VOL. 1

INDIAN LAW REPORT (M.P.) COMMITTEE

FEBRUARY 2021

PATRON

Hon'ble Shri Justice MOHAMMAD RAFIQ

Chief Justice

CHAIRMAN

Hon'ble Shri Justice ATUL SREEDHARAN

MEMBERS

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

SECRETARY

Shri Alok Mishra, Registrar (Exam)

PUBLISHED BY

SHRI AVANINDRA KUMAR SINGH, PRINCIPAL REGISTRAR (ILR)

TABLE OF CASES REPORTED

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

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

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

INDEX

INDEX

वाद में, जहां यदि प्रतिवादी, पंजीयन का प्रतिसंहरण चाहता है, उस स्थिति में, वाद को अधिनियम की धारा 22(4) के निबंधनों में उच्च न्यायालय को अंतरित करना होगा – दोनों स्वतंत्र उपबंध हैं जिनसे भिन्न एवं सुभिन्न वाद हेतुक उत्पन्न होते हैं। (एस.डी. कंटेनर्स इंदौर वि. मे. मोल्ड टेक पेकेजिंग लि.) **(SC)…163**

Designs Act (16 of 2000), Section 19 & 22(4) and The Commercial Courts, Commercial Division, Commercial Appellate Division of High Courts Act, 2015 (4 of 2016), Sections 4, 7 & 21 – Jurisdiction **– Held – Plea of revocation of registration was raised in suit which is required to be transferred to High Court as per Section 22(4) of 2000 Act and since no part of cause of action has arisen within jurisdiction of Kolkata, suit is liable to be transferred to M.P. High Court, Indore Bench – Order of Commercial Court at District Level was in accordance with law – Order of High Court not sustainable and set aside – Matter remitted to M.P. High Court, Indore Bench – Appeal disposed. [S.D. Containers Indore Vs. M/s. Mold Tek Packaging Ltd.]** **(SC)…163**

डिजाइन अधिनियम (2000 का 16), धारा 19 व 22(4) एवं वाणिज्यिक न्यायालय, उच्च न्यायालय वाणिज्यिक प्रभाग और वाणिज्यिक अपील प्रभाग अधिनियम, 2015 (2016 का 4), धाराएँ 4, 7 व 21 – अधिकारिता – अभिनिर्धारित – पंजीयन के प्रतिसंहरण का अभिवाक् उस वाद में उठाया गया था जिसे, 2000 के अधिनियम की धारा 22(4) के अनुसार उच्च न्यायालय को अंतरित किया जाना अपेक्षित है और चूंकि कोलकाता की अधिकारिता के भीतर, वाद हेतुक का कोई भाग उत्पन्न नहीं हुआ है, वाद, म.प्र. उच्च न्यायालय, इंदौर खण्डपीठ को अंतरणीय है – जिला स्तर पर वाणिज्यिक न्यायालय का आदेश, विधि के अनुसरण में था – उच्च न्यायालय का आदेश कायम रखने योग्य नहीं एवं अपास्त – मामला, म.प्र. उच्च न्यायालय, इंदौर खण्डपीठ को प्रतिप्रेषित – अपील निराकृत। (एस.डी. कंटेनर्स इंदौर वि. मे. मोल्ड टेक पेकेजिंग लि.) **(SC)…163**

Designs Act (16 of 2000), Section 22(4) – Transfer of Proceedings – Jurisdiction **– Held – In terms of Section 22(4), defendant has a right to seek cancellation of design which necessarily mandates the Courts to transfer the suit – Transfer of suit is a ministerial act if there is a prayer for cancellation of registration – If a suit is to be transferred to Commercial Division of High Court having ordinary original civil jurisdiction, then the Civil Suit in which there is plea to revoke the registered design has to be transferred to High Court where there is no ordinary original civil jurisdiction. [S.D. Containers Indore Vs. M/s. Mold Tek Packaging Ltd.]** **(SC)…163**

डिजाइन अधिनियम (2000 का 16), धारा 22(4) – कार्यवाहियों का अंतरण – अधिकारिता – अभिनिर्धारित – धारा 22(4) के निबंधनों में, प्रतिवादी को डिजाइन का

INDEX

INDEX

INDEX

INDEX

* * * * *

THE INDIAN LAW REPORTS M.P. SERIES, 2021

(Vol.-1)

JOURNAL SECTION

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

THE MADHYA PRADESH NIJI VIDYALAYA (FEES TATHA SAMBANDHIT VISHAYON KA VINIYAMAN) RULE, 2020

[Published in Madhya Pradesh Gazette, (Extra-ordinary), dated 04 December 2020, page Nos. 948(17) to 948(37)]

No. F-37-4-2017-XX-3.- In exercise the powers conferred by sub-section (1) of Section 14 of the Madhya Pradesh Niji Vidayalaya (Fees Tatha Sambandhit Vishayon Ka Viniyaman) Adhiniyam, 2017 (No. 6 of 2018) the State Government, hereby, makes the following rules for regulation of fees and related issues, which has been previously published in the Madhya Pradesh Gazette (Extra Ordinary, dated 26th June, 2018, namely:-

RULES

1. Short title and commencement.-

(1) These rules may be called The Madhya Pradesh Niji Vidyalaya (Fees Tatha Sambandhit Vishayon Ka Viniyaman) Rule, 2020.

(2) It shall come into force from the date of its publication in official Gazette.

2. Definitions.-

(1) In these rules, unless the context otherwise requires—

(a) **"Academic session"** means an academic session as notified by the competent authority or the Central Board of Secondary Education or other recognized board including international board;

(b) **"Act"** means the Madhya Pradesh Niji Vidyalaya (Fees Tatha Sambandhit Vishayon Ka Viniyaman) Adhiniyam, 2017;

(c) **"Authorized signatory"** means a person who is a Principal/HeadMaster/Director/Manager/Trustee, authorized to sign documents such as containing an undertaking or affirmation or other relevant information required to be submitted by a private school under these rules;

(d) **"Commissioner"** means the Commissioner, Public Instruction, Madhya Pradesh;

(e) **"Director"** means Director, Public Instruction, Madhya Pradesh;

(f) **"District Committee"** means the District Level Committee constituted for regulation of fees and related issues under Section 7 of the Act;

(g) **"Format"** means the format prescribed under these rules;

(h) **"Portal"** means the official web portal designated by the School Education Department for the purpose of the Act and the implementation of these rules;

(i) **"School Education Department"** means the School Education Department of the Government of Madhya Pradesh;

(j) **"State Committee"** means a State Level Committee constituted for regulation of fees and related issues under sub-section (1) of section 11 of the Act.

(2) Words and expressions used in these rules but not defined shall have the same meaning as assigned to them in the Act.

3. Submission of General information & Accounts and procedure for submission of proposal.-

(1) **Preliminary Information -** Each private school shall within 90 days of the notification of these rules, enter or upload, as the case may be, the following information and records on the portal-

(One) **General information of the school -** Updated information of each private school shall be available pre-filled on the portal as per the format-I, which shall be updated, verified and uploaded by the Authorized Signatory, as defined in sub-section (1)(C) of section 2 of the concerned private school.

(Two) **Information pertaining to the audited accounts -** Each private school shall upload copies of audited accounts for three financial years, preceding the year of notification of these rules, as per format-II on the portal. Audited account shall include Balance sheet, Receipt payment statement, Income Expenditure Account with schedule and audit report.

(2) **Information to be submitted every year -** 180 days before the commencement of the upcoming academic session every year,

management of each private school shall enter or upload, as the case may be, the following information and documents on the portal: -

(One) In case of a change in general information submitted under Sub clause (one) of clause (1) of sub-rule (3) related to the school, the information as per format - I shall be updated and verified.

(Two) The audited accounts of the last financial year as per format-II,

(Three) An attested copy of the budget estimated for the current financial year, as per format-II.

(Four) The proposed fee structure for the upcoming academic session as per format-III. The amount payable against the items of fees shall be mentioned in the proposed fee structure, as per the sub-section (1) of section 3 of the Act. Along with the said proposed fee structure, such online process fee shall be submitted, as determined by the Department. If the increase in fee in the proposed fee structure is 10% or less than 10% as compared to the fees of the previous academic session, then the proposed fee structure for the upcoming academic session may be uploaded on the portal up to 90 days before the commencement of the session.

(3) As per sub-section (4) of the section 4 of the Act, a separate account will be maintained by the department for the collection of process fee. This account will be operated jointly by the Director Public Instruction or Additional Director Public Instruction and Joint Director (Finance) Public Instruction. Each Private school will deposit the prescribed process fee in this account online, along with the proposed fee structure.

(4) In the event of non-submission of proposed fee structure within the stipulated time by the Private school as per sub-rule (2), the District Committee may impose such penalty on the private school concerned as may be determined by the Department.

4. Examination of the proposed fee structure and the procedure of decision making by the District/State Committee on the proposal.-

(1) If the increment in fee by a private school in the proposed fee structure under Sub clause (four) of clause (2) of sub-rule (3) is 10% or less than 10% as compared to the fees of the previous academic session, then the private school will be competent to increase such proposed fee. In such a situation the proposal submitted by the private school in Form-III will be treated as deemed informed and admitted by the District Committee. No separate order will be required to be issued by the District Committee in this regard.

(2) If the increment in fee by a private school in the proposed fee structure under Sub clause (four) of clause (2) of sub-rule (3) is more than 10% but up to 15% or less as compared to the fee of the previous academic session, then the District Committee will take decision on the proposed fee structure within 45 working days.

(3) If the increment in fee by a private school in the proposed fee structure under Sub clause (four) of clause (2) of sub-rule (3) is more than 15% as compared to the fees of the previous academic session, then the District Committee will forward the said proposal with its clear opinion to the State Committee within 07 working days.

(4) The District Committee will take following action to decide proposed fee structure:-

(A) Examine the information and documents presented with the proposal and shall ensure that the proposed fee structure is in accordance with sub-section (2) of section 3 and sub-section (3) of section 5 of the Act.

(B) May avail the services of a chartered accountant to examine the fee structure submitted by the private school and the points arising in the processes of decision making on proposed fee structure, as determined by the committee. The department will issue necessary guidelines from time to time regarding the selection of district wise Chartered Accountants and the fee to be paid to them.

(C) May ask the management of the private school for such additional information or evidence as it deems necessary to decide on the proposed fee structure.

(D) May direct an officer not below the rank of Assistant Director, Public Instructions, for the physical verification of information or facts in the documents submitted with the proposal.

(E) Shall provide an opportunity of hearing to the school management before deciding on the proposed fee structure. If necessary, students of the concerned school or their parents or guardians may also be given a reasonable opportunity of hearing.

(F) The 45 working days deadline will be binding on the District Committee to decide on the proposed fee structure. The time taken by the private school under sub-rule (4)(c) will not be taken into account in computing this time period.

(G) The District Education Officer shall inform the concerned school electronically in Form-IV, the decision passed by the District Committee. The online order will be deemed to have been served properly for each purpose.

(5) The provisions of sub-rules clause (A) of sub-rule (4) upto clause (G) of sub-rule (4) shall *mutatis-mutandis* apply to the State Committee with necessary changes.

(6) The State Committee will take decision on the proposed fee structure as per sub-rule (3) within 45 working days. This deadline will be binding on the State Committee. The time taken by the private school under sub-rule (4)(c), if any, will not be taken into account in computing this time period.

(7) The Director, Public Instructions shall inform the concerned school electronically in Form-V(one), the decision passed by the State Committee. The online order will be deemed to have been served properly for each purpose.

(8) The private school management shall display the fees structure as decided under sub-rule (1) or as decided by the District Committee under clause (G) of sub-rule (4) or decided by State Committee under sub-rule (6), in Hindi and English language for the information of the public on school notice board and its official website.

(9) The management of a private school or any person authorized on its behalf shall not collect fee in excess of the prescribed fee under the provisions of this rule. No donation or per capita (capitation) fee in any name shall be received from a student, parent or guardian. The complaints received in this regards may be disposed of as per the provisions specified in rule 9.

(10) If the fee is collected in excess of the prescribed under the provision of this rule will be refunded by the private school management to the concerned students, parents or guardians, as the case may be, within a period of 30 working days from the date of decision by the District Committee or the State Committee, as the case may be. Information regarding refund made will be given by the concerned school to the District or State Committee as the case may be.

(11) If the fees decided by the District or State Committee, as the case may be, is more than the fees collected by the school, then in such case the arrear of the difference amount of fee will be payable by the students/parents to the school management within reasonable time, as specified by the concerned District or State Committee in its order.

5. Bank account for deposit of fees and expenses incurred. -

(1) Every private school shall have a bank account, which will be designated by private school for deposition of fee. Necessary information about the process of depositing of fees and the details of bank account will be provided at the time of admission by private school to students, parents or guardians. This information will also be displayed on the notice board of the school and its official website.

(2) Fee may be paid by the parents or guardians through online process or offline means, such as cash, cheque etc. The amount of fees received by private school will be deposited in the designated bank account as per sub-rule (1).

(3) The private school shall provide a receipt to the parents or guardians for the fees deposited by them. The receipt of the fees deposited online will be provided after verification of the said payment from the bank account.

(4) All transactions by private school management will be carried out through designated account as per sub-rule (1). Cash withdrawal and disbursement will be practiced under the provisions of sub section (3) section 40A of the Income Tax Act 1961.

6. Regulation of related issues.-

(1) The related issues will be regulated in the following manner, namely:-

(A) Information regarding the date of commencement and process of admission, textbooks, stationery, reading material, school bags, uniforms, sports kits etc. used in the school, transportation facility; the details of fee or the amount collected directly or indirectly by the private school management will be displayed on the school notice board and on the official website.

(B) The private school will provide necessary information regarding obtaining school prospectus and application form on the notice board and official website of the school. For this, if any payment is required to be made by the parents it will be clearly described.

(C) The prescription of textbooks by the private school management will be decided according to the regulation of the affiliation board or examination body to which it is affiliated.

(D) The private school management will not force students or parents either formally or informally to purchase books, uniforms, ties, shoes,

copies etc. from selected vendors only. Students or parents will be free to purchase these materials from open market.

(E) The name of the school will not be mentioned on any course material except the uniforms by the school management.

(F) If any changes in school uniform are made by private school management, it will remain in force for the next three academic sessions. Changes in the uniform can be made only after a period of three years.

(G) The private school management will follow the guidelines issued by the Department of Transport and the Department of School Education from time to time regarding transport facilities.

(H) In the event of the private school management providing transportation facilities to the students, the amount to be paid by the student will be included in the proposed fees structure as per clause (4) of sub-rule (2) of rule 3.

(2) The private school shall abide by the provisions descried in sub-rule (1) regarding the relevant issues. An undertaking to this effect will be uploaded every year as per Form-VI.

7. Procedure and functions of the District Committee.-

(1) The Chairperson of the District Committee will preside over the meetings of the District Committee constituted under sub section (1) of section 7 of the Act.

(2) The date, time, place and agenda of the meeting of the District Committee will be decided by the Chairperson. It will be communicated to all members of the District Committee by the member secretary.

(3) The agenda and information of the meeting shall be sent to each member of the District Committee within such time frame and manner as may be fixed by the District Committee.

(4) The quorum of the District Committee meeting shall be a minimum of three members. Presence of Chairperson and Member Secretary shall be mandatory for quorum.

(5) The Member Secretary of the District Committee shall function under the direction of the Chairperson. Member secretary will prepare the proceedings of the meeting and disseminate it to all the members of the committee within 07 days from the date of the meeting.

(6) The decisions of the District Committee and official correspondence will be communicated and issued with the signature of the Member Secretary.

8. Procedure and functions of the State Committee.-

(1) All the provisions of rule 7 shall mutatis mutandis apply to the State Committee with necessary changes.

(2) The State Committee shall decide the appeal submitted by the private school in accordance with rule 11.

(3) The State Committee may reduce or increase or repeal the penalty imposed by the District Committee.

9. Redressal of complaints in respect of fee increment and related issues.

(1) The District Committee will inquire into a complaint, made by a parent or guardian of a student or a student, regarding violation of any provision of Act and these rules committed by the management of the private school in which the student is studying.

(2) The District Committee may take *suo moto* cognizance of violation of any provision of the Act and these Rules and may investigate the same if necessary.

(3) The District Committee, under sub-section (3) of section 9 of the Act, may authorise any officer not below the rank of Assistant Director Public Instruction to enter the premises of the private school against whom inquiry has been instituted under sub-section (1) and (2) above.

(4) The officer authorized under sub-rule (3) above, shall search, inspect and seize documents which appear necessary and relevant for the conduct of inquiry.

(5) The District Committee for the purpose of making any inquiry shall have the powers of the a Civil Court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit, in respect of the following matters, namely:-

(A) summoning and forcing the attendance of any witness and examining him on oath;

(B) require the disclosure and production of any document;

(C) receiving evidence on affidavit; and

(D) issue commission for the test of witnesses.

(6) The District Committee shall give a reasonable opportunity of hearing to the management of private school against whom inquiry has been instituted.

(7) On completion of the inquiry regarding increment in fees, under sub-rule (1) and (2), if the District Committee finds that the fee has been collected in excess of that permitted under rule 4, it shall pass an order directing the management of the said private school to refund the same to the students or their parent or guardians from whom it has been collected. The deadline and procedure of refund of excess fees will be mentioned in the order passed.

(8) On completion of the inquiry in relation to the violation of rule 6 or any other provision of the Act and these rules, if the District Committee finds that the management has violated the provisions of the Act and these rules, it shall pass an order directing the management of the private school to refund an amount as determined by it to such students or their parents or guardians from whom it has been collected. The deadline and procedure of refund of excess amount will be mentioned in the order passed.

(9) The District Committee, in addition to the refund order under the sub-rules (7) or (8) above, shall impose a penalty up to rupees two lakhs on the management of said private school where order of refund has been issued for the first time and penalty up to rupees four lakhs where order of refund is issued for the second time and up to rupees six lakhs for subsequent orders of refund.

(10) The District Committee, in addition to imposition of penalty under sub-rule (9) above, may also recommend to the competent authority to suspend or cancel the recognition of the said private school.

(11) If the management of the private school fails to refund the amount as ordered under sub-rule (7) or (8) above, or to pay penalty imposed under sub-rule (9) above, the District Committee shall send a request to the District Collector to recover the said amount as arrears of land revenue.

(12) The amount recovered under sub-rule (11) above, shall be paid to such persons and by such procedure as may be mentioned in the refund order. The penalty amount collected will be deposited in the bank account as per sub-rule (3) of rule 3 fixed for this.

10. Expenditure of amount received from process fee and penalty.-

(1) The amount received as process fee and penalty shall be deposited in the bank account as per sub-rule (3) of rule 3.

(2) The amount received as process fee and penalty will be used as follows:-

(One) Infrastructure development for implementation of e-governance in departmental offices.

(Two) For the availability of necessary infrastructure and IT solutions to promote ICT enabled education in schools.

(Three) For leadership development and soft skill enhancement training for departmental officers, heads of institutions and teachers of government and private schools.

(Four) Exposure visits of departmental officers, institution heads and teachers to study innovations in the field of ICT and quality education in the country and abroad.

(Five) For the execution of such task or topics as may be considered essential from time to time by Commissioner Public Instruction.

11. Disposal of appeal.-

(1) A private school aggrieved by the order of the District Committee passed as per clause (G) of sub-rule (4) of rule 4 may appeal to the State Committee within 15 working days from the date of receipt of such order. For this, a fee of Rs. 2500/- shall be deposited online in the account specified in sub-rule (3) of rule 3.

(2) In the event of delay in filing the appeal, the private school may submit the appeal application within next 10 working days from the last date of applying for appeal with the reasons for delay and Rs. 5000/- as late fee which has to be deposited online in the account specified in sub-rule (3) of rule 3. In case the State Committee agrees to the reason for delay, the appeal application shall be considered as per the prescribed procedure.

(3) The State Committee may obtain records relating the action taken by the District Committee in the matter and such additional information from the appellant as it deems necessary for the disposal of the appeal.

(4) The State Committee, after taking into consideration all the factors related to the case and giving a opportunity of hearing to the concerned parties, shall decide the appeal by passing speaking order as per Form-V (two).

(5) The State Committee will decide the appeal within 45 working days from the date of receipt of the appeal application. The decision of the State Committee shall be final and binding.

12. Maintenance of accounts and records.- (1) Every private school shall maintain the accounts in the following manner, namely:-

(A) Each private school shall maintain all the relevant accounts and transaction records.

(B) Certificates relating to Tax Deducted at Source (TDS) for salaries of academic and non-academic staff.

(C) Expenditure incurred towards the concerned trust or affiliated / holding / subsidiary company having the same trustees / directors / members or relatives / society / society member.

(2) The private school will keep all the registers, accounts and records on its premises for inspection by the State / District Committee or Authorized Officer.

(3) The account maintained by the private school together with all the vouchers relating to various items of receipts and expenditure will be preserved by that school till the audit of account is over and objections raised, if any, are settled or till a period of seven years, whichever is later. Apart from this, other relevant records as the State Government deems appropriate will be preserved by the private school for the period fixed.

(4) (a) The private school will maintain the following registers and records for the purposes of the Act and the Rules, namely:-

(i) Admission register;

(ii) Fee collection register;

(iii) Cash books and all relevant ledgers;

(iv) Staff payroll register;

(v) Cheque register;

(vi) Stock registers;

(vii) Asset register;

(viii) Minute book of school management meetings;

(ix) Such other register or records as may be directed by the Government from time to time.

(B) The Principal/Headmaster/Manager/Trustee or the authorized person of private school, shall be responsible for the maintenance of accounts, records and registers.

(C) All expenditure towards management, teaching and non-teaching staff, housekeeping etc. will be incurred from the account specified in sub-rule (1) of rule 5.

(D) Payments of salary and allowances of academic and non-academic staff members will be credited directly from the aforesaid bank account electronically to their bank accounts.

13. Power to issue guidelines.-

The State Government shall have the power to redress any issues or difficulties encountered in the process of implementation of these rules or to issue guidelines, if any question arises regarding the implementation of these rules.

मध्यप्रदेश के राज्यपाल के नाम से तथा आदेशानुसार,
के.के. द्विवेदी, उपसचिव.

Form-I
(See rule 3(1) (one) and 3(2) (one))

General information of school

(update information of school shall be made available in the prescribed format on the portal in the pre-filled form which shall be updated and locked by the concerned private school and this information shall be updated for each session)

School Information format shall be seen here

Form-II
(See rule 3(1) (two) and 3(2) (two)

(For the first time, copies of the audited accounts of the preceding three financial years should be uploaded and from the current session information related to the audited accounts should be recorded and uploaded every year)

Table No. 1:- Information to be presented for the first time

Serial No.	Name of the school	Financial year	Upload the copy of the audited Accounts
(1)	(2)	(3)	(4)
		2017-18	Yes/Not Applicable
		2018-19	Yes/Not Applicable
		2019-20	Yes/Not Applicable

Table No. 2:- Information to be presented annually

Serial Number	School Name	Upload the copy of audited accounts for the last financial year	Upload a verified copy of the provisional budget estimate for the current financial year
(1)	(2)	(3)	(4)
		Yes	Yes

Form-III
(See rule 3(2) (four))
Proposed Fee Structure Session 20 ..-20 ..

By :
Name of applicant,
School Address with PIN Code
Telephone Number (Office)
E-Mail ID:
DISE Code:

To,

The Collector and President,
District Committee for regulation of Fee and Related Issues
District ----------.

Subject: Proposed Fee structure for Academic Session .....For.....School.

Mr./Mrs,

As per the provisions of The Madhya Pradesh Niji Vidyalaya (Fees Tatha Sambandhit Vishayon Ka Viniyaman) Adhiniyam, 2017, the proposed fee structure for the academic session..... of the school .....managed by..... (Trust/Committee/Enterprises name) ..... as per appendix-I is attached.

2. The school management has, by its resolution number ..... date ..... decided the fee structure as above for academic session ..... to be presented for information and consideration of District Committee.

3. The online payment of process fees of Rs ..... has been made through the portal.

4. School Management proposes that :-

(A) No increase in the fees for forthcoming academic session..... is proposed as compared to the previous academic session.

Or

(B) The fee for forthcoming academic session ..... has to be increased by ___percent as compared to the previous academic session.

5. All the provisions of the Madhya Pradesh Niji Vidyalaya (Fees Tatha Sambandhit Vishayon Ka Viniyaman) Adhiniyam, 2017 and Rules 2020 made theirunder have been read and understood by us and which the school management is obliged to follow.

6. Information related to the audited accounts of the school, provisional budget estimate and other information, records and evidences which are required under the said rules have been entered and uploaded on the portal.

7. The required undertaking to be produced under the above rules is attached as per Appendix-II.

Yours faithfully

( )

Authorized Signatory
Principal/Headmaster/Director/
Manager/Trustee
Name of the
school/Trust/Committee/Enterprises

Note:- After signing and stamping the required information in above format, has to be uploaded on the portal by the private school.

Appendix-I

1. Proposed Fee Structure - Academic session

.....

No.	Division Pre-primary/Primary/ Middle/High Secondary/Higher Secondary (Stream wise)	Proposed Annual Fee per student for forthcoming session.....	Annual Fee per student for last session	Increase/ decrease in annual fees per student In percentage	Justification of fee increase as per sub-section (2) of section 3 of the Act
(1)	(2)	(3)	(4)	(5)	(6)
1	Tuition Fee				(The options as per sub-section (2) of section 3 of the Act shall be available in drop-down menu)
2	Library fee				
3	Reading room fee				
4	Games fee				
5	Laboratory fee				
6	Computer fee				
7	Caution money				
8	Examination fee				
9	Fee for programs organized on occasions such as national festivals, Annual functions, Sporting events				
10	Admission fee				
11	Fee for registration, prospectus and admission form				

12	Any other amount which is mandatory for the student to pay;				
13	Any other amount payable by the students which may be prescribed by the Government				
14	Transportation fee				
	Total fee				

(Please attach Division-wise, category-wise in separate sheets.)

Authentication

It is certified that all the information given in the application form is correct to the best of my knowledge and belief and these have been verified from the original records of the school. It is also certified that as a result of increase in fees, in the accordance of Section 5 of Act.

The surplus on annual receipts, based on the proposed expenditure for the year for which the fee increase is proposed, shall not exceed 15% percent.

( )
Authorized Signatory
Principal/Headmaster/Director/
Manager/Trustee
Name of the
school/Trust/Committee/Enterprises

Appendix-II

Undertaking

I, Authorized Signatory, Mr./Ms./Mrs.....Son/Doughter/Spouse Shri.....Age.....Resident of.....in the capacity of Principal/Headmaster/Manager/Trustee hereby state that -

I. The details shown in Form-1 and the evidence presented with the proposal are true and correct according to best of my knowledge.

II. The accounts submitted through Form-2 have been duly audited by the Chartered Accountant and the provisional budget estimates are certified by the Chartered Accountant.

III. If desired by the District/State Committee, I shall submit additional information or details and evidence etc, within the stipulated time frame given.

IV. For regulating fees and related matters, I shall abide by with the instructions of the District/State Committee.

V. The management of a the private school or a person authorized on its behalf shall not collect fees in excess of the prescribed fee under the provisions of these rule and shall not receive any donation or capitation fee under any name whatsoever from any student, parent or guardian.

VI. Excess fees, if any, collected by the school management shall be refunded to the students, parents or guardians, as the case may be, within the stipulated time period as decided by District/State Committee.

VII. The income and expenditure details attached to the proposal are true and correct to the best of my knowledge.

(2) I assure to follow the provisions of the Act and the rules made thereunder.

(3) I certify that I have neither hidden any important facts nor given false or incorrect information.

Place :
Date .....

(Authorized signatory)
Principal/Headmaster/Director/
Manager/Trustee
Authorized Officer/Person
Name of school
Name of Trust/Committee/Enterprises

Form-IV
(See rule 4(4) (G))

[The order to be passed under The Madhya Pradesh Niji Vidyalaya (Fees Tatha Sambandhit Vishayon Ka Viniyaman) Rule, 2020 for the determination of fee structure by the District Committee.]

No. ..... Date .....
Office of the District Committee for regulating fee and related issues
District :- ----------

Order

1. That the management of .....school has submitted a proposal for increment in fees structure in Form-3 on .....(date) along with the undertaking of the authorized Signatory, under the provisions of The Madhya Pradesh Niji Vidyalaya (Fees Tatha Sambandhit Vishayon Ka Viniyaman) Adhiniyam, 2017 and clause (four) of sub-rule (2) of rule 3 of The Madhya Pradesh Niji Vidyalaya (Fees Tatha Sambandhit Vishayon Ka Viniyaman) Rule, 2020 made there under.

2. That the proposal for fee increase as mentioned above was examined on the basis of justification for fee hike. Based on the evidence and documents submitted by the

school management, the increment in fee was considered in terms of the provisions of the Act and the Rules.

3. That in connection with the case, private school management/student studying in that school/parent or guardian was given an opportunity of personal hearing on .....(This point should not be included if there is no hearing)

4. Therefore, in exercise of the powers conferred under The Madhya Pradesh Niji Vidyalaya (Fees Tatha Sambandhit Vishayon Ka Viniyaman) Adhiniyam, 2017 and the Rule 2020 made thereunder, subject to the conditions specified as below in this order,

The District Committee hereby agrees on the fee structure proposed by the private school management.

Or

The District Committee hereby decided the fees charged by the private school management as per Annexure - I.

Conditions (whichever is applicable):

I. In pursuance of sub-rule (8) of rule 4 of The Madhya Pradesh Niji Vidyalaya (Fees Tatha Sambandhit Vishayon Ka Viniyaman) Niyam, 2020, fees structure decided as in para-4 above, shall be displayed in Hindi and English language for the information of the general public on school notice board and its official website.

II. In pursuance of sub-rule (9) of rule 4 of The Madhya Pradesh Niji Vidyalaya (Fees Tatha Sambandhit Vishayon Ka Viniyaman) Niyam, 2020, the management of a private school or any person authorized on its behalf shall not collect fee in excess of the decided fee as in para-4 above. Donation or Per Capita (capitation) fee in any name shall not be received from a student, parent or guardian.

iii. In pursuance of sub-rule (10) of rule 4 of The Madhya Pradesh Niji Vidyalaya (Fees Tatha Sambandhit Vishayon Ka Viniyaman) Niyam, 2020, if the fees is collected in excess of the fee as decided in para-4 above by the private school management, that will be refunded to the concerned students, parents or guardians, as the case may be, within a period of 30 working days.

Or

In pursuance of sub-rule (11) of rule 4 of The Madhya Pradesh Niji Vidyalaya (Fees Tatha Sambandhit Vishayon Ka Viniyaman) Niyam, 2020, If the fees decided as in para-4 above is more than the fees collected by the school, then in such case the arrear of the difference amount of fee will be within .....days (time limit), the student, parent or guardian, will return to the school management.

As per the order of the District Committee for regulation of fees and related Issue

(Name)
District Education Officer and Member secretary
District.....

Annexure-I

Determination of fees for Pre-Primary / Primary / Middle / High Secondary / Higher Secondary (Science/Commerce / Humanities / Agriculture / Other stream) School:
(Should be prepared class wise and stream wise separately)

No	Division/Stream		Proposed Fee per student by school management	Fee per student determined by District Committee
(1)	(2)		(3)	(4)
1	Pre-primary	Class wise		
2	Primary	Class wise		
3	Middle	Class wise		
4	High Secondary	Class wise		
5	Higher Secondary (Science/Commerce/ Humanities/Agriculture/Other stream)	Class wise		

(Name)
District Education Officer and
Member secretary
District.....

Form-Five (One)
(See rule 4 (6))

[The order passed under The Madhya Pradesh Niji Vidyalaya (Fees Tatha Sambandhit Vishayon Ka Viniyaman) Rule, 2020 for the determination of fee structure by the State Committee.]

No. ..... Date .....

Office of the State Committee for regulating fee and related issue

Goutam Nagar, Bhopal

Order

1. That the management of .....school has submitted a proposal for increment in fees structure in Form-3 on .....(date) along with the undertaking of the authorized Signatory, under the provisions of The Madhya Pradesh Niji Vidyalaya (Fees Tatha Sambandhit Vishayon Ka Viniyaman) Adhiniyam, 2017 and clause (four) of sub-rule (2) of rule 3 of The Madhya Pradesh Niji Vidyalaya (Fees Tatha Sambandhit Vishayon Ka Viniyaman) Rule, 2020.

2. That the proposal for increase of fees as mentioned above has been sent to the State

Committee for its consideration by the District Committee with its opinion on ..... authorized for regulation of fee and related issues in the pursuance of sub-rule (3) of Rule 4.

3. That the proposal for fee increase as mentioned above was examined on the basis of justification for fee hike. Based on the evidence and documents submitted by the school management, the increment in fee was considered in terms of the provisions of the Act and the Rules.

4. That in connection with the case, private school management/student studying in that school/parent or guardian was given an opportunity of personal hearing on .....(This point should not be included if there is no hearing)

5. Therefore, in exercise of the powers conferred under The Madhya Pradesh Niji Vidyalaya (Fees Tatha Sambandhit Vishayon Ka Viniyaman) Adhiniyam, 2017 and the Rule 2020, subject to the conditions specified as below in this order,

The State Committee hereby agrees on the fee structure proposed by the private school management.

Or

The State Committee hereby decides the fees charged by the private school management as per Annexure - I.

Conditions (whichever is applicable):

I. In pursuance of sub-rule (8) of rule 4 of The Madhya Pradesh Niji Vidyalaya (Fees Tatha Sambandhit Vishayon Ka Viniyaman) Niyam, 2020, fees structure decided as in para-5 above shall be displayed in Hindi and English language for the information of the public on school notice board and its official website.

II. In pursuance of sub-rule (9) of rule 4 of The Madhya Pradesh Niji Vidyalaya (Fees Tatha Sambandhit Vishayon Ka Viniyaman) Niyam, 2020, the management of a private school or any person authorized on its behalf shall not collect fee in excess of the decided fee as in para-5 above. Donation or Per Capita (capitation) fee in any name shall not be received from a student, parent or guardian.

III. In pursuance of sub-rule (10) of rule 4 of The Madhya Pradesh Niji Vidyalaya (Fees Tatha Sambandhit Vishayon Ka Viniyaman) Niyam, 2020, if the fees is collected in excess of the decided as in para-5 above by the private school management, that will be refunded to the concerned students, parents or guardians, as the case may be, within a period of 30 working days.

Or

In pursuance of sub-rule (11) of rule 4 of The Madhya Pradesh Niji Vidyalaya (Fees Tatha Sambandhit Vishayon Ka Viniyaman) Niyam, 2020, If the fees decided as in para-5 above is more than the fees collected by the school, then in such case the arrear of the difference amount of fee will be within .....days (time limit), the student, parent or guardian will return to the school management.

As per the order of the State Committee for Regulation of Fees and Related Issue

(Name)
Director and Member secretary
Public Instructions, M.P.
Bhopal

Annexure-I

Determination of fees for Pre-Primary / Primary / Middle / High Secondary / Higher Secondary (Science/Commerce / Humanities / Agriculture / Other Stream) School:
(Should be prepared class wise and stream wise separately)

No	Division/Stream		Proposed Fee per student by school management	Fee per student determined by State Committees
(1)	(2)		(3)	(4)
1	Pre-primary	Class wise		
2	Primary	Class wise		
3	Middle	Class wise		
4	High Secondary	Class wise		
5	Higher Secondary (Science / Commerce / Humanities / Agriculture / Other Stream)	Class wise		

(Name)
Director and Member secretary
Public Instructions, M.P.Bhopal

Form-Five (Two)
(See rule 11 (4))

[The order passed under The Madhya Pradesh Niji Vidyalaya Fees Tatha Sambandhit Vishayon Ka Viniyaman) Rule, 2020 for the determination of appeal and deciding fee structure by the State Committee.]

No. ..... Date .....
Office of the State Committee for regulating fee and related issue
Goutam Nagar, Bhopal, M.P.

Order

1. That the management of .....school has submitted a proposal for increment in fees structure in Form-3 on .....(date) along with the undertaking of the authorized person, under the provisions of The Madhya Pradesh Niji Vidyalaya

(Fees Tatha Sambandhit Vishayon Ka Viniyaman) Adhiniyam, 2017 and rule (2)(four) of rule (3) of The Madhya Pradesh Niji Vidyalaya (Fees Tatha Sambandhit Vishayon Ka Viniyaman) Rule, 2020.

2. That the proposal for increase of fees as mentioned above has been decided on date ..... by the District Committee authorized for regulation of fees and other issues in pursuance of sub-rule (3) of Rule 4. Aggrieved by the said decision, an appellate application has been submitted to this office on ..... under sub-rule (1) of Rule 11, which is under consideration.

3. That the proposal for fee increase as mentioned above was examined on the basis of justification for fee hike. Based on the evidence and documents submitted by the school management, the increment in fee was considered in terms of the provisions of the Act and the Rules.

4. That in connection with the case, private school management/student studying in that school/parent or guardian was given an opportunity of personal hearing on .....(This point should not be included if there is no hearing)

5. Therefore, in exercise of the powers conferred under The Madhya Pradesh Niji Vidyalaya (Fees Tatha Sambandhit Vishayon Ka Viniyaman) Adhiniyam, 2017 and the Rule 2020 made there under, subject to the conditions specified as below in this order,

The State Committee after due consideration, accepting the appeal and hereby agrees on the fee structure proposed by the private school management.

Or

The State Committee after due consideration, rejecting the appeal and hereby agrees on the fee structure proposed by the District Committee.

Or

State Committee after due consideration of appeal decides the fees charged by the private school management as per Annexure-I.

Conditions (whichever is applicable):

I. In pursuance of sub-rule (8) of rule 4 of The Madhya Pradesh Niji Vidyalaya (Fees Tatha Sambandhit Vishayon Ka Viniyaman) Niyam, 2020, fees structure decided as in para-5 shall be displayed in Hindi and English language for the information of the public on school notice board and its official website.

II. In pursuance of sub-rule (9) of rule 4 of The Madhya Pradesh Niji Vidyalaya (Fees Tatha Sambandhit Vishayon Ka Viniyaman) Niyam, 2020, the management of a private school or any person authorized on its behalf shall not collect fee in excess of the decided fee as in para-5 above. Donation or Per Capita (capitation) fee in any name shall not be received from a student, parent or guardian.

III. In pursuance of sub-rule (10) of rule 4 of The Madhya Pradesh Niji Vidyalaya (Fees Tatha Sambandhit Vishayon Ka Viniyaman) Niyam, 2020, if the fees is collected in

excess of the decided as in para-5 above by the private school management, that will be refunded to the concerned students, parents or guardians, as the case may be, within a period of 30 working days.

Or

In pursuance of sub-rule (11) of rule 4 of The Madhya Pradesh Niji Vidyalaya (Fees Tatha Sambandhit Vishayon Ka Viniyaman) Niyam, 2020, If the fees decided as in para-5 above is more than the fees collected by the school, then in such case the arrear of the difference amount of fee will be within .....days (time limit), the student, parent or guardian will return to the school management.

As per the order of the State Committee for regulation of fees and related matters

(Name)
Director and Member secretary
Public Instructions, M.P.
Bhopal

Annexure-I

Determination of fees for Pre-Primary / Primary / Middle / High Secondary / Higher Secondary (Science / Commerce / Humanities / Agriculture / Other Stream) School:
(Should be prepared class wise and stream wise separately)

No	Division/Stream		Proposed Fee per student by school management	Fee per student determined by State Committee
(1)	(2)		(3)	(4)
1	Pre-primary	Class wise		
2	Primary	Class wise		
3	Middle	Class wise		
4	High Secondary	Class wise		
5	Higher Secondary (Science/Commerce/ Humanities/Agriculture/Other Stream)	Class wise		

(Name)
Director and Member secretary
Public Instructions, M.P.
Bhopal

J/40

Form- Six
(See rule 6(2))

(Affidavit shall be prepared on the non-judicial stamp paper of Rs. 100/- by private school and upload online)

Affidavit

(Name of school) ..... City/Town ..... Block ..... District: ..... School DISE Code ..... Trust/Committee/Undertaking ..... Is operated by .....

I declare that the school has complied with the provisions as mentioned in sub-rule (1) of Rule 6 of The Madhya Pradesh Niji Vidyalaya (Fees Tatha Sambandhit Vishayon Ka Viniyaman) Rule, 2020, especially with reference to the following,

I. Textbook
II. Stationery
III. Reading material
IV. School bag
V. Uniform
VI. Sports Kit
VII. Transport
VIII. Any other .....

Promissory note

I, undersigned ..... (Name) ..... (Age: ..... Year .....), (Mention Business, School / Trust / Undertaking Name and Address) as Head Master / Principal / Manager / Trustee / Authorized Signatory (Write the name of the school): ..... City ..... Town ..... Vidyalaya Code .....hereby solemnly declare that the statements made in the above paragraphs are true to the best of my knowledge and belief and are given on the basis of school records. I have not concealed any important fact nor produced any incorrect information. I know that preparing false affidavit is a punishable offence.

Head Master / Principal /
Manager / Trustee /
Authorized Signatory
Name of school .....
Trust / Undertaking/
Committee Name: .....

Place:
Date: .....

Confirmed to
Name and address:-

I.L.R. [2021] M.P. 163 (SC)
SUPREME COURT OF INDIA

Before Mr. Justice L. Nageswara Rao, Mr. Justice Hemant Gupta & Mr. Justice Ajay Rastogi

CA No. 3695/2020 decided on 1 December, 2020

S.D. CONTAINERS INDORE …Appellant

Vs.

M/S. MOLD TEK PACKAGING LTD. …Respondent

A. Designs Act (16 of 2000), Section 19 & 22(4) and The Commercial Courts, Commercial Division, Commercial Appellate Division of High Courts Act, 2015 (4 of 2016), Sections 4, 7 & 21 – Jurisdiction **– Held – Plea of revocation of registration was raised in suit which is required to be transferred to High Court as per Section 22(4) of 2000 Act and since no part of cause of action has arisen within jurisdiction of Kolkata, suit is liable to be transferred to M.P. High Court, Indore Bench – Order of Commercial Court at District Level was in accordance with law – Order of High Court not sustainable and set aside – Matter remitted to M.P. High Court, Indore Bench – Appeal disposed. (Paras 13, 20 & 21)**

क. डिजाइन अधिनियम (2000 का 16), धारा 19 व 22(4) एवं वाणिज्यिक न्यायालय, उच्च न्यायालय वाणिज्यिक प्रभाग और वाणिज्यिक अपील प्रभाग अधिनियम, 2015 (2016 का 4), धाराएँ 4, 7 व 21 – अधिकारिता – अभिनिर्धारित – पंजीयन के प्रतिसंहरण का अभिवाक् उस वाद में उठाया गया था जिसे, 2000 के अधिनियम की धारा 22(4) के अनुसार उच्च न्यायालय को अंतरित किया जाना अपेक्षित है और चूंकि कोलकाता की अधिकारिता के भीतर, वाद हेतुक का कोई भाग उत्पन्न नहीं हुआ है, वाद, म.प्र. उच्च न्यायालय, इंदौर खण्डपीठ को अंतरणीय है – जिला स्तर पर वाणिज्यिक न्यायालय का आदेश, विधि के अनुसरण में था – उच्च न्यायालय का आदेश कायम रखने योग्य नहीं एवं अपास्त – मामला, म.प्र. उच्च न्यायालय, इंदौर खण्डपीठ को प्रतिप्रेषित – अपील निराकृत।

B. Designs Act (16 of 2000), Section 22(4) – Transfer of Proceedings – Jurisdiction **– Held – In terms of Section 22(4), defendant has a right to seek cancellation of design which necessarily mandates the Courts to transfer the suit – Transfer of suit is a ministerial act if there is a prayer for cancellation of registration – If a suit is to be transferred to Commercial Division of High Court having ordinary original civil jurisdiction, then the Civil Suit in which there is plea to revoke the registered design has to be transferred to High Court where there is no ordinary original civil jurisdiction. (Para 11)**

ख. डिजाइन अधिनियम (2000 का 16), धारा 22(4) – कार्यवाहियों का अंतरण – अधिकारिता – अभिनिर्धारित – धारा 22(4) के निबंधनों में, प्रतिवादी को

डिजाइन का निरस्तीकरण चाहने का अधिकार है, जो कि न्यायालयों को वाद अंतरित करने के लिए आवश्यक रूप से आज्ञा करती है – वाद का अंतरण एक लिपिकीय कार्य है यदि पंजीयन के रद्दरण हेतु प्रार्थना की गई है – यदि एक वाद को, साधारण मूल सिविल अधिकारिता के उच्च न्यायालय के वाणिज्यिक प्रभाग को अंतरित किया जाना है, तब वह सिविल वाद जिसमें पंजीकृत डिजाइन को प्रतिसंहृत करने के लिए अभिवाक् है, उसे उच्च न्यायालय को अंतरित किया जाना होगा जहां कोई साधारण मूल सिविल अधिकारिता नहीं है।

***C. Designs Act (16 of 2000), Section 19 & 22(4) – Revocation of Registration* – Held – There are two options available to seek revocation of registration, one of them is before the Controller, appeal against which would lie before High Court and second, in a suit for infringement in a proceeding before Civil Court on basis of registration certificate, where if, defendant seeks revocation of registration, in that eventuality, suit is to be transferred to High Court in terms of Section 22(4) of the Act – Both are independent provisions giving rise to different and distinct cause of action.**

(Para 13 & 14)

ग. डिजाइन अधिनियम (2000 का 16), धारा 19 व 22(4) – पंजीयन का प्रतिसंहरण – अभिनिर्धारित – पंजीयन का प्रतिसंहरण चाहने के लिए दो विकल्प उपलब्ध है, उनमें से एक, नियंत्रक के समक्ष, जिसके विरूद्ध अपील, उच्च न्यायालय के समक्ष होगी और दूसरा, पंजीयन प्रमाणपत्र के आधार पर सिविल न्यायालय के समक्ष कार्यवाही में अतिलंघन हेतु वाद में, जहां यदि प्रतिवादी, पंजीयन का प्रतिसंहरण चाहता है, उस स्थिति में, वाद को अधिनियम की धारा 22(4) के निबंधनों में उच्च न्यायालय को अंतरित करना होगा – दोनों स्वतंत्र उपबंध हैं जिनसे भिन्न एवं सुभिन्न वाद हेतुक उत्पन्न होते हैं।

***D. The Commercial Courts, Commercial Division, Commercial Appellate Division of High Courts Act, 2015 (4 of 2016), Section 2(c)(xvii) & 3 – "Commercial Dispute" – Jurisdiction* – Held – Disputes related to design are required to be instituted before a Commercial Court constituted u/S 3 of the Act of 2015.** **(Para 8)**

घ. वाणिज्यिक न्यायालय, उच्च न्यायालय वाणिज्यिक प्रभाग और वाणिज्यिक अपील प्रभाग अधिनियम, 2015 (2016 का 4), धारा 2(c)(xvii) व 3 – ''वाणिज्यिक विवाद'' – अधिकारिता – अभिनिर्धारित – डिजाइन से संबंधित विवादों को 2015 के अधिनियम की धारा 3 के अंतर्गत गठित एक वाणिज्यिक न्यायालय के समक्ष संस्थित किया जाना अपेक्षित है।

Cases referred:

(2010) 2 SCC 535, ILR 2008 Kar 2533, 2016 SCC OnLine All 975, AIR 2010 J & K 13, 2009 SCC OnLine Guj 9488, AIR 1961 All 101, 2014 SCC OnLine Bom 565.

J U D G M E N T

The Judgment of the Court was delivered by : **HEMANT GUPTA, J.** :- The present appeal has been filed to challenge an order passed by the Madhya Pradesh High Court, setting aside an order dated 23.03.2020 transferring the suit under Section 22(4) of the Design Act, 2000[1] to the Calcutta High Court. It is the said order which was set aside by the High Court on 1.9.2020 directing that the Commercial Court, Indore is itself competent to decide the suit in terms of the Commercial Courts Act, 2015[2].

2. The plaintiff/respondent herein filed a suit for declaration and permanent injunction to restrain the appellants from either directly or indirectly copying, using or enabling others to use the plaintiff's design of Container and Lid registered under Design Application Nos. 299039 and 299041 respectively.

3. In the said suit, the defendant/appellant had filed a written statement along with the counter-claim before the Commercial Court, inter alia seeking cancellation of the abovementioned registered designs for the reason that the said designs were not new or original and hence could not be registered in terms of Section 4(a) of the 2000 Act. The appellant also filed an application under Section 22(4) read with Section 19(2) of the 2000 Act to transfer the suit to the Madhya Pradesh High Court, Indore Bench. It is the said application which was allowed by the learned District Judge and the suit was thus transferred to the Calcutta High Court.

4. The said order passed by Commercial Court was challenged by the plaintiff/respondent before the Madhya Pradesh High Court. The High Court examined the question as to whether the proceedings of the said suit was liable to be transferred to the High Court or if the Commercial Court at Indore was competent to decide the matter. The High Court relied upon *Godrej Sara Lee Ltd. vs Reckitt Benckiser Australia Pty. Ltd. and another*[3] to hold that the legislature intended that an application for cancellation of registration of design would lie to the Controller exclusively without the High Court having a parallel jurisdiction to entertain such matter because the appeals from the order of the Controller lie before the High Court. It was further held that the 2015 Act is a special enactment having an overriding effect, save as otherwise provided the provisions, by virtue of Section 21 of the said Act.

5. The relevant provisions of the statutes, i.e. the 2000 Act and the 2015 Act are reproduced below:

---

[1]for short the '2000 Act'
[2]for short the '2015 Act'
[3](2010) 2 SCC 535

"The Design Act, 2000

4. Prohibition of registration of certain designs.--A design which--

(a) is not new or original; or

(b) xx xx xx

(c) xx xx xx

(d) xx xx xx

shall not be registered."

Xx xx xx

19. **Cancellation of registration**.--(l) Any person interested may present a petition for the cancellation of the registration of a design at any time after the registration of the design, to the Controller on any of the following grounds, namely:--

(a) that the design has been previously registered in India; or

(b) that it has been published in India or in any other country prior to the date of registration; or

(c) that the design is not a new or original design; or

(d) that the design is not registrable under this Act; or

(e) that it is not a design as defined under clause *(*d*)* of section 2.

(2) An appeal shall lie from any order of the Controller under this section to the High Court, and the Controller may at any time refer any such petition to the High Court, and the High Court shall decide any petition so referred.

Xx xx xx

22. Piracy of registered design. —

(1) xx xxx xxx

(2) xx xxx xxx

(3) In any suit or any other proceeding for relief under sub- section *(2),* ever ground on which the registration

of a design may be cancelled under section 19 shall be available as a ground of defence.

(4) Notwithstanding anything contained in the second proviso to sub-section (2), where any ground or which the registration of a design may be cancelled under section 19 has been availed of as a ground of defence under sub-section (3) in any suit or other proceeding for relief under sub-section (2), the suit or such other proceedings shall be transferred by the Court, in which the suit or such other proceeding is pending, to the High Court for decision.

(5) When the court makes a decree in a suit under sub-section (2), it shall send a copy of the decree to the Controller, who shall cause an entry thereof to be made in the register of designs.

THE COMMERCIAL COURTS ACT, 2015

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

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

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

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

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

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

3A. Designation of Commercial Appellate Courts.--

Except the territories over which the High Courts have ordinary original civil jurisdiction, the State Government may, after consultation with the concerned High Court, by notification, designate such number of Commercial Appellate Courts at District Judge level, as it may deem necessary, for the purposes of exercising the jurisdiction and powers conferred on those Courts under this Act.

4. Constitution of Commercial Division of High Court.--

(1) In all High Courts, having [2][ordinary original civil jurisdiction], the Chief Justice of the High Court may, by order, constitute Commercial Division having one or more Benches consisting of a single Judge for the purpose of exercising the jurisdiction and powers conferred on it under this Act.

Xxx xxx xxx

7. Jurisdiction of Commercial Divisions of High Courts. --All suits and applications relating to commercial disputes of a Specified Value filed in a High Court having ordinary original civil jurisdiction shall be heard and disposed of by the Commercial Division of that High Court:

Provided that all suits and applications relating to commercial disputes, stipulated by an Act to lie in a court not inferior to a District Court, and filed or pending on the original side of the High Court, shall be heard and disposed of by the Commercial Division of the High Court:

> Provided further that all suits and applications transferred to the High Court by virtue of sub-section (4) of section 22 of the Designs Act, 2000 (16 of 2000) or section 104 of the Patents Act, 1970 (39 of 1970) shall be heard and disposed of by the Commercial Division of the High Court in all the areas over which the High Court exercises ordinary original civil jurisdiction.
>
> Xxx xxx xxx
>
> **21. Act to have overriding effect.--** Save as otherwise provided, the provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law for the time being in force other than this Act."

6. Mr. Jai Sai Deepak, learned counsel for the appellant referred to the judgments reported as *M/s Astral Polytechnic Limited v. M/s Ashirwad Pipes Private Ltd.*[4], *R. N. Gupta and Co. Ltd. Jasola New Delhi v. M/s Action Construction Equipments Ltd. Dudhohla and 3 others.*[5], *M/s. Escorts Construction Equipment Ltd. v. M/s Gautam Engineering Company and another*[6], *Salutri Remedies v. Unim Pharma Lab Pvt. Ltd*[7] *and Standard Glass Beads Factory and another v. Shri Dhar and Ors*[8] to contend that the High Court erred in law in transferring the suit to the Commercial Court (District Level) while setting aside the order passed by the Commercial Court to transfer the said suit to the High Court. It was also argued that the High Court erred in holding that since an appeal against the order of cancellation by the Controller lies to the High Court, the transfer would not be sustainable for the reason that the appellate jurisdiction is distinct from the original jurisdiction in a plea for cancellation of the design in a suit in terms of the provisions of 2000 Act.

7. On the other hand, Mr. Assudani, learned counsel for the respondent relied upon the order of this Court in *Godrej Sara Lee* as well as *Whirlpool of India v. Videocon Industries Ltd.*[9] to support the order passed by the High Court.

8. We have heard learned counsel for the parties. The 2015 Act deals with two situations i.e. the High Courts which have ordinary original civil jurisdiction and the High Courts which do not have such jurisdiction. The High Court of

---

[4]ILR 2008 Kar 2533
[5]2016 SCC OnLine All 975
[6]AIR 2010 J&K 13
[7]2009 SCC OnLine Guj 9488
[8]AIR 1961 All 101
[9]2014 SCC OnLine Bom 565

Madhya Pradesh does not have the ordinary original civil jurisdiction. In areas where the High Courts do not have ordinary original civil jurisdiction, the Commercial Courts at the District Level are to be constituted under Section 3 of the 2015 Act. The State Government is also empowered to fix the pecuniary limit of the Commercial Courts at the District Level in consultation with the concerned High Court. In terms of Section 3(2) of the 2015 Act, the Court of District Judge at Indore is notified to be a Commercial Court. "Commercial Dispute" within the meaning of Section 2(c)(xvii) of the Act, 2015 includes the dispute pertaining to "intellectual property rights relating to registered and unregistered trademarks, copyright, patent, design, domain names, geographical indications and semiconductor integrated circuits." Therefore, disputes related to design are required to be instituted before a Commercial Court constituted under Section 3 of the said Act.

9. On the other hand, Section 4 of the 2015 Act provides that where the High Courts have ordinary original civil jurisdiction, a Commercial Division is required to be constituted. Further, in terms of Section 5 of the Act, a Commercial Appellate Division is required to be constituted. Section 7 of the Act deals with the suits and applications relating to the commercial disputes of a specified value filed in the High Court having ordinary original jurisdiction, whereas, the second proviso contemplates that all suits and the applications transferred to the High Court by virtue of sub-section (4) of Section 22 of 2000 Act shall be heard and disposed of by the Commercial Division of the High Court in all the areas over which the High Court exercises ordinary original civil jurisdiction.

10. It is thus contended that in the High Courts having ordinary original civil jurisdiction, the suits which have been transferred to the High Court by virtue of sub-section (4) of Section 22 of the Act are required to be dealt with by the Commercial Division of the High Court instead of a Bench of the High Court, in terms of the Rules appliable to each High Court. Thus, the suit pertaining to design under the 2000 Act would be transferred to the Commercial Division from the ordinary original civil jurisdiction, i.e., from one Bench to the other exclusive Court dealing with Commercial Disputes.

11. It is pertinent to mention that Section 7 of the 2015 Act only deals with the situation where the High Courts have ordinary original civil jurisdiction. There is no provision in the 2015 Act either prohibiting or permitting the transfer of the proceedings under the 2000 Act to the High Courts which do not have ordinary original civil jurisdiction. Further, Section 21 of the 2015 Act gives an overriding effect, only if the provisions of the Act have anything inconsistent with any other law for the time being in force or any instrument having effect by virtue of law other than this Act. Since the 2015 Act has no provision either prohibiting or permitting the transfer of proceedings under the 2000 Act, Section 21 of the 2015

Act cannot be said to be inconsistent with the provisions of the 2000 Act. It is only the inconsistent provisions of any other law which will give way to the provisions of the 2015 Act. In terms of Section 22(4) of the 2000 Act, the defendant has a right to seek cancellation of the design which necessarily mandates the Courts to transfer the suit. The transfer of suit is a ministerial act if there is a prayer for cancellation of the registration. In fact, transfer of proceedings from one Bench to the Commercial Division supports the argument raised by learned counsel for the Appellant that if a suit is to be transferred to Commercial Division of the High Court having ordinary original civil jurisdiction, then the Civil Suit in which there is plea to revoke the registered design has to be transferred to the High Court where there is no ordinary original civil jurisdiction.

12. The judgment in *Godrej Sara Lee* arises out of an order passed by the Controller of Patent & Designs, Kolkata under Section 19(1) of the 2000 Act, cancelling the registered designs belonging to the respondent therein. The question examined was as to whether the Delhi High Court has jurisdiction to entertain the appeals against the order of the Controller. The respondent had also filed a civil suit before the Delhi High Court alleging infringement of registered designs and thus seeking cancellation of the designs. Later, the Controller of Design cancelled three designs belonging to the respondent. This order of cancellation was challenged by the respondent before the High Court. In these circumstances, the question examined was regarding interpretation of the expression High Court used in Section 19(2) and 22(4) of the 2000 Act and Section 51A of the Indian Patents and Designs Act, 1911[10].

13. It was held that any application for cancellation of registration under Section 19 could be filed only before the Controller and not to the High Court. Therefore, in these circumstances, it was held that the High Court would be entitled to assume jurisdiction only in appeal. It was not a case of suit for infringement in which the defendant has raised a plea of revocation of registration which is required to be transferred to the High Court in terms of Section 22(4) of the 2000 Act. Therefore, such judgment has been wrongly relied upon by the High Court assuming that the proceedings are before the Controller and that the plaintiff/respondent had filed a suit for infringement wherein a plea of revocation of registration was raised which was required to be transferred to the High Court in terms of Section 22(4) of the 2000 Act.

14. Furthermore, in the 2000 Act, there are two options available to seek revocation of registration. One of them is before the Controller, appeal against which would lie before the High Court. Second, in a suit for infringement in a proceeding before the civil court on the basis of registration certificate, the

[10]for short the '1911 Act'

defendant has been given the right to seek revocation of registration. In that eventuality, the suit is to be transferred to the High Court in terms of sub-section (4) of Section 22 of the 2000 Act. Both are independent provisions giving rise to different and distinct causes of action.

15. In *Standard Glass Beads,* the 1911 Act was under examination before the Division Bench of the Allahabad High Court. Section 29 thereof permits a suit to be filed by a patentee wherein the defendant could raise a plea of revocation of patent in a counter-claim. Considering Section 29 of the Act, it was held as under:

> "10. The expression "shall be transferred" in our judgment means "shall stand transferred"; and the District Judge is left with no jurisdiction save to make such order as is necessary to secure the physical transfer of the records of the case to the High Court. If this meaning be not given to these words there will be an element of uncertainty both with regard to the time when the record of the case is to be sent to the High Court and to the powers of the District Court during the period which is allowed to elapse before the record is in fact transferred."

16. The said view was reiterated by another Single Bench of Allahabad High Court in a judgment reported as *R. N. Gupta* after the enactment of the 2000 Act. The Court held as under:

> **"35.** Apart from that, looking from another angle, in case it is left open to District Court to proceed further to record any satisfaction on the material filed on record in support of the ground taken by the defendant as available under Section 19, it would mean that the District Court would be entering into the jurisdiction of the Controller of the Designs as provided to him under Section 19 or of the High Court, in case any such proceedings for cancellation of registration are proceeded further by the Controller of Designs or are sent to the High Court. To my mind, the District Court can go only to the extent of satisfying itself as to whether ground, on which the registration of design may be cancelled under Section 19, has been availed as a ground of defence or not. It cannot go into the merits of the defence so taken by the defendant as it would amount to exceeding his jurisdiction, which can only be gone into by the High Court on transfer of the case to the High court as to whether there is any force or not in such defence taken by the defendant under Section 19 of the Act.
>
> **36.** In such view of the matter, once, on bare reading of the reply filed to the interim injunction application, it is found

> that that a defence or ground under Section 19 is availed of, nothing further is to be seen by the District court and he has no option but to transfer the case to the High Court for decision including the interim injunction application."

17. Similar view was taken by Single Bench of Karnataka High Court in a judgment reported as *M/s Astral Polytechnic,* wherein the Court held as under:

> "15. In that view of the matter, the order passed by the trial judge refusing to transfer the pending suit to this court when admittedly the second defendant has taken a defence under sec. 19 of the Act contending that the design which is registered in favour of the plaintiff was not registerable at all, is erroneous and liable to be quashed..... "

18. To the same effect is a judgment of Jammu and Kashmir High Court reported as *M/s. Escorts Construction Equipment,* wherein it is held that once a defence is taken for revocation of registration, then in terms of sub-section (4) of Section 22 of the 2000 Act, the Civil Court has no power to decide the revocation of the design and it is only the High Court which has to adjudicate upon the matter and decide as to whether the design is to be cancelled or not. It was held that the learned trial court committed a legal error in not transferring the case to the High Court.

19. The Bombay High Court in *Whirlpool of India* was dealing with a suit against the Defendant for infringement of the registered designs; passing off; and the damages. The defendant never sought the cancellation of the registration granted to the plaintiff but relied upon the registration granted to it. In these circumstances, the High Court held as under:

> "19. In support of its contention that the Defendant's registered design can only be challenged by proceedings under Section 19 of the Act before the Controller, the Defendant would argue that the availability of a remedy under Section 19 of the Act for cancellation of a registered design amounts to a negation and exclusion of remedy under Section 22 of the Act. This is plainly incorrect. Section 19 and Section 22 of the Act operate independently in different circumstances. Section 19 of the Act is invoked to seek cancellation of a registration of a design. Section 22 of the Act is invoked where a registered design of a proprietor is infringed by any person and the registered proprietor seeks reliefs in the form of damages, injunction, etc. against the infringer. Such relief can be sought even against a registered proprietor of a design by questioning his registration. The Defendant too can submit that the Plaintiff is not entitled to any relief in terms of damages,

> injunction etc. by questioning the registration of the Plaintiff's on grounds available under Section 19 of the Act for cancellation of a registration. Again, Section 19 entitles a party to move the Controller for cancellation of a design even where the registered proprietor is not using the design. Section 19 therefore affords a cause of action where a mere registration is considered objectionable and a mere factum of registration affords a cause of action. In marked contrast, Section 22 of the Act affords a cause of action only where a registered design is being applied or caused to be applied to any article for the purposes of sale or in relation to or in connection with such sale. Consequently, if a registered proprietor does not apply his design to an article for sale or in connection with such sale, another registered proprietor cannot have recourse to Section 22 of the Act. The remedy under Section 22 of the Act is only available where the impugned design is being used. A further distinction between Section 19 and 22 of the Act, as correctly pointed out on behalf of the Plaintiff is that while Section 19 is applicable to 'any person interested', Section 22 is available only to a small segment of such person viz. registered proprietors. The remedy under Section 19 and the remedy under Section 22 are therefore very different. They apply to different persons in different circumstances and for different reliefs."

20. In view of the above, the order of the Commercial Court at the District Level is in accordance with law. However, we are unable to agree with the Commercial Court to transfer such suit to Calcutta High Court. The High Court, where the cause of action arises has the Jurisdiction to entertain the Suit in terms of *Godrej Sara Lee.* Since no part of cause of action has arisen within the jurisdiction of Kolkata, the suit is liable to be transferred to Madhya Pradesh High Court, Indore Bench. In fact, the Plaintiff has filed suit at Indore, Madhya Pradesh only.

21. Thus, we find that the order of the High Court is not sustainable. The same is set aside and the matter is remitted to the High Court of Madhya Pradesh, Indore Bench, who shall decide the suit in accordance with law. The appeal is disposed of in the above terms.

Order accordingly

I.L.R. [2021] M.P. 175 (SC)
SUPREME COURT OF INDIA

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

CRA Nos. 824-825/2020 decided on 3 December, 2020

JAYANT ETC. …Appellants

Vs.

STATE OF M.P. …Respondent

(Alongwith Cr.A. No. 826/2020)

***A. Mines and Minerals (Development and Regulation) Act (67 of 1957), Sections 4/21, 23-A(1) & 23-A(2), Minor Mineral Rules, M.P. 1996, Rule 53 and Mineral (Prevention of Illegal Mining, Transportation and Storage) Rules, M.P. 2006, Rule 18 – Compounding of Offence & Prosecution* – Held – If violator is permitted to compound the offence on payment of penalty u/S 23-A(1) of the Act then as per Section 23-A(2), there shall be no further proceedings against him for the offence so compounded – Offence under the Act has been compounded by appellants with permission of competent authority, thus the *suo motu* proceedings drawn by Magistrate under the Act quashed – Prosecution under Penal Code will continue – State appeal dismissed – Appeals by violators partly allowed. (Para 13(v) & 14)**

क. खान और खनिज (विकास और विनियमन) अधिनियम (1957 का 67), धाराएँ 4/21, 23–A(1) व 23–A(2), गौण खनिज नियम, म.प्र., 1996, नियम 53 एवं खनिज (अवैध खनन, परिवहन तथा भंडारण का निवारण) नियम, म.प्र., 2006, नियम 18 – अपराध का शमन व अभियोजन – अभिनिर्धारित – यदि उल्लंघनकर्ता को अधिनियम की धारा 23–A(1) के अंतर्गत शास्ति का भुगतान करने पर अपराध का शमन करने की अनुमति दी जाती है तब धारा 23–A(2) के अनुसार, शमन किये गये ऐसे अपराध के लिए उसके विरूद्ध आगे कोई कार्यवाहियां नहीं होगी – अधिनियम के अंतर्गत अपराध का अपीलार्थीगण द्वारा सक्षम प्राधिकारी की अनुमति से शमन किया गया, अतः अधिनियम के अंतर्गत मजिस्ट्रेट द्वारा स्वप्रेरणा से की गई कार्यवाहियां अभिखंडित – दण्ड संहिता के अंतर्गत अभियोजन जारी रहेगा – राज्य की अपील खारिज – उल्लंघनकर्ताओं की अपीलें अंशतः मंजूर।

***B. Mines and Minerals (Development and Regulation) Act (67 of 1957), Sections 4, 22 & 23-A(2) and Penal Code (45 of 1860), Section 379 & 414 – Prohibition of Prosecution – Applicability* – Held – This Court has already concluded that prohibition u/S 22 of the Act against prosecution of a person except on written complaint by authorized officer, would be attracted only when such person is prosecuted u/S 4 of the Act – Thus, there is no complete and absolute bar in prosecuting persons under Penal Code where offences are penal and cognizable – Offence under the Act of 1957 and Rules made**

thereunder and the offences under IPC are different and distinct – Bar u/S 23-A(2) of the Act shall not affect proceedings under the Penal Code.

(Paras 7.3, 7.4, 11 & 13(v))

ख. खान और खनिज (विकास और विनियमन) अधिनियम (1957 का 67), धाराएँ 4, 22 व 23–A(2) एवं दण्ड संहिता (1860 का 45), धारा 379 व 414 – अभियोजन का प्रतिषेध – प्रयोज्यता – अभिनिर्धारित – इस न्यायालय ने पहले ही निष्कर्षित किया है कि प्राधिकृत अधिकारी के द्वारा लिखित परिवाद के सिवाय किसी व्यक्ति के अभियोजन के विरूद्ध अधिनियम की धारा 22 के अंतर्गत प्रतिषेध, केवल तब आकर्षित होगा जब ऐसे व्यक्ति को अधिनियम की धारा 4 के अंतर्गत अभियोजित किया जाता है – अतः दण्ड संहिता के अंतर्गत व्यक्तियों को अभियोजित करने में कोई पूर्ण और आत्यांतिक वर्जन नहीं है, जहां अपराध दण्डनीय तथा संज्ञेय हैं – 1957 के अधिनियम के अंतर्गत अपराध तथा उसके अंतर्गत बनाये गये नियम एवं भारतीय दण्ड संहिता के अंतर्गत अपराध भिन्न और सुस्पष्ट हैं – अधिनियम की धारा 23–A(2) के अंतर्गत वर्जन दण्ड संहिता के अंतर्गत कार्यवाहियों को प्रभावित नहीं करेगा।

***C. Criminal Procedure Code, 1973 (2 of 1974), Section 156(3) and Mines and Minerals (Development and Regulation) Act (67 of 1957), Section 22 – Suo Motu Power of Magistrate – Cognizance of Offence* – Held – U/S 156(3) Cr.P.C., Magistrate can direct/order the police to lodge FIR even for offences under the Act of 1957 and Rules made thereunder and at this stage, bar u/S 22 of Act of 1957 shall not be attracted – It will only be attracted when Magistrate takes cognizance of the offence under the Act and Rules made thereunder.**

(Paras 8, 13(i) & (ii))

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 156(3) एवं खान और खनिज (विकास और विनियमन) अधिनियम (1957 का 67), धारा 22 – मजिस्ट्रेट की स्वप्रेरणा शक्ति – अपराध का संज्ञान – अभिनिर्धारित – दण्ड प्रक्रिया संहिता की धारा 156(3) के अंतर्गत, मजिस्ट्रेट पुलिस को 1957 के अधिनियम तथा उसके अंतर्गत बनाये गये नियमों के अंतर्गत अपराधों के लिए भी प्रथम सूचना प्रतिवेदन पंजीबद्ध करने हेतु निदेशित/आदेशित कर सकता है तथा इस प्रक्रम पर, 1957 के अधिनियम की धारा 22 के अंतर्गत वर्जन आकर्षित नहीं होगा – वह केवल तब आकर्षित होगा जब मजिस्ट्रेट अधिनियम तथा उसके अधीन बनाये गये नियमों के अंतर्गत अपराध का संज्ञान लेता है।

***D. Criminal Procedure Code, 1973 (2 of 1974), Section 156(3) and Mines and Minerals (Development and Regulation) Act (67 of 1957), Section 4/21 & 22 – Cognizance of Offence – Written Complaint by Authorised Officer* – Held – For offence under IPC, Magistrate can take cognizance without awaiting for any written complaint by authorized officer – In respect of offence under the Act of 1957 and Rules made thereunder, when Magistrate directs the police u/S 156(3) Cr.P.C. to investigate the matter and submit a report, then such report can be sent to concerned Magistrate as well as**

authorized officer and thereafter authorized officer may file a complaint before Magistrate and then it will be open for Magistrate to take cognizance.
(Paras 10, 10.3, 13(iii) & 13(iv))

घ. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 156(3) एवं खान और खनिज (विकास और विनियमन) अधिनियम (1957 का 67), धारा 4/21 व 22 – अपराध का संज्ञान – प्राधिकृत अधिकारी द्वारा लिखित परिवाद – अभिनिर्धारित – भा.दं.सं. के अंतर्गत अपराध हेतु, मजिस्ट्रेट प्राधिकृत अधिकारी द्वारा किसी भी लिखित परिवाद की प्रतीक्षा किये बिना संज्ञान ले सकता है – 1957 के अधिनियम तथा उसके अधीन बनाये गये नियमों के अंतर्गत अपराध के संबंध में, जब मजिस्ट्रेट दं.प्र.सं. की धारा 156(3) के अंतर्गत मामले का अन्वेषण करने तथा प्रतिवेदन प्रस्तुत करने हेतु पुलिस को निदेशित करता है, तब उक्त प्रतिवेदन को संबंधित मजिस्ट्रेट के साथ–साथ प्राधिकृत अधिकारी को भेजा जा सकता है एवं तत्पश्चात् प्राधिकृत अधिकारी मजिस्ट्रेट के समक्ष एक परिवाद प्रस्तुत कर सकता है और तब मजिस्ट्रेट संज्ञान लेने हेतु स्वतंत्र होगा।

Cases referred:

(2014) 9 SCC 772, Cr.A. No. 1920/2019 decided on 18.12.2019, (1990) (Supp) SCC 121, (1984) 2 SCC 500, (1999) 8 SCC 737, (2008) 2 SCC 492, (2008) 17 SCC 157, (2012) 3 SCC 64, (2013) 10 SCC 705.

J U D G M E N T

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

2. Feeling aggrieved and dissatisfied with the impugned common judgment and order dated 11.05.2020 passed by the High Court of Madhya Pradesh, Bench at Indore in M.Cr.C No. 49338/2019 and M.Cr.C. No. 49972/2019, the original petitioner as well as the State of Madhya Pradesh have preferred the present appeals.

By the impugned common judgment and order, the High Court has dismissed the aforesaid applications filed under Section 482 Cr.P.C. to quash the respective FIRs for the offences under Sections 379 and 414, IPC, Sections 4/21 of the Mines & Minerals (Development & Regulation) Act, 1957 (hereinafter referred to as the 'MMDR Act') and under Rule 18 of the M.P. Minerals (Prevention of illegal Mining, Transportation and Storage) Rules, 2006 (hereinafter referred to as the '2006 Rules').

3. The facts in nutshell are as under:

On a surprise inspection, the respective Mining Inspectors checked the tractor/trolleys of the private appellants along with the minor mineral (sand/storage/yellow soil etc.) loaded in them. They handed over the tractor/trolleys to the concerned police stations to keep them in safe custody.

Finding the private appellants indulged in illegal mining/transportation of minor mineral, the mining Inspectors prepared their respective cases under Rule 53 of the Madhya Pradesh Minor Mineral Rules, 1996 (hereinafter referred to as the '1996 Rules') and submitted them before the Mining Officers with a proposal of compounding the same for the amount calculated according to the concerned 1996 Rules. The concerned Mining Officers submitted those cases before the Collector, who approved the proposal. The violators accepted the decision and deposited the amounts determined by the Collector for compounding the cases. Their tractor/trolleys along with the minerals, which were illegally excavated/transported, were released.

3.1 That after some time, a news was published in a daily newspaper - Bhaskar on 8.9.2019 with respect to illegal excavation/transportation of mineral sand from Chambal, Shivna and Retam and other Tributary rivers flow from District Mandsuar and in surrounding places. It was revealed that due to illegal transportation of the minerals and without payment of royalty, revenue loss is occurring. It was reported that illegal mining, storage and transportation of mineral sand was being carried out at large scale. Similar kind of information was also subsequently published on 3.10.2019 in the daily newspaper -Bhaskar in Mandsuar edition. It was also reported that despite the offences under Sections 379 and 414, IPC and the offences under the MMDR Act and the 2006 Rules were found attracted, necessary legal action has not been taken and the violators were permitted to go on compounding the offence under Rule 53 of the 1996 Rules. The learned Judicial Magistrate, First Class, Mandsuar took note of the aforesaid information and having taken note of the decision of this Court in the case of *State (NCT of Delhi) v. Sanjay,* (2014) 9 SCC 772 taking the view that offences under the IPC and offences under the MMDR Act are distinct and different and it is permissible to lodge/initiate the proceedings for the offences under the IPC as well as under the MMDR Act, the learned Magistrate in exercise of powers conferred under Section 156(3), Cr.P.C. (suo motu) directed to register criminal case under Section 156(3) Cr.P.C. for initiation of investigation and for submitting of report after due investigation is conducted. The learned Magistrate also directed the concerned In-charge/SHOs of the concerned police stations to register the first information report and a copy of the first information report be sent to the learned Magistrate as per the provisions of Section 157, Cr.P.C.

3.2 That pursuant to the order passed by the learned Magistrate, the In-charge/SHOs of the concerned police stations lodged separate FIRs for the aforesaid offences for illegal mining/transportation of sand, particulars of which are as under:

Sr.No	MCRC NO.	FIR NO/DATE	POLICE STATION	Date of Incident
1	49338/2019	234/16.11.2019	Nai Abadi	27.07.2019
2	49340/2019	554/16.11.2019	Y.D. Nagar	16.11.2019
3	49847/2019	564/17.11.2019	Y.D. Nagar	20.04.2019
4	49856/2019	280/16.11.2019	Afzalpur	30.08.2019
5	49859/2019	563/17.11.2019	Y.D. Nagar	20.04.2019
6	49861/2019	588/18.11.2019	Y.D. Nagar	24.08.2019
7	49963/2019	281/16.11.2019	Afzalpur	30.08.2019
8	49972/2019	238/18.11.2019	Nai Abadi	28.08.2019
9	50602/2019	137/17.11.2019	Daloda	25.05.2019
10	50610/2019	136/16.11.2019	Daloda	25.05.2019
11	50614/2019	139/17.11.2019	Daloda	10.06.2019
12	50627/2019	591/18.11.2019	Y.D. Nagar	13.06.2019
13	50636/2019	551/16.11.2019	Y.D. Nagar	02.04.2019
14	05648/2019	552/16.11.2019	Y.D. Nagar	02.04.2019

3.3 That thereafter the private appellants and others approached the High Court to quash the aforesaid FIRs registered against them for illegal mining/ transportation of sand by submitting the applications under Section 482, Cr.P.C. It was mainly contended on behalf of the private appellants and other violators that in view of Bar under Section 22 of the MMDR Act, the order passed by the learned Magistrate directing to register the FIRs is unsustainable and deserves to the quashed and set aside. It was also contended on behalf of the private appellants and other violators that once there was compounding of offence in exercise of powers under Rule 53 of the 1996 Rules and the violators paid the amount determined by permitting them to compound the offence, thereafter the Magistrate was not justified in directing to initiate fresh proceedings which would be hit by the principle of "double jeopardy". That by the impugned common judgment and order, the High Court has dismissed all the aforesaid applications relying upon the decision of this Court in the case of *Sanjay* (supra).

4. Feeling aggrieved and dissatisfied with the common impugned judgment and order passed by the High Court in refusing to quash the FIRs filed against the private appellants and other violators, the original petitioners - violators have

preferred the present appeals. Though, before the High Court, the learned Public Prosecutor appearing on behalf of the State of Madhya Pradesh supported the order passed by the learned Magistrate directing to register/lodge FIRs, the State has preferred a separate special leave petition challenging the impugned judgment and order passed by the High Court confirming the order passed by the learned Magistrate. It is very surprising that despite supporting the order passed by the learned Magistrate before the High Court, the State of Madhya Pradesh has preferred the special leave petition, which shall be dealt with hereinbelow.

5. Shri Devadatt Kamat, learned Senior Advocate appearing on behalf of the private appellants has made following submissions:

i) initiation of criminal proceedings and filing of respective FIRs against the private appellants which have been filed/lodged pursuant to the order passed by the learned Magistrate in exercise of powers under Section 156(3), Cr.P.C. are hit by Section 22 and 23A of the MMDR Act, as well as, Rule 53 of the 1996 Rules;

ii) on a plain reading of Section 22, cognizance of the offence can be taken by the Magistrate only if there is a written complaint in that regard by the Mining Officer/authorised officer. In the present case, admittedly, there is no written complaint made by the Mining Officer/authorised officer;

iii) MMDR Act does not contemplate the taking of suo motu cognizance by the Magistrate. The Magistrate does not have jurisdiction under the MMDR Act to direct the Mining Officer/police officer in-charge to register FIR under the penal provisions of the MMDR Act. Heavy reliance is placed on the decision of this Court in the case of *Sanjay* (Supra), as well as, in the case of *Kanwar Pal Singh v. State of U.P.,* Criminal Appeal No. 1920 of 2019, decided on December 18, 2019;

iv) Section 23A of the MMDR Act contemplates the compounding of offence under the MMDR Act. Therefore, the Rules made under the MMDR Act contain provisions for compounding of offence. Sub-section 2 of Section 23A places a bar on proceedings or further proceedings, when the offences have been compounded under sub-section (1). Therefore, once the proceedings have been compounded under the Act or Rules made thereunder, no further proceedings can lie. In the present case, the offences under the MMDR Act as against the private appellants were permitted to be compounded by the competent authority.

5.1 Making the above submissions and relying upon the aforesaid decisions of this Court, it is prayed to allow the present appals and quash the criminal proceedings initiated against the private appellants for the offences under Sections 379 and 414, IPC and Sections 4/21 of the MMDR Act.

6. Learned counsel appearing on behalf of the State of Madhya Pradesh has supported the private appellants - violators and has submitted that the order

passed by the learned Magistrate directing to lodge/register FIRs for the offences under Sections 379 and 414, IPC and Sections 4/21 of the MMDR Act is unsustainable, though and as observed hereinabove, the learned Public Prosecutor appearing on behalf of the State of Madhya Pradesh supported the order passed by the learned Magistrate before the High Court.

One of the grounds stated in the memo of appeal is that the order passed by the learned Magistrate, confirmed by the High Court, impinges/affects the powers of the authorised person to compound the offence under Rule 18 of the 2006 Rules.

7. Before submissions made on behalf of the respective parties are considered, the decision of this Court in the case of *Sanjay* (supra) dealing with the provisions of the MMDR Act in which this Court considered in detail the policy and object of the MMDR Act and the Rules made thereunder, is required to be referred to.

7.1 The question which arose for consideration before this Court was, whether the provisions contained in Sections 21, 22 and other Sections of the MMDR Act operate as bar against prosecution of a person who has been charged with allegation which constitutes offences under Sections 379/414 and other provisions of the Penal Code (IPC). The question which arose was, whether the provisions of the MMDR Act explicitly or impliedly exclude the provisions of the Penal Code (IPC) when the act of an accused is an offence both under the Penal Code and under the provisions of the MMDR Act. This Court considered in detail the policy, object and purpose of the MMDR Act in paragraphs 32 to 39, which read as under:

> **"32**. The policy and object of the Mines and Minerals Act and Rules have a long history and are the result of an increasing awareness of the compelling need to restore the serious ecological imbalance and to stop the damages being caused to the nature. The Court cannot lose sight of the fact that adverse and destructive environmental impact of sand mining has been discussed in the UNEP Global Environmental Alert Service Report. As per the contents of the Report, lack of proper scientific methodology for river sand mining has led to indiscriminate sand mining, while weak governance and corruption have led to widespread illegal mining. While referring to the proposition in India, it was stated that sand trading is a lucrative business, and there is evidence of illegal trading such as the case of the influential mafias in our country.
>
> **33.** The mining of aggregates in rivers has led to severe damage to rivers, including pollution and changes in levels of PH. Removing sediment from rivers causes the river to cut its channel through the bed of the valley floor, or channel incision, both upstream and downstream of the extraction site. This leads to coarsening of bed material and lateral

channel instability. It can change the riverbed itself. The removal of more than 12 million tonnes of sand a year from Vembanad Lake catchment in India has led to the lowering of the riverbed by 7 to 15 cm a year. Incision can also cause the alluvial aquifer to drain to a lower level, resulting in a loss of aquifer storage. It can also increase flood frequency and intensity by reducing flood regulation capacity. However, lowering the water table is most threatening to water supply exacerbating drought occurrence and severity as tributaries of major rivers dry up when sand mining reaches certain thresholds. Illegal sand mining also causes erosion. Damming and mining have reduced sediment delivery from rivers to many coastal areas, leading to accelerated beach erosion.

34. The Report also dealt with the astonishing impact of sand mining on the economy. It states that tourism may be affected through beach erosion. Fishing, both traditional and commercial, can be affected through destruction of benthic fauna. Agriculture could be affected through loss of agricultural land from river erosion and the lowering of the water table. The insurance sector is affected through exacerbation of the impact of extreme events such as floods, droughts and storm surges through decreased protection of beach fronts. The erosion of coastal areas and beaches affects houses and infrastructure. A decrease in bed load or channel shortening can cause downstream erosion including bank erosion and the undercutting or undermining of engineering structures such as bridges, side protection walls and structures for water supply.

35. Sand is often removed from beaches to build hotels, roads and other tourism-related infrastructure. In some locations, continued construction is likely to lead to an unsustainable situation and destruction of the main natural attraction for visitors—beaches themselves. Mining from, within or near a riverbed has a direct impact on the stream's physical characteristics, such as channel geometry, bed elevation, substratum composition and stability, instream roughness of the bed, flow velocity, discharge capacity, sediment transportation capacity, turbidity, temperature, etc. Alteration or modification of the above attributes may cause hazardous impact on ecological equilibrium of riverine regime. This may also cause adverse impact on instream biota and riparian habitats. This disturbance may also cause changes in channel configuration and flow paths.

36. In *M. Palanisamy* v. *State of T.N*(2012) 4 CTC 1, the amended provisions of the Tamil Nadu Mines and Minerals Concession Rules, 1959 was challenged on the ground that the said Rules for the purpose of preventing and restricting illegal mining, transportation and storage of minerals are ultra vires constitutional provisions and the provisions of the Mines and Minerals (Development and Regulation) Act, 1957.

Upholding the vires of the Rules, the Division Bench (one of us, Eqbal, J. as he then was) of the Madras High Court, elaborately discussed the object of restriction put in the illegal mining, transportation and storage of minerals including sand and after considering various reports observed thus: (CTC pp. 24-25, paras 21 & 23-24)

> *"21.* In order to appreciate the issue involved in these writ petitions, we may have to look at the larger picture — the impact of indiscriminate, uninterrupted sand quarrying on the already brittle ecological set-up of ours. According to expert reports, for thousands of years, sand and gravel have been used in the construction of roads and buildings. Today, demand for sand and gravel continues to increase. Mining operators, instead of working in conjunction with cognizant resource agencies to ensure that sand mining is conducted in a responsible manner, are engaged in full-time profiteering. Excessive in-stream sand and gravel mining from riverbeds and like resources causes the degradation of rivers. In-stream mining lowers the stream bottom, which leads to bank erosion. Depletion of sand in the stream-bed and along coastal areas causes the deepening of rivers and estuaries and enlargement of river mouths and coastal inlets. It also leads to saline water intrusion from the nearby sea. The effect of mining is compounded by the effect of sea level rise. Any volume of sand exported from stream-beds and coastal areas is a loss to the system. Excessive in-stream sand mining is a threat to bridges, river banks and nearby structures. Sand mining also affects the adjoining groundwater system and the uses that local people make of the river. Further, according to researches, in-stream sand mining results in the destruction of aquatic and riparian habitat through wholesale changes in the channel morphology. The ill effects include bed degradation, bed coarsening, lowered water tables near the stream-bed and channel instability. These physical impacts cause degradation of riparian and aquatic biota and may lead to the undermining of bridges and other structures. Continued extraction of sand from riverbeds may also cause the entire stream-bed to degrade to the depth of excavation.
>
> * * *
>
> *23.* The most important effects of in-stream sand mining on aquatic habitats are bed degradation and sedimentation, which can have substantial negative effects on aquatic life. The stability of sand-bed and gravel-bed streams depends on a delicate balance between stream flow, the sediments supplied from the watershed and the channel form. Mining-induced

changes in sediment supply and channel form disrupt the channel and the habitat development processes. Furthermore, movement of unstable substrates results in downstream sedimentation of habitats. The affected distance depends on the intensity of mining, particle sizes, stream flows, and channel morphology.

24. Apart from threatening bridges, sand mining transforms the riverbeds into large and deep pits; as a result, the groundwater table drops leaving the drinking water wells on the embankments of these rivers dry. Bed degradation from in-stream mining lowers the elevation of stream flow and the floodplain water table, which in turn, can eliminate water table-dependent woody vegetation in riparian areas and decrease wetted periods in riparian wetlands. So far as locations close to the sea are concerned, saline water may intrude into the fresh waterbody."

37. In *Centre for Public Interest Litigation* v. *Union of India (2012) 3 SCC 1*, this Court, while observing that the natural resources are the public property and national assets, held as under: (SCC p. 53, para 75)

"*75.* The State is empowered to distribute natural resources. However, as they constitute public property/ national asset, while distributing natural resources the State is bound to act in consonance with the principles of equality and public trust and ensure that no action is taken which may be detrimental to public interest. Like any other State action, constitutionalism must be reflected at every stage of the distribution of natural resources. In Article 39(b) of the Constitution it has been provided that the ownership and control of the material resources of the community should be so distributed so as to best subserve the common good, but no comprehensive legislation has been enacted to generally define natural resources and a framework for their protection. Of course, environment laws enacted by Parliament and State Legislatures deal with specific natural resources i.e. forest, air, water, coastal zones, etc."

38. *In M.C. Mehta* v. *Kamal Nath (1997) 1 SCC 388,* this Court while considering the doctrine of public trust which extends to natural resources observed as under: (SCC pp. 407-08 & 413, paras 24-25 & 34)

"*24*. The ancient Roman Empire developed a legal theory known as the 'Doctrine of the Public Trust'. It was founded on the ideas that certain common properties such as rivers, seashore, forests and the air were held by Government in trusteeship for the free and unimpeded use of the general public. Our contemporary concern about 'the environment' bear a very

close conceptual relationship to this legal doctrine. Under the Roman law these resources were either owned by no one *(res nullius)* or by everyone in common (res *communious).* Under the English common law, however, the Sovereign could own these resources but the ownership was limited in nature, the Crown could not grant these properties to private owners if the effect was to interfere with the public interests in navigation or fishing. Resources that were suitable for these uses were deemed to be held in trust by the Crown for the benefit of the public. Joseph L. Sax, Professor of Law, University of Michigan—proponent of the Modern Public Trust Doctrine—in an erudite article '*Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention',* Michigan Law Review, Vol. 68, Part 1, p. 473, has given the historical background of the Public Trust Doctrine as under:

'The source of modern public trust law is found in a concept that received much attention in Roman and English law—the nature of property rights in rivers, the sea, and the seashore. That history has been given considerable attention in the legal literature and need not be repeated in detail here. But two points should be emphasised. First, certain interests, such as navigation and fishing, were sought to be preserved for the benefit of the public; accordingly, property used for those purposes was distinguished from general public property which the sovereign could routinely grant to private owners. Second, while it was understood that in certain common properties —such as the seashore, highways and running water —"perpetual use was dedicated to the public", it has never been clear whether the public had an enforceable right to prevent infringement of those interests. Although the State apparently did protect public uses, no evidence is available that public rights could be legally asserted against a recalcitrant government.'

25. The Public Trust Doctrine primarily rests on the principle that certain resources like air, sea, waters and the forests have such a great importance to the people as a whole that it would be wholly unjustified to make them a subject of private ownership. The said resources being a gift of nature, they should be made freely available to everyone irrespective of the status in life. The doctrine enjoins upon the Government to protect the resources for the enjoyment of the general public rather than to permit their use for private ownership or commercial purposes. According to Professor Sax the

Public Trust Doctrine imposes the following restrictions on governmental authority:

> Three types of restrictions on governmental authority are often thought to be imposed by the public trust: first, the property subject to the trust must not only be used for a public purpose, but it must be held available for use by the general public; second, the property may not be sold, even for a fair cash equivalent; and third the property must be maintained for particular types of uses.'
>
> * * *
>
> *34.* Our legal system—based on English common law—includes the Public Trust Doctrine as part of its jurisprudence. The State is the trustee of all natural resources which are by nature meant for public use and enjoyment. Public at large is the beneficiary of the seashore, running waters, air, forests and ecologically fragile lands. The State as a trustee is under a legal duty to protect the natural resources. These resources meant for public use cannot be converted into private ownership."

39. In *Intellectuals Forum* v. *State of A.P (2006) 3 SCC 549*, this Court while balancing the conservation of natural resources *vis-a-vis* urban development observed as under: (SCC p. 572, para 67)

> *"67.* The responsibility of the State to protect the environment is now a well-accepted notion in all countries. It is this notion that, in international law, gave rise to the principle of 'State responsibility' for pollution emanating within one's own territories *(Corfu Channel case* [14]*)*. This responsibility is clearly enunciated in the *United Nations Conference on the Human Environment,* Stockholm 1972 (Stockholm Convention), to which India was a party. The relevant clause of this declaration in the present context is para 2, which states:
>
> 'The natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate.'

Thus, there is no doubt about the fact that there is a responsibility bestowed upon the Government to protect and

preserve the tanks, which are an important part of the environment of the area."

7.2 This Court further observed in paragraphs 60 & 69 as under:

"**60**. There cannot be any two opinions that natural resources are the assets of the nation and its citizens. It is the obligation of all concerned, including the Central and the State Governments, to conserve and not waste such valuable resources. Article 48-A of the Constitution requires that the State shall endeavour to protect and improve the environment and safeguard the forests and wildlife of the country. Similarly, Article 51-A enjoins a duty upon every citizen to protect and improve the natural environment including forests, lakes, rivers and wildlife, and to have compassion for all the living creatures. In view of the constitutional provisions, the doctrine of public trust has become the law of the land. The said doctrine rests on the principle that certain resources like air, sea, water and forests are of such great importance to the people as a whole that it would be highly unjustifiable to make them a subject of private ownership.

69. Considering the principles of interpretation and the wordings used in Section 22, in our considered opinion, the provision is not a complete and absolute bar for taking action by the police for illegal and dishonestly committing theft of minerals including sand from the riverbed. The Court shall take judicial notice of the fact that over the years rivers in India have been affected by the alarming rate of unrestricted sand mining which is damaging the ecosystem of the rivers and safety of bridges. It also weakens riverbeds, fish breeding and destroys the natural habitat of many organisms. If these illegal activities are not stopped by the State and the police authorities of the State, it will cause serious repercussions as mentioned hereinabove. It will not only change the river hydrology but also will deplete the groundwater levels."

7.3 That thereafter, after considering the relevant provisions of the MMDR Act, this Court opined that there is no complete and absolute bar in prosecuting persons under the Penal Code where the offences committed by persons are penal and cognizable offence. Ultimately, this Court concluded in paragraphs 72 and 73 as under:

"**72.** From a close reading of the provisions of the MMDR Act and the offence defined under Section 378 IPC, it is manifest that the ingredients constituting the offence are different. The contravention of terms and conditions of mining lease or doing mining activity in violation of Section 4 of the Act is an offence punishable under Section 21 of the MMDR Act, whereas dishonestly removing sand, gravel and other minerals from the river, which is the property of the State, out of the State's possession without the consent, constitute an offence of theft.

> Hence, merely because initiation of proceeding for commission of an offence under the MMDR Act on the basis of complaint cannot and shall not debar the police from taking action against persons for committing theft of sand and minerals in the manner mentioned above by exercising power under the Code of Criminal Procedure and submit a report before the Magistrate for taking cognizance against such persons. In other words, in a case where there is a theft of sand and gravel from the government land, the police can register a case, investigate the same and submit a final report under Section 173 CrPC before a Magistrate having jurisdiction for the purpose of taking cognizance as provided in Section 190(1)(d) of the Code of Criminal Procedure.
>
> **73.** After giving our thoughtful consideration in the matter, in the light of the relevant provisions of the Act vis-a-vis the Code of Criminal Procedure and the Penal Code, we are of the definite opinion that the ingredients constituting the offence under the MMDR Act and the ingredients of dishonestly removing sand and gravel from the riverbeds without consent, which is the property of the State, is a distinct offence under IPC. Hence, for the commission of offence under Section 378 IPC, on receipt of the police report, the Magistrate having jurisdiction can take cognizance of the said offence without awaiting the receipt of complaint that may be filed by the authorised officer for taking cognizance in respect of violation of various provisions of the MMDR Act. Consequently, the contrary view taken by the different High Courts cannot be sustained in law and, therefore, overruled. Consequently, these criminal appeals are disposed of with a direction to the Magistrates concerned to proceed accordingly."

7.4 Thus, as held by this Court, the prohibition contained in Section 22 of the MMDR Act against prosecution of a person except on a written complaint made by the authorised officer in this behalf would be attracted only when such person is sought to be prosecuted for contraventions of Section 4 of the MMDR Act and not for any act or omission which constitutes an offence under the Penal Code.

8. However, it is required to be noted that in the case of *Sanjay* (supra), this Court had no occasion and/or had not considered when and at what stage the bar under Section 22 of the MMDR Act would be attracted. The further question which is required to be considered is, when and at what stage the Magistrate can be said to have taken cognizance attracting the bar under Section 22 of the MMDR Act?

8.1 While considering the aforesaid issue, Section 22 of the MMDR Act is required to be referred to, which is as under:

> **"22. *Cognizance of offences.***—No court shall take cognizance of any offence punishable under this Act or any Rules made thereunder except

upon complaint in writing made by a person authorised in this behalf by the Central Government or the State Government."

Reading the aforesaid provision would show that cognizance of any offence punishable under the MMDR Act or the Rules made thereunder shall be taken only upon a written complaint made by a person authorised in this behalf by the Central Government or the State Government. Therefore, on a fair reading of Section 22 of the MMDR Act, the bar would be attracted when the Magistrate takes cognizance.

9. Let us now consider the question in the light of judicial pronouncements on the point.

9.1. In the case of *Krishna Pillai v. T.A. Rajendran,* 1990 (Supp) SCC 121, after considering a five Judge Bench judgment of this Court in the case of *A.R. Antulay v. Ramdas Sriniwas Nayak,* (1984) 2 SCC 500, it is observed in paragraph 4 as under:

> *"***4**. Taking cognizance has assumed a special meaning in our criminal jurisprudence. We may refer to the view taken by a five Judge bench of this Court in *A.R. Antulay* v. *Ramdas Sriniwas Nayak (supra)* at p. 530 (para 31) of the reports this Court indicated:
>
> > "When a private complaint is filed, the court has to examine the complainant on oath save in the cases set out in the proviso to Section 200 CrPC After examining the complainant on oath and examining the witnesses present, if any, meaning thereby that the witnesses not present need not be examined, it would be open to the court to judicially determine whether a case is made out for issuing process. When it is said that court issued process, it means the court has taken cognizance of the offence and has decided to initiate the proceedings and a visible manifestation of taking cognizance process is issued which means that the accused is called upon to appear before the court."
>
> The extract from the Constitution Bench judgment clearly indicates that filing of a complaint in court is not taking cognizance and what exactly constitutes taking cognizance is different from filing of a complaint....."

9.2 In the case of *Manohar M. Galani v. Ashok N. Advani* (1999) 8 SCC 737*,* when the bar under Section 195 Cr. P.C. was pressed into service and the High Court quashed the complaint and enquiry on the basis of the FIR registered by the complainant, while setting aside the order passed by the High Court, this Court accepted the submission on behalf of the State that the bar under Section 195 Cr.P.C. can be gone into at the stage when the court takes cognizance of the offence and investigation on the basis of the information received could not have been quashed and an investigating agency cannot be throttled at this stage from

proceeding with the investigation particularly when the charges are serious and grave.

9.3 In the case of *S.K. Sinha, Chief Enforcement Officer v. Videocon International Limited,* (2008) 2 SCC 492*,* in paragraphs 19 to 34, it is observed and held as under:

> **"19.** The expression "cognizance" has not been defined in the Code. But the word (cognizance) is of indefinite import. It has no esoteric or mystic significance in criminal law. It merely means "become aware of " and when used with reference to a court or a Judge, it connotes "to take notice of judicially". It indicates the point when a court or a Magistrate takes judicial notice of an offence with a view to initiating proceedings in respect of such offence said to have been committed by someone.
>
> **20.** "Taking cognizance" does not involve any formal action of any kind. It occurs as soon as a Magistrate applies his mind to the suspected commission of an offence. Cognizance is taken prior to commencement of criminal proceedings. Taking of cognizance is thus a sine qua non or condition precedent for holding a valid trial. Cognizance is taken of an offence and not of an offender. Whether or not a Magistrate has taken cognizance of an offence depends on the facts and circumstances of each case and no rule of universal application can be laid down as to when a Magistrate can be said to have taken cognizance.
>
> **21.** Chapter XIV (Sections 190-199) of the Code deals with "Conditions requisite for initiation of proceedings". Section 190 empowers a Magistrate to take cognizance of an offence in certain circumstances. Sub-section (1) thereof is material and may be quoted in extenso:
>
> > "190. *Cognizance of offences by Magistrates* —(1) Subject to the provisions of this Chapter, any Magistrate of the First Class, and any Magistrate of the Second Class specially empowered in this behalf under sub-section (2), may take cognizance of any offence—
> >
> > (*a*) upon receiving a complaint of facts which constitute such offence;
> >
> > (*b*) upon a police report of such facts;
> >
> > (*c*) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed."
>
> **22.** Chapter XV (Sections 200-203) relates to "Complaints to Magistrates" and covers cases before actual commencement of proceedings in a court or before a Magistrate. Section 200 of the Code requires a Magistrate taking cognizance of an offence to examine the complainant and his witnesses on oath. Section 202, however, enacts

that a Magistrate is not bound to issue process against the accused as a matter of course. It enables him before the issue of process either to inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit for the purpose of deciding whether there is sufficient ground for proceeding further. The underlying object of the inquiry under Section 202 is to ascertain whether there is *prima facie* case against the accused. It thus allows a Magistrate to form an opinion whether the process should or should not be issued. The scope of inquiry under Section 202 is, no doubt, extremely limited. At that stage, what a Magistrate is called upon to see is whether there is *sufficient ground for proceeding with the matter* and not whether there is *sufficient ground for conviction of the accused.*

23. Then comes Chapter XVI (Commencement of proceedings before Magistrates). This Chapter will apply only after cognizance of an offence has been taken by a Magistrate under Chapter XIV. Section 204, whereunder process can be issued, is another material provision which reads as under:

> "204. *Issue of process.—(1)* If in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceeding, and the case appears to be—
>
> *(a)* a summons case, he shall issue his summons for the attendance of the accused, or
>
> (*b*) a warrant case, he may issue a warrant, or, if he thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before such Magistrate or (if he has no jurisdiction himself) some other Magistrate having jurisdiction.
>
> (2) No summons or warrant shall be issued against the accused under sub-section (1) until a list of the prosecution witnesses has been filed.
>
> (3) In a proceeding instituted upon a complaint made in writing, every summons or warrant issued under sub-section (1) shall be accompanied by a copy of such complaint.
>
> (4) When by any law for the time being in force any process-fees or other fees are payable, no process shall be issued until the fees are paid and, if such fees are not paid within a reasonable time, the Magistrate may dismiss the complaint.
>
> (5) Nothing in this section shall be deemed to affect the provisions of Section 87."

24. From the above scheme of the Code, in our judgment, it is clear that "Initiation of proceedings", dealt with in Chapter XIV, is different from "Commencement of proceedings" covered by Chapter XVI. For

commencement of proceedings, there must be initiation of proceedings. In other words, initiation of proceedings must precede commencement of proceedings. Without initiation of proceedings under Chapter XIV, there cannot be commencement of proceedings before a Magistrate under Chapter XVI. The High Court, in our considered view, was not right in equating initiation of proceedings under Chapter XIV with commencement of proceedings under Chapter XVI.

25. Let us now consider the question in the light of judicial pronouncements on the point.

26. In *Supdt. & Remembrancer of Legal Affairs* v. *Abani Kumar Banerjee, AIR 1950 Cal. 437,* the High Court of Calcutta had an occasion to consider the ambit and scope of the phrase "taking cognizance" under Section 190 of the Code of Criminal Procedure, 1898 which was in pari materia with Section 190 of the present Code of 1973. Referring to various decisions, Das Gupta, J. (as His Lordship then was) stated: (AIR p. 438, para 7)

> "*7.* ... What is 'taking cognizance' has not been defined in the Criminal Procedure Code, and I have no desire now to attempt to define it. It seems to me clear, however, that before it can be said that any Magistrate has taken cognizance of any offence under Section 190(1)*(a)* CrPC, he must not only have applied his mind to the contents of the petition, but he must have done so for the purpose of proceeding in a particular way as indicated in the subsequent provisions of this Chapter, proceeding under Section 200, and thereafter sending it for enquiry and report under Section 202. When the Magistrate applies his mind not for the purpose of proceeding under the subsequent sections of this Chapter, but for taking action of some other kind, e.g., ordering investigation under Section 156(3), or issuing a search warrant for the purpose of the investigation, he cannot be said to have taken cognizance of the offence."

27. *R.R. Chari* v. *State of U.P. AIR 1951 SC 207* was probably the first leading decision of this Court on the point. There, the police, having suspected the appellant-accused to be guilty of offences punishable under Sections 161 and 165 of the Penal Code (IPC) as also under the Prevention of Corruption Act, 1947, applied to the District Magistrate, Kanpur to issue warrant of arrest on 22- 10-1947. Warrant was issued on the next day and the accused was arrested on 27-10-1947.

28. On 25-3-1949, the accused was produced before the Magistrate to answer the charge-sheet submitted by the prosecution. According to the accused, on 22-10-1947, when warrant for his arrest was issued by the Magistrate, the Magistrate was said to have taken cognizance of offence and since no sanction of the Government had been obtained before that

date, initiation of proceedings against him was unlawful. The question before the Court was as to when cognizance of the offence could be said to have been taken by the Magistrate under Section 190 of the Code. Considering the circumstances under which "cognizance of offence" under sub-section (1) of Section 190 of the Code can be taken by a Magistrate and referring to *Abani Kumar Banerjee (supra),* the Court, speaking through Kania, C.J. stated: *(Chari case (supra),* AIR p. 208, para 3)

> "*3*. It is clear from the wording of the section that the initiation of the proceedings against a person commences on the cognizance of the offence by the Magistrate under one of the three contingencies mentioned in the section. The first contingency evidently is in respect of non-cognizable offences as defined in CrPC on the complaint of an aggrieved person. The second is on a police report, which evidently is the case of a cognizable offence when the police have completed their investigation and come to the Magistrate for the issue of a process. The third is when the Magistrate himself takes notice of an offence and issues the process. It is important to remember that in respect of any cognizable offence, the police, at the initial stage when they are investigating the matter, can arrest a person without obtaining an order from the Magistrate. Under Section 167*(b)* CrPC the police have of course to put up the person so arrested before a Magistrate within 24 hours and obtain an order of remand to police custody for the purpose of further investigation, if they so desire. But they have the power to arrest a person for the purpose of investigation without approaching the Magistrate first. Therefore, in cases of cognizable offence before proceedings are initiated and while the matter is under investigation by the police the suspected person is liable to be arrested by the police without an order by the Magistrate."

29. Approving the observations of Das Gupta, J. in *Abani Kumar Banerjee (supra)*, this Court held that it was on 25-3-1949 when the Magistrate issued a notice under Section 190 of the Code against the accused that he took "cognizance" of the offence. Since before that day, sanction had been granted by the Government, the proceedings could not be said to have been initiated without authority of law.

30. Again in *Narayandas Bhagwandas Madhavdas* v. *State of W.B.*AIR 1959 SC 1118, this Court observed that when cognizance is taken of an offence depends upon the facts and circumstances of each case and it is impossible to attempt to define what is meant by taking cognizance. Issuance of a search warrant for the purpose of an investigation or a warrant of arrest of the accused cannot by itself be regarded as an act of taking cognizance of an offence. It is only when a Magistrate applies his mind for proceeding under Section 200 and subsequent sections of

Chapter XV or under Section 204 of Chapter XVI of the Code that it can be positively stated that he had applied his mind and thereby had taken cognizance of an offence (see also *Ajit Kumar Palit* v. *State of W.B. AIR 1963 SC 765* and *Hareram Satpathy* v. *Tikaram Agarwala, (1978) 4 SCC 58).*

31. In *Gopal Das Sindhi* v. *State of Assam,* AIR 1961 SC 986, referring to earlier judgments, this Court said: (AIR p. 989, para 7)

> *"7.* ... We cannot read the provisions of Section 190 to mean that once a complaint is filed, a Magistrate is bound to take cognizance if the facts stated in the complaint disclose the commission of any offence. We are unable to construe the word 'may' in Section 190 to mean 'must'. The reason is obvious. A complaint disclosing cognizable offences may well justify a Magistrate in sending the complaint, under Section 156(3) to the police for investigation. There is no reason why the time of the Magistrate should be wasted when primarily the duty to investigate in cases involving cognizable offences is with the police. On the other hand, there may be occasions when the Magistrate may exercise his discretion and take cognizance of a cognizable offence. If he does so then he would have to proceed in the manner provided by Chapter XVI of the Code."

32. In *Nirmaljit Singh Hoon* v. *State of W.B.,* (1973) 3 SCC 753, the Court stated that it is well settled that before a Magistrate can be said to have taken cognizance of an offence under Section 190(1)*(a)* of the Code, he must have not only applied his mind to the contents of the complaint presented before him, but must have done so for the purpose of proceeding under Section 200 and the provisions following that section. Where, however, he applies his mind only for ordering an investigation under Section 156(3) or issues a warrant for arrest of the accused, he cannot be said to have taken cognizance of the offence.

33. In *Darshan Singh Ram Kishan* v. *State of Maharashtra (1971) 2 SCC 654*, speaking for the Court, Shelat, J. stated that under Section 190 of the Code, a Magistrate may take cognizance of an offence either *(a)* upon receiving a complaint, or *(b)* upon a police report, or *(c)* upon information received from a person other than a police officer or even upon his own information or suspicion that such an offence has been committed. As has often been said, taking cognizance does not involve any formal action or indeed action of any kind. It occurs as soon as a Magistrate applies his mind to the suspected commission of an offence. Cognizance, thus, takes place at a point when a Magistrate first takes judicial notice of an offence.

34. In *Devarapalli Lakshminarayana Reddy v. V. Narayana Reddy (1976) 3 SCC252*, this Court said: (SCC p. 257, paras 13-14)

"*13*. It is well settled that when a Magistrate receives a complaint, he is not bound to take cognizance if the facts alleged in the complaint, disclose the commission of an offence. This is clear from the use of the words 'may take cognizance' which in the context in which they occur cannot be equated with 'must take cognizance'. The word 'may' gives a discretion to the Magistrate in the matter. If on a reading of the complaint he finds that the allegations therein disclose a cognizable offence and the forwarding of the complaint to the police for investigation under Section 156(3) will be conducive to justice and save the valuable time of the Magistrate from being wasted in enquiring into a matter which was primarily the duty of the police to investigate, he will be justified in adopting that course as an alternative to taking cognizance of the offence, himself.

14. This raises the incidental question: What is meant by 'taking cognizance of an offence' by a Magistrate within the contemplation of Section 190? This expression has not been defined in the Code. But from the scheme of the Code, the content and marginal heading of Section 190 and the caption of Chapter XIV under which Sections 190 to 199 occur, it is clear that a case can be said to be instituted in a court only when the court takes cognizance of the offence alleged therein. The ways in which such cognizance can be taken are set out in Clauses *(a), (b)* and *(c)* of Section 190(1). Whether the Magistrate has or has not taken cognizance of the offence will depend on the circumstances of the particular case including the mode in which the case is sought to be instituted, and the nature of the preliminary action, if any, taken by the Magistrate. Broadly speaking, when on receiving a complaint, the Magistrate applies his mind for the purposes of proceeding under Section 200 and the succeeding sections in Chapter XV of the Code of 1973, he is said to have taken cognizance of the offence within the meaning of Section 190(1)*(a)*. If, instead of proceeding under Chapter XV, he has, in the judicial exercise of his discretion, taken action of some other kind, such as issuing a search warrant for the purpose of investigation, or ordering investigation by the police under Section 156(3), he cannot be said to have taken cognizance of any offence."
(see also M.L. Sethi v. R.P. Kapur, AIR 1967 SC 528).

9.4 In the case of *Fakhruddin Ahmad v. State of Uttaranchal,* (2008) 17 SCC 157, in paragraphs 9 to 17, it is observed and held as under:

"**9.** Before examining the rival contentions, we may briefly refer to some of the relevant provisions in the Code. Chapter XIV of the Code, containing Sections 190 to 199 deals with the statutory conditions requisite for initiation of criminal proceedings and as to the powers of cognizance of a Magistrate. Sub-section (1) of Section 190 of the Code

empowers a Magistrate to take cognizance of an offence in the manner laid therein. It provides that a Magistrate may take cognizance of an offence either *(a)* upon receiving a complaint of facts which constitute such offence; or *(b)* upon a police report of such facts; or *(c)* upon information received from any person other than a police officer, or upon his own knowledge that such offence has been committed.

10. Chapter XV containing Sections 200 to 203 deals with "Complaints to Magistrates" and lays down the procedure which is required to be followed by the Magistrate taking cognizance of an offence on complaint. Similarly, Chapter XVI deals with "Commencement of Proceedings before Magistrates". Since admittedly, in the present case, the Magistrate has taken cognizance of the complaint in terms of Section 190 of the Code, we shall confine our discussion only to the said provision. We may, however, note that on receipt of a complaint, the Magistrate has more than one course open to him to determine the procedure and the manner to be adopted for taking cognizance of the offence.

11. One of the courses open to the Magistrate is that instead of exercising his discretion and taking cognizance of a cognizable offence and following the procedure laid down under Section 200 or Section 202 of the Code, he may order an investigation to be made by the police under Section 156(3) of the Code, which the learned Magistrate did in the instant case. When such an order is made, the police is obliged to investigate the case and submit a report under Section 173(2) of the Code. On receiving the police report, if the Magistrate is satisfied that on the facts discovered or unearthed by the police there is sufficient material for him to take cognizance of the offence, he may take cognizance of the offence under Section 190(1)*(b)* of the Code and issue process straightaway to the accused. However, Section 190(1)*(b)* of the Code does not lay down that a Magistrate can take cognizance of an offence only if the investigating officer gives an opinion that the investigation makes out a case against the accused. Undoubtedly, the Magistrate can ignore the conclusion(s) arrived at by the investigating officer.

12. Thus, it is trite that the Magistrate is not bound by the opinion of the investigating officer and he is competent to exercise his discretion in this behalf, irrespective of the view expressed by the police in their report and decide whether an offence has been made out or not. This is because the purpose of the police report under Section 173(2) of the Code, which will contain the facts discovered or unearthed by the police as well as the conclusion drawn by the police therefrom is primarily to enable the Magistrate to satisfy himself whether on the basis of the report and the material referred therein, a case for cognizance is made out or not.

13. The next incidental question is as to what is meant by the expression "taking cognizance of an offence" by a Magistrate within the contemplation of Section 190 of the Code?

14. The expression "cognizance" is not defined in the Code but is a word of indefinite import. As observed by this Court in *Ajit Kumar Palit v. State of W.B.*, *AIR 1963 SC 765* (AIR p. 770, para 19)

> "*19.* ... The word 'cognizance' has no esoteric or mystic significance in criminal law or procedure. It merely means— become aware of and when used with reference to a court or Judge, to take notice of judicially."

Approving the observations of the Calcutta High Court in *Emperor v. Sourindra Mohan Chuckerbutty*, ILR (1910) 37 Cal. 412 (at ILR p. 416), the Court said that

> "taking cognizance does not involve any formal action, or indeed action of any kind, but occurs as soon as a Magistrate, as such, *applies his mind* to the suspected commission of an offence."
>
> (emphasis supplied)

15. Recently, this Court in *Chief Enforcement Officer v. Videocon International Ltd.* [4] speaking through C.K. Thakker, J., while considering the ambit and scope of the phrase "taking cognizance" under Section 190 of the Code, has highlighted some of the observations of the Calcutta High Court in *Supdt. & Remembrancer of Legal Affairs v. Abani Kumar Banerjee, AIR 1950 Cal. 437* which were approved by this Court in *R.R. Chari v. State of U.P.*, *AIR 1951 SC 207*. The observations are: (*Abani Kumar Banerjee case(supra)*, AIR p. 438, para 7)

> *"7.* ... What is 'taking cognizance' has not been defined in the Criminal Procedure Code, and I have no desire now to attempt to define it. It seems to me clear, however, that before it can be said that any Magistrate has taken cognizance of any offence under Section 190(1)*(a)* CrPC, he must not only have applied his mind to the contents of the petition, but he must have done so for the purpose of proceeding in a particular way as indicated in the subsequent provisions of this Chapter, proceeding under Section 200, and thereafter sending it for enquiry and report under Section 202. When the Magistrate applies his mind not for the purpose of proceeding under the subsequent sections of this Chapter, but for taking action of some other kind e.g. ordering investigation under Section 156(3), or issuing a search warrant for the purpose of the investigation, he cannot be said to have taken cognizance of the offence."

16. From the aforenoted judicial pronouncements, it is clear that being an expression of indefinite import, it is neither practicable nor desirable

to precisely define as to what is meant by "taking cognizance". Whether the Magistrate has or has not taken cognizance of the offence will depend upon the circumstances of the particular case, including the mode in which the case is sought to be instituted and the nature of the preliminary action.

17. Nevertheless, it is well settled that before a Magistrate can be said to have taken cognizance of an offence, it is imperative that he must have taken notice of the accusations and *applied his mind* to the allegations made in the complaint or in the police report or the information received from a source other than a police report, as the case may be, and the material filed therewith. It needs little emphasis that it is only when the Magistrate *applies his mind* and is satisfied that the allegations, if proved, would constitute an offence and decides to initiate proceedings against the alleged offender, that it can be positively stated that he has taken cognizance of the offence. Cognizance is in regard to the offence and not the offender."

9.5 In the case of *Subramanian Swamy v. Manmohan Singh,* (2012) 3 SCC 64, it is observed in paragraphs 34 to 37 as under:

"34. The argument of the learned Attorney General that the question of granting sanction for prosecution of a public servant charged with an offence under the 1988 Act arises only at the stage of taking cognizance and not before that is neither supported by the plain language of the section nor the judicial precedents relied upon by him. Though, the term "cognizance" has not been defined either in the 1988 Act or CrPC, the same has acquired a definite meaning and connotation from various judicial precedents. In legal parlance cognizance is "taking judicial notice by the court of law, possessing jurisdiction, on a cause or matter presented before it so as to decide whether there is any basis for initiating proceedings and determination of the cause or matter judicially".

35. In *R.R. Chari v. State of U.P AIR 1951 SC 207*, the three-Judge Bench approved the following observations made by the Calcutta High Court in *Supt. and Remembrancer of Legal Affairs v. Abani Kumar Banerjee AIR 1950 Cal. 437*,: (AIR p. 438, para 7)

"7. ... What is 'taking cognizance' has not been defined in the Criminal Procedure Code, and I have no desire now to attempt to define it. It seems to me clear, however, that before it can be said that any Magistrate has taken cognizance of any offence under Section 190(1)*(a)*, Criminal Procedure Code, he must not only have applied his mind to the contents of the petition, but he must have done so for the purpose of proceeding in a particular way as indicated in the subsequent provisions of this Chapter,— proceeding under Section 200, and thereafter sending it for inquiry and report under Section 202. When the Magistrate applies his mind not for the purpose of proceeding under the

subsequent sections of this Chapter, but for taking action of some other kind e.g. ordering investigation under Section 156(3), or issuing a search warrant for the purpose of the investigation, he cannot be said to have taken cognizance of the offence."

36. In *State of W.B. v. Mohd. Khalid (1995) 1 SCC 684*, the Court referred to Section 190 CrPC and observed: (SCC p. 696, para 43)

"*43*. ... In its broad and literal sense, it means taking notice of an offence. This would include the intention of initiating judicial proceedings against the offender in respect of that offence or taking steps to see whether there is any basis for initiating judicial proceedings or for other purposes. The word 'cognizance' indicates the point when a Magistrate or a Judge first takes judicial notice of an offence. It is entirely a different thing from initiation of proceedings; rather it is the condition precedent to the initiation of proceedings by the Magistrate or the Judge. Cognizance is taken of cases and not of persons."

37. In *State of Karnataka v. Pastor P. Raju* (2006) 6 SCC 728, this Court referred to the provisions of Chapter XIV and Sections 190 and 196(1-A) CrPC and observed: (SCC p. 732, para 8)

"*8*. ... There is no bar against registration of a criminal case or investigation by the police agency or submission of a report by the police on completion of investigation, as contemplated by Section 173 CrPC. If a criminal case is registered, investigation of the offence is done and the police submits a report as a result of such investigation before a Magistrate without the previous sanction of the Central Government or of the State Government or of the District Magistrate, there will be no violation of Section 196(1-A) CrPC and no illegality of any kind would be committed."

9.6 In the case of *Anil Kumar v. M.K. Aiyappa* (2013) 10 SCC 705, it is observed and held in paragraphs 12 to 15 as under:

"12. We will now examine whether the order directing investigation under Section 156(3) CrPC would amount to taking cognizance of the offence, since a contention was raised that the expression "cognizance" appearing in Section 19(1) of the PC Act will have to be construed as post-cognizance stage, not pre-cognizance stage and, therefore, the requirement of sanction does not arise prior to taking cognizance of the offences punishable under the provisions of the PC Act.

13. The expression "cognizance" which appears in Section 197 CrPC came up for consideration before a three-Judge Bench of this Court in *State of U.P. v. Paras Nath Singh (2009) 6 SCC 372*, and this Court expressed the following view: (SCC pp. 375, para 6)

"*6*. ... '*10*. ... And the jurisdiction of a Magistrate to take cognizance of any offence is provided by Section 190 of the Code, either on

receipt of a complaint, or upon a police report or upon information received from any person other than a police officer, or upon his knowledge that such offence has been committed. So far as public servants are concerned, the cognizance of any offence, by any court, is barred by Section 197 of the Code unless sanction is obtained from the appropriate authority, if the offence, alleged to have been committed, was in discharge of the official duty. The section not only specifies the persons to whom the protection is afforded but it also specifies the conditions and circumstances in which it shall be available and the effect in law if the conditions are satisfied. The mandatory character of the protection afforded to a public servant is brought out by the expression, 'no court shall take cognizance of such offence except with the previous sanction'. Use of the words 'no' and 'shall' makes it abundantly clear that the bar on the exercise of power of the court to take cognizance of any offence is absolute and complete. The very cognizance is barred. That is, the complaint cannot be taken notice of. According to *Black's Law Dictionary* the word 'cognizance' means 'jurisdiction' or 'the exercise of jurisdiction' or 'power to try and determine causes'. In common parlance, it means taking notice of. A court, therefore, is precluded from entertaining a complaint or taking notice of it or exercising jurisdiction if it is in respect of a public servant who is accused of an offence alleged to have been committed during discharge of his official duty."

14. In *State of W.B. v. Mohd. Khalid (1995) 1 SCC 684*, this Court has observed as follows:

> *"13.* It is necessary to mention here that taking cognizance of an offence is not the same thing as issuance of process. Cognizance is taken at the initial stage when the Magistrate applies his judicial mind to the facts mentioned in a complaint or to a police report or upon information received from any other person that an offence has been committed. The issuance of process is at a subsequent stage when after considering the material placed before it the court decides to proceed against the offenders against whom a prima facie case is made out.

The meaning of the said expression was also considered by this Court in *Subramanian Swamy case (2012) 3 SCC 64*.

15. The judgments referred to hereinabove clearly indicate that the word "cognizance" has a wider connotation and is not merely confined to the stage of taking cognizance of the offence. When a Special Judge refers a complaint for investigation under Section 156(3) CrPC, obviously, he has not taken cognizance of the offence and, therefore, it is a pre-cognizance stage and cannot be equated with post-cognizance

> stage. When a Special Judge takes cognizance of the offence on a complaint presented under Section 200 CrPC and the next step to be taken is to follow up under Section 202 CrPC. Consequently, a Special Judge referring the case for investigation under Section 156(3) is at pre-cognizance stage."

10. Having heard learned counsel for the parties and having perused the relevant provisions of the law as also the judicial pronouncements, we are of the view that the High Court has not committed any error in not quashing the order passed by the learned Magistrate and not quashing the criminal proceedings for the offences under Sections 379 and 414. It is required to be noted that the learned Magistrate in exercise of the suo motu powers conferred under Section 156(3), Cr.P.C. directed the concerned In-charge/SHO of the police station to lodge/register the crime case/FIR and directed initiation of investigation and directed the concerned In-charge/SHO of the police station to submit a report after due investigation.

Applying the law laid down by this Court in the cases referred to hereinabove, it cannot be said that at this stage the learned Magistrate had taken any cognizance of the alleged offences attracting bar under Section 22 of the MMDR Act. On considering the relevant provisions of the MMDR Act and the Rules made thereunder, it cannot be said that there is a bar against registration of a criminal case or investigation by the police agency or submission of a report by the police on completion of investigation, as contemplated by Section 173, Cr.P.C.

10.1 At this stage, it is required to be noted that as per Section 21 of the MMDR Act, the offences under the MMDR Act are cognizable.

10.2 As specifically observed by this Court in the case of *Anil Kumar* (supra), 'when a Special Judge refers a complaint for investigation under Section 156(3) Cr.P.C., obviously, he has not taken cognizance of the offence and, therefore, it is a pre-cognizance stage and cannot be equated with post-cognizance stage'.

10.3 Even as observed by this Court in the case of *R.R. Chari* (supra), even the order passed by the Magistrate ordering investigation under Section 156(3), or issuing a search warrant for the purpose of the investigation, he cannot be said to have taken cognizance of the offence. As observed by the Constitution Bench of this Court in the case of *A.R. Antulay*(supra), filing of a complaint in court is not taking cognizance and what exactly constitutes taking cognizance is different from filing of a complaint. Therefore, when an order is passed by the Magistrate for investigation to be made by the police under Section 156(3) of the Code, which the learned Magistrate did in the instant case, when such an order is made the police is obliged to investigate the case and submit a report under Section 173(2)

of the Code. That thereafter the investigating officer is required to send report to the authorised officer and thereafter as envisaged under Section 22 of the MMDR Act the authorised officer as mentioned in Section 22 of the MMDR Act may file the complaint before the learned Magistrate along with the report submitted by the investigating officer and at that stage the question with respect to taking cognizance by the learned Magistrate would arise.

11. Now so far as the submission on behalf of the private appellants-violators that in view of the fact that violators were permitted to compound the violation in exercise of powers under Rule 53 of the 1996 Rules or Rule 18 of the 2006 Rules and the violators accepted the decision and deposited the amount of penalty determined by the appropriate authority for compounding the offences/ violations, there cannot be any further criminal proceedings for the offences under Sections 379 and 414 IPC and Sections 4/21 of the MMDR Act and the reliance placed on Section 23A of the MMDR Act is concerned, it is true that in the present case the appropriate authority determined the penalty under Rule 53 of the 1996 Rules/Rule 18 of the 2006 Rules, which the private appellants-violators paid and therefore the bar contained in sub-section 2 of Section 23A of the MMDR Act will be attracted. Section 23A as it stands today has been brought on the Statute in the year 1972 on the recommendations of the Mineral Advisory Board which provides that any offence punishable under the MMDR Act or any rule made thereunder may, either before or after the institution of the prosecution, be compounded by the person authorised under section 22 to make a complaint to the court with respect to that offence, on payment to that person, for credit to the Government, of such sum as that person may specify. Sub-section 2 of Section 23A further provides that where an offence is compounded under sub-section (1), no proceeding or further proceeding, as the case may be, shall be taken against the offender in respect of the offence so compounded, and the offender, if in custody, shall be released forthwith. Thus, the bar under sub-section 2 of Section 23A shall be applicable with respect to offences under the MMDR Act or any rule made thereunder. However, the bar contained in sub-section 2 of Section 23A shall not be applicable for the offences under the IPC, such as, Section 379 and 414 IPC. In the present case, as observed and held hereinabove, the offences under the MMDR Act or any rule made thereunder and the offences under the IPC are different and distinct offences. Therefore, as in the present case, the mining inspectors prepared the cases under Rule 53 of the 1996 Rules and submitted them before the mining officers with the proposals of compounding the same for the amount calculated according to the concerned rules and the Collector approved the said proposal and thereafter the private appellants-violators accepted the decision and deposited the amount of penalty determined by the Collector for compounding the cases in view of sub-section 2 of Section 23A of the MMDR Act

and the 1996 rules and even the 2006 rules are framed in exercise of the powers under Section 15 of the MMDR Act, criminal complaints/proceedings for the offences under Sections 4/21 of the MMDR Act are not permissible and are not required to be proceeded further in view of the bar contained in sub-section 2 of Section 23A of the MMDR Act. At the same time, as observed hereinabove, the criminal complaints/proceedings for the offences under the IPC - Sections 379/414 IPC which are held to be distinct and different can be proceeded further, subject to the observations made hereinabove.

However, our above conclusions are considering the provisions of Section 23A of the MMDR Act, as it stands today. It might be true that by permitting the violators to compound the offences under the MMDR Act or the rules made thereunder, the State may get the revenue and the same shall be on the principle of person who causes the damage shall have to compensate the damage and shall have to pay the penalty like the principle of polluters to pay in case of damage to the environment. However, in view of the large scale damages being caused to the nature and as observed and held by this Court in the case of *Sanjay* (supra), the policy and object of MMDR Act and Rules are the result of an increasing awareness of the compelling need to restore the serious ecological imbalance and to stop the damages being caused to the nature and considering the observations made by this Court in the aforesaid decision, reproduced hereinabove, and when the violations like this are increasing and the serious damage is caused to the nature and the earth and it also affects the ground water levels etc. and it causes severe damage as observed by this Court in the case of *Sanjay* (supra), reproduced hereinabove, we are of the opinion that the violators cannot be permitted to go scot free on payment of penalty only. There must be some stringent provisions which may have deterrent effect so that the violators may think twice before committing such offences and before causing damage to the earth and the nature.

It is the duty cast upon the State to restore the ecological imbalance and to stop damages being caused to the nature. As observed by this Court in the case of *Sanjay* (supra), excessive in-stream sand-and-gravel mining from river beds and like resources causes the degradation of rivers. It is further observed that apart from threatening bridges, sand mining transforms the riverbeds into large and deep pits, as a result, the groundwater table drops leaving the drinking water wells on the embankments of these rivers dry. Even otherwise, sand/mines is a public property and the State is the custodian of the said public property and therefore the State should be more sensitive to protect the environment and ecological balance and to protect the public property the State should always be in favour of taking very stern action against the violators who are creating serious ecological imbalance and causing damages to the nature in any form. As the provisions of Section 23A are not under challenge and Section 23A of the MMDR Act so long as

it stands, we leave the matter there and leave it to the wisdom of the legislatures and the concerned States.

12. Now so far as the appeal preferred by the State on the premise that the order passed by the learned Magistrate, confirmed by the High Court, affects the powers of the authorised person to compound the offence, in exercise of powers under Rule 53 of the 1996 Rules and Rule 18 of the 2006 Rules is concerned, the same is absolutely misconceived. By the order passed by the learned Magistrate, confirmed by the High Court, by no stretch of imagination, it can be said that directing to file the first information report/crime case for the offences under the IPC and even for the offences under the MMDR Act and the rules made thereunder, it affects any of the powers of the authorised person to compound the offence. In fact, in view of the decision of this Court in the case of *Sanjay* (supra), in which this Court has specifically observed and held that so far as the offence under the IPC is concerned, there shall not be any bar under Section 22 of the MMDR Act and when before the High Court the State supported the order passed by the learned Magistrate and rightly so and when the impugned judgment and order passed by the High Court is in favour of the State, as such, the State ought not to have filed the special leave petition/appeal.

13. After giving our thoughtful consideration in the matter, in the light of the relevant provisions of the MMDR Act and the Rules made thereunder vis-a-vis the Code of Criminal Procedure and the Penal Code, and the law laid down by this Court in the cases referred to hereinabove and for the reasons stated hereinabove, our conclusions are as under:

i) that the learned Magistrate can in exercise of powers under Section 156(3) of the Code order/direct the concerned In-charge/SHO of the police station to lodge/register crime case/FIR even for the offences under the MMDR Act and the Rules made thereunder and at this stage the bar under Section 22 of the MMDR Act shall not be attracted;

ii) the bar under Section 22 of the MMDR Act shall be attracted only when the learned Magistrate takes cognizance of the offences under the MMDR Act and Rules made thereunder and orders issuance of process/summons for the offences under the MMDR Act and Rules made thereunder;

iii) for commission of the offence under the IPC, on receipt of the police report, the Magistrate having jurisdiction can take cognizance of the said offence without awaiting the receipt of complaint that may be filed by the authorised officer for taking cognizance in respect of violation of various provisions of the MMDR Act and Rules made thereunder; and

iv) that in respect of violation of various provisions of the MMDR Act and the Rules made thereunder, when a Magistrate passes an order under Section 156(3)

of the Code and directs the concerned In-charge/SHO of the police station to register/lodge the crime case/FIR in respect of the violation of various provisions of the Act and Rules made thereunder and thereafter after investigation the concerned In-charge of the police station/investigating officer submits a report, the same can be sent to the concerned Magistrate as well as to the concerned authorised officer as mentioned in Section 22 of the MMDR Act and thereafter the concerned authorised officer may file the complaint before the learned Magistrate along with the report submitted by the concerned investigating officer and thereafter it will be open for the learned Magistrate to take cognizance after following due procedure, issue process/summons in respect of the violations of the various provisions of the MMDR Act and Rules made thereunder and at that stage it can be said that cognizance has been taken by the learned Magistrate.

v) in a case where the violator is permitted to compound the offences on payment of penalty as per sub-section1 of Section 23A, considering sub-section 2 of Section 23A of the MMDR Act, there shall not be any proceedings or further proceedings against the offender in respect of the offences punishable under the MMDR Act or any rule made thereunder so compounded. However, the bar under sub-section 2 of Section 23A shall not affect any proceedings for the offences under the IPC, such as, Sections 379 and 414 IPC and the same shall be proceeded with further.

14. In view of the above and for the reasons stated above, the appeals filed by the violators/private appellants are partly allowed, to the extent quashing the proceedings for the offences under the MMDR Act - Sections 4/21 of the MMDR Act only. The appeal preferred by the State of Madhya Pradesh stands dismissed.

Order accordingly

I.L.R. [2021] M.P. 205 (SC)
SUPREME COURT OF INDIA

Before Mr. Justice Sanjay Kishan Kaul, Mr. Justice Dinesh Maheshwari & Mr. Justice Hrishikesh Roy

CA No. 6209/2010 decided on 19 January, 2021

BAJRANGA (DEAD) BY LRs. .....Appellants

Vs.

STATE OF M.P. & ors. …Respondents

***A. Ceiling on Agricultural Holdings Act, M.P. (20 of 1960), Sections 7(b), 9, 11 & 46 – Surplus Land* – Decree was in favour of Jenobai, thus appellant loses the right to hold that land and thus remaining total land holding of appellant comes within ceiling limit – No surplus land with appellant – Impugned order set aside – Appeal allowed. (Para 29 & 30)**

क. कृषि जोत अधिकतम सीमा अधिनियम, म.प्र. (1960 का 20), धाराएँ 7(b), 9, 11 व 46 – अधिशेष भूमि – डिक्री, जेनोबाई के पक्ष में थी, अतः, अपीलार्थी उस भूमि को धारण करने का अधिकार खो देता है और इस तरह अपीलार्थी की शेष संपूर्ण जोत भूमि अधिकतम सीमा के भीतर आती है – अपीलार्थी के पास कोई अधिशेष भूमि नहीं – आक्षेपित आदेश अपास्त – अपील मंजूर।

***B. Ceiling on Agricultural Holdings Act, M.P. (20 of 1960), Sections 7(b), 9, 11(4), 11(5), 11(6) & 46 – Surplus Land – Declaration in Return* – Held – Once a disclosure of pending suit was made by appellant u/S 9, matter had to be dealt with u/S 11(4) of Act – Respondent authorities should have kept the proceedings in abeyance and were required to await decision of Court – Section 11(5) & 11(6) comes into play when mandate of Section 11(4) is fulfilled, which was not done in present case – Provisions of Section 11 has to be strictly complied with – Even notice was not issued to Jenobai – Respondents breached statutory provisions. (Paras 24, 28 & 29)**

ख. कृषि जोत अधिकतम सीमा अधिनियम, म.प्र. (1960 का 20), धाराएँ 7(b), 9, 11(4), 11(5), 11(6) व 46 – अधिशेष भूमि – विवरणी में घोषणा – अभिनिर्धारित – एक बार जब धारा 9 के अंतर्गत अपीलार्थी द्वारा लंबित वाद का प्रकटन किया गया था, मामले को अधिनियम की धारा 11(4) के अंतर्गत निपटाया जाना चाहिए था – प्रत्यर्थी प्राधिकारियों को कार्यवाहियां प्रास्थगन में रखनी चाहिए थी तथा न्यायालय के विनिश्चय की प्रतीक्षा करना उनसे अपेक्षित था – धारा 11(5) व 11(6) तब प्रयोज्य होती हैं जब धारा 11(4) की आज्ञा की पूर्ति की गई हो, जो कि वर्तमान प्रकरण में नहीं किया गया था – धारा 11 के उपबंधों का कठोरता से अनुपालन किया जाना चाहिए – यहां तक कि जेनोबाई को नोटिस तक जारी नहीं किया गया था – प्रत्यर्थीगण ने कानूनी उपबंधों का भंग किया है।

***C. Ceiling on Agricultural Holdings Act, M.P. (20 of 1960), Sections 7(b), 9 & 11(3) – Principle of Natural Justice – Notice* – In terms of Section 11(3), the draft statement of land held in excess of ceiling limit is to be published and served on the holder, the creditor and "all other persons interested in land to which it relates" – Once a disclosure is made u/S 9 that Jenobai had filed a suit, there has to be mandatorily a notice to her otherwise any decision would be behind her back and would violate principle of natural justice. (Para 22)**

ग. कृषि जोत अधिकतम सीमा अधिनियम, म.प्र. (1960 का 20), धाराएँ 7(b), 9 व 11(3) – नैसर्गिक न्याय का सिद्धांत – नोटिस – धारा 11(3) के निबंधनों में अधिकतम सीमा से अधिक धारण की गई भूमि का प्रारूप कथन प्रकाशित करना चाहिए और धारक, लेनदार एवं ''उससे संबंधित भूमि में सभी अन्य हितबद्ध व्यक्तियों'' को तामील किया जाना चाहिए – एक बार धारा 9 के अंतर्गत प्रकटन करने पर कि जेनोबाई ने एक वाद प्रस्तुत किया था, आज्ञापक रूप से उसे एक नोटिस होना चाहिए अन्यथा कोई विनिश्चय उसकी पीठ पीछे होगा और नैसर्गिक न्याय के सिद्धांत का उल्लंघन होगा।

D. ***Constitution – Article 300A – Right to Property*** **– Held – Right of property is a constitutional right though not a fundamental right – Deprivation of right can only be in accordance with procedure established by law. (Para 28)**

घ. संविधान – अनुच्छेद 300A – संपत्ति का अधिकार – अभिनिर्धारित – संपत्ति का अधिकार, एक संवैधानिक अधिकार है यद्यपि एक मूलभूत अधिकार नहीं है – अधिकार से वंचित किया जाना केवल विधि द्वारा स्थापित प्रक्रिया के अनुसरण में ही हो सकता है।

Cases referred:

1991 Supp (2) SCC 631, (2019) 7 SCC 465.

J U D G M E N T

The Judgment of the Court was delivered by :-

SANJAY KISHAN KAUL, J. :- The social objective of providing land to the tiller and the landless post independence was sought to be subserved by bringing in ceiling in agricultural holdings in different States. It is towards this objective that the Madhya Pradesh Ceiling on Agricultural Holdings Act, 1960 (hereinafter referred to as the 'said Act') was brought into force in 1960. The said Act, *inter alia,* provided for acquisition as well as disposal of surplus land.

2. The predecessor-in-interest of the appellant (now represented by the LRs) was the *bhumiswami* of agricultural dry land measuring 64.438 acres situated in Village Bagadua, Paragna Sheopur Kala, District Morena, Madhya Pradesh. He was, thus, stated to be holding land in excess of the ceiling limit prescribed as per Section 7(b) of the said Act, whereby a holder along with his family of five members or less could hold a maximum amount of 54 acres of land. As a sequitur thereto the competent authority/competent officer (respondent No.2 herein) initiated the process to acquire the surplus land and issued a draft statement in Land Ceiling Case No.180/75-76/A-90(B) for acquisition of 10.436 acres of dry land from Survey Nos.755, 756, 780 and 881/1 (for short 'surplus land'). A final order dated 30.3.1979 was published declaring such land as surplus. In furtherance of the aforesaid, the respondents herein initiated the process of taking over possession and eviction under Section 248 of the Madhya Pradesh Land Revenue Code, 1959 (hereinafter referred to as the 'said Code') (the provision has since been deleted).

3. The appellant being aggrieved by the final order dated 30.3.1979 filed a suit for declaration of title and permanent injunction before the Court of Civil Judge Class-II, Sheopur Kala, District Morena. It is the say of the appellant, as per averments in the plaint, that the proceedings to recover land from him were illegal as he was actually left with only 54 acres of land which was within the prescribed

ceiling limit in view of the fact that the land measuring 17 bighas and 7 biswa in Survey No.77 had been decreed in favour of one Jenobai, who was in *kabza kasht* (possession by cultivation) of the land for about 20 years. She had filed a civil suit, being Civil Suit No.319/75A O.C. on 15.10.1975 against the appellant seeking declaration of title and permanent injunction with respect to the aforementioned land. There had been an admission of the ground position by the appellant and thus, the suit was decreed on 5.3.1979 declaring Jenobai to be the owner in possession of the said land. We may note that Jenobai is actually the mother-in-law of the appellant and according to her, this land was being cultivated by her on the basis of half and half of the land proceeds. However, subsequently the appellant developed improper intent and taking advantage of her being a widow and an old woman, had colluded with the Patwari to get this disputed land mutated in his name.

4. The suit filed by the appellant was contested by the respondents herein and they took a defence in the written statement that the possession of the surplus land had been taken over and allotted to other cultivators. There was, however, an admission that the appellant in the return, filed as per Section 9 of the said Act, mentioned the aspect of the pending suit qua Survey No.77. However, it was contended that the appellant had neither submitted a copy of the suit nor any proof of pendency of the suit. The suit was alleged to be collusive inasmuch as Jenobai, in fact, was the mother-in-law of the appellant and the endeavour was to prevent the surplus land from being acquired. It was pleaded that Jenobai, if she had title or possession of the land in survey No.77, would have submitted a claim before the competent authority after the draft statement was issued. The appellant was also alleged to not have submitted any objection to the draft statement and the remedy of the appellant was stated to be by way of an appeal before the competent court which was not pursued. The order of the competent authority was stated to have become final and, thus, the action for taking over possession of surplus land and allotment thereof was lawful.

5. The trial court decided the suit post trial *vide* judgment and decree dated 7.10.1997. The trial court held that the appellant was the *bhumiswami* in respect of the survey number in question and the suit was collusive with Jenobai having knowledge of the ceiling proceedings. These findings resulted in a dismissal of the suit.

6. The appellant filed an appeal under Section 96 of the Code of Civil Procedure, 1908 (hereinafter referred to as the 'CPC') before the Court of Additional District Judge, Sheopur Kala, District Morena. The appellant's say was that in view of the pendency of the suit filed by Jenobai, the proceedings under the said Act should have been kept in abeyance in view of the provisions of Section 11(4) of the said Act. The relevant provisions of Section 11 read as under:

"11. **Preparation of statement of land held in excess of the ceiling area. -** (1) On the basis of information given in the return under Section 9 or the information obtained by the competent authority under Section 10, the said authority shall after making such enquiry as it may deem fit, prepare a separate draft statement in respect of each person holding land in excess of the ceiling area, containing the following particulars:

(3) The draft statement shall be published at such place and in such manner as may be prescribed and a copy thereof shall be served on the holder or holders concerned, the creditors and all other persons interested in the land to which it relates. Any objection to the draft statement received within thirty days of the publication thereof shall be duly considered by the competent authority who after giving the objector an opportunity of being heard shall pass such order as it deems fit.

(4) If while considering the objections received under sub-section (3) or otherwise, the competent authority finds that any question has arisen regarding the title of a particular holder and such question has not already been determined by a Court of competent jurisdiction, the competent authority shall proceed to enquire summarily into the merits of such question and pass such orders as it thinks fit.

Provided that if such question is already pending for decision before a competent court, the competent authority shall await the decision of the court.

(5) The order of the competent authority under sub-section (4) shall subject to appeal or revision, but any party may, within three months from the date of such order, institute a suit in the civil court to have the order set aside, and the decision of such court shall be binding on the competent authority, but subject to the result of such suit, if any, the order of the competent authority shall be final and conclusive.]

[(6) After all such objections, have been disposed of, the competent authority shall, subject to the provisions of this Act and the rules made thereunder, make necessary alterations in the draft statement in accordance with the orders passed on objections and shall declare the surplus land held by each holder. The competent authority shall, thereafter, publish a final statement specifying therein the entire land held by the holder, the land to be retained by him and the land declared to be surplus and send a copy thereof the holder concerned. Such a statement shall be published in such manner as may be prescribed and shall be conclusive evidence of the facts stated therein.]"

7. The information about the pendency of the suit between Jenobai and the appellant had been furnished to the competent authority, and post decree of the suit the appellant had been left with only 54 acres of land. Thus, there was no reason to initiate proceedings to take possession of the disputed land. The

appellate court noted the admission in the written statement filed by the respondents herein, that in the return filed by the appellant there was disclosure of the factum of Jenobai being in possession of Survey No.77 land as also of the pendency of the suit, being Suit No.319A/75 between her and the appellant. That being the factual position, Section 11(3) of the said Act mandated that the copy of the draft statement ought to have been served on Jenobai as she was an 'interested person' in the land. The acquisition proceedings had to be kept in abeyance in view of the proviso to Section 11(4) of the said Act till the disposal of the suit, and that such a judgment of the civil court was binding on the competent authority. The suit was stated to have been decreed for 3.306 hectares out of 17.715 hectares of land recorded in the name of the appellant, resultantly leaving 14.399 hectares of land, which was within the prescribed limited under Section 7 of the said Act. On the basis of these findings, the appeal was allowed and the judgment of the trial court was set aside on the ground that the competent authority had failed to comply with the statutory provisions under Section 11(3) and 11(4) of the said Act. The appellant was declared as the *bhumiswami* of the surplus land and the respondents were restrained from interfering with his possession of the land.

8. It is now the turn of the respondents herein to prefer an appeal under Section 100 of the CPC before the High Court of Madhya Pradesh, Gwalior Bench in Second Appeal No.644 of 1998. The High Court *vide* order dated 8.5.2008 framed two substantive questions of law, which read as under:

> "i. Whether the jurisdiction of the Civil Court challenging the order of the Competent Officer is barred under Section 46 of the said Act?
>
> ii. Whether the judgment and decree of the first appellate court is sustainable under the provisions of the said Act?"

9. On a conspectus of the matter, the High Court allowed the appeal. The rationale for the same was that after the publication of the draft statement neither the appellant nor Jenobai had filed objections. In the revenue records the appellant's name was recorded as holder of the entire agricultural land in question. No information was stated to have been provided to the competent authority giving particulars of the suit of Jenobai. The competent authority was found not at fault in the alleged breach of Sections 11(3) and 11(4) of the said Act as the information germane for the same had not been disclosed.

10. The appellant at that stage, thus, approached this Court by the present Special Leave Petition and on 2.3.2009, notice was issued and status quo was directed to be maintained. Subsequently, leave was granted on 26.7.2010 and ad interim order was made absolute till the disposal of the appeal.

11. On the appeal being taken up for hearing on 16.1.2020 an order was passed recording the factual controversy as to whether the appellant had filed

objections giving particulars of the pendency of the civil suit. This was so as in terms of Section 9(iv) of the said Act that such particulars were required to be stated. Even on the question of maintainability of the suit, it was mentioned that it was necessary to peruse the objections filed by the appellant to determine whether the requirement of Section 9 of the said Act had been fulfilled, Thus, records of the last ceiling case were directed to be produced by the respondents herein. The records were, however, not produced and, thus, on 9.9.2020, an order was passed giving further time but directing that failure to produce the record would result in an adverse inference being drawn against the respondents herein.

12. The respondents filed an affidavit on 26.9.2020 stating that the records were untraceable including the objections filed by the appellant. It appears that due to carving out of some districts the records could not be traced out. The son of the appellant had stated that he did not have the record either.

13. We have heard learned counsel for the parties, albeit in the absence of the aforesaid record, which was not produced right till the date of hearing.

14. The appellant canvassed that the civil suit filed was maintainable as the bar of jurisdiction of the civil court did not come into play as specified in Section 46 of the said Act in view of the provisions of Sections 11(4) and 11(5) of the said Act read together. Section 46 of the said Act reads as under:

> "46. **Bar of jurisdiction of Civil Courts.** - Save as expressly provided in this Act, no Civil Court shall have any jurisdiction to settle, decide or deal with any question which is by or under this Act required to be settled, decided or dealt with by the competent authority."

15. The plea, thus, was that the Section begins with a saving clause qua the bar of civil court - "Save as expressly provided in this Act....." The provisions of Section 46 were pleaded to be expressly subject to the provisions of Section 11(5) of the said Act and the observations in *Competent Authority, Tarana District, Ujjain (M.P.) v. Vijay Gupta & Ors.*[1] were relied upon, opining that a suit can be filed in a civil court within three months of passing of an order by the competent authority under Section 11(4) of the said Act in view of the provisions of Section 11(5) of the said Act. There was pleaded to be an admission about the disclosure of the appellant regarding the factum of the suit filed by Jenobai in the returns and, thus, the respondents herein were required to wait for the outcome of the suit and should have also invited objections from Jenobai. The decree in the civil suit between the appellant and Jenobai was, thus, submitted to be binding on the competent authority.

---

[1] 1991 Supp (2) SCC 631.

16. On the other hand, the respondents herein reiterated that the suit filed by Jenobai was a collusive one and the object of the institution was to circumvent the provisions of the said Act. In this behalf, it was submitted that the suit under Section 11(5) of the said Act can only be instituted within three months from the date of Section 11(4) order, the date of which is not mentioned. However, even if the date of the subsequent order under Section 11(6) passed on 31.3.1979 is considered, the period of three months elapsed as the suit was filed on 31.8.1979/3.9.1979 (there is some discrepancy qua the dates as recorded in different proceedings). Further under Section 11(5) of the said Act, a suit can only be filed for setting aside the order under Section 11(4) of the said Act but no such prayer was made.

17. It was urged that after the order under Section 11(6) of the said Act is passed, the land vests with the State under Section 12 of the said Act and, thus, a suit for declaration of title was not maintainable. There was no challenge to the order under Section 11(6) of the said Act and, thus, the suit was not maintainable. It was also urged that no suit lies against an order under Section 11(6) of the said Act in view of the judgment of this Court in *State of Madhya Pradesh & Anr. v. Dungaji (Dead) Represented by Legal Representatives & Anr.*[2] Learned counsel for the respondents herein pleaded that though the appellant raised the issue about the pendency of the suit with Jenobai in the return filed under Section 9 of the said Act, the documents were not produced and exhibited in this behalf even before the trial court. The possession of Jenobai as reflected in the revenue records was not proved by any evidence led in that behalf. And, in fact, no such objections were filed before the trial court.

18. On the aspect of this Court observing that an adverse inference will be drawn as per the orders dated 16.1.2020 and 9.9.2020, it was submitted that the copy of the objections were never placed before the trial court, the first appellate court and the High Court and, thus, the appellant failed to discharge the burden of proving the case. There should, thus, be no occasion to draw the adverse inference against the respondents herein.

19. We have given a thought to the matter in the conspectus of what has been urged before us on the different dates and the proceedings that had been recorded. The matter was taken up on 16.1.2020 and in view of the submissions advanced by the parties, the Court required perusal of the record. Thus, in the proceedings it was recorded that there was a factual controversy as to whether the appellant in pursuance of the draft statement in the objections filed had given the particulars of the pending civil suit filed by the mother-in-law of the appellant claiming part of the land held by the appellant. This was considered to be relevant as in terms of

[2] (2019) 7 SCC 465.

Section 9(iv) of the said Act such particulars are mandated to be given and, thus, the respondents herein being in breach or not of the other succeeding provisions of the Act would depend on this important aspect. We also took note of the fact that as per the respondents herein no particulars had been given and the suit was alleged to be collusive. In order to determine the question it was opined that this Court found it necessary to peruse the objections filed by the appellant to come to a conclusion.

20. On the said date itself, this Court also required the pleadings in the civil suit filed by the mother-in-law, Jenobai, to be placed on record as also the judgment.

21. The appellant complied with the order dated 16.1.2020 by filing these additional documents but the respondents herein did not do the needful. It is in these circumstances that on 9.9.2020 this Court made it clear that in case the records are not filed adverse inference will be drawn. The natural sequitur to this is that the failure to place the aforementioned documents on record shows that there had been proper disclosure about the suit in the return filed under Section 9 of the said Act. The factum of disclosure of the suit could not really be doubted by the respondents herein in view of their own pleadings (admitted in the pleadings before the trial court, as perused by us). However, the records are alleged not to have been located.

22. The aforesaid factual matrix is, thus, to be examined in the context of the provisions of the said Act. The preparation of the statement of land held in excess of ceiling limit under Section 11 of the said Act has to be on the basis of information given in the return under Section 9 of the said Act, or the information obtained by the competent authority under Section 10 of the said Act after making an enquiry. In terms of Section 11(3), the draft statement is to be published and served on the holder, the creditor and "all other persons interested in the land to which it relates." Once a disclosure is there that Jenobai had filed a suit, there has to be mandatorily a notice to her as otherwise any decision would be behind her back and would, thus, violate the principles of natural justice.

23. There is little ambiguity about the aforesaid position as in Section 11(4) it has been stated that in case the competent authority finds that any question has arisen regarding the title of a particular holder, which has not been determined by the competent court, the competent authority shall proceed to enquire summarily into merits of such question and pass such orders as it thinks fit. Thus, the power is vested with the competent authority to determine such conflict of the land holding. This is, however, subject to a proviso. The proviso clearly stipulates that if such a question is already pending for decision before the competent court, the competent authority shall await the decision of the court.

24. In our view, the embargo came there and then as once the disclosure was made the proceedings should have been kept in abeyance to await the decision in those proceedings. The occasion to pass orders under sub-section (5) and sub-section (6) of Section 11 of the said Act did not arise in the present case as in view of the disclosure of Jenobai's suit. Further proceedings should have been kept in abeyance to await the verdict in the suit as per proviso to sub-section (4) and notice should have been issued to Jenobai. All this has been observed to be in breach by the respondents herein. We are, thus, of the view that the findings of the appellate court in constructions of these provisions reflects the correct position of law in the given facts of the case.

25. The issue of jurisdiction of civil court is no more *res integra* in view of the judgment in *Competent Authority, Tarana District, Ujjain (M.P.).*[3] where it has been observed in para 4 as under:

> "4. So far as the other question regarding the maintainability of the suit in a civil court is concerned, suffice to say that sub-section (5) of Section 11 of the Act itself provides that any party may within three months from the date of any order passed by the Competent Authority under sub-section (4) of Section 11 of the Act institute a suit in the civil court to have the order set aside. Thus the above provision itself permits the filing of a suit in a civil court and any decision of such court has been made binding on the Competent Authority under the above provision of sub-section (5) of Section 11 of the Act. It is not in dispute that the suit in the present case was filed within three months as provided under sub-section (5) of Section 11 of the Act. In the result, we do not find any force in this appeal and it is accordingly dismissed with no order as to costs."

26. We have taken note of the latter proceedings of this Court in *State of Madhya Pradesh & Anr. v. Dungaji (Dead) Represented by Legal Representatives & Anr.*[4] discussing the scheme of the Act and the requirement of taking recourse to the provisions of appeal and revision under the said Act.

27. We have also considered the plea of limitation advanced by learned counsel for the respondents albeit no specific issue being framed in respect of the same.

28. In our view the legal position has to be appreciated in the factual context. Thus, though there may be a process provided for redressal under the scheme of the Act, it is this very scheme of the Act which has been breached by the respondents herein in not complying with the statutory provisions. It can be nobody's say that Jenobai cannot file a title suit against the appellant. That suit being maintainable and pending, and the factum of that suit being disclosed in the

[3] (Supra).
[4] (Supra).

return (if the nature of disclosure being the reason we wanted to peruse the record, which were not made available), the provisions of Section 11 had to be strictly complied with. We say so as the right to property is still a constitutional right under Article 300A of the Constitution of India though not a fundamental right. The deprivation of the right can only be in accordance with the procedure established by law. The law in this case is the said Act. Thus, the provisions of the said Act had to be complied with to deprive a person of the land being surplus.

29. The provisions of the said Act are very clear as to what has to be done at each stage. In our view once a disclosure was made, the matter had to be dealt with under sub-section (4) of Section 11 of the said Act and in view of the pending suit proceedings between the appellant and Jenobai, the proviso came into play which required the respondent authorities to await the decision of the court. Sub-section 5 and thereafter sub-section 6 would kick in only after the mandate of sub-section 4 was fulfilled. In the present case it was not so. Even notice was not issued to Jenobai. She could have clarified the position further. The effect of the decree in favour of Jenobai is that the appellant loses the right to hold that land and his total land holding comes within the ceiling limit. If there is no surplus land there can be no question of any proceedings for take over of the surplus land under the said Act.

30. We are, thus, of the view that the impugned order is liable to be set aside and the order of the first appellate court is restored.

31. The appeal is accordingly allowed leaving the parties to bear their own costs.

Appeal allowed

I.L.R. [2021] M.P. 215 (DB)
WRIT APPEAL
Before Mr. Justice Mohammad Rafiq, Chief Justice &
Mr. Justice Vijay Kumar Shukla
WA No. 655/2020 (Jabalpur) decided on 8 February, 2021

JABALPUR DEVELOPMENT AUTHORITY & anr. …Appellants

Vs.

DEEPAK SHARMA & ors. …Respondents

***A. Constitution – Article 226 – Cause of Action – Delay – Representation* – Held – Even if Court or Tribunal directs for consideration of representations relating to a stale claim or dead grievance, it does not give rise to a fresh cause of action – Mere submission of representation to the competent authority does not arrest time – No right accrued in favour of**

petitioner – Petition suffers from delay and laches – Petition dismissed – Writ Appeal allowed. (Paras 8, 9 & 15 to 17)

क. संविधान – अनुच्छेद 226 – वाद हेतुक – विलंब – अभ्यावेदन – अभिनिर्धारित – यदि न्यायालय या अधिकरण, किसी जीर्ण दावे या निर्जीव शिकायत से संबंधित अभ्यावेदनों को विचार में लिए जाने हेतु निदेशित करता है, इससे एक नया वाद हेतुक उत्पन्न नहीं होता – सक्षम प्राधिकारी को मात्र अभ्यावेदन प्रस्तुत करना, समय को नहीं रोकता – याची के पक्ष में कोई अधिकार प्रोद्भूत नहीं हुआ है – याचिका, विलंब एवं अति–विलंब से ग्रसित है – याचिका खारिज – रिट अपील मंजूर।

***B. Constitution – Article 226 – Delay & Laches – Limitation* – Held – Apex Court concluded that though there is no period of limitation providing for filing a writ petition under Article 226 of Constitution yet ordinarily a writ petition should be filed within a reasonable time – Making of repeated representations is not a satisfactory explanation of delay. (Paras 10, 13 & 14)**

ख. संविधान – अनुच्छेद 226 – विलंब एवं अतिविलंब – परिसीमा – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया कि यद्यपि संविधान के अनुच्छेद 226 के अंतर्गत रिट याचिका प्रस्तुत करने हेतु परिसीमा की कोई अवधि उपबंधित नहीं है, तथापि साधारणतः एक रिट याचिका को युक्तियुक्त समय अवधि के भीतर प्रस्तुत किया जाना चाहिए – बारंबार अभ्यावेदन करना, विलंब का संतोषजनक स्पष्टीकरण नहीं है।

Cases referred:

2003 (5) M.P.L.J. 469, 2007 9 SCC 278, (2008) 10 SCC 115, (2010) 2 SCC 59, (2006) 4 SCC 322, (1977) 3 SCC 396, (1976) 3 SCC 579.

Siddharth Sharma, for the appellants.
Ashish Shroti, for the respondent No. 1.

J U D G M E N T

The Judgment of the Court was delivered by :
V.K. SHUKLA, J. :- The present intra court appeal is filed under Section 2(1) of M.P. Uchcha Nyayalaya (Khand Nyaya Peeth Ko Appeal) Adhiniyam, 2005, being aggrieved by the judgment dated 22-01-2020 passed in W.P. No. 9909/2018 *(Deepak Sharma Vs. Jabalpur Development Authority and another)* passed by the learned Single Judge, whereby the impugned orders dated 04-08-2012 and 31-03-2018 have been quashed. It has been further directed that the allotment order of plot in question shall be made in favour of the writ petitioner and the possession of the said plot be also handed over to him after completing all requisite formalities and also taking difference amount from him as per the rate quoted by him at the time of submitting his offer.

2. The facts adumbrated in nutshell are that respondent no.1 Deepak Sharma filed a writ petition under Article 226 of the Constitution of India praying for quashment of orders dated 04-08-2012 and 31-03-2018 withdrawing the earlier resolution, by which the plot was decided to be allotted to the petitioner therein, as well as the order rejecting the representation of the petitioner. The facts further reveal that an advertisement was issued on 01-03-2012 inviting offers in respect of Plot No.936-B, area 4675 sq.ft. situated at Scheme No.6, Sanjeevni Nagar, Jabalpur. The respondent no.1 submitted his offer at the rate of Rs.827/- per sq.ft. Two other applicants also submitted offers at a lower rate i.e.Rs.818/- and 821/- per sq.ft. In pursuance to the offer made by the respondent no.1, the matter was taken up in the meeting of Board of Directors on 15-06-2012 and it was resolved to reserve the plot for allotment in favour of the respondent no.1. Large number of complaints were received in respect of financial irregularities in allotting the plot to the respondent no.1 at a throwaway price without giving wide publicity to the notice inviting offer. It is stated that the notice inviting tender was not published in widely circulated news paper i.e. Dainik Bhaskar and Nai Duniya etc. The complaints were scrutinized and it was decided that the earlier resolution dated 15-06-2012 made in favour of the respondent no.1 be recalled and the matter be placed before the Allotment Committee afresh. After taking the decision recalling the reservation made in favour of the petitioner, the security amount deposited by the respondent no.1 was returned on 04-08-2012. The respondent no.1 thereafter filed a writ petition i.e. W.P. No.15148/2012. However, the said writ petition was withdrawn on 10-05-2013 with a liberty to file a fresh writ petition. According to the appellant for almost 4 years, no writ petition was preferred and the appellant-Jabalpur Development Authority issued a fresh advertisement for the plot in question in the year 2018. The respondent no.1 in the year, 2018 preferred another writ petition i.e. W.P. No.5095/2018 and the same was disposed of by an order dated 07-03-2018 with a direction to the respondents to decide the petitioner's representation within a period of 60 days. The petitioner's representation was rejected and thereafter the third petition was preferred i.e. W.P. No.9909/2018, which has been allowed by the impugned order.

3. Learned counsel for the appellant submitted that no right in favour of the respondent no.1 had accrued because no letter of allotment was issued in favour of the respondent no.1 at any point of time. Merely because a decision was taken to allot the plot in favour of the respondent no.1, it would not mean that right was created in favour of the respondent no.1. It is further urged that the Board of Directors, being the final authority is certainly free to take final decision in the matter. Since no right was crystallized in favour of the respondent no.1, therefore, in the year 2012 itself, the security deposit was returned to the respondent no.1. It has also been submitted that the amount offered by the respondent no.1 was about Rs.38,00,000/- whereas pursuant to the subsequent advertisement issued in the

year 2018, the amount offered in respect of the same plot was about Rs.1.00 crore. The plot was allotted to Poonam Soni and Kapil Soni vide allotment letter dated 10-04-2018, however the subsequent allottees were not made parties in the writ petition.

4. Learned counsel for the appellant argued that there was a delay in filing the petition and, therefore, no relief could have been granted by the learned Single Judge. The question which has cropped up for consideration is whether there was a delay in filing the instant writ petition.

5. Learned counsel for the respondent-writ petitioner submitted that the Board cancelled the allotment of the plot on 04-08-2012. The petitioner immediately filed a writ petition i.e. W.P.No.15148/2012. An order of status quo was passed by the learned Single Judge on 12-092012. The petitioner has simultaneously approached the State Government. He was assured that necessary directions would be given to the JDA in the matter and therefore, the petition was withdrawn by filing an application for withdrawal of the petition on 30-04-2013. The petition was dismissed as withdrawn granting liberty to the petitioner to file a fresh writ petition on 10-05-2013. On 31-07-2015, the Government directed the JDA to consider the matter. The petitioner made representations to the JDA on 09-12-2015, 09-12-2016 and 05-06-2017. According to him, no reply was given one way or the other and on the contrary, the JDA re-advertised the auction of the plot. The petitioner filed second petition W.P. No.5095/2018 on 27-04-2018. The said petition was disposed of to reconsider the matter, as the JDA also agreed to reconsider the matter and therefore, now the appellant-JDA is stopped from raising the objection of the delay.

6. It is submitted that when the Government had directed the authority to consider the case by order dated 31-07-2015, the authority of its own should have considered the matter and passed appropriate orders. Even though, the representation was made soon after the Government passed the order, followed by successive representations, but the appellant authority did not pass any order one way or the other. The petitioner then filed the writ petition as submitted above. It is urged that there is no such delay to dis-entitle him from the relief sought. Secondly, it is the inaction on the part of the appellant-JDA, which is responsible for the delay, if any. In support of his submissions, he placed reliance on the judgment passed in the case of *Raghubir Singh Vs. Union of India,* 2003(5) M.P.L.J. 469.

7. In rebuttal to the aforesaid submissions, learned counsel for the appellant submitted that there was no assurance given by the appellant or the State Government for reconsideration of the case of the petitioner and the reasons best known to the petitioner, he withdrew the writ petition on 10-05-2013 with a

liberty to file a fresh petition. For almost 4 years, no writ petition was preferred and the appellant-JDA issued a fresh advertisement for the plot in question in the year 2018. Only when the fresh advertisement for the plot in question was issued in the year 2018, then the petitioner preferred another writ petition W.P. No.5095/2018 and the same was disposed of by an order dated 07-03-2018 with a direction to the respondents to decide the petitioner's representation within a period of 60 days. Thereafter, the petitioner's representation was rejected and the third petition W.P. No.9909/2018 was preferred.

8. Upon perusal of the records, we do not find that there was any assurance given to the petitioner for reconsideration of his allotment after having been cancelled by the Board of Directors. In the present case, no letter of allotment was issued in favour of the respondent no.1 at any point of time. Merely because a decision was taken to allot the plot in favour of the respondent no.1, it would not mean that right was created in favour of the respondent no.1, the Board of Directors, being the final authority has taken a final decision in the matter not to allot the plot to the writ petitioner considering the complaints that wide publicity was not given to the previous auction and the same was decided to settle the same in favour of writ petitioner on throwaway price. Further no right was crystallized in favour of the respondent no.1, therefore, in the year 2012 itself, the security deposit was returned to the respondent no.1. The first petition was filed in the year 2012 challenging the order dated 04-08-2012 which was registered as W.P. No. 15148/2012, however, the said writ petition was withdrawn by the respondent no.1 on 10-05-2013 and thereafter the petitioner did not take any step in the matter for a period of almost 4 years. Mere submission of the representations would not grant any benefit to the respondent no.1 specially when his rights were not crystallized and no right of allotment had accrued in his favour. Further, no assurance was given for allotment by the appellant. In the year 2018 by filing second writ petition W.P. No.5095/2018, challenged the action of the respondents of issuance of the fresh tender and the said petition was disposed of directing the appellant to decide the representation of the respondents. This itself, would not condone the delay and laches on the part of the petitioner as for a period of 4 years, the petitioner did not file any fresh writ petition after withdrawal of the first petition on 10-05-2013.

9. The plot in question has been subjected to disposal by issuing fresh NIT. The petitioner did not participate in the fresh tender in pursuant to the subsequent advertisement issued in the year 2018. The amount offered in respect of the same plot is about Rs. 1.00 crore as against the offer of the respondent no.1 about Rs. 38,00,000/-. The plot has already been allotted to one Poonam Soni and Kapil Soni, the intervenors vide allotment letter dated 10-04-2018. Merely because the petitioner had participated in respect of NIT of the year 2012 and decision was taken to allot the plot in question to him would not confer any right to him

specially when the Board of Directors had taken a decision to cancel the said decision in the year 2012 itself for the reasons stated earlier. The security amount deposited by the respondent no.1 was also returned to him in the year 2012 itself. The appellant has received subsequent offer more than three times than the offer of the petitioner. The petitioner has been in slumber for a period of five years from the year 2013 to the year 2018. The allotment has already been made to the subsequent allottees and the rights have accrued in their favour. The offer of the subsequent allottees is about Rs. 1.00 crore in comparison to the offer of the respondent no.1 of about Rs. 38,00,000/-. Merely because some representations were given, the representations itself would not constitute the reason for condoning the delay and laches. From the facts, it has been established that no letter of allotment was issued in favour of the respondent no.1 at any point of time. Merely because a decision was taken to allot the plot in favour of the respondent no.1 which has been subsequently withdrawn by the Board of Directors would not mean that any right was created in favour of the respondent no.1. The Board of Directors being the final authority was free to take final decision in the matter and no right was crystallized in favour of the respondent no.1 and therefore, we do not find any illegality in the order/decision of the respondent dated 04-08-2012 and rejecting the representation dated 31-03-2018. Apparently, the petition suffers from delay and laches as the decision to cancel the offer of the petitioner was taken on 04-08-2012. Because of the delay and laches on the part of the respondent, the price of the plot has already gone up three times than the offer made by the respondent no.1. The subsequent offers have been accepted and the plots have been allotted to the intervenors.

10. In the case of *NDMC Vs. Pan Singh* 2007 9 SCC 278, the Apex Court has opined that though there is no period of limitation providing for filing a writ petition under Article 226 of the Constitution of India, yet ordinarily a writ petition should be filed within a reasonable time.

11. In *C. Jacob Vs. Director of Geology and Mining* (2008) 10 SCC 115, the Apex Court while dealing with the concept of representations and the directions issued by the Court or Tribunal to consider the representations and the challenge to the said rejection thereafter. In that context, the court has expressed thus: -

> *"Every representation to the Government for relief, may not be replied on merits. Representations relating to matters which have become stale or barred by limitation, can be rejected on that ground alone, without examining the merits of the claim. In regard to representations unrelated to the Department, the reply may be only to inform that the matter did not concern*

> *the Department or to inform the appropriate Department. Representations with incomplete particulars may be replied by seeking relevant particulars. The replies to such representations, cannot furnish a fresh cause of action or revive a stale or dead claim. "*

12. In the case of *Union of India Vs. M.K.Sarkar* (2010)2 SCC 59 this Court after referring to *C. Jacob* (supra) has ruled that :-

> *"When a belated representation in regard to a "stale" or "dead" issue/dispute is considered and decided, in compliance with a direction by the court/tribunal to do so, the date of such decision cannot be considered as furnishing a fresh cause of action for reviving the "dead" issue or time-barred dispute. The issue of limitation or delay and laches should be considered with reference to the original cause of action and not with reference to the date on which an order is passed in compliance with a court's direction. Neither a court's direction to consider a representation issued without examining the merits, nor a decision given in compliance with such direction, will extend the limitation, or erase the delay and laches."*

13. In *Karnataka Power Corpn. Ltd. through its Chairman & Managing Director v. K. Thangappan and another* (2006) 4 SCC 322, the Court took note of the factual position and laid down that when nearly for two decades the respondent-workmen therein had remained silent mere making of representations could not justify a belated approach.

14. In *State of Orissa v. Pyarimohan Samantaray* (1977) 3 SCC 396 it has been opined that making of repeated representations is not a satisfactory explanation of delay. The said principle was reiterated in *State of Orissa v. Arun Kumar Patnaik* (1976) 3 SCC 579.

15. From the aforesaid authorities it is clear as crystal that even if the court or Tribunal directs for consideration of representations relating to a stale claim or dead grievance, it does not give rise to a fresh cause of action. Similarly, a mere submission of representation to the competent authority does not arrest time.

16. The judgments relied by the learned counsel for the respondent would not render any assistance to the facts of the present case as in the present case no right had accrued in favour of the petitioner.

17. In view of the aforesaid, we find that the learned Single Judge has erred while setting aside the decision of the appellant and the allotment made in favour

of the subsequent allottees and directing for handing over the possession of the plot in question after completing all requisite formalities to the writ petitioner.

18. Accordingly the writ appeal is allowed and the writ petition is dismissed.

Appeal allowed

I.L.R. [2021] M.P. 222
WRIT PETITION

Before Mr. Justice G.S. Ahluwalia

WP No. 8593/2013 (Gwalior) decided on 3 September, 2020

RAKESH SINGH BHADORIYA …Petitioner

Vs.

UNION OF INDIA & ors. …Respondents

A. LPG Distributorship – Eligibility **– Held – Graduation certificate issued by Indian Army cannot be confined to recruitment of Ex-Army man to Class-C post only, but it applies for allotment of LPG Distributorship also – Directorate General Resettlement also certified petitioner to be eligible for allotment of LPG Distributorship – Respondents directed to reconsider educational qualification afresh in light of notification of Ministry of HRD – Petition disposed. (Paras 17 to 20)**

क. एल पी जी वितरणकर्ता – पात्रता – अभिनिर्धारित – भारतीय सेना द्वारा जारी स्नातक प्रमाणपत्र को केवल भूतपूर्व सेनानी की श्रेणी–C के पद पर भर्ती हेतु सीमित नहीं किया जा सकता बल्कि वह एल पी जी वितरणकर्ता के आबंटन के लिए भी लागू होता है – पुनर्व्यवस्थापन महानिदेशालय ने भी याची को एल पी जी वितरणकर्ता के आबंटन हेतु पात्र प्रमाणित किया – प्रत्यर्थीगण को मानव संसाधन विकास मंत्रालय की अधिसूचना के आलोक में शैक्षणिक अर्हता का नये सिरे से पुनः विचार करने के लिए निदेशित किया गया – याचिका निराकृत।

B. LPG Distributorship – Guidelines, 2011 – Clause 7.1.ii – Graduation Certificate **– Held – As per clause 7.1.ii, any candidate who possesses equivalent qualification to qualifications mentioned therein, recognized by Ministry of HRD, as on date of application, he shall also be entitled for allotment of LPG Distributorship – Special category for grant of distributorship created for Ex-Army-man/Defence Personnel which certainly include an Army-man holding the lowest post upto the highest post. (Para 11 & 13)**

ख. एल पी जी वितरणकर्ता – निर्देशिका, 2011 – खंड 7.1ii – स्नातक प्रमाणपत्र – अभिनिर्धारित – खंड 7.1.ii के अनुसार, कोई उम्मीदवार जो आवेदन की तिथि को उसमें उल्लिखित अर्हताओं के समतुल्य, मानव संसाधन विकास मंत्रालय द्वारा मान्यता

प्राप्त अर्हता धारक है, वह एल पी जी वितरणकर्ता के आबंटन हेतु भी हकदार होगा – वितरणकर्ता के प्रदान हेतु भूतपूर्व सेनानी/रक्षाकर्मी के लिए विशेष श्रेणी सृजित की गई है, जिसमें निश्चित रूप से, सबसे निचले पद से लेकर उच्चतम पद धारण करने वाला सेनानी, समाविष्ट है।

***C. Constitution – Article 14 & 19 – Interpretation of Statutes* – Held – If an interpretation of provision leads to an absurdity or frustrates the mandate of Article 14 & 19 of Constitution, then it must be avoided.**

(Para 16)

ग. संविधान – अनुच्छेद 14 व 19 – कानूनो का निर्वचन – अभिनिर्धारित – यदि उपबंध का कोई निर्वचन, अर्थहीनता की ओर ले जाता है या संविधान के अनुच्छेद 14 व 19 की आज्ञा को विफल करता है, तब उससे बचना चाहिए।

***D. Precedent* – Held – Judgment passed by highest Court of State is binding on subordinate Courts/Tribunals/Authorities of same State because of power of superintendence enjoyed by it – Judgment passed by one High Court is not binding on another High Court although it may have persuasive value.** **(Para 6)**

घ. पूर्व निर्णय – अभिनिर्धारित – राज्य के सर्वोच्च न्यायालय द्वारा पारित निर्णय उसी राज्य के अधीनस्थ न्यायालयों/अधिकरणों/प्राधिकरणों पर बाध्यकारी है क्योंकि उसके द्वारा पर्यवेक्षण की शक्ति का उपभोग किया जाता है – एक उच्च न्यायालय द्वारा पारित निर्णय अन्य उच्च न्यायालय पर बाध्यकारी नहीं है यद्यपि उसका आग्रही मूल्य हो सकता है।

Cases referred :

CWP No. 13263/2016 (O & M) order passed on 18.02.2020 (Punjab & Haryana High Court), Writ-C No. 60706/2014 order passed on 19.11.2014 (Allahabad High Court) (DB), 2018 (2) MPLJ 344, AIR 1962 SC 1893, (1979) 4 SCC 429, (2009) 1 SCC 540.

Prashant Sharma, for the petitioner.

A.K. Jain, for the respondent Nos. 2 & 3/Indian Oil Corporation.

(Supplied : Paragraph numbers)

O R D E R

G.S. AHLUWALIA, J. :- Heard finally through video conferencing.

This petition under Article 226 of the Constitution of India has been filed seeking the following reliefs:-

7.(i) The order impugned annexure P/1 may kindly be quashed.

(ii) Respondents may kindly be directed to allot the distributorship of LPG to the petitioner.

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

2. It is the case of the petitioner that the petitioner is an Ex-Army man who had suffered gunshot injuries while he was posted at the Border. An advertisement was issued by the respondents on 22/04/2011 for awarding the Distributorship of LPG at Mehgaon, District Bhind for G.P. Category. It is submitted that the petitioner is having a graduation certificate issued by the Indian Army and this certificate is duly recognized by the Association of Indian Universities and as per the notification issued by the Ministry of Personnel, Public Grievances and Pensions, the certificate issued by the Indian Army is having equivalence to graduation. There is a scheme with regard to allotment of oil products agency to the Defence Personnel. The petitioner was holding the post of Havaldar and had received a bullet injury while he was posted at the Border and the eligibility certificate has also been issued by the Directorate General Settlement. Copy of the battle casualty certificate has been filed as Annexure P11 and character certificate is Ex.P12. The application of the petitioner for allotment of Distributorship of LPG was rejected by the respondents by discarding his graduation certificate. Therefore, the petitioner filed a Writ Petition No.424/2012, which was allowed and the respondents were directed to reconsider the educational qualification of the petitioner. Thereafter, the petitioner made a representation but the same has been dismissed by the impugned order. Accordingly, this petition has been filed, contending *inter alia* that the graduation certificate issued by the Indian Army fulfills the educational qualification as laid down in the guidelines for allotment of LPG Distributorship. It is further submitted that the **Punjab & Haryana High Court** by its order dated **18th February, 2020** passed in the case of *Krishan Singh Yadav vs. Union of India and Ors.* in CWP No.13263 of 2016 (O & M) has held that the graduation certificate issued by the Indian Army is equivalent to Graduation/Degree awarded by any of the Universities incorporated by an Act of the Central or State Legislature in India or any other educational institutions established by an Act of Parliament or declared to be deemed as a University under the UGC Act, 1956, or possess an equivalent qualification recognized by the Ministry of HRD, Government of India and the present petition is duly covered by the said order.

3. *Per contra,* it is submitted by the counsel for the respondents/ Indian Oil Corporation that so far as graduation certificate issued by the Indian Army is concerned, it is valid for appointment on Class-C post and is not valid for allotment of LPG Distributorship because the graduation certificate issued by the Indian Army cannot be treated at par with the educational qualification degree awarded by any of the Universities or any other educational institutions established by an Act of Parliament or declared to be deemed as a University

under the UGC Act, 1956 and further, the graduation certificate issued by the Indian Army has not been recognized by the Ministry of HRD, Government of India. It is further submitted that the **Division Bench of Allahabad High Court** by order dated 19/11/2014 passed in Writ-C No.60706 of 2014 *[Jai Vijay Singh vs. Union of India, through Secretary & Others]* has held that graduation certificate issued by the Indian Army cannot be treated as an embodiment of an educational qualification awarded either by a University or by any other educational institution or by an entity declared to be a deemed University. Therefore, the said certificate does not fulfil the minimum educational qualification as mentioned in the guidelines for allotment of LPG Distributorship. It is further submitted that when the Division Bench of Allahabad High Court has held that the graduation certificate issued by the Indian Army is not equivalent to the educational qualification as required for allotment of LPG Distributorship, then the Single Judge of Punjab & Haryana High Court should not have passed the judgment in the case of *Krishan Singh Yadav* (supra) which runs contrary to the judgment of Division Bench of Allahabad High Court because the judgment passed by the Division Bench of Allahabad High Court is binding on the Single Judge of another High Court and in the light of the judgment passed by the Supreme Court in the case of *National Insurance Company Limited vs. Pranay Sethi & Others* reported in 2018(2) MPLJ 344, the Single Judge of Punjab & Haryana High Court should have referred the matter to a Larger Bench.

4. Heard the learned counsel for the parties.

5. This Court could not understand as to how a Single Judge of one High Court can refer the Judgment, passed by Division Bench of another High Court to a Larger Bench ? The Supreme Court in the case of *East India Commercial Company Limited, Calcutta & Another vs. The Collector of Customs, Calcutta,* reported in AIR 1962 SC 1893 and it was held as under:-

> **"(14)** It is also said that the decision of a High Court on a point of law is binding on all inferior Tribunals within its territorial jurisdiction. It is, therefore, contended that the Collector is bound by the decision of Sen. J., to which I have earlier referred, that the breach of a condition of a licence is not a breach of the order under which the licence was issued and the condition imposed, As at present advised I am not prepared to subscribe to the view that the decision of a High Court is so binding. But it seems to me that the question does not arise, for even if the decision of the High Court was binding on the Collector, that would not affect his jurisdiction. All that it would establish is that the Collector would have. while exercising his jurisdiction, to hold that the breach of a condition of the licence is not a breach of an order. Its only effect would be that the appellants would not have to establish independently as a proposition of law that a breach of a condition of a licence is not the breach of an order under which it had been issued but might for that purpose rely on the

judgment of Sen, J.

* * *

(29) As we have already noticed in the earlier stage of the judgment, the notice issued by the respondent charges the appellants thus:

> "One of the conditions of the special licence was that the goods would be utilized for consumption as raw material or accessories in the factory of the licence-holder and no part thereof would be sold to other parties, but in contravention of that condition the appellants sold a part of the goods imported to a third party and as the goods had been caused to be issued by fraudulent misrepresentation, they were liable to be confiscated under s. 167(8) of the Sea Customs Act."

Section 167 (8) of the Sea Customs Act can be invoked only if an order issued under s. 3 of the Act was infringed during the course of the import or export. The division Bench of the High Court held that a contravention of a condition imposed by a licence issued under the Act is not an offence under s. 5 of the Act. This raises the question whether an administrative tribunal can ignore the law declared by the highest court in the State and initiate proceedings in direct violation of the law so declared. Under Art,. 215, every High Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself. Under Art. 226, it has a plenary power to issue orders or writs for the enforcement of the fundamental rights and for any other purpose to any person or authority, including in appropriate cases any Government, within its territorial jurisdiction. Under Art. 227 it has jurisdiction over all courts and tribunals throughout the territories in relation to which it exercise jurisdiction. It would be anomalous to suggest that a tribunal over which the High Court has superintendence can ignore the law declared by that court and start proceedings in direct violation of it. If a tribunal can do so, all the sub-ordinate courts can equally do so, for there is no specific, provision, just like in the case of Supreme Court, making the law declared by the High Court binding on subordinate courts. It is implicit in the power of supervision conferred on a superior tribunal that all the tribunals subject to its supervision should conform to the law laid down by it. Such obedience would also be conducive to their smooth working: otherwise there would be confusion in the administration of law and respect for law would irretrievably suffer. We, therefor, hold that the law declared by the highest court in the State is binding on authorities or tribunals under its superintendence, and that they cannot ignore it either in initiating a proceeding or deciding on the rights involved in such a proceeding. If that be so, the notice issued by the authority signifying the launching of proceedings contrary to the law laid down by the High Court would be in. valid and the proceedings themselves would be without jurisdiction."

6. Thus, it is clear that the judgment passed by the Highest Court of the State is binding on the subordinate courts/Tribunals/ authorities of the same State because of power of superintendence enjoyed by the Highest Court of the State. However, the judgment passed by one High Court is not binding on the another High Court although it may have a persuasive value.

7. The Supreme Court in the case of *Valliamma Champaka Pillai vs. Sivathanu Pillai and Others,* reported in (1979) 4 SCC 429 has held as under:-

> **"21.** These erroneous decisions of the Travancore Court, at best, have a persuasive effect and not the force of binding precedents on the Madras High Court. There is nothing in the States Reorganization Act 1956 or any other law which exalts the ratio of those decisions to the status of a binding law nor could the ratio decidendi of those decisions be perpetuated by invoking the doctrine of stare decisis."

8. Thus, the contention of the petitioner that the Single Judge of Punjab & Haryana High Court should not have distinguished the judgment passed by the Division Bench of Allahabad High Court and should have referred the matter to the Larger Bench is *per se* misconceived and is hereby **rejected.**

9. Now, the only question for consideration is that whether the graduation certificate issued by the Indian Army can be treated at par with the graduation certificate issued by any University or not ?

10. Clause 7.1.ii. of the Guidelines for Selection on Regular LPG Distributorship, 2011 reads as under:-

> 7.1.ii. **The applicant should**
>
> have minimum any one of the following educational qualification awarded by any of the Universities incorporated by an Act of the Central or State Legislature in India or any other educational institutions established by an Act of Parliament or declared to be deemed as a University under the UGC Act, 1956, or possess an equivalent qualification recognized by the Ministry of HRD, Government of India as on the date of application:-
>
> a) Graduation in any field.
>
> b) Chartered Accountant
>
> c) Company Secretary
>
> d) Cost Accountant
>
> e) Diploma in Engineering. "

11. From the plain reading of aforesaid provisions, it is clear that if any candidate possesses an equivalent qualification recognized by the Ministry of HRD, Government of India, then he shall also be entitled for allotment of LPG Distributorship. In the present case, the petitioner was working as Havaldar in the Indian Army who sustained a bullet injury while he was posted at the Border. The Directorate General Resettlement has issued an eligibility certificate certifying that the petitioner is eligible for allotment of LPG Distributorship.

12. In the first round of litigation when the candidature of the petitioner was cancelled due to educational qualification, then he had approached this Court by filing a Writ Petition No.424/2012 which was disposed of by this Court with the following observations:-

> **"(6)** Technically speaking, I find force in the argument of learned senior counsel Shri Jain that petitioner's case does not fall within the eligibility clause 7.1(ii) because the petitioner's certificate is not treated as equivalent by UGC or by the Ministry of HRD. However, in the considered opinion of this Court, the DOP&T is a model department and its circulars and general provisions are made applicable to Ministries of other departments. Considering this aspect, I deem it proper to remit the matter back for consideration by the Indian Oil Corporation.
>
> **(7)** Accordingly, the petitioner shall submit a detailed representation along with aforesaid relevant documents and submit it before the respondents No. 2 and 3. In turn, the respondents No.2 and 3 shall reconsider the aspect dispassionately and shall decide whether the notification of DOP&T and Association of Indian Universities can make the petitioner eligible. After proper application of mind, the petitioner's case be decided by a reasoned order. The entire exercise be completed within 30 days."

13. If Clause 7.1.ii of the Guidelines for Selection on Regular LPG Distributorship, 2011 is read, then it is clear that any candidate who possesses an equivalent qualification recognized by the Ministry of HRD, Government of India as on the date of application, then he is also treated to be holding the educational qualification mentioned in sub-clauses(a) to (e) of Clause 7.1.ii of the Guidelines. Neither the petitioner nor the respondents have filed any circular/notification of the Ministry of HRD, Government of India, thereby recognizing the graduation certificate issued by the Indian Army. However, the petitioner has relied upon the judgment passed by Punjab & Haryana High Court in the case of *Krishan Singh Yadav* (supra), in which it has been mentioned that the Ministry of Human Resources Development of the Government of India has issued a notification dated 31.04.1996 wherein it has been declared that qualifications recognized for the purpose of recruitment to superior posts and services under the Central Government whose equivalence does not exist

otherwise, to be recognized qualifications for the purposes of employment under the Central Government for which graduation is a prescribed qualification.

14. Now, the only question for consideration is that whether the graduation certificate which has been issued by the Indian Army, has to be confined to the recruitment to Class-C post or it can be used for other purposes.

15. The respondents/Indian Oil Corporation has not pointed out as to why a special category of Defence Personnel has been created in the Guidelines for Selection on Regular LPG Distributorship. The basic purpose for creating a special category appears to be to provide avenues for grant of LPG Distributorship to the Ex-Army personnel who are covered by the definition of "Defence Personnel" as mentioned in the Guidelines. The Defence personnel would certainly include an Army-man holding the lowest post up-to the Highest post. It is not the case of the respondents that the minimum qualification for appointment to lowest post in the Army is graduation. Therefore, there are several posts for which the minimum qualification is less than graduation. Even for the Post of Sepoy in the Army, the minimum qualification is less than graduation. Every Army-man during his service period can be posted at the Border irrespective of the post which he might be holding and any Army-man may suffer disability on his duty. The counsel for the respondents could not point out the rationale behind distinction between an Army-man holding the graduate degree and an Army-man not holding the graduate degree issued by an University. Therefore, it is held that if the graduation certificate issued by Indian Army is confined to the recruitment to Class-C post, then it would frustrate the very purpose of creating the special category for allotment of LPG Distributorship under the Guidelines.

16. It is well-established principle of law that if an interpretation of provision leads to an absurdity or frustrates the mandate of Articles 14, 19 of the Constitution of India, then it must be avoided. The Supreme Court in the case of *Corporation Bank vs. Saraswati Abharansala and Another,* reported in (2009) 1 SCC 540 has held as under :-

> **"24.** The statute furthermore, it is trite, should be read in the manner so as to do justice to the parties. If it is to be held, without there being any statutory provision that those who have deposited the amount in time would be put to a disadvantageous position and those who were defaulters would be better placed, the same would give rise to an absurdity. Construction of the statute which leads to confusion must be avoided."

17. Therefore, it is held that the graduation certificate issued by the Indian Army cannot be confined to the recruitment of an Ex-Army-man on Class-C post only.

18. However, the notification dated 31.04.1996 issued by the Ministry of Human Resources Development of the Government of India is not on record.

19. Accordingly, the order dated 30/09/2013 (Annexure P1) issued by the respondents is hereby quashed.

20. The respondents are directed to reconsider the educational qualification of the petitioner in the light of notification dated 31/04/1996 issued by the Ministry of Human Resources Development of the Government of India. Let the entire exercise be completed within a period of **three months** from the date of receipt of certified copy of this order. While deciding the question of educational qualification of the petitioner, if the respondents come to a conclusion that the petitioner does not hold the minimum qualification as required under the Guidelines, then they are directed to pass a specific speaking order, pointing out as to why the notification dated 31.04.1996 issued by the Ministry of Human Resources Development, Government of India will not come to the rescue of the petitioner specifically when this Court has already held that the graduation certificate issued by the Indian Army cannot be confined to the recruitment to Class-C post only, but it applies for allotment of LPG Distributorship also and the Directorate General Resettlement has also issued the eligibility certificate, thereby certifying that the petitioner is eligible for allotment of LPG Distributorship.

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

Order accordingly

I.L.R. [2021] M.P. 230
WRIT PETITION

Before Mr. Justice G.S. Ahluwalia

WP No. 15061/2020 (Gwalior) decided on 7 October, 2020

SURENDRA KUMAR JAIN …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

A. Constitution – Article 226 and Limitation Act (36 of 1963), Section 7 – Scope & Jurisdiction – Cause of Action – **Petitioner retired in 2013 and petition filed in 2020 – Held – Period of limitation u/S 7 for recovery of wages is 3 years – Although period of limitation does not apply to writ jurisdiction, but a litigant cannot wake up belatedly and claim benefits of judgments passed in other cases – Cause of action would not arise when the claim of a similarly situated litigant is allowed. (Para 6)**

क. संविधान – अनुच्छेद 226 एवं परिसीमा अधिनियम (1963 का 36), धारा 7 – व्याप्ति व अधिकारिता – वाद हेतुक – याची 2013 में सेवा निवृत्त हुआ एवं 2020 में याचिका प्रस्तुत की – अभिनिर्धारित – वेतन की वसूली हेतु, धारा 7 के अंतर्गत परिसीमा की अवधि 3 वर्ष है – यद्यपि रिट अधिकारिता के लिए परिसीमा की अवधि लागू नहीं होती परंतु एक मुकदमेबाज विलंबित रूप से जाग कर अन्य प्रकरणों में पारित निर्णयों के लाभों का दावा नहीं कर सकता – वाद हेतुक तब उत्पन्न नहीं होगा जब समान रूप से स्थित मुकदमेबाज का दावा मंजूर किया गया हो।

***B. Service Law – Pension – Cause of Action* – Held – Any deficiency in pension would result in recurring cause of action as in the case of petitioner – Since petition has been filed after 7 years of accrual of cause of action, petitioner would not be entitled for arrears for a period beyond 3 years – He will be entitled for arrears and interest for last 3 years only – Re-fixation of pension directed after adding increment – Petition disposed.**

(Paras 10 to 14)

ख. सेवा विधि – पेंशन – वाद हेतुक – अभिनिर्धारित – पेंशन में किसी कमी से आवर्ती वाद हेतुक परिणामित होगा जैसा कि याची के प्रकरण में है – चूंकि याचिका वाद हेतुक प्रोद्भूत होने के 7 वर्ष पश्चात् प्रस्तुत की गयी है, याची, 3 वर्ष से परे की अवधि के बकाया हेतु हकदार नहीं होगा – वह केवल पिछले 3 वर्ष के बकाया एवं ब्याज हेतु हकदार होगा – वेतनवृद्धि जोड़ने के पश्चात् पेंशन का पुनः निर्धारण करने के लिए निदेशित किया गया – याचिका निराकृत।

Cases referred :

W.P. No. 15732/2017 decided on 15.09.2017 (Madras High Court), SLP (Civil) Diary No. 22283/2018 (Supreme Court), W.A. No. 363/2020 decided on 06.03.2020 (DB), (2008) 8 SCC 648, W.A. No. 645/2020 order passed on 22.09.2020 (DB), W.P. No. 11480/2020 order passed on 29.08.2020.

Neeraj Shrivastava, for the petitioner.
Abhishek Sharma, P.L. for the State.

(Supplied: Paragraph numbers)

O R D E R

G.S. AHLUWALIA, J. :- Heard through video conferencing.

This petition under Article 226 of the Constitution of India has been filed seeking the following reliefs:-

> ''(7.1) पिटीशनर द्वारा प्रस्तुत पिटीशन को स्वीकार करते हुए, पिटीशनर को दिनांक 01.07.2013 को देय वार्षिक वेतन वृद्धि वेतनमान 9300–34800+4200 ग्रेड–पे में, माननीय उच्च न्यायालय प्रिसीपल सीट जबलपुर के प्र0क0 डब्ल्यू0पी0 18030/2019, राजेन्द प्रसाद तिवारी विरूद्ध म0प्र0राज्य व अन्य में जारी दिशा–निर्देश दिनांक 03.12.2019

एवं माननीय उच्च न्यायालय प्रिसीपल सीट जबलपुर का प्रकरण डब्ल्यूए0 363/2020 म0प्र0 राज्य व अन्य विरूद्ध राजेन्द्र प्रसाद तिवारी जारी दिशा–निर्देश दिनांक 06/03/2020 एवं अन्य समान दिशा–निर्देश के क्रम में स्वीकृत कर प्रदान करते हुए, पुनः वेतन निर्धारण कर एवं सेवाहित लाभ/सेवानिवृत लाभों पेशन आदि का पुर्न निर्धारण कर अंतर की राशि का भुगतान निर्धारित ब्याज सहित 30 दिवस में स्वीकृत कर भुगतान करने के आदेश–निर्देश रेस्पोन्डेन्ट्स को दिये जाने की कृपा करें।

(7.2) अन्य उचित रिट, आदेश अथवा निर्देश न्याय हित में पिटीशनर के पक्ष में जारी करने की कृपा करें, प्रकरण व्यय रेस्पोन्डेन्ट्स से दिलाये जाने की कृपा करें।''

2. It is submitted by the counsel for the petitioner that the petitioner stood retired on 30/06/2013, whereas the next increment was payable from 01/07/2013 which has not been paid. It is submitted by the counsel for the petitioner that the judgment dated 15/09/2017 passed by the Madras High Court in the case of *P. Ayyamperumal vs. The Registrar, Central Administrative Tribunal & Others* passed in W.P.No. 15732/2017 was upheld by the the Supreme Court in SLP (Civil) Diary No.(s) 22283/2018. Review Petition (C) No.1731/2019 was also dismissed by order dated 02/08/2019. Further, the Division Bench (Principal Seat) of this Court in the case of *State of MP & Others vs. Rajendra Prasad Tiwari* (Writ Appeal No.363/2020) by judgment dated 06/03/2020, has dismissed the writ appeal filed by the State and has held that the employee retiring on 30th June of a particular year is also entitled for the increment which was payable from 1st of July of the said year. Further, it is submitted that the petitioner has retired on 30/06/2013, but the increment which was payable from 01/07/2013, has not been paid and accordingly, he is entitled for the arrears as well as for re-fixation of his pension.

3. *Per contra,* the petition is opposed by the counsel for the State on the ground of delay and laches. It is submitted that the petitioner had retired on 30/06/2013, whereas the petition has been filed in the year 2020, therefore, the petition is liable to be dismissed on the ground of delay and laches.

4. Heard the learned counsel for the parties.

5. So far as the question of delay and laches is concerned, it is the case of the petitioner that since, a petition arising out of similar circumstances was allowed by the Madras High Court in the case of *P. Ayyamperumal* (Supra) in the year 2017 and the S.L.P. filed by the State was dismissed in the year 2018, therefore, it cannot be said that there was any delay on the part of the petitioner. It is further submitted that the petitioner decided to challenge the non-grant of increment which was payable to him w.e.f. 1-7-2013, only after coming to know that a

similar claim has been allowed by the Supreme Court. Thus, it is submitted that this petition does not suffer from delay and laches.

6. As per Article 7 of Indian Limitation Act, 1963, the period of limitation for recovery of wages is three years. Although the period of limitation does not apply to the writ jurisdiction, but a litigant cannot wake up belatedly and claim benefits of the judgments passed in the cases where some diligent person had approached the Court within a reasonable time. The explanation submitted by the petitioner for explaining the delay cannot be accepted. The cause of action would not arise when the claim of a similarly situated litigant is allowed. The cause of action means a fact or bundle of facts that enable a person to bring an action against another. A judgment passed in the case of another litigant cannot be said to be a cause of action. The Supreme Court in the case of *State of Karnataka Vs. S.N. Katrayya,* reported in (1996) 6 SC 267 has held as under :

> **9.** Thus considered, we hold that it is not necessary that the respondents should give an explanation for the delay which occasioned for the period mentioned in sub-sections (1) or (2) of Section 21, but they should give explanation for the delay which occasioned after the expiry of the aforesaid respective period applicable to the appropriate case and the Tribunal should be required to satisfy itself whether the explanation offered was proper explanation. In this case, the explanation offered was that they came to know of the relief granted by the Tribunal in August 1989 and that they filed the petition immediately thereafter. That is not a proper explanation at all. What was required of them to explain under sub-sections (1) and (2) was as to why they could not avail of the remedy of redressal of their grievances before the expiry of the period prescribed under sub-section (1) or (2). That was not the explanation given. Therefore, the Tribunal is wholly unjustified in condoning the delay.
>
> (underline supplied)

7. Thus, the petitioner cannot claim that he woke up only after the claim of a diligent litigant was allowed by the Court, therefore, there was no delay on the part of the petitioner.

8. Now the only question which requires consideration is that whether the question of pension would ever become barred by time or not?

9. The Supreme Court in the case of *Union of India v. Tarsem Singh,* reported in (2008) 8 SCC 648 has held as under :

> **7.** To summarise, normally, a belated service related claim will be rejected on the ground of delay and laches (where remedy is sought by filing a writ petition) or limitation (where remedy is sought by an application to the Administrative Tribunal). One of the exceptions to the said rule is cases relating to a continuing wrong. Where a service related claim is based on a

> continuing wrong, relief can be granted even if there is a long delay in seeking remedy, with reference to the date on which the continuing wrong commenced, if such continuing wrong creates a continuing source of injury. But there is an exception to the exception. If the grievance is in respect of any order or administrative decision which related to or affected several others also, and if the reopening of the issue would affect the settled rights of third parties, then the claim will not be entertained. For example, if the issue relates to payment or refixation of pay or pension, relief may be granted in spite of delay as it does not affect the rights of third parties. But if the claim involved issues relating to seniority or promotion, etc., affecting others, delay would render the claim stale and doctrine of laches/limitation will be applied. Insofar as the consequential relief of recovery of arrears for a past period is concerned, the principles relating to recurring/successive wrongs will apply. As a consequence, the High Courts will restrict the consequential relief relating to arrears normally to a period of three years prior to the date of filing of the writ petition.
>
> (underline supplied)

10. Thus, so far as the question of pension is concerned, any deficiency in the same would result in recurring cause of action. Therefore, it cannot be said that the entire petition suffers from delay and laches because the petitioner has a recurring cause of action, as the re-fixation of pension would certainly affect the pension which the petitioner is currently receiving. However since, the petition has been filed after seven years of accrual of cause of action i.e., 1-7-2013, therefore, he would not be entitled for arrears for a period beyond three years.

11. At this stage, it is submitted by the Counsel for the petitioner, that the Division Bench of this Court, in the case of *Yogendra Singh Bhadauriya and another Vs. State of M.P.,* by order dated 22-9-2020 passed in W.A. No. 645 of 2020, has granted arrears from the date of retirement.

12. Considered the submissions made by the Counsel for the petitioner.

13. In the case of *Yogendra Singh Bhadauriya* (Supra), the learned Single Judge, while directing the State to consider the case of the petitioners, had directed that the petitioners shall not be entitled for arrears and interest thereupon. Accordingly, the direction that the petitioners shall not be entitled for arrears and interest at all, was set aside in W.A. No. 645 of 2020. However, the question that whether the petitioner would be entitled for arrears for a period of three years only or not was not the subject matter of the W.A. No. 645 of 2020. In the light of the judgment passed by the Supreme Court in the case of *Tarsem Singh* (Supra) it is held that the petitioner shall be entitled for arrears and interest for the last three years only. A similar view has been taken in the case of *Dr. Subhash Kakkad Vs. State of M.P.* by order dated 29-8-2020 in W.P. No. 11480 of 2020.

14. Accordingly, it is directed that the pension of the petitioner be re-fixed after adding increment which was payable from 01/07/2013. However, it is directed that the petitioner shall be entitled for the arrears of last three years and shall not be entitled for the arrears for the period prior to three years. Since the petitioner is found to be entitled for his increment which was payable from 01/07/2013, therefore, the arrears of three years shall carry interest @ 6% per annum till the final payment is made.

15. With aforesaid observations, this petition is **finally disposed of.**

Order accordingly

I.L.R. [2021] M.P. 235
WRIT PETITION
Before Mr. Justice Vishal Mishra
WP No. 9013/2020 (Gwalior) decided on 15 December, 2020

MAHENDRA SINGH AMB …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

A. ***Service Law – Transfer – Grounds*** **– Held – Transfer is a condition of service and normally Court should refrain from interfering into transfer orders until and unless it is an outcome of *malafide* or passed by incompetent authority or are changing the service conditions of employee or disturbing the seniority etc. – No such grounds available to petitioner – Petition dismissed. (Para 15)**

क. *सेवा विधि – स्थानांतरण – आधार* – अभिनिर्धारित – स्थानांतरण सेवा की एक शर्त है तथा सामान्यतः न्यायालय को स्थानांतरण आदेशों में तब तक हस्तक्षेप करने से विरत रहना चाहिए जब तक कि यह असद्भावना का परिणाम न हो या अक्षम प्राधिकारी द्वारा पारित किया गया न हो या कर्मचारी की सेवा शर्तों में परिवर्तन या वरिष्ठता इत्यादि प्रभावित न करते हों – याची के पास ऐसे कोई आधार उपलब्ध नहीं – याचिका खारिज।

B. ***Service Law – Transfer Policy*** **– Held – Division Bench of this Court has concluded that in case transfer is alleged to be contrary to policy, the appropriate remedy is to approach the authority themselves by filing a representation seeking cancellation/ modification of transfer orders. (Para 16 & 18)**

ख. *सेवा विधि – स्थानांतरण नीति* – अभिनिर्धारित – इस न्यायालय की खंड पीठ ने निष्कर्षित किया है कि यदि स्थानांतरण का नीति के विपरीत होना अभिकथित है, तो

स्थानांतरण आदेशों का रद्दकरण/उपांतरण चाहते हुए एक अभ्यावेदन प्रस्तुत कर प्राधिकारी के समक्ष जाना समुचित उपचार है।

***C. Service Law – Transfer – Recommendation by Political Person* – Held – If the work of a person is not found to be satisfactory then the recommendation can be made by political person for transferring the employee. (Para 10)**

ग. सेवा विधि – स्थानांतरण – राजनैतिक व्यक्ति द्वारा सिफारिश – अभिनिर्धारित – यदि एक व्यक्ति का कार्य संतोषजनक नहीं पाया जाता है तब राजनैतिक व्यक्ति द्वारा कर्मचारी को स्थानांतरित करने हेतु सिफारिश की जा सकती है।

***D. Service Law – Post of Current Charge* – Held – No relief can be extended to petitioner who was holding the post of current charge and was transferred on a vacant and regular post – Petitioner has no right to claim for holding a post of current charge. (Para 9 & 18)**

घ. सेवा विधि – वर्तमान प्रभार का पद – अभिनिर्धारित – उस याची को कोई अनुतोष नहीं दिया जा सकता जो कि वर्तमान प्रभार के पद को धारण किये हुए था तथा एक रिक्त और नियमित पद पर स्थानांतरित कर दिया गया था – याची को वर्तमान प्रभार का पद धारण करने का दावा करने का कोई अधिकार नहीं है।

***E. Constitution – Article 226 – Transfer – Judicial Review – Scope* – Held – Apex Court concluded that transfer is a part of service condition of employee which should not be interfered ordinarily by Court of law in exercise of discretionary jurisdiction under Article 226 unless Court finds that either the order is *malafide* or against service rules or passed by incompetent authority. (Para 13)**

ङ. संविधान – अनुच्छेद 226 – स्थानांतरण – न्यायिक पुनर्विलोकन – विस्तार – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया है कि स्थानांतरण, कर्मचारी की सेवा शर्त का एक भाग है जिसमें साधारणतया न्यायालय द्वारा अनुच्छेद 226 के अंतर्गत वैवेकिक अधिकारिता का प्रयोग करते हुए तब तक हस्तक्षेप नहीं किया जाना चाहिए जब तक कि न्यायालय यह न पाये कि आदेश असद्भावपूर्वक किया गया है या सेवा नियमों के विपरीत है या अक्षम प्राधिकारी द्वारा पारित है।

Cases referred:

AIR 1993 SC 2444, (1993) 1 SCC 148, (2001) 8 SCC 574, (2001) 5 SCC 508, (1989) 2 SCC 602, (2009) 8 SCC 337, 2007 ILR M.P. 1329, ILR (2015) MP 2556, AIR 1993 SC 2273, 2020 (2) M.P.L.J. 88, (2013) 15 SCC 732, 2007 (8) SCC 150.

D.P. Singh, for the petitioner.
M.P.S. Raghuvanshi, Addl. A. G. for the respondent/State.

O R D E R

VISHAL MISHRA, J. :- Heard through Video Conferencing.

The present petition is being filed challenging the order dated 23.6.2020 passed by the respondent no.1, whereby the petitioner has been transferred from District Datia to District Morena. It is submitted that the transfer of the petitioner is within a short span of 9 months, therefore, the same falls under the purview of frequent transfers. It is further argued that the transfer of the petitioner is made just to accommodate the respondent no.4 as the respondent no.4 is politically influential person and just to post him at Datia the petitioner has been subjected to transfer.

2. The petitioner was initially appointed as Asstt. Statistical Officer in the year 1994 and thereafter was promoted to the post of Child Development Project Officer in the year 1998. He was made Asstt. Director in the year 2013. And from the date of initial appointment the petitioner is discharging his duties with utmost devotion and sincerity. The petitioner could not be further promoted owing to the interim order passed by the Hon'ble Supreme Court with respect to the cases of promotions and in pursuance to the same the State Government has not convened the D.P.C. On 20th December, 2013 the petitioner was posted at Morena in the office of Joint Director and was transferred in December, 2015 to District Bhind, where he continued to work up to September, 2019. Thereafter the petitioner has been transferred from District Bhind to District Datia vide order dated 14.9.2019 Annexure P/2. In pursuance to the transfer order the petitioner was relieved from District Bhind on 18.9.2019 and assumed the charge of the D.P.O on 19th September, 2019. It is submitted that within a short span of 9 months the petitioner has again been subjected to transfer by the impugned order, just to accommodate the respondent no.4, who is a politically influential person. It is argued that the entire country is going through the phase of pandemic COVID-19 and the petitioner was working at District Datia with utmost devotion and sincerity and was taking care of the Woman and Child Development Department, wherein various beneficiaries were in flow during this COVID-19 pandemic, but all of a sudden the petitioner has been subjected to transfer on political instructions with an ulterior motive to accommodate the respondent no.4, who has already worked at District Datia for last several years.

3. The petitioner has further pointed out that the transfer order is in-violation of clause 11.11 of the transfer policy, wherein it is categorically mentioned that in case of complaints transfer being made on the complaints the same should be considered only when the complaint is investigated and final opinion is given regarding the guilt of the employee. The petitioner has also preferred a detailed representation to the respondents authorities highlighting all the facts and requested the authorities to cancel the transfer order.

4. The respondents by filing a return has denied all the averments of the petitioner and has argued that transfer is an incident of service and the transfer of the petitioner is being made on administrative grounds. It is not a case of frequent transfer as the petitioner has worked in Morena 2 ½ years prior to his transfer. There was a requirement of work of the petitioner at District Morena, therefore, he has been subjected to transfer on administrative grounds. Even otherwise, the transfer is an incident of service as has been held by the Hon'ble Supreme Court in large number of cases for which the reliance has been placed on the judgments passed by the Hon'ble Supreme Court in the case of *Union of India and others Vs. S.L. Abbas,* AIR 1993 SC 2444, *Rajendra Roy Vs. Union of India,* (1993) 1 SCC 148, *National Hydroelectric Power Corporation Ltd. Vs. Shri Bhagwan,* (2001) 8 SCC 574, *State Bank of India Vs. Anjan Sanyal,* (2001) 5 SCC 508, *Gujarat Electricity Board Vs. Atmaram Sungaomal Poshani,* (1989) 2 SCC 602. *Airports Authority of India Vs. Rajeev Rataan Pandey,* (2009) 8 SCC 337. It is argued that the Division Bench of this Court in the case of *R.S. Chaudhary and others Vs. State of M.P. and others,* 2007 ILR M.P. 1329 has categorically held that transfer in-violation of condition of the transfer policy if the only remedy which could be granted to the petitioner is that the direction is to be given to decided (sic: decide) the representation to the authorities. Further in the Division Bench of the case in *Mridul Kumar Sharma Vs. State of M.P.,* ILR (2015) MP 2556 has held that the representation given by the petitioner with respect to his transfer will only be considered after the petitioner has submitted his joining at the transferred place. In view of the aforesaid laws laid down by the Hon'ble Supreme Court, it is contended that as the transfer is made on administrative grounds, therefore, the interference by this Court in transfer order is not required.

5. Learned Additional Advocate General has further pointed out that the petitioner is holding a current charge and is having no right to continue on the aforesaid post. The law with respect to holding of current charge is settled by the Hon'ble Supreme Court in the case of *State of Haryana Vs. S.M. Sharma and others,* AIR 1993 SC 2273, wherein the Hon'ble Supreme Court has held that the employee holding a current charge is having no right to ask for his continuance on the said post. The petitioner admittedly is holding a current charge. In these circumstances, the petitioner is having no right to ask to continue on the aforesaid post. Even otherwise by the impugned transfer order the petitioner has been transferred to a vacant regular post at Morena. In such circumstances, transfer of the petitioner within a period of 9 months on a vacant or regular post cannot be said to be an outcome of malafide and colourable exercise of powers. He has prayed for dismissal of the petition.

6. By way of rejoinder the petitioner has pointed out the fact that the transfer is being made on a political recommendation. It is further pointed out that on earlier occasion also the transfer order of other employees who were posted at

Datia were cancelled subsequently just to accommodate the respondent no.4. In such circumstances, the interference in transfer order should be made. He has relied upon the judgments passed by the Hon'ble Supreme Court in the case of *Manpal Rawat Vs. State of M.P. and others,* 2020 (2) M.P.L.J. 88, and in the case of *T.S.R. Subramanian and others Vs. Union of India and others,* (2013) 15 SCC 732 and order passed in W.P.No.11308/2020 Bench at Gwalior.

7. By refuting the contentions of the rejoinder the learned Additional Advocate General has argued that the recommendation by a political person can be made asking for transfer of a person on the allegations that the work has not satisfactory. He has placed reliance upon the judgment passed by the Hon'ble Supreme Court in the case of *Mohd. Masood Ahmad Vs. State of U.P. and others,* 2007 (8) SCC 150 and has argued that the recommendation is permissible. He has further produced the note-sheet of the recommendation made by the political person with respect to transfer of the petitioner and has pointed out that the aforesaid recommendation only speaks of the fact that the work of the petitioner is not satisfactory. In such circumstances, he should be transferred. He has prayed for dismissal of the petition.

8. Heard the learned counsel for the parties and perused the record.

9. From perusal of the record, it is seen that the petitioner was posted at Morena in the office of Joint Director on 20.12.2013 and after working therefor two years he was subjected to transfer to District Bhind in the year December, 2015, where he worked up to September, 2019. From District Bhind the petitioner has been transferred to District Datia and in pursuance to the transfer order vide order dated 14.9.2019 he was relieved on 18.9.2019 and he assumed the post of D.P.O on current charge on 19th September, 2019. It is not in dispute that the petitioner is working on the current charge to the post of D.P.O. Law is well settled with respect to holding of a post on current charge as has been held by the Hon'ble Supreme Court in the case of *S.M. Sharma* (supra). The relevant para is as under:

> "9. It is only a posting order in respect of two officers. With the posting of Ram Niwas as Executive Engineer Sharma was automatically relieved of the current duty charge (if the post of Executive Engineer. Sharma was neither appointed/promoted/ posted as Executive Engineer nor was he ever reverted from the said post. He was only holding current duty charge of the post of Executive Engineer. The Chief Administrator never promoted Sharma to the post of Executive Engineer and as such the question of his reversion from the said post did not arise. Under the circumstances the controversy whether the powers of the Board to appoint/promote a person to the post of an Executive Engineer were delegated to the chairman or to the chief Administrator. is wholly irrelevant.

> 10. Sharma was given the current duty charge of the post of Executive Engineer under the orders of the Chief Administrator and the said charge was also withdrawn by the same authority. We have already reproduced above Rule 4(2) of the General Rules and Rule 13 of the Service Rules. We are of the view that the Chief Administrator, in the facts and circumstances of this case. was within his powers to issue the two orders dated June 13. 1991 and January 6, 1992.
>
> 11. We are constrained to say that the High Court extended its extraordinary jurisdiction under Article 226 of the Constitution of India to a frivolity. No one has a right to ask for or stick to a current duty charge. The impugned order did not cause any financial loss or prejudice of any kind to Sharma. He had no cause of action whatsoever to invoke the writ jurisdiction of the High Court. It was a patient misuse of the process of the Court.

Thus, from the aforesaid it is apparently clear that the petitioner is having no right to claim for holding a post of current charge.

10. The next ground which is raised by the petitioner regarding his frequent transfer on the recommendation of a political person just to accommodate respondent no.4 is concerned, it is seen from the record that the petitioner has been subjected to transfer on administrative grounds by impugned order within a period of nine months from his earlier transfer order. The fact remains that the petitioner was holding a current charge post and by the impugned order he has been transferred on a vacant and regular post. The ground just to accommodate the respondent no.4 on a recommendation of a political Minister is concerned the law has also settled by the Hon'ble Supreme Court in the case of *Mohd. Masood Ahmad* (supra), wherein the Hon'ble Supreme Court has held as under:

> "4. The petitioner-appellant, who was an Executive Officer, Nagar Palika Parishad Muzaffarnagar, had in his writ petition challenged his transfer by the State Government by order dated 21.6.2005 as Executive Officer, Nagar Palika Parishad Mawana, District Meerut. Since the petitioner was on a transferable post, in our opinion, the High Court has rightly dismissed the writ petition since transfer is an exigency of service and is an administrative decision. Interference by the Courts with transfer orders should only be in very rare cases. As repeatedly held in several decisions, transfer is an exigency of service vide B. Varadha Rao Vs. State of Karnataka AIR 1986 SC 1955, Shilpi Bose vs. State of Bihar AIR 1991 SC 532, Union of India vs. N.P. Thomas AIR 1993 SC 1605, Union of India vs. S.L. Abbas AIR 1993 SC 2444, etc.
>
> 7. The scope of judicial review of transfer under Article 226 of

> the Constitution of India has been settled by the Supreme Court in Rajendra Rao vs. Union of India (1993) 1 SCC 148; (AIR 1939 SC 1236), National Hydroelectric Power Corporation Ltd. vs. Shri Bhagwan (2001) 8 SCC 574; (AIR 2001 SC 3309), State Bank of India vs. Anjan Sanyal (2001) 5 SCC 508; (AIR 2001 SC 1748). Following the aforesaid principles laid down by the Supreme Court, the Allahabad High Court in Vijay Pal Singh vs. State of U.P. (1997) 3 ESC 1668; (1998) All LJ 70) and Onkarnath Tiwari vs. The Chief Engineer, Minor Irrigation Department, U.P. Lucknow (1997) 3 ESC 1866; (1998 All LJ 245), has held that the principle of law laid down in the aforesaid decisions is that an order of transfer is a part of the service conditions of an employee which should not be interfered with ordinarily by a Court of law in exercise of its discretionary jurisdiction under Article 226 unless the Court finds that either the order is mala fide or that the service rules prohibit such transfer, or that the authorities who issued the orders, were not competent to pass the orders.
>
> 8. Learned counsel for the appellant submitted that the impugned transfer order of the appellant from Muzaffarnagar to Mawana, District Meerut was made at the instance of an MLA. On the other hand, it has been stated in the counter affidavit filed on behalf of respondent Nos. 1 & 2 that the appellant has been transferred due to complaints against him. In our opinion, even if the allegation of the appellant is correct that he was transferred on the recommendation of an MLA, that by itself would not vitiate the transfer order. After all, it is the duty of the representatives of the people in the legislature to express the grievances of the people and if there is any complaint against an official the State government is certainly within its jurisdiction to transfer such an employee. There can be no hard and fast rule that every transfer at the instance of an M.P. or MLA would be vitiated. It all depends on the facts & circumstances of an individual case. In the present case, we see no infirmity in the impugned transfer order."

From the aforesaid it is apparently clear that if the work of a person is not found to be satisfactory then the recommendation can be made by the political person for transferring the employee. In such circumstances, the petitioner has been transferred.

11. From the perusal of the note-sheets, it is apparently clear that no specific allegation with respect to the illegalities or irregularities being committed by the petitioner is mentioned, rather it is only mentioned that the work of the petitioner is not satisfactory, therefore, his transfer is recommended. In such circumstances, it cannot be said that inquiry is required on a particular complaint made against

the petitioner and only after obtaining the result of the inquiry and finding the guilt of the petitioner, the petitioner should have been transferred. Rather it is a case where a general allegations are made against the petitioner that his work is not satisfactory, therefore, the recommendation is made by the Minister to transfer the petitioner and in pursuance to the same the petitioner was holding the current charge has been subjected to transfer by the impugned order.

12. Law is well settled with respect to transfer by the Hon'ble Supreme Court in large number of cases. In the case of *S.L. Abbas* (supra) the Hon'ble Supreme Court has held as under:

> "6. An order of transfer is an incident of Government Service. Fundamental Rule 11 says that "the whole time of a Government servant is at the disposal of the Government which pays him and he may be employed in any manner required by proper authority". Fundemental Rule 15 says that "the President may transfer a government servant from one post to another". That the respondent is liable to transfer anywhere in India is not in dispute. It is not the case of the respondent that order of his transfer is vitiated by mala fides on the part of the authority making the order,- though the Tribunal does say so merely because certain guidelines issued by the Central Government are not followed, with which finding we shall deal later. The respondent attributed "mischief" to his immediate superior who had nothing to do with his transfer. All he says is that he should not be transferred because his wife is working at shillong, his children are studying there and also because his health had suffered a set-back some time ago. He relies upon certain executive instructions issued by the Government in that behalf. Those instructions are in the nature of guidelines. They do not have statutory force.
>
> 7. Who should be transferred where, is a matter for the appropriate authority to decide. Unless the order of transfer is vitiated by malafides or is made in violation of any statutory provisions, the Court cannot interfere with it. While ordering the transfer, there is no doubt, the authority must keep in mind the guidelines issued by the Government on the subject. Similarly if a person makes any representation with respect to his transfer, the appropriate authority must consider the same having regard to the exigencies of administration. The guidelines say that as far as possible, husband and wife must be posted at the same place. The said guideline however does not confer upon the government employee a legally enforceable right."

13. Further in the case of *Rajendra Roy* (supra), *National Hydroelectric Power Corporation Ltd.* (supra), *Anjan Sanyal* (supra), the Hon'ble Supreme Court has considered the scope of judicial review with respect to transfer against which the petitions are being filed under Article 226 of the Constitution of India and has stated that the transfer is a part of service condition of an employee which should not be interfered ordinarily by a court of law in exercise of its discretionary jurisdiction under Article 226 of the Constitution of India unless the court finds that either the order is malafide or that the service rules prohibit such transfer, or that the authorities who issued the orders, were not competent to pass transfer orders.

14. In the case of *Gujarat Electricity Board* (supra) the Hon'ble Supreme Court has held as under:

> "4. Transfer of a Government servant appointed to a particular cadre of transferable posts from one place to the other is an incident of service. No Government servant or employee of Public Undertaking has legal tight for being posted at any particular place. Transfer from one place to other is generally a condition of service and the employee has no choice in the matter. Transfer from one place to other is necessary in public interest and efficiency in the Public administration. Whenever, a public servant is transferred he must comply with the order but if there be any genuine difficulty in proceeding on transfer it is open to him to make representation to the competent authority for stay, modification or cancellation of the transfer order. If the order of transfer is not stayed, modified or cancelled the concerned public servant must carry out the order of transfer. In the absence of any stay of the transfer order a public servant has no justification to avoid or evade the transfer order merely on the ground of having made a representation, or on the ground of his difficulty in moving from one place to the other. If he fails to proceed on transfer in compliance to the transfer order, he would expose himself to disciplinary action under the relevant rules....."

In the case of *Rajendra Singh* (supra) the Hon'ble Supreme Court has held as under:

> "8. A Government Servant has no vested right to remain posted at a place of his choice nor can he insist that he must be posted at one place or the other. He is liable to be transferred in the administrative exigencies from one place to the other. Transfer of an employee is not only an incident inherent in the terms of appointment but also implicit as an essential condition of service in the absence of any specific indication to the contrary.

> No Government can function if the Government Servant insists that once appointed or posted in a particular place or position, he should continue in such place or position as long as he desires."

In the case of *Rajeev Ratan Pandey* (supra), the Hon'ble Apex Court has held as under:

> "10. In the writ petition, the transfer order has been assailed by the present Respondent No. 1 on the sole ground that it was violative of transfer policy framed by the appellant. The High Court, did not, even find any contravention of transfer policy in transferring the Respondent No. 1 from Lucknow to Calicut. In a matter of transfer of a government employee, scope of judicial review is limited and High Court would not interfere with an order of transfer lightly, be it at interim stage or final hearing. This is so because the courts do not substitute their own decision in the matter of transfer."

In the case of *Gobardhan Lal* (supra), the Hon'ble Supreme Court has held as under:

> "7. It is too late in the day for any Government Servant to contend that once appointed or posted in a particular place or position, he should continue in such place or position as long as he desires. Transfer of an employee is not only an incident inherent in the terms of appointment but also implicit as an essential condition of service in the absence of any specific indication to the contra in the law governing or conditions of service. Unless the order of transfer is shown to be an outcome of a mala fide exercise of power or violative of any statutory provision (an Act or Rule) or passed by an authority not competent to do so, an order of transfer cannot lightly be interfered with as a matter of course or routine for any or every type of grievance sought to be made. Even administrative guidelines for regulating transfers or containing transfer policies at best may afford an opportunity to the officer or servant concerned to approach their higher authorities for redress but cannot have the consequence of depriving or denying the competent authority to transfer a particular officer/servant to any place in public interest and as is found necessitated by exigencies of service as long as the official status is not affected adversely and there is no infraction of any career prospects such as seniority, scale of pay and secured emoluments. This Court has often reiterated that the order of transfer made even in transgression of administrative guidelines cannot also be interfered with, as they do not confer any legally enforceable rights, unless, as noticed supra, shown to be vitiated

> by mala fides or is made in violation of any statutory provision.
> 8. A challenge to an order of transfer should normally be eschewed and should not be countenanced by the Courts or Tribunals as though they are Appellate Authorities over such orders, which could assess the niceties of the administrative needs and requirements of the situation concerned. This is for the reason that Courts or Tribunals cannot substitute their own decisions in the matter of transfer for that of competent authorities of the State and even allegations of mala fides when made must be such as to inspire confidence in the Court or are based on concrete materials and ought not to be entertained on the mere making of it or on consideration borne out of conjectures or surmises and except for strong and convincing reasons, no interference could ordinarily be made with an order of transfer."

15. From the aforesaid it is apparently clear that the transfer is a condition of service and normally the Court should refrain from interfering into transfer orders until and unless the same are being an outcome of malafides or are passed by an incompetent authority or are changing the service conditions of the employee or disturbing the seniority etc. None of the grounds are available to the petitioner which are being available to the petitioner.

16. The petitioner has pointed that the transfer order is violative of clause 11.11 of the transfer policy. In such circumstances, the Division Bench of this Court has considered the aforesaid aspect in the case of *R.S. Chaudhary* (supra) has held that in case transfer is alleged to be contrary to the policy, the appropriate remedy of the petitioner is to approach the authority themselves by filing a representation seeking cancellation/ modification of the order of transfer.

17. Further the Division Bench of this Court recently in the case of *Mridul Kumar* (supra) has held as under:

> "5. Be that as it may, in the present case, it is not as if the two writ petitions were kept pending and inconsistent "interim relief" granted therein. In fact, both the writ petitions have been finally disposed of. However, in one case limited protection has been given to the writ petitioner therein by another Bench. In our opinion, in the light of the principle expounded by the Supreme Court, referred to above, the Court must eschew from issuing such direction
>
> - as it inevitably results in dictating the concerned Authority in respect of administrative matter within his domain. Accordingly, the decision pressed into service, cannot be treated as a binding precedent on the matter in issue and will be of no avail to the appellant."

18. Considering the aforesaid laws laid down by the Division Bench of this Court the only relief which could have been granted to the petitioner is that the petitioner could have preferred a detailed representation to the respondents authorities against his transfer order alleging all the grounds and in turn the authorities can be directed to decide the representation by a speaking order.

19. In such circumstances, no relief can be extended to the petitioner who was holding the post of current charge and has been subjected to transfer on a vacant and regular post in District Bhind. Accordingly, the petition sans merit and is hereby dismissed.

E-copy/Certified copy as per rules/directions.

Petition dismissed

I.L.R. [2021] M.P. 246
WRIT PETITION
Before Mr. Justice Sujoy Paul
WP No. 821/2014 (Jabalpur) decided on 16 December, 2020

ARUN NARAYAN HIWASE & ors. …Petitioners

Vs.

STATE OF M.P. & ors. …Respondents

(Alongwith WP No. 3518/2014)

***A. Service Law – Cancellation of Regularisation – Petitioners regularised on 20.07.1998 under the Regulation of 1988* – Vide administrative order dated 29.07.1998, Regulation of 1988 was nullified w.e.f. 13.07.1998 – Held – On date of regularization, previous regulation and instructions were in force and new regulation of 1998 was not in existence – Subsequent administrative order cannot take away the vested right – Regularisation cannot be cancelled – Petitions allowed. (Paras 13 to 15)**

क. सेवा विधि – नियमितीकरण का रद्दकरण – याचीगण 1988 के विनियम के अंतर्गत दिनांक 20.07.1998 को नियमित हुए – दिनांक 29.07.1998 के प्रशासनिक आदेश द्वारा, 1988 के विनियम को 13.07.1998 से प्रभावी रूप से अकृत किया गया था – अभिनिर्धारित – नियमितीकरण की तिथि को, पूर्व विनियम और अनुदेश प्रभावी थे तथा 1998 का नया विनियम अस्तित्व में नहीं था – पश्चात्वर्ती प्रशासनिक आदेश निहित अधिकार को नहीं छीन सकता – नियमितीकरण रद्द नहीं किया जा सकता–याचिकाएँ मंजूर।

***B. Service Law – Regulation of 1998 – Repeal & Saving Clause* – Held – The Repeal and Saving Clause of Regulation of 1998 protects such**

regularization/action which was taken pursuant to erstwhile Regulation and instructions. (Para 14)

ख. सेवा विधि – 1998 का विनियम – निरसन व व्यावृत्ति खंड – अभिनिर्धारित – 1998 के विनियम का निरसन और व्यावृत्ति खंड ऐसे नियमितीकरण/कार्रवाई को संरक्षित करता है जो कि पहले के विनियम और अनुदेशों के अनुसरण में किये गये थे।

***C. Service Law – Executive Order – Effect* – Held – Apex Court concluded that executive order of government cannot be made operative with retrospective effect. (Para 14)**

ग. सेवा विधि – कार्यपालिक आदेश – प्रभाव – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया है कि सरकार के कार्यपालिक आदेश को भूतलक्षी प्रभाव से प्रवर्तन में नहीं लाया जा सकता।

Cases referred :

AIR 1978 SC 851, (2002) 1 SCC 520, (2018) 15 SCC 463, (1972) 4 SCC 765, (1994) 1 SCC 437, (2006) 4 SCC 1.

Ashish Shroti, for the petitioners.
Swapnil Sohgaura, P.L. for the respondent No. 1.
Pranay Choubey, for the respondent Nos. 2 to 4.

O R D E R

SUJOY PAUL, J. :- These petitions take exception to the similar impugned order dated 29.11.2013 (Annx.P/8) whereby regularization order of petitioners dated 20.7.98 was cancelled and they were de-regularized.

2. The facts are taken from W.P.No.821/2014. The petitioners were working as daily rated employees from the dates prior to 31.12.1988. The Commissioner Mandi Board issued instructions dated 30.5.1988 (Annx.P/1) and 15.4.1993 (Annx.P/2) for the purpose of regularization of workers who were engaged prior to 31.12.1988. In furtherance of said instructions, Screening Committee was constituted which considered the cases of petitioners for regularization on 16.7.1998. It resulted with issuance of order dated 20.7.1998 (Annx.P/6) whereby petitioners were regularized on the post of Nakedar (Redesignated as Asst. Sub Inspector later on).

3. It is pointed out that one Shankar Lonare was promoted as Assistant Sub Inspector (ASI) at Mandi Samiti Sounsar (Chindwara) by order dated 27.7.98. Later on, he was reverted from the post of ASI which order was assailed by him by filing W.P.No.5670/2020. The present petitioners were also impleaded by him as

party respondents. The aforesaid petition was allowed by this court by order dated 14.10.2020 (Annx.P/7) and order of reversion was quashed. The said order of learned Single Judge was unsuccessfully challenged by the employer in W.A.No.52/2012 and before the Supreme Court.

4. Shri Ashish Shroti, learned counsel for the petitioner submits that impugned order dated 29.11.2013 (Annx.P/8) came as bolt from the blue to the petitioners whereby their regularization orders were cancelled unilaterally without following the principles of natural justice. This order is assailed by contending that petitioners were regularized as per the Regulation of 1988 and instructions which were *in vogue* when petitioners' claim for regularization was considered and subsequent regulation of 1998, namely, Rajya Mandi Board Sewa Viniyam, 1998 cannot have adverse effect on the regularization of petitioners. In Lonare's case, this court did not set aside the order of regularization of present petitioners. The case of present petitioners cannot be compared with Lonare's because Lonare was admittedly promoted on the post of ASI whereas present petitioners were regularized. Both belong to different Mandis and their cases were incomparable.

5. The next contention of Shri Shroti is that Shri Lonare continued on the post of ASI whereas petitioners regularization was cancelled thereby discrimination is caused by respondents. Section 26 of Krishi Upaj Mandi Adhiniyam and the administrative order dated 29.7.1998 (Annx.R/2) did not empower the employer to annul/ cancel the regularization order which was taken pursuant to decision dated 20.7.1998, the date when the previous regulation of 1988 was in force. The Regulation of 1998 (Repeal and Saving clause) also saved the previous action of regulation. It is further argued that the validity of the order impugned needs to be examined on the grounds mentioned therein and cannot be supported by furnishing new grounds by way of counter affidavit. Reliance is placed on AIR 1978 SC 851 *(Mohinder Singh Gill and another Vs. The Chief Election Commissioner and others)* and (2002) 1 SCC 520 *(Pavanendra Narayan Verma Vs. Sanjay Gandhi PGI of Medical Science & Anr.)*. Lastly, it is submitted that the impugned order is arbitrary and contrary to the principles of natural justice.

6. Countering the aforesaid arguments, Shri Pranay Choubey, learned counsel for the employer supported the impugned order on the basis of return filed. Shri Choubey urged that Section 26 of Krishi Upaj Mandi Adhiniyam was amended by notification dated 30.5.1997. As per amended section, the employer was required to constituted the service of employees of Board and the Marketing Committee. In furtherance thereof, two notifications were issued whereby Sanshodhan Adhiniyam was brought into force from 09.06.1998.

7. Shri Pranay Choubey placed reliance on administrative order dated 29.7.1998 whereby the new regulation namely Rajya Mandi Board Seva Viniyam, 1998 were made applicable w.e.f. 13.7.1998 and from that date, the erstwhile regulation of 1988 were made ineffective. It is submitted that the amended provision namely Section 26 read with the administrative order dated 29.7.1998 shows that consequent upon enforcement of these provisions, the post of Assistant Sub-Inspector became a post under Mandi Board Services. The Mandi Board alone had jurisdiction and competence to undertake the exercise of selection for filling the post of *Nakedar*/ASI after 15.6.97. In the present case, indisputably, the petitioners' regularisation order was not passed by the Mandi Board and therefore, their regularisation order was void *ab initio.* In view of (2018) 15 SCC 463 *[Union of India & Another Vs. Raghuwar Pal Singh],* the petitioners were not entitled to be heard before cancellation of regularisation order. Since their order of regularisation were passed by an incompetent authority, the principle of natural justice is not applicable. Lastly, it is argued that in view of the order of single bench in *Lonare* (supra), the petitioners' regularisation order were rightly cancelled.

8. Next submission is that the judgment of Supreme Court in *Mohinder Singh* (supra), has no application to the present case because the impugned order is an internal communication between the departmental authorities and no consequential order was passed by the authority on the basis of this internal communication dated 29.11.2013.

9. Parties confined their arguments to the extent indicated above.

10. I have heard counsel for the parties at length and perused the record.

11. Indisputably, the petitioners and Shri Lonare belong to the different *Mandi Samities.* Petitioners belong to Pandhurna whereas Shri Lonaray belong to the Mandi Samiti Saunsar. Similarly, the petitioners were regularised on the post of Nakedar/Assistant Sub Inspector whereas Shri Lonaray occupied that post on promotion.

12. This Court in W.P.No.5670/2000 gave an observation that the respondents acted in a discriminatory manner in not cancelling the promotions of proposed respondents (present petitioners). The respondents unsuccessfully assailed this order in W.A.No.52/2012. After becoming unsuccessful, they realised that question of discrimination may be a hurdle for them in arguing the SLP, therefore, the impugned order/communication dated 29.11.2013 was passed. This was passed on the basis of opinion of government advocate. The decision was taken to cancel the regularisation order so that the question/ground of discrimination in favour of Shri Lonare does not survive. For this singular reason, the petitioners' regularisation order was cancelled by treating them to be

illegal appointees.

13. The dates in the instant case are important and makes the present matter very interesting. The petitioners were admittedly regularised on 20.7.1998. On that date, admittedly, the regulation of 1998 was not applicable because of administrative order dated 29.7.1998 and the regulation of 1988 were applicable. The ancillary question arises whether this administrative order can take away the right of consideration of regularisation which accrued in favour of the petitioners as on 20.7.1998.

14. In my opinion, for three reasons, the fruits of regularisation of petitioners ripened on 20.7.1998 cannot be taken away. **Firstly;** the Regulation of 1998, (Repeal & Saving Clause) protects such regulation/action which was taken pursuant to erstwhile regulation and instructions. **Secondly;** the administrative order dated 29.7.1998 cannot take away the vested right in view of the (1972) 4SCC 765*[Ex-MajorN.C. Singhal Vs. Director General, Armed Forces Medical Services, New Delhi & Another].* The Apex Court held that the conditions of services of an employee cannot be altered or modified to his prejudice by a subsequent administrative order having retrospective effect. The same view is followed by the Supreme Court in the case of (1994) 1 SCC 437 *[Govind Prasad Vs. R.G. Prasad & Ors.].* It was poignantly held that an executive order of government cannot be made operative with retrospective effect. **Thirdly,** the singular reason to cancel the regularisation was to maintain the parity with Shri Lonare. Interestingly and admittedly, Shri Lonare continued in employment because of dismissal of writ appeal and SLP of the employer. Thus, if Lonare can be permitted to continue, the reversion on the ground of discrimination does not arise. Moreso, when admittedly the petitioners and Lonare are not similarly situated. Shri Lonare was a promotee of a different mandi whereas the petitioners occupied the post of Sub Inspector because of regularisation. The Constitution bench in (2006) 4 SCC 1 *[Secretary, State of Karnataka & Ors. Vs. Umadevi (3) & Ors.]* opined that as a one time measure, the regularisation is permissible and on the basis of subsequent instructions, the previous regularisation order need not to be disturbed.

15. As noticed above, I am unable to hold that when the petitioners were regularised, the action was void *ab initio* and contrary to regulation. For this reason, the judgment cited by Shri Choubey cannot be pressed into service.

16. For the reasons stated above, the impugned order dated 29.11.2013 cannot sustain judicial scrutiny and is accordingly set aside. It is pointed out that petitioner no.1, Arun Narayan Hiwase (in W.P.No.821/2014) died during the pendency of the case. Similarly, petitioner no.2 Ambadas Mahadeo retired on attaining the age of superannuation. Consequent upon setting aside of the impugned order, the legal representative of petitioner no.1 shall get the retiral

dues of petitioner no.1 in accordance with the rules whereas the petitioner no.2 shall get his own retiral dues as if he was never de-regularised.

17. The entire exercise be completed within 90 days from the date of production of this order.

18. The petitions are allowed.

Petition allowed

I.L.R. [2021] M.P. 251
WRIT PETITION

Before Mr. Justice Anand Pathak

WP No. 16370/2020 (Gwalior) decided on 21 December, 2020

DIPESH ARYA …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

***A. Municipalities (Reservation of Wards for Scheduled Castes, Scheduled Tribes, Other Backward Classes and Women) Rules, M.P., 1994, Rule 3 – Grounds for Reservation* – Held – Total percentage of SC population in any particular ward is to be seen and wards having most concentrated population of SC people are to be chosen for reservation of wards for SC category candidates – Respondents rightly reserved Ward No. 2 on basis of density of SC population rather than the numbers – No case for interference – Petition dismissed. (Paras 24, 25, 26 & 32)**

क. नगरपालिका (अनुसूचित जाति, अनुसूचित जनजाति, अन्य पिछड़ा वर्ग एवं महिलाओं के लिए वार्डों का आरक्षण), नियम, म.प्र., 1994, नियम 3 – आरक्षण हेतु आधार – अभिनिर्धारित – किसी विशिष्ट वार्ड में अनुसूचित जाति की जनसंख्या का कुल प्रतिशत देखा जाता है और अ.जा. लोगों की अधिकतम संकेन्द्रित जनसंख्या वाले वार्डों को अ.जा. श्रेणी के प्रत्याशियों हेतु वार्डों के आरक्षण के लिए चुने जाते हैं – प्रत्यर्थीगण ने उचित रूप से अ.जा. जनसंख्या के आंकड़ों की बजाए सघनता के आधार पर वार्ड क्र. 2 आरक्षित किया – हस्तक्षेप का प्रकरण नहीं – याचिका खारिज।

***B. Constitution – Article 243 ZG, Municipalities Act, M.P. (37 of 1961), Section 20 and Municipalities (Reservation of Wards for Scheduled Castes, Scheduled Tribes, Other Backward Classes and Women) Rules, M.P., 1994, Rule 3 – Maintainability of Writ Petition* – Held – In present case, validity of any law has not been challenged therefore bar of 243 ZG does not come to hinder the prospects of petitioner to file writ petition, similarly any nomination or election of any candidate has not been challenged so as to attract the rigours of Section 20 of Act of 1961 – Writ Petition maintainable. (Para 23)**

ख. संविधान – अनुच्छेद 243 ZG, नगरपालिका अधिनियम, म.प्र. (1961 का 37), धारा 20 एवं नगरपालिका (अनुसूचित जाति, अनुसूचित जनजाति, अन्य पिछड़ा वर्ग एवं महिलाओं के लिए वार्डों का आरक्षण), नियम, म.प्र., 1994, नियम 3 – रिट याचिका की पोषणीयता – अभिनिर्धारित – वर्तमान प्रकरण में, किसी विधि की विधिमान्यता को चुनौती नहीं दी गई है इसलिए रिट याचिका प्रस्तुत करने हेतु याची का अवसर बाधित करने के लिए 243 ZG का वर्जन नहीं आएगा, इसी प्रकार, किसी प्रत्याशी के नामांकन या निर्वाचन को चुनौती नहीं दी गई है जिससे कि 1961 के अधिनियम की धारा 20 की कठिनाईयां आकर्षित होती – रिट याचिका पोषणीय।

C. Municipalities (Reservation of Wards for Scheduled Castes, Scheduled Tribes, Other Backward Classes and Women) Rules, M.P., 1994, Rule 3 – Maintainability of Petition **– Held – Election starts with notification and culminates in declaration of returning candidate – Present proceedings are not post notification of election but constitutes preparation of election, thus scope of judicial review lies – Petition maintainable. (Para 22 & 23)**

ग. नगरपालिका (अनुसूचित जाति, अनुसूचित जनजाति, अन्य पिछड़ा वर्ग एवं महिलाओं के लिए वार्डों का आरक्षण), नियम, म.प्र., 1994, नियम 3 – याचिका की पोषणीयता – अभिनिर्धारित – निर्वाचन, अधिसूचना के साथ आरंभ होता है तथा निर्वाचित प्रत्याशी की घोषणा पर समाप्त होता है – वर्तमान कार्यवाहियां, निर्वाचन की अधिसूचना पश्चात् की नहीं बल्कि निर्वाचन की तैयारी गठित करती हैं, अतः, न्यायिक पुनर्विलोकन की व्याप्ति लागू होगी – याचिका पोषणीय।

D. Municipalities (Reservation of Wards for Scheduled Castes, Scheduled Tribes, Other Backward Classes and Women) Rules, M.P., 1994, Rule 3 – Legislative Intent & Purpose **– Held – Total density of SC category of people has material bearing because that way they have the feeling of representation through the candidates of their categories and new leadership would emerge amongst them. (Para 27)**

घ. नगरपालिका (अनुसूचित जाति, अनुसूचित जनजाति, अन्य पिछड़ा वर्ग एवं महिलाओं के लिए वार्डों का आरक्षण), नियम, म.प्र., 1994, नियम 3 – विधायी आशय व प्रयोजन – अभिनिर्धारित – अ.जा. श्रेणी के लोगों की सघनता का तात्विक प्रभाव है क्योंकि इस तरह उनमें उनकी श्रेणी के प्रत्याशियों के जरिए प्रतिनिधित्व की भावना होती है और उनमें से नया नेतृत्व उभर सकता है।

E. Municipalities (Reservation of Wards for Scheduled Castes, Scheduled Tribes, Other Backward Classes and Women) Rules, M.P., 1994, Rule 3 (Explanation) – Pattern & Practice **– Held – Declaration of ward as unreserved shall be limited to that election only – If ward no. 10 has been declared unreserved and ward no. 2 is being reserved then, this pattern of reservation is confined to this election only. (Para 29)**

ङ. नगरपालिका (अनुसूचित जाति, अनुसूचित जनजाति, अन्य पिछड़ा वर्ग एवं महिलाओं के लिए वार्डों का आरक्षण), नियम, म.प्र., 1994, नियम 3 (स्पष्टीकरण) – क्रम व पद्धति – अभिनिर्धारित – अनारक्षित के रूप में वार्ड की घोषणा केवल उसी निर्वाचन के लिए सीमित होगी – यदि वार्ड क्र. 10 को अनारक्षित घोषित किया गया है तथा वार्ड क्र. 2 को आरक्षित किया गया है, तब आरक्षण का यह क्रम केवल इसी निर्वाचन तक के लिए सीमित है।

Cases referred :

AIR 1995 MP 188, AIR 1952 SC 64, (1978) 1 SCC 405, AIR 1986 SC 103, (2000) 8 SCC 216, (1985) 4 SCC 689, (1996) 6 SCC 303.

Jitendra Sharma, for the petitioner.
Vijay Sundaram, P.L. for the respondents/State.

O R D E R

ANAND PATHAK, J.:- The instant petition under Article 226 of Constitution of India is being preferred by the petitioner, being crestfallen by the order dated 18-09-2020 (Annexure P/1) passed by the Collector District Sheopur as prescribed authority (respondent No.3 herein) whereby Collector District Sheopur reserved the ward No.2 (along with two other wards i.e. ward No.11 and 20) for reservation for representation of Scheduled Castes (hereinafter referred to as 'SC') candidate, whereas according to the petitioner ward No.10 ought to have been included as reserved ward for SC category candidate because of more number of people living in ward No.10 than in ward No.2.

2. Petitioner is also aggrieved by the letter dated 08-09-2020 (Annexure P/3) issued by Commissioner, Urban Administration and Development, respondent No.2 herein whereby he has given direction for reservation of ward No.2 instead of ward No.10. Petitioner is further aggrieved by notification Annexure P/11 issued by Urban Administration and Development Department.

3. Precisely stated facts of the case are that petitioner is resident of ward No.10 of municipality area Sheopur district Sheopur and is a member of SC category, therefore, entitled to cast his vote to the representative of his choice for the said ward in election of councillor/office bearer of Municipality Sheopur. State Government in exercise of power conferred by Section 433 read with Section 11 of M.P. Municipal Corporation Act, 1956 (hereinafter referred to as 'the Act of 1956') and Section 355 read with Section 29-A of the M.P. Municipalities Act, 1961 (hereinafter referred as 'the Act of 1961'), made the rules -M.P. Municipalities (Reservation of Wards for Scheduled Castes, Scheduled Tribes, Other Backward Classes and Women), Rules 1994 (hereinafter referred as 'the Rules 1994') whereby the reservation in Municipalities, Panchayats and

Municipal Corporation for different categories were prescribed.

4. Section 29-A of the Act of 1961 prescribes determination of number and extent of wards and conduct of elections in which formation of the wards and basis of the said formation has been prescribed. In Section 29-A of the Act of 1961 read with rule 3 of Rules 1994, reservation of seats has been prescribed whereby number of seats has to be reserved for SC/ST in every municipality in same proportion to the total number of seats to be filled by direct elections in the municipalities as per the proportion of the population of said category in municipal area and out of the wards so reserved, those wards shall be reserved for SC/ST candidates in which population of the SC/ST (as the case may be) are most concentrated.

5. It is the grievance of the petitioner that as per census 2011 total population of municipality Sheopur is 68,820 in which population of people of SC category is 9,806 and total wards are 23 in number, therefore, proportion of population of SC *vis a vis* total population in 23 wards comes to 3.27 meaning thereby, 3 wards are to be reserved for SC category candidates and as per descending order of total population, ward No.11, 20 and 10 have maximum number of people of SC category, therefore, according to the petitioner, reserved wards should be ward No.11, 20 and 10 whereas respondents have taken ward No.11 and 20 as reserved wards correctly, but in place of ward No.10, respondents have reserved the ward No.2, which according to the petitioner is an arbitrary and illegal exercise. Therefore, this petition has been preferred.

6. It is the submission of learned counsel appearing for petitioner that in year 2009 (as per census 2001), 3 wards were reserved for SC category candidates and those 3 wards were determined on the basis of descending order of population and at that time ward No.11, 15 and 2 were having maximum number of SC population, therefore, those 3 wards were reserved for contest for SC candidates. Later on, in the elections of 2014 (as per census 2011) same way of determination continued because ward No.11 had maximum number of people of SC category, thereafter ward No.20 and thereafter ward No.10 and therefore, those wards were reserved for SC candidates. Keeping in line with the said thought process, the same formula was devised by the Collector/Prescribed Authority and proposal was sent to the State Government on 11-08-2020 (Annexure P/2) which was just and proper but on the instructions of respondent No.2 i.e. Commissioner, the Collector District Sheopur (respondent No.3) changed the ward No.10 and in its place ward No.2 has been included for reservation which is arbitrary, illegal and contrary to spirit of rules 3 and 4 of Rules of 1994 which are being placed with the petition for perusal.

7. Learned counsel for the petitioner vehemently pressed into service the interpretation of rule 3 of Rules of 1994 which according to him prescribes pattern

of reservation on the basis of descending order of population of SC people in a ward and as per that formula ward No. 11, 20 and 10 were to be included as reserved wards for SC category but same has not been done therefore, violation of rule 3 of Rules of 1994 is apparent on record. It is further submitted that at this stage election process is not started and only administrative formalities have been completed. Therefore, this petition is maintainable for redressal of grievance of petitioner.

8. Learned counsel for the petitioner also raised the plea of malafide as according to him one Tarachand Dhuliya who is working as Project Officer, in District Urban Development Agency (DUDA) Sheopur and was part of impugned proceedings dated 18-09-2020 (Annexure P/1) and since he is resident of ward No.2 therefore, he has ulterior motive to get ward No.2 reserved for SC category candidate. He relied upon judgment rendered by this Court in the case of *Prahlad Das and another Vs. State of M.P. and others*, AIR 1995 MP 188. According to him, earlier precedent of reservation of wards of SC category candidates has been given a go bye for ulterior motive and contrary to the mandate of rules. Therefore, appropriate writ of mandamus be issued and alleged anomalies be corrected.

9. Learned counsel for the respondents/State on the basis of reply/additional reply filed with the petition opposed the submissions and pleadings of petitioner as reflected in the petition and rejoinder. Learned counsel for the respondents referred the reply and the example placed into it to augment his arguments and submits that petitioner has misinterpreted the rules. As per rule 3 of Rules of 1994 it is to be seen where the ratio of population of SC category is more *vis a vis* general population and therefore, even if any ward has more number of people of SC category but in ratio to overall population, their percentage is lower and if any ward contains less number of people of SC category but their overall population *vis a vis* total population of ward is more then that ward shall be considered as the ward suitable for reservation for SC candidates.

10. Therefore, according to him ward No. 11, 20 and 2 contain maximum percentage of population *vis a vis* general population in descending order as compared to other wards. Therefore, said anomaly has been referred by the Commissioner (respondent No.2 herein) and therefore, same has been corrected. He denied the allegations of arbitrariness. It is further submitted through additional return that notification of list of reserved wards as per rule 7 of Rules 1994 has been published. Petitioner has not challenged the said notification, therefore, on this count also petition *sans* merits. He prayed for dismissal of petition.

11. Heard learned counsel for the parties at length and perused the documents appended thereto.

12. **Elections are the festivals of Democracy.** People of Democratic Republic of India reflect their choice of representatives by casting their votes. Instant matter pertains to election of municipality and same has been taken care of by Constitution (74th) Amendment Act, 1992 wherein part IX-A (the municipalities) has been inserted in Constitution. Municipality has been defined in Article 243 -P (e) of the Constitution. Municipality means an institution of self-government constituted under Article 243 (Q). Other provisions of the said Chapter deal with Composition of Municipalities, Constitution and Composition of Wards Committees, Reservation of Seats, Duration of Municipalities, Power Authorities and Responsibilities of Municipalities, Elections to the Municipalities and bar to interference by Court in electoral matter etc.

13. Article 243 -ZA gives power to legislature of a State to make provisions with respect to all matters relating to or in connection with elections to the municipalities. Thereafter, present day Section 29 and 29-A of the Act of 1961 were inserted. Section 29 deals with determination of number and extent of wards and conduct of elections. Same is reproduced herein for ready reference:

> ***"29. Determination of number and extent of wards and conduct of elections.*** *- (1) The State Government shall from lime to lime, by notification in the official gazette, determine the number and extent of wards to be constituted for each Municipality:*
>
> *Provided that the total number of wards shall not be more than forty and not less than fifteen.*
>
> *(2) Only one Councillor shall be elected from each ward.*
>
> *(3) The formation of the wards shall be made in such a way that the population of each of the wards shall, so far as practicable, be the same throughout the Municipal area and the area included in the ward is compact.*
>
> *(4) As soon as the formation of wards of a Municipality is completed, the same shall be reported by the State Government to the State Election Commission.*
>
> *(5) x x x*
>
> *(6) x x x"*

14. Similarly, Section 29-A deals with reservation of seats. Relevant clause is reproduced for ready reference:

> ***"29A. Reservation of seats.*** *- (1) Out of the total number of wards determined under sub-section (1) of Section 29, such number of seats shall be reserved for Scheduled Castes and Scheduled Tribes in every Municipality as bears as may be, the same proportion to the total number of seats to be filled by direct*

election in the Municipality as the population of the Schedule Castes or of the Scheduled Tribes in the Municipal area bears to the total population of that area and such wards shall be those in which the population of the Scheduled Castes or the Scheduled Tribes, as the case may be, is most concentrated.

(2) xx xx xx

(3) xx xx xx

(4) xx xx xx

(5) xx xx xx

15. As referred above in pursuance to Section 433 read with Section 11 of the Act of 1956 and Section 355 read with Section 29-A of the Act of 1961, Rules of 1994 were promulgated. Rule 3 of the said Rules which also has material bearing in the controversy deserves to be reproduced for ready reference:

"3. First time reservation of wards.- (1) Out of the total number of wards determined under sub-section (1) of Section 10 of the Madhya Pradesh Municipal Corporation Act, 1956 and sub-section (1) of Section 29 of the Madhya Pradesh Municipalities Act, 1961 such number of wards shall be reserved for Scheduled Castes and Scheduled Tribes in every' Municipality the proportion of which in the total number of wards determined for that municipality may be, as nearly as may be, the same which is to the Population of the Scheduled Castes or of the Scheduled Tribes in that municipality bears to the total population of that municipality and such wards shall be those in a descending order in which the population of the Scheduled Castes or the Scheduled Tribes, as the case may be, is most concentrated.

(2) As nearly as possible, twenty-five per cent of the total number of wards shall be reserved for other backward classes in such Municipalities, where out of the total number of wards fifty per cent or less in number wards are reserved for Scheduled Castes and Scheduled Tribes, and such wards shall be reserved by lot from the remaining wards excluding the wards, reserved for Scheduled Castes and Scheduled Tribes.

(3) Out of the wards reserved for Scheduled Castes, Scheduled Tribes and Other Backward Classes, as above, as nearly as possible fifty percent wards for the women of the aforesaid castes, as the case may be, shall be reserved, by lot :

Provided that where only one ward is reserved for the Scheduled Castes or Scheduled Tribes as the case may be, then in that case, such ward shall not be reserved for woman of

Scheduled Castes or Scheduled Tribes, as the case may be.

Explanation.- When the Collector declares any ward as unreserved under sub-section (2) of Section 11 of the Madhya Pradesh Municipal Corporation Act, 1956 or sub-section (2) of Section 29-A of the Madhya Pradesh Municipalities Act, 1961, then such unreservation shall be limited to that election only.

(4) At the time of calculation under sub-rules (1), (2) and (3) fraction less than half shall be ignored and fraction equal to half or more shall be counted as one.

(5) Reservation of wards for ladies shall be made by deriving lot of unreserved wards, in such number that comes after subtracting the number of wards reserved for Scheduled Castes, Scheduled Tribes and Other Backward Classes under sub-rule (3) from as nearly as possible fifty percent in number of the total number of wards :

Provided that the number of wards reserved for women, including the wards reserved for the women of Scheduled Castes, Scheduled Tribes and Other Backward Classes shall be as nearly as possible fifty percent of the total number of wards.

(6) The reservation made as aforesaid shall remain in force for the whole period of five years of Municipality including casual vacancies."

16. At this juncture, it would be apt to deal with the objection regarding maintainability of petition because it goes to the root of the matter and if this Court finds that at this stage, by the operation of Constitutional provisions and statutory rules, any impregnability exists qua judicial review then this Court would have to desist from making any observations on merits.

17. In this regard Article 243 -ZG of Constitution is worth consideration which bars interference by Court in electoral matters. Same is reproduced for ready reference:

243-ZG. Bar to interference by Courts in electoral matters.-- Notwithstanding anything in this Constitution.--

(a) the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies, made or purporting to be made under Article 243 ZA shall not be called in question in any Court;

(b) no election to any Municipality shall be called in question except by an election petition presented to such authority and in such manner as is provided for by or under any law made by the Legislature of a State."

18. Similarly Section 20 of the Act of 1961 deals with election petition and it starts with non obstantive clause that no election or nomination under this Act be called in question except by a petition presented before District Judge of the concerned revenue district in which the election is held in accordance with the provisions of the Section. This provision bars the challenge to election or nomination except by election petition. In such legal backdrop it is to be seen whether the procedure which is under challenge gets the umbrella of election process or its a prelude to the commencement of election process.

19. Valuable guidance and precedential reflection can be borrowed from the judgment rendered by the Hon'ble Apex Court in the case of *N.P. Ponnuswami v. The Returning Officer*, AIR 1952 SC 64 and *Mohinder Singh Gill and another Vs. Chief Election Commissioner New Delhi and others*, (1978) 1 SCC 405. In the case of *Mohinder Singh Gill* (supra), Apex Court has explained the term 'Election'. It reads as under:

> *"The rainbow of operations, covered by the compendious expression election, thus commences from the initial notification and culminates in the declaration of the return of a candidate. The paramount policy of the Constitution-framers in declaring that no election shall be called in question except the way it is provided for in Article 329 (b) and the Representation of the People Act, 1951, compels us to read, as Fazal Ali, J. did in Ponnuswami, the Constitution and the Act together as an integral scheme. The reason for postponement of election litigation to. the post-election stage is that elections poll not unduly be protracted or obstructed. The speed and promptitude in getting due representation for the electors in the- legislative bodies is the real reason suggested in the course of judgment."*

20. This aspect has further been discussed by the Hon'ble Apex Court in the matter of *Indrajit Barau V. Election Commission of India*, AIR 1986 SC 103 which is reproduced below:

> *"We are not prepared to take the view that preparation of elctoral rolls is also a process of election. We find support for our view from the observations of Chandrachud, C.J. in Lakshmi Charan Sen's case (AIR 1985 SC 1233) (supra) that "it may be difficult, consistently with that view to hold that preperation and revision of electoral rolls is a part of 'election' within the meaning of* Article 329(b)". *In a suitable case challenge to the electoral roll for not complying with the requirements of the law may be entertained subject to the rule indicated in Ponnuswami's case. (AIR 1952 SC 64 : 1952 (2) SCR 218 (supra). "*

21. Similarly in the case of *Election Commission of India Vs. Ashok Kumar and others*, (2000) 8 SCC 216, the Apex Court again considering the case of *N.P. Ponnuswami* (supra), *Mohinder Singh Gill* (supra), *Lakshmi Charan Sen and others Vs. AKM Hassan Uzzaman and others,* (1985) 4 SCC 689 and *Anugrah Narain Singh and another Vs. State of U.P. and others,* (1996) 6 SCC 303 concluded as under:

> "*For convenience sake we would now generally sum up our conclusions by partly restating what the two Constitution Benches have already said and then adding by clarifying what follows therefrom in view of the analysis made by us hereinabove:-*
>
> *1) If an election, (the term election being widely interpreted so as to include all steps and entire proceedings commencing from the date of notification of election till the date of declaration of result) is to be called in question and which questioning may have the effect of interrupting, obstructing or protracting the election proceedings in any manner, the invoking of judicial remedy has to be postponed till after the completing of proceedings in elections.*
>
> *2) Any decision sought and rendered will not amount to calling in question an election if it subserves the progress of the election and facilitates the completion of the election. Anything done towards completing or in furtherance of the election proceedings cannot be described as questioning the election.*
>
> *3) Subject to the above, the action taken or orders issued by Election Commission are open to judicial review on the well-settled parameters which enable judicial review of decisions of statutory bodies such as on a case of mala fide or arbitrary exercise of power being made out or the statutory body being shown to have acted in breach of law.*
>
> *4) Without interrupting, obstructing or delaying the progress of the election proceedings, judicial intervention is available if assistance of the Court has been sought for merely to correct or smoothen the progress of the election proceedings, to remove the obstacles therein, or to preserve a vital piece of evidence if the same would be lost or destroyed or rendered irretrievable by the time the results are declared and stage is set for invoking the jurisdiction of the Court.*
>
> *5) The Court must be very circumspect and act with caution while entertaining any election dispute though not hit by the bar of Article 329(b) but brought to it during the pendency of election proceedings. The Court must guard against any*

attempt at retarding, interrupting, protracting or stalling of the election proceedings. Care has to be taken to see that there is no attempt to utilise the courts indulgence by filing a petition outwardly innocuous but essentially a subterfuge or pretext for achieving an ulterior or hidden end. Needless to say that in the very nature of the things the Court would act with reluctance and shall not act except on a clear and strong case for its intervention having been made out by raising the pleas with particulars and precision and supporting the same by necessary material."

22. Considering the above guidance given by different Benches of Hon'ble Apex Court including Constitution Bench, it is clear that any preparation before notification of election by Election Commission/competent authority and their administrative exercise to serve progress of election and facilitates completion of election if subjected to challenge and if election is not imminent (as per pleadings of parties, no notification has been issued yet) then certainly scope of judicial review lies. Here, petitioner challenges correctness of decision taken by the administrative authority as per rule 3 of Rules of 1994.

23. Here, in the present case, validity of any law has not been challenged therefore, bar of 243 ZG does not come to hinder the prospects of petitioner to file writ petition. Similarly, petitioner has not challenged nomination or election of any candidate so as to attract the rigours of Section 20 of the Act of 1961. It is a case wherein petitioner intends to ensure the action of respondents as per rule 3 of the Rules of 1994, of course with the pleadings of malafide, which although not factually substantiated, but tangentially referred. Therefore, as per the mandate of Apex Court in the case of *N.P. Ponnuswami* (supra), *Mohinder Singh Gill* (supra), *Indrajit Barau* (supra), *Lakshmi Charan Sen and others* (supra) and *Ashok Kumar* (supra), it can be well inferred that election starts with the notification and culminates in the declaration of the return of a candidate and the proceedings in the instant petition are not such proceedings which are post notification of election but constitutes preparation of election. Once the petition is found maintainable then this Court can enter into the arena of merits as put forward by the petitioner.

24. The main grievance of the petitioner is non compliance of rule 3 of the Rules of 1994. Perusal of rule 3 indicates that it provides a formula for ascertaining the number of wards for SC category candidates in a given municipality and after ascertaining number of wards those wards are to be earmarked in which population of SC category is concentrated in descending order. Here, word **"Concentrated"** assumes significance because Connotation of Concentration leads to the fate of this controversy and determines whether the attempt of respondents is a course correction from earlier deviation or it is an attempt to

subterfuge the electoral prospects by taking wrong interpretation. The word concentrate is defined in The New International Webster's Comprehensive Dictionary as under:

> *"**1.** To draw to a common center; cocenter; focus. **2.** To intensify in strength or to purity by the removal of certain constituents; condense. **3.** To converge toward a center; become compacted or intensified. n. **1** A product of concentration. **2** Usually pl. Metall. The product of concentration processes whereby a mass of high metal content has been obtained from the ore of the other raw materials."*

25. In reply, the respondents have demonstrated two hypothetical tables and through those tables tried to drive home the point that those wards have been taken into consideration in which population of SC category people *vis a vis* total population is more. In other words, it is the narration of the respondents that total percentage of population of SC people *vis a vis* population of general category is o (sic: to) be seen rather than number of people *per se.*

26. Those tables deserve reproduction by this Court to clarify the position:

For example 1:

Ward No.	Population of SC people	Total Population of Ward
1	500	1000
2	600	1500
3	700	1200
4	800	2000
5	900	5000

For example 2:

Ward No.	Population of SC people	Total population of ward	Percentage
1	500	1000	50.00%
2	600	1500	40.00%
3	700	1200	58.33%
4	800	2000	40.00%
5	900	5000	18.00%

Through these examples, respondents have demonstrated that total percentage of SC population in any particular ward is to be seen and through that formula those wards which fall at serial No.1 to 3 having the most concentrated population of SC people are to be chosen for reservation of wards for SC category candidates. Respondents have placed Annexure R/4 on record in which percentage of SC population has been referred and perusal of that document reveals that ward No.11 (Dr. Ambedkar Ward) has 78.92% population of SC people in the ward, therefore, it was included for reservation. Ward No.20 (Malviya Ward) contains SC population to the extent of 41.45%, therefore, it was also included and ward No.2 (Saint Kabir Ward) contains population of SC category to the tune of 30.99% of total population therefore, it was given precedence over ward No.10 (Lokmanya Tilak Ward) which has 26.61% of SC population in the ward. Interestingly, ward No.10 has total 921 persons from SC category whereas ward No.2 has 865 SC people in the ward and therefore, if descending order is to be determined through percentage, density or concentrated as interpreted by the respondents then respondents are right in their disposition to include ward No.2 in their reservation tally.

27. If legislative intent and purpose are seen, then it has logical bearing, because total density of SC category of people has material bearing because that way they have the feeling of representation through the candidates of their categories and new leadership would emerge amongst them. Constitutional goal for which the very concept of reservation in part XVI of Constitution conceptualized, wherein special provisions relating to certain classes were made and which is later on reflected in other provisions also of Constitution then it appears that respondents were logical in their approach.

28. Besides that Section 29(3) of the Act of 1961 contemplates formation of the wards in such a way that the population of each of the wards shall, so far as practicable, be the same throughout the municipal area and the area included in the ward is compact. It means area of the ward should be clearly distinctive or geographically distinguishable forming a unit and it has to be seen that population of each of the ward shall be, so far as practicable, be the same throughout the municipal area meaning thereby population should be homogeneously distributed, therefore, it is assumed that total population of the municipal area is almost divided in equal number of people (as far as practicable) and therefore, density of the particular community assumes significance. Even otherwise there is not much difference between 865 people (ward No.2) and 921 persons (ward No.10) but difference of density is noticeable.

29. One more fact deserves discussion is rule 3 (3) of the Rules of 1994 specially the explanation which clarifies the position that declaration of ward as unreserved shall be limited to that election only. It means if in 2014 elections,

ward No.2 was unreserved then it was limited to that election only. Now with proper interpretation of rule 3 of the Rules of 1994 if ward No.10 has been declared unreserved and ward No.2 is being reserved then this pattern of reservation is confined to this election only.

Although in the present case, petitioner has filed certain documents with the rejoinder which are order-sheets of committee which earlier took decisions to include ward No.10 amongst the reserved wards and from perusal of those note-sheets it further appears that election of 2014 which was also based upon census of 2011 proceeded on different assumption. The respondents should have corrected the said anomalous position then and then only but for some elections respondents did not correct their stand therefore, petitioner has the occasion to raise the plea of foul play.

30. In election matters, respondents must take precaution to streamline the free election process so transparently and fairly that nobody should have occasion to raise the doubt over intention because as said earlier Elections are the Festivals of Democracy and they should not convert into the event denoted by the phrase that "Chaos is come again" (from "Othello" by Shakespeare). Piousness of election and election proceedings are paramount to maintain the confidence of people in Democracy.

31. However the attractive plea and dialectical ingenuity may exists in the submission of petitioner but it may lead to wrong interpretation, therefore, this Court does not subscribe to the view about the continuance of previous anomalies crept into as error in decision making made earlier by the respondents in 2009 and 2014 elections. However, it is expected from the respondents that they would maintain uniform standard for determination of wards on this principle throughout the State and for all those elections which are governed by the same Act/Rules or identical provisions.

32. In the considered opinion of this Court, respondents have not erred in making course correction while correcting their earlier stand and now they have reserved ward No.2 on the basis of density of population rather than the numbers. Therefore, no case for interference is made out.

33. Consequently, petition sans merits and is hereby dismissed. No costs.

Petition dismissed

I.L.R. [2021] M.P. 265
WRIT PETITION

Before Mr. Justice Prakash Shrivastava

WP No. 32/2011 (Indore) decided on 22 December, 2020

NAGESWAR SONKESRI …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

(Alongwith WP No. 57/2011)

***A. Constitution – Article 342(1) – Scheduled Caste/Scheduled Tribe – Presidential Notification* – Held – Presidential Notification specifying Schedule Tribe/Scheduled Caste can be amended only by law made by Parliament and it cannot be varied by way of administrative circular, judicial pronouncements or by State – Notification must be read as it is – "*Halba Koshti*" is not mentioned in Presidential order thus it cannot be held to be Scheduled tribe – No error in decision of Caste Scrutiny Committee – Petition dismissed. (Para 24(i) & 24(ii))**

क. संविधान – अनुच्छेद 342(1) – अनुसूचित जाति/अनुसूचित जनजाति – राष्ट्रपति की अधिसूचना–अभिनिर्धारित – अनुसूचित जाति/अनुसूचित जनजाति विनिर्दिष्ट करने वाली राष्ट्रपति की अधिसूचना को केवल संसद द्वारा बनाई गई विधि द्वारा संशोधित किया जा सकता है तथा इसमें प्रशासनिक परिपत्र, न्यायिक निर्णय के माध्यम से या राज्य द्वारा फेरफार नहीं किया जा सकता – अधिसूचना ज्यों कि त्यों पढ़ी जानी चाहिए – राष्ट्रपति के आदेश में *''हल्बा कोष्टी''* का उल्लेख नहीं है अतः इसे अनुसूचित जनजाति नहीं माना जा सकता है – जाति छानबीन समिति के विनिश्चय में कोई त्रुटि नहीं – याचिका खारिज।

***B. Service Law - Constitution – Article 342(1) – Scheduled Caste/Scheduled Tribe – False Caste Certificate* – Held – Petitioner obtained employment against the post reserved for Scheduled Tribe – Petitioner belongs to "*Halba Koshti*" caste which is OBC in State of M.P. and not a scheduled tribe – When employment/appointment is obtained on basis of false/forged caste certificate, person concerned cannot be allowed to enjoy the benefit of wrong committed by him – Such appointment is *void ab initio* and is liable to be cancelled. (Paras 24(iv), 24(v), 25, 26 & 29)**

ख. सेवा विधि – संविधान – अनुच्छेद 342(1) – अनुसूचित जाति/अनुसूचित जनजाति – मिथ्या जाति प्रमाण–पत्र – अभिनिर्धारित – याची ने अनुसूचित जनजाति हेतु आरक्षित पद पर रोजगार प्राप्त किया – याची ''हल्बा कोष्टी'' जाति का है जो कि म.प्र. राज्य में अन्य पिछड़ा वर्ग में आती है तथा न कि अनुसूचित जनजाति में आती है – जब रोजगार/नियुक्ति, मिथ्या/कूटकृत जाति प्रमाण–पत्र के आधार पर प्राप्त हुआ है,

संबंधित व्यक्ति को उसके द्वारा कारित किये गये दोष का लाभ उठाने की मंजूरी नहीं दी जा सकती – उक्त नियुक्ति आरंभ से ही शून्य है तथा रद्द किये जाने योग्य है।

***C. Constitution – Article 142 – Cancellation of Appointment – Protection – Applicability* – Held – Apex Court concluded that even jurisdiction under Article 142 should be exercised with circumspection in such cases so that unjust and false claims of imposters are not protected – For protection under Article 142, Apex Court drawn a distinction between a student who completes professional course on basis of forged certificates and a person who obtains public employment on basis of false caste certificate.**

(Paras 17, 18, 19 & 21)

ग. संविधान – अनुच्छेद 142 – नियुक्ति का रद्दकरण – संरक्षण – प्रयोज्यता – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया है कि ऐसे प्रकरणों में अनुच्छेद 142 के अंतर्गत अधिकारिता का प्रयोग भी सावधानी के साथ किया जाना चाहिए ताकि धोखेबाजों के अनुचित और मिथ्या दावों की संरक्षा न हो – अनुच्छेद 142 के अंतर्गत संरक्षण हेतु, सर्वोच्च न्यायालय ने कूटकृत प्रमाण पत्रों के आधार पर व्यावसायिक पाठ्यक्रम को पूरा करने वाले छात्र तथा मिथ्या जाति प्रमाण–पत्र के आधार पर लोक नियोजन प्राप्त करने वाले व्यक्ति के मध्य विभेद किया है।

Cases referred :

(2001) 1 SCC 4, (1994) 6 SCC 241, (2007) 5 SCC 336, (2008) 4 SCC 612, (2017) 8 SCC 670, C.A. No. 1865/2020 decided on 28.02.2020 (Supreme Court).

A.K. Sethi with *Rahul Sethi*, for the petitioner.
Amol Shrivastava, for the respondents.

O R D E R

(Heard finally with consent through Video Conferencing)

PRAKASH SHRIVASTAVA, J. :- This order will govern the disposal of WP No.32/2011 and WP No.57/2011. In WP No.57/2011 petitioner has challenged the decision of the Caste Scrutiny Committee finding the caste certificate to be false and by WP No.32/2011 the petitioner has challenged the consequential dismissal order. WP No.32/2011 was allowed by this Court by order dated 20/3/2014 and the writ appeal was dismissed on 12/5/2016 and this order was challenged before Supreme Court. The Hon'ble Supreme Court by order dated 22nd July, 2019 passed in Civil Appeal(S)No.5776/2019 (arising out of SLP(C) No.14510/2017) has set aside the order of this Court and has directed for deciding both these petitions together.

2. In WP No.57/2011, the case of the petitioner is that he belongs to "Halba/Halba Koshti" caste which is a Scheduled Tribe in the State of Madhya Pradesh as per Presidential Notification. The caste certificate dated 18/8/2005

was issued by the SDO. The petitioner was appointed as District Excise Officer on 15/02/2001 and by order dated 24/1/2004 his past service rendered from 4/9/1991 to 14/2/2001 were counted in his service tenure in continuation. On the basis of certain complaints, proceedings were initiated before the Caste Scrutiny Committee to examine the caste certificate issued to the petitioner and a notice was issued to the petitioner to which he had filed the reply annexing there with the material relating to Halba/Halbi/Koshta/Koshti and the Caste Scrutiny Committee without following the due procedure, by the order dated 21/6/2010 has found the caste certificate to be false and cancelled it. The order of the Caste Scrutiny Committee was communicated to the petitioner vide letter dated 15/7/2010. Hence, the present petition has been filed challenging the same.

3. The stand of the respondents in the reply is that the petitioner belongs to Koshti caste which does not fall under the category of either scheduled caste or scheduled tribe in the State of Madhya Pradesh. Hence, the decision of the Caste Scrutiny Committee does not require any interference. The parties had also filed the rejoinder, reply to the rejoinder and additional rejoinder to substantiate their stand.

4. In WP No.32/2011 the case of the petitioner is that the petitioner was appointed in the Women and Child Development Department on 4/9/1991 and had continued in that department till 14/2/2001. The petitioner was appointed as District Excise Officer after selection by PSC on 15/02/2001 and by order dated 24/1/2004 his earlier services were counted. The petitioner was subsequently promoted as Assistant Commissioner (Excise) on 18/4/2007 and thereafter on certain complaints the proceedings were initiated before Caste Scrutiny Committee which had passed the adverse order dated 21/6/2010 which is subject matter of challenge in the connected writ petition. Further case of the petitioner is that the petitioner was placed under suspension by order dated 27/7/2010. The show cause notice dated 6/8/2010 was issued to the petitioner which was duly replied by him. The order of suspension was unsuccessfully challenged by the petitioner. The respondents thereafter by order dated 22/11/2010 have dismissed the petitioner from services on the ground of obtaining employment on the basis of false caste certificate, without conducting any departmental enquiry. To substantiate the plea further, petitioner has also filed the rejoinder.

5. In the reply, the stand of the respondents is that since the petitioner had entered in services on the basis of the forged caste certificate and the caste certificate was cancelled by the Caste Scrutiny Committee, therefore, the services of the petitioner have been terminated. Further stand of the respondents is that the appointment of the petitioner as District Excise Officer and subsequent promotion on the next higher post is on the basis of forged documents, therefore, the regular departmental enquiry was not required and in this regard reference to Circular

dated 21/7/2003 issued by the GAD Annexure R/2 has been made and a plea has been taken that in such cases regular departmental enquiry is not required and prior consent of the PSC was taken on 16/11/2010 and after granting him salary for three months, the order of termination has been passed.

6. The submission of learned counsel for petitioner in WP No.57/2011 is that the Caste Scrutiny Committee has not followed the due procedure inasmuch as a copy of the report was not supplied and independent enquiry was not conducted and the documents enclosed along with the reply to the notice have not been taken into consideration. Further submission of counsel for petitioner is that the conclusion of the Caste Scrutiny Committee that the caste certificate issued to the petitioner is forged, is unfounded, therefore, the order of the Caste Scrutiny Committee cannot be sustained.

7. In WP No.32/2011 the submission of learned counsel for petitioner is that in terms of the judgment of the Supreme Court in the case of *State of Maharashtra Vs. Milind* (2001) 1 SCC 4 the petitioner is protected because his appointment on the basis of caste certificate is prior to 28/11/2000 i.e. the date of judgment in the case of *Milind* (supra). Further submission of learned counsel for petitioner is that the petitioner is protected by the circulars dated 7/3/2011 Annexure P/12 and 27/2/2013 Annexure P/15 which have been issued by the State government to give effect of the judgment of the Supreme Court in the case of *Milind* (supra). Counsel for petitioner has also submitted that in the earlier round of litigation the dismissal order was set aside by this Court and the matter has been remanded back by the Hon'ble Supreme Court, but in the meanwhile the petitioner has been reinstated in services and has been protected by the remand order of the Supreme Court. He has also submitted that the petitioner is a permanent employee and he cannot be dismissed from services without regular departmental enquiry.

8. The submission of learned counsel for State is that since the petitioner had obtained appointment on the basis of the forged caste certificate, therefore, his appointment was void and illegal *ab initio,* hence no regular departmental enquiry is required to be conducted and that the petitioner's services have been terminated after issuing show cause notice and after obtaining the approval of the PSC, therefore, the order of dismissal does not suffer from any error.

9. I have heard the learned counsel for parties and perused the record.

10. The clear stand of the petitioner in WP No.57/2011 is that the petitioner belongs to "Halba Koshti" caste. In para 6.1 of the petition, the petitioner has pleaded that:-

> "6.1. Because the petitioner belongs to "Halba- Koshti" caste and the predecessors of the petitioner used to live in forests and earn their livelihood by cultivating land by the use of "Hal" and

> on account of their occupation, they were classified as "Halba-Halbi". In Ratanpur State in the township of "Sinhawa" the forefathers of the petitioner used to live on account of outspread of certain disputes, the forefathers of the petitioner had to disperse and were ousted from living at the same place. After the forefathers of the petitioner, were displaced, they used to collect the fruit of "Kosa" and by use of manual spindles used to undertake weaving of clothes by making threads and for this reason they were called as "Koshta/Koshti".

11. Before the Caste Scrutiny Committee also similar reply dated 12/6/2010 was filed and in para 1 the petitioner had clearly stated that the petitioner belongs to "Halba Koshti" caste. Hence, the admitted position before this court is that the petitioner belongs to *"Halba Koshti"* caste.

12. The Hon'ble Supreme Court in the matter of *Ku. Madhuri Patil and another Vs. Additional Commissioner, Tribal Development and others* (1994) 6 SCC 241 had directed for verification of the caste certificate by the Caste Scrutiny Committee constituted at State level. The procedure which is to be followed by the Caste Scrutiny Committee, has been provided therein and it has been held that the order passed by the Committee is final and conclusive only subject to the proceedings under Article 226 of the Constitution.

13. In the present case, the record reflects that on receiving the complaint in respect of the forged caste certificate of the petitioner, the five member Caste Scrutiny Committee at the State level had initiated the proceeding. As per the complaint, the petitioner belongs to *Koshta/Koshti* caste which is OBC and he had obtained employment on the basis of the caste certificate showing him to be *Halba/Halbi* Scheduled Tribe. The Committee had obtained the report from Superintendent of Police and it was found that the address disclosed by the petitioner was incorrect. The Committee had also issued notice to the petitioner and given opportunity of personal hearing. The petitioner had appeared before the Committee and had filed the reply as also produced the documents in support of his claim. The Committee had examined the police report as also the documents submitted by the petitioner and had noted the petitioner's plea in the reply that he belongs to "Halba Koshti" caste. The Committee had duly considered the judgment of the Hon'ble Supreme Court in the case of *Milind* (supra). It had also taken into account the communication sent by the SDO, Tehsil Hujur Bhopal that the caste certificate dated 18/8/2005 was not issued as per record. Considering the entire material, the Committee has reached to the conclusion that the temporary caste certificate dated 22/7/1998 had lost its validity after six months and the permanent caste certificate dated 18/8/2005 was forged. The petitioner had obtained the forged certificate by disclosing incorrect address. It was also found that as per the report petitioner belongs to *"Koshta"* caste which is OBC and he

does not belong to *"Halba"* Scheduled Tribe. In this view of the matter, the Caste Scrutiny Committee has concluded that the petitioner does not belong to *"Halba"* Scheduled Tribe and decided to cancel the so called caste certificate.

14. The conclusion drawn by the Caste Scrutiny Committee is also based upon the petitioner's own admission that he belongs to the *"Koshta"* caste. The Committee has duly considered the entire material and this Court is not exercising the appellate power against the decision of the Committee.

15. The issue if *"Halba Koshti"* caste is a Scheduled Tribe had come up before the Hon'ble Supreme Court in the matter of *Milind* (supra) wherein the Hon'ble Supreme Court has considered the issue if *"Halba Koshti"* can be treated to be a sub tribe of *"Halba/Halbi"*. The Supreme Court reiterating the legal position earlier settled has held that the notification issued under Article 342(1) specifying Scheduled Tribe, can be amended only by the law made by Parliament and by none else including State government, Courts and Tribunal and that the entries made in the Presidential Order are required to be read as it is. A Tribe, sub tribe, part or group of any tribe or tribal community, if not specifically mentioned in the Presidential order, cannot be said to be synonymous to one mentioned therein. In clear terms it has been held that the Presidential Order must be read as it is. It is not even permissible to say that a tribe, sub tribe, part or group of any tribe or tribal community is synonymous to one mentioned in the scheduled tribe order if they are not so specifically mentioned in it. In the case of *Milind* (supra) the Hon'ble Supreme Court has found the decision of the High Court erroneous wherein the High Court had held that *"Halba Koshti"* was included in *"Halba"* or *"Halbi"*. The Supreme Court in the case of *Milind* (supra) has held that:-

> "36.- In the light of what is stated above, the following positions emerge:-
>
> 1. It is not at all permissible to hold any enquiry or let in any evidence to decide or declare that any tribe or tribal community or part of or group within any tribe or tribal community is included in the general name even though it is not specifically mentioned in the entry concerned in the Constitution (Scheduled Tribes) Order, 1950.
>
> 2. The Scheduled Tribes Order must be read as it is. It is not even permissible to say that a tribe, sub-tribe, part of or group of any tribe or tribal community is synonymous to the one mentioned in the Scheduled Tribes Order if they are not so specifically mentioned in it.
>
> 3. A notification issued under Clause (1) of Article 342, specifying Scheduled Tribes, can be amended only by law to be made by Parliament. In other words, any tribe or tribal

community or part of or group within any tribe can be included or excluded from the list of Scheduled Tribes issued under Clause (1) of Article 342 only by Parliament by law and by no other authority.

4. It is not open to State Governments or courts or tribunals or any other authority to modify, amend or alter the list of Scheduled Tribes specified in the notification issued under Clause (1) of Article 342.

5. Decisions of the Division Benches of this Court in *Bhaiya Ram Munda vs. Anirudh Patar & others* (1971 (1) SCR 804) and *Dina vs. Narayan Singh* (38 ELR 212), did not lay down law correctly in stating that the enquiry was permissible and the evidence was admissible within the limitations indicated for the purpose of showing what an entry in the Presidential Order was intended to be. As stated in Position (1) above no enquiry at all is permissible and no evidence can be let in, in the matter."

16. Learned counsel for petitioner has placed reliance upon para 38 of the judgment in the case of *Milind* (supra) and has submitted that since the appointment of the petitioner is prior to the date of judgment in the case of *Milind* (supra), therefore, the petitioner is required to be protected. The Hon'ble Supreme Court in the case of *Milind* (supra) in para 38 has held that:-

"38.- Respondent no. 1 joined the medical course for the year 1985-86. Almost 15 years have passed by now. We are told he has already completed the course and may be he is practicing as doctor. In this view and at this length of time it is for nobody's benefit to annul his Admission. Huge amount is spent on each candidate for completion of medical course. No doubt, one Scheduled Tribe candidate was deprived of joining medical course by the admission given to respondent no. 1. If any action is taken against respondent no. 1, it may lead depriving the service of a doctor to the society on whom public money has already been spent. In these circumstances, this judgment shall not affect the degree obtained by him and his practicing as a doctor. But we make it clear that he cannot claim to belong to the Scheduled Tribe covered by the Scheduled Tribes Order. In other words, he cannot take advantage of the Scheduled Tribes Order any further or for any other constitutional purpose. Having regard to the passage of time, in the given circumstances, including interim orders passed by this Court in SLP (C) No. 16372/1985 and other related affairs, we make it clear that the admissions and appointments that have become final, shall remain unaffected by this judgment."

17. In the case of *Milind* (supra) the Hon'ble Supreme Court has protected the candidate therein exercising the power under Article 142 of the Constitution because in the mean while he had completed the MBBS course and was practicing as a Doctor. The Supreme Court had also held that admissions and appointments which had become final will remain unaffected by the judgment.

18. The judgment in the case of *Milind* (supra) was pronounced by the Hon'ble Supreme Court on 28/11/2000 whereas the petitioner was selected by PSC for appointment on the post of District Excise Officer on the basis of the forged caste certificate and he had joined on that post on 15/2/2001 i.e. after the judgment in the case of *Milind* (supra), therefore, he is not entitled to the protection. The services earlier rendered by the petitioner prior to 15/2/2001 in the Women and Child Welfare Department have been counted only for limited purpose of giving continuity in service. Even otherwise in the case of *Milind* (supra) protection was extended exercising the power under Article 142.

19. It is worth noting that the view of the Hon'ble Supreme Court in the case of *Milind* (supra) protecting the appointments/admissions in a given fact situation has been explained in the subsequent judgment. In the matter of *Additional General Manager-Human Resource. Bharat Heavy Electricals Ltd. Vs. Suresh Ramkrishna Burde* (2007) 5 SCC 336 in a case where services were terminated after a long time when it was found that the appointment on the post reserved for Scheduled Tribe category was obtained by producing a false certificate, the Hon'ble Supreme Court has held that the protection extended by the High Court based upon the judgment in the case of *Milind* (supra) was misplaced. In this case, a distinction has been drawn between a student who completes professional course on the basis of forged certificate and a person who obtains public employment on the basis of false caste certificate. The Hon'ble Supreme Court in the case of *Additional General Manager* (supra) has held that:-

> "7- The High Court has granted relief to the respondent and has directed his reinstatement only on the basis of the Constitution Bench decision of this Court in State of Maharashtra vs. Milind (2001) 1 SCC 4. In our opinion the said judgment does not lay down any such principle of law that where a person secures an appointment by producing a false caste certificate, his services can be protected and an order of reinstatement can be passed if he gives an undertaking that in future he and his family members shall not take any advantage of being member of a caste which is in reserved category. The questions which required for consideration by the Constitution Bench, are noted in the very first paragraph of the judgment and they are being reproduced below: -
>
> > "(1) Whether at all, it is permissible to hold enquiry and let in evidence to decide or declare that any tribe or tribal community or part of or group within any tribe or

tribal community is included in the general name even though it is not specifically mentioned in the concerned Entry in the Constitution (Scheduled Tribes) Order, 1950?

(2) Whether 'Halba Koshti' caste is a sub-tribe within the meaning of Entry 19 (Halba/Halbi) of the said Scheduled Tribes Order relating to State of Maharashtra, even though it is not specifically mentioned as such?"

8. After thorough discussion of the matter the conclusions of the Bench are recorded in paragraph 36 of the report. It was held that it is not at all permissible to hold any enquiry or let in any evidence to decide or declare that any tribe or tribal community or part of or group within any tribe or tribal community is included in the general name even though it is not specifically mentioned in the concerned Entry in the Constitution (Scheduled Tribes) Order, 1950. It was further held that the notification issued under clause (1) of Article 342, specifying Scheduled Tribes, can be amended only by law to be made by Parliament and it is not open to the State Governments or courts or any other authority to modify, amend or alter the list of Scheduled Tribes specified in the notification issued under clause (1) of Article 342 and the Constitution (Scheduled Tribes) Order 1950. The law declared by the Constitution Bench does not at all lay down that where a person secures an appointment by producing a false caste certificate, his services can be protected on his giving an undertaking that in future he will not take any advantage of being a member of the reserved category.

9. After interpreting the relevant constitutional or statutory provisions and laying down the law, it is always open to a court to mould the relief which may appear to be just and proper in the facts and circumstances of the case. Some times equitable considerations also come into play while granting a relief. Milind had got admission in a medical course in the year 1985-86 by producing a caste certificate that he belonged to Halba Caste, which was later on invalidated by the Scrutiny Committee. That order was challenged by him by filing a writ petition which was allowed by the High Court. The appeal filed by the State of Maharashtra was allowed by the Constitution Bench of this Court on 28.11.2000, i.e., almost 15 years after he had got admission in the course. By that time Milind had already completed his MBBS course and was practising as a doctor. This Court took notice of the fact that a huge amount of public money is spent on every student studying in the medical course

and a qualified doctor on whom public money had been spent does service to the society. The Court, therefore, observed "in these circumstances, this judgment shall not affect the degree obtained by him and his practicing as a doctor". However, it was made clear that he cannot take any advantage as being a member of Scheduled Tribe for any other purpose.

10. An identical controversy was again examined in *R. Vishwanatha Pillai vs. State of Kerala* (2004) 2 SCC 105, which is a decision rendered by a Bench of three learned Judges. The employee in the aforesaid case had got an appointment in the year 1973 against a post reserved for Scheduled Caste. On complaint, the matter was enquired into and the Scrutiny Committee vide its order dated 18.11.1995 held that he did not belong to Scheduled Caste and the challenge raised to the said order was rejected by the High Court and the special leave petition filed against the said order was also dismissed by this Court. He then filed a petition before the Administrative Tribunal praying for a direction not to terminate his services which was allowed, but the order was reversed by the High Court in a writ petition. The employee then filed an appeal in this Court. After a detailed consideration of the matter this Court dismissed the appeal and para 15 of the report, which is relevant for the decision of the present case, is reproduced below: - (SCC p.115)

> "15. This apart, the appellant obtained the appointment in the service on the basis that he belonged to a Scheduled Caste community. When it was found by the Scrutiny Committee that he did not belong to the Scheduled Caste community, then the very basis of his appointment was taken away. His appointment was no appointment in the eyes of law. He cannot claim a right to the post as he had usurped the post meant for a reserved candidate by playing a fraud and producing a false caste certificate. Unless the appellant can lay a claim to the post on the basis of his appointment he cannot claim the constitutional guarantee given under the Article 311 of the Constitution. As he had obtained the appointment on the basis of a false caste certificate he cannot be considered to be a person who holds a post within the meaning of Article 311 of the Constitution of India, Finding recorded by the Scrutiny Committee that the appellant got the appointment on the basis of false caste certificate has become final. The position, therefore, is that the appellant has usurped the post which should have gone to a member of the Scheduled Caste. In view

> of the finding recorded by the Scrutiny Committee and upheld upto this Court he has disqualified himself to hold the post. Appointment was void from its inception."

11. In *Bank of India vs. Avinash D. Mandivikar* (2005) 7 SCC 690, the employee had got an appointment on 15.10.1976 on a post which was reserved for a member of Scheduled Tribe. The Scrutiny Committee invalidated the caste certificate on 18.7.1987 which was challenged by the employee. After several rounds of litigation his services were terminated on 28.2.2002. After referring to the decision in the case of *Milind* and some other decisions, this Court allowed the appeal of the employer affirming the order of termination of service of the employee. Paragraph 6 of the report where the principle was laid down reads as under: -

> "6. Respondent No. 1-employee obtained appointment in the service on the basis that he belonged to Scheduled Tribe. When the clear finding of the Scrutiny Committee is that he did not belong to Scheduled Tribe, the very foundation of his appointment collapses and his appointment is no appointment in the eyes of law. There is absolutely no justification for his claim in respect of post he usurped, as the same was meant for reserved candidate."

12. In *R. Vishwanatha Pillai vs. State of Kerala* (2004) 2 SCC 105, which we have referred to earlier, the case of the employee's son, who got admission in an engineering college against a seat reserved for Scheduled Caste, was also considered. The admission in the engineering college was obtained in 1992 and he completed the course in 1996 though under the interim order of the High Court. The appeal was decided by this Court on 7.1.2004. Placing reliance upon paragraph 38 of the judgment in the case of *Milind* (supra), this Court observed that no purpose would be served in withholding the declaration of the result on the basis of examination already taken by the student or depriving him of the degree in case he passes the examination. It was accordingly directed that the student's result be declared and he be allowed to take his degree with the condition that he will not be treated as Scheduled Caste candidate in future either in obtaining service or for any other benefits flowing from the caste certificate obtained by him and he shall be treated to be a person belonging to general category.

13. The principle, which seems to have been followed by this Court is, that, where a person secures an appointment on the

> basis of a false caste certificate, he cannot be allowed to retain the benefit of the wrong committed by him and his services are liable to be terminated. However, where a person has got admission in a professional course like engineering or MBBS and has successfully completed the course after studying for the prescribed period and has passed the examination, his case may, on special facts, be considered on a different footing. Normally, huge amount of public money is spent in imparting education in a professional college and the student also acquires the necessary skill in the subjects which he has studied. The skill acquired by him can be gainfully utilized by the society. In such cases the professional degree obtained by the student may be protected though he may have got admission by producing a false caste certificate. Here again no hard and fast rule can be laid down. If the falsehood of the caste certificate submitted by the student is detected within a short period of his getting admission in the professional course, his admission would be liable to be cancelled. However, where he has completed the course and has passed all the examinations and acquired the degree, his case may be treated on a different footing.In such cases only a limited relief of protection of his professional degree may be granted."

20. The similar issue again came up before the Hon'ble supreme Court in the matter of *Union of India Vs. Dattatrey & Ors.* (2008) 4 SCC 612 wherein the Hon'ble Supreme Court has held that a false certificate deprives a genuine candidate's opportunity of appointment, therefore, proper course in such case is to cancel/terminate appointment so that post can be refilled by genuine scheduled caste/scheduled tribe candidate. The issue before the Hon'ble Supreme Court in that case was also in respect of furnishing a false caste certificate of "Halba Tribe". The Hon'ble Supreme Court has held that the judgment in the case of *Milind* (supra) does not lay down proposition of law that wrongful appointment can be continued. The Hon'ble Supreme Court held that once the caste certificate is declared invalid, no further action is required except payment of terminal benefit if due, but no pensionary benefits is to be paid. The Hon'ble Supreme Court in this regard hash (sic: has) held that:-

> "5. *Milind* (supra) related to a Medical College admission. The question that arose for consideration in that case was whether it was open to the State Government or Courts or other authorities to modify, amend or alter the list of Scheduled Tribes and in particular whether the *"Halba-Koshti"* was a sub-division of *'Halba'* Tribe. This Court held that it was not permissible to amend or alter the list of Schedule Tribes by including any sub-divisions or otherwise. On facts, this court found that the

respondent therein had been admitted in medical course in ST category, more than 15 years back; that though his admission deprived a scheduled tribe student of a medical seat, the benefit of that seat could not be offered to scheduled tribe student at that distance of time even if respondent's admission was to be annulled; and that if his admission was annulled, it will lead to depriving the services of a doctor to the society on whom the public money had already been spent. In these peculiar circumstances, this Court held that the decision will not affect the degree secured by respondent or his practice as a doctor but made it clear that he could not claim to belong to a Scheduled Tribe. But the said decision has no application to a case which does not relate to an admission to an educational institution, but relates to securing employment by wrongly claiming the benefit of reservation meant for Schedule Tribes. When a person secures employment by making a false claim regarding caste/tribe, he deprives a legitimate candidate belonging to scheduled caste/tribe, of employment. In such a situation, the proper course is to cancel the employment obtained on the basis of the false certificate so that the post may be filled up by a candidate who is entitled to the benefit of reservation.

6. In this context, we may also refer to the decisions in *Bank of India v. Avinash D.Mandivikar* (2005) 7 SCC 690 and *Additional General Manager Human Resources, Bharat Heavy Electricals Ltd. V. Suresh Ramkrishna Burde,* 2007 (5) SCC 336, wherein this Court held that when a person secures appointment on the basis of a false caste certificate, he cannot be allowed to retain the benefit of the wrong committed by him and his services are liable to be terminated. In the latter case, this Court explained *Milind* thus:

> "7. The High Court has granted relief to the respondent and has directed his reinstatement only on the basis of the Constitution Bench decision of this Court in *State of Maharashtra v. Milind.* In our opinion the said judgment does not lay down any such principle of law that where a person secures an appointment by producing a false caste certificate, his services can be protected and an order of reinstatement can be passed if he gives an undertaking that in future he and his family members shall not take any advantage of being member of a caste which is in reserved category."

This Court further held that even in cases of admission to educational institutions, the protection extended by *Milind* (supra) will be applicable only where the candidate had

> successfully completed the course and secured the degree, and not to cases where the falsehood of the caste certificate is detected within a short period from the date of admission.
>
> 7. We are of the view that the High Court failed to appreciate the ratio of *Milind.* Having held that the first respondent had falsely claimed that he belonged to a Schedule Tribe, it wrongly extended him the benefit of continuing in employment.
>
> 8. We, therefore, allow this appeal and set aside the judgment of the High Court in so far as it directs the appellant to continue the first respondent in service. However, as the first respondent has submitted his resignation even before the writ petition was decided, and has not attended to duty from 13.10.2004, his terminal benefits, if any due to him, may be settled. It is however made clear that he will not be entitled to any pensionary benefit."

21. In a recent judgment in the matter of *Chairman and Managing Director. FCI & Ors. Vs. Jagdish Balaram Bahira & Ors.* (2017) 8 SCC 670 the Hon'ble Supreme Court has considered the entire scheme and the earlier judgments on the point and has held that even the jurisdiction under Article 142 of the Constitution should be exercised with circumspection in such cases so that unjust and false claims of imposters are not protected. It has been held that once it is found that the caste certificate was false, then *mens rea* or dishonest intention of claimant is not required to be established for cancellation of admission/appointment/withdrawal of benefit. It has also been held that the person who claims the benefit of the caste certificate has the burden to prove that he belongs to that particular category. The Hon'ble Supreme Court in the case of *FCI* (supra) has held that:-

> "65. Administrative circulars and government resolutions are subservient to legislative mandate and cannot be contrary either to constitutional norms or statutory principles. Where a candidate has obtained an appointment to a post on the solemn basis that he or she belongs to a designated caste, tribe or class for whom the post is meant and it is found upon verification by the Scrutiny Committee that the claim is false, the services of such an individual cannot be protected by taking recourse to administrative circulars or resolutions. Protection of claims of a usurper is an act of deviance to the constitutional scheme as well as to statutory mandate. No government resolution or circular can override constitutional or statutory norms. The principle that government is bound by its own circulars is well-settled but it cannot apply in a situation such as present. Protecting the services of a candidate who is found not to belong to the community or tribe for whom the reservation is intended substantially encroaches upon legal rights of genuine members of

the reserved communities whose just entitlements are negated by the grant of a seat to an ineligible person. In such a situation where the rights of genuine members of reserved groups or communities are liable to be affected detrimentally, government circulars or resolutions cannot operate to their detriment.

66. One of the considerations which is placed in store before the court particularly when an admission to an educational institution is sought to be cancelled upon the invalidation of a caste or tribe claim is that the student has substantially progressed in the course of studies and a cancellation of admission would result in prejudice not only to the student but to the system as well. When the student has completed the degree or diploma, a submission against its withdrawal is urged a fortiori. In our view, the state legislature has made a statutory decision amongst competing claims, based on a public policy perspective which the court must respect. The argument that there is a loss of productive societal resources when an educational qualification is withdrawn or a student is compelled to leave the course of studies (when he or she is found not to belong to the caste or tribe on the basis of which admission to a reserved seat was obtained) cannot possibly outweigh or nullify the legislative mandate contained in Section 10 of the state legislation. When a candidate is found to have put forth a false claim of belonging to a designated caste, tribe or class for whom a benefit is reserved, it would be a negation of the rule of law to exercise the jurisdiction under Article 142 to protect that individual. Societal good lies in ensuring probity. That is the only manner in which the sanctity of the system can be preserved. The legal system cannot be seen as an avenue to support those who make untrue claims to belong to a caste or tribe or socially and educationally backward class. These benefits are provided only to designated castes, tribes or classes in accordance with the constitutional scheme and cannot be usurped by those who do not belong to them. The credibility not merely of the legal system but also of the judicial process will be eroded if such claims are protected in exercise of the constitutional power conferred by Article 142 despite the State law."

22. The position has been summarised by the Hon'ble Supreme Court in para 69 as under:-

"69. For these reasons, we hold and declare that:

69.1. The directions which were issued by the Constitution Bench of this Court in paragraph 38 of the decision in *Milind*

were in pursuance of the powers vested in this Court under Article 142 of the Constitution;

69.2. Since the decision of this Court in *Madhuri Patil* which was rendered on 2 September 1994, the regime which held the field in pursuance of those directions envisaged a detailed procedure for:

(a) the issuance of caste certificates;

(b) scrutiny and verification of caste and tribe claims by Scrutiny Committees to be constituted by the State Government;

(c) the procedure for the conduct of investigation into the authenticity of the claim;

(d) Cancellation and confiscation of the caste certificate where the claim is found to be false or not genuine;

(e) Withdrawal of benefits in terms of the termination of an appointment, cancellation of an admission to an educational institution or disqualification from an electoral office obtained on the basis that the candidate belongs to a reserved category; and

(f) Prosecution for a criminal offence;

69.3. The decisions of this Court in *R. Vishwanatha Pillai and in Dattatray* which were rendered by benches of three Judges laid down the principle of law that where a benefit is secured by an individual - such as an appointment to a post or admission to an educational institution - on the basis that the candidate belongs to a reserved category for which the benefit is reserved, the invalidation of the caste or tribe claim upon verification would result in the appointment or, as the case may be, the admission being rendered void or non est.

69.4. The exception to the above doctrine was in those cases where this Court exercised its power under Article 142 of the Constitution to render complete justice;

69.5. By Maharashtra Act XXIII of 2001 there is a legislative codification of the broad principles enunciated in *Madhuri Patil*. The legislation provides a statutory framework for regulating the issuance of caste certificates (Section 4); constitution of Scrutiny Committees for verification of claims (Section 6); submission of applications for verification of caste certificates (Section 6(2) and 6(3); cancellation of caste certificates (Section 7); burden of proof (Section 8);

withdrawal of benefits obtained upon the invalidation of the claim (Section 10); and initiation of prosecution (Section 11), amongst other things;

69.6 The power conferred by Section 7 upon the Scrutiny Committee to verify a claim is both in respect of caste certificates issued prior to and subsequent to the enforcement of the Act on 18 October 2001. Finality does not attach to a caste certificate (or to the claim to receive benefits) where the claim of the individual to belong to a reserved caste, tribe or class is yet to be verified by the Scrutiny Committee;

69.7. Withdrawal of benefits secured on the basis of a caste claim which has been found to be false and is invalidated is a necessary consequence which flows from the invalidation of the caste claim and no issue of retrospectivity would arise;

69.8.The decisions in *Kavita Solunke* and *Shalini* of two learned Judges are overruled. *Shalini* in so far as it stipulates a requirement of a dishonest intent for the application of the provision of Section 10 is, with respect, erroneous and does not reflect the correct position in law;

69.9. *Mens rea* is an ingredient of the penal provisions contained in Section 11. Section 11 is prospective and would apply in those situations where the act constituting the offence has taken place after the date of its enforcement;

69.10. The judgment of the Full Bench of the Bombay High Court in Arun Sonone is manifestly erroneous and is overruled; and

69.11. Though the power of the Supreme Court under Article 142 of the Constitution is a constitutional power vested in the court for rendering complete justice and is a power which is couched in wide terms, the exercise of the jurisdiction must have due regard to legislative mandate, where a law such as Maharashtra Act XXIII of 2001 holds the field."

23. The Supreme Court in a recent judgment in the case of *Vijay Krishnarao Kurundkar & another Vs. State of Maharashtra and others* dated 28th February 2020 in Civil Appeal No.1865/2020 considering the similar issue has reiterated that an appointment made on the basis of forged certificate is *void ab initio* by holding that:-

"12. The decision in ***Punjab National Bank*** must be read in light of these observations by the three- Judge Bench of this Court in Food Corporation of India. It is trite law that an

> appointment secured on the basis of a fraudulent certificate is void ab initio. It is not open to the government to circumvent the existing statutory mandate by indefinitely protecting the deceitful activities of such candidates through the use of circulars or resolutions."

24. The position of law emerging from the above judicial pronouncements can be summarised as under:-

[i] The Presidential Notification issued under Article 342(1) specifying the Scheduled Tribe/Scheduled Caste can be amended only by the law made by the Parliament and it cannot be varied by way of administrative circular, judicial pronouncements or by the State. The Presidential order must be read as it is.

[ii] Since *"Halba Koshti"* is not mentioned as "Scheduled Tribe" in the Presidential order, therefore, it cannot be held to be scheduled tribe.

[iii] The Hon'ble Supreme Court in *Milind* (supra) while protecting the admission of MBBS student had exercised the power under Article 142 of the Constitution, but the position has been clarified in the subsequent judgment in the matter of *FCI* (supra) by holding that if such claims based upon false caste certificate are protected, then credibility of legal system and judicial process will be eroded.

[iv] Cases where employment is obtained on the basis of false caste certificate stand on different footing and in such cases the person concerned cannot be allowed to enjoy the benefit of wrong committed by him.

[v] If the appointment is obtained on the basis of the false/forged caste certificate, then such an appointment is *void ab initio* and is liable to be cancelled.

25. In the present case, on the basis of the admitted facts itself as also report of Caste Scrutiny Committee, it is clear that the petitioner does not belong to scheduled tribe category. The admitted position in para 6.1 in the writ petition and in para 1 and 2 of the reply of the petitioner dated 12/6/2010 filed before the Caste Scrutiny Committee is that the petitioner belongs to *"Halba Koshti"* caste which in view of the settled legal position is not a scheduled tribe. *"Halba Koshti"* caste is OBC in the State of Madhya Pradesh. The petitioner does not belong to *"Halba"* or *"Halbi"* which is a scheduled tribe. It is also undisputed that the petitioner has obtained employment under the reserved category seat of scheduled tribe.

26. In view of the admitted position on record and finding of Caste Scrutiny Committee that the petitioner belongs to *"Halba Koshti"* caste and in view of the judgment of the Supreme Court in the case of *Milind* (supra), it is clear that the petitioner does not belong to *"Halba"* Scheduled Tribe. The decision of the Caste Scrutiny Committee does not suffer from any error and warrants no interference.

Hence, no merit is found in WP No.57/2011.

27. So far as WP No.32/2011 is concerned, by this petition the petitioner has challenged the order dated 22/11/2010 whereby on the basis of the report of the Caste Scrutiny Committee and its decision dated 21/6/2010 the petitioner's services have been terminated. The order dated 22/11/2010 reveals that before terminating the petitioner's services the show cause notice dated 6/8/2010 was issued to the petitioner and consent of the PSC vide communication dated 16/11/2010 was obtained and the petitioner was also paid three months salary.

28. The main contention of the counsel for petitioner is that the petitioner was a permanent employee and services of the petitioner could not be terminated without conducting regular departmental enquiry. His further contention is that major penalty of dismissal from services has been imposed under Rule 10(8) of the M.P. Civil Services (Classification, Control and Appeal) Rules, 1966.

29. Since the petitioner had obtained employment against the post reserved for Scheduled Tribe on the basis of the forged caste certificate though he does not belong to scheduled tribe, therefore, the appointment of the petitioner as District Excise Officer was *void ab initio.* In the earlier round of litigation this Court by the order dated 20/3/2014 had allowed this writ petition directing the respondents to initiate fresh proceedings in accordance with the rules. This order of the single bench was affirmed by the division bench by order dated 12/5/2016 and aggrieved with the same, the respondent State of Madhya Pradesh had filed Civil Appeal(s)No.5776/2019 (arising out of SLP(C) No.14510/2017. The Hon'ble Supreme Court had expressed that both the writ petitions being WP No.32/2011 and WP No.57/2011 had to be heard together. Accordingly, the order of the division bench of this Court dated 12/5/2016 in WA No.581/2014 was set aside requiring this Court to decide the petitions expeditiously. The Hon'ble Supreme Court had directed that in the mean while the petitioner will continue in service subject to the decision in the writ petition. Counsel for petitioner has pointed out that the petitioner has continued in service. Hence, the order of dismissal has lost its efficacy for all practical purposes.

30. In this case once the Caste Scrutiny Committee has found that the employment was obtained on the basis of the forged caste certificate and decision of Committee is upheld, then nothing further is required and only consequential order of termination of service/cancellation of appointment is to be passed.

31. Having regard to the above analysis, **WP No.57/2011 is dismissed** having been found to be devoid of any merit and **WP No.32/2011 is disposed of** by permitting the respondents to pass an appropriate order cancelling the appointment of the petitioner and terminating his service.

32. The signed order be placed in the record of WP No.32/2011 & a copy whereof be placed in the record of connected WP No.57/2011

Order accordingly

I.L.R. [2021] M.P. 284 (DB)
WRIT PETITION

Before Mr. Justice Sheel Nagu & Mr. Justice Vishal Mishra

WP No. 19958/2020 (Gwalior) decided on 22 December, 2020

PEETHAMBARA GRANITE GWALIOR (M/S) …Petitioner

Vs.

STATE OF M.P. …Respondent

A. Minor Mineral Rules, M.P. 1996, Rule 53(7) – Power of Suspension – Principle of Natural Justice – Expression "by issuing show cause notice" **– Held – Power of suspension of quarrying operation and obligation to issue show cause notice is exercisable simultaneously – Order of suspension can be passed informing reasons for suspension which would satisfy the requirements of issuance of notice to defaulter under Rule 53(7) – Expression "by issuing show cause notice" does not mean that it is incumbent upon competent authority to first issue show cause notice and thereafter consider the reply of defaulter to go in for suspension – Petition dismissed.**

(Para 4)

क. गौण खनिज नियम, म.प्र. 1996, नियम 53(7) – निलंबन की शक्ति – नैसर्गिक न्याय का सिद्धांत – अभिव्यक्ति ''कारण बताओ नोटिस जारी करके'' – अभिनिर्धारित – खदान क्रिया कार्यान्वयन के निलंबन की शक्ति एवं कारण बताओ नोटिस जारी करने की बाध्यता, समसामयिक रूप से प्रयोक्तव्य है – निलंबन के आदेश को निलंबन के कारण सूचित करते हुए पारित किया जा सकता है जिससे नियम 53(7) के अंतर्गत व्यतिक्रमी को नोटिस जारी किये जाने की अपेक्षाओं की संतुष्टि होगी – अभिव्यक्ति ''कारण बताओ नोटिस जारी करके'' का अर्थ यह नहीं है कि निलंबन प्राप्त करने हेतु, सक्षम प्राधिकारी के लिए यह अनिवार्य है कि पहले कारण बताओ नोटिस जारी करें और तत्पश्चात् व्यतिक्रमी के उत्तर को विचार में लें – याचिका खारिज।

B. Minor Mineral Rules, M.P. 1996, Rule 53(7) – Power of Suspension – Object – Principle of "audi alteram partem" **– Held – Concept behind suspension is to arrest with immediate effect illegality/irregularity being caused by defaulting lease holder – Power of suspension can be exercised in any field be it mines & minerals, services etc. – It does not depend upon following the principle of "*audi alteram partem*" as a condition precedent.** **(Para 4.2 & 4.3)**

ख. गौण खनिज नियम, म.प्र. 1996, नियम 53(7) – निलंबन की शक्ति – उद्देश्य – ''दूसरे पक्ष को भी सुनो'' का सिद्धांत – अभिनिर्धारित – निलंबन के पीछे की संकल्पना, व्यतिक्रमी पट्टाधृति द्वारा कारित की जा रही अवैधता/अनियमितता को तत्काल प्रभाव से रोकना है – निलंबन की शक्ति का प्रयोग किसी भी क्षेत्र में किया जा सकता है चाहे वह खान एवं खनिज हो चाहे सेवाएं इत्यादि हो – यह ''दूसरे पक्ष को भी सुनो'' के सिद्धांत का पालन एक पुरोभावी शर्त के रूप में किये जाने पर निर्भर नहीं है।

***C. Minor Mineral Rules, M.P. 1996, Rule 53(7) – Power of Suspension & Power of Cancellation – Expression "providing opportunity of being heard"* – Held – Expression "providing opportunity of being heard" is relatable to power of cancellation and not to the power of suspension.**

(Para 4.1)

ग. गौण खनिज नियम, म.प्र. 1996, नियम 53(7) – निलंबन की शक्ति व रद्दकरण की शक्ति – अभिव्यक्ति ''सुने जाने का अवसर प्रदान किया जाना'' – अभिनिर्धारित – अभिव्यक्ति ''सुने जाने का अवसर प्रदान किया जाना'', रद्दकरण की शक्ति से संबंधित मानी जा सकने वाली है और न कि निलंबन की शक्ति से संबंधित।

Cases referred :

W.P. No. 14421/2020 decided on 15.10.2020.

Pawan Kumar Dwivedi, for the petitioner.
M.P.S. Raghuvanshi, Addl. A. G. for the State.

O R D E R

The Order of the Court was passed by : **SHEEL NAGU, J.** Heard through video conferencing.

This petition filed u/Art. 226 of the Constitution assails the order dated 25/11/2020, P/1 passed by the Collector, Gwalior/respondent No.2 suspending quarrying operations undertaken by petitioner for a period from 22/9/2018 to 22/9/2028 vide agreement P/2. The reason assigned for suspension is discovery of violation of condition of terms of agreement and indulging in unlawful extraction of minerals. Provision of Rule 53(7) of M.P. Minor Mineral Rules, 1996 (for brevity 1996 Rules) has been invoked to issue the impugned order P/1.

2. On being confronted by this court as to the factum of petitioner having alternative efficacious remedy of preferring an appeal/review/revision u/R. 57 of 1996 Rules, learned counsel for petitioner submits that the impugned order violates the principle of natural justice *(audi alteram partem)* as the same could not have been passed without issuing of show cause notice as stipulated in mandatory terms u/R. 53(7) of 1996 Rules.

2.1 To adjudicate the aforesaid ground, it is essential to first textually & contextually analysis the contents of Rule 53(7) of 1996 Rules. For ready

reference and convenience, Rule 53(7) is reproduced below:-

> *"53(7) Action against contravention of conditions of extract trade quarry/quarry lease/permit or the provisions of this rule. - If during the enquiry of any illegal extraction/transportation a fact comes into the knowledge that any lease holder/contractor/ permit holder, in order to evade the royalty from any sanctioned quarry lease/trade quarry/permit, area is involved in dispatching/selling of minerals in excess quantity by showing less quantity of minerals in transit pass/defective transit permit/blank transit permit, then the Collector of the concerned district may suspend the quarrying operation in such quarry lease/trade quarry permit by issuing show cause notice for violating the conditions of the agreement and after providing an opportunity of being heard may cancel the such lease/ trade quarry/permit. The additional royalty may be recovered after making the assessment of the quantity dispatched or sold in order to evade the royalty :*
>
> *Provided that during the inspection if it is found that illegal minerals transporter by securing the transit pass from the lease holder in order to evade the royalty has made overwriting or tempered the pass then the officer of the minerals department/ Mineral Inspector may registered a case against the person concerned."*

2.2 A bare perusal of the aforesaid reveals that as and when the Collector during inquiry into illegal extraction/transportation, discovers that the lease holder/contractor/permit holder in order to evade royalty is involved in dispatching/selling of minerals in excess quantity by showing less quantity of minerals as mentioned in transit pass or permit, then said authority in it's discretion can suspend the quarrying operation by issuing show cause notice for violating the conditions of the agreement and thereafter can also cancel trade quarry/permit after affording reasonable opportunity of being heard.

3. Learned counsel for petitioner laid much stress on the expression "by issuing show cause notice" found in Rule 53(7) of 1996 Rules and urges that suspension is required to be preceded by issuing of show cause notice and since in the instant case no show cause notice was issued before passing impugned order P/1, the same is liable to be set aside.

4. A close scrutiny of Rule 53(7) elicits that power of suspension can be exercised on discovery of violation of conditions of agreement/lead (sic: lease)deed. The use of expression "by issuing show cause notice", in juxtaposition to discovery of violation of condition of terms of agreement, does not mean that it is incumbent upon the competent authority to first issue show cause notice, calling upon the lease holder to show cause as to why the quarrying

operation be not suspended and thereafter consider the reply of defaulter to go in for suspension. If that was the intention of the Rule Making Authority then the rule would have expressly provided that exercise of power of suspension can be made only after issuing of show cause notice and calling for a reply before passing order of suspension. The Rule Making Authority has chosen to confer the power of suspension and in the same breath has made it incumbent upon the competent authority to issue show cause notice for violating the condition of the agreement/lease deed. Meaning thereby that power of suspension of quarrying operation and the obligation to issue show cause notice is exercisable simultaneously. Therefore the order of suspension can be passed informing the reasons for suspension, which would satisfy the requirement of issuance of notice to the defaulter u/R.53(7).

4.1 The requirement of following principle of natural justice *(audi alterm* (sic: *alteram*) *partem)* by affording of reasonable opportunity of being heard is expressly contemplated by Rule 53(7) before cancelling the lead (sic: lease) deed/permit. The expression "providing opportunity of being heard", is relatable to the power of cancellation and not to the power of suspension.

4.2 More so, the concept behind suspension is to arrest with immediate effect illegality/irregularity being caused by defaulting lease holder. If the exercise of power of suspension is required to be preceded by issuing of show cause notice and affording of reasonable opportunity of being heard, then the illegality being committed by defaulter would not be arrested and by the time the inquiry is held affording of reasonable opportunity of being heard, damage to the natural resources which are assets of the Nation would become irreparable leading to environmental degradation which often assume irreversible nature.

4.3 Thus, conceptually the power of suspension to be exercised in any field be it mines & mineral, service etc. does not depend upon following the principle of *audi alterm* (si: *alteram*) *partem* as a condition precedent.

4.4 The aforesaid view of this court is bolstered by single bench decision of this court though relating to field of fair price shop, where in somewhat similar facts in Writ Petition No.14421 of 2020 *[Mahila Bahuddeshiya Sahakari Sanstha Mdt., Morena Vs. State of M.P. and others],* decided on 15/10/2020 it was held as under:-

> *"3.2 A bare perusal of the aforesaid provision reveals that statute does not oblige the competent authority to afford an opportunity of being heard to the 5 society as a pre-requiste for passing order of suspension. The opportunity of being heard is a concept which is relatable to the proceedings for the purpose of cancellation of fair price shop. The concept of show-cause notice can never be relatable to the power of suspension. If the*

person/institution concerned is given an opportunity to respond as to why the shop may not be suspended, then grant of such opportunity would defeat the object behind the power of suspension which is an extraordinary power vested with competent authority to immediately stop continuance of irregularities and illegalities alleged in the process of distribution of essential commodities.

3.3 If opportunity is given to show-cause within 10 days and therefore to conclude proceedings regarding suspension within 3 months as contended by learned counsel for petitioner, it would lead to incongruous result of allowing the fair price shop to continue indulging in illegalities and irregularities.

3.4 Therefore, the intention behind Clause 16(3) of Control Order 2015 is best understood by taking que from object behind the Control Order 2015 which is to ensure uninterrupted supply of essential commodities to public at large. This is possible only when power is available to stop the mischief pending inquiry into veracity of the mischief/misconduct. Thus, a pre-hearing before suspension is abhorant to the object sought to be achieved by Control Order, 2015.

3.5 If the decision to suspend is required to be preceded by show-cause for grant of opportunity of being heard to the delinquent and thereafter considering reply and taking a call on the suspension then hearing would consume much time thereby allowing delinquent to continue indulging in illegalities in distribution of essential commodities. This can never be the object of Clause 16(3) of Control Order 2015. Reading of Clause 16(3) of Control Order 2015 shows invocation of the provision with harmony to the object behind the Control Order. Thus it is obvious that power of suspension is to be exercised without affording any prior opportunity of being heard. Period of 10 days for issuance of notice and then placing matter before competent authority to conclude proceedings within 3 months is relatable to the proceeding for cancellation if thought it best by competent authority to initiate.

4. From the above it is evident that exercise of power of suspension is not dependent upon following of principle of audi alteram partem."

5. In view of above, the impugned order Annexure-P/1 dated 25/11/2020 by Collector, Gwalior suspending quarrying operation of petitioner/lease holder on discovery of certain illegality/unlawful extraction is found to be passed in accordance with provision of Rule 53(7) of 1996 Rules.

6. Since the ground of violation of principle of *audi alterm* (sic: *alteram*) *partem* raised by petitioner does not appeal to this court as explained above, and petitioner has alternative statutory remedy of appeal/review/revision u/R. 57 of 1996 Rules and for involvement of disputed questions of fact, this court declines interference.

7. Accordingly, the petition stands dismissed with liberty to petitioner to avail statutory remedy of appeal/review/revision, as the case may be, under 1996 Rules.

No cost.

Petition dismissed

I.L.R. [2021] M.P. 289
WRIT PETITION
Before Mr. Justice Vishal Dhagat

WP No. 18878/2020 (Jabalpur) decided on 24 December, 2020

RAJENDRA SINGH PAWAR & ors. …Petitioners

Vs.

STATE OF M.P. & ors. …Respondents

***A. Criminal Procedure Code, 1973 (2 of 1974), Section 154, 154(3), 156(3), 190 & 200 and Constitution – Article 226 – Complaint – Remedies* – Held – It is already concluded by Courts that in case where FIR is not registered by police, complainant has alternate remedy u/S 154(3) & 156(3) Cr.P.C. or to avail remedy u/S 190 & 200 Cr.P.C. or in exceptions as enumerated by Apex Court to *Whirphool case*, can file writ petition before High Court – Petitioners failed to demonstrate that their case falls in such exceptions – Registration of FIR cannot be directed – Police directed to consider complaint of petitioners and take appropriate action – Petition disposed. (Paras 3, 4 & 12)**

***क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 154, 154(3), 156(3), 190 व 200 एवं संविधान – अनुच्छेद 226 – परिवाद – उपचार* – अभिनिर्धारित – न्यायालयों द्वारा यह पहले ही निष्कर्षित किया गया है कि पुलिस द्वारा प्रथम सूचना प्रतिवेदन पंजीबद्ध न किये जाने के प्रकरण में, परिवादी के पास धारा 154(3) व 156(3) दं. प्र.सं. के अंतर्गत वैकल्पिक उपचार हैं या धारा 190 व 200 दं.प्र.सं. के अंतर्गत उपचार का अवलंब ले सकता है अथवा सर्वोच्च न्यायालय द्वारा *व्हर्लपूल* प्रकरण में यथा प्रगणित अपवादों में उच्च न्यायालय के समक्ष रिट याचिका प्रस्तुत कर सकता है – याचीगण यह दर्शाने में असफल रहे कि उनका प्रकरण उक्त अपवादों में आता है – प्रथम सूचना प्रतिवेदन को पंजीबद्ध करने का निदेश नहीं दिया जा सकता – पुलिस को याचीगण के परिवाद पर विचार करने के लिए तथा समुचित कार्रवाई करने के लिए निदेशित किया गया – याचिका निराकृत।**

B. ***Police Regulations, M.P., Regulation 634 – The General Diary – Economic Offences*** **– Held – Every complaint received by I.O. shall be entered into General Diary as per Regulation 634 maintained at police station and entry number shall be given to complainant – Police officer shall process all complaints within 15 days and if not possible then maximum 42 days – S.P. shall keep a check that process is done within stipulated period and result is intimated to complainant and if not done, S.P. shall initiate Departmental Enquiry against delinquent officer. (Para 10 & 11)**

ख. पुलिस विनियमन, म.प्र., विनियम 634 – साधारण डायरी – आर्थिक अपराध – अभिनिर्धारित – अन्वेषण अधिकारी द्वारा प्राप्त प्रत्येक परिवाद की प्रविष्टि, विनिमय 634 के अनुसार, पुलिस थाने में संधारित साधारण डायरी में की जाएगी और परिवाद को प्रविष्टि क्रमांक दिया जाएगा – पुलिस अधिकारी सभी परिवादों पर 15 दिनों के भीतर और यदि संभव न हो तब अधिकतम 42 दिनों के भीतर कार्यवाही करेगा – पुलिस अधीक्षक पड़ताल करेगा कि नियत अवधि के भीतर कार्यवाही की गई तथा परिवादी को परिणाम सूचित किया गया है और यदि ऐसा नहीं किया गया है, पुलिस अधीक्षक, अपचारी अधिकारी के विरूद्ध विभागीय जांच आरंभ करेगा।

C. ***Practice & Procedure – Complaint – Procedure*** **– Apex Court laid down certain directions for action to be taken on receipt of complaint – Procedure discussed and enumerated. (Para 6)**

ग. पद्धति एवं प्रक्रिया – परिवाद – प्रक्रिया – सर्वोच्च न्यायालय ने शिकायत प्राप्त होने पर की जाने वाली कार्रवाई हेतु कतिपय निदेश अधिकथित किये – प्रक्रिया विवेचित एवं प्रगणित की गई।

Cases referred:

2018 (1) MPLJ 716, 2017 (1) MPJR 247, (2016) 6 SCC 277, (1998) 8 SCC 1, (2014) 2 SCC 1.

Munish Saini, for the petitioners.
Aman Pandey, P.L. for the respondents/State.

O R D E R

(Hearing through Video Conferencing)

VISHAL DHAGAT, J. :- Petitioners have filed this present writ petition making following prayers:-

> ***7.1*** To call for entire record from the office of respondent nos. 2 and 3 relating to steps taken and investigation conducted in relation to the written complaint submitted by the petitioners (Annexure P/6)
>
> ***7.2.*** To direct respondent nos. 2 and 3 to take appropriate action on

> the written complaint submitted by the petitioners (Annexure P/6) and register F.I.R. against accused Shridhar Ingle S/o Shri D. S. Ingle R/o C-26, New Jail Road, Indore Byepass, Bhopal (M.P.) while keeping in view his previous conduct as was appreciated by this Hon'ble Court in M.Cr.C.No. 11099/2016 (Annexure P/15).

2. Counsel for the petitioners submitted that no action has been taken by respondent no.3 on his complaint/information given regarding commission of offence by one Shridhar Engle. It is submitted by counsel for the petitioners that Shridhar Engle is a habitual offender and he is doing forgery and cheating and, therefore, offences ought to have been registered by respondent no.3 against him.

3. Number of petitions are filed before High Court as Police does not take any decision on a complaint made by a party regarding economic offences. In all such petitions, prayer is made for lodging of First Information Report against the accused persons or prayer is made to decide the complaint/representation preferred by the petitioners before concerned police station or by Superintendent of Police. This Court in matter of *Dharmendra Sonkar Vs. State of M.P. and others* reported in 2018(1) MPLJ 716, *Shweta Bhadauria Vs. State of M.P. and others*- 2017 (1) MPJR 247, *Sudhir Bhaskar Rao Tambe Vs. Hemant Yashwant Dnage and others-(2016) 6 SCC 277,* has held that in cases, where First Information Report is not registered at Police Station, then complainant has an alternate remedy under Sections 154 (3), 156 (3) of the Code of Criminal Procedure or to avail alternative remedy under Sections 190 and 200 of the Code of Criminal Procedure or in exceptions enumerated in case of *Whirphool Corporation Vs. Registrar of Trade Marks, Mumbai and others-reported* in (1998) 8 SCC 1 can file a writ petition before High Court.

4. In view of the aforesaid law, this Court does not deem fit to exercise jurisdiction to give direction to Police Authorities to register First Information Report as petitioners have not demonstrated that their case falls in exception laid down in case of *Whirphool Corporation* (supra).

5. Chapter XII-Section 154 of the Code of Criminal Procedure fixes duty on concerned police officer to examine the complaint and form opinion whether cognizable offence is made out or not. If cognizable offence is made out then he is duty bound to register First Information Report. Otherwise, he can close the complaint if no offence is made out or enter the information as non cognizable offence under Section 155 of the Code of Criminal Procedure.

6. Hon'ble Supreme Court in the matter of *Lalita Kumari Vs. Govt. of U.P. and others* reported in (2014) 2 SCC 1 has specifically laid down following directions for action to be taken on receipt of complaint:-

Conclusion *Directions* :

111.

"i) Registration of FIR is mandatory under Section 154 of the Code, if the information discloses commission of a cognizable offence and no preliminary inquiry is permissible in such a situation.

ii) If the information received does not disclose a cognizable offence but indicates the necessity for an inquiry, a preliminary inquiry may be conducted only to ascertain whether cognizable offence is disclosed or not.

iii) If the inquiry discloses the commission of a cognizable offence, the FIR must be registered. In cases where preliminary inquiry ends in closing the complaint, a copy of the entry of such closure must be supplied to the first informant forthwith and not later than one week. It must disclose reasons in brief for closing the complaint and not proceeding further.

iv) The police officer cannot avoid his duty of registering offence if cognizable offence is disclosed. Action must be taken against erring officers who do not register the FIR if information received by him discloses a cognizable offence.

v) The scope of preliminary inquiry is not to verify the veracity or otherwise of the information received but only to ascertain whether the information reveals any cognizable offence.

vi) As to what type and in which cases preliminary inquiry is to be conducted will depend on the facts and circumstances of each case. The category of cases in which preliminary inquiry may be made are as under:

a) Matrimonial disputes/ family disputes

b) Commercial offences

c) Medical negligence cases

d) Corruption cases

e) Cases where there is abnormal delay/ laches in initiating criminal prosecution, for example, over 3 months delay in reporting the matter without satisfactorily explaining the reasons for delay.

The aforesaid are only illustrations and not exhaustive of all conditions which may warrant preliminary inquiry.

vii) While ensuring and protecting the rights of the accused and

the complainant, a preliminary inquiry should be made time bound and in any case it should not exceed fifteen days generally and in exceptional cases, by giving adequate reasons, six weeks time is provided. The fact of such delay and the causes of it must be reflected in the General Diary entry.

viii) Since the General Diary/Station Diary/Daily Diary is the record of all information received in a police station, we direct that all information relating to cognizable offences, whether resulting in registration of FIR or leading to an inquiry, must be mandatorily and meticulously reflected in the said Diary and the decision to conduct a preliminary inquiry must also be reflected, as mentioned above."

7. **Section 154 of the Code of Criminal Procedure** reads as under:-

154. Information in cognizable cases.

1. Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read Over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf:

[Provided that if the information is given by the woman against whom an offence under Section 326-A, Section 326-B, Section 354, Section 354-A, Section 354-B, Section 354-C, Section 354-D, Section 376, [Section 376A, Section 376AB, Section 376B, Section 376C, Section 376D, Section 376DA, Section 376DB], Section 376-E or Section 509 of the Indian Penal Code (45 of 1860) is alleged to have been committed or attempted, then such information shall be recorded, by a woman police officer or any woman officer:

Provided further that-

(a) in the event that the person against whom an offence under Section 354, Section 354-A, Section 354-B, Section 354-C, Section 354-D, Section 376, [Section 376A, Section 376AB, Section 376B, Section 376C, Section 376D, Section 376DA, Section 376DB], Section 376-E or Section 509 of the Indian Penal Code (45 of 1860) is alleged to have been committed or attempted, is temporarily or permanently mentally or physically disabled, then such information shall be recorded by a police officer, at the residence of the person seeking to report such

offence or at a convenient place of such person's choice, in the presence of an interpreter or a special educator, as the case may be;

(b) the recording of such information shall be video graphed ;

(c) the police officer shall get the statement of the person recorded by a Judicial Magistrate under clause (a) of subsection (5-A) of Section 164 as soon as possible.]

(2) A copy of the information as recorded under sub- section (1) shall be given forthwith, free of cost, to the informant.

(3) Any person aggrieved by a refusal on the part of an officer in charge of a police station to record the information referred to in subsection (1) may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who, if satisfied that such information discloses the commission of a cognizable offence, shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him, in the manner provided by this Code, and such officer shall have all the powers of an officer in charge of the police station in relation to that offence."

8. **Section 156 of the Code of Criminal Procedure** reads as under:-

156. Police officer's power to investigate cognizable case.

(1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII.

(2) No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.

(3) Any Magistrate empowered under section 190 may order such an investigation as above- mentioned.

9. **Section 200 of the Code of Criminal Procedure** reads as under:-

200. Examination of complainant.

A Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate:

Provided that, when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses-

(a) if a public servant acting or- purporting to act in the discharge of his official duties or a Court has made the complaint; or

(b) if the Magistrate makes over the case for inquiry or trial to another Magistrate under section 192:

Provided further that if the Magistrate makes over the case to another Magistrate under section 192 after examining the complainant and the witnesses, the latter Magistrate need not re-examine them.

10. **Section 634 of the M.P. Police Regulations Act** reads as under:-

"634. The General Diary:- This is the diary prescribed by Section 44 of the Police Act, 1861, and is the book referred to in Sections 154 and 155 of the Criminal Procedure Code. It is brief record of the proceedings of the police and the occurrences which are reported to them, or of which they obtain information from day to day, and it is therefore, of the utmost importance that it should be written up accurately and punctually. Any official who enters, or causes to be entered, in it a report which he knows to be false renders himself liable to dismissal from the service."

11. In instant case aforesaid directions and law are not followed by Station House Officer/Investigating Officer after receiving complaint. Complainant is not informed about result of preliminary inquiry/scrutiny done by the Investigating Officer. If such result is informed to the complainant, then he can resort to remedy available to him under the law, but the complaint filed by a person remains unattended. To weed out the problem which is being faced by complainant/ informant in respect of economic offences at the police station following directions are reiterated:-

(i) Whenever a complaint is filed at police station, concerned Police Officer shall examine the complaint and if required preliminary inquiry be done to ascertain whether information reveals any cognizable offence.

(ii) Investigating Officer shall either register First Information Report if complaint/information discloses cognizable offence or proceed under Section 155 of the Code of Criminal Procedure, if no cognizable offence is disclosed or if no offence is made out then complainant shall be informed that his compliant has been filed. Police Officer shall process all complaints received within a period of 15 days. If due to some

reasons, it is not possible for concerned Police Officer to process the complaint and take action on it within said time, he shall take aforesaid action within maximum period of 42 days after receiving of complaint.

(iii) Every complaint which is received by Investigating Officer shall be entered into General Diary, as per M.P. Police Regulation 634 maintained at the Police Station and a number on which said complaint is entered in General Diary shall be given to the complainant. Superintendent of Police shall keep a check that such complaints are decided within the stipulated time mentioned above as per the directions of Apex Court. If complaints remain pending for more than 42 days then Superintendent of Police shall initiate Departmental Enquiry against delinquent Police Officer.

(iv) It is observed that in offences of cheating and fraud, Investigating Officer/Station House Officer is taking a long time to register an offence under Indian Penal Code or to dispose off complaint in accordance with law. Principal Secretary, Home/Director General of Police shall issue directions to Superintendent of Police to sensitize all Police Officers on filed when offence of cheating is made out and when only a civil wrong is made out so that concerned Police Officer can process the complaints/applications made in case of economic offence of cheating and fraud expeditiously.

12. This writ petition filed by the petitioners is **disposed off** with direction to Station House Officer, Lordganj to consider the complaint filed by the petitioners and take appropriate action as mentioned above within a period of 15 days from the date of receipt of certified copy of the order passed today. Result of scrutiny of complaint and action shall be conveyed to petitioners.

13. Let a copy of this order be forwarded to Secretary, Department of Home Affairs, Vallabh Bhawan, Bhopal, Principal Secretary, Law, Director General of Police, Inspector General andAdvocate General so that necessary action shall be taken for compliance of directions issued.

Certified copy as per rules.

Order accordingly

I.L.R. [2021] M.P. 297 (DB)
WRIT PETITION

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

WP No. 9678/2020 (Jabalpur) decided on 9 February, 2021

KISHAN PATEL & ors. …Petitioners

Vs.

STATE OF M.P. & ors. …Respondents

(Alongwith WP No. 12120/2020)

A. Sinchai Prabandhan Me Krishkon Ki Bhagidari Adhiniyam, M.P. (23 of 1999), Section 4, Sinchai Prabandhan Me Krishkon Ki Bhagidari (Sansodhan) Adhiniyam, M.P. (23 of 2013), Section 4 and Sinchai Prabandhan Me Krishkon Ki Bhagidari (Second Amendment) Adhiniyam, M.P., 2019 (5 of 2020), Sections 4(6), 4(8) & 41 – Amendment – Practice – **Held – As per Section 4(6) & 4(8) of Second Amendment Act of 2019, tenure of elected President and Members of Committee could not have been abruptly reduced for period of less than 5 years without assigning/recording reasons whereas in present case, body has been dissolved before completing period of 3 years and that too without assigning any reasons – Impugned notification quashed – Petition allowed. (Para 8 & 9)**

क. सिंचाई प्रबंधन में कृषकों की भागीदारी अधिनियम, म.प्र. (1999 का 23), धारा 4, सिंचाई प्रबंधन में कृषकों की भागीदारी (संशोधन) अधिनियम, म.प्र. (2013 का 23), धारा 4 एवं सिंचाई प्रबंधन में कृषकों की भागीदारी (द्वितीय संशोधन) अधिनियम, म.प्र., 2019 (2020 का 5), धाराएँ 4(6), 4(8) व 41 – संशोधन – पद्धति – अभिनिर्धारित – 2019 के द्वितीय संशोधन अधिनियम की धारा 4(6) व 4(8) के अनुसार, समिति के निर्वाचित अध्यक्ष एवं सदस्यों के कार्यकाल को, बिना कारण दिये/अभिलिखित किये, 5 वर्षों से कम अवधि के लिए अप्रत्याशित ढंग से घटाया नहीं जा सकता था, जबकि वर्तमान प्रकरण में, निकाय को 3 वर्षों की अवधि पूर्ण होने के पहले ही विघटित किया गया है और वह भी कोई कारण दिये बिना – आक्षेपित अधिसूचना अभिखंडित – याचिका मंजूर।

B. Constitution – Article 226/227 – Judicial/Administrative Order – Assigning of Reasons – **Held – Reasons are sacrosanct not only for judicial order but even for an administrative order. (Para 10 & 17)**

ख. संविधान – अनुच्छेद 226/227 – न्यायिक/प्रशासनिक आदेश – कारण दिये जाना – अभिनिर्धारित – कारण, न केवल न्यायिक आदेश के लिए बल्कि एक प्रशासनिक आदेश के लिए भी अतिमहत्वपूर्ण होते है।

Cases referred:

2018 SCC Online SC 1386, 2017 (2) MPLJ 681, AIR 2013 All. 183, (2012) 4 SCC 194, AIR 2007 SC 2599, (2012) 4 SCC 407, AIR 1993 SC 1407, (2019) 15 SCC 1, (1976) 2 SCC 981, (1979) 2 SCC 368, (2004) 5 SCC 568, (2003) 11 SCC 519.

Aseem Trivedi, for the petitioners in WP No. 9678/2020.
Kundan Lal Prajapati, for the petitioners in WP No. 12120/2020.
R.K. Verma, Addl. A. G. for the respondents-State.

O R D E R

(Hearing Convened through Video Conferencing)

The Order of the Court was passed by :

MOHAMMAD RAFIQ, CHIEF JUSTICE :- These two writ petitions have been filed by eight writ petitioners challenging the validity of notification dated 6th March, 2020 (Annexure-P/3) whereby the respondents/State in exercise of powers conferred upon it by Section 41 and other enabling provisions of the Madhya Pradesh Sinchai Prabandhan Me Krishkon Ki Bhagidari Adhiniyam, 1999 (No.23 of 1999) (for short "the Principal Act of 1999") and consequent upon changes made in Section 4 of the Principal Act of 1999 by the Madhya Pradesh Sinchai Prabandhan Me Krishkon Ki Bhagidari (Second Amendment) Adhiniyam, 2019 (No.5 of 2020) (for short "the Second Amendment Act of 2019") thereby reducing the tenure of the Association from six years to five years, dissolved all the existing Water Users' Associations with immediate effect. The petitioners have also challenged the notification dated 09th June, 2020 (Annexure- P/4) passed by the Principal Secretary, Narmada Valley Development Department, Government of Madhya Pradesh, Bhopal (respondent No.1), whereby the State Government in exercise of powers conferred upon it by Section 34 and other enabling provisions of the Principal Act of 1999 appointed Sub-Divisional Officers concerned to discharge duties assigned to Water Users' Association till election/ constitution of new Water Users' Association.

2. The factual matrix of the case, as set out in the writ petitions, in brief, is that the petitioners are elected members/office bearers of the Water Users' Association having been elected as such for a period of six years. The election to the Water Users' Association is regulated under the provisions of the Principal Act of 1999. The Government by Gazette Notification dated 23rd January, 2020 amended Section 4 of the Principal Act of 1999 and provided in sub-section (6) thereof that the President and the Members of the Managing Committee shall, if not recalled earlier, be in office for a period of five years from the date of appointment of competent authority under Section 21(1). By aforesaid notification, sub-section

(8) was also inserted in Section 4, which provides that the State Government may, by notification, dissolve the Managing Committee of Water Users' Association before the period of five years, recording the reasons therefor and the new elections shall be conducted in such manner as may be prescribed.

3. Mr. Aseem Trivedi and Mr. Kundan Lal Prajapati, learned counsels for the petitioners have argued that the State Government has inserted the aforesaid amendment with *mala fide* intention and with oblique motive as well as legal malice. The elections of the Water Users' Association were held in the year 2017 for a period of six years. In these elections, most of the elected persons were from the ruling party- BJP. However, in the Legislative Election that were held in the year 2018, the Congress became the ruling party and the impugned amendments have been brought with *mala fide* intention. It is argued that the Committees have been dissolved in an illegal and arbitrary manner. Even though sub-section (8) inserted in Section 4 by the Second Amendment Act of 2019 provides that the State Government while dissolving the Managing Committee of Water Users' Associations before the period of five years shall record reasons therefor but the impugned notifications do not record any reason whatsoever. It is therefore prayed that the impugned notification be set aside and the petitioners be allowed to complete the tenure of six years for which they were originally elected.

4. Mr. R.K. Verma, learned Additional Advocate General opposed the writ petitions and submitted that though as per the Principal Act of 1999 the tenure of the President and the Members of the Managing Committee was for five years from the date of first meeting, but this was increased to six years by the Madhya Pradesh Sinchai Prabandhan Me Krishkon Ki Bhagidari (Sanshodhan) Adhiniyam, 2013 (No.23 of 2013) (for short "the Sanshodhan Adhiniyam of 2013"). The aforesaid Sanshodhan Adhiniyam of 2013 while substituting Section 4 provided that the Managing Committee for Water Users' Association shall be a continuous body, with one third of its elected members retiring every two years as specified in sub-section (3) of Section 4. Although the total tenure of the Members/Office-bearers will be of six years, but after first election of the Members, one-third out of them shall retire on completion of two years and another one-third shall retire after completion of four years and the remaining one-third shall retire after completion of six years. Later, the tenure of the President and the Members of the Managing Committee was again reduced to five years by the Second Amendment Act of 2019. Sub-section (8) of Section 4 of the Second Amendment Act of 2019 provides that the State Government may, by notification, dissolve the Managing Committee of Water Users' Association even before the period of five years. As far as the requirement of recording reasons for dissolution of the Water Users' Association is concerned, the respondents have already recorded such reasons.

5. Learned Additional Advocate General submitted that the writ petitions are liable to be dismissed because the petitioners have not challenged the constitutional validity of the Second Amendment Act, 2019, without which the challenge to the consequential notification dated 06th March, 2020, dissolving the Water Users' Association and subsequent notification dated 09th June, 2020, cannot be sustained. It is argued that infact it is not a case of amendment rather it is the case of substitution. The effect of substitution of Section 4 of the Principal Act of 1999 by the Second Amendment Act, 2019 would be that the tenure of the Management Committee of any existing Water Association would now be governed by the amended provisions. The petitioners have no vested right to continue in the office. They were elected for the Water Users' Association as per the provisions of the statute and, therefore, are entitled to hold office only for the duration prescribed under the statute. In support of the aforesaid argument, learned counsel placed reliance on the judgment of the Supreme Court in the case of *Gottumukkala Venkata Krishamraju vs. Union of India,* 2018 SCC Online SC 1386; Full Bench decision of this Court in *Viva Highways Ltd. Vs Madhya Pradesh Raod Development Corporation Ltd.,* 2017 (2) MPLJ 681 and another Full Bench decision of Allahabad High Court in the case of *Committee of Management, Saltnat Bahadur P.G. College, Badlapur & another vs. State of U.P. & others,* AIR 2013 All. 183. It is further argued that the right to contest election and hold elective office is not a fundamental right or a common law right but only a statutory right. The elected members therefore cannot claim protection of Clause 6(c) of the General Clauses Act. Reliance in this connection is placed on the judgment of Supreme Court in the cases of *Jitu Patnaik vs. Sanatan Mohakud* reported in (2012) 4 SCC 194 and *Udai Singh Dagar vs. Union of India & others* reported in AIR 2007 SC 2599.

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

7. The contention that the writ petitions are liable to be dismissed for the failure of the petitioners to challenge the constitutional validity of the Second Amendment Act of 2019 is noted to be rejected for the simple reason that the validity of the notification dated 06th March, 2020 and another notification dated 09th June, 2020, has been challenged solely on the ground that such notifications have not been passed even as per the amended Section 4 of the Act. What therefore has to be examined in the present writ petitions is whether the notifications of the respondents while dissolving the Water Users' Associations elected for a period of six years, even before they could complete three years, let alone five years as per the amended provisions, has been passed in conformity with the amended Section 4. In order to appreciate the rival submissions, it is deemed appropriate to reproduce Section 4 of the Principal Act as substituted by the Second Amendment Act of 2019, which reads as under:

"4. Managing Committee of Water Users' Association. -

(1) There shall be a managing committee for every water users' association, which shall consist of a President and one member from each of the territorial constituencies of the water user's area.

(2) The Collector shall make arrangements for the election of President of the managing committee of the water users' association by direct election through the method of secret ballot in such manner as may be prescribed.

(3) The Collector shall also cause arrangements for the election of the members of managing committee through the method of secret ballot in such manner as may be prescribed.

(4) If at an election held under sub-sections (2) and (3), the President or the members of any territorial constituency of water users' association are not elected, fresh election shall be held in such manner as may be prescribed.

(5) If the managing committee of the water users' association does not have a woman member, the managing committee shall co-opt a woman as a member who shall ordinarily be a resident of the farmer's organization area.

(6) The President and the members of the managing committee shall, if not recalled earlier, be in office for a period of five years from the date of appointment of competent authority under sub-section (1) of Section 21:

Provided that on expiry of term of the President and the members of the managing committee, a new managing committee is not constituted, the State Government may, by notification, extend the term of President and the member of the managing committee for further period of six months from the date of such expiration, recording the reasons for extension.

(7) The managing committee shall exercise the powers and perform the functions of the water users' association.

(8) The State Government may, by notification, dissolve the managing committee of water users' association before the period of five years, recording the reasons therefor and the new elections shall be conducted in such manner as may be prescribed."

Sub-section (6) of Section 4 of the aforesaid clearly provides that the President and the Members of the Managing Committee shall, if not recalled earlier, be in office for a period of five years from the date of appointment of

competent authority under sub-section (1) of Section 21. The maximum term of the President and the Members of the Managing Committee as per sub-section (6) of Section 4 of the Second Amendment Act of 2019 aforesaid is five years but the power has been conferred on the State Government to recall them even before completion of five years, which is what has been done in the present case. Here at this stage, sub-section (8) of Section 4 acquires significance which *inter-alia* provides that the State Government may by notification dissolve the Managing Committee of Water Users' Association before the period of five years, recording reasons therefor and the new elections shall be conducted in such manner as may be prescribed. The notification dated 06th March, 2020 has simply provided that "consequent upon the changes made in Section 4 of the Principal Act of 1999 by the Act No.5 of 2020", "for proper enforcement of amended provisions of the Act, all Water User's Associations are required to be dissolved" with immediate effect. This notification further provides that "in exercise of the powers conferred by Section 41 and all other enabling provisions of the Principal Act of 1999 (No.23 of 1999) in this regard", "all existing Water Users' Association constituted stand dissolved with immediate effect". Lastly, this notification provides "in exercise of powers conferred by Section 34 and all other enabling provisions of the Principal Act of 1999 (No.23 of 1999) in this regard", "the controlling Basin Chief Engineer of Water Resources Department are authorized to appoint Sub-Divisional Officers concerned to discharge the duties assigned to Water Users' Association till the new Water Users' Associations are constituted". The further consequential notification has been issued on 09th June, 2020 by the State Government which merely provides that since the tenure of the President and Secretary of the Water Users' Association, which was earlier six years, has been reduced to five years vide amendment brought in the year 2020, the Water Users' Associations have been dissolved by notification dated 06th March, 2020. In exercise of powers conferred by Section 41 of the Principal Act of 1999, the State Government hereby dissolved all such Water Users' Associations whose term has not come to end, on the date of issuance of this notification and appointed concerned Sub-Divisional Officers/Assistant Engineers (Field) by exercising power under Section 21 of the Act as the competent authority.

8. Obviously, the first notification dated 06th March, 2020, except for saying that consequent upon the changes made in Section 4 of the Principal Act and for proper enforcement of the amended provisions of the Act all Water Users' Associations are required to be dissolved, does not record any reason whatsoever why all Water Users' Associations have been dissolved at one go by single notification. The respondents in their counter affidavit have tried to justify their action by stating as under:

> "11. That, the answering respondents submit that last elections were held in the year 2017 in accordance with the provisions of

> the Amendment Act 2013, which prescribes the scheme of continuous managing committee and term of the Office was prescribed as six years. It was also prescribed in the said amendment that at the first election of the territorial constituency members shall be elected on one time, out of which one third of the members thereof shall retire on completion of 2 years, another one third shall retire after completion of four years and remaining one third shall retire after completion of six years from the Office and their terms of retirement shall be decided before commencement of first election of the members of the territorial constituency by drawl of lots. On the said premises, last elections were held which were conducted on altogether different scheme than has been provided under Amendment Act 2019. If Associations which were elected in accordance with Act of 2013 are permitted to be continued then provisions of Amendment Act 2019 cannot be implemented. For proper implementation of Second Amendment Act 2019, it was required for the State Government to dissolve all the managing committee which were constituted in accordance with Amendment Act 2013. Section 41 confers power to the State Government to pass any order for removing any difficulty. Sub Section (8) of Sec. 4 of the Amendment Act 2019 also confers power to the State Government to dissolve the committee before completion of five years. Therefore, in exercise of powers conferred u/s 41, State Government has passed notification on 6/3/2020 taking decision to dissolve all the water users associations with immediate effect. The order of dissolution passed by the State Government is absolutely in accordance with law and within its jurisdiction. As the State Government has competence to enact the law and within its jurisdiction State Legislature has made amendment in the Act of 2019 and by exercising powers conferred under the Principal Act as also in Amendment Act, order impugned i.e., 6/3/2020 has been passed, which cannot be said as illegal and arbitrary in any manner."

The afore-noted narrative cannot be considered as a reason. A careful consideration of the above-mentioned paragraph would make it evident that the only reason which the respondents have given in their counter-affidavit/return for their decision to dissolve the Water Users' Association elected for six years is that their tenure has been reduced by substituting Section 4 of the Principal Act of 1999 to five years. This argument would perhaps have been valid if the elected bodies would have been dissolved soon upon completion of five years. In the present case, however, these bodies have been dissolved even before they could complete the period of three years. The impugned notifications does not mention any reason as to why such dissolution was necessary.

9. The contention that petitioners would not have any vested right to continue to hold the office for the period of six years inasmuch as the right to contest election and to get elected is neither a fundamental right nor a common law right and this being a statutory right, can always be curtailed by amendment in the statute, also cannot be countenanced because what has been done by the Legislature by substituting Section 4 is to provide in its sub-section (6) that the Presidents and the Members of the Managing Committee shall, if not recalled earlier, be in office for a period of five years from the date of appointment of competent authority under sub-section (1) of Section 21, but at the same time, the Legislature consciously provided in sub-section (8) of the substituted Section 4 that the State Government may, by notification, dissolve the Managing Committee of Water Users' Association before the period of five years, recording the reasons therefor and the new elections shall be conducted in such manner as may be prescribed. The tenure of the elected Presidents and the Members of the Managing Committees therefore could not have been abruptly reduced for a period less than five years and, in any case, if the State Government wanted to recall them earlier, as is envisaged in sub-section (6) of Section 4, as per the mandate given in sub-section (8) thereof, it could do so only after recording reasons therefor and not otherwise. Recording of reasons is thus *sine qua non* for exercising the power of dissolution of elected body of Water Users' Association.

10. Reasons are sacrosanct not only for a judicial order but now as per settled proposition of law, even for an administrative order. This would be evident from a catena of judgments rendered by the Apex Court which we shall presently discuss hereunder.

11. The Supreme Court in *Ravi Yashwant Bhori vs. The Collector, District Raigad & others,* reported in (2012) 4 SCC 407 held that a duly elected person is entitled to hold the office for the term for which he has been elected and he can be removed only on proven misconduct or any other procedure prescribed under the law. Even in administrative matters, the reasons should be recorded as it is incumbent upon the authorities to pass speaking and reasoned order. The relevant paragraphs of the aforesaid judgment read as under:

> **"36.** In view of the above, the law on the issue stands crystallized to the effect that an elected member can be removed in exceptional circumstances giving strict adherence to the statutory provisions and holding the enquiry, meeting the requirement of principles of natural justice and giving an incumbent an opportunity to defend himself, for the reason that removal of an elected person casts stigma upon him and takes away his valuable statutory right. Not only the elected office bearer but his constituency/electoral college is also deprived of representation by the person of their choice.

37. A duly elected person is entitled to hold office for the term for which he has been elected and he can be removed only on a proved misconduct or any other procedure established under law like "no confidence motion", etc. The elected official is accountable to its electorate as he has been elected by a large number of voters and it would have serious repercussions when he is removed from the office and further declared disqualified to contest the election for a further stipulated period.

Recording of reasons

38. It is a settled proposition of law that even in administrative matters, the reasons should be recorded as it is incumbent upon the authorities to pass a speaking and reasoned order.

39. In *Shrilekha Vidyarthi vs. State of U.P. & Ors.,* AIR 1991 SC 537, this Court has observed as under:-

> "36. .....Every State action may be informed by reason and if follows that an act uninformed by reason, is arbitrary. The rule of law contemplates governance by laws and not by humour, whims or caprices of the men to whom the governance is entrusted for the time being. It is the trite law that "be you ever so high, the laws are above you." This is what a man in power must remember always."

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

Malice in law

47. This Court has consistently held that the State is under an obligation to act fairly without ill will or malice-in fact or in law. Where malice is attributed to the State, it can never be a case of personal ill will or spite on the part of the State. "Legal malice" or "malice in law" means something done without lawful excuse. It is a deliberate act in disregard to the rights of others. It is an act which is taken with an oblique or indirect object. It is an act done wrongfully and wilfully without reasonable or probable cause, and not necessarily an act done from ill feeling and spite.

48. Mala fide exercise of power does not imply any moral turpitude. It means exercise of statutory power for "purposes foreign to those for which it is in law intended." It means conscious violation of the law to the prejudice of another, a depraved inclination on the part of the authority to disregard the rights of others, where intent is manifested by its injurious acts. Passing an order for unauthorized purpose constitutes malice in

law. (See: *Addl. Distt. Magistrate, Jabalpur v. Shivakant Shukla,* AIR 1976 SC 1207; *Union of India thr. Govt. of Pondicherry & Anr. v. V Ramakrishnan & Ors.,* (2005) 8 SCC 394; and *Kalabharati Advertising v. Hemant Vimalnath Narichania & Ors.,* AIR 2010 SC 3745)"

12. In *Krishna Swami vs. Union of India & others*, AIR 1993 SC 1407 the Supreme Court highlighting the necessity of recording reasons in administrative orders has held as under:

> **"46**. .....Reasons are the links between the material, the foundation for their erection and the actual conclusions. They would also demonstrate how the mind of the maker was activated and actuated and their rational nexus and synthesis with the facts considered and the conclusions reached. Lest it would be arbitrary, unfair and unjust, violating Article 14 or unfair procedure offending Article 21 "

13. The Supreme Court in *Nareshbhai Bhagubhai and others vs. Union of India & others,* reported in (2019) 15 SCC 1 held as under:

> **"21.** In the present case, it is the undisputed position that no order as contemplated in the eye of the law was passed by the competent authority in deciding the objections raised by the appellants. A statutory authority discharging a quasi-judicial function is required to pass a reasoned order after due application of mind. In *Laxmi Devi v. State of Bihar,* (2015) 10 SCC 241, this Court held that : (SCC pp. 254-55, para 9)
>
> > "9. *The importance of Section 5-A cannot be overemphasised. It is conceived from natural justice and has matured into manhood in the maxim of audi alteram partem i.e. every person likely to be adversely affected by a decision must be granted a meaningful opportunity of being heard. This right cannot be taken away by a side wind, as so powerfully and pellucidly stated in Nandeshwar Prasad v. State of U.P.,* AIR 1964 SC 1217. So stringent is this right that it mandates that the person who heard and considered the objections can alone decide them; and not even his successor is competent to do so even on the basis of the materials collected by his predecessor. *Furthermore, the decision on the objections should be available in a self-contained, speaking and reasoned order; reasons cannot be added to it later as that would be akin to putting old wine in new bottles.* We can do no better than commend a careful perusal of Union of India v.

Shiv Raj, (2014) 6 SCC 564, on these as well as cognate considerations."

(emphasis supplied)

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

File notings and lack of communication

26. It is settled law that a valid order must be a reasoned order, which is duly communicated to the parties. The file noting contained in an internal office file, or in the report submitted by the competent authority to the Central Government, would not constitute a valid order in the eye of the law. In the present case, there was no order whatsoever passed rejecting the objections, after the personal hearing was concluded on 30-7-2011. It is important to note that the competent authority did not communicate the contents of the file noting to the appellants at any stage of the proceedings. The said file noting came to light when the matter was pending before the High Court, and the original files were summoned. The High Court, upon a perusal of the files, came across the file noting recording rejection of the objections only on the ground that the matter pertained to an infrastructure project for public utility.

27. In *Bachhittar Singh v. State of Punjab, AIR 1963 SC 395* a Constitution Bench held that merely writing something on the file does not amount to an order. For a file noting to amount to a decision of the Government, it must be communicated to the person so affected, before that person can be bound by that order. Until the order is communicated to the person affected by it, it cannot be regarded as anything more than being provisional in character.

28. Similarly, in *Shanti Sports Club v. Union of India,* (2009) 15 SCC 705 this Court held that notings recorded in the official files, by the officers of the Government at different levels, and even the Ministers, do not become a decision of the Government, unless the same are sanctified and acted upon, by issuing an order in the name of the President or Governor, as the case may be, and are communicated to the affected persons.

29. In *Sethi Auto Service Station v. DDA,* (2009) 1 SCC 180, this Court held that : (SCC pp. 185-86, paras 14 & 16)

> *"14.* It is trite to state that notings in a departmental file do not have the sanction of law to be an effective order. A noting by an officer is an expression of his viewpoint on the subject. It is no more than an opinion by an officer for internal use and consideration of the other officials of the department and for the benefit of the final decision-making authority. Needless to add that internal notings are not meant for outside exposure. *Notings*

> *in the file culminate into an executable order, affecting the rights of the parties, only when it reaches the final decision-making authority in the department, gets his approval and the final order is communicated to the person concerned.*
>
> * * * *
>
> *16. To the like effect are the observations of this Court in Laxminarayan R Bhattad* v. *State of Maharashtra,* (2003) 5 SCC 413, *wherein it was said that a right created under an order of a statutory authority must be communicated to the person concerned so as to confer an enforceable right."*
>
> (emphasis supplied)"

14. The Supreme Court in *Siemens Engineering & Manufacturing Co. of India Ltd. vs. The Union of India & another* reported in (1976) 2 SCC 981 highlighting the importance of reasons, albeit in the context of arbitral award, but also emphasizing on the need on giving reason by the administrative authorities as well, in para-6 of the judgment has held as under:

> "6.....If courts of law are to be replaced by administrative authorities and tribunals, as indeed, in some kinds of cases, with the proliferation of Administrative law, they may have to be so replaced, it is essential that administrative authorities and tribunals should accord fair and proper hearing to the persons sought to be affected by their orders and give sufficiently clear and explicit reasons in support of the orders made by them. Then alone administrative authorities and tribunals exercising quasi-judicial function will be able to justify their existence and carry credibility with the people by inspiring confidence in the adjudicatory process. The rule requiring reasons to be given in support of an order is, like the principle of **audi alteram partem,** a basic principle of natural justice which must inform every quasi-judicial process and this rule must be observed in its proper spirit and mere pretence of compliance with it would not satisfy the requirement of law...."

15. In *Gurdial Singh Fijji vs. State of Punjab and others* reported in (1979) 2 SCC 368, in para-18 the Supreme Court held as under;

> **"18.** ..... "Reasons", according to Beg J. (with whom Mathew J.concurred) "are the links between the materials on which certain conclusions are based and the actual conclusions". The Court accordingly held that the mandatory provisions of regulation 5(5) were not complied with by the Selection Committee. That an officer was "not found suitable" is the conclusion and not a reason in support of the decision to supersede him. True, that it is not expected that the Selection Committee should give

> anything approaching the judgment of a Court, but it must at least state, as briefly as it may, why it came to the conclusion that the officer concerned was found to be not suitable for inclusion in the Select List. In the absence of any such reason, we are unable to agree with the High Court that the Selection Committee had another "reason" for not bringing the appellant on the Select List."

16. The Supreme Court in *State of Orissa vs. Dhaniram Luhar* reported in (2004) 5 SCC 568 by referring to its earlier decision in *Raj Kishore Jha vs. State of Bihar,* (2003) 11 SCC 519 while highlighting the necessity for giving reasons held that "reason is the heartbeat of every conclusion, and without the same it becomes lifeless".

17. In view of the analysis of law as above-discussed, it is well settled that reasons are the link between the order and the mind of the authority who passes the order. Proper reasons, even in administrative order, are the necessary concomitant for a valid order passed by the administrative authority. The purpose of indicating such reasons in administrative order is to convey to the affected parties the satisfaction arrived at by the authority for the conclusion it has reached, so that the aggrieved person will have the opportunity to get the correctness of such reasons tested before the appropriate forum, be it appellate authority or the Constitutional Courts.

In view of the above discussion, the present writ petitions deserve to succeed. The impugned notifications are quashed and set aside. Accordingly, the writ petitions are **allowed.**

Petition allowed

I.L.R. [2021] M.P. 309 (DB)
REVIEW PETITION

Before Mr. Justice Sujoy Paul & Mr. Justice Mohd. Fahim Anwar

RP No. 1077/2019 (Jabalpur) decided on 18 December, 2020

RAJASTHAN PATRIKA PVT. LTD. …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

(Alongwith RP No. 1076/2019)

***A. Working Journalists (Conditions of Service) and Miscellaneous Provisions Rules, 1957, Rule 36 – Application – Prescribed Form* – Held – If necessary details are otherwise available in application, although in a different manner and not in prescribed form, application cannot be thrown**

into winds – It is the "substance" and not the "form" which will decide the entertainability of application. (Para 15)

क. श्रमजीवी पत्रकार (सेवा की शर्तें) और प्रकीर्ण उपबंध नियम, 1957, नियम 36 – आवेदन – विहित प्ररूप – अभिनिर्धारित – यदि आवश्यक विवरण आवेदन में अन्यथा उपलब्ध है, यद्यपि एक अलग ढंग में तथा विहित प्ररूप में नहीं, आवेदन अस्वीकार नहीं किया जा सकता – यह ''सार'' है तथा न कि ''प्ररूप'' जो कि आवेदन के ग्रहण किये जाने की योग्यता विनिश्चित करेगा।

***B. Working Journalists and Other Newspaper Employees (Conditions of Service) and Miscellaneous Provisions Act (45 of 1955) – Aims & Objects* – Held – Act of 1955 is a beneficent piece of legislation and it cannot be read in a hyper technical manner to strangulate a litigant – Liberal interpretation should be given to provisions in order to advance the cause of justice. (Para 16 & 18)**

ख. श्रमजीवी पत्रकार और अन्य समाचार–पत्र कर्मचारी (सेवा की शर्तें) और प्रकीर्ण उपबंध अधिनियम (1955 का 45) – लक्ष्य व उद्देश्य – अभिनिर्धारित – 1955 का अधिनियम विधान का एक परोपकारी अंग है तथा एक मुकदमेबाज का गला घोंटने हेतु इसे अत्यंत तकनीकी ढंग से नहीं पढ़ा जा सकता – न्याय के ध्येय को आगे बढ़ाने के लिए उपबंधों का उदार निर्वचन किया जाना चाहिए।

***C. Constitution – Article 226/227 – Review – Grounds* – Held – Reasoned order passed in writ petition – Matter has been dealt with in great detail – No error apparent on face of record – Petitioner cannot be permitted to reagitate the issue in the review – Petition dismissed. (Paras 14, 20 & 22)**

ग. संविधान – अनुच्छेद 226/227 – पुनर्विलोकन – आधार – अभिनिर्धारित – रिट याचिका में सकारण आदेश पारित किया गया – मामले पर बहुत विस्तार से विचार किया गया – अभिलेख पर प्रत्यक्ष रूप से कोई त्रुटि प्रकट नहीं होती – याची को पुनर्विलोकन में पुनः विवाद्यक उठाने की अनुमति नहीं दी जा सकती – याचिका खारिज।

***D. Practice & Procedure – Review – Scope* – Held – Scope of review is very limited – Under the garb of review, petitioner cannot be permitted to re-argue the matter on merits, unless an error apparent on face of record is pointed out – No long drawn arguments can be entertained to fish out such error. (Para 13)**

घ. पद्धति व प्रक्रिया – पुनर्विलोकन – विस्तार – अभिनिर्धारित – पुनर्विलोकन का विस्तार बहुत सीमित है – पुनर्विलोकन की आड़ में, याची को गुण दोषों के आधार पर मामले पर पुनः तर्क करने की अनुमति नहीं दी जा सकती, जब तक कि अभिलेख पर प्रत्यक्ष रूप से प्रकट त्रुटि दर्शाई गई न हो – उक्त त्रुटि दर्शाने हेतु किन्हीं लंबे तर्कों को ग्रहण नहीं किया जा सकता।

Cases referred:

AIR 1958 SC 507, (2009) 14 SCC 663, (2009) 10 SCC 464, (1976) 3 SCC 832, (2012) 7 SCC 788, AIR 1955 SC 425, (1975) 1 SCC 774, (1976) 1 SCC 719, (1984) 3 SCC 46, (2005) 4 SCC 480.

Gopal Jain assisted by *Lalji Kushwaha*, for the petitioner in RP No. 1076/2019.

Ajay Choudhary assisted by *Lalji Kushwaha,* for the petitioner in RP No. 1077/2019.

Rahul Deshmukh, P.L. for the respondents-State.

Abhishek Arjaria, for the private respondents/employees.

O R D E R

(Through Video Conferencing)

The Order of the Court was passed by:

SUJOY PAUL, J :- These review petitions are arising out of a common order dated 18.07.2019, passed in WP-17859-2016 & WP-18489-2016. The petitioners submit that the matter is related to **"Working Journalists and Other Newspapers Employees (Conditions of Service) and Miscellaneous Provisions Act, 1955"** (in short the **"WJ Act").**

2. By taking this Court to Section 17(2), Shri Jain, learned senior counsel urged that a statutory procedure is prescribed for adjudication of a "dispute". If there exists a "dispute", the mechanism is prescribed under sub-section (2) of Section 17 of the WJ Act. Thus existence of a "dispute" is a pre-condition to invoke Section 17(2) of the WJ Act.

3. In the instant matters, the applications filed by the workmen does not fall within the ambit of "dispute" and, therefore, the very basis on the strength of which proceedings could be started before the authority was not available. The next contention is that Rule 36 of the " **Working Journalists (Conditions of Service) and Miscellaneous Provisions Rules, 1957"** (for short the **"Rules of 1957")** prescribes a statutory Form "C". Referring to the language employed in Rule 36, Shri Jain argued that the law makers have chosen to use the word "shall" which leaves no room for any doubt that the provision is mandatory. Thus, the application can be entertained only when it is filed in statutory Form "C". If the applications preferred by the employees are examined on the anvil of statutory From (sic: Form) "C", it will be clear that same are not in the prescribed form. The law is well settled that if a thing is prescribed to be done in a particular manner by a statute, it has to be done in the same manner and other methods are forbidden.

4. The error of classification is apparent on the face of the record. If the written submission filed before the authority by the petitioners is seen, it will be clear that there existed a dispute whether the petitioners fall within the category 7 or category 1. Without examining this, the proceedings were not maintainable. The reference is made to AIR 1958 SC 507, *[Kasturi & Sons (Pvt.) Ltd. Vs. Shri N. Salivateeswaran & Anr.]* to bolster the contention that as per this Constitution Bench judgment relating to the WJ Act, it is clear that the procedure adopted by the authority runs contrary to Section 17 of the WJ Act which is analogous/akin to Section 33 of the Industrial Disputes Act, 1947.

5. Shri Jain has taken us to Para-17 of the order under review and urged that the findings given in this para are factually incorrect and legally improper. In absence of existence of a "dispute", the question of invoking section 17 of W.J Act did not arise.

6. Lastly, Shri Jain relied on a chart which is filed as Annexure-A (at Page No.31). He submits that if CTC amount and the amount claimed by employees are examined in juxtaposition, it will be clear like noon day that what employees have received is much higher than what they claimed in the instant application. Since a more favourable benefit is received by them, their application under Section 17 was not maintainable.

7. On the basis of aforesaid contentions, learned senior counsel submits that the order under review contains factual as well as apparent legal error which can be corrected in exercise of review jurisdiction.

8. Countering the aforesaid, Shri Arjaria, learned counsel for the private respondnets (sic: respondents) submits that the authority under the W.J.Act passed the order dated 19.09.2016 which became subject matter of challenge. The written submissions on which learned senior counsel have placed reliance were filed on 20.09.2016 (Annexure-P/11). The written submission filed after final order is passed, is of no assistance to the petitioners. The Revenue Recovery Certificate (RRC) was also issued on 19.09.2020. The additional return or submission filed subsequent to the final order cannot be a ground for review. In support of this contention reliance is placed on Para- 5.13 of the petition.

9. Shri Arjaria placed heavy reliance on the order passed by Indore Bench in WA-193-2019. The Rajasthan Patrika/ petitioner unsuccessfully filed RP-1429-2019, which was dismissed on 05.11.2019. Under the garb of review petition, the petitioner cannot be permitted to re-argue the matter or raise the same points which have already been adjudicated on merits. Lastly, it is urged that if employees' application (Annexure-P/4) is examined in juxtaposition to prescribed Form "C", it will be clear that in substance it is same and pregnant with

necessary details. Thus, on technical ground, employees cannot be non-suited. The chart Annexure-A was not part of the writ petition, submits Shri Arjaria and, therefore, new factual matter cannot be a reason to entertain a review petition.

10. In rejoinder submission, Shri Jain urged that Rule 36 uses the word "shall" which means that application of employee must be strictly in the statutory Form "C". If edifice/foundation of application is incorrect, the entire building of proceedings founded upon it must collapse. Shri Choudhary advanced the arguments in similar lines.

11. No other point is pressed by counsel for the parties.

12. We have heard the parties at length and perused the record.

13. This is trite that scope of review is very limited. Under the garb of review, the petitioner cannot be permitted to re-argue the matter on merits (unless an error apparent on the face of record is pointed out). No long drawn arguments can be entertained to fish out such error. (See: (2009) 14 SCC 663. *[Inderchand Jain (dead) through LRs vs. Motilal (dead) through LRs]* & (2009) 10 SCC 464, *[S. Bagirathi Ammal vs. Palani Roman Catholic Mission])*.

14. The argument advanced by Shri Jain, learned senior counsel relating to applicability of Section 17 was dealt with in great detail in order dated 18.07.2019. Para-14 of the order under review (reproduced in Para-18 of this order) is the complete answer to this argument. No case is made out to revisit the said aspect in this review jurisdiction.

15. Rule 36 of the Rules of 1957 reads as under:

> **"36. Application under section 17 of the Act.** - An application under section 17 of the Act shall be made in Form C to the Government of the State, where the Central Office or the Branch Office of the newspaper establishment in which the newspaper employee is employed, is situated."

True it is that Rule 36 of the Rules of 1957 is pregnant with the word "shall". The question is whether the rule can be read in the manner suggested by Shri Jain and Shri Choudhary. We are unable to persuade ourselves with the line of argument advanced by learned counsel for the petitioners. The intention of law makers is to enable and encourage the litigant to file their application in the prescribed form so that the necessary details are spelled out. If such details are otherwise available, although in a different manner, merely because such application was not filed in the prescribed form, the application cannot be thrown to winds. It is the "substance" which will decide the entertainability of application and not the "form".

16. The WJ Act, in our considered opinion, is a beneficent piece of legislation. It cannot be read in a hyper technical manner to strangulate a litigant. While dealing with another beneficent provision, namely, the Industrial Disputes Act, 1947, Krishna Iyer, J in (1976) 3 SCC 832, *[The Mumbai Kamgar Sabha, Bombay vs. M/s. Abdulbhai Faizullabhai & others]* opined as under:

> "7..... The substance of the matter is obvious and formal defects, in such circumstances, fade away. We are not dealing with a civil litigation governed by the Civil Procedure Code but with an industrial dispute where the process of conflict resolution is informal, rough-and-ready and invites a liberal approach. Procedural prescriptions are hand-maids, not mistresses, of justice and failure of fair play is the spirit in which courts must view processual deviances. Our adjectival branch of jurisprudence, by and large, deals not with sophisticated litigants but the rural poor, the urban lay and the weaker societal segments for whom law will be an added terror if technical misdescriptions and deficiencies in drafting pleadings and setting out the cause title create a secret weapon to nonsuit a party. Where foul play is absent, and fairness is not faulted, latitude is a grace of processual justice....."
>
> [Emphasis Supplied]

17. The reference may be made to (2012) 7 SCC 788, *[Ponnala Lakshmaiah vs. Kommuri Pratap Reddy & others]* wherein the election petitioner urged that Section 83(1) of the Representation of Peoples Act, 1951 read with Rule 94-A of the Conduct of Election Rules, 1961 shows that the word used in the statute is "shall", which make it mandatory/obligatory for the petitioner to support the averments by an affidavit filed in a *prescribed form.* The Apex Court repelled the said argument by holding thus:

> "28. ..... The format of the affidavit is at any rate not a matter of substance. What is important and at the heart of the requirement is whether the election petitioner has made averments which are testified by him on oath, no matter in a form other than the one that is stipulated in the Rules. The absence of an affidavit or an affidavit in a form other than the one stipulated by the Rules does not by itself cause any prejudice...."
>
> [Emphasis Supplied]

18. In view of scheme and object of WJ Act, the liberal interpretation should be given to the provisions in order to advance the cause of justice. This is settled law that all the rules of procedure are the handmaid of justice. The Apex Court in AIR 1955 SC 425. *Sangram Singh* v. *Election Tribunal, Kotah* opined that A code of procedure must be regarded as such. It is "procedure", something designed to

facilitate justice and further its ends: not a penal enactment for punishment and penalties; not a thing designed to trip people up. Too technical a construction of sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against. The Apex Court in (1975) 1 SCC 774, *Sushil Kumar Sen* v. *State of Bihar* opined that the mortality of justice at the hands of law troubles a judge's conscience and points an angry interrogation at the law reformer. The processual law so dominates in certain systems as to overpower substantive rights and substantial justice. The humanist rule that procedure should be the handmaid, not the mistress, of legal justice compels consideration of vesting a residuary power in judges to act ex debito justitiae where the tragic sequel otherwise would be wholly inequitable. Justice is the goal of jurisprudence-processual, as much as substantive. In (1976) 1 SCC 719, *State of Punjab* v. *Shamlal Murari,* the Apex Court held that processual law is not to be a tyrant but a servant, not an obstruction but an aid to justice. Procedural prescriptions are the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice. In (1984) 3 SCC 46, *Ghanshyam Dass* v. *Dominion of India* the Apex Court reiterated the need for interpreting a part of the adjective law dealing with procedure alone in such a manner as to subserve and advance the cause of justice rather than to defeat it as all the laws of procedure are based on this principle. In (2005) 4 SCC 480, *Kailash* v. *Nanhku* the Apex Court held that the provisions of Civil Procedure Code or any other procedural enactment ought not to be construed in a manner which would leave the Court helpless to meet extraordinary situations in the ends of justice.

19. The Representation of Peoples Act, 1951 and the Conduct of Election Rules, 1961 are more technical in nature if compared with ID Act or WJ Act. Despite that, the Apex Court was not impressed with the hyper technical argument based on "form" and insisted on "substance". In the instant matters employees could not show any prejudice being caused to them if applications were not filed in the prescribed form. Thus, this argument advanced by the petitioners is devoid of substance.

20. The judgment of Supreme Court in *Kasturi & Sons (Pvt.) Ltd.* (supra) was considered in later judgments. While deciding the writ petition, this Court has given finding by passing a reasoned order. The petitioners cannot be permitted to reagitate the said issue in the review. We do not find any error apparent on the face of record which requires review of Para-17 of the order. It is common ground raised by Shri Jain, learned senior counsel and Mr. Choudhary that petitioners filed written submissions before the final order could be passed by the authority below. Thus, the ground so raised in the written submission ought to have been considered by the authority.

21. In our view, this Court has dealt with this aspect in Para-14 of the order under review, which reads as under:

> **"(14)** This is settled in law that if something is pleaded in the claim application, the same must be denied with accuracy and precision while filing the reply. If reply is pregnant with relevant pleadings, necessary arguments can be advanced based thereupon either orally or by way of filing written submission. In the main reply, there is no denial of quantification of amount claimed by the employee. In absence thereto, it cannot be said that there exists a dispute on the question of claim (to the tune of Rs.9,06,108/-). In other words, a party can say that there exists a dispute when a claim preferred is categorically denied by the other side while filing reply. In 2008 (4) MPLJ 536, *[Smt. Gomti Bai Tamrakar & ors. vs. State of M.P. & ors.]* and 2007 (3) MPHT 309 (DB), *[Nagda Municipality vs. ITC Ltd.],* the Courts opined that if reply or pleading are silent on a question of fact, no amount of argument can be advanced and accepted. For this reason, we are unable to hold that present petitioners disputed the claim of the petitioner. The alleged dispute raised was founded upon Clause 20(j) of the Majithia Wage Board award. At the cost of repetition, in our opinion, in Para-26 of the judgment of *Avishek Raja* (supra)*,* the Apex Court made it clear that by invoking clause 20(j), lesser wages than the wages flowing from W.J. Act cannot be granted. Thus, dispute in this regard raised by the employer is no dispute in the eyes of law. So far the orders of Labour Court Jaipur are concerned, the said orders were neither placed before the authority below nor before this court. Accordingly, this dispute also does not exist in the eyes of law. In *Avishek Raja* (supra), it is made clear that if there exists no dispute, Section 17(1) can be invoked. In the instant case, as analyzed, the employer has failed to raise any actual dispute while filing the reply before the Deputy Labour Commissioner."
>
> [Emphasis Supplied]

Thus, this aspect cannot be permitted to be reagitated in these review petitions.

22. For the reasons stated above, no case is made out to exercise review jurisdiction. **Review petitions fails and are hereby dismissed.**

Petition dismissed

I.L.R. [2021] M.P. 317
APPELLATE CRIMINAL

Before Mr. Justice Atul Sreedharan

CR.A. No. 8469/2019 (Jabalpur) decided on 20 January, 2021

SHIVCHARAN …Appellant

Vs.

STATE OF M.P. …Respondent

A. Penal Code (45 of 1860), Section 107 & 306 – Appreciation of Evidence – Suicide by married woman by consuming poison **– Held – Record does not indicate that it was appellant (husband) who purchased and gave her poison which she consumed and died – No evidence that appellant directly or indirectly instigated the deceased by action or omission to commit suicide – Evidence regarding abetment not available – Conviction u/S 306 IPC not sustainable and is set aside – Appeal partly allowed. (Paras 22 to 24)**

क. दण्ड संहिता (1860 का 45), धारा 107 व 306 – साक्ष्य का मूल्यांकन – विवाहित महिला द्वारा विष का सेवन कर आत्महत्या – अभिनिर्धारित – अभिलेख यह नहीं दर्शाता कि वह अपीलार्थी (पति) था जिसने विष क्रय किया और उसे दिया था जिसका उसने सेवन किया और उसकी मृत्यु हुई – कोई साक्ष्य नहीं कि अपीलार्थी ने मृतिका को आत्महत्या कारित करने के लिए, कार्य अथवा लोप द्वारा प्रत्यक्ष या परोक्ष रूप से उकसाया – दुष्प्रेरण के संबंध में साक्ष्य उपलब्ध नहीं – धारा 306 भा.दं.सं. के अंतर्गत दोषसिद्धि कायम रखने योग्य नहीं एवं अपास्त – अपील अंशतः मंजूर।

B. Penal Code 1860 (45 of 1860), Section 498-A – Hostile Witness – Credibility **– Held – Although father and mother of deceased were declared hostile but fact of violence being perpetrated upon deceased by appellant stands proved by their deposition in their examination in chief itself which remains uncontroverted in cross examination – Conviction u/S 498-A IPC upheld. (Paras 8, 9 & 24)**

ख. दण्ड संहिता (1860 का 45), धारा 498–A– पक्षविरोधी साक्षी – विश्वसनीयता – अभिनिर्धारित – यद्यपि मृतिका के पिता और माता पक्षविरोधी घोषित किये गये थे किंतु अपीलार्थी द्वारा मृतिका के साथ हिंसा कारित किये जाने का तथ्य, उनके मुख्य परीक्षण में ही उनके अभिसाक्ष्य से साबित होता है, जो कि प्रतिपरीक्षण में अविवादित रहा है – धारा 498–A भा.दं.सं. के अंतर्गत दोषसिद्धि कायम रखी गई।

C. Penal Code (45 of 1860), Section 107 & 306 – Recourse to Legal Remedy – Availability **– Held – Appellant never restrained the deceased from leaving matrimonial home and going to her parental home – Parents of deceased also stated that she use to come several times – Deceased could have sought legal redressal if she wanted to – Deceased had recourse to legal**

remedy – Evidence do not show that deceased did not have any option before her but, to commit suicide. (Paras 19 to 21)

ग. दण्ड संहिता (1860 का 45), धारा 107 व 306 – विधिक उपचार का अवलंब – उपलब्धता – अभिनिर्धारित – अपीलार्थी ने मृतिका को दाम्पत्य निवास छोड़कर उसके पैतृक निवास जाने से कभी अवरूद्ध नहीं किया – मृतिका के माता–पिता ने भी यह कथन किया कि वह कई बार आती थी – मृतिका यदि चाहती तो विधिक निवारण के लिए यत्न कर सकती थी – मृतिका के पास विधिक उपचार का अवलंब था – साक्ष्य नहीं दर्शाता कि मृतिका के पास आत्महत्या कारित करने के अलावा उसके समक्ष कोई विकल्प नहीं था।

***D. Evidence Act (1 of 1872), Section 113-A and Penal Code (45 of 1860), Sections 107, 306 & 498-A – Presumption of Abetment – Intensity & Extent of Cruelty – Assessment* – Held – Where a slap or humiliation may constitute cruelty for purpose of Section 498-A IPC, the same would be grossly inadequate to hold husband guilty u/S 306 IPC – A hypersensitive individual may have a low breaking point and may commit suicide on account of even trivial matters. (Para 18)**

घ. साक्ष्य अधिनियम (1872 का 1), धारा 113–A एवं दण्ड संहिता (1860 का 45), धाराएँ 107, 306 व 498–A – दुष्प्रेरण की उपधारणा – क्रूरता की सीमा व उग्रता – निर्धारण – अभिनिर्धारित – जहां एक थप्पड़ या अपमान, धारा 498–A भा.दं.सं. के प्रयोजन हेतु क्रूरता गठित कर सकते हैं, वहीं, धारा 306 भा.दं.सं. के अंतर्गत पति को दोषी ठहराने के लिए वह अत्यधिक रूप से अपर्याप्त होगा – एक अति–संवेदनशील व्यक्ति में तनाव सहने की कम क्षमता हो सकती है और वह तुच्छ मामलों के कारण भी आत्महत्या कर सकता है।

***E. Penal Code (45 of 1860), Section 107 – Criminal Jurisprudence* – Held – Offence of abetment falls in the category of "Inchoate Offences" which is a species which are also known as "incomplete" or "incipient offences". (Para 16)**

ङ. दण्ड संहिता (1860 का 45), धारा 107 – दाण्डिक विधि शास्त्र – अभिनिर्धारित – दुष्प्रेरणा का अपराध ''अपूर्ण अपराधों'' की श्रेणी में आता है जो कि एक ऐसी प्रजाति है जिन्हें ''अधूरे'' या ''आरंभी अपराधों'' के रूप में भी जाना जाता है।

***F. Criminal Practice – Conviction for Lesser Offence* – Held – A conviction under a lesser offence could be imposed even though the accused was not specifically charged with. (Para 12)**

च. दाण्डिक पद्धति – लघुतर अपराध हेतु दोषसिद्धि – अभिनिर्धारित – एक लघुतर अपराध के अंतर्गत दोषसिद्धि अधिरोपित की जा सकती है यद्यपि, अभियुक्त पर विनिर्दिष्ट रूप से वह आरोप नहीं लगाया गया था।

Cases referred:

(2014) 12 SCC 496, 2019 SCC OnLine Supreme Court 1516.

Pramendra Singh Thakur, for the appellant.
Utkarsh Agarwal, P.L. for the respondent/State.

J U D G M E N T
(Heard through video Conferencing)

ATUL SREEDHARAN, J.:- The present appeal has been filed by the appellant, aggrieved by the judgment and order dated 10-07-2019 passed by the II Additional Sessions Judge, Multai, District Betul, in Sessions Trial No. 101/2018. The appellant has been found guilty and convicted to suffer seven years RI for the offence under Section 306 IPC and a fine of Rs. 1,000/ - with an additional RI of three months in default thereof. He has also been convicted for an offence under Section 498-A of IPC and sentenced to rigorous imprisonment for two years and fine of Rs. 1,000/- in default of the same, to undergo RI of an additional three months. With the consent of parties, this appeal is finally heard.

2. Briefly stated, the case of the prosecution is that the appellant herein who is a labourer, is the husband of the deceased Bhimibai. The marriage was solemnised with the consent of both the parties and their families on 16-05-2017. The deceased consumed poison and died on 04-07-2018, just about a year after she got married.

3. Vide order dated 10-12-2018, charges were framed against the appellant u/ss. 304-B and 498-A of IPC. However, as the prosecution was unable to prove the demand of dowry, the learned court below acquitted him of the charge under Section 304-B but convicted him for an offence under Section 498-A and 306 of IPC. It would be relevant to mention here that the appellant was never charged under Section 306 of IPC.

4. PW 1 and 2, are the father and the mother of the deceased, who have stated in their evidence that the deceased, after marriage was a victim of physical violence by the appellant. This violence, according to the prosecution was inflicted upon the deceased by the appellant under the influence of alcohol or, upon the refusal of the deceased to give money to the appellant to consume alcohol. These witnesses have also stated that the appellant had pawned the manga sutra and silver anklets of the deceased for the purpose of consuming alcohol. They have stated that whenever the deceased used to come to her parental home, she used to inform them about the violence being inflicted upon her by the appellant for extracting money from her for the purpose of consuming alcohol.

5. PW 3 and 4, are the aunt and uncle of the deceased whose testimonies reveals that their evidence is hearsay, as none of them state that they have ever heard the deceased inform PW 1 and 2, in their presence, about the violence being inflicted upon the deceased by the appellant and neither do they state that the deceased herself had ever informed them directly.

6. PW 7 is the Doctor who performed the post-mortem examination. He says that there was a lacerated injury on the neck of the deceased measuring 2x1x1.5 cms and the same was caused by hard and blunt instrument within 24 hours of the post-mortem examination and that it was simple in nature. As regards the opinion pertaining to cause of death, he says that it is inconclusive and left it open to be inferred on appreciating the report of the chemical analyst, pertaining to the viscera. The postmortem report proved by the witness is Exhibit P/6. The viscera report dated 24-09-2018 is Exhibit P/13. It reveals that Phorate, an organophosphorus insecticide was found in the visceral organs (parts of liver, kidney, spleen, lungs, heart, stomach and stomach contents, large intestine and small intestine) thus, it could be inferred that the deceased died on account of ingesting the aforementioned toxic substance.

7. Learned counsel for the appellant has submitted that PW 1 and 2 have been declared hostile and therefore, their statements are unworthy of reliance and that the rest of the witnesses are hearsay witnesses. In fact, he has submitted that there is no legal evidence on which the learned trial Court could have based the conviction of the appellant.

8. Having gone through the statement of PW 1, this Court finds that in paragraph-1 and 2 (Examination-in-Chief), the witness has clearly indicted the appellant herein of having physically assaulted the deceased as recently as one week before her death. The reason for the physical violence given by PW 1, is non-fulfilment of the appellant's demand for money to consume alcohol. He further states that he did not make any report to the police as the appellant was his son-in-law. The reason why this witness has been declared hostile and cross-examined by the prosecution is that he has forgotten to reproduce in totality his statement u/s. 161 Cr.P.C and not because he wanted to aid the appellant/accused. To leading questions put by the Public Prosecutor after having been declared hostile, this witness has reiterated as correct what he has given in his police statement, of the various instances of physical violence meted out to the deceased by the appellant. In the cross-examination by the defence, no material contradiction has been brought out with regard to the physical assaults on the deceased by the appellant and neither has there being any substantial confrontation with the 161 statement of this witness to shake the substratum of the prosecution's case with regard to physical violence inflicted upon the deceased by the appellant.

9. Similar is the statement of PW 2, the stepmother of the deceased. She says that the deceased is the daughter of PW 1 from his first wife. In her examination-in-Chief this witness states that the deceased had come to her parental home two to three times before her death and informed her that her husband (the appellant) used to fight with her and beat her. She was also declared hostile and then subjected to cross-examination by the Public Prosecutor and in her cross-

examination, she has reiterated her 161 statement and has stated the instances when the deceased was beaten by the appellant. She further states that the appellant may have murdered the deceased or the deceased may have committed suicide on account of the beatings received by her from the appellant. Therefore, this Court finds that as regards the fact of violence being perpetrated upon the deceased by the appellant, the same stands proved by the deposition of PW 1 and 2 in their examination in chief itself which remains uncontroverted in cross examination.

10. Learned counsel for the appellant has also stated that as regards the injury on her neck, there is no evidence to show that it was the appellant, who had caused the said injury immediately preceding the death of the deceased. In this regard, he has referred to the statement of PW 7, the doctor who performed the post-mortem. In paragraph 7, a suggestion was put to the doctor by the defence that besides the external injury on the neck, there were no other injuries on the body of the deceased. The doctor has answered in the affirmative. It was also suggested that the injury on the neck could have happened on account of falling on an iron box, which was kept in the same room where the body was found. The doctor has answered the same as a probability which could have taken place.

11. Learned counsel for the appellant has drawn the attention of this Court to Exhibit P/3, which is the site map prepared by the police at the scene of occurrence. Where the body of the deceased was found, on the right-hand side of the body, there is an iron box which is marked as number 3 in the map. Learned counsel for the appellant has submitted that the probability of the deceased having fallen over the iron box injuring herself on the neck, cannot be discounted and that it does not go to reflect that the said injury was caused by the appellant immediately before the death of the deceased. He further states that none of the witnesses have stated that the appellant was responsible for the injury on the neck of the deceased. He also states that no question to that effect was put to the appellant in his 313 statement. This Court has gone through the statement u/s. 313 Cr.P.C of the appellant in detail. Questions at serial No. 68, 69, 72, 73, 87, 99 and 100 are questions disclosing to the appellant of the injury on the neck of the deceased. However, there is no question in the 313 statement to the effect that the appellant was responsible for that injury on the neck by assaulting the deceased with a hard and blunt object. Understandably so, as no witness has spoken to that effect. Under the circumstances, the contention of the learned counsel for the appellant is accepted that the injury on the neck of the deceased cannot be considered as having been caused by the appellant.

12. Learned counsel for the State has submitted that the appeal deserves to be dismissed and that the order passed by the learned court below is just and proper and there is no deficiency in the impugned order requiring interference by this

Court. As the learned counsel for the appellant has not argued on the point that conviction under Section 306 IPC is bad on account of the appellant not having been charged with the same, and in view of the observations of the learned trial court in paragraph-47 of the judgment, this Court does not find fault with the findings of the learned trial Court that a conviction under a lesser offence could be imposed even though the accused was not specifically charged with. However, this court has to examine whether the conviction under Section 306 of IPC of the appellant was proper or not?

13. Heard the learned counsel for the parties and perused the Trial Court record. As regards the offence of abetment of suicide punishable u/s. 306 IPC, it is imperative that it must satisfy the ingredients of s. 107 of IPC. The ingredients of abetment are given in Section 107 IPC. Abetment can be effected by three means:

a] By instigation

b] By illegal act or omission pursuant to a conspiracy, and

c] By participation.

14. In *State of Maharashtra Vs. Rajendra and Ors.,*[1] the Supreme Court held that there must be specific evidence which reveals abetment on the part of the accused which resulted in the deceased committing suicide (paragraph 33 at page 506). In that case, the deceased wife had committed suicide by setting herself on fire. Allegations were levelled against the entire family of harassing the deceased for dowry and subjecting her to mental and physical cruelty. The Supreme Court held that the harassment of the deceased was with the view of coercing her to convince her parents to meet the demand for dowry. However, as regards the question whether the harassment would result in the deceased committing suicide, the Supreme Court held that the same was a matter of doubt. The Supreme Court acquitted the appellants for the charge u/s. 306 IPC.

15. *In Gurjit Singh Vs. State of Punjab*[2], the Supreme Court was dealing with a case where the appellant was convicted for an offence u/s. 498-A and 306 IPC. As the sections suggest, the case was one where the deceased committed suicide, allegedly on account of matrimonial cruelty. The Supreme Court held that there was sufficient evidence to sustain conviction u/s. 498-A but acquitted the appellant for the charge u/s. 306 IPC in the following words **"There is no material on record to show that immediately prior to the deceased committing suicide there was a cruelty meted out to the deceased by the accused due to which the deceased had no other option than to commit the suicide. We are of the view,**

[1] (2014) 12 SCC 496
[2] 2019 SCC OnLine Supreme Court 1516

that there is no material placed on record to reach a cause and effect relationship between the cruelty and the suicide for the purpose of raising presumption" (paragraph 33).

16. The offence of abetment falls in the category of **"Inchoate Offences".** In criminal jurisprudence, inchoate offences are a species which are also known as "incomplete" or "incipient offences". Those guilty of the same fall under Principals in the Second degree (present at the scene of occurrence and "assisting" or "instigating" the principal offender) or Third degree (as in a conspirator or instigator - not present at the scene of occurrence) and may be guilty even where the principal offence intended has not attained fruition. In such offences, what remains inchoate or incomplete is the principal offence intended. However, the abettor may still be liable for punishment as the offence of abetment is complete against the abettor. Besides the offence of abetment, the other offence is "attempt" which also falls under this category of offences.

17. Instigation is the *actus reus* by the abettor on the abetted, where the abettor intends/desires or has sufficient knowledge, that the abetted would follow a particular course of action, in the manner desired or intended by the abettor. It is only in such a circumstance, proved beyond reasonable doubt by evidence, that the accused can be held guilty of having abetted the offence.

18. Section 113-A of the Evidence Act requires that the abetted is a married woman who committed suicide on account of the cruelty inflicted by the abettors. The difficulty is in assessing the intensity and extent of cruelty inflicted upon the deceased woman. The normal rigours of two human beings living under the same roof, can see strife between them. More so in a matrimonial home, where the existence of the normal stress of matrimony sees some extent of strife taking place regularly amongst married people. Where a slap or humiliation may constitute cruelty for the purpose of s. 498-A, the same would be grossly inadequate to hold the husband guilty for an offence u/s. 306 IPC. An extramarital relationship of a wife may be grounds for divorce for the husband, but the wife cannot be held guilty u/s. 306 IPC only because the husband committed suicide on account of it. A hypersensitive individual may have a low breaking point and may commit suicide on account of even trivial matters.

19. In such cases, it would be essential for the Courts to examine whether the victim in a matrimonial relationship had access to legal redress. Today, with the availability of effective legal aid assistance available to even the most indigent of women suffering in matrimonial relationships gone sour and also the availability of police stations, specially established to cater to women of domestic violence arising from matrimonial strife, manned by women police personnel trained and sensitised in the handling of matrimonial cases, not every case of suicide by a wife

can disclose a case against the husband and other members of his family for the offence u/s. 306 IPC.

20. In cases where the suicide takes place in the matrimonial home, abetment by incitement, which is sublime and indirect, may be inferred by proved circumstances. Where the deceased had no option but, to commit suicide on account of the circumstances, created by the abettor, which prevented her, either from seeking recourse to legal remedy or, the absence of any avenue by which she could escape the overbearing cruelty of the abettor, abetment of suicide may be inferred. It is only in a situation where the deceased was faced with a "Hobson's Choice", can abetment be inferred in a matrimonial home. However, before that inference is drawn, evidence must be brought to that effect.

21. In the present case, the evidence on record, goes to reveal that the deceased had recourse to legal remedy as the parents of the deceased themselves have stated before the learned trial court that the deceased used to come to her parental home several times and therefore, could have sought legal redress if she wanted to. The evidence also goes to show that the appellant never restrained the deceased from leaving the matrimonial home and going to her parental home as and when she wanted and therefore, the circumstances in this case do not go to show that the deceased did not have any option before her but, to commit suicide.

22. The record of the learned trial Court does not indicate or reveal that it was the appellant, who purchased and gave her poison which she consumed on account of which she died. The record also does not bear evidence that the appellant directly or indirectly instigated the deceased by action or omission, to commit suicide.

23. Under the circumstances, this Court is of the opinion that the conviction under Section 306 of IPC cannot be sustained as, evidence with regard to abetment by the appellant resulting in suicide by the deceased, is unavailable.

24. Therefore, this **appeal is partly allowed** and the conviction of the appellant under Section 306 IPC is set aside. As regards the conviction of the appellant under Section 498-A of IPC is concerned, the conviction and sentence is sustained in view of the evidence that has come on record. The appellant shall be released by the jail authorities if he has completed the two years sentence that was imposed upon him by the learned trial Court and if his continued incarceration is not wanted in any other case.

25. With the above, the appeal is **finally disposed of.**

Appeal partly allowed

I.L.R. [2021] M.P. 325
ARBITRATION CASE

Before Mr. Justice Mohammad Rafiq, Chief Justice

A.C. No. 64/2018 (Jabalpur) decided on 22 January, 2021

VIJAY ENERGY EQUIPMENTS (M/S) …Applicant

Vs.

WEST CENTRAL RAILWAY …Non-applicant

***A. Arbitration and Conciliation (Amendment) Act, 2015 (3 of 2016), Section 12(5) and Arbitration and Conciliation Act (26 of 1996), Section 11(6) – Appointment of Arbitrator* – Held – As applicant failed to waive off the applicability of Section 12(5) of Amendment Act of 2015, respondent would be justified in invoking clause 64(3) (amended) of General Conditions of Contract thereby forwarding panel of 3 retired officers of railways to applicant, calling upon him to choose any 2 of them, out of which one will be chosen as nominee arbitrator of applicant – Directions issued accordingly – Application disposed. (Para 7 & 10)**

क. माध्यस्थम् और सुलह अधिनियम (संशोधन) अधिनियम, 2015 (2016 का 3), धारा 12(5) एवं माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 11(6) – मध्यस्थ की नियुक्ति – अभिनिर्धारित – चूंकि आवेदक 2015 के संशोधित अधिनियम की धारा 12(5) के प्रयोजन का अधित्यजन करने में असफल रहा, प्रत्यर्थी का संविदा की सामान्य शर्तों का खंड 64(3)(संशोधित) का अवलंब लेना न्यायानुमत होगा जिसके चलते आवेदक को रेलवे के तीन सेवानिवृत्त अधिकारियों की सूची अग्रेषित कर, उसे उनमें से किन्हीं दो का चुनाव करने को कहा गया, जिसमें से एक को आवेदक के नामनिर्देशिती मध्यस्थ के रूप में चुना जाएगा – निदेश तद्नुसार जारी किये गये – आवेदन निराकृत।

***B. Arbitration and Conciliation (Amendment) Act, 2015 (3 of 2016), Section 26 and Arbitration and Conciliation Act (26 of 1996), Section 21 – Applicability* – Held – Apex Court concluded that on conjoint reading of Section 21 of principal Act and Section 26 of Amendment Act, it is clear that provisions of 2015 Act shall not apply to such arbitral proceedings, commenced in terms of provisions of Section 21 of principal Act unless the parties otherwise agree. (Para 9)**

ख. माध्यस्थम् और सुलह अधिनियम (संशोधन) अधिनियम, 2015 (2016 का 3), धारा 26 एवं माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 21 – प्रयोज्यता – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया है कि मूल अधिनियम की धारा 21 तथा संशोधित अधिनियम की धारा 26 को साथ में पढ़े जाने पर, यह सुस्पष्ट होता है कि 2015 के अधिनियम के उपबंध ऐसी माध्यस्थम् कार्यवाहियों पर जो कि मूल अधिनियम की धारा 21 के उपबंधों की शर्तों के अनुसार आरंभ हुई हैं लागू नहीं होंगे, जब तक पक्षकार अन्यथा सहमत न हों।

Cases referred:

(2017) 8 SCC 377, 2019 SCC Online SC 1635, (2019) SCC Online SC 1517, (2019) 15 SCC 682, (2018) 6 SCC 287.

Tabrez Sheikh, for the applicant.
Atul Choudhari, for the non-applicant.

O R D E R

(Hearing Convened through Video Conferencing)

MOHAMMAD RAFIQ, C. J. :- This application has been filed by applicant - M/s Vijay Energy Equipments under Section 11(6) of the Arbitration and Conciliation Act, 1996 (for short "the Act") with the prayer that this Court may appoint an independent Arbitrator as the applicable clause in the agreement between the parties is in conflict with the prevailing law.

2. According to the case set up by the applicant in the application, the respondent-Railways issued a tender on 05.07.2013 inviting bids for construction of ROB No.152/2 at Ch 152550 (New No.150/3 Ch 150627) with 2x18 m +1x36 m composite girder including sub-structure and superstructure over NH-75 and allied works in connection with LAR-KHJB new B.G. Rail line project with approximate cost Rs.599 Lakhs. The applicant also participated in the process of tender and was eventually awarded the work. The applicant submitted a bank guarantee of Rs.31,24,550/- before the respondent. An agreement was executed between the parties on 16.06.2014. However, the respondent failed to provide the approved drawing in time despite his several requests. The applicant sent a letter on 28.07.2016 requesting that the drawing may be sent so that the work can commence. The applicant further sent reminder letters on 06.09.2016 and 08.10.2016 so much so that applicant finally requested the respondent to close the work and refund the expenditure incurred due to the tender process. Thereafter, yet another reminder was sent by the applicant on 30.11.2016.

3. The respondent by letter dated 07.12.2016 denied the claim of the applicant and stated that the contract is under process of short closure. Aggrieved thereby, the applicant wrote a further letter on 22.12.2016 invoking the arbitration clause 64 under the General Conditions of Contract (in short "the GCC"). The respondent vide letter dated 30.12.2016 advised the applicant to waive off the applicability of Sections 12(5) and 31-A(5) of the Arbitration and Conciliation (Amendment) Act, 2015 (3 of 2016). However, the applicant vide letter dated 28.03.2017 requested for appointment of retired High Court Judge as independent arbitrator. The Chief Engineer-II(C), in the meantime, vide order dated 18.05.2017 closed the contract. The applicant thereafter sent multiple letters requesting the respondent for return of bank guarantee as well as for

appointment of impartial arbitrator. Suddenly, the respondent vide letter dated 21.03.2018 informed the applicant that its claims are not arbitrable and therefore, no arbitrator can be appointed.

4. Shri Tabrez Sheikh, learned counsel for the applicant referring to Clause 64 of the GCC contended that in view of Section 12(5) and Seventh Schedule appended to the amended Act, a serving officer of the Railways cannot be appointed as arbitrator. Sub-section (5) of Section 12 of the amended Act stipulates that "Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator". In view of the said amendment in the Act and the decision of the Hon'ble Supreme Court in the case of *TRF Limited vs. Energo Engineer Project Ltd.,* reported in (2017) 8 SCC 377, the respondent cannot appoint its serving officer or even retired Railway officer as the arbitrator.

5. Shri Atul Choudhari, learned counsel for the respondent-Railways submits that after the aforesaid 2015 amendment in the Act under Subsection (5) of Section 12 and Seventh Schedule thereof, the respondent-Railways have also suitably amended Clause 64(3) of the GCC. Now if the claimant does not waive the applicability of Section 12(5) of the Act, the Railway Board will offer him panel of three retired Railway personnel out of whom he has to choose two. Thereafter, one out of them shall be appointed as his nominee arbitrator. The respondent-Railways are ready to invoke the said provision and accordingly will supply the names of three retired Railway personnel to the applicant.

6. Having heard learned counsel for the parties and perusing the material on record, I am of the considered opinion that the question involved in the present case is no more *res integra* in view of the authoritative pronouncement of the Supreme Court in the case of *Central Organization for Railway Electrification vs. ECI-SPIC-SMO-MCML (JV) A Joint Venture Company,* reported in 2019 SCC Online SC 1635. The Supreme Court therein considered the case of *TRF Limited* (supra) relied upon by learned counsel for the applicant. The Supreme Court has also considered that after amendment of the Act of 1996 w.e.f. 23.10.2015, the Railway Board made modification in Clause 64 of the GCC and issued notification dated 16.11.2016 for implementation of modification. The Supreme Court in *Central Organization for Railway Electrification* (supra) in paragraphs-31 and 39 of the judgment held as under:

> **"31.** As discussed earlier, as per the modified Clause 64(3)(b) of GCC, when a written and valid demand for arbitration is received by the General Manager, the Railway will send a panel of at least four names of retired railway officers empanelled to work as arbitrators. The contractor will be asked to suggest to

the General Manager at least two names out of the panel for appointment as contractor's nominee within thirty days from the date of dispatch of the request by the Railway. Vide letter dated 27.07.2018, the respondent has sought for appointment of an arbitrator for resolving the disputes. The appellant by its letter dated 24.09.2018 (which is well within the period of sixty days) in terms of Clause 64(3)(a)(ii) (where applicability of Section 12(5) of the Act has been waived off) sent a panel of four serving railway officers of JA Grade to act as arbitrators and requested the respondent to select any two from the list and communicate to the office at the earliest for formation of Arbitration Tribunal. By the letter dated 26.09.2018, the respondent conveyed their disagreement in waiving the applicability of Section 12(5) of the Amendment Act, 2015. By the letter dated 25.10.2018, in terms of Clause 64(3)(b) of GCC (where applicability of Section 12(5) has not been waived off) the appellant has nominated a panel of four retired railway officers to act as arbitrators and requested the respondent to select any two from the list and communicate to the appellant within thirty days from the date of the letter for formation of Arbitration Tribunal. The respondent has neither sent its reply nor selected two names from the list and replied to the appellant. Without responding to the appellant, the respondent has filed petition under Section 11(6) of the Arbitration and Conciliation Act before the High Court on 17.12.2018. When the respondent has not sent any reply to the communication dated 25.10.2018, the respondent is not justified in contending that the appointment of Arbitral Tribunal has not been made before filing of the application under Section 11 of the Act and that the right of the appellant to constitute Arbitral Tribunal is extinguished on filing of the application under Section 11(6) of the Act.

xxx xxx xxx

39. There is an express provision in the modified clauses of General Conditions of Contract, as per Clauses 64(3)(a)(ii) and 64(3)(b), the Arbitral Tribunal shall consist of a panel of three Gazetted Railway Officers [Clause 64(3)(a)(ii)] and three retired Railway Officers retired not below the rank of Senior Administrative Grade Officers [Clause 64(3)(b)]. When the agreement specifically provides for appointment of Arbitral Tribunal consisting of three arbitrators from out of the panel serving or retired Railway Officers, the appointment of the arbitrators should be in terms of the agreement as agreed by the parties. That being the conditions in the agreement between the parties and the General Conditions of the Contract, the High

> Court was not justified in appointing an independent sole arbitrator ignoring Clauses 64(3)(a)(ii) and 64(3)(b) of the General Conditions of Contract and the impugned orders cannot be sustained."

7. The present case will fall in the category of Clause 64(3)(b) of GCC (supra) because the applicant herein has not waived off the applicability of Section 12(5) of the amended Act. Therefore, the opposite party-Railways would be justified in forwarding the panel of three retired officers of Railways to the applicant, calling upon him to choose two of them, out of which one will be chosen as nominee arbitrator of the applicant.

8. The contention that since the General Manager of the Railways was himself not eligible to be appointed as an arbitrator, he cannot nominate any other person to be an arbitrator was also specifically considered by the Supreme Court in the case of *Central Organization for Railway Electrification* (supra) in paragraph 32 and was repelled by relying on earlier judgment of the Supreme Court in *Perkins Eastman Architects DPC and another v. HSCC (India) Limited* (2019) SCC Online SC 1517, as would be evident from paragraphs 32 and 34 of the case of *Central Organization for Railway Electrification* (supra). Paragraphs 32 and 34 thereof are reproduced hereunder:

> **"32.** Stand of the learned counsel for the respondent is that by virtue of Section 12(5) read with Schedule VII of the Act, General Manager himself is made ineligible to be appointed as an arbitrator and hence, he cannot nominate any other person to be an arbitrator. The essence of the submission is "that which cannot be done directly, may not be done indirectly". In support of his contention, the learned counsel for the respondent placed reliance upon TRF Limited v. Energo Engineering Projects Limited (2017) 8 SCC 377 wherein the Supreme Court held as under:--
>
> > **"54.** In such a context, the fulcrum of the controversy would be, can an ineligible arbitrator, like the Managing Director, nominate an arbitrator, who may be otherwise eligible and a respectable person. As stated earlier, we are neither concerned with the objectivity nor the individual respectability. We are only concerned with the authority or the power of the Managing Director. By our analysis, we are obligated to arrive at the conclusion that once the arbitrator has become ineligible by operation of law, he cannot nominate another as an arbitrator. The arbitrator becomes ineligible as per prescription contained in Section 12(5) of the Act. It is inconceivable in law that person who is

> statutorily ineligible can nominate a person. Needless to say, once the infrastructure collapses, the superstructure is bound to collapse. One cannot have a building without the plinth. Or to put it differently, once the identity of the Managing Director as the sole arbitrator is lost, the power to nominate someone else as an arbitrator is obliterated. Therefore, the view expressed by the High Court is not sustainable and we say so."

34. Considering the decision in TRF Limited, in Perkins Eastman Architects DPC v. HSCC (India) Limited 2019 SCC OnLine SC 1517, the Supreme Court observed that there are two categories of cases. The first, similar to the one dealt with in TRF Limited where the Managing Director himself is named as an arbitrator with an additional power to appoint any other person as an arbitrator. In the second category, the Managing Director is not to act as an arbitrator himself; but is authorized to appoint any other person of his choice or discretion as an arbitrator. Observing that if in the first category, the Managing Director was found incompetent similar invalidity will always arise even in the second category of cases, in para (20) in Perkins Eastman, the Supreme Court held as under:

> **"20**. .....If, in the first category of cases, the Managing Director was found incompetent, it was because of the interest that he would be said to be having in the outcome or result of the dispute. The element of invalidity would thus be directly relatable to and arise from the interest that he would be having in such outcome or decision. If that be the test, similar invalidity would always arise and spring even in the second category of cases. If the interest that he has in the outcome of the dispute, is taken to be the basis for the possibility of bias, it will always be present irrespective of whether the matter stands under the first or second category of cases. We are conscious that if such deduction is drawn from the decision of this Court in TRF Limited, all cases having clauses similar to that with which we are presently concerned, a party to the agreement would be disentitled to make any appointment of an Arbitrator on its own and it would always be available to argue that a party or an official or an authority having interest in the dispute would be disentitled to make appointment of an Arbitrator."

9. The matter can be examined from another angle. The Supreme Court in the case of *Union of India vs. Parmar Construction Company,* reported in (2019) 15

SCC 682, held that conjoint reading of Section 21 of principal Act and Section 26 of the amendment Act, 2015 leaves no manner of doubt that the provisions of the 2015 Amendment Act shall not apply to such of the arbitral proceedings which have commenced in terms of the provisions of Section 21 of the Principal Act unless the parties otherwise agree. The Supreme Court also held that the request by respondent contractors for referring the dispute to arbitration was made and was received by the appellants much before the 2015 Amendment Act came into force. Thus, the applications/requests made by the respondent contractors have to be examined in accordance with the principal Act, 1996 without taking resort to the 2015 Amendment Act which came into force from 23.10.2015. This was also the view taken by the Supreme Court in *BCCI vrs. Kochi Cricket Private Ltd.* (2018) 6 SCC 287.

10. Having regard to the submissions made by the learned counsel for the parties and considering the provisions of the amended Clause 64 of the GCC, the present application is disposed of, requiring the respondent to send a proposal to the applicant of three retired Railway officers, not below the rank of SAG, within a period of 30 days, out of whom two names shall be selected by the applicant and communicated to the respondent-Railways, whereafter the respondent-Railways shall appoint at least one out of the said two names as contractor/applicant's nominee and the respondent-Railways shall also appoint its own nominees either from its panel or from outside the panel duly indicating the Presiding Officer from amongst the three arbitrators so appointed so as to complete the exercise within 30 days thereafter.

11. The application is accordingly **disposed of.**

Order accordingly

I.L.R. [2021] M.P. 331
CIVIL REVISION

Before Mr. Justice G.S. Ahluwalia

C.R. No. 10/2018 (Gwalior) decided on 24 November, 2020

INDERCHAND JAIN (DIED) THROUGH LRs. …Applicants

Vs.

SHYAMLAL VYAS (DIED) THROUGH LRs. …Non-applicants

***A. Accommodation Control Act, M.P. (41 of 1961) Section 23-C – Grant of Leave to Defend – Presumption* – Held – When leave to defend is rejected or if it is not prayed then even recording of evidence of plaintiff/ landlord is required and in view of the presumption u/S 23-C, statement made in eviction application is deemed to have been admitted by defendant/tenant – Plaintiff made all necessary statement in his eviction application thus**

entitled for order of eviction – Order of RCA upheld – Revision dismissed. (Paras 32, 40 & 41)

क. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 23–C – प्रतिरक्षा हेतु अनुमति प्रदान की जाना – उपधारणा – अभिनिर्धारित – जब प्रतिरक्षा हेतु अनुमति नामंजूर की गई है या उसके लिए प्रार्थना नहीं की गई है तब भी, वादी/भू–स्वामी का साक्ष्य अभिलिखित किया जाना अपेक्षित नहीं है और धारा 23–C के अंतर्गत उपधारणा को दृष्टिगत रखते हुए, बेदखली के आवेदन में किये गये कथन को प्रतिवादी/किराएदार द्वारा स्वीकार करना माना गया है – वादी ने उसके बेदखली के आवेदन में सभी आवश्यक कथन किये अतः बेदखली के आदेश हेतु हकदार है – भाड़ा नियंत्रण प्राधिकारी का आदेश कायम रखा गया – पुनरीक्षण खारिज किया गया।

B. Accommodation Control Act, M.P. (41 of 1961), Section 23-C – Grant of Leave to Defend – Strike Out of Defence – Effect **– Held – Leave to defend was granted but later, defence was struck of due to non-payment of rent, thus defendant/tenant stood relegated back to position as provided u/S 23-C, as if application for leave to defend is refused. (Para 33)**

ख. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 23–C – प्रतिरक्षा हेतु अनुमति प्रदान की जाना – प्रतिरक्षा को काट दिया जाना – प्रभाव – अभिनिर्धारित – प्रतिरक्षा हेतु अनुमति प्रदान की गई किंतु बाद में, भाड़े के असंदाय के कारण प्रतिरक्षण को काट दिया गया, अतः, प्रतिवादी/किराएदार वापस उस स्थिति पर आ जायेगा जैसा कि धारा 23–C के अंतर्गत उपबंधित है, मानो प्रतिरक्षा हेतु अनुमति के आवेदन को अस्वीकार किया गया हो।

C. Accommodation Control Act, M.P. (41 of 1961), Section 23-C – Grant of Leave to Defend – Additional defence **– Held – Tenant has not raised any dispute regarding landlord-tenant relationship in his application filed u/S 23-C and raised the said dispute in his written statement – After striking out of defence, in absence of any right to file written statement, RCA has to proceed on basis of defence disclosed by tenant in his application for grant leave to defend – Any additional defence raised by tenant in written statement cannot be looked into. (Paras 30, 31 & 33)**

ग. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 23–C – प्रतिरक्षा हेतु अनुमति प्रदान की जाना – अतिरिक्त प्रतिरक्षा – अभिनिर्धारित – किराएदार ने धारा 23–C के अंतर्गत प्रस्तुत उसके आवेदन में भू–स्वामी–किराएदार के नाते के संबंध में कोई विवाद नहीं उठाया है एवं उक्त विवाद को उसके लिखित कथन में उठाया है – प्रतिरक्षण को काट देने के पश्चात्, लिखित कथन प्रस्तुत करने के किसी अधिकार की अनुपस्थिति में, भाड़ा नियंत्रण प्राधिकारी को किराएदार द्वारा प्रतिरक्षा हेतु अनुमति प्रदान करने के लिए उसके आवेदन में प्रकटित प्रतिरक्षा के आधार पर कार्यवाही करनी होगी – किराएदार द्वारा लिखित कथन में उठायी गई किसी अतिरिक्त प्रतिरक्षा को विचार में नहीं लिया जा सकता।

Cases referred:

2007 (4) MPLJ 238, SLP (Civil) No. 23630/2007 order passed on 01.05.2014 (Supreme Court), AIR 1989 MP 134.

Sanjeev Jain, for the applicants.
B.B. Shukla, Sanjay Dwivedi and *Prashant Sharma,* for the non-applicants.

(Supplied: Paragraph numbers)

O R D E R

(Through Video Conferencing)

G.S. AHLUWALIA, J.:- This Civil Revision under Section 23-E of M.P. Accommodation Control Act, 1961 (In short "Act, 1961) has been filed against the order dated 28-11-2017 passed by Rent Controlling Authority, Gwalior in Case No. 23/95-96/90-7 by which an order of eviction has been passed against the applicants.

2. The necessary facts for disposal of present revision in short are that the original respondent (Shyamlal Vyas) filed an application for eviction against the original applicant (Inderchand Jain) from a suit shop situated at Chhaparwala Bridge, Phalka Bazar, Lashkar, Gwalior bearing Corporation No. 34/304 on the bonafide requirement of his son, Amitabh for starting the business of Paint and Cement. It is the case of the plaintiff-landlord/respondent that the suit shop was let out by Shantilal to defendant-tenant/applicant, and a rent Note was also executed. The plaintiff-landlord/respondent has become owner of the suit shop by virtue of Will executed by Shantilal and Probate in this regard has been issued. It was his case, that he has retired from Judicial service, and his fourth son, namely Amitabh Vyas is aged about 25 years, and is unemployed, and the suit shop is bonafidely required for opening the business of paint and cement. It was further stated that the plaintiff-landlord/respondent has no other alternative and suitable accommodation.

3. The original defendant/applicant filed an application under Section 23-C of Act, 1961 seeking leave to defend. In the application for leave to defend, the defendant/applicant accepted that he was regularly making payment of rent to the plaintiff/respondent, and in fact the plaintiff-landlord wants to enhance the rent and therefore, the application for eviction has been filed on frivolous ground. The statement made by the plaintiff-landlord with regard to the bonafide requirement for non-residential purpose of his son Amitabh was also denied.

4. Accordingly, leave to defend was granted on the grounds mentioned in the application for grant of leave to defend. At the cost of repetition, it is once again clarified that the landlord tenant relationship was admitted by the defendant-tenant/applicant in his application for grant of leave to defend, and no leave was sought by denying the landlord tenant relationship.

5. Thereafter, it appears that the applicant filed an application under Order 11 Rule 12 C.P.C., seeking direction to the Plaintiff-landlord/respondent to produce his documents of title, claiming that the applicant was inducted as tenant by Shantilal (Grand father of original applicant Shyamlal Vyas). The said application was rejected by R.C.A. by order dated 5-2-1997 and thereafter, written statement was filed on 27-2-1997 and an additional defence by disputing landlord tenant relationship was also taken. It was pleaded that in fact, the owner of the property is Mahalaxmi Temple and Shantilal was appointed as Pujari of the said temple and therefore, the Plaintiff-landlord/applicant, namely Shyamlal Vyas is not the owner and the ownership dispute can be decided by the Competent Court of civil jurisdiction.

6. It appears that during the pendency of the eviction proceedings, the defendant-tenant/applicant filed an application for framing additional issue with regard to the ownership, which was rejected by the Trial Court and accordingly C.R. No. 530/1997 was filed. The said Civil Revision was dismissed by this Court by order dated 23-7-1997 by holding that, the defendant is making payment of rent to the Plaintiff-landlord/applicant and on some occasions, rent was paid even by money orders, and it has never been disputed by the defendant that the defendant-tenant/applicant/Shyamlal Vyas is not the owner.

7. Thereafter again, the present applicant filed an application seeking extensive amendment in the written statement thereby raising the dispute of ownership. The said application was rejected by R.C.A. by order dated 24-9-1997, against which C.R. No. 1277/1997 was filed and the said revision was dismissed by order dated 11-8-1998 with the following observations :

> "In the present case, the petitioner was granted leave. He filed the written statement as well. The plea taken was that the petitioner was not the owner. To my mind, there is already an order of this Court passed in C.R. No. 529/1997 wherein this Court has observed that the defendant did not dispute the ownership of Shyamlal. That order has become final and no further order in this respect need be passed at this stage. As stated above, the amendment sought to be made is not necessary in the circumstances of the case, and the court-below has rightly rejected the application on this ground.
>
> Accordingly, the revision fails and is dismissed summarily."

8. It appears that during the pendency of eviction proceedings, one Akhil Bhartavarshiya Shrimali Brahman Samaj Sansthan filed a suit for declaration in respect of the property in dispute. The said suit was pending . The R.C.A. by its order dated 29-10-1997, directed the defendant-tenant/applicant to pay the rent within a period of 15 days, failing which his right to defend against eviction will

be forfeited. As the aforesaid direction was not complied, therefore, the plaintiff-landlord/respondent, moved an application on 9-1-1998 seeking a direction that the defence of the defendant be struck off. The defendant-tenant/applicant filed his reply and submitted that monthly rent of Rs. 40/- is being deposited in the Civil Court, in a civil suit instituted by Akhil Bharavarshiya Shrimali Brahman Samaj Sansthan. By order dated 27-3-1998, the R.C.A. directed to comply the order by depositing rent within a period of 7 days, failing which the right of the defendant shall be deemed to have extinguished automatically and fixed the case for 24-4-1998. Against the said direction, Civil Revision No. 439/1998 was filed by the defendant which was rejected by this Court by order dated 7-10-1998.

9. Thereafter again, the defendant-tenant/applicant made an attempt to file documents. It is not out of place to mention here that earlier, the defendant-tenant/applicant had filed an application under Order 16 Rule 6 and 7 CPC which was allowed by order dated 16-12-1997. Against the said order, a C.R. No. 614/1998 was filed by Plaintiff-landlord/respondent which was dismissed. However, by order dated 1-3-1999, it was held by the R.C.A., that since, the defence of the defendant-tenant/applicant has already been struck off by order dated 27-3-1998, therefore, the question of landlord and tenant relationship cannot be raised and it has attained finality. Against the said order, C.R. No. 492/1999 was preferred by the applicant, which was partially allowed, however, a following observation was also made :

> "In this revision, there is no material to show as to how the documents filed by the petitioner, for which, original record was summoned are relevant for the purpose of cross examination of the witnesses. In the circumstances, this Court is unable to decide this point at this stage...."

and it was further held, that since, the defence of the defendant-tenant/applicant has already been struck off, therefore, the relevancy of the documents shall be considered at the time of cross-examination.

10. It appears that thereafter, the applicant/defendant insisted upon the R.C.A. to decide the relevancy of the documents. The said application was dismissed by R.C.A. by order dated 30-9-2001, against which C.R. No. 126/2002 was filed and the said Civil Revision was dismissed by order dated 4-12-2002 with following observations :

> "5.....From the conduct of the petitioner shows that he wants anyhow to linger on the litigation. Till today, he has filed as many as seven different revisions against the interim orders passed by the Rent Controlling Authority and most of the revisions were found baseless by this Court. This conduct of the

petitioner itself shows that he is in the habit if misleading the trial Court. Once, this Court has ordered in the revision filed by him that the relevancy of the document shall be decided at the time of evidence his insistence for deciding the relevancy prior to recording of the evidence is unjustified. Moreover, these documents relate to the title of the suit property. This Court in the earlier revisions i.e., Civil Revision No. 439/1998 has already observed in para 5 that order dated 6-1-1998 indicates that the defendant had agreed to deposit the rent and had also admitted the right of the person authorized by the plaintiff to receive the rent. In Para 17 the Court has observed that : a perusal of the impugned order indicates that the relationship of the landlord and tenant existed between Shyamlal Vyas and the present applicants. In para 20, the Court held that the present applicants have been paying rent as noticed in the impugned order in respect of the accommodation in dispute from much before the filing of the suits, and thus, as per this Court, there was no dispute about relationship of landlord and tenant between the parties and the defendant i.e, the present petitioner is estopped from challenging the title of the plaintiff. Hence, in view of this judgment, the Rent Controlling Authority has rightly held that once, it is found proved that the tenant was paying rent to the plaintiff-landlords and hence he was estopped from challenging his title and, therefore, the document of title are not relevant for just and property decision of the case."

11. In the meanwhile, on 5-10-2001, Shri Ajit Jain Advocate, Counsel for the defendant-tenant/applicant appeared before the R.C.A. and pleaded no instructions and hence, the defendant-tenant/applicant was proceeded exparte. The evidence of the plaintiff-landlord/plaintiffs witness was recorded and the case was fixed for final arguments. On 25-2-2002, the defendant-tenant/applicant filed an application under Order 9 Rule 7 C.P.C for setting aside, exparte proceedings dated 25-2-2002 and on the same day, the plaintiff/respondent also filed his written arguments.

12. By order dated 9-1-2003, the application filed by defendant-tenant/applicant under Order 9 Rule 7 CPC was rejected and case was fixed for 10-1-2003. On 10-1-2003, none appeared for the defendant-tenant/applicant and final arguments by plaintiff-landlord/respondent were heard and on 14-1-2003, final order of eviction was passed.

13. The defendant-tenant/applicant filed an application for setting aside exparte proceedings which was rejected by R.C.A. by order dated 13-3-2003 against which C.R. No. 114/2003 was filed.

14. The defendant-tenant/applicant also filed Civil Revision No. 85/2003 against the final order.

15. The defendant-tenant/applicant also filed an application under Order 9 Rule 13 CPC, which was allowed by R.C.A. by order dated 10-7-2004.

16. Civil Revision No. 114/2003 which was filed by the defendant-tenant/applicant against the order dated 13-3-2003 was allowed by order dated 11-9-2003, and the matter was remanded back to the R.C.A. to decide the application filed under Order 9 Rule 7 CPC afresh as well as to decide the correctness of the order dated 5-10-2001 by which the defendant-tenant/applicant was proceeded exparte.

17. Thereafter, by order dated 7-7-2004, the R.C.A. allowed the application filed by the defendant-tenant/applicant for setting aside exparte order under Order 9 Rule 13 CPC.

18. On 2-5-2009, the plaintiff/respondent filed an application for passing an eviction order in the light of the judgment passed by a Division Bench of this Court in the case of *Paramjeet Kaur Bambah Vs. Smt. Jasbir Kaur Wadhwa* reported in 2007 (4) MPLJ 238.

19. In the meanwhile, the suit filed by Akhil Bhartavarshiya Shrimali Brahman Samaj Sansthan was decreed against which the Plaintiff-landlord/respondent had filed F.A. No. 24/2008. By judgment and decree dated 18-3-2011, the appeal filed by Plaintiff-landlord/respondent was allowed and the suit filed by Akhil Bhartavarshiya Shrimali Brahman Samaj Sansthan was dismissed.

20. It appears that Akhil Bhartavarshiya Shirmali Brahman Samaj Sansthan has filed C.A. No. 3160-3161 of 2012 against the judgment and decree dated 18-3-2011 passed by the High Court, and on 19-3-2020, an interim order was passed and the respondents therein were restrained from alienating the property or changing its present character. At the relevant time, eviction proceedings in the present case were pending before R.C.A., therefore, a further prayer was made by Akhil Bhartavarshiya Shirmali Brahman Samaj Sansthan, seeking stay of further proceedings in the present case which was pending before the R.C.A. as well as also in other cases in which the subject matter of the property is involved. The Supreme Court by order dated 24-1-2013 observed as under :

> "In our view, it is not necessary to pass any order on the aforementioned prayers because any alienation of the property during the pendency of the appeal will be subject to final adjudication thereof and the third party in whose favour the property in question or any part thereof, is alienated will be bound by the judgment of this Court."

21. Therefore, the further proceedings in this case which were pending before the R.C.A. continued and ultimately by order dated 28-11-2017, an order of eviction was passed on the ground that since, the defence of the applicant/defendant has already been struck off, therefore, the bonafide requirement for non-residential purposes has to be presumed.

22. Challenging the impugned order dated 28-11-2017, it is submitted by the Counsel for the applicant/defendant, that once the stage of Section 23-C of Act, 1961 had crossed, then even if the defence of the applicant/defendant is struck off, but still for the limited purposes, in order to demolish the case of the plaintiff-landlord/respondent, they have a right to cross examine the plaintiff's witnesses, therefore, the R.C.A. committed a material illegality by passing a final order of eviction on the basis of presumption.

23. Per contra, the Counsel for the respondent/plaintiff has supported the reasoning assigned by the R.C.A.

24. Heard the learned Counsel for the parties.

25. The applicant/defendant had not raised any dispute regarding landlord tenant relationship in his application, seeking leave to defend filed under Section 23-C of Act, 1961. Para 4 and 5 of the application for leave to defence (sic : defend) reads as under :

> 4. यह कि, वास्तव मे आवेदक अनावेदक से किराया 40/– रूप्ये माहवार के स्थान पर 1,000/– एक हजार रूप्ये माहवार करना चाहता है। जब कि अनावेदक / प्रार्थी उपरोक्त किराया बढाने को तत्पर नही है। इस कारण आवेदक ने अनावेदक पर बेजा दबाव डालने की नियत से ताकि वह किराया 40/– रूप्ये माहवार के स्थान पर 1,000/–रूप्ये एक हजार रूप्ये माहवार कर दे, प्रस्तुत किया है इस कारण भी आवेदक द्वारा प्रस्तुत किया आवेदन पत्र निरस्त किए जाने योग्य है।
>
> 5. यह कि, आवेदक ने विवादित स्थान के पास मे रिक्त स्थान को पुन : बढे हुए किराये पर अधिवासित कर दिया है। यदि वास्तव मे उसको अपने पुत्र की आवश्यकता होती तो वह विवादित स्थान जो कि विवादित स्थान से ज्यादा युक्तियुक्त व सुविधाजनक है को पुनः बढे हुए किराये पर नही देता । जो कि आवेदक की दुर्भावना प्रमाणित करता है। इस कारण भी विवादित स्थान रिक्त कराने का अधिकारी नही है। इस कारण भी अनावेदक प्रकरण मे अपना बचाव का अधिकार प्राप्त करने का अधिकारी है।

26. Only after the leave was granted, the applicant/defendant raised the dispute regarding landlord tenant relationship in his written statement. An attempt was also made to extensively amend the written statement in this regard, which

was rejected and the Civil Revision was also dismissed. Therefore, the first question which arises for consideration is that whether any ground which was not raised in the application for grant of leave to defend can be permitted to be raised at a later stage or not?

27. The aforesaid question is no more *res integra.*

28. On a reference made by a learned Single Judge, the Division Bench of this Court in the case of *Smt. Paramjeet Kaur Bambah* (Supra) has held as under :

> "20. Thus, the question referred is answered as under:
>
> Under the scheme of Chapter III-A and the procedure laid down under Section 23-D of the Act there is no provision for granting time to the tenant to file written statement after grant of leave to defend. The Rent Controlling Authority is required to proceed with the application for eviction and decide the application after considering the grounds on which leave to defend is granted to the tenant after recording evidence as provided under Order XVIII Rule 13 of the Code."

29. The aforesaid order passed by the Division Bench of this Court in the case of *Smt. Paramjeet Kaur Bambah* (Supra) was assailed before the Supreme Court in SLP (Civil) No. 23630/2007 which was dismissed by order dated 1-5-2014.

30. Thus, it is clear that in absence of any right to file a written statement, the R.C.A. has to proceed with the case only on the basis of defence disclosed by the tenant in his application for grant leave to defend.

31. Thus, any additional defence raised by the applicant/defendant in his written statement cannot be looked into. In the present case, in the application for grant of leave to defend, the applicant/defendant had admitted landlord tenant relationship.

32. The Division Bench of this Court, on a reference made by learned Single Judge in the case of *Ratnakar Vs. Hazi Inayatullah* reported in AIR 1989 MP 134 has held that if the tenant fails to deposit the rent, then the R.C.A. has a jurisdiction to strike out the defence of the tenant as contemplated under Section 13(6) of the said Act.

33. In the present case also, the defence of the applicant/defendant was also struck off. Therefore, now question for determination is that whether the statement of the plaintiff-landlord, made in the eviction application, are to be treated as admitted by the defendant-tenant, or the plaintiff landlord is still required to prove his case.

Section 23-C of Act, 2019 reads as under:

> **Section 23-C. Tenant not entitled to contest except under certain circumstances -(1) T**he tenant on whom the summons is served in the form specified in the Second Schedule shall not contest the prayer for eviction from the accommodation unless he files within fifteen days from the date of service of the summons, an application supported by an affidavit stating the grounds on which he seeks to contest the application for eviction and obtains leave from the Rent Controlling Authority as hereinafter provided, and in default of his appearance in pursuance of the summons or in default of his obtaining such leave, or if such leave is refused, the statement made by the landlord in the application for eviction shall be deemed to be admitted by the tenant. The Rent Controlling Authority shall in such a case pass an order of eviction of the tenant from the accommodation

34. Thus, it is clear that where the leave to defend is refused or not prayed, then the statement made by the plaintiff-landlord in his application for eviction shall be deemed to have been admitted by the defendant-tenant, and the R.C.A. shall only see that whether the plaintiff-landlord is entitled to get an order of eviction under the law, on the basis of statement(s) in the application made by the landlord which are deemed to have been admitted by the tenant, or not.

35. In the present case, leave to defend was granted, but thereafter, the defence of the defendant-tenant/applicant was struck off due to non-payment of rent. Thus, the defendant-tenant/applicant stood relegated back to the position as provided under Section 23-C of Act, 1961, as if his application for leave to defend is refused. The contention of the Counsel for the applicant/defendant, that once, the leave is granted, then the presumption as provided under Section 23-C of Act, 1961 would not arise, even if the defence is struck off at a later stage cannot be accepted. In the case of *Smt. Paramjeet Kaur Bambah* (Supra) it has been held that there is no provision for filing written statement, and the application for grant of leave to defend is to be considered as grounds of defence. Once, the defence is struck off, then it would mean, that the application for leave to defend is removed from the file. Therefore, under this circumstance, the defendant-tenant would be relegated back to the stage of either non-filing of an application for leave to defend or refusal to grant leave to defend, and the consequences of non-filing of an application for leave to defend or refusal to grant leave to defend would automatically follow as provided under Section 23-C of Act, 1961.

36. Therefore, in case of striking off of the defence of the defendant, then the statement made by the landlord in his application for eviction shall be deemed to have been admitted by the defendant/tenant, and the R.C.A. is under obligation to pass an order of eviction, if the statement made in the eviction application are sufficient to pass an order of eviction.

37. In the present case, the evidence of plaintiff's witness was also recorded who had stated that the suit shop is bonafidely required for his non-residential purposes. It appears that while passing the impugned order of eviction, the R.C.A. has merely mentioned that since, the defence of the defendant-tenant/applicant has already been struck off, therefore, in the light of Section 23-D of Act, 1961, it shall be presumed that the requirement of the plaintiff-landlord/respondent is bonafide. However, the case of the Plaintiff-landlord/respondent was not considered, and no finding has been given as to whether an order of eviction can be passed on the basis of statement made in the application for eviction or not. Although the R.C.A. should have assigned the reasons for passing an order of eviction, but this Court is of the considered opinion, that there is no good ground for remanding the matter back to R.C.A. for this purpose. The application for eviction was filed by Shyamlal Vyas against Inderchand Jain on 22-8-1996. Inderchand Jain expired during the pendency of the proceedings before R.C.A. and Shyamlal Vyas expired during the pendency of this revision. The original litigants have already expired and their legal representatives are fighting. More than 24 long years have passed, and still the final order could not be passed. Remand of matter would further delay the proceedings. Chapter III-A of Act, 1961 was inserted for the first time by M.P. Amending Act 27 of 1983 with effect from 16-8-1983. Special Provisions have been made under Chapter III-A of Act, 1961, so that a landlord falling in the said category is not required to go to the Civil Court, and there is no provision for appeal, and only a revision lies to the High Court. This special provision was inserted with a sole object of expeditious trial of eviction cases on the ground of "bonafide requirement" of certain landlords. By M.P. Amending Act, 1985, Section 23-J was inserted and a special category of Landlord was introduced. Thus, expeditious trial is the sole object, and in the present case, the final order of eviction was passed by the Rent Controlling Authority after 21 long years of institution of eviction application and in C.R. No. 126/2012 dated 4-12-2012, this Court had already made an observation with regard to the conduct of the defendant-tenant/applicant in making every effort to linger on the litigation, and still, the R.C.A. took further 5 years to pass the final order and the present revision is pending from the year 2018. Therefore, this Court is of the view, that instead of remanding the matter, it would be appropriate to find out as to whether the statement made by the plaintiff-landlord/respondent in his application for eviction is sufficient to pass an order of eviction or not?

38. The plaintiff-landlord/respondent had filed an application for eviction on the ground that the suit shop is being used by the defendant-tenant/applicant for non-residential purposes. It was the case of the plaintiff-landlord/respondent that Shyamlal Vyas is a retired Judicial officer having retired in the year 1976 and thus, falls within the definition of "Landlord" as given in Section 23-J of Act, 1961. His fourth son Amitabh Vyas who is aged about 25 years, is unemployed and wants to

start his independent business of Paint and Cement. In absence of any alternative and suitable accommodation, his son is not in a position to start his business, although sufficient funds are available for starting business. Since, his son is sitting in the shops of his friends, therefore, he is having knowledge of business also. When the plaintiff/respondent requested the defendant-tenant/applicant to vacate the suit shop, then he refused to do so.

39. The defendant-tenant/applicant, filed an application for leave to defend and denied the bonafide requirement for running a paint and cement shop by the son of the plaintiff-landlord/respondent, but admitted that the plaintiff-landlord/respondent is the landlord of the suit shop.

40. Thus, the applicant/defendant cannot raise a dispute of landlord tenant relationship at a later stage by filing written statement on the basis of a suit filed by Akhil Bhartavarshiya Shrimali Brahman Samaj Sansthan. It is not out of place to mention here that Akhil Bhartavarshiya Shrimali Brahman Samaj Sansthan had filed the suit subsequent to filing of the eviction application by the plaintiff-landlord/respondent. The suit filed by Akhil Bhartavarshiya Shrimali Brahman Samaj Sansthan has already been dismissed and Civil Appeal is pending before Supreme Court.

41. The evidence of Amitabh Vyas was also recorded and he has specifically stated about his bonafide need to start business. Further, when the leave to defend is refused or is not prayed, then R.C.A.is only required to see that whether the statement made by the plaintiff-landlord in his eviction application, is sufficient to pass an order of eviction or not as the entire statement made in the eviction application is deemed to have been admitted.

42. If the statement made by the plaintiff/respondent in his eviction application is considered, then it is clear that he had specifically pleaded that he falls within the definition of Landlord as provided under Section 23-J of Act, 1961. He doesnot have any alternative and suitable accommodation, and the suit shop is required bonafide for non-residential purposes for starting a paint and cement shop by his fourth son Amitabh as he is an unemployed person and is having sufficient funds for starting the business. Although the evidence of Amitabh Vyas was recorded after the defendant-tenant/applicant was proceeded exparte, and subsequently, exparte proceedings were set aside, but in view of presumption as provided under Section 23-C of Act, 1961, the statement made in eviction application is deemed to have been admitted, therefore, it is held that when the leave to defend is rejected or if it is not prayed, then even recording of evidence of plaintiff-landlord is not required. Under these circumstances, this Court is of the considered opinion, that the plaintiff/respondent has made all necessary statement in his application for eviction, and therefore, he is entitled for an order of eviction.

43. Accordingly, the order dated 28-11-2017, passed by R.C.A., Gwalior in Case No. 23/95-96/90-7 is hereby affirmed for the reasons mentioned above.

Thus, for the reasons mentioned above, the Civil Revision fails and is hereby **Dismissed.**

Revision dismissed

I.L.R. [2021] M.P 343
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice G.S. Ahluwalia

MCRC No. 37969/2020 (Gwalior) decided on 4 November, 2020

ASFAQ KHAN ...Applicant

Vs.

STATE OF M.P. …Non-applicant

A. Criminal Procedure Code, 1973 (2 of 1974), Section 439 and Penal Code (45 of 1860), Sections 302, 201 & 34 – Delay In Trial – Compensation **– Held – Trial suffered a lightning stroke because of non-appearance of Town Inspector (Investigating Officer) for evidence – An undertrial cannot be kept in jail at mercy of police witnesses – As per record, case not fit for grant of bail, however State directed to pay compensation of Rs. 30,000 to applicant for failing in its duty to keep even the police witnesses present before trial Court – Application disposed. (Paras 9 to 11)**

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 439 एवं दण्ड संहिता (1860 का 45), धाराएँ 302, 201 व 34 – विचारण में विलंब – प्रतिकर – अभिनिर्धारित – नगर निरीक्षक (अन्वेषण अधिकारी) के साक्ष्य हेतु उपस्थित न होने से विचारण को तड़ित आघात सहना पड़ा – एक विचारणाधीन को पुलिस साक्षियों की दया पर जेल में नहीं रखा जा सकता – अभिलेख के अनुसार, जमानत प्रदान करने के लिए उपयुक्त प्रकरण नहीं तथापि राज्य को उसके कर्तव्य, यहां तक कि पुलिस साक्षियों को विचारण न्यायालय के समक्ष उपस्थित रखने की विफलता के लिए आवेदक को रू. 30,000/– का प्रतिकर अदा करने के लिए निदेशित किया गया – आवेदन निराकृत।

B. Constitution – Article 21 – Speedy Trial – Fundamental Right – **Held – Speedy trial is fundamental right of accused and police witnesses cannot stay away from trial Court thereby resulting in an unwarranted incarceration of the under trial without there being any progress in trial.**

(Para 9)

ख. संविधान – अनुच्छेद 21 – शीघ्र विचारण – मूलभूत अधिकार – अभिनिर्धारित – शीघ्र विचारण, अभियुक्त का मूलभूत अधिकार है और पुलिस साक्षीगण विचारण न्यायालय से दूर नहीं रह सकते जिससे विचारण में किसी प्रगति के बिना विचारणाधीन का अनावश्यक कैद परिणामित हो।

Cases referred:

(1980) 1 SCC 98, (1986) 3 SCC 632, (1994) 6 SCC 731, (1994) 3 SCC 569.

Dharmendra Kumar Garg, for the applicant.
M.P.S. Raghuvanshi, Addl. A. G. for the non-applicant/State.
Rajesh Kumar Singh, Superintendent of Police, Guna is present through video conferencing.

O R D E R

G.S. AHLUWALIA, J.:- Heard through video conferencing.

Case diary is available.

This fourth application under Section 439 of Cr.P.C. has been filed for grant of bail. Third application was dismissed as withdrawn by order dated 26/11/2018 passed in M.Cr.C. No.46868/2018.

2. The applicant has been arrested on 17/11/2017 in connection with Crime No.493/2017 registered at Police Station Raghogarh, District Guna for offence under Sections 302, 201, 34 of IPC.

3. The present application has been filed mainly on the ground of delay. On 20/10/2020, the State counsel was directed to seek instructions from the Superintendent of Police, Guna as to why Mr. D.P.S. Chauhan, Town Inspector, is not appearing before the Trial Court as well as why non-bailable warrants of arrest issued against him were received back either unserved or not returned back at all. Accordingly, on 22/10/2020 Shri Rajesh Kumar Singh, Superintendent of Police, Guna appeared on his own before the Court through video conferencing and submitted that he had a talk with the concerning Town Inspector, who informed that earlier on two occasions, he had appeared before the Trial Court, but since the FSL report was not available as well as the statements of the witnesses, which were recorded during *Marg* proceedings, were not available, therefore, his evidence was not recorded. He further submitted that a preliminary enquiry would be conducted into the matter as to why the police witnesses are not appearing. Accordingly, Shri Rajesh Kumar Singh, Superintendent of Police, Guna prayed for time to hold the preliminary enquiry on the issues mentioned in order dated 22/10/2020, which are as under:-

> "1. Why the FSL report was not filed before the Trial Court.
>
> 2. If already ordered, then why the statements of the witesses which were recorded during *Marg* enquiry were not filed.
>
> 3. Why Shri DPS Chauhan did not appear before the Trial Court for the last several months.

4. Why the bailable warrants issued against Shri DPS Chauhan were returned back unserved, specifically when he was discharging his duties and was not absconding.

5. Whether, the Gazetted Officer had ever complied the circular dated 30-3-2019 issued by the Police Headquarter."

4. Today, it is submitted by Shri M.P.S. Raghuvanshi, Additional Advocate General that in the preliminary enquiry it has come on record that Mr. D.P.S. Chauhan had given a false information to the Superintendent of Police, Guna that he had appeared before the Trial Court on two occasions and his evidence was not recorded because the FSL report as well as *Marg* statements of the witnesses were not available. It is submitted that in fact both the documents were already filed along with the charge sheet. It is submitted that in fact Mr. D.P.S. Chauhan had appeared before the Trial Court only once and his cross-examination was deferred because the police case diary was not available. However, the counsel for the State could not point out as to why the police case diary was not kept available at the time of recording of evidence of the Investigating Officer.

5. Be that as it may. It is for the Police Department to introspect a situation where the subordinate officers do not hesitate in giving false information to their senior officers specifically when the senior officer was to make a statement before the Court.

6. Although the State has filed the compliance report, but instead of mentioning the facts in detail, has relied upon the documents which have been filed alongwith the said compliance report. From the compliance report, it appears that a charge-sheet has been issued to Mr. D.P.S. Chauhan and in that charge-sheet following chart has been given:-

Sr. No.	Summons /Warrant	Date of issuance by the Court	Date fixed for appearance	Serve/ unserved	Proceedings by Police Station for Sending report to the Court	Witness present /absent in the Court
1	Summons	16.5.2019	.12.6.2019	Witness was informed on mobile	Report sent with the note regarding giving information by mobl. no.	Absent
2	Summons	.12/06/19	26.6.2019	-	-	Present but due to non-availability of case diary statements could not be recorded

3	Summons	26.6.2019	.12.7.2019	unserved	Returned back unserved to the Court with the note that witness is on leave	-
4	Summons	12/07/19	24.7.2019	-	No report regarding serve/unserve has been submitted	Absent
5	Summons	24.7.2019	.6.8.2019	served	Report regarding service has been submitted to the Court	Absent
6	Bailable warrant	06/08/19	27.8.2019	-	No report regarding serve/unserve has been submitted	Absent
7	Bailable warrant	25.9.2019	11.10.2019	Service through RM	Report regarding service of bailable warrant through RM has been submitted	Absent
8	Bailable warrant	11/10/19	24.10.2019	-	No report regarding serve/ unserve has been submitted	Absent
9	Bailable warrant	24.10.2019	.7.11.2019	served	Report regarding service has been submitted to the Court	Absent
10	Arrest warrant	07/11/19	19.11.2019	unserved	Report regarding Unserve has been Submitted to the Court	–

11	Arrest warrant	19.11.2019	.2.12.2019	-	No report regarding serve/ unserve has been submitted	–
12	Arrest warrant	.2.12.2019	19.12.2019	–	No report regarding serve/ unserve has been submitted	–
13	Arrest warrant	19.12.2019	13.1.2020	Informati-on given	report submitted with the note regarding giving information about date of appearance	Absent
14	Arrest warrant	13.1.2020	11/02/20	Informati-on given	report submitted with the note regarding giving information about date of appearance	Absent
15	Arrest warrant	11/02/20	17.3.2020	Informati on given	report submitted with the note regarding giving information about date of appearance	Absent

7. Thus, it is clear that on various dates Mr. D.P.S. Chauhan was served with summons or he was informed on telephone, but for no good reason neither he made any prayer before the Trial Court for adjournment nor appeared before the Trial Court. The respondents have also filed a copy of the reply of Mr. D.P.S. Chauhan dated 28/10/2020 addressed to the SDO (P) Raghogarh, District Guna in which he has mentioned that on 16/10/2019 and on 10/12/2019 because of law and order situation, he was not permitted by the Superintendent of Police, Indore to leave the district and, therefore, he could not appear before the trial court. However, his reply is completely silent as to why he did not appear before the trial court on remaining dates and there is nothing on record to indicate that any written order was ever issued by the Superintendent of Police, Indore thereby restraining Mr. D.P.S. Chauhan from appearing before the Trial Court. Further, the

respondents have filed a copy of letter dated 12/12/2019 issued by the Superintendent of Police, Guna to the SHOs of all the Police Stations in District Guna, in which it was mentioned that the percentage of execution of perpetual warrant of arrest is 1.64, whereas 1893 warrants of arrest are pending. By another letter dated 12/12/2019 the Superintendent of Police, Guna wrote to the SHOs of all the Police Stations that in the month of October, 2019, the execution of perpetual warrants of arrest issued by the High Court was "0", whereas 13 warrants of arrest were pending for execution. Similarly, by order dated 7/1/2020 the Superintendent of Police, Guna had observed that 13 perpetual warrants of arrest issued by the High Court are still pending for execution. By order dated 4/2/2020 it has been observed by the Superintendent of Police, Guna that out of 2051 perpetual warrants of arrest, only 34 warrants of arrest were executed. Again by letter dated 16/3/2020 the Superintendent of Police, Guna had found that total percentage of execution of perpetual warrants of arrest is "0', whereas 12 perpetual warrants of arrest and one warrant of arrest are pending for execution. The SDO (P) Raghogarh, District Guna by his letter dated 10/6/2020 addressed to S.H.O., Police Station Vijaypur has observed that 17 perpetual warrants of arrest are pending in the Police Station Vijaypur, but not a single warrant of arrest was executed. Similarly, by order dated 10/7/2020 the SDO (P) Raghogarh, District Guna found that out of 313 perpetual warrants of arrest, which were pending in the Police Station Dharnavada, only three warrants were executed. Similarly, by order dated 10/6/2020 it was observed by the SDO (P), Raghogarh, District Guna that out of 130 perpetual warrants of arrest which were pending in Police Station Raghogarh, not a single warrant of arrest was executed. Similarly, out of 162 perpetual warrants of arrest, which were pending in Police Station Aron, only one warrant of arrest was found to be executed. It also appears that the Superintendent of Police, Guna had also written to the subordinates thereby expressing his displeasure on non-execution of warrants of arrest, but all those letters fell on deaf ears. Again on 21/9/2020 the SDO (P) Raghogarh, District Guna wrote a letter to the SHOs of Police Stations Dharnavada, Raghogarh, Aron and Vijaypur that execution of perpetual warrants of arrest is "0" percent. Furthermore, the Additional DGP/IG Gwalior Zone, Gwalior by its letter dated 28/10/2019 which was addressed to the Superintendent of Police, Gwalior, Shivpuri, Guna and Ashok Nagar had also expressed his displeasure with regard to non-execution of warrants. Further, it has been found in the preliminary enquiry conducted by the Additional SP that the Gazetted Officer did not verify the status of pendency of warrants of arrest on weekly basis, as directed by the Police Headquarters by its circular dated 30/3/2019 and 21/5/2019 and accordingly, a proposal has been sent for taking action against said Gazetted Officer. Thus, it is clear that Mr. D.P.S. Chauhan, the Investigating Officer did not appear before the Trial Court in spite of service of summons as well as information and on one day when he appeared before the Trial Court, then he was not having the police case diary with him.

Thus, it is clear that it is the State and only the State, which is responsible for the delay.

8. Now the next question for consideration is that:-

> "Whether the applicant is entitled for bail on the ground of delay or the State can be saddled with the liability to pay the compensation for violation of fundamental right of speedy trial as enshrined under Article 21 of the Constitution of India?"

9. It is well established principle of law that speedy trial is the fundamental right of an accused and the police witnesses cannot stay away from the Trial Court thereby resulting in an unwarranted incarceration of the under-trial without there being any progress in the trial. An under-trial cannot be kept in jail at the mercy of the police witnesses. The Supreme Court in the case o*f Hussainara Khatoon Vs. Home Secretary, State of Bihar,* reported in (1980) 1SCC 98 has held as under :

> **10.** We find from the counter-affidavit filed on behalf of the respondents that no reasons have been given by the State Government as to why there has been such enormous delay in bringing the undertrial prisoners to trial. Speedy trial is, as held by us in our earlier judgment dated February 26, 1979, an essential ingredient of "reasonable, fair and just" procedure guaranteed by Article 21 and it is the constitutional obligation of the State to device such a procedure as would ensure speedy trial to the accused. The State cannot be permitted to deny the constitutional right of speedy trial to the accused on the ground that the State has no adequate financial resources to incur the necessary expenditure needed for improving the administrative and judicial apparatus with a view to ensuring speedy trial. The State may have its financial constraints and its priorities in expenditure, but, as pointed out by the Court in *Rhem* v. *Malcolm:* "The law does not permit any government to deprive its citizens of constitutional rights on a plea of poverty". It is also interesting to notice what Justice, then Judge, Blackmum said in *Jackon* v. *Bishop:*
>
> "Humane considerations and constitutional requirements are not, in this day, to be measured by dollar considerations."
>
> So also in *Holt* v. *Sarver* affirmed in 442 F Supp 362, the Court, dealing with the obligation of the State to maintain a Penitentiary System which did not violate the Eighth Amendment aptly and eloquently said:
>
> "Let there be no mistake in the matter; the obligation of the respondents to eliminate existing unconstitutionalities does not depend upon what the legislature may do, or upon what the Governor may do, or, indeed upon what respondents may

> actually be able to accomplish. If Arkansas is going to operate a Penitentiary System, it is going to have to be a system that is countenanced by the Constitution of the United States."
>
> The State cannot avoid its constitutional obligation to provide speedy trial to the accused by pleading financial or administrative inability. The State is under a constitutional mandate to ensure speedy trial and whatever is necessary for this purpose has to be done by the State. It is also the constitutional obligation of this Court, as the guardian of the fundamental rights of the people, as a sentinel on the qui vive, to enforce the fundamental right of the accused to speedy trial by issuing the necessary directions to the State which may include taking of positive action, such as augmenting and strengthening the investigative machinery, setting up new courts, building new court houses, providing more staff and equipment to the courts, appointment of additional Judges and other measures calculated to ensure speedy trial.

The Supreme Court in the case of *Sheela Barse Vs. Union of India* reported in (1986) 3 SCC 632 has held as under :

> 3. .....We have already held in *Hussainara Khatoon (I)* v. *Home Secretary, State of Bihar* that the right to speedy trial is a fundamental right implicit in Article 21 of the Constitution. If an accused is not tried speedily and his case remains pending before the magistrate or the Sessions Court for an unreasonable length of time, it is clear that his fundamental right to speedy trial would be violated unless, of course, the trial is held up on account of some interim order passed by a superior court or the accused is responsible for the delay in the trial of the case. The consequence of violation of the fundamental right to speedy trial would be that the prosecution itself would be liable to be quashed on the ground that it is in breach of the fundamental right .....

The Supreme Court in the case of *Supreme Court Legal Aid Committee (Representing Undertial (*sic: *Undertrial) Prisoners) Vs. Union of India* reported in (1994) 6 SCC 731 has held as under :

> 15. ..... As we have not felt inclined to accept the extreme submission of quashing the proceedings and setting free the accused whose trials have been delayed beyond reasonable time for reasons already alluded to, we have felt that deprivation of the personal liberty without ensuring speedy trial would also not be in consonance with the right guaranteed by Article 21. Of course, some amount of deprivation of personal liberty cannot be avoided in such cases; but if the period of deprivation

> pending trial becomes unduly long, the fairness assured by Article 21 would receive a jolt. It is because of this that we have felt that after the accused persons have suffered imprisonment which is half of the maximum punishment provided for the offence, any further deprivation of personal liberty would be violative of the fundamental right visualised by Article 21, which has to be telescoped with the right guaranteed by Article 14 which also promises justness, fairness and reasonableness in procedural matters. What then is the remedy? The offences under the Act are grave and, therefore, we are not inclined to agree with the submission of the learned counsel for the petitioner that we should quash the prosecutions and set free the accused persons whose trials are delayed beyond reasonable time. Alternatively he contended that such accused persons whose trials have been delayed beyond reasonable time and are likely to be further delayed should be released on bail on such terms as this Court considers appropriate to impose .....

The Supreme Court in the case of *Kartar Singh VS. State of Punjab* reported in (1994) 3 SCC 569 has held as under :

> **84.** The right to a speedy trial is a derivation from a provision of Magna Carta. This principle has also been incorporated into the Virginia Declaration of Rights of 1776 and from there into the Sixth Amendment of the Constitution of United States of America which reads, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial...". It may be pointed out, in this connection, that there is a Federal Act of 1974 called 'Speedy Trial Act' establishing a set of time-limits for carrying out the major events, e.g., information, indictment, arraignment, in the prosecution of criminal cases. See *Black's Law Dictionary, 6th Edn.* p. 1400.
>
> **85.** The right to a speedy trial is not only an important safeguard to prevent undue and oppressive incarceration, to minimise anxiety and concern accompanying the accusation and to limit the possibility of impairing the ability of an accused to defend himself but also there is a societal interest in providing a speedy trial. This right has been actuated in the recent past and the courts have laid down a series of decisions opening up new vistas of fundamental rights. In fact, lot of cases are coming before the courts for quashing of proceedings on the ground of inordinate and undue delay stating that the invocation of this right even need not await formal indictment or charge.
>
> **86.** The concept of speedy trial is read into Article 21 as an essential part of the fundamental right to life and liberty guaranteed and preserved under our Constitution. The right to

> speedy trial begins with the actual restraint imposed by arrest and consequent incarceration and continues at all stages, namely, the stage of investigation, inquiry, trial, appeal and revision so that any possible prejudice that may result from impermissible and avoidable delay from the time of the commission of the offence till it consummates into a finality, can be averted. In this context, it may be noted that the constitutional guarantee of speedy trial is properly reflected in Section 309 of the Code of Criminal Procedure.

10. The allegations against the applicant are that a property dispute was going on between the deceased and the co-accused Bablu alias Dinesh and on the said issue, the deceased was killed. Under such circumstances, this Court is of the considered opinion that it is not a fit case for grant of bail. However, this Court in the case of *Jaipal Singh Vs State of M.P.* in M.Cr.C. No. 10547 of 2020 has held as under:-

> "....The Police Department has also issued various circulars including the circular dated 30-3-2019, by which it has been directed that a Gazetted Officer would monitor the execution and non-execution of summons/bailable warrants/warrants of arrest on daily basis. However, it is clear that the Gazetted officer also did not show any respect to the directions issued by the Police Headquarter. Thus, it is clear that the police witnesses and the Gazetted officer, were not only negligent in discharging their duties, but they donot have respect for their own senior police officers. It is for the Director General of Police as well as other Senior officers to find out as to whether this conduct of the police witnesses is indicative of indiscipline of their part, or the circulars issued by the Police Head quarters from time to time are merely paper circulars issued with no intention to comply the same. Be that whatever it may be.
>
> Speedy Trial is a fundamental right of the accused being an integral part of Article 21 of the Constitution of India.
>
> * * * *
>
> Thus, not only these two witnesses were playing with the life and liberty of an undertrial, but they had taken the Trial Court for granted. Even otherwise, according to Shri Manoj Kumar Singh, S.P., Bhind, that there was no reason for the witnesses for not appearing before the Trial Court for giving their evidence.
>
> * * * *
>
> The State cannot be allowed to become an instrumentality in securing bail for an accused. If the State is of the view that it is

> unable to keep its witnesses present before the Trial Court, without any lapses, then it must make a concessional statement before the Court, thereby conceding to the prayer of the accused for grant of bail. However, the State cannot be permitted to play the game of hide and seek. The State functionaries cannot be permitted to create a situation which may result in grant of bail to the accused. It is the primary duty of the State to maintain law and order in the society by bringing the breakers of law to the Court. Therefore, their officers cannot be permitted to stay away from the Court for no good reason, so that an accused can claim bail on the ground of delay in trial.
>
> However, the breach of fundamental right of a citizen cannot be permitted and it can be compensated in terms of money....
>
> So far the departmental action against the erring police officers is concerned, it is the outlook of the police department. This Court is of the view that if the police department is really interested in improving its working, then apart from issuing paper circulars from time to time, it must take effective steps in the matter. Since, it is the internal matter of the police department, therefore, this Court doesnot want to indulge itself in the internal affairs of the police department."

11. Accordingly, it is directed that the State shall pay a compensation of Rs.30,000/- to the applicant for failing in its duty to keep even the police witnesses present before the Trial Court and the trial has suffered a lightning stroke because of non-appearance of Mr. D.P.S. Chauhan, Town Inspector. Let the compensation be paid within a period of one month from today with liberty to the State that the same shall be recovered from the salary of Mr. D.P.S. Chauhan, Town Inspector. The Superintendent of Police, Guna is further directed to submit the monthly report to the Principal Registrar of this Court with regard to the progress in the departmental enquiry, which has been initiated against the erring police officers. It is further directed that the prosecution shall keep all its witnesses present before the Trial Court on the next date fixed for evidence.

12. With aforesaid observations and directions, this application is finally **disposed of.**

Order accordingly

I.L.R. [2021] M.P. 354
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice Rajeev Kumar Shrivastava

MCRC No. 37683/2020 (Gwalior) decided on 8 December, 2020

PRADEEP KUMAR SHINDE ...Applicant

Vs.

STATE OF M.P. & anr. …Non-applicants

(Alongwith MCRC No. 38528/2020)

A. Criminal Procedure Code, 1973 (2 of 1974), Section 482 and Penal Code (45 of 1860), Section 420 & 120-B – Quashment of FIR – Grounds – **Held – Truthfulness/falsehood of allegation and documents of prosecution is to be established by evidence before trial Court, it cannot be questioned by defence at this stage – From available records, it cannot be said that no offence has taken place or there is no ground to proceed with trial against applicants – Applications dismissed. (Para 11 & 13)**

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 एवं दण्ड संहिता (1860 का 45), धारा 420 व 120–B – प्रथम सूचना प्रतिवेदन अभिखंडित किया जाना – आधार – अभिनिर्धारित – अभियोजन के अभिकथन एवं दस्तावेजों की सत्यता/झूठ को विचारण न्यायालय के समक्ष साक्ष्य द्वारा स्थापित किया जाता है, इस प्रक्रम पर बचाव पक्ष द्वारा इस पर सवाल नहीं उठाया जा सकता – उपलब्ध अभिलेखों से, यह नहीं कहा जा सकता कि कोई अपराध कारित नहीं हुआ है अथवा आवेदकगण के विरूद्ध आगे विचारण करने हेतु कोई आधार नहीं है – आवेदन खारिज।

B. Criminal Procedure Code, 1973 (2 of 1974), Section 482 – Scope & Jurisdiction **– Held – Court should not examine the facts, evidence and material on record to determine whether there is sufficient material, which may end in a conviction – U/S 482 Cr.P.C., Court cannot consider external materials given by accused to conclude that no offence was disclosed or there was possibility of acquittal. (Para 10)**

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – व्याप्ति व अधिकारिता – अभिनिर्धारित – न्यायालय को अभिलेख पर उपलब्ध तथ्यों, साक्ष्य और सामग्री का परीक्षण यह अवधारित करने हेतु नहीं करना चाहिए कि क्या पर्याप्त सामग्री है, जिससे दोषसिद्धि हो सकती है – दं.प्र.सं. की धारा 482 के अंतर्गत, न्यायालय यह निष्कर्षित करने के लिए कि कोई अपराध प्रकट नहीं हुआ था अथवा दोषमुक्ति की संभावना थी, अभियुक्त द्वारा दी गई बाहरी सामग्री को विचार में नहीं ले सकता।

C. Criminal Procedure Code, 1973 (2 of 1974), Section 482 – Interference **– Relevant parameters laid down by Apex Court enumerated. (Para 9)**

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – हस्तक्षेप – सर्वोच्च न्यायालय द्वारा प्रतिपादित सुसंगत मापदण्ड प्रगणित।

Cases referred:

(2014) 2 SCC 532, (2013) 5 SCC 762, Cr.A. No. 217/2020 decided on 03.02.2020 (Supreme Court), 2005 (4) MPLJ 380, (2012) 9 SCC 460, AIR 1992 SC 604, (2006) 2 SCC 272.

Deependra Singh Kushwah, for the applicant in MCRC No. 37683/2020.
Vivek Jain, for the applicant in MCRC No. 38528/2020.
Upendri Singh, P.L. for the non-applicant No. 1/State.
S.S. Rajput, for the non-applicant No. 2/complainant.

O R D E R

RAJEEV KUMAR SHRIVASTAVA, J. :- This order shall govern the disposal of both Misc. Cri. Case Nos. 37683/2020 and 38528/2020, as both the cases have been filed by the applicants in connection with same Crime No.15/2020 registered at Police Station Madhoganj, District Gwalior.

2. Both the petitions under Section 482 of the Code of Criminal Procedure have been preferred by the applicants praying for quashment of First Information Report No. 15/2020 registered at Police Station Madhoganj, District Gwalior for offence punishable under Sections 420 and 120-B of the IPC and its all consequential proceedings.

3. The facts are taken from **MCRC No.37683/2020** as under:-

The prosecution story in nutshell is that the complainant filed a complaint in Police Station Madhoganj, District Gwalior on 07/12/2019 alleging therein that he had executed an agreement in Nov, 2015 to purchase a flat bearing no. FO-401, which is situated at H.G. Hights, Pan Patte ki Goth, Kampu, Lashkar, Gwalior, with Pradeep Shinde, Arun Shinde, Pramod Shinde, Uday Shinde and Suheel Shinde, Proprietor of Kaivalya Construction for which he had given an advance amount of Rs.25,00,000/- vide cheque no. 318543 on 10/11/2015 to Suheel Shinde and the rest amount was to be given after transfer of the flat in dispute. It has also been mentioned in the aforesaid agreement that in case the ownership of the disputed flat is not transferred to the complainant within two years from the date of agreement, the advance amount, which has been given by the complainant, shall be refunded to him but even after passing of more than four years, neither the ownership of the disputed flat has been transferred in the name of the complainant nor the advance amount has been refunded to him. On this complaint, FIR No. 15/2020 has been registered by Police Station Madhoganj, District Gwalior against present applicants and co-accused Arun Shinde, Uday Shinde and Suheel

Shinde and for the quashment of the same, present petitions have been filed by the applicants.

4. Learned counsel for the applicants submit that a false report has been lodged against the applicants. In November, 2015, with ill intention, co-accused Suheel Shinde entered into an agreement to sale Annexure P-4 with complainant Yudhistra Arora whereby agreeing to sale the flat in dispute bearing no. 401, which as per agreement Annexure P-2, executed between the applicants, their brothers and Suheel Shinde, Proprietor of M/s. Kewalya Construction, was under the ownership of present applicants and their brothers. It is further submitted that neither the applicants nor their brothers had any knowledge of the agreement executed between the complainant and co-accused Suheel Shinde nor they had signed any documents being party no. 1 (owner of the flat) and the signatures shown in the agreement Annexure P-4 are forged one. In this regard, on 14/11/2019, a representation was had also been submitted by applicant Pramod Kumar Shinde before the Superintendent of Police, Gwalior submitting therein that the applicants and their brothers had not signed in the agreement to sale Annexure P-4 and the signature shown in the agreement Annexure P-4 is a forged one and the same could be tallied from the signatures in their bank accounts and also prayed for free an fair investigation in the matter but so far no heed has been paid on the aforesaid representation. It is further submitted that the aim of investigation is ultimately to search for truth and to bring the real offender to book. In support of their submission, learned counsel for the applicants have relied upon the judgments passed by the Supreme Court in the cases of *Manohar Lal Sharma vs. Union of India,* [(2014) 2 SCC 532], *Vinay Tyagi vs. Irshad Ali,* [(2013) 5 SCC 762 and *Akhtar Shakeel vs. State of U.P. & Ors.,*[Criminal Appeal No.217/2020, decided on 03/2/2020].Therefore, learned counsel for the applicants pray that the petitions may be allowed and the FIR No. 15/2020 lodged at Police Station Madhoganj, District Gwalior against the present applicants and other co-accused persons and its all consequential proceedings be quashed.

5. To the contrary, learned counsel for the non-applicants submitted that on the basis of material collected during investigation, no interference is warranted.

6. I have considered rival contentions of the parties and perused the record.

7. Section 482 of Code of Criminal Procedure reads as under:-

> ***"482. Saving for inherent power of High Court -***
> *Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice."*

8. This Court in the case of *Colgate Palmolive India Ltd. vs. Satish Rohra,* 2005 (4) MPLJ 380, has held in the following manner: -

> *"6. I have heard the learned Counsel of both the parties and carefully perused the evidence and the material on record. Before considering the evidence and the material on record for the limited purpose of finding out whether a prima facie case for issuance of process has been made out or not, it may be mentioned at the very outset that the various documents and the reports filed by the petitioners/Company along with the petition can not be looked into at the stage of taking cognizance or at the stage of framing of the charge. The question whether prima facie case is made out or not has to be decided purely from the point of view of the complainant without at all adverting to any defence that the accused may have. No provision in the Code of Criminal Procedure grants to the accused any right to file any material or document at the stage of taking cognizance or even at the stage of framing of the charge in order to thwart it. That right is granted only at the stage of trial. At this preliminary stage the material produced by the complainant alone is to be considered."*

9. The question is whether at this stage this Court can examine the documents and conduct a mini trial simultaneously. This aspect is no more *res integra.* The Apex Court in *Amit Kapoor vs. Ramesh Chander,* [(2012) 9 SCC 460] has held that where the factual foundation for an offence has been laid, the courts should be reluctant and should not hasten to quash the proceedings even on the premise that one or two ingredients have not been stated or do not appear to be satisfied if there is substantial compliance with the requirements of the offence. In the said case, the Apex Court laid down the relevant parameters, on the strength of which interference under Section 482 CrPC can be made. The said principles are as under:-

> *"1. Though there are no limits of the powers of the Court under Section 482 CrPC but the more the power, the more due care and caution is to be exercised in invoking these powers. The power of quashing criminal proceedings, particularly, the charge framed in terms of Section 228 CrPC should be exercised very sparingly and with circumspection and that too in the rarest of rare cases.*

2. *The court should apply the test as to whether the uncontroverted allegations as made from the record of the case and the documents submitted therewith prima facie establish the offence or not. If the allegations are so patently absurd and inherently improbable that no prudent person can ever reach such a conclusion and where the basic ingredients of a criminal offence are not satisfied then the Court may interfere.*

3. *The High Court should not unduly interfere. No meticulous examination of the evidence is needed for considering whether the case would end in conviction or not at the stage of framing of charge or quashing of charge.*

4. *Where the exercise of such power is absolutely essential to prevent patent miscarriage of justice and for correcting some grave error that might be committed by the subordinate courts even in such cases, the High Court should be loathe to interfere, at the threshold, to throttle the prosecution in exercise of its inherent powers.*

5. *Where there is an express legal bar enacted in any of the provisions of CrPC or any specific law in force to the very initiation or institution and continuance of such criminal proceedings, such a bar is intended to provide specific protection to an accused.*

6. *The Court has a duty to balance the freedom of a person and the right of the complainant or prosecution to investigate and prosecute the offender.*

7. *The process of the Court cannot be permitted to be used for an oblique or ultimate/ulterior purpose.*

8. *Where allegations give rise to a civil claim and also amount to an offence, merely because a civil claim is maintainable, does not mean that a criminal complaint cannot be maintained. It may be purely a civil wrong or purely a criminal offence or a civil wrong as also a criminal offence constituting both on the same set of facts. But if the records disclose commission of a criminal offence and the ingredients of the offence are satisfied, then such criminal proceedings cannot be quashed merely because a civil wrong has also been committed. The power cannot be invoked to stifle or scuttle a legitimate prosecution. The factual foundation and ingredients of an offence being satisfied, the court will*

not either dismiss a complaint or quash such proceedings in exercise of its inherent or original jurisdiction.

9. *Where the allegations made and as they appeared from the record and documents annexed therewith to predominantly give rise and constitute a civil wrong with no element of criminality and does not satisfy the basic ingredients of a criminal offence, the court may be justified in quashing the charge. Even in such cases, the court would not embark upon the critical analysis of the evidence.*

10. *Another very significant caution that the courts have to observe is that it cannot examine the facts, evidence and materials on record to determine whether there is sufficient material on the basis of which the case would end in a conviction; the court is concerned primarily with the allegations taken as a whole whether they will constitute an offence and, if so, is it an abuse of the process of court leading to injustice.*

11. *It is neither necessary nor is the court called upon to hold a full-fledged enquiry or to appreciate evidence collected by the investigating agencies to find out whether it is a case of acquittal or conviction.*

12. *In exercise of its jurisdiction under Section 228 and/or under Section 482, the court cannot take into consideration external materials given by an accused for reaching the conclusion that no offence was disclosed or that there was possibility of his acquittal. The court has to consider the record and documents annexed with by the prosecution.*

13. *Quashing of a charge is an exception to the rule of continuous prosecution. Where the offence is even broadly satisfied, the court should be more inclined to permit continuation of prosecution rather than its quashing at that initial stage. The court is not expected to marshal the records with a view to decide admissibility and reliability of the documents or records but is an opinion formed prima facie.*

14. *Where the charge-sheet, report under Section 173(2)CrPC, suffers from fundamental legal defects, the Court may be well within its jurisdiction to frame a charge.*

15. *Coupled with any or all of the above, where the court*

finds that it would amount to abuse of process of CrPC or that interest of justice favours, otherwise it may quash the charge. The power is to be exercised ex debito justitiae i.e. to do real and substantial justice for administration of which alone, the courts exist."

10. As per the provision of law which flows from paras 11 and 13 of the judgment in *Amit Kapoor* (supra), it is clear that at the stage, at which the present case is, the court should not examine the facts, evidence and material on record to determine whether there is sufficient material, which may end in a conviction. The court is only concerned with the allegations taken as a whole whether they will constitute an offence. Similarly, under section 482 CrPC the court cannot take into consideration external materials given by an accused for arriving to a conclusion that no offence was disclosed or there was possibility of her acquittal. The trial Court is best suited to examine the defence documents at appropriate stage. The defence taken by the petitioner is matter of evidence which is required to be proved during trial.

11. The truthfulness of the statement or circumstances or documents of the prosecution cannot be questioned at this stage by the defence. The material on record discloses the grave suspicion. On the basis of the material on record, it can be inferred that the accused might have committed an offence.

12. It has been held by the Apex Court in the case of *State of Haryana and others Vs. CH. Bhaiyalal,* (AIR 1992 SC 604) that when allegations in complaint clearly constitute cognizable offence, then quashing of FIR is not justified. Similarly, in the case of *State of Orissa and another vs. Saroj Kumar Sahoo,* [(2006) 2 SCC 272], it has been observed that inherent powers are to be exercised sparingly and that too in the rarest of rare cases and the High Courts should not embark upon an inquiry as to reliability of evidence to sustain the allegations, which is the function of the trial Court.

13. Truthfulness or falsehood of allegations made by the complainant in his complaint is to be established by evidence to be produced before the trial Court and only looking to the FIR it cannot be inferred that *prima facie* no offence is made out against the present applicant. In the present case, from perusal of the documents available on record, it cannot be said that no offence has taken place or there is no ground available to proceed further with the trial against the present applicant. Therefore, in the case in hand, there is no question of invoking inherent powers impugned under Section 482 of Cr.P.C. for quashing of FIR.

14. Consequently, both the petitions (MCRC Nos.37683/2020 and 38528/2020) filed by the applicants under Section 482 of Cr.P.C. are hereby dismissed being devoid of merits.

Application dismissed