VOL. 2

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TABLE OF CASES REPORTED

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

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

service and would be assigned seniority below his batchmates who have earlier qualified the examination – Once employee passed examination, he would ceases to be subject to 1960 Rules and would be governed from that stage onwards by 1961 Rules or 1975 Rules as the case may be – Full Bench (*Dr. Masood Akhtar*) correctly answered the reference – No justification to refer the matter to Larger Bench. [Arun Parmar Vs. State of M.P.](FB)…822

सिविल सेवा (सेवा की सामान्य शर्तें) नियम, म.प्र., 1961, नियम 8(1), 8(7) व 12, राज्य प्रशासनिक सेवा (वर्गीकरण, भर्ती और सेवा की शर्तें) नियम, म.प्र., 1975, नियम 13(1) व 13(7) एवं शासकीय सेवक (अस्थायी एवं स्थायीवत् सेवा) नियम, म.प्र. 1960 – परिवीक्षाधीन – विभागीय परीक्षा – वरिष्ठता की गणना – नियमों की प्रयोज्यता – अभिनिर्धारित – कर्मचारी जो 1961 के नियमों के नियम 8(1) अथवा 1975 के नियमों के नियम 13(1) के अंतर्गत सीधे भर्ती हुआ है किंतु विभागीय परीक्षा को 3 वर्षों की बढ़ायी गई अवधि के भीतर भी अर्हित करने में असमर्थ है तथा अभी तक सेवोन्मुक्त नहीं किया गया, तब 1961 के नियमों के नियम 8(7) अथवा 1975 के नियमों के नियम 13(7) की आज्ञा अनुसार उसकी सेवा शर्तें, 1960 के नियमों द्वारा शासित होगी – विभागीय परीक्षा में उपस्थित होने के लिए उसकी हकदारी जारी रहेगी और उसे उत्तीर्ण करने पर सेवा में स्थाई किया जायेगा एवं सेवा का सदस्य बनेगा और उसे उसके उन साथी बैच वालों के नीचे वरिष्ठता दी जायेगी जिन्होंने परीक्षा को पूर्व में अर्हित किया है – एक बार कर्मचारी परीक्षा उत्तीर्ण करने पर वह 1960 के नियमों के अधीन नहीं रहेगा और उस प्रक्रम से आगे वह 1961 के नियमों या 1975 के नियमों द्वारा शासित होगा, जैसा भी प्रकरण हो – पूर्ण न्यायपीठ (*डॉ. मसूद अख्तर*) ने निर्देश सही उत्तरित किया – वृह्द न्यायपीठ को मामला निर्देशित करने के लिए कोई न्यायोचित्य नहीं। (अरूण परमार वि. म.प्र. राज्य) **(FB)…822**

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दण्ड संहिता (1860 का 45), धारा 302/34 एवं किशोर न्याय (बालकों की देखरेख और संरक्षण) अधिनियम (2000 का 56), धारा 20 – अभिनिर्धारित – 1998 में घटना घटित हुई, उस तिथि को, अपीलार्थी क्र. 3 की आयु 16 वर्ष 11 माह 26 दिन थी – 2000 के अधिनियम की धारा 20 के अनुसार, घटना दिनांक को अपीलार्थी क्र. 3 की आयु 18 वर्ष से कम थी, अतः अपीलार्थी क्र. 3 को 2000 के अधिनियम के उपबंधों का लाभ दिया जायेगा – आजीवन कारावास का दण्डादेश अपास्त तथा अपीलार्थी क्र. 3 पर लगाये जाने वाले जुर्माने की समुचित मात्रा अवधारित करने हेतु मामला अधिकारिता वाले किशोर न्याय बोर्ड को प्रतिप्रेषित – अपील निराकृत। (देवीलाल वि. म.प्र. राज्य) **(SC)…806**

Penal Code (45 of 1860), Sections 302, 201, 147 & 149 – Appreciation of Evidence – Nature of Injury & Cause of Death **– Held – Existence of a grievous injury on vital part of body (brain) of deceased shows that it could have been a reason for his death – No delay in hospitalization – Oral dying declaration by deceased to his brother, wife and son regarding assault by appellants, cannot be doubted – Prosecution established its case beyond reasonable doubt – Appeal dismissed. [Kuldeep Choudhary @ Kuldeep Yadav Vs. State of M.P.] (DB)…953**

दण्ड संहिता (1860 का 45), धाराएँ 302, 201, 147 व 149 – साक्ष्य का मूल्यांकन – चोट का स्वरूप व मृत्यु का कारण – अभिनिर्धारित – मृतक के शरीर के महत्वपूर्ण अंग (मस्तिष्क) पर गंभीर चोट दर्शाती है कि यह उसकी मृत्यु का कारण हो सकता है – चिकित्सालय में भर्ती करने में कोई विलंब नहीं – अपीलार्थीगण द्वारा किये गये हमले के संबंध में मृतक द्वारा उसके भाई, पत्नी एवं पुत्र को दिये गये मौखिक मृत्युकालिक कथन पर संदेह नहीं किया जा सकता – अभियोजन ने युक्तियुक्त संदेह से परे अपना प्रकरण स्थापित किया – अपील खारिज। (कुलदीप चौधरी उर्फ कुलदीप यादव वि. म.प्र. राज्य) **(DB)…953**

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THE INDIAN LAW REPORTS M.P. SERIES, 2021

(Vol.-2)

JOURNAL SECTION

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

THE MADHYA PRADESH CIVIL COURTS (AMENDMENT) ACT, 2021

[Published in Madhya Pradesh Gazette (Extra-ordinary), dated 30 March 2021, page No. 362(1)]

MADHYA PRADESH ACT
No. 10 of 2021

THE MADHYA PRADESH CIVIL COURTS (AMENDMENT) ACT, 2021

(Received the assent of the Governor on the 26th March 2021; assent first published in the "Madhya Pradesh Gazette (Extra-ordinary)", dated the 30th March, 2021)

An Act further to amend the Madhya Pradesh Civil Courts Act, 1958.

Be it enacted by the Madhya Pradesh Legislature in the seventy-second year of the Republic of India, as follows :—

1. Short title. This Act may be called the Madhya Pradesh Civil Courts (Amendment) Act, 2021;

2. Substitution of certain phrases throughout the principal Act. Except clause (a) of Section 2, Section 25 and Section 26 of the Madhya Pradesh Civil Courts Act, 1958 (No. 19 of 1958) (hereinafter referred to as the principal Act), throughout the principal Act,—

(i) for the words "District Judge" wherever they occur, the words "Principal District Judge" shall be substituted:

(ii) for the words "Additional District Judge" wherever they occur, the words "District Judge" shall be substituted;

(iii) for the words and figure "Civil Judge Class I" wherever they occur, the words "Civil Judge, Senior Division" shall be substituted;

(iv) for the words and figure "Civil Judge Class II" wherever they occur, the words "Civil Judge, Junior Division" shall be substituted;

3. Amendment of Section 2. In Section 2 of the principal Act, for clause (a), the following clause shall be substituted. namely:—

"(a) "cadre of higher judicial service" means the cadre of District Judges and shall include the Principal District Judge, District Judge (Entry Level) and District Judge (Selection Grade);".

4. Amendment of Section 18. In Section 18 of the principal Act, for the words "District Court" the words "Principal District Court" shall be substituted.

AMENDMENTS IN THE MADHYA PRADESH SAND (MINING, TRANSPORTATION, STORAGE AND TRADING) RULES, 2019

[Published in Madhya Pradesh Gazette (Extra-ordinary), dated 05 January 2021, page Nos. 10 to 10(1)]

No. F 19-2-2019-XII-1-part.— In exercise of the powers conferred by Section 15 and Section 23(C) of the Mines and Minerals (Development and Regulation) Act, 1957 (67 of 1957), the State Government, hereby, makes the following further amendments in the Madhya Pradesh Sand (Mining, Transportation, Storage and Trading) Rules, 2019, namely:—

AMENDMENT

In the said rules.—

1. For rule 9, the following rule shall be substituted, namely:—

"9. Period of sand group included in tender.— The contract period of the quarries of the group shall be 3 years and first year shall be calculated from the date of issuing of letter of intent upto 30th June of the year and last period shall be 30th June of the third year.

For example :— If the Letter of Intent is issued on 5th October, 2019 the period of the group shall be calculated as under:

Sr. No.	Year	Period
(1)	(2)	(3)
1.	First Year	5th October 2019 to 30th June 2020
2.	Second Year	1st July 2020 to 30th June 2021
3.	Third Year	1st July 2021 to 30th June 2022

2. In rule 13, after sub-rule (4), the following sub-rule shall be inserted, namely:—

"(5) If the holder of Letter of Intent, inspite of receiving consent to operate (C.T.O.) for any one quarry of the group within 7 days, has not made application for agreement of group of district or has not executed the agreement within 5 working days of receiving information for sanction of execution of agreement, then cancellation of letter of intent shall be made by forfeiting the security amount so deposited.".

3. In rule 18, in sub-rule (6), for the first para, the following para shall be substituted, namely:—

"Permit for storage of sand mineral for commercial purpose shall be sanctioned to the group contractor or contractor authorized for sand mining, beyond 5 k.m. but within the radius of 8 k.m. from any valid sand quarry sanctioned in his favor.".

4. In rule 26, after sub-rule (6), the following sub-rule shall be inserted, namely:—

"(7) Quarry Permit for excavation, removal and transportation of sand minerals from the sand quarry of the group remained vacant temporarily, shall be sanctioned by the Collector of the concerned district, which is required for the works of the Central Government or the State Government or any department, undertaking or local body of the Central Government or any department, undertaking or local body of the Central Government or State Government, for a period of 30 days on the condition prescribed by the State Government. Such permit shall be given either to the concerned departmental authority or the contractor authorized by him on submission of proof regarding the award of the contract.".

5. In Form-VIII, for the first para, the following para shall be substituted, namely:—

"I.....S/o. D/o. W/o Shri/Smt. ..... aged .....Year, resident of ..... district ..... am the Contractor of the sanction group quarry number ..... in Tender or authorized contractor of sanctioned sand quarry in district ..... village ..... area ..... (Whichever is applicable) in tender. I am authorized on behalf of firm/company to submit the application for grant of storage license (attached copy of the letter of authorization). The following documents are attached along with the application form:—.".

मध्यप्रदेश के राज्यपाल के नाम से तथा आदेशानुसार,
आर. आर. भोंसले, अपर सचिव.

AMENDMENTS IN THE MADHYA PRADESH BHUMI VIKAS NIYAM, 2012

[Published in Madhya Pradesh Gazette, Part 4(Ga), dated 08 January 2021, page No. 06.]

No. F.-03-71-2020-XVIII-5 — In exercise of the powers conferred by sub-section (1) of Section 85 read with sub-section (3) of Section 24 of Madhya Pradesh Town and Country Planning Act, 1973. The State Government hereby makes the following amendments in Madhya Pradesh Bhumi Vikas Niyam, 2012 rules the same having been previously published in the Madhya Pradesh Gazette (Ordinary) Part-4 dated 13th November 2020 as required by sub-section (1) of Section 85 of the said Act:—

AMENDMENT

In the said rules, in rule 6, for sub-rule (3), the following sub-rule shall be substituted namely:—

"(3) Architect/Structural Engineer duly registered by the Authority having jurisdiction may be authorised to issue the building permission on the plots measuring up to 300 sq.meter after getting approval of the Director, town and country planning:

Provided that such permission cannot be issued to the colonisers who intend to sale the plot/building.

Provided further that competent Authority shall not give the power to issue building permission to such Architect/Structural Engineer who does not fulfil the norms provided in rule 26-A and 26-B and do not possess minimum 10 years experience.".

By order and in the name of the Governor of Madhya Pradesh,
SHUBHASHISH BANERJEE, Dy. Secy.

AMENDMENT IN THE MADHYA PRADESH CIVIL COURTS RULES, 1961

[Published in Madhya Pradesh Gazette, Part 4(Ga), dated 12 February 2021, page No. 87]

F. No. 496-2020-XXI-B(II). — In exercise of the powers conferred by Article 227 of the Constitution of India read with Section 122 of the Code of Civil Procedure, 1908 (5 of 1908) and Section 23 of the Madhya Pradesh Civil Courts Act, 1958 (No. 19 of 1958), the State Government in consultation with the High Court of Madhya Pradesh, hereby, makes the following further amendment in the Madhya Pradesh Civil Courts Rules, 1961, namely :—

AMENDMENT

In the said rules, in Part-I, in Chapter-I, in rule 10, for clause (i), the following clause shall be substituted, namely :—

(i) Neatly typewritten or printed in font type Unicode (Mangal) font size 16 (for Deonagari script and font type Times New Roman font size 14 (for Roman script), on both side of A4 size paper having not less than 75 GSM, leaving 1.5" margin on the top and bottom and 1.75" margin left and at least 1.0" margin right, with one and half line space.".

FURTHER AMENDMENTS IN THE MADHYA PRADESH CIVIL COURTS RULES, 1961

[Published in Madhya Pradesh Gazette, Part 4(Ga), dated 12 February 2021, page No. 88]

F. No. 498-2021-XXI-B(II). — In exercise of the powers conferred by Article 227 of the Constitution of India, the State Government in consultation with the High Court of Madhya Pradesh, hereby, makes the following further amendments in the Madhya Pradesh Civil Courts Rules, 1961, namely :—

AMENDMENTS

In the said rules,—

(1) In rule 484, the existing paragraph shall be renumbered as sub-rule (1) and after sub-rule (1) as so renumbered, the following sub-rule shall be inserted, namely :—

"(2) If, the application for copying relates to any record, which has been digitized as per digitization rules, the certified copy can be issued on the basis of such digitized record. However, if the application is for pending record or part thereof the permission of the Presiding Judge shall be required.".

(2) In rule 489,—

(1) in serial number (4) and (5), after the word "Room", the following symbol, and word "/Court" shall be inserted.

(2) after serial number 11, the following serial numbers shall be inserted, namely :—

"12. Copy prepared from the hard copy or

13.Copy prepared from the digitized record.".

मध्यप्रदेश के राज्यपाल के नाम से तथा आदेशानुसार,
गोपाल श्रीवास्तव, सचिव.

AMENDMENT IN THE MADHYA PRADESH MEDIATION RULES, 2016

[Published in Madhya Pradesh Gazette, Part 4(Ga), dated 19 February 2021, page No. 90]

No. B-938.— In exercise of the powers conferred by Article 225 of the Constitution of India read with Section 122 and Section 128 of the Code of Civil Procedure, 1908 (No. 5 of 1908), the High Court of Madhya Pradesh hereby, make the following amendment in the **Madhya Pradesh Mediation Rules, 2016,** the same having been previously published as required by Section 122 of the said Code in the Madhya Pradesh Gazette, Part IV(ग), dated 25th December, 2020, namely:—

AMENDMENT

In the said rules in Rule 6, in sub-rule (2), for the figure and word "10 years", the figure and word "5 years" shall be substituted.

राजेन्द्र कुमार वाणी, रजिस्ट्रार जनरल.

AMENDMENT IN THE MADHYA PRADESH MOTOR VEHICLES RULES, 1994

[Published in Madhya Pradesh Gazette, (Extra-ordinary), dated 03 March 2021, page No. 255]

No. F.19-76-2019-VIII. — In exercise of the powers conferred by Section 138 of the Motor Vehicles Act, 1988 (59 of 1988), the State Government, hereby, makes the following amendment in the Madhya Pradesh Motor Vehicles Rules, 1994, namely :—

AMENDMENT

In the said rules, Rule 213 shall be omitted.

मध्यप्रदेश के राज्यपाल के नाम से तथा आदेशानुसार,
अनिल सुचारी, अपर सचिव.

THE MADHYA PRADESH MUNICIPALITY (REGISTRATION AND USE OF MARRIAGE GARDEN) MODEL BYE-LAWS, 2020

[Published in Madhya Pradesh Gazette (Extra-ordinary), dated 06 January 2021, page Nos. 12(13) to 12(25)]

Not-No 01 F 1-358/2020/18-3 - In exercise of the powers conferred by Section 432-A of the Madhya Pradesh Municipal Corporation Act, 1956 (Act 23 of 1956) and Section 359 of the Madhya Pradesh Municipalities Act, 1961 (Act 37 of 1961), the State Government, hereby, makes the following models by-laws for registration and use of Marriage Gardens, namely:

MODEL BYE-LAWS

1. Short title, extent and commencement.

(1) These model bye-laws may be called the Madhya Pradesh Municipality (Registration and Use of Marriage Garden) Model bye-laws, 2020.

(2) They shall extend to the entire area under the jurisdiction of the Municipal Corporations/Municipalities/Nagar Parishads.

(3) These bye-laws shall come into force from the date of their publication in the Madhya Pradesh Gazette.

2. Definitions.

(1) In these bye-laws, unless the context otherwise requires,-

(a) **"Act"** means the Madhya Pradesh Municipal Corporation Act, 1956 (No. 23 of 1956) and Madhya Pradesh Municipalities Act, 1961 (No. 37 of 1961), as the case may be;

(b) **"Appendix"** means, forms appended to these bye-laws;

(c) **"Applicant"** means, any person, organisation or company or any representative authorised by them, who applies for license for registration and use of marriage garden;

(d) **"Chief Municipal Officer"** means, Chief Municipal Officer of Municipality/Nagar Parishad as defined in section 3(5) of Madhya Pradesh Municipalities Act, 1961;

(e) **"Commissioner"** means, Commissioner of Municipal Corporation as defined in section 5(11) of Madhya Pradesh Municipal Corporation Act, 1956;

(f) **"Competent Authority"** means, Municipal Commissioner in case of any area falling under jurisdiction of the Municipal Corporation and Chief Municipal Officer, in case of any area falling within the jurisdiction of Municipality/Nagar Parishad or any officer authorised by them;

(g) **"License for Registration and Use"** means, license for registration and use of marriage garden under these model bye-laws;

(h) **"Marriage Garden"** means, all the places in the municipal limits, like hotels / plots / farms / community centres / buildings / clubs / banquet halls / dharmshalas etc which are used for marriage, engagement, baratghar, birthdays and, other types of social functions like festivals /exhibition/convention/garba festival /new year celebration etc. having capacity for gathering more than 50 person;

(i) **"Municipality"** means, Municipal Corporation / Municipality / Nagar Parishad, as the case may be;

(j) **"Population"** means, population enumerated in latest census and whose data has been published;

(2) The words and expressions used but not defined in these bye-laws shall have the same meaning as assigned to them generally or specifically under Act.

3. Conditions for license for registration and use and application.- Any person, organisation or company or their authorised representative who desires to register and use any place as marriage garden within the municipal limits or is using any place as marriage garden before commencement of these bye-laws, shall submit following information and documents along with application in the prescribed form given in Form-A:

(1) Ownership documents of building/land.

(2) Copy of building permission and approved lay-out or in case of temporary structure lay-out approved by the architect.

(3) Copy of "NOC" from Fire Department for proper arrangement of fire fighting system in compliance of provisions of National Building Code Part-4 and applicable Act/Rules and number and details of trained fire fighting workers.

(4) The capacity of place applied for to accommodate total number of persons.

(5) Information about two separate ways for entry and exit (compulsory for security purpose). In the existing place if there is only one way for entry and exit, then before submission of application, arrangement shall be made for the second way.

(6) Copy of document/information about minimum width of 12 meters of approach road to the marriage garden. The minimum road width of 9 meters shall be required for public community centres.

(7) Information regarding arrangement for regular collection of garbage and solid waste.

(8) Information regarding water harvesting system.

(9) Information regarding place for confectioner/catering/fire arrangement where food will be prepared.

(10) Details of grown trees, park, landscaping etc..

(11) Details of sanctioned load of electric connection along with generator room arrangement.

(12) Area earmarked for fireworks etc. shall be submitted.

(13) Details of parking arrangement which shall be atleast 25 percent of the total area.

(14) Copy of no-dues certificate/receipts of payment of property tax, water charges and other municipal dues for the applied place shall be submitted.

(15) If the applicant is not the owner of the place but tenant, then he shall submit notarised copy of the agreement and MOU/other legal documents entered into the arrangement with the owner.

(16) The applicant will be required to submit an affidavit on non-judicial stamp paper of the prescribed value along with the application to the following:

(a) The expenditure on cleaning of the marriage garden, collection and disposal of generated garbage and solid waste shall be borne by us.

(b) If the on-line system is implemented by the government/ municipality for grant of license the same will be applicable to the applicant.

(c) If the marriage garden is at such place where hospital, night education or such type of activities are conducted in near vicinity, no disturbance shall be caused to health and education activities by the registration of marriage garden.

(d) The sound amplifying system will not be used between 10 P.M. and 8 A.M. of the following morning at the marriage garden. A board shall be displayed at the marriage garden in this regard. The directions/prohibitory orders issued by the district administration for sound systems shall be strictly complied with.

4. Marriage garden (registration and user) license Fee.-

(1) The minimum registration and user fee for marriage garden according to its size for different categories of municipalities shall be as under:-

S.No.	Category of Marriage Garden	Description of the Category	Municipality	Registration Fee (One time at the time of registration) (in Rupees)	User Fee at Annual Rate (in Rupees)
1.	Category-1	From 500 sq. meter to 1000 sq. meter	Municipal Corporation	4000/-	3000/-
			Municipal Council	2000/-	1500/-
			Nagar Parishad	1000/-	750/-
2.	Category-2	1000 sq. meter to 1500 sq. meter	Municipal Corporation	5000/-	3500/-
			Municipal Council	3000/-	2000/-
			Nagar Parishad	1500/-	1000/-
3.	Category- 3	1501 sq. meter to 2500 sq. meter	Municipal Corporation	7500/-	7000/-
			Municipal Council	4500/-	4000/-
			Nagar Parishad	3000/-	2000/-

4.	Category- 4	2501 sq. meter to 5000 sq. meter	Municipal Corporation	10000/-	9000/-
			Municipal Council	7000/-	6000/-
			Nagar Parishad	4500/-	3000/-
5.	Category- 5	above 5000 sq. meter	Municipal Corporation	12500/-	15000/-
			Municipal Council	9000/-	8000/-
			Nagar Parishad	6000/-	4000/-

(2) Registration fee shall be taken once at the time of registration of the marriage garden which shall be valid for 3 years. User fee shall be payable for each financial year. In case marriage garden is established in the middle of a financial year, the user fee shall be payable for the whole financial year. The above registration and user fee for marriage garden shall be in addition to any fee/tax being imposed by the municipality.

(3) The municipality shall be competent to levy registration fee and user fee at higher rates than the minimum rates as specified in bye-law 4(1). The municipality shall increase the above rates atleast 10 percent every 3 years.

5. License for registration and use.- The competent authority shall issue acknowledgement letter in Form-B after completion of all the formalities. The competent authority after inspection of the place applied for use as marriage garden, finds that the place complies to all the provisions of the bye-laws, shall issue license in Form-C after deposit of registration/license fee within 30 days. However, in case the application is rejected, an opportunity shall be given for hearing and appropriate orders shall be passed within 30 days.

6. The license for registration and use shall be subject to following conditions.-

(1) Necessary security arrangements shall be made around the marriage garden.

(2) All the information regarding necessary instructions and notices, registration number, receipt number of deposited amount issued by the municipality, terms and conditions shall be displayed outside the venue on a board of size 1.80 x 1.20 meter, at such a place where it is easily visible, as determined by the municipality.

(3) All orders/instructions issued by the State Government/District Administration/Municipality from time to time shall be complied with strictly.

(4) Municipality shall not be liable to lift garbage and solid waste from the marriage garden and this shall be done by the licensee at his own cost. The garbage and solid waste shall not be thrown near the venue or on road outside. In case of any violation, action shall be taken against the licensee under the relevant rules and penalty will be charged besides, the garbage and solid waste shall be collected and disposed off by licensee.

(5) It shall be necessary to install prescribed fire fighting system at the marriage garden, and if it is found that after issue of license the fire fighting system is not in accordance with the prescribed criteria, the authorised officer of the municipality shall have the powers to cancel the license.

(6) The licensee shall earmark 25 percent area of the marriage garden exclusively for secure and convenient parking at his own expense and that area shall be barricaded and displayed separately as parking space. It shall be necessary for the licensee to develop the marriage garden in accordance with the conditions indicated in the approved layout.

(7) Information regarding toilets and urinals for Males and Females shall be provided separately as per the following norms:

(a) For the marriage garden up to 3000 sq. meter:

1. Water Closets (WC)	- 3 numbers (Male)
	- 6 numbers (Female)
	- 1 number (Specially abled Male)
	- 1 number (Specially abled Female)
2. Urinals	- 6 numbers (Male)

(b) It shall be necessary to provide additional 1 toilet and 1 urinal for males and additional one toilet for females for each additional 2000 sq. meters area.

(8) On the day of marriage or any function, licensee at his own expense shall make necessary arrangement to provide adequate number of guards outside the marriage gardens as per the following

criteria. In categories of marriage gardens as per bye-law 4, Minimum 2 guards for categories - 1 & 2, Minimum 4 guards for category - 3, Minimum 6 guards for category - 4, and 8 guards for category - 5. In addition, the municipality shall be competent to direct the licensee to increase the number of guards in view of the local conditions. These guards shall be posted at the earmarked parking space of the marriage garden and shall prevent traffic jam in front of the marriage garden besides will be responsible for security of the marriage garden.

(9) The generator sets in the municipal area shall be set up in such a way that there is no inconvenience caused to public and there is no pollution of any kind.

(10) In addition to stairs, arrangements shall be made to provide lifts and ramps as per provisions of National Building Code.

(11) The distance of plot/building licensed for use as marriage garden shall be more than 100 meters from boundary of any school, college and hospital.

7. Renewal. - The applicant shall after every 3 years get the licence for registration and use of marriage garden renewed for which the applicant shall apply with full formalities before 30 days of expiry of the existing license, however, -

(a) If the applicant, has every year during the period of 3 years deposited user fee within the prescribed time and pays property tax regularly then it shall be treated as adequate and renewal shall not be necessary:

Provided, the applicant shall pay prescribed registration fee for the new license and user fee regularly for the new license period.

(b) The fee for registration and use shall be payable for the whole year, and even if the marriage garden is established in the middle of the financial year.

(c) It will be necessary for the Licensee to deposit registration fee/user fee as prescribed by the municipality at the time of new registration or renewal.

(d) If the applicant fails to deposit fee during the prescribed period (1st March to 31st July), a penalty of 10 percent on the due amount of fee and 2 percent late fee surcharge per month for the delay for

the first 3 months shall be imposed. Municipality shall be competent to impose higher penalties than these.

8. Violation of bye-laws.- In case of violation of any bye-law of these bye-laws, action shall be taken against the licensee by the competent authority by imposing a penalty of up to an amount of Rs. 10000/- (Ten Thousand Rupees).

9. Amount of penalty to be deposited in the local treasury.- The licensee shall deposit the amount of penalty in the treasury of the municipality and inform the competent authority.

10. Action against unauthorised marriage gardens.- If any marriage garden is run by any person or organisation without license issued by the municipality or if any existing marriage garden running before notification of these bye-laws is not registered within 3 months of notification of the bye-laws as per prescribed procedure, the municipality shall declare it unauthorised and shall remove it and prosecution proceeding shall be initiated against it.

11. Prohibition on holding social functions at public places.- The public places in the municipal limits, earmarked for public parks by the development committee and house construction and Mohalla development Committee shall not be used for marriage gardens and shall not be issued any license. They shall be used only for the purpose for which they have been earmarked.

12. Ensure smooth Parking and Traffic system.- The licensee shall ensure hard and plain surface parking at his own expense. In case of traffic, the marriage procession shall be controlled by district administration and local police. The marriage procession may be prohibited by the competent authority on any particular road.

13. Prohibition on use of marriage garden.- In consideration of the fulfilment of any social obligations by the municipality, the license issued for the registration and use of marriage garden shall not be considered for permission to change in land use. The licensee after receipt of license shall send one copy of license to concerned police station and collector.

14. Appeal against order of the competent authority.- If the licensee is aggrieved by any orders of the competent authority, the appeal can be filed before the appeal committee under section 403(4) of Madhya Pradesh Municipal Corporation Act, 1956 or to the Collector under section 308(d) of the Madhya Pradesh Municipalities Act, 1961, as the case may be.

15. Prosecution.- The competent authority can inspect the marriage garden at any time. If any violation of any provision of bye-laws is detected, the competent authority shall inform the licensee to take necessary action within 3

days. If the licensee does not comply with the instructions then license can be cancelled immediately, and the competent authority can initiate proceedings for prosecution before the competent court against the guilty person, organisation, or company.

16. Settlement.- The powers to withdraw charges under consideration before the court or settlement of dispute shall vest with the competent authority of the municipality.

17. All right of the municipality reserved.- The municipality shall not get any ownership rights of the land/building registered as marriage garden. The municipality shall reserve the right to cancel license in public interest without assigning any reason. Municipality shall not be liable to pay any amount as damages for cancellation of the license of marriage garden.

18. Prohibition.- Within the municipal limits, no person, organisation, company without the valid licence from the municipality shall use any place for marriage. License for the marriage gardens in the municipal limits existing before the commencement of these bye-laws, shall be taken before 31st March of that financial year in accordance with the procedure prescribed in these model bye-laws, otherwise action shall be taken by treating them unauthorised.

19. Repeal and saving.- As from the date of commencement of these bye-laws, all rules, bye-laws corresponding to these bye-laws applicable in municipalities shall stand repealed:

Provided, anything done or any action taken under the rules or bye-laws so repealed, shall, unless such thing or action is inconsistent with the provisions of these bye-laws, be deemed to have been done or taken under the corresponding provisions of these bye-laws.

Form—A

(See Bye-Law-3)

Application form for registration under Madhya Pradesh Municipality (Registration and use of marriage garden) Model Bye-Laws, 2020

To,

.....

Municipal Corporation/Municipality/
Nagar Parishad .....

1.	Name of the marriage garden	
2.	Address of the marriage garden	
3.	Name of the Applicant	
4.	Address/Telephone No. (Office/Residence/Mobile)	
5.	Name, Address and Telephone No. of the Owner of the Plot/Building (Office/Residence/Mobile)	
6.	Total area of marriage garden (Provide information for built up area and open area separately)	
7.	Capacity of applied place to accommodate total gathering of people.	
8.	Photocopy of the No objection Certificate from Fire Department with Receipt Number and date.	
9.	Copy of the receipt of depositing registration fee with date.	
10.	Layout plan of marriage garden along with documents related to ownership or tenancy.	

Kindly issue the licence of the above marriage garden for the year.....
List of attachments

Signatures of the applicant
Name
Telephone No.

Form—B

(See Bye-Law-5)

Receipt of Application under Madhya Pradesh Municipality (Registration and use of marriage garden), Model Bye-laws, 2020

Applicant has submitted application and other documents under Madhya Pradesh Municipality (Registration and use of marriage garden), Model Bye-Laws, 2020, which shall be examined and if information submitted is found correct, license shall be issued within 30 days. The information of applicant in the application is as under;-

1.	Name of the applicant	
2.	Father's Name	
3.	Name and address of the owner	
4.	Telephone No. (Office/Residence/Mobile)	
5.	Name and address of marriage garden	
6.	Ward Committee Zone No.	
7.	Ward Number	
8.	Details of marriage garden	
9.	Financial Year	
10.	Instructions	

Note: This license is not valid for determination of ownership and land use of the plot.

Signature with Seal

Form—C

(See Bye-Law-5)

Serial No. **Dated:**

License of Registration and Use under Madhya Pradesh Municipality (Registration and use of marriage garden) Model Bye-laws, 2020.

Shri/Smt.. .....son/wife of .....

resident of .....is

hereby granted license to use the place situated in Ward No.....Zone No..... as marriage garden from the date of issue of this license till 31st March ..... subject to terms and conditions of said Bye Laws.

Issued on.....

Signature with Seal

----------xxxxx---------

J/88

By order and in the name of Governor
of Madhya Pradesh

Sd/-

(Ajay Singh Gangwar)
Secretary
Government of Madhya Pradesh
Urban development and housing department

I.L.R. [2021] M.P. 795 (SC)
SUPREME COURT OF INDIA
Before Mr. Justice L. Nageswara Rao & Ms. Justice Indira Banerjee
CA No. 867/2021 decided on 3 February, 2021

INDEX MEDICAL COLLEGE, HOSPITAL & RESEARCH CENTRE …Appellant

Vs.

STATE OF M.P. & ors. …Respondents

(Along with CA Nos. 868/2021 & 869/2021)

***Chikitsa Shiksha Pravesh Niyam, M.P., 2018, Rule 12(8)(a) and Constitution – Article 14 & 19(1)(g) – Admission Rules – Constitutional Validity – Test of Proportionality* – Held – Right to admit students which is a part of management's right to occupation under Article 19(1)(g) of Constitution stands defeated by Rule 12(8)(a) as it prevents them from filling up all the seats in medical courses – Non-filling up all medical seats is detrimental to public interest – Applying test of proportionality, the restriction imposed by Rule 12(8)(a) is unreasonable and is violative of Article 14 and 19(1)(g) of Constitution – Impugned order set aside – Appeals allowed. (Paras 24 to 26)**

चिकित्सा शिक्षा प्रवेश नियम, म.प्र., 2018, नियम 12(8)(a) एवं संविधान – अनुच्छेद 14 व 19(1)(g) – प्रवेश नियम – संवैधानिक विधिमान्यता – आनुपातिकता का परीक्षण – अभिनिर्धारित – विद्यार्थियों को प्रवेश देने का अधिकार जो कि संविधान के अनुच्छेद 19(1)(g) के अंतर्गत, प्रबंधन के उपजीविका के अधिकार का एक भाग है, नियम 12(8)(a) द्वारा विफल हो जाता है क्योंकि वह उन्हें चिकित्सा पाठ्यक्रम में सभी सीटों को भरने से निवारित करता है – सभी चिकित्सा सीटों को न भरा जाना लोक हित के लिए हानिकारक है – आनुपातिकता का परीक्षण लागू करते हुए, नियम 12(8)(a) द्वारा अधिरोपित निर्बंधन अयुक्तियुक्त है तथा संविधान के अनुच्छेद 14 व 19(1)(g) का उल्लंघन करता है – आक्षेपित आदेश अपास्त – अपीलें मंजूर।

Cases referred:

(2017) 8 SCC 627, (2002) 8 SCC 481, (2006) 4 SCC 517, (2019) 9 SCC 710, (2001) 2 SCC 386, (2007) 4 SCC 669, (1986) 1 SCR 103(Can./SC), (2016) 7 SCC 353, (1998) 8 SCC 227.

O R D E R

Leave granted.

We had heard the above set of Appeals and passed an order on 03.02.2021 as follows:

"After hearing the learned counsel for the parties, we declare Rule 12 (8) (a) of the Madhya Pradesh Chikitsa Shiksha Pravesh Niyam, 2018 as violative of Article 14 of the Constitution of India.

We direct the State of Madhya Pradesh to initiate the process of filling up the 7 unfilled seats of 1st year MBBS course in the mop-up round for the year 2020-21 by college level counselling within a period of 7 days from today.

Reasons to follow."

2. Reasons for the order dated 03.02.2021 are given hereinunder: -

3. The Appellants-Private Medical Colleges filed Writ Petitions in the High Court of Madhya Pradesh, Bench at Indore, challenging the Constitutional validity of Sub-Rule 8 (a) of Rule 12 of the Admission Rules (Madhya Pradesh Chikitsa Shiksha Pravesh Niyam), 2018 (hereinafter, 'the Rules'). Aggrieved by the dismissal of the Writ Petitions, the Appellants are before this Court.

4. The Madhya Pradesh Niji Vyavasayik (Pravesh Ka Viniyaman Evam Shulk Ka Nirdharan) Adhiniyam, 2007 (hereinafter, 'the Act') was promulgated to provide for regulation of admission, fixation of fee and for reservation of seats to persons belonging to Scheduled Castes, Scheduled Tribes and Other Backward Classes in private unaided professional educational institutions and matters connected therewith. Admission to private unaided professional educational institutions is dealt with in Chapter III of the Act. Every admission to a private unaided professional educational institution shall be made only in accordance with the provisions of the Act or Rules made thereunder. The State Government constituted the Admission and Fee Regulatory Committee for supervision and management of the admission process and for fixing the fee to be charged from the candidates seeking admission in these institutions.

5. Rules were framed by the State Government in exercise of the powers conferred under Section 12 of the Act. Rule 10 prescribes the process of admission to be on the basis of allotment of students who participated in the first round of counselling. The procedure for admission in second round of counselling is dealt with in Rule 11 and that of in last round (mop-up round) is found in Rule 12. The allotment of admission after completion of final round of counselling is governed by Rule 13. Amendments to the Rules were notified on 19.06.2019. The relevant amendment which is subject matter of challenge in these Appeals is Rule 12 (8) (a) which reads as follows: -

> "(8) (a) The vacant seats as a result of allotted candidates from MOP-UP round not taking admission or candidates resigning from admitted seat shall not be included in the college level counseling (CLC) being conducted after MOP-UP round".

6. Writ Petitions filed by Index Medical College, Hospital and Research Centre and Arushi Mahant and Others challenging Rule 12 (8) (a) as being violative of Articles 14 and 19 (1)(g) were dismissed by a Division Bench of the High Court of Madhya Pradesh, Bench at Indore by a judgment dated 15.12.2020. Index Medical College, Hospital and Research Centre and others have filed the Appeal arising out of SLP (C) No.179 of 2021, assailing the validity of the judgment dated 15.12.2020. L.N. Medical College, Hospital and Research Centre has also challenged the said judgment of the High Court by seeking permission to file SLP. People's College of Medical Sciences and Research Centre filed a Writ Petition questioning the vires of Rule 12 (8) (a) as well. It was disposed of by the High Court of Madhya Pradesh giving liberty to the Petitioner therein to file an appropriate representation before the Directorate of Medical Education for redressal of its grievances. People's College of Medical Sciences and Research Centre and Another are questioning the order dated 13.01.2021 in one of the Appeals. As the point that arises in all these Appeals pertains to the validity of Rule 12 (8) (a), they were heard together.

7. We have heard Mr. Neeraj Kishan Kaul, learned Senior Counsel, Mr. Siddharth R. Gupta and Mr. Amalpushp Shroti, learned counsel for the Appellants, Mr. Saurabh Mishra, learned Additional Advocate General for the State of Madhya Pradesh assisted by Mr. Sunny Chaudhary, Advocate for the Respondents. It was contended on behalf of the Appellants that Rule 12 (8) (a) is an affront to their right of occupation which is protected under Article 19 (1) (g) of the Constitution of India. Proscribing medical institutions from filling up seats which fall vacant due to candidates in the mop-up round not taking admission or candidates submitting resignation after taking admission amounts to an unreasonable restriction. It was asserted on behalf of the Appellants that admissions made by them are on the basis of allotment of students from common counselling pool. After two rounds of counselling, unfilled seats are taken up in mop-up round. Such of those seats which are not filled up in mop-up round are filled through college level counselling as provided in Rule 13. It was further argued that the pronounced object with which Rule 12 (8) (a) has been introduced is to avoid manipulations in admission process and to prevent non-meritorious students from getting seats in better colleges. As the measures adopted have no nexus with the object, according to the Appellants, Rule 12 (8) (a) is violative of Article 14 of the Constitution of India. It was submitted on behalf of the Appellants that Rule 12 (8) (a) results in some seats going vacant, which is not only a national waste of resources but also a huge financial burden to educational institutions.

8. On the other hand, the State of Madhya Pradesh defended the judgment of the High Court. The State contended that it has become necessary to make

amendment to Rule 12 and insert Sub-Rule 8 as it was found that students with lesser merit were getting admission to better colleges in stray vacancies which arose due to non-joining or resignation of candidates after mop-up round. Further, Rule 12 (8) was also brought to prevent manipulation by those candidates who were blocking seats in collusion with less meritorious candidates. As the entire exercise of admission to medical colleges has been laid to ensure transparency, Rule 12 (8) was made with the objective that less meritorious candidates do not steal a march over those who have higher merit. The State relied upon a judgment passed by the High Court of Madhya Pradesh in Writ Petition No.8097 of 2017 wherein the High Court had directed the Government to prevent manipulation of admission process and stop the filling up of prime postgraduate seats by non-meritorious candidates in mop-up round. Seven seats were identified as those which became vacant due to students participating in mop-up round of counselling but not joining. Therefore, those seats have not been allotted for college level counselling.

9. Admission to private unaided medical institutions in the State of Madhya Pradesh are made on the basis of allotment through common counselling conducted by the State. There are two rounds of counselling conducted as per the procedure laid down in Rules 10 and 11. Students who are eligible for admission in first round are given an option to seek upgradation or change in second round along with those candidates who did not get admission in first round. Those who have sought for better option under Rule 10 are also considered in the second round of counselling which is conducted in accordance with Rule 11. Rule 11 (7) provides that admission in second round of counselling is final and candidates who are admitted shall not be given the facility of a better choice. Rule 12 (2) makes it clear that candidates to whom allotment orders were issued in the previous rounds of counselling shall not be eligible for consideration in last round (mop-up round). The process of admission in last round shall be according to Rule 10. However, candidates participating in last round shall not be given the benefit of choosing a better option. In case, candidates do not take admission after the allotment order in last round of counselling, the amount of Rs. 2 lakhs deposited under Rule 12 (2) would automatically be forfeited.

10. Mr. Saket Bansal filed a Writ Petition No.8079 of 2017 before the High Court complaining of injustice caused to him by a lesser meritorious candidate getting a better subject/seat in the postgraduate medical course. He alleged that he accepted his fourth choice of subject in second round of counselling for admission to postgraduate course. In view of the Rules, he was not allowed to participate in the mop-up round. His first choice of subject came up for consideration in mop-up round and was filled up by a lesser meritorious candidate. He further alleged that certain candidates are indulging in manipulation of blocking seats and thereafter not joining which gives an opportunity to lesser meritorious candidates to get better

subject/college in later rounds of counselling. The High Court by an order dated 24.04.2019 expressed its anguish regarding the inaction of the State Government in the matter of manipulations in admissions to medical courses. The High Court was concerned that directions issued by this Court in *Dar-us-Slam Educational Trust & Ors. v. Medical Council of India and Ors.*[1], are not being followed by the State of Madhya Pradesh. The High Court recorded the statement made on behalf of the Government that such of those candidates who block seats and not join later shall be met with penal consequence of being debarred from taking admission in any other college for the current academic year. The High Court was also informed that admissions after mop-up round are confined to only such seats that remained vacant after the counselling, excluding those which are vacated by candidates who were allotted admissions.

11. Rule 12 (8) (a) provides that vacant seats which arise due to candidates in mop-up round not taking admission or submitting resignation after taking admission shall not be included in college level counselling. Rule 12 (8) (b) disqualifies these candidates who are allotted seats in the mop-up round and do not take up admissions or resign. They will automictically be declared ineligible and a list of such candidates shall be displayed on the portal and on the website of the Directorate. In addition, the list shall be sent to the Directorate of Medical Education of other States, Medical Council of India, Dental Council of India and D.G.H.S., Government of India, for not giving admission to such candidates in any other Medical or Dental colleges.

12. The right to establish and manage educational institutions as an occupation is protected under Article 19 (1) (g) of the Constitution of India. It is recognized by this Court in *T.M.A. Pai Foundation & Ors. v. State of Karnataka & Ors.*[2]. The right includes:

(a) The right to admit students.

(b) Right to set up of reasonable fee structure.

(c) Right to appoint staff.

(d) Right to take action, if there is a dereliction of duty on the part of an employee.

13. However, to ensure that admissions in educational institutions are made in a fair and transparent manner on the basis of merit, the Government is empowered to frame regulations. In *T.M.A. Pai Foundation & Ors. v. State of Karnataka & Ors.* (supra) it was held as under:

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1. (2017) 8 SCC 627
2. (2002) 8 SCC 481

> **67.** We now come to the regulations that can be framed relating to private unaided professional institutions.
>
> **68.** It would be unfair to apply the same rules and regulations regulating admission to both aided and unaided professional institutions. It must be borne in mind that unaided professional institutions are entitled to autonomy in their administration while, at the same time, they do not forego or discard the principle of merit. It would, therefore, be permissible for the university or the Government, at the time of granting recognition, to require a private unaided institution to provide for merit-based selection while, at the same time, giving the management sufficient discretion in admitting students. This can be done through various methods. For instance, a certain percentage of the seats can be reserved for admission by the management out of those students who have passed the common entrance test held by itself or by the State/university and have applied to the college concerned for admission, while the rest of the seats may be filled up on the basis of counselling by the State agency. This will incidentally take care of poorer and backward sections of the society. The prescription of percentage for this purpose has to be done by the Government according to the local needs and different percentages can be fixed for minority unaided and non-minority unaided and professional colleges. The same principles may be applied to other non-professional but unaided educational institutions viz. graduation and postgraduation non-professional colleges or institutes.

14. There is no controversy relating to provisions of the Act and Rules where procedure for admission to professional colleges is prescribed. The only dispute that arises for our consideration is validity of Rule 12 (8) (a) which was introduced on 19.06.2019. The object of Rule 12 (8) (a) is to ensure that all admissions to medical institutions are based on merit and to bar students of lesser merit from getting admission to better colleges. The notice issued by the Director General of Health Services, Ministry of Health and Family Welfare, Government of India dated 11.04.2018 has been referred to by the High Court in its order dated 24.04.2019. The said letter highlights the active participation of a group of students who were blocking all India quota seats in second round of counselling deliberately for financial gratification without intention to join. During the said period in the letter nearly 1,000 identified students did not join after first round. They were being monitored to find out whether they were taking admission at least in second round. DGHS proposed severe penal action against those indulging in such activities. Having been informed of this menace, this Court passed an order dated 09.05.2017 in *Dar-us-Slam Educational Trust & Ors. v. Medical Council of India and Ors.* (supra), barring students who take admission in all India quota seats from being allowed to vacate seats after second round of counselling. All vacant seats after last round of counselling were directed to be

filled up from a list that is forwarded to the institutions in the ratio of ten times to the number of vacancies to ensure that all stray vacancies are filled. The contention of the Appellants is that being asked to keep seats unfilled amounts to an unreasonable restriction on their right to carry on their occupation guaranteed under Article 19 (1) (g) of the Constitution of India. Even assuming the object of the Rule is to ensure that lesser meritorious candidates do not get admission to better colleges, the measure adopted by the Government in keeping seats vacant is disproportionate.

15. This Court in *State of T.N. & Anr. v. P. Krishnamurthy & Ors.*[3] held that a subordinate legislation can be challenged on the following grounds:

a) Lack of legislative competence to make the sub-ordinate legislation.

b) Violation of Fundamental Rights guaranteed under the Constitution of India.

c) Violation of any provision of the Constitution of India.

d) Failure to conform to the Statute under which it is made or exceeding the limits of authority conferred by the enabling Act.

e) Repugnancy to the laws of the land, that is, any enactment.

f) Manifest arbitrariness/unreasonableness (to an extent where court might well say that Legislature never intended to give authority to make such Rules).

16. It is relevant to examine whether a subordinate legislation can be declared as unconstitutional on the principle of proportionality. This Court in *Kerala State Beverages (M&M) Corpn. Ltd. v. P.P. Suresh*[4] held as under: -

C. Judicial Review and Proportionality

26. The challenge to the Order dated 7-8-2004 by which the respondents were deprived of an opportunity of being considered for employment is on the ground of violation of Articles 14, 19 and 21 of the Constitution of India. Lord Diplock in *Council of Civil Service Unions* v. *Minister for the Civil Service [Council of Civil Service Unions* v. *Minister for the Civil Service,* 1985 AC 374 : (1984) 3 WLR 1174 : (1984) 3 All ER 935 (HL)] held that the interference with an administrative action could be on the grounds of "illegality", "irrationality" and "procedural impropriety". He was of the opinion that "proportionality" could be an additional ground of review in the future. Interference with an administrative decision by applying the *Wednesbury [Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corpn.,* (1948) 1 KB 223-

3. (2006) 4 SCC 517
4. (2019) 9 SCC 710

(CA)] principles is restricted only to decisions which are outrageous in their defiance of logic or of accepted moral standards that no sensible person who applied his mind to the question to be decided could have arrived at it.

17. In *Om Kumar and Ors. v. Union of India*[5], this Court observed that the principle of proportionality was being applied to legislative action in India since 1950. Any challenge to restrictions imposed by the Government under Articles 19 (2) to 19 (6) are tested by Courts on the principle of proportionality. Whether restrictions placed are reasonable or not is adjudicated on the basis of appropriate balance between rights guaranteed and the control permissible under Article 19 (2) to 19 (6). When legislation is challenged on the ground that restrictions placed on the fundamental right is disproportionate, the Court conducts a primary review where the State has to justify the necessity of restricting the fundamental rights. Proportionality involves balancing test and necessity test. The "balancing test" relates to scrutiny of excessive onerous penalties or infringement of rights or interest and a manifest imbalance of relevant considerations. Whereas, the "necessity test" requires infringement of human rights in question to be by the least restrictive alternative.[6]

18. According to Aharon Barak[7] proportionality in the broad sense is based on two principal components. The first is legality, which requires that the limitation be "prescribed by law"; the second is legitimacy, which is fulfilled by compliance with the requirements of proportionality in the regular sense. Its concern is with the conditions that justify the limitation of a constitutional right by a law. There are two main justificatory conditions: an appropriate goal and proportionate means. An appropriate goal is a threshold requirement and in determining it no consideration is given to the means utilized by the law for attaining the goal. A goal is appropriate even if the means of attaining it is or not. The proportionate means must comply with three secondary criteria: (a) a rational connection between the appropriate goal and the means utilized by the law to attain it, (b) the goal cannot be achieved by means that are less restrictive of the constitutional right; (c) there must be a proportionate balance between the social benefit of realizing the appropriate goal, and the harm caused to the right (proportionality *stricto sensu* or the proportionate effect).

19. The three tests of proportionality propounded by *Dickson, C. J. of Canada in R. v. Oakes*[8] are:

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5. (2001) 2 SCC 386
6. District Central Co-operative Bank V. Coimbatore District Central Co-operative Bank Employees Association and another'- (2007) 4 SCC 669
7. Aharon Barak, Proportionality and Principled Balancing 4 Law & Ethics Human Rights, 1
8. R.v. Oakes, (1986) 1 SCR 103 (Can. SC)]

(a) The measures adopted must be rationally connected to the objective.

(b) The means should impair "as little as possible" the right or freedom in question.

(c) There must be a proportionality between the effects of the measures which are responsible for limiting the right or freedom, and the objective which has been identified as of "sufficient importance".

20. A. K. Sikri, J. in *Modern Dental College and Research Centre & Others v. State of Madhya Pradesh*[9] remarked that the doctrine of proportionality is enshrined in Article 19 itself. He explained that the expression "reasonable restrictions" seeks to strike a balance between the freedom guaranteed in Article 19 (1) and social control permitted by Article 19 (2) to 19 (6). It was further held in *Modern Dental College and Research Centre & others v. State of Madhya Pradesh* (supra) that limitations imposed on the enjoyment of a right guaranteed under the Constitution should not be arbitrary or excessive to what is required in the interest of public. It is also relevant to refer to the following factors which have to be kept in mind for examining the reasonableness of a statutory provision as laid down in *M.R.F. Ltd. v. Inspector Kerala Govt.*[10]*:*

> **13.** On a conspectus of various decisions of this Court, the following principles are clearly discernible:
>
> (*1*) While considering the reasonableness of the restrictions, the court has to keep in mind the Directive Principles of State Policy.
>
> (*2*) Restrictions must not be arbitrary or of an excessive nature so as to go beyond the requirement of the interest of the general public.
>
> (*3*) In order to judge the reasonableness of the restrictions, no abstract or general pattern or a fixed principle can be laid down so as to be of universal application and the same will vary from case to case as also with regard to changing conditions, values of human life, social philosophy of the Constitution, prevailing conditions and the surrounding circumstances.
>
> (*4*) A just balance has to be struck between the restrictions imposed and the social control envisaged by clause (6) of Article 19.
>
> (*5*) Prevailing social values as also social needs which are intended to be satisfied by restrictions have to be borne in mind. (See: *State of U.P.* v. *Kaushailiya* [AIR 1964 SC 416 : (1964) 4 SCR 1002] .)
>
> (*6*) There must be a direct and proximate nexus or a reasonable connection between the restrictions imposed and the object sought to be achieved. If there is a direct nexus between the restrictions and the object

9. (2016) 7 SCC 353
10. (1998) 8 SCC 227

> of the Act, then a strong presumption in favour of the constitutionality of the Act will naturally arise. (See: *Kavalappara Kottarathil Kochuni* v. *States of Madras and Kerala* [AIR 1960 SC 1080 : (1960) 3 SCR 887] ; *O.K. Ghosh* v. *E.X. Joseph* [AIR 1963 SC 812 : 1963 Supp (1) SCR 789 : (1962) 2 LLJ 615] .)

21. It is pertinent to refer to the observations made by Justice M. Jagannadha Rao in *Om Kumar and Ors. v. Union of India* (supra) regarding proportionality in connection with Article 14 of the Constitution of India which are as under: -

> **"32.** So far as Article 14 is concerned, the courts in India examined whether the classification was based on intelligible differentia and whether the differentia had a reasonable nexus with the object of the legislation. Obviously, when the courts considered the question whether the classification was based on intelligible differentia, the courts were examining the validity of the differences and the adequacy of the differences. This is again nothing but the principle of proportionality. There are also cases where legislation or rules have been struck down as being arbitrary in the sense of being unreasonable [see *Air India* v. *Nergesh Meerza* [(1981) 4 SCC 335: 1981 SCC (L&S) 599] (SCC at pp. 372-373)]".

22. The Rules govern admission to both undergraduate and postgraduate medical courses. The practice of students vacating allotted seats in All India Quota to help lesser meritorious candidates was identified and suitable steps were directed to be taken to prevent it. Large number of seats in All India Quota were being sent for counselling to State Quota. It was found that certain unscrupulous elements were making meritorious students vacate their seats so that the said seats would be filled up by candidates having lower merit in the next rounds of counselling. In the counter affidavit filed in these Appeals, the State Government referred to the observations made by the High Court in the Writ Petition filed by Mr. Saket Bansal relating to postgraduate admissions. The complaint of the Writ Petitioner therein was that a lesser meritorious candidate got a better subject due to the filling of the seat in mop-up round and the student who was allotted the seat in the earlier round not joining. In the background of the said facts, the High Court directed the State Government to find a solution to put an end to the pernicious practice of students who were allotted to a medical seat not joining to favour lesser meritorious candidates.

23. The professed object of the amendment to the Rules by insertion of Rule 12 (8) (a) is to ensure that admission to medical institutions are made strictly in accordance to merit as the Government noticed that lesser meritorious candidates were getting better colleges/subjects. Therefore, seats that fall vacant due to non-joining or resignation of students who were allotted seats in mop-up round of

counselling will not be included in the college level counselling. The result is such seats will remain unfilled.

24. There is no doubt that the object with which Rule 12 (8) (a) is made is appropriate as malpractice by students in the admission process should be curtailed. Rule 12 (7) (c) provides that students who do not take admission after issuance of an allotment letter will not be entitled to seek refund of the advance admission fee of Rs.2 lakhs which would stand forfeited automatically. According to Rule 12 (8) (b), those students who do not join after being allotted a seat through mop-up round will automatically be declared ineligible for the next round of counselling. They will not be entitled for admission to any other medical/dental colleges. Suitable steps are taken to prevent such students from participating in the next round of counselling, forfeiting the advance admission fee and making them ineligible for admission in any medical college. However, the medical colleges who have no part to play in the manipulation as detailed above are penalised by not being permitted to fill up all the seats. The measure taken by the Government of proscribing the managements from filling up those seats that fall vacant due to non-joining of the candidates in mop-up round is an excessive and unreasonable restriction.

25. The right to admit students which is a part of the management's right to occupation under Article 19 (1) (g) of the Constitution of India stands defeated by Rule 12 (8) (a) as it prevents them from filling up all the seats in medical courses. Upgradation and selection of subject of study is pertinent only to postgraduate medical course. In so far as undergraduate medical course is concerned, the upgradation is restricted only to a better college. Not filling up all the medical seats is not a solution to the problem. Moreover, seats being kept vacant results in huge financial loss to the management of the educational institutions apart from being a national waste of resources. Interest of the general public is not subserved by seats being kept vacant. On the other hand, seats in recognised medical colleges not being filled up is detrimental to public interest. We are constrained to observe that the policy of not permitting the managements from filling up all the seats does not have any nexus with the object sought to be achieved by Rule 12 (8) (a). The classification of seats remaining vacant due to non-joining may be based on intelligible differentia but it does not have any rational connection with the object sought to be achieved by Rule 12 (8) (a). Applying the test of proportionality, we are of the opinion that the restriction imposed by the Rule is unreasonable. Ergo, Rule 12 (8)(a) is violative of Articles 14 and 19 (1) (g) of the Constitution.

26. For the aforementioned reasons, the judgment of the High Court is set aside and the Appeals are allowed accordingly.

Appeal allowed

I.L.R. [2021] M.P. 806 (SC)
SUPREME COURT OF INDIA

Before Mr. Justice Uday Umesh Lalit, Ms. Justice Indira Banerjee & Mr. Justice K.M. Joseph

CRA No. 989/2007 decided on 25 February 2021

DEVILAL & ors. …Appellants

Vs.

STATE OF M.P. …Respondent

***A. Penal Code (45 of 1860), Section 302/34 – Appreciation of Evidence* – Held – Courts below rightly relied on FIR as dying declaration – Testimonies of witnesses and recovery of weapons clearly discloses that appellants opened an assault on deceased which led to his death – Conviction and sentence affirmed – Appeal of appellant No. 1 & appellant No. 2 dismissed. (Paras 21 to 23)**

क. दण्ड संहिता (1860 का 45), धारा 302/34 – साक्ष्य का मूल्यांकन – अभिनिर्धारित – निचले न्यायालयों ने प्रथम सूचना प्रतिवेदन पर मृत्युकालिक कथन के रूप में उचित रूप से विश्वास किया – साक्षीगण के परिसाक्ष्य तथा हथियारों की बरामदगी स्पष्ट रूप से यह प्रकट करती है कि अपीलार्थीगण ने मृतक पर हमला किया जिससे उसकी मृत्यु हो गई – दोषसिद्धि एवं दण्डादेश की अभिपुष्टि – अपीलार्थी क्र. 1 व अपीलार्थी क्र. 2 की अपील खारिज।

***B. Penal Code (45 of 1860), Section 302/34 and Juvenile Justice (Care and Protection of Children) Act (56 of 2000), Section 20* – Held – Incident occurred in 1998, on that date, age of appellant No. 3 was 16 years 11 months and 26 days – As per Section 20 of Act of 2000, age of appellant No. 3 was less than 18 years on date of incident, thus benefit of provisions of Act of 2000 will be extended to appellant No. 3 – Sentence of life imprisonment set aside and matter remitted to jurisdictional Juvenile Justice Board for determining appropriate quantum of fine to be levied on appellant No. 3 – Appeal disposed. (Paras 15 to 18 & 24)**

ख. दण्ड संहिता (1860 का 45), धारा 302/34 एवं किशोर न्याय (बालकों की देखरेख और संरक्षण) अधिनियम (2000 का 56), धारा 20 – अभिनिर्धारित – 1998 में घटना घटित हुई, उस तिथि को, अपीलार्थी क्र. 3 की आयु 16 वर्ष 11 माह 26 दिन थी – 2000 के अधिनियम की धारा 20 के अनुसार, घटना दिनांक को अपीलार्थी क्र. 3 की आयु 18 वर्ष से कम थी, अतः अपीलार्थी क्र. 3 को 2000 के अधिनियम के उपबंधों का लाभ दिया जायेगा – आजीवन कारावास का दण्डादेश अपास्त तथा अपीलार्थी क्र. 3 पर लगाये जाने वाले जुर्माने की समुचित मात्रा अवधारित करने हेतु मामला अधिकारिता वाले किशोर न्याय बोर्ड को प्रतिप्रेषित – अपील निराकृत।

Cases Referred :

(2009) 13 SCC 211, (2016) 11 SCC 786, (2013) 11 SCC 193, (2020) 10 SCC 555.

J U D G M E N T

The Judgment of the Court was delivered by :
UDAY UMESH LALIT, J. :- This appeal, at the instance of Devilal son of Chetaram Gujar and his two sons Gokul and Amrat Ram, is directed against the judgment and order dated 14.09.2006 passed by the High Court[1] in Criminal Appeal No.700 of 1999.

2. The appellants along with one Gattubai, wife of accused Devilal, were tried in Special Offence Case No. 88 of 1998 in the court of Special Judge (SC/ST), Mandsaur, Madhya Pradesh under Sections 302 read with 34 of the Indian Penal Code (for short, 'IPC') and Sections 3(1)(10) and 3(2)(5) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 ('SC/ST Act', for short).

3. The instant crime arose out of F.I.R. No.212 of 1998 registered at 11.10 p.m. on 19.07.1998 with Police Station Manasa, District Neemach, Madhya Pradesh. The reporting made by one Ganeshram was to the following effect:-

> "I am resident of village Khera Kushalpura. On 14.7.98, there had been quarrel between Devilal son of Jetram Gurjar and me in village Khera Kusalpura. Today, in the evening I was coming from Binabas after doing my work and going by walk to my house. At about 8 p.m., while going towards my house on public road when I had reached in front of the house of Devilal Gurjar then after seeking me Devilal armed with Kulhari, his son Gokul armed with Talwar and Amritlal armed with lathi had come there. Devilal had abused me and called me as Chamar and stated that Chamars have advanced too much. He told me that he shall finish me. He had attacked me from sharp side of Kulhari with intention to kill me. The first blow hit me on the bone (calf) of right leg. Gokul had given second sword blow on my bone (calf) of left leg. My both legs were cut and I fell down there itself. Then Amritram had given lathi blow on

1. High Court of Madhya Pradesh, Bench Indore

> my right fist and left hand and my right fist was fractured. These persons had again called me Chamar and told me that if I shall fight with them again. They had kicked me on my face below both eyes and there is swelling. Then I shouted for help. My mother Gattu Bai, wife Sajan Bai and sister-in-law Saman Bai had run from home and reached there, they protected me. When Saman Bai was protecting me then Devilal had given blow on her left elbow. Later, my mother, wife and sister-in-law lifted me and taken me to home. Kanhaiyalal had brought tractor from Barbua. ...Satyanarain, my sister-in-law Saman Bai have put me in the tractor and brought me to police station. I am lodging report, I have heard the report, it is correct. Action may be taken. My hand is fractured and I cannot sign. I have put my thumb impression."

4. The aforesaid FIR was recorded by PW8-Shankar Rao, who, then took Ganeshram along with Tehsildar to Community Health Centre, Manasa, where PW9-Dr. Kailash Chandra Kothari examined injured Ganeshram. It was found that the general condition of the injured was not good; that he was unable to speak; and that his blood pressure could not be recorded. The injuries found on the person of Ganeshram were recorded in report Exhibit P/23 and Ganeshram was referred to Surgical Specialist, District Hospital, Mandasaur vide Reference Form Exhibit P/25 at about 12.45 a.m. on 20.07.1998. However, while PW9-Dr. Kothari was completing the formalities, Ganeshram expired at 1.00 a.m.. PW9-Dr. Kothari, therefore, recorded the information of death in Exhibit P/26 under his signature.

5. At about 9.45 a.m. on 20.07.1998, application Exhibit P/17 was received by PW9-Dr. Kothari, pursuant to which post-mortem was conducted on the dead body of Ganeshram. The observations with respect to external and internal injuries suffered by the deceased were as under:-

> "16. The following external injuries were present on his person -
>
> 1. Incised wound with dimension of five X four and a half X three and a half cm. which is present on left leg in which broken pieces of Tibia and Fibula bone were found. Much of blood was found to have coagulated near about the wound.
>
> 2. Incised wound with dimension of four and a half X three and a half X two and a half cm. which was

present on right leg through which tibia and Febula bone was clearly visible and in which much blood was found coagulated.

3. Cyanosed mark on lower part of right hand four and half X two and a half cm. dimension.

4. Cyanosed mark on left hand three and a half X two and a half cm. dimension.

5. Incised wound on left eyebrow two X one X half cm dimension.

17. All the said injuries were ante mortem.

18. The internal examination found that -

1. Skull - The front right part of the skull was found broken. Membrane was contracted and much of blood was found coagulated. Blood lumps were stuck in the brain and brain was found contracted. Tympanium, rib, pleura, Trachea and throat were found contracted. Both the lungs were found dry and contracted. After cutting the lungs blood etc. yeast etc. did not come out.

2. Heart - left chamber of the heart was found empty. Right side chamber was full of blood. The velum membrane of the intestine morsel pipe all were pale and contracted Membrane in the stomach was contracted and was pale and stomach was empty small intestine and large intestine were contracted and was having paleness. Liver, spleen, Kidney all were contracted.

3. Bladder was empty.

4. The following bones inside the body were found fractured -

1. Front skull bone, right side skull bone, Tibia, Febulas left and right both were found broken. Right radius ALNA was found fractured. Left numerous was found broken."

The cause of death was stated to be excessive bleeding from the injuries suffered by the deceased.

6. During the course of investigation, PW8-Shankar Rao prepared site map Exhibit P/18 and arrested accused Devilal, Gokul and Amrat Ram vide Exhibits P/5 to 7.

Pursuant to disclosure statement made by accused Gokul vide Exhibit P/8, a sword was recovered. Similarly, pursuant to the disclosure statement made by accused Amrat Ram, vide Exhibit P/9, a lathi was recovered, while pursuant to disclosure statement made by accused Devilal, vide Exhibit P/10, an axe was recovered.

Statements of Sajan Bai (PW1), Saman Bai (PW2), Kanhaiyalal (PW3) Satya Narayan (PW4), Amarlal (PW6) and Gatto Bai were also recorded by PW8-Shankar Rao.

7. After completion of investigation, the appellants along with Gattubai wife of accused Devilal were tried in Special Offence Case No. 88 of 1998 as stated above.

8. In support of its case, the prosecution relied upon the eyewitness account through PW1-Sajan Bai, PW2-Saman Bai and PW7-Lakshminarayan.

a) PW1-Sajan Bai, wife of the deceased, in her examination-in-chief stated:-

> "2. The event is of 19th of Seventh month. The time was evening between 7 to 8 o'clock. I had returned after doing labour and myself, my mother-in-law and Devrani were sitting on otla outside the house. I heard the call of my husband that rush I am being beaten.
>
> 3. All the three of us rushed and reached in front of Devi Lal's house. We saw there that Gokul, Amrit Ram and Devi Lal were beating my husband and Gatto Bai was standing there. Gokul was having sword, Amrit Ram was having lathi. Devilal was having axe in his hand. My husband's hands and legs had been cut. His hands were broken and legs were cut. While beating these were telling DHED Caste CHAMARS have become arrogant (DHED JAT CHAMARON KE BHAV BADH GAYE HAIN).
>
> 4. I, my mother-in-law, my Devrani lifted Ganeshram and brought to our house. My husband was having injury on eye and head also. Then my Jeth Kanhiyalal came at home.
>
> 5. My Jeth went to Badkua to bring tractor wherefrom he came with Ratan Ba's tractor. Then Ganeshram was put in tractor and brought to Manasa Police Station. My husband lodged report at the police station, myself, my Jeth, my Devrani, two Devars, mother-in-law and Devi Lal of Badkuan also went to manage in the tractor. My husband could read and write but hands had been broken, therefore did not sign had put thumb impression.

6. They were taken to the hospital from the Police Station. Treatment was given there. Ganeshram breathed his last within 2 to 3 hours there itself."

In her cross-examination the witness stated:-

"10. The police had taken my statement which was read over to me yesterday. Then said did not read over yesterday. Had read over to all the three of us separately. We were made to understand what statement we have to make in the court. The Government Advocate who examined today had read over."

b) PW2-Saman Bai, sister-in-law of the deceased, stated:-

"2. On dated 19th of seventh month, at about 7-8 p.m., we had come from our work and we were sitting on Otley. My sister-in-law, mother-in-law and I all three were sitting there. At the time of fight, Ganeshram had shouted for help. After hearing shout, we all the three had run and reached there in front of the house of Devilal.

3. All the four accused persons were beating Ganeshram and they were telling that they shall kill him. They were continuously calling him Chamar. Gokul was armed with Talwar, Devilal was armed with Kulhari, Amritram was armed with lathi and Gattubai was having Mogri of washing cloth."

c) PW7-Laxminarayan, brother of the deceased, in his examination-in-chief stated:-

"3. This incident has taken place nearly 7 months ago. Ganeshram was coming to house by motor. Motor comes at 7 p.m. This incident has taken place during the evening. Ganeshram was coming. On the way, a quarrel started in front of the house of Devilal. I was standing outside my house on the "Otle". I heard shouts on which I have gone to see what is happening. I saw that Gokul, Amritram, Devilal were beating my brother. Devilal had an axe, Gokul had a sword and Amritram had a truncheon. Gatthubai had a "Tenpa" (a piece of wood). I was standing slightly away. I was standing at a distance of around 15-20 steps away.

4. I could not see that who has inflicted injury on which part.

5. Devilal exclaimed for me that, "kill this 'Chamate Rampe' also", on which I have ran away to my house.

6. I have ran away to my house from there, on which my mother, my sister-in-law Sajanbai and my wife Samanbai went to the place where quarrel was taking place. Then, all three of them brought Ganeshram to the house.

7. Hands and legs of Ganeshram have been incised.

8. Then, my brother Kanhaiyyalal went to Badkuan and brought a tractor from there. We took Ganeshram to Manasa by tractor. Ganeshram had lodged a report at Manasa P.S. Statements were recorded over there and then we went to hospital. Doctors have provided treatment over there and during the course of treatment Ganeshram had died."

In his cross-examination the witness stated:-

"28. I have returned back from the place of incident and sent my mother, sister-in-law and wife, a fact which I have not told to the police. Police has not held inquiry in this regard because of which I have not told this fact.

29. The house of Devilal cannot be seen from my house.

30. I have came back running from the house of Devilal in 2-3 minutes."

d) The medical evidence was unfolded through the testimony of PW9-Dr. Kothari, who in his cross-examination accepted:-

"24. I agree with Modi's Medical jurisprudence that breathing intermittently, not catching the pulse speed, non tracing of blood pressure, spreading of eye pupils and reacting weakly on throwing light spreading of blackness on the pupils and eye brows of the injured Ganesh - all these symptoms are of immediately following unconscious at the spot in the state of injured and will not get consciousness till death.

25. Such type of injured persons lose their memory at once on getting injury.

26. If the incident takes place at 8 o'clock evening then the patient will become unconscious at once and will not remain in the state of speaking.

27. All this condition was of the injured Ganesh."

9. After considering the evidence on record, the Trial Court found that the FIR recorded at the instance of the deceased could be relied upon as dying declaration and that the statements of PW1-Sajan Bai, PW2-Saman Bai and PW7-Laxminarayan as well as the recoveries at the instance of accused Devilal, Gokul

and Amrat Ram proved the case of prosecution. By its judgment and order dated 01.05.1999, the trial Court found that the offence under Section 302 read with 34 IPC was proved by the prosecution as against accused Devilal, Gokul and Amrat Ram. It was, however, found that the case was not proved against the fourth accused Gattubai. It was further found that none of the accused could be held guilty under offences punishable under SC/ST Act.

Thus, the appellants were convicted under Sections 302 read with 34 IPC and by a separate order recorded on the same day they were sentenced to suffer imprisonment for life with fine of Rs.5,000/-each, in default whereof to undergo further imprisonment for two years.

10. Being aggrieved, Criminal Appeal No. 700 of 1999 was preferred by accused Devilal, Gokul and Amrat Ram in the High Court. It was submitted before the High Court that considering the medical evidence on record and the statement of PW9-Dr. Kothari, it was unlikely that the deceased could have made any statement before the police, on the basis of which the FIR was recorded in the present case. The further submission was that, as admitted by PW1-Sajan Bai, in her cross-examination, the witnesses were tutored. These submissions were not accepted by the High Court. It, however, accepted that the version of PW7-Laxminarayan could not be relied upon as the same was not consistent with the statement of PW2-Saman Bai and the name of PW7-Laxminarayan was also not mentioned in the FIR. The High Court thus affirmed the conviction and sentence recorded against accused Devilal, Gokul and Amrat Ram and dismissed Criminal Appeal No. 700 of 1999 by its judgment and order dated 14.09.2006 which decision is presently under challenge.

11. During the pendency of this appeal, by Order dated 08.04.2009 this Court released accused Devilal and Gokul on bail as they had undergone imprisonment for nine years and four months.

I.A. No. 4224 of 2017 was, thereafter, filed submitting *inter alia* that accused Amrat Lal was a juvenile on the day the offence was committed and that in the light of the decision of this Court in *Hari Ram vs. State of Rajasthan and another*[2], the submission of his juvenility could be raised for the first time before this Court.

12. By Order dated 3.10.2018 this Court directed the Sessions Judge, Neemach to conduct an inquiry into the issue of juvenility of Amrat Ram and submit a report to this Court. In the inquiry so conducted, statements of concerned persons including Assistant Teacher, Government Primary School, Khushalpura, were recorded and the documents were considered, whereafter, it was found that

2. (2009) 13 SCC 211

the date of birth of accused Amrat Ram was 23.03.1981 and that he was 16 years 11 months and 26 days on the date of offence. Accordingly, the in-charge District and Sessions Judge, Neemach has forwarded report dated 03.12.2018 to this Court.

13. In this appeal, we have heard Mr. Sushil Kumar Jain, learned Senior Advocate on behalf of the appellants and Mr. Harmeet Singh Ruprah, learned Advocate appearing for the respondent-State.

14. At the outset, we must deal with the issue of juvenility of Amrat Ram.

15. The incident in the present case had occurred in July, 1998 when the Juvenile Justice Act, 1986 ('the 1986 Act', for short) was in force. The age of juvenility for a male juvenile under the 1986 Act was 16 years. Since Amrat Ram was 16 years 11 months as on the date when the offence was committed, he was certainly not a juvenile within the meaning of 1986 Act. However, the age of juvenility was raised to 18 years in terms of the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000 ('the 2000 Act', for short). Section 20 of the 2000 Act dealing with proceedings pending against a juvenile on the date the 2000 Act came into force, states:-

> **"20. Special provision in respect of pending cases.-** Notwithstanding anything contained in this Act, all proceedings in respect of a juvenile pending in any court in any area on the date on which this Act comes into force in that area, shall be continued in that court as if this Act had not been passed and if the court finds that the juvenile has committed an offence, it shall record such finding and instead of passing any sentence in respect of the juvenile, forward the juvenile to the Board which shall pass orders in respect of that juvenile in accordance with the provisions of this Act as if it had been satisfied on inquiry under this Act that a juvenile has committed the offence:
>
> Provided that the Board may, for any adequate and special reason to be mentioned in the order, review the case and pass appropriate order in the interest of such juvenile.
>
> Explanation.- In all pending cases including trial, revision, appeal or any other criminal proceedings in respect of a juvenile in conflict with law, in any court, the determination of juvenility of such a juvenile shall be in terms of clause (1) of section 2, even if the juvenile ceases to be so on or before the date of commencement of this Act and the provisions of this Act shall apply as if the said provisions had been in force, for all purposes and at all material times when the alleged offence was committed."

16. Where an offender was more than 16 years of age on the day when the incident had occurred (and therefore was not a juvenile within the meaning of the 1986 Act) but was less than 18 years of age on the day of the incident, the question as to what extent benefit can be given in terms of the provisions of the 2000 Act, was considered by this Court in some cases. In *Mumtaz alias Muntyaz vs. State of Uttar Pradesh (now Uttarakhand)*[3], after noting the earlier decisions, this Court observed:-

> **" 18.** The effect of Section 20 of the 2000 Act was considered in *Pratap Singh* v. *State of Jharkhand*[4] and it was stated as under: (SCC p. 570, para 31)
>
> > *"31.* Section 20 of the Act as quoted above deals with the special provision in respect of pending cases and begins with a non obstante clause. The sentence
> >
> > > 'notwithstanding anything contained in this Act, all proceedings in respect of a juvenile pending in any court in any area on the date on which this Act came into force'
> > > has great significance. The proceedings in respect of a juvenile pending in any court referred to in Section 20 of the Act are relatable to proceedings initiated before the 2000 Act came into force and which are pending when the 2000 Act came into force. The term "any court" would include even ordinary criminal courts. If the person was a "juvenile" under the 1986 Act the proceedings would not be pending in criminal courts. They would be pending in criminal courts only if the boy had crossed 16 years or the girl had crossed 18 years. This shows that Section 20 refers to cases where a person had ceased to be a juvenile under the 1986 Act but had not yet crossed the age of 18 years then the pending case shall continue in that court as if the 2000 Act has not been passed and if the court finds that the juvenile has committed an offence, it shall record such finding and instead of passing any sentence in respect of the juvenile, shall forward the juvenile to the Board which shall pass orders in respect of that juvenile."

3. (2016) 11 SCC 786
4. (2005) 3 SCC 551

19. In *Bijender Singh* v. *State of Haryana*[5], the legal position as regards Section 20 was stated in the following words: (SCC pp. 687-88, paras 8-10 & 12)

> "*8*. One of the basic distinctions between the 1986 Act and the 2000 Act relates to the age of males and females. Under the 1986 Act, a juvenile means a male juvenile who has not attained the age of 16 years, and a female juvenile who has not attained the age of 18 years. In the 2000 Act, the distinction between male and female juveniles on the basis of age has not been maintained. The age-limit is 18 years for both males and females.
>
> *9*. A person above 16 years in terms of the 1986 Act was not a juvenile. In that view of the matter the question whether a person above 16 years becomes "juvenile" within the purview of the 2000 Act must be answered having regard to the object and purport thereof.
>
> *10*. In terms of the 1986 Act, a person who was not juvenile could be tried in any court. Section 20 of the 2000 Act takes care of such a situation stating that despite the same the trial shall continue in that court as if that Act has not been passed and in the event, he is found to be guilty of commission of an offence, a finding to that effect shall be recorded in the judgment of conviction, if any, but instead of passing any sentence in relation to the juvenile, he would be forwarded to the Juvenile Justice Board (in short "the Board") which shall pass orders in accordance with the provisions of the Act as if it has been satisfied on inquiry that a juvenile has committed the offence. A legal fiction has, thus, been created in the said provision. A legal fiction as is well known must be given its full effect although it has its limitations. ...
>
> *11* ***
>
> *12*. Thus, by reason of legal fiction, a person, although not a juvenile, has to be treated to be one by the Board for the purpose of sentencing, which takes care of a situation that the person although not a juvenile in terms of the 1986 Act but still would be treated as such under the 2000 Act for the said limited purpose."

5. (2005) 3 SCC 685

20. In *Dharambir* v. *State (NCT of Delhi)*[6] the determination of juvenility even after conviction was one of the issues and it was stated: (SCC p. 347, paras 11-12)

> *"11.* It is plain from the language of the Explanation to Section 20 that in all pending cases, which would include not only trials but even subsequent proceedings by way of revision or appeal, etc., the determination of juvenility of a juvenile has to be in terms of clause *(l)* of Section 2, even if the juvenile ceases to be a juvenile on or before 1-4-2001, when the 2000 Act came into force, and the provisions of the Act would apply as if the said provision had been in force for all purposes and for all material times when the alleged offence was committed.
>
> *12*. Clause (l) of Section 2 of the 2000 Act provides that "juvenile in conflict with law" means a "juvenile" who is alleged to have committed an offence and has not completed eighteenth year of age as on the date of commission of such offence. Section 20 also enables the court to consider and determine the juvenility of a person even after conviction by the regular court and also empowers the court, while maintaining the conviction, to set aside the sentence imposed and forward the case to the Juvenile Justice Board concerned for passing sentence in accordance with the provisions of the 2000 Act."

21. Similarly in *Kalu* v. *State of Haryana*[7], this Court summed up as under: (SCC p. 41, para 21)

> "21. Section 20 makes a special provision in respect of pending cases. It states that notwithstanding anything contained in the Juvenile Act, all proceedings in respect of a juvenile pending in any court in any area on the date on which the Juvenile Act comes into force in that area shall be continued in that court as if the Juvenile Act had not been passed and if the court finds that the juvenile has committed an offence, it shall record such finding and instead of passing any sentence in respect of the juvenile forward the juvenile to the Board which shall pass orders in respect of that juvenile in accordance with the provisions of the Juvenile Act as if it had been satisfied on inquiry under the Juvenile Act that the

6. (2010) 5 SCC 344
7. (2012) 8 SCC 34

juvenile has committed the offence. The Explanation to Section 20 makes it clear that in all pending cases, which would include not only trials but even subsequent proceedings by way of revision or appeal, the determination of juvenility of a juvenile would be in terms of clause *(l)* of Section 2, even if the juvenile ceased to be a juvenile on or before 1-4-2001, when the Juvenile Act came into force, and the provisions of the Juvenile Act would apply as if the said provision had been in force for all purposes and for all material times when the alleged offence was committed."

22. It is thus well settled that in terms of Section 20 of the 2000 Act, in all cases where the accused was above 16 years but below 18 years of age on the date of occurrence, the proceedings pending in the court would continue and be taken to the logical end subject to an exception that upon finding the juvenile to be guilty, the court would not pass an order of sentence against him but the juvenile would be referred to the Board for appropriate orders under the 2000 Act. What kind of order could be passed in a matter where claim of juvenility came to be accepted in a situation similar to the present case, was dealt with by this Court in *Jitendra Singh* v. *State of U.P.*[8] in the following terms: (SCC pp. 210-11, para 32)

"*32*. A perusal of the "punishments" provided for under the Juvenile Justice Act, 1986 indicate that given the nature of the offence committed by the appellant, advising or admonishing him [clause *(a)]* is hardly a "punishment" that can be awarded since it is not at all commensurate with the gravity of the crime. Similarly, considering his age of about 40 years, it is completely illusory to expect the appellant to be released on probation of good conduct, to be placed under the care of any parent, guardian or fit person [clause (*b*)]. For the same reason, the appellant cannot be released on probation of good conduct under the care of a fit institution [clause (*c*)] nor can he be sent to a special home under Section 10 of the Juvenile Justice Act, 1986 which is intended to be for the rehabilitation and reformation of delinquent juveniles [clause *(d)].* The only realistic punishment that can possibly be awarded to the appellant on the facts of this case is to require him to pay a fine under clause *(e)* of Section 21(1) of the Juvenile Justice Act, 1986."

8. (2013) 11 SCC 193

> **23.** In *Jitendra Singh* v. *State of U.P.*[8], having found the juvenile guilty of the offence with which he was charged, in accordance with the law laid down by this Court as stated above, the matter was remanded to the jurisdictional Juvenile Justice Board constituted under the 2000 Act for determining appropriate quantum of fine. The view taken therein is completely consistent with the law laid down by this Court and in our opinion the decision in *Jitendra Singh* v. *State of U.P.* [8] does not call for any reconsideration. The subsequent repeal of the 2000 Act on and with effect from 15-1-2016 would not affect the inquiry in which such claim was found to be acceptable. Section 25 of the 2015 Act makes it very clear."

17. Recently, in *Satya Deo alias Bhoorey vs. State of Uttar Pradesh*[9], this Court observed:-

> **"19.** This position of law and principle in *Mumtaz case*[3] was affirmed by this Court for the first time in *Hari Ram* v. *State of Rajasthan*[3] in the following words: (SCC p. 223, para 39)
>
> > "*39*. The Explanation which was added in 2006, makes it very clear that in all pending cases, which would include not only trials but even subsequent proceedings by way of revision or appeal, the determination of juvenility of a juvenile would be in terms of clause (/) of Section 2, even if the juvenile ceased to be a juvenile on or before 1-4-2001, when the Juvenile Justice Act, 2000, came into force, and the provisions of the Act would apply as if the said provision had been in force for all purposes and for all material times when the alleged offence was committed. In fact, Section 20 enables the court to consider and determine the juvenility of a person even after conviction by the regular court and also empowers the court, while maintaining the conviction, to set aside the sentence imposed and forward the case to the Juvenile Justice Board concerned for passing sentence in accordance with the provisions of the Juvenile Justice Act, 2000."
>
> **20.** In light of the legal position as expounded above and in the aforementioned judgments, this Court at this stage can decide and determine the question of juvenility of Satya Deo, notwithstanding the fact that Satya Deo was not entitled to the benefit of being a juvenile on the date of the offence, under the 1986 Act, and had turned an adult when the 2000 Act was

9. (2020) 10 SCC 555

> enforced. As Satya Deo was less than 18 years of age on the date of commission of offence on 11-12-1981, he is entitled to be treated as a juvenile and be given benefit as per the 2000 Act."

18. It is thus clear that, even if it is held that Amrat Ram was guilty of the offence with which he was charged, the matter must be remitted to the jurisdictional Juvenile Justice Board for determining appropriate quantum of fine that should be levied on Amrat Ram.

19. We now turn to the basic issue whether the appellants were rightly held guilty by the courts below.

20. Mr. Sushil Kumar Jain, learned Senior Advocate for the appellants has submitted that given the cross-examination of PW9-Dr. Kothari, it would be impossible to believe that Ganeshram could have made any reporting to the police as alleged. It is submitted that, according to the FIR, the incident had occurred around 8.00 p.m., while the FIR was recorded after more than three hours. Mr. Jain has further submitted that, as accepted by PW1-Sajan Bai, witnesses were clearly tutored and, as such, the value of the testimony of PWs 1 and 2 stands diminished to a great extent. Relying on the cross-examination of PW7-Laxminarayan, it is submitted that the front of the house of accused Devilal where the incident was stated to have occurred was not visible for the alleged eye witnesses.

The submissions are countered by Mr. Harmeet Singh Ruprah, learned Advocate for the State. It is submitted that the testimonies of PWs 1 and 2 are quite consistent; their presence was recorded right from the initial stage of reporting of the crime; that the distance between the houses was just about 100 feet and; that there was no effective cross-examination on the issue whether they had enough opportunity to witness the incident.

21. The testimony of PW9-Dr. Kothari, shows that Ganeshram was alive when the initial examination was undertaken by PW9-Dr. Kothari. According to the witness, when he examined Ganeshram, the blood pressure could not be detected. However, that by itself does not mean that Ganeshram was not in a physical condition to make any reporting to the police two hours earlier. Paragraph 24 of the deposition of PW9-Dr Kothari shows that if the symptoms stated therein were present, it could possibly be said that the concerned person would not be in a position to speak. First of all, such assertion is purely an opinion of an expert. Secondly, nothing is available on record to show that Ganeshram had shown these symptoms either soon after the incident or when his statement was recorded by PW8 Shankar Rao. No questions were put to PW1-Sajan Bai, PW2 Saman Bai and PW8-

Shankar Rao in that behalf. We, therefore, reject the submission advanced on this score and find that the FIR was rightly relied upon by the courts below as dying declaration on part of Ganeshram.

22. The FIR itself referred to the presence of PW1-Sajan Bai and PW2-Saman Bai. The substantive testimony of both these witnesses clearly discloses that the appellants had opened an assault on Ganeshram which led to his death. The assertion on part of PW1-Sajan Bai that her earlier statement recorded during investigation was read over to her does not mean that she was tutored to follow the line of prosecution. It is relevant to note that no such questions were put to PW2-Saman Bai.

Thus, even if the testimony of PW1-Sajan Bai is eschewed from consideration, the deposition of PW2-Saman Bai, along with the dying declaration of Ganeshram, completely clinch the matter against the appellants.

Additionally, the recoveries of the weapons in question viz., lathi, sword and axe also lend sufficient corroboration to the case of the prosecution.

23. In the premises, we affirm the view taken by the courts below and find the appellants guilty of the offence with which they were charged. Their appeal, therefore, deserves dismissal. The conviction and sentence recorded by the courts below, insofar as accused Devilal and Gokul are concerned, are, therefore, affirmed and the present appeal insofar as these two accused are concerned is dismissed.

24. However, even while holding the appellant Amrat Ram to be juvenile in terms of the 2000 Act and guilty of the offence with which he was charged, we set aside the sentence of life imprisonment imposed upon him and remit the matter to the jurisdictional Juvenile Justice Board for determining appropriate quantum of fine that should be levied on appellant Amrat Ram in keeping with the directions issued by this Court in *Jitendra Singh vs. State of U.P*[8].

25. Since Devilal and Gokul were released on bail by this Court vide Order dated 08.04.2009, they are directed to surrender before the concerned Police Station within two weeks from today, failing which the bail bonds furnished at the time of their release on bail shall stand forfeited and they shall immediately be arrested by the concerned police to undergo the sentence imposed upon them. A copy of this Order shall immediately be transmitted by the Registry of this Court to the jurisdictional Chief Judicial Magistrate and the concerned Police Station for compliance.

26. The appeal is disposed of in afore-stated terms.

Order accordingly

I.L.R. [2021] M.P. 822 (FB)
FULL BENCH

Before Mr. Justice Mohammad Rafiq, Chief Justice,
Mr. Justice Rajeev Kumar Dubey & Mr. Justice Vijay Kumar Shukla
WP No. 1539/2018 (Jabalpur) order passed on 22 April, 2021

ARUN PARMAR …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

(Along with WP Nos. 1541/2018, 1712/2018, 2644/2018, 3706/2018, 3716/2018 & 16735/2018)

***A. Civil Services (General Conditions of Service) Rules, M.P., 1961, Rules 8(1), 8(7) & 12, State Administrative Services (Classification, Recruitment and Conditions of Service) Rules, M.P., 1975, Rule 13(1) & 13(7) and Government Servants (Temporary and Quasi-Permanent Service) Rules, M.P. 1960 – Probationers – Departmental Examination – Calculation of Seniority – Applicability of Rules* – Held – Employee who is directly recruited u/R 8(1) of 1961 Rules or u/R 13(1) of 1975 Rules but is unable to qualify departmental examination even within extended period of 3 years and yet not discharged from service, his service conditions as per mandate of Rule 8(7) of 1961 Rules or Rule 13(7) of 1975 Rules would then be governed by 1960 Rules – He shall continue to be entitled to appear in departmental examination and upon passing the same, shall be confirmed in service and would become member of service and would be assigned seniority below his batchmates who have earlier qualified the examination – Once employee passed examination, he would cease to be subject to 1960 Rules and would be governed from that stage onwards by 1961 Rules or 1975 Rules as the case may be – Full Bench (*Dr. Masood Akhtar*) correctly answered the reference – No justification to refer the matter to Larger Bench. (Paras 15, 18, 28 & 31)**

क. सिविल सेवा (सेवा की सामान्य शर्तें) नियम, म.प्र., 1961, नियम 8(1), 8(7) व 12, राज्य प्रशासनिक सेवा (वर्गीकरण, भर्ती और सेवा की शर्तें) नियम, म.प्र., 1975, नियम 13(1) व 13(7) एवं शासकीय सेवक (अस्थायी एवं स्थायीवत् सेवा) नियम, म.प्र. 1960 – परिवीक्षाधीन – विभागीय परीक्षा – वरिष्ठता की गणना – नियमों की प्रयोज्यता – अभिनिर्धारित – कर्मचारी जो 1961 के नियमों के नियम 8(1) अथवा 1975 के नियमों के नियम 13(1) के अंतर्गत सीधे भर्ती हुआ है किंतु विभागीय परीक्षा को 3 वर्षों की बढ़ायी गई अवधि के भीतर भी अर्हित करने में असमर्थ है तथा अभी तक सेवोन्मुक्त नहीं किया गया, तब 1961 के नियमों के नियम 8(7) अथवा 1975 के नियमों के नियम 13(7) की आज्ञा अनुसार उसकी सेवा शर्तें, 1960 के नियमों द्वारा शासित होगी – विभागीय परीक्षा में उपस्थित होने के लिए उसकी हकदारी जारी रहेगी और उसे उत्तीर्ण करने पर सेवा में स्थाई किया जायेगा एवं सेवा का सदस्य बनेगा और उसे उसके उन साथी बैच वालों के

नीचे वरिष्ठता दी जायेगी जिन्होंने परीक्षा को पूर्व में अर्हित किया है – एक बार कर्मचारी परीक्षा उत्तीर्ण करने पर वह 1960 के नियमों के अधीन नहीं रहेगा और उस प्रक्रम से आगे वह 1961 के नियमों या 1975 के नियमों द्वारा शासित होगा, जैसा भी प्रकरण हो – पूर्ण न्यायपीठ (*डॉ. मसूद अख्तर*) ने निर्देश सही उत्तरित किया – वृहद न्यायपीठ को मामला निर्देशित करने के लिए कोई न्यायोचित्य नहीं।

***B. Civil Services (General Conditions of Service) Rules, M.P., 1961, Rule 8 & 12 and State Administrative Services (Classification, Recruitment and Conditions of Service) Rules, M.P., 1975, Rule 13 & 23 – Seniority* – Held – Rule 23 of 1975 Rules specifically provides that seniority of persons appointed to the service shall be regulated in accordance with provisions of Rule 12 of 1961 Rules – Thus, non consideration of Rule 13 of 1975 Rules by the Full Bench (*Dr. Masood Akhtar*) would not make any material difference – This Court considered and interpreted Rule 13 of 1975 Rules and came to same conclusion as concluded by earlier Full Bench on harmonious interpretation of Rule 12(1)(a) and Rule 12(1)(f) of 1961 Rules. (Para 19)**

ख. सिविल सेवा (सेवा की सामान्य शर्तें) नियम, म.प्र., 1961, नियम 8 व 12 एवं राज्य प्रशासनिक सेवा (वर्गीकरण, भर्ती और सेवा की शर्तें) नियम, म.प्र., 1975, नियम 13 व 23 – वरिष्ठता – अभिनिर्धारित – 1975 के नियमों का नियम 23 विनिर्दिष्ट रूप से उपबंधित करता है कि सेवा में नियुक्त व्यक्तियों की वरिष्ठता, 1961 के नियमों के नियम 12 के उपबंधों के अनुसार विनियमित होगी – अतः, पूर्ण न्यायपीठ (*डॉ. मसूद अख्तर*) द्वारा 1975 के नियमों का नियम 13 विचार में न लिये जाने से कोई तात्विक अंतर नहीं आयेगा – इस न्यायालय ने 1975 के नियमों के नियम 13 को विचार में लिया और निर्वचित किया तथा 1961 के नियमों के नियम 12(1)(a) व नियम 12(1)(f) के समन्वयपूर्ण निर्वचन पर, समान निष्कर्ष पर पहुंचा जैसा कि पूर्वतर पूर्ण न्यायपीठ द्वारा निष्कर्षित किया गया था।

***C. Civil Services (General Conditions of Service) Rules, M.P., 1961, Rules 12(1)(a) & 12(1)(f) (Vide amendment of 1998) – Departmental Examination – Seniority* – Held – Unlike old Rule 12, new Rule 12 governs discretion of appointing authority restricting its power to assign the lower seniority to those who qualify departmental examination some time after expiry of probation period but with a rider that he shall be assigned the bottom seniority with his own batch but shall be placed above the direct recruits from the subsequent batch – Amended Rule 12 categorically provides that persons appointed as a result of earlier selection shall always rank senior to those appointed as a result of subsequent selection.**

(Paras 20 to 24 & 28)

ग. सिविल सेवा (सेवा की सामान्य शर्तें) नियम, म.प्र., 1961, नियम 12(1)(a) व 12(1)(f)(देखें 1998 का संशोधन) – विभागीय परीक्षा – वरिष्ठता – अभिनिर्धारित – पुराने नियम 12 के विपरीत, नया नियम 12, नियुक्ति प्राधिकारी के विवेकाधिकार को, परिवीक्षा अवधि समाप्त होने के कुछ समय पश्चात् विभागीय परीक्षा अर्हित करने वालों को

निम्नतर वरिष्ठता देने की उसकी शक्ति निर्बंधित करते हुए, शासित करता है परंतु इस उपरिका के साथ कि उसे उसके स्वयं के बैच के निम्नतर स्थान की वरिष्ठता दी जायेगी किंतु पश्चात्वर्ती बैच से सीधी भर्ती वालों से ऊपर रखा जायेगा – संशोधित नियम 12 स्पष्ट रूप से उपबंधित करता है कि पूर्वतर चयन के परिणामस्वरूप नियुक्त व्यक्तियों का पश्चात्वर्ती चयन के परिणामस्वरूप नियुक्त होने वालों से सदैव वरिष्ठ स्थान रहेगा।

***D. Civil Services (General Conditions of Service) Rules, M.P., 1961, Rule 3 and State Administrative Services (Classification, Recruitment and Conditions of Service) Rules, M.P., 1975 – Applicability* – Held – Rule 3 does not *stricto sensu* provide that it shall only apply to a member of service but it rather begins by providing that "the rule shall apply to every person who holds a post or is a member of a service in the State" - Rules of 1975 would govern conditions of service of members of M.P. State Administrative Services but without prejudice to generality of 1961 Rules – Rule of 1961 shall continue to apply except in so far as special provisions have been made in Rules of 1975 – It continues to be applicable to those who hold a post.**

(Para 17)

घ. सिविल सेवा (सेवा की सामान्य शर्तें) नियम, म.प्र., 1961, नियम 3 एवं राज्य प्रशासनिक सेवा (वर्गीकरण, भर्ती और सेवा की शर्तें) नियम, म.प्र., 1975 – प्रयोज्यता – अभिनिर्धारित – नियम 3 कठोर बोध में यह उपबंधित नहीं करता कि वह केवल सेवा के सदस्य को लागू होगा बल्कि यह उपबंधित करते हुए आरंभ होता है कि ''नियम, उस प्रत्येक व्यक्ति पर लागू होगा जो एक पद धारण किये हुए है या राज्य में एक सेवा का सदस्य है'' – 1975 के नियम, म.प्र. प्रशासनिक सेवा के सदस्यों की सेवा शर्तों को शासित करेंगे परंतु, 1961 के नियमों की व्यापकता को प्रतिकूल रूप से प्रभावित किये बिना – 1961 का नियम निरंतर लागू होता रहेगा, सिवाय 1975 के नियमों में दिये गये विशेष उपबंधों का जहां तक संबंध है – उनके लिए लागू होता रहेगा जो एक पद धारण किये है।

***E. Civil Services (General Conditions of Service) Rules, M.P., 1961, Rule 8(1) and State Administrative Services (Classification, Recruitment and Conditions of Service) Rules, M.P., 1975, Rule 13(1) – Probation Period* – Held – Rule 8(1) of 1961 Rules provide that a direct recruit shall ordinarily be placed on probation as may be prescribed whereas Rule 13(1) of 1975 Rules has specifically provided probation period of 2 years and it is this Rule which would prevail so far as the initial period of probation is concerned – This apart, there is no material difference between these two provisions under different set of Rules, they both deal with the case of probation in the same way.**

(Para 18)

ङ. सिविल सेवा (सेवा की सामान्य शर्तें) नियम, म.प्र., 1961, नियम 8(1) एवं राज्य प्रशासनिक सेवा (वर्गीकरण, भर्ती और सेवा की शर्तें) नियम, म.प्र., 1975, नियम 13(1) – परिवीक्षा अवधि – अभिनिर्धारित – 1961 के नियमों का नियम 8(1) उपबंधित करता है कि एक सीधी भर्ती वाले को साधारणतः यथा विहित परिवीक्षा पर रखा जाये

जबकि 1975 के नियमों का नियम 13(1) विनिर्दिष्ट रूप से 2 वर्ष की परिवीक्षा अवधि उपबंधित करता है और यह वही नियम है जो अभिभावी होगा जहां तक परिवीक्षा की आरंभिक अवधि का संबंध है – इसके अलावा, भिन्न नियमों के समूह के अंतर्गत इन दो उपबंधों के बीच कोई तात्विक अंतर नहीं, वे दोनों समान रूप से परिवीक्षा के प्रकरण से संबंधित है।

F. ***Interpretation of Statutes – Rule of Harmonious Construction* – Held – While interpreting a statute, different parts of a section or the rule have to be harmoniously constructed so as to give effect to the purpose and intention of legislature. (Para 27)**

च. *कानूनों का निर्वचन – समन्वयपूर्ण अर्थान्वयन का नियम* – अभिनिर्धारित – कानून का निर्वचन करते समय, एक धारा या नियम के भिन्न हिस्सों का समन्वयपूर्ण अर्थान्वयन करना चाहिए जिससे कि विधान–मंडल के प्रयोजन एवं आशय को प्रभावशील किया जा सके।

G. ***Precedent* – Held – A judgment for purpose of precedent can be relied upon for the proposition of law that is actually decided and not for what can be logically deducted from it, for difference of a minor fact would make a lot of change in the precedential value of the judgment. (Para 26)**

छ. *पूर्व निर्णय* – अभिनिर्धारित – पूर्व निर्णय के प्रयोजन हेतु एक निर्णय पर विश्वास, वास्तविक रूप से विनिश्चित की गई विधि की प्रतिपादना हेतु किया जा सकता है और न कि उसके लिए जिसे उससे तर्क सम्मत रूप से निष्कर्षित किया जा सकता है, क्योंकि एक गौण तथ्य का अंतर, निर्णय के पूर्व–निर्णय मूल्य में काफी बदलाव करेगा।

Cases referred:

2012 (I) MPJR (FB) 375 : 2012 SCC OnLine MP 11024, 2017 SCC OnLine SC 1972, 2018 SCC OnLine SC 3568, Special Leave to Appeal (C) No. 14036/2019 decided on 11.07.2019 (FB) (Supreme Court), (2020) 7 SCC 509, (2002) 1 SCC 1, (2004) 5 SCC 518, (2005) 2 SCC 673, (1996) 11 SCC 173, (2000) 10 SCC 77, (2005) 11 SCC 488, W.A. No. 1267/2007 order passed on 25.03.2009 (DB), W.A. No. 510/2009 order passed on 17.12.2009 (DB), W.A. No. 607/2011 order passed on 22.09.2011 (DB), (1990) 2 SCC 715, (1999) 8 SCC 287, (1984) 4 SCC 329, (2009) 13 SCC 165, (2017) 1 SCC 283, (2015) 8 SCC 399, (1989) 3 SCC 211, (2017) 13 SCC 836, (1992) 3 SCC 293, [1901] A.C. 495, (2002) 2 SCC 95, AIR 1954 SC 202, AIR 1962 SC 1543.

Naman Nagrath assisted by *Anvesh Shrivastava* and *Jubin Prasad*, for the petitioners in WP Nos. 2644/2018, 3706/2018 & 3716/2018.

Anshuman Singh, for the petitioner in WP No. 1541/2018.

Manoj Kumar Sharma, for the petitioners in WP Nos. 1539/2018, 1712/2018 & 16735/2018.

Pushpendra Yadav, Addl. A.G. for the respondents-State.

Abhishek Arjaria, for the intervenor-*Dr. Kedar Singh* in WP No. 1539/2018.

O R D E R

The Order of the Court was passed by :

MOHAMMAD RAFIQ, CHIEF JUSTICE :- These matters have been laid before the Larger Bench upon a reference made by the Division Bench of this Court, doubting correctness of the earlier decision of the Full Bench, consisting of three Judges, in *Masood Akhtar (Dr.) vs. R.K. Tripathi* reported in 2012 (I) MPJR (FB) 375 : 2012 SCC OnLine MP 11024. (Though the Division Bench in the reference order has mentioned *Prakash Chandra Jangre (State of Madhya Pradesh and another vs. Prakash Chandra Jangre)* as the main case, but the lead judgment of the Full Bench was delivered in *Masood Akhtar* (supra). It may be noted at the outset that the aforementioned decision of Full Bench was challenged by the State of Madhya Pradesh by filing Special Leave Petition (Civil) No.20288/2012 *(State of M.P. vs. Masood Akhtar)* and other connected matters, which were dismissed by the Supreme Court vide order dated 01.09.2017 (2017 SCC OnLine SC 1972). Thereafter, Review Petition (Civil) No.2663/2018, *(State of M.P. vs. Masood Akhtar)* arising therefrom was also dismissed by the Supreme Court vide order dated 18.09.2019 (2018 SCC OnLine SC 3568). Referring to the aforesaid decision of the Full Bench of this Court in *Masood Akhtar (Dr.)* (supra), the Division Bench of this Court by order under reference dated 30.05.2019, doubting correctness of the same, made the reference by the following order:

> "22. In view of the foregoing observations, we deem it appropriate to refer the judgment of the Full Bench to the Larger Bench to answer the aforesaid issues.
>
> 23. Registrar (Judicial) is requested to place the matter before Hon'ble the Chief Justice to do the needful and to take appropriate steps in this regard in view of the foregoing observations."

2. The writ petitioners before this Court, challenging the aforesaid order dated 30.05.2019 passed by the Division Bench making reference to the Full Bench, filed Special Leave to Appeal (C) No.14036/2019 *(Warad Murti Mishra vs. State of M.P. & another)* and connected matters. The Supreme Court by detailed order dated 11.07.2019 initially stayed the operation of the aforequoted paras-22 & 23 of the order passed by the Division Bench and issued notices. Thereafter, the Supreme Court after granting leave finally decided all the appeals vide judgment dated 15.06.2020, reported in (2020) 7 SCC 509. Apart from merits of the case, it was also argued before the Supreme Court that since reference to the Full Bench in *Masood Akhtar (Dr.)* (supra) was made on account of divergent views expressed by two Division Benches of this Court, with the

dismissal of SLP as well as review petition arising therefrom, by the Supreme Court, the Full Bench judgment in *Masood Akhtar (Dr.)* (supra) having attained finality, the Division Bench was bound to follow the decision of the Full Bench and, therefore, reference to the Larger Bench was incompetent. Reliance was placed on the judgments of the Supreme Court in *Pradi Chandra Parija vs. Pramod Chandra Patnaik* reported in (2002) 1 SCC 1 and *Sakshi vs. Union of India* reported in (2004) 5 SCC 518 to argue that no reference could and ought to have been made unless the earlier decisions were so "palpably wrong" or so "very incorrect" that reference was called for and in any case the reference ought to have been made to a Bench of equal strength (three Judges) keeping in view the law laid down by the Supreme Court in *Central Board of Dawoodi Bohra Community vs. State of Maharashtra* reported in (2005) 2 SCC 673. It was also argued that the Full Bench in *Masood Akhtar (Dr.)* (supra) failed to consider binding decision of the Supreme Court in *M.P. Chandoria* vs. *State of M.P. & others* reported in (1996) 11 SCC 173, *State of Madhya Pradesh vs. Ramkinkar Gupta* reported in (2000) 10 SCC 77 and *Om Prakash Shrivastava vs. State of M.P.* reported in (2005) 11 SCC 488. The Supreme Court disposed of the appeals with the following observations as contained in Paras-22 & 24 of the report, which reads as under:

> **"22.** It is true that the decisions of the Division Bench and the Full Bench *[Prakash Chandra Jangre (supra)]* were challenged and not only the Special Leave Petitions *(State of M.P. vs. Sandeep Kumar Mawkin, 2010 SCC Online SC 86)* but the Review Petitions were also dismissed. But as observed by the Division Bench (Ward Murti Mishra vs. State of M.P., WP No.1712/2018, order dated 30.05.2019 [MP]) in the instant case, the effect of Rule 13 of 1975 Rules was not considered on the earlier occasions. Since the Division Bench (Ward Murti Mishra vs. State of M.P., WP No.1712/2018, order dated 30.05.2019 [MP]) has now made a reference to a larger bench, we do not propose to enter into the matter and decide the controversy but leave it to the High Court to consider and decide all the issues.
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> *** *** ***
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> **24.** Whether the reference was justified or not will certainly be considered by the bench answering the reference. We, however, accept the latter submission and direct that the matters shall first be placed before a bench of three Judges, which may consider whether the decision *[Prakash Chandra Jangre (supra)]* of the Full Bench on the earlier occasion requires reconsideration. The bench may consider the effect of non-consideration of Rule 13 of 1975 Rules on the earlier occasion as well as the impact of the decisions of this Court quoted hereinabove on the controversy in question. The matters shall be considered purely on merits and without being influenced by the dismissal of Special Leave

> Petitions by this Court on the earlier occasions or dismissal of the Review Petitions. We have not and shall not be taken to have expressed any view touching the merits of the matters."

3. In view of above, the question that is required to be considered at the outset is whether or not, the reference made by the Division Bench is legally justified? If eventually we are persuaded to hold that the conclusion arrived at by the Full Bench in *Masood Akhtar (Dr.)* (supra) was not legally correct, because it failed to specifically consider the effect of Rule 13 of Madhya Pradesh State Administrative Service Classification, Recruitment and Conditions of Service Rules, 1975 (of short the "Rules of 1975") and also failed to consider above referred to three decisions of the Supreme Court, would the question of referring the matter to a Larger Bench consisting of five Judges arise.

4. In order to appreciate the controversy, it has to be examined first of all as to what was the precise question on which reference was made to the Full Bench in *Masood Akhtar (Dr.)* (supra) and how has the same been answered. The Division Bench of this Court vide order dated 25.03.2009, passed in Writ Appeal No.1267/2007 *(State of M.P. and another vs. Prakash Chandra Jangre and others)* held that the seniority of a probationer would be counted from the date he passes the requisite departmental examination. Another Division Bench of this Court vide order dated 17.12.2009 passed in Writ Appeal No.510/2009 *(Suresh Kumar vs. State of M.P. & others)* and other connected matters held that even though a probationer may not have completed his probation period successfully, yet he would be senior to the persons, who have been selected/appointed in the subsequent selection process. In view of such conflicting opinions, the Division Bench of this Court vide order dated 22.09.2011 passed in Writ Appeal No.607/2011 *(Dr. Masood Akhtar vs. R.K. Tripathi)* and other connected matters, referred the matter to the Full Bench. The Full Bench while considering the reference as to which of the two views taken by the aforesaid Division Benches is correct, framed two questions, namely:- (i) what are the parameters on which the discretion conferred on appointing authority under Rule 12(1)(f) to assign lower seniority to probationer who has either not satisfactorily completed the period of probation or has not passed the departmental examination, has to be exercised and (ii) what is the interpretation of Rule 12(1)(a) and Rule 12(1)(f) of the Rules of 1961. It was this reference which was answered by the Full Bench on consideration of Rules 8, 12(1)(a) and 12(1)(f) of the Madhya Pradesh Civil Services (General Conditions of Service) Rules, 1961 (for short "the Rules of 1961") in Paras-5 to 12 of its order in *Masood Akhtar (Dr.)* (supra), in the following terms:

> **"5.** From the conjoint reading of the aforesaid rules it is clear that every person appointed to a service or post is initially placed on probation for the prescribed period. The probation can be extended for

sufficient reasons by the appointing authority for a further period not exceeding one year. The extension of period of probation may be made, *inter alia* due to the following reasons:

(I) a probationer fails to pass the departmental examination where passing of such examination is a condition precedent for confirmation.

(II) although the probationer clears the departmental examination but his performance is not satisfactory during period of probation.

(III) non-availabilily of a permanent post for the purposes of confirmation.

(IV) non-consideration of case for confirmation of a probationer by the confirming authority.

Except in cases where an order of termination of service of a probationer is passed either during the initial period of probation or at the end of the extended period of probation, there may be two kinds of cases:

(I) where the confirming authority has passed an order expressly extending the period of probation.

(II) where the confirming authority has not passed any order either extending the period of probation or of confirming services of the probationer.

6. In the second contingency mentioned above, *i.e.* where the confirming authority has not been able to apply its mind or to take a decision on the question whether to confirm or not to confirm the probationer at the end of initial period of probation and whether or not the probationer has cleared the departmental examination, the scheme of the Rule 8 quoted above suggests that the probation period shall be deemed to have been extended by one year, which is the maximum permissible period of extension. At the end of the extended period of probation, when no further extension of period of probation is permissible, the status of the probationer in the eye of law will be that of a deemed confirmed employee where he has passed the departmental examination and where passing of such departmental examination is the condition precedent for confirmation either in the rules or in the order of appointment. This view finds support from the decisions in *High Court of M.P. through Registrar and others* v. *Satya Narayan Jhavar (2001) 7 SCC 161 and Rajindra Singh Chouhan (2005) 13 SCC 179.* Moreover taking the other view *i.e.* an employee does not get status of confirmed employee on successful completion of period of probation and on passing the departmental examination would bring in operation rule 8(7) of the 1961 Rules which would confer the status of a temporary employee on the probationer. We are not inclined to adopt the aforesaid

interpretation since the same is contrary to rule 8(2) of the 1961 Rules which prescribes the maximum period of probation. Besides that, by such an interpretation, the confirming authority can destroy the service career of a probationer merely by indecision in the matter of confirmation of such an employee. However, where the probationer at the end of extended period of probation has not been able to pass the departmental examination and that passing of the departmental examination is mandatory for confirmation, and confirmation has neither been granted nor refused the probationer will be deemed to have been refused confirmation at the end of maximum permissible period of probation, because even if the confirming authority would have actually considered the case of probationer for confirmation, it would have no option except to refuse confirmation on the ground that the probationer had not passed the departmental examination. The case of such a probationer would be covered by rule 8(7) quoted above and he will be deemed to have been appointed as a temporary Government servant with effect from the date of expiry of probation and his condition of service shall be covered by the 1960 Rules.

7. Now we may advert to rule 12(1)(f) of the 1961 Rules. The aforesaid rule confers discretion on the appointing authority in case of a probationer who has not successfully completed the period of probation or has not passed the examination either to assign him the same seniority which would have been assigned to him, if he had completed the normal period of probation successfully or to assign him lower seniority. The aforesaid statutory discretion has to be exercised on a rational and reasonable criteria and cannot be permitted to be exercised either arbitrarily or capriciously which is anathema, to the rule of law envisaged in Article 14 of the constitution. [See: *BEML Employees House Building Cooperative Society Ltd.* v. *State of Karnataka and others, (2005) 9 SCC 248]*

8. In our opinion, allowing such probationer to retain original seniority would have to be confined to cases where such extension of probation is not due to any fault or shortcoming on part of the employee concerned. For example, where the employee could not appear at the departmental examination on account of illness or such other cause beyond the control of the employee or where some departmental inquiry was pending in which the employee is ultimately exonerated. The above contingencies are only illustrative and not exhaustive.

9. However, where the extension of probation is made due to any shortcoming of the employee, like not being able to pass the departmental examination or not performing well during the initial period of probation, his seniority would have to be pushed down and in that case also the question would arise as to the extent of assignment of lower seniority to such an employee. Again decision

in this regard cannot be left to whim and caprice of appointing authority but the same has to be based on rational and reasonable criteria.

10. In our considered opinion, in such an event, such a probationer would have to be assigned a seniority calculated from the date on which he actually overcomes the shortcomings, if that date can be ascertained. For example the date on which he passes the departmental examination and if such date cannot be ascertained, then from the date on which he is considered and found fit to be confirmed.

11. Now we may advert to the second issue, namely, interpretation of rule 12(1)(a) and (f) of the 1961 Rules. It is well settled rule of statutory interpretation that subsections of a section must be read as parts of an integral whole and as being interdependent; an attempt should be made in construing them to reconcile them if it is reasonably possible to do so, and to avoid repugnancy. The rule of construction is well settled that when there are in an enactment two provisions which cannot be reconciled with each other, they should be so interpreted that, if possible, effect should be given to both. [See: *British Airways* v. *Union of India,* (2002) 2 SCC 95] Rule 12(1)(a) of the 1961 Rules *inter alia,* provides that persons appointed as a result of earlier selection shall be senior to those appointed as a result of subsequent selection whereas rule 12 (1)(f) confers discretion on the appointing authority to assign the same seniority or to assign lower seniority to a probationer whose probation or testing period is extended. In the light of aforesaid well settled rule of statutory interpretation the discretion conferred on the appointing authority to assign lower seniority to an employee under rule 12(1)(f) of the 1961 Rules has to be confined to the extent that despite assigning lower seniority such a probationer shall always rank senior to those who appointed/promoted as a result of subsequent selection/ promotion. In other words the power to assign a lower seniority to a probationer has to be interpreted as stated supra so as to give full effect to provision of rule 12(1)(a) of the Rules which provides that persons appointed as a result of an earlier selection shall be senior to those who appointed as a result of subsequent selection/promotion. In view of the preceding analysis, our conclusions are as under:

(i) A probationer who has passed the departmental examination prescribed either in the rules or in the order of appointment at the end of extended period of probation shall be deemed to be a confirmed employee and shall be assigned seniority accordingly,

(ii) A probationer who has not been able to pass the departmental examination prescribed, either in the rules or in the order of appointment at the end of extended period of probation shall be deemed to be temporary employee under Rule 8(7) of the 1961 Rules

(iii) Under rule 12(1)(f) an employee would be allowed to retain original seniority where extension of period of probation is not due to any fault or shortcoming of the employee. However, where extension of period of probation is on account of fault or shortcoming on the part of the employee, in such a case the probationer has to be assigned seniority from the date if that date can be ascertained *i.e.* the date on which he clears the departmental examination or where such date cannot be ascertained, the date on which he is considered suitable for confirmation.

(iv) The discretion to confer lower seniority to a probationer under rule 12(1)(f) is confined to the extent that despite assigning lower seniority, such probationer shall always rank senior to those who are appointed in subsequent selection.

12. Accordingly, we answer the question referred to us by holding that the order dated 25.3.2009 passed in W.A. No. 1267/2007 and the order dated 17.12.2009 of the Division Bench in W.A. No. 510/2009 and W.A.. No. 511/2009 lay down the correct proposition of law only to the extent they are consistent with the conclusions arrived at by us, which have been referred to in preceding paragraph."

5. When similar writ petitions later came up before the Division Bench of this Court in the present matters, correctness of the aforementioned Full Bench decision was doubted, primarily on the premise that it failed to consider Rule 13 of the Rules of 1975 inasmuch that the Rules of 1961 would not apply as according to its Rule 12(1)(a) the Rules of 1961 apply to the "members of the service" only. As would be evident from Para-21 of the aforesaid order dated 30.05.2019, the reference was made on following three questions, which reads as under:

"21. In view of the foregoing discussion and looking to the language of the Rules of 1960, the Rules of 1961, the Rules of 1975 an also the directions issued by the Full Bench, the direction No.2 related to Rule 8(7) of the Rules of 1961 but infact Rule 13(7) of the Rules of 1975 would govern the issue. It is further seen that after becoming a temporary government servant, how their seniority be decided, it has not been discussed although Rules 3, 3A, 4, 5, 6, 7 of the Rules of 1960 deals the issue. In case the above Rules of 1960 is made applicable, the direction No.4 do not subsist. Similarly, the Court while interpreting Rule 12(1)(a) and Rule 12(1)(f) issued the direction that the probationers shall be assigned the lower seniority but they shall remain rank senior to those who have been subsequently selected. Rule 12(1)(a) do not apply to the "probationers" but it applies to the "members of service". It is to further observe here that Rule 12(1)(f) deals a situation for grant of seniority on passing the departmental examination within the period of probation or within the extended period of probation. It do not apply to a case where the probationer has not passed the departmental examination even after elapse of the extended period of

probation. In such circumstances, the judgment of the Full Bench appears to be contrary to the provisions of the rules framed under proviso to Article 309 of the Constitution of India, which requires reconsideration. In view of the foregoing discussion, the following question arise for consideration:-

(1) The judgment of the Full Bench dealing the issues of probation is relying upon the Rule 8 of the Rules of 1961 although in the light of Rule 3 which deals the applicability either in the Rules of 1961 or in the Rules of 1975 on having special provision, the Rules of 1961 would not apply and in the present case, the services of the petitioners or the intervenors are governed by the Rules of 1975 and Rule 13 deals the issue of probation, however, the judgment of the Full Bench requires reconsideration in the said context.

(2) Rule 12 and Rule 12(1)(a) apply to the "members of the service" and it do not deal with the seniority of the probationers, who have not qualified the departmental examination within the period of probation or within the extended period of probation, which shall not be more than one year, however, the interpretation made in Paragraph No.4 of the direction applying those rules is justified.

(3) As per direction No.2 of the judgment of the Full Bench in the case of **Prakash Chandra Jangre (supra),** it is held that if the probationer has not qualified the departmental examination within the period of probation or within the extended period of probation, he shall be deemed to be a temporary government servant and shall be governed by the Rules of 1960 but without dealing the issue of seniority, how they will achieve, as specified in Rules 3, 3A, 4, 5, 6, 7, the direction issued in Clause 4 of the said judgment, is not contrary to the spirit of the Rules of 1960."

6. We have heard Mr. Naman Nagrath, learned Senior Counsel, Mr. Anshuman Singh and Mr. Manoj Kumar Sharma, learned counsel for the petitioners, Mr. Pushpendra Yadav, learned Additional Advocate General for the respondents-State and Mr. Abhishek Arjaria, learned counsel for the intervenor-Dr. Kedar Singh.

7. Mr. Naman Nagrath, learned Senior Counsel appearing for the petitioners in WP-2644-2018, WP-3706-2018 & WP-3716-2018 submitted that in view of law laid down by the Supreme Court in *Pradip Chandra Parija* (supra) and *Sakshi* (supra), no reference could and ought to have been made by the Division Bench unless a categorical finding was recorded that the earlier decision was so "palpably wrong" or so "very incorrect" that reference was called for. The

Division Bench was wrong in observing that the earlier Full Bench in *Prakash Chandra Jangre* (supra) [i.e. *Masood Akhtar (Dr.)* (supra)] did not consider the applicability of the Rules of 1975. It further failed to consider that the purpose of departmental examination is confirmation and not the appointment. There is basically no difference between what is prescribed in the Rules of 1961 and in the Rules of 1975, with respect to promotion and seniority. Learned Senior Counsel drew attention of the Court towards the provisions contained in Rule 8 with respect to "probation" of the Rules of 1961 and corresponding Rule 13 about "probation" in the Rules of 1975 and argued that these two provisions are in *pari materia* with each other. There is striking similarity between Rule 8(6) of the Rules of 1961 and Rule 13(6) of the Rules of 1975 in so far as the issue of probation and confirmation is concerned. The only difference between two sub-rules is with regard to entitlement of increment, which is not at all relevant for the issue at hand. It is submitted that there is also striking similarity between Rule 8(7) of the Rules of 1961 and Rule 13(7) of the Rules of 1975. Moreover, there is also similarity between what is prescribed in Rule 12 of the Rules of 1961 and in Rule 23 of the Rules of 1975, which both provide that seniority of persons appointed to the service shall be regulated in accordance with the provisions of Rule 12 of the Rules of 1961. Since there is practically no difference between Rule 13 of the Rules of 1975 and Rule 8 of the Rules of 1961 in so far as issue regarding grant of seniority is concerned, no consequences would follow on account of non-consideration of Rule 13 of the Rules of 1975. The Division Bench erred in holding that the Rules of 1961 would not apply in the present case as the petitioners are not "members of service". The Division Bench failed to consider that in the order of confirmation of the petitioners, the respondents have categorically mentioned that the seniority of the petitioners would be determined according to Rule 12(1)(f) of the Rules of 1961. The Division Bench in so observing lost sight of the fact that after completing maximum permissible period of probation of three years, the petitioners would be deemed to be temporary government servants as per Rule 13(7) of the Rules of 1975. But even while being temporary government servant, they continue to be entitled and eligible to appear in the departmental examination and pass the same. Upon clearing the examination as a temporary government servant, they would still be entitled to be confirmed in service. It is not in dispute that petitioners have passed the examination and were then confirmed. Soon upon confirmation, they also become members of service under the Rules of 1975. In view of Rule 12(1)(a) read with Rule 12(1)(f) of the Rules of 1961, they are liable to be placed at the bottom of seniority with their batch but in any case they are entitled to be placed above the subsequent batch.

8. Mr. Naman Nagrath, learned Senior Counsel argued that the Division Bench was not justified in making reference to the Larger Bench by observing that

the Madhya Pradesh Government Servants (Temporary and Quasi-Permanent Service) Rules, 1960 (for short the "Rules of 1960") have not be considered by the earlier Full Bench which deals with the seniority. According to him, this conclusion of the Division Bench is based on misreading of Rules of 1960 which are absolutely silent about the seniority of the officers. As per Rules 2(b) and 2(d) of the Rules of 1960, the petitioners fall under temporary service, which includes "officiating and substantive service in a temporary post". Their officiating period has to be counted for determination of their seniority as it is followed by confirmation. Reliance in this regard has been placed on the judgments of the Supreme Court in *Direct Recruit Class II Engineering Officer's Association vs. State of Maharashtra* reported in (1990) 2 SCC 715 and *L. Chandrakishore Singh vs. State of Manipur and others* reported in (1999) 8 SCC 287. Even in the case of probationer, which is an officiating appointment followed by confirmation, the period so spent cannot be ignored for the purpose of seniority unless a contrary rule is there. Reliance in support of this argument is placed on the judgment of Supreme Court *G.P. Doval and others vs. Chief Secretary, Government of U.P. and others* reported in (1984) 4 SCC 329. It is further argued that the only provision which gives discretion to the State Government to fix the seniority of an officer who has not been able to clear the departmental examination within the extended period of probation upto three years and has qualified such examination thereafter, is Rule 12(1)(f), which is however subject to the provision contained in Rule 12(1)(a) of the Rules of 1961. Apart from this, there is no other rule empowering the State Government to re-fix the seniority.

9. Mr. Manoj Kumar Sharma and Mr. Anshuman Singh, learned counsel appearing for the petitioners in WP-1541-2018, WP-1539-2018, WP-1712-2018 & WP-16735-2018 mostly adopted the arguments advanced by Mr. Naman Nagrath, learned Senior Counsel. Further, in addition to that, Mr. Anshuman Singh submitted that ratio of judgments of Supreme Court in the cases of *M.P. Chandoria* (supra), *Ramkinkar Gupta* (supra) and *Om Prakash Shrivastava* (supra) would not be applicable to the present matters as these judgments were rendered upon consideration of un-amended Rule 12 of the Rules of 1961, which did not contain any restriction or ceiling to the extent upto which seniority of officers clearing departmental examination after the extended period of probation, could be curtailed. The rule making authority while incorporating Rule 12(1)(a) in the Rules of 1961 consciously restricted the power of the State Government to assign lower seniority to an officer who passes departmental examination after the extended period of probation. This power however is limited to lowering down in the same batch and does not extend to lowering down of seniority below the officers who have been appointed in subsequent selections. Mr. Anshuman Singh, learned counsel argued that the aforementioned three judgments of the Supreme Court were passed placing reliance on the judgments reported in (2009) 13 SCC 165, *(State of HP vs. Narain Singh)* and (2017) 1 SCC 283,

(Cheviti Venkanna Yadav vs. State of Telangana). It is however trite that amendment in law can have the effect of taking away the foundation of a judgment. Rule 12(1)(a) of the Rules of 1961 after amendment consciously uses the word "selection" for the purpose of determining *inter-se* seniority between batches and does not use the word "confirmation". It mandates that persons appointed as a result of an "earlier selection" shall be senior to persons appointed as a result of a "subsequent selection". Therefore those three judgments would not be applicable now. Reference to selection by the Public Service Commission at the time of initial recruitment is made for the purpose of inter-batch seniority. For this purpose, the date of confirmation is irrelevant and what is material is the date of selection. It is only within the same batch that seniority may be changed and a person may be assigned lower seniority if he fails to pass the departmental examination within the period of probation. The Full Bench in *Masood Akhtar (Dr.)* (supra) has therefore correctly interpreted Rule 12(1)(a) read with Rule 12(1)(f) of the Rules of 1961 by giving purposive interpretation and holding that petitioner cannot be made junior to the subsequent batch even if he did not pass the departmental examination within three years of probation and at worst, he could be placed at the bottom of the same batch in which he was selected. The State of Madhya Pradesh has therefore been rightly having the practice of allowing the officers to retain the same seniority which they got in the order of merit in which their names were recommended for appointment, even if they qualify the departmental examination after the extended period of probation, but in any case, they cannot be placed below the officers who have been selected in subsequent selection.

10. Mr. Pushpendra Yadav, learned Additional Advocate General for the respondents-State contended that generally three situations emerge: (I) the persons who have cleared the examination within the initial period of probation of two years; (II) the persons who have cleared the examination within the extended period of one year and (III) the person who have cleared the examination after the expiry of extended period of probation. The earlier Full Bench in the case of *Masood Akhtar (Dr.)* (supra) had dealt with the above Situation-(I) and in that context considered Rules 8 and 12 of the Rules of 1961 and drawn the conclusion that the discretion to confer lower seniority to a probationer under Rule 12(1)(f) is confined to the extent that despite assigning lower seniority such probationers shall always rank senior to those who are appointed in subsequent selection. But the aforesaid conclusion is valid only for the persons who have cleared the examination within the extended period of 1 year of probation. The Full Bench has passed the order for determining the seniority of the probationer who has cleared the departmental examinations within extended period of probation. It is further submitted that before passing of the aforesaid Full Bench decision, the issue of seniority of persons, who have cleared the departmental examination after the

expiry of extended period of probation, was not under consideration, therefore, the said Full Bench decision cannot be applied to persons who fall under the above Situation-(III).

11. Learned Additional Advocate General submitted that the directions of the Full Bench have to be understood in the context in which the matter was referred to it for consideration, i.e. the conflicting opinions given by the two Division Benches of this Court, wherein both the Division Benches dealt with the situation where probationers cleared the examination during the extended period of one year of probation and the Full Bench answered accordingly. But the present case is related with the persons who have not cleared the examination even in the extended period of probation and despite that they are claiming seniority over the persons of subsequent batch, who have cleared the examination in normal period or extended period of probation. The cases of persons who have not cleared the examination even within the extended period of probation would be governed by Rule 13(7) of the Rules of 1975 and Rule 8(7) of the Rules of 1961, wherein a probationer who has neither been confirmed nor a certificate issued in his favour nor discharged from the service, shall be deemed to have been appointed as a temporary government servant w.e.f. the date of expiry of probation as per the Rules of 1960. However, after being appointed as temporary servant under the Rules of 1960, he is not governed by Rule 12 of the Rules of 1961 as the same deals with seniority of member of service and probationer. It is further contended that there could be a situation where a person who cleared the departmental examination within normal period of probation and person who does not clear the departmental examination within a period of two years plus one year and is a temporary government servant after the period of expiry of probation and does not clear the department examination for the period of ten years and would come after ten years to claim seniority with his batch. Such a situation is not envisaged under the Rules as the same would lead to total chaos and the state of utter confusion and would be very discouraging for the persons who clear the department examination within the period of probation as provided under the Rules. Learned Additional Advocate General therefore submitted that by virtue of Rule 13(7) of the Rules of 1975 and Rule 8(7) of the Rules of 1961, the status of government servant who has not cleared the examination even within the extended period of probation would be that of a temporary government servant. He would from then onwards cease to be part of the regular service and, therefore, Rule 12 of the Rules of 1961 would be completely inapplicable to him.

12. Mr. Abhishek Arjaria, learned counsel for the intervenor- Dr. Kedar Singh in WP-1539-2018, submitted that the Full Bench in *Masood Akhtar (Dr.)* (supra) considered only two questions, which would be evident from Para-4 of the judgment itself i.e. (i) the discretion conferred on appointing authority under Rule 12(1)(f) to assign lower seniority to "probationer" who has either not successfully

completed the period of probation or has not passed the department examination and (ii) interpretation of Rule 12 of the Rules of 1961. The Full Bench held that the persons, who were not able to qualify the departmental examination within the extended period of one year, would be covered by Rule 8(7) of the Rules of 1961 and therefore would be deemed to have been appointed as temporary servant w.e.f. the date of expiry of probation and their condition of service shall be then governed by the Rules of 1960. The questions framed by the Full Bench were answered in Paras-10 and 11 of the order. Even the conclusion No.(iv) in Para-11 arrived at by the Full Bench talks about "probationer" and not about the "temporary government servant". A bare reading of the entire judgment of the Full Bench thus makes it clear that the issue related to probationer, who has cleared the departmental examination within the extended period of time, has been considered and answered. As regards applicability of the Rules of 1960, Mr. Abhishek Arjaria, learned counsel argued that a bare reading of provisions contained in Rule 8(7) of the Rules of 1961 and also in Rule 13(7) of the Rules of 1975, would make it clear that the government servant who has failed to clear the departmental examination in accordance with Rule 8(7) within the extended period of one year, would cease to be a government servant and the Rules of 1961 would cease to apply to him. On such cessation by virtue of law, Rules of 1960 will come into the effect and such an employee will be treated in the temporary service. He further urged that Rule 1(2) speaks about the applicability of the Rules and clearly stated that the Rules of 1960 would be applicable to all the persons who are holding a civil post under the State Government. A temporary employee cannot claim a post in a particular batch or seniority above any person, who is in regular employment of the State within the same service. Rule 7 of the Rules of 1960 specifically mentions that any person who is in quasi permanent service will be eligible for permanent appointment only on the occurrence of the vacancy in the specified post. Thus it is very clear that no post can be held or a lien be created for such temporary employee. Sub-rule (2) of Rule 7 of the Rules of 1961 also specifies the procedure about the quasi permanent servant, who had cleared the examination and became eligible for a permanent employment, according to which a merit list be prepared of all such quasi permanent servants and then they will be placed for permanent appointment in accordance with the vacancies arising in the department.

13. It is submitted that from interpretation of Rule 7 of Rules of 1960, it is very clear that a quasi permanent employee would be entitled for a fresh appointment in the service only from the date when he overcomes all the shortcoming i.e. from the date of clearing the departmental examination. It is also to be noted that once any selected candidate is declared as temporary employee, then although the applicability of Rules of 1961 would come to an end but his fresh appointment in accordance with Rule 7 of the Rules of 1960 cannot be related back to his earlier

appointment or probation period. It is urged that Rule 11(1) of the Rules of 1960 specifically talks about benefits available to a temporary/quasi permanent servant on being appointed to a permanent post and the rule making authority has deliberately excluded the benefit of seniority to such an employee. At the transition stage (i.e. when the quasi permanent employee clears the departmental examination), he would be given a fresh appointment on the vacant post available at that time by preparing a seniority list amongst all quasi permanent servants.

14. We have given our anxious consideration to the rival submissions with regard to the earlier decision of the Full Bench in *Masood Akhtar (Dr.)* (supra) and also the Division Bench order dated 30.05.2019 making reference to the Larger Bench.

15. The order of reference is founded on the conclusion arrived at by the Division Bench in para-21 of its order that once a probationer, by virtue of Rule 13(7) of the Rules of 1975, has neither been confirmed nor a certificate issued in his favour nor discharged from the services under Sub-Rules (4) and (5) of Rule 13 of the Rules of 1975, would be deemed to have been appointed as a temporary Government servant on expiry of a period of probation. His service conditions would then be governed by the Rules of 1960, therefore, the conclusion arrived at by the Full Bench in *Masood Akhtar (Dr.)* (supra) in para 11(iv) of its judgment that by virtue of Rule 12(1)(f) of the Rules of 1961, that such probationer shall always rank senior to those, who are appointed in subsequent selection, cannot be justified. In order to fully appreciate the conclusion so arrived at and three questions so framed in para-21 of the reference order, we deem it appropriate to compare the relevant provisions of the Rules of 1961 and the Rules of 1975, which read as under:-

Rules of 1961	**Rules of 1975**
8. Probation. -	**13. 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.	(1) Every person directly recruited to the service shall be appointed on probation for a period of two years.
(2) The appointing authority may, for sufficient reasons, extend the period of probation by a further period not exceeding one year.	(2) The appointing authority may, for sufficient reasons, extend the period of probation by a further period not exceeding one year.
(3) The probationer shall undergo such training and pass such departmental examination during the period of his probation as may be prescribed.	(3) The probationer shall undergo the prescribed training and pass the prescribed departmental examination by the higher standard during the period of his probation.

(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.	(4) The services of the 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.	(5) The services of a probationer who does not pass the prescribed departmental examinations or who is found unsuitable for the service may also be terminated at the end of the period of 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 permanent post becomes available he will been confirmed.	(6) On the successful completion of probation and the passing of the prescribed departmental examinations, the probationer shall be confirmed in the service provided permanent vacancies exist for him otherwise 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 as soon as permanent post become available he will be confirmed. The probationer shall not draw any increments until he is confirmed. On confirmation his pay will be fixed with reference to the total length of service. If the probationary period is extended, government will decide at the time of confirmation whether arrears of increment shall be paid or not. Such arrears shall ordinarily be paid when the extension of the probationary period is due to no fault of the probationer.
(7) A probationer, who has neither been confirmed, nor a certificate	(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.

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12. Seniority. –

The seniority of the members of a service or a distinct branch or group of posts of that service shall be determined in accordance with the following principles, viz –

(1) Seniority of Direct Recruits and Promotees.-

(a) The seniority of persons directly appointed to a post according to rules shall be determined on the basis of the order of merit in which they are recommended for appointment irrespective of the date of joining. Persons appointed as a result of an earlier selection shall be senior to those appointed as a result of a subsequent selection.

(b) Where promotions are made on the basis of selection by a Departmental Promotion Committee, the seniority of such promotees shall be in the order in which they are recommended for such promotion by the committee.

(c) Where promotions are made on the basis of seniority subject to rejection of the unfit, the seniority of persons considered fit for promotion at the same time shall be the same as the

issued in his favour under sub-rule (6) above nor discharged from service under sub-rules (4) and (5) above, 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 (Temporary and Quasi-Permanent Service) Rules, 1 960.

* * ***

23. Seniority. –

The seniority of persons appointed to the service shall be regulated in accordance with the provisions of Rule 12 of the Madhya Pradesh Civil Services (General Conditions of Service) Rules, 1961.

relative seniority in the lower grade from which they are promoted. Where however a person is considered as unfit for promotion and is superseded by a junior, such persons shall not, if subsequently found suitable and promoted, take seniority in the higher grade over the junior persons who had superseded him.

(d) The seniority of a person whose case was deferred by the Departmental Promotion Committee for lack of Annual Character Rolls or for any other reasons but subsequently found fit to be promoted from the date on which his junior was promoted, shall be counted from the date of promotion of his immediate junior in the select list or from the date on which he is found fit to be promoted by the Departmental Promotion Committee.

(e) The relative seniority between direct recruits and promotees shall be determined according to the date of issue of appointment/ promotion order :

Provided that if a person is appointed/promoted on the basis of roster earlier than his senior, seniority of such person shall be determined according to the merit/ select/ fit list prepared by the appropriate authority.

(f) If the period of probation of any direct recruit or the testing period of any promotee is extended, the appointing authority shall determine whether he should be assigned the

same seniority as would have been assigned to him if he had completed the normal period of probation testing period successfully, or whether he should be assigned a lower seniority.

(g) If orders of direct recruitment and promotion are issued on the same date, promotee persons enblock shall be treated as senior to the direct recruitees.

A comparison of Rule 8(7) of the Rules of 1961 with Rule 13(7) of the Rules of 1975 would clearly show that there is, in fact, no difference between those two sub-rules, as both provide that if a probationer has neither been confirmed, nor has he been issued a certificate under sub-rule (6) of those Rules, he 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 then would be governed by the Rules of 1960. Therefore, in our considered view, the opinion expressed by the Division Bench while making reference in para-21 of its order that in view of the above fact, Rule 13(7) of the Rules of 1975 would govern the issue and not the Rule 8(7) of the Rules of 1961 and so, the conclusion arrived at by the Full Bench in para 11(iv) of its judgment in *Masood Akhtar (Dr.)* (supra) may not subsist, does not sound convincing. Still further, the Sub-Rules (1) to (6) of Rule 8 of the 1961 Rules and Sub-Rule (1) to (6) of Rule 13 of the Rules of 1975 show a striking similarity between them except with a minor addition in Sub-Rule (6) of Rule 13 of the 1975 Rules which provides that the probationer shall not draw any increments until he is confirmed and that on confirmation, his pay would be fixed with reference to the total length of service and if the probation period is extended, the Government will decide at the time of confirmation whether arrears of increment shall be paid or not. But this additional part of Sub-Rule (6) of Rule 13 of the Rules of 1975 does not have any bearing on the question with which we are concerned in the present set of cases. However, the view taken by the Division Bench that once the probationer has not cleared the prescribed departmental examination even within the extended period of probation, he would be deemed to be a temporary Government servant governed by the Rules of 1960 and therefore the conclusion arrived at in para 11(iv) of the Full Bench is not correct, also cannot be supported because the Rules of 1960 do not, in any case, provide for the manner in which the seniority of the persons recruited under the Rules of 1975 would be regulated.

16. In view of the above, we have to now examine the first question formulated by the Division Bench in the order of reference, whether the judgment

of the Full Bench in *Prakash Chandra Jangre* (supra) [i.e. *Masood Akhtar (Dr.)* (supra)] requires reconsideration because it is based on interpretation of Rule 8 of the Rules of 1961 although in the light of Rule 3 of the Rules of 1961, which deals with its applicability or the Rules of 1975, the Rules of 1961 would not apply and that in the present case, the services of the petitioners/the intervenors are governed by the Rules of 1975 and since Rule 13 of the Rules of 1975 deals with the issue of probation and therefore, Rule 8 of the Rules of 1961 could not be applied. The question No.(1) does not appear to be clearly worded but what perhaps the learned Division Bench intended to convey was that since Rule 3 of the Rules of 1961 provides that these Rules apply to every person who holds a post or is a "member of a service" and the petitioners or the intervenors having not qualified the departmental examination even during the extended period of probation, would not become "member of service", therefore, Rules of 1961 would not apply to them. In question No.(1) the learned Division Bench appears to have alluded itself to the idea that Rule 13 of the Rules of 1975 would apply to a probationer and not the Rule 8 of the Rules of 1961 whereas on comparison of these two Rules, we have seen that both the set of the Rules are exactly identically worded in regard to all their sub-rules, except for a minor and insignificant difference. We shall, however, now examine the question No.(1), in whatever way it has been formulated, by splitting it into two parts.

17. Insofar as the applicability of the Rules of 1961 is concerned, its Rule 3 does not *stricto sensu* provide that it shall only apply to a member of service but it rather begins by providing that "The rule shall apply to every person who holds a post or is a member of a service in the State". The Rule 3 of the 1961 Rules reads, thus:-

> **"3. Scope of application.** - The rule shall apply to every person who holds a post or is a member of a service in the State, except -
>
> (a) person whose appointment and conditions of employment are regulated by the special provisions of any law for the time being in force;
>
> (b) persons in respect of whose appointment and conditions of service special provisions have been made, or may be made hereinafter by agreement;
>
> (c) persons appointed to the Madhya Pradesh Judicial Service:
>
> Provided that in respect of any matter not covered by the special provisions relating to them, their services or their posts, these rules shall apply to the persons mentioned in clauses (a), (b) and (c) above."

From a perusal of Rule 3 (supra) it would be evident that this Rule shall apply not only to a member of service in the State but also to every person who

holds a post. Use of 'or' here is disjunctive. But applicability of the rule excluded, as it has carved out an exception, qua those (a) whose appointment and conditions of service are regulated by the special provisions of any law for the time being in force; (b) in respect of whose appointment and conditions of service special provisions have been made and (c) who are appointed to the Madhya Pradesh Judicial Service. But when we compare the Rules of 1961 with the Rules of 1975 in regard to their applicability, the Rule 3 of the Rules of 1975 provides as under:-

> **"3. Scope and Application.** - *Without prejudice to the generality of the provisions contained in the Madhya Pradesh Civil Services (General Conditions of Service) Rules, 1961, these rules shall apply to every member of the service".*

In other words, the Rules of 1975 would govern the conditions of service of the members of the Madhya Pradesh State Administrative Services but without prejudice to the generality of the Rules of 1961. What therefore can be deduced from this is that the Rules of 1961 shall continue to apply except insofar as special provisions have been made in the Rules of 1975. Therefore, it continues to be applicable to those who hold a post.

18. Let us now therefore come to the second part of the question No.(1) according to which, the case of the probationer should have been considered in the light of Rule 13 of the Rules of 1975 and not Rule 8 of the Rules of 1961. At the cost of repetition, it may be stated that not only there is no material difference between these two provisions under different set of Rules but they both deal with the case of the probationer in the same way except Sub-Rule (1) of Rule 8 of the Rules of 1961 by providing that a direct recruit shall ordinarily be placed on probation for such period as may be prescribed but Sub-Rule (1) of Rule 13 of the Rules of 1975 by specifically providing that a direct recruit shall be appointed on probation for a period of two years. In other words, while Rule 8(1) of the Rules has provided that a direct recruit shall ordinarily be placed on probation as may be prescribed, the Sub-Rule (1) of Rule 13 of the Rules of 1975 has specifically provided probation period of two years. It is this Rule, which would prevail so far as the initial period of probation is concerned. Thereafter, the Sub-Rule (2) of Rule 8 of the Rules of 1961 has provided that the appointing authority may for sufficient reasons, extend the period of probation by a further period not exceeding one year but when we compare this with Sub-Rule (2) of Rule 13 of the Rules of 1975 it is exactly identically worded. The Sub-Rule (3) in both the set of Rules provides that the probationer shall undergo the prescribed training and shall pass departmental examination during the period of probation. Rule 8(4) of the Rules of 1961 as well as Rule 13(4) of the Rules of 1975, both the set of Rules, have given the discretion to the appointing authority or the Government to terminate the services of a probationer during the period of probation if in its

opinion he is not likely to shape into a suitable Government servant. Sub-Rule (5) of both the set of Rules again thereafter provide that services of a probationer (i) who has not passed the departmental examination or (ii) who is found unsuitable for the service or post, may be terminated at the end of the period of his probation. We are dealing with a case of those who were probationers but were not been able to pass the departmental examination even during the extended period of probation, yet the appointing authority/Government, despite having the specific power under Sub-Rule (5) of Rule 8 of the Rules of 1961 and/or under Sub-Rule (5) of Rule 13 of the Rules of 1975 to terminate their services, consciously decided not to do so and has allowed them to continue in service, which is where the Sub-Rule (7) of both the set of Rules would come into play thereby subjecting the conditions of service of the directly recruited employees falling in this category of Rules of 1960. All this while they continue to be eligible and are entitled to appear in departmental examination and on clearing such examination, are entitled to be confirmed.

19. In our considered opinion, it would have been ideal if the Full Bench while answering the reference in *Masood Akhtar (Dr.)* (supra) had also specifically examined Rule 13 of the Rules of 1975 but the mere fact that the Full Bench only considered Rule 8 of the Rules of 1961 and not Rule 13 of the Rules of 1975, would not make any difference insofar as the interpretation of the Rule that we have made and further so far as the question of seniority of such Government servants, who are at that stage considered as temporary Government servant, is concerned, even while observing that the Full Bench in *Masood Akhtar (Dr.)* (supra) ought to have considered the Rule 13 of the Rules of 1975, we are inclined to hold that its non-consideration does not in any manner affect the correctness of the conclusion arrived at by the Full Bench. And now when we have considered and interpreted the Rule 13 of the Rules of 1975 we have also arrived at the same conclusion as the Full Bench has recorded in *Masood Akhtar (Dr.)* (supra) on harmonious interpretation of Rule 12(1)(a) and 12(1)(f) of the Rules of 1961. In any case, non-consideration of Rule 13 of the Rules of 1975 would not make any material difference also for an additional reason which is that Rule 23 in the Rules of 1975 itself specifically provides that "the seniority of persons appointed to the service shall be regulated in accordance with the provisions of Rule 12 of the Madhya Pradesh Civil Services (General Conditions of Service) Rules, 1961".

20. Adverting now to the question No.(2) formulated in the order under reference as to whether Rule 12, and Rule 12(1)(a) in specific, would apply to the "members of the service" and it does not deal with the seniority of the probationers, who have not qualified the departmental examination within the period of probation or within the extended period of probation, and therefore, the conclusion recorded in para 11(iv) of the direction is justified. It appears that in

paraphrasing this question, the Division Bench was guided by the ratio of the three Supreme Court judgments in *M.P. Chandoria* (supra), *Ramkinkar Gupta* (supra) and *Om Prakash Shrivastava* (supra), which have been relied upon even before us by the learned Additional Advocate General and the learned counsel for the intervenors.

21. The Supreme Court in *M.P. Chandoria* (supra), the earliest of the three judgments rendered on 29th March, 1996, while dealing with the case of direct recruit, who failed to qualify the prescribed test even within the extended period of probation but confirmed only after he passed the test, while dealing with Rule 12 of the Rules of 1961 existing at that point of time, concluded that his seniority shall be reckoned from the date of passing the prescribed test and not from the date of joining the services. Again interpreting the Rule 12 of the Rules of 1961, this very view also reiterated by the Supreme Court in *Ramkinkar Gupta* (supra) delivered on 17th September, 1999 relying upon *M.P Chandoria* (supra). On interpretation of the very same Rule 12 of the Rules of 1961 and relying upon its earlier two decisions in *M.P. Chandoria* (supra) and *Ramkinkar Gupta* (supra), the same view was again expressed by the Supreme Court in *Om Prakash Shrivastava* (supra) in its judgment dated 19th April, 2005. But what is significant to notice here is that the view taken by the Full Bench in *Masood Akhtar (Dr.)* (supra) is based on interpretation of unamended Rule 12 of the Rules of 1961, which was amended by way of substitution vide Notification dated 2nd April, 1998. This amendment has taken away the very basis of these three judgments. This has made all the difference in regard to placement of the direct recruits, who inspite of having failed to qualify the prescribed test/departmental examination within the extended period of probation i.e. three years and appointing authority/Government having decided not to terminate their services, despite having power to do so under Sub-Rule (5) of Rule 8 of Rules of 1961 read with Sub-Rule (5) of Rule 13 of the Rules of 1975, as now in the amended Rule 12 of the Rules of 1961, upon their passing the examination even at the later stage, in view of amended Rule 12(1)(a) of the said Rules that now the seniority of persons directly appointed to a post, according to the rules, shall be determined on the basis of the order of merit in which they are recommended for appointment irrespective of the date of joining and that the persons appointed as a result of an earlier selection shall be senior to those appointed as a result of a subsequent selection with Rule 12(1)(f) of the said Rules providing that if the period of probation of any direct recruit or the testing period of any promotee is extended, the appointing authority shall determine whether he should be assigned the same seniority as would have been assigned to him if he had completed the normal period of probation testing period successfully, or whether he should be assigned a lower seniority.

22. The Full Bench in *Masood Akhtar (Dr.)* (supra) has, while making a conjoint reading of the Rule 12(1)(a) and 12(1)(f) of the Rules of 1961 has placed harmonious interpretation so as to reconcile them, which would be evident from the conclusion arrived at by the Bench in para 11 of its judgment, as reproduced above in para 4 of this judgment. But the question that has also to be additionally answered in the light of the observation of the Supreme Court in *Warad Murti Mishra* (supra) is: as to whether it was permissible for the Full Bench in *Masood Akhtar (Dr.)* (supra), despite the Supreme Court consistently holding in above referred to three judgments that direct recruits not having qualified the departmental examination even within the extended period of service, could not be treated as member of service and therefore cannot claim seniority of that period?

23. In order to appreciate this question, we need to compare the unamended Rule 12 of the Rules of 1961 on interpretation of which the ratio of the aforementioned three judgments of the Supreme Court in *M.P. Chandoria* (supra)*; Ramkinkar Gupta* (supra) and *Om Prakash Shrivastava* (supra) is founded, with the newly inserted Rules 12(1)(a) and (f) of the Rules of 1961 by way of substitution, which have been interpreted by the Full Bench in *Masood Akhtar (Dr.)* (supra), insofar as the question of seniority is concerned. The unamended and the amended Rule 12 of the Rules of 1961 insofar as they are relevant for the purposes of deciding the present matter, read as under:-

Unamended Rule 12 of the Rules of 1961	**Amended Rule 12 of the Rules of 1961 (substituted by No. 4, dated 2-4-1998)**
12. Seniority:	**12. Seniority. –**
The seniority of the members of service of a district branch or group of posts of that service shall be determined in accordance with the following principles, viz. -	The seniority of the members of a service or a distinct branch or group of posts of that service shall be determined in accordance with the following principles, viz –
(a) Direct recruits:	(1) **Seniority of Direct Recruits and Promotees.-**
(i) The seniority of a directly recruited Government servant appointed on probation, shall count during his probation from the date of appointment, viz.:	(a) The seniority of persons directly appointed to a post according to rules shall be determined on the basis of the order of merit in which they are recommended for appointment irrespective of the date of joining. Persons appointed as a

result of an earlier selection shall be senior to those appointed as a result of a subsequent selection.

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(ii) the same order of inter se seniority shall be maintained on the confirmation of such direct recruits if the confirmation is ordered at the end of the normal period of probation. If, however, the period of probation of any direct recruits is extended, the appointing authority shall determine whether he should be assigned the same seniority as would be assigned to him if he had been confirmed on the expiry of the normal period of probation or whether he should be assigned a lower seniority.

(f) If the period of probation of any direct recruit or the testing period of any promotee is extended, the appointing authority shall determine whether he should be assigned the same seniority as would have been assigned to him if he had completed the normal period of probation testing period successfully, or whether he should be assigned a lower seniority.

24. It would be evident from the comparative reading of the unamended Rule 12 with the amended Rule 12 of the Rules of 1961 that while in the old Rule 12 of the Rules of 1961, there is no provision which would restrict the powers of the appointing authority/ Government by providing that the persons appointed as a result of an earlier selection shall always rank senior to those appointed in a subsequent selection. In the new Rule 12 of the Rules of 1961 however it is specifically provided, which would be evident from Rule 12(1)(a), by stipulating that ***"persons appointed as a result of an earlier selection shall be senior to those appointed as a result of a subsequent selection*** ". It would be therefore evident from the above that the amendment in Rule 12 has taken away the very basis of the aforementioned three judgments of the Supreme Court in *M.P. Chandoria* (supra), *Ramkinkar Gupta* (supra) and *Om Prakash Shrivastava* (supra) and, therefore, ratio of those judgments cannot be applied to the present case. The rule making authority has now in the amended Rule 12 categorically provided that the persons appointed as a result of an earlier selection shall always rank senior to those appointed as a result of subsequent selection, thus manifesting a different intention than the one expressed in unamended Rule 12. Reference in this connection may be made to the judgment of the Supreme Court in *Agricultural Income Tax Officer and another vs. Goodricke Group Limited and another* reported in (2015) 8 SCC 399. Reliance in that case was placed on an earlier judgment of the Supreme Court in *Buxa Dooars Tea Co. Ltd. Vs. State of W.B.*

reported in (1989) 3 SCC 211, wherein two charging provision, namely, Section 4-B of the West Bengal Rural Employment and Production Act, 1976 and Section 78-C of the West Bengal Primary Education Act, 1973, levying cess on production of tea, were struck down as unconstitutional on the ground that the basis of levy was not covered under the legislative competence of the State Legislature under Schedule VII List II Entry 49 and that the said levy encroached upon the legislative field covered under Schedule VII List I Entry 84 and further contravened Article 301 and was not saved by Article 304(b) of the Constitution of India. However, subsequently by an amendment the defect was cured by changing the basis of the charging provision (that is, by levying cess on the yield or income from a given unit of land) and brining (sic: bringing) the levy within the legislative competence of the State Legislature. The two cesses by the said amendment were imposed retrospectively from 1981 and 1984 respectively. However, when the judgment of the Supreme Court in *Buxa Dooars Tea Co. Ltd.* (supra) was relied in the aforesaid case of *Agricultural Income Tax Officer and another* (supra), it was held as under:

> **"12.** In our view, the purport of these two sections is clear. Whatever may have been the subject-matter of *Buxa Dooars Tea Co. Ltd. (supra),* that is the subject-matter of the two Acts as originally enacted, will now, notwithstanding the interim order or the final judgment in *Buxa Dooars Tea Co. Ltd. (supra)* be deemed to have been validly levied, collected and paid as rural employment cess and education cess under the Amended Act.
>
> **13.** This being the case, it is clear that Section 4-B and Section 78-C have changed the basis of the law as it existed when *Buxa Dooars Tea Co. Ltd. (supra)* was decided and consequently, the judgment and interim order passed in *Buxa Dooars Tea Co. Ltd. (supra)* will cease to have any effect. Also, what would have been payable under the Act as unamended, is now payable only under the 1989 Amendment Act which has come into force with retrospective effect."

25. Reference can also be made to another judgment of the Supreme Court on the similar subject in *State of Madhya Pradesh and another vs. Kedi Great Galeon Limited and another* reported in (2017) 13 SCC 836. In the aforesaid case, in the writ petition before this Court, argument was made that in view of judgment of the Supreme Court in *M/s. Lilasons Breweries (Pvt.) Ltd. and another vs. State of Madhya Pradesh and others* reported in (1992) 3 SCC 293, Rule 4 (41) of the M.P. Distillery Rules, 1995 was declared as *non est* and void as Rule 22 of old M.P. Brewery Rules, 1970 has already been declared ultra vires by the Supreme Court, it would be unnecessary to seek similar relief of striking down its successor Rule 4(41). Even though no specific prayer was made in the writ petition to that effect, but the High Court upholding the aforesaid argument struck down Rule 4(41) of

the M.P. Distillery Rules, 1995. Apart from other grounds, the Supreme Court set aside the judgment of the High Court also on the premise that subsequent amendment made in Section 28 of the M.P. Excise Act, 1915 had the effect of changing the very basis of the earlier judgment. It would be useful to extract following observations of the Supreme Court from Para-43 of the report:

> **"43.** The judgment in ***Banerjee Chandra Banerjee vs. State of M.P.,*** reported in **(1970) 2 SCC 467** was delivered on 19.08.1970. there has been amendment in Section 28 by Madhya Pradesh Act 6 of 1995 by which provision, specific provision requiring the license to lift for sale, the minimum quantity of country spirit or Indian-made liquor, fixed for his shop and to pay the penalty at the prescribed rate on the quantity of liquor short lifted, has been brought in the statute book. The scheme of the M.P. Excise Act, 1915 having been amended by the aforesaid 1995 Act, the very basis of *Banerjee (supra)* is knocked down and cannot be relied on in view of changed statutory scheme....."

26. It is a trite that a judgment for the purpose of precedent can be relied upon for the proposition of law that it actually decided and not for what can be logically deduced from it, for difference of a minor fact would make a lot of change in the precedential value of the judgment. The House of Lords in their celebrated decision reported as [1901] A.C. 495 titled *Quinn v. Leathem* aptly observed: (16 of 21) "every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it.... ".

27. It is settled position of law that while interpreting a statute different parts of a section of the rule have to be harmoniously construed so as to give effect to the purpose of the legislation and the intention of the legislature. Even the Full Bench in its judgment in *Masood Akhtar (Dr.)* (supra) while relying upon the judgment of the Supreme Court in *British Airways vs. Union of India,* (2002) 2 SCC 95 has observed that sub-sections of a section must be read as parts of an integral whole and as being interdependent and an attempt should be made in construing them to reconcile them if it is reasonably possible to do so and to avoid repugnancy. As held by the Supreme Court in *Raj Krushna Bose vs. Binod Kanungo and others,* AIR 1954 SC 202, a statute must be read as a whole and one provision of the Act should be construed with reference to the other provisions in the same Act so as to make a consistent enactment of the whole statute. Such a construction has the merit of avoiding any inconsistency or repugnancy either within a section or between a section and other parts of the statute. It is the duty of the courts to avoid

"a head on clash" between the two sections of the same Act and whenever it is possible to do so, to construe provisions which appear to conflict so that they harmonise. The Supreme Court in *Madanlal Fakirchand Dudhediya vs. Shree Changdeo Sugar Mills Ltd.,* AIR 1962 SC1543 has held that the rule of construction is well settled that when there are in an enactment two provisions, which cannot be reconciled with each other, they would be so interpreted that if possible the effect should be given to both. This is what is known as "rule of harmonious construction".

28. Unlike the old Rule 12 of the Rules of 1961, the new Rule 12 of the Rules of 1961 governs the discretion of the appointing authority/Government, restricting its power to assign the lower seniority to those who qualify the departmental examination some time after expiry of the period of probation and gives power to it to lower down the seniority of such an employee falling in this category but with a rider that he shall be assigned the bottom seniority with his own batch but in any case shall be placed above the direct recruits from the subsequent batch. The employee, who is directly recruited with reference to Rule 8(1) of the Rules of 1961 or Rule 13(1) of the Rules of 1975 but is unable to qualify the departmental examination even within the extended period of probation of three years and yet not discharged from service by the appointing authority at the end of the period of probation despite it having power to do so under Rule 8(5) of the Rules of 1961 and Rule 13(5) of the Rules of 1975, his service conditions, as per the mandate of Rule 8(7) of the Rules of 1961 or Rule 13(7) of the Rules of 1975 would then be governed by the Rules of 1960. However, this situation would continue only for the interregnum period till he qualifies the departmental examination. It must, therefore, be construed that the person falling in this category as per Rule 8(1) of the Rules of 1961 continues to be *"a person appointed to a service or post by direct recruitment"* or Rule 13(1) of the Rules of 1975, as *"every person directly recruited to the service"* as the Government, despite having power under Rule 8(5) of the Rules of 1961 or Rule 13(5) of the Rules of 1975, to terminate his services upon his failure to pass the departmental examination even within the extended period of probation, having taken a conscious decision to retain him in service. Obviously, his recruitment was made against a post and he continues to occupy that post even after expiry of extended period of probation. He is eventually confirmed when he passes the departmental examination. Since he continues to work on the same post on which he was initially appointed and continuing to draw pay against such post, there would not arise any question of his needing to retain any lien. Argument to that effect raised on behalf of the Intervener does not have any force and is rejected. He shall continue to be entitled to appear in departmental examination even thereafter and upon passing the same, shall be confirmed in service. If and when he would qualify such examination and is confirmed, he would become a member

of service with reference to his original appointment and in that case, would be continued in service and consequently, would be assigned the seniority below his batchmates, who have already earlier qualified the departmental examination. This is because once such an employee has passed the departmental examination, he would then cease to be subject to the Rules of 1960 and would be governed from that stage onward by the Rules of 1961 and/or Rules of 1975, as the case may be. Even otherwise, there is no provision in anywhere in the Rules of 1960 with regard to fixation and regulation of seniority of the employees falling in this category.

29. We are in taking that view fortified from the ratio of the Constitution Bench judgment of the Supreme Court in *Direct Recruit Class II Engineering Officer's Association* (supra) wherein, in para-13, it was held as under:-

> "13..... the period of continuous officiation by a government servant, after his appointment by following the rules applicable for substantive appointments, has to be taken into account for determining his seniority; and seniority cannot be determined on the sole 'test of confirmation, for, confirmation is one of the inglorious uncertainties of government service depending neither on efficiency of the incumbent nor on the availability of substantive vacancies....."

Thereafter, the Supreme Court, in the same very para, further held that:-

> " .....The principle for deciding inter se seniority has to conform to the principles of equality spelt out by Articles 14 and 16 of the Constitution of India. If an appointment is made by way of stopgap arrangement, without considering the claims of all the eligible available persons and without following the rules of appointment, the experience on such appointment cannot be equated with the experience of a regular appointee, because of the qualitative difference in the appointment ....."

After holding so, the Supreme Court further held that:-

> "..... But if the appointment is made after considering the claims of all eligible candidates and the appointee continues in the post uninterruptedly till the regularisation of his service in accordance with the rules made for regular substantive appointments, there is no reason to exclude the officiating service for purpose of seniority...."

30. The Supreme Court in *L. Chandrakishore Singh* (supra) in para 15 has held as under:-

> "It is now well settled that even in cases of probation or officiating appointments which are followed by a confirmation unless a contrary rule is shown, the service rendered as officiating appointment or on probation cannot be ignored for

reckoning the length of continuous officiating service for determining the place in the seniority list..... "

31. In view of the above discussion, we are inclined to agree with the view expressed by the Full Bench in *Masood Akhtar (Dr.)* (supra) although we have recorded our own additional reasons in support of such conclusion. Since we agree with the ultimate conclusion arrived at by the Full Bench in *Masood Akhtar (Dr.)* (supra) despite giving additional reasons for our view, we are not persuaded to hold that the Full Bench has not correctly answered the reference. We therefore see no justification to further refer this matter to a Larger Bench consisting of five Judges.

Referred questions having thus been answered, let the writ petitions be now listed before the Division Bench for hearing on merits as per Roster.

Order accordingly

I.L.R. [2021] M.P. 854 (FB)
FULL BENCH

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

WP No. 4021/2019 (Jabalpur) decided on 22 April, 2021

BHOPAL COOPERATIVE CENTRAL BANK MARYADIT BHOPAL & ors. …Petitioners

Vs.

STATE OF M.P. & ors. …Respondents

(Along with WP Nos. 4057/2019, 4339/2019, 4915/2019, 4919/2019, 5124/2019, 5535/2019, 6038/2019, 6607/2019, 7065/2019 & 7518/2019)

A. Cooperative Societies Act, M.P. 1960 (17 of 1961), Section 48-AA & 50-A – Principle of Natural Justice – Reasonable Opportunity of Hearing – **Held – Unlike Section 48-AA, Section 50-A does not specifically envisage for giving reasonable opportunity of being heard to person who is sought to be disqualified to continue as member of Board of Directors, but adherence to principle of natural justice must be read into the statute as there is no clear mandate to the contrary – Unless a statutory provision, either specifically or by necessary implication excludes application of principle of natural justice, requirement of providing reasonable opportunity of hearing before passing an order having civil consequences, has to be read into a statute, be it an administrative or quasi-judicial order. (Para 16 & 18)**

क. सहकारी सोसाइटी अधिनियम, म.प्र. 1960 (1961 का 17), धारा 48–AA व 50–A – नैसर्गिक न्याय का सिद्धांत – सुनवाई का युक्तियुक्त अवसर – अभिनिर्धारित – धारा 48–**AA** के विपरीत, धारा 50–**A** ऐसे व्यक्ति को सुने जाने का युक्तियुक्त अवसर दिया जाना विनिर्दिष्ट रूप से परिकल्पित नहीं करती जिसे निदेशक बोर्ड के सदस्य के रूप में बने रहने के लिए निरर्हित किया जाना चाहा गया है, परंतु, कानून में, नैसर्गिक न्याय के सिद्धांत की अनुषक्ति पढ़ी जाना चाहिए क्योंकि इसके विपरीत कोई स्पष्ट आज्ञा नहीं है – जब तक कि एक कानूनी उपबंध, या तो विनिर्दिष्ट रूप से अथवा आवश्यक विवक्षा द्वारा नैसर्गिक न्याय के सिद्धांत की प्रयोज्यता अपवर्जित नहीं करता, सिविल परिणाम वाले आदेश को पारित करने के पूर्व सुनवाई का युक्तियुक्त अवसर प्रदान करने की अपेक्षा को कानून में पढ़ा जाना चाहिए, चाहे वह प्रशासनिक आदेश हो अथवा न्यायिककल्प आदेश।

***B. Cooperative Societies Act, M.P. 1960 (17 of 1961), Section 50-A – Removal of Director – Deemed Provision* – Held – There cannot be an automatic removal/disqualification of Director/member of Board of Directors – Since Section 50-A cannot be held to be a deemed provision, there cannot be deemed vacation of his seat in office of Board of Directors – Competent authority after due application of mind would in any case be required to give opportunity of hearing to member of Board of Directors, pass a specific order for removing/unseating him from such office.**

(Para 19 & 32)

ख. सहकारी सोसाइटी अधिनियम, म.प्र. 1960 (1961 का 17), धारा 50–A – निदेशक को हटाया जाना – समझा गया उपबंध – अभिनिर्धारित – निदेशक बोर्ड का निदेशक/सदस्य अपने आप हटाया/निरर्हित नहीं किया जा सकता – चूंकि धारा 50–**A** को समझा गया उपबंध नहीं ठहराया जा सकता, निदेशक बोर्ड के कार्यालय में उसकी सीट की समझी गई रिक्ति नहीं हो सकती – सक्षम प्राधिकारी से मस्तिष्क के सम्यक् उपयोग पश्चात्, किसी भी प्रकरण में, निदेशक बोर्ड के सदस्य को सुनवाई का अवसर देने, उसे उक्त पद से हटाने/अपदस्थ करने हेतु विनिर्दिष्ट आदेश पारित करने की अपेक्षा होगी।

***C. Cooperative Societies Act, M.P. 1960 (17 of 1961), Section 48-AA & 50-A(2) proviso – Applicability* – Held – Provisions of Section 48-AA to be applied in both situation i.e. at the time of election (pre-election stage) or if any person is disqualified after election (post election stage) – Proviso to Section 50-A(2) stipulates that an elected person shall cease to hold the office, if such society commits default for any loan/advance, for a period exceeding 12 months, thus it would apply to post election stage. (Para 17)**

ग. सहकारी सोसाइटी अधिनियम, म.प्र. 1960 (1961 का 17), धारा 48–AA व 50–A(2) परंतुक – प्रयोज्यता – अभिनिर्धारित – धारा 48–**AA** के उपबंधों को दोनों स्थितियों में लागू किया जाना चाहिए अर्थात्, निर्वाचन के समय (निर्वाचनपूर्व प्रक्रम) या यदि कोई व्यक्ति निर्वाचन पश्चात् निरर्हित होता है (निर्वाचन उपरांत प्रक्रम) – धारा 50–**A**(2) का परंतुक अनुबद्ध करता है कि एक निर्वाचित व्यक्ति पदधारक नहीं रहेगा यदि

उक्त सोसाइटी, 12 माह से अधिक की अवधि के लिए किसी ऋण/अग्रिम का व्यतिक्रम कारित करती है, अतः यह निर्वाचन उपरांत प्रक्रम पर लागू होगा।

***D. Cooperative Societies Act, M.P. 1960 (17 of 1961), Section 50-A(3) – Applicability* – Held – Section 50-A(3) envisages a situation where representative/delegate of society is debarred from voting, if he is in default for a period exceeding 12 months to the society or any other society for any loan/advance taken by him, thus it would apply to pre-election stage.**

(Para 17)

घ. सहकारी सोसाइटी अधिनियम, म.प्र. 1960 (1961 का 17), धारा 50–A(3) – प्रयोज्यता – अभिनिर्धारित – धारा 50–A(3) एक ऐसी स्थिति परिकल्पित करती है जहां सोसाइटी के प्रतिनिधी/प्रत्यायुक्त (डेलीगेट) को मतदान करने से विवर्जित किया गया है, यदि वह उसके द्वारा लिये गये किसी ऋण/अग्रिम के लिए उस सोसाइटी या किसी अन्य सोसाइटी के 12 माह से अधिक अवधि हेतु व्यतिक्रम में है, अतः यह निर्वाचन पूर्व प्रक्रम पर लागू होगा।

***E. Cooperative Societies Act, M.P. 1960 (17 of 1961), Section 48-AA & 50-A – Conflict between Judgments* – Held – Analysis of two Division Bench judgments i.e. one in Brij Kumar Chanpuriya (*W.P. No. 6913/2017*) and another in Anter Singh (*W.A. No. 551/2019*) which formed the basis of present reference thus clearly shows that there was actually no conflict between these two judgments.**

(Paras 10 to 14)

ङ. सहकारी सोसाइटी अधिनियम, म.प्र. 1960 (1961 का 17), धारा 48–AA व 50–A – निर्णयों में अंतर्विरोध – अभिनिर्धारित – दो खंड न्यायपीठों के निर्णयों का विश्लेषण अर्थात् एक बृज कुमार चनपुरिया (***W.P. No. 6913/2017***) तथा दूसरा अंतर सिंह (***W.A. No. 551/2019***) जिन्होंने वर्तमान निर्देश का आधार निर्मित किया है, इस प्रकार स्पष्ट रूप से दर्शाता है कि वास्तविक रूप से इन दो निर्णयों के बीच कोई अंतर्विरोध नहीं था।

Cases referred:

W.P. No. 6913/2017 decided on 15.05.2017 (DB), W.A. No. 551/2019 decided on 17.05.2019 (DB), (2008) 14 SCC 151, (2013) 7 SCC 25, AIR 1985 SC 582, 2015 (2) MPLJ 300, W.P. No. 4584/2016 decided on 07.04.2017 (DB), AIR 1981 SC 136, AIR 1970 SC 1039, 2000 (3) MPLJ 551, (2015) 8 SCC 519, 1969 MPLJ 683 (DB), (2002) 2 SCC 7, AIR 1968 SC 33, 2012 (2) MPHT 352, 2015 RN 135, 2006 (4) MPLJ 403, (1978) 1 SCC 405, (2008) 14 SCC 151, AIR 1967 SC 1269, (2005) 6 SCC 321, (1985) 3 SCC 545, (1993) 1 SCC 78, (2007) 2 SCC 181, (1981) 1 SCC 664, (1969) 2 SCC 262.

Shobha Menon with *Rahul Choubey*, for the petitioners in WP No. 4021/2019.

Sanjay Ram Tamrakar, for the petitioners in WP Nos. 4915/2019 & 4919/2019.

Rahul Deshmukh, for the petitioners in WP Nos. 4057/2019, 4339/2019, 5124/2019 & 6607/2019.

Anil Lala, for the petitioners in WP No. 6038/2019 & 7518/2019.

Naveen Dubey, for the petitioner in WP No. 7065/2019.

Rajendra Kumar Shrivastava, for the petitioner in WP No. 5535/2019.

R.K. Verma, Addl. A.G. for the respondents/State.

Ankit Saxena, for the respondent No. 6-Kewal Singh.

J U D G M E N T

The Judgment of the Court was delivered by :

MOHAMMAD RAFIQ, C.J. :- All these matters have been laid before the Full Bench upon a reference from a learned Single Bench of this Court vide order dated 25.4.2019, assuming conflict between the ratio of two judgments rendered by Division Benches of this Court, one in Writ Petition No.6913/2017-*Brij Kumar Chanpuriya Vs. State of M.P. & others* decided on 15.5.2017 and another in Writ Appeal No.551/2019-*Anter Singh & others Vs. State of M.P. & others* decided on 17.5.2019, for answering the following three questions of law:-

> "1. Whether the order passed by the Division Bench of this Court in WP No.6913/2017 on 15.05.2017 lays down the correct law in regard to Section 48-AA and Section 50-A of the Act of 1960 or the order passed in Writ Appeal No.551/2019 affirming the order passed by the Single Bench of this Court in WP No.5033/2019?
>
> 2. Whether the provisions of Section 48-AA and Section 50-A of the Act of 1960 operates in a different sphere i.e. pre and post election of the Director?
>
> 3. Whether Section 50-A of the Act of 1960 is a deeming provision for holding a Director of a society as disqualified or an opportunity of hearing is still required to be given as held by this Court in WP No.6913 of 2017?"

2. The petitioners in all these writ petitions were the Directors of the various Cooperative Central Banks, who assailed their removal as such Directors, on the ground of breach of principles of natural justice as well as non-service of notice prior to their removal in terms of Section 48-AA of the Madhya Pradesh Cooperative Societies Act, 1960 (for short 'the Act of 1960"). All the petitioners in their capacity as representatives of the parent Cooperative Societies were elected as Directors of the District Cooperative Central Banks and were removed/

disqualified to continue as such Directors, because the Societies, of which they were representatives, were in default for exceeding 12 months.

3. We have heard learned counsel appearing for the petitioners and learned Additional Advocate General for the respondent/State. The arguments on behalf of the petitioners have been led by Smt. Shobha Menon, learned Senior Advocate and other advocates appearing for the petitioners in respective petitions have also made the submissions, who have substantially adopted her arguments.

4. Learned counsel appearing on behalf of the petitioners argued that the petitioners were elected representatives from different Cooperative Societies and in that capacity, they were further elected as Directors of the another Cooperative Society, which is in each case is a separate Central Cooperative Bank in terms of Rule 49-C of the Madhya Pradesh Cooperative Societies Rules, 1962 (for short "the Rules of 1962), as per the procedure contained in Rule 49-E of the Rules of 1962. The Registrar/Joint Registrar illegally removed them from the office of the Directors without following the provisions of Section 48-AA of the Act of 1960 which mandates for providing an opportunity of hearing to any such Directors/representatives before their removal/disqualification. Section 50-A of the Act of 1960, especially proviso to sub-section (2) thereof, would not be applicable to the case of removal of any Director/representative as it operates in entirely different sphere and applies to only pre-election stage of a candidate or voter, for election to Board of Directors, as representative or delegate of the Society. Once the petitioners were elected as Directors/Members of the Board of Directors in terms of Section 48-B of the Act of 1960, they were entitled to continue in that capacity till next election of the members of the Board of Directors in terms of Section 48-B of the Act of 1960. Besides this, Section 49(7-A)(d) of the Act of 1960 also ordains that the term of the representatives elected by the Board of Directors to other societies shall be co-terminus with the term of Board of Directors of the Society. It is argued that Rule 45(3) of the Rules of 1962 applies to eligibility for election as a member of the Board of Directors of Cooperative Bank/Financial Bank/Federal Society or any Apex Society, which were defaulter to the Co-operative Bank for period exceeding twelve months. Therefore, it can be invoked only at any pre-election stage. Once a delegate of the Society has been elected as a member of the Board of Directors, this rule ceases to have any application.

5. It is contended that proviso to sub-section (2) of Section 50-A excludes the applicability of Section 50-A of the Act of 1960 to the Societies in question as it specifically mentions that it applies to "other than co-operative credit structure" which has been defined in Section 2(d)(ii) to mean "Madhya Pradesh State Co-operative Bank or Central Co-operative Bank or Primary Agriculture Credit Co-operative Society" and includes the Primary Service Cooperative Society. The

Societies of which the petitioners are representatives, are thus excluded from the purview of Section 50-A of the Act of 1960. Learned counsel for the petitioners further argued that even if such Societies were defaulter for a period exceeding 12 months, Section 48-AA of the Act of 1960 would still be applicable in their case and in that event, the Board of Directors of the Society would be required to initiate action and not the Registrar/the Joint Registrar of the Cooperative Society. It is also argued that only if the Society fails to take action within two months, the Registrar/the Joint Registrar may take action.

6. Smt. Shobha Menon, learned Senior Advocate in support of her arguments has relied upon the judgments of the Supreme Court in (2008) 14 SCC 151-*Sahara India (Firm, Lucknow Vs. Commissioner of Income Tax* and other, (2013) 7 SCC 25-*State of Madhya Pradesh and others Vs. Sanjay Nagayach and others.* Relying on the judgment of the Supreme Court rendered in *S.Sundaram Pillai vs. V.R.Pattabiraman* AIR 1985 SC 582, Smt. Shobha Menon, learned Senior Advocate argued that the Explanation to the second proviso to Section 48-AA of the Act of 1960 is merely meant to explain or clarify certain ambiguities which may have crept in the statutory provision but this cannot be taken as a substantive provision. It can be invoked only to explain the meaning and intendment of the main provision when there is obscurity or vagueness in the main provision. But the Explanation cannot in any way interfere with or change, the enactment or any part thereof. Other learned counsels appearing for the petitioners in support of their contentions have placed reliance on the judgment passed by the Single Bench of this Court in *Registered District Co-operative Agricultural and Rural Development Bank Maryadit and others Vs. State of M.P. and others* 2015 (2) MPLJ 300, *Bhawani Vipanan Sahkari Sanstha Vs. Megh Singh & others*-W.P.NO.4584/2016 decided by a Division Bench on 7.4.2017, *S.L.Kapoor vs. Jagmohan and others* AIR 1981 SC 136, the *Board of High School and Intermediate Education U.P. and others Vs. Kumari Chittra Srivastava and others* AIR 1970 SC 1039 and a judgment of Single Bench of this Court in *Arjun Lal Patel Vs. State of M.P. and others* 2000 (3) MPLJ 551.

7. Per contra, Shri R.K.Verma, learned Additional Advocate General appearing for the State has argued that the fact about the Society, of which the petitioners were delegates or representatives, and in that capacity were elected as members of the Board of Directors, being in default for consecutive 12 months, not being disputed, removal of the petitioners from that position would be consequence of such persistent default by the parent Society, resulting into their cessation as such Directors by virtue of proviso to sub-section (2) of Section 50-A of the Act of 1960 read with Rule 45(3) of the Rules of 1962. The learned Additional Advocate General argued that this position of law has been correctly analysed by the Division Bench of this Court at Indore Bench in *Anter Singh &*

others (supra) by relying on the judgment of the Supreme Court in *Dharampal Satyapal Limited Vs. Deputy Commissioner of Central Excise, Gauhati* (2015) 8 SCC 519. The Supreme Court in that case categorically held that the principles of natural justice are very flexible principles and they cannot be applied in a straitjacket formula and there may be situation wherein for some reasons it is felt that a fair hearing 'would make no difference' - meaning that a hearing would not change the ultimate conclusion reached by the decision maker, then no legal duty to serve a notice arises. Once when the factum of the parent Society being defaulter is not disputed, providing opportunity of hearing to the petitioners for being discontinued/removed as members of the Board of Directors, would be a useless formality as it is unlikely to change the consequences. The issue will have to be therefore approached on the touchstone of prejudice to the petitioners. If the petitioners are not in position to dispute that the Society of which they are delegates, was in default for consecutive twelve months, no purpose would be served in providing them the opportunity of hearing inasmuch as such exercise would be totally futile having regard to the ratio of judgment of the Supreme Court in *Dharampal Satyapal Limited* (supra) as in that event, no prejudice would be caused to the petitioners.

8. Shri R.K.Verma, learned Additional Advocate General in support of his arguments has also relied upon of a Division Bench judgment of this Court in *Basant Kumar Mishra Vs. Assistant Registrar, Co-operative Societies, Jabalpur and others* 1969 MPLJ 683. He has relied on a judgment of the Supreme Court in *State of Punjab Vs. Tehal Singh and others* (2002) 2 SCC 7 to argue that the principles of natural justice need not be observed by State Government in the absence of clear provisions stipulating such observance. He has also relied upon a judgment of the Supreme Court in *National Engineering Industries Ltd., Jaipur Vs. Hanuman* AIR 1968 SC 33 to contend that the Court should not interfere with the finding of fact recorded by quasi-judicial tribunal unless it is shown the finding so recorded is ex facie perverse. In conclusion, learned Addition (sic: Additional) Advocate General argued that the adherence to principles of natural justice in the facts of the present case is not required as it would be a case of deemed removal by virtue of proviso to Section 50-A(2) of the Act of 1960.

9. In order to appreciate the rival submissions, it would be apposite to reproduce relevant provisions contained in Section 48-AA, 48-B, 50-A of the Act of 1960 and Rule 45 of the Rules of 1962, which are as under:-

> **"48-AA. Disqualification for membership of Board of Directors and for representation.** - No person shall be eligible for election as a member of the Board of Directors of a society, and shall cease to hold his office as such, if he suffers from any disqualification specified in this Act or the rules made thereunder and no society shall elect any

member as its representative to the Board of Directors of any other society or to represent the society in other society, if he suffers from any disqualification specified in this Act or the rules made thereunder:

Provided that if a member suffers from any of the disqualifications specified in this Act or the rules made thereunder,-

(i) it shall be lawful for the Board of Directors of the society to disqualify such member where he is elected as a Director, being a member of that society, after giving him a reasonable opportunity of being heard, within two months from the date of coming to the notice of the society from holding the post and if the society fails to take action within two months, the Registrar shall disqualify such member from holding such post, by an order in writing after giving him reasonable opportunity of being heard.

(ii) if the member incurs a disqualification in the higher level society, for his actions as a representative, such higher level society shall take action to disqualify him for holding the post in the higher level society and if the society fails to take action within two months, the Registrar shall disqualify such member from holding such post by an order in writing after giving him reasonable opportunity of being heard.

Explanation.-For the purpose of this section, the expression "disqualification" shall not include the disqualification specified in Section 50-A for election as a member of the Board of Directors or a representative of a society"

*** *** ***

48-B. Representatives and delegates.-(1) Every Board of Directors of society shall at the time of election of Chairman or Vice-Chairman, also elect representative ho shall represent it in other society and the representative so elected shall not be withdrawn by the Board of Directors till the next election of the Board of Directors.

(2) xxx

(3) If the byelaws of a society provide for the constitution of its general body by the elections of the delegates, the society shall reserve seats in the general body for the members belonging to Scheduled Castes, Scheduled Tribes and other Backward Classes in such a manner that the number of seats so reserved for each category shall as far as possible, be in the same proportion in which members of each category, shall bear to the total membership of the society.

Provided that number of total reserved seats of the delegates shall not exceed fifty percent."

*** *** ***

"50-A. Disqualification for being candidate or voter for election to Board of Director of representative or delegate of society.-(l) No person shall be qualified to be a candidate for election as member of the Board of Directors, representative or delegate of the society, if he is in default for a period exceeding 12 months to the society or any other society for any loan or advance taken by him.

(2) A person elected to an office of a society shall cease to hold such office, if he is in default for a period exceeding 12 months to the society or any other society for any loan or advance taken by him, and the Registrar shall declare his seat vacant:

Provided that a person elected to an office of a co-operative bank from a society other than co-operative credit structure, shall cease to hold such office, if such society commits default for any loan or advance or for a period exceeding three months, and the Registrar shall declare his seat vacant.

(3) No person shall be entitled to vote any election of the Board of Directors, representative or delegate of the society, if he is in default for a period exceeding 12 months to the society or any other society for any loan or advance taken by him.

(4) No person shall be qualified to be a candidate for election as member of the board of director, representative or delegate of the society if he has any dues payable to Madhya Pradesh State Electricity Board or its successor companies, standing against his name for a period exceeding six months at the time of submission of nomination paper."

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Rule 45 of the Rules of 1962:

"Rule 45. Disqualification for representation.-(l) No society shall elect any member as its representative, who suffers from any of the disqualifications mentioned in Rule 44.

(2) A representative of a society representing it in the general body or committee of another society shall cease to hold his office as such-

(a) if he suffers from any of the disqualifications mentioned in Rule 44; or

(b) if he ceases to be a member of the society which he represents; or

(c) if elections fall due and the society, which he represents elects another representative; or

(d) if the registration of the society which he represents is cancelled under Section [18 or 18-A]; or

(e) if-

(i) xxx

(ii) the committee of the society which he represents is removed by the State Government under sub-section (1) of Section 52; or

(iii) the committee of the society which he represents has been removed under sub-section (1) of Section 53; or

(f) if the society is ordered to be wound up under Section 69.

(2A) If a representative ceases to hold office in the circumstances referred to in clause (e) of sub-rule (2), administrator appointed under the relevant provisions of the Act to manage the affairs of the society shall have the power to fill the vacancy so caused.

(3) No representative of the society shall be eligible for election as a member of the Board of Directors of a Cooperative Bank, Financial Bank,Federal Society or Apex Society and shall not hold his office as such if the society is or gets into default for a period exceeding twelve months in respect of loan or loans taken by it from such Co-operative Bank, Financial Bank, Federal Society or Apex Society or payment due for contribution and subscription of Rajya Sahakari Sangh and Zila Sahakari Sangh and of dispensing with government liabilities."

10. The order of reference made by the learned Single Judge proceeds on the assumption of conflict between two Division Bench judgments of this Court in *Brij Kumar Chanpuriya* (supra) and *Anter Singh & others* (supra). That is the basis on which the first question is formed. Therefore, first of all, what is to be seen is whether these two judgments have actually rendered conflicting opinion with regard to necessity of the adherence to the principles of natural justice before discontinuing or removing an elected Director or declaring his/her seat as vacant. The Division Bench in *Brij Kumar Chanpuriya* (supra), decided earlier in point of time, vide order dated 15.5.2017, categorically held that "an elected Director cannot be declared to vacate his office by virtue of deemed provisions without giving any opportunity of hearing. It is the basic principle of natural justice that nobody should be condemned without granting opportunity of hearing." The Division Bench in this judgment on analyzing Sections 48-AA and 50-A of the Act of 1960 also noted that in *Rajiv Kumar Jain Vs. Elected Representative, Veerendra Narain Mishra and others* 2012(2) MPHT 352, the challenge was made to the judgment of the Cooperative Tribunal and its order rejecting the application of the petitioner for his impleadment to contest the appeal. The issue in that case was with regard to election of the member of the Board of Directors of the Cooperative Bank as representative from Primary Agriculture Credit Society, Ramnagar, Tehsil Chanderi, District Ashoknagar. The petitioner and other members of the Board of Directors resigned from their post alleging some

illegalities. The petitioner submitted a complaint against the respondent No.1 (in that case) to the Cooperative Bank and alleged that the respondent No. 1 was not eligible to continue as a member of the Board of Directors as his parent Society had become defaulter of the Bank and a show cause notice was issued to the respondent No.1. Thus, admittedly, in that case, a show cause notice dated 12.1.2011 was issued to the respondent No.1 as to why he should not be disqualified to continue as Director of the respondent No.3 Bank on account of the fact that the Society of which he has been elected as a representative, had become defaulter of the Bank. The respondent No.1 did not file reply to the show cause notice before the Joint Registrar. The Joint Registrar in exercise of powers conferred by Section 50-A(2) of the Act of 1960 read with Rule 45 of the Rules of 1962 disqualified the respondent No.1 to continue as Director of the Bank and declared his seat vacant. It was against that order that an appeal was preferred before the Cooperative Tribunal. The petitioner in the aforementioned writ petition had filed an application before the Tribunal for his impleadment in the appeal. However, his application was rejected and thereafter, the Tribunal vide order dated 1.11.2011 set aside the order passed by the Joint Registrar. In those facts, this Court in *Rajiv Kumar's case* (supra), relying on the earlier judgment in *Basant Kumar* (supra), in Paras 13 and 14 of the report held as under:-

> "13. Section 50-A of the Act of 1960 prescribes disqualification for being candidate or voter for election to Board of Director or representative or delegate of society. Proviso to section 50-A(2) prescribes that a person elected to an office of a co-operative bank from a society shall cease to hold such office, if such society commits default for any loan or advance for a period exceeding three months, and the Registrar shall declare his seat vacant. The relevant provisions are as under:
>
> "(2) A person elected to an office of a society shall cease to hold such office, if he is in default for a period exceeding 12 months to the society or any other society for any loan or advance taken by him, and the Registrar shall declare his seat vacant:
>
> Provided that a person elected to an office of co-operative bank from a society other than co-operative credit structure, shall cease to hold such office, if such society commits default for any loan or advance or for a period exceeding three months, and the Registrar shall declare his seat vacant."
>
> 14. From the aforesaid proviso to section 50-A(2) of the Act of 1960, it is clear that a person elected to an office of a Co-operative bank from a society shall cease to hold such office, if such society commits default. Admittedly, in the present case, the society, from which the respondent No.1 had been elected as representative of the co-operative bank and thereafter he was elected as Board of Director of

the Bank, became defaulter. In such circumstances, the Joint Registrar has rightly declared his seat vacant. The Division Bench in the case of Basant Kumar Vs. Assistant Registrar, Co-operative Societies, Jabalpur and other, 1969 MPLJ 683= 1969 JLJ 1016 has held as under in regard to disqualification to hold a post in a society when a society disqualified to represent the other society:

> 'It was then contended that disqualification for a delegate of representative are all provided in Rule 45 and unless it can be said that the delegate or representative of the member society in the Committee of another society has himself incurred the disqualification under Rule 45, the delegate or the representative does not loss his seat in the Committee. There is no substance in this contention. A society to be a member in the Committee of management of another society must not suffer from the disqualifications mentioned in Rule 44. As a society can only function in the committee of management through some individual, the society must elect one of its members as its delegate. But Rule 45 provides that the delegate or representative so elected should also not suffer from any of the disqualifications mentioned in Rule 44. Thus, the requirements of the Rules are two fold. The member society must not suffer from any disqualifications mentioned in Rule 44 and the delegate elected by it to represent it should also not suffer from any of the disqualifications. The delegate however, has no independent existence. He only represent the society which is the real member in the committee and if the society ceases to be a member of the committee because of a disqualification incurred by it, the delegate will automatically ceased to be delegate although he may not have himself incurred any disqualification under Rule 45.'"

But the argument that the principles of natural justice was not followed as no notice was issued by the Joint Registrar to the Cooperative Society and the respondent No.3, was categorically negatived by this Court in para 18 of the judgment observing that not only notice was issued by the Joint Registrar to the respondent No.3 himself but the matter was listed by the Joint Registrar on four consecutive dates and no one had appeared on behalf of the Bank/the Society. The Court therefore concluded that sufficient opportunity was given to them and on that basis reversed the order of the Tribunal.

11. Another Division Bench judgment in question is that of *Anter Singh and others* (supra). In that case, a writ petition was filed by Anter Singh and others,

being aggrieved by the order dated 21.2.2019 passed by the Joint Registrar, Cooperative Societies under Section 50-A(2) of the Act of 1960, whereby they were declared ineligible to hold the post of Director of Indore Premiere Cooperative Bank Limited, Indore, on the ground that primary society of which they (appellants in that case) were elected as representative/delegate, had committed default for more than 12 months and in their place appointed an administrator under Section 53(12) of the Act of 1960. In appeal, the Division Bench merely affirmed the judgment of the Single Bench. What is significant to notice in regard to applicability of principles of natural justice, with which we are concerned in the present case, is that the learned Single Bench relying on the earlier Single Bench judgment in *District Co-operative Agricultural and Rural Development Bank Vs. State of M.P. & others* 2015 RN 135, the Court in para 11 of the report held as under:-

> "So far as the applicability of principle of natural justice is concerned, the petitioners themselves have admitted in para 5.7 of the writ petition that the Societies have committed the default...."

It was further observed by the Single Bench in *Anter Singh* (supra) that "in the case of *District Co-operative Agricultural and Rural Development Bank,* this Court entertained the writ petition filed by the District Co-operative Bank itself, not by individual Directors challenging the order of supersession. The writ Court distinguished the order passed by the Division Bench in case of *Rajiv Kumar* (supra) only on the ground that the petitioners have disputed that they are not defaulters and did not suffer any disqualification." Moreover, in *Anter Singh* (supra), the writ petition was dismissed by the learned Single Bench of this Court on recording satisfaction that there are no disputed questions of fact. The petitioners have suffered removal from the post of Directors as a consequential action because their society has been declared defaulter. The Single Bench in that regard recorded the following finding:-

> "In this case, there is no disputed question of facts. The petitioners have suffered removal from the post of directors as a consequential action because their society has been declared defaulter, which is a requirement of law, therefore, in view of the law laid down in the case of ***Dharampal Satyapal Limited*** (supra) whether opportunity of hearing will serve the purpose or not, this has to be considered by the Court whether any prejudice is going to be caused against him if any action is taken. In view of above discussion, it is for the society to challenge the order of Joint Registrar and if the society succeeds and a tag of defaulter is removed, then only the petitioners are entitled for any relief."

12. The above Single Bench judgment dated 26.3.2019 passed in Writ Petition No.5033/2019- *Anter Singh and others Vs. State of M.P. and others* was

upheld by the Division Bench in Writ Appeal No.551/2019 vide judgment dated 17.5.2019 which also took note of the fact that the writ petitioners in *Anter Singh and others* (supra) themselves admitted in para 5.7 of the writ petition that the Societies have committed default, which was also the position in *Rajiv Kumar Jain's case* (supra) wherein there was no dispute that the petitioners suffered removal from the post of members of the Board of Directors as a consequence of their Society being declared as defaulter. In those facts, it was held by the Division Bench as under:-

> "15. Even otherwise in the present case it is not in dispute that society had committed default therefore by virtue of proviso to Section 50-A(2) the member elected from the society had 'ceases to hold such office' on committing default by the society hence they cannot find fault in the effect of operation of provision on the ground of non compliance of principles of natural justice, as in such a case giving an opportunity of hearing is nothing more then a mere formality."

13. Having referred to the Supreme Court judgment in *Dharampal Satyapal Limited* (supra), the Division Bench in *Anter Singh and others* (supra) observed that the principles of natural justice are very flexible and they cannot be applied in a straitjacket formula and there may be situation wherein for some reason it is felt that a fair hearing 'would make no difference'- meaning that a hearing would not change the ultimate conclusion reached by the decision maker, then no legal duty to supply a hearing arises. The Division Bench then relying on the judgment of the Supreme Court in *Maharaja Jiwajirao Education Society Vs. State of M.P. and others* 2006 (4) MPLJ 403, further held that "question of violation of natural justice" has to be judged on the principle of prejudice caused. But then in para 15 of the judgment, the Division Bench also held that it is not in dispute that society had committed default, therefore, by virtue of proviso to Section 50-A(2), the member elected from the Society 'ceases to hold such office' on committing default by the Society. Obviously, the observations made in *Anter Singh and others* (supra) in para 13 and 14 were obiter and not the ratio of the judgment because it was clearly noted both by the Single Bench and the Division Bench in *Anter Singh and others* (supra) that the petitioners in para 5.7 of the writ petition themselves admitted that their Society had committed default.

14. Analysis of the two Division Bench judgments which formed the basis of reference thus clearly shows that insofar as the first question referred for answer by the learned Single Judge is concerned, there is no apparent conflict between the Division Bench judgment in *Brij Kumar Chanpuriya* (supra) and another Division Bench judgment in *Anter Singh and others* (supra). Infact, none of these judgments has questioned correctness of *Rajiv Kumar Jain* (supra).

15. Question No.1 is answered accordingly. Even then, we shall for the purpose of giving quietus to the matter proceed to examine and answer the other two questions.

16. Adverting now to the second question referred to us whether the provisions of Section 48-AA and Section 50-A of the Act of 1960 operates in a different sphere i.e. pre and post election of the Director, we must begin observing that mere fact that the legislature in Section 48-AA of the Act of 1960 having specifically provided for giving reasonable opportunity of hearing to the members, who are sought to be disqualified from the office, has not done so in the proviso to section 50-A(2), would not mean that the legislature expressly intended to exclude the applicability of principles of natural justice.

17. Section 48-AA of the Act of 1960 provides that no person shall be eligible for election as a member of the Board of Directors of a Society, and shall cease to hold his office as such, if he suffers from such disqualification specified in this Act or the rules made thereunder and no Society shall elect any member as its representative to the Board of Directors of any other Society or to represent the Society in other Society, if he suffers from such disqualification as may be specified in this Act or the rules made thereunder. This provision shall apply in both situations i.e. at the time of election (i.e. pre-election stage) or if any person is disqualified after election (i.e. post-election stage). Sub-section (1) of section 50-A which provides that no person shall be qualified to be a candidate for election as member of the Board of Directors, representative or delegate of the Society if he is in default for a period exceeding 12 months to the Society or any other Society for any loan or advance taken by him, shall apply at the stage of election. However, the proviso to sub-section (2) of Section 50-A would apply to post-election stage wherein a person holding office of the Director of the Cooperative Bank on account of the default of his parent Society for a period exceeding 12 months, is sought to be unseated. This is because the proviso to sub-section (2) of section 50-A stipulates that an elected person shall cease to hold the office, if such Society commits default for any loan or advance, for a period exceeding twelve months. But sub-section (3) of Section 50-A, which envisages a situation where representative/delegate of the Society is debarred from voting, if he is in default for a period exceeding 12 months to the Society or any other Society for any loan or advance taken by him, is however applicable to pre-election stage.

18. In view of above discussion, it must be held that the aim of principles of natural justice is not only to secure justice but also to prevent miscarriage of justice. The observance of such principles of natural justice checks arbitrary exercise of power by the State and its functionaries. Unless a statutory provision, either specifically or by necessary implication, excludes the application of principles of natural justice, the requirement of providing reasonable opportunity

of hearing before an order having civil consequence is passed against someone, has to be read into the provisions of a statute, be it an administrative or quasi-judicial order. Law is well settled that if a statute is silent and statutory provision does not specifically provide giving opportunity of hearing, there could be nothing wrong in spelling out therein the need to hear the parties whose interest is likely to be affected by the order that may be passed, and making it a requirement to follow a fair procedure before taking a decision, unless the statute provides otherwise. It is trite that silence of the statutory provision with regard to the principles of natural justice is also taken in support of its compliance, if the person is likely to be adversely affected by an order passed under such provision. Even if, therefore, unlike Section 48- AA, Section 50-A of the Act of 1960 does not specifically envisage for giving reasonable opportunity of being heard to the person, who is sought to be disqualified, to continue as member of the Board of Directors, adherence to principles of natural justice must be read into the statue (sic: statute) as there is no clear mandate to the contrary. Analytical examination of both Section 48-AA and Section 50-A of the Act of 1960 would thus show that these two provisions operate in different spheres and stage of their applicability would depend upon fact situation of a given case. The second question is answered accordingly.

19. Coming now to the third question that whether Section 50-A of the Act of 1960 is a deeming provision for holding a Director of a Society as disqualified, an opportunity of hearing is still required to be given, we should at the outset deal with the argument that if it is not disputed that the parent society, of which the petitioners are representatives and in that capacity, elected as members of the Board of Director, is in default, providing opportunity of hearing to them would be an useless formality, cannot be countenanced for the reasons to be stated presently. It needs no emphasis to state that question that the Society is in default for consecutive period of 12 months in term of Rule 45(3) of the Rules of 1962 is essentially a question of fact. Therefore, the scope of the opportunity of hearing to be given to such representative/delegate of the Society, who is sought to be unseated from the office of member of the Board of Director, would be to call upon him to prove to the contrary that the Society in question is not actually in default. There may be variety of situations like the Society having paid its dues but relevant entries are not made in the account books of the concerned Cooperative Bank or there may be mismatch in the record maintained by them or there can be a possibility of negligent or even deliberate omission in the record by the officials/accountants of a given Society. In such a scenario, a limited opportunity would be required to be given to the affected persons, which need not be elaborate. The notice to the petitioners/representatives/delegates of the parent Society may only briefly contain the factum that the society is in default for consecutive 12 months, giving opportunity to them to prove otherwise and show that the Society

is not actually in default and has already cleared its dues. Howsoever limited may be the scope of opportunity of hearing but it cannot be held that the principles of natural justice at this stage should be given a complete go by because discontinuation/removal of representative/delegate of the parent Society or declaring his/her seat of the office of the Member of the Board of Directors vacant, would certainly have civil consequences for him. What would be "civil consequence" has been deliberated in *Mohinder Singh Gill & Anr. Vs. The Chief Election Commissioner, New Delhi & others* (1978) 1 SCC 405, by his Lordship Krishna Iyer J. in his inimitable style, observed while speaking for the majority thus:-

> "66" .....Civil Consequences' undoubtedly cover infraction of not merely property or personal rights but of civil liberties, material deprivations and non-pecuniary damages. *In its comprehensive connotation, everything that affects a citizen in his civil life inflicts a civil consequence.*"
>
> (emphasis supplied)

20. The Supreme Court in *Sahara India (Firm), Lucknow Vs. Commissioner of Income Tax and another* (2008) 14 SCC 151 relying on its earlier judgment in *State of Orissa Vs. Dr.(Miss) Binapani Dei & others* AIR 1967 SC 1269, held that the distinction between quasi-judicial and administrative orders was perceptively mitigated and even an administrative order or decision in matters involving civil consequences, has to be made in consonance with the principles of natural justice. Since then the concept of natural justice has made great strides and is invariably read into administrative actions involving civil consequences, unless the statute, conferring power, excludes its application by express language. The Supreme Court in *Canara Bank Vs. V.K.Awasthy* (2005) 6 SCC 321 extensively discussed the concept, scope, history of development and significance of principles of natural justice and observed that the principles of natural justice are those rules which have been laid down by the Courts as being the minimum protection of the rights of the individual against the arbitrary procedure that may be adopted by a judicial, quasi- judicial and administrative authority while making an order affecting those rights. In para 14, the Supreme Court has held as under:-

> "14. Concept of natural justice has undergone a great deal of change in recent years. Rules of natural justice are not rules embodied always expressly in a statute or in rules framed thereunder. They may be implied from the nature of the duty to be performed under a statute. What particular rule of natural justice should be implied and what its context should be in a given case must depend to a great extent on the fact and circumstances of that case, the frame- work of the statute under which the enquiry is held. The old distinction between a judicial act and an administrative act has withered away. Even an administrative order

> which involves civil consequences must be consistent with the rules of natural justice. Expression 'civil consequences' encompasses infraction of not merely property or personal rights but of civil liberties, material deprivations and non- pecuniary damages. In its wide umbrella comes everything that affects a citizen in his civil life.

21. The Constitution Bench of the Supreme Court in *Olga Tellis Vs. Bombay Municipal Corporation* (1985) 3 SCC 545 while interpreting Section 314 of the Bombay Municipal Corporation Act, 1888, which confers discretion on the Municipal Commissioner to get any encroachment removed, with or without notice, observed as follows:

> "45. It must further be presumed that, while vesting in the Commissioner the power to act without notice, the Legislature intended that the power should be exercised sparingly and in cases of urgency which brook no delay. In all other cases, no departure from the audi alteram partem rule ('Hear the other side') could be presumed to have been intended. Section 314 is so designed as to exclude the principles of natural justice by way of exemption and not as a general rule. There are situations which demand the exclusion of the rules of natural justice by reason of diverse factors like time, place the apprehended danger and so on. The ordinary rule which regulates all procedure is that persons who are likely to be affected by the proposed action must be afforded an opportunity of being heard as to why that action should not be taken. The hearing may be given individually or collectively, depending upon the facts of each situation. A departure from this fundamental rule of natural justice may be presumed to have been intended by the Legislature only in circumstances which warrant it. Such circumstances must be shown to exist, when so required, the burden being upon those who affirm their existence.

22. Subsequently, the Supreme Court in *C.B.Gautam Vs. Union of India* (1993) 1 SCC 78 while dealing with the question as to whether in the absence of a provision for giving the concerned parties an opportunity of being heard before an order is passed invoking section 269-UD of the Income Tax Act, for peremptory purchase of immovable property by the Central Government, an opportunity of hearing is required to be given or not, held as under:-

> ."30. .....Although Chapter XX-C does not contain any express provision for the affected parties being given an opportunity to be heard before an order for purchase is made under Section 269-UD, not to read the requirement of such an opportunity would be to give too literal and strict an interpretation to the provisions of Chapter XX-C and in the words of Judge Learned Hand of the United States of America "to make a fortress out of the dictionary."

> Again, there is no express provision in Chapter XX-C barring the giving of a show cause notice or reasonable opportunity to show cause nor is there anything in the language of Chapter XX-C which could lead to such an implication. The observance of principles of natural justice is the pragmatic requirement of fair play in action. In our view, therefore, the requirement of an opportunity to show cause being given before an order for purchase by the Central Government is made by an appropriate authority under Section 269-UD must be read into the provisions of Chapter XX-C. There is nothing in the language of Section 269- UD or any other provision in the said Chapter which would negate such an opportunity being given. Moreover, if such a requirement were not read into the provisions of the said Chapter, they would be seriously open to challenge on the ground of violations of the provisions of Article 14 on the ground of non-compliance with principles of natural justice. The provision that when an order for purchase is made under Section 269- UD-reasons must be recorded in writing is no substitute for a provision requiring a reasonable opportunity of being heard before such an order is made."

23. The Supreme Court in *Rajesh Kumar and others Vs. Dy. CIT and others* (2007) 2 SCC181 was dealing with the question that if the Assessing Officer directing special audit as under Section 142(2A) of the Income Tax Act by formulating the opinion, even if with the previous approval of the Chief Commissioner to audit of the account, was required to afford an opportunity of hearing to the assessee, relying on many previous judgments including one of *Dr.(Miss) Binapani Dei* (supra), in paras 60 and 61 of the report held as under:-

> "60. Whereas the order of assessment can be the subject-matter of an appeal, a direction issued under Section 142(2-A) of the Act is not. No internal remedy is prescribed. Judicial review cannot be said to be an appropriate remedy in this behalf. The appellate power under the Act does not contain any provision like Section 105 of the Code of Civil Procedure. The power of judicial review is limited. It is discretionary. The Court may not interfere with a statutory power. (See for example Jhunjhunwala Vanaspati Ltd. V. CIT (2004) 266 ITR 657 (All), see, however, U.P. State Handloom Corpn. Ltd. V. CIT (1988) 171 ITR 640 (All).
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> 61. The hearing given, however, need not be elaborate. The notice issued may only contain briefly the issues which the assessing officer thinks to be necessary. The reasons assigned therefor need not be detailed ones. But, that would not mean that the principles of justice are not required to be complied with. Only because certain consequences would ensue if the principles of natural justice are required to be complied with, the same by itself would not mean that the court would not insist on complying with the fundamental

> principles of law. If the principles of natural justice are to be excluded, Parliament could have said so expressly. The hearing given is only in terms of Section 142(3) which is limited only to the findings of the special auditor. The order of assessment would be based upon the findings of the special auditor subject of course to its acceptance by the assessing officer. Even at that stage the assessee cannot put forward a case that power under Section 142(2-A) of the Act had wrongly been exercised and he has unnecessarily been saddled with a heavy expenditure. An appeal against the order of assessment, as noticed hereinbefore, would not serve any real purpose as the Appellate Authority would not go into such a question since the direction issued under Section 142(2-A) of the Act is not an appellate order."

24. In Supreme Court judgment of *Swadeshi Cotton Mills Vs. Union of India* (1981) 1 SCC 664, His Lordship Chinnappa Reddy, J. in his dissenting judgment, summarized the legal position in the following terms:-

> "106. The principles of natural justice have taken deep root in the judicial conscience of our people, nurtured by Binapani (supra), Kraipak (A.K.Kraipak V Union of India [(1969) 2 SCC 262], Mohinder Singh Gill [(1978) 1 SCC 405], Maneka Gandhi [Maneka Gandhi v. Union of India (1978) 1 SCC 248]. They are now considered so fundamental as to be 'implicit in the concept of ordered liberty' and, therefore, implicit in every decision-making function, call it judicial, quasi-judicial or administrative. Where authority functions under a statute and the statute provides for the observance of the principles of natural justice in a particular manner, natural justice will have to be observed in that manner and in no other. No wider right than that provided by statute can be claimed nor can the right be narrowed. Where the statute is silent about the observance of the principles of natural justice, such statutory silence is taken to imply compliance with the principles of natural justice. The implication of natural justice being presumptive it may be excluded by express words of statute or by necessary intendment. Where the conflict is between the public interest and the private interest, the presumption must necessarily be weak and may, therefore, be readily displaced."

25. In *State of Orissa Vs. Dr. (Miss) Binapani Dei and others* (supra), the Supreme Court while holding that even administrative order which involves civil consequence has to be passed in consonance with the principles of natural justice, observed as under:-

> "12. It is true that some preliminary enquiry was made by Dr. S.Mitra. But the report of that Enquiry Officer was never disclosed to the first respondent. Thereafter the first respondent was required to show cause why April 16, 1907, should not be accepted

> as the date of birth and without recording any evidence the order was passed. We think that such an enquiry and decision were contrary to the basic concept of justice and cannot have any value. It is true that the order is administrative in character, but even an administrative order which involves civil consequences, as already stated, must be made consistently with the rules of natural justice after informing the first respondent of the case of the State, the evidence in support thereof and after giving an opportunity to the first respondent of being heard and meeting or explaining the evidence. No such steps were admittedly taken, the High Court was in our judgment, right in setting aside the order of the State."

26. Reiterating the law laid down in *Dr.(Miss) Binapani's* case (supra), the Constitution Bench of the Supreme Court in *A.K.Kraipak and others Vs. Union of India and others* (1969) 2 SCC 262 held as under:-

> "13. The dividing line between an administrative power and a quasi judicial power is quite thin and is being gradually obliterated. For determining whether a power is an administrative power or a quasi- judicial power one has to look to the nature of the power conferred, the person or persons on whom it is conferred, the framework of the law conferring that power, the consequences ensuing from the exercise of that power and the manner in which that power is expected to be exercised. Under our Constitution the rule of law pervades over the entire field of administration. Every organ of the State under our Constitution is regulated and controlled by the rule of law. In a welfare State like ours it is inevitable that the jurisdiction of the administrative bodies is increasing at a rapid rate. The concept of rule of law would lose its vitality if the instrumentalities of the State are not charged with the duty of discharging their functions in a fair and just manner. The requirement of acting judicially in essence is nothing but a requirement to act justly and fairly and not arbitrarily or capriciously. The procedures which are considered inherent in the exercise of a judicial power are merely those which facilitate if no ensure a just and fair decision....."

27. Judgment cited by the learned Additional Advocate General in *State of Punjab Vs. Tehal Singh & others* (supra) has no application to the facts of the present case because in that case, the question was whether the State Government was required to provide opportunity of hearing to the affected persons while issuing notice regarding establishment of Gram Sabha areas and constitution of Gram Sabhas. It was held that power of the State Government under Section 3 and 4 of the Punjab Panchayati Raj Act, 1994, is legislative in character and the principles of natural justice need not be observed by the State Government in the absence of clear provisions stipulating such observance. The impugned order in

the present case cannot be described legislative in character and therefore, aforesaid judgment does not in any manner help the case of the respondent/State.

28. On the question of applicability of principles of natural justice for declaring the office of the elected Director in the capacity of delegate of the different societies, we agree with the view expressed by this Court in *Registered District Co-operative Agricultural* (supra) in para 14, which reads as under:-

> "14. If in the light of aforesaid principle, Sections 48-AA and 50-A are examined, it will be clear that Section 50-A only provides that if a person elected to an office of a society is in default of payment of loan or advance for more than twelve months to the society, he shall cease to hold such office. The Registrar is empowered under sub-section (2) of section 50-A to declare his post vacant. However, no methodology is prescribed in section 50-A. In other words, section 50-A is silent regarding the applicability of principle of natural justice. This point need not detain this Court for a longer time. This is settled in law that "Even if a statute is silent and there are no positive words in the Act or the Rules made thereunder, there could be nothing wrong in spelling out the need to hear the parties and interest are likely to be affected by the orders that may be passed, and making it a requirement to follow a fair procedure before taking a decision, unless the statute provides otherwise. The principles of natural justice must be read into unoccupied interstices of the statue, unless there is a clear mandate to the contrary. Where the statute is silent about the observance of the principles of natural justice, such statutory silence is taken to imply compliance with the principles of natural justice where substantial rights of parties are considerably affected. The application of natural justice becomes presumptive, unless found excluded by express words to statute or necessary intendment. Its aim is to secure justice or to prevent miscarriage of justice. Principles of natural justice do not supplant the law, but supplement it." [See, *Swadeshi Cotton Mills vs. Union of India (1981) 1 SCC 664].* This view is consistently followed by the Courts. In *(1994) 4 SCC 328 (Dr. Umrao Singh Chaudhary vs. State of MP),* the Apex Court took the same view. In the light of this legal position, in my opinion, the principles of natural justice are implicit and are required to be read into Section 50-A of the Act. Section 48-AA also deals with the same subject matter, which relates with disqualification of membership of Board of Directors and representatives of the candidates. Undoubtedly, Section 48-AA was inserted later on. Section 48-AA (1) makes it clear that the Legislature intended to provide reasonable opportunity of hearing to the person concerned. This section makes it clear that if a member suffers from any of disqualifications specified in the Act or Rules, it is the duty of the Board of Directors of the society to disqualify such member. However, proviso makes it clear that this can be done after giving him a reasonable opportunity of being heard. If the society fails to take action within two

> months, the power is vested with the Registrar to disqualify such member by passing an order in writing after giving him reasonable opportunity of being heard. Thus, the principles of natural justice are embodied in Section 48-AA."

29. In *Bhawani Vipanan Sahkari Sanstha* (supra), the Division Bench of Gwalior Bench approvingly quoting the aforesaid observations from *Registered District Co-operative Agricultural* (supra) categorically held as under:-

> "5. In view of above, it is evident that before taking any action in Sec.50-A, the principles of natural justice (audi alteram partem) are required to be followed."

30. Here we note with approval the views expressed by this Court in *Registered District Co-operative Agricultural* (supra) while repelling the argument that since Section 48-AA of the Act of 1960 was inserted in the Act later in point of time on 4.1.2010 whereas Section 50-A was inserted by way of the amendment in the Act with effect from 13.12.2007, therefore, Section 48-AA being a later provision, dealing with the same aspect as contained in Section 50-A, should be treated to have been impliedly repealed. This would be evident from the following excerpts of the judgment:-

> "13. It is argued by the petitioners that section 48-AA is a later provision dealing with the same aspect and, therefore, earlier provision (Section 50-A) must be treated as impliedly repealed. This is settled in law that there is a presumption against a repeal by implication and the reason of this rule is based on the theory that the Legislature while enacting a provision has complete knowledge of existing provision on the same subject matter, and therefore, when it does not provide a repealing provision, it gives out an intention not to repeal the existing legislation. [See, *AIR 1963 SC 1561 (Municipal Council, Palai vs. P.J.Joseph)* and *(2003) 7 SCC 389 (State of MP vs. Kedia Leather and Liquor Ltd.)].* This presumption can be rebutted and repeal can be inferred by necessary implication when the later provision is so inconsistent with or repugnant to the earlier provision that "two cannot stand together". [See, *AIR 1963 SC 1561 (Municipal Council, Palai vs. P.J.Joseph)* and *(1997) 1 SCC 450 (Cantonment Board, Mhow* vs. *M.P.State Road Transport Corporation)*. Justice G.P.Singh in Principles of Statutory Interpretation (12th Edition), page 681, opined as under :-
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> > *'The general principle that there is a strong presumption against implied repeal recently came up for consideration before the High Court of Australia in Shergold Vs. Tanner reported in (2002) 76 ALJR 808. In a joint judgment the court GLEESON, C.J. McHUGH, GUMMOW, KIRBY and Hayane JJ.) quoted with approval the following observations of*

> *GAUDRON J. in Saraswati Vs. the Queen reported in (1991) 172 CLR1 "it is a basic rule of construction that in the absence of express words, an earlier statutory provision is not repealed, altered or derogated from by a later provision unless an intention to that effect is necessarily to be implied. There must be very strong grounds to support that implication, for there is a general presumption that the legislature intended that both provisions should operate and that, to the extent that they would otherwise overlap, one should be read as subject to the other'. "*
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> *(Emphasis Supplied)*

31. The Division Bench in *Brij Kumar Chanpuriya* (supra) has relied on the earlier Division Bench judgment of this Court in *Rajiv Kumar Jain* (supra) to hold that the office of the elected Director cannot be declared vacant by virtue of deemed provision in proviso to sub-section (2) of Section 50-A of the Act of 1960 without giving opportunity of hearing. This would be evident from following excerpt of *Brij Kumar Chanpuriya* (supra):

> "That apart, an elected Director cannot be declared to vacate his office by virtue of deemed provisions without giving any opportunity of hearing. It is against the basic principles of natural justice that nobody should be condemned without granting opportunity of hearing"

32. Question No.3 as to whether Section 50-A of the Act of 1960 is a deeming provision for holding Director of the Society as disqualified or an opportunity of hearing is still required to be given as held by this Court in *Brij Kumar Chanpuriya* (supra) is thus answered in the terms that there cannot be an automatic removal/disqualification of a Director or member of Board of Directors. Since, Section 50-A of the Act of 1960 cannot be held to be a deemed provision, there cannot be deemed vacation of his seat in the office of the Board of Directors. The competent authority after due application of mind would in any case be required to give opportunity of hearing to the member of the Board of Directors, apply its mind and then pass a specific order for removing/unseating him from such office. The question No.3 is accordingly answered.

In view of our answers to all the questions referred, let the matters be now placed before the regular Bench in accordance with the Roster for final disposal.

Order accordingly

I.L.R. [2021] M.P. 878 (DB)
WRIT PETITION

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

WP No. 16878/2020 (Indore) decided on 22 February, 2021

KRSNAA DIAGNOSTICS PVT. LTD. …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

***A. Constitution – Article 226 – Scrapping of Tender* – Held – Introduction of revised tender clauses by R-2 which are in variance with existing tender clause issued by R-3 has made the entire process vulnerable – Decision to scrap the entire tender/contract cannot be said to be arbitrary, unreasonable or against public interest – Petition dismissed. (Paras 25 to 29)**

क. संविधान – अनुच्छेद 226 – निविदा खत्म करना – अभिनिर्धारित – प्रत्यर्थी क्र. 2 द्वारा पुनरीक्षित निविदा खंडों का प्रवेश, जो कि प्रत्यर्थी क्र. 3 द्वारा जारी विद्यमान निविदा खंड से भिन्नता रखते हैं, ने संपूर्ण प्रक्रिया को भेद्य बना दिया है – संपूर्ण निविदा/संविदा को खत्म करने के विनिश्चय को मनमाना, अयुक्तियुक्त अथवा लोक हित के विरूद्ध नहीं कहा जा सकता है – याचिका खारिज।

***B. Constitution – Article 226 – Tender – Judicial Review – Scope & Jurisdiction* – Held – In Contractual matter, judicial review is permissible on aspect of arbitrariness, unreasonableness and on the touchstone of Wednesbury principle – Public interest is also essential element to be looked into while exercising power of judicial review. (Para 28)**

ख. संविधान – अनुच्छेद 226 – निविदा – न्यायिक पुनर्विलोकन – व्याप्ति व अधिकारिता – अभिनिर्धारित – संविदात्मक मामले में, मनमानेपन, अयुक्तियुक्तता के पहलू पर तथा वेडनसबरी सिद्धांत की कसौटी पर न्यायिक पुनर्विलोकन अनुज्ञेय है – लोक हित भी आवश्यक तत्व है जिस पर न्यायिक पुनर्विलोकन की शक्ति का प्रयोग करते समय विचार किया जाना चाहिए।

***C. Constitution – Article 226 – Tender Clauses – Judicial Review – Scope* – Held – Although clause 17 provides that no reasons are required to be given for invoking the said clause, it does not mean that without any reason or justifiable reasons, powers under clause 17 can be invoked – Clause 17 does not insulate the process and impugned order from judicial review. (Para 20)**

ग. संविधान – अनुच्छेद 226 – निविदा खंड – न्यायिक पुनर्विलोकन – व्याप्ति – अभिनिर्धारित – यद्यपि खंड 17 यह उपबंधित करता है कि कथित खंड का अवलंब लेने हेतु कोई कारण देने की आवश्यकता नहीं है, इसका यह अर्थ नहीं है कि बिना किसी कारण या न्यायसंगत कारणों के, खंड 17 के अंतर्गत शक्तियों का अवलंब लिया जा सकता है – खंड 17, प्रक्रिया तथा आक्षेपित आदेश को न्यायिक पुनर्विलोकन से पृथक नहीं करता।

***D. Tender – Alterations of Conditions – Competent Authority* – Held – If NIT issued by R-3, its conditions can be altered by R-3 only – Consultancy Agency (R-2) was neither justified nor competent in revising tender clauses. (Para 26)**

घ. निविदा – शर्तों का परिवर्तन – सक्षम प्राधिकारी – अभिनिर्धारित – यदि प्रत्यर्थी क्र. 3 द्वारा निविदा आमंत्रण सूचना (एन.आई.टी.) जारी की गई है, तो उसकी शर्तें केवल प्रत्यर्थी क्र. 3 द्वारा ही परिवर्तित की जा सकती हैं – सलाहकारी एजेंसी (प्र.क्र. 2) निविदा खंडों को पुनरीक्षित करने में न तो न्यायोचित थी, न ही सक्षम थी।

Cases referred :

(2001) 2 SCC 451, (1979) 3 SCC 489, (1993) 1 SCC 71, (1993) 1 SCC 445, (1999) 1 SCC 492, (2011) 5 SCC 103, (2014) 3 SCC 760, (1994) 6 SCC 651, (2015) 15 SCC 137, (1979) 1 SCC 489, (1997) 1 SCC 53, (2012) 5 SCC 443, (2013) 5 SCC 252, (1993) 1 SCC 44, (2005) 6 SCC 138, (2012) 8 SCC 216, (2016) 14 SCC 172, (2000) 2 SCC 617, (2007) 14 SCC 517, (2007) 8 SCC 1, (2014) 3 SCC 493, (2014) 11 SCC 288.

Piyush Mathur with *Manu Maheshwari*, for the petitioner.
Vivek Dalal, A.A.G. with *Kirti Patwardhan,* P.L. for the respondent/State.
Prasanna Prasad, for the respondent No. 2.

O R D E R

The Order of the Court was passed by :

SUJOY PAUL, J. :- The petitioner, a private limited company registered under the Companies Act, 1956 has filed this petition under Article 226 of the Constitution to assail the letter dated 7/10/2020 (Annexure P/9) whereby it was intimated that the tender is scrapped and the bank guarantees furnished by him were returned. It is further prayed that respondents be directed to proceed further in the NIT and execute the agreement with the petitioner by issuing letter of acceptance for Cluster (II), (III) and (IV). By amending the petition, new NIT is also called in question.

2. Draped in brevity, the admitted facts between the parties are that respondent No.3 floated an NIT dated 10/12/2019 for setting up, operating, managing and maintenance of computerized tomography - CT and MRI diagonostic facility at six government medical colleges namely Datia, Khandwa, Ratlam, Vidisha, Shahdol and Shivpuri with four more colleges namely Rewa, Sagar, Indore and Jabalpur. The aforesaid 10 colleges were divided in four different clusters. The NIT issued by the respondent No.3 (Director, Medical Education) is Annexure P/3.

3. Respondent No.2 issued amendment dated 7/1/2020 in the aforesaid NIT and amended last date of submission of bid closing date, time etc. Thereafter

another amendment was issued by respondent No.2 on 20/1/2020 (Annexure P/4) whereby last date of submission of online bid was changed and it was made clear that "the bidder who quotes minimum percentage on prevailing CGHS list of Bhopal Circle will be awarded the project".

4. The petitioner submitted the bid on 3/2/2020. The Committee appointed by the department opened the technical bid of all the bidders and found petitioner's bid as responsive and accordingly approved the same, through the e-portal. The consequential message was conveyed to petitioner through an e-mail dated 10/5/2020 by stating that financial bid will be opened on 11th May, 2020. The Committee later-on opened financial bids of petitioner and other bidders and after due evaluation of technical and financial bid for all clusters, the petitioner came out as offering minimum percentage (highest discount) on prevailing Bhopal CGHS rates as per Clause 16 as amended, for Cluster II, III and IV of the NIT. The tender summary report for all clusters was prepared. The petitioner came out as L-1 in Cluster II, III and IV. The petitioner placed reliance on tender summary report (Annexure P/6) (collectively) of all clusters in support of his submission that petitioner offered minimum discount to the respondents in accordance with provisions of amended NIT.

5. The stand of petitioner is that he did not receive any letter of acceptance and, therefore, after waiting for some time preferred representations dated 22/5/2020, 17/6/2020, 8/7/2020 for issuance of letter of acceptance which are collectively marked as Annexure P/7. These letters were followed by yet another representation dated 12/10/2020 (Annexure P/8).

6. Shri Piyush Mathur, learned Sr.Counsel assisted by Shri Manu Maheshwari, learned counsel submits that impugned order dated 7/10/2020 (Annexure P/9) issued by respondent No.2 came as a bolt from blue to the petitioner whereby it was informed that tender has been scrapped and accordingly BGs are returned herewith. Learned Sr.Counsel submits that the decision to scrap the NIT is wholly arbitrary, unjust, unreasonable and unconstitutional. The decision runs contrary to settled legal position. The principles of legitimate expectation were grossly violated. The cancellation process of NIT is pregnant with serious procedural improprieties. The decision to cancel the tender is against public interest which should be paramount consideration in a matter of this nature. The reason of cancellation spelled out in order dated 27/6/2020 (Annexure R-2/3) are bad in law.

7. To elaborate, learned Sr. Counsel for petitioner contends that if any bidder had any doubt about the conditions of the original NIT, that stood clarified in view of clarification No.2 (Annexure P/4) issued by respondent No.2. Clause 5 and 6 of this clarification leaves no room for any doubt for anybody. In other words, bid evaluation criteria is made explicitly clear which admits of no doubt. The bidders knowing fully well about the conditions submitted their bid with eyes open and,

therefore, it was no more open for an unsuccessful bidder to take a different stand at a later point of time. To everybody's surprise, one bidder namely Sanya Hospital and Diagnostics Pvt. Ltd preferred a representation to respondent No.3 on 12/5/2020 (Annexure R-2/2) and stated as under:-

> "We would like to clarify that we have quoted for discount rate of CGHS as given above, therefore, we would be charging as 100-28=72% of the BGHS rates to the patient. We have inadvertently quoted for the above discount rates only and therefore threat the final rate for patient, which is 100% minus the discount rate offered."
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> **(emphasis supplied)**

8. It is submitted that on the strength of this communication the DME issued the letter dated 27/6/2020 and termed the process as irregular and decided to decline the bids with further direction to proceed as per conditions of NIT and Rules.

9. Further more, heavy reliance is placed on document dated 28th May, 2020 written by respondent No.2 to respondent No.3 wherein summary of price bids is reproduced and it was made clear that the NIT was issued keeping into account "emergency requirement of services". Since the services were "emergency" in nature it goes without saying that an element of public interest was involved in the NIT. The learned Sr.Counsel placed reliance on following portion of this document:-

"The summary of the price bids as opened on 11.05.2020 are as below:-

S. No.	Cluster	Colleges Name	Name of the bidders (M/s)	Percentage of CGHS Rate quoted		Ranking and remarks
				Jabalpur	Vidisha	
1	Cluster-1	Jabalpur, Vidhisha	Sanya GIC Imaging Pvt. Ltd	23	23	Clarification lettes received from Sanya GIC Imaging Pvt. Ltd and Sanya Hospital and Diagnostics Pvt. Ltd post price bid opening is attached for reference.
			Sanya Hospital and Diagnostics Pvt. Ltd	28	28	
			Krsnaa Diagnostics Pvt. Ltd	76.96	76.96	
			Add Annex Health Care Pvt. Ltd	84.61	92.17	

				Indore	Khandwa	Ratlam	
2	Cluster-2	Indore (Super Specialty), Khandwa, Ratlam	Krsnaa Diagnostics Pvt. Ltd.	76.96	76.96	76.96	Single bid (L1 for all colleges in Cluster 2)
				Sagar	Datia	Shiv-puri	
3	Cluster-3	Sagar, Datia, Shivpuri	Krsnaa Diagnostics Pvt. Ltd.	76.96	76.96	76.96	Single bid (L1 for all colleges in Cluster3)
			Consortium of (M/s Medion Diagnostics Ltd and M/s Faiguni Niman Pvt. Ltd)	78.89	211.11	211.11	L2 for all Colleges in Cluster 3
				Rewa	Shahdol		
4	Cluster-4	Rewa (Super Speciality), Shahdol	Krsnaa Diagnostics Pvt. Ltd.	76.96	76.96		Single bid (L1 for all colleges in Cluster-4)

HITES submission to DME:

For Cluster 1: (No. of price bids opened:4, No. of Bids received:4)

The bidder Sanyua GIC Imaging Pvt. Ltd. Post opening of price bids have submitted a letter (encls) stating that they inadvertently mentioned 23% in the price bid and submitted that they had quoted the discount % in the price bid instead of Percentage offered on CGHS rate. They have also requested to consider their quote as 77% on CGHS rate.

Similarly, Sanya Hospital And Diagnostics Pvt. Ltd, post opening of price bids have submitted a letter (ensl) stating that they inadvertently mentioned 28% in the price bid and submitted that thy had quoted the discount % in the price bid instead of Percentage offered on CGHS rate. They have also requested to consider their quote as 72% on CGHS rate.

It is noted that these clarifications were received post price bid opening and hence the same are submitted after considering % rate quoted by other firms for perusal of competent authority.

Going by the rules of procurement, no post facto clarification should be taken into cognizance subsequent to price bid opening. Going by rules award can be given only at 23% of the CGHS rate list of Bhopal

circle. Since the bidders namely M/s Sanya GIS Imaging Pvt. Ltd and M/s Sanya Hospital and Diagnostics Pvt. Ltd offer should be ignored considering the mistake and subsequent revision in the offer. M/s Krsnaa Diagnostics Pvt. Ltd should be asked to offer the services at 72% of CGHS approved Bhopal rate list or the current tender should be canceled and a fresh tender should be recalled for this cluster. Competent authority may take decision depending upon the emergency requirement of the service."

(emphasis supplied)

10. It is urged that the opinion of respondent No.2 for issuance of fresh tender is confined to cluster No. I whereas for remaining clusters, he opined in favour of the petitioner. The respondent No.3 by ignoring the opinion of its own agency, took a different view for no valid reasons and decided to cancel the entire NIT. The reasons assigned in the letter dated 27/6/2020 Annexure R-2/3 are erroneous and based on improper parameters. To bolster this argument, it is averred that the bidders were directed to quote zero percent on prevailing CGHS Bhopal rates. It was further mentioned that if bidders are quoting 90% then discount, they agreed to provide an offer of 10% discount on the CGHS rates. In the present scenario, the petitioner for one of the cluster quoted 76% which means that petitioner is offering to provide 24% discount on the CGHS rates. The concept to calculate the discount is very much clear whereas respondents have miscalculated and misunderstood it. It is further averred that one of the bidders referred by respondent No.2 has quoted the bid amount as 23% for cluster No.I and thus that bidder was declared L-1 in that bid. If one of the bidders have quoted wrong percentage then NIT for cluster I cannot be scrapped because that bidder misunderstood or quoted it mistakenly. Reference is made to *W.B. State Electricity Board Vs. Patel Engineering Co. Ltd & Ors.* (2001) 2 SCC 451 to contend that mistakes in bid whether intentional or unintentional, cannot be pardoned and permission of its correction would be discriminatory. Negligence or inadvertant mistakes in the bid document cannot be permitted to be corrected even on the principles of equity more so said direction cannot be issued when bids have already been opened.

11. The learned Sr. counsel for petitioner submits that the respondent State is under an obligation to act fairly even in the matters of contract. The State and its instrumentalities' action must be in conformity with Article 14 of the Constitution. It should also be in conformity with principles of legitimate expectation. Reliance is placed on *Ramana Dayaram Shetty Vs. International Airport Authority of India* (1979) 3 SCC 489, *Food Corporation of India Vs. M/s. Kamdhenu Cattle Feeds Industries* (1993) 1 SCC 71, *Sterling Computers Ltd. Vs. M & N Publications Ltd* (1993) 1 SCC 445. Safeguarding public interest should be paramount consideration is also an argument based on *Raunaq International Ltd. Vs. I.V.R.*

Construction Ltd. (1999) 1 SCC 492. Lastly, reliance is placed on *Glodyne Techno Serve Vs. State of Madhya Pradesh* (2011) 5 SCC 103 to contend that criteria of bid evaluation must be strictly followed.

12. Based on these judgments, learned Sr. Counsel for petitioner submits that the decision to scrap the NIT is based on unjustifiable, arbitrary and impermissible reasons. Hence, the impugned order may be set aside and respondents be directed to proceed with the NIT and issue a letter of acceptance to the petitioner. New NIT is attacked on the basis of grounds raised in the amendment application.

13. *Per contra,* Shri Vivek Dalal, learned A.A.G supported the impugned order/action. By placing reliance on Clause 17 of the NIT, the impugned action was supported. Clause 17 reads as under:-

> "17. RIGHT TO ACCEPT OR REJECT ANY OR ALL THE PROPOSALS
>
> Notwithstanding anything contained in this RFP document, the authority reserves the right to accept or reject any proposal and to annul the selection process and reject all the proposals, at any time without any liability or any obligation for such acceptance, rejection or annulment, and without assigning any reasons thereof."
>
> **(emphasis supplied)**

14. Learned A.A.G submits that financial bid of petitioner (Page 68) has creates serious confusion. On the one hand the petitioner has mentioned that he is offering "following percentage discounts" whereas in the relevant column he has mentioned about "percentage offered on prevailing CGHS rates". The reasons mentioned in letter of respondent No.3 dated 27/6/2020 Annexure R-2/3 were supported by the counsel by contending that all the reasons mentioned in this letter are legal and justifiable. It was prerogative of the respondent No.3 to take a decision on the basis of enabling provisions. Since he found serious confusion, infirmities and illegalities in the process, he rightly decided to cancel the tender process. The decision so taken is strictly in public interest, in order to save public money and save the public from unnecessary financial burden. The petitioner is free to participate in the new NIT. No right is created in favour of petitioner as per previous NIT. The mathematical calculation which also became foundation for issuing letter dated 26/7/2020 is also supported. Reliance is placed on the judgment of Apex Court in *Maa Binda Express Carrier & another Vs. North-East Frontier Railway & Ors.* (2014) 3 SCC 760 which affirmed the action of department in cancelling the tendering process. For these cumulative reasons, no fault can be found in the impugned action.

15. Shri Prasanna Prasad, learned counsel for respondent No.2 entered appearance and borrowed the argument of learned A.A.G. Thus, it is common ground that decision to scrap the NIT does not suffer from any procedural impropriety, illegality, arbitrariness or unreasonableness. Indeed decision is based on public interest.

16. The parties confined their arguments to the extent indicated above.

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

18. We deem it proper to first deal with the argument of learned AAG and Counsel for the respondent No.2 based on Clause-17 of the NIT. It was argued that the order of scrapping NIT is founded upon Clause-17 aforesaid which gives power to the Competent Authority to accept, reject or annul any selection process/NIT. In our view, existence of power and exercise of power are two different things. Mere existence of power does not insulate the ultimate order which is passed in exercise of such power. Whether power is exercised in a justifiable manner is always subject to judicial review. Despite existence of power like one which is mentioned in Clause-17, it is duty of the Court to examine following factors:-

i) Whether the decision making authority exceeded its power?

ii) Committed an error of law.

iii) Breached the rules of natural justice.

iv) Arrived to a decision which no reasonable authority would have reached (Wednesbury principle of reasonableness).

v) Abused its power.

19. Thus any enabling provision does not make the ultimate order passed in exercise of such power as sacred or sacrosanct.

20. The Apex Court in catena of judgments held that the judicial review of a contractual matter is permissible on certain parameters spelled out by us in the previous paragraph. In *Tata Cellular vs. Union of India,* (1994) 6 SCC 651 and *Elektron Lighting Systems (P) Ltd. vs. Shah Investments Financial Developments & Consultants (P) Ltd.*, (2015) 15 SCC 137, the Apex Court opined that the judicial review in contract matter is permissible if action impugned is shown to be arbitrary. In *Ramana Dayaram Shetty vs. International Airport Authority of India,* (1979) 1 SCC 489, *Dutta Associates (P) Ltd. v. Indo Merchantiles (P) Ltd.,* (1997) 1 SCC 53, *Heinz India (P) Ltd. v. State of U.P.,* (2012) 5 SCC 443 and *Kalinga Mining Corpn. v. Union of India*, (2013) 5 SCC 252, the Supreme Court ruled that if decision making process or the decision is unreasonable, interference can be made even in contractual matters. In *Sterling Computers Ltd. v. M & N*

Publications Ltd., (1993) 1 SCC 44, *Master Marine Services (P) Ltd. v. Metcalfe & Hodgkinson (P) Ltd.,* (2005) 6 SCC 138, *Michigan Rubber (India) Ltd. v. State of Karnataka,* (2012) 8 SCC 216 and *State of Jharkhand v. CWE-SOMA Consortium,* (2016) 14 SCC 172, the Wednesbury principle is also applied to test the decision making process adopted in a contractual matter. Reference may be made to *Raunaq International Ltd. v. I.V.R. Construction Ltd.,* (1999) 1 SCC 492, *Air India Ltd. v. Cochin International Airport Ltd.,* (2000) 2 SCC 617, *Jagdish Mandal v. State of Orissa,* (2007) 14 SCC 517, *Reliance Energy Ltd. v. Maharashtra State Road Development Corpn. Ltd.,* (2007) 8 SCC 1, *Sanjay Kumar Shukla v. Bharat Petroleum Corpn. Ltd.,* (2014) 3 SCC 493 and *Siemens Aktiengeselischaft & Siemens Ltd. v. DMRC Ltd.,* (2014) 11 SCC 288, wherein Apex Court opined that apart from the facets of arbitrariness, unreasonableness and parameters relating to Wednesbury principles, the public interest element is also an essential facet which needs to be looked into in a contractual matter. In view of these judgments, there is no cavil of doubt that judicial review of impugned order is permissible and enabling provision namely, Clause-17 aforesaid does not insulate the process and impugned order from judicial review. Despite the fact that it contained a phrase that no reasons are required to be given for invoking Section (sic : Clause) 17. This, in our view, does not mean that without any reasons or justifiable reasons, power under Clause 17 can be invoked.

21. In view of principles laid down in aforesaid cases, the impugned order/action needs to be tested. Impugned communication dated 07/10/2020 (Annexure P/9) is written by respondent No.2 HITES. During the course of arguments, the learned counsel for the parties informed that HITES is subsidiary of HLL Life Care Ltd., a Govt of India enterprise. This organization provides consultancy to official respondents in contractual matters. The letter dated 07/10/2020 (Annexure P/9) only shows that tender has been scrapped. The real reasons for scrapping the tender are spelled out in letter dated 27/06/2020 (Annexure R-2/3). Relevant portion of which reads as under:-

> संदर्भित पत्र दिनांक 28.05.2020 के माध्यम से आपके द्वारा निविदा उपरांत चयनित एजेंसी एवं उनके द्वारा प्रस्तावित दरों के अनुमोदन हेतु प्रस्ताव आयुक्त, चिकित्सा शिक्षा के समक्ष प्रस्तुत किये गये हैं। प्रस्तुत प्रस्ताव का अवलोकन करने पर निविदा में प्रथम दृष्टया निम्नानुसार विसंगतिया परिलक्षित होती है :
>
> **1. वित्तीय निविदा प्रपत्र तथा आपके द्वारा अपलोडेड संशोधन/कोरीजेंडम में वर्णित शर्तो में भिन्नता परिलक्षित होती है।** निविदाकारों द्वारा जिस प्रपत्र पर वित्तीय निविदा डिजिटल हस्ताक्षर कर प्रस्तुत की गई है, उस पर % discount on CGHS Rate अंकित है। जिससे ऐसा प्रतीत होता है, कि एजेंसी द्वारा % discount on CGHS Offer किया गया है।

2. उदाहरणस्वरूप Cluster 2 मे आपके द्वारा प्रस्तावित किया गया है कि न्यूनतम दर वाली एजेंसी मेसर्स कृष्णा द्वारा 76 % CGHS पर निविदा भरी गई है, किंतु मेसर्स कृष्णा द्वारा प्रस्तुत Bid Format के अवलोकन से प्रथम दृष्टया यह प्रतीत होता है, कि 76 % का discount CGHS रेट पर दिया गया है। अर्थात यदि किसी क्लरटर की CGHS की Test की दर रु 100 निर्धारित है, तो आपके प्रस्ताव के अनुसार मेसर्स कृष्णा द्वारा CTMRI Test हेतु रु 76 Charge किया जायेगा (शासन / मरीज)। जबकि निविदा प्रपत्र की भाषा से यह आशय स्पष्ट हो रहा है, कि मेसर्स कृष्णा द्वारा टेस्ट हेतु रु 24 (100-76 = 24) Charge किया जायेगा। इस प्रकार से Charge की जाने वाली राशि में रु 52 (76-24 = 52) का अंतर है, जोकि बहुत अधिक है जिससे रु 52 का नुकसान मरीजों अथवा शासन को हो सकता है। इसी क्रम मे निविदा स्पष्ट न होने के कारण 02 निविदाकारों द्वारा Bidding Criteria के सम्बंध में Post Tender स्पष्टीकरण प्रस्तुत किया गया है, जोकि इसी असमंजस एवं अस्पष्टता को इंगित करता है।

3. यह स्पष्ट करना चाहेंगे कि उपरोक्त निविदा CTMRI जैसे महत्वपूर्ण कार्य से संबंधित होकर PPP मॉडल पर 10 वर्षो के लिए है। जोकि आम जनता एवं मरीजों से प्रत्यक्ष रूप से जुड़ा हुआ विषय है। यहां यह लेख है, कि वित्तीय प्रस्ताव किसी भी निविदा का अंतिम चरण होता है। जिससे इस प्रकार की विरोधाभासी निविदा को स्वीकार करने पर भविष्य में विधिक एवं वित्तीय प्रश्न निर्मित हो सकते है।

अतः सम्पादित निविदा के माध्यम से चयनित एजेंसी एवं प्रस्तावित दरों को स्वीकार करने पर इसे अनियमितता की श्रेणी में माना जा सकता है। इस प्रकार की विरोधाभासी निविदा स्वीकार किये जाने योग्य नही है।

अतः उक्त संबंध में निविदा शर्तो एवं नियमों के अनुसार आगामी आवश्यक कार्यवाही की जावें।

(Emphasis Supplied)

22. As noticed above, the argument of learned Senior Counsel for the petitioners were aimed against and confined to reasons mentioned in para-2 & 3 of aforesaid letter dated 27/06/2020. It was strenuously contended that the mathematical calculation and parameters mentioned in para-2 are erroneous and arbitrary in nature. In our view, the decision to scrap the contract is not solely based on para-2 of said letter. The first and foremost reason is contained in para-1 of the said letter reproduced herein-above. Pertinently, nothing is averred and argued against the reason mentioned in para-1 of said letter. The reason spelled out in para-1 is that there exists a difference in the conditions mentioned in the main financial NIT and in the amended one 'issued by HITES. Importantly, this letter is addressed to head of HITES. The main NIT was issued by the Directorate of Medical Education, Govt. of Madhya Pradesh. Clause-15 deals with financial proposal bid. Sub- **Clause-b** reads as under:-

"b - The bidder has to quote % discount rate applicable for each Medical College of the cluster (up to 2 decimal points). All the discounts will be applicable on the CGHS rates (Bhopal circle)."

23. Similarly, in **Clause-16 (Selection Process)** it is ruled that :-

"The bidder, who will offer **maximum % discount** on prevailing CGHS rate list of Bhopal circle will be awarded the project."

24. The respondent No.2 issued the "amendment No.2" (Annexure P/4) and revised tender clause. Relevant portion is reproduced for ready reference:-

S.No	Para Nos. of the TED	Existing Tender Clause	Revised Tender Clause
5	Schedule of RFP 14	Bid Evaluation Criteria: % discount offered on prevailing CGHS rate list of Bhopal Circle	Bidding Criterion would be the lowest percentage offered on prevailing CGHS rate list of Bhopal circle, offered for each medical college of the cluster.
6	15 Page 20 Financial Proposal Bid	Bidding Criterion would be highest % discount on prevailing CGHS rate list of Bhopal circle, offered for each medical college of the cluster, a) All bidders have to compulsorily bid for all GMCs in a particular cluster. b) The bidder has to quote % discount rate applicable for each Medical College of the cluster (up to 2 decimal points). All the discounts will be applicable on the CGHS rate (Bhopal Circle). c) GI bidder for the GMC would be awarded the Contract	Bidding Criterion would be the lowest percentage offered on prevailing CGHS rate list of Bhopal circle, offered for each Medical college of the bluster. a) All bidders have to compulsorily bid for all GMCs in a particular Cluster. b) The bidder has to quote % on prevailing CGHs Bhopal rate list (upto 2decimal points). Percentage offered will be applicable on all seans as mentioned in prevailing CGHS Bhopal rate list . c) Bidders interested in giving discount may quote percentage below 100% (for example 90% means a discount of 10% on CGHS rates have been offered)

		d) Contract would be individually awarded by the respective GMC to the respective HI bidder.	d) Bidders intersted in premium over CGHS rate list may quote above 100% (for example 110% means a premium of 10% over CGHS rates have been offered. e) L1 bidder (Bidder who quotes minimum percentage for the GMC would be awarded the Contract).

(Emphasis Supplied)

25. The above chart contains the main/'existing tender Clause' and 'revised tender Clause'. The revision in tender Clause is not made by the issuing authority i.e.respondent No.3. Indeed, the revised tender clauses are introduced by HITES. If revised Clauses are examined in juxtaposition to the main Clauses of NIT issued by respondent No.3, it will be crystal clear that parameters of the conditions of evaluation are different. This is the primary reason the respondents decided to scrap the contract. In any event, a confusion is created by HITES by introducing the revised clauses. The petitioner projected Annexure P/4 as clarification of clauses of previous NIT. We are unable to persuade ourselves with this line of argument. As caption of this document suggests, it is "amendment number 2" and not a 'clarification'. The existing tender clause stood revised by providing a different tender clause. Had it been a 'clarification' of existing tender clause there was no occasion for HITES to term it as "revised tender clause".

26. In our considered view, if NIT was issued by the Department/respondent No.3, its conditions could have been altered by respondent No.3/Competent Authority only. The consultancy agency/respondent No.2 was neither justified nor competent in revising the tender clauses. A comparative reading of existing tender Clause and revised tender Clause shows that the decision taken in para-1 of order dated 27/06/2020 is a plausible decision and is not hit by Wednesbury principles nor it can be treated to be against public interest. We find no infirmity or illegality in the decision to scrap the contract.

27. New NIT dated 30/12/2020 (Annexure P/13) is challenged by contending that it relates to same scope of work and when matter relating to previous NIT is subject matter of challenge, the issuance of new NIT is illegal. The petitioner is already declared L-1 in certain clusters and has disclosed his price pursuant to previous NIT and hence issuance of another NIT covering same work is bad in law. We have already dealt with the validity of decision scrapping the previous NIT and upheld it. Since that decision of scrapping is not interfered with, we find no reason to interfere with the new NIT. The grounds raised to assail new NIT are devoid of substance and cannot be reason to interfere with the NIT.

28. To sum up, in a contractual matter, the judicial review is permissible on the aspect of arbitrariness, unreasonableness and on the touchstone of Wednesbury principle. Public interest is also an essential element which needs to be looked into while exercising power of judicial review. Clause-17 of NIT does not give unfettered power to the authority to take a decision to cancel the NIT. The decision taken by Competent Authority in exercise of enabling provision can also be subject matter of judicial review on above parameters. However, introduction of revised tender clauses by HITES which are in variance with existing tender clause issued by Respondent No.3 has made the entire process vulnerable and, therefore, decision taken on 27/06/2020 cannot be said to be arbitrary, unreasonable or against public interest. Thus, we find no reason to interfere in the present case.

29. Writ petition is **dismissed.** No cost.

Petition dismissed

I.L.R. [2021] M.P. 890
WRIT PETITION

Before Mr. Justice Vishal Mishra

WP No. 5590/2021 (Gwalior) decided on 10 March, 2021

INDAL SINGH …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

***A. Criminal Procedure Code, 1973 (2 of 1974), Sections 156, 157 & 173 and Penal Code (45 of 1860), Section 304-B & 498-A/34 – Delay in Investigation – Duties of Investigation Officer* – Held – Police authorities on receipt of information of cognizable offence has to conclude investigation without any delay and submit report to concerned Magistrate – They are duty bound to follow prescribed procedure without any undue delay – FIR registered on 30.01.2021 and investigation not completed yet – Authorities directed to conclude investigation and produce report before Magistrate at the earliest – Petition disposed. (Paras 6 to 8)**

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 156, 157 व 173 एवं दण्ड संहिता (1860 का 45), धारा 304–B व 498–A/34 – अन्वेषण में विलंब – अन्वेषण अधिकारी के कर्तव्य – अभिनिर्धारित – पुलिस प्राधिकारीगण को संज्ञेय अपराध की जानकारी प्राप्त होने पर बिना किसी विलंब के अन्वेषण समाप्त करना होगा तथा संबंधित मजिस्ट्रेट को प्रतिवेदन प्रस्तुत करना होगा – वे बिना किसी अनुचित विलंब के विहित प्रक्रिया का पालन करने हेतु कर्तव्य द्वारा आबद्ध हैं – दिनांक 30.01.2021 को प्रथम सूचना प्रतिवेदन दर्ज किया गया और अभी तक अन्वेषण पूर्ण नहीं हुआ है – प्राधिकारीगण को अन्वेषण समाप्त करने तथा शीघ्रातिशीघ्र मजिस्ट्रेट के समक्ष प्रतिवेदन प्रस्तुत करने हेतु निदेशित किया गया – याचिका निराकृत।

***B. Criminal Procedure Code, 1973 (2 of 1974), Section 156(3) – Delay in Investigation – Remedy* – Held – In case of delay/improper investigation, petitioner is having remedy to approach concerning Magistrate u/S 156(3) by filing appropriate application – Petitioner praying arrest of accused persons and providing him protection as he is a witness – Such relief cannot be granted to petitioner – He may file application before concerning Magistrate. (Para 9 & 10)**

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 156(3) – अन्वेषण में विलंब – उपचार – अभिनिर्धारित – विलंब/अनुचित अन्वेषण के प्रकरण में, याची के पास धारा 156(3) के अंतर्गत समुचित आवेदन प्रस्तुत कर संबंधित मजिस्ट्रेट के समक्ष जाने का उपचार है – याची अभियुक्तगण की गिरफ्तारी तथा चूंकि वह एक साक्षी है अतः उसे संरक्षण प्रदान किये जाने हेतु प्रार्थना कर रहा है – याची को उक्त अनुतोष प्रदान नहीं किया जा सकता – वह संबंधित मजिस्ट्रेट के समक्ष आवेदन प्रस्तुत कर सकता है।

***C. Witness Protection Scheme, 2018, Clause 2(i), 2(c) & 6 – Protection of Witness – Procedure* – Held – Witness or his family members or duly engaged counsel or Investigating Officer or SHO or SDO (P) and S.P. may file application in prescribed format before competent authority and same shall be preferably be got forwarded through Prosecutor concerned – Petitioner granted liberty to prefer such application claiming protection. (Paras 11 to 14)**

ग. साक्षी संरक्षण स्कीम, 2018, खंड 2(i), 2(c) व 6 – साक्षी का संरक्षण – प्रक्रिया – अभिनिर्धारित – साक्षी या उसके परिवार के सदस्य या सम्यक् रूप से लगा हुआ काउंसेल या अन्वेषण अधिकारी या एस.एच.ओ. या एस.डी.ओ. (पुलिस) या एस.पी. विहित प्रारूप में सक्षम प्राधिकारी के समक्ष आवेदन प्रस्तुत कर सकता है तथा संबंधित अभियोजक के माध्यम से उक्त को अधिमानतः अग्रेषित किया जाएगा – याची को संरक्षण का दावा करते हुए आवेदन बढ़ाने की स्वतंत्रता प्रदान की गई।

***D. Witness Protection Scheme, 2018, Clause 2(c) – Competent Authorities* – Held – Competent Authorities is defined as Standing Committee in each District chaired by District & Session Judge with head of Police in District as Member and head of Prosecution in District as its Member Secretary. (Para 11)**

घ. साक्षी संरक्षण स्कीम, 2018, खंड 2(c) – सक्षम प्राधिकारीगण – अभिनिर्धारित – सक्षम प्राधिकारीगण, प्रत्येक जिले में जिला एवं सत्र न्यायाधीश की अध्यक्षता वाली स्थाई समिति के रूप में परिभाषित है जिसमें जिले के पुलिस प्रधान सदस्य और जिले के अभियोजन प्रमुख सदस्य सचिव के रूप में होते हैं।

Cases referred:

2019 (4) SCC 615, AIR 2008 SC 907, 2016 (6) SCC 277.

H.K. Shukla, for the petitioner.
D.D. Bansal, G.A. for the respondent/State.

O R D E R

VISHAL MISHRA, J:- The present petition has been filed being aggrieved by the action on the part of the respondents/authorities, whereby, they are not taking any action with respect to the offence under Section 304-B, 498-A and 34 of IPC and Sec. 3/4 of Dowry Prohibition Act against the respondents No. 4 to 6 bearing Crime No.85/2021 registered at Police Station Kotwali, District Morena and have not taken any steps to ensure the arrest and completion of the investigation even after rejection of bail application by the Sessions Court, Morena.

2. It is submitted that threat was given by the accused persons that if compromise will not be done, then petitioner has to face dire consequences. It is argued that the petitioner's daughter Rohini @ Binnu was married with respondent No.6/Deepak as per the Hindu customs on 19.05.2015 and thereafter, under the unnatural circumstances, she passed away on 13.09.2020 within a period of five years of the marriage. On the basis of which, an FIR was got registered against the respondent No.4 to 6. The application for anticipatory bail were already rejected by Sessions Court. It is argued that the police authorities are not investigating the matter and are not arresting the respondents till date as per the provisions under Section 156 and 157 of Cr.P.C. It is the duty of the Police Authorities to conclude the investigation without any delay and also not to secure the life and liberty of the witnesses from threatening. He has relied upon the judgment passed by the Hon'ble Supreme Court in the case of *Mahendra Chawla Vs. Union of India and ors.* reported in 2019 (4) SCC 615, wherein certain directions with respect to the witnesses protection scheme 2018 has been given by the Hon'ble Supreme Court. Petitioner has also approached before the Superintendent of Police, District Morena by way of filing a detailed application, but the same has not been given effect to till date. In such circumstances, he has prayed for following reliefs:-

> "(1) That, in the light of the above mentioned peculiar facts and circumstances of the case the police authorities be directed to ensure to arrest of the accused person and also to provide protection to the petitioner who is the witness of heinous offence u/s 304-B of IPC.
>
> (2) That, the cost of the litigation may also be awarded."

3. Per contra, counsel for the State has opposed the arguments made by the petitioner and has argued that the police authorities will complete the investigation and file the charge sheet at the earliest. As far as the reliefs claimed

by the petitioner are concerned, the petitioner is having an alternative and efficacious remedy of approaching the concerning Magistrate, in case, he is not satisfied with the manner in which the investigation is being carried out by the police authorities, he has relied upon the judgment passed by the Hon'ble Supreme Court in the case of *Sakiri Basu Vs. State of U.P and Others* reported in AIR 2008 SC 907 and in case of *Sudhir Bhaskar Rao Tambe Vs. Hemant Yashwant Dhage and Others* reported in 2016 (6) SCC 277 and has argued that the remedy is provided under Section 156(3) of Cr.P.C to approach before the concerning Magistrate against the investigation carried out by the police authorities.

4. As far as harassment and protection to the petitioner is concerned it is submitted that the Witness Protection Scheme, 2018 has been framed by the Home Ministry. The petitioner has to apply as per the provision of Scheme, 2018 and file an application to the competent authority in a prescribed format. The matter can be taken up by the authorities for granting protection to the petitioner who happens to be witnesses of the case, therefore, no the reliefs can be extended to the petitioner at this stage in the petition. He has prayed for dismissal of the petition.

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

6. From perusal of the record it is seen that with respect to the death of the daughter of the petitioner and FIR was got registered at Crime No.85/2020 for offences under Sections 304-B, 498-A and 34 of IPC and Sec. 3/4 of Dowry Prohibition Act. It is pointed out that police authorities are not completed the investigation till date despite of the fact that the complaint was got made on 30.01.2021 and despite rejection of the application of anticipatory bail by the Sessions Court, the police authorities have not concluded the investigation till date.

7. As far as the relief with respect to the conclusion of investigation is concerned the provision of Sections, 173, 156 and 157 of Cr.PC. are required to be seen.

> **173.** Report of police officer on completion of investigation.
>
> (1) Every investigation under this Chapter shall be completed without unnecessary delay.
>
> (2) (i) As soon as it is completed, the officer in charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the State Government, stating-
>
> (a) the names of the parties;
>
> (b) the nature of the information;

(c) the names of the persons who appear to be acquainted with the circumstances of the case;

(d) whether any offence appears to have been committed and, if so, by whom;

(e) whether the accused has been arrested;

(f) whether he has been released on his bond and, if so, weather with or without sureties;

(g) whether he has been forwarded in custody under section 170.

(ii) The officer shall also communicate, In such manner as may be prescribed by the State Government, the action taken by him, to the person, if any, by whom the information relating to the commission of the offence was first given.

(3) Where a superior officer of police has been appointed under section 158, the report shall, in any case in which the State Government by general or special order so directs, be submitted through that officer, and he may, pending the orders of the Magistrate, direct the officer in charge of the police station to make further investigation,

(4) Whenever it appears from a report forwarded under this section that the accused has been released on his bond, the Magistrate shall make such order- for the discharge of such bond or otherwise as he thinks fit.

(5) When such report is in respect of a case to which section 170 applies, the police officer shall forward to the Magistrate alongwith the report-

(a) all documents or relevant extracts thereof on which the prosecution proposes to rely other than those already sent to the Magistrate during investigation;

(b) the statements- recorded under section 161 of all the persons whom the prosecution proposes to examine as its witnesses.

(6) If the police officer is of opinion that any part of any such statement is not relevant to the subject- matter of the proceedings or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interest, he shall indicate that part of the statement and append a note requesting the Magistrate to exclude that part from the copies to be granted to the accused and stating his reasons for making such request.

(7) Where the police officer investigating the case finds it convenient so to do, he may furnish to the accused copies of all or any of the documents referred to in sub- section (5).

(8) Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub-section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of sub-sections (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub- section (2).

156. Police officer' s power to investigate cognizable case.

(1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII.

(2) No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.

(3) Any Magistrate empowered under section 190 may order such an investigation as above- mentioned.

157. Procedure for investigation preliminary inquiry.

(1) If, from information received or otherwise, an officer in charge of a police station has reason to suspect the commission of an offence which he is empowered under section 156 to investigate, he shall forthwith send a report of the same to a Magistrate empowered to take cognizance of such offence upon a police report and shall proceed in person, or shall depute one of his subordinate officers not being below such rank as the State Government may, by general or special order, prescribe in this behalf, to proceed, to the spot, to investigate the facts and circumstances of the case, and, if necessary, to take measures for the discovery and arrest of the offender; Provided that-

(a) when information as to the commission of any such offence is given against any person by name and the case is not of a serious nature, the officer in charge of a police station need not proceed in person or depute a subordinate officer to make an investigation on the spot;

(b) if it appears to the officer in charge of a police station that there is no sufficient ground for entering on an investigation, he shall not investigate the case.

(2) In each of the cases mentioned in clauses (a) and (b) of the proviso to sub-section (1), the officer in charge of the police station shall state in his report his reasons for not fully complying with the requirements of that

> sub- section, and, in the case mentioned in clause (b) of the said proviso, the officer shall also forthwith notify to the informant, if any, in such manner as may be prescribed by the State Government, the fact that he will not investigate the case or cause it to be investigated.

8. From perusal of the aforesaid sections it is apparently clear that the police authorities on receipt of the information with respect to cognizable offence has to take up the matter and investigate the same and conclude the investigation without any delay and submit the report to the concerning Magistrate. They are duty bound to follow such procedure prescribed in the aforesaid sections without any undue delay. Therefore, in such circumstances, if the investigation is pending in the case bearing Crime No. 85/2021 registered at Police Station Aron, District Guna, the authorities are directed to conclude the same and produce the report before the concerning Magistrate at the earliest.

9. As far as the relief claimed by the petitioner with respect to the manner in which investigation is being carried out by the Police authorities, the petitioner is having remedy to approach before the concerning Magistrate under Section 156(3) of Cr.P.C. by filing an appropriate application, as has been considered and held by the Hon'ble Supreme Court in the case of *Sakiri Basu, Sudhir Bhaskar Rao Tambe and M. Subramaniam* (Supra) wherein the Hon'ble Supreme Court has held as under:-

> "5. While it is not possible to accept the contention of the appellants on the question of locus standi, we are inclined to accept the contention that the High Court could not have directed the registration of an FIR with a direction to the police to investigate and file the final report in view of the judgment of this Court in **Sakiri Vasu v. State Of Uttar Pradesh And Others** in which it has been inter alia held as under:
>
> > "11. In this connection we would like to state that if a person has a grievance that the police station is not registering his FIR under Section 154 CrPC, then he can approach the Superintendent of Police under Section 154(3) CrPC by an application in writing. Even if that does not yield any satisfactory result in the sense that either the FIR is still not registered, or that even after registering it no proper investigation is held, it is open to the aggrieved person to file an application under Section 156(3) CrPC before the learned Magistrate concerned. If such an application under Section 156(3) is filed before the Magistrate, the Magistrate can direct the FIR to be registered and also can direct a proper investigation to be made, in a case where, according to the aggrieved person, no proper investigation was made. The Magistrate can also under the same provision monitor the investigation to ensure a proper investigation.
>
> 12. Thus in **Mohd. Yousuf v. Afaq Jahan** this Court observed: (SCC p. 631, para 11)

"11. The clear position therefore is that any Judicial Magistrate, before taking cognizance of the offence, can order investigation under Section 156(3) of the Code. If he does so, he is not to examine the complainant on oath because he was not taking cognizance of any offence therein. For the purpose of enabling the police to start investigation it is open to the Magistrate to direct the police to register an FIR. There is nothing illegal in doing so. After all registration of an FIR involves only the process of entering the substance of the information relating to the commission of the cognizable offence in a book kept by the officer in charge of the police station as indicated in Section 154 of the Code. Even if a Magistrate does not say in so many words while directing investigation under Section 156(3) of the Code that an FIR should be registered, it is the duty of the officer in charge of the police station to register the FIR regarding the cognizable offence disclosed by the complainant because that police officer could take further steps contemplated in Chapter XII of the Code only thereafter."

13. The same view was taken by this Court in **Dilawar Singh v. State of Delhi (JT vide para 17).** We would further clarify that even if an FIR has been registered and even if the police has made the investigation, or is actually making the investigation, which the aggrieved person feels is not proper, such a person can approach the Magistrate under Section 156(3) CrPC, and if the Magistrate is satisfied he can order a proper investigation and take other suitable steps and pass such order(s) as he thinks necessary for ensuring a proper investigation. All these powers a Magistrate enjoys under Section 156(3) CrPC.

14. Section 156(3) states: "156. (3) Any Magistrate empowered under Section 190 may order such an investigation as abovementioned."

The words "as abovementioned" obviously refer to Section 156(1), which contemplates investigation by the officer in charge of the police station.

15. Section 156(3) provides for a check by the Magistrate on the police performing its duties under Chapter XII CrPC. In cases where the Magistrate finds that the police has not done its duty of investigating the case at all, or has not done it satisfactorily, he can issue a direction to the police to do the investigation properly, and can monitor the same.

16. The power in the Magistrate to order further investigation under Section 156(3) is an independent power and does not affect the power of the investigating officer to further investigate the case even after submission of his report vide Section 173(8). Hence the Magistrate can order reopening of the investigation even after the police submits the final report, vide **State of Bihar v. J.A.C. Saldanha (SCC : AIR para 19).**

17. In our opinion Section 156(3) CrPC is wide enough to include all such powers in a Magistrate which are necessary for ensuring a proper investigation, and it includes the power to order registration of an FIR and of ordering a proper investigation if the Magistrate is satisfied that a proper investigation has not been done, or is not being done by the police. Section 156(3) CrPC, though briefly worded, in our opinion, is very wide and it will include all such incidental powers as are necessary for ensuring a proper investigation.

18. It is well settled that when a power is given to an authority to do something it includes such incidental or implied powers which would ensure the proper doing of that thing. In other words, when any power is expressly granted by the statute, there is impliedly included in the grant, even without special mention, every power and every control the denial of which would render the grant itself ineffective. Thus where an Act confers jurisdiction it impliedly also grants the power of doing Criminal Appeal No. 102 of 2011 Page 5 of 8 all such acts or employ such means as are essentially necessary for its execution."

6. The said ratio has been followed in **Sudhir Bhaskarrao Tambe v. Hemant Yashwant Dhage and Others 2,** in which it is observed.

"2. This Court has held in **Sakiri Vasu v. State of U.P.,** that if a person has a grievance that his FIR has not been registered by the police, or having been registered, proper investigation is not being done, then the remedy of the aggrieved person is not to go to the High Court under Article 226 of the Constitution of India, but to approach the Magistrate concerned under Section 156(3) CrPC. If such an application under Section 156(3) CrPC is made and the Magistrate is, prima facie, satisfied, he can direct the FIR to be registered, or if it has already been registered, he can direct proper investigation to be done which includes in his discretion, if he deems it necessary, recommending change of the investigating officer, so that a proper investigation is done in the matter. We have said this in Sakiri Vasu case because what we have found in this country is that the High Courts have been flooded with writ petitions praying for registration of the first information report or praying for a proper investigation.

3.We are of the opinion that if the High Courts entertain such writ petitions, then they will be flooded with such writ petitions and will not be able to do any other work except dealing with such writ petitions. Hence, we have held that the complainant must avail of his alternate remedy to approach the Magistrate concerned under Section 156(3) CrPC and if he does so, the Magistrate will ensure, if prima facie he is satisfied, registration of the first information report and also ensure a proper investigation in the matter, and he can also monitor the investigation.

> 4. In view of the settled position in **Sakiri Vasu case,** the impugned judgment of the High Court cannot be sustained and is hereby set aside. The Magistrate concerned is directed to ensure proper investigation into the alleged offence under Section 156(3) CrPC and if he deems it necessary, he can also recommend to the SSP/SP concerned a change of the investigating 2 (2016) 6 SCC 277 Criminal Appeal No. 102 of 2011 Page 6 of 8 officer, so that a proper investigation is done. The Magistrate can also monitor the investigation, though he cannot himself investigate (as investigation is the job of the police). Parties may produce any material they wish before the Magistrate concerned. The learned Magistrate shall be uninfluenced by any observation in the impugned order of the High Court."
>
> 7. We are also surprised and concerned at the registration of the FIR in Crime No. 7 of 2010, notwithstanding, the stay order passed by this Court while issuing notice by which the operation of the impugned judgment was directed to remain stayed.
>
> 8. In these circumstances, we would allow the present appeal and set aside the direction of the High Court for registration of the FIR and investigation into the matter by the police. At the same time, our order would not be an impediment in the way of the first respondent filing documents and papers with the police pursuant to the complaint dated 18.09.2008 and the police on being satisfied that a criminal offence is made out would have liberty to register an FIR. It is also open to the first respondent to approach the court of the metropolitan magistrate if deemed appropriate and necessary. Equally, it will be open to the appellants and others to take steps to protect their interest."

10. In view of the law laid down by Hon'ble Supreme Court the relief as claimed cannot be granted to the petitioner. Petitioner may file an application before the concerning Magistrate.

11. As far as the relief claimed by the petitioner with respect to granting protection to him as he is witness in the offence committed under Section 304-B of IPC is concerned, the Witness Protection Scheme, 2018 provides for filing of an application by the witness in the prescribed format before the competent authorities for seeking witness protection order. It can be moved by the witness or his family members or duly engaged counsel or Investigating Officer or Station House Officer or SDO(P)/Prison and SP concerned and the same shall preferably be got forwarded through the Prosecutor concerned; The Competent Authorities is defined as the Standing Committee in each District chaired by District and Sessions Judge with Head of the Police in the District as Member and Head of the Prosecution in the District as its Member Secretary.

12. The offences for which such the offences is formulated is provided under the definition Clause 2(i) which is read as under:

"Offence" means those offences which are punishable with death or life imprisonment or an imprisonment up to seven years and above and also offences punishable under Section 354, 354-A, 354-B, 354-C, 354-D and 509 of IPC."

13. The **Procedure for processing the application** is also prescribed in Clause 6 which reads as under:-

"(a) As and when an application is received by the Member Secretary of the Competent Authority, in the prescribed form, it shall forthwith pass an order for calling for the Threat Analysis Report from the ACP/DSP in charge of the concerned Police Sub-Division.

(b) Depending upon the urgency in the matter owing to imminent threat, the Competent Authority can pass orders for interim protection of the witness or his family members during the pendency of the application.

(c) The Threat Analysis Report shall be prepared expeditiously while maintaining full confidentiality and it shall reach the Competent Authority within five working days of receipt of the order.

(d) The Threat Analysis Report shall categorize the threat perception and also include suggestive protection measures for providing adequate protection to the witness or his family.

(e)While processing the application for witness protection, the Competent Authority shall also interact preferably in person and if not possible through electronic means with the witness and/or his family members/employers or any other person deemed fit so as to ascertain the witness protection needs of the witness.

(f) All the hearings on Witness Protection Application shall be held in-camera by the Competent Authority while maintaining full confidentiality.

(g) An application shall be disposed of within five working days of receipt of Threat Analysis Report from the Police authorities.

(h) The Witness Protection Order passed by the Competent Authority shall be implemented by the Witness Protection Cell of the State/UT or the Trial Court, as the case may be. Overall responsibility of implementation of all witness protection orders passed by the Competent Authority shall lie on the Head of the Police in the State/UT.

However the Witness Protection Order passed by the Competent Authority for change of identity and/or relocation shall be implemented by the Department of Home of the concerned State/UT.

(i) Upon passing of a Witness Protection Order, the witness Protection Cell Shall file a monthly follow-up report before the Competent Authority.

(j) In case, the Competent Authority finds that there is a need to revise the Witness Protection Order or an application is moved in this regard, and upon completion of trial, a fresh Threat Analysis Report shall be called from the ACP/DSP in charge of the concerned Police Sub-Division."

14. In the present case, the petitioner has not filed any application and the petitioner has sought protection alleging himself from the threatening given by the accused persons and their family members pressurizing him to compromise into the matter out of fear of dire consequences as the petitioner is one of the witnesses in the criminal case registered for offence under Sections 304-B regarding death of her daughter under the unnatural circumstances within five years of her marriage. The petitioner is required to file an application to the concerning Authorities i.e. the competent authorities as defined under Clause 2(c) of the Witness Protection Scheme, 2018. The application on the prescribed format is required to be submitted. As soon as the application will be filed, then, the same will be processed by the competent authorities. In such circumstances and looking to the Witness Protection Scheme 2018, no relief regarding protection can be extended to the petitioner at this stage. Petitioner is at liberty to prefer an application to the competent authority claiming protection.

15. With the aforesaid observation, the petition is **disposed off.**

Order accordingly

I.L.R. [2021] M.P. 901
WRIT PETITION

Before Mr. Justice Vivek Rusia

WP No. 17603/2020 (Indore) decided on 12 March, 2021

JAYA CHAKRAVARTI …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

***A. Criminal Procedure Code, 1973 (2 of 1974), Section 97 & 98 – Custody of Minor Children – Illegal/Wrongful Confinement* – Held – Children were in custody of mother, a natural guardian, thus no reasons to believe that they were under wrongful confinement or it amounts to an offence – On application by father/husband, production of minor children (16 years) through search warrant was uncalled for – Impugned order is absolute abuse of process of Court, thus set aside – Petition allowed with cost of Rs. 25,000/- to be paid by husband to petitioner wife. (Paras 10, 11 & 14)**

***क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 97 व 98 – अवयस्क बालकों की अभिरक्षा – अवैध/सदोष परिरोध* – अभिनिर्धारित – बालक, मां की अभिरक्षा**

में थे, जो कि एक नैसर्गिक संरक्षक है, अतः यह विश्वास करने हेतु कोई कारण नहीं हैं कि वे सदोष परिरोध में थे अथवा यह एक अपराध की कोटि में आता है – पिता/पति के आवेदन पर, तलाशी वारंट के माध्यम से अवयस्क बालकों (16 वर्षीय) को पेश किया जाना अनुचित था – आक्षेपित आदेश पूर्ण रूप से न्यायालय की प्रक्रिया का दुरूपयोग है – याचिका 25000/– रू. के व्यय सहित मंजूर जो कि पति द्वारा याची पत्नी को दिया जाये।

***B. Criminal Procedure Code, 1973 (2 of 1974), Section 98 – Custody of Minor Male Children – Jurisdiction of Sub-Divisional Magistrate* – Held – Provision of Section 98 Cr.P.C. does not apply because it deals with a woman or female child below age of 18 years whereas respondent No. 5 and respondent No. 6 are male children – Impugned order is *per se* illegal and without jurisdiction. (Para 10 & 13)**

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 98 – अवयस्क बालक की अभिरक्षा – उपखंड मजिस्ट्रेट की अधिकारिता – अभिनिर्धारित – दं.प्र.सं. की धारा 98 के उपबंध लागू नहीं होते क्योंकि यह 18 वर्ष से कम आयु की एक महिला अथवा बालिका से संबंधित है जबकि प्रत्यर्थी क्र. 5 व प्रत्यर्थी क्र. 6 बालक हैं – आक्षेपित आदेश अपने आप में अवैध है और बिना अधिकारिता का है।

***C. Criminal Procedure Code, 1973 (2 of 1974), Section 97 & 98 – Custody of Minor Children – Principle of Natural Justice* – Held – SDM did not issue notice to petitioner/mother and called the children through police, recorded their statement behind the back of petitioner without there being any cross-examination etc. and passed the order – Principle of natural justice not followed by Magistrate. (Para 13)**

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 97 व 98 – अवयस्क बालकों की अभिरक्षा – नैसर्गिक न्याय का सिद्धांत – अभिनिर्धारित – उपखंड मजिस्ट्रेट ने याची/मां को नोटिस जारी नहीं किया तथा पुलिस के माध्यम से बालकों को बुलाया, याची की पीठ पीछे बिना किसी प्रति–परीक्षण इत्यादि के उनके कथन अभिलिखित किये तथा आदेश पारित किया – मजिस्ट्रेट द्वारा नैसर्गिक न्याय के सिद्धांत का पालन नहीं किया गया।

***D. Criminal Procedure Code, 1973 (2 of 1974), Section 97 & 98 – Custody of Minor Children – Statement of Child – Effect* – While recording of statements, children stated their willingness to live with father – Allegation of cruelty against mother are vague in nature, no specific instances quoted in their statements about ill-treatment by mother – Children spent most of their time with mother and sometimes do not like the strictness/control of mother, but that cannot be termed as an offence or illegal confinement – Father directed not to force children to live with him, they are free to live with their mother. (Para 13)**

घ. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 97 व 98 – अवयस्क बालकों की अभिरक्षा – बालक के कथन – प्रभाव – कथन अभिलिखित करते समय, बालकों ने अपने पिता के साथ रहने की इच्छा बताई – मां के विरूद्ध क्रूरता के अभिकथन अस्पष्ट स्वरूप के हैं, उनके कथनों में मां के द्वारा दुर्व्यवहार का कोई विनिर्दिष्ट उदाहरण उत्कथित नहीं किया गया है – बालकों ने अपना अधिकांश समय मां के साथ बिताया है और कभी–कभी मां की सख्ती/नियंत्रण पसंद नहीं आता लेकिन उसे एक अपराध अथवा अवैध परिरोध नहीं कहा जा सकता – पिता को निदेशित किया गया कि वह बालकों को अपने साथ रहने के लिए विवश न करे, वे अपनी मां के साथ रहने के लिए स्वतंत्र हैं।

***E. Constitution – Article 226 – Custody of Children – Remedy* – Held – Apex Court concluded that in child custody matters, the ordinary remedy lies wholly under the Hindu Minority and Guardianship Act or the Guardian and Wards Act, as the case may be. (Para 11)**

कृ संविधान – अनुच्छेद 226 – बालक की अभिरक्षा – उपचार – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया है कि बालक की अभिरक्षा के मामलों में जैसी स्थिति हो, साधारण उपचार पूर्ण रूप से हिंदू अप्राप्तवयता और संरक्षकता अधिनियम या संरक्षक और प्रतिपाल्य अधिनियम के अंतर्गत निहित है।

Cases referred:

(1998) 9 SCC 266, (2019) 7 SCC 42, 2000 (3) MPLJ 268, 2008 Cri.LJ 625, 2013 CriLJ 610.

Prateek Maheshwari, for the petitioner.

Valmik Sakargayen, G.A. for the respondents/State with Sub Divisional Magistrate (In person).

A.K. Saxena, for the respondent Nos. 4 to 6.

O R D E R

VIVEK RUSIA, J. :- Petitioner has filed the present petition being aggrieved by the order dated 24.09.2020 passed by the Sub Divisional Magistrate in the exercise of the power under section 97,98 of the Cr.P.C whereby the custody of respondents No.5 & 6 have been handed over to respondent No.4.

The facts of the case in short are as under:

2. The marriage of petitioner and respondent No.4 solemnized in the year 2003 and the petitioner gave birth to twin sons i.e. respondents No.5 & 6 in the year 2005. According to the petitioner, she has started living separately from her husband respondents No4 and since birth, respondents No.5 & 6 are living with her. Because of some matrimonial dispute with respondent No.4 petitioner has left the matrimonial house along with respondents No.5 & 6 and since then they have been brought up and educated by her. Although respondent No.4 used to visit and meet them the petitioner took entire liability for the betterment of future.

3. Respondent No.4 approached the Sub Divisional Magistrate by way of an application under section 97 of the Cr.P.C. seeking custody of respondents No.5 & 6. The Sub Divisional Magistrate without any authority has entertained the application and issued a search warrant of respondents nos. 5&6. In compliance of the search warrant, the police procured them from her house to produce respondents No.5 & 6 before Sub Divisional Magistrate. No notice was issued to the petitioner in the aforesaid case, after recording the statements of respondents No.5 & 6 and vide order dated 14.09.2020 permitted respondent No.4 to keep respondents nos. 5&6 with them, hence the present petition before this Court.

4. After notice the Sub Divisional Magistrate has filed the reply by submitting that respondent No.4 has applied under section 97 Cr.P.C, in which a search warrant was issued on 11.09.2020. In compliance of the said search warrant the police station Narsinghgarh has produced respondents No.5 & 6 in the Court and thereafter he took their statements in which they have categorically stated and shown their willingness to go with respondent No.4, father. Upon the said statement respondent No.3 has passed the impugned order dated 14.09.2020, hence there is no illegality in it and the petition is liable to be dismissed.

5. Shri A.K.Saxena, learned counsel appearing on behalf of respondents No.4 to 6 has argued in support of the impugned action of Sub Divisional Magistrate by submitting that the respondents No.5 & 6 were being ill-treated by the petitioner, therefore, looking to the welfare of the children learned SDM has rightly handed over their custody to the respondent No.4. The power has rightly been exercised under section 97 Cr.P.C in which no interference is called for in a writ petition filed under Article 226 of the Constitution of India. It is further submitted that the paramount consideration of the Court should be the welfare of the children while deciding their custody and the respondents No.5 & 6 without any pressure has willingly deposed before the SDM that they are not interested in residing with the petitioner, hence no interference is called for and the petition is liable to be dismissed.

6. Facts of the case are not in dispute to the extent that the petitioner and respondent No.4 are husband and wife but they are living separately for the last so many years and after separation, respondents No.5 & 6 were living with the petitioner till the impugned order was passed by the SDM.

7. Respondent No.4 has filed an application under section 97 & 98 Cr.P.C alleging that he used to live with the petitioner in Champi Mohalla, Narsinghgarh and in the year 2011 after creating a dispute she took him alongwith respondents No.5 & 6 with her to Madhusoodangarh where they have started living on a rented house. The petitioner's behaviour remained cruel towards respondents No.4 to 6 and compelled him to leave the house. He has received a call from respondents No.5 & 6 that the petitioner is behaving cruelly with them and they do not want to

live with her, hence they are searched by issuing a warrant. The Sub Divisional Magistrate has registered the application as case No.09/Criminal/97/98/2020 and issued a search warrant and in the execution of the said warrant, the police station Narsinghgarh took the respondents No.5 & 6 from the custody of the petitioner and produced them before the SDM. Respondent No.5 & 6 have recorded their statements that they are not willing to reside with the petitioner as she ill-treats them and they are willing to live with their father and accordingly learned Sub Divisional Magistrate vide order dated 14.09.2020 has handed over the custody of respondents No.5 & 6 to respondent No.4 in the exercise of power under section 98 of the Cr.P.C and also warned that in future if the petitioner creates any dispute in respect of custody of the respondents No.5 & 6 the respondent No.4 may report to the police station.

8. The only issue which requires consideration in this petition is as to whether the Magistrate is having power under sections 97 & 98 of the Cr.P.C to pass an order in respect of custody of the children or to decide the dispute in respect of custody of the children between the father and mother?

9. It is also not in dispute that since birth the respondents No.5 & 6 were living with the petitioner and respondent No.4 and when they parted in the year 2011 twin children were only aged about 6 years and they have started living with their mother i.e. petitioner. Till the day of the passing of the impugned order, they were brought up and educated by the present petitioner. The petitioner has filed various photographs of different times and age groups of respondents No.5 & 6 in which they are seen along with the petitioner/mother. The petitioner has also filed the mark sheets, certificates and other documents to show that they studied at Madhusoodangarh, district Guna. The petitioner has also worked as a Teacher in Radha Convent School. All of a sudden the respondent No.4 has filed an application under section 97 & 98 Cr.P.C alleging that the petitioner is ill-treating respondents No.5 & 6 and they are kept under confinement.

10. Section 97 Cr.P.C gives power to the Magistrate to issue a search warrant if he has reason to believe that any person is confined under such circumstances that the confinement amounts to an offence and upon search, if the person is found in the confinement shall be taken before the Magistrate who shall make such order as in the circumstances of the case seems proper. Section 98 Cr.P.C gives power to the Magistrate for the restoration of liberty of a woman or a female child under the age of 18 years who is under abduction or unlawful detention and the female child under the age of 18 years to her husband, parent, guardian or other person having the lawful charge of such child, therefore, admittedly, in this case, the provision of section 98 Cr.P.C does not apply because it deals with a woman or female child below the age of 18 years and the respondents No.5 & 6 are male children. So far the power under section 97 Cr.P.C is concerned such power is liable to be exercised if the Magistrate has a reason to believe that any person is confined

under such circumstances **that confinement amounts to an offence.** In the present case admittedly the respondents No.5 & 6 were living with the petitioner/mother who is a natural guardian, therefore, it cannot be termed as 'confinement' and the same is not an offence. In the present case, the Magistrate has not recorded its satisfaction that the respondents No.5 & 6 were in the confinement of the mother which amounts to an offence.

11. The Apex Court in the case of *Ramesh vs. Laxmi Bai* reported in (1998) 9 SCC 266 has held that section 97 of the Cr.P.C does not attract in the case when the child was living with his own father. In the case of *Tejaswini Gaud & others vs. Shekhar Jagdish Prasad Tewari & others* reported in (2019) 7 SCC 42 the Apex Court has held that in the child custody matter the ordinary remedy lies wholly under the Hindu Minority and Guardianship Act or the Guardians and Wards Act, as the case may be. In the cases arising out of the proceeding under the Guardian and Wards Act, the jurisdiction of the Court is determined by whether the minor ordinarily resides within the area in which the Court exercises the jurisdiction and the welfare of the child. Even in the writ of *habeas corpus* where the Court is of the view that a detailed enquiry is required the Court may decline to exercise the extraordinary jurisdiction and direct the parties to approach the civil Court. This Court in the case of *Pushpa Ramesh Kumar Patwa vs. Ramesh Kumar Badri Prasad* reported in 2000 (3) MPLJ 268 has held that in the exercise of power under section 97 of the Code the Magistrate cannot issue a direction for production of a child from the custody of the father and direct that the child shall be in the custody of the mother because the custody of the child with the father does not amount to wrongful confinement thereby no offence is committed attracting the provision of section 97 of the Cr.P.C. The High Court of Calcutta in the case of *Lily Manna vs. State of West Bengal and others* reported in 2008 Cri.LJ 625 has held that *sine qua non* of application of section 97 Cr.P.C is that there has to be, prima facie, finding that the person has been in wrongful confinement and that wrongful confinement must amount to an offence. The High Court of Rajasthan in the case of *Jaishree Tiwari vs. State of Rajasthan & others* reported in 2013 CriLJ 610 has held that the Executive Magistrate has no power under section 97 to wrest custody of the child from its natural guardian. Admittedly, when the child was in the custody of the minor (sic: mother) there was no reason to believe that he was under wrongful confinement and as such issuance of the search warrant was itself uncalled for and accordingly the order of the Magistrate was set aside being an illegal, perverse and absolutely abuse of process of Court.

12. Although this Court vide order dated 09.03.2021 has directed the Registrar (Judicial) to interact with the respondents No.5 & 6 personally and submit its report in a closed envelope. The OSD/Registrar has interacted with respondents No.5 & 6 on 09.03.2021 and gave its report to the effect that

respondents No.5 & 6 who are 16 years of age want to reside along with their father. The report dated 9.3.21 is reproduced below:

> Date: 09.03.2021
>
> In compliance of order of Hon'ble Court, Respondent No.5-Ankit @ Ansh Chakravarti s/o Vikas Chakravarti and Respondent No.6-Aabhas @ Vansh Chakravarti s/o Vikas Chakravarti are brought before me.
>
> I have personally interacted with respondent No.5 -Ankit @ Ansh Chakravarti and Respondent No.6-Aabhas @ Vansh Chakravarti, who are twins. Upon interaction with both of them, they have categorically stated that they do not want to live along with their mother, as their mother used to ill treat with them and with their father. They have stated that presently they are residing with their father Vikas at Narsinghgarh and both of them are pursuing their studies at Narsinghgarh. Both of them have also stated that their father is taking very good care of them, hence, they wish to stay along with their father.
>
> State of No.5-Ankit @ Ansh Chakravarti and Respondent No.6-Aabhas @ Vansh Chakravarti were also recorded.
>
> Interaction with No.5-Ankit @ Ansh Chakravarti s/o Vikas Chakravarti and Respondent No.6-Aabhas @ Vansh Chakravarti s/o Vikas Chakravarti and from their statement it reveals that both the twins do not want to resides along with their mother and are presently residing with their father happily. They also allege ill treatment with them by their mother. It does not appear that both twins are under any kind of influence with their father.
>
> Respondent No.5-Ankit @ Ansh Chakravarti and Respondent No.6 Aabhas @ Vansh Chakravarti, who are 16 years old wants to resides along with their father.
>
> Report along with statement of Respondent No.5-Ankit @ Ansh Chakravarti and Respondent No.6-Aabhas @ Vansh Chakravarti be kept in sealed envelope and put up before Hon'ble Court for kind perusal.
>
> OSD/Registrar

13. Respondents No.5 & 6 are aged 16 years, therefore, they are in a position to give their choice as to with whom they want to live. They recorded their statement before the Magistrate as well as before the Registrar of this Court that they are willing to live with their father. So far the allegation against the mother i.e. petitioner is concerned same is very vague in nature. No specific instances have been quoted in their statements about ill-treatment by the petitioner. Some times mother become very strict towards their children than the father, therefore, the Children's liking develops towards the father but that does not mean that the

mother ill-treats her children or becomes their enemy. The children spend most of the time with their mother, therefore, some times does not like the control and strictness of the mother and by no stretch of the imagination, it cannot be termed as an offence that can be led to illegal confinement. It appears that respondents No.5 & 6 were not liking the strictness of the mother, therefore, they have shown their willingness to reside with the father. Since they are aged about 16 years, therefore, it would not be proper to pressurize them to live either with mother or father but so far the order of the Magistrate is concerned it is *per se* illegal and without jurisdiction. Sub Divisional Magistrate has wrongly exercised his power under section 97 Cr.P.C that too without following the principle of natural justice. Sub Divisional Magistrate did not issue a notice to the petitioner and called the children through police and recorded their statement behind the back of the petitioner without there being any cross-examination etc. and passed the order. Respondents No.5 & 6 are minors as per the definition of child under section 2(12) of the Juvenile Justice (Care & Protection of Children) Act, 2015. The Sub Divisional Magistrate has directed the police to produce them before the Court by way of a search warrant without considering that such process may affect their mind, it is nothing but insensitive conduct on the part of the Sub Divisional Magistrate, therefore, the order dated 24.09.2020 passed by the Sub Divisional Magistrate is hereby quashed. Respondent No.4 is directed not to force respondents No.5 & 6 to live with him. They are free to live with their mother.

14. As the result, the petition is allowed with a cost of Rs.25,000/- payable by respondent No.4 to the petitioner. The Sub Divisional Magistrate is directed not to behave in this manner in future.

Petition allowed

I.L.R. [2021] M.P. 908 (DB)
WRIT PETITION

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

WP No. 5877/2021 (Jabalpur) decided on 1 April, 2021

RACHNA MAHAWAR …Petitioner

Vs.

THE DISTRICT MAGISTRATE & ors. …Respondents

***Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act (54 of 2002), Sections 14, 17 & 37 and Criminal Procedure Code, 1973 (2 of 1974), Section 20 – Scope & Jurisdiction – Competent Authority* – Held – District Magistrate while passing order u/S 14 exercises only administrative/executive functions – As per Section 20 Cr.P.C. Additional District magistrate also exercises same power as are exercisable by**

District Magistrate as per directions of State Government – Hence, power u/S 14 of Act of 2002 can be exercised by Additional District Magistrate also – Impugned order not beyond jurisdiction – Petition dismissed. (Para 8)

वित्तीय आस्तियों का प्रतिभूतिकरण और पुनर्गठन तथा प्रतिभूति हित का प्रवर्तन (SARFAESI) अधिनियम (2002 का 54), धाराएँ 14, 17 व 37 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 20 – व्याप्ति व अधिकारिता – सक्षम प्राधिकारी – अभिनिर्धारित – जिला मजिस्ट्रेट धारा 14 के अंतर्गत आदेश पारित करते समय केवल प्रशासनिक / कार्यपालिक अधिकारों का प्रयोग करता है – दं.प्र.सं. की धारा 20 के अनुसार, अतिरिक्त जिला मजिस्ट्रेट भी राज्य सरकार के निदेशों अनुसार जिला मजिस्ट्रेट द्वारा प्रयोज्य शक्तियों के समान शक्ति का प्रयोग करता है – अतः 2002 के अधिनियम की धारा 14 के अंतर्गत शक्ति का प्रयोग अतिरिक्त जिला मजिस्ट्रेट द्वारा भी किया जा सकता है – आक्षेपित आदेश अधिकारिता से परे नहीं – याचिका खारिज।

Cases referred :

(2019) 20 SCC 47, AIR 1969 SC 483.

Aseem Trivedi, for the petitioner.
Piyush Dharmadhikari, G.A. for the respondents/State

O R D E R

The Order of the Court was passed by :

PRAKASH SHRIVASTAVA, J. :- This petition has been filed by the petitioner aggrieved with the order dated 16.02.2021 passed by the Additional District Magistrate under Section 14 of the the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (in short **'the Act').**

2. A preliminary objection has been raised in respect of availability of alternate remedy of appeal.

3. Submission of learned counsel for the petitioner is that against such an order the remedy of appeal under Section 17 of the Act is not available and that the power under Section 14 can be exercised only by the District Magistrate and not the Additional District Magistrate.

4. I have heard the learned counsel for the parties and perused the record.

5. The issue relating to the jurisdiction of the Additional District Magistrate to pass an order under Section 14 of the Act needs consideration by this Court because if the Additional District Magistrate had no jurisdiction to pass the impugned order then the availability of alternative remedy of appeal will not come in the way of the petitioner from approaching this Court.

6. Section 14 of the Act gives the power to Chief Metropolitan Magistrate or District Magistrate to assist secured creditor in taking possession of secured asset. The term "District Magistrate" has not been defined under the Act. Section 37 of the Act makes it clear that the application of other laws is not barred and provides as under :-

> **"37. Application of other laws not barred.**—The provisions of this Act or the rules made thereunder shall be in addition to, and not in derogation of, the Companies Act, 1956 (1 of 1956), the Securities Contracts (Regulation) Act, 1956 (42 of 1956), the Securities and Exchange Board of India Act 1992 (15 of 1992), the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) or any other law for the time being in force."

7. The term "District Magistrate" has been defined under Section 20 of the Cr.P.C., which reads as under :-

> **"20. Executive Magistrates.**
>
> (1) In every district and in every metropolitan area, the State Government may appoint as many persons as it thinks fit to be Executive Magistrates and shall appoint one of them to be the District Magistrate.
>
> (2) The State Government may appoint any Executive Magistrate to be an Additional District Magistrate, and such Magistrate shall have such of the powers of a District Magistrate under this Code or under any other law for the time being in force, as may be directed by the State Government.
>
> (3) Whenever, in consequence of the office of a District Magistrate becoming vacant, any officer succeeds temporarily to the executive administration of the district, such officer shall, pending the orders of he State Government, exercise all the powers and perform all the duties respectively conferred and imposed by this Code on the District Magistrate.
>
> (4) The State Government may place an Executive Magistrate in charge of a sub- division and may relieve him of the charge as occasion requires; and the Magistrate so placed in charge of a sub- division shall be called the Sub- divisional Magistrate.
>
> [(4A) The State Government may, by general or special order and subject to such control and directions as it may deem fit to impose, delegate its powers under sub-section (4) to the District Magistrate.

> (5) Nothing in this section shall preclude the State Government from conferring, under any law for the time being in force, on a Commissioner of Police, all or any of the powers of an Executive Magistrate in relation to a metropolitan area."

8. A District Magistrate while passing an order under Section 14 of the Act, exercises only administrative or executive function. Section 20 of the Cr.P.C. makes it clear that the Additional District Magistrate also exercises the same power as are exercisable by the District Magistrate as per the direction of the State Government. Hence, the power under Section 14 of the Act can be exercised by the Additional District Magistrate also.

9. The Supreme Court in the matter of *Authorised Officer, Indian Bank Vs. D. Visalakshi and another,* (2019) 20 SCC 47 has considered somewhat similar issue while holding that the expression "Chief Metropolitan Magistrate" used under Section 14 of the Act is inclusive of Chief Judicial Magistrate. While holding so, the Court has given expansive meaning to the term "CMM" in order to make the provision more meaningful as the same does not militate against the legislative intent. The Supreme Court in the case of **Authorised Officer, Indian Bank** (supra) has considered the conflicting views of various High Courts on this issue and has laid down as under :

> **"35.** Indisputably, the expressions "CMM" and "DM" have not been defined in the 2002 Act. That definition can thus, be traced to the provisions of CrPC. It is also well established by now that the 2002 Act, is a self-contained code. Concededly, the nature of inquiry to be conducted by the designated authorities under the 2002 Act, is spelt out in Section 14 of the 2002 Act. The same is circumscribed and is limited to matters specified in clauses (*i*) to (*ix*) of the first proviso in sub-section (1) of Section 14 of the 2002 Act, inserted in 2013. Prior to the insertion of that proviso, it was always understood that in such inquiry, it is not open to adjudicate upon contentious pleas regarding the rights of the parties in any manner. The stated authorities could only do verification of the genuineness of the plea and upon being satisfied that it is genuine, the adjudication thereof could then be left to the court of competent jurisdiction.
>
> **37.** Notably, the powers and functions of CMM and CJM are equivalent and similar, in relation to matters specified in CrPC. These expressions (CMM and CJM) are interchangeable and synonymous to each other. Moreover,

> Section 14 of the 2002 Act does not explicitly exclude CJM from dealing with the request of the secured creditor made thereunder. The power to be exercised under Section 14 of the 2002 Act by the authority concerned is, by its very nature, non-judicial or State's coercive power. Furthermore, the borrower or the persons claiming through borrower or for that matter likely to be affected by the proposed action being in possession of the subject property, have statutory remedy under Section 17 of the 2002 Act and/or judicial review under Article 226 of the Constitution of India. In that sense, no prejudice is likely to be caused to the borrower/lessee; nor is it possible to suggest that they are rendered remediless in law. At the same time, the secured creditor who invokes the process under Section 14 of the 2002 Act does not get any advantage much less added advantage. Taking totality of all these aspects, there is nothing wrong in giving expansive meaning to the expression "CMM", as inclusive of CJM concerning non-metropolitan area, who is otherwise competent to discharge administrative as well as judicial functions as delineated in CrPC on the same terms as CMM. That interpretation would make the provision more meaningful. Such interpretation does not militate against the legislative intent nor it would be a case of allowing an unworthy person or authority to undertake inquiry which is limited to matters specified in Section 14 of the 2002 Act."

It has further been held that :

> **"44.** Be it noted that Section 14 of the 2002 Act is not a provision dealing with the jurisdiction of the Court as such. It is a remedial measure available to the secured creditor, who intends to take assistance of the authorised officer for taking possession of the secured asset in furtherance of enforcement of security furnished by the borrower. The authorised officer essentially exercises administrative or executive functions, to provide assistance to the secured creditor in terms of the State's coercive power to effectuate the underlying legislative intent of speeding the recovery of the outstanding dues receivable by the secured creditor. At best, the exercise of power by the authorised officer may partake the colour of quasi-judicial function, which can be discharged even by

the Executive Magistrate. The authorised officer is not expected to adjudicate the contentious issues raised by the parties concerned but only verify the compliances referred to in the first proviso of Section 14; and being satisfied in that behalf, proceed to pass an order to facilitate taking over possession of the secured assets.

45. It is well established that no civil court can interdict the action initiated in respect of any matter, which a Debts Recovery Tribunal or Debts Recovery Appellate Tribunal is empowered by or under the 2002 Act, to determine and in particular, in respect of any action taken or to be taken in pursuance of any power conferred by or under the 2002 Act or under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. That has been ordained by Section 34 of the 2002 Act.

46. The borrowers or the persons claiming through borrowers had placed emphasis on Section 35 of the 2002 Act. The same reads thus:

> **"35.** ***The provisions of this Act to override other laws.***—The provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law."

47. The construction of this provision plainly indicates that the provisions of the Act will override any other law for the time being in force. The question is : do the provisions of the 2002 Act override the provisions of CrPC, whereunder the functions to be discharged by CMM are similar to that of CJM. Further, the expressions "CMM and CJM" are used interchangeably in CrPC and are considered as synonymous to each other. Section 14, even if read literally, in no manner denotes that allocation of jurisdictions and powers to CMM and CJM under the Code of Criminal Procedure are modified by the 2002 Act. Thus understood, Section 14 of the 2002 Act, stricto sensu, cannot be construed as being inconsistent with the provisions of the Code of Criminal Procedure or vice versa in that regard. If so, the stipulation in Section 35 of the 2002 Act will have no impact on the expansive

construction of Section 14 of the 2002 Act. Whereas, there is force in the submission canvassed by the secured creditors (banks), that Section 37 of the 2002 Act answers the issue under consideration. The same reads thus:

> **"37.** ***Application of other laws not barred.—***
>
> The provisions of this Act or the rules made thereunder shall be in addition to, and not in derogation of, the Companies Act, 1956 (1 of 1956), the Securities Contracts (Regulation) Act, 1956 (42 of 1956), the Securities and Exchange Board of India Act, 1992 (15 of 1992), the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) or any other law for the time being in force.

"The bare text of this provision predicates that the provisions of the 2002 Act or the Rules made thereunder shall be in addition to the stated enactments or "any other law for the time being in force". Having said that the provisions of Section 14 of the 2002 Act are in no way inconsistent with the provisions of the Code of Criminal Procedure, it must then follow that the provisions of the 2002 Act are in addition to, and not in derogation of the Code.

48. Suffice it to observe that keeping in mind the subject and object of the 2002 Act and the legislative intent and purpose underlying Section 14 of the 2002 Act, contextual and purposive construction of the said provision would further the legislative intent. In that, the power conferred on the authorised officer in Section 14 of the 2002 Act is circumscribed and is only in the nature of exercise of State's coercive power to facilitate taking over possession of the secured assets."

Finally, it has been concluded that :

> **"52.** Applying the principle underlying this decision, it must follow that substitution of functionaries (CMM as CJM) qua the administrative and executive or so to say non-judicial functions discharged by them in light of the provisions of the Code of Criminal Procedure, would not

> be inconsistent with Section 14 of the 2002 Act; nay, it would be a permissible approach in the matter of interpretation thereof and would further the legislative intent having regard to the subject and object of the enactment. That would be a meaningful, purposive and contextual construction of Section 14 of the 2002 Act, to include CJM as being competent to assist the secured creditor to take possession of the secured asset."

On the same analogy, it can be safely concluded that the power under Section 14 of the Act can very well be exercised by the Additional Magistrate also.

10. Learned counsel for the petitioner has placed reliance upon the judgment of the Supreme Court in the matter of *Hari Chand Aggarwal v. The Batala Engineering Co. Ltd. And others,* AIR 1969 SC 483 but in that case the nature of power of requisition exercisable under Section 29 of the Defence of India, Act (1962) was found to be very drastic in nature involving fundamental right of property hence it was held that the word "District Magistrate" could not be read as "Additional District Magistrate" but that is not so in the present case as the nature of power exercisable under Section 14 of the Act is quite different. Hence, the petitioner is not entitled to the benefit of the judgment of the Supreme Court in the matter of *Hari Chand Aggarwal* (supra).

11. Counsel for the petitioner referring to the Principles of Statutory Interpretation by Shri G.P. Singh (Twelfth Edition, 2010) has raised the issue that when the Act confer power on the authority then it should be exercised by the same authority. That principle is not in dispute but in terms of the judgment of the Supreme Court in the matter of *Authorised Officer, Indian Bank* (supra), the term "District Magistrate" as contained in Section 14 of the Act is inclusive of Additional District Magistrate also. Hence, the contention of the counsel for the petitioner in this regard is not accepted.

12. Thus, in the present case, the order passed by the Additional District Magistrate under Section 14 of the Act cannot be held to be beyond jurisdiction.

13. So far as the other issues, which are raised by the counsel for the petitioner, the appropriate remedy is to file an appeal under Section 17 of the Act. This Court in another judgment delivered today in the matter of *Madan Mohan Shrivastava Vs. Additional District Magistrate (South) Bhopal and others* passed in W.P. No.5629/2021 has already held that against the order passed under Section 14, remedy of appeal under Section 17 is available.

14. Hence, the writ petition is **disposed of** after granting liberty to the petitioner to avail the remedy of appeal.

Order accordingly

I.L.R. [2021] M.P. 916 (DB)
WRIT PETITION

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

WP No. 8178/2020 (Jabalpur) decided on 23 April, 2021

INDRAKALA AGRAWAL (SMT.) & ors. …Petitioners

Vs.

STATE OF M.P. & ors. …Respondents

A. Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act (30 of 2013), Section 33 – Review of Award – Jurisdiction **– Held – Unless Statute provides for power of review, an award once passed in itself becomes final – Power of Review is not an inherent power, it must be conferred by law either specifically or by necessary implication – Respondent by reviewing its award, acted beyond jurisdiction – Impugned order quashed – Petition allowed. (Para 19 & 21)**

क. भूमि अर्जन, पुनर्वासन और पुनर्व्यवस्थापन में उचित प्रतिकर और पारदर्शिता का अधिकार अधिनियम (2013 का 30), धारा 33 – अवार्ड का पुनर्विलोकन – अधिकारिता – अभिनिर्धारित – जब तक कानून पुनर्विलोकन की शक्ति उपबंधित नहीं करता, एक बार पारित किया गया अवार्ड अपने आप में अंतिम बन जाता है – पुनर्विलोकन की शक्ति एक अंतर्निहित शक्ति नहीं है, उसे विनिर्दिष्ट रूप से अथवा आवश्यक विवक्षा द्वारा, विधि द्वारा प्रदत्त होना चाहिए – प्रत्यर्थी ने उसके अवार्ड का पुनर्विलोकन कर, अधिकारिता से परे कार्य किया – आक्षेपित आदेश अभिखंडित – याचिका मंजूर।

B. Constitution – Article 226, Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act (30 of 2013), Section 64 and National Highways Act (48 of 1956), Section 3G(5) – Alternate Remedy – Judicial Review – Maintainability of Petition **– Held – When a challenge to an order is primarily on ground of jurisdiction and competence of authority, Writ Court can entertain a writ petition under Article 226 of Constitution exercising its power of judicial review, even if there is provision of appeal provided in Statute – Petition maintainable. (Para 20)**

ख. संविधान – अनुच्छेद 226, भूमि अर्जन, पुनर्वासन और पुनर्व्यवस्थापन में उचित प्रतिकर और पारदर्शिता का अधिकार अधिनियम (2013 का 30), धारा 64 एवं राष्ट्रीय राजमार्ग अधिनियम (1956 का 48), धारा 3G(5) – वैकल्पिक उपचार – न्यायिक पुनर्विलोकन – याचिका की पोषणीयता – अभिनिर्धारित – जब एक आदेश को चुनौती, प्राथमिक रूप से अधिकारिता एवं प्राधिकारी की सक्षमता के आधार पर दी गई है, रिट न्यायालय, यदि कानून में अपील का उपबंध उपबंधित है तब भी, न्यायिक पुनर्विलोकन की

उसकी शक्ति का प्रयोग करते हुए संविधान के अनुच्छेद 226 के अंतर्गत रिट याचिका ग्रहण कर सकता है – याचिका पोषणीय है।

C. ***National Highways Rules, 1957 – Power of Review*** **– Held – The entire provision of Rules of 1957 does not provide for a power of review to competent authority so far as award under the National Highways Act, 1956 is concerned. (Para 13)**

ग. *राष्ट्रीय राजमार्ग नियम, 1957 – पुनर्विलोकन की शक्ति* – अभिनिर्धारित – जहां तक राष्ट्रीय राजमार्ग अधिनियम, 1956 के अंतर्गत अवार्ड का संबंध है, 1957 के नियम के समूचे उपबंध, सक्षम प्राधिकारी को पुनर्विलोकन की शक्ति उपबंधित नहीं करते।

Cases referred:

2019 SCC On line Bom 6092, 2019 SCC Online Cal 6122, W.P. (C) No. 665/2019 decided on 14.09.2020 (High Court of Chattishgarh), 2019 SCC OnLine All 3589, 2011 SCC Online KAR 115, 2019 (9) SCC 416.

Avinash Zargar, for the petitioners.
Ankit Agrawal, G.A. for the respondent Nos. 1 & 2.
Mohan Sausarkar, for the respondent No. 3.

O R D E R

The Order of the Court was passed by :

V. K. SHUKLA, J. :- The present petition has been filed under Article 226 of the Constitution of India for quashing and setting aside of the award dated 01-06-2020 and for restoration of the original award dated 07-03-2019.

2. The facts of the case are that the industrial lands belonging to the petitioners and the industrial unit appurtenant thereto have been acquired by the respondents and an award granting compensation was passed on 07-03-2019. It is submitted that the compensation for the land has been assessed @ Rs.2700/- per square meter. This rate was based on relevant market value guidelines. After more than one year from the date of passing of the award, the respondent no.2 issued a notice to the petitioners on 18-03-2020. By the said notice, three days time was granted to the petitioners to submit their reply with regard to review of the award. The petitioners filed a detailed reply inter alia pointing out that there is no error in the award and that the respondent no.2 has become *functus officio* and thus he has no jurisdiction to review the award that too after lapse of more than a year. The respondent no.2 has reviewed the award and passed the impugned award and reduced the amount of compensation awarded to the petitioners by applying rate on the basis of measurement of lands acquired as per hectare basis, whereas initially the compensation was computed at per square meter.

3. Learned counsel for the petitioners submitted that admittedly the lands of the petitioners are industrial and thus in the original award compensation was rightly computed on the basis of per square meter. It is submitted that the impugned award passed in exercise of the review jurisdiction is without jurisdiction. In absence of the statutory power of review, the respondent no.2 could not have reviewed the award. The correction which has been sought by the respondent no.2 would not fall within the ambit of correction of clerical error under Section 33 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (hereinafter referred to as 'Act,2013). It is submitted that the aforesaid provision permits correction of award of clerical error within a period of six months and not beyond that. The sole question which crops up for consideration is as follows :-

> "Whether the SDO cum Land Acquisition Officer cum Competent Authority (who after passing of award becomes *functus officio)* can review the award passed by it in absence of statutory powers of review under the National Highways Act, 1956 that too after a lapse of more than one year."

4. The learned counsel for the petitioners cited a Division Bench Judgment of Bombay High Court in the case of *Bhupendra Singh Vs. Competent Authority,* 2019 SCC On line Bom 6092, Single Bench judgment of High Court of Calcutta in WPA 142 of 2019, 2019 SCC Online Cal 6122 *(Md. Asaduzzaman and another Vs. State of West Bengal* and others and also a Single Bench decision of High Court of Chattishgarh at Bilaspur passed in Writ Petition (C) No.665/2019 *(Mahesh Nachrani & Ors. Vs. Union of India & Ors.) and connected writ petitions* on 14-09-2020 to argue that once the competent authority has passed the award as to the quantum of compensation payable in lieu of acquisition of the land under the National Highways Act, he cannot review the order, therefore, the amended award dated 01-06-2020 is wholly illegal and incompetent.

5. The respondents filed reply and raised preliminary objection regarding the maintainability of the instant petition on the ground of availability of statutory remedy as provided under Section 64 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation Act, 2013. It is submitted that without availing the said alternative remedy, the instant petition is liable to be dismissed. It is further submitted that the impugned award do not fall within the purview of review, it is only a correction which is done by the answering respondents to rectify the error occurred in the earlier award. It is submitted that the lands of the petitioners were acquired for the four lane road for National Highway from Indore to Aadlabad. The Acquisition Officer earlier passed the award on 07-03-2019 and computed the amount of compensation of Rs.94793367/- in respect of total acquired area of village Dehagavon i.e. 13.493 hectare. On

13-03-2020, the Project Director submitted an application for correction of the award on the ground that the rates which have been applied by the authority in respect of the plot area (residential purpose) of Village Dehagavon i.e. Rs.2700 per sq. meter is not correct and it shall be as per market value of the land in the year 2017-2018 and for the land having area more than 0.03 hectare, rates applicable for valuation will be 1.5 times of the rates of agricultural irrigated land, therefore, the corrected rates will be Rs.4054500/- per hectare in place of 27000 per sq. meter. The authority after taking into consideration the market value of the property, reviewed the award on 01-06-2020. The notices were given to the petitioners. As per the amended award, the compensation amount of the land of the petitioners was determined at Rs.42014928/-. It is submitted that the petitioners have raised the ground that the authority cannot review the award as he became *functus officio* and thus he has no jurisdiction to review the award after lapse of a year. It is submitted that the original award was passed on 07-03-2019 as per relevant provision of the Act, 2013, but in original award, the authority has determined the value of the land (residential plot) i.e. Rs.2700 per sq. meter for diverted land whereas as per the market value and Collector guideline 2017-2018, the diverted land (residential, industrial and any other use) more than 0.03 hectare, the rates applicable for valuation is 1.5 times the rate of agricultural irrigated land. The impugned award has been passed under Section 33(1) & 64 of the Act, 2013 and if the petitioners are aggrieved by the aforesaid award, then they have alternative remedy to challenge the impugned award under the Act. It is submitted that the petitioners have alternative remedy under section 3G(5) of the National Highways Act to approach the Arbitrator.

6. The respondent no.3 filed an affidavit in compliance to the order dated 03-09-2020 passed by this court and submitted that the award dated 07-03-2019 in which for Khasra nos.1140/1, 1140/2, 1140/3 and 1140/4 Rs.40,01,208/-, Rs.3,57,85,995/-, Rs.34,29,607/- and Rs.1,82,91,235/- (cumulatively amounting to Rs.6,15,08,045/-) has been awarded respectively. Admittedly, the rate which has been applied by the respondent no.2 is of Rs.2700/- per sq.meter (rate applicable for diverted land) whereas as per the Collector Guidelines 2017-18 क्रमांक 2 के अनुसार "कण्डिका क्रमांक 4 में उल्लेखित क्षेत्रों/ग्रामों को छोड़कर शेष ग्रामीण क्षेत्रों में 0.03 हेक्टेयर से अधिक व्यपवर्तित भूमि (आवास, उद्योग, व्यवसाय एवं अन्य उपयोग हेतु) का मुल्यांकन् सिंचित कृषि भूमि के मूल्य के डेढ़ गुना मान्य किया जाएगा"।

7. It is further submitted that as per subsequent amended award dated 01-06-2020 (amounting to Rs.1,00,16,884/- cumulatively for Khasra Nos. 1140/1, 1140/2, 1140/3 and 1140/40) in which the rates are applicable as per Collector Guidelines 2017-2018 क्रमांक 2 के अनुसार कण्डिका क्रमांक 4 में उल्लेखित क्षेत्रों/ग्रामों को छोड़कर शेष ग्रामीण क्षेत्रों में 0.03 हेक्टेयर से अधिक व्यपवर्तित भूमि (आवास, उद्योग, व्यवसाय एवं अन्य उपयोग हेतु) का मुल्यांकन् सिंचित कृषि भूमि के मूल्य के डेढ़ गुना मान्य किया जाएगा"।

On the basis of the aforesaid submissions, it is contended that the subsequent impugned award passed by the respondent no.2 is proper and legal. They also raised preliminary objection regarding availability of alternative remedy to approach the Arbitrator as per the provision of Section 3G(5) of the National Highways Act. Now he adverted to the question which has cropped up for consideration in the present case is "Whether the SDO cum Land Acquisition Officer cum Competent Authority (who after passing of award becomes *functus officio)* can review the award passed by it in absence of statutory powers of review under the National Highways Act, 1956 that too after a lapse of more than one year ?"

8. It was the stand and contention of the petitioners all along that once when the prescribed authority has passed a final award and the same has been published, the prescribed authority thereafter becomes *functus officio*. It was further contended that once when an award has been passed, the statute does not provide for any of the aggrieved persons to prefer a review, nor does the statute confer any suo-moto (sic : motu) powers upon the prescribed authority permitting suo moto (sic : motu) review of the final award. In view of this, the counsel for the petitioners stressed that the impugned amended award dated 01.06.2020 to be per-se illegal and contrary to law. Another ground raised by the petitioners while challenging the amended award was that while registering a review the authority concerned did not issue any sort of notice to the petitioners nor was a fair and reasonable opportunity of hearing provided and thus the impugned order was also violative of the principles of natural justice. The further contention of the petitioners was that the plain reading and the proceedings would clearly reflect that the entire acquisition proceedings have been conducted strictly in accordance with the provisions of the Act and as such there is no procedural, technical and legal shortcoming or lacuna in the process of passing of the final award under Section 3(G) of the National Highways Act, 1956.

9. As regard to the counsel appearing for the respondents, have taken a plea of there being an alternative remedy under sub-clause (5) of clause (G) of Section 3, which provides for the petitioners moving an appropriate application seeking for appointment of an Arbitrator for redressal of the grievance of the aggrieved party.

10. At this juncture, it would be relevant to refer to Section 3G of the National Highways Act, 1956 and which for ready reference is being reproduced hereinunder:

> **"3G. Determination of amount payable as compensation**-(1) Where any land is acquired under this Act, there shall be paid an amount which shall be determined by an order of the competent authority.

(2) Where the right of user or any right in the nature of an easement on, any land is acquired under this Act, there shall be paid an amount to the owner and any other person whose right of enjoyment in that land has been affected in any manner whatsoever by reason of such acquisition an amount calculated at ten per cent. of the amount determined under sub-section (1), for that land.

(3) Before proceeding to determine the amount under sub-section (1) or sub-section (2), the competent authority shall give a public notice published in two local newspapers, one of which will be in a vernacular language inviting claims from all persons interested in the land to be acquired.

(4) Such notice shall state the particulars of the land and shall require all persons interested in such land to appear in person or by an agent or by a legal practitioner referred to in sub-section (2) of section 3C, before the competent authority, at a time and place and to state the nature of their respective interest in such land.

(5) If the amount determined by the competent authority under sub-section (1) or sub-section (2) is not acceptable to either of the parties, the amount shall, on an application by either of the parties, be determined by the arbitrator to be appointed by the Central Government.

(6) Subject to the provisions of this Act, the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply to every arbitration under this Act.

(7) The competent authority or the arbitrator while determining the amount under sub-section (1) or sub-section (5), as the case may be, shall take into consideration -

(a) the market value of the land on the date of publication of the notification under section 3A;

(b) the damage, if any, sustained by the person interested at the time of taking possession of the land, by reason of the severing of such land from other land;

(c) the damage, if any, sustained by the person interested at the time of taking possession of the land, by reason of the acquisition injuriously affecting his other immovable property in any manner, or his earnings;

(d) if, in consequences of the acquisition of the land, the person interested is compelled to change his residence or place of business, the reasonable expenses, if any, incidental to such change."

11. And for the competent authority in the course of conducting the proceedings under the National Highways Act, 1956 they have been given certain powers which the Civil Court exercises while trying a suit under the Code of Civil Procedure, 1908.

12. The limited provisions of the Code of Civil Procedure which can be exercised by the competent authority under the NH Act is spelt out in 3(I) of the Act of 1956, which again for ready reference is reproduced herein under:

> "3-I. Competent authority to have certain powers of civil court.— The competent authority shall have, for the purposes of this Act, all the powers of a civil court while trying a suit under the Code of Civil Procedure, 1908 (5 of 1908), in respect of the following matters, namely:—
>
> (a) summoning and enforcing the attendance of any person and examining him on oath;
>
> (b) requiring the discovery and production of any document;
>
> (c) reception of evidence on affidavits;
>
> (d) requisitioning any public record from any court or office;
>
> (e) issuing commission for examination of witnesses."

13. In exercise of power conferred under Section 9 of the National Highways Act, 1956, the Central Government had also framed certain Rules known as **"The National Highways Rules, 1957".** The entire provision of the Rules of 1957 does not provide for a power of review to the competent authority, so far as the award under the National Highways Act, 1956 is concerned.

14. Recently, the Bombay High Court had the occasion of dealing with a similar issue and in the said judgment of *"Bhupendrasingh v. Competent Authority"* 2019 SCC OnLine Bom 6092, the Division Bench of the Bombay High Court in paragraphs No. 25, 27 & 47 has held as under:

> "25. It would thus be apparent that the power of review, being a creature of a statute, has to be conferred upon the authority by the provisions of the statute. It cannot be said that the Parliament while enacting the Amending Act No. 16 of 1997, amending the provisions of the NH Act 1956, was oblivious of the nature of rights and powers being conferred upon the Competent Authority for the purposes of acquisition of land for the National Highways. Thus, had it been the intention of the Parliament to confer a power of review upon the 'Competent Authority', as constituted u/s. 3(a) of the NH Act, 1956, it would have so done by insertion of a proper provision in that regard in the statute. The absence

of such a provision, therefore, indicates the intention of the law makers, not to confer such a power upon the Competent Authority, in absence of which, such a power cannot be said to be available to the Competent Authority.

27. Thus, under the scheme of acquisition under the NH Act, 1956, under Section 3-A, the Central Government, for the purposes as stated therein, has the power to, by publication of notification in the Official Gazette, declare its intention to acquire such land. Under Sec. 3-B, any person authorised in this behalf, has the lawful authority to inspect, survey, measure, value, enquire, take levels, etc.. Section 3-C then authorises the Competent Authority to hear objections, as may be filed by any person interested in land and after hearing him or his counsel and after making such further enquiry, if any, as thought necessary, decide the objections, and such decisions/order has been made final. Section 3-D relates to submitting the report as to acquisition of land to the Central Government and on receipt of such report, the Central Government shall declare, by notification in the Official Gazette, that the land should be acquired for the purpose mentioned in sub-section (1) or Section 3-A. Section 3-E prescribes for taking possession of the land acquired. Section 3-F is with regard to the right to enter into the land where land has vested in the Central Government and Section 3-G is relating to determination of compensation amount by the Competent Authority for the land acquired. This would demonstrate no power of review or for that matter a power to make any correction in the award passed, for whatsoever reason, has been conferred upon the Competent Authority. The status of the Competent Authority and the nature of the power exercised by it, are material in considering whether it would have an inherent power of review/correction as is being contended by the learned A.S.G. Shri Sanjeev Deshpande.

47. The net result of the discussion, as made above, is that the provisions of section 33 of the Act of 2013, are not available to the Competent Authority constituted u/s. 3(a) of the NH Act, 1956, in the process of acquisition of land under the NH Act, 1956 and thus, it is impermissible for the Competent Authority to make any correction or for that matter to pass any order in the nature of correction of an award or for that matter an amended award. Once the award has been passed by the Competent Authority, the Competent Authority loses any authority to tinker with it in any manner whatsoever."

15. A similar dispute also came up before the Allahabad High Court in the case *"Ravindra Kumar Singh v. Union of India",* 2019 SCC OnLine All 3589. The Division Bench of Allahabad also in paragraphs No. 30 to 34 held as under:

"30. We find unbroken line of authority to the effect that power of review is not an inherent power. It needs to be conferred by the statute by express or specific provision. In absence of any such power the order simply becomes without jurisdiction.

31. The legal position in this regard is much too well settled to require any reiteration. We may in this regard gainfully refer to the decision of the Supreme Court in Patel Chunibhai Dajibha v. Narayanrao Khanderao Jambekar.

32. The Act does not empower the Collector to review an order passed by him under Section 76-A. In the absence of any power of review, the Collector could not subsequently reconsider his previous decisions and hold that there were grounds for annulling or reversing the Mahalkari's order. The subsequent order dated February 17, 1959 reopening the matter was illegal, ultra vires and without jurisdiction. The High Court ought to have quashed the order of the Collector dated February 17, 1959 on this ground.

33. The said judgement has been consistently followed by the Supreme Court, in Kalabharati Advertising v. Hemant Vimalnath Narichania4 the Supreme Court has made the following observation:

> "Review in absence of statutory provisions
>
> 12. It is settled legal proposition that unless the statute/ rules so permit, the review application is not maintainable in case of judicial/ quasijudicial orders. In the absence of any provision in the Act granting an express power of review, it is manifest that a review could not be made and the order in review, if passed, is ultra vires, illegal and without jurisdiction. (Vide Patel Chunibhai Dajibha v. Narayanrao Khanderao Jambekar and Harbhajan Singh v. Karam Singh.)
>
> 13. In Patel Narshi Thakershi v. Pradyuman Singhji Arjunsinghji, Major Chandra Bhan Singh v. Latafat Ullah Khan4, Kuntesh Gupta (Dr.) v. Hindu Kanya Mahavidyalaya, State of Orissa v. Commr. of Land Records and Settlement and Sunita Jain v. Pawan Kumar Jain this Court held that the power to review is not an inherent power. It must be conferred by law either expressly/specifically or by necessary implication and in the absence of any provision in the Act/Rules, review of an earlier order is impermissible as review is a creation of statute. Jurisdiction of review can be derived only from the statute and thus, any order of review in the absence of any statutory provision for the same is a nullity, being without jurisdiction."

> 34. Applying the said principle, we find that the competent authority has traveled beyond its jurisdiction to review its own order. He has ventured to sit over the order by his predecessor in reopening the Award. Hence, in the absence of any power of review, impugned order passed by the competent authority in the present case is without jurisdiction."

16. The High Court of Karnataka also had an occasion of dealing with a similar situation in the case of *"National Highway Authority of India v. Assistant Commissioner and Competent Authority, Kolar and Another"* 2011 SCC Online KAR 115, wherein in paragraph No.13 the Division Bench has held as under:

> "13. The question is whether respondent No. 1 has any such power under the provisions of the Act to pass such a second award. The answer has to be an emphatic no. There is no provision in the Act clothing respondent No. 1 to pass a second award. Once an award is passed determining the compensation by the competent authority, then as per the provisions contained under sub-Section (5) of Section 3G of the Act, the aggrieved party who does not accept the amount has to make an application to the Arbitrator appointed by the Central Government who will determine the correct amount payable. As per sub-Section (6) of Section 3G of the Act, the provisions of the Arbitration & Conciliation Act, 1996, are made applicable to every Arbitration that takes place under the National Highways Act, 1956. As per sub-Section (7) of Section 3G of the Act, certain factors are enumerated which are required to be taken into consideration while determining the amount of compensation by the competent authority and also by the arbitrator. It is thus clear that if it is the case of the claimants-land owners that proper market value to the acquired lands payable as on the date of preliminary Notification published under Section 3A of the Act was not determined and awarded by the competent authority, the only course open for them is to move the arbitrator whereupon the arbitrator is enjoined with a duty to determine the same by following the provisions contained under sub-Section (7) of Section 3G of the Act The aggrieved party will be further entitled to avail the provisions of the Arbitration & Conciliation Act, 1996."

17. The same view has been reiterated by *High Court of Chhatishgarh at Bilaspur in the case of Mahesh Nachrani and others Vs. Union of India and others* passed in Writ Petition (C) No.665/2019, *and* High Court of Calcutta in WPA 142 of 2019, 2019 SCC Online Cal 6122 *(Md. Asaduzzaman and another Vs. State of West Bengal and others.*

18. Recently the Hon'ble Supreme Court also in the case of " *Naresh Kumar & Others v. Government (NCT of Delhi)"* 2019 (9) SCC 416 considering the issue whether a review of an award passed under the Acquisition Act was permissible or not, in paragraphs No.13 & 14 held as under:

"13. It is settled law that the power of Review can be exercised only when the statute provides for the same. In the absence of any such provision in the concerned statute, such power of Review cannot be exercised by the authority concerned. This Court in the case of ***Kalabharati Advertising vs. Hemant Vmalnath Narichania (2010) 9 SCC437,*** has held as under:

> "... 12. It is settled legal proposition that unless the statute/rules so permit, the review application is not maintainable in case of judicial/quasi-judicial orders. In the absence of any provision in the Act granting an express power of review, it is manifest that a review could not be made and the order in review, if passed, is ultra vires, illegal and without jurisdiction. (Vide Patel Chunibhai Dajibha v. Narayanrao Khanderao Jambekar [AIR 1965 SC 1457] and Harbhajan Singh v. Karam Singh [AIR 1966 SC 641] .
>
> 13. In Patel Narshi Thakershi v. Pradyuman Singhji Arjunsinghji [(1971) 3 SCC 844] , Chandra Bhan Singh v. Latafat Ullah Khan [(1979) 1 SCC 321] , Kuntesh Gupta (Dr.) v. Hindu Kanya Mahavidyalaya [(1987) 4 SCC 525] , State of Orissa v. Commr. of Land Records and Settlement [(1998) 7 SCC 162] and Sunita Jain v. Pawan Kumar Jain [(2008) 2 SCC 705] this Court held that the power to review is not an inherent power. It must be conferred by law either expressly/specifically or by necessary implication and in the absence of any provision in the Act/Rules, review of an earlier order is impermissible as review is a creation of statute. Jurisdiction of review can be derived only from the statute and thus, any order of review in the absence of any statutory provision for the same is a nullity, being without jurisdiction.
>
> 14. Therefore, in view of the above, the law on the point can be summarised to the effect that in the absence of any statutory provision providing for review, entertaining an application for review or under the garb of clarification /modification/ correction is not permissible."

14. In view of the aforesaid, we hold that the Award dated 01.10.2003 could not have been reviewed by the Collector, and thus we allow these appeals and quash the order dated 04.07.2004 passed by the Collector in Review Award No. 16/03/04 as well as the order dated 04.03.2010 passed by the Delhi High Court in Naresh Kumar v. State (NCT of Delhi). The appellants shall thus be entitled to the compensation as awarded in terms of the Award of the Land Acquisition Collector dated 01.10.2003, and the Supplementary Award dated 27.10.2004. No orders as to costs."

19. From the reading of the aforesaid judicial pronouncements of the various High Courts as also of the Hon'ble Supreme Court a fact which stands established is that unless the provision of law i.e. the statute provides for the power of review, an award once passed in itself becomes final. The position of Law also gets well settled on the basis of the aforesaid judicial pronouncements that the power of review is not an inherent power, it must be conferred by law either specifically or by necessary implication. A review is always considered to be a creature of statute and the power of review cannot be entertained in the absence of a provision thereof.

20. As regards the objection of the respondents, so far as the right of the petitioners to challenge the award by way of an arbitration invoking Section 3G(5) of the National Highways Act, 1956 is concerned, this Court is of the opinion that, once when the challenge is made to the amended award primarily on the ground of, lack of jurisdiction and competence on the part of the prescribed authority, in reviewing his award and the ground being that of the authorities being denuded of their power of review this Court is of the opinion that under such circumstances, this Court in exercise of its powers under Article 226 of the Constitution of India exercising the power of judicial review can entertain a writ petition in this regard, even in the case, if there is a provision of appeal provided under the statute. It is by now a well settled proposition of law that when a challenge to an order is primarily on the ground of jurisdiction and competence of the authority Writ Court can entertain a writ petition. Thus, the objection so far as the petitioners having an alliterative (sic : alternative) remedy stands rejected.

21. For all the aforesaid reasons, the writ petition deserve to be and are accordingly allowed and the impugned amended award (Annexure P/1) dated 01.06.2020 is held to be bad in law, illegal and without jurisdiction and are accordingly set-aside thereby entitling the petitioners the benefit as per the original award dated 07.03.2019.

22. In view of the aforesaid, the writ petition stands allowed. No order as to costs.

Petition allowed

I.L.R. [2021] M.P. 928
MISCELLANEOUS PETITION
Before Mr. Justice Vishal Dhagat

MP No. 2679/2020 (Jabalpur) decided on 10 February, 2021

GANESH & anr. …Petitioners

Vs.

SMT. INDU BAI & anr. …Respondents

***A. Maintenance and Welfare of Parents and Senior Citizens Act (56 of 2007), Sections 2(b), 21, 22 & 23 – Relief of Residence – Order of Eviction – Jurisdiction* – Held – Relief of residence is implicit in the Act and it cannot be granted to senior citizen and parents unless and until there is an order of eviction of persons who have forcefully occupied premises/residential area of such parents and senior citizens – Maintenance includes residence, thus to give them substantial justice, Tribunal has power to order eviction – Petition dismissed. (Para 10)**

क. माता पिता एवं वरिष्ठ नागरिकों का भरण पोषण एवं कल्याण अधिनियम (2007 का 56), धाराएँ 2(b), 21, 22 व 23 – निवास का अनुतोष – बेदखली का आदेश – अधिकारिता – अभिनिर्धारित – निवास का अनुतोष, अधिनियम में उपलक्षित है तथा उसे वरिष्ठ नागरिक एवं माता–पिता को प्रदान नहीं किया जा सकता जब तक कि उन व्यक्तियों की बेदखली का आदेश न हो जिन्होंने उक्त माता–पिता एवं वरिष्ठ नागरिक का परिसर/निवास क्षेत्र बलपूर्वक दखल किया हुआ है – भरणपोषण में निवास समाविष्ट है अतः, उन्हें सारवान न्याय प्रदान करने के लिए अधिकरण को बेदखली आदेशित करने की शक्ति है – याचिका खारिज।

***B. Maintenance and Welfare of Parents and Senior Citizens Act (56 of 2007), Sections 2(b), 21, 22 & 23 – Order of Eviction – Right of Parents* – Held – Giving right of residence or evicting a person from house who had forcefully occupied the house without recourse to law does not deprive him of his title or interest in the property – It only safeguards right of senior citizen and parents in the property. (Para 10)**

ख. माता पिता एवं वरिष्ठ नागरिकों का भरण पोषण एवं कल्याण अधिनियम (2007 का 56), धाराएँ 2(b), 21, 22 व 23 – बेदखली का आदेश – माता–पिता का अधिकार – अभिनिर्धारित – निवास का अधिकार देना अथवा एक व्यक्ति, जिसने विधि का अवलंब लिए बिना मकान में बलपूर्वक दखल किया था, को मकान से बेदखल करना, उसे संपत्ति में उसके हक या हित से वंचित नहीं करता – यह केवल वरिष्ठ नागरिक एवं माता–पिता के संपत्ति में अधिकार की रक्षा करता है।

C. Interpretation of Statutes – General Act & Special Act – Effect – **Held – If a provision of Special Act is inconsistent with provision of General Act, provision of Special Act will override the provision of General Act.**
(Para 11)

ग. कानूनों का निर्वचन – साधारण अधिनियम व विशेष अधिनियम – प्रभाव – अभिनिर्धारित – यदि विशेष अधिनियम का कोई उपबंध, साधारण अधिनियम के उपबंध के साथ असंगत है, विशेष अधिनियम का उपबंध, साधारण अधिनियम के उपबंध पर अध्यारोही होगा।

Case referred :

2020 SCC Online 1023.

Abdul Waheed Choudhary, for the petitioner.
Arpan Pawar, for the respondent No.1.

O R D E R

VISHAL DHAGAT, J. :- Petitioners have filed this Misc. Petition challenging order dated 6.8.2020 passed by Sub Divisional Officer, Khandwa, in application filed for maintenance under the Maintenance and Welfare of Parents and Senior Citizens Act, 2007 (hereinafter referred to as the 'Act of 2007'). By said order, learned Tribunal has passed an order under Sections 21, 22 and 23 of the Act of 2007, for eviction of respondent nos.1 & 2 from the house situated in Prem Nagar, District Khandwa.

2. Petitioners had challenged the order passed by SDO, Khandwa before Collector Khandwa. Collector, Khandwa vide its order dated 16.9.2020 has dismissed the appeal as not maintainable on the ground that appeal under Section 16 can only be preferred by senior citizen and parent and further party shall not be represented through legal representative. As petitioner has no other alternative remedy under Act of 2007, has approached this Court under Article 226 of the Constitution of India, for quashing or order of Sub Divisional Officer. Order passed by Collector is not called in question in this misc. petition.

3. Petitioners have challenged the order of SDO dated 6.8.2020 on the ground that SDO has no jurisdiction to pass the order of eviction.

4. Learned counsel for the petitioners as well as respondents had relied on a judgment passed by the Apex Court in the case of *S. Vanitha vs. Dy. Commissioner, Bengaluru Urban District and Others*, 2020 SCC Online 1023.

5. Learned counsel for the petitioners submitted that Sections 20, 21, 22 & 23 of the Act of 2007, does not provide any power to Tribunal to pass an order of eviction. Under Section 20, the State Government shall ensure medical support for senior citizens; under Section 23, senior citizens who have, after

commencement of this Act, has transferred by way of gift or otherwise, his property, subject to the condition that the transferee shall provide basic amenities and basic physical needs to the transferor and such transferee refuses or fails to provide such amenities and physical needs, the said transfer of property shall be deemed to have been made by fraud or coercion and shall be declared void by the Tribunal. Section 9 of the Act of 2007, provides for order of maintenance.

6. It is submitted by learned counsel for the petitioners that petitioners who are legal representatives of deceased has a share in the property. Being the legal heir of deceased and co-owner of property with respondent no.1 Indu Bai, petitioners cannot be deprived of their right and they cannot be evicted from the house. It is further argued by him that as per the judgment passed by the Apex Court in the case of *S. Vanitha* (supra) eviction orders which was passed by the Tribunal and confirmed by the Appellate Authority and Division Bench of High Court of Karnataka were set aside by the Apex Court. The issue involved in the case was that one **S. Vanitha,** who was daughter-in-law, filed an appeal before Apex Court against the order of High Court where she has challenged the jurisdiction of the Tribunal to pass an order of eviction under the Act of 2007. The Apex Court, in para-41 of the judgment, held that appellant *S. Vanitha* (supra) has a right of residence in the share household under the provisions of Domestic Violence Act, 2005 and said right cannot be eliminated by evicting appellant *S. Vanitha* (supra) in exercise of summary powers entrusted by the Act of 2007, and due to said reason orders by the Tribunal, Appellate Authority and High Court were set aside. In this background it was urged by him that tribunal has no jurisdiction to pass an order of eviction under the Act of 2007.

7. Learned counsel for respondent no.1 has relied on the same judgment and took shelter of para-20 of said judgment. Relying on the said paragraph, it is submitted by him that Tribunal under the Act of 2007, may have authority to order eviction, if it is necessary and expedient to ensure the maintenance and protection of senior citizen or parent. Eviction, in other words, would be an incident of the enforcement of the right to maintenance and protection. Supreme Court has further observed in said paragraph that remedy of eviction can be granted only after adverting to the competing claims in the dispute. In view of the said observations made by Apex Court and also considering Section 2(b), Section 9 and Rule 20 of the Rules of 2009, power to order eviction is implicit in the Act so that a senior citizen or parent can peacefully live in the house with dignity.

8. Learned counsel for the respondent no.1 submitted that SDO was well within its jurisdiction to pass an order of eviction. As per Section 2(b) of the Act of 2007, maintenance includes provision for residence. It is further submitted by him that as per Rule 19 of the Act of 2007, it is the duty and power of District Magistrate to ensure that life and property of Senior Citizens of the district are

protected and they are able to live with security and dignity. In view of Section 2(b) of the Act of 2007 and Rule 19 of the Maintenance and Welfare of Parents and Senior Citizens Rules, 2009 (hereinafter referred to as 'the Rules of 2009'), SDO has acted within its jurisdiction to pass the order of eviction. It is further argued that respondent no.1 is mother and respondent no.2 who is aunt of petitioners is covered within the definition of senior citizen and parents in the Act of 2007. Petitioners have no right on the property of respondent no.2 and they may have some share in property of respondent no.1 but eviction of petitioners can be ordered by SDO. Petitioners have forcefully driven out respondents from their house. It is further submitted by learned counsel for respondent no.1 that she is aged more than 60 years. Right of residence and protection of the property will be without meaning if Tribunal does not have any power to order eviction. The power of Tribunal to grant relief of eviction is to be considered in the light and object of the Act of 2007. Respondents cannot be asked to approach the civil court seeking eviction of the petitioners. If such a direction is given, then same will defeat the very purpose of the Act of 2007, which is enacted to give speedy and immediate relief to elderly citizens and parents. In view of the aforesaid submission, he made a prayer for dismissal of this Misc. Petition.

9. Heard learned counsel for the petitioners as well as respondents.

10. There is no specific provision for ordering eviction of persons who had forcibly occupied the house of senior citizen and parent. However, the relief of eviction is implicit in the Act. Definition of maintenance given under Section 2(b) of the Act of 2007, includes provision for food, clothing and residence. The relief of residence to senior citizen and parents cannot be granted unless and until there is an order of eviction of persons who have forcefully occupied premises/ residential area of such parents and senior citizens. Maintenance includes residence, therefore, to give substantial justice to parents and senior citizen, Tribunal has power to order eviction. It has been submitted by learned counsel for petitioners that petitioner no.1 has right and interest in the property after death of his father. Giving right of residence or evicting a person from house who had forcefully occupied the house without recourse to law does not deprive him of his title or interest in the property. It only safeguards right of senior citizen and parents in the property. Independence and liberty of senior citizen and parents can only be ensured if there is protection of their property. Substantive justice of maintenance and protection of property of parents and senior citizen will only be illusionary if Tribunal does not have right to evict. In cases where the person who is sought to be evicted is also having a right in the property or have right of residence in the property by virtue of some other Act, then for such eventuality Section 3 of Act of 2007, is provided. Section 3, is having a non-obstant (sic : obstante) clause which is as under:-

> "3. **Act to have overriding effect.-** The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act, or in any instrument having effect by virtue of any enactment other than this Act."

11. In case of *S. Vanitha* (supra) Apex Court held Section 36 of Prevention of Women from Domestic Violence Act, 2005 (hereinafter referred to as 'the Act of 2005) not in nature of a non-obstante clause, has to be construed harmoniously with non-obstente (sic : obstante) clause in Section 3 of the Act of 2007. Such ratio is laid down as both Acts i.e. Act of 2007 and Act of 2005, are special Acts. But where one Act is Special Act and other Act is General and in case of inconsistency between the provisions, provisions of Special Act will over-ride provision of General Act.

12. In view of same, Tribunal is empowered to pass an order of eviction against petitioners. Learned Apex Court, in the case of *S. Vanitha* (supra) has set aside the order of eviction as daughter-in-law was also having right of residence under Protection of Women from Domestic Violence Act, 2005 and, therefore, claim of daughter-in-law cannot be overlooked/eliminated in exercise of summary powers under the Act of 2007. Aforesaid case is distinguishable as rights of residence in share household under the Act of 2005 is not in issue in this case. In para-20 of the judgment passed in the case of *S. Vanitha* (supra), observations have been made that the Tribunal under the Senior Citizens Act 2007 may have the authority to order an eviction, if it is necessary and expedient to ensure the maintenance and protection of the senior citizen or parent.

13. In view of the aforesaid facts and circumstances of the case and law, misc. petition filed by the petitioners is **dismissed.**

Petition dismissed

I.L.R. [2021] M.P. 932
MISCELLANEOUS PETITION

Before Mr. Justice G.S. Ahluwalia

MP No. 3423/2020 (Gwalior) decided on 23 February, 2021

SHREERAM SHARMA …Petitioner

Vs.

STATE OF M.P. & anr. …Respondents

***A. Motor Vehicles Rules, M.P. 1994, Rule 77(1a) & 77(1b) – Registration of Vehicle – Renewal* – Held – According to amended Rules, amended Rule 77(1a) would not be applicable to stage carriage which was registered before coming into force of amended Rules i.e. from 28.12.2015 – Vehicle was registered prior to coming into force of amended Rule 77(1a) –**

Under Rule 77(1b), outer limit of 15 years is not applicable to vehicle in question – Respondents directed to decide application of renewal of registration of vehicle – Petition allowed with cost of Rs. 20,000.

(Paras 8 to 11, 14 & 17 to 19)

क. मोटर यान नियम, म.प्र. 1994, नियम 77(1a) व 77(1b) – वाहन का रजिस्ट्रीकरण – नवीकरण – अभिनिर्धारित – संशोधित नियमों के अनुसार, संशोधित नियम 77(1a) मंजिली गाड़ी पर लागू नहीं होगा जिसका रजिस्ट्रीकरण संशोधित नियमों के प्रवर्तन में आने अर्थात् 28.12.2015 से पूर्व किया गया था – वाहन का रजिस्ट्रीकरण संशोधित नियम 77(1a) के प्रवर्तन में आने के पूर्व किया गया था – नियम 77(1b) के अंतर्गत, 15 वर्ष की बाहरी सीमा प्रश्नगत वाहन पर लागू नहीं होती – प्रत्यर्थीगण को वाहन के रजिस्ट्रीकरण के नवीकरण का आवेदन विनिश्चित करने हेतु निदेशित किया गया – याचिका 20,000/– रू. के व्यय सहित मंजूर।

***B. Motor Vehicles Act (59 of 1988), Section 72 – Regional Transport Authority – Power & Jurisdiction* – Held – Section 72 does not authorise Regional Transport Authority (RTA) to amend the Rules – If Rules are silent on any aspect, RTA by incorporating some conditions can grant or review the permit but Section 72 does not confers unfettered right on him to amend the Rules itself.**

(Para 12 & 13)

ख. मोटर यान अधिनियम (1988 का 59), धारा 72 – क्षेत्रीय परिवहन प्राधिकरण – शक्ति व अधिकारिता – अभिनिर्धारित – धारा 72 क्षेत्रीय परिवहन प्राधिकरण (आर.टी.ए.) को नियमों को संशोधित करने हेतु प्राधिकृत नहीं करती है – यदि किसी पहलू पर नियम मौन हैं, आर.टी.ए. कुछ शर्तें सम्मिलित कर परमिट दे सकता है अथवा उसका पुनर्विलोकन कर सकता है परंतु धारा 72 उसे स्वयं नियमों को संशोधित करने का निरंकुश अधिकार प्रदत्त नहीं करती।

***C. Judicial Discipline* – Held – STAT shockingly refused to rely on judgments of High Court on ground that same were unreported judgments – It has given a complete go bye to Judicial Discipline in making distinction in unreported and reported judgments – Such observation is contrary to law.**

(Paras 14 to 16)

ग. न्यायिक अनुशासन – अभिनिर्धारित – राज्य परिवहन अपील अधिकरण ने चौंकाने वाले रूप से उच्च न्यायालय के निर्णयों पर विश्वास करने से इस आधार पर इंकार किया है कि उक्त निर्णय अप्रकाशित निर्णय थे – उसने प्रकाशित और अप्रकाशित निर्णयों में अंतर करने में न्यायिक अनुशासन को पूरी तरह अनदेखा किया है – उक्त संप्रेक्षण विधि के प्रतिकूल है।

Cases referred :

W.P. No. 7703/2018 decided on 30.08.2018, AIR 1962 SC 1893.

Neerendra Sharma, for the petitioner.
Deepak Khot, G.A. for the respondent/State.

(Supplied: Paragraph numbers)

O R D E R

G. S. AHLUWALIA, J. :- This petition under Article 227 of Constitution of India has been filed against the order dated at 08.12.2020 passed by Shri Axay Kumar Dwivedi, STAT, Gwalior in Appeal No. 21/2020 whereby the appeal filed by the petitioner against the order dated 16.9.2020 has been dismissed and the application filed by the petitioner for renewal of permit in respect of bus No. M.P-33-E-0199 has been deferred on the ground that the said bus has completed its life of 15 years and, therefore, the petitioner should replace the bus as per the amendment in Rule 77 of (MP Motor Vehicles Rules, 1994).

2. It is submitted by the Counsel for the petitioner that the petitioner was granted permit for plying bus No. M.P-33-E-0199. The last renewal of the permit was having its validity from 25.4.2015 to 25.4.2020. After the validity came to an end, he filed an application for renewal which has been deferred by RTA by the impugned order dated 16.9.2020 which has been affirmed by STAT. It is submitted that the co-ordinate bench of this Court by order dated 30.8.2018 passed in case of *Waheed Khan v. Transport Department and Ors*. (W.P. No. 7703/2018) has held that the provision of sub-rule (1a) of Rule 77 of MP Motor Vehicles Rules, 1994 (In short Rules 1994) would not apply to the stage carriage which were registered earlier and accordingly, petitioner is entitled for renewal of his permit and deferment of his application is contrary to such judgment.

3. This Court, by orders dated 5-1- 2021, 12-1-2021, 18-1-2021, 29-1-2021 and 15-2-2021 granted time to the State Counsel to verify as to whether any writ appeal against the order passed in the case of *Waheed Khan* (Supra) is under contemplation or not. It is submitted by the State Counsel that in spite of various letters sent by the Office of Additional Advocate General, no response has been received.

4. Under these circumstances, this Court is left with no other option, but to hear this case on merits.

5. It is the case of the petitioner that he was granted permit for the bus bearing registration no. M.P-33-E-0199 which was lastly renewed in the year 2015 and validity of renewed permit was upto 25.4.2020. It is further admitted by the Counsel for the petitioner that bus bearing registration No. M.P-33-E-0199 has attained its age of 15 years in the month of July 2020.

6. Now the only question for consideration is as to whether the case of the petitioner is covered by the amended provision of Rule 77 (1a) of Rules, 1994 or not.

7. By amendment dated 24th of September, 2010 in the Rules of 1994, sub-rule (1a) was inserted in Rule 77 of Rule of 1994 which reads as under:-

> "3. In rule 77, Sub-rule (1), the following sub-rule shall be inserted, namely:-
>
> (1 a) In order to ensure safe, secure and convenient transport services to the passengers, the permit granting authority while granting a stage carriage permit shall abide the following conditions, namely :-
>
> (i) that no stage carriage permit shall be granted on interstate route to a vehicle which has completed 10 years from the manufacture year;
>
> (ii) that no stage carriage permit shall be granted for ordinary route within the State to a vehicle which has completed 15 years from the year of manufacture;
>
> (iii) that no stage carriage permit shall be granted for any route to the vehicle which has completed 20 years from the year of manufacture;
>
> (iv) that for long distance route of 150 km or above in a single trip, the following category of vehicles with seating capacity shown against each shall be permitted to ply:

1	Deluxe/Air Conditioned bus	not less than 35+2 seats, excluding driver and conductor
2	Express bus	not less than 45+2 seats, excluding driver and conductor
3	Ordinary bus	not less than 50+2 seats, excluding driver and conductor

8. Rules 77 (1a) (ii) which provided that no stage carriage permit shall be granted for ordinary route within the State to a vehicle which has completed 15 years from the date of manufacture was omitted by amendment dated 28th of December, 2015. Further in place of 20 years in Rule 77 (1a) (iv) was substituted by 15 years.

9. However, sub rule (1b) of Rule 77 of Rules of 1994 has also been added by amendment dated 28.12.2015 which reads as under:-

> "The restriction imposed by sub-rule (1a), in so far as they relates to the stage carriage registered before coming into force of the said rules shall not apply".

10. Thus, according to the amended rules, the amended rule (1a) of Rule 77 of Rules of 1994 would not be applicable to the stage carriage which was registered before coming into force of the amended Rules w.e.f. 28.12.2015. Undoubtedly, the bus bearing registration no. M.P-33-E-0199 was registered much prior to coming into force of amended Rule (1a) of Rule 77 of Rules of 1994.

11. Under these circumstances, in the light of provisions of Rule 77 (1b) of Rules of 1994, it is clear that the outer limit of 15 years is not applicable to the bus bearing registration number M.P-33-E-0199.

12. At this stage, it is submitted by the State Counsel that STAT while considering the provisions of Section 72 of Motor Vehicles Act, has considered the condition imposed in renewed Permit of the bus bearing registration no. M.P-33-E-0199 in which it was provided that the petitioner shall not operate the bus older than 10 years. As this condition of renewed Permit was never challenged, therefore the petitioner is now bound by the said condition and now he cannot go back to plead that the conditions on which the last renewal was granted is not binding on him.

13. Section 72 of Motor Vehicles Act does not authorize the Regional Transport Authority to amend Rules. If the Rules are silent on any aspect, then the Regional Transport Authority by incorporating some condition can grant or review permit. But by no stretch of imagination, it can be said that Section 72 of Motor Vehicles Act confers unfettered right on Regional Transport Authority to amend Rules itself. When Rule 77 (1b) of Rules of 1994 itself provides that amended provision of Rule 77 (1a) of Rules of 1994 would not be applicable to the stage carriage which was registered much prior to coming into force of said Rule, then Regional Transport Authority was at fault in deferring the application filed by the petitioner for renewal of permit of bus bearing registration No.M.P-33-E-0199.

14. Thus from 28th December 2015 onwards, the legal situation is that any stage carriage which was registered prior to coming into force of amendment Rules shall be out of the purview of the amended rule (1a) of Rule 77 of Rules of 1994. Unfortunately, the STAT, has not only lost sight of the fact that the clause (2) of sub-rule (1a) of Rule 77 of Rules of 1994 was already omitted by amendment dated 28th December 2015 in MP Motor Vehicles Rules 1994 and Rule 77 (1b) of

Rules of 1994 has granted exemption to stage carriage which were registered earlier, but shockingly refused to rely upon the judgments, passed by this Court only on the ground that they are not reported. It is not the case of STAT that the unreported judgments relied upon by the petitioner were in fact never passed or they were forged copies. How the Subordinate Tribunal can refuse to rely upon unreported judgments of the High-Court is beyond imagination.

15. The Supreme court in the case of *East India Commercial Company Ltd., Calcutta and Anr. v. The Collector of Customs* reported in AIR 1962 SC 1893 has held that order passed by the High Court is binding on all subordinate Courts and on all Tribunals functioning within the same State. It has been held as under:-

> "29.....This raises the question whether an administrative tribunal can ignore the law declared by the highest court in the State & initiate proceedings in direct violation of the law so declared. Under Art. 215, every High Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself. Under Art.226, it has a plenary power to issue orders or writs for the enforcement of the fundamental rights and for any other purpose to any person or authority, including in appropriate cases any Government, within its territorial jurisdiction. Under Art. 227 it has jurisdiction over all courts and tribunals throughout the territories in relation to which it exercise jurisdiction. It would be anomalous to suggest that a tribunal over which the High Court has superintendence can ignore the law declared by that court and start proceedings in direct violation of it. If a tribunal can do so, all the subordinate courts can equally do so, for there is no specific provision, just like in the case of Supreme Court, making the law declared by the High Court binding on subordinate courts. It is implicit in the power of supervision conferred on a superior tribunal that all the tribunals subject to its supervision should conform to the law laid down by it. Such obedience would also be conducive to their smooth working: otherwise, there would be confusion in the administration of law and respect for law would irretrievably suffer. We, therefor, hold that the law declared by the highest court in the State is binding on authorities or tribunals under its superintendence, and that they cannot ignore it either in initiating a proceeding or deciding on the rights involved in such a proceeding. If that be so the notice issued by the

authority signifying the launching of proceedings contrary to the law laid down by the High Court would be invalid and the proceedings themselves would be without jurisdiction".

16. It appears that the STAT has given complete go bye to the judicial discipline in making distinction in unreported judgment and the reported judgment of the High Court. Accordingly, it is held that observation made by the STAT in paragraph 16 of its order dated 8.12.2020 passed in appeal number 21/2020 is contrary to law.

17. Considering the legal as well as factual position of this case, this Court is of the considered opinion that neither the order dated 8 th December 2020 passed by STAT in Appeal No. 21/2020 nor the order dated 16th September 2020 passed by Regional Transport Authority, Chambal Division, Morena with stand the judicial scrutiny, accordingly they are hereby quashed.

18. Regional Transport authority is directed to decide the application for grant of permit for plying bus bearing M.P-33-E-0199 within a period of 15 days.

19. The petition is **allowed with cost of Rs. 20,000/-** to be paid by the respondents to the petitioner within a period of one month from today. The receipt of payment of cost be deposited by the respondents in the office of Principal Registrar of this court within a period of 45 days from today.

Petition allowed

I.L.R. [2021] M.P. 938
APPELLATE CIVIL

Before Mr. Justice S.A. Dharmadhikari

SA No. 348/2017 (Gwalior) decided on 23 March, 2021

M.P. HOUSING BOARD, GWALIOR …Appellant

Vs.

SHANTI DEVI & ors. …Respondents

Limitation Act (36 of 1963), Section 5 – Condonation of Delay – Grounds – Delay of 6972 days **– Condonation sought on ground that appellant's counsel never advised to file second appeal before High Court and as OIC of case was regularly being transferred from Gwalior to other places and record was being kept by dealing clerk who subsequently died due to long illness and thus present appeal could not be filed – Held – No case for condonation made out – Appeal dismissed as time barred – Appellant being instrumentality of State must pay for wastage of judicial time – Cost imposed. (Paras 6, 12 & 13)**

परिसीमा अधिनियम (1963 का 36), धारा 5 – विलंब की माफी – आधार – 6972 दिनों का विलंब – इस आधार पर माफी चाही गई कि अपीलार्थी के वकील ने उच्च न्यायालय के समक्ष द्वितीय अपील प्रस्तुत करने के लिए कभी सलाह नहीं दी और प्रकरण के प्रभारी अधिकारी को नियमित रूप से ग्वालियर से अन्य स्थानों पर स्थानांतरित किया जा रहा था तथा अभिलेख डीलिंग क्लर्क द्वारा रखा जा रहा था, तत्पश्चात् जिसकी लंबी बीमारी के कारण मृत्यु हुई और इसलिए वर्तमान अपील प्रस्तुत नहीं की जा सकी – अभिनिर्धारित – माफी के लिए प्रकरण नहीं बनता – समय वर्जित होने के कारण अपील खारिज – अपीलार्थी को राज्य का परिकरण होने के नाते, न्यायिक समय की बर्बादी हेतु कीमत चुकानी चाहिए – व्यय अधिरोपित किया गया।

Cases referred:

2007 (I) MPJR 70, AIR 2016 SC 3554, AIR 2001 SC 2171, 2010 (II) MPJR 10, (2020) 10 SCC 654.

R.V.S. Ghuraiya with *Samar Ghuraiya*, for the appellant.
Sanjay Kumar Sharma, for the respondents.

O R D E R

S.A. DHARMADHIKARI, J. :- This Second Appeal under Section 100 of the code of Civil Procedure has been filed by the defendant/appellant -M.P. Housing Board, who happens to the instrumentality of the State, being aggrieved by the judgment and decree dt.07.03.1998 passed by the Additional District Judge Datia (M.P.) in Civil Appeal No.29A/1990, confirming the judgment and decree dated 16.11.1989 passed by the Third Civil Judge, Class II, Datia in Civil Suit No.85-A/87, whereby the suit filed by the respondents/ plaintiffs was allowed.

2. Initially, the respondents/plaintiffs had filed the suit for declaration and permanent injunction on the ground that they were entitled to allotment of residential plot @ Rs.1.50 per sq.ft. and Housing Board had no power to enhance the price and had also prayed for an injunction that the Housing Board be restrained from allotting the residential plots to others. A detailed written statement was filed by the appellant/ defendant denying the claim.

3. On the basis of the pleadings of the parties, learned trial court recorded the evidence led by the parties and thereafter vide judgment and decree dated 16.11.1989 decreed the suit holding that the appellant/defendant shall allot the residential plot ad measuring 40 x 60 sq. ft. situated near the Bus Stand Datia @ Rs.1.50 per sq. ft. in accordance with rules within a period of two months. Being aggrieved, the appellant/defendant preferred First Appeal under Section 96 of the Code of Civil Procedure, which was dismissed vide judgment and decree dated 07.03.1998 on the ground of limitation. Being aggrieved, the present Second Appeal has been filed with a delay of 6972 days.

4. I.A.No.3154/2017, an application under Section 5 of Limitation has been filed by the appellant for condonation of delay in filing the second appeal.

5. This Court vide order dt.25.07.2017 issued notice on the aforesaid application for condonation of delay.

6. Learned counsel for the appellant has putforth the proposition that it is well settled in law that the Courts are not required to see the length of delay but has to see the sufficient cause. It is argued that in the present case the counsel for the appellant never advised to file the second appeal before the High Court and as the OIC of the case were regularly being transferred from Gwalior to other places and record was being kept by the dealing clerk, who subsequently died due to long illness, the appeal could not be filed. It is further submitted that while considering the application for condonation of delay, the approach of the courts should be liberal, judicious and litigant should not be deprived of the decision on merits, as such, the delay in filing the second appeal deserves to be given a go bye.

7. In support of his contentions, learned counsel for the appellant has relied on the judgment of the Apex Court in the case of *Cantonment Board, Gwalior Vs. M/s K.L.Kochar and Co. and another* reported in 2007 (I) MPJR 70, wherein it has been held that the Board is unknown regarding proceeding and award of Court as Advocate did not inform about proceedings. Learned counsel also placed reliance on the judgment of Apex Court in the case of *Madina Begum and another Vs. Shiv Murti Prasad Pandey and others* reported in AIR 2016 SC 3554 and in *Madhukar and others Vs. Sangram and others* reported in AIR 2001 SC 2171 and submitted that not only the question of limitation is to be considered while deciding the delay aspect but all other issues are also required to be considered. Learned counsel further relied on the judgment of this Court in the case of *Pyarelal Vs. State of M.P. and others* reported in 2010 (II) MPJR 10, wherein it has been held that the Court should remain cautious at the time of ascertaining whether delay was caused as a result of skillful management of some individuals to commit public mischief. Placing reliance on the aforesaid judgments, it is prayed that the delay in filing the second appeal is liable to be condoned.

8. On the other hand, learned counsel for the respondents has filed the reply to the application seeking condonation of delay. It is submitted that there is exorbitant delay of more than 19 years in filing the second appeal, i.e. the judgment and decree under challenge was passed on 07.03.1998 and the present appeal has been filed on 07.07.2017. The appellant -Board has miserably failed to explain the delay of each day. Only allegations for cause of delay have been the basis of procedural lapses for non-tendering the legal advise to file the appeal by any of the previous counsel engaged by the appellant Board and also shifting the burden on a poor clerk in the department, who died subsequently due to prolonged

illness, which can not be taken as plausible explanation for the delay. It is settled principle of law that one who approaches the Hon'ble Court after considerable delay is required to putforth proper explanation for day to day delay. It is also submitted that the appellant has not enclosed any supporting documents with the application for condonation of delay to explain as to when for the first time it came to their knowledge about the fate of first appeal as well as when the officers have been transferred from time to time. It is not a case where such huge delay in filing the appeal has been caused due to formalities/non-tendering of legal advise but it is a callous approach of the appellant authority, due to lackluster and negligent attitude. Learned counsel for the respondent in support of his contention has placed reliance on the judgment of the Apex Court in the case of *State of M.P. and others Vs. Bherulal* as reported in (2020) 10 SCC 654 and submitted that application for condonation of delay deserves to be rejected so also the appeal is liable to be dismissed in limine.

9. Heard learned counsel for the parties.

10. A bare perusal of the application for condonation of delay shows that the reasons for such an inordinate delay are stated as under :-

> (2) That, Bhagwan Singh Kushwah Assistant Engineer M.P. Grih Nirman Datia was O.I.C. of the case, who has filed the first appeal in Add. Distt. Judge Datia, The appeal is only 76 days time barred as mentioned the para 8 of impugned Judgment dated 7/3/98. And reasons stated in application (u/S 5 limitation act supported with affidavit) was reasonable and limitation was liable to be condoned in the interest of Justice.
>
> (3) That, 1st appellate Court has dismissed the first appeal as being time-barred. But there was no opinion of the appointed counsel of M.P. Housing Board is in record, for filling the second appeal in the Hon'ble High Court against the Judgment and decree dated 7/3/98 passed by Add. District Judge Datia.
>
> (4) That, the Clark of Assistant Engineer M.P. Grih Nirman Datiya deposited the file with records in record room, after pronouncing the Judgment by 1st appellate Court Datia and Assistant Engineer Datia, transferred from Datia to other place, hence the second appeal could not be filed.
>
> (5) That, plaintiff/respondent filed the Execution proceeding, notice was issued to Executive Engineer Grih Nirman Mandal Division No.1 Gwalior. The Rajesh Pathak Advocate Datia was appointed as Counsel of the Housing Board for defending the execution proceeding. But the appointed counsel did not advise to file the second appeal before the Hon'ble High Court against the Judgment and decree of 1st Appellate Court-Add. District Judge Datia.

(6) That, the several O.I.C. Of the case has been transferred from Datia and Gwalior to other places, since 7.3.98 to June 2017.

(7) That, the appointed Counsel of the Housing Board has been repeatedly filed the application before the executing Court and submitting the revision or petition before the Hon'ble High Court, but they never gave the advise for filing the second appeal before the Hon'ble High Court.

(8) That, lastly matter put-up before the counsel Mahendra Kumar Jain for opinion. The Counsel M.K.Jain gave to them opinion for filing second appeal, because the Judgment and decree passed by the Trial Court is not executable and First appeal was dismissed as holding time barred.

(9) That, the Chief legal Adviser M.P. Grih Nirman and Adhosanrachana Vikas Mandal head office Bhopal appointed M.K.Jain the Counsel of Housing Board vide letter dt. 20.06.2017 for filing Second Appeal before the Hon'ble High Court, said appointment letter received by Counsel on 24.06.2017. The counsel prepared the Second Appeal, application u/S 5 Limitation Act, and application u/O 41 Rule 5 C.P.C. and collected the certified copy of impugned judgment and decree dt. 07.3.1998 and filed on 7.7.2017.

11. Apex Court in the case of *Bherulal* (supra) has held as under :-

2. We are constrained to pen down a detailed order as it appears that all our counselling to the Government and government authorities has fallen on deaf ears i.e., the Supreme Court of India cannot be a place for the Governments to walk in when they choose ignoring the period of limitation prescribed. We have raised the issue that if the government machinery is so inefficient and incapable of filing appeals/petitions in time, the solution may lie in requesting the legislature to expand the time period for filing limitation for government authorities because of their gross incompetence. That is not so. Till the statute subsists, the appeals/petitions have to be filed as per the statues prescribed.

3. No doubt, some leeway is given for the government inefficiencies but the sad part is that the authorities keep on relying on judicial pronouncements for a period of time when technology had not advanced and a greater leeway was given to the Government [LAO v. Katiji]. This position is more than elucidated by the judgment of this Court in Postmaster General v. Living Media (India) Ltd. wherein the Court observed as under:

"27. It is not in dispute that the person(s) concerned were well aware or conversant with the issues involved including the

prescribed period of limitation for taking up the matter by way of filing a special leave petition in this Court. They cannot claim that they have a separate period of limitation when the Department was possessed with competent persons familiar with court proceedings. In the absence of plausible and acceptable explanation, we are posing a question why the delay is to be condoned mechanically merely because the Government or a wing of the Government is a party before us.

28. Though we are conscious of the fact that in a matter of condonation of delay when there was no gross negligence or deliberate inaction or lack of bona fides, a liberal concession has to be adopted to advance substantial justice, we are of the view that in the facts and circumstances, the Department cannot take advantage of various earlier decisions. The claim on account of impersonal machinery and inherited bureaucratic methodology of making several notes cannot be accepted in view of the modern technologies being used and available. The law of limitation undoubtedly binds everybody including the Government.

29. In our view, it is the right time to inform all the government bodies, their agencies and instrumentalities that unless they have reasonable and acceptable explanation for the delay and there was bona fide effort, there is no need to accept the usual explanation that the file was kept pending for several months/years due to considerable degree of procedural red tape in the process. The government departments are under a special obligation to ensure that they perform their duties with diligence and commitment. Condonation of delay is an exception and should not be used as an anticipated benefit for government departments. The law shelters everyone under the same light and should not be swirled for the benefit of a few.

30. Considering the fact that there was no proper explanation offered by the Department for the delay except mentioning of various dates, according to us, the Department has miserably failed to give any acceptable and cogent reasons sufficient to condone such a huge delay."

Eight years hence the judgment is still unheeded!

4. A reading of the aforesaid application shows that the reason for such an inordinate delay is stated to be only "due to unavailability of the documents and the process of arranging the documents". In paragraph 4, a reference has been made to "bureaucratic process works, it is inadvertent that delay occurs".

> 5. A preposterous proposition is sought to be propounded that if there is some merit in the case, the period of delay is to be given a go-by. If a case is good on merits, it will succeed in any case. It is really a bar of limitation which can even shut out good cases. This does not, of course, take away the jurisdiction of the Court in an appropriate case to condone the delay.
>
> 6. We are also of the view that the aforesaid approach is being adopted in what we have categorized earlier as "certificate cases". The object appears to be to obtain a certificate of dismissal from the Supreme Court to put a quietus to the issue and thus, say that nothing could be done because the highest Court has dismissed the appeal. It is to complete this formality and save the skin of officers who may be at default that such a process is followed. We have on earlier occasions also strongly deprecated such a practice and process. There seems to be no improvement. The purpose of coming to this Court is not to obtain such certificates and if the Government suffers losses, it is time when the concerned officer responsible for the same bears the consequences. The irony is that in none of the cases any action is taken against the officers, who sit on the files and do nothing. It is presumed that this Court will condone the delay and even in making submissions, straight away counsel appear to address on merits without referring even to the aspect of limitation as happened in this case till we pointed out to the counsel that he must first address us on the question of limitation."

12. Considering the pronouncement of the Apex Court in the case of *Bherulal* (supra), period of huge delay of 6972 days, no case for condonation of delay is made out. Accordingly, I.A.No.3154/2017, an application for condonation of delay is hereby **dismissed.** As a consequence, Second Appeal is also **dismissed** as time barred.

13. Taking into consideration the inordinate delay, the appellant being the instrumentality of the State must pay for the wastage of judicial time. This Court considers it appropriate to impose cost on the appellant-Board of Rs.20,000/- (Rupees Twenty Thousand) to be deposited with the M.P.legal Services Authority, Gwalior within a period of four weeks from the date of receipt of certified copy of this order. The said amount be recovered from the officers responsible for delay in filing the second appeal and a certificate of recovery of the said amount be also filed before the Registry of this Court within the same period, failing which the matter may be placed before the court for initiating proceedings under Contempt of Courts Act.

14. It is made clear that if the aforesaid order is not complied within time, this Court will be constrained to initiate contempt proceedings against the Commissioner, M.P.Housing Board, Bhopal.

Registry is directed to send a copy of this order to the Commissioner M.P. Housing Board, Bhopal for information and necessary action.

Appeal dismissed

I.L.R. [2021] M.P. 945 (DB)
CIVIL SUIT

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

CS No. 1/2021 (Indore) decided on 27 February, 2021

MOLD TEK PACKING PVT. LTD. (M/S) …Plaintiff

Vs.

S.D. CONTAINERS …Defendant

***High Court of Madhya Pradesh Rules, 2008, Chapter IV, Rule 1(8), Commercial Courts Act, 2015 (4 of 2016), Sections 4, 5 & 13 & Letters Patent, Clause 9 – Trial of Civil Suit – Jurisdiction of Court* – Held – High Court of M.P. does not exercise ordinary original civil jurisdiction – Civil Suit cannot be tried by Commercial Division of High Court as the same has not been constituted in High Court of M.P. – Commercial Appellate Division, which is in existence in M.P. High Court, being an appellate forum also cannot try the civil suit – Civil suit can only be tried under clause 9 of Letters Patent r/w Rule 1(8) of Chapter V of M.P. High Court Rules 2008 – Registry directed to list before appropriate Single Bench. (Paras 11 to 21)**

मध्य प्रदेश उच्च न्यायालय नियम, 2008, अध्याय IV, नियम 1(8), वाणिज्यिक न्यायालय अधिनियम, 2015 (2016 का 4), धाराएँ 4, 5 व 13 व लेटर्स पेटेंट, खंड 9 – सिविल वाद का विचारण – न्यायालय की अधिकारिता – अभिनिर्धारित – उच्च न्यायालय, म.प्र. साधारण मूल सिविल अधिकारिता का प्रयोग नहीं करता – सिविल वाद का विचारण उच्च न्यायालय के वाणिज्यिक प्रभाग द्वारा नहीं किया जा सकता क्योंकि म.प्र. उच्च न्यायालय में उक्त को गठित नहीं किया गया है – वाणिज्यिक अपील प्रभाग जो कि म.प्र. उच्च न्यायालय में अस्तित्वमान है, एक अपील न्यायालय होने के नाते वह भी सिविल वाद का विचारण नहीं कर सकता – सिविल वाद का विचारण केवल लेटर्स पेटेंट के खंड 9 सहपठित म.प्र. उच्च न्यायालय नियम 2008 के अध्याय V के नियम 1(8) के अंतर्गत किया जा सकता है – समुचित एकल न्यायपीठ के समक्ष लिस्ट करने के लिए रजिस्ट्री को निदेशित किया गया।

Case referred:

1988 MPLJ 435.

V.K. Asudani, for the plaintiff.
Neeraj Grover with *Prakhar Karpe,* for the defendant.

O R D E R

The Order of the Court was passed by :

SUJOY PAUL, J.:- The Apex Court by its judgment dated December 1, 2020 passed in Civil Appeal No.3695/2020 (SD Containers, Indore vs. M/s. Mold Tek Packaging Ltd.) directed transfer of instant suit to Indore Bench of Madhya Pradesh High Court and in turn directed the High Court, Indore Bench to decide the suit in accordance with law.

2. The interesting quagmire in this case is whether the suit is to be tried and decided by Single Bench/Commercial Division of High Court or by a Division Bench/Commercial Appellate Division of the High Court.

3. Interestingly, both the parties on this aspect have taken diametrically opposite stand. Shri VK Assudani, learned counsel for the plaintiff urged that suit needs to be tried and decided by Commercial Appellate Division whereas Shri Neeraj Grover assisted by Shri Prakhar Karpe urged that the jurisdiction is vested with Commercial Division of the High Court.

4. The stand of Shri Assudani is that as per the scheme of the Commercial Courts Act, 2015 (Act of 2015), the hierarchy of Courts is as follows:-

(i) Commercial Court at the level of District Court.

(ii) Commercial Division and

(iii) Commercial Appellate Division at the level of High Court.

5. Section 3 of the Act of 2015 was relied upon to submit that by way of Notification, Commercial Courts at district level are required to be constituted. Section 3A of said Act provides the method to designate Commercial Appellate Courts. As per the scheme of Act of 2015 and an amendment which is incorporated in the said Act, there exists no commercial division in the High Court which can exercise original jurisdiction. Admittedly, the High Court of Madhya Pradesh does not exercise any original civil jurisdiction. Thus, civil suit must be decided by the Division Bench/Commercial Appellate Division.

6. Sounding a *contra* note, Shri Grover, learned counsel for the other side placed reliance on Section 22(4) of the Designs Act, 2000 to submit that suit needs to be tried by the High Court. By placing reliance on Chapter-IV Rule 1 (8) of High Court of Madhya Pradesh Rules 2008 (High Court Rules), it is submitted that the Civil Suit must be tried by a Single Bench/Commercial Division. Since Section 21 of the Act of 2015 has an overriding effect on any other enactment, Shri Grover contended that Civil Suit needs to be decided by Commercial Division of the High Court. This will also facilitate the parties to prefer an appeal before Commercial Appellate Division of the High Court and right of appeal will not be frustrated.

7. Both the parties placed reliance on certain paragraphs of aforesaid judgment of Supreme Court dated 01/12/2020. The matter was heard only on the question as to which Bench of High Court is having jurisdiction to try the present suit.

8. Before dealing with rival contentions, it is apposite to reproduce relevant statutory provisions on which reliance was placed by the learned counsel for the parties.

Section 3 of Commercial Courts Act, 2015

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

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

Section 3A of Commercial Courts Act, 2015

3A. Designation of Commercial Appellate Courts. - Except the territories over which the High Courts have ordinary original civil jurisdiction, the State Government may, after consultation with the concerned High Court, by notification, designate such number of Commercial Appellate Courts at District Judge level, as it may deem necessary, for the purposes of exercising the jurisdiction and powers conferred on those Courts under this Act.

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

(2) The Chief Justice of the High Court shall nominate such Judges of the High Court who have experience in dealing with commercial disputes to be Judges of the Commercial Division.

5. Constitution of Commercial Appellate Division.—(1) After issuing notification under subsection (1) of section 3 or order under sub-section (1) of section 4, the Chief Justice of the concerned High Court shall, by order, constitute Commercial Appellate Division having one or more Division Benches for the purpose of exercising the jurisdiction and powers conferred on it by the Act.

(2) The Chief Justice of the High Court shall nominate such Judges of the High Court who have experience in dealing with commercial disputes to be Judges of the Commercial Appellate Division.

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

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

Provided further that all suits and applications transferred to the High Court by virtue of sub-section (4) of section 22 of the Designs Act, 2000 (16 of 2000) or section 104 of the Patents Act, 1970 (39 of 1970) shall be heard and disposed of by the Commercial Division of the High Court in all the areas over which the High Court exercises ordinary original civil jurisdiction.

Section 22(4) of the Designs Act, 2000

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

Chapter-IV Rule 1 (8) of High Court of Madhya Pradesh Rules 2008

Suits- A suit invoking extraordinary original civil jurisdiction of the High Court.

Chapter-IV Rule 22 of High Court of Madhya Pradesh Rules 2008

Notwithstanding anything hereinbefore contained in these Rules, the Chief Justice may, by a special or general order, direct a particular case (s) or a particular class(es) of cases to be listed before a particular bench.

(emphasis supplied)

9. Pertinently, both the parties placed reliance on following paras of the aforesaid judgment of the Supreme Court.

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

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

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

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

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

> Section 21 of the 2015 Act cannot be said to be inconsistent with the provisions of the 2000 Act. It is only the inconsistent provisions of any other law which will give way to the provisions of the 2015 Act. In terms of Section 22(4) of the 2000 Act, the defendant has a right to seek cancellation of the design which necessarily mandates the Courts to transfer the suit. The transfer of suit is a ministerial act if there is a prayer for cancellation of the registration. In fact, transfer of proceedings from one Bench to the Commercial Division supports the argument raised by learned counsel for the Appellant that if a suit is to be transferred to Commercial Division of the High Court having ordinary original civil jurisdiction, then the Civil Suit in which there is plea to revoke the registered design has to be transferred to the High Court where there is no ordinary original civil jurisdiction.
>
> 14. Furthermore, in the 2000 Act, there are two options available to seek revocation of registration. One of them is before the Controller, appeal against which would lie before the High Court. Second, in a suit for infringement in a proceeding before the civil court on the basis of registration certificate, the defendant has been given the right to seek revocation of registration. In that eventuality, the suit is to be transferred to the High Court in terms of sub-section (4) of Section 22 of the 2000 Act. Both are independent provisions giving rise to different and distinct causes of action."
>
> (emphasis supplied)

10. During the course of hearing Shri Asudani, learned counsel for plaintiff produced the order/notification dated 2/4/2019 whereby Commercial Courts have been constituted in various districts of Madhya Pradesh.

11. Commercial Division of High Court can be constituted only in consonance with Sec.4 of the Act of 2015. A bare perusal of Sec.4 makes it clear that in High Courts having *ordinary original civil jurisdiction,* the Hon'ble Chief Justice may by order constitute one or more benches of commercial division. Thus, commercial division at the High Court level is to be constituted in those High Courts who are having ordinary original jurisdiction. Constitution of bench shall be by order of Hon'ble Chief Justice. In the instant case, indisputedly, the High Court of Madhya Pradesh does not have ordinary original civil jurisdiction. No order of Hon'ble Chief Justice was also brought to our notice whereby any commercial division is directed to be constituted in High Court of Madhya Pradesh. Apart from this, second proviso to section 7 mandates that on fulfilling certain conditions, the suit and applications be transferred to the High Court by virtue of sub-section 4 of section 22 of the Designs Act, 2000 or section 104 of the Patents Act, 1970. Such transferred civil suit shall be heard and disposed off *"by commercial division of High Court"* in all areas over which the High Court exercise ordinary original civil jurisdiction.

12. Since commercial division was not constituted in High Court of Madhya Pradesh, this second proviso of section 7 cannot be translated into reality. Thus, we find force in the argument of Shri Asudani, learned counsel that no commercial division was established in Madhya Pradesh High Court as per Act of 2015. Hence, we are unable to persuade ourselves with the argument of Shri N.Grover that commercial division of High Court must try the instant civil suit.

13. The ancillary question is whether commercial appellate division can try the suit.

14. A careful reading of Sec.5 of Act of 2015 leaves no room for any doubt that power u/S.5 for constituting commercial appellate division can be exercised only after issuing notification under sub-section 1 of Section 3 or order under sub-section 1 of Section 4. A Notification dated 2/4/2019 mentioned above has already been issued by State government in exercise of power vested in it under sub-section 3(1) of the Act of 2015 and, therefore, there was no impediment in constituting a bench of commercial appellate division in High Court of M.P. The Hon'ble Chief Justice by an order constituted a commercial appellate division. Thus, commercial appellate division exists very much in High Court of M.P. The next question is whether commercial appellate division can try the present civil suit.

15. The jurisdiction of commercial appellate division can be traced from Section 13 of Act of 2015 which reads as under:-

> **"Appeals from decrees of Commercial Courts and Commercial Divisions.**—(1) Any person aggrieved by the judgment or order of a Commercial Court below the level of a District Judge may appeal to the Commercial Appellate Court within a period of sixty days from the date of judgment or order.
>
> (1A) Any person aggrieved by the judgment or order of a Commercial Court at the level of District Judge exercising original civil jurisdiction or, as the case may be, Commercial Division of a High Court may appeal to the Commercial Appellate Division of that High Court within a period of sixty days from the date of the judgment or order:
>
> Provided that an appeal shall lie from such orders passed by a Commercial Division or a Commercial Court that are specifically enumerated under Order XLIII of the Code of Civil Procedure, 1908 (5 of 1908) as amended by this Act and section 37 of the Arbitration and Conciliation Act, 1996 (26 of 1996).]
>
> (2) Notwithstanding anything contained in any other law for the time being in force or Letters Patent of a High Court, no appeal shall lie from any order or decree of a Commercial Division or Commercial Court otherwise than in accordance with the provisions of this Act."
>
> (emphasis supplied)

16. This provision clearly shows that commercial appellate division is required to act as appellate court and does not have any original civil jurisdiction to try a suit. The judgment or order of commercial Court at the level of District Judge exercising original civil jurisdiction or commercial division of the High Court can be called in question in appeal before commercial appellate division. We are thus unable to persuade ourselves with the argument of Shri Asudani that commercial appellate division must try the present suit.

17. A peculiar situation has arisen in the present matter in view of provisions of Act of 2015 which can be summarised as under:-

(i) No commercial division is constituted in High Court of Madhya Pradesh;

(ii) Commercial appellate division being an appellate forum cannot try the present suit;

18. The quagmire springs out of this situation is; which Court then can decide the present suit ?

19. At the cost of repetition, it is clear that the High Court of Madhya Pradesh does not exercise ordinary original civil jurisdiction. However, clause 9 of Letters Patent provides that High Court can exercise extra ordinary original civil jurisdiction. Clause 9 read as under:-

> "9. Extraordinary original civil jurisdiction- An We do further ordain that the High Court of Judicature at nagpur shall have power to remove and to try and determine, as a Court of extraordinary original jurisdiction any suit being or falling within the jurisdiction of any Court subject to its superintendence when the said High Court may think proper to do so, either on the agreement of the parties to that effect, or for purpose of justice. the reasons for so doing being recorded on the proceedings of the said High Court."
>
> (emphasis supplied)

20. The Division of this Court in 1988 MPLJ 435, *Union Carbide Corporation Vs. Union of India and others* considered clause 9 of Letters Patent and held as under :-

> "This Court is not a Court of original civil jurisdiction, but under clause 9, of the Letters Patent, this Court has extraordinary original civil jurisdiction to try any suit, when this Court thinks proper to do so for the purpose of justice."
>
> (emphasis supplied)

21. In our considered opinion, for purpose of justice this civil suit can be tried only by invoking clause 9 of Letters Patent read with rule 1(8) of Chapter IV of High Court Rules, 2008. Hence, the Registry is directed to list the matter before appropriate Single Bench of this Court.

Order accordingly

I.L.R. [2021] M.P. 953 (DB)
APPELLATE CRIMINAL

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

CRA No. 585/2014 (Indore) decided on 26 February, 2021

KULDEEP CHOUDHARY @ KULDEEP YADAV & anr. …Appellants

Vs.

STATE OF M.P. …Respondent

***A. Penal Code (45 of 1860), Sections 302, 201, 147 & 149 – Appreciation of Evidence – Nature of Injury & Cause of Death* – Held – Existence of a grievous injury on vital part of body (brain) of deceased shows that it could have been a reason for his death – No delay in hospitalization – Oral dying declaration by deceased to his brother, wife and son regarding assault by appellants, cannot be doubted – Prosecution established its case beyond reasonable doubt – Appeal dismissed. (Paras 24, 30 & 32)**

क. दण्ड संहिता (1860 का 45), धाराएँ 302, 201, 147 व 149 – साक्ष्य का मूल्यांकन – चोट का स्वरूप व मृत्यु का कारण – अभिनिर्धारित – मृतक के शरीर के महत्वपूर्ण अंग (मस्तिष्क) पर गंभीर चोट दर्शाती है कि यह उसकी मृत्यु का कारण हो सकता है – चिकित्सालय में भर्ती करने में कोई विलंब नहीं – अपीलार्थीगण द्वारा किये गये हमले के संबंध में मृतक द्वारा उसके भाई, पत्नी एवं पुत्र को दिये गये मौखिक मृत्युकालिक कथन पर संदेह नहीं किया जा सकता – अभियोजन ने युक्तियुक्त संदेह से परे अपना प्रकरण स्थापित किया – अपील खारिज।

***B. Penal Code (45 of 1860), Sections 302, 201, 147 & 149 and Evidence Act (1 of 1872), Section 45 – Appreciation of Evidence – Opinion of Doctor/Expert* – Held – Expert opinion is not like gospel truth which needs to be swallowed without examining its truthfulness and veracity – Doctor in his Court statement assigned singular reason of death i.e. cardio vascular failure but in his report he specifically mentioned another reason of death i.e. injuries on person of deceased by hard and blunt object – Court below rightly disbelieved the statement of doctor regarding reason of death. (Para 26 & 28)**

ख. दण्ड संहिता (1860 का 45), धाराएँ 302, 201, 147 व 149 एवं साक्ष्य अधिनियम (1872 का 1), धारा 45 – साक्ष्य का मूल्यांकन – चिकित्सक/विशेषज्ञ की राय –

अभिनिर्धारित – विशेषज्ञ की राय परम सत्य जैसी नहीं है कि उसकी सत्यता एवं सत्यवादिता का परीक्षण किये बिना उस पर आंख बंद करके विश्वास करने की आवश्यकता हो – चिकित्सक ने उसके न्यायालयीन कथन में मृत्यु का एकमात्र कारण दिया है अर्थात्, कार्डियो वेस्कुलर फेलुअर, परंतु उसके प्रतिवेदन में उसने विनिर्दिष्ट रूप से मृत्यु का अन्य कारण उल्लिखित किया है अर्थात् सख्त एवं भोथरी वस्तु द्वारा मृतक के शरीर पर चोटें – निचले न्यायालय ने मृत्यु के कारण के संबंध में चिकित्सक के कथन पर उचित रूप से अविश्वास किया।

***C. Evidence Act (1 of 1872), Section 32 – Oral Dying Declaration – Corroboration* – Held – Oral dying declaration can be sole basis for holding appellants guilty – If dying declaration is suspicious, then corroboration is required, it is not essential if declaration is truthful and voluntary – Requirement of doctor's endorsement as to mental fitness of deceased is merely a rule of prudence – No straight jacket formula that in every case, declaration must be corroborated and mental state of deceased be certified by doctor. (Paras 29 to 31)**

ग. साक्ष्य अधिनियम (1872 का 1), धारा 32 – मौखिक मृत्युकालिक कथन – संपुष्टि – अभिनिर्धारित – अपीलार्थीगण को दोषी ठहराने के लिए मौखिक मृत्युकालिक कथन एकमात्र आधार हो सकता है – यदि मृत्युकालिक कथन संदेहास्पद है तब संपुष्टि अपेक्षित है, यह आवश्यक नहीं यदि कथन सत्य एवं स्वेच्छापूर्ण है – मृतक की मानसिक समर्थता के बारे में चिकित्सक के पृष्ठांकन की अपेक्षा मात्र प्रज्ञा का एक नियम है – कोई निश्चित सूत्र नहीं कि प्रत्येक प्रकरण में, कथन की संपुष्टि होनी चाहिए एवं चिकित्सक द्वारा मृतक की मानसिक स्थिति प्रमाणित होनी चाहिए।

***D. Evidence Act (1 of 1872), Section 32(1) – Oral Dying Declaration – Nature of Injuries & Cause of Death* – Held – If statement of deceased relates to cause of his death, it was admissible in evidence u/S 32(1) of the Act – In instant case, dying declaration is within purview of Section 32(1) of Evidence Act. (Para 22 & 25)**

घ. साक्ष्य अधिनियम (1872 का 1), धारा 32(1) – मौखिक मृत्युकालिक कथन – चोटों का स्वरूप व मृत्यु का कारण – अभिनिर्धारित – यदि मृतक का कथन उसकी मृत्यु के कारण से संबंधित है, वह अधिनियम की धारा 32(1) के अंतर्गत साक्ष्य में ग्राह्य था – वर्तमान प्रकरण में, मृत्युकालिक कथन, साक्ष्य अधिनियम की धारा 32(1) की परिधि के भीतर है।

***E. Evidence Act (1 of 1872), Section 65 – Secondary Evidence – Photocopy of Document* – Held – A photocopy can be treated as secondary evidence provided one of the clauses/conditions of Section 65 are satisfied – In absence thereof, a photocopy cannot be treated as secondary evidence. (Para 16)**

ङ. *साक्ष्य अधिनियम (1872 का 1), धारा 65 – द्वितीयक साक्ष्य – दस्तावेज की छायाप्रति* – अभिनिर्धारित – एक छायाप्रति को द्वितीयक साक्ष्य के रूप में माना जा सकता है परंतु यह कि धारा 65 के खंडों/शर्तों में से एक की संतुष्टि हो – इसकी अनुपस्थिति में, एक छायाप्रति को द्वितीयक साक्ष्य नहीं माना जा सकता।

Cases referred:

(2009) 6 SCC 681, (2013) 2 SCC 114, (2019) 8 SCC 779, 1994 MPLJ 862, (1994) Supplementary 1 SCC 498, (1998) 5 SCC 150, (1992) 4 SCC 69, (2012) 8 SCC 263, AIR 2009 SC 1487, 2008 (3) MPHT 194, (2008) 2 SCC 516, (2005) 9 SCC 113, (2009) 8 SCC 796, (2018) 14 SCC 513.

Surendra Singh with *Vaibhav Jain*, for the appellant No. 1.
Vivek Singh, for the appellant No. 2.
Archana Kher, Dy. A.G. for the respondent/State.

J U D G M E N T

The Judgment of the Court was delivered by : **SUJOY PAUL, J.:-** In this appeal filed u/S.374 of Code of Criminal Procedure (Cr.P.C) the appellants have challenged the judgment dated 5/4/2014 passed by Addl.Sessions Judge, Badwahaa, District Khargone in ST No.50/2011 whereby convicting and sentencing the appellants as under:-

Name of accused	Section	Punishment	Default sentence
Kuldeep Choudhary @ Kuldeep Yadav	147 of IPC	RI for one year	
	302/149 IPC	RI for life with fine of Rs.10,000	One year RI
	201/149 IPC	RI for five years with fine of Rs.5000	Six months RI
	25 (1-b) of Arms Act	One year RI with fine of Rs.500	Three months RI
Yogesh @ Bobysingh	147 of IPC	One year RI	
	302/149 IPC	RI for life with fine of Rs.10000	One year RI
	201/149 IPC	Five years RI with fine of Rs.5000	Six months RI

Background Facts:-

2. In short, the relevant facts which have given rise to this matter are that deceased Omprakash was working as Salesman in the liquor shop of Rinku Bhatia situated at Khargone bus station. On 27/10/2010 at around 7.00 PM Mahendra was sitting in the shop whereas another co-accused Sanjay was unloading the liquor boxes from a vehicle. The appellant Kuldeep and Baby Singh @ Yogesh Chouhan came in a vehicle with driver and two other persons in the shop and forcibly took Mahendra with them. Kuldeep assaulted Mahendra with the *butt* of a revolver on his head. In the said vehicle they took him towards Kasrawad road. Mahendra was beaten by accused persons by sticks, kicks and fists. Mahendra found that another salesman of liquor shop Omprakash was sitting and weeping in the said vehicle. Omprakash was also assaulted by sticks, slaps and fists. After some time, Mahendra became unconscious. When Mahendra gained consciousness, he found himself in the office of liquor contractor of Badwahaa namely Rinku Bhatia. At this place also, Mahendra and Omprakash were beaten by sticks, belts, kicks and fists. Mahendra again became unconscious. On 29/10/2020 at around 7.30 AM when Mahendra gained consciousness, he found Omprakash is lying in another room in an unconscious stage. Mahendra could fled away from the said house and reached Indore where he narrated the said incident to brother Ramvachan. Later on 31/10/2020, Gourishankar informed him that Omprakash was taken to Sunderson Hospital on 29/10/2010 from where he was referred to M.Y. Hospital, Indore where he died on 31/10/2010.

3. As per information of incident furnished by Mahendra, ASI O.S. Kushwaha (PW.28) lodged the report and *murg* intimation was also recorded. The postmortem report was also obtained along death notification letter Ex.P/34 issued by the M.Y. Hospital. The intimation of death Ex.P/39 was recorded. The postmortem report Ex.P/38 was procured. Mahendra was subjected to medical examination and serious injuries were found on his body. Resultantly, after investigation against present appellants and three other persons, offences u/Ss.342, 364, 365, 302/149, 307/149 read with 201 of the IPC were registered by way of FIR Annexure P/34.

4. After completion of investigation, challan has been filed. In turn, matter was committed to the Court of Additional Sessions Judge. Appellants and co-accused persons abjured the guilt. The Court framed nine issues for determination.

5. The Court below after recording the statements of prosecution witnesses, permitted the appellants to put forth their defence. In their statements recorded u/S.313 Cr.P.C, the appellants pleaded that they are innocent and have been falsely implicated. One defence witness namely Dr.Varsha Dhakad (DW.1) from M.Y. Hospital, Indore deposed in favour of the defence.

6. The Court below by impugned judgment found that the prosecution has satisfactorily and beyond reasonable doubt proved the charges against the appellants and resultantly convicted them and imposed the sentence mentioned in the previous paragraph.

Appellants' Submissions:-

7. Shri Surendra Singh, learned Sr.Counsel for appellant No.1 and Shri Vivek Singh, learned counsel for appellant No.2 urged that both the appellants were Managers of a liquor shop whereas deceased Omprakash was a salesman. As per prosecution story, the present appellants abducted Omprakash and demanded money to release him. The said incident had taken place on 27/10/2010. Mahendra is an injured eye witness who did not support the prosecution story. Reliance is placed on para 13 of the impugned judgment wherein it is recorded that Mahendra did not identify the accused persons during investigation. He did not narrate while entering the witness box that he was either abducted or assaulted by accused persons. Mahendra was declared hostile. During his cross examination also, he did not depose anything against the accused persons. Thus, Court below has rightly opined that statement of Mahendra Yadav does not help the prosecution and accordingly appellants deserve exoneration from committing offence u/S.364 of the IPC.

8. As per said story, Omprakash was initially hospitalized in Sunderson Hospital, Badwahaa on 29/10/2010. The statement of Dr. Taygore PW.1 and Ex.P/10 were referred to by appellants to contend that in this letter written by Sunderson hospital to Station House Officer (SHO), Police Station, Badwahaa, it is mentioned that Prakash was brought to the hospital in unconscious condition and is suffering from Hyperglycemia and is in coma. Since nobody is with him, arrangements may be made to send him for further treatment to M.Y. Hospital Indore. This document is referred to show (i) Prakash was brought to Sunderson Hospital in unconscious stage; (ii) Sunderson Hospital informed the police about his unconscious stage on 29/10/2010 itself. Thereafter, Omprakash was taken to M.Y. Hospital. He remained hospitalized in M.Y. Hospital on 30th and 31st October, 2010. Omprakash died on 31/10/2010. It is common ground taken by learned counsel for appellants that the injuries found on the person of Omprakash were not fatal in nature. Injuries were not on the vital parts of the body. It cannot be said that injuries were so grave in nature which could have become reason for his death. In support of this contention, statement of Dr. Prashant Rajput PW.29 is relied upon who conducted the postmortem of Omprakash. The nature of injuries found on the person of Omprakash is referred to from his statement where he stated that reason of death of Omprakash is cardio vascular failure. Heavy reliance is placed on para 7 of statement of PW.29 wherein he stated that as per admission card and medical reports, it is clear that when Omprakash was admitted

in M.Y. Hospital he was unconscious. On 31/10/2010 also, he was unconscious. As per medical documents, Omprakash was in unconscious stage on 30/10/2010 also. Omprakash died at 11.45 PM on 31/10/2010. As per this deposition, the reason of death is not the said injuries indeed he died because of cardio vascular failure. On the strength of the statement of Dr.Prashant Rajput who was working in Forensic Medicine Department of M.Y. Hospital, it is urged that Omprakash was brought in unconscious stage and he continuously remained unconscious till his death. Thus, question of any oral dying declaration by Omprakash did not arise. To strengthen this argument, reliance is also placed on the statement of Dr.Varsha Dhakad (DW.1). This Doctor was working as Assistant Professor in Surgical Department of M.Y. Hospital. She deposed that Omprakash was brought for treatment by his brother Gourishankar (PW.4) on 29/10/2010 in unconscious stage. He was admitted in ICU. Next day on 30/10/2010, it was found that he is suffering from diabetic disease. His sugar count was on higher side i.e. between 500-600. He died during treatment on 31/10/2010 in ICU. In view of expert opinion of PW.29 and DW.1, it is canvassed that the deceased during entire period of treatment in Badwahaa and Indore remained unconscious and died in the same stage.

9. Great deal of arguments were advanced to show that statement of PW.4 Gourishankar, brother of deceased is not trustworthy. This witness brought the deceased to M.Y. Hospital. It is submitted that during his deposition, a photocopy of his application was produced before the trial Court to establish that an application (photocopy) regarding incident was submitted by Omprakash before police station, Badwahaa. The prosecution raised serious objection against this photocopy on the strength of Sec.65 of the Evidence Act. Learned Sr.Counsel drew the attention of this bench to the note mentioned in the deposition of PW.4 wherein the Court rejected the objection on the said photo copy for the reason that witness stated that the original application was preferred before police station on which acknowledgment was duly given. By placing reliance on Sec.65 of Evidence Act and judgments of Supreme Court reported in (2009) 6 SCC 681 *Ram Suresh Singh Vs. Prabhat Singh & another* and (2013) 2 SCC 114 *U.Sree Vs. U.Srinivas,* it is argued that in absence of satisfying necessary ingredients mentioned in different clauses of Sec.65 of Indian Evidence Act, a photocopy cannot be treated as secondary evidence. The Court below has erred in permitting this application (Ex.D.1) as secondary evidence. This Ex.D.1 is the only document, submits Shri Singh, learned Sr.Counsel which shows that with quite promptitude Gourishankar informed the police station regarding reason of death i.e. beating by present appellants. He submits that this is a fabricated document which was prepared later on and for this reason, neither Omprakash nor Investigating Officer O.S. Kushwaha PW.28 could produce the original of this application. Hence, Ex.D/1 pales into insignificance and it cannot be treated as a

piece of legal evidence. In absence thereof, it is clear that about the incident which had taken place on 27/10/2020, for the first time in his statement recorded u/S.161 Cr.P.C on 4/12/2010, PW.4 stated about the oral dying declaration and reason of death. In other words, after five weeks from the date of incident, Omprakash deposed his statement u/S.161 on 4/12/2010 and stated about oral dying declaration. This is clearly an afterthought. For the same reason, statements of widow Gitadevi (PW.5) and son Rajan Kumar Jaiswal (PW.6) of deceased are not trustworthy.

10. At the cost of repetition, On the basis of statement of Dr.Rajput (PW.29) and Dr.Varsha Dhakad (DW.1), it is submitted that there is no manner of doubt that Omprakash was unconscious during entire treatment and, therefore, question of giving information about beating by present appellants or giving any oral dying declaration did not arise. The story of prosecution is unreliable. The test about dying declaration is laid down by Supreme Court in *Jagbir Singh Vs. State (NCT of Delhi)* (2019) 8 SCC 779. In para 21(iv) and (v) of the judgment, the Court held that where dying declaration is suspicious it should not be acted upon without corroborative evidence. Similarly, where deceased was unconscious and could never make any dying declaration, the evidence with regard to it is to be rejected.

11. Reference is made to *Imran Khan Vs. State of M.P.* 1994 MPLJ 862 wherein by following a passage from *Manaye's* on Criminal Law of India (IV Edition) the Court opined that death should be connected with act of violence and dying declaration can be accepted only if nature of injury caused to the deceased are of such nature which can result into his death. In the instant case, it is contended that nature of injuries were not grievous in nature at all. No vital part of body was injured. At best, offence u/S.323 IPC can be made out. Unless transaction or injury is of such nature which could have resulted into his death, the alleged statement of Omprakash cannot be treated to be a oral dying declaration as per Sec.32 of the Indian Evidence Act.

12. To elaborate, Shri Surendra Singh, learned Sr.Counsel urged that the reason of death of Omprakash as per medical opinion is diabetics or coma. The said disease, by no stretch of imagination can be outcome of beating or injuries caused by beating. *Pirthi Vs. State of Haryana* (1994) supplementary 1 SCC 498 is relied upon to contend that in this case, the deceased Jia Lal was kicked by the appellants therein on his testicles as a result of which he fell down. Another attack on same body part was made. Injured was taken to his house and was shifted to hospital after two days. Because of blackening and gangrene, deceased died on April 5, 1986. The Apex Court opined that lack of immediate medical help became reason of gangrene attack because of which Jia Lal died. Hence conviction of appellants u/S.304-II IPC was converted into Sec.323 of IPC. Shri

Singh submits that in the instant case also, at the most appellants could have been convicted u/S.323 of IPC.

Respondent's Submissions:-

13. Mrs. Archana Kher, learned Dy.A.G supported the impugned judgment and urged that the Court below has given justifiable reasons in support of its conclusions. Even DW.1 deposed that Gourishankar informed her that Omprakash was beaten by appellants by hard and blunt object. This statement of defence witness itself shows that story of dying declaration is not cooked up as an afterthought. More so, when report Ex.P.41 also shows that reason of death of Omprakash is beating. By placing reliance on postmortem report and other documents, learned Dy.A.G supported the impugned judgment.

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

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

Findings:-

16. The case of appellants is that when deceased Omprakash was hospitalized in Sunderson hospital, Badwaha, the treating doctor O.P. Taygor (PW.1) recorded in Ex.P/2 that on the body of patient Omprakash, there are no injury marks. He promptly through letter dated 29/10/2010 (Ex.P/1) communicated the police station that Omprakash is unconscious and there is nobody to support him and, therefore, he should be transferred to MY Hospital, Indore. On the strength of these communications, it is sought to be established that case of appellants is clear like a mirror which leaves no room for any doubt that deceased Omprakash was not subjected to any beating etc. because of which he was admitted in Sunderson hospital. The Court below discarded this defence. We will deal with this aspect little later in this judgment. The prosecution intended to establish on the basis of letter/application of Gauri Shankar (PW.4) - Ex.D/1 which is written to the police station regarding intimation of injuries on 29/10/2010. Admittedly, original of this document was not produced before the Court. As per appellants' contention, this is the only document by which prosecution intended to fill the gap and show that Omprakash promptly informed the police regarding beating and injury to deceased Omprakash. The Court below has committed an error in accepting this photocopy as secondary evidence despite objection and in absence of fulfilling the requirement of Section 65 of Evidence Act. We find substance in this contention. A photocopy can be treated as secondary evidence provided one of the clauses/conditions enumerated in Section 65 of Evidence Act are satisfied. In absence thereof, a photocopy cannot be treated as secondary evidence. Either existence of original to which photocopy is produced must be established or in alternatively, any of other clauses of Section 65 must be satisfied. In the instant

case, prosecution has not satisfied the said requirement and, therefore, we have no hesitation to hold that Court below has erred in accepting the photocopy as secondary evidence. The impact of ignoring this piece of evidence namely Ex.D/1 will be dealt with by us in later paragraphs.

17. It was strenuously contended that incident had taken place in last week of October 2010. Omprakash was hospitalized in Badwaha and MY hospital, Indore from 29/10/2010 to 31/10/2010. He died on 31/10/2010, but after about five weeks, Gauri Shankar (PW.4) deposed his statement under Section 161 of Cr.P.C. wherein for the first time, he disclosed about factum of beating and oral dying declaration of Omprakash given to him. This aspect needs careful consideration. Dr. Varsha Dhakad entered the witness box on behalf of defence as DW.1. She was working with MY hospital. In her deposition, she candidly admitted that Gauri Shankar (PW.4) informed her that Omprakash was beaten by hard and blunt object. In view of this statement of defence witness, there is no manner of doubt that story of beating/assault and hospitalization because of that was not cooked up or outcome of any afterthought on the part of family members namely Omprakash and widow and son of deceased.

18. In the application submitted for conducting postmortem also (Ex.P/42), Gauri Shankar (PW.4) specifically mentioned that reason of death is *"Marpit"*. Hence, we are unable to hold that for five weeks, Omprakash did not inform anybody regarding beating/assault by appellants. In our view, Omprakash was not obliged to mention in the application seeking postmortem that deceased has given him dying declaration.

19. In view of foregoing analysis, even if police complaint Ex.D/1 is ignored and it vanishes into thin air, it will not cause any dent to the prosecution story because as per statement of Dr. Varsha Dhakad (DW.1) and application for postmortem, it is clear that Gauri Shankar (PW.4) informed about injuries available on the person of deceased. He also informed that reason of hospitalization was the said injuries.

20. Now coming to the statement of Dr. Taygor (PW.1), it is noteworthy that Court below disbelieved his statement and document Ex.P/2 in which he opined that no injuries were there on the body of Omprakash. The said statement and documents were disbelieved by holding that in Ex.P/2 the name of relative and attendant of deceased Omprakash and his cell number was mentioned which makes it clear that Omprakash was not alone in the hospital. Indeed, a relative was accompanying him. For this reason, Court below disbelieved the communication dated 29/10/2010 (Ex.P/1) whereby OP Taygor (PW.1) informed Police Station-Badwaha that there is nobody with Omprakash and considering his serious condition, he must be shifted to MY hospital. Apart from the aforesaid, Court below disbelieved it for yet another reason, which in our opinion is a plausible

reason. It was held that if there had been no injuries on the person of Omprakash and it was not a medico-legal case, there was no occasion for Dr. Taygor (PW.1) to inform the police station regarding factum of admission and need of transfer of patient to MY hospital. The appreciation of evidence and analysis by Court below is in accordance with law and we do not find any infirmity which warrants our interference. Hence, we are unable to hold that statement of Dr. Taygor (PW.1) supports the appellants and establishes that no injuries were there when Omprakash was admitted in Sunderson hospital, Badwaha.

21. Shri Surendra Singh, learned Senior Counsel placed heavy reliance on the statement of Dr. Prashant Rajput (PW.29), who conducted the postmortem and prepared the report. In his Court statement, PW.29 assigns singular reason for death of Omprakash i.e. "cardio vascular failure". In view of this statement, two fold submissions were advanced:-

(i) None of the injury on the body of Omprakash were grievous and fatal. Injuries were not on any vital part of the body.

(ii) Reason of death was not injuries, indeed it was because of cardio vascular failure.

On the first blush, argument appears to be very attractive, but on microscopic reading of evidence, it has lost much of its shine.

22. On the basis of first point, it was further argued that if nature of injuries were not sufficient to cause death, any statement given by person does not fall within the ambit of Section 32 of Evidence Act. Appellants relied on certain judgments of Supreme Court and judgment of this Court in *Imran* (supra). There cannot be any quarrel on this legal proposition. A careful reading of Section 32(1) leads us to the same conclusion that if injury or transaction cannot be treated to be a reason for causing death, statement of injured/declarant does not fall within the fore (sic : four) corners of Section 32(1) of the Act. Whether principle propounded in *Imran* (supra) can be made applicable or not depends on the facts and circumstances of each case. This depends on the nature of injuries and cause of death.

23. As per PW.29 following injuries were found on the person of Omprakash :-

External examination:-

1. Abrasion present lateral part posteriorly which was present at back of right arm, 1 x 1 cm in size blackish colour.
2. Contusion 3 x 3 cm in size medial part of left arm mid point.
3. Contusion 4 x 2 cm size present at lower outer side of right thigh.
4. Contusion 3 x 3 cm size in anterior lateral part of right shoulder.

5. Contusion 3 x 2 cm size present on left medial meiosis.
6. Contusion was present at Centre of sole of right foot.
7. Abrasion of 6 x 4 cm size over posterior lateral mid point of right thigh.

Internal examination:-

1. The right lung was affixed to thoracic cavity.
2. The liver has been found rigid and gritty.
3. Spleen was slightly enlarged.
4. The kidneys were attached at front from both sides and fat was deposited around it.
5. Brown liquid material about 140 ml was found in stomach. Stool was present in large intestine. All the organs were found normally congested.
6. Scalp and skull were found normal. **Upon opening the skull a small blood clot was found inside lateral frontal region.**

(emphasis supplied)

24. If injuries mentioned in "external examination" alone are taken into account, the appellants certainly deserve to succeed based on the principle laid down in *Imran* (supra). However, finding about injuries based on "internal examination" cannot be ignored or thrown to wind. Injury No.6 is grievous, fatal and on a vital part of the body namely, frontal region of the brain. This injury could be detected only upon opening the skull during postmortem. The Court below opined that this injury was reason of death of deceased. No amount of arguments were advanced to attack finding of the Court below given in this regard in para-24 of the judgment. Existence of a grievous injury on the vital part of Omprakash shows that it could have been a reason for his death. For this reason, the principle laid down in *Imran* (supra) cannot be pressed into service. For the same reason, the judgment of *Pirthi* (supra) is of no assistance. In *Pirthi* (supra), there was delay in hospitalizing the injured by family members. Because of delay, gangrene was developed in his body and he died because of gangrene. It is not the case of appellants that there was any delay in hospitalizing Omprakash. On the contrary, the defence is that Omprakash was not injured when he was admitted in Sunderson Hospital, Badwaha. His injuries which were found at MY hospital, Indore were not fatal and not on vital parts.

25. In *G.S.Walia Vs. State of Punjab & Ors.* (1998) 5 SCC 150 the Apex Court considered a medical evidence which shows that death was not caused because of injuries themselves. During taking bed rest because of said injuries, the deceased developed pulmonary embolism. Thus, injuries had necessitated bed rest and complication had arisen during the bed rest. The death was found to be natural

consequence of injuries caused and it was not because of any negligence or external factor. Thus, it was ruled that it cannot be said that the injuries were only indirectly responsible for causing death of dying declarant and as his death cannot be said to have been caused due to the injuries caused, the statement made by him would not fall within Sec.32 of the Evidence Act. Since statement of deceased related to the cause of his death it was admissible in evidence u/S.32 and judgment of High Court was turned down which decided otherwise. This judgment of Apex Court, in our view clearly covers the instant case and brings dying declaration within the purview of Sec.32(1) of Indian Evidence Act.

26. So far second contention aforesaid is concerned, it is based on the opinion of a doctor/expert. We are not oblivious of legal position that normally the expert opinion's must be respected. It is equally settled that expert opinion is not like a gospel truth which needs to be swallowed without examining its truthfulness and veracity. Dr. Rajput (PW.29) in his Court statement assigned singular reason of death i.e. cardio vascular failure and went on stating that there was no element of beating by stick etc to Omprakash, otherwise he would have mentioned it in his court statement or in the PM report. When his court statement was tested on the anvil of postmortem report, we found that in his written opinion reduced in writing in PM report, he specifically mentioned another reason of death i.e. injuries on the person of Omprakash caused by hard and blunt object. Dr. Rajput did not mention about this reason in his court statement. Thus, his court statement could neither inspire confidence of Court below nor of this Court.

27. In (1992) 4 SCC 69 *Mafabhai Nagarbhai Raval Vs. State of Gujarat,* the Apex Court opined that credibility of expert opinion depends on the reasons stated in support of his conclusions and the data and *material furnished which formed the basis of conclusion.* Reference may be made to relevant portion of judgment of *Dayal Singh vs. State of Uttaranchal* (2012) 8 SCC 263 which reads as under:-

> "The courts, normally, look at expert evidence with a greater sense of acceptability, but it is equally true that the courts are not absolutely guided by the report of the experts, especially if such reports are perfunctory, unsustainable and are the result of a deliberate attempt to misdirect the prosecution.
>
> The essential principle governing expert evidence is that the expert is not only to provide reasons to support his opinion but the result should be directly demonstrable. The court is not to surrender its own judgment to that of the expert or delegate its authority to a third party, but should assess his evidence like any other evidence.
>
> We really need not reiterate various judgments which have taken the view that the purpose of an expert opinion is primarily to assist the court in arriving at a final conclusion. Such report is not binding upon the court. The court is expected to analyse the report, read it in

conjunction with the other evidence on record and then form its final opinion as to whether such report is worthy of reliance or not."

(emphasis supplied)

28. As per the *ratio decidendi* of these judgments, we have no hesitation to hold that Court below has rightly disbelieved the statement of Dr. Rajput (PW.29) regarding reason of death.

29. Oral dying declarations given by brother of deceased Gauri Shankar (PW.4), wife of deceased Geeta Devi (PW.5) and son Rajan Kumar Jaiswal (PW.6) were assailed by contending (i) the statement of Dr. Varsha Dhakad (DW.1) and Dr. Rajput (PW.29) shows that right from the date of admission in MY hospital till his death on 31/10/2010, Omprakash was unconscious and hence there was no question of giving oral dying declaration to family members. Since dying declarations are suspicious, in view of judgment of Supreme Court in *Jagbir Singh* (supra), it requires corroboration.

30. Dr. Varsha Dhakad (DW.1) deposed about health and condition of Omprakash at the time of hospitalization. Neither her statement nor statement of Dr. Rajput (P.W.29) contains any statement that during entire period of hospitalization, Omprakash continuously remained unconscious. Dr. Rajput (PW.29) on the basis of certain medical documents opined that there exists findings about each day's hospitalization at MY hospital that deceased was unconscious. The Court below opined that the medical documents on the strength which said statement was made by Dr. Rajput (PW.29) were not exhibited and proved by prosecution. Hence, his statement is not worthy of credence. We do not find any perversity or illegality in this finding. The finding of Court below that doctors do not remain with the patient in the hospital during the entire period of hospitalization and family members remain with the patient full time is a plausible view which does not require any interference. In that event, the statement of Gauri Shankar (PW.4) that during hospitalization Omprakash gained consciousness and informed him, his wife and son about assault by appellants cannot be doubted.

31. In view of foregoing analysis, we are constraint to hold that oral dying declaration can be sole basis for holding the appellants as guilty. We find support in our view from the judgment of Supreme Court and this Court. [See AIR 2009 SC 1487 *Varikuppal Srinivas Vs. State of Andhra Pradesh*) and Division Bench judgment of this court reported in 2008(3) MPHT 194 *State of Madhya Pradesh Vs. Ashok & another.* In *Vikas & Ors. Vs. State of Maharashtra* (2008) 2 SCC 516], it was poignantly held that corroboration of dying declaration is not essential if dying declaration is truthful and voluntary. Requirement of doctor's endorsement as to mental fitness of deceased is merely a rule of prudence. There is no straight jacket formula that in every case oral dying declaration must be

corroborated and mental condition of declarant must be certified by a doctor. [See also (2005) 9 SCC 113 *Muthu Kutty & another Vs. State of Tamil Nadu]*

32. As analyzed above, we do not find any illegality or perversity in the impugned judgment. The prosecution has established its case beyond reasonable doubt. The Court below rightly appreciated the evidence and took a plausible view in the judgment, which does not warrant interference by this Court. (See *Maniben v. State of Gujarat* (2009) 8 SCC 796, *Madathil Narayanan v. State of Kerala* (2018) 14 SCC 513).

33. Resultantly, appeal fails and is hereby **dismissed.**

Appeal dismissed

I.L.R. [2021] M.P. 966
CRIMINAL REVISION
Before Mr. Justice Sanjay Dwivedi
CRR No. 1800/2020 (Jabalpur) decided on 22 October, 2020

VIKAS ...Applicant

Vs.

STATE OF M.P. …Non-applicant

***A. Juvenile Justice (Care and Protection of Children) Act, 2015 (2 of 2016), Section 12(1) – Bail – Heinous Crime* – Applicant, aged 17 years murdered his father, mother and brother for money – Held – Offence is heinous in nature which shakes the conscience of society, infact a threat to society – No guardian of applicant to take care of him thus every possibility for him to get associated with hardcore criminals – Release of applicant on bail would defeat the "ends of justice" – Revision dismissed. (Para 7 & 8)**

क. किशोर न्याय (बालकों की देखरेख और संरक्षण) अधिनियम, 2015 (2016 का 2), धारा 12(1) – जमानत – जघन्य अपराध – आवेदक, उम्र 17 वर्ष ने पैसों के लिए अपने पिता, माता और भाई की हत्या कर दी – अभिनिर्धारित – अपराध जघन्य स्वरूप का है जो समाज की अंतश्चेतना को झकझोर देता है, वास्तव में समाज के लिए एक खतरा है – आवेदक की देखभाल करने के लिए कोई संरक्षक नहीं है, इसलिए उसके कट्टर अपराधियों के साथ जुड़ने की पूरी संभावना है – आवेदक को जमानत पर छोड़ने से ''न्याय का उद्देश्य'' विफल होगा – पुनरीक्षण खारिज।

***B. Juvenile Justice (Care and Protection of Children) Act, 2015 (2 of 2016), Section 12(1) – Bail – Exception* – Held – Bail cannot be claimed as a matter of right and cannot be granted to a juvenile without considering gravity of offence and nature of crime. (Para 6)**

ख. किशोर न्याय (बालकों की देखरेख और संरक्षण) अधिनियम, 2015 (2016 का 2), धारा 12(1) – जमानत – अपवाद – अभिनिर्धारित – जमानत हेतु अधिकार स्वरूप दावा नहीं किया जा सकता तथा अपराध की गंभीरता और अपराध के स्वरूप पर विचार किये बिना एक किशोर को जमानत प्रदान नहीं की जा सकती।

Case referred:

(2012) 5 SCC 201.

Jafar Khan, for the applicant.
Shweta Yadav, P.L. for the non-applicant/State.

O R D E R

SANJAY DWIVEDI, J. :- Although this matter is listed for consideration of I.A. No.7896/2020, an application for grant of bail, but considering the facts and circumstances and also the arguments advanced by learned counsel for the parties, this matter is heard finally.

2. This criminal revision under Section 102 of the Juvenile Justice (Care and Protection of Child) Act, 2015 (hereinafter referred to as the 'Act, 2015') has been filed by the applicant for grant of bail in connection with Crime No.35/2020 registered at Police Station Makroniya, District Sagar for the offence punishable under Sections 302 and 201 of the Indian Penal Code.

3. As per the allegations attributed against the present applicant, on 28.01.2020, the complainant Chain Singh has lodged a dehati nalisi that his brother namely Ramgopal Patel resides at Gali No.3, Anand Nagar, Makroniya with his family but since last four to five days despite trying to contact him on phone, neither he was connecting nor responding. Thereafter, the complainant went to his brother's house and found that his house was locked, and on inquiring from the children of the school when nothing was found, then he came back to his brother's house and shifted the glass of the window then saw that the dead bodies of his brother, sister-in-law and his nephew Adarsh were lying on the floor. The present applicant was not present in the house and his mobile was switched off. The complainant doubted over the conduct of the present applicant and as such, informed the police and then dehati nalisi was registered and investigation was started by the police and ultimately, it is found that the present applicant committed murder of his mother, father and brother.

4. Learned counsel for the applicant submits that the applicant is a juvenile and in jail since 30.01.2020. He further submits that this Court on earlier occasion has called the report regarding conduct of the applicant during the period of custody and as per the said report, nothing unusual is found in the conduct of the applicant and his behaviour was also normal. He also submits that considering the period of custody of the applicant who is a juvenile, he may be enlarged on bail.

5. In compliance to the order passed by this Court on 08.10.2020, Mr. J.P. Thakur, Incharge Town Inspector, PS Makroniya, District Sagar is present today through video-conferencing alongwith the case-diary with learned Panel Lawyer for the respondent/State to apprise this Court about the conduct of the applicant/accused. In turn, he has informed that the conduct of the applicant is normal and nothing unusual is reported against him. However, learned Panel Lawyer submits that looking to the gravity of the offence committed by the applicant/accused, he is not entitled to be released on bail and this revision deserves to be dismissed.

6. I have considered the arguments advanced by learned counsel for the parties. Section 12 of the Act, 2015 deals with grant of bail to a juvenile and provides as to under what parameters, the bail can be considered. In assessing the merit of rival submissions, it would, at the outset, be necessary to advert to Section 12 of the Act, 2015:-

> **"12. Bail to a person who is apparently a child alleged to be in conflict with law.**—(1) When any person, who is apparently a child and is alleged to have committed a bailable or non-bailable offence, is apprehended or detained by the police or appears or brought before a Board, such person shall, notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) or in any other law for the time being in force, be released on bail with or without surety or placed under the supervision of a probation officer or under the care of any fit person:
>
> Provided that such person shall not be so released if there appears reasonable grounds for believing that the release is likely to bring that person into association with any known criminal or expose the said person to moral, physical or psychological danger or the person's release would defeat the ends of justice, and the Board shall record the reasons for denying the bail and circumstances that led to such a decision.
>
> (2) When such person having been apprehended is not released on bail under sub-section (1) by the officer-in-charge of the police station, such officer shall cause the person to be kept only in an observation home in such manner as may be prescribed until the person can be brought before a Board.
>
> (3) When such person is not released on bail under sub-section (1) by the Board, it shall make an order sending him to an observation home or a place of safety, as the case may be, for such period during the pendency of the inquiry regarding the person, as may be specified in the order.

> (4) When a child in conflict with law is unable to fulfil the conditions of bail order within seven days of the bail order, such child shall be produced before the Board for modification of the conditions of bail."

As per learned counsel for the applicant, considering the conduct of the applicant, he is entitled to be released on bail irrespective of the gravity of offence committed, but in the opinion of this Court the consideration for grant of bail to a juvenile delinquent though is entirely different than that of normal consideration of granting bail but still the Court has to consider whether his release would defeat the 'ends of justice'. In my opinion, the words 'ends of justice' should be confined to the fact which shows that grant of bail itself is likely to a result in injustice and as per the exception provided under Section 12 (1) of the Act, 2015 if the Court finds that release would defeat the 'ends of justice' then bail can be denied to a juvenile. Although, various High Courts in most of the cases while dealing with the provisions of grant of bail as per Section 12 of the Act, 2015 have adopted an approach that a juvenile can be considered to be released on bail irrespective of gravity of offence but I am not convinced that the bail can be claimed by a juvenile as a matter of right and can be granted to the juvenile without considering the gravity of offence and nature of crime committed by him. As per the provisions of Section 12 of the Act, 2015, it is clear that there was no intent of the legislature to consider the grant of bail to a juvenile as his absolute right and that is why it carved out an exception under which bail can be denied, otherwise there was no occasion to attach proviso with Section 12(1) of the Act, 2015. My view gets strength by the view taken by the Supreme Court in the case of *Om Prakash Vs. State of Rajasthan and another* reported in (2012) 5 SCC 201 in which the Supreme Court in paragraphs-3 and 23 of its judgment has observed as under:-

> **"3.** The Juvenile Justice Act was enacted with a laudable object of providing a separate forum or a Special Court for holding trial of children/juveniles by the Juvenile Court as it was felt that children become delinquent by force of circumstance and not by choice and hence they need to be treated with care and sensitivity while dealing and trying cases involving criminal offence. But when an accused is alleged to have committed a heinous offence like rape and murder or any other grave offence when he ceased to be a child on attaining the age of 18 years, but seeks protection of the Juvenile Justice Act under the ostensible plea of being a minor, should such an accused be allowed to be tried by a Juvenile Court or should he be referred to a competent court of criminal jurisdiction where the trial of other adult persons are held?
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> 23. Hence, while the courts must be sensitive in dealing with the juvenile who is involved in cases of serious nature like sexual molestation, rape, gang rape, murder and host of other offences, the accused cannot be allowed to abuse the statutory protection by attempting to prove himself as a minor when the documentary evidence to prove his minority gives rise to a reasonable doubt about his assertion of minority. Under such circumstance, the medical evidence based on scientific investigation will have to be given due weight and precedence over the evidence based on school administration records which give rise to hypothesis and speculation about the age of the accused. The matter however would stand on a different footing if the academic certificates and school records are alleged to have been withheld deliberately with ulterior motive and authenticity of the medical evidence is under challenge by the prosecution."

However, in the case of *Om Prakash* (supra), there was some dispute with regard to the age of the accused but it is clearly observed by the Supreme Court while considering the crime committed by the juvenile and also considering the beneficial legislation i.e Act, 2015, has observed that the gravity of offence and nature of crime cannot be ignored. In the case of *Raju Vs. State of U.P. and ors* the High Court of Allahabad in **Criminal Revision No.2492/2017** also taking note of the view taken by the Supreme Court in the case of *Om Prakash* (supra), while considering the provisions of Section 12(1) of the Act, 2015 has observed as under:-

> "30. Thus, it is no ultimate rule that a juvenile below the age of 16 years has to be granted bail and can be denied the privilege only on the first two of the grounds mentioned in the proviso, that is to say, likelihood of the juvenile on release being likely to be brought in association with any known criminal or in consequence of being released exposure of the juvenile to moral, physical or psychological danger. It can be equally refused on the ground that releasing a juvenile, that includes a juvenile below 16 years would "defeat the ends of justice." In the opinion of this Court the words "defeat the ends of justice" employed in the proviso to Section 12 of the Act postulate as one of the relevant consideration, the nature and gravity of the offence though not the only consideration in applying the aforesaid part of the disentitling legislative edict. Other factors such as the specific need for supervision or intervention, circumstances as brought out in the social investigation

> report and past conduct of the child would also be relevant that are spoken of under Section 18 of the Act."

Further, the High Court of Allahabad has also in the case of *Sanjay Kumar Vs. State of U.P.* in **Criminal Appeal No.1481/2002** while dealing with the provisions of Section 12 of the Act, 2015 has observed that if a juvenile accused is arrested or detained or appears or is brought before a Board, such person shall be released on bail but he shall not be so released if there appears reasonable grounds for believing that the release is likely to bring him into association with any known criminal or expose him to moral, physical or psychological danger or that his release would defeat the 'ends of justice'. In the case of *Harsh Bhavi Vs. State of Rajasthan,* the High Court of Rajasthan (Jaipur Bench) in **Criminal Revision No.437/2018,** while dealing with the case of release of a juvenile on bail who was aged about 17 years, and had committed the offence of kidnapping and murder of a minor child aged about 16 years, has observed as under:-

> "6. Protection granted under Section 12 of the Juvenile Justice (Care and Protection of Children) Act 2015 is claimed on behalf of juveniles who are in conflict with law. But at the same time the child who is in need of care and protection, his interest is also to be watched by the Courts. Further, Section 12 also speaks that the juvenile shall not be released if it appears that his release would defeat the ends of justice. If viewed from this angle, it appears that if in the case in hand bail is granted to the petitioner then it will be a gross injustice qua the child who had been victim of the offence and the society at large also. By showing misplaced sympathy to the petitioner who has perpetrated the offence of kidnapping and then murder, the victim and the society will be denied justice which is not the intention of the Act of 2015."

Here, in the present case also as observed by the Court below while rejecting the application for release the juvenile on bail that before committing a crime, the behaviour of the applicant was also not proper as earlier also he had stolen money from his parents and had run away from the house. He was very stubborn and used to steal money by using the ATM card of his parents which clearly indicates that he was of mature mind, even though he was aged below 18 years and the manner in which he has committed the crime shows that he has sound mind and was also fully aware of the crime which he was committing. Further, it has been observed that even after committing the crime, he had not shown remorse or regret in any form.

7. However, as per the case of the prosecution, at the time of committing the offence, the juvenile was aged about 17 years and was near to the age of majority.

The applicant has committed the offence which undoubtedly is of a grave nature, killing his mother, father and brother for no reason but money, and spent almost two days with the dead bodies of his family members and thereafter even enjoyed his father's money, which he received out of his retiral dues, hence this Court cannot ignore this aspect. Furthermore, from the conduct of the applicant/ accused, it can easily be gathered that his mental status seems to be stable and the offence which he has committed just to quench his thirst of money, shocks the conscience of the society and infact it is a threat to the society too. The Juvenile Justice Bill was passed in the Lok Sabha on 07th May, 2015 and in the Rajya Sabha on 22nd December, 2015 vide Bill No.99-C/2014 proposing that a minor in the age group of 16 to 18 years to be tried as an adult if they commit a heinous crime. As a general parlance, bail is the rule in the case of a juvenile and places the burden for denying the bail on the prosecution to show that on the parameters specified in the proviso to Section 12 of the Act, 2015, bail should be denied to a juvenile. But here in this case, I am of the opinion that since at the time of committing the offence, the age of the applicant was 17 years and if he is released on bail the expression defeat the 'ends of justice' would frustrate the confidence as repose for the society. Indeed, the parents are murdered by the applicant and in the event of his release, there is no guardian to take care of him which would create every possibility for the applicant to get associated with the hardcore criminals. No doubt, the Juvenile Act is a beneficial legislation intended for reformation of the juvenile/child in conflict with law, but the law also demands that justice should be done not only to the accused, but also to the accuser. Thus, while considering the room for granting the bail to a juvenile, the Court has to consider the surrounding facts and circumstances. The alleged act of the applicant/accused itself shakes the conscience of the society. The offence is obviously heinous in nature as it is a case of triple murder that too murder of his blood relations i.e. mother, father and brother by an adolescent aged about 17 years and if he is released on bail, it would defeat the 'ends of justice'.

8. In view of the overall facts and circumstances, I am of the opinion that the present revision filed under Section 102 of the Act, 2015 does not deserve to be allowed and accordingly, the same stands **rejected.** The order passed by the Court below rejecting the request for grant of bail to the applicant is hereby affirmed.

Revision dismissed

I.L.R. [2021] M.P. 973
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice G.S. Ahluwalia

MCRC No. 10898/2021 (Gwalior) decided on 25 February, 2021

KAMLA @ SARLA YADAV (SMT.) ...Applicant

Vs.

STATE OF M.P. …Non-applicant

***A. Criminal Procedure Code, 1973 (2 of 1974), Section 439 and Penal Code (45 of 1860), Sections 304-B, 498-A & 34 – Suppression of Material Fact – Effect* – Held – Applicant tried to obtain bail order by deliberately suppressing the *factum* of dismissal of SLP by Supreme Court – Counsel was aware of said fact thus it is not a *bonafide* mistake – Act of counsel is glaring example of unfair means – Application dismissed with cost of Rs. 5000/-.**
(Paras 7, 12 & 24)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 439 एवं दण्ड संहिता (1860 का 45), धाराएँ 304–B, 498–A व 34 – तात्विक तथ्य को छिपाना – प्रभाव – अभिनिर्धारित – आवेदक ने सर्वोच्च न्यायालय द्वारा विशेष इजाजत याचिका (एस.एल.पी.) की खारिजी के तथ्य को जानबूझकर छिपाते हुए जमानत आदेश प्राप्त करने का प्रयत्न किया – काउंसेल को उपरोक्त तथ्य की जानकारी थी अतः यह एक सद्भाविक गलती नहीं है – काउंसेल का कृत्य अनुचित साधन का स्पष्ट उदाहरण है – 5000/– रू. के व्यय सहित आवेदन खारिज।

***B. Penal Code (45 of 1860), Section 52 – Good Faith* – Held – Counsel was aware of the fact of dismissal of SLP by Supreme Court thus he cannot claim that he could not discover information inspite of his due attention and care.** **(Para 12)**

ख. दण्ड संहिता (1860 का 45), धारा 52 – सद्भावपूर्वक – अभिनिर्धारित – काउंसेल को सर्वोच्च न्यायालय द्वारा विशेष इजाजत याचिका (एस.एल.पी.) की खारिजी के तथ्य की जानकारी थी अतः वह यह दावा नहीं कर सकता कि सम्यक् सावधानी और सतर्कता के बावजूद भी उसे जानकारी का पता नहीं चला।

***C. Advocate – Duties towards Court* – Held – Lawyer should act as an Officer of Court and should not do anything which would erode his credibility – Playing fraud on Court is certainly an unfair means which cannot be ignored at any cost – Case laws discussed – Stern warning issued to counsel.** **(Paras 14 to 19)**

ग. अधिवक्ता – न्यायालय के प्रति कर्तव्य – अभिनिर्धारित – अधिवक्ता को न्यायालय के अधिकारी के रूप में कार्य करना चाहिए तथा ऐसा कुछ भी नहीं करना चाहिए जिससे उसकी विश्वसनीयता कम हो – न्यायालय से कपट करना निश्चित रूप से एक

अनुचित साधन है जिसे किसी भी कीमत पर अनदेखा नहीं किया जा सकता – निर्णयज विधि विवेचित – काउंसेल को कठोर चेतावनी जारी की गई।

Cases referred:

(2009) 8 SCC 106, (2015) 13 SCC 288, (1997) 7 SCC 147, (2001) 2 SCC 221, (2011) 6 SCC 86.

Mahavir Pathak, for the applicant.
Vinod Pathak, P.L. for the non-applicant/State.

(Supplied: Paragraph numbers)

O R D E R

G.S. AHLUWALIA, J. :- Case diary is available.

This is sixth application filed under Section 439 of Cr.P.C. for grant of bail.

2. The applicant has been arrested on 07.08.2018 in connection with Crime No.368/2017 registered by Police Station Padav, District Gwalior for offence punishable under Sections 498-A, 304-B, 34 of IPC.

3. Fourth application was dismissed by this Court by order dated 29.07.2019 passed in M.Cr.C. No. 28730/2019, against which the applicant had preferred a SLP (Criminal) Diary No. 45740/2019 before the Supreme Court, which was dismissed by the Supreme Court by order dated 24.01.2020 with a direction to the Trial Court to complete the trial within a period of four months from the date of communication of the order.

4. The applicant has not filed the copies of the order-sheets of the Trial Court to show that the applicant is not responsible for the delay.

5. Furthermore, the disturbing fact is that the applicant has suppressed the fact of filing of SLP and its dismissal by the Supreme Court.

6. Clause 2 of the bail application reads as under:-

> ''2. यह कि, वर्तमान आवेदन के अतिरिक्त आवेदिका का अन्य कोई समान आवेदन माननीय सर्वोच्च न्यायालय अथवा माननीय उच्च न्यायालय के समक्ष ना तो प्रस्तुत किया गया है, ना ही विचाराधीन है और ना ही निराकृत हुआ है।''

7. Even the applicant has not filed the copy of the order dated 24.01.2020 passed by the Supreme Court in the SLP. Thus, it is clear that in spite of the specific clause in the format of bail application, the applicant deliberately suppressed the fact of dismissal of SLP by the Supreme Court.

8. While deciding the previous bail application, this Court had mentioned the fact of dismissal of SLP by the Supreme Court in detail and the counsel for the applicant was so daring that in spite of filing the copy of last order-sheet of the Court, in which the details of the Supreme Court order were mentioned, did not declare that his SLP has already been dismissed by the Supreme Court. Even the during course of argument, this fact was not disclosed by Shri Pathak. When the fact of non-disclosure of dismissal of S.L.P. by Supreme Court was pointed out to Shri Pathak, then he did not show any remorse. Thus, it is a clear case of contempt by misleading this Court.

9. When this Court was inclined to issue Contempt Notice, then it was submitted by Shri Mahavir Pathak that contempt notice may not be issued and he is ready to submit his written apology.

10. Accordingly, dictation of the order was deferred for some time, in order to facilitate Shri Pathak to file his affidavit. Thereafter, Shri Pathak filed his affidavit, which reads as under:-

"**माननीय उच्च न्यायालय मध्यप्रदेश खण्डपीठ ग्वालियर**

एम.सी.आर.सी 10898 / 2021

आवेदिका———————— कमला उर्फ सरला
बनाम
अनावेदक———————— म.प्र. शासन

शपथपत्र

नाम–महावीर पाठक पिता का नाम–स्व. श्री रघुराज किशोर पाठक आयु–47 वर्ष, व्यवसाय–वकालत, निवासी–लाईन नम्बर–14 मकान नम्बर–55 बिड़ला नगर, हजीरा जिला ग्वालियर म.प्र.

मैं शपथकर्ता शपथपूर्वक सत्य कथन करता हूं कि–

1. यहकि, माननीय न्यायालय के समक्ष मेरे द्वारा उक्त जमानत आवेदन पत्र प्रस्तुत किया गया था।

2. यहकि, मेरे द्वारा प्रस्तुत जमानत आवेदन में माननीय सर्वोच्च न्यायालय द्वारा पारित आदेश स्पेशल लीव पिटीशन दिनांक–24–01–20 (क्रिमिनल) डायरी नम्बर–45740 / 2019 का उल्लेख लिखने से रह गया है उक्त त्रुटि के लिए मैं क्षमा मांगता हूं यह मेरी त्रुटि है मेरे द्वारा उक्त त्रुटि जानबूझकर नहीं की गयी, भविष्य मे ऐसी त्रुटि नही करूंगा इसके लिए मै क्षमा मांगता हूं। उक्त तथ्यों के समर्थन मे शपथपत्र प्रस्तुत है।

दिनांकः–25–02–21 हस्ताक्षर
स्थान–ग्वालियर

सत्यापन

मै शपथपूर्वक सत्यापित करता हूं कि–उक्त शपथपत्र के पद क्रमांक–1 व 2 मे वर्णित समस्त तथ्य सत्य एवं सही है और ना ही कुछ छिपाया गया है।

दिनांकः–25–02–21 हस्ताक्षर

स्थान–ग्वालियर

11. Section 52 of I.P.C. reads as under :

> **52. "Good faith".**—Nothing is said to be done or believed in "good faith" which is done or believed without due care and attention.

12. The factum of dismissal of S.L.P. by Supreme Court is specifically mentioned in the previous order of this Court, by which the 5th application of the applicant was dismissed. The Copy of the said order of the High Court has also been filed by the applicant. Thus, it cannot be said that non-disclosure of factum of dismissal of S.L.P. by Supreme Court was bonafide mistake of the Lawyer because the Counsel was aware of the fact of dismissal of S.L.P. by Supreme Court and he also cannot claim that he could not discover the information inspite of his due attention and care. Thus, the act of Shri Pathak is a glaring example of unfair means.

13. Further, this Court would like to mention about the duties of a lawyer towards the Court.

14. The Supreme Court in the case of *R.K. Anand Vs. Delhi High Court,* reported in (2009) 8 SCC 106 has held as under :

> **"Role of the Lawyer**
>
> **331.** The other important issue thrown up by this case and that causes us both grave concern and dismay is the decline of ethical and professional standards among lawyers. The conduct of the two appellants (one convicted of committing criminal contempt of court and the other found guilty of misconduct as Special Public Prosecutor), both of them lawyers of long standing, and designated Senior Advocates, should not be seen in isolation.The bitter truth is that the facts of the case are manifestation of the general erosion of the professional values among lawyers at all levels. We find today lawyers indulging in practices that would have appalled their predecessors in the profession barely two or three decades ago. Leaving aside the many kinds of unethical practices indulged in by a section of lawyers we find that even some highly successful lawyers seem to live by their own rules of conduct.

332. We have viewed with disbelief Senior Advocates freely taking part in TV debates or giving interviews to a TV reporter/anchor of the show on issues that are directly the subject-matter of cases pending before the court and in which they are appearing for one of the sides or taking up the brief of one of the sides soon after the TV show. Such conduct reminds us of the fictional barrister, Rumpole, "the Old Hack of Bailey", who self-deprecatingly described himself as an "old taxi plying for hire". He at least was not bereft of professional values. When a young and enthusiastic journalist invited him to a drink of Dom Perignon, vastly superior and far more expensive than his usual "plonk", "Château Fleet Street", he joined him with alacrity but when in the course of the drink the journalist offered him a large sum of money for giving him a story on the case; "why he was defending the most hated woman in England", Rumpole ended the meeting simply saying

"In the circumstance I think it is best if I pay for the Dom Perignon."

333. We express our concern on the falling professional norms among the lawyers with considerable pain because we strongly feel that unless the trend is immediately arrested and reversed, it will have very deleterious consequences for the administration of justice in the country. No judicial system in a democratic society can work satisfactorily unless it is supported by a Bar that enjoys the unqualified trust and confidence of the people, that shares the aspirations, hopes and the ideals of the people and whose members are monetarily accessible and affordable to the people.

334. We are glad to note that Mr Gopal Subramanium, the amicus fully shared our concern and realised the gravity of the issue. In course of his submissions he eloquently addressed us on the elevated position enjoyed by a lawyer in our system of justice and the responsibilities cast upon him in consequence. His written submissions begin with this issue and he quotes extensively from the address of Shri M.C. Setalvad at the Diamond Jubilee Celebrations of the Bangalore Bar Association, 1961, and from the decisions of this Court in *Pritam Pal* v. *High Court of M.P. [1993 Supp (1) SCC 529]* (observations of Ratnavel Pandian, J.) and *Sanjiv Datta, In Re [(1995) 3 SCC 619]* (observations of Sawant, J. at pp. 634-35, para 20). We respectfully endorse the views and sentiments expressed by Mr M.C. Setalvad, Pandian, J. and Sawant, J.

> **335.** Here we must also observe that the Bar Council of India and the Bar Councils of the different States cannot escape their responsibility in this regard. Indeed the Bar Council(s) have very positively taken up a number of important issues concerning the administration of justice in the country. It has consistently fought to safeguard the interests of lawyers and it has done a lot of good work for their welfare. But on the issue of maintaining high professional standards and enforcing discipline among lawyers its performance hardly matches its achievements in other areas. It has not shown much concern even to see that lawyers should observe the statutory norms prescribed by the Council itself. We hope and trust that the Council will at least now sit up and pay proper attention to the restoration of the high professional standards among lawyers worthy of their position in the judicial system and in the society."

15. The Supreme Court in the case of *Amit Chanchal Jha v. High Court of Delhi,* reported in (2015) 13 SCC 288 has held as under :

> **"17.** This Court has earlier acknowledged the falling standards of certain members of the Bar and it has become necessary to reiterate the said view on account of repeated instances which are being highlighted. In *R.K. Anand* v. *Delhi High Court,* this Court expressed its grave concern and dismay on the decline of ethical and professional standards among lawyers as follows: (SCC pp. 205-06, paras 331, 333 & 335)
>
> *"331*. The other important issue thrown up by this case and that causes us both grave concern and dismay is the decline of ethical and professional standards among lawyers. The conduct of the two appellants (one convicted of committing criminal contempt of court and the other found guilty of misconduct as Special Public Prosecutor), both of them lawyers of long standing, and designated Senior Advocates, should not be seen in isolation. The bitter truth is that the facts of the case are manifestation of the general erosion of the professional values among lawyers at all levels. We find today lawyers indulging in practices that would have appalled their predecessors in the profession barely two or three decades ago. Leaving aside the many kinds of unethical practices indulged in by a section of lawyers we find that even some highly successful lawyers seem to live by their own rules of conduct.
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> * * *

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* * *

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18. We may also recall the observations of this Court in *Ministry of Information & Broadcasting, In re,* that the legal profession is a solemn and serious occupation. It is a noble calling and all those who belong to it are its honourable members. The honour as a legal profession has to be maintained by its members by their exemplary conduct both in and outside the court. The lawyer has to conduct himself as a model for others in his profession as well as in private and public life. Society has the right to expect from him ideal behaviour. This Court observed: (SCC pp. 634-35, para 20)

"*20*. The legal profession is a solemn and serious occupation. It is a noble calling and all those who belong to it are its honourable members. Although the entry to the profession can be had by acquiring merely the qualification of technical competence, the honour as a professional has to be maintained by its members by their exemplary conduct both in and outside the court. The legal profession is different from other professions in that what the lawyers do, affects not only an individual but the administration of justice which is the foundation of the civilised society. Both as a leading member of the intelligentsia of the society and as a responsible citizen, the lawyer has to conduct himself as a model for others both in his professional and in his private and public life. The society has a right to expect of him such ideal behaviour. It must not

be forgotten that the legal profession has always been held in high esteem and its members have played an enviable role in public life. The regard for the legal and judicial systems in this country is in no small measure due to the tireless role played by the stalwarts in the profession to strengthen them. They took their profession seriously and practised it with dignity, deference and devotion. If the profession is to survive, the judicial system has to be vitalised. No service will be too small in making the system efficient, effective and credible. The casualness and indifference with which some members practise the profession are certainly not calculated to achieve that purpose or to enhance the prestige either of the profession or of the institution they are serving. If people lose confidence in the profession on account of the deviant ways of some of its members, it is not only the profession which will suffer but also the administration of justice as a whole. The present trend unless checked is likely to lead to a stage when the system will be found wrecked from within before it is wrecked from outside. It is for the members of the profession to introspect and take the corrective steps in time and also spare the courts the unpleasant duty. We say no more."

19. In *Bar Council of Maharashtra* v. *M.V. Dabholkar,* it was observed: (SCC p. 298, para 15)

"15. Now to the legal issue bearing on canons of professional conduct. The rule of law cannot be built on the ruins of democracy, for where law ends tyranny begins. If such be the keynote thought for the very survival of our Republic, the integral bond between the lawyer and the public is unbreakable. And the vital role of the lawyer depends upon his probity and professional lifestyle. Be it remembered that the central function of the legal profession is to promote the administration of justice. If the practice of law is thus a public utility of great implications and a monopoly is statutorily granted by the nation, it obligates the lawyer to observe scrupulously those norms which make him worthy of the confidence of the community in him as a vehicle of justice—social justice. The Bar cannot behave with doubtful scruples or strive to thrive on litigation. Canons of conduct cannot be crystallised into rigid rules but *felt* by the collective conscience of the practitioners as right: 'It must be a conscience alive to the proprieties and the improprieties incident to the discharge of a sacred public trust. It must be a conscience governed by the rejection of self-interest and selfish ambition. It must be a conscience propelled by a consuming desire to play a leading role in the fair and impartial administration of justice, to the end that public confidence may be kept undiminished at all times in the belief that we shall always seek truth and justice in the preservation of the rule of law. It must be a conscience, not shaped by rigid rules of doubtful validity, but answerable only to a moral code which would drive irresponsible Judges from the profession. Without such a conscience, there should be no Judge' [Hastings, Hon

> John S. : Judicial Ethics as it Relates to Participation in Money-Making Activities — Conference on Judicial Ethics, p. 8. The School of Law, University of Chicago (1964)].
>
> —and, we may add, no lawyer. Such is the high, standard set for professional conduct as expounded by courts in this country and elsewhere."
>
> (emphasis in original)

16. The Supreme Court in the case of *P.D. Gupta Vs. Ram Murti* reported in (1997) 7 SCC 147 has held as under :

> "A lawyer owes a duty to be fair not only to his client but also to the court as well as to the opposite party in the conduct of the case. Administration of justice is a stream which has to be kept pure and clean. It has to be kept unpolluted. Administration of justice is not something which concerns the Bench only. It concerns the Bar as well. The Bar is the principal ground for recruiting Judges. No one should be able to raise a finger about the conduct of a lawyer. While conducting the case he functions as an officer of the court."

17. The Supreme Court in the case of *D.P. Chadhu Vs. Triyugi Narain Mishra* reported in (2001) 2 SCC 221 has held as under :

> **"24.** It has been a saying as old as the profession itself that the court and counsel are two wheels of the chariot of justice. In the adversarial system, it will be more appropriate to say that while the Judge holds the reigns, the two opponent counsel are the wheels of the chariot. While the direction of the movement is controlled by the Judge holding the reigns, the movement itself is facilitated by the wheels without which the chariot of justice may not move and may even collapse. Mutual confidence in the discharge of duties and cordial relations between Bench and Bar smoothen the movement of the chariot. As responsible officers of the court, as they are called — and rightly, the counsel have an overall obligation of assisting the courts in a just and proper manner in the just and proper administration of justice. Zeal and enthusiasm are the traits of success in profession but overzealousness and misguided enthusiasm have no place in the personality of a professional.
>
> 25. An advocate while discharging duty to his client, has a right to do everything fearlessly and boldly that would advance the cause of his client. After all he has been engaged by his client to secure justice for him. A counsel need not make a concession merely because it would please the Judge. Yet a counsel, in his zeal to earn success for a client, need not step

over the well-defined limits or propriety, repute and justness. Independence and fearlessness are not licences of liberty to do anything in the court and to earn success to a client whatever be the cost and whatever be the sacrifice of professional norms."

18. The Supreme Court in the case of *O.P. Sharma Vs. High Court of Punjab & Haryana* reported in (2011) 6 SCC 86 has held as under :

"17. The role and status of lawyers at the beginning of sovereign and democratic India is accounted as extremely vital in deciding that the nation's administration was to be governed by the rule of law. They were considered intellectuals amongst the elites of the country and social activists amongst the downtrodden. These include the names of a galaxy of lawyers like Mahatma Gandhi, Motilal Nehru, Jawaharlal Nehru, Bhulabhai Desai, C. Rajagopalachari, Dr. Rajendra Prasad and Dr. B.R. Ambedkar, to name a few. The role of lawyers in the framing of the Constitution needs no special mention. In a profession with such a vivid history it is regretful, to say the least, to witness instances of the nature of the present kind. Lawyers are the officers of the court in the administration of justice.

* * * *

20. In *R.D. Saxena* v. *Balram Prasad Sharma* this Court held as under: (SCC p. 281, para 42)

"*42*. In our country, admittedly, a social duty is cast upon the legal profession to show the people beckon (sic beacon) light by their conduct and actions. The poor, uneducated and exploited mass of the people need a helping hand from the legal profession, admittedly, acknowledged as a most respectable profession. No effort should be made or allowed to be made by which a litigant could be deprived of his rights, statutory as well as constitutional, by an advocate only on account of the exalted position conferred upon him under the judicial system prevalent in the country."

* * * *

24. Advocacy touches and asserts the primary value of freedom of expression. It is a practical manifestation of the principle of freedom of speech. Freedom of expression in arguments encourages the development of judicial dignity, forensic skills of advocacy and enables protection of fraternity, equality and justice. It plays its part in helping to secure the protection of other fundamental human rights,

freedom of expression, therefore, is one of the basic conditions for the progress of advocacy and for the development of every man including legal fraternity practising the profession of law. Freedom of expression, therefore, is vital to the maintenance of free society. It is essential to the rule of law and liberty of the citizens. The advocate or the party appearing in person, therefore, is given liberty of expression. But they equally owe countervailing duty to maintain dignity, decorum and order in the court proceedings or judicial processes. Any adverse opinion about the judiciary should only be expressed in a detached manner and respectful language. The liberty of free expression is not to be confounded or confused with licence to make unfounded allegations against any institution, much less the judiciary [vide *D.C. Saxena (Dr.)* v. *Chief Justice of India]*.

38. An advocate's duty is as important as that of a Judge. Advocates have a large responsibility towards the society. A client's relationship with his/her advocate is underlined by utmost trust. An advocate is expected to act with utmost sincerity and respect. In all professional functions, an advocate should be diligent and his conduct should also be diligent and should conform to the requirements of the law by which an advocate plays a vital role in the preservation of society and justice system. An advocate is under an obligation to uphold the rule of law and ensure that the public justice system is enabled to function at its full potential. Any violation of the principles of professional ethics by an advocate is unfortunate and unacceptable. Ignoring even a minor violation/misconduct militates against the fundamental foundation of the public justice system.

39. An advocate should be dignified in his dealings to the court, to his fellow lawyers and to the litigants. He should have integrity in abundance and should never do anything that erodes his credibility. An advocate has a duty to enlighten and encourage the juniors in the profession. An ideal advocate should believe that the legal profession has an element of service also and associates with legal service activities. Most importantly, he should faithfully abide by the standards of professional conduct and etiquette prescribed by the Bar Council of India in Chapter II, Part VI of the Bar Council of India Rules.

40. As a rule, an advocate being a member of the legal profession has a social duty to show the people a beacon of light by his conduct and actions rather than being adamant on an unwarranted and uncalled for issue."

19. Thus, it is clear that a lawyer should act as an officer of Court and should not do anything which would erode his credibility. If a Lawyer has professional duty towards his client, then he has duty towards the Court by maintaining decorum and by refusing to indulge in any unfair means. Playing fraud on the Court is certainly an unfair means, which cannot be ignored at any cost.

20. Although in the light of Section 52 of I.P.C., the explanation given by Shri Pathak is not worthy of acceptance, however, by adopting a lenient view, the affidavit is taken on record and a **stern warning** is issued to Shri Mahavir Pathak not to indulge in such condemnable practice in future.

21. So far as the merits of the case is concerned, this Court while dismissing the last application of the applicant on 13.07.2020 had specifically observed "that the application is completely silent as to when the order of the Supreme Court was communicated to the Trial Court. Further, the order-sheets of the Trial Court have not been filed".

22. Be that whatever it may.

23. Without there being any order-sheet of the Trial Court on record, it is difficult for this Court to adjudicate as to whether the applicant is responsible for the delay in trial or not.

24. As the applicant has tried to obtain the bail order by suppressing the factum of dismissal of SLP by the Supreme Court, accordingly, this application is **dismissed with cost of Rs.5,000/-** to be deposited in the Registry of this Court within a period of seven days from today.

Application dismissed

I.L.R. [2021] M.P. 984
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice Sheel Nagu

MCRC No. 44485/2020 (Gwalior) decided on 25 March, 2021

OM PRAKASH SHARMA ...Applicant

Vs.

STATE OF M.P. & anr. …Non-applicants

A. Criminal Procedure Code, 1973 (2 of 1974), Sections 154, 156(3), 200 & 482 **– Police failed to register cognizable offence of theft – Applicant filed application u/S 156(3) alongwith a complaint u/S 200 Cr.P.C. – Magistrate called for police report and kept complaint case u/S 200 Cr.P.C. in abeyance as unregistered – Several opportunities sought by police to submit report – Neither FIR was registered nor police report was filed –**

Guiding principle laid down on cases of simultaneous filing of application u/S 156(3) and complaint u/S 200 Cr.P.C. – Magistrate directed to proceed accordingly. (Paras 2, 3, 6, 10, 15, 20 & 21)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 154, 156(3), 200 व 482 – पुलिस, चोरी का संज्ञेय अपराध पंजीबद्ध करने में विफल रही – आवेदक ने धारा 200 दं.प्र.सं. के अंतर्गत परिवाद के साथ–साथ धारा 156(3) के अंतर्गत आवेदन प्रस्तुत किया – मजिस्ट्रेट ने पुलिस प्रतिवेदन बुलवाया और धारा 200 दं.प्र.सं. के अंतर्गत परिवाद प्रकरण को अपंजीबद्ध स्थिति में प्रास्थगित रखा – प्रतिवेदन प्रस्तुत करने हेतु पुलिस द्वारा कई अवसर चाहे गये – न तो प्रथम सूचना प्रतिवेदन पंजीबद्ध किया गया न ही पुलिस प्रतिवेदन प्रस्तुत किया गया था – धारा 156(3) के अंतर्गत आवेदन तथा धारा 200 दं.प्र.सं. के अंतर्गत परिवाद की एक साथ प्रस्तुति के प्रकरणों पर मार्गदर्शक सिद्धांत अधिकथित किया गया – मजिस्ट्रेट को तद्नुसार कार्यवाही करने के लिए निदेशित किया गया।

***B. Criminal Procedure Code, 1973 (2 of 1974), Section 156(3) – Investigation – Role/Duty of Magistrate – Scope* – Held – Magistrate vested with limited role of supervision, to be sparingly exercised on occasion where police either fails to register FIR or conducts investigation in improper manner – It is incumbent upon Magistrate u/S 156(3) to not only direct for registration of cognizable offence wherever it is found to be not registered by police but also to ensure that investigation is fair, expeditious and without prejudice. (Para 8 & 9.1)**

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 156(3) – अन्वेषण – मजिस्ट्रेट की भूमिका/कर्तव्य – व्याप्ति – अभिनिर्धारित – मजिस्ट्रेट को पर्यवेक्षण की सीमित भूमिका निहित है जिसका प्रयोग संयमता से ऐसे अवसर पर करना होता है जहां पुलिस या तो प्रथम सूचना प्रतिवेदन पंजीबद्ध करने में विफल होती है या अनुचित ढंग से अन्वेषण संचालित करती है – धारा 156(3) के अंतर्गत, मजिस्ट्रेट के लिए यह अनिवार्य है कि न केवल संज्ञेय अपराध को पंजीबद्ध करने के लिए निदेशित करें, जहां कहीं भी उसे पुलिस द्वारा पंजीबद्ध न किया जाना पाया गया है बल्कि यह सुनिश्चित करना भी है कि अन्वेषण, निष्पक्ष, शीघ्रता से एवं बिना पूर्वाग्रह के है।

***C. Criminal Procedure Code, 1973 (2 of 1974), Section 156(3) – Calling Report from Police & Registration of FIR* – Held – On application u/S 156(3), whenever Magistrate seeks report from police station, it necessarily means that if application reveals commission of cognizable offence and no offence is yet registered, then police is obliged to register offence and thereafter submit report – In such case, direction to register cognizable offence ought to be treated to be implicit in order to Magistrate calling for report. (Para 11 & 11.2)**

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 156(3) – पुलिस से प्रतिवेदन बुलवाना व प्रथम सूचना प्रतिवेदन को पंजीबद्ध करना – अभिनिर्धारित – धारा 156(3) के अंतर्गत आवेदन पर जब भी मजिस्ट्रेट पुलिस थाने से प्रतिवेदन की मांग करता

है, इसका आवश्यक रूप से यह अर्थ है कि यदि आवेदन से संज्ञेय अपराध कारित होना प्रकट होता है और अभी तक कोई अपराध पंजीबद्ध नहीं किया गया है, तब पुलिस, अपराध पंजीबद्ध करने के लिए एवं तत्पश्चात् प्रतिवेदन प्रस्तुत करने के लिए बाध्य है – ऐसे प्रकरण में, संज्ञेय अपराध पंजीबद्ध करने का निदेश, मजिस्ट्रेट के प्रतिवेदन बुलवाने के आदेश में विवक्षित होना समझा जाना चाहिए।

***D. Criminal Procedure Code, 1973 (2 of 1974), Section 156(3) – Word "May"* – Held – Use of expression "may" reveals the intention of legislature to vest discretionary power upon Magistrate to either direct for investigation or to refuse from doing so. (Para 11.1)**

घ. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 156(3) – शब्द ''सकता है'' – अभिनिर्धारित – अभिव्यक्ति ''सकता है'' का प्रयोग, मजिस्ट्रेट पर, या तो अन्वेषण हेतु निदेशित करने अथवा ऐसा करने से मना करने की वैवेकिक शक्ति निहित करने का विधान मंडल का आशय प्रकट करता है।

***E. Criminal Procedure Code, 1973 (2 of 1974), Section 156(3) and Constitution – Article 14 – Investigation – Delay & Uncertainty* – Held – On being asked by Magistrate to submit report, if police delays the investigation, it ultimately leads to arbitrariness in functioning of State which directly offends Article 14 of Constitution – Right of victim to seek justice cannot be sacrificed at the alter of omissions, commissions and inaction of investigating agency. (Paras 14 & 19.7)**

ङ. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 156(3) एवं संविधान – अनुच्छेद 14 – अन्वेषण – विलंब व अनिश्चितता – अभिनिर्धारित – मजिस्ट्रेट द्वारा प्रतिवेदन प्रस्तुत करने के लिए कहे जाने पर यदि पुलिस अन्वेषण में विलंब करती है, यह अंतिम रूप से राज्य के कृत्यों में मनमानेपन की ओर ले जाता है जो प्रत्यक्ष रूप से संविधान के अनुच्छेद 14 का उल्लंघन करता है – न्याय चाहने के पीड़ित के अधिकार की बलि, अन्वेषण ऐजेंसी के लोपों, कृत्यों एवं निष्क्रियता की वेदी पर नहीं दी जा सकती।

***F. Criminal Procedure Code, 1973 (2 of 1974), Sections 156(3), 167 & 173 – Conclusion of Investigation – Reasonable Time* – Held – If not in express term but impliedly it can be gathered that law-makers prescribed a maximum period of 60/90 days within which police is expected to complete investigation starting from stage of Section 154 to Section 169 or Section 173 Cr.P.C. (Paras 16.2, 18, 18.1 & 18.2)**

च. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 156(3), 167 व 173 – अन्वेषण की समाप्ति – युक्तियुक्त समय – अभिनिर्धारित – यदि शब्द में अभिव्यक्त नहीं है किंतु विवक्षित रूप से यह समझा जा सकता है कि विधि बनाने वालों ने अधिकतम अवधि 60/90 दिनों की विहित की है जिसके भीतर पुलिस से धारा 154 के प्रक्रम से आरंभ होते हुए धारा 169 या धारा 173 तक, अन्वेषण पूर्ण किया जाना अपेक्षित है।

***G. Criminal Procedure Code, 1973 (2 of 1974), Sections 156(3), 200 & 210 – Non-Registration of Cognizable Offence or Improper/Delayed Investigation – Duties & Functions of Magistrate* – Held – In case police fails to submit report within 60/90 days or any longer period of time statutorily prescribed, Magistrate shall proceed with complaint u/S 200 Cr.P.C. in accordance with Chapter XV & XVI Cr.P.C. notwithstanding the bar u/S 210 Cr.P.C. – Factors to be considered, enumerated – Guidelines laid down.**

(Paras 15.4, 16.1 & 20)

छ. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 156(3), 200 व 210 – संज्ञेय अपराध को पंजीबद्ध न किया जाना या अनुचित/विलंबित अन्वेषण – मजिस्ट्रेट के कर्तव्य व कार्य – अभिनिर्धारित – पुलिस के 60/90 दिन या कानूनी रूप से विहित किसी अधिक अवधि के भीतर प्रतिवेदन प्रस्तुत करने में असफल होने की दशा में, मजिस्ट्रेट धारा 200 दं.प्र.सं. के अंतर्गत परिवाद में, धारा 210 दं.प्र.सं. के अंतर्गत वर्जन होते हुए भी, अध्याय XV व XVI दं.प्र.सं. के अनुसरण में कार्यवाही करेगा – विचार में लिए जाने वाले कारक प्रगणित किये गये – दिशानिर्देश अधिकथित किये गये।

Cases referred:

AIR 2001 SC 571, (2008) 2 SCC 409, (2016) 6 SCC 277, (2014) 2 SCC 1, (2015) 6 SCC 287, 2008 Cri.L.J. 472, (2013) 6 SCC 384, (2006) 8 SCC 1.

Purushottam Rai, for the applicant.
Kalpana Parmar, P.L. for the non-applicants/State.

O R D E R

SHEEL NAGU, J.:- Inherent powers of this Court u/S.482 Cr.P.C. are invoked praying for the following relief(s):

> *"It is, therefore, most humbly prayed that the criminal petition filed by the petitioner may kindly be allowed and directed to the respondents for protection of the property, and the life of the petitioner and also directed to respondents for registration of the cases of the petitioner and fair investigation in the supervision of the learned lower court as per law. Any other relief, which this Honble Court may kindly deem fit and considers necessary in the facts and circumstances of the case may kindly also be granted."*

1.1 The question before this Court primarily relates to the extent and nature of power of a Magistrate u/S.156(3) Cr.P.C. while considering grievance either of non-registration of cognizable offence or improper/delayed investigation.

1.2 Other question is of nature and extent of jurisdiction available to Magistrate when an application u/S.156(3) Cr.P.C. is filed along with a complaint u/S.200 Cr.P.C.

2. The present case reveals abject apathy and dereliction of duty on the part of Police in failing to register cognizable offence of theft in regard to which information was furnished as early as on 18.11.2019 (vide Annexure P-2) and despite the learned Magistrate passing order dated 23.12.2019 u/S.156(3) Cr.P.C., calling for report from Police Station Picchore, District Gwalior (M.P.). Pertinently while doing so the Magistrate kept the complaint filed by petitioner u/S.200 Cr.P.C. in a state of suspended animation (unregistered).

3. The petitioner/complainant herein after unsuccessfully knocking the doors of the Police and as well as Superintendent of Police, Gwalior (M.P.) u/S.154(1) and 154(3) Cr.P.C. respectively, approached the learned Magistrate u/S.156(3) Cr.P.C. by filing application on 23.12.2019 which was subjected to various hearings i.e. 13.01.2020, 05.02.2020, 26.02.2020 and 16.03.2020. On each occasion the police sought and was granted time to submit report in regard to the contents of application u/S.156(3). Thereafter, the matter could not be listed on the next date i.e. 30.03.2020 due to lockdown owing to Covid-19 pandemic. The Magistrate thereafter took up the matter on 10.07.2020 to be again adjourned due to non-resumption of physical hearing in courts. The proceedings u/S.156(3) in the case are now informed to have resumed, but to no avail since FIR has not yet been lodged by the police.

3.1 Pertinently, in this case, Sec.156(3) application and the complaint u/S.200 Cr.P.C. were filed simultaneously by the complainant/petitioner alleging the same offence of theft (Sec.379 IPC). From the record, it appears that the said complaint u/S.200 Cr.P.C. remained unregistered or in a state of suspended animation.

4. The aforesaid act on the part of police authorities of failing to register the offence is in violation of the law laid down in the case of *"Suresh Chand Jain Vs. State of Madhya Pradesh and another* [AIR 2001 SC 571]" whereby it is held:

> *"10. The position is thus clear. Any judicial Magistrate, before, taking cognizance of the offence, can order investigation under Section 156(3) of the Code. If he does so, he is not to examine the complainant on oath because he was not taking cognizance of any offence therein. For the purpose of enabling the police to start investigation it is open to the Magistrate to direct the police to register an FIR. There is nothing illegal in doing so. After all registration of an FIR involves only the process of entering the substance of the information relating to the commission of the cognizable offence in a book kept by the officer-in-charge of the police station as indicated in Section 154 of the Code. Even if a Magistrate does not say in so many words while directing investigation under Section 156(3) of the Code that an FIR should be registered, it is the duty of the officer-in-charge of the police station to register the FIR regarding the cognizable offence disclosed by the*

complaint because that police officer could take further steps contemplated in Chapter XII of the Code only thereafter. "

4.1 Similar view was taken by Apex Court in *"Sakiri Vasu Vs. State of Uttar Pradesh And Others* [(2008) 2 SCC 409]" whereby while analyzing the sweep & extent of power vested in a Magistrate u/S.156(3) Cr.P.C., the Apex Court held in para 11 and 17 as under:

"11. In this connection we would like to state that if a person has a grievance that the police station is not registering his FIR under Section 154 Cr.P.C., then he can approach the Superintendent of Police under Section 154(3) Cr.P.C. by an application in writing. Even if that does not yield any satisfactory result in the sense that either the FIR is still not registered, or that even after registering it no proper investigation is held, it is open to the aggrieved person to file an application under Section 156 (3) Cr.P.C. before the learned Magistrate concerned. If such an application under Section 156 (3) is filed before the Magistrate, the Magistrate can direct the FIR to be registered and also can direct a proper investigation to be made, in a case where, according to the aggrieved person, no proper investigation was made. The Magistrate can also under the same provision monitor the investigation to ensure a proper investigation.

17. In our opinion Section 156(3) CrPC is wide enough to include all such powers in a Magistrate which are necessary for ensuring a proper investigation, and it includes the power to order registration of an FIR and of ordering a proper investigation if the Magistrate is satisfied that a proper investigation has not been done, or is not being done by the police. Section 156(3) CrPC, though briefly worded, in our opinion, is very wide and it will include all such incidental powers as are necessary for ensuring a proper investigation."

5. The aforesaid decisions of the Apex Court in *Suresh Chand Jain & Sakiri Vasu* (supra) have held the field till date which is evident from perusal of following subsequent verdict of Apex Court rendered after relying upon **Sakiri Vasu** with approval. The relevant extract in *"Sudhir Bhaskarrao Tambe v/s Hemant Yashwant Dhage And Ors.* [(2016) 6 SCC 277]" is reproduced below:

"2. This Court has held in Sakiri Vasu v. State of U.P. [(2008) 2 SCC 409], that if a person has a grievance that his FIR has not been registered by the police, or having been registered, proper investigation is not being done, then the remedy of the aggrieved person is not to go to the High Court under Article 226 of the Constitution of India, but to approach the Magistrate concerned under Section 156 (3) CrPC. If such an application under Section 156 (3) CrPC is made and the Magistrate is, prima facie, satisfied, he can direct the FIR to be registered, or if it has already been registered, he can direct proper investigation to be done

which includes in his discretion, if he deems it necessary, recommending change of the investigating officer, so that a proper investigation is done in the matter. We have said this in Sakiri Vasu case [(2008) 2 SCC 409] because what we have found in this country is that the High Courts have been flooded with writ petitions praying for registration of the first information report or praying for a proper investigation.

3. We are of the opinion that if the High Courts entertain such writ petitions, then they will be flooded with such writ petitions and will not be able to do any other work except dealing with such writ petitions. Hence, we have held that the complainant must avail of his alternate remedy to approach the Magistrate concerned under Section 156 (3) CrPC and if he does so, the Magistrate will ensure, if prima facie he is satisfied, registration of the first information report and also ensure a proper investigation in the matter, and he can also monitor the investigation."

6. In the instant case, as informed by learned counsel for petitioner, no offence has yet been registered by the police. It is also informed that the concerned police station has not yet given any report to the learned Magistrate despite repeated reminders. It is also not denied that the learned Magistrate has not proceeded to record statement of the complainant u/S.200 Cr.P.C. Therefore, in sum and substance, the entire matter hangs fire and is in a state of suspended animation leaving the petitioner-complainant high and dry with no hope of justice coming his way.

6.1 For sake of convenience & ready reference, relevant Sections 154, 156, 190 and 200 Cr.P.C. are reproduced below:

"154. Information in cognizable cases.-

(1) Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf:

Provided that if the information is given by the woman against whom an offence under section 326A, section 326B, section 354, section 354A, section 354B, section 354C, section 354D, section 376, section 376A, section 376AB, section 376B, section 376C, section 376D, section 376DA, section 376 DB, section 376E or section 509 of the Indian Penal Code (45 of 1860) is alleged to have been committed or attempted, then such information shall be recorded, by a woman police officer or any woman police officer:

Provided further that-

(a) in the event that the person against whom an offence under section 354, section 354A, section 354B, section 354C, section 354D, section 376, section 376A, section 376AB, section 376B, section 376C, section 376D, section 376DA, section 376 DB, section 376E or section 509 of the Indian Penal Code (45 of 1860) is alleged to have been committed or attempted, is temporarily or permanently mentally or physically disabled, then such information shall be recorded by a police officer, at the residence of the person seeking to report such offence or at a convenient place of such person's choice, in the presence of an interpreter or a special educator, as the case may be;

(b) the recording of such information shall be videographed;

(c) the police officer shall get the statement of the person recorded by a Judicial Magistrate under clause (a) of sub-section (5A) of section 164 as soon as possible.

(2) A copy of the information as recorded under sub-section (1) shall be given forthwith, free of cost, to the informant.

(3) Any person aggrieved by a refusal on the part of an officer in charge of a police station to record the information referred to in sub-section (1) may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who, if satisfied that such information discloses the commission of a cognizable offence, shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him, in the manner provided by this Code, and such officer shall have all the powers of an officer in charge of the police station in relation to that offence.

156. Police officer's power to investigate cognizable case.

(1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII.

(2) No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.

(3) Any Magistrate empowered under section 190 may order such an investigation as above- mentioned.

190. Cognizance of offences by Magistrates.

(1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub-section (2), may take cognizance of any offence-

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a police report of such facts;

(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

(2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub-section (1) of such offences as are within his competence to inquire into or try.

200. Examination of complainant.- A Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate:

Provided that, when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses-

(a) if a public servant acting or- purporting to act in the discharge of his official duties or a Court has made the complaint; or

(b) if the Magistrate makes over the case for inquiry or trial to another Magistrate under section 192:

Provided further that if the Magistrate makes over the case to another Magistrate under section 192 after examining the complainant and the witnesses, the latter Magistrate need not re- examine them.

7. Chapter XII of Cr.P.C. (Information to Police and it's power to investigate) begins with Section 154. If the police finds that the information received relates to commission of cognizable offence then the same has to be entered into the document known as First Information Report (FIR) u/S.154 Cr.P.C. with supply of the copy of FIR to the informant. Section 154(3) Cr.P.C. provides remedy to the informant to approach the Superintendent of Police in case of refusal by the police station to register FIR u/S.154(1).

7.1 Next comes Section 155 Cr.P.C. which relates to information received regarding non-cognizable offence and investigation thereof which need not be dealt with since the present case does not relate to non-cognizable offence.

7.2 Thereafter is the crucial and relevant Section 156 Cr.P.C. which in sub-section (1) vests power in the officer-in-charge of police station to investigate into cognizable offence in regard to which FIR has been lodged u/S.154.

7.3 Section 156(2) Cr.P.C. protects a *bona fide* registration of cognizable offence and the consequential investigation from being sacrificed at the alter of want of territorial jurisdiction of the investigating officer.

7.4 Adverting to the relevant Sec.156(3), it is seen that the same empowers the Magistrate, who is competent u/S.190, to intervene and take remedial steps to iron out the creases *qua* investigation, arising out of non-registration of offence u/S.154 or improper investigation.

8. A bare perusal of Chapter XII of Cr.P.C., which relates to investigation of offence, reveals that authority to conduct investigation is exclusively vested with the police. However, the Magistrate is vested with limited role which is of supervisory nature to be sparingly exercised on occasions where police either fails to register an FIR or conducts investigation in improper manner.

8.1 The legislature while vesting the power of investigation solely in the hands of police, was conscious of it's possible misuse. As such, Sec.156(3) was engrafted in Chapter XII conferring supervisory power upon Magistrate, with a view to ensure free, fair and expeditious investigation. These limited powers available to the Magistrate are to cater to the following eventualities:

1. Failure of police to register an FIR u/S.154(1) and (3) Cr.P.C.;
2. Failure of Police to conduct free, fair and expeditious investigation.

9. Scheme of Chapter XII Cr.P.C. elicits that object behind vesting this limited supervisory power upon the Magistrate is to ensure that the information regarding commission of cognizable offence received from any source does not go uninvestigated. Rationale behind this object is not far to see. A cognizable offence is serious enough to not only adversely affect the victim but also the society at large and therefore it is the sovereign function of the State through the police to ensure that any cognizable offence whenever and wherever committed does not go unregistered & uninvestigated by police, untried by the competent court and unpunished if found proved.

9.1 Thus, it is incumbent upon the Magistrate u/S.156(3) Cr.P.C. to not only direct for registration of cognizable offence wherever it is found to be not registered by the Police but also to ensure that the investigation conducted by the police is fair, expeditious and without any element of prejudice towards anyone, with the sole object of reaching the truth. The role of the Magistrate u/S.156(3) Cr.P.C. is thus of great significance. Prompt and appropriate exercise of power

u/S.156(3) Cr.P.C. can, not only bring succor to the victim but also to the society at large by bringing the delinquent to the book and in the process instilling enough fear in the mind of the miscreant so as to dissuade him from indulging in delinquency again.

10. In the case at hand, as explained above, several opportunities were sought by the police and granted by the learned Magistrate to submit report by the concerned police station in response to Sec.156(3) Cr.P.C. application.

11. It is settled law that whenever a Magistrate acting upon an application u/S.156(3) Cr.P.C. seeks report from the concerned Police Station, it necessarily means that if the contents of Section 156(3) Cr.P.C. application reveal commission of cognizable offence and no such offence is yet registered, then the Police is obliged to register the offence and thereafter submit a report.

11.1 The use of expression "may" in Sec.156(3) reveals the intention of legislature to vest discretionary power upon Magistrate to either direct for an investigation or to refuse from doing so.

11.2 Pertinently if the contents of application u/S.156(3) reveal commission of cognizable offence, then whether the Magistrate directs for registration of cognizable offence, or merely seeks report from the concerned Police Station, it is the duty of Police to register cognizable offence informed about in the application. The very fact that the Magistrate has sought report from the police is an indication that the Magistrate has found the case to be worth investigating. Since the process of investigation is a necessary consequence to registration of cognizable offence u/S.154(1) it goes without saying that the calling of report by the Magistrate is nothing but an enquiry into the quality of investigation with presumption that cognizable offence has been registered or if not registered then the direction to register a cognizable offence ought to be treated to be implicit in the order of the Magistrate calling for report.

11.3 Pertinently, if the provision is understood in any other manner and the police is allowed to linger upon and keep seeking adjournments for filing report without registration of offence then the very object behind Chapter XII Cr.P.C. of prompt registration of cognizable offence on receipt of information of its commission and the mandate of law laid down by Apex Court in Constitution Bench decision in *"Lalita Kumari Vs. Government of Uttar Pradesh And Others* [(2014) 2 SCC 1]", would stand defeated.

12. Reverting to the factual scenario, it is seen that the police who ought to have registered the offence immediately on receipt of intimation by the Magistrate between 23.12.2019 to 13.01.2020, kept seeking adjournment after adjournment.

13. The learned Magistrate too, ought not to have granted so many adjournments to the police for submitting report without first ensuring that the police has registered cognizable offence as informed in the application u/S.156(3) Cr.P.C.

14. At this juncture, it is relevant to point out that experience has revealed that on being asked by Magistrate to submit report u/S.156(3), the Police takes it's own convenient time and more often than not seeks and is granted various opportunities to file report. This causes delay and uncertainty. The rule of law does not appreciate delay or uncertainty as it ultimately leads to arbitrariness in the functioning of the State and its functionaries which directly offends Art.14 of Constitution of India.

15. In the instant case, the learned Magistrate was faced with simultaneous filing of an application u/S.156(3) seeking registration of cognizable offence and a complaint u/S.200 Cr.P.C. The learned Magistrate proceeded first with Section 156(3) application by keeping the complaint u/S.200 in a state of suspended animation (unregistered). Police report was sought by the Magistrate on Section 156(3) application. The case kept getting adjourned on various occasions for submission of report by the police station while the complaint u/S.200 was kept in abeyance.

15.1 It is seen quite often that Magistrates are faced with such piquant situation when they simultaneously receive Section 156(3) application and Section 200 complaint. Therefore, this Court deems it appropriate to dilate upon the statutory obligation of a Magistrate in such a situation.

15.2 The scheme of Cr.P.C., in particular, Section 210, gives a clear indication that legislature gives primacy and preference to police case emanating from FIR lodged u/S.154 or pursuant to Section 156(3), over the proceedings emanating from criminal complaint u/S.200. The said Sec.210 Cr.P.C. for ready reference and convenience is reproduced below:

> **"210. Procedure to be followed when there is a complaint case and police investigation in respect of the same offence.**
>
> (1) When in a case instituted otherwise than on a police report (hereinafter referred to as a complaint case), it is made to appear to the Magistrate, during the course of the inquiry or trial held by him, that an investigation by the police is in progress in relation to the offence which is the subject-matter of the inquiry or trial held by him, the Magistrate shall stay the proceedings of such inquiry or trial and call for a report on the matter from the police officer conducting the investigation.
>
> (2) If a report is made by the investigating police officer under section 173 and on such report cognizance of any offence is taken by the Magistrate against any person who is an accused in the complaint case,

the Magistrate shall inquire into or try together the complaint case and the case arising out of police report as if both the cases were instituted on a police report.

(3) If the police report does not relate to any accused in the complaint case or if the Magistrate does not take cognizance of any offence on the police report, he shall proceed with the inquiry or trial, which was stayed by him, in accordance with the provisions of this Code."

15.3 Thus, a Magistrate is obliged to keep the complaint u/S.200 filed against particular accused pending, against whom (accused) same offence (as alleged in complaint) is registered by police.

15.4 To assist the Magistrates from aberrating from the right path laid down by law and to brook delay, it is essential that Magistrates act to achieve the object behind Sec.156(3) and conclude the proceeding as expeditiously as possible. This Court is, thus, compelled to lay down certain guidelines governing the exercise of their power u/S.156(3) where such applications are either filed individually or along with complaint u/S.200 Cr.P.C.:

(A) **WHERE APPLICATION U/S 156(3) CRPC ONLY ALLEGES NON-REGISTRATION OF COGNIZABLE OFFENCE**

(i) The Magistrate, on receiving an application u/S.156(3) Cr.P.C. should first ensure that the application is supported by an affidavit of the applicant detailing about exhaustion of remedy u/S.154(1) and 154(3) Cr.P.C. [vide **Priyanka Srivastava and another Vs. State of Uttar Pradesh and others (2015) 6 SCC 287] (Para 31)].**

(ii) If the application u/S.156(3) passes the aforesaid test laid down in **Priyanka Shrivastava (supra)** then the Magistrate shall form an opinion as to whether the information contained in Sec.156(3) application reveals commission of any cognizable offence or not.

(iii) In case the Magistrate is of the opinion that application does not disclose commission of any cognizable offence, then the same should be forthwith dismissed by passing a short speaking order.

(iv) In case, the Magistrate finds that Sec.156(3) application discloses commission of cognizable offence then direction may either be issued to the Police to lodge FIR or the Magistrate may, in his discretion, dismiss the application in the interest of justice for reasons to be recorded in writing. **[Vide 2008 Cri.L.J. 472 (Sukhwasi Vs. State of U.P.) & Anju Chaudhary Vs. State of Uttar Pradesh And Another (2013) 6 SCC 384]**

(B) **WHEN APPLICATION U/S 156(3) CRPC REVEALS IMPROPER / DELAYED INVESTIGATION ONLY**

(i) In case, application u/S.156(3) relates to grievance of improper or delayed investigation after lodging of FIR, the Magistrate should direct the police to submit report and thereafter pass appropriate remedial directions if the report submitted by Police discloses improper or delayed investigation. The Magistrate after passing such order can also monitor the process of investigation to ensure that it reaches to it's logical & lawful conclusion.

However, while doing so, the Magistrate should avoid stepping into the shoes of investigating authority. The Magistrate ought to assume only supervisory role.

(ii) In case the report requisitioned from Police reveals that investigation is being done with promptitude and in accordance with law, then the application u/S.156(3) should be dismissed by passing a short speaking order.

16. It is matter of common knowledge that applications u/S.156(3) Cr.P.C. are kept pending for long awaiting report of Police. There are occasions, as is the case herein, where Sec.156(3) application is filed along with Sec.200 Cr.P.C. complaint but due to delay in processing Sec.156(3) application, the complaint u/S.200 Cr.P.C. is kept pending for an unreasonably long time. To brook this delay, it is further appropriate to lay down certain guidelines which are though not exhaustive in character but are enough to show the right path to be treaded.

16.1 The Magistrates while dealing with application ought to keep in mind certain relevant factors which are as under :-

1. The requirement of laying down a timeline, for deciding proceedings where application u/S.156(3) is filed along with complaint u/S.200 Cr.P.C., would arise only in those cases where 156(3) application complains of improper and/or delayed investigation but not in cases where application u/S.156(3) relates exclusively to grievance of non-registration of FIR. This is because the grievance of non-registration of offence raised in application u/S.156(3) can be disposed of within a few days of its receipt by directing the Police to lodge FIR.

2. Turning to the grievance of improper and/or delayed investigation raised in application u/S.156(3), it is seen that:-

(a) As and when report from Police is requisitioned by Magistrate on application u/S.156(3) Cr.P.C. complaining about improper and/or delayed investigation, it is presumed that the case being dealt with by the Magistrate is one where FIR has already been lodged and process of investigation is pending. Thus, the bar contained in Sec.210(1) Cr.P.C.

comes into operation, compelling the Magistrate to put on hold the enquiry/trial if commenced pursuant to complaint u/S.200 Cr.P.C.

(b) In this manner, the complaint u/S.200 Cr.P.C. suffers a state of suspended animation.

(c) It is, at this stage, that delays take place, not only due to laxity on the part of Police to submit report requisitioned by Magistrate u/S.156(3) in a pending investigation, but also due to leniency shown by the Magistrate in liberally granting time to the Police, resulting into the complaint u/S.200 Cr.P.C. suffering stalemate.

(d) Pertinently, the bar contained in Sec.210 Cr.P.C. is based on following foundational assumptions:-

1. That, primacy and preference is to be given to police case [originating from FIR lodged u/S.154 Cr.P.C.], over proceedings originating from a complaint u/S.200 Cr.P.C.

2. The preference and primacy given to a police case is in turn based on the assumption that police being part and parcel of State performs the sovereign function of crime investigation in a fair, reasonable & expeditious manner.

3. The police while performing this sovereign function is presumed to act honestly.

(e) The presumption of police being honest and diligent during crime investigation, is rebuttable. The falling standards of morality in society have rendered the all important elements of probity either missing or suffering a considerable value-erosion. As such the presumptive element in Sec.210 Cr.P.C. of police case getting primacy and preference over complaint case, needs re-visit.

(f) The mandate of Sec.210 Cr.P.C. is such, that it prohibits complaint u/S.200 Cr.P.C. to be proceeded with, during pending investigation by police *qua* the same offence and accused.

(g) The problem arises when investigation is kept pending for unreasonably long time and is not completed even on expiry of 60 / 90 days as prescribed in Sec.167 Cr.P.C. or for any other longer period as prescribed under certain special penal statutes.

(h) This indefinite delay, in investigation, paralyses the complaint u/S.200 Cr.P.C. dissuading the Magistrate from taking steps under Chapter XV & XVI of Cr.P.C. for cognizance. This problem deserves scrutiny from another view-point. The remedy in shape of "Complaint" under Chapter XV & XVI of Cr.P.C. is available exclusively to a victim. The concept of victim came to be statutorily recognized in Cr.P.C. since 31.12.2009. Whereas Sec.210 is part of Cr.P.C. since inception i.e. 1973.

Thus, the law- makers, while engrafting Sec.210, had no occasion to take into account it's repercussions *qua* "Victims".

(i) Moreso, the remedy of complaint in Chapter XV & XVI of Cr.P.C. is a statutory avenue made available to a victim/ complainant. This avenue may not have primacy or preference over police case but the same cannot be allowed to be rendered infructuous at the alter of Sec.210 Cr.P.C. specially in cases where police fails to conclude investigation within a reasonable time.

16.2(a) At this juncture, another issue that needs addressing is as to what should be deemed to be the "reasonable time" for conclusion of investigation. Indisputably, Cr.P.C. does not lay down any time-frame for conclusion of investigation except stipulating in Sec.173(1) that every investigation under Chapter XII shall be completed without unnecessary delay. Non-prescription of a time-frame for conclusion of investigation is understandable. With innumerable variable factors involved in the process of investigation which is complex in nature the law has left the field open for police to initiate, conduct and conclude investigation in an unfettered environment with the ultimate object of reaching the truth without fear, favour, affection or ill-will.

(b) Pertinently, there are very few investigations which are conducted & concluded without fear, favour, affection or ill-will. Therefore, this Court cannot turn a blind-eye towards this stark reality by conveniently hiding behind technicalities of law.

(c) This Court is thus impelled to tread on an unchartered path to secure the ends of justice for protecting the interests of the complainant/victim.

17. Crime investigation is one of the primary duties of police. Though, in recent times, energy and time of police officers appear to be diverted more towards the ancillary duty of maintainance of law & order and VIP duty. Since crime investigation is more arduous than the said ancillary duties, the police tends to tread the convenient path. This dangerous tendency developing in the police is at the cost of quality of crime investigation. More so, the police reforms as directed by the Apex Court in the case of *"Prakash Singh & Ors. Vs. Union of India & Ors.* [(2006) 8 SCC 1]" decided fifteen (15) years back are still to see the light of the day.

18. The law-makers while enacting Cr.P.C. appear to be aware of the possibility of omission/commission committed by the Police during investigation. Therefore, the provision of Section 167 Cr.P.C. was engrafted where bail can be claimed as of right in case of failure of police to complete investigation and submit charge-sheet within 60/90 days or any longer period prescribed. The law-makers realizing the importance of personal liberty

guaranteed as fundamental right u/Art.21 of the Constitution, incorporated Section 167 Cr.P.C.

18.1 Section 167 Cr.P.C. further gives an indication that law-makers were of the view that investigation in cognizable offences attracting punishment of seven years' imprisonment or more would in normal course be completed by the police within an outer limit of 60 / 90 days or any longer period of time statutorily provided.

18.2 Thus, if not in express terms but impliedly, it can be gathered that the law-makers prescribed a maximum period of 60 / 90 days within which the police is expected to complete the investigation, starting from the stage of Sec.154 to Sec.169 or Sec.173 Cr.P.C.

19. This Court, thus, needs to visualize that for how long the Magistrate can keep the complaint u/S.200 Cr.P.C. in a state of suspended animation, when the investigation is getting delayed and charge-sheet is not filed even on expiry of the period of 60 / 90 days or any longer period statutorily provided.

19.1 The answer to this question lies in meaningful interpretation of Section 210 Cr.P.C.

19.2 Sub-section (1) of Section 210 Cr.P.C. obliges the Magistrate to stay the proceedings of enquiry/trial initiated pursuant to complaint u/S.200Cr.PC., whenever the Magistrate comes to know that police investigation *qua* the same offence and the same accused is pending. The provision also makes it obligatory on the Magistrate to call for a report from the police in such a situation.

19.3 Sub-section (2) of Section 210 Cr.P.C. deals with the contingency that pursuant to the situation contemplated by Section 210(1) if charge-sheet is filed u/S.173 by the Police and cognizance of offence alleged is taken by the Magistrate against the person who is also accused in the complaint u/S.200 Cr.P.C., then both the cases i.e. complaint u/S.200 and the charge-sheet filed by Police shall be adjudicated simultaneously by treating both as cases instituted on police report.

19.4 Sub-section (3) of Section 210 Cr.P.C. lastly provides that in case the charge-sheet filed u/S.173 Cr.P.C. is not against a person who is an accused in the complaint case or if the Magistrate does not take cognizance of the offence in charge-sheet filed by the police, then the Magistrate shall proceed with the enquiry/trial originating from complaint filed u/S.200 Cr.P.C.

19.5 The common thread which runs through all the three sub-sections of Section 210 is the foundational presumption that the investigation shall be conducted expeditiously without any unnecessary delay, so that the fate of the proceedings originating from complaint u/S.200 do not hang fire for indefinite period of time. Though this common thread is not expressly provided but can be

presumed to exist in the minds of the law-makers from conjunctive reading of Section 210 and Section 167 Cr.P.C.

19.6 Thus, if a complaint u/S.200 Cr.P.C. is kept pending in a state of suspended animation awaiting the police to file charge-sheet but the police fails to complete investigation expeditiously and keeps it pending for months or years together then the said presumption lying at the foundation of Sec.210 is shaken. Leading to the complainant u/S.200 Cr.P.C., being relegated to a state of uncertainty and procrastination with justice nowhere in sight for victim.

19.7 The complainant who has filed the complaint u/S.200 Cr.P.C. is often the victim of the crime. Pursuant to the amendment in the Cr.P.C. with effect from 2009 ***(vide Act No. 5 of 2009)*** victim is conferred with statutory recognition as one of the important stakeholders in the process of criminal justice system. Victim has been given precious rights under amended Cr.P.C. and therefore these rights cannot be made to suffer due to uncertainty and arbitrariness stemming from inaction of the police to complete investigation within reasonable period of time. The right of a victim to seek justice cannot be sacrificed at the alter of omissions, commissions and inaction of the investigating agency. The victim has an independent precious right under the Cr.P.C. not only to prefer a complaint u/S.200 Cr.P.C. but also to insist expeditious enquiry and trial pursuant to said complaint u/S.200 Cr.P.C.

19.8 This avenue u/S.200 Cr.P.C. available to the victim/complainant to seek justice gets blocked and frustrated due to indolence of the police.

20. To resolve this situation, following guiding principles are laid down in cases of simultaneous filing of Sec.156(3) application and Sec.200 complaint:-

(i) As regards Sec.156(3) Cr.P.C. application (alleging only non-registration of FIR), the procedure as per para 15.(4)(A) be followed.

(ii) The Police *qua* Sec.156(3) Cr.P.C. application (alleging improper/delayed investigation simpliciter or along with non-registration of FIR) should not be granted more than 60/90 days or any longer period of time statutorily prescribed.

(iii) If the Police submits the report within 60/90 days or any longer period of time statutorily prescribed, then the Magistrate may pass appropriate directions in accordance with law to either dismiss/dispose of 156(3) application with/without directions by passing a speaking order or to supervise and monitor the investigating process if need arises.

(iv) However, in case the Police fails to submit report within 60/90 days or any longer period of time statutorily prescribed, then the Magistrate shall proceed with the complaint u/S.200 Cr.P.C. in

accordance with Chapter XV & XVI Cr.P.C., notwithstanding the bar in Sec.210 Cr.P.C.

(v) While so proceeding under Chapter XV & XVI Cr.P.C., the Magistrate shall keep in mind that as and when police report u/S.173 Cr.P.C. is filed [even after 60/90 days or any longer period of time statutorily prescribed] and cognizance of offence in police report is taken, then the Magistrate shall club the complaint case with the charge-sheet (final report) filed by police and proceed to adjudicate both the cases together treating them to have arisen from police report.

21. Accordingly, in the conspectus of above discussion, this Court has no option but to invoke its inherent powers to direct as follows:

(i) The learned Magistrate seized with the application u/S.156(3) and complaint u/S.200 Cr.P.C is directed to proceed in accordance with the above directions in accordance with law.

(ii) Since the petitioner/complainant has been made to run from pillar to post since last more than one year, the State deserves to be saddled with cost of **Rs.10,000/- (Rupees Ten Thousand Only)** which shall be paid to the petitioner/complainant through digital transfer in his bank account within 30 days of petitioner furnishing necessary bank details to Superintendent of Police of the concerned district.

(iii) The State with an object to reinforce the justice dispensation system is directed to deposit five sets of books (in Hindi language) to the Legal Aid Section of the Registry of this Court within 15 days to be distributed to freshers in the Bar.

Each set of books shall contain the following books published by reputed publishers:-

1. Criminal Major Acts (in hindi language)
2. CPC (in hindi language)
3. Constitution of India (in hindi language)

Order accordingly