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Autonomous Medical Collegiate Education Model Service Rules, M.P., 2018, Section 12(1)(iv) – Applicability – **Held – These rules operate in different field relating to grant of educational leave, thus, provision relating to fixing maximum age for admission in a course will not be regulated by these Rules. [Catherin Josfin Thangadurai (Mrs.) Vs. State of M.P.] (DB)…*9**

स्वशासी चिकित्सा महाविद्यालयीन शैक्षणिक आदर्श सेवा नियम, म.प्र., 2018, नियम 12(1)(iv) – प्रयोज्यता – अभिनिर्धारित – ये नियम शैक्षणिक अवकाश प्रदान करने से संबंधित विभिन्न क्षेत्रों पर लागू होते हैं, अतः, एक पाठ्यक्रम में प्रवेश हेतु अधिकतम आयु नियत करने से संबंधित उपबंध इन नियमों से विनियमित नहीं होंगे। (केथरीन जॉसफिन थंगादुराई (श्रीमती) वि. म.प्र. राज्य) **(DB)…*9**

Civil Services (General Conditions of Service) Rules, M.P., 1961, Rule 8(7) and Government Servants (Temporary and Quasi-Permanent Service) Rules, M.P. 1960, Rule 12 – Probation – Applicability of Rules – **Held – A probationer, who has neither been confirmed, nor a certificate issued in his favour, nor discharged from service, shall be deemed to have been appointed as a temporary government servant with effect from date of expiry of probation and his service shall be governed by Rules of 1960. [Sinnam Singh Vs. State of M.P.] …1317**

सिविल सेवा (सेवा की सामान्य शर्तें) नियम, म.प्र., 1961, नियम 8(7) एवं शासकीय सेवक (अस्थायी एवं स्थायीवत् सेवा) नियम, म.प्र. 1960, नियम 12 – परिवीक्षा – नियमों की प्रयोज्यता – अभिनिर्धारित – एक परिवीक्षाधीन व्यक्ति को, जिसे न तो स्थाई किया गया है, न ही उसके पक्ष में प्रमाण–पत्र जारी किया गया है, न ही उसे सेवोन्मुक्त किया गया है, परिवीक्षा के अवसान की तिथि से एक अस्थाई शासकीय सेवक के रूप में नियुक्त किया गया माना जावेगा तथा उसकी सेवा 1960 के नियमों द्वारा शासित होगी। (सिन्नम सिंह वि. म.प्र. राज्य) **…1317**

Constitution – Article 21 – Covid 19 Pandemic – Ayushman/ BPL/CGHS Cardholders – Admission/Treatment of Patients – **Held – Hospitals which are approved for treatment of patients covered by cashless schemes of government like Ayushman Cards, BPL Cards & CGHS Cards, shall not refuse to provide them treatment and if any complaint is received, State shall take action against such hospitals/Nursing Homes. [In Reference (Suo Motu) Vs. Union of India] (DB)…1324**

संविधान – अनुच्छेद 21 – कोविड 19 महामारी – आयुष्मान/ बीपीएल/ सीजीएचएस कार्ड धारक – रूग्णों की भर्ती/उपचार – अभिनिर्धारित – आयुष्मान कार्ड, बीपीएल कार्ड व सीजीएचएस कार्ड जैसी सरकार की कैशलेस प्रणालियों द्वारा आच्छादित

रूग्णों के उपचार हेतु जो चिकित्सालय अनुमोदित हैं, वे उन्हें उपचार प्रदान करने से मना नहीं करेंगे और यदि कोई शिकायत प्राप्त होती है, राज्य, ऐसे चिकित्सालयों/नर्सिंग होम्स के विरूद्ध कार्रवाई करेगा। (इन रेफ्रेन्स (सू मोटो) वि. यूनियन ऑफ इंडिया)
(DB)…1324

***Constitution – Article 21 – Covid 19 Pandemic – Private Hospitals/ Nursing Homes – Air Separation Units* – State directed to consider providing soft loans through Nationalized Banks and other Financial Institutions to all private hospitals and Nursing Homes to set up their own Air Separation units so that they may become self reliant regarding their oxygen requirement – Government should also consider providing subsidy and incentive to such private hospitals. [In Reference (Suo Motu) Vs. Union of India] (DB)…1324**

संविधान – अनुच्छेद 21 – कोविड 19 महामारी – निजी चिकित्सालय/नर्सिंग होम्स – वायु पृथक्करण इकाईयां – राज्य को सभी निजी चिकित्सालयों एवं नर्सिंग होम्स को उनके स्वयं के वायु पृथक्करण इकाईयां स्थापित करने के लिए राष्ट्रीयकृत बैंकों एवं अन्य वित्तीय संस्थानों के जरिए सुलभ ऋण उपलब्ध कराने पर विचार करने के लिए निदेशित किया गया जिससे कि वे उनकी ऑक्सीजन आवश्यकता के संबंध में आत्मनिर्भर बन सके – सरकार को ऐसे निजी चिकित्सालयों को सब्सिडी तथा प्रोत्साहन राशि प्रदान करने पर भी विचार करना चाहिए। (इन रेफ्रेन्स (सू मोटो) वि. यूनियन ऑफ इंडिया)
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***Constitution – Article 21 – Covid 19 Pandemic – Right to Life – Right to Health – Duty of State* – Held – Right to health forms an integral component of right to life enshrined under Article 21 – State Government directed to improve availability and rationalize the distribution policy of medicines/ oxygen alongwith check on its cost, ensure regular and continuous supply of oxygen to Government and Private hospitals increase sample collection from twice a day to four times a day, increase the number of technicians, scientists and lab attendants – State & PCB directed to undertake a special drive for disposal of bio-medical waste – All State Governments directed to ensure free interstate movements of LMO tankers. [In Reference (Suo Motu) Vs. Union of India] (DB)…1324**

संविधान – अनुच्छेद 21 – कोविड 19 महामारी – जीवन का अधिकार – स्वास्थ्य का अधिकार – राज्य का कर्तव्य – अभिनिर्धारित – स्वास्थ्य का अधिकार, अनुच्छेद 21 के अंतर्गत प्रतिष्ठापित जीवन के अधिकार का एक अभिन्न अंग बनाता है – राज्य सरकार को दवाईयों/ऑक्सीजन की उपलब्धता सुधारने और वितरण नीति को सुव्यवस्थित करने के साथ–साथ उसके दामों को नियंत्रित करने, सरकारी एवं निजी चिकित्सालयों को नियमित एवं निरंतर ऑक्सीजन प्रदाय सुनिश्चित करने, दिन में दो बार नमूना एकत्रित करने को बढ़ाकर दिन में चार बार करने, तकनीशियनों, वैज्ञानिकों एवं प्रयोगशाला परिचारकों की

संख्या बढ़ाने के लिए निदेशित किया गया – राज्य व पी सी बी को जैव चिकित्सा अपशिष्ट के निपटान हेतु विशेष मुहिम चलाने के लिए निदेशित किया गया – सभी राज्य सरकारों को लिक्विड मेडिकल ऑक्सीजन के टेंकरों के निःशुल्क अंतरराज्यीय संचलन को सुनिश्चित करने के लिए निदेशित किया गया। (इन रेफ्रेन्स (सू मोटो) वि. यूनियन ऑफ इंडिया) **(DB)…1324**

***Constitution – Article 226 – Admission Process – Fixation of Age – Scope of Interference* – Held – Fixation of minimum or maximum age for admission in a course or making a provision for relaxation thereof is essentially a policy matter and same is not open to interference unless it is pointed out that the same is in violation of any statutory provision or is *per se* arbitrary and discriminatory. [Catherin Josfin Thangadurai (Mrs.) Vs. State of M.P.] (DB)…*9**

संविधान – अनुच्छेद 226 – प्रवेश प्रक्रिया – आयु नियत की जाना – हस्तक्षेप की व्याप्ति – अभिनिर्धारित – एक पाठ्यक्रम में प्रवेश हेतु न्यूनतम या अधिकतम आयु नियत करना या उसमें छूट का कोई उपबंध करना, आवश्यक रूप से एक नीतिगत मामला है तथा जब तक यह इंगित न किया जाए कि उक्त किसी कानूनी उपबंध के उल्लंघन में है या अपने आप में मनमाना और विभेदकारी है, इसमें हस्तक्षेप नहीं किया जा सकता। (केथरीन जॉसफिन थंगादुराई (श्रीमती) वि. म.प्र. राज्य) **(DB)…*9**

***Constitution – Article 226 – Covid 19 Pandemic (Second Wave) – Overcrowded Jails – Arrest & Bail* – Registrar General of High Court directed to circulate copy of judgment of Apex Court in *Arnesh Kumar's* case alongwith copy of this order to all District Judges for being served upon Judicial Magistrates – Director, State Judicial Academy directed to organize online/virtual programme for sensitizing not only Judicial Magistrates but also Police Officers – Director, M.P. Police Academy shall also work out modalities for sensitizing police officers of State – DGP shall also be responsible for compliance of this direction. [In reference (Suo Motu) Vs. State of M.P.] (DB)…1337**

संविधान – अनुच्छेद 226 – कोविड–19 महामारी (द्वितीय लहर) – अतिभीड़ वाली जेलें – गिरफ्तारी व जमानत – इस आदेश की प्रति के साथ–साथ अर्नेश कुमार के प्रकरण में सर्वोच्च न्यायालय के निर्णय की प्रति, न्यायिक मजिस्ट्रेटों पर तामील किये जाने हेतु सभी जिला जजों को परिचालित करने के लिए उच्च न्यायालय के रजिस्ट्रार जनरल को निदेशित किया गया – निदेशक, राज्य न्यायिक अकादमी को न केवल न्यायिक मजिस्ट्रेटों को बल्कि पुलिस अधिकारियों को भी संवेदनशील बनाने हेतु ऑनलाईन/वर्च्युअल कार्यक्रम आयोजित करने के लिए निदेशित किया गया – निदेशक, म.प्र. पुलिस अकादमी भी राज्य के पुलिस अधिकारियों को संवेदनशील बनाने के लिए तौर तरीके निकालें – इस निदेश के अनुपालन हेतु डी.जी.पी. भी उत्तरदायी रहेंगे। (इन रेफ्रेन्स (सू मोटो) वि. म.प्र. राज्य) **(DB)…1337**

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Constitution – Article 226 – Covid 19 Pandemic (Second Wave) – Overcrowded Jails – Release of Prisoners – **Held – On 07.05.2021, Supreme Court directed that all those inmates who were granted parole in pursuance to its earlier order, should be again released on parole for a period of 90 days in order to tide over the pandemic. [In reference (Suo Motu) Vs. State of M.P.] (DB)…1337**

संविधान – अनुच्छेद 226 – कोविड–19 महामारी (द्वितीय लहर) – अति भीड़ वाली जेले – बंदियों को छोड़ा जाना – अभिनिर्धारित – 07.05.2021 को उच्चतम न्यायालय ने निदेशित किया कि महामारी पर काबू पाने के लिए उन सभी अंतः वासियों को 90 दिनों की अवधि हेतु पैरोल पर पुनः छोड़ा जाये, जिन्हें उसके पूर्ववर्ती आदेश के अनुसरण में पैरोल प्रदान किया गया था। (इन रेफ्रेन्स (सू मोटो) वि. म.प्र. राज्य) **(DB)…1337**

Constitution – Article 226 – Encroachments and Regularization – **Held – Apex Court concluded that long duration of illegal encroachment/occupation of land or huge expenditure in making constructions thereon or political connections of trespassers are no justification for regularizing such illegal occupation – Removal of encroachment on such land is a rule and regularization an exception and that too in extremely limited cases which only the government can do by appropriate notification and no other authority. [Gram Panchayat Dhooma Vs. State of M.P.] (DB)…1369**

संविधान – अनुच्छेद 226 – अधिक्रमण और नियमितीकरण – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया है कि लंबी अवधि तक भूमि पर अवैध अधिक्रमण/अधिभोग या उस पर निर्माण करने में अत्याधिक खर्च या अतिचारियों के राजनीतिक संबंध, उक्त अवैध अधिभोग को नियमित करने के कारण नहीं हैं – उक्त भूमि पर से अधिक्रमण को हटाना नियम है और नियमितिकरण एक अपवाद है एवं वह भी अत्यंत सीमित प्रकरणों में जो समुचित अधिसूचना द्वारा केवल सरकार कर सकती है तथा कोई अन्य प्राधिकारी नहीं कर सकता। (ग्राम पंचायत धूमा वि. म.प्र. राज्य) **(DB)…1369**

Constitution – Article 226 – New Plea in Rejoinder – Maintainability – **Held – No new plea ordinarily could have been permitted by way of rejoinder – A new case cannot be set up by rejoinder, more so, when factual matrix of case is within the knowledge of petitioner – Apex Court concluded that if a point is not pleaded, High Court should not allow it to be urged during arguments. [Vishnu Vs. State of M.P.] (DB)…1292**

संविधान – अनुच्छेद 226 – प्रत्युत्तर में नया अभिवाक् – पोषणीयता – अभिनिर्धारित – प्रत्युत्तर के जरिए साधारणतः किसी नये अभिवाक् की अनुमति नहीं दी जा सकती थी – प्रत्युत्तर द्वारा एक नया प्रकरण स्थापित नहीं किया जा सकता, तब और अधिक जब प्रकरण की तथ्यात्मक स्थिति, याची की जानकारी के भीतर है – सर्वोच्च

न्यायालय ने निष्कर्षित किया कि यदि एक बिंदु का अभिवाक् नहीं किया गया है, उच्च न्यायालय को उसे तर्कों के दौरान निवेदित करने की मंजूरी नहीं देनी चाहिए। (विष्णु वि. म.प्र. राज्य) **(DB)…1292**

***Constitution – Article 226 – Protection of Public Land – Illegal Encroachments* – Chief Secretary, Government of M.P. directed to issue necessary notification for notifying a permanent body designated as Public Land Protection Cell (PLPC) in every district with Collector as its head and a Tehsildar as its Member Secretary and other revenue officers as its Members and it shall be as per guidelines issued by Apex Court – Complaint regarding encroachment over public land in rural area can be made to such authorities, which shall be responsible for causing enquiry and taking expeditious action for removal of encroachments so as to protect public land and appropriate penal action be also taken against trespassers. [Gram Panchayat Dhooma Vs. State of M.P.] (DB)…1369**

संविधान – अनुच्छेद 226 – सार्वजनिक भूमि का संरक्षण – अवैध अधिक्रमण – मुख्य सचिव, म.प्र. शासन को प्रत्येक जिले में सार्वजनिक भूमि संरक्षण प्रकोष्ठ (पी.एल.पी. सी.) के रूप से नामनिर्दिष्ट एक स्थाई निकाय अधिसूचित करने के लिए आवश्यक अधिसूचना जारी करने हेतु निदेशित किया जाता है जिसके प्रमुख कलेक्टर और सदस्य–सचिव तहसीलदार और अन्य राजस्व अधिकारीगण उसके सदस्य होंगे तथा यह सर्वोच्च न्यायालय द्वारा जारी दिशा निर्देशों के अनुसार होगा – ग्रामीण क्षेत्र में सार्वजनिक भूमि पर अधिक्रमण के संबंध में उक्त प्राधिकारीगण को शिकायत की जा सकती है, जो सार्वजनिक भूमि के संरक्षण हेतु जांच करने और अधिक्रमण हटाने के लिए त्वरित कार्रवाई करने के लिए उत्तरदायी होंगे और अतिचारियों के विरूद्ध उचित दण्डात्मक कार्रवाई भी की जाएगी। (ग्राम पंचायत धूमा वि. म.प्र. राज्य) **(DB)…1369**

***Constitution – Article 226 – See – Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act 2013, Section 24(2)* [Vishnu Vs. State of M.P.] (DB)…1292**

संविधान – अनुच्छेद 226 – देखें – भूमि अर्जन, पुनर्वासन और पुनर्व्यवस्थापन में उचित प्रतिकर और पारदर्शिता का अधिकार अधिनियम 2013, धारा 24(2) (विष्णु वि. म.प्र. राज्य) **(DB)…1292**

***Constitution – Article 226 and Criminal Procedure Code, 1973 (2 of 1974), Section 41 & 41A – Covid 19 Pandemic (Second Wave) – Overcrowded Jails – Directions to DGP & Judicial Magistrates* – DGP directed to issue instructions to all police stations to strictly adhere to guidelines issued by Apex Court in *Arnesh Kumar's* case – Judicial Magistrate, on production of accused before them by police, for authorizing further detention, shall mandatorily examine whether stipulation u/S 41 & 41A Cr.P.C. have been**

followed or not – If any arrest has been made without following guidelines, accused would be entitled to directly apply to competent court for regular bail on this ground alone. [In reference (Suo Motu) Vs. State of M.P.]
(DB)…1337

संविधान – अनुच्छेद 226 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 41 व 41A – कोविड–19 महामारी (द्वितीय लहर) – अति भीड़ वाली जेलें – पुलिस महानिदेशक (डी.जी.पी.) व न्यायिक मजिस्ट्रेटों के लिए निदेश – अर्नेश कुमार के प्रकरण में सर्वोच्च न्यायालय द्वारा जारी किये गये दिशानिर्देशों के कठोरता से पालन हेतु सभी पुलिस थानों को अनुदेश जारी करने के लिए डी.जी.पी. को निदेशित किया गया – पुलिस द्वारा अभियुक्त को न्यायिक मजिस्ट्रेट के समक्ष प्रस्तुत किये जाने पर, अतिरिक्त निरोध प्राधिकृत किये जाने हेतु न्यायिक मजिस्ट्रेट आज्ञापक रूप से परीक्षण करेंगे कि क्या धारा 41 व 41A, दं.प्र.सं. के उपबंधों का पालन किया गया है अथवा नहीं – यदि दिशा निदेशों का पालन किये बिना कोई गिरफ्तारी की गयी है, अभियुक्त केवल इस आधार पर नियमित जमानत हेतु सीधे सक्षम न्यायालय को आवेदन करने के लिए हकदार होगा। (इन रेफ्रेन्स (सू मोटो) वि. म.प्र. राज्य) **(DB)…1337**

Constitution – Article 226 and Criminal Procedure Code, 1973 (2 of 1974), Section 154 – Second FIR – Duty of Court **– Held – Court is required to see the circumstances of a given case indicating proximity of time, unity or proximity of case, continuity of action, commonality of purpose of crime, to ascertain if more than one FIR can be allowed to stand. [Pawan Tamrakar (Dr.) Vs. M.P. Special Police Establishment]** **(DB)…1357**

संविधान – अनुच्छेद 226 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 154 – द्वितीय प्रथम सूचना प्रतिवेदन – न्यायालय का कर्तव्य – अभिनिर्धारित – न्यायालय द्वारा दिये गये प्रकरण की परिस्थितियों पर, जो कि समय की निकटता, प्रकरण की समानता या समीप्यता, कार्य की निरंतरता, अपराध के प्रयोजन की समानता दर्शाती हो विचार किया जाना अपेक्षित है, ताकि यह सुनिश्चित किया जा सके कि एक से अधिक प्रथम सूचना प्रतिवेदन स्वीकार किया जा सकता है। (पवन ताम्रकार (डॉ.) वि. एम.पी. स्पेशल पुलिस इस्टैब्लिशमेंट) **(DB)…1357**

Constitution – Article 226 and Criminal Procedure Code, 1973 (2 of 1974), Section 154 – Second FIR & Clubbing of FIRs **– Held – Different FIRs registered for different category of students and for different courses – No repeat FIR for same category of student with same course – Defalcation of amount in respect of each course and category of person has given separate cause of action, even witnesses in each case are different – Subsequent FIRs do not arise as a consequence of allegations made in first FIR – Test of 'sameness' and test of 'consequence' is not satisfied – Petition dismissed. [Pawan Tamrakar (Dr.) Vs. M.P. Special Police Establishment]** **(DB)…1357**

संविधान – अनुच्छेद 226 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 154 – द्वितीय प्रथम सूचना प्रतिवेदन व प्रथम सूचना प्रतिवेदनों को एकत्र/एक साथ किया जाना – अभिनिर्धारित – विभिन्न श्रेणी के छात्रों और विभिन्न पाठ्यक्रमों के लिए अलग–अलग प्रथम सूचना प्रतिवेदन पंजीबद्ध किये गये – एक ही श्रेणी के समान पाठ्यक्रम वाले छात्रों हेतु प्रथम सूचना प्रतिवेदन की कोई पुनरावृत्ति नहीं – प्रत्येक पाठ्यक्रम और श्रेणी के व्यक्ति के संबंध में राशि के गबन ने पृथक वाद हेतुक दिया है, यहां तक कि प्रत्येक प्रकरण में साक्षीगण भी भिन्न हैं – पहले प्रथम सूचना प्रतिवेदन में किये गये अभिकथनों के परिणामस्वरूप पश्चात्वर्ती प्रथम सूचना प्रतिवेदन उत्पन्न नहीं होते है – 'समानता' का परीक्षण तथा 'परिणाम' का परीक्षण संतुष्ट नहीं होता – याचिका खारिज। (पवन ताम्रकार (डॉ.) वि. एम.पी. स्पेशल पुलिस इस्टैब्लिशमेंट) **(DB)…1357**

Constitution – Article 226 and Criminal Procedure Code, 1973 (2 of 1974), Section 154 – Second FIR & Clubbing of FIRs – Interference by Court – **Held – Second or successive FIR for same or connected cognizable offence alleged to have been committed in course of same transaction for which earlier FIR is already registered, may furnish a ground for interference by Court but where FIRs are based upon separate incident or similar or different offences or subsequent crime is of such magnitude that it does not fall within ambit and scope of earlier FIR then second FIR can be registered. [Pawan Tamrakar (Dr.) Vs. M.P. Special Police Establishment] (DB)…1357**

संविधान – अनुच्छेद 226 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 154 – द्वितीय प्रथम सूचना प्रतिवेदन व प्रथम सूचना प्रतिवेदनों को एकत्र/एक साथ किया जाना – न्यायालय द्वारा हस्तक्षेप – अभिनिर्धारित – समान अथवा संबंधित संज्ञेय अपराध जो कि अभिकथित रूप से समान संव्यवहार के दौरान कारित किया गया है, जिस हेतु पूर्व प्रथम सूचना प्रतिवेदन पहले से ही पंजीबद्ध है, के लिए द्वितीय या उत्तरोत्तर प्रथम सूचना प्रतिवेदन, न्यायालय द्वारा हस्तक्षेप के लिए आधार प्रदान करता है परंतु जहां प्रथम सूचना प्रतिवेदन पृथक घटना या समान या भिन्न अपराधों पर आधारित हैं या पश्चात्वर्ती अपराध ऐसे पैमाने का है कि वह पूर्व प्रथम सूचना प्रतिवेदन की परिधि एवं व्याप्ति में नहीं आता तब द्वितीय प्रथम सूचना प्रतिवेदन पंजीबद्ध किया जा सकता है। (पवन ताम्रकार (डॉ.) वि. एम. पी. स्पेशल पुलिस इस्टैब्लिशमेंट) **(DB)…1357**

Constitution – Article 226 and Criminal Procedure Code, 1973 (2 of 1974), Section 154 & 220 – Clubbing of FIRs – Delay & Latches **– Held – Both FIRs registered in 2015 whereas petitioners approached this Court at a belated stage in 2021 – There is an unexplained delay and latches, thus at this stage petitioners not entitled for any relief in this petition – They may pray before trial Court for common trial u/S 220 Cr.P.C., if case for the same is made out – Petition dismissed. [Pawan Tamrakar (Dr.) Vs. M.P. Special Police Establishment] (DB)…1357**

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संविधान – अनुच्छेद 226 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 154 व 220 – प्रथम सूचना प्रतिवेदनों को एकत्र/एक साथ किया जाना – विलंब व अनुचित विलंब – अभिनिर्धारित – दोनों प्रथम सूचना प्रतिवेदन 2015 में पंजीबद्ध किये गये जबकि याचीगण देरी से 2021 में इस न्यायालय के समक्ष आये – यहां एक अस्पष्ट विलंब तथा अनुचित विलंब है, अतः इस प्रक्रम पर याचीगण इस याचिका में किसी अनुतोष के लिए हकदार नहीं है – वे दं.प्र.सं. की धारा 220 के अंतर्गत संयुक्त विचारण हेतु विचारण न्यायालय के समक्ष प्रार्थना कर सकते है, यदि उक्त के लिए प्रकरण बनता हो – याचिका खारिज। (पवन ताम्रकार (डॉ.) वि. एम.पी. स्पेशल पुलिस इस्टैब्लिशमेंट) **(DB)…1357**

Constitution – Article 226 and Juvenile Justice (Care and Protection of Children) Act, 2015 (2 of 2016) Section 12 proviso – Covid 19 Pandemic (Second Wave) – Juveniles in Conflict with Law – Release from Observation Homes **– Member Secretary, M.P. State Legal Services Authority, Jabalpur directed to require Member Secretaries of respective District Legal Services Authorities to move appropriate application through their legal aid counsels before respective Juvenile Justice Boards on behalf of children in conflict with law for their release from Observation Homes across the State, who shall decide application within 3 days considering proviso to Section 12 of Juvenile Justice Act. [In reference (Suo Motu) Vs. State of M.P.] (DB)…1337**

संविधान – अनुच्छेद 226 एवं किशोर न्याय (बालकों की देखरेख और संरक्षण) अधिनियम, 2015 (2016 का 2), धारा 12 परंतुक – कोविड–19 महामारी (द्वितीय लहर) – विधि के विरोध में किशोर – संप्रेक्षण गृहों से छोड़ा जाना – सदस्य–सचिव, म.प्र. राज्य विधिक सेवा प्राधिकरण, जबलपुर को निदेशित किया गया कि संबंधित जिला विधिक सेवा प्राधिकारियों के सदस्य–सचिवों से अपेक्षा की जाए कि उनके विधिक सहायता परामर्शदाताओं के जरिए पूरे राज्य के संप्रेक्षण गृहों से विधि के विरोध में बच्चों को, छोड़े जाने हेतु समुचित आवेदन, संबंधित किशोर न्याय बोर्ड के समक्ष पेश करें, जो कि किशोर न्याय अधिनियम की धारा 12 के परंतुक को विचार में लेते हुए 3 दिन के भीतर आवेदन का विनिश्चय करेगा। (इन रेफ्रेन्स (सू मोटो) वि. म.प्र. राज्य) **(DB)…1337**

Constitution – Article 243Q and Municipalities Act, M.P. (37 of 1961), Section 5(2) & 6 – Transitional Area – Notification – Legislative Intent **– Held – Conjoint reading of Article 243Q(2) of Constitution and Section 5 & 6 of Act of 1961 concludes that the legislative intent behind said provisions was to apply the required parameters in relation to a "particular transitional area" and issue notification in relation to the said area and circulate it in the said area as per procedure prescribed. [Kan Singh Vs. State of M.P.] (DB)…1306**

संविधान – अनुच्छेद 243 Q एवं नगरपालिका अधिनियम, म.प्र. (1961 का 37), धारा 5(2) व 6 – संक्रमणशील क्षेत्र – अधिसूचना – विधायी आशय – अभिनिर्धारित – संविधान के अनुच्छेद 243Q(2) और 1961 के अधिनियम की धारा 5 व 6 को संयुक्त पढ़े

जाने से यह निष्कर्षित होता है कि उक्त उपबंधों के पीछे विधायी आशय एक ''विशिष्ट संक्रमणशील क्षेत्र'' के संबंध में अपेक्षित मापदंडों को लागू करना और उक्त क्षेत्र के संबंध में अधिसूचना जारी करना तथा विहित प्रक्रिया के अनुसार उक्त क्षेत्र में उसे परिचालित करना था। (कान सिंह वि. म.प्र. राज्य) **(DB)…1306**

***Constitution – Article 243Q and Municipalities Act, M.P. (37 of 1961), Section 5(2) & 6 – Transitional Area – Notification – Statutory Requirement* – Held – Notification dated 27.11.2011 is only a general notification whereby basic parameters have been laid down for establishing a "transitional area" – Constitutional/Statutory requirement is to issue an area specific notification – Notification of 27.11.2011 is not area specific and thus does not fulfill requirement of law and it cannot be a reason to sustain the impugned notifications – All impugned notifications set aside – State at liberty to follow due process and proceed – Petitions disposed. [Kan Singh Vs. State of M.P.]** **(DB)…1306**

संविधान – अनुच्छेद 243 Q एवं नगरपालिका अधिनियम, म.प्र. (1961 का 37), धारा 5(2) व 6 – संक्रमणशील क्षेत्र – अधिसूचना – कानूनी अपेक्षा – अभिनिर्धारित – अधिसूचना दिनांक 27.11.2011 केवल एक साधारण अधिसूचना है जिसके तहत ''संक्रमणशील क्षेत्र'' स्थापित करने के लिए मूलभूत मापदंड प्रतिपादित किये गये हैं – एक क्षेत्र विशिष्ट अधिसूचना जारी करने की संवैधानिक/कानूनी आवश्यकता है – दिनांक 27.11.2011 की अधिसूचना क्षेत्र विशिष्ट नहीं है और इसलिए विधि की अपेक्षा की पूर्ति नहीं करती तथा आक्षेपित अधिसूचनाओं को कायम रखने के लिए यह एक कारण नहीं हो सकती – सभी आक्षेपित अधिसूचनाएं अपास्त – सम्यक् प्रक्रिया का पालन करने और आगे कार्यवाही करने हेतु राज्य स्वतंत्र है – याचिकाएं निराकृत। (कान सिंह वि. म.प्र. राज्य) **(DB)…1306**

***Contract Act (9 of 1872), Sections 128, 133 & 140 – See – Insolvency and Bankruptcy Code, 2016, Section 1(3) & 31* [Lalit Kumar Jain Vs. Union of India]** **(SC)…1221**

संविदा अधिनियम (1872 का 9), धाराएँ 128, 133 व 140 – देखें – दिवाला और शोधन अक्षमता संहिता, 2016, धारा 1(3) व 31 (ललित कुमार जैन वि. यूनियन ऑफ इंडिया) **(SC)…1221**

***Criminal Practice* –**

***(i). Witness – Credibility* – Held – It is the quality of a witness which counts and not quantity of witnesses – Merely because a witness has been disbelieved on some part of his evidence, would not result in discarding of his entire evidence – Court must try to remove grain from the chaff.**

***(ii). Site Plan* – Held – Site plan is an important document – Part of Site Plan, prepared by Investigating Officer, on basis of what he had seen and**

observed would be a substantive evidence and part of Site Plan prepared on the information given by witness, would be admissible, if witness giving such information is also examined.

***(iii). Abscondence* – Held – Abscondence by itself cannot be said to be an incriminating circumstances to indicate the guilty mind of a suspect – An innocent person, under an apprehension of false implication may also abscond.**

***(iv). Evidence of Police* – Held – Evidence of Police personnel cannot be discarded only because he is an investigating officer or his evidence is not corroborated by independent witnesses.**

***(v). Evidence – Discrepancies* – Held – Unless and until contradictions is pointed out to the witness, the defence cannot take advantage of such discrepancies.**

[Nathu Singh Vs. State of M.P.] (DB)…1388

दाण्डिक पद्धति –

(*I*) *साक्षी – विश्वसनीयता* – अभिनिर्धारित – यह एक साक्षी की गुणवत्ता है जो महत्व रखती है और न कि साक्षियों की संख्या – मात्र इसलिए कि एक साक्षी के साक्ष्य के कुछ भाग पर अविश्वास किया गया है, इसके परिणामस्वरूप उसका संपूर्ण साक्ष्य अमान्य नहीं होगा – न्यायालय को भूसे से धान अलग करने का प्रयास करना चाहिए।

(*ii*) *स्थल–नक्शा* – अभिनिर्धारित – स्थल–नक्शा एक महत्वपूर्ण दस्तावेज है – अन्वेषण अधिकारी द्वारा, उसने जो देखा और गौर किया है, के आधार पर तैयार किया गया स्थल–नक्शे का भाग, एक सारभूत साक्ष्य होगा और साक्षी द्वारा दी गई जानकारी पर तैयार किया गया स्थल–नक्शे का भाग ग्राह्य होगा यदि उक्त जानकारी देने वाले साक्षी का भी परीक्षण किया गया है।

(*iii*) *फरारी* – अभिनिर्धारित – फरारी, अपने आप में एक संदिग्ध के दोषी मन को दर्शाने हेतु एक अपराध में फंसाने वाली परिस्थिति नहीं कही जा सकती – एक निर्दोष व्यक्ति, मिथ्या आलिप्त किये जाने की आशंका से भी फरार हो सकता है।

(*iv*) *पुलिस का साक्ष्य* – अभिनिर्धारित – पुलिस कर्मी का साक्ष्य अमान्य नहीं किया जा सकता, मात्र इसलिए कि वह एक अन्वेषण अधिकारी है अथवा स्वतंत्र साक्षियों द्वारा उसका साक्ष्य संपुष्ट नहीं है।

(*v*) *साक्ष्य – विसंगतियां* – अभिनिर्धारित – जब तक कि विरोधाभासों को साक्षी के ध्यान में नहीं लाया जाता, बचाव पक्ष, उक्त विसंगतियों का लाभ नहीं ले सकता।

(नाथू सिंह वि. म.प्र. राज्य) **(DB)…1388**

Criminal Procedure Code, 1973 (2 of 1974), Section 41 & 41A –See –Constitution – Article 226 **[In reference (Suo Motu) Vs. State of M.P.] (DB)…1337**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 41 व 41A – देखें – संविधान – अनुच्छेद 226 (इन रेफ्रेन्स (सू मोटो) वि म.प्र. राज्य) **(DB)…1337**

***Criminal Procedure Code, 1973 (2 of 1974), Section 154 – Clubbing of FIRs* – Held – There can be no straightjacket formula for consolidating or clubbing the FIR and Courts are required to examine the facts of each case. [Pawan Tamrakar (Dr.) Vs. M.P. Special Police Establishment] (DB)…1357**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 154 – प्रथम सूचना प्रतिवेदनों को एकत्र/एक साथ किया जाना – अभिनिर्धारित – प्रथम सूचना प्रतिवेदन के समेकन अथवा एकत्र करने हेतु कोई निश्चित सूत्र नहीं है तथा न्यायालय द्वारा प्रत्येक प्रकरण के तथ्यों का परीक्षण किया जाना अपेक्षित है। (पवन ताम्रकार (डॉ.) वि. एम.पी. स्पेशल पुलिस इस्टैब्लिशमेंट) **(DB)…1357**

***Criminal Procedure Code, 1973 (2 of 1974), Section 154 – FIR – Contents* – Held – Every omission is not a contradiction – Minor details which are not indicative in FIR are later on elaborated in Court and which do not in any way introduces a new facet of the case, is not fatal for prosecution – Variation in *dehati nalishi*/FIR and Court statement are not so grave which makes prosecution evidence brittle and untrustworthy. [Sonu Jain Vs. State of M.P.] (DB)…1373**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 154 – प्रथम सूचना प्रतिवेदन – अंतर्वस्तु – अभिनिर्धारित – प्रत्येक लोप विरोधाभास नहीं है – मामूली विवरण जिन्हें प्रथम सूचना प्रतिवेदन में दर्शाया नहीं गया है, को बाद में न्यायालय में विस्तृत किया गया और जो किसी भी तरह से प्रकरण के एक नये पहलू को प्रस्तुत नहीं करते हैं, अभियोजन के लिए घातक नहीं है – *देहाती नालिशी*/प्रथम सूचना प्रतिवेदन और न्यायालय कथन में फेरफार इतने गंभीर नहीं थे जो अभियोजन साक्ष्य को कमजोर और अविश्वसनीय बनाता हो। (सोनू जैन वि. म.प्र. राज्य) **(DB)…1373**

***Criminal Procedure Code, 1973 (2 of 1974), Section 154 – Second FIR* – Held – Second FIR in respect of same offence or different offences committed in course of same transaction is not permissible – Second FIR on basis of receipt of information for same cognizable offence or same occurrence or incident giving rise to one or more cognizable offences is not permissible – Where two incidents took place at different point of time or involve different person or there is no commonality and purpose thereof is**

different and circumstances are also different then there can be more than one FIR. [Pawan Tamrakar (Dr.) Vs. M.P. Special Police Establishment] (DB)…1357

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 154 – द्वितीय प्रथम सूचना प्रतिवेदन – अभिनिर्धारित – समान अपराध अथवा समान संव्यवहार के दौरान कारित भिन्न अपराधों के संबंध में द्वितीय प्रथम सूचना प्रतिवेदन अनुज्ञेय नहीं है – समान संज्ञेय अपराध अथवा एक या एक से अधिक संज्ञेय अपराधों को जन्म देने वाली समान घटना की सूचना की प्राप्ति के आधार पर द्वितीय प्रथम सूचना प्रतिवेदन अनुज्ञेय नहीं है – जहां दो घटनाएं अलग–अलग समय पर घटित हुई हो या उसमें भिन्न व्यक्ति शामिल हो या कोई समानता न हो तथा उसके प्रयोजन भिन्न हो और परिस्थितियां भी भिन्न हो तब एक से अधिक प्रथम सूचना प्रतिवेदन हो सकते हैं। (पवन ताम्रकार (डॉ.) वि. एम.पी. स्पेशल पुलिस इस्टैब्लिशमेंट) **(DB)…1357**

Criminal Procedure Code, 1973 (2 of 1974), Section 154 – See – Constitution – Article 226 **[Pawan Tamrakar (Dr.) Vs. M.P. Special Police Establishment] (DB)…1357**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 154 – देखें – संविधान – अनुच्छेद 226 (पवन ताम्रकार (डॉ.) वि. एम.पी. स्पेशल पुलिस इस्टैब्लिशमेंट)**(DB)…1357**

Criminal Procedure Code, 1973 (2 of 1974), Section 154 & 220 – See – Constitution – Article 226 **[Pawan Tamrakar (Dr.) Vs. M.P. Special Police Establishment] (DB)…1357**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 154 व 220 – देखें – संविधान – अनुच्छेद 226 (पवन ताम्रकार (डॉ.) वि. एम.पी. स्पेशल पुलिस इस्टैब्लिशमेंट)**(DB)…1357**

Criminal Procedure Code, 1973 (2 of 1974), Section 438 and Penal Code (45 of 1860), Section 375, Fourthly & 376(2)(n) **– Held – In Hindu Law, marriages cannot be performed by execution of marriage affidavit – Applicant obtained affidavits of marriage and divorce thereby playing fraud on prosecutrix – Her consent was obtained which is hit by Section 375, *fourthly* IPC – No case of anticipatory bail – Application dismissed. [Bundel Singh Lodhi Vs. State of M.P.] …*8**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 438 एवं दण्ड संहिता (1860 का 45), धारा 375, चतुर्थ परिस्थिति व 376(2)(n) – अभिनिर्धारित – हिन्दू विधि में, विवाह शपथ–पत्र के निष्पादन द्वारा विवाह संपन्न नहीं किये जा सकते – आवेदक ने विवाह और विवाह–विच्छेद के शपथ–पत्र अभिप्राप्त किये और इस प्रकार से उसने अभियोक्त्री के साथ कपट किया है – उसकी सहमति अभिप्राप्त की गई थी जो कि भा.दं.सं. की धारा 375, की चतुर्थ परिस्थिति द्वारा प्रभावित है – अग्रिम जमानत का कोई प्रकरण नहीं – आवेदन खारिज। (बुन्देल सिंह लोधी वि. म.प्र. राज्य) **…*8**

Criminal Procedure Code, 1973 (2 of 1974), Section 439, Penal Code (45 of 1860), Sections 363, 366-A & 375, Exception 2 & 376(2)(n) and Protection of Children from Sexual Offences Act (32 of 2012), Section 5/6 & 16/17 – Bail – Grounds – Age & Consent of Prosecutrix – **Held – Applicant married prosecutrix aged about 16 years and one month – Held – Marriageable age of girl in our country is 18 years and marriage below that age is *void ab initio* – Now age of consent is also fixed at 18 years – Applicant not entitled for bail taking benefit of Exception 2 of Section 375 IPC – Application dismissed. [Vishal Vs. State of M.P.] …1458**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 439, दण्ड संहिता (1860 का 45), धाराएँ 363, 366–A व 375, अपवाद 2 व 376(2)(n) एवं लैंगिक अपराधों से बालकों का संरक्षण अधिनियम (2012 का 32), धारा 5/6 व 16/17 – जमानत – आधार – अभियोक्त्री की वय व सम्मति – अभिनिर्धारित – आवेदक ने लगभग 16 वर्ष 1 माह की आयु की अभियोक्त्री से विवाह किया – अभिनिर्धारित – हमारे देश में लड़की की विवाह योग्य आयु 18 वर्ष है तथा उस आयु से कम में किया गया विवाह आरंभ से शून्य है – अब सम्मति की आयु भी 18 वर्ष निश्चित की गई है – आवेदक धारा 375 भा.दं.सं. के अपवाद 2 का लाभ लेकर जमानत हेतु हकदार नहीं – आवेदन खारिज। (विशाल वि. म.प्र. राज्य) …1458

***Education – Admission Process – Fixation of Age* – Held – Merely because in earlier advertisement, maximum age for admission was fixed at 48 years, it cannot be concluded that fixing maximum age of 45 years in subsequent advertisement is discriminatory – It is not in violation of any statutory provision – Petition dismissed. [Catherin Josfin Thangadurai (Mrs.) Vs. State of M.P.] (DB)…*9**

शिक्षा – प्रवेश प्रक्रिया – आयु नियत की जाना – अभिनिर्धारित – मात्र चूंकि पूर्वतर विज्ञापन में, प्रवेश के लिए अधिकतम आयु 48 वर्ष नियत की गई थी, यह निष्कर्षित नहीं किया जा सकता कि पश्चात्वर्ती विज्ञापन में 45 वर्ष की अधिकतम आयु नियत करना विभेदकारी है – यह किसी कानूनी उपबंध का उल्लंघन नहीं है – याचिका खारिज। (केथरीन जॉसफिन थंगादुराई (श्रीमती) वि. म.प्र. राज्य) **(DB)…*9**

***Evidence Act (1 of 1872), Section 32 – See – Penal Code, 1860, Section 302 & 307/34* [Nathu Singh Vs. State of M.P.] (DB)…1388**

साक्ष्य अधिनियम (1872 का 1), धारा 32 – देखें – दण्ड संहिता, 1860, धारा 302 व 307/34 (नाथू सिंह वि. म.प्र. राज्य) **(DB)…1388**

***Government Servants (Temporary and Quasi-Permanent Service) Rules, M.P. 1960, Rule 12 – See – Civil Services (General Conditions of Service) Rules, M.P., 1961, Rule 8(7)* [Sinnam Singh Vs. State of M.P.] …1317**

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शासकीय सेवक (अस्थायी एवं स्थायीवत् सेवा) नियम, म.प्र. 1960, नियम 12 – देखें – सिविल सेवा (सेवा की सामान्य शर्तें) नियम, म.प्र., 1961, नियम 8(7) (सिन्नम सिंह वि. म.प्र. राज्य) **...1317**

***Government Servants (Temporary and Quasi-Permanent Service) Rules, M.P. 1960, Rule 12(b) – Termination* – Held – Services of temporary employee can be terminated by issuing one month's notice or by making payment of one month's advance salary in lieu of notice, which was not done in present case – Impugned order of termination is modified and respondents directed to pay one month's salary to petitioner in lieu of one month's notice – Petition disposed. [Sinnam Singh Vs. State of M.P.] ...1317**

शासकीय सेवक (अस्थायी एवं स्थायीवत् सेवा) नियम, म.प्र. 1960, नियम 12(b) – सेवा समाप्ति – अभिनिर्धारित – अस्थाई कर्मचारी की सेवा, एक माह का नोटिस जारी कर या नोटिस के बदले में एक माह के अग्रिम वेतन का भुगतान कर समाप्त की जा सकती है, जैसा कि वर्तमान प्रकरण में नहीं किया गया था – सेवा समाप्ति का आक्षेपित आदेश उपांतरित तथा प्रत्यर्थीगण को एक माह के नोटिस के बदले याची को एक माह के वेतन का भुगतान करने हेतु निदेशित किया गया – याचिका निराकृत। (सिन्नम सिंह वि. म.प्र. राज्य) **...1317**

***Insolvency and Bankruptcy Code, 2016 (31 of 2016), Section 1(3) – Vires of Notification – Powers of Central Government – Personal Guarantor of Corporate Debtors* – Held – Notification is not an instance of legislative exercise, or amounting to impermissible and selective application of provisions of Code – No compulsion in Code that it should, at the same time, be made applicable to all individuals (including personal guarantors) or not at all – Notification *inter alia* makes provisions of Code applicable in respect of personal guarantors to corporate debtors as another such category of persons to whom Code has been extended – Notification issued u/S 1(3) was within the power granted by Parliament and in valid exercise of it and is thus not *ultra vires* – Petitions dismissed. [Lalit Kumar Jain Vs. Union of India] (SC)...1221**

दिवाला और शोधन अक्षमता संहिता, 2016 (2016 का 31), धारा 1(3) – अधिसूचना के अधीन – केंद्र सरकार की शक्तियां – निगमित ऋणियों के निजी प्रत्याभूति–दाता – अभिनिर्धारित – अधिसूचना विधायी प्रयोग का एक उदाहरण नहीं है, अथवा संहिता के उपबंधों का अननुज्ञेय और चयनात्मक उपयोजन की कोटि में नहीं आता है – संहिता में कोई बाध्यता नहीं है कि इसे एक ही समय पर सभी व्यक्तियों पर (निजी प्रत्याभूति–दाता समेत) लागू किया जाना चाहिए अथवा बिल्कुल भी लागू नहीं किया जाना चाहिए – अधिसूचना अन्य बातों के साथ–साथ निगमित ऋणियों के निजी प्रत्याभूति–दाता व्यक्तियों की एक ऐसी अन्य श्रेणी जिन पर संहिता का विस्तार है, के रूप में संहिता के उपबंधों को लागू करती है – धारा 1(3) के अंतर्गत जारी अधिसूचना संसद द्वारा प्रदान की

गई शक्ति के भीतर थी तथा उसके विधिमान्य प्रयोग में थी एवं इसलिए अधिकारातीत नहीं है – याचिकाएं खारिज। (ललित कुमार जैन वि. यूनियन ऑफ इंडिया) **(SC)…1221**

***Insolvency and Bankruptcy Code, 2016 (31 of 2016), Section 1(3) & 31 and Contract Act (9 of 1872), Sections 128, 133 & 140 – Approval of Resolution Plan – Liability of Personal Guarantor* – Held – Approval of resolution plan does not *ipso facto* discharge a personal guarantor (of a corporate debtor) of her or his liabilities under contract of guarantee – Release or discharge of principal borrower from debt owed by it to its creditors by an involuntary process i.e. by operation of law, or due to liquidation or insolvency proceedings, does not absolve the surety/guarantor of his or her liability – Petitions dismissed. [Lalit Kumar Jain Vs. Union of India] (SC)…1221**

दिवाला और शोधन अक्षमता संहिता, 2016 (2016 का 31), धारा 1(3) व 31 एवं संविदा अधिनियम (1872 का 9), धाराएँ 128, 133 व 140 – संकल्प योजना का अनुमोदन – निजी प्रत्याभूति–दाता का दायित्व – अभिनिर्धारित – संकल्प योजना का अनुमोदन स्वयंमेव ही एक निजी प्रत्यभूति–दाता (निगमित ऋणी के) को प्रत्याभूति की संविदा के अंतर्गत उसके दायित्वों से उन्मुक्त नहीं करता – मूल उधार लेने वाले की एक अस्वैच्छिक प्रक्रिया द्वारा अर्थात् विधि के प्रवर्तन द्वारा अथवा समापन या दिवालियापन की कार्यवाहियों के कारण उसके लेनदारों को देय ऋण से निर्मुक्ति या उन्मोचन, प्रतिभू/प्रत्याभूति–दाता को उसके दायित्व से मुक्त नहीं करती – याचिकाएं खारिज। (ललित कुमार जैन वि. यूनियन ऑफ इंडिया) **(SC)…1221**

***Juvenile Justice (Care and Protection of Children) Act, 2015 (2 of 2016) Section 12 proviso – See – Constitution – Article 226* [In reference (Suo Motu) Vs. State of M.P.] (DB)…1337**

किशोर न्याय (बालकों की देखरेख और संरक्षण) अधिनियम, 2015 (2016 का 2), धारा 12 परंतुक – देखें – संविधान – अनुच्छेद 226 (इन रेफ्रेन्स (सू मोटो) वि. म.प्र. राज्य) **(DB)…1337**

***Land Revenue Code, M.P. (20 of 1959), Section 165(6) – Lease of Tribal Land – Word "otherwise" – Jurisdiction of Collector* – Held – Explanation of Section 165(6) carves out an exception that word "otherwise" mentioned in sub-Section shall not include lease – This means that in notified scheduled areas or in non-notified rural areas, there is no bar for entering into lease between tribals and non-tribals and permission of Collector is not required. [Mohbe Infrastructure A Partnership Firm (M/s.) Vs. State of M.P.] …1300**

भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 165(6) – जनजातीय भूमि का पट्टा – शब्द ''अन्यथा'' – कलेक्टर की अधिकारिता – अभिनिर्धारित – धारा 165(6) का स्पष्टीकरण एक अपवाद परिकल्पित करता है कि उप–धारा में उल्लिखित शब्द ''अन्यथा'' में पट्टा शामिल नहीं होगा – इसका अर्थ यह है कि अधिसूचित अनुसूचित क्षेत्रों में या

गैर–अधिसूचित ग्रामीण क्षेत्रों में, जनजाति और गैर–जनजाति के मध्य पट्टे में प्रवेश हेतु कोई वर्जन नहीं है तथा कलेक्टर की अनुज्ञा अपेक्षित नहीं है। (मोहबे इन्फ्रास्ट्रक्चर ए पार्टनरशिप फर्म (मे.) वि. म.प्र. राज्य) **...1300**

***Land Revenue Code, M.P. (20 of 1959), Section 165(6) & 165(6-a) – Purchase of Land by Tribals – Jurisdiction of Collector* – Held – There is no bar to purchase a land by tribal – A tribal can purchase a land from another tribal and also from a non-tribal and permission of Collector for such transactions are not required. [Mohbe Infrastructure A Partnership Firm (M/s.) Vs. State of M.P.] ...1300**

भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 165(6) व 165(6–a) – जनजाति द्वारा भूमि का क्रय – कलेक्टर की अधिकारिता – अभिनिर्धारित – जनजाति द्वारा भूमि क्रय किये जाने पर कोई वर्जन नहीं है – एक जनजाति किसी अन्य जनजाति तथा गैर–जनजातीय से भी भूमि क्रय कर सकता है एवं ऐसे संव्यवहारों हेतु कलेक्टर की अनुज्ञा अपेक्षित नहीं है। (मोहबे इन्फ्रास्ट्रक्चर ए पार्टनरशिप फर्म (मे.) वि. म.प्र. राज्य) **...1300**

***Land Revenue Code, M.P. (20 of 1959), Section 165(6) & 165(6-a) – Transfer of Tribal Land – Jurisdiction of Collector* – Held – Land of tribal in notified scheduled area shall not be transferred or transferable by way of sale or otherwise or as consequence of loan transaction to a non-tribal – Collector has no jurisdiction to grant permission for such transfers – In non-notified areas, i.e. rural areas and villages, tribal can transfer his land to a non-tribal after seeking written permission of Collector. [Mohbe Infrastructure A Partnership Firm (M/s.) Vs. State of M.P.] ...1300**

भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 165(6) व 165(6–a) – जनजातीय भूमि का अंतरण – कलेक्टर की अधिकारिता – अभिनिर्धारित – अधिसूचित अनुसूचित क्षेत्र में जनजाति की भूमि को विक्रय के माध्यम से या अन्यथा या किसी ऋण संव्यवहार के परिणामस्वरूप गैर–जनजाति को न तो अंतरित किया जाएगा अथवा न ही अंतरणीय होगा – कलेक्टर को ऐसे अंतरण के लिए अनुज्ञा प्रदान करने की कोई अधिकारिता नहीं है – गैर–अधिसूचित क्षेत्र अर्थात् ग्रामीण क्षेत्र और गाँवों में, कलेक्टर की लिखित अनुज्ञा मांगने के पश्चात् जनजाति अपनी भूमि का अंतरण किसी गैर–जनजाति को कर सकते हैं। (मोहबे इन्फ्रास्ट्रक्चर ए पार्टनरशिप फर्म (मे.) वि. म.प्र. राज्य) **...1300**

***Land Revenue Code, M.P. (20 of 1959), Section 165(6-a) – Lease/ Transfer of Tribal Land – Word "otherwise" – Jurisdiction of Collector* – Held – Section 165(6-a) does not carves out an explanation for word "otherwise" for leases which means any land located in notified scheduled areas, non-tribal cannot execute a lease in favour of another non-tribal without written permission of Collector – Diverted land of non-tribals cannot be transferred to other non-tribals without permission of Collector, if located in notified**

scheduled areas. [Mohbe Infrastructure A Partnership Firm (M/s.) Vs. State of M.P.] …1300

भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 165(6–a) – जनजातीय भूमि का पट्टा/अंतरण – शब्द ''अन्यथा'' – कलेक्टर की अधिकारिता – अभिनिर्धारित – धारा 165(6–a) पट्टे हेतु ''अन्यथा'' शब्द के लिए कोई स्पष्टीकरण परिकल्पित नहीं करती अर्थात् अधिसूचित अनुसूचित क्षेत्रों में स्थित किसी भूमि के संबंध में गैर–जनजाति किसी अन्य गैर–जनजाति के पक्ष में कलेक्टर की लिखित अनुज्ञा के बिना पट्टे का निष्पादन नहीं कर सकता – गैर–जनजाति की अपयोजित भूमि यदि किसी अधिसूचित अनुसूचित क्षेत्र में स्थित हो तो किसी अन्य गैर जनजाति को उसका अंतरण कलेक्टर की अनुज्ञा के बिना नहीं किया जा सकता। (मोहबे इन्फ्रास्ट्रक्चर ए पार्टनरशिप फर्म (मे.) वि. म.प्र. राज्य) …1300

***Maxim* – "*falsus in uno falsus in omnibus*" – Held – Has no application in India. [Nathu Singh Vs. State of M.P.] (DB)…1388**

सूत्र – ''एक बात में मिथ्या तो सब में मिथ्या'' – अभिनिर्धारित – भारत में कोई प्रयोज्यता नहीं। (नाथू सिंह वि. म.प्र. राज्य) **(DB)…1388**

***Municipal Corporation Act, M.P. (23 of 1956), Sections 148, 153 & 167 – Purpose and Scope* – Held – Purpose and scope of Section 148/153 is totally different vis-à-vis Section 167 which falls under supplemental provision and not under other two sub-division which are Taxation and Property Tax – Section 148 & 153 are for imposition of property tax and the rate at which it is to be charged – It's concept is altogether different than "Mutation", where indeterminate class of persons may have right, title or interest in property. [Ram Bharose Sharma Vs. State of M.P.] (DB)…1345**

नगरपालिक निगम अधिनियम, म.प्र. (1956 का 23), धाराएँ 148, 153 व 167 – प्रयोजन और विस्तार – अभिनिर्धारित – धारा 167 की तुलना में, धारा 148/153 का प्रयोजन और विस्तार पूर्णतः भिन्न है जो कि अनुपूरक उपबंध के अंतर्गत आता है तथा अन्य दो उपभाग जो कि कराधान और संपत्ति कर हैं, के अंतर्गत नहीं आता – धारा 148 व 153 संपत्ति कर के अधिरोपण और इसे प्रभारित की जाने वाली दर के लिए हैं – इसकी संकल्पना ''नामांतरण'' से पूरी तरह से भिन्न है, जहां अनिश्चित वर्ग के व्यक्तियों का संपत्ति में अधिकार, हक और हित हो सकता है। (राम भरोसे शर्मा वि. म.प्र. राज्य) **(DB)…1345**

***Municipal Corporation Act, M.P. (23 of 1956), Section 167 & 371 – Public Notice – Principle* – Issuance of public notice by way of publication in newspaper for mutation purpose is as per principles of Public Policy and Public Welfare – Concept of Public Policy, discussed & explained. [Ram Bharose Sharma Vs. State of M.P.] (DB)…1345**

नगरपालिक निगम अधिनियम, म.प्र. (1956 का 23), धारा 167 व 371 – सार्वजनिक नोटिस – सिद्धांत – नामांतरण प्रयोजन हेतु समाचार पत्र में प्रकाशन के माध्यम

से सार्वजनिक नोटिस जारी करना लोक नीति और लोक कल्याण के सिद्धांतों के अनुसार है – लोक नीति की संकल्पना, विवेचित और स्पष्ट की गई। (राम भरोसे शर्मा वि. म.प्र. राज्य) **(DB)…1345**

Municipal Corporation Act, M.P. (23 of 1956), Sections 167, 378, 379 & 421 – Mutation Proceedings – Public Notice – Publication Charges **– Held – Corporation can direct the applicants to cause notice to be published in widely circulated newspapers at their own expenses. [Ram Bharose Sharma Vs. State of M.P.] (DB)…1345**

नगरपालिक निगम अधिनियम, म.प्र. (1956 का 23), धाराएँ 167, 378, 379 व 421 – नामांतरण कार्यवाहियां – सार्वजनिक नोटिस – प्रकाशन शुल्क – अभिनिर्धारित – निगम आवेदकगण को उनके स्वयं के व्यय पर व्यापक रूप से परिचालित समाचार–पत्र में नोटिस प्रकाशित करने के लिए निदेशित कर सकता है। (राम भरोसे शर्मा वि. म.प्र. राज्य) **(DB)…1345**

Municipal Corporation Act, M.P. (23 of 1956), Sections 167, 378, 379 & 421 – Mutation Proceedings – Public Notice – Publication Charges **– Held – Publication of notice brings transparency, fair play and clarity in mutation proceedings and any intended/prospective mischief can be avoided – Asking for publication cost by Municipal Corporation, from an individual is not an element of *quid pro quo* or a device to fill-up its treasury – It is a regulatory and a facilitating measure – Corporation is just and right in its approach to avoid future litigation and complication – Petition disposed. [Ram Bharose Sharma Vs. State of M.P.] (DB)…1345**

नगरपालिक निगम अधिनियम, म.प्र. (1956 का 23), धाराएँ 167, 378, 379 व 421 – नामांतरण कार्यवाहियां – सार्वजनिक नोटिस – प्रकाशन शुल्क – अभिनिर्धारित – नोटिस के प्रकाशन से नामांतरण कार्यवाहियों में पारदर्शिता, निष्पक्षता और स्पष्टता आती है तथा किसी भी आशयित/भावी रिष्टि से बचा जा सकता है – नगर निगम द्वारा किसी व्यक्ति से प्रकाशन की लागत पूछी जाना, प्रतिकर का तत्व या अपने खजाने को भरने का एक उपकरण नहीं है – यह एक विनियामक और एक सुविधाजनक उपाय है – भावी मुकदमेबाजी और जटिलता से बचने हेतु निगम अपने दृष्टिकोण में न्यायसंगत और सही है – याचिका निराकृत। (राम भरोसे शर्मा वि. म.प्र. राज्य) **(DB)…1345**

Municipal Corporation Act, M.P. (23 of 1956), Section 371 & 378 – Issuance of Public Notice – Power of Commissioner **– Held – Provisions of issuance of public notice and authority to impose improvement charges lie with Commissioner u/S 371 and 378 respectively – Commissioner has power to declare certain expenses to be improvement expenses u/S 378 and said expenses are recoverable and payable by the owner/occupier of the premises u/S 379 of Act. [Ram Bharose Sharma Vs. State of M.P.] (DB)…1345**

नगरपालिक निगम अधिनियम, म.प्र. (1956 का 23), धारा 371 व 378 – सार्वजनिक नोटिस जारी करना – आयुक्त की शक्ति – अभिनिर्धारित – सार्वजनिक नोटिस जारी करने के उपबंध तथा सुधार शुल्क अधिरोपित करने का प्राधिकार क्रमशः धारा 371 एवं 378 के अंतर्गत आयुक्त को है – आयुक्त को धारा 378 के अंतर्गत कुछ व्ययों को सुधार व्यय घोषित करने की शक्ति है एवं उक्त व्यय अधिनियम की धारा 379 के अंतर्गत परिसर के स्वामी/अधिभोगी द्वारा वसूली योग्य और देय है। (राम भरोसे शर्मा वि. म.प्र. राज्य) **(DB)…1345**

Municipalities Act, M.P. (37 of 1961), Section 5(2) & 6 – See – Constitution – Article 243Q **[Kan Singh Vs. State of M.P.] (DB)…1306**

नगरपालिका अधिनियम, म.प्र. (1961 का 37), धारा 5(2) व 6 – देखें – संविधान – अनुच्छेद 243 Q (कान सिंह वि. म.प्र. राज्य) **(DB)…1306**

Notaries Act (53 of 1952), Section 8 & 10 – Affidavit of Marriage & Divorce – Functions of Notary **– Held – Notaries have never been appointed as Marriage Officers, they cannot notarize an affidavit of marriage or divorce – Competent authority directed to initiate proceedings u/S 10 against the said Notary. [Bundel Singh Lodhi Vs. State of M.P.] …*8**

नोटरी अधिनियम (1952 का 53), धारा 8 व 10 – विवाह व विवाह विच्छेद का शपथ–पत्र – नोटरी के कार्य – अभिनिर्धारित – नोटरी को कभी भी विवाह अधिकारीगण के रूप में नियुक्त नहीं किया जाता है वे विवाह या विवाह विच्छेद के शपथपत्र को नोटेराइज नहीं कर सकते – सक्षम प्राधिकारी को उक्त नोटरी के विरूद्ध धारा 10 के अंतर्गत कार्यवाही आरंभ करने हेतु निदेशित किया गया। (बुन्देल सिंह लोधी वि. म.प्र. राज्य) **…*8**

Penal Code (45 of 1860), Section 34 & 149 – Common Intention – Framing of Charge – Principle of Conviction **– Held – If charge u/S 149 has been framed and if it is found that some of accused persons were not guilty and some of accused persons have participated in the occurrence and were sharing common intention, then they can be convicted with the aid of Section 34 IPC – Non-framing of charge u/S 34 would not cause any prejudice to them. [Nathu Singh Vs. State of M.P.] (DB)…1388**

दण्ड संहिता (1860 का 45), धारा 34 व 149 – सामान्य आशय – आरोप विरचित किया जाना – दोषसिद्धि का सिद्धांत – अभिनिर्धारित – यदि धारा 149 के अंतर्गत आरोप विरचित किया गया है और यदि यह पाया गया है कि कुछ अभियुक्तगण दोषी नहीं थे एवं कुछ अभियुक्तगण का घटना में सहभाग है तथा सामान्य आशय के भागी थे, तब उन्हें धारा 34 भा.दं.सं. की सहायता से दोषसिद्ध किया जा सकता है – धारा 34 के अंतर्गत आरोप विरचित न किये जाने से उन्हें कोई प्रतिकूल प्रभाव कारित नहीं होगा। (नाथू सिंह वि. म.प्र. राज्य) **(DB)…1388**

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Penal Code (45 of 1860), Section 34 & 149 – Common Intention & Common Object **– Held – There is a basic difference between common intention and common object – Common intention requires pre-oriented minds and concerted plans whereas, common object has no such requirement of meeting of minds of the members of unlawfull assembly before commission of offence – Since some of elements of common intention and common object overlap each other, therefore due to acquittal of remaining accused persons, appellants can be convicted with aid of Section 34 IPC. [Nathu Singh Vs. State of M.P.] (DB)…1388**

दण्ड संहिता (1860 का 45), धारा 34 व 149 – सामान्य आशय व सामान्य उद्देश्य – अभिनिर्धारित – सामान्य आशय एवं सामान्य उद्देश्य के बीच मूलभूत अंतर है – सामान्य आशय में पूर्व उन्मुख मन एवं मिलकर योजनाऐं अपेक्षित हैं जबकि सामान्य उद्देश्य में, अपराध कारित किये जाने से पूर्व, विधि विरूद्ध जमाव के सदस्यों की एक जैसी राय की, उक्त जैसी कोई अपेक्षा नहीं – चूंकि सामान्य आशय एवं सामान्य उद्देश्य के कुछ तत्व एक दूसरे को परस्पर अतिव्याप्त करते है इसलिए, शेष अभियुक्तगण की दोषमुक्ति के कारण, अपीलार्थीगण को धारा 34 भा.दं.सं. की सहायता से दोषसिद्ध किया जा सकता है। (नाथू सिंह वि. म.प्र. राज्य) **(DB)…1388**

Penal Code (45 of 1860), Sections 85, 86 & 302 – Influence of Liquor – Burden of Proof **– Held – Defence failed to establish that degree of intoxication was such because of which they could not prevent themselves from committing the said crime – Drinking is purely their own act and they cannot be permitted to take advantage of their own wrong. [Sonu Jain Vs. State of M.P.] (DB)…1373**

दण्ड संहिता (1860 का 45), धाराएँ 85, 86 व 302 – मदिरा का प्रभाव – सबूत का भार – अभिनिर्धारित – बचाव पक्ष यह स्थापित करने में विफल रहा कि नशे की मात्रा इतनी थी जिसके कारण वे अपने आप को उक्त अपराध कारित करने से रोक नहीं सके – मदिरापान पूर्ण रूप से उनका स्वयं का कृत्य है और उन्हें उनके स्वयं के दोष का लाभ उठाने की अनुमति नहीं दी जा सकती। (सोनू जैन वि. म.प्र. राज्य) **(DB)…1373**

Penal Code (45 of 1860), Section 300, Exceptions – Doctrine of Provocation **– Held – Application of doctrine of provocation shows that exception to Section 300 is available to the normal person behaving normally in a given situation – There was no such altercation where a normal man can loose his ordinary sense – Knife blow after half an hour from altercation do not attract any of exceptions mentioned u/S 300 IPC. [Sonu Jain Vs. State of M.P.] (DB)…1373**

दण्ड संहिता (1860 का 45), धारा 300, अपवाद – प्रकोपन का सिद्धांत – अभिनिर्धारित – प्रकोपन के सिद्धांत का प्रयोग यह दर्शाता है कि धारा 300 का अपवाद

किसी भी परिस्थिति में सामान्य रूप से व्यवहार करने वाले सामान्य व्यक्ति के लिए उपलब्ध है – ऐसी कोई कहा–सुनी नहीं थी जहां एक साधारण व्यक्ति अपना सामान्य विवेक खो दे – कहा–सुनी के आधे घंटे पश्चात् चाकू से वार करना, भा.दं.सं. की धारा 300 में उल्लिखित किन्हीं भी अपवादों को आकर्षित नहीं करता। (सोनू जैन वि. म.प्र. राज्य) **(DB)…1373**

Penal Code (45 of 1860), Section 300, Exception 1 – Grave & Sudden Provocation **– Held – What would constitute grave and sudden provocation, which would be enough to prevent the offence from amounting to murder, is a question of fact – Provocation is an external stimulus which can result into loss of self control – Provocation must be such as will upset not merely a hasty, hot tempered and hyper sensitive person but also a person with clam nature and ordinary sense. [Sonu Jain Vs. State of M.P.] (DB)…1373**

दण्ड संहिता (1860 का 45), धारा 300, अपवाद 1 – गंभीर व अचानक प्रकोपन – अभिनिर्धारित – क्या गंभीर और अचानक प्रकोपन गठित करेगा, जो अपराध को हत्या की कोटि में आने से निवारित करने हेतु पर्याप्त होगा, यह तथ्य का प्रश्न है – प्रकोपन एक बाहरी प्रोत्साहन है जिसके परिणामस्वरूप आत्म नियंत्रण की हानि हो सकती है – प्रकोपन ऐसा होना चाहिए जो न केवल एक उतावले, गर्म स्वभाव और अतिसंवेदनशील व्यक्ति को बल्कि एक शांत स्वभाव और सामान्य विवेक वाले व्यक्ति को भी अशांत कर दे। (सोनू जैन वि. म.प्र. राज्य) **(DB)…1373**

Penal Code (45 of 1860), Section 300, Exception 4 – Requirements – Sudden Provocation **– Held – Apex Court concluded that to invoke this exception, four requirements must be satisfied namely (i) there was a sudden fight, (ii) there was no premeditation, (iii) act was done in heat of passion and, (iv) assailant had not taken any undue advantage or acted in cruel manner – No sudden provocation in present case, appellants acted in a cruel manner depriving them from taking shelter of Exception 4 to Section 300 IPC – It is immaterial whether appellant Santosh gave single blow or multiple blow. [Sonu Jain Vs. State of M.P.] (DB)…1373**

दण्ड संहिता (1860 का 45), धारा 300, अपवाद 4 – अपेक्षाएँ – अचानक प्रकोपन – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया है कि इस अपवाद का अवलंब लेने हेतु, चार अपेक्षाओं की पूर्ति की जानी चाहिए **(i)** अचानक लड़ाई हुई हो, **(ii)** कोई पूर्वचिंतन नहीं, **(iii)** कृत्य भावावेश में किया गया हो, तथा **(iv)** हमलावर ने कोई अनुचित लाभ न उठाया हो या क्रूर ढंग से कृत्य न किया हो – वर्तमान प्रकरण में कोई अचानक प्रकोपन नहीं था, अपीलार्थीगण ने क्रूर तरीके से कृत्य किया जो उन्हें भा.दं.सं. की धारा 300 के अपवाद 4 का आश्रय लेने से वंचित करता है – यह तत्वहीन है कि क्या अपीलार्थी संतोष ने एक वार या अनेक वार किये। (सोनू जैन वि. म.प्र. राज्य) **(DB)…1373**

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Penal Code (45 of 1860), Section 302 – Nature of Injury, Weapon of Crime & Cause of Death **– Held – The nature of injury, the gravity and dimension shows that knife was a deadly weapon otherwise the rib of deceased could not have been cut and injury could not have been so deep to reach upper portion of right lung – Injury was sufficient in ordinary course of nature to cause death. [Sonu Jain Vs. State of M.P.] (DB)…1373**

दण्ड संहिता (1860 का 45), धारा 302 – चोट का स्वरूप, अपराध का शस्त्र व हत्या का कारण – अभिनिर्धारित – चोट का स्वरूप, गंभीरता और आकार यह दर्शाता है कि चाकू एक घातक शस्त्र था अन्यथा मृतक की पसली को काटा नहीं जा सकता था और चोट इतनी गहरी नहीं हो सकती थी कि दाहिने फेफड़े के ऊपरी हिस्से तक पहुंच सके – चोट का स्वरूप साधारण अनुक्रम में हत्या कारित करने हेतु पर्याप्त था। (सोनू जैन वि. म.प्र. राज्य) **(DB)…1373**

Penal Code (45 of 1860), Section 302 – "Spur of Moment" **– Held – Hot altercation between deceased and appellants – Deceased slapped appellant Santosh – Appellants left the place and after almost half an hour, appellants rushed back and Santosh with the aid of other appellants, gave single knife blow to deceased – Assault did not take place during hot altercation, thus, such single knife blow is not outcome of "spur of moment". [Sonu Jain Vs. State of M.P.] (DB)…1373**

दण्ड संहिता (1860 का 45), धारा 302 – ''उत्तेजक क्षण'' – अभिनिर्धारित – मृतक और अपीलार्थीगण के मध्य कहा–सुनी – मृतक ने अपीलार्थी संतोष को थप्पड़ मारा – अपीलार्थीगण उस स्थान से चले गये और लगभग आधा घंटे पश्चात्, अपीलार्थीगण वापस पहुंचे और संतोष ने अन्य अपीलार्थीगण की सहायता से, मृतक पर चाकू से एक वार किया – हमला कहा–सुनी के दौरान नहीं हुआ, अतः, चाकू द्वारा उक्त एक वार ''उत्तेजक क्षण'' का परिणाम नहीं है। (सोनू जैन वि. म.प्र. राज्य) **(DB)…1373**

Penal Code (45 of 1860), Section 302/34 & 294 – Appreciation of Evidence **– Held – Single blow by knife – Injury caused to vital organ namely right lung and the rib, sufficient to cause death – It shows the intention of appellant to cause death – No explanation given by appellants about human blood found on their clothes – No grave or sudden provocation established – Prosecution established its case beyond reasonable doubt – Conviction upheld – Appeals dismissed. [Sonu Jain Vs. State of M.P.] (DB)…1373**

दण्ड संहिता (1860 का 45), धारा 302/34 व 294 – साक्ष्य का मूल्यांकन – अभिनिर्धारित – चाकू द्वारा एकल वार – महत्वपूर्ण अंग अर्थात् दांया फेफड़ा और पसली में चोट कारित की गई, मृत्यु कारित करने हेतु पर्याप्त – यह हत्या कारित करने का अपीलार्थी का आशय दर्शाता है – अपीलार्थीगण द्वारा उनके कपड़ों में पाये गये मानव रक्त के बारे में कोई स्पष्टीकरण नहीं दिया गया – कोई गंभीर और अचानक प्रकोपन स्थापित नहीं होता

– अभियोजन ने अपना प्रकरण युक्तियुक्त संदेह से परे स्थापित किया – दोषसिद्धि कायम – अपीलें खारिज। (सोनू जैन वि. म.प्र. राज्य) **(DB)…1373**

***Penal Code (45 of 1860), Section 302 & 304 Part II – Single Blow* – Held – As a rule of thumb it cannot be said that in no case of single blow or injury, accused can be convicted u/S 302 IPC – In cases of single injury, facts and circumstances of each case have to be considered to conclude whether accused be convicted u/S 302 or u/S 304 Part II – Relevant factors to be considered as laid down by Apex Court, enumerated – Further held, these factors are illustrative and not exhaustive in nature – Other relevant factors can also be taken into consideration. [Sonu Jain Vs. State of M.P.]**
(DB)…1373

दण्ड संहिता (1860 का 45), धारा 302 व 304 भाग II – एकल वार – अभिनिर्धारित – एक सामान्य नियम के रूप में यह नहीं कहा जा सकता कि एकल वार अथवा चोट के किसी भी प्रकरण में, अभियुक्त को भारतीय दण्ड संहिता की धारा 302 के अंतर्गत दोषसिद्ध नहीं किया जा सकता – एकल चोट के प्रकरणों में, यह निष्कर्षित करने हेतु प्रत्येक प्रकरण के तथ्यों और परिस्थितियों पर विचार किया जाना चाहिए कि क्या अभियुक्त को धारा 302 या धारा 304 भाग II के अंतर्गत दोषसिद्ध किया जाए – सर्वोच्च न्यायालय द्वारा प्रतिपादित सुसंगत कारकों जिन पर विचार किया जाना चाहिए, प्रगणित – आगे अभिनिर्धारित, ये कारक उदाहरणात्मक हैं और विस्तृत स्वरूप के नहीं हैं – अन्य सुसंगत कारक पर भी विचार किया जा सकता है। (सोनू जैन वि. म.प्र. राज्य)**(DB)…1373**

***Penal Code (45 of 1860), Section 302 & 307/34 – Direct Evidence* – Held – Prosecution case based on direct evidence – Minor omissions, contradictions, embellishment in evidence of prosecution witnesses would not make them unreliable – Ocular evidence supported by *post mortem* report and ballistic evidence – Appeals dismissed. [Nathu Singh Vs. State of M.P.] (DB)…1388**

दण्ड संहिता (1860 का 45), धारा 302 व 307/34 – प्रत्यक्ष साक्ष्य – अभिनिर्धारित – अभियोजन का प्रकरण प्रत्यक्ष साक्ष्य पर आधारित – अभियोजन साक्षियों के साक्ष्य में गौण लोप, विरोधाभास, अलंकरण उन्हें अविश्वसनीय नहीं बनायेंगे – चाक्षुष साक्ष्य, शव परीक्षण प्रतिवेदन एवं प्राक्षेयिकी साक्ष्य द्वारा समर्थित है – अपीलें खारिज। (नाथू सिंह वि. म.प्र. राज्य) **(DB)…1388**

***Penal Code (45 of 1860), Section 302 & 307/34 – Direct Evidence & Motive* – Held – Where a case is based on direct evidence, absence of motive is immaterial – Motive always remains in mind of wrongdoer, thus, merely because witnesses have not alleged any motive, would not make their evidence unreliable. [Nathu Singh Vs. State of M.P.] (DB)…1388**

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दण्ड संहिता (1860 का 45), धारा 302 व 307/34 – प्रत्यक्ष साक्ष्य व हेतुक – अभिनिर्धारित – जहां एक प्रकरण प्रत्यक्ष साक्ष्य पर आधारित है, हेतु की अनुपस्थिति महत्वहीन है – अपकृत्यकारी के मन में हेतु सदैव बना रहता है, अतः, मात्र इसलिए कि साक्षीगण ने किसी हेतु का अभिकथन नहीं किया है, उनके साक्ष्य को अविश्वसनीय नहीं बनायेगा। (नाथू सिंह वि. म.प्र. राज्य) **(DB)…1388**

***Penal Code (45 of 1860), Section 302 & 307/34 – Plea of Alibi* – Held – Taking a false plea of *alibi* would also be an additional link to the circumstances, although false plea of *alibi* cannot be a sole criteria to record conviction – Plea of *alibi* is required to be proved by accused by leading cogent evidence – Defence/accused failed to prove his plea of *alibi*. [Nathu Singh Vs. State of M.P.] (DB)…1388**

दण्ड संहिता (1860 का 45), धारा 302 व 307/34 – अन्यत्र उपस्थित होने का अभिवाक् – अभिनिर्धारित – अन्यत्र उपस्थित होने का अभिवाक् लेना भी परिस्थितियों की एक अतिरिक्त कड़ी होगी, यद्यपि, दोषसिद्धि अभिलिखित करने के लिए अन्यत्र उपस्थित होने का मिथ्या अभिवाक् एकमात्र मानदंड नहीं हो सकता – अन्यत्र उपस्थित होने के अभिवाक् को अभियुक्त द्वारा तर्कपूर्ण साक्ष्य प्रस्तुत कर साबित किया जाना अपेक्षित है – बचाव पक्ष/अभियुक्त, अन्यत्र उपस्थित होने के उसके अभिवाक् को साबित करने में असफल रहा। (नाथू सिंह वि. म.प्र. राज्य) **(DB)…1388**

***Penal Code (45 of 1860), Section 302 & 307/34 – Previous Enmity* – Held – Enmity is a double edged weapon – If appellants claim that there was an enmity between them and complainant party, then such enmity may also provide motive to commit offence – From facts, it would be incorrect to say that appellants were falsely implicated due to previous enmity. [Nathu Singh Vs. State of M.P.] (DB)…1388**

दण्ड संहिता (1860 का 45), धारा 302 व 307/34 – पूर्वतर वैमनस्यता – अभिनिर्धारित – वैमनस्यता, एक दुधारी शस्त्र है – यदि अपीलार्थीगण दावा करते हैं कि उनमें और परिवादी पक्षकार के बीच वैमनस्यता थी, तब उक्त वैमनस्यता भी, अपराध कारित करने का हेतु उपलब्ध करा सकती है – तथ्यों से, यह कहना गलत होगा कि अपीलार्थीगण को पूर्वतर वैमनस्यता के कारण मिथ्या रूप से आलिप्त किया गया था। (नाथू सिंह वि. म.प्र. राज्य) **(DB)…1388**

***Penal Code (45 of 1860), Section 302 & 307/34 – Related Witness & Interested Witness* – Held – Evidence of "related witness" cannot be discarded only on ground of relationship – There is a difference between "related witness" and "interested witness" – Interested witness is a witness who is vitally interested in conviction of a person due to previous enmity. [Nathu Singh Vs. State of M.P.] (DB)…1388**

दण्ड संहिता (1860 का 45), धारा 302 व 307/34 – संबंधित साक्षी व हितबद्ध साक्षी – अभिनिर्धारित – ''संबंधित साक्षी'' के साक्ष्य को केवल रिश्तेदारी के आधार पर अमान्य नहीं किया जा सकता – ''संबंधित साक्षी'' एवं ''हितबद्ध साक्षी'' के बीच अंतर है – हितबद्ध साक्षी वह साक्षी है जो पूर्वतर वैमनस्यता के कारण एक व्यक्ति की दोषसिद्धि में अत्यंत हितबद्ध है। (नाथू सिंह वि. म.प्र. राज्य) **(DB)…1388**

Penal Code (45 of 1860), Section 302 & 307/34 and Evidence Act (1 of 1872), Section 32 – Dying Declaration – Admissibility **– Held – Dying declaration recorded by Doctor but later declarant survived – Doctor who recorded dying declaration was not examined, therefore so called dying declaration is not admissible u/S 32 of Evidence Act – Court evidence cannot be discarded in light of the statement which was recorded as dying declaration. [Nathu Singh Vs. State of M.P.] (DB)…1388**

दण्ड संहिता (1860 का 45), धारा 302 व 307/34 एवं साक्ष्य अधिनियम (1872 का 1), धारा 32 – मृत्युकालिक कथन – ग्राह्यता – अभिनिर्धारित – चिकित्सक द्वारा मृत्युकालिक कथन अभिलिखित किया गया किंतु बाद में कथनकर्ता जीवित रहा – चिकित्सक, जिसने मृत्युकालिक कथन अभिलिखित किया था, का परीक्षण नहीं किया गया इसलिए तथाकथित मृत्युकालिक कथन, साक्ष्य अधिनियम की धारा 32 के अंतर्गत ग्राह्य नहीं है – न्यायालयीन साक्ष्य को, मृत्युकालिक कथन के रूप में अभिलिखित कथन के आलोक में अमान्य नहीं किया जा सकता। (नाथू सिंह वि. म.प्र. राज्य) **(DB)…1388**

Penal Code (45 of 1860), Sections 302, 307/34 & 149 – Common Intention **– Held – Common intention can develop during the course of occurrence also, provided there is clear proof and cogent evidence to prove it – Accused persons coming to the place of occurrence with their .12 bore or .315 bore guns and fired indiscriminately thereby causing death of deceased persons, clearly establishes that all 3 appellants were sharing common intention. [Nathu Singh Vs. State of M.P.] (DB)…1388**

दण्ड संहिता (1860 का 45), धाराएँ 302, 307/34 व 149 – सामान्य आशय – अभिनिर्धारित – सामान्य आशय, घटनाक्रम के दौरान भी विकसित हो सकता है, परंतु यह कि उसे सिद्ध करने के लिए वहां स्पष्ट सबूत एवं तर्कपूर्ण साक्ष्य है – अभियुक्तगण का अपनी .12 बोर या .315 बोर की बंदूकों के साथ घटनास्थल पर आना और अंधाधुंध गोलियां चलाना, जिससे मृतक व्यक्तियों की मृत्यु कारित हुई, स्पष्ट रूप से स्थापित करता है कि सभी 3 अपीलार्थीगण सामान्य आशय के भागी थे। (नाथू सिंह वि. म.प्र. राज्य) **(DB)…1388**

Penal Code (45 of 1860), Sections 363, 366-A & 375, Exception 2 & 376(2)(n) – See – Criminal Procedure Code, 1973, Section 439 **[Vishal Vs. State of M.P.] …1458**

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दण्ड संहिता (1860 का 45), धाराएँ 363, 366–A व 375, अपवाद 2 व 376(2)(n) – देखें – दण्ड प्रक्रिया संहिता, 1973, धारा 439 (विशाल वि. म.प्र. राज्य) **…1458**

Penal Code (45 of 1860), Section 375, Exception 2 – See – Protection of Children from Sexual Offences Act, 2012, Section 42-A **[Vishal Vs. State of M.P.] …1458**

दण्ड संहिता (1860 का 45), धारा 375, अपवाद–2 – देखें – लैंगिक अपराधों से बालकों का संरक्षण अधिनियम, 2012, धारा 42–A (विशाल वि. म.प्र. राज्य) **…1458**

Penal Code (45 of 1860), Section 375, Exception 2 and Protection of Children from Sexual Offences Act (32 of 2012), Section 5/6 & 16/17 – Age & Consent of Prosecutrix **– Held – When minimum age of marriage is fixed at 18 years and age of consent is also fixed at 18 years, fixing a lower age of 15 years in Exception 2 to Section 375 is totally irrational, unjust and not fair, infact it is oppressive to the girl child. [Vishal Vs. State of M.P.] …1458**

दण्ड संहिता (1860 का 45), धारा 375, अपवाद 2 एवं लैंगिक अपराधों से बालकों का संरक्षण अधिनियम, (2012 का 32), धारा 5/6 व 16/17 – अभियोक्त्री की वय व सम्मति – अभिनिर्धारित – जब विवाह की न्यूनतम आयु 18 वर्ष निश्चित है और सम्मति की आयु भी 18 वर्ष निश्चित है, धारा 375 के अपवाद 2 में 15 वर्ष की निम्न आयु निश्चित करना पूर्णतः तर्कहीन, अन्यायपूर्ण एवं अनुचित है, वास्तव में वह बालिका के लिए पीड़ा पहुंचाने वाला है। (विशाल वि. म.प्र. राज्य) **…1458**

Penal Code (45 of 1860), Section 375, Fourthly & 376(2)(n) – See – Criminal Procedure Code, 1973, Section 438 **[Bundel Singh Lodhi Vs. State of M.P.] …*8**

दण्ड संहिता (1860 का 45), धारा 375, चतुर्थ परिस्थिति व 376(2)(n) – देखें – दण्ड प्रक्रिया संहिता, 1973, धारा 438 (बुन्देल सिंह लोधी वि. म.प्र. राज्य) **…*8**

Protection of Children from Sexual Offences Act (32 of 2012), Section 5/6 & 16/17 – See – Penal Code, 1860, Section 375, Exception 2 **[Vishal Vs. State of M.P.] …1458**

लैंगिक अपराधों से बालकों का संरक्षण अधिनियम, (2012 का 32), धारा 5/6 व 16/17 – देखें – दण्ड संहिता, 1860, धारा 375, अपवाद 2 (विशाल वि. म.प्र. राज्य) **…1458**

Protection of Children from Sexual Offences Act (32 of 2012), Section 42-A and Penal Code (45 of 1860), Section 375, Exception 2 – Inconsistency regarding Age – Overriding Effect **– Held – Section 42-A inserted in POCSO Act vide amendment on 03.02.2013 and in consequence of such amendment, POCSO Act will override provisions of any other law including IPC to the**

extent of any inconsistency – Apex Court concluded that Exception 2 to Section 375 is arbitrary and needs to be struck down. [Vishal Vs. State of M.P.] …1458

लैंगिक अपराधों से बालकों का संरक्षण अधिनियम (2012 का 32), धारा 42–A एवं दण्ड संहिता (1860 का 45), धारा 375, अपवाद–2 – आयु के संबंध में असंगति – अध्यारोही प्रभाव – अभिनिर्धारित – पोक्सो अधिनियम में, 03.02.2013 के संशोधन द्वारा धारा 42–A अंतःस्थापित की गयी और उक्त संशोधन के परिणामस्वरूप, पोक्सो अधिनियम किसी असंगति की सीमा तक, किसी अन्य विधि, जिसमें भा.दं.सं. शामिल है, के उपबंधों को अध्यारोही करेगा – सर्वोच्च न्यायालय ने निष्कर्षित किया कि धारा 375 का अपवाद 2 मनमाना है और हटा दिये जाने की आवश्यकता है। (विशाल वि. म.प्र. राज्य) **…1458**

***Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, (30 of 2013), Section 24(2) – Lapse of Proceedings – Deeming Provision* – Held – Award passed on 07.03.2009, not prior to 5 years from date of commencement of Act of 2013, thus deeming provision of lapsation of acquisition proceedings cannot be pressed into service – No infirmity in impugned order – Appeals dismissed. [Vishnu Vs. State of M.P.] (DB)…1292**

भूमि अर्जन, पुनर्वासन और पुनर्व्यवस्थापन में उचित प्रतिकर और पारदर्शिता का अधिकार अधिनियम, (2013 का 30), धारा 24(2) – कार्यवाहियां व्यपगत हो जाना – अभिगृहित उपबंध – अभिनिर्धारित – 07.03.2009 को पारित अवार्ड, 2013 के अधिनियम के प्रारंभ होने की तिथि से 5 वर्षों के पूर्व नहीं, अतः अर्जन कार्यवाहियों के व्यपगम का अभिगृहित उपबंध लागू नहीं किया जा सकता – आक्षेपित आदेश में कोई कमी नहीं – अपीलें खारिज। (विष्णु वि. म.प्र. राज्य) **(DB)…1292**

***Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, (30 of 2013), Section 24(2) – Non-payment of Compensation – Lapse of Proceedings* – Held – Apex Court opined that if attempts were made to deliver compensation and claimants failed to receive it, acquisition proceedings will not fail or vanish in thin air. [Vishnu Vs. State of M.P.] (DB)…1292**

भूमि अर्जन, पुनर्वासन और पुनर्व्यवस्थापन में उचित प्रतिकर और पारदर्शिता का अधिकार अधिनियम, (2013 का 30), धारा 24(2) – प्रतिकर का असंदाय – कार्यवाहियां व्यपगत हो जाना – अभिनिर्धारित – सर्वोच्च न्यायालय ने राय दी कि यदि प्रतिकर देने के लिए प्रयास किये गये थे और दावाकर्ता उसे प्राप्त करने में असफल रहे, अर्जन कार्यवाहियां असफल या अचानक अदृश्य नहीं होगी। (विष्णु वि. म.प्र. राज्य) **(DB)…1292**

Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, (30 of 2013), Section 24(2) and

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Constitution – Article 226 – Reliefs Claimed & Pleadings **– Held – Apex Court concluded that relief claimed beyond pleadings should not be granted – Entire edifice of petition and relief is founded on Section 24(2), no challenge was made to acquisition proceedings, thus in absence of pleadings, the same cannot be called in question by way of oral/written arguments – Single Judge rightly did not interfered. [Vishnu Vs. State of M.P.] (DB)…1292**

भूमि अर्जन, पुनर्वासन और पुनर्व्यवस्थापन में उचित प्रतिकर और पारदर्शिता का अधिकार अधिनियम, (2013 का 30), धारा 24(2) एवं संविधान – अनुच्छेद 226 – दावा किया गया अनुतोष व अभिवचन – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया कि अभिवचनों से परे दावा किया गया अनुतोष प्रदान नहीं करना चाहिए – याचिका का संपूर्ण ढांचा एवं अनुतोष, धारा 24(2) पर आधारित है, अर्जन कार्यवाहियों को कोई चुनौती नहीं दी गई थी, अतः अभिवचनों की अनुपस्थिति में, उसे मौखिक/लिखित तर्कों के जरिए प्रश्नागत नहीं किया जा सकता – एकल न्यायाधीश ने उचित रूप से हस्तक्षेप नहीं किया। (विष्णु वि. म.प्र. राज्य) **(DB)…1292**

Service Law – Appointment on Probation – Unauthorized absence **– Held – The only explanation of unauthorized absence given by petitioner was that his father was sick – No medical prescriptions showing serious sickness of father of petitioner – Government employee cannot be permitted to remain on unauthorized absence without informing the department – Petitioner failed to make out a *prima facie* case to show that his father was seriously sick. [Sinnam Singh Vs. State of M.P.] …1317**

सेवा विधि – परिवीक्षा पर नियुक्ति – अनधिकृत अनुपस्थिति – अभिनिर्धारित – याची द्वारा अनधिकृत रूप से अनुपस्थित रहने हेतु दिया गया एकमात्र स्पष्टीकरण यह था कि उसके पिता बीमार थे – याची के पिता की गंभीर बीमारी को दर्शाने वाली कोई चिकित्सा पर्चियाँ नहीं – सरकारी कर्मचारी को विभाग को सूचित किये बिना अनधिकृत रूप से अनुपस्थित रहने के लिए अनुमति नहीं दी जा सकती – याची यह दर्शाने हेतु कि उसके पिता गंभीर रूप से बीमार थे, प्रथम दृष्ट्या प्रकरण बनाने मे असफल रहा। (सिन्नम सिंह वि. म.प्र. राज्य) **…1317**

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

JOURNAL SECTION

FAREWELL

HON'BLE MR. JUSTICE BRIJ KISHORE SHRIVASTAVA

Born on July 01, 1959. Did B.Sc., LL.B., S.A.S and joined Judicial Service as Civil Judge Class-II on November 07, 1985. Appointed as Civil Judge Class-I in the year 1992. Appointed as C.J.M./A.C.J.M in the year 1995 and was posted as A.C.J.M. at Ashoknagar. Posted as C.J.M., Seoni in the year 1996. Promoted as Officiating District Judge in Higher Judicial Service on May 16, 1997 and was posted as I A.D.J. at Seoni. Posted as IX A.D.J., Jabalpur in the year 1999. Posted as A.D.J., Datia in May 2003 and thereafter as also Incharge, District & Sessions Judge, Datia in June, 2003. Posted as A.D.J., Lakhnadon in September 2003. Was granted Selection Grade Scale w.e.f. 26.02.2006. Posted as O.S.D., High Court of M.P., Jabalpur in the year 2006. Posted as Additional Registrar (Judl.-I) in June 2009 and thereafter as Registrar (Judl.-I) in September 2009 in the High Court of M.P. at Jabalpur. Worked as President, District Consumer Forum Chhatarpur from June 2010 to December 2012. Posted as District & Sessions Judge, Damoh on December 20, 2012. Was granted Super Time Scale w.e.f. 01.09.2013. Posted as District & Sessions Judge, Shivpuri in the year 2015. Posted as District & Sessions Judge, Ujjain from October 25, 2016 till elevation. Elevated as Judge of the High Court of Madhya Pradesh on June 19, 2018 and demitted Office on June 30, 2021.

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

FAREWELL OVATION TO HON'BLE MR. JUSTICE BRIJ KISHORE SHRIVASTAVA, GIVEN ON 30.06.2021, THROUGH VIRTUAL MODE, IN THE CONFERENCE HALL OF SOUTH BLOCK, HIGH COURT OF M.P., JABALPUR.

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

We have gathered here to bid an endearing farewell to Shri Justice Brij Kishore Shrivastava, who is demitting office on attaining the age of superannuation after successful tenure of about 36 years in judiciary.

Shri Justice B.K. Shrivastava was born on 01 July 1959. After completing graduation in Science and obtaining LL.B. degree, Shri Justice B.K. Shrivastava joined the Judicial Service and was appointed as Civil Judge, Class-II on 07 November 1985. Brother Justice B.K. Shrivastava was promoted as Civil Judge, Class-I on 28 February 1992 and thereafter as C.J.M/A.C.J.M. on 20 October 1995. He was later on promoted as officiating District Judge in Higher Judicial Service on 16 May 1997. Brother Justice B.K. Shrivastava was granted Selection Grade Scale on 26 February 2006 and Super Time Scale on 01 September 2013.

During his tenure as Judicial Officer, Shri Justice B.K. Shrivastava also held the posts of Additional Registrar (Judicial-I), High Court of Madhya Pradesh, Jabalpur, Registrar (Judicial-I), High Court of Madhya Pradesh, Jabalpur and President, District Consumer Forum, Chhatarpur.

Considering the vast experience treasured by Shri Justice B.K. Shrivastava in the District Judiciary, he was elevated as Judge of the High Court of Madhya Pradesh on 19 June 2018.

Brother Justice B.K. Shrivastava is known for his soft and polite behavior and pleasant mannerism. The decisions rendered by him reflect his knowledge of law and approach in tackling complex issues. I found Shri Justice B.K. Shrivastava to be one of our finest Judges, silent, modest and dedicated to the cause of justice. He is admired and respected in the judicial fraternity. Shri Justice B.K. Shrivastava shall always be remembered as a Judge whose actions were always just, rational and reasonable. I have found his assistance in administrative matters very useful. I am sure that his vast knowledge and experience will continue to be useful to the society even after his retirement.

I, on my behalf and on behalf of my esteemed sister and brother Judges and the Registry of the High Court, wish Shri Justice B.K. Shrivastava and Mrs. Vandana Shrivastava a very happy, prosperous and glorious life ahead.

Thank you.

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

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

Socrates had described the characteristics of a good Judge, as someone who –

I Quote

"hears courteously, answers wisely, considers soberly and decides impartially"

Unquote

Your Lordship's wisdom, courage, firmness, alertness and sympathetic approach towards the poor litigant was commendable.

Hon'ble Justice Shri B.K. Shrivastava was born on 01 July 1959 and after completing his education, joined the Judicial Service on 07 November 1985. His Lordship was appointed as Judge of the High Court on 19 June 2018. Your Lordship had a relatively short tenure of about 3 years, but has left a significant mark which will be remembered for the years to come. During his tenure, he has made a remarkable contribution through his judgments and all of us wish, that he could have spent more time with us. Your Lordship's career of about 36 years in the Judicial Service in various capacities was an asset to the judicial system. Your Lordship maintained high traditions while deciding the fate and future of many litigants of the State of Madhya Pradesh.

Sometimes, the dissenting opinion leads to evolution of new dimensions of law and sometimes dissenting judgments are necessary for the betterment of the judicial system. Though, there are many examples, but the most famous one is the dissent by Hon'ble Justice Shri H.R. Khanna in the case of ADM Jabalpur. I have come across, one of the dissenting opinions of Your Lordship in a criminal case where he has dissented from the then Hon'ble Acting Chief Justice. This shows the boldness and also signifies that while discharging the duties, Your Lordship was always of the view, that the dignity and majesty of this institution is of paramount importance. I am sure that while demitting the office, Your Lordship must have the feeling of satisfaction of discharging the duties of this august office as per the oath administered to you on 19 June 2018.

Justice Shrivastava has maintained a fine balance between his commitment towards his professional duties and towards his personal life. Normally, it is observed that the Hon'ble Judges keep a little distance from social media platforms etc. but that is not the case with My Lord Justice Shrivastava. He has always been active and visible in social media platforms which shows his jovial nature.

I believe that Your Lordship's acumen, abilities and instincts are very sharp and therefore, if Your Lordship continues to discharge public service in one form or another, it would greatly contribute to society. Even though Your Lordship has retired, but I don't believe that Your Lordship is tired.

I am sure that Your Lordship would be looking forward to spend more time with your friends and family members after a long and successful tenure as a Judge.

I, on behalf of the State of Madhya Pradesh, its law officers and on my own behalf convey best wishes to Hon'ble Justice Shri B.K. Shrivastava and his family and pray that they lead a happy and peaceful life ahead. May Your Lordship live a very healthy, happy and peaceful life and achieve even greater heights.

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

आज हमारे लिए बृज किशोर श्रीवास्तव साहब का विदाई समारोह आप सब के समक्ष है। न्यायिक सेवा में इतने लंबे अर्से में निर्णय देने की आपकी जो प्रक्रिया थी वो किसी से छिपी हुई नहीं है। आपने सदैव अधिवक्ताओं को चाहे वे शासकीय अधिवक्ता हों, चाहे डिफेंस के अधिवक्ता हों, चाहे दीवानी और चाहे रिट पिटीशन के अधिवक्ता हों सबसे मृदुभाषी होकर के अपना निर्णय लिया और जिसने जिस तरह की स्थिति उसे समझ में आई उसे एडजस्ट भी किया। बार में लोगों को सुनते थे और सुनने के पश्चात् यदि किसी लॉयर ने या पार्टी ने adjournment चाहा तो कभी उन्होंने संकोच नहीं किया और जिस स्थिति में भी हो उन्होंने कहा इसे आप स्वीकार कर लीजिये और तत्पश्चात् इस तरह से लोगों को अपनापन दिया। मिलनसारिता में आपका कोई जवाब नहीं।

बार में भी जब कभी भी अधिवक्ताओं से मुलाकात करते थे तो वे बड़ी विनम्रता के साथ अपनापन अधिवक्ताओं को देते थे। एक–दो बार हमारे बार में भी आपने विजिट किया। 26 जनवरी में भी, 15 अगस्त में भी और सारे लॉयर्स ने आपसे मुलाकात कर आपको साधुवाद दिया।

आज हमारे पास से, एक तो वैसे ही न्यायाधिपतिगण गिनती में कम थे और आज फिर हम एक न्यायाधिपति को विदा कर रहे हैं, इस बात के लिए हम पहले ही कह चुके हैं कि राष्ट्रपति महोदय, हमारे मुख्य न्यायाधिपति जी से भी प्रार्थना है कि वे अतिशीघ्र और भी जजेस की नियुक्ति के लिए बार के मेंबर्स के नाम उन्होंने भेजे हैं और स्वीकृति के पश्चात् जल्द से जल्द हमारा उच्च न्यायालय चाहे वो जबलपुर में हो, चाहे इन्दौर में हो, चाहे ग्वालियर में हो, जितनी सीटें sanction की गई, जनसंख्या के अनुसार अभी भी वो कम थीं, लेकिन कम से कम उतनी ही पूरी हो जायें तब बहुत बड़ी उपलब्धि इस प्रदेश के लिए होगी और न्यायपालिका ही ऐसी परिधि है, न्यायपालिका ही ऐसी जनमानस के लिए उपलब्धि है, जहॉ उसे उसको जो भी सता रहा है वो राहत मिलती है, चाहे वो आपके द्वारा हो, चाहे वो शासन के पदाधिकारियों के द्वारा हो, प्रशासनिक व्यक्तियों के द्वारा हो, उन सब के लिए न्यायपालिका ही एक रास्ता है। यदि न्यायपालिका न होती या न विचार करती तो एनार्की फैल जायेगी। आम जनमानस के लिए आज की स्थिति में ही देखिये हम जैसा कि विचार करते हैं, मैं ये सोचता हूँ कि वो हिन्दी में एक कवि ने लिखा था कि परिवर्तन ही यदि उन्नति है तो हम बढ़ते जाते हैं किन्तु मुझे तो सीधे सच्चे पूर्ण भाव ही भाते हैं। उस जमाने के लोग इस तरह की स्थितियॉ विचार करके चलते थे

और ऐसी मानसिकता के लोग जब ऐसी जगह पर आयें। हमने अभी पढ़ा कि हमारे पास 6 जज आये हैं, उनमें से हमने देखा कि 5 लोगों ने साईंस के सब्जेक्ट से बी.एस.सी. किया और फिर उन्होंने हमारे विधि व्यवसाय में अपनी मानसिकता बनाई और इससे ऐसा लगता है कि साईंस के विद्यार्थियों के मन में न्यायपालिका के प्रति स्नेह है, प्यार है, अपनापन है और आदर है।

आज उच्च न्यायालय ने, जिस तरह से, चाहे वो प्रदेश में हो, चाहे देश में हो, अपनी हैसियत जनमानस के बीच रखी है और उसी का परिणाम है कि आम जनता को बहुत ज्यादा भरोसा अगर कहीं पर है कि उसे कोई राहत नहीं देगा अगर दुनिया में तो, चाहे वो विधवा हो, चाहे असहाय हो, चाहे गरीब हो, चाहे छोटा हो, चाहे बड़ा हो उसे न्यायपालिका के द्वारा निष्पक्ष राहत मिलती है और उस सीढ़ी में बैठे हुए आदरणीय श्री बृजकिशोर श्रीवास्तव जी, जो भी उन्होंने किया, अब बार के भीतर तो हर तरह की बातें होती रहती हैं। बार तो अपने ढंग से सोचता है, prosecution वाले सोचते हैं हमारे लिये ठीक है, डिफेंस वाले सोचते हैं हमारे लिए ठीक है, तो ये चलता रहता है लेकिन न्यायाधिपति को निष्पक्षता से ही जनमानस के बीच में अपनापन देना पड़ता है और उस ख्याति में हमारे जितने भी न्यायाधिपति यहॉ पर हैं और रहे हैं वे सब के सब धन्यवाद के पात्र हैं। वे सब के सब, उनमें से कुछ तो बड़ी हैसियत से सुप्रीम कोर्ट भी गये, वहॉ से रिटायर भी हुए। बड़ी हैसियत हमारे यहॉ के दो–दो, तीन–तीन न्यायाधिपति और मुख्य न्यायाधिपति सुप्रीम कोर्ट में जे.एस.वर्मा साहब जैसे लोगों की तरह चीफ जस्टिस ऑफ सुप्रीम कोर्ट हुए। न्यायमूर्ति श्री दीपक मिश्रा की तरह लोग–बाग भी यहॉ से गये और अपना नाम कमाया और इसी सब के साथ मैं श्री बी. के श्रीवास्तव साहब को उनके रिटायरमेंट पर एक ही बात कहूॅगा कि वे जब भी उन्हें समय मिले तब हमारे बार में अवश्य आते–जाते रहें। बार से भी उनको वही स्नेह मिलेगा जो उनको उनके परिवार से इसी हैसियत पर पहुॅचने से मिला था, हम भी उन्हीं के सदस्यों में से एक थे। इन्हीं शब्दों के साथ मैं धन्यवाद देता हूॅ और सारे न्यायाधिपति महोदय जो उपस्थित हैं उन्हें प्रणाम करते हुए अपनी बात को विराम देता हूॅ।

जय हिन्द जय भारत।

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

We have assembled here to bid a fond farewell to Hon'ble Shri Justice B.K. Shrivastava on the day of his demitting the office of Judge High Court of Madhya Pradesh.

My Lord Justice B.K. Shrivastava has had an illustrious and distinguished career as a Judge for 36 years. My Lord after completing studies joined Madhya Pradesh Judicial Service on 07.11.1985 and after earning promotions was appointed to Higher Judicial Service on 16.05.1997. My Lord has held the offices of Additional Registrar and Registrar (Judicial) in the High Court of Madhya Pradesh, Principal seat at Jabalpur; and President, District Consumer Forum, Chhatarpur, besides other Judicial Offices.

My Lord Justice B.K. Shrivastava was elevated as Judge of this Hon'ble Court on 19.06.2018, and has been performing the duties, functions and responsibilities of the high office ever since.

It has been a common experience of all the members of the Bar to observe a unique facet of My Lord's personality and functioning, namely the extreme sense of order and cleanliness. An uncanny ability to adapt to and improve the functional systems and procedures, of which I cite an example. Due to pandemic the Courts are functioning online and many a time there are issues like one of the counsel appearing is addressing the Court without realizing that his mike is mute, which takes some effort by the others and especially the Court to point it to the counsel. In one such instance, I happened to be one such erring counsel; *promptly* I was shown a placard by His Lordship pointing to unmute the mike. I was later informed that My Lord has prepared various such instructive placards to smoothen the process of online hearing, a thoughtful effort but what a gesture of commitment to the functionality of the system.

Though My Lord kept the members of the Bar on our toes by constant questioning and comments, but we are sure that it was for the benefit of all concern and to derive clarity to the issues being argued; as after such scrutiny if counsel were successful in bringing home the point, relief was a plenty and unbridled. Today while demitting the high office of Judge of this Hon'ble Court, My Lord can positively look back and be satisfied of a job well done.

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

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

On behalf of High Court Advocates' Bar Association and on my own behalf I wish God speed to Hon'ble Shri Justice B.K. Shrivastava in all his future endeavors.

I wish Mrs. Vandana Shrivastava and Hon'ble Shri Justice B.K. Shrivastava, abundance of happiness, peace and good health.

Thank You.

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

आज हम लोग जस्टिस बी.के. श्रीवास्तव को विदाई दे रहे हैं। अभी स्वागत 6 लोगों का हमने किया और उनकी मिठाई भी हमको खाने नहीं मिली थी कि विदाई शुरू हो गई।

मध्यप्रदेश उच्च न्यायालय मे ज्यों–ज्यों सोचते हैं कि हमारे न्यायाधीशों की संख्या पूरी हो जाये, त्यों–त्यों लोग रिटायर होते जा रहे। माननीय रमन पटेल जी ने जो बात आज कही है, उससे मैं

गदगद हूँ कि मुख्य न्यायाधिपति के रूप में जो गौरवशाली व्यक्तित्व हमें प्राप्त हुआ है, उनके शासनकाल में ये नवाचार होगा कि जब हम उत्सव मनायेगें कि हमारे 53 न्यायाधिपतियों की पोस्ट पर 53 न्यायाधिपतिगण मध्यप्रदेश में विद्यमान है। उस दिन मध्यप्रदेश बार कॉउंसिल में दीवाली मनाऊँगा मैं और ऐसा उत्सव मनेगा कि लोग याद करेंगे उस उत्सव को, ये बहुत जरूरी है, मेरी बात रमन पटेल जी ने कही। मैं दिल से अपने बड़े भाई रमन पटेल जी का आभारी हूँ कि उन्होंने माननीय मुख्य न्यायाधिपति महोदय तक मेरी बात पहुँचाई और उससे मेरा पक्ष सबल हुआ।

मैं इस अवसर पर निवेदन करना चाहता हूँ कि इस वर्ष हमने अच्छे–अच्छे 4–5 न्यायाधिपतिगण रिटायर होते देखे, सुप्रीम कोर्ट ने रास्ता भी अभी हमको दिखाया है कि उनकी सेवायें फिर लेना बहुत जरूरी है। मैं देख रहा हूँ फोटो में कि बी.के. श्रीवास्तव साहब बिल्कुल एकदम तरोताज़ा मुझे दिख रहे हैं। कैसे मान लें हम कि ये रिटायर हो रहे हैं। नियमानुसार रिटायर हो रहे हैं। वीडियो में जो मैं देख रहा हूँ तो मुझे ऐसे लग रहा है कि अभी और 5 साल इनकी सेवायें बढ़ सकती हैं। माननीय न्यायाधिपतिगण बार से जो जाते हैं, डायरेक्ट मनोनयन जिनका होता है वो बेहद extraordinary व्यक्तित्व के धनी होते हैं। ये मैंने देखा है, टैलेंट उनमें कूट कूट कर भरा होता है। लेकिन 32 साल, 30 साल न्यायिक सेवा में गुजारने के बाद जिनका मनोनयन बैंच से होता है, उनकी क्षमता भी अद्भुत होती है। सारे न्यायाधिपतिगण मिलकर जिस institution में आज विद्यमान है वो institution, मध्यप्रदेश की judiciary, हमेशा गौरवशाली रही। इतिहास है मध्यप्रदेश judiciary का, यहॉ के लोग, यहॉ के न्यायाधिपति महोदय चीफ जस्टिस ऑफ इण्डिया भी बने हैं और सुप्रीम कोर्ट भी गये और अब जायेंगे इस बार। मैं भगवान से दुआ करता हूँ हर रोज कि जायें सुप्रीम कोर्ट हमारे मुख्य न्यायाधिपति, और हम उनका भी उत्सव मनायें और हमें अच्छा लगेगा। कोर्ट का काम बहुत नीरस काम है, हम वकीलों को केवल आपकी मुस्कुराहट की जरूरत है। आदेश तो आप विधि पूर्वक लिखेंगे, प्यार से बस आप मुस्कुरा दें, हमारे दिन बढ़िया हो जाते हैं, आनंद आ जाता है हमारे दिल में। क्योंकि नियम के बाहर तो कोई आदेश हो ही नही सकता, सब नियम में होता है लेकिन प्यार का कोई नियम नही है।

जस्टिस पटनायक साहब ने एक सर्कुलर निकाला था 2006 में, हाईकोर्ट में आप पता करेंगे तो मिल जायेगा, उन्होंने कहा था, न्यायालयों का काम पारिवारिक माहौल में होना चाहिये, पारिवारिक माहौल का मतलब जहाँ तक मैं समझा हूँ यही है कि यदि किसी को रिलीफ नहीं देना तो उसको बोल दो कि भाई हम देख लेंगे बाद में आ जाना, 15–20 दिन बाद, महीने भर बाद देख लेंगे, विचार करेंगें, पारिवारिक माहौल का मतलब ही वो है कि प्यार न केवल दिखे बल्कि प्यार महसूस हो, और प्यार में ही जियें और न्याय भी प्यार में ही हो। मैं हमेशा अपने वकीलों से कहता हूँ कि बैंच के प्रति जितना आपका सम्मान होगा, जितना आप बैंच के प्रति नम्रता से बात करोगे, जितना प्यार आप दोगे, उससे चौगुना प्यार आपको वापस मिलेगा। विवाद से कभी कुछ नहीं मिलता।

मैं इस विदाई समारोह के अवसर पर माननीय न्यायाधिपति बी.के. श्रीवास्तव साहब से अपील करूंगा कि सर आप बार में आओ, हमारे यहाँ सैंकड़ों लॉ यूनिवर्सिटी और लोग अच्छी जगह से आ रहे, उनको आपके ज्ञान, आपकी प्रक्रिया, आपके द्वारा दी गई बातें जिनको सुनने का अवसर मिलेगा। आपको बैठना नही है, कल आप जबलपुर बार में जाईये रमन पटेल जी ने दे ही दिया आमंत्रण, भोपाल बार में भी पधारें सर, भोपाल बार का मैं ही अध्यक्ष हूँ सौभाग्य से, हमें समझायें और हमारे बच्चों को आप सिखायें नये लोगों को कि हाईकोर्ट क्या है, कैसे हाईकोर्ट का working है, कैसे घर बैठ के आज इस online प्रक्रिया ने क्रांति ला दी है। मैं कभी सोच नहीं सकता था कि मैं अपने कार्यालय में बैठ करके आप सब के दर्शन करूंगा, आपको संबोधित करूंगा, आपका प्यार पाऊँगा, आपको सम्मान दूंगा, पर ये सब इसी से संभव हुआ है, इतने सब लोग बैठ जाते हैं और सही कहते हैं हमारे मनोज

शर्मा जी कि virtual अब चालू रहना चाहिये। ये कभी बंद न हो, मैं आपसे पुनः निवेदन करूंगा कि आप बार में आते रहें, हमारे नये लोगों को सिखाते रहें और हम लोगों को भी सिखायें, हमारी जहाँ कहीं भी गलती देखें, आप बराबर हमसे बोलें और सतत् आपकी सेवा न्याय प्रक्रिया में बनी रहे और हमेशा हम सबको प्यार करते रहें आप जीवन में शतायु हों क्योंकि हम लोगों की तो अब उम्र निकल गई 72 साल की ऐज है मेरी। आप शतायु हो, और आप हम लोगों को ऐसे जवान और खुश मिजाज़ और खुशहाल दिखते रहें

So kind of you thank you very much

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

आज हम न्यायमूर्ति श्री बी.के. श्रीवास्तव का स्वागत, अभिनन्दन एवं भावभीनी विदाई समारोह हेतु एकत्रित हुये हैं।

न्यायमूर्ति श्री बृज किशोर श्रीवास्तव के जीवन के 62 वर्षों का आज अंतिम दिवस है, आने वाला दिवस नई ऊर्जा, नई ज्योति एवं परिवर्तन एवं उत्साह का दिवस होगा। मातृभूमि से कर्मभूमि की यात्रा में बचपन, माधुर्य एवं मित्र मंडली के साथ जीवन के मस्ती से भरे दिन, माता पिता का वात्सल्य, प्राथमिक स्कूल के दिन से आगे बढ़ता हुआ जीवनचक्र, हाईस्कूल, फिर महाविद्यालय के माध्यम से शिक्षा पूरी कर भावी जीवन को सुन्दर बनाने एवं सपने को साकार करते हुये सुखमय बनाने के लिये नये जीवन में प्रवेश कर व्यवसाय, वह भी न्याय क्षेत्र में व्यवहार न्यायाधीश के रूप में नियुक्ति पाकर प्रगति का पहिया जीवन के 26 वर्ष 4 माह पूर्ण कर चुका था।

न्यायिक सेवा में प्रवेश के पश्चात् व्यवहार न्यायाधीश, मुख्य न्यायिक दंडाधिकारी, जिला न्यायाधीश, रजिस्ट्रार, उच्च न्यायालय जैसे महत्वपूर्ण पदों पर पदस्थ होकर अपनी प्रतिभा की किरणों की आभा प्रदेश के कई जिलों में बिखेरते हुये अनेक जरूरतमंदों को न्याय प्रदत्त कर लाभ पहुँचाते हुये प्रगति चक्र का पहिया म0प्र0 उच्च न्यायालय के न्यायाधिपति के गरिमामय पद पर पदस्थ होकर 19 जून 2018 से न्यायाधिपति के पद का निर्वहन करते हुये अनेक प्रकरणों का निराकरण कर संस्कारधानी एवं प्रदेश के अनेक पक्षकारों को न्याय की किरणों के माध्यम से न्याय प्रदत्त किया ।

समय परिवर्तनशील है, परिवर्तन ही जिन्दगी है, भावी जीवन अनेक खुशियों भरा, स्वस्थ एवं सुन्दर भविष्य की कामना करते हुये, मैं अपनी ओर से, भारत सरकार की ओर से, केन्द्रीय विधि अधिकारियों की ओर से आपका हृदय से स्वागत करता हूँ, आपके उज्ज्वल भविष्य की कामना करता हूँ एवं आशा करता हूँ कि इस विलक्षण प्रतिभा का लाभ सेवा के माध्यम से जरूरतमंद व्यक्तियों को प्राप्त होगा।

''धन्यवाद ''

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

We have assembled here today to bid farewell to Hon'ble Shri Justice B.K. Shrivastava on his attaining the age of superannuation.

I had known Hon'ble Justice Shrivastava when he was Additional District Judge in Jabalpur. I still remember 19 June 2018 when Hon'ble Justice Shrivastava had taken oath alongwith others of this High Office.

It is time to reckon and recall the achievements and contributions made by Hon'ble Judge when he is laying down his office.

Hon'ble Shri Justice B.K. Shrivastava has left an imprint of his being a Judge of very high integrity, independent attitude and capacity to dissent. He delivered landmark judgments and we need such Judges to maintain and advance the cause of justice.

Today the matter is being discussed at the national level equalizing the date of superannuation of Hon'ble High Court and Supreme Court Judges to utilize the knowledge and experience of the High Court Judges up to the age of 65 years. If that is accepted, the judiciary at large will be benefited from such long experience and knowledge acquired by continuous hard work.

Recently two Former Chief Justices of India Shri M.N. Venkatachaliah and Shri R.C. Lahoti have expressed their opinion that age of retirement of the Judges of the High Court as also the Supreme Court be increased.

Shri B.N. Srikrishna, Former Judge of the Supreme Court has also expressed that the age of retirement of the High Court Judges to be at par with that of Supreme Court Judges.

Shri R.V. Raveendran, Former Judge of the Supreme Court has also expressed the same view for increasing the age of Judges of the Supreme Court and the High Court. If Judges even after their retirement can preside over the Judicial Tribunals and act as an Arbitrator performing judicial functions and dispensation of justice, the why their services cannot be utilized in the institution itself in which they have served for years. If the age of retirement of the Judges is increased, we will have active, more experienced and matured Judges for dispensation of justice.

The tenure of Hon'ble Shri Justice B.K. Shrivastava had been an eventful one. His justice delivery system has been appreciated by all of us.

It is a matter of great satisfaction that My Lord is keeping good health at the age of 62.

My his Lordship live long and continue to serve people at large even after laying down the office. I wish a long life and further wish that My Lord may render his valuable services to the people at large.

Thank you.

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

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

My Lord Justice Shri B.K. Shrivastava was born on 01 July 1959 and after completing his education, his Lordship joined Judicial Service as Civil Judge on 07 November 1985. My Lord Justice Shri B.K. Shrivastava in the course of time promoted as Civil Judge Class-I, ACJM/CJM, Additional District Judge, District Judge. My Lord Justice Shri B.K. Shrivastava was given Selection Grade and Super Time Scale and has successfully performed his duties as Additional Registrar and Registrar (Judicial) and President, District Consumer Redressal Forum also. In view of his long tenure and judicial experience and competence he was elevated as the Judge of this Hon'ble Court on 19 June 2018. Having completed successful tenure of more than three years as a Judge of this Hon'ble High Court, today My Lord is retiring. On this occasion I may mention that we shall miss a good Judge and human being.

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

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

Thank you.

Shri M.P.S Raghuvanshi, Additional Advocate General & President High Court Bar Association, Gwalior bids farewell :-

We have assembled here to give farewell to Hon'ble Justice Shri Brij Kishore Shrivastava who is demitting office of Judge of this prestigious institution on attaining the age of superannuation.

My Lord Justice Shri B.K. Shrivastava was born on 01 July 1959 and after completing law graduation he entered in the Judicial Service on 07 November 1985. He was granted promotion in due course.

My Lord was elevated as Judge of the High Court of M.P. on 19 June 2018. My Lord has given so many landmark judgments. The retirement on attaining the

age of superannuation is a condition of service but however My Lord will ever be remembered by his judgments.

I, on behalf of the members of High Court Bar Association, Gwalior and on my own behalf wish you all the best and good health in future.

Thanking you.

Farewell Speech delivered by Hon'ble Mr. Justice Brij Kishore Shrivastava :-

07 नवंबर 1985 से मैंने जो यात्रा प्रारंभ की थी न्यायिक सेवा की, आज उसका अंतिम पड़ाव आ गया है। बहुत सारे अनुभव इस यात्रा में जुड़ते हैं, बहुत सारी सीख मिलती है, बहुत सी चीजें सीखने को मिलती हैं।

शुरूआत जीवन की होती है, समय–समय पर परिवर्तन होते रहते हैं। जन्म से ही शुरूआत हुई। 01–07–1959 जैसा कि सब ने बताया डेट ऑफ बर्थ है, उसी के हिसाब से सुनिश्चित रहता है कि एक दिन रिटायरमेंट किस तारीख को होना है।

मैं जिस मुकाम पर पहुॅचा हूँ, वह वास्तव में मेरे लिये कल्पना से परे था। एक सिविल जज क्लास–2 से नौकरी शुरूकर यहाँ तक आना अपने आप में मैं समझता हूं कि आप सब का सहयोग, मेरे स्वयं के पूर्वजों के कुछ अच्छे कार्यों का फल और मेहनत का फल हो सकता है। मेरे पिता जी District Court में स्टेनो थे। हम लोग 6 भाई–बहन थे, उस परिवार में पलकर मैं इस सेवा में आया। यहां तक आया। परिवार का अगर सहयोग नहीं है और अभिभाषकगण का सहयोग नहीं है तो एक अच्छा न्यायाधीश सामने नहीं आ सकता है। शुरूआत हुई परिवार से। आ गये न्यायिक सेवा में। 07–11–1985 से, जब से शुरू की तो ग्वालियर से मेरा न्यायिक सफर शुरू हुआ था और ग्वालियर से होते हुए विदिशा, भिण्ड़, सुसनेर, जौरा, अशोक नगर, सिवनी, जबलपुर, लखनादौन, दतिया सभी जगह होते हुए आखिर जबलपुर वापस भी आये। काफी कुछ सीखने को मिला। इतना सारा स्नेह मिला जीवन को संवारने में। एक अच्छे न्यायाधीश को अच्छा कार्य करने में सबसे पहले जो योगदान होता है वो माता–पिता का ही होता है। उनका आर्शीवाद होता है कि उन्होंने उस कच्ची मिट्टी को एक रूप दिया, एक दिशा दी और अपना स्वयं का अमूल्य समय नष्ट किया। अपनी स्वयं की कुछ इच्छाओं का भी दमन करते हुए वे बच्चों को अच्छा–सा पढ़ाते हैं, उसके बाद वे इस सीमा तक पहुँचते हैं कि अपनी मन माफिक जगह तक पहुॅच सकें। इसलिए मैं सबसे पहले अपना आभार व्यक्त करता हूं अपने माँ–बाप के चरणों में।

पारिवारिक जीवन में मेरी पत्नी श्रीमती वंदना श्रीवास्तव यहाँ मौजूद हैं। मेरा जो भी काम रहा है उनके सहयोग के बिना कभी संभव नहीं था। बहुत त्याग भी किया, परिश्रम भी किया, सेक्रीफाईज भी किया। आज मैं अपने दोनों बच्चों का भी बहुत ज्यादा आभारी हूँ। मेरा बेटा सिद्धार्थ, बेटी श्रृद्धा जो नहीं आ सकी आज इस कार्यक्रम में। लेकिन बच्चों का जो भावनात्मक सपोर्ट रहता है उसको कोई भुला नहीं सकता। पोता दक्ष और पोती आर्या इन्होंने तो जीवन में क्रांति ही ला दी, एक नई सोच की दिशा दी, एक नया आनंद जीवन में भर दिया।

इस न्यायिक सेवा में भी मैंने कई न्यायाधीशगण से काफी कुछ सीखा है। आप सभी जजों से, जो अधीनस्थ न्यायिक सेवा के जज, जिला न्यायाधीश और उनसे नीचे के जज जो अगर सुन रहे हैं

तो इस चीज को बिल्कुल ध्यान रखें कि हमें जीवन में इतनी न्यायिक सेवा में कई तरह के न्यायाधीश मिलते हैं। हर एक से हमें कुछ न कुछ सीखने को मिलता है, उनके व्यक्तित्व से, उनके कार्य से। कुछ गलत लोग भी दुर्भाग्य से मिलते हैं परन्तु उनसे भी हमें ये सीखना चाहिये कि हमें ऐसा नहीं होना चाहिये। मैंने भरपूर ये कोशिश की है कि किसी–न–किसी से कुछ–न–कुछ ग्रहण करते चलें। शुरूआत के समय के कुछ अपने न्यायाधीशगण को याद भी करना चाहूंगा जिन्होंने मेरे इस न्यायिक कार्य को अच्छा सृदृढ़ बनाने में और मुझे आत्मबल मजबूत करने में सहयोग दिया।

इसकी शुरूआत भिण्ड़ से ही हुई थी। सबसे पहले मैं याद करूंगा श्री के.सी. गर्ग साहब, जो मेरे first सीजेएम थे। उन्होंने बड़े भाई की तरह मुझे स्नेह दिया। इसके बाद आगे सफर चलता रहा, बहुत अच्छे–अच्छे डिस्ट्रिक्ट जज मिले जिन्होंने मुझे छोटे भाई की तरह treat किया। मेरी गल्तियों को भी नजरअंदाज किया और बताया। जिनमें रिटायर माननीय जिला न्यायाधीश श्री ए.एन.एस. श्रीवास्तव, जस्टिस ए.के. सक्सेना जैसे लोगों को हम भूल नहीं सकते कभी। डिस्ट्रिक्ट जज में आर. जी. फड़के साहब को भी मैं याद करूंगा कि उन्होंने भी काफी सहयोग दिया और सबसे प्रथम जब मैं ट्रेनिंग में आया तो रजनी कांत शर्मा जी मेरे सीनियर थे। उन्होंने भी बोल्डनेस जो सिखाई है वो हमने सीखी और सीखा कि बोर्ड में कैसे काम करते हैं, कैसे नियंत्रण करते हैं। कुछ अपनी तरफ से भी मैंने प्रयोग किये कि अच्छी तरह से कोर्ट को व्यवस्थित कैसे रखा जा सकता है, कैसे संभाला जा सकता है।

माननीय उच्च न्यायालय में तो जो सहयोग हमें मिला उसको मैं भुला नहीं सकता। सबसे पहले तो मैं जब एलिवेट हुआ था तो जस्टिस स्व. श्री एस. के सेठ साहब के साथ मुझे डी.बी. में बैठने का मौका मिला। जस्टिस जे.के. माहेश्वरी साहब के साथ भी मैं बहुत समय तक बैठा और जस्टिस सुजॉय पाल साहब के साथ भी बैठा। सब के साथ बिल्कुल छोटे भाई की तरह स्नेह मिला और इतने अच्छे माहौल में काम किया कि मैं उनका ऋण कभी नहीं चुका सकता हूं। उन्होंने मुझे आत्मबल दिया, ज्ञान दिया काफी discussion किया और सबसे बड़ी चीज कि मेरी बातों को सम्मान दिया। हर आदमी की राय different हो सकती है। माननीय श्री संजय यादव साहब को भी मैं याद करूंगा कि बिल्कुल स्पोर्टसमेन स्प्रिट की तरह वो काम करते थे, पूरा सम्मान उन्होंने हमारी राय को दिया। ये तो judiciary में सामान्य बात है कि राय different हो सकती है। हर जज की अपनी राय होती है। कोई जज ये दावा नहीं कर सकता कि हमारी राय सही है, लेकिन इसके बाद मन में कोई कड़वाहट न आये और केवल इसी रूप में समझे कि हमने जो काम किया है वो न्यायिक काम किया है तो कभी कष्ट हो ही नहीं सकता। हमारी जिला न्यायिक सेवा के सदस्य जितने भी हैं वास्तव में उनका अपार स्नेह मुझे मिला है। उसका प्रतीक मैंने आज देखा कि आज सुबह से अपने जजों के सिविल जज से लेकर, अपने एडीजे और डीजे, के ऐसे और इतने मैसेज आये हैं कि जिन्हें पढ़ के मैं अभिभूत हो गया। इससे लगता है कि उनके मन में जो श्रद्धा है वह आज के वाले दिन प्रकट हुई है। पद पर रहते हुए तो बहुत से लोग हो सकते हैं जो आप के लिए अच्छी बातें बोलें लेकिन दिल से कुछ और होते हैं। लेकिन आज के दिन जिन्होंने मैसेज किये, वास्तव में मेरा दिल भर आया। उन सब का मैं हृदय से आभारी हूँ। उन सब के सहयोग के बिना एक अच्छा न्यायाधीश बना भी नहीं जा सकता था। न्यायाधीश अच्छा तभी बनता है जब उसे अच्छी बार मिलती है और अच्छे सहयोगी न्यायाधीश मिलते हैं। अगर वरिष्ठ पद पर हैं तो कनिष्ठ न्यायाधीश अगर आपको अच्छे मिलते हैं तभी आपके व्यक्तित्व में निखार होगा और अच्छे न्यायाधीश बन सकते हैं। बार का अद्वितीय सहयोग मिला मुझे शुरू से ही। जबलपुर बार में तो काफी मेरी आत्मीयता भी रही। अच्छे–अच्छे सीनियर वकील थे। हम यहाँ जब 9 एडीजे हुआ करते थे मेरे पास आर्बिट्रेशन की कोर्ट थी, सिविल की कोर्ट थी। हमारे जो डिस्ट्रिक्ट जज थे उनकी अपार श्रद्धा थी, लोगों को बता के भेजते थे हम ऐसे कोर्ट में मामला भेज रहे हैं जहॉ आपको काम करने में

अपने आप महसूस होगा कि हम अच्छी कोर्ट में आये हैं, तो ये मेरे लिये गर्व की बात थी कि हमारे डिस्ट्रिक्ट जज इतना मुझ पर फेथ रखते थे और वास्तव में मैंने कोशिश की कि उनकी जो धारणा है वो खण्डित न हो सके। सभी जजों से कहते हैं कि कभी–कभी ऐसे मौके मिलते हैं जब आपको अपना नाम कमाने का भी मौका मिलता है। ऐसे मौके को कभी डर के ना गवांये कि बड़ा केस है, घातक केस है या खराब वकील का केस है, या शिकायती पक्षकार का केस है। हमें कभी नहीं डरना चाहिये। अगर आप अपने रास्ते पर चल रहे हैं, न्याय की भावना आपके मन में है, आप निष्पक्ष रूप से काम कर सकते हैं तो कोई आपका कुछ नहीं बिगाड़ सकता। अन्दर से वो भी खुश होते हैं जिनके खिलाफ फैसला होता है। कभी भी हमें डर के फैसला नहीं करना, समस्त न्यायाधीशगण से हमारा यही कहना है। एक तो मन में ये लालच छोड़ दें कि हमे कहाँ पोस्टिंग होना है। अगर आपने पोस्टिंग का भय मन से निकाल दिया तो निश्चित है कि आप निर्भीक होकर, निष्पक्ष होकर अच्छे से अच्छा काम करके दे सकते हैं। आपके मन में स्वार्थ आया तभी आपसे गडबड़ होती है।

यहाँ हाईकोर्ट में रहने के दौरान हमारा जो स्टाफ था–पी.ए., पी.एस., जमादार इन सब का भी अपूर्व सहयोग मिला मुझे। सभी लोग समर्पित भाव से काम करते थे। जो जिससे कहा बिल्कुल तुरंत उन्होंने काम किया। इन लोगों के सहयोग के बिना न तो हम अच्छे आर्डर लिख सकते थे, न तो अच्छा काम कर सकते थे। इन लोगों का भी परिश्रम भुलाया नही जा सकता।

डिस्ट्रिक्ट कोर्ट में भी मेरे साथ जो स्टेनो रहे हैं, क्लास–4 या क्लास–3 कर्मचारी रहे हैं उनकी भी भावनाओं को, उनके devotion को हम भुला नहीं सकते। उन सब के प्रति भी मैं आभारी हूँ। वो कम साधनों में, कम वेतन में, कम सुविधाओं में बेचारे काम करते हैं। हम न्यायाधीशगण को तो बहुत–सी सुविधायें होती हैं पर उन्हें उतनी सुविधायें नहीं होती हैं। इसके बाद भी वो समर्पित भाव से काम करते हैं। इसलिए उनकी सेवायें वास्तव में स्तुति योग्य होती हैं और मैंने तो उस माहौल को स्वयं भी देखा है इसलिए उन सब को मैं शुभकामनायें देता हूँ सब लोग अपने परिवार सहित प्रसन्न रहें। जो–जो कर्मचारी मेरे साथ रहे, जो न्यायाधीश मेरे साथ रहे या जिन सब का मेरे साथ प्रत्यक्ष या अप्रत्यक्ष रूप से सहयोग रहा, उन सब का मैं दिल से आभारी हूँ। और समस्त न्यायाधीशगण से कहता हूं कि ऐसे अच्छे कार्य करें। जैसे रमन पटेल साहब अभी बोल रहे थे, भोपाल अध्यक्ष, विजय कुमार चौधरी जी बोल रहे थे कि फ्रेश दिख रहे हैं, तो ये खासियत है, आप लोगों का सौजन्य है, आप लोगों का इतना सहयोग है, परिवार वालों का इतना सहयोग है कि अपने चेहरे पर थकान नहीं दिखती है। मैं 3 जिलों में डिस्ट्रिक्ट जज रहा हूं– दमोह, शिवपुरी और उज्जैन। मेरा हमेशा समस्त न्यायाधीशगण को बैठाकर ये कहना था कि न्यायाधीश की पहली क्वालिटी तो ये है कि सुबह साढ़े 10 बजे जितना फ्रेश दिख रहा उतना ही फ्रेश वो साढ़े 5 बजे दिखना चाहिये। यदि आप शाम को थके हुए दिख रहे हैं, आपको खीझ आ रही है, आप काम फेंकने के मूड में हैं, आपके चेहरे पर तनाव दिख रहा है तो उसके सिर्फ दो ही कारण ही कारण हो सकते हैं, या तो आपकी काम और लॉ पर पकड़ नहीं है या आपको स्वास्थ्यजन्य कोई तकलीफ है, शरीर के अंदर आपके कोई बीमारी पनप रही है तो आप दोनों चीजों को ध्यान रखें, आप स्वस्थ रहें, सब लोग अच्छी तरह से काम में ध्यान दें। टेंशन दिमाग में मत लें, काम तो आपको तब भी करना है पर टेंशन से वो काम बिगड़ने की संभावना रहती है। मैंने इस चीज को हमेशा फॉलो किया है। साढ़े 5 बजे भी जो हमारे साथ रहे, सबने देखा कि हम इसी मूड में दिखते हैं कि अभी फ्रेश होकर घर से आये हैं। ऐसा नहीं है कि काम में कोई कोताही है, काम अपनी जगह सब चलता है एक दूसरे के सहयोग से ही चलता है। हमें एक दूसरे की भावनायें भी समझना चाहिये।

मैं सब के अपूर्व सहयोग के लिए आभार प्रकट करता हूँ और सबसे अंत में मैं अपने माननीय मुख्य न्यायाधिपति महोदय का आभार प्रकट करना चाहूँगा कि इतने सहज व्यक्तित्व के चीफ जस्टिस हम लोगों को मिले जो कल्पना से परे होते हैं। आमतौर पर ऐसा होता नहीं है, पर साहब इतनी अच्छी

तरह से सब से जुडे हुए हैं, सब की पारिवारिक समस्याओं को समझते हैं और इन्होंने एक फैमिली जैसा वातावरण निर्मित किया है। सेम वहीं आचरण मैडम जी का भी है तो ये सराहनीय है, अनुकरणीय है। वरिष्ठ अधिकारी या फलों की डाली बड़ी हो तो उसमें झुकाव होना चाहिये, तने हुए पेड़ कभी स्थिर नहीं रह पाते, गिर जाते हैं। फलों की डाली झुकी हुई रहती है, वही स्तुति योग्य होती है, वही तारीफ योग्य होती है। माननीय सी.जे. साहब का मैं हृदय से आभारी हूँ कि उन्होंने इतना अच्छा अवसर हम लोगों को दिया इतना अच्छा माहौल दिया कि हम लोग और अच्छे से अच्छा काम करने की सब लोग सोचते हैं और आगे करेंगे उन्हें आश्वासन देते हैं कि बिल्कुल आपकी कसौटी पर सभी लोग खरे उतरेंगे।

बार वालों से तो मेरा विशेष आग्रह है कि मैं जब भी आऊंगा, भोपाल बार में भी आऊंगा, ग्वालियर बार में भी आऊंगा और जबलपुर बार के लिए तो हमेशा ही उपलब्ध हूं यहाँ। कभी भी आप मेरी जरूरत समझें किसी भी तरह की। अगर आपको लगता है कि हम आपके लिए कुछ सहायक हो सकते हैं, अपने कनिष्ठ अभिभाषकों के लिये सहायक हो सकते हैं, मैं सदैव तैयार हूँ। आप मेरे मोबाईल पर एक फोन करेंगे तो मै जरूर आऊंगा, इसके लिए किसी आमंत्रण की जरूरत नहीं है। ये हमारा खुद का काम है, हमारे सब छोटे भाई बहन हैं। काम में भी हमने यही समझा है कि जो भी जूनियर वकील आते हैं उनको प्रोत्साहन मिलना चाहिये। थोड़ा–थोड़ा मौका मिलेगा तभी उनकी झिझक टूटती है। अगर शुरू से आप झिड़क देंगे तो उनका व्यक्तित्व निखर नहीं पायेगा। मेरी सीनियर एडवोकेट्स से और सभी जजों से भी यही अपील है कि वकील की हमें थोड़ी सी कठिनाईयाँ समझना चाहिये। आज जज को कोई भी असुविधा आती है, कोई भी घर में काम आ गया, अर्जेंट वर्क आ गया तुरंत सी.एल., ई.एल., मेडीकल सब मिलती है। लेकिन वकील के पास ये नहीं होती। उसकी सी.एल., ई.एल., मेडीकल सब जजों के discretion पर डिपेंड रहती है। वो adjournment अगर मांगते हैं तो आप हमेशा मन में ये प्रीज्यूडाईस होकर न रहें कि वो हमेशा बदमाशी में माँग रहे हैं या टाल रहे हैं। दस परसेंट केस ऐसे हो सकते हैं, लेकिन अगर मान लो वकील साहब के घर में कोई बिटिया को देखने आया है, कोई मेहमान–गेस्ट आये हैं, कोई बीमार है तो उन्हें आप ही से सहयोग की अपेक्षा है। आप उसे एडजस्ट करोगे तो और अच्छा काम करके देगा। उसके मन में कृतज्ञता आयेगी आपके प्रति, आप जैसा बोओगे वैसा काटोगे। दोनों तरफ से होता है सम्मान, आप दोगे तो सम्मान मिलेगा। मुझे तो आज अच्छा अनुभव रहा, हमें बार बहुत अच्छी मिली, समस्त बार जहाँ जहाँ हम रहे। कई सीनियर वकीलों से, आज भी मैं हृदय से कहता हूं कि हमने वकीलों से बहुत कुछ सीखा है। शुरूआत क्लास–2 में हुई, वहाँ भी सुसनेर जैसी जगह में भी ऐसे अच्छे वकील थे। भिण्ड़ जैसी जगह में भी इतने अच्छे वकील साहब मिले कि जिन्होंने हमें पढ़ाया, उनसे सीखा हमने काफी कुछ। उन सबके प्रति, अब नाम लेना सबके संभव नहीं है लेकिन सब के प्रति मैं आभार व्यक्त करता हूँ। जिन–जिन ने मेरी इस यात्रा में सहयोग दिया, मेरे व्यक्तित्व निर्माण में सहयोग किया, जिन–जिन ने मेरे सहयोग को सराहा, मेरे काम को और मुझे एक अच्छा माहौल क्रियेट करने में मदद की, उन सबका मैं हृदय से आभारी हूं और अन्त में अपने सभी सदस्यों से न्यायाधीशगण सब से कह रहा हूं कि मेरे कार्य एवं व्यवहार से यदि कभी किसी को कोई मानसिक पीड़ा पहुंची हो तो बिल्कुल आप क्षमा करने का कष्ट करें। मेरा आशय कभी किसी का दिल दुखाने का नहीं रहा। हाँ काम की प्रक्रिया में हो सकता है कि कुछ लोगों को कष्ट होता है जो स्वाभाविक भी है लेकिन कृपया इसे क्षमा करें, दिल पे न लें। ये विदाई केवल न्यायिक सेवा से है, दिलों से न हो, ये मेरी अपील है आपसे।

नमस्कार

NOTES OF CASES SECTION

Short Note

****(8)***

Before Mr. Justice G.S. Ahluwalia

MCRC No. 15168/2021 (Gwalior) decided on 30 April, 2021

BUNDEL SINGH LODHI ...Applicant

Vs.

STATE OF M.P. …Non-applicant

A. Criminal Procedure Code, 1973 (2 of 1974), Section 438 and Penal Code (45 of 1860), Section 375, Fourthly & 376(2)(n) **– Held – In Hindu Law, marriages cannot be performed by execution of marriage affidavit – Applicant obtained affidavits of marriage and divorce thereby playing fraud on prosecutrix – Her consent was obtained which is hit by Section 375, *fourthly* IPC – No case of anticipatory bail – Application dismissed.**

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 438 एवं दण्ड संहिता (1860 का 45), धारा 375, चतुर्थ परिस्थिति व 376(2)(n) – अभिनिर्धारित – हिन्दू विधि में, विवाह शपथ–पत्र के निष्पादन द्वारा विवाह संपन्न नहीं किये जा सकते – आवेदक ने विवाह और विवाह–विच्छेद के शपथ–पत्र अभिप्राप्त किये और इस प्रकार से उसने अभियोक्त्री के साथ कपट किया है – उसकी सहमति अभिप्राप्त की गई थी जो कि भा.दं.सं. की धारा 375, की चतुर्थ परिस्थिति द्वारा प्रभावित है – अग्रिम जमानत का कोई प्रकरण नहीं – आवेदन खारिज।

B. Notaries Act (53 of 1952), Section 8 & 10 – Affidavit of Marriage & Divorce – Functions of Notary **– Held – Notaries have never been appointed as Marriage Officers, they cannot notarize an affidavit of marriage or divorce – Competent authority directed to initiate proceedings u/S 10 against the said Notary.**

ख. नोटरी अधिनियम (1952 का 53), धारा 8 व 10 – विवाह व विवाह विच्छेद का शपथ–पत्र – नोटरी के कार्य – अभिनिर्धारित – नोटरी को कभी भी विवाह अधिकारीगण के रूप में नियुक्त नहीं किया जाता है वे विवाह या विवाह विच्छेद के शपथपत्र को नोटेराइज नहीं कर सकते – सक्षम प्राधिकारी को उक्त नोटरी के विरूद्ध धारा 10 के अंतर्गत कार्यवाही आरंभ करने हेतु निदेशित किया गया।

Rajeev Sharma, for the applicant.
Alok Sharma, for the State.

NOTES OF CASES SECTION

Short Note
**(9)(DB)*

Before Mr. Justice Prakash Shrivastava & Mr. Justice Virender Singh

WP No. 9341/2021 (Jabalpur) decided on 9 June, 2021

CATHERIN JOSFIN THANGADURAI (MRS.) …Petitioner

Vs.

STATE OF M.P. …Respondent

***A. Education – Admission Process – Fixation of Age* – Held – Merely because in earlier advertisement, maximum age for admission was fixed at 48 years, it cannot be concluded that fixing maximum age of 45 years in subsequent advertisement is discriminatory – It is not in violation of any statutory provision – Petition dismissed.**

क. शिक्षा – प्रवेश प्रक्रिया – आयु नियत की जाना – अभिनिर्धारित – मात्र चूंकि पूर्वतर विज्ञापन में, प्रवेश के लिए अधिकतम आयु 48 वर्ष नियत की गई थी, यह निष्कर्षित नहीं किया जा सकता कि पश्चात्वर्ती विज्ञापन में 45 वर्ष की अधिकतम आयु नियत करना विभेदकारी है – यह किसी कानूनी उपबंध का उल्लंघन नहीं है – याचिका खारिज।

***B. Constitution – Article 226 – Admission Process – Fixation of Age – Scope of Interference* – Held – Fixation of minimum or maximum age for admission in a course or making a provision for relaxation thereof is essentially a policy matter and same is not open to interference unless it is pointed out that the same is in violation of any statutory provision or is *per se* arbitrary and discriminatory.**

ख. संविधान – अनुच्छेद 226 – प्रवेश प्रक्रिया – आयु नियत की जाना – हस्तक्षेप की व्याप्ति – अभिनिर्धारित – एक पाठ्यक्रम में प्रवेश हेतु न्यूनतम या अधिकतम आयु नियत करना या उसमें छूट का कोई उपबंध करना, आवश्यक रूप से एक नीतिगत मामला है तथा जब तक यह इंगित न किया जाए कि उक्त किसी कानूनी उपबंध के उल्लंघन में है या अपने आप में मनमाना और विभेदकारी है, इसमें हस्तक्षेप नहीं किया जा सकता।

***C. Autonomous Medical Collegiate Education Model Service Rules, M.P., 2018, Section 12(1)(iv) – Applicability* – Held – These rules operate in different field relating to grant of educational leave, thus, provision relating to fixing maximum age for admission in a course will not be regulated by these Rules.**

ग. स्वशासी चिकित्सा महाविद्यालयीन शैक्षणिक आदर्श सेवा नियम, म.प्र., 2018, नियम 12(1)(iv) – प्रयोज्यता – अभिनिर्धारित – ये नियम शैक्षणिक अवकाश प्रदान करने से संबंधित विभिन्न क्षेत्रों पर लागू होते हैं, अतः, एक पाठ्यक्रम में प्रवेश हेतु अधिकतम आयु नियत करने से संबंधित उपबंध इन नियमों से विनियमित नहीं होंगे।

The order of the Court was passed by : **PRAKASH SHRIVASTAVA, J.**

Cases referred :

(2001) 9 SCC 356, (2020) 13 SCC 201.

Anshuman Singh, for the petitioner.

Piyush Dharmadhikari, G.A. for the State.

I.L.R. [2021] M.P. 1221 (SC)
SUPREME COURT OF INDIA

Before Mr. Justice L. Nageswara Rao & Mr. Justice S. Ravindra Bhat

TC (Civil) No. 245/2020 decided on 21 May, 2021

LALIT KUMAR JAIN …Petitioner

Vs.

UNION OF INDIA & ors. …Respondents

(Along with WP (C) Nos. 117/2021, 1371/2020, 1420/2020, 1353/2020, 1276/2020, 1287/2020, 1364/2020, 1434/2020, 38/2021, 1419/2020, 1342/ 2020, 1348/2020, 1344/2020, 1343/2020, 62/2021, 32/2021, 106/2021, 97/ 2021, 142/2021, 135/2021, 131/2021, 122/2021, 138/2021, 146/2021, 207/2021, 160/ 2021, 168/2021, 205/2021, 209/2021, 194/2021, 187/2021, 180/2021, 182/ 2021, 203/2021, 220/2021, 229/2021, 217/2021, 221/2021, 225/2021, 239/2021, 240/ 2021, 228/2021, 224/2021, 234/2021, 260/2021, 262/2021, 283/2021 and TP (C) Nos. 1252/2020, 1285/2020, 1325/2020, 257/2020, 1202/2020, 1220/2020, 1203/ 2020, 1193/2020, 1196/2020, 1289/2020, 1323/2020, 1333/2020, 1292/ 2020, 1299/2020, 1331/2020, 1339/2020, 250/2020, 251/2020, 247/2020, 253/ 2020, 252/2020, 248/2020, 254/2020, 246/2020, 256/2020, 249/2020, 255/ 2020)

***A. Insolvency and Bankruptcy Code, 2016 (31 of 2016), Section 1(3) – Vires of Notification – Powers of Central Government – Personal Guarantor of Corporate Debtors* – Held – Notification is not an instance of legislative exercise, or amounting to impermissible and selective application of provisions of Code – No compulsion in Code that it should, at the same time, be made applicable to all individuals (including personal guarantors) or not at all – Notification *inter alia* makes provisions of Code applicable in respect of personal guarantors to corporate debtors as another such category of persons to whom Code has been extended – Notification issued u/S 1(3) was within the power granted by Parliament and in valid exercise of it and is thus not *ultra vires* – Petitions dismissed. (Paras 95 to 101)**

क. दिवाला और शोधन अक्षमता संहिता, 2016 (2016 का 31), धारा 1(3) – अधिसूचना के अधीन – केंद्र सरकार की शक्तियां – निगमित ऋणियों के निजी प्रत्याभूति–दाता – अभिनिर्धारित – अधिसूचना विधायी प्रयोग का एक उदाहरण नहीं है, अथवा संहिता के उपबंधों का अननुज्ञेय और चयनात्मक उपयोजन की कोटि में नहीं आता है – संहिता में कोई बाध्यता नहीं है कि इसे एक ही समय पर सभी व्यक्तियों पर (निजी प्रत्याभूति–दाता समेत) लागू किया जाना चाहिए अथवा बिल्कुल भी लागू नहीं किया जाना चाहिए – अधिसूचना अन्य बातों के साथ–साथ निगमित ऋणियों के निजी प्रत्याभूति–दाता व्यक्तियों की एक ऐसी अन्य श्रेणी जिन पर संहिता का विस्तार है, के रूप में संहिता के

उपबंधों को लागू करती है – धारा 1(3) के अंतर्गत जारी अधिसूचना संसद द्वारा प्रदान की गई शक्ति के भीतर थी तथा उसके विधिमान्य प्रयोग में थी एवं इसलिए अधिकारातीत नहीं है – याचिकाएं खारिज।

***B. Insolvency and Bankruptcy Code, 2016 (31 of 2016), Section 1(3) & 31 and Contract Act (9 of 1872), Sections 128, 133 & 140 – Approval of Resolution Plan – Liability of Personal Guarantor* – Held – Approval of resolution plan does not *ipso facto* discharge a personal guarantor (of a corporate debtor) of her or his liabilities under contract of guarantee – Release or discharge of principal borrower from debt owed by it to its creditors by an involuntary process i.e. by operation of law, or due to liquidation or insolvency proceedings, does not absolve the surety/guarantor of his or her liability – Petitions dismissed. (Paras 102, 104, 107, 108, 111 & 112)**

ख. दिवाला और शोधन अक्षमता संहिता, 2016 (2016 का 31), धारा 1(3) व 31 एवं संविदा अधिनियम (1872 का 9), धाराएँ 128, 133 व 140 – संकल्प योजना का अनुमोदन – निजी प्रत्याभूति–दाता का दायित्व – अभिनिर्धारित – संकल्प योजना का अनुमोदन स्वयंमेव ही एक निजी प्रत्यभूति–दाता (निगमित ऋणी के) को प्रत्याभूति की संविदा के अंतर्गत उसके दायित्वों से उन्मुक्त नहीं करता – मूल उधार लेने वाले की एक अस्वैच्छिक प्रक्रिया द्वारा अर्थात् विधि के प्रवर्तन द्वारा अथवा समापन या दिवालियापन की कार्यवाहियों के कारण उसके लेनदारों को देय ऋण से निर्मुक्ति या उन्मोचन, प्रतिभू/प्रत्याभूति–दाता को उसके दायित्व से मुक्त नहीं करती – याचिकाएं खारिज।

Cases referred:

(2018) 17 SCC 394, (2019) 4 SCC 17, 1951 SCR 747, (1998) 1 SCC 318, (2006) 12 SCC 753, 1878 (3) App. Cases 889, 1951 2 SCR 51, 1957 SCR 605, 1960 (2) SCR 671, (2020) 15 SCC 1, (1949-50) 11 FCR 595, 2019 SCC Online SC 1478, (2012) 171 Comp Cas 94, 2019 SCC Online NCLAT 542, (1980) 1 SCC 499, (1964) 6 SCR 913, 1954 SCR 842, (2020) 13 SCC 308, (2008) 10 SCC 368, (1988) 2 SCC 433, (2003) 8 SCC 369, AIR 1978 Mad. 134, AIR 1969 (1) SCR 620, AIR 1992 SC 1740, (2009) 9 SCC 478, 1982 (3) SCC 358, (2002) 5 SCC 80, 2019 SC Online Cal 7288, 2016 SCC Online Kar 5991, 2012 (1) All ER 883, (1976) 2 SCC 953, AIR 1959 SC 909, (1980) 2 SCC 295, (1961) 3 SCR 698, (1996) 6 SCC 634, (1955) 1 SCR 735, (1964) 1 SCR 371, AIR 1977 SC 965, (1994) 3 SCC 440, (2019) 2 SCC 1, (1982) 1 SCC 125, (2016) 1 SCC 444, (2002) 7 SCC 657, 1989 (1) SCC 561, 1987 (3) SCC 82, SO 1817 (E), 2020 Vide S.O. 1123 (E), (1969) 1 SCC 255, (2020) 13 SCC 208, (1996) 2 SCC 498, 2019 SCC Online SC 103, (2020) 8 SCC 531, (2002) 5 SCC 54.

J U D G M E N T

The Judgment of the Court was delivered by :

S. RAVINDRA BHAT, J. :- This judgment will dispose of common questions of

law, which arise in various proceedings preferred under Article 32 of the Constitution of India, as well as transferred cases under Article 139A; those causes were transferred to the file of this court, from various High Courts[1], as they involved interpretation of common questions of law, in relation to provisions of the Insolvency and Bankruptcy Code, 2016 (hereafter "the Code").

I *The Petitions and Common Grievances*

2. The common question which arises in all these cases concerns the *vires* and validity of a notification dated 15.11.2019 issued by the Central Government[2] (hereafter called "the impugned notification"). Other reliefs too have been claimed concerning the validity of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019 issued on 15.11.2019. Likewise, the validity of regulations challenged by the Insolvency and Bankruptcy Board of India on 20.11.2019 are also the subject matter of challenge. However, during the course of submissions, learned counsel for the parties stated that the challenge would be confined to the impugned notification.

3. All writ petitioners before the High Courts, arrayed as respondents in the transferred cases before this Court, as well as the petitioners under Article 32 claim to be aggrieved by the impugned notification. At some stage or the other, these petitioners (compendiously termed as "the writ petitioners") had furnished personal guarantees to banks and financial institutions which led to release of advances to various companies which they (the petitioners) were associated with as directors, promoters or in some instances, as chairman or managing directors. In many cases, the personal guarantees furnished by the writ petitioners were invoked, and proceedings are pending against companies which they are or were associated with, and the advances for which they furnished bank guarantees. In several cases, recovery proceedings and later insolvency proceedings were initiated. The insolvency proceedings are at different stages and the resolution plans are at the stage of finalization. In a few cases, the resolution plans have not yet been approved by the adjudicating authority and in some cases, the approvals granted are subject to attack before the appellate tribunal.

4. All the writ petitioners challenged the impugned notification as having been issued in excess of the authority conferred upon the Union of India (through the Ministry of Corporate Affairs) which has been arrayed in all these proceedings as parties. The petitioners contend that the power conferred upon the Union under Section 1(3) of the Insolvency and Bankruptcy Code, 2016 (hereafter referred to as "the Code") could not have been resorted to in the manner as to extend the

1. Madhya Pradesh, Telengana, Delhi, etc.
2. S.O. 4126 (E) issued by the Ministry of Corporation Affairs, Central Government

provisions of the Code only as far as they relate to personal guarantors of corporate debtors. The impugned notification brought into force Section 2(e), Section 78 (except with regard to fresh start process), Sections 79, 94-187 (both inclusive); Section 239(2)(g), (h) & (i); Section 239(2)(m) to (zc); Section 239 (2)(zn) to (zs) and Section 249.

5. After publication of the impugned notification, many petitioners were served with demand notices proposing to initiate insolvency proceedings under the Code. These demand notices were based on various counts, including that recovery proceedings were initiated after invocation of the guarantees. This led to initiation of insolvency resolution process under Part-III of the Code against some of the petitioners. The main argument advanced in all these proceedings on behalf of the writ petitioners is that the impugned notification is an exercise of excessive delegation. It is contended that the Central Government has no authority - legislative or statutory - to impose conditions on the enforcement of the Code. It is further contended as a corollary, that the enforcement of Sections 78, 79, 94-187 etc. in terms of the impugned notification of the Code only in relation to personal guarantors is *ultra vires* the powers granted to the Central Government.

6. It is argued that in terms of the proviso to Section 1(3) of the Code, Parliament delegated the power to enforce different provisions of the Code at different points in time to the Central Government. Section1(3) reads as under:

> *"It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint:*
>
> *Provided that different dates may be appointed for different provisions of this Code and any reference in any such provision to the commencement of this Code shall be construed a reference the commencement of that provision."*

7. The petitioners argue that the power delegated under Section 1(3) is only as regards the point(s) in time when different provisions of the Code can be brought into effect and that it does not permit the Central Government to notify parts of provisions of the Code, or to limit the application of the provisions to certain categories of persons. The impugned notification, however, notified various provisions of the Code *only* in so far as *they relate to personal guarantors to corporate debtors.* It is therefore, *ultra vires* the proviso to Section 1(3) of the Code.

8. It is argued that the provisions of the Code brought into effect by the impugned notification are not in severable, as they do not specifically or separately deal with or govern insolvency proceedings against personal guarantors to corporate debtors. The provisions only deal with individuals and partnership firms. It is urged that from a plain reading of the provisions, it is not possible to carve out a limited application of the provisions only in relation to

personal guarantors to corporate debtors. The Central Government's move to enforce Sections 78, 79, 94 to 187, etc. only in relation to personal guarantors to corporate debtors is an exercise of legislative power wholly impermissible in law and amounts to an unconstitutional usurpation of legislative power by the executive. The petitioners argue that the impugned notification, to the extent it brings into force Section 2 (e) of the Code with effect from 01.12.2019 is hit by non-application of mind. It is argued that Section 2(e) of the Code, as amended by Act 8 of 2018, came into force with retrospective effect from 23.11.2017. This is duly noted by this court in the case of *State Bank of India v. V. Ramakrishnan*[3], which observed that:

> *"Though the original Section 2(e) did not come into force at all, the substituted Section 2(e) has come into force w.e.f. 23.11.2017."*

It is urged that this court should, therefore, set aside the impugned notification.

9. The petitioners also attack the impugned notification on the ground that it suffers from non-application of mind, because the Central Government failed to bring into effect Section 243 of the Code, which would have repealed the Presidency Towns Insolvency Act, 1909 ("PTI Act" hereafter) and the Provincial Insolvency Act, 1920 ("PIA" hereafter). Prior to issuance of the impugned notification, insolvency proceedings against an individual could be initiated only in terms of the said two Acts. After enactment of the Code, insolvency proceedings against personal guarantors to corporate debtors would lie before the Adjudicating Authority, in terms of Section 60 of the Code, although they would be governed by the said two Acts. With the enforcement of the impugned provisions, rules and regulations, insolvency proceedings can now be initiated against personal guarantors to corporate debtors under Part III of the Code, and also under the PTI Act and the PIA. Since Section 243 of the Code has not been brought into force, the petitioners contend that the impugned notification has the illogical effect of creating two self-contradictory legal regimes for in solvency proceedings against personal guarantors to corporate debtors.

10. It is urged that the impugned notification is *ultra vires* the provisions of the Code in so far as it notifies provisions of Part III of the Code only in respect of personal guarantors to corporate debtors. Part III of the Code governs " *Insolvency Resolution and Bankruptcy for Individuals and Partnership Firms".* Also, Section 2(g) of the Code defines an individual to mean " *individuals, other than persons referred to in clause (e)".* Section 2 (e) relates to personal guarantors to corporate debtors. A joint reading of Section 2(e) with Section 2(g) and Part III of the Code shows that personal guarantors to corporate debtors are not covered by

3. (2018) 17 SCC 394

Part II, which only deals with individuals and partnership firms, and personal guarantors to corporate debtors stand specifically excluded from the definition of individuals. The petitioners also rely on Section 95 of the Code[4], which permits a creditor to invoke insolvency resolution process against an individual only in relation to a partnership debt.

11. Part III of the Code does not contain any provision permitting initiation of the insolvency resolution process (hereafter "IRP") against personal guarantors to corporate debtors. The impugned notification which provides to the contrary, is *ultra vires*. It is further contended that provisions of the Code brought into effect by the impugned notification [Clause (e) of Section 2, Section 78 (except with regard to fresh start process), Section 79, Section 94 to 187 (both inclusive), Clause (g) to Clause (l) of sub-section (2) of Section 239, Clause (m) to (zc) of sub-section (2) of Section 239, Clause (zn) to Clause (zs) of Sub-section (2) of Section 239 and Section 249] when enforced only in respect of personal guarantors to corporate debtors, are manifestly arbitrary; they are also discriminatory because:

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*4."**95. Application by creditor to initiate insolvency resolution process.***

(1) A creditor may apply either by himself, or jointly with other creditors, or through resolution professional to the Adjudicating Authority for initiating an insolvency resolution process under this section by submitting an application.

(2) A creditor may apply under sub-section (1) in relation to any partnership debt owed to him for initiating an insolvency resolution process against

(a) anyone or more partners of the firm; or

(b) the firm.

(c)

(3) Where an application has been made against one partner in a firm, any other application against another partner in the same firm shall be presented in or transferred to the Adjudicating Authority in which the first mentioned application is pending for adjudication and such Adjudicating Authority may give such directions for consolidating the proceedings under the applications as it thinks just.

(4) An application under sub-section (1)shall be accompanied with details and documents relating to:

(a) the debts owed by the debtor to the creditor or creditors submitting the application for insolvency resolution process as on the date of application;

(b) the failure by the debtor to pay the debt within a period of fourteen days of the service of the notice of demand; and

(c) relevant evidence of such default or non-repayment of debt.

(5) The creditor shall also provide a copy of the application made under sub-section (1) to the debtor.

(6) The application referred to in sub-section (1) shall be in such form and manner and accompanied by such fee as may be prescribed.

(7) The details and documents required to be submitted under Sub-section (4) shall be such as may be specified."

(i) There is no intelligible differentia or rational basis on which personal guarantors to corporate debtors have been singled out for being covered by the impugned provisions, particularly when the provisions of the Code do not separately apply to one sub-category of individuals, i.e., personal guarantors to corporate debtors. Rather, Part III of the Code does not apply to personal guarantors to corporate debtors at all.

(ii) the provisions of Part III of the Code, which are partly brought into effect by the impugned notification, provide a single procedure for the insolvency resolution process of a personal guarantor, irrespective of whether the creditor is a financial creditor or an operational creditor. Treating financial creditors and operational creditors on an equal footing in Part III of the Code is in contrast to Part II of the Code, which provides different sets of procedures for different classes of creditors.

12. The petitioners rely on *Swiss Ribbons (P.) Ltd. v. Union of India*[5], where this court upheld the difference in procedure for operational creditors and financial creditors on the basis that there are fundamental differences in the nature of loan agreements with financial creditors, from contracts with operational creditors for supplying goods and services. Financial creditors generally lend finance on a term loan or for working capital that enables the corporate debtor to either set up and/or operate its business. On the other hand, contracts with operational creditors are relatable to supply of goods and services in the operation of business. Financial contracts generally involve large sums of money.

13. The petitioners argue that the act of clubbing financial creditors and operational creditors in relation to the procedure for insolvency resolution of personal guarantors to corporate debtors amounts to treating unequals equally and amounts to collapsing the classification that is carefully created by Parliament in Part II of the Code. They also argue that the application of Sections 96 and 101 of the Code by the impugned notification results in the illogical consequence of staying insolvency proceedings against the corporate debtor, when insolvency proceedings are initiated against the personal guarantor. It is pointed out that a combined reading of Sections 99 and100 of the Code shows that the resolution professional, while recommending the approval/rejection of the application, and the Adjudicating Authority while accepting it, do not have to consider whether the underlying debt owed by the corporate debtor to the creditor stands discharged or extinguished.

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5. (2019) 4 SCC 17.

14. It is argued that the liability of a guarantor is co-extensive with that of the principal debtor (Section 128 of Indian Contract Act, 1872). Further, it is settled law that upon conclusion of insolvency proceedings against a principal debtor, the same amounts to extinction of all claims against the principal debtor, except to the extent admitted in the insolvency resolution process itself. This is clear from Section 31 of the Code, which makes the resolution plan approved by the Adjudicating Authority binding on the corporate debtor, its creditors and guarantors. The petitioners also contend that the impugned notification allows creditors to unjustly enrich themselves by claiming in the insolvency process of the guarantor without accounting for the amount realized by them in the corporate insolvency resolution process of the corporate debtor under Part II of the Code. It is therefore, untenable.

15. It is argued that the impugned notification has resulted in clothing authorities, the Committee of Creditors (CoC) and Resolution Professionals (RPs) with powers beyond the enacted statute. They have defined the term "guarantor" as a debtor who is a personal guarantor to a corporate debtor and in respect of whom guarantee has been invoked by the creditor and remains unpaid in full or part. The parent statute does not define "guarantor". It is pointed out that though Section 239(1) of the Code empowers the Insolvency Board to make rules to carry out the provisions of the Code, those rules cannot define a term that is not defined in the Code, as it is likely to result in class legislation for one category of guarantors, i.e., personal guarantors to corporate debtors. The impugned notification is therefore *ultra vires* the Code.

II *Contentions of the Petitioners*

16. Mr. Harish Salve, learned senior counsel appearing on behalf of the petitioners, urged that Section 1(3) of the Code authorizes or empowers the Central Government only to bring provisions of the Code into force on such date by a notification in the Official Gazette. The proviso to this Section categorically provides that different dates may be appointed for bringing different provisions into force. Section 1(3) is an instance of 'conditional legislation', where the legislature has enacted the law, and the only function assigned to the executive is to bring the law into operation at such time as it may decide. Such legislation is termed as conditional, because the legislature has itself made the law in all its completeness as regards "place, person, laws, powers", leaving nothing for an outside authority to legislate on. Therefore, no element of legislation was left open to the government, and the only function assigned to it being to bring the law into operation at such time as it might decide. The central government has however, by the impugned notification exceeded the power conferred upon it, and has in effect modified the provisions of Part III of the Code, which it was not authorized to do by Parliament. Assuming that such powers were present under

Section 1(3) of the Code, it would amount to an unconstitutional delegation of power. It is argued that this court has repeatedly held that in conditional legislation, the law is already complete in all respects, and as such the outside agency i.e., the government, while exercising power under such a provision, cannot legislate or in any manner add or alter the effect of the law already laid down. Reliance is placed on *Delhi Laws Act, 1912, In re v. Part 'C' States (Laws) Act, 1950*[6]*, State of Tamil Nadu v. K. Sabanayagam*[7] and *Vasu Dev Singh & Ors. v. Union of India & Ors.*[8] The effect of the impugned notification translates into going beyond the power to notify a date when the Code or its provisions should come into force.

17. It is argued that Part III of the Code does not create any distinction between an individual and a personal guarantor to a corporate debtor. Part III provides for *"Insolvency Resolution and Bankruptcy for Individuals and Partnership Firms",* and thereafter refers to these two categories of persons simply as debtors. The impugned notification in substance modifies the text of the actual sections of Part III, despite the absence of any element of legislation/ legislative authority having been conferred upon the Central Government. The words *"only in so far as they relate to personal guarantors to corporate debtors"* forming a part of the impugned notification are attempted to be added like a rider to each of the sections mentioned in the impugned notification, clearly rendering such an exercise completely outside the scope and powers conferred under Section 1(3) of the Code.

18. It was argued further by Mr. Salve, that the impugned notification is ex facie in violation of the principles of delegation, inasmuch as the Central Government has effected a classification of individuals- and sought to ensure that insolvency issues of one category of individuals, i.e. personal guarantors to corporate debtors, are considered along with insolvency proceedings of corporate debtors. The distinction between Part II and Part III, the forum and the remedies available to creditors of individuals is no longer available to this category, i.e. personal guarantors, whose insolvency issues are to be now considered along with insolvency process of corporate debtors. It is argued that the power of classification is legislative and that the impugned notification is an instance of the executive acting beyond its jurisdiction. Mr. Salve relied upon observations made by the Privy Council in *R v Burah*[9] that laws cannot be said to empower *general legislative authority,* on the executive, or to exercise power not granted to it under the parent Act.

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6. 1951 SCR 747 at paras 39, 42 and 47.
7. (1998) 1 SCC 318 at para 14.
8. (2006) 12 SCC 753 at para 16.
9. 1878 (3) App. Cases 889.

19. It was argued that the Central Government mistakenly assumed that inclusion of personal guarantors in the definition provisions by amending Section 2 and inserting section 2(e) automatically results in amendment of section 1(3) of the Code. Section 2 provides that the Code applies to the entities enumerated in the various sub-sections. The amendment of 2018 added that the Code would apply to personal guarantors to corporate debtors. Consequently, when provisions of the Code are brought into force, they would apply to personal guarantors to corporate debtors. The application of a provision depends upon its plain language, and not upon the enumeration of entities to whom the Code applies. The provisions which have been now brought into force by virtue of the impugned notification do not limit themselves to personal guarantors to corporate debtors, but apply generally to individuals and other entities. However, to the extent that it limits their application to personal guarantors alone, through the impugned notification, it is illegal and beyond the powers conferred by Parliament. It was urged that conditional legislation should not be confused with delegation, which is a broader concept allowing the executive to frame rules and flesh out gaps within the broad legislative policy. That exercise is *legislative.* However, conditional legislation only permits the executive government the power to designate the time when the law is to be brought into force, or place or places where it operates, but not which parts of an enactment can apply to which class of persons, without any substantive legislative provision or guidance. The impugned notification has the effect of amending the statutory scheme in the manner it applies them to personal guarantors and is therefore, *ultra vires* the Code.

20. Mr. P.S. Narasimha, learned senior counsel, who argued next, contended further that in several judgments, this court has ruled that conditional legislation is one where a legislative exercise is complete in itself, and the only power and/or function to be delegated to the authority (in this case the Central Government), is to apply the law to a specific area or to determine the time and manner of carrying into effect such law. He cited the decision in *State of Bombay v. Narothamdas Jethabhai*[10] in which this court observed as follows:

> *".....The section does not empower the Provincial Government to enact a law as regards the pecuniary jurisdiction of the new court and it can in no sense be held to be legislation conferring legislative power on the Provincial Government"*

Mr. Narasimha also cited *Sardar Inder Singh v. State of Rajasthan*[11] and *Hamdard Dawakhana v. Union of India*[12] and urged that when legislation is complete, and

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10. *State of Bombay v. Narothamdas Jethabai1951 2 SCR51, at para 37.*
11. 1957 SCR 605 at para 10.
12. 1960 (2) SCR 671 at para 28.

the executive is left to *apply the law to an area* or determine the time and manner of carrying it out, that is the only permissible task. However, the executive cannot perform its task outside the power granted to it, choosing the subjects to which the law is to apply.

21. Mr. Narasimha referred to the previous notifications, bringing into force provisions of the Code on different dates. He submitted that none of them brought into force some provisions for a limited sub-category, or a class of individuals or entities. He referred to one notification dated 30.11.2016 that brought into force certain provisions of Part II of the Code, within which section 2(a) to 2(d) were also notified. However, it was submitted that irrespective of the notification, Part II was brought into force and it applied to every entity contemplated to be in its coverage. Under the notification of 30.11.2016, the inclusion of the four sub categories described in section 2(a) to 2(d) became irrelevant, and Part II of the Code applied uniformly to all categories of persons intended to be covered by it by virtue of the definition of a corporate person under Section 3(7) of the Act. The impugned notification however applies to only a sub-category, namely, personal guarantors to corporate debtors, among a homogeneous class of individuals; therefore, it is an unprecedented exercise of conditional legislation power, clearly *ultra vires* the parent enactment.

22. It was urged that even if it were assumed that the Central Government had the power to issue the impugned notification and bring Part III in force only with respect to personal guarantors to corporate debtors, it is *ultra vires* the objects and purpose of the Code. Reliance was placed on the Statement of Objects and Reasons of the Insolvency and Bankruptcy Code (Amendment) Bill, 2017 in this regard.[13]

23. Learned counsel emphasized that this court has repeatedly clarified that the object of the Code is to ensure a company's revival and continuation by protecting from its management and, as far as feasible, to save it from liquidation, thereby maximizing its value. The Code is a beneficial legislation which puts the corporate debtor back on its feet, not being a mere recovery legislation for creditors. Observations in *Swiss Ribbons Pvt. Ltd. and Anr. v. Union of India & Ors.*[14] and *Babulal Vardharji Gurjar v. Veer Gurjar Aluminum Industries Pvt. Ltd. & Anr.* [15] are relied upon for this purpose.

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13. " The Code prescribes for the insolvency resolution and for individuals and partnership firms, which are proposed to be implemented in a phased manner on account of the wider impact of these provisions. In the first phase, the provisions would be extended to personal guarantors of corporate debtors to further strengthen the corporate insolvency resolution process and a clear enabling provision for the purpose has been provided in the Bill."

14. Swiss Ribbons Pvt. Ltd. and Anr. vs. Union of India &Ors., (2019) 4 SCC 17, at para 28; Babulal Vardharji Gurjar v. Veer Gurjar Aluminum Industries Pvt. Ltd. and Anr. (2020) 15 SCC 1, at paras 21, 21.1.

15. (2020) 15 SCC 1 at paras 21, 21.1.

24. It was submitted that Parliament undoubtedly amended the Code in 2018, defining "personal guarantor" as a species of individuals to whom the law applied. However, the manner of its application continued to be the same, i.e. to all individuals. Therefore, the resort to conditional legislation power under Section 1(3) to bring into force certain provisions *selectively, in respect of some individuals, i.e. personal guarantors* and not all individuals, is *ultra vires,* and contrary to the power conferred on Parliament. Illustratively, it is pointed out that the application of the law itself is limited- for instance in the case of Section 78 which applies to fresh start of insolvency proceedings- the Code is limited then, in its application to one sub category of individuals (all of whom are covered by the chapter, which is opened by Section 78) i.e., personal guarantors. This selective application is naked classification exercised by the government conferred with conditional legislative powers.

25. It was next argued that Part III of the Code relating to individuals and partnership firms are outlined in various sections of the Act. Of these chapters, I, III to VII, all of which have been notified are operative components of the Code, relatable to individuals and partnership firms. They can certainly be brought into force independently, whenever the executive is of the opinion that it is appropriate to do so. However, Section 2 cannot be used for this purpose, certainly not for bifurcating individuals and partnership firms into subcategories and then to apply Part II provisions exclusively to personal guarantors. It is argued that Section 2 of the Code is not an operative component, but more merely a descriptive component. Counsel argued that the nature of Section 2 is similar to an amendable descriptive component. Elaborating, it was submitted that an amendable descriptive component of an enactment is one that describes the whole or some part of the Act, and was subject to amendment when the Bill was introduced in Parliament in 2017. Section 2, in other words, is descriptive and merely declares the subjects to which the code would apply. It certainly cannot clothe the executive with power to apply the code selectively at its discretion to different subjects.

26. Mr. Sudipto Sarkar, learned senior counsel, adopted the arguments of Mr. Salve. He also relied on the decision of the Federal Court in *Jatindra Nath Gupta v. Province of Bihar*[16], especially the following passage:

> *"The proviso contains the power to extend the Act for a period of one year with modifications, if any. It is one power and not two severable powers. The fact that no modifications were made in the Act when the power was exercised cannot help in determining the true nature of the power. The power to extend the operation of the Act beyond the period mentioned in the Act*

16.(1949-50) 11 FCR 595.

prima facie is a legislative power. It is for the Legislature to state how long a particular legislation will be in operation. That cannot be left to the discretion of some other body. The power to modify an Act of a Legislature, without any limitation on the extent of the power of modification, is undoubtedly a legislative power. It is not a power confined to apply the Act subject to any restriction, limitation or proviso (which is the same as an exception) only."

27. The other counsel, viz. Mr. Rohit Sharma, Ms. Pruthi Gupta, Mr. Rishi Raj Sharma, and Mr. Manish Paliwal too, argued for other petitioners. Pointing to the distinction between provisions in Part II of the Code and those in Part III, it is argued that the procedure for initiation of insolvency resolution against personal guarantors to corporate debtors is the same as in relation to other individuals. The only difference is that the forum to decide this would be the National Company Law Tribunal (NCLT). In all other respects, in terms of Part III, the recovery process for debt realization is identical for personal guarantors to corporate debtors, as in the case of individuals. By separating the process in an artificial manner, and subjecting the insolvency process of personal guarantors who are also individuals, to adjudication by the NCLT, and furthermore, virtually directing that the two proceedings, i.e. in relation to the corporate debtor on the one hand, and the personal guarantor, on the other hand, to be clubbed, is, in effect, a legislative exercise, unsupported by any express provision of the Code. It is also submitted that the object of the Code is to ensure a revival of corporate debtors. On the other hand, if an application against a personal guarantor is admitted, a moratorium under Section 101 of the Code automatically applies. This results in stay of all pending proceedings or legal claims in respect of all debts. Since the debt of the personal guarantor is the same as the debt of the corporate debtor, all pending proceedings, including the corporate insolvency resolution plan initiated against a corporate debtor would be stayed on admission of an application for initiation of the resolution plan against a personal guarantor. This would in fact, amount to treating unequals as equals by a sheer legislative fiat. In other words, argued counsel, the moratorium which would operate in respect of pending resolution plans of corporate debtors, upon the initiation of an application against personal guarantors puts them on the same level, which the statute itself does not permit.

28. It is submitted that by virtue of Section 140 of the Indian Contract Act, a guarantor upon payment or performance of all that he is liable for, is invested with all rights which the creditor had enjoyed against the principal debtor. This provision enables the guarantor to exercise all rights, which the creditor had against the principal debtor, which would include the right to file a resolution plan against the corporate debtor after conclusion of the latter's resolution process.

However, by virtue of Section 29A of the Code, promoters of corporate debtors who in most cases are personal guarantors, are barred from filing a resolution plan in the corporate resolution process of the corporate debtor. This places them at a distinct disadvantage as compared with individuals who are not personal guarantors. In this regard, the inability of such personal guarantors to recover amounts from the corporate debtor in the insolvency process, as well as at a later stage, if necessary, to initiate insolvency process, has been affected by virtue of the impugned notification. It was submitted that this court, in *Committee of Creditors of Essar Steel India Ltd. v. Satish Kumar Gupta*[17] , ruled that

> *"Section 31 (1) of the Code makes it clear that once a resolution plan is approved by the Committee of Creditors it shall be binding on all stakeholders ... This is for the reason that this provision ensures that the successful resolution applicant starts running the business of the corporate debtor on a fresh slate... All claims must be submitted to and decided by the resolution professional so that a prospective resolution applicant knows exactly what has to be paid in order that it may then take over and run the business of the corporate debtor. This the successful resolution applicant does on a fresh slate* ".

Counsel therefore argued that an approved resolution plan in respect of a corporate debtor amounts to extinction of all outstanding claims against that debtor; consequently, the liability of the guarantor, which is co-extensive with that of the corporate debtor, would also be extinguished.

29. It was further argued that the resolution plans, duly approved by the Committee of Creditors would propose to extinguish and discharge the liability of the principal borrower to the financial creditor. Therefore, the petitioners' liability as guarantors under the personal guarantee would stand completely discharged. Reliance is placed on the judgment of the Punjab and Haryana High Court in *Kundanlal Dabriwala v. Haryana Financial Corporation*[18] , which ruled that:

> *"on a fair reading of the provisions of the Contract Act, I am inclined to hold that as the liability of the surety is co-extensive with that of the principal debtor, if the latter's liability is scaled down in an amended decree, or otherwise extinguished in whole or in part by statute, the liability of the surety also is pro tanto reduced or extinguished."*

30. Reliance was also placed on the judgment of the National Company Law Appellate Tribunal (NCLAT) in *Dr. Vishnu Kumar Agarwal v. Piramal*

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17. 2019 SCC Online SC 1478.
18. (2012) 171 Comp Cas 94.

Enterprises Ltd[19], where it was held that *"for the same set of debts, claim cannot be filed by same financial creditor in two separate corporate insolvency resolution processes."*

III *Arguments of the Union and other Respondents*

31. Arguing for the Union of India, the Attorney General Mr. K.K. Venugopal submitted that the Code was amended in 2018. It substituted the pre-amended definition in Section 2(e) by introducing three different classes of debtors, which were personal guarantors to corporate debtors [Section 2(e)], partnership firms and proprietorship firms [Section 2 (f)] and individuals [Section 2(g)]. The purpose of splitting the provision and defining three separate categories of debtors was to cover three separate sets of entities. Parliament wanted to deal with personal guarantors [under Section 2(e)], differently from partnership firms and proprietorship firms [under section 2(f),] and individuals other than persons referred to in Section 2 (e) [under Section 2(g)]. The intention was to clearly distinguish personal guarantors to corporate debtors from other individuals. This was because Section 60 of the Code which deals with the adjudicating authority for corporate debtors too was partially amended in 2018. The amendment to Section 60(2) added that it applied to insolvency proceedings or liquidation/ bankruptcy of a corporate guarantor or personal guarantor as the case may be, to a corporate debtor. The result of the amendment is that when a corporate debtor faces insolvency proceedings, insolvency of its corporate guarantor too can be triggered. Likewise, *a personal guarantor to a corporate debtor, facing insolvency,* can be subjected to insolvency proceedings. All this is to be resolved and decided by the NCLT. In other words, the amendment by Section 60(2) too achieved a unified adjudication through the same forum for resolution of issues and disputes concerning corporate resolution processes, as well as bankruptcy and insolvency processes in relation to personal guarantors to corporate debtors.

32. It was argued that Parliament felt compelled to separate personal guarantors from other individuals such as partnership firms, proprietorships and individuals. It was felt that if this separation, achieved through the amendment of 2018 were not realized, the insolvency resolution process of corporate debtors would have to be dealt with separately and independently of its promoters, managing directors, and directors who had furnished their personal guarantees to secure debts of corporate debtors. If insolvency resolution proceedings against corporate debtors were continued without this amendment, and without the unification, (of the adjudicatory body) on the default of the corporate debtor to a debt owed to a financial creditor, the entire machinery of the Code relating to the

19. 2019 SCC Online NCLAT 542.

corporate debtor would work itself out, to the exclusion of personal guarantors. This presented a peculiar problem, in that the resolution applicant, wishing to bid for takeover of the corporate debtor and operate it as a running concern would be faced with a huge liability, and the personal guarantor in most cases would be one of the individuals primarily responsible for the insolvency of the company, but would be out of the resolution process and have to be separately proceeded with. What therefore, has been effectuated by creating an independent provision, by separating personal guarantors of corporate debtors and by the same amendment, placing the personal guarantor's debt before one tribunal/forum namely the NCLT, is that such a forum would apply the procedure in Part III, in regard to personal guarantors for providing repayment of the entire debt for which the guarantee is furnished in the first place. If that debt is not repaid in the Part III, the personal guarantor would not stand discharged, but on the other hand, would himself be forced into bankruptcy proceedings.

33. It was submitted that though the procedure to be adopted by the NCLT and rules of insolvency (in relation to personal guarantors, under Part III of the Code) might be different from that relating to corporate debtors, unifying both processes under one forum enables the adjudicating body to have a clear vision of the extent of debt of the corporate debtor, its available assets and resources, as also the assets and resources of the personal guarantor. This would not have been viable, had the insolvency resolution process of the personal guarantor continued under Part III, before another body. The amendment, and the impugned notification would ensure a more optimal resolution process, as resolution applicants wishing to take over the management of corporate debtors, would ultimately find the process of taking over more attractive; besides, there will be more competition in regard to the bids proposed, and the total debt servicing of the corporate debtor might be lowered if the personal guarantor's assets are also taken into account to mitigate the corporate debtor's liabilities. The personal guarantor in such cases, who provides assets which have been charged against the amount advanced to his company would most probably not permit himself to be driven to bankruptcy, and would therefore, be more likely to arrange for payment of monies due from him to obtain a discharge by payment of the amount outstanding to the bank or other financial creditor. In some cases, the creditor bank may be even prepared to take a haircut or forego the interest amounts so as to enable an equitable settlement of the corporate debt, as well as that of the personal guarantor. This would result in maximizing the value of assets and promoting entrepreneurship, which is one of the main purposes of the Code.

34. The learned Attorney General submitted that the expression "provision" has been defined in Black's Law Dictionary (10th edition at page 1420) as, *"a*

clause in a statute, contract or other legal instrument"/ He also relied upon the judgment in *Chettian Veettil Amman v. Taluk Land Board*[20] to the effect that:

> *"A provision is therefore a distinct rule or principle of law in a statute which governs the situation covered by it. So an incomplete idea, even though stated in the form of a section of a statute, cannot be said to be a provision for, by its incompleteness, it cannot really be said to provide a whole rule or principle for observance by those concerned. A provision of law cannot therefore be said to exist if it is incomplete, for then it provides nothing."*

He therefore urged that Section 2(e) being complete and distinct is a provision within the meaning of Section 1(3), and the Central government acted *intra vires* to bring it into force, as well as certain provisions in Part III of the code.

35. It was argued that the executive has the power to bring into force any one provision of a statute at different times for different purposes, and that the government can exercise this power to commence a provision for one purpose on one day and for the remaining purposes on a later date. He relied upon the following extract from *Bennion on Statutory Interpretation: A Code* (6th Edition, at page 257):

> *"Where power is given to bring an Act into force by order, it is usual to provide flexibility by enabling different provisions to be brought into force at different times. Furthermore any one provision may be brought into force at different times for different purposes. [..]*
>
> *Advantages. This method of commencement gives all the advantages of extreme flexibility. Before a new Act is brought into operation, any necessary regulations or other instruments which need to be made under it can be drafted. [...]"*

36. The learned Attorney General relied upon two Constitution bench decisions of this Court, which throw light on the power exercised by the Central Government under provisions, which permit notification of provisions bringing into force legislation in phases. The judgments cited were *Basant Kumar Sarkar v. Eagle Rolling Mills Ltd.*[21] *and Bishwambhar Singh v. State of Orissa*[22]. He emphasized that often, when new legislation is introduced, the impact it might

20. (1980) 1 SCC 499.
21. (1964) 6 SCR 913.
22. 1954 SCR 842.

have on the subject matter needs to be studied and it would be to the benefit of all that a stage by stage or region by region implementation is adopted. Furthermore the discretion exercised by the executive government is not unfettered.

37. The Attorney General urged that what follows from the above decisions is that Section 1(3) of the IBC has to be interpreted to give flexibility to the Central Government to implement provisions of the Code to meet the objectives of the enactment. He highlighted that the Central Government has in fact been enforcing the provisions of the Code in a phased manner and brought to the Court's notice that the provisions were notified on 10 different dates. It was submitted that the Code brought about a radical change in the existing laws applicable to debtor companies in that a single default by the corporate debtor above a threshold limit prescribed in the Code triggers an insolvency resolution process enabling a creditor to demand repayment. Heavy emphasis is placed by the Code on attempting resolution of the corporate debtor to maximize the value of the company and ensure that it continues as the going concern in the interests of the economy. It was keeping in mind these objectives that the impugned notification was issued appointing 1st of December 2019 as the date on which certain provisions of the IBC were to come into force, only so far as they relate to personal guarantors to corporate debtors. The submission that the impugned notification creates a classification was refuted. He stated that it only brought into force sections in Part III of the Code and Section 2(e) of the Code, from 1st December 2019. From that date, proceedings could be filed against personal guarantors to corporate debtors under the Code. The proceedings would be initiated before the NCLT, which would also be seized of resolution proceedings against the corporate debtors.

38. The Attorney General submitted that the Amendment Act brought about a classification after detailed deliberations and in the light of the report of the Working Group on Individual Insolvency, Regarding Strategy and Approach for implementation of Provisions of the Code to Deal with Insolvency of Guarantors to Corporate debtors, and Individuals having business. In this report of 2017, the working group recognized the dynamics and the interwoven connection between the corporate debtor and guarantor, who has extended his personal guarantee.

39. The Attorney General also relied upon the report of the Bankruptcy Law Reforms Committee ("BLRC") tasked with introducing a comprehensive framework for insolvency in bankruptcy. That committee recognized that personal guarantors were a category of entities to whom individual insolvency proceedings applied, and acknowledged the link between them and corporate debtors and found that under a common Code, there could be synchronous resolution. In this regard, paras 3.4.3 and 6.1 of the report of the committee, dated November 2015, were relied

upon[23]. He pointed out that the synchronous resolution envisaged by the BLRC is found in the IBC in Section 5(22)and Section 60 (which fall in Part II of the Code), and Section 179 (which falls in Part III of the Code) and submitted that- *firstly,* the term 'personal guarantors' is defined in Part II of the Code which provides for insolvency resolution and liquidation for corporate persons, Section 5(22) of the IBC defines "personal guarantor" to mean "an individual who is the surety in a contract of guarantee to a corporate debtor". *Secondly,* by reason of Section 60(1), the Adjudicating Authority, in relation to insolvency resolution and liquidation for corporate persons (including corporate debtors and their personal guarantors), shall be the NCLT. Section 60(2) mandates that where a corporate insolvency resolution process or liquidation proceeding of a corporate debtor is pending before the NCLT, an application relating to the insolvency resolution or bankruptcy of a personal guarantor of such corporate debtor shall be filed before the NCLT. Section 60(4) vests the NCLT with all powers of the Debt Recovery Tribunal (DRT) as contemplated under Part III of the Code for the purpose of Section 60(2). Thirdly, under Section 179, the DRT is the Adjudicating Authority for insolvency resolution for all other categories of individuals and partnership firms. Section 179 itself is *"subject to Section 60".* It was argued that common oversight of insolvency processes of the corporate debtor, its corporate guarantor, and personal guarantors, through one forum, under the Code, (which, by reason of Section 238, overrides all other laws), was the objective of the amendment of 2018 and the impugned notification. The learned Attorney General also pointed out to Section 30, which enacts that an Adjudicatory authority approved

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23. The said extracts are as follows:

"3.4.3 Design of the proposed Code: A unified Code -

The Committee recommends that there be a single Code to resolve insolvency for all companies, limited liability partnerships, partnership firms and individuals.

In order to ensure legal clarity, the Committee recommends that provisions in all existing law that deals with insolvency of registered entities be removed and replaced by this Code.

This has two distinct advantages in improving the insolvency and bankruptcy framework in India. The first is that all the provisions in one Code will allow for higher legal clarity when there arises any question of insolvency or bankruptcy. The second is that a common insolvency and bankruptcy framework for individual and enterprise will enable more coherent policies when the two interact. For example, it is common practice that Indian bank stake a personal guarantee from the firm's promoter when they enter into a loan with the firm. At present, there are a separate set of provisions that guide recovery on the loan to the firm and on the personal guarantee to the promoter. Under a common Code, the resolution can be synchronous, less costly and help more efficient recovery. "

"6.1 The applicability of the Code

The Committee considers the following categories of entities to whom the individual insolvency and bankruptcy provisions shall apply:

- *Sole proprietorships where the legal personality of the proprietorship is not different from the individual who owns it.*
- *Personal guarantors*
- *Consumer finance borrowers...."*

resolution plan binds all stakeholders. However, at the same time, in the event a resolution plan permits creditors to continue proceedings against the personal guarantor, then such personal guarantors would continue to be liable to discharge the debts owed to the creditor by the corporate debtor, which would be limited of course to the extent of debt that did not get repaid under the resolution plan. The Attorney General also relied on *Embassy Property Developments (P) Ltd. v. State of Karnataka*[24] where this court had examined and dealt with the interplay between Sections 5(22), 60 and 179 of the Code.

40. Mr. Tushar Mehta, Solicitor General of India, supported the submissions of the Attorney General. He too stressed that different provisions were brought into force on different dates. He highlighted that Section 1(3) of the Code confers wide powers enabling the Central Government to operationalize the Code in a subject-wise and (not necessarily in a contiguous manner) - particular sections, provisions or parts. He urged that the petitioner's interpretation of the statute is unduly narrow and would result in disrupting the Code. It was argued that Section 2 of the Code is not a definition clause - but rather acts as a lever to provide a mechanism for a phased and limited interpretation of the Code. He underlined, therefore, that Section 2 represents Parliamentary classification as regards classes of debtors who fall under the Code. The Solicitor General pointed out that before the 2018 amendment, Section 2(e) was generic and that the amendment classified three distinct types of entities. The personal guarantors to corporate debtors are no doubt individuals like others, but are in fact at the centre of insolvency of a corporate debtor. He submitted that a predominant reason for the insolvency of corporate debtors invariably is the role played by its directors, etc., who are personal guarantors and are or were, mostly at the helm of affairs of the corporate debtor itself.

41. The Solicitor General submitted that Part-II of the Code applied to all categories of corporate entities who are debtors. By virtue of Section 3(8), the corporate debtor is a corporate or juristic entity that owes a debt to any person. Likewise, the corporate guarantor under Section 3(7) is a corporate person who has stood guarantee to a corporate debtor. Before the impugned notification, proceedings in Part-II were confined to corporate debtors and only another class, i.e. corporate guarantors. Personal guarantors and corporate guarantors formed part of the same class inasmuch as they were guarantors since they had furnished guarantees to corporate debtors to secure their loans. Yet, personal guarantors being individuals were not included in Part-III, for functional and operational purposes. The Solicitor General submitted that Part-II outlines the mechanism involved in regard to insolvency resolution functionally and operationally

24. (2020)13 SCC 308.

designed for corporate bodies. This takes into its sweep a resolution professional, committee of creditors as third parties taking over the debtor and taking crucial decisions for insolvency resolution. This statutory mechanism could not be applied to individuals as there is no question of "take over" of individuals. Individuals, who stand guarantee to corporate debtors and whose liability is co-terminus with such corporate debtors were therefore, outside the field of the Code. This resulted in an anomaly inasmuch as one set of guarantors to corporate debtors, i.e. individuals or personal guarantors were outside the purview of the Code whereas other set of guarantors, i.e. corporate guarantors were subjected to the provisions of the Code and could also be proceeded against in Part-II. As a result, a conscious decision was taken to enforce Part-III and operationalize the mechanism suitably for a class of individuals, i.e. personal guarantors. This decision was implemented through the impugned notification.

42. Apart from reiterating the submission of the Attorney General with regard to the flexibility in respect of notifying parts of the Code on different dates, having regard to the difference in subject matter and those governed by it, the learned Solicitor General also relied upon the decision reported as *J. Mitra and Co. Pvt. Ltd. v. Assistant Controller of Patents*[25]. He relied upon the report of the Working Group of Individual Insolvency (Regarding Strategy and Approach for Implementation of the Provisions of the Insolvency and Bankruptcy Code, 2016) to deal with insolvency of guarantors to corporate debtors and individuals having business, which had highlighted that in the absence of notification of provisions of the Code dealing with insolvency and bankruptcy of personal guarantors to corporate debtors and creditors are unable to effectuate the provisions of the Code and access remedies available under the Code. He submitted that this court has repeatedly held in several decisions that there is no compulsion that all provisions of law or an Act of Parliament or any other legislation should be brought into force at the same time. The legislature in its wisdom may clothe the executive with discretion to bring into force different parts of a statute on different dates, or in respect of different subject matters, or in different areas. Reliance was placed upon *Lalit Narayan Mishra Institute of Economic Development v. State Of Bihar & Ors. Etc*[26] and *Javed & Ors v. State of Haryana &Ors*[27]. It was submitted that the Central Government, therefore, acted within its rights to confine the enforcement of the provisions of the Code to a class of individuals, i.e., to personal guarantors, without altering the identity and structure of the Code. It was submitted that this is permissible as it is within the larger power of enforcement of the statute, which

25. (2008) 10 SCC 368.
26. (1988) 2 SCC 433.
27. (2003) 8 SCC 369.

encompasses the discretion to enforce the law in respect of a definite category, provided that such an act of enforcement would not alter the character of the Code. It was therefore, submitted that the enforcement of parts through the impugned notification - only in respect of personal guarantors in no way alters the identity or character of the Code.

43. The Solicitor General further submitted that the liability of a guarantor is co extensive, joint and several with that of the principal borrower unless the contrary is provided by the contract. A discharge which a principal borrower may secure by operation of law (for instance on account of winding up or the process under the Code) does not however absolve the surety from its liability. Section 128 of the Indian Contract Act, 1872 ("Contract Act") provides that the liability of a principal debtor and a surety is co-extensive, unless provided to the contrary in the contract. The word *"co-extensive"* is an objective for the word 'extent' and it can relate only to the quantum of the principal debt. The Solicitor General relied on certain decisions in this regard.[28] It is stated that the creditor also has the liberty to proceed against the principal borrower and all sureties simultaneously; in this regard, he cited *Bank of Bihar Ltd. v. Dr. Damodar Prasad & Anr.*[29] It is submitted that no court or co-surety can limit such a right. For this proposition, reliance was placed on *State Bank of India v. Index port Registered*[30] and *Industrial Investment Bank of India v. Biswanath Jhunjhunwala*[31]. Counsel also submitted that a surety cannot alter or defer such a right of the creditor. Hence, until the debt is paid off to the creditor in entirety, the guarantor is not absolved of its joint and several liability to make payment of the amounts outstanding in favour of the creditor.

44. The Solicitor General submitted that neither the guarantor's obligations are absolved nor discharged in terms of Sections 133 to 136 of the Indian Contract Act, 1872, on account of release/discharge/composition or variance of contract which a principal borrower may secure by way of *operation of law* for instance as under the Code. The rights of a creditor against a guarantor continue even in the event of bankruptcy or liquidation, stressed the Solicitor General, and relied on *Maharashtra State Electricity Board Bombay v. Official Liquidator, High Court, Ernakulum & Anr.*[32], where this court considered the interplay of Sections 128 and 134 of the Contract Act in the facts of the case. In that case, a company whose advances were secured by a guarantee went into liquidation. The court held that the fact the principal debtor went into liquidation had no effect on the liability of

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28. Gopilal J Nichani v. Trac Inds. and Components Ltd, AIR 1978 Mad. 134.

29. AIR 1969 (1) SCR 620.

30. AIR 1992 SC 1740.

31. (2009) 9 SCC 478.

32. 1982 (3) SCC 358.

the guarantor, because the discharge secured of the principal borrower was by "operation of law" and involuntary in nature. This was followed in *Punjab National Bank v. State of UP*[33]. This court held that:

> *"In our opinion, the principle of the aforesaid decision of this court is equally applicable in the present case. The right of the appellant to recover money from respondents Nos. 1,2 and 3 who stood guarantors arises out of the terms of the deeds of guarantee which are not in any way superseded or brought to a naught merely because the appellant may not be able to recover money from the principal-borrower. It may here be added that even as a result of the Nationalization Act the liability of the principal-borrower does not come to an end. It is only the mode of recovery which is referred to in the said Act."*

45. To a similar end, the judgment of the Calcutta High Court in *Gouri Shankar Jain v. Punjab National Bank & Anr.*[34] were relied on. It was held that none of the obligations of the surety under Section 133 to 139, 141 and 145 of the Contract Act are discharged on account of admission of a Section 7 application. As such, a discharge is on account of a statute and involuntary in nature. It was also argued that similarly, in terms of Section 31 of the Code, a resolution plan approved by the Adjudicating Authority is binding on all stakeholders including the guarantors, and hence, the release/discharge/ composition or variance of contract with the principal borrower in terms of a resolution plan, is "statutorily" presumed to be consented by the guarantors in question. Therefore, by way of approval of a resolution plan, any release/discharge secured by the principal borrower or entering into a composition with the principal borrower (reference to Section 135 of the Contract Act) cannot discharge the guarantor in any manner what so ever. The judgment of this court in *State Bank of India v. V. Ramakrishnan &Ors*[35]. too was relied on, where the court recognized that a guarantor cannot seek a discharge of its liability on account of approval of a resolution plan, and the terms of such a plan can provide for the continuation of the debt of the guarantors. It was submitted that the continuation of a financial creditor's claim against a guarantor would not lead to double recovery of a claim as the financial creditor would be able to recover only the balance debt which remains outstanding and unrecovered from the principal borrower. There are enough safeguards against double recovery as provided under (a) the settled principle of contract law that simultaneous remedy against the co-obligors does not permit the creditor to recover more than the total debt owed to it, and (b) the provisions of the Code

33. (2002) 5 SCC 80.
34. 2019 SC Online Cal 7288 at para 34 and 35.
35. 2018(17) SCC 394.

itself. The Solicitor General relied on the acknowledged practice, known as, the principle of "double dip" or the notion of dual nature of recovery by a creditor for the same debt from two entities - be it principal borrower and guarantor or co-guarantors or co-debtors. When a primary obligor and a guarantor are liable on account of a single claim, the creditor can assert a claim for the full amount owed against each debtor until the creditor is paid in full (that is it can double dip). This means that in case a portion of debt is recovered from one of the entities, either principal borrower or guarantor, the other would be liable for the unsatisfied amount of the claim, the principal borrower being joint and several with the surety. This principle is opposed to the principle prohibiting "double proof" in which the same debt is pursued against the same estate twice, leading to double payment. This right of double dip of a creditor was spoken of, in recent judgment *PAFCO 2916 INC. C/o Pegasus Aviation Finance Company vs. Kingfisher Airlines Limited*[36], where the decree holders initiated simultaneous execution proceedings against both the principal debtor and the guarantor on the basis of the same decree, and the Executing Court *suo moto* raised the issue of maintainability to hold that both the execution petitions are not simultaneously maintainable. The High Court of Karnataka disagreed and held that the decree holders cannot be directed to amend their claims in each of the execution petitions to only half the decretal amount. Reliance was also placed on the judgment of the UK Supreme Court in *In Re Kaupthing Singer and Friedlander Ltd. (in administration)*[37].

46. Mr. Rakesh Dwivedi, learned senior counsel, appearing for the State Bank of India, urged that the substance of the petitioners' argument is that Section 1(3) does not empower the Central Government to enforce the provisions of Part III of the Code selectively to personal guarantors of Corporate Debtors only. The petitioners highlight that Part III applies to individuals and partnership firms in a composite manner, and the impugned notification dated 15.11.2019 splits up that unity by enforcing the provisions of Part III only upon personal guarantors of corporate debtors. It is urged that the submission that Section 1(3) does not confer the power of modification on the Central Government is presented by characterizing Section 1(3) as conditional legislation. He submits that Section 1(3) has two distinct dimensions. Parliament firstly conferred on the Central Government not only the power to determine the date on which the Code will come into force, but also empowers it to appoint different dates for different provisions of the Code. It was intended that all the provisions of the Code may not be enforced at once. Given the width of impact and with an eye on the objectives set out in the statement of objects and reasons and preamble, a staggered enforcement was anticipated.

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36. 2016 SCC On Line Kar 5991.
37. 2012 (1) All ER 883 Paras 11, 12, 53-54.

47. Mr. Dwivedi stated that nothing much depends on the characterization of Section 1(3) as conditional or delegated legislation. Even conditional legislation involves a delegation of legislative power to the authority concerned. Under Section 1(3), the Central Government is only a delegate of the Parliament. In some cases, such provisions or provisions of broadly similar nature have been described by this court as conditional legislation, but equally in some cases such a power has been described as delegated legislation by different judges. Reliance was placed on *Delhi Laws Act, 1912, In re v. Part 'C' States (Laws) Act, 1950* (supra) and *Lachmi Narain v. Union of India*[38].

48. It was urged that provisions of diverse nature have been characterized as conditional legislation by this court. The cases relied upon by the Petitioners related to a challenge to the validity of legislative provisions on the ground of excessive delegation of legislative power. In *In re Delhi Laws,* the Central Government was expressly empowered to enforce certain laws with *"modifications and restrictions"*. The power of modification was held to be limited to such modifications as did not affect the identity or structure or the essential purpose of the law. This was a departure from the judgment of the Federal Court in *Jatindra Nath*[39]. However, in the case of *Lachmi Narain,* the notification issued by the Government was challenged, and this court held that the real question was whether the delegate acts within the general scope of the affirmative words which give the power, and without violating any express conditions or restrictions by which that power is limited. While *Jatindra Nath* involved extension of the life of a temporary Act, in the *Delhi Laws* case, the power under consideration was to extend the laws of Part C States to Part A States. Later, in *Raghubar Swarup v. State of U.P*[40] , the State Government was conferred power by Section 2 of U.P. Zamindari Abolition and Land Reforms Act, 1951, to extend the Act to other areas in the State. It involved selection of geographical area for applying the law. Similarly, in *Tulsipur Sugar Company*[41], the power was conferred to extend the U.P. Town Areas Act, 1914, to a notified area. Learned senior counsel argued that in *Sardar Inder Singh* (supra), the power conferred on the executive to extend the life of a temporary Act, even when no outer limit is prescribed, was upheld. In *Bangalore Woollen, Cotton and Silk Mills v. Bangalore Corporation*[42], the power conferred on the Municipal Corporation to levy octroi on "other articles not specified in the Schedule" was upheld saying that it was

38. (1976) 2 SCC 953, para 49.
39. *Jatindra Nath Gupta v. State of Bihar* (1949-1950) 11 FCR 595.
40. AIR 1959 SC 909 at p. 913
41. (1980) 2 SCC 295.
42. (1961)3 SCR 698.

more in the nature of conditional legislation. Reliance was also place on *ITC Bhadrachalam v. Mandal Revenue Officer*[43], where the power to exempt any class of non-agricultural land and was upheld saying:

> *"the power to bring an Act into force as well as the power to grant exemption are both treated, without a doubt, as belonging to the category of conditional legislation".*

Learned counsel therefore urged that the line of demarcation between conditional and delegated legislation at times gets blurred.

49. While judging the validity of the legislations, this Court has examined the sufficiency of the guidance afforded by the legislative policy indicated in the relevant statute. For this, reliance was placed on *Edward Mills v. State of Ajmer*[44]. All these establish that diverse provisions apart from those which empower the executive to enforce the Act or provisions of the Act have been characterized as conditional legislation and their validity and scope has been determined in the light of the text, context and purpose of the Act.

50. Learned counsel stated that a schematic, structural and purposive construction of Section 1(3) of the Code needs to be adopted to determine the scope of the power conferred on the Central Government by Section 1(3) of the Code. The Petitioners apply the rule of literal construction and seek to construe Section 1(3) in isolation, without reference to the context, scheme or purpose of the Code. It is submitted that the ambit of Section 1(3) should not be determined by merely applying the doctrine of literal construction. All provisions of the Code, including the enforcement provision should be construed in the context of the entire enactment and the approach should be schematic, structural and purposive. Furthermore, Section 1(3) should not be construed in isolation. It is well settled that a statute has to be read as a whole. The scope of the power under Section 1(3) of the Code cannot be expounded without taking note of the scheme of the Code and the other related provisions. Counsel relied on the following observations of this court in *State of West Bengal v. Union of India*[45]

> *"In considering the true meaning of words or expression used by the legislature the court must have regard to the aim, object and scope of the statute to be read in its entirety. The court must ascertain the intention of the legislature by directing its attention not merely to the clauses to be construed but to the entire Statute; it must compare the clause with the other parts of the law, and the setting in which the clause to be interpreted occurs."*

43. (1996) 6 SCC634.
44. (1955) I SCR 735.
45. (1964) ISCR 371, at para 69.

51. Legislative intent, it is urged, cannot be gathered by a bare mechanical interpretation of words or mere literal reading. The words are to be read and understood in the context of the scheme of the Act and the purpose or object with which the power is conferred. As Iyer, J. observed in *Chairman Board of Mining Examination v. Ramji*[46] *" to be literal in meaning is to see the skin and miss the soul. The judicial key to construction is the composite perception of the deha and the dehi of the provision".* This has been followed in *Directorate of Enforcement v. Dipak Mahajan*[47]. Recently too, this court has moved on to accept purposive interpretation of the statute as the correct approach to ascertain legislative intent. If the given words can reasonably bear a construction which effectuates the purpose or object then that construction is to be preferred. In this regard, the decision in *Arcelor Mittal v. Satish Kumar Gupta*[48] and *Swiss Ribbons* (supra) were relied on.

52. Mr. Dwivedi stated that the impugned notification does not modify any provisions of the Code. By enforcing certain provisions of the Code by its seven clauses" *only in so far as they relate to personal guarantors to corporate debtors"*, the notification does not modify any legislative provision. It merely carries out the Parliamentary intention as expressed by the scheme, structure and purpose of the Code. Section 1(3), Section 2, Section 3(23), Section 5(5)(a) and (22), Section 14(3), Section 31(1)and in particular, Section 60 and Section 179 are indicative of the fact that the scheme and structure of the Code involves a parliamentary hybridization and legislative fusion of the provisions of Part III, in so far as personal guarantors of corporate debtors are concerned. The object of this hybridization is to empower the NCLT to deal with the insolvency resolution and bankruptcy process of the corporate debtor along with the corporate guarantor and personal guarantor of the corporate debtor. Parliament is conscious of the fact that personal guarantors to corporate debtors are generally promoters or close relatives of corporate debtors, and in many cases, the corporate's indebtedness was due to acts misfeasance and siphoning of funds done by personal guarantors. Apart from this, personal guarantors to corporate debtors have a contractually agreed debt alignment with such debtors. They are coextensively as well as jointly and severally responsible for the same debt. As Parliament created a legislative hybridization, Part III of the Code had to be enforced by the Central Government under Section 1(3) with Parliamentary categorization through Section 2. The unifying of the forum for insolvency resolution/bankruptcy of the corporate debtor along with its personal guarantor is a Parliamentary dispensation and determination. Therefore, Section 1(3) empowers the Central Government to appoint different dates for different provisions.

46. AIR 1977 SC 965 at p. 968.

47. (1994) 3 SCC 440.

48. (2019) 2 SCC 1, at para 27-29.

53. Learned senior counsel highlighted Section 60(1), (2), (3) and (4) and urged that Parliament had merged the provisions of Part III with the process undertaken against the corporate debtors under Part II. The process of Part II and the provisions of Part III were legislatively fused for the purpose of proceedings against personal guarantors along with the corporate debtors. He argued that Section 179, the corresponding provision in Part III, begins by deploying the phrase *"subject to the provisions of Section 60".* Section 60(4) incorporates the provisions of Part III, in relation to proceedings before the NCLT against personal guarantors. Counsel cited *Western Coalfield Ltd. v. Special Area Development Authority*[49]*; Baleshwar Dayal v. Bank of India*[50]*,* and *Nagpur Improvement Trust v. Vasantrao*[51]. It was submitted that other individuals and partnership firms do not figure in this Parliamentary hybridization/fusion. Sections 2(e) and 2(g) when read together, would indicate that personal guarantors are also individuals. Act 8 of 2018 has brought about a trifurcation of the categories which were comprehended in Section 2(e) as it stood before the amendment. Section 179 also indicates that personal guarantors are individuals and Part III is applicable to them. In fact, it is by operation of the provisions in Chapter III of Part III that personal guarantors get the benefit of interim moratorium [Section 96] and moratorium [Section 101]. Personal guarantors do not get moratorium under Section 14. In this regard, reliance is placed on V *Ramakrishnan* (supra). It is contended that the hybridization achieved by the impugned notification does not create any anomaly or problem in enforcement.

54. It was lastly contended that Section 78 is declaratory and states that Part III applies to individuals and partnership firms. It is made applicable to the various categories of individuals and partnership firms. Both Sections 2 and 78 carry the margin caption of "application". Section 2 commences with *"the provisions of this Code shall apply"* to the six categories and Section 78 also declares that *"Part III shall apply"* to the mentioned categories. Section 2 embraces the whole Code including Section 78 and other provisions enforced by the impugned notification, which clearly appoints the date of enforcement for Section 2(e) and other provisions, and Chapter III of Part III. There is no vivisection or dissection involved in the impugned notification.

55. Mr. K.V. Vishwanathan, learned senior counsel appearing for some respondents, argued that an overall reading of the provisions of the Code would show that personal guarantors to corporate debtors are a distinct class of individuals (by virtue of Section 2 (e) and Section 60); the classification is not achieved through the impugned notification, but by the amending Act of 2018, by

49(1982) 1SCC 125, paras 3, 17, 18.
50(2016) 1 SCC 444. paras 6-8.
51(2002) 7 SCC 657, para 31.

Parliament. It is emphasized that the amendment ensured that the same forum (NCLT) deals with insolvency processes of corporate debtors, and also deals with similar issues relating to personal guarantors. The statute permits Part III application by NCLT *in relation to personal guarantors.* All that the impugned notification did was to operationalize these existing provisions of the Code. Learned senior counsel cited *Brij Sundar Kapoor v. First Additional Judge*[52] *to* refute the petitioners' argument that the power under Section 1(3) power is a one-time power. He also relied on Section 14 of the General Clauses Act, 1897, which states that any power conferred by any Act or Regulation can be exercised *from time to time*[53].

56. Mr. Vishwanathan cited *Raghubir Sarup v. State of UP*[54] and urged that the legislature acts within its rights in enacting a law and leaving it to the executive to apply it to different geographical areas at different times, depending upon various considerations. He also relied on *Khargram Panchayat Samiti v. State of West Bengal*[55] and argued that the power to bring into force different provisions, or different parts of a statute, on different dates, having regard to the subject matter, is part of the incidental power conferred by Parliament under Section 1 (3) of the Code.

57. Mr. Ritin Rai, learned senior counsel appearing for some respondents, urged that there is an inter connectedness between corporate debtors and personal guarantors, which was recognized by the 2018 amendment, evidenced by its Statement of Objects and Reasons. He stated that the power under Section 1(3) of the Code has been properly exercised. Mr. Rai submitted that like the impugned notification, another notification was issued on 01-05-2018[56] bringing into effect provisions of the Code in relation to a distinct class, i.e., financial service providers[57]. This was achieved by bringing into force Sections 227 to 229 of the Code. It was submitted that the discretion conferred on the executive, to experiment, and bring into force a legislation in phases, is part of the general pattern of legislative practice and it recognizes that it is not always wise or possible to enforce provisions of a new law, together, at all places, in respect of all that it seeks to cover.

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52. 1989 (1) SCC 561.

53. ***"14. Powers conferred to be exercisable from time to time—****(1) Where, by any Central Act or Regulation made after the commencement of this Act, any power is conferred, then unless a different intention appears that power may be exercised from time to time as occasion requires.*

(2) This section applies also to all Central Acts and Regulations made on or after the fourteenth day of January, 1887."

54. AIR 1959 SC 909.
55. 1987 (3) SCC 82.
56. SO 1817 (E).
57. Defined separately under Section 2 (17) of the Code.

IV The Provisions of the Code and the Impugned Notification

58. On 28th May, 2016, the Code was published in the official gazette after its passage in Parliament. It has been hailed as a major economic measure, aimed at aligning insolvency laws with international standards. Parliament's previous attempts to ensure recovery of public debt, (through the Recovery of Debts due to Banks or Financial Institutions Act, 1993, hereafter "RDBFI Act") securitization (by the Securitization and Reconstruction and Enforcement of Security Interests Act, 2002 hereafter "SARFESI") deal with certain facets of corporate insolvency. These did not result in the desired consequences. The aim of the Code is to a) promote entrepreneurship and availability of credit; b) ensure the balanced interests of all stakeholders and c) promote time-bound resolution of insolvency in case of corporate persons, partnership firms and individuals.

The relevant provisions of the code are extracted below:

> ***"1. Short title, extent and commencement -***
>
> *(1) This Code may be called the Insolvency and Bankruptcy Code, 2016.*
>
> *(2) It extends to the whole of India:*
>
> *Provided that Part III of this Code shall not extend to the State of Jammu and Kashmir.*[58]
>
> *(3) It shall come into force on such date1 as the Central Government may, by notification in the Official Gazette, appoint:*
>
> *Provided that different dates may be appointed for different provisions of this Code and any reference in any such provision to the commencement of this Code shall be construed as a reference to the commencement of that provision.*
>
> ***2. Application. -*** *The provisions of this Code shall apply to -*
>
> *(a) any company incorporated under the Companies Act, 2013 (18 of 2013) or under any previous company law;*
>
> *(b) any other company governed by any special Act for the time being in force, except in so far as the said provisions are inconsistent with the provisions of such special Act;*
>
> *(c) any Limited Liability Partnership incorporated under the Limited Liability Partnership Act, 2008 (6 of2009);*

58. Proviso omitted by the Jammu and Kashmir Reorganisation (Adaptation of Central Laws) Order, 2020 *vide* S.O. 1123 (E), dated 18th March 2020 (w.e.f. 18-3-2020)

(d) such other body incorporated under any law for the time being in force, as the Central Government may, by notification, specify in this behalf;

(e) personal guarantors to corporate debtors;

(f) partnership firms and proprietorship firms; and

(g) individuals, other than persons referred to in clause (e).

***3. Definitions** - In this Code, unless the context otherwise requires, -*

***

(7) "corporate person" means a company as defined in clause (20) of section 2 of the Companies Act, 2013 (18 of 2013), a limited liability partnership, as defined in clause (n) of sub-section (1) of section 2 of the Limited Liability Partnership Act, 2008 (6 of 2009), or any other person incorporated with limited liability under any law for the time being in force but shall not include any financial service provider;

(8) "corporate debtor" means a corporate person who owes a debt to any person;

***

(10) "creditor" means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree-holder;

(11) "debt" means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;

***

(23) "person" includes—

(a) an individual;

(b) a Hindu Undivided Family;

(c) a company;

(d) a trust;

(e) a partnership;

(f) a limited liability partnership; and

(g) any other entity established under a statute, and includes a person resident outside India;

***

4. *Application.* -

(1) This Part shall apply to matters relating to the insolvency and liquidation of corporate debtors where the minimum amount of the default is one crore rupees.[59]

Provided that the Central Government may, by notification, specify the minimum amount of default of higher value which shall not be more than one crore rupees.

5. Definitions. *- In this part, unless the context otherwise requires -*

(1) "Adjudicating Authority", for the purposes of this Part, means National Company Law Tribunal constituted under section 408 of the Companies Act, 2013 (18 of 2013);

***

(5) "corporate applicant" means-

(a) corporate debtor; or

(b) a member or partner of the corporate debtor who is authorised to make an application for the corporate insolvency resolution process under the constitutional document of the corporate debtor; or

(c) an individual who is in charge of managing the operations and resources of the corporate debtor; or

(d) a person who has the control and supervision over the financial affairs of the corporate debtor;

(5A) "corporate guarantor" means a corporate person who is the surety in a contract of guarantee to a corporate debtor;

***

(22) "personal guarantor" means an individual who is the surety in a contract of guarantee to a corporate debtor"

59. Section 13 (Declaration of moratorium and public announcement) provides that the Adjudicating Authority shall (a) declare a moratorium for the purposes referred to under Section 14, (b) cause a public announcement of the initiation of corporate insolvency resolution process and call for the submission of claims under section 15, and (c) appoint an interim resolution professional in the manner as laid down in Section 16. A public announcement is to be made immediately after the appointment of the interim resolution professional. Section 14 (Moratorium) provides that on the insolvency commencement date, the

59. W.e.f. 01.12.2016 vide Notification No. SO3594(E) dated 30.11.2016.

Adjudicating Authority shall declare a moratorium prohibiting (a) the institution or continuation of suits or proceedings against the corporate debtor including execution of a judgment, decree, order, etc; (b) transferring, encumbering alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest; (c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002; and (d) recovery of any property by an owner or lessor where such property is occupied by, or in the possession of the corporate debtor. Section 16 provides for the appointment and tenure of an interim resolution professional.

60. The highlight of the Code is the institutional framework it envisions. This framework consists of the regulator (Insolvency and Bankruptcy Board of India) insolvency professionals, information utilities and adjudicatory mechanisms (NCLT and National Company Law Appellate Tribunal-NCLAT). These institutions and structures are aimed at promoting corporate governance and also enable a time bound and formal resolution of insolvency. The major features of the Code include a two- step process -insolvency resolution for corporate debtors where the minimum amount of the default is ₹1,00,00,000/-. Two processes are proposed by the Code: a) Insolvency resolution process (Sections 6 to 32 of the Code) - In this, the creditors play a crucial role in evaluating and ultimately determining whether the debtor's business can be continued and if so, what are the choices for its revival; and b) Liquidation [Sections 33-54 Code] - If revival fails or is not a feasible option, then creditors can resolve to wind up the company. Upon winding up, assets of the debtor are to be distributed.

61. The insolvency resolution process under Section 6 can be initiated by the financial creditor [Section 7 of the Code] or operational creditor [subject to issuing a demand notice to the corporate debtor stating the amount involved in the default, under Section 8, of the Code] against the corporate debtor in the NCLT. Voluntary insolvency proceedings may also be initiated by the defaulting company, its employees or shareholders [Section 10 of the Code]. Once the resolution process begins, for the entire period, a moratorium is ordered by the NCLT on the debtor's operations. During this period, no judicial proceedings can be initiated. There can also be no enforcement of securities, sale or transfer of assets or termination of essential contracts against the debtor. The next step is appointment of an Interim Resolution Professional under Section16 of the Code. The resolution professional has to work under the broad guidelines of the committee of creditors (or "COC"- in terms of Section 21 of the Code). The CoC includes all the financial creditors of the corporate debtor, except all related parties and operational creditors. Further, Section 22 of the Code provides that the CoC has to appoint the resolution professional. This resolution professional can

also be the interim resolution professional. A vote of 75% of the voting share shall determine the decisions of the committee to opt for either a revival or liquidation (Section 30). The decision of the CoC is binding not only on debtors, but also on all the other creditors. Different types of revival plans include fresh finance, sale of assets, haircuts (i.e. acceptance by creditors of amounts lower than what is due to them), change of management etc. The committee should approve the resolution plan forwarded by the creditor. Only upon approval does the resolution professional forward the plan to the adjudicating authority for final approval. The resolution plan has to be approved by the NCLT; while doing so, it can consider objections to the resolution plan by any party interested in voicing such objections (i.e. operational creditors, financial creditors, etc).

62. Section 78(3) of the Code states that the adjudicating authority, for the purpose of Part III (that deals with insolvency Resolution and bankruptcy of individuals and partnership firms) would be the Debt Recovery Tribunal(DRT) that was established under the RDBFI Act. The adjudicating authority for corporate insolvency (companies, LLPs and limited liability entities), on the other hand, is the NCLT. The appeal from the NCLT lies to the National Company Law Appellate Tribunal (NCLAT). The appeal from the DRT lies to the Debt Recovery Appellate Tribunal (DRAT). This court hears appeals from both the NCLAT and the DRAT.

63. The provisions of the Code were brought into force through different notifications issued on different dates.The impugned notification issued in the Gazette of India Extraordinary, by the Ministry of Corporate Affairs, reads as follows:

"NOTIFICATION

New Delhi. the 15th November, 2019

S.O. 4126(E).- ln exercise of the powers conferred by sub-section (3) of section I of the Insolvency and Bankruptcy Code. 2016 (31 of 2016). the Central Government hereby appoints the 1st day of December,2019 as the date on which the following provisions of the said Code only in so far as they relate to personal guarantors to corporate debtors. shall come into force:

(1) clause (e) of section 2;

(2) section 78 (except with regard to fresh start process) and section 79;

(3) sections 94 to 187 (both inclusive);

(4) clause (g) to clause (i) of sub-section (2) of section 239;

(5) clause (m) to clause (zc) of sub-section (2) of section 239;

(6) clause (zn) to clause (zs) of sub-section (2) of section 240; and

(7) Section 249.

[F. No. 30/21/2018-Insolvency Section]
GYANESHWAR KUMAR SINGH, Jt. Secy."

V Analysis and conclusions

64. The principal ground of attack in all these proceedings has been that the executive government could not have selectively brought into force the Code, and applied some of its provisions to one sub-category of individuals, i.e., personal guarantors to corporate creditors. All the petitioners in unison argued that the impugned notification, in seeking to achieve that end, is *ultra vires.* This argument is premised on the nature and content of Section 1(3), which the petitioners characterize to be *conditional legislation.* Unlike delegated legislation, they say, conditional legislation is a limited power which can be exercised once, in respect of the subject matter or class of subject matters. As long as different dates are designated for bringing into force the enactment, or in relation to different areas, the executive acts within its powers. However, when it selectively does so, and segregates the subject matter of coverage of the enactment, it indulges in impermissible legislation. Reliance has been placed on several judgments of this court, with respect to the limits of such power- notably the decisions of the Privy Council in *Burah,* of the Federal Court in *Narothamdas Jethabai; In Re Delhi Laws Act, 1912, Jatindranath Gupta, Hamdard Dawakhana, Sabanayagam* and *Vasu Dev Singh.*

65. In *Burah,* the question arose in the context of a law made by the Indian Legislature removing the district of Garo Hills from the jurisdiction of the civil and criminal courts and the law applied to them, and to vest the administration of civil and criminal justice within the same district in such officers as the Lieutenant-Governor of Bengal might appoint for the purpose. By Section 9, the Lt. Governor was empowered from time to time, by notification in the Calcutta Gazette, to extend, *mutatis mutandis,* all or any of the provisions contained in the Act to the Jaintia, Naga and Khasi Hills and to fix the date of application thereof as well. By a notification, the Lt. Governor extended all the provisions, which was challenged by Burah, who was convicted of murder and sentenced to death. The High Court of Calcutta upheld his contention and held that Section 9 of the Act was *ultra vires* the powers of the Indian Legislature as it was a delegate of the Imperial Parliament and as such further delegation was not permissible. The Privy Council overturned that verdict, and held:

> *"Legislation which does not directly fix the period for its own commencement, but leaves that to be done by an external authority, may with quite as much reason he called incomplete; as that which does not itself immediately determine the whole area to which it is to be applied, but leaves this to be done by the same external authority. If it is an act of legislation on the part of the external authority so trusted to enlarge the area within which a law actually in operation is to be applied, it would seem a fortiori to be an act of legislation to bring the law originally into operation by fixing the time for its commencement....."*

It was also observed that:

> *"Their Lordships agree that the Governor-General in Council could not, by any form of enactment, create in India, and arm with general legislative authority, a new legislative Power, not created or authorized by the Councils Act. Nothing of that kind has, in their Lordships' opinion, been done or attempted in the present case."*

66. The next case cited was *Jatindra Nath Gupta* where the validity of Section 1(3) of the Bihar Maintenance of Public Order Act, 1948 was challenged on the ground that it empowered the Provincial Government to extend the life of the Act for one year with such modification as it could deem fit. The Federal Court held that the power of extension with modification is not a valid delegation of legislative power because it is an essential legislative function which cannot be delegated. The court observed, *inter alia,* that:

> *"The proviso contains the power to extend the Act for a period of one year with modifications, if any. It is one power and not two severable powers. The fact that no modifications were made in the Act when the power was exercised cannot help in determining the true nature of the power. The power to extend the operation of the Act beyond the period mentioned in the Act prima facie is a legislative power. It is for the Legislature to state how long a particular legislation will be in operation. That cannot be left to the discretion of some other body. The power to modify an Act of a Legislature, without any limitation on the extent of the power of modification, is undoubtedly a legislative power. It is not a power confined to apply the Act subject to any restriction, limitation or proviso (which is the aim as an exception) only. It seems to me therefore that the power contained in the proviso is legislative."*

67. In the case of *In re Delhi Laws Act, 1912,* a reference made under Article 143 of the Constitution, saw a polyvocal court and a plurality of judicial opinion by the seven judge bench of this court. Three provisions were referred for the

opinion of this court. Having regard to the majority view, it was held that essential legislative functions could not be delegated, and that the power to repeal an enactment, extended by the Central Government, to a part C state, could not be delegated. The majority's conclusion was that the power of repeal is legislative. The observations in some of the judgments are telling, and are reproduced below. Kania, CJ observed as follows:

> *"53. It is common ground that no law creating such bodies has been passed by the Parliament so far. Article 246 deals with the distribution of legislative powers between the Centre and the States but Part 'C' States are outside its operation. Therefore on any subject affecting Part 'C' States, Parliament is the sole and exclusive legislature until it passes an Act creating a legislature or a council in terms of Article 240. Proceeding on the footing that a power of legislation does not carry with it the power of delegation (as claimed by the Attorney-General), the question is whether Section 2 of the Part 'C' States (Laws) Act is valid or not. By that section the Parliament has given power to the Central Government by notification to extend to any part of such State (Part 'C' State), with such restrictions and modifications as it thinks fit, any enactment which is in force in Part A State at the date of the notification. The section although framed on the lines of the Delhi Laws Act and the Ajmer-Merwara Act is restricted in its scope as the executive Government is empowered to extend only an Act which is in force in any of the Part A States. For the reasons I have considered certain parts of the two sections covered by Questions 1 and 2 ultra vires, that part of Section 2 of the Part 'C' States (Laws) Act, 1950, which empowers the Central Government to extend laws passed by any legislature of Part A State, will also be ultra vires. To the extent the Central Legislature or Parliament has passed Acts which are applicable to Part A States, there can be no objection to the Central Government extending, if necessary, the operation of those Acts to the Province of Delhi, because the Parliament is the competent legislature for that Province. To the extent however the section permits the Central Government to extend laws made by any legislature of Part A State to the Province of Delhi, the section is ultra vires."*

Mahajan, J had this to say:

> *"The section does not declare any law but gives the Central Government power to declare what the law shall be. The choice to select any enactment in force in any province at the date of such notification clearly shows that the legislature declared no principles or policies as regards the law to be made on any subject. It may be pointed out that under the Act of 1935 different provinces had the exclusive power of laying down their policies*

in respect to subjects within their own legislative field. What policy was to be adopted for Delhi, whether that adopted in the province of Punjab or of Bombay, was left to the Central Government. Illustratively, the mischief of such law-making may be pointed out with reference to what happened in pursuance of this section in Ajmer-Merwara. The Bombay Agricultural Debtors' Relief Act, 1947, has been extended under cover of this section to Ajmer-Merwara and under the power of modification by amending the definition of the word 'debtor' the whole policy of the Bombay Act has been altered. Under the Bombay Act a person is a debtor who is indebted and whose annual income from sources other than agricultural and manly labour does not exceed 33 per cent of his total annual income or does not exceed Rs 500, whichever is greater. In the modified statutes "debtor" means an agriculturist who owes a debt, and "agriculturist" means a person who earns his livelihood by agriculture and whose income from such source exceeds 66 per cent of his total income. The outside limit of Rs 500 is removed. The exercise of this power amounts to making a new law by a body which was not in the contemplation of the Constitution and was not authorized to enact any laws. Shortly stated, the question is, could the Indian Legislature under the Act of 1935 enact that the executive could extend to Delhi laws that may be made hereinafter by a legislature in Timbuctoo or Soviet Russia with modifications. The answer would be in the negative because the policy of those laws could never be determined by the law making body entrusted with making laws for Delhi. The Provincial Legislatures in India under the Constitution Act of 1935 qua Delhi constitutionally stood on no better footing than the legislatures of Timbuctoo and Soviet Russia though geographically and politically they were in a different situation.

****

271. *For reasons given for answering Questions 1 and 2 that the enactments mentioned therein are ultra vires the constitution in the particulars stated, this question is also answered similarly. It might, however, be observed that in this case express power to repeal or amend laws already applicable in Part-C States has been conferred on the Central Government. Power to repeal or amend laws is a power which can only be exercised by an authority that has the power to enact laws. It is a power coordinate and coextensive with the power of the legislature itself. In bestowing on the Central Government and clothing it with the same capacity as is possessed by the legislature itself the Parliament has acted unconstitutionally."*

B.K. Mukherjea, J, held as follows:

> ***"342.*** *It will be noticed that the powers conferred by this section upon the Central Government are far in excess of those conferred by the other two legislative provisions, at least in accordance with the interpretation which I have attempted to put upon them. As has been stated already, it is quite an intelligible policy that so long as a proper legislative machinery is not set up in a particular area, the Parliament might empower an executive authority to introduce laws validly passed by a competent legislature and actually in force in other parts of the country to such area, with each modifications and restrictions as the authority thinks proper, the modifications being limited to local adjustments or changes of a minor character. But this presupposes that there is no existing law on that particular subject actually in force in that territory. If any such law exists and power is given to repeal or abrogate such laws either in whole or in part and substitute in place of the same other laws which are in force in other areas, it would certainly amount to an unwarrantable delegation of legislative powers. To repeal or abrogate an existing law is the exercise of an essential legislative power, and the policy behind such acts must be the policy of the legislature itself. If the legislature invests the executive with the power to determine as to which of the laws in force in a particular territory are useful or proper and if it is given to that authority to replace any of them by laws brought from other provinces with such modifications as it thinks proper, that would be to invest the executive with the determination of the entire legislative policy and not merely of carrying out a policy which the legislature has already laid down. Thus the power of extension, which is contemplated by Section 2 of Part-C States (Laws) Act, includes the power of introducing laws which may be in actual conflict with the laws validly established and already in operation in that territory...."*

68. It is apparent that the legislation which this court had to deal with had virtually granted what was described as a *carte blanche* in regard to whether to extend the provisions of any state Act, if so, which, the power of modification, as well as the power of repeal. The judges were agreed that within the broad remit of delegated legislative power, as long as essential legislative powers were not delegated, the provisions would not be *ultra vires.* However, the power to extend laws that Parliament had not enacted (as it was competent to enact, in respect of Part C states) as well as the power to repeal, was held to be legislative in content. Therefore, the court held such power to be *ultra vires.* This is evident from the following Opinion of the court, recorded as a result of the majority judgment:

"OPINION OF THE COURT

357. The Court held by a majority that the provisions contained in Questions 1 and 2 are not ultra vires the legislatures which passed the Act containing those provisions. As regards the section mentioned on Question 3, the first part was held to be intra vires, but the second portion, which is in the following terms:

"provision may be made in any enactment so extended, for the repeal or amendment of any corresponding law (other than a Central Act) which is for the time being applicable to that Part-C State", is ultra vires the Indian Parliament which passed the Act."

69. In *Narottamdas Jethabhai* (supra) three issues were involved; one of them concerned the question of empowering the executive to designate a court to exercise jurisdiction upto ₹25,000/-, i.e. Section 4 of the Bombay City Civil Courts Act [60]. The contention successfully raised before the High Court was that once the legislature had conferred jurisdiction upto a pecuniary limit of ₹10,000/- to the City Civil Court, delegating the power to increase that jurisdiction was *ultra vires*. The argument was repelled by a majority of judges (Mahajan, Fazal Ali and B.K. Mukherjea, JJ). Fazal Ali, J stated that

"22. It is contended that this section is invalid, because the Provincial Legislature has thereby delegated its legislative powers to the Provincial Government which it cannot do. This contention does not appear to me to be sound. The section itself shows that the Provincial Legislature having exercised its judgment and determined that the New Court should be invested with jurisdiction to try suits and proceedings of a civil nature of a value not exceeding Rs. 25,000, left it to the Provincial Government to determine when the Court should be invested with this larger jurisdiction, for which the limit had been fixed. It is clear that if and when the New Court has to be invested with the larger jurisdiction, that jurisdiction would be due to no other authority than the Provincial Legislature itself and the court would exercise that jurisdiction by virtue of the Act itself. As several of my learned colleagues have pointed out, the case of Queen v. Burah [3 A.C. 889.], the authority of which was not questioned before us, fully covers the contention raised, and the impugned provision is an instance of what the Privy Council has designated as conditional legislation, and does not really

60. *"Subject to the exceptions specified in Section 3, the Provincial Government, may by notification in the Official Gazette, invest the City Civil Court with jurisdiction to receive, try and dispose of all suits and other proceedings of a civil nature, arising within the Greater Bombay and of such value not exceeding Rs. 25,000 as may be specified in the notification."*

> *delegate any legislative power but merely prescribes as to how effect is to be given to what the Legislature has already decided. As the Privy Council has pointed out, legislation conditional on the use of particular powers or on the exercise of a limited discretion entrusted by the Legislature to persons in whom it places confidence, is no uncommon thing, and in many instances it may be highly convenient and desirable."*

Mahajan, J observed as follows:

> *"The fixation of the maximum limit of the court's pecuniary jurisdiction is the result of exercise of legislative will, as without arriving at this judgment it would not have been able to determine the outside limit of the pecuniary jurisdiction of the new court. The policy of the legislature in regard to the pecuniary jurisdiction of the court that was being set up was settled by Sections 3 and 4 of the Act and it was to the effect that initially its pecuniary jurisdiction will be limited to Rs. 10,000 and that in future if circumstances make it desirable - and this was left to the determination of the Provincial Government - it could be given jurisdiction to hear cases up to the value of Rs.25,000. It was also determined that the extension of the pecuniary jurisdiction of the new court will be subject to the provisions contained in the exceptions to Section 3. I am therefore of the opinion that the learned Chief Justice was not right in saying that the legislative mind was never applied as to the conditions subject to which and as to the amount up to which the new court could have pecuniary jurisdiction. All that was left to the discretion of the Provincial Government was the determination of the circumstances under which the new court would be clothed with enhanced pecuniary jurisdiction. The vital matters of policy having been determined, the actual execution of that policy was left to the Provincial Government and to such conditional legislation no exception could be taken."*

Again, the court upheld the exercise of executive discretion on the ground that there was proper legislative framework and guidance to the government, with respect to conferring jurisdiction upon the City Civil Court, beyond the limit enacted by Section 3, and Section 4 was enacted to achieve that objective.

70. In *Sardar Inder Singh*, the validity of an ordinance which was extended by two notifications was involved. Section 4 of the original ordinance enacted that as long as it (the ordinance) was in force:

> *"no tenant shall be liable to ejectment or dispossession from the whole or a part of his holding in such area on any ground whatsoever."*

The validity of this ordinance, enacted originally in 1949 (and in force for two years), was extended twice, for two years each (by notifications dated June 14, 1951 and June 20, 1953). The Legislative Assembly of Rajasthan was constituted and came into being on March 29, 1952. Till then, the Rajpramukh was vested with legislative authority. On October 15, 1955, a new enactment, the Rajasthan Tenancy Act No. III of 1955 came into force, and the relationship between landlords and tenants was governed by it. Negativing the challenge to the extension of the ordinance, this court ruled, (after considering *Burah, In re Delhi Laws Act and Jatindra Nath Gupta*) that:

> *"In the present case, the preamble to the Ordinance clearly recites the state of facts which necessitated the enactment of the law in question, and Section 3 fixed the duration of the Act as two years, on an understanding of the situation as it then existed. At the same time, it conferred a power on the Rajpramukh to extend the life of the Ordinance beyond that period, if the state of affairs then should require it. When such extension is decided by the Rajpramukh and notified, the law that will operate is the law which was enacted by the legislative authority in respect of " place, person, laws, powers ", and it is clearly conditional and not delegated legislation as laid down in The Queen v. Burah ([1878] 5 I.A. 178), and must, in consequence, be held to be valid. It follows that we are unable to agree with the statement of the law in Jatindra Nath Gupta v. The, State of Bihar([1949] F.C.R. 595) that a power to extend the life of an enactment cannot validly be conferred on an outside authority. In this view, the question as to the permissible limits of delegation of legislative authority on which the judgments in In re The Delhi Laws Act, 1912 ([1951] S.C.R. 747), reveal a sharp conflict of opinion does not arise for consideration, and we reserve our opinion thereon.*
>
> *It is next contended that the notification dated June 20, 1953, is bad, because after the Constitution came into force, the Rajpramukh derived his authority to legislate from Article 385, and that under that Article his authority ceased when the Legislature of the State was constituted, which was in the present case, on March 29, 1952. This argument proceeds on a misconception as to the true character of a notification issued under Section 3 of the Ordinance. It was not an independent piece of legislation such as could be enacted only by the then competent legislative (1).authority of the State, but merely an exercise of a power conferred by a statute which had been previously enacted by the appropriate legislative authority. The exercise of such a power is referable not to the legislative competence of the Rajpramukh*

> *but to Ordinance No- IX of 1949, and provided Section 3 is valid, the validity of the notification is co- extensive with that of the Ordinance. If the Ordinance did not come to an end by reason of the fact that the authority of the Rajpramukh to legislate came to an end-and that is not and cannot be disputed-neither did the power to issue a notification which is conferred therein. The true position is that it is in his character as the authority on whom power was conferred under Section 3 of the Ordinance that the Rajpramukh issued the impugned notification, and not as the legislative authority of the State. This objection should accordingly be overruled."*

71. In *Hamdard Dawakhana* (supra), the validity of Section 3(d) of the Drug and Magic Remedies (Objectionable Advertisement) Act, 1954 was in issue. Section 16(1) of that Act conferred power on the government to frame rules, among others, by Section 16(2)(a) *"to specify any disease or condition to which the provisions of Section 3 shall apply"* and by Section 16(2)(b) *"prescribe the manner in which advertisement of articles or things referred to in cl. (c) of sub-s.(1) of Section 14 may be sent confidentially."* The Central Government argued that Section 3(d), which empowered it to notify *"any other disease or condition which maybe specified in the rules made under this Act"* was an instance of conditional legislation. The relevant discussion on conditional legislation, in the judgment, is extracted below:

> *"The distinction between conditional legislation and delegated legislation is this that in the former the delegate's power is that of determining when a legislative declared rule of conduct shall become effective; Hampton & Co. v. U.S. (1) and the latter involves delegation of rule making power which constitutionally may be exercised by the administrative agent. This means that the legislature having laid down the broad principles of its policy in the legislation can then leave the details to be supplied by the administrative authority. In other words by delegated legislation the delegate completes the legislation by supplying details within the limits prescribed by the statute and in the case of conditional legislation the power of legislation is exercised by the legislature conditionally leaving to the discretion of an external authority the time and manner -of carrying its legislation into effect as also the determination of the area to which it is to extend."*

The court held that the impugned provision was impermissible delegation as it lacked legislative guidance as regards the exercise of executive power:

> *"The question for decision then is, is the delegation constitutional in that the administrative authority has been supplied with*

proper guidance. In our view the words impugned are vague. Parliament has established no criteria, no standards and has not prescribed any principle on which a particular disease or condition is to be specified in the Schedule. It is not stated what facts or circumstances are to be taken into consideration to include a particular- condition or disease. The power of specifying diseases and conditions as given in s. 3(d) must therefore be held to be going beyond permissible boundaries of valid delegation. As a consequence the Schedule in the rules must be struck down."

72. In *Sabanayagam* (supra) the *vires* of a notification issued under Section 36 of the Payment of Bonus Act, exempting the concerned statutory board from its coverage, was in issue. This court interpreted the notification as one operating from the date of its issue, thus resulting in the application of the Payment of Bonus Act for previous accounting years. As to the nature of the power (to exempt), this court, after considering various previous decisions, held that there are three broad categories of conditional legislation, and elaborated as follows:

"In the first category when the Legislature has completed its task of enacting a Statute, the entire superstructure of the legislation is ready but its future applicability to a given area is left to the subjective satisfaction of the delegate who being satisfied about the conditions indicating the ripe time for applying the machinery of the said Act to a given area exercises that power as a delegate of the parent legislative body. Tulsipur Sugar Co. 's case (supra) is an illustration on this point. When the Act itself is complete and is enacted to be uniformly applied in future to all those who are to be covered by the sweep of the Act, the Legislature can be said to have completed its task. All that it leaves to the delegate is to apply the same uniformly to a given area indicated by the parent Legislature itself but at an appropriate time. This would be an act of pure and simple conditional legislation depending upon the subjective satisfaction of the delegate as to when the said Act enacted and completed by the parent Legislature is to be made effective. As the parent Legislature itself has laid down a binding course of conduct to be followed by all and sundry to be covered by the sweep of the legislation and as it has to act as a binding rule of conduct within that sweep and on the basis of which all their future actions are to be controlled and guided, it can easily be visualised that of the parent Legislature while it enacted such law was not required to hear the parties likely to be affected by the operation of the Act, is delegate exercising an extremely limited and almost ministerial function as an agent of the principal Legislature applying the Act to the area at an

appropriate time is also not supposed and required to hear all those who are likely to be affected in future by the binding code of conduct uniformly laid down to be followed by all within the sweep of the Act as enacted by the parent Legislature.

However, there may be second category of conditional legislations wherein the delegate has to decide whether and under what circumstances a completed Act of the parent legislation which has already come into force is to be partially withdraw from operation in a given area or in given cases so as not to be applicable to a given class of persons who are otherwise admittedly governed by the Act. When such a power by way of conditional legislation is to be exercised by the delegate a question may arise as to how the said power can be exercised. In such an eventuality if the satisfaction regarding the existence of condition precedent to the exercise of such power depends upon pure subjective satisfaction of the delegate and if such an exercise is not required to be based on the prima face proof of factual data for ad against such an exercise and if such an exercise to uniformly apply in future to a given common class of subjects to be governed by such an exercise and when such an exercise is not to be confined to individual cases only, then even in such category of cases while exercising conditional legislative powers the delegate may not be required to have an objective assessment after considering rival versions on the data placed before it for being taken into consideration by it in exercise of such power of conditional legislation. For example if a tariff is fixed under the Act and exemption power is conferred on the delegate whether to grant full exemption or partial exemption from the tariff rate it may involve such an exercise of conditional legislative function wherein the exercise has to be made by the delegate on its own subjective satisfaction and once that exercise is made whatever exemption is granted or partially granted or partially withdrawn from time to time would be binding on the entire class of persons similarly situated and who will be covered by the seep of such exemptions, partial or whole, and whether granted or withdrawn, wholly or partially, and in exercise of such a power there may be no occasion to hear the parties likely to be affected by such an exercise. For example from a settled tariff say if earlier 30% exemption is granted by the delegate and then reduced to 20% all those who are similarly situated and covered by the sweep of such exemption and its modification cannot be permitted to say in the absence of any statutory provision to that effect that they should be given a hearing before the granted exemption is wholly or partially withdrawn.

> *In the aforesaid first two categories of cases delegate who exercises conditional legislation acting on its pure subjective satisfaction regarding existence of conditions precedent for exercise of such power may not be required to hear parties likely to be affected by the exercise of such power. Where the delegate proceeds to fill p the details of the legislation for the future - which is part of the integrated action of policy-making for the future, it is part of the future policy and is legislative. But where he merely determines either subjectively or objectively - depending upon the "conditions" imposed in the statute permitting exercise of power by the delegate - there is no legislation involved in the real sense and therefore, in our opinion, applicability of principles of fair play, consultation or natural justice to the extent necessary cannot be said to be foreclosed. Of course, the fact that in such cases of ^conditional legislation' these principles are not foreclosed does not necessarily mean that they are always mandated. In a case of purely ministerial function or in a case where no objective conditions are prescribed and the matter is left to the subjective satisfaction of the delegate (as in categories one and two explained above) no such principles of fair play, consultation or natural justice could be attracted. That is because the very nature of the administrative determination does not attract these formalities and not because the determination is legislative in character. There may also be situations where the persons affected are unidentifiable class of persons or where public interest or interests of State etc. preclude observations of such a procedure. (....)"*

73. In another decision, *Vasu Dev Singh,* the court had to decide upon the validity of a notification issued by the Administrator of Chandigarh dated 7.11.2002, directing that the provision of the East Punjab Urban Rent Restriction Act, 1949, (which was extended by Parliament to Chandigarh by the East Punjab Urban Rent Restriction Act (Extension to Chandigarh) Act 1974) was not applicable to buildings and rented lands whose monthly rent exceeded ₹1500. The Administrator justified the notification as an instance of conditional legislation since the power under Section 3 enabled him to exempt provisions of the Act to classes of buildings[61]. This court disagreed with the contention that the exemption was in the exercise of conditional legislative power:

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61. *"3. Exemptions.—The Central Government may direct that all or any of the provisions of this Act, shall not apply to any particular building or rented land or any class of buildings or rented lands."*

> *"16. We, at the outset, would like to express our disagreement with the contentions raised before us by the learned counsel appearing on behalf of the respondents that the impugned notification is in effect and substance a conditional legislation and not a delegated legislation. The distinction between conditional legislation and delegated legislation is clear and unambiguous. In a conditional legislation the delegatee has to apply the law to an area or to determine the time and manner of carrying it into effect or at such time, as it decides or to understand the rule of legislation, it would be a conditional legislation. The legislature in such a case makes the law, which is complete in all respects but the same is not brought into operation immediately. The enforcement of the law would depend upon the fulfilment of a condition and what is delegated to the executive is the authority to determine by exercising its own judgment as to whether such conditions have been fulfilled and/or the time has come when such legislation should be brought into force. The taking effect of a legislation, therefore, is made dependent upon the determination of such fact or condition by the executive organ of the Government. Delegated legislation, however, involves delegation of rule-making power of legislation and authorises an executive authority to bring in force such an area by reason thereof. The discretion conferred on the executive by way of delegated legislation is much wider. Such power to make rules or regulations, however, must be exercised within the four corners of the Act. Delegated legislation, thus, is a device which has been fashioned by the legislature to be exercised in the manner laid down in the legislation itself. By reason of Section 3 of the Act, the Administrator, however, has been empowered to issue a notification whereby and whereunder, an exemption is granted for application of the Act itself."*

After considering a large number of decisions, including those where this court had upheld exemptions issued by different states based on rent, this court concluded that there was insufficient justification for the impugned exemption notification, and that it was *ultra vires* the power conferred upon the Administrator:

> *"150. Moreover, the notification has not been issued for a limited period. It will have, therefore, a permanent effect. Submission of Mr Nariman that having regard to the provisions of the General Clauses Act, the same can be modified, amended at any time and withdrawn, cannot be accepted for more than one reason. Firstly, the respondent proceeded on the basis that the said notification has been issued with a view to give effect to the National Policy i.e. amendments must be carried out until a new Rent Act is enacted. Whether the Act would be enacted or*

> *not is a matter of surmises and conjectures. It would be again a matter of legislative policy which was not within the domain of the Administrator. Secondly, the Administrator in following the National Policy proceeded on the basis that the provisions of the Act must ultimately be repealed. When steps are taken to repeal the Act either wholly or in part, the intention becomes clear i.e. the same is not meant to be given a temporary effect. When the repealed provisions are sought to be brought back to the statute-book, it has to be done by way of fresh legislation. (...) What can be done in future by another authority cannot be a ground for upholding an executive act."*

74. A close reading of the decisions cited on behalf of the petitioners would reveal that the power to extend laws has been upheld. As B.K. Mukherjea observed, in *In re Delhi Laws Act, 1912* (supra):

> *"it is quite an intelligible policy that so long as a proper legislative machinery is not set up in a particular area, the Parliament might empower an executive authority to introduce laws validly passed by a competent legislature and actually in force in other parts of the country to such area, with each modifications and restrictions as the authority thinks proper, the modifications being limited to local adjustments or changes of a minor character."*

Lord Selborne, in *Burah* (supra) held such power to be unexceptionable, saying that

> *"Legislation, conditional on the use of particular powers, or on the executive of a limited discretion, entrusted by the Legislature to persons in whom it places confidence is no uncommon thing; and, in many circumstances, it may be highly convenient"*

In *Jitendra Nath Gupta* (supra), what the Federal Court held objectionable was the conferment of *power to extend provisions of an enactment, beyond its expressed duration or time:*

> *"It is for the Legislature to state how long a particular legislation will be in operation. That cannot be left to the discretion of some other body. The power to modify an Act of a Legislature, without any limitation on the extent of the power of modification, is undoubtedly a legislative power."*

The plurality of judgments, as well as opinions rendered in *In Re Delhi Laws Act, 1912,* makes that decision a somewhat complex reading. Yet, the final *per curiam* opinion of the court was that the power to extend, modify or repeal enactments of Part C States, in respect of matters which the Parliament had *not directly enacted,* amounted to excessive legislation. Additionally, exception was taken to the power

to repeal, being delegated, as it was an essential legislative power.

75. In *Sardar Inder Singh* (supra), the extension of rent restriction ordinances was in question; the court did not apply the rule in *Jatindra Nath Gupta* (supra), and ultimately held that the true position was that the Rajpramukh *"in his character as the authority on whom power was conferred under Section 3 of the Ordinance that the Rajpramukh issued the impugned notification, and not as the legislative authority of the State."* In *Hamdard Dawakhana* (supra), the argument that Section 3 was conditional legislation was *negatived* and it was held to be an instance of excessive delegation, where Parliament did not indicate any guidance for inclusion of particular instances in the schedule, leaving it to the executive government to decide the issue, in what could be an arbitrary manner. *Vasu Dev Singh* (supra) was a case where the court held that the power to exclude from application of the enactment, based on the quantum of rent, was premised on the Administrator's opinion that the legislation would be repealed, having regard to a National Policy. Moreover, the notification excluded the application of the Act in relation to premises based on rent and had a permanent character. This court held that the notification was an instance of impermissible legislation by the executive. It is evident that the court ruled in *Jitendra Nath Gupta, In re Delhi Laws Act* and *Vasu Dev Singh* that the exercise of extending an enactment beyond the time of its designated application by the legislature; the power of extension, modification and repeal of laws made by other legislative bodies; and the limiting the application of an enactment based on a quantification (an amount of rent) were legislative exercises, beyond the powers conferred. They *stricto sensu* fall in the category of *"general legislative authority, a new legislative Power, not created or authorized"* by the parent legislation, *(per Burah, supra).* In *Hamdard Dawakhana,* the power to *include* new drugs, was held to be *uncanalized,* i.e. without any legislative guidance. The decision did not involve bringing into force provisions of an enactment, or exclusion, but inclusion within its fold, *without any statutory guidance* on new drugs. The case therefore involved delegated legislation.

76. It would now be useful to analyse some decisions cited by the respondents. In *Bishwambhar Singh* (supra) the power under Section 3(1) of the Orissa Estates Abolition (Amendment) Act, 1952 was involved. The provision enabled the state to declare that an estate had - in terms of notifications issued in that regard- vested in it, free from all encumbrances. This court negatived the challenge to that provision:

> *"77. The long title of the Act and the two preambles which have been quoted above clearly indicate that the object and purpose of the Act is to abolish all the rights, title and interest in land of intermediaries by whatever name known. This is a clear enunciation of the policy which is sought to be implemented by the operative provisions of the Act. Whatever discretion has been*

> *vested in the State Government under Section 3 or Section 4 must be exercised in the light of this policy and, therefore, it cannot be said to be an absolute or unfettered discretion, for sooner or later all estates must perforce be abolished. From the very nature of things a certain amount of discretionary latitude had to be given to the State Government. It would have been a colossal task if the State Government had to take over all the estates at one and the same time. It would have broken down the entire administrative machinery. It could not be possible to collect sufficient staff to take over and discharge the responsibilities. It would be difficult to arrange for the requisite finance all at once. It was, therefore, imperative to confer some discretion on the State Government. It has not been suggested or shown that in practice any discrimination has been made."*

In *Basant Kumar Sarkar* (supra), the power in question was Section 1(3) of the Employees State Insurance Act, which enabled the government to extend the enactment to establishments. This court negatived that the power was *ultra vires:*

> *"4. The argument is that the power given to the Central Government to apply the provisions of the Act by notification, confers on the Central Government absolute discretion, the exercise of which is not guided by any legislative provision and is, therefore, invalid. The Act does not prescribe any considerations in the light of which the Central Government can proceed to act under Section 1(3) and such un-canalised power conferred on the Central Government must be treated as invalid. We are not impressed by this argument. Section 1(3) is really not an illustration of delegated legislation at all; it is what can be properly described as conditional legislation. The Act has prescribed a self-contained Code in regard to the insurance of the employees covered by it; several remedial measures which the legislature thought it necessary to enforce in regard to such workmen have been specifically dealt with and appropriate provisions have been made to carry out the policy of the Act as laid down in its relevant sections. Section 3(1) of the Act purports to authorise the Central Government to establish a Corporation for the administration of the scheme of Employees' State Insurance by a notification. In other words, when the notification should be issued and in respect of what factories it should be issued, has been left to the discretion of the Central Government and that is precisely what is usually done by conditional legislation. [....]*
>
> *5. [...] In the very nature of things, it would have been impossible for the legislature to decide in what areas and in respect of which*

> *factories the Employees' State Insurance Corporation should be established. It is obvious that a scheme of this kind, though very beneficent, could not be introduced in the whole of the country all at once. Such beneficial measures which need careful experimentation have some times to be adopted by stages and in different phases..."*

77. The next decision cited was *Lachmi Narain* (supra). Here, the Central Government was empowered by Section 2 of the Part C States (Laws) (Act), 1950 to extend through a notification any enactment in Part A States. The Central Government had issued a Notification in 1951 to extend the provisions of the Bengal Finance (Sales Tax) Act to the then Part C State of Delhi. In 1957, a notification in exercise of this power under Section 2 was issued modifying the earlier notification resulting in withdrawal of certain benefits. In the background of these facts, a three-judge bench of this Court dealing with an argument on whether the power to extend with or without modifications any enactment was conditional or delegated legislation, made the following observations:

> *"49. Before proceeding further, it will be proper to say a few words in regard to the argument that the power conferred by Section 2 of the Laws Act is a power of conditional legislation and not a power of 'delegated' legislation. In our opinion, no useful purpose will be served to pursue this line of argument because the distinction propounded between the two categories of legislative powers makes no difference, in principle. In either case, the person to whom the power is entrusted can do nothing beyond the limits which circumscribe the power; he has to act - to use the words of Lord Selbourne - "within the general scope of the affirmative words which give the power" and without violating any "express conditions or restrictions by which that power is limited". There is no magic in a name. Whether you call it the power of "conditional legislation" as Privy Council called it in Burah's case (supra), or 'ancillary legislation' as the Federal Court termed it in Choitram v. C. I. T., Bihar, or 'subsidiary legislation' as Kania, C. J. Styled it, or whether you camouflage it under the veiling name of 'administrative or quasi-legislative power' - as Professor Cushman and other authorities have done it - necessary for bringing into operation and effect an enactment, the fact remains that it has a content, howsoever small and restricted, of the law-making power itself. There is ample authority in support of the proposition that the power to extend and carry into operation an enactment with necessary modifications and adaptations is in truth and reality in the nature of a power of delegated legislation."*

After these observations, this court held that the power of modification could not have been exercised by the Government in the manner that it did, and observed as follows:

> *"60. The power given by Section 2 exhausts itself on extension of the enactment; it cannot be exercised repeatedly or subsequently to such extension. It can be exercised only one, simultaneously with the extension of the enactment. This is one dimension of the statutory limits which circumscribe the power. The second is that the power cannot be used for the purpose other than that of extension. In the exercise of this power, only such "restrictions and modifications can be validly engrafted in the enactment sought to be extended, which are necessary to bring it into operation and effect in the Union territory. "Modifications" which are not necessary for, or ancillary and subservient to the purpose of extension, are not permissible. And, only such "modifications" can be legitimately necessary for such purpose as are required to adjust, adapt and make the enactment suitable to the peculiar local conditions of the Union territory for carrying it into operation and effect. In the context of the section, the words "restrictions and modifications" do not cover such alterations as involve a change in any essential feature, of the enactment or the legislative policy built into it. This is the third dimension of the limits that circumscribe the power.*
>
> *61. It is true that the word "such restrictions and modifications as it thinks fit" if construed literally and in isolation, appear to give unfettered power of amending and modifying the enactment sought to be extended. Such a wide construction must be eschewed lest the very validity of the section becomes vulnerable on account of the vice of excessive delegation. Moreover, such a construction would be repugnant to the context and the content of the section, read as a whole, and the statutory limits and conditions attaching to the exercise of the power. We must, therefore, confine the scope of the words "restrictions and modifications" to alterations of such a character which keep the inbuilt policy, essence and substance of the enactment sought to be extended, intact, and introduce only such peripheral or insubstantial changes which are appropriate and necessary to adapt and adjust it to the local conditions of the Union territory."*

78. It would be useful at this stage to set out in tabular form, the various dates on which the provisions of the Code were brought into force. The chart is set out below:

SI. No	Date	S.O.	Provisions brought into force
1.	05.08.2016	S.O. 2618(E)	Sections 188 to 194
2.	19.08.2016	S.O. 2746(E)	Clauses (1), (5), (22), (26), (28) and (37) of section 3, sections 221, 222, 225, 226, 230, 232and 233, sub-section (1) and clause (zd) of sub-section (2) of section 239, sub-section (1) and clause (zt) of sub-section (2) of section 240, sections 241 and 242
3.	01.11.2016	S.O.3355(E)	Clause (2) to clause(4), clause (6) to clause (21), clause (23) to clause (25), clause (27) clause (29) to clause (36) of section 3, sections 196, 197 and 223, clause(ze) to clause (zh), clause (zl) to clause (zm) of sub-section (2) of section 239, clause (a) to clause (zm), clause (zu) to clause (zzzc) of sub-section (2) of section 240, section 244, section 246 to section 248 (both inclusive), sections 250 and 252
4.	15.11.2016	S.O. 3453(E)	Section 199 to section 207 (both inclusive), clause (c) and clause (e) of sub-section (1) of section 208, sub-section (2) of section 208, section 217 to section 220 (both inclusive) sections 251, 253, 254 and 255
5.	Came into force on 01.12.2016 vide S.O. dated 30.11.2016	S.O. 3594(E)	Clause (a) to clause (d) of section 2 (except with regard to voluntary liquidation or Bankruptcy section 4 to section 32 (both inclusive), section 60 to section 77 (both inclusive), section 198, section 231, section 236 to section 238 (both inclusive) and clause (a) to clause (f) of subsection (2) of section 239
6.	S.O. dated 09.12.2016 Came into force on 15.12.2016	S.O. 3687(E)	Section 33 to section 54 (both inclusive)
7.	S.O. dated 30.03.2017; came into force on 01.04.2017	S.O. 1005(E)	Section 59; section 209 to 215 (both inclusive); subsection (1) of section 216; and section 234 and section 235
8.	Came into force on 01.04.2017 vide S.O. dated 15.05.2017	S.O. 1570(E)	Clause (a) to clause (d) of section 2 relating to voluntary liquidation or bankruptcy
9.	14.06.2017	S.O. 1910(E)	Section 55 to section 58 (both inclusive)
10.	01.05.2018	S.O. 1817(E)	Section 227 to section 229 (both inclusive)
11.	S.O. dated 15.11.2019 **(impugned notification)** Came into force on 01.12.2019	S.O. 4126(E)	Section 2 (e); section 78 (except with regard to fresh start process) and section 79; Sections 94 to 187 [both inclusive]; Section 239 (2) (g) to (i) ;239 (2) (m) to (zc);Section 240 (2) (zn) to (zs); and section 249 only in so far as they relate to personal guarantors to corporate debtors

79. The above tabular chart reveals that the provisions relating to the Insolvency and Bankruptcy Board of India were brought into force at the earliest point of time, i.e., 05.08.2016. This was to enable the setting up of the regulatory body so that it could commence its task of examining the relevant issues and evolving standards to be embodied in rules and regulations. Thereafter, the notification dated 19.08.2016 brought into force Chapter VII) of Part-IV and

some provisions of Part-V - relating to finance, acts, audit and miscellaneous provisions. These were the provisions ancillary to the working of the Board. The next to be brought into force were parts of Sections 196-197 and 223, again which dealt with the Board's functions, its funds etc. as well as Sections 244, 246-248 and 250-252. These were general provisions relating to the provisions that amended various other enactments in terms of the Schedules set out to the Code. The fourth notification dated 15.11.2016 brought into force those provisions relating to insolvency professional agencies and some other provisions which amended other enactments.

80. The notification of 30.11.2016 brought into force certain provisions that had the effect of operationalizing the enactment in respect of four distinct categories, i.e. companies incorporated under the Companies Act, companies governed by special Act, LLPs and other bodies incorporated under any law which the Central Government could by notification specify. These provisions triggered the application of the Code to corporate debtors as well as LLPs and other companies and corporations. Significantly, provisions with regard to voluntary liquidation or bankruptcy were excluded from application by this notification. Those provisions were brought into force by the eighth notification dated 01.04.2017, with effect from 15.05.2017. In the meanwhile, the notification dated 09.12.2016 with effect from 15.12.2016, operationalized Sections 33 to 44 which deal with the liquidation process.

81. It is quite evident that the method adopted by the Central Government to bring into force different provisions of the Act had a specific design: to fulfill the objectives underlying the Code, having regard to its priorities. Plainly, the Central Government was concerned with triggering the insolvency mechanism processes in relation to corporate persons at the earliest. Therefore, by the first three notifications, the necessary mechanism such as setting up of the regulatory body, provisions relating to its functions, powers and the operationalization of provisions relating to insolvency professionals and agencies were brought into force. These started the mechanism through which insolvency processes were to be carried out and regulated by law. In the next phase, the part of the Code dealing with one of its subjects, i.e., corporate persons [covered by Section 2(a) to 2(d) of the Code] was brought into force. The entire process for conduct of insolvency proceedings and provisions relating to such corporate persons were brought into force. The other notifications brought into force certain consequential provisions, as well as provisions which give overriding effect to the Code (as also the provisions that amend or modify other laws). All these clearly show that the Central Government followed a stage-by-stage process of bringing into force the provisions of the Code, regard being had to the similarities or dissimilarities of the subject matter and those covered by the Code.

82. As discussed in a previous part of this judgment, insolvency proceedings relating to individuals is regulated by Part-III of the Code. Before the amendment of 2018, all individuals (personal guarantors to corporate debtors, partners of firms, partnership firms and other partners as well as individuals who were either partners or personal guarantors to corporate debtors) fell under one descriptive description under the unamended Section 2(e). The unamended Section 60 contemplated that the adjudicating authority in respect of personal guarantors was to be the NCLT. Yet, having regard to the fact that Section 2 brought all three categories of individuals within one umbrella class as it were, it would have been difficult for the Central Government to selectively bring into force the provisions of part -III only in respect of personal guarantors. It was here that the Central Government heeded the reports of expert bodies which recommended that personal guarantors to corporate debtors facing insolvency process should also be involved in proceedings by the same adjudicator and for this, necessary amendments were required. Consequently, the 2018 Amendment Act altered Section 2(e) and subcategorized three categories of individuals, resulting in Sections 2(e), (f) and (g). Given that the earlier notification of 30.11.2016 had brought the Code into force in relation to entities covered under Section 2(a) to 2(d), the amendment Act of 2018 provided the necessary statutory backing for the Central Government to apply the Code, in such a manner as to achieve the objective of the amendment, i.e. to ensure that adjudicating body dealing with insolvency of corporate debtors also had before it the insolvency proceedings of personal guarantors to such corporate debtors.

83. The amendment of 2018 also altered Section 60 in that insolvency and bankruptcy processes relating to liquidation and bankruptcy in respect of three categories, i.e. corporate debtors, corporate guarantors of corporate debtors and personal guarantors to corporate debtors were to be considered by the same forum, i.e. NCLT.

84. Section 2, i.e., (application provision of the Code, in relation to different entities), as originally enacted, did not contain a separate category of personal guarantors to corporate debtors. Instead, personal guarantors were part of a category or group of individuals, to whom the Code applied (i.e. individuals, proprietorship and partnership firms, *per* Section 2(e) which stated *"partnership firms and individuals").* The Code envisioned that the insolvency process outlined in provisions of Part III was to apply to them. The Statement of Objects and Reasons for the Amendment Bill of 2017, which eventually metamorphosized into the Amendment Act, stated that the Code provided for insolvency resolution for individuals and partnership firms

> *"which are proposed to be implemented in a phased manner on account of the wider impact of these provisions. In the first*

> *phase, the provisions would be extended to personal guarantors of corporate debtors to further strengthen the corporate insolvency resolution process and a clear enabling provision for the purpose has been provided in the Bill."*

85. The amendment introduced Section 2(e) i.e. personal guarantors to corporate debtors, *as a distinct category to whom the Code applied.* Now, the amendment was brought into force retrospectively, on 23 November, 2017. Section 1 of the Amendment Act states:

> *"Section 1. (1) This Act may be called the Insolvency and Bankruptcy Code (Amendment) Act, 2018.*
>
> *(2) It shall be deemed to have come into force on the 23rd day of November, 2017."*

86. In addition to amending Section 2, the same Amendment also amended Section 60 (2). Interestingly, though "personal guarantor" was not defined, and fell within the larger rubric of "individual" under the Code, the adjudicating authority for insolvency process and liquidation of corporate persons including corporate debtors and personal guarantors was the NCLT- even under the unamended Code. The amendment of Section 60(2) added a few concepts. This is best understood on a juxtaposition of the unamended and the amended provisions: The unamended Section 60 (2) read as follows:

> *"(2) Without prejudice to sub-section (1) and notwithstanding anything to the contrary contained in this Code, where a corporate insolvency resolution process or liquidation proceeding of a corporate debtor is pending before a National Company Law Tribunal, an application relating to the insolvency resolution or bankruptcy proceeding of a personal guarantor of the corporate debtor shall be filed before the National Company Law Tribunal."*

The amended Section 60 (2) reads as follows:

> *"(2) Without prejudice to sub-section (1) and notwithstanding anything to the contrary contained in this Code, where a corporate insolvency resolution process or liquidation proceeding of a corporate debtor is pending before a National Company Law Tribunal, an application relating to the insolvency resolution or liquidation or bankruptcy of a corporate guarantor or personal guarantor, as the case may be, of such corporate debtor shall be filed before the National Company Law Tribunal"*

87. The amendment inserted the expression *"or liquidation"* before the words *"or bankruptcy"* and also inserted the expression *"of a corporate guarantor... as the case may be, of"* such corporate debtor. The interpretation of this expression

has to be contextual. There is no question of *liquidation* of a personal guarantor, an individual. In such cases, this court has ruled that the principle behind the maxim *"reddendo singular singulis"* applies. This court had, in *Koteswar Vittal Kamath* v. *K. Rangappa Baliga &* Co[62] quoted *Black's Interpretation of Laws,* to explain the meaning of that maxim:

> *"Where a sentence in a statute contains several antecedents and several consequences, they are to be read distributively, that is to say, each phrase or expression is to be referred to its appropriate object."*

Koteswar Vittal Kamath was concerned with the interpretation of the proviso to Article 304(b) of the Constitution of India which provided that:

> *"Provided that no Bill or amendment for the purposes of clause (b) shall be introduced or moved in the Legislature of a State without the previous sanction of the President."*

The term "no Bill or amendment" was construed distributively. The Court held

> *"In our opinion, the High Court did not correctly appreciate the position. The language of the proviso cannot be interpreted in the manner accepted by the High Court without doing violence to the rules of construction. If both the words "introduced" or "moved" are held to refer to the Bill, it must necessarily be held that both those words will also refer to the word "amendment". On the face of it, there can be no question of introducing an amendment. Amendments are moved and then, if accepted by the House, incorporated in the Bill before it is passed. There is further an indication in the Constitution itself that wherever a reference is made to a Bill, the only step envisaged is introduction of the Bill. There is no reference to such a step as a Bill being moved. The Articles, of which notice may be taken in this connection, are Articles 109, 114, 117, 198 and 207. In all these articles, whatever prohibition is laid down relates to the introduction of a Bill in the Legislature. There is no reference at any stage to a Bill being moved in a House. The language thus used in the Constitution clearly points to the interpretation that, even in the proviso to Article 304, the word "introduced" refers to the Bill, while the word "moved" refers to the amendment."*

88. Recently, in *Rajendra K. Bhutta v. Maharashtra Housing and Area Development Authority*[63], this principle and *Koteshwar Vittal Kamath* were cited and applied. Therefore, it is held that when Section 60(2) alludes to insolvency resolution or bankruptcy, or liquidation of three categories, i.e. corporate debtors,

62. (1969) 1 SCC 255.
63. (2020) 13 SCC 208.

corporate guarantors (to corporate debtors) and personal guarantors (to corporate debtors) they apply distributively, i.e. that insolvency resolution, or liquidation processes apply to corporate debtors and their corporate guarantors, whereas insolvency resolution and bankruptcy processes apply to personal guarantors, (to corporate debtors) who cannot be subjected to liquidation.

89. The case law cited on behalf of the petitioners shows a certain pattern. In many cases (*In re Delhi Laws Act, Jitendra Kumar Gupta)* this court had held that the power to extend the law, existing or future, that had not been enacted by the competent legislature, and the power of repeal, as well as the power to extend the life of the law, were instances of *excessive* delegation of legislative power. In *Narottamdas Jethabhai* (supra), this court upheld the extension of pecuniary jurisdiction of city civil courts beyond the statutorily prescribed limit, *because* there was a provision enabling it, and the executive confined the exercise of its power to extend the jurisdiction, within the limits enacted. *Hamdard Dawakhana* was an instance of grant of un-canalized power (without legislative guidance) of inclusion in the schedule to the Act, acts falling within its application; it was clearly a case of excessive delegation. In *Lachmi Narain* (supra), this court held that the power of modification cannot be used at any time, but has to be resorted to initially by the executive, at the time a law is extended and applied. The observations in *Bishwambhar Singh* and *Basant Kumar Sarkar* (supra) reveal that the executive is tasked with implementing the Act in stages, as it *"would have been impossible for the legislature to decide in what areas"* and in respect of what subject matters (in that case, factories and establishments) the provisions can apply. Crucially, it was held that *"a scheme of this kind, though very beneficent, could not be introduced in the whole of the country all at once."* Further, held this court, such provisions may *"need careful experimentation have some times to be adopted by stages and in different phases."*

90. The theme of gradual implementation of law or legal principles, was also spoken about in *Javed v. State of Haryana*[64] by this court, which held that there is no constitutional imperative that a law or policy should be implemented all at once:

> ***"16.*** *A uniform policy may be devised by the Centre or by a State. However, there is no constitutional requirement that any such policy must be implemented at one go. Policies are capable of being implemented in a phased manner. More so, when the policies have far-reaching implications and are dynamic in nature, their implementation in a phased manner is welcome for it receives gradual willing acceptance and invites lesser resistance."*

64. (2003) 8 SCC 369.

Similar observations were made in *Pannalal Bansilal Pitti* v. *State of A.P.*[65] where the court held that imposition of a uniform law, in some areas, or subjects may be counterproductive and contrary to public purpose. *Sabanayagam* (supra) too emphasized discretion to extend an enactment, having regard to the time, area of operation, and its applicability when it was emphasized that such power is *"limited and almost ministerial function as an agent of the principal Legislature applying the Act to the area at an appropriate time"*

91. The close proximity, or inter-relatedness of personal guarantors with corporate debtors, as opposed to individuals and partners in firms was noted by the report of the Working Group, which remarked that it:

> *"recognizes that dynamics, the interwoven connection between the corporate debtor and a guarantor (who has extended his personal guarantee for the corporate debtor) and the partnership firms engaged in business activities may be on distinct footing in reality, and would, therefore, require different treatment, because of economic considerations. Assets of the guarantor would be relevant for the resolution process of the corporate debtor. Between the financial creditor and the corporate debtor, mostly the guarantee would contain a covenant that as between the guarantor and the financial creditor, the guarantor is also a principal debtor, notwithstanding that he is guarantor to a corporate debtor."*
>
> *(Emphasis supplied)*

92. As noticed earlier, Section 60 had previously, under the original Code, designated the NCLT as the adjudicating authority in relation to two categories: corporate debtors and personal guarantors to corporate debtors. The 2018 amendment added another category: corporate guarantors to corporate debtors. The amendment seen in the background of the report, as indeed the scheme of the Code (i.e., Section 2 (e), Section 5 (22), Section 29A, and Section 60), clearly show that all matters that *were likely to impact, or have a bearing on a corporate debtor's insolvency process, were sought to be clubbed together and brought before the same forum.* Section 5 (22) which is found in Part II (insolvency process provisions in respect of corporate debtors) as it was originally, defined personal guarantor to say that it*"means an individual who is the surety in a contract of guarantee to a corporate debtor."* There are two more provisions relevant for the purpose of this judgment. They are Sections 234 and 235 of the Code; they read as follows:

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65. (1996) 2 SCC 498.

"234. (1) The Central Government may enter into an agreement with the Government of any country outside India for enforcing the provisions of this Code.

(2) The Central Government may, by notification in the Official Gazette, direct that the application of provisions of this Code in relation to assets or property of corporate debtor or debtor, including a personal guarantor of a corporate debtor, as the case may be, situated at any place in a country outside India with which reciprocal arrangements have been made, shall be subject to such conditions as may be specified.

235. (1) Notwithstanding anything contained in this Code or any law for the time being in force if, in the course of insolvency resolution process, or liquidation or bankruptcy proceedings, as the case may be, under this Code, the resolution professional, liquidator or bankruptcy trustee, as the case may be, is of the opinion that assets of the corporate debtor or debtor, including a personal guarantor of a corporate debtor, are situated in a country outside India with which reciprocal arrangements have been made under section 234, he may make an application to the Adjudicating Authority that evidence or action relating to such assets is required in connection with such process or proceeding.

(2) The Adjudicating Authority on receipt of an application under sub-section (1) and, on being satisfied that evidence or action relating to assets under sub-section (1) is required in connection with insolvency resolution process or liquidation or bankruptcy proceeding, may issue a letter of request to a court or an authority of such country competent to deal with such request."

93. These two provisions also reveal that the scheme of the Code always contemplated that overseas assets of a corporate debtor or its personal guarantor could be dealt with in an identical manner during insolvency proceedings, including by issuing letters of request to courts or authorities in other countries for the purpose of dealing with such assets located within their jurisdiction.

94. The impugned notification operationalizes the Code so far as it relates to personal guarantors to corporate debtors:

(1) Section 79 pertains to the definitional section for the purposes of insolvency resolution and bankruptcy for individuals before the Adjudicating Authority.

(2) Section 94 to 187 outline the entire structure regarding initiation of the resolution process for individuals before the Adjudicating Authority.

95. The impugned notification authorises the Central Government and the

Board to frame rules and regulations on how to allow the pending actions against a personal guarantor to a corporate debtor before the Adjudicating Authority. The intent of the notification, facially, is to allow for pending proceedings to be adjudicated in terms of the Code. Section 243, which provides for the repeal of the personal insolvency laws has not as yet been notified. Section 60(2) prescribes that in the event of an ongoing resolution process or liquidation process against a corporate debtor, an application for resolution process or bankruptcy of the personal guarantor to the corporate debtor shall be filed with the concerned NCLT seized of the resolution process or liquidation. Therefore, the Adjudicating Authority for personal guarantors will be the NCLT, if a parallel resolution process or liquidation process is pending in respect of a corporate debtor for whom the guarantee is given. The same logic prevails, under Section 60(3), when any insolvency or bankruptcy proceeding pending against the personal guarantor in a court or tribunal and a resolution process or liquidation is initiated against the corporate debtor. Thus if A, an individual is the subject of a resolution process before the DRT and he has furnished a personal guarantee for a debt owed by a company B, in the event a resolution process is initiated against B in an NCLT, the provision results in transferring the proceedings going on against A in the DRT to NCLT.

96. This court in *V. Ramakrishnan* (supra), noticed why an application under Section 60(2) could not be allowed. At that stage, neither Part III of the Code nor Section 243 had not been notified. This meant that proceedings against personal guarantors stood outside the NCLT and the Code. The *non-obstante* provision under Section 238 gives the Code overriding effect over other prevailing enactments. This is perhaps the *rationale* for not notifying Section 243 as far as personal guarantors to corporate persons are concerned. Section 243(2) saves pending proceedings under the Acts repealed (PIA and PTI Act) to be undertaken in accordance with those enactments. As of now, Section 243 has not been notified. In the event Section 243 is notified and those two Acts repealed, then, the present notification would not have had the effect of covering pending proceedings against individuals, such as personal guarantors in other *forums,* and would bring them under the provisions of the Code pertaining to insolvency and bankruptcy of personal guarantors. The impugned notification, as a consequence of the *non obstante* clause in Section 238, has the result that if any proceeding were to be initiated against personal guarantors it would be under the Code.

97. In the opinion of this court, there was sufficient legislative guidance for the Central Government, before the amendment of 2018 was made effective, to distinguish and classify personal guarantors separately from other individuals. This is evident from Sections 5(22), 60, 234, 235 and unamended Section 60. In *V. Ramakrishnan* (supra) this court noted the effect of various provisions of the Code, and how they applied to personal guarantors:

"22. *We are afraid that such arguments have to be turned down on a careful reading of the sections relied upon. Section 60 of the Code, in sub-section (1) thereof, refers to insolvency resolution and liquidation for both corporate debtors and personal guarantors, the adjudicating authority for which shall be the National Company Law Tribunal, having territorial jurisdiction over the place where the registered office of the corporate person is located. This sub-section is only important in that it locates the Tribunal which has territorial jurisdiction in insolvency resolution processes against corporate debtors. So far as personal guarantors are concerned, we have seen that Part III has not been brought into force, and neither has Section 243, which repeals the Presidency Towns Insolvency Act, 1909 and the Provincial Insolvency Act, 1920. The net result of this is that so far as individual personal guarantors are concerned, they will continue to be proceeded against under the aforesaid two Insolvency Acts and not under the Code. Indeed, by a Press Release dated 28-8-2017, the Government of India, through the Ministry of Finance, cautioned that Section 243 of the Code, which provides for the repeal of the said enactments, has not been notified till date, and further, that the provisions relating to insolvency resolution and bankruptcy for individuals and partnerships as contained in Part III of the Code are yet to be notified. Hence, it was advised that stakeholders who intend to pursue their insolvency cases may approach the appropriate authority/court under the existing enactments, instead of approaching the Debts Recovery Tribunals.*

23. *It is for this reason that sub-section (2) of Section 60 speaks of an application relating to the "bankruptcy" of a personal guarantor of a corporate debtor and states that any such bankruptcy proceedings shall be filed only before the National Company Law Tribunal. The argument of the learned counsel on behalf of the respondents that "bankruptcy" would include SARFAESI proceedings must be turned down as "bankruptcy" has reference only to the two Insolvency Acts referred to above. Thus, SARFAESI proceedings against the guarantor can continue under the SARFAESI Act. Similarly, sub-section (3) speaks of a bankruptcy proceeding of a personal guarantor of the corporate debtor pending in any court or tribunal, which shall stand transferred to the adjudicating authority dealing with the insolvency resolution process or liquidation proceedings of such corporate debtor. An "Adjudicating Authority", defined under Section 5(1) of the Code, means the National Company Law Tribunal constituted under the Companies Act, 2013.*

> ***24.*** *The scheme of Sections 60(2) and (3) is thus clear — the moment there is a proceeding against the corporate debtor pending under the 2016 Code, any bankruptcy proceeding against the individual personal guarantor will, if already initiated before the proceeding against the corporate debtor, be transferred to the National Company Law Tribunal or, if initiated after such proceedings had been commenced against the corporate debtor, be filed only in the National Company Law Tribunal. However, the Tribunal is to decide such proceedings only in accordance with the Presidency Towns Insolvency Act, 1909 or the Provincial Insolvency Act, 1920, as the case may be. It is clear that sub-section (4), which states that the Tribunal shall be vested with all the powers of the Debts Recovery Tribunal, as contemplated under Part III of this Code, for the purposes of sub-section (2), would not take effect, as the Debts Recovery Tribunal has not yet been empowered to hear bankruptcy proceedings against individuals under Section 179 of the Code, as the said Section has not yet been brought into force. Also, we have seen that Section 249, dealing with the consequential amendment of the Recovery of Debts Act to empower Debts Recovery Tribunals to try such proceedings, has also not been brought into force. It is thus clear that Section 2(e), which was brought into force on 23-11-2017 would, when it refers to the application of the Code to a personal guarantor of a corporate debtor, apply only for the limited purpose contained in Sections 60(2) and (3), as stated hereinabove. This is what is meant by strengthening the Corporate Insolvency Resolution Process in the Statement of Objects of the Amendment Act, 2018."*

98. This court was clearly cognizant of the fact that the amendment, in so far as it inserted Section 2(e) and altered Section 60(2), was aimed at *strengthening* the corporate insolvency process. At the same time, since the Code was not made applicable to individuals (including personal guarantors), the court had no occasion to consider what would be the effect of exercise of power under Section 1(3) of the Code, bringing into force such provisions in relation to personal guarantors.

99. The argument that the insolvency processes, application of moratorium and other provisions are incongruous, and so on, in the opinion of this court, are insubstantial. The insolvency process in relation to *corporate persons* (a compendious term covering all juristic entities which have been described in Sections 2 [a] to [d] of the Code) is entirely different from those relating to

individuals; the former is covered in the provisions of Part II and the latter, by Part III. Section 179, which defines what the Adjudicating authority is for individuals[66] is *"subject to"* Section 60. Section 60(2) is without prejudice to Section 60(1) and *notwithstanding anything to the contrary contained in the Code,* thus giving overriding effect to Section 60(2) as far as it provides that the application relating to insolvency resolution, liquidation or bankruptcy of personal guarantors of such corporate debtors shall be filed before the NCLT where proceedings relating to corporate debtors are pending. Furthermore, Section 60(3) provides for transfer of proceedings relating to personal guarantors to that NCLT which is dealing with the proceedings against corporate debtors. *After* providing for a common adjudicating forum, Section 60(4) vests the NCLT *"with all the powers of the DRT as contemplated under Part III of this Code for the purpose of sub-section (2)".* Section 60 (4) thus (a) vests all the powers of DRT with NCLT and (b) also vests NCLT with powers under Part III. Parliament therefore merged the provisions of Part III with the process undertaken against the corporate debtors under Part II, for the purpose of Section 60(2), i.e., proceedings against personal guarantors along with corporate debtors. Section 179 is the corresponding provision in Part III. It is *"subject to the provisions of Section 60".* Section 60 (4) clearly incorporates the provisions of Part III in relation to proceedings before the NCLT against personal guarantors.

100. It is clear from the above analysis that Parliamentary intent was to treat personal guarantors differently from other categories of individuals. The intimate connection between such individuals and corporate entities to whom they stood guarantee, as well as the possibility of two separate processes being carried on in different forums, with its attendant uncertain outcomes, led to carving out personal guarantors as a separate *species* of individuals, for whom the Adjudicating authority was common with the corporate debtor to whom they had stood guarantee. The fact that the *process of insolvency* in Part III is to be applied

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66. "179. (1) Subject to the provisions of section 60, the Adjudicating Authority, in relation to insolvency matters of individuals and firms shall be the Debt Recovery Tribunal having territorial jurisdiction over the place where the individual debtor actually and voluntarily resides or carries on business or personally works for gain and can entertain an application under this Code regarding such person.

(2) The Debt Recovery Tribunal shall, notwithstanding anything contained in any other law for the time being in force, have jurisdiction to entertain or dispose of

(a) any suit or proceeding by or against the individual debtor;

(b) any claim made by or against the individual debtor;

(c) any question of priorities or any other question whether of law or facts, arising out of or in relation to insolvency and bankruptcy of the individual debtor or firm under this Code.

(3) Notwithstanding anything contained in the Limitation Act, 1963 or in any other law for the time being in force, in computing the period of limitation specified for any suit or application in the name and on behalf of a debtor for which an order of moratorium has been made under this Part, the period during which such moratorium is in place shall be excluded"

to individuals, whereas the process in relation to corporate debtors, set out in Part II is to be applied to such corporate persons, does not lead to incongruity. On the other hand, there appear to be sound reasons why the *forum* for adjudicating insolvency processes - the provisions of which are disparate- is to be common, i.e through the NCLT. As was emphasized during the hearing, the NCLT would be able to consider the whole picture, as it were, about the nature of the assets available, either during the corporate debtor's insolvency process, or even later; this would facilitate the CoC in framing realistic plans, keeping in mind the prospect of realizing some part of the creditors' dues from personal guarantors.

101. In view of the above discussion, it is held that the impugned notification is not an instance of legislative exercise, or amounting to impermissible and selective application of provisions of the Code. There is no compulsion in the Code that it should, at the same time, be made applicable to *all individuals,* (including personal guarantors) or not at all. There is sufficient indication in the Code- by Section 2(e), Section 5(22), Section 60 and Section 179 indicating that personal guarantors, though forming part of the larger grouping of individuals, were to be, in view of their intrinsic connection with corporate debtors, dealt with differently, through the same adjudicatory process and by the same forum (though not insolvency provisions) as such corporate debtors. The notifications under Section 1(3), (issued before the impugned notification was issued) disclose that the Code was brought into force in stages, regard being had to the categories of persons to whom its provisions were to be applied. The impugned notification, similarly *inter alia* makes the provisions of the Code applicable in respect of personal guarantors to corporate debtors, as another such category of persons to whom the Code has been extended. It is held that the impugned notification was issued within the power granted by Parliament, and in valid exercise of it. The exercise of power in issuing the impugned notification under Section 1(3) is therefore, not *ultra vires;* the notification is valid.

102. The other question which parties had urged before this court was that the impugned notification, by applying the Code to personal guarantors only, takes away the protection afforded by law; reference was made to Sections 128, 133 and 140 of the Contract Act; the petitioners submitted that once a resolution plan is accepted, the corporate debtor is discharged of liability. As a consequence, the guarantor whose liability is co-extensive with the principal debtor, i.e. the corporate debtor, too is discharged of all liabilities. It was urged therefore, that the impugned notification which has the effect of allowing proceedings before the NCLT by applying provisions of Part III of the Code, deprives the guarantors of their valuable substantive rights.

103. Section 31 of the Code, *inter alia,* provides that:

"31. (1) If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors under sub-section (4) of section 30 meets the requirements as referred to in sub-section (2) of section 30, it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan."

The relevant provisions of the Indian Contract Act are extracted below:

***"128. Surety's liability.**—The liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract.*

***129. "Continuing guarantee".**—A guarantee which extends to a series of transactions, is called a "continuing guarantee".*

***130. Revocation of continuing guarantee**.—A continuing guarantee may at any time be revoked by the surety, as to future transactions, by notice to the creditor.*

***131. Revocation of continuing guarantee by surety's death.**—The death of the surety operates, in the absence of any contract to the contrary, as a revocation of a continuing guarantee, so far as regards future transactions.*

***133. Discharge of surety by variance in terms of contract**. —Any variance, made without the surety's consent, in the terms of the contract between the principal 1 [debtor] and the creditor, discharges the surety as to transactions subsequent to the variance.*

***134. Discharge of surety by release or discharge of principal debtor.**—The surety is discharged by any contract between the creditor and the principal debtor, by which the principal debtor is released, or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor.*

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***140.Rights of surety on payment or performance.**—Where a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, the surety upon payment or performance of all that he is liable for, is invested with all the rights which the creditor had against the principal debtor.*

***141.Surety's right to benefit of creditor's securities**.—A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of*

> *suretyship is entered into, whether the surety knows of the existence of such security or not; and if the creditor loses, or, without the consent of the surety, parts with such security, the surety is discharged to the extent of the value of the security."*

104. All creditors and other classes of claimants, including financial and operational creditors, those entitled to statutory dues, workers, etc., who participate in the resolution process, are heard and those in relation to whom the CoC accepts or rejects pleas, are entitled to vent their grievances before the NCLT. *After* considering their submissions and objections, the resolution plan is accepted and approved. This results in finality as to the claims of creditors, and others, *from the company* (i.e. the company which undergoes the insolvency process). The question which the petitioners urge is that in view of this *finality,* their liabilities would be extinguished; they rely on Sections 128, 133 and 140 of the Contract Act to urge that creditors cannot therefore, proceed against them separately.

105. In *Vijay Kumar Jain* v. *Standard Chartered Bank*[67], this court, while dealing with the right of erstwhile directors participating in meetings of Committee of Creditors observed that:

> *"we find that Section 31(1) of the Code would make it clear that such members of the erstwhile Board of Directors, who are often guarantors, are vitally interested in a resolution plan as such resolution plan then binds them. Such plan may scale down the debt of the principal debtor, resulting in scaling down the debt of the guarantor as well, or it may not. The resolution plan may also scale down certain debts and not others, leaving guarantors of the latter kind of debts exposed for the entire amount of the debt. The regulations also make it clear that these persons are vitally interested in resolution plans as they affect them"*

106. The *rationale* for allowing directors to participate in meetings of the CoC is that the directors' liability as personal guarantors persists against the creditors and an approved resolution plan can only lead to a revision of amount or exposure for the entire amount. Any recourse under Section 133 of the Contract Act to discharge the liability of the surety on account of variance in terms of the contract, without her or his consent, stands negated by this court, in *V. Ramakrishnan* where it was observed that the language of Section 31 makes it clear that the approved plan is binding on the guarantor, to avoid any attempt to escape liability under the provisions of the Contract Act. It was observed that:

> *"25. Section 31(1), in fact, makes it clear that the guarantor cannot escape payment as the resolution plan, which has been*

67. 2019 SCC OnLine SC 103

> *approved, may well include provisions as to payments to be made by such guarantor...."*

And further that:

> *"26.1 Section 14 refers only to debts due by corporate debtors, who are limited liability companies, and it is clear that in the vast majority of cases, personal guarantees are given by Directors who are in management of the companies. The object of the Code is not to allow such guarantors to escape from an independent and coextensive liability to pay off the entire outstanding debt, which is why Section 14 is not applied to them. However, insofar as firms and individuals are concerned, guarantees are given in respect of individual debts by persons who have unlimited liability to pay them. And such guarantors may be complete strangers to the debtor — often it could be a personal friend. It is for this reason that the moratorium mentioned in Section 101 would cover such persons, as such moratorium is in relation to the debt and not the debtor."*

107. In *Committee of Creditors of Essar Steel (I) Ltd. v. Satish Kumar Gupta*[68] (the *"Essar Steel case")* this court refused to interfere with proceedings initiated to enforce personal guarantees by financial creditors; it was observed as follows:

> *"106. Following this judgment in V. Ramakrishnan case [SBI v. V. Ramakrishnan, (2018) 17 SCC 394], it is difficult to accept Shri Rohatgi's argument that that part of the resolution plan which states that the claims of the guarantor on account of subrogation shall be extinguished, cannot be applied to the guarantees furnished by the erstwhile Directors of the corporate debtor. So far as the present case is concerned, we hasten to add that we are saying nothing which may affect the pending litigation on account of invocation of these guarantees. However, NCLAT judgment being contrary to Section 31(1) of the Code and this Court's judgment in V. Ramakrishnan case [SBI v. V. Ramakrishnan, (2018) 17 SCC 394], is set aside."*

108. It is therefore, clear that the sanction of a resolution plan and finality imparted to it by Section 31 does not *per se* operate as a discharge of the guarantor's liability. As to the nature and extent of the liability, much would depend on the terms of the guarantee itself. However, this court has indicated, time and again, that an involuntary act of the principal debtor leading to loss of

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68. (2020) 8 SCC 531.

security, would not absolve a guarantor of its liability. In *Maharashtra State Electricity Board* (supra) the liability of the guarantor (in a case where liability of the principal debtor was discharged under the insolvency law or the company law), was considered. It was held that in view of the unequivocal guarantee, such liability of the guarantor continues and the creditor can realize the same from the guarantor in view of the language of Section 128 of the Contract Act as there is no discharge under Section 134 of that Act. This court observed as follows:

> *"7. Under the bank guarantee in question the Bank has undertaken to pay the Electricity Board any sum up to Rs 50,000 and in order to realise it all that the Electricity Board has to do is to make a demand. Within forty-eight hours of such demand the Bank has to pay the amount to the Electricity Board which is not under any obligation to prove any default on the part of the Company in liquidation before the amount demanded is paid. The Bank cannot raise the plea that it is liable only to the extent of any loss that may have been sustained by the Electricity Board owing to any default on the part of the supplier of goods i.e. the Company in liquidation. The liability is absolute and unconditional. The fact that the Company in liquidation i.e. the principal debtor has gone into liquidation also would not have any effect on the liability of the Bank i.e. the guarantor. Under Section 128 of the Indian Contract Act, the liability of the surety is coextensive with that of the principal debtor unless it is otherwise provided by the contract. A surety is no doubt discharged under Section 134 of the Indian Contract Act by any contract between the creditor and the principal debtor by which the principal debtor is released or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor. But a discharge which the principal debtor may secure by operation of law in bankruptcy (or in liquidation proceedings in the case of a company) does not absolve the surety of his liability (see Jagannath Ganeshram Agarwala v. Shivnarayan Bhagirath [AIR1940 Bom 247; see also In re Fitzgeorge Ex parte Robson [(1905) 1 KB 462])."*

109. This legal position was noticed and approved later in *Industrial Finance Corpn. of India Ltd. v. Cannanore Spg. & Wvg. Mills Ltd.*[69] An earlier decision of three judges, *Punjab National Bank* v. *State of U.P.*[70] pertains to the issues regarding a guarantor and the principal debtor. The court observed as follows:

> *"The appellant had, after Respondent 4's management was taken over by U.P. State Textile Corporation Ltd. (Respondent*

69. (2002) 5 SCC 54
70. (2002) 5 SCC 80

3) under the Industries (Development and Regulation) Act, advanced some money to the said Respondent 4. In respect of the advance so made, Respondents 1, 2 and 3 executed deeds of guarantee undertaking to pay the amount due to the bank as guarantors in the event of the principal borrower being unable to pay the same.

Subsequently, Respondent 3 which had taken over the management of Respondent 4 became sick and proceedings were initiated under the Sick Textile Undertakings (Nationalisation) Act, 1974 (for short 'the Act'). The appellant filed suit for recovery against the guarantors and the principal debtor of the amount claimed by it.

The following preliminary issue was, on the pleadings of the parties, framed:

'Whether the claim of the plaintiff is not maintainable in view of the provisions of Act 57 of 1974 as alleged in para 25 of the written statement of Defendant 2?'

The trial court as well as the High Court, both came to the conclusion that in view of the provisions of Section 29 of the Act, the suit of the appellant was not maintainable.

We have gone through the provisions of the said Act and in our opinion the decision of the courts below is not correct. Section 5 of the said Act provides for the owner to be liable for certain prior liabilities and Section 29 states that the said Act will have an overriding effect over all other enactments. This Act only deals with the liabilities of a company which is nationalized and there is no provision therein which in any way affects the liability of a guarantor who is bound by the deed of guarantee executed by it. The High Court has referred to a decision of this Court in Maharashtra SEB v. Official Liquidator, High Court, Ernakulam [(1982) 3 SCC 358 : AIR 1982 SC 1497] where the liability of the guarantor in a case where liability of the principal debtor was discharged under the insolvency law or the company law, was considered. It was held in this case that in view of the unequivocal guarantee such liability of the guarantor continues and the creditor can realize the same from the guarantor in view of the language of Section 128 of the Contract Act as there is no discharge under Section 134 of that Act.

In our opinion, the principle of the aforesaid decision of this Court is equally applicable in the present case. The right of the appellant to recover money from Respondents 1, 2 and 3 who stood guarantors arises out of the terms of the deed of guarantee

which are not in any way superseded or brought to a naught merely because the appellant may not be able to recover money from the principal borrower. It may here be added that even as a result of the Nationalisation Act the liability of the principal borrower does not come to an end. It is only the mode of recovery which is referred to in the said Act."

110. In *Kaupthing Singer and Friedlander Ltd.* (supra) the UK Supreme Court reviewed a large number of previous authorities on the concept of double proof, i.e. recovery from guarantors in the context of insolvency proceedings. The court held that:

"The function of the rule is not to prevent a double proof of the same debt against two separate estates (that is what insolvency practitioners call "double dip"). The rule prevents a double proof of what is in substance the same debt being made against the same estate, leading to the payment of a double dividend out of one estate. It is for that reason sometimes called the rule against double dividend. In the simplest case of suretyship (where the surety has neither given nor been provided with security, and has an unlimited liability) there is a triangle of rights and liabilities between the principal debtor (PD), the surety (S) and the creditor (C). PD has the primary obligation to C and a secondary obligation to indemnify S if and so far as S discharges PD's liability, but if PD is insolvent S may not enforce that right in competition with C. S has an obligation to C to answer for PD's liability, and the secondary right of obtaining an indemnity from PD. C can (after due notice) proceed against either or both of PD and S. If both PD and S are in insolvent liquidation, C can prove against each for 100p in the pound but may not recover more than 100p in the pound in all."

111. In view of the above discussion, it is held that approval of a resolution plan does not *ipso facto* discharge a personal guarantor (of a corporate debtor) of her or his liabilities under the contract of guarantee. As held by this court, the release or discharge of a principal borrower from the debt owed by it to its creditor, by an involuntary process, i.e. by operation of law, or due to liquidation or insolvency proceeding, does not absolve the surety/guarantor of his or her liability, which arises out of an independent contract.

112. For the foregoing reasons, it is held that the impugned notification is legal and valid. It is also held that approval of a resolution plan relating to a corporate debtor does not operate so as to discharge the liabilities of personal guarantors (to corporate debtors). The writ petitions, transferred cases and transfer petitions are accordingly dismissed in the above terms, without order on costs.

Case dismissed

I.L.R. [2021] M.P. 1292 (DB)
WRIT APPEAL

Before Mr. Justice Sujoy Paul & Mr. Justice Shailendra Shukla
WA No. 1150/2020 (Indore) decided on 26 March, 2021

VISHNU & ors. …Appellants

Vs.

STATE OF M.P. & ors. …Respondents

(Along with WA Nos. 1164/2020, 1171/2020, 1174/2020, 1175/2020 & 1201/2020)

A. Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, (30 of 2013), Section 24(2) – Lapse of Proceedings – Deeming Provision **– Held – Award passed on 07.03.2009, not prior to 5 years from date of commencement of Act of 2013, thus deeming provision of lapsation of acquisition proceedings cannot be pressed into service – No infirmity in impugned order – Appeals dismissed.**
(Para 20 & 21)

क. भूमि अर्जन, पुनर्वासन और पुनर्व्यवस्थापन में उचित प्रतिकर और पारदर्शिता का अधिकार अधिनियम, (2013 का 30), धारा 24(2) – कार्यवाहियां व्यपगत हो जाना – अभिगृहित उपबंध – अभिनिर्धारित – 07.03.2009 को पारित अवार्ड, 2013 के अधिनियम के प्रारंभ होने की तिथि से 5 वर्षों के पूर्व नहीं, अतः अर्जन कार्यवाहियों के व्यपगम का अभिगृहित उपबंध लागू नहीं किया जा सकता – आक्षेपित आदेश में कोई कमी नहीं – अपीलें खारिज।

B. Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, (30 of 2013), Section 24(2) – Non-payment of Compensation – Lapse of Proceedings **– Held – Apex Court opined that if attempts were made to deliver compensation and claimants failed to receive it, acquisition proceedings will not fail or vanish in thin air.**
(Para 19)

ख. भूमि अर्जन, पुनर्वासन और पुनर्व्यवस्थापन में उचित प्रतिकर और पारदर्शिता का अधिकार अधिनियम, (2013 का 30), धारा 24(2) – प्रतिकर का असंदाय – कार्यवाहियां व्यपगत हो जाना – अभिनिर्धारित – सर्वोच्च न्यायालय ने राय दी कि यदि प्रतिकर देने के लिए प्रयास किये गये थे और दावाकर्ता उसे प्राप्त करने में असफल रहे, अर्जन कार्यवाहियां असफल या अचानक अदृश्य नहीं होगी।

C. Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, (30 of 2013), Section 24(2) and Constitution – Article 226 – Reliefs Claimed & Pleadings **– Held – Apex Court concluded that relief claimed beyond pleadings should not be granted –**

Entire edifice of petition and relief is founded on Section 24(2), no challenge was made to acquisition proceedings, thus in absence of pleadings, the same cannot be called in question by way of oral/written arguments – Single Judge rightly did not interfered. (Paras 12, 13, 18 & 20)

ग. भूमि अर्जन, पुनर्वासन और पुनर्व्यवस्थापन में उचित प्रतिकर और पारदर्शिता का अधिकार अधिनियम, (2013 का 30), धारा 24(2) एवं संविधान – अनुच्छेद 226 – दावा किया गया अनुतोष व अभिवचन – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया कि अभिवचनों से परे दावा किया गया अनुतोष प्रदान नहीं करना चाहिए – याचिका का संपूर्ण ढांचा एवं अनुतोष, धारा 24(2) पर आधारित है, अर्जन कार्यवाहियों को कोई चुनौती नहीं दी गई थी, अतः अभिवचनों की अनुपस्थिति में, उसे मौखिक/लिखित तर्कों के जरिए प्रश्नागत नहीं किया जा सकता – एकल न्यायाधीश ने उचित रूप से हस्तक्षेप नहीं किया।

***D. Constitution – Article 226 – New Plea in Rejoinder – Maintainability* – Held – No new plea ordinarily could have been permitted by way of rejoinder – A new case cannot be set up by rejoinder, more so, when factual matrix of case is within the knowledge of petitioner – Apex Court concluded that if a point is not pleaded, High Court should not allow it to be urged during arguments. (Para 15 & 16)**

घ. संविधान – अनुच्छेद 226 – प्रत्युत्तर में नया अभिवाक् – पोषणीयता – अभिनिर्धारित – प्रत्युत्तर के जरिए साधारणतः किसी नये अभिवाक् की अनुमति नहीं दी जा सकती थी– प्रत्युत्तर द्वारा एक नया प्रकरण स्थापित नहीं किया जा सकता, तब और अधिक जब प्रकरण की तथ्यात्मक स्थिति, याची की जानकारी के भीतर है – सर्वोच्च न्यायालय ने निष्कर्षित किया कि यदि एक बिंदु का अभिवाक् नहीं किया गया है, उच्च न्यायालय को उसे तर्कों के दौरान निवेदित करने की मंजूरी नहीं देनी चाहिए।

Cases referred:

2007 (3) MPLJ 439, AIR 1998 SC 477, 1994 JLJ 96, (2012) 1 SCC 792, CA No. 301/2021 order passed on 01.02.2021 (Supreme Court), (2016) 16 SCC 285, (2011) 2 SCC 54, (2018) 18 SCC 792, (1994) 6 SCC 74, AIR 1974 SC 2077, (2010) 4 SCC 532, (2008) 4 SCC 695, 2008 (4) MPLJ 536, (2006) 11 SCC 548, 2007 (3) MPHT 309, (2006) 9 SCC 90, (2011) 3 SCC 436, (2020) 1 SCC 1, (2020) 8 SCC 129, (2004) 7 SCC 19, (2001) 2 SCC 221, (2019) 6 SCC 441.

K.L. Hardia with *Rajiv Jain*, for the appellants.
Archana Kher, Dy. A.G. for the respondent/State.
Mini Ravindran, for the respondent No. 6.

O R D E R

The Order of the Court was passed by :
SUJOY PAUL, J. :- In these batch of Writ Appeals challenge is made to the common order passed by learned Single Judge in Writ Petitions No.3250/2017

and other connected matters decided on 2nd November, 2020 whereby the petitions filed by the petitioners/appellants were dismissed. It was held that land acquisition proceedings have not at all lapsed, even if the petitioners have not received the compensation. A specific finding was given in the impugned order that in the present cases, compensation was deposited with the land acquisition officer and the question of granting relief to the petitioners, especially in the light of the fact that entire project is complete does not arise. The liberty was reserved to the petitioners to receive compensation in accordance with law if not received so far.

2. Shri K.L. Hardia, learned counsel for appellants contended that notification u/S.4 of Land Acquisition Act, 1894 (for short "Act of 1894") was defective. The said notification was issued on 16/2/2007 whereas notification u/S.6 of the said Act was issued on 9/2/2007. By no stretch of imagination, Sec.4 Notification can be issued after issuance of Sec.6 notification. The award passed on 7/3/2009 is liable to be interfered with on this score alone.

3. It is noteworthy that this matter was heard for quite some time on 18/3/2021. Because of paucity of time, to conclude the hearing, with the consent of parties, matter was taken up on 22/3/2021. An amendment application IA No.2749/2021 was filed by Shri Hardia seeking amendment at appellate stage. We are not inclined to entertain amendment application filed at the midst of hearing. More so when the facts and pleadings mentioned in the amendment application are based on factual matrix which were already known to the present appellants during writ proceedings. The appellants did not file amendment application before the writ court and filed this application at appellate stage. In absence of showing any "due diligence" for not filing application at appropriate stage, we find no reason to entertain this application.

4. Shri Hardia, learned counsel submits that the defects in the acquisition proceedings were brought to the notice of learned Single Judge. However, there is no iota of discussion regarding the flaw relating to issuance of Sec.4 and Sec.6 notification. The written submissions filed by the appellants were also not considered by learned Writ Court. A specific ground was taken regarding illegality of acquisition proceedings in the rejoinder which were also not considered by learned Single Judge.

5. To bolster aforesaid submissions, learned counsel for appellants placed reliance on the judgments of Apex court in *Kunwar Pal Singh (dead) by L.Rs Vs. State of U.P. & Ors* 2007(3) MPLJ 439, *Amarnath Ashram Trust Society & another Vs. Governor of Uttar Pradesh & Ors* AIR 1998 SC 477*, Chaitram Verma & Ors Vs. Land Acquisition Officer, Raipur* 1994 JLJ 96, *Raghbir Singh Sehrawat Vs. State of Haryana & Ors* (2012) 1 SCC 792 and *Sunita Agrawal Vs. Bhanwarlal & another* passed in CA No.301/2021 passed on 1/2/2021.

6. It is contended that in the teeth of sub section 2 of Sec.24 of The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (for short "Act of 2013") the land acquisition proceedings stood lapsed. The respondents have neither paid the compensation to the present appellants nor taken the possession. Hence, by operation of sub section (2) of Sec.24 of Act of 2013 the award became a nullity. Lastly, it is submitted that respondent No.6 being a beneficiary has no *locus standi* to oppose the present appellants.

7. Per contra, Ms.Archana Kher, learned Dy.A.G and Ms.Mini Ravindran, learned counsel for respondent No.6 supported the impugned order. It is common ground that in view of limited relief claimed in the writ petition, no fault can be found in the impugned order. Appellant cannot be permitted to set up entirely a new case at writ appellate stage. Neither the notification issued u/Ss.4 and 6 nor the proceedings of land acquisition were subject matter of challenge in the writ petition. The award dated 7/3/2009 was also not under challenge. Sec.24 cannot be pressed into service because award is not passed prior to five years from the date of commencement of the Act of 2013. Indeed, it was passed before four years nine months and 23 days from he (sic : the) date of Act of 2013 came into being.

8. It is submitted that present acquisition is of land for Auto Testing Track popularly known as "National Automative Testing and R & D Infrastructure Project (Project)". Respondent No.6 is beneficiary and is project implementation society. In view of the judgments of Supreme Court in *Delhi Development Authority Vs. Sukhbir Singh & Ors,* (2016) 16 SCC 285, *Delhi Development Authority Vs. Bholanath Sharma & Ors.* (2011) 2 SCC 54, *Trishakti Electron & Industries Ltd. And another Vs. TIL Limited & Ors.* (2018) 18 SCC 792 and *N. Krishnamachari Vs. Managing Director, APSRTC, Hyderabad & Ors.* (1994) 6 SCC 74 the respondent No.6 falls within the ambit of "person interested". Person for whose benefit the land is being acquired is a "person interested" and is entitled to support the acquisition proceedings. It is further canvassed by learned counsel for respondents that the project is working under the Department of Heavy Industry. The award was passed in 2009. The petitions were filed after considerable long delay. Thus, in view of judgment of Supreme Court reported in *Aflatoon & Ors. Vs. Lt. Governor of Delhi and Ors.* AIR 1974 SC 2077*, Swaran Lata and Ors. Vs. State of Haryana & Ors.* (2010) 4 SCC 532 and *Swaika Properties (P) Ltd & another Vs. State of Rajasthan & Ors.* (2008) 4 SCC 695, the writ petitions were liable to be dismissed on the ground of delay alone. It is further submitted by learned counsel for respondents that project is now being implemented on 1195 hectare (2950 acre) of land out of which land under litigation in this batch of writ appeals is only 0.623 hectare (1.54 acres) of village Madhupora. The project cost was 1718.00 crores for setting up world class Automative Testing Infrastructure. The said project cost is now increased to

Rupees 3727 crores. The cheques were prepared and all efforts were made to handover the cheques of compensation to the appellants, but they did not accept the same. The letter of Tehsildar dated 30/8/2010 (Annexure R/3) was placed on record. Repeated efforts to provide cheques of compensation to present appellants went in vain. Cheques were again refused on 11/7/2014 (Annexure R/3) by the appellants. On 25/4/2017 public notice was issued in the newspaper requesting the appellants to obtain the said cheques but this effort also could not fetch any result. The respondents supported the impugned order of learned Single Judge.

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

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

11. The original writ petition filed by the petitioners was amended and the amended relief clause reads as under:-

> **7. चाही गई सहायता :–**
>
> याचिकाकर्ता माननीय न्यायालय से निम्नानुसार सहायता चाहता है।
>
> *परंतुक जहां अधिनिर्णय किया गया है तथा बहुसंख्यक भू–धृतियों की बाबत् हिताधिकारियों के खाते में प्रतिकर जमा नही किया गया है, तो उक्त भू–अर्जन अधिनियम की धारा 4 के अधीन अर्जन की अधिसूचना में विनिर्दिष्ट सभी हिताधिकारी, इस अधिनियम के उपबंधो के अनुसार प्रतिकर के हकदार होगे।*
>
> 7.1 यह कि, भूमि अर्जन पुर्नवासन ओर पुर्नव्यवस्थापन में उचित प्रतिकर ओर पारदर्शिता का आधिकार अधिनियम, 2013 की धारा 24 (2) उपधारा (1) में कुछ भी अर्न्तविष्ट होते हुए भू–अर्जन अधिनियम 1894 के किसी मामले में जहॉ उक्त धारा 11 के अधीन इस अधिनियम के प्रारंभ की तारिख के 5 वर्ष या उससे अधिक पुर्व अधिनिर्णय किया गया है किन्तु भूमि का वास्तविक कब्जा नही लिया गया या प्रतिकर का संदाय नही किया गया है, वहां उक्त कार्यवाहियों के बारे में यह समझा जायेगा कि वह व्यपगत हो गई है। याचिकाकर्ता के प्रकरण में भू–अर्जन की कार्यवाही व्यपगत हो चुकी है।
>
> 7.2 यह कि रेस्पोडेण्ट कमांक 1 से 3 के द्वारा भू–अर्जन प्रकरण क.13/अ–82/2006–2007 का जो अवार्ड दिनांक 7/3/2009 को पारित किया गया है, घोषित मुआवजा राशि का भुगतान 8 वर्षो में याचिकाकर्ता को नही किया गया होने से याचिकाकर्तागणो की भूमि एवं भवन के संबंध में अर्जन की कार्यवाही व्यपगत हो चुकी है।

दिनांक 15.12.2017
संशोधन धारा 24 (2)की उपधारा 1 ''परंतुक'' जहॉ अधिनिर्णय किया गया है तथा बहुसंख्यक भू–धृतियों की बाबत् हिताधिकायिों के खाते में प्रतिकर जमा नही किया गया है, तो उक्त भू–अर्जन अधिनियम की धारा 4 के अधीन अर्जन की अधिसूचना में विनिर्दिष्ट सभी हिताधिकारी, इस अधिनियम के उपबंधो के अनुसार प्रतिकर के हकदार होगे।

7.3 यह कि, प्रस्तुत याचिका सहःव्यय स्वीकार की जावे तथा याचिका का समस्त हर्जा–खर्चा रेस्पोडेण्ट से याचिकाकर्ता को दिलाया जावे।

12. A careful reading of averments of writ petition and relief clause shows that no challenge was made to the acquisition proceedings on the basis of any flaw in issuance of notification u/S.4 and Sec.6 of Act of 1894. The learned Single Judge in the impugned order categorically recorded that the main ground of petitioners is that after the award was delivered on 7/3/2009 compensation has not been distributed and, therefore, the land acquisition proceedings have come to an end. In the impugned order this contention of appellants was duly recorded with further finding that prayer was made to declare the proceedings which took place in respect of land acquisition as null and void keeping in view Sec.24(2) of Act of 2013.

13. We find no infirmity in the order of learned Single Judge if land acquisition proceedings was not interfered with on alleged violation of Sec.4 and Sec.6 of Act of 1894. In absence of any pleadings and relief claimed in this regard, no fault can be found in the order of learned Single Judge. Interestingly, in the written submissions filed before the learned Single Judge attack is made to the land acquisition proceedings. In absence of any pleadings and foundation in the writ petitions, acquisition proceedings cannot be called in question by way of oral/written arguments.

14. In *Gomti Bai Tamrakar Vs. State of M.P.* 2008(4) MPLJ 536 this Court opined as under :-

> "15. The learned counsel for the petitioners has also argued that the order for invoking the urgency clause was passed subsequent to section 6 declaration dated 15-5/2008. A perusal of the writ petition indicates that no such ground has been raised by the petitioners in the writ petition questioning the legality and correctness of the invocation of the urgency clause. Therefore, such an argument raised at the time of final hearing cannot be considered since State had no opportunity to respond to the same."
>
> (emphasis supplied)

15. After taking note of Supreme Court's judgment in *B.S.N. Joshi & Sons Vs. Nair Coal Services Ltd* (2006) 11 SCC 548, this Court in *Nagda Municipality, Naga Vs. ITC Ltd.*2007 (3) MPHT 309 opined that if a point is not pleaded, the High Court should not allow it to be urged during arguments.

16. So far averments of rejoinder is concerned, this is trite that no new plea ordinarily could have been permitted by way of rejoinder. A new case cannot be set up by rejoinder. More so when factual matrix of the case were well within the knowledge of petitioner while filing the main petition. In *Ashok Lanka Vs. Rishi Dikshit* (2006) 9 SCC 90 the Apex court held as under:-

> **"43.** In the writ petition, the writ petitioners have not disclosed as to how each one of the licensees who had appeared as respondents therein were ineligible or otherwise disqualified and/or did not fulfil the conditions therefor. Had such opportunities been given, the State as also the said respondents could have met the said allegations. Such allegations were made only in the rejoinder. No new plea ordinarily could have been permitted in the rejoinder without the leave of the court. We would not have commented upon this as the High Court does not appear to have placed reliance upon the additional affidavit filed by the State, inter alia, on the ground that the same being a surrejoinder could not have been filed. The High Court's attention was evidently not drawn to the fact that writ petitioners brought on record new facts for the first time in the rejoinder and, thus, the State was entitled to file a surrejoinder controverting the allegations made therein.

17. In *State of Orissa Vs. Mamata Mohanty* (2011) 3 SCC 436 the Apex Court has held that:-

> **55.** Pleadings and particulars are required to enable the court to decide the rights of the parties in the trial. Thus, the pleadings are more to help the court in narrowing the controversy involved and to inform the parties concerned to the question in issue, so that the parties may adduce appropriate evidence on the said issue. It is a settled legal proposition that **"as a rule relief not founded on the pleadings should not be granted".** Therefore, a decision of a case cannot be based on grounds outside the pleadings of the parties. The pleadings and issues are to ascertain the real dispute between the parties to narrow the area of conflict and to see just where the two sides differ. [Vide *Sri Mahant Govind Rao* v. *Sita Ram Kesho* [(1897-98) 25 IA 195 (PC)] *Trojan & Co.* v. *Nagappa Chettiar* [AIR 1953 SC 235], *Ishwar Dutt* v. *Collector (L.A.)* [(2005) 7 SCC 190 : AIR 2005 SC 3165] and *State of Maharashtra* v. *Hindustan*

Construction Co. Ltd. [(2010) 4 SCC 518 : (2010) 2 SCC (Civ) 207]]"

(emphasis supplied)

18. The Apex Court in the aforesaid case disapproved the order of High Court and opined that the High Court granted relief in some cases which had not even been asked for. In other words it is held that relief claimed and beyond the pleadings should not be granted. Same view is taken in *M. Siddiq (Ram Janmabhumi Temple-5 J.) V. Suresh Das* (2020) 1 SCC 1 by holding that evidence, it is well settled, can only be adduced with reference to matters which are pleaded in a case and in the absence of an adequate pleading, evidence by itself cannot supply the deficiency of a pleaded case.

19. Pertinently, the learned Single Judge dismissed the writ petitions based on the recent constitution bench judgment reported in *Indore Development Authority Vs. Manoharlal & ors.* (2020) 8 SCC 129. It was poignantly held that if attempts were made to deliver compensation and claimants failed to receive it, acquisition proceedings will not fail or vanish in thin air. In addition, it was held that the action of taking possession is in consonance with the Constitution bench judgment. No arguments were advanced to attack the said twin findings on which the entire order of learned Single Judge is based. On the contrary, for the purpose of possession, reliance is placed on the judgment of Supreme Court in *Raghbir Singh Sehrawat Vs. State of Haryana & Ors* (2012) 1 SCC 792 which has been over ruled by Supreme Court in the case of *Indore Development Authority* (supra). The Apex Court in *State of Orissa Vs. Nalinikanta Muduli* (2004) 7 SCC 19, *D.P. Chadha Vs. Triyugi Narain Mishra & ors.* (2001) 2 SCC 221 *and Lal Bahadur Gautam Vs. State of Uttar Pradesh & Ors.* (2019) 6 SCC 441 took serious note of the practice in citing over ruled judgment and opined that it is an example of falling standard of professional conduct.

20. The entire edifice of writ petition and relief is founded on sub section 2 of Sec.24 of Act of 2013. A plain reading of this provision makes it clear that this deeming provision of lapsation can be pressed into service only when award is passed five years or more prior to the commencement of the Act of 2013. In the instant case, award dated 7/3/2009 was not passed prior to five years from the date of commencement of the Act of 2013. The language of this provision is clear and unambiguous. Deeming clause of lapsation cannot be pressed into service, if award is not passed before 5 years from the date of commencement of the Act of 2013.When the language of a statue (sic : statute) is clear and unambiguous, it should be given effect to irrespective of consequences.

21. In view of foregoing analysis, we find no infirmity in the order of learned Single Judge. The appeals are devoid of substance and are hereby **dismissed.**

22. Original order be retained in WA No. 1150/2020 and a copy of this order be kept in the record of connected Writ Appeals.

Appeal dismissed

I.LR. [2021] M.P. 1300
WRIT PETITION

Before Mr. Justice Vishal Dhagat

WP No. 3730/2021 (Jabalpur) decided on 3 March, 2021

MOHBE INFRASTRUCTURE A PARTNERSHIP FIRM (M/S) …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

***A. Land Revenue Code, M.P. (20 of 1959), Section 165(6) & 165 (6-a) – Transfer of Tribal Land – Jurisdiction of Collector* – Held – Land of tribal in notified scheduled area shall not be transferred or transferable by way of sale or otherwise or as consequence of loan transaction to a non-tribal – Collector has no jurisdiction to grant permission for such transfers – In non-notified areas, i.e. rural areas and villages, tribal can transfer his land to a non-tribal after seeking written permission of Collector.**

(Paras 11(i), (ii) & 12)

क. भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 165(6) व 165(6–a) – जनजातीय भूमि का अंतरण – कलेक्टर की अधिकारिता – अभिनिर्धारित – अधिसूचित अनुसूचित क्षेत्र में जनजाति की भूमि को विक्रय के माध्यम से या अन्यथा या किसी ऋण संव्यवहार के परिणामस्वरूप गैर–जनजाति को न तो अंतरित किया जाएगा अथवा न ही अंतरणीय होगा – कलेक्टर को ऐसे अंतरण के लिए अनुज्ञा प्रदान करने की कोई अधिकारिता नहीं है – गैर–अधिसूचित क्षेत्र अर्थात् ग्रामीण क्षेत्र और गाँवों में, कलेक्टर की लिखित अनुज्ञा मांगने के पश्चात् जनजाति अपनी भूमि का अंतरण किसी गैर–जनजाति को कर सकते हैं।

***B. Land Revenue Code, M.P. (20 of 1959), Section 165(6) – Lease of Tribal Land – Word "otherwise" – Jurisdiction of Collector* – Held – Explanation of Section 165(6) carves out an exception that word "otherwise" mentioned in sub-Section shall not include lease – This means that in notified scheduled areas or in non-notified rural areas, there is no bar for entering into lease between tribals and non-tribals and permission of Collector is not required.** **(Para 11(iii))**

ख. भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 165(6) – जनजातीय भूमि का पट्टा – शब्द ''अन्यथा'' – कलेक्टर की अधिकारिता – अभिनिर्धारित – धारा 165(6) का

स्पष्टीकरण एक अपवाद परिकल्पित करता है कि उप–धारा में उल्लिखित शब्द ''अन्यथा'' में पट्टा शामिल नहीं होगा – इसका अर्थ यह है कि अधिसूचित अनुसूचित क्षेत्रों में या गैर–अधिसूचित ग्रामीण क्षेत्रों में, जनजाति और गैर–जनजाति के मध्य पट्टे में प्रवेश हेतु कोई वर्जन नहीं है तथा कलेक्टर की अनुज्ञा अपेक्षित नहीं है।

C. Land Revenue Code, M.P. (20 of 1959), Section 165(6-a) – Lease/Transfer of Tribal Land – Word "otherwise" – Jurisdiction of Collector – **Held – Section 165(6-a) does not carves out an explanation for word "otherwise" for leases which means any land located in notified scheduled areas, non-tribal cannot execute a lease in favour of another non-tribal without written permission of Collector – Diverted land of non-tribals cannot be transferred to other non-tribals without permission of Collector, if located in notified scheduled areas. (Para 11(iv) & (v))**

ग. भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 165(6–a) – जनजातीय भूमि का पट्टा/अंतरण – शब्द ''अन्यथा'' – कलेक्टर की अधिकारिता – अभिनिर्धारित – धारा 165(6–a) पट्टे हेतु ''अन्यथा'' शब्द के लिए कोई स्पष्टीकरण परिकल्पित नहीं करती अर्थात् अधिसूचित अनुसूचित क्षेत्रों में स्थित किसी भूमि के संबंध में गैर–जनजाति किसी अन्य गैर–जनजाति के पक्ष में कलेक्टर की लिखित अनुज्ञा के बिना पट्टे का निष्पादन नहीं कर सकता – गैर–जनजाति की अपयोजित भूमि यदि किसी अधिसूचित अनुसूचित क्षेत्र में स्थित हो तो किसी अन्य गैर जनजाति को उसका अंतरण कलेक्टर की अनुज्ञा के बिना नहीं किया जा सकता।

D. Land Revenue Code, M.P. (20 of 1959), Section 165(6) & 165 (6-a) – Purchase of Land by Tribals – Jurisdiction of Collector – **Held – There is no bar to purchase a land by tribal – A tribal can purchase a land from another tribal and also from a non-tribal and permission of Collector for such transactions are not required. (Para 11(vi))**

घ. भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 165(6) व 165(6–a) – जनजाति द्वारा भूमि का क्रय – कलेक्टर की अधिकारिता – अभिनिर्धारित – जनजाति द्वारा भूमि क्रय किये जाने पर कोई वर्जन नहीं है – एक जनजाति किसी अन्य जनजाति तथा गैर–जनजातीय से भी भूमि क्रय कर सकता है एवं ऐसे संव्यवहारों हेतु कलेक्टर की अनुज्ञा अपेक्षित नहीं है।

Cases referred :

M.P. No. 535/1971 decided on 02.11.1972, W.P. No. 2608/2012 decided on 02.01.2013.

Sankalp Kochar, for the petitioner.
Anuj Shrivastava, P.L. for the respondents.

O R D E R

VISHAL DHAGAT, J.:- Petitioner has filed the present writ petition challenging order dated 25.11.2020 contained in Annexure-P/15.

2. It is submitted by counsel appearing for petitioner that petitioner is a partnership firm which had purchased land bearing Khasra No.102/1 and Khasra No.102/2, admeasuring total 1.475 hectares. Petitioner firm developed Real Estate Project 'Betul Pride' on a part of said land. All requisite permissions were obtained. It is submitted that subsequent purchasers were Scheduled Castes and were granted approval in legal search report of Canara Bank. Respondent No.3 i.e. State Bank of India expressed inability to sanction loan on the project as land which is sought to be mortgaged belongs to purchaser who is from Scheduled Tribe category. Bank expressed that permission of Collector was required under relevant provisions of M.P. Land Revenue Code. When subsequent purchaser approached Collector for getting permission under Section 165(6) of M.P. Land Revenue Code, the same was rejected on the ground that there is ban on transfer including creation of mortgage. It is submitted that Collector ignored the recommendation of S.D.O. as well as Patwari to grant permission.

3. Perused the order dated 25.11.2020 contained in Annexure-P/15.

4. An application was filed before Collector seeking direction that provision of Section 165 (6) of M.P. Land Revenue Code is not attracted in case of project under RERA and diverted land accordingly bank may not ask for Collector's permission under Section 165 (6) of M.P. Land Revenue Code for mortgaging the land. Counsel for petitioner relied on the judgment dated 02.11.1972 passed by this Court in M.P. No.535/1971 *(Ail Das Vs. Board of Revenue, Madhya Pradesh and others)* and order dated 02.01.2013 passed in W.P. No.2608/2012 *(Kamal Singh Narre Vs. State of M.P. and others).* Collector has wrongly dismissed the application on the ground that land in question is located in notified scheduled area i.e. Batama, Betul. Notification is issued by State Government on 21.02.1977 by which, Betul Tehsil area was notified to be Scheduled Tribe predominant area. Collector wrongly held that there is complete ban on transfer of land from Scheduled Tribe to a Non-scheduled Tribe person and, therefore, Collector does not have jurisdiction to grant permission and no direction can be given to bank because it is province of bank to decide what documents are required for loan.

5. Counsel appearing for respondent/State opposed the prayer of petitioner. It is submitted by him that provisions of Section 165(6) of M.P. Land Revenue Code is attracted in the case. As per said provisions, no land situated in notified scheduled area predominantly inhabited by aboriginal tribes be transferred either by way of sale or otherwise in consequence of transaction of loan to a person not belonging to such tribe. It is submitted by him that there is no error in order passed

by Collector. He relied on judgment passed in W.A. No.431/2005 dated 19.01.2016.

6. Heard the counsel for petitioner as well as respondents/State.

7. Case of *Ail Das* and *Kamal Singh Narre* (supra) relied by petitioner are distinguishable. In *Ail Das* (supra) land was located in urban area and in case of *Kamal Singh Narre* (supra) condition imposed to develop colony was under challenge. Collector rightly held said cases are not applicable in present case.

8. It is clear from perusal of Section 165(6) (i) of M.P. Land Revenue Code that transaction of land by Bhumiswami belonging to a Scheduled Tribe which is located in the area notified by the State Government to be a scheduled area inhabited by predominantly aboriginal tribe cannot be transferred to a non-scheduled tribe by way of sale or otherwise or in consequence of loan transaction. No power is given to Collector to grant permission to a Scheduled Tribe to transfer his land to non-tribal person in respect of land located in a notified scheduled area predominantly inhabited by aboriginal tribe. However, in land which are located outside the notified scheduled area, Collector can grant permission to a tribal to transfer his land to a non-tribal.

9. Collector has held that land in question is situated in notified scheduled area, therefore, he has no jurisdiction to grant permission for transfer of land and it was further held that he cannot give any direction to Bank to ask for particular documents for grant of loan, it is within the province of Bank to decide that which document is required by it for granting of loan.

10. Counsel for petitioner submitted that his land is a diverted land, therefore, provision of Section 165 (6) of M.P. Land Revenue Code, 1959 will not be applicable. Section 165 (6) and Section 165 (6-a) of the Code is quoted as under:-

> **"165. Rights of transfer.** - (1) Subject to the other provisions of this section and the provision of Section 168 a bhumiswami may transfer [***] any interest in his land.
>
> **(6)** Notwithstanding anything contained in sub-section (1) the right of bhumiswami belonging to a tribe which has been declared to be an aboriginal tribe by the State Government by a notification in that behalf, for the whole or part of the area to which this Code applies shall-
>
> (i) in such areas as are predominately inhabited by aboriginal tribes and from such date as the State Government may, by notification, specify, not be transferred nor it shall be transferable either by way of sale or otherwise or as a consequence of transaction of loan to

a person not belonging to such tribe in the area specified in the notification;

(ii) in areas other than those specified in the notification under clause (i), not to be transferred or be transferable either by way of sale or otherwise or as a consequence of transaction of loan to a person not belonging to such tribe without the permission of a Revenue Officer not below the rank of Collector, given for reasons to be recorded in writing.

(6-a) Notwithstanding anything contained in sub-section (1), [the right of a bhumiswami other than a bhumiswami belonging to a tribe which has been declared to be an aboriginal tribe under sub-section (6), in the land excluding the agricultural land] shall not be transferred or be transferable either by way of sale or otherwise or as a consequence of transaction of loan to a person not belonging to aboriginal tribe without the permission of the Collector given for reasons to be recorded in writing:

Provided that every such transfer effected [after the 9th day of June, 1980 but before the 20th April, 1981] which is not in accordance with the provisions herein contained shall, unless such transfer if ratified by the Collector in accordance with the provisions hereinafter contained, be void and shall be of no effect whatsoever, notwithstanding anything contained in this Code or any other law for the time being in force."

There is no force in argument of petitioner that Section 165 (6) of the Code is not applicable on diverted lands. Even in diverted lands which are diverted for other than agricultural purposes i.e. for dwelling houses, educational purpose, commercial purpose, industrial purpose are assessed to land revenue and it cannot be said that Section 165 (6) of M.P. Land Revenue Code, 1959 is not applicable on such lands. If land in question is located in an urban area, and falls within Municipal limits, then provision of Section 165(6) of Land Revenue Code will not be applicable. Petitioner does not have a case that land of petitioner falls in an urban area which falls within municipal limits but is relying on the fact that diversion has been done, therefore, provision of Section 165 (6) of M.P. Land Revenue Code will not be attracted in his case, is misconceived. Any land whether diverted or non-diverted agricultural land, which is situated in notified area, the transfer of any interest shall be regulated as per provision of Section 165 (6) of M.P. Land Revenue Code. Even on diverted land, provisions of Section 165 (6) of M.P. Land Revenue Code shall be applicable. However, lease which is executed by Tribal in favour of Non-Tribal in notified Scheduled area is not barred. Explanation to Section 165 (6) lays down that expression 'otherwise' shall not include lease. Explanation signifies transfer of land by sale or consequence of

loan transaction or otherwise in notified Scheduled area is completely barred but expression 'otherwise' shall not include lease, therefore, lease is permissible in notified Scheduled area. Further as per Section 165 (6-a) of MP Land Revenue Code rights of Bhumiswami who is non-tribal having non-agricultural land (diverted land) in notified Scheduled area shall not be transferred or transferable by sale or otherwise or as a consequence of loan transaction to a non-tribal person without permission of Collector. Thus, interest in diverted land of non-tribal shall not be transferred to non-tribal by way of sale or otherwise or as a consequence of loan transaction without permission of Collector. Proviso to Section 165 (6-a) of MP Land Revenue Code is not considered as same is not in issue in present case.

11. In view of aforesaid, Section 165(6) and 165 (6-a) of M.P. Land Revenue Code are summed up as under:-

(i) Land of tribal in notified scheduled area shall not be transferred or transferable by way of sale or otherwise or as consequence of loan transaction to a non-tribal. Collector has no jurisdiction to grant permission in aforesaid case of transfer's referred above.

(ii) In non notified areas i.e. rural areas and villages, tribal can transfer his land to a non-tribal after seeking written permission of Collector.

(iii) Explanation of Section 165 (6) M.P. Land Revenue Code carves out an exception that word "otherwise" mentioned in said sub Section shall not include lease. This means that in notified scheduled areas or in non-notified rural areas, there is no bar for entering into lease between tribals and non-tribals and permission of Collector for lease is not required.

(iv) In scheduled notified areas, non-tribal cannot transfer his non-agricultural land i.e. land for purpose of dwelling house, educational purpose, commercial purpose, industrial purpose (diverted land) by sale or otherwise or as a consequence of loan transaction to non-tribal without written permission of Collector. In simple words, diverted land of non-tribals cannot be transferred to non-tribals without permission of Collector if located in notified scheduled areas.

(v) Section 165 (6-a) M.P. Land Revenue Code does not carves out an exception for word 'otherwise' for leases which means any land located in notified scheduled areas non-tribal cannot execute a lease in favour of other non-tribal without written permission of Collector.

(vi) As per Section 165 (6) and 165 (6-a) of M.P. Land Revenue Code, there is no bar to purchase a land by tribal. A

tribal can purchase a land from another tribal and also from a non-tribal and permission of Collector for such transactions are not required.

12. In view of aforesaid, diverted land if situated in notified scheduled areas belonging to a non-tribal, then there is requirement of permission of Collector to transfer the land in favour of a non-tribal. However, a land belonging to non-tribal in notified scheduled area can be transferred in favour of a tribal and permission of Collector is not required.

13. In view of same, respondents are directed to act in accordance with aforesaid directions.

14. With aforesaid direction, writ petition filed by the petitioner is **disposed off.**

15. A copy of order be sent to Principal Secretary, Department of Revenue and the Collectors posted in notified scheduled areas.

Order accordingly

I.L.R. [2021] M.P. 1306 (DB)
WRIT PETITION

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

WP No. 16904/2020 (Indore) decided on 23 March, 2021

KAN SINGH & ors. …Petitioners

Vs.

STATE OF M.P. & ors. …Respondents

(Along with WP Nos. 483/2019 & 10833/2020)

A. Constitution – Article 243Q and Municipalities Act, M.P. (37 of 1961), Section 5(2) & 6 – Transitional Area – Notification – Statutory Requirement **– Held – Notification dated 27.11.2011 is only a general notification whereby basic parameters have been laid down for establishing a "transitional area" – Constitutional/Statutory requirement is to issue an area specific notification – Notification of 27.11.2011 is not area specific and thus does not fulfill requirement of law and it cannot be a reason to sustain the impugned notifications – All impugned notifications set aside – State at liberty to follow due process and proceed – Petitions disposed.**

(Paras 16 & 21 to 28)

क. संविधान – अनुच्छेद 243 Q एवं नगरपालिका अधिनियम, म.प्र. (1961 का 37), धारा 5(2) व 6 – संक्रमणशील क्षेत्र – अधिसूचना – कानूनी अपेक्षा – अभिनिर्धारित – अधिसूचना दिनांक 27.11.2011 केवल एक साधारण अधिसूचना है जिसके तहत

''संक्रमणशील क्षेत्र'' स्थापित करने के लिए मूलभूत मापदंड प्रतिपादित किये गये हैं – एक क्षेत्र विशिष्ट अधिसूचना जारी करने की संवैधानिक/कानूनी आवश्यकता है – दिनांक 27.11.2011 की अधिसूचना क्षेत्र विशिष्ट नहीं है और इसलिए विधि की अपेक्षा की पूर्ति नहीं करती तथा आक्षेपित अधिसूचनाओं को कायम रखने के लिए यह एक कारण नहीं हो सकती – सभी आक्षेपित अधिसूचनाएं अपास्त – सम्यक् प्रक्रिया का पालन करने और आगे कार्यवाही करने हेतु राज्य स्वतंत्र है – याचिकाएं निराकृत।

B. Constitution – Article 243Q and Municipalities Act, M.P. (37 of 1961), Section 5(2) & 6 – Transitional Area – Notification – Legislative Intent – **Held – Conjoint reading of Article 243Q(2) of Constitution and Section 5 & 6 of Act of 1961 concludes that the legislative intent behind said provisions was to apply the required parameters in relation to a "particular transitional area" and issue notification in relation to the said area and circulate it in the said area as per procedure prescribed. (Para 27)**

ख. संविधान – अनुच्छेद 243 Q एवं नगरपालिका अधिनियम, म.प्र. (1961 का 37), धारा 5(2) व 6 – संक्रमणशील क्षेत्र – अधिसूचना – विधायी आशय – अभिनिर्धारित – संविधान के अनुच्छेद 243 Q (2) और 1961 के अधिनियम की धारा 5 व 6 को संयुक्त पढ़े जाने से यह निष्कर्षित होता है कि उक्त उपबंधों के पीछे विधायी आशय एक ''विशिष्ट संक्रमणशील क्षेत्र'' के संबंध में अपेक्षित मापदंडों को लागू करना और उक्त क्षेत्र के संबंध में अधिसूचना जारी करना तथा विहित प्रक्रिया के अनुसार उक्त क्षेत्र में उसे परिचालित करना था।

Cases referred:

AIR 2018 SC 2352, 342 US 98 (1951), 2012 10 SCC Page 1, 98 ER 327, AIR 1961 SC 1170, AIR 1997 SC 1165, AIR 2002 SC 564, AIR 2004 SC 1039, AIR 1920 PC 181, AIR 2002 SC 3240, (1949) 2 ALL ER 452 (HL), AIR 1959 SC 781, AIR 1975 SC Page 43.

V.K. Jain assisted by *Abhishek Tugnawat*, for the petitioners.
Vivek Dalal, Addl. A.G. for the respondents/State.

O R D E R

The Order of the Court was passed by :
SUJOY PAUL, J. :- In these batch of petitions filed under Article 226 of the Constitution, challenge is made to similar Notifications dated 04/10/2018 (Annexure P/3), 29/09/2018 (Annexure P/4) & 02/07/2020 (Annexure P/1) issued by Urban Development and Housing Department in exercise of power under Section 5(1)(B) of Madhya Pradesh Municipalities Act, 1961 (37 of 1961) (in short Municipalities Act), whereby Govt. included the areas of certain village panchayats as Municipal Council.

2. This Court by common order dated 21/10/2020 had set aside the impugned Notifications by reserving liberty to the State to follow the "due process" and proceed afresh.

3. Review Petitions No.51 & 52 of 2021 were filed by the State seeking review of said common order dated 21/10/2020. The singular ground taken in the review petition was that a gazette Notification dated 27/11/2011 was filed by the State in aforesaid writ petitions but while passing the final order, the said Notification has not been taken into account. If Notification would have been taken into account, the fate of the matters would have been different. Since a relevant Notification which has a bearing on the issues involved has been left out, the matter may be reviewed. The review petitions were entertained and order dated 21/10/2020 was reviewed and recalled. The writ petitions were directed to be restored to their original numbers. In turn, these matters again came up for consideration before us.

4. Facts are taken from WP No.16904/2020. The petitioners are Sarpanch of different panchayats. From newspapers, they came to know that Nagar Parishad (Municipal Council) is decided to be formed in Tehsil-Kukshi, District-Dhar. The petitioners promptly sent their representations against the formation of Nagar Parishad which are cumulatively marked as Annexure P/1. Since Petitioners' representations went in vain, they filed present petition contending that impugned Notification dated 04/10/2018 is not passed as per constitutional requirement of Article 243(Q) of Constitution of India and Section 5 & 6 of Municipalities Act.

5. To bolster this submission, Shri VK Jain, learned Senior Counsel assisted by Shri Abhishek Tugnawat, learned counsel placed heavy reliance on Article 243Q and Section 5 & 6 of the Municipalities Act. It is submitted that :-

(i) no order for disestablishment of any village was ever passed under Panchayat Raj and Gram Swaraj Adhiniyam, 1993 (Adhiniyam),

(ii) no Notification under Section 126 of Adhiniyam for disestablishment of any Gram Panchayat was ever issued,

(iii) no opportunity of filing objections or hearing was ever afforded to the residents of any village,

(iv) no consequential order was ever passed under the Adhiniyam,

(v) no Notification as required under Article 243-Q of the Constitution of India and Section 5(2) & (6) of Municipalities Act was ever issued,

(vi) the Notification dated 27/11/2011 by no stretch of imagination can be said to be a Notification in consonance with Article 243-Q and Section 5(2) of Municipalities Act because :-

(a) The said Notification does not fulfill the requirement of proviso to Article 243-Q of the Constitution and Section 5(2) of Municipalities Act.

(b) The said Notification does not mention the name of any village and other necessary details.

(c) By said Notification, no Gram Panchayat was disestablished.

(d) The Notification dated 27/11/2011 at the most can be treated to be a guideline for declaring any area as "transitional area" subject to fulfillment of other standards.

(e) "Transitional area" cannot be established unless Gram Panchayat is disestablished. A separate Notification for declaring the area as "transitional area" is required to be established. In absence of any declaration/Notification being issued either to disestablish any Gram Panchayat or to declare any area as "transitional area", the petitioners got no opportunity of filing objection.

6. Shri VK Jain, learned Senior Counsel placed reliance on the order of this Court dated 16/03/2012 passed in WP No.910/2012 filed with the return and urged that this judgment does not approve the stand of the respondents. In the said case, there was a Notification declaring particular area as "transitional area", while in the present case there exists no such Notification. Lastly, by placing reliance on the judgment of Supreme Court reported in AIR 2018 SC 2352 (*Champa Lal vs. State of Rajasthan & Ors.*), the petitioners urged that the impugned Notification runs contrary to the principles laid down by Apex Court in the case of *Champalal* (supra). In support of the aforesaid contention, the petitioners have filed written synopsis.

7. Sounding a *contra* note, Shri Vivek Dalal, learned Additional Advocate General for the State submits that a plain reading of Notification dated 27/11/2011 shows that it fulfills the constitutional and statutory requirement of Article 243Q and Section 5 & 6 of Municipalities Act. By placing reliance on the definition of "Gram Panchayat" and "village" mentioned in the Panchayat Act, learned AAG urged that argument regarding violation of Section 126 of Panchayat Act is misconceived and without any basis. The argument advanced by petitioners is regarding disestablishment of Gram Panchayat, whereas Section 126 deals with disestablishment of village. The constitutional and statutory requirement of Municipalities Act was taken care of while issuing Notification dated 27/11/2011. All necessary parameters were laid down in this Notification in consonance with the aforesaid requirement of law. The impugned Notifications were passed in furtherance of previous Notification dated 27/12/2011. Hence, no fault can be found in the impugned Notifications. It is pointed out that this Court in WP No.910/2012 has not interfered with the Notification. Hence, no interference is warranted in these batch of petitions.

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

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

10. The pivotal question for determination is whether the Notification dated 27/11/2011 can be said to be a Notification which fulfills the requirement of Article 243Q of the Constitution and Section 5(2) and Section 6 of the Municipalities Act.

11. Article 243Q of the Constitution and Section 5 of Municipalities Act are reproduced hereinunder in a tabular form.

Art. 243Q of the Constitution	**Sec. 5 of Municipalities Act**
(1) There shall be constituted in every State, *(a) a Nagar Panchayat (by whatever name called) for a transitional area, that is to say, an area in transition from a rural area to an urban area* *(b) a Municipal Council for a smaller urban area; and* *(c) a Municipal Corporation for a larger urban area, in accordance with the provisions of this Part:* *Provided that a Municipality under this clause may not be constituted in such urban area or part thereof as the Governor may, having regard to the size of tile area and the municipal services being provided or proposed to be provided by an industrial establishment in that area and such other factors as he may deem fit, by public notification, specify to be an industrial township* *(2) In this article, a transitional area, a smaller urban area or a larger urban area means* ***such area*** *as the Governor may, having regard to the population of* ***the area,*** *the density of the population therein, the revenue generated for local administration, the percentage of employment in non*	***5. Constitution of Municipal Councils and Nagar Parishad -*** *(1) There shall be constituted-* *(a) a Municipal Council for a smaller urban area; and* ***(b) a Nagar Parishad for a transitional area, that is to say an area in transition from a rural area to an urban area.*** *Provided that a Municipal Council or a Nagar Parishad, as the case may be, may not be constituted in such urban area or part thereof as the Governor may, having regard to the size of the area and the municipal services being provided or proposed to be provided by an industrial establishment or a group of such establishments in that area and such other factors as he may deem fit, by public notification specify to be an industrial township :* *Provided further that when an area is notified to be a transitional area, the Gram panchayat having jurisdiction over such area shall continue to function until a duly elected Nagar Panchayat is constituted under this Act.* *(2) In this section, 'a smaller urban area' or 'a transitional area' means* ***such area*** *as the Governor may, having regard to the population of* ***the area,*** *the density of the population* ***therein,*** *the revenue generated*

Art. 243Q of the Constitution	Sec. 5 of Municipalities Act
agricultural activities, the economic importance or such other factors as he may deem fit, ***specify by public notification*** *for the purposes of this Part*	*for local administration, the percentage of employment in non-agricultural activities, the economic importance or such other factors, as he may deem fit,* ***specify, by public notification*** *for the purposes of this Act.* *(3) Omitted.*

(Emphasis Supplied)

12. Section 6 of the Municipalities Act is also relevant for decision of the matter which reads as under:-

> ***"6. Procedure for publication of notifications.***
>
> ***Every notification*** *under Section 5 [or Section 5-A] shall be published in the Official Gazette and in at least one Hindi newspaper having circulation* ***in the area to which it relates*** *and also by posting a copy thereof-*
>
> *(a) in a conspicuous place in the office of the Collector;*
>
> *(b) in a conspicuous place in the office of the Municipality, if any, affected by the notification; and*
>
> *(c) in such conspicuous place in the area affected by the notification as the Collector may deem fit."*

(Emphasis Supplied)

13. The **Gazette Notification dated 27/11/2011** reads as under:-

मध्यप्रदेश राज्य

(असाधारण)

प्राधिकार से प्रकाशित

क्रमांक 584 भोपाल, मंगलवार, दिनांक 27 दिसम्बर 2011 – पौष 6, शक 1933

नगरीय प्रशासन एवं विकास विभाग

मंत्रालय, वल्लभ भवन, भोपाल

भोपाल दिनांक 27 दिसम्बर 2011

अधिसूचना क्र.64–एफ–1–19–2009–अट्ठराह–3 मध्यप्रदेश नगरपालिका अधिनियम 1961 की धारा 5 में नगर परिषद् के लिए संक्रमणशील क्षेत्र तथा नगरपालिका के लिये

लघुत्तर नगरीय क्षेत्र एवं मध्यप्रदेश नगर पालिका निगम अधिनियम 1956 की धारा 7 में नगर निगमो के लिए वृहत्तर नगरीय क्षेत्र के गठन का प्रावधान है,

2. राज्य सरकार द्वारा लिये गये निर्णय अनुसार नगर परिषद् / नगरपालिका /नगर निगम के गठन का मापदण्ड जनसंख्या के आधार पर निम्नानुसार निर्धारित किया जाता है :

नगर परिषद्	–	20,000 से अधिक 50,000 से कम जनसंख्या
नगरपालिका	–	50,000 से अधिक 3,00,000 से कम जनसंख्या
नगर पालिका निगम	–	3,00,000 से अधिक जनसंख्या

इसके अतिरिक्त संक्रमणशील क्षेत्र के गठन हेतु निम्न मापदण्डो की पूर्ति भी आवश्यक है: –

1. जनसंख्या 20 हजार से कम न हो, इसमें से जनसंख्या का 60 प्रतिशत सघन जनसंख्या हो,

2. प्रकरणाधीन निकाय में कृषि इतर गतिविधियां संचालित हो तथा इन गतिविधियों में 50 प्रतिशत जनसंख्या कार्यरत हो,

3. परिवर्तित होने वाली निकाय का स्वंय का राजस्व कम से कम रूपये 10 लाख प्रतिवर्ष हो,

4. प्रकरणाधीन निकाय में स्थित कुल भवनों में से 30 प्रतिशत भवन संपत्किर की परिधि में आते हो अर्थात् इनकी वार्षिक भाडा मूल्य 4800.00 रूपये से कम न हो,

5. प्रकरणाधीन निकाय के पूरे क्षेत्र में जल प्रदाय किया जा रहा हो,

6. प्रकरणाधीन निकाय में लगने वाले बाजार, पशु बाजार, आस–पास की अन्य ग्राम पंचायतों की तुलना में अधिक राजस्व देने वाले हो,

7. ग्राम पंचायत का स्वयं का भवन होना चाहिए, जिसमें कम से कम 10 कर्मचारी बैठ सेके और 15 पार्षद बैठक कर सके,

8. प्रकरणाधीन निकाय में कुल सडकों की लम्बाई की 30 प्रतिशत सड़के / नालियां पक्की होना चाहिये,

9. विद्युत व्यवस्था के अन्तर्गत निकाय के अधिकतर क्षेत्र में विद्युत खम्भे स्थापित हो,

मध्यप्रदेश के राज्यपाल के नाम से तथा आदेशानुसार
एस.पी.एस. परिहार, प्रमुख सचिव

14. Article 243Q is part of Chapter IX-A of the Constitution which was inserted by Constitution (74th amendment) (Act 1992) w.e.f. 01/06/1993). This part deals with various facets of municipalities including its constitution, composition, reservation of seats, power/ authority and responsibility of municipality etc.

15. The parties are at loggerheads on the aspect whether Notification dated 27/11/2011 can be treated to be a Notification issued under Article 243Q of Constitution. A careful reading of Article 243Q(2) shows that following parameters are required to be taken into account while issuing the Notification:-

(i) population of the area

(ii) density of population therein

(iii) revenue generated for local administration

(iv) percentage of employment in non agricultural activities

(v) economic importance

(vi) such other factors as Governor of the State may deem fit.

The argument of State is that all these parameters were taken note of while issuing the Notification dated 27/11/2011 and hence, impugned Notifications are in accordance with law.

16. Indisputably, the necessary parameters were taken note of while issuing the Notification dated 27/11/2011. Interestingly, in this Notification, the Government itself mentioned that certain laid down parameters are required to be fulfilled for the purpose of establishment of a "transitional area". A microscopic reading of this notification dated 27/11/2011 makes it crystal clear that this is a general Notification whereby only parameters for establishment of a 'transitional area' have been laid down. It is not area specific. In other words, the State has made endeavour to reduce in writing the relevant parameters flowing from Article 243Q and Section 5 of Municipalities Act in order to ensure that whenever a "transitional area" is to be constituted, the necessary parameters laid down can be applied. In our opinion, this Notification dated 27/11/2011 is a general Notification whereby basic parameters have been laid down for establishing a 'transitional area'.

17. Whether this Notification fulfills the requirement of Article 243Q of the Constitution and whether on the strength of this Notification, the impugned Notifications can sustain judicial scrutiny is the core issue.

18. Sub Article 2 of Article 243Q talks about necessary parameters which have been certainly taken care of while issuing the Notification dated 27/11/2011. However, the language employed in Sub Article 2 shows that transitional area means 'such area' as the Government may after considering the aforesaid parameters, 'specify' by public Notification for the purpose of this Act. Thus, the provision makes it obligatory that such Notification must be "area specific".

19. Section 5 of Adhiniyam is almost verbatim reproduction of Article 243Q in the statute book of Municipalities Act except second proviso to Clause b of Sub-Section 1 of Section 5 of the Municipalities Act. This Court has taken note of this aspect while passing order in WP No.910/2012 decided on 16/03/2012.

20. Pertinently, Section 5, 5A of the Municipalities Act became part of statute book pursuant to an amendment incorporated w.e.f. 30/05/1994. On the same date, certain words were inserted in Section 6 of the Municipalities Act.

21. Section 5 of Municipalities Act deals with "constitution of Municipal Councils and Nagar Parishads". As noticed, Sub-Section 2 of Section 5 is almost analogous to Article 243Q(2) of the Constitution. Section 6 prescribes the procedure for publication of Notification under Section 5 or Section 5A of the Municipalities Act. This provision, in no uncertain manner makes it clear that "every Notification" under Section 5 needs to be published in the official gazette and in hindi newspaper having circulation *in the area to which it relates*. A combined reading of Section 5(2) and Section 6 leaves no room for any doubt that the Notification issued under Sub-Section 5(2)/Article 243Q of the Constitution must be an area specific Notification.

22. The law makers, who have drafted Sub-Section 6, in our view were clear in their mind that every Notification issued under Section 5 must take care of necessary parameters mentioned herein-above and it must be issued and relate to the area for which it is issued. Thus, we find force in the argument of counsel for the petitioners that the Notification dated 27/11/2011 is a general Notification which only lays down the basic parameters for the purpose of constitution of a "transitional area". The constitutional and statutory requirement is to issue specific Notification relating to a particular area by taking into account said parameters in the fact situation of the particular area.

23. In the case of *Champalal* (supra), the Apex Court opined as under:-

> **"8.** It is declared under Article 243 Q (2) that the expressions "a transitional area", "a smaller urban area" and "a larger urban area" (hereinafter collectively referred to as "AREAS") would mean such areas as may be specified by the Governor by a public notification for the purpose of Part IX A of the Constitution of India. Article 243Q(2) further obligates the Governor to have due regard to the various factors mentioned therein before specifying the AREAS i.e. population of the area, the density of the population, the revenue generated in the area for local administration, percentage of employment in non-agricultural activities, the economic importance or such other factors as he may deem fit.

> **9.** It, therefore, appears from the scheme of Article 243Q(2) that the Governor is not free to notify 'AREAS' in his absolute discretion but is required to fix the parameters necessary to determine whether a particular AREA is a transitional area or a smaller urban area or a larger urban area with due regard to the factors mentioned above. It is implicit that such parameters must be uniform for the entire State. It is only after the determination of the parameters, various municipal bodies contemplated under Article 243Q(1) could be constituted.
>
> **(Emphasis supplied)**

24. In this judgment, the Apex Court poignantly held that areas would mean *such areas as may be specified.* Great emphasis is laid by Apex Court about requirement of specifying the 'area'. The parameters were required to be applied in relation to "particular area" as a transitional area or a small urban area or a large urban area. Hence, there is no cavil of doubt that the Notification dated 27/11/2011 cannot be said to be an area specific Notification which fulfills the requirement of law and on the strength of this Notification dated 27/11/2011 whereby only general parameters were laid down, the impugned Notifications cannot be given stamp of approval.

25. The decision of the government for constituting a "transitional area" cannot be based on unfettered discretion. Indeed, it must be guided by parameters laid down in Article 243Q of Constitution. If decision is taken without considering any principle and parameters, such a decision is antithesis of a decision taken in accordance with law. Douglas J. in *United States vs. Wunder Lich* (342 US 98 (1951)) opined that 'law has reached its finest moments when it has freed man from the unlimited discretion of some ruler..... where discretion is absolute, man has always suffered.' This observation of **Douglas J.** was quoted with profit by constitution Bench of Supreme Court in 2012 10 SCC Page 1 *(Natural Resources Allocation, in reference, Special Reference No.1 of 2012).* Similarly, it was held that Rule of Law may be said to be the sworn enemy of caprice. Discretion, as Lord Mansfield stated it in classical terms in *Wilkes (R. vs. Wilkes)* 98 ER 327. Since in the instant case, the impugned Notifications are passed without testing the factual matrix of areas in question on the relevant parameters which were laid down in the Notification dated 27/11/2011, the impugned decision cannot be said to be taken based on relevant parameters.

26. This is trite that while interpreting a constitutional/statutory provision, due care must be taken to give meaning and interpretation to every word used and employed in the provision.

The Courts always presumed that the legislature inserted every part of statute for a purpose and the legislative intention is that every part of the statute

should have effect. (*See:J.K. Cotton Spinning & Weaving Mills Co. Ltd. vs. State of U.P.* (AIR 1961 SC 1170), *Shri Mohammad Alikhan vs. Commissioner of Wealth Tax* (AIR 1997 SC 1165), *Dilwar Babu Kurane vs. State of Maharashtra* (AIR 2002 SC 564), *Ramphal Kundu vs. Kamal Sharma* (AIR 2004 SC 1039). This is equally settled that legislature is deemed not to waste its words or to say anything in vain. *(See: Quebec Railway, Light, Heat & Power Co. v. Vandry*, (AIR 1920 PC 181), *Union of India vs. Hansoli Devi* (AIR 2002 SC 3240). Patanjali Shastry, C.J.I. held that it is not a sound principle of construction "to brush aside words" in a statute as being in apposite surplusage, if they can have appropriate application in circumstances conceivably within the contemplation of the statute. In *Hill vs. Williams Hill* (1949) 2 ALL ER 452 (HL) referred to in *Bherulal Parakh vs. Mohadev Das Maya,* AIR 1959 SC 781, it was ruled that "the rule that a meaning should, if possible, be given to every word in the statute implies that, unless there is good reason to the contrary, the words add something which would not be there if words are left out." *(See also*: AIR 1975 SC Page 43-*Umed vs. Raj Singh)*.

27. Section 6 mandates that Notification issued under Section 5 needs to be published in the gazette and in the Newspaper having circulation *in the area to which it relates.* A conjoint reading of Article 243Q(2) of Constitution and Section 5 & 6 of Municipalities Act leads us to the conclusion that the legislative intent behind said provisions was to apply aforesaid parameters in relation to a "particular transitional area" and issue Notification in relation to the said area and circulate it in the said area as per the procedure prescribed.

28. In view of foregoing analysis, the question framed must be answered against the State. In our view, the Notification dated 27/11/2011 was not area specific and said Notification cannot be a reason to sustain the impugned Notifications dated 04/10/2018, 29/09/2018 & 02/07/2020 challenged in these petitions. At the cost of repetition, in our view general notification dated 27/11/2011 does not fulfill the requirement of law. Admittedly, in the impugned notifications there exists no consideration of necessary parameters for declaring the areas as 'transitional areas'. In absence thereof, impugned notifications became vulnerable. Consequently, all the Notifications dated 04/10/2018, 29/09/2018 & 02/07/2020 are set aside. The respondents/State shall be at liberty to follow the "due process" and proceed afresh in the matter.

29. The writ petitions are disposed of.

30. A copy of this order shall be placed in the record of connected matters.

Order accordingly

I.L.R. [2021] M.P. 1317
WRIT PETITION

Before Mr. Justice G.S. Ahluwalia

WP No. 21814/2018 (Gwalior) decided on 23 March, 2021

SINNAM SINGH …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

A. Civil Services (General Conditions of Service) Rules, M.P., 1961, Rule 8(7) and Government Servants (Temporary and Quasi-Permanent Service) Rules, M.P. 1960, Rule 12 – Probation – Applicability of Rules – **Held – A probationer, who has neither been confirmed, nor a certificate issued in his favour, nor discharged from service, shall be deemed to have been appointed as a temporary government servant with effect from date of expiry of probation and his service shall be governed by Rules of 1960. (Para 15 & 16)**

क. सिविल सेवा (सेवा की सामान्य शर्तें) नियम, म.प्र., 1961, नियम 8(7) एवं शासकीय सेवक (अस्थायी एवं स्थायीवत् सेवा) नियम, म.प्र. 1960, नियम 12 – परिवीक्षा – नियमों की प्रयोज्यता – अभिनिर्धारित – एक परिवीक्षाधीन व्यक्ति को, जिसे न तो स्थाई किया गया है, न ही उसके पक्ष में प्रमाण–पत्र जारी किया गया है, न ही उसे सेवोन्मुक्त किया गया है, परिवीक्षा के अवसान की तिथि से एक अस्थाई शासकीय सेवक के रूप में नियुक्त किया गया माना जावेगा तथा उसकी सेवा 1960 के नियमों द्वारा शासित होगी।

B. Government Servants (Temporary and Quasi-Permanent Service) Rules, M.P. 1960, Rule 12(b) – Termination – **Held – Services of temporary employee can be terminated by issuing one month's notice or by making payment of one month's advance salary in lieu of notice, which was not done in present case – Impugned order of termination is modified and respondents directed to pay one month's salary to petitioner in lieu of one month's notice – Petition disposed. (Paras 17 to 23)**

ख. शासकीय सेवक (अस्थायी एवं स्थायीवत् सेवा) नियम, म.प्र. 1960, नियम 12(b) – सेवा समाप्ति – अभिनिर्धारित – अस्थाई कर्मचारी की सेवा, एक माह का नोटिस जारी कर या नोटिस के बदले में एक माह के अग्रिम वेतन का भुगतान कर समाप्त की जा सकती है, जैसा कि वर्तमान प्रकरण में नहीं किया गया था – सेवा समाप्ति का आक्षेपित आदेश उपांतरित तथा प्रत्यर्थीगण को एक माह के नोटिस के बदले याची को एक माह के वेतन का भुगतान करने हेतु निदेशित किया गया – याचिका निराकृत।

C. Service Law – Appointment on Probation – Unauthorized absence – **Held – The only explanation of unauthorized absence given by petitioner was that his father was sick – No medical prescriptions showing serious sickness of father of petitioner – Government employee cannot be permitted to remain on unauthorized absence without informing the**

department – Petitioner failed to make out a *prima facie* case to show that his father was seriously sick. (Para 8 & 9)

ग. सेवा विधि – परिवीक्षा पर नियुक्ति – अनधिकृत अनुपस्थिति – अभिनिर्धारित – याची द्वारा अनधिकृत रूप से अनुपस्थित रहने हेतु दिया गया एकमात्र स्पष्टीकरण यह था कि उसके पिता बीमार थे – याची के पिता की गंभीर बीमारी को दर्शाने वाली कोई चिकित्सा पर्चियाँ नहीं – सरकारी कर्मचारी को विभाग को सूचित किये बिना अनधिकृत रूप से अनुपस्थित रहने के लिए अनुमति नहीं दी जा सकती – याची यह दर्शाने हेतु कि उसके पिता गंभीर रूप से बीमार थे, प्रथम दृष्ट्या प्रकरण बनाने मे असफल रहा।

Cases referred :

(1997) 9 SCC 243, (2005) 1 SCC 132, (2008) 2 SCC 653.

Prashant Sharma, for the petitioner.
Varun Kaushik, G.A. for the respondents/State.

O R D E R

G.S. AHLUWALIA, J.:- This petition under Article 226 of the Constitution of India has been filed against the order dated 02/01/2018 passed by Commandant, 2nd Battalion, SAF, Gwalior thereby putting the services of the petitioner to an end under Regulation 59 of the Madhya Pradesh Police Regulations.

2. Against the said order, the petitioner had preferred an appeal which has been dismissed by order dated 09/04/2018 passed by Inspector General of Police, SAF, Gwalior Range, Gwalior. Thereafter, the petitioner preferred a mercy appeal which too has been dismissed by the respondents by the impugned order dated 30/08/2018.

3. It is the case of the petitioner that an advertisement was issued in the year 2014 for recruitment on the post of Constable and after due medical and character verification, the petitioner was granted appointment by appointment order dated 01/01/2014 (Annexure P4). The petitioner was appointed on probation of two years. One of the conditions of the appointment order was that in the light of Rule 12 of the Madhya Pradesh Government Servants (Temporary and Quasi-permanent Service) Rules, 1960 (in short "the Rules,1960"), the services of the petitioner can be discontinued by giving one month's notice or one month's advance salary in lieu thereof.

4. It is submitted that on account of sickness of the father of the petitioner, he remained absent from his duties w.e.f. 15/04/2017 and did not submit his joining thereafter. Therefore, the services of the petitioner were discontinued by order dated 02/01/2018 as per the provisions of Regulation 59 of the Madhya Pradesh Police Regulations. It is the case of the petitioner that since the father of the petitioner was of old-age and had fallen sick which was in the knowledge of the Department, yet the

services of the petitioner were put to an end. The petitioner preferred an appeal along with medical documents of the sickness of the father of the petitioner but the same was not taken into consideration and the appeal was rejected. The copy of the medical certificates of the sickness of the father of the petitioner have been filed as Annexure P5. Thereafter, the mercy appeal has also been dismissed.

5. It is submitted by the Counsel for the petitioner that in the impugned order dated 02/01/2018, the respondent No.4 did not disclose the reasons for putting the services of the petitioner to an end but in the appeal, it was specifically mentioned that the petitioner was in habit of remaining on unauthorized absence and on one occasion, one minor penalty was also imposed. Multiple opportunities were given to the petitioner to improve his conduct but he did not improve. The petitioner had remained on unauthorized absence for 102 days from his Training Institute and when he was sent back to his original Unit, then again he remained on unauthorized absence for 54 days and accordingly, it was held that from 15/04/2017 the petitioner remained on unauthorized absence till passing of the impugned order dated 02/01/2018. It is submitted that the reason assigned by the Appellate Authority is stigmatic in nature and, therefore, a Departmental Enquiry should have been conducted against the petitioner. It is further submitted that the original period of probation was for two years and according to Regulation 59 of Madhya Pradesh Police Regulations, the period of probation can be extended by further period of six months for two times. It is submitted that since the petitioner was appointed in the year 2014 and although no specific order was issued thereby confirming him in service but as the probation period of the petitioner was not extended after completion of his three years (including the extension period), therefore, it has to be presumed that the petitioner was confirmed in the service and accordingly, his services could not have been terminated without holding a Departmental Enquiry.

6. Per contra, the petition is vehemently opposed by the Counsel for the State. It is submitted that in the impugned order dated 02/01/2018, no reasons were assigned, therefore, it was a discontinuation simplictor (sic: simpliciter) without any allegation /stigma. Only in the memo of appeal, as the petitioner had raised a question of absence of reasons, therefore, in order to consider the grounds raised in the appeal, the Appellate Authority has considered the previous conduct of the petitioner, which cannot be said to be stigmatic in nature. It is further submitted that there is no provision of law which provides that if order of extension of probation is not passed after completion of probation period, then an employee shall be treated to be confirmed in the service.

7. Heard the learned Counsel for the parties.

8. So far as the factual aspects are concerned, it has not disputed by the petitioner that he remained on unauthorized absence for a period of 102 days in the Training Institute. When he was sent back, he also did not attend in his Unit for

a period of 54 days and from 15/04/2017 till passing of the impugned order dated 02/01/2018, the petitioner was on unauthorized absence. The only explanation which he has given for his unauthorized absence is that the father of the petitioner was sick. The petitioner has filed the medical certificates purportedly issued by Medical Officer (issued by Gazetted /Non-Gazetted Government Servant of Madhya Pradesh). Undisputedly, the father of the petitioner was not a Government employee. The petitioner has not filed any medical prescriptions of his father to show that his father was seriously sick. The petitioner also could not point out any legal provision of law which authorizes an employee to remain on unauthorized absence without informing and seeking leave from the Department on any ground. The Government employee cannot be permitted to remain on unauthorized absence without informing the Department and specifically when the petitioner was a Constable in SAF, which is a uniform disciplined force.

9. Accordingly, in absence of any medical prescriptions and receipts of medicines, this Court is of the considered opinion that the petitioner has failed to make out a *prima facie* case to show that his father had fallen seriously sick. Even otherwise, in absence of any prior sanction, the petitioner could not have remained on unauthorized absence from 15/04/2017. Furthermore, from the medical documents, it appears that the father of the petitioner was suffering from joint pain, thus, it cannot be said that the father of petitioner was suffering from any serious ailment.

10. The counsel for the petitioner could not point out any provision of law which provides that in case if the probation period is not extended after the period of three years (including two extensions) from the date of appointment, then the petitioner has to be treated as a confirmed employee.

11. The Supreme Court in the case of *Tarsem Lal Verma vs. Union of India and Others*, reported in (1997) 9 SCC 243 has held that mere expiry of one year beyond the original two-year period of probation would not result in automatic confirmation.

12. The Supreme Court in the case of *Registrar, High Court of Gujarat vs. C.G. Sharma,* reported in (2005) 1 SCC 132, has held that even if the period of two years of probation expires and the probationer is allowed to continue after a period of two years, automatic confirmation cannot be claimed as a matter of right because in terms of the Rules, the confirmation order can be passed only if there is vacancy and the work is found to be satisfactory, which are the prerequisites or preconditions for confirmation.

13. The Supreme Court in the case of *C. V. Satheeshchandran vs. General Manager, UCO Bank and Others,* reported in (2008) 2 SCC 653, has held that expiry of the probation period does not necessarily mean confirmation and at the

end/ expiry of the period of probation, normally an order confirming the officer is required to be passed and if no such order is passed, he shall be deemed to have continued on probation unless the terms of appointment or the relevant rules governing the service conditions provide otherwise.

14. Under these circumstances, it would be appropriate to consider the Service Rules governing the service conditions of the employees of the State Government.

15. Rule 8 of Madhya Pradesh Civil Services (General Conditions of Services) Rules, 1961 [in short "the Rules, 1961"] reads as under:-

> **"8.Probation.-** (1) A person appointed to a service or post by direct recruitment shall ordinarily be placed on probation for such period as may be prescribed.
>
> (2) The appointing authority may, for sufficient reasons, extend the period of probation by a further period not exceeding one year.
>
> (3) A probationer shall undergo such training and pass such departmental examination during the period of his probation as may be prescribed.
>
> (4) The services of a probationer may be terminated during the period of probation if in the opinion of the appointing authority he is not likely to shape into a suitable Government servant.
>
> (5) The services of a probationer who has not passed the departmental examination or who is found unsuitable for the service or post may be terminated at the end of the period of his probation.
>
> [(6) On the successful completion of probation: and passing of the prescribed departmental examination, if any, the probationer shall, if there is a permanent post available, be confirmed in the service or post to which he has been appointed, either a certificate shall be issued in his favour by the appointing authority to the effect that the probationer would have been confirmed but for the non-availability of the permanent post and that as soon as a permanent post becomes available he will be confirmed].
>
> [(7) A probationer, who has neither been confirmed, nor a certificate issued in his favour under sub-rule (6), nor discharged from service under sub-rule (4), shall be deemed to have been appointed as a temporary Government servant with effect from the date of expiry of probation and his conditions of service shall be governed by the Madhya Pradesh Government

Servants (Temporary and Quasi-Permanent Service) Rules, 1960]."

Rule 2(d) and Rule 12 of Rules, 1960 read as under:-

"2. In these rules, unless there is anything repugnant in the subject or context-

(a) xxx xxx xxx

[(b) xxx xxx xxx

[(c) xxx xxx xxx

(d) "Temporary service" means officiating or substantive service in a temporary post, and officiating service in a permanent post, under State Government and also includes the period of leave with allowance taken while on temporary service and complete years of approved war-service, which have been counted for fixation of pay and seniority.

xxx xxx xxx

12. (a) Subject to any provision contained in the order of appointment or in any agreement between the Government and the temporary Government servant who is not in quasi-permanent service shall be liable to termination at any time by notice in writing given either by the Government servant to the appointing authority or by the appointing authority to the Government servant:

[Provided that the services of any such Government servant may be terminated forthwith and on such termination, the Government servant shall be entitled to claim a sum equivalent to the amount of his pay plus allowances for the period of the notice at the same rates at which he was drawing them immediately before such termination or, as the case may be, for the period by which such notice falls short of one month :]

Provided further that the payment of allowances shall be subject to the conditions under which such allowances are admissible.

(b) The period of such notice shall be one month unless otherwise agreed between the Government and the Government servant."

16. Rules 8(7) of the Rules, 1961 provides that a Probationer, who has neither been confirmed, nor a certificate issued in his favour under sub-rule (6), nor discharged from service under sub- rule (4), shall be deemed to have been appointed as a temporary Government servant with effect from the date of expiry of probation and his conditions of service shall be governed by the Rules, 1960.

17. From the plain reading of Rule 12 of the Rules, 1960, it is clear that the services of a temporary Government employee are liable to be terminated at any time by notice in writing given either by the Government servant to the appointing authority or by the appointing authority to the Government servant. Provided that the services of any Government servant may be terminated forthwith and on such termination, the Government servant shall be entitled to claim a sum equivalent to the amount of his pay plus allowances for the period of the notice at the same rates at which he was drawing them immediately before such termination or as the case may be, for the period by which such notice falls short of one month.

18. Thus, it is clear that the services of temporary employee can be terminated by issuing one month's notice or by making payment of one month's advance salary in lieu of notice. If the order dated 02/01/2018 is tested in the light of Rule 12 of the Rules, 1960, then it is clear that neither one month's notice has been given nor one month's salary in advance has been paid in lieu of the notice as required under Rule 12 of the Rules, 1960.

19. As per Rule 12(b) of the Rules, 1960, the period of notice shall be one month notice unless otherwise agreed between the Government and Government servant.

20. Now the next question for consideration is as to whether the order dated 02/01/2018 is bad in law in absence of one month's notice or advance salary of one month or not?

21. Rule 12 of the Rules, 1960, provides that in case of immediate termination, an employee can claim a sum equivalent to the amount of his pay of one month. The use of words "is entitled to claim" clearly indicates that the instant termination without one month's salary would be an irregularity and can be rectified by directing the respondents to pay one month's salary in lieu of one month's notice.

22. Under these circumstances, this Court is of the considered opinion that the impugned order dated 02/01/2018 (Annexure P3) passed Commandant, 2nd Battalion, SAF, Gwalior is required to be modified and accordingly, it is directed that the petitioner shall be entitled for one month's salary in lieu of one month's notice. With aforesaid modification, the orders dated 02/01/2018, 09/04/2018 and 30/08/2018 are hereby affirmed. It is directed that the petitioner shall be entitled for one month's salary in lieu of one month's notice as provided under Rule 12 (b) of the Rules, 1960. Let one month's salary be paid to the petitioner within a period of **three months** from today.

23. With aforesaid observations, this petition is **finally disposed.**

Order accordingly

I.L.R. [2021] M.P 1324 (DB)
WRIT PETITION

Before Mr. Justice Mohammad Rafiq, Chief Justice &
Mr. Justice Atul Sreedharan

WP No. 8914/2020 (Jabalpur) order passed on 30 April, 2021

IN REFERENCE (SUO MOTU) …Petitioner

Vs.

UNION OF INDIA & ors. …Respondents

(Along with WP Nos. 20889/2020 & 8991/2021)

***A. Constitution – Article 21 – Covid 19 Pandemic – Right to Life – Right to Health – Duty of State* – Held – Right to health forms an integral component of right to life enshrined under Article 21 – State Government directed to improve availability and rationalize the distribution policy of medicines/oxygen alongwith check on its cost, ensure regular and continuous supply of oxygen to Government and Private hospitals increase sample collection from twice a day to four times a day, increase the number of technicians, scientists and lab attendants – State & PCB directed to undertake a special drive for disposal of bio-medical waste – All State Governments directed to ensure free interstate movements of LMO tankers.**

(Paras 13, 14, 17, 18, 20, 22 & 23)

क. संविधान – अनुच्छेद 21 – कोविड 19 महामारी – जीवन का अधिकार – स्वास्थ्य का अधिकार – राज्य का कर्तव्य – अभिनिर्धारित – स्वास्थ्य का अधिकार, अनुच्छेद 21 के अंतर्गत प्रतिष्ठापित जीवन के अधिकार का एक अभिन्न अंग बनाता है – राज्य सरकार को दवाईयों/ऑक्सीजन की उपलब्धता सुधारने और वितरण नीति को सुव्यवस्थित करने के साथ–साथ उसके दामों को नियंत्रित करने, सरकारी एवं निजी चिकित्सालयों को नियमित एवं निरंतर ऑक्सीजन प्रदाय सुनिश्चित करने, दिन में दो बार नमूना एकत्रित करने को बढ़ाकर दिन में चार बार करने, तकनीशियनों, वैज्ञानिकों एवं प्रयोगशाला परिचारकों की संख्या बढ़ाने के लिए निदेशित किया गया – राज्य व पी सी बी को जैव चिकित्सा अपशिष्ट के निपटान हेतु विशेष मुहिम चलाने के लिए निदेशित किया गया – सभी राज्य सरकारों को लिक्विड मेडिकल ऑक्सीजन के टेंकरों के निःशुल्क अंतरराज्यीय संचलन को सुनिश्चित करने के लिए निदेशित किया गया।

***B. Constitution – Article 21 – Covid 19 Pandemic – Private Hospitals/Nursing Homes – Air Separation Units* – State directed to consider providing soft loans through Nationalized Banks and other Financial Institutions to all private hospitals and Nursing Homes to set up their own Air Separation units so that they may become self reliant regarding their oxygen requirement – Government should also consider providing subsidy and incentive to such private hospitals. (Para 19)**

ख. संविधान– अनुच्छेद 21 – कोविड 19 महामारी – निजी चिकित्सालय / नर्सिंग होम्स – वायु पृथक्करण इकाईयां – राज्य को सभी निजी चिकित्सालयों एवं नर्सिंग होम्स को उनके स्वयं के वायु पृथक्करण इकाईयां स्थापित करने के लिए राष्ट्रीयकृत बैंकों एवं अन्य वित्तीय संस्थानों के जरिए सुलभ ऋण उपलब्ध कराने पर विचार करने के लिए निदेशित किया गया जिससे कि वे उनकी ऑक्सीजन आवश्यकता के संबंध में आत्मनिर्भर बन सके – सरकार को ऐसे निजी चिकित्सालयों को सब्सिडी तथा प्रोत्साहन राशि प्रदान करने पर भी विचार करना चाहिए।

C. Constitution – Article 21 – Covid 19 Pandemic – Ayushman/ BPL/CGHS Cardholders – Admission/Treatment of Patients **– Held – Hospitals which are approved for treatment of patients covered by cashless schemes of government like Ayushman Cards, BPL Cards & CGHS Cards, shall not refuse to provide them treatment and if any complaint is received, State shall take action against such hospitals/Nursing Homes. (Para 21)**

ग. संविधान – अनुच्छेद 21 – कोविड 19 महामारी – आयुष्मान / बीपीएल /सीजीएचएस कार्ड धारक – रूग्णों की भर्ती/उपचार – अभिनिर्धारित – आयुष्मान कार्ड, बीपीएल कार्ड व सीजीएचएस कार्ड जैसी सरकार की कैशलेस प्रणालियों द्वारा आच्छादित रूग्णों के उपचार हेतु जो चिकित्सालय अनुमोदित हैं, वे उन्हें उपचार प्रदान करने से मना नहीं करेंगे और यदि कोई शिकायत प्राप्त होती है, राज्य, ऐसे चिकित्सालयों/नर्सिंग होम्स के विरूद्ध कार्रवाई करेगा।

Naman Nagrath with *Jubin Prasad*, as *Amicus Curiae* in WP No. 8914/2020.

Sanjay Kumar Verma, for the petitioner in WP No. 20889/2020.

Rohit Jain, for the petitioner in WP No. 8991/2021.

Purushaindra Kaurav, A.G., *Pushpendra Yadav*, Addl. A.G. and *Swapnil Ganguly*, Dy. A.G. for the respondents/State alongwith *Mohammad Suleman*, Addl. Chief Secretary, Directorate of Health Services, Govt. of M.P. and *Chhavi Bhardwaj*, Managing Director, National Health Mission (M.P.).

Jitendra Kumar Jain, Asstt. Solicitor General and *Vikram Singh*, for the Union of India.

Shivendra Pandey, for the Indian Medical Association (respondent No. 5 in WP No. 8914/2020).

Shreyas Pandit, for the M.P. Nursing Home Association (respondent No. 8 in WP No. 8914/2020).

A.M. Mathur alongwith *Sanjay Agarwal* and *Abhinav P. Dhanodkar*, for the intervenor/Shanti Manch Samiti (IA No. 4353/2021 in WP No. 8914/2020).

Manoj Sharma, President, High Court Advocates' Bar Association, Jabalpur (IA No. 4396/2021 in WP No. 8914/2020).

Shashank Shekhar, for the intervenor in WP No. 8914/2020.

Subhash Upadhyay, for the intervenor in WP No. 8914/2020.

Ajay Raizada, for the intervenor (IA No. 4349/2021 in WP No. 8914/2020).

Girish Patwardhan, for the intervenor (IA No. 4389/2021 in WP No. 8914/2020).

Rajesh Chand, for the intervenor in WP No. 8914/2020.

Nikhil Tiwari, for the intervenor in WP No. 8914/2020.

Zaki Ahmad, for the intervenor in WP No. 8914/2020.

O R D E R

(Heard through Video Conferencing)

Present *suo motu* petition was registered as Public Interest Litigation for benefit of residents of the State suffering from Coronavirus, who are aggrieved by inaction on the part of the various State Authorities in not providing them timely and proper treatment. This Court vide order dated 19.04.2021 had issued as many as 19 directions aimed at redressing their grievances. An action taken report was filed by the State on 26.04.2021. When the matter was listed on 26.04.2021, Mr. Naman Nagrath, learned *Amicus Curiae* filed an application to call for further action taken report on certain points. A supplementary action taken report was filed by the State on 28.04.2021.

2. Mr. Naman Nagrath, learned *Amicus Curiae* has argued that despite exhaustive directions issued by this Court to ensure continuous and regular supply of Oxygen and Remdesivir to all the Government Hospitals as well as private Hospitals/Nursing Homes, the State Government has failed to manage the state of affairs inasmuch as more than 60 deaths have so far taken place in the State owing to lack of oxygen. The portrayal regarding availability of oxygen in the action plan submitted by the State before this Court, is far from reality. Out of eight PSA (Pressure Swing Adsorption) Oxygen Plants approved by the Central Government under the **PM** CARES *(Prime Minister's Citizen Assistance and Relief in Emergency Situations Fund)* Fund, so far only five Plants have been installed and they too are also functional with less than half capacity. It is submitted that one PSA Oxygen Plant costs approximately Rupees One Crore. The State of Madhya Pradesh has got 52 districts in which District Hospitals are situated. There is no reason why it cannot invest an amount of Rs.50 Crore so as to set up one PSA Oxygen Plants in each of them. There is no liquid oxygen manufacturing plant in the entire State. Since there is possibility of third wave of Covid-19 in the coming months, it is the duty of the State to take steps to ensure that such plants are set up in the State.

3. Learned *Amicus Curiae* submitted that availability of Remdesivir still remains major cause of concern. This medicine is being openly black-marketed and sold at exorbitant price in the State. Most of the private hospitals are requiring the Covid-19 patients to obtain this medicine on their own. The patients requiring

admission are being made to shuttle from one hospital to another in view of ambiguity regarding availability of beds. The State Government has to pay urgent attention to strengthen the healthcare facilities in the rural areas, so that citizens do not suffer adverse consequence. Despite direction by this Court for not charging more than the rates prescribed for treatment, the private hospitals are taking exorbitant charges. The Government has so far taken no steps to curb such malpractice. It is submitted that as per experts, second wave of Covid - 19 is likely to reach peak in the mid of May, 2021. Despite direction by this Court, the State Government has not increased number of testing and has not complied direction to ensure that report of RT-PCR is provided to the suspects/patients within 36 hours of the collection of the sample , which generally takes 3 to 4 days. Even though statement was made on behalf of the Government before this Court on 07.04.2021 that no oral instruction has been issued to private labs to stop conduct of Covid-19 test, the private pathology labs/diagnostics centres are refusing to conduct the Covid-19 test. The patients having BPL cards under Deendayal Antyodaya Upchar Yojana, Cards under Ayushman Bharat Yojana and those covered under the CGHS are neither being given admission nor provided treatment by the Private Hospitals /Nursing Homes approved therefor, The State Government is not taking any effective steps for disposal of the medical waste, which is being dumped at open place in all the major cities of the State.

4. Mr. Shashank Shekhar, learned counsel for the intervenor also submitted that the State Government has instructed all the private pathological labs and diagnostics centres not to conduct the RT-PCR test of the Coronavirus. The private hospitals are not honouring the rates prescribed by the State Government for treatment of the patients suffering from Coronavirus. The State Government is not taking steps to fill up the huge number of vacancies of medical and paramedical staff in the State. The posts of Specialists to the extent of 80% are lying unfilled and the posts of Medical Officers to the extent of 40% are lying vacant. The helpline number provided by the Government is hardly helpful to the people seeking to know the position of availability of beds in the private hospitals. The private hospitals are refusing to admit the ordinary patients and honouring only those patients who pay the hefty amount in advance. The State Government should regulate admission of the Coronavirus patients in Government hospitals as well as private hospitals as per modal developed by the Government of NCR Delhi.

5. Mr. Anand Mohan Mathur, learned Senior Counsel appearing for the intervenor - Shanti Manch Samiti submitted that various directions issued by this Court on 19.04.2021 have not been complied by the State Government. People are dying in many hospitals only because of non-availability of oxygen. Reference in this connection is made to various news items in different newspapers. All private hospitals should be mandated to set up their own Air Separation Units. It is contended that Indore city alone is getting more than 1500 Corona positive cases

every day. There is no dedicated website or help line number with details about availability of beds either in Government or private hospitals. Many people are losing their lives in absence of medical treatment. The State Government and the local administration are not revealing actual figure of death owing to Covid-19 and hiding data only in order to cover up their failure. Reference in this connection is also made to various newspaper reports. It is argued that Indore city is facing the huge problem of oxygen. The patients of Indore and other cities of the State are also facing acute scarcity of Remdesivir injection and Fabiflu. Learned Senior Counsel has invited attention of this Court towards the fact that Chacha Nehru Children Hospital, Indore which was catering to medical needs of large number of children of Indore and adjoining districts, has been converted into Coronavirus care centre. This ill-advised action of the State would deprive thousands of children of the treatment.

6. Mr. Shivendra Pandey, learned counsel appearing for Indian Medical Association and Mr. Shreyas Pandit, learned counsel appearing for M.P. Nursing Home Association have denied the suggestion that approved private hospitals are not treating the Coronavirus patients holding cards under the Ayushman Bharat Yojana, BPL card holders under the Deendayal Antyodaya Upchar Yojana and CGHS approved cards, They also denied that the Private Hospitals/Nursing Homes are overcharging the patients inasmuch as demanding hefty amount in advance for starting treatment. It is submitted that despite directions of this Court in the order dated 19.04.2021 to hold periodical meetings with representatives of the private hospitals, no such steps are being taken by the concerned authorities in this behalf. In spite of specific direction, the State Government has failed to consider providing soft loan to the Private Hospitals/Nursing Homes through Banks for setting up their own Air Separation Units.

7. Having taken note of the submissions made by the learned *Amicus Curiae,* learned counsel for the intervenors and also learned Advocate General, we are constrained to observe that the situation on ground is totally different than what was portrayed by the State Government in the action taken report about its efforts to continuously procure and provide oxygen to Government Hospitals as well as Private Hospitals. There have been several incidents in past two weeks, in which numbers of people have lost their lives only because of sudden disruption or low-pressure in supply of oxygen or due to non-availability of oxygen. As per several newspaper reports, which have been placed on record reporting such incidents, two persons lost their lives on 02.04.2021 in J.P. Hospital, Bhopal. Four persons lost their lives on 08.04.2021 at Bundelkhand Medical College, Sagar. One patient died on 08.04.2021 in District Hospital, Khargone. Ten persons died for this reason on 09.04.2021 at Bundelkhand Medical College, Sagar. Five persons died on 09.04.2021 in Madhav Nagar Government Hospital, Ujjain. One person died on 13.04.2021 at P.G.B.M,

Bhopal. One person died in Life Medicity Hospital, Jabalpur. Four persons died in Sukhsagar Medical College, Jabalpur on 16.04.2021. Two persons died in JP Hospital, Bhopal. Similarly in the incident which took place in ICU of Medical College, Shahdol, sixteen Covid patients are said to have died because of non - supply of oxygen. Ten persons lost their lives on 20.04.2021 in Peoples' Medical College, Bhopal. Five persons died on 24.04.2021 in Galaxy Hospital, Jabalpur. Eleven persons died on 25.04.2021 at Gwalior in different hospitals. Six persons died on 25.04.2021 in District Hospital at Chhatarpur. Two persons lost their lives on 27.04.2021 in District Hospital, Katni. Two persons lost their lives on 27.04.2021 at District Hospital, Morena and five persons died on 28.04.2021 in Jayarogya Hospital, Gwalior. We do not know how far these data are correct, which may be a matter of enquiry, but such reports have been appearing in all the leading newspapers of the State, almost regularly, during the month of April, 2021. Even the State has not made any serious effort to dispute the veracity of the alleged deaths of several persons in the hospitals due to non-availability of oxygen. Death of citizens, so large in number, is really heart-rending. It is a pity that people are dying in the hospitals due to lack of oxygen.

8. This Court in its earlier order dated 19.04.2021 has discussed the law in detail to hold that the right to health forms an integral component of right to life enshrined under Article 21 of the Constitution of India. Right to life is meaningless unless accompanied by the guarantee of certain concomitant rights including, but not limited to, the right of health. This Court referred to catena of judgments, in which the Supreme Court has given dynamic interpretation to Article 21 of the Constitution of India, thereby expanding the meaning of right to life to also include the right to health. In our view, the right to health can be secured to the citizens only if the State provides adequate measures for their well being, treatment, healthcare and takes their care by protecting them from calamities like Coronavirus. Health has its own prerequisites of social justice and equality and that it should be accessible to all. It includes the ability to obtain all kind of healthcare services including prevention, diagnosis, treatment and management of health disorders, diseases, illness and other health impacting conditions. What is significance of oxygen for the right to life need not be overemphasized. Human life and oxygen always go together. About 21% of Earth's atmosphere consists of oxygen, which plays a critical role in the respiratory system of the human and many other living creatures. One cannot imagine existence of life without the oxygen. We need oxygen in the air we breathe to stay alive. Right to life cannot be accomplished without the availability of oxygen. The right to life, apart from other things, also means right to breathe, which, in the present context, is possible only on availability of oxygen. There has always been emphasis by the Constitutional Courts on maintenance of hygiene and pollution free environment as one of the facets of right to life so that citizens can breathe unpolluted air. We inhale oxygen into our body and exhale carbon dioxide out. In the ongoing

pandemic, if one gets infected, his lungs may get overpowered by the deadly virus of Corona. In this condition, their function to constantly purify the blood with the use of oxygen which they inhale from the atmosphere around and send it back to the heart, gets impaired. How important is continuous availability of oxygen to humans thus needs no elaboration. At such crucial stage, survival of citizen can be ensured by supply of oxygen from external source till the time his lungs with the use of approved medication can be made to regain their normal functioning. The right to life enshrined under Article 21 of the Constitution of India would be meaningless in the present situation without the continuous availability of oxygen. Here comes the role of State as a Constitutional obligation to provide for not only the life saving drugs but also the oxygen.

9. We are constrained to record that most of the significant directions issued by this Court in its order dated 19.04.2021 , mainly in respect of continuous and regular supply of Oxygen and Remdesivir to the Government as well as the private Hospitals / Nursing Homes, have not been fully complied. What has been contended before us is that most of the private hospitals are refusing to admit Corona patients for the reason of non-availability of the oxygen and now with every passing day, it is becoming difficult for Covid patients to get admission either in the Government Hospitals or the Private Hospitals. Evidently, the Oxygen and Remdesivir continue to be two major problems which the State Government is trying to grapple with.

10. Learned Advocate General submitted that as far as the oxygen is concerned, the Central Government has allocated the quota of 649 MT (Metric Ton) Liquid Medical Oxygen (LMO) but this includes 60 MT of oxygen generated by the Government Medical Colleges of the State by their own Air Separation Unit Plants and 6 MT of LMO allocated from Air Liquide Panipat, which the State surrendered because it cannot spare any cryogenic tanker of 20 MT capacity to go that far away for this purpose. Thus, actual supply as per allocation by the Central Government to the State is only 583 MT of LMO. Further, out of eight districts where PSA Oxygen Generation Plants were sanctioned under **PM** CARES Fund, six have already become functional and remaining two will start functioning by 30.04.2021. The State Government has issued work order for installation of PSA Plants in 37 districts out of which 13 will be commissioned by 16th May, 2021, 9 by 23rd May, 2021 and remaining 15 by 20th July, 2021. The work order has also been issued to CSIR authorized vendor for installation of 650 LPM PSA plants in 5 districts i.e. Bhopal, Indore, Gwalior, Rewa and Shahdol and these will be installed by 20th May, 2021 The Directorate of Health Services has also issued work order for setting up of 570 LPM onsite Oxygen Generation Plant, each in eight district hospitals, at a cost of Rs.5.87 Crore. Thus in all new PSA Oxygen Generation Plants worth Rs.56.2 Crore have already been sanctioned covering on 51 district hospitals in the State along with 15 civil

hospitals. As on 26.04.2021, the installed LMO capacity in Government Medical Colleges stands at 310 MT as compared to 89 MT of LMO in June, 2020, which means that the State Government has improved its installed LMO capacity in Government Medical Colleges. But continuous availability of oxygen for the patients admitted in the hospitals attached to these Government Medical Colleges can be ensured only if constant and regular supply of the LMO is received. The State Government has procured 2150 (5 LPM) Oxygen Concentrators and orders have been placed for another 6000 (10 LPM) Oxygen Concentrators and 3000 (5 LPM) Oxygen Concentrators. In addition, the Government of India has been requested to provide 2000 Concentrators to the State.

11. Learned Advocate General however submitted that since the State Government is not having the sufficient number of cryogenic tankers, therefore, the transportation of oxygen from the place where it has to be lifted from, is a major stumbling block in making timely supply to different hospitals located in the State. As of now, the State Government is having 61 such tankers at its disposal and through them, it is able to transport roughly about 550 MT Liquid Medical Oxygen to the State. A total number of five liquid Nitrogen tankers and three liquid Argon tankers, with a total capacity of 167 MT, have already been converted into LMO tankers, which are included in the above number of 61 tankers. The Government of India has assigned two such tankers (each with the capacity of 20 MT) to the State of Madhya Pradesh, which it has imported from Singapore and has promised to allocate four more tankers to improve the movement of oxygen from eastern part of the country. It is contended that the State Government with the help from the Central Government has arranged for transportation of filled tankers by special trains through green corridor especially created for the purpose from different locations. Six tankers carrying 63.78 MT LMO have been dispatched via train from Bokaro of which three tankers are for Sagar, two tankers for Bhopal and one for Jabalpur. Six more are expected to reach shortly. It is submitted that the State Government has been airlifting empty tankers from Bhopal to Bokaro and from Indore to Jamnagar with the help of Indian Air Force in their Jumbo Air Crafts in order to reduce the transit time, at least at one end. It is submitted that the Central Government has set up the Oxygen Crisis Management Task Force which takes stock of the day to day situation about the oxygen in different States. The State of M.P. is constantly apprising the Union Government of its requirements of oxygen. The Chief Minister of the State wrote a letter to the Hon'ble Prime Minister on 09.04.2021 , that since bed capacity of hospitals in the State in the month of May, 2021 would be increased to one lakh, requirement of oxygen would rise to 840 MT. The Additional Chief Secretary, Department of Public Health & Family Welfare, Government of Madhya Pradesh has now therefore on 27.04.2021 written a letter to the Additional Secretary, DPIIT, Oxygen Nodal Officer, Government of India requesting for allocation of

100 MT LMO more. However, the learned Advocate General submitted that the State Government still requires more number of Cryogenic tankers to transport the allocated oxygen and has, in this connection, taken up the matter with the Central Government.

12. On a query by the Court, Mr. J.K. Ja in, learned Assistant Solicitor General and Mr. Vikram Singh, learned counsel for the Union of India sought time to seek instructions from the Government of India as to why the quota of Liquid Medical Oxygen for the State of Madhya Pradesh may not be increased at least by 100 MT, in addition to the allocation already made and also in addition to two tankers already allocated and four more, which are promised to be given, six more cryogenic tankers may not be made available to the State of Madhya Pradesh for timely transportation of the oxygen to different locations considering the geographical width and length of the State.

13. There can be no doubt that the State Government and its functionaries are making all out efforts to continuously procure the oxygen and supply it to the Government Hospitals as well as the Private Hospitals in the State. But procurement of oxygen should be so regular and punctual, that all hospitals, be it Government or Private, continue to have such quantity of oxygen, as may be necessary to maintain the required pressure of oxygen supply to all the patients under their treatment so that no patient loses his life due to shortage or non-supply of oxygen. We therefore, reiterate our earlier directions which required the State Government to ensure regular and continuous supply of oxygen to all the citizens admitted anywhere either in Government or Private facilities.

14. Coming now to Remdesivir, the medicine with regard to which lot of complaints are being made by the people at large, Corona patients and their kith and kin. We may at the outset observe that it should be for the doctor treating the patient to decide as to which patient has to be administered Remdesivir injection and which not, but once when it is prescribed by a treating doctor to any patient, the State should ensure that such injection becomes available at the earliest, which is why this Court in its earlier order set the time line of one hour from the time the treating doctor prescribes such medicine. Moreover, this Court also directed that the State Government should ensure that the patients/attendants are not exploited by exorbitantly charging. This Court had required the State Government to regulate and ensure continuous supply of Remdesivir, not only to the Government Hospitals but also to the Private Hospitals/Nursing Homes with regard to which there are lots of complaints, which we notice on regular basis in local Media, print and electronic both. Several newspaper clippings about this have been placed on record. In the action taken report and supplementary action taken report it has been stated on behalf of the State Government that the Remdesivir is approved for restricted emergency use only. This drug is sold on authorised permission from the Drug Controller General of India as investigational therapy only in moderate to

severe cases of Covid - 19 with due exclusion of clinical conditions as mandated by the Ministry of Health and Family Welfare. In view of the sudden surge in demand for this medicine, the Government of India has ramped up the manufacturing capacity of domestic manufacturers and has further taken up the task of judicious distribution and seamless inter-State supply of the drug to address the shortages.

15. Learned Advocate General submitted that interim allocation of Remdesivir for the period of 10 days from 21st to 30th April, 2021, has been ensured, with supplies from seven domestic manufacturers. The State of Madhya Pradesh has been allocated 95000 vials of Remdesivir for consumption before 30.04.2021, out of which, the State has retained only 45,000 vials for utilization in the Government Hospitals and allotted 50,000 to be supplied to the private hospitals through C&F/Stockists, however, with a rider that they shall ensure equitable sale/ availability of drug for treatment of admitted Covid - 19 patients in private hospitals based on the number of Covid - 19 in-patients admitted in Covid ICU/HDU/Oxygen supported beds. Mr. Mohammad Suleman, Additional Chief Secretary, Directorate of Health Services, Government of Madhya Pradesh has however submitted that while in Government Hospitals only 5 to 6% Covid -19 patients are being prescribed Remdesivir injection but the private hospitals are advising this injection indiscriminately to large number of patients, which is why a lot of demand of the said medicine has arisen. It is contended that the State Government has taken punitive action against the persons, who were found indulging in black -marketing of Remdesivir inasmuch as nine persons from Indore and two persons from Ujjain, in total 11 persons, have been detained for illegally selling the Remdesivir.

16. Mr. Shreyas Pandit, learned counsel for the M.P. Nursing Home Association and Mr. Shailendra Pandey, learned counsel for the Indian Medical Association submitted that despite the demand by the private Hospitals and Nursing Homes for supply of Remdesivir injunction (sic : injection), the sufficient number of vials are not being provided to them because the Government in its policy has put a rider on C&F stockist to distribute this medicine on the basis of number of Covid-19 in-patients admitted in the Covid - ICU/HDU/Oxygen supported beds whereas the doctors may, at times, prescribe this medicine to the patients having CT- score, anywhere between 5 and 10 which is the best time when it can give positive results, even though the patients may not be on oxygen support. Mr. Shivendra Pandey, learned counsel for the Indian Medical Association has therefore disputed the aforesaid contention of the Additional Chief Secretary and submitted that only when there is involvement of lungs that the doctors in the private hospitals prescribe the Remdesivir injection.

17. Whether or not a particular Covid- 19 patient is required to be administered Remdesivir as medicine, should be left to the discretion of the treating doctors and ought not to be decided by the executive fiat. We see no justification on the insistence

of providing Remdesivir to only such patients who are on oxygen support, particularly when oxygen, as a commodity, itself has become so scarce. There appears to be no logic behind this policy. Considering the submission of learned *Amicus Curiae* and learned counsel appearing for the Indian Medical Association and M.P. Nursing Home Association and the respective intervenors, we find that there is tremendous amount of dissatisfaction not only amongst the Private Hospitals and Nursing Homes with regard to justness of policy of distribution of this drug but also there is lot of hue and cry amongst the patients and their attendants/family members with regard to the policy of distribution of Remdesivir injections. Resultantly black marketeers are flourishing. This sometimes results into very chaotic conditions in such hospitals giving rise to law and order situation. We do not want to go into the details of all these issues but considering serious question marks put on the efficacy of the policy adopted in this behalf, the State Government ought to have re-look at its distribution policy so as to rationalize the same in consultation with all the stakeholders, in such a way that the medicine becomes available to common man at reasonable price.

18. At this stage, learned Advocate General submitted that this is largely happening because of the scarcity of Remdesivir due to short supply. The State Government is taking up this issue with the Central Government for getting allocation of Remdesivir increased. We require Mr. J.K. Jain, learned Assistant Solicitor General as well as Mr. Vikram Singh, learned counsel appearing for the Union of India to seek instructions from the Central Government as to why the quota of 95,000 vials of Remdesivir, for a block of 10 days, may not be increased by atleast 20% more, so as to make it more just, equitable and reasonable to cater to the everyday increasing demand, considering the huge surge in the number of Covid positive cases in the State. This Court also requires the Central Government to consider allowing the State Government to directly procure all kind of essential drugs, be it Remdesivir, Tocilizumab, Itolizumab, Fabiflu or any other drug, from the manufacturers, within or outside the country, so as to ensure its easy availability to the patients. At this stage, we also want to impress upon all the private Hospitals and Nursing Homes as well as the Government Hospitals to educate the patients, their attendants/family members and the people at large as to in what kind of cases the prescription of Remdesivir as a medicine is advisable.

19. This Court in para 27 (xv) of its order dated 19.04.2021, on the suggestions made by the learned counsel appearing for the Indian Medical Association and M.P. Nursing Home Association, had required the State Government to consider providing soft loan to all the private Hospitals and Nursing Homes to set up their own Air Separation Units so that they may become self-reliant with regard to their oxygen requirement. An argument has been advanced before us that all the private hospitals should be mandated to set up their own Air Separation Units. In this regard, we direct the State Government to take up this issue with the Nationalised

Banks and other Financial institutions, by involving the major Private Hospitals, to provide them soft loan on priority basis, for setting up their own Air Separation Units and come out with the progress on this aspect. The State Government, at its own level, should also consider providing subsidy and incentive to such private hospitals.

20. This Court time and again impressed upon the State Government to ensure that the number of RT-PCR tests conducted by different Government Labs as well as Private Labs and Diagnostic Centres should be increased inasmuch as their reports should become available within 36 hours from the time of collection of samples. In this respect, learned Advocate General submitted that unless the ICMR is directed to approve more number of BSL certified Labs in the State, this target may be difficult to be achieved. The State Government, in this connection, may approach the ICMR with its proposal but in this connection we also record the submission made by learned *Amicus Curiae* and Mr. Shashank Shekhar, learned counsel for the intervenor that the State Government has by an oral direction required all the private Labs to either refuse or discourage conducting the RT-PCR tests and despite the submission made before this Court on 07.04.2021 that no such direction has been issued to the private Labs/Diagnostic Centres, the fact is that the private Labs are still not willing to conduct the RT-PCR tests. Considering that number of private BSL certified Labs even as per the State Government is 37, it is very important to have their continuous support and involvement in conducting more and more number of RT-PCR tests and screen the patients so that timely detection of Covid- 19 positive cases may prevent such disease from spreading further. We, therefore, direct the State Government to consider increasing the sample collection from twice a day, to four-times a day, and also for that purpose, increasing the number of Technicians, Scientists and Lab Attendants etc. involved in the process to positively achieve the above target of 36 hours and submit the further progress report in this regard.

21. Learned *Amicus Curiae* and other learned counsel appearing for the intervenors have further submitted that despite specific direction by this Court, the private hospitals are refusing to admit and treat those patients who are entitled to cashless treatment facility in terms of Ayushman Card *(under Ayushman Bharat Yojana)* and BPL cards *(under Deendayal Antyodaya Upchar Yojana)* and CGHS Cards and the State Government has not ensured the compliance in that behalf. We further reiterate our earlier directions given in the order dated 19.04.2021 that those hospitals, which are approved for treatment of the patients covered by those cashless schemes of the Government, shall not refuse to provide treatment to concerned patients and if any complaint in that behalf is received, the State Government shall take appropriate action against such private Hospitals /Nursing Homes.

22. Learned *Amicus Curiae* has invited attention of this Court towards accumulation of medical waste consisting of PPE kits, masks and other items in all the major cities of the State including Bhopal, Indore, Gwalior and Jabalpur. He has produced certain newspaper clippings to bring home the point. This Court, in this connection, directs the State Government as well as the M.P. State Pollution Control Board to undertake a special drive for disposal of such bio-medical waste, wherever found, in accordance with the provisions of the Bio-Medical Waste (Management & Handling) Rules, 1998 and submit a compliance report thereabout.

23. Mr. J.K. Jain, learned Assistant Solicitor General and Mr. Vikram Singh, learned counsel for the Union of India, in response to the query made by this Court on **I.A. No.4396/2021**, have submitted that the Government of India has taken a serious note of the incident in which an oxygen tanker carrying the oxygen allocated to the State of Madhya Pradesh was intercepted by police officers of Uttar Pradesh to be diverted to Jhansi. Learned counsel submitted that the Government of India shall in future ensure that no such incident recurs and in this regard, a direction has again been issued to all the State Governments to ensure free movement of the tankers carrying the oxygen to the respective destinations to which they have to deliver the same. This Court impresses upon all the State Governments and through them, their Police Authorities and the Transport Authorities, to provide green corridors to the Tankers carrying Liquid Medical Oxygen involving inter-state movement, at par with ambulances, so that the oxygen can be timely delivered at the respective destinations, to save the precious human lives in this crucial period. Accordingly, the **I.A. No.4396/2021** is **disposed of**.

24. The State Government and its various authorities shall in the meantime make all the endeavours to carry out various directions issued by this Court in its order dated 19.04.2021.

25 . Let the matter to come up again on **06.05.2021 on top of the list** to see the further progress.

Order accordingly

I.L.R. [2021] M.P. 1337 (DB)
WRIT PETITION

Before Mr. Justice Mohammad Rafiq, Chief Justice &
Mr. Justice Atul Sreedharan

WP No. 9320/2021 (Jabalpur) order passed on 17 May, 2021

IN REFERENCE (SUO MOTU) …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

(Along with WP No. 8391/2020)

A. Constitution – Article 226 – Covid 19 Pandemic (Second Wave) – Overcrowded Jails – Release of Prisoners – **Held – On 07.05.2021, Supreme Court directed that all those inmates who were granted parole in pursuance to its earlier order, should be again released on parole for a period of 90 days in order to tide over the pandemic. (Para 1)**

क. संविधान – अनुच्छेद 226 – कोविड–19 महामारी (द्वितीय लहर) – अति भीड़ वाली जेले – बंदियों को छोड़ा जाना – अभिनिर्धारित – 07.05.2021 को उच्चतम न्यायालय ने निदेशित किया कि महामारी पर काबू पाने के लिए उन सभी अंतः वासियों को 90 दिनों की अवधि हेतु पैरोल पर पुनः छोड़ा जाये, जिन्हें उसके पूर्ववर्ती आदेश के अनुसरण में पैरोल प्रदान किया गया था।

B. Constitution – Article 226 and Criminal Procedure Code, 1973 (2 of 1974), Section 41 & 41A – Covid 19 Pandemic (Second Wave) – Overcrowded Jails – Directions to DGP & Judicial Magistrates – **DGP directed to issue instructions to all police stations to strictly adhere to guidelines issued by Apex Court in *Arnesh Kumar's* case – Judicial Magistrate, on production of accused before them by police, for authorizing further detention, shall mandatorily examine whether stipulation u/S 41 & 41ACr.P.C. have been followed or not – If any arrest has been made without following guidelines, accused would be entitled to directly apply to competent court for regular bail on this ground alone. (Para 9)**

ख. संविधान – अनुच्छेद 226 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 41 व 41A – कोविड–19 महामारी (द्वितीय लहर) – अति भीड़ वाली जेले – पुलिस महानिदेशक (डी.जी.पी.) व न्यायिक मजिस्ट्रेटों के लिए निदेश – अर्नेश कुमार के प्रकरण में सर्वोच्च न्यायालय द्वारा जारी किये गये दिशानिर्देशों के कठोरता से पालन हेतु सभी पुलिस थानों को अनुदेश जारी करने के लिए डी.जी.पी. को निदेशित किया गया – पुलिस द्वारा अभियुक्त को न्यायिक मजिस्ट्रेट के समक्ष प्रस्तुत किये जाने पर, अतिरिक्त निरोध प्राधिकृत किये जाने हेतु न्यायिक मजिस्ट्रेट आज्ञापक रूप से परीक्षण करेंगे कि क्या धारा 41 व 41A, दं.प्र.सं. के उपबंधों का पालन किया गया है अथवा नहीं – यदि दिशा निदेशों

का पालन किये बिना कोई गिरफ्तारी की गयी है, अभियुक्त केवल इस आधार पर नियमित जमानत हेतु सीधे सक्षम न्यायालय को आवेदन करने के लिए हकदार होगा।

***C. Constitution – Article 226 – Covid 19 Pandemic (Second Wave) – Overcrowded Jails – Arrest & Bail* – Registrar General of High Court directed to circulate copy of judgment of Apex Court in *Arnesh Kumar's* case alongwith copy of this order to all District Judges for being served upon Judicial Magistrates – Director, State Judicial Academy directed to organize online/virtual programme for sensitizing not only Judicial Magistrates but also Police Officers – Director, M.P. Police Academy shall also work out modalities for sensitizing police officers of State – DGP shall also be responsible for compliance of this direction. (Para 10)**

ग. संविधान – अनुच्छेद 226 – कोविड–19 महामारी (द्वितीय लहर) – अतिभीड़ वाली जेलें – गिरफ्तारी व जमानत – इस आदेश की प्रति के साथ–साथ अर्नेश कुमार के प्रकरण में सर्वोच्च न्यायालय के निर्णय की प्रति, न्यायिक मजिस्ट्रेटों पर तामील किये जाने हेतु सभी जिला जजों को परिचालित करने के लिए उच्च न्यायालय के रजिस्ट्रार जनरल को निदेशित किया गया – निदेशक, राज्य न्यायिक अकादमी को न केवल न्यायिक मजिस्ट्रेटों को बल्कि पुलिस अधिकारियों को भी संवेदनशील बनाने हेतु ऑनलाईन/वर्च्युअल कार्यक्रम आयोजित करने के लिए निदेशित किया गया – निदेशक, म.प्र. पुलिस अकादमी भी राज्य के पुलिस अधिकारियों को संवेदनशील बनाने के लिए तौर तरीके निकालें – इस निदेश के अनुपालन हेतु डी.जी.पी. भी उत्तरदायी रहेंगे।

***D. Constitution – Article 226 and Juvenile Justice (Care and Protection of Children) Act, 2015 (2 of 2016) Section 12 proviso – Covid 19 Pandemic (Second Wave) – Juveniles in Conflict with Law – Release from Observation Homes* – Member Secretary, M.P. State Legal Services Authority, Jabalpur directed to require Member Secretaries of respective District Legal Services Authorities to move appropriate application through their legal aid counsels before respective Juvenile Justice Boards on behalf of children in conflict with law for their release from Observation Homes across the State, who shall decide application within 3 days considering proviso to Section 12 of Juvenile Justice Act. (Para 11 & 12)**

घ. संविधान – अनुच्छेद 226 एवं किशोर न्याय (बालकों की देखरेख और संरक्षण) अधिनियम, 2015 (2016 का 2), धारा 12 परंतुक – कोविड–19 महामारी (द्वितीय लहर) – विधि के विरोध में किशोर – संप्रेक्षण गृहों से छोड़ा जाना – सदस्य–सचिव, म.प्र. राज्य विधिक सेवा प्राधिकरण, जबलपुर को निदेशित किया गया कि संबंधित जिला विधिक सेवा प्राधिकारियों के सदस्य–सचिवों से अपेक्षा की जाए कि उनके विधिक सहायता परामर्शदाताओं के जरिए पूरे राज्य के संप्रेक्षण गृहों से विधि के विरोध में बच्चों को, छोड़े जाने हेतु समुचित आवेदन, संबंधित किशोर न्याय बोर्ड के समक्ष पेश करें, जो कि किशोर न्याय अधिनियम की धारा 12 के परंतुक को विचार में लेते हुए 3 दिन के भीतर आवेदन का विनिश्चय करेगा।

Cases referred:

(2014) 8 SCC 273, W.P. (Civil) No. 4/2020 decided on 03.04.2020 (SC).

Sankalp Kochar, as *Amicus Curiae* in WP No. 9320/2021.

Chander Uday Singh with *Bhavil Pandey*, *Nikita Sonwane* and *Aditi Pradhan*, for the petitioner in WP No. 8391/2020.

Pushpendra Yadav, Addl. A.G. for the respondent-State with *Arvind Kumar*, Director General of Prisons and *Sanjay Pandey*, Dy. I.G. of Jails.

Giribala Singh, Member Secretary, M.P.S.L.S.A., Jabalpur

O R D E R

(Heard through Video Conferencing)

The Order of the Court was passed by :

MOHAMMAD RAFIQ, CHIEF JUSTICE :- This Court on 07.05.2021, taking into consideration the circumstances prevailing in the State following the second wave of Covid-19 pandemic, had taken *suo motu* cognizance of the overcrowded jails in the State of Madhya Pradesh and passed certain orders. On the same date, the Supreme Court also in continuation with its earlier order in Re: Contagion of Covid-19 Virus in Prisons Suo moto Writ Petition (Civil) No.1/2020, passed a fresh order directing *inter alia* that the High Powered Committees constituted by the State Governments shall consider release of prisoners by adopting the guidelines followed by them last year, at the earliest and further directed that all those inmates, who were granted parole in pursuance to the earlier order of the Supreme Court, should be again released on parole for a period of 90 days in order to tide over the pandemic. This Court on 10.05.2021, on the submissions made given by the learned *Amicus Curiae*, learned Advocate General and the Director General of Prisons, had passed the following order:-

> **"15.** Having heard the learned Amicus Curiae and the learned Additional Advocate General, this Court, in view of extraordinary situation prevailing in the State, deems it appropriate to direct the respondents to place before the High Powered Committee the following suggestions given by both the Director General of Prisons and the learned Amicus Curiae:
>
> **I. <u>For convicted prisoners:</u>**
>
> The jail authorities should consider granting emergent parole, of atleast 90 days, on usual conditions to the following categories of prisoners,
>
> i. All male prisoners, who are more than 60 years of age;
>
> ii. All female prisoners, who are more than 45 years of age;

iii All female prisoners, regardless of their age, who are lodged in jail alongwith with their minor children,

iv All female prisoners who are carrying pregnancy of whatever duration;

v. All prisoners on the basis of medical certification found to be suffering from cancer, serious heart ailments such as having: (i) undergone bypass surgery, (ii) valve replacement surgery, (iii) HIV, (iv) Cancer, (v) Chronic Kidney Dysfunction (UTPs requiring Dialysis), (vi) Hepatitis B or C, (vii) Asthma, (viii) Tuberculoses and (ix) disablement of body to the extent of 40% or more;

II. <u>For under-trial prisoners:</u>

i. The Superintendent of the concerned Jail, should, in respect of those under-trial prisoners, who are facing trial for the offence punishable up to maximum of seven years, with or without fine, obtain their applications for interim bail and forward the same to the District and Session Judge concerned, who shall have the same considered and decided within four days for their release on temporary bail for atleast a period of 90 days, on execution of bail bond and surety, as may be deemed appropriate;

ii. The Superintendent of Jail, should in respect of those under-trial prisoners, who are covered by the SOP issued by the National Legal Services Authority in December, 2018, obtain their applications for grant of interim bail and similarly forward the same to the District and Session Judge concerned, who shall have the same considered and decided within four days for their release on temporary bail for atleast a period of 90 days, on execution of bail bond and surety, as may be deemed appropriate. In this regard, the assistance of the District Legal Services Authority may be taken if necessary;

iii. The following category of under-trial prisoners, may not however be considered for release on interim/ temporary bail:-

a. those under trial prisoners, who are now in custody for an offence committed by them

during the period of interim bail earlier granted to them; and

b. those under trial prisoners, who were granted interim bail on the basis of criteria adopted earlier but failed to surrender in time in terms of the bail order and were taken in custody, pursuant to execution of non-bailable warrant.

The meeting of the High Powered Committee for this purpose be convened on 12.05.2021 at the time fixed by the Executive Chairman of the M.P. State Legal Services Authority, either by physical or virtual mode, as may be deemed possible."

2. Mr. Chander Uday Singh, learned Senior Counsel and Mr. Sankalp Kochar, learned *Amicus Curiae*, have submitted that despite recommendations of the High Powered Committee in its recent meeting held on 12.05.2021, the number of prisoners lodged in different jails of the State of Madhya Pradesh , which was 45,582 on 07.05.2021, as against their total capacity of 28,675, is not going to be substantially reduced. Therefore, the desired object of decongesting the jails may not be achieved. They both suggested that the High Powered Committee ought to consider recommending release of all such convicts on parole, who have either served out one-third of the substantive sentence awarded to them or if sentenced to life imprisonment, have completed incarceration of seven years or more. Additionally, the learned Senior Counsel and learned *Amicus Curiae* suggested that the High Powered Committee ought to also consider recommending release of all such under-trial prisoners on interim bail, who are facing trial for offences exclusively triable by the Court of Magistrate regardless of the outer limit of the sentence. Third suggestion given by them is that the High Powered Committee should also consider recommending release of all women prisoners, both convicts and under-trial, regardless of the offence for which they have been convicted and the sentence awarded to them or the maximum sentence that may be awarded to them upon conviction.

3. Learned Additional Advocate General and the Director General of Prisons have submitted that they will collate the data under all these three categories and provide the same to the High Powered Committee within a period of three days, for their consideration.

4. The Member Secretary, M.P. State Legal Services Authority, Jabalpur submitted that soon after the receipt of the data covering the aforesaid three categories, request will be made to the Executive Chairman of the M.P. State Legal Services Authority to hold the meeting of the High Powered Committee, for their consideration.

5. The High Powered Committee upon production of necessary data before it, shall in its wisdom, consider the suggestions objectively and shall make its recommendation with or without any modification/conditions, as it may deem fit.

6. Mr. Chander Uday Singh, learned Senior Counsel and Mr. Sankalp Kochar, learned *Amicus Curiae*, have submitted that despite direction issued by the Supreme Court in *Arnesh Kumar vs. State o f Bihar and another* (2014) 8 SCC 273, the police in the State is not following the guidelines given in paras 8.1 to 8.4 and paras 11.1 to 11.8 of the said judgment. This explains why there was an enormous increase of approximately 8,000 under-trial prisoners in different jails of the State during the period of lockdown even after release of about 7,500 prisoners-convicts on parole and UTPs on interim bail, pursuant to earlier order passed by the Supreme Court on 23.03.2020.

7. Mr. Pushpendra Yadav, learned Additional Advocate General submitted that steps are being taken to release convicts on parole as per the recent recommendation of the High Powered Committee. As regards UTPs, applications have been moved before the concerned Courts and orders for grant of interim bail to them are likely to be passed shortly. On the question of compliance of directions of the Supreme Court in *Arnesh Kumar* (supra), learned Additional Advocate General submitted that he will have to seek instructions in the matter to find out whether the Director General of Police has issued general instructions to all the police stations to adhere to the mandatory guidelines issued by the Supreme Court in paras 8.1 to 8.4 and paras 11.1 to 11.8 of its decision in *Arnesh Kumar* (supra).

8. The Supreme Court in *Arnesh Kumar* (supra) categorically observed that the law mandates that the police officer, before making arrest of an accused, against whom a reasonable suspicion exists that he has committed a cognizable offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years, should record his satisfaction as mandated by Section 41 of the Code of Criminal Procedure (for short the "Code") that his arrest is necessary (i) to prevent such person from committing any further offence; (ii) for proper investigation of the offence; (iii) to prevent such person from causing the evidence of the offence to disappear or tampering with evidence; (iv) to prevent such person from making any inducement, threat or promise to any witness from disclosing facts to the court or to the police officer & (v) and that unless such person is arrested, his presence in the court when required cannot be secured. The Supreme Court therefore observed that before a Magistrate authorizes detention under Section 167 of the Code, he has to be first satisfied that the arrest made is legal and in accordance with law and all the constitutional rights of the person arrested have been safeguarded. If in his opinion, the arrest does not satisfy the requirements of Section 41 of the Code, the Magistrate is duty-bound not to authorize his further detention and release the accused after recording his own

satisfaction which shall never be based on the ipse dixit of the police officer. The Supreme Court further highlighted the importance of Section 41-A of the Code which was inserted by Section 6 of the Code of Criminal Procedure (Amendment) Act, 2008 (No.5 of 2009) providing that in all cases where the arrest of a person is not required as per Section 41(1) of the Code, the police officer is required to issue notice directing the accused person to appear before him at specific place and time. If such accused complies with the terms of notice, the law further mandates that he shall not be arrested, unless the reasons are recorded by the police officer that the arrest is necessary. At this stage also the condition precedent for causing arrest, as envisaged in Section 41 of the Code, has to be complied with, which shall be subject to the same scrutiny by the Magistrate as aforesaid. The Supreme Court deprecated the practice of mechanically reproducing in the case diary all or most of the reasons contained in Section 41 of the Code for effecting arrest. The Supreme Court observed that it seems that police has not learnt its lesson; the lesson implicit and embodied in the Code and is persisting with its colonial approach despite six decades of independence, as the power of arrest is being used as a tool of harassment and oppression of the citizen, which is "one of the lucrative sources of police corruption". All these directions issued by the Supreme Court were intended to put a check on the arbitrary power of police in mechanically arresting a citizen accused of committing offences of rather lesser gravity, either without adequate sensitivity or with oblique motive.

9. In view of what has been noticed above, we direct the Director General of Police to immediately issue fresh direction to all the Police Stations in the State to adhere to the guidelines issued by the Supreme Court in *Arnesh Kumar* (supra) in letter and spirit. We also direct that all the Judicial Magistrates, upon the accused being produced before them by the police for authorizing further detention, shall mandatorily examine whether or not stipulations contained in both Sections 41 and 41A of the Code, have been followed and if, for reasons to be recorded in writing, the Judicial Magistrate concerned is satisfied that mandate of both or any of those provisions, has not been complied with by the police, he/she shall refuse to authorize further detention of the accused and shall direct immediate release of the accused. Even otherwise, if any arrest has been made without adherence to the aforesaid guidelines, the accused concerned would be entitled to directly apply to the court of competent jurisdiction for his regular bail on this ground alone.

10. We direct the Registrar General of the High Court to again circulate the copy of the judgment of the Supreme Court in *Arnesh Kumar* (supra) alongwith copy of this order to all the District Judges of the State, for being served upon the Judicial Magistrates in their respective judgeships. We also require the Director of the State Judicial Academy to organize online/ virtual programme, in a cluster of districts or division-wise, in batches, for sensitizing, not only the Judicial Magistrates but also the police officers, in tandem with the M.P. Police Academy. The Director of

the M.P. Police Academy shall in this connection coordinate with the Director of State Judicial Academy to work out the modalities for sensitizing the police officers of the State. The Director General of Police shall also be responsible for compliance of this direction.

11. Learned Senior Counsel and learned *Amicus Curiae* also invited attention of this Court to the order passed by the Supreme Court on 03.04.2020 in *Suo Motu* Writ Petition (Civil) No.4 of 2020 (In Re Contagion of Covid 19 Virus in Children Protection Homes) whereby all the Juvenile Justice Boards (JJB) and Children's Courts were directed to proactively consider whether a child or children should be kept in the Child Care Institutions considering the best interest, health and safety concerns, which also included a direction that for the children alleged to be in conflict with law, residing in Observation Homes, the Juvenile Justice Boards shall consider taking steps to release them on bail, unless there are clear and valid reasons for the application of the proviso to Section 12 of the Juvenile Justice (Care and Protection of Children) Act, 2015 (for short "the JJ Act").

12. We direct the Member Secretary of the M.P. State Legal Services Authority, Jabalpur to require the Member Secretaries of the respective District Legal Services Authorities to move an appropriate application through their Legal Aid Counsels before the respective Juvenile Justice Boards on behalf of the children in conflict with law, for their release from Observation Homes across the State, who shall consider the application and decide the same within a period of three days from the date of its filing in the light of the observations made by the Supreme Court in the aforesaid order dated 03.04.2020 passed in *Suo Motu* Writ Petition (Civil) No.4 of 2020 (supra), especially, taking into consideration the proviso to Section 12 of the JJ Act.

13. Let a copy of this order be forwarded to the Director General of Police, State of M.P., Bhopal; Director General of Prisons, Bhopal; Member Secretary, M.P. State Legal Services Authority, Jabalpur; Director, M.P. State Judicial Academy, Jabalpur; Director, M.P. Police Academy, Bhopal and the Registrar General of M.P. High Court, Jabalpur for necessary action.

Matters to come up on **31.05.2021**.

Order accordingly

I.L.R. [2021] M.P. 1345 (DB)
WRIT PETITION

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

WP No. 10989/2020 (PIL) (Gwalior) decided on 7 June, 2021

RAM BHAROSE SHARMA …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

A. Municipal Corporation Act, M.P. (23 of 1956), Sections 167, 378, 379 & 421 – Mutation Proceedings – Public Notice – Publication Charges **– Held – Publication of notice brings transparency, fair play and clarity in mutation proceedings and any intended/prospective mischief can be avoided – Asking for publication cost by Municipal Corporation, from an individual is not an element of *quid pro quo* or a device to fill-up its treasury – It is a regulatory and a facilitating measure – Corporation is just and right in its approach to avoid future litigation and complication – Petition disposed. (Paras 14, 16, 30 & 33)**

क. नगरपालिक निगम अधिनियम, म.प्र. (1956 का 23), धाराएँ 167, 378, 379 व 421 – नामांतरण कार्यवाहियां – सार्वजनिक नोटिस – प्रकाशन शुल्क – अभिनिर्धारित – नोटिस के प्रकाशन से नामांतरण कार्यवाहियों में पारदर्शिता, निष्पक्षता और स्पष्टता आती है तथा किसी भी आशयित/भावी रिष्टि से बचा जा सकता है – नगर निगम द्वारा किसी व्यक्ति से प्रकाशन की लागत पूछी जाना, प्रतिकर का तत्व या अपने खजाने को भरने का एक उपकरण नहीं है – यह एक विनियामक और एक सुविधाजनक उपाय है – भावी मुकदमेबाजी और जटिलता से बचने हेतु निगम अपने दृष्टिकोण में न्यायसंगत और सही है – याचिका निराकृत।

B. Municipal Corporation Act, M.P. (23 of 1956), Sections 167, 378, 379 & 421 – Mutation Proceedings – Public Notice – Publication Charges **– Held – Corporation can direct the applicants to cause notice to be published in widely circulated newspapers at their own expenses. (Para 33)**

ख. नगरपालिक निगम अधिनियम, म.प्र. (1956 का 23), धाराएँ 167, 378, 379 व 421 – नामांतरण कार्यवाहियां – सार्वजनिक नोटिस – प्रकाशन शुल्क – अभिनिर्धारित – निगम आवेदकगण को उनके स्वयं के व्यय पर व्यापक रूप से परिचालित समाचार–पत्र में नोटिस प्रकाशित करने के लिए निदेशित कर सकता है।

C. Municipal Corporation Act, M.P. (23 of 1956), Section 167 & 371 – Public Notice – Principle **– Issuance of public notice by way of publication in newspaper for mutation purpose is as per principles of Public Policy and Public Welfare – Concept of Public Policy, discussed & explained. (Para 16, 20 & 21)**

ग. नगरपालिक निगम अधिनियम, म.प्र. (1956 का 23), धारा 167 व 371 – सार्वजनिक नोटिस – सिद्धांत – नामांतरण प्रयोजन हेतु समाचार पत्र में प्रकाशन के माध्यम से सार्वजनिक नोटिस जारी करना लोक नीति और लोक कल्याण के सिद्धांतों के अनुसार है – लोक नीति की संकल्पना, विवेचित और स्पष्ट की गई।

***D. Municipal Corporation Act, M.P. (23 of 1956), Section 371 & 378 – Issuance of Public Notice – Power of Commissioner* – Held – Provisions of issuance of public notice and authority to impose improvement charges lie with Commissioner u/S 371 and 378 respectively – Commissioner has power to declare certain expenses to be improvement expenses u/S 378 and said expenses are recoverable and payable by the owner/occupier of the premises u/S 379 of Act. (Para 17 & 28)**

घ. नगरपालिक निगम अधिनियम, म.प्र. (1956 का 23), धारा 371 व 378 – सार्वजनिक नोटिस जारी करना – आयुक्त की शक्ति – अभिनिर्धारित – सार्वजनिक नोटिस जारी करने के उपबंध तथा सुधार शुल्क अधिरोपित करने का प्राधिकार क्रमशः धारा 371 एवं 378 के अंतर्गत आयुक्त को है – आयुक्त को धारा 378 के अंतर्गत कुछ व्ययों को सुधार व्यय घोषित करने की शक्ति है एवं उक्त व्यय अधिनियम की धारा 379 के अंतर्गत परिसर के स्वामी/अधिभोगी द्वारा वसूली योग्य और देय है।

***E. Municipal Corporation Act, M.P. (23 of 1956), Sections 148, 153 & 167 – Purpose and Scope* – Held – Purpose and scope of Section 148/153 is totally different vis-à-vis Section 167 which falls under supplemental provision and not under other two sub-division which are Taxation and Property Tax – Section 148 & 153 are for imposition of property tax and the rate at which it is to be charged – It's concept is altogether different than "Mutation", where indeterminate class of persons may have right, title or interest in property. (Para 24 & 25)**

ङ. नगरपालिक निगम अधिनियम, म.प्र. (1956 का 23), धाराएँ 148, 153 व 167 – प्रयोजन और विस्तार – अभिनिर्धारित – धारा 167 की तुलना में, धारा 148/153 का प्रयोजन और विस्तार पूर्णतः भिन्न है जो कि अनुपूरक उपबंध के अंतर्गत आता है तथा अन्य दो उपभाग जो कि कराधान और संपत्ति कर हैं, के अंतर्गत नहीं आता – धारा 148 व 153 संपत्ति कर के अधिरोपण और इसे प्रभारित की जाने वाली दर के लिए हैं – इसकी संकल्पना ''नामांतरण'' से पूरी तरह से भिन्न है, जहां अनिश्चित वर्ग के व्यक्तियों का संपत्ति में अधिकार, हक और हित हो सकता है।

Cases referred:

1986 (1) MPWN 290, 1991 MPJR 137, AIR 1972 SC 2656, (2014) 9 SCC 105, (2005) 4 SCC 245, (1986) 3 SCC 156.

J.P. Mishra and *Aditya Sharma*, for the petitioner.
Ankur Modi, Addl. A.G. for the respondent Nos. 1 & 2/State.
Deepak Khot, for the respondent No. 3-Municipal Corporation, Gwalior.

O R D E R

The Order of the Court was passed by :

ANAND PATHAK, J.:- The present petition under Article 226 of the Constitution of India has been preferred by the petitioner as Pro Bono Publico in which quashment of resolution dated 8/4/2020 (Annexure P/1) and resolution dated 29/6/2020 (Annexure P/4) passed by Divisional Commissioner as Administrator of Municipal Corporation, Gwalior; whereby, the order dated 26/5/2020 (Annexure P/2) passed by Commissioner, Municipal Corporation, Gwalior and order dated 8/6/2020 (Annexure P/3) passed by Additional Commissioner, Municipal Corporation, Gwalior has been considered by the Administrator, Municipal Corporation, Gwalior (respondent No. 3 herein) and it is resolved to accept Rs. 5,000/- as publication charges from the owners/applicants for mutation of immovable properties and in lieu thereof, they have been given facility to get the notice for mutation published in the format prescribed by the Corporation.

2. It is the grievance of the petitioner that Section 167 of the Municipal Corporation Act, 1956 (for short "Act of 1956") nowhere contemplates such mechanism whereby Corporation may seek mutation fees from applicants for publication of notice. Section 167 of the Act of 1956 does not enable charging of mutation fees, therefore, resolution passed by Corporation is illegal. In support of his submissions, learned counsel for the petitioner placed reliance over the judgment passed by Division Bench of this Court (Indore Bench) in the matter of *Awas Smasya Niwaran Sansthan Vs. Municipal Corporation, Indore*, 1986 (1) MPWN 290 and later on another judgment passed by another Division Bench at Gwalior in the case of *Ward Sudhar Samiti, Gwalior Vs. Municipal Corporation, Gwalior*, 1991 MPJR 137 while placing reliance over the said judgments. It has been submitted that action of the respondents is arbitrary and illegal. No other ground has been raised by the petitioner.

3. On the other hand, learned counsel for respondents/State opposed the prayer and submits that State Government has power as per **Part IX, Chapter XXXVI-Control** under Act of 1956. It is further submitted that if petitioner has any grievance; then he can approach State Government under Section 421 of Act of 1956 for redressal of his grievances.

4. Learned counsel for the Corporation also vehemently opposed the prayer. According to him, Section 133 of Act of 1956 gives sufficient powers to the Corporation to impose fees by a resolution. He relied upon *Madan Gopal Agarwal Vs. District Magistrate, Allahabad*, AIR 1972 SC 2656 and *Gorkha Security Services Vs. Government (NCT of Delhi) and Others,* (2014) 9 SCC 105.

5. It is further submitted that as per Madhya Pradesh Municipal (Achal Sampatti Antaran) Rule, 2016, especially Rule 4, Corporation has the right to

invite objections by publishing a notice in two daily newspapers, and therefore, Corporation has not tried to enrich it by taking money as publication charges, but the purpose is to intimate all concerned about the mutation proceedings of the property so that litigation may be avoided in future. He also stressed over the point that if any person who intends to mutate the property caused the publication of notice on his own expenses as per the format provided by the Corporation, then Corporation has no objection to such proposition and it would be accepted as service by publication and no further amount would be asked for mutation.

6. Therefore, according to respondent/Corporation, it is not a case of unjust enrichment by imposing mutation fees per se, but it is procedural / incidental charges at best.

7. It is further submission that judgments passed by the earlier Division Bench are to be seen in that perspective only. He prayed for dismissal of the writ petition.

8. Heard learned counsel for the parties and perused the documents appended thereto.

9. Sheet anchor of the case of petitioner is two orders passed by Division Bench of this Court earlier in almost identical facts situation; wherein, then petitioners also resisted the imposition of mutation fees. Therefore, case is to be seen on its own merits as well as the discussion so surfaced in earlier orders of Division Bench.

10. Concept of mutation is being provided in **part IV, Chapter XI-Taxation** under Act of 1956. Relevant provision, i.e. Section 167 of the Act of 1956 is hereby reproduced for ready reference; as under:-

> ***"167. Notice of transfer of title, when to be given.-***
>
> *(1) Whenever the title in any land or building or in any part or share of any land or building is transferred , the transfer and the transferee shall, within three months of the registration of the deed of transfer or if it be not registered, within three months of the execution of the instrument of transfer, or, if no such instrument be executed, after the transfer is effected, give notice in writing of such transfer to the Commissioner.*
>
> *(2) Every person liable for the payment of a tax on any property whose transfers his title to or over such property without giving notice of such transfers to the Corporation as aforesaid, shall in addition to any other liability which he incurs through such neglect, continue to be liable for the payment of all such taxes payable in respect of the said property until he gives*

such notice or until the transfer is recorded in the books of the Corporation.

(3) In the event of the death of the person in whom title to any land or building or in any part or share of any land or building vests,, the person who as an heir or otherwise takes the title of the deceased by descent or devise, shall, within three months from the death of the deceased, give notice of his title to the Commissioner in writing.

(4) Nothing in this Section shall be deemed to affect the liability of the heir or devise for the said taxes or to affect the prior claim of the Corporation for the recovery of the taxes due thereupon.

(5) (i) When any new building is erected, or when any building is rebuilt or enlarged, or when any building which has been vacant is re-occupied, the person primarily liable for the property taxes assessed on the building shall within fifteen days give notice thereof in writing to the Commissioner.

(ii) The said period of fifteen days shall be counted from the date of the completion or the occupation, whichever first occurs, of the building which has been newly erected or rebuilt, or of the enlargement, as the case may be, and in the case of a building which has been vacant, from the date of the re-occupation thereof."

11. It is to be noted that **Chapter XI** is segmented into three sub-divisions in which Section 167 falls under Supplemental Provision and other two sub-divisions are Taxation and the Property Tax (Imposition of Property Tax). At the first glance, it appears that Section 167 of the Act of 1956 contemplates issuance of notice in writing by the Transferer as well as Transferee, who claim any right, title or interest in the property and Corporation does not have to invite objections through publication but Clause 2 puts liability over a person (as transferer also) that the transferer shall continue to pay property tax, if he does not inform about the sale of the property to transferee within three months of the execution of the instrument. Therefore, to avoid such anomalous situation, transferer has to intimate the Corporation alongwith transferee. Same situation exists if the property is devolved upon a legal heir because Section 167 (3) contemplates death of title holder and therefore, legal heir of deceased (within three months of the death of title holder) has to give notice of factum of his devolved title to the Commissioner.

12. In both the situations, as contemplated under Section 167 (2) as well as under Section 167 (3), it is experienced by the authorities that at times mutations are being done with oblique motive by unscrupulous persons, who may not have any right, title or interest over the property or may be one of the claimants of the

property, who intends to get the whole property in his name bypassing the claims of other legitimate claimants (or other existing legal heirs of a deceased owner). Therefore, to reconcile the same, as a regulatory measure, concept of publication of intention of an applicant to mutate the property in his name has been formulated to avoid future complications. This thought is in line with concept of Fair Play, Public Welfare and Transparency.

13. When any expenses or charges are levied without the element of *quid pro quo* then such imposition can be treated as a part of regulatory measure and this aspect has been elaborately discussed in the case of *Calcutta Municipal Corporation and Ors. Vs. M/s Shrey Mercantile Pvt. Ltd. & Ors.,* (2005) 4 SCC 245. Relevant discussion is worth reproduction for clarity purpose:-

> ***"14.*** *According to "Words & Phrases", Permanent Edition, Vol. 41 Page 230, a charge or fee, if levied for the purpose of raising revenue under the taxing power is a "tax". Similarly, imposition of fees for the primary purpose of "regulation and control" may be classified as fees as it is in the exercise of "police power", but if revenue is the primary purpose and regulation is merely incidental, then the imposition is a "tax". A tax is an enforced contribution expected pursuant to a legislative authority for purpose of raising revenue to be used for public or governmental purposes and not as payment for a special privilege or service rendered by a public officer, in which case it is a "fee". Generally speaking "taxes" are burdens of a pecuniary nature imposed for defraying the cost of governmental functions, whereas charges are "fees" where they are imposed upon a person to defray the cost of particular services rendered to his account.*
>
> *16.Therefore, the main difference between "a fee"and "a tax" is on account of the source of power. Although "police power" is not mentioned in the Constitution, we may rely upon it as a concept to bring out the difference between "a fee" and "a tax". The power to tax must be distinguished from an exercise of the police power. The "police power" is different from the "taxing power" in its essential principles. The power to regulate, control and prohibit with the main object of giving some special benefit to a specific class or group of persons is in the exercise of police power and the charge levied on that class to defray the costs of providing benefit to such a class is "a fee". Therefore, in the aforestated judgment in Kesoram's case, it has been held that where regulation is the primary purpose, its power is referable to the "police power". If the primary purpose in imposing the charge is to regulate, the charge is not a tax even if it produces revenue for the government. But where the government intends to raise revenue as the primary object, the*

> *imposition is a tax. In the case of Synthetics & Chemicals Ltd. Vs. State of U.P., reported in [(1990) 1 SCC 109], it has been held that regulation is a necessary concomitant of the police power of the State and that though the doctrine of police power is an American doctrine, the power to regulate is a part of the sovereign power of the State, exercisable by the competent legislature.* ***However, as held in Kesoram's case (supra), in the garb of regulation, any fee or levy which has no connection with the cost or expense of administering the regulation cannot be imposed and only such levy can be justified which can be treated as a part of regulatory measure. To that extent, the State's power to regulate as an expression of the sovereign power has its limitations. It is not plenary as in the case of the power of taxation."***

14. Therefore, asking for publication cost by Municipal Corporation, Gwalior from an individual is to be seen in that perspective only and not as an element of *quid pro quo* or a device to fill-up the treasury of Corporation. It is only meant for such regulatory purpose only because publication of notice brings transparency, fair play and clarity in the mutation proceedings and any intended or prospective mischief can be avoided. Therefore, Corporation is just and right in its approach to avoid future litigation and complication, rightly decided to go for publication. It is not a device to enrich the treasury.

15. Not only this, another facet of the controversy is drain of public money over personal use of property of an individual. If Corporation is saddled with the liability to publish notice for mutation purpose in newspaper for an individual's immovable property, then Corporation shall have to pay through the public money (deposited by the citizenry of that Corporation under different heads like property tax, service charges, etc.), and that would again create anomalous situation wherein the expenses of mutation proceedings of an individual are being paid by public money.

16. Therefore, the controversy from this perspective also does not stand to Principles of Public Policy and Public Welfare rather it is opposed to it. Public Policy in its broad spectrum, as a system of Laws, Regulatory Measures, Source of Action and Funding Priorities concerning a given topic promulgated by a government entity or its representatives has basically three types of Policies (I) Restrictive, (ii) Regulatory and (iii) Facilitating. The evolutionary trend of Public Policy has been discussed in detail by Apex Court in the case of *Central Inland Water Transport Corporation Limited and Anr. Vs. Brojo Nath Ganguly and Ors.,* (1986) 3 SCC 156. Para 92 is worth reproduction:-

> ***"92.*** *The Indian Contract Act does not define the expression "public policy" or "opposed to public policy". From the very*

nature of things, the expressions "public policy", "opposed to public policy" or "contrary to public policy" are incapable of precise definition. Public policy, however, is not the policy of a particular government. It connotes some matter which concerns the public good and the public interest. The concept of what is for the public good or in the public interest or what would be injurious or harmful to the public good or the public interest has varied from time to time. As new concepts take the place of old, transactions which were once considered against public policy are now being upheld by the courts and similarly where there has been a well-recognized head of public policy, the courts have not shirked from extending it to new transactions and changed circumstances and have at times not even flinched from inventing a new head of public policy. There are two schools of thought -"the narrow view" school and "the broad view" school. According to the former, courts can not create new heads of public policy whereas the latter countenances judicial law-making in this area. The adherents of "the narrow view" school would not invalidate a contract on the ground of public policy unless that particular ground had been well-established by authorities. Hardly ever has the voice of the timorous spoken more clearly and loudly than in these words of Lord Davey in Janson v. Uriefontein Consolidated Mines Limited [1902] A.C. 484, 500 "Public policy is always an unsafe and treacherous ground for legal decision." That was in the year 1902. Seventy-eight years earlier, & Burros, J., in Richardson v. Mellish, [1824] 2 Bing. 229, 252; s.c. 130 E.R. 294, 303 and [1824-34] All E.R. Reprint 258, 266, described public policy as "a very unruly horse, and when once you get astride it you never know where it will carry you." The Master of the Rolls, Lord Denning, however, was not a-man to shy away from unmanageable horses and in words which conjure up before our eyes the picture of the young Alexander the Great taming Bucephalus, he said in Enderyby Town Football Club Ltd. v. Football Association Ltd., [1971] Ch. 591, 606. "With a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles." Had the timorous always held the field, not only the doctrine of public policy but even the Common Law or the principles of Equity would never have evolved. Sir William Holdsworth in his "History of English Law", Volume III, page 55, has said:

> *In fact, a body of law like the common law, which has grown up gradually with the growth of the nation, necessarily acquires some fixed principles, and if it is to maintain these principles it must be able, on the ground of public policy or some other like ground, to suppress*

> *practices which, under ever new disguises, seek to weaken or negative them.*
>
> *It is thus clear that the principles governing public policy must be and are capable, on proper occasion, of expansion or modification. Practices which were considered perfectly normal at one time have today become obnoxious and oppressive to public conscience. If there is no head of public policy which D covers a case, then the court must in consonance with public conscience and in keeping with public good and public interest declare such practice to be opposed to public policy. Above all, in deciding any case which may not be covered by authority our courts have before them the beacon light of the Preamble to the Constitution. Lacking precedent, the court can always be guided by that light and the principles underlying the Fundamental Rights and the Directive Principles enshrined in our Constitution.*

Therefore, with the changed circumstances, decision of Corporation regarding Publication is to be seen in the light of such broad principle of Public Policy and guidance given by Apex Court in this regard. It is a regulatory or at best a Facilitating Measure, nothing else.

17. Even otherwise, it cannot be said that Corporation /Commissioner is completely bereft of any legal authority because Commissioner has power to declare certain expenses to be **improvement expenses** as per Section 378 of the Act of 1956 and said expenses are recoverable and payable by the owner / occupier of the premises as per the provisions of Section 379 of Act of 1956..

18. Section 377 and 378 of the Act of 1956 are reproduced hereinbelow for ready reference:-

> ***"377. Power of Commissioner to accept agreement for payment of expenses in installments.-*** *(1) When ever under this Act or under any rule or byelaw made there under, the cost of any work executed or of any measure taken or thing done, by or under the order of a municipal authority, any magistrate or any municipal officer empowered in this behalf, is payable by any person, the Commissioner may with the approval of the Mayor-in- Council instead of recovering any such cost in any other manner provided in this Act or in any rule or byelaw made there under, take an agreement from the said person to pay the same in installments of such amount and at such intervals as will secure the payment of the whole amount due, with interest there on at the rate not exceeding six per centum per annum, within a period of not more than five years. (2) If any installment is not paid on or before the date on which it falls due, the Commissioner may thence forward recover interest on the sum then due at such rate not exceeding nine per centum per annum as he may deem fit.*

> ***378. Power to declare certain expenses to be improvement expenses.-*** *If any cost or expenses removable under this Act have been incurred by the Commissioner under any provision of this Act or any rule or byelaw made there under in respect of, or for the benefit of, any land or building the Commissioner may with the approval of the Corporation declare such costs or expenses to be improvement expenses. "*

19. Perusal of these provisions reinforces authority in the Office of Commissioner to declare any cost or expenses to be improvement expenses and therefore, source of power is not altogether held up or missing as tried to be projected by the petitioner. Both the judgments relied upon by the petitioner have not taken into account these provisions of Act of 1956, which are apparently the source of power of Commissioner.

20. Even otherwise, when issuance of public notice by way of publication in newspapers and its utility is being established then Section 371 of the Act of 1956 ought to be read in tendum with other provisions of Act of 1956 to bring home the point that Commissioner has the authority to ask for public notice through publication in local newspaper. Section 371 is to be read in conjunction with all other relevant provisions of Act of 1956. Section 371 is reproduced as under:-

> ***"371. Public notice how to be made known.-*** *Whenever it is provided by or under this Act that public notice shall or may be given of anything, such public notice shall, in the absence of special provision to the contrary, be in writing under the signature of the Commissioner or of a municipal officer empowered under sub section (4) of section 69 to give the same, and shall be widely made known in the locality to be effected thereby, affixing copy thereof in conspicuous public places within the said locality, or by publishing the same by beat of drum, or by advertisement in the local newspapers, or by two or more of these means and by any other means that the Commissioner shall think fit."*

21. Perusal of the section reveals that Public Notice of "anything", "may" ("shall") be given as provided under the Section. When necessity of Public Notice is established in this time period as discussed above, then Public Notice can very well be published and expenses can be sought by commissioner as "Improvement Expenses". It is in line with Public Policy and Public Welfare also.

22. So far as, judgment of Divisions bench in case of *Awas Smasya Niwaran* (Supra) is concerned, it revolves around Section 167 and Section 366 of the Act of 1956. If the discussion as surfaced into it is accepted then it would render scope and object of Section 167 very limited and virtually redundant in some circumstances because in that condition only notice of intimation by the transferer

/ transferee would complete the proceedings. It would not address the problem of indeterminate class of persons who are not on record but have Right, Title or Interest in the property. It is true that mutation is not the document of title and only presumptive in nature but it cannot be ignored that if mutation is being done in favour of a wrong man or without knowledge of all claimants / stakeholders then it may lead to further complications; wherein, said person after mutation; done surreptitiously, may go for construction of the building thus leading to more complications. Therefore, said reasoning as advanced in the judgment cannot be accepted on the basis of discussion made above.

23. Later judgment of Division Bench *Ward Sudhar Samiti* (supra) is proceeded mainly on the assumption that Section 148 and 153 of the Act of 1956 nowhere contemplate issuance of public notice in newspaper and therefore, no public notice is required by law to be given in proceedings under Section 148 (1) and Section 153(1) of the Act of 1956. Section 371 has also been discussed accordingly.

24. In fact, proceedings under Section 148 and 153 fall under sub-section **Imposition of Property Tax in Chapter XI (Taxation);** whereas, Mutation falls under **Supplemental Provision.** Beside that Sections 148 and 153 are in respect of imposition of property tax and the rate at which it is to be charged, therefore, fundamentally, it is for assessment of the different variables used for ascertaining property tax / annual letting value of land and building. There, the owners or occupiers or stakeholders are known. Its a concept altogether different than 'Mutation', where multiple claimants/legal heirs as indeterminate class of persons may have right, title or interest in the property.

25. In computation of annual letting value / property tax, etc., the person concerned or owners are usually before the Corporation, therefore, recipients are determinant class of individuals; whereas, in mutation proceedings, most of the time nobody knows who has Right, Title or Interest in the property which is likely to be mutated because acquisition of property through sale deed or devolution / succession, may have multiple claims. Therefore, Corporation has to inform the **'indeterminate class of public'** for inviting objections. Therefore, purpose and scope of Section 148 / 153 is totally different vis-a-vis Section 167 which mainly falls under Supplemental Provision and not under other two subdivisions which are Taxation and the Property Tax (Imposition of Property Tax). Therefore, that analogy of judgment cannot be borrowed here and interpretation of scope of Section 371 vis-a-vis Sections 148/153 is misplaced in facts and circumstances of the case.

26. Division Bench in the case of *Ward Sudhar Samiti* (Supra) further proceeded on the point of service of notice as per Section 369 and 370 of Act of

1956 also and opined that those provisions also nowhere refer the service of notice through publication in newspapers and therefore, mutation proceedings cannot be proceeded with publication of notice in newspaper, but said service of notices as per Section 369/370 is for limited purpose and nowhere deals for addressing question of intimation to **'indeterminate class of persons'**.

27. Even otherwise, Code of Civil Procedure also postulates service of notice through publication. (see: Order V Rule 20, substituted service) and provisions of CPC are not barred in the proceedings in hand. Rather provisions are accepted for realizing the objects of the Act.

28. Therefore, cumulatively, the decision of Division Bench in the case of *Awas Smasya Niwaran Sansthan* (supra) as well as in *Ward Sudhar Samiti* (supra), did not consider the interplay of different provisions of the Act of 1956 and their resultant effect in the light of principle of Public Policy, especially when provisions of issuance of public notice and authority to impose improvement charges lie with the Commissioner as per Section 371 and 378 respectively of the Act of 1956 and both judgments did not consider these provisions and point of law involved in given factual set up, then both these judgments pass *sub silentio* and cannot be relied upon being *per incuriam* on discussion made and reasons stated above.

29. Still, certain creases need to be ironed out.

30. In future, Commissioner, Municipal Corporation shall have to give liberty (as per the resolution itself) to the applicants / persons interested in mutation, to get the intimation notice published in a given format in any enlisted newspaper, which is widely circulated in the area (not any newspaper with poor circulation), so that public at large may know the particulars of the property and person for mutation and that can only be the best possible solution in the controversy. Format of notice, dimensions of notice and list of newspapers should be transparent, clear and be in public domain, so that publication of mutation notice may become facilitator of disputes rather than its launching pad.

31. It is given to understand that several applications are pending consideration for mutation and because of interim order, such mutation proceedings are on hold and amount has been deposited in different head, therefore, Commissioner, Municipal Corporation, Gwalior is directed to proceed expeditiously with the applications as per law and amount which were already deposited by the applicants may be utilized for publication of notices and residuary amount if any remains, after publication charges, then same be returned back to the applicants in transparent and fair manner.

32. Still, even after this judgment if any anomaly or discrepancy exists then it would be the duty of Municipal Corporation as well as State to contemplate such difficulty in accordance with law especially as per the provisions of Act of 1956

inter alia as contained in Section 421 of Act of 1956 and come out with a legal framework or solution for facilitating process of mutation more transparent and smooth.

33. Resultantly, in the considered opinion of this Court, Municipal Corporation, Gwalior can direct the applicants to cause notice to be published in newspapers and no illegality exists in getting the notice published in widely circulated newspapers at the expense of applicants.

34. Petition accordingly fails in substance, however, disposed of as referred above.

35. Ordered accordingly.

Petition dismissed

I.L.R. [2021] M.P. 1357 (DB)
WRIT PETITION

Before Mr. Justice Prakash Shrivastava & Mr. Justice Virender Singh

WP No. 7496/2021 (Jabalpur) decided on 8 June, 2021

PAWAN TAMRAKAR (DR.) & anr. …Petitioners

Vs.

M.P. SPECIAL POLICE ESTABLISHMENT & ors. …Respondents

***A. Constitution – Article 226 and Criminal Procedure Code, 1973 (2 of 1974), Section 154 – Second FIR & Clubbing of FIRs* – Held – Different FIRs registered for different category of students and for different courses – No repeat FIR for same category of student with same course – Defalcation of amount in respect of each course and category of person has given separate cause of action, even witnesses in each case are different – Subsequent FIRs do not arise as a consequence of allegations made in first FIR – Test of 'sameness' and test of 'consequence' is not satisfied – Petition dismissed.**

(Paras 17 to 19)

क. संविधान – अनुच्छेद 226 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 154 – द्वितीय प्रथम सूचना प्रतिवेदन व प्रथम सूचना प्रतिवेदनों को एकत्र/एक साथ किया जाना – अभिनिर्धारित – विभिन्न श्रेणी के छात्रों और विभिन्न पाठ्यक्रमों के लिए अलग–अलग प्रथम सूचना प्रतिवेदन पंजीबद्ध किये गये – एक ही श्रेणी के समान पाठ्यक्रम वाले छात्रों हेतु प्रथम सूचना प्रतिवेदन की कोई पुनरावृत्ति नहीं – प्रत्येक पाठ्यक्रम और श्रेणी के व्यक्ति के संबंध में राशि के गबन ने पृथक वाद हेतुक दिया है, यहां तक कि प्रत्येक प्रकरण में साक्षीगण भी भिन्न हैं – पहले प्रथम सूचना प्रतिवेदन में किये गये अभिकथनों के परिणामस्वरूप पश्चात्वर्ती प्रथम सूचना प्रतिवेदन उत्पन्न नहीं होते है – 'समानता' का परीक्षण तथा 'परिणाम' का परीक्षण संतुष्ट नहीं होता – याचिका खारिज।

B. ***Constitution – Article 226 and Criminal Procedure Code, 1973 (2 of 1974), Section 154 & 220 – Clubbing of FIRs – Delay & Latches*** **– Held – Both FIRs registered in 2015 whereas petitioners approached this Court at a belated stage in 2021 – There is an unexplained delay and latches, thus at this stage petitioners not entitled for any relief in this petition – They may pray before trial Court for common trial u/S 220 Cr.P.C., if case for the same is made out – Petition dismissed. (Para 20 & 21)**

ख. संविधान – अनुच्छेद 226 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 154 व 220 – प्रथम सूचना प्रतिवेदनों को एकत्र/एक साथ किया जाना – विलंब व अनुचित विलंब – अभिनिर्धारित – दोनों प्रथम सूचना प्रतिवेदन 2015 में पंजीबद्ध किये गये जबकि याचीगण देरी से 2021 में इस न्यायालय के समक्ष आये – यहां एक अस्पष्ट विलंब तथा अनुचित विलंब है, अतः इस प्रक्रम पर याचीगण इस याचिका में किसी अनुतोष के लिए हकदार नहीं है – वे दं.प्र.सं. की धारा 220 के अंतर्गत संयुक्त विचारण हेतु विचारण न्यायालय के समक्ष प्रार्थना कर सकते है, यदि उक्त के लिए प्रकरण बनता हो – याचिका खारिज।

C. ***Criminal Procedure Code, 1973 (2 of 1974), Section 154 – Second FIR*** **– Held – Second FIR in respect of same offence or different offences committed in course of same transaction is not permissible – Second FIR on basis of receipt of information for same cognizable offence or same occurrence or incident giving rise to one or more cognizable offences is not permissible – Where two incidents took place at different point of time or involve different person or there is no commonality and purpose thereof is different and circumstances are also different then there can be more than one FIR. (Para 7)**

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 154 – द्वितीय प्रथम सूचना प्रतिवेदन – अभिनिर्धारित – समान अपराध अथवा समान संव्यवहार के दौरान कारित भिन्न अपराधों के संबंध में द्वितीय प्रथम सूचना प्रतिवेदन अनुज्ञेय नहीं है – समान संज्ञेय अपराध अथवा एक या एक से अधिक संज्ञेय अपराधों को जन्म देने वाली समान घटना की सूचना की प्राप्ति के आधार पर द्वितीय प्रथम सूचना प्रतिवेदन अनुज्ञेय नहीं है – जहां दो घटनाएं अलग–अलग समय पर घटित हुई हो या उसमें भिन्न व्यक्ति शामिल हो या कोई समानता न हो तथा उसके प्रयोजन भिन्न हो और परिस्थितियां भी भिन्न हो तब एक से अधिक प्रथम सूचना प्रतिवेदन हो सकते हैं।

D. ***Criminal Procedure Code, 1973 (2 of 1974), Section 154 – Clubbing of FIRs*** **– Held – There can be no straightjacket formula for consolidating or clubbing the FIR and Courts are required to examine the facts of each case. (Para 7)**

घ. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 154 – प्रथम सूचना प्रतिवेदनों को एकत्र/एक साथ किया जाना – अभिनिर्धारित – प्रथम सूचना प्रतिवेदन के

समेकन अथवा एकत्र करने हेतु कोई निश्चित सूत्र नहीं है तथा न्यायालय द्वारा प्रत्येक प्रकरण के तथ्यों का परीक्षण किया जाना अपेक्षित है।

***E. Constitution – Article 226 and Criminal Procedure Code, 1973 (2 of 1974), Section 154 – Second FIR & Clubbing of FIRs – Interference by Court* – Held – Second or successive FIR for same or connected cognizable offence alleged to have been committed in course of same transaction for which earlier FIR is already registered, may furnish a ground for interference by Court but where FIRs are based upon separate incident or similar or different offences or subsequent crime is of such magnitude that it does not fall within ambit and scope of earlier FIR then second FIR can be registered. (Para 7)**

ङ. संविधान – अनुच्छेद 226 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 154 – द्वितीय प्रथम सूचना प्रतिवेदन व प्रथम सूचना प्रतिवेदनों को एकत्र/एक साथ किया जाना – न्यायालय द्वारा हस्तक्षेप – अभिनिर्धारित – समान अथवा संबंधित संज्ञेय अपराध जो कि अभिकथित रूप से समान संव्यवहार के दौरान कारित किया गया है, जिस हेतु पूर्व प्रथम सूचना प्रतिवेदन पहले से ही पंजीबद्ध है, के लिए द्वितीय या उत्तरोत्तर प्रथम सूचना प्रतिवेदन, न्यायालय द्वारा हस्तक्षेप के लिए आधार प्रदान करता है परंतु जहां प्रथम सूचना प्रतिवेदन पृथक घटना या समान या भिन्न अपराधों पर आधारित हैं या पश्चात्वर्ती अपराध ऐसे पैमाने का है कि वह पूर्व प्रथम सूचना प्रतिवेदन की परिधि एवं व्याप्ति में नहीं आता तब द्वितीय प्रथम सूचना प्रतिवेदन पंजीबद्ध किया जा सकता है।

***F. Constitution – Article 226 and Criminal Procedure Code, 1973 (2 of 1974), Section 154 – Second FIR – Duty of Court* – Held – Court is required to see the circumstances of a given case indicating proximity of time, unity or proximity of case, continuity of action, commonality of purpose of crime, to ascertain if more than one FIR can be allowed to stand. (Para 7)**

च. संविधान – अनुच्छेद 226 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 154 – द्वितीय प्रथम सूचना प्रतिवेदन – न्यायालय का कर्तव्य – अभिनिर्धारित – न्यायालय द्वारा दिये गये प्रकरण की परिस्थितियों पर, जो कि समय की निकटता, प्रकरण की समानता या समीप्यता, कार्य की निरंतरता, अपराध के प्रयोजन की समानता दर्शाती हो विचार किया जाना अपेक्षित है, ताकि यह सुनिश्चित किया जा सके कि एक से अधिक प्रथम सूचना प्रतिवेदन स्वीकार किया जा सकता है।

Cases referred :

(2020) SCC Online SC 460, (2020) 14 SCC 12, (2013) 6 SCC 348, (2001) 6 SCC 181, (1986) 4 SCC 566, (2011) 5 SCC 607, AIR 1969 SC 329, (2017) 8 SCC 1, WP No. 21487/2018 decided on 11.12.2018 (High Court of Hyderabad), (2004) 13 SCC 292, (2006) 1 SCC 732, (2009) 1 SCC 441, (2010) 12 SCC 254, (2010) 9 SCC 567, (2016) 3 SCC 8, (2018) 1 SCC 330.

Anil Khare with *Abhinav Shrivastava*, for the petitioners.
Abhijeet Awasthi, for the respondents.

O R D E R

The Order of the Court was passed by :
PRAKASH SHRIVASTAVA, J. :- By this petition under Article 226 of the Constitution, the petitioners have prayed for quashing the FIR in Crime Nos.99/2015, 100/2015, 101/2015, 148/2015, 149/2015, 150/2015, 151/2015, 152/2015, 195/2015, 196/2015, 197/2015 and 198/15 and have made a further prayer for consolidating the above FIRs and clubbing them with Crime No.98/15.

2. FIR in Crime No.98/2015 dated 31.03.2015 has been registered in Special Police Establishment Bhopal for commission of offence under Section 120-B, 409, 420, 467, 468 of the IPC and Section 13 (1)(d) and 13(2) of the Prevention of Corruption Act, 1988. The allegation against the petitioners is that while working in different capacities in Genius Paramedical Institute, Pagara Road, Sagar, the petitioners had submitted the forged list of the students and had claimed scholarship amount. The impugned FIRs have been registered containing similar allegations in respect of different courses run by the Institute.

3. Shri Anil Khare, learned Senior Advocate appearing for the petitioners submits that all the FIRs are based upon the same preliminary enquiry; they relate to the same academic year and based upon the same cause of action, therefore all the impugned FIRs should be consolidated and clubbed with the FIR No.98/2015. He further submits that no student has filed the complaint but it is the Lokayukta which has filed the FIR. He has also submitted that in respect of the similar incident by the other insitutes only one single FIR has been lodged. In support of his submission, he has placed reliance upon the judgment of the Supreme Court in the matter of *Dr. Jerryl Banait vs. Union of India and another* reported in (2020) SCC Online SC 460, *Arnab Ranjan Goswami vs. Union of India and others* reported in (2020) 14 SCC 12, *Amitbhai Anilchandra Shah vs. Central Bureau of Investigation and another* reported in (2013) 6 SCC 348 and *T.T. Antony Vs. State of Kerala and others* reported in (2001) 6 SCC 181.

4. Learned counsel for the State has opposed the writ petition submitting that the petition is liable to be dismissed on the ground of delay itself as the FIRs were registered more than five years back and the investigation is complete and challan will be filed in a shortwhile. In support of his submission, he has placed reliance upon the judgment of the Supreme Court in the matter of *State of M.P. & others vs. Nandlal Jaiswal & others* reported in (1986) 4 SCC 566, *Shankara Cooperative Housing Society Limited vs. M. Prabhakar and others* reported in (2011) 5 SCC 607 and *Maharashtra State Road Transport Corporation vs. Balwant Regular Motor Service, Amaravati and others* reported in AIR 1969 SC 329. He further

submits that the separate FIRs have been registered for different courses run by the institute and for different reserved category of students, on the basis of caste and course of students. He has also submitted that the witnesses in each case are different. In support of his submission, he has placed reliance upon the judgment of the Supreme Court reported in (2017) 8 SCC 1 (*State of Jharkhand vs. Lalu Prasad Yadav*) and also the judgment of High Court of Judicature at Hyderabad dated 11.12.2018 passed in WP. No.21487/2018.

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

6. Before entering into the facts of this case, we deem it proper to examine the law relating to the clubbing or consolidation of the FIRs. Section 154 of the Cr.P.C. provides for registration of the FIR on the basis of the information relating to the commission of cognizable offences. Section 155 of Cr.P.C. provides for recording of such information in respect of non-cognizable offences. Section 169 and 170 of the Cr.P.C. provide for the course of action on completion of investigation i.e. to release the accused when evidence is deficient or to send the case to Magistrate when evidence is sufficient. Section 173 of the Cr.P.C. requires the police officer to submit the final report before the Magistrate on completion of investigation containing the requisite details. Sub-section (8) of Section 173 permits further investigation after submission of report to the Magistrate. Section 220 of the Cr.P.C. deals with trial for more than one offences and provides that if in one series of act so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with and tried at one trial for every such offence. Similarly, Section 219 of the Cr.P.C. provides that three offences of the same crime within one year may be charged together.

7. Considering the above statutory provisions by various judicial pronouncements, it is settled that there can be no straightjacket formula for consolidating or clubbing the FIR and Courts are required to examine the facts of each case. A second FIR in respect of same offence or different offences committed in the course of same transaction is not permissible. The second FIR on the basis of receipt of information in respect of same cognizable offence or the same occurrence or incident giving rise one or more cognizable offences is not permissible. It is also settled that the Courts are required to draw a balance between the fundamental rights of the citizens under Article 19 & 21 of the Constitution and expansive power of the police to investigate a cognizable offence. In a given case, second or successive FIR for same or connected cognizable offence alleged to have been committed in the course of the same transaction in respect of which earlier FIR is already registered, may furnish a ground for interference by the Court but where the FIRs are based upon the separate incident or similar or different offences or the subsequent crime is of such

magnitude that it does not fall within the ambit and scope of the earlier FIR then the second FIR can be registered. Where two incidents took place at different point of time or involve different person or there is no commonality and the purpose thereof is different and the circumstances are also different then there can be more than one FIR. The Court is required to see the circumstances of a given case indicating proximity of time, unity or proximity of case, continuity of action, commonality of purpose of the crime to ascertain if more than one FIR can be allowed to stand.

8. The Supreme Court in the matter of *T.T. Antony* (supra) after taking note of the provisions of Section 154 to 157, 162, 169, 170 and 173 of the Cr.P.C. and considering the issue of striking a balance between citizen's right under Article 19 and 21 of the Constitution and expansive power of police to make investigation, has held that there can be no second FIR and no fresh investigation on receipt of every subsequent information in respect of the same cognizable offence or same occurrence giving rise to one or more cognizable offences. It has further been held that after registration of the FIR under Section 154 of the Cr.P.C. in respect of commission of the cognizable offence, all such subsequent information is covered by Section 162 of the Cr.P.C. and that Officer Incharge of the Police Station has to investigate not merely the cognizable offence reported in the FIR but also other connected offences found to have been committed in the course of the same transaction or the same occurrence and file one or more reports provided in Section 173 of Cr.P.C.

9. The Supreme Court in the matter of *Upkar Singh vs. Ved Prakash & Others* (2004) 13 SCC 292 has clarified and explained the judgments in the case of *T.T. Antony* (supra) and has held that the second complaint in regard to the same incident filed as a counter complaint is not prohibited under the Cr.P.C. It has been held that in *T.T. Antony's* case (supra) the legal right of an aggrieved person to file counter complaint has not been considered.

10. In the matter of *Rameshchandra Nandlal Parikh vs. State of Gujarat & Another* (2006) 1 SCC 732, it has been held that if subsequent complaints were not in relation to same offence or occurrence or did not pertain to same party as alleged in the first report then on that ground the subsequent complaint need not be quashed.

11. In the matter of *Nirmal Singh Kahlon vs. State of Punjab & others* (2009) 1 SCC 441 where the C.B.I. registered the second FIR considering the nature and extent of crime, the Hon'ble Supreme Court held that the C.B.I. detecting larger conspiracy not detected by local police is not precluded from lodging the second FIR.

12. In the matter of *Babubhai vs. State of Gujarat & others* (2010) 12 SCC 254 the Supreme Court has further clarified it that if two FIRs pertains to two different incidents/crimes, second FIR is permissible. Applying the test of sameness, it has been held that subsequent to registration of an FIR any further complaint in connection with the same or connected offence relating to the incident or incidents which are part of the same transaction is not permissible. Taking note of the earlier pronouncements on the issue, it has been held that:

> *"20. Thus, in view of the above, the law on the subject emerges to the effect that an FIR under Section 154 Cr.P.C. is a very important document. It is the first information of a cognizable offence recorded by the Officer In-Charge of the Police Station. It sets the machinery of criminal law in motion and marks the commencement of the investigation which ends with the formation of an opinion under Section 169 or 170 Cr.P.C., as the case may be, and forwarding of a police report under Section 173 Cr.P.C. Thus, it is quite possible that more than one piece of information be given to the Police Officer In- charge of the Police Station in respect of the same incident involving one or more than one cognizable offences. In such a case, he need not enter each piece of information in the Diary. All other information given orally or in writing after the commencement of the investigation into the facts mentioned in the First Information Report will be statements falling under Section 162 Cr.P.C.*
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> *21. In such a case the court has to examine the facts and circumstances giving rise to both the FIRs and the test of sameness is to be applied to find out whether both the FIRs relate to the same incident in respect of the same occurrence or are in regard to the incidents which are two or more parts of the same transaction. If the answer is affirmative, the second FIR is liable to be quashed. However, in case, the contrary is proved, where the version in the second FIR is different and they are in respect of the two different incidents/crimes, the second FIR is permissible. In case in respect of the same incident the accused in the first FIR comes forward with a different version or counter claim, investigation on both the FIRs has to be conducted. "*

13. In the matter of *Amitbhai Anilchandra Shah* (supra), Hon'ble Supreme Court has considered the applicability of 'consequence test' as laid down in the case of *C. Muniappan & others vs. State of Tamil Nadu* (2010) 9 SCC 567 and has held that there can be no fresh investigation on receipt of every subsequent information in respect of the same cognizable offence or the same occurence or incident giving rise to one or more cognizable offence. It has further been held that the second FIR is permissible in the case of cross cases and it is also permissible if the offence disclosed does not form part of the first FIR or it cannot be said to be part of the same transaction as covered by the first FIR or cannot be said to be arising as a consequence of the offence covered by the first FIR.

14. In the matter of *Awadesh Kumar Jha @ Akhilesh Kumar Jha vs. State of Bihar* (2016) 3 SCC 8, it has been held that if the substance of allegation in the second FIR is different from the first FIR and the second FIR relates to different transaction then the second FIR can be maintained.

15. In the matter of *Chirag M. Pathak & others vs. Dollyben Kantilal Patel & others* (2018) 1 SCC 330 in a case where six FIRs were registered in different police stations and the ground was raised that all the FIRs are based on identical facts, the Hon'ble Supreme Court held that the six cooperative societies were different, their members were different, their area of operation was different, the lands which were sold/transferred were also different in different area, the party to whom the land was sold was different. The totality of factual allegations constitutes commission of several offences in relation to every cooperative society, hence, the FIRs were not overlapping and no case for quashing the FIR was made out.

16. In the matter of *Lalu Prasad Yadav* (supra), the defalcations were from different treasury for different financial year, amount involved was different, fake vouchers/allotment letters/supply orders were prepared with the help of different sets of accused persons, the Supreme Court has held that the separate trials are required to be conducted. It has further been clarified that 'same offence' is different from 'same kind of offence' and has held that if 'same kind of offence' was committed multiple times then each time it constitutes a separate offence and therefore accused can be tried in different trials. It has also been clarified that even if the modus operandi was same that would not make it a single offence when offences were different. The Supreme Court in the said case has held as under:

> *"42. We are unable to accept the submissions raised by learned senior counsel. Though there was one general charge of conspiracy, which was allied in nature, the charge was qualified with the substantive charge of defalcation of a particular sum from a particular treasury in particular time period. The charge has to be taken in substance for the purpose of defalcation from a particular treasury in a particular financial year exceeding the allocation made for the purpose of animal husbandry on the basis of fake vouchers, fake supply orders etc. The sanctions made in Budget were separate for each and every year. This Court has already dealt with this matter when the prayers for amalgamation and joint trial had been made and in view of the position of law and various provisions discussed above, we are of the opinion that separate trials which are being made are in accordance with provisions of law otherwise it would have prejudiced the accused persons considering the different defalcations from different treasuries at different times with different documents. Whatever could be combined has already been done. Each defalcation would constitute an independent offence. Thus, by no stretch, it can be held to be in violation of Article 20(2) of the*

Constitution or Section 300 Cr.P.C. Separate trials in such cases is the very intendment of law. There is no room to raise such a grievance. Though evidence of general conspiracy has been adduced in cases which have been concluded, it may be common to all the cases but at the same time offences are different at different places, by different accused persons. As and when a separate offence is committed, it becomes punishable and the substantive charge which has to be taken is that of the offence under the P.C. Act etc. There was conspiracy hatched which was continuing one and has resulted into various offences. It was joined from time to time by different accused persons, so whenever an offence is committed in continuation of the conspiracy, it would be punishable separately for different periods as envisaged in section 212(2), obviously, there have to be separate trials. Thus it cannot be said to be a case of double jeopardy at all. It cannot be said that for the same offence the accused persons are being tried again.

50. The modus operandi being the same would not make it a single offence when the offences are separate. Commission of offence pursuant to a conspiracy has to be punished. If conspiracy is furthered into several distinct offences there have to be separate trials. There may be a situation where in furtherance of general conspiracy, offences take place in various parts of India and several persons are killed at different times. Each trial has to be separately held and the accused to be punished separately for the offence committed in furtherance of conspiracy. In case there is only one trial for such conspiracy for separate offences, it would enable the accused person to go scotfree and commit number of offences which is not the intendment of law. The concept is of 'same offence' under Article 20(2) and Section 300 Cr.PC. In case distinct offences are being committed there has to be independent trial for each of such offence based on such conspiracy and in the case of misappropriation as statutorily mandated, there should not be joinder of charges in one trial for more than one year except as provided in section 219 . One general conspiracy from 1988 to 1996 has led to various offences as such there have to be different trials for each of such offence based upon conspiracy in which different persons have participated at different times at different places for completion of the offence. Whatever could be combined has already been done. Thus we find no merit in the submissions made by learned senior counsel appearing on behalf of accused persons. "

17. The High Court of Judicature at Hyderabad in WP. No.21487/18 (supra) in this regard has held that:

"27. The ruling of the Supreme Court in State of Jharkhand vs. Lalu Prasad Yadav (supra) wherein a distinction has been made of the "same offence" with that of "same kind of offence" and has given in categorical finding that if "same kind of offence" was committed multiple times, each

time constitutes a separate offence. In the instant case, the petitioner and its promoters alleged to have committed "same kind of offence" involving different banks with same kind of modus operandi and hence the acts of the petitioner and its promoters constitute a different and distinct offence and consequently multiple FIRs are maintainable based on the written complaints of the consortium of banks. Though the transaction was through consortium of banks and appraisal of the project may be common, it would be only for procedural convenience of the lending banks, but each of the aggrieved bank of the consortium lodged a written complaint in respect of fraud played on them insofar as the amounts advanced by it and; in such a situation the principle of double jeopardy, as envisaged in Article 20 (2) of the Constitution is in-applicable to the case of the petitioner. It is settled proposition of law that the scope of civil and criminal proceedings and the standard of proof required in both the matters is different and distinct. Whereas in civil proceedings matter can be decided on the basis of probabilities, the criminal case has to be decided by adopting the standard of proof of "beyond reasonable doubt." In a given case, civil proceedings and criminal proceedings can proceed simultaneously maintained. (see Devendra vs. State of Uttar Pradesh & P. Swaroopra Rani vs. M. Hari Narayana. The case on hand is not an exception and mere pendency of the proceedings in OA filed by the consortium of banks will not absolve the petitioner and its promoters of the penal provisions. The Crl.P.No.6473 of 2017 and batch filed by the petitioner and its promoters to quash FIR No.05/2017 (2nd FIR) was dismissed by this Court, relevant portion thereof, reads as under:-

> *"As discussed above, the accused in F.I.R.No.05 of 2017 of Central Bureau of Investigation, Bank Securities and Frauds Cell, Bangalore are different from the F.I.R.No.02 of 2015. In both the complaints, there is only two common accused. All the more, in F.I.R.No.02 of 2015, the transaction covered by the present complaint was not investigated into though made an allegation against the accused therein about the commission of fraud against the respondent No.2 herein. Therefore, on the principle of sameness, the Court cannot quash the proceedings by exercising power under Section 482 of Cr.P.C. Even as per the principles rendered in various prospective pronouncements of Apex Court referred supra, 2ndF.I.R. is maintainable in certain circumstances, which I stated above. Consequently, the contention of the counsel for the petitioners cannot be sustained, which is based on "Babubhai v. State of Gujarat " "Awadesh Kumar Jha Alias Akhilesh Kumar Jha v. State of Bihar" "T.T.Antony v. State of Kerala" (referred supra) and the judgment of this Court rendered in "Akbaruddin Owaisi v.*

Government of A.P. " (referred supra) as the principle laid down in " T.T.Antony vs. State of Kerala " was distinguished by the Full Bench of Apex Court in "Upkar Singh vs. Ved Prakash" (referred supra). Therefore, on the ground of "sameness" I am unable to quash the proceedings in F.I.R.No.05 of 2017 on the file of Central Bureau of Investigation, Bank Securities and Frauds Cell, Bangalore."

Counsel for the petitioners has placed heavy reliance upon the judgment of the Supreme Court in the case of (2020) 14 SCC 12 (*Arnab Ranjan Goswami vs. Union of India and others*) but that was a case where multiple FIRs were registered arising out of the same cause of action in different States. Hence, it was held that filing of such multiple FIR causes intervention into petitioner's right as a citizen to fair treatment under Article 14 and freedom to conduct independent portryal (sic : portrayal) of views under Article 19 (1)(a), but that is not so in the present case because in the present case defalcation of amount in respect of each course and category of person has given separate cause of action. It is also worth noting that had the separate FIRs been registered in respect of each students of same course and category then it could be said to be a case of multiple FIRs for same offence but that is not so in the present case as the different FIRs are for different category of students and for different courses and there is no repeat FIR for same category of student with same course.

18. Thus, it is settled that subsequent FIRs for different offences committed in the course of same transaction or offences arising as a consequence of prior offence is not permissible but the second complaint in regard to the same incident filed as a counter complaint as also the second FIR for the same nature of offence against same accused persons lodged by different person or containing the different allegation is permissible.

19. In the present case, it is noticed that the petitioners had allegedly submitted forged list of students of SC, ST and OBC category in respect of the different courses i.e. Health Inspector, X-Ray, Homeopathy Compounder, Ayurvedic Compounder, Medical Lab Technology (CMNT). The chart below reflects that each FIR is for different set of students and separate course and different defalcation.

S. No.	Crime No.	Caste and Course of Victims
1	98/2015	Scheduled Caste (SC) - Health Inspector
2	99/2015	SC- X-Ray
3	100/2015	SC- Homeopathy Compounder
4	101/2015	SC- Ayurvedic Compounder
5	148/2015	OBC - Ayurvedic Compounder
6	149/015	OBC - Homeopathy Compounder

7	150/2015	OBC - Certificate in Medical Lab Technology (CMLT)
8	151/2015	OBC - Health Inspector
9	152/2015	OBC - X-Ray
10	195/2015	ST - Homeopathy Compounder
11	196/2015	ST - Health Inspector
12	197/2015	ST - Ayurvedic Compounder
13	198/2015	ST - CMLT

The details of the students in each of the category and course are different. The amount involved in respect of each of the category and course is also different. Nothing has been pointed out to refute the submission of counsel for the State that even the witnesses in each of the case are different. Though the different FIRs reveal that the same kind of offence has been registered against the petitioners for different courses and categories of students but they are not the same offence or the offence in the same transaction. The subsequent FIRs do not arise as a consequence of allegations made in the first FIR. Hence, the test of 'sameness' and the test of 'consequence' is not satisfied in the present case.

20. That apart, it is also noticed that the impugned FIR as well as the first FIR in Crime No.98/2015 was registered against the petitioners in the year 2015, thereafter the investigation had continued but at no point of time the petitioners had raised any objection or had taken any action for clubbing of these FIRs. Now the investigation is complete and it is pointed out by the counsel for the State that the challan is ready and the same will be filed in the shortwhile. The petitioners have approached at a belated stage by filing the present petition on 26.03.2021, therefore at this stage no such relief can be granted. Now the petitioners will have remedy to make a prayer before the Trial Court for common trial under Section 220 of the Cr.P.C., if case for the same is made out.

21. Thus, in view of the judgments in the case of *Nandlal Jaiswal* (supra) and *Shankara Cooperative Housing Society Ltd.* (supra) as also *Maharashtra State Road Transport Corporation* (supra), the petitioners are not entitled for any relief in this writ petition on account of the unexplained delay and latches in approaching this Court. With the delay now circumstances have changed.

22. Hence, the writ petition is dismissed.

Petition dismissed

I.L.R. [2021] M.P. 1369 (DB)
WRIT PETITION

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

WP No. 7865/2021 (PIL) (Jabalpur) decided on 9 June, 2021

GRAM PANCHAYAT DHOOMA …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

(Along with WP No. 8517/2021)

A. Constitution – Article 226 – Protection of Public Land – Illegal Encroachments – **Chief Secretary, Government of M.P. directed to issue necessary notification for notifying a permanent body designated as Public Land Protection Cell (PLPC) in every district with Collector as its head and a Tehsildar as its Member Secretary and other revenue officers as its Members and it shall be as per guidelines issued by Apex Court – Complaint regarding encroachment over public land in rural area can be made to such authorities, which shall be responsible for causing enquiry and taking expeditious action for removal of encroachments so as to protect public land and appropriate penal action be also taken against trespassers. (Para 6 to 8)**

क. संविधान – अनुच्छेद 226 – सार्वजनिक भूमि का संरक्षण – अवैध अधिक्रमण – मुख्य सचिव, म.प्र. शासन को प्रत्येक जिले में सार्वजनिक भूमि संरक्षण प्रकोष्ठ (पी.एल.पी.सी.) के रूप से नामनिर्दिष्ट एक स्थाई निकाय अधिसूचित करने के लिए आवश्यक अधिसूचना जारी करने हेतु निदेशित किया जाता है जिसके प्रमुख कलेक्टर और सदस्य–सचिव तहसीलदार और अन्य राजस्व अधिकारीगण उसके सदस्य होंगे तथा यह सर्वोच्च न्यायालय द्वारा जारी दिशा निर्देशों के अनुसार होगा – ग्रामीण क्षेत्र में सार्वजनिक भूमि पर अधिक्रमण के संबंध में उक्त प्राधिकारीगण को शिकायत की जा सकती है, जो सार्वजनिक भूमि के संरक्षण हेतु जांच करने और अधिक्रमण हटाने के लिए त्वरित कार्रवाई करने के लिए उत्तरदायी होंगे और अतिचारियों के विरूद्ध उचित दण्डात्मक कार्रवाई भी की जाएगी।

B. Constitution – Article 226 – Encroachments and Regularization – **Held – Apex Court concluded that long duration of illegal encroachment/ occupation of land or huge expenditure in making constructions thereon or political connections of trespassers are no justification for regularizing such illegal occupation – Removal of encroachment on such land is a rule and regularization an exception and that too in extremely limited cases which only the government can do by appropriate notification and no other authority. (Para 7)**

ख. संविधान – अनुच्छेद 226 – अधिक्रमण और नियमितीकरण – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया है कि लंबी अवधि तक भूमि पर अवैध अधिक्रमण/अधिभोग या उस पर निर्माण करने में अत्याधिक खर्च या अतिचारियों के राजनीतिक संबंध, उक्त अवैध अधिभोग को नियमित करने के कारण नहीं हैं – उक्त भूमि पर से अधिक्रमण को हटाना नियम है और नियमितिकरण एक अपवाद है एवं वह भी अत्यंत सीमित प्रकरणों में जो समुचित अधिसूचना द्वारा केवल सरकार कर सकती है तथा कोई अन्य प्राधिकारी नहीं कर सकता।

Case referred:

(2011) 11 SCC 396.

Shitala Prasad Tripathi, for the petitioner in WP No. 7865/2021.
Brahmadatt Singh, G.A. for the State in WP No. 7865/2021.
Kamal Bhan Vishwakarma, for the petitioner in WP No. 8517/2021..
Ashish Anand Bernard, Dy. A.G. for the State in WP No. 8517/2021.

O R D E R

The Order of the Court was passed by :

MOHAMMAD RAFIQ, CHIEF JUSTICE :- These two Writ Petitions have been filed as Public Interest Litigation with a similar grievance about the encroachment on the public land seeking a direction to the respondent - State authorities to remove such encroachment and restore the public land to its original position.

2. W.P.No. 7865/2021 (PIL) has been filed by the Gram Panchayat Dhooma through its Sarpanch Smt. Gulsam Bai, with regard to land of Khasra No. 491 Area 0.78 hectare; Khasra No. 492/1 Area 3.22 hectare, Khasra No. 90 area 9.30 hectare, Khasra No. 410/1 area 0.82 hectare, Khasra No. 411 area 0.82 hectare, Khasra No. 499/4 area 0.17 hectare, Khasra No. 469 area 0.02 hectare, Khasra No. 464 area 0.17 hectare, Khasra No. 670 area 0.20 hectare, Khasra No. 383 area 0.30 hectare, Khasra No. 50 area 0.30 hectare and Khasra No. 141 area 9.9 hectare situated at Resham Kendra Village Dhooma, Patwari Halka No. 15, R.N.M. Dhooma, Tehsil Lakhnadoon, District Seoni (M.P.).

3. According to the petitioner all the aforementioned parcels of the land fall within the jurisdiction of Gram Panchayat Dhooma. Since these plots of land are appurtenant to National Highway No.7 and are having commercial utility, several persons from outside villages have raised *Kachcha* houses / huts thereupon and started living there. Few local persons have also made illegal encroachment and constructions by use of stones and *moram.* The Gram Panchayat periodically takes the steps to remove the encroachment but the trespassers again occupied the land. Gram Panahcyat (sic : Panchayat) passed a resolution on 4/10/2018 by unanimous vote for removing these encroachments and submitted application

before respondent No.2 -Collector, Seoni and respondent No.3 - Sub-Divisional Officer, Lakhnadon requesting them to remove the encroachments from the public land, but no action has been taken. In these circumstances, the Gram Panchayat by resolution dated 4/6/2019 authorised the Sarpanch to file the present Public Interest Litigation. Reliance has been placed on the judgment of the Supreme Court in *Jagpal Singh and others Vs. State of Punjab and others* reported in (2011) 11 SCC 396 and it was argued that the State Government has in compliance of this judgment of the Supreme Court on 18/3/2011 issued a Circular to all the Divisional Commissioner, Commissioner Land Records and Settlement and all the Collectors for removal of illegal encroachments from the public land and restore possession of all such public land to the Gram Panchayat but this Circular has not been effectively implemented.

4. W.P.No. 8517/2021 (PIL) has been filed by Raghvendra Pratap Singh, resident of Village & Post Ganjan Tehsil Rampur Baghelan, District Satna. It is stated therein that the petitioner is aggrieved by the inaction on the part of the State authorities in not being able to remove the encroachments over the Government land bearing Khasra No. 458 and 459, situated at Village Ganjan Tehsil Rampur Baghelan, District Satna. The land in question has been recorded as the land of pond in revenue record. Water of such pond is being used by the villagers for the last more than 50 years for their household purposes as well as for their cattle. The land has always been recorded as pond in the revenue records of the Government but now large number of encroachments have come up on the land. Some of the encroachers have constructed boundary walls and houses. These people have protection of political persons and, therefore, the District Administration is not taking any interest in removal of their encroachments. It is argued that the petitioner submitted a representation on 17/11/2020 and thereafter another representation on 11/1/2021 to the Collector, Satna, with the request that the land of pond / *talab* should be freed from the trespassers and all the encroachments should be removed. However, no action has been taken by the authorities.

5. This Court is inundated with large number of writ petitions, styled as public interest litigation, from almost all the Districts of the State, with allegations of encroachment over the 'nistar land' / 'charnoi' / 'gocher' / 'pasture land' / land of 'pond', 'talab'/ 'river' / 'river bed' / 'public way' / 'shamshan' / 'kabristan' etc. In all such petitions, common allegation is that despite repeated complaints / representations to the concerned revenue officers, no steps are taken by them to remove the encroachment. This results in number of writ petitions being filed by the complainants / representationists before this Court. This Court has been passing orders in such matters requiring the respective District Collectors and other revenue authorities to examine the factual content of the allegations and take steps to remove the encroachments so as to secure such land.

6. In order therefore to provide a State wide solution to this ever persisting problem, we deem it appropriate to direct the Chief Secretary of the State to devise a permanent mechanism, which should be functional in every district of the State where the concerned District Collector should be required to periodically notify for the information of the general public to lodge the complaints / representations with regard to such encroachments with a specially designated Public Land Protection Cell (for short 'PLPC') for rural areas. The PLPC should be headed by District Collector and function under his direction and supervision with an officer of the rank of Tehsildar as its Member Secretary and such other Officers as its Members as the Government may deem fit to nominate. The PLPC shall get such complaints / representations enquired into by deputing concerned Sub Divisional Officer / Tehsildar / Naib Tehsildar so as to verify whether or not such encroachments have actually taken place on public land. If the allegations are found to be substantiated, appropriate steps in accordance with law be immediately taken for removal of the encroachments and appropriate penal action be also taken against the trespassers. The complaints / representations received in the PLPC should be decided by passing speaking order, informing the respective complainant / representationist about the action taken. This would obviate the necessity of such complainants/representationists approaching this Court directly by way of public interest litigation. If this permanent mechanism is put in place, this Court would not be required to directly entertain such public interest litigation and would do so only in the event of inaction on the part of the concerned PLPC.

7. The PLPC aforementioned shall also keep in view the guidelines issued by the Supreme Court in *Jagpal Singh & Others Vs. State of Punjab & Others*, (2011) 11 SCC 396 wherein all the State Governments of the country have been directed to prepare scheme for eviction of illegal / unauthorised occupants of the Gram Sabha / Gram Panchayat / Poramboke / Shamlat land which should then be restored to the Gram Sabha / Gram Panchayat for the common use of residents of the village. The said scheme should provide for the speedy eviction of such illegal occupants, after giving them a show cause notice and a brief hearing. The Supreme Court further held therein that long duration of the illegal encroachment / occupation of land or huge expenditure in making construction thereon or political connections of trespassers are no justification for regularising such illegal occupation. Regularisation should be permitted only in exceptional cases where lease has been granted under some government notification e.g. to landless labourers or members of Scheduled Castes / Scheduled Tribes or where there is already a school, hospital, dispensary, 'shamshan', 'kabristan' or other public utility of the like nature on the land. Observations of the Supreme Court in *Jagpal Singh* (supra) thus leaves no manner of doubt that removal of encroachment on all such land is a rule and regularisation an exception and that too in extremely

limited number of cases, which only the Government can do by appropriate notification and no other authority.

8. A copy of this order be forwarded to the Chief Secretary of the State of Madhya Pradesh, Bhopal for issuance of necessary notification for notifying the permanent body designated as Public Land Protection Cell (PLPC) in every District with the District Collector as its head and a Tehsildar as its Member Secretary, apart from other revenue officers as the Members. This should be given due publicity for information of all the citizens that complaint with regard to encroachment over public land in the rural areas can be made to such authorities which shall be responsible for causing an enquiry into such complaint to be made and taking expeditious action for removal of encroachments so as to protect the public land.

9. With the aforesaid both the writ petitions stand disposed of.

10. A copy of this order be placed in the record of W.P.No.8517/2021.

Order accordingly

I.L.R. [2021] M.P. 1373 (DB)
APPELLATE CRIMINAL

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

CRA No. 474/2016 (Indore) decided on 6 April, 2021

SONU JAIN …Appellant

Vs.

STATE OF M.P. …Respondent

(Along with CRA Nos. 616/2016 & 644/2016)

***A. Penal Code (45 of 1860), Section 302/34 & 294 – Appreciation of Evidence* – Held – Single blow by knife – Injury caused to vital organ namely right lung and the rib, sufficient to cause death – It shows the intention of appellant to cause death – No explanation given by appellants about human blood found on their clothes – No grave or sudden provocation established – Prosecution established its case beyond reasonable doubt – Conviction upheld – Appeals dismissed. (Paras 14, 16, 23 to 29, 41 & 42)**

क. दण्ड संहिता (1860 का 45), धारा 302/34 व 294 – साक्ष्य का मूल्यांकन – अभिनिर्धारित – चाकू द्वारा एकल वार – महत्वपूर्ण अंग अर्थात् दांया फेफड़ा और पसली में चोट कारित की गई, मृत्यु कारित करने हेतु पर्याप्त – यह हत्या कारित करने का अपीलार्थी का आशय दर्शाता है – अपीलार्थीगण द्वारा उनके कपड़ों में पाये गये मानव रक्त के बारे में कोई स्पष्टीकरण नहीं दिया गया – कोई गंभीर और अचानक प्रकोपन स्थापित

नहीं होता – अभियोजन ने अपना प्रकरण युक्तियुक्त संदेह से परे स्थापित किया – दोषसिद्धि कायम – अपीलें खारिज।

B. Penal Code (45 of 1860), Section 302 & 304 Part II – Single Blow **– Held – As a rule of thumb it cannot be said that in no case of single blow or injury, accused can be convicted u/S 302 IPC – In cases of single injury, facts and circumstances of each case have to be considered to conclude whether accused be convicted u/S 302 or u/S 304 Part II – Relevant factors to be considered as laid down by Apex Court, enumerated – Further held, these factors are illustrative and not exhaustive in nature – Other relevant factors can also be taken into consideration. (Para 18)**

ख. दण्ड संहिता (1860 का 45), धारा 302 व 304 भाग II – एकल वार – अभिनिर्धारित – एक सामान्य नियम के रूप में यह नहीं कहा जा सकता कि एकल वार अथवा चोट के किसी भी प्रकरण में, अभियुक्त को भारतीय दण्ड संहिता की धारा 302 के अंतर्गत दोषसिद्ध नहीं किया जा सकता – एकल चोट के प्रकरणों में, यह निष्कर्षित करने हेतु प्रत्येक प्रकरण के तथ्यों और परिस्थितियों पर विचार किया जाना चाहिए कि क्या अभियुक्त को धारा 302 या धारा 304 भाग II के अंतर्गत दोषसिद्ध किया जाए – सर्वोच्च न्यायालय द्वारा प्रतिपादित सुसंगत कारकों जिन पर विचार किया जाना चाहिए, प्रगणित – आगे अभिनिर्धारित, ये कारक उदाहरणात्मक हैं और विस्तृत स्वरूप के नहीं हैं – अन्य सुसंगत कारक पर भी विचार किया जा सकता है।

C. Penal Code (45 of 1860), Section 302 – "Spur of Moment" **– Held – Hot altercation between deceased and appellants – Deceased slapped appellant Santosh – Appellants left the place and after almost half an hour, appellants rushed back and Santosh with the aid of other appellants, gave single knife blow to deceased – Assault did not take place during hot altercation, thus, such single knife blow is not outcome of "spur of moment". (Para 21)**

ग. दण्ड संहिता (1860 का 45), धारा 302 – ''उत्तेजक क्षण'' – अभिनिर्धारित – मृतक और अपीलार्थीगण के मध्य कहा–सुनी – मृतक ने अपीलार्थी संतोष को थप्पड़ मारा – अपीलार्थीगण उस स्थान से चले गये और लगभग आधा घंटे पश्चात्, अपीलार्थीगण वापस पहुंचे और संतोष ने अन्य अपीलार्थीगण की सहायता से, मृतक पर चाकू से एक वार किया – हमला कहा–सुनी के दौरान नहीं हुआ, अतः, चाकू द्वारा उक्त एक वार ''उत्तेजक क्षण'' का परिणाम नहीं है।

D. Penal Code (45 of 1860), Section 302 – Nature of Injury, Weapon of Crime & Cause of Death **– Held – The nature of injury, the gravity and dimension shows that knife was a deadly weapon otherwise the rib of deceased could not have been cut and injury could not have been so deep to reach upper portion of right lung – Injury was sufficient in ordinary course of nature to cause death. (Paras 14, 23 & 28)**

घ. दण्ड संहिता (1860 का 45), धारा 302 – चोट का स्वरूप, अपराध का शस्त्र व हत्या का कारण – अभिनिर्धारित – चोट का स्वरूप, गंभीरता और आकार यह दर्शाता है कि चाकू एक घातक शस्त्र था अन्यथा मृतक की पसली को काटा नहीं जा सकता था और चोट इतनी गहरी नहीं हो सकती थी कि दाहिने फेफड़े के ऊपरी हिस्से तक पहुंच सके – चोट का स्वरूप साधारण अनुक्रम में हत्या कारित करने हेतु पर्याप्त था।

E. Penal Code (45 of 1860), Section 300, Exception 4 – Requirements – Sudden Provocation **– Held – Apex Court concluded that to invoke this exception, four requirements must be satisfied namely (i) there was a sudden fight, (ii) there was no premeditation, (iii) act was done in heat of passion and, (iv) assailant had not taken any undue advantage or acted in cruel manner – No sudden provocation in present case, appellants acted in a cruel manner depriving them from taking shelter of Exception 4 to Section 300 IPC – It is immaterial whether appellant Santosh gave single blow or multiple blow.**

(Paras 21, 27 & 28)

ङ. दण्ड संहिता (1860 का 45), धारा 300, अपवाद 4 – अपेक्षाएँ – अचानक प्रकोपन – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया है कि इस अपवाद का अवलंब लेने हेतु, चार अपेक्षाओं की पूर्ति की जानी चाहिए **(i)** अचानक लड़ाई हुई हो, **(ii)** कोई पूर्वचिंतन नहीं, **(iii)** कृत्य भावावेश में किया गया हो, तथा **(iv)** हमलावर ने कोई अनुचित लाभ न उठाया हो या क्रूर ढंग से कृत्य न किया हो – वर्तमान प्रकरण में कोई अचानक प्रकोपन नहीं था, अपीलार्थीगण ने क्रूर तरीके से कृत्य किया जो उन्हें भा.दं.सं. की धारा 300 के अपवाद 4 का आश्रय लेने से वंचित करता है – यह तत्वहीन है कि क्या अपीलार्थी संतोष ने एक वार या अनेक वार किये।

F. Penal Code (45 of 1860), Section 300, Exception 1 – Grave & Sudden Provocation **– Held – What would constitute grave and sudden provocation, which would be enough to prevent the offence from amounting to murder, is a question of fact – Provocation is an external stimulus which can result into loss of self control – Provocation must be such as will upset not merely a hasty, hot tempered and hyper sensitive person but also a person with clam nature and ordinary sense.** **(Paras 24 to 28)**

च. दण्ड संहिता (1860 का 45), धारा 300, अपवाद 1 – गंभीर व अचानक प्रकोपन – अभिनिर्धारित – क्या गंभीर और अचानक प्रकोपन गठित करेगा, जो अपराध को हत्या की कोटि में आने से निवारित करने हेतु पर्याप्त होगा, यह तथ्य का प्रश्न है – प्रकोपन एक बाहरी प्रोत्साहन है जिसके परिणामस्वरूप आत्म नियंत्रण की हानि हो सकती है – प्रकोपन ऐसा होना चाहिए जो न केवल एक उतावले, गर्म स्वभाव और अतिसंवेदनशील व्यक्ति को बल्कि एक शांत स्वभाव और सामान्य विवेक वाले व्यक्ति को भी अशांत कर दे।

G. Penal Code (45 of 1860), Section 300, Exceptions – Doctrine of Provocation **– Held – Application of doctrine of provocation shows that exception to Section 300 is available to the normal person behaving normally in a given situation – There was no such altercation where a normal man can**

loose his ordinary sense – Knife blow after half an hour from altercation do not attract any of exceptions mentioned u/S 300 IPC. (Para 27 & 28)

छ. दण्ड संहिता (1860 का 45), धारा 300, अपवाद – प्रकोपन का सिद्धांत – अभिनिर्धारित – प्रकोपन के सिद्धांत का प्रयोग यह दर्शाता है कि धारा 300 का अपवाद किसी भी परिस्थिति में सामान्य रूप से व्यवहार करने वाले सामान्य व्यक्ति के लिए उपलब्ध है – ऐसी कोई कहा–सुनी नहीं थी जहां एक साधारण व्यक्ति अपना सामान्य विवेक खो दे – कहा–सुनी के आधे घंटे पश्चात् चाकू से वार करना, भा.दं.सं. की धारा 300 में उल्लिखित किन्हीं भी अपवादों को आकर्षित नहीं करता।

***H. Penal Code (45 of 1860), Sections 85, 86 & 302 – Influence of Liquor – Burden of Proof* – Held – Defence failed to establish that degree of intoxication was such because of which they could not prevent themselves from committing the said crime – Drinking is purely their own act and they cannot be permitted to take advantage of their own wrong. (Paras 29 to 37)**

ज. दण्ड संहिता (1860 का 45), धाराएँ 85, 86 व 302 – मदिरा का प्रभाव – सबूत का भार – अभिनिर्धारित – बचाव पक्ष यह स्थापित करने में विफल रहा कि नशे की मात्रा इतनी थी जिसके कारण वे अपने आप को उक्त अपराध कारित करने से रोक नहीं सके – मदिरापान पूर्ण रूप से उनका स्वयं का कृत्य है और उन्हें उनके स्वयं के दोष का लाभ उठाने की अनुमति नहीं दी जा सकती।

***I. Criminal Procedure Code, 1973 (2 of 1974), Section 154 – FIR – Contents* – Held – Every omission is not a contradiction – Minor details which are not indicative in FIR are later on elaborated in Court and which do not in any way introduces a new facet of the case, is not fatal for prosecution – Variation in *dehati nalishi*/FIR and Court statement are not so grave which makes prosecution evidence brittle and untrustworthy. (Paras 38 to 41)**

झ. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 154 – प्रथम सूचना प्रतिवेदन – अंतर्वस्तु – अभिनिर्धारित – प्रत्येक लोप विरोधाभास नहीं है – मामूली विवरण जिन्हें प्रथम सूचना प्रतिवेदन में दर्शाया नहीं गया है, को बाद में न्यायालय में विस्तृत किया गया और जो किसी भी तरह से प्रकरण के एक नये पहलू को प्रस्तुत नहीं करते हैं, अभियोजन के लिए घातक नहीं है – *देहाती नालिशी*/प्रथम सूचना प्रतिवेदन और न्यायालय कथन में फेरफार इतने गंभीर नहीं थे जो अभियोजन साक्ष्य को कमजोर और अविश्वसनीय बनाता हो।

Cases referred:

(2017) 3 SCC 247, 2018 (3) MPLJ Criminal 23, 2019 SCC OnLine SC 1104, (1981) 3 SCC 331, (1990) Supp. SCC 682, (1992) Supp. 3 SCC 21, (1993) Supp. 1 SCC 554, (1997) SCC (Cri) 408, (1996) 10 SCC 668, (2009) 15 SCC 635, (2010) 6 SCC 457, 1941 (3) All E.R. 272 (HL), (1836) 173 ER 131 : 7 Car & P.

295, (1838) 173 ER 610: 8 Car., (1849) 4 Cox CC 55, AIR 1956 SC 488, 2006 (13) SCC 116, AIR 1960 MP 242, (2019) 12 SCC 326, (2003) 10 SCC 414, (2003) 11 SCC 367, (2010) 13 SCC 657.

Virendra Sharma, for the appellants.
A.S. Sisodia, G.A. for the respondent/State.

J U D G M E N T

The Judgment of the Court was delivered by :
SUJOY PAUL, J. :- These criminal appeals filed under Section 374 of the Cr.P.C are directed against the common judgment passed by learned 10th Sessions Judge, Ujjain in Sessions Trial No.556/14 decided on 23/02/2016.

2. The appellants are held guilty for the offence under section 302/34 and sentenced to undergo life imprisonment with fine of Rs.5000/- and in default of payment of fine, they shall further undergo five months RI. They are also held guilty for the offence under Section 294 of IPC and sentenced to undergo three months RI with fine of Rs.1000/- and in default of payment of fine, they shall further undergo one month RI.

3. As per prosecution story, a premises *(Ahata)* is situated at Nayi Sadak, Ujjain wherein liquor was being served to the customers. Deceased Kishore used to sit on the counter of said *"Ahata"*. On 16/08/2014 at around 7 PM, appellants Santosh, Jiwan and Sonu visited the *Ahata* and ordered liquor and other food items. Akash (PW- 4) served the food and liquor to them. Since all the accused persons were frequent visitors of *Ahata,* Vinod was acquainted with them. After consuming liquor and finishing the food, appellants approached Kishore Panchal, who was manning the counter. A dispute arose regarding payment because of which altercation took place between Santosh and deceased Kishore. Kishore slapped Santosh. All the accused persons left the place by using filthy language and saying that Kishore will face dire consequences. After 25-30 minutes, all the appellants visited the same *Ahata* and started using abusive language for Kishore Panchal. Jiwan and Sonu caught hold of Kishore and asked Santosh to assault him. In furtherance thereof, Santosh took out a knife and assaulted Kishore at his right side of the chest. Because of said attack, Kishore fell down. Vinod (PW-3) and Akash (PW-4) witnessed the incident and immediately approached Kishore. All the appellants fled away. Kishore was immediately taken to Govt. Hospital, Ujjain. The doctor declared him as dead.

4. In turn, Head Constable Dinesh Saxena was informed about the said incident because of which *"Merg* intimation" (Ex.P/20) was recorded. SHO Gopal Parmar (PW-10) visited the place of incident. He also visited Civil Hospital, Ujjain. He came to know from Vinod (PW-3) about the details of

incident which were reduced in writing in the shape of *"Dehati Nalishi"* (Ex.P/15). Consequently, Crime No.207/14 in FIR (Ex.P/21) was registered against the appellants.

5. During the investigation, Gopal Parmar (PW-10) prepared the *"panchnama"* of dead body. Postmortem was conducted. Spot map was prepared. Appellants were arrested. From the spot, bloodstained cotton, plain cotton and an old cycle of Santosh were recovered. The appellants were interrogated and their memorandum statements were recorded. During investigation, the bloodstained knife and clothes were recovered from appellants. In turn, said knife and bloodstained clothes were sent to FSL. Report of FSL was also obtained.

6. After completion of investigation, challan was filed. The matter was ultimately committed to the Court of Additional Sessions Judge for trial.

7. The appellants abjured the guilt. In their statements recorded under Section 313 of Cr.P.C. they stated that they have been falsely implicated and they are innocent. In support of their stand, Jitendra Lashkari (DW-1) was examined.

8. The Court below framed three issues and after recording the evidence and hearing the arguments, passed the impugned judgment whereby appellants were held guilty for committing offence under Sections 302/34 and 294 of IPC.

9. Shri Virendra Sharma, learned counsel for the appellants urged that necessary ingredients for attracting Section 302 of IPC are missing against appellant Santosh. To elaborate, it is submitted that there was no previous enmity between appellants and deceased Kishore Panchal. It was deceased, who slapped Santosh because of which said incident had taken place. The size of the knife was 4 & 1/2" only. Knife has a plastic handle. This knife cannot be said to be a deadly weapon. Appellant Santosh caused only one injury on the deceased. The appellants were under the influence of liquor. Hence, Court below committed an error in holding the appellants as guilty for committing offence under Section 302 of IPC. In the facts and circumstances of this case, at best Section 304 Part-II of IPC is attracted. In support of this submission, he placed reliance on (2017) 3 SCC 247- *(Arjun & Anr. vs. State of Chhatisgarh),* 2018 (3) MPLJ Criminal 23 - *Manoj @ Bablu vs. State of MP* and 2019 SCC OnLine SC 1104-*Khuman Singh vs. State of MP.*

10. By taking this Court to the *Dehati Nalishi* and FIR (Ex.P/15), learned counsel for the appellants strenuously urged that complainant stated while recording *dehati nalishi/*FIR that appellants Jiwan and Sonu caught hold of Kishore Panchal and Santosh gave the knife blow on him. It was pointed out that in the *Dehati Nalishi/*FIR, there is no specific mention that Kishore's hands were caught hold by appellant Jiwan and Sonu whereas in their Court statement, the witnesses have improved their stand by deposing that Kishore's hands were

caught hold by Sonu and Jiwan. This, as per appellants' counsel, it is a clear improvement which makes the statement of witness as unreliable. Similarly, it is urged that in the FIR and *Dehati Nalishi,* it was reported that appellants Sonu and Jiwan asked Santosh *"maar sale ko"* whereas in the Court statement Vinod Panwar (PW-3) deposed that Sonu and Jiwan asked Santosh *"jaanse maar do".* This is also a clear improvement and Court below has not taken note of omission of relevant words in the *Dehati Nalishi*/FIR.

11. Shri AS Sisodia, learned Govt. Counsel supported the impugned judgment.

12. The parties confined their arguments to the extent indicated above.

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

14. The Court below after recording the prosecution story and relevant documents which were gathered during investigation referred the statement of Dr. BB Purohit (PW-2), who conducted the postmortem of deceased Kishore. As per his statement, the Court below recorded a finding that the deceased was a healthy and robust male, aged about 50 years. His clothes were bloodstained. On the right side of chest, 2" below clavicle bone and sternal bone a wound of spindle size was found. The size of wound was 1 ½" long X ½" wide and its depth was up to chest cavity. The sides of wound were clean cut and regular. Wound gaping was available and clotted blood was found on the wound. It was found that third rib of right side of chest was cut by a sharp edged weapon. The doctor opined that death was homicidal in nature. The injury was caused by a sharp edged weapon like knife. The blow was very intensive because of which third rib was cut and the upper portion of right lung was also injured. In other words, the injury was caused even to the lung tissues which were sufficient for causing death. In the opinion of Dr. BB Purohit (PW-2), the reason of death was excessive bleeding and shock because of injury caused to vital organ namely right lung and the rib. He further deposed that injury caused was possible from the knife seized from Santosh.

15. The Court below found that eye witnesses Vinod (PW-3) and Akash (PW-4) supported the prosecution story. Human blood was found on the knife recovered from appellant Santosh.

16. The report of laboratory Ex.P/24 was considered by the Court below. As per this report (Ex.P/24), on the trouser of Santosh and deceased Kishore Panchal, bloodstains were found which were of 'A' group. The bloodstains of same blood group were found in the clothes of Jiwan and Santosh. The blood of same blood group was found on the knife (Article F) which was recovered from Santosh. Similarly, in the T-shirt of Jiwan and Santosh, human blood was found. They have

not given any explanation about human blood found on their clothes. The Court below after considering judgments of Supreme Court and this Court opined that it was obligatory on the part of appellants to explain regarding existence of human blood on their clothes.

17. The Court below opined that the incident of quarrel was not that grave because of which appellant could have used a deadly weapon (knife) to assault Kishore Panchal. With the aid of Section 34 of IPC, appellants Sonu and Jiwan were also held guilty because they caught hold of deceased and appellant Santosh assaulted him by a deadly weapon.

18. On several occasion, a question came up for consideration before Supreme Court whether single blow inflicted can be reason to attract Section 302 of IPC. [See *Gokul Parashram Patil v. State of Maharashtra* (1981) 3 SCC 331, *Gulshan Vs. State of Punjab* (1990 Supp. SCC 682, *Sreedharan Vs. State of Kerala* (1992) Supp. 3 SCC 21, *Guljar Hussain Vs. State of U.P.* (1993) Supp. 1 SCC 554, *Balaur Singh Vs. State of Punjab* (1997) SCC (Cri) 408 and *Mahesh Vs. State of M.P.* (1996) 10 SCC 668]. In *Gurmukh Singh Vs. State of Haryana* (2009) 15 SCC 635 it was held that as a rule of thumb it cannot be said that in no case of single blow or injury, accused can be convicted u/S.302 of IPC. In cases of single injury, the fact and circumstances of each case have to be taken into consideration before arriving at the conclusion whether the accused should be appropriately convicted u/S.302 of IPC or u/S.304 Part II of IPC. The Apex Court laid down relevant factors on the strength of which said decision was required to be taken which reads as under:-

> "(a) Motive or previous enmity;
>
> (b) Whether the incident had taken place on the spur of the moment;
>
> (c) The intention/knowledge of the accused while inflicting the blow or injury;
>
> (d) Whether the death ensued instantaneously or the victim died after several days;
>
> (e) The gravity, dimension and nature of injury;
>
> (f) The age and general health condition of the accused;
>
> (g) Whether the injury was caused without premeditation in a sudden fight;
>
> (h) The nature and size of weapon used for inflicting the injury and the force with which the blow was inflicted.
>
> (i) The criminal background and adverse history of the accused;
>
> (j) Whether the injury inflicted was not sufficient in the ordinary course of nature to cause death but the death was because of

shock;

(k) Number of other criminal cases pending against the accused;

(l) Incident occurred within the family members or close relations;

(m) The conduct and behaviour of the accused after the incident. Whether the accused had taken the injured/the deceased to the hospital immediately to ensure that he/she gets proper medical treatment ?"

19. These factors are illustrative and not exhaustive in nature. Other relevant factors can also be taken into consideration while granting an appropriate sentence to the accused.

20. As noticed, much emphasis is laid by learned counsel for appellants that appellants have no previous enmity with the deceased. Incident took place because of sudden quarrel. The weapon/knife is having plastic handle and its size was 4 ½" only. The appellants were under the influence of liquor and, therefore, no case u/S.302 of IPC is made out.

21. No previous enmity prior to the date of incident between appellants and deceased could be established. The pivotal question is whether the incident of knife blow had taken place on the spur of moment. The factual matrix of the present case shows that there was some altercation between the deceased and Santosh. However, during this altercation, the knife blow was not made. Indeed appellants left the place of quarrel and came back after 25-30 minutes. Appellant Santosh was armed with a sharp cutting weapon namely knife. In the case of *Khuman Singh* and *Arjun* (supra), the Supreme Court took note of the fact that the blow was made during quarrel between the parties. As noticed, in the instant case, during hot altercation which took place between deceased and Santosh, the incident of assault did not take place. After almost half an hour, the appellants rushed back to the place of quarrel and then Santosh with the aid of other appellants gave single blow to the deceased. Thus, judgment of *Arjun* and *Khumansingh* (supra) have no application in the peculiar facts and circumstances of this case. Interestingly, in both the cases namely *Khuman Singh* and *Arjun* (supra), the Apex Court considered *Exception 4* appended to Section 300 IPC and opined that to invoke this Exception, four requirements must be satisfied, namely; (i) there was a sudden fight; (ii) there was no premeditation; (iii) act was done in a heat of passion and; (iv) assailant had not taken any undue advantage or acted in a cruel manner.

22. In the case of *Manoj @ Bablu* (supra), the division bench of this court converted the offence u/S.302 IPC to Sec. 304-II of IPC. In the said case, the appellant and deceased Mahavir had no previous enmity. One gun shot was fired by appellant at deceased Mahavir on his shoulder resulting into his death because

of excessive bleeding. Since appellant was found to be in a bad mood, without any intention to cause death of Mahavir, he had only knowledge that firing of gun shot may cause his death, this Court converted the offence from Sec.302 to 304-II of IPC. Shri Sharma, learned counsel for appellant placed heavy reliance on this judgment. This point raised by appellants counsel needs serious consideration.

23. At the cost of repetition, in our view, the incident had not taken place on the spur of moment. On the contrary, after almost a gap of half an hour, the deceased was subjected to injury. The gravity, dimension and nature of injury shows that the knife used in commission of crime was a deadly weapon otherwise the rib could not have been cut and injury could not have been so deep to reach upper portion of right lung. It was also clearly established that injury inflicted on Kishore was sufficient in the ordinary course of nature to cause death. In this backdrop, it is to be seen whether offence committed attracts Sec.302 of IPC or 304-II of IPC.

24. Section 300 IPC have five Exceptions wherein the culpable homicide will not fall within the ambit of *murder.* Under *Exception 1* an injury resulting into death of the person would not be considered as murder *when the offender has lost his self control due to the grave and sudden provocation.* The provision, in no uncertain terms, makes it clear by way of *explanation* provided that what would constitute grave and sudden provocation, which would be enough to prevent the offence from amounting to murder, *is a question of fact.* Provocation is an external stimulus which can result into loss of self control. Such provocation and resulted reaction needs to be measured from the attended circumstances. The provocation must be such as will upset not merely a hasty, hot tempered and hyper sensitive person, but also a person with calm nature and ordinary sense. What is sought by the law by creating the Exception is that to take into consideration situations wherein a person with *normal behaviour* reacting to given incidence of provocation. Thus, the protection extended by Exception is to the normal person acting normally in the given situation. [See. *Arun Raj Vs. Union of India* (2010) 6 SCC 457 (para16)].

25. The scope of 'doctrine of provocation' were stated by *Viscount Simon* in *Mancini Vs. Director of Public Prosecutions* 1941(3) All E.R 272 (HL). It was held as under:-

> "It is not all provocation that will reduce the crime of murder to manslaughter. Provocation, to have that result, must be such as temporarily deprives the person provoked of the power of self-control, as the result of which he commits the unlawful act which causes death. ... The test to be applied is that of the effect of the provocation on a reasonable man, as was laid down by the Court of Criminal Appeal in *R.* v. *Lesbini* [(1914) 3 KB 1116 (CCA)], so that an unusually excitable or pugnacious individual is not entitled to rely on provocation which would

not have led an ordinary person to act as he did. In applying the test, it is of particular importance (*a*) to consider whether a sufficient interval has elapsed since the provocation to allow a reasonable man time to cool, and *(b)* to take into account the instrument with which the homicide was effected, for to retort, in the heat of passion induced by provocation, by a simple blow, is a very different thing from making use of a deadly instrument like a concealed dagger. In short, the mode of resentment must bear a reasonable relationship to the provocation if the offence is to be reduced to manslaughter."

(emphasis supplied)

26. This view of *Viscount Simon* (supra) was quoted with profit by Supreme Court in *Arun Raj* (supra). Reference may be made to relevant paragraphs which read as under:-

"18. It is, therefore, important in the case at hand to consider the reasonable relationship of the action of the appellant of stabbing the deceased, to the provocation by the deceased in the form of abusing the appellant. At this stage, it would be useful to recall the relevant chain of events in brief to judge whether there was sufficient provocation and the criteria under the provision are satisfied to bring the offence under Exception 1. As is already stated, on the previous night of the incidence, there was an altercation between the appellant and the deceased, as the deceased had abused the appellant.

22. The first ingredient is easily solved by referring to the weapon used by the appellant to strike a knife-blow to the deceased. The appellant in this instance has used a kitchen knife. A kitchen knife with sharp edges is a dangerous weapon and it is very obvious that the appellant was aware that the use of such a weapon can cause death or serious bodily injury, that is, likely to cause death. As far as the second ingredient is concerned, the learned counsel for the appellant contended that the fact that there was one single blow struck, proves that there was no intention to cause death.

23. In support of the plea, reliance is placed on the decisions of this Court in *Bhera* v. *State of Rajasthan* [(2000) 10 SCC 225 : 2000 SCC (Cri) 1230], *Kunhayippu* v. *State of Kerala[*(2000) 10 SCC 307: 2000 SCC (Cri) 1374], *Masumsha Hasanasha Musalman* v. *State of Maharashtra* [(2000) 3 SCC 557 : 2000 SCC (Cri) 722], *Guljar Hussain* v. *State of U.P.* [1993 Supp (1) SCC 554: 1993 SCC (Cri) 354], *K. Ramakrishnan Unnithan* v. *State of Kerala[*(1999) 3 SCC 309: 1999 SCC (Cri) 410], *Pappu* v. *State of M.P.* [(2006) 7 SCC 391: (2006) 3 SCC (Cri) 283] and *Muthu* v. *State* [(2009) 17 SCC 433: (2007) 12 Scale 795]. A brief perusal of all these cases would reveal that in all these cases there was a sudden and instantaneous altercation which led to the accused inflicting a single blow to the deceased with a sharp weapon. Hence, there has

been conviction under Section 304 Part II as delivering a single blow with a sharp weapon in a sudden fight would not point towards intention to cause death. These cases are clearly distinguishable from the case at hand, purely on the basis of facts.

24. In the present case, there has been **no sudden altercation** which ensued between the appellant and the deceased. The deceased called the appellant "gandu" following which there was a heated exchange of words between the two, the day before the murder. The next day, however, the appellant concealed a kitchen knife in his lungi and went towards the cot of the deceased and struck the deceased a blow on the right side of the chest while the deceased was sleeping. The fact that the appellant waited till the next day, went on to procure a deadly weapon like a kitchen knife and then proceeded to strike a blow on the chest of the appellant when he was sleeping, points unerringly towards due deliberation on the part of the appellant to avenge his humiliation at the hands of the deceased. The nature of the weapon used and the part of the body where the blow was struck, which was a vital part of the body helps in proving beyond reasonable doubt the **intention of the appellant** to cause the death of the deceased. Once these ingredients are proved, **it is irrelevant whether there was a single blow struck or multiple blows."**

(emphasis supplied)

27. In para 23 of the judgment of *Arun Raj* (supra), the Apex Court took note of its previous judgments wherein single blow was made because of sudden and instantaneous altercation which led to the accused inflicting a single blow to the deceased. In cases where single blow is not made during the sudden altercation, but it is given after some time with a deadly weapon, the Apex Court opined that even use of kitchen knife for single blow clearly shows that it was used in a calculated manner to avenge his humiliation at the hands of deceased. After taking note of nature of weapon used on the vital part of body where blow was made shows the intention of appellant to cause the death of deceased. If we apply the *doctrine of provocation* aforesaid in the instant case, it will be clear that there was no such altercation because of which a normal man can loose his ordinary sense.

28. The application of *doctrine of provocation* shows that Exception to Sec.300 is available to the normal person behaving normally in a given situation. His blow after almost half an hour from altercation, by no stretch of imagination can be said to be covered by any of the *Exceptions* mentioned u/S.300 of IPC. In other words, heated altercation and slap on Santosh by the deceased didn't have the effect of temporarily depriving him of the power of self control. The resentment shown by appellants after half an hour does not have any reasonable relation with nature of provocation. Hence in our view, crime of murder cannot be reduced to manslaughter. Apart from this appellants definitely acted in a cruel

manner which deprives them from taking shelter of *Exception* 4. In this backdrop, it is totally immaterial whether appellant Santosh gave single blow or multiple blows. The 'doctrine of provocation' was not considered in the case of *Manoj @ Bablu* (supra) and, therefore, said judgment is distinguishable and cannot be pressed into service in the factual matrix of the present case.

29. Interference of this Court is also prayed for on the ground that the appellants were under the influence of liquor at the time of incident. This point also requires serious consideration. In *Rex* v. *Meakin* [(1836) 173 ER 131 : 7 Car & P. 295] *Baron Alderson* referred to the nature of the instrument as an element to be taken in presuming the intention in these words:

> *"However, with regard to the intention, drunkenness may perhaps be adverted to according to the nature of the instrument used. If a man uses a stick, you would not infer a malicious intent so strongly against him, if drunk, when he made an intemperate use of it, as he would if he had used a different kind of weapon; but where a dangerous instrument is used, which, if used, must produce grievous bodily harm, drunkenness can have no effect on the consideration of the malicious intent of the party. "*
>
> (emphasis supplied)

30. Patteson J., observed in *Regina* v. *Cruse and Mary his wife* [(1838) 173 ER 610: 8 Car.] which is as under:

> *"It appears that both these persons were drunk, and although drunkenness is no excuse for any crime whatever, yet it is often of very great importance in cases where it is a question of intention. A person may be so drunk as to be utterly unable to form any intention at all, and yet he may be guilty of very great violence."*
>
> (emphasis supplied)

31. Coleridge J., in *Reg.* v. *Monk house* [(1849) 4 Cox CC 55], which is as under:

> *"Drunkenness is ordinarily neither a defence nor excuse for crime, and where it is available as a partial answer to a charge, it rests on the prisoner to prove it, and it is not enough that he was excited or rendered more irritable, unless the intoxication was such as to prevent his restraining himself from committing the act in question, or to take away from him the power of forming any specific intention. Such a state of drunkenness may no doubt exist."*
>
> (emphasis supplied)

32. A plain reading of the judgment in *Monk house* (supra), makes it clear that burden was on the defence to establish/prove that the degree of intoxication was such because of which they could not prevent themselves from committing the act in question.

33. Interestingly, the Apex Court in AIR 1956 SC 488 (*Basdev Vs. State of Pepsu*) considered Section 86 of IPC and did not accept the excuse and incapacity of the accused on the ground that he was under influence of liquor. It was held that such incapacity as would have been available to the accused as a defence and so the law presumes that he intended the natural and probable consequences of his act. Since accused had failed to prove such incapacity, the Court came to hold that he intended to inflect bodily injury to the deceased and the bodily injury intended to be inflicted was sufficient in the ordinary course of nature to cause death.

34. Section 85 of Indian Penal Code was again considered by the Apex Court in 2006 (13) SCC 116 (*Bablu Vs. State of Rajasthan*) and the Apex Court held as under:

> *"11. Section 85 IPC deals with act of a person incapable of judgment by reason of intoxication caused against his will. As the heading of the provision itself shows, intoxication must have been against his will and/or the thing with which he was intoxicated was administered to him without his knowledge. There is no specific plea taken in the present case about intoxicant having administered without the appellant's knowledge. The expression "without his knowledge" simply means an ignorance of the fact that what is being administered to him is or contains or is mixed with an intoxicant."*
>
> (emphasis supplied)

35. A Division Bench of this Court in AIR 1960 MP 242 (*Jethuram Shukhra Nagbanshi Vs. State of M.P.*) has also considered Section 85 IPC. The Division Bench quoted the Great Philosopher **Aristotle** who said that such a man deserves double punishment, because he has doubly offended, viz in being drunk to the evil example of others, and in committing the crime of homicide. And this act is said to be done ignoranter, for that he is the cause of his own ignorance: and so the diversity appears between a thing done *ex ignorantia,* and *ignoranter.*

36. In the case of *Jethuram Sukhra Nagbanshi* (supra), the Division Bench further held that the act of drinking was his own act for which the immediate force was his own free will. The act of persuasion could not and did not make the act of drinking the act of anybody else than the doer's. But if a person were put in fear of immediate physical danger and then made to drink, the act cannot be said to be his. Similarly, when he is bound hand and foot and then the intoxicant is literally

poured down his throat, the mere reflex act of swallowing cannot make the drinking of the intoxicant his own act performed out of his own free will.

37. If the evidence on record is examined on the anvil of principles laid down in the said judgments, it will be clear that the defence has not discharged the burden to show that the incapacity of the appellants because of intoxication is of that degree where they can claim any benefit. It cannot be forgotten that the drinking is purely their own act and they cannot be permitted to take advantage of their own wrong. Thus, we do not see any merit in this contention.

38. Argument of Shri Sharma that in the *dehati nalishi* and FIR, it was not stated that appellants Jiwan and Soni caught hold of hands of deceased. It was also not stated therein that these appellants instigated appellant Santosh to kill the deceased by using the expression *"maaro sale ko"*. In *Dehati nalishi* and FIR it is mentioned that Jiwan and Sonu caught hold of Kishore Panchal. PW.3 Vinod Panwar and PW.4 Akash Bunkar have deposed that Sonu and Jiwan caught hold of hand of deceased. Whether this difference is so fatal which makes the evidence unreliable is the next question. Similarly, the nature of phrase used by appellants Sonu and Jiwan while instigating Santosh is also pointed out to show that it amounts to serious omission on the part of the prosecution. We do not see any merit in this contention. In *State of M.P. Vs. Chaakki Lal* (2019) 12 SCC 326 it was poignantly held that FIR is not an encyclopedia which is expected to contain all the minute details of the prosecution case, it may be sufficient if the broad facts of prosecution case are stated in the FIR. In *State of M.P. Vs. Mansingh* (2003) 10 SCC 414 it was held as under:-

> "9. Merely because there was no mention of a knife in the first information report, that does not wash away the effect of the evidence tendered by the injured witnesses PWs 4 and 7. Minor discrepancies do not corrode the credibility of an otherwise acceptable evidence. The circumstances highlighted by the High Court to attach vulnerability to the evidence of the injured witnesses are clearly inconsequential. It is fairly conceded by the learned counsel for the accused that though mere non-mention of the assailants' names in the requisition memo of injury is not sufficient to discard the prosecution version in entirety, according to him it is a doubtful circumstance and forms a vital link to determine whether the prosecution version is credible. It is a settled position in law that omission to mention the name of the assailants in the requisition memo perforce does not render the prosecution version brittle."
>
> (emphasis supplied)

39. The so called improvement do not, in any way, introduced a new facet of the case. Every omission is not a contradiction. Minor details which are not indicative in the first FIR are later on elaborated in Court, do not justify the

criticism that the case originally presented has been abandoned to be substituted by another view. [See *Sunil Kumar Vs. State (Govt. of NCT of Delhi)* (2003) 11 SCC 367].

40. Reference may be made to *Sunil Kumar Shambhudayal Gupta (Dr.) Vs. State of Maharashtra* (2010) 13 SCC 657 wherein it was held as under:-

> "30. While appreciating the evidence, the court has to take into consideration whether the contradictions/ omissions had been of such magnitude that they may materially affect the trial. Minor contradictions, inconsistencies, embellishments or improvements on trivial matters without effecting the core of the prosecution case should not be made a ground to reject the evidence in its entirety. The trial court, after going through the entire evidence, must form an opinion about the credibility of the witnesses and the appellate court in normal course would not be justified in reviewing the same again without justifiable reasons. (Vide *State* v. *Saravanan* [(2008) 17 SCC 587 : (2010) 4 SCC (Cri) 580 : AIR 2009 SC 152].)"
>
> (emphasis supplied)

41. In view of these authoritative pronouncements, we are unable to hold that aforesaid variation in *dehati nalishi*/FIR and Court statements are so grave which makes the prosecution evidence as brittle and untrustworthy.

42. In view of foregoing analysis, in our view, the prosecution has established its case before Court below beyond reasonable doubt. The Court below has appreciated the evidence on permissible parameters. We find no illegality on the strength of which interference can be made. The appeals fail and are hereby **dismissed.**

Appeal dismissed

I.L.R. [2021] M.P. 1388 (DB)
APPELLATE CRIMINAL

Before Mr. Justice G.S. Ahluwalia & Mr. Justice Rajeev Kumar Shrivastava

CRA No. 397/2005 (Gwalior) decided on 30 April, 2021

NATHU SINGH …Appellant

Vs.

STATE OF M.P. …Respondent

(Along with CRA Nos. 401/2005 & 425/2005)

A. Penal Code (45 of 1860), Section 302 & 307/34 – Direct Evidence **– Held – Prosecution case based on direct evidence – Minor omissions, contradictions, embellishment in evidence of prosecution witnesses would**

not make them unreliable – Ocular evidence supported by *post mortem* report and ballistic evidence – Appeals dismissed. (Paras 45, 126, 146 & 150)

क. दण्ड संहिता (1860 का 45), धारा 302 व 307/34 – प्रत्यक्ष साक्ष्य – अभिनिर्धारित – अभियोजन का प्रकरण प्रत्यक्ष साक्ष्य पर आधारित – अभियोजन साक्षियों के साक्ष्य में गौण लोप, विरोधाभास, अलंकरण उन्हें अविश्वसनीय नहीं बनायेंगे – चाक्षुष साक्ष्य, शव परीक्षण प्रतिवेदन एवं प्राक्षेयिकी साक्ष्य द्वारा समर्थित है – अपीलें खारिज।

***B. Penal Code (45 of 1860), Section 302 & 307/34 – Related Witness & Interested Witness* – Held – Evidence of "related witness" cannot be discarded only on ground of relationship – There is a difference between "related witness" and "interested witness" – Interested witness is a witness who is vitally interested in conviction of a person due to previous enmity.**

(Paras 50 to 52)

ख. दण्ड संहिता (1860 का 45), धारा 302 व 307/34 – संबंधित साक्षी व हितबद्ध साक्षी – अभिनिर्धारित – ''संबंधित साक्षी'' के साक्ष्य को केवल रिश्तेदारी के आधार पर अमान्य नहीं किया जा सकता – ''संबंधित साक्षी'' एवं ''हितबद्ध साक्षी'' के बीच अंतर है – हितबद्ध साक्षी वह साक्षी है जो पूर्वतर वैमनस्यता के कारण एक व्यक्ति की दोषसिद्धि में अत्यंत हितबद्ध है।

***C. Penal Code (45 of 1860), Section 302 & 307/34 – Previous Enmity* – Held – Enmity is a double edged weapon – If appellants claim that there was an enmity between them and complainant party, then such enmity may also provide motive to commit offence – From facts, it would be incorrect to say that appellants were falsely implicated due to previous enmity.**

(Para 60 & 61)

ग. दण्ड संहिता (1860 का 45), धारा 302 व 307/34 – पूर्वतर वैमनस्यता – अभिनिर्धारित – वैमनस्यता, एक दुधारी शस्त्र है – यदि अपीलार्थीगण दावा करते हैं कि उनमें और परिवादी पक्षकार के बीच वैमनस्यता थी, तब उक्त वैमनस्यता भी, अपराध कारित करने का हेतु उपलब्ध करा सकती है – तथ्यों से, यह कहना गलत होगा कि अपीलार्थीगण को पूर्वतर वैमनस्यता के कारण मिथ्या रूप से आलिप्त किया गया था।

***D. Penal Code (45 of 1860), Section 302 & 307/34 – Direct Evidence & Motive* – Held – Where a case is based on direct evidence, absence of motive is immaterial – Motive always remains in mind of wrongdoer, thus, merely because witnesses have not alleged any motive, would not make their evidence unreliable. (Para 107 & 108)**

घ. दण्ड संहिता (1860 का 45), धारा 302 व 307/34 – प्रत्यक्ष साक्ष्य व हेतुक – अभिनिर्धारित – जहां एक प्रकरण प्रत्यक्ष साक्ष्य पर आधारित है, हेतु की अनुपस्थिति महत्वहीन है – अपकृत्यकारी के मन में हेतु सदैव बना रहता है, अतः, मात्र इसलिए कि साक्षीगण ने किसी हेतु का अभिकथन नहीं किया है, उनके साक्ष्य को अविश्वसनीय नहीं बनायेगा।

E. ***Penal Code (45 of 1860), Sections 302, 307/34 & 149 – Common Intention*** **– Held – Common intention can develop during the course of occurrence also, provided there is clear proof and cogent evidence to prove it – Accused persons coming to the place of occurrence with their .12 bore or .315 bore guns and fired indiscriminately thereby causing death of deceased persons, clearly establishes that all 3 appellants were sharing common intention. (Paras 146 to 148 & 150)**

ङ. दण्ड संहिता (1860 का 45), धाराएँ 302, 307/34 व 149 – सामान्य आशय – अभिनिर्धारित – सामान्य आशय, घटनाक्रम के दौरान भी विकसित हो सकता है, परंतु यह कि उसे सिद्ध करने के लिए वहां स्पष्ट सबूत एवं तर्कपूर्ण साक्ष्य है – अभियुक्तगण का अपनी .12 बोर या .315 बोर की बंदूकों के साथ घटनास्थल पर आना और अंधाधुंध गोलियां चलाना, जिससे मृतक व्यक्तियों की मृत्यु कारित हुई, स्पष्ट रूप से स्थापित करता है कि सभी 3 अपीलार्थीगण सामान्य आशय के भागी थे।

F. ***Penal Code (45 of 1860), Section 34 & 149 – Common Intention – Framing of Charge – Principle of Conviction*** **– Held – If charge u/S 149 has been framed and if it is found that some of accused persons were not guilty and some of accused persons have participated in the occurrence and were sharing common intention, then they can be convicted with the aid of Section 34 IPC – Non-framing of charge u/S 34 would not cause any prejudice to them. (Para 149)**

च. दण्ड संहिता (1860 का 45), धारा 34 व 149 – सामान्य आशय – आरोप विरचित किया जाना – दोषसिद्धि का सिद्धांत – अभिनिर्धारित – यदि धारा 149 के अंतर्गत आरोप विरचित किया गया है और यदि यह पाया गया है कि कुछ अभियुक्तगण दोषी नहीं थे एवं कुछ अभियुक्तगण का घटना में सहभाग है तथा सामान्य आशय के भागी थे, तब उन्हें धारा 34 भा.दं.सं. की सहायता से दोषसिद्ध किया जा सकता है – धारा 34 के अंतर्गत आरोप विरचित न किये जाने से उन्हें कोई प्रतिकूल प्रभाव कारित नहीं होगा।

G. ***Penal Code (45 of 1860), Section 34 & 149 – Common Intention & Common Object*** **– Held – There is a basic difference between common intention and common object – Common intention requires pre-oriented minds and concerted plans whereas, common object has no such requirement of meeting of minds of the members of unlawfull assembly before commission of offence – Since some of elements of common intention and common object overlap each other, therefore due to acquittal of remaining accused persons, appellants can be convicted with aid of Section 34 IPC. (Para 150)**

छ. दण्ड संहिता (1860 का 45), धारा 34 व 149 – सामान्य आशय व सामान्य उद्देश्य – अभिनिर्धारित – सामान्य आशय एवं सामान्य उद्देश्य के बीच मूलभूत अंतर है – सामान्य आशय में पूर्व उन्मुख मन एवं मिलकर योजनाऐं अपेक्षित हैं जबकि सामान्य उद्देश्य में, अपराध कारित किये जाने से पूर्व, विधि विरूद्ध जमाव के सदस्यों की एक जैसी

राय की, उक्त जैसी कोई अपेक्षा नहीं – चूंकि सामान्य आशय एवं सामान्य उद्देश्य के कुछ तत्व एक दूसरे को परस्पर अतिव्याप्त करते है इसलिए, शेष अभियुक्तगण की दोषमुक्ति के कारण, अपीलार्थीगण को धारा 34 भा.दं.सं. की सहायता से दोषसिद्ध किया जा सकता है।

***H. Penal Code (45 of 1860), Section 302 & 307/34 – Plea of Alibi* – Held – Taking a false plea of *alibi* would also be an additional link to the circumstances, although false plea of *alibi* cannot be a sole criteria to record conviction – Plea of *alibi* is required to be proved by accused by leading cogent evidence – Defence/accused failed to prove his plea of *alibi*.**

(Para 134 & 137)

ज. दण्ड संहिता (1860 का 45), धारा 302 व 307/34 – अन्यत्र उपस्थित होने का अभिवाक् – अभिनिर्धारित – अन्यत्र उपस्थित होने का अभिवाक् लेना भी परिस्थितियों की एक अतिरिक्त कड़ी होगी, यद्यपि, दोषसिद्धि अभिलिखित करने के लिए अन्यत्र उपस्थित होने का मिथ्या अभिवाक् एकमात्र मानदंड नहीं हो सकता – अन्यत्र उपस्थित होने के अभिवाक् को अभियुक्त द्वारा तर्कपूर्ण साक्ष्य प्रस्तुत कर साबित किया जाना अपेक्षित है – बचाव पक्ष/अभियुक्त, अन्यत्र उपस्थित होने के उसके अभिवाक् को साबित करने में असफल रहा।

***I. Penal Code (45 of 1860), Section 302 & 307/34 and Evidence Act (1 of 1872), Section 32 – Dying Declaration – Admissibility* – Held – Dying declaration recorded by Doctor but later declarant survived – Doctor who recorded dying declaration was not examined, therefore so called dying declaration is not admissible u/S 32 of Evidence Act – Court evidence cannot be discarded in light of the statement which was recorded as dying declaration. (Para 129(v))**

झ. दण्ड संहिता (1860 का 45), धारा 302 व 307/34 एवं साक्ष्य अधिनियम (1872 का 1), धारा 32 – मृत्युकालिक कथन – ग्राह्यता – अभिनिर्धारित – चिकित्सक द्वारा मृत्युकालिक कथन अभिलिखित किया गया किंतु बाद में कथनकर्ता जीवित रहा – चिकित्सक, जिसने मृत्युकालिक कथन अभिलिखित किया था, का परीक्षण नहीं किया गया इसलिए तथाकथित मृत्युकालिक कथन, साक्ष्य अधिनियम की धारा 32 के अंतर्गत ग्राह्य नहीं है – न्यायालयीन साक्ष्य को, मृत्युकालिक कथन के रूप में अभिलिखित कथन के आलोक में अमान्य नहीं किया जा सकता।

***J. Criminal Practice* –**

***(i). Witness – Credibility* – Held – It is the quality of a witness which counts and not quantity of witnesses – Merely because a witness has been disbelieved on some part of his evidence, would not result in discarding of his entire evidence – Court must try to remove grain from the chaff.**

(Para 59 & 104)

***(ii). Site Plan* – Held – Site plan is an important document – Part of Site Plan, prepared by Investigating Officer, on basis of**

what he had seen and observed would be a substantive evidence and part of Site Plan prepared on the information given by witness, would be admissible, if witness giving such information is also examined. (Para 65)

***(iii). Abscondence* – Held – Abscondence by itself cannot be said to be an incriminating circumstances to indicate the guilty mind of a suspect – An innocent person, under an apprehension of false implication may also abscond. (Para 68)**

***(iv). Evidence of Police* – Held – Evidence of Police personnel cannot be discarded only because he is an investigating officer or his evidence is not corroborated by independent witnesses. (Para 146(e))**

***(v). Evidence – Discrepancies* – Held – Unless and until contradictions is pointed out to the witness, the defence cannot take advantage of such discrepancies. (Para 130(v))**

ञ. दाण्डिक पद्धति –

(I) *साक्षी – विश्वसनीयता* – अभिनिर्धारित – यह एक साक्षी की गुणवत्ता है जो महत्व रखती है और न कि साक्षियों की संख्या – मात्र इसलिए कि एक साक्षी के साक्ष्य के कुछ भाग पर अविश्वास किया गया है, इसके परिणामस्वरूप उसका संपूर्ण साक्ष्य अमान्य नहीं होगा – न्यायालय को भूसे से धान अलग करने का प्रयास करना चाहिए।

(ii) *स्थल–नक्शा* – अभिनिर्धारित – स्थल–नक्शा एक महत्वपूर्ण दस्तावेज है – अन्वेषण अधिकारी द्वारा, उसने जो देखा और गौर किया है, के आधार पर तैयार किया गया स्थल–नक्शे का भाग, एक सारभूत साक्ष्य होगा और साक्षी द्वारा दी गई जानकारी पर तैयार किया गया स्थल–नक्शे का भाग ग्राह्य होगा यदि उक्त जानकारी देने वाले साक्षी का भी परीक्षण किया गया है।

(iii) *फरारी* – अभिनिर्धारित – फरारी, अपने आप में एक संदिग्ध के दोषी मन को दर्शाने हेतु एक अपराध में फंसाने वाली परिस्थिति नहीं कही जा सकती – एक निर्दोष व्यक्ति, मिथ्या आलिप्त किये जाने की आशंका से भी फरार हो सकता है।

(iv) *पुलिस का साक्ष्य* – अभिनिर्धारित – पुलिस कर्मी का साक्ष्य अमान्य नहीं किया जा सकता, मात्र इसलिए कि वह एक अन्वेषण अधिकारी है अथवा स्वतंत्र साक्षियों द्वारा उसका साक्ष्य संपुष्ट नहीं है।

(v) *साक्ष्य – विसंगतियां* – अभिनिर्धारित – जब तक कि विरोधाभासों को साक्षी के ध्यान में नहीं लाया जाता, बचाव पक्ष, उक्त विसंगतियों का लाभ नहीं ले सकता।

***K. Maxim* – "*falsus in uno falsus in omnibus*" – Held – Has no application in India. (Para 103 & 104)**

ट. सूत्र – ''एक बात में मिथ्या तो सब में मिथ्या'' – अभिनिर्धारित – भारत में कोई प्रयोज्यता नहीं।

Cases referred:

1990 Supp SCC 145, (2018) 16 SCC 475, (2018) 10 SCC 509, (2003) 2 SCC 661, (2019) 19 SCC 567, (1976) 4 SCC 369, (2013) 6 SCC 428, (2008) 13 SCC 271, (2005) 10 SCC 369, (2017) 11 SCC 129, (2016) 4 SCC 357, (2014) 16 SCC 560, (1996) 8 SCC 199, (1978) 2 SCC 518, (1993) 2 SCC 684, (1971) 2 SCC 75, (2010) 13 SCC 657, (2017) 13 SCC 585, (2010) 10 SCC 259, (2003) 7 SCC 749, (2016) 10 SCC 663, (2017) 11 SCC 195, (2004) 13 SCC 279, (2015) 9 SCC 588, (2012) 6 SCC 204, (2012) 5 SCC 201, (2014) 11 SCC 355, (2009) 14 SCC 415, (2012) 5 SCC 777, (2013) 14 SCC 434, (2020) 10 SCC 120, (2020) 4 SCC 126, (2019) 5 SCC 127, (2006) 9 SCC 307.

V.K. Saxena with *Ayush Saxena*, for the appellants Nathu Singh & Ramvir Singh in CRA Nos. 397/2005 & 425/2005.

Atul Gupta, for the appellant Ghanshyam Singh in CRA No. 401/2005.

B.P.S. Chouhan, P.P. for the State.

R.K. Sharma with M.K. Choudhary, for the complainant.

J U D G M E N T

The Judgment of the Court was delivered by :

G.S. AHLUWALIA, J. :- Cr.A. No. 584/2008 (State of M.P. Vs. Ramant Singh) has been filed by the State of M.P., against the acquittal of Ramant Singh in cross S.T. No. 229/2003. Similarly, State of M.P. has filed Cr.A. No. 790/2005 against the acquittal of 7 co-accused persons, in the present case. In the light of the judgment passed by the Supreme Court in the case of *Nathilal & Ors. Vs. State of U.P. & Anr.* reported in 1990 Supp SCC 145 the present appeal as well as Cr.A. No. 790/2005 and Criminal Appeal No. 584/2008 arising out of cross case were heard simultaneously, and accordingly, judgments in all the cases are being pronounced on the same day.

2. By this common Judgment, Criminal Appeals filed by Nathu Singh (Cr.A. No. 397/2005), Ghanshyam Singh (Cr.A. No. 401/2005) and Ramvir Singh (Cr.A. No. 425/2005) shall be decided.

3. All the three Criminal Appeals have been filed under Section 374 of Cr.P.C., against the judgment and sentence dated 20-5-2005 passed by 2nd Additional Sessions Judge, Morena in Sessions Trial No. 37/2001, by which appellant Ramvir Singh has been convicted under Section 302 of I.P.C. (two

counts), under Section 302/34 of I.P.C. (two counts) and under Sections 307/34 of I.P.C. (two Counts), whereas appellants Nathu Singh and Ghanshyam Singh have been convicted under Section 302/34 of I.P.C. (four counts) and 307/34 of I.P.C(two counts). Nathu Singh and Ghanshyam have been sentenced to undergo Life Imprisonment and a fine of Rs. 1000/- for offence under Section 302/34 of I.P.C. (four counts) and rigorous imprisonment of 7 years and fine of Rs. 500/- for offence under Section 307/34 of I.P.C. (two counts). Similarly Ramvir Singh has been sentenced to undergo Life Imprisonment and a fine of Rs. 1000/- for offence under Section 302 of I.P.C. (two counts), & for 302/34 of I.P.C. (two counts), and rigorous imprisonment of 7 years and fine of Rs. 500/- for offence under Section 307/34 of I.P.C. (two counts). All the sentences have been directed to run concurrently.

4. It is not out of place to mention here that on the report lodged by one Angad Singh, Crime No. 203/2000 was registered by Police Station Porsa, Distt. Morena, against unknown persons, for committing murder of Brajesh. The complainant party of the present case was tried for the said offence. By a separate judgment passed by the Trial Court, Ramant Singh (P.W.1) was extended the benefit of right of private defence and other 9 accused persons were acquitted. Accordingly, all the accused persons in S.T. No. 229/2003 (Arising out of Crime No. 203/2000, registered at Police Station Porsa, Distt. Morena) were acquitted. The State had challenged the acquittal of all the 10 persons in the cross case by filing M.Cr.C. No. 3966/2005 and by order dated 30-7-2008, this Court granted leave to file appeal against acquittal of Ramant Singh (P.W.1) only and the application for grant of leave to appeal against acquittal of other 9 co-accused persons was dismissed.

5. In the present case, total 10 persons were tried for committing murder of Keshav, Jaswant, Raghunath @ Chhote Singh, Mamta and for making an attempt to murder Smt. Gomati (P.W. 13) and Manohar Singh (P.W.16). Three persons, namely Nathu Singh (Cr.A. No. 397/2005), Ghanshyam Singh (Cr.A. No. 401/2005) and Ramvir Singh (Cr.A. No. 425/2005) have been convicted, whereas Mahendra @ Kallu Singh, Kaushlendra, Sindhi Singh, Dinesh Singh Tomar, Kallu @ Kalyan Singh, Mahesh Singh Tomar, Rajesh Singh Sikarwar have been acquitted.

6. It is the case of the prosecution that after F.I.R. in crime no. 203/2000 was lodged, the police party went to village Khoyala. During the investigation of the said case, the police party came to know that more persons have been killed in the village. Accordingly on 16-10-2000, at about 23:00, Dehati Nalishi, Ex. P.1 was lodged by Ramant Singh (P.W.1) on the allegations, that a function was going on in his house on the occasion of birth of his son. He was serving food. The sitting room *(Baithak)*of Ramvir Singh Tomar, is situated by the side of his house. Kaushlendra Singh, Bhanupratap Singh Tomar, Kallu Singh, Mahendra Singh Tomar, started bursting crackers towards the house of the complainant. It was

objected by Manohar Singh. Thereafter, these persons, started pelting stones on the house. Nathu Singh, came there with .12 bore gun, whereas Ghanshyam Singh came there with .12 bore gun. Ramvir Singh also came there with his mouser gun. They started firing towards the house of the complainant. Ramvir Singh shot Jaswant and Keshav, whereas Ghanshyam Singh [Note : The name of Ramvir Singh has been substituted by mentioning Ghanshyam Singh] shot Chhote Singh, as a result they expired on the spot. Nathu Singh caused gun shot injury to Manohar Singh, whereas Ghanshyam caused injury to Mamta, wife of Naresh Singh. Ladies were having their meals inside the house. The above mentioned persons, entered inside the house and started beating as well as also fired, as a result Gomati bai has also sustained injuries. The dead bodies of Keshav Singh, Jaswant Singh, Raghunath are lying in front of the door of his house and Gomati, Manohar Singh and Mamta are injured. Nathu Singh (another person), Sudesh Singh, Virendra Singh, Sultan Singh, Vinod Kumar came on the spot, and thereafter, the assailants ran away. While fleeing away, they also extended a threat that they would kill more persons. As he was scared, therefore, immediately did not go to the police station to lodge the report. For the last 2 years, they are not on visiting terms and on that issue they are on inimical terms.

7. Thereafter, the F.I.R., Ex. P.10 was lodged. The police sent the injured persons, namely Mamta, Gomati and Manohar Singh for medical treatment. On 17-10-2000, Smt. Mamta lost her life during her treatment. The postmortem of the dead bodies was conducted. The blood stained and plain earth was seized. Live, empty cartridges and misfired cartridges of .12 and .315 bore were seized from the spot. The accused persons were arrested. Fire arms were seized. Site plans were prepared. The M.L.C. reports of the injured persons were obtained. The report from F.S.L. Sagar was obtained. The report from armorer was also obtained and after concluding investigation, the police filed charge sheet against Ghanshyam Singh, Nathu Singh, Kallu @ Kalyan Singh, Mahendra @ Kallu, Sindhi Singh, Rajesh Sikarwar, Dinesh Tomar, for offence under Sections 302, 307, 147, 148, 149, 45 of I.P.C. and under Section 25/27 of Arms Act. **Bhanu Pratap Singh was a Juvenile.** Since, Ramvir, Kaushlendra and Mahesh were absconding, therefore, investigation against them was kept pending under Section 178(3) of Cr.P.C. The case was committed on 1-2-2001 against Ghanshyam Singh, Mahendra Singh @ Kallu, Rajesh Singh, Sindhi Singh, Kallu Singh @ Kalyan, Dinesh Singh and Nathu Singh. Lateron, Kaushlendra Singh was also arrested and accordingly, on 7-5-2001, supplementary charge sheet was filed against Kaushlendra Singh and the case was committed. Lateron, Ramvir Singh, and Mahesh Singh were also arrested and supplementary charge sheets were filed. The case against Mahesh Singh and Ramvir Singh was committed on 4-12-2001.

8. It is not out of place to mention here that it appears from the record of the Court of J.M.F.C., Ambah, Distt. Morena, that initially, Dinesh, Ghanshyam,

Nathu Singh, Mahesh Singh, Kaushlendra Singh, and Ramvir were absconding, accordingly, proclamation under Section 82 of Cr.P.C. was issued against Ramvir Singh Tomar, Mahesh Singh, Kaushlendra Singh, Nathu Singh, and Ghanshyam Singh. On 26-2-2001, an application under Section 83 of Cr.P.C. was also filed for attachment of the property of Ramvir Singh.

9. Be that as it may.

10. The Trial Court by order dated 27-6-2001, framed charges against Mahendra @ Kallu Singh, for offence under Sections 148, 324 (for assaulting Ramant Singh by lathi), 302/149 (for causing murder of Mamta by Ghanshyam), 302/149 (for causing murder of Keshav by Ramvir), 302/149 (for committing murder of Jaswant by Ramvir), 302/149 (for committing murder of Chhotelal @ Raghunath by Ghanshyam), 307/149 (for making an attempt to commit murder of Manohar Singh by Nathu Singh), 307/149 (for making an attempt to commit murder of Manohar Singh by Kaushlendra Singh), 307/149 (for making an attempt to commit murder of Gomati by Nathu Singh).

11. By order dated 27-6-2001, the Trial Court framed charges against Rajesh Singh, Sindhi Singh, Dinesh Singh, Kallu @ Kalyan Singh, for offence under Sections 148, 324/149 (for assaulting Ramant Singh by lathi by Mahendra @ Kallu Singh), 302/149 (for causing murder of Mamta by Ghanshyam), 302/149 (for causing murder of Keshav by Ramvir), 302/149 (for committing murder of Jaswant by Ramvir), 302/149 (for committing murder of Chhotelal @ Raghunath by Ghanshyam), 307/149 (for making an attempt to commit murder of Manohar Singh by Nathu Singh), 307/149 (for making an attempt to commit murder of Manohar Singh by Kaushlendra Singh), 307/149 (for making an attempt to commit murder of Gomati by Nathu Singh). Similar charges were framed against Mahesh Singh on 3-1-2002.

12. By order dated 27-6-2001, charges were framed against Kaushlendra Singh for offence under Sections 148 of I.P.C., 324 of I.P.C.(for assaulting Ramant Singh by lathi by Mahendra @ Kallu Singh), 302/149 of I.P.C.(for causing murder of Mamta by Ghanshyam), 302/149 of I.P.C. (for causing murder of Keshav by Ramvir), 302/149 of I.P.C.(for committing murder of Jaswant by Ramvir), 302/149 of I.P.C.(for committing murder of Chhotelal @ Raghunath by Ghanshyam), 307/149 of I.P.C.(for making an attempt to commit murder of Manohar Singh by Nathu Singh), 307 of I.P.C. (for making an attempt to commit murder of Manohar Singh , 307/149 of I.P.C. (for making an attempt to commit murder of Gomati by Nathu Singh).

13. By order dated 27-6-2001, charges were framed against Nathu Singh for offence under Sections 148 of I.P.C., 324/149 of I.P.C.(for assaulting Ramant Singh by lathi by Mahendra @ Kallu Singh), 302/149 of I.P.C.(for causing murder

of Mamta by Ghanshyam), 302/149 of I.P.C. (for causing murder of Keshav by Ramvir), 302/149 of I.P.C.(for committing murder of Jaswant by Ramvir), 302/149 of I.P.C.(for committing murder of Chhotelal @ Raghunath by Ghanshyam), 307 of I.P.C. (for making an attempt to commit murder of Manohar Singh), 307/149 of I.P.C. (for making an attempt to murder Manohar Singh by Kaushlendra Singh), 307 of I.P.C. (for making an attempt to commit murder of Gomati).

14. By order dated 27-6-2001, charges were framed against Ghanshyam Singh for offence under Sections 148 of I.P.C., 324/149 of I.P.C.(for assaulting Ramant Singh by lathi by Mahendra @ Kallu Singh), 302 of I.P.C.(for causing murder of Mamta), 302/149 of I.P.C. (for causing murder of Keshav by Ramvir), 302/149 of I.P.C.(for committing murder of Jaswant by Ramvir), 302 of I.P.C.(for committing murder of Chhotelal @ Raghunath), 307/149 of I.P.C. (for making an attempt to commit murder of Manohar Singh by Nathu Singh), 307/149 of I.P.C. (for making an attempt to murder Manohar Singh by Kaushlendra Singh), 307/149 of I.P.C. (for making an attempt to commit murder of Gomati by Nathu Singh).

15. By order dated 24-7-2002, charges were framed against Ramvir Singh for offence under Sections 148 of I.P.C., 324/149 of I.P.C.(for assaulting Ramant Singh by lathi by Mahendra @ Kallu Singh), 302/149 of I.P.C. (for causing murder of Mamta by Ghanshyam), 302 of I.P.C. (for causing murder of Keshav), 302 of I.P.C.(for committing murder of Jaswant), 302/149 of I.P.C.(for committing murder of Chhotelal @ Raghunath by Ghanshyam), 307/149 of I.P.C. (for making an attempt to commit murder of Manohar Singh by Nathu Singh), 307/149 of I.P.C. (for making an attempt to murder Manohar Singh by Kaushlendra Singh), 307/149 of I.P.C. (for making an attempt to commit murder of Gomati by Nathu Singh).

16. All the accused persons abjured their guilt.

17. The prosecution in support of its case, examined Ramant Singh (P.W.1), Rajveer Sharma (P.W.2), Surendra Singh (P.W.3), M.P. Shukla (P.W.4), Lalaram (P.W.5), Dr. Ravindra Singh Sikarwar (P.W.6), R. Kanhaiya Singh (P.W.7), Jitendra Singh Bhadauria (P.W.8), Dr. Meera Bandil (P.W.9), Mewaram (P.W.10), Dr. S.K. Sharma (P.W.11), Lakhan Singh (P.W.12), Gomati Bai (P.W.13), Dr. D.C. Parashar (P.W.14), Smt. Rajabeti (P.W.15), Manohar Singh Tomar (P.W.16), Kumher Singh (P.W. 17), Dinesh Sharma (P.W.18), D.R. Mishra (P.W.19) R.S. Ghuraiya (P.W. 20), and Vinod Kumar (P.W.21).

18. In defence, Ghanshyam Singh (D.W.1), Binda Singh Sengar (D.W.2), Parwat Singh Sengar (D.W.3), were examined by the accused persons.

19. The prosecution relied upon Dehati Nalishi, Ex. P.1/D.25, Crime Details Form, Ex. P.2, Safina Form, Ex. P.3, Safina Form, Ex. P.4, site plan, Ex. P.6, site plan, Ex. P.7, site plan, Ex. P.8, Seizure of Cloths, Intestine, liver, Heart, Spleen, Kidney and Lungs of deceased Mamta, as well as bullet recovered from her body and other articles, Ex. P.9, F.I.R., Ex. P.10/D.26, Requisition for M.L.C. of Gomati, Ex. P.11,11A/D.8, Requisition for M.L.C. of Manohar Singh Ex. P.12,12A/D.9,D.10, Requisition for M.L.C. of Mamta, Ex. P.13/D.11, M.L.C. of Mamta, Ex. P.13A/D.12, Intimations under Section 174 of Cr.P.C., Ex. P.14,15,16, Seizure Memo, Ex. P.17, Sanction for prosecution, Ex. P.18, Report of Armorar, Ex. P.19, Intimation of death of Mamta, Ex. P.20, P.21 Not in the paper book as well as in the original record, X-ray report, Ex. P.22, X-ray report, Ex. P.23, X-ray report Ex. P.25, Seizure Memo, Ex. P.26, Requisition for post mortem of Mamta, Ex. P.27, Post Mortem report of Mamta Ex. P.28, Seizure memo of 12 bore rifle, Ex. P.29, F.I.R., Ex. P.30, case diary statement of Sultan Singh,Ex. P.31, Requisition for Postmortem of Keshav Singh, Ex. P.32/D.1, Postmortem report of Keshav, Ex. P.33/D.2, Requisition of Postmortem of Raghunath Singh, Ex. P.34/D3, Postmortem report of Raghunath Singh, Ex. P.35/D.4, Requisition for Postmortem of Jaswant Singh, Ex. 36/D.5, Postmortem report of Jaswant Singh, Ex. P.37/D.6, Memo to F.S.L., Sagar, Ex. P.38, Report of F.S.L. Sagar, Ex. P.39, Seizure memo of Mouser Gun, Ex. P.40, Arrest Memo of Mahendra Singh Tomar, Ex. P.41, Arrest Memo of Rajesh Singh Sikarwar, Ex. P.42, Arrest Memo of Bhanupratap Singh Tomar, Ex. P.43, Arrest Memo of Sindhi Singh Tomar, Ex. P.44, Memorandum under Section 27 of Evidence Act, Ex. P.45, Seizure Memo of Lathi, Ex. P.46, Arrest Memo of Kallu Singh Tomar, Ex. P.47, Arrest Memo of Ghanshyam Singh Tomar, Ex. P.48, Arrest Memo of Nathu Singh, Ex. P.49, Memorandum under Section 47 of Evidence Act, Ex. P.50, Memo to F.S.L. Sagar, Ex. P.51, Report of F.S.L. Sagar, Ex. P.52, Report of F.S.L. Sagar, Ex. P.53.

20. The defence relied upon case diary statement of Ramant Singh, Ex. D.1, F.I.R., Ex. D.2, case diary statement of Gomati bai, Ex. D.3, case diary statement of Rajabeti, Ex. D.4, case diary statement of Manohar Singh, Ex. D.5, Certified copy of charge sheet, Ex. D.6, List of evidence, Ex. D.7, certified copy of Kaushlendra Singh, Ex. D.8, certified copy of statement of Rajesh Singh Sikarwar, Ex. D.9, certified copy of statement of Brajesh Singh Tomar, Ex. D.10, certified copy of order sheet, Ex. D.11, certified copy of order sheet Ex. D.12, ceritified copy of judgment dated 16-11-2002, Ex. D.13, certified copy of F.I.R., Ex. D.14, certified copy of Police charge sheet Ex. D.15, site plan, Ex.D.16, case diary statement of Kumher Singh, Ex. D.17, Dying Declaration, Ex. D.18, certified copy of requisition for postmortem of Brajesh, certified copy of postmortem report of Brajesh, certified copy of site plan, Ex. D.21, Copy of Rojnamcha Ex. D.22 and D.23, Certified copy of Judgment dated 30-11-1991,

Ex. D.24, Certified copy of Judgment dated 30-11-1991, Ex. D.25, Copy of Rojnamcha Ex. D.26, Certified copy of Habeas Corpus No. 2/2001, Certified copy of order dated 8-1-2001, Ex. D. 28, Certified copy of order sheet, Ex. D.29, and Certified copy of order sheet Ex. D.30.

21. The Trial Court, by impugned judgment and sentence dated 20-5-2005 acquitted Mahendra @ Kallu Singh, Kaushlendra Singh, Sindhi Singh, Dinesh Singh Tomar, Kallu @ Kalyan Singh,Mahesh Singh Tomar and Rajesh Singh Sikarwar. However, convicted and sentenced Nathu Singh, Ghanshyam Singh and Ramvir Singh for the Offences mentioned in para 3 of this judgment.

22. Challenging the conviction and sentence awarded by the Trial Court, it is submitted by the Counsels for the appellants, that the Trial Court has ignored the material omissions, contradictions, and embellishments. It is submitted that the witnesses are "related" and "interested witnesses". The appellants have been falsely implicated, as Brajesh was killed by the complainant party and in order to mount pressure, they have falsely deposed against the appellants. The appellants and the complainant party were on inimical terms and the prosecution of the appellants is the outcome of said enmity. In support of their contention, the Counsels for the appellants have relied upon Para 3 to 7, 46, 53, 54, 82, 94, 96, 103, 105, 141, 142, 148, 150 of evidence of Ramant Singh (P.W.1), Para 4, 16, 23, 72 of Gomtibai (P.W.13), Para 2, 5, 9, 16, 17, 23, 28, 53 and 54 of Rajabeti (P.W. 15), Para 3, 20, 22, 23, 31, 32, 34, 43, 52, 53, 76, 81, 96 and 97 of Manohar Singh (P.W. 16), Para 3,8,11,13,23,37 and 78 of Kumher Singh (P.W. 17).

23. Per contra, the Counsel for the State and the complainant have supported the findings recorded by the Trial Court.

24. Heard the learned Counsel for the parties.

25. The First question for consideration is that whether Keshav, Raghunath @ Chhote Singh, Jaswant and Mamta died a homicidal death or not?

26. Dr. D.C. Parashar (P.W. 14) and team of other Doctors had conducted Postmortem of Keshav. The Requisition for postmortem of Keshav is Ex. P.32. The postmortem was conducted by a team of Doctors. The following injuries were found on the dead body of Keshav :

> 1. Entry Wound : On left side of chest measuring 2 x 1.5 cm oval shaped inverted margins blackening present, situated 6 cm below and lateral to the left nipple direction downward towards right side.
>
> 2. Exit Wound : Situated on back mid line 25 cm below neck, measuring 3 cma x 2.5 cm margins Everted. Wound lacerated. Blood clot present.

On internal examination, 9th and 10th vertebra were found broken. Left lung was burnt. Heart was empty.

The cause of death was excessive hemorrhage as a result of injuries to vital organs. The Postmortem report is Ex. P.33.

27. The requisition for postmortem of Raghunath @ Chhote Singh is Ex. P.34. The postmortem was done by a team of Doctors. The following injuries were found on the body of deceased Raghunath @ Chhote Singh :

> 1. Entry Wound : Right side of chest on anterial axillary line 4 cm x 2½ cm direction downward. Inverted margins blackening present. Situated 7 cm below lateral to the right nipple
>
> 2. Entry Wound : On right chest measuring 3.x 2.5 x 2.5 cm below the injury no.1. Inverted margins. Blackening present.

On internal examination, chest wall, right lung were found lacerated, both chambers of heart were empty. There was a fracture of 9th and 10th thoracic vertebra. Three pallets were found lodged inside measuring 1.5x1cm, 1.5x1 and 1x1cm. Pallets were removed and were sealed and handed over to the Police Constable. The cause of death was excessive hemorrhage as a result of injuries to vital organs. The Postmortem report is Ex. P.35.

28. The requisition for postmortem of Jaswant is Ex. P. 36. The postmortem was done by a team of Doctors. The following injuries were found of the body of deceased Jawant Singh :

> 1. Entry Wound : Left side of chest measuring 1.8x1.5 cm oval in shape. Inverted margins. Blackening present 5.5 cm medial to the left nipple. Direction downward laterally.
>
> 2. Exit Wound : Measuring 3cm x 2 cm on the left side back 2 cm below the lnferior border of left scapula.

On internal examination, left lung was teared. Heart was teared and empty. Left 7th rib was fractured. The cause of death was excessive hemorrhage as a result of injuries to vital organs. The Postmortem report is Ex. P.37.

29. Dr. Meera Bandil (P.W.9) and Dr. S.K. Sharma (P.W. 11) had conducted Postmortem of Deceased Mamta. The requisition for postmortem is Ex. P. 27. This witness has stated that She along with Dr. S.K. Sharma had conducted the Postmortem. The postmortem report is in the handwriting of Dr. S.K. Sharma. This witness has proved her signatures on the Postmortem report of deceased Mamta, Ex. P.28.

30. Dr. S.K. Sharma (P.W. 11) had conducted the postmortem of deceased Mamta. As per the postmortem report, following injuries were found on the dead body of deceased Mamta :

1. One lacerated wound with charring ring around the 2.15 elliptical direction medially - posterior over right lumber abdominal part. Its track is going in abdomen puncturing internal loops, mesenteric aortic (Abd., Aorta and vein) punctured Left Illiac bone.

2. Exit wound : left upper outer hip, everted margins elliptical shape 2.5x3 cm blood clot with slice of muscle and skin flap. .5x1 cm curved metallic material was seen in cavity which was sealed.

3. Three small 1/4x/14 cm charring injury spots seen over Right thigh, one over Right Trochanter and 2nd over upper thigh and third over thigh anterior and one small F.B. Metallic obtained and sealed.

4. Third charring injury was found on the front side of lower part of thigh and one 1/4x1/4 size small pellet was also recovered.

The cause of death was hemorrhage shock due to injuries due to gun shot (firearm). The Postmortem report is Ex. P.28.

31. Dr. D.C. Parashar (P.W.14) has also proved the postmortem report, Ex. D.20, of deceased Brajesh, in respect of which cross case i.e., Crime No. 203/2000 (S.T. No. 229/2003), was registered against Ramant Singh (P.W.1), Vinod, Girraj, Suresh Singh, Manohar Singh, Virendra Singh, Sultan Singh, Nathu Singh son of Madho Singh, Jaikaran Singh and Ran Singh. The following injuries were found on the dead body of Brajesh :

The entry wound was on right side over sternum of chest at last border, 6 cms below the supra sternal notch, measuring 1.5x1.5cm oval shaped inverted margins, and blackening was present. The Exit wound was situated on left side of back of lower border of scapula measuring 3cmx2cm irregular margins everted edges. The certified copy of requisition for postmortem of Brajesh is Ex. D.19 and certified copy of Postmortem report of Deceased Brajesh is Ex. D.20.

32. Dr. Mamta Bandil (P.W.9) was not cross examined on the ground that Dr. S. K. Sharma (P.W.11) has also been cited as prosecution witness, and since, the postmortem report is in his handwriting, therefore, he will be cross examined by the Counsel for the accused. Dr. D.C. Parashar (P.W.14) was cross examined by the Counsel for the accused persons.

33. Dr. S.K. Sharma (P.W.11) was cross examined by the Counsel for the appellants. In cross-examination, it was clarified by this witness that gun shot was fired from a parallel place and not from the roof.

34. The deaths of Keshav, Raghunath @ Chhote Singh, Jaswant and Mamta were homicidal in nature has not been challenged by the Counsel for the appellants. Therefore, it is not necessary to consider the evidence of Dr. D. C. Parashar (P.W.14) and Dr. S.K. Sharma (P.W.11) in detail.

35. From the postmortem reports of Keshav, Raghunath @ Chhote Singh, Jaswant and Mamta, Ex. P.33, P.35, P.37 and P.28 respectively, it is clear that all the four persons died due to gun shot injuries sustained by them and accordingly, it is held that all the four persons namely Keshav, Raghunath @ Chhote Singh, Jaswant and Mamta died homicidal death.

36. Now the next question for consideration is that whether Gomati and Manohar sustained any gun shot injury or not?

37. It is not out of place to mention here that Mamta died during her treatment in the hospital. Initially Mamta was also medically examined along with Manohar Singh (P.W. 16) and Gomati (P.W.13). Dr. D.C. Parashar (P.W.14) had examined all the injured persons. The requisition for M.L.C. of Gomati bai (P.W.13) is Ex. P.11. Gomati bai (P.W.13) was examined on 17-10-2000 at 12:35 A.M., in the night. Following injuries were found on her body :

> 1. Firearm wound of entrance with intermingle wound of exit on 2nd bone of right wrist. Margins are inverted and everted. Blackening present
>
> 2. Lacerated wound on the mid of forearm of right side. Feeling of hardness on the internal side of writ of forearm. Hardness and Blackening present. X-ray was advised.
>
> The M.L.C. report of Gomati bai (P.W.13) is Ex. P.11A.

38. The requisition for M.L.C. of Manohar Singh (P.W.16) is Ex. P.12. Manohar Singh (P.W.16) was medically examined on 17-10-2000 at 12:50 A.M., in the night and following injuries were found :

> 1 Multiple lacerated wounds present about 7 in number of various size. Inverted and everted margins present at the site all over the hip on lower part of back.
>
> 2. Lacerated wound in between the buttocks inverted and everted margins present. Blackening present. The M.L.C. report of Manohar Singh is Ex. P.12A.

39. The requisition for M.L.C. of Mamta (Died on 17-10-2000 itself) is Ex. P.13. She was medically examined on 17-10-2000 at 12:40 A.M. in the night and following injuries were found on her body :

> 1. Firearm gun shot injury wound of entrance on the right side of abdomen near (Not "legible" but as per evidence "Navel") inverted margins oval shape. Slightly blackening present, blood cot with bleeding 1 cm x 1.5 in the abdomen surface. F.B. In abdomen.

2. Lacerated wound over the left buttock. Irregular margins, blood cot present 1½ cm x ¼ x ¼ x ¼ with diffuse swelling near wound. The M.L.C. report is Ex. P.13A.

40. Dr. Ravindra Singh Sikarwar (P.W.6) had conducted x-ray of Gomati bai (P.W.13), Manohar Singh (P.W. 16). The X-ray plate of Gomati bai (P.W.13) has been marked as Ex. P.21 (However, as per office noting, X-ray plate of Gomatibai (P.W.13) is missing in the official file). In X-ray report of Gomatibai (P.W.13), fracture of distal 1/3rd of right ulna bone was seen. Multiple Metallic radio-opaque irregular size were present in the soft tissues under the muscles and laceration of blood vessels of Soft tissues was seen. The X- ray report of Gomatibai (P.W.13) is Ex. P.22.

41. The x-ray plate of Manohar Singh (P.W.16) is Ex. P.23 and P.24. In x-ray report, it was found that multiple radio-opaque foreign bodyshadows of metallic density of different sizes, shapes were present in both sides of lower abdomen. Right half of (not clear) in the lower abdomen F.B. Shadows are present. No bony injury was seen. The x-ray report of Manohar Singh is Ex. P.25.

42. As the Counsel for the appellants have not challenged the M.L.C. reports of Gomati bai (P.W.13) as well as Manohar Singh (P.W. 16), therefore, it is suffice to say, that Gomati bai (P.W.13) and Manohar Singh (P.W.16) sustained gun shot injuries and radio-opaque foreign bodies were also seen in x-ray.

43. Thus, it is held that Keshav, Raghunath @ Chhote Singh, Jaswant and Mamta died homicidal death, whereas Gomati bai (P.W.13) and Manohar Singh (P.W. 16) sustained gun shot injuries.

44. Now the next question for consideration is that who killed four persons and who caused injuries to the injured persons.

45. The prosecution case is based on direct evidence. The prosecution has examined Ramant Singh (P.W.1), Gomati bai (P.W.13), Rajabeti (P.W. 15), Manohar Singh (P.W. 16) and Kumher Singh (P.W.17) as eye witnesses.

46. Ramant Singh (P.W.1) had lodged Dehati Nalishi, Ex. P.1, whereas Gomati bai (P.W.13) and Manohar Singh (P.W.16) are injured witnesses.

47. Since, four persons have died and two have sustained injuries and three persons have been convicted, therefore, the role assigned to each of the appellant shall be considered after deciding as to whether Ramant Singh (P.W.1), Gomati bai (P.W.13), Rajabeti (P.W. 15), Manohar Singh (P.W. 16) and Kumher Singh (P.W.17) are reliable witnesses or not?

48. Ramant Singh (P.W.1) is the son of deceased Keshav Singh and real brother of deceased Jaswant Singh. He is cousin brother of deceased Raghunath Singh @ Chhote Singh. Gomati bai (P.W.13) is not related to deceased Keshav but

is the resident of same village. Thus, She is an independent witness. Rajabeti (P.W. 15) is the widow of Keshav and mother of deceased Jaswant and Ramant Singh (P.W.1). Deceased Raghnuath Singh was her nephew. Manohar Singh (P.W. 16) is the resident of village Khoyala and thus he is an independent witness. Further, Kumher Singh (P.W. 17) is the father-in-law of the deceased Mamta, but is not related to Ramant Singh (P.W.1).

49. Thus, the first question for consideration is that whether Ramant Singh (P.W.1), Rajabeti (P.W. 15), and Kumher Singh (P.W.17) are "interested witnesses" or not?

50. It is well established principle of law that the evidence of a "related witness" cannot be discarded only on the ground of relationship. The Supreme Court in the case of *Rupinder Singh Sandhu v. State of Punjab,* reported in (2018) 16 SCC 475 has held as under :

> 50. The fact that PWs 3 and 4 are related to the deceased Gurnam Singh is not in dispute. The existence of such relationship by itself does not render the evidence of PWs 3 and 4 untrustworthy. This Court has repeatedly held so and also held that the related witnesses are less likely to implicate innocent persons exonerating the real culprits.

The Supreme Court in the case of *Shamim Vs. State (NCT of Delhi)* reported in (2018) 10 SCC 509 has held as under :

> **9.** In a criminal trial, normally the evidence of the wife, husband, son or daughter of the deceased, is given great weightage on the principle that there is no reason for them not to speak the truth and shield the real culprit.....

The Supreme Court in the case of *Rizan v. State of Chhattisgarh,* reported in (2003) 2 SCC 661 has held as under :

> **6.** We shall first deal with the contention regarding interestedness of the witnesses for furthering the prosecution version. Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal the actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible.
>
> **7.** In *Dalip Singh* v. *State of Punjab* it has been laid down as under: (AIR p. 366, para 26)
>
> > *"26.* A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity

against the accused, to wish to implicate him falsely. Ordinarily a close relation would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalization. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts."

8. The above decision has since been followed in *Guli Chand* v. *State of Rajasthan* in which *Vadivelu Thevar* v. *State of Madras* was also relied upon.

9. We may also observe that the ground that the witness being a close relative and consequently being a partisan witness, should not be relied upon, has no substance. This theory was repelled by this Court as early as in *Dalip Singh case* in which surprise was expressed over the impression which prevailed in the minds of the Members of the Bar that relatives were not independent witnesses. Speaking through Vivian Bose, J. it was observed: (AIR p. 366, para 25)

"25. We are unable to agree with the learned Judges of the High Court that the testimony of the two eyewitnesses requires corroboration. If the foundation for such an observation is based on the fact that the witnesses are women and that the fate of seven men hangs on their testimony, we know of no such rule. If it is grounded on the reason that they are closely related to the deceased we are unable to concur. This is a fallacy common to many criminal cases and one which another Bench of this Court endeavoured to dispel in — *'Rameshwar* v. *State of Rajasthan'* (AIR at p. 59). We find, however, that it unfortunately still persists, if not in the judgments of the courts, at any rate in the arguments of counsel."

10. Again in *Masalti* v. *State of U.P.* this Court observed: (AIR pp. 209-10, para 14)

"But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses. ... The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice. No hard-and-fast rule can be laid down as to how much evidence

> should be appreciated. Judicial approach has to be cautious in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct."
>
> **11.** To the same effect is the decision in *State of Punjab* v. *Jagir Singh* and *Lehna* v. *State of Haryana.*

51. Thus, it is clear that the evidence of a "related witness" cannot be discarded only on the ground of relationship. On the contrary, why a "related witness" would spare the real culprit in order to falsely implicate some innocent person? There is a difference between "related witness" and "interested witness". "Interested witness" is a witness who is vitally interested in conviction of a person due to previous enmity. The "Interested witness" has been defined by the Supreme Court in the case of *Mohd. Rojali Ali v. State of Assam,* reported in (2019) 19 SCC 567 as under :

> **13.** As regards the contention that all the eyewitnesses are close relatives of the deceased, it is by now well-settled that a related witness cannot be said to be an "interested" witness merely by virtue of being a relative of the victim. This Court has elucidated the difference between "interested" and "related" witnesses in a plethora of cases, stating that a witness may be called interested only when he or she derives some benefit from the result of a litigation, which in the context of a criminal case would mean that the witness has a direct or indirect interest in seeing the accused punished due to prior enmity or other reasons, and thus has a motive to falsely implicate the accused (for instance, see *State of Rajasthan* v. *Kalki; Amit* v. *State of U.P.;* and *Gangabhavani* v. *Rayapati Venkat Reddy).* Recently, this difference was reiterated in *Ganapathi* v. *State of T.N.,* in the following terms, by referring to the three-Judge Bench decision in *State of Rajasthan* v. *Kalki: (Ganapathi case,* SCC p. 555, para 14)
>
> > *"14.* "Related" is not equivalent to "interested". A witness may be called "interested" only when he or she derives some benefit from the result of a litigation; in the decree in a civil case, or in seeing an accused person punished. A witness who is a natural one and is the only possible eyewitness in the circumstances of a case cannot be said to be "interested"."
>
> **14.** In criminal cases, it is often the case that the offence is witnessed by a close relative of the victim, whose presence on the scene of the offence would be natural. The evidence of such a witness cannot automatically be discarded by labelling the witness as interested. Indeed, one of the earliest statements with respect to interested witnesses in criminal cases was made by this Court in *Dalip Singh* v. *State of Punjab,* wherein this Court observed: (AIR p. 366, para 26)

> *"26.* A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily a close relative would be the last to screen the real culprit and falsely implicate an innocent person."

15. In case of a related witness, the Court may not treat his or her testimony as inherently tainted, and needs to ensure only that the evidence is inherently reliable, probable, cogent and consistent. We may refer to the observations of this Court in *Jayabalan* v. *State (UT of Pondicherry):* (SCC p. 213, para 23)

> *"23.* We are of the considered view that in cases where the court is called upon to deal with the evidence of the interested witnesses, the approach of the court, while appreciating the evidence of such witnesses must not be pedantic. The court must be cautious in appreciating and accepting the evidence given by the interested witnesses but the court must not be suspicious of such evidence. The primary endeavour of the court must be to look for consistency. The evidence of a witness cannot be ignored or thrown out solely because it comes from the mouth of a person who is closely related to the victim."

52. Thus, if a witness has a direct or indirect interest in seeing the accused punished due to prior enmity or other reasons, and has a strong motive to falsely implicate the accused, then he would be called an "interested witness". Therefore, the evidence of Ramant Singh (P.W.1), Rajabeti (P.W.15) and Kumer Singh (P.W.17) (as he is father-in-law of deceased Mamta) shall be considered in the light of the fact that being "related witness" whether they can be termed as "interested witness" having any strong motive to falsely implicate the appellants or not?

53. Dehati Nalishi, Ex. P.1 was lodged by Ramant Singh (P.W.1) at 11:00 P.M. on 16-10-2000. Dehati Nalishi, Ex. P.1 was recorded by D.R. Sharma (P.W.19). D.R. Sharma (P.W. 19) has stated that he was posted as S.H.O., Police Station Porsa, Distt. Morena, as the post of Town Inspector was vacant. On 16-10-2000, Angad Singh lodged a F.I.R.,Ex. D.2, regarding murder of Brajesh, and accordingly, he went to village Khoyala. After preparing inquest report, when he went to the sitting room *(Baithak)* of Ramvir (a room situated away from the house of Ramvir Singh), then he found that the dead bodies of Keshav, Jaswant and Raghunath who were father, brother and relative of Ramant Singh were lying near the house of Ramant Singh (P.W.1). Mamta, Gomti and Manohar were found in an injured condition. All of them had sustained gun shot injuries. On 16-10-2000 itself at 11:00 P.M., he recorded the Dehati Nalishi, Ex. P.1 which was lodged by Ramant Singh (P.W.1). All the three injured persons were sent for

medical examination. Police force was deployed for safety of dead bodies. Thereafter, R.S. Ghuraiya (P.W. 20) also came there along with police force and informed this witness, that the Superintendent of Police, Morena has instructed him to take over the investigation. Thereafter, the case diary of Crime No. 203/2000 (Cross case) and Crime No. 204/2000 (present case) was handed over to him. It was further admitted that on 17-10-2000, he was present along with Shri Ghuraiya to assist him in investigation. On 17-10-2000, requisition for postmortem of Keshav Singh, Ex. P.32, Raghunath Singh, Ex. P.34 and Jaswant Singh, Ex. P.36 were prepared.

54. Thus, it is clear that when this witness reached village Khoyala, he found that dead bodies of three persons, namely Keshav, Jaswant and Raghunath were lying near the house of Ramant Singh (P.W.1) and Ramant Singh (P.W.1) was present and he lodged the Dehati Nalishi, Ex. P.1. Thus, it is clear that Ramant Singh (P.W.1) did not abscond after the incident. In cross examination, this witness denied that earlier one Ramlakhan was also detained but thereafter, he was released by Ghuraiya (P.W. 20). He further stated that he had found the dead body of Brajesh outside the house (different from sitting room *[Baithak])of* Ramvir. On cross-examination by Court, this witness stated that the house of Ramvir Singh is situated near field, garden, School and pond. He further clarified that in Crime No. 203/2000, he issued *Safina form* at 21:55 and prepared inquest report, Ex. D.21 at 22:00 and he took only 15-20 minutes to do so. Requisition for postmortem of Brajesh Ex. P.19 was prepared. He further stated that the dead body of Brajesh was sent along with Constable Kaushal Pratap. He denied that this witness also went back to Police Station Porsa, along with the dead body of Brajesh. The sitting room *(Baithak)* of Ramvir is about 60-70 yards away from the place where the dead body of Brajesh was kept. At the time of preparation of inquest report, he was not aware of the fact that some more persons have been killed. In further cross examination, this witness in para 20 has stated that the dead body of Brajesh was sent to Police Station Porsa at 22:15 and thereafter, he called the father and brother of the deceased Brajesh, but they did not turn up and accordingly, he went to the sitting room *(Baithak)* of Ramvir. (Here it is not out of place to mention here that as Brajesh had already lost his life, but still his father, brother and other relatives were not there, which indicates that they had already absconded indicating their guilty mind). On further cross examination, this witness clarified that when he interrogated the persons who were present, then all of them replied, that Ramvir will disclose the names of the assailants, but he has gone to Porsa. He further denied the suggestion that he was knowing that Ramvir was in Distt. Jalon. He further denied that F.I.R., Ex. D.2 was not lodged on the information of Angad Singh, but his signatures were obtained on blank papers. He further denied that Angad Singh had disclosed, that Ramant Singh (P.W.1) has killed Brajesh.

55. R. S. Ghuraiya (P.W. 20) has investigated the matter. According to this witness, the post of S.H.O., Police Station Porsa, Distt. Morena was vacant, therefore, by wireless message, the Superintendent of Police, Morena, instructed him to take over the investigation. At about 12:30 A.M., in the night, he reached village Khoyala and took over the investigation of Crime No. 203/2000 (cross case) and Crime No. 204/2000 (present case). This witness has further stated that three dead bodies were lying in front of the door of the house of Ramant Singh (P.W.1). The persons, who had allegedly killed three persons were not found in the village. On 17-10-2000, he issued notice, Ex. P.5 to the witnesses for preparation of inquest report. Requisition for postmortem of Keshav Singh, Ex. P.4, of Raghunath Singh, Ex. P.3 were prepared. Inquest report, E. P.8 was prepared in the presence of Ramant Singh (P.W.1), Nathu Singh son of Madho Singh, Ashok Singh, Manoj Singh and Siyaram Upadhyaya. The inquest report of dead body of Keshav Singh, Ex. P.8 was prepared at 6:50 A.M., inquest report of dead body Jaswant Singh, Ex. P.7 was prepared at 7:00 A.M. and inquest report of dead body of Raghunath Singh Ex. P.6 was prepared at 7:10 A.M. The blood stained earth and plain earth was seized from the spot where dead bodies were lying. Three empty cartridges of .315 bore gun, three live cartridges of .315 bore (out of which two had misfired but were having fire marks, whereas one cartridge was live), one empty cartridge of .12 bore gun, 5 pieces of paper of fired .12 bore cartridge, one blood stained pant of Jaswant, one blood stained white coloured *safi* of Raghunath, one *Taihmad* and one black coloured sleeper from the roof of house of Keshav Singh were seized. The blood stained and plain earth found near the dead body of Keshav, Jaswant and Raghunath were also seized. Blood stained and plain earth from the place, where Mamta had suffered gun shot was also seized. The seizure proceedings were completed at 8:30 A.M. vide seizure memo Ex. P.40 in the presence of Ashok Singh Bhadoria and Nathu Singh. Thereafter, site plan, Ex. P.2 was prepared showing the houses of different persons as well as the places where dead bodies of Keshav, Raghunath and Jaswant were found. At serial No. 15, he had found blood on the dilapidated house of Brijlal. Site plan D.16 was also prepared, in which he had also shown the places from where empty cartridges, misfired cartridges, as well as live cartridges were seized. The spot where the witnesses were standing was also shown. Ramant Singh (P.W. 1) also participated in other police proceedings on 17-10-2000, like preparation of Crime Detail Form, Ex. P.2, Inquest Reports, Ex. P.6,7, and 8, site plan Ex. D.16 etc. The Statement of Ramant Singh (P.W.1) was recorded on 17-10-2000 and on the same day, the statements of Kumher Singh, Vinod Singh, were recorded. On 18-10-2000, the statements of Rajakumari, Ranikumari, were recorded. On 19-10-2000, the statements of Rajabeti (P.W.15), Lakhan Singh were recorded. On 2-11-2000, the statements of Suresh, Sultan Singh, Ashok, Laxmi devi and Gomti bai (P.W. 13) were recorded.

56. Thus, it is clear that Ramant Singh (P.W.1) was not only present on the spot on 16-10-2000 at 11:00 P.M., but also lodged the Dehati Nalishi, Ex. P.1 and also participated in the police proceedings on 17-10-2000. Thus, the conduct of Ramant Singh (P.W.1) clearly indicates, that there was no intention on his part to abscond. Further, the presence of Ramant Singh (P.W.1) on the spot is also natural, because not only the incident took place in front of his house, but a function was also going on in his house on the occasion of birth of his son. Further, the mental condition of a person, who all of sudden lost his father, brother, cousin brother and other persons in a shoot out during the celebration of his son, can be presumed.

57. So far as the reliability and credibility of Ramant Singh (P.W.1) is concerned, the Counsel for the appellants have attacked the evidence of this witness on the ground that this witness has admitted that there was no enmity between the appellants and the complainant party. Further, the allegation that Brajesh died due to gun shot fired by Ramvir Singh is missing in the Dehati Nalishi, Ex. D.1, therefore, it is an improved version, made with an intention to save himself in the cross case. Further, there are material contradictions and omissions. In para 46 of his evidence, this witness has stated, that no litigation, either civil or criminal has taken place between him and the appellants. It is further stated that they were on visiting terms, and this witness had no apprehension that the appellants may commit an offence. Further, in para 53 and 54, this witness has stated about serving of meals. It is submitted that in para 54, this witness has admitted that about 50-60 independent witnesses were there, but not a single independent witness has been examined. It is submitted that although Gomati (P.W. 13) and Manohar Singh (P.W. 16) are independent witnesses, but they are injured witnesses and not a single eye witness who did not sustain any injury has been examined. It is contended by the Counsel for the State that since, in the Dehati Nalishi, Ex. P.1, this witness had disclosed enmity with the appellants, therefore it is clear that he is an "interested witness". Under these circumstances, non-examination of independent witnesses assume importance. An attempt was also made to substantiate the plea of false allegation, by submitting that although one Ramlakhan had fired, thereby killing four persons and injuring two, but due to animosity, the appellants have been falsely implicated.

58. Considered the submission made by the Counsel for the appellants.

59. It is well established principle of law that it is the quality of a witness which counts and not quantity of witnesses. The Supreme Court in the case of *Sarwan Singh v. State of Punjab,* reported in (1976) 4 SCC 369 has held as under :

> 13..... The onus of proving the prosecution case rests entirely on the prosecution and it follows as a logical corollary that the prosecution has complete liberty to choose its witnesses if it is to prove its case. The court cannot compel the prosecution to examine one witness or the other as its

witness. At the most, if a material witness is withheld, the court may draw an adverse inference against the prosecution. But it is not the law that the omission to examine any and every witness even on minor points would undoubtedly lead to rejection of the prosecution case or drawing of an adverse inference against the prosecution. The law is well-settled that the prosecution is bound to produce only such witnesses as are essential for unfolding of the prosecution narrative. In other words, before an adverse inference against the prosecution can be drawn it must be proved to the satisfaction of the court that the witnesses who had been withheld were eyewitnesses who had actually seen the occurrence and were therefore material to prove the case. It is not necessary for the prosecution to multiply witnesses after witnesses on the same point; it is the quality rather than the quantity of the evidence that matters.....

The Supreme Court in the case of *Yanob Sheikh Vs. State of W.B.* Reported in (2013) 6 SCC 428 has held as under :

20. We must notice at this stage that it is not always the quantity but the quality of the prosecution evidence that weighs with the court in determining the guilt of the accused or otherwise. The prosecution is under the responsibility of bringing its case beyond reasonable doubt and cannot escape that responsibility. In order to prove its case beyond reasonable doubt, the evidence produced by the prosecution has to be qualitative and may not be quantitative in nature. In *Namdeo* v. *State of Maharashtra,* the Court held as under: (SCC p. 161, para 28)

"28. From the aforesaid discussion, it is clear that Indian legal system does not insist on plurality of witnesses. Neither the legislature (Section 134 of the Evidence Act, 1872) nor the judiciary mandates that there must be particular number of witnesses to record an order of conviction against the accused. Our legal system has always laid emphasis on *value, weight* and *quality* of evidence rather than on *quantity, multiplicity* or *plurality* of witnesses. It is, therefore, open to a competent court to fully and completely rely on a solitary witness and record conviction. Conversely, it may acquit the accused in spite of testimony of several witnesses if it is not satisfied about the quality of evidence. The bald contention that no conviction can be recorded in case of a solitary eyewitness, therefore, has no force and must be negatived."

(emphasis in original)

21. Similarly, in *Bipin Kumar Mondal* v. *State of W.B.,* this Court took the view: (SCC p. 99, para 31)

"31. ... In fact, it is not the number [and] quantity, but the quality that is material. The time-honoured principle is that evidence has to be

weighed and not counted. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy [and reliable]."

The Supreme Court in the case of *Mahesh v. State of Maharashtra,* reported in (2008) 13 SCC 271 has held as under :

> **55.** As regards non-examination of the independent witnesses who probably witnessed the occurrence on the roadside, suffice it to say that testimony of PW Sanjay, an eyewitness, who received injuries in the occurrence, if found to be trustworthy of belief, cannot be discarded merely for non-examination of the independent witnesses. The High Court has held in its judgment and, in our view, rightly that the reasons given by the learned trial Judge for discarding and disbelieving the testimony of PWs 4, 5, 6 and 8 were wholly unreasonable, untenable and perverse. The occurrence of the incident, as noticed earlier, is not in serious dispute. PW Prakash Deshkar has also admitted that he had lodged complaint to the police about the incident on the basis of which FIR came to be registered and this witness has supported in his deposition the contents of the complaint to some extent. It is well settled that in such cases many a times, independent witnesses do not come forward to depose in favour of the prosecution. There are many reasons that persons sometimes are not inclined to become witnesses in the case for a variety of reasons. It is well settled that merely because the witnesses examined by the prosecution are relatives of the victim, that fact by itself will not be sufficient to discard and discredit the evidence of the relative witnesses, if otherwise they are found to be truthful witnesses and rule of caution is that the evidence of the relative witnesses has to be reliable evidence which has to be accepted after deep and thorough scrutiny.

The Supreme Court in the case of *Nagarjit Ahir v. State of Bihar,* reported in (2005) 10 SCC 369 has held as under :

> **12.** It was then submitted that in spite of the fact that a large number of persons had assembled at the bank of the river at the time of occurrence, the witnesses examined are only those who are members of the family of the deceased or in some manner connected with him. We cannot lose sight of the fact that four of such witnesses are injured witnesses and, therefore, in the absence of strong reasons, we cannot discard their testimony. The fact that they are related to the deceased is the reason why they were attacked by the appellants. Moreover, in such situations though many people may have seen the occurrence, it may not be possible for the prosecution to examine each one of them. In fact, there is evidence on record to suggest that when the occurrence took place, people started running helter-skelter. In such a situation it would be indeed difficult to find out the other persons who had witnessed the occurrence. In any event, we have the evidence of as many as 7

witnesses, 4 of them injured, whose evidence has been found to be reliable by the courts below, and we find no reason to take a different view.

The Supreme Court in the case of *Vijendra Singh Vs. State of U.P.* reported in (2017) 11 SCC 129 has held as under :

> **35.** The next plank of argument of Mr Giri is that since Nepal Singh who had been stated to have accompanied PW 2 and PW 3 has not been examined and similarly, Ram Kala and Bansa who had been stated to have arrived at the tubewell as per the testimony of PW 2, have not been examined, the prosecution's version has to be discarded, for it has deliberately not cited the independent material witnesses. It is noticeable from the decision of the trial court and the High Court, that reliance has been placed on the testimony of PWs 1 to 3 and their version has been accepted. They have treated PW 2 and PW 3 as natural witnesses who have testified that the accused persons were leaving the place after commission of the offence and they had seen them quite closely. The contention that they were interested witnesses and their implication is due to inimical disposition towards accused persons has not been accepted and we have concurred with the said finding. It has come out in evidence that witnesses and the accused persons belong to the same village. The submission of Mr Giri is that non-examination of Nepal Singh, Ramlal and Kalsa is quite critical for the case of the prosecution and as put forth by him, their non-examination crucially affects the prosecution version and creates a sense of doubt. According to Mr Giri, Nepal Singh is a material witness. In this regard we may refer to the authority in *State of H.P.* v. *Gian Chand* wherein it has been held that: (SCC p. 81, para 14)
>
> > *"14.* Non-examination of a material witness is again not a mathematical formula for discarding the weight of the testimony available on record howsoever natural, trustworthy and convincing it may be. The charge of withholding a material witness from the court levelled against the prosecution should be examined in the background of the facts and circumstances of each case so as to find whether the witnesses were available for being examined in the court and were yet withheld by the prosecution."
> >
> > The Court after so holding further ruled that it is the duty of the court to first assess the trustworthiness of the evidence available on record and if the court finds the evidence adduced worthy of being relied on and deserves acceptance, then non-examination of any other witnesses available who could also have been examined but were not examined, does not affect the case of the prosecution.
>
> **36.** In *Takhaji Hiraji* v. *Thakore Kubersing Chamansing,* it has been held that: (SCC p. 155, para 19)

> *"19.* ... if a material witness, who would unfold the genesis of the incident or an essential part of the prosecution case, not convincingly brought to fore otherwise, or where there is a gap or infirmity in the prosecution case which could have been supplied or made good by examining a witness who though available is not examined, the prosecution case can be termed as suffering from a deficiency and withholding of such a material witness would oblige the court to draw an adverse inference against the prosecution by holding that if the witness would have been examined it would not have supported the prosecution case. On the other hand, if already overwhelming evidence is available and examination of other witnesses would only be a repetition or duplication of the evidence already adduced, non-examination of such other witnesses may not be material. ... If the witnesses already examined are reliable and the testimony coming from their mouth is unimpeachable, the court can safely act upon it, uninfluenced by the factum of non-examination of other witnesses."

> **37.** In *Dahari* v. *State of U.P.*, while discussing about the non-examination of material witness, the Court expressed the view that when he was not the only competent witness who would have been fully capable of explaining the factual situation correctly and the prosecution case stood fully corroborated by the medical evidence and the testimony of other reliable witnesses, no adverse inference could be drawn against the prosecution. Similar view has been expressed in *Manjit Singh* v. *State of Punjab* and *Joginder Singh* v. *State of Haryana.*

The Supreme Court in the case of *Sadhu Saran Singh v. State of U.P.,* reported in (2016) 4 SCC 357 has held as under :

> **29.** As far as the non-examination of any other independent witness is concerned, there is no doubt that the prosecution has not been able to produce any independent witness. But, the prosecution case cannot be doubted on this ground alone. In these days, civilised people are generally insensitive to come forward to give any statement in respect of any criminal offence. Unless it is inevitable, people normally keep away from the court as they find it distressing and stressful. Though this kind of human behaviour is indeed unfortunate, but it is a normal phenomena. We cannot ignore this handicap of the investigating agency in discharging their duty. We cannot derail the entire case on the mere ground of absence of independent witness as long as the evidence of the eyewitness, though interested, is trustworthy.

60. Enmity is a double edged weapon. If the appellants claim that there was an enmity between them and the complainant party, then such enmity may also

provide motive to commit offence. The Supreme Court in the case of *Kunwarpal v. State of Uttarakhand,* reported in (2014) 16 SCC 560, has held as under :

> **16.** According to the complainant there was litigation between them and the accused persons leading to enmity. PW 3 Atmaram has also stated that there was litigation between them and it culminated in the occurrence. Animosity is a double-edged sword. While it can be a basis for false implication, it can also be a basis for the crime *(Ruli Ram* v. *State of Haryana* and *State of Punjab* v. *Sucha Singh).* In the instant case there is no foundation established for the plea of false implication advanced by the accused and on the other hand evidence shows that enmity has led to the occurrence.

61. The appellants themselves have filed copies of judgment dated 30-11-1991, Ex. D.24, passed by 1st Add. Sessions Judge, Morena in S.T. No. 194/1988 by which Ramant Singh (P.W.1), his father and other persons were held guilty for offence under Section 326, 324,323, 147,148 of I.P.C. for causing injuries to Ramlakhan. Similarly by judgment dated 30-11-1991, Ex. D.25, passed by 1st Add. Sessions Judge, Morena in S.T. No. 202/1988, Ramlakhan was convicted for offence under Section 307 of I.P.C. for causing gun shot injuries to Suresh Singh. Thus, it is clear that Ramlakhan and complainant party were convicted for causing injuries to each other. If the judgments, Ex. D.24 and D. 25 are considered, then it is clear that the said offence was committed in the year 1988 and judgments were passed in the year 1991. The offence in question was committed on 16-10-2000. By no stretch of imagination, it can be said that Ramlakhan might have killed four persons and injured 2 persons, because of criminal case which was decided in the year 1991. It also appears that some civil dispute is also going on between Ramlakhan and complainant. Thus, for the sake of arguments, if it is accepted that there was an enmity between Ramlakhan and complainant party, even then there was no good reason for the complainant party to spare Ramlakhan. Thus, it is incorrect to say that the appellants have been falsely implicated due to enmity.

62. It is next contended by the Counsel for the appellants, that since, Ramant Singh (P.W.1) had suppressed the fact of murder of Brajesh, in Dehati Nalishi, Ex. P.1, therefore, it is clear that he had suppressed very genesis of the incident, thereby making him unreliable.

63. Considered the submission made by the Counsel for the appellans.

64. The appellants have relied upon site plan, Ex. D.16 prepared by R.S. Ghuraiya (P.W.20) in the presence of D.R. Sharma (P.W. 19). From the said site plan, it is clear that blood was found on the roof of dilapidated house of Brajlal and one shoe of deceased Brajesh was also found near the dilapidated house of Brajlal. As per site plan, Ex. D.16, the dilapidated house of Brajlal is shown at Sr. No. 1 and one shoe of deceased Brajesh is shown at Sr. No.2. The dead body of Brajesh

was shifted to the house of Ramvir Singh, which is shown at Sr. No.5, which is approximately 365 steps away from the dilapidated house of Brajlal. In the cross case, it was the stand of the appellants that Brajesh was shot by Ramant Singh (P.W.1) in front of the sitting room *(Baithak)* of Ramvir Singh (which is shown in site plan Ex. D.16) and from there, the dead body of Brajesh was shifted by his father and others to the house of Ramvir Singh which is 365 steps away from dilapidated house of Brajlal, shown at Sr. No.1. Further, from the site plan, Ex. D.16, as well as from the evidence of R.S. Ghuraiya (P.W.20), it is clear that empty cartridges, misfired cartridges, and live cartridges were lying near the house of Ramvir Singh (appellant), whereas the dead bodies of Keshav, Jaswant and Raghunath @ Chhote Singh were lying in front of the house of Keshav Singh. The fact that .12 bore and .315 bore cartridges were found near the house of Ramvir Singh (appellant), it is clear that the assailants were standing near the house of Ramvir Singh (appellant) and they were firing towards the house of Ramant Singh (P.W.1). The Site Plan, Ex. D.16 throws sufficient light in this regard. Site plan is an important document. A part of site plan which has been prepared by the investigating officer, on the basis of what he had seen and observed, would be a substantive evidence, and a part of site plan which is prepared on the information given by a witness, would be admissible, if the witness giving such information is also examined. The Supreme Court in the case of *Jagdish Narain v. State of U.P.,* reported in (1996) 8 SCC 199 has held as under :

> 9 .....While preparing a site plan an Investigating Police Officer can certainly record what he sees and observes, for that will be direct and substantive evidence being based on his personal knowledge; but as, he was not obviously present when the incident took place, he has to derive knowledge as to when, where and how it happened from persons who had seen the incident. When a witness testifies about what he heard from somebody else it is ordinarily not admissible in evidence being hearsay, but if the person from whom he heard is examined to give direct evidence within the meaning of Section 60 of the Evidence Act, 1872 the former's evidence would be admissible to corroborate the latter in accordance with Section 157 CrPC *(sic* Evidence Act)

The Supreme Court in the case of *Rameshwar Dayal v. State of U.P.,* reported in (1978) 2 SCC 518 has held as under:

> **36.** Apart from the inquest report Ex. K-a-10 there is another document which throws a flood of light on this question—Ex. Ka-18 which is the site plan prepared by the Investigating Officer at the spot from where the empty cartridges of.12 bore were recovered. This is also a record of what the Investigating Officer himself found at the spot. The learned counsel for the appellants submitted that the site plan was also not admissible in evidence because it was based on information derived by the Investigating Officer from the statement of witnesses during

investigation. Reliance was placed on a judgment of this Court in the case of *Jit Singh* v. *State of Punjab* where this Court observed as follows:

> "It is argued that presumably this site plan also was prepared by the Investigating Officer in accordance with the various situations pointed out to him by the witnesses... We are afraid it is not permissible to use the site plan Ex. P-14 in the manner suggested by the counsel. The notes in question on this site plan were statements recorded by the Police Officer in the course of investigation, and were hit by Section 162 of the Code of Criminal Procedure. These notes could be used only for the purposes of contradicting the prosecution witnesses concerned in accordance with the provisions of Section 145 of the Evidence Act and for no other purpose."

In our opinion, the argument of the learned counsel is based on misconception of law laid down by this Court. What this Court has said is that the notes in question which are in the nature of a statement recorded by the Police Officer in the course of investigation would not be admissible. There can be no quarrel with this proposition. Note No. 4 in Ex. Ka-18 is not a note which is based on the information given to the Investigating Officer by the witnesses but is a memo of what he himself found and observed at the spot. Such a statement does not fall within the four corners of Section 162 CrPC. In fact, documents like the inquest reports, seizure lists or the site plans consist of two parts one of which is admissible and the other is inadmissible. That part of such documents which is based on the actual observation of the witness at the spot being direct evidence in the case is clearly admissible under Section 60 of the Evidence Act whereas the other part which is based on information given to the Investigating Officer or on the statement recorded by him in the course of investigation is inadmissible under Section 162 CrPC except for the limited purpose mentioned in that section. For these reasons, therefore, we are of the opinion that the decision cited by the counsel for the appellants has no application to this case.

65. One thing is clear that the dead body of Brajesh was immediately removed by his family members. On the contrary, Ramant Singh (P.W.1) had already lost 3 members of his family i.e., father, real brother and cousin brother and three persons were injured. Under these circumstances, if Ramant Singh (P.W.1) at the time of lodging Dehati Nalishi, Ex. P.1, could not notice that Brajesh has also expired, then it cannot be said that there was a deliberate suppression by Ramant Singh (P.W.1) about murder of Brajesh in his Dehati Nalishi, Ex. P.1. Further, this Court while deciding Cr.A. No. 584/2008 (arising out of cross case) has come to a conclusion that Ramant Singh (P.W.1) did not kill Brajesh. As per the postmortem report of deceased Brajesh, Ex. D.20, a bullet injury was found on his body. It was Ramvir Singh (appellant) who was having .315 bore mouser, in which bullet

cartridge is used. As per site plan Ex. D.16, one shoe of Brajesh was found near the dilapidated house of Brajlal. Further, the subsequent conduct of Ramant Singh (P.W.1) in not absconding from the place of incident, and thereafter, participating in police proceedings, also indicates his innocence. Therefore, non-disclosure of murder of Brajesh in Dehati Nalishi, Ex. P.1, would not give any dent to the prosecution story as well as to the reliability and credibility of Ramant Singh (P.W.1).

66. It is further submitted that since, Ramant Singh (P.W.1) absconded at subsequent stage, therefore, he has suppressed the very genesis of murder of Brajesh and in fact, Ramant Singh (P.W.1) had killed Brajesh and only thereafter, it appears that the appellants retaliated either in exercise of their right of private defence or due to sudden and grave provocation.

67. Considered the submission made by the Counsel for the appellants.

68. Abscondence by itself cannot be said to be an incriminating circumstance to indicate the guilty mind of a suspect. An innocent person, under an apprehension of false implication, may also abscond. In the present case, R.S. Ghuraiya (P.W. 20) in para 2 of his examination-in-chief, has specifically stated that on 17-10-2000, no suspect who was alleged to have committed the present offence was found in the village. Further, it is clear from the evidence of D. R. Sharma (P.W.19), Angad Singh, had lodged F.I.R., Ex. D.2 in relation to murder/death of Brajesh. It is not out of place to mention here that Angad Singh was not the eye witness of murder of Brajesh. In F.I.R. Ex. D.2 he had merely informed that he was in the field. After hearing the noice of gun shots, he came back to village and found that the dead body of Brajesh was lying on *Kharanja* (Street made up of stones) in front of the sitting room *(Baithak)* of Ramvir Singh. Kallu Singh, Mahesh Singh, Rajesh Singh were near the dead body and the names of the assailants would be disclosed by Mahesh Singh, Ramvir Singh and Rajesh Singh. Thus, F.I.R. regarding murder of Brajesh Singh was lodged against unknown persons. It is really surprising that although the dead body of Brajesh was lying in front of the sitting room *(Baithak)* of Ramvir Singh, but the father of the deceased namely Ram Singh, Ramvir Singh himself and other persons were not there. Further the information given in F.I.R., Ex. D.2, that names of the assailants would be disclosed by Ramvir Singh, clearly indicates, that Angad Singh knew this fact that Ramvir Singh had witnessed the incident and even then, if Ramvir Singh, along with Ram Singh (father of deceased Brajesh) and others absconded from the spot, then it clearly indicates the guilty mind of Ramvir Singh. Whereas Ramant Singh (P.W.1) against whom it was alleged that he had shot Brajesh, did not abscond and remained with the dead bodies of his father Keshav, brother Jaswant and cousin brother Raghunath @ Chhote Singh and not only lodged the Dehati Nalishi, Ex. P.1, but also participated in the police proceedings

which took place on 17-10-2000. As the appellants were alleging that it was Ramant Singh (P.W.1) who had shot Brajesh, therefore, subsequent abscondence of Ramant Singh (P.W.1) would not amount to an incriminating circumstance against him. The Supreme Court in the case of *Kundula Bala Subrahmanyam v. State of A.P.,* reported in (1993) 2 SCC 684 has held as under :

> 23. A closer link with the conduct of the appellants both at the time of the occurrence and immediately thereafter is also the circumstance relating to their absconding .....

69. The Supreme Court in the case of *Matru Vs. State of U.P.* reported in (1971) 2 SCC 75 has held that where the appellant had gone to the police station to lodge F.I.R. about the incident, then such behavior of the appellant by normal standards is not suggestive of his involvement in a heinous offence like murder, unless and until he is an experienced criminal with extra ordinary balance of mind and disciplined control over his senses and faculties. Therefore, the immediate conduct of a person after the incident, also indicates his guilty mind/innocence. Under these circumstances, the subsequent abscondence of Ramant Singh (P.W.1) would not lead to any conclusion.

70. Thus, viewed from every angle, it is held that Ramant Singh (P.W.1) is a reliable witness and has narrated the truth.

71. Gomati bai (P.W. 13) is an independent witness who had come to attend the function. Attacking her evidence, it is submitted by the Counsel for the appellants that Gomati bai (P.W. 13) in her evidence has stated that Ramvir Singh shot Keshav, Jaswant and Raghunath and Ghanshyam shot Mamta. However, Gomati bai (P.W. 13) in her police statement, Ex. D.3 had stated that Ghanshyam shot Mamta and "She came to know" that Ramvir has killed Keshav and Jaswant whereas Ghanshyam has killed Raghunath also. It is submitted that since, the attention of this witness was drawn to the said statement, therefore, her evidence that Ramvir Singh had shot Keshav and Jaswant is not reliable and similarly, her evidence that Ghanshyam killed Raghunath is also not reliable. Considered the submissions made by the Counsel for the appellants.

72. Gomati bai (P.W.13) in her police statement Ex. D.3, had not claimed that She had seen Ramvir Singh or Ghanshyam causing any gunshot injury to Keshav, Jaswant and Raghuvir. On the contrary, She had stated that "She came to know" that Ramvir Singh has killed Keshav and Jaswant, whereas Ghanshyam has killed Raghunath. When She was confronted with her police statement, Ex. D.3, then in para 26 of her cross examination, She claimed that She never disclosed to police that "She came to know" and could not explain as to how, "She came to know" was mentioned in her Police statement, Ex. D.3. Thus in view of vital contradiction in the evidence of Gomati bai (P.W.13), it is held that She did not see that who caused gun shot injuries to Keshav, Jaswant and Raghunath @ Chhote Singh. However, it

is held that immediately after the incident, she came to know that Ramvir Singh has killed Keshav and Jaswant, whereas Ghanshyam has killed Raghunath @ Chhote Singh.

73. But so far as her evidence that gun shot injury was caused to her by Nathu Singh, and Ghanshyam Singh shot Mamta is concerned, her evidence is consistence. Thus, it is held that Gomati bai (P.W. 13) did not see that who caused death of Keshav, Jaswant and Raghunath Singh @ Chhote Singh.

74. It is further submitted that one Doctor had recorded the statement of Gomati bai (P.W.13) as dying-declaration, Ex. D.18 in which She had stated that Ramvir Singh had caused injuries to her, therefore, her evidence that Nathu Singh had caused gun shot injuries to her cannot be accepted.

75. In the dying declaration of Gomati bai (P.W.13) Ex. D.18, which was recorded by a Doctor, Gomatibai (P.W. 13) had stated that Ramvir has caused injury to her, but on confrontation, She explained that since She was not fully conscious, therefore, She might have committed mistake in disclosing the name of the assailant to the Doctor. In the present case, the Doctor who had recorded the dying declaration, Ex. D.18 has not been examined. Since, Gomati bai (P.W.13) has survived, therefore, so called Dying-declaration, Ex. D.18 is not admissible under Section 32 of Evidence Act. Further, in the light of the explanation given by Gomati bai (P.W. 13) in para 72 of her cross-examination, it is held that her statement which was recorded as Dying declaration, would not give any dent to her evidence, that Nathu Singh had caused gun shot injury to her. Further, She is an independent witness having no enmity with Nathu Singh.

76. By referring to Para 16 of her cross-examination, it is submitted by the Counsel for the appellants, that this witness has admitted that firstly, Brajesh (deceased in cross case) suffered gun shot injury and thereafter, the victims/ deceased of this case suffered gun shot injuries. Thus, it is clear that since, Brajesh was killed by Ramant Singh (P.W.1) therefore, the prosecution has suppressed the very genesis of the incident.

77. Considered the submission made by the Counsel for the appellants. This Court has already considered the fact that the dead body of Brajesh was immediately removed by his family members and was taken to a place which was 365 steps away from the place of incident. Why the dead body of Brajesh was removed has not been explained by the appellants. Although in the light of the judgment passed by the Supreme Court in the case of *Nathilal* (Supra), in case where there is a cross case, then both the cases should be tried by one judge and should be decided on one day, without getting influenced by evidence or arguments in cross case. In the present case, in S.T. No. 229/2003 (Cross case), Mahesh was cited as a witness and was examined as Prosecution Witness No. 3. It

is not out of place to mention here, that Mahesh is Accused No. 9 in the present case. He had admitted in S.T. No. 229/2003, that gun shot was firstly fired by Brajesh. Although it is the case of the Counsel for the appellants, that any evidence led in cross case should not be read, but the very purpose of deciding both the cases on one day by same judge is, to avoid any contradictory findings with regard to the manner in which incident took place. Further there is a difference between "Admission" and "Evidence". This Court by judgment in Cr.A. No. 584/2008 State of M.P. Vs. Ramant Singh, passed today, has held that in fact Ramant Singh (P.W.1) did not cause death of Brajesh. In the case of *Nathilal* (Supra) it has not been held that the same Court can give contradictory findings. Under these circumstances, it is held that the very genesis of the incident, has not been suppressed by the prosecution. Thus, it is held that Gomati bai (P.W. 13) is a reliable witness, who not only got injured but is also an independent witness.

78. Rajabeti (P.W. 15) is an eye witness and is the widow of Keshav and mother of deceased Jaswant as well as mother of Ramant Singh (P.W.1). By referring to para 5 of evidence of this witness, it is submitted by the Counsel for the appellants, that this witness was not in a position to depose that who caused injury to Gomati bai (P.W.13).

79. Considered the submission made by the Counsel for the appellants.

80. In para 2 of the examination-in-chief, this witness has narrated the role played by each and every accused, however, she did not say anything as to who caused injuries to Gomati bai (P.W.13). Thereafter, in para 5, She stated that She cannot say, that who caused injuries to Gomatibai (P.W.13). Immediately thereafter, She was cross-examined by the Court and in that cross-examination, this witness clarified that Nathu Singh had caused gun shot injury to Gomati bai (P.W.13). This witness is aged about 60 years and is a rustic villager. It is true that initially She did not recollect that who caused injury to Gomati bai (P.W.13), but on question put by the Court immediately after examination-in-chief, this witness clarified that Nathu Singh caused injury to Gomati bai (P.W.13). Thus, this Court is of the considered opinion, that looking to the fact that not only this witness is aged about 60 years, but She had lost her husband and one child in her front of her and her evidence was recorded after almost 3 years of incident, this witness is a natural witness and is clear that She is narrating the truth and therefore, some lapses of minor in nature, are bound to occur. Further, it is clear from the deposition sheet of this witness, that her examination-in-chief and cross examination by Court was recorded in one session only, therefore, this witness had no time to improve her version. Accordingly, it is held that this witness has duly proved that Nathu Singh had caused gun shot injury to Gomatibai (P.W. 13).

81. Further, by referring to para 9,16 and 17 of this witness, it is submitted that although this witness had stated that her statement was recorded in the night of the incident itself, but infact the police case diary doesnot contain any such statement. On the contrary, her police statement was recorded on 22-10-2000.

82. Heard the learned Counsel for the appellants.

83. Looking to the trauma under which this witness must have undergone, such lapses in the evidence of the witness are natural. While appreciating the evidence of a witness, a Court is required to consider all the circumstances, including the trauma under which a witness must have undergone due to the incident. As already pointed out, since, this witness had lost her husband and a son in front of her, therefore, some minor omissions and contradictions are bound to occur and that shows that the witness is a truthful witness. In para 17, a suggestion was also given by the appellants, to this witness that her police statement was recorded on 22-10-2000. The police statement of this witness is Ex. D.4, which was recorded on 22-10-2000. Looking to the fact that four persons, including the husband and son of this witness were killed on 16-10-2000, this Court is of the considered opinion, that even if the police statement of this witness was recorded on 22-10-2000, it cannot be said that there was any delay in recording of the same. In para 23, this witness had stated that Nathu Singh had fired on Gomati bai (P.W.13), from front and denied that Nathu Singh was standing on the roof of her house. Accordingly, she was confronted with her police statement Ex. D.4, in which She had stated that Nathu Singh fired from the roof of her house. On confrontation, this witness replied that She had never disclosed to the S.H.O. that Nathu Singh had fired from the roof.

84. It is well established principle of law, that only material contradictions makes the evidence of a witness unreliable. The Supreme Court in the case of *Sunil Kumar Sambhudayal Gupta (Dr.) v. State of Maharashtra,* reported in (2010) 13 SCC 657 has held as under :

> **30.** While appreciating the evidence, the court has to take into consideration whether the contradictions/omissions had been of such magnitude that they may materially affect the trial. Minor contradictions, inconsistencies, embellishments or improvements on trivial matters without effecting the core of the prosecution case should not be made a ground to reject the evidence in its entirety. The trial court, after going through the entire evidence, must form an opinion about the credibility of the witnesses and the appellate court in normal course would not be justified in reviewing the same again without justifiable reasons. (Vide *State* v. *Saravanan.)*

85. Nathu Singh was carrying .12 bore gun which uses cartridge having pellets in it. Therefore, whether the gun shot was fired from the roof or from front

while standing on the ground, would not make much difference, because after a gun shot is fired from .12 bore gun, the pellets get spread and it is very difficult to trace out the track or direction unlike in the case of bullet injury. If the evidence of all the witnesses including Gomati bai (P.W.13) is considered along with this witness, then it is clear that the contradiction as to whether Nathu Singh had fired from the roof of her house or from front of Gomati bai (P.W. 13) is of minor in nature and doesnot adversely effect the credibility and reliability of this witness.

86. By referring to para 23, 54 and 55 of this witness, it is submitted that since, this witness has stated that there was no enmity between the complainant party and accused party, where as Ramant Singh (P.W.1) has stated in his Dehati Nalishi, P.1, that there was an enmity between the parties, therefore, it is clear that this witness is not trustworthy.

87. Considered the submission made by the Counsel for the appellants.

88. The word "enmity" is a relative term and is a double edged weapon. In Dehati Nalishi, Ex. P.1, it was stated by Ramant Singh (P.W.1), that for the last two years, the accused party and complainant party were not inviting each other and therefore, the accused party was aggrieved by it. Minor differences between the parties, cannot be termed as "enmity". Therefore, the suggestion which was given to this witness as to whether there was any enmity between accused party and complainant party cannot be equated with non-inviting of each other in their functions. Further, it is clear that this witness is not trying to exaggerate any thing, which makes her a natural and truthful witness. Thus, it is held that Rajabeti (P.W. 15) is a reliable witness and is not an "interested witness".

89. In order to attack the evidence of Manohar Singh (P.W. 16), the Counsel for the appellants has drawn the attention of this Court, to para 20 of his evidence, to contend that since, this witness was also an accused in cross case, therefore, he is an "interested witness".

90. Considered the submissions made by the Counsel for the appellants.

91. Manohar Singh (P.W. 16) is also an injured witness who had suffered gun shot injuries on his back in the same incident. Therefore, the presence of this witness on the spot is undisputed. The Supreme Court in the case of *Chandrasekar v. State,* reported in (2017) 13 SCC 585 has held as under :

> **10.** Criminal jurisprudence attaches great weightage to the evidence of a person injured in the same occurrence as it presumes that he was speaking the truth unless shown otherwise. Though the law is well settled and precedents abound, reference may usefully be made to *Brahm Swaroop* v. *State of U.P.* observing as follows: (SCC p. 302, para 28)

> *"28.* Where a witness to the occurrence has himself been injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with an in-built guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone."

The Supreme Court in the case of *Abdul Sayeed v. State of M.P.,* reported in (2010) 10 SCC 259 has held as under :

> **28.** The question of the weight to be attached to the evidence of a witness that was himself injured in the course of the occurrence has been extensively discussed by this Court. Where a witness to the occurrence has himself been injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone. "Convincing evidence is required to discredit an injured witness." [Vide *Ramlagan Singh* v. *State of Bihar, Malkhan Singh* v. *State of U.P., Machhi Singh* v. *State of Punjab, Appabhai* v. *State of Gujarat, Bonkya* v. *State of Maharashtra, Bhag Singh, Mohar* v. *State of U.P.* (SCC p. 606b-c), *Dinesh Kumar* v. *State of Rajasthan, Vishnu* v. *State of Rajasthan, Annareddy Sambasiva Reddy* v. *State of A.P.* and *Balraje* v. *State of Maharashtra]*
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> 29. While deciding this issue, a similar view was taken in *Jarnail Singh* v. *State of Punjab,* where this Court reiterated the special evidentiary status accorded to the testimony of an injured accused and relying on its earlier judgments held as under: (SCC pp. 726-27, paras 28-29)
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> > *"28.* Darshan Singh (PW 4) was an injured witness. He had been examined by the doctor. His testimony could not be brushed aside lightly. He had given full details of the incident as he was present at the time when the assailants reached the tubewell. In *Shivalingappa Kallayanappa* v. *State of Karnataka* this Court has held that the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies, for the reason that his presence on the scene stands established in case it is proved that he suffered the injury during the said incident.
> >
> > *29.* In *State of U.P.* v. *Kishan Chand* a similar view has been reiterated observing that the testimony of a stamped

witness has its own relevance and efficacy. The fact that the witness sustained injuries at the time and place of occurrence, lends support to his testimony that he was present during the occurrence. In case the injured witness is subjected to lengthy cross-examination and nothing can be elicited to discard his testimony, it should be relied upon (vide *Krishan* v. *State of Haryana).* Thus, we are of the considered opinion that evidence of Darshan Singh (PW 4) has rightly been relied upon by the courts below."

30. The law on the point can be summarised to the effect that the testimony of the injured witness is accorded a special status in law. This is as a consequence of the fact that the injury to the witness is an inbuilt guarantee of his presence at the scene of the crime and because the witness will not want to let his actual assailant go unpunished merely to falsely implicate a third party for the commission of the offence. Thus, the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies therein.

92. Thus, it is clear that an injured witness enjoys a special status and the injury found on his body indicates his undoubted presence on the scene of occurrence.

93. Further more, Manohar Singh (P.W. 16) was already acquitted by the Trial Court and application for grant of leave to appeal has already been rejected by this Court.

94. By referring to paragraphs 22, 23 of evidence of this witness, it is submitted that his police statement was recorded belatedly. However, the answer to the submission lies in the same paragraph, in which this witness has clarified that he remained hospitalized at Gwalior for 9 days and thereafter, he went to Indore, and stayed with his son and was getting treatment. From the M.L.C.,Ex.P. 12A, it is clear that this witness had suffered gun shot injuries on his buttock and if he did not return back to the village and went to Indore to take further treatment, while staying with his son, then this act of this witness cannot be said to be unrealistic.

95. By referring to para 31,32 and 34 of his evidence, it is submitted that since, Brajesh had died due to gun shot injury and since, this witness was also being tried for murder of Brajesh, therefore, this witness is not reliable.

96. Considered the submissions made by the Counsel for the appellants.

97. Manohar Singh (P.W. 16) has stated that although he had not seen Brajesh sustaining gun shot but the accused party had started shouting that Brajesh has

sustained a gun shot injury and thereafter, the accused party took the body of Brajesh to their house. This evidence of Manohar Singh (P.W.16) is in accordance with site plan, Ex. D.16, according to which the dead body of Brajesh was taken by his family members to the house of Ramvir Singh, which was at a distance of 365 steps from the dilapidated house of Brajlal. It is also clear from the site plan, Ex. D.16, that the sitting room *(Baithak)* of Ramvir Singh and dilapidated house of Brajlal are situated at nearby places. This Court has already held that the accused persons have not explained as to why they shifted the dead body of Brajesh from the place where he sustained gun shot injury? It is also clear from F.I.R., Ex. D.2, that the F.I.R., in respect of murder of Brajesh was lodged by Angad Singh against unknown persons. Further, Brajesh had suffered bullet injury and Ramvir Singh was carrying .315 bore gun and according to the witnesses, the gun shot fired by Ramvir Singh had hit his own nephew Brajesh. Thus, it cannot be said that the evidence of Manohar Singh (P.W.16) is unreliable on account of non-explanation of manner in which Brajesh was killed. Further, by a separate judgment passed by this Court in Cr.A. No. 229/2003 (State of M.P. Vs. Ramant Singh [Cross Case]), this Court has already held that Ramant Singh did not shot Brajesh.

98. By referring to para 43 of his evidence, it is submitted by the Counsel for the appellants that there are material omissions and contradictions in the evidence of this witness with regard to who caused injury Gomati bai (P.W.13) and this witness (P.W. 16), therefore, he is a unreliable witness.

99. Considered the submissions made by the Counsel for the appellants.

100. Manohar Singh (P.W. 16) in his evidence has stated that Nathu Singh shot Gomati, whereas Kaushlendra Singh (acquitted) shot this witness. Whereas in his police statement, Ex. D.5, this witness had stated that Kaushlendra Singh fired at him, and as he bent down, therefore, the gun shot hit Gomati bai (P.W.13), and gun shot fired by Nathu Singh hit him. On confrontation, this witness could not explain as to how, the above fact was mentioned in his police statement, Ex. D.5. If the manner in which the incident in question had taken place is considered, then it is clear that as number of gun shots were fired, therefore, the persons who had come to attend the function must have run helter-skelter. In this circumstance, some discrepancies in the evidence of the witnesses are bound to happen. Even otherwise, this case is not based on the solitary evidence of this witness. Kaushlendra Singh has already been acquitted by the Trial Court in cross S.T. No. 37/2001. Since, the State has also filed an appeal against the acquittal of Kaushlendra Singh, therefore, whether he has been rightly acquitted or not shall be considered separately while deciding the State Appeal. However, looking to the contradictions in the police statement and Court evidence of this witness, at the most, it can be said that this witness has failed to prove that who caused gun shot injury to Gomatibai (P.W. 13) as well as to himself.

101. By referring to para 52 of evidence of this witness, it is contended by the Counsel for the appellants that there are material improvements in the evidence of this witness. By referring to police statement, Ex. D.5 of this witness, it is submitted that there was no allegation that "after he requested the accused party not to burst crackers, then Ramvir, Ghanshyam, Kaushlendra, Nathu Singh, Bhanupratap, Rajesh, Dinesh Singh, Chhote Singh, Sindhi and Kallu started pelting stones". Thus, it is submitted that since, this witness has improved his version, therefore, his evidence is liable to be rejected in toto.

102. Considered the submissions made by the Counsel for the appellants.

103. The maxim *falsus in uno falsus in omnibus* has no application in India. The Supreme Court in the case of *Shakila Abdul Gafar Khan v. Vasant Raghunath Dhoble,* reported in (2003) 7 SCC 749 has held as under :

> **25.** It is the duty of the court to separate the grain from the chaff. Falsity of a particular material witness or a material particular would not ruin it from the beginning to end. The maxim *"falsus in uno falsus in omnibus""* has no application in India and the witnesses cannot be branded as liars. The maxim *'falsus in uno falsus in omnibus"* has not received general acceptance nor has this maxim come to occupy the status of rule of law. It is merely a rule of caution. All that it amounts to is that in such cases testimony may be disregarded, and not that it must be disregarded. The doctrine merely involves the question of weight of evidence which a court may apply in a given set of circumstances, but it is not what may be called "a mandatory rule of evidence". (See *Nisar Ali* v. *State of U.P.)*
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> **26.** The doctrine is a dangerous one especially in India for if a whole body of the testimony were to be rejected, because the witness was evidently speaking an untruth in some aspect, it is to be feared that administration of criminal justice would come to a dead stop. Witnesses just cannot help in giving embroidery to a story, however true in the main. Therefore, it has to be appraised in each case as to what extent the evidence is worthy of acceptance, and merely because in some respects the court considers the same to be insufficient for placing reliance on the testimony of a witness, it does not necessarily follow as a matter of law that it must be disregarded in all respects as well. The evidence has to be sifted with care. The aforesaid dictum is not a sound rule for the reason that one hardly comes across a witness whose evidence does not contain a grain of untruth or at any rate an exaggeration, embroideries or embellishment. (See *Sohrab* v. *State of M.P.* and *Ugar Ahir* v. *State of Bihar.)* An attempt has to be made to, as noted above, in terms of felicitous metaphor, separate the grain from the chaff, truth from falsehood. Where it is not feasible to separate the truth from falsehood, because grain and chaff are inextricably mixed up, and in the process of

> separation an absolutely new case has to be reconstructed by divorcing essential details presented by the prosecution completely from the context and the background against which they are made, the only available course to be made is to discard the evidence in toto. (See *Zwinglee Ariel* v. *State of M.P.* and *Balaka Singh* v. *State of Punjab.)* As observed by this Court in *State of Rajasthan* v. *Kalki* normal discrepancies in the evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence and those are always there, however honest and truthful a witness may be. Material discrepancies are those which are not normal, and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so. These aspects were highlighted recently in *Krishna Mochi* v. *State of Bihar, Gangadhar Behera* v. *State of Orissa* and *Rizan* v. *State of Chhattisgarh*.

104. Therefore, merely because a witness has been disbelieved on some part of his evidence, would not result in discarding of his entire evidence. The Court must try to remove grain from the chaff. As the major part of the evidence of this witness is in consonance with his previous version as well as the prosecution story and also medical evidence, therefore, the same cannot be discarded only on the ground that on some issue, this witness has been disbelieved.

105. By referring to para 54 of evidence of this witness, it was once again submitted by the Counsel for the appellants, that since, this witness has stated that there was no enmity between the parties, therefore, it is impossible for the accused party to kill four persons and to injure 2 persons.

106. Considered the submissions made by the Counsel for the appellants.

107. It is the case of the complainant party, that the gun shot fired by Ramvir Singh had hit the deceased Brajesh and thereafter, they started firing at the complainant party. While deciding the Cr.A. No. 584/2008 (State of M.P. Vs. Ramant Singh [cross case]), this Court has already held that the prosecution has failed to prove, that Brajesh was killed by Ramant Singh (P.W.1). Further, where a case is based on direct evidence, absence of motive is not material. The Supreme Court in the case of *Saddik v. State of Gujarat,* reported in (2016) 10 SCC 663 has held as under :

> 21. It is settled legal position that even if the absence of motive, as alleged, is accepted, that is of no consequence and pales into insignificance when direct evidence establishes the crime. Therefore, in case there is direct trustworthy evidence of witnesses as to commission of an offence, the motive part loses its significance. Therefore, if the genesis of the

> motive of the occurrence is not proved, the ocular testimony of the witnesses as to the occurrence cannot be discarded only on the ground of absence of motive, if otherwise the evidence is worthy of reliance. (See *Hari Shanker* v. *State of U.P.; Bikau Pandey* v. *State of Bihar; Abu Thakir* v. *State of T.N.; State of U.P.* v. *Kishanpal* and *Bipin Kumar Mondal* v. *State of W.B.)*

The Supreme Court in the case of *Yogesh Singh Vs. Mahabeer Singh* reported in (2017) 11 SCC 195 has held as under :

> **46.** It has next been contended by the learned counsel for the respondents that there was no immediate motive with the respondents to commit the murder of the deceased. However, the trial court found that there was sufficient motive with the accused persons to commit the murder of the deceased since the deceased had defeated accused Harcharan in the Pradhan elections, thus putting an end to his position as Pradhan for the last 28-30 years. The long nursed feeling of hatred and the simmering enmity between the family of the deceased and the accused persons most likely manifested itself in the outburst of anger resulting in the murder of the deceased. We are not required to express any opinion on this point in the light of the evidence adduced by the direct witnesses to the incident. It is a settled legal proposition that even if the absence of motive, as alleged, is accepted that is of no consequence and pales into insignificance when direct evidence establishes the crime. Therefore, in case there is direct trustworthy evidence of the witnesses as to commission of an offence, motive loses its significance. Therefore, if the genesis of the motive of the occurrence is not proved, the ocular testimony of the witnesses as to the occurrence could not be discarded only on the ground of absence of motive, if otherwise the evidence is worthy of reliance. *(Hari Shanker* v. *State of U.P., Bikau Pandey* v. *State of Bihar, State of U.P.* v. *Kishanpal, Abu Thakir* v. *State of T.N.* and *Bipin Kumar Mondal* v. *State of W.B.)*

108. Motive always remains in the mind of the wrongdoer. Therefore, merely because the witnesses have not alleged any motive, would not make their evidence unreliable.

109. By referring to para 76 of his evidence, it is submitted by the Counsel for the appellants, that the prosecution has failed to prove that this witness had sustained gun shot injury.

110. Considered the submissions made by the Counsel for the appellants.

111. M.L.C. of Manohar Singh (P.W. 16) is Ex. 12A. This witness was medically examined on 17-10-2000 at 1:50 A.M. in the night. Thus, it is clear that this witness was medically examined immediately after the incident, without there being any undue delay. From the M.L.C., Ex. P.12A, it is clear that this

witness had suffered gun shot injury on his back. Therefore, there is every likelihood, that this witness might not have authoritatively noticed that, who had caused gun shot injury to him. Further, according to this witness, Kaushlendra Singh had caused gun shot injury to him, whereas Kaushlendra Singh has been acquitted and whether the acquittal of Kaushlendra Singh is in accordance with law or not, shall be decided in the Criminal Appeal No.790/2005 filed by State.

112. By referring to para 96 and 97 of evidence of this witness, it is contended that this witness has admitted that it was a dark night, and without any source of light, it was not possible to see the faces of any persons. Although it is claimed by this witness, that Gas Patromax were burning, but since, the same has not been mentioned in his police statement, Ex. D.5, therefore, it is clear that there was no source of light on the spot. It is further submitted that even in the site plan Ex. D.16, the gas patromax have not been shown therefore, it is clear that there was no source of light.

113. Considered the submissions made by the Counsel for the appellants.

114. Gomati bai (P.W.13), this witness and Kumher Singh (P.W. 17) [Although his daughter-in-law namely Mamta was killed] are independent witnesses. Since, Gomati bai (P.W.13) and this witness are injured witnesses, therefore, their presence on the spot is doubtful. It is the case of the prosecution, that a function was going on in the house of Ramant Singh and lot of persons had gathered there. Therefore, under these circumstances, it is clear that there cannot be any function without light. If the investigating Officer, R.S. Ghuraiya (P.W. 20) did not show Gas Patromax in the site plan, Ex. D.16, then at the most, it can be said to be a faulty investigation and the trustworthy evidence of prosecution witness cannot be thrown out. In an identical situation, the Supreme Court in the case of *Prithvi (minor) Vs. Mamraj* reported in (2004) 13 SCC 279 has held as under :

> **17.** A further reason for disbelieving the evidence of Prithvi is that, while Prithvi stated that he could see the assailants because there was light on the spot coming from a bulb fitted in an electric pole near the *chakki* of Birbal (which was situated about fifteen steps from the place of occurrence) the investigating officer (PW 36) when cross-examined said that he did not remember anything about it nor did he include any electric pole in his site plan. Assuming that this was faulty investigation by the investigating officer, it could hardly be a ground for rejection of the testimony of Prithvi which had a ring of truth in it. We may recount here the observation of this Court in *Allarakha K. Mansuri* v. *State of Gujarat,* SCC at p. 64, para 8, that:
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> > "The defects in the investigation holding it to be shaky and creating doubts also appears to be the result of the imaginative

thought of the trial court. Otherwise also, defective investigation by itself cannot be made a ground for acquitting the accused."

115. Thus, it is held that Manohar Singh (P.W. 16) is a trustworthy and reliable witness.

116. Kumher Singh (P.W. 17) is the father-in-law of the deceased Mamta. However, he is not related to Ramant Singh (P.W.1) and accordingly, he is an independent witness. This witness has stated that a function in the house of Ramant Singh (P.W.1) was going on. He was having his meal. He further stated that Ramvir shot Jaswant and Keshav. Nathu Singh, Kaushlendra Singh, and Ghanshyam started firing. Gun shot fired by Kaushlendra hit Gomati bai (P.W. 13). Immediately thereafter, he corrected himself and stated that gun shot fired by Kaushlendra hit Manohar Singh (P.W.16) and gun shot fired by Nathu Singh hit Gomati bai (P.W. 13). However, he could not see that who shot Mamta. He further stated that gun shot fired by Nathu Singh hit Raghunath. Kumher Singh (P.W. 17) was confronted with his police statement, Ex. D.17 in which it was stated that "Ghanshyam shot Raghunath", but in reply this witness insisted that he had informed the Investigating Officer, that it was Nathu Singh, who shot Raghunath. Thus, there is a material contradiction as to who shot Raghunath. Under these circumstances, it is held that the evidence of this witness that Nathu Singh shot Raghunath cannot be accepted.

117. By referring to para 8 of evidence of this witness, it is submitted that this witness has clearly stated that none of the assailant had entered inside the house of Ramant Singh (P.W.1).

118. Considered the submissions made by the Counsel for the appellants.

119. This incident has taken place in a most gruesome manner. Multiple firing had taken place. As number of persons had gathered to attend the function, therefore, they must have run helter-skelter. In these circumstances, if a witness could not notice some part of the incident, then he cannot be disbelieved in toto.

120. By referring to para 11 of evidence of this witness, it is submitted that the allegation that Nathu Singh shot Raghunath cannot be accepted. This aspect of the matter has already been considered in the previous paragraph and it has already been held that the evidence of this witness that Nathu Singh shot Raghunath cannot be relied upon.

121. By referring to para 23 of evidence of this witness, it is submitted that some of the residents of the village had telephones in their houses, in spite of that no information was given to police. Therefore, the entire prosecution story is unreliable.

122. Considered the submissions made by the Counsel for the appellants.

123. Where three persons had already died and three more were injured, then the reaction of each and every person would be different. Their conduct cannot be considered with a particular and uniform yardstick.

124. By referring to suggestion given in para 78 of his evidence, it is submitted that in fact this witness and members of other complainant party were creating ruckus under the influence of alcohol and since, Brajesh had come to lodge his objection, therefore, he was chased by this witness and others and Brajesh was killed by Ramant Singh (P.W.1). It is further submitted that in fact all the four persons died due to gun shots fired by Ramlakhan and the injured also sustained injuries due to gun shot fired by Ramlakhan, therefore, it is prayed that the appellants have been falsely implicated.

125. This defence of the appellants has already been considered in detail in the previous paragraphs of this judgment. Further, this defence cannot be accepted for other reason also. The deceased persons namely, Keshav, Jaswant and Mamta had suffered bullet injuries, whereas Raghunath @ Chhote Singh suffered pellet injuries. Gomati bai (P.W.13) and Manohar Singh (P.W. 16) had suffered pellet injuries. Thus, it is clear that two types of guns were used in the incident. Therefore, it is clear that the entire incident was not committed by one person, but more than one assailants were involved in the incident. Further, why the witnesses would spare Ramlakhan in order to falsely implicate the appellants, specifically when some civil dispute is already going on between Ramlakhan and the complainant party?

126. Thus, considering the submissions made by the Counsel for the appellants, this Court is of the considered opinion, that minor omissions, contradictions, embellishment in the evidences of the prosecution witnesses, would not make them unreliable, therefore, it is held that Ramant Singh (P.W.1), Gomati bai (P.W.13), Rajabeti (P.W.15), Manohar Singh (P.W. 16) and Kumher Singh (P.W.17) are reliable witnesses and their testimony is worth reliance.

127. Now, the next question for consideration is that what offence was committed by the appellants Nathu Singh, Ramvir Singh and Ghanshyam.

128. For the sake of clarity, the role played by each and every appellant shall be considered separately.

Nathu Singh (Cr.A. No. 397/2005)

129. Ramant Singh (P.W.1), has lodged Dehati Nalishi, Ex. P. 1 and F.I.R., Ex. P.10 was lodged on the basis of Dehati Nalishi, Ex. P.1. As Per Dehati Nalishi Ex. P.1, the appellant Nathu Singh was also armed with 12 bore gun and caused injuries to Manohar.

(i) Ramant Singh (P.W.1) has stated that on the date of incident, a function on the occasion of birth of his son was going on. The invitees were having their meals. Kaushlendra (acquitted), Sindhi (acquitted), Rajesh (acquitted), Mahendra (acquitted), Kallu (acquitted), and Bhanupratap started bursting crackers by the side of the platform of his house. Ladies were having their meals on the roof of the house, and Jaswant (deceased) and Suresh were serving food. Manohar requested the accused persons, to burst crackers after 10-15 minutes. On this issue, all the accused persons started abusing and also started pelting stones and bricks. Kaushlendra (acquitted) left the place and came back with his .12 bore gun, Ramvir (appellant) also came there with his mouser, whereas Ghanshyam (appellant) came there with .12 bore gun and Nathu Singh (appellant) also came there with .12 bore gun. Ramvir Singh (appellant) shot Keshav and Jaswant, whereas Ghanshyam (appellant) shot Raghunath @ Chhote Singh. This witness went inside the house. Thereafter, all the accused persons surrounded the house and started pelting stones. Mamta (deceased) scolded from inside, as to why they are killing all the persons, then Ramvir (appellant) shot Mamta, who fell down. Kaushlendra (acquitted) caused injury to Manohar Singh (P.W.16). Nathu Singh (appellant) caused gun shot injury to Gomati bai (P.W.13). Ramant Singh (P.W.1) ran to the roof of the house, where he was assaulted by Mahendra Singh (acquitted) by lathi and had scuffle with him. As Ramant Singh (P.W.1) got scared, therefore, he continued to sit by the side of the dead bodies. The police party came to his house at about 11-11:30 P.M., and thereafter, he lodged the Dehati Nalishi, Ex. P.1.

(ii) Thus, if the evidence of Ramant Singh (P.W.1) is considered, then it appears that Nathu Singh was armed with .12 bore gun and caused injury to Gomati bai (P.W.13).

(iii) Although Ramant Singh (P.W.1) was confronted with some portion of his statement recorded under Section 161 of Cr.P.C., Ex. D.1, but there is no discrepancy with regard to the role allegedly played by Nathu Singh (appellant). However, in Dehati Nalishi, Ex. P.1, this witness had stated that Nathu Singh had caused gun shot injury to Manohar Singh. He was confronted with said contradiction and in para 61 of his cross-examination, this witness has stated that he never disclosed to the police that Nathu Singh had caused injury to Manohar Singh.

(iv) It is not out of place to mention here that three persons, had already lost their lives and three were injured, therefore, the mental condition and the trauma under which this witness must be going can be understood. Further, the Dehati Nalishi, Ex. P.1 was lodged within 2.30 hours of the incident. However, in his police statement, Ex. D.1, which was recorded on the next date of incident i.e., 17-10-2000, this witness had specifically stated that Nathu Singh caused injury to

Gomatibai (P.W. 13). Therefore, under these circumstances, the evidence of Ramant Singh (P.W.1) that Nathu Singh caused injuries to Gomati bai (P.W.13) can be relied upon, provided the evidence of other witnesses is found in consonance with said allegation.

(v) Gomati bai (P.W.13) has also stated in her evidence, that gun shot injury was caused to her by Nathu Singh. Although Gomati bai (P.W.13) was confronted with her police statement, Ex. D.3, but there is no discrepancy with regard to the role allegedly played by Nathu Singh (appellant). Further, the dying declaration, Ex. D.18 of Gomatibai (P.W. 13) was recorded by a Doctor, in which She had stated that Ramvir had caused injury to her, but on confrontation, She explained that since She was not fully conscious, therefore, She might have committed mistake in disclosing the name to the Doctor. In the present case, the Doctor who had recorded the dying declaration, Ex. D.18 has not been examined. Since, Gomati bai (P.W.13) survived, therefore, so called Dying-declaration, Ex. D.18 is not admissible under Section 32 of Evidence Act. Further, in the light of the explanation given by Gomati bai (P.W. 13) in para 72 of her cross-examination, it is held that her Court evidence cannot be discarded in the light of the statement which was recorded as Dying declaration, Ex. D.18.

(vi) Rajabeti (P.W. 15), is an eye witness and is widow of Keshav and mother of deceased Jaswant. Rajabeti (P.W. 15) has also stated that the Nathu Singh (appellant) caused gun shot injury to Gomati bai (P.W.13). Although in para 2 of her examination-in-chief, this witness had earlier stated that Nathu Singh had caused injury to Manohar, but in cross examination by Trial Court, this witness in para 5 of her cross examination, clarified that Gomatibai (P.W. 13) sustained injuries due to gun shot fired by Nathu Singh. Although Rajabeti (P.W.15) was confronted with her police statement, Ex. D.4, but there is no discrepancy with regard to the role allegedly played by Nathu Singh (appellant).

(vii) Manohar Singh (P.W.16) is an injured witness. He has also stated that Nathu Singh, caused injury to Gomati bai (P.W.13). This witness was confronted with his statement, Ex. D.5, in which he had stated that Kaushlendra (acquitted) fired a gun shot on this witness, but as this witness bent down, therefore, the said shot hit Gomati bai (P.W.13). In reply it was stated by this witness that he had not given the statement " then Kaushlendra fired .....hit Gomati bai".

(viii) Kumher Singh (P.W.17) is an eye witness. Initially in para 4, he stated that Kaushlendra (acquitted) caused injury to Gomatibai (P.W.13) but immediately thereafter, he corrected himself in the same para, and stated that Nathu Singh (appellant) caused gun shot injury to Gomatibai (P.W.13). He also stated that Nathu Singh shot Raghunath. However, in his police statement, Ex. D.17, it was stated by him that it was Ghanshyam who shot Raghunath. When the attention of this witness was drawn to his previous police statement, Ex. D.17,

then he replied that he cannot explain as to how the police has written that "Ghanshyam had fired gun shot causing injury to Raghunath", but in fact Nathu Singh had shot Raghunath Singh. Since, there is a material contradiction in the evidence of this witness and his police statement, Ex. D.17 of this witness, therefore, the evidence of this witness that Nathu Singh had shot Raghunath Singh, cannot be accepted.

(ix) Thus, it is clear that as per Dehati Nalishi, Ex. P.1, F.I.R., Ex. P.10, Nathu Singh was armed with .12 bore gun and had also fired, whereas Ramant Singh (P.W.1), Gomati bai (P.W.13), Rajabeti (P.W.15), and Kumher Singh (P.W.17) have stated that the appellant Nathu Singh (appellant) caused gun shot injuries to Gomatibai (P.W.13).

Ramvir Singh (Cr.A. No. 425/2005)

130. (i)Ramant Singh (P.W.1) in his Dehati Nalishi, Ex. P.1 and F.I.R., Ex. P.10 has stated that Ramvir Singh shot Keshav and Jaswant.

(ii) Ramant Singh (P.W.1) in his Court evidence, stated that Keshav, Jaswant and Mamta were shot by Ramvir Singh.

(iii) Ramant Singh (P.W.1) was confronted with his police statement, Ex. D.1, in which he had stated that it was Ghanshyam, who shot Mamta. In para 94 of his cross-examination, it was clarified by this witness that since, various persons had already died, therefore, he was un-confortable. Accordingly, it was claimed that he had wrongly disclosed in his police statement, Ex. D.1, that Ghanshyam had shot Mamta. In para 96 of his cross examination, this witness replied that in fact he had disclosed to the S.H.O., that Ramvir had shot Mamta. Thus, according to this witness, Ramvir Singh also shot Mamta.

(iv) Gomati bai (P.W. 13) has stated that Ramvir Singh shot Keshav and Jaswant. Further, it is stated that Ghanshyam shot Raghunath @ Chhote Singh. Gomati bai (P.W.13) in her police statement Ex. D.3, had not claimed that She had seen Ramvir Singh or Ghanshyam causing any gunshot injury to Keshav, Jaswant and Raghuvir. On the contrary, She had stated that "She came to know" that Ramvir Singh, killed Keshav and Jaswant, whereas Ghanshyam killed Raghunath. When She was confronted with her police statement, Ex. D.3, then in para 26 of her cross examination, She claimed that She never disclosed to police that "She came to know" and could not explain as to how, "She came to know" was mentioned in here Police statement, Ex. D.3. Thus in view of vital contradiction in the evidence of Gomati bai (P.W.13), it is held that She did not see that who caused gun shot injuries to Keshav, Jaswant and Raghunath @ Chhote Singh. However, it is held that immediately after the incident, she came to know that Ramvir Singh has killed Keshav and Jaswant, whereas Ghanshyam has killed Raghunath @ Chhote Singh.

(iv) Rajabeti (P.W.15) has stated that Ramvir Singh (appellant) shot Jaswant, Keshav and Mamta. Rajabeti was not confronted with her police statement Ex. D.4, in which She had stated that it was Ghanshyam who shot Mamta. It is well established principle of law that unless and until, the contradiction is pointed out to the witness, the defence cannot take advantage of such discrepancy. The Supreme Court in the case of *V.K. Mishra Vs. State of Uttarakhand* reported in (2015) 9 SCC 588 has held as under :

> 93. **19.** Under Section 145 of the Evidence Act when it is intended to contradict the witness by his previous statement reduced into writing, the attention of such witness must be called to those parts of it which are to be used for the purpose of contradicting him, before the writing can be used. While recording the deposition of a witness, it becomes the duty of the trial court to ensure that the part of the police statement with which it is intended to contradict the witness is brought to the notice of the witness in his cross-examination. The attention of witness is drawn to that part and this must reflect in his cross-examination by reproducing it. If the witness admits the part intended to contradict him, it stands proved and there is no need to further proof of contradiction and it will be read while appreciating the evidence. If he denies having made that part of the statement, his attention must be drawn to that statement and must be mentioned in the deposition. By this process the contradiction is merely brought on record, but it is yet to be proved. Thereafter when investigating officer is examined in the court, his attention should be drawn to the passage marked for the purpose of contradiction, it will then be proved in the deposition of the investigating officer who again by referring to the police statement will depose about the witness having made that statement. The process again involves referring to the police statement and culling out that part with which the maker of the statement was intended to be contradicted. If the witness was not confronted with that part of the statement with which the defence wanted to contradict him, then the court cannot suo motu make use of statements to police not proved in compliance with Section 145 of the Evidence Act that is, by drawing attention to the parts intended for contradiction.

Since, the attention of this witness was not drawn to her previous statement with regard to contradiction on the issue as to who caused gun shot injury to Mamta, therefore, this Court cannot look into the previous statement i.e., police statement of this witness. Accordingly, as per evidence of Rajabeti (P.W. 15) it was Ramvir who shot Mamta also. Thus, according to this witness, Ramvir Singh, shot Keshav, Jaswant and Mamta.

(v) Manohar Singh (P.W. 16) has stated in his court evidence that it was Ramvir (appellant) who shot Keshav and Jaswant. Thus, according to this witness, Ramvir Singh killed Keshav and Jaswant.

(vi) Kumher Singh (P.W. 17) has stated that he could not see as to who caused gun shot injury to Mamta. However, it was specifically stated by him that Ramvir Singh shot Jaswant Singh and Keshav Singh.

(vi) Thus, from the evidence of Ramant Singh (P.W.1), Rajabeti (P.W. 15), Manohar Singh (P.W. 16) and Kumher Singh (P.W. 17), it is clear that Ramvir Singh (appellant) shot Keshav and Jaswant.

(vii) There is some discrepancy as to who caused gun shot injury to Mamta. Ramant Singh (P.W.1) and Rajabeti (P.W. 15) says, that it was Ramvir who caused gun shot injury to Mamta, whereas Gomati bai (P.W.13), and Manohar Singh (P.W.16) have stated that in fact Ghanshyam caused gun shot injury to Mamta.

(viii) According to the witnesses, Ramvir Singh was carrying .315 bore gun, whereas Ghanshyam was carrying .12 bore gun. As per postmortem report of Mamta, Ex. P.28, as well as F.S.L. report, Ex. P.39, one piece of .315 bullet was recovered from the dead body of Mamta. As per postmortem report, Ex. P.28, one pellet was also recovered from the dead body of Mamta. Thus, it is clear that deceased Mamta had suffered two gun shots, i.e., one by .315 bore gun and another by .12 bore gun. Accordingly, whether Ramvir Singh shot Mamta or not shall be considered in the following paragraphs. Further, Raghunath @ Chhote Singh had suffered pellet injuries, whereas Ramvir Singh was carrying .315 bore mouser. Therefore, whether Raghunath @ Chhote Singh died due to gun shot fired by Ramvir Singh or not shall also be considered in the following paragraphs.

Ghanshyam (Cr.A. 401/2005)

131. (i)Ramant Singh (P.W.1) in his Dehati Nalishi, Ex. P.1 and F.I.R., Ex. P.10 had informed that Ghanshyam shot Raghunath @ Chhote Singh and Mamta, whereas in his Court evidence, Ramant Singh (P.W.1) has stated that Ghanshyam shot Raghunath @ Chhote Singh, whereas Ramvir Shot Mamta. Ramant Singh (P.W.1) in his police statement, Ex. D.1 had stated that Ghanshyam had shot Mamta and accordingly, he was confronted with such contradiction in his police statement Ex. D.1. In para 94 of his cross-examination, it was clarified by this witness that since, various persons had already died, therefore, he was un-confortable (sic : comfortable). Accordingly, it was claimed that he had wrongly disclosed in his police statement, Ex. D.1 that Ghanshyam had shot Mamta. In para 96 of his cross examination, this witness replied that in fact he had disclosed to the S.H.O., that Ramvir had shot Mamta. Thus,it is held that Ramant Singh (P.W.1) has claimed that Ghanshyam had shot Raghunath.

(ii) Gomati bai (P.W. 13) has stated that Mamta was standing along with her, when Ghanshyam shot Mamta. Although Gomati bai (P.W.13) was confronted with her police statement, Ex. D. 3 in respect of other aspects, but there is no

discrepancy regarding causing injury to Mamta, because in her police statement, Ex. D.3, She had stated that it was Ghanshyam who shot Mamta. Thus, it is clear that the evidence of Gomati bai (P.W.13) is consistent so far it relates to the allegation that Ghanshyam shot Mamta. So far as the allegation of killing Raghunath @ Chhote Singh by Ghanshyam is concerned, this witness in her police statement, Ex. D.3 had stated that lateron, "She came to know" that Ghanshyam killed Raghunath @ Chhote Singh. Thus, according to Gomati bai (P.W.13), Ghanshyam shot Mamta, and also came to know immediately after the incident, that Ghanshyam killed Raghunath @ Chhote Singh also. However, in the light of evidence of Gomatibai (P.W.13) it can be held that it is her claim that Ghanshyam shot Mamta.

(iii) Rajabeti (P.W. 15) has stated in her Court evidence that Ghanshyam shot Raghunath and Kaushlendra (acquitted) shot Mamta. On cross examination by Court, this witness in para 5 of her evidence stated that Mamta was shot by Ramvir, whereas in her police statement, Ex. D.4, She has stated that Ghanshyam shot Raghunath and Mamta. However, She was not confronted with contradiction in causing injury to Mamta. As statement recorded under Section 161 of Cr.P.C. is not a substantial piece of evidence, therefore, her police statement cannot be read against Ghanshyam with regard to causing death of Mamta. Thus, the evidence of Rajabeti (P.W.15) can be read only to the extent that Ghanshyam caused death of Raghunath.

(iv) Manohar Singh (P.W. 16) has stated that Ghanshyam shot Raghunath @ Chhote Singh and Mamta. Manohar Singh (P.W.16) was confronted with his police statement, Ex. D.5, in respect of certain contradictions regarding other aspects, but there is no contradiction with regard to the role played by Ghanshyam. Thus, according to Manohar Singh (P.W.15), Ghanshyam shot Raghunath and Mamta.

(v) Kumher Singh (P.W. 17) in para 7 of his cross examination by Court, has stated that Nathu Singh shot Raghunath Singh. So far as the role played by Ghanshyam Singh is concerned, it was stated by this witness that Ghanshyam Singh was also armed with gun and was firing.

132. For the sake of convenience, chart showing the allegations made by the witnesses, of causing injuries to different persons, is as under :

	Jaswant (D)	Keshav (D)	Raghunath (D)	Mamta (D)	Gomati (I)	Manohar (I)
Ramant Singh (P.W.1)						
Dehati Nalishi Ex. P.1	Ramvir Singh	Ramvir Singh	Ghanshyam	Ghanshyam		Nathu Singh

Case Diary Statement, Ex. D.1	Ramvir Singh	Ramvir Singh	Ghanshyam	Ghanshyam	Nathu Singh	Kaushlendra Singh
Court Evidence	Ramvir Singh	Ramvir Singh	Ghanshyam	Ramvir Singh	Nathu Singh	Kaushlendra Singh
Gomati bai (P.W.13)						
Case Diary Statement Ex. D.4	Ramvir Singh (Came to know)	Ramvir Singh (Came to know)	Ghanshyam (Came to know)	Ghanshyam	Nathu Singh	
Dying Declaration Ex. D.18					Ramvir Singh	
Court Evidence	Ramvir Singh	Ramvir Singh	Ramvir Singh	Ghanshyam	Nathu Singh	Kaushlendra Singh
Rajabeti (P.W. 15)						
Case Diary Statement Ex. D.4	Ramvir Singh	Ramvir Singh	Ghanshyam	Ghanshyam	Nathu Singh	Kaushlendra Singh
Court Evidence	Ramvir Singh	Ramvir Singh	Ghanshyam	Ramvir Singh	Nathu Singh	Kaushlendra Singh
Manohar Singh (P.W. 16)						
Case Diary Statement Ex. D. 5	Ramvir Singh	Ramvir Singh	Ghanshyam	Ghanshyam	Kaushlendra Singh	Nathu Singh
Court Evidence	Ramvir Singh	Ramvir Singh	Ghanshyam	Ghanshyam	Nathu Singh	Kaushlendra Singh
Kumher Singh (P.W.16)						
Case Diary Statement Ex. D. 17	Ramvir Singh	Ramvir Singh	Ghanshyam	Ghanshyam	Nathu Singh	Kaushlendra Singh
Court Evidence	Ramvir Singh	Ramvir Singh	Nathu Singh		Nathu Singh	Kaushlendra Singh

133. Before proceeding further, this Court thinks to apposite to consider the defence of the appellants Ghanshyam and Ramvir Singh.

Defence of Appellants Ghanshyam and Ramvir Singh

134. The appellant Ghanshyam and Ramvir have taken a defence of plea of alibi. It is well established principle of law that plea of alibi is required to be proved by the accused by leading cogent evidence. The Supreme Court in the case of *Jitender Kumar Vs. State of Haryana* reported in (2012) 6 SCC 204 has held as under :

> 71. Once PW 10 and PW 11 are believed and their statements are found to be trustworthy, as rightly dealt with by the courts below, then the plea of abili raised by the accused loses its significance. The burden of establishing the plea of alibi lay upon the appellants and the appellants have failed to bring on record any such evidence which would, even by reasonable probability, establish their plea of alibi. The plea of alibi in fact is required to be proved with certainty so as to completely exclude the possibility of the presence of the accused at the place of occurrence and in the house which was the home of their relatives. (Ref. *Sk. Sattar* v. *State of Maharashtra)*

The Supreme Court in the case of *Om Prakash v. State of Rajasthan,* reported in (2012) 5 SCC 201 has held as under :

> **32.** Drawing a parallel between the plea of minority and the plea of alibi, it may be worthwhile to state that it is not uncommon to come across criminal cases wherein an accused makes an effort to take shelter under the plea of alibi which has to be raised at the first instance but has to be subjected to strict proof of evidence by the court trying the offence and cannot be allowed lightly in spite of lack of evidence merely with the aid of salutary principle that an innocent man may not have to suffer injustice by recording an order of conviction in spite of his plea of alibi.

The Supreme Court in the case of *Jumni Vs. State of Haryana* reported in (2014) 11 SCC 355 has held as under :

> **23.** On the standard of proof, it was held in *Mohinder Singh* v. *State* that the standard of proof required in regard to a plea of alibi must be the same as the standard applied to the prosecution evidence and in both cases it should be a reasonable standard. *Dudh Nath Pandey* goes a step further and seeks to bury the ghost of disbelief that shadows alibi witnesses, in the following words: *(Dudh Nath case,* SCC p. 173, para 19)
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> > *"19.* ... Defence witnesses are entitled to equal treatment with those of the prosecution. And, courts ought to overcome their traditional, instinctive disbelief in defence witnesses. Quite often, they tell lies but so do the prosecution witnesses."

Therefore, the evidence led by Ghanshyam and Ramvir Singh in support of their plea of Alibi shall be considered in the light of the degree of proof as pointed out by the Supreme Court in the above mentioned judgments.

135. Ghanshyam (D.W.1) has examined himself under Section 315 of Cr.P.C. He has stated that he is a teacher in Govt. School and from the date of his appointment, he is residing in village Kheriya, in the house of one Rajendra Singh

Tomar as his tenant. He further stated that only on special occasions, he goes to village Khoyala, where incident took place. It is further stated by him that on 27-10-2000, when he went to Porsa to collect his salary, then he came to know that some people have been killed. He has further stated that he was illegally detained by R.S. Ghuraiya (P.W. 20) and accordingly, he had also filed a writ petition in the nature of Habeas Corpus. He has also stated that on 18-7-2000 some dispute arose between Kaushlendra Singh and Virendra, Sultan Singh, Manohar Singh (P.W. 16), Dinesh and Ramesh. Accordingly, a complaint Ex. D.6 was filed for offence under Section 323,294,506(B), 427,336 of I.P.C. The statement of Kaushlendra recorded under Section 200 of Cr.P.C. is Ex. D.8, statement of Rajesh under Section 202 of Cr.P.C. is Ex. D.9, statement of Brajesh under Section 202 of Cr.P.C. is Ex. D.10 and the copies of the ordersheets are Ex. D.11 and D.12. He also stated that a false F.I.R., Ex. P.14 was lodged by Sultan Singh on the basis of which the police filed charge sheet, Ex.D.15 and by judgment, Ex. D.13, Ghanshyam, Kaushlendra and Ramvir have been acquitted. Since, the complaint was filed, therefore, Sultan, Manohar, Dinesh, Ramesh and Ramant (P.W. 1) were having grudge against him. In cross-examination, Ghanshyam claimed that distance between village Kheriya and Khoyala, where incident took place, is about 116-17 Km.s and not 1-2 Km. He accepted that he has not filed any document to show that he was on duty from 16-10-2000 to 26-10-2000. He denied that on the date of incident, he was in village Khoyala.

136. Thus, if the defence of Ghanshyam regarding plea of alibi is considered, then it is clear that he had never claimed that on 16-10- 2000, he was in village Kheriya. He has not filed any document to show that he was on duty from 16-10-2000 till 26-10-2000. Further, in criminal complaint Ex. D.6 and his statement Ex. D.8, this witness had disclosed his address as village Khoyala and not village Kheriya. Further according to Ghanshyam himself, the distance between village Kheriya and village Khoyala is only 16-17 Kms. Thus, it cannot be said that it was physically impossible for him to remain present in village Khoyala at the time of incident. Further, this witness has not examined Rajendra Singh Tomar, in whose house, Ghanshyam was claiming that he was residing as a tenant. Thus, it is held that Ghanshyam has failed to prove his plea of alibi. Further, he has claimed that because of some incident which took place on 18-7-2000, there was an enmity between the parties. As already held, enmity is a double edged weapon and it also provides motive for committing offence.

137. Further, taking a false plea of alibi, would also be an additional link to the circumstances, although false plea of alibi cannot be a sole criteria to record conviction. The Supreme Court in the case of *Subramaniam v. State of T.N.,* reported in (2009) 14 SCC 415 has held as under :

> 34 .....Failure to prove the plea of alibi and/or giving of false evidence itself may not be sufficient to arrive at a verdict of guilt; it may be an additional circumstance. But before such additional circumstance is taken into consideration, the prosecution must prove all other circumstances to prove his guilt.

138. Ramvir Singh has examined Binda Singh Tomar (D.W.2) and Parvat Singh Sengar (D.W.3). Ramvir Singh is the brother-in-law *(Jija)* of Binda Singh Tomar (D.W.2). He has stated that Ramvir was arrested from village Patrai. Ramvir is residing in village Patrai for the last 6-7 years back and is cultivating lands on *Batai.* He has further claimed that in the night of *Karvachouth,* Ramvir and his sister Ishnokumari were in village Patrai. In cross-examination, this witness accepted, that Ishnokumari was elected as Sarpanch of Gram Panchayat Khoyala. He further claimed that most probably, Ishnokumari had shifted to village Patrai in the year 1999.

139. Considered the evidence of Binda Singh Tomar (D.W.2). Ishnokumari, the wife of Ramvir was elected as Sarpanch of Gram Panchayat, Khoyala, therefore, there was no reason for Ramvir to shift to village Patrai. Ramvir has not clarified the reason for his shifting to village Patrai. Further, Ramvir has not examined any witness, in whose house, he was residing as tenant, because Binda Singh Tomar (D.W.2) has not claimed that Ramvir Singh was residing in his house. Thus, it is clear that Binda Singh Tomar (D.W.2) is not a reliable witness.

140. Parvat Singh Sengar (D.W.3) has claimed that he is having 25 acres of land and Ramvir Singh was cultivating the same on *batai.* However, this witness has not filed any document to show that he is the owner of 25 acres of land in village Patrai. He further admitted that his grand father Jahar Singh and father-in-law of Ramvir, Kamal Singh are real brothers. Therefore, it is clear that Parvat Singh Sengar (D.W.3) is not an independent witness. Further, this witness has not clarified the residential address of Ramvir Singh in village Patrai. Thus, in absence of any evidence that Parvat Singh Sengar (D.W.3) is having any agricultural land in village Patrai, coupled with the fact that he is a near relative of Ramvir Singh, this Court is of the considered opinion, that Ramvir Singh has failed to prove that he had ever shifted to village Patrai and was not present in village Khoyala at the time of incident.

141. By referring to para 144 and 149 of the impugned judgment, it is submitted by the Counsel for the appellants, that the Trial Court, itself has come to a conclusion that there are certain improvements in the evidence of the witnesses, and they have tried to over implicate other accused persons, therefore, the evidence of the witnesses are not reliable.

142. This Court has already held that the principle of *falsus in uno falsus in omnibus* has no application in India and the Court must try to remove grain from

the chaff. The Trial Court after appreciating the evidence has already acquitted some of the co-accused persons.

143. By referring to the findings given by the Trial Court in para 165, 166, 169, 175, 177, 178, 179, 181, 182 and 194 of Judgment, it is submitted by the Counsel for the appellants, that the Trial Court, itself has found that the incident cannot take place only on the question of bursting of crackers and thus, the witnesses and investigating officer have tried to suppress some part of the incident.

144. It is suffice to say, that this Court while deciding the Cr.A. No. 584 of 2008 filed by the State of M.P. against the acquittal of Ramant Singh (P.W.1), has already held that Ramant Singh (P.W.1) did not commit murder of Brajesh. In fact, by shifting the dead body and by improving their version, specifically in the light of the fact that F.I.R., by Angad Singh in cross S.T. No. 229/2003 was lodged against unknown persons, the appellants have tried to suppress the very genesis of the incident. Therefore, in the light of findings recorded by this Court in Cr.A. No. 584 of 2008, the findings given by the Trial Court in the above mentioned paragraphs loses its importance.

145. No other argument was advanced by the Counsel for the appellants.

146. If the evidence of all the witnesses along with the weapons used by the appellants are considered, then the following conclusion would emerge :

(a) So far as the murder of Keshav and Jaswant is conerned, all the witnesses have stated in single voice that Ramvir Singh, killed Keshav and Jaswant. The ocular evidence is supported by Postmortem report. Further, Ramvir Singh was allegedly having .315 bore gun and bullet injuries were found in the dead bodies of Keshav and Jaswant. Accordingly, it is held that Ramvir Singh killed Keshav and Jaswant.

(b) So far as the murder of Raghunath @ Chhote Singh is concerned, Ramant Singh (P.W. 1), Rajabeti (P.W. 15) and Manohar Singh (P.W. 16) have stated in single voice that it was Ghanshyam who shot Raghunath @ Chhote Singh. Kumher Singh (P. 17) has also stated that Ghanshyam was having gun and he too had fired. Although, the Trial Court has held that it was Ramvir Singh who killed Raghunath @ Chhote Singh, but the said finding recorded by the Trial Court is contrary to record. As per the Postmortem report of Raghunath @ Chhote Singh, Ex. P.35, no exit wound was found and three pellets were also recovered from the dead body of Raghunath @ Chhote Singh, which were seized vide seizure memo Ex. P. 26. Ghanshyam Singh was armed with .12 bore gun and cartridge having pellets are used in the said gun. Since, Raghunath @ Chhote Singh had suffered pellet injuries, and Ghanshyam was having.12 bore gun, therefore, it is clear that Raghunath @ Chhote Singh, died of gun shot fired by Ghanshyam. A charge under Section 302 of I.P.C. was also framed against Ghanshyam for killing

Raghunath. Under these circumstances, it is held that it was Ghanshyam who killed Raghunath @ Chhote Singh.

(c) There is some discrepancy as to who caused gun shot injuries to deceased Mamta. According to Ramant Singh (P.W.1) and Rajabeti (P.W. 15), it was Ramvir Singh who shot Mamta, whereas according to Gomati bai (P.W. 13) and Manohar Singh (P.W. 15), Mamta was shot by Ghanshyam Singh. Under these circumstances, it becomes necessary to verify the ocular evidence with medical evidence as well as ballistic evidence. As per Postmortem report, Ex. P.28, one piece of .315 bore bullet and one pellet were recovered from the dead body of Mamta. Thus, it is clear that deceased Mamta had suffered gun shots from two different guns. One injury was caused by bullet and a piece of .315 bore bullet was also recovered from her dead body and another gun shot injury (three charring injuries) were caused by pellets and one pellet was also recovered from her dead body. Ramvir Singh was having .315 bore gun whereas Ghanshyam was having .12 bore gun. Thus, it is clear that in fact there is no discrepancy in the evidence of the witnesses. Thus, it is held that Mamta suffered injuries from gun shots fired by Ramvir Singh and Ghanshyam Singh. According to Postmortem report, the cause of death was shock due to injuries due to gun shot (firearm). The three charring injuries from which one pellet was recovered were found on the thigh of Mamta. Thus, in all probabilities, those three charring injuries were not sufficient to cause death. Accordingly, it is held that gun shot fired by Ramvir Singh, caused death of Mamta. However, no charge under Section 302 of I.P.C. for committing murder of Mamta was framed, but a charge under Section 302/149 of I.P.C. for committing murder of Mamta was framed. Thus, it is held that the appellant Ramvir Singh cannot be held guilty for offence under Section 302 of I.P.C. for committing murder of Mamta.

(d) So far as the injury sustained by Manohar Singh (P.W. 16) is concerned, it is the evidence of the witnesses, that it was Kaushlendar Singh who caused gun shot injury to Manohar Singh. However, in Dehati Nalishi, Ex. P.1, although, the presence of Kaushlendra on the spot was mentioned, but it was alleged that Kaushlendra Singh along with others was bursting crackers. When it was objected by Manohar Singh, then he abused him. However, no role after the opening of fire was attributed to him. Further, there was no allegation that Kaushlendra was having any firearm or had fired any gun shot. Since, the Trial Court has already acquitted Kaushlendra Singh, and the State Appeal No. 790/2005 against his acquittal has also been dismissed by this Court by a separate judgment passed today, therefore, in absence of any specific allegation against any of the appellants, it is held, that Ramvir Singh, Nathu Singh and Ghanshyam Singh were sharing common intention to make an attempt to commit murder of Manohar Singh.

(e) So far as the injuries sustained by Gomati bai (P.W. 13) is concerned, it is clear from her M.L.C., Ex. P. 11A, as well as x-ray report, Ex. P22, multiple metallic radio-opaque irregular size foreign body Shadows were found in the soft tissue under the muscles. Thus, it is clear that Gomatibai (P.W.13) had suffered pellet injuries which could have been caused by .12 bore gun. According to the evidence of witnesses, Nathu Singh was having .12 bore gun and he had caused gun shot injury to Gomatibai (P.W.13).

A .12 bore gun was also seized from the possession of Nathu Singh vide seizure memo, Ex. P. 29. Although independent witnesses of seizure namely Mewaram (P.W.10) and Lakhan Singh (P.W. 12) have turned hostile and have not supported the prosecution story, but they have admitted their signatures on seizure memo, Ex. P.29. Why they put their signatures on the seizure memo, Ex. P.29 has not been explained by them. The Supreme Court in the case of *Ramesh Harijan Vs. State of U.P.* Reported in (2012) 5 SCC 777 has held as under :

> **22.4.** The recovery of part of the sheet and white clothes having blood and semen as per the FSL report has been disbelieved by the trial court in view of the fact that Ram Prasad alias Parsadi (PW 5) and Bhikari (PW 10) did not support the prosecution case like other witnesses who did not support the last seen theory. The trial court failed to appreciate that both the said witnesses, Ram Prasad alias Parsadi (PW 5) and Bhikari (PW 10) had admitted their signature/thumb impression on the recovery memo. The factum of taking the material exhibits and preparing of the recovery memo with regard to the same and sending the cut out portions to the serologist who found the blood and semen on them vide report dated 21-3-1996 (Ext. Ka-21) is not disputed. The serological report also revealed that the vaginal swab which was taken by the doctor was also human blood and semen stained.
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> **23.** It is a settled legal proposition that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examine him.
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> > *"6.* ... The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent that their version is found to be dependable on a careful scrutiny thereof." [Vide *Bhagwan Singh* v. *State of Haryana; Rabindra Kumar Dey* v. *State of Orissa; Syad Akbar* v. *State of Karnatak* and *Khujji* v. *State of M.P.*(SCC p. 635, para 6).]
>
> **24.** In *State of U.P.* v. *Ramesh Prasad Misra* (SCC p. 363, para 7) this Court held that evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused but

required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon. A similar view has been reiterated by this Court in *Balu Sonba Shinde* v. *State of Maharashtra, Gagan Kanojia* v. *State of Punjab; Radha Mohan Singh* v. *State of U.P., Sarvesh Narain Shukla* v. *Daroga Singh* and *Subbu Singh* v. *State.*

> *"83.* Thus, the law can be summarised to the effect that the evidence of a hostile witness cannot be discarded as a whole, and relevant parts thereof which are admissible in law, can be used by the prosecution or the defence."
>
> [See also *C. Muniappan* v. *State of T.N.* (SCC p. 596, para 83) and *Himanshu* v. *State (NCTof Delhi).]*

25. Undoubtedly, there may be some exaggeration in the evidence of the prosecution witnesses, particularly that of Kunwar Dhruv Narain Singh (PW 1), Jata Shankar Singh (PW 7) and Shitla Prasad Verma (PW 8). However, it is the duty of the court to unravel the truth under all circumstances.

26. In *Balaka Singh* v. *State of Punjab,* this Court considered a similar issue, placing reliance upon its earlier judgment in *Zwinglee Ariel* v. *State of M.P.* and held as under: *(Balaka Singh case,* SCC p. 517, para 8)

> *"8.* ... the court must make an attempt to separate grain from the chaff, the truth from the falsehood, yet this could only be possible when the truth is separable from the falsehood. Where the grain cannot be separated from the chaff because the grain and the chaff are so inextricably mixed up that in the process of separation, the court would have to reconstruct an absolutely new case for the prosecution by divorcing the essential details presented by the prosecution completely from the context and the background against which they are made, then this principle will not apply."

27. In *Sukhdev Yadav* v. *State of Bihar* this Court held as under: (SCC p. 90, para 3)

> *"3.* It is indeed necessary, however, to note that there would hardly be a witness whose evidence does not contain some amount of exaggeration or embellishment—sometimes there would be a deliberate attempt to offer the same and sometimes the witnesses in their over anxiety to do better from the witness box detail out an exaggerated account."

28. A similar view has been reiterated in *Appabhai* v. *State of Gujarat* (SCC pp. 246-47, para 13) wherein this Court has cautioned the courts below not to give undue importance to minor discrepancies which do not

> shake the basic version of the prosecution case. The court by calling into aid its vast experience of men and matters in different cases must evaluate the entire material on record by excluding the exaggerated version given by any witness for the reason that witnesses nowadays go on adding embellishments to their version perhaps for the fear of their testimony being rejected by the court. However, the courts should not disbelieve the evidence of such witnesses altogether if they are otherwise trustworthy.
>
> **29.** In *Sucha Singh* v. *State of Punjab* (SCC pp. 113-14, para 51) this Court had taken note of its various earlier judgments and held that even if major portion of the evidence is found to be deficient, in case residue is sufficient to prove guilt of an accused, it is the duty of the court to separate grain from chaff. Falsity of particular material witness or material particular would not ruin it from the beginning to end. The maxim *falsus in uno, falsus in omnibus* has no application in India and the witness cannot be branded as a liar. In case this maxim is applied in all the cases it is to be feared that administration of criminal justice would come to a dead stop. Witnesses just cannot help in giving embroidery to a story, however true in the main. Therefore, it has to be appraised in each case as to what extent the evidence is worthy of credence, and merely because in some respects the court considers the same to be insufficient or unworthy of reliance, it does not necessarily follow as a matter of law that it must be disregarded in all respects as well.

Further, V.K. Sharma (P.W.21) has stated that on 24-12-2000, he had arrested Nathu Singh and his confessional statement, Ex. P.50 was recorded. On production of .12 bore gun by Nathu Singh, the same was seized vide seizure memo, Ex. P.29.

It is well established principle of law that the evidence of Police personal (sic : personnel) cannot be discarded only because of the fact, that either he is an investigating officer or his evidence is not corroborated by independent witness. The Supreme Court in the case of *Rohtash Kumar v. State of Haryana,* reported in (2013) 14 SCC 434 has held as under:

> **35.** The term witness, means a person who is capable of providing information by way of deposing as regards relevant facts, via an oral statement, or a statement in writing, made or given in the court, or otherwise. In *Pradeep Narayan Madgaonkar* v. *State of Maharashtra*[32] this Court examined the issue of the requirement of the examination of an independent witness, and whether the evidence of a police witness requires corroboration. The Court therein held that the same must be subject to strict scrutiny. However, the evidence of police officials cannot be discarded merely on the ground that they belonged to the police force, and are either interested in the investigating or the

> prosecuting agency. However, as far as possible the corroboration of their evidence on material particulars, should be sought. (See also *Paras Ram* v. *State of Haryana, Balbir Singh* v. *State, Kalpnath Rai* v. *State, M. Prabhulal* v. *Directorate of Revenue Intelligence* and *Ravindran* v. *Supt. of Customs)*

The Supreme Court in the case of *Mukesh Singh Vs. State (NCT of Delhi),* reported in (2020) 10 SCC 120 has held as under :

> 11.....The informant/investigator concerned will be cited as a witness and he is always subject to cross-examination. There may be cases in which even the case of the prosecution is not solely based upon the deposition of the informant/informant-cum-investigator but there may be some independent witnesses and/or even the other police witnesses. As held by this Court in a catena of decisions, the testimony of police personnel will be treated in the same manner as testimony of any other witness and there is no principle of law that without corroboration by independent witnesses his testimony cannot be relied upon. [See *Karamjit Singh* v. *State (NCT of Delhi).]* As observed and held by this Court in *Devender Pal Singh* v. *State (NCT of Delhi),* the presumption that a person acts honestly applies as much in favour of a police officer as of other persons, and it is not judicial approach to distrust and suspect him without good grounds therefor.

One fired cartridge was also found embedded in the barrel. Thus, it is held that one .12 bore gun and fired cartridge were seized from the possession of Nathu Singh.

Lalaram (P.W.5) had examined the .12 bore gun. Lalaram (P.W. 5) is an armorer working in the police department and according to the report of the armorer, Ex. P.19, the said gun was found in working condition. Therefore, it is held that Nathu Singh (Cr.A. No. 397/2005) caused gun shot injuries to Gomati bai (P.W.13).

Whether, the appellants Nathu Singh, Ramvir Singh and Ghanshyam were sharing common intention

147. The Supreme Court in the case of *Chhota Ahirwar v. State of M.P.,* reported in (2020) 4 SCC 126 has held as under :

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

each person is liable for the result of all the acts as if all the acts had been done by all of these persons.

22. Section 34 is only a rule of evidence which attracts the principle of joint criminal liability and does not create any distinct, substantive offence as held by this Court in *B.N. Srikantiah* v. *State of Mysore; Bharwad Mepa Dana* v. *State of Bombay* and other similar cases. To quote Arijit Pasayat, J. in *Harbans Kaur* v. *State of Haryana;* the distinctive feature of Section 34 is the element of participation in action.

23. Common intention can only be inferred from proved facts and circumstances as held by this Court in *Manik Das* v. *State of Assam.* Of course, as held in *Abdul Mannan* v. *State of Assam,* the common intention can develop during the course of an occurrence.

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

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

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

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

148. Thus, it is clear that common intention can develop during the course of occurrence also. If the facts of this case are considered, then it is clear that Ramvir Singh, Nathu Singh and Ghanshyam Singh, fired indiscriminately, thereby causing death of Keshav, Jaswant, Raghunath @ Chhote Singh and Mamta and causing gun shot injuries to Gomati bai (P.W. 13) and Manohar Singh (P.W. 16). Further, coming to the place of occurrence with their .12 bore or .315 bore guns, clearly establishes that all the three appellants were sharing common intention.

No charge under Section 34 of I.P.C. was framed, but charge under Section 149 of I.P.C. was framed and its effect

149. It is well established principle of law that if charge under Section 149 of I.P.C. has been framed and if it is found that some of the accused persons were not guilty and some of the accused had participated in the occurrence and were sharing common intention then, they can be convicted with the aid of Section 34 of I.P.C. and non-framing of charge under Section 34 of I.P.C. would not cause any prejudice to them.

The Supreme Court in the case of *Mala Singh v. State of Haryana,* reported in (2019) 5 SCC 127 has held as under :

> **40.** Now coming to the question regarding altering of the charge from Section 149 to Section 34 IPC read with Section 302 IPC, this question was considered by this Court for the first time in *Lachhman Singh* v. *State* where Fazl Ali, J. speaking for the Bench held as under: (AIR p. 170, para 13)
>
> > *"13.* It was also contended that there being no charge under Section 302 read with Section 34, Penal Code, the conviction of the appellants under Section 302 read with Section 149 could not have been altered by the High Court to one under Section 302 read with Section 34, upon the acquittal of the remaining accused persons. The facts of the case are however such that the accused could have been charged alternatively, either under Section 302 read with Section 149 or under Section 302 read with Section 34. The point has therefore no force."
>
> **41.** This question was again examined by this Court in *Karnail Singh* v. *State of Punjab* wherein the learned Judge Venkatarama Ayyar, J. elaborating the law on the subject, held as under: (AIR p. 207, para 7)

> *"7.* Then the next question is whether the conviction of the appellant under Section 302 read with Section 34, when they had been charged only under Section 302 read with Section 149 was illegal. The contention of the appellants is that the scope of Section 149 is different from that of Section 34, that while what Section 149 requires is proof of a common object, it would be necessary under Section 34 to establish a common intention and that therefore when the charge against the accused is under Section 149, it cannot be converted in appeal into one under Section 34. The following observations of this Court in *Dalip Singh* v. *State of Punjab* were relied on in support of this position: (AIR p. 366, para 24)
>
> '*24.* Nor is it possible in this case to have recourse to Section 34 because the appellants have not been charged with that even in the alternative and the common intention required by Section 34 and the common object required by Section 149 are far from being the same thing.'

It is true that there is substantial difference between the two sections but as observed by Lord Sumner in *Barendra Kumar Ghosh* v. *King Emperor,* they also to some extent overlap and it is a question to be determined on the facts of each case whether the charge under Section 149 overlaps the ground covered by Section 34. If the common object which is the subject-matter of the charge under Section 149 does not necessarily involve a common intention, then the substitution of Section 34 for Section 149 might result in prejudice to the accused and ought not therefore to be permitted. But if the facts to be proved and the evidence to be adduced with reference to the charge under Section 149 would be the same if the charge were under Section 34, then the failure to charge the accused under Section 34 could not result in any prejudice and in such cases the substitution of Section 34 for Section 149 must be held to be a formal matter.

We do not read the observations in *Dalip Singh* v. *State of Punjab* as an authority for the broad proposition that in law there could be no recourse to Section 34 when the charge is only under Section 149. Whether such recourse can be had or not must depend on the facts of each case. This is in accord with the view taken by this Court in *Lachhman Singh* v. *State,* where the substitution of Section 34 for Section 149 was upheld on the ground that the facts were such 'that the accused could have been charged alternatively either under Section 302 read with Section 149, or under Section 302 read with Section 34' (AIR p. 170, para 13)."

42. The law laid down in *Lachhman Singh* and *Karnail Singh* was reiterated in *Willie (William) Slaney* wherein Vivian Bose, J. speaking for the Bench while referring to these two decisions, held as under: *[Willie (William) Slaney case,* AIR p. 129, para 49]

> *"49.* The following cases afford no difficulty because they directly accord with the view we have set out at length above. In *Lachhman Singh* v. *State,* it was held that when there is a charge under Section 302 of the Penal Code read with Section 149 and the charge under Section 149 disappears because of the acquittal of some of the accused, a conviction under Section 302 of the Penal Code read with Section 34 is good even though there is no separate charge under Section 302 read with Section 34, provided the accused could have been so charged on the facts of the case.
>
> The decision in *Karnail Singh* v. *State of Punjab* is to the same effect and the question about prejudice was also considered."

43. This principle of law was then reiterated after referring to law laid down in *Willie (William) Slaney* in *Chittarmal* v. *State of Rajasthan* in the following words: *(Chittarmal case,* SCC p. 273, para 14)

> *"14.* It is well settled by a catena of decisions that Section 34 as well as Section 149 deal with liability for constructive criminality i.e. vicarious liability of a person for acts of others. Both the sections deal with combinations of persons who become punishable as sharers in an offence. Thus they have a certain resemblance and may to some extent overlap. But a clear distinction is made out between common intention and common object in that common intention denotes action in concert and necessarily postulates the existence of a pre-arranged plan implying a prior meeting of the minds, while common object does not necessarily require proof of prior meeting of minds or preconcert. Though there is substantial difference between the two sections, they also to some extent overlap and it is a question to be determined on the facts of each case whether the charge under Section 149 overlaps the ground covered by Section 34. Thus, if several persons numbering five or more, do an act and intend to do it, both Section 34 and Section 149 may apply. If the common object does not necessarily involve a common intention, then the substitution of Section 34 for Section 149 might result in prejudice to the accused and ought not, therefore, to be permitted. But if it does involve a common intention then the substitution of Section 34 for Section 149 must be held to be a formal matter. Whether such recourse can be had or not must depend on the facts of each case. The non-

applicability of Section 149 is, therefore, no bar in convicting the appellants under Section 302 read with Section 34 IPC, if the evidence discloses commission of an offence in furtherance of the common intention of them all. (See *Barendra Kumar Ghosh* v. *King Emperor; Mannam Venkatadari* v. *State of A.P.; Nethala Pothuraju* v. *State of A.P.* and *Ram Tahal* v. *State ofUP.)"*

The Supreme Court in the case of *Dhaneswar Mahakud Vs. State of Orissa* reported in (2006) 9 SCC 307 has held as under :

12. Recently in *Gurpreet Singh* v. *State of Punjab* this Court has relied upon *Ramji Singh* v. *State of Bihar* for the proposition that charges framed under simpliciter Section 302 can be changed to Section 302 read with Section 34 IPC. The relevant portion of the judgment in *Ramji Singh case* is extracted below: (SCC pp. 533-34, paras 14-16)

"14. Legal position as to whether in the absence of charge under Section 34 conviction could be maintained under Section 34 was cleared by the Constitution Bench in *Willie (William) Slaney* v. *State of M.P.* where this Court observed at para 86: (AIR p. 137)

'86. Sections 34, 114 and 149 of the Penal Code provide for criminal liability viewed from different angles as regards actual participants, accessories and men actuated by a common object or a common intention; "and the charge is a rolled-up one involving the direct liability and the constructive liability" without specifying who are directly liable and who are sought to be made constructively liable.

In such a situation, the absence of a charge under one or other of the various heads of criminal liability for the offence cannot be said to be fatal by itself, and before a conviction for the substantive offence, without a charge, can be set aside, prejudice will have to be made out. In most of the cases of this kind, evidence is normally given from the outset as to who was primarily responsible for the act which brought about the offence and such evidence is of course relevant.'

This was reiterated by the Supreme Court a number of times. We may refer to *Dhanna* v. *State of M.P.* where this position is reiterated after referring to the other cases. It held: (SCC pp. 82-83, para 9)

'9. It is, therefore, open to the court to take recourse to Section 34 IPC even if the said section was not specifically mentioned in the charge and instead Section 149 IPC has been included. Of course a finding that the assailant concerned had a common intention with the other accused

is necessary for resorting to such a course. This view was followed by this Court in later decisions also. *(Amar Singh* v. *State of Haryana, Bhoor Singh* v. *State of Punjab)* The first submission of the learned counsel for the appellant has no merit.'

Accordingly it is held that even in the absence of the charge under Section 34 the conviction could be maintained by the courts below.

15. The counsel for the appellants could not show that any prejudice was caused to either of the accused persons because of the non-framing of charge under Section 34.

16. It is true that the two injuries which proved to be fatal were not specifically attributed to either of the accused. The common intention can be formed at the spot. At times it is difficult to get direct evidence of preconcert of minds. The common intention can be gathered from the circumstances and the manner in which assault is carried out. The manner in which assault was carried out leaves no manner of doubt in our mind that the appellants had come with the intention to kill the deceased. Their intention was not to cause injuries alone."

13. It is apparent from the decisions rendered by this Court that there is no bar on conviction of the accused-appellants with the aid of Section 34 IPC in place of Section 149 IPC if there is evidence on record to show that such accused shared a common intention to commit the crime and no apparent injustice or prejudice is shown to have been caused by application of Section 34 IPC in place of Section 149.

150. However, there is basic difference between common intention and common object. Common intention requires pre-oriented minds and concerted plans whereas, Common object has no such requirement of meeting of minds of the members of unlawful assembly before commission of offence. However, common intention may also develop during the course of occurrence, provided there is clear proof and cogent evidence to prove common intention. Thus, if the facts of this case are considered, then it is clear that all the three appellants came on the spot with their respective guns and fired multiple gun shots. Even empty, live and misfired cartridges of .12 and .315 bore guns were found on the spot. Both the injured persons as well as deceased Mamta (three charring injuries with one pellet inside such injury) and Raghunath @ Chhote Singh had suffered injuries

due to gun shot fired from .12 bore guns. Thus, it is clear that all the three appellants were sharing common intention. Since, some of the elements of common intention and common object overlap each other, therefore, due to acquittal of remaining accused persons, the appellants can be convicted with the aid of Section 34 of I.P.C.

Whether the conviction of Ghanshyam and Nathu Singh can be converted into under Section 302 and 307 of IPC respectively instead of 302/34 of I.P.C. and 307/34 of I.P.C. as awarded by Trial Court.

151. The Trial Court has convicted Ghanshyam Singh for offence under Section 302/34 of I.P.C. for murder of Raghunath @ Chhote Singh, whereas this Court has found that the findings given by the Trial Court in this regard are not correct and in fact Raghunath @ Chhote Singh died because of gun shot fired by Ghanshyam.

The Trial Court had framed charge under Section 302 of I.P.C. against Ghanshyam Singh for murder of Raghunath @ Chhote Singh. The State has not filed any appeal against the findings given by the Trial Court in this regard. However, it is clear that Ghanshyam Singh has already been convicted under Section 302/34 of I.P.C. for murder of Raghunath @ Chhote Singh and has already been awarded Life Imprisonment and a fine of Rs. 1000 for offence under Section 302/34 of I.P.C. It is true that conviction with the help of Section 34 of I.P.C. and conviction for offence under Section 302 of I.P.C. stands on a different footing, but since, no prejudice is caused to the appellant Ghanshyam due to alteration of his conviction from under Section 302/34 of I.P.C. to under Section 302 of I.P.C. for murder of Raghunath @ Chhote Singh, specifically when a specific charge was framed against Ghanshyam Singh, and he faced the criminal trial knowing fully well that he is being tried for committing murder of Raghunath @ Chhote Singh, therefore, it is held that even in absence of any appeal against acquittal of Ghanshyam for offence under Section 302 of I.P.C., the findings recorded by the Trial Court thereby convicting Ghanshyam Singh for offence under Section 302/34 of I.P.C. can be altered to conviction under Section 302 of I.P.C.

Similarly, the conviction of Nathu Singh for offence under Section 307/34 of I.P.C. can be altered to conviction under Section 307 of I.P.C., because a specific charge was framed against him under Section 307 of I.P.C. for making an attempt to murder Gomatibai (P.W.13).

Accordingly, it is held as under :

(i) **Ramvir Singh (Cr.A. of 425 of 2005)** caused death of Keshav, and Jaswant, therefore, he is held guilty of committing offence under Section 302 of I.P.C. on two counts. He is further held guilty of offence under Section 302/34 of I.P.C. for

murder of Raghunath @ Chhote Singh and Mamta. He is further held guilty for committing offence under Section 307/34 of I.P.C. i.e., for making an attempt to commit murder of Gomati bai (P.W. 13).

(ii) **Nathu Singh (Cr.A. 397/2005)** is held guilty for offence under Section 302/34 of I.P.C. on four counts. Since, he also caused gun shot injury to Gomatibai (P.W. 13), therefore, it is held that he had knowledge and intention that by his act, if death of Gomati bai (P.W.13) had occurred then he would have been guilty of murder. Accordingly, he is held guilty for committing offence under Section 307 of I.P.C. for making an attempt to commit murder of Gomatibai (P.W.13).

(iii) **Ghanshyam Singh (Cr.A. No. 401/2005)** is held guilty for committing offence under Section 302 of I.P.C. for killing Raghunath @ Chhote Singh. He is further held guilty of offence under Section 302/34 of I.P.C. on three counts i.e., for murder of Keshav, Jaswant and Mamta. He is also held guilty for committing offence under Section 307/34 of I.P.C. i.e., for making an attempt to commit murder of Gomati bai (P.W. 13).

(iv) By a separate judgment passed today in Cr.A. No. 790/2005, this Court has upheld the acquittal of Kaushlendra Singh and others. Accordingly, **Nathu Singh, Ramvir Singh and Ghanshyam Singh** are also held guilty for committing offence under Section 307/34 of I.P.C., for making an attempt to commit murder of Manohar Singh.

152. (i) Accordingly, following sentence is awarded to the appellants :

(a) Ramvir Singh :

Life Imprisonment with fine of Rs. 1000/- for offence under Section 302 of I.P.C. on two counts (for murder of Keshav, and Jaswant) and under Section 302/34 of I.P.C. for murder of Raghunath @ Chhote Singh and Mamta awarded by Trial Court is hereby affirmed.

Rigorous imprisonment of 7 years and fine of Rs. 500/- awarded by Trial Court for offence under Sections 307/34 of I.P.C. (on two counts) for making an attempt to murder Gomati bai and Manohar Singh is hereby affirmed.

All sentences shall run concurrently.

(b) Nathu Singh :

Life imprisonment with fine of Rs. 1000/- awarded by Trial Court for offence under Section 302/34 of I.P.C. on four counts i.e., for murder of Keshav, Jaswant, Raghunath @ Chhote Singh and Mamta is hereby affirmed.

Rigorous Imprisonment of 7 years with fine of Rs. 500/- is awarded for offence under Section 307 of I.P.C., i.e., for making an attempt to kill Gomati bai (P.W.13) [As awarded by Trial Court for offence under Section 307/34 of I.P.C.]

Rigorous Imprisonment of 7 years with fine of Rs. 500/-awarded by the Trial Court for offence under Section 307/34 of I.P.C. for making an attempt to murder Manohar is hereby affirmed.

All sentences shall run concurrently.

(c) Ghanshyam :

Life Imprisonment with fine of Rs. 1000/- for offence under Section 302/34 of I.P.C. on three counts (for murder of Keshav, Jaswant and Mamta) awarded by Trial Court is hereby affirmed.

Life imprisonment with fine of Rs. 1000/- is awarded for offence under Section 302 of I.P.C. for murder of Raghunath @ Chhote Singh.

Rigorous Imprisonment of 7 years with fine of Rs. 500/-awarded by Trial Court for offence under Section 307/34 of I.P.C. (on two counts) for making an attempt to murder Gomati bai and Manohar Singh is hereby affirmed.

All sentences shall run concurrently.

153. Accordingly, with aforementioned modification, the judgment and sentence dated 20-5-2005 passed by 2nd Additional Sessions Judge, Morena in S.T. No. 37/2001 is hereby affirmed.

154. The appellants Ghanshyam Singh and Ramvir Singh are in jail. They shall undergo the remaining jail sentence. They be intimated about the judgment.

155. The appellant Nathu Singh is on bail. His bail bonds are hereby cancelled. He is directed to immediately surrender before the Trial Court, for undergoing the remaining jail sentence.

156. The record of the Trial Court be returned back. The appeals fail and are hereby **Dismissed.**

Appeal dismissed

I.L.R. [2021] M.P. 1458
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice Sanjay Dwivedi

MCRC No. 17991/2021 (Jabalpur) decided on 4 May, 2021

VISHAL ...Applicant

Vs.

STATE OF M.P. …Non-applicant

***A. Criminal Procedure Code, 1973 (2 of 1974), Section 439, Penal Code (45 of 1860), Sections 363, 366-A & 375, Exception 2 & 376(2)(n) and Protection of Children from Sexual Offences Act (32 of 2012), Section 5/6 & 16/17 – Bail – Grounds – Age & Consent of Prosecutrix* – Held – Applicant married prosecutrix aged about 16 years and one month – Held – Marriageable age of girl in our country is 18 years and marriage below that age is *void ab initio* – Now age of consent is also fixed at 18 years – Applicant not entitled for bail taking benefit of Exception 2 of Section 375 IPC – Application dismissed. (Paras 4 to 6 & 14)**

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 439, दण्ड संहिता (1860 का 45), धाराएँ 363, 366–A व 375, अपवाद 2 व 376(2)(n) एवं लैंगिक अपराधों से बालकों का संरक्षण अधिनियम (2012 का 32), धारा 5/6 व 16/17 – जमानत – आधार – अभियोक्त्री की वय व सम्मति – अभिनिर्धारित – आवेदक ने लगभग 16 वर्ष 1 माह की आयु की अभियोक्त्री से विवाह किया – अभिनिर्धारित – हमारे देश में लड़की की विवाह योग्य आयु 18 वर्ष है तथा उस आयु से कम में किया गया विवाह आरंभ से शून्य है – अब सम्मति की आयु भी 18 वर्ष निश्चित की गई है – आवेदक धारा 375 भा.दं.सं. के अपवाद 2 का लाभ लेकर जमानत हेतु हकदार नहीं – आवेदन खारिज।

***B. Penal Code (45 of 1860), Section 375, Exception 2 and Protection of Children from Sexual Offences Act (32 of 2012), Section 5/6 & 16/17 – Age & Consent of Prosecutrix* – Held – When minimum age of marriage is fixed at 18 years and age of consent is also fixed at 18 years, fixing a lower age of 15 years in Exception 2 to Section 375 is totally irrational, unjust and not fair, infact it is oppressive to the girl child. (Para 6)**

ख. दण्ड संहिता (1860 का 45), धारा 375, अपवाद 2 एवं लैंगिक अपराधों से बालकों का संरक्षण अधिनियम, (2012 का 32), धारा 5/6 व 16/17 – अभियोक्त्री की वय व सम्मति – अभिनिर्धारित – जब विवाह की न्यूनतम आयु 18 वर्ष निश्चित है और सम्मति की आयु भी 18 वर्ष निश्चित है, धारा 375 के अपवाद 2 में 15 वर्ष की निम्न आयु निश्चित करना पूर्णतः तर्कहीन, अन्यायपूर्ण एवं अनुचित है, वास्तव में वह बालिका के लिए पीड़ा पहुंचाने वाला है।

***C. Protection of Children from Sexual Offences Act (32 of 2012), Section 42-A and Penal Code (45 of 1860), Section 375, Exception 2 – Inconsistency regarding Age – Overriding Effect* – Held – Section 42-A inserted in POCSO Act vide amendment on 03.02.2013 and in consequence of such amendment, POCSO Act will override provisions of any other law including IPC to the extent of any inconsistency – Apex Court concluded that Exception 2 to Section 375 is arbitrary and needs to be struck down.**

(Paras 9 to 12)

ग. लैंगिक अपराधों से बालकों का संरक्षण अधिनियम (2012 का 32), धारा 42–A एवं दण्ड संहिता (1860 का 45), धारा 375, अपवाद–2 – आयु के संबंध में असंगति – अध्यारोही प्रभाव – अभिनिर्धारित – पोक्सो अधिनियम में, 03.02.2013 के संशोधन द्वारा धारा 42–A अंतःस्थापित की गयी और उक्त संशोधन के परिणामस्वरूप, पोक्सो अधिनियम किसी असंगति की सीमा तक, किसी अन्य विधि, जिसमें भा.दं.सं. शामिल है, के उपबंधों को अध्यारोही करेगा – सर्वोच्च न्यायालय ने निष्कर्षित किया कि धारा 375 का अपवाद 2 मनमाना है और हटा दिये जाने की आवश्यकता है।

Case referred:

2017 (10) SCC 800.

Satyam Agrawal with *Deepak Sahu*, for the applicant.
Gaurav Tiwari, P.L. for the non-applicant-State.

O R D E R

SANJAY DWIVEDI, J. :- This first bail application under Section 439 of the Code of Criminal Procedure has been filed by the applicant for grant of bail in connection with Crime No.216/2020, registered at Police Station Parvati District Sehore, for the offence punishable under Section 363, 366-A, 376(2)(n) of IPC and Section 5/6, 16/17 of POCSO Act. Applicant is in arrest since 15/01/2021.

2. Counsel for the applicant submits that in view of the statement of the prosecutrix recorded under Section 164 of Cr.P.C she has very categorically stated that she had gone with the applicant voluntarily, got married with him and he made physical relation with her consent. He further submits that as per the case of prosecution at the time of the incident, the age of the prosecutrix was 16 years and one month and as such considering the Exception 2 of Section 375 of IPC sexual intercourse by a man with his own wife, not being under 15 years of age, is not rape. He submits that considering the said explanation and the case of the prosecution as prosecutrix herself has admitted that she got married with the applicant and was aged about 16 years one month, no case of rape is made out and the applicant is accordingly entitled to be released on bail.

3. Per contra, Shri Tiwari appearing on behalf of the State has opposed the bail application and submits that the consent of a girl below 18 years of age is no consent in the eye of law and if any physical relation is made to a girl who is below 18 years of age even with her consent amounts to a rape and as such application deserves to be dismissed.

4. Considering the rival contentions of the parties and perusal of case diary, I am of the opinion though the applicant is relying upon Exception 2 of Section 375 of IPC submitting that the case of rape is not made out but that does not convince me for the reason that the marriageable age of a girl in our country is 18 years and any marriage solemnized below that age is considered to be void. It is also clear that a girl below 18 years is not capable of giving consent to have sex and legally she cannot marry and as such if she even otherwise admits that she got married with the applicant, the same cannot be a ground to release the applicant on bail by giving benefit of Exception 2 of Section 375 of IPC, which reads as under:-

> Exception 2- Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.

5. However, I am not convinced with submission made by counsel for the applicant because if the statement of prosecutrix is accepted, even otherwise, she can't be considered a legally married wife, and relation between applicant and prosecutrix cannot be that of a husband or wife, simply because marriage of a girl below 18 years of age is void *ab initio,* and the husband, therefore, cannot get the benefit under Exception 2(2) of Section 375 of IPC. It is also pertinent to mention that Section 198(6) of Cr.P.C applies to a case of rape of wife below 18 years of age, clearly indicating that the act of the applicant, even otherwise amounts to rape.

6. I am also of the opinion that when minimum marriageable age is 18 years then fixing a lower age under Exception-2 of Section 375 of IPC is totally irrational. The magic figure of 15 years is not based on any scientific evaluation, but is based on the mere fact that it has been existing for a long time. The age of 15 years in Exception 2 was fixed in the year 1940 when the minimum age for marriage was also 15 and the age of consent was 16 but at present the age for marriage has been fixed at 18 years and age of consent is also fixed at 18 years, keeping the age under Exception 2 at 15 years, cannot be said to be right, just and fair. Infact, it is arbitrary and oppressive to the girl child.

7. Further, in the present case, the applicant is also facing an offence under the POCSO Act which is a special enactment introduced with reference to Article 15(3) of Constitution. The preamble recognizes that the best interest of a child should be secured, a "child" being defined under Section 2 (1)(d) as any person below the age of 18 years. Infact, securing the best interest of the child is an

obligation cast upon the Government of Indian having acceded to the *Convention on the Rights of the Child.*

8. The preamble also provides that "sexual exploitation and sexual abuse of children are heinous crimes and need to be effectively addressed." This is directly in conflict with Exception 2 to Section 375 of IPC which effectively provides that the sexual exploitation or sexual abuse of a girl child is not even a crime, let alone a heinous crime-on the contrary, it is a perfectly legitimate activity if the sexual exploitation or sexual abuse of the girl child is by her husband.

9. In my opinion also, Section 42-A inserted in the POCSO Act by an amendment made on 03/02/2013 with an intention that the same has overriding effect on the provisions of any other law in force includes IPC.

Section 42-A reads as under:-

> "42-A Act not in derogation of any other law -The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force and, in case of any inconsistency, the provisions of this Act shall have overriding effect on the provisions of any such law to the extent of the inconsistency."

10. The consequence of this amendment is that the provisions of the POCSO Act will override the provisions of any other law (including IPC) to the extent of any inconsistency.

11. According to the provisions of POCSO Act, applicant has committed an offence of rape and as such by giving benefit of said Exception he cannot be considered to be innocent.

12. The Supreme Court had an occasion to consider the provisions of Exception 2 of Section 375 of IPC in case of *Independent Thought Vs. Union of India and another* reported in 2017(10) SCC 800 and Supreme Court finally was of the opinion that such an Exception is arbitrary and needs to be struck down. The Supreme Court in the said case has held as under :-

> Exception 2 to Section 375 IPC insofar as it relates to a girl child below 18 years is liable to be struck down on the following grounds:
>
> (i) it is arbitrary, capricious, whimsical and violative of the rights of the girl child and not fair, just and reasonable and, therefore, violative of Articles 14, 15 and 21 of the Constitution of India :
>
> (ii) it is discriminatory and violative of Article 14 of the Constitution of India; and

(iii) it is inconsistent with the provisions of the POCSO Act, which must prevail.

13. A similar situation was seen before the Allahabad Court in the case of *Pradeep Tomar and another Vs. State of U.P and another* in a petition preferred under Article 227 of the Constitution of India in Case No.4804/2020 against the order passed by the Judicial Magistrate, Hapur under Section 363 of IPC, whereby the Court directed a girl of 16 years one month to go with her husband relying upon Exception 2 of Section 375. The Allahabad High Court relying upon a judgment of *Independent Thought* (supra) has set aside the said order and also observed that such an Exception is arbitrary and in conflict with the provisions of POCSO Act which have overriding effect and as such said provision is liable to be struck down.

14. Considering the aforesaid legal position, I am also of the opinion that the present applicant is not entitled to be released on bail by taking benefit of Exception 2 of Section 375 of IPC. The bail application is accordingly **dismissed.**

Application dismissed