक्ति – आकस्मिकता – अभिनिर्धारित – अनुकंपा नियुक्ति प्रदान करने के लिए दो मान्य आकस्मिक परिस्थितियाँ हैं – (i) सेवा में रहने के दौरान कमाने वाले की मृत्यु हो जाने के कारण परिवार में आये आकस्मिक संकट से निपटने हेतु अनुकंपा के आधार पर नियुक्ति एवं (ii) कमाने वाले की चिकित्सीय अशक्तता के कारण परिवार में आये संकट से निपटने हेतु अनुकंपा के आधार पर नियुक्ति। (मेनेजिंग डायरेक्टर, एम.पी. पश्चिम क्षेत्र विद्युत वितरण कं. वि. आशिक शाह) **(DB)…1485**

Service Law – Transfer – Administrative Exigency – Grounds **– Held – A sensitive/responsible post of CMO (Class A) cannot be manned by a Revenue Inspector (Class C) – He does not have any administrative experience or**

* * * * *

THE INDIAN LAW REPORTS M.P. SERIES, 2021
(Vol.-3)

JOURNAL SECTION

APPOINTMENT TO THE MADHYA PRADESH HIGH COURT

We congratulate Hon'ble Mr. Justice Pranay Verma on his appointment as Judge of the High Court of Madhya Pradesh. Hon'ble Mr. Justice Pranay Verma took oath of the High Office on 27/08/2021.

HON'BLE MR. JUSTICE PRANAY VERMA

Born on December 12, 1973. Did schooling from Christ Church Boys School, Jabalpur, Madhya Pradesh, graduation in the year 1994 and LL.B from I.L.S. Law College, Pune in the year 1998. Enrolled as an Advocate on July 01, 1998 on the rolls of the State Bar Council of Madhya Pradesh and started practice at High Court of Madhya Pradesh, Jabalpur. Practiced mainly in Constitutional, Civil and Criminal matters before the High Court of M.P., Jabalpur. Also practiced in various District Courts as well as Family Courts, Consumer Forum and Debt Recovery Tribunal. Also worked as Counsel for Hindustan Power Projects Pvt. Ltd., Essar Power Pvt. Ltd., Jhabua Power M.P. Ltd., Prism Johnson Ltd., National Fertilizers Ltd., Corporation Bank, Commercial Automobiles Ltd., M.P. Audyogik Kendriya Vikas Nigam Ltd., Tega Industries Ltd., Metal Scrap Corporation Ltd.. Also appeared for the State Bank of India in individual cases.

Elevated as Judge of the High Court of Madhya Pradesh and took oath on August 27, 2021.

We, on behalf of The Indian Law Reports (M.P. Series), wish Hon'ble Mr. Justice Pranay Verma, a successful tenure on the Bench.

OVATION TO HON'BLE MR. JUSTICE PRANAY VERMA, GIVEN ON 27-08-2021, THROUGH VIRTUAL MODE, IN THE CONFERENCE HALL OF SOUTH BLOCK, HIGH COURT OF M.P., JABALPUR.

Shri Purushaindra Kaurav, Advocate General, M.P., while felicitating the new Judge, said :-

Kautilya in Arthshastra had said –

I quote

"The fragrance of flowers spreads only in the direction of the wind. But the goodness of a person spreads in all directions."

Unquote

Hon'ble Justice Pranay Verma is the embodiment of all virtues, such as, dedication, hard work, perseverance & humility. We are always delighted when one of our leading members of the Bar is elevated to the Bench. Hon'ble Justice Verma's elevation proves that genuinely good people who work hard can attain great heights. He is an excellent example to show that surroundings, he is destined for greatness. He is a role model for the younger members of the Bar to maintain a determined focus on their work. Hon'ble Justice Pranay Verma was born on 12 December 1973 in a family of reputed lawyers. His father late Hon'ble Justice Shri Bipin Chandra Verma initially served as a Judge of this Court from August 1978 up to September 1991 and then as Chief Justice of the Punjab and Haryana High Court from September 1991 to May 1992.

Your Lordship obtained Bachelor Degree in Commerce and Law and started practice on 01 July 1998 under the able guidance of Shri Ravish Chandra Agarwal, Senior Advocate and Former Advocate General of the State of Madhya Pradesh and Chhattisgarh. Justice Verma has vast experience of more than 23 years at the Bar and is highly regarded as an expert in the field of civil, constitutional and service matters. He has represented prestigious institutions such as Hindustan Power Projects Pvt. Ltd., Essar Power Pvt. Ltd., National Fertilizers Ltd., MP Audyogik Kendra Vikas Nigam Ltd. and State Bank of India etc..

In my interactions with Your Lordship, I have seen that Justice Verma is extremely humble, soft-spoken and respectful to the senior members of the Bar while at the same time being helpful to the young lawyers. I have observed that during arguments, Justice Verma was always well prepared, made concise & crisp arguments and was fair to the Court as well as to the counsel for the other side. It was always a pleasure to appear in a matter with him. His Lordship's command

over the various legal fields is exemplary. Your Lordship is an avid follower of formula 1 racing and enjoys watching the races in person.

I am sure that by Your Lordship's elevation, the litigants of the State would be greatly benefitted. Your Lordship's appointment has come at an extremely opportune time as the Court is on one hand facing acute shortage of Hon'ble Judges and on the other hand is facing mounting arrears of pending cases.

At this stage, I may take liberty to place on record, that My Lord, Hon'ble The Chief Justice has indeed been extremely auspicious, as in a short tenure of 8 months, Your Lordship has administered oath of 7th new Judge. With Justice Verma's appointment, the strength of Judges has increased to 28. We are all conscious of the fact that My Lord Hon'ble The Chief Justice is taking great pains to fill the remaining vacancies and has recently recommended names for elevation as Judges of this Court. I am confident that the Hon'ble Court will be able to function at its full sanctioned strength during Your Lordship's tenure. I am sure that Justice Verma would be greatly benefitted by the dynamic leadership and guidance of Hon'ble The Chief Justice who is not only ably discharging his judicial functions but is also working extremely hard in strengthening the overall judicial system within the State of Madhya Pradesh.

I, on behalf of the State of Madhya Pradesh, its law officers and on my own behalf, congratulate and convey best wishes to Hon'ble Shri Justice Pranay Verma and assure of our full support to discharge the duties of the office of Judge of this Court.

Thank you.

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

प्रणय वर्मा प्रारंभ से ही कुशाग्र बुद्धि के अधिवक्ता हैं। आप मिलनसार और शांत स्वभाव के व्यक्ति हैं। मैं इन्हें आज से नहीं इनके बचपन से, स्कूल लाईफ से समझिये, क्योंकि मैं श्री बी.सी. वर्मा साहब के बहुत पारिवारिक करीब था और उनके निर्देश पर ही हम लोग बार में सभी कार्य करते थे। आपके न्याय जगत के पिता श्री बी.सी. वर्मा साहब से हमारे पारिवारिक संबंध थे, वे दीक्षितपुरा, जो सबसे पुराना इस शहर का वार्ड है, वहाँ के निवासी थे और बहुत तेज स्वभाव के थे। श्री बी.सी. वर्मा साहब दीवानी वकालत के तो बादशाह कहलाते थे, माहिर थे, उनका प्रदेश में नाम था। हमारे गुरू सतीश चन्द्र दत्त और श्री बी.सी. वर्मा साहब की जोड़ी मानी जाती थी। एक दीवानी में माहिर, एक फौजदारी में माहिर। उस वक्त जबलपुर में इनके नाम चलते थे और जनता इन्हें मानती थी।

प्रणय जी इस संस्कारधानी में हमारी शान बनकर उभरेंगें ऐसी मैं आशा करता हूँ, अपेक्षा भी करता हूँ। हमारी बार और बैंच इस वक्त कोरोना काल में भी जनहित में लगी हुई है। बार, इस उपलब्धि को पाकर हम सभी सहभागियों का शुक्रिया अदा करते हैं।

प्रणय जी आप सभी अधिवक्ताओं को अपना बनाकर रखियेगा, इसी उम्मीद के साथ हम आपको ऐसे पद पर प्रतिष्ठित होने के लिए बधाई देते हैं और उम्मीद करते हैं कि जब भी किसी बार के व्यक्ति के ऊपर उचित कोई परिस्थितियाँ पैदा होंगी तो जैसा कि आप और आपका परिवार सदैव अधिवक्ताओं के साथ रहा है, आप से भी उसी उम्मीद के साथ हम आपका स्वागत करते रहेंगे। मैं और कुछ इसलिए नहीं कहना चाहता हूं क्योंकि कौरव साहब ने आपके जीवन के पूरे डिटेल हम सब लोगों को सुना दिये हैं, मुझे भी पुनः वही उपलब्धि प्राप्त हुई है।

आप भी जजेस महोदय जो हमारे लिए इस प्रदेश की शान हैं, उन सब को प्रणाम करता हूं। चीफ जस्टिस साहब को विशेषकर क्योंकि उन्होंने बार को बहुत अपनापन दिया है और बार उन्हें बहुत स्नेह करता है। इन्हीं शब्दों के साथ मैं पुनः प्रणय वर्मा को अब मैं, उनको भाई कह लो या पारिवारिक बोल लो, इन सब के साथ बधाई देते हुए अपनी बात को विराम देता हूँ और बार की ओर से उन्हें इस पद पर आरूढ़ होने के लिए पुनः बधाई देकर मैं अपनी बात को समाप्त करता हूँ।

जय हिन्द जय भारत।

Shri Dr. Vijay Kumar Choudhary, Chairman, State Bar Council of M.P., said :-

आज मुझे लगा कि सिविल के विद्वान अधिवक्ता को माननीय मुख्य न्यायाधिपति ने अपनी बैंच में चांस दे दिया। प्रणय वर्मा हमारे सिविल के माने हुये विद्वान और यदि मैं कहूं कि सिविल उन्हीं से शुरू होती है, श्री रवीश चन्द्र जी अग्रवाल साहब के प्रिय शिष्य हैं और सर झुकाकर काम करने वाले एडवोकेट रहे। अपने गुरू के साथ इतने लंबे समय तक सिविल में जो इन्होंने आयाम हासिल किये हैं, उसका लाभ मध्यप्रदेश के वकीलों को, मध्यप्रदेश की जनता को मिलेगा। किसी ने कहा है कि– *जहाँ रहेगा वहीं रोशनी लुटायेगा, जहाँ रहेगा वहीं रोशनी लुटायेगा और किसी चिराग का अपना मकां नहीं होता, किसी चिराग का अपना मकां नहीं होता।*

इस अवसर पर मैं प्रदेश के 81 हजार वकीलों की ओर से प्रणय जी आपको बहुत बधाई देता हूँ और आपसे सिर्फ एक ही कामना है कि आपकी कृपा वकीलों पर सदैव बनी रहे। आप जल्दी–जल्दी न्याय दें, और तत्काल वकीलों को रिलीफ दें, जनता को रिलीफ दें, यही मेरा प्रदेश के 81 हजार वकीलों की ओर से आपसे अनुनय विनय है।

इस अवसर पर मैं माननीय मुख्य न्यायाधिपति महोदय का आभार मध्यप्रदेश के वकीलों की ओर से और स्टेट बार काउंसिल के चेयरमेन की ओर से करना न भूलूंगा कि जिन्होंने बैठते ही जल्दी से जल्दी यहाँ के खाली पदों की पूर्ति के लिए कार्यवाहियाँ की और बेहद कुशल तरीके से अच्छे लोगों को पदों पर बैठाया, बैंच से भी अच्छे लोग लिये, जोरदार लोग, बार से भी जोरदार लोग लिये, मजा आ गया, आप महान हैं और आपके साथ काम करने की भी बड़ी इच्छा होती है। मैं तो कहता हूँ कि मैं 2–4 घंटे आपसे बातचीत भी करता रहूं क्योंकि हर समस्या के लिए जो इस तरह खुले दिल से हमें समर्थन करते हैं वो एक बहुत बड़ी बात है। मैंने आपसे निवेदन किया कि मॉय लार्ड 5 साल से मध्यप्रदेश में सीनियर एडवोकेट नहीं बने। मैंने चिट्ठी लिखी आपको। आज आप देखिये बार काउंसिल में 87 वकीलों की लिस्ट आ गई है जिन्होनें एप्लाई किया है कि हम सीनियर एडवोकेट बनना चाहते हैं। ये आपकी सराईयत है, उसकी शर्तों में भी आपने ढील दी ताकि आम वकील भी

सीनियर एडवोकेट बन सके। ये सब अच्छाई आपके अंदर है, मैं चाहता हूं कि मध्यप्रदेश का लाभ आपको मिले और आपकी अच्छाईयाँ दिल्ली तक पहुँचे ताकि आप और आगे जल्दी से जल्दी बढ़ें, ये मेरी शुभकामना है आपके साथ और ऐसा होगा।

मैं जस्टिस बी.सी. वर्मा साहब को अपने सिविल जज के टाईम से जानता हूं। वे एक वृहद व्यक्तित्व तो थे लेकिन जिससे उनकी बात मिल जाये, जिससे उनके मन मिल जायें, उनके लिए बहुत अच्छे थे वे। खुरई में जब वे अपनी ससुराल आते थे और खुरई में उन दिनों मैं सिविल जज था, 76–77 में, हैरान हो जायेंगे जब उनसे मिलते थे ऐसा लगता नहीं था कि इतने बड़े आदमी से हम लोग मिल रहे हैं। इतने बड़े आदमी के सामने हम लोग खड़े हैं। बहुत हँस के बात करना, प्लेट उठाके देना, ये लीजिये, ये बड़ी सराईयत थी। हाईकोर्ट जज की पोस्ट पर बैठ के जिसका अहंकार झुक जाये समझ लीजिये वो पूजनीय है, ये बहुत भारी पोस्ट होती है, बहुत बड़ी पोस्ट है। कॉन्स्टीट्यूशनल पोस्ट है तो मैं आपसे अपेक्षा करता हूँ कि आपका ऐसे ही प्यार वर्मा जी को, प्रदेश के वकीलों का मिलता रहेगा।

मैं पुनः आपको स्टेट बार काउंसिल की ओर से इस मनोनयन पर साधुवाद देता हूं और माननीय मुख्य न्यायाधिपति महोदय की भूरि–भूरि प्रशंसा करता हूं जिन्होंने मध्यप्रदेश हाईकोर्ट के रिक्त पदों को भरने के लिए इतनी जल्दी कार्यवाहियाँ शुरू की और ये कार्यवाहियाँ सतत् जारी रहें और मॉय लार्ड जल्दी से आप सारे पद भर दें तो आपकी बहत बड़ी कृपा होगी।

So kind of you.

जय हिन्द

Thank you very much.

Shri Manoj Sharma, President, High Court Advocates' Bar Association, Jabalpur, said :-

It is my pleasure and privilege to welcome our newly appointed Judge.

My Lord Hon'ble Shri Justice Pranay Verma, congratulations on your elevation as Judge of Madhya Pradesh High Court.

Hon'ble Shri Justice Pranay Verma was born on 12 December 1973 in the illustrious family of distinguished jurist, late Hon'ble Shri Justice Bipin Chandra Verma, a leading light of the legal profession at Jabalpur, who besides adorning the high office of Judge of this Hon'ble Court held the high office of Chief Justice of Punjab and Haryana High Court.

My Lord Justice Pranay Verma did his education from Jabalpur wherein after schooling; he graduated in Commerce and Law. His Lordship was enrolled as an Advocate on 01 July 1998 on the rolls of State Bar Council of Madhya Pradesh and joined the office of Senior Advocate Shri Ravish Chandra Agarwal, a doyen of the Bar at Jabalpur, holding the unique distinction of serving as the Advocate

General of two States, viz. Madhya Pradesh and Chhattisgarh. Thus His Lordship has been truly blessed being baptized and nurtured in the profession under the guidance of legal stalwarts. The result of this high degree of training coupled with hard work of His Lordship led to his continuous rise as an Advocate with tremendous potential.

In a short span of time My Lord Justice Pranay Verma commanded a lucrative practice on Civil, Constitutional, Service and Criminal side in the High Court, District Court and other Forums and Tribunals at Jabalpur. Throughout this fascinating journey in the profession, His Lordship's politeness and courteous behaviour towards all, is something that all the Bar members shall remember and cherish.

My Lord, you have risen from our ranks and the legal community at Jabalpur is truly delighted on your elevation as Judge of the High Court, the great and noble traditions of which are fully known to you with sense of déjà vu, as your late father adorned the high office of Judge of this High Court.

My Lord, in the backdrop of ever rising pendency, slow judicial appointments and the adverse situation brought about by the pandemic, your appointment as Judge of the High Court has come as waft of morning breeze.

Needless to remind My Lord that with great authority comes greater responsibility and in this case coupled with the burden of our expectations, which My Lord shall be carrying with ease, of which we are fully confident.

My Lord, may I most humbly reiterate and quote what I submitted on earlier similar occasions:

“Kindly give due sympathy, compassion and mercy to the causes brought before Your Lordship.

By and large, people invoke judicial process genuinely to mitigate their problems. All situations are not perfect and niceties of law are not known to everyone. Although the presumption is that ignorance of law is no excuse but in practical life, it is quite the contrary. In the maze of numerous laws with their own peculiarities, invariably an individual is lost. Thus while judging him or her, please bear this in mind that there is no standard situation tailor-made to suit the statute, for Your Lordship to invoke your benign jurisdiction for granting relief. The entire apparatus of justice dispensation is for the people and it is the people who invoke this jurisdiction with the pious hope for getting justice. May it be the central endeavor of Your Lordship not to disappoint them. Thus, the age-old approach of justice tempered with mercy may become your guiding light during your tenure as Judge of this Hon'ble High Court.”

I, on behalf of High Court Advocates' Bar Association, Jabalpur and on my own behalf offer our heartfelt congratulations and we welcome My Lord with utmost warmth of our hearts to adorn the high office of Judge of this Hon'ble Court.

On our part, it is my pious duty to put on record that all the members of the Association are keen and committed to ensure smooth functioning of the Justice dispensation system and will offer all assistance in all endeavors of My Lord as Judge of this Hon'ble Court.

Best of Luck

Shri Jinendra Kumar Jain, Assistant Solicitor General, said :-

आज श्री प्रणय वर्मा जी के द्वारा उच्च न्यायालय में न्यायाधिपति के पद पर पदासीन होने के पूर्व शपथ ग्रहण का, एवं भारत के संविधान की रक्षा करने का एवं संविधान की मंशा के अनुरूप, व्यक्ति, समाज, भारतीय संस्कृति एवं परंपरा को अक्षुण्ण बनाये रखने, पालन करने एवं कराने की सौगंध का दिन है।

श्री प्रणय वर्मा जिनका बाल्यकाल से अभी तक का जीवन संस्कारधानी एवं माँ नर्मदा की इस पवित्र माटी से जुड़ा हुआ है, माता–पिता से संस्कार प्राप्त कर वाणिज्य एवं विधि में स्नातक की उपाधि अर्जित करने के पश्चात्, वरिष्ठ अधिवक्ता श्री रवीश चन्द्र अग्रवाल के मार्गदर्शन में न्यायिक जगत में प्रवेश किया। पिता, न्यायाधिपति स्व. श्री बिपिन चन्द्र वर्मा से विरासत में वकालत की प्रक्रिया, कानून की बारीकियों के ज्ञान को अर्जित करने एवं वरिष्ठ अधिवक्ता श्री अग्रवाल जी से कुशलता प्राप्त कर विगत 23 वर्षों से हम सब के बीच वकालत कर जबलपुर बार में एवं संस्कारधानी में उचित सम्मान एवं गौरव प्राप्त किया।

आज हम सभी आनंदित हैं कि संस्कारधानी में पढ़ लिख कर एवं योग्य गुरू के मार्गदर्शन में वकालत के बीजमंत्रों से शिक्षित होकर म.प्र. उच्च न्यायालय के न्यायाधिपति के रूप में शपथ लेने का अवसर है, हम आशा करते हैं कि बगैर भेदभाव, सूरज की किरणों के समान न्याय की किरणों से, न्याय की आशा करने वाले पक्षकारों को निराश नहीं होना पड़ेगा।

इस अवसर पर मैं अपनी ओर से, भारत सरकार की ओर से, केन्द्रीय विधि अधिकारियों की ओर से आपका स्वागत करता हूँ एवं आपके उज्ज्वल भविष्य की कामना करता हूँ एवं आपको इस सफलता की बधाई देता हूँ।

धन्यवाद्।

Shri R.P. Agrawal, President, Senior Advocates' Council, Jabalpur, said :-

It is a matter of great pride and privilege to welcome Shri Pranay Verma on his appointment as a Judge of this High Court.

Justice Verma was born on 12 December 1973 and is a worthy son of worthy father late Shri Bipin Chandra Verma, who was a Judge of this High Court as also the Chief Justice of Punjab and Haryana High Court. After completing his school education, Justice Pranay Verma obtained Bachelors' Degree in Commerce and Law. He was enrolled as an Advocate on 01 July 1998 on the rolls of the State Bar Council of Madhya Pradesh. He has inherited a great legacy from his father. Soon after he started practice, he started gaining ground and also started acquiring name and fame in his profession. It had appeared to us, that in due course of time, he would carve out a place for himself in the High Court by sheer dint of his merits and hard work. It is said coming events cast their shadows before, and this is just true in the case of Justice Pranay Verma. He is calm and quiet. He concentrated on his professional job alone. He had a passion for law. He very soon became standing Counsel for Hindustan Power Project Pvt. Ltd., Essar Power Pvt. Ltd., Prism Johnson Ltd., National Fertilizers Ltd., Corporation Bank, Commercial Automobiles Ltd. and many such other concerns. He has also been appearing for the State Bank of India in individual cases.

Justice Verma is a man of versatile genius, which we had an occasion to note in his learned arguments before the Courts and we are sure that he would attain heights of literary renown very soon.

I, on behalf of Senior Advocates' Council and on my own behalf, wish a very bright future for Justice Pranay Verma.

Thank you.

Shri Veer Kumar Jain, Convenor, Ad hoc Committee, High Court Bar Association, Indore, said :-

Milords, addition to the judicial family and that too long awaited, is a matter of pleasure. I feel proud to be a part of this auspicious ovation ceremony. Since long we have been facing acute shortage of Hon'ble Judges. We are happy to get an experienced advocate as a Judge in our High Court. We are certainly going to be benefited with his unquestionable competence and experience at the Bar. Efforts of Hon'ble the Chief Justice to fill up vacancies in the High Court are really remarkable.

Shri Pranay Verma was born on 12 December 1973. My Lord is the able son of able father Hon'ble Justice Shri B.C. Verma, Judge of this Hon'ble High Court and later the Chief Justice of Punjab & Haryana High Court. Having completed his graduation in commerce and law, he joined the Bar in 1998. Shri Pranay Verma during his career as an advocate practiced in various Courts, Forums and Tribunals

having diverse practice in almost all important fields of law. Shri Verma has represented several companies, corporations, banks etc. and his vast experience would certainly be beneficial in discharging his duties and responsibilities being the Hon'ble Judge of this august High Court and the lawyers and litigants would certainly be benefitted in getting justice with your long experience.

I, on behalf of the High Court Bar Association, Indore and on my behalf warmly welcome and congratulate Your Lordship and wish Your Lordship all success and a very bright tenure as Judge of this Hon'ble High Court and other achievements, which Your Lordship is going to certainly achieve.

Thank you.

Shri M.P.S. Raghuvanshi, Addl. Advocate General & President, High Court Bar Association, Gwalior, said :-

Congratulations to My Lord Hon'ble Mr. Justice Pranay Verma.

Hon'ble Mr. Pranay Verma was born on 12 December 1973. His father late Hon'ble Justice Shri Bipin Chandra Verma was the Judge of this Hon'ble Court who later on became the Chief Justice of Punjab & Haryana High Court. Justice Pranay Verma was enrolled as an Advocate on 01 July 1998 on the rolls of the State Bar Council of Madhya Pradesh and started practice under the guidance of Shri Ravish Chandra Agarwal, Senior Advocate and former Advocate General of State. Apart from constitutional and criminal matters, he was mainly dealing civil matters.

I, on my behalf and on behalf of the members of the High Court Bar Association, Gwalior, offer heartfelt congratulations to the newly appointed Hon'ble Judge and we welcome My Lord with utmost warmth of our hearts to adorn the high office of Judge of this Hon'ble Court.

Due to appointment of My Lord as Judge of this prestigious Institution, I am sure that the pendency of the cases will be reduced and same will help in delivery of justice to the litigants. I again extend a grand welcome to Hon'ble Judge and wish him a very bright, unblemished career and good health in future.

Thank you.

Reply to the Ovation, by Hon'ble Mr. Justice Pranay Verma :-

I am overwhelmed and extremely grateful for the kind words showered upon me.

I begin by offering my salutation to the Almighty God for bestowing upon me this pious responsibility of rendering justice.

I take this opportunity to express my gratitude to my father late Justice B.C. Verma and my mother Smt. Swarnlata Verma for the values and principles they have instilled in me. As destiny would have it, they have left for heavenly abode but still their teachings and blessings guide me in times of need.

I am equally indebted to my Senior Shri Ravish Chandra Agarwal, Senior Advocate, an eminent lawyer of this Hon'ble Court.

I am extremely grateful to my wife, son and my entire family as I stand here today only on account of their constant cooperation, support and sacrifices which they had to make during my struggling days.

I have always idolized as an advocate and as a Judge several legal luminaries of this Court both past as well as present, who have been a beacon of inspiration and guidance for me. It shall always be my earnest endeavour to follow the path shown to me by them.

I am also thankful to the members of the Bar, both seniors and juniors who always gave affection, cooperation and love during my practice as an advocate in this Court. I hope that the members of the Bar will continue to extend cooperation to me to enable me to perform the duty of dispensation of justice.

Last but not the least, I also appreciate the assistance provided to me by my associate advocates, juniors and office staff.

Donning this Prestigious Chair is not an easy task as Lord Denning once aptly said : *"Every Judge, in a sense, is on trial to see that he does his job honestly and properly."*

Keeping these virtues and qualities in mind, I shall make every possible effort to fulfill the oath that I have taken today for dispensation of justice to the best of my ability.

I once again thank you all.

FAREWELL

HON'BLE MR. JUSTICE AKHIL KUMAR SRIVASTAVA

Born on August 05, 1959. Did B.A., LL.B. and joined Judicial Service as Civil Judge Class-II on December 19, 1985. Appointed as Civil Judge Class-I in the year 1991. Appointed as C.J.M./A.C.J.M. in the year 1994 and was posted as C.J.M., Narsinghpur. Promoted as Officiating District Judge in Higher Judicial Service on May 31, 1997 and was posted as II A.D.J., Khandwa. Posted as A.D.J. and Special Judge, NDPS Act, Rewa in the year 1999. Worked as Deputy Secretary, Law and Legislative Affairs Department, Bhopal from May 2004 and thereafter as Addl. Legal Remembrancer & Addl. Secretary Law, Law Department, Bhopal from September 2004. Was granted Selection Grade Scale w.e.f. 17.09.2004. Posted as Secretary, Law & Legislative Affairs Department, Bhopal in the year 2006. Posted as Special Judge, SC/ST (P.A.) Act & I AJ to I A.D.J., Sagar in June 2008 and thereafter also as Special Judge, N.D.P.S., Sagar in July 2008. Posted as I A.D.J. & Special Judge, Corruption Act at Bhopal in the year 2009. Posted as Law Officer, State Economic Offences Investigation Bureau at Bhopal in the year 2010. Posted as District & Sessions Judge, Narsinghpur in the year 2011. Was granted Super Time Scale w.e.f. 01.03.2013. Posted as Principal Registrar (ILR & Examination), High Court of M.P. at Jabalpur in the year 2013. Elevated as Judge of the High Court of Madhya Pradesh on June 19, 2018 and demitted Office on August 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 AKHIL KUMAR SRIVASTAVA, GIVEN ON 04.08.2021, THROUGH VIRTUAL MODE, 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 Akhil Kumar Srivastava, who is demitting office on attaining the age of superannuation after successful tenure of about 36 years in judiciary.

Shri Justice Akhil Kumar Srivastava was born on 05 August 1959 in Bansgaon, District Gorakhpur (U.P.). After completing graduation in Arts, Shri Justice Srivastava obtained LL.B. Degree in 1983 from Allahabad University. He joined the Judicial Service and was appointed as Civil Judge, Class-II on 19 December 1985. Brother Justice A.K. Srivastava was promoted as Civil Judge, Class-I on 30 August 1991 and thereafter as C.J.M./A.C.J.M. on 07 November 1994. He was later on promoted as Officiating District Judge in Higher Judicial Service on 31 May 1997. Shri Justice A.K. Srivastava was granted Selection Grade Scale on 17 September 2004 and Super Time Scale on 01 March 2013. Shri Justice A.K Srivastava, during his tenure as Judicial Officer, was posted in various districts of the State of Madhya Pradesh in different capacities. He also held the posts of Deputy Secretary, Law & Legislative Affairs Department, Bhopal; Additional Legal Remembrancer & Additional Secretary, Law & Legislative Affairs Department, Bhopal; Secretary, Law & Legislative Affairs Department, Bhopal; Law Officer, State Economic Offences Investigation Bureau, Bhopal and Principal Registrar (ILR and Examination), High Court of Madhya Pradesh, Jabalpur.

Considering the vast experience gained by Shri Justice Srivastava in the District Judiciary, he was elevated as Judge of this High Court on 19 June 2018.

Justice Srivastava's contribution on Judicial and Administrative side has been very illustrative. He is known for his soft and polite behavior and pleasant mannerism. Brother Justice Srivastava is an embodiment of the most desirable qualities reasonably expected of a Judge and indeed of a noble human being. Those who are close to Justice Srivastava would certainly vouch for his multifaceted personality. I have found his assistance in administrative matters very useful. I am sure that his vast knowledge and experience will continue to be useful to the society even after his retirement.

I, on my behalf and on behalf of my esteemed sister and brother Judges and the Registry of the High Court, wish Shri Justice Akhil Kumar Srivastava and Mrs. Sarita Srivastava a very happy, prosperous and glorious life ahead.

Thank you.

Shri Purushaindra Kaurav, Advocate General, M.P., bids farewell :-

Today, we have assembled to bid fond farewell to Hon'ble Justice Shri A.K. Srivastava who is demitting the office of Judge of this Court.

Your Lordship took oath as a Judge of this Hon'ble Court on 19th of June 2018. On Your Lordship's oath taking ceremony, I had the privilege to highlight the legacy and heritage of this great institution and the notable contribution of some of the great Judges. Your Lordship has lived up to the high traditions.

Your Lordship while discharging judicial duties has had the opportunity to be posted at various places within the State and also had the occasion to discharge function on the administrative side while being posted as Dy. Secretary, Additional Secretary and even as a Secretary, Department of Law and Legislative Affairs, Government of M.P. It is by garnering this experience that Your Lordship was able to undertake the righteous task of dispensation of justice.

Though Your Lordship's tenure as a Judge of this Court was for little over three years, however, Your Lordship's legal acumen and knowledge have left a lasting impression on all of us and it was a privilege to argue before Your Lordship. We were assured of getting a patient and fair hearing and I am sure that Your Lordship would look back at the last 30 years and be certainly satisfied that it was a well played innings.

I, on behalf of the State of M.P., its law officers and on my behalf, convey best wishes to Hon'ble Justice Shri A.K. Srivastava and his family and pray that they lead a happy and peaceful life ahead.

Thank you.

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

बडगांव वंशगांव में जन्म लेने के बाद, यू.पी.स्टेट में सारी शिक्षा प्राप्त करने के बाद, माननीय ए.के. श्रीवास्तव जी की जन्म भूमि तो यू.पी. स्टेट की थी लेकिन उनके जीवन की कर्मभूमि सी.पी. की

थी। यू.पी. से सी.पी. याने उत्तर प्रदेश से सेण्ट्रल प्रोविंस में भी उनके सारे जीवन की कुर्बानियां, इस नगर में विशेषकर रहीं। सिविल जज से लेकर के उच्च न्यायालय तक जज का पहुँचना गर्व की बात है। सारे खानदान को सम्मान मिलता है, सारे दोस्तों को, परिवार को, आमजनों को ऐसा लगता है कि हमारे बीच भी एक हैसियत पैदा हो गई है।

श्री ए.के. श्रीवास्तव साहब हमेशा मुस्कुराकर न्यायालय में बैठते थे और उचित निर्णय देते थे। किसी भी पक्ष को अपनी कलम से उन्होंने नुकसान नहीं पहुँचाया है। जो उचित निर्णय होना चाहिये या उन्हें जो दोनों पक्ष की दलीलों में से जो निर्णायक था, वही देते थे और इसीलिए उनको हम इस तरह से अपनापन देते हैं।

श्री ए.के. श्रीवास्तव साहब ने हमें किन्हीं भी परिस्थितियों में, यहाँ तक कि उच्च न्यायालय अधिवक्ता संघ के पदाधिकारी होने के नाते यदि उनके किसी मसले को लेकर के किसी अधिवक्ता की समस्या के लिये भी उनके चेंबर में या उनके निवास स्थान में हम अपने दोस्तों और साथियों के साथ गये हैं तो बड़े स्नेह के साथ सुना, सब को अपनापन दिया और यहाँ तक कि उन्होंने यह भी कहा कि मेरे से जो कुछ भी आपकी समस्यायें हल हो सकेंगी उन्हें मैं हल करूंगा। जिन–जिन जिलों में वे इन्चार्ज थे, वहाँ के अधिवक्तागण और उन जिलों के पदाधिकारी भी हम लोगों के साथ में कई बार आते थे, उन लोगों के साथ बड़े स्नेह के साथ अपना समय देकर श्री ए.के. श्रीवास्तव जी ने जो उन्हें अपनापन दिया, वे भी बड़े प्रफुल्लित होकर के उनके चेंबर से निकलते थे। इन्हीं बातों को लेकर के और अपनेपन को दिखाते हुए उन्होंने बार के साथ जो मोहब्बत दर्शाई है, बार के साथ जो उन्होंने अपनापन दिया है, मैं उम्मीद करूंगा कि भविष्य में भी वे हमारी बार में आते रहें और उनका वही पुरजोर स्वागत और सम्मान हम करेंगे जो हम आज कर रहें हैं, न्यायाधिपति की हैसियत से। एक शायर ने कहा है कि "खुदा नसीब से भेजता है उन्हें हमारे हरम में – खुदा नसीब से भेजता है उन्हें हमारे हरम में, हम उसे कबूल करते हैं अपने करम में"। श्री श्रीवास्तव जी के न्यायाधिपति होने पर हम उन्हें अपनापन देते हैं।

मैं, अपनी ओर से, समस्त बार की ओर से एवं समस्त बार के सदस्यों की ओर से और मध्यप्रदेश के सभी अधिवक्ताओं की ओर से इस बात के लिए धन्यवाद देते हुए आज विदाई समारोह में हम उनके जाने पर खुश नहीं है, लेकिन अब इतनी–सी नई उम्र में भी, आज भी वे बहुत नई उम्र के ही दिखते हैं, अगर उन्हें और दस वर्ष तक ऐसे पद पर रखा जाये तो मैं समझूँगा कि बहुत बड़ा कल्याण होगा। इन्हीं शब्दों के साथ मैं अपनी बात को विराम देता हूँ।

बहुत–बहुत धन्यवाद्।

Shri Dr. Vijay Kumar Choudhary, Chairman, State Bar Council of M.P., bids farewell :-

आज हम न्यायाधिपति श्री अखिल कुमार श्रीवास्तव साहब को विदाई दे रहे हैं। ये भोपाल में प्रथम अतिरिक्त जिला न्यायाधीश रहे। मैंने अपने जीवन में जो अनुभव किया कि मृदु और सद्व्यवहारी और रिलीफ देने वाले, ये तीन चीजें बड़ी मुश्किल से मिलती हैं। कुछ लोग मृदु होते हैं और व्यवहारिक भी होते हैं, लेकिन वे गुस्सा करते हैं, वे नाराज होते हैं, ये बात दिल में बहुत अखरती है।

अखिल कुमार श्रीवास्तव साहब मृदु, सद्व्यवहारी, रिलीफ और प्यार से लोगों को समझाते। वकील बड़ी कुंठा और बहुत टेंशन में कोर्ट में एपियर होता है। उसको दो चीजों की बहुत चिन्ता रहती है, एक तो अपने क्लाईंट की और दूसरे अपने सम्मान की, उसको प्यार से आप सुन लें और उसको प्यार से आप इंसाफ दें इसमें आपका कुछ नहीं जाता। इसमें आपके गुणगान गाए जायेंगे, सारी दुनिया आपको चाहेगी और ये अच्छाईयाँ बहुत कम अब इस समय देखने को मिलती हैं।

अखिल कुमार जी श्रीवास्तव साहब की भोपाल पदस्थापना के दौरान मैंने भरपूर प्यार, व्यवहार और रिलीफ उनसे पाया। सिविल जज से हाईकोर्ट जज बनना ये बड़ी कठिन यात्रा है और डायरेक्ट हाईकोर्ट जज बनना उससे चौगुना कठिन है। नाम जाना शुरू नहीं होते और बार काउंसिल में चिट्ठियाँ आना शुरू हो जाती हैं। बड़ा मुसीबत का ये पद है, न्यायाधिपति का, बेहद कठिन पद। कहा जाये तो तलवार पर चलने जैसी स्थिति है। लेकिन आप लोग महान हैं, आप लोग बड़े इंसान हैं जो इतने बड़े पद पर रहकर भी शांति से अपना न्यायदान करते हैं। सभी को साथ लेकर चलते हैं, सबको प्यार देते हैं।

मैं, अखिल कुमार श्रीवास्तव जी से स्टेट बार काउंसिल की ओर से ये प्रार्थना कर सकता हूँ कि सर आप बार काउंसिल में आओ, वहाँ की व्यवस्थायें भी देखो। भोपाल का भी मैं अध्यक्ष हूं, भोपाल बार में भी आओ सर। यहाँ भी हमारे नये वकीलों को ज्ञान दान दो और मेरा आपसे इस विदाई की बेला में यही निवेदन है कि हमेशा आप जूनियर्स को प्रशिक्षित करते रहें। आप एक घंटे भी दिन में, आपको समय मिले तो आप बार के लिये सोचें, वकीलों के लिए सोचें और न्यायपालिका के लिये सोचें।

हम बहुत दुखी हैं कि ये 62 साल की उम्र बेकार उम्र है, अब 70 वर्ष की औसत ऐज हो गई है। 70 साल से पहले किसी न्यायाधीश को रिटायर नहीं होना चाहिये, 62 तो कुछ समझ ही नहीं आता। मैं तो आपको देख रहा हूं स्क्रीन पे, एकदम यंग रखे हैं आप, 62 होता क्या है, not less than 70 होना चाहिये जजेस का, 70 साल की उम्र तक उनसे काम लिया जाना चाहिये और अगर government रिटायर करती है तो भी शासन और हाईकोर्ट को चाहिये कि उनकी सेवायें लें 70 वर्ष की उम्र तक। मैं 72 साल की उम्र का हूं, खूब वकालत कर रहा हूं, आठ घंटे कोर्ट में रहता हूं। समझ नहीं आता कि अंग्रेजों के जमाने का बना हुआ ये कानून, 62 साल में रिटायरमेंट, कब हमारा हाईकोर्ट खत्म करेगा। मैं आपको इस विदाई के क्षण में आपके शतायु होने की कामना के साथ प्रभु से कामना करता हूँ कि वह आपको स्वस्थ, प्रसन्न रखे, आप प्यारे हैं आप प्यार देते रहें और हम लोगों से सम्मान पाते रहें।

So kind of you thank you very much.

Shri Manoj Sharma, President, High Court Advocates' Bar Association, Jabalpur, bids farewell :-

We have assembled here to bid a fond farewell to Hon'ble Shri Justice Akhil Kumar Srivastava on the day of his demitting the office of Judge, High Court of Madhya Pradesh.

My Lord Justice Akhil Kumar Srivastava was born on 05 August 1959 in District Gorakhpur, Uttar Pradesh and did his higher education from the prestigious Allahabad University, wherein he graduated in Law in the year 1983.

My Lord Justice Akhil Kumar Srivastava joined Madhya Pradesh Judicial Service on 19 December 1985 as Civil Judge Class II and after earning promotions was appointed to Higher Judicial Service on 31 May 1997. My Lord has held various offices in legal administration, such as Deputy Secretary, Law & Legislative Affairs Department, Bhopal; Additional Legal Remembrancer & Additional Secretary, Law & Legislative Affairs Department, Bhopal; Secretary, Law & Legislative Affairs Department, Bhopal; Law Officer, State Economic Offences Investigation Bureau, Bhopal; Principal Registrar (ILR & Examination), High Court of Madhya Pradesh, Jabalpur, besides other Judicial Offices.

My Lord Justice Akhil Kumar Srivastava was elevated as Judge of this Hon'ble Court on 19 June 2018 and has been performing the duties, functions and responsibilities of the high office ever since.

It has been a common experience of all the members of the Bar that it has always been a pleasure to appear in the Court of My Lord Justice Akhil Kumar Srivastava. The courtesy and politeness and easy manners with which My Lord dealt with the advocates and the litigants appearing before him, has been remarkable. Today, while demitting the high office of Judge of this Hon'ble Court, My Lord can positively look back and be satisfied of a job well done.

I hope, My Lord will be able to make the best use of the additional time provided by retirement to pursue his hobbies and spend more time with his family.

We are fully hopeful, though My Lord is demitting office of Judge, High Court, but he shall be contributing to the legal community and society at large and be putting his rich experience and knowledge to good use for the benefit of the society.

On behalf of High Court Advocates' Bar Association and on my own behalf, I wish Godspeed to Hon'ble Shri Justice Akhil Kumar Srivastava in all his future endeavors.

I wish Mrs. Sarita Srivastava and Hon'ble Shri Justice Akhil Kumar Srivastava, abundance of happiness, peace and good health.

Thank you.

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

आज हम न्यायमूर्ति श्री अखिल कुमार श्रीवास्तव का स्वागत, अभिनंदन एवं भावभीनी विदाई हेतु एकत्रित हुए हैं।

न्यायमूर्ति श्री अखिल कुमार श्रीवास्तव की न्यायिक सेवा का आज अंतिम दिवस है, आने वाला समय परिवर्तन एवं विस्तृत क्षेत्र में स्वतंत्र रूप से उत्साह के साथ, नई ऊर्जा, नई ज्योति के साथ अनेक आयामों पर सेवा का अवसर मिलने वाला है।

श्री अखिल कुमार श्रीवास्तव की जीवन यात्रा सन् 1959 में भारतवर्ष के विस्तृत प्रदेश के धार्मिक जिला गोरखपुर के वंशगाँव से प्रारंभ हुई है। माता–पिता एवं परिवार से संस्कार प्राप्त कर मातृभूमि की पवित्र भूमि में बचपन के ईष्ट मित्रों के साथ मस्ती भरा जीवन, माता–पिता का वात्सल्य एवं शिक्षकों की सीख के साथ प्राथमिक से आगे बढ़ता हुआ जीवन चक्र धीरे से गृहस्थ आश्रम में प्रवेश कर गया। पारिवारिक जीवन को सुदृढ़ बनाने एवं सपनों को साकार करने के लिए न्यायिक सेवा का माध्यम चयन किया। जिसमें 1985 में व्यवहार न्यायाधीश के पद पर नियुक्ति पाकर सफलता अर्जित की। न्यायिक सेवा में प्रवेश के पश्चात् प्रगति का चक्र निरंतर आगे बढ़ता गया। अनेक पदों पर अपनी प्रतिभा की आभा प्रदेश के अनेक स्थानों पर बिखेरते हुए प्रगति का पहिया मध्यप्रदेश उच्च न्यायालय के न्यायाधिपति के गौरवमयी पद पर पदस्थ होकर 19 जून 2018 से न्यायाधिपति के पद का निर्वहन करते हुए विगत 3 वर्षों में अनेक मामलों में शांत एवं स्थिरता से निर्णय पारित कर प्रदेश के अनेक पक्षकारों को न्याय प्रदत्त किया।

जीवन का प्रत्येक पल परिवर्तनशील है, हम आशा करते हैं भावी जीवन खुशियों से भरा हो, आपकी योग्यता एवं दक्षता का लाभ न्यायिक क्षेत्र के अलावा समाजिक जीवन के अन्य क्षेत्रों को भी मिले, इसी कामना के साथ मैं अपनी ओर से, भारत सरकार की ओर से, केन्द्रीय विधि अधिकारियों की ओर से आपका हृदय से स्वागत करता हूं एवं आपके उज्जवल भविष्य की कामना करता हूँ।

धन्यवाद

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

My Lord Hon'ble Justice Srivastava was sworn in as a Judge of this High Court on 19 June 2018. He has a tenure of almost 36 years in the Judicial Service. Justice Srivastava has a very pleasing personality and has been liked by one and all. He treated the lawyers with utmost politeness and has also been very kind to the junior advocates. Justice Srivastava has an ability to run the Court proceedings with great dexterity and has passed several judgments which have settled propositions of law.

My Lord Hon'ble Justice A.K. Srivastava has disposed off several cases without compromising with the quality of judgments. Looking back, I feel that Hon'ble Justice Srivastava has lived up to the expectations of the legal fraternity. The lawyers would surely remember Hon'ble Justice A.K. Srivastava as a very hardworking and sincere Judge.

It is apt to say that retirement from active service is not a retirement forever. It is a beginning of a new chapter. I wish My Lord all success for his new assignments.

Hon'ble Sir, you will always be remembered for your accomplishments. Thanks for your years of hard work and dedication to the Institution. On behalf of the Senior Advocates' Council and on my own behalf, I wish Your Lordship a very happy and fulfilling retirement and at the same time wish you all the best for a new assignment.

Thank you.

Shri Veer Kumar Jain, Convenor, Ad hoc Committee, High Court Bar Association, Indore, bids farewell:-

Milords, detachment of long associate and giving him farewell is always a painful moment but it is obvious and is the rule of nature and practice. My Lord Justice Shri A.K. Srivastava has been a part of our Institution and judicial family since last more than 35 years, when he first joined Judicial Service in the year 1985. Rendering successful, competent and unblemished judicial service for long more than 35 years, itself is an achievement and is a matter of great satisfaction for any person like My Lord.

My Lord Justice Shri A.K. Srivastava was born in the month of August, the month itself by name is glorious and magnificent like the personality of My Lord. After completing his education, His Lordship joined Judicial Service as Civil Judge on 19 December 1985. My Lord Justice Shri A.K. Srivastava in the course of time promoted as Civil Judge Class-I, ACJM, CJM, Additional District Judge and District Judge. My Lord Justice Shri A.K. Srivastava was given Selection Grade and Super Time Scale. My Lord has successfully discharged his duties while posted as Deputy Secretary, Legal Remembrancer, Additional Secretary, Law and Legislative Department; Law Officer, Economic Offences Investigation Bureau and Principal Registrar (ILR & Examination). In view of his long tenure and judicial experience and competence, he was elevated as the Judge

of this Hon'ble Court on 19 June 2018. Having completed successful tenure of more than three years as a Judge of this Hon'ble High Court, today My Lord is retiring. On this occasion, I may mention that we shall miss a good Judge and a good human being.

I hope and wish that My Lord Justice Shri A.K. Srivastava shall now find more time for himself, his family and for the well being of the society. Even after his retirement he shall always remain a part of our judicial family.

I, on behalf of the High Court Bar Association, Indore and on my behalf wish Your Lordship good, healthy and active life.

Thank you.

Shri Dilip Awasthy, Secretary, High Court Bar Association, Gwalior, bids farewell:-

5 अगस्त 1959 को गोरखपुर जिले में जन्मे माननीय न्यायमूर्ति श्री ए.के. श्रीवास्तव इलाहबाद विश्वविद्यालय से विधि स्नातक की डिग्री 1983 में प्राप्त कर मध्यप्रदेश न्यायिक सेवा में वर्ष 1985 में आये। उसके उपरांत निरंतर न्याय पथ पर अग्रसर होते हुये निष्कलंक सेवाकाल और कर्तव्य और कार्य के प्रति समर्पण के प्रतिफल स्वरूप दिनांक 19 जून 2018 को मध्यप्रदेश उच्च न्यायालय के न्यायमूर्ति बने।

माननीय न्यायमूर्ति श्री ए.के. श्रीवास्तव का तीन वर्ष से अधिक का कार्यकाल भी कर्तव्य एवं न्यायपथ पर बेदाग पथिक के रूप में हम सभी ने देखा। बिना किसी राग द्वेष के, माननीय द्वारा न्यायदान में अपने कर्तव्य का निर्वहन कौशलपूर्वक किया गया। माननीय द्वारा अपनी संवैधानिक शपथ के दिन एक सैद्धांतिक शपथ अपने उदबोधन में लेते हुये कहा गया था कि –

"I am fully conscious and aware of the expectations and responsibilities approaching my way. I am sure that with my work ethics along with the guidance of The Hon'ble Chief Justice, senior Judges of the Court and valuable support of this experienced and accomplished Bar I will be able to discharge my duties and responsibilities.".

इस सैद्धांतिक शपथ का पूर्ण पालन करते हुये आपके द्वारा अपना कार्यकाल आज पूर्ण किया गया। ग्वालियर उच्च न्यायालय अभिभाषक संघ के अध्यक्ष और संपूर्ण अधिवक्ता परिवार की ओर से मैं आपके सुखद, स्वस्थ और आनंदमयी दीर्घ जीवन की कामना करता हूँ और आशा करता हूँ कि आपका मार्गदर्शन और सहयोग भविष्य में भी हमें मिलता रहेगा। आज आप न्यायिक दायित्व से विरत हुये हैं, पारिवारिक दायित्व के तहत आपका साथ हमें हमेशा मिलता रहेगा, ऐसी कामना के साथ मैं अपनी वाणी को इन दो लाईनों के साथ विराम देता हूँ कि –

उजाले अपनी यादों के हमारे साथ रहने दो
न जाने किस गली में जिंदगी की शाम हो जाए।

धन्यवाद।

Farewell Speech delivered by Hon'ble Mr. Justice Akhil Kumar Srivastava :-

Good afternoon to all present on this occasion.

I am overwhelmed by the kind and generous words of appreciation, all the esteemed speakers have spoken about me. I do not know how much I do deserve.

I will be demitting my office, leaving behind some very fond memories and this noble profession. At this juncture, I have mixed feelings, I am happy, because I owe to this High Court for selecting me as a Civil Judge 36 years ago and also for elevating me as a Judge of this prestigious High Court.

I also feel sad because I am leaving behind something which I have been doing from the last 36 years.

Nevertheless, I am truly honoured to serve this Institution which has had such a glorious history of Judges achieving great heights.

I was posted in different places in the State in different capacities; from Civil Judge Class-II to Principal District Judge, as Secretary in Law Department, Law Advisor at EOW and as Principal Registrar and finally as a Judge of this High Court.

Through these years, having been posted in different places and capacities, I have been fortunate to have had associated with a lot of persons who impacted my life and profession in many positive ways.

I would like to take this opportunity to thank and acknowledge the support and encouragement that I have received from all my seniors, colleagues, staff and near and dear ones. Unfortunately, due to paucity of time I have to be concise.

I am grateful to Hon'ble Shri Justice Hemant Gupta, the then Chief Justice of this High Court and present Judge of the Supreme Court, who administered the oath of this pious office to me and I feel pride and privilege to have shared Bench with His Lordship.

I feel pleasure to have had sat in the Division Benches with Senior Judges of this Court who have always been kind to me and who have left unmatched

impression on me regarding knowledge and working. I learnt a lot from them and I am thankful for their guidance.

I was fortunate to have a fine set of persons as my colleagues on the Bench. I cannot overlook my brother and sister Judges for their kind co-operation and support throughout.

I have always received full support and affection from Members of Bar at the places where I had been. I am thankful for their cooperation.

I will always be indebted to my parents late Mr. B.L. Srivastava and Late Mrs. Kiran Srivastava and their blessings. I am grateful to my maternal uncle late Mr. Bhagwan Dayal and maternal grandfather and grandmother without whose blessings it would have not been possible for me to have achieved success in my career.

My wife Sarita has been my support system since the beginning of my career and I am very grateful that she has supported me through all stages of my life. My daughters Smriti and Stuti have been constant source of inspiration. I have constantly received support from my brothers:- Anil Kumar, Arun Kumar and Anurag Dayal and all family members.

I am thankful to the Registrar General and Officers of the Registry.

I am thankful to all the staff members; Registrar General and officers of the Registry. I have had hands in the District Judiciary and in the Registry. I am also thankful to Dr. Sonkar by whom I was given full medical assistance and advice whenever I needed.

My address would be incomplete without thanking the people who have worked hard tirelessly to ensure that I perform my duties and functions smoothly. I am thankful to all the staff members; I have had hands in the District Judiciary and in the Registry while I was posted there.

I am fortunate and thankful to have had such a supporting staff during my tenure as a Judge of this Court, APO attached to me and all officers and staff posted in protocol section, Secretarial staff, Reader, technical support staff, driver, P.S.Os. and the working staff in my Court and at my residence.

In my brief stint during the tenure of Hon'ble Chief Justice Shri Mohammad Rafiq, I have been fortunate enough to experience his cordial brotherhood-ship. He is thorough gentle, simple and humble person and his practice of taking everyone along together is par excellence and worth imbibing. I thank him for his support, guidance and motivation.

In the end, I express my thanks to all the persons present on this occasion. I wish everyone achieves great heights and success in their lives and future endeavors.

Thank you very much.

May justice always prevail.

JAI HIND.

I.L.R. [2021] M.P. 1463 (SC)
SUPREME COURT OF INDIA

Before Mr. Justice Dr. Dhananjaya Y. Chandrachud &
Mr. Justice Hrishikesh Roy

CRA Nos. 590-591/2021 decided on 22 July, 2021

SOMESH CHAURASIA …Appellant

Vs.

STATE OF M.P. & anr. …Respondents

***A. Criminal Procedure Code, 1973 (2 of 1974), Section 389(1) – Revocation of Suspension of Sentence & Grant of Bail* – Held – Respondent No. 2 was implicated for offence u/S 302 during the period when his sentence was suspended and despite order u/S 319 Cr.P.C. Respondent No. 2 evaded arrest in contravention of the warrant of arrest issued by ASJ – Police have been complicit in shielding Respondent No. 2 – Criminal antecedent of Respondent No. 2 and prior conviction for murder u/S 302 IPC was on record – High Court erred in dismissing the application for revocation of suspension of sentence and grant of bail – Respondent No. 2, whose spouse was an MLA, was provided security by State – A clear case of cancellation of bail was established – Bail granted to Respondent No. 2 is cancelled – Applications filed by State and appellant is allowed – Respondent No. 2 directed to be shifted to another jail in M.P. to ensure fair course of criminal proceedings – Appeal disposed. (Paras 29, 35 & 37 to 39)**

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 389(1) – दण्डादेश के निलंबन का प्रतिसंहरण व जमानत प्रदान की जाना – अभिनिर्धारित – प्रत्यर्थी क्र. 2 को उस अवधि के दौरान जब उसका दण्डादेश निलंबित था, धारा 302 के अंतर्गत अपराध के लिए आलिप्त किया गया था एवं दं.प्र.सं. की धारा 319 के अंतर्गत आदेश के बावजूद प्रत्यर्थी क्र. 2 अतिरिक्त सत्र न्यायाधीश द्वारा जारी गिरफ्तारी वारंट के उल्लंघन में गिरफ्तारी से बचा रहा – प्रत्यर्थी क्र. 2 को बचाने में पुलिस सह–अपराधी है – प्रत्यर्थी क्र. 2 का आपराधिक पूर्ववृत्त एवं भा.दं.सं. की धारा 302 के अंतर्गत हत्या के लिए दोषसिद्धि अभिलेख पर थी – उच्च न्यायालय ने दण्डादेश के निलंबन के प्रतिसंहरण के लिए आवेदन को खारिज करने एवं जमानत प्रदान करने में त्रुटि की है – प्रत्यर्थी क्र. 2, जिसकी पत्नी एक एम.एल.ए. थी, को राज्य द्वारा सुरक्षा प्रदान की गई थी – जमानत रद्द करने का एक स्पष्ट प्रकरण स्थापित किया गया था – प्रत्यर्थी क्र. 2 को प्रदान की गई जमानत रद्द – राज्य एवं अपीलार्थी द्वारा प्रस्तुत आवेदन मंजूर किये गये – दाण्डिक कार्यवाहियों की निष्पक्ष कार्यप्रणाली को सुनिश्चित करने के लिए प्रत्यर्थी क्र. 2 को म.प्र. की दूसरी जेल में भेजे जाने हेतु निदेशित किया गया – अपील निराकृत।

***B. Criminal Procedure Code, 1973 (2 of 1974), Section 389(1) – Suspension of Sentence – Grounds* – Apex Court concluded that in cases**

involving conviction u/S 302 IPC, the sentence should be suspended only in exceptional circumstances – Mere fact that accused who were on bail during period of trial, did not misuse their liberty is not a sufficient reason for grant of suspension of sentence post conviction – If accused misuse their liberty by committing other offences during suspension on sentence u/S 389(1) Cr.P.C. they are not entitled to be released on bail. (Paras 31, 32 & 36)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 389(1) – दण्डादेश का निलंबन – आधार – सर्वोच्च न्यायालय ने निष्कर्षित किया है कि ऐसे प्रकरणों में जिनमें भा.दं.सं. की धारा 302 के अंतर्गत दोषसिद्धि अंतर्वलित है, दण्डादेश केवल आपवादिक परिस्थितियों में ही निलंबित किया जाना चाहिए – मात्र यह तथ्य कि अभियुक्त जो कि विचारण की अवधि के दौरान जमानत पर थे, ने अपनी स्वतंत्रता का दुरूपयोग नहीं किया, दोषसिद्धि के बाद दण्डादेश का निलंबन प्रदान करने के लिए एक पर्याप्त कारण नहीं है – यदि अभियुक्त द.प्र.सं. की धारा 389(1) के अंतर्गत दण्डादेश के निलंबन के दौरान अन्य अपराध कारित कर उनकी स्वतंत्रता का दुरूपयोग करते हैं, वे जमानत पर छोड़े जाने के हकदार नहीं हैं।

***C. Constitution – Article 50 – Judicial Independence – District Judiciary* – Held – Constitution specifically envisages the independence of district judiciary – Article 50 provides that State must take steps to separate judiciary from executive in public services of the State – Judicial independence of district judiciary is cardinal to the integrity of entire system – District judiciary operates under administrative supervision of High Court which must secure and enhance its independence from external influence and control – Judiciary should be immune from political pressures and consideration. (Paras 40 to 45)**

ग. संविधान – अनुच्छेद 50 – न्यायिक स्वतंत्रता – जिला न्यायपालिका – अभिनिर्धारित – संविधान जिला न्यायपालिका की स्वतंत्रता विनिर्दिष्ट रूप से परिकल्पित करता है – अनुच्छेद 50 यह उपबंधित करता है कि राज्य की लोक सेवाओं में न्यायपालिका को कार्यपालिका से पृथक करने के लिए राज्य को कदम उठाने चाहिए – जिला न्यायपालिका की न्यायिक स्वतंत्रता संपूर्ण तंत्र की अखंडता के लिए मुख्य है – जिला न्यायपालिका उच्च न्यायालय के प्रशासनिक पर्यवेक्षण के अधीन कार्य करती है जिसे बाहरी प्रभाव और नियंत्रण से उसकी स्वतंत्रता को सुरक्षित करना एवं बढ़ाना चाहिए – न्यायपालिका राजनीतिक दबावों और विचारों से मुक्त होना चाहिए।

***D. Judicial Independence* – Held – ASJ expressed his apprehensions that accused persons are highly influential political persons and he has been targeted with false charges and that in future any unpleasant incident could happen with him – SDOP also made complaint against ASJ before Registrar General – The complaint made by SDOP and order passed by ASJ be placed before the Chief Justice, who is requested to cause an enquiry into the matter. (Paras 9, 21 & 46)**

घ. न्यायिक स्वतंत्रता – अभिनिर्धारित – अतिरिक्त सत्र न्यायाधीश ने उसकी आशंकाएं अभिव्यक्त की हैं कि अभियुक्तगण अत्याधिक प्रभावशाली राजनीतिक व्यक्ति हैं एवं उसे मिथ्या आरोपों से निशाना बनाया गया है एवं भविष्य में उसके साथ कोई अप्रिय घटना घटित हो सकती है – एसडीओपी ने भी रजिस्ट्रार जनरल के समक्ष अतिरिक्त सत्र न्यायाधीश के विरूद्ध शिकायत की – एसडीओपी द्वारा की गई शिकायत एवं अतिरिक्त सत्र न्यायाधीश द्वारा पारित आदेश को मुख्य न्यायाधिपति महोदय के समक्ष रखा गया, जिनसे मामले की जांच कराने का अनुरोध किया गया।

Cases referred:

(2014) 9 SCC 177, (2002) 9 SCC 366, (2009) 3 SCC 492, (2002) 9 SCC 364, (2014) 10 SCC 754, 1996 Supp SCR 477, (2003) 10 SCC 195, 2021 SCC OnLine SC 463.

J U D G M E N T

The Judgment of the Court was delivered by :
DR DHANANJAYA Y CHANDRACHUD, J. :- This appeal arises from an order by a Division Bench of the High Court of Madhya Pradesh dated 23 July 2019. The High Court declined to entertain two application - IA 6837 of 2019 filed by the State of Madhya Pradesh and IA 5781 of 2019 filed by the appellant - seeking a revocation of the suspension of sentence and bail granted to the second respondent.

2. The second respondent has been convicted of an offence punishable under Section 302 of the Indian Penal Code ("**IPC**") and sentenced to suffer imprisonment for life. By an order dated 3 February 2016, the High Court directed that the sentence shall, during the pendency of the appeal, remain suspended under the provisions of Section 389(1) of the Code of Criminal Procedure 1973 ("**CrPC"**).

3. Two applications were moved before the Division Bench of the High Court (IA 6837 of 2019 and IA 5781 of 2019) for cancellation of bail and revocation of the order dated 3 February 2016 suspending the sentence of the second respondent. These applications for bail were filed by the appellant and by the State of Madhya Pradesh. The appellant sought cancellation of bail on the ground that after the sentence was suspended, FIR No 143 of 2019 was registered against the second respondent at Police Station Hata, District, Damoh, in which he is implicated in the murder of the appellant's father. The State of Madhya Pradesh sought cancellation of bail on the ground that:

(i) The second respondent has two other convictions against him on a charge of murder;

(ii) The second respondent has been convicted of another crime for offences punishable under Section 399 and 402 of the IPC and Section 25 (1) (1B)(a) of the Arms Act; and

(iii) An FIR has been registered at the behest of the appellant alleging that the second respondent is involved in the murder of his father during the period when he was on bail.

4. The application for cancellation of bail which was moved by the State of Madhya Pradesh sets out the criminal antecedents of the second respondent. Paragraph 8 reads as follows:

> "8. At this stage, it would be relevant to detail the three convictions suffered by the appellant. The same are detailed hereunder:
>
> (a) It is submitted that in the first crime, the appellant committed the murder of the deceased Rajendra Pathak on 13.10.1998 who was going on his scooter and was confronted by the appellant and co-accused Chandu Thakur who were coming on a motorcycle from the opposite direction. At the relevant point of time the appellant Govind Singh fired through Katta on the deceased Rajendra Pathak which hit the deceased on his chest. After receiving the said shot the deceased ran to save his life and on noticing the same co-accused Chandu Thakur fired a shot which hit the deceased on his back. The deceased Rajendra Pathak succumbed to the said injuries. Based on the said incident, session trial was instituted and appellant was convicted for the murder of Rajendra Pathak and sentenced to life imprisonment by judgment dated 30.09.2008. It is thereafter Cr.A No.2353/2008 was filed by the appellant before this Hon'ble Court. It is also relevant to mention herein that the similarity of the present case with a case relating to deceased Rajendra Pathak is that the deceased in the present case Pappu @Ramakant Pathak and Kailash Pathak were all belonging to the same family.
>
> (b) It is submitted that in the second crime, the appellant along with others committed the murder of Munna Vishwakarma. Based on the said incident, Sessions Trial No. 113/2005 was instituted and the appellant was convicted for the murder of Munna vide Judgment dated 27.10.2015. It is thereafter, Criminal Appeal No. 3108/2015 was filed by the appellant before this Hon'ble Court.
>
> (c) To put it differently, it can thus be seen that the appellant committed two crimes punishable under Section 302 IPC on the same date i.e. 11.5.2004 viz. the present case in which Ramakant Pathak and Kailash Pathak were killed and Munna Vishwakarma in respect to which Criminal Appeal No. 3108/2015 is pending.

> (d) It would also be relevant to mention herein that the appellant committed another crime for offences punishable under Section 399 and 402 of the Indian Penal Code and Section 25 (1) (1B)(a) of the Arms Act. In the said case too, the appellant was convicted and thereafter filed a Criminal Appeal No. 1984/ 2011, in which case also his sentence was suspended. It is thus clear that the appellant has been a serious threat to the society and that has been continuously committing criminal offences."

Paragraph 10 contains a reference to the FIR lodged on 15 March 2019 at the behest of the appellant alleging that the second respondent has committed the murder of his father:

> "10 It is also relevant to mention herein that after grant of bail in the said criminal appeals, the appellant has again committed murder of one Devendra Chaurasiva on 15.03.2019 and an F.I.R. to that respect has been registered against the appellant on 15.03.2019 itself for offences punishable U/s 294. 323, 324, 307, 147, 148, 149, 506 of I.P.C. Pertinently, since the deceased died after registration of F.I.R., offence U/s 302 has been added in the present crime. Copy of the F.I.R dated 15.03.2019 bearing crime No. 143/2019 is filed herewith as ANNEXURE-R/1."

5. By its order dated 23 July 2019, the High Court declined to entertain the application for revocation of the suspension of sentence/ grant of bail. The grounds which weighed with the High Court appear in the following extract:

> "...we are of the considered opinion that I.A.No.6837/2019 & I.A.No.5781/2019 can be disposed of as per the statement made at bar by Shri Ajay Gupta, Additional Advocate General for the State that the State Government is further investigating the issue on an application filed on behalf of appellant Govind Singh inter alia stating that he has been falsely implicated. We, therefore, direct that the investigation may be completed as far as possible within three months but not later than 90 days. On completion of the investigation, if the appellant is found involved in commission of the crime, he be immediately taken into custody and the procedure as prescribed be followed. It is also observed that neither appellant Govind Singh shall threaten nor influence the witnesses and the complainant side."

6. After notice was issued in these proceedings on 18 November 2020, counsel for the State of Madhya Pradesh was granted an adjournment on 11 January 2021 to file a counter affidavit. In the meantime, on 12 February 2021, counsel for the appellant apprised this Court of the fact that on 8 January 2021, the Additional Sessions Judge ("**ASJ**") at Aurangabad, issued summons to the second respondent under Section 319 of the CrPC in the course of the sessions trial arising

out of the charge sheet filed in FIR 143 of 2019. The Court was apprised that though a warrant of arrest has been issued against the second respondent, he was resisting arrest. The order of the ASJ summoning the second respondent to stand trial has been placed on the record.

7. Subsequently, when the proceedings were listed before this Court on 12 March 2021, the Court took note of an order dated 8 January 2021 passed by the ASJ, Hata District, Damoh in Sessions Trial No 30 of 2019 (Addl. No. 143 of 2019).

8. The order dated 8 January 2021 passed by the ASJ specifically refers to the criminal record of the second respondent, and is extracted below:

> "Details of criminal records of accused Govind Singh are accordingly:-

PS-Damoh Dehat

S.No.	Crime Case No.	Under Sections
1.	150/93	147, 148, 149, 302, 34 of IPC.
2.	173/94	393, 365, 34 of IPC.
3.	169/04	395, 396, 397, of IPC.
4.	170/04	147, 148, 149, 302, 324 of IPC, and under section 3/5 and under section 25/27 Arms Act.
5.	414/06	399, 402 of IPC, and under section 25/27 Arms Act.
6.	68/07	364, 34 of IPC.
7.	390/07	384 of IPC.
8.	S.No. 01/10	Under section 3(2) of the MP Protection Act, 1980.
9.	S.No. 02/19	Under section 3(2) of the MP Protection Act, 1980.
10.	S.No. 08/19	Under section 110 Jaa.fau.
11.	S.No. 160/19	Under section 107, 116 (3)
		Jaa.fau.
12.	203/95	396, 386, 365 of I PC.
13.	241/96	384, 34 of IPC.
14.	44/99	384 of IPC.
15.	168/2000	341,294, 506B, 34 of IPC.

16.	80/04	307, 34 of IPC.
17.	171/04	394 of IPC.
18.	S.No. 01/13	Under section 6 of the MP Protection Act, 1980.
19.	S.No. 01/19	Under section 3(2) of the MP Protection Act, 1980.
20.	S.No. 07/19	Under section 110 jaa faa.
21.	S.No. 159/19	Under section 107, 116(3) jaa faa.
PS-Patharia, Damoh		
22.	56/92	294, 323, 34 of IPC, under section 3(1 - 10) SC ST Act.
23.	93/92	436, 34 of IPC, under section 3(1-10) SC ST Act.
24.	31/10	147, 341, 307, 506 of IPC.
25.	157/93	295, 397 of IPC.
26.	169/90	294, 506, 427 of IPC.
PS-Kotwali Damoh		
27.	578/98	307, 302, 34, 120 of IPC and Arms Act.
28.	214/16	147, 452, 294, 506, 34 of IPC."

The ASJ provided reasons in his order for taking steps in pursuance of the provisions of Section 319 of CrPC to arraign the second respondent as an accused.

9. Thereafter, in his order dated 8 February 2021, the ASJ noted that though he was taking action in compliance with the directions of this Court for ensuring service on the second respondent, the process of the court was being obstructed. The ASJ expressed a serious apprehension that the accused and the Superintendent of Police ("**SP**"), Damoh had colluded with the subordinates of the latter "to frame serious charges" against the judge. The accused, the trial judge noted, is a "highly influential political person" and though false allegations had been made against the judge for transfer of the case, the application for transfer had been dismissed by the District Judge. The relevant extract from the order dated 8 February 2021 reads as follows:

> "The action in this case is being taken in compliance with the directions given by Hon. Supreme Court expeditiously. But accused persons are highly influential political persons and have raised false allegations against me and made application

> for transfer of case before Hon. District Judge which was found false and Hon. District Judge had dismissed the application with cost and being contemptuous. But like accused persons, now Police Superintendent Damoh had connived with his subordinates and made false and fabricated pressure on me. From the above such acts it is clear and I am confident that accused persons with Police Superintendent Damoh had colluded with his subordinates to frame serious charges against me in future or any unpleasant incident can be done with me."

10. Adverting to these developments, this Court took serious note of the anguish expressed by the ASJ on 8 February 2021 and noted in its order dated 12 March 2021 that:

> "8. The order of the learned Additional Sessions Judge dated 8 February 2021 indicates that he is being pressurized by the Superintendent of Police, Damoh, who, together with his subordinates, is attempting to pressurize the judicial officer. The judicial officer has expressed the apprehension that the accused who are "highly influential political persons" have raised false allegations against him and applied for transfer of the pending case which was dismissed by the District Judge after it was found to be false. The learned Additional Sessions Judge has apprehended that he may be subjected to an "unpleasant incident" in the future."

11. The order of this Court dated 12 March 2021 took note of the fact that:

(i) Despite the registration of an FIR on 15 March 2019 where the appellant had alleged that the second respondent was complicit in the murder of his father no steps were being taken by the investigating authorities to arrest him;

(ii) In this backdrop, it was the ASJ who was constrained to issue summons to the second respondent under Section 319 of the CrPC to face trial;

(iii) Despite the issuance of warrants against him, the second respondent continued to abscond; and

(iv) It had been stated during the course of the proceedings that the spouse of the second respondent is an MLA and "all possible steps are, therefore, being adopted to shield the second respondent from the coercive arm of the law".

Taking note of the apprehension expressed by the ASJ that he was being targeted, this Court observed:

> "10. We take serious note of the manner in which the Additional Sessions Judge, Hata who is in charge of the criminal case has been harassed by the law enforcement machinery in Damoh. We have no reason to disbelieve a judicial officer who has made an impassioned plea that he was being pressurized as a result of his orders under Section 319 of the CrPC. The State which had moved the High Court for cancellation of the bail which was granted to the second respondent as an incident of the suspension of sentence on 3 February 2016, has failed to apprehend the second respondent who continues to evade arrest. A warrant of arrest was issued against the second respondent. Mr Saurabh Mishra, Additional Advocate General appearing for the State, states that a proclamation has been issued against the second respondent under Section 82 of the CrPC on 4 March 2021 with an award of Rs 10,000. Yet the second respondent continues to evade arrest. The rule of law must be preserved."

12. In this backdrop, the Director General of Police ("**DGP**") of Madhya Pradesh was directed "to immediately ensure the arrest of the second respondent and report compliance by filing a personal affidavit in this Court". The DGP was also directed to enquire into the allegations levelled by the second respondent against the SP by the ASJ in his order dated 8 February 2021.

13. Notice was issued to the SP, Damoh.

14. In pursuance of the order dated 12 March 2021, the DGP filed an affidavit stating that despite efforts to secure the presence of the second respondent, the police were unable to apprehend and arrest him. The affidavit provided the following details:

(i) After the ASJ by his order dated 8 January 2021, arraigned the second respondent as an accused, an arrest warrant was issued against him. Steps were taken by the Damoh Police to arrest the second respondent from 8 January 2021. However, the second respondent was absconding and evading arrest. As a result, an award of Rs. 10,000 was announced for giving information on the whereabouts of the accused;

(ii) The DGP directed the formation of a "special team" under the Additional Superintendent of Police ("**ASP**"), Damoh, to arrest the second respondent to comply with this Court's order dated 12 March 2021. The Special Task Force, Bhopal ("**STF**") was also tasked to apprehend the accused. The affidavit details the steps taken by Damoh police and the STF;

(iii) Provision of security was made for the ASJ Hata; and

(iv) An enquiry into the allegations levelled by the ASJ against the SP in his order dated 8 February 2021 was entrusted to the Additional Director General of Police ("**ADGP**"), STF, Police headquarters, Bhopal.

15. Finding the explanation provided by the DGP for the failure of the police to arrest the second respondent to be unacceptable, this Court in its order dated 26 March 2021 observed:

> "2 We find the affidavit of the Director General of Police to be completely unacceptable. It defies reason as to how an accused who is the spouse of a sitting Member of the Legislative Assembly has not been arrested despite being arraigned in pursuance of the provisions of Section 319 of the Code of Criminal Procedure 1973 to face trial for an offence under Section 302 of the Indian Penal Code 1860. An effort is being made to shield the accused from the due process of criminal law. The Court was informed that earlier, the accused was even given security by the police though it is stated by Counsel for the State that it is now withdrawn."

16. Accordingly, the DGP was directed to ensure that the previous order of this Court dated 12 March 2021 is complied with, failing which this Court would be constrained to take coercive steps in accordance with law. At that stage, this Court was also apprised by counsel for the appellant that though the second respondent had been summoned under Section 319 of the CrPC to face trial for an offence punishable under Section 302, he continued to abscond. On the other hand, security had been provided to him by the State of Madhya Pradesh. Accordingly, a further affidavit was directed to be filed by the DGP stating:

(i) The date on which and the cause on the basis of which security was granted to the accused;

(ii) Whether the security continues to be provided as on date; and

(iii) If the answer to (ii) above is in the negative, the date on which the security was withdrawn.

17 A further affidavit dated 3 April 2021 was filed by the DGP in compliance with this Court's order dated 26 March 2021 explaining that:

(i) Pursuant to the steps taken by the Damoh Police and the STF, the second respondent was arrested from a bus stand in Bhind District on 28 March 2021. The second respondent was presently in the judicial custody at SubJail, Hata District, Damoh; and

(ii) The SP had recommended grant of security to the second respondent in view of his enmity with several persons and his political background. On the basis of the recommendation, the second respondent was provided security of one officer on 11 July 2020. This was ratified by State Security Committee on 25 September 2020. The security was withdrawn on 9 January 2021.

18. On 6 April 2021, another affidavit was filed by the DGP detailing the reasons for grant of security to the second respondent. The affidavit stated that:

(i) Smt. Rambai Govind Singh, who is an MLA, made an application dated 3 July 2020 for providing security to her spouse (the second respondent) "on the basis of his political background and enmity with several persons";

(ii) A security officer was detailed to the second respondent on 11 July 2020;

(iii) A threat assessment report was sought from the SP who recommended grant of security on 24 September 2020. The recommendation of the SP was ratified by the State Security Committee on 25 September 2020;

(iv) Thereafter, a final order for grant of security was passed on 7 October 2020; and

(v) The ASP by an order dated 10 January 2021 directed the removal of the security provided to the second respondent on the issuance of a warrant of arrest by the ASJ on 8 January 2021.

19. Mr Varun Thakur, learned counsel appearing on behalf of the appellant has, during the course of his submissions, outlined the basis on which cancellation of bail granted pursuant to the order suspending sentence is sought. Learned counsel urged that the second respondent has been implicated in a serious offence punishable under section 302 of the Penal Code after he was enlarged on bail. It has been urged that the sequence of events indicates that despite the order under Section 319 of the CrPC, the second respondent evaded the due course of law despite a warrant against him and a proclamation. It has been submitted that the investigating authorities were complicit in this and continued to protect the second respondent whose spouse is an MLA. Despite the order of this court, the DGP reported initially that the second respondent could not be apprehended. The state had provided security to him despite the conviction of an offence under Section 302. The order of the ASJ is a clear indicator of the police attempting to pressurize the trial judge. Hence a cancellation of bail is warranted.

20. These submissions have been contested on behalf of the State and its authorities by Mr Saurabh Mishra, learned Additional Advocate General. Mr Mishra submitted that the following sequence of events may be borne in mind:

(i) 15 March 2019 - an FIR was registered against certain accused including the second respondent;

(ii) 13 June 2019 - a chargesheet was submitted to the competent court. Though, the second respondent was named as an accused in the FIR, the charge sheet did not name the second respondent as further investigation was pending against him under Section 173(8) of the CrPC;

(iii) 23 July 2019 - the impugned order was passed by the High Court;

(iv) 7 September 2019-a closure report was submitted before the competent court absolving the second respondent;

(v) 24 March 2020 - a new government was formed in the State of MP following a floor test in the legislative assembly on 18 March 2020; and

(vi) 8 January 2021 - an application was filed by the appellant under Section 319 of the CrPC for the issuance of summons to the second respondent to face trial. The State did not oppose the application.

It was urged on behalf of the State that there is no substance in the charge of collusion since as a matter of fact, the State had not opposed the application under Section 319 of the CrPC.

21. The second limb of the submission is that pursuant to the directions issued by this Court on 12 March 2021, an enquiry was conducted by the ADGP and STF, Bhopal. The ADGP in his report dated 22 March 2021 to the DGP stated that no substance was found in the observations of the ASJ in his order dated 8 February 2021. The conclusions in the enquiry indicate:

> "24. Upon analyzing the whole incident the following conclusions are drawn :
>
> (a) Ms. Bhawna Dangi, SDOP, had joined her new posting, 6 days prior to appearance before Hon'ble Court and it was her first field posting.
>
> (b) Ms. Bhawna Dangi, SDOP informed the incident with herself in the court to her senior officers.
>
> (c) Superintendent of Police, Damoh, immediately apprised of the incident happened with Ms. Bhawna Dangi to the senior

most Judge of the District i.e. Hon'ble District and Session Judge, Damoh on 06.02.21.

(d) For coordination at the district level between judiciary and executive, the District and Additional Session Judge and Superintendent of Police remain in touch. Under the same protocol, the Superintendent of Police informed about the incident to the District and Session Judge.

(e) During the enquiry, the Hon'ble Additional Session Judge, Hata and both the JMFC, Hata were contacted but they showed their inability to give any statement unless permitted by the Hon'ble High Court of Jabalpur. In this context on 17.03.21 an application was filed before the Hon'ble Registrar General, Madhya Pradesh High Court, Jabalpur.

(f) The application dated 12.02.21 filed by Ms. Bhawna Dangi is pending in the office of Hon'ble Registrar General, Madhya Pradesh High Court, Jabalpur and only after its inquiry any comment can be given on the application filed by SOOP, Ms. Dangi.

25 It is proved from the facts came in inquiry that the Superintendent of Police has endorsed the grievance of his subordinate to his senior officers which is a part of his duty. No evidence of Superintendent of Police intention in connivance with accuseds to level false charges is found out."

Based on the above report, it has been submitted that the SDOP had joined at her new place of posting on 31 January 2021. On 6 February 2021, she appeared before the ASJ and explained the efforts which were made to arrest the second respondent. It is alleged that the ASJ was not satisfied with the explanation and had made her stand in the court for over four hours and had insulted her. The SDOP had expressed her desire to the ASP to resign from service. This incident was narrated by the ASP to the JMFC, Hata who has attempted to sort out the matter. Subsequently, the SDOP had submitted a complaint to the High Court and had met the Registrar General on 12 February 2021. The order dated 8 February 2021 was made known for the first time when it was published in the newspapers on 20 February 2021.

22 In this context, it has been submitted that the enquiry against the SP has been conducted in pursuance of the orders of this Court and no substance has been found in the allegations leveled by the judicial officer.

23. The report of the ADGP states that though the ASP had denied communicating to the JMFC that, "it is an order of the ... Superintendent of Police that the Magistrate... of Hata should be informed that SDOP Dangi is disturbed, she is resigning, Sonkar Sahab to show some leniency", he had communicated with the JMFC "to maintain better coordination between the Hon'ble Court and the Executive" on his own accord. The relevant extract of the report is as follows:

> "21. In this entire incident, the Additional Superintendent of Police, Damoh communicated with the Hon'ble JMFC's, Hata to maintain the better coordination between the Hon'ble Court and the Executive. During his statement, Addl. Superintendent of Police admitted some comments mentioned in the order sheet and denied some other comments. In his statement, the Additional Superintendent of Police, absolutely denied some references came in between the Hon'ble JMFC, Hata about the Superintendent of Police, Damoh. He further states that Superintendent of Police, Damoh didn't instruct him to communicate with JMFC, Hata. He had discussed the matter with both the Hon'ble JMFCs' on his own to maintain better coordination between the parties."

24. Mr Sidharth Luthra, learned senior counsel appearing on behalf of the SP submitted that on 6 February 2021, the SDOP had made a complaint about being humiliated by the judicial officer in court and the SP had informed the District and Sessions Judge about the incident on the same date. On 7 February 2021, the Registrar General of the High Court was informed on phone. On 8 February 2021, the ASJ passed an order expressing his apprehension that he was being targeted in the discharge of his duties. However, on the same day, the ASJ addressed a communication to the SP making no such allegations. On 12 February 2021, the Registrar General of the High Court was furnished with the application of the SDOP and met her. The order dated 8 February 2021, it has been submitted, was published in the newspapers on 20 February 2021. In this backdrop, Mr Luthra urged that there is no substance in the allegation which have been leveled against the SP.

25. Mr Shakeel Ahmed, learned Counsel appearing on behalf of the second respondent has submitted that no adverse order may be passed against the second respondent. At this stage, it may be necessary to note that an application for bail was moved before this Court on behalf of the second respondent in IA No 50800 of 2021 in SLP (Crl) Diary No 21783 of 2020. On 1 June 2021, the following order was passed by this Court:

> "1 After arguing the application for bail, the learned counsel appearing on behalf of the applicant (the second respondent in

> the Special Leave Petitions) seeks the permission of the Court to withdraw the application for bail.
>
> 2 The application for bail is accordingly dismissed as withdrawn."

The IA was accordingly dismissed as withdrawn.

26. Before we deal with the rival contentions, it is necessary at the outset to advert to the correctness of the order passed by the High Court on 23 July 2019. FIR No 143 of 2019 was registered on 15 March 2019 for offences under Sections 294, 323, 324, 307, 147, 148, 149 and 506 of the IPC against several accused including the second respondent. It was alleged in the FIR that the accused had assaulted the victim, Devendra Chaurasia, by rods and sticks. The injured victim having succumbed to his injuries, an offence under Section 302 was added. Among other accused, the FIR named the second respondent. On 13 June 2019, a charge sheet was filed before the competent court, which did not name the second respondent. Investigation under Section 173(8) of the CrPC was kept pending against the second respondent.

27. In another case, the second respondent was convicted under Section 302 by the Sessions Court on 27 October 2015 against which he had filed Criminal Appeal No 3107 of 2015 before the High Court. During the pendency of the appeal, the sentence was suspended on 3 February 2016. In view of the allegation that the second respondent had committed offence of murder when his sentence was suspended, the State government filed an application before the High Court for the revocation of the order suspending the sentence/ granting bail to the second respondent. Another application was filed by the appellant. The High Court disposed of the two applications by noting the statements of the Additional Advocate General that the State government is further investigating the application filed by the second respondent stating that he has been falsely implicated. The High Court directed that the investigation may be completed as far as possible within three months but not later, and if upon investigation the second respondent is involved in the commission of the crime, he should be taken into custody immediately and "the procedure as prescribed be followed".

28. On 7 September 2019, the police filed a closure report in relation to the second respondent before the competent court in FIR No 143 of 2019 dated 15 March 2019. An application under Section 319 of the CrPC was filed before the ASJ for summoning the second respondent. By an order dated 8 January 2021, the application was allowed and the second respondent was arraigned as an accused. A warrant of arrest was issued against the second respondent. Despite the issuance of the warrant of arrest and a proclamation, the second respondent was not arrested. The order of this Court dated 12 March 2021 speaks for itself.

29. The High Court by its impugned order dated 23 July 2019 allowed the second respondent, who allegedly committed murder during the period when his sentence was suspended, to continue on bail until his claim that he was being falsely implicated was first investigated in ninety days. In adopting such a procedure, the High Court has clearly transgressed into an unusual domain. The High Court has in effect stultified the administration of criminal justice.

30. Section 389 (1)[1] of the CrPC allows the court to release a convicted person on bail. The second proviso to Section 389 (1) of CrPC provides that where a convicted person has been released on bail, it is open to the public prosecutor to file an application for the cancellation of bail. However, the grant of bail post-conviction is governed by well-defined procedures and parameters. The factors that govern the grant of suspension of sentence under Section 389 (1) have been discussed by this Court (speaking through Justice Kurian Joseph) in *Atul Tripathi vs. State of U.P.*[2] in the following terms:

> "It may be seen that there is a marked difference between the procedure for consideration of bail under Section 439, which is pre conviction stage and Section 389 Code of Criminal Procedure, which is post-conviction stage. In case of Section 439, the Code provides that only notice to the public prosecutor unless impractical be given before granting bail to a person who is accused of an offence which is triable exclusively by the Court of Sessions or where the punishment for the offence is imprisonment for life; whereas in the case of post-conviction bail under Section 389 Code of Criminal Procedure, where the conviction in respect of a serious offence having punishment with death or life imprisonment or imprisonment for a term not less than ten years, it is mandatory that the appellate court gives an opportunity to the public prosecutor for showing cause in writing against such release.
>
> 15. Service of a copy of the appeal and application for bail on the public prosecutor by the Appellant will not satisfy the

1. "Section 389. Suspension of sentence pending the appeal; release of Appellant on bail.--(1) Pending any appeal by a convicted person, the Appellate Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, also, if he is in confinement, that he be released on bail, or on his own bond.

Provided that the Appellate Court shall, before releasing on bail or on his own bond a convicted person who is convicted of an offence punishable with death or imprisonment for life or imprisonment for a term of not less than ten years, shall give opportunity to the Public Prosecutor for showing cause in writing against such release:

Provided further that in cases where a convicted person is released on bail it shall be open to the Public Prosecutor to file an application for the cancellation of the bail."

2. (2014) 9 SCC 177

requirement of first proviso to Section 389 Code of Criminal Procedure. The appellate court may even without hearing the public prosecutor, decline to grant bail. However, in case the appellate court is inclined to consider the release of the convict on bail, the public prosecutor shall be granted an opportunity to show cause in writing as to why the Appellant be not released on bail. **Such a stringent provision is introduced only to ensure that the court is apprised of all the relevant factors so that the court may consider whether it is an appropriate case for release having regard to the manner in which the crime is committed, gravity of the offence, age, criminal antecedents of the convict, impact on public confidence in the justice delivery system, etc**. Despite such an opportunity being granted to the public prosecutor, in case no cause is shown in writing, the appellate court shall record that the State has not filed any objection in writing. This procedure is intended to ensure transparency, to ensure that there is no allegation of collusion and to ensure that the court is properly assisted by the State with true and correct facts with regard to the relevant considerations for grant of bail in respect of serious offences, at the post conviction stage."

31. This Court in *Ramji Prasad vs. Rattan Kumar Jaiswal and Anr.*[3] has observed that in cases involving conviction under Section 302 of the IPC, the sentence should be suspended only in exceptional cases.

32. In *Masood Ali Khan vs. State of U.P. and Ors.*[4], this Court has held that the mere fact that the accused, who were on bail during the period of trial, did not misuse their liberty is not a sufficient reason for the grant of suspension of sentence post-conviction. This Court by placing reliance on *Vijay Kumar vs Narendra*[5] reiterated that all the relevant factors including "nature of accusation made against the accused, the manner in which the crime was alleged to have been committed, the gravity of the offence, desirability of releasing the accused on bail after they have committed the serious offence of murder" must be looked into.

33 The High Court had suspended the sentence. We are not in these proceedings called upon to consider whether the order of the High Court granting a suspension of sentence was valid in the first place.

34 There are distinct doctrinal concepts in criminal law namely (i) the grant of bail before trial or, what is described as the 'pre-conviction' stage; (ii) setting aside an order granting bail when the principles which must weigh in the decision

3. (2002) 9 SCC 366
4. (2009) 3 SCC 492
5. (2002) 9 SCC 364

on whether bail should be granted have been overlooked or wrongly applied; (iii) the post-conviction suspension of sentence under the provisions of Section 389(1); and (iv) the cancellation of bail on the ground of supervening events, such as the conduct of the accused during the period of bail, vitiating the continuance of bail.

35. The present case falls in the last of the above genres where bail was sought to be cancelled on the ground that the second respondent was implicated in an offence under section 302 during the period when his sentence was suspended.

36. This Court in *Abdul Basit vs. Abdul Kadir Choudhary*[6], while discussing the powers of the High Court to cancel bail granted to an accused under Section 439 (2) of the CrPC, has observed that typically the following conduct of the accused would result in the cancellation of bail - (i) misuse of liberty by engaging in similar criminal activity; (ii) interference with the course of investigation; (iii) tampering of evidence or witnesses; (iv) threatening of witnesses or engaging in similar activities which would hinder the investigation; (v) possibility of fleeing to another country; (vi) attempts to become scarce by becoming unavailable for investigation or going underground; and (vii) being out of the reach of their surety. Similar considerations govern the cancellation of bail at the post-conviction stage under the second proviso to Section 389 (1) of the CrPC. This Court in *Pampapathy vs. State of Mysore*[7] , had held that the High Court had the power to revoke the suspension of sentence granted under sub-Sections (1) and (2) of Section 426[8] of the erstwhile Code of Criminal Procedure, 1898 ("**CrPC, 1898**") using its inherent powers under Section 561-A of the CrPC, 1898. The accused were alleged to have misused their liberty while their sentence was suspended. Sub-Sections (1) and (2) of Section 426 of the CrPC, 1898 are similar to Section 389 (1) of the present CrPC. It may be noted that in *Pamapathy* (supra), the issue of cancellation of bail of a convict, by taking recourse to Section 561-A of the CrPC, 1898, arose because the second proviso, which, now, has been added to sub-Section (1) of Section 389 CrPC, did not exist under the earlier legal framework. However, since the second proviso to sub-Section (1) of Section 389 CrPC., now, deals with the cancellation of bail, no inherent power, would be required for revocation of suspension of sentence and bail granted to a convicted person during the pendency of appeal at the appellate court. This Court in its order passed in *Ramesh Kumar Singh vs. Jhabbar Singh & Ors.*[9], has held that if the

---

6. (2014) 10 SCC 754

7. 1966 Supp SCR 477

8. "426. (1) Pending any appeal by a convicted person, the Appellate court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, also, if he is in confinement, that he be released on bail or on his own bond.

(2) The power conferred by this section on an appellate court may be exercised also by the High Court in the case of any appeal by a convicted person to a court subordinate thereto."

9. (2003) 10 SCC 195

accused misuses their liberty by committing other offences during the suspension of sentence under Section 389 (1) of the CrPC, they are not entitled to the privilege of being released on bail. In that case, the accused was convicted under Section 302 of the IPC for killing the father of the complainant and during the suspension of his sentence, when he was out on bail, he had committed the murder of the brothers of the complainant. This Court set aside the bail that was granted to the accused by the High Court.

37. The present case was a fit case for the cancellation of bail by the High Court. The narration in the earlier part of the judgment highlights the following facets:

(i) The registration of FIR 143 of 2019 implicating the second respondent in the murder of the appellant's father during the period when the sentence of the second respondent was suspended after his conviction of a prior offence under Section 302.

(ii) The criminal antecedents of the second respondent;

(iii) The strong likelihood of the second respondent using his political clout to prevent a fair investigation of FIR 143 of 2019;

(iv) The truth in the apprehensions of the appellant having become evident by the abject failure of the police to properly investigate the FIR lodged against the second respondent on the allegation that he had committed the murder of the appellant's father on 15 March 2019 after his sentence was suspended by the High Court;

(v) The submission of a closure report by the police against the second respondent absolving him;

(vi) The order of the ASJ dated 8 January 2021 summoning the second respondent under Section 319 of the CrPC;

(vii) The second respondent having evaded arrest despite the issuance of a warrant of arrest and a proclamation;

(viii) The failure of the law enforcement authorities to effectuate the arrest of the second respondent in spite of the order of this Court dated 12 March 2021;

(ix) The peremptory directions issued by this Court on 26 March 2021 requiring the DGP to take necessary steps for compliance with the previous order failing which the Court would be constrained to take coercive steps in accordance with law;

(x) The eventual arrest of the second respondent on 28 March 2021 ostensibly from a bus stand;

(xi) The apprehension expressed by the ASJ in his order dated 8 February 2021 that he was being targeted at the behest of a politically influential accused; and

(xii) The provision of security to the second respondent by the State government at the behest of his spouse who is an MLA despite a prior conviction under Section 302 of the IPC.

38. The High Court mis-applied itself to the legal principles which must govern such a case. The serious error by the High Court in its impugned order can be considered from two perspectives. First, the High Court by simply disposing of the IAs seeking cancellation of bail ignored material considerations which ought to have weighed in the decision. Some of the events which we have narrated above have undoubtedly transpired after the order of the High Court. However, taking the position as it stood when the High Court considered the issue, a clear case for cancellation of bail was established. The second aspect which is also of significance is the impact of the order of the High Court. The High Court was apprised of the fact that FIR No 143 of 2019 had been lodged against the second respondent. The investigation into the FIR had to proceed according to law. Instead, the High Court gave a period of ninety days to the police to enquire into the complaint of the second respondent that he was being targeted and allowed the police to thereafter proceed in accordance with law. This order had the effect of obstructing a fair investigation into the FIR at the behest of the accused despite the nature and gravity of the allegations against him. The events which have transpired since go to emphasize the fact that the High Court was in grievous error in passing its directions which were misused to defeat the investigation. The police submitted a closure report absolving the second respondent. Thereafter, despite the order under section 319, the second respondent evaded arrested in contravention of the warrant of arrest which was issued by the ASJ. The facts which have been narrated in the earlier part of this judgment indicate that the police have been complicit in shielding the second respondent. The criminal antecedents of the second respondent and the prior conviction on a charge of murder have been adverted to earlier. The second respondent, whose spouse is an MLA was provided security by the State. The DGP was sanguine in informing this court that the second respondent could not be arrested despite the directions issued by this Court. It was only after this Court issued a peremptory direction indicating recourse to the coercive arm of law that the second respondent was arrested, ostensibly from a bus-stand. The material on the record indicates that an effort has been made to shield the accused from the administration of criminal justice. The apprehensions expressed by the ASJ in his order dated 8 February 2021 of the machinations of a

highly influential accused evading the process of law are amply borne out by the facts which have been revealed before this Court. There is no reasonable basis to doubt the anguish and concern of a judicial officer. That the state did not oppose the application under section 319 is a feeble attempt to justify the inaction of the police. Unfortunately, the High Court failed in its duty to ensure that the sanctity of the criminal justice process is preserved. This court has had to step in to ensure that the rule of law is preserved.

39. We accordingly order and direct that the order of the High Court dated 23 July 2019 shall stand set aside. IA Nos 6837 and 5781 of 2019 shall in the circumstances stand allowed. The bail granted to the second respondent shall stand cancelled. We also direct that the second respondent shall be moved under the directions of the DGP to another jail in Madhya Pradesh to ensure that the fair course of the criminal proceedings is not deflected.

40. During the course of this proceeding, an enquiry was directed to be made into the apprehensions expressed by the ASJ in his order dated 8 February 2021. An independent and impartial judiciary is the cornerstone of democracy. Judicial independence of the district judiciary is cardinal to the integrity of the entire system. The courts comprised in the district judiciary are the first point of interface with citizens. If the faith of the citizen in the administration of justice has to be preserved, it is to the district judiciary that attention must be focused as well as the 'higher' judiciary. Trial judges work amidst appalling conditions - a lack of infrastructure, inadequate protection, examples of judges being made targets when they stand up for what is right and sadly, a subservience to the administration of the High Court for transfers and postings which renders them vulnerable. The colonial mindset which pervades the treatment meted out to the district judiciary must change. It is only then that civil liberties for every stakeholder - be it the accused, the victims or civil society - will be meaningfully preserved in our trial courts which are the first line of defense for those who have been wronged.

41. The functioning of the judiciary as an independent institution is rooted in the concept of separation of powers. Individual judges must be able to adjudicate disputes in accordance with the law, unhindered by any other factors. Thus, "for that reason independence of judiciary is the independence of each and every judge". The independence of individual judges also encompasses that they are independent of their judicial superiors and colleagues[10]. This Court in *Madras Bar Association v. Union of India & Anr.*[11] speaking through Justice L. Nageswara Rao has observed:

---

10. M.P. Singh, *Securing the Independence of the Judiciary - The Indian Experience*, Indiana International and Comparative Law Review 10, No. 2 (2000): 245-292.

11. 2021 SCC OnLine SC 463

> "29. Impartiality, independence, fairness and reasonableness in decision-making are the hallmarks of the judiciary. If "impartiality" is the soul of the judiciary, "independence" is the lifeblood of the judiciary. Without independence, impartiality cannot thrive. Independence is not the freedom for Judges to do what they like. It is the independence of judicial thought. It is the freedom from interference and pressures which provides the judicial atmosphere where he can work with absolute commitment to the cause of justice and constitutional values. It is also the discipline in life, habits and outlook that enables a Judge to be impartial. Its existence depends however not only on philosophical, ethical or moral aspects but also upon several mundane things—security in tenure, freedom from ordinary monetary worries, freedom from influences and pressures within (from others in the judiciary) and without (from the executive). The independence of an individual Judge, that is, decisional independence; and independence of the judiciary as an institution or an organ of the State, that is, functional independence are the broad concepts of the principle of independence of the judiciary/ tribunal."

42. Our Constitution specifically envisages the independence of the district judiciary. This is implicit in Article 50 of the Constitution which provides that the State must take steps to separate the judiciary from the executive in the public services of the State. The district judiciary operates under the administrative supervision of the High Court which must secure and enhance its independence from external influence and control. This compartmentalization of the judiciary and executive should not be breached by interfering with the personal decision-making of the judges and the conduct of court proceedings under them.

43. There is no gainsaying that the judiciary should be immune from political pressures and considerations. A judiciary that is susceptible to such pressures allows politicians to operate with impunity and incentivizes criminality to flourish in the political apparatus of the State.

44. India cannot have two parallel legal systems, "one for the rich and the resourceful and those who wield political power and influence and the other for the small men without resources and capabilities to obtain justice or fight injustice." The existence of a dual legal system will only chip away the legitimacy of the law. The duty also falls on the State machinery to be committed to the rule of law and demonstrate its ability and willingness to follow the rules it itself makes, for its actions to not transgress into the domain of "governmental lawlessness"[12].

---

12. Upendra Baxi, *The Crisis of Legitimation of Law* in The Crisis of the Indian Legal System: Alternative Developments in Law (Vikas Publishing House, 1982).

45. At the same time, we believe that judges, while being undeterred in their commitment to follow the law and do justice, should be wary of launching into a diatribe against the State authorities without due care and reflection.

46. The apprehensions expressed by the ASJ should be duly enquired into by the High Court of Madhya Pradesh on its administrative side so that if they are found to be true, necessary action should be taken in order to secure the fair administration of justice. We have already taken note of the fact that the SDOP Hata had submitted a complaint to the Registrar General. The complaint by the SDOP as well the the order of the ASJ dated 8 February 2021 shall be placed before the Chief justice of the Madhya Pradesh High Court on the administrative side by the Registrar General within two weeks. The Chief Justice of the High Court of Madhya Pradesh is requested to cause an enquiry to be made on the administrative side so that an appropriate decision in that regard is taken. Having regard to this direction we are not expressing any views on the report which has been submitted by the ADGP and STF, Bhopal. The enquiry as directed above should be concluded expeditiously and preferably within a period of one month from the date of the receipt of a certified copy of this judgment. A copy of this order shall be communicated by the Registrar (Judicial) of this court to the Registrar General of the High Court for compliance. The appeals shall stand disposed of in the above terms.

47. Pending application(s), if any, stand disposed of.

Order accordingly

I.L.R. [2021] M.P. 1485 (DB)
WRIT APPEAL

Before Mr. Justice Mohammad Rafiq, Chief Justice
& Mr. Justice Sujoy Paul

WA No. 10/2020 (Indore) decided on 7 June, 2021

MANAGING DIRECTOR, M.P. PASCHIM KSHETRA VIDYUT VITARAN CO. & ors. …Appellants

Vs.

ASHIQ SHAH & anr. …Respondents

A. Service Law – Compassionate Appointment – Belated Claim – **Held – Compassionate appointment is carved out as exception to general rule – Its basic purpose is to provide immediate helping hand to the family in distress – Appointment cannot given after more than two decades – There cannot be a reservation of vacancy till a candidate becomes major after number of years – Writ Court wrongly directed consideration of R-1 on compassionate ground after almost 24 years from date of death of his father – Impugned order set aside – Appeal allowed. (Paras 6 & 9 to 11)**

क. सेवा विधि – अनुकंपा नियुक्ति – विलंबित दावा – अभिनिर्धारित – अनुकंपा नियुक्ति को सामान्य नियम के अपवाद के रूप में परिकल्पित किया गया है – इसका मूल प्रयोजन संकट में परिवार को तत्काल सहायता प्रदान करना है – दो दशक से अधिक हो जाने के पश्चात् नियुक्ति नहीं दी जा सकती – अनेक वर्षों के पश्चात् अभ्यर्थी के वयस्क हो जाने तक, रिक्ति को आरक्षित नहीं किया जा सकता – रिट न्यायालय ने प्रत्यर्थी क्र. 1 के पिता की मृत्यु के लगभग 24 वर्षों के पश्चात् अनुकंपा के आधार पर उसको विचार में लिये जाने हेतु गलत रूप से निदेशित किया – आक्षेपित आदेश अपास्त – अपील मंजूर।

B. Service Law – Compassionate Appointment – Contingency – **Held – Two recognized contingency for grant of compassionate appointment are – (i) appointment on compassionate ground to meet sudden crisis occurring in a family on account of death of bread winner while in service and (ii) appointment on compassionate ground to meet crisis in family on account of medical invalidation of bread winner. (Para 6)**

ख. सेवा विधि – अनुकंपा नियुक्ति – आकस्मिकता – अभिनिर्धारित – अनुकंपा नियुक्ति प्रदान करने के लिए दो मान्य आकस्मिक परिस्थितियाँ हैं – (i) सेवा में रहने के दौरान कमाने वाले की मृत्यु हो जाने के कारण परिवार में आये आकस्मिक संकट से निपटने हेतु अनुकंपा के आधार पर नियुक्ति एवं (ii) कमाने वाले की चिकित्सीय अशक्तता के कारण परिवार में आये संकट से निपटने हेतु अनुकंपा के आधार पर नियुक्ति।

Cases referred:

SLP (Civil) No. 12876/2000 decided on 28.08.2000 (Supreme Court), WP No. 5386/2015 decided on 13.02.2017, WA No. 270/2017 decided on 23.10.2017, WA No. 136/2018 decided on 11.01.2019, WP No. 13899/2020 decided on 18.01.2021, (2008) 13 SCC 730, (1998) 2 SCC 412, (1995) 6 SCC 476, (2009) 6 SCC 481, (2000) 7 SCC 192, 2003 (1) MPLJ 342, 2005 (4) MPLJ 575.

Madhusudan Dwivedi, for the appellant.
L.C. Patne, for the respondent No. 1.

O R D E R

(Heard through Video Conferencing)

The Order of the Court was passed by:
SUJOY PAUL, J. :- In this *intra* Court Appeal filed under Section 2(1)of the Madhya Pradesh Uchha Nyayalaya (Khand Nyaya Peeth Ko Appeal) Adhiniyam, 2005, the appellant/department has challenged the order of writ court dated 30/9/2019 passed in WP No.6510/2015 whereby the Court has set aside the impugned order dated 23/5/2016 whereby claim of respondent No.1 for compassionate appointment was rejected. In turn, department was directed to consider the case of respondent No. 1 and pass necessary orders within three months. The department was prevented to reject the claim of the respondent No. 1 on the ground of delay.

2. Shri Dwivedi, learned counsel for appellant submits that father of respondent No.1 died on 16/6/1996. Merely, because the respondent No.1 was minor at the time of death, his claim application cannot be considered and he cannot be appointed after more than two decades from the date of death of his father. This will defeat the very purpose of grant of compassionate appointment. In support of his contentions he has placed reliance upon the judgment of Apex Court in the matter of *Sanjay Kumar Vs. State of Bihar & Ors.* dated 28/8/2000 passed in SLP (Civil) No. 12876/2000 and orders of this Court in the matter of *Sanjay Shriwas Vs. C.M.D & another* dated 13/2/2017 passed in WP No. 5386/2015, *Sanjay Shriwas Vs. C.M.D. & another* dated 23/10/2017 passed in WA No.270/2017, *Amit Kumar Vs. C.M.D, M.P. P.K.V.V.Co. Ltd. & another* dated 11/1/2019 passed in WA No.136/2018 and *Hitesh Bharti Vs. State of M.P. & Ors.* dated 18/1/2021 passed in WP No. 13899/2020.

3. *Per contra,* Shri L.C. Patne supported the impugned order on the basis of the policy.

4. No other point is advanced by learned counsel for parties.

5. We have heard the learned counsel for parties at length and perused the record.

6. This is trite that compassionate appointment is carved out as exception to the general rule. The two well recognized contingencies for grant of compassionate appointment are - (i) appointment on compassionate ground to meet the *sudden crisis* occurring in a family on account of death of the bread winner while in service; (ii) appointment on compassionate ground to meet the crisis in a family on account of medical invalidation of the bread winner. (See (2008) 13 SCC 730 *V. Sivamurthy Vs. State of U.P.).*

7. Reference may be made to (1998) 2 SCC 412 *(State of U.P. Vs. Paras Nath)* wherein after taking note of previous judgment reported in (1995) 6 SCC 476 *(Union of India Vs. Bhagwansingh),* the Apex Court opined as under:-

State of U.P. vs. Paras Nath (1998) 2 SCC 412

> **"6.** We may, in this connection, refer to only one judgment of this Court in the case of ***Union of India v. Bhagwan Singh [(1995) 6 SCC 476: 1996 SCC (L&S) 33: (1995) 31ATC 736].*** In this case, the application for appointment on similar compassionate grounds was made twenty years after the railway servant's death. This Court observed:
>
> > "The reason for making compassionate appointment, which is exceptional, **is to provide immediate financial assistance to the family** of a government servant who

> dies in harness, when there is no other earning member in the family."
>
> 7. No such considerations would normally operate seventeen years after the death of the government servant. The High Court was, therefore, not right in granting any relief to the respondents."
>
> (emphasis supplied)

8. Similarly, in the case of *Santosh Kumar Dubey Vs. State of U.P.* (2009) 6 SCC 481, the Apex Court poignantly held as under:-

> ***Santosh Kumar Dubey v. State of U.P.*, (2009) 6 SCC 481**
>
> **"12.** The request for appointment on compassionate grounds should be reasonable and proximate to the time of the death of the bread earner of the family, inasmuch as the very purpose of giving such benefit is to make financial help available to the family to overcome sudden economic crisis occurring in the family of the deceased who has died in harness. But this, however, cannot be another source of recruitment. This also cannot be treated as a bonanza and also as a right to get an appointment in government service."
>
> (emphasis supplied)

9. It is trite that the basic purpose of compassionate appointment is to provide immediate helping hand to the family in distress. The appointment cannot be directed to be given after more than two decades. There cannot be a reservation of vacancy till a candidate becomes major after number of years. In (2000) 7 SCC 192 *(Sanjay Kumar Vs. State of Bihar & Ors.),* the Apex Court opined as under: -

> "3... This Court has held in a number of cases that compassionate appointment is intended to enable the family of the deceased employee to tide over sudden crisis resulting due to death of the bread earner who had left the family in penury and without any means of livelihood. In fact such a view has been expressed in the very decision cited by the petitioner in Director of Education Vs. Pushpendra Kumar. It is also significant to notice that on the date when the first application was made by the petitioner on 02/06/1988, the petitioner was a minor and was not eligible for appointment. This is conceded by the petitioner. There cannot be reservation of a vacancy till such time as a petitioner becomes a major after a number of years, unless there are some specific provisions. The very basis of compassionate appointment is to see that the family gets immediate relief."
>
> (emphasis supplied)

A Division Bench of this Court took same view in 2003(1) MPLJ 342 *[Beni Lal Bamney Vs. Union of India and others]* and 2005(4) MPLJ 575 *(Riazuddin Khan Vs. State of M.P. and others]*.

10. By passing the impugned order, the learned Single Judge has directed consideration of respondent No.1 on compassionate ground after almost 24 years from the date of death of father of respondent No. 1. In view of principles laid down in the aforesaid judgments, we are unable to countenance the order of learned writ court. No directions could have been issued for consideration on compassionate ground after almost 24 years from the date of death of father of respondent No.1. The very purpose of grant of compassionate appointment will be defeated if claims of compassionate appointment after decades are entertained.

11. Considering the aforesaid, the impugned order of writ court dated 30/9/2019 is set aside. Writ appeal is **allowed.**

Appeal allowed

I.L.R. [2021] M.P. 1489 (DB)
WRIT APPEAL

Before Mr. Justice Mohammad Rafiq, Chief Justice &
Mr. Justice Sujoy Paul

WA No. 382/2021 (Indore) decided on 9 June, 2021

RADHESHYAM MANDLOI …Appellant

Vs.

STATE OF M.P. & ors. …Respondents

***A. Service Law – Transfer – Administrative Exigency – Grounds* – Held – A sensitive/responsible post of CMO (Class A) cannot be manned by a Revenue Inspector (Class C) – He does not have any administrative experience or knowledge to function as a CMO, neither he was in the feeder cadre nor entitled to occupy post of CMO as per Rules – Such transfer order is an example of colourable exercise of power – Impugned order of transfer set aside – Appeal allowed. (Paras 10, 13 & 14)**

क. सेवा विधि – स्थानांतरण – प्रशासनिक आवश्यकता – आधार – अभिनिर्धारित – मुख्य नगरपालिका अधिकारी (वर्ग ए) के एक संवेदनशील/जिम्मेदारी के पद को एक राजस्व निरीक्षक (वर्ग सी) द्वारा संचालित नहीं किया जा सकता – उसके पास एक मुख्य नगरपालिका अधिकारी के रूप में कार्य करने के लिए कोई प्रशासनिक अनुभव अथवा ज्ञान नहीं है, न तो वह फीडर काडर में था न ही वह नियमानुसार मुख्य नगरपालिका अधिकारी के पद को धारण करने का हकदार है – उक्त स्थानांतरण आदेश शक्ति के छद्म प्रयोग का एक उदाहरण है – स्थानांतरण का आक्षेपित आदेश अपास्त – अपील मंजूर।

***B. Service Law – Transfer – Administrative Exigency* – Held – Expression "administrative exigency" is not a magic expression or**

a "*mantra*" which can serve the purpose in every situation – Words "administrative exigency' are not carpet under which anything can be swept. (Para 13)

ख. सेवा विधि – स्थानांतरण – प्रशासनिक आवश्यकता – अभिनिर्धारित – अभिव्यक्ति ''प्रशासनिक आवश्यकता'' कोई जादुई अभिव्यक्ति या ''मंत्र'' नहीं है जो कि हर परिस्थिति में प्रयोजन की पूर्ति कर सके – शब्द ''प्रशासनिक आवश्यकता'' कालीन नहीं है जिसके नीचे कुछ भी ढंका/छिपाया जा सके।

Cases referred:

(1986) 4 SCC 131, 2014 (2) MPLJ 419, 2021 (1) MPLJ 427, (1994) 6 SCC 98.

A.K. Sethi with *Rahul Sethi*, for the appellant.
Vivek Dalal, A.A.G. for the respondent/State.
M.S. Dwivedi, for the respondent No. 2.

O R D E R

The Order of the Court was passed by:
SUJOY PAUL, J. :- The core issue raised in this *intra* court appeal is whether the order dated 18/3/2021 (Annexure P/1) passed by the respondent No.2 is legal and justifiable whereby the appellant who was holding the substantive post of Chief Municipal Officer, Nagar Palika Parishad, Barwaha, District Khargone is transferred to the post of Dy. Commisioner, Nagar Palika Nigam, Ratlam and in-lieu thereof respondent No.2, a Revenue Inspector is transferred as Incharge Chief Municipal Officer, Nagar Palika Parishad, Barwaha.

2. The appellant filed WP No.7114/2021 to assail the said transfer order dated 18/3/2021. The transfer order was assailed on various grounds which are reproduced by learned Single Judge in para two of the impugned order dated 24/3/2021.

3. Shri A.K.Sethi, learned Sr.Counsel for appellant submits that although the writ court in its order mentioned the main ground of challenge i.e. the appellant a substantive CMO could not have been substituted by Revenue Sub Inspector, did not specifically decided this point. By taking this Court to the Recruitment Rules namely M.P. State Municipal Service (Executive) Rules, 1973 (for short "Recruitment Rules") it is urged that the appellant is entitled to occupy the post of CMO Class A. The private respondent is a revenue Inspector who is not even holding the feeder post for the purpose of promotion on the said post of CMO. As per said Rules, the posts of CMOs are available in three categories. The private respondent is working in a Class C Municipal Council whereas appellant is entitled to occupy the post of CMO in Class A Municipality. The private respondent is required to travel a long upward distance in the ladder of promotion to occupy the substantive post of CMO Class A. He has to travel from Class C

Municipality to Class B and then to Class A Municipality. On the strength of this factual backdrop, the learned Sr. Counsel for appellant submits that transfer order is bad in law. More so, when the appellant is victim of frequent transfer. By order dated 23/9/2020 he was transferred from Dhar to Barwaha and joined at Barwaha only on 25/9/2020. Within a short span of time of six months, the appellant is again subjected to transfer by stating it to be on "administrative exigency".

4. Shri Vivek Dalal, learned A.A.G supported the transfer order and the order of writ court. He also filed written submissions on behalf of the State wherein it is stated that as per (1986) 4 SCC131 *B. Vardha Rao Vs. State of Karanataka & Ors,* the ground of frequent transfer is not available to Class I and Class II Officers of the government. It is further urged that appellant was transferred on account of administrative exigency and this transfer is strictly in terms of Schedule II of M.P. Municipal Services (Executive) Rules 1973 (as amended on 10/4/2015). The competent authority through coordination granted approval for transfer of the appellant. Thus, no fault can be found in the transfer of appellant.

5. Shri M.S.Dwivedi, learned counsel for respondent No.2 opposed the prayer by contending that respondent No.2 has already joined at the place of transfer. The respondent No.2 has been absorbed in newly created Nagar Parishad with effect from 1/4/2015 on the post of Revenue Inspector (5200-20200 + 2100 GP). Heavy reliance is placed on the order passed by division bench in WA No.1458/2019 *(Rajendra Prasad Mishra Vs. State of MP & Ors*.) by contending that CMO Class A can be transferred as a Dy. Commissioner in Municipal Corporation. It is pointed out that same view is taken by learned Single Judge. Reliance is also placed on the order dated 2/7/2019 passed in WA No.984/2019 *(Ms.Sheetal Bhalavi Vs. State of M.P)* and 2014(2) MPLJ 419 *(Sanjay Soni Vs. State of M.P.).* It is averred that in *Sanjay Soni* (supra), it was held that only those employees were allowed to continue on the post who are holding substantive post in the feeder cadre for regular promotion on the post of CMO.

6. No other point is pressed by learned counsel for parties.

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

8. A careful reading of the Recruitment Rules makes it clear that the following employees are eligible for consideration for promotion to the post of Chief Municipal Officer Class A, Class B and Class C:-

> "[A] Chief Municipal Officer Class A-- (i) Chief Municipal Officer Class B; (ii) **Revenue Officer of Class AA and A Municipal Council.**
>
> The above officers should have atleaset five hears experience on their post.

> [B] Chief Municipal Officer Class B-- (I) Chief Municipal Officer Class C; (ii) Revenue Inspector of Class AA, A and B Municipal Council.
>
> The above officers should have atleast five years experience on their post.
>
> [C] Chief Municipal Officer (Class C)-- (I) Superintendent of Class A Municipal Council; (ii) Revenue Inspector of Class C Municipal Council; (iii) Revenue Sub Inspector of Class C Municipal Council, (iv) Employees of the Municipal Corporation having atleast five years experience of above post."
>
> (emphasis supplied)

Pertinently, in a recent judgment, this view is taken by this Court in *Vijay Kumar Sharma Vs. State of MP & Ors.* reported in 2021(1) MPLJ 427.

9. Indisputably, the appellant is entitled to occupy the post of CMO Class A Municipality whereas respondent No.2 is a Revenue Inspector in Class C Municipal Council. The respondent No.2, by no stretch of imagination, can be said to be holding a feeder post for the promotional post of CMO Class A. A Revenue Inspector of Class B has to climb various steps in the ladder by reaching Class B and then reach to Class A. Then only, he can be said to be in the feeder post for CMO Class A.

10. The factual backdrop of this matter shows that appellant was holding a sensitive/responsible statutory post and he has been substituted by a person who is neither in the feeder cadre nor is entitled to occupy the post of CMO as per Rules of 1973. In (1994) 6 SCC 98 *N.K. Singh Vs. Union of India & Ors.,* the Apex Court poignantly held that:-

> "Transfer of a public servant from a **significant post can be prejudicial to the public interest if transfer was avoidable and the successor is not suitable for the post**. Suitability is a matter for the objective assessment by hierarchical superiors in administration. **If such transfer is avoidable and replacement officer by a unsuitable person, interference can be made."**

11. The learned Single Judge has recorded that the present matter is identical to WP No.5286/2019 which was decided on 19/3/2019. In the said case, it was held that a CMO can be transferred as Dy. Commissioner. The main point involved in the instant case that whether a person holding the substantive post of CMO cannot be substituted by a Revenue Inspector of Class C Municipality was neither argued nor decided. Apart from this, in WP No.5286/2019, the respondent No.3 was not transferred in place of petitioner therein in the capacity of Incharge CMO. Indeed, he was transferred in the same capacity as Health Officer. Since

petitioner therein was transferred in administrative exigency and elections were due, the additional charge was thereafter given to him. Thus, we are unable to give stamp of approval to the order of learned Single Judge wherein it was held that order of WP No.5286/2019 squarely covers the instant matter.

12. On specific query from the bench, Shri Dalal, learned A.A.G submits that he is unable to gather any reason from the perusal of original transfer file as to why appellant was transferred within six months. He merely stated that transfer order was issued in "administrative exigency".

13. The expression "administrative exigency" is not a magic expression or a "mantra" which can serve the purpose in every situation. *In a case of this nature,* where a substantive post holder is transferred within short span of six months and respondent No.2, an employee holding inferior post and unsuitable to hold the post of CMO was permitted to act as a striker in the carrom board of the department, the reasons for issuing such transfer order must be discernible. Putting it differently, the words "administrative exigency" are not carpet under which anything can be swept. It is a matter of common knowledge that a sensitive /responsible post of CMO cannot be manned by a Revenue Inspector. He does not have any administrative experience or knowledge to function as a CMO. It is incomprehensive as to how the impugned transfer order will improve "administrative exigency" or take care of "administrative interest". Thus, in our view, the transfer order is an example of colurable exercise of power and needs to be interfered with.

14. Resultantly, the order dated 24/3/2021 passed in WP No.7114/2021 and the transfer order dated 18/3/2021 to the extent it relates to appellant and respondent No.2 is concerned, are set aside. The writ appeal is **allowed.**

Appeal allowed

I.L.R. [2021] M.P. 1493 (DB)
WRIT APPEAL

Before Mr. Justice Mohammad Rafiq, Chief Justice &
Mr. Justice Sujoy Paul

WA No. 42/2021 (Indore) decided on 24 June, 2021

UNION OF INDIA & ors. …Appellants

Vs.

M/S S.R. FERRO ALLOYS …Respondent

***A. Railways Act (24 of 1989), Section 73 and Railway (Punitive Charges for Overloading of Wagon) Rules, 2005 – Rule 3 – Punitive Charge for Overloading* – Held – Representative of writ petitioner was intimated to unload excess material from overloaded wagons and shift it in underloaded wagons – Writ petitioner arranged two labourers for shifting goods in**

underweight wagons – Material was accordingly adjusted and thereafter only train could depart and for this reason of overloading and detention of train, Station Manager imposed penalty upon him u/S 73 of Railways Act – Impugned order set aside – Appeal allowed. (Paras 20, 21 & 23)

क. रेल अधिनियम (1989 का 24), धारा 73 एवं रेल (वैगनों की अतिभराई के लिए दण्डात्मक प्रभार) नियम, 2005 – नियम 3 – अतिभराई के लिए दण्डात्मक प्रभार – अभिनिर्धारित – रिट याची के प्रतिनिधि को अतिभारित वैगनों से अतिरिक्त सामग्री उतारने एवं उसे अधोभारित वैगनों में शिफ्ट करने/लादने को सूचित किया गया था – रिट याची ने अधोभारित वैगनों में माल शिफ्ट करने/लादने के लिए दो श्रमिकों की व्यवस्था की – तद्नुसार सामग्री को ठीक से रखा गया था एवं तत्पश्चात् ही रेल रवाना हो सकी तथा अतिभराई करने और रेल को रोके रखने के इसी कारण से, स्टेशन प्रबंधक ने रेल अधिनियम की धारा 73 के अंतर्गत उस पर शास्ति अधिरोपित की – आक्षेपित आदेश अपास्त – अपील मंजूर।

***B. Railways Act (24 of 1989), Section 73 and Railway (Punitive Charges for Overloading of Wagon) Rules, 2005 – Rule 3 – Punitive Charge – Opportunity of Hearing/Notice* – Held – Contention that Railways should have provided opportunity of hearing to writ petitioner before re-weighment at New Katni Junction and at least, before levying of punitive charges, was categorically considered and repelled by Division Bench in its judgment in *S.Goenka Lime & Chemicals Ltd.* – It was held that giving prior notice before taking such surprise action, would be counterproductive. (Para 22)**

ख. रेल अधिनियम (1989 का 24), धारा 73 एवं रेल (वैगनों की अतिभराई के लिए दण्डात्मक प्रभार) नियम, 2005 – धारा 3 – दण्डात्मक प्रभार – सुनवाई का अवसर/नोटिस – अभिनिर्धारित – रेलवे को नये कटनी जंक्शन पर पुनः तौल करने से पूर्व एवं कम से कम दण्डात्मक प्रभार उद्गृहीत करने से पहले रिट याची को सुनवाई का अवसर देना चाहिए, यह तर्क एस. गोयनका लाइम व केमिकल्स लि. के निर्णय में खंड न्यायपीठ द्वारा स्पष्ट रूप से विचार में लिया गया और निरसित किया गया – यह अभिनिर्धारित किया गया था कि ऐसी आकस्मिक कार्रवाई करने से पूर्व पहले से नोटिस देना, प्रतिकूल होगा।

Cases referred:

(2014) 2 High Court Cases (Cal) 457, LAWS (GAU) 1995 818, AIR 2016 MP 70, AIR 2010 (Cal.) 90 (DB), 2000 (2) AWC 1682 All: Manu/UP/0347/2000 : 2000 All LJ 2529, (1998) 5 SCC 126.

H.Y. Mehta, for the appellants.
R.S. Chhabra, for the respondent.

O R D E R

The Order of the Court was passed by:
MOHAMMAD RAFIQ, CHIEF JUSTICE :- This writ appeal under Section 2 of the

Madhya Pradesh Uchcha Nyayalaya (Khand Nyayapeeth Ko Appeal) Adhiniyam, 2005 has been filed by the appellants (hereinafter referred to as "the appellants-Railways") assailing the order dated 06.02.2020 passed by the learned Single Judge in W.P. No.1256/2018 (*M/s S.R. Ferro Alloys vs. Union of India and others*) whereby the writ petition filed by the present respondent (hereinafter referred to as "the writ petitioner") has been allowed.

2. The respondent-writ petitioner in the aforesaid writ petition challenged the demand letter dated 15.05.2017 (Annexure P-10) and calculation sheet dated 18.05.2017 (Annexure P-12) whereby demand was made towards punitive charge for alleged overloading of loose Manganese Ore transported through Railway from Meghnagar (Madhya Pradesh) to Baraduar (Chhattisgarh).

3. According to the case set up by the writ petitioner in the memorandum of writ petition, it was a Partnership Firm registered under the Indian Partnership Act, 1932. The writ petitioner-Firm was engaged in the business of mining and in that connection it has to transport loose Manganese Ore throughout the country through Railways. The writ petitioner received an order for supply of loose Manganese Ore from M/s Chhattisgarh Steel and Power Limited, Village Amjhar, Champa, District Janjgir (C.G.). The writ petitioner submitted a forwarding note on 10.05.2017, as required under Section 64 of the Railways Act, 1989 (for short "the Railways Act") to the Station Manager, Meghnagar mentioning therein the weight of loose Manganese Ore i.e. 2800 Metric Ton (MT) along with other necessary details for its transportation from Meghnagar to Baraduar Goods Station. The respondent-writ petitioner was permitted to load the goods in the Railway Rake by the Station Manager. The goods were transported from the mines at Kajli Dungari to the Railway Station Meghnagar from 10.05.2017 to 12.05.2017 for the purposes of loading in the Railway Rake and transportation. According to the writ petitioner, trucks were duly weighed by *Tol Kanta* installed at the site of the mine. The writ petitioner produced on record a chart with the dates, vehicle numbers, mineral, royalty books, slip number along with the quantity of the loose Manganese Ore transported by the vehicles. The Mining Officer, Jhabua permitted the petitioner to transport 2800 MT loose Manganese Ore and issued a certificate verifying the quantity of Manganese Ore i.e. 2800 MT with other details before transportation. The writ petitioner raised an invoice No.037(17-18) dated 12.05.2017 for sale of loose Manganese Ore weighing 2800 MT in favour of Chhattisgarh Steel and Power Ltd. (supra). Loading of 2800 MT goods was done in the wagons at Meghnagar Railway Station as per the rules and the requirement specified in that behalf by the Railways on 12.05.2017. The Station Manager issued a Railway Receipt No.212000253, as required by Section 65 of the Railways Act. According to the writ petitioner, Section 65(2) of the Railways Act contemplates that the Railway Receipt shall be *prima facie* evidence of the weight and the number of packages stated therein. The

respondent-writ petitioner paid freight to the tune of Rs.39,66,177/- to the appellant for transportation of 2835 MT.

4. It was further stated by the respondent-writ petitioner that the goods loaded at Meghnagar Railway Station were got weighed at Katni In-Motion Rail weight. As per the allegation of the Railways, the excess weight of 185.60 MT was found. The communication with regard to excess weight was given to the representative of the writ petitioner with instructions to unload the material from the alleged overloaded wagons and shift the same in the underloaded wagons. The writ petitioner arranged two labourers for shifting the goods in the underweight wagons as directed by the Railways. The material was accordingly adjusted and the train departed. The Station Manager (Goods), Meghnagar vide order dated 15.05.2017 (Annexure P-10) imposed penalty of Rs.25,43,179/- upon the respondent-writ petitioner on account of alleged overloading in the wagons and detention of the train. The respondent-writ petitioner by letter dated 16.05.2017 (Annexure P-11) resisted the demand raised by the appellants-Railways and requested for re-weighment of the goods under Section 70 of the Railways Act, as its case was that there was no overloading in the wagons and only 2800 MT was loaded. It was alleged that the goods had not yet reached the destination at the time the letter was addressed and the consignment could have been put to re-weighment. However, no heed was paid to the request of the writ petitioner. Baraduar Goods Station issued an under charges calculation sheet without re-weighment of the goods and called upon the writ petitioner to deposit a sum of Rs.26,11,800/-. Since the delivery of the goods was to be received by Chhattisgarh Steel and Power Ltd. (supra), a letter dated 18.05.2017 (Annexure P-13) was addressed to the Commercial Supervisor, Baraduar (Mall Dhakka), South East Central Railway, Janjgir (Champa) i.e. appellant No.3 herein, reiterating that only 2800 MT loose Manganese Ore was loaded by the writ petitioner from Meghnagar to Baraduar and on account of rake weighment at Katni Station, overload weight of 185.60 MT was alleged to have been found. A request was made for re-weighment of the rake by Chhattisgarh Steel and Power Ltd. (supra) to the Senior Divisional Commercial Manager, BSP Division, who, however, did not pay any heed and levied punitive charges of Rs.25,43,179/-. The writ petitioner then filed an application under the Right to Information Act, 2005 (in short "the RTI Act") seeking information with regard to TARE weight of the wagon BVZC, a wagon used and meant for guard, with other information. According to the writ petitioner, the Divisional Rail Manager, WCR, Jabalpur provided information under the RTI Act that TARE weight of the BVZC wagon is 13.803 MT, however, it was taken to be 14.50 MT while making calculation for the illegal demand. The case of the writ petitioner was, therefore, that there is a marked difference between the actual TARE weight and the TARE weight shown by the weighment machine at Katni, which resulted into erroneous weighment of

the consignment and consequently levy of illegal punitive charges on the petitioner. The writ petitioner, therefore, sent a notice dated 04.08.2017 (Annexure P-15) to the Commercial Supervisor, Baraduar and Goods In-charge Meghnagar and other officers of the Railways calling upon them to waive off the demand raised towards overloading and also citing the reason of defect in the weighing machine at Katni. The Senior Divisional Commercial Manager, Bilaspur, SECR submitted reply dated 06.09.2017 (Annexure P-16) refusing to waive off the demand. Hence, the writ petition.

5. The appellants-Railways contested the writ petition and filed reply thereto. It was contended that challenge to the calculation sheet (Annexure P-12) is wholly misconceived, which in fact, was prepared by the appellants-Railways on the basis of the undercharge calculation made by the appellants as per letter dated 16.05.2017 (Annexure P-11) written by the writ petitioner itself to the Senior Divisional Manager, Ratlam and Senior Divisional Commercial Manager, Bilaspur, requesting for re-weighment of the rake. The calculation sheet (Annexure P-12) contains the actual weighment and it cannot be construed to be an order. It is denied that the calculation sheet was prepared without the request of the writ petitioner. The appellants-Railways have made calculation of the actual freight to be recovered from the respondent-writ petitioner. The cause of action to file writ petition arose at New Katni Junction wherein, the weight was intercepted and it was found that petitioner had deliberately shown lesser weight of the article in question. Since New Katni Junction comes within the West Central Railway, its non-impleadment to the writ petition as respondent would be fatal particularly when the Western Central Railway is a different zone than Western Railway and South East Central Railway.

6. The appellants-Railways further contended in the counter-affidavit that weighment was made for the first time at New Katni Junction. The procedure for weighment of wagons/rakes and issue of RR Rules are applicable for the weighment of the consignment. As per Railway Board Rates Circular No.86/2006 dated 13.10.2006 (Annexure R-1), para No.1451(c) if the wagons are loaded in the wagon without weighing it where there is no facility of weighment. Thereafter, wherever for the first time the facility becomes available within 24 hours from loading of consignment, weighment can be done by the Railway authorities. Since the consignment was loaded from Meghnagar and weighment of the consignment was done for the first time at New Katni Junction, the first stop where such facility was available, it was found that consignment was having more weight than disclosed by the petitioner. Therefore, calculation sheet (Annexure P-12) was prepared on the request of the writ petitioner himself as per Annexure P-11 dated 16.05.2017. The appellants-Railways further maintained that respondent-writ petitioner demanded 45 wagons of BOST nomenclature. The permissible carrying capacity of one wagon is 63 tons, therefore, total 45 wagons

can carry 2835 Metric Ton material. But when the weighment was done at New Katni Junction, it was found that the writ petitioner has loaded 2893.80 tons, which was more than the allowed weight of 2835 Metric Ton. Therefore, as per Railway Board's Rates Circular No.19 of 2012 dated 23.07.2012, the Railways was justified in raising additional demand of Rs.25,01,845/- for additional weight of 185.60 tons.

7. The learned Single Judge by impugned order dated 06.02.2020 allowed the writ petition by holding that the Railway Receipt issued in terms of Section 65 of the Railways Act is *prima facie* evidence of the weight and the number of packets stated therein. Since there was no weighment facility at Meghnagar, the weighment was taken at Katni Goods Railway site. But, there is nothing on record to indicate that the said weighment was done in the presence of any representative of the petitioner or with due notice to it. Immediately after coming to know about the stand of the Railways that overload weight of 185.60 MT was found, the respondent-writ petitioner filed an application under Section 79 of the Railways Act on 16.05.2017 demanding re-weighment. The learned Single Judge noted that as per pleadings contained in para-13 of the writ petition, at the stage of filing of the application, the goods had not reached the destination, therefore, it was possible for the appellants-Railways to put the goods to re-weighment. The learned Single Judge also held that Section 79 of the Railways Act provides for re-weighment of consignment on payment of prescribed charges. The appellants-Railways did not dispute the factum of filing of application for re-weighment (Annexure P-11) but on that application no action was taken and re-weighment was not done nor was any reason assigned therefor. The learned Single Judge held that before imposing penalty and issuing demand vide impugned orders Annexure P-10 and P-12, no opportunity of hearing was given to the writ petitioner. Besides, the learned Single Judge also observed that the Counsel for the petitioner has also pointed out that the weighbridge at Katni was not functioning properly earlier. The learned Single Judge relying on the judgment of Calcutta High Court reported as *Skylark Fiscal Service Pvt. Ltd. and Another vs. Union of India and others,* (2014) 2 High Court Cases (Cal) 457 and Gauhati High Court decision in the case of *Union of India vs. Salt Marketing Centre* reported in LAWS (GAU) 1995 818, set aside the impugned demand contained in letter dated 15.05.2017 (Annexure P-10) and calculation sheet dated 18.05.2017 (Annexure P-12).

8. We have heard Mr. H.Y. Mehta, learned counsel for the appellants-Railways and Mr. R.S. Chhabra, learned counsel for the respondent-writ petitioner.

9. Mr. H.Y. Mehta, learned counsel for the appellants has argued that the learned Single Judge failed to appreciate that Section 79 of the Railways Act gives the right to make a request for re-weighment only to the consignee or his endorsee.

In the present case, the request for re-weighment was made by the writ petitioner, who was consignor and therefore, since he had no right to demand re-weighment, there was no question of acceding to his prayer. It was argued that under Section 79 of the Railways Act, the payment of the charges for re-weighment is a pre-requisite condition and since the writ petitioner did not deposit any charges for re-weighment nor furnished any proof therefor, the respondent-writ petitioner therefore, did not have any right to demand re-weighment. Learned counsel for the appellants further argued that as per the law in question, there was no need for giving notice to the consignor before weighment was done at the first instance at New Katni Junction. On checking done at New Katni Junction, it was found that there was overloading done by the consignor. Learned counsel also argued that a Division Bench of this Court in *S. Goenka Lime & Chemicals Limited vs. Union of India and Another,* AIR 2016 MP 70 has held that the Railway administration is empowered to check weight of wagons at any point before delivery of goods and that giving of prior notice in such a situation would be counterproductive. The Division Bench also held that imposition of penalty is not only intended to recover extra charges but it is also aimed at discouraging consignor from overloading.

10. Learned counsel for the appellants also relied on a Division Bench judgment of Calcutta High Court in *Suresh Kumar Agarwal vs. Union of India,* AIR 2010 (Cal.) 90 (DB) and Division Bench judgment of Allahabad High Court in Durgesh Coal and others vs. Northern Railway, New Delhi and others, 2000 (2) AWC 1682 All: Manu / UP / 0347/2000: 2000 All LJ 2529. Learned counsel argued that in these cases it was held that Railway Receipt is issued on the basis of forwarding note. If the consignor loaded the consignment from its own siding, the Railway administration cannot be held responsible for overloading. Reference was made to the endorsement on Railway Receipt at Annexure P-7.

11. It was submitted that the respondent-writ petitioner wrongly contended that weighing-bridge was not functioning properly at New Katni Junction. Such allegation is missing in the pleadings of the writ petition. Therefore, the appellants-Railways cannot be taken by surprise by such argument for the first time directly before the Division Bench. Moreover, the writ petition involves several disputed questions of fact, which cannot be looked into in exercise of extraordinary jurisdiction by the High Court. Again relying on the judgment of the Division Bench in *S. Goenka Lime & Chemicals Limited* (supra), learned counsel submitted that this Court in that case has held that for such a plea, the aggrieved party had a statutory remedy to raise a dispute before the Tribunal on merits. It is therefore prayed that the impugned judgment be set aside and writ petition be dismissed.

12. *Per contra,* Mr. R.S. Chhabra, learned counsel for the respondent-writ petitioner argued that the learned Single Judge has rightly set aside the impugned demand, as the appellants-Railways failed to take any action on the application of

the writ petitioner for re-weighment nor they gave any reason for not taking any such action. It is argued that despite application for re-weighment dated 16.05.2017 filed by the consignor, re-weighment was not carried out by the Railways inasmuch as no reason was assigned for not doing so. The application for re-weighment not only was not responded but was also not dismissed on the ground now raised in the appeal. The statutory authorities cannot be permitted to supplement reasons by raising fresh grounds at the appellate stage. Moreover, the appellants-Railways also did not offer any opportunity of hearing to the writ petitioner before imposing penalty and issuing demand. Besides that, weighbridge at New Katni Junction was not functioning properly, which was evident from the difference in TARE weight of BVZC wagon as was revealed from the information gathered by the writ petitioner under the RTI Act. While the actual weight of BVZC wagon was 13.803 MT whereas the weighment machine at Katni depicted it 14.50 MT. It is argued that the Railways did not dispute the discrepancy of weighment of wagon BVZC in their reply to writ petition. Therefore, it cannot be said that the petition involves any disputed question of fact. The appellants-Railways, for the first time, have raised the issue about Section 79 of the Railways Act. It is disputed that Section 79 of the Railways Act does not permit re-weighment at the instance of the consignor. The Railways also for the first time raised this argument that consignee by letter dated 18.05.2017 had agreed to pay demurrage and penalty charges. It was also wrongly contended on behalf of the Railways that weighment can take place in the absence of the consignor and no notice or opportunity of hearing is required to be given. Reliance in this regard was wrongly placed by the Railways on the Division Bench judgment of this Court in *S. Goenka Lime & Chemicals Limited* (supra).

13. Mr. R.S. Chhabra, learned counsel for the respondent-writ petitioner placed heavy reliance upon the decision of the Supreme Court in *Jagjit Cotton Textile Mills vs. Chief Commercial Superintendent N.R. & Others,* (1998) 5 SCC 126, to argue that Section 73 of the Railways Act gives power to the Railways to collect the penal charges from the consignor, consignee or the endorsee if the goods are overloaded beyond the permissible carrying capacity. However, Section 74 of the said Act provides that the property in the consignment covered by a Railway receipt shall pass to the consignee or the endorsee, as the case may be, on the delivery of such railway receipt to him and he shall have all the rights and liabilities of the consignor. Therefore, the respondent-writ petitioner could very much file the application for re-weighment under Section 79 of the Railways Act. Learned counsel further argued that Sections 73 and 74 of the Railways Act clearly state that penal charges can be collected from the consignor, consignee or the endorsee, as the case may be. Therefore, the consignor shall be liable for penal charges even at the stage of delivery of goods at the destination if he has booked the goods for self. It was also held by the Supreme Court that the endorsee would

be liable if the delivery is applied for at the destination by the endorsee. The consignee would be liable if the delivery is applied for at the destination by the consignee. Section 73 of the Railways Act thus, expressly permits these penal charges to be collected from the consignee also. However, when the Railway Receipt is delivered to the consignee as per Section 74 of the Railways Act, not only the rights of the consignor but also the liabilities of the consignor pass on to the consignee. It is, therefore argued that Section 79 of the Railways Act has to be seen in consonance with Sections 73 and 74 of the said Act or else any other interpretation would lead to absurdity or arbitrariness thereby defeating the intent of the legislation. The Railways have not placed correct interpretation of Sections 73 and 74 of the Railways Act and the law propounded by the Supreme Court in *Jagjit Cotton Textile Mills* (supra).

14. As regards the Division Bench judgment in *S. Goenka Lime & Chemicals Limited* (supra), it was argued by learned counsel for the writ petitioner that this judgment only deals with opportunity of hearing at the time of weighment whereas the judgment of the Calcutta High Court in *Skylark Fiscal Service Pvt. Ltd.* (supra) and decision of Gauhati High Court in the case of *Salt Marketing Centre* (supra) deals with opportunity of hearing before levying punitive charges whereas, the weighment of goods is the first step, levy of punitive charges is second. Even though the principles of natural justice may not be required to be adhered to at the first stage but the same have to be mandatorily followed before the second stage i.e. before levying punitive charges. It is argued that the Division Bench in *S. Goenka Lime & Chemicals Limited* (supra) has not correctly analysed the ratio of the judgment of the Supreme Court in *Jagjit Cotton Textile Mills* (supra) and read it only for a limited purpose of challenge made to the Constitutional validity of Section 73 of the Railways Act read with Rule 3 of the Railway (Punitive Charges for Overloading of Wagon) Rules, 2005 (for short "the Rules of 2005"). It was argued that during the course of transportation of the goods, shipment was weighed at Katni In-Motion Rail weight on 14.05.2017 and allegedly an excess weight of 185.60 MT was found but this weighment was defective as demonstrated by TARE weight of empty BVZC wagon, which was mentioned as 14.50 MT at serial No.46 at page No.46 of weighment slip. The information received by the writ petitioner from the Railway authorities under the RTI Act reveals that TARE weight of BVZC wagon is 13.803 MT as against the weight depicted in wagon slip as 14.50 MT at page No.46. In these circumstances, there was material difference to the extent of 0.7 MT (700 kg) shown at the weighing machine at Katni. It was argued that as the other wagons i.e. BOST were filled with goods, the authorities could not have measured the actual TARE weight and used the standard TARE weight. The defect in the machine can be ascertained only from BVZC wagon as the same was empty and the TARE weight was wrongly measured by the Railway authorities. The claim of the appellants-

respondents is on the basis of the calculation derived out of a defective weighing machine. The claim as such was not disputed by the appellants-Railways in their reply before the writ court.

15. Learned counsel for the respondent-writ petitioner further argued that the Railways ought to have exercised their right under Section 78 of the Railways Act before delivery of goods to the consignee, which empowers them to re-measure, re-weigh or re-classify any consignment before its delivery. Even if Section 75(b) of the Railways Act is made applicable to the present case, the Railways would only have a right to recover freight from the consignor and not punitive charges. The punitive charges are to be recovered from the consignee in terms of Section 74 of the Railways Act. It is, therefore prayed that the appeal be dismissed.

16. The learned Single Judge in the impugned order has upheld the arguments of the writ petitioner that: (i) the re-weighment at New Katni Junction ought to have been done in the presence of the respondent-writ petitioner or with due notice to the writ petitioner; (ii) the application filed by the consignor under Section 79 of the Railways Act for re-weighment ought to have been decided, as it was made before the goods had reached the destination and (iii) the counsel for the writ petitioner has also pointed out that the weighbridge at Katni was not functioning properly earlier, by referring to documents enclosed with the petition. All these arguments raised by the writ petitioner, which have found favour with the learned Single Judge in the impugned order, are covered by the Division Bench judgment of this Court in *S. Goenka Lime & Chemicals Limited* (supra). However, since the said judgment was not cited before the learned Single Judge, it could not be considered.

17. As regards the argument that the Railway administration could not have unilaterally taken re-weighment of the goods at New Katni Junction and that the weighbridge thereat was defective at some point of time earlier, it may be noted that no specific finding has been given by the learned Single Judge in this regard. Though the learned counsel for the writ petitioner on the basis of the information obtained under the RTI Act sought to argue that the weighbridge at some point of time in the past was defective and on that basis, tried to lead an inference that computation of excess load made by the Railways was incorrect but the impugned order does not indicate that the learned Single Judge has given any specific finding to that effect and has merely recorded the argument of the learned counsel for the writ petitioner at the bottom of page-3 of the impugned order in the following terms:

> ".....Counsel for the petitioner has also pointed out that the weighbridge at Katni was not functioning properly earlier, by referring to the documents enclosed with the petition."

18. Both the arguments: whether the Railways could have taken the re-weighment at New Katni Junction or whether the weighbridge thereat was defective, were specifically taken note of by the Division Bench of this Court in *S. Goenka Lime & Chemicals Limited* (supra) and were rejected in paras 11 to 13 in the following terms:

> **"11.** As regards the argument that the Railway Administration could not have taken the goods to Katni Junction and the weighbridge thereat was defective, it is stated that the weighbridge at New Katni Junction is periodically checked by the Measurement Department. As per Rule 1422 of the Indian Railways Commercial Manual Volume II, the rake could be weighed at New Katni Junction weighbridge.
>
> The said rule reads thus:
>
> > "1422. Weighment of outward goods.-- (a) Outward goods should be weighed as indicated below, the particulars of weighment being entered on the forwarding note in the place provided for the purpose --
> >
> > (i) Consignments in small lots. - All consignments should be weighed in full at the forwarding station.
> >
> > (ii) Consignments in wagon loads. - (1) In the case of consignments of grain, salt, seeds, sugar, pressed cotton or other staples, in bags or bales of uniform size and weight, the weight declared by the consignor may be checked by weighing a proportion of the number of bags or bales of uniform size and averaging their weight. If the bags or bales are not of uniform size and weight, those of uniform size and weight, should be grouped separately, each lot being treated for the purpose of weighment as a separate consignment and weighed as such.
> >
> > The remainder of the consignment of bags or bales or other commodities not of uniform size should be weighed in full. The proportion weighed should not be less than 10 per cent at stations where the traffic is large and 20 per cent at other stations.
> >
> > (2) Goods loose, bulky goods or goods in bulk such as sand, stone, timber, etc., which cannot be weighed on the ordinary weighing machine provided at stations should be weighed on a wagon weighbridge at the forwarding station, if one is provided there. If there is no weighbridge at the starting station, the wagon may be weighed at a convenient weighbridge station en route,

> which should as far as possible, be the first weigh bridge station. In case there is no weighbridge en route the wagon may be weighed at destination, if a weighbridge is available there."
>
> **12.** According to the respondents, the onus is on the owner of the goods as per the scheme of the Act and the Rules regarding loading or unloading. The Volumetric method adopted is the responsibility of the consigner. The weighment done at the weighbridge is meant to be authentic and any action of overloading arising in, is the responsibility of the consigner. As per section 87 of the Railways Act, the Rules of 2005 have been framed. Rule 3 of the Rules of 2005 provides for punitive charges for overloading the wagon. This provision is to prevent any foul play being committed by the consigner/owner. For that reason, the Railway Administration, scrupulously checks all railway wagons to detect any mischief. If the weighment is done at the originating Station and if overloading is noticed, the owner/consigner can be given option to unload the excess weight. However, when such weighing facility is not available at the originating Station, the responsibility is that of the consigner/owner to ensure that no overloading takes place and if such overloading is detected en route or at the destination Station the consigner/owner is made liable to pay punitive charges and other charges as the case may be.
>
> **13.** On facts of the present case, it is stated that the grievance of the petitioner is founded on surmises and conjectures. Whereas, the punitive charges and other charges levied on the petitioner are on the basis of the actual weight detected en route, in accordance with the prescribed norms. The action of the Railways is strictly in conformity with the provisions of the Act and Rules made thereunder. The respondents have prayed for dismissal of the writ petition."

Still further, with regard to the contention of the writ petitioner that the weighbridge at the point of re-weighment at Katni was defective at some point of time earlier and therefore, the claim of the Railways was misconceived, the Division Bench categorically held that this being a disputed question of fact, could be agitated by the aggrieved party by way of statutory remedy provided under the Railways Act or by filing a suit asking for appropriate relief. The relevant extract of the judgment in *S. Goenka Lime & Chemicals Limited* (supra), reads as under:

> **"25.** It was argued that the weighing machine at NKJ, Katni was defective and could not have projected the correct weight of the goods or aggregate weight along with the wagon weight. This being a disputed question of fact can be agitated by the petitioner

> by way of statutory remedy provided under the Railways Act or by filing a suit and ask for appropriate relief, if so advised. We do not intend to examine that controversy in the present petition."

19. The argument of the learned counsel for the writ petitioner that the judgment of the Supreme Court in *Jagjit Cotton Textile Mills* (supra) was not correctly analysed by the Division Bench in *S. Goenka Lime & Chemicals Limited* (supra) is noted to be rejected. The aforesaid judgment of the Supreme Court was thoroughly considered and was in fact, relied upon by the Division Bench to repel the challenge to the validity of Section 73 of the Railways Act and Rule 3 of the Rules of 2005, by quoting para-42 of the aforementioned judgment of the Supreme Court, as would be evident from para-15 of the report in *S. Goenka Lime & Chemicals Ltd.* (supra), which reads, thus:

> **"15.** Having considered the rival submissions, we may first deal with the challenge to the validity of section 73 of the Act and Rule 3 of the Rules of 2005. The purport of section 73 of the Act of 1989 has been considered by the Supreme Court in the case of Jagjit Cotton Textile Mills (AIR 1998 SC 1959) (supra). The Supreme Court has opined that the provisions of the Act and the Rules made thereunder, empower the Central Government to fix the maximum and minimum rates. The expression "rate" is wide enough to encompass the amount towards penal charges, being other payment. The stipulation in section 73 was earlier engrafted in Rule 161-A of IRCA Rules. The Supreme Court further noted that section 73 of the Act gives power to the Railways to levy and collect penal charges from the consignor, consignee or the endorsee, as the case may be, if the goods are overloaded beyond the "permissible carrying capacity". The provisions in question, not only prohibit the "consignors" from exceeding the permissible carrying capacity of the wagon, but, also empower the Railway Administration to recover penal charges in the event of discovery of overweight at the booking point or en route or at the destination station, for the entire distance from the booking point to the destination station. It is held that the second part of the provision is quite wide and unrestricted and can be treated as permitting recovery of the penal charge from the consignor or consignee or the endorsee as the case may be, though these words are not expressly used in Rule 161-A. In para 42 of the judgment while specifically dealing with the challenge to the relevant provisions including section 73 of the Act, the court observed thus:
>
> > **"42.** In our view, these contentions are not tenable. As has been noticed in our discussion on Points 1 and 2, the railway statutes define "maximum carrying capacity",

"normal carrying capacity"(to be marked on the wagon); and the "permissible carrying capacity". No wagon can be loaded beyond the maximum carrying capacity. The wagon could not ordinarily be loaded beyond the normal carrying capacity or upto any upward variation thereof and this limit is called the permissible carrying capacity. Section 73 of the new Act and Rule 161-A of the old Rules permit loading in excess of the permissible carrying capacity without any penal charges, now upto a limit of 2 tonnes. (Earlier it was upto 1 tonne). What is now subjected to a penal charge is the excess over and above the permissible level above stated which is always below the maximum limit. In our view, this levy under Sec. 73 of the new Act and the old Rule 161-A is intended for dual purposes - one is to see that the gross weight at the axles is not unduly heavy so that accidents on account of the axles breaking down, could be prevented. The other reason behind the collection is that, inasmuch as the wagon has carried such excess load upto the destination point at the other end, the replacement cost of the coaches, engines or rails or of repairs to be bridges be covered. In our view, the extra rate is a higher rate i.e., something like a surcharge for the excess load, to meet the said expense. Therefore, we do not think that any principle of "delinquency" is ingrained in this levy as in the case of breach of civil obligations under the FERA or Customs Act or the Employees Provident Fund Act. Those cases involved penalties for breach of the Acts and were not concerned with charging a person for services rendered nor with an extra charge for services which involved extra strain to the property of the bailee who had rendered the service. Obviously the Railway Board has kept these aspects in mind while collecting these charges. There is therefore no violation of Article 14. Further, the question of reasonableness of the quantum of any such extra rate cannot be challenged before us and the appropriate forum therefor is the Railway Rates Tribunal. Rule 161-A can therefore, be resorted to for collecting these penal charges from the consignee also. After all, the consignee had received delivery of the overloaded goods and used the same for their business, commercial or industrial purposes. For the above reasons, a statutory provision like Sec. 73 or Rule 161-A which permits levy on such a consignee cannot, in our

> view, be said to be arbitrary or unreasonable in the context of Article 14."
>
> (emphasis supplied)

20. Section 73 of the Railways Act postulates punitive charges for overloading a wagon and provides that where a person loads goods in a wagon beyond its permissible carrying capacity, the Railway administration may, in addition to the freight and other charges, recover from the consignor, the consignee or the endorsee, as the case may be, charges by way of penalty at such rates, as may be prescribed, before the delivery of the goods. The proviso to Section 73 of the said Act amplifies the scope of the main provision by stipulating that it shall be lawful for the Railway administration to unload the goods loaded beyond the capacity of the wagon, if detected at the forwarding station or at any place before the destination station and to recover the cost of such unloading and any charge for the detention of any wagon on this account. It has come on record that the representative of the writ petitioner was sent a communication to unload the excess material from the alleged overloaded wagons and shift the same in the underloaded wagons. Indisputably, the writ petitioner arranged two labourers for shifting the goods in the underweight wagons. The material was accordingly adjusted and thereafter only the train could depart. It is for this reason of overloading in the wagons at the instance of the writ petitioner and detention of the train, the Station Manager (Goods), Meghnagar vide order dated 15.05.2017 (Annexure P-10) had imposed a penalty upon the respondent-writ petitioner, as provided under Section 73 of the Railways Act.

21. The punitive charges have also been prescribed under Rule 3 of the Rules of 2005. According to the same, where the commodities are overloaded in a eight wheeled wagon, the Railway administration shall recover punitive charges as provided in parts I, II and III of the situations 'A' and 'B' of the Schedule, from the consignor, the consignee or the endorsee as the case may be, for the entire weight of the commodities loaded beyond the permissible carrying capacity for the entire distance to be travelled by train hauling the wagon from the originating station to the destination point, irrespective of the point of detection of overloading. The only exception, however is that if the customer carries out load adjustment at the originating station itself in case of detection of overloading at originating point, he may not be liable to pay punitive charges. Reliance on this aspect may be placed on the observations in para-20 of the Division Bench judgment in *S. Goenka Lime & Chemicals Ltd.* (supra), which reads as under:-

> **"20.** The argument then proceeds that if the overloaded goods were removed after being detected en route, the Railway Administration cannot be allowed to recover any amount in the name of penalty for the distance between the originating station and the destination station. This argument though attractive at

> the first blush, deserves to be stated to be rejected. Section 73 empowers the Railway Administration to collect penalty charges at the prescribed rate and as per Rule 3, the person becomes liable to pay such rates for the entire weight of the commodities loaded beyond the permissible carrying capacity for the entire distance to be travelled by train hauling the wagon from the originating station to the destination point, irrespective of the point of detection of overloading. This provision may appear to be harsh for levy of penalty charges, after the unloading of the wagon at the point en route where the overloading was detected. However, keeping in mind the purpose underlying Section 73 - is not only to recover extra charges for dual purposes, but, also to discourage the consignor from overloading the wagons beyond permissible limits which inevitably results in damage to the coaches, engines or rails or of repairs to the bridges. It cannot be overlooked that damage is bound to be caused due to overloading of wagons; and any accident on that account inevitably affects the rolling stock of the Railways. The fact that such accident in fact did not take place, can be no argument to extricate the consignor/owner. For, the damage due to overloading is inevitable. Further, the cascading effect of any such damage in the given situation, may be much more than the amount of the prescribed penalty to be recovered because of the overloading of wagons."

22. The contention that the Railways should have provided opportunity of hearing to the writ petitioner before re-weighment at New Katni Junction and at least, before levying of the punitive charges, was also categorically considered and repelled by the Division Bench in para-23 of its judgment in *S. Goenka Lime & Chemicals Ltd.* (supra), in the following terms:

> **"23.** The next contention of the petitioner that no opportunity of hearing was given to the petitioner nor any notice was given before the wagon was taken to NKJ Kami and the wagon was weighed in the absence of petitioner, also does not commend to us. The provision of Section 73 of the Act read with Rule 3 of the Rules, on the other hand, empowers the Railway Administration to check the weight of wagon at any point before the delivery of the goods to ascertain whether the loading of goods was within the permissible limits. Giving prior notice before taking such surprise action, would be counterproductive. If the aggrieved person has any dispute about the correctness of the weighment done by the Railway Administration en route before delivery of goods to the consignee, is free to question the same by way of appropriate proceedings including statutory remedy provided under the Railways Act. The aggrieved person must substantiate

his claim in the said proceedings to succeed in questioning the assessment made by the Railway Administration."

23. In view of the above discussion, it must be held that the impugned order passed by the learned Single Judge having been passed under ignorance of the binding decision of the Division Bench in *S. Goenka Lime & Chemicals Ltd.* (supra), besides being per incuriam, is also liable to be set aside on the law propounded by the Division Bench, as discussed hereinabove. We, however, leave it open for the writ petitioner to pursue the statutory remedy before the Railway Claims Tribunal or in a suit or before any other statutory forum, as may be advised to it, and raise all the permissible arguments including the argument whether the request for re-weighment could have been made only by the consignor and not by the consignee or his endorsee, which shall be decided on its own merits in accordance with law. On this aspect, this Court may not be understood to have expressed any opinion, one way or the other.

24. Resultantly, the impugned order passed by the learned Single Judge is set aside. The present appeal succeeds and is allowed, however, with aforementioned observation.

Appeal allowed

I.L.R. [2021] M.P. 1509 (DB)
WRIT APPEAL

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

WA No. 1381/2019 (Gwalior) decided on 30 June, 2021

LAXMAN SINGH BAGHEL …Appellant

Vs.

STATE OF M.P. & anr. …Respondents

***A. Civil Services (General Conditions of Service) Rules, M.P., 1961, Rule 6(6) – Disqualification – Issuance of Appointment Order* – Held – Point of incurring disqualification under Rule 6(6) is the appointment and not the last date of submission of application pursuant to advertisement – Since 3rd child was born before issuance of appointment order, petitioner rendered himself disqualified for the said appointment – Appeal dismissed.**

(Paras 6, 8, 9 & 11)

क. सिविल सेवा (सेवा की सामान्य शर्तें) नियम, म.प्र., 1961, नियम 6(6) – निरर्हता – नियुक्ति आदेश जारी किया जाना – अभिनिर्धारित – नियम 6(6) के अंतर्गत निरर्हता उपगत करने का बिंदु नियुक्ति है न कि विज्ञापन के अनुसरण में आवेदन जमा करने की अंतिम तिथि – चूंकि तीसरे बच्चे का जन्म नियुक्ति आदेश के जारी होने के पूर्व हुआ था, याची ने उक्त नियुक्ति के लिए स्वयं को निरर्हित बना दिया – अपील खारिज।

***B. Civil Services (General Conditions of Service) Rules, M.P., 1961, Rule 6(6) – Disqualification – Grounds* – Held – Candidate who may not be disqualified under this provision at the time of submission of his application form or at any stage during recruitment process, but incurred disqualification on account of 3rd child born before the appointment order, would suffer disqualification under the said provision. (Para 7)**

ख. सिविल सेवा (सेवा की सामान्य शर्तें) नियम, म.प्र., 1961, नियम 6(6) – निरर्हता – आधार – अभिनिर्धारित – अभ्यर्थी जिसे उसके आवेदन पत्र जमा करने के समय अथवा भर्ती प्रक्रिया के दौरान किसी भी प्रक्रम पर इस उपबंध के अंतर्गत निरर्हित नहीं किया जा सकता, परंतु नियुक्ति आदेश के पूर्व जन्में तीसरे बच्चे के कारण निरर्हता उपगत करता है, उक्त उपबंध के अंतर्गत निरर्हित होगा।

Prashant Sharma, for the appellant.
Ankur Mody, Addl. A.G. for the respondent No. 1/State.
Arun Katare, for the respondent No. 2.

O R D E R

The Order of the Court was passed by:
SHEEL NAGU, J. :- Present intra-court appeal, filed u/S.2(1) of Madhya Pradesh Uccha Nayalaya (Khand Nyayapeeth Ko Appeal) Adhiniyam, 2005, assails the final order dated 19.07.2019 passed in Writ Petition No.8343/2016 by the learned Single Judge while exercising writ jurisdiction u/Art.226 of the Constitution dismissing the petition in question by which challenge was made to Annexure P-1 and P-2 dated 16.09.2016 & 05.11.2012 informing petitioner/appellant that he is disqualified to be appointed as Assistant Seed Certification Officer owing to third child having been born to appellant/petitioner after 26.01.2001. The other letter under challenge was a show-cause notice as to why FIR be not lodged against the petitioner/appellant for taking shifting stands on affidavit in regard to the date of birth of the third child.

2. Learned Single Judge has dismissed the petition in question on the ground that petitioner/appellant was disqualified u/R.6(6) of the Madhya Pradesh Civil Services [General Conditions of Services] Rules 1961 (for brevity "1961 Rules") and has misled the employer by giving two different dates of birth of third child. As such it is held by the learned Single Judge that the petitioner/appellant is ineligible for government service.

3. Though the controversy lies in a narrow compass but enumeration of the skeletal facts attending the case is necessary:

09/01/01	:	First child Ku. Pragati born to the petitioner/appellant.
08/07/03	:	Second child Ku. Rakshita born to the petitioner/appellant.

20.03.2008	:	Third child Master Krishna Baghel born to petitioner/ appellant as per the first affidavit sworn in by petitioner/ appellant vide A-3 along with IA.1406/2020 in WA.
30.06.2009	:	Last date for submission of application forms invited by advertisement issued by VYAPAM for filling up 112 posts of Assistant Seed Certification Officer.
20.11.2009	:	Allegedly corrected date of birth of third child Master Krishna Baghel as per second affidavit sworn in by the petitioner/appellant.

4. For the sake of clarity, the relevant statutory provision contained in Rule 6(6) of 1961 Rules is reproduced below:

> "(6) No candidate shall be eligible for appointment to a service or post who has more than two living children on of whom is born on or after the 26th day of January, 2001.
>
> Provided that no candidate shall be disqualified for appointment to a service or post, who has already one living child and next delivery takes place on or after the 26th day of January 2001, in which two or more than two children are born."

5. The contention of learned counsel for petitioner/appellant is that the eligibility of a candidate is judged as on the last date of submission of application forms published in the advertisement, which was 30.06.2009 in the present case and since third child [Master Krishna Baghel] was born on 20.11.2009 [as per the second affidavit containing the changed date of birth] petitioner/appellant did not incur any disqualification under Rule 6(6) of 1961 Rules on the relevant date i.e. 30.06.2009 when the third child was not born.

6. It is not disputed at the bar by the rival parties that the said element of disqualification as alleged by the employer of petitioner/appellant having third child was discovered before the appointment order could be issued.

7. A close scrutiny of the text of Rule 6(6) reveals that the disqualification of a third child born after 26.01.2001 contemplated therein is in relation to eligibility for appointment to a service or post under the Government of Madhya Pradesh. This disqualification *qua* a candidate is for appointment. Thus, the candidate who may not be disqualified under this provision at the time of submission of his application form or at any stage during the process of recruitment, but incurred disqualification on account of third child born before the appointment order, would suffer disqualification under the said provision. This is the plain and simple meaning which can be derived from textual & contextual interpretation of the said provision.

8. In the instant case, even if we ignore the dispute as regards correct date of birth of third child [20.03.2008 or 20.11.2009] and for the sake of argument accept the contention of petitioner/appellant that the third child was born on 20.11.2009, then too petitioner/appellant has suffered disqualification u/R.6(6) of 1961 Rules with effect from 20.11.2009 and has rendered himself ineligible for appointment to the post of Assistant Seed Certification Officer.

9. The concept of last date for submissions of application forms has no relevance for the purpose of disqualification u/R.6(6) of 1961 Rules. The reason is not far to see. The point of incurring of disqualification u/R.6(6) of 1961 Rules is the appointment and not the last date of submission of application pursuant to advertisement.

10. It could have been a different matter if petitioner/appellant had been appointed by issuance of the appointment order prior to the birth of third child. In that situation petitioner/appellant would have been dealt with differently as per the applicable rules.

11. In view of above discussion and testing the factual matrix attending the instant case on the anvil of Rule 6(6) of 1961 Rules, there is no manner of doubt that since third child was born before the appointment order to the post in question could be issued, the petitioner/appellant has rendered himself disqualified for the said appointment.

12. Consequently, this Court does not see any reason to take a different view than the one taken by the learned Single Judge, though for an additional reason as enumerated above.

13. Consequently, present writ appeal stands ***dismissed.***

Appeal dismissed

I.L.R. [2021] M.P. 1512
WRIT PETITION
Before Mr. Justice G.S. Ahluwalia
WP No. 18600/2020 (Jabalpur) decided on 31 May, 2021

RAJJAN YADAV …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

***A. Rajya Suraksha Adhiniyam, M.P. 1990 (4 of 1991), Sections 4, 5 & 6 – Externment Orders – Principle of Natural Justice* – Held – Compelling petitioner's counsel to argue finally before cross-examination of witness and thereafter not giving him any opportunity to argue in light of cross-examination,**

is a complete go by to principles of natural justice – District Magistrate acted in a haste – No reasoning mentioned in the order – Procedure adopted by District Magistrate shows that he acted *malafidely* and arbitrarily – Impugned order set aside – Petition allowed with cost of Rs. 20,000. (Paras 11 to 15)

क. राज्य सुरक्षा अधिनियम, म.प्र., 1990 (1991 का 4), धाराएँ 4, 5 व 6 – निर्वासन आदेश – नैसर्गिक न्याय का सिद्धांत – अभिनिर्धारित – याची के अधिवक्ता को साक्षी के प्रतिपरीक्षण के पूर्व अंतिम रूप से बहस करने हेतु विवश करना और तत्पश्चात् उसे प्रति–परीक्षण के आलोक में बहस करने का कोई अवसर नहीं देना, नैसर्गिक न्याय के सिद्धांतों की पूर्णतः उपेक्षा करना है – जिला मजिस्ट्रेट ने जल्दबाजी में कार्य किया – आदेश में कोई तर्क उल्लिखित नहीं – जिला मजिस्ट्रेट द्वारा अपनाई गई प्रक्रिया यह दर्शाती है कि उन्होंने असद्भावपूर्वक और मनमाने रूप से कार्य किया है – आक्षेपित आदेश अपास्त – याचिका 20,000/– रू. के व्यय सहित स्वीकार।

***B. Rajya Suraksha Adhiniyam, M.P. 1990 (4 of 1991), Sections 4, 5 & 6 – Externment Orders – Cross Examination* – Held – Cross-examination is the only important tool in the hands of wrongdoer to prove his innocence – Cross examination of witness is not a mere formality. (Para 12)**

ख. राज्य सुरक्षा अधिनियम, म.प्र., 1990 (1991 का 4), धाराएँ 4, 5 व 6 – निर्वासन आदेश – प्रतिपरीक्षण – अभिनिर्धारित – अपनी निर्दोषिता साबित करने के लिए अपराधी के हाथ में प्रति–परीक्षण ही एकमात्र महत्वपूर्ण औजार है – साक्षी का प्रति–परीक्षण मात्र औपचारिकता नहीं है।

***C. Rajya Suraksha Adhiniyam, M.P. 1990 (4 of 1991), Sections 4, 5 & 6 – Externment Orders – Reasoning* – Held – Nothing has been discussed in the order as to why activities of petitioner are detrimental to law and order requiring him to remove him from the District of Jabalpur and its neighboring District – Reasons are heartbeat of an order – Order passed without application of mind. (Para 13)**

ग. राज्य सुरक्षा अधिनियम, म.प्र., 1990 (1991 का 4), धाराएँ 4, 5 व 6 – निर्वासन आदेश – तर्क – अभिनिर्धारित – आदेश में ऐसा कुछ विवेचित नहीं किया गया है कि क्यों याची की गतिविधियां विधि एवं व्यवस्था के लिए अहितकर है जिससे उसे जबलपुर जिले एवं उसके पड़ोसी जिले से बाहर निकालना उससे अपेक्षित था – कारण, एक आदेश का मर्म होते हैं – आदेश मस्तिष्क का प्रयोग किये बिना पारित किया गया।

***D. Rajya Suraksha Adhiniyam, M.P. 1990 (4 of 1991), Sections 4, 5 & 6 – Externment Orders – Requirement* – Held – Two conditions are required to be satisfied for passing an order of externment, firstly, alleged offence should have close proximity to the order of externment; and, secondly, there has to be some material to show that witnesses were not coming forward to give statement against the proposed externee. (Paras 7 to 9)**

घ. राज्य सुरक्षा अधिनियम, म.प्र., 1990 (1991 का 4), धाराएँ 4, 5 व 6 – निर्वासन आदेश – अपेक्षा – अभिनिर्धारित – निर्वासन का आदेश पारित करने के लिए दो शर्तों का पूर्ण किया जाना अपेक्षित है, पहली अभिकथित अपराध की निर्वासन के आदेश से निकटता होनी चाहिए, और दूसरी यह दर्शाने हेतु कुछ सामग्री होनी चाहिए कि प्रस्तावित निर्वासित व्यक्ति के विरूद्ध कथन देने हेतु साक्षीगण आगे नहीं आ रहे थे।

Cases referred :

W.P. No. 18605/2020 order passed on 09.02.2021, (2010) 9 SCC 496.

Vasant Roland Daniel, for the petitioner.
Ankit Agrawal, G.A. for the respondents/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 seeking the following reliefs:-

> "1. That, this Hon'ble Court may kindly be please to set aside the order of the Commissioner Jabalpur respondent no.1 dated 11.11.2020.
>
> 2. That, the Hon'ble Court may kindly be pleased to pass any other relieves in accordance with law."

2. It is the case of the petitioner that an order of externment was passed on 6/11/2016 by the District Magistrate, Jabalpur, which was complied by the Petitioner. Thereafter, on 26/3/2018 the SP, Jabalpur vide his recommendation No.PA/Jabalpur/Reader/IJB/18/18 prayed the District Magistrate, Jabalpur to take action against the petitioner under Section 5 of the M.P. Rajya Suraksha Adhiniyam.

3. By order dated 29/9/2018 the District Magistrate passed an order of externment thereby externing the petitioner from the limits of District of Jabalpur and other adjoining Districts, namely, Mandla, Dindori, Narsinghpur, Seoni, Katni, Damoh and Umaria for a period of one year. The petitioner preferred an appeal against the order dated 29/8/2018 before the Commissioner, Jabalpur, which was registered in case No.91/Externment/18, which was decided on 20/2/2019 and the order dated 29/9/2019 passed by the Collector, Jabalpur was set aside because the District Magistrate had not even recorded the statement of the department and accordingly, the matter was remanded back to decide afresh after giving full opportunity to the petitioner to put forward his defence. On 8/7/2020 an FIR was registered against the petitioner and other two co-accused persons in Police Station Khamariya, Jabalpur for offence under Sections 327, 294, 506, 427/34 of IPC in Crime No.184/2020. It is submitted that again on 8/7/2020 itself,

the S.P. Jabalpur sent a recommendation for taking action under M.P. Rajya Suraksha Adhiniyam, in the light of the order passed by the Commissioner, Jabalpur dated 20/2/2019, Annexure P/2 as well as in the light of the fact that Crime No.184/2020 has been registered against the petitioner, and prayed that an order of externment for a period of one year may be passed. Accordingly, a show-cause notice was issued by the District Magistrate, Gwalior on 8/7/2020. It is submitted that the petitioner submitted his reply. The respondents examined their witness and after considering the material available on record, the District Magistrate, Jabalpur passed the order dated 28/7/2020 thereby externing the petitioner from the limits of Jabalpur and adjoining Districts, namely, Mandla, Dindori, Narsinghpur, Seoni, Katni, Damoh and Umaria for a period of one year. Being aggrieved by the said order, the petitioner preferred an appeal, which has been dismissed by the Commissioner, Jabalpur by order dated 11/11/2020 passed in case No. 12/Externment/2020.

4. Challenging the orders passed by the District Magistrate as well as the Commissioner, Jabalpur, it is submitted by the counsel for the petitioner that while passing an order of externment, the stale cases cannot be taken into consideration. The Sub Inspector, Police Station Khamariya, District Jabalpur in her evidence has admitted that from the year 2017 till 2020 neither any criminal case except Crime No.184/2020, was registered against the petitioner nor any preventive measure was taken. It is further submitted that it is clear from the order of the District Magistrate that he has relied upon the stale criminal cases which were registered against the petitioner, according to which, two criminal cases were registered against the petitioner in the year 1997, three criminal cases were registered in the year 1998, one case each was registered in the years 2004, 2006, 2009, 2010, 2013, four criminal cases were registered in the year 2014 and one criminal case each was registered in the year 2016 and 2017. It is further submitted that the Commissioner, Jabalpur has held that although the order of externment was also passed against the petitioner in the year 2018, but still his criminal activities could not be controlled and in the year 2020 one more offence under Sections 327, 294, 506 and 427/34 of IPC was also registered. It is submitted that the coordinate Bench of this Court in the case of *Ramlakhan Yadav Vs. State of M.P. and others* passed in Writ Petition No.18605/2020 by order dated 9/2/2021 has quashed the externment proceedings and the present case is squarely covered by it. It is further submitted that this Court by order dated 1/3/2021 had directed the State Counsel to verify as to whether the case of the petitioner is squarely covered by the judgment passed by the coordinate Bench of this Court in the case of *Ramlakhan Yadav* (supra) or not. It is further submitted that the alleged offences should have close proximity to the order of externment and there has to be some material on record to show that the witnesses are not coming forward to give statement against the externee. It is submitted that in view of the fact that no

offence was registered against the petitioner in the year 2017, 2018 and 2019 and only one crime was registered against the petitioner in the year 2020, which was not for committing any heinous offence, the order of externment is harsh one and is liable to be quashed.

5. *Per contra,* the counsel for the State opposed the writ petition, however, fairly conceded that the present case is squarely covered by the judgment passed by the coordinate Bench of this Court in the case of *Ramlakhan Yadav* (supra). It is further submitted that in the said case there was no material to show that the witnesses are not coming forward, however, in the present case the statement of Police Sub Inspector was recorded, who has stated that the witnesses are afraid of the petitioner and they are not coming forward and even in most of the cases, the reports are not lodged against the petitioner in the police station. However, it is fairly conceded that except this bald statement, the respondents have not filed any documentary evidence to show that the witnesses are not coming forward to depose against the petitioner or they are afraid of him.

6. Heard learned counsel for the parties.

7. It is well established principle of law that two conditions are required to be satisfied for passing an order of externment:

8. Firstly, the alleged offence should have close proximity to the order of externment; and,

9. Secondly, there has to be some material to show that the witnesses were not coming forward to give statement against the proposed externee.

10. The respondents have filed their return and has also produced the record of the Court of District Magistrate, Jabalpur.

11. From the order-sheets of the Court of District Magistrate, Jabalpur it is clear that on 8/7/2020, the SP Jabalpur made an application for taking action against the petitioner under Sections 4, 5, 6 of M.P. Rajya Suraksha Adhiniyam and on the very same day notices were issued and the case was fixed for 10/7/2020. On 10/7/2020, the counsel for the petitioner appeared before the District Magistrate, Jabalpur and prayed for time to file reply as well as to argue the matter. On the very same day, statement of Sub Inspector Nirupa Pandey was recorded and a liberty was given to the counsel for the petitioner to cross-examine her, however, the counsel for the petitioner prayed for time to file reply to the show-cause notice, to cross-examine the witness as well as to argue the matter. Accordingly, time was granted to the petitioner to cross-examine the witness as well as to file the reply and to finally argue the matter. On the same day, the copy of application filed by the SP, Jabalpur alongwith documents were supplied to the counsel for the petitioner. On 14/7/2020 a detailed reply was filed by the

petitioner and the arguments were made by the counsel for the petitioner. Since the witness was not present, therefore, the case was adjourned for cross-examination of the witness. Later on, the Sub Inspector Nirupa Pandey appeared before the District Magistrate and accordingly, she was bound over for the next date. On 17/7/2020 the prosecution witness Sub Inspector Nirupa Pandey was cross-examined by the petitioner and accordingly, the case was fixed for delivery of judgment and accordingly, on 28/7/2020 the final order was passed by the District Magistrate, Jabalpur.

12. Although the petitioner has not challenged the manner in which the proceedings were conducted, but from the order-sheets, it appears that the District Magistrate has acted in a haste. Notices were issued on 8/7/2020, which were affixed on the house of the petitioner and the counsel for the petitioner appeared on 10/7/2020 and prayed for time to file reply and argue the matter. On the very same day, the prosecution witness was examined and the cross-examination was deferred on the request of the petitioner. Thereafter, on the next day the reply was filed, but it appears that the counsel for the petitioner was directed to finally argue the matter even prior to cross-examination of the witness. Thereafter, on 17/7/2020 the prosecution witness was cross-examined and the case was fixed for delivery of judgment and no further argument was heard in the light of the cross-examination of the prosecution witness. The manner in which the proceedings were conducted by the District Magistrate, Jabalpur cannot be approved. Cross-examination is the only important tool in the hands of the wrongdoer to prove his innocence. Cross-examination of a witness is not a mere formality. Without adverting to the question as to whether the District Magistrate should have recorded the examination-in-chief of the prosecution witness on day one without supplying the copy of the application filed by the S.P., Jabalpur along with its documents and without awaiting for the reply of the petitioner, this Court is of the considered opinion that compelling the petitioner's counsel to argue the matter finally before cross-examination of a witness and thereafter not giving any opportunity of hearing to the petitioner's counsel to argue in the light of the cross-examination of the witness, is a complete go by to the principles of natural justice. It is clear that no opportunity was granted to the Petitioner to advance arguments on the basis of cross-examination of the witness. It is also not clear from the order-sheet dated 17/7/2020, as to whether the petitioner had sought time to lead his evidence or not or the petitioner had expressed that he does not want to lead his evidence.

13. Further, it is apparent from the order dated 28-7-2020, passed by the District Magistrate, Jabalpur, the practice of cut and paste has been adopted. The District Magistrate, Jabalpur in the impugned order, has cut and paste its earlier order dated 29-9-2018, and thereafter, has cut and paste the examination-in-chief of Ms. Nirupa Pandey, Sub-Inspector, thereafter cut and paste the show cause

notice issued to the petitioner and the reply submitted by the petitioner. Thereafter, the District Magistrate, cut and paste the cross-examination of Ms. Nirupa Pandey, Sub-Inspector. Thereafter, in para 13, the District Magistrate, Jabalpur, without considering the nature of criminal cases registered against the petitioner, its outcome, as well as without considering that whether the stale cases can be taken into consideration for passing the order of externment, directly jumped to the conclusion that since, one more criminal case was registered against the petitioner in the year 2020, therefore, his activities have made him liable for his externment from the District Of Jabalpur and its neighboring Districts Mandla, Dindori, Narsinghpur, Seoni, Katni, Damoh and Umaria. In para 13, except by mentioning that he has gone through the various orders passed by the Courts, nothing has been discussed as to why the activities of the petitioner are detrimental to the law and order requiring him to remove him from the District of Jabalpur and its neighboring District. It is well established principle of law that reasons are heartbeat of an order. The Supreme Court in the case of *Kranti Associates (P) Ltd. Vs. Masood Ahmed Khan,* reported in (2010) 9 SCC 496 has held as under :

> **46.** The position in the United States has been indicated by this Court in *S.N. Mukherjee* in SCC p. 602, para 11 : AIR para 11 at p. 1988 of the judgment. This Court held that in the United States the courts have always insisted on the recording of reasons by administrative authorities in exercise of their powers. It was further held that such recording of reasons is required as "the courts cannot exercise their duty of review unless they are advised of the considerations underlying the action under review". In *S.N. Mukherjee* this Court relied on the decisions of the US Court in *Securities and Exchange Commission* v. *Chenery Corpn.* and *Dunlop* v. *Bachowski* in support of its opinion discussed above.
>
> **47.** Summarising the above discussion, this Court holds:
>
> (*a*) In India the judicial trend has always been to record reasons, even in administrative decisions, if such decisions affect anyone prejudicially.
>
> (*b*) A quasi-judicial authority must record reasons in support of its conclusions.
>
> (*c*) Insistence on recording of reasons is meant to serve the wider principle of justice that justice must not only be done it must also appear to be done as well.
>
> (*d*) Recording of reasons also operates as a valid restraint on any possible arbitrary exercise of judicial and quasi-judicial or even administrative power.

(*e*) Reasons reassure that discretion has been exercised by the decision-maker on relevant grounds and by disregarding extraneous considerations.

(*f*) Reasons have virtually become as indispensable a component of a decision-making process as observing principles of natural justice by judicial, quasi-judicial and even by administrative bodies.

(*g*) Reasons facilitate the process of judicial review by superior courts.

(*h*) The ongoing judicial trend in all countries committed to rule of law and constitutional governance is in favour of reasoned decisions based on relevant facts. This is virtually the lifeblood of judicial decision-making justifying the principle that reason is the soul of justice.

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

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

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

(*l*) Reasons in support of decisions must be cogent, clear and succinct. A pretence of reasons or "rubberstamp reasons" is not to be equated with a valid decision-making process.

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

(*n*) Since the requirement to record reasons emanates from the broad doctrine of fairness in

> decision-making, the said requirement is now virtually a component of human rights and was considered part of Strasbourg Jurisprudence. See *Ruiz Torija* v. *Spain* EHRR, at 562 para 29 and *Anya* v. *University of Oxford*, wherein the Court referred to Article 6 of the European Convention of Human Rights which requires, "adequate and intelligent reasons must be given for judicial decisions".

14. If the impugned order passed by the District Magistrate, Jabalpur is tested on the anvil of law laid down by Supreme Court in the case of *Kranti Associates* (Supra), then it is clear that the impugned order lacks reasons which clearly show that there was a complete non-application of mind by the District Mgaistrate, Jabalpur.

15. Thus, from the procedure which was adopted by the District Magistrate, Jabalpur, as well as also from the unreasoned order passed by the District Magistrate Jabalpur, it is clear that the District Magistrate Jabalpur has acted malafidely and arbitrarily. On earlier occasion also, the order of externment was passed against the petitioner, without even recording the statement of any departmental witness and therefore, the order of externment was set aside and the matter was remanded back. The manner in which the District Magistrate, Jabalpur, has conducted the proceedings, it is clear that he just wanted to complete the formalities of recording the statement of a police officer. Further, the practice of cut and paste in the impugned order, as well as passing unreasoned orders, cannot be approved. An order of externment has serious civil as well as criminal consequences. By removing a person from his house, may also amount to depriving him from his livelihood, therefore, the authorities, should not adopt the practice of cut and paste and must pass reasoned orders.

16. Similarly, the Commissioner, while deciding the appeal did not adhere to the above mentioned loopholes in the procedure as well as the order passed by the District Magistrate. Right of appeal is not a mere formalities, and the Appellate Authority should not act mechanically while deciding the appeals and should minutely scrutinize the orders under challenge.

17. Under these circumstances, this Court is left with no option but to set aside the order dated 28-7-2020 passed by District Magistrate, Jabalpur and order dated 11-11-2020 passed by Commissioner, Jabalpur Division, Jabalpur.

18. This petition is **allowed** with cost of Rs. 20,000/- to be deposited by the District Magistrate, Jabalpur, in the Registry of this Court within a period of 30 days from today. The petitioner shall be entitled to withdraw the cost.

Petition allowed

I.L.R. [2021] M.P. 1521 (DB)
WRIT PETITION

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

WP No. 9780/2021 (Indore) decided on 15 June, 2021

PIYUSH KUMAR SHETH …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

***A. Constitution – Article 226 – Contractual Matters – Cancellation of Tender* – Held – Administration is best suited to take decision in matters of contract – No legal vested or constitutional right was crystallized in favour of the petitioner before cancellation of tender – No enforceable right was created in favour of petitioner – Further, cancellation of single tender and resultant issuance of N.I.T. will encourage competition and may fetch better rates/results – It cannot be said that cancellation of tender is wholly impermissible – No interference required – Petition dismissed. (Para 14)**

क. संविधान – अनुच्छेद 226 – संविदात्मक मामले – निविदा का रद्दकरण – अभिनिर्धारित – प्रशासन, संविदा के मामलों में निर्णय लेने के लिए सबसे उपयुक्त है – निविदा रद्द करने से पूर्व याची के पक्ष में कोई विधिक निहित या संवैधानिक अधिकार स्पष्ट नहीं किया गया था – याची के पक्ष में कोई प्रवर्तनीय अधिकार सृजित नहीं किया गया था – इसके अतिरिक्त, एकल निविदा का रद्दकरण एवं परिणामिक निविदा आमंत्रण सूचना जारी की जाना, प्रतिस्पर्धा को बढ़ावा देगा तथा बेहतर दरें/परिणाम ला सकता है – यह नहीं कहा जा सकता कि निविदा का रद्दकरण पूर्णतः अननुज्ञेय है – कोई हस्तक्षेप अपेक्षित नहीं – याचिका खारिज।

***B. Constitution – Article 226 – Contractual Matters – Judicial Review – Scope of Interference* – Held – In matters of contract, scope of interference by this Court is limited – Court cannot sit in appeal on the decision of department unless such a decision is shown to be arbitrary, capricious or malicious in nature or it attracts wednesbury principles – Interference can also be made if decision runs contrary to public interest. (Para 9 & 10)**

ख. संविधान – अनुच्छेद 226 – संविदात्मक मामले – न्यायिक पुनर्विलोकन – हस्तक्षेप का विस्तार – अभिनिर्धारित – संविदा के मामलों में, इस न्यायालय द्वारा हस्तक्षेप का विस्तार सीमित है – न्यायालय, विभाग द्वारा किये गये विनिश्चय की अपील के रूप में सुनवाई नहीं कर सकता जब तक कि ऐसा विनिश्चय मनमाना, अनुचित या द्वेषपूर्ण स्वरूप का प्रतीत नहीं होता हो अथवा यह वेडनसबरी सिद्धातों को आकर्षित न करता हो – यदि विनिश्चय लोक हित के प्रतिकूल जाता है तो भी हस्तक्षेप किया जा सकता है।

Cases referred :

(2001) 8 SCC 491, (2012) 8 SCC 216, (2000) 5 SCC 287, MANU/KA80618/2009, (1994) 6 SCC 651, (2015) 15 SCC 137, (1993) 1 SCC 44, (2005) 6 SCC 138, (1999) 1 SCC 492, (2000) 2 SCC 617, (2007) 14 SCC 517, (2007) 8 SCC 1, (2014) 3 SCC 493, (2014) 11 SCC 288, (2016) 14 SCC 172.

A.K. Sethi alongwith *P.C. Mehta*, for the petitioner.
Pushyamitra Bhargav, Addl. A.G. for the respondent/State.

O R D E R

The Order of the Court was passed by:
SUJOY PAUL, J. :- In this petition filed under Article 226 of the Constitution of India, the challenge is mounted to order dated 27.05.2011 (Annexure- P/9 and P/10), whereby the tender of petitioner has been cancelled. The challenge is also made to the new N.I.T. issued on 27.05.2021.

2. Shri Sethi, learned Senior Counsel urged that the pivotal question in the case is whether the respondents are justified in cancelling the tender of the petitioner when admittedly his bid was of more than 75 crores, whereas the reserve price was only 72.6 crores. His technical and financial bids were accepted. The reserve price fixed was much above the price to be fixed as per Collector guidelines. Petitioner's bid was shown to be accepted on 26.05.2021 on the portal of the Government. The decision of cancellation of bid could have been taken by Finance Committee and not by the Cabinet. The new N.I.T. again quotes the same reserve price of rupees 72.61 crores. Since the petitioner's bid was much above the reserve price aforesaid, there was no justification in cancelling the bid.

3. It is further submitted that although the petitioner was the single bidder, there is no justification for cancelling his tender. The decision to cancel the tender is arbitrary and runs contrary to the judgment of Supreme Court reported in (2001) 8 SCC 491 *(Union of India & Others v/s Dinesh Engineering Corporation & Another)*.

4. Lastly, learned Senior Counsel submits that the Supreme Court by order dated 27.07.2019 issued directions to the Department to undertake an exercise pursuant to which they were required to initiate tender process within two years. The tender so cancelled was issued in obedience of Apex Court's order. Cancellation thereof violates Court order.

5. Shri Pushyamitra Bhargav, learned Additional Advocate General opposed the prayer by contending that various clauses of N.I.T. namely 2.1.11, 3.3, 3.7 and 3.8 permit the respondents to cancel the tender at any stage. No right has been created in favour of the petitioner. A conscious decision was taken at apex level which is reflected in the letter dated 28.05.2021 to cancel the tender

which cannot said to be arbitrary, malicious and capricious in nature. Moreso, when petitioner was admittedly the single person who submitted his bid. Reliance is placed on certain judgments namely (2012) 8 SCC 216 *(Michigan Rubber (India) Limited v/s The State of Karnataka,* (2000) 5 SCC 287 *(Monarch Infrastructure (P) Limited v/s Commissioner Ulhasnagar Municipal Corporation & Others)* and MANU/KA80618/2009 *(Mahendra Labs Pvt. Ltd. v/s Principal Secretary to Government Animal Husbandry and Fishries Department)*.

6. In rejoinder submissions, Shri Sethi, learned Senior Counsel submits that petitioner's tender was cancelled on 27.05.2021, whereas document dated 28.05.2021 filed with the return shows that Cabinet took decision on 28.05.2021. For this reasons also, impugned order is arbitrary and bad in law.

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

8. We have heard learned counsel for the parties at length and perused the record.

9. This is trite that in matters of contract the scope of interference by this Court is limited. This Court cannot sit in appeal on the decision of the department unless such a decision is shown to be arbitrary, capricious or malicious in nature or it attracts wednesbury principles. (See:- *Tata Cellular vs. Union of India,* (1994) 6 SCC 651 and *Elektron Lighting Systems (P) Ltd. vs. Shah Investments Financial Developments & Consultants (P) Ltd.,* (2015) 15 SCC 137, *Sterling Computers Ltd. v. M & N Publications Ltd.,* (1993) 1 SCC 44, *Master Marine Services (P) Ltd. v. Metcalfe & Hodgkinson (P) Ltd.,* (2005) 6 SCC 138, *Michigan Rubber (India) Ltd. v. State of Karnataka*, (2012) 8 SCC 216).

10. Interference can also be made if decision runs contrary to the public interest. (See:- *Raunaq International Ltd. v. I.V.R. Construction Ltd.*, (1999) 1 SCC 492, *Air India Ltd. v. Cochin International Airport Ltd.*, (2000) 2 SCC 617, *Jagdish Mandal v. State of Orissa*, (2007) 14 SCC 517, *Reliance Energy Ltd. v. Maharashtra State Road Development Corpn. Ltd.*, (2007) 8 SCC 1, *Sanjay Kumar Shukla v. Bharat Petroleum Corpn. Ltd.*, (2014) 3 SCC 493 and *Siemens Aktiengeselischaft & Siemens Ltd. v. DMRC Ltd.*, (2014) 11 SCC 288).

11. Indisputably, the present case is a case of single tender. The department decided to cancel the same and decided to issue fresh NIT.

12. After considering CVC guidelines, the Apex Court opined in *State of Jharkhand v. CWE-SOMA Consortium*, (2016) 14 SCC 172 as under :-

> **"20.** Admittedly, in the pre-bid meeting held on 24-3-2014, ten tenderers have participated. After conclusion of the pre-bid meeting on 24-3-2014, as a result of stringent conditions prescribed in Clauses 4.5(A)(*a*) and 4.5(A)(*c*), only three

> tenderers could participate in the bidding process and submit their bids. As noticed earlier, upon scrutiny two were found non-responsive. In our considered view, the High Court erred in presuming that there was adequate competition. In order to make the tender more competitive, the Tender Committee in its collective wisdom has taken the decision to cancel and reinvite tenders in the light of SBD norms. As noticed earlier, the same was reiterated in a subsequent meeting held on 9-7-2014. While so, the High Court was not justified to sit in judgment over the decision of the Tender Committee and substitute its opinion on the cancellation of tender. Decision of the State issuing tender notice to cancel the tender and invite fresh tenders could not have been interfered with by the High Court unless found to be mala fide or arbitrary. When the authority took a decision to cancel the tender due to lack of adequate competition and in order to make it more competitive, it decided to invite fresh tenders, it cannot be said that there are any mala fides or want of bona fides in such decision. While exercising judicial review in the matter of government contracts, the primary concern of the court is to see whether there is any infirmity in the decision-making process or whether it is vitiated by mala fides, unreasonableness or arbitrariness."
>
> (Emphasis Supplied)

13. A microscopic reading of communication dated 29.05.2021, shows that it is an internal correspondence between Public Property Management Department and MP Road Development Corporation wherein the Additional Secretary informed the Managing Director about the decision of cabinet to cancel the tender. This document nowhere shows that the cabinet took a decision on 28.05.2021. Thus, argument of learned senior counsel that the tender is cancelled prior in time on 27.05.2021 and decision was taken by cabinet on 28.05.2021 pales into insignificance.

14. The administration is best suited to take decision in the matter of contracts. As noticed above, such decisions can be interfered with, when the same are shown to be arbitrary, malicious, against the public interest or hitting wednesbury principles. The cancellation of single tender and resultant issuance of N.I.T. will encourage competition and may fetch better rates / results. Thus, it cannot be said that cancellation of tender is wholly impermissible. No enforceable right was created in favour of the petitioner. Putting it differently, no legal vested or constitutional right was crystallized in favour of the petitioner before cancellation of tender. Thus, no writ of Mandamus can be issued in favour of the petitioner.

15. In case of single tender, the Hon'ble Apex Court in the case of *State of Jharkhand v. CWE-SOMA Consortium* (supra) opined that such decisions cannot

be said to be malafide or want of bonafides. In such case, judicial interference must be astute.

16. In the factual backdrop of this case, we are unable to hold that there exists any such ingredient on which interference can be made in a contract matter. The respondents have taken a possible and plausible decision which does not warrant interference by this Court.

17. Thus, the petition fails and hereby **dismissed**.

Petition dismissed

I.L.R. [2021] M.P. 1525 (DB)
WRIT PETITION

Before Mr. Justice Mohammad Rafiq, Chief Justice &
Mr. Justice B.K. Shrivastava

WP No. 10786/2021 (Jabalpur) decided on 30 June, 2021

SHRISHTI INFRASTRUCTURE DEVELOPMENT CORPORATION LIMITED …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

***A. Constitution – Article 226 – Tender – Pre-requisite Conditions* – Held – It was the pre-requisite condition of NIT that bidder was required to have experience of having successfully (i) executed (ii) completed and (iii) commissioned, one similar work – Partially completed work even if its value exceeds the total value of the work for which tenders are being invited, cannot be treated as completed work – Treating the bid of petitioner as technically non-responsive cannot be said to be *malafide* nor it was done to favour someone – Petition dismissed. (Para 23 & 24)**

क. संविधान – अनुच्छेद 226 – निविदा – पूर्वापेक्षित शर्तें – अभिनिर्धारित – यह निविदा आमंत्रण सूचना की पूर्व अपेक्षित शर्त थी कि बोलीदाता को एक समान कार्य को सफलतापूर्वक (i) निष्पादित (ii) पूर्ण और (iii) आरंभ करने का अनुभव होना अपेक्षित था – आंशिक रूप से पूरे किये गये कार्य को, यद्यपि उसका मूल्य उस कार्य के कुल मूल्य से अधिक हो जिसके लिए निविदाएं आमंत्रित की जा रही हैं, पूर्ण कार्य नहीं माना जा सकता – याची की बोली को तकनीकी रूप से अप्रतिक्रियाशील मानने को असद्भाविक नहीं कहा जा सकता है और न ही यह किसी के पक्ष में किया गया था – याचिका खारिज।

***B. Constitution – Article 226 – Tender – Language of Terms & Conditions – Interpretation* – Held – Words used in terms and conditions have**

to be construed in the way, employer has used them while formulating them – Court cannot substitute the opinion of employer by its own unless interpretation of such conditions suffers from *malafides* or perversity or it is so obnoxious that it defies reason and logic and is not a possible interpretation – Decision of employer has to be respected by Court unless it is shown to be *ex-facie* arbitrary, outrageous and highly unreasonable.

(Para 24 & 25)

ख. संविधान – अनुच्छेद 226 – निविदा – निबंधन व शर्तों की भाषा – निर्वचन – अभिनिर्धारित – निबंधन और शर्तों में प्रयुक्त शब्दों का अर्थ उस तरह से लगाया जाना चाहिए जैसे नियोक्ता ने उन्हें विनिर्मित करते समय उनका उपयोग किया है – न्यायालय नियोक्ता की राय को अपने आप से प्रतिस्थापित नहीं कर सकता जब तक कि उक्त शर्तों का निर्वचन असद्भावना या विपर्यस्तता से ग्रसित न हो या इतना घृणाजनक न हो कि कारण और तर्क की उपेक्षा करता हो एवं एक संभाव्य निर्वचन नहीं है – नियोक्ता के निर्णय का न्यायालय द्वारा सम्मान किया जाना चाहिए, जब तक यह स्पष्टतः मनमाना, अपमानजनक एवं अत्यधिक अनुचित दर्शित न हो।

***C. Constitution – Article 226 – Tender – Interpretation of Terms & Conditions – Judicial Review* – Held – Employer who issued the tender is best judge to interpret the conditions of eligibility contained therein – Unless interpretation of employer is found to be so arbitrary, perverse and erroneous that no reasonable person of ordinary prudence would take that interpretation, Courts under the power of judicial review would not be justified to interfere therewith.** **(Para 23)**

ग. संविधान – अनुच्छेद 226 – निविदा – निबंधन व शर्तों का निर्वचन – न्यायिक पुनर्विलोकन – अभिनिर्धारित – नियोक्ता जिसने निविदा जारी की है, वह उसमें अंतर्विष्ट पात्रता की शर्तों का निर्वचन करने हेतु सर्वश्रेष्ठ न्यायाधीश है – जब तक नियोक्ता का निर्वचन इतना मनमाना, विपर्यस्त एवं गलत न पाया जाता हो कि मामूली प्रज्ञावाला कोई भी युक्तियुक्त व्यक्ति उस निर्वचन को ग्रहण नहीं करेगा, न्यायालय द्वारा, न्यायिक पुनर्विलोकन की शक्ति के अधीन इसमें हस्तक्षेप करना न्यायानुमत नहीं होगा।

Cases referred:

(1994) 6 SCC 651, (2000) 2 SCC 617, (2007) 14 SCC 517, (2008) 16 SCC 215, (2009) 6 SCC 171, (1990) 2 SCC 488, (2016) 15 SCC 272, (2016) 16 SCC 818, (1979) 3 SCC 489, (2017) 4 SCC 170, 1948 1 KB 223 :(1947) 2 All ER 680, (2011) 15 SCC 616.

Prashant Singh with *Sanket Anand,* for the petitioner.

Purushaindra Kaurav, A.G. with *S.S. Sharma* for the respondent Nos. 2, 3 & 4.

Pushpendra Yadav, Addl. A.G. for the respondent No. 1.

J U D G M E N T

The Judgment of the Court was delivered by:
MOHAMMAD RAFIQ, CHIEF JUSTICE :- This writ petition has been directed against the order Annexure-P/1 dated 7.6.2021 by which the bid of the petitioner submitted in response to notice inviting tender floated by the respondent-M.P. Urban Development Company Ltd. dated 25.2.2021, being technically non-responsive, has been rejected.

2. Mr. Prashant Singh, learned Senior Counsel submitted that the respondents in their tender document enclosed with the NIT Annexure-C laid down the pre-qualification criteria, which in so far as relevant for the present matter, provided that the bidder should have "experience of having sufficiently executed, completed and commissioned" "one similar work of aggregate cost not less than the amount equal to 50% of the probable amount of during the last 5 financial years." It is contended that the petitioner submitted the experience certificate duly signed by the Project Director, Ganga Pollution Control Unit, U.P. Jal Nigam Kanpur, which clearly stated that the petitioner has completed and commissioned, to the extent of value of Rs.328.6 crores, the work of "Survey, review the designs, redesign where necessary and build new sewerage network of about 102 km length and rehabilitation of existing small sized sewer and trunk sewer network of 198 km length including survey, design & construction of 2 no. of sewage pumping stations and 01 no. of lift stations and all appurtenant structures, and operation & maintenance of rehabilitated and new sewerage network and sewage pumping stations for a period of 10 years in Sewerage District -1 of Kanpur, State of Uttar Pradesh, India".

3. Learned Senior Counsel for the petitioner submitted that the respondents have illegally rejected the bid of the petitioner as technically non-responsive on the premise that the petitioner does not have the experience of completion and commissioning of similar work as required in Annexure-C to the NIT. Learned Senior Counsel has referred to the communication issued by the Deputy Project Director (Technical) M.P. Urban Development Co. Ltd. rejecting their subsequent representation mentioning that the case of the petitioner has been reviewed in the light of their submission against the bid and the claim in their letter dated 8.6.2021. It was observed that the certificate dated 3.3.2021 of similar work claimed by the petitioner for eligibility does not mention "completion of work in totality", hence the decision has been uploaded on the website of respondents stands confirmed without any change in the status of responsiveness of the bidders. Mr. Prashant Singh, learned Senior Counsel further argued that the conditions of the tender document have to be given purposive interpretation. The respondents required the similar work to have been successfully executed, completed and commissioned costing not less than the amount equal to 50% of the

probable amount of contract value of the work in question for past 5 years. The petitioner not only executed, but also commissioned the work of the value of 328.06 crores, which is much more than the value of the work of which tender as has been floated by the respondents i.e. Rs.226.94 crores. It is contended that the respondent-M.P. Urban Development Company has illegally awarded the work to respondent No.4, who had quoted the bid of Rs.208 crores as against the bid amount of Rs.202 crores offered by the petitioner.

4. Mr. Purushaindra Kaurav, learned Advocate General appearing for the respondents submitted that for the purpose of examining the eligibility of the bidders in the process evaluation of the technical bid, the conditions of the tender cannot be split and one part cannot be read in isolation from another. Learned Advocate General referred to Annexure-C, the pre-qualification criteria, appended to the NIT and argued that it only intended to ensure that the bidder should have successfully executed, completed and commissioned similar work of aggregate costing not less than the amount equal to 50% of the probable amount of work in question. On own showing the petitioner, the certificate produced by it proves that it has not completed the work as on 3.3.2021 when the certificate was issued by the Project Director of Ganga Pollution Control Unit, U.P. Jal Nigam Kanpur. In fact, it was also mentioned in that very certificate that it was proposed to extend the time for completion of work awarded to the petitioner by 31.3.2021. If the petitioner would have really completed the work by 31.3.2021, it had ample time to produce the certificate of completion of the work to satisfy the requirement of pre-qualification criteria, as the last date of the submission of the tender, which was originally fixed as 25th March, 2021, was extended to 17th May, 2021. The implication would be that the petitioner could not complete the work even up to 17th May, 2021.

5. Mr. Purushaindra Kaurav, learned Advocate General submitted that what amount has been quoted by the petitioner in the financial bid would be immaterial for the purpose of deciding the present matter because financial bid of the petitioner was never opened as its technical bid was found non-responsive. Secondly it is submitted that the English version of the certificate now submitted by the petitioner with IA No.6159/21 has been subsequently procured on 21.6.2021 and was never produced before the respondents. It is not in the shape of certificate, but is a mere communication addressed to petitioner by the Project Manager of Ganga Pollution Control Unit, U.P. Jal Nigam Kanpur and therefore that document can not be looked into.

6. We have given our anxious consideration to the rival contentions and perused the record.

7. Before adverting to merits of the case, we deem it appropriate to remind ourselves of the position of law with regard to scope of jurisdiction of this Court in

the matter of award of contracts by the Government and its instrumentalities. The Supreme Court in the celebrated judgment in *Tata Cellular Vs. Union of India,* (1994) 6 SCC 651, delineated the scope of interference by the Constitutional Courts in the matter of Government Contracts/Tenders by observing that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. There are however inherent limitations in exercise of that power of judicial review. Government is always the guardian of the finances of the State and it is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government, but the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or rejecting a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation and the right to choose cannot be considered to be an arbitrary power. The judicial power of review is exercised to rein in any unbridled executive process. The Supreme Court held that it is not for the court to determine whether a particular policy or particular decision taken in the fulfillment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The power of judicial review is not an appeal from the decision and therefore, the Court cannot substitute its decision since the Court does not have the necessary expertise to review. Apart from the fact that the Court is hardly equipped to do so, it would not be desirable either. However, where the selection or rejection is arbitrary, certainly the Court would interfere. But it is not the function of a Judge to act as a superboard, or with the zeal of a pedantic schoolmaster substituting its judgment for that of the administrator.

8. In *Air India Ltd. Vs. Cochin International Airport Ltd. & Ors.,* (2000) 2 SCC 617, while relying on its several earlier decisions on the law relating to award of contract by the State, its corporations and bodies acting as instrumentalities and agencies of the Government, the Supreme Court observed as under:

> "7. ..... The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for *bona fide* reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by

> them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the court can examine the decision-making process and interfere if it is found vitiated by *mala fides*, unreasonableness and arbitrariness. The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process the court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should intervene."

9. The Supreme Court in *Jagdish Mandal Vs. State of Orissa & Others,* (2007) 14 SCC 517, has also dealt with the scope of interference in contractual matters by the Constitutional Courts and held that while invoking power of judicial review in matters relating to tenders /contracts, certain special features should be borne in mind that evaluation of tenders and awarding of contracts are essentially commercial functions and principles of equity and natural justice stay at a distance in such matters. If the decision relating to award of contract is *bona fide* and is in public interest, the courts will not interfere by exercising power of judicial review even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. Power of judicial review will not be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. Tenderer or contractor with a grievance can always seek damages in a civil court. Interference in tender or contractual matters in exercise of power of judicial review is permissible only if:

(i) the process adopted or decision made is *mala fide* or intended to favour someone, or (ii) the same is so arbitrary and irrational that no responsible authority acting under law could have arrived at it, or (iii) it affected the public interest. The purpose and scope of judicial review is intended to prevent arbitrariness, irrationality, unreasonableness, bias and *mala fides*, its purpose is to check whether the choice or decision is made "lawfully" and not to check whether the choice or decision is "sound".

10. The Supreme Court, in the case of *Siemens Public Communication Networks Pvt. Ltd. & Anr. Vs. Union of India & Ors.,* (2008) 16 SCC 215 while dealing with the scope of judicial review of the constitutional courts, held that in matters of highly technical nature, a high degree of care, precision and strict adherence to requirements of bid is necessary. Decision making process of Government or its instrumentality should exclude remotest possibility of discrimination, arbitrariness and favoritism. It should be transparent, fair, *bona*

fide and in public interest. However, the Supreme Court clearly held therein that it is not possible to rewrite entries in bid document and read into the bid document, terms that did not exist therein, nor is it permissible to improve upon the bid originally made by a bidder. Power of judicial review can only be exercised when the decision making process is so arbitrary or irrational that no responsible authority acting reasonably or lawfully could have taken such decision, but if it is *bona fide* and in public interest, court will not interfere with the same in exercise of power of judicial review even if there is a procedural lacuna. Principles of equity and natural justice do not operate in the field of such commercial transactions.

11. The Supreme Court in the case of *Meerut Development Authority Vs. Association of Management Studies & Anr.,* (2009) 6 SCC 171, held that the tender is an offer, which invites and is communicated to notify acceptance. It must be an unconditional, must be in the proper form, and the person by whom tender is made must be able to and willing to perform his obligations. The terms of the invitation to tender cannot be open to a judicial scrutiny because the invitation to tender is in the realm of contract. Only a limited judicial review may be available in cases where it is established that the terms of the invitation to tender were so tailor-made to suit the convenience of any particular person with a view to eliminate all others from participating in the bidding process. The bidders have no other right except the right to equality and fair treatment in the matter of evaluation of competitive bids offered by interested persons in response to notice inviting tender in a transparent manner and free from hidden agenda. The authority has the right not to accept the highest bid and even to prefer a tender other than the highest bidder, if there exist good and sufficient reasons. The action taken by the authorities in awarding contracts can be judged and tested in the light of Article 14 of the Constitution of India and the Court cannot examine details of the terms of the contract entered into by public bodies or State. The Court has inherent limitations on the scope of any such enquiry.

12. Adverting now to the events of the case in hand, in order to effectively appreciate the matter, we deem it appropriate to reproduce the pre-requisite qualification criteria contained in Annexure-C appended to the NIT which reads as under :-

> **"The bidder should have :**
>
> **Financial**
>
> I. Experience of having successfully executed, completed and commissioned,
>
> a) three similar works each costing not less than the amount equal to 20% of the probable amount of contract during the last 5 financial years : **or**

b) two similar works each costing not less than the amount equal to 30% of the probable amount of contract during the last 5 financial years : **or**

c) one similar work of aggregate cost not less than the amount equal to 50% of the probable amount of during the last 5 financial years:"

13. According to aforesaid criteria, it is required that the bidder interested in submitting the bid in response to the NIT, should have the experience of having **successfully executed, completed and commissioned,** one similar work of aggregate cost not less than the amount equal to 50% of the probable amount of during the last 5 financial years. This condition does not show that the value of the partially completed or executed work would determine the eligibility in the process of evaluation of the technical bid. What the respondents required was duly executed work which has been completed and commissioned.

14. The experience certificate produced by the petitioner in the required proforma submitted alongwith NIT reads as under :-

"**Work Experience**

Agreement Number & Year	Name of Work	Date of Work Order	Date of Completion	Amount of Contract	Employer's/ Engineer in Charge Name and Address
Agreement Number: 1399/AC-11/61 Year 2017	Survey, review the designs, redesign where nececessary and build new sewerage network of about 102 km length and rehabilitation of existing small sized sewer and trunk sewer network of 300 km length including Survey, design, & construction of 4 no. of sewage pumping stations and 2 no. of lift stations and all appurtenant structures, and operation & maintenance of rehabilitated and new	17/08/2017	Under progress and More than 80% completed	Work of Amount 328.06 cr. Completed successfully out of 358.33 cr.	Officer of the General Manager, Ganga Pollution Control Unit, U.P.Jal Nigam, Benajhaber Road, Kanpur - 208 002 Telephone: +91-0512-2545573

	sewerage network and sewage pumping stations for a period of 10 years in sewerage district-1 of Kanpur, state of Uttar Pradesh, India.				

15. What appears from the aforementioned certificate on the proforma required by the respondents is that the petitioner itself categorically stated in the column pertaining to date of completion of the work that the work that he was executing is "Under progress and More than 80% Completed". In the column pertaining to the amount of contract, however the petitioner mentioned that the work to the extent of an amount of Rs.328.06 crore out of Rs.358.33 crore has been successfully completed. The respondents in the first letter of rejection uploaded on their website indicated the following reasons for rejection of the technical bid of the petitioner:-

> "Does not have the experience of completion and commissioning of similar work as described in Annexure C (read with amendment)"

16. Subsequently, when the petitioner again persisted in his demand to treat him eligible, the respondents have again considered his representation and rejected the same by communication dated 10th June, 2021, which reads as under :-

> "The case has been reviewed in the light of your submission against the bid and the claim in your aforesaid letter dt 8.06.2021. It is observed that the certificate dt 03.03.2021 of similar works, claimed by you for eligibility issued by Project Manager of Ganga Pollution Control Unit, UP Jal Nigam, Kanpur does not mention "completion of works in totality" and hence, the decision uploaded on the website www.mptenders.gov.in stands confirmed without any change in the status of responsiveness of the bidders.
>
> (Approved by Engineer-in-Chief, MPUDC)"

17. The Supreme Court in the case of *G.J. Fernandez v. State of Karnataka,* (1990) 2 SCC 488, relying on its earlier decision in *Ramana Dayaram Shetty* (supra) categorically held that "the party issuing the tender (the employer) has the right to punctiliously and rigidly" enforce the terms of the tender. If a party approaches a court for an order restraining the employer from strict enforcement of the terms of the tender, the court would decline to do so. It was also reaffirmed that the employer could deviate from the terms and conditions of the tender if the "changes affected all intending applicants alike and were not objectionable".

18. In *Montecarlo Ltd. Vs. National Thermal Power Corporation Ltd.,* (2016) 15 SCC 272, the appellant participated in the tender process pursuant to the NIT issued by respondent and as the appellant did not meet with technical qualifications prescribed, his bid was treated non-responsive. The appellant approached the High Court challenging action of respondent, but the High Court declined to interfere. The Supreme Court held that judicial review of decision making process is permissible only if it suffers from arbitrariness or *mala fides* or procedure adopted is to favour one. But if decision is taken according to language of tender document or decision sub-serves purpose of tender, then courts must exercise principle of restraint. Technical evaluation or comparison by courts would be impermissible. Principles of interpretation of tender documents involving technical works and projects requiring special skills are different from interpretation of contractual instruments relating to other branches of law. It was held that the tender inviting authorities should be allowed to carry out the purpose and there has to be free hand in exercising discretion. Tender inviting authorities have discretion to enter into contract under some special circumstances and there has to be judicial restraint in administrative action. The courts do not have expertise to correct administrative decisions and if courts are permitted to review such decisions then courts are substituting their own view without there being necessary expertise, which may be fallible. If decision is *bona fide* and is in public interest, courts would not interfere even if there is procedural aberration or error in assessment or prejudice to tenderer.

19. The Supreme Court in *AFCONS Infrastructure Ltd. Vs. Nagpur Metro Rail Corporation Ltd. & Anr.,* (2016) 16 SCC 818, relying on its various earlier decisions reiterated the well settled principle of law that decision in accepting or rejecting bid should not be interfered with, unless the decision making process suffers from *mala fides* or is intended to favour someone. Interference is also permissible if the decision is arbitrary or irrational, or is such that no responsible authority acting reasonably and in accordance with law could have reached such a decision. Further, perversity of a decision making process or decision and not merely faulty or erroneous or incorrect, is one of grounds for interference by courts. Constitutional courts are expected to exercise restraint in interfering with administrative decision and ought not to substitute their view for that of administrative authority. Constitutional courts must defer to this understanding and appreciation of tender documents unless there are *mala fides* or perversity in understanding or appreciation or in application of terms of tender conditions. Different interpretation given by authority which is not acceptable to court is no ground for constitutional courts to interfere with interpretation of authority unless it is proved to be perverse or *mala fide* or intended to favour a particular bidder. Relying on the decision of *Ramana Dayaram Shetty v. International Airport Authoirty of India,* (1979) 3 SCC 489, in paragraphs 14 and 15 of the report in

AFCONS Infrastructure Ltd. (supra), the Supreme Court clearly observed as under:

> "14. We must reiterate the words of caution that this Court has stated right from the time when Ramana Dayaram Shetty v. International Airport Authority of India [Ramana Dayaram Shetty v. International Airport Authoirty of India, (1979) 3 SCC 489] was decided almost 40 years ago, namely, that the words used in the tender documents cannot be ignored or treated as redundant or superfluous - they must be given meaning and their necessary significance. In this context, the use of the word "metro" in Clause 4.2(a) of Section III of the bid documents and its connotation in ordinary parlance cannot be overlooked.
>
> 15. We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional courts must defer to this understanding and appreciation of the tender documents, unless there is *mala fide* or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional courts but that by itself is not a reason for interfering with the interpretation given".

20. The Supreme Court in *JSW Infrastructure Ltd. & Anr. Vs. Kakinada Seaports Limited & Ors.,* (2017) 4 SCC 170, has held that the words used in the NIT cannot be treated to be surplus-age or superfluous or redundant. They must be given some meaning and weightage and courts should be inclined to suppose that every word is intended to have some effect or be of some use. Rejecting words as insensible should be last resort of judicial interpretation and as far as possible, courts should avoid construction which would render words used by author of document meaningless and futile or reduce or silence any part of document and make it altogether inapplicable. If interpretation of tender documents adopted by tender inviting authority suffers from *mala fide* or perversity then only courts can interpret documents. Interpretation given by tender inviting authority not acceptable to courts is no reason for interfering with interpretation adopted by the authority.

21. The famous "Wednesbury Case" *Associated Provincial Picture Houses Ltd. Vs. Wednesburry Corpn.,* (1948) 1 KB 223: (1947) 2 All ER 680, is considered to be landmark in so far as the basic principles relating to judicial review of administrative or statutory direction are concerned. In the said judgment, it has been observed by Lord Greene M.R. that "It is clear that the local authority are entrusted by Parliament with the decision on a matter which the

knowledge and experience of that authority can best be trusted to deal with. The subject-matter with which the condition deals is one relevant for its consideration. They have considered it and come to a decision upon it. It is true to say that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere".

22. In *Maharashtra Land Development Corporation & Ors. Vs. State of Maharashtra & Anr*., (2011) 15 SCC 616, the Supreme Court observed that the Wednesbury principle of reasonableness has given way to the doctrine of proportionality. As per the Wednesbury principles, administrative action can be subject to judicial review on the grounds of illegality, irrationality or procedural impropriety. The principle of proportionality envisages that a public authority ought to maintain a sense of proportion between particular goals and the means employed to achieve those goals, so that administrative action impinges on the individual rights to the minimum extent to preserve public interest. It was held by the Court that administrative action ought to bear a reasonable relationship to the general purpose for which the power has been conferred. Any administrative authority while exercising a discretionary power will have to necessarily establish that its decision is balanced and in proportion to the object of the power conferred. The test of proportionality is concerned with the way in which the decision maker has ordered his priorities, i.e. the attribution of relative importance to the factors in the case. It is not so much the correctness of the decision that is called into question, but the method to reach the same. If an administrative action is contrary to law, improper, irrational or otherwise unreasonable, a court competent to do so can interfere with the same while exercising its power of judicial review. It was further held that, the principle of proportionality therefore implies that the Court has to necessarily go into the advantages and disadvantages of any administrative action called into question. Unless the impugned administrative action is advantageous and in public interest, such an action cannot be upheld. At the core of this principle is the scrutiny of the administrative action to examine whether the power conferred is exercised in proportion to the purpose for which it has been conferred.

23. It is trite that an employer, who has issued the tender, is the best judge to interpret the conditions of eligibility contained therein. Unless the interpretation taken by the employer is found to be so arbitrary, perverse and erroneous that no reasonable person of ordinary prudence would take that interpretation, the Constitutional Courts in the realm of its power of judicial review would not be justified to interfere therewith. It is also trite that the governmental agencies entrusted with the task of undertaking the developmental projects have to be given freedom to not only lay the criteria of eligibility but also give them reasonable interpretation so as to determine whether or not the bidder participating in response to the NIT is technically sound to undertake the work. Merely because

the value of the work which the petitioner completed has exceeded the total cost of the work for which the respondents have invited the NIT, does not by itself make the petitioner eligible, if the petitioner otherwise does not fulfill the criteria of "(a) three similar works each costing not less than the amount equal to 20%, (b) two similar works each costing not less than the amount equal to 30% (c) and one similar work of aggregate cost not less than the amount equal to 50% of the probable amount" of the value of the works put in NIT by the respondents in the tender. A partially completed work even if its value exceeds the total value of the work for which tenders are being invited, cannot be treated as completed work.

24. Moreover, in the fact situation obtaining in the present case, decision of the respondents treating the bid submitted by the petitioner as technically non-responsive can neither be said to be *mala fide* nor intended to favour someone. It cannot be termed so arbitrary or irrational which no responsible body of person acting under law could on available facts arrive at. It is trite that when power is given to do a certain thing in a certain way, the thing must be done in that way or not at all. If as per conditions of the NIT, the bidder was required to have experience of having successfully (i) executed; (ii) completed; and (iii) commissioned, in this case, one similar work of aggregate cost not less than the amount equal to 50% of the value of the work in question during last five financial years, the bidder has to necessarily possess experience showing that he has not only executed and completed but also commissioned one complete work of that much value. It is settled proposition of law that the words used in the tender document as conditions of acceptability of technical bid have to be construed in the way the employer has used them while formulating such terms and conditions, therefore, the interpretation of the employer in that respect has to be accepted unless it is so obnoxious that it defies reason and logic and is not a possible interpretation on the language used in formulation of the conditions. Moreover, whether a particular condition is essential or not also is a decision to be taken by the employer. The tender inviting authorities have to be allowed greater play in the joints not only in formulating the terms and conditions of tender but also in interpreting them. No words in the tender documents can be treated as surplusage or superfluous or redundant. The decision of the employer has to be respected by the court unless it is shown to be *ex-facie* arbitrary, outrageous, and highly unreasonable. If non-fulfillment of the mandatory conditions of eligibility conditions of the terms of the NIT results in the bid submitted by a particular bidder being rendered non-responsive, the court cannot substitute the opinion of the employer by its own unless interpretation of such condition by the tender inviting authority suffers from *mala fides* or perversity.

25. In the present case, interpretation of the relevant condition taken by the respondents is a possible interpretation. Moreover, neither there is any allegation of *mala fide* on the part of any authority of the respondents nor is there any

allegation of undue favour shown to the successful bidder. The matter does not call for any interference.

26. In view of the above, we do not find any merit in the writ petition. Accordingly, this writ petition is dismissed.

Petition dismissed

I.L.R. [2021] M. P. 1538 (DB)
WRIT PETITION

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

WP No. 12155/2021 (Jabalpur) decided on 14 July, 2021

XYZ …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

A. Medical Termination of Pregnancy Act, (34 of 1971), Section 3(2)(i) r/w Explanation 2 & 5 and Constitution – Article 21 – Rape Victim – **Held – A rape victim, 23 years of age, carrying fetus of 25 weeks 5 days (+/-2 weeks) – As per medical opinion, she is suffering from severe mental retardation with behavioral problems – Her mental age is 6 years, her hygiene and intellectual abilities are poor and is unable to take care of herself and fetus, it would be hazardous to allow her to continue with pregnancy – Looking to the psychological trauma and intellectual deficiency, continuance of pregnancy would be violative of her bodily integrity which would also cause grave injury to her mental health – Permission for termination of pregnancy granted – Petition disposed. (Para 22 & 24)**

क. गर्भ का चिकित्सीय समापन अधिनियम, (1971 का 34), धारा 3(2)(i) सहपठित स्पष्टीकरण 2 व 5 एवं संविधान – अनुच्छेद 21 – बलात्संग पीड़ित – अभिनिर्धारित – एक बलात्संग पीड़ित, आयु 23 वर्ष, 25 सप्ताह 5 दिन (+/–2 सप्ताह) का भ्रूण धारण किये हुये है – चिकित्सीय राय के अनुसार, वह व्यवहार संबंधी समस्याओं के साथ गंभीर मानसिक मंदता से पीड़ित है – उसकी मानसिक आयु 6 वर्ष है, उसकी स्वच्छता और बौद्धिक क्षमताएं खराब हैं एवं वह अपनी और भ्रूण की देखभाल करने में असमर्थ है, उसे गर्भावस्था जारी रखने की अनुमति देना जोखिमपूर्ण होगा – मनोवैज्ञानिक आघात और बौद्धिक कमी को देखते हुए, गर्भावस्था को जारी रखना उसकी दैहिक संपूर्णता का उल्लंघन होगा जो उसके मानसिक स्वास्थ्य को गंभीर क्षति पहुंचाएगा – गर्भावस्था के समापन हेतु अनुमति प्रदान की गई – याचिका निराकृत।

B. Medical Termination of Pregnancy Act, (34 of 1971), Section 3(2)(i) & 5(1) – Grave Injury to Mental Health – Expression "life" – **Held – If expression "life" in Section 5(1) is not to be confined to mere physical**

existence or survival, then, permission will have to be granted u/S 5(1) for medical termination of pregnancy which may have exceeded 24 weeks, if continuance of such pregnancy would involve grave injury to mental health of pregnant women. (Para 21)

ख. गर्भ का चिकित्सीय समापन अधिनियम, (1971 का 34), धारा 3(2)(i) व 5(1) – मानसिक स्वास्थ्य को गंभीर क्षति – अभिव्यक्ति ''जीवन'' – अभिनिर्धारित – यदि धारा 5(1) में अभिव्यक्ति ''जीवन'' मात्र भौतिक अस्तित्व अथवा जीवित रहने तक ही सीमित नहीं है तो, धारा 5(1) के अंतर्गत ऐसी गर्भावस्था के समापन की अनुमति दी जानी चाहिए जो कि 24 सप्ताह से अधिक हो गई है, यदि उक्त गर्भावस्था को जारी रखने में गर्भवती महिला के मानसिक स्वास्थ्य को गंभीर क्षति अंर्तवलित होगी।

Cases referred:

(1987) 1 SCC 424, WP (C) No. 928/2007 decided on 09.10.2007 (Supreme Court), (2008) 12 SCC 57, (2017) 3 SCC 458, (2017) 3 SCC 462, (2017) SCC Online SC 1902, (2018) 11 SCC 572, (2018) 13 SCC 339, (2018) 14 SCC 75, (2018) SCC Online Bom 11, (2009) 9 SCC 1, WP No. 20961/2017 decided on 06.12.2017, WP No. 148/2020 decided on 26.02.2020 (Rajasthan High Court), WP No. 1271/2019 decided on 29.01.2019 (Rajasthan High Court), WP (C) No. 2294/2021 decided on 25.06.2021 (High Court of Chhattisgarh), 2018 (2) Mh.L.J. 46, 2019 SCC OnLine Bom 560=(2019) 3 Bom CR 400.

Harpreet Singh Ruprah, for the petitioner.
Swapnil Ganguly, Dy. A.G. for the respondents/State.

O R D E R

The Order of the Court was passed by:
MOHAMMAD RAFIQ, C. J. :- This writ petition has been filed by petitioner- XYZ praying for a direction to the respondents to allow her daughter (hereinafter referred to as "Victim-A") to undergo medical termination of pregnancy at the State expense. The petitioner has also challenged the constitutional validity of Section 3(2)(b) of the Medical Termination of Pregnancy Act, 1971 (for short "the MTP Act") to the extent it stipulates a ceiling of 24 weeks for medical termination of pregnancy with the prayer the same be declared as ultra vires Article 14 and 21 of the Constitution of India. The petitioner has also challenged the order dated 6.7.2021 passed by the Third Additional Sessions Judge, Hoshangabad in MJC-R No.207/2021 rejecting application of the petitioner for permission to terminate pregnancy of Victim-A.

2. The petitioner is resident of Village Baagratwa, Tehsil Babai, District Hoshangabad of State of Madhya Pradesh. She belongs to Scheduled Tribe community. She is wholly illiterate, living below poverty line. She does not have

any moveable or immoveable property. According to the petitioner, she and her husband work as a labourer. Her daughter Victim-A is aged about 23 years and she is mentally retarded. The petitioner and her husband left their village for Ujjain for earning livelihood by doing labour work. When they returned back after some time, the petitioner found that her daughter Victim-A was behaving in a peculiar manner. Their daughter Victim-A informed them in sign language about certain stomach pain. On making further enquiry, she learnt that one of her neighbours had committed rape upon her. She immediately took her to the doctor, who found that she was pregnant. The petitioner lodged a First Information Report with the Police Station Babai. District Hoshangabad, which has been registered for offence under Section 376(2)(1) of the IPC as Crime No.301/2021. The accused was arrested on 20.6.2021. The police got Victim-A medically examined and also obtained the medical report about her mental health. Victim-A was thereafter sent for further medical examination on 22.6.2021, upon which it was confirmed that she was carrying pregnancy of 22 weeks. The petitioner immediately filed an application under Section 3 of the MTP Act on 30.6.2021 before the Judicial Magistrate First Class, Hoshangabad, seeking permission for termination of her pregnancy, who rejected the same on 2.7.2021. Since 3rd and 4th July, 2021, being Saturday and Sunday, were holidays, the petitioner filed application under Section 3 of the MTP Act with the same prayer before the Third Additional Sessions Judge, Hoshangabad on 5.7.2021, which was registered as MJC-R No.207/2021. The same was however rejected on the very next working day i.e. 6.7.2021 under the ignorance about the latest law whereby maximum length of pregnancy under Section 3(2)(b) of the Act, which was earlier 20 weeks, was raised to 24 weeks by amendment to that effect by the Act 8 of 2021 published in the Gazette of Government of India on 25.3.2021.

3. When the matter was listed before this Court on 12.7.2021, the Court directed the Medical Superintendent, Hamidia Hospital, Bhopal to constitute a Multi Disciplinary Medical Board consisting of registered medical practitioner each from the Department of Gynaecology, Psychiatry, Paediatrics and Radiology or any other specialist, in his discretion, as per the MTP Act for having the radiological examination of the fetus to determine the status of its health and also give the bona fide opinion as to whether the medical termination of the pregnancy would be necessary to save the life of the victim. A report of the Medical Board has been produced today, which reads thus:-

> "The findings of the Medical Board are as follows:-
>
> 1. Survivor age 24 y/f (as per AADHAR card). As per the history narrated by mother, she has history of delayed milestone, poor understanding, poor self care, inability to speak, drooling of saliva since childhood. She has been certified as Mental Retardation by District Hospital Hoshangabad. On examination,

it was found that patient is unable to take care of self, her hygiene is poor, her intellectual abilities are poor. In view of these, patient suffers from SEVERE MENTAL RETARDATION WITH BEHAVIORAL PROBLEMS.

2. Obstetric Ultrasound was performed on 13.07.2021 and it reveals a single live intrauterine fetus of Gestational Age by USG is 25 week 5 days +/- 2 weeks. During this scan No gross congenital anomaly was detected.

3. There is alleged history of sexual assault, which has resulted in pregnancy. During her Antenatal checkup done on 13.07.2021, it was found that she is vitally stable. Today, she is having single live intrauterine fetus of Gestational Age is 25 week 5 days without evidence of gross congenital anomaly (as per USG report dated 13/07/2021). As per the MTP Act, 1971, Medical termination of pregnancy is permissible up to 20 weeks and as per the amendment made in MTP Act, 2021, termination of pregnancy is permitted up to 24 weeks gestation age.

4. There is no immediate risk to the life of pregnant woman in continuation of Pregnancy.

5. Survivor is a case of SEVERE MENTAL RETARDATION WITH BEHAVIORAL PROBLEMS. Mental age of the survivor is that of a Minor (Mental age approximately 6 years). She is unable to take care of self and she will not be in a position to take care of the baby, if she delivers it.

OPINION: Based on above findings, Medical Board is of the opinion that Survivor is a case of SEVERE MENTAL RETARDATION WITH BEHAVIORAL PROBLEMS, she is antenatal with 25 weeks 5 days live pregnancy. She is unable to take care of self and she will not be in a position to take care of the baby, if she delivers it. There is no immediate risk to the life of pregnant woman in continuation of Pregnancy."

Apart from the report of the Medical Board, the Radiologist in the Department of Radiodiagnosis GMC and SZH Hospital, Bhopal in his report has given the following conclusion:-

"Total cervical length- 3.5 cm.

Impression- Single live intrauterine fetus of MGA 25 WKS 5 days (+/- 2 weeks) without evidence of any gross congenital anomaly detected in the present scan."

4. Shri Harpreet Singh Ruprah, learned counsel for the petitioner submitted that Medical Board in their collective opinion as well as Radiologist, have concluded that the Victim-A is bearing pregnancy of 25 weeks and 5 days, with the

variation of +/- 2 weeks. That means that even according to the experts, the duration of pregnancy could even be 23 weeks. The petitioner upon being advised immediately filed an application before the Court of Judicial Magistrate First Class on 30.6.2021 which was rejected on 2.7.2021. Thereafter the petitioner again filed an application before 3rd Additional Sessions Judge, Hoshangabad on 5.7.2021, which too was dismissed on 6.7.2021 under ignorance of the amended provision of law which came into effect from 25.3.2021 whereby outer limit of the duration of pregnancy, for permitting termination, was increased from 20 weeks to 24 weeks. In the first place, the delay if all has taken place, is not attributable to the petitioner or atleast the Victim-A, secondly, even the experts are not certain about the age of the fetus by indicating in their opinion that the Victim A is antenatal with 25 weeks 5 days live pregnancy, which is adjustable, plus or minus, by two weeks and thirdly there is no risk to the life of the Victim-A even if her pregnancy is terminated now. Learned counsel further argued that even otherwise, as per report of the Medical Board, Victim-A is a case of severe mental retardation with behavioural problems and her mental age is of a minor aged approximately 6 years. She is unable to take care of herself and she is not in a position to take care of the baby, if she delivers it. Moreover, this Court may consider the case of the petitioner for permitting termination of pregnancy in view of Section 3(2)(b)(i) read with Explanation (2) thereto, according to which if a pregnancy is alleged to have been caused by rape, the anguish caused by the pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman.

5. Learned counsel in support of his arguments relied upon the judgments of the Supreme Court in *RBI Vs. Peerless General Finance & Investment Co. Ltd.* (1987) 1 SCC 424; *Sonali Kiran Gaikwad Vs. Union of India* in W.P.(C) No.928/2007 decided on 9.10.2007; *Tapasya Umesh Pisal Vs. Union of India & others* (2008) 12 SCC 57; X Vs. Union of India (2017) 3 SCC 458; *Meera Santosh Pal Vs. Union of India* (2017) 3 SCC 462; *Murugan Nayakkar Vs. Union of India & others* (2017) SCC Online SC 1902; *Z Vs. State of Bihar* (2018) 11 SCC 572; *Sarmishtha Chakrabortty Vs. Union of India* (2018) 13 SCC 339 and *A Vs. Union of India & others* (2018) 14 SCC 75. Learned counsel also relied upon the Division Bench judgment of Bombay High Court in *Sheikh Ayesha Khatoon Vs. Union of India & others* (2018) SCC Online Bom 11.

6. Per contra, Shri Swapnil Ganguly, learned Deputy Advocate General submitted that though the Medical Board in their collective opinion as well as Radiologist in his individual opinion have opined that the gestational age of fetus appears to be 25 weeks 5 days with the variation of +/- 2 weeks. In any case, now when the outer limit is 24 weeks, primary consideration for grant of permission for medical termination of pregnancy would be the possible risk to the life of the woman concerned or the fetus. In most of the cases relied by the learned counsel for the petitioner, report of the medical expert was in favour of either of the

situations whereas in the present case, the Medical Board had opined that there is no immediate risk to the life of the woman or the fetus.

7. We have given our anxious consideration to rival submissions, perused the material on record and studied the cited precedents.

8. A perusal of the afore-quoted opinion of the Medical Board in condition no.1 indicates that the survivor is a case of severe mental retardation with behavioral problems. Mental age of the survivor is approximately 6 years. She is unable to take care of herself and therefore, obviously she will not be in a position to take care of the baby, if she delivers the one. In conclusion no.2 of the aforesaid opinion of the Medical Board, the victim-A is opined to be a single live intrauterine fetus of gestational age by USG is 25 week 5 days +/- 2 weeks with the possibility of age being either less or more by 2 weeks, which is indicated by "+/- of 2 weeks". This is also the opinion given by the Radiologist. We have to therefore now examine whether in the facts like these, this Court would be justified in refusing to grant permission for medical termination of the pregnancy on the law available on the subject.

9. Section 3 of the MTP Act is relevant for the purpose of deciding the present case, which reads as under:-

> **"Section 3. When pregnancies may be terminated by registered medical practitioners.-**
>
> (1) Notwithstanding anything contained in the Indian Penal Code (45 of 1860), a registered medical practitioner shall not be guilty of any offence under that Code or under any other law for the time being in force, if any pregnancy is terminated by him in accordance with the provisions of this Act.
>
> (2) Subject to the provisions of sub-section (4), a pregnancy may be terminated by a registered medical practitioner,-
>
> (a) where the length of the pregnancy does not exceed twenty weeks, if such medical practitioner is, or
>
> (b) where the length of the pregnancy exceeds twenty weeks but does not exceed twenty-four weeks, in case of such category of woman as may be prescribed by rules made under this Act, if not less than two registered medical practitioners are.
>
> of the opinion, formed in good faith, that,-
>
> (i) the continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health ; or

(ii) there is a substantial risk that if the child were born, it would suffer from any serious physical or mental abnormality.

Explanation 1.-For the purposes of Clause (a), where any pregnancy occurs as a result of failure of any device or method used by any woman or her partner for the purpose of limiting the number of children or preventing pregnancy, the anguish caused by such pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman.

Explanation 2.-For the purposes of Clause (a) and (b), where any pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by the pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman.

(2-A) The norms for the registered medical practitioner whose opinion is required for termination of pregnancy at different gestational age shall be such as may be prescribed by rules made under this Act.

(2-B) The provisions of sub-section (2) relating to the length of the pregnancy shall not apply to the termination of pregnancy by the medical practitioner where such termination is necessitated by the diagnosis of any of the substantial foetal abnormalities diagnosed by a Medical Board.

(2-C) Every State Government or Union territory, as the case may be, shall by notification in the official Gazette, constitute a Board to be called a Medical Board for the purposes of this Act to exercise such powers and functions as may be prescribed by rules made under this Act.

(2-D) The Medical Board shall consist of the following, namely-

(a) a Gynaecologist;

(b) a Paediatrician

(c) a Radiologist or Sonologist; and

(d) Such other number of members as may be notified in the Official Gazette by the State Government or Union Territory, as the case may be.

(3) In determining whether the continuance of pregnancy would involve such risk of injury to the health as is mentioned in sub-section (2), account may be taken of the pregnant woman's actual or reasonably foreseeable environment.

> (4) (a) No pregnancy of a woman, who has not attained the age of eighteen years, or, who, having attained the age of eighteen years, is a mentally ill person, shall be terminated except with the consent in writing of her guardian.
>
> (b) Save as otherwise provided in clause (a), no pregnancy shall be terminated except with the consent of the pregnant woman."

10. It is indeed surprising that the Third Additional Sessions Judge, Hoshangabad relied on unamended Section 3 of the MTP Act rather than considering the amended provision, which has now increased the permissible outer limit for termination of pregnancy from 20 weeks to 24 weeks. This means that if the law was correctly read and applied by him, the permission of medical termination of the pregnancy could have been granted as the period of 24 weeks had yet not passed on the date the said Court was approached. Be that as may be, Section 3(2)(b), which is relevant for deciding the medical termination of pregnancy, inter alia provides that subject to the provisions of sub-section (4), a pregnancy may be terminated by a registered medical practitioner where the length of the pregnancy exceeds twenty weeks but does not exceed twenty-four weeks in case of such category of woman as may be prescribed by rules made under this Act, if not less than two registered medical practitioners are of the opinion, formed in good faith that; (i) the continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health; or (ii) there is a substantial risk that if the child were born, it would suffer from any serious physical or mental abnormality. The first Explanation thereto relates to Clause (a), which provides that where any pregnancy occurs as a result of failure of any device or method used by any woman or her partner for the purpose of limiting the number of children or preventing pregnancy, the anguish caused by such pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman. This Explanation may not be relevant for deciding the present case, but the second Explanation of Section 3(2) would in the facts of the present case have bearing on the interpretation of Section 3(2)(i) of the MTP Act, which stipulates that <u>where any pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by the pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman.</u>
(emphasis supplied)

11. Admittedly, in the present case, the Victim-A, daughter of the petitioner, was subjected to rape and according to experts, her mental age is only 6 years and therefore, regardless of her biological age, the consent for sexual intercourse in her case would be irrelevant. The First Information Report was lodged by her mother for the offence of Section 376(2)(1) of the IPC against the accused with the

Police Station Babai, District Hoshangabad in Crime No.301/2021. This therefore would bring the case of her daughter within the purview of Explanation (2) which provides that the anguish caused by the pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman, who in this case is Victim-A. Moreover, what is peculiar about this case is that the Medical Board itself has opined that duration of pregnancy is variable by two weeks. The victim is unable to take care of self, her hygiene is poor, her intellectual abilities are poor, her mental age is only 6 years and therefore, obviously she will not be in a position to take care of the baby, even if she delivers it.

12. This Court is cognizant of the fact that the Victim-A is mentally retarded, and her mental age having been adjudged by the experts to be only 6 years, therefore, all the steps on her behalf could be and were in fact taken by her mother, who is her natural guardian. She immediately filed an application before the Court of JMFC, Hoshangabad on 30.6.2021 which was rejected on 2.7.2021 and thereafter, immediately on the very first next working day i.e. on 5.7.2021, she filed the application before the Third Additional Sessions Judge, who being ignorant of the amended provision, which came into effect from 25.3.2021, rejected the same under the misconception that the outer limit for grant of permission of medical termination of pregnancy was 20 weeks and not 24 weeks. Sub-section (4) of Section 3 requires consent of the guardian of a minor, or a major who is mentally ill person. The exceptions to this rule of consent have been given in Section 3(4)(a) of the MTP Act, which provides that when the pregnant woman is below eighteen years of age or is a "mentally ill" person, then consent of her guardian would have to be obtained. Since in the present case the mental age of the Victim-A was determined approximately 6 years, her pregnancy can be medically terminated with the consent of the guardian who is actually natural mother of Victim-A. The permission/consent has to be therefore necessarily assumed.

13. In *Murugan Nayakkar* (supra), the petitioner, who was 13 years of age, was a victim of alleged rape and sexual abuse. She preferred a writ petition for termination of her pregnancy. The Medical Board opined that termination of pregnancy at this stage or delivery at term will both have equal risk to the mother. The Supreme Court held that considering the age of the petitioner, trauma which she prima facie suffered due to sexual abuse and the agony she is going through at the present, it would be appropriate to allow termination of pregnancy. In *Tapasya Umesh Pisal Vs. Union of India and others* (supra), the victim, who was 24 years old, was seeking permission to undergo medical termination of the pregnancy, which had progressed to 24 weeks. The Supreme Court held that it is difficult to refuse the permission to the petitioner to undergo medical termination of pregnancy as it is certain that if the foetus is allowed to be born it would have a limited life span with serious handicaps which cannot be avoided. In *Kalpana*

Singh vs. Government of NCT of Delhi & others (supra), the victim had pregnancy of 25 weeks and 5 days, which was permitted to be terminated medically.

14. The Supreme Court in *Suchita Srivastava and Another Vs. Chandigarh Administration* reported in (2009) 9 SCC 1, held that there is no doubt that a woman's right to make reproductive choices is also a dimension of "personal liberty" as understood under Article 21 of the Constitution of India. Reproductive rights include a woman's entitlement to carry pregnancy to its full term, to give birth and to subsequently raise children. However, in the case of pregnant women, there is also a "compelling State interest" in protecting the life of the prospective child. Therefore, the termination of a pregnancy is only permitted when the conditions specified in the applicable statute have been fulfilled. Hence the provisions of the MTP Act, 1971 can also be viewed as reasonable restrictions that have been placed on the exercise of reproductive choices. The Lordship further held that ordinarily a pregnancy can be terminated only when a medical practitioner is satisfied that a "continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health". The Explanations to Section 3 however also contemplate termination of pregnancy when the same is the result of a rape or a failure of birth control methods since both of these eventualities have been equated with a "grave injury to the mental health" of a woman.

15. This Court in Writ Petition No.20961/2017-*Sundarlal Vs. The State of M.P. & others,* decided on 6.12.2017, was dealing with the case of minor daughter of the petitioner, who was kidnapped and a First Information Report at his instance was registered under Sections 363, 366, 376 of the IPC read with Section 4 and 6 of the Protection of Children From Sexual Offences Act, 2012 against the accused. The police secured the custody of the minor daughter of the petitioner, who was handed over to the petitioner. On medical examination, she was found to be carrying pregnancy of about 16 weeks. The petitioner being guardian gave consent for termination of the pregnancy of his minor daughter. This Court while directing constitution of a committee of three medical practitioners to form bonafide opinion as to termination of pregnancy and retention of DNA sample of fetus and providing all medical assistance and care to the victim observed as under:-

> "12. In Explanation I, the law makers made it clear that where pregnancy is alleged by victim because of rape, a presumption can be drawn that such pregnancy constitute a grave injury to the mental health of pregnant woman. In the present case, this is not in dispute that victim is a minor and petitioner is praying for termination of pregnancy because her daughter is a rape victim. This court in ***Hallo Bi*** (supra) (Hallo Bi @ Halima Vs. State of M.P. & others 2013 (1) MPHT 451) opined that we cannot force

> a victim of violent rape/forced sex to give birth to a child of a rapist. The anguish and the humiliation which the victim is suffering daily, will certainly cause a grave injury to her mental health. Not only this, the child will also suffer mental anguish in case the lady gives birth to a child."

16. The Rajasthan High Court in *Victim (A) Vs. State of Rajasthan & others,* S.B.Criminal Writ Petition No.148/2020, decided on 26.2.2020, was dealing with the case where the Medical Board had opined the age of the fetus to be 23 +/- 2 weeks. Relying on the decision of the Supreme Court in *Meera Santosh Pal & others Vs. Union of India & others* (2017) 3 SCC 462, where permission was granted for termination of pregnancy of a term of 24 weeks and another judgment of the same High Court in *Nisha Vaishnav Vs. State of Rajasthan* S.B. Civil Writ Petition No.1271/2019, decided on 29.1.2019, the High Court allowed termination of pregnancy, in view of aforesaid Explanation (2) to Section 3(2) of the MTP Act as it was a case where a minor victim was subjected to rape and held that anguish caused by such pregnancy shall be presumed to constitute a grave injury to the mental health of the petitioner.

17. In *ABC Vs. State of Chhattisgarh & others,* Writ Petition (C) No.2294/2021, vide judgment dated 25.06.2021, the High Court of Chhattisgarh dealing in a case of rape victim bearing pregnancy of 14 weeks and 3 days, relying on the judgment of Supreme Court in *Meera Santosh Pal* (supra) permitted the termination of pregnancy, holding thus:

> "8. The explanation clause of Section 3 of MTP Act takes within its ambit not only the physical injury but also to mental injury and anguish. It is obvious that if the victim is subjected to rape and if she is forced to give birth to a child in the social scenario she has to face a life time anguish apart from the fact the child who is born will also have to face disdain of the society. Under the circumstances, it is directed that the petitioner shall be entitled to Medical termination of pregnancy. In order to carry out the pregnancy State shall form a panel of expert doctors at the District Hospital Durg as early as possible. The hospital shall take due care of the petitioner's health and provide her all medical support. It is further directed that the DNA of the child shall also be preserved considering the fact that the victim has already lodged a report under Section 373 which will eventually be required at a future date. The petitioner is directed to appear at District Hospital Durg on Wednesday i.e. 23.06.2021."

18. The Bombay High Court in *X Vs. Union of India & others* 2018 (2) Mh.L.J. 46, was dealing with a case of victim who was mentally retarded, deaf and dumb and her pregnancy was of 18-19 weeks. The case of the guardian before the Court, like in the present case, was that the victim was unable to take care of

herself and therefore, she would not be able to take care of the fetus. The Court relying on the judgment of the Supreme Court in *Suchita Srivastava* (supra) held as under:-

> "13. The crucial question here is whether permission can be granted to terminate the pregnancy of 22 weeks in this case. The victim in this case is deaf, dumb and mentally retarded; therefore, she is unable to make a choice on her own whether to terminate the pregnancy or to continue with it. She has no such intellectual capacity, therefore, her guardian should be given that right to make choice. This case is also required to be considered from the physical point of view of the victim. Victim is deaf, dumb and mentally retarded. She is unable to take any decision. In fact, she is not even aware that she has been raped and she is pregnant. It has been stated by her guardian and brother that she is not even able to take care of herself. Question therefore arises under such circumstance as to how she would take care of child to be borne? It has been stated in the medical certificate that "On Paediatrics examination, survivor has gross development delay with Down Syndrome". If we consider "Down Syndrome", it means "is a genetic disorder caused by the presence of all or part of a third copy of chromorome". It is typically associated with physical growth delays, characteristic facial features and mild to moderate intellectual disability. The medical literature would show that there is no cure to the "down syndrome". No doubt, a person with down syndrome may lead a normal life, but in the present case, when the victim is unable to take care of herself, there is every possibility that she will not be able to take care of the foetus. Though the certificate states that the risk of termination of pregnancy is within normal acceptable limits; it would be hazardous to ask her to bear the pregnancy. It is not only dangerous to her, but dangerous to the unborn child also. Apart from danger to the life of the petitioner, this Court has to take note of the psychological trauma the petitioner is undergoing as a result of carrying unwanted pregnancy. The pregnancy of the petitioner is definitely unwanted for her and it is violative of her personal liberty. Since she is unable to take decision due to intellectual disability, her guardian is taking the said decision, which is in the best interest of the victim and her survival. In the circumstances, we do not notice any impediment in permitting petitioner to terminate unwanted pregnancy."
>
> (emphasis supplied)

19. In *Z Vs. State of Bihar and others* (2018) 11 SCC 572, the Supreme Court was dealing with a case of mentally retarded rape victim, who was found to be

pregnant and was also HIV positive. The issue before the High Court was whether medical termination of pregnancy should be permitted. The High Court having relied on doctrine of "parens patriae" and "compelling State interest" declined medical termination of pregnancy, which had advanced in 23-24 weeks. The Supreme Court on detailed analysis reversed the verdict of the High Court. Explanation 2 to Section 3(2)(b), which has been relied by the learned counsel for the petitioner, was at that time Explanation 1, which provided that where any pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by the same has to be presumed to constitute a grave injury to the mental health of the pregnant woman. The Supreme Court held that once such a statutory presumption is provided, the same comes within the compartment of grave injury to mental health of the victim. Following observations made by the Supreme Court in paras 23 are worth quoting:-

> "23. We have already anlaysed in detail the factual score and the approach of the High Court. We do not have the slightest hesitation in saying that the approach of the High Court is completely erroneous. The report submitted by the IGIMS stated that termination of pregnancy may need major surgical procedure along with subsequent consequences such as bleeding, sepsis and anesthesia hazards, but there was no opinion that the termination could not be carried out and it was risky to the life of the appellant. There should have been a query in this regard by the High Court which it did not do. That apart, the report shows that the appellant, who was a writ petitioner before the High Court, was suffering from mild mental retardation and she was on medications and her condition was stable and she would require long term psychiatry treatment. The Medical Board has not stated that she was suffering from any kind of mental illness. The appellant was thirty-five years old at that time. She was a major. She was able to allege that she had been raped and that she wanted to terminate her pregnancy. PMCH, as we find, is definitely a place where pregnancy can be terminated."

20. The Division Bench of Bombay High Court in a case on its own motion in *XYZ Vs. Union of India and others,* 2019 SCC OnLine Bom 560=(2019) 3 Bom CR 400 held that a woman's decision to terminate a pregnancy is not a frivolous one. Abortion is often the only way out of a very difficult situation for a woman. An abortion is a carefully considered decision taken by a woman who fears that the welfare of the child she already has, and of other members of the household that she is obliged to care for with limited financial and other resources, may be compromised by the birth of another child. These are decisions taken by responsible women who have few other options. They are women who would ideally have preferred to prevent an unwanted pregnancy, but were unable to do

so. If a woman does not want to continue with the pregnancy, then forcing her to do so represents a violation of the woman's bodily integrity and aggravates her mental trauma which would be deleterious to her mental health. The Division Bench referred to certain international treaties concerning human rights. In that context, the Division Bench observed that the pregnancy takes place within the body of a woman and has profound effects on her health, mental well being and life. Thus, how she wants to deal with this pregnancy must be a decision she and she alone can make. The right to control her own body and fertility and motherhood choices should be left to the women alone. The basic right of a woman is the right to autonomy, which includes the right to decide whether or not to get pregnant and stay pregnant.

21. While dealing with Explanation 1 of Section 3(2) of the MTP Act, which after amendment is now Explanation 2, the Bombay High Court in the above case observed that this Explanation expands the concept of "grave injury to mental health" by raising a presumption that anguish caused by any pregnancy as a result of rape shall be presumed to constitute a grave injury to the mental health of a pregnant woman. In fact, the Explanation states that where pregnancy is alleged by a pregnant woman to have been caused by rape, anguish caused by such pregnancy shall be presumed to constitute a grave injury to the mental health of a pregnant woman. Therefore, for the purposes of Section 3(2) of the MTP Act, the expression "grave injury to mental health", is used in a liberal sense by the legislature itself and further Section 3(3) of the MTP Act, in terms provides that in determining whether continuance of pregnancy would involve such risk of injury to the health as is mentioned in Section 3(2), account may be taken of the pregnant woman's actual or reasonable foreseeable environment. Section 3(3) of the MTP Act, makes reference not merely to physical injury but also to mental injury. In fact, the aspect of a pregnant woman's actual or reasonable foreseeable environment has greater nexus to aspect of mental health as compared to physical health, particularly in the present context. This legislative liberality when it comes to expanding the concept of the grave injury to mental health cannot evaporate no sooner the ceiling of 24 weeks prescribed in Section 3(2)(b) of the MTP Act is crossed. If the expression "life" in Section 5(1) of the MTP Act is not to be confined to mere physical existence or survival, then, permission will have to be granted under section 5(1) of the MTP Act for medical termination of pregnancy which may have exceeded 24 weeks, if the continuance of such pregnancy would involve grave injury to the mental health of the pregnant woman.

22. Curial question that we posed to ourselves at the beginning of this judgment still is whether this Court in the facts of the present case, would be justified in refusing to permit medical termination of pregnancy? According to Medical Board, the victim has history of delayed milestone, poor understanding, poor self-care, inabilities to speak, drooling of saliva since childhood. The

Medical Board further opined that on examination, it was found that patient is unable to take care of self, her hygiene is very poor and her intellectual abilities are poor. In view of these factors, patient was opined to suffer from SEVERE MENTAL RETARDATION WITH BEHAVIORAL PROBLEMS. The Medical Board was further of the view that mental age of the victim is that of a minor, being only 6 years. According to them, she is unable to take care of herself and, therefore, she would not be able to take care of the fetus. In our considered view, in a situation like this, it would be hazardous to allow her to continue with the pregnancy till full duration. It may even be more dangerous to the unborn child too. In facts like these, this Court cannot lose sight of the psychological trauma the victim would have to undergo all this time. She being not in a position to take a decision due to her intellectual deficiency, decision of her guardian to consent for termination of unwanted pregnancy has to be accepted as a move in her best interest. Not permitting the rape victim in the present case to go in for medical termination of unwanted pregnancy would amount to compelling her to continue to bear such pregnancy for full duration and deliver the child, which would be violative of her bodily integrity, which would not only aggravate her mental trauma but would also have devastating effect on her overall health including on psychological and mental aspects. This is violative of her personal liberty, to borrow the words of the Supreme Court in *Suchita Srivastava* (supra), (para 22) because "a woman's right to make reproductive choices is also a dimension of "personal liberty" as understood under Article 21 of the Constitution of India". In the peculiar facts of the case, her personal integrity has to be respected.

23. Explanation 2 to Section 3(2) of the MTP Act has expanded the scope of "grave injury to mental health" by raising a presumption that "the anguish caused by such pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman". "Such pregnancy" here refers to pregnancy "alleged to have been caused by rape". Thus, the legislature has by providing for raising such presumption rather expanded the meaning of the expression "grave injury to mental health" of the rape victim for deciding whether it would constitute a grave risk to the mental health of the pregnant woman in the meaning of Section 3(2)(i) of the MTP Act. The Court would also be entitled to reasonably visualise the environment in which the victim will have to live in immediate foreseeable future to decide the question of her mental health.

24. In view of the above discussion, the present writ petition seeking permission for medical termination of pregnancy of the Victim-A, daughter of the petitioner, is allowed. She shall be produced before the Medical Superintendent, Hamidia Hospital, Bhopal by tomorrow, who is directed to ensure the medical termination of the pregnancy of Victim-A under the supervision of the experts at the earliest by taking all the precautions. The Superintendent of Police,

Hoshangabad shall arrange for transportation of the Victim-A along with her parents to Hamidia Hospital, Bhopal. It is further directed that DNA sample of the fetus shall be saved for the purposes of evidence to be led by the prosecution before the Court in the criminal case of rape registered in the matter. All expenses shall be borne by the State.

25. Since this Court was persuaded to allow the writ petition on applying provisions of Section 3(2)(i) read with its Explanation-2 to the facts of the case, the question of constitutional validity of Section 3(2)(ii) was left untouched.

26. The writ petition is accordingly **disposed of**.

Order accordingly

I.L.R. [2021] M.P. 1553
WRIT PETITION

Before Mr. Justice Vishal Dhagat

WP No. 9398/2021 (Jabalpur) order passed on 19 July, 2021

NAGENDRA SINGH & anr. …Petitioners

Vs.

STATE OF M.P. & ors. …Respondents

A. Public Distribution System (Control) Order, M.P., 2015, Clause 2(c) & 16(8) – Appellate Authority – Powers of Collector & SDO **– Held – Occurrence of word 'Collector' wherever it occurs in Food Control Order, 2015 does not mean that he is appellate authority – Whether Collector is appellate authority or not is to be construed in reference to context – Appellate authority means Collector of concerned district unless context otherwise requires – Action under Clause 16 for suspension of fair price shop and cancellation of license is to be taken by shop allotment authority, which is SDO. (Para 8)**

क. सार्वजनिक वितरण प्रणाली (नियंत्रण) आदेश, म.प्र., 2015, खंड 2(c) व 16(8) – अपीली प्राधिकारी – कलेक्टर व उपखंड अधिकारी की शक्तियां – अभिनिर्धारित – खाद्य नियंत्रण आदेश, 2015 में जहां कहीं भी 'कलेक्टर' शब्द आता है, इसका अर्थ यह नहीं है कि वह अपीली प्राधिकारी है – कलेक्टर अपीली प्राधिकारी है अथवा नहीं, इसका अर्थ संदर्भ के संबंध में लगाया जाना चाहिए – अपीली प्राधिकारी का अर्थ संबंधित जिले के कलेक्टर से है, जब तक संदर्भ द्वारा अन्यथा अपेक्षित न हो – खंड 16 के अंतर्गत उचित मूल्य की दुकान के निलंबन एवं अनुज्ञप्ति के रद्दकरण की कार्रवाई दुकान आबंटन प्राधिकारी द्वारा की जानी चाहिए, जो कि उपखंड अधिकारी है।

B. Public Distribution System (Control) Order, M.P., 2015, Clause 2(c) & 16(8) – Appellate Authority/Collector **– Held – When there is**

irregularity in operation of fair price shop then Collector has to form an opinion for prosecution – Collector in Clause 16(8) does not mean appellate authority as he has to form its independent opinion regarding lodging of prosecution – Collector is to act as authority exercising original jurisdiction under Clause 16(8). (Para 8)

ख. सार्वजनिक वितरण प्रणाली (नियंत्रण) आदेश, म.प्र., 2015, खंड 2(c) व 16(8) – अपीली प्राधिकारी/कलेक्टर – अभिनिर्धारित – जब उचित मूल्य की दुकान के संचालन में अनियमितता हो कलेक्टर को अभियोजन हेतु एक राय बनानी होती है – खंड 16(8) में कलेक्टर का अर्थ अपीली प्राधिकारी नहीं है क्योंकि उसे अभियोजन दाखिल करने के संबंध में अपनी स्वतंत्र राय बनानी होती है – कलेक्टर को खंड 16(8) के अंतर्गत आरंभिक अधिकारिता का प्रयोग करने वाले प्राधिकारी के रूप में कार्य करना है।

Devendra Kumar Tripathi, for the petitioner.
Vivek Kumar Sharma, Dy. A.G. for the respondents/State.

O R D E R

VISHAL DHAGAT, J.:- Petitioners have called in question order dated 06.04.2021 and consequential FIR dated 18.04.2021. By order dated 06.04.2021, Collector Chhatarpur has ordered District Supply Officer to lodge FIR against petitioners.

2. Counsel for the petitioner raised a ground that as per Food Control Order, Clause 2(c), Collector is appellate authority. Sub Divisional Officer is shop allotment authority and therefore, Sub Divisional Officer has to take action under Sections 16 and 17 of the Food Control Order. Collector is only the appellate authority therefore, Collector has exceeded its jurisdiction and power in passing impugned order. Such power ought to have been exercised by shop allotment authority.

3. Counsel appearing for the petitioners challenged the impugned order on the ground that there is non-compliance of Clause 16(2) and Clause 13 of Madhya Pradesh Public Distribution System (Control) Order, 2015 (hereinafter referred as the 'Food Control Order, 2015'). Due to non-compliance of said clauses, action cannot be taken against the petitioners under 16(8) of Food Control Order, 2015.

4. To buttress the aforesaid submission, counsel for the petitioner has relied on order dated 31.03.2027 passed in *W.P. No. 13958/2016 (Suresh Patel vs State of Madhya Pradesh and another)*. In the said order learned Single Judge has held as under :

> *"17. As per the discussion made hereinabove and after going through the provisions of the Essential Commodities Act, Control Order, 2009 (repealed) and Control Order, 2015, it is apparent that in case of violation of any Central Order or the*

State Order, an action may be taken for suspension or revocation of a fair price shop which also includes the forfeiture of the security amount and the recovery of the diversion of the food grains either from the society or salesperson or employee or manager or chairman as the case may be. In case the violation of Clause 13 of the Control Order, 2015 has been shown more than 10% of the food grains supplied, action must be taken under the provisions of E.C. Act. In the order impugned finding showing violation of clause 16(2) has not been recorded, however, even on having competence, the District Magistrate without indicating deviation of more than 10% of the food grains supplied, action under Section 7 of the E.C. Act cannot be directed.

18. As this Court has set aside the order impugned passed by the District Magistrate because he do not have any authority to exercise the power under the Control Order, 2009 (repealed) or under Control Order, 2015 to suspend or revoke the license and also on the ground of non application of mind, without considering the justification of the allegation on merit, therefore, direction sought by the petitioner for initiation of departmental enquiry against respondent no.2 is hereby refused."

5. On basis of aforesaid two fold submissions, counsel for the petitioner prays for quashing of impugned order dated 06.04.2021 as well as consequential FIR dated 18.04.2021.

6. Heard the counsel for the petitioner.

7. Definition clause of Food Control Order reads as under:-

"2.Definitions. -

(1) in this order, unless the context otherwise requires, -

(a) * * * *

(b) * * * *

(c) ***"Appellate Authority"*** *means the Collector of the concerned district;"*

8. Occurrence of word 'Collector' wherever it occurs in Food Control Order, 2015 does not mean that Collector is appellate authority. Whether Collector is appellate authority or not is to be construed in reference to context. Appellate authority means Collector of the concerned district unless context otherwise requires. Action under Clause 16 for suspension of fair price shop and cancellation of license is to be taken by shop allotment authority, which is Sub

Divisional Officer. However, it is specifically provided that when there is irregularity in operation of fair price shop then Collector has to form an opinion for prosecution against chairman or head of the society / salesperson / employee of institution. Collector in Clause 16(8) of Food Control Order, 2015 does not means appellate authority as he has to form its independent opinion regarding lodging of prosecution. Collector is not to act as appellate authority but authority exercising original jurisdiction under Clause 16(8) of Food Control Order, 2015. Context spells that Collector is not appellate authority. There is no force in first submission made by counsel for the petitioner.

9. Secondly, counsel for the petitioner has relied on judgment dated 31.03.2017 passed by learned Single Judge in W.P. No. 13958/2016. Learned Single Judge has held that if violation of Clause 16(2) has not been recorded and it has not been shown that there is deviation of more than 10% of food grains supplied, action under Section 7 of Essential Commodities Act cannot be directed.

10. Clause 16(2) of Food Control Order, 2015 reads as under:-

> *"(2) In case of violation under clause 13 for quantity more than 10 percent of the monthly allocation or repetition of violation under the same clause, a person shall mandatorily be prosecuted under section 7 of Essential Commodities Act, 1955 (No. 10 of 1955)."*

11. Plain wordings of aforesaid clause say that if there is violation of clause 13 and there is deviation of 10 percent or more of monthly allocation or there is repetition of violation under same clause then person shall mandatorily be prosecuted under Section 7 of Essential Commodities Act, 1955. Clause 16(2) does not lay down that there cannot be any prosecution if deviation of quantity is less than 10% and Collector cannot form its opinion under Clause 16(8) without compliance of provision under clause 16(2) of Food Control Order, 2015.

12. As I am not in agreement with law laid down in order dated 31.03.2017 in W.P. No.13958/2016, therefore, I refer the matter to Division Bench for deciding the following question: -

> **Whether action for prosecution is mandatory if deviation is more than 10% of monthly quota and only discretionary if deviation is less than 10% of monthly quota or there shall not be any prosecution if deviation is less than 10% of monthly quota?**

Order accordingly

I.L.R. [2021] M.P. 1557
WRIT PETITION
Before Mr. Justice Vishal Dhagat

WP No. 6608/2020 (Jabalpur) decided on 19 July, 2021

RAVI SHANKER CHOUKSEY …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

***A. Constitution – Article 226 – Scope & Jurisdiction – Allegation of obtaining compassionate appointment by suppression/fraud* – Held – Court must strike at illegality and injustice wherever it is found – R-2 directed to look into the matter and if any fraud/suppression is found practiced by R-5, action be taken in accordance with law after giving opportunity of hearing – Petition disposed. (Para 11)**

क. संविधान – अनुच्छेद 226 – विस्तार व अधिकारिता – छिपाव/कपट द्वारा अनुकंपा नियुक्ति प्राप्त करने का अभिकथन – अभिनिर्धारित – न्यायालय को, अवैधता और अन्याय पर प्रहार करना चाहिए जहां भी वह पाया जाये – प्रत्यर्थी क्र. 2 को मामले पर विचार करने हेतु निदेशित किया गया एवं यदि प्रत्यर्थी क्र. 5 के द्वारा कोई कपट/छिपाव किया जाना पाया जाता है, सुनवाई का अवसर प्रदान करने पश्चात् विधि अनुसार कार्रवाई की जाए – याचिका निराकृत।

***B. Constitution – Article 226 – Locus Standi* – Held – Petitioner has no direct and substantial interest in challenging compassionate appointment of R-5 – Only incidental or indirect interest will not give *locus* to petitioner to file writ petition. (Para 10)**

ख. संविधान – अनुच्छेद 226 – सुने जाने का अधिकार – अभिनिर्धारित – प्रत्यर्थी क्र. 5 की अनुकंपा नियुक्ति को चुनौती देने में याची का कोई प्रत्यक्ष एवं सारभूत हित नहीं है – केवल आनुषंगिक या अप्रत्यक्ष हित याची को रिट याचिका प्रस्तुत करने का अधिकार प्रदान नहीं करेगा।

***C. Constitution – Article 226 – Delay and Laches* – Held – Order of 2007 challenged in 2020 – Held – No specific pleading when and how petitioner learnt about the order of 2007 – Petitioner fails to explain delay and laches. (Para 9)**

ग. संविधान – अनुच्छेद 226 – विलंब एवं अनुचित विलंब – अभिनिर्धारित – 2007 के आदेश को 2020 में चुनौती दी गई – अभिनिर्धारित – कोई विनिर्दिष्ट अभिवचन नहीं कि कब और कैसे याची को 2007 के आदेश के बारे में ज्ञात हुआ – याची विलंब एवं अनुचित विलंब को स्पष्ट करने में विफल रहा।

D. ***Constitution – Article 226 – Quo Warranto – Public Office –*** **Held – Petitioner challenging appointment of R-5 on compassionate ground on Class IV post – Said office cannot be held to be a public office – Petition for issuance of writ of *quo warranto* for that office is not maintainable. (Para 8)**

घ. *संविधान – अनुच्छेद 226 – अधिकार पृच्छा – लोक पद* – अभिनिर्धारित – याची द्वारा, प्रत्यर्थी क्र. 5 की चतुर्थ श्रेणी पद पर अनुकंपा के आधार पर नियुक्ति को चुनौती दी जा रही है – उक्त पद को एक लोक पद नहीं ठहराया जा सकता – उक्त पद के लिए अधिकार पृच्छा की रिट जारी करने के लिए याचिका पोषणीय नहीं है।

E. ***Words & Phrases – "Public Office"* – Discussed & explained.** **(Para 6 & 7)**

ङ. *शब्द व वाक्यांश – ''लोक पद''* – विवेचित एवं स्पष्ट।

Case referred :

AIR 1987 MP 11.

Sanjay Ram Tamrakar, for the petitioner.
Devendra Gangrade, P.L. for the respondents/State.

O R D E R

VISHAL DHAGAT, J.:- The petitioner has called in question compassionate appointment of respondent No.5 i.e. Aatish Kumar Dagoria and has prayed for issuance of writ of *quo warranto* thereby quashing of appointment order dated 31.12.2007 and to issue writ of *mandamus* to consider and decide the representation of the petitioner.

2. On 18.01.2021 this Court asked the petitioner to explain delay and laches in filing of writ petition. The petitioner has challenged the order of the year 2007 in the year 2020. Later on this Court vide order dated 15.06.2021 asked the petitioner to argue on issue of *locus standi* of petitioner whether the writ of *quo warranto* can be issued for removal of a Class IV employee.

3. Learned counsel for the petitioner submitted that petitioner and respondent No.5 both are in zone of consideration for promotion, therefore, petitioner is having direct interest in challenging the appointment of respondent No.5, therefore, he has *locus standi* to file the present writ petition.

4. Leaned (sic: Learned) counsel for the petitioner has further submitted that respondent No.5 is holding public office and therefore, writ of *quo warranto* is maintainable. It is submitted that writ of *quo warranto* is issued to correct the appointment if any person is appointed illegally *de hors* the rules. The person is appointed in the public office for which he is not legally entitled to and thus writ of *quo warranto* can be issued in this case. It is submitted that as soon as the petitioner

learnt about the illegal appointment of respondent No.5, he had immediately filed writ petition before this Court. The petitioner was not having knowledge of appointment of respondent No.5 in the year 2007. As soon as he learnt about the order of appointment, he filed writ petition, therefore, there is no delay and laches on the part of the petitioner. On these grounds, learned counsel for the petitioner made a prayer for issuance of writ of *quo warranto*, *mandamus* or in alternative to direct respondents to consider his representation.

5. Heard the learned counsel for the parties on aforesaid issues.

6. Literal meaning of the word *quo warranto* is "Where is your warrant of appointment ?". *Quo warranto* is remedy or proceeding whereby State enquires into the legality of claim which a party asserts in office of franchise to oust him from enjoyment if the claim is not well founded. As held by Apex Court in the case of *University of Mysore Vs. Govinda Rao* reported in 1965 SC 491, the Court has jurisdiction under Article 226 of the Constitution of India to control executive action in making appointments to public offices. The test of public office is whether the duties of the office are public in nature in which public is interested or not ? This court in the case of *Jagram Vs. Gwalior Town and Country Development Authority* reported in AIR 1987 MP 11 held that public office must be of substantive in character i.e. an office independent in title. It is not applicable to ministerial officers, who hold office at the pleasure of master.

7. The definition of Public Office given in Black's Law Dictionary is as under :-

> **"Public Office** - Essential characteristics of "Public Office' are (1) authority conferred by law (2) fixed tenure of Office and (3) power to exercise some portion of sovereign functions of government; key element of such test is that "Officer" is carrying out sovereign function. Spring v. Constantino, 168 Conn. 563,362 A 2d 871, 875. Essential elements to establish public position as "Public Office' are position must be created by Constitution, Legislature, or through authority conferred by legislature, portion of sovereign power of government must be delegated to position, duties and powers must be defined, directly or impliedly, by legislature or through legislative authority, duties must be performed independently without control of superior power other than law, and position must have some permanency and continuity. *State v. Taylor*, 260 Iowa 634, 144 NW 2d 289, 292."

8. The petitioner is challenging the appointment of respondent No.5 on compassionate ground on Class IV post. The said office cannot be held to be a public office, therefore, petition for issuance of writ of *quo warranto* for that office is not maintainable.

9. Learned counsel for the petitioner submitted that father and mother of respondent No.5 both were in government service. Respondent No.5 was granted compassionate appointment on the death of his mother. Respondent No.5 had suppressed the fact that his father is also in service in the same establishment. Since father of respondent No.5 was in service and respondent No.5 has obtained compassionate appointment suppressing the aforesaid fact, if any person is illegally benefited then he is required to disgorge illegal benefits he has obtained. The petitioner was not aware of the appointment order of respondent No.5. In cases of fraud limitation is to run from date of discovery of fraud. He immediately filed petition as soon as he learnt about the order. There is no specific pleading when and how he learnt about order. In view of the same petitioner fails to explain delay and laches satisfactorily.

10. Petitioner has no *locus* to challenge order dated 31.12.2007. Petitioner has no direct and substantial interest in challenging compassionate appointment of respondent No.5. Only incidental of indirect interest will not give *locus* to petitioner to file writ petition.

11. Court must strike at illegality and injustice wherever it is found. Court cannot perpetuate illegality, therefore, it is directed that respondent No.2 shall look into the matter and if any fraud and suppression is found to be practiced by respondent No.5 then action shall be taken in accordance with law after giving opportunity of hearing to respondent No.5.

12. No opinion is expressed on the merits of the case.

13. Accordingly, the writ petition filed by the petitioner is **disposed off.**

C.C. As per rules.

Order accordingly

I.L.R. [2021] M.P. 1560 (DB)
CONTEMPT PETITION CIVIL

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

CONC No. 1444/2020 (Gwalior) decided on 24 June, 2021

MAHIP KUMAR RAWAT …Petitioner

Vs.

SHRI ASHWINI KUMAR RAI & ors. …Respondents

***A. Service Law – Back Wages – Principle* – Held – Concept of back wages is based on fundamental principle of compensating workman for the period he remained unemployed owing to termination which was found to be unlawful at subsequent point of time. (Para 6)**

क. सेवा विधि – पिछली मजदूरी – सिद्धांत – अभिनिर्धारित – पिछली मजदूरी की संकल्पना कर्मकार को उस अवधि के लिए प्रतिकर प्रदान करने के मूलभूत सिद्धांत पर आधारित है, जब वह सेवा के पर्यवसान के कारण बेरोजगार रहा जो कि पश्चात्वर्ती समय में विधि विरूद्ध पाया गया था।

B. Service Law – Back Wages – Concept of Calculation **– Held – Back wages have to be worked out based on wages which would have been drawn by workman during period he was on termination till he was actually re-instated with all corresponding increase in wages from time to time – Back wages are never relatable to the concept of last wages drawn. (Para 6 & 7)**

ख. सेवा विधि – पिछली मजदूरी – गणना की संकल्पना – अभिनिर्धारित – पिछली मजदूरी उस मजदूरी के आधार पर निकाली जाना चाहिए जो कि कर्मकार द्वारा ऐसी अवधि में जो कि सेवा से पर्यवसित रहने से लेकर उसके समय–समय पर मजदूरी में तत्संबंधी वृद्धि के साथ वास्तव में पुनः स्थापित किये जाने तक प्राप्त की गई होगी – पिछली मजदूरी कभी भी आहरित अंतिम मजदूरी की संकल्पना से संबंधित नहीं होती है।

C. Contract Act (9 of 1872), Section 23 – Concept of Back Wages – Public Policy **– Held – If back wages are related to last wages drawn, it would not only be prejudicial to the concept of back wages after re-instatement but would also be contrary to principle of public policy as per Chapter II of Contract Act especially u/S 23 of the Act. (Para 9 & 11)**

ग. संविदा अधिनियम (1872 का 9), धारा 23 – पिछली मजदूरी की संकल्पना – लोक नीति – अभिनिर्धारित – यदि पिछली मजदूरी आहरित अंतिम मजदूरी से संबंधित है, तो यह न केवल पुनः स्थापन के पश्चात् पिछली मजदूरी संकल्पना के प्रतिकूल होगा बल्कि संविदा अधिनियम के अध्याय II के अनुसार विशेष रूप से अधिनियम की धारा 23 के अंतर्गत लोक नीति के सिद्धांत के भी प्रतिकूल होगा।

D. Constitution – Article 215 & 226 – Scope & Jurisdiction **– Held – Court cannot travel beyond four corners of the order but such directions which are explicit in a judgment or order or are plainly self evident, ought to be taken care of – This Court in present contempt petition invokes inherent power under Article 226 to clarify the anomaly which had inadvertently crept into the direction issued in writ petition. (Para 15 & 19)**

घ. संविधान – अनुच्छेद 215 व 226 – व्याप्ति व अधिकारिता – अभिनिर्धारित – न्यायालय आदेश से परे नहीं जा सकता परंतु ऐसे निदेश जो कि किसी निर्णय अथवा आदेश में स्पष्ट हैं या स्पष्ट रूप से स्वयं सिद्ध हैं, का ध्यान रखा जाना चाहिए – वर्तमान अवमानना याचिका में इस न्यायालय ने अनुच्छेद 226 के अंतर्गत अंतर्निहित शक्ति का अवलंब लिया है ताकि उस विषमता को स्पष्ट किया जा सके जो कि अनजाने में रिट याचिका में जारी निदेश में आ गई थी।

Cases referred :

(1986) 3 SCC 156, (2020) 6 SCC 438, [1993 Supp (4) SCC 595], (1999) 9 SCC 58, (2008) 14 SCC 115, (2014) 3 SCC 373.

B.P. Singh, for the petitioner.
MPS Raghuvanshi, for the respondent No. 1.

O R D E R

The Order of the Court was Passed by : **SHEEL NAGU, J. :-** The instant contempt petition preferred u/Art. 215 of Constitution of India alleges non-compliance of the final order passed by co-ordinate bench of this court in W.P.2222.2010 passed on 27/6/2011 (C/1) whereby this Court while allowing the petition of workman and setting aside the Award of the Labour Court directed for reinstatement with 50% back wages relevant paras of which are reproduced below for ready reference and convenience :-

> "13. Looking to the aforesaid principle of law laid down by the Hon'ble Supreme Court in our opinion, the petitioner is entitled 50% back wages.
>
> 14. Consequently, the petition filed by the petitioner is allowed with the following directions:-
>
> i) The impugned award, Annexure-P/1 dated 23-9-2009, is hereby quashed.
>
> ii) The reference is answered in favour of the petitioner by holding that the termination of services of the petitioner w.e.f. 1-3-99 is illegal and void *ab initio.*
>
> iii) The petitioner is entitled for reinstatement and other service benefits.
>
> iv) It is further held that the petitioner shall be entitled the salary as the salary he was getting before his termination of service including D.A.
>
> v) It is further held that the petitioner shall be entitled 50% back wages. The order be complied with within a period of three months from the date of receipt of the copy of this order.
>
> vi) No order as to costs."

2. It is not disputed by learned counsel for rival parties that aforesaid decision dated 27/6/2011 was initially stayed by Apex Court while entertaining

SLP of the State but later the claim of State before Apex Court was dismissed vide order dated 2/3/2020 in Civil Appeal 6302/12.

3. The case of workman/petitioner to file this contempt petition arose out of the fact that though workman was reinstated but 50% back wages have been worked out based on the last wages drawn by workman prior to his termination, i.e. prior to 1/3/1999 and not the actual wages payable for period between termination and reinstatement.

4. The stand of respondents, especially respondent No.1-Shri Ashwini Kumar Rai, Additional Chief Secretary to Govt of M.P. is that direction contained in the operative portion of the order dated 27/6/2011 was complied with in letter and spirit inasmuch as this Court had directed for payment of salary the workman was getting before his termination as contained in para 14(iv) of the order dated 27/6/2011. For ready reference and effective adjudication of the matter, the bone of contention i.e. para 14(iv) is reproduced below:-

> 14. Consequently, the petition filed by the petitioner is allowed with the following directions:-
>
> i) xxxx xxxx
>
> xxxx
>
> ii) xxxx xxxx
>
> xxxx
>
> iii) xxxx xxxx
>
> xxxx
>
> **iv) It is further held that the petitioner shall be entitled the salary as the salary he was getting before his termination of service including D.A.**

5. From bare perusal of direction contained in para 14(iv) of order dated 27/6/2011, it appears apparently that petitioner has been held to be entitled to salary as he was getting before his termination of service. Meaning thereby the salary/wages received by the workman immediately prior to termination of his service dated 1/3/1999 would be the deciding factor for working out 50% back wages. Thus, the contention of Shri Ashwini Kumar Rai/respondent No.1 is that 50% back wages had been worked out on the basis of last wages drawn (the wages received by the workman immediately prior to his termination), appears to be correct and no wilful disobedience appears on part of contemnors at this stage. Thus, this Court declines to draw contempt against respondent No.1-Ashwini Kumar Rai.

6. Dismissing this case at this stage would be travesty of justice since calculation of back wages pursuant to the order of reinstatement is invariably based on the wages which the workman would have drawn had the termination never taken place. Meaning thereby that the concept of award of back wages is based on the fundamental principle of compensating the workman for the period he remained unemployed owing to termination which was found to be unlawful at subsequent point of time. Thus, the back wages have to be worked out based on wages which would have been drawn by the workman in the present case w.e.f. March, 1999 till he was actually reinstated pursuant to the order dated 27/6/2011 with all corresponding increase in wages from time to time.

7. The corollary to the above is that back wages are never relatable to the concept of last wages drawn. For the simple reason that last wages are relatable to the pre-termination period and not to the post termination period.

8. Purportedly intention and object of the Court while passing the order in the given fact situation were to ensure that petitioner, who is a class IV employee, may not be put to disadvantageous position in any manner so far as wages are concerned like lowering down of pay scale or loss of seniority in emoluments because of long drawn ouster in service because he was removed in year 1999 and directed to be reinstated in year 2011 and meanwhile sufficiently long period of time has been consumed. Therefore, when Court refers in para 14(iv) the word "salary" then it is to be construed as concept of back wages and not particular pay and allowances or pay scale.

9. If the arguments advanced by the contemnors is accepted then it would be not only be prejudicial to the concept of back wages after reinstatement but would also be contrary to the principle of Public Policy as per Chapter II of Indian Contract Act, especially under Section 23. In Master and Servant or Employer-Employee relationship, employer cannot rest on "inequality of bargaining power". Any "unconscionable term of contract" cannot be enforced and Court may even refuse to enforce such unconscionable term of contract from the remainder of the contract.

10. Apex Court in the case of *Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another,* (1986) 3 SCC 156 has delineated the principle and recently in the case of *Assistant General Manager, State Bank of India and Ors. Vs. Radhe Shyam Pandey,* (2020) 6 SCC 438, Apex Court has reiterated the principle while relying upon the earlier judgment. Para 50(a) to (j) of judgment explained the said concept in detail.

11. In the instant case also, arguments of the contemnors and their reliance over the notion that back wages would be stagnated as last drawn salary is opposed to the principle of Public Policy and therefore, cannot be countenanced

in any manner. This way employer or master would gain undue premium over their acts of removal of an employee and thereafter, even if, reinstatement is made then employee would be made to suffer by paying the back wages stagnated on the day when he was removed. On this count (of Public Policy) and the explanation provided by the Apex Court in the case of *Central Inland Water Transport Corporation Limited* (supra) & *Radhe Shyam Pandey* (supra), the arguments of the contemnors lack merits.

12. In view of above discussions, direction passed in para 14(iv) of the order dated 27/6/2011 of this court is either a product of typographical error or inadvertent mistake on the part of the author of the judgment.

13. The easier course available to this Court would be to go by the literal construction of para 14(iv) of order dated 27/6/2011 and leave it to the petitioner to seek clarification by way of review. However, looking to the fact that petitioner is a workman and low paid employee and is fighting for his legitimate right since last nearly 21 years, this Court in exercise of it's inherent powers u/Art. 226 of the Constitution proceeds to clarify the anomaly which had inadvertently crept into the direction contained in para 14(iv) of the order dated 27/6/2011.

14. It is an undisputed fact that while allowing the petition on 27/6/2011 this Court had held the termination of workman to fall within the category of unlawful retrenchment and therefore same was truncated with consequential direction of reinstatement with 50% back wages.

15. As explained above, the concept of back wages being relatable to the wages which would have been drawn by the workman in the post-termination period when he was unemployed till his reinstatement and not to the pre-termination period, this court has to iron out the creases which appear to have crept in the direction contained in para 14(iv) either due to inadvertence or by mistake or by oversight. Thus this Court proceeds to invoke it's inherent power u/Art. 226 to rectify the said defect and replace para 14(iv) with following paragraph:-

> **"14.(iv) 50% back wages shall be worked out on the basis of salary/wages which the workman would have received during the period of unemployment i.e. from the date of his termination till actual reinstatement by treating the order of termination to be non-existent."**

16. The aforesaid view is taken by this Court in the extraordinary situation of preventing the workman from undergoing travails on another round of litigation and in the interest of justice in regard to which this court is bolstered by the

decision of Apex Court in the case of *S. Nagaraj and others Vs. State of Karnataka and another* [1993 Supp (4) SCC 595].

The relevant para is as under:-

> "18. Justice is a virtue which transcends all barriers. Neither the rules of procedure nor technicalities of law can stand in its way. The order of the Court should not be prejudicial to anyone. Rule of stare decisis is adhered for consistency but it is not as inflexible in Administrative Law as in Public Law. Even the law bends before justice. Entire concept of writ jurisdiction exercised by the higher courts is founded on equity and fairness. If the Court finds that the order was passed under a mistake and it would not have exercised the jurisdiction but for the erroneous assumption which in fact did not exist and its perpetration shall result in miscarriage of justice then it cannot on any principle be precluded from rectifying the error. Mistake is accepted as valid reason to recall an order. Difference lies in the nature of mistake and scope of rectification, depending on if it is of fact or law. But the root from which the power flows is the anxiety to avoid injustice. It is either statutory or inherent. The latter is available where the mistake is of the Court. In Administrative Law the scope is still wider. Technicalities apart if the Court is satisfied of the injustice then it is its constitutional and legal obligation to set it right by recalling its order."

17. This aspect has been dealt with by Apex Court in the case of *Welfare Association of Absorbed Central Govt. Employees in Public Enterprises and Another Vs. Arvind Verma and Ors.,* (1999) 9 SCC 58 *also.* In the said judgment clarification issued in following words:-

> "6.After hearing counsel on both sides, we make it clear that the respondents are liable to restore not only the pension as ordered by this Court in the said judgment but also all the attendant benefits as given to the Central Government pensioners. We hold that there was some genuine doubt on the part of the respondents in construing and giving effect to the judgment of this Court and, therefor, there is no contempt. We now direct the respondents to comply with the judgment of this Court as explained hereinbefore within three months from this date."

18. Later on, Apex Court in the case of *Anil Kumar Shahi (2) and Ors. Vs. Professor Ram Sevak Yadav and Ors.,* (2008) 14 SCC 115, held in para 50 as under:-

> "50.It is by now well-settled under the Act and under Article 129 of the Constitution of India that if it is alleged before this Court that a person has wilfully violated its order it can invoke its jurisdiction under the Act to enquire whether the allegation is true or not and if found to be true it can punish the offenders for having committed "civil contempt" and if need be, can pass consequential orders for enforcement of execution of the order, as the case may be, for violation of which, the proceeding for contempt was initiated. In other words, while exercising its power under the Act, it is not open to the court to pass an order, which will materially add to or alter the order for alleged disobedience of which contempt jurisdiction was invoked. When the Court directs the authority to consider a matter in accordance with law, it means that the matter should be considered to the best of understanding by the authority and, therefore, a mere error of judgment with regard to the legal position cannot constitute contempt of Court. There is no wilful disobedience if best efforts are made to comply with the order."

19. It is true that Court cannot travel beyond the four corners of the order which are alleged to have been non-complied but such directions which are explicit in a judgment or order or are plainly self evident ought to be taken into account. {See:- *Sudhir Vasudeva, Chairman and Managing Director, ONGC Limited and Ors. Vs. M. George Ravishekaran and Ors.,* (2014) 3 SCC 373}.

20. Therefore, looking to the peculiar facts and circumstances of the case where petitioner is fighting for almost 22 years for reinstatement and back wages, therefore, it is in the interest of justice that a finality be given to the litigation as well as sufferings of a Class IV employee and thus cannot be perpetuated on interpretational pretext.

21. In view of the above, although at present no wilful disobedience is committed at the instance of respondents/contemnors but now with the said clarification /explanation / modification in para 14(iv) of order dated 27/6/2011 in W.P.No. 2222/2010, **further three months time (from date of order)** is granted to the respondents / contemnors to comply the order dated 27/6/2011 (to be read with the instant order) and grant the necessary benefits of 50% back wages till reinstatement as if, petitioner was in the services and on the basis of clarification made above.

22. Contempt Petition accordingly disposed of and *Rule Nisi* issued against respondent No.1 stands dropped.

Order accordingly

I.L.R. [2021] M.P. 1568
MISCELLANEOUS PETITION
Before Mr. Justice Rajeev Kumar Shrivastava
MP No. 1914/2021 (Gwalior) decided on 26 July, 2021

INDIRA CHAURASIA (DECEASED) (SMT.) THROUGH LRs BIPIN BIHARI CHAURASIA & ors. …Petitioners

Vs.

DIRECTOR, KRISHI UPAJ MANDI BOARD & ors. …Respondents

***Civil Procedure Code (5 of 1908), Order 1 Rule 10 and Order 6 Rule 4(a) – Applicability* – Held – Dispute exist between plaintiff and Krishi Upaj Mandi regarding boundary wall and no any agricultural land is involved, thus no relief could be sought against the State – Provisions of Order 6 Rule 4(a) CPC shall not be attracted – Petition dismissed. (Para 6)**

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 1 नियम 10 एवं आदेश 6 नियम 4(a) – प्रयोज्यता – अभिनिर्धारित – वादी एवं कृषि उपज मंडी के मध्य बाउण्ड्री वॉल / चारदीवारी को लेकर विवाद है एवं इसमें कोई कृषि भूमि शामिल नहीं है, अतः राज्य के विरूद्ध कोई अनुतोष नहीं चाहा जा सकता – सि.प्र.सं. के आदेश 6 नियम 4(a) के उपबंध आकर्षित नहीं होंगे – याचिका खारिज।

Pratip Bisoriya, for the petitioner.
M.P.S. Raghuvanshi, Addl. A.G. for the respondent Nos. 1 to 3.

O R D E R

RAJEEV KUMAR SHRIVASTAVA, J.:- The parties are at loggerheads on the question of legality, validity and propriety of the order dated 10.03.2021, whereby the application filed by the petitioner-plaintiff under Order 1 Rule 10 CPC has been rejected.

2. The brief facts of the case are that the petitioner has filed a civil suit bearing No. 84A/2015. In the suit it is alleged that the petitioner is owner of survey No. 2467/9/1 min 2 and having way through Krishi Upaj Mandi. The Krishi Upaj Mandi is closing the way which is the easementary right of the petitioner. During pendency of civil suit, vide order dated 8.5.2018 Tehsildar, Tehsil Datia, declared survey No. 2467 as Jungle, on which Krishi Upaj Mandi is situated. Thereafter, the petitioner filed an application under Order 1 Rule 10 CPC for impleading

Forest Department as party respondent. The Forest Department denied the land to be of Forest Department and submitted that only Revenue Department can clarify the situation. On account of that, petitioner moved application under Order 1 Rule 10 CPC for impleading Government through Collector as party respondent, but the trial Court without deciding the controversy in the matter has rejected the application by the impugned order. Hence, prayed that for effective adjudication of the case and for avoiding multiplicity of the litigation it is necessary that the State Government be impleaded as party respondent.

3. Per Contra, learned Additional Advocate General appearing for the respondents No.1 to 3 has opposed the petition and has submitted that the present petition is devoid of merits as the property belongs to Krishi Upaj Mandi, Datia. Hence, prayed for rejection of the petition.

4. Heard learned counsel for the parties and perused the impugned order and available record.

5. The trial Court by impugned order dated 10.3.2021 has passed the following order :-

> ''इस आदेश द्वारा वादीगण की ओर से प्रस्तुत आवेदन अंतर्गत आदेश 1 नियम 10 सहपठित धारा 153 सीपीसी का निराकरण किया जा रहा हैं।
>
> वादीगण की ओर से प्रस्तुत आवेदन संक्षेप में इस प्रकार है कि वाद के प्रचलन के दौरान कृषि उपज मण्डी द्वारा वादी की ओर से प्रस्तुत आवेदन अंतर्गत आदेश 6 नियम 17 सीपीसी दिनांकित 06.01.21 के जबाव में खसरा की प्रति, सर्वे कं 2467 के संबंध में प्रस्तुत की गई है तथा प्रतिवादीगण द्वारा यह बताया गया है कि 2467 की भूमि अब शासकीय हो गई हैं इसलिए मध्यप्रदेश शासन को पक्षकार बनाने का निवेदन किया है।
>
> प्रतिवादीगण की ओर से वादीगण के आवेदन का पृथक पृथक जबाव प्रस्तुत किया गया है। प्रतिवादीगण की ओर से प्रस्तुत जबाव संक्षेप में इस प्रकार है कि यह सर्वविदित है कि दतिया गिर्द का सर्वे नंबर 2467 राजस्व अभिलेखों में मध्यप्रदेश शासन दर्ज है जिसमें वादीगण निवास करते है। सर्वे नंबर 2467 का भाग रकवा 7.88 है0 कलैक्टर महोदय दतिया के द्वारा प्र.कं. 27अ–75 दिनांक 28.01.75 में पारित आदेश के द्वारा उक्त रकवा कृषि उपज मण्डी समिति दतिया को लीज पर दिया गया है जिसके बाद आबंटित भूमि में कृषि उपज मण्डी सम्मिलित हो गई है। विवादित स्थल पर जिस निर्माण

को लेकर वादपत्र प्रस्तुत है उसमें म0प्र0 शासन का कोई रोल नहीं है। वादीगण ने प्रकरण को विलंब करने के उद्देश्य से आवेदन प्रस्तुत किया है। अतः आवेदन निरस्त करने का निवेदन किया है।

प्रकरण के अवलोकन से स्पष्ट है कि वादीगण ने दिनांक प्रतिवादीगण की ओर से दिए गए जबाव के आधार पर प्रस्तुत किया है। वादीगण का मुख्यतः विवाद कृषि उपज मण्डी से रास्ते को लेकर है। वादीगण द्वारा वादपत्र में जो सहायता चाही गई है उसमें प्रतिवादीगण को कृषि उपज मण्डी में बाउण्ड्रीवॉल बनाने से निषेधित करने का निवेदन किया है। वादीगण का मुख्य विवाद कृषि उपज मण्डी से है उक्त सहायता शासन या शासन की भूमि के विरूद्ध नहीं चाही गई है। सर्वे कं. 2467 की भूमि शासन की होने या उसकी स्थिति के संबंध में वादीगण को दिनांक 20.01.21 को हो गई थी। वादी साक्ष्य के प्रकम पर वादीगण की ओर से उक्त संबंध में कोई आवेदन प्रस्तुत नहीं किया गया। यह अवलोकनीय है कि उक्त तथ्य वादी के ज्ञान में आने के उपरांत वादी अखिल, साक्षी परशुराम, साक्षी जगदीश एवं साक्षी विपिन बिहारी की साक्ष्य वादीगण की ओर से प्रस्तुत भिन्न भिन्न प्रकृति के आवेदनों का निराकरण करते हुए अंकित की गई। तब भी वादी की ओर से यह आवेदन प्रस्तुत नहीं किया गया। जब प्रकरण प्रतिवादी साक्ष्य के लिए नियत किया गया। तब वादी की ओर से उक्त आवेदन प्रस्तुत किए गए हैं जिससे यह स्पष्ट दर्शित होता है कि वादीगण प्रकरण को विलंबित करना चाहते है। अतः वादीगण की ओर से प्रस्तुत यह आवेदन भी 500 रूपये के परिव्यय पर निरस्त किया जाता है।''

6. On perusal of the aforesaid order impugned it is apparent that the trial Court has passed the order impugned in accordance with law, wherein it is specifically observed that the dispute exists between plaintiff and Krishi Upaj Mandi with regard to boundary wall and no any agricultural land is involved, therefore no relief could be sought against the State and provisions of Order 6 Rule 4(a) of CPC shall not be attracted. Despite above, aforesaid application was filed before the trial Court on the date fixed for recording of defendants' evidence, which reflects the intention of the petitioner/plaintiff to linger on the suit and, therefore the trial Court has rightly rejected the application by imposing cost of Rs.500/-.

7. Considering the facts and circumstances in totality, it is clear that the impugned order does not suffer from any manifest procedural impropriety or

palpable perversity. Consequently, the writ petition filed by the petitioner fails and is hereby dismissed being devoid of merits.

Petition dismissed

I.L.R. [2021] M.P. 1571 (DB)
APPELLATE CRIMINAL

Before Mr. Justice Sujoy Paul & Mr. Justice Rohit Arya

CRA No. 949/2012 (Indore) decided on 3 June, 2021

PAPPU @ DAYARAM …Appellant

Vs.

STATE OF M.P. …Respondent

***A. Penal Code (45 of 1860), Section 302 – Multiple Oral Dying Declaration – Effect* – Held – First dying declaration given to PW-1 who is independent witness and was not declared hostile – Second dying declaration given to PW-2, who is real brother of deceased – Serious and glaring inconsistencies and contradiction in two dying declarations, making the second one doubtful – First dying declaration was worthy of credence and could not have been ignored and discharged – Court below erred in convicting appellant on basis of such second dying declaration – Fit case for giving benefit of doubt to appellant – Conviction set aside – Appeal allowed.**

(Paras 15, 16, 19, 23 & 24)

क. दण्ड संहिता (1860 का 45), धारा 302 – अनेक मौखिक मृत्युकालिक कथन – प्रभाव – अभिनिर्धारित – प्रथम मृत्युकालिक कथन, अ.सा. 1 को दिया गया जो कि स्वतंत्र साक्षी है और पक्ष विरोधी घोषित नहीं किया गया था – द्वितीय मृत्युकालिक कथन, अ.सा. 2 को दिया गया जो मृतक का सगा भाई है – दोनों मृत्युकालिक कथनों में गंभीर एवं प्रखर असंगतियां तथा विरोधाभास हैं जो द्वितीय मृत्युकालिक कथन को संदेहास्पद बनाता है – प्रथम मृत्युकालिक कथन विश्वास योग्य था और अनदेखा एवं अमान्य नहीं किया जा सकता – निचले न्यायालय ने ऐसे द्वितीय मृत्युकालिक कथन के आधार पर अपीलार्थी को दोषसिद्ध करने में गलती की – अपीलार्थी को संदेह का लाभ देने के लिए उपयुक्त प्रकरण – दोषसिद्धि अपास्त – अपील मंजूर।

***B. Penal Code (45 of 1860), Section 302 and Evidence Act (1 of 1872), Section 32 – Multiple Oral Dying Declaration* – Held – If there are multiple dying declarations, trial Court was under obligation to examine each one with accuracy and precision – Adequate reasons were required to be given if any dying declaration is given preference over the other, which was not done in present case – Trial Court miserably failed to undertake aforesaid exercise and mechanically relied on second dying declaration.**

(Para 13)

ख. दण्ड संहिता (1860 का 45), धारा 302 एवं साक्ष्य अधिनियम (1872 का 1), धारा 32 – अनेक मौखिक मृत्युकालिक कथन – अभिनिर्धारित – यदि अनेक मौखिक मृत्युकालिक कथन हैं, विचारण न्यायालय, प्रत्येक का यथार्थता एवं सूक्ष्मता से परीक्षण करने के लिए बाध्यताधीन था – यदि किसी मृत्युकालिक कथन को दूसरे पर अधिमान दिया गया है, पर्याप्त कारण दिये जाना अपेक्षित था, जो कि वर्तमान प्रकरण में नहीं किया गया – विचारण न्यायालय, उपरोक्त कार्य करने में बुरी तरह विफल रहा और यांत्रिक रूप से द्वितीय मृत्युकालिक कथन पर विश्वास किया।

***C. Penal Code (45 of 1860), Section 302 – Last Seen Theory* – Held – As per evidence, appellant took deceased with him on 26.04.2011 and later deceased was found injured in a well on 28.04.2011 – No iota of material to show what happened during these two days – On basis of this theory alone, appellant cannot be convicted – Benefit of doubt given to appellant.**

(Paras 20 to 24)

ग. दण्ड संहिता (1860 का 45), धारा 302 – अंतिम बार देखे जाने का सिद्धांत – अभिनिर्धारित – साक्ष्य के अनुसार, 26.04.2011 को मृतक को अपीलार्थी अपने साथ ले गया और बाद में, 28.04.2011 को मृतक को कुऐं में आहत पाया गया था – यह दर्शाने के लिए किंचित भी सामग्री नहीं कि इन दो दिनों के दौरान क्या हुआ था – अकेले इस सिद्धांत के आधार पर अपीलार्थी को दोषसिद्ध नहीं किया जा सकता – अपीलार्थी को संदेह का लाभ दिया गया।

***D. Penal Code (45 of 1860), Section 302 – Last Seen Theory* – Held – Apex Court concluded that last seen together itself would not be sufficient, prosecution has to complete the chain of circumstances to bring home the guilt of accused – It is not prudent to base conviction solely on "last seen theory".**

(Para 21 & 22)

घ. दण्ड संहिता (1860 का 45), धारा 302 – अंतिम बार देखे जाने का सिद्धांत – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया कि अंतिम बार साथ देखा जाना अपने आप में पर्याप्त नहीं होगा, अभियोजन को अभियुक्त की दोषिता साबित करने के लिए परिस्थितियों की श्रृंखला पूरी करनी होती है – मात्र ''अंतिम बार देखे जाने के सिद्धांत'' पर दोषसिद्धि आधारित करना प्रज्ञायुक्त नहीं है।

***E. Penal Code (45 of 1860), Section 302 and Evidence Act (1 of 1872), Section 32 – Oral Dying Declaration* – Held – Conviction can be recorded solely on basis of dying declaration or even on basis of oral dying declaration, provided it should be free from any doubt and must pass scrutiny of reliability.**

(Para 12)

ङ. दण्ड संहिता (1860 का 45), धारा 302 एवं साक्ष्य अधिनियम (1872 का 1), धारा 32 – मौखिक मृत्युकालिक कथन – अभिनिर्धारित – मात्र मृत्युकालिक कथन के आधार पर या यहां तक कि मौखिक मृत्युकालिक कथन के आधार पर दोषसिद्धि

अभिलिखित की जा सकती है, परंतु यह कि, उसे किसी संदेह से मुक्त होना चाहिए तथा विश्वसनीयता की संवीक्षा पास करनी चाहिए।

***F. Evidence Act (1 of 1872), Section 32 – Dying Declaration – Principle* – Held – It is a qualitative worth of a declaration and not plurality of declaration which matters – Dying declaration is to be examined very carefully with utmost care and caution because the maker of statement is not alive and cannot be put to cross examination (Para 12 & 14)**

च. साक्ष्य अधिनियम (1872 का 1), धारा 32 – मृत्युकालिक कथन – सिद्धांत – अभिनिर्धारित – वह कथन का गुणवत्ता मूल्य है और न कि कथन की बहुल्यता, जो महत्व रखता है – मृत्युकालिक कथन का परीक्षण अति सावधानीपूर्वक, अत्यंत सतर्कता एवं सजगता से करना है क्योंकि कथनकर्ता जीवित नहीं है और उसका प्रति–परीक्षण नहीं किया जा सकता।

***G. Criminal Practice – Witness* – Held – If a witness is not declared hostile by prosecution, benefit of such evidence should go to accused and not to prosecution. (Para 16)**

छ. दाण्डिक पद्धति – साक्षी – अभिनिर्धारित – यदि अभियोजन द्वारा साक्षी को पक्ष विरोधी घोषित नहीं किया गया है, ऐसे साक्ष्य का लाभ अभियुक्त को जाना चाहिए और न कि अभियोजन को।

Cases referred:

(1999) 8 SCC 458, 2016 Cr.L.J. 2939, 1992 SC 223, 2014 SCC OnLine MP 8652, 2011 (1) MPHT 50, (2004) 13 SCC 314, (2005) 5 SCC 272, AIR 2013 SC 2519, 2009 (2) MPHT 313, 2013 SCC Online MP 2491, AIR 1994 SC 464, (2016) 1 SCC 550, (2014) 4 SCC 715, (2006) 10 SCC 172, (2007) 3 SCC 755.

Tarun Kushwaha, for the appellant.
Archana Kher, Dy. A.G. for the respondent/State.

J U D G M E N T

The Judgment of the Court was delivered by :
SUJOY PAUL, J. :- This Criminal filed u/S.374 of Cr.P.C assails the judgment of 1st Additional Sessions Judge (Fast Track Court), Narsinghgarh, District Rajgarh in Sessions Trial No.223/2011, dated 26/07/2012 whereby the appellant was held guilty for the offence u/S.302 of the IPC and sentenced to undergo life imprisonment with fine of Rs.5000/- and in default of payment of fine he shall further undergo six month's RI.

2. Draped in brevity, the case of the prosecution is that the appellant has assaulted and thrown deceased Bhupendra in a well between 26/4/2011 and 27/4/2011. Bhupendra was found alive by the villagers at Sonkatch

(Narsingharh). The intimation was given to Kesri (PW.2), real brother of deceased Bhupendra. In turn, Dhansingh (PW.1), an independent witness and Kesri (PW.2) reached to the place of incident and found that villagers are trying to rescue Bhupendra who is found injured inside the well. In turn, Bhupendra was taken out of the well. Bhupendra died after some time. As per prosecution story, Kesri (PW.2) took him in injured condition to hospital in a Jeep. While travelling between the place of incident and hospital, Bhupendra informed Kesri (PW.2) that he was assaulted by Pappu @ Dayaram (appellant) and three other persons. He further stated that Pappu who is brother-in-law of deceased assaulted him but three other persons who accompanied Pappu were not known to him.

3. Before the Court below 15 prosecution witnesses entered the witness box and deposed their statements. The appellant abjured his guilt. Nobody entered the witness box on behalf of the accused.

4. The Court below has considered the statement of wife of deceased Pragbai (PW.3) and Devchand (PW.10) wherein they stated that Bhupendra was taken by Pappu in his motor cycle on 26/4/2011 on the pretext that they have to distribute marriage card of appellant's brother. Thereafter Bhupendra could be traced only on 28/4/2011 and he died on the same day. These two witnesses were introduced by prosecution in order to show that the deceased was last seen with Pappu by the said witnesses.

5. Dr.Sandeep Narayani (PW.13) deposed his statement on the basis of postmortem report and stated that 18 injuries were found on the person of Bhupendra (which are mentioned in para 20 of the impugned judgment). PW.13 further stated that reason of death is head injury and failure of respiratory system and other complications. This witness proved his communication with concern police station Ex.P/17 which was duly signed by him.

6. The Court below treated the statement of Kesri (PW.2) as oral dying declaration. On the basis of last seen evidence and aforesaid dying declaration, the court below opined that prosecution has proved its case beyond reasonable doubt and resultantly convicted and sentenced the appellant for committing offence u/S. 302 of IPC.

7. Shri Tarun Kushwaha, learned counsel for appellant urged that Dhansingh (PW.1) is an independent witness who categorically deposed that when he along with other persons reached to the place of occurrence i.e. the well in Sonkatch, he found that Bhupendra is lying inside the well. With the help of villagers, Bhupendra was taken out of the well. By this time, real brother of Bhupendra, Kesri (PW.2) also reached to the place of incident. Bhupendra informed Dhansingh (PW.1) that two unknown persons of Beenaganj had thrown him in the well. This intimation was given by Bhupendra to Dhansingh (PW.1) only. By taking this Court to the cross examination, learned counsel for appellant submits

that PW.1 clearly stated that only two unknown persons have thrown him in the well. The reliance is placed on the statement of Kesri (PW.2) to contend that this witness who is real brother of deceased narrates a different story. This witness deposed that when he carried injured Bhupendra in a Jeep to the hospital, he asked him as to who assaulted him. In turn, Bhupendra informed him that his brother-in-law (appellant) along with three unknown persons assaulted him and thrown him in the well. Before reaching hospital, Bhupendra died. He further deposed that Bhupendra was taken by the appellant on 26/4/2011 from his house. The contention of learned counsel for appellant is that both the dying declarations are not in tune with one another. It was not proper on the part of court below to totally ignore the first dying declaration given to PW.1 and solely rely on the second dying declaration given to the relative (PW.2). By placing reliance on (1999) 8 SCC 458 *(Heikrujam Chaoba Singh Vs. State of Manipur)* and 2016 Cr.L.J. 2939 *(Rambraksh alias Jalim v. State of Chhattisgarh),* it is urged that there are serious inconsistencies in both the dying declarations. The court below has committed an error in passing the impugned judgment on the basis of 'last seen' and second dying declaration alone. It is further urged that 'merg' intimation (Ex.P.22) which is recorded on the basis of information given by Kesri (PW.2), clearly shows that Bhupendra died because he fell down in the well. It is not mentioned that anybody either assaulted or thrown the deceased in the well. For the same purpose, reliance is placed on the communication (Ex.P.17) of Dr. Narayani (PW.13) to concerned police station wherein the same reason of death is mentioned by the treating doctor. On the strength of these documents, Shri Kushwaha submits that had it been a case of assault and throwing the deceased in the well by the present appellant, Kesri would have informed this reason while recording of 'merg' intimation. Thus, dying declaration allegedly given by Bhupendra to Kesri (PW.2) is not corroborated by any material whatsoever and it is not worthy of credence.

The learned counsel for the appellant further contends that Dhansingh (PW.1) before whom oral dying declaration was given by deceased was not declared as a hostile witness. Thus, his statement could not have been discarded and disbelieved. When there are multiple dying declarations, the dying declaration which is in favour of the accused should be relied upon. The reliance is placed on (1999) 8 SCC 458 *(Heikrujam Chaoba Singh Vs. State of Manipur),* 1992 SC 223 *(Kamla vs. State of Punjab),* 2014 SCC OnLine MP 8652 *(Guddi Bai vs. State of MP)* and 2011(1) MPHT 50 *Jugal @ Shabbir Khan.* Attention of this Court is also drawn on the statement of Dr. Sandeep Narayani (PW.13), who conducted the postmortem and deposed that the injuries found on the person of deceased could have been caused because of falling in the well. Statement of RP Pathak (PW.15), Investigation Officer is relied upon to contend that this witness clearly stated that Kesri (PW.2) did not inform him about any oral dying declaration being given to him by deceased Bhupendra. In absence of any motive

and previous animosity between appellant and deceased, who are close relatives, the appellant could not have been held guilty for committing murder.

8. Criticizing the impugned judgment on the basis of last seen theory, learned counsel for appellant submits that as per wife of deceased Pranbai (PW.3) and Devchand (PW.10), the deceased was taken for distributing marriage invitation card by appellant on 26.4.2011. Thereafter there exists no evidence to show that he remained with the appellant for next two days. In absence of any corroboration, the last seen theory is not sufficient to hold the appellant as guilty. Further more, as per statement of Dhansingh (PW.1) and Kesri (PW.2) more than one person were involved in the offence. Police has not made any effort to investigate the matter regarding involvement of other persons. In absence of any corroboration and in view of time gap between the date Bhupendra was allegedly taken by appellant and the date when he was found, last seen theory cannot be the sole basis to convict the appellant. In support of aforesaid submissions, the appellant has also filed the written submissions.

9. Sounding a *contra* note, Ms.Archana Kher, learned Dy.A.G supported the impugned judgment. She submits that although there was no eye witness to the incident, the case of prosecution was based on last seen theory and the dying declaration of Bhupendra given to Kesri (PW.2). The Court below has not committed any error in appreciating the evidence and has rightly passed the impugned judgment.

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

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

ORAL DYING DECLARATION:

12. As noticed above, the impugned judgment of conviction is based on the oral dying declaration of Bhupendra given to Keshri (PW.2) and last seen evidence based on deposition of wife of deceased Pragbai (PW.3) and Devchand (PW.10). This is trite that conviction can be recorded solely on the basis of a dying declaration or even on the basis of an oral dying declaration. However, such dying declaration should be free from any doubt and must pass scrutiny of reliability. [See: *Heikrujam Chaoba Singh Vs. State of Manipur* (supra)]. It is equally settled that it is qualitative worth of a declaration and not plurality of declaration which matters. [See: (2004) 13 SCC 314 *(State of Maharashtra vs. Sanjay D. Rajhans)*]

13. In the instant case, as per prosecution story, there are two oral dying declarations given by Bhupendra to Dhansingh (PW.1) and Kesri (PW.2). In the first dying declaration, the deceased did not take the name of appellant or anybody else. He categorically stated that he was assaulted and thrown in the well by two unknown persons. Pertinently, this independent prosecution witness was not

declared hostile by the prosecution. In a case of this nature where there are multiple dying declarations, the trial Court was under an obligation to examine each one with accuracy and precision. Adequate reasons were required to be given if any dying declaration is given preference over the other. Putting it differently, if second dying declaration was relied upon and believed, adequate reasons ought to have been assigned as to why first one could not inspire confidence and worthy of credence. The Court below has miserably failed to undertake aforesaid exercise and mechanically relied upon the second dying declaration.

14. The dying declaration is required to be examined very carefully, because the maker of the statement is not alive and cannot be put to cross-examination. In this backdrop, the dying declaration must be examined with utmost care and caution. [See: *Kamla vs. State of Punjab* (supra)].

15. If both the dying declarations are examined in juxta position, it will be clear that there are glaring inconsistencies and contradictions. In the first dying declaration, nobody's name was taken and number of persons, who were involved in commission of crime were stated to be two, whereas in the second dying declaration, the name of appellant was taken with three more unknown persons who were accompanying the present appellant. This, in our view shows serious inconsistency and contradiction in the dying declaration which makes the second dying declaration as doubtful. In the case of *Kamla* and *Heikrujam Chaoba Singh* (supra), the Apex Court interfered with the impugned judgment because of inconsistencies in the dying declarations. Same is the view taken by Division Bench of this Court in the case of *Guddi Bai* (supra). Another Division Bench in *Jugal @ Shabbir Khan* (supra) opined that if there are more dying declarations than one and on the material points they are contradictory to each other, certainly, the benefit will go to the accused and authenticity could not be attributed to the said dying declarations. It was further held that no reliance can be placed upon such dying declarations to hold the appellant as guilty.

16. Thus, in our view, the Court below has erred in recording conviction on the basis of second dying declaration. The first dying declaration was given to Dhansingh. The prosecution did not declare PW.1 as a hostile witness. This is settled law that if a witness is not declared hostile by the prosecution, the benefit of such evidence should go to the accused and not to the prosecution. (See (2005) 5 SCC 272 *Raja Ram Vs. State of Rajasthan*). This principle was followed in AIR 2013 SC 2519 *Safi Mohd. Vs. State of Rajasthan.* A division bench of this Court in 2009(2) MPHT 313 *(State of M.P. Vs. Munshilal)* followed the *ratio decidendi* of *Raja Ram* (supra) and opined that the prosecution is bound by the statement of a prosecution witness who was not declared as hostile. For this reason, the statement of PW.1 and first dying declaration was worthy of credence and could not have been ignored and discarded. More so when admittedly Dhansingh (PW.1) was an independent witness whereas Kesri (PW.2) was real brother of deceased.

17. Apart from this, while recording *'merg'* intimation, Kesri (PW.2) did not inform the hospital authorities regarding any assault or the incident of throwing the deceased in the well by anybody. Indeed, he informed that Bhupendra fell into the well. This Court in 2013 SCC Online MP 2491 *(Karan Vs. State of M.P.)* opined that in the *murg* intimation the star prosecution witness mentioned that the offence was committed by "one person", without disclosing his name whereas in his later deposition, he took the name of said person by stating that said person was known to him. Since name of that person was not taken in the *murg* intimation, the statement of said witness was found to be not trustworthy.

18. In the case of *Ramsai and others Vs. State of MP* (AIR 1994 SC 464), the trial court relied only on evidence of one prosecution witness namely PW.29 and discarded the other statements. Interestingly, in the said case, PW.29 did not inform anybody about the alleged oral dying declaration and it is only on that day he disclosed it to the police inspector. Since no explanation was given as to why he has not informed anybody earlier, the Court disbelieved his statement. It was poignantly held that the dying declaration is no doubt an important piece of evidence, but it should be free from all infirmities. In cases of inconsistencies and contradictions in dying declarations there must be some corroboration. The Apex Court opined that it will be highly unsafe to base the conviction on the basis of oral dying declaration in view of aforesaid infirmity.

19. Apart from the above, RP Pathak (PW.15), I.O. in his cross-examination clearly admitted that Kesri (PW.2) did not inform him about any oral dying declaration during investigation. No other prosecution witness supported the statement of Kesri (PW.2) regarding second dying declaration. Thus, for the cumulative reasons mentioned herein-above, the second dying declaration could not have been relied upon by the Court below to convict the appellant.

LAST SEEN THEORY:

20. Another reason for convicting the appellant is based on "last seen theory". As noticed above, as per deposition of wife of deceased Pragbai (PW.3) and Devchand (PW.10), appellant took the deceased with him on 26/4/2011 and he was found injured in a well on 28/4/2011. There is no iota of material/evidence to show what happened during these two days.

21. The Apex Court in the case of *Rambraksh @ Jalim* (supra) clearly held that to record a conviction, the last seen together itself would not be sufficient and the prosecution has to complete the chain of circumstances to bring home the guilt of the accused. In this case also, the independent prosecution witnesses did not support the prosecution story, and, therefore, the judgment of conviction was turned down.

22. In *Nizam Vs. State of Rajasthan* (2016) 1 SCC 550, it was ruled that it is not prudent to base the conviction solely on "last seen theory". The said theory

should be applied taking into consideration the case of prosecution in the entirety and keeping in mind the circumstances that precede and follow the point of being so last seen. Similarly in *Kanhaiyalal Vs. State of Rajasthan* (2014) 4 SCC 715, it was held that the circumstance of last seen together does not by itself and necessarily lead to the inference that it was the accused who committed the crime. There must be something more establishing connectivity between the accused and the crime. In *Ramreddy Rajesh Khanna Reddy* (2006) 10 SCC 172 which was followed in *State of Goa Vs. Sanjay Thakran* (2007) 3 SCC 755, it was poignantly held that even in the cases where time gap between the point of time when the accused and deceased were last seen alive and when the deceased was found dead is too small, the possibility of other person committing the offence cannot be ruled out.

23. In view of the principles laid down by Supreme Court in the aforesaid judgments, there is no cavil of doubt that last seen evidence in the present case is a weak piece of evidence and on the basis of this theory alone conviction cannot be affirmed. More so when the second dying declaration given to Kesri (PW.2) does not inspire confidence and there exists serious inconsistencies in two dying declarations.

24. In view of foregoing analysis, we are unable to countenance the impugned judgment. In our view, the prosecution could not establish its case beyond reasonable doubt and Court below has clearly erred in recording conviction on the basis of last seen theory and second dying declaration. In our view, it is a fit case of giving benefit of doubt to the appellant. Resultantly, impugned judgment passed in Sessions Trial No.223/2011 is set aside. If appellant's presence in the custody is not required for any other offence, he be released forthwith.

25. The appeal is **allowed.**

Appeal allowed

I.L.R. [2021] M.P. 1579
APPELLATE CRIMINAL
Before Mr. Justice Vivek Rusia
CRA No. 5475/2020 (Indore) decided on 10 June, 2021

RAJU @ VIJAY …Appellant

Vs.

STATE OF M.P. & anr. …Respondents

A. Juvenile Justice (Care and Protection of Children) Act, 2015 (2 of 2016), Sections 7-A, 9 & 94(2) and Juvenile Justice (Care and Protection of children) Rules, 2007, Rule 12 – Determination of Age – Ossification Test – **Held – In absence of birth certificate or mark sheet issued by Board, birth certificate given by corporation or municipal authority or panchayat is**

admissible – In absence of these two documents, age is to be determined by ossification test – Appellant produced mark sheets of Class 5 & 6 and the Scholar register – No error while assessing the age of appellant as 18 years on basis of report of Medical Board – Appeal dismissed. (Para 10 & 13)

क. किशोर न्याय (बालकों की देखरेख और संरक्षण) अधिनियम, 2015 (2016 का 2), धाराएँ 7–A, 9 व 94(2) एवं किशोर न्याय (बालकों की देखरेख और संरक्षण) नियम, 2007, नियम 12 – आयु का अवधारण – अस्थि जांच – अभिनिर्धारित – जन्म प्रमाण–पत्र या बोर्ड द्वारा जारी अंक सूची के अभाव में, निगम या नगरपालिका प्राधिकारी या पंचायत द्वारा दिया गया जन्म प्रमाण–पत्र ग्राह्य है – इन दोनों दस्तावेजों के अभाव में, आयु का अवधारण अस्थि जांच द्वारा किया जाता है – अपीलार्थी ने कक्षा 5 व 6 की अंकसूचियाँ और छात्र पंजी प्रस्तुत किये – चिकित्सा बोर्ड के प्रतिवेदन के आधार पर अपीलार्थी की आयु 18 वर्ष निर्धारित करने में कोई त्रुटि नहीं – अपील खारिज।

***B. Juvenile Justice (Care and Protection of Children) Act, 2015 (2 of 2016), Section 9(2) & 94(2) – Enquiry* – Held – Provisions of Section 94(2) about the date of birth recorded in birth certificate or matriculation or equivalent certificate from the concerned board cannot be ignored by Magistrate/Sessions Court while conducting enquiry as contemplated u/S 9(2) of the Act. (Para 12)**

ख. किशोर न्याय (बालकों की देखरेख और संरक्षण) अधिनियम, 2015 (2016 का 2), धारा 9(2) व 94(2) – जांच – अभिनिर्धारित – जन्म प्रमाण–पत्र या संबंधित बोर्ड के मैट्रिक परीक्षा या उसके समकक्ष प्रमाण–पत्र में अभिलिखित जन्मतिथि के बारे में धारा 94(2) के उपबंधों को मजिस्ट्रेट/सत्र न्यायालय द्वारा अधिनियम की धारा 9(2) के अंतर्गत अनुध्यात जांच संचालित करते समय अनदेखा नहीं किया जा सकता।

Cases referred:

(2017) 11 SCC 598, (2012) 9 SCC 750.

Nilesh Dave, for the appellant.
R.S. Bhadoria, P.L. for the respondent/State.

O R D E R

(Heard through Video Conferencing)

VIVEK RUSIA, J. :- Appellant has filed the present appeal under section 14(A)(2) of the Scheduled Caste & Scheduled Tribe (Prevention of Atrocities) Act (for short 'the SC/ST Act') being aggrieved by the order dated 16.09.2020 passed by the Special Judge (SC/ST Act), Rajgarh whereby the application filed by the accused seeking declaration that he is **"child in conflict with law"** and his trial be sent to Board was rejected.

Facts of the case in short are as under:

2. An FIR was registered against the appellant under sections 363, 366, 376-B, 376(2) of the IPC read with section 5 & 6 of the Protection of Children from Sexual Offences Act and 3(2)(v) of the SC/ST Act and he was arrested. The investigation was completed and charge sheet has been filed before the Special Session Judge . In the charge sheet his age is declared as 19 years at the time of commission of offence on 25.12.2019.

3. Appellant/accused filed an application asserting that at the time of commission of the offence he was below 16 years of age i.e. juvenile, therefore, his trial be sent to the juvenile Court/ board. In support of above contention, he has produced the mark sheet of class-6, year 2018-19 in which his date of birth is mentioned as 13.03.2006.

4. Vide order dated 06.08.2020 learned trail (sic : Trial) Court has ordered for an enquiry under section 9(2) read with section 94(2) of the Juvenile Justice (Care and Protection of Children) Act, 2015 (for short **'the JJ Act, 2015').** In support of his contention the appellant has examined ML Kushwaha, In-charge Head Master of Govt. Primary School, Pipalkheda as PW/1, Dauljiram, (father) as PW/2 & Ramkalibai (Mother) as PW/3. They have deposed that the date of birth of the appellant is recorded as 15.07.2015 at the time of admission in class-3. The Head Master has appeared before the Court with the original admission register Ex.D/1. *Prima facie*, learned Judge has disbelieved the entry in the record and directed for ossification test of the appellant. He was examined by the District Medical Board, Rajgarh and a report dated 04.09.2020 was submitted to the Court. As per the findings of the Medical Board, the age of the applicant was 18 years or more at the time of commission of the offence. In order to prove the report Dr.Devashish Maskole, Dentist appeared in the Court as PW/4 and deposed that as per the opinion of the Medical Board Ex.P/2 the age of the appellant/ accused was 18 years or more.

5. After hearing learned counsel for the appellant and the Public Prosecutor, learned trail (sic : Trial) Court has disbelieved the entry of date of birth recorded in the mark sheet as well as scholar register and accepted the opinion of the Medical Board and held that the appellant is not "child in conflict with law" means a child who is alleged or found to have committed an offence and who has not completed eighteen years of age on the date of commission of such offence; as defined under section 2(13) of the JJ Act and the trial cannot be sent to the JJ Board. Being aggrieved by the aforesaid order, the present appeal is filed.

6. Shri Dave, learned counsel appearing for the appellant submits that sub section (2) of section 94 of the JJ Act provides that in case the committee or the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not then shall undertake the process of age determination by obtaining date of birth certificate from the school or matriculation or equivalent

certificate or birth certificate from the corporation and only in absence of the aforesaid certificates age shall be determined by the ossification test or any other medical age determination test. In the present case, the appellant has produced the mark sheet and examined the In-charge school Head Master, therefore, there was no need to send the appellant for determination of age by an ossification test. The date of birth as recorded in the birth certificate is 13.3.2006 and at the time of alleged commission of offence he was a child, therefore, learned Court has wrongly passed the impugned order contrary to the provisions of law, hence the impugned order be set aside and the trial be sent to the juvenile Court.

7. Learned Panel Lawyer appears for the State opposes the aforesaid prayer by submitting that the learned Court has rightly disbelieved the entry made in the mark sheet as well as record because the witnesses have disclosed that there was no material produced at the time of recording the date of birth as 13.03.2006 in the school. As per section 94(2) of the JJ Act the date of birth recorded in the matriculation certificate is admissible. The date of birth recorded in the scholar register as well as in the mark sheet of class-3 to 6 are not admissible, hence this appellant was rightly referred to the Medical Board. Learned Trail (sic : Trial) Court has also found that the age of mother of the appellant was 50 years at the time of birth of the appellant on 13.03.2006 which is also doubtful in the rural areas where the marriage undertakes at an early age. Learned Court has personally seen the appellant and found that he appears to be more than 18 years of age, therefore, in view of this cumulative circumstances and the material available on record the appellant has rightly been not hold child and the appeal is devoid of merit and liable to be dismissed.

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

8. According to the section 2 (13) of the JJ Act "child in conflict with law" means a child who is alleged or found to have committed an offence and who has not completed eighteen years of age on the date of commission of such offence. Section 9(2) of the JJ Act is reproduced below for ready reference:

> ***9. Procedure to be followed by a Magistrate who has not been empowered under this Act-*** *(1) When a Magistrate, not empowered to exercise the powers of the Board under this Act is of the opinion that the person alleged to have committed the offence and brought before him is a child, he shall, without any delay, record such opinion and forward the child immediately along with the record of such proceedings to the Board having jurisdiction.*
>
> *(2) In case a person alleged to have committed an offence claims before a court other than a Board, that the person is a child or was a child on the date of commission of the offence, or if the court itself is of the opinion that the person was a child on*

the date of commission of the offence, the said court shall make an inquiry, take such evidence as may be necessary (but not an affidavit) to determine the age of such person, and shall record a finding on the matter, stating the age of the person as nearly as may be:

Provided that such a claim may be raised before any court and it shall be recognised at any stage, even after final disposal of the case, and such a claim shall be determined in accordance with the provisions contained in this Act and the rules made thereunder even if the person has ceased to be a child on or before the date of commencement of this Act.

(3) If the court finds that a person has committed an offence and was a child on the date of commission of such offence, it shall forward the child to the Board for passing appropriate orders and the sentence, if any, passed by the court shall be deemed to have no effect.

(4) In case a person under this section is required to be kept in protective custody, while the person's claim of being a child is being inquired into, such person may be placed, in the intervening period in a place of safety.

9. The aforesaid section provides the procedure to be followed by the Magistrate who has not been empowered under this Act. When a Magistrate is of the opinion that the person alleged to have committed an offence and brought before him is a child, he shall without any delay record such opinion and forward the child immediately along with the record of such proceedings to the Board having jurisdiction. Under sub section (2) in case a person before the Court is a child or was a child on the date of commission of the offence, the Court shall make an enquiry, take such evidence as may be necessary but not an affidavit to determine the age of such person and shall record the finding.

10. Learned counsel for the appellant has emphasized on the provisions of the Section 94 of the JJ Act. For ready reference same is reproduced as under:-

94. Presumption and determination of age.—(1) Where, it is obvious to the Committee or the Board, based on the appearance of the person brought before it under any of the provisions of this Act (other than for the purpose of giving evidence) that the said person is a child, the Committee or the Board shall record such observation stating the age of the child as nearly as may be and proceed with the inquiry under section 14 or section 36, as the case may be, without waiting for further confirmation of the age.

> (2) In case, the Committee or the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Committee or the Board, as the case may be, shall undertake the process of age determination, by seeking evidence by obtaining—
>
> > (i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;
> >
> > (ii) the birth certificate given by a corporation or a municipal authority or a panchayat;
> >
> > (iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board: 39 Provided such age determination test conducted on the order of the Committee or the Board shall be completed within fifteen days from the date of such order.
>
> (3) The age recorded by the Committee or the Board to be the age of person so brought before it shall, for the purpose of this Act, be deemed to be the true age of that person.

Above section provides the procedure for the Committee or Board to be adopted in order to form an opinion about the age of the child. In case the committee or the board has reasonable ground for doubt regarding whether the person brought before it is a child or not the committee or board shall undertake a process of age determination by seeking evidence by obtaining date of birth, certificate from the school or matriculation or equivalent certificate from the concerned examination board, if available or the birth certificate given by the corporation and in case of failure to produce non availability of aforesaid certificate the age shall be determined by ossification test.

11. It is clear from the aforesaid that the procedure prescribed under section 94 is to be adopted by the committee or board but in the present case the appellant was produced before the Special Court empowered under SC/ST Act and Cr.P.C. and an objection has been raised about his juvenility at the time of commission of offence, therefore, the procedure prescribed under section 9 is to be followed and rightly so done by the learned Court. Sub section (2) of section 9 provides a formal enquiry, taking of evidence as may be necessary to determine the age. The learned Magistrate took the evidence of Headmaster, parents and the doctor and held that this applicant was not child at the time of commission of the offence. Parents have failed to produce any material to show the basis on which the date of birth 13.03.2006 was recorded.

12. Since this issue is related to the juvenility of an accused, hence provisions of the section 94 (2) about the date of birth recorded in the birth certificate or matriculation or equivalent certificate from the concerned board cannot be ignored by the Magistrate/Sessions Court while conducting enquiry as contemplated under section 9(2) of JJ Act, 2015.

13. The appellant has produced his mark sheets of class-5 & 6 and the scholar register. In absence of birth certificate or mark sheet issued by the board the birth certificate given by the corporation or municipal authority, or panchayat is admissible. In absence of these two documents the age is to be determined by an ossification test, therefore, learned Court below has not committed any error while assessing the age of the appellant as 18 years on the basis of the report submitted by the Medical Board.

14. In the case of *Nagendra alias Wireless vs. State of Uttar Pradesh* reported in (2017) 11 SCC 598 in similar facts and circumstances and in view of rule 12 of the Juvenile Justice (Card (sic : Care) and Protection of Children) Rules, 2007 which is para-material (sic : pari-materia) to section 94(2) of the JJ Act, 2015 the Hon'ble the Supreme Court of India has discarded the entry in the school leaving certificate is inadmissible under Rule 13(3). The relevant para is reproduced below:

> *3. Having given our thoughtful consideration to the submission advanced at the hands of the learned counsel for the appellant, we are satisfied that a school leaving certificate is not a relevant consideration to determine the juvenility of an accused/convict under Rule 12(3) thereof. The aforementioned statutory provision was not considered by this Court while deciding Ranjeet Goswami case. The same cannot therefore be any precedential value in terms of the statutory provisions, referred to hereinabove.*

15. In the case of *Ashwani Kumar Saxena vs. State of M.P* reported in (2012) 9 SCC 750 while interpreting rule 12, section 7-A of the Act read with section rule 12 of the Rules, 2007 the Supreme Court of India has held that only in absence of matriculation or equivalent certificate or the date of birth certificate from the school first attended the question of obtaining the medical opinion from the duly constituted medical board arises. Para-32 is reproduced below:

> *32. "Age determination inquiry" contemplated under section 7A of . the Act r/w Rule 12 of the 2007 Rules enables the court to seek evidence and in that process, the court can obtain the matriculation or equivalent certificates, if available. Only in the absence of any matriculation or equivalent certificates, the court need obtain the date of birth certificate from the school first attended other than a play school. Only in the absence of matriculation*

or equivalent certificate or the date of birth certificate from the school first attended, the court need obtain the birth certificate given by a corporation or a municipal authority or a panchayat (not an affidavit but certificates or documents). The question of obtaining medical opinion from a duly constituted Medical Board arises only if the above mentioned documents are unavailable. In case exact assessment of the age cannot be done, then the court, for reasons to be recorded, may, if considered necessary, give the benefit to the child or juvenile by considering his or her age on lower side within the margin of one year.

16. In view of the above, there is no substance in the contention of the learned counsel for the appellant that the learned Court has wrongly obtained the medical opinion despite availability of the mark sheet of class-5th of the appellant. I do not find any ground in the appeal, accordingly same is dismissed.

Appeal dismissed

I.L.R. [2021] M.P. 1586
APPELLATE CRIMINAL
Before Mr. Justice G.S. Ahluwalia

CRA No. 764/2016 (Gwalior) decided on 28 June, 2021

PINKI …Appellant

Vs.

STATE OF M.P. …Respondent

***A. Penal Code (45 of 1860), Section 376(1) and Protection of Children from Sexual Offences Act (32 of 2012), Section 4 – Ocular & Medical Evidence* – Held – Ocular evidence duly corroborated by medical evidence – Presence of human semen and sperms in vaginal slide corroborate the evidence of prosecutrix – MLC and FSL report corroborates the version of prosecutrix – Prosecution has proved the case beyond reasonable doubt – Conviction affirmed – Appeal dismissed. (Paras 14, 15, 28, 29 & 37)**

क. दण्ड संहिता (1860 का 45), धारा 376(1) एवं लैंगिक अपराधों से बालकों का संरक्षण अधिनियम (2012 का 32), धारा 4 – चाक्षुष व चिकित्सीय साक्ष्य – अभिनिर्धारित – चाक्षुष साक्ष्य की चिकित्सीय साक्ष्य से सम्यक् रूप से संपुष्टि होती है – वैजिनल स्लाइड पर मानव वीर्य एवं शुक्राणु की मौजूदगी अभियोक्त्री के साक्ष्य की संपुष्टि करता है – एम.एल.सी. एवं एफ.एस.एल. रिपोर्ट अभियोक्त्री के कथन की संपुष्टि करती हैं – अभियोक्त्री ने प्रकरण को युक्तियुक्त संदेह से परे साबित किया – दोषसिद्धि की अभिपुष्टि – अपील खारिज।

B. Penal Code (45 of 1860), Section 376(1) and Protection of Children from Sexual Offences Act (32 of 2012), Section 4 – Reduction of

***Sentence* – Appellant undergone jail sentence of 7 years with remission, praying for reduction of sentence to period already undergone – Appellant found guilty u/S 376(1) IPC and u/S 4 POCSO Act and considering Section 42 of the Act, he was sentenced u/S 4 of the Act – Held – On date of conviction, minimum sentence u/S 4 of POCSO Act was 7 years but minimum sentence u/S 376(1) IPC was 10 years – Anomaly was rectified in 2019 by amending POCSO Act – Sentence cannot be reduced to period already undergone by appellant. (Paras 32 to 35)**

ख. दण्ड संहिता (1860 का 45), धारा 376(1) एवं लैंगिक अपराधों से बालकों का संरक्षण अधिनियम (2012 का 32), धारा 4 – दण्डादेश घटाया जाना – अपीलार्थी परिहार सहित 7 वर्षों की जेल का दण्डादेश भुगत चुका है, पूर्व में भुगत चुकी अवधि तक दण्डादेश को घटाये जाने हेतु प्रार्थना कर रहा है – अपीलार्थी भा.दं.सं. की धारा 376(1) एवं पॉक्सो अधिनियम की धारा 4 के अंतर्गत दोषी पाया गया तथा अधिनियम की धारा 42 को विचार में लेते हुए, उसे अधिनियम की धारा 4 के अंतर्गत दण्डादिष्ट किया गया था – अभिनिर्धारित – दोषसिद्धि की तिथि को, पॉक्सो अधिनियम की धारा 4 के अंतर्गत न्यूनतम दण्डादेश 7 वर्ष का था लेकिन भा.दं.सं. की धारा 376(1) के अंतर्गत न्यूनतम दण्डादेश 10 वर्ष था – 2019 में पॉक्सो अधिनियम को संशोधित कर विषमता को परिशोधित किया गया था – दण्डादेश को अपीलार्थी द्वारा पहले ही भुगत चुकी अवधि तक कम नहीं किया जा सकता।

***C. Juvenile Justice (Care and Protection of Children) Act (56 of 2000), Section 7A and Juvenile Justice (Care and Protection of children) Rules, 2007, Rule 12(3) – Determination of Age* – Held – When school record of prosecutrix is available, then it is not necessary to look into her ossification Test report – Ossification test is merely a medical opinion which is subject to margin of error of two years on either side. (Paras 20 to 24)**

ग. किशोर न्याय (बालकों की देखरेख और संरक्षण) अधिनियम (2000 का 56), धारा 7A एवं किशोर न्याय (बालकों की देखरेख और संरक्षण) नियम, 2007, नियम 12(3) – आयु का अवधारण – अभिनिर्धारित – जब अभियोक्त्री का शाला अभिलेख उपलब्ध है, तो उसकी अस्थि जांच रिपोर्ट पर विचार करना आवश्यक नहीं है – अस्थि जांच मात्र एक चिकित्सीय राय है जो कि दोनों ओर दो वर्ष तक के अंतर की गुंजाईश के अधीन है।

Cases referred:

(2017) 11 SCC 431, (2013) 7 SCC 263.

A.K. Jain, for the appellant.
Alok Sharma, for the State.

J U D G M E N T

G.S. AHLUWALIA, J.:- This criminal appeal under Section 374 of CrPC has been filed against the judgment and sentence dated 04.08.2016 passed by Additional Sessions Judge, Karera, District Shivpuri in S.S.T. No.16/2015, by

which the appellant has been convicted under Section 4 of Protection of Children from Sexual Offences Act, 2012 and has been sentenced to undergo rigorous imprisonment of 10 years and a fine of Rs.5,000/- with default imprisonment of three months.

2. At the outset, counsel for the appellant submitted that since the appellant is in jail from 24.02.2015 and he has completed more than seven years including remission, therefore, he may be sentenced to the period already undergone by him.

3. The submission made by the counsel for the appellant cannot be considered unless and until the case is considered on merits. However, the counsel for the appellant did not argue on merits and stick to his submission that the appellant may be punished with the period already undergone by him. In the light of judgment passed by the Supreme Court in the case of *Nagpal Traders Vs. Davinder Singh* reported in (2017) 11 SCC 431, the question of sentence cannot be decided unless and until the appeal is decided on merits. Accordingly, this Court is left with no other option but to consider the merits of the case on its own after going through the record.

4. According to the prosecution case, on 23.02.2015 at about 6:00 PM the prosecutrix (PW-1) had gone with her cattles along with her younger sister (PW-2) to Kumhargadha well for providing water to her cattles. At that time the appellant came there and gave Rs.40/- to the younger sister of the prosecutrix and instructed that she should equally share with the prosecutrix. The appellant also suggested the younger sister of the prosecutrix that she should stand there and thereafter he caught hold the prosecutrix from behind and gagged her mouth. He dragged her to a nearby place where the appellant committed rape on the prosecutrix and also extended a threat that she should not narrate the incident in her house, otherwise she would be killed. Thereafter, the prosecutrix came back and informed the incident to her parents. Since it was already late in the night, therefore, the FIR was lodged on the next day. The police prepared the spot map. The prosecutrix was sent for medical examination. The vaginal slide and undergarments of the prosecutrix as well as the undergarments, pubic hairs and slide of the appellant were sent for FSL report. The school record of the prosecutrix was seized. The appellant was arrested and he was got medically examined and after completing investigation, police filed the charge sheet for offence under Sections 376(1), 506 (Part-II) of IPC and under Section 3/4 of the POCSO Act, 2012.

5. The Trial Court by order dated 17.03.2015 framed the charges under Sections 376(1), 506 (Part-II) of IPC and also under Section 4 of the POCSO Act, 2012.

6. The appellant abjured his guilt and pleaded not guilty.

7. The prosecution in order to prove its case, examined prosecutrix (PW-1), her younger sister (PW-2), the father of the prosecutrix (PW-3), Dr. Sunil Jain (PW-4), the mother of the prosecutrix (PW-5), Dr. Anjana Jain (PW-6), Ramesh Chandra Sharma (PW-7), Kaluram Parihar (PW-8), Smt. Anjana Khare (PW-9) and Ravindra Singh Sikarwar (PW-10).

8. The appellant examined Santosh Jatav (DW-1) and Dr. M.L. Agrawal (DW-2) in his defence.

9. The Trial Court after considering the ocular as well documentary evidence held that the age of the prosecutrix was 14 years and the prosecution has succeeded in establishing that the prosecutrix was raped by the appellant and, accordingly, held the appellant is guilty for offence under Section 376(1) of IPC and under Section 4 of the POCSO Act but acquitted the appellant for offence under Section 506 (Part-II) of IPC. Since the appellant was found guilty for offence under Section 376(1) of IPC and under Section 4 of the POCSO Act, therefore, in the light of Section 42 of POCSO Act, no separate sentence was awarded for offence under Section 376(1) of IPC and the appellant was sentenced for a rigorous imprisonment of 10 years and a fine of Rs.5000/- with default imprisonment of three months for offence under Section 4 of the POCSO Act, 2012.

10. The prosecutrix (PW-1) had claimed that she is the student of Class 8th and she is aged about 14 years and her date of birth is 22.4.2001. It was further claimed that she resides with her parents. About one and half months prior to the date of her examination, she along with her younger sister had gone to a well and was giving fodder and the appellant came there and gave Rs.40/- to her younger sister and suggested that both the sisters should share Rs.20/- each and instructed her younger sister to stand there. Thereafter, he caught hold of her and took her to a nearby place where he committed rape on her. He also extended a threat that in case if the incident is narrated to anybody then he would kill her. Thereafter, the prosecutrix came back to her house and informed the incident to her parents and since it was night and they were afraid, therefore, they went to the police station on the next day and lodged the FIR Ex.P-1. Thereafter, she was sent for medical examination. In cross-examination it was accepted that the land of the prosecutrix as well as the appellant is joint and the well is also joint. She denied that the father of the prosecutrix had not returned the money of the father of the appellant. She further stated that the incident took place at a place which is about half km. away from her house. She further claimed that although she was resisting but he did not run away. She further denied that the false report was lodged on account of property dispute.

11. The younger sister of the prosecutrix (PW-2) has supported the evidence of the prosecutrix and accepted that the appellant had given an amount of Rs.40/- to her and had instructed that both the sisters should share with each other. However, this witness is not the witness of rape.

12. The father of the prosecutrix (PW-3) and mother of the prosecutrix (PW-5) have stated that the prosecutrix and her younger sister had gone to well. After coming back from the well she informed that she was raped by the appellant. In cross-examination, the father of the prosecutrix denied that, false FIR was lodged due to property dispute. He further denied that the age of the prosecutrix is more than 18 years.

13. Dr. Sunil Jain (PW-4) had medically examined the appellant and found that the appellant is potent.

14. Dr. Anjana Jain (PW-6) had medically examined the prosecutrix and prepared the MLC Ex. P-4. In medical examination, it was found that hymen of the prosecutrix was torn with congestion and slight tenderness was also found. A specific opinion was given by this witness that penetration has taken place within a period of 48 hours. Vaginal slide of the prosecutrix was prepared and her panty was seized. Undergarments of the appellant, pubic hairs and slide were also seized and they were sent for FSL examination and as per FSL report Ex. P-13 which was exhibited as per the provisions of Section 293(i)(iv)(a) of CrPC. It was found that the panty of prosecutrix, slide of prosecutrix, underwear of appellant and slide of the appellant were containing semen and sperms.

15. Thus, it is clear that the ocular evidence of the prosecutrix was corroborated by the medical evidence.

16. The Police has seized the school record of the prosecutrix in support of her date of birth. According to the school record, her date of birth was 22.02.2001, whereas the incident took place on 23.02.2015. Ramesh Chandra Sharma, P.W. 7, proved School Admission Register, Ex. P-5C and also proved the certificate as Ex. P.6.

17. Thus, according to the school record, the prosecutrix was aged about 14 years.

18. The appellant had examined Dr. M.L. Agrawal (DW-2) who had conducted ossification test of the prosecutrix. The ossification test report is Ex. D-1, according to which, the age of prosecutrix was between 16 to 18 years.

19. Now the next question for consideration is as to whether the ossification test report can be relied upon or not ?

20. Section 7A of the Juvenile Justice (Care and Protection of Children) Act, 2000 [although this offence was committed in the month of February, 2015, but the Juvenile Justice (Care and Protection of Children) Act, 2015 came into force thereafter] reads as under :

> **"7A- Procedure to be followed when claim of juvenility is raised before any court.-(1)**Whenever a claim of juvenility is raised before any court or a court is of the opinion that an accused person was a juvenile on the date of commission of the offence, the court shall make an inquiry, take such evidence as may be necessary(but not an affidavit) so as to determine the age of such person, and shall record a finding whether the person is a juvenile or a child or not, stating his age as nearly as may be:
>
> Provided that a claim of juvenility may be raised before any court and it shall be recognised at any stage, even after final disposal of the case, and such claim shall be determined in terms of the provisions contained in this Act and the rules made thereunder, even if the juvenile has ceased to be so on or before the date of commencement of this Act.
>
> (2) If the court finds a person to be a juvenile on the date of commission of the offence under subsection (1), it shall forward the juvenile to the Board for passing appropriate order, and the sentence, if any, passed by a court shall be deemed to have no effect."

21. Rule 12 of Juvenile Justice Rules, 2007 reads as under :

> **"12. Procedure to be followed in determination of Age**.-(1) In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be the Committee referred to in rule 19 of these rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of 30 days from the date of making of the application for that purpose.
>
> (2) The court or the Board or as the case may be the Committee shall decide the juvenility or otherwise of the juvenile or the child or as the case may be the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and send him to the observation home or in jail.
>
> (3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining -

(a) (i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat; and

(b) only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.

and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.

(4) If the age of a juvenile or child or the juvenile in conflict with law is found to be below 18 years on the date of offence, on the basis of any of the conclusive proof specified in sub-rule (3), the court or the Board or as the case may be the Committee shall in writing pass an order stating the age and declaring the status of juvenility or otherwise, for the purpose of the Act and these rules and a copy of the order shall be given to such juvenile or the person concerned.

(5) Save and except where, further inquiry or otherwise is required, inter alia, in terms of section 7A, section 64 of the Act and these rules, no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof referred to in sub-rule (3) of this rule.

(6) The provisions contained in this rule shall also apply to those disposed off cases, where the status of juvenility has not been determined in accordance with the provisions contained in

> subrule(3) and the Act, requiring dispensation of the sentence under the Act for passing appropriate order in the interest of the juvenile in conflict with law."

22. It is clear from Rule 12(3) of the Juvenile Justice Rules, 2007 that the age of a juvenile shall be determined by seeking evidence by obtaining (i) matriculation or equivalent certificates, if available, and in absence whereof, (ii) date of birth certificate from the school and in absence whereof (iii) the birth certificate given by Corporation or Municipal Authority or a Panchayat and in absence of the documents mentioned in Rule 12(3)(a), the medical opinion will be sought.

23. The Supreme Court in case of *Jarnail Singh Vs. State of Haryana,* reported in (2013) 7 SCC 263 has held that the age of a juvenile victim can be assessed in the light of the provisions of Juvenile Justice (Care and Protection of Children) Act.

> It has been held as under :
>
> 23. Even though Rule 12 is strictly applicable only to determine the age of a child in conflict with law, we are of the view that the aforesaid statutory provision should be the basis for determining age, even of a child who is a victim of crime. For, in our view, there is hardly any difference insofar as the issue of minority is concerned, between a child in conflict with law, and a child who is a victim of crime. Therefore, in our considered opinion, it would be just and appropriate to apply Rule 12 of the 2007 Rules, to determine the age of the prosecutrix VW, PW 6. The manner of determining age conclusively has been expressed in sub-rule (3) of Rule 12 extracted above. Under the aforesaid provision, the age of a child is ascertained by adopting the first available basis out of a number of options postulated in Rule 12(3). If, in the scheme of options under Rule 12(3), an option is expressed in a preceding clause, it has overriding effect over an option expressed in a subsequent clause. The highest rated option available would conclusively determine the age of a minor. In the scheme of Rule 12(3), matriculation (or equivalent) certificate of the child concerned is the highest rated option. In case, the said certificate is available, no other evidence can be relied upon. Only in the absence of the said certificate, Rule 12(3) envisages consideration of the date of birth entered in the school first attended by the child. In case such an entry of date of birth is available, the date of birth depicted therein is liable to be treated as final and conclusive, and no other material is to be relied upon. Only in the absence of such entry, Rule 12(3) postulates reliance on a birth certificate issued by a corporation or a municipal authority or a panchayat. Yet

> again, if such a certificate is available, then no other material whatsoever is to be taken into consideration for determining the age of the child concerned, as the said certificate would conclusively determine the age of the child. It is only in the absence of any of the aforesaid, that Rule 12(3) postulates the determination of age of the child concerned, on the basis of medical opinion.

24. Thus, it is clear that when the school record of the prosecutrix is available, then it is not necessary to look into the ossification test report of the prosecutrix. Furthermore, the ossification test is merely a medical opinion which is subject to margin of error of two years on either side. According to the ossification test report Ex. D-1, the radio-logical age of the prosecutrix was in between 16 to 18 years with margin of error of two years. According to school record of prosecutrix, the age of prosecutrix was 14 years. Accordingly, if the margin of two years is considered on a lower side, then it is clear that even as per the ossification test report, radio-logical age of the prosecutrix can be taken as 14 years.

25. Considering the totality of the facts and circumstances of the case and after relying upon the school record of the prosecutrix, it is held that on the date of incident, the prosecutrix was 14 years and was minor.

26. The trial Court in paragraph 26 has held that since the prosecutrix was aged about 14 years, i.e., less than 16 years, therefore, her consent is immaterial. It appears that the Trial Court lost sight of the fact that Section 375 of IPC was amended in the year 2013 and age under Section 375 *sixthly* of IPC was enhanced to 18 years.

27. Be that whatever it may.

28. One thing is clear that the prosecutrix was aged about 14 years and although the DNA was not conducted to find out as to whether human sperms found in the vaginal slide of the prosecutrix were that of the appellant or not, but considering the ocular evidence of the parties, coupled with the medical evidence, it can be said that the presence of human semen and sperms in the vaginal slide, further corroborates the evidence of prosecutrix.

29. As per FSL report Ex. P-13 and the definite opinion given by Dr. Anjana Jain (PW-4) in her MLC Ex. P-4, it is held that the prosecution has succeeded in establishing beyond reasonable doubt that he had raped a minor girl aged about 14 years.

30. Accordingly, the conviction of the appellant for offence under Section 376(1) of IPC and under Section 4 of POCSO Act is hereby affirmed.

31. The next question for consideration is as to whether the period of custody undergone by the appellant can be said to be sufficient or not ?

32. By Amendment Act 13 of 2013, the minimum sentence for offence under Section 376(1) of IPC was enhanced to 10 years. However, anomaly continued for punishment under Section 4 of POCSO Act. Anomaly was realized at a later stage. By Amendment Act No. 25/2019, the minimum sentence for offence under Section 4 of POCSO Act was also enhanced to 10 years.

33. It is submitted by the counsel for the appellant that the appellant has undergone the jail sentence of 7 years with remission.

34. Now the only question for consideration is as to whether the appellant has undergone the minimum jail sentence or not ?

35. The Trial Court by impugned judgment dated 04.08.2016 has found that the appellant is guilty of committing offence under Section 376(1) of IPC and under Section 4 of POCSO Act and considering Section 42 of POCSO Act, held that since the appellant has been found guilty of offence under POCSO Act, therefore, sentenced the appellant for offence under Section 4 of POCSO Act. It is true that on the date of conviction, the minimum sentence for offence under Section 4 of the POCSO Act was 7 years but it is equally true that the minimum sentence for offence under Section 376 (1) of IPC was 10 years. The aforesaid anomaly was rectified by the Legislature by amending POCSO Act in the year 2019. Under these circumstances, when the minimum sentence for offence under Section 376(1) of IPC was 10 years, this Court is of the considered opinion that the sentence cannot be reduced to the period of sentence already undergone by the appellant.

36. Accordingly, the solitary contention made by the counsel for the appellant for reduction of sentence to the period already undergone is hereby rejected.

37. As a consequence thereof, the judgment and sentence dated 04.08.2016 passed by the Special Judge (POCSO Act), Karera District Shivpuri in S.S.T. No.16/2015 is hereby affirmed. Consequently, the appeal fails and is hereby **dismissed.**

38. The appellant is in jail. He shall undergo the entire jail sentence awarded by the Trial Court.

39. Copy of this judgment may be supplied to the appellant free of cost.

Appeal dismissed

I.L.R. [2021] M.P. 1596 (DB)
APPELLATE CRIMINAL

Before Mr. Justice Prakash Shrivastava &
Mr. Justice Akhil Kumar Srivastava

CRA No. 262/2002 (Jabalpur) decided on 30 June, 2021

KARAN SINGH …Appellant

Vs.

STATE OF M.P. …Respondent

A. Penal Code (45 of 1860), Sections 363, 366 & 376 – Appreciation of Evidence **– Held – Doctors who examined the prosecutrix and the X-Ray report, concluded that prosecutrix was subjected to sexual intercourse – Statement of prosecutrix duly corroborated by other witnesses – Trial Court rightly convicted the appellant – Appeal dismissed. (Para 7 & 8)**

क. दण्ड संहिता (1860 का 45), धाराएँ 363, 366 व 376 – साक्ष्य का मूल्यांकन – अभिनिर्धारित – चिकित्सक, जिन्होंने अभियोक्त्री एवं X-रे प्रतिवेदन का परीक्षण किया, ने यह निष्कर्षित किया कि अभियोक्त्री के साथ मैथुन किया गया था – अन्य साक्षीगण द्वारा अभियोक्त्री का कथन सम्यक् रूप से संपुष्ट – विचारण न्यायालय ने अपीलार्थी को उचित रूप से दोषसिद्ध किया – अपील खारिज।

B. Penal Code (45 of 1860), Section 45 & 53 – Life Imprisonment – Term of Sentence – Remission **– Held – A sentence of imprisonment for life will run for the entire life of convict unless remission is granted in accordance with law – Appellant served actual sentence of 20 years, 4 months and 11 days and has also earned remission of 9 years, 5 months and 15 days – Competent authority of State directed to consider release of appellant in accordance with law by granting benefit of remission. (Paras 10 to 12 & 20)**

ख. दण्ड संहिता (1860 का 45), धारा 45 व 53 – आजीवन कारावास – दण्डादेश की अवधि – परिहार – अभिनिर्धारित – आजीवन कारावास का दण्डादेश, सिद्धदोष के संपूर्ण जीवनकाल तक चलेगा जब तक कि विधि के अनुसार परिहार प्रदान नहीं किया गया है – अपीलार्थी ने 20 वर्ष, 4 माह व 11 दिनों का वास्तविक दण्डादेश भुगता है और 9 वर्ष, 5 माह व 15 दिनों का परिहार भी अर्जित किया – राज्य के सक्षम प्राधिकारी को, विधि के अनुसार परिहार का लाभ प्रदान करते हुए अपीलार्थी को छोड़े जाने पर विचार करने के लिए निदेशित किया गया।

C. Criminal Procedure Code, 1973 (2 of 1974), Sections 432, 433 & 433-A – Power of Remission – Competent Authority – Jurisdiction of High Court **– Held – Power to grant remission lies with State Government – Such exercise of power is an executive discretion and the same is not available to the High Court in exercise of review jurisdiction. (Paras 13 to 19)**

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 432, 433 व 433–A – परिहार की शक्ति – सक्षम प्राधिकारी – उच्च न्यायालय की अधिकारिता – अभिनिर्धारित – परिहार प्रदान करने की शक्ति राज्य सरकार के पास होती है – शक्ति का ऐसा प्रयोग एक कार्यपालिक विवेकाधिकार है और उच्च न्यायालय को पुनर्विलोकन अधिकारिता के प्रयोग में यह उपलब्ध नहीं है।

***D. Criminal Procedure Code, 1973 (2 of 1974), Section 433-A – Power of Remission* – Held – Power of remission is restricted and a convict with sentence of imprisonment of life for an offence for which death is one of the punishment, cannot be released before completion of atleast 14 years of imprisonment. (Para 16)**

घ. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 433–A – परिहार की शक्ति – अभिनिर्धारित – परिहार की शक्ति निर्बंधित है और एक सिद्धदोष, जिसे एक ऐसे अपराध हेतु आजीवन कारावास से दण्डादिष्ट किया गया है जिसके लिए मृत्युदण्ड एक दण्ड है, को, कारावास के कम से कम 14 वर्ष पूर्ण होने के पूर्व नहीं छोड़ा जा सकता।

Cases referred:

AIR 1961 SC 600, (1981) 1 SCC 107, (1976) 3 SCC 470, (2016) 7 SCC 1.

Ahadulla Usmani, for the appellant.
S.K. Kashyap, G.A. for the respondent.

J U D G M E N T

The Judgment of the Court was delivered by :
PRAKASH SHRIVASTAVA, J. :- By this appeal under Section 374(2) of Criminal Procedure Code, 1973, appellant has challenged the judgment dated 25th of January, 2002 passed by the Additional Sessions Judge, Asdhta, District Sehore in Session Trial No.19/2001 convicting the appellant for offence under Section 363, 366 and 376 of the IPC and sentencing him to imprisonment for life.

2. The prosecution story is that the appellant is son of Kamla Bai's Uncle and was residing in her house for last two months. On Wednesday, Kamla Bai had gone out of the house to work as a labour and the appellant was in the house with the children. In the evening when Kamla Bai came back, she found that her son Babu aged about 5 years, daughter Akeela Bai aged about 8 years and Sarju Bai aged about 10 years were missing. She had lodged the missing report on 14.09.2000 vide Exhibit P/23 in Police Chowki, Mehatwada, Police Station, Jawar and had expressed the suspicion that the appellant had taken those children. The children were recovered from the custody of the appellant on 13.11.2000. On inquiry, Akeela Bai and Sarju Bai had disclosed that the appellant used to commit rape upon them. The statements of Sarju Bai, Babu, Kamla Bai and Shankarlal were recorded by the police on 14.11.2000. The appellant was arrested and medical examination of the appellant and Sarju Bai and Akeela Bai was done. The clothes

and semen slides were also seized. After investigation, challan was filed. Appellant had abjured the guilt and the trial had taken place. During the trial, Abdul Hamid Qureshi (PW/16) had produced the record of Central Jail, Bhopal and proved the earlier conviction of the appellant under Sections 363, 366 and 376 of the IPC and the fact that the appellant had earlier remained in custody in Central Jail, Bhopal from 30.06.1991 to 12.06.2000.

3. The trial court after appreciating the ocular as well as the documentary evidence had found that the offences against the appellant were proved and; accordingly' convicted and sentenced the appellant in the manner indicated above.

4. Learned counsel for the appellant has submitted that the appellant has falsely implicated in the matter and that the appellant had already remained for a sufficient period in custody after completing 14 years and; therefore, now he should be released.

5. Learned counsel for the State has opposed the appeal and has submitted that having regard to the nature of the case and the material available, no ground for interference is made out.

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

7. Akeela Bai (PW/7) is a minor aged about 10-12 years and she in her Court statement has deposed that the appellant had come to her house and had taken her on the pretext of going to her mother. She has also stated that the appellant has taken Sarju Bai her cousin sister and Babu her brother alongwith her and had kept all three of them in Buddleia Forest and had committed rape upon her and Sarju Bai. She has given the clear description of the commission of rape by the appellant. She has also disclosed that the appellant had kept them in Media, Deria and other forests and used to commit rape of and on. She has also stated that the appellant used to beat them in case of any resistance. Similar is the statement of Sarju Bai (PW/8) who had also given the description of commission of rape upon her in her Court statement. The statements of Akeela Bai (PW/7) and Sarju Bai (PW/8) and further corroborated it the statement of PW/9 Babu who was the eye-witness of the entire incident. Dr. (Smt.) Archna Soni (PW/3) had examined Sarju Bai and had found swelling on her private parts and also found hymen missing and expressed the possibility of sexual intercourse. As per the X-Ray report (Ex.P/3), she has disclosed the age of Sarju Bai to be around 10-12 years. Smt. Malti Arya (PW/6) had medically examined Akeela Bai and has found old ruptured hymen and had opined that she was subjected to sexual intercourse since 1 and 1/2 - 2 months. As per the X-Ray report (Exhibit P/10), she had opined that her age was 8-10 years. Dr. Bharat Arya (PW/13) had medically examined the appellant and had found him capable of doing sexual intercourse. Kamla Bai (PW/10), mother of prosecutrix Akeela Bai had also disclosed that the children were missing and that

Akeela Bai and Sarju Bai had disclosed about the commission of rape by the appellant. Madan (PW/4) had disclosed that the appellant had come to Village Bapcha Varampt alongwith two girls and he had informed this fact to Chowkidar Devi.

8. From the above material, it is clear that the trial Court has not committed any error in reaching to the conclusion that the appellant had committed offence under Section 363, 366 and 376 of the IPC.

9. Coming to the question of sentence, the record reflects that the appellant has suffered the actual sentence of 20 years 4 months and 11 days as on 26.03.2021 as reflected in the communication dated 30th of March, 2021 received from the Superintendent of Jail, Bhopal. As per the said communication, he had also earned remission of 9 years 5 months and 15 days as on 31.12.2020, therefore, following two issues arise for consideration before this Court:-

(i) Whether the sentence of life imprisonment awarded to the appellant means actual sentence of 14 years or 20 years ?

(ii) Whether this Court can commute or reduce the sentence giving the benefit of remission ?

10. Section 53 of the IPC provides for life imprisonment as a punishment as under:

> ***"53. Punishments.***—*The punishments to which offenders are liable under the provisions of this Code are—*
>
> *First-Death*
>
> *[1][Secondly-Imprisonment for life;]*
>
> *[2] [***]*
>
> *Fourthly-Imprisonment, which is of two descriptions, namely-*
>
> *(1) Rigorous, that is, with hard labour;*
>
> *(2) Simple;*
>
> *Fifthly-Forfeiture of property;*
>
> *Sixthly-Fine "*

11. Section 45 of Indian Penal Code defines "Life Imprisonment" as under:

> ***"45. "Life"- The word "life" denotes the life of a human being, unless the contrary appears from the context."***

12. Section 53 of the IPC provides for sentence of imprisonment for life and the definition of 'life' as contained in Section 45 makes it clear that life means the life of a human being i.e. till he breathes his last. The Supreme Court in the matter of *Gopal Vinayak Godse vs. State of Maharashtra and others* reported in AIR 1961 SC 600 has held that a sentence for transportation for life or imprisonment for life

must *prima facie* be treated as transportation or imprisonment for whole or remaining period of convicted person's natural life. In the matter of *Maru Ram vs. Union of India and others* reported in (1981) 1 SCC 107, the Constitution Bench has followed the earlier judgment in the case of *Gopal Vinayak Godse* (supra) and reiterated in paragraph 72(4) that the imprisonment for life lasts until the last breath and the prisoner can claim release only if the remaining sentence is remitted by the government. The above position of law was reiterated again by the Hon'ble Supreme Court in the matter of *State of M.P. vs. Ratan Singh* reported in (1976) 3 SCC 470. Hence, from the aforesaid pronouncements, it is clear that a sentence for imprisonment of life will run for the entire life of the convict unless the remission is granted in accordance with law.

13. This takes us to the next question if this Court can grant remission and release a life convict on completion of 14 years or 20 years of actual sentence.

14. Section 432 of the Cr.P.C. gives power to the appropriate Government to suspend or remit sentence and Section 433 of the Cr.P.C. empowers the appropriate Government to commute the sentence. Section 433 reads as under:

> ***"433. Power to commute sentence.-*** *The appropriate Government may, without the consent of the person sentenced commute -*
>
> *(a) a sentence of death, for any other punishment provided by the Indian Penal Code (45 of1860);*
>
> *(b) a sentence of imprisonment for life, for imprisonment for a term not exceeding fourteen years or for fine;*
>
> *(c) a sentence of rigorous imprisonment, for simple imprisonment for any term to which that person might have been sentenced, or for fine;*
>
> *(d) a sentence of simple imprisonment, for fine."*

15. The restriction imposed upon the power of remission or commutation of sentence is contained under Section 433-A of the Cr.P.C. which provides that:

> ***"433A- Restriction on powers of remission or Commutation in certain cases-*** *Notwithstanding anything contained in section 432, where a sentence of imprisonment for life is imposed on conviction of a person for an offence for which death is one of the punishments provided by laws, or where a sentence of death imposed on a person has been commuted under section 433 into one of imprisonment for life, such person shall not be released from prison unless he had served at least fourteen years of imprisonment."*

16. In terms of Section 433 Cr.P.C., the appropriate government is empowered to commute the sentence of a convict for imprisonment for life for a term not exceeding 14 years and in terms of Section 433A Cr.P.C., the power of remission or commutation is restricted and a convict with sentence of imprisonment of life for an offence for which death is one of the punishment, cannot be released before completion of atleast 14 years of imprisonment. Section 432 and 433 of the Cr.P.C. also reveal that the remission can be granted only by the appropriate government. Such an exercise of power is an executive discretion and the same is not available to the High Court in exercise of review jurisdiction.

17. The Constitution Bench of the Supreme Court in the matter of *Union of India vs. V. Sriharan @ Murugan and others* reported in (2016) 7 SCC 1 has held that the power of remission vests with the State executive and the Court at best can only give a direction to consider any claim for remission and cannot grant any remission and provide for premature release. It has further been held that -

> *114. Therefore, it must be held that there is every scope and ambit for the Appropriate Government to consider and grant remission under Sections 432 and 433 of the Criminal Procedure Code even if such consideration was earlier made and exercised under Article 72 by the President and under Article 161 by the Governor. As far as the implication of Article 32 of the Constitution by this Court is concerned, we have already held that the power under Section 432 and 433 is to be exercised by the Appropriate Government statutorily, it is not for this Court to exercise the said power and it is always left to be decided by the Appropriate Government, even if someone approaches this Court under Article 32 of the Constitution. We answer the said question on the above terms."*

18. In the matter of *Ratan Singh* (supra), the Supreme Court has held as under:

> *"9. From a review of the authorities and the statutory provisions of the Code of Criminal Procedure the following propositions emerge:*
>
> *(1) that a sentence of imprisonment for life does not automatically expire at the end of 20 years including the remissions, because the administrative rules framed under the various Jail Manuals or under the Prisons Act cannot supersede the statutory provisions of the Indian Penal Code. A sentence of imprisonment for life means a sentence for the entire life of the prisoner unless the appropriate Government chooses to exercise its discretion to remit either the whole or a part of the sentence under Section 401 of the Code of Criminal Procedure;"*

19. Having regard to the aforesaid position in law, we are of the opinion that the life sentence which is awarded to the appellant is for a period of his entire remaining life till his last breath and the power to grant remission lies with the State Government. In view of the fact that the appellant has completed more than 20 years of sentence, we are of the opinion that the issue relating to release of the appellant after granting the benefit of remission now needs to be considered by the competent authority of the State Government in accordance with law.

20. Hence, we **dispose of** the appeal affirming the conviction and sentence of the appellant and by directing the competent authority of the State Government to consider the release of the appellant in accordance with law by granting the benefit of remission. Let this exercise be completed by the competent authority as expeditiously as possible preferably within a period of three months from today.

Order accordingly

I.L.R. [2021] M.P. 1602 (DB)
APPELLATE CRIMINAL

Before Mr. Justice Atul Sreedharan & Smt. Justice Sunita Yadav

CRA No. 146/2009 (Jabalpur) decided on 28 July, 2021

INDU @ INDRAPAL SINGH & anr. …Appellants

Vs.

STATE OF M.P. …Respondent

A. Penal Code (45 of 1860), Section 302 & 307 and Arms Act (54 of 1959), Section 25 & 27 – Eye Witness Turning Hostile – Effect – Appreciation of Evidence **– Held – Direct evidence of eye witness found reliable – Seizure of weapon from A-1 duly proved by evidence – It was also established that A-1 used the fire arm to commit the crime – Medical evidence corroborated the ocular evidence – FIR within half an hour from incident – Offence by A-1 proved beyond reasonable doubt – Conviction of A-1 affirmed – Appeal filed by A-1 dismissed. (Paras 8 to 11 & 14 to 16)**

क. दण्ड संहिता (1860 का 45), धारा 302 व 307 एवं आयुध अधिनियम (1959 का 54), धारा 25 व 27 – चक्षुदर्शी साक्षी का पक्षद्रोही हो जाना – प्रभाव – साक्ष्य का मूल्यांकन – अभिनिर्धारित – चक्षुदर्शी साक्षी का प्रत्यक्ष साक्ष्य विश्वसनीय पाया गया – अ.क्र. 1 से शस्त्र की जब्ती साक्ष्य द्वारा सम्यक् रूप से साबित – यह भी स्थापित किया गया था कि अ.क्र. 1 ने अपराध कारित करने के लिए अग्न्यायुध का प्रयोग किया – चिकित्सीय साक्ष्य ने चाक्षुष साक्ष्य की संपुष्टि की – घटना के आधे घंटे के भीतर प्रथम सूचना प्रतिवेदन – अ.क्र. 1 का अपराध युक्तियुक्त संदेह से परे साबित – अ.क्र. 1 की दोषसिद्धि अभिपुष्ट – अ.क्र. 1 द्वारा प्रस्तुत अपील खारिज।

B. ***Penal Code (45 of 1860), Section 302/34 & 307/34 – Common Intention*** **– Held – A-2 carrying an axe, but did not participated in any manner to cause injuries to deceased – Eye witness also did not attributed any act against A-2 – Seizure of axe not proved – No previous enmity between A-2 and deceased – No instigation by A-2 towards A-1 to fire at deceased – Common intention and pre-arranged plan not proved – Conviction of A-2 set aside and appeal filed by him is allowed. (Para 13 & 16)**

ख. दण्ड संहिता (1860 का 45), धारा 302/34 व 307/34 – सामान्य आशय – अभिनिर्धारित – अ.क्र. 2 कुल्हाड़ी लिये हुए था, लेकिन मृतक को चोटे कारित करने में किसी भी तरीके से सम्मिलित नहीं हुआ – चक्षुदर्शी साक्षी ने भी अ.क्र. 2 के विरूद्ध कोई कृत्य आरोपित नहीं किया – कुल्हाड़ी की जब्ती साबित नहीं – अ.क्र. 2 एवं मृतक के बीच कोई पूर्व वैमनस्यता नहीं – मृतक पर गोली चलाने के लिए अ.क्र. 1 को अ.क्र. 2 के द्वारा कोई उकसाहट नहीं – सामान्य आशय एवं पूर्वायोजित योजना साबित नहीं – अ.क्र. 2 की दोषसिद्धि अपास्त एवं उसके द्वारा प्रस्तुत अपील मंजूर।

C. ***Penal Code (45 of 1860), Section 34 – Common Intention*** **– Held – Common intention implies pre-plan and acting in concert pursuant to pre-arranged plan – Essence of liability u/S 34 IPC is simultaneous conscious mind of persons participating in criminal action to bring about a particular result – Minds regarding sharing of common intention gets satisfied when an overt act is established *qua* each of the accused. (Para 12)**

ग. दण्ड संहिता (1860 का 45), धारा 34 – सामान्य आशय – अभिनिर्धारित – सामान्य आशय पूर्व–योजना एवं पूर्वायोजित योजना के अनुसरण में मिलकर कार्य करना विवक्षित करता है – भा.दं.सं. की धारा 34 के अंतर्गत दायित्व का मर्म, एक विशिष्ट परिणाम लाने के लिए आपराधिक कार्य में सम्मिलित होने वाले व्यक्तियों का एक ही समय पर सचेत मस्तिष्क का होना है – सामान्य आशय साझा करने के बारे में मस्तिष्क की संतुष्टि तब होती है जब प्रत्येक अभियुक्त की ओर से प्रत्यक्ष कृत्य स्थापित होता है।

D. ***Criminal Practice – Irregularity/Illegality by Investigation Officer – Effect*** **– Held – Apex Court concluded that mere fact that the Investigation Officer committed irregularity or illegality during course of investigation would not and does not cast doubt on prosecution case nor trustworthy and reliable evidence can be set aside to record acquittal on that account – If prosecution case is established by evidence, any failure or omission on part of Investigation Officer cannot render the case of prosecution doubtful. (Para 15)**

घ. दाण्डिक पद्धति – अन्वेषण अधिकारी द्वारा अनियमितता/अवैधता – प्रभाव – अभिनिर्धारित – सर्वोच्च न्यायालय ने यह निष्कर्षित किया है कि मात्र यह तथ्य कि अन्वेषण अधिकारी ने अन्वेषण के दौरान अनियमितता या अवैधता कारित की है, अभियोजन प्रकरण पर संदेह उत्पन्न नहीं करेगा एवं नहीं करता है, न ही उस कारण से दोषमुक्ति अभिलिखित करने हेतु भरोसेमंद और विश्वसनीय साक्ष्य को अपास्त किया जा सकता है –

यदि साक्ष्य द्वारा अभियोजन प्रकरण स्थापित होता है, अन्वेषण अधिकारी की ओर से कोई विफलता अथवा लोप, अभियोजन के प्रकरण को संदेहास्पद नहीं बना सकता।

Cases referred:

1996 SCC (Cri) 646 : (1996) 8 SCC 217: 1996 Cr.L.J. 2003, AIR 2003 SC 1164 : 2003 (2) SCC 518 : 2003 SCC (Cri) 641.

Vikash Mahawar, for the appellant No. 1.
L.N. Sakle, for the appellant No. 2.
Manhar Dixit, P.L. for the respondent/State.

J U D G M E N T

The Judgment of the Court was delivered by :
SUNITA YADAV, J. :- This appeal has been filed against the judgment dated 29.11.2008 in Sessions Trial No.2/2007, passed by Sixth Additional Sessions Judge, Fast Track Court, Chhatarpur by which appellant No.1 Indu @ Indrapal Singh has been convicted under Section 302 of IPC and sentenced to undergo life imprisonment and a fine of Rs.5000/-,in default of payment of fine, additional rigorous imprisonment for 2 years, under Section 307 of the Indian Penal Code rigorous imprisonment for 7 years and a fine of Rs.2000/- in default of payment of fine additional rigorous imprisonment of one year, under Section 25/27 of the Arms Act rigorous imprisonment for 3 years and a fine of Rs.1000/-, failing which simple imprisonment for six months and Appellant No.2 Devendra Singh @ Pappu Raja has been convicted under Section 302/34 and sentenced to undergo life imprisonment and a fine of Rs.5000/-, in default of payment of fine, additional rigorous imprisonment for 2 years, under Section 307/34 of the IPC rigorous imprisonment for 7 years and a fine of Rs.2000/- in default of payment of fine additional rigorous imprisonment of one year.

2. For the sake of convenience, the appellants shall be referred as accused persons and the respondent as prosecution hereinafter.

3. The case of prosecution, in brief, is that accused Indu @ Indrapal had enmity with deceased Khuman Patel because Khuman had slapped Indu three years before. On 17.09.2006 at about 7:00 p.m. in village Darguwa in the field of Bachchu Patwari, accused Indu @ Indrapal and Devendra Singh @ Pappu Raja arrived where Khuman Patel, Santosh Patel and Shankar Patel were working. Accused Indrapal was carrying a gun and Devendra Singh @ Pappu Raja had an axe in his hand. Accused Indrapal uttered obscene words and ordered Khuman, Santosh and Shankar to stand in a line. Then he asked whom should he shot at first. When Khuman asked the accused why were they killing them, accused Devendra Singh said "kill them all". After that Accused Indu @ Indrapal fired at Khuman Patel on his chest who died on the spot. When Shankar tried to escape, accused

Indu @ Indrapal fired at him too. The bullet hit Shankar's left hand. Devideen Patel and Santosh, who were present at the time of incident in the same field, came running to their village and told the entire incident to sarpanch Harsevak Patel, Nandu Patel and Balkishan Patel.

4. Injured Shankar was taken to the Police Station Satai where he lodged a report. The report was registered under crime no. zero. The FIR was registered by Police Station Pipat as the place of incident falls within its jurisdiction.

5. The concerned police station completed the investigation and filed the charge sheet against the accused persons under Sections 302/34,307/34 of the Indian Penal Code and Sections 25 and 27 of the Arms Act.

6. The learned trial Court framed charges for the offence under Sections 302, 307 of the IPC and Sections 25, 27 of the Arms Act against the accused Indu @ Indrapal and also framed charges under Sections 302/34, 307/34 of the IPC against accused Devendra Singh @ Ghappu Raja. The accused persons denied their guilt and stated that they are innocent and pleaded for trial raising defence of false implication.

7. The Learned trial Court after trial of the case and on the basis of the evidence and material came on record found the accused persons guilty of the offences as mentioned above and sentenced them as per the impugned judgment.

8. As per the prosecution story, Shankar Patel (PW-12) Santosh (PW-6) and Devideen (PW-14) are the eyewitnesses. Santosh (PW-6) has corroborated the story of prosecution. However, Shankar Patel (PW-12), who had lodged the First Information Report, has turned hostile and only corroborated the part of the prosecution story about his receiving gun fire injury on his left hand. This witness has denied that it was accused Indrapal who shot at him with intent to kill him.

9. Devideen (PW-14) has corroborated the prosecution story in his examination-in-chief. However, this witness has turned hostile during his cross-examination. At para 23 of his statement PW-14-Devideen has categorically admitted that after the death of Khuman, accused persons lodged an FIR under Section 307 of the Indian Penal Code against the complainant party in which both parties had entered into a compromise and because of that he had changed his version about the incident. PW-12 Shankar who is the brother of Devideen has also admitted in his statement at para-5 that Durg Singh had got a false case registered against them to put the pressure upon them and in that case they have reached a compromise. Looking to the above admission of the witness Devideen (PW-14), and Shankar (PW-12) the possibility of their turning hostile to save the accused persons because of the compromise in the criminal case registered against them by the father of accused cannot be ruled out. Therefore, the

prosecution story cannot be disbelieved only on account of the statements of Shankar (PW-12) and Devideen (PW-14) who have turned hostile.

10. From a perusal of First Information Report Exhibit P-2, it transpires that the same was lodged on the date of incident within half an hour from the time of incident by injured Shankar (PW-12). Complainant Shankar (PW-12) was examined by Dr. B.S. Chourasiya (PW-9) on 18.09.2006. Dr. Chourasiya had found a gun shot injury on the left hand of Shankar which corroborates the prosecution case and the statement of Santosh (PW-6). The time gap between the incident and the report was too short to concoct a false story against the accused persons.

11. PW-6 Santosh who is the eye witness remained unshaken during his cross-examination. Nothing emerged in his cross-examination to disbelieve his statement. Medical report of injured Shankar and P.M. report of Khuman also support his statement. Therefore, there is no reason to disbelieve his statement. Hence, it is proved beyond any reasonable doubt that the accused Indu @ Indrapal has committed the murder of Khuman and attempted to murder Shankar.

12. Now it is to be considered whether the accused Devendra @ Pappu Raja had common intention to commit the crime with co-accused Indu @ Indrapal ? To invoke Section 34 of Indian Penal Code, it must be established that the criminal act was done by more than one person in furtherance of common intention of all. It must, therefore be proved that (i) there was common intention on the part of several persons to commit a particular crime and (ii) the crime was actually committed by them in furtherance of that common intention. The essence of liability under Section 34 of Indian Penal Code is simultaneous conscious mind of persons participating in the criminal action to bring about a particular result. Minds regarding the sharing of common intention gets satisfied when an overt act is established qua each of the accused. Common intention implies pre-plan and acting in concert pursuant to the pre-arranged plan. Common intention is an intention to commit the crime actually committed and each accused person can be convicted of that crime, only if he has participated in that common intention.

13. In the present case, as per prosecution story, at the time of incident, accused Devendra @ Pappu Raja was carrying an axe in his hand but this is not the case of prosecution that this accused has participated in any manner to cause injuries to deceased Khuman or Shankar with co-accused Indu @ Indrapal. It is apparent that the eye witness PW-6 Santosh has also not attributed any act to this accused to commit the crime by using the said axe. The prosecution has not even got the independent witnesses examined to prove the seizure of the said axe. As per the court evidence of PW-6 Santosh at para -1 accused Indrapal and Devendra arrived in the field where they were working and accused Indrapal had fired at Khuman on his chest. This witness does not say that after the instigation of

accused Devendra @ Pappu, co-accused Indrapal had fired at Khuman. Therefore, the participation of accused Devendra @ Pappu Raja in the crime with co-accused Indu @ Indrapal with common intention and pre-arranged plan has not been proved. Prosecution has not put forth any fact about the previous enmity of this accused with deceased Khuman or Shankar. Consequently, the offence under Section 302/34 and Section 307/34 of the Indian Penal Code is not proved beyond reasonable doubt against him.

14. The prosecution has duly proved the seizure of a 12 bore gun and cartridges from the possession of accused Indrapal Singh through the evidence of B.S. Parihar (PW-18) and Jamna Prasad (PW-13). It has also been proved that the accused Indu @ Indrapal has used the said fire arm to commit the crime as mentioned above. Therefore, the conviction of accused Indu @ Indrapal under Section 25 and 27 Arms Act is found to be in accordance with law and facts.

15. Learned counsel for the appellant Indu @ Indrapal submitted during the arguments that the prosecution case is vitiated because Police Station Satai had gone beyond its territorial jurisdiction and did primary investigation before sending the case to police station Pipat who had the territorial jurisdiction to investigate the case. But the above argument is not tenable because this case is based on direct evidence and the direct evidence of the eye witness has been found reliable. Hon'ble Supreme Court in the case of *State of Rajasthan vs Kishore* 1996 SCC (Cri) 646: (1996) 8 SCC 217: 1996 Cr. L.J 2003 held that "mere fact that the Investigating Officer committed irregularity or illegality during the course of the investigation would not and does not cast doubt on the prosecution case nor trustworthy and reliable evidence can be set aside to record acquittal on that account." Similarly in the case of *Amar Singh vs. Balwinder Singh and Others* AIR 2003 SC 1164: 2003(2) SCC 518: 2003 SCC(Cri) 641 it was held by Hon'ble Supreme Court that "If the prosecution case is established by the evidence adduced, any failure or omission on the part of the Investigating Officer cannot render the case of the prosecution doubtful".

16. In light of the above discussion, the appeal filed by accused Indu @ Indrapal Singh is dismissed hereby. His conviction and sentence under Sections 302, 307 of the Indian Penal Code and section 25/27 of the Arms Act, is affirmed. The appeal filed by accused Devendra Singh @ Pappu Raja is allowed. The impugned judgment with regard to this appellant is set aside and he is acquitted from the offence under Sections 302/34 and 307/34 of the Indian Penal Code.

Order accordingly

I.L.R. [2021] M.P. 1608
CIVIL REVISION

Before Mr. Justice G.S. Ahluwalia

CR No. 284/2020 (Gwalior) decided on 18 June, 2021

HEMRAJ & ors. …Applicants

Vs.

KALLU KHAN …Non-applicant

***A. Civil Procedure Code (5 of 1908), Order 21 Rule 29 & Order 41, Rule 5(1) – Stay of Execution Proceedings* – Held – Appeal shall not operate as stay of proceedings unless and until, a stay order is passed by Appellate Court – Even execution of decree shall not be stayed by reason that the appeal has been preferred – No stay order in the present case, even the second appeal has not been admitted – Impugned order set aside – Executing Court directed to proceed further unless and until execution is stayed in the second appeal. (Paras 15, 18 & 19)**

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 21 नियम 29 व आदेश 41 नियम 5(1) – निष्पादन कार्यवाहियों पर रोक – अभिनिर्धारित – अपील, कार्यवाहियों पर रोक के रूप में प्रवर्तित नहीं होगी जब तक कि अपीली न्यायालय द्वारा रोक आदेश पारित नहीं किया जाता है – यहां तक कि डिक्री के निष्पादन पर भी इस कारण से रोक नहीं लगाई जाएगी कि अपील की गई है – वर्तमान प्रकरण में कोई रोक आदेश नहीं, यहां तक कि द्वितीय अपील भी स्वीकार नहीं की गई है – आक्षेपित आदेश अपास्त – निष्पादन न्यायालय को आगे कार्यवाही करने हेतु निदेशित किया गया जब तक कि द्वितीय अपील में निष्पादन पर रोक नहीं लगाई जाती है।

***B. Civil Procedure Code (5 of 1908), Section 100, Order 41 Rule 11 & Order 41 Rule 3A and Limitation Act (36 of 1963), Section 5 – Stay of Execution Proceedings* – Held – When appeal is presented after expiry of limitation period, then it has to be accompanied by application for condonation of delay and Court shall not make a stay order of execution and decree, unless and until, Appellate Court decides to hear the appeal under Order 41 Rule 11 CPC. (Para 13)**

ख. सिविल प्रक्रिया संहिता (1908 का 5), धारा 100, आदेश 41 नियम 11 व आदेश 41 नियम 3 A एवं परिसीमा अधिनियम (1963 का 36), धारा 5 – निष्पादन कार्यवाहियों पर रोक – अभिनिर्धारित – जब परिसीमा अवधि के अवसान के पश्चात् अपील प्रस्तुत की जाती है, तो उसमें विलंब के लिए माफी का आवेदन उसके साथ होना चाहिए और जब तक कि अपीली न्यायालय सि.प्र.सं. के आदेश 41 नियम 11 के अंतर्गत अपील की सुनवाई करने का विनिश्चय नहीं कर लेता तब तक न्यायालय निष्पादन और डिक्री का रोक आदेश नहीं करेगा।

C. Civil Procedure Code (5 of 1908), Section 100 – Interim Orders – **Held – Unless and until the second appeal is admitted, High Court has no jurisdiction to pass any interim order. (Para 11)**

ग. सिविल प्रक्रिया संहिता (1908 का 5), धारा 100 – अंतरिम आदेश – अभिनिर्धारित – जब तक कि द्वितीय अपील स्वीकार नहीं की जाती, उच्च न्यायालय को कोई भी अंतरिम आदेश पारित करने की अधिकारिता नहीं है।

Case referred:

(2016) 11 SCC 235.

S.K. Shrivastava, for the applicants.
Ravi Rahul, for the non-applicant.

(Supplied: Paragraph numbers)

O R D E R

(Through Video Conferencing)

G.S. AHLUWALIA, J.:- This civil revision under Section 115 of C.P.C. has been filed against the order dated 07/03/2020 passed by Civil Judge, Class-II, Lateri, District Vidisha in Execution Case No.16-A/16/19, by which the Executing Court has stayed the further proceedings of execution case under Order 21 Rule 29 of C.P.C.

2. It is submitted by the counsel for the petitioners that a verbal prayer was made by the counsel for the respondent that since second appeal No.1040/2019 filed by the respondent is pending before the High Court, therefore, the further proceedings in execution case be stayed in the light of the provisions of Order 21 Rule 29 of C.P.C. It is submitted that the verbal prayer made by the counsel for the respondent was allowed, and the executing Court by impugned order has stayed the proceedings.

3. Challenging the order passed by the Court below, it is submitted by the counsel for the petitioners that the second appeal No.1040/2019 has not been admitted so far. No interim order has been passed and under these circumstances, the executing Court should not have stayed the proceedings merely on the ground that the second appeal is pending before the High Court.

4. *Per contra,* the petition is vehemently opposed by the counsel for the respondent. It is submitted that the executing Court did not commit any illegality by staying the further proceedings of the execution case in the light of the pendency of second appeal No.1040/2019 before the High Court. Further, it was fairly conceded by the counsel for the respondent that the second appeal No.1040/2019 has not been admitted so far and there is no stay in the said appeal.

5. Heard the learned counsel for the parties.

6. From the order-sheets of the second appeal No.1040/2019, it appears that on 16/01/2020, the notices on I.A.No.118/2020, an application under Section 5 of Limitation Act and I.A.No.117/2020, an application under Order 22 Rule 4 of C.P.C. were issued. Thereafter, on 03/03/2020 fresh process fee was directed to be paid to the legal representatives of Hemraj. The said second appeal is not admitted so far and there is no stay.

7. From the order-sheets of the second appeal No.1040/2019, it is clear that the petitioner No.1 Hemraj has expired. No steps have been taken by the petitioners to bring the legal representatives of Hemraj on record.

8. Be that as it may.

9. The copy of the judgment and decree dated 29/09/2016 passed by Civil Judge, Class-II, Lateri, District Vidisha has been placed on record, which shows that the respondent had filed a civil suit against defendant No.1 Sampat Bai. The petitioners are the legal representative of Sampat Bai. Sampat Bai had filed a counter claim,which was decreed and the respondent was directed to hand over the vacant possession of Survey No.599 area 2.251 hectares situated in Lateri, District Vidisha. It appears that the respondent filed an appeal, which was dismissed by Ist Additional District Judge, Sironj, District Vidisha, by judgment and decree dated 09/10/2018 passed in Regular Civil Appeal No.38A/2016. It appears that the respondent preferred an appeal on 02/04/2019 and since, there is a delay in filing the second appeal, therefore, an application under Section 5 of Limitation Act has also been filed. It is undisputed fact that the delay in filing the appeal has not been condoned so far.

10. The Supreme Court in the case of *Raghavendra Swamy Mutt Vs. Uttaradi Mutt* reported in (2016) 11 SCC 235 has held as under:-

> **23.** The submission of the learned Senior Counsel for the appellant is that Order 41 Rule 5 confers jurisdiction on the High Court while dealing with an appeal under Section 100 CPC to pass an ex parte order and such an order can be passed deferring formulation of question of law in grave situations. Be it stated, for passing an ex parte order the Court has to keep in mind the postulates provided under sub-rule (3) of Rule 5 of Order 41. It has to be made clear that the Court for the purpose of passing an ex parte order is obligated to keep in view the language employed under Section 100 CPC. It is because formulation of substantial question of law enables the High Court to entertain an appeal and thereafter proceed to pass an order and at that juncture, needless to say, the Court has the

jurisdiction to pass an interim order subject to the language employed in Order 41 Rule 5(3).

24. It is clear as day that the High Court cannot admit a second appeal without examining whether it raises any substantial question of law for admission and thereafter, it is obliged to formulate the substantial question of law. Solely because the Court has the jurisdiction to pass an ex parte order, it does not empower it not to formulate the substantial question of law for the purpose of admission, defer the date of admission and pass an order of stay or grant an interim relief. That is not the scheme of CPC after its amendment in 1976 and that is not the tenor of precedents of this Court and it has been clearly so stated in *Ram Phal*. Therefore, the High Court has rectified its mistake by vacating the order passed in IA No. 1 of 2015 and it is the correct approach adopted by the High Court. Thus, the impugned order is absolutely impregnable.

11. Thus, it is clear that unless and until the second appeal is admitted, the High Court has no jurisdiction to pass any interim order.

12. Further, Order 41 Rule 3A of C.P.C. reads as under:-

"3A. **Application for condonation of delay.-** (1) When an appeal is presented after the expiry of the period of limitation specified there for, it shall be accompanied by an application supported by affidavit setting forth the facts on which the appellant relies to satisfy the court that he had sufficient cause for not preferring the appeal within such period.

(2) If the court sees no reason to reject the application without the issue of a notice to the respondent, notice thereof shall be issued to the respondent and the matter shall be finally decided by the court before it proceeds to deal with the appeal under rule 11 or rule 13, as the case may be.

(3) Where an application has been made under sub-rule (1), the court shall not make an order for the stay of execution of the decree against which the appeal is proposed to be filed so long as the court does not, after hearing under rule 11, decide to hear the appeal."

13. Thus, it is clear that when an appeal is presented after expiry of period of limitation, then it has to be accompanied by an application for condonation of delay and the Court shall not make an order stay of execution and decree, unless and until, the Appellate Court decides to hear the appeal under Order 41 Rule 11 of C.P.C.

14. Order 41 Rule 11 of C.P.C. reads as under:-

> **"11. Power to dismiss appeal without sending notice to Lower Court. (1)** The Appellate Court, after sending for the record if it thinks fit so to do, and after fixing a day for hearing the appellant or his pleader and hearing him accordingly if he appears on that day, may dismiss the appeal without sending notice to the Court from whose decree the appeal is preferred and without serving notice on the respondent or his pleader.
>
> **(2)** If on the day fixed or any other day to which the hearing may be adjourned the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed.
>
> **(3)** The dismissal of an appeal under this rule shall be notified to the Court from whose decree the appeal is preferred.
>
> **(4)** Where an Appellate Court, not being the High Court, dismisses an appeal under sub-rule (1), it shall deliver a judgment, recording in brief its grounds for doing so, and a decree shall be drawn up in accordance with the judgment."

15. From the plain reading of Order 41 Rule 5(1) of C.P.C. it is clear that the appeal shall not operate as stay of proceedings unless and until, a stay order is passed by the Appellate Court. It is also clear from Rule 5(1) Order 41 of C.P.C. that even the execution of decree shall not be stayed by reason that the appeal has been preferred from the decree.

16. While considering the verbal prayer made by the counsel for the respondent, the executing Court has ignored the provisions of Order 41 Rule 3A of C.P.C., Order 41 Rule 5 of C.P.C. and judgment passed by the Supreme Court in case of *Raghavendra Swamy Mutt* (supra).

17. Under these circumstances, viewed from any angel (sic : angle), the order passed by the executing Court cannot be given the approval of judicial stamp.

18. Accordingly, the order dated 07/03/2020 passed by Civil Judge, Class-II, Lateri, District Vidisha in Execution Case No.16-A/16/19 is hereby set aside.

19. The executing Court is directed to proceed further with the execution proceedings, unless and until, the execution of the decree is stayed by this Court in S.A.No.1040/2019.

20. With aforesaid observation, the petition is finally **disposed of.**

Order accordingly

I.L.R. [2021] M.P. 1613 (DB)
MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice Prakash Shrivastava & Mr. Justice Virender Singh

MCRC No. 45036/2020 (Jabalpur) decided on 30 June, 2021

R.K. AKHANDE ...Applicant

Vs.

SPECIAL POLICE ESTABLISHMENT,
LOKAYUKT, BHOPAL & anr. …Non-applicants

A. Constitution – Article 20(3) – Scope – Voice Sample – **Held – Requiring an accused to give voice sample does not mean that he is asked to testify against himself, it is only taken for comparison – It cannot be said that he has been compelled to be a witness against himself – Fundamental right under Article 20(3) of the Constitution not violated – Petition dismissed.**

(Para 6)

क. संविधान – अनुच्छेद 20(3) – व्याप्ति – आवाज का नमूना – अभिनिर्धारित – अभियुक्त से आवाज का नमूना देने की अपेक्षा का यह अर्थ नहीं है कि उसे स्वयं के विरूद्ध साक्ष्य देने को कहा गया है, यह केवल मिलान के लिए लिया जाता है – यह नहीं कहा जा सकता कि उसे स्वयं के विरूद्ध साक्षी बनने हेतु विवश किया गया – संविधान के अनुच्छेद 20(3) के अंतर्गत मूल अधिकार का उल्लंघन नहीं होता – याचिका खारिज।

B. Constitution – Article 20(3) – Self Incrimination – Scope – **Held – Protection extended by Article 20(3) is only to the extent of being witness against himself – Article 20(3) extends protection to accused against self incrimination which means conveying information based upon personal knowledge of the person giving the information and it does not mean to include merely the mechanical process of producing document in Court which may throw a light on any point of controversy but which does not contain any statement of accused based upon his present knowledge.**

(Para 6)

ख. संविधान – अनुच्छेद 20(3) – आत्म दोषारोपण – व्याप्ति – अभिनिर्धारित – अनुच्छेद 20(3) द्वारा संरक्षण का विस्तार केवल स्वयं के विरूद्ध साक्षी बनने की सीमा तक है – अनुच्छेद 20(3) अभियुक्त को आत्म दोषारोपण के विरूद्ध संरक्षण प्रदान करता है जिसका अर्थ सूचना देने वाले व्यक्ति के व्यक्तिगत ज्ञान के आधार पर सूचना दिया जाना है एवं इसका अर्थ न्यायालय में दस्तावेज प्रस्तुत करने की यांत्रिक प्रक्रिया को शामिल करना मात्र नहीं है जो कि विवाद के किसी बिंदु पर प्रकाश डाल सकता है लेकिन जिसमें अभियुक्त के वर्तमान ज्ञान पर आधारित उसका कोई कथन शामिल नहीं है।

C. ***Criminal Practice – Voice Sample – Power of Magistrate*** **– Held – Magistrate has the power to order a person to give his voice sample for purpose of investigation of a crime. (Para 7 & 8)**

ग. *दाण्डिक पद्धति – आवाज का नमूना – मजिस्ट्रेट की शक्ति* – अभिनिर्धारित – मजिस्ट्रेट को अपराध के अन्वेषण के प्रयोजन से किसी व्यक्ति को उसकी आवाज का नमूना देने का आदेश करने की शक्ति है।

D. ***Criminal Practice – Opportunity of Hearing*** **– Magistrate ordered accused to give his voice sample – Held – Matter is at investigation stage where prosecution is only collecting evidence – No prejudice has been caused to accused – No error by trial Court in passing the impugned order without giving opportunity of hearing. (Paras 9 to 11)**

घ. *दाण्डिक पद्धति – सुनवाई का अवसर* – मजिस्ट्रेट ने अभियुक्त को उसकी आवाज का नमूना देने का आदेश किया – अभिनिर्धारित – मामला अन्वेषण प्रक्रम पर है जहां अभियोजन केवल साक्ष्य एकत्र कर रहा है – अभियुक्त को कोई प्रतिकूल प्रभाव कारित नहीं हुआ है – विचारण न्यायालय द्वारा सुनवाई का अवसर प्रदान किये बिना आक्षेपित आदेश पारित करने में कोई त्रुटि नहीं।

Cases referred:

AIR 2010 SC 1974, AIR 1961 SC 1808, 2019 (8) SCC 1, 2010 (13) SCC 255, 2011 (8) SCC 300, 2013 (9) SCC 209.

Manoj Kushwaha, for the applicant.
Abhijeet Awasthi, for the non-applicant No. 1.

O R D E R

The Order of the Court was passed by :
PRAKASH SHRIVASTAVA, J.:- IA No.12586/2020, an application for amendment in the petition is allowed.

2. By this writ petition under Section 482 of the Criminal Procedure Code, petitioner has challenged the order of the trial Court dated 21.10.2020 whereby for the purpose of investigation permission has been granted to take the voice sample of the petitioner.

3. The submission of learned counsel for the petitioner is that such a direction violates the petitioner's right under Article 20(3) of the Constitution of India and infringes the petitioner's privacy. In support of his submission, he has placed reliance upon the judgment of the Supreme Court in the matter of *Selvi and others vs. State of Karnataka* reported in AIR 2010 SC 1974. He has also submitted that

no opportunity of hearing has been given to the petitioner before passing the order.

4. Opposing the prayer, learned counsel for the respondent No. 1 has submitted that the matter is at the investigation stage and the petitioner's right under Article 20(3) of the Constitution is not violated and that no prejudice is caused to the petitioner by the impugned order.

5. Having heard the learned counsel for the parties and on perusal of the record, it is noticed that the petitioner is an accused in a trap case and the voice sample of the petitioner is required to tally it with the recorded voice, hence the petitioner was given a notice to appear in the Office of the Collector and give his voice sample which was refused by him, therefore, the investigating agency had approached the trial court and the trial court after examining the entire case and the case diary has found that the voice sample of the petitioner is required, hence it has granted permission to the investigating agency to take the voice sample and directed the petitioner to give the voice sample.

6. Article 20 of the Constitution of India extends certain protection to a person in respect of the conviction for offence and sub-clause (3) thereof provides that no person accused of any offence shall be compelled to be a witness against himself. Article 20(3) reads as under:

> *"20(3) No person accused of any offence shall be compelled to be a witness against himself. "*

The protection extended by Article 20(3) is only to the extent of being witness against himself. Thus, clause (3) of Article 20 extends protection against self incrimination to an accused person. Self incrimination is held to mean conveying information based upon the personal knowledge of the person giving the information and it does not mean to include merely the mechanical process of producing document in the Court which may throw a light on any points of controversy but which does not contain any statement of accused based upon his present knowledge. Requiring an accused to give voice sample does not mean that he is asked to testify against himself. Voice sample is taken only for comparison. Hence, it cannot be said that when an accused is asked to give voice sample, he is compelled to be a witness against himself. Therefore, fundamental right under Article 20(3) of the Constitution is not violated in such a case.

7. The question relating to violation of Article 20(3) of the Constitution came up before 11 Judges Bench of Hon'ble Supreme Court in the matter of *State of Bombay vs. Kathi Kalu Oghad* reported in AIR 1961 SC 1808 wherein the issue was about the specimen writing and the Hon'ble Supreme Court held that -

"11. The matter maybe looked at from another point of view. The giving of finger impression or of specimen signature or of handwriting, strictly speaking, is not ",to be a witness". "To be a witness" means imparting knowledge in respect of relevant fact, by means of oral statements or statements in writing, by a person who has personal knowledge of the facts to be communicated to a court or to a person holding an enquiry or investigation. A person is said "to be a witness" to a certain state of facts which has to be determined by a court or authority authorised to come to a decision, by testifying to what he has seen, or something he has heard which is capable of being heard and is not hit by the rule excluding hearsay, or giving his opinion, as an expert, in respect of matters in controversy. Evidence has been classified by text writers into three categories, namely, (1) oral testimony; (2) evidence furnished by documents; and (3) material evidence. We have already indicated that we are in agreement with the Full Court decision in Sharma's case that the prohibition in clause (3) of Article 20 covers not only oral testimony given by a person accused of an offence but also his written statements which may have a bearing on the controversy with reference to the charge against him. The accused may have documentary evidence in his possession which may throw some light on the controversy. If it is a document, which is not his statement conveying his personal knowledge relating to the charge against him, he may be called upon by the Court to produce that document in accordance. with the provisions of Section 139 of the Evidence Act, which, in terms, provides that a person may be summoned to produce a document in his possession or power and that he does not become a witness by the mere fact that he has produced it; and therefore, he cannot be cross-examined. Of course, he can be cross-examined if he is called as a witness who has made statements conveying his personal knowledge by reference to the contents of the document or if he has given his statements in Court otherwise than by reference to the contents of the documents. In our opinion, therefore, the observations of this Court in Sharma's case that Section 139 of the Evidence Act has no bearing on the connotation of the word 'witness' is not entirely well-founded in law. It is well-established that clause (3) of Article 20 is directed against self-incrimination by an accused person. Self-incrimination must mean conveying information based upon the personal knowledge of the person giving the information and cannot include merely the mechanical process of producing documents in court which may throw a light on any of the points in controversy, but which do not contain any statement of the accused based on his personal knowledge. For example, the accused person may be in possession of a document which is in his writing or which contains his

signature or his thumb impression. The production of such a document, with a view to comparison of the writing or the signature or the impression, is not the statement of an accused person, which can be said to be of the nature of a personal testimony. When an accused person is called upon by the Court or any other authority holding an investigation to give his finger impression or signature or a specimen of his handwriting, he is not giving any testimony of the nature of a 'personal testimony'. The giving of a "personal testimony" must depend upon his volition. He can make any kind of statement or may refuse to make any statement. But his finger impressions or his handwriting, in spite of efforts at concealing the true nature of it by dissimulation cannot change their intrinsic character. Thus, the giving of finger impressions or of specimen writing or of signatures by an accused person, though it may amount to furnishing evidence in the larger sense, is not included within the expression to be a witness.

12. In order that a testimony by an accused person may be said to have been self-incriminatory, the compulsion of which comes within the prohibition, of the constitutional provision, it must be of such a character, that by itself it should have the tendency of incriminating the accused, if not also of actually doing so. In other words, it should be a statement which makes the case against the accused person atleast probable, considered by itself. A specimen handwriting or signature or finger impressions by themselves are no testimony at all, being wholly innocuous because they are unchangeable except in rare cases where the ridges of the fingers or the style of writing have been tampered with. They are only materials for comparison in order to lend assurance to the Court that its inference based on other pieces of evidence is reliable. They are neither oral nor documentary evidence but belong to the third category of material evidence which is outside the limit of 'testimony'."

The Hon'ble Supreme Court took the view that the specimen handwriting or signature or finger impression by themselves are not testimony at all and they are only materials for comparison. It has further been held that they are neither oral nor documentary evidence but belong to the third category of material evidence which is outside the limit of testimony. When voice sample is taken that also stands on the same footing and therefore same reasoning applies for voice sample also.

8. The issue relating to the power of the Magistrate to direct giving of voice sample came up before the Hon'ble Supreme Court in the matter of *Ritesh Sinha vs. State of Uttar Pradesh and another* reported in 2019 (8) SCC 1 wherein the

three Judge Bench of the Hon'ble Supreme Court has held that the Magistrates are conceded with such power. In this regard, it is held that -

> *"27. In the light of the above discussions, we unhesitatingly take the view that until explicit provisions are engrafted in the Code of Criminal Procedure by Parliament, a Judicial Magistrate must be conceded the power to order a person to give a sample of his voice for the purpose of investigation of a crime. Such power has to be conferred on a Magistrate by a process of judicial interpretation and in exercise of jurisdiction vested in this Court under Article 142 of the Constitution of India. We order accordingly and consequently dispose the appeals in terms of the above."*

Thus, now it is settled that the Magistrate has the power to order a person to give his voice sample for the purpose of investigation of a crime.

9. The next question which is raised by counsel for the petitioner that the petitioner has not been heard while passing the impugned order. The counsel for the petitioner has failed to point out any prejudice caused to him while passing the impugned order without hearing him. The prejudice is required to be pointed out as the issue is squarely covered by the judgment of the Supreme Court and the power exists with the Magistrate to issue such a direction. The Supreme Court in the matter of *Natwar Singh vs. Director of Enforcement and another* reported in 2010 (13) SCC 255 has held that even in the application of doctrine of fair play there must be real flexibility and mere technical infringement of natural justice is not enough but some real prejudice is required to be shown. In the matter of *Rafiq Ahmad @ Rafi vs. State of Uttar Pradesh* reported in 2011 (8) SCC 300, the Supreme court has held that -

> *"35. When we speak of prejudice to an accused, it has to be shown that the accused has suffered some disability or detriment in the protections available to him under the Indian criminal jurisprudence. It is also a settled canon of criminal law that this has occasioned the accused with failure of justice. One of the other cardinal principles of criminal justice administration is that the courts should make a close examination to ascertain whether there was really a failure of justice or whether it is only a camouflage, as this expression is perhaps too pliable. With the development of law, Indian courts have accepted the following protections to and rights of the accused during investigation and trial:*
>
> *(a) The accused has the freedom to maintain silence during investigation as well as before the Court. The accused may*

choose to maintain silence or make complete denial even when his statement under Section 313 of the Code of Criminal Procedure is being recorded, of course, the Court would be entitled to draw an inference, including adverse inference, as may be permissible to it in accordance with law;

(b) Right to fair trial;

(c) Presumption of innocence (not guilty);

(d) Prosecution must prove its case beyond reasonable doubt.

36. Prejudice to an accused or failure of justice, thus, has to be examined with reference to these aspects. That alone, probably, is the method to determine with some element of certainty and discernment whether there has been actual failure of justice. 'Prejudice' is incapable of being interpreted in its generic sense and applied to criminal jurisprudence. The plea of prejudice has to be in relation to investigation or trial and not matters falling beyond their scope. Once the accused is able to show that there is serious prejudice to either of these aspects and that the same has defeated the rights available to him under the criminal jurisprudence, then the accused can seek benefit under the orders of the Court.

37. Right to fair trial, presumption of innocence until pronouncement of guilt and the standards of proof, i.e., the prosecution must prove its case beyond reasonable doubt are the basic and crucial tenets of our criminal jurisprudence. The Courts are required to examine both the contents of the allegation of prejudice as well as its extent in relation to these aspects of the case of the accused. It will neither be possible nor appropriate to state such principle with exactitude as it will always depend on the facts and circumstances of a given case. Therefore, the Court has to ensure that the ends of justice are met as that alone is the goal of criminal adjudication.

38. Thus, wherever a plea of prejudice is raised by the accused, it must be examined with reference to the above rights and safeguards, as it is the violation of these rights alone that may result in weakening of the case of the prosecution and benefit to the accused in accordance with law."

10. The Supreme Court in the matter of *Sunil Mehta and another vs. State of Gujarat and another* reported in 2013 (9) SCC 209 while considering the question of issuing show cause notice to the accused while examining the complainant under Section 200 of the Cr.P.C. has held that there is a qualitative difference

between the approach that the court adopts and the evidence adduced at the stage of taking cognizance and summoning of the accused and that recorded at the trial. The difference lies in the fact that the former is a process that is conducted in absence of accused and latter is undertaken in his presence with an opportunity to him to cross-examine the witnesses produced by the prosecution.

11. In the present case also, the matter is at the investigating stage where the prosecution is only collecting the evidence, hence no error has been committed by the trial court in passing the impugned order without giving opportunity of hearing to the petitioner. Thus, no case for interference is made out.

12. The petition is accordingly dismissed.

Application dismissed