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TABLE OF CASES REPORTED

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

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संशोधित अधिनियम, पहले से ही आरंभ हो चुकी माध्यस्थम् कार्यवाहियों में भूतलक्षी रूप से प्रवर्तनीय नहीं हो सकता जब तक कि पक्षकार अन्यथा सहमत न हों – वर्तमान प्रकरण में, संशोधन के प्रवर्तन में आने के पूर्व ही कार्यवाहियाँ आरंभ की गई – आवेदक माध्यस्थम् अधिकरण के किसी भी सदस्य की ओर से कोई पक्षपात या भेदभाव दर्शाने के लिए कोई सामग्री प्रस्तुत करने में विफल रहा – किसी अन्य मध्यस्थ को नियुक्त करने की आवश्यकता नहीं है। (एलोरा पेपर मिल्स लि. वि. म.प्र. राज्य) **...2110**

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माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 16 व 34 – व्याप्ति व अधिकारिता – अभिनिर्धारित – एक बार यदि माध्यस्थम् अधिकरण धारा 16(2) या 16(3) के अंतर्गत निर्दिष्ट अभिवाक् को नामंजूर करने का विनिश्चय करता है, वह माध्यस्थम् कार्यवाहियों को जारी रखेगा और माध्यस्थम् अवार्ड देगा – यह नहीं कहा जा सकता कि व्यथित पक्षकार को अधिकरण की अधिकारिता के संबंध में उसकी आपत्ति की नामंजूरी के विरूद्ध उपचारहीन छोड़ दिया गया है, केवल एक बात यह है कि इसके उपचार को अधिनियम की धारा 34 के प्रक्रम पर आस्थगित कर दिया गया है – अधिकरण के आदेश में कोई दोष नहीं – याचिका खारिज। (एम.पी. रोड़ डव्हेलपमेन्ट कारपोरेशन वि. द मिनिस्ट्री ऑफ रोड, ट्रान्सपोर्ट एण्ड हाईवे (एमओआरटी एण्ड एच)) **(DB)...2072**

Arbitration and Conciliation Act (26 of 1996), Section 16 & 37(2) **– Held – It is evident from Section 37(2) that it purposely does not provide for an appeal against an order of Arbitral Tribunal rejecting the plea referred u/S 16(2) or 16(3) – Plea of petitioner jurisdiction or that proper notice of appointment of arbitrator was not given, may only be available to it as ground of challenge to the award if eventually it is passed against it. [M.P. Road Development Corporation Vs. The Ministry of Road, Transport and Highways (MORT & H)] (DB)...2072**

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Constitution – Article 226 and NALSA (Effective Implementation of Poverty Alleviation Schemes) Scheme, 2015, Clause 10(3) – Legal Proceedings – Scope & Jurisdiction – **Held – State authority/District authority may file appropriate legal proceedings as per clause 10(3) by way of complaint before Lokayukt as per relevant provisions or may file private complaint against the erring persons or may file a petition if subject matter requires so by way of a Public Interest Litigation under Article 226 of Constitution. [Omnarayan Sharma Vs. State of M.P.] (DB)…2025**

संविधान – अनुच्छेद 226 एवं नालसा (गरीबी उन्मूलन योजनाओं का प्रभावी कार्यान्वयन) योजना, 2015, खंड 10(3) – विधिक कार्यवाहियां – व्याप्ति व अधिकारिता – अभिनिर्धारित – राज्य प्राधिकरण/जिला प्राधिकरण सुसंगत उपबंधों के अनुसार लोकायुक्त के समक्ष शिकायत के माध्यम से खंड 10(3) के अनुसार समुचित विधिक कार्यवाहियां प्रस्तुत कर सकता है या गलती करने वाले व्यक्तियों के विरूद्ध निजी शिकायत प्रस्तुत कर सकता है या यदि विषयवस्तु द्वारा अपेक्षित हो तो संविधान के अनुच्छेद 226 के

अन्वेषण अधिकारी की ओर से कुछ मामूली लोप अभियोजन प्रकरण को क्षति नहीं पहुंचाएंगे। (इन रेफ्रेन्स (सू मोटो) वि. मनोज) **(DB)…2150**

Criminal Practice – Identification of Accused **– Held – Villagers have the ability of identifying the things even in poor light – Villages have limited number of inhabitants and are closely watched by each and every resident of the village – Evidence of witness that he identified accused from his back, style of walking and body buildup, cannot be said to be unreliable. [In Reference (Suo Motu) Vs. Manoj]** **(DB)…2150**

दाण्डिक पद्धति – अभियुक्त की पहचान – अभिनिर्धारित – ग्रामीणों में धुंधले प्रकाश में भी चीजों को पहचानने की क्षमता होती है – ग्रामों में निवासियों की संख्या सीमित होती है एवं ग्राम के प्रत्येक निवासी द्वारा बारीकी से नजर रखी जाती है – साक्षी के साक्ष्य कि उसने अभियुक्त को उसकी पीठ से, चलने के तरीके और शारीरिक बनावट से पहचाना, अविश्वसनीय नहीं कहा जा सकता। (इन रेफ्रेन्स (सू मोटो) वि. मनोज) **(DB)…2150**

Criminal Practice – Prosecution Witness – Quality & Quantity **– Held – Evidence is to be weighed and not counted – It is the quality and not the quantity of witnesses which decided the fate of trial – Each and every possible witness is not required to be examined – If prosecution witnesses, so examined are trustworthy and reliable then their evidence cannot be discarded only on ground that some more witnesses should have been examined to corroborate the prosecution witnesses. [In Reference (Suo Motu) Vs. Manoj]** **(DB)…2150**

दाण्डिक पद्धति – अभियोजन साक्षी – गुणवत्ता व संख्या – अभिनिर्धारित – साक्ष्य को तौला जाना चाहिए एवं गिना नहीं जाना चाहिए – यह साक्षीगण की गुणवत्ता है तथा न कि उनकी संख्या जो विचारण के भाग्य का विनिश्चय करती है – प्रत्येक संभव साक्षी का परीक्षण किया जाना अपेक्षित नहीं है – यदि अभियोजन साक्षीगण जिनका परीक्षण किया गया है, भरोसेमंद और विश्वसनीय है, तो उनके साक्ष्य को केवल इस आधार पर अमान्य नहीं किया जा सकता कि अभियोजन साक्षीगण की संपुष्टि के लिए कुछ और साक्षीगण का परीक्षण किया जाना चाहिए। (इन रेफ्रेन्स (सू मोटो) वि. मनोज) **(DB)…2150**

Criminal Practice – Rape Case – Injury on Genital Organ of Accused **– Held – Presence of injuries on male organ is not necessary in all cases – As per Modi's Jurisprudence, it is not necessary that there should always be mark of injuries on the penis of accused – Absence of any injury on penis of accused would not belie the prosecution case. [In Reference (Suo Motu) Vs. Manoj]** **(DB)…2150**

दाण्डिक पद्धति – बलात्संग प्रकरण – अभियुक्त के जननांग पर चोट – अभिनिर्धारित – लिंग पर चोटों की मौजूदगी, सभी प्रकरणों में आवश्यक नहीं है – मोदी के विधिशास्त्र के अनुसार, यह आवश्यक नहीं है कि अभियुक्त के लिंग पर हमेशा चोटों के

निशान होने चाहिए – अभियुक्त के लिंग पर किसी चोट का अभाव अभियोजन के प्रकरण को नहीं झुठलायेगा। (इन रेफ्रेन्स (सू मोटो) वि. मनोज) **(DB)…2150**

***Criminal Procedure Code, 1973 (2 of 1974), Section 230 & 231 – Prosecution Evidence & Cross-examination – Expeditious Trial* – Held – If trial Court has proceeded expeditiously by examining the witnesses on the date so fixed, no fault can be found on part of trial Court – No objection raised by counsel for accused that witnesses are appearing on their first date of appearance, therefore he is not in a position to cross-examine them effectively – No application of recall of witness filed by accused on ground that certain questions could not be put to them as the evidence is being recorded expeditiously – Objection rejected. [State of M.P. Vs. Nandu @ Nandkishore Gupta] (DB)…2122**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 230 व 231 – अभियोजन साक्ष्य व प्रति–परीक्षण – शीघ्र विचारण – अभिनिर्धारित – यदि विचारण न्यायालय नियत की गई तिथि पर साक्षीगण का परीक्षण कर शीघ्रता से कार्यवाही करता है, तो विचारण न्यायालय की ओर से कोई त्रुटि नहीं पाई जा सकती – अभियुक्त के अधिवक्ता द्वारा कोई आपत्ति नहीं उठाई गई कि साक्षीगण उनकी उपस्थिति की पहली तिथि को उपस्थित हो रहे हैं, इसलिए वह प्रभावी रूप से उनका प्रति–परीक्षण करने की स्थिति में नहीं है – अभियुक्त द्वारा इस आधार पर साक्षी को पुनः बुलाने का कोई आवेदन प्रस्तुत नहीं किया गया कि शीघ्रता से साक्ष्य अभिलिखित किये जाने के कारण उनसे कुछ प्रश्न नहीं पूछे जा सके – आपत्ति नामंजूर। (म.प्र. राज्य वि. नन्दू उर्फ नन्दकिशोर गुप्ता) **(DB)…2122**

***Criminal Procedure Code, 1973 (2 of 1974), Sections 233, 234 & 273 – Fair opportunity to Accused* – Held – Evidence of PW-15 & PW-16 recorded in absence of accused – Procedures adopted by trial Court certainly prejudiced the accused – Matter remanded back to trial Court to record evidence of above witnesses afresh in presence of accused and proceed further from stage of filing of DNA report – Accused shall be granted opportunity to file written objection/lead evidence in defence to DNA report and if application for cross-examination of Scientific Officer is filed, same shall be decided – After following provisions of Section 233 Cr.P.C., case be fixed for final hearing giving atleast one week time to prepare and argue the case – Impugned judgment set aside – Reference & appeal disposed. [State of M.P. Vs. Nandu @ Nandkishore Gupta] (DB)…2122**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 233, 234 व 273 – अभियुक्त को उचित अवसर – अभिनिर्धारित – अ.सा.–15 व अ.सा.–16 के साक्ष्य अभियुक्त की अनुपस्थिति में अभिलिखित किये गये – विचारण न्यायालय द्वारा अपनाई गई प्रक्रियाओं ने निश्चित रूप से अभियुक्त को प्रतिकूल रूप से प्रभावित किया – अभियुक्त की उपस्थिति में उपरोक्त साक्षीगण का नये सिरे से साक्ष्य अभिलिखित करने एवं डी.एन.ए. रिपोर्ट प्रस्तुत करने के प्रक्रम से आगे बढ़ने हेतु मामला विचारण न्यायालय को प्रतिप्रेषित किया गया –

होने तक आजीवन कारावास में उपांतरित किया गया – अपील अंशतः मंजूर। (इन रेफ्रेन्स (सू मोटो) वि. मनोज) **(DB)…2150**

***Criminal Procedure Code, 1973 (2 of 1974), Section 273 – Evidence in Presence of Accused* – Held – Accused was in jail and was not produced by prosecution, thus there was no question of disturbing the proceedings in Court – Any Undertaking or No Objection given by counsel for accused without instructions of accused cannot be said to be given on behalf of accused and it would not bind him – He was not responsible for his absence but it was the prosecution who failed to keep him present in Court – Case remanded back to record evidence of PW-15 & PW-16 in presence of accused. [State of M.P. Vs. Nandu @ Nandkishore Gupta] (DB)…2122**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 273 – अभियुक्त की उपस्थिति में साक्ष्य – अभिनिर्धारित – अभियुक्त जेल में था एवं अभियोजन द्वारा पेश नहीं किया गया था, अतः न्यायालय की कार्यवाहियों में विघ्न डालने का कोई प्रश्न नहीं था – अभियुक्त के अनुदेश के बिना अभियुक्त के अधिवक्ता द्वारा दिये गये किसी भी वचनबंध अथवा अनापत्ति को अभियुक्त की ओर से दिया जाना नहीं कहा जा सकता है एवं वह उसे बाध्य नहीं करेगा – वह अपनी अनुपस्थिति के लिए जिम्मेदार नहीं था, बल्कि वह अभियोजन था जो उसे न्यायालय में उपस्थित रखने में विफल रहा – अभियुक्त की उपस्थिति में अ.सा.–15 व अ. सा.–16 के साक्ष्य अभिलिखित करने के लिए प्रकरण प्रतिप्रेषित। (म.प्र. राज्य वि. नन्दू उर्फ नन्दकिशोर गुप्ता) **(DB)…2122**

***Criminal Procedure Code, 1973 (2 of 1974), Section 317 & 273 – Presence of Accused* – Held – Only when an application u/S 317 is filed and a statement made by accused that his presence through his counsel may be accepted and he don't have any objection regarding question of identity or recording of evidence of witness in his absence, then the effect of such declaration can be considered – In present case, accused was in jail, thus provisions of Section 317 are not applicable. [State of M.P. Vs. Nandu @ Nandkishore Gupta] (DB)…2122**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 317 व 273 – अभियुक्त की उपस्थिति – अभिनिर्धारित – केवल जब धारा 317 के अंतर्गत एक आवेदन प्रस्तुत किया जाता है एवं अभियुक्त द्वारा यह कथन किया जाता है कि उसके अधिवक्ता के माध्यम से उसकी उपस्थिति को स्वीकार किया जा सकता है एवं उसे उसकी अनुपस्थिति में, पहचान के प्रश्न या साक्षी के साक्ष्य अभिलिखित किये जाने के संबंध में कोई आपत्ति नहीं है, तब उक्त घोषणा के प्रभाव पर विचार किया जा सकता है – वर्तमान प्रकरण में, अभियुक्त जेल में था, अतः धारा 317 के उपबंध लागू नहीं होते हैं। (म.प्र. राज्य वि. नन्दू उर्फ नन्दकिशोर गुप्ता) **(DB)…2122**

***Criminal Procedure Code, 1973 (2 of 1974), Section 366 – Fair Procedure* – Held – Reference u/S 366 is a continuation of trial, thus it is obligatory on High Court to ensure that persons who are facing trial for murder are**

provided fair procedure and no prejudice should be caused to them due to procedural lapse. [State of M.P. Vs. Nandu @ Nandkishore Gupta]
(DB)…2122

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 366 – उचित प्रक्रिया – अभिनिर्धारित – धारा 366 के अंतर्गत निर्देश, विचारण का जारी रहना है, अतः यह सुनिश्चित करना उच्च न्यायालय पर बाध्यकर है कि जो व्यक्ति हत्या के विचारण का सामना कर रहे हैं उनको उचित प्रक्रिया प्रदान की जाए एवं प्रक्रियात्मक गलती के कारण उन्हें कोई प्रतिकूल प्रभाव कारित नहीं होना चाहिए। (म.प्र. राज्य वि. नन्दू उर्फ नन्दकिशोर गुप्ता) **(DB)…2122**

***Criminal Procedure Code, 1973 (2 of 1974), Section 438 – Cancellation of Anticipatory Bail – Factors to be Considered* – Discussed and explained. [Prashant Singh Rajput Vs. State of M.P.] (SC)…2000**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 438 – अग्रिम जमानत का रद्दकरण – विचार किये जाने योग्य कारक – विवेचित एवं स्पष्ट किये गये। (प्रशांत सिंह राजपूत वि. म.प्र. राज्य) **(SC)…2000**

***Criminal Procedure Code, 1973 (2 of 1974), Section 438 and Penal Code (45 of 1860), Section 302 – Anticipatory Bail – Cancellation – Counter FIR by Parties* – R-2 in both appeals (accused persons) were granted anticipatory bail by High Court – Held – The offence is of serious nature in which a person was murdered – FIR and statements u/S 161 & 164 Cr.P.C. indicates a specific role of accused persons in the crime – Fact of previous enmity also exists – Order granting anticipatory bail has ignored material aspects, including the nature and gravity of offence and specific allegations – Sufficient case made out for cancelling the anticipatory bail – Orders granting anticipatory bail to R-2 in both appeals set aside – Appeals allowed. [Prashant Singh Rajput Vs. State of M.P.] (SC)…2000**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 438 एवं दण्ड संहिता (1860 का 45), धारा 302 – अग्रिम जमानत – रद्दकरण – पक्षकारों द्वारा प्रति–प्रथम सूचना प्रतिवेदन – दोनों अपीलों में प्रत्यर्थी क्र. 2 (अभियुक्तगण) को उच्च न्यायालय द्वारा अग्रिम जमानत प्रदान की गई – अभिनिर्धारित – अपराध गंभीर स्वरूप का है जिसमें एक व्यक्ति की हत्या की गई थी – प्रथम सूचना प्रतिवेदन एवं दं.प्र.सं. की धारा 161 व 164 के अंतर्गत कथन, अपराध में अभियुक्तगण की एक विनिर्दिष्ट भूमिका इंगित करते हैं – पूर्व वैमनस्यता का तथ्य भी विद्यमान है – अग्रिम जमानत प्रदान करने के आदेश में तात्विक पहलुओं जिसमें अपराध का स्वरूप और गंभीरता एवं विनिर्दिष्ट अभिकथन शामिल हैं, को अनदेखा किया गया है – अग्रिम जमानत को रद्द करने के लिए पर्याप्त प्रकरण बनता है – दोनों अपीलों में प्रत्यर्थी क्र. 2 को अग्रिम जमानत प्रदान करने के आदेश अपास्त – अपीलें मंजूर। (प्रशांत सिंह राजपूत वि. म.प्र. राज्य) **(SC)…2000**

***Criminal Trial – Standard of Proof* – Held – Standard of proof in a criminal trial is proof beyond reasonable doubt because the right to personal liberty of a citizen can never be taken away by the standard of preponderance of probability – Apex Court concluded that suspicion, however strong, cannot take place of legal proof. [Amar Singh Vs. State of M.P.] (DB)…2212**

दाण्डिक विचारण – सबूत का मानक – अभिनिर्धारित – दाण्डिक विचारण में सबूत का मानक, युक्तियुक्त संदेह से परे सबूत है क्योंकि एक नागरिक की दैहिक स्वतंत्रता का अधिकार, अधिसंभाव्यता की प्रबलता के मानक द्वारा कभी छीना नहीं जा सकता – सर्वोच्च न्यायालय ने निष्कर्षित किया कि संदेह चाहे जितना प्रबल हो, विधिक सबूत का स्थान नहीं ले सकता। (अमर सिंह वि. म.प्र. राज्य) **(DB)…2212**

***District Court Establishment (Recruitment and Conditions of Service) Rules, M.P., 2016, Rule 17(3) – See – Constitution – Article 226* [Shailesh Kumar Sonwane Vs. State of M.P.] (DB)…2092**

जिला न्यायालय स्थापना (भर्ती एवं सेवा की शर्तें) नियम, म.प्र., 2016, नियम 17(3) – देखें – संविधान – अनुच्छेद 226 (शैलेष कुमार सोनवाने वि. म.प्र. राज्य) **(DB)…2092**

***District Court Establishment (Recruitment and Conditions of Service) Rules, M.P., 2016, Rule 17(3) and District Court Establishment (Recruitment and Conditions of Service) Rules, M.P., 2019, Rule 17(3) – Select List/Wait List Candidates – Validity Period of Select / Wait List – Applicability of Rules* – Though posts were lying vacant, petitioners (wait list candidates) were denied appointment on ground that as per Rules of 2019, validity period of select list was reduced from 18 months to 12 months and accordingly the list has lapsed – Held – Norms of process of selection cannot be changed by changing Rules in middle of selection process – Selection process commenced as per 2016 Rules, wherein as per Rule 17(3), validity period will be 18 months – 2019 Rules have not been made retrospective by any express provision – Decision of respondents set aside – Petitioners have right to be considered for appointment on unfilled posts – Respondents directed accordingly – Petitions disposed. [Shailesh Kumar Sonwane Vs. State of M.P.] (DB)…2092**

जिला न्यायालय स्थापना (भर्ती एवं सेवा की शर्तें) नियम, म.प्र., 2016, नियम 17(3) एवं जिला न्यायालय स्थापना (भर्ती एवं सेवा की शर्तें) नियम, म.प्र., 2019, नियम 17(3) – चयन सूची/प्रतीक्षा सूची के अभ्यर्थी – चयन/प्रतीक्षा सूची की विधिमान्यता अवधि – नियमों की प्रयोज्यता – यद्यपि पद रिक्त थे, याचीगण (प्रतीक्षा सूची के अभ्यर्थी) को इस आधार पर नियुक्ति से इन्कार किया गया कि 2019 के नियमों के अनुसार, चयन सूची की विधिमान्यता अवधि को 18 माह से घटाकर 12 माह किया गया था और तद्नुसार सूची व्यपगत हो गयी है – अभिनिर्धारित – चयन की प्रक्रिया के बीच में नियमों को बदलकर, चयन प्रक्रिया के मानकों को नहीं बदला जा सकता – चयन प्रक्रिया, 2016 के नियमों के

अनुध्यात करने का अनुरोध है – यह भी अनुरोध है कि प्राप्त शिकायतों और उनके परिणामों पर लगातार नजर रखने के लिए एक सॉफ्टवेयर/मोबाईल एप्लिकेशन तैयार करने पर विचार करें। (ओमनारायण शर्मा वि. म.प्र. राज्य) **(DB)…2025**

Legal Services Authorities Act (39 of 1987) and NALSA (Effective Implementation of Poverty Alleviation Schemes) Scheme, 2015, Clause 9, 10 & 11 – Complaint of Corruption **– Held – If any complaint is received regarding inaction, inappropriate execution, corruption or any matter related thereto which comes under purview of the Act of 1987 and Scheme of 2015, then District Legal Services Authority (DLSA) shall proactively take care of situation by proceeding as per clause 9, 10 & 11 of the Scheme 2015. [Omnarayan Sharma Vs. State of M.P.]** **(DB)…2025**

विधिक सेवा प्राधिकरण अधिनियम (1987 का 39) एवं नालसा (गरीबी उन्मूलन योजनाओं का प्रभावी कार्यान्वयन) योजना, 2015, खंड 9, 10 व 11 – भ्रष्टाचार की शिकायत/परिवाद – अभिनिर्धारित – यदि अकर्मण्यता, अनुचित निष्पादन, भ्रष्टाचार या उससे संबंधी किसी मामले के संबंध में कोई शिकायत प्राप्त होती है, जो 1987 के अधिनियम एवं 2015 की स्कीम की परिधि के अंतर्गत आती है, तब जिला विधिक सेवा प्राधिकरण (DLSA) 2015 की स्कीम के खंड 9, 10 एवं 11 के अनुसार कार्यवाही करते हुए स्थिति का अग्रसक्रिय रूप से ध्यान रखेगा। (ओमनारायण शर्मा वि. म.प्र. राज्य) **(DB)…2025**

Madhyastham Adhikaran Adhiniyam, M.P. (29 of 1983), Section 7-A – See – Arbitration and Conciliation Act, 1996, Sections 16(2), 34 & 37 **[M.P. Road Development Corporation Vs. The Ministry of Road, Transport and Highways (MORT & H)]** **(DB)…2072**

माध्यस्थम् अधिकरण अधिनियम, म.प्र. (1983 का 29), धारा 7–A – देखें – माध्यस्थम् और सुलह अधिनियम, 1996, धाराएँ 16(2), 34 व 37 (एम.पी. रोड डव्हेलपमेन्ट कारपोरेशन वि. द मिनिस्ट्री ऑफ रोड, ट्रान्सपोर्ट एण्ड हाईवे (एमओआरटी एण्ड एच)) **(DB)…2072**

Maxim – "actus curiae neminem gravabit" **– Discussed. [Shailesh Kumar Sonwane Vs. State of M.P.]** **(DB)…2092**

सूत्र – "न्यायालय के कृत्यों के कारण किसी भी पक्ष को हानि नहीं होनी चाहिए – विवेचित। (शैलेष कुमार सोनवाने वि. म.प्र. राज्य) **(DB)…2092**

NALSA (Effective Implementation of Poverty Alleviation Schemes) Scheme, 2015, Clause 9, 10 & 11 – See – Legal Services Authorities Act, 1987 **[Omnarayan Sharma Vs. State of M.P.]** **(DB)…2025**

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कृत्य किसी व्यक्ति को राष्ट्रीय सुरक्षा अधिनियम के अंतर्गत निरूद्ध करने हेतु पर्याप्त है –एक निरूद्ध व्यक्ति चाहे सामाजिक कार्यकर्ता या अधिवक्ता हो, यह महत्वहीन है यदि उसका आचरण ''लोक व्यवस्था'' के लिए खतरा है – याची विनिश्चिय करने की प्रक्रिया में कोई दोष स्थापित करने में विफल रहा – याचिका खारिज। (कमलेश्वर दीक्षित वि. म.प्र. राज्य) **(DB)…2035**

***Penal Code (45 of 1860), Sections 299, 300, 302 & 304 Part I – Culpable Homicide & Murder* – Held – It is often difficult to distinguish between culpable homicide and murder as both involve death, yet there is subtle distinction of intention and knowledge involved in both the crimes – This difference lies in the degree of act – There is very wide variance of degree of intention and knowledge among both the crimes. [Mohd. Rafiq @ Kallu Vs. State of M.P.] (SC)…1991**

दण्ड संहिता (1860 का 45), धाराएँ 299, 300, 302 व 304 भाग I – आपराधिक मानव वध व हत्या – अभिनिर्धारित – आपराधिक मानव वध और हत्या के मध्य अंतर करना प्रायः कठिन होता है क्योंकि दोनों में मृत्यु अंतर्ग्रस्त है, फिर भी दोनों अपराधों में अंतर्ग्रस्त आशय एवं ज्ञान में सूक्ष्म अंतर है – यह अंतर कृत्य के परिमाण में निहित है – दोनों अपराधों के मध्य आशय और ज्ञान के परिमाण में बहुत व्यापक फेरफार है। (मोहम्मद रफीक उर्फ कल्लू वि. म.प्र. राज्य) **(SC)…1991**

***Penal Code (45 of 1860), Sections 299, 300, 302 & 304 Part I – Culpable Homicide Not Amounting to Murder – Intention & Knowledge* – Held – No previous quarrel with deceased, thus there was lack of *animus* – No motive or pre-meditation proved – Act of throwing off the deceased from truck and driving on without pausing appears to have been in the heat of passion or rage – It is not proved that appellant with deliberate intention drove over the deceased and he knew that deceased would have fallen inside, so that truck's rear tyre would have gone over him – Conviction u/S 302 altered to one u/S 304 Part I, IPC– Appeal allowed accordingly. [Mohd. Rafiq @ Kallu Vs. State of M.P.] (SC)…1991**

दण्ड संहिता (1860 का 45), धाराएँ 299, 300, 302 व 304 भाग I – हत्या की कोटि में न आने वाला आपराधिक मानव वध – आशय व ज्ञान – अभिनिर्धारित – मृतक के साथ कोई पूर्व झगड़ा नहीं, इस प्रकार आशय की कमी थी – कोई हेतु अथवा पूर्वचिंतन साबित नहीं हुआ – मृतक को ट्रक से फेंकना और बिना रूके गाड़ी चलाने का कृत्य आवेश की तीव्रता अथवा रोष में किया गया प्रतीत होता है – यह साबित नहीं हुआ कि अपीलार्थी ने सोचे–समझे आशय के साथ मृतक के ऊपर से गाड़ी चला दी एवं उसे यह ज्ञात था कि मृतक भीतरी भाग में गिरा होगा ताकि ट्रक का पिछला टायर उसके ऊपर से निकल जाए – भा.दं.सं. की धारा 302 के अंतर्गत दोषसिद्धि, धारा 304 भाग I में संपरिवर्तित की गई – तद्नुसार अपील मंजूर। (मोहम्मद रफीक उर्फ कल्लू वि. म.प्र. राज्य) **(SC)…1991**

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***Penal Code (45 of 1860), Sections 302, 366, 376-A & 201 and Protection of Children from Sexual Offences Act, (32 of 2012), Section 5(L) & 6 – Circumstantial Evidence – Ocular & Medical Evidence – DNA Report* – Held – In postmortem report, signs of forceful vaginal penetration were found – DNA profile of accused found in clothes, vaginal slide and swab of deceased – Female DNA profile of deceased was found on cloths of accused – Theory of last seen together was established – Prosecution established beyond reasonable doubt that accused committed rape on his 8 years old minor sister and killed her – Conviction upheld – Reference disposed. [In Reference (Suo Motu) Vs. Manoj] (DB)…2150**

दण्ड संहिता (1860 का 45), धाराएँ 302, 366, 376–A व 201 एवं लैंगिक अपराधों से बालकों का संरक्षण अधिनियम, (2012 का 32), धारा 5(L) व 6 – परिस्थितिजन्य साक्ष्य – चाक्षुष व चिकित्सीय साक्ष्य – डी.एन.ए. रिपोर्ट – अभिनिर्धारित – शव परीक्षण प्रतिवेदन में, बलपूर्वक योनि/वेजाइनल प्रवेशन के संकेत पाये गये थे – मृतिका के कपड़ों, वेजाइनल स्लाइड और स्वैब में अभियुक्त की डी.एन.ए. प्रोफाईल पाई गई – मृतिका का महिला डी.एन.ए. प्रोफाईल अभियुक्त के कपड़ों पर पाया गया था – अंतिम बार साथ देखे जाने का सिद्धांत स्थापित किया गया था – अभियोजन ने युक्तियुक्त संदेह से परे यह स्थापित किया कि अभियुक्त ने अपनी 8 वर्षीय अवयस्क बहिन के साथ बलात्संग कारित किया एवं उसकी हत्या कर दी – दोषसिद्धि कायम – निर्देश निराकृत। (इन रेफ्रेन्स (सू मोटो) वि. मनोज) **(DB)…2150**

***Penal Code (45 of 1860), Sections 302, 366, 376-A & 201 and Protection of Children from Sexual Offences Act, (32 of 2012), Section 5(L) & 6 – Delay in Recording Statement – Effect* – Held – Every delay in recording of police statement is not fatal – If a plausible explanation is given for the same, then it would not give any dent to the prosecution story – Unless and until the IO is asked about the delay, the delayed recording of statement by itself would not make the evidence of the witnesses suspicious or unreliable. [In Reference (Suo Motu) Vs. Manoj] (DB)…2150**

दण्ड संहिता (1860 का 45), धाराएँ 302, 366, 376–A व 201 एवं लैंगिक अपराधों से बालकों का संरक्षण अधिनियम, (2012 का 32), धारा 5(L) व 6 – कथन अभिलिखित करने में विलंब – प्रभाव – अभिनिर्धारित – पुलिस कथन को अभिलिखित करने में हुआ प्रत्येक विलंब घातक नहीं है – यदि उक्त के लिए एक स्वीकार्य/सत्याभासी स्पष्टीकरण दिया जाता है, तो यह अभियोजन कहानी को कोई क्षति नहीं पहुंचाएगा – जब तक अन्वेषण अधिकारी से विलंब के बारे में नहीं पूछा जाता है, विलंब से कथन अभिलिखित किया जाना अपने आप में साक्षीगण के साक्ष्य को संदिग्ध या अविश्वसनीय नहीं बनाएगा। (इन रेफ्रेन्स (सू मोटो) वि. मनोज) **(DB)…2150**

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Penal Code (45 of 1860), Sections 302, 366, 376-A & 201 and Protection of Children from Sexual Offences Act, (32 of 2012), Section 5(L) & 6 – Theory of "Last Seen Together" – Burden of Proof **– Held – Deceased was seen for the last time in company of accused and thereafter she was never seen alive – Prosecution succeeded in establishing that there was minimum gap between the time when victim was seen in company of accused for the last time and when death took place and the dead body was recovered – Thus burden shifted to accused to explain as to when he parted away with company of deceased, but the said burden has not been discharged by accused. [In Reference (Suo Motu) Vs. Manoj]** **(DB)…2150**

दण्ड संहिता (1860 का 45), धाराएँ 302, 366, 376–A व 201 एवं लैंगिक अपराधों से बालकों का संरक्षण अधिनियम, (2012 का 32), धारा 5(L) व 6 – ''अंतिम बार साथ देखे जाने'' का सिद्धांत – सबूत का भार – अभिनिर्धारित – मृतिका को अंतिम बार अभियुक्त के साथ देखा गया था एवं उसके बाद उसे कभी जीवित नहीं देखा गया – अभियोजन यह स्थापित करने में सफल रहा कि उस समय के बीच में न्यूनतम अंतर था जब पीड़िता को अंतिम बार अभियुक्त के साथ देखा गया था और जब उसकी हत्या हुई थी एवं उसका शव बरामद किया गया था – इस प्रकार यह स्पष्ट करने का भार अभियुक्त पर चला जाता है कि कब वह मृतिका के साथ से अलग हुआ, परंतु अभियुक्त द्वारा उक्त भार का उन्मोचन नहीं किया गया। (इन रेफ्रेन्स (सू मोटो) वि. मनोज) **(DB)…2150**

Petroleum Retail Dealership – Letter of Intent (LOI) – Effect **– Held – LOI is only a proposal that respondents are intending to enter into an agreement – Corporation was still having its rights to decline to enter into a contract – Once the contract is not completed, Corporation cannot be directed to complete all formalities – No right has accrued in his favour on basis of issuance of LOI – Petition dismissed. [Brijesh Shrivastava (Smt.) Vs. Hindustan Petroleum Corporation Ltd.]** **…*13**

पेट्रोलियम की फुटकर वितरकता – आशय–पत्र (LOI) – प्रभाव – अभिनिर्धारित – आशय–पत्र केवल एक प्रस्ताव है कि प्रत्यर्थीगण करार करने का आशय रखते हैं – कॉर्पोरेशन के पास अभी भी संविदा में प्रवेश करने से इंकार करने का अधिकार था – एक बार संविदा के पूर्ण नहीं होने पर, निगम को सभी औपचारिकताओं को पूरा करने के लिए निदेशित नहीं किया जा सकता – आशय–पत्र जारी किये जाने के आधार पर उसके पक्ष में कोई अधिकार प्रोद्भूत नहीं हुआ – याचिका खारिज। (ब्रजेश श्रीवास्तव (श्रीमती) वि. हिन्दुस्तान पेट्रोलियम कारपोरेशन लि.) **…*13**

Petroleum Retail Dealership – NOC by Collector – Title of Land **– Held – Merely NOC being issued by competent authority i.e. Collector does not amounts to its clearance of title – Apex Court concluded that while granting NOC, Collector is not concerned about ownership of land, he is concerned**

drawn that the expression "retired employees" or "employees who are deemed to retire within one year" employed in *Rafiq Masih's* case, includes within its sweep and ambit all categories of employees irrespective of the class. [Manoj Sharma (Smt.) Vs. State of M.P.] (DB)…2015

सेवा विधि – अतिरिक्त संदाय की वसूली – कर्मचारी का वर्ग व सेवानिवृत्त/सेवारत कर्मचारी – अभिनिर्धारित – चूंकि सर्वोच्च न्यायालय ने जगदेव सिंह के प्रकरण में कर्मचारियों के वर्ग को विनिर्दिष्ट किये बिना अभिनिर्धारित किया कि सेवा निवृत्त कर्मचारी से भी वसूली की जा सकती है, तब आवश्यक निष्कर्ष जो निकाला जा सकता है वह यह है कि अभिव्यक्ति ''सेवा निवृत्त कर्मचारी'' या ''कर्मचारी जो एक वर्ष के भीतर सेवानिवृत्त हो सकते हैं'', जिसे रफीक मसीह के प्रकरण में प्रयुक्त किया है, उसकी व्याप्ति एवं परिधि के भीतर, वर्ग को विचार में लिए बिना, सभी प्रवर्ग समाविष्ट हैं। (मनोज शर्मा (श्रीमती) वि. म.प्र. राज्य) **(DB)…2015**

***Service Law – Recovery of Excess Pay – Wrong Fixation of Pay/ Increment – Petitioner, a class III employee and continue to be in service* – Held – If there is an written undertaking given by petitioner, the excess payment given to her vide wrong fixation of pay/increment deserves to be recovered – A written undertaking by an employee binds him in the future – Order of recovery of principal excess amount is upheld. [Manoj Sharma (Smt.) Vs. State of M.P.] (DB)…2015**

सेवा विधि – अतिरिक्त संदाय की वसूली – वेतन/वेतनवृद्धि का गलत नियतन – याची एक वर्ग–III कर्मचारी है और निरंतर सेवा में है – अभिनिर्धारित – यदि याची द्वारा लिखित वचनबंध दिया गया है, तब उसे वेतन/वेतनवृद्धि के गलत नियतन द्वारा किया गया अतिरिक्त संदाय वसूल किये जाने योग्य है – एक कर्मचारी द्वारा लिखित वचनबंध उसे भविष्य में आबद्ध करता है – मूल अतिरिक्त रकम की वसूली का आदेश कायम। (मनोज शर्मा (श्रीमती) वि. म.प्र. राज्य) **(DB)…2015**

***Service Law – Recovery of Interest on Excess Pay* – Held – Written undertaking given by petitioner does not contain any promise to return the interest amount which may have accrued, thus, the employer is now estopped to make any recovery of interest over the excess principal amount paid in past – Order of recovery of interest is set aside – Appeal allowed in above terms. [Manoj Sharma (Smt.) Vs. State of M.P.] (DB)…2015**

सेवा विधि – अतिरिक्त संदाय पर ब्याज की वसूली – अभिनिर्धारित – याची द्वारा दिये गये लिखित वचनबंध में, ब्याज की रकम, जो कि प्रोद्भूत हुई हो, की वापसी के लिए कोई वचन नहीं है अतः, अब नियोक्ता, पूर्व में अदा की गई अतिरिक्त मूल रकम पर ब्याज की कोई वसूली करने से विबंधित है – ब्याज की वसूली का आदेश अपास्त – उपरोक्त निबंधनों में अपील मंजूर। (मनोज शर्मा (श्रीमती) वि. म.प्र. राज्य) **(DB)…2015**

Service Law – Select List – Rights of Candidates **– Held – Apex Court concluded that though a candidate who passed examination or whose name appeared in select list does not have any indefeasible right to be appointed yet appointment cannot be denied arbitrarily and select list cannot be cancelled without any proper justification. [Shailesh Kumar Sonwane Vs. State of M.P.] (DB)…2092**

सेवा विधि – चयन सूची – अभ्यर्थियों के अधिकार – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया कि यद्यपि एक अभ्यर्थी, जिसने परीक्षा उत्तीर्ण की या जिसका चयन सूची में नाम आया है, को नियुक्त किये जाने का कोई अजेय अधिकार नहीं है, तथापि, मनमाने रूप से नियुक्ति से इन्कार नहीं किया जा सकता और बिना किसी समुचित न्यायोचित्य के चयन सूची को निरस्त नहीं किया जा सकता। (शैलेष कुमार सोनवाने वि. म.प्र. राज्य) **(DB)…2092**

Service Law – Wait List – Rights of Candidates **– Held – A candidate in waiting list, as per his position in list, has right to be considered for appointment if for any reason the post falls vacant during validity period of list – Such right is not a vested right but it is only a right to be considered for appointment – Appointing authority can deny appointment for some justifiable reason to such candidate. [Shailesh Kumar Sonwane Vs. State of M.P.] (DB)…2092**

सेवा विधि – प्रतीक्षा सूची – अभ्यर्थियों के अधिकार – अभिनिर्धारित – प्रतीक्षा सूची के एक अभ्यर्थी को, सूची में उसके स्थान के अनुसार नियुक्ति के लिये विचार में लिये जाने का अधिकार है यदि किसी कारणवश सूची की विधिमान्यता अवधि के दौरान पद रिक्त हो जाता है – उक्त अधिकार एक निहित अधिकार नहीं है अपितु यह केवल नियुक्ति हेतु विचार में लिये जाने का एक अधिकार है – नियुक्ति प्राधिकारी किसी न्यायोचित कारण पर उक्त अभ्यर्थी की नियुक्ति से इन्कार कर सकता है। (शैलेष कुमार सोनवाने वि. म.प्र. राज्य) **(DB)…2092**

Service Law and Fundamental Rules, Rules 24, 26 & 54-B(1) – Withholding Increment during Suspension **– Held – Petitioner during suspension is not on duty and increments are granted for period spent on duty – No prejudice caused to petitioner if decision regarding his allowance is to be taken after conclusion of criminal trial – Non grant of increment during suspension period does not amount to penalty – Action of respondents not violative of Rules 24 and 54-B(1) – Petition dismissed. [Suresh Kumar Kurve Vs. State of M.P.] …*15**

सेवा विधि एवं मूलभूत नियम, नियम 24, 26 व 54–B(1) – निलंबन के दौरान वेतन–वृद्धि रोकना – अभिनिर्धारित – निलंबन के दौरान याची कर्तव्य पर नहीं था एवं वेतन–वृद्धियां कर्तव्य पर व्यतीत अवधि के लिए प्रदान की जाती हैं – याची को कोई

प्रतिकूल प्रभाव कारित नहीं होगा यदि दाण्डिक विचारण की समाप्ति के पश्चात् उसके भत्ते के संबंध में विनिश्चिय किया जाता है – निलंबन अवधि के दौरान वेतन–वृद्धि प्रदान न की जाना, शास्ति की कोटि में नहीं आता – प्रत्यर्थीगण की कार्रवाई नियम 24 एवं 54–B(1) का उल्लंघन नहीं – याचिका खारिज। (सुरेश कुमार कुर्वे वि. म.प्र. राज्य) **...*15**

Tender – Debarment – Disproportionate Action **– Held – As per the clause, debarment upto a period of 5 years can be taken whereas in present case debarment has been done for 2 years – Order of debarment is not disproportionate. [K & J Projects Pvt. Ltd. (M/s.) Vs. M.P. Road Development Corp.] (DB)...2059**

निविदा – विवर्जन – अननुपातिक कार्रवाई – अभिनिर्धारित – खंड के अनुसार, 5 वर्ष तक की अवधि तक विवर्जन किया जा सकता है जबकि वर्तमान प्रकरण में 2 वर्ष के लिए विवर्जन किया गया है – विवर्जन का आदेश अननुपातिक नहीं है। (के एण्ड जे प्रोजेक्टस् प्रा. लि. (मे.) वि. एम.पी. रोड डव्हेलपमेन्ट कारपोरेशन) **(DB)...2059**

Tender – Debarment – Ground of Misrepresentation **– Held – It is admitted that petitioner have submitted CV's which had variances – Action of debarment of petitioner is in conformity with clause 3.4(iv)(b) of Request for Proposal (RFP) which specifically provided that if any information is found incorrect at any stage, action including termination and debarment from future MPRDC projects upto 5 years will be taken – Bid was annulled owing to fact that petitioner submitted false and fabricated CV – No illegality in decision making process – Petitions dismissed. [K & J Projects Pvt. Ltd. (M/s.) Vs. M.P. Road Development Corp.] (DB)...2059**

निविदा – विवर्जन – दुर्व्यपदेशन का आधार – अभिनिर्धारित – यह स्वीकृत है कि याची ने शैक्षिक अभिलेख एवं कार्य अनुभव (CV) प्रस्तुत किये है जिनमें फेरफार थे – याची के विवर्जन की कार्रवाई, प्रस्ताव हेतु निवेदन (RFP) के खंड 3.4(iv)(b) के साथ अनुरूपता में है जो विनिर्दिष्ट रूप से उपबंधित करता है कि यदि किसी प्रक्रम पर किसी जानकारी को गलत पाया जाता है, कार्रवाई, जिसमें पर्यवसान तथा 5 वर्ष तक म.प्र. सड़क विकास निगम (MPRDC) की भविष्य की परियोजनाओं से विवर्जन शामिल है, की जाएगी – इस तथ्य के चलते बोली बातिल की गई थी कि याची ने मिथ्या एवं कूटरचित शैक्षिक अभिलेख एवं कार्य अनुभव (CV) प्रस्तुत किया – विनिश्चय करने की प्रक्रिया में कोई अवैधता नहीं – याचिकाएं खारिज। (के एण्ड जे प्रोजेक्टस् प्रा. लि. (मे.) वि. एम.पी. रोड डव्हेलपमेन्ट कारपोरेशन) **(DB)...2059**

Tender – Debarment – Obligation of Bidder **– Held – As per clause of RFP, CV was required to be certified by Consultant (Bidder) – Certificate was given by petitioner stating that CV has been checked and found to be**

correct – Obligation to submit a correct CV was on petitioner or its minor partner. [K & J Projects Pvt. Ltd. (M/s.) Vs. M.P. Road Development Corp.] (DB)…2059

निविदा – विवर्जन – बोली लगाने वाले की बाध्यता – अभिनिर्धारित – RFP के खंड के अनुसार, शैक्षिक अभिलेख एवं कार्य अनुभव (CV) को परमर्शदाता (बोली लगाने वाला) द्वारा प्रमाणित किया जाना अपेक्षित था – याची द्वारा यह कथन करते हुए प्रमाणपत्र दिया गया था कि CV की पड़ताल की गई है और सही पाया गया है – सही CV प्रस्तुत करने की बाध्यता याची पर या उसके अवयस्क भागीदार पर थी। (के एण्ड जे प्रोजेक्टस् प्रा. लि. (मे.) वि. एम.पी. रोड डव्हेलपमेन्ट कारपोरेशन) **(DB)…2059**

***Tender – Debarment – Principle of Natural Justice* – Held – Respondents issued show cause notice in clear terms of clauses of RFP to petitioner whereby they submitted their reply and after considering the same, order of debarment has been passed – No violation of principle of natural justice. [K & J Projects Pvt. Ltd. (M/s.) Vs. M.P. Road Development Corp.] (DB)…2059**

निविदा – विवर्जन – नैसर्गिक न्याय का सिद्धांत – अभिनिर्धारित – प्रत्यर्थीगण ने याची को, RFP के खंडों के स्पष्ट निबंधनों में, कारण बताओ नोटिस जारी किया जिस पर उन्होंने उनका जवाब प्रस्तुत किया और उक्त पर विचार करने के पश्चात्, विवर्जन का आदेश पारित किया गया है – नैसर्गिक न्याय के सिद्धांत का कोई उल्लंघन नहीं। (के एण्ड जे प्रोजेक्टस् प्रा. लि. (मे.) वि. एम.पी. रोड़ डव्हेलपमेन्ट कारपोरेशन) **(DB)…2059**

***Vishesh Sashastra Bal Adhiniyam, M.P. (29 of 1968), Section 3-Chapter II & 9 – Transfer – Scope & Jurisdiction* – Held – State government can divide the Special Armed Force into groups and further sub divide each group into battalions and each battalion into companies and each company into platoons – As per Section 9, State Government or Inspector General has powers to transfer member of Police Force to Special Armed Force and vice-versa. [Pradeep Kumar Vs. State of M.P.] …*14**

विशेष सशस्त्र बल अधिनियम, म.प्र. (1968 का 29), धारा 3–अध्याय II व 9 – स्थानांतरण – व्याप्ति व अधिकारिता – अभिनिर्धारित – राज्य सरकार विशेष सशस्त्र बल को समूहों में विभाजित कर सकता है और आगे प्रत्येक समूह को बटालियनों में और प्रत्येक बटालियन को कंपनियों में और प्रत्येक कंपनी को प्लाटूनों में उपविभाजित कर सकता है – धारा 9 के अनुसार, राज्य सरकार अथवा महानिरीक्षक के पास पुलिस बल के सदस्य को विशेष सशस्त्र बल में स्थानांतरित करने तथा इसके विपर्ययेन करने की शक्तियां हैं। (प्रदीप कुमार वि. म.प्र. राज्य) …*14

***Vishesh Sashastra Bal Adhiniyam, M.P. (29 of 1968), Section 9 – Deputation & Transfer* – Held – Clause 9 of the appointment order of**

petitioner specifically provides that prior consent is not necessary for transfer – No fault can be found in transferring petitioner to another battalion which also cannot be termed as "deputation" – Petition dismissed. [Pradeep Kumar Vs. State of M.P.] **…*14**

विशेष सशस्त्र बल अधिनियम, म.प्र. (1968 का 29), धारा 9 – प्रतिनियुक्ति व स्थानांतरण – अभिनिर्धारित – याची के नियुक्ति आदेश का खंड 9 विनिर्दिष्ट रूप से यह उपबंधित करता है कि स्थानांतरण के लिए पूर्व सहमति आवश्यक नहीं है – याची को दूसरी बटालियन में स्थानांतरित किये जाने में कोई त्रुटि नहीं पायी जा सकती, जिसे ''प्रतिनियुक्ति'' भी नहीं कहा जा सकता – याचिका खारिज। (प्रदीप कुमार वि. म.प्र. राज्य) **…*14**

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THE INDIAN LAW REPORTS M.P. SERIES, 2021
(Vol.-4)

JOURNAL SECTION

APPOINTMENT TO THE MADHYA PRADESH HIGH COURT

We congratulate Hon'ble Mr. Justice Satish Kumar Sharma on his appointment as Judge of the High Court of Madhya Pradesh. Hon'ble Mr. Justice Satish Kumar Sharma took oath of the High Office on 25.11.2021.

HON'BLE MR. JUSTICE SATISH KUMAR SHARMA

Born on May 25, 1960 in village Kheda, district Karauli, Rajasthan. Did B.Sc. from Government M.S.J. College, Bharatpur and thereafter LL.B. in the year 1982 and M.A. in the year 1984 from University of Rajasthan, Jaipur. Appointed as Civil Judge-cum-Judicial Magistrate on July 19, 1985. Promoted as Senior Civil Judge-cum-Judicial Magistrate in the year 1993. Appointed as Additional District Judge on May 19, 2001 and thereafter as District & Sessions Judge on August 13, 2008. Worked as Member Secretary, Rajasthan State Legal Services Authority from November 30, 2014 to April 07, 2016. Posted as Registrar General of Rajasthan High Court from April 11, 2016 to March 05, 2020. Elevated as Judge of the Rajasthan High Court on March 06, 2020.

Transferred to the Madhya Pradesh High Court and took oath as Judge of the Madhya Pradesh High Court on November 25, 2021.

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

OVATION TO HON'BLE MR. JUSTICE SATISH KUMAR SHARMA, GIVEN ON 25-11-2021, IN THE CONFERENCE HALL OF SOUTH BLOCK, HIGH COURT OF M.P., JABALPUR.

Shri R.K. Verma, Addl. Advocate General, M.P., while felicitating the new Judge, said:-

Today, we have assembled here to welcome Hon'ble Shri Justice Satish Kumar Sharma on Your Lordship's transfer from Rajasthan High Court to this Hon'ble High Court as Judge of this Court.

My Lord, Hon'ble Shri Justice Satish Kumar Sharma, was born on 25th of May 1960. After completing school education, His Lordship obtained B.Sc., M.A. and LL.B. degrees. Your Lordship was appointed as Civil Judge-cum-Judicial Magistrate on 19th of July 1985. On 26th of May 1993, His Lordship was promoted as Senior Civil Judge-cum-Judicial Magistrate and thereafter on 19th of May 2001, as Additional District Judge. Subsequently, Your Lordship was promoted as District and Sessions Judge on 13th of August 2008. Thereafter, Your Lordship was elevated as Judge of the Rajasthan High Court on 6th of March 2020.

On administrative side, Your Lordship held the post of Registrar General of Rajasthan High Court with effect from 11th of April 2016 till 5th of March 2020.

Sir, the life of a Judge is equivalent to that of a hermit and the quest for justice entails tremendous struggles and sacrifices. Your Lordship's journey from Judicial Magistrate to the District Judge and from District Judge to the Judge of the High Court is an example of such struggles and sacrifices. It clearly paves way for many.

My Lord has vast judicial experience especially in civil and criminal matters and I am sure that this will be an asset for Hon'ble High Court as well as to the litigants of the State.

The High Court is a superior Court of record. It has original and appellate jurisdiction and possess plenary powers due to which the responsibilities are multiplied but the Judge should be the bastion for the people to uphold the majesty of law which is the backbone of fair and impartial dispensation of justice.

My Lord, the Bar and Bench are two facets of the same coin and the system runs smoothly when both are in sync. In this direction, we assure that the State Government and the law Officers of the State will provide full cooperation and assistance to Your Lordship in dispensation of Justice.

The great jurist Holmes once remarked that *"the law is not mere logic but is also experience"* and I believe that the massive experience, which My Lord holds, will be a great asset to this High Court in tendering justice. According to

another Jurist S. Shetreet, a Judge decides cases based on fundamental values of the legal system and it is from this angle that we can say that the adjudication based on such long experience, would be fruitful to litigant, public and advocates of Madhya Pradesh and the society.

I, on behalf of the State Government, Law Officers of the Office of the Advocate General and on my own behalf, convey best wishes to Hon'ble Shri Justice Satish Kumar Sharma and are keen and committed to ensure smooth functioning of the justice dispensation system and will offer all assistance from the State Government in this regard.

Thank you.

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

आज हम पंडित सतीश कुमार शर्मा जी की अगवानी के लिए यहाँ उपस्थित हुये हैं। सिविल जज से लेकर उच्च न्यायालय में न्यायाधिपति की हैसियत तक आना एक बड़े निर्विकार व्यक्तित्व का स्पष्टीकरण देता है, उसकी वजह है कि आप सन् 1985 से न्यायिक सेवा में हैं और आज तक आप न्यायिक सेवा में रत रहे। आपके खिलाफ कोई शिकायत और अन्यथा कोई ऐसी परिस्थिति नहीं आयी। आप और आपका परिवार अपने आपको धन्य मानता है।

मैं आज बहुत स्पष्ट रूप से कह देना चाहता हूँ कि न्यायालयों में न्यायाधिपति का होना और निर्विकार होना बहुत बड़ी उपलब्धि होती है, विशेषकर जनमानस के लिए, अधिवक्ताओं के लिए, चाहे वे शासकीय हों या प्रायवेट टाईप के हों। मैं पहले ही कह चुका हूँ कि हमारी कोई जाति नहीं होती है, हम केवल न्याय के लिए होते हैं। अधिवक्ताओं का पक्षकार उसका अन्नदाता होता है। न्यायाधिपति के सामने जो कुछ भी दलीलें दोनों पक्ष की ओर से दी जाती हैं वे उसको निचोड़कर एक सही आदेश को पारित करते हैं।

मैं आज यह भी कह देना चाहूंगा कि आज अखबार में पढ़ा गया कि अभी हमारे पास 22 जजों की कमी है, क्या वजह है, इतने बड़े देश की आबादी में जहाँ सवा सौ करोड़ व्यक्ति हैं, वहाँ क्या हमारे पास न्यायाधिपति के 50 पद भी पूरे नहीं हो सकते हैं। ये जो कार्य की कमी के लिए अभी दो दिन पहले माननीय मुख्य न्यायाधिपति ने हम अधिवक्ताओं के प्रतिनिधियों को बुलाकर कहा था कि हम समय बढ़ाना चाहते हैं, करटेल करना चाहते हैं, वर्किंग ऑवर को। मेरा आपसे निवेदन यह है कि कुछ बार की हैसियत को भी बढ़ाईये, बार से और आप रेकमेंड करके हमारे जजेस को भी बढ़ाईये। देखिये, हमारे सामने आज यहाँ 25 कमरे बने हैं, माननीय न्यायाधिपतियों के बैठने के लिए, लेकिन अभी 15–16 जजेस आज उपस्थित हुये हैं। कैसे डिस्पोजल होंगे, पेंडेंसी को कम करने के लिए एक और निवेदन करूंगा कि कल अखबार में हम पढ़ रहे थे कि जैसे मुख्यमंत्री, जो उनके मातहत होता है, उनके निर्देश पर उसे चलना पड़ता है, उनसे कह दिया कि मैंने बहुत से मुकद्मों को, जो बहुत ही स्माल केसेस हैं उन्हें अपने आप समाप्त करता हूँ अपने अधिकार से। क्या मैं उम्मीद करूं कि माननीय मुख्य न्यायाधिपति और न्यायाधिपतियों से कि यहाँ भी इस तरह के जो साधारण किस्म के मुकदमें हैं, उन्हें आप अविलंब समाप्त कर सकते हैं। बेवजह 25 साल में मुदद्ई भी मर गया, मुल्जिम भी मर गया, फिर भी मुकदमें पेंडिंग हैं। कुछ पेंडेंसी को आप अपने खुद के अधिकार से तुरंत छांट के समाप्त कर

सकते हैं। एक चौथाई मुकदमें इस तरह के होंगे, पेंडेंसी के, जो तुरंत समाप्त हो जायेंगे और जिसका आपको अधिकार हैं और यह भी निवेदन करना चाहूँगा कि वर्किंग ऑवर से क्या होगा। छोटे–छोटे मामलों को रिलीफ देने की स्थिति में आ जायें या conviction की स्थिति में अगर हैं तो उसमें आ जायें, दफा 34, 149 और इस तरह के जो मुकदमे हैं। पुलिस के लिए आप pro-prosecution से अपने आपको दूर करें। मुख्य अभियुक्त है फौजदारी में, तो उसे निश्चित दण्ड मिलना चाहिये, लेकिन पुलिस महान होती है – चाचा को भी, पापा को भी, मामा को भी, परिवार वालों को भी, यहाँ तक कि महिलाओं को भी बेवजह का उलझाती है और उस पर हम विश्वास करके अगर उसको डिस्पोजल नहीं करेंगे या उन लोगों को राहत नहीं देंगे तो पेंडेंसी कैसे नहीं बढ़ेगी। बहरहाल मैं थोड़ा–सा अपने विषय से दूर हुआ क्योंकि मुझे मेरे बार में जिस तरह की शिकायतें आती हैं, उसके लिए मैं आप सब से निवेदन करूंगा। बचे हुए मुकदमों को, आज जो नहीं हो पायें हैं, उनको प्राथमिकता दी जानी चाहिये, कल आने वाली तारीख में वो भी नहीं मिलती है। आज वो 40 में नहीं हो पाया, कल वो 140 में लगा है। माननीय रजिस्ट्रार साहब हैं, इनसे मैं निवेदन करूंगा, ये इनके अधिकार क्षेत्र की बात है, जो preliminary cases हैं उनको urgent में लगाईये, आज की जगह कल लगाईये, सभी केस में और इस तरह से अधिवक्ताओं को भी और आपको भी सहूलियत होगी क्योंकि जितनी भी फाइलें आज लगी हैं, सारे न्यायाधिपति, घर में न कोई आराम करते, न कोई सोते और न परिवार देखते, शाम को 8 बजे 9 बजे से लेकर के। मैंने बहुत करीब से आपको देखा है, उमरदराज होने के नाते और 53 साल से मुकदमों में आते–जाते, कि आधी रात तक न्यायाधिपति जो हैं, फाइलों को पढ़ते रहते हैं और दूसरे दिन नंबर नहीं आ पाया तो दोबारा उनके लिए स्थिति वही हो जाती है और इस तरह से ये सब बार की तरफ से मैं आपको कह रहा हूं।

माननीय पंडित सतीश कुमार शर्मा जी हमारे बीच में आये, हमारे लिये सौभाग्य की बात है कि राजस्थान में उनका न्यायिक जीवन गुजरा और अब हमें उनका शुभाशीष मिलेगा, न्याय मिलेगा, अपनापन मिलेगा, मोहब्बत मिलेगी। अब वो जितने दिन रहेंगे, देखते ही देखते, हम समझ जायेंगे कि ऐसे व्यक्तित्व को हमारे पास आना हमारे लिये सौभाग्य की बात है। मैं उन्हें उनकी अगवानी के लिए धन्यवाद देता हूँ, इस संस्कारधानी में उनकी उपस्थिति हमारे लिए उपलब्धि होगी। इन्हीं शब्दों के साथ मैं अपनी बात को विराम देता हूँ।

जय हिन्द, जय भारत।

Shri Radhe Lal Gupta, Representative, State Bar Council of M.P., said :-

It is a great pleasure for all of us to welcome My Lord Shri Justice Satish Kumar Sharma to this great temple of Justice who has come from Rajasthan High Court and is adorning the Office of M.P. High Court. We offer our heartiest welcome and congratulations to My Lord Shri Justice Satish Kumar Sharma. Today, we are getting one more stalwart & highly experienced Judge, coming from the land of colors.

My Lord Shri Justice Satish Kumar Sharma was born on 25th of May 1960. After completing law graduation, he joined Judiciary in the year 1985. Thereafter, My Lord continued up to District Judge in the year 2008 and also appointed as a

Registrar General of the Rajasthan High Court. Thereafter, My Lord Justice Shri Satish Kumar Sharma was elevated as Judge of the Rajasthan High Court on 6th of March 2020.

As we heard about My Lord Shri Justice Satish Kumar Sharma that My Lord, always wants to give as much relief as is permissible by fair administration of Justice. This quality of My Lord is equal to the quality of a surgeon, who wants to give maximum relief to his patient by giving little pain as possible. I am sure, the surgeon, who have discovered and invented the painless surgery must be a surgeon having humane qualities of My Lord.

Your Lordship Shri Justice Satish Kumar Sharma is an extraordinary talent, having great experience and composed temperament, endeared you as Judge of Rajasthan High Court. I am sure that the same will be illuminating Judiciary in future in Madhya Pradesh also. I, on this occasion, extend my wishes to Your Lordship and believe firmly that Your Lordship will be greatly contributing for the cause of common man while dispensing justice.

At last but not the least, I, on behalf of State Bar Council of M.P., all the Members and Advocates of Madhya Pradesh, my own behalf, I sincerely offer my whole hearted welcome and best wishes to My Lord Shri Satish Kumar Sharma of the High Court of M.P.

Thank you.

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

It is my pleasure to welcome My Lord Hon'ble Shri Justice Satish Kumar Sharma.

Felicitations on your appointment as Judge of Madhya Pradesh High Court.

Hon'ble Shri Justice Satish Kumar Sharma was born on 25th of May 1960 and after his academic pursuits, joined the Judicial Service on 19th of July 1985 as Civil Judge-cum-Judicial Magistrate in the State of Rajasthan; earning timely promotions, His Lordship was promoted to Higher Judicial Service as Additional District Judge on 19th of May 2001 and as District and Sessions Judge on 13th of August 2008. My Lord held the post of Registrar General of Rajasthan High Court from 11th of April 2016 till his elevation as Judge of High Court.

My Lord Hon'ble Shri Justice Satish Kumar Sharma was elevated as Judge, Rajasthan High Court on 6th of March 2020 and upon transfer to Madhya Pradesh High Court has taken oath of Office today.

Welcome to Madhya Pradesh, My Lord.On this occasion, I most humbly submit and quote from my earlier speeches which I had the privilege of delivering on such earlier occasions:

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

We all are aware of the age old and established precept that ignorance of law is no excuse and everybody is presumed to know the law, but in practical life this cannot be entirely true. There are so many laws having their own nuances wherein invariably anyone can be lost. By and large, people invoke judicial process genuinely to mitigate their problems/hardships. All the situations are not perfect and niceties of law are not known to everyone. Thus, while dealing with these causes, may Your Lordship bear this in mind that there is no standard situation tailor-made to suit the statute for Your Lordship to invoke your benign jurisdiction for granting relief. May it always be kept in mind that the entire apparatus of justice delivery system is for the people and it is the people who invoke this jurisdiction with the pious hope of getting justice.

I, pray to Lord Almighty that may it be the central endeavor of Your Lordship, not to disappoint them. Thus, may I most humbly submit that the age old approach of justice tempered with mercy may become your guiding light during your tenure as Judge of the High Court.

All of us are aware of mounting pendency of litigation and corresponding scarcity of Judges at which crucial time any addition to the Bench is a great relief to all of us and the citizens of Madhya Pradesh.

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

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

Best of Luck.

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

न्यायाधिपति श्री सतीश कुमार शर्मा का हम संस्कारधानी, जबलपुर में हृदय से स्वागत करते हैं।

श्री सतीश कुमार शर्मा जी की जीवन यात्रा सन् 1960 से प्रारंभ हुई। प्रारंभिक शिक्षा समाप्त करने के पश्चात, विज्ञान एवं विधि विषय में स्नातक एवं कला विषय में स्नातकोत्तर की उपाधि अर्जित

करने के पश्चात् सन् 1985 में न्यायिक जगत में व्यवहार न्यायाधीश के पद पर प्रवेश कर निरंतर प्रगति के पथ पर आगे बढ़ते हुये सन् 2008 में जिला न्यायाधीश के महत्वपूर्ण पद पर पदासीन होकर लगभग 8 वर्ष दायित्वों का निर्वहन किया। इस प्रकार लगभग 31 वर्ष विभिन्न दायित्वों पर रहकर न्यायिक सेवा के माध्यम से न्याय प्रदत्त किया। तत्पश्चात् आपकी नियुक्ति राजस्थान उच्च न्यायालय में रजिस्ट्रार जनरल के पद पर पदासीन होकर काम करने का अवसर प्राप्त हुआ।

आपकी प्रतिभा एवं दीर्घकालीन न्यायिक सेवा का प्रतिफल 06 मार्च 2020 को प्राप्त हुआ जब आपकी नियुक्ति राजस्थान उच्च न्यायालय में न्यायाधीश के गरिमामय पद पर हुई। लगभग 20 माह राजस्थान उच्च न्यायालय में पदस्थ होकर न्याय की किरणों को सूर्य की रोशनी के समान न्यायिक सेवा के माध्यम से आलोकित करने के पश्चात्, अब अवसर आया है, जब आपकी जीवन यात्रा राजस्थान के गुलाबी शहर से माँ नर्मदा के अंचल में संस्कारधानी जबलपुर में पहुँच गई है।

म.प्र. उच्च न्यायालय की गौरवमयी परम्परा का निर्वाह करने हेतु शपथग्रहण करने के अवसर पर, हम आपका अभिनंदन करते हैं। हम आशा करते हैं कि बगैर भेदभाव एवं निर्भयता से न्यायालय में लंबित मामलों का निपटारा शीघ्र करने में आपकी सहभागिता महत्वपूर्ण रहेगी।

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

''जय भारत''

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

We warmly welcome here Hon'ble Shri Justice Satish Kumar Sharma on his transfer from Rajasthan High Court to the High Court of Madhya Pradesh.

It was only on 6th of March 2020 that My Lord was elevated as a Judge of the Rajasthan High Court on which date the tenure of My Lord was only about 26 months which further stands limited to 6 months on My Lordship's arrival as Judge of this High Court. Such transfer of My Lord from Rajasthan High Court to this High Court for such a short period cannot be termed commendable as it causes great disturbance and inconvenience. However, the entire fraternity of lawyers does welcome Hon'ble Shri Justice Sharma on his transfer to this High Court.

We, not only welcome My Lord but also extend our fullest cooperation in the dispensation of justice.

With these words, I, on behalf of Senior Advocates' Council and my own behalf, again welcome Hon'ble Shri Justice Sharma on his transfer to this High Court which is located on the holy banks of mother Narmada.

Thank you.

Reply to the Ovation, by Hon'ble Mr. Justice Satish Kumar Sharma :-

मेरे स्वागत के लिए आयोजित इस गरिमामय समारोह में उपस्थित आप सबको आदर और स्नेह सहित नमस्कार। मैं इस अवसर पर आप सबका हृदय से अभिवादन करता हूँ।

माननीय मुख्य न्यायाधिपति एवं आप सबके द्वारा मेरे प्रति व्यक्त किये गये स्नेह और सम्मान से मैं अभिभूत हूँ, जिसके लिए मैं आत्मीय आभार व्यक्त करता हूँ।

आप सबके द्वारा मेरी प्रशंसा में कही गई बातें, आपकी महानता व विनम्रता का परिचायक हैं। यद्यपि मैं अपने आपको इसके योग्य नहीं पाता हूँ फिर भी यह विश्वास दिलाता हूँ कि मैं आपकी अपेक्षाओं पर खरा उतरने का भरपूर प्रयास करूंगा।

मैंने राजस्थान के करौली जिले के एक छोटे से गांव खेड़ा में एक सामान्य कृषक परिवार में जन्म लिया। स्कूली शिक्षा सरकारी विद्यालयों में प्राप्त की। भरतपुर के सरकारी एम.एस.जे. कॉलेज से बी.एस.सी. की और तदुपरान्त राजस्थान विश्वविद्यालय, जयपुर से वर्ष 1982 में एल.एल.बी. तथा वर्ष 1984 में एम.ए. किया। वर्ष 1985 में मेरा चयन राजस्थान न्यायिक सेवा में हुआ। न्यायिक सेवा के विभिन्न पदों पर कार्य करते हुए मुझे वर्ष 2014 में राजस्थान विधिक सेवा प्राधिकरण का सदस्य सचिव नियुक्त किया गया। अप्रैल 2016 से मार्च 2020 तक मुझे राजस्थान उच्च न्यायालय के रजिस्ट्रार जनरल के रूप में आठ माननीय मुख्य न्यायाधिपति एवं कार्यकारी मुख्य न्यायाधिपतिगण के साथ काम करने का सौभाग्य मिला। 06 मार्च 2020 को मैंने राजस्थान उच्च न्यायालय के न्यायाधिपति के पद की शपथ ली और वहां से स्थानान्तरण होने पर मैं आज आपके बीच हूँ।

मध्यप्रदेश, मेरे गृह प्रदेश राजस्थान का पड़ौसी प्रदेश है। इस प्रदेश को प्रकृति का पूरा वरदान प्राप्त है। यहां विश्व प्रसिद्ध धार्मिक स्थलों के साथ साथ वन अभयारण्य एवं अन्य पर्यटन स्थल विद्यमान हैं। इस प्रदेश पर मां नर्मदा की कृपा है जो देव नदी गंगा के समकक्ष है। यहां का गौरवशाली इतिहास है। यहां के लोग अपनी सहजता, सरलता और विश्वसनीयता के लिए जाने जाते हैं। ऐसे गौरवशाली प्रदेश में सेवा का अवसर मिलने पर मैं स्वयं को सौभाग्यशाली मानता हूँ।

यद्यपि आगामी मई माह में ही मेरी सेवानिवृत्ति है। समय बहुत कम है, फिर भी जितने दिन भी आप लोगों के साथ काम करने का मौका मिला है, उसमें मेरा पूरा प्रयास रहेगा कि मैं अपनी पूर्ण निष्ठा और क्षमता के साथ अपने कर्तव्य का निर्वहन करूँ। आज जो शपथ ली है, उसका अक्षरशः पालन करूँ। आप सबसे आग्रह एवं अनुरोध है, साथ में पूरा विश्वास भी है कि आप सभी मुझे अपना स्नेह और सहयोग प्रदान करेंगे, जिसके लिए मैं आप सबका आजीवन कृतज्ञ रहूंगा।

आप सबके द्वारा प्रदर्शित स्नेह और सम्मान से मुझे यह कतई नहीं लग रहा है कि मैं किसी दूसरी जगह पर हूँ। सब मुझे अपने लग रहे हैं। इसमें मेरा कोई योगदान नहीं है। यह सब आपका अपनत्व और बड़प्पन है, जिसके लिए मैं फिर से माननीय मुख्य न्यायाधिपति, मेरी आदरणीय बहिन और भ्राता न्यायाधिपतिगण का तहे दिल से आभार व्यक्त करता हूँ।

साथ ही विद्वान एडवोकेट जनरल, एडिशनल सोलिसिटर जनरल, विद्वान वरिष्ठ अधिवक्तागण, सम्मानित अधिवक्तागण, रजिस्ट्रार जनरल और उनकी टीम के सभी अधिकारीगण और प्रदेश के सभी न्यायिक अधिकारीगण के प्रति हृदय से सम्मान व्यक्त करता हूँ। आप सभी को पुनः बहुत बहुत धन्यवाद एवं आत्मीय आभार।

FAREWELL

HON'BLE MR. JUSTICE SHAILENDRA SHUKLA

Born on November 17, 1959. Did M.Sc., LL.B. and joined Judicial Service as Civil Judge Class-II on August 18, 1987. Appointed as Civil Judge Class-I in the year 1993. Appointed as C.J.M./A.C.J.M., in the year 1997 and was posted as C.J.M. at Sagar. Promoted as Officiating District Judge in Higher Judicial Service on August 29, 1998 and was posted as II A.D.J., at Sagar. Posted as II A.J. to I A.D.J., Chhindwara in the year 1999. Posted as Officer on Special Duty, High Court of M.P., Jabalpur in the year 2000. Posted as Additional Registrar (Vigilance), High Court of M.P., Jabalpur in the year 2001. Posted as Additional Director, J.O.T.R.I., High Court M.P., Jabalpur in the year 2005. Posted as IV A.D.J., Bhopal on June 18, 2007 and as IV A.D.J. & Special Judge, N.D.P.S. Act, Bhopal in July 2007. Was granted Selection Grade Scale w.e.f. 10.10.2007. Posted as Special Judge under C.B.I. cases as well, in November 2009. Posted as President, District Consumer Forum, Khandwa in the year 2012. Posted as Director, M.P. State Judicial Academy (JOTRI), High Court of M.P., Jabalpur in the year 2014. Posted as Principal Registrar (Vigilance), High Court of M.P., Jabalpur in April 2015. Was granted Super Time Scale w.e.f. 01.10.2015. Posted as District & Sessions Judge, Bhopal from October 2016 till elevation. Elevated as Judge of the High Court of Madhya Pradesh and took oath on November 19, 2018 and demitted Office on November 16, 2021.

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

FAREWELL OVATION TO HON'BLE MR. JUSTICE SHAILENDRA SHUKLA, GIVEN ON 16.11.2021, IN THE HIGH COURT OF MADHYA PRADESH AT BENCH INDORE.

Hon'ble Mr. Justice Sujoy Paul, Administrative Judge, High Court of M.P., Bench Indore, bids farewell to the demitting Judge :-

We have assembled here with heavy heart to bid farewell to Hon'ble Shri Justice Shailendra Shukla as he is demitting office today.

Justice Shailendra Shukla was born on 17.11.1959. He joined the Judicial Service on 18.08.1987. He was promoted as Civil Judge, Class-I on 24.12.1993 and in due course became C.J.M. on 09.06.1997, he was promoted as District Judge in Higher Judicial Service on 29.08.1998, he was granted Selection Grade Scale with effect from 10.10.2007 and Super Time Scale with effect from 01.10.2015. During his tenure as Judicial Officer, he was posted at Jabalpur, Narsinghpur, Seoni, Damoh, Sagar, Chhindwara, Bhopal and Khandwa. He also worked as O.S.D., High Court of Madhya Pradesh and Additional Registrar (Vigilance.) in the Principal Seat at Jabalpur. Justice Shukla also worked as Additional Director, JOTRI, Jabalpur, President, District Consumer Forum, Director, M.P. State Judicial Academy (JOTRI) and Principal Registrar (Vigilance). Before elevation as a Judge of this Court, he was posted as District Judge, Bhopal.

Justice Shukla was elevated as Additional Judge of this Court on 17.11.2018 and later on became permanent Judge. During his tenure as Judge of this Court, he has authored various landmark judgments in Single and Division Benches.

In Cr.R. No.1299/2019 (Jai Singh v/s The State of Madhya Pradesh), Justice Shukla held that if sizable number of bottles of liquor were recovered, it was not necessary to examine each and every bottle, when bottles were sealed with label is carrying description of the liquor along with other necessary specifications such as batch number, lot number, serial number etc., examination of one such bottle of each kind will serve the purpose.

In Cr.A. No. 9930/2018 (Anil Bhaskar v/s The State of Madhya Pradesh), His Lordship held that even though voice recording against the appellant was not found to be reliable and complainant also turned hostile, recovery of tainted money from the pocket of accused, coupled with the fact that his hands when washed in the chemical solution turned pink, raises presumption under Section 114 of the Evidence Act and Section 20(1) of the P.C. Act. Hence, conviction was maintained.

Speaking for the Division Bench and while answering the death reference in Irfan v/s The State of Madhya Pradesh decided on 09.09.2021, a microscopic scrutiny of facts and law was undertaken. It was poignantly held that Dock Identification Parade shortly after the incident is reliable though no Test Identification Parade was conducted. The prosecutrix identified the appellants through photo albums.

Taking into account the serious condition of prosecutrix, this mode adopted was found to be appropriate and permissible. The mobile of the appellant was found to be 'switched off' at the time of incident which was held to be a relevant fact under Section 8 of the Evidence Act. The appellant sold his mobile soon after the incident was also considered as a relevant fact. It was ruled that there exists no statutory requirement to postpone the case to a future date for hearing the accused on the quantum of sentence.

Justice Shukla is worthy son of late Justice K.N. Shukla. He held various important posts during his long tenure. He maintained courtesy in behavior and firmness in decision making.

Abraham Lincoln said:-

[“If you want to test a man's character, give him power.”]

An ancient Indian thinker said:-

''लघुता और प्रभुता
दोनों को ही पचाना
कठिन होता है''

Justice Shukla could accomplish this difficult task easily.

I have good fortune to share the Bench with Justice Shukla from the day I joined at Indore Bench in January 2021. Meaningful discussion with Justice Shukla was always a guiding factor for me.

Justice Shukla is entering into the second inning of life after rendering more than three decades of unblemished judicial service. He shall be remembered for his efficiency, integrity, courtesy and deep knowledge of law. I am sure that his vast knowledge and reservoir of experience will be useful for the members of Bar in particular and for the society in general.

A poet said:-

'सिर्फ होने से
कुछ नहीं होता
कुछ होने का
हक भी तो अदा कीजिए'

I am sure respected brother as you leave your dias on the day of your demitting the office, you leave behind a treasure of impeccable integrity, hard work and satisfaction of performing to the best of your abilities.

I, on my behalf and on behalf of my colleagues on the Bench, wish you and Mrs. Shukla a very happy, healthy and peaceful life.

Shri Pushyamitra Bhargav, Additional Advocate General, M.P., bids farewell :-

Today we are assembled here to bid farewell to My Lord Hon'ble Justice Shri Shailendra Shukla Sahab upon his retirement as a High Court Judge.

My Lord was born on 17.11.1959 and joined the Judicial Service on 18.08.1987, discharging his duties on every hierarchy i.e. Civil Judge Class-I, C.J.M. and District Judge to his elevation as Hon'ble Judge of the Madhya Pradesh High Court.

Apart from the judicial posts, Hon'ble Justice Shukla had also worked on various posts of Administrative side of the High Court. My Lord's father had also been the Hon'ble Judge of this Hon'ble Court.

As a Judge of this Hon'ble Court, My Lord Justice Shukla has delivered many decisions of high precedential value including verdicts of complex issues be it constitutional laws or criminal jurisprudence. However, one of My Lord's recent decisions stand out in my mind, wherein My Lord feeling the pain and sorrow of a eight years old rape victim, balancing it with the legal positions, was pleased to affirm the death sentence which is the first of it's own kind, where the death sentence was imposed even after the survival of the victim.

Besides it, My Lord has also been party to numerous orders and judgments that have furthered the cause of justice in this State.

All through his judicial career, My Lord has uphold the rule of law while also being conscious of the needs of the underprivileged and vulnerable groups of society.

It is indeed difficult to spell out the plethora of judgments which bear testimony to his judicial qualities.

On behalf of the Advocate General's Office and it's law officers and the AG office staff and my personal staff, I would like to convey our gratitude for My Lord Shri Justice Shailendra Shukla Sahab's service to this Hon'ble Court.

At this stage, it is also important to mention here that in the tough times of Covid and with limited Judges, My Lord has made every effort to serve the justice to every litigant by introducing a new practice of giving fix time of hearing along with the fixed date in a particular case.

While summing up, I refer the quote of the great philosopher Confucius *"A superior man is modest in his speech but exceeds in his actions"* as this is squarely applicable to our Hon'ble Justice Shukla.

Today, as we bid farewell from this Hon'ble Court, please accept our best wishes and we pray our almighty God to grant him longevity, good health, happiness and an active and fulfilling next chapter and all the best wishes in his future pursuit.

Thank you.

Shri Suraj Sharma, President, High Court Bar Association, Indore, bids farewell :-

आज हम सभी कर्मनिष्ठ न्यायमूर्ति श्री शैलेन्द्र शुक्ला साहब के विदाई समारोह के लिए उपस्थित हैं। ना चाहते हुए भी हमें विदाई को आगे बढ़ाना ही होता है।

माननीय न्यायाधिपति महोदय श्री शैलेन्द्र शुक्ला साहब का और हमारा साथ बेशक अल्प समयावधि, तीन वर्ष (19.11.2018 से 16.11.2021) का था, किंतु इसके उपरांत भी बेहद चुनौतीपूर्ण (कोरोना काल) समय में आपके द्वारा इसका सर्वोत्तम इस्तेमाल कर आपका होना सार्थक कर दिया।

माननीय न्यायमूर्ति श्री शैलेन्द्र शुक्ला का जन्म 17.11.1959 को हुआ था। न्यायमूर्ति श्री शैलेन्द्र शुक्ला जी दिनांक 18.08.1987 को न्यायिक सेवा में शामिल हुए। न्यायमूर्ति श्री शैलेन्द्र शुक्ला जी 24.12.1993 को सिविल जज क्लास–1 पर नियुक्त हुए। न्यायमूर्ति श्री शैलेन्द्र शुक्ला जी को 09.06.1997 को सी.जे.एम./ए.सी.जे.एम. के रूप में नियुक्त किया गया था और 29.08.1998 को उच्च न्यायिक सेवा में कार्यवाहक जिला न्यायाधीश के रूप में पदोन्नत किया गया था। न्यायमूर्ति साहब जबलपुर, नरसिंहपुर, सिवनी, दमोह, सागर, छिंदवाड़ा, भोपाल और खंडवा में पदस्थ रहे। न्यायमूर्ति साहब, मध्यप्रदेश उच्च न्यायालय के ओ.एस.डी., अतिरिक्त रजिस्ट्रार (विजिलेंस) के पद पर पदस्थ रहे। न्यायमूर्ति साहब ने उच्च न्यायालय, जबलपुर में अतिरिक्त निदेशक, जोत्री, जबलपुर, अध्यक्ष, जिला उपभोक्ता मंच, निदेशक, एम.पी. राज्य न्यायिक अकादमी और प्रिंसिपल रजिस्ट्रार (सर्तकता) के रूप में भी काम किया। उच्च न्यायालय के न्यायाधिपति के रूप में शपथ से पहले उन्हें जिला न्यायाधीश, भोपाल के रूप में तैनात किया गया था।

अल्पकालीन व कोरोना काल के चुनौतीपूर्ण समय के उपरांत भी आपकी उपलब्धियाँ अतुलनीय रही।

(i) आपके द्वारा माननीय न्यायमूर्ति के रूप में आज तक कुल 13 ए.फ.आर. आदेश दिए और हजारों बेगुनाहों को न्याय देकर बेल आउट किया और निर्दोष किया।

(ii) इंदौर बैंच में न्यायाधिपतियों की कमी होने के उपरांत भी, एक ही दिन में सिंगल बैंच के माध्यम से हजारों पक्षकारों को त्वरित न्याय उपलब्ध करवाया और डिवीजन बैंच का भी कार्य बखूबी तरीके से समय पर पूर्ण कर, इंदौर उच्च न्यायालय के कानूनी कार्य में न्यायमूर्तियों की कमी को महसूस नहीं होने दिया।

(iii) आपके अनुभवों से बार एसोसिएशन बहुत ही लाभान्वित हुई हैं तथा आपका, बार और सम्पूर्ण मध्यप्रदेश के निवासियों के प्रति उदारतापूर्ण व्यवहार रहा और इसी के कारण आज हम आपके सेवानिवृत्त होने से शब्दहीन हैं।

आपको आगामी कार्य हेतु अंतर्मन से अनंत शुभकामनाएँ।

इसी भावना को संजोते हुए मैं न्यायमूर्ति श्री शैलेन्द्र शुक्ला साहब के उज्ज्वल कीर्तिमान एवं विशाल व्यक्तित्व की कामना करता हूँ, एवं इस अवसर पर मैं स्वयं अपनी ओर से और उच्च न्यायालय अभिभाषक संघ, इंदौर के समस्त अधिवक्ताओं की ओर से आपको पुनः धन्यवाद देता हूँ।

धन्यवाद्।

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

आज का यह विशेष क्षण हम सभी के लिये अत्यन्त महत्वपूर्ण है, जब हम मध्यप्रदेश उच्च न्यायालय के माननीय न्यायमूर्ति श्री शैलेन्द्र शुक्ला साहब के न्यायाधिपति के रूप मे यशस्वी एवं सफल कार्यकाल पूर्ण होने पर उन्हें भावभीनी विदाई देने हेतु एकत्रित हुए हैं।

न्यायमूर्ति श्री शैलेन्द्र शुक्ला साहब का जन्म 17 नवम्बर 1959 को हुआ था। न्यायमूर्ति श्री शैलेन्द्र शुक्ला साहब को न्यायिक सेवा में दिनांक 18.08.1987 को सिविल जज के रूप में नियुक्त किया गया। दिनांक 29.08.1998 में जिला जज के रूप में नियुक्त किया गया। न्यायमूर्ति श्री शैलेन्द्र शुक्ला साहब जबलपुर, नरसिंहपुर, सिवनी, दमोह, सागर, छिन्दवाड़ा, भोपाल एवं खंडवा में जिला जज के रूप में कार्यरत रहे। मध्यप्रदेश उच्च न्यायालय में ओ.एस.डी. एवं एडिशनल रजिस्ट्रार, विजिलेंस के पद पर कार्यरत रहे। जिला उपभोक्ता फोरम के अध्यक्ष रहे तथा मध्यप्रदेश ज्यूडिशियल एकेडमी के डायरेक्टर के पद पर पदस्थ रहे तथा प्रिंसीपल रजिस्ट्रार, विजिलेंस के रूप में रहे। मध्यप्रदेश न्यायिक सेवा में आपको शनैः–शनैः दिये गये सभी दायित्वों का आपके द्वारा सफलतापूर्वक निर्वाह किया गया तथा मध्यप्रदेश उच्च न्यायालय के अतिरिक्त न्यायमूर्ति नियुक्त किए जाने के पूर्व जिला जज, भोपाल के रूप में पदस्थ रहे, एवं आपको इस महान न्याय मंदिर में स्थाई न्यायमूर्ति के रूप में नियुक्त किया गया।

आपने इस उच्च न्यायालय के महान् न्यायमूर्ति के पद का अत्यन्त गरिमा, शालीनता और सादगी के साथ निर्वहन किया और जिस सहजता से आपने उलझे कानूनी प्रश्नों को सरलता से सुलझा कर पक्ष और विपक्ष के पक्षकारों के मन में सन्तोष का बोध कराया, निश्चित ही वे आपकी अद्वितीय कार्यशैली के अंग बन गये हैं।

आप बड़े ही प्रसन्नचित्त स्वभाव के हैं और अपनत्व की जो भावना झलकती है, आपके द्वारा जूनियर अभिभाषकगण को सदैव प्रोत्साहित करते हुए उनका मार्गदर्शन कर न्यायदान में सहायता प्रदान की। आप सदैव हमारे लिये प्रेरणादायी रहे, आने वाले समय में आपकी अनुपस्थिति से जो रिक्तता उत्पन्न होगी वह हमेशा महसूस होती रहेगी। हमें आशा ही नहीं पूर्ण विश्वास है कि आप समय समय पर हमारा मार्गदर्शन कर आपकी रिक्तता महसूस नहीं होने देंगे।

इन्ही भावनाओं के साथ, मैं, अपनी स्वयं की ओर से, मध्यप्रदेश राज्य अधिवक्ता परिषद् के सभी सदस्यों एवं प्रदेश के विधि जगत की ओर से आपके प्रति कृतज्ञता तथा आभार व्यक्त करता हूँ एवं आपके उत्तम स्वास्थ्य एवं दीर्घायु होने की कामना करता हूँ।

धन्यवाद्

Shri Himanshu Joshi, Assistant Solicitor General, bids farewell :-

Every inning comes to an end and so the every tenure, it's the time for which we all have gathered here for saying bon voyage to My Lord, for starting a new inning, a totally new one.

The day has come to bid Your Lordship farewell from the office and not from our hearts and minds. It is this day that we give our judgment on Lordship, having received so many at Lordship's hands for last 3 years.

The journey of Your Lordship started after joining judiciary as a Civil Judge on 18.08.1987. My Lord has been posted at Jabalpur, Narsinghpur, Seoni, Damoh, Sagar, Chhindwada, Bhopal and Khargone. Your Lordship held the office of O.S.D., High Court of M.P., Additional Registrar, Vigilance, High Court of M.P., President, District Consumer Forum, Director, M.P. State Judicial Academy, Principal Registrar (Vigilance) also. Finally, My Lord elevated to the Bench in the year 2018. Your Lordship's patience, profound knowledge and sharp sense of humour reflected in his Court room, while sitting as a Judge. Your Lordship's congenial nature and the atmosphere in the Court always added to the pleasure of conducting cases before you. Vast knowledge, experience and great analytical ability duly reflected in the judgments passed by My Lord and we will always look forward to your guidance in future also.

Though, we will not be having My Lord with us in the Court from now, but will always be with us in our minds and in our heart. I extend good wishes to My Lord as well as to Mrs. Shukla on my behalf and on behalf of the Central Government, for starting new inning and I extend good wishes and hope that you will continue to be as cheerful as always and spread happiness wherever My Lord be.

Thank you.

Farewell Speech delivered by Hon'ble Mr. Justice Shailendra Shukla :-

I am extremely thankful for charitable words expressed by respected speakers. I consider such laudatory words more of their large heartedness than my true worth. However, I would only say that I have tried to do my work with devotion and sincerity and if at all I have been able to carve a niche in the minds, I would consider myself truly blessed.

The journey which had begun more than 34 years ago, has culminated today. The journey was like a long and winding road interspersed with beautiful landscapes at times and rough terrain on other occasions but it was worth it

nevertheless. Serving the needy and poor litigants was itself an incentive. The journey would not have ended on a positive note but for the support and blessings of my superior officers in District Judiciary and Registry and subsequent association with respected brothers of huge ability, character and wisdom in this High Court and also members of the Bar.

During the span of 34 years, apart from gaining experience as a Judge over the years, as an officer on deputation in Registry, I had the opportunity to get exposure to other dimensions of framework within which the judicial system operates. During my stint in M.P. State Judicial Academy, I had the opportunity to learn from the colleagues and judicial officers coming to the Institute and gain finer insights in respect of legal issues. I consider myself very fortunate to be associated with some other assignments of importance including setting up of museum at the High Court, bringing to life almost defunct ILR in its present format including covering up the backlog of issues, involvement in commemorative book on the occasion of golden jubilee of the High Court in the year 2005 and also in the book titled "Courts of India".

Today, I feel blessed to come out safe after trial by fire and having done my bit in the "Yagya" of justice dispensation. However, a feeling of sadness has also enveloped me on leaving hallowed precincts of this great Institution. After being elevated as a High Court Judge, I was fortunate to learn deeper crafts of justice dispensation from my respected brothers with whom I had the opportunity to share the Bench. Their sagacity and wisdom would always be etched in my mind. I convey my heartful thanks to them.

I found the learned members of Indore Bar to be very professional and patient. They were always prepared with in-depth study of their cases and had profound ability to answer random queries made to them. I shall always cherish the memories of vibrant moments and pulsating court craft and at times magical dawning of the correct solution to the problem at hand, as if being guided by some supernatural force. If I have been rough to any of you, I regret the same but whatever may have been said, was for the ends of justice only. It would however, be appropriate to point out that while dealing with criminal cases in the Special Bench, we found that there was no interaction between panel lawyers and jail convicts. It is expected that such interaction should be established so as to understand the psyche of the convict and the circumstances in which he committed the crime.

I must say at this juncture that the officers of the State Judicial Services have been performing extremely well. The infrastructure has been enhanced over the years. I would however, advise them to get rid of the attitude of playing it safe. The focus should be on decision making process without any apprehension. A

case actually under Section 304 Part-I or Part-II may not necessarily result in conviction under Section 302 IPC.

We had troubled times during Corona pandemic but our State emerged as one of the few having higher disposal rates in such times, which is an example of cooperation between the Bench and Bar striving to provide expeditious and timely justice.

At this juncture, I must say that burgeoning number of cases and resultant heavy workload has been causing huge strain to the Judges. Their number in this Bench had recently dwindled down to five in number, which was so even in the year 1981 while my father was a Judge in this Bench. There is crying need to fill up vacancies as early as possible.

I express my thanks to the Principal Registrar of this Bench and officers of the Registry for their whole hearted support.

I express my thanks to Dr. Rajesh Solanki and Dr. Smt. Ira Joshi for their due support and advice with regard to health issues concerning myself and my family members.

I also extend my heartfelt thanks to my extremely hard working staff, who were always willing to render their services at any hour of the day. I would like to thank my Reader Mr. B.K. Shrivastava, Secretary, Mr. Shailesh Sukhdeve and Mr. Trilok Singh Savner, Senior Personal Assistant, Mr. Arun Nair and Ms. Geeta Pramod and Jamadar, Mr. Govind Ram Baluni.

I would also like to thank my staff at home who saw to it that I do not have to bother about my essential daily needs. My whole hearted thanks to Driver Leeladharji and PSOs, who were very respectful and available at short notice.

The unseen pillar giving strength to a Judge in performing his duty, in an unhindered manner is always his immediate family. I would like to thank my dear wife Sangeeta who was forever the biggest source of strength to me. My children Ayushi and Varun also learnt to manage their own lives seeing their father perennially digging his head in files. I owe them much and I am very proud of them. I bow to almighty for making me the medium of immense joy to my revered mother, who after seeing her husband and son-in-law getting elevated, also got the chance to see her son also in the same frame.

After demitting office, I would pursue my other interests such as reading literature of my choice, listening to good music, as also looking after the welfare of my family members, who have always stood by me through my thick and thin. I also wish to utilize my services for the society in whichever manner possible. I am eagerly looking ahead for the next inning of my life.

I thank you once again for your kind and good wishes and for warm welcome today.

I wish you all, best health and happiness.

Bidding adieu to all with folded hands.

Jai Hind

NOTES OF CASES SECTION

Short Note
****(12)(DB)***
Before Mr. Justice Sujoy Paul & Mr. Justice Anil Verma
WP No. 11298/2021 (Indore) decided on 30 July, 2021

ARUN SINGH CHOUHAN …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

***A. Constitution – Article 226 – Writ of Quo Warranto – Maintainability* – Held – Writ of *quo warranto* can be issued against a person and related to a post which he is substantively holding – Appointment of R-4 not challenged nor his appointment order has been filed – Posting and working of R-4 cannot be a reason for issuing writ of *quo warranto* – Petition filed to either settle personal score or gain publicity and cannot be treated as PIL – Petition not maintainable and dismissed with cost of Rs. 10,000.**

क. संविधान – अनुच्छेद 226 – अधिकार पृच्छा की याचिका – पोषणीयता – अभिनिर्धारित – अधिकार पृच्छा की रिट एक व्यक्ति के विरूद्ध जारी की जा सकती है तथा उस पद से संबंधित है जिसे वह मूल रूप से धारण किये हुए है – प्रत्यर्थी क्र. 4 की नियुक्ति को चुनौती नहीं, न ही उसका नियुक्ति आदेश प्रस्तुत किया गया है – प्रत्यर्थी क्र. 4 की पदस्थापना एवं कार्य करना, अधिकार पृच्छा की रिट जारी करने का कारण नहीं हो सकता – याचिका या तो व्यक्तिगत बदला लेने या लोक–प्रसिद्धि प्राप्त करने प्रस्तुत की गई एवं इसे लोक हित वाद नहीं माना जा सकता – याचिका पोषणीय नहीं एवं 10,000 रू. के व्यय सहित खारिज।

***B. Constitution – Article 226 – Writ of Quo Warranto – Locus Standi* – Held – For issuance of writ of *quo warranto, locus standi* is insignificant but to maintain a regular writ petition, petitioner must show that he is a "person aggrieved".**

ख. संविधान – अनुच्छेद 226 – अधिकार पृच्छा की याचिका – सुने जाने का अधिकार – अभिनिर्धारित – अधिकार पृच्छा की रिट जारी करने के लिए, सुने जाने का अधिकार महत्वहीन है परंतु एक नियमित रिट याचिका को कायम रखने के लिए, याची को यह दर्शाना होगा कि वह एक ''व्यथित व्यक्ति'' है।

***C. Constitution – Article 226 – Writ of Quo Warranto – Necessary Party* – Apex Court concluded that the person against whom the writ of *quo warranto* is prayed for is a necessary party.**

ग. संविधान – अनुच्छेद 226 – अधिकार पृच्छा की याचिका – आवश्यक पक्षकार – सर्वोच्च न्यायालय ने निष्कर्षित किया है कि जिस व्यक्ति के विरूद्ध अधिकार पृच्छा की रिट के लिए प्रार्थना की गई है, वह एक आवश्यक पक्षकार है।

The Order of the Court was passed by : **SUJOY PAUL, J.**

Cases referred:

AIR 2001 SC 3435, (1916) 1 K.B. 595, (1964) 4 SCR 575, (2006) 11 SCC 731(2), (2009) 7 SCC 1, 1983 SCC Online Del 32, 2010 ILR (MP) 1357, (2006) 11 SCC 731 (I).

Petitioner *Arun Singh Chouhan* present in person.
Vivek Dalal, A.A.G. for the respondents/State.

Short Note
****(13)***
Before Mr. Justice Vishal Mishra
WP No. 3157/2017 (Gwalior) decided on 31 July, 2021

BRIJESH SHRIVASTAVA (SMT.) …Petitioner

Vs.

HINDUSTAN PETROLEUM CORPORATION LTD. & ors. …Respondents

A. Petroleum Retail Dealership – Letter of Intent (LOI) – Effect – **Held – LOI is only a proposal that respondents are intending to enter into an agreement – Corporation was still having its rights to decline to enter into a contract – Once the contract is not completed, Corporation cannot be directed to complete all formalities – No right has accrued in his favour on basis of issuance of LOI – Petition dismissed.**

*क. पेट्रोलियम की फुटकर वितरकता – आशय–पत्र (**LOI**) – प्रभाव –* अभिनिर्धारित – आशय–पत्र केवल एक प्रस्ताव है कि प्रत्यर्थीगण करार करने का आशय रखते हैं – कॉर्पोरेशन के पास अभी भी संविदा में प्रवेश करने से इंकार करने का अधिकार था – एक बार संविदा के पूर्ण नहीं होने पर, निगम को सभी औपचारिकताओं को पूरा करने के लिए निदेशित नहीं किया जा सकता – आशय–पत्र जारी किये जाने के आधार पर उसके पक्ष में कोई अधिकार प्रोद्भूत नहीं हुआ – याचिका खारिज।

B. Petroleum Retail Dealership – NOC by Collector – Title of Land **– Held – Merely NOC being issued by competent authority i.e. Collector does not amounts to its clearance of title – Apex Court concluded that while granting NOC, Collector is not concerned about ownership of land, he is concerned about the location of land and its suitability as a place for storage of petroleum – Petitioner failed to demonstrate clear title of land – No right accrued in favour of petitioner.**

ख. पेट्रोलियम की फुटकर वितरकता – कलेक्टर द्वारा अनापत्ति प्रमाण–पत्र – भूमि का हक – अभिनिर्धारित – सक्षम प्राधिकारी अर्थात् कलेक्टर द्वारा मात्र अनापत्ति प्रमाण–पत्र का जारी किया जाना, उसके हक के निर्बंधन की कोटि में नहीं आता – सर्वोच्च न्यायालय ने निष्कर्षित किया है कि अनापत्ति प्रमाण–पत्र प्रदान करते समय, कलेक्टर भूमि

के स्वामित्व के बारे में, चिंतित नहीं है, वह भूमि की अवस्थिति एवं पेट्रोलियम के भण्डारण हेतु स्थान के रूप में उसकी उपयुक्तता के बारे में चिंतित है – याची भूमि का स्पष्ट हक प्रदर्शित करने में विफल रहा – याची के पक्ष में कोई अधिकार प्रोद्भूत नहीं होता।

Cases referred:

(2006) 1 SCC 228, C.A. No. 4358/2016 decided on 23.07.2021 (Supreme Court), AIR 1973 SC 1164, (2017) 2 SCC 125, (1996) 10 SCC 405.

Arvind Dudawat, for the petitioner.
Harish Dixit, for the respondents.

Short Note
****(14)***
Before Mr. Justice S.A. Dharmadhikari
WP No. 16532/2021 (Gwalior) decided on 28 September, 2021

PRADEEP KUMAR …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

***A. Vishesh Sashastra Bal Adhiniyam, M.P. (29 of 1968), Section 9 – Deputation & Transfer* – Held – Clause 9 of the appointment order of petitioner specifically provides that prior consent is not necessary for transfer – No fault can be found in transferring petitioner to another battalion which also cannot be termed as "deputation" – Petition dismissed.**

क. विशेष सशस्त्र बल अधिनियम, म.प्र. (1968 का 29), धारा 9 – प्रतिनियुक्ति व स्थानांतरण – अभिनिर्धारित – याची के नियुक्ति आदेश का खंड 9 विनिर्दिष्ट रूप से यह उपबंधित करता है कि स्थानांतरण के लिए पूर्व सहमति आवश्यक नहीं है – याची को दूसरी बटालियन में स्थानांतरित किये जाने में कोई त्रुटि नहीं पायी जा सकती, जिसे ''प्रतिनियुक्ति'' भी नहीं कहा जा सकता – याचिका खारिज।

***B. Vishesh Sashastra Bal Adhiniyam, M.P. (29 of 1968), Section 3-Chapter II & 9 – Transfer – Scope & Jurisdiction* – Held – State government can divide the Special Armed Force into groups and further sub divide each group into battalions and each battalion into companies and each company into platoons – As per Section 9, State Government or Inspector General has powers to transfer member of Police Force to Special Armed Force and vice-versa.**

ख. विशेष सशस्त्र बल अधिनियम, म.प्र. (1968 का 29), धारा 3–अध्याय II व 9 – स्थानांतरण – व्याप्ति व अधिकारिता – अभिनिर्धारित – राज्य सरकार विशेष सशस्त्र बल को समूहों में विभाजित कर सकता है और आगे प्रत्येक समूह को बटालियनों में और प्रत्येक बटालियन को कंपनियों में और प्रत्येक कंपनी को प्लाटूनों में उपविभाजित कर

सकता है – धारा 9 के अनुसार, राज्य सरकार अथवा महानिरीक्षक के पास पुलिस बल के सदस्य को विशेष सशस्त्र बल में स्थानांतरित करने तथा इसके विपर्ययेन करने की शक्तियां हैं।

D.S. Raghuvanshi, for the petitioner.
Vijay Sundaram, P.L. for the respondents/State.

Short Note
**(15)*
Before Mr. Justice Vishal Dhagat

WP No. 15544/2021 (Jabalpur) decided on 6 September, 2021

SURESH KUMAR KURVE …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

***A. Service Law and Fundamental Rules, Rules 24, 26 & 54-B(1) – Withholding Increment during Suspension* – Held – Petitioner during suspension is not on duty and increments are granted for period spent on duty – No prejudice caused to petitioner if decision regarding his allowance is to be taken after conclusion of criminal trial – Non grant of increment during suspension period does not amount to penalty – Action of respondents not violative of Rules 24 and 54-B(1) – Petition dismissed.**

क. सेवा विधि एवं मूलभूत नियम, नियम 24, 26 व 54–B(1) – निलंबन के दौरान वेतन–वृद्धि रोकना – अभिनिर्धारित – निलंबन के दौरान याची कर्तव्य पर नहीं था एवं वेतन–वृद्धियां कर्तव्य पर व्यतीत अवधि के लिए प्रदान की जाती हैं – याची को कोई प्रतिकूल प्रभाव कारित नहीं होगा यदि दाण्डिक विचारण की समाप्ति के पश्चात् उसके भत्ते के संबंध में विनिश्चिय किया जाता है – निलंबन अवधि के दौरान वेतन–वृद्धि प्रदान न की जाना, शास्ति की कोटि में नहीं आता – प्रत्यर्थीगण की कार्रवाई नियम 24 एवं 54–B(1) का उल्लंघन नहीं – याचिका खारिज।

***B. Binding Precedent* – Held – Observation made by Court in a judgment or order is not binding on Court – Reasons for the decision and findings of Court on an issue is binding precedent.**

ख. बाध्यकारी पूर्व निर्णय – अभिनिर्धारित – किसी निर्णय अथवा आदेश में न्यायालय द्वारा किया गया संप्रेक्षण न्यायालय पर बाध्यकारी नहीं है – निर्णय के कारण तथा किसी विवाद्यक पर न्यायालय के निष्कर्ष बाध्यकारी पूर्व निर्णय हैं।

Case referred:

2012 SCC Online MP 6887.

Akash Choudhary, for the petitioner.
Anvesh Shrivastava, P.L. for the respondents/State.

I.L.R. [2021] M.P. 1991 (SC)
SUPREME COURT OF INDIA

Before Mr. Justice K.M. Joseph & Mr. Justice S. Ravindra Bhat

CRA No. 856/2021 decided on 15 September, 2021

MOHD. RAFIQ @ KALLU …Appellant

Vs.

STATE OF M.P. …Respondent

***A. Penal Code (45 of 1860), Sections 299, 300, 302 & 304 Part I – Culpable Homicide Not Amounting to Murder – Intention & Knowledge* – Held – No previous quarrel with deceased, thus there was lack of *animus* – No motive or pre-meditation proved – Act of throwing off the deceased from truck and driving on without pausing appears to have been in the heat of passion or rage – It is not proved that appellant with deliberate intention drove over the deceased and he knew that deceased would have fallen inside, so that truck's rear tyre would have gone over him – Conviction u/S 302 altered to one u/S 304 Part I, IPC– Appeal allowed accordingly.**

(Paras 14 to 17)

क. दण्ड संहिता (1860 का 45), धाराएँ 299, 300, 302 व 304 भाग I – हत्या की कोटि में न आने वाला आपराधिक मानव वध – आशय व ज्ञान – अभिनिर्धारित – मृतक के साथ कोई पूर्व झगड़ा नहीं, इस प्रकार आशय की कमी थी – कोई हेतु अथवा पूर्वचिंतन साबित नहीं हुआ – मृतक को ट्रक से फेंकना और बिना रूके गाड़ी चलाने का कृत्य आवेश की तीव्रता अथवा रोष में किया गया प्रतीत होता है – यह साबित नहीं हुआ कि अपीलार्थी ने सोचे–समझे आशय के साथ मृतक के ऊपर से गाड़ी चला दी एवं उसे यह ज्ञात था कि मृतक भीतरी भाग में गिरा होगा ताकि ट्रक का पिछला टायर उसके ऊपर से निकल जाए – भा.दं.सं. की धारा 302 के अंतर्गत दोषसिद्धि, धारा 304 भाग I में संपरिवर्तित की गई – तद्नुसार अपील मंजूर।

***B. Penal Code (45 of 1860), Sections 299, 300, 302 & 304 Part I – Culpable Homicide & Murder* – Held – It is often difficult to distinguish between culpable homicide and murder as both involve death, yet there is subtle distinction of intention and knowledge involved in both the crimes – This difference lies in the degree of act – There is very wide variance of degree of intention and knowledge among both the crimes. (Para 11)**

ख. दण्ड संहिता (1860 का 45), धाराएँ 299, 300, 302 व 304 भाग I – आपराधिक मानव वध व हत्या – अभिनिर्धारित – आपराधिक मानव वध और हत्या के मध्य अंतर करना प्रायः कठिन होता है क्योंकि दोनों में मृत्यु अंतर्ग्रस्त है, फिर भी दोनों अपराधों में अंतर्ग्रस्त आशय एवं ज्ञान में सूक्ष्म अंतर है – यह अंतर कृत्य के परिमाण में निहित है – दोनों अपराधों के मध्य आशय और ज्ञान के परिमाण में बहुत व्यापक फेरफार है।

Cases referred:

1976 (4) SCC 382, (2006) 11 SCC 444.

J U D G E M E N T

The Judgment of the Court was delivered by :

S. RAVINDRA BHAT, J. :- The appellant is aggrieved by a judgment of the Madhya Pradesh High Court[1] which confirmed his conviction for the offence punishable under Section 302 of the Indian Penal Code ("IPC"), and the sentence of rigorous imprisonment for life imposed on him.

2. The facts are that Police Station Jabera received information in the evening of 09.03.1992 that a truck (CPQ 4115) had broken the Forest Department barrier and collided with a motorcycle. The receipt of this information (by means of telephonic conversation) alerted the police. It was further alleged that Sub Inspector (SI) D.K. Tiwari along with others were stationed at a vantage point, on the main road, when the truck reached there. SI Tiwari motioned the truck to stop; it was driven by the appellant. Instead of applying brakes, the accused tried to speed away, upon which SI Tiwari boarded the truck from its left side. At that stage, it is alleged that the accused/appellant warned SI Tiwari not to do so and that he would get killed. Nevertheless, SI Tiwari boarded the truck. Immediately, the appellant pushed him, as a result of which SI Tiwari fell off the truck and he was run over by the rear wheels of the truck. SI Tiwari died. It is further alleged that the appellant fled with the truck. He was later caught, arrested and charged with committing murder of SI Tiwari.

3. In the trial before the Addl. Sessions Judge, Damoh, the prosecution relied upon the depositions of 18 witnesses, besides several exhibits, including the postmortem report, seizure of articles from the site and the deposition of medical witness (PW-6). The prosecution essentially relied upon the statements of PW-2, PW-10, PW-11, PW-14 & PW-15, i.e. the principal eye witnesses. The accused also led oral evidence of three witnesses, including that of Majeed, DW-1, who deposed that he was the conductor who was in the truck when the incident had occurred.

4. After duly considering the entire evidence and materials led before it, the Trial Court, by its judgment and order[2] convicted the appellant as charged and sentenced him to rigorous imprisonment for life. The appeal against the conviction and sentence was rejected by the impugned order.

5. It was argued on behalf of the appellant by Ms. Ritu Gangele, Advocate that a close reading of the evidence disclosed that the depositions of PW-2, PW-

1. Dated 27.02.2018 in Crl. A. 1570/1995
2. Dated 04.11.1995 in SC 123/1992

10, PW-14 and PW-15 contain fatal contradictions and exaggerations. It was pointed out that the prosecution version about the deceased boarding the truck from its left side and being pushed by the appellant was highly improbable given that two witnesses had clearly deposed that the latter, i.e. the accused continued to drive the truck. It was submitted that if such was the position, unless the prosecution established that the deceased had actually boarded the truck and sat in it near the driver, it was impossible for the accused to have pushed him with such force that he would have fallen off and gotten crushed under the rear wheels.

6. Learned counsel also pointed out to depositions of PW-2 and PW10 and submitted that several improvements were made to the original statements, recorded during the course of the investigation. It was stated that firstly the statement made during the investigation by PW-2 did not mention how the accused was identified when he was in the truck at 09.45 p.m. whereas the deposition of PW-2 stated that he could identify the accused in the light of the cabin and tube light on the street. She also pointed out that PW-2 improved upon his previous statement during the course of the trial inasmuch as he had not previously stated that the appellant had freed his left hand to push the deceased and that at the same time he continued to drive with his right hand. Most crucially, it was submitted by the learned counsel that the witness nowhere had stated previously that the truck had sped after slowing down - a position that he deposed to during the course of trial.

7. It was next submitted that the depositions of all the other so-called eye witnesses were suspicious because they spoke in unison about the incident in a manner identical to the deposition of PW-2. Learned counsel pointed out to the improbability of four persons observing an incident in the same manner, although they were located at different points or places, but painting the same picture given that the incident had occurred in the dark. It was submitted that all the witnesses were not standing at the same spot but dispersed at different points. In these circumstances, the nature of the light, i.e. how well lit the area was as well as the distance of the concerned witnesses from the concerned location, i.e. where the incident occurred, became crucial. The Courts below ignored these important features and held the appellant guilty of murder. Learned counsel submitted that there was no material on record pointing towards any motive on part of the accused. She highlighted that the deceased was not in uniform but rather in plain clothes and that his efforts to board the vehicle were resisted by the appellant who did not know that he was a public servant. It was submitted that the question of the appellant having any *animus* or intention to commit murder therefore did not arise.

8. Mr. Gopal Jha, appearing for the State urged the Court not to interfere with the concurrent findings and conviction recorded by the Trial Court and the High

Court. He submitted that both the courts carefully weighed the evidence and concluded that the appellant deliberately pushed SI Tiwari when he boarded the truck. What is more, the appellant had also threatened to kill him if SI Tiwari interfered with the movement of the truck. When SI Tiwari did not heed and actually boarded the truck, the appellant, in a cold-blooded manner, pushed him out, and instead of stopping the truck, deliberately ran over SI Tiwari. The medical evidence also substantiated the prosecution version that the truck had run over SI Tiwari since his body disclosed multiple injuries, including ruptured spleen and intestines and that his skull had cracked open. It was submitted that the arguments on behalf of the appellant with respect to contradictions in the depositions of the witnesses could not outweigh the overall effect of the evidence led before the Court which clearly showed that SI Tiwari was pushed and deliberately ran over by the appellant. These, submitted, the learned counsel, established the intention to kill beyond reasonable doubt.

Analysis and Conclusions

9. Having carefully considered the record, the evidence of the trial court and the High Court, as well as the contentions made before this court, the only question which arises is as to the precise nature of the criminal liability of the appellant. There can be no serious dispute about the occurrence of the incident; all the eye witnesses - especially PW-2 deposed about the receipt of information about a speeding truck which had run through a Forest Department barrier and which was also involved in an incident with a motorcycle. SI Tiwari was alerted about this information and therefore positioned himself along with a few others, on the road. The evidence also discloses that the incident occurred in the close vicinity of a police station. By the side of the police station, there was a medical store. The incident apparently occurred at 09.45 P.M. according to the eye witnesses; in any case, the copy of the First Information Report reveals that it was recorded at 10:10 PM; it reflects the time of the incident to be 9:50 PM. There is some contradiction between the statements made during the investigation by the prosecution witnesses about the source of light: PW-2 admitted that he had not mentioned about any light and that he deposed about it for the first time in court and that he could identify the accused from a distance of about 50 feet due to the light source within the truck's cabin. There cannot be serious dispute on this aspect because there is no argument that the appellant was in fact driving the truck. What is more important however, is the exact sequence of events. The depositions of PW-2, PW-14 and PW-15 are consistent in that the truck had slowed and that SI Tiwari asked the appellant to stop it. When the appellant did not pay heed, SI Tiwari attempted and did board the truck. The appellant at that point allegedly pushed SI Tiwari. This point becomes crucial because the witnesses consistently deposed that SI Tiwari boarded the left side of the truck. If so, the accused would have had to use both his hands depending on how secure SI Tiwari was in the

truck. However, PW- 2's deposition discloses that the accused appellant continued to drive with his right hand and used his left hand to push SI Tiwari.

10. The High Court, we notice, did not go by the prosecution version entirely and observed in the impugned judgment that SI Tiwari fell off the truck on account of "excessive speed of the truck". If that is the position, the prosecution's version that the appellant pushed him and deliberately ran over SI Tiwari is implausible. The deposition of PW-10 says that the appellant on being asked to stop had in fact slowed the truck after which a short altercation with SI Tiwari took place and then the deceased boarded the truck. PW-10 also deposed that the truck was driven *"in an oblique manner"*. Given all these factors, the propensity of the eye witnesses, PW-2, PW-10, PW-14 and PW-15 to improve upon the actual incident and introduce exaggerations cannot be ruled out as they were the deceased's colleagues and subordinates. There can however, be no doubt that the incident broadly occurred in the manner the prosecution alleged: upon receipt of the information of the truck being involved in a previous incident with the forest department barrier, SI Tiwari positioned himself along with others in front of the police station. When the appellant arrived at the spot in the truck, SI Tiwari gestured him to stop. Momentarily, he stopped down; after this SI Tiwari boarded from the left side of the truck. It is after this point that the prosecution version seems improbable and somewhat riddled with contradictions. If one considers the fact that at least two eye witnesses turned hostile and that depositions of PW-2 and PW-10 disclose clear improvements, much importance cannot be given to the words uttered by the appellant to SI Tiwari, warning that if he tried to board, he would be killed. Likewise, there is no discussion about the map or the course that the truck took after SI Tiwari fell from the truck, i.e., whether it speeded up and that the appellant intended to drive over and crush SI Tiwari, and that the position where SI Tiwari fell was known by the appellant to be within the line of the rear tyre of the moving truck.

11. The question of whether in a given case, a homicide is murder[3], punishable under Section 302 IPC, or culpable homicide, of either description, punishable

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3. Sections 299 and 300 IPC define the two offences. They are extracted below:

299. Culpable homicide*.—Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.*

Illustrations

(a) A lays sticks and turf over a pit, with the intention of thereby causing death, or with the knowledge that death is likely to be thereby caused. Z believing the ground to be firm, treads on it, falls in and is killed. A has committed the offence of culpable homicide.

(b) A knows Z to be behind a bush. B does not know it A, intending to cause, or knowing it to be likely to cause Z's death, induces B to fire at the bush. B fires and kills Z. Here B may be guilty of no offence; but A has committed the offence of culpable homicide.

under Section 304 IPC has engaged the attention of courts in this country for over one and a half century, since the enactment of the IPC; a welter of case law, on this aspect exists, including perhaps several hundred rulings by this court. The use of the term "likely" in several places in respect of culpable homicide, highlights the element of uncertainty that the act of the accused may or may not have killed the person. Section 300 IPC which defines murder, however refrains from the use of the term *likely,* which reveals absence of ambiguity left on behalf of the accused. The accused is for sure that his act will definitely cause death. It is often difficult to distinguish between culpable homicide and murder as both involve death. Yet, there is a subtle distinction of intention and knowledge involved in both the crimes. This difference lies in the degree of the act. There is a very wide variance of degree of intention and knowledge among both the crimes.

(c) A, by shooting at a fowl with intent to kill and steal it, kills B who is behind a bush; A not knowing that he was there. Here, although A was doing an unlawful act, he was not guilty of culpable homicide, as he did not intend to kill B, or to cause death by doing an act that he knew was likely to cause death.

Explanation 1.—A person who causes bodily injury to another who is labouring under a disorder, disease or bodily infirmity, and thereby accelerates the death of that other, shall be deemed to have caused his death. Explanation 2.—Where death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death, although by resorting to proper remedies and skilful treatment the death might have been prevented. Explanation

Explanation 3.—The causing of the death of child in the mother's womb is not homicide. But it may amount to culpable homicide to cause the death of a living child, if any part of that child has been brought forth, though the child may not have breathed or been completely born.

300. Murder.—*Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or—*

Secondly —If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or—

Thirdly —If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or—

Fourthly —If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

Illustrations

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Exception 1.—When culpable homicide is not murder.—Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident. The above exception is subject to the following provisos:—

First —That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

Secondly —That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.

12. The decision in *State of Andhra Pradesh v Rayavarapu Punnayya & Anr*[4] notes the important distinction between the two provisions, and their differing, but subtle distinction. The court pertinently pointed out that:

> *"12. In the scheme of the Penal Code, "culpable homicide" is genus and "murder" its specie. All "murder" is "culpable homicide" but not vice- versa. Speaking generally, "culpable homicide" sans "special characteristics of murder", is "culpable homicide not amounting to murder". For the purpose of fixing punishment, proportionate to the gravity of this generic offence, the Code practically recognises three degrees of culpable homicide. The first is, what may be called, "culpable homicide of the first degree". This is the greatest form of culpable homicide, which is defined in Section 300 as "murder". The second may be termed as "culpable homicide of the second degree". This is punishable under the first part of Section 304. Then, there is "culpable homicide of the third degree". This is the lowest type of culpable homicide and the punishment provided for it is, also, the lowest among the punishments provided for the three grades. Culpable homicide of this degree is punishable under the second part of Section 304..*

Thirdly —That the provocation is not given by anything done in the lawful exercise of the right of private defence. Explanation.—Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact. Illustrations

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

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Exception 2.—Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence. Illustration Z attempts to horsewhip A, not in such a manner as to cause grievous hurt to A. A draws out a pistol. Z persists in the assault. A believing in good faith that he can by no other means prevent himself from being horsewhipped, shoots Z dead. A has not committed murder, but only culpable homicide.

Exception 3.—Culpable homicide is not murder if the offender, being a public servant or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant and without ill-will towards the person whose death is caused.

Exception 4.—Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner.

Explanation.—It is immaterial in such cases which party offers the provocation or commits the first assault. Exception 5.—Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent.

Illustration A, by instigation, voluntarily causes, Z, a person under eighteen years of age to commit suicide. Here, on account of Z's youth, he was incapable of giving consent to his own death; A has therefore abetted murder.

4. 1976 (4) SCC 382

> *13. The academic distinction between "murder" and "culpable homicide not amounting to murder" has vexed the courts for more than a century. The confusion is caused, if courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of Sections 299 and 300."*

13. The considerations that should weigh with courts, in discerning whether an act is punishable as murder, or culpable homicide, not amounting to murder, were outlined in *Pulicherla Nagaraju @ Nagaraja Reddy v State of Andhra Pradesh*[5]. This court observed that:

> *"29. Therefore, the Court should proceed to decide the pivotal question of intention, with care and caution, as that will decide whether the case falls under Section 302 or 304 Part I or 304 Part II. Many petty or insignificant matters - plucking of a fruit, straying of cattle, quarrel of children, utterance of a rude word or even an objectionable glance, may lead to altercations and group clashes culminating in deaths. Usual motives like revenge, greed, jealousy or suspicion may be totally absent in such cases. There may be no intention. There may be no premeditation. In fact, there may not even be criminality. At the other end of the spectrum, there may be cases of murder where the accused attempts to avoid the penalty for murder by attempting to put forth a case that there was no intention to cause death. It is for the courts to ensure that the cases of murder punishable under Section 302, are not converted into offences punishable under Section 304 Part I/II, or cases of culpable homicide not amounting to murder are treated as murder punishable under Section 302. The intention to cause death can be gathered generally from a combination of a few or several of the following, among other, circumstances; (i) nature of the weapon used; (ii) whether the weapon was carried by the accused or was picked up from the spot; (iii) whether the blow is aimed at a vital part of the body;(iv) the amount of force employed in causing injury; (v) whether the act was in the course of sudden quarrel or sudden fight or free for all fight; (vi) whether the incident occurs by chance or whether there was any premeditation; (vii) whether there was any prior enmity or whether the deceased was a stranger;(viii) whether there was any grave and sudden provocation, and if so, the cause for such provocation; (ix) whether it was in the heat of passion; (x) whether the person inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner; (xi) whether the*

5. (2006) 11 SCC 444

accused dealt a single blow or several blows. The above list of circumstances is, of course, not exhaustive and there may be several other special circumstances with reference to individual cases which may throw light on the question of intention."

14. Coming back to the facts of this case, as observed earlier, there can be no serious dispute that the prosecution established the main elements of its factual allegations: the receipt of information of the breaking of the forest barrier; positioning of the deceased SI Tiwari, with a *posse* of policemen on the road; the identification of the appellant, as one who drove the truck; gesturing by the deceased to the appellant to stop the truck; the latter slowing down the vehicle; attempt by the SI to board the vehicle, and his being shaken off the truck, on account of the driver refusing to stop, and, on the other hand, speeding the vehicle. Even if the prosecution version that the appellant having threatened to kill the deceased were to be accepted, one cannot set much store by it, because no motive or no *animus* against the deceased was proved. A general expression of the extreme threat, (without any real intention of carrying it, since the truck was not laden with any contraband[6] or was not used for any illegal or suspect activity), cannot be given too much weight. What is of consequence, is that upon the deceased falling off the truck, the appellant drove on. Here, the prosecution established that the truck was driven, without heed; however, it did not establish the intention of the driver (i.e. the appellant) to run over the deceased. This point, though fine, is not without significance, because it goes to the root of the *nature of the intention.* Did the appellant intend to kill SI Tiwari? We think not. Clearly, he *knew* that SI Tiwari had fallen off; he proceeded to drive on. However, whether the deceased fell in the direction of the rear tyre, of the truck, or whether he fell clear of the vehicle, has not been proved; equally it is not clear from the evidence, that the appellant knew that he did. What was established, however was that he did fall off the truck, which continued its movement, perhaps with greater rapidity. This does not prove that the appellant, with deliberate intent, drove over the deceased and he knew that the deceased would have fallen inside, so that the truck's rear tyre would have gone over him. In these circumstances, it can however be inferred that the appellant intended to cause such bodily injury as was likely to cause SI Tiwari's death.

15. All the essential elements show that the appellant did not have any previous quarrel with the deceased; there was lack of *animus.* The act resulting in SI Tiwari's death was not pre-meditated. Though it cannot be said that there was a quarrel, caused by sudden provocation, if one considers that the deceased tried to board the truck, and was perhaps in plain clothes, the instinctive reaction of the appellant was to resist; he disproportionately reacted, which resulted in the

6. In fact the owner of the truck deposed during the trial.

deceased being thrown off the vehicle. Such act of throwing off the deceased and driving on without pausing, appears to have been in the heat of passion, or rage. Therefore, it is held that the appellant's conviction under Section 302 IPC was not appropriate.

16. Section 304 IPC[7] Code provides punishment for culpable homicide not amounting to murder (under Section 299 IPC). In the facts of the present case, this court is of the opinion that the appellants should be convicted for the offence punishable under the first part of Section 304 IPC, as he had the intention of causing such bodily harm, to the deceased, as was likely to result in his death, as it did. Having regard to these circumstances, the conviction recorded by the courts below, is altered to one under Section 304 Part I, IPC. The sentence too is therefore modified - instead of rigorous imprisonment ("RI") for life, the appellant is hereby sentenced to 10 years' RI. The direction to pay fine, is however, left undisturbed.

17. The appeal succeeds and is allowed in the above terms. No costs.

Appeal allowed

I.L.R. [2021] M.P. 2000 (SC)
SUPREME COURT OF INDIA

Before Mr. Justice Dr. Dhananjaya Y. Chandrachud &
Mr. Justice B.V. Nagarathna

CRA No. 1202/2021 decided on 8 October, 2021

PRASHANT SINGH RAJPUT …Appellant

Vs.

STATE OF M.P. & anr. …Respondents

(Alongwith CRA No. 1203/2021)

***A. Criminal Procedure Code, 1973 (2 of 1974), Section 438 and Penal Code (45 of 1860), Section 302 – Anticipatory Bail – Cancellation – Counter FIR by Parties* – R-2 in both appeals (accused persons) were granted anticipatory bail by High Court – Held – The offence is of serious nature in which a person was murdered – FIR and statements u/S 161 & 164 Cr.P.C.**

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7. ***304. Punishment for culpable homicide not amounting to murder****.—Whoever commits culpable homicide not amounting to murder shall be punished with 1[imprisonment for life], or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death, or*
with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.."

indicates a specific role of accused persons in the crime – Fact of previous enmity also exists – Order granting anticipatory bail has ignored material aspects, including the nature and gravity of offence and specific allegations – Sufficient case made out for cancelling the anticipatory bail – Orders granting anticipatory bail to R-2 in both appeals set aside – Appeals allowed.
(Paras 26 to 31)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 438 एवं दण्ड संहिता (1860 का 45), धारा 302 – अग्रिम जमानत – रद्दकरण – पक्षकारों द्वारा प्रति–प्रथम सूचना प्रतिवेदन – दोनों अपीलों में प्रत्यर्थी क्र. 2 (अभियुक्तगण) को उच्च न्यायालय द्वारा अग्रिम जमानत प्रदान की गई – अभिनिर्धारित – अपराध गंभीर स्वरूप का है जिसमें एक व्यक्ति की हत्या की गई थी – प्रथम सूचना प्रतिवेदन एवं दं.प्र.सं. की धारा 161 व 164 के अंतर्गत कथन, अपराध में अभियुक्तगण की एक विनिर्दिष्ट भूमिका इंगित करते हैं – पूर्व वैमनस्यता का तथ्य भी विद्यमान है – अग्रिम जमानत प्रदान करने के आदेश में तात्विक पहलुओं जिसमें अपराध का स्वरूप और गंभीरता एवं विनिर्दिष्ट अभिकथन शामिल हैं, को अनदेखा किया गया है – अग्रिम जमानत को रद्द करने के लिए पर्याप्त प्रकरण बनता है – दोनों अपीलों में प्रत्यर्थी क्र. 2 को अग्रिम जमानत प्रदान करने के आदेश अपास्त – अपीलें मंजूर।

***B. Criminal Procedure Code, 1973 (2 of 1974), Section 438 – Cancellation of Anticipatory Bail – Factors to be Considered* – Discussed and explained.** **(Para 24 & 25)**

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 438 – अग्रिम जमानत का रद्दकरण – विचार किये जाने योग्य कारक – विवेचित एवं स्पष्ट किये गये।

Cases referred:

(2020) 2 SCC 118, 2020 SCC OnLine SC 1031.

J U D G M E N T

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

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A The Appeal
B Facts
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A The appeal

1. These appeals arise from judgments dated 1 July 2021[1] and 31 May 2021[2] of a Single Judge of the Jabalpur Bench of the High Court for the State of Madhya Pradesh through which it allowed the applications for anticipatory bail filed by the second respondents in both the appeals under Section 438 of the Code of Criminal Procedure 1973[3] in connection with a crime[4] registered at the Police Station Majholi, District Jabalpur, State of Madhya Pradesh for the offences punishable under Sections 302 and 323 read with Section 34 of the Indian Penal Code 1860[5].

2. The crime was registered on the basis of a *dehati nalsi*/FIR lodged by the appellant on 29 September 2020. The allegation in the FIR is that the appellant was at Negai Tiraha with the deceased, Vikas Singh (who was his brother in-law) and two other individuals (Rajkishore Rajput and Dharmender Patel). It was alleged that the four accused persons, namely Ujiyar Singh, his two sons Chandrabhan Singh and Suryabhan Singh (the second respondent in the companion appeal) and his driver Jogendra Singh (the second respondent in the lead appeal) arrived in a jeep. Thereafter, allegedly due to a previous rivalry, Ujiyar Singh and Chandrabhan Singh shot at Vikas Singh, while Jogendra Singh held him, leading to his death while Suryabhan Singh hit the appellant on his head with the butt of his gun, leading to an injury. Upon being brought to a hospital, Vikas Singh was pronounced dead, following which the appellant got the FIR registered.

3. Suryabhan Singh and Jogendra Singh filed applications seeking anticipatory bail under Section 438 of the CrPC, apprehending their arrest in relation to the crime. While allowing the application for anticipatory bail of Jogendra Singh, the High Court noted that according to the report submitted by the investigating officer under Section 173 of the CrPC, the investigation did not reveal that he was even present at the spot of crime. The High Court observed that the veracity of such a report could not be questioned at this stage. Further, it held that even if he was present at the spot, there was no allegation against him of having fired at the deceased-Vikas Singh or having provoked Ujiyar Singh/ Chandrabhan Singh to fire at the deceased-Vikas Singh. Hence, the High Court passed the following order allowing his application for anticipatory bail:

> "So, looking to the facts and circumstances of the case, the application is allowed and it is directed that if the applicant surrenders himself before concerned court within fifteen days

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1 SLP (Criminal) No 5786 of 2021 (the **"lead appeal"**)
2 SLP (Criminal) No 5786 of 2021 (the **"companion appeal"**)
3 **"CrPC"**
4 Crime No 329 of 2020
5 **"IPC"**

> from today, he shall be released on anticipatory bail on furnishing a personal bond in the sum of Rs.50,000/- (Rupees Fifty Thousand only) with one surety in like amount to the satisfaction of the concerned Court for his regular appearance before the Court during trial.
>
> This order will remain operative subject to compliance of the following conditions by the applicant:-
>
> 1. The applicant will comply with all the terms and conditions of the bond executed by him;
>
> 2. The applicant will cooperate in the investigation/trial, as the case may be;
>
> 3. The applicant will not indulge himself in extending inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to the Police Officer, as the case may be;
>
> 4. The applicant shall not commit an offence similar to the offence of which he is accused;
>
> 5. The applicant will not seek unnecessary adjournments during the trial; and
>
> 6. The applicant will not leave India without previous permission of the trial Court/Investigating Officer, as the case may be."

Similarly, while considering the application filed by Suryabhan Singh, the High Court observed that the report of the investigating officer under Section 173 of the CrPC indicated that he was not present at the spot of the incident, but was in Jabalpur on the basis of the statements of witnesses, tower location of mobile numbers of the accused persons and the CCTV footage. The High Court held that the 'only' allegation against Suryabhan Singh was that he attacked the appellant, but that it only resulted in a simple injury. Hence, the High Court allowed his application for anticipatory bail, observing:

> "8.... So, looking to the facts and circumstances of the case, the application is allowed and it is directed that if the applicant surrenders himself before concerned court within fifteen days from today, he shall be released on anticipatory bail on furnishing a personal bond in the sum of Rs.50,000/- (Rupees Fifty Thousand only) with one surety in like amount to the satisfaction of the concerned Court for his regular appearance before the Court during trial.
>
> 9. This order will remain operative subject to compliance of the following conditions by the applicant:-

1. The applicant will comply with all the terms and conditions of the bond executed by him;

2. The applicant will cooperate in the investigation/trial, as the case may be;

3. The applicant will not indulge himself in extending inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to the Police Officer, as the case may be;

4. The applicant shall not commit an offence similar to the offence of which he is accused;

5. The applicant will not seek unnecessary adjournments during the trial; and

6. The applicant will not leave India without previous permission of the trial Court/Investigating Officer, as the case may be."

B Facts

4. The genesis of this dispute between the deceased-Vikas Singh and the accused persons allegedly originated from complaints dated 23 February 2019 and 27 July 2020 which the deceased-Vikas Singh had filed against the accused persons. In his complaint dated 23 February 2019 against Ujiyar Singh and Suryabhan Singh, he had alleged that the accused persons had been threatening him and his workers who were engaged in farming activities, allegedly since they did not belong to the area and had leased the land. He alleged that they had followed him in their vehicle and had also gotten false complaints registered against him. Further, he alleged that they were threatening him because they were engaged in the business of illegal mining of sand from the nearby river and used to pass over the land on which he was cultivating presently while transporting sand (which he had stopped them from doing since he started farming). He also alleged that he, and other residents of the village, had registered complaints against them previously but no action had been taken by the police.

5. Thereafter, in his complaint dated 27 July 2020 against Jogendra Singh, Vikas Singh alleged that he had caught Jogendra Singh stealing the illegally excavated sand which the police had seized from him earlier, following which Jogendra Singh threatened his life. On the basis of his complaint, a crime[6] had been registered at the Police Station Panagar, District Jabalpur, State of Madhya Pradesh against Jogendra Singh under Section 379 of the IPC on 28 July 2020. Deceased- Vikas Singh had also lodged another written complaint on 4 August 2020 where he alleged that the he apprehended that his life was at risk at the hands

6. Crime No 720 of 2020

of the Jogendra Singh and his brother, who had been threatening him since the crime had been registered based on his complaint.

6. On the other hand, according to Jogendra Singh and Suryabhan Singh, the complaints made by Vikas Singh were in fact counter-blasts filed in response to a complaint dated 30 January 2019 filed by Ujiyar Singh against him. In his complaint, Ujiyar Singh had alleged that in fact it was the deceased-Vikas Singh who headed the sand mafia and it was he who complained against the deceased-Vikas Singh. Further, they also argue that the family of the deceased-Vikas Singh has criminal antecedents since: *(i)* the father of the deceased-Vikas Singh, after being convicted under Section 8 read with Section 20(b)(ii)(C) of the Narcotics Drugs and Psychotropic Substances Act 1985 and Section 25(1)(1B)(a) of the Arms Act 1959, has been undergoing rigorous imprisonment for 20 years and 3 years respectively; and *(ii)* the grandfather of the deceased was arraigned as one of the accused in a case of murder with robbery.

7. In relation to the present case, according to the information provided under Section 154 of the CrPC by the appellant, at around 12:45 pm on 29 September 2020, the deceased-Vikas Singh along with the appellant and two other individuals were near the Negai Tiraha. The accused persons allegedly arrived in a jeep, which was being driven by Jogendra Singh. Once they parked the jeep, Ujiyar Singh allegedly sat in a chair while his sons (Chandrabhan Singh and Suryabhan Singh) stood near him. Allegedly, due to their pre-existing enmity, Ujiyar Singh shot Vikas Singh in his abdomen. When Vikas Singh tried to run, he was held by Jogendra Singh. Chandrabhan Singh then took the gun from Ujiyar Singh and is alleged to have shot Vikas Singh in the head, while Suryabhan Singh attacked the appellant on his head with the butt of the gun. Thereafter, the four accused persons are alleged to have left in their jeep while the appellant and the other two individuals took Vikas Singh to a hospital, where he was pronounced dead. The statement of the appellant under Section 161 of the CrPC was recorded by the police on 30 September 2020. Later, the statements of the appellant and the other alleged eye-witnesses under Section 164 of the CrPC were recorded on 16 October 2020.

8 In relation to this same incident, Ujiyar Singh also got a crime[7] registered at the Police Station Majholi, District Jabalpur, State of Madhya Pradesh against the deceased-Vikas Singh and the appellant on 30 September 2020 under Sections 294, 506, 323, 324 and 34 of the IPC. In the cross-FIR, he alleged that the crime took place between 12.45 pm to 1 pm on 29 September 2020. He alleged that he was being driven by his driver Babloo when he came across the deceased-Vikas Singh and the appellant near Negai Tiraha. There, the deceased-Vikas Singh allegedly started recording a video, told him he belonged to the sand mafia and

7. Crime No 331 of 2020

started abusing him. When he allegedly asked him to stop, the appellant is alleged to have assaulted him with a *lathi* on the left side of his head above the ear which started bleeding, while the deceased-Vikas Singh starting assaulting him with kicks and punches. He alleges that this is when he fired his registered firearm - a 0.22 rifle - at Vikas Singh, which hit him in his stomach and head. The appellant allegedly then hit his hand with the *lathi*, due to which the butt and barrel of the gun broke apart and blood started oozing from his left hand. Allegedly, he then managed to run away from the spot with his driver Babloo.

9. During the investigation of the present incident, Jogendra Singh had filed an application for anticipatory bail in the crime registered against him under Section 379 of the IPC for stealing sand. By its order dated 8 October 2020, the High Court rejected the application, while noting that the objector (deceased-Vikas Singh) in the application had been murdered, in which Jogendra Singh was one of the individuals who had been named as an accused in the FIR. The High Court had held:

> "This case has transcended and gone beyond a simple case for anticipatory bail in a case of theft of sand. Subsequently, during the pendency of this application the objector has been murdered in which the applicant herein has been named as an accused and there are eyewitness testimony which speak about his presence at the scene of occurrence and also his participation in pulling back the deceased when the deceased tried to run away and saved his life.
>
> Be that as it may, this court refrains from passing any observations on the merits of Crime No. 329/2020 as the same is not before this court. But at the same time, this court cannot close its eyes to the fact that the objector in this case has been murdered and the case has taken a far more serious turn and is no more merely restricted to a case of theft of sand.
>
> Under the circumstances, this may be a case that would require custodia I interrogation as far as Crime No.720/2020 is concerned and, therefore, the application is dismissed."

Thereafter, Jogendra Singh withdrew his application altogether, seeking to move an application for regular bail under Section 439 of the CrPC, which was recorded by the High Court in its final order dated 7 January 2021.

10. In the final report submitted on 15 December 2020 under Section 173 of the CrPC, Ujiyar Singh and Chandrabhan Singh were named as accused, but Jogendra Singh and Suryabhan Singh were stated to have had no role in the death of Vikas Singh since they were in Jabalpur, 40 km away from the spot where the incident occurred. The report is stated to have been based on: *(i)* Call Data

Records[8], Tower Mapping and Public Switched Telephone Network[9] data from Jogendra Singh and Suryabhan Singh's mobile phones; *(ii)* CCTV footage; and *(iii)* statements of independent witnesses confirming their presence in Jabalpur.

11. The appellant and other family members of the deceased-Vikas Singh filed a protest petition. By an order dated 13 January 2021, the Judicial Magistrate First Class, Siroha[10] directed a further investigation, for the following reasons: *(i)* the investigating officer's report focused more on the CCTV footage and witness statements proving Jogendra Singh and Suryabhan Singh's presence in Jabalpur, rather than the witness statements of the appellant and other eye-witnesses who noted their presence at the spot where the crime occurred; *(ii)* the CCTV footage obtained by the police of the scene of crime was from 1.00 pm to 5.00 pm, while the appellant's FIR and even Ujiyar Singh's FIR place the time of the incident between 12 noon and 1 pm and 12.45 pm and 1.00 pm respectively: *(iii)* the police had not checked the CCTV footage of the roads between the place where the incident took place and Jabalpur; *(iv)* there were inconsistencies between the statement of Ujiyar Singh and his FIR; *(v)* Jogendra Singh's fingerprints had not been obtained from the jeep (which he was alleged to be driving); and *(vi)* Suryabhan Singh's finger prints had not been lifted from Ujiyar Singh's gun.

12. The investigating officer then filed a supplementary *challan* on 8 March 2021 indicating that on the basis of the further investigation directed by the JMFC, evidence had emerged showing the involvement of Ujiyar Singh and Chandrabhan Singh in the death of Vikas Singh. Hence, in the order dated 10 March 2021, the JMFC observed that the investigating officer had conducted an investigation only against Ujiyar Singh and Chandrabhan Singh, and had not properly considered the accusations against Suryabhan Singh and Jogendra Singh. Both of them were thus summoned.

13. Jogendra Singh and Suryabhan Singh then filed applications for anticipatory bail[11]. By separate orders dated 24 March 2021, the trial Court rejected their applications while noting that: *(i)* the earlier order dated 13 January 2021 of the JMFC had adverted to the omissions of the investigating officer; *(ii)* the investigating officer relied upon CDRs but did not ascertain if Jogendra Singh and Suryabhan Singh even used those numbers or whether they were just registered in their name; and *(iii)* the witness statements under Sections 161 and 164 of the CrPC assign them a specific role, which cannot be overlooked only because of a prior enmity between the deceased-Vikas Singh and the accused persons.

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8. **"CDRs"**
9. **"PSTN"**
10. **"JMFC"**
11. Bail Application No 89 of 2021 and Bail Application No 88 of 2021

14. Jogendra Singh and Suryabhan Singh then moved the High Court in applications[12] for anticipatory bail. The High Court allowed the applications on 1 July 2021 and 31 May 2021 respectively. The orders of the High Court are in question before this Court.

C Submissions

15. Assailing the judgment of the Single Judge of the High Court, Mr Uday Gupta, learned Counsel appearing on behalf of the appellant has urged the following submissions:

(i) The Single Judge relied exclusively upon the report of the investigating officer to hold that Jogendra Singh and Suryabhan Singh could not have been present at the spot where the incident occurred and that the veracity of the report could not be called into question at this stage;

(ii) The Single Judge ignored the observations in the order of the JMFC dated 13 January 2021 and in the subsequent order of the trial Court dated 24 March 2021, which indicate that the investigation conducted by the investigating officer ignored vital circumstances pertaining to the crime;

(iii) The Single Judge ignored the FIR and the statements of the appellant and the other eye-witnesses according to which Jogendra Singh and Suryabhan Singh were present at the spot since the four accused had come together in a jeep, and each had specific role in the crime: *(a)* Jogendra Singh was driving the jeep and then held Vikas Singh while he was trying to escape after Ujiyar Singh had shot him in the abdomen, following which Chandrabhan Singh shot him in the head; and *(b)* Suryabhan Singh assaulted the appellant with the butt of the rifle;

(iv) That another Single Judge of the High Court rejected the application for anticipatory bail filed by Jogendra Singh even in the case registered against him for illegal sand mining on the complaint filed by the deceased- Vikas Singh, due to the nature of allegations against him in the present case; and

(v) The Single Judge has ignored the seriousness and gravity of the crime as well as material aspects and hence, this Court should cancel the anticipatory bail granted, in accordance with the principles laid down by this Court in *Mahipal v. Rajesh Kumar*[13] (*"Mahipal"*).

16. Mr S K Gangele, learned Counsel appearing on behalf of Jogendra Singh urged that:

12. MCRC No 31835 of 2021 and MCRC No 18604 of 2021
13. (2020) 2 SCC 118, para 16

(i) The report filed by the investigating officer shows that Jogendra Singh was not present at the spot where the incident occurred, but was in Jabalpur;

(ii) The FIR registered at the behest of Ujiyar Singh provides an alternate explanation of the events leading to the death of Vikas Singh, according to which Ujiyar Singh fired at the deceased since he and the appellant were threatening his life; and

(iii) Ujiyar Singh's FIR notes that his rifle was broken by the appellant and he was also injured by a *lathi* on his head and hand, both of which injuries have not been explained.

17. Mr R C Mishra, learned Senior Counsel appeared on behalf of Suryabhan Singh, urged:

(i) The FIR has been registered due to enmity between his family and the deceased-Vikas Singh who used to run a sand mafia against which his father, accused Ujiyar Singh, had complained. The deceased-Vikas Singh also had criminal antecedents;

(ii) The allegation that the appellant suffered an injury on his head due to Suryabhan Singh assaulting him with the butt of the rifle is inconsistent with the nature of the injury, which is an abrasion; and

(iii) The FIR and the appellant's statement under Section 161 of the CrPC do not make any allegation of Suryabhan Singh having fired at the appellant prior to hitting him with a gun, while his statement under Section 164 of the CrPC makes that claim for the first time. No such empty cartridge has been found and only the bullets in body of the deceased-Vikas Singh have been recovered.

18. Mr Abhinav Srivastava, learned Counsel has appeared on behalf of the State of Madhya Pradesh, urged that the order granting anticipatory bail is unsustainable since:

(i) The crime is of a serious nature; and

(ii) As noted in JMFC's order dated 13 January 2021, while Ujiyar Singh and Chandrabhan Singh had been arrested and kept in judicial custody, Jogendra Singh and Suryabhan Singh continued to abscond.

19. The rival submissions now fall for our consideration.

D Analysis

20. The FIR attributes specific roles to both Jogendra Singh and Suryabhan Singh in the commission of the crime. The statement of the appellant under Section 161 of the CrPC adverts to the following: *(i)* that Ujiyar Singh would take

sand illegally mined through the land on which he was cultivating along with the deceased-Vikas Singh; *(ii)* when they told Ujiyar Singh to desist, he took offence and filed false complaints against the deceased-Vikas Singh; *(iii)* on 29 September 2020, the deceased-Vikas Singh and the appellant went to Negai Tiraha in the vehicle of the deceased-Vikas Singh and reached there at about 1.00 pm, where they met the two others (Rajkishore Rajput and Dharmendra Patel); *(iv)* the four accused persons (Ujiyar Singh, Chandrabhan Singh, Suryabhan Singh and Jogendra Singh) arrived in a jeep being driven by Jogendra Singh; *(v)* Vikas Singh received a call and started moving towards Negai Road when Ujiyar Singh shot him in the abdomen; *(vi)* when Vikas Singh tried to flee, Jogendra Singh caught hold of him while Chandrabhan Singh took the gun from Ujiyar Singh and shot him in the head; *(vii)* Suryabhan Singh took the gun from Chandrabhan Singh and assaulted the appellant on the head using the butt of the gun; *(viii)* one Nilesh Gotia came around in his car and saw them, following which the appellant and the other two individuals took Vikas Singh to a hospital in Nilesh's car, from where they transferred him to the medical college in an ambulance, where he was pronounced dead; and *(ix)* the police arrived at the medical college, following which the appellant registered his complaint.

21. The material at this stage cannot be examined with a fine toothcomb in the manner of a criminal trial. What needs to be determined is whether the parameters for the grant of anticipatory bail were correctly formulated and applied by the Single Judge. The line of submission of the counsel for the accused persons dwells on some variance between the statements of the appellant under Section 161 and Section 164 of the CrPC, namely: *(i)* that the appellant and the deceased reached the Negai Tiraha around 12.15 pm, and not 1.00 pm; and *(ii)* after Vikas Singh was shot in the head by Chandrabhan Singh, Suryabhan Singh first shot at the appellant but the shot went above his head. Thereafter, Suryabhan Singh hit him in the head with the butt of the gun, following which the handle of the rifle broke and fell there.

22. The statement of Rajkishore Rajput, an eye-witness, under Section 164 of the CrPC mentions that: *(i)* on 29 September 2020, the deceased-Vikas Singh came to his house at 9 am and told him to meet him at Negai Tiraha; *(ii)* he reached Negai Tiraha with Dharmender Patel at 12 noon, following which the deceased-Vikas Singh arrived in his vehicle with the appellant; and *(iii)* after committing the murder of the Vikas Singh, the four accused left in their jeep.

23. The statement of Dharmender Patel, another eye-witness, under Section 164 of the CrPC, mentions that when he reached Negai Tiraha, he saw Rajkishore Rajput who informed him that the deceased-Vikas Singh was about to arrive. Other than that, his statement accords with those of the appellant and Rajkishore Rajput under Section 164.

D.1 Cancellation of Anticipatory Bail

24. In a recent judgment of a two Judge Bench of this Court in *Mahipal* (supra), this Court noted the difference in the approach that this Court must adopt while considering a challenge to an order which has granted bail and an application for cancelling the bail granted. The Court held:

> "16. The considerations that guide the power of an appellate court in assessing the correctness of an order granting bail stand on a different footing from an assessment of an application for the cancellation of bail. **The correctness of an order granting bail is tested on the anvil of whether there was an improper or arbitrary exercise of the discretion in the grant of bail. The test is whether the order granting bail is perverse, illegal or unjustified.** On the other hand, an application for cancellation of bail is generally examined on the anvil of the existence of supervening circumstances or violations of the conditions of bail by a person to whom bail has been granted. In Neeru Yadav v. State ofU.P. [Neeru Yadav v. State of U.P., (2014) 16 SCC 508 : (2015) 3 SCC (Cri) 527] , the accused was granted bail by the High Court [Mitthan Yadav v. State of U.P., 2014 SCC OnLine All 16031] . In an appeal against the order [Mitthan Yadav v. State of U.P., 2014 SCC OnLine All 16031] of the High Court, a two- Judge Bench of this Court surveyed the precedent on the principles that guide the grant of bail. Dipak Misra, J. (as the learned Chief Justice then was) held: (Neeru Yadav case [Neeru Yadav v. State of U.P., (2014) 16 SCC 508 : (2015) 3 SCC (Cri) 527] , SCC p. 513, para 12)
>
> "12. ... It is well settled in law that cancellation of bail after it is granted because the accused has misconducted himself or of some supervening circumstances warranting such cancellation have occurred is in a different compartment altogether than an order granting bail which is unjustified, illegal and perverse. **If in a case, the relevant factors which should have been taken into consideration while dealing with the application for bail have not been taken note of, or bail is founded on irrelevant considerations, indisputably the superior court can set aside the order of such a grant of bail. Such a case belongs to a different category and is in a separate realm. While dealing with a case of the second nature, the Court does not dwell upon the violation of conditions by the accused or the supervening circumstances that have happened subsequently. It, on the contrary, delves into the justifiability and the soundness of the order passed by the Court."**
>
> **17. Where a court considering an application for bail fails to consider relevant factors, an appellate court may justifiably set**

> **aside the order granting bail. An appellate court is thus required to consider whether the order granting bail suffers from a non-application of mind or is not borne out from a prima facie view of the evidence on record. It is thus necessary for this Court to assess whether, on the basis of the evidentiary record, there existed a prima facie or reasonable ground to believe that the accused had committed the crime, also taking into account the seriousness of the crime and the severity of the punishment...**"
>
> (**emphasis supplied**)

25. In another decision in *Dr. Naresh Kumar Mangla v. Anita Agarwal and Others*[14] a three Judge Bench of this Court cancelled the anticipatory bail granted to the accused, following the unnatural death of his wife. The Court surveyed the authorities on the grant of anticipatory bail and held:

> "19. In the recent decision of the Constitution Bench in Sushila Aggarwal v. State (NCT of Delhi) [(2020) 5 SCC 1], the considerations which ought to weigh with the Court in deciding an application for the grant of anticipatory bail have been reiterated. The final conclusions of the Court indicate that:
>
> "....92.3...While considering an application (for grant of anticipatory bail) the court has to consider the nature of the offence, the role of the person, the likelihood of his influencing the course of investigation, or tampering with evidence (including intimidating witnesses), likelihood of fleeing justice (such as leaving the country), etc.
>
> 92.4. Courts ought to be generally guided by considerations such as the nature and gravity of the offences, the role attributed to the applicant, and the facts of the case, while considering whether to grant anticipatory bail, or refuse it. Whether to grant or not is a matter of discretion; equally whether and if so, what kind of special conditions are to be imposed (or not imposed) are dependent on facts of the case, and subject to the discretion of the court."
>
> 20. The Constitution Bench has reiterated that the correctness of an order granting bail is subject to assessment by an appellate or superior court and it may be set aside on the ground that the Court granting bail did not consider material facts or crucial circumstances...
>
> [...]
>
> 22. It is apposite to mention here the distinction between the considerations which guide the grant of anticipatory bail and regular

14. 2020 SCC OnLine SC 1031

bail. In Pokar Ram v. State of Rajasthan [(1985) 2 SCC 597], while setting aside an order granting anticipatory bail, this Court observed:

> "...Says the learned Chief Justice that in regard to anticipatory bail, if the proposed accusation appears to stem not from motives of furthering the ends of justice but from some ulterior motive, the object being to injure and humiliate the applicant by having him arrested, a direction for the release of the applicant on bail in the event of his arrest would generally be made. It was observed that "it cannot be laid down as an inexorable rule that anticipatory bail cannot be granted unless the proposed accusation appears to be actuated by mala fides; and, equally, that anticipatory bail must be granted if there is no fear that the applicant will abscond". Some of the relevant considerations which govern the discretion, noticed therein are "the nature and seriousness of the proposed charges, the context of the events likely to lead to the making of the charges, a reasonable possibility of the applicant's presence not being secured at the trial, a reasonable apprehension that witnesses will be tampered with and 'the larger interests of the public or the State', are some of the considerations which the court has to keep in mind while deciding an application for anticipatory bail". A caution was voiced that "in the evaluation of the consideration whether the applicant is likely to abscond, there can be no presumption that the wealthy and the mighty will submit themselves to trial and that the humble and the poor will run away from the course of justice, any more than there can be a presumption that the former are not likely to commit a crime and the latter are more likely to commit it.""

26. Let us now consider these principles in the context of the facts of the present case. Both the sides have presented their point-of-view in relation to the enmity which existed between the deceased-Vikas Singh and the family of Ujiyar Singh. However, we are not required to adjudicate on whether it was the deceased-Vikas Singh or Ujiyar Singh who was mining sand illegally; rather, it is sufficient to note that previous enmity did exist between both, whoever be the instigator.

27. In relation to the present incident, the appellant's case is supported by the FIR, his statements under Sections 161 and 164 of the CrPC, and the statements of the other two eye-witnesses under Section 164 of the CrPC. On the other hand, Jogendra Singh and Suryabhan Singh rely on the counter FIR filed by Ujiyar Singh according to which they were not present at the scene of crime and Ujiyar Singh shot the deceased-Vikas Singh in self-defense. The orders of the JMFC dated 13 January 2021 and 10 March 2021 advert to the contents of the FIR registered at the behest of the appellant. The investigating officer's first report dated 15 December 2020 indicated that there was a *prima facie* case against Ujiyar Singh and Chandrabhan Singh. The supplementary *challan* dated 8 March 2021 indicates that more material had emerged during the course of investigation

as against the events portrayed in the FIR registered at the behest of Ujiyar Singh. Hence, the case portrayed by the appellant could not have been ignored by solely relying on the counter-FIR.

28. The High Court has placed reliance upon the report submitted under Section 173 of the CrPC on 15 December 2020 to hold that Jogendra Singh and Suryabhan Singh were not present when the incident occurred. However, the High Court has not addressed the clear deficiencies in the course of the investigation which have been highlighted in the order of the JMFC dated 13 February 2021 and the trial Court's order dated 24 March 2021. These are, *inter alia*: *(i)* the failure to notice eyewitness statements; *(ii)* reliance on CCTV footage for the period of time after incident had occurred, ignoring prior or contemporaneous footage; *(iii)* not collecting CCTV footage between Jabalpur and the scene of offence; *(iv)* relying on CDRs without determining if Jogendra Singh and Suryabhan Singh had actually used the number; and *(v)* not conducting any finger print analysis. In the order dated 13 February 2021, the JMFC identified these deficiencies with the investigation and directed further investigation. Upon the submission of the supplementary *challan*, the JMFC noted in their order dated 10 March 2021 that the *challan* was only in relation to Ujiyar Singh and Chandrabhan Singh, and did not address the role of Jogendra Singh and Suryabhan Singh. The obvious deficiencies in the investigation have pointed out the errors in the trial Court's order dated 24 March 2021 rejecting Jogendra Singh and Suryabhan Singh's applications for anticipatory bail. The Single Judge has, however, overlooked these crucial aspects.

29. Finally, it has also been argued on behalf of Suryabhan Singh that while the appellant's statement under Section 164 of the CrPC is that Suryabhan Singh also shot at the appellant, the FIR and his statement under Section 161 of the CrPC only record that he hit him with the butt of the gun. The trial is yet to take place where the evidence adduced by the prosecution will be appreciated, and the veracity of appellant's claim in his statement under Section 164 can be determined there. However, at the present stage, the FIR and both the appellant's statements under Section 161 and 164 are consistent in as much as that Suryabhan Singh did hit him in his head with the butt of the gun. An argument has also been raised in relation to the nature of the injury caused to the appellant, but this has to be decided at the stage of trial after evidence has been led.

30. The Court has to determine whether on the basis of the material available at this stage, the High Court has applied the correct principles in allowing the applications for anticipatory bail. The offence is of a serious nature in which Vikas Singh was murdered. The FIR and the statements under Sections 161 and 164 of the CrPC indicate a specific role to Jogendra Singh and Suryabhan Singh in the crime. The order granting anticipatory bail has ignored material aspects, including

the nature and gravity of the offence, and the specific allegations against Jogendra Singh and Suryabhan Singh. Hence, a sufficient case has been made out for cancelling the anticipatory bail granted by the High Court.

E Conclusion

31. Therefore, the appeals are allowed. The impugned judgments dated 1 July 2021 and 31 May 2021 of the Single Judge of the High Court of Madhya Pradesh granting anticipatory bail to Jogendra Singh and Suryabhan Singh - the second respondents in these appeals - are set aside.

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

Appeal allowed

I.L.R. [2021] M.P. 2015 (DB)
WRIT APPEAL

Before Mr. Justice Sheel Nagu & Mr. Justice Deepak Kumar Agarwal

WA No. 293/2021 (Gwalior) decided on 31 August, 2021

MANOJ SHARMA (SMT.) …Appellant

Vs.

STATE OF M.P. & ors. …Respondents

A. Service Law – Recovery of Excess Pay – Wrong Fixation of Pay/Increment – Petitioner, a class III employee and continue to be in service – **Held – If there is an written undertaking given by petitioner, the excess payment given to her vide wrong fixation of pay/increment deserves to be recovered – A written undertaking by an employee binds him in the future – Order of recovery of principal excess amount is upheld. (Paras 3.7, 3.8, 6 & 7)**

क. सेवा विधि – अतिरिक्त संदाय की वसूली – वेतन/वेतनवृद्धि का गलत नियतन – याची एक वर्ग–III कर्मचारी है और निरंतर सेवा में है – अभिनिर्धारित – यदि याची द्वारा लिखित वचनबंध दिया गया है, तब उसे वेतन/वेतनवृद्धि के गलत नियतन द्वारा किया गया अतिरिक्त संदाय वसूल किये जाने योग्य है – एक कर्मचारी द्वारा लिखित वचनबंध उसे भविष्य में आबद्ध करता है – मूल अतिरिक्त रकम की वसूली का आदेश कायम।

B. Service Law – Recovery of Interest on Excess Pay **– Held – Written undertaking given by petitioner does not contain any promise to return the interest amount which may have accrued, thus, the employer is now estopped to make any recovery of interest over the excess principal amount paid in past – Order of recovery of interest is set aside – Appeal allowed in above terms. (Paras 4.3 to 4.5, 6 & 7)**

ख. सेवा विधि – अतिरिक्त संदाय पर ब्याज की वसूली – अभिनिर्धारित – याची द्वारा दिये गये लिखित वचनबंध में, ब्याज की रकम, जो कि प्रोद्भूत हुई हो, की वापसी के लिए कोई वचन नहीं है अतः, अब नियोक्ता, पूर्व में अदा की गई अतिरिक्त मूल रकम पर ब्याज की कोई वसूली करने से विबंधित है – ब्याज की वसूली का आदेश अपास्त – उपरोक्त निबंधनों में अपील मंजूर।

***C. Service Law – Recovery of Excess Pay – Class of Employee & Retired/In-Service Employee* – Held – Since without specifying the class of employees, Apex court in *Jagdev Singh's* case held that recovery can be made even from retired employees then the necessary inference which can be drawn that the expression "retired employees" or "employees who are deemed to retire within one year" employed in *Rafiq Masih's* case, includes within its sweep and ambit all categories of employees irrespective of the class. (Para 3.5 & 3.6)**

ग. सेवा विधि – अतिरिक्त संदाय की वसूली – कर्मचारी का वर्ग व सेवानिवृत्त/सेवारत कर्मचारी – अभिनिर्धारित – चूंकि सर्वोच्च न्यायालय ने *जगदेव सिंह* के प्रकरण में कर्मचारियों के वर्ग को विनिर्दिष्ट किये बिना अभिनिर्धारित किया कि सेवा निवृत्त कर्मचारी से भी वसूली की जा सकती है, तब आवश्यक निष्कर्ष जो निकाला जा सकता है वह यह है कि अभिव्यक्ति ''सेवा निवृत्त कर्मचारी'' या ''कर्मचारी जो एक वर्ष के भीतर सेवानिवृत्त हो सकते हैं'', जिसे *रफीक मसीह* के प्रकरण में प्रयुक्त किया है, उसकी व्याप्ति एवं परिधि के भीतर, वर्ग को विचार में लिए बिना, सभी प्रवर्ग समाविष्ट हैं।

Cases referred:

(2015) 4 SCC 334, AIR 2016 SC 3523.

Krishna Kartikey Sharma, for the appellant.
M.P.S. Raghuvanshi, Addl. A.G. for the respondent/State.

O R D E R

The Order of the Court was passed by :
SHEEL NAGU, J. :-

PROLOGUE

The present intra court appeal filed u/S.2(i) of M.P. Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, 2005 assails the final order dated 22.02.2021 passed in WP 11449/2021 by the learned Single Judge while exercising writ jurisdiction of this Court u/Art. 226 of the Constitution dismissing the petition in question by which challenge was made to the order dated 28.07.2020 by which the employer directed recovery of an amount of Rs.1,07,913/- (the principal amount of excess payment of Rs.57,419 + interest of Rs.50,494/- over the principal amount), which has been paid in excess during the period from July, 2009 to July 2018 to petitioner/a Vanrakshak (Class III emoployee) when wrong fixation was made of increment in 2011 and also due to wrong fixation of pay in 2017.

SUBMISSIONS

2. Learned counsel for petitioner/appellant submits by relying upon the decision of the Apex Court in the case of *State of Punjab & ors. Vs. Rafiq Masih (White Washer) etc.* (2015) 4 SCC 334 that the case of petitioner, who is a serving Class III employee, is covered by the ratio laid down in the said Apex Court decision in Para 18, which is reproduced below for ready reference and convenience:-

> *"18. It is not possible to postulate all situations of hardship, which would govern employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement. Be that as it may, based on the decisions referred to herein above, we may, as a ready reference, summarise the following few situations, wherein recoveries by the employers, would be impermissible in law:*
>
> (i) *Recovery from employees belonging to Class-III and Class-IV service (or Group C and Group D service).*
>
> (ii) *Recovery from retired employees, or employees who are due to retire within one year, of the order of recovery.*
>
> (iii) *Recovery from employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.*
>
> (iv) *Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.*
>
> (v) *In any other case, where the Court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover."*

2.1 On the basis of aforesaid decision of *Rafiq Masih* (supra), learned counsel for petitioner/appellant submits that there was no misrepresentation made by petitioner and the wrong fixation of increment in 2011 and wrong fixation of salary in 2017 were for reasons not attributed to petitioner but solely to the employer. Thus, learend counsel for petitioner/appellant urges that the writ Court committed error in rejecting the writ petition.

2.2 Learned counsel for the State on the other hand referring to reply to the writ petition submits that at the time of fixation of increment in 2011 and as well as fixation of salary in 2017, petitioner had furnished written undertaking that in case it is found that the benefit extended is in excess of the due amount then the

same can be recovered from the petitioner or in her absence from her legal heirs. These written undertakings have been signed by petitioner in 2009 and 2017 which are on record as Annexure R/1 accompanying the reply of State in WP.

2.3 Learned Single Bench has held that in view of undertakings and the subsequent decision of Apex Court in case of *High Court of Punjab and Haryana Vs. Jagdev Singh* AIR 2016 SC 3523, the earlier decision of *Rafiq Masih* (supra) has been distinguished by holding that the ratio laid down by *Rafiq Masih* (supra) would not apply to cases of recovery from retired employee who had submitted written undertaking promising to return the excess amount as and when the same is found to be excess in the future. By holding so the Apex Court in the case of *Jagdev Singh* (supra) however directed the employer to make recovery in reasonable instalments from retired employee.

FINDINGS

3. In the instant case, it is not disputed that petitioner/appellant is a Class III employee and continues to be in service and therefore, her case as per learned counsel for petitioner/appellant falls in the cases of recovery from employees belonging to Class III and Class IV category.

3.1 Thus the question before this Court which falls for consideration is as follows:-

> "*Whether the benefit of ratio laid down by Rafiq Masih (supra) would be available in cases of recovery from employees who are still in service and are holding post in Class III category and who had given written undertaking as a pre-condition to grant of payment promising to return any amount which is found to be in excess of entitlement ?"*

3.2 For the purpose of understanding the ratio laid down in the case of *Jagdev Singh* (supra), it would be apt to reproduce the relevant paragraphs of the said judgment:-

> *" 2. The facts lie in a narrow compass. The Respondent was appointed as a Civil Judge (Junior Division) on 16 July 1987 and was promoted as Additional Civil Judge on 28 August 1997 in the judicial service of the State. By a notification dated 28 September 2001, a pay scale of Rs. 10000-325-15200 (senior scale) was allowed under the Haryana Civil Service (Judicial Branch) and Haryana Superior Judicial Service Revised Pay Rules 2001. Under the rules, each officer was required to submit an undertaking that any excess which may be found to have been paid will be refunded to the Government either by adjustment against future payments due or otherwise.*
>
> *3 The Respondent furnished an undertaking and was granted the revised pay scale and selection grade of Rs. 14300-400-18000-300.*

While opting for the revised pay scale, the Respondent undertook to refund any excess payment if it was so detected and demanded subsequently. The revised pay scale in the selection grade was allowed to the Respondent on 7 January 2002.

4 The Respondent was placed under suspension on 19 August 2002 and eventually, was compulsorily retired from service on 12 February 2003.

5 In the meantime, this Court in Civil Writ (C) 1022 of 1989 accepted the recommendations of the First National Judicial Pay Commission (Shetty Commission). Thereupon, the Haryana Civil Services (Judicial Branch) and Haryana Superior Judicial Service Revised Pay Rules 2003 were notified on 7 May 2003.

6 In view thereof the pay scales of judicial officers in Haryana were once again revised with effect from 1 January 1996. An exercise was undertaken for adjustment of excess payments made to judicial officers, following the notification of the revised pay rules. On 18 February 2004, a letter for the recovery of an amount of Rs. 1,22,003/- was served upon the Respondent pursuant to the direction of the Registrar of the High Court.

7 The Respondent challenged the action for recovery in writ proceedings under Article 226. The petition was allowed by the impugned judgment of the High Court. The High Court found substance in the grievance of the Respondent that the excess payment made to him towards salary and allowance prior to his retirement could not be recovered at that stage, there being no fraud or misrepresentation on his part.

8 The order of the High Court has been challenged in these proceedings. From the record of the proceedings, it is evident that when the Respondent opted for the revised pay scale, he furnished an undertaking to the effect that he would be liable to refund any excess payment made to him. In the counter affidavit which has been filed by the Respondent in these proceedings, this position has been specifically admitted. Subsequently, when the rules were revised and notified on 7 May 2003 it was found that a payment in excess had been made to the Respondent. On 18 February 2004, the excess payment was sought to be recovered in terms of the undertaking.

9 The submission of the Respondent, which found favour with the High Court, was that a payment which has been made in excess cannot be recovered from an employee who has retired from the service of the state. This, in our view, will have no application to a situation such as the present where an undertaking was specifically furnished by the officer at the time when his pay was initially revised accepting that any payment

found to have been made in excess would be liable to be adjusted. While opting for the benefit of the revised pay scale, the Respondent was clearly on notice of the fact that a future re-fixation or revision may warrant an adjustment of the excess payment, if any, made.

10 . In State of Punjab & Ors. vs. Rafiq Masih (White Washer) this Court held that while it is not possible to postulate all situations of hardship where payments have mistakenly been made by an employer, in the following situations, a recovery by the employer would be impermissible in law:

"(i) Recovery from employees belonging to Class-III and Class-IV service (or Group 'C' and Group 'D' service).

(ii) Recovery from retired employees, or employees who are due to retire within one year, of the order of recovery.

(iii) Recovery from employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.

(iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.

(v) In any other case, where the Court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover." (emphasis supplied).

11 The principle enunciated in proposition (ii) above cannot apply to a situation such as in the present case. In the present case, the officer to whom the payment was made in the first instance was clearly placed on notice that any payment found to have been made in excess would be required to be refunded. The officer furnished an undertaking while opting for the revised pay scale. He is bound by the undertaking.

12 For these reasons, the judgment of the High Court which set aside the action for recovery is unsustainable. However, we are of the view that the recovery should be made in reasonable instalments. We direct that the recovery be made in equated monthly instalments spread over a period of two years.

13 The judgment of the High Court is accordingly set aside. The Civil Appeal shall stand allowed in the above terms. There shall be no order as to costs. "

3.3 The subsequent decision in *Jagdev Singh* (supra) was a case of a Civil Judge (Junior Divison) who had been extended pay-scale of higher judicial

service and was compulsorily retired in 2003 against whom impugned recovery was made from sometime in 2004-05 of an amount of Rs. 1,22,003/-. It was found by the Apex Court that the said Civil Judge during the time of receipt of excess payment during his service tenure had furnished written undertaking for adjustment of excess amount, if found due in future. In this factual background, the Apex Court in *Jagdev Singh* (supra) differs with it's earlier verdict in *Rafiq Masih* (supra) and holds that if a written undertaking has been given promising to return the excess amount, if found due, then recovery of excess amount can be effected even after retirement, since the retired employee was put to notice and is bound by her/his undertaking.

3.4 Petitioner/appellant herein is not a retired employee but is still in service. However, the petitioner had given written undertakings in 2009 and 2017 as explained above and thus to that extent bound herself.

3.5 Since the Apex Court in the case of *Jagdev Singh* (supra) held that recovery can be made even from retired employees without specifying the Class of employees (Class III, Class IV or any other Class) then the necessary inference which can be drawn is that clause (ii) of Para 18 of *Rafiq Masih* (supra) by employing the expression "retired employees" or "employees who are deemed to retire within one year", includes within it's sweep and ambit all categories of employees irrespective of the Class. Clause (ii) of Para 18 of *Rafiq Masih* (supra) which stands explained by *Jagdev Singh* (supra) does not grant immunity from recovery to retired employees or employees who are retiring within one year of the excess payment in cases where they have submitted written undertaking for making recovery.

3.6 Thus, if the factor of existence of written undertaking pervades all Classes of employees (from Class I to Class IV) who have either retired or are retiring within one year of the order of recovery, then this Court sees no reason as to why the same factor (of existence of written undertaking) should not apply and bind Class III or Class IV employees provided vide Clause (i) of Para 18 of *Rafiq Masih* (supra).

3.7 A written undertaking by an employee binds the employee in the future. This ensures that public money if paid to an employee in excess of the amount due can be returned and credited to the public exchequer, the place where it actually belongs. This may cause inconvenience to the employee especially when the time gap between the making of excess payment and it's recovery is long. However, it cannot be lost sight of that the excess payment made and enjoyed by the employee concerned neither belongs to the employee nor to the accountant or the officers making the excess payment but to the State. The excess payment has to reach it's rightful place so that the same can be used in public interest.

3.8 In the conspectus of above analysis, this Court has no hesistation to hold that the excess payment given to petitioner at the time of grant of increment in 2011 and during fixation of pay in 2017 deserves to be recovered.

4. The only question which now remains to be answered is as to whether it was lawful on the part of the employer to have also recovered the interest over the excess payment.

4.1 For answering this question, a close scrutiny of written undertakings is necessary.

4.2 The two undertakings given by petitioner in 2009 and 2017 are reproduced below for ready reference and convenience:-

Undertaking given in 2009

पप्रत्र –तीन

वचन पत्र (Undertaking)

मुझे यह ज्ञात है कि दिनांक 01/01/2006 से स्वीकृत मध्यप्रदेश वेतन पुनरीक्षण नियम, 2009 के प्रावधानों के अन्तर्गत मेरा जो वेतन नियतन अभी पुनरीक्षित वेतन ढॉचे में किया गया है वह अनन्तिम (Provisional) हैं। मैं वचन **देता/देती** हूँ कि मैं राज्य शासन को वह संपूर्ण राशि जो कि वेतन नियतन में अनियमितता के कारण तथा अन्य कोई भी धनराशि जो कि इस प्रकार वेतन नियतन के कारण मुझे अधिक भुगतान की गई हो, शासन के निर्देशों के अनुरूप निर्धारित राशि वापस **करूंगा/करूंगी** तथा इस प्रकार की राशि मेरे देय स्वत्वों से जिनमें पेंशन ग्रेच्यूटी एवं अवकाश नगदीकरण की राशि भी सम्मिलित है, काटी जा सकेगीं। मैं यह भी वचन **देता/देती** हूं कि यदि उक्तानुसार मेरे द्वारा देय राशि को मैं लौटाने में असमर्थ **रहता/रहती** हूँ तो इस देय राशि की वापसी के लिये मैं अपने उत्तराधिकारियों, निष्पादकों, प्रतिनिधियों और समनुदेशितियों को आबद्ध **करता/करती** हैं। मैं यह भी सहमति **देता/देती** हूं कि मेरे द्वारा देय राशि मुझसे राजस्व की बकाया के रूप में वसूल कर ली जावे।

साक्षी :– हस्ताक्षर शासकीय कर्मचारी

हस्ताक्षर :– पदनाम

पता :– स्थान

दिनांक ..... दिनांक .....

Undertaking given in 2016

पप्रत्र –तीन

वचन पत्र (Undertaking)

मुझे यह ज्ञात है कि दिनांक 01/01/2016 से स्वीकृत मध्यप्रदेश वेतन पुनरीक्षण नियम, 2017 के प्रावधानों के अन्तर्गत मेरा जो वेतन नियतन अभी पुनरीक्षित वेतन मेट्रिक्स में किया गया है वह अनन्तिम (Provisional) हैं। मैं वचन **देता/देती** हूँ कि मैं राज्य शासन को वह संपूर्ण राशि जो कि वेतन नियतन में अनियमितता के कारण तथा अन्य कोई भी धनराशि जो कि इस प्रकार वेतन नियतन के कारण मुझे अधिक भुगतान कि गई है, शासन के निर्देशों के अनुरूप निर्धारित राशि वापस **करूंगा/करूंगी** तथा इस प्रकार की राशि मेरे देय स्वत्वों से जिनमें पेंशन, ग्रेच्यूटी एवं अवकाश नगदीकरण की राशि भी सम्मिलित है, काटी जा सकेगी। मैं यह भी वचन **देता/देती** हूँ कि यदि उक्तानुसार मेरे द्वारा देय राशि को मैं लौटाने में असमर्थ **रहता/रहती** हूँ, तो इस देय राशि की वापसी के लिए मैं अपने उत्तराधिकारियों, निष्पादकों, प्रतिनिधियों और समनुदेशितियों को आबद्ध **करता/करती** हूँ। मैं यह भी सहमति **देता/देती** हूं कि मेरे द्वारा देय राशि मुझसे राजस्व की बकाया के रूप में वसूल कर ली जाए।

साक्षी :–	हस्ताक्षर शासकीय कर्मचारी
हस्ताक्षर :–	पदनाम
पता :–	स्थान
दिनांक	दिनांक .....

4.3 A microscopic reading of undertakings reveals that petitioner has undertaken to return the amount which is found to be in excess of amount due but there is no undertaking in regard to recovery even of interest over the excess payment was given.

4.4 In both written undertakings as aforesaid, there is no promise extended by petitioner for recovery of interest over the excess payment and therefore, it is explicit that petitioner had undertaken to return the amount which is found to be in excess of amount due but there was no undertaking for returning the interest over the said excess amount.

4.5 Since the immunity extended to Class III employees by the decision of *Rafiq Masih* (supra) was diluted by *Jagdev Singh* (supra) in cases where written undertaking had been furnished, it can safely be held that if the written undertaking does not contain any promise to return the interest amount, which may have accrued, then the employer is estopped in view of decision of *Rafiq Masih* (supra) and *Jagdev Singh* (supra) to make any recovery of interest over the excess principal amount paid to petitioner in the past.

5. The aforesaid arrangement of preventing the employer from recovering interest over and above the amount for which undertaking was given, would serve

dual purposes. It shall prevent wastage of public money by enabling the employer to recover the principal amount as promised vide undertaking and also would prevent undue enrichment of the employer by means of interest. An argument may be raised that once an undertaking is given, may be, for refund of excess principal amount then the employee concerned is also liable to pay interest for having retained public money for number of years before refunding the same. The argument ostensibly appears to be attractive but in reality and from practical point of view is neither viable nor feasible. The reason being that the undertaking is limited to the recovery of principal amount of excess payment. The other reason is that there was no misrepresentation on the part of employee to retain and consume the excess amount for number of years. Thus, at the time of refund, the employee ought not to be additionally burdened by recovery of interest over and above the principal amount. Therefore, from the point of view of equity, good conscience and fair play, the amount of recovery which the employer is liable to make based on undertaking in writing, would be limited to the quantum and nature of the amount promised to be refunded in the undertaking. In this view of the matter, it would be in the interest of justice and to prevent undue enrichment of either of the parties, that the quantum and nature of recovery in such cases is limited to the quantum and nature of recovery promised in the written undertaking to be refunded.

6. From the aforesaid analysis what comes out loud and clear is that the employer is entitled in the face of written undertakings given by petitioner/ appellant to reocver the principal amount of excess payment of Rs. 57,419/- but not the interest amount of Rs.50,494/-.

7. Consequently, this Court **allows** the present writ appeal to the following extent:-

(i) The impugned order 22.02.2021 passed in WP 11449/2021 by learned Single Judge so far as it permits recovery of principal amount of excess payment of Rs.57,419/- is upheld.

(ii) The impunged order of writ court dated 22.02.2021 passed in WP 11449/2021 and the impugned order dated 28.07.2020 vide P/1 is set aisde to the extent it permits recovery of amount of interest of Rs. 50,494/-.

(iii) Recovery of principal excess amount can be made from petitioner/ appellant in easy instalments. However, if recovery of interest amount has already been made then the same be refunded to the petitioner/appellant forthwith.

(iv) No order as to cost.

Order accordingly

I.L.R. [2021] M.P. 2025 (DB)
WRIT PETITION

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

WP No. 1930/2020 (PIL) (Gwalior) decided on 6 July, 2021

OMNARAYAN SHARMA …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

***A. Constitution – Article 226 and NALSA (Effective Implementation of Poverty Alleviation Schemes) Scheme, 2015, Clause 10(3) – Swachh Bharat Mission – Constructions of Toilets* – Held – Allegations of irregularities/ corruption and siphoning off money of beneficiaries in respect of construction of toilets are *prima facie* serious in nature – Collector and CEO, Zila Panchayat directed to look into the allegations with utmost promptitude and role of concerned persons be enquired expeditiously. (Para 18 & 19)**

क. संविधान – अनुच्छेद 226 एवं नालसा (गरीबी उन्मूलन योजनाओं का प्रभावी कार्यान्वयन) योजना, 2015, खंड 10(3) – स्वच्छ भारत अभियान – शौचालयों का निर्माण – अभिनिर्धारित – शौचालयों के निर्माण के संबंध में अनियमितताओं/भ्रष्टाचार एवं हिताधिकारियों से बेईमानी से पैसा निकालने के अभिकथन, प्रथम दृष्ट्या गंभीर स्वरूप के हैं – कलेक्टर एवं सी.ई.ओ., जिला पंचायत को अभिकथनों पर अत्यंत तत्परता से विचार करने एवं संबंधित व्यक्तियों की भूमिका की शीघ्रता से जांच करने हेतु निदेशित किया गया।

***B. Legal Services Authorities Act (39 of 1987) and NALSA (Effective Implementation of Poverty Alleviation Schemes) Scheme, 2015, Clause 9, 10 & 11 – Complaint of Corruption* – Held – If any complaint is received regarding inaction, inappropriate execution, corruption or any matter related thereto which comes under purview of the Act of 1987 and Scheme of 2015, then District Legal Services Authority (DLSA) shall proactively take care of situation by proceeding as per clause 9, 10 & 11 of the Scheme 2015. (Para 22.1)**

ख. विधिक सेवा प्राधिकरण अधिनियम (1987 का 39) एवं नालसा (गरीबी उन्मूलन योजनाओं का प्रभावी कार्यान्वयन) योजना, 2015, खंड 9, 10 व 11 – भ्रष्टाचार की शिकायत/परिवाद – अभिनिर्धारित – यदि अकर्मण्यता, अनुचित निष्पादन, भ्रष्टाचार या उससे संबंधी किसी मामले के संबंध में कोई शिकायत प्राप्त होती है, जो 1987 के अधिनियम एवं 2015 की स्कीम की परिधि के अंतर्गत आती है, तब जिला विधिक सेवा प्राधिकरण (DLSA) 2015 की स्कीम के खंड 9, 10 एवं 11 के अनुसार कार्यवाही करते हुए स्थिति का अग्रसक्रिय रूप से ध्यान रखेगा।

***C. Constitution – Article 226 and NALSA (Effective Implementation of Poverty Alleviation Schemes) Scheme, 2015, Clause 10(3) – Legal Proceedings – Scope & Jurisdiction* – Held – State authority/District authority may file appropriate legal proceedings as per clause 10(3) by way of complaint before Lokayukt as per relevant provisions or may file private complaint against the erring persons or may file a petition if subject matter requires so by way of a Public Interest Litigation under Article 226 of Constitution. (Para 22.2)**

ग. संविधान – अनुच्छेद 226 एवं नालसा (गरीबी उन्मूलन योजनाओं का प्रभावी कार्यान्वयन) योजना, 2015, खंड 10(3) – विधिक कार्यवाहियां – व्याप्ति व अधिकारिता – अभिनिर्धारित – राज्य प्राधिकरण/जिला प्राधिकरण सुसंगत उपबंधों के अनुसार लोकायुक्त के समक्ष शिकायत के माध्यम से खंड 10(3) के अनुसार समुचित विधिक कार्यवाहियां प्रस्तुत कर सकता है या गलती करने वाले व्यक्तियों के विरूद्ध निजी शिकायत प्रस्तुत कर सकता है या यदि विषयवस्तु द्वारा अपेक्षित हो तो संविधान के अनुच्छेद 226 के अंतर्गत लोक हित वाद के माध्यम से याचिका प्रस्तुत कर सकता है।

***D. Legal Services Authorities Act (39 of 1987), Section 29-A and NALSA (Effective Implementation of Poverty Alleviation Schemes) Scheme, 2015 – Framing Regulations* – Held – State authority is requested to contemplate for framing suitable regulations as per provisions of Act of 1987, especially u/S 29-A for effective implementation of different schemes of Government of India/State Government falling under the Scheme of 2015 – It is also requested to contemplate about preparation of a software/Mobile Application for keeping a tab over the complaints received and their outcome.**

(Para 22.3)

घ. विधिक सेवा प्राधिकरण अधिनियम (1987 का 39), धारा 29–A एवं नालसा (गरीबी उन्मूलन योजनाओं का प्रभावी कार्यान्वयन) योजना, 2015 – विनियम विरचित करना – अभिनिर्धारित – राज्य प्राधिकरण से 2015 की योजना के अंतर्गत भारत सरकार/राज्य सरकार की विभिन्न योजनाओं के प्रभावी क्रियान्वयन हेतु, 1987 के अधिनियम के उपबंध अनुसार, विशेष रूप से धारा 29–A के अंतर्गत उपयुक्त विनियम विरचित करने हेतु अनुध्यात करने का अनुरोध है – यह भी अनुरोध है कि प्राप्त शिकायतों और उनके परिणामों पर लगातार नजर रखने के लिए एक सॉफ्टवेयर/मोबाईल एप्लिकेशन तैयार करने पर विचार करें।

U.K. Bohre, for the petitioner.
Ankur Modi, Addl. A.G. for the respondents/State.

O R D E R

The Order of the Court was passed by :

ANAND PATHAK, J. :- The present petition under Article 226 of the Constitution of India has been preferred by the petitioner as Pro Bono Publico projecting

himself to be a public spirited citizen and has raised the grievance regarding illegality and irregularity committed by the respondents, especially respondents No. 6 to 13 who according to petitioner have not undertaken any enquiry over the complaint of petitioner regarding corruption / illegality committed in construction of toilets under Swachh Bharat Mission.

2. Counsel for the petitioner has sought following reliefs:-

> *''1. प्रतियाचिकाकर्ता क0 1 लगायत 13 को आदेश / निर्देश दिया जाये कि जिला भिण्ड के अन्तर्गत 6 जनपद पंचायत, अटेर, मेहगांव, भिण्ड, गोह, रोन एवं लहार के अन्तर्गत शौचालय निर्माण में हुये भ्रष्टाचार की जांच किसी निष्पक्ष एजेन्सी / अधिकारी से करायी जायें तथा उक्त भ्रष्टाचार में संलिप्त अधिकारियों / कर्मचारियों के विरूद्ध कानूनी कार्यवाही की जायें ।*
>
> *2. प्रतियाचिकाकर्ता क0 1 लगायत 13 को आदेश / निर्देश दिया जाये कि उक्त शौचालय निर्माण में हुये भ्रष्टाचार से शासन को जो हानि हुवी है उसकी वसूली दोषी अधिकारी / कर्मचारियों से की जायें ।*
>
> *3. अन्य न्यायोचित सहायता जो प्रकरण की परिस्थितियों के अनुरूप उचित हो वह माननीय न्यायालय द्वारा याचिकाकर्ता के हित में जारी की जाये ।*
>
> *4. याचिकाकर्ता को मुकदमें का हर्जा खर्चा भी प्रतियाचिकाकर्तागण से दिलाया जाये और याचिकाकर्ता की जनहित याचिका स्वीकार की जाये तो माननीय न्यायालय की अतिकृपा होगी।''*

3. Precisely stated facts of the case are that on 31/12/2019, one Ramu Chaudhary, resident of village Etahar, District Bhind registered a complaint on Chief Minister Helpline Portal that Sarpanch, Secretary and other officers of the Gram Panchayat Ater, District Bhind have embezzled public fund in the name of construction of toilets but neither toilets have been constructed nor any amount for construction has been received by 93 beneficiaries. Despite making complaint by the petitioner on behalf of the beneficiaries to Collector, District Bhind no affirmative steps have been taken.

4. It is the grievance of the petitioner that in other blocks of District Bhind also corruption and illegality have been conducted in construction of toilets under Swachh Bharat Mission. Petitioner placed the list of beneficiaries (94 in number) vide Annexure P/3, who did not receive the benefits of toilets nor any amount. Petitioner also referred the screen shot of app. (Pandit Deendayal Shram Seva App) to demonstrate that allegedly amount has been received by the beneficiaries but in fact bogus papers have been prepared and amount has been siphoned off.

5. Learned counsel for the respondents/State opposed the prayer and placed certain documents on record. It is the submission of learned counsel for the State

that immediately after issuance of notice in this writ petition (on 27/8/2020), CEO, Zila Panchayat, Bhind vide order dated 14/1/2021 (Annexure R/1) constituted a committee to look into the complaint made by petitioner. He also referred the show cause notice issued by same authority to then Panchayat Secretary, Gram Rojgar Sahayak and other Secretaries, who worked at the relevant point of time including the then Supervisor. Therefore, as per respondents, enquiry is under process. Learned Government counsel assured this Court that due enquiry would be conducted and if any illegality or irregularity is found then same shall be taken care of earnestly and consequent action shall be taken as per enquiry report.

6. Rejoinder has been filed by petitioner in which he referred statements of certain residents of Gram Panchayat Etahar, who specifically referred the fact regarding non-receipt of any amount for construction of toilets. They also denied the construction of toilets at the instance of Gram Panchayat.

7. Heard learned counsel for the parties at length and perused the record.

8. This is a case by way of Pro Bone (sic: Bono) Publico; whereby, petitioner as public interest litigant raised the question of alleged illegality and corruption brewing in the Gram Panchayat Etahar, Tahsil Ater, District Bhind regarding implementation of Swachh Bharat Mission Scheme, which is a flagship scheme of Government of India to solve problems of sanitation and waste management in India by ensuring hygiene across the country. Primary object of this scheme is to eliminate open defecation and improve solid waste management. In the challenging period of COVID-19 Pandemic cleanliness and public hygiene assumed much significance. Therefore, it is the solemn duty of the District and Local Administration as well as local self government to look into the effective implementation of this scheme.

9. National Legal Services Authority (NALSA) under the provisions of Legal Services Authorities Act, 1987 has framed certain schemes encompassing wide range of subjects and the compendium of the said schemes reflects one such scheme namely **NALSA (Effective Implementation of Poverty Alleviation Schemes) Scheme, 2015.** This scheme is built on the foundation that poverty is a multi dimensional experience and is not limited to the issues of income. Multi dimensional poverty includes issues like health (including mental health), access to water, education, sanitation, subsidies and basic services, social exclusion, discrimination etc.

10. Further, in identifying the specific scheme for implementation at the State and District Level, Legal Services Authorities as per NALSA are expected to be cognizant of the fact that various vulnerable and marginalized groups experience poverty in myriad and unique ways.

11. To address this exigency faced by people the Scheme of 2015 as referred above has been conceptualized. In the scheme, following topics have been discussed:-

Clause 4 -Objectives of the Scheme:-,

Clause 5 -Identification of Poverty Alleviation Schemes:-,

Clause 6 -Organization of Awareness Programmes:-,

Clause 7 - Legal Services Officers and Para-legal Volunteers:-,

1) Every District Authority and Taluka Legal Services Authority shall designate at least three panel lawyers as Legal Services Officers for the purpose of this Scheme.

2) District Authorities shall constitute teams of PLVs under a Legal Services Officer to implement this Scheme and the Legal Services Officer will supervise and mentor the PLVs in his team to help the beneficiaries access the various schemes of the Govt.

3) District Authorities shall conduct specialised training programs for panel of lawyers, members working in legal services clinics, members of panchayats, law students and other para-legal volunteers to assist in the implementation of the Scheme, to sensitise them regarding the needs of persons belonging to socially and economically weaker sections and the benefits that they can avail through Poverty Alleviation Schemes.

Clause 8 - Legal Assistance for Access to Poverty Alleviation Schemes,

Legal assistance must be provided to all the Scheme Beneficiaries seeking access to Poverty Alleviation Schemes. Legal Services to be provided by Legal Services Officers or volunteers under this Scheme includes, inter alia:

1) Informing the Scheme Beneficiaries about each of the Poverty Alleviation Scheme to which they are entitled, and the benefits thereunder

2) Assisting the Scheme Beneficiary in procuring the documents required for availing the benefits under any of the Poverty Alleviation Scheme

3) Informing the Scheme Beneficiary of the name and address of the designated authority or the officer to be approached for registration under any of the Poverty Alleviation Schemes

4) Offering to send para-legal volunteers including from the legal services clinics with Scheme Beneficiaries to the office of

the designated authority or the officer to be approached under any of the Poverty Alleviation Schemes

5) Informing the Scheme Beneficiary of her option to register a complaint with the Legal Services Officer or para-legal volunteer, about any designated authority or officer under any of the Poverty Alleviation Schemes who refuses to cooperate with the Scheme Beneficiary in providing her access to the benefits that she is entitled to under the Poverty Alleviation Scheme.

6) Maintaining a record of all the complaints received under sub-clause(5).

7) Providing Scheme Beneficiaries with the contact number, if available, of the Legal Services Officer, and availability of the Legal Services Officer on call during working hours for such Scheme Beneficiaries to whom contact number is provided

Clause 9 -Action by Legal Services Officers on complaints;

1) On receiving complaints under sub-clause (5) of clause 8, each Legal Services Officer shall herself personally accompany the Complainant Beneficiary to the office of the designated authority or officer, and assist the Complainant Beneficiary in availing the benefit that she is entitled to under the Poverty Alleviation Scheme.

2) In case the designated authority or officer fails to register the Complainant Beneficiary in the Poverty Alleviation Scheme, the Legal Services Officer shall submit a complaint to the District Authority. The letter of complaint shall describe the conduct of the designated authority or officer who refused to register the Complainant Beneficiary under the Poverty Alleviation Scheme, and circumstances of such refusal and whether refusal was despite submission of all necessary docuemnts.

Clause 10.- Action by District Authority and State Authority on complaints:-

1) On receiving a complaint regarding the designated authority or officer, the District Authority shall seek a report from the concerned officer regarding the reason for denying the benefits under the Poverty Alleviation Scheme to the complainant Beneficiary. In the event that sufficient reason is not provided by the concerned officer for refusal to register the Complainant Beneficiary in the Poverty Alleviation Scheme or to provide benefits under the Poverty Alleviation Scheme, the District

Authority shall immediately communicate to the superior officer in the department the details of the refusal to provide access to the Poverty Alleviation Scheme.

2) If the superior officer, in the opinion of the District Authority, also withholds the benefits under the Poverty Alleviation Scheme without sufficient cause, the District Authority shall then communicate the same to the State Authority.

3) On receiving such communication from the District Authority, the State Authority may choose to further pursue the matter with the concerned department ***or file appropriate legal proceedings*** *to ensure that the Complainant Beneficiary receives the benefit under the Poverty Alleviation Scheme.*

4) The District Authority, through para-legal volunteers or legal services clinics, shall provide regular updates to the Complainant Beneficiary about the status of the complaint.

Clause ll.-Evaluation of the Scheme:-

1)Every Legal Services Officer shall follow-up with each Scheme Beneficiary who sought legal assistance under this Scheme and record:

a. if such person was able to register under the Poverty Alleviation Scheme sought to be registered under and whether such benefits were being received

b. any grievances experienced by the Scheme Beneficiaries in getting registered and availing benefits under the various Poverty Alleviation Schemes.

2) The District Authority shall compile the observations made under sub-clause (1) for all the Legal Services Officers working under the Scheme in the district and shall send a copy of such observations in a complied document to the State Authority every six months.

3) The State Authority shall consolidate the compiled documents received from all the District Authorities under sub-clause (2) and hold a meeting every 6 months to review the functioning and effectiveness of this Scheme. The minutes of such meeting shall be recorded and published as a public document.

4) If in the meeting under sub-clause (3) the State Authority finds a substantive or procedural defect in any of the Poverty Alleviation Schemes which makes seeking benefits under the

scheme a problem for the Scheme Beneficiaries, such defect must be brought to the notice of the Central Government or the State Government as the case may be for improving the specific Poverty Alleviation Scheme and / or its effective implementation."

12. Perusal of the whole scheme indicates that certain responsibilities have been bestowed upon the State and District Legal Services Authorities to train the legal and para-legal volunteers for providing legal assistance for giving access to beneficiaries to Poverty Alleviation Scheme and to act upon the complaints if the benefits have not been extended to him/her or if any authority refuses to cooperate with the scheme beneficiaries in providing access to the benefits.

13. As referred in the Scheme of 2015, poverty is a multi dimensional experience and it includes basic services including sanitation etc. and when a duty has been cast upon Legal Services Authority as per the Legal Services Authority Act, 1987 and Scheme of 2015 then if any complaint is received by the Legal Services Officer from complainant / Scheme Beneficiary then such complaint like the present one can be taken care of by the District Authority as per Clause (9), (10) and (11) of the Scheme of 2015 by the District Authority and even by the State Authority.

14. It is being experienced by this Court that many complaints come regarding poor implementation, corruption and / or irregularities in Schemes like MGNREGA and Swachh Bharat Mission regarding construction of toilets or non-grant of amount to the beneficiaries for construction of toilets, etc. and by way of Public Interest Litigation, people seek Continuing Mandamus from this Court, whereas, provisions of Act of 1987 and Scheme of 2015 are apparently also available to address such problems.

15. Clause 10(3) of Scheme of 2015 gives option to choose between the Persuasion (with the concerned Department) or Petition (to file appropriate legal proceedings). Here, appropriate legal proceedings may include complaint before the Lokayukt, if it comes under the purview of said Authority or private complaint against the erring persons or to file a Petition on behalf of complainant under Article 226 of the Constitution of India as Public Interest Litigation. It can club cause of more than one beneficiaries also.

16. Recently, Ministry of Panchayati Raj, Government of India has undertaken steps in respect of Online Audit and Social Audit of 20% Gram Panchayats' in every Janpad Panchayat and therefore, it appears that Government also intends to make these Institutions more accountable which are having direct bearing over day to day welfare of people at large. In pursuance thereof, a circular has also been issued by Panchayat Raj Directorate, Madhya Pradesh, Bhopal dated 17/2/2021 to all CEOs of Zila Panchayats / Janpad Panchayats to organize camps in this regard.

17. State Authority may contemplate about preparation of one Software and Mobile Application (Mobile App.) for keeping a tab over the complaints received and their outcome. This Software / Mobile App. may coordinate amongst the concern departments so that complaints received over the said application (App.) would be displayed all over. Concerned stakeholders and State Authority / District Authority would be in a better position to proceed as per the spirit of Act of 1987 and Scheme of 2015. State Authority even has power to make regulations as per Section 29-A of the Act 1987 to provide for all matters for which provision is necessary or expedient for the purposes of giving effect to the provisions of Act.

18. Here, in the case in hand, it appears that certain beneficiaries allegedly did not receive the benefits under Swachh Bharat Mission about construction of toilets. As per the allegations, neither toilets have been constructed by the concern authorities nor amount has been transferred in their accounts and it is the allegations that amount of 93 beneficiaries (or may be 94) has been siphoned off by Sarpanch /Panchayat Secretary / Gram Rojgar Sahayak etc. Allegations are prima facie serious in nature.

19. This Court cannot go into the authenticity or otherwise of the allegations at this juncture especially when CEO, Zila Panchayat is seized of the matter vide show cause notices issued to erring officers / authorities in this regard. Therefore, at this juncture, any observation would pre-empt the controversy. However, Collector and CEO, Zila Panchayat, Bhind are directed to look into the allegations with utmost promptitude and role of concerned Sarpanch, Panchayat Secretary, Gram Rojgar Sahayak, Supervisor and any other person involved in the transaction / or having any responsibility under the Swachh Bharat Mission Scheme failed or acted mischievously be enquired into in accordance with law. If any conclusion has not been drawn in the enquiry up till now then enquiry be conducted expeditiously within two months from the date of passing of this order and outcome of the enquiry be intimated to the office of this Court and office shall place the matter under the caption "Direction" for perusal of this Court and even if conclusion is drawn then consequential follow up action be informed to office of this Court.

20. Before parting, this Court feels it appropriate to give direction to the District Legal Services Authority to update the contents of different schemes promulgated under the different provisions of Legal Services Authority Act, 1987 including the Scheme in hand i.e. NALSA (Effective Implementation of Poverty Alleviation Schemes) Scheme, 2015 and ensure that in their respective jurisdiction (District) Poverty Alleviation Scheme especially Swachh Bharat Mission Scheme and Mahatma Gandhi National Rural Employment Guarantee Act, 2005 (MGNREGA), etc. are being properly executed and intended beneficiaries get the benefits of the scheme and if any authority refuses to cooperate with the beneficiary in providing him / her access to the benefits that she is entitled to under

any Poverty Alleviation Scheme, then the responsible authority under District Legal Services Authority (DALSA) shall proactively take care of the situation by proceeding as per Clause 9, 10 and 11 of the Scheme, 2015.

21. It is further expected from the Authority and its Office Bearers that they shall constantly organize awareness programmes as well as training programmes for Panel Lawyers / Legal Volunteers / Para-legal Volunteers as the case may be in a constructive and proactive manner. The training must sensitize the volunteers / activists to the notion that they have to act as Healers of the Society looking to the great responsibility bestowed upon them of Poverty Alleviation. **Poverty**, which is a Problem (Social Evil) can be addressed through **Law** (with its healing touch) as its solution to achieve the ultimate destination of **Development.**

22. In view of aforesaid discussion, this Court summarizes the following directions:-

(i) If, any complaint is received regarding inaction, inappropriate execution, corruption or any matter related thereto which comes under the purview of Legal Services Authority Act, 1987 and NALSA (Effective Implementation of Poverty Alleviation Schemes) Scheme, 2015 then District Legal Service Authority (DALSA) shall proactively take care of the situation by proceeding as per Clause 9,10 and 11 of the Scheme of 2015;;

(ii) State Authority/District Authority may file appropriate legal proceedings as per Clause 10 (3) of Scheme of 2015 by way of complaint before the Office of Lokayukt as per relevant provisions or may file Private Complaint against the erring persons or may file a petition if subject matter requires so by way of a Public Interest Litigation under Article 226 of the Constitution of India;

(iii) State Authority is requested to contemplate for framing of suitable regulations as per the provisions of Act of 1987, especially under Section 29-A for effective implementation of different schemes of Government of India / State Government fall under NALSA (Effective Implementation of Poverty Alleviation Schemes) Scheme, 2015. A further request is made to contemplate about preparation of a Software / Mobile Application (Mobile App.) for keeping a tab over the complaints received and their outcome; and

(iv) District Authority and its Office Bearers are expected to regularly organize awareness / training programmes for Panel Lawyers / Para-legal Volunteers in a constructive and proactive manner to sensitize them with the notion that they have to act as **Healers of**

the Society, looking to the great responsibilities bestowed upon them. Secretary, SALSA shall coordinate and guide all such awareness / training programmes.

23. Consequently, petition is disposed of with a direction to the respondents especially Collector and CEO, Zila Panchayat Bhind to look into the matter and complete the enquiry, if not already completed within two months from the date of passing of this order and if any person is found guilty then consequential follow up action shall be ensured in accordance with law. If the enquiry is already concluded then Collector and CEO are directed to place the enquiry report before the office of this Court so that same can be placed before this Court for perusal.

24. Petition stands disposed of.

25. A copy of this order be sent to Principal Secretary, Panchayat Raj, Government of Madhya Pradesh, Bhopal as well as to Member Secretary, SALSA, Jabalpur for circulation to all District Legal Service Authorities (DALSA) for sensitization and implementation of the concept as referred above by this Court.

Order accordingly

I.L.R. [2021] M.P. 2035 (DB)
WRIT PETITION

Before Mr. Justice Sujoy Paul & Mr. Justice Anil Verma

WP No. 9785/2021 (Indore) decided on 20 July, 2021

KAMLESHWAR DIXIT …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

***A. National Security Act (65 of 1980), Section 3(3) and Constitution – Article 22 – Covid-19 Pandemic – Blackmarketing of Essential Drug* – Held – In the days of extreme crises, a single act of blackmarketing of essential drug like Remedesivir is sufficient to detain a person under NSA – Whether a detenu is a social worker or an advocate is insignificant if his conduct is a threat to "public order" – Petitioner failed to establish any flaw in decision making process – Petition dismissed. (Paras 15 & 19 to 21)**

क. राष्ट्रीय सुरक्षा अधिनियम (1980 का 65), धारा 3(3) एवं संविधान – अनुच्छेद 22 – कोविड–19 महामारी – आवश्यक औषधि की कालाबाजारी – अभिनिर्धारित – अत्यंत संकट के दिनों में, रेमडेसिविर जैसी आवश्यक औषधि की कालाबाजारी का एक एकल कृत्य किसी व्यक्ति को राष्ट्रीय सुरक्षा अधिनियम के अंतर्गत निरूद्ध करने हेतु पर्याप्त है – एक निरूद्ध व्यक्ति, चाहे सामाजिक कार्यकर्ता या अधिवक्ता हो, यह महत्वहीन है यदि उसका आचरण ''लोक व्यवस्था'' के लिए खतरा है – याची विनिश्चिय करने की प्रक्रिया में कोई दोष स्थापित करने में विफल रहा – याचिका खारिज।

B. ***National Security Act (65 of 1980), Section 3(3) – Doctrine of Severability*** **– Held – Para 4 of detention order, even if it is erroneous and is deleted or treated as invalid, contents of rest of the order will be sufficient to uphold the invocation of power u/S 3(2) of the Act – The invalid para 4 will not eclipse the entire order. (Paras 11 to 14)**

ख. राष्ट्रीय सुरक्षा अधिनियम (1980 का 65), धारा 3(3) – पृथक्करणीयता का सिद्धांत – अभिनिर्धारित – निरोध आदेश का चतुर्थ पैरा, भले ही यह त्रुटिपूर्ण हो एवं हटा दिया गया हो या अवैध माना गया हो, शेष आदेश की अंतर्वस्तु अधिनियम की धारा 3(2) के अंतर्गत शक्ति का अवलंबन कायम रखने के लिए पर्याप्त होगा – अवैध चतुर्थ पैरा संपूर्ण आदेश को प्रभावहीन नहीं करेगा।

Cases referred:

W.P. No. 9792/2021 decided on 24.06.2021, W.P. No. 4499/2021 decided on 09.04.2021, 1960 2 SCR 146, 1966 2 SCR 204, (1976) 2 SCC 495, 2014 (12) SCC 106, 1974 (3) SCC 601, 2015 SCC OnLine ALL 8706, (1989) 1 SCC 374, (1986) 4 SCC 407.

C.P. Purohit, for the petitioner.
Vivek Dalal, Addl. A.G. for the respondent/State.

O R D E R

The Order of the Court was passed by :

SUJOY PAUL, J:- This petition filed under article 226 of the Constitution of India assails the order of District Magistrate, Gwalior dated 14.05.2021 (Annexure P/1), whereby the petitioner is detained in exercise of power under section 3(2) of National Security Act, 1980 (NSA Act).

2. In nutshell, the contention of the petitioner as projected by the counsel is that the petitioner is an advocate practicing at Seoni and Indore. The petitioner was called by the Special Task Force, Chindwara from where he was taken by the said force to Gwalior. A false case is lodged against the petitioner at Gwalior. The petitioner purchased Remdesivir injections for treatment of his father-in-law. Later on, his father-in-law died because of Corona. The CT scan report, death certificate and medical documents are filed as Annexure P/2 and 3.

3. Learned counsel for the petitioner submits that the petitioner has been falsely implicated. Para 4 of the impugned order shows that the same is passed without application of mind. The reasons assigned in para 4 are without any basis. The report of Superintendent of Police does not contain any such reason, which became basis for detention as per para 4 of the detention order dated 14.05.2021.

4. It is further contended by the learned counsel for the petitioner that as per recent judgment of this Court in the case of *Yatindra Verma Vs. State of MP and*

Others passed in WP No.9792/2021 dated 24.06.2021, the petitioner is similarly situated in as much as the petitioner therein was a social worker/politician, whereas, in the instant case, the petitioner is a practicing advocate. Hence, detention of petitioner is bad in law.

5. Learned Additional Advocate General supported the impugned order and contended that indisputably para 4 of the impugned order dated 14.05.2021 is erroneous and is erroneously pasted. As per the return, STF Police Station, Gwalior got information regarding black marketing of Remdesivir injections. In turn, the petitioner was arrested and 5 Remdesivir injections were recovered from him. An FIR in crime no.16/2020 under section 420, 188 of the IPC, 3/7 of the Essential Commodities Act and 3 of the Pandemic Act was duly registered at Police Station STF on 08.05.2021. Further investigation is going on.

6. As per the report of Superintendent of Police, Gwalior, the District Magistrate took necessary steps and invoked NSA Act against the petitioner. During the pandemic era, there was severe scarcity of the said injection and the petitioner's conduct became a threat to the maintenance of 'public order'. Hence, the impugned order was passed. The ground of detention and intimation regarding detention order was duly served on the petitioner on 14.05.2021 (Annexure R/3). Reliance is placed on the order passed by this Court in WP No.4499/2021 *(Kalla @ Surendra Jat Vs. State of MP and others)* decided on 09.04.2021.

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

8. During the course of hearing, on a specific question raised from the bench, learned counsel for the petitioner fairly admitted that he erroneously stated that the medical documents filed by him are related to the father-in-law of the petitioner. Para 5.4 of the petitioner shows that the petitioner is unmarried. In reply to another question from the bench, learned counsel for the petitioner fairly submitted that his contention is that article 22 of the Constitution of India is infringed because the petitioner is an advocate and he cannot be detained in this manner under the NSA Act. To this extent, he placed reliance on the judgment of this Court in the case of *Yatindra Verma* (supra).

9. The respondents by filing additional counter affidavit, clearly averred that the stand of the petitioner that he was called by the STF, Chhindwara from where he was taken by the said force to Gwalior is factually incorrect. The petitioner has been arrested at Gwalior itself.

10. Indisputably, para 4 of the impugned order dated 14.05.2021 has no foundation/basis. As per learned counsel for the respondent/State, para 4 is pasted from some other document because of a typographic error. The contention is correct because if the order of detention passed by the District Magistrate is read in juxtaposition to the Superintendent of Police's report, it will be clear like noon

day that there is no foundation on the strength of which finding of para 4 could have been recorded. Thus, finding of para 4 is an example of cut/paste syndrome and non application of mind.

11. The ancillary question is whether because of this erroneous finding mentioned in para 4 above, the entire order dated 14.05.2021 needs to be axed. A careful reading of para 3 and 5 shows that the main reason to detain the petitioner is that 5 Remdesivir injections were found in unauthorized possession of the petitioner. The order passed under the NSA is preventive and not punitive in nature. This Court is not obliged to give any finding on the correctness of the allegations against the petitioner because trial against him is pending and any such finding may have an impact on the trial. In *Yatindra Verma* (supra), this Court held that activity like black marketing the Remdesivir injections has an adverse impact on "public order" and for this reason section 3(2) of the NSA Act can very well be invoked. If para 3 of the detention order is conjointly read with the S.P's report, it will be clear that the findings are similar and the main reason of detention is black marketing and possession of 5 Remdesivir injections.

12. Reverting back to the ancillary question aforesaid, the interesting conundrum is whether the entire order dated 14.05.2021 is liable to be jettisoned if part of it is found to be erroneous or without basis.

13. This point is no more *res-integra*. The Apex Court laid down the Doctrine of Severability on the anvil of which the impugned order can be tested. In 1960 2 SCR 146 *(Y.Mahaboob Sheriff Vs. Mysore State Transport Authority),* the Apex Court held that it is open to sever the illegal part of the order from the part which is legal. This principle was followed in 1966 2 SCR 204 *(R. Jeevarantnam Vs. State of Madras)*. It was held that two parts of composite order are separable. The first part of the order operates as a dismissal of the appellants as from October 17, 1950. The invalidity of the second part of the order, assuming this part to be invalid, does not affect the first part of the order. The order of dismissal as from October 17, 1950 is valid and effective. The appellant has been lawfully dismissed, and he is not entitled to claim that he is still in service. The same principle was followed in (1976) 2 SCC 495 *(State of Mysore Vs. K. Chandrasekhara Adiga)*. It was clearly held that where valid and invalid portion of the order are severable, the test is whether after excision of the invalid part, the rest remains viable and self-contained. The deletion cannot render rest of the order illegal or ineffective if it can survive independently and found to be valid. In 2014 (12) SCC 106 *(State Bank of Patiala Vs. Ram Niwas Bansal)*, it was again held that two parts of the order are clearly severable assuming that second part of the order is invalid. There is no reason that the first part of the order should not be given the fullest effect. Reliance can be placed on another judgment of Apex Court in the case of *Gujarat Mineral Development Corporation Vs. P.H Brahmbhatt* reported in 1974 (3) SCC

601. Pertinently, Allahabad High Court in *Gajendra Prasad Saxena, VS. State of UP* reported in 2015 SCC OnLine ALL 8706 applied the Doctrine of "Partial Quashing" and opined that the principle of unconstitution provision of a statue being severed and struck down leaving other parts untouched is well known. The said principle of severability has been extended to administrative orders also.

14. If the Doctrine of Severability is applied on the impugned order, it will be clear that even if para 4 is deleted or treated as invalid, the contents of rest of the order will be sufficient to uphold the action under the NSA. In other words, if para 4 of order is treated as invalid portion of order, after excision of this invalid part, the remaining part is found to be self-contained and can be a reason to uphold the invokation of power under section 3(2) of the NSA. Thus, two parts of the order are severable. The invalid para 4 will not eclipse the entire order dated 14.05.2021.

15. Thus, we are not inclined to set aside the order dated 14.05.2021, merely because para 4 of the said order is perverse and without any basis. The judgment of this Court in *Yatindra Verma* (supra) was pressed into service by contending that the petitioner therein was a social worker, whereas, the petitioner herein is an Advocate. Thus, they are similarly situated. We do not see any merit in this contention. Interference in *Yatindra Verma* (supra) was not made because of social status of the petitioner. Whether a detenue was a social worker or an Advocate is insignificant if his conduct is a threat to "public order".

16. The Supreme Court answered an interesting and challenging conundrum relating to maintaining balance between the liberty and license in most appropriate words in certain judgments which are as under:-

> "*K.K. Methew, J.* in ***1975 (Supp.) SCC 1 (Smt. Indira Nehru Gandhi vs. Raj Narain)*** stated that the major problem of human society is to combine that degree of liberty without which law is tyranny with that degree of law without which liberty becomes licence; and the difficulty has been to discover the practical means of achieving this grand objective and to find the opportunity for applying these means in the ever shifting tangle of human affairs." **(para 318)**
>
> ***(Emphasis supplied)***

17. Justice *M.N. Venkatchaliah* in (1989) 1 SCC 374 *(Ayya @ Ayub vs. State of UP and Anr)* held as under:-

> "..... the actual manner of administration of the law of preventive detention is of utmost importance. **The law has to be justified by the genius of its administration so as to strike the right balance between individual-liberty on the one hand**

> **and the needs of an orderly society on the other. But the realities of executive excesses in the actual enforcement of the law have put the courts on the alert, ever-ready to intervene and confine the power within strict limits of the law both substantive and procedural. The paradigms and value judgments of the maintenance of a right balance are not static but vary according as the "pressures of the day" and according as the intensity of the imperatives that justify both the need for and the extent of the curtailment to be individual liberty.** Adjustments and readjustments are constantly to be made and reviewed. No law is an end in itself. The "inn that shelters for the night is not journey's end and the law, like the traveller, must be ready for the morrow." **(para 14)**
>
> (***Emphasis supplied)***

18. Justice *Savyasachi Mukherjee* in (1986) 4 SCC 407 *(Raj Kumar Singh vs. State of Bihar)* held as under:-

> "Preventive detention as reiterated as hard law and must be applied with circumspection rationally, reasonably and on relevant materials. Hard and ugly facts make application of harsh laws imperative."
>
> **(para 22)**
> (***Emphasis supplied)***

19. The second wave of Covid-19 was very fatal and there was severe scarcity of Remdesivir injections, oxygen, beds, hospital facilities, medicines etc in most of the major towns of the province. This grave situation of pandemic, threatened the humanity after almost 100 years from the previous pandemic of Spanish Flu, which broke out in 1918-1920. In the days of extreme crisis, a single act of black marketing of an essential drug like Remdesivir is sufficient to detain a person under the NSA Act. This court has already taken this view in *Yatindra Verma* (supra). In another case, WP No.11008/2021 *(Ram Avtar Vs State of MP),* this Court opined as under :-

> **16)** The last submission was that petitioners did not have any past record. This aspect was also dealt with in explicit manner in the case of ***Manikant Asati (supra)***. In para 8 & 9 of said order, this Court made it clear that in an extraordinary crisis like Covid-19 pandemic, a singular act of blackmarketing can attract the Blackmarketing Act for the purpose of detention. The pandemic of this magnitude came in 2019 after more than 100 years from the previous pandemic of Spanish Flu which threatened the humanity in the year 1918. Thus, question of availability of any past record in a case of this nature is

insignificant. Hence, this point raised by petitioners also cannot cut any ice. In **Ayya *Ayub*** (supra), the Apex Court visualised the requirement of maintenance of a right balance and opined that principles relating to said balance are not static but vary according to the ***pressures of the day*** and according to the intensity of imperatives that justify both the need for and the extent of curtailment of the individual liberty. The impugned order of detention takes into account *pressures of the day* and assigns justifiable reasons for detaining the corpus. In this factual backdrop, we find no reason to interfere in the matter."

Emphasis Supplied

20. The petitioner has failed to establish any flaw in the decision making process pursuant to which the impugned order dated 14.05.2021 is passed. In absence thereof, no case is made out for interference.

21. The petition fails and is hereby **dismissed**.

Petition dismissed

I.L.R. [2021] M.P. 2041 (DB)
WRIT PETITION

Before Mr. Justice Sujoy Paul & Mr. Justice Anil Verma

WP No. 17290/2020 (Indore) decided on 22 July, 2021

MOHAMMAD SULTAN KHAN …Petitioner

Vs.

UNION OF INDIA & ors. …Respondents

(Alongwith WP No. 18637/2020)

***A. Constitution – Article 226 – Tender – Review of Decision* – Decision of disqualification of Respondent No. 4 was reviewed by Committee and his bid was accepted – Held – In absence of enabling provision, decision to review the previous decision was wholly impermissible – No reasons assigned in minutes as to what compelled the committee to review the decision – Such decision to review is arbitrary, unjust, unreasonable and attracts Wednesbury Principles – Contract given to Respondent No. 4 set aside – Respondents directed to consider claim of petitioner – Petition allowed. (Paras 18 to 20)**

क. संविधान – अनुच्छेद 226 – निविदा – विनिश्चय का पुनर्विलोकन – समिति द्वारा प्रत्यर्थी क्र. 4 की निरर्हता के विनिश्चय का पुनर्विलोकन किया गया एवं उसकी बोली स्वीकार की गई थी – अभिनिर्धारित – सामर्थ्यकारी उपबंध के अभाव में, पूर्व विनिश्चय का पुनर्विलोकन करने का निर्णय पूर्णतया अननुज्ञेय था – समिति को विनिश्चय का पुनर्विलोकन करने की क्या बाध्यता थी इसके बारे में कार्यवृत्त में कोई कारण नहीं दिये

गये – पुनर्विलोकन का उक्त विनिश्चय मनमाना, अनुचित, अयुक्तियुक्त है एवं वेडनसबरी सिद्धान्तों को आकर्षित करता है – प्रत्यर्थी क्र. 4 को दी गई संविदा अपास्त – प्रत्यर्थीगण को याची के दावे पर विचार करने हेतु निदेशित किया गया – याचिका मंजूर।

***B. Constitution – Article 226 – Interference in Contractual Matter – Scope & Jurisdiction* – Held – Interference can be made in contract matters if decision making process is arbitrary, capricious and hits Wednesbury principles. (Para 13 & 19)**

ख. संविधान – अनुच्छेद 226 – संविदात्मक मामले में हस्तक्षेप – व्याप्ति व अधिकारिता – अभिनिर्धारित – संविदा मामलों में हस्तक्षेप किया जा सकता है यदि विनिश्चय की प्रक्रिया मनमानी, अनुचित है एवं वेडनसबरी सिद्धांतों को प्रभावित करती है।

Cases referred:

(1971) 3 SCC 844, APOT No. 344/2013 decided on 07.08.2013 (Calcutta High Court), (2000) 2 SCC 617, (2001) 2 SCC 451, (1978) 1 SCC 405, (2007) 14 SCC 517, (2020) 16 SCC 759, (1985) 1 AC 374, (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, (1999) 1 SCC 492, (2007) 8 SCC 1, (2014) 3 SCC 493, (2014) 11 SCC 288, 2021 (1) JLJ 582.

Arjun Agrawal, for the petitioners.
Himanshu Joshi, for the official respondent.
None, for the private respondents despite service.

O R D E R

(Heard through Video Conferencing)

The Order of the Court was passed by :

SUJOY PAUL, J. :- In these petitions, the parties are at loggerheads on the validity of decision of the respondents in accepting bid of private respondent after declaring him as disqualified. It is further prayed that since petitioners are the lowest bidders and qualified the technical bid, they may be awarded the tender. Since both the petitions are similar, on the joint request of the parties, the matters were analogously heard and decided by this common order.

2. Facts are taken from WP No.17290/2020.

3. The respondent/department issued a notice inviting tender (NIT) on 26/06/2020 (Annexure P/5) for transport of posts on the route Indore to Burhanpur. It was pointed out that the only difference in the connected matter is that the route involved therein is different. The petitioners, respondent No.4 and other persons submitted their tender submission form. The petitioners duly

submitted their signed tender documents. Petitioners duly filled up all the relevant columns of the prescribed tender form. They furnished the necessary information against relevant columns and also filed supporting documents which is evident from a bare perusal of Annexure P/6, P/7 & P/8. It is pointed out that respondent No.4 also submitted his signed tender document (Annexure P/10). However, he did not submit the details of proposed vehicles which was the heart and soul of the tender because tender was for transfer of posts. The relevant page of tender document (Page-113) was left blank and no vehicle details have been provided by respondent No.4. In addition, respondent No.4 submitted an affidavit stating that if his bid is accepted and in turn, tender is awarded to him, respondent No.4 will provide a new vehicle for the purpose of fulfilling the mandatory requirement/ eligibility criteria of the tender.

4. Shri Arjun Agrawal, learned counsel for petitioners submits that technical bids were opened on 28/07/2020 and respondent No.4 was found to be disqualified in the technical bid because he did not provide details of vehicle and stated in the affidavit that new vehicle will be provided if contract is awarded to him. Criticising the impugned minutes dated 07/10/2020 (Annexure P/13), Shri Agrawal urged that the technical bid of private respondents were rejected on 28/07/2020, but for no valid reasons, the said decision was *reviewed* without therebeing any enabling provision for review and respondent No.4 was permitted to participate in further tender process. In reply the respondents supported their action by contending that respondent No.4 furnished vehicle details with the bid, but since documents were not legible, he produced legible copies of said documents and, therefore, on 07/10/2020, the technical bid was reviewed.

5. The petitioners raised their eyebrows on such review by contending that :-

> i) there exists no enabling provision to review a decision and hence such review is impermissible and runs contrary to the judgments of Supreme Court reported in ***(1971) 3 SCC 844 (Patel Narshi Thakershi & Ors. vs. Shri Pradyuman Singhji Arjunsinghji)***. Reliance is placed on Division Bench judgment of Calcutta High Court in ***APOT No.344/2013 (Electrosteel Castings Ltd. vs. Kolkata Municipal Corporation & Ors.)*** decided on 07/08/2013.
>
> ii) In contract matters, interference can be made if the procedure of taking decision is arbitrary and faulty. The impugned decisions in these cases are irrational, arbitrary and malicious in nature. Reliance is placed on ***(2000) 2 SCC 617 (Air India vs. Chochin International Airport Ltd.)*** and ***(2001) 2 SCC 451 (WB. State Electricity Board vs. Patel Engineering Co.)***.
>
> iii) If the impugned order/minutes do not contain the reason for review i.e. providing legible documents at subsequent stage, this

> defence taken for the first time by way of counter affidavit in the Court cannot be entertained as per Constitution Bench judgment of Supreme Court in ***(1978) 1 SCC 405 (Mohinder Singh Gill vs. Chief Election Commissioner),***.

6. In nutshell, Shri Agrawal, learned counsel for the petitioners submits that after having declared respondent No.4 as ineligible at the stage of technical bid, it was no more open to the respondents to review their decision. Moreso, when there exists no enabling provision and no valid reason for undertaking the said exercise.

7. Countering the said argument, Shri Himanshu Joshi, learned counsel for the Department supported the impugned decision and award of contract in favour of respondent No.4. He submits that although on 28/07/2020, the respondent No.4 was held to be disqualified at the stage of examining the technical bid, he was found to be eligible subsequently on 28/07/2020. The decision to review was taken by the Department pursuant to the direction of Chief Post Master General. He submits that review committee's decision dated 07/10/2020 (Annexure R/4) is in consonance with law. There is no fault in the process adopted by the respondents. By placing reliance on (2007) 14 SCC 517 *(Jagdish Mandal vs. State of Orissa & Ors.)* and (2020) 16 SCC 759 *(Bharat Coking Coal Limited & Ors. vs. Amr Dev Prabha & Ors.)*, Shri Joshi urged that the scope of interference in Article 226 of Constitution in contractual matters is limited. In absence of arbitrariness, malice or any serious flaw in the process in which decision is taken, interference is not warranted. The petitioner in his E-mail (page-149) and in Annexure P/5 dated 26/06/2020 himself accepted that relevant papers of respondent No.4 were made available to the department after opening of technical bid. Thus, no fault can be found in the impugned minutes and consequential award of contract to the private respondents.

8. Nobody appeared for private respondents in both the cases in spite of due service of notice.

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

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

11. Before dealing with rival contentions we deem it proper to remind ourselves with the scope of judicial review in contractual matter. *Lord Diplock* stated in (1985) 1 AC 374, at 415 *(Council of Civil Services Union vs. Minister for Civil Services)*:-

> ".....one can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'."

12. In *Council of Civil Services Union* (supra), *Lord Diplock* has suggested a three-fold classification of the various grounds on which an administrative decision can be reviewed by a court. These grounds are:

> (i) 'Illegality' which means that the "decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it".
>
> It means that the decision-maker must keep within the scope of his legal power. Illegality means that the decision-maker has made an error of law; it represents infidelity of an official action to a statutory purpose. Such grounds as excess of jurisdiction, patent error of law, etc. fall under the head of "illegality".
>
> (ii) 'Irrationality' denotes unreasonableness in the sense of *Wednesbury* unreasonableness.
>
> (iii) Procedural Impropriety- The expression includes failure to observe procedural rules including the rules of natural justice or fairness wherever these are applicable."

The Supreme Court followed the dictum of *Lord Diplock* in *Council of Civil Services Union* (supra) in *Tata Cellular vs. Union of India,* (1994) 6 SCC 651.

13. The Apex Court in catena of judgments held that the judicial review of a contractual matter is permissible on certain parameters. In *Tata Cellular* (supra) 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 can be looked into in a contractual matter. (See also *Krsnaa Diagnostics Pvt. Ltd. v. State of M.P* [2021 (1) JLJ 582]).

14. In view of principles laid down in aforesaid cases, it is to be seen whether impugned decision taken by respondents is legal and justifiable. Indisputably, in the instant case when technical bid of candidates were opened on 28/7/2020, the respondent No.4 was held to be disqualified. He was found to be disqualified because of not fulfilling the requirement of Clause 8 of NIT which reads as under:-

> "8. The make and model of the vehicle should be specified separately. Copies of registration certificate, fitness certificate and insurance should be enclosed along with technical bid. All the vehicles must have valid road permit to run in the territory of Madhya Pradesh."
>
> ***(emphasis supplied)***

15. The respondent No.4 admittedly did not furnish the necessary informations regarding vehicles in the relevant columns of his tender form which is evident from a plain reading of his form and more particularly Annexure III of the prescribed form (Page 113). In this form he was required to provide following informations:-

Details of the Vehicle

(i)	Type of vehicle
(ii)	Make and Model
(iii)	Year of manufacture
(iv)	Registration No./Date
(v)	Type of fuel used
(vi)	Fitness/Road worthiness
(vii)	Insurance validity of the vehicle
(viii)	PAN No.
(ix)	GST No.
(x)	Annual turnover 2017-18
(xi)	Annual turnover 2018-19

16. The affidavit of respondent No.4 (page 136) clearly establishes that he intended to provide details of vehicle only when his bid is accepted. For this reason, admittedly the respondent No.4 was not found to be eligible. However, the three members review committee on 7/10/2020 took the impugned decision. Relevant portion of which reads as under:-

> ''जनरेट किये गये दस्तावेजों के आधार पर निविदाओं का विवरण चेक लिस्ट में दर्ज किये गए कुल 06 निविदाओं में से बाबा ट्रांसपोर्ट, 95 अरविन्द विहार, बाग मुगालिया, भोपाल एवं कबीर इंटरप्राइजेस, 115 बी, ग्रीन पार्क कॉलोनी, इंदौर – 452002 द्वारा प्रस्तुत निविदा, शर्तों के अनुकूल नहीं पायी गयी क्योंकि निविदाकर्ता द्वारा प्रस्तुत घोषणा पत्रक के आधार पर निविदा स्वीकृत होने पर उसके द्वारा नया वाहन क्रय करके उपलब्ध कराने की सहमति दी गयी है, **जबकि निविदा ज्ञापन की शर्तों के अतंर्गत केवल उपलब्ध वाहन के लिये ही निविदा प्रकिया में भाग लिया जा सकता है।**
>
> अधीक्षक रेल डाक सेवा इंदौर द्वारा समिति के सदस्य श्री एमके. श्रीवास, प्रवर अधीक्षक डाकघर इंदौर सिटी एवं श्री गोपाल मुजाल्दा, सहायक लेखाधिकारी (SB) कार्यालय पोस्टमास्टर जनरल इंदौर क्षेत्र को जारी पत्र क्रमांक डी3/सीएमएमएस/इंदौर–बुरहानपुर/आयडी/2019–21 इंदौर दिनांक 06.10.2020 के तारतम्य में आज दिनांक 07.10.2020 को समिति के सदस्यों द्वारा अधीक्षक रेल डाक सेवा इंदौर के कार्यालय में उपस्थित होकर तकनिकी बोली के कार्यवृत्त दिनांक 28.07.2020 की **पुनः समीक्षा** की गयी तथा अधीक्षक रेल डाक सेवा आयडी मंडल इंदौर को जारी क्षेत्रीय कार्यालय के पत्र क्रमांक मेल्स–14/16/इंदौर–बुरहानपुर/चेप–II, दिनांक 23.09.2020 में दिये गये निर्देशों के परिपालन में निविदाकार बाबा ट्रांसपोर्ट, 95 अरविन्द विहार, बाग मुगालिया, भोपाल की निविदा को शामिल करते हुए तकनिकी बोली का **पुनः सशोधित कार्यवृत्त जारी किया गया जिसके आधार पर निविदाकर्ता कबीर इटंरप्राइजेस, 115 बी, ग्रीन पार्क कॉलोनी, इंदौर – 452002 को छोड़कर शेष सभी पांच निविदाओं की तकनिकी बोली उपयुक्त मानी गयी,** जिसका विवरण सलंग्न अनेक्जर (चेकलिस्ट) में दर्शित है।''

17. A plain reading of the aforesaid paragraphs makes it clear that technical bid of respondent No.4 was not found to be in consonance with conditions of NIT because he intended to provide details of vehicle after getting the contract. This decision was reviewed by three member committee but no enabling provision of review was shown to this court. The division bench of Calcutta High Court in *Electrosteel Castings Ltd* (supra) opined as under:-

> "**In the absence of any power reserved by the Corporation in terms and condition of NIT to review its decision, we are of the considered opinion that it was a**

> **misadventure on the part of the Corporation** to make aforesaid concession which it could not have defended on merits and it was also incumbent upon the Single Bench to go into the legality of such concession. Concession could not have been made in respect of mandatory terms and conditions of the tender. It would be discriminatory to permit at a subsequent stage, such a waiver of a mandatory technical qualification due to subsequent event. Particularly in process of tender question of eligibility is to be examined with respect to a particular date."
>
> ***(emphasis supplied)***

18. In absence of showing enabling provision, the decision to review the previous decision dated 7/10/2020 was wholly impermissible. Moreso when no reasons are assigned in the minutes dated 7/10/2020 as to what necessitated the committee to review the previous decision and treat respondent No.4 as eligible. In other words, the impugned minutes nowhere shows that the relevant documents of respondent No.4 were received by the Committee subsequently which compelled them to review the decision. This defence is taken for the first time in the reply filed before this Court. In *Mohinder Singh Gill Vs. Chief Election Commission* (supra), the Apex Court opined as under:-

> "8..... Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conducts of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself.
>
> Orders are not like old wine becoming better as they grow older."
>
> ***(emphasis supplied)***

19. In view of above judgments of supreme court it is clear that interference can be made in contract matters if decision making process is arbitrary, capricious and hits *Wednesbury principles*. The condition No.8 of NIT makes it obligatory for the bidder to furnish the details regarding make and model of vehicle. In addition, the copies of registration certificate, fitness certificate, insurance etc were required to be enclosed with the Tender form. As noticed, the necessary informations were not furnished by respondent No.4 as per Annexure III of tender document. His affidavit leaves no room for any doubt that he intended to provide details of vehicle after getting the contract. This clearly runs contrary to condition No.8 of NIT. The action of respondents in reviewing the previous decision

without any enabling provision and for no valid reason cannot be countenanced. In our considered opinion, the respondent No.4 was rightly held ineligible in the meeting held on 28/7/2020 and decision to review the same is arbitrary, unjust, unreasonable and attracts *Wednesbury principles*. The decision making process is certainly arbitrary and runs contrary to Clause 8 of the NIT. Thus, the impugned decision in both the cases whereby respondent No.4 was held to be eligible needs to be interfered with. Consequently, the contracts given to respondent No.4 also deserve to be set aside.

20. The petitioners have pleaded that they were the lowest bidder if respondent No.4 is excluded. Shri Himanshu Joshi did not dispute the same during the course of arguments. Thus, while setting aside the impugned decision dated 7/10/2020 and contracts given to respondent No.4 in both the cases, we deem it proper to direct the respondents to consider the claim of petitioners for grant of contracts. The entire exercise be completed within 30 days from the date of production of copy of this order.

21. The petitions **are allowed**.

Petition allowed

I.L.R. [2021] M.P. 2049
WRIT PETITION

Before Mr. Justice Sanjay Dwivedi

WP No. 3658/2021 (Jabalpur) decided on 24 August, 2021

AMIT CHAURASIA …Petitioner

Vs.

STATE OF M.P. & anr. …Respondents

***A. Civil Services (Classification, Control and Appeal) Rules, M.P. 1966, Rules 10, 14 & 15 and Constitution – Article 311(2)(b) – Punishment of Dismissal – Dispensing with Departmental Enquiry – Grounds* – Lady constable lodged FIR against male constable (petitioner) u/S 452, 354, 354-Gh, 376 & 506 IPC – Petitioner dismissed from service without departmental enquiry on ground that calling prosecutrix in enquiry would tarnish her image, dignity and respect – Held – Lady constable who can file FIR and would appear before Court, there should be no hitch while appearing in enquiry that too before police officers – Reason assigned for dispensing with regular departmental enquiry is unreasonable and unjustified – Article 311(2)(b) cannot be applied – Impugned order of dismissal set aside – Petition allowed. (Paras 9, 10, 13 & 14)**

क. सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966, नियम 10, 14 व 15 एवं संविधान – अनुच्छेद 311(2)(b) – पदच्युति का दण्ड – विभागीय जांच से

अभिमुक्ति – आधार – महिला आरक्षक ने पुरूष आरक्षक (याची) के विरूद्ध धारा 452, 354, 354–Gh, 376 व 506 भा.दं.सं. के अंतर्गत प्रथम सूचना प्रतिवेदन दर्ज किया – याची को विभागीय जांच किये बिना इस आधार पर सेवा से पदच्युत किया गया कि अभियोक्त्री को जांच में बुलाने से उसकी छवि, गरिमा व सम्मान मलीन होगा – अभिनिर्धारित – महिला आरक्षक जो प्रथम सूचना प्रतिवेदन प्रस्तुत कर सकती है और न्यायालय के समक्ष उपस्थित होगी, तो जांच में उपस्थित होने में कोई अड़चन नहीं होनी चाहिए, वह भी पुलिस अधिकारियों के समक्ष – नियमित विभागीय जांच से अभिमुक्त करने हेतु दिया गया कारण, अयुक्तियुक्त व अन्यायपूर्ण है – अनुच्छेद 311(2)(b) लागू नहीं किया जा सकता – पदच्युति का आक्षेपित आदेश अपास्त – याचिका मंजूर।

B. Civil Services (Classification, Control and Appeal) Rules, M.P. 1966, Rule 10 & 14 – Major Punishment – Departmental Enquiry **– Held – Major punishment like dismissal from service can be inflicted after conducting a regular departmental enquiry as per provisions of Rule 14 of the Rules of 1966. (Para 11)**

ख. सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966, नियम 10 व 14 – मुख्य दण्ड – विभागीय जांच – अभिनिर्धारित – सेवा से पदच्युति जैसे मुख्य दण्ड को, 1966 के नियमों के नियम 14 के उपबंधों के अनुसार नियमित विभागीय जांच संचालित करने के पश्चात दिया जाना चाहिए।

C. Constitution – Article 226 – Dismissal – Judicial Review – Scope **– Held – Apex Court concluded that dismissal without conducting a departmental enquiry on the ground of being not reasonably practicable, is open for judicial review – Petition maintainable. (Para 12)**

ग. संविधान – अनुच्छेद 226 – पदच्युति – न्यायिक पुनर्विलोकन – व्याप्ति – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया कि युक्तियुक्त रूप से व्यवहारिक न होने के आधार पर, विभागीय जांच संचालित किये बिना पदच्युति, न्यायिक पुनर्विलोकन हेतु खुली है – याचिका पोषणीय है।

Cases referred :

(1985) 4 SCC 252, (1987) Supp SCC 164, (2000) 10 SCC 196, (1996) 3 SCC 753, (2005) 11 SCC 525, (1993) 4 SCC 269, (1991) 1 SCC 362, (2003) 9 SCC 75.

Sanjeev Chansoriya, for the petitioner.
Ankit Agrawal, G.A. for the respondents/State.

O R D E R

SANJAY DWIVEDI, J. :- Since the pleadings are complete and learned counsel for the parties are ready to argue the matter finally, therefore, it is heard finally.

2. By the instant petition filed under Article 226 of the Constitution of India, the petitioner is questioning the legality, validity and propriety of the order dated 02.02.2021 (Annexure-P/2) whereby as per the provisions of Article 311(2) (b) of the Constitution of India, he has been dismissed from service and also challenging the order 06.02.2021 (Annexure-P/3) whereby he has been directed to vacate the Government Quarter as allotment made in his favour was cancelled in pursuance to his dismissal from service.

3. The facts of the case in nutshell are that the petitioner was initially appointed on the post of Constable and was posted at Police Station Kotwali, District Sagar. Thereafter, on a complaint made by a lady constable namely Sonali Nayak, an FIR vide Crime No.07/2021 was registered against the petitioner in Mahila Police Station, District Sagar on 21.01.2021 (Annexure-P/4) for the offence punishable under Sections 452, 354, 354-Gh, 376 and 506 of the Indian Penal Code and pursuant thereto, the petitioner was arrested and sent to jail. In view of the said complaint, the petitioner was placed under suspension and thereafter, respondent No.2/ Superintendent of Police exercising the powers provided under Article 311(2)(b) of the Constitution of India, dismissed the petitioner from service vide order dated 02.02.2021 (Annexure-P/2) observing therein that the conduct of the petitioner has stigmatized the image of the Police Department. It is also observed by respondent No.2 that the manner in which the petitioner committed the crime, there was no reason for conducting any departmental enquiry and call the prosecutrix as a witness in the enquiry as that would adversely affect her dignity and image in the society. Consequently, vide order dated 06.02.2021 (Annexure-P/3), the allotment of Government Quarter No.C-05 made in the petitioner's favour was cancelled and directing him to vacate the said premise.

4. Learned counsel for the petitioner submits that the challenge is founded mainly on the ground that the order of dismissal from service has been passed in violation of principle of natural justice and contrary to the law for the reason that the petitioner being a civil servant and a regular employee of the Police Department, cannot be dismissed without conducting a regular departmental enquiry. More so, the provisions of Article 311(2)(b) of the Constitution of India are not applicable in the petitioner's case and the reason assigned in the order for not conducting the regular departmental enquiry is not only unreasonable but also unacceptable which makes the order vitiate and as such, it is claimed that the impugned order dismissing the petitioner from service deserves to be quashed.

5. *Per contra*, learned Government Advocate has supported the order of dismissal and stated that the provisions of Article 311(2)(b) of the Constitution of India have rightly been applied while removing the petitioner from service.

6. Considering the rival submissions made by learned counsel for the parties and on perusal of the record, the core question which crops up for consideration is as to whether under the existing circumstances, the power exercised by respondent No.2 and the reason assigned in the impugned order for not conducting the regular departmental enquiry is valid, acceptable and approves the decision for dispensing with the regular departmental enquiry or not?

7. The hub of the argument on behalf of the petitioner is that merely on the ground of registration of an offence, the petitioner who was a regular employee of the Police Department, could not be removed from service that too without conducting any departmental enquiry. Further, the reason assigned for dispensing with the departmental enquiry and for not following the principle of natural justice is not justified. The relevant portion of the impugned order which contains the reasons for not conducting the regular departmental euqiry reads thus:-

> ''निलंबित आरक्षक के विरूद्ध थाना महिला अंतर्गत पंजीबद्ध अपराध में विवेचना पूर्ण की जाकर चालान कमांक 05/21 दिनांक 28.01.21 को पेश किया जा चुका है। उपरोक्त अपराध की परिस्थितियां अपचारी आर.1029 अमित चौरसिया की आपराधिक मानसिकता, दुस्साहस एवं नैतिक मूल्यों के अधोपतन को प्रदर्शित करती है। अपचारी आरक्षक पुलिस विभाग की अनुशासित सेवा का सदस्य है जिसका दायित्व समाज के कमजोर वर्गों एवं महिलाओं की सुरक्षा व उनके सम्मान की प्रतिष्ठा बनाये रखने से संबंधित है। अपचारी आरक्षक द्वारा पुलिस लाइन जैसे सुरक्षित स्थान पर दुस्साहसपूर्वक पीडिता के निवास के अंदर उक्त अपराध घटित करना, उसकी अनुशासनहीन आपराधिक मानसिकता को प्रकट करता है। इस प्रकरण में अपचारी आरक्षक के विरूद्ध अपराध में संलिप्त होने के साक्ष्य विवेचना में तथा धारा 164 जाफौ. अंतर्गत न्यायालय के समक्ष प्रदर्शित होने के उपरांत अभियोग पत्र प्रस्तुत किया गया है। अपचारी आरक्षक को न्यायालय के समक्ष रिमांड हेतु प्रस्तुत करने में उसे अपने पक्ष रखने का अवसर प्राप्त हुआ है। इस प्रकरण में अपचारी आरक्षक के सेवा शर्तों के प्रतिकूल आचरण के संबंध में प्रदर्शित होने वाली समस्त साक्ष्य आपराधिक विचारण में संयुक्त होकर सम्मिलित है। इस प्रकरण में आपराधिक विचारण के समानांतर किसी विभागीय जांच का वैधानिक आधार एवं व्यवहारिक औचित्य नहीं है एवं पीडित महिला को विभागीय जांच में साक्ष्य प्रस्तुति हेतु तलब करने से प्रार्थिया के सम्मान एवं प्रतिष्ठा पर प्रतिकूल प्रभाव पडने की पूरी संभावना है। अतः इस प्रकरण में आपराधिक विवेचना से प्राप्त साक्ष्य व प्राथमिक जांच से निलंबित अपचारी आर. 1029 अमित चौरसिया द्वारा प्रदर्शित कदाचरण पूर्णतः स्पष्ट हुआ है। अपचारी निलं.आर.1029 अमित चौरसिया के,

बलात्कार जैसे शर्मनाक अपराध में संलिप्त होकर जेल निरूद्ध रहने से, उसकी पुलिस अधिकारी के रूप में पहचान, पद की गरिमा व विभागीय प्रतिष्ठा को कलंकित करेगी। इसके अतिरिक्त सेवा में रहने तक पुलिस अधिकारी के रूप में उसके द्वारा प्रार्थिया को भविष्य में उसके पक्ष में साक्ष्य देने हेतु दबाव बनाने अथवा मनोवैज्ञानिक रूप से प्रार्थिया को विचारण में स्वतंत्र व भयमुक्त होकर कथन देने में भी बाधा बनेगा। पुलिस अधिकारी के रूप में निलंबित आरक्षक द्वारा नियमित रूप से उपरोक्त घृणित अपराध की न्यायालयीन पेशी में जाने से सार्वजनिक रूप से पदीय तथा विभागीय प्रतिष्ठा व मर्यादा पर प्रतिकूल प्रभाव पडने की पूरी संभावना है। बलात्कार जैसे गंभीर अपराध में अभियोजित होने की शोहरत के साथ अपचारी की भविष्य में सार्वजनिक स्थलों में पुलिस सेवा हेतु उपस्थिति से, आम महिला वर्ग के मन में असुरक्षा का भाव तथा पुलिस बल हेतु प्रतिकूल धारणा का अवसर उत्पन्न होगा।

अतः निलंबित आरक्षक 1029 अमित चौरसिया के पद के नियुक्तिकर्ता अधिकारी के रूप में पुलिस अधीक्षक को प्राप्त, भारतीय संविधान के अनुच्छेद 311 (2) के **परन्तुक** उल्लेखित पैरा (ख) में प्राप्त शक्ति एवं वर्णित प्रक्रिया के पालन में, **इस आदेश जारी होने के दिनांक से, आरक्षक 1029 अमित चौरसिया को, ''पुलिस सेवा से बर्खास्त'' (Dismiss From Service)** किया जाता है।''

It is worthwhile to go through the relevant provisions of Article 311(2)(b) of the Constitution of India, which read as under:-

"311. **Dismissal, removal or reduction in rank of persons employed in civil capacities under the Union or a State.**—(1) No person who is a member of a civil service of the Union or an all-India service or a civil service of a State or holds a civil post under the Union or a State shall be dismissed or removed by an authority subordinate to that by which he was appointed.

[**(2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges**[2] **[***]**:

[Provided that where it is proposed after such inquiry, to impose upon him any such penalty, such penalty may be imposed on the basis of the evidence adduced during such inquiry and it shall not be necessary to give such person any opportunity of making representation on the penalty proposed:

Provided further that this clause shall not apply—]

(a) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge; or

(b) **where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry; or**

(c) where the President or the Governor, as the case may be, is satisfied that in the interest of the security of the State it is not expedient to hold such inquiry.]

[(3) If, in respect of any such person as aforesaid, a question arises whether it is reasonably practicable to hold such inquiry as is referred to in clause (2), the decision thereon of the authority empowered to dismiss or remove such person or to reduce him in rank shall be final.]"

8. Admittedly, the services of the petitioner are governed with provisions of Madhya Pradesh Civil Services (Classification, Control and Appeal) Rules, 1966 (in short the 'Rules, 1966'). The punishment of dismissal from service is prescribed under the Rules, 1966 as a major penalty and that can be imposed after conducting a regular departmental enquiry. Rule 10 of the Rules, 1966 deals with the penalties relate to civil servants. Rule 10 (ix) of the Rules, 1966 speaks about major penalties which reads as under:-

"10 (ix) dismissal from service which shall ordinarily be a disqualification for future employment under the Government;

Explanation. - The following shall not amount to a penalty within the meaning of this rule, namely :-

(i) withholding of increments of pay of a Government servant for his failure to pass any departmental examination in accordance with the rules or orders governing the service to which he belongs or post which he holds or the terms of his appointment;

(ii) stoppage of a Government servant at the efficiency bar in the time scale of pay on the ground of his unfitness to cross the bar;

(iii) non-promotion of a Government servant, whether in a substantive or officiating capacity, after consideration of his case, to a service, grade or post for promotion to which he is eligible;

(iv) reversion of a Government servant officiating in a higher service, grade or post to a lower service, grade or post, on the ground that he is considered to be unsuitable for such higher service, grade or post or on any administrative ground unconnected with his conduct;

(v) reversion of a Government servant, appointed on probation to any other service, grade or post, to his permanent service, grade or post during or at the end of the period of probation in accordance with the terms of his appointment or the rules and orders governing such probation;

(vi) replacement of the services of a Government servant, whose services had been borrowed from the Union Government or any other State Government, or an authority under the control of any Government, at the disposal of the authority from which the service of such Government servant had been borrowed;

(vii) compulsory retirement of a Government servant in accordance with the provisions relating to his superannuation or retirement;

(viii) termination of the services;

(a) of a Government servant appointed on probation, during or at the end of the period of his probation, in accordance with the terms of his appointment or the rules and orders governing such probation; or

(b) of a temporary Government servant appointed until further orders on the ground that his services are no longer required; or

(c) of a Government servant, employed under an agreement, in accordance with the terms of such agreement."

Rule 14 of the Rules, 1966 which is a mandatory requirement provides the procedure for imposing the penalty and if any punishment as specified in sub clauses (v) to (ix) of Rule 10 has to be made, the same can only be made after conducting an enquiry as per the procedure provided in Rule 15 of the Rules, 1966 and perusal of the aforesaid rules, makes it clear that for conducting a regular departmental enquiry, charge-sheet has to be issued and the Disciplinary Authority after reaching the conclusion that the charges levelled against the delinquent are found proved, can inflict the punishment of dismissal, but not without that.

9. Although, Article 311(2)(b) of the Constitution of the India provides the requirement of principle of natural justice in respect of the civil servant if punishment of dismissal, removal or reduction in rank is to be imposed. The said Article prescribes some eventualities, in which, the major penalty like dismissal can be inflicted without following the requirement of principle of natural justice or without conducting a regular departmental enquiry. If the said exception is applied and challenged before the Court of law, then the Court has to see whether the reasons assigned for adopting such exception are proper or not. Here in this case, the reason has been assigned by respondent No.2 that challan has been filed and criminal case is being tried by the competent Court, therefore, there is no justification for conducting the regular departmental enquiry and calling the prosecutrix for recording her statement in the said enquiry because that would tarnish her image, dignity and respect in the department.

10. In my considered opinion, the reason assigned by the Authority for not conducting a regular departmental enquiry is not only unreasonable but also unjustified for the reason that the prosecutrix in the criminal case will be a material witness and would appear before the Court for getting her statement recorded then there should be no hitch while appearing in the departmental proceeding that too before the officers of the Police Department as the prosecutrix is also a police constable and when she made a complaint to the police about the alleged crime, then she must not have any hesitation to get recorded her statement as a witness in the departmental enquiry and she cannot be allowed to have her cake and eat it too.

11. The Supreme Court in several occasions has considered the scope of application of Article 311(2)(b) of the Constitution of India and has clarified as to under what circumstances, regular departmental enquiry can be dispensed with and order of dismissal from service can be issued. The Supreme Court in many occasions, has also observed that in every case, the application of Article 311(2)(b) of the Constitution of India does not apply and the Authority has to proceed in accordance with the respective rules under which the procedure prescribed for conducting the enquiry and also for inflicting the punishment. As has already been discussed hereinabove, it is clear that the major punishment like dismissal from service can be inflicted after conducting a regular departmental enquiry as per the provisions of Rule 14 of the Rules, 1966. In this context, the Supreme Court in the case reported in (1985) 4 SCC 252 [*Satyavir Singh v. Union of India*] has observed as under:-

> "16.....sometimes not taking prompt action may result in the trouble spreading and the situation worsening and at times becoming uncontrollable, and may at times be also construed by the troublemakers and agitators as a sign of weakness on the part

> of the authorities and encourage them to step up the tempo of their activities or agitation. The affidavits filed in the High Court clearly show that this is exactly what happened when the suspension orders were issued and what was required was prompt and urgent action against those who were considered to be the ringleaders and that once such action was taken the situation improved and started becoming normal."

Further, in the case reported in (1987) Supp SCC 164 [*S.J. Meshram v. Union of India*], the Supreme Court has observed as under:-

> "**Art. 311(2) second proviso (b)- Whether "not reasonably practicable" to hold inquiry-Factors**- Likelihood of destruction of evidence and of non-appearance of members of Mahila Samiti to adduce evidence for fear and loss of vital document (bill register) showing actual amount of misappropriation caused wilfully by the delinquent employee-Held irrelevant and ex facie inadequate reasons for dispensing with the inquiry-Removal order set aside permitting the employee continuity in service and due salary and allowance-Authority entitled to commence normal departmental proceedings."

Thereafter, the Supreme Court in the case reported in (2000) 10 SCC 196 [*Ex Constable Chhote Lal Vs. Union of India*] has observed as under:-

> "**Arts.311(2) second proviso, cl.(b) and 311(3)- "not reasonably practicable to hold inquiry"-Such an opinion of departmental authority when not justified**- Argument advanced that the appellant being a police constable could have influenced witnesses and therefore dispensing of inquiry was justified-Rejected-Held, the order dispensing with the inquiry was not according to law-Consequently, the order dismissing the appellant also not sustainable- Liberty however given to respondents to proceed against appellant by holding inquiry-Further held, setting aside the dismissal would normally entitle an employee to back wages but in the present case and more so in view of the nature of the charges against the appellant, back wages not deserved."

The Supreme Court in the case reported in (1996) 3 SCC 753 [*Chandigarh Administration, Union Territory, Chandigarh v. Ajay Manchanda*] has observed as under:-

> "**Art.311(2)(b)-Departmental enqiry-Generally-Reasonably practicable or not**-Order of dismissal, dispensing with departmental enquiry on the ground of not being reasonably practicable, passed by SSP against Sub-Inspector of Police pursuant to a complaint of extortion-Complainant's reluctance to pursue the complaint whether by itself sufficient to conclude

> that he had been won over, making a departmental enquiry impracticable-Complainant, an advocate, initially not appearing when called by the SSP in connection with the complaint, on the ground of his alleged engagements in the Sessions Court but subsequently expressing his unwillingness to pursue the complaint on the ground of having reached a compromise with the Sub-Inspector-In absence of any statement by the complainant or any other witness to that effect, merely from the unwillingness of the complainant to pursue the complaint, held, it could not be inferred that the complainant had been terrorised and intimidated by the Sub-Inspector-Hence, there being no material before the SSP to conclude that holding of a departmental enquiry was not reasonably practicable, CAT's order quashing the said order of dismissal, upheld."

In the case reported in (2005) 11 SCC 525 [*Sudesh Kumar v. State of Haryana*] the Supreme Court has observed as under:-

> "**Art.311(2) proviso (b)- "Not reasonably practicable to hold such inquiry"-Reasons for satisfaction regarding-**Complaint filed by a foreign national that he had to pay bribe money in the office of Superintendent of Police for securing extension of his visa for one year-Complainant not disclosing name of the official who took the bribe due to fear of harassment-Pursuant to a preliminary inquiry, appellant dealing clerk dismissed from service without holding regular departmental inquiry on being satisfied that it was not reasonably practicable to hold the inquiry-Reasons for such satisfaction stated to be that the complainant being a foreigner may leave the country in the midst of the inquiry and that he was not likely to name the delinquent official during the departmental proceedings-Held, reasons not sufficient for dispensing with the regular departmental inquiry-Hence Art.311(2) violated as holding the inquiry by informing of the charges and giving reasonable opportunity of being heard is the rule and dispensing therewith is an exception-Dismissal order liable to be set aside."

12. The Supreme Court in the cases reported in (1993) 4 SCC 269 [*Union of India and others v. R. Reddappa and others*], (1991) 1 SCC 362 [*Jaswant Singh v. State of Punjab and others*] and (2003) 9 SCC 75 [*Sahadeo Singh and others v. Union of India and others*], has categorically observed that the dismissal without conducting a departmental enquiry on the ground of being not reasonably practicable, is open for judicial review, therefore, the objection raised by the respondents that the impugned order is appealable, is not sustainable in the eyes of law.

13. This Court has no hesitation to say that it is not a case in which the Disciplinary Authority can inflict the punishment of dismissal that too without conducting a regular departmental enquiry. The reason assigned in the impugned order for not conducting a regular departmental enquiry and for applying the provisions of Article 311(2)(b) of the Constitution of India is not found satisfactory for the reason that if at all that lady police constable can lodge the FIR and in relation to that would appear before the Court for getting her statement recorded, then that would not cause any harm to her dignity and respect but if she could have appeared before the Enquiry Officer for recording her statement, then that could damage her dignity and respect, cannot be considered to be a proper reason for not conducting the regular departmental enquiry and as such, the impugned order of dismissal dated 02.02.2021 (Annexure-P/2) is not sustainable in the eyes of law and is hereby set aside. However, a liberty is granted to the respondents that if they so desire, may conduct a regular departmental enquiry as has been provided under the provisions of the Rules, 1966 for imposing the penalty after giving an opportunity of hearing to the petitioner.

14. With the aforesaid, the petition filed by the petitioner stands **allowed**.

Petition allowed

I.L.R. [2021] M.P. 2059 (DB)
WRIT PETITION

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

WP No. 11239/2021 (Jabalpur) decided on 27 August, 2021

K & J PROJECTS PVT. LTD. (M/S) …Petitioner

Vs.

M.P. ROAD DEVELOPMENT CORP. & anr. …Respondents

(Alongwith WP No. 11371/2021)

A. Tender – Debarment – Ground of Misrepresentation **– Held – It is admitted that petitioner have submitted CV's which had variances – Action of debarment of petitioner is in conformity with clause 3.4(iv)(b) of Request for Proposal (RFP) which specifically provided that if any information is found incorrect at any stage, action including termination and debarment from future MPRDC projects upto 5 years will be taken – Bid was annulled owing to fact that petitioner submitted false and fabricated CV – No illegality in decision making process – Petitions dismissed.**

(Paras 27 to 29, 32 & 37)

क. निविदा – विवर्जन – दुर्व्यपदेशन का आधार – अभिनिर्धारित – यह स्वीकृत है कि याची ने शैक्षिक अभिलेख एवं कार्य अनुभव (CV) प्रस्तुत किये है जिनमें फेरफार थे – याची के विवर्जन की कार्रवाई, प्रस्ताव हेतु निवेदन (RFP) के खंड 3.4(iv)(b) के साथ अनुरूपता में है जो विनिर्दिष्ट रूप से उपबंधित करता है कि यदि किसी प्रक्रम पर किसी जानकारी को गलत पाया जाता है, कार्रवाई, जिसमें पर्यवसान तथा 5 वर्ष तक म.प्र. सड़क विकास निगम (MPRDC) की भविष्य की परियोजनाओं से विवर्जन शामिल है, की जाएगी – इस तथ्य के चलते बोली बातिल की गई थी कि याची ने मिथ्या एवं कूटरचित शैक्षिक अभिलेख एवं कार्य अनुभव (CV) प्रस्तुत किया – विनिश्चय करने की प्रक्रिया में कोई अवैधता नहीं – याचिकाएं खारिज।

***B. Tender – Debarment – Obligation of Bidder* – Held – As per clause of RFP, CV was required to be certified by Consultant (Bidder) – Certificate was given by petitioner stating that CV has been checked and found to be correct – Obligation to submit a correct CV was on petitioner or its minor partner. (Para 31)**

ख. निविदा – विवर्जन – बोली लगाने वाले की बाध्यता – अभिनिर्धारित – RFP के खंड के अनुसार, शैक्षिक अभिलेख एवं कार्य अनुभव (CV) को परमर्शदाता (बोली लगाने वाला) द्वारा प्रमाणित किया जाना अपेक्षित था – याची द्वारा यह कथन करते हुए प्रमाणपत्र दिया गया था कि CV की पड़ताल की गई है और सही पाया गया है – सही CV प्रस्तुत करने की बाध्यता याची पर या उसके अवयस्क भागीदार पर थी।

***C. Tender – Debarment – Principle of Natural Justice* – Held – Respondents issued show cause notice in clear terms of clauses of RFP to petitioner whereby they submitted their reply and after considering the same, order of debarment has been passed – No violation of principle of natural justice. (Para 32)**

ग. निविदा – विवर्जन – नैसर्गिक न्याय का सिद्धांत – अभिनिर्धारित – प्रत्यर्थीगण ने याची को, RFP के खंडों के स्पष्ट निबंधनों में, कारण बताओ नोटिस जारी किया जिस पर उन्होंने उनका जवाब प्रस्तुत किया और उक्त पर विचार करने के पश्चात्, विवर्जन का आदेश पारित किया गया है – नैसर्गिक न्याय के सिद्धांत का कोई उल्लंघन नहीं।

***D. Tender – Debarment – Disproportionate Action* – Held – As per the clause, debarment upto a period of 5 years can be taken whereas in present case debarment has been done for 2 years – Order of debarment is not disproportionate. (Para 28 & 34)**

घ. निविदा – विवर्जन – अननुपातिक कार्रवाई – अभिनिर्धारित – खंड के अनुसार, 5 वर्ष तक की अवधि तक विवर्जन किया जा सकता है जबकि वर्तमान प्रकरण में 2 वर्ष के लिए विवर्जन किया गया है – विवर्जन का आदेश अननुपातिक नहीं है।

Cases referred:

2013 Online MP 5471, (2014) 14 SCC 731, (2014) 9 SCC 105, (2021) 1 SCC 804, (1995) 3 SCC 334.

Deepesh Joshi, for the petitioners.
P.K.Kaurav, A.G. with *Aditya Khandekar,* for the respondents.

O R D E R

(Hearing convened Through Video Conferencing)

The Order of the Court was passed by :

VIJAY KUMAR SHUKLA, J. :- Regard being had to the facts of the case and the reliefs sought in the present writ petitions, they were heard together and are being disposed of by a common order. For the sake of convenience and clarity the facts enumerated in WP-11371-2021 are taken note of.

2. Shorn or unnecessary details : The respondent No.1 -Madhya Pradesh Road Development Corporation [for short, "the MPRDC"] invited tender for Consultancy of Independent Engineer for Operation & Maintenance (O & M) period on Completed Road Projects under BOT (Toll), BOT (Toll + Annuity) & BOT (Annuity) Mode for MPRDC for the State of Madhya Pradesh (hereinafter referred to as "the Project") on 22-9-2020. Request for Proposal (for brevity "RFP) was issued by the respondents. The petitioner along with its lead partner - M/s K & J Projects Private Limited participated in the tender process and submitted its bid for the tender on 17-10-2020. The technical evaluation was declared on 25-01-2021 wherein the score of the petitioner was recorded to be 94.55 marks which is reflected in the Minutes of the Meeting of the Bid Evaluation Committee held on 21-01-2021. The petitioner further submits that as per sub-clause (ii) of Clause 5.5 of the Data Sheet, the technical proposal of a bidder must secure a minimum of 75 marks to be considered for the financial evaluation. A reference is made to Clause 5.5 (iii) of the Data Sheet. A revaluation was conducted on 9-02-2021, however, there was no change in the scores obtained by the petitioner, which scored the highest marks and thus, qualified for opening of the financial bid. The petitioner has referred to the Minutes of the Meeting of the Bid Evaluation Committee, dated 9-02-2021. It is stated that as a result of the petitioner's highest score, it was qualified for the financial bid, wherein the petitioner was also the lowest bidder in the whole tender process.

3. It is setforth that pursuant to the petitioner's qualification for the technical and financial bid on 16-02-2021, a complaint was received by the respondent No.2 on 18-02-2021 against the petitioner regarding the documents submitted by it from Neeraj Nigam. On the basis of the complaint dated 18-02-2021, the respondent No.2 issued a letter dated 31-03-2021 to the petitioner seeking clarification

with regard to the difference of period of engagement of Mr. Akhil Khare shown in his Curriculum Vitae [hereinafter referred to as "CV"] submitted by the lead partner in association with the petitioner in the present Project and in another CV submitted in a project of M/s URS Scott Wilson India Private Limited, in association with the petitioner are not matching with each other. The CV of Mr. Akhil Khare was submitted as per Appendix B-5 under Section 4 Format for submission of Technical Proposal of the RFP, as also uploaded in the Infracon portal.

4. It is putforth that in the meanwhile, the respondent No.2 had also sought the same clarification from M/s URS Scott Wilson India Private Limited as to the differences in the contents of the CV of Mr. Akhil Khare on 6-03-2021. In consequence of the letter dated 6-03-2021 M/s URS Scott Wilson India Private Limited sought clarification from Mr. Akhil Khare and Mr. Akhil Khare also replied, vide letter dated 12-03-2021.

5. The petitioner vide its reply dated 7-04-2021 to the letter dated 31-03-2021 issued by the respondent No.2 informed that the CV of Mr. Akhil Khare which was submitted in the present Project by the petitioner was taken from the Infracon Portal of the Ministry of Road Transport and Highways, Govt. of India and the CV submitted in the earlier Project of M/s URS Project was submitted as per requirements of that Project. For the present Project, the CV was obtained from Infracon Portal, wherein the Key Personnel submitted the details in an elaborate format containing his employment records. It is relevant to note that Section 3 of the RFP issued to M/s URS Scott Wilson India Private Limited project provides the qualification of the Senior Quality Surveyor (SQS) and accordingly, the CV was submitted by the petitioner therein to the respondent No.1 in the prescribed format. It is further submitted that the work experience of Mr. Akhil Khare submitted by M/s URS Scott Private Limited for previous tender, which clearly states that 'the past employment that is not relevant to the assignment does not need to be included'. Hence, the formats of the CV submitted by Mr. Akhil Khare were different as per the requirement of both the RFPs and the same could not be compared for the purposes of ascertaining the qualification of Mr. Akhil Khare for this RFP.

6. It is contended that despite having received the reply and justification so offered by the petitioner, the decision to annul the tender was taken by the Bid Evaluation Committee of the respondent No.1 in a haste manner and the bid submitted by the petitioner was rejected on 7-5-2021. Thereafter, as the decision for rejecting the bid was already taken without giving an opportunity of hearing to the petitioner, an order of annulment of tender dated 11-5-2021 was purportedly passed by the respondent No.2.

7. After passing of the tender annulment order dated 11-5-2021, the very next day on 12-5-2021 a fresh tender bearing No.2021_MPRDC_142220_1 having Tender Ref. No.502 was invited by the respondent No.1 for the same Project as "Proposal for engaging an Independent Engineer (IE) on the basis of National Competitive Bidding for Operation and Maintenance (O & M) of the MPRDC road projects under BOT (Toll), BOT (Toll and Annuity and BOT (Annuity mode in the State of Madhya Pradesh.

8. According to the petitioner the respondent No.1 issued a fresh tender in a haste manner in order to ensure that the petitioner had no chance to present its claim or make an adequate representation before the respondents regarding the said complaint of Key Personnel's CV made to the respondent No.2. After having annulled the said tender the respondent No.2 realised that the petitioner was not given an opportunity of hearing and was also not offered the opportunity to replace the Key Personnel and hence, the exercise of giving an opportunity was initiated. After passage of almost 1 ½ months and after sleeping on the allegations mentioned in a false complaint against the petitioner, the respondent No.2 issued a show cause notice dated 20-5-2021 to the petitioner to conceal the act already done with the intent to award the tender to third party. The show cause notice issued to the petitioner required the petitioner to give an explanation as to why the petitioner should not be debarred owing to the alleged difference in CV of the Key Personnel. The allegation in the said show cause notice were only based on the differences found in the CV of the Key Personnel for the position of SQS, and there was no such content which points out that the petitioner has presented wrong information wilfully during the course of the tender process.

9. It is putforth that the petitioner has completely complied with all the contents of Clause 3.4(iv)(b) of Section 2 of the RFP. It is pertinent to mention here that the respondent No.2 alleged that the said tender was annulled due to foul play found in the CV of Mr. Akhil Khare submitted by lead partner and the petitioner by putting incorrect data in the CV to get the tender. It was also denied that the petitioner has never dictated the contents of the CV of Mr. Akhil Khare and it was Mr. Akhil Khare, who uploaded the CV on Infracon portal with the sole responsibility of content correctness vested with him. The submissions in the CV of Mr. Akhil Khare is totally his own responsibility and the petitioner had no involvement in it. It is asserted that even when the respondents found the alleged discrepancy in the CV of Mr. Akhil Khare, then instead of giving the benefit of the remarks 2 of Data Sheet under Section 2 of the RFP and Clause 4.5(d) of the General Conditions of Contract (GCC) to the petitioner or undertake the process of revaluation of the CV as per the terms and conditions of the RFP, the respondent No.2 directly annulled the tender and then did a futile exercise of issuing a show cause notice. The petitioner was also issued a show cause notice on 20-5-2021. It is strenuously urged that the petitioner only submitted the CV which was taken

from the most authentic Infracon portal of MORTH, Govt. of India. It is stated that as per the Note (g) of the Format of CV for the proposed professional staff provided under Appendix B-5 of Section 4 of the RFP it was mandated that the CV of the Key Personnel must be taken from the Infracon Portal only for its validity.

It is necessary to note here that the CV was only submitted in the format as mandated by the terms and conditions of the RFP. The petitioner did not make any amendment or modification in the CV of the Key Personnel for the tender process.

10. The petitioner replied to the show cause notice vide letter dated 26-5-2021, wherein it explained its position in the light of the Remark 2 under Date (sic: Data) Sheet of the RFP and requested for withdrawal of the show cause notice. The petitioner elaborately explained its position regarding the information mentioned in the CV and in fact, the petitioner had nothing to do with the preparation of the CV of the Key Personnel for the post of SQS. It is pertinent to state that the said Key Personnel Mr. Akhil Khare even clarified the same information that he was working simultaneously in two organizations and there is nothing to hide or he has represented any factually incorrect information, as the said CV was uploaded on the Infracon portal which was relied upon by the petitioner.

11. It is setforth that the petitioner in its reply dated 26-5-2021 also relied on Clause 4.5(d) of GCC which provides that in case the information mentioned in the CV is found to be incorrect, then the Key Personnel shall be removed and it was only in case of a second time involvement of the consulting firm, then an action can be taken against the consulting firm. It is submitted that the petitioner had no involvement whatsoever in the preparation of the CV of the Key Personnel for the position of SQS or any involvement with regard to the mention of the total years of experience with the firm. The petitioner solely relied on the CV which it took from the most authentic portal of Infracon.

12. It is asserted that the petitioner being the highest scorer in technical bid and having the lowest financial bid, again requested vide letter dated 4-6-2021 for reconsideration and re-evaluation of the technical bid and requested for cancellation of fresh tender for the same Project. No consideration was made by the respondents on the aforesaid letters. The respondent No.2 passed an order dated 15-6-2021 debarring the petitioner from participating in future tenders invited by the respondent No.1 quoting violation of Clause 3.4(iv) (b) of Section 2 of the RFP for a period of two years.

13. According to the petitioner it submitted all necessary informations derived from the CV as uploaded in the Infracon Portal. The CV clearly elaborated the number of years of Key Personnel with the firm and also his degree of responsibility held in various assignments. Thus, no incorrect information has been submitted

by the petitioner. The respondent No.2 also debarred Mr. Akhil Khare, Key Personnel for the post of SQS in the instant Project, vide order dated 15-6-2021.

14. It is urged that pursuant to the order of debarment the petitioner submitted a representation before the respondent No.1 on 18-6-2021 seeking a relief to revoke the order of debarment. However, the representation was rejected by the respondent No.2 vide letter dated 23-6-2021. It is submitted that the order of debarment passed by the respondent No.2 was with the knowledge of and in concurrence with the respondent No.1, whereas the order of debarment dated 15-6-2021 does not state so and in fact, the respondent No.2 gave the option to challenge the order of debarment before the appellate authority, i.e., Managing Director in the said letter. But when the petitioner preferred the appeal/ representation against the order of debarment, the same was again rejected by the respondent No.2 without considering the submissions made by the petitioner. The order impugned debarring the petitioner from participating in future tender of the respondents, has been assailed on the ground that the same runs counter to the principles of natural justice. It is vehemently pleaded that the impugned order is against the terms and conditions of the RFP and the decision of debarment has been taken in haste and the formality of issuance of show cause notice was done only after the decision of the debarment was taken. It is vehemently argued that the respondent No.2 while debarring the petitioner by issuing the order dated 15-6-2021 did not follow the provisions contained in the RFP and misinterpreted the clauses as well. The respondent No.2 also ignored the fact that it was not in dispute that it was not a concluded contract, as the work was not awarded to the petitioner. Thus, the question of commission of any breach of the terms and conditions of the concluded contract also does not arise. It is argued that debarring the petitioner from participating in future tenders for two years was that the CV submitted by Mr. Akhil Khare by the lead partner - M/s K & J Projects Private Limited of the petitioner in association with the petitioner for the subject work, had shown that Mr. Akhil Khare was working with the petitioner since September, 2011. Whereas the CV of Mr. Akhil Khare was submitted by a company - M/s URS Scott Wilson India Private Limited in association with the petitioner for :MPRDC SDV-V MPDR-II SP Package - I Bhopal Projhect" shows that Mr. Akhil Khare had worked with M/s Stanley Consultant Inc. from July 2010 to August, 2012; M/s STUP Consultancy Private Limited from September, 2012 to November, 2015; and M/s Consultancy Engineering Group from December, 2020 till date. It is contended that Mr. Akhil Khare was working simultaneously in two different projects at different locations and the said fact was known to the petitioner but he suppressed the said fact. Therefore, taking recourse of Clause 3.4(iv)(b) of Section 2 of the RFP, the petitioner was debarred, whereas there was no breach of Clause 3.4(iv)(b) of Section 2 of the RFP, as the petitioner has already submitted all the informations pertaining to Key Personnel, Mr. Akhil Khare for the post of

SQS, as enclosed in the CV and no information supplied by the petitioner was found to be incorrect at any stage, enabling the respondents to annul the tender or debar the petitioner.

15. It is argued that the impugned order suffers from gross non-application of mind, as even if the said Key Personnel's experience was not found to be correct, then the said CV could have been ignored and zero mark could have been given to the petitioner for consideration of the qualification as per the Data Sheet Remark-2. It is put forth that since the contract itself was never concluded and, therefore, the respondent No.2 had no authority to invoke Clause 3.4(iv)(b) of Section 2 of the RFP. Lastly it is submitted that debarment of the petitioner from participating in the future tenders for a period of 2 years is not only grossly disproportionate to the alleged fault attributed, but also grossly punitive, as the petitioner has not committed any fault in submitting the requisite information, because as per the requirement mentioned in the tender document, the CV of the Key Personnel was required to be taken from Infracon Portal, wherein the said Key Personnel Akhil Khare had already uploaded the CV.

16. The respondents have filed reply in WP-11239-2021 and adopted the same in other writ petition (WP-11371-2021). It is stated that the respondents had invited tender on 22-9-2020 for the Project which included a total of 87 roads in 10 divisions of the MPRDC in the State having total length of 4070.88 Kms. The Independent Engineer/Consultant was required to independently review activities associated with design, design review, during construction, required quality assurance and quality control tests and operation and maintenance of the Project on behalf of both the MPRDC and Concessionaire, so as to ensure compliance of the requirement of the provisions of the Concession Agreement and to report to the MPRDC on financial, technical and physical progress of implementation aspects of the Project. The total period of contract was 3 years which was extendable by a further period of one year. The Request for Proposal (RFP) permitted consultants to apply either as a sole firm or as a joint venture with upto a total of three partners. In the present case, the petitioner was the lead partner and M/s Aicons Engineering Pvt. Ltd. was the associate partner.

17. It is putforth that the format for submitting the certification of the qualifications and experience by the candidate as well as the Consultant is enclosed with the RFP. Format of Curriculum Vitae (CV) for proposed professional staff which clearly shows that the prospective bidder was obligated or required to examine and verify the credentials of the professional staff and had to certify that the contents of their CV were true and correct.

18. Though the respondents raised preliminary issue regarding availability of an alternative remedy of arbitration under Clause 8.2 of the General Conditions of Contract (GCC) which prescribes arbitration as a mode of dispute resolution as

per the provisions of the M.P. Madhyastham Adhikaran Adhiniyam, 1983, but they did not press the aforesaid ground of availability of an alternative remedy. It is submitted that the impugned order of debarment was passed under Clause 3.4(iv)(b) of the RFP. It is apt to reproduce Clause 3.4(iv)(b) of the RFP which reads :

> *"3.4(iv)(b) - Key information should include years with the firm and degree of responsibility held in various assignments. In CV format, at summary, the individual shall declare his qualification and total experience (in years) against the requirements specified in TOR for the position. If any information is found incorrect at any stage, action including termination and debarment from future MPRDC projects upto 5 years may be taken by MPRDC on the personnel and the Firm."*

19. Further, Clause 3.4(vii) mandates that a certification to the effect should be furnished by the Consultant that they have checked the qualification and experience details submitted by the Key Personnel in their CVs and found the same to be correct. It further stipulates that the certification should be made in CVs of all Key Personnel after the certification by the candidates. The format of CV includes certification to this effect.

20. Then respondents have raised the objection that there is no challenge to the annulment order. It is asseverated that a complaint was received stating inter alia, that a false and fabricated CV has been submitted by Shri Akhil Khare, Senior Quantity Surveyor-cum-Contract Specialist alleging that Shri Akhil Khare is working for URS Scott Wilson India Pvt. Ltd. with Sub-consultant M/s Aicons Engineering Pvt. Ltd. in MP District Road-II Sector Project (MPDRIISP) Package-I (Bhopal); that on the basis of CV showing employment with M/s CEG Engineering Ltd. from December, 2015 onwards; that based on the complaint, a show cause notice was issued to the lead partner i.e. the petitioner on 31-03-2021; that the petitioner submitted its response to the show cause notice on 7-4-2021 and Shri Akhil Khare submitted his response on 12-3-2021; that in the said response, the petitioner has not disputed the variance in the CV and has in fact, admitted that the variation is minor in nature; and that the Bid Evaluation Committee examined the entire matter on 7-5-2021 and observed that Mr. Akhil Khare has worked with multiple organizations at the same time and, therefore, recommended that the tender awarded to M/s K & J Projects Pvt. Ltd. and M/s Aicons Engineering Pvt. Ltd. be recalled and action as per Clause 3.4(iv)(b) be taken against them. It is argued that in the aforesaid backdrop the tender was annulled by order dated 11-5-2021. The petitioner has not challenged this order and, therefore, it has accepted cancellation of the tender.

21. The respondents further raised an objection regarding non-participation of the petitioner in the Tender No.2021 MPRDC 142220 1. Upon annulment of the earlier tender, the respondents issued a new tender on 12-5-2021. As per the terms of the tender, the bids were invited from 12-5-2021 till 16-6-2021 and the bids were opened on 17-6-2021. But, neither the petitioner nor its associate partner i.e. M/s Aicons Engineering Pvt. Ltd. participate in the tender process and, therefore, the petitioner cannot seek for a relief for staying or setting aside the tender process. It is contended that in absence of taking part in the tender process, the petitioner has no locus to challenge the fresh tender. The respondents placed reliance on the judgment rendered in *Dinesh Dixit vs. State of M.P.,* 2013 Online MP 5471. It is also submitted that the earlier tender was annulled on 11-5-2021. The fresh tender was invited on 12-5-2021 and the last date for submission of bids was 16-6-2021 and the petitioner was debarred on 15-6-2021. Therefore, if the petitioner was desirous to participate in fresh tender, could have submitted its bid from 12-5-2021 till 15-6-2021. Since the petitioner failed to participate in the fresh tender process, it cannot be said to be affected by its outcome and cannot challenge the same before this Court by way of a writ petition.

22. The respondents vehemently argued that the order of debarment was passed as per law, after issuance of a show cause notice and considering the reply submitted by the petitioner. It is stated that in view of the recommendation of the Bid Evaluation Committee, a show cause notice was issued to the petitioner, M/s Aicon Engineering Pvt. Ltd. and to Mr. Akhil Khare on 20-5-2021.In the show cause notice it was clearly stated that the petitioner should submit its reply within 15 days, otherwise appropriate action would be taken as per Clause 3.4(iv)(b) of the RFP. The petitioner submitted its response on 25-5-2021 stating that - we wish to again submit that we have submitted the CV as available on Infracon portal only and not made any change in it. There is no mechanism that we find out regarding 4-5 years back details of CV submitted by Key Personnel for any other assignment. Hence, onus of submission of correct information is on the Key Personnel and not on the firm.

23. According to the respondents, in fact, the petitioner has admitted that an incorrect CV has been submitted and it has attempted to shift the obligation to Mr. Akhil Khare. It is submitted that as per the RFP, the CV was required to be certified by the consultant and even in the present case, a certificate has been given by M/s Aicons Engineering Pvt. Ltd. stating that the CV has been checked and found to be correct. Thus, the obligation of submitting a correct CV was on the petitioner or its minor partner. Thus, the respondents have duly considered the reply submitted by the petitioner as well as M/s Aicons Engineering Pvt. Ltd. and Shri Akhil Khare and all of them have been debarred for a period of two years by clearly recording that Shri Akhil Khare was working in multiple places. There is no illegality in issuance of the impugned order.

24. To buttress his submissions, the learned counsel for the respondents has relied on the judgment of the Apex Court rendered in the case of *Kulja Industries vs. Chief General Manager, Western Telecom Project, BSNL,* (2014) 14 SCC 731. According to the respondents the CV submitted by the petitioner's consortium was false and fabricated and the onus to submit the correct CVs was on the petitioner. Clause 3.4(iv)(b) of the RFP specifically provided that, if any misappropriation was made, the bidder was liable to be debarred upto 5 years. Action of the respondents is in consonance with the RFP. It is submitted that the impugned order has been passed after following the principles of natural justice, as show cause notice was issued to the petitioner - M/s Aicons Engineering Pvt. Ltd. and to Shri Akhil Khare. They submitted their respective responses and after considering the same, three orders debarring them have been issued on 15-6-2021. The respondents submitted that the bid was annulled due to the fact that the petitioner submitted a false and fabricated CV. According to them, it has been admitted by the petitioner as well as M/s Aicons that the CV of Shri Akhil Khare has variances and, therefore, the action has been taken as per Clause 3.4(iv) (b) of the RFP.

25. The respondents denied the submission canvassed by the learned counsel for the petitioner that an opportunity ought to have been given to the petitioner to replace the Key Personnel. The show cause notice clearly states that if the reply is not found satisfactory, then action as per Clause 3.4(iv)(b) would be taken. The said clause permits for debarment upto a period of 5 years. In the case in hand, debarment has been done for a period of two years.

26. We have heard the learned counsel for the parties and bestowed our anxious consideration on their respective arguments advanced.

27. The learned counsel for the petitioner submitted that the impugned action of debarment could have been taken only after the contract was executed by the parties. We are not impressed with the aforesaid contention, as in the present case, Clause 3.4(iv)(b) of the RFP which has been reproduced in the preceding paragraph clearly stipulates that if any false information is supplied then action of debarment can be initiated at any stage. Further, as per Clause 3.4(vii) of the RFP, a certification to the effect should be furnished by the Consultant that they have checked the qualifications and experience details submitted by the Key Personnel in their CVs and found the same to be correct. This clarification has to be made in the CVs of all key personnel after the certification by the candidate. The format of CV includes certification to this effect. The format for submitting the certification of the qualifications and experience by the candidate as well as consultant is enclosed with the RFP. Format of CV for proposed professional staff clearly shows that the prospective bidder was obligated/required to examine and verify the credentials of the professional staff and had to certify that the contents of their CV were true and correct.

28. The learned counsel for the petitioner further argued that if the CV was incorrect, the same could have been ignored. The said argument also cannot be accepted in view of the specific Clause 3.4(iv)(b) of the RFP, which clearly mandates that if any false information or misrepresentation is done, then respondents can debar the said employee as well as the firm that has submitted the fabricated CV. It has also been argued that the respondents were required to give an opportunity to the petitioner to replace the Key Personnel. In the show cause notice, it was clearly mentioned that in the event of failure to file reply to the show cause, action as per Clause 3.4(iv)(b) would be taken. The argument of the learned counsel for the petitioner that the debarment is grossly disproportionate, is also not worth acceptance. As per Clause 3.4(iv)(b) debarment upto a period of 5 years can take place. In present case, debarment has been done for a period of two years and, therefore, it cannot be said that the order of debarment is disproportionate.

29. We have discussed the case of the petitioner as well as respondents in a greater detail. It is vivid that as per the RFP the bidder was required to certify that the contents of CV of the Key Personnel is true and correct and such a certification has been given in the present case as well. Thus, since the petitioner's Consultant has furnished a false certification, therefore, Clause 3.4(iv)(b) of the RFP is attracted and the order of debarment has been passed, after giving show cause notice to the petitioner to M/s Aicons Engineering Pvt. Ltd. and Shri Akhil Khare.

30. In response to the show cause notice the petitioner has averred as follows :

> " *We wish to again submit that we have submitted the CV as available on Infracon Portal only and not made any change in it. There is no mechanism that we find out regarding 4-5 years back details of CV submitted by Key Personnel for any other assignment. Hence, onus of submission of correct information is on the key professional and not on the firm*."

31. From the aforesaid reply, it is luminescent that the petitioner has admitted that an incorrect CV has been submitted and it has attempted to shift the obligation to Mr. Akhil Khare. As per Clause of the RFP, the CV was required to be certified by the Consultant and even in the case in hand, a certificate has been given by M/s Aicons Engineering Pvt. Ltd. stating that the CV has been checked and found to be correct. Thus, the obligation to submit a correct CV was on the petitioner or its minor partner.

32. The argument of the learned counsel for the petitioner that the impugned order has been passed in violation of principles of natural justice also deserves no acceptance. The respondents have issued a show cause notice in clear terms of Clause 3.4(iv)(b) of the RFP, which was issued to the petitioner M/s Aicons Engineering Pvt. Ltd and Shri Akhil Khare and they have submitted their respective

responses. After considering the same, the orders of debarment were issued from 16-6-2021. The show cause notice was issued on 20-5-2021; reply thereto was submitted on 25-5-2021; and the order of debarment was issued on 15-6-2021. Thus, there is no illegality in the decision-making process. The Bid Evaluation Committee returned the finding that action under Clause 3.4(iv)(b) of the RFP should be taken. Thereafter, the decision was taken on 7-5-2021. Thus, the contention of the petitioner that the decision was taken on 7-5-2021 *per se* has no merit. The bid was annulled owing to the fact that the petitioner submitted a false and fabricated CV. It has been admitted by the petitioner as well as M/s Aicons Engineering Pvt. Ltd. that the CV of Shri Akhil Khare has variances and, therefore, action has been taken as per Clause 3.4(iv)(b) of the RFP.

33. The learned counsel for the respondents placed reliance on the judgment rendered in the case of *Kulja Industries* (supra) and also in *Gorkha Security Services vs. Government (NCT of Delhi) and others,* (2014) 9 SCC 105, to substantiate his submission that the order of debarment/blacklisting has been passed after issuing a show cause notice and considering the reply to show cause submitted by the petitioner. Thus, there is compliance of the principle of natural justice.

34. The learned counsel for the petitioner heavily relied on the judgement rendered in the case of *Vetindia Pharamaceuticals Limited vs. State of Uttar Pradesh and another,* (2021) 1 SCC 804. The said judgement would not render any assistance to the petitioner in the present case, as the facts of the present case are distinguishable and in the case in hand, action for debarment has been taken in view of the Clause 3.4(iv)(b) of the RFP. In the said case, the allegation made in the show cause notice was that the petitioner had supplied misbranded medicines, whereas the fact was that the supply of injections had not commenced. In the present case, Clause 3.4(iv)(b) of the RFP clearly postulates that if any information is found incorrect, action including termination and debarment from future MPRDC projects upto 5 years may be taken by MPRDC.

35. The allegations in the show cause notice are that the CVs of Shri Akhil Khare was submitted by M/s Scott Wilson India Pvt. Ltd. with sub-consultant M/s Aicons Engineering Pvt. Ltd. and other is submitted by M/s K & J Projects Pvt. Ltd. in association with M/s Aicons Engineering Pvt. Ltd. the details of work are not matching with each other from September 2011 and the date of submission of CV. Therefore, the MPRDC is of the view to take action as per Clause 3.4(b) Section 2 of RFP document. In the impugned order it has been recorded that in view of above paras, it is clear that overlapping period of employment of Mr. Akhil Khare was suppressed by M/s K & J Projects Pvt. Ltd. in association with M/s Aicons Engineering Pvt. Ltd.

36. The argument advanced on behalf of the petitioner that as per remark 2 the petitioner could have been permitted to replace the Key Personnel or the CV of Akhil Khare could have been awarded zero mark, is also not worth acceptance, because the remark clearly states that this provision is applicable only till the opening of the financial bid. In the present case, the financial bid was opened on 16-02-2021 and the complaint was received on 18- 02-2021. Therefore, it was crystal clear that there was misrepresentation and suppression of material facts as well.

37. The action of debarment of the petitioner is in conformity with Clause 3.4(iv)(b) of the RFP, wherein it has been specifically provided that if any information is found incorrect at any stage, action including termination and debarment from future MPRDC projects upto 5 year will be taken. In view of the said clause, action should have been taken even prior to execution of the contract. A reference may be made to the the decision rendered in the case of *Nova Steel (India) vs. MCD,* (1995) 3 SCC 334.

38. We have confined our judicial scrutiny only to the decision-making process and we do not perceive any illegality or arbitrariness in the decision taken by the respondents in passing the order impugned in the instant petitions.

39. In view of our preceding analysis, we do not find any illegality in the impugned order and **the writ petitions being sans substratum, are dismissed**. There shall be no any order as to costs.

Petition dismissed

I.L.R. [2021] M.P. 2072 (DB)
WRIT PETITION

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

WP No. 11783/2021 (Jabalpur) decided on 3 September, 2021

M.P. ROAD DEVELOPMENT CORPORATION …Petitioner

Vs.

THE MINISTRY OF ROAD, TRANSPORT AND HIGHWAYS (MORT & H) & anr. …Respondents

A. Arbitration and Conciliation Act (26 of 1996), Section 16 & 34 – Scope & Jurisdiction **– Held – Once if Arbitral Tribunal takes a decision to reject the plea referred u/S 16(2) or 16(3), it shall continue with arbitral proceedings and make an arbitral award – It cannot be said that aggrieved party has been left remediless against rejection of his objection regarding jurisdiction of Tribunal, the only thing is that its remedy has been deferred**

till stage of Section 34 of the Act – No infirmity in Tribunal's order – Petition dismissed. (Paras 19, 20 & 24)

क. माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 16 व 34 – व्याप्ति व अधिकारिता – अभिनिर्धारित – एक बार यदि माध्यस्थम् अधिकरण धारा 16(2) या 16(3) के अंतर्गत निर्दिष्ट अभिवाक् को नामंजूर करने का विनिश्चय करता है, वह माध्यस्थम् कार्यवाहियों को जारी रखेगा और माध्यस्थम् अवार्ड देगा – यह नहीं कहा जा सकता कि व्यथित पक्षकार को अधिकरण की अधिकारिता के संबंध में उसकी आपत्ति की नामंजूरी के विरूद्ध उपचारहीन छोड़ दिया गया है, केवल एक बात यह है कि इसके उपचार को अधिनियम की धारा 34 के प्रक्रम पर आस्थगित कर दिया गया है – अधिकरण के आदेश में कोई दोष नहीं – याचिका खारिज।

***B. Arbitration and Conciliation Act (26 of 1996), Section 16 & 37(2)* – Held – It is evident from Section 37(2) that it purposely does not provide for an appeal against an order of Arbitral Tribunal rejecting the plea referred u/S 16(2) or 16(3) – Plea of petitioner jurisdiction or that proper notice of appointment of arbitrator was not given, may only be available to it as ground of challenge to the award if eventually it is passed against it. (Para 20)**

ख. माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 16 व 37(2) – अभिनिर्धारित – धारा 37(2) से यह साक्ष्यित है कि यह सप्रयोजन धारा 16(2) या 16(3) के अंतर्गत निर्दिष्ट अभिवाक् को नामंजूर करने वाले माध्यस्थम् अधिकरण के आदेश के विरूद्ध अपील उपबंधित नहीं करती है – अधिकारिता या मध्यस्थ की नियुक्ति का उचित नोटिस न दिये जाने के संबंध में याची का अभिवाक्, उसे अवार्ड को चुनौती के आधार केवल तब उपलब्ध हो सकता है यदि अंततः उसके विरूद्ध पारित किया गया है।

***C. Arbitration and Conciliation Act (26 of 1996), Sections 16(2), 34 & 37 and Madhyastham Adhikaran Adhiniyam, M.P. (29 of 1983), Section 7-A – Adjudication of Dispute – Applicability of Act* – Held – If despite existence of Arbitration Tribunal under the Act of 1983, parties have agreed for arbitration in accordance with ICADR Rules and Arbitration Act and consciously did not mention in agreement about existence of Arbitration Tribunal established under Act of 1983, which then was already in existence, petitioner cannot be permitted now to raise this plea. (Para 14 & 15)**

ग. माध्यस्थम् और सुलह अधिनियम (1996 का 26), धाराएँ 16(2), 34 व 37 एवं माध्यस्थम् अधिकरण अधिनियम, म.प्र. (1983 का 29), धारा 7–A – विवाद का न्यायनिर्णयन – अधिनियम की प्रयोज्यता – अभिनिर्धारित – यदि 1983 के अधिनियम के अंतर्गत माध्यस्थम् अधिकरण के विद्यमानता के बावजूद, पक्षकार आई.सी.ए.डी. आर. नियमों एवं माध्यस्थम् अधिनियम के अनुसार मध्यस्थता के लिए सहमत हुए एवं भानपूर्वक 1983 के अधिनियम के अंतर्गत स्थापित माध्यस्थम् अधिकरण की

विद्यमानता के बारे में करार में उल्लेख नहीं किया है, जो तब पहले से ही अस्तित्व में था, याची को अब इस अभिवाक् को उठाने की अनुमति नहीं दी जा सकती।

***D. Constitution – Article 226/227 and Arbitration and Conciliation Act (26 of 1996), Section 11(6) & 37 – Scope of Interference* – Apex Court concluded that the legislative object of enacting the consolidated Act is to minimize judicial intervention while the matter is in process of arbitration – Once arbitration has commenced in Arbitral Tribunal, parties have to wait until award is pronounced, however right of appeal is available to them u/S 37 even at an early stage. (Para 16)**

घ. संविधान – अनुच्छेद 226/227 एवं माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 11(6) व 37 – हस्तक्षेप की व्याप्ति – सर्वोच्च न्यायालय ने निष्कर्षित किया है कि समेकित अधिनियम को अधिनियमित करने का विधायी उद्देश्य, न्यायिक मध्यक्षेप को कम करना है जब मामला मध्यस्थता की प्रक्रिया में हो – एक बार माध्यस्थम् अधिकरण में मध्यस्थता आरंभ हो जाने पर, पक्षकारों को अवार्ड सुनाए जाने तक प्रतीक्षा करनी होगी, तथापि धारा 37 के अंतर्गत अपील का अधिकार उन्हें प्रारंभिक प्रक्रम पर भी उपलब्ध है।

***E. Arbitration and Conciliation Act (26 of 1996), Section 11(6) – Aims & Objects* – Held – This Act is a self contained code dealing with every aspect of arbitration – The legislative policy in consolidating all the laws relating to domestic arbitration, international commercial arbitration, enforcement of foreign arbitral awards is aimed at ensuring not only speedy disposal of arbitration cases but also timely execution of awards. (Para 15)**

ङ. माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 11(6) – लक्ष्य व उद्देश्य – अभिनिर्धारित – यह अधिनियम मध्यस्थता के प्रत्येक पहलू से संबंधित एक स्वतः पूर्ण संहिता है – घरेलू मध्यस्थता, अंतरराष्ट्रीय वाणिज्यिक मध्यस्थता, विदेशी माध्यस्थम् अवार्ड के प्रवर्तन से संबंधित सभी कानूनों को समेकित करने में विधायी नीति का उद्देश्य न केवल माध्यस्थम् प्रकरणों का शीघ्र निपटान सुनिश्चित करना है बल्कि अवार्ड का समय पर निष्पादन सुनिश्चित करना भी है।

Cases referred:

AC No. 21/2014 decided on 21.07.2015, SLP No. 10676/2018 decided on 04.05.2018 (Supreme Court), (2021) SCC Online SC 8, (2020) 15 SCC 706, 1994 SCC Online 4, (2017) 2 MPLJ 681, (2011) 13 SCC 261, (2012) 3 SCC 495, (2008) 7 SCC 487, (2011) 8 SCC 333, 2019 SCC Online SC 1154, (2005) 8 SCC 618, (2002) 2 SCC 388, (2011) 14 SCC 337.

Purushaindra Kaurav, A.G. with *Aditya Khandekar* for the petitioner.
Mohan Sausarkar, for the respondent No. 1.
Ranjeet Kumar with *Akshay Sapre,* for the respondent No. 2.

O R D E R

The Order of the Court was passed by : **MOHAMMAD RAFIQ, CHIEF JUSTICE, J. :-** This writ petition has been filed by M.P. Road Development Corporation challenging the order dated 29.12.2020 passed by the Arbitral Tribunal which is in seisin over the dispute arising out of the concession agreement executed between the petitioner and the Respondent No.2 on 25.1.2021 to augment the existing road from km 2229/10 to km 140/6 approximately 89.300 kms on the Rewa to MP/UP Border section of the National Highway No.7 by four laning on design, build, finance, operate and transfer (DBFOT) basis on the terms and conditions set forth therein. By the aforesaid order, the application filed by the petitioner on 24.12.2020 under Section 16 of the **Arbitration and conciliation Act, 1996** (hereinafter referred to as "**the Act of 1996**" for short) contending that the dispute falls within the definition of 'works contract' over which the Arbitral Tribunal constituted under the **Madhya Pradesh Madhyastham Adhikaran Adhiniyam, 1983** (hereinafter referred to as **"the Adhiniyam of 1983"** for short) would have exclusive jurisdiction and therefore, the learned Arbitral Tribunal has no jurisdiction to entertain the same, has been rejected.

2. The petitioner is a Company incorporated under the Indian Companies Act, fully owned by the State Government having its head office at Bhopal. The agreement in question was executed between the petitioner and the Respondent No.2. Upon a dispute having been arisen between them, the Respondent No.2 invoked the Arbitration Clause No.44.3 of the Concession Agreement and appointed Hon'ble Mr. Justice Vikramjit Sen, Former Judge of the Supreme Court of India as its nominee arbitrator. The petitioner instead of appointing its arbitrator, raised a dispute that the matter is required to be adjudicated by the Arbitration Tribunal constituted under the Adhiniyam of 1983. Since the petitioner failed to appoint arbitrator as per Clause 44.3.2, the International Centre for Alternative Dispute Resolution, New Delhi having been empowered under Clause 44.3.1 of the Agreement by invoking Rule 5 of the ICADR Rules, appointed Shri Amarjit Singh Chandhiok as its nominee arbitrator. Both the arbitrators then nominated Hon'ble Mr. Justice A. K. Sikri, former Judge of Supreme Court of India as the Presiding Arbitrator. The petitioner thereafter filed an application before the Arbitral Tribunal under Section 16 of the Act of 1996 contending that it has no jurisdiction to decide the dispute between the parties and also contending that since the dispute between the parties under the Concession Agreement falls within the definition of 'works contract', therefore, in view of Clause 44.4 of the Concession Agreement, Madhya Pradesh Arbitration Tribunal constituted under the Adhiniyam of 1983 would have the exclusive jurisdiction to entertain the dispute. The learned Arbitral Tribunal by impugned order dated 29.12.2020 dismissed the said application. Hence this writ petition.

3. We have heard learned counsel for the parties.

4. Shri Purushaindra Kaurav, learned Advocate General referring to definition of 'works contract' in Section 2(1)(i) of the Adhiniyam of 1983 contended that the essential elements for any work to be termed as a 'works contract' is that the work must be for construction, repair or maintenance of a road and must be executed by the State or its Corporation. This provision nowhere provides that the State or its Corporation must be the owner of the said work. It further clarifies that even when there is no State support agreement, the work would still fall within the definition of works contract. Learned Advocate General argued that Section 5 of the National Highway Act provides it shall be the responsibility of the Central Government to develop and maintain in proper repair all national highways, but the Central Government may, by notification in the Gazette, direct that any function in relation to development or maintenance of any national highway, shall, subject to such conditions, if any, as may be specified in the notification, also be exercisable by the Government of the State within which the national highway is situated or by any officer or authority subordinate to the Central Government or to the State Government. It is argued that the Ministry of Shipping, Road Transport and Highways by notification dated 4.8.2005 directed that the functions in relation to the execution of works pertaining to some of the National Highways including the National Highway No.7, would be exercisable by the State Government.

5. Learned Advocate General submitted that Clause 2.1(ix) of the Memorandum of Understanding executed between the State Government and the Central Government on 30.9.2009 clearly mandates the State Government to ensure effective and efficient implementation of the project as per the terms of the concession agreement and discharge all the obligations, duties and functions of the NHAI in accordance with the concession agreement provided, however, the Authority shall obtain prior written consent of the Central Government before issuing any termination notice of the concession agreement or for making any change in the scope of work under the concession agreement, payment thereunder is to be reimbursed by the Central Government or for issuing any order that has the effect of increasing the concession period under the concession agreement. It is submitted that the concession agreement for four laning of Rewa-MP/UP border (NH-7) was executed with Respondent No.2-M/s Vindhyachal Expressway Private Ltd. on 25.1.2012 in which the concession has been awarded by the M.P. Road Development Corporation. Learned Advocate General argued that this Court in Arbitration Case No.21/2014 (*M/s Highway Infrastructure Vs. Union of India*) decided on 21.7.2015 has in the context of similar controversy clearly observed that the dispute between the petitioner and any person party to the works contract, shall be adjudicated only by the Arbitration Tribunal constituted under the Adhiniyam of 1983. Clause 44.4 of the agreement would be attracted in the

present situation and not Clause 44.3. Clause 44.4 clearly provides that in the event of constitution of a statutory Regulatory Authority or Commission with powers to adjudicate upon disputes between the Concessionaire, all such disputers shall be adjudicated upon by such Regulatory Authority or Commission in accordance with the applicable law and all reference to dispute resolution procedure shall be construed accordingly. This provision, according to the learned Advocate General, has been interpreted by this Court in Arbitration Case No.5/2016 - *M/s Concast Ambha Road Projects Private Ltd. Vs. M.P. Road Development Corporation.*

6. Learned Advocate General argued that comparative analysis of Clause 44.3 which relates to arbitration and Clause 44.4 which relates to adjudication by the Regulatory Statutory body, elicits that remedy of arbitration under Clause 44.3, can be availed only in the event there is no statutory body constituted to adjudicate between the rival parties. In case of constitution and functioning of the said statutory body, the parties have expressly agreed for taking recourse before the Statutory Tribunal under clause 44.4 for adjudication of disputes arising out of the agreement in question to the exclusion of Clause 44.3. It is argued that the M.P. Arbitration Tribunal has in this connection been constituted under the provisions of Adhiniyam of 1983 and it is functional since long, having power to adjudicate reference made to it in shape of disputes relating to work contract awarded by the State or any of its functionaries. The petitioner-corporation is a functionary of the State of M.P. and the contract in question pertains to work for development of Ambha - Pinhat- Manpur- Rameshwar - Nadigon - Seondha - Satanbada - Narwar major district road on BOT (Annuity) basis and squarely falls within the expression "works contract" as defined in Section 2(1)(i) of the Adhiniyam of 1983. Therefore, the remedy of the respondent No.2 would be to approach the statutory Tribunal by filing a reference under Section 7-A of the Adhiniyam of 1983.

7. Learned Advocate General has referred to the order of Supreme Court passed in SLP No.10676/2018 (*M/s ARSS Damoh Hirapur Vs. M.P. Road Development Corporation*) decided on 4.5.2018 to argue that the Supreme Court was therein pleased to transfer the proceedings pending before the Arbitrator to the Arbitration Tribunal under the Adhiniyam of 1983. Similarly, this Court in W.P. No.16194/2018 (*M.P. Road Development Corporation Vs. M/s Nila Construction Company Ltd.)* following the aforesaid order of the Supreme Court, was also persuaded to transfer the arbitration proceedings to the Arbitration Tribunal under the Adhiniyam of 1983. Learned Advocate General sought to distinguish the cited judgment of the Supreme Court in the case of *Bhaven Construction Vs. Executive Engineer,* (2021) SCC Online SC 8 and contended that the argument that once the Arbitral Tribunal decides the application filed under Section 16 of the Act of 1996, remedy of the aggrieved party there against

would be only under Section 34 of the Act of 1996, is wholly misconceived. The aforesaid judgment is not applicable to the present case as the agreement in that case was for manufacture and supply of bricks and the Supreme Court observed that the contract for manufacturing simpliciter was not a works contract and for that reason, the Court went on to say that the question requires contractual interpretation. In the present case, the contract is for construction and maintenance of a road which beyond doubt simpliciter falls within the definition of a works contract. Another judgment of the Supreme Court in *Deep Industries Vs. Oil and National Gas Corporation* reported in (2020) 15 SCC 706 relied on behalf of the respondent No.2 also does not bar the jurisdiction of this Court. Both the judgments do not rule out the exceptions to the general rule that the writ jurisdiction of this Court under Article 226 and 227 of the Constitution of India cannot be curtailed atleast in matters where impugned order passed during arbitral proceedings is lacking in inherent jurisdiction or is founded on bad faith. Relying on the judgment of Calcutta High Court in the case of *State of West Bengal Vs. Sk. Isha Ali* reported in 1994 SCC Online 4, the learned Advocate General argued that the 'bad faith' in that case has been held to mean something opposite to bona fide and the good faith means generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake, as to one's rights or duties but by some interested or sinister motive. Citing from the judgment of the Full Bench of this Court in the case of *Viva Highways Ltd. Vs. M.P. Road Development Corporation Ltd.* reported in (2017) 2 MPLJ 681, the learned Advocate General argued that this Court held therein that if an agreement by whatever name called, falls within the definition of "works contract" and the difference between the parties is covered within the definition of 'dispute' as defined under the Adhiniyam of 1983, it has to be referred for adjudication to the Arbitration Tribunal constituted under Section 3 thereof.

8. Learned Advocate General referring to Section 7 of the Adhiniyam of 1983 argued that it provides that either party to a works contract shall irrespective of the fact whether the agreement contains an arbitration clause or not, refer in writing the dispute to the Tribunal under the Adhiniyam of 1983, which is having overriding effect over the Act of 1996. The present like dispute was dealt with by the Supreme Court in *VA Tech Escher Wyass Flovel Ltd. Vs. M.P. SEB,* reported in (2011) 13 SCC 261 wherein it was held that provisions of the Adhiniyam of 1983 would apply even if there is no arbitration agreement. But if there was an express arbitration agreement after the Act of 1996 came into force, the provisions of Adhiniyam of 1983 shall be taken to have been impliedly repealed. However, correctness of the judgment of Supreme Court in *VA Tech Escher Wyass Flovel Ltd.* (supra) was doubted in *M.P. Rural Road Development Authority Vs. L. G. Chaudhary Engineers & Contractors* reported in (2012) 3 SCC 495 holding that

judgment in *VA Tech Escher Wyass Flovel Ltd.* (supra) was *per incuriam*. It was held that Section 2(4) of the Act of 1996 saves other inconsistent legislations and hence the Adhiniyam of 1983 shall prevail over the Act of 1996 in respect of disputes arising out of a "works contract." The Supreme Court held that it is clear from the statutory provisions of the Adhiniyam of 1983 that the parties' choice of Arbitral Tribunal is not there. Relying on the judgment of the Supreme Court in the case of *State of M.P. Vs. Anshuman Shukla* reported in (2008) 7 SCC 487 it was argued that the Supreme Court while referring to the Adhiniyam of 1983 and dealing with the nature of the Arbitral Tribunal constituted under the said Act held that the said Act was a special Act and provides for compulsory arbitration. Section 14 of the Adhiniyam of 1983 specifically provides that the award can be challenged under special circumstances and Section 17 provides for finality of the award, notwithstanding anything to the contrary contained in any other law relating to arbitration. Learned Advocate General, therefore, prayed that the impugned order passed by the learned Arbitral Tribunal is liable to be set aside and the dispute pending between the parties before the said Tribunal deserves to be transferred to the Arbitration Tribunal constituted under the provisions of Adhiniyam of 1983. Learned Advocate General argued that the ICADR has appointed nominee Arbitrator of the petitioner without any notice to it.

9. *Per contra*, Shri Ranjeet Kumar, learned Senior Counsel opposed the writ petition and submitted that the writ petition, filed under Article 226 of the Constitution of India, against the impugned order of Arbitral Tribunal, is not maintainable. It is argued that that the Ministry of Road, Transport and Highways (MORT & H) in terms of Section 5 of the National Highways Act, 1956 and Rule 2(d) of the National Highways Rules, 1957 has merely appointed the M.P. Road Development Corporation as its executing agency in relation to the present project. The Concession Agreement dated 25.1.2012 was signed by the petitioner for and on behalf of the Respondent No.1. Article 44 of the said Concession Agreement provides the dispute resolution mechanism. As certain disputes arose between the parties, the Respondent No.2 invoked Clause 44 of the said Concession Agreement. Since the dispute could not be resolved through conciliation, the Respondent No.2 was constrained to invoke arbitration under Clause 44.3 of the agreement. Finally, the Arbitral Tribunal was constituted and the parties including the petitioner submitted to the jurisdiction to the said Tribunal. Learned Senior Counsel argued that Clause 44.3 of the Concession Agreement clearly provides that in case of any dispute, which could not be resolved amicably, the parties could invoke arbitration, which shall be held in accordance with the rules of Arbitration of International Centre for Alternative Dispute Resolution, New Delhi (ICADR) and shall be subject to the provisions of the Act of 1996. It is argued that despite existence of the Arbitral Tribunal constituted under the Adhiniyam of 1983, when the parties with open eyes agreed

for the arbitration under the aegis of ICADR in terms of the Act of 1996, the petitioner cannot be now allowed to resile from its stand. It is argued that the learned Arbitral Tribunal has rightly dismissed the application filed under Section 16 of the Act of 1996 by the petitioner on 24.12.2020, by the impugned order dated 29.12.2020 and thereafter the learned Arbitral Tribunal continued with the arbitration proceedings in terms of Section 16(5) of the Act of 1996.

10. Relying on the judgment of Supreme Court in the case of *Fuerst Day Lawson Ltd. Vs. Jindal Exports Ltd.,* (2011) 8 SCC 333, Shri Ranjeet Kumar, learned Senior Counsel argued that the Act of 1996 is a self-contained code and it carries with it, a negative import that only such acts as are mentioned in the Act, are permissible to be done and acts or things, not mentioned therein, are not permissible to be done. Section 5 of the Act of 1996 provides that notwithstanding anything contained in any other law for the time being in force, in matters governed by Part I of the Act, no judicial authority shall intervene except where so provided in this Part. Section 16 of the Act of 1996 provides for the competence of the Arbitral Tribunal to rule on its jurisdiction. Learned Senior Counsel argued that in the legislative scheme of Section 16 if the Arbitral Tribunal decides to reject the objection as to its jurisdiction raised under Section 16, then it will continue with the arbitral proceedings and will finally make an award and the remedy of the party aggrieved by such award is to challenge the same under Section 34 of the Act of 1996. Referring to Section 34 of the Act of 1996, Shri Ranjeet Kumar, learned Senior Counsel argued that legislation in its wisdom has provided the grounds of challenge at the stage of Section 34, which includes jurisdictional challenge as well. A combined reading of Sections, 5, 16 and 34 of the Act of 1996 makes it clear that once the jurisdictional challenge under Section 16 has been rejected, the petitioner has to wait till the stage of Section 34 proceedings. The petitioner would then have an efficacious remedy available against the dismissal of its jurisdictional challenge. The present writ petition filed under Article 226 of the Constitution of India is therefore not maintainable. In order to buttress his argument, learned Senior Counsel placed reliance on the judgments of the Supreme Court in *Bhaven Construction* (supra), *Deep Industries Limited* (supra), *Sterling Industries Vs. Jayprakash Associates Ltd. and others* reported in 2019 SCC Online SC 1154 and judgment of the Constitution Bench of the Supreme Court in *SBP and Co. Vs. Patel Engineering Ltd.,* (2005) 8 SCC 618. Learned Senior Counsel argued the judgment of the Supreme Court in *Bhaven Construction* (supra) specifically covers the facts situation of the present case. In that case also the dispute was pertaining to a "works contract", with the Gujarat Public Works Contracts Disputes Arbitration Tribunal Act, 1992 having similar remedy of arbitration before the Arbitral Tribunal under that enactment but the Supreme Court negatived the objection holding that this is a question that requires contractual interpretation, and is a matter of evidence, especially when both the parties have taken contradictory stands regarding the issue.

11. Shri Ranjeet Kumar, learned Senior Counsel argued that the petitioner's argument of bad faith is completely unsubstantiated and without any merit. Neither in the writ petition nor in the rejoinder the term 'bad faith' has ever been once used by the petitioner and no pleadings regarding the same have been made. It is denied that the appointment of Arbitrator has been made without reference to the petitioner and therefore is bad in law. It is submitted that Clause 44.3.1 of the Concession Agreement provides that the arbitration shall be held in accordance with the Rules of ICADR. Rule 5 of the ICADR Rules provides that in case a party fails to appoint an arbitrator within thirty days from receipt of request from the other party, the appointment shall be made by ICADR. The Respondent No.2 issued notice invoking arbitration clause on 6.7.2020. The petitioner did not appoint any arbitrator on its behalf within thirty days and therefore ICADR exercising its power under Rule 5 appointed Shri Amarjit Singh Chandhok, Senior Advocate, as arbitrator on behalf of the petitioner. It is submitted that Clause 44.4 of the Concession Agreement clearly contemplates a future situation. Clause 44.3 and 44.4 nowhere mentions about the M.P. Madhyasthan Act or the Arbitral Tribunal constituted thereunder for resolution of the dispute between the parties. On the contrary, the parties agreed for arbitration under ICADR Rules and the Act of 1996. The learned Arbitral Tribunal by the impugned order has therefore, rightly rejected the application filed by the petitioner in this behalf. The entire funding of the project on Built, Operate and Transfer basis of the national highway is covered by the National Highways Act, 1956 relatable to Entry 23 of the Seventh Schedule of the Constitution of India and that is also the stand of the Ministry of Road, Transport and Highways.

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

13. Let us first of all begin with analyzing Clause 44 of the agreement executed between the parties which provides for dispute resolution. Parties are at variance with regard to interpretation of this clause and also on the question whether Clause 44.3 would be attracted or Clause 44.4 would apply. While the learned Advocate General by heavily relying on Clause 44.4 has contended that since it makes specific reference to a statutory Regulatory Authority or Commission with powers to adjudicate upon disputes between the Concessionaire and the Authority, the Arbitration Tribunal constituted under the Adhiniyam of 1983 shall be the only forum having power to arbitrate upon the disputes between the parties. Learned Senior Counsel appearing for the respondent No.2 has however on the contrary submitted that Clause 44.4 is meant to be applicable for a future situation which is evident from its wordings that "*in the event of constitution of a statutory Regulatory Authority or Commission", "all disputes arising after such constitution"* shall be referred to it. The intention of the parties was thus never intended to submit to the jurisdiction of the arbitral tribunal

constituted under the Adhiniyam of 1983. If that were to be so, nothing prevented them from specifically mentioning so. According to him, Clause 44.3 which specifically provides for reference of dispute for arbitration under the aegis of ICADR, the arbitral tribunal has rightly been constituted. In order to meaningfully appreciate the rival submissions, we deem it appropriate to reproduced Clause 44 of the concession agreement executed between the parties, which reads as under:-

"ARTICLE 44
DISPUTE RESOLUTION

44.1 Dispute resolution

44.1.1 Any dispute, difference or controversy of whatever nature howsoever arising under or out of or in relation to this Agreement (including its interpretation) between the Parties, and so notified in writing by either Party to the other Party (the **"Dispute"**) shall, in the first instance, be attempted to be resolved amicably in accordance with the conciliation procedure set forth in Clause 44.2.

44.1.2 The Parties agree to use their best efforts for resolving all Disputes arising under or in respect of this Agreement promptly, equitably and in good faith, and further agree to provide each other with reasonable access during normal business hours to all non-privileged records, information and data pertaining to any Dispute.

44.2 Conciliation

In the event of any Dispute between the Parties, either Party may call upon the Independent Engineer to mediate and assist the Parties in arriving at an amicable settlement thereof. Failing mediation by the Independent Engineer or without the intervention of the Independent Engineer, either Party may require such Dispute to be referred to the Managing Director, MPRDC, Bhopal of the Authority and the Chairman of the Board of Directors of the Concessionaire for amicable settlement, and upon such reference, the said persons shall meet no later than 7 (seven) days from the date of reference to discuss and attempt to amicably resolve the Dispute. If such meeting does not take place within the 7 (seven) day period or the Dispute is not amicably settled within 15 (fifteen) days of the meeting or the Dispute is not resolved as evidenced by the signing of written terms of settlement within 30 (thirty) days of the notice in writing referred to in Clause 44.1.1 or such longer period as may be mutually agreed by the Parties, either Party may refer the Dispute to arbitration in accordance with the provisions of Clause 44.3.

44.3 Arbitration

44.3.1 Any Dispute which is not resolved amicably by conciliation, as provided in Clause 44.2, shall be finally decided by reference to arbitration by a Board of Arbitrators appointed in accordance with Clause 44.3.2. Such arbitration shall be held in accordance with the Rules of Arbitration of the International Centre for Alternative Dispute Resolution, New Delhi (the **"Rules"**), or such other rules as may be mutually agreed by the Parties, and shall be subject to the provisions of the Arbitration Act. The venue of such arbitration shall be Bhopal (Madhya Pradesh), and the language of arbitration proceedings shall be English.

44.3.2 There shall be a Board of three arbitrators, of whom each Party shall select one, and the third arbitrator shall be appointed by the two arbitrators so selected, and in the event of disagreement between the two arbitrators, the appointment shall be made in accordance with the Rules.

44.3.3 The arbitrators shall make a reasoned award (the **"Award"**). Any Award made in any arbitration held pursuant to this Article 44 shall be final and binding on the Parties as from the date it is made, and the Concessionaire and the Authority agree and undertake to carry out such Award without delay.

44.3.4 The Concessionaire and the Authority agree that an Award may be enforced against the Concessionaire and/or the Authority, as the case may be, and their respective assets wherever situated.

44.3.5 This Agreement and the rights and obligations of the Parties shall remain in full force and effect, pending the Award in any arbitration proceedings hereunder.

44.4 Adjudication by Regulatory Authority or Commission

In the event of constitution of a statutory Regulatory Authority or Commission with powers to adjudicate upon disputes between the Concessionaire and the Authority, all Disputes arising after such constitution shall, instead of reference to arbitration under Clause 44.3, be adjudicated upon by such Regulatory Authority or Commission in accordance with the Applicable Law and all references to Dispute Resolution Procedure shall be construed accordingly. For the avoidance of doubt, the Parties hereto agree that the adjudication hereunder shall not be final and binding until an appeal against such adjudication has been decided by an appellate tribunal or High Court, as the case may be, or no such appeal has been preferred within the time specified in the Applicable Law."

14. The contention that according to Clause 44.4 of the Agreement, in the event of situation of a statutory Regulatory Authority or Commission with powers to adjudicate upon disputes between the Concessionaire and the Authority, all Disputes arising after such constitution shall, instead of reference to arbitration under Clause 44.3, be adjudicated upon by such Regulatory Authority or Commission in accordance with the law, is noted to be rejected as undeniably, the very same agreement contains Clause 44.3.1 which provides that any dispute, which could not be resolved amicably by conciliation, as provided in Clause 44.2, shall be finally decided by reference to arbitration by a Board of Arbitrators appointed in accordance with Clause 44.3.2, in accordance with the Rules of Arbitration of the International Centre for Alternative Dispute Resolution, New Delhi, subject to the provisions of the Arbitration Act and that the venue of such arbitration shall be at Bhopal. If despite existence of the Arbitration Tribunal under the Adhiniyam of 1983, the parties have agreed for arbitration under the aegis of ICADR in accordance with the ICADR Rules and the Arbitration Act and consciously did not mention about existence of the arbitration tribunal established under the Adhiniyam of 1983, which then was already in existence, the petitioner cannot be permitted now to raise this plea. Clause 44.4 in any case, can be interpreted to cover a future situation as is evident from its wordings that "*in the event of constitution of a statutory Regulatory Authority or Commission with powers to adjudicate upon disputes between the Concessionaire and the Authority, all Disputes arising after such constitution*". Had the parties while entering into the agreement wanted to refer their future disputes to the Arbitration Tribunal constituted under the Adhiniyam of 1983, they would have most certainly mentioned about the same in Clause 44.3 or Clause 44.4 rather than wording these clauses in the manner they have been formulated.

15 The Arbitration and Conciliation Act, 1996 was brought into effect on 16.08.1996. This Act repealed the Arbitration Act, 1940, the Arbitration (Protocol and Convention) Act, 1937 and the Foreign Awards (Recognition and Enforcement) Act, 1961. These Acts were replaced by the Arbitration and Conciliation Act, 1996 which is based on the United Nations Commission on International Trade Law (UNCITRAL) the Model Law on International Commercial Arbitration, which is broadly in conformity with the Rules of Arbitration of International Chamber of Commerce. This Act is a self contained code dealing with every aspect of arbitration. The legislative policy in consolidating all the laws relating to domestic arbitration, international commercial arbitration, enforcement of foreign arbitral awards is aimed at ensuring not only speedy disposal of arbitration cases but also timely execution of the awards. The Supreme Court in *Fuerst Day Lawson Ltd.* (supra) while highlighting that the Arbitration Act is a self contained code, held that since Section 37(2) of the Act explicitly interdicted second appeals, the appeals filed under Letters Patent would also be so

interdicted, policy of the legislature being speedy disposal of the arbitration cases. The following observations of the Supreme Court in para 89 are apt to quote:-

> **"89.** It is, thus, to be seen that Arbitration Act, 1940, from its inception and right through 2004 (in P.S. Sathappan) was held to be a self-contained code. Now, if Arbitration Act, 1940 was held to be a self-contained code, on matters pertaining to arbitration, the Arbitration and Conciliation Act, 1996, which consolidates, amends and designs the law relating to arbitration to bring it, as much as possible, in harmony with the UNCITRAL Model must be held only to be more so. Once it is held that the Arbitration Act is a self-contained code and exhaustive, then it must also be held, using the lucid expression of Tulzapurkar, J., that it carries with it "a negative import that only such acts as are mentioned in the Act are permissible to be done and acts or things not mentioned therein are not permissible to be done". In other words, a Letters Patent Appeal would be excluded by the application of one of the general principles that where the special Act sets out a self-contained code the applicability of the general law procedure would be impliedly excluded."

16. The seven-judge Constitution Bench of the Supreme Court in *SBP and Co.* (supra) while reversing earlier five-judge Constitution Bench judgment in *Konkan Railway Corpn. Ltd. vs. Rani Construction (P) Ltd.,* (2002) 2 SCC 388 held that the power exercised by the Chief Justice of the High Court or the Chief justice of India under Section 11(6) of the Arbitration Act is not an administrative power but is a judicial power. The Supreme Court in this judgment disapproved the practice adopted by some of the High Courts in entertaining challenge to any order passed by an Arbitral Tribunal in exercise of power under Article 226 or 227 of the Constitution of India by observing that the legislative object of enacting the consolidated Act is to minimize judicial intervention while the matter is in the process of arbitration. We are tempted to quote the following weighty observation of the Constitution Bench in paras 45 and 46 of the report:-

> **"45.** It is seen that some High Courts have proceeded on the basis that any order passed by an arbitral tribunal during arbitration, would be capable of being challenged under Article 226 or 227 of the Constitution. We see no warrant for such an approach. Section 37 makes certain orders of the arbitral tribunal appealable. Under Section 34, the aggrieved party has an avenue for ventilating its grievances against the award including any in-between orders that might have been passed by the arbitral tribunal acting under Section 16 of the Act. The party aggrieved by any order of the arbitral tribunal, unless has a right of appeal under Section 37 of the Act, has to wait until the award is passed by the Tribunal. This appears to be the scheme of the Act. The arbitral

> tribunal is, after all, a creature of a contract between the parties, the arbitration agreement, even though, if the occasion arises, the Chief Justice may constitute it based on the contract between the parties. But that would not alter the status of the arbitral tribunal. It will still be a forum chosen by the parties by agreement. We, therefore, disapprove of the stand adopted by some of the High Courts that any order passed by the arbitral tribunal is capable of being corrected by the High Court under Article 226 or 227 of the Constitution. Such an intervention by the High Courts is not permissible.
>
> **46.** The object of minimizing judicial intervention while the matter is in the process of being arbitrated upon, will certainly be defeated if the High Court could be approached under Article 227 or under Article 226 of the Constitution against every order made by the arbitral tribunal. Therefore, it is necessary to indicate that once the arbitration has commenced in the arbitral tribunal, parties have to wait until the award is pronounced unless, of course, a right of appeal is available to them under Section 37 of the Act even at an earlier stage."

17. The Supreme Court in *Deep Industries Limited* (supra) was examining challenge to judgment passed by the Gujarat High Court under Articles 226 and 227 of the Constitution of India, whereby the judgment of the City Civil Court, Ahmedabad passed in appeal filed under Section 37 of the Act of 1996, upholding Arbitrator's order, who while deciding the application of the claimant under Section 17 of the Act of 1996 stayed the operation of the order of its blacklisting for two years holding that the same will operate only if the appellant ultimately loses in final arbitration proceedings, was reversed. Reiterating that the policy of the legislation is to ensure timely adjudication of the disputes under the Arbitration and Conciliation Act specially after the Amendment Act, 2016, the Supreme Court in para 14 and 15 of the judgment observed thus:-

> **"14.** What is also important to note is that under Section 29A of the Act which was inserted by the Amendment Act, 2016 a time limit was made within which arbitral awards must be made, namely, 12 months from the date the arbitral tribunal enters upon the reference. Also, it is important to note that even so far as Section 34 applications are concerned, Section 34(6) added by the same amendment states that these applications are to be disposed of expeditiously, and in any event, within a period of one year from the date on which the notice referred to in sub-section (5) is served upon the other parties.
>
> **15.** Given the aforesaid statutory provision and given the fact that the 1996 Act repealed three previous enactments in order that there be speedy disposal of all matters covered by it, it is clear that the statutory policy of the Act is that not only are time limits set down for disposal of the arbitral proceedings themselves but time limits have also been set

down for Section 34 references to be decided. Equally, in Union of India vs. Varindera Constructions Ltd, (2020) 2 SCC 111, dated 17.09.2018, disposing of SLP (C) No. 23155/2013, this Court has imposed the self-same limitation on first appeals under Section 37 so that there be a timely resolution of all matters which are covered by arbitration awards."

18. Taking note of the non obstante clause contained in Section 5 of the Act of 1996, which provided that *"notwithstanding anything contained in any other law, in matters that arise under Part I of the Arbitration Act, no judicial authority shall intervene except where so provided in this Part*" and keeping in view the above intendment of legislature behind this, the Supreme Court in *Deep Industries Limited* (supra) in paras 16 and 17 of the report had the following observations to make:-

> **"16.** Most significant of all is the non-obstante clause contained in Section 5 which states that notwithstanding anything contained in any other law, in matters that arise under Part I of the Arbitration Act, no judicial authority shall intervene except where so provided in this Part. Section 37 grants a constricted right of first appeal against certain judgments and orders and no others. Further, the statutory mandate also provides for one bite at the cherry, and interdicts a second appeal being filed (See Section 37(2) of the Act).
>
> **17.** This being the case, there is no doubt whatsoever that if petitions were to be filed under Articles 226/227 of the Constitution against orders passed in appeals under Section 37, the entire arbitral process would be derailed and would not come to fruition for many years. At the same time, we cannot forget that Article 227 is a constitutional provision which remains untouched by the non-obstante clause of Section 5 of the Act. In these circumstances, what is important to note is that though petitions can be filed under Article 227 against judgments allowing or dismissing first appeals under Section 37 of the Act, yet the High Court would be extremely circumspect in interfering with the same, taking into account the statutory policy as adumbrated by us herein above so that interference is restricted to orders that are passed which are patently lacking in inherent jurisdiction."

19. Section 16(2) of the Act of 1996 stipulates that a plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator. Sub-section (5) of Section 16 provides that the arbitral tribunal shall decide on a plea referred to in subsection (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award. The language employed by the Parliament in this sub-section thus makes its intention clear that once if the

arbitral tribunal takes a decision to reject the plea, it shall continue with the arbitral proceedings and make an arbitral award. It cannot however be said for this that the aggrieved party has been left remediless against the rejection of its objection as to the jurisdiction of the arbitral tribunal. The only thing is that its remedy has been deferred till the stage of Section 34 of the Act of 1996 arises as is evident from sub-section (6) of Section 16 of the Act of 1996 which *interalia* provides that the parties aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with Section 34.

20. Moreover, intention of the legislature in not providing the appeal against the rejection of the application under Section 16(2) is also evident from sub-section (2) of Section 37, which, vide its sub-clause (a), while providing for an appeal to a Court from an order of the arbitral tribunal accepting the plea referred to in sub-section (2) or sub-section (3) of Section 16, purposely does not provide for an appeal against an order of the arbitral tribunal rejecting the plea referred to in sub-section (2) or sub-section (3) of Section 16. Therefore, argument of the petitioner that the arbitral tribunal does not have the jurisdiction or for that matter, its argument that it was not given proper notice of appointment of the Arbitrator, may only be available to it as ground of challenge to the award if eventually the same were to be passed against it. The Supreme Court in *Deep Industries Limited* (supra) while adverting to this aspect of the matter made the following useful observations:

> "**22.** One other feature of this case is of some importance. As stated herein above, on 09.05.2018, a Section 16 application had been dismissed by the learned Arbitrator in which substantially the same contention which found favour with the High Court was taken up. The drill of Section 16 of the Act is that where a Section 16 application is dismissed, no appeal is provided and the challenge to the Section 16 application being dismissed must await the passing of a final award at which stage it may be raised under Section 34. What the High Court has done in the present case is to invert this statutory scheme by going into exactly the same matter as was gone into by the arbitrator in the Section 16 application, and then decided that the two year ban/blacklisting was no part of the notice for arbitration issued on 02.11.2017, a finding which is directly contrary to the finding of the learned Arbitrator dismissing the Section 16 application. For this reason alone, the judgment under appeal needs to be set aside....."

21. The Supreme Court in *Deep Industries Limited* (supra), while approvingly quoting para 11 to 16 of the report from the earlier judgment in *Nivedita Sharma Vs. COAI,* (2011) 14 SCC 337, has found the remedy of challenge under Section 34 to the aggrieved party against the rejection of application under Section 16(2) of the Act of 1996 to be efficacious, which paras for the facility of reference, are again reproduced hereunder:-

"**11.** We have considered the respective arguments/ submissions. There cannot be any dispute that the power of the High Courts to issue directions, orders or writs including writs in the nature of habeas corpus, certiorari, mandamus, quo warranto and prohibition under Article 226 of the Constitution is a basic feature of the Constitution and cannot be curtailed by parliamentary legislation - *L. Chandra Kumar v. Union of India, (1997) 3 SCC 261*. However, it is one thing to say that in exercise of the power vested in it under Article 226 of the Constitution, the High Court can entertain a writ petition against any order passed by or action taken by the State and/or its agency/ instrumentality or any public authority or order passed by a quasi judicial body/authority, and it is an altogether different thing to say that each and every petition filed under Article 226 of the Constitution must be entertained by the High Court as a matter of course ignoring the fact that the aggrieved person has an effective alternative remedy. Rather, it is settled law that when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation.

12. In *Thansingh Nathmal v. Superintendent of Taxes, AIR 1964 SC 1419*, this Court adverted to the rule of self-imposed restraint that the writ petition will not be entertained if an effective remedy is available to the aggrieved person and observed: (AIR p. 1423, para 7)

> "7... The High Court does not therefore act as a court of appeal against the decision of a court or tribunal, to correct errors of fact, and does not by assuming jurisdiction under Article 226 trench upon an alternative remedy provided by statute for obtaining relief. Where it is open to the aggrieved petitioner to move another tribunal, or even itself in another jurisdiction for obtaining redress in the manner provided by a statute, the High Court normally will not permit by entertaining a petition under Article 226 of the Constitution the machinery created under the statute to be bypassed, and will leave the party applying to it to seek resort to the machinery so set up."

13. In *Titaghur Paper Mills Co. Ltd. v. State of Orissa, (1983) 2 SCC 433*, this court observed:

> "11. It is now well recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of. This rule was stated with great clarity by *Willes, J. in Wolverhampton New Waterworks Co. v. Hawkesford (1859) 6 CBNS 336 : 141 ER 486* in the following passage: (ER p. 495)
>
> > "... There are three classes of cases in which a liability may be established founded upon

> a statute... But there is a third class viz. where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it... The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to."

The rule laid down in this passage was approved by the House of Lords in Neville v. London Express Newspapers Ltd. 1919 AC 368 (HL) and has been reaffirmed by the Privy Council in Attorney General of Trinidad and Tobago v. Gordon Grant and Co. Ltd. 1935 AC 532 (PC) and Secy. of State v. Mask and Co. AIR 1940 PC 105. It has also been held to be equally applicable to enforcement of rights, and has been followed by this Court throughout. The High Court was therefore justified in dismissing the writ petitions in limine."

14. In *Mafatlal Industries Ltd. v. Union of India (1997) 5 SCC 536*, B.P. Jeevan Reddy, J. (speaking for the majority of the larger Bench) observed: (SCC p. 607, para 77)

> "77. ... So far as the jurisdiction of the High Court under Article 226 - or for that matter, the jurisdiction of this Court under Article 32 - is concerned, it is obvious that the provisions of the Act cannot bar and curtail these remedies. It is, however, equally obvious that while exercising the power under Article 226/Article 32, the Court would certainly take note of the legislative intent manifested in the provisions of the Act and would exercise their jurisdiction consistent with the provisions of the enactment."

15. In the judgments relied upon by Shri Vaidyanathan, which, by and large, reiterate the proposition laid down in Baburam Prakash Chandra Maheshwari v. Antarim Zila Parishad AIR 1969 SC 556, it has been held that an alternative remedy is not a bar to the entertaining of writ petition filed for the enforcement of any of the fundamental rights or where there has been a violation of the principles of natural justice or where the order under challenge is wholly without jurisdiction or the vires of the statute is under challenge.

16. It can, thus, be said that this Court has recognised some exceptions to the rule of alternative remedy. However, the proposition laid down in Thansingh Nathmal v. Superintendent of Taxes (supra) and other similar judgments that the High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action

complained of has been taken itself contains a mechanism for rederssal of grievance still holds the field."

22. The Supreme Court in *Bhaven Construction* (supra) was dealing with somewhat identical case in which a similar stand was taken by the respondents that the State of Gujarat has enacted the Gujarat Public Works Contracts Disputers Arbitration Tribunal Act, 1992 with the object to provide for the constitution of a tribunal to arbitrate disputes arising from works contract to which the State Government or a public undertaking is a party. The objection under Section 16(2) of the Act of 1996 raised by the respondents questioning jurisdiction of the sole arbitrator on that basis was rejected in that case too. Aggrieved thereby, the respondent preferred Special Civil Application under Articles 226 and 227 of the Constitution before the Single Bench of Gujarat High Court. While the Single Bench dismissed the Special Civil Application, the Division Bench revered that judgment and allowed the Letters Patent Appeal. The Supreme Court relying on the judgment in *Deep Industries Limited* (supra) and *Nivedita Sharma* (supra) held that "t*he non-obstante clause is provided to uphold the intention of the legislature as provided in the Preamble of to adopt UNCITRAL Model Law and Rules, to reduce excessive judicial interference which is not contemplated under the Arbitration Act*". The Supreme Court also held that "t*he Arbitration Act itself gives various procedures and forums to challenge the appointment of an arbitrator. The framework clearly portrays an intention to address most of the issues within the ambit of the act itself, without there being scope for any extra statutory mechanism to provide just and fair solutions*." The Supreme Court further held that it would be "*prudent for a Judge to not exercise discretion to allow judicial interference beyond the procedure established under the enactment. This power needs to be exercised in exceptional rarity, wherein one party is left remediless under the statute or a clear 'bad faith' shown by one of the parties. This high standard set by this Court is in terms of the legislative intention to make the arbitration fair and efficient*".

23. Even though the learned Advocate General, in the present case, has argued that the present matter falls within the exceptions to the general rule that this Court under Article 226 and 227 of the Constitution of India can interfere with orders "patently lacking in inherent jurisdiction" and also if it suffers from 'bad faith' but neither of the arguments has been brought home inasmuch as, as has rightly been argued, the petitioner appears to have coined the argument of "patent lack of inherent jurisdiction" and the "bad faith" only during the course of arguments as none of them find mention either in the application under Section 16(2) filed before the Arbitral Tribunal or in the memorandum of writ petition challenging rejection thereof or even in the rejoinder to the reply of the respondent No.2. As regard various orders of the Supreme Court and this Court cited by the learned Advocate General, transferring the proceedings pending before the arbitrator to

the arbitral tribunal under the Adhiniyam of 1983, suffice it to say that in none of these orders, Sections 16, 34 and 37 of the Act of 1996 were analyzed and the precedents referred to supra, were considered.

24. In view of the analysis of the law and the facts made above, we do not find any infirmity in the order passed by the learned Arbitral Tribunal and any merit in the writ petition. The writ petition is therefore dismissed with no order as to costs.

Petition dismissed

I.L.R. [2021] M.P. 2092 (DB)
WRIT PETITION

Before Mr. Justice Prakash Shrivastava & Mr. Justice Vishal Dhagat

WP No. 4792/2020 (Jabalpur) decided on 9 September, 2021

SHAILESH KUMAR SONWANE …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

(Alongwith W.P. Nos. 4801/2020, 4808/2020 & 6675/2020)

***A. District Court Establishment (Recruitment and Conditions of Service) Rules, M.P., 2016, Rule 17(3) and District Court Establishment (Recruitment and Conditions of Service) Rules, M.P., 2019, Rule 17(3) – Select List/Wait List Candidates – Validity Period of Select/Wait List – Applicability of Rules* – Though posts were lying vacant, petitioners (wait list candidates) were denied appointment on ground that as per Rules of 2019, validity period of select list was reduced from 18 months to 12 months and accordingly the list has lapsed – Held – Norms of process of selection cannot be changed by changing Rules in middle of selection process – Selection process commenced as per 2016 Rules, wherein as per Rule 17(3), validity period will be 18 months – 2019 Rules have not been made retrospective by any express provision – Decision of respondents set aside – Petitioners have right to be considered for appointment on unfilled posts – Respondents directed accordingly – Petitions disposed. (Paras 14, 18 to 23, 27, 29, 30 & 34)**

क. जिला न्यायालय स्थापना (भर्ती एवं सेवा की शर्तें) नियम, म.प्र., 2016, नियम 17(3) एवं जिला न्यायालय स्थापना (भर्ती एवं सेवा की शर्तें) नियम, म.प्र., 2019, नियम 17(3) – चयन सूची/प्रतीक्षा सूची के अभ्यर्थी – चयन/प्रतीक्षा सूची की विधिमान्यता अवधि – नियमों की प्रयोज्यता – यद्यपि पद रिक्त थे, याचीगण (प्रतीक्षा सूची के अभ्यर्थी) को इस आधार पर नियुक्ति से इन्कार किया गया कि 2019 के नियमों के अनुसार, चयन सूची की विधिमान्यता अवधि को 18 माह से घटाकर 12 माह किया गया था और तद्नुसार

सूची व्यपगत हो गयी है – अभिनिर्धारित – चयन की प्रक्रिया के बीच में नियमों को बदलकर, चयन प्रक्रिया के मानकों को नहीं बदला जा सकता – चयन प्रक्रिया, 2016 के नियमों के अनुसार आरंभ हुई थी जिसमें नियम 17(3) के अनुसार, विधिमान्यता अवधि 18 माह होगी – 2019 के नियमों को किसी अभिव्यक्त उपबंध द्वारा भूतलक्षी नहीं बनाया गया है – प्रत्यर्थीगण का विनिश्चय अपास्त – याचीगण को, रिक्त पदों पर नियुक्ति हेतु विचार में लिए जाने का अधिकार है – प्रत्यर्थीगण को तद्नुसार निदेशित किया गया – याचिकाएं निराकृत।

B. ***Constitution – Article 226 and District Court Establishment (Recruitment and Conditions of Service) Rules, M.P., 2016, Rule 17(3) – Validity Period of Select List – Exclusion of Litigation Period*** **– Held – Validity period of 18 months was to expire on 20.03.2020 and writ petition was filed on 20.02.2020, thus right of petitioners were existing on date of filing petition – Act of Court shall prejudice no one – Respondent directed to exclude the period from date of filing petition till date of judgment, for calculating validity period. (Paras 31 to 33)**

ख. संविधान – अनुच्छेद 226 एवं जिला न्यायालय स्थापना (भर्ती एवं सेवा की शर्तें) नियम, म.प्र., 2016, नियम 17(3) – चयन सूची की विधिमान्यता अवधि – मुकदमेबाजी की अवधि का अपवर्जन – अभिनिर्धारित – 18 माह की विधिमान्य अवधि, 20.03.2020 को समाप्त होनी थी और रिट याचिका 20.02.2020 को प्रस्तुत की गयी थी, अतः, याचिका प्रस्तुत करने की तिथि को याचीगण का अधिकार विद्यमान था – न्यायालय की कार्रवाई से किसी पर प्रतिकूल प्रभाव नहीं पड़ेगा – विधिमान्यता अवधि की गणना हेतु, याचिका प्रस्तुत करने की तिथि से निर्णय की तिथि तक की अवधि अपवर्जित करने के लिए प्रत्यर्थी को निदेशित किया गया।

C. ***Service Law – Applicability of Rules*** **– Held – Normal rule is that vacancies which arise prior to amended Rules would be governed by unamended Rules and in exceptional circumstances, Government can take a conscious decision not to fill vacancies under old Rules – In present case, no such exceptional circumstances placed on record – Petitioners legitimate expections and right of consideration for appointment cannot be taken away. (Paras 24, 27 & 29)**

ग. सेवा विधि – नियमों की प्रयोज्यता – अभिनिर्धारित – सामान्य नियम यह है कि रिक्तियां जो संशोधित नियमों के पूर्व उत्पन्न हुई है, असंशोधित नियमों द्वारा शासित होगी तथा अपवादात्मक परिस्थितियों में, सरकार, पुराने नियमों के अंतर्गत रिक्तियों को न भरे जाने का सचेत विनिश्चय कर सकती है – वर्तमान प्रकरण में, ऐसी कोई अपवादात्मक परिस्थितियां अभिलेख पर नहीं रखी गयी – नियुक्ति हेतु विचार में लिए जाने की याचीगण की विधिसम्मत प्रत्याशा एवं अधिकार छीना नहीं जा सकता।

D. ***Constitution – Article 14 – Appointment – Rights of Selected Candidates*** **– Held – State must give some justifiable and non-arbitrary**

reasons for not filling up the posts – It is not at the whims and fancies of State to keep the advertised post vacant when select list is operative, as same would run counter to the mandate of Article 14 of Constitution. (Para 16)

घ. संविधान – अनुच्छेद 14 – नियुक्ति – चयनित अभ्यर्थियों के अधिकार – अभिनिर्धारित – राज्य को पदों को न भरे जाने हेतु कुछ न्यायोचित एवं गैर–मनमाने कारण देने चाहिए – यह राज्य की सनक और कल्पना पर नहीं है कि विज्ञापित पद रिक्त रखें जब चयन सूची प्रवर्तनशील है क्योंकि ऐसा करना संविधान के अनुच्छेद 14 की आज्ञा के विपरीत होगा।

***E. Service Law – Select List – Rights of Candidates* – Held – Apex Court concluded that though a candidate who passed examination or whose name appeared in select list does not have any indefeasible right to be appointed yet appointment cannot be denied arbitrarily and select list cannot be cancelled without any proper justification. (Para 17)**

ङ. सेवा विधि – चयन सूची – अभ्यर्थियों के अधिकार – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया कि यद्यपि एक अभ्यर्थी, जिसने परीक्षा उत्तीर्ण की या जिसका चयन सूची में नाम आया है, को नियुक्त किये जाने का कोई अजेय अधिकार नहीं है, तथापि, मनमाने रूप से नियुक्ति से इन्कार नहीं किया जा सकता और बिना किसी समुचित न्यायोचित्य के चयन सूची को निरस्त नहीं किया जा सकता।

***F. Service Law – Wait List – Rights of Candidates* – Held – A candidate in waiting list, as per his position in list, has right to be considered for appointment if for any reason the post falls vacant during validity period of list – Such right is not a vested right but it is only a right to be considered for appointment – Appointing authority can deny appointment for some justifiable reason to such candidate. (Para 12)**

च. सेवा विधि – प्रतीक्षा सूची – अभ्यर्थियों के अधिकार – अभिनिर्धारित – प्रतीक्षा सूची के एक अभ्यर्थी को, सूची में उसके स्थान के अनुसार नियुक्ति के लिये विचार में लिये जाने का अधिकार है यदि किसी कारणवश सूची की विधिमान्यता अवधि के दौरान पद रिक्त हो जाता है – उक्त अधिकार एक निहित अधिकार नहीं है अपितु यह केवल नियुक्ति हेतु विचार में लिये जाने का एक अधिकार है – नियुक्ति प्राधिकारी किसी न्यायोचित कारण पर उक्त अभ्यर्थी की नियुक्ति से इन्कार कर सकता है।

***G. Maxim – "actus curiae neminem gravabit"* – Discussed. (Para 33)**

छ. सूत्र – "न्यायालय के कृत्यों के कारण किसी भी पक्ष को हानि नहीं होनी चाहिए – विवेचित।

Cases referred :

(1997) 8 SCC 488, (1994) Supp. 2 SCC 591, (1999) SCC Online Rajasthan 241, (1986) 3 SCC 273, (1995) Supp. 2 SCC 230, (2019) 12 SCC 798, (2010) 7

SCC 678, (2019) 11 SCC 771, (1983) 3 SCC 284, (2003) 9 SCC 335/336, (1994) 5 SCC 450, (2010) 13 SCC 467, (2016) 4 SCC 179, (2009) 4 Guwahati Law Report 507, (1990) 1 SCC 411, (1987) 3 SCC 516, (2006) 2 MPLJ 312, (2013) SCC Online MP 6365, (2009) 2 SCC 1, (2020) 2 SCC 173, (2004) 2 SCC 681, (2013) 12 SCC 243, (1997) 1 SCC 650, (1991) 3 SCC 47, 1996 (9) SCC 309.

Naman Nagrath with *Vikram Singh* and *Satyendra Jain*, for the petitioners.

Piyush Dharmadhikari, B.N. Mishra, Arpan J. Pawar and *Ashish Shroti,* for the respondents.

O R D E R

The Order of the Court was passed by :

PRAKASH SHRIVASTAVA, J. :- This order will govern the disposal of WP No.4792/2020, W.P. No.4801/2020, W.P. No.4808/2020 and W.P. No.6675/2020 since it is jointly submitted by counsel for the parties that these writ petitions involve common issue in the identical fact situation.

2. For convenience the facts are noted from W.P. No.4792/2020. In the writ petition, the petitioner has prayed for a direction to the respondents to appoint the petitioner on the vacant post of Assistant Grade-III by giving effect to the waiting list and has further challenged the validity of Rule 17(3) of the Rules of 2019.

3. An advertisement dated 02.06.2017 was issued by the respondent No.3 for recruitment to the post of Assistant Grade- III. After the screening, District-wise select list (Annexure P/3) was declared and the waiting list (Annexure P/2) in respect of UR, OBC, SC and ST candidates was also published on 20.09.2018. As per the averment, in the petition, the name of the petitioners find place in the waiting list. Further case of the petitioners is that certain vacancies are still unfilled on account of non-joining of some of the selected candidates. As per the averment made in para 5.7 of W.P.No.4792/2020, the respondents have cleared the waiting list by making some of the appointments and the petitioner's name has come up from Sr. No.42 to Sr. No.5 in the waiting list and 6 seats in the UR category are still lying vacant. Further case of the petitioner is that since the advertisement was published on 02.06.2017, the result of the examination was declared on 20.09.2018, therefore, validity of the select list will be 18 months in terms of the rules which were prevailing at the time of issuance of advertisement and conduct of examination and the same cannot be reduced to 12 months on the basis of new Rules which have subsequently come in force.

4. The stand of the respondent No.2 and 3 is that though in the Rules of 2016, the validity of the select list was 18 months from the date of declaration of final list but in terms of the subsequent Rules published in the year 2019, the validity period has been reduced to 12 months and justifiable reason exists for reducing the

validity period and now the select list has lapsed as the validity period is over.

5. Shri Naman Nagrath, learned senior counsel has submitted that since the petitioners have been placed in the waiting list, therefore, they have a legitimate right of consideration for appointment on the posts which have fallen vacant due to non-joining, resignation, etc. of the selected candidates. In support of his submission, he has placed reliance upon the judgments of Supreme Court in the cases reported in (1997) 8 SCC 488 *(Surinder Singh and others vs. State of Punjab and another),* (1994) Supp. 2 SCC 591 *(Gujarat State Dy. Executive Engineers' Association vs. State of Gujarat and others),* (1999) SCC Online Rajasthan 241 *(Ram Babu Koli Vs. Zila Parishad Sawai Madhopur),* (1986) 3 SCC 273 *(S. Govindaraju Vs. Karnataka SRTC and another)* and (1995) Supp. 2 SCC 230 *(R.S. Mittal Vs. Union of India)*.

He has further submitted that the State cannot act arbitrarily and if the posts are lying vacant, the appointment cannot be denied unless there is a valid justifiable reason. In support of his submission, he has placed reliance on the judgments of Supreme Court in the cases reported in (2019) 12 SCC 798 *(Dinesh Kumar Kashyap and others vs. South East Central Railway and others),* (2010) 7 SCC 678 *(East Coast Railway and another Vs. Mahadev Appa Rao and others)* and (2019) 11 SCC 771 *(Gagandeep Singh Vs. State of Punjab and others)*.

His further argument is that Rules of Game cannot be changed after commencement of the game. He has submitted that the selection process was initiated under the Rules of 2016, therefore, the entire process is required to be completed under the said Rules and in the midway the Rules of 2019 cannot be applied. In support of his submission, he has placed reliance upon the judgments in the cases reported in (1983) 3 SCC 284 *(Y.V. Rangaiah and others Vs. J. Sreenivasa Rao and others),* (2003) 9 SCC 335/336 *(State of Uttaranchal and others Vs. Sidharth Srivastava and others),* (1994) 5 SCC 450 (Para 14 & 15) *(Union of India and others Vs. Tushar Ranjan Mohanty and others)* and (2010) 13 SCC 467 *(State of Bihar and others Vs. Mithilesh Kumar)*. He has further submitted that the Rules of 2019 have not been made retrospective nor they can be inferred to be retrospective and in this regard he has referred to the Repeal and Savings clause of the Rules of 2019. In support of his submission, he has placed reliance upon the judgments in the cases reported in (2016) 4 SCC 179 (*Richa Mishra Vs. State of Chhattisgarh and others*), (2009) 4 Guwahati Law Report 507 *(Abdul Hai Ahmed and others Vs. State of Assam and others)*, (1990) 1 SCC 411 *(P. Mahendran vs. State of Karnataka)* and (1987) 3 SCC 516 *(Commissioner of Income Tax, U.P. Vs. M/s Shah Sadiq and Sons)*. Arguing on the issue of challenge to the *vires* of the Rules of 2019, he has made limited submission that his grievance is only in respect of retrospective application of the Rules, therefore, he

is not questioning the constitutional validity of the Rules.

Learned senior counsel for the petitioners has further placed reliance upon the judgment in the case reported in (2006) 2 MPLJ 312 *(Kanchan Saxena Vs. State of M.P. and another)* and has submitted that the right of the petitioners was crystallized on the date of filing of the petitions which were filed before expiry of 18 months. He has also placed reliance upon the judgment of Supreme Court in the case reported in (2013) SCC Online MP 6365 *(Gopal Singh Gurjar Vs. State of M.P. and others)*.

6. Shri Ashish Shroti, learned counsel for the respondent High Court has placed reliance upon Rule 11 of the Rules of 2016 and has submitted that the requisition from District Establishment is made by 30th of September in each recruitment year for all the posts and has further referred to Rule 12(c) and submitted that examination is conducted between January to April every year and referring to Rule 2(r), he has submitted that "year of recruitment" means year commencing from 1st January to 31st December and in this background, he has submitted that an anomalous position was created as Rule 17(3) of the Rules of 2016 contained the provision about validity of the select list for 18 months whereas the recruitment was required to be made every years, hence Rules of 2019 have been introduced and the validity period of select list has been reduced to one year. He has further submitted that there is no violation of fundamental right, therefore there is no question of challenging the *vires* of the Rules of 2019 and in this regard he has placed reliance upon the judgment in the case reported in (2009) 2 SCC 1 *(Mahmad Husen Abdulrahim Kalota Shaikh Vs. Union of India and others)*. He has also submitted that the Rules of 2019 have not been applied retrospectively but these Rules have been applied from the date they have come in force. He has also submitted that by changing the duration of the validity of the select list, there is no change in the Rules of Game and in this regard he has further placed reliance upon the judgment in the case reported in (2020) 2 SCC 173 *(Anupal Singh and others Vs. State of U.P.)*. Elaborating the meaning of the wait list, he has placed reliance upon the judgment in the matter of *Gujarat State Dy. Executive Engineers' Association* (supra). He has also submitted that there is no provision in the Rules of 2016 or 2019 to prepare any waiting list and even otherwise the wait list candidate has no right to be considered. In this regard, he has placed reliance upon the judgment of Supreme Court in the case of *Anupal Singh and others* (supra). Shri Shroti has also placed reliance upon the judgments in the cases reported in (2004) 2 SCC 681 *(Bihar State Electricity Board Vs. Suresh Prasad and others),* (2013) 12 SCC 243 *(Raj Rishi Mehra and others Vs. State of Punjab and another)* and (1997) 1 SCC 650 *(Gajraj Singh and others Vs. State Transport Appellate Tribunal and others)*.

7. We have heard the learned counsel for the parties and perused the record.

8. Undisputedly, the advertisement for recruitment to the post of Assistant Grade-III and other posts was issued on 02.06.2017. The result of the said examination was declared on 20th September, 2018. While declaring the result alongwith the list of the selected candidates, a waiting list was also published. The name of these petitioners finds place in the waiting list. At the time of issuance of the advertisement and publication of the select list and waiting list, the Madhya Pradesh District Court Establishment (Recruitment and Conditions of Service) Rules, 2016 were in force. Sub-rule (3) of Rule 17 of the Rules of 2016 provides for the duration of validity of the list of successful candidates and reads as under:

> *"**17(3) Duration of validity of the final list of successful candidate**: The final list of the successful candidates in the examination in any recruitment year shall be valid upto 18 months from the date of declaration of the final list, but shall become invalid after declaring the results of next years examination."*

Subsequently same Rules were again published in official Gazette on 28.06.2019 with certain modifications. These Rules published on 28.06.2019 are referred to in this order as Rules of 2019. Sub-rule (3) of Rule 17 of the Rules of 2019 provides for validity period of the select list and reads under:

> ***"17(3) Validity period of the select list**- The select list of the successful candidates in the examination in any recruitment year shall be valid upto 12 months from the date of declaration of the select list."*

9. A bare perusal of the aforesaid Rules reveal that under the Rules of 2016, the validity period of the select list was 18 months whereas in the Rules of 2019, the validity period of the select list has been reduced to 12 months from the date of declaration of the select list.

10. In the present case, the select list was declared on 20th of September, 2018, therefore, 12 months period was to be over on 20th September, 2019 and 18 months period was to be over on 20th March, 2020. The respondents in their reply have taken a stand that the Rules of 2019 will apply and therefore the validity period of the list expired on 20th September, 2019 and during the validity of the select list, the waiting list of UR category was cleared upto Sr. No.42 and after 20th September, 2019, the waiting list cannot be given effect to.

11. In the above factual background, the first issue is as to whether the petitioners who are wait list candidates have any legitimate right of consideration for appointment on the post falling vacant due to non-joining, resignation, etc. of the selected candidates ?

12. A candidate in the waiting list, as per his position in the list, has right to be considered for appointment if for any reason the post falls vacant during the validity period of the list. Such a right is not a vested right but it is only a right to be considered for appointment. The appointing authority can deny appointment for some justifiable reason to such a candidate. In the matter of *Gujarat State Dy. Executive Engineers' Association*(supra), the Hon'ble Supreme Court has explained the meaning of waiting list by clarifying that a waiting list prepared in service matters by the competent authority is a list of eligible and qualified candidates who in order of merit are placed below the last selected candidate. Such lists are prepared either under the Rules or even otherwise mainly to ensure that the working in the office does not suffer if the selected candidates do not join for one or the other reason or the next selection or examination is not held soon. A wait list candidate has no vested right except the right to claim that he may be appointed if for any reason one or other selected candidates does not join. Supreme Court in the matter of *Surinder Singh and others* (Supra) has held that a waiting list cannot be used as a perennial source of recruitment for filling up the vacancy not advertised. The candidate in the waiting list has no vested right to be appointed except to the limited extent that when a candidate selected against the existing vacancy does not join for some reason and the waiting list is still operative.

13. In the matter of *S. Gonvindaraju*(Supra), Supreme Court has held that once a candidate is selected and his name is included in the select list for appointment in accordance with the Regulation, he gets a right to be considered for appointment as and when the vacancy arises. In the matter of *R.S. Mittal*(Supra), the Hon'ble Supreme Court has further clarified that although a person on the select panel has no vested right to be appointed to the post for which he has been selected, the appointing authority cannot ignore the select panel or on its whims decline to make the appointment. When a person has been selected by the Selection Board and there is a vacancy which can be offered to him keeping in view his merit position then ordinarily there is no justification for ignoring him for appointment. There has to be a justifiable reason to decline to appoint a person who is on the select panel.

14. Thus, from the aforesaid pronouncements, it is clear that if name of a candidate is included in the select list, he has a right to be considered for appointment but the appointment can be declined for justifiable reason. In the present case, the name of the petitioners were included in the waiting list, the respondents have offered appointment to the candidate upto Sr. No.42 in the waiting list of UR category. The posts are lying vacant against which remaining wait listed candidates can be considered for appointment.

15. In the above factual and legal backdrop, the next issue is as to whether the

respondents are justified in denying appointment to the petitioners on the posts which are lying vacant ?

16. The law in this regard is settled that the State must give some justifiable and non-arbitrary reason for not filling up the posts. It is not at the whims and fancies of the State to keep the advertised post vacant when the select list is operative as the same would run counter to the mandate of Article 14 of the Constitution. Though the justification offered by the State is normally not questioned by the Court but the justification must be reasonable and not arbitrary or capricious.

17. The Supreme Court in the matter of *Dinesh Kumar Kashyap*(Supra) in this regard has held that-

> *"6. Our country is governed by the rule of law. Arbitrariness is an anathema to the rule of law. When an employer invites applications for filling up a large number of posts, a large number of unemployed youth apply for the same. They spend time in filling the form and pay the application fees. Thereafter, they spend time to prepare for the examination. They spend time and money to travel to the place where written test is held. If they qualify the written test, they have to again travel to appear for the interview and medical examination, etc. Those who are successful and declared to be passed have a reasonable expectation that they will be appointed. No doubt, as pointed out above, this is not a vested right. However, the State must give some justifiable, non- arbitrary reason for not filling up the post. When the employer is the State it is bound to act according to Article 14 of the Constitution. It cannot without any rhyme or reason decide not to fill up the post. The Courts would normally not question the justification but the justification must be reasonable and should not be an arbitrary capricious or whimsical exercise of discretion vested in the State. It is in the light of these principles that we need to examine the contentions of SECR."*

In the matter of *East Coast Railway and another* (Supra), the Hon'ble Supreme Court has held that though a candidate who has passed an examination or whose name appeared in the select list does not have any indefeasible right to be appointed yet appointment cannot be denied arbitrarily and the select list also cannot be cancelled without giving proper justification. While holding so, Hon'ble Supreme Court has placed reliance upon the Constitution Bench judgment of the Supreme Court in the matter *Shankarsan Dash vs. Union of India* reported in (1991) 3 SCC 47 wherein it is held that-

> *"7. It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted. This correct position has been consistently followed by this Court, and we do not find any discordant note in the decisions in* State of Haryana V. Subhash Chander Marwaha and Others, *[1974] 1 SCR 165; Miss Neelima Shangla v. State of Haryana and Others, [1986] 4 SCC 268 and Jatendra Kumar and Others v. State of Punjab and Others, [1985] 1 SCR 899."*

In the matter of *Gagandeep Singh*(Supra), the Hon'ble Supreme Court has taken the view that though no candidate has vested right for appointment but at the same time appointing authority cannot frustrate intention behind and purpose of preparation of select list. Next available candidate in the select list has legitimate expectation for being considered for appointment when the post falls vacant.

18. Thus, it is clear that the legitimate expectation of the select list candidate for consideration for appointment when post in question falls vacant cannot be denied by the Government by acting arbitrarily or without offering any justifiable reason.

19. In the present case, only reason which has been offered by the State Government for denying appointment to the remaining wait list candidates is that the Rules of 2019 had come in force in the meanwhile; therefore, the validity of the select list was curtailed to 12 months from 18 months.

20. In view of the above position, the next issue which arises for consideration of this Court is whether the respondents could have changed the rules of the game after commencement of the process of selection and curtail the validity period of select list ?

21. Once the norms of selection are declared on the commencement of the selection process then those norms cannot be changed and the right accrued to a candidate by virtue of the original norms cannot be taken away. The Supreme Court in the matter of *Y.V. Rangaiya and others*(Supra), in a case of promotion where the Rules were changed in the midway, has taken the view that vacancies

which occured prior to the amended Rules would be governed by the old Rules and not by the amended Rules. In the matter of *Siddharth Shrivastava*(Supra), the Hon'ble Supreme Court has considered the scope of power to make laws under Article 309 with retrospective effect and has held that this power cannot be used to nullify a right vested in a person under a Statute or the Constitution. In the matter of *Tushar Ranjan Mohanty and others*(Supra), in a case where norms for recruitment were changed during the pendency of the selection process has held that norms or Rules as existing on the date when the process of selection begins will control such selection and any alteration to such norms would not affect the continuing process unless specifically the same were given retrospective effect. After referring earlier judgments on the point, Hon'ble Supreme Court in the case of *Tushar Ranjan Mohanty and others*(Supra) has held that-

> *"14. The legislatures and the competent authority under Article 309 of the Constitution of India have the power to make laws with retrospective effect. This power, however, cannot be used to justify the arbitrary, illegal or unconstitutional acts of the Executive. When a person is deprived of an accrued right vested in him under a statute or under the Constitution and he successfully challenges the same in the court of law, the legislature cannot render the said right and the relief obtained nugatory by enacting retrospective legislation.*
>
> *15. Respectfully following the law laid down by this Court in the judgments referred to and quoted above, we are of the view that the retrospective operation of the amended Rule 13 cannot be sustained. We are satisfied that the retrospective amendment of Rule 13 of the Rules takes away the vested rights of Mohanty and other general category candidates senior to Respondents 2 to 9. We, therefore, declare amended Rule 13 to the extent it has been made operative retrospectively to be unreasonable, arbitrary and, as such, violative of Articles 14 and 16 of the Constitution of India. We strike down the retrospective operation of the rule. In the view we have taken on the point it is not necessary to deal with the other contentions raised by Mohanty."*

22. Thus, from the aforesaid analysis, it is clear that once the process of selection had commenced on the basis of the norms prescribed under the Rules of 2016 then in normal circumstances the changed norms relating to curtailing the validity period of select list could not have been applied to the pending process.

23. This takes us to the next issue as to whether the Rules of 2019 can be applied to the pending selection process to curtail the validity period of the select list ?

24. To examine this issue, the Repeal and Savings Clause of the Rules of 2019

needs to be considered which reads as under:

> *"**37. Repeal and Savings**-*
>
> *All Rules, Orders, Instructions and Circulars corresponding to these Rules, in force immediately before the commencement of these Rules are hereby repealed in respect of matters covered by these Rules:*
>
> *Provided that any order made or action taken under the rules so repealed shall be deemed to have been made or taken under the corresponding provisions of these rules."*

The Rules of 2019 have not been made retrospective by any express provision. The stand of the respondents is that the Rules of 2019 have been applied from the date they have came in force and therefore in terms of Rule 17(3) of the Rules of 2019, the validity period of the list has been curtailed to 12 months. Hon'ble Supreme Court in the case of *Richa Sharma*(Supra) has considered the issue if the Rules specified in the advertisement for recruitment process can be departed from and new Rules can have the retrospective effect. In that case, the recruitment had commenced under the Rules of 2000 and subsequently the Rules of 2005 were promulgated, therefore, the Hon'ble Supreme Court after considering the similar proviso in the Repeal and Savings clause which exists in the present case has held that -

> ***18.*** *The High Court held that the first and second requisitions to commence recruitment process against the vacant seats to the post of DSP were made when the 2000 Rules were in force. Therefore, recruitment was rightly undertaken under the 2000 Rules. The admitted facts are that the process of selection started before the 2005 Rules were promulgated with the requisitions dated 27-9-2004 and 26-3-2005 sent by the State Government to CPSC. At that time, the 2000 Rules were in vogue. For this reason, even in the requisition it was mentioned that appointments are to be made under the 2000 Rules. Further, it is also an admitted fact that the vacancies in question which were to be filled were for the period prior to 2005. Such vacancies needed to be filled in as per those Rules i.e. the 2000 Rules. This is patent legal position which can be discerned from Y. V. Rangaiah v. J. Sreenivasa Rao [Y. V. Rangaiah v. J. Sreenivasa Rao, (1983) 3 SCC 284: 1983 SCC (L&S) 382]. As per the facts of that case a panel had to be prepared every year of list of approved candidates for making appointments to the grade of Sub-Registrar Grade II by transfer according to the old Rules. However, the panel was not prepared in the year 1976 and the petitioners were deprived of their right of being considered for promotion. In the meanwhile, new Rules came into force. In this factual background, it was held that the vacancies which occurred prior to the amended rules*

would be governed by the old Rules and not by the amended rules. The judgment in B.L. Gupta v. MCD [B.L. Gupta v. MCD, (1998) 9 SCC 223 : 1998 SCC (L&S) 532] also summarises the legal position in this behalf. The judgment in P. Ganeshwar Rao v. State of A.P. [P. Ganeshwar Rao v. State of A.P., 1988 Supp SCC 740 : 1989 SCC (L&S) 123 : (1988) 8 ATC 957] is also to the same effect. Para 9 of the judgment laying down the aforesaid proposition of law, is reproduced below: (B.L. Gupta case [B.L. Gupta v. MCD, (1998) 9 SCC 223 : 1998 SCC (L&S) 532], SCC p. 226)

> *"9. When the statutory rules had been framed in 1978, the vacancies had to be filled only according to the said Rules. The Rules of 1995 have been held to be prospective by the High Court [K.C. Sharma v. DESU, 1997 SCC OnLine Del 128: (1997) 66 DLT39] and in our opinion this was the correct conclusion. This being so, the question which arises is whether the vacancies which had arisen earlier than 1995 can be filled as per the 1995 Rules. Our attention has been drawn by Mr Mehta to a decision of this Court in N. T. Devin Katti v. Karnataka Public Service Commission [N.T. Devin Katti v. Karnataka Public Service Commission, (1990) 3 SCC 157: 1990 SCC (L&S) 446: (1990) 14 ATC 688]. In that case after referring to the earlier decisions in Y. V. Rangaiah [Y. V. Rangaiah v. J. Sreenivasa Rao, (1983) 3 SCC 284: 1983 SCC (L&S) 382], P. Ganeshwar Rao [P. Ganeshwar Rao v. State of A.P., 1988 Supp SCC 740 : 1989 SCC (L&S) 123 : (1988) 8 ATC 957] and A.A. Calton v. Director of Education [A.A. Calton v. Director of Education, (1983) 3 SCC 33 : 1983 SCC (L&S) 356] it was held by this Court that the vacancies which had occurred prior to the amendment of the Rules would be governed by the old Rules and not by the amended Rules."*

19. *No doubt, under certain exceptional circumstances, the Government can take a conscious decision not to fill the vacancies under the old Rules and, thus, there can be departure of the aforesaid general rule in exceptional cases. This legal precept was recognised in Rajasthan Public Service Commission v. Kaila Kumar Paliwal [Rajasthan Public Service Commission v. Kaila Kumar Paliwal (2007) 10 SCC 260 : (2008) 1 SCC (L&S) 492] in the following words:*

> *"30. There is no quarrel over the proposition of law that normal rule is that the vacancy prior to the new Rules would be governed by the old Rules and not by the new Rules. However, in the present case, we have already held that the Government has taken conscious decision not to fill the vacancy under the old Rules and that such decision has been validly taken keeping in*

view the facts and circumstances of the case."

This position is reaffirmed in State of Punjab Vs. Arun Kumar Aggarwal, (2007) 10 SCC 402.

20. *However, as far as the present case is concerned, the State sent the requisition specifically mentioning that the recruitment has to be under the 2000 Rules. This was so provided even in the advertisement. The appellant never challenged the advertisement and contended that after the promulgation of the 2005 Rules the recruitment should have been made under the 2005 Rules and not the 2000 Rules. Therefore, the appellant is even precluded from arguing that recruitment should have been made under the 2005 Rules.*

21. *Thus, we answer Question (a) by holding that recruitment was rightly made as per the 2000 Rules.*

The normal Rule is that the vacancies which arise prior to the amended Rules would be governed by the unamended Rules and in exceptional circumstances the Government can take a conscious decision not to fill the vacancies under the old Rules. In the present case, neither any exceptional circumstances are shown nor any conscious decision of the respondents based on such exceptional circumstances has been placed on record for not filling the vacancies under the Rules of 2016. The Division Bench of the Gauhati High Court in the case of *Abdul Hai Ahmed and others*(Supra) has considered some what similar position and has taken note of the similar though not identically worded the Repeal and Savings clause and provision of the Assam General Clauses Act (which is similar to M.P. General Clauses Act, 1957) about the effect of Repeal and has held that -

"9. *As the Rules of 2003 referred to earlier or rules framed under article 309, which repealed the 1982 Rules, also made in exercise of article 309 the effect of such repeal is to be decided in accordance with the provisions of the Assam General Clauses Act, 1915. It can be seen that section 6 seeks to protect the legality of the orders and also the rights and privileges acquired during the subsistence of the repealed enactment. It also preserves the obligations or liabilities accrued during such subsistence. It also declared that any legal proceeding or remedy, etc., initiated during the subsistence of the repealed enactment would continue to be prosecuted as if the repeal never took place. The true import of the proviso to rule 32, in our opinion, is not to affect the operation of section 6 of the General Clauses Act, 1897 or section 6 of the Assam General Clauses Act, 1915, which is substantially similar to section 6 of the General Clauses Act, 1897. The effect of section 6 of the Assam General Clauses Act, in our view, is similar to the effect of section 6 of the General Clauses Act, 1897. No doubt, the Legislature while repealing any law and replacing it by a new law can stipulate such consequences as the Legislature deems fit shall follow such a repeal. If*

the Legislature is silent about the consequences of the repeal the provisions of the General Clauses Act, 1897 or the Assam Act, 1915 automatically apply by virtue of the declaration contained in section 6. If any provision is made by the repealing enactment declaring the consequences of the repeal the language of such a declaration should be examined in juxtaposition with the language of section 6 of the General Clauses Act, 1897, Assam Act, 1915. Unless the language of the repealing enactment is found to be plainly and expressly contrary to the scheme of section 6 of the General Clauses Act, 1915 this court is not to infer a departure from the principles enshrined under the General Clauses Act. Having regard to the language of the proviso of rule 3 we are not able to perceive any intention of the Legislature (in the present case the Governor acting under article 309) to depart from the scheme of section 6 of the General Clauses Act. In our view, the proviso is more akin to the provisions under section 24 of the General Clauses Act, 1897 or section 26 [26. Continuation of orders, etc., issued under enactments repealed and re-enacted. Where any enactment is repealed and re-enacted with or without modification, then, unless it is otherwise expressly provided, any appointment, notification, order, scheme, rule, form or bye-law, made or issued under the repealed enactment, shall so far as it is not inconsistent with the provisions re-enacted, continue in force, and be deemed to have been made or issued under the provisions so re-enacted, unless and until it is superseded by any appointment, notification, order, scheme, rule, form, bye-law made or issued under the provisions so re-enacted.] of the Assam General Clauses Act, 1915.

10. *In the matter of recruitment in public service, it is settled law of this Country that "Rules of the game cannot be changed in the midstream". K Manjusree v. State of Andhra Pradesh, (2008) 3 SCC 512]. This is a principle enunciated by the Supreme Court in the background of the requirements of articles 14 and 16 of the Constitution of India as permitting the change of the rules of recruitment midstream would enable the State to arbitrarily eliminate some of the candidates who were otherwise eligible to compete for the post for which the recruitment process is undertaken or alternatively arbitrarily enable the State to enable some of the candidates who were not otherwise eligible to compete in accordance with the law as ir existed on the date when the recruitment process was initiated. It is a principle which is consistent with the general scheme of the consequences of repeal of a law as envisaged under the provisions of the General Clauses Act discussed above. In our view in the realm of public law and more particularly in the context of employment under the State the above referred judgments only declare that notwithstanding the ability of the Legislature in general to alter the scheme of section 6 of the General Clauses Act such an ability in the context of recruitment in public employment is liable to be restricted in view of the demands of articles 14 and 16 of the*

Constitution of India. Therefore the submission of Mr. Sharma is set aside."

25. Hon'ble Supreme Court in the matter of *P. Mahendran*(Supra) in a case where the Rule relating to qualifications for appointment was amended during continuance of the process of selection and the process was subsequently completed under the old Rules, has held that the select list was not vitiated on account of the amendment of the Rules. Considering the issue of retrospectivity, it has been reiterated that every Statute or Statutory Rules is prospective unless it is expressly or by necessary implication made to have retrospective effect. Considering this issue, the Hon'ble Supreme Court has held that -

"5. It is well-settled rule of construction that every statute or statutory Rule is prospective unless it is expressly or by necessary implication made to have retrospective effect. Unless there are words in the statute or in the Rules showing the intention to affect existing rights the Rule must be held to be prospective. If a Rule is expressed in language which is fairly capable of either interpretation it ought to be construed as prospective only. In the absence of any express provision or necessary intendment the rule cannot be given retrospective effect except in matter of procedure. The amending Rule of 1987 do not contain any express provision giving the amendment retrospective effect nor there is anything therein showing the necessary intendment for enforcing the Rule with retrospective effect. Since the amending Rule was not retrospective, it could not adversely affect the right of those candidates who were qualified for selection and appointment on the date they applied for the post, moreover as the process of selection had already commenced when the amending Rules came into force. The amended Rule could not affect the existing rights of those candidates who were being considered for selection as they possessed the requisite qualifications prescribed by the Rules before its amendment moreover construction of amending Rules should be made in a reasonable manner to avoid unnecessary hardship to those who have no control over the subject matter."

26. In the matter of *M/s Shah Sadiq and Sons*(Supra) while considering the issue of vested and accrued right of set off under the Income Tax Act and Section 6 of the General Clauses Act, 1957, the Hon'ble Supreme Court has held that accrued and vested right acquired under a repealed Act which is neither expressly saved nor expressly or impliedly taken away by the repealing Act, would continue to be effective and enforceable.

27. Thus, we are of the opinion that the right which had accrued to the select list candidates on the basis of their placement in the select list/waiting list prepared under the Rules of 2016 cannot be taken away by subsequent

notification of the Rules of 2019.

28. Counsel for the respondents has placed reliance upon the judgment of the Supreme Court in the matter of Mohd. Hussain wherein settled principles have been enumerated which are to be kept in view while examining the constitutional validity of the Repealing Act but in the present case, the petitioner has not raised any argument about constitutional validity of the Rules of 2019 but has raised a limited issue in respect of applicability of Rules of 2019 in the pending select list, hence this judgment is of no help to the respondents. Counsel for the respondents has also placed reliance upon the judgment of the Supreme Court in the case of *Anupal Singh and others*(Supra) but in that case there was a revised requisition notifying revised vacancies in different categories of a particular subordinate service, therefore, it was held valid since the same was only intended to rectify wrongful calculation of number of vacancies in different category and to comply with the requisite percentage of quota of reservation in different category as per 1994 Act, hence the said judgment stands on different footing. So far as the submission of counsel for the respondents that there is no provision for preparing the wait list is concerned, the same does not carry any weight as in the present case not only the wait list has been prepared but has also been acted upon by giving appointment upto Sr. No.42 in the UR category of wait list. Counsel for the respondents has also placed reliance upon the judgment of the Supreme Court in the matter of *Bihar State Electricity Board*(Supra) wherein it is held that in the absence of any Statutory Rules to the contrary, the employer is not bound to offer the unfilled vacancies to the candidates next below the candidates selected for appointment but had not joined but the respondents cannot be extended any benefit on the basis of the said judgment, in view of the settled legal position that the respondents cannot act arbitrarily and deny appointment to a select list candidate without any justifiable reason. Even otherwise, in that case, no wait list was prepared; therefore, it was held that in the absence of the Statutory Rules to the contrary, the employer is not bound to prepare the wait list in addition to the panel of select list candidate, but, in the present case, not only the wait list has been prepared but it has also been acted upon. Counsel for the respondents has also placed reliance upon the judgment of the Supreme Court in the case of *Raj Rishi Mehra and others*(Supra), but, in that case, settled position has been reiterated that a wait list candidate is not entitled to appointment against unfilled post as of right. In that case, in the meanwhile, the State Government had already approved fresh recruitment and State Public Service Commission had issued fresh advertisement, therefore, it stands on different footing. Counsel for the respondents has also placed reliance upon the judgment of the Supreme Court in the matter of *Gajraj Singh and others*(Supra), but in that case also, the Stage Permit was granted under the Repealed Act for a period which was to expire after the commencement of the new Act, therefore, while holding that grant of permit

under the new Act is a mere privilege and not a vested and accrued right, the Hon'ble Supreme Court has held that the permit will lapse after the expiry of the period for which it was initially granted unless publication for renewal was pending under Section 58 of the Repealed Act as on the date of commencement of the new Act.

29. Hence, in view of the above analysis, it is clear that since the waiting list has been prepared by the respondents and the appointment upto Sr. No.42 in UR category in the wait list has been made, therefore, remaining candidates also have legitimate expectation and right for consideration of their names for appointment since posts have fallen vacant on account of nonjoining or resignation, etc. of selected candidates during the validity of the select list. The respondents without any justifiable reason acting in arbitrary manner cannot deny consideration for such appointment.

30. In the present case, since the selection process had commenced and selection list was prepared under the Rules of 2016, therefore, in terms of Rule 17(3) of the Rules of 2016, the final list of successful candidates will be valid upto 18 months. By virtue of Rule 17(3) of the Rules of 2019 which came into force pending the selection process, the validity period of the select list prepared under the old Rules cannot be curtailed from 18 months to 12 months because it is the settled principle that the norms of process of selection cannot be changed by changing the rules of the game in the middle of the selection process. It is also worth noting that under the Rules of 2019 some of the eligibility conditions have been changed, therefore, the respondents cannot selectively apply Rule 17(3) of the Rules of 2019 relating to validity period of the select list ignoring that if the Rules of 2019 are applied in toto then vested right of other selected candidate will also be taken away due to change of the eligibility condition. Hence, the decision of the respondents to curtail the period of select list to 12 months cannot be sustained and is hereby set aside.

31. The next issue as to whether the petitioners can be granted any relief at this stage in view of the fact that subsequently 18 months period from the date of declaration of select list has already expired ?

32. The 18 months was to expire on 20th of March, 2020. It is worth noting that the present petition being W.P. No.4792/2020 was filed on 20th of February, 2020 when the select list was valid. In the case of *Ram Babu Koli*(supra), the Hon'ble Supreme Court has considered the issue if any right survives if the list lapses during the pendency of the petition **.** In that case, the writ petition was filed on the date when merit list was operative and the Hon'ble Supreme Court placing reliance upon the judgments in the matter of *Surinder Singh and others*(Supra)

and 1996(9) SCC 309 has held that the right was subsisting on the date of filing of the writ petition and accordingly allowed the writ petition.

33. In view of the above analysis and having regard to the basic principles of "*actus curiae neminem gravabit" i.e.* the act of the Court shall prejudice no one, the respondents are directed to exclude the period from the date of filing of the petition till the date of this judgment for calculating 18 months validity period of the select list.

34. Having regard to the aforesaid factual and legal position, we are of the opinion that the petitioners have right to be considered for appointment on the posts which are unfilled due to non-joining, resignation, etc. of the selected candidates. Hence, the present writ petition is **disposed of** by directing the respondents to consider the names of the petitioners and other wait list candidates as per their position in the waiting list in accordance with law before the list lapses.

Order accordingly

I.L.R. [2021] M.P. 2110
ARBITRATION CASE

Before Mr. Justice Mohammad Rafiq, Chief Justice

AC No. 100/2019 (Jabalpur) decided on 27 August, 2021

ELLORA PAPER MILLS LTD. …Applicant

Vs.

STATE OF M.P. …Non-applicant

***A. Arbitration and Conciliation Act (26 of 1996), Sections 11(6), 12(5) & 21 and Arbitration and Conciliation (Amendment) Act, 2015 (3 of 2016), Section 26 – Change of Arbitrator* – Held – Apex Court concluded that Amendment Act of 2015 cannot have retrospective operation in the arbitration proceedings which had already commenced unless parties otherwise agree – In instant case, proceedings commenced before amendment came into force – Applicant failed to produce any material to show any bias or partiality on part of any member of Arbitral Tribunal – No need to appoint another arbitrator. (Paras 9, 15 & 17 to 20)**

क. माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 11(6), 12(5) व 21 एवं माध्यस्थम् और सुलह (संशोधन) अधिनियम, 2015 (2016 का 3), धारा 26 – मध्यस्थ का परिवर्तन – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया है कि 2015 का संशोधित अधिनियम, पहले से ही आरंभ हो चुकी माध्यस्थम् कार्यवाहियों में भूतलक्षी रूप से प्रवर्तनीय नहीं हो सकता जब तक कि पक्षकार अन्यथा सहमत न हों – वर्तमान प्रकरण में, संशोधन के प्रवर्तन में आने के पूर्व ही कार्यवाहियाँ आरंभ की गई – आवेदक माध्यस्थम्

अधिकरण के किसी भी सदस्य की ओर से कोई पक्षपात या भेदभाव दर्शाने के लिए कोई सामग्री प्रस्तुत करने में विफल रहा – किसी अन्य मध्यस्थ को नियुक्त करने की आवश्यकता नहीं है।

***B. Arbitration and Conciliation Act (26 of 1996), Section 11(6) –Appointment of Arbitrator by Designation* – Held – Mere change of incumbents by reason of transfer or retirement would not make any difference as they were made members of Arbitral Tribunal by designation and not by name. (Para 15)**

ख. माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 11(6) – पदनाम द्वारा मध्यस्थ की नियुक्ति – अभिनिर्धारित – स्थानांतरण या सेवानिवृत्ति के कारण पदधारियों के परिवर्तन मात्र से कोई अंतर नहीं आयेगा क्योंकि उन्हें नाम द्वारा नहीं बल्कि पदनाम द्वारा माध्यस्थम् अधिकरण का सदस्य बनाया गया था।

Cases referred :

(2017) 8 SCC 377, AC No. 38/2020 decided on 26.02.2021, (2019) SCC Online SC 1517, 2018 SCC Online Del 8914, (2017) 15 SCC 32, (2019) 2 SCC 488, (2019) 3 SCC 382, (2020) 2 SCC 464, (2020) 10 SCC 1, (2009) 8 SCC 520, (2007) 5 SCC 304, (2004) 10 SCC 504, (2019) 15 SCC 682, 2019 SCC Online SC 1635, (2019) 3 SCC 282, (2018) 6 SCC 287.

Sandeep Bajaj with *Siddharth Shrivastava*, for the applicant.
Pushpendra Yadav, Addl. A.G. for the non-applicant/State.

O R D E R

MOHAMMAD RAFIQ, C.J. :-This application under Section 14 read with Sections 11 and 15 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act of 1996" for short) has been filed by the petitioner-Ellora Paper Mills Limited, seeking termination of the mandate of originally constituted Arbitral Tribunal and appointment of a new Arbitrator.

2. Facts of the case, as averred in the application, are that the petitioner Company is engaged in manufacturing of printing and writing paper of various grades. Its plant is located in Maharashtra State. The respondent issued a tender for supply of the cream wove paper and duplicating paper for the year 1993-94. The petitioner participated in the said tender process and was awarded contract for supply of 1510MT of Cream Wove and 238 MT of Duplicating Paper aggregating 1748 MT vide supply order dated 22.9.1993. According to the terms of the payment, 90% of the amount was to be paid by the respondent immediately after receipt of paper and balance 10% after receipt of the test report. According to the petitioner, it supplied 420 MT of cream wove and 238 MT of duplicating paper to the respondent but the respondent not only did not make the payment of 90% of the amount, as per the terms of the contract, but also rejected some consignment

any response, much less positive response. The petitioner then filed a civil suit in the year 1994 for permanent injunction against the respondent in the Civil Court at Bhopal seeking to restrain them from awarding the supply order to the third party. The respondent, however, in the meantime, awarded the said contract to the third party for remaining supply and therefore, the said suit became infructuous. The petitioner therefore filed another suit seeking recovery of an amount of Rs.95,32,103/- bearing Civil Suit No.2-B/98 before the Civil Court, Bhopal. During the pendency of the said suit, the respondent preferred an application under Section 8 of the Act of 1996 seeking stay of the proceedings on the ground that there exists an arbitration clause in the agreement between the parties. The Civil Court however rejected the said application vide order dated 27.2.1999. The respondent then filed Revision Petition No.1117/1999 before this Court which was allowed vide order dated 03.05.2000. This Court referred the parties to the arbitration by Stationery Purchase Committee comprising of the officers of the respondent. Against the said order of this Court, the petitioner filed Special Leave Petition bearing SLP (C) No.13914/2000 before the Supreme Court, which however was dismissed as withdrawn vide order dated 28.9.2000. The respondent constituted the Arbitral Tribunal, styled as Stationery Purchase Committee comprising their officers. The petitioner filed its objection to the constitution of the Arbitral Committee on 12.9.2000. The petitioner also challenged its jurisdiction by filing an application under Section 13 of the Act of 1996. The learned Arbitral Tribunal however vide order dated 2.2.2001 rejected the said application of the petitioner. Aggrieved thereby the petitioner filed a writ petition bearing W.P. No.1824/2001 before this Court which however was dismissed vide order dated 24.1.2017 with liberty to the petitioner to raise objections before the appropriate forum. In the meanwhile, the National Company Law Tribunal admitted and initiated the proceedings against the petitioner under the Insolvency and Bankruptcy Code. The Corporate Insolvency Resolution Process was commenced which ultimately culminated on its approval on 26.6.2018.

3. Shri Sandeep Bajaj and Shri Siddharth Shrivastava, learned counsel for the petitioner submitted that the respondent constituted the Arbitral Tribunal of Stationery Purchase Committee, which comprises only of the officers of the respondent viz :- Additional Secretary, Department of Revenue as President and (i) Deputy Secretary, Department of Revenue, (ii) Deputy Secretary, General Administration Department, (iii) Deputy Secretary, Department of Finance, (iv) Deputy Secretary/Under Secretary, General Administration Department and (v) Senior Deputy Controller of Head Office, Printing as Members. Learned counsel submitted that since the respondent/department itself is a party to the dispute, its officers, by virtue of Section 12(5) of the Act of 1996, are ineligible to perform as Arbitrator or members of the Arbitral Tribunal. Learned counsel for the petitioner in support of his argument has relied on the judgment of Supreme Court in *TRF*

Ltd. vs Energo Engineering Projects Limited reported in (2017) 8 SCC 377 wherein it was held that the person who has become ineligible to be appointed as the Arbitrator in terms of Section 12(5) of the Act of 1996, can neither continue as arbitrator nor can appoint anyone else as arbitrator.

4. It is contended that this Court in the case of *M/s HCL Technologies Limited Vs. Madhya Pradesh Computerization of Police Society* (MPCOPS) (Arbitration Case No.38/2020) decided on 26.2.2021, relying on the aforesaid judgment of the Supreme Court in the case of *TRF Ltd.* (supra) and another judgment of the Supreme Court in the case of *Perkins Eastman Architects DPC and another Vs. HSCC (India) Ltd.* reported in (2019) SCC Online SC 1517 held that since MPCOPS is itself in dispute with the applicant therefore in view of the mandate of Section 12(5) read with the stipulations contained in Fifth and Seventh Schedules of the Act of 1996, it cannot now appoint the arbitrator. Learned counsel for the petitioner argued that all the erstwhile members of the Stationery Purchase Committee, who initiated the arbitration proceedings, have ceased to hold their respective positions as the constitution of the Arbitral Tribunal pertains to the year 2001. Now therefore a new Arbitral Tribunal in any case will have to be constituted and an independent and impartial Arbitrator should be appointed in terms of Section 11 of the Act to resolve the disputes between the parties. It is submitted that according to Section 11 of the Act of 1996, **only a person** can be appointed as an Arbitrator, which cannot be a specified post like Deputy Secretary of Stationery Purchase Committee. When an Arbitrator is approached in connection with his possible appointment, he is mandatorily required to disclose his relationship with the parties or his interest in the subject matter of the dispute in terms of Section 12 of the Act of 1996, a bare perusal of which makes it clear that ineligibility of an Arbitrator is to be seen from the date when an Arbitrator is approached by the party for his possible appointment. Therefore, no member of Stationery Purchase Committee can now be appointed as Arbitrator. Learned counsel in support of his argument has placed reliance on the judgment of Delhi High Court in the case of *Omaxe Infrastructure and Construction Ltd. Vs. Union of India and another* reported in 2018 SCC Online Del 8914. It is argued that the dispute in the present matter between the parties pertains to the year 1993 when the claim of the petitioner was for Rs.95,32,103/- (Rs.Ninety Five Lakh Thirty Two Thousand One Hundred and Three only) and now because of lapse of time the total amount of claim including the interest thereon would far exceed Rupees One Crore. The petitioner is contesting the dispute for last 28 years and therefore, the mandate of Arbitral Tribunal is liable to be terminated and an impartial arbitrator is required to be appointed in terms of Section 11 of the Act of 1996 to adjudicate the disputes between the parties.

5. Shri Pushpendra Yadav, learned Additional Advocate General submitted that the agreement was entered into between the petitioner and the Government of Madhya Pradesh in respect of supply of Cream Wove Paper and Duplicating Paper pursuant to supply order dated 22.9.1993. Clause 7 of that the agreement clearly provides that if any dispute in respect of this agreement or any provision thereof arises between the parties, or any matter in relation thereto, except in respect of matters declared to be conclusive in the agreement, every such dispute shall be referred to the Stationery Purchase Committee of the Government, Madhya Pradesh, Bhopal for arbitration, whose decision shall be final, conclusive and binding on the parties. Since the dispute between the parties arose and the petitioner filed Civil Suit for permanent injunction in the Civil Court, the respondent filed an application under Section 34 of the Arbitration Act, 1940 seeking stay of the proceedings on the ground of Arbitration Clause and the trial Court vide order dated 22.7.1999 rejected the said application. The respondent then filed revision petition before this Court, which was allowed vide order dated 3.5.2000 relegating the parties to avail the remedy of arbitration before the Stationery Purchase Committee. The petitioner filed SLP (C) No.13914/2000 against the said order before the Supreme Court. The same was dismissed as withdrawn vide order dated 28.9.2000 reserving the right of the petitioner to challenge the jurisdiction of the Arbitrator. The petitioner thereafter filed objection under Section 13 of the Act of 1996 challenging constitution of the Arbitral Committee as well as its jurisdiction. The Committee, however vide order dated 2.2.2001 rejected the said objection. Aggrieved by the aforesaid order of the Arbitral Committee, the petitioner filed WP No.1824/2001 before this Court, which too was dismissed vide order dated 24.1.2017, while reserving liberty to the petitioner to raise objection before the appropriate forum at appropriate stage. The petitioner has now filed the present application under Section 14 read with Section 11 and 15 of the Arbitration & Conciliation Act, 1996 seeking appointment of the Arbitrator.

6. Shri Pushpendra Yadav, learned Additional Advocate General submitted that Arbitral Tribunal in the present case was constituted pursuant to the order of this Court dated 3.5.2000 passed in Civil Revision No.1117/1999. Although thereafter Section 12(5) in the Act of 1996 has been inserted w.e.f. 23.10.2015, but this sub section does not apply to the cases, where Arbitrator has already been appointed on or before commencement of Arbitration & Conciliation (Amendment) Ordinance 2015. Since Section 12(5) was inserted w.e.f. 23.10.2015, it will have only prospective effect and that all the arbitral proceedings which were initiated prior to Amendment Ordinance 2015, could be continued under the unamended provision. It is argued that in the present case, the Arbitral Tribunal was constituted in pursuance of the order passed by this Court much prior to insertion of Section 12(5) by way of 2015 Amendment Act w.e.f. 23.10.2015, the same

would therefore have no applicability to the present case. Learned Additional Advocate General in support of his arguments has relied on the judgments of the Supreme Court in *Aravali Power Co. Power Ltd. Vs. Era Infra Engineering* reported in (2017) 15 SCC 32, *S. P. Singla Constructions Vs. State of Himanchal Pradesh* reported in (2019) 2 SCC 488, *Rajasthan Small Industries Corporation Vs. Ganesh Containers* reported in (2019) 3 SCC 382, *Union of India Vs. Pradeep Vinod Construction Co.* reported in (2020) 2 SCC 464 and *Government of India Vs. Vedanta Ltd. reported* in (2020) 10 SCC 1.

7. Alternatively, Shri Pushpendra Yadav, learned Additional Advocate General submitted that this Court has no jurisdiction to exercise the power under Section 14 of Arbitration & Conciliation Act. As per sub-section 2 of Section 14, if the controversy pertains to any of the grounds referred to in Clause (a) of Sub Section (1), a party may, unless otherwise agreed by the parties, apply to the Court to decide on the termination of the mandate. The Court has been defined in Section 2(e) to mean in case of an arbitration other than international commercial arbitration, the Member of Civil Court of original jurisdiction in a district and includes High Court in exercise of its ordinary original civil jurisdiction having jurisdiction to decide the question forming subject matter of arbitration if same had been the subject matter of the suit. In the light of definition of Court, only a Civil Court including High Court exercising its original civil jurisdiction, has jurisdiction to entertain the application under Section 14 of the Act of 1996. Since the High Court of Madhya Pradesh does not have original civil jurisdiction to entertain the application, it would have no jurisdiction to entertain the present application. Therefore, the present application is not maintainable and deserves to be dismissed.

8. I have given my anxious consideration to the rival submissions and perused the record.

9. The application filed by the petitioner seeks not only to terminate the mandate of originally constituted Arbitral Tribunal but also to appoint a new Arbitrator. The argument of the learned counsel for the petitioner is mainly founded on amended sub-section (5) inserted in Section 12 of the Act of 1996, which inter alia provides that notwithstanding any prior agreement to the contrary, any person whose relationship with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator. But the question that requires answer in the present case is whether this sub-section would apply to arbitration proceeding which had already commenced prior to introduction of the amendment by Act 3 of 2016 with effect from 23.10.2015. In other words, whether sub-section (5) of Section 12 read with Seventh Schedule appended to the Act of 1996 can be relied by a party which had already appeared before the Arbitral Tribunal, as in

this case, the petitioner, who had already appeared before Arbitral Tribunal and participated in the proceedings, can now seek termination of the mandate of the Arbitral Tribunal? This argument has to be examined against the backdrop of the facts in the present case already noticed in the beginning of the judgment. For the sake of repetition, it may be stated again that the petitioner filed a Civil Suit in the year 1998 seeking recovery of security amount of Rs.95,32,103/- before the Civil Court. The respondent preferred an application under Section 8 of the Act of 1996 praying for stay of the proceedings on the ground that there existed an arbitration clause in the agreement between the parties. The Civil Court however rejected the application by order dated 27.2.1999. Then the respondent filed a revision petition before this Court, which was allowed by this Court on 3.5.2000. This Court relegated the parties to arbitration by Stationery Purchase Committee comprising of officers of the respondent. The petitioner challenged the aforesaid order by filing the Special Leave Petition before the Supreme Court, which was however dismissed as withdrawn vide order dated 28.9.2000. It was thereafter that the respondent constituted the Arbitral Tribunal, styled as Stationery Purchase Committee. The petitioner objected to the constitution of the Arbitral Tribunal by filing an application under Section 13 of the Act of 1996 on 12.9.2000. The Arbitral Tribunal however rejected the said application on 2.2.2001. The petitioner then filed a writ petition before this Court, which was also dismissed vide order dated 24.1.2017 with liberty to raise objection before the appropriate forum. Sheet anchor of the petitioner's argument is that in view of the law enunciated by the Supreme Court in *TRF Ltd.* (supra), all the five officers constituting the Stationery Purchase Committee, being employees of the respondent, have rendered themselves ineligible to continue as Arbitrators. Since they have become ineligible to continue as Arbitrators, they also cannot appoint another person as Arbitrator. It is contended that the original members of the Arbitral Tribunal, who initiated the proceedings have since ceased to hold their respective office, therefore, in any case a new Arbitral Tribunal will have to be constituted and therefore, an impartial and independent Arbitrator is required to be appointed in terms of Section 11 of the Act of 1996.

10. The Supreme Court in *Aravali Power Company Pvt. Ltd. Vs. Era Infra Engineering Ltd.* (2017) 15 SCC 32 relying on its earlier judgment in *Indian Oil Corporation Ltd. & others Vs. Raja Transport Pvt. Ltd.* (2009) 8 SCC 520, held that mere fact that the arbitrator is an employee is not ipso facto a ground to raise any presumption of bias or partiality so long as there is no justifiable apprehension about arbitrator's independence or impartiality. It was held that appointment of the Chief Executive Officer as the sole arbitrator in terms of the arbitration clause by rejecting the demand of the respondent for appointment of an independent arbitrator cannot be faulted. In that case, the respondent participated in the arbitration proceedings without raising any objection and for the first time after the Amendment Act, 2015

came into effect, raised objection regarding constitution of the Arbitral Tribunal. The High Court entertained the apprehension of the respondent as reasonable in exercise of power under Section 11(6) applying principles of impartiality/ neutrality and to avoid doubt in the mind of the petitioner, but the Supreme Court while reversing the judgment of the High Court held that the fact that the named arbitrator happens to be an employee of one of the parties to the arbitration agreement has not by itself, before the Amendment Act came into force, rendered such appointment invalid and unenforceable.

11. In judgment of Supreme Court in *Raja Transport Pvt. Ltd.* (supra) relied on by the Supreme Court in *Aravali Power Company Pvt. Ltd.* (supra)**,** the same argument was repelled by the Supreme Court holding thus:-

> "34. The fact that the named arbitrator is an employee of one of the parties is not ipso facto a ground to raise a presumption of bias or partiality of lack of independence on his part. There can however be a justifiable apprehension about the independence or impartiality of an Employee-Arbitrator, if such person was the controlling or dealing authority in regard to the subject contract or if he is a direct subordinate (as contrasted from an officer of an inferior rank in some other department) to the officer whose decision is the subject matter of the dispute.
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> 35. Where however the named arbitrator though a senior officer of the government/statutory body/government company, had nothing to do with execution of the subject contract, there can be no justification for anyone doubting his independence or impartiality, in the absence of any specific evidence. Therefore, senior officer(s) (usually heads of department or equivalent) of a government/statutory corporation/public sector undertaking, not associated with the contract, are considered to be independent and impartial and are not barred from functioning as Arbitrators merely because their employer is a party to the contract.
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> 45. If the arbitration agreement provides for arbitration by a named Arbitrator, the courts should normally give effect to the provisions of the arbitration agreement. But as clarified by Northern Railway Administration [Northern Railway Admn. V Patel Engg. Co.Ltd. (2008) 10 SCC 240], where there is material to create a reasonable apprehension that the person mentioned in the arbitration agreement as the Arbitrator is not likely to act independently or impartially, or if the named person is not available, then the Chief Justice or his designate may, after recording reasons for not following the agreed procedure of referring the dispute to the named arbitrator, appoint an independent Arbitrator

> in accordance with section 11(8) of the Act. In other words, referring the disputes to the named arbitrator shall be the rule. The Chief Justice or his designate will have to merely reiterate the arbitration agreement by referring the parties to the named arbitrator or named Arbitral Tribunal. Ignoring the named Arbitrator /Arbitral Tribunal and nominating an independent arbitrator shall be the exception to the rule, to be resorted for valid reasons."

12. The view similar to *Raja Transport Pvt. Ltd.* (supra) was also taken by the Supreme Court in *ACE Pipeline Contracts (P) Ltd. Vs. Bharat Petroleum Corpn Ltd.* (2007) 5 SCC 304 and *Union of India and another Vs. M.P. Gupta* (2004) 10 SCC 504 holding that mere fact that the named arbitrator is an employee of one of the parties is not ipso facto a ground to raise any presumption of bias or partiality or lack of independence on his part.

13. In *Union of India Vs. Parmar Construction Company* (2019) 15 SCC 682, the Supreme Court upon a conjoint reading of Section 21 of the Principal Act and Section 26 of the Amendment Act, held that where the request to refer the dispute to arbitration has been sent and received by the other side before the 2015 Amendment Act came into force and in other words where the arbitration commenced prior to 23.10.2015, the provision of the 2015 Amendment Act shall not apply to such of the arbitral proceedings which have commenced in terms of the provisions of Section 21 of the Principal Act unless the parties otherwise agree. The Court should first appoint the arbitrators in the manner provided for in the arbitration agreement but where the independence and impartiality of the arbitrator(s) appointed/nominated in terms of the arbitration agreement is in doubt, or where the Arbitral Tribunal appointed in the manner provided in the arbitration agreement has not functioned and it becomes necessary to make fresh appointment, the Chief Justice or his designate, in the given circumstances, after assigning cogent reasons in appropriate cases, may resort to an alternative arrangement to give effect to the appointment of independent arbitrator under Section 11(6) of the Act of 1996.

14. In *Union of India Vs. Pradeep Vinod Construction Company* (2020) 2 SCC 464, the respondent(s) were registered contractors with the Railways and the request of respondent(s) for appointment of arbitrator invoking Clause 64 of the contract was declined by the Railways stating that their claims have been settled and respondent(s) have issued "no claim" certificate and executed supplementary agreement recording "accord and satisfaction" and hence, the matter is not referable to arbitration. Reversing judgment of the High Court, the Supreme Court held that since request for appointment of arbitrator was made much prior to coming into force of Amendment Act, 2015, provisions of Amendment Act, 2015 shall not apply to arbitral proceedings in terms of Section 21 of the Principal Act

unless the parties otherwise agree. Thus, request by respondent(s) contractors should be examined in accordance with the principal Act, 1996, without taking resort to Amendment Act, 2015. Reversing the judgment of the High Court, the Union of India was directed by the Supreme Court to appoint arbitrator in terms of Clause 64(3) of the agreement within a period of one month under intimation to the respondent(s) contractors.

15. In *S.P.Singla Constructions Pvt. Ltd. Vs. State of Himachal Pradesh and another* (2019) 2 SCC 488, the Chief Engineer, H.P. PWD appointed Superintendent Engineer pursuant to request of appellant as arbitrator in terms of Clause 65 of agreement but appellant-petitioner challenged such appointment on premise that arbitrator had not been appointed by name but had been appointed by designation. Reliance in that case was also placed on Section 12(5) as amended with effect from 23.10.2015 by Amendment Act 3 of 2016. It was held that Amendment Act shall not apply to the Arbitral Tribunal which had commenced its proceedings before its enforcement, inasmuch as same cannot have retrospective operation in arbitral proceedings already commenced unless parties otherwise agree. Repelling the argument of the appellant, similar to the one raised in the present case, the Supreme Court held that it was permissible to appoint a person by designation. The arbitration agreements involving government contracts providing that an employee of department or a higher official unconnected with the work or contract will be arbitrator are neither void nor unreasonable. Once appointment of arbitrator is made at the instance of Government, arbitration agreement could not have been invoked for second time. In the present case also when on invocation of arbitration clause by the petitioner, the Arbitral Tribunal consisting of the officers named by designation had already been appointed and has been acted upon, it cannot be said that there ever remained any vacuum in the Arbitral Tribunal because mere change of incumbents by reason of transfer or retirement would not make any difference as they were made members of the Arbitral Tribunal by designation and not by name. Therefore, there does not arise any necessity to appoint another Arbitral Tribunal.

16. The Supreme Court in the judgment in *Central Organization for Railway Electrification Vs ECI-SPIC-SMO-MCML (JV)* reported in 2019 SCC Online SC 1635, considered the case of TRF Limited, supra, relied upon by learned counsel for the petitioner. The Supreme Court also considered that after amendment of the Arbitration and Conciliation Act, 1996 w.e.f. 23.10.2015, the Railway Board made modification in Clause 64 of the General Conditions of Contract and issued notification dated 16.11.2016 for implementation of modification. The Supreme Court in Central Organization for Railway Electrification, supra in Paragraphs-31 & 39 of the judgment held as under:

"31. As discussed earlier, as per the modified Clause 64(3)(b) of GCC, when a written and valid demand for arbitration is received by the General Manager, the Railway will send a panel of at least four names of retired railway officers empanelled to work as arbitrators. The contractor will be asked to suggest to the General Manager at least two names out of the panel for appointment as contractor's nominee within thirty days from the date of dispatch of the request by the Railway. Vide letter dated 27.07.2018, the respondent has sought for appointment of an arbitrator for resolving the disputes. The appellant by its letter dated 24.09.2018 (which is well within the period of sixty days) in terms of Clause 64(3)(a)(ii) (where applicability of Section 12(5) of the Act has been waived off) sent a panel of four serving railway officers of JA Grade to act as arbitrators and requested the respondent to select any two from the list and communicate to the office at the earliest for formation of Arbitration Tribunal. By the letter dated 26.09.2018, the respondent conveyed their disagreement in waiving the applicability of Section 12(5) of the Amendment Act, 2015. By the letter dated 25.10.2018, in terms of Clause 64(3)(b) of GCC (where applicability of Section 12(5) has not been waived off) the appellant has nominated a panel of four retired railway officers to act as arbitrators and requested the respondent to select any two from the list and communicate to the appellant within thirty days from the date of the letter for formation of Arbitration Tribunal. The respondent has neither sent its reply nor selected two names from the list and replied to the appellant. Without responding to the appellant, the respondent has filed petition under Section 11(6) of the Arbitration and Conciliation Act before the High Court on 17.12.2018. When the respondent has not sent any reply to the communication dated 25.10.2018, the respondent is not justified in contending that the appointment of Arbitral Tribunal has not been made before filing of the application under Section 11 of the Act and that the right of the appellant to constitute Arbitral Tribunal is extinguished on filing of the application under Section 11(6) of the Act.

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39. There is an express provision in the modified clauses of General Conditions of Contract, as per Clauses 64(3)(a)(ii) and 64(3)(b), the Arbitral Tribunal shall consist of a panel of three Gazetted Railway Officers [Clause 64(3)(a)(ii)] and three retired Railway Officers retired not below the rank of Senior Administrative Grade Officers [Clause 64(3)(b)]. When the agreement specifically provides for appointment of Arbitral Tribunal consisting of three arbitrators from out of the panel

> serving or retired Railway Officers, the appointment of the arbitrators should be in terms of the agreement as agreed by the parties. That being the conditions in the agreement between the parties and the General Conditions of the Contract, the High Court was not justified in appointing an independent sole arbitrator ignoring Clauses 64(3)(a)(ii) and 64(3)(b) of the General Conditions of Contract and the impugned orders cannot be sustained."

17. In *Rajasthan Small Industries Corporation Ltd. Vs. Ganesh Containers Movers Syndicate* (2019) 3 SCC 282, the Supreme Court held that the Amendment Act, 2015, as made effective with effect from 23.10.2015, cannot have retrospective operation in the arbitral proceedings already commenced unless the parties otherwise agree. In that case, proceedings before the Arbitral Tribunal continued till 17.8.2011 and thereafter, no progress was made. The respondent filed application under Sections 11 and 15 before the High Court on 13.5.2015 seeking appointment of an arbitrator for adjudication of the disputes and differences between the appellant and the respondent. The Supreme Court held that the respondent having participated in the proceedings before the Arbitral Tribunal for quite some time and also having expressed faith in the sole arbitrator, was not justified in challenging the appointment of Managing Director of appellant Corporation as the sole arbitrator. Further in the absence of any material to show that arbitrator had not acted independently or impartially, there could not be a presumption of bias or lack of independence on his part. It was held that the High Court was not right in appointing the arbitrator without keeping in view the terms of the agreement between the parties. In the present case too, the petitioner has not been able to produce any material to show any bias or partiality on the part of any of members of the Arbitral Tribunal and therefore failed to substantiate that one or more of them have not acted impartially or independently.

18. The matter can be examined even from another angle. The Supreme Court in the case of *Union of India vs. Parmar Construction Company*, reported in (2019) 15 SCC 682, held that conjoint reading of Section 21 of principal Act and Section 26 of the Amendment Act, 2015 leaves no manner of doubt that the provisions of the 2015 Amendment Act shall not apply to such of the arbitral proceedings which have commenced in terms of the provisions of Section 21 of the Principal Act unless the parties otherwise agree. The Supreme Court also held that the request by respondent contractors for referring the dispute to arbitration was made and received by the appellants much before the 2015 Amendment Act came into force. Thus, the applications/requests made by the respondent contractors have to be examined in accordance with the principal Act, 1996 without taking resort to the 2015 Amendment Act which came into force from 23.10.2015. This was also the view taken by the Supreme Court in *BCCI vrs. Kochi Cricket Private Ltd.* (2018) 6 SCC 287.

19. The judgment of this Court in *M/s HCL Technologies Limited* (supra) cited by the petitioner is distinguishable on facts. The dispute in that case arose much after the enforcement of the Amendment Act, 2015 came into effect from 23.10.2015. In fact, as would be evident from para 5 of that judgment, notice was served by the applicant on non-applicant on 16.6.2020 invoking the arbitration clause contained in Clause 1.23 of the agreement proposing to nominate the name of a retired Acting Chief Justice of this Court as the sole arbitrator to resolve the dispute between the parties. Not only that judgment therefore is distinguishable on facts but the ratio of that judgment does not apply to the present matter.

20. In view of the aforesaid discussion, the present application fails and it is hereby dismissed. It would be however open for the petitioner to participate in proceedings before the Arbitral Tribunal constituted by the respondent as Stationery Purchase Committee which shall decide the matter expeditiously in accordance with the law.

21. There shall be no order as to costs.

Application dismissed

I.L.R. [2021] M.P. 2122 (DB)
CRIMINAL REFERENCE
Before Mr. Justice G.S. Ahluwalia
& Mr. Justice Rajeev Kumar Shrivastava
CRRFC No. 9/2018 (Gwalior) decided on 26 July, 2021

STATE OF M.P. ...Applicant

Vs.

NANDU @ NANDKISHORE GUPTA …Non-applicant

(Alongwith CRA No. 6946/2018)

A. Criminal Procedure Code, 1973 (2 of 1974), Sections 233, 234 & 273 – Fair opportunity to Accused **– Held – Evidence of PW-15 & PW-16 recorded in absence of accused – Procedures adopted by trial Court certainly prejudiced the accused – Matter remanded back to trial Court to record evidence of above witnesses afresh in presence of accused and proceed further from stage of filing of DNA report – Accused shall be granted opportunity to file written objection/lead evidence in defence to DNA report and if application for cross-examination of Scientific Officer is filed, same shall be decided – After following provisions of Section 233 Cr.P.C., case be fixed for final hearing giving atleast one week time to prepare and argue the case – Impugned judgment set aside – Reference & appeal disposed.**

(Paras 36 & 56 to 63)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 233, 234 व 273 – अभियुक्त को उचित अवसर – अभिनिर्धारित – अ.सा.–15 व अ.सा.–16 के साक्ष्य अभियुक्त की अनुपस्थिति में अभिलिखित किये गये – विचारण न्यायालय द्वारा अपनाई गई प्रक्रियाओं ने निश्चित रूप से अभियुक्त को प्रतिकूल रूप से प्रभावित किया – अभियुक्त की उपस्थिति में उपरोक्त साक्षीगण का नये सिरे से साक्ष्य अभिलिखित करने एवं डी.एन.ए. रिपोर्ट प्रस्तुत करने के प्रक्रम से आगे बढ़ने हेतु मामला विचारण न्यायालय को प्रतिप्रेषित किया गया – अभियुक्त को डी.एन.ए. रिपोर्ट के बचाव में लिखित आपत्ति/साक्ष्य प्रस्तुत करने का अवसर प्रदान किया जाएगा एवं यदि वैज्ञानिक अधिकारी के प्रति–परीक्षण के लिए आवेदन प्रस्तुत किया जाता है, उसका विनिश्चय किया जावेगा – दं.प्र.सं. की धारा 233 के उपबंधों का पालन करने के पश्चात्, प्रकरण की तैयारी करने एवं तर्क करने के लिए कम से कम एक सप्ताह का समय देते हुए प्रकरण को अंतिम सुनवाई के लिए नियत किया जाए – आक्षेपित आदेश अपास्त – निर्देश व अपील निराकृत।

***B. Criminal Procedure Code, 1973 (2 of 1974), Section 273 – Evidence in Presence of Accused* – Held – Accused was in jail and was not produced by prosecution, thus there was no question of disturbing the proceedings in Court – Any Undertaking or No Objection given by counsel for accused without instructions of accused cannot be said to be given on behalf of accused and it would not bind him – He was not responsible for his absence but it was the prosecution who failed to keep him present in Court – Case remanded back to record evidence of PW-15 & PW-16 in presence of accused. (Paras 31, 35 & 36)**

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 273 – अभियुक्त की उपस्थिति में साक्ष्य – अभिनिर्धारित – अभियुक्त जेल में था एवं अभियोजन द्वारा पेश नहीं किया गया था, अतः न्यायालय की कार्यवाहियों में विघ्न डालने का कोई प्रश्न नहीं था – अभियुक्त के अनुदेश के बिना अभियुक्त के अधिवक्ता द्वारा दिये गये किसी भी वचनबंध अथवा अनापत्ति को अभियुक्त की ओर से दिया जाना नहीं कहा जा सकता है एवं वह उसे बाध्य नहीं करेगा – वह अपनी अनुपस्थिति के लिए जिम्मेदार नहीं था, बल्कि वह अभियोजन था जो उसे न्यायालय में उपस्थित रखने में विफल रहा – अभियुक्त की उपस्थिति में अ.सा.–15 व अ.सा.–16 के साक्ष्य अभिलिखित करने के लिए प्रकरण प्रतिप्रेषित।

***C. Criminal Procedure Code, 1973 (2 of 1974), Section 317 & 273 – Presence of Accused* – Held – Only when an application u/S 317 is filed and a statement made by accused that his presence through his counsel may be accepted and he don't have any objection regarding question of identity or recording of evidence of witness in his absence, then the effect of such declaration can be considered – In present case, accused was in jail, thus provisions of Section 317 are not applicable. (Para 34)**

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 317 व 273 – अभियुक्त की उपस्थिति – अभिनिर्धारित – केवल जब धारा 317 के अंतर्गत एक आवेदन प्रस्तुत किया

जाता है एवं अभियुक्त द्वारा यह कथन किया जाता है कि उसके अधिवक्ता के माध्यम से उसकी उपस्थिति को स्वीकार किया जा सकता है एवं उसे उसकी अनुपस्थिति में, पहचान के प्रश्न या साक्षी के साक्ष्य अभिलिखित किये जाने के संबंध में कोई आपत्ति नहीं है, तब उक्त घोषणा के प्रभाव पर विचार किया जा सकता है – वर्तमान प्रकरण में, अभियुक्त जेल में था, अतः धारा 317 के उपबंध लागू नहीं होते हैं।

D. ***Criminal Procedure Code, 1973 (2 of 1974), Section 366 – Fair Procedure*** **– Held – Reference u/S 366 is a continuation of trial, thus it is obligatory on High Court to ensure that persons who are facing trial for murder are provided fair procedure and no prejudice should be caused to them due to procedural lapse. (Para 55)**

घ. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 366 – उचित प्रक्रिया – अभिनिर्धारित – धारा 366 के अंतर्गत निर्देश, विचारण का जारी रहना है, अतः यह सुनिश्चित करना उच्च न्यायालय पर बाध्यकर है कि जो व्यक्ति हत्या के विचारण का सामना कर रहे हैं उनको उचित प्रक्रिया प्रदान की जाए एवं प्रक्रियात्मक गलती के कारण उन्हें कोई प्रतिकूल प्रभाव कारित नहीं होना चाहिए।

E. ***Criminal Procedure Code, 1973 (2 of 1974), Section 234 – Final Arguments*** **– Held – Final argument is Final Sum up of the case – Court must give patient hearing to both parties, so that they can effectively present their case – Order rejecting the objection to DNA report and fixing the case for final arguments on the same day and hearing the final arguments on same day is held to be bad in law – DNA report be exhibited afresh after deciding the objections or after examining the Scientific Officer.**

(Paras 49, 50 & 52 to 56)

ङ. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 234 – अंतिम तर्क – अभिनिर्धारित – अंतिम तर्क प्रकरण का अंतिम संक्षिप्त सार है – न्यायालय को दोनों पक्षों की धैर्यपूर्वक सुनवाई करनी चाहिए, ताकि वे प्रभावी रूप से उनका प्रकरण प्रस्तुत कर सकें – डी.एन.ए. रिपोर्ट पर आपत्ति नामंजूर करने के आदेश को एवं उसी दिन अंतिम तर्क के लिए प्रकरण को नियत करने तथा उसी दिन अंतिम तर्क पर सुनवाई करने को विधि की दृष्टि से दोषपूर्ण ठहराया जाता है – आपत्तियां विनिश्चित करने के पश्चात् या वैज्ञानिक अधिकारी का परीक्षण करने के पश्चात् डी.एन.ए. रिपोर्ट को नये सिरे से प्रदर्शित किया जाए।

F. ***Criminal Procedure Code, 1973 (2 of 1974), Section 230 & 231 – Prosecution Evidence & Cross-examination – Expeditious Trial*** **– Held – If trial Court has proceeded expeditiously by examining the witnesses on the date so fixed, no fault can be found on part of trial Court – No objection raised by counsel for accused that witnesses are appearing on their first date of appearance, therefore he is not in a position to cross-examine them effectively – No application of recall of witness filed by accused on ground that certain**

questions could not be put to them as the evidence is being recorded expeditiously – Objection rejected. (Paras 38 to 40)

च. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 230 व 231 – अभियोजन साक्ष्य व प्रति–परीक्षण – शीघ्र विचारण – अभिनिर्धारित – यदि विचारण न्यायालय नियत की गई तिथि पर साक्षीगण का परीक्षण कर शीघ्रता से कार्यवाही करता है, तो विचारण न्यायालय की ओर से कोई त्रुटि नहीं पाई जा सकती – अभियुक्त के अधिवक्ता द्वारा कोई आपत्ति नहीं उठाई गई कि साक्षीगण उनकी उपस्थिति की पहली तिथि को उपस्थित हो रहे हैं, इसलिए वह प्रभावी रूप से उनका प्रति–परीक्षण करने की स्थिति में नहीं है – अभियुक्त द्वारा इस आधार पर साक्षी को पुनः बुलाने का कोई आवेदन प्रस्तुत नहीं किया गया कि शीघ्रता से साक्ष्य अभिलिखित किये जाने के कारण उनसे कुछ प्रश्न नहीं पूछे जा सके – आपत्ति नामंजूर।

***G. Criminal Practice – Adjudication of Objections of Accused* – Held – Where life and liberty of a person is involved, objections of accused should be decided by assigning reasons and should not be decided by holding the same to be "*non-effective*" – Trial Court is expected to at-least mention the nature of objections raised by accused – Rejection of objection to DNA report by terming as "*non-effective objection*" was not in accordance with law. (Para 51)**

छ. दाण्डिक पद्धति – अभियुक्त की आपत्तियों का न्यायनिर्णयन – अभिनिर्धारित – जहां एक व्यक्ति का जीवन और स्वतंत्रता शामिल है, कारण देते हुए अभियुक्त की आपत्तियों का विनिश्चय किया जाना चाहिए तथा उक्त को *''प्रभावहीन''* ठहराते हुए विनिश्चय नहीं किया जाना चाहिए – विचारण न्यायालय द्वारा कम से कम अभियुक्त द्वारा उठाई गई आपत्तियों के स्वरूप का उल्लेख करना अपेक्षित है – डी.एन.ए. रिपोर्ट पर आपत्ति को *''अप्रभावी आपत्ति''* के रूप में परिभाषित करते हुए नामंजूर करना विधि के अनुसार नहीं था।

Cases referred:

(2019) 20 SCC 481, (2021) 3 SCC 380.

Rajesh Shukla, Dy. A.G. for the State.

D.R. Sharma with *Padam Singh* with *Vijay Dutt Sharma,* for the non-applicant/accused in CRRFC No. 9/2018 and for the appellant in CRA No. 6946/2018.

J U D G M E N T

(Heard through Video Conferencing)

The Judgment of the Court was delivered by :

G.S. AHLUWALIA J.:- CRRFC No.9/2018 is a reference under Section 366 of Cr.P.C. for confirmation of death sentence awarded by 1st Additional Sessions Judge, Datia by judgment and sentence dated 13-8-2018 passed in Special Sessions

Trial No.21/2018, whereas Cr.A. No.6946 of 2018 is a Criminal Appeal filed by the accused under Section 374 of Cr.P.C. against the same judgment and sentence.

2. By this common judgment, CRRFC No.9 of 2018 and Cr.A. No.6946 of 2018 shall be disposed of.

3. It is not out of place to mention here that co-accused Ranu @ Dilip Sahu was a juvenile and he was being tried as an adult in the Children's Court. Since, the trial of the co-accused Ranu @ Dilip Sahu was to commence, therefore at the request of the Children"s Court, the record of the Trial Court was sent back with a request to the Children's Court to expedite the matter and the hearing of this case was deferred so that it may not cause any prejudice to either of the respective parties. Thereafter on 18-3-2019, 17-6-2019 also, the hearing of this appeal was deferred in the light of pendency of trial against co-accused Ranu @ Dilip Sahu. On 18-3-2019, it was also observed, that if the Trial against the co-accused Ranu @ Dilip Sahu is completed, then the record of the Trial Court be requisitioned. Accordingly, the Record of the Trial Court was again sent back to this Court, however, the Trial against the co-accused Ranu @ Dilip Sahu was still pending. Therefore, by order dated 26-8-2019, the office was directed to return the original record to the Children's Court after retaining the Xerox copy of the same. Thereafter, the matter came up for hearing on 5-4-2021. It was found that a report has been received regarding the status of the trial pending against co-accused Ranu @ Dilip Sahu, according to which co-accused Ranu @ Dilip Sahu has absconded after breaking the Special Home Indore and therefore, the trial has come to a halt. Accordingly, it was observed that under these circumstances, there is no good reason to defer the hearing of the appeal. Accordingly, the hearing of the case started on 9-4-2021 but, thereafter, due to summer vacations, the case could not be taken up. Thereafter, the Special Division Bench was reconstituted w.e.f. 12-7-2021 and accordingly, the hearing of the case was concluded on 15-7-2021.

4. The prosecution story in short is that on 2-3-2018 at about 20:50, the complainant Sanjeev Kumar Gupta, lodged a F.I.R. that he had gone to market. His wife and son Rishabh Gupta aged about 10 years, were in the house. At about 6 P.M., he came back from the market, then he was told by his wife, that at about 5 P.M., his son had gone out of the house for playing but now he is missing. Accordingly, the complainant and his wife verified from the neighbourers but could not get any information about whereabouts of their son. It was also alleged that it appears that some unidentified person has taken away his child. It was further alleged that at about 7:30 P.M., he has received a call from some unidentified person on his mobile no.9669842934 from mobile No.9513543492 and 14714332274, who informed that his son is with him. Accordingly, the F.I.R. in crime No.53 of 2018 was registered in Police Station Indergarh, Distt. Gwalior.

5. On 3-3-2018 at 8:10 A.M., Spot map was prepared. At 17:40, the CCTV footage of the camera installed in the shop of Dharmendra Prajapati was seen. In the said CCTV footage, the missing boy was seen going on a motorcycle along with the respondent/accused Nandkishore and co-accused Ranu @ Dilip Sahu. On 3-3-2018 itself at 18:30, the CCTV footage of the cameras installed in the house of Pradeep Kumar were seen, in which the missing boy was seen on a motorcycle along with respondent/accused Nandkishore and coaccused Ranu @ Dilip Sahu. Thereafter, on 4-3-2018 at 7:40, the memorandum of co-accused Ranu @ Dilip Sahu was recorded. At 8:00, the memorandum of respondent/accused Nandkishore was recorded. At 8:20, the lock of the room of co-accused Ranu @ Dilip Sahu was broke open and a chappal of the missing boy and one torn bed-sheet were seized. Co-accused Ranu @ Dilip Sahu was arrested at 8:30 whereas the respondent/accused Nandkishore was arrested at 8:50. On the basis of confessional statements made by the co-accused Ranu @ Dilip Sahu as well as respondent/accused Nandkishore, the dead body of the boy, namely Rishabh Gupta was recovered from a Canal at 9:15. Identification panchnama of the dead body was prepared at 9:30. Dehati Nalishi was recorded at 9:45. Notice under Section 175 of Cr.P.C. was given to the witnesses at 10:00 and *Lash Panchnama* was prepared at 10:30. The dead body was found packed in gunny bags and accordingly vide seizure memo prepared at 11:00, two gunny bags, two pieces of bed-sheets which were used for tying the mouth of gunny bags, one bottle containing the water of canal, two pieces of bed-sheets which were used for tying the mouth of the dead body, as well as the rope which was used for tying the hands and legs of the deceased were seized.

6. The dead body of the deceased was sent for postmortem. According to the postmortem report, the dead body was received by the autopsy surgeon at 9:00. Postmortem was conducted on 4-3-2018 and vide seizure memo prepared at 13:10, Viscera, heart, lungs, liver, spleen, Hyoid bone and tibia bone of the deceased, One slide of anal swab, cloths of the deceased and a bottle containing the liquid were seized. At 16:40, unnatural death under Section 174 of Cr.P.C. was registered and the dead body of the deceased was handed over to the witnesses on 4-3-2018 itself. On 5-3-2018 at 14:15, the cloths of the respondent/accused Nandkishore, his pubic hairs and specimen of seal of Distt. Hospital Datia were seized. The confessional statement of respondent/accused Nandkishore was recorded on 5-3-2018 at 16:40 and the confessional statement of co-accused Ranu @ Dilip Sahu was recorded at 16:55 on 5-3-2018. On 5-3-2018 itself at 18:00, the motorcycle of the co-accused Ranu @ Dilip Sahu was seized. The respondent/accused was got medically examined on 5-3-2018. Another confessional statement of co-accused Ranu @ Dilip Sahu was recorded on 7-3-2018 and the mobile number of the mobile, seized from the possession of co-accused Ranu @ Dilip was checked and it was found that the mobile number of

the mobile of co-accused Ranu @ Dilip was 7389346752 and panchnama was prepared. On 7-3-2018, a mobile from Co-accused Ranu @ Dilip was seized. Call details of the mobile phones of the complainant and co-accused Ranu @ Dilip were obtained. Another confessional statement of respondent/accused Nandkishore was recorded on 8-3-2018 at 9:00 and a mobile was seized vide seizure memo dated 8-3-2018 prepared at 10:20. Semen slide of the respondent/accused Nandkishore was prepared on 8-3-2018. On 12-3-2018, the hard disk of the CCTV camera of Dharmendra Prajapati was seized at 17:00, whereas hard disk of CCTV camera of Pradeep Kumar was seized at 18:05. The relevant CCTV footage was got transferred in different pen drives which were seized vide seizure memo dated 13-3-2018 at 19:00. The hard disks were handed over in Supurdagi to Dharmendra Prajapati and Pradeep Kumar on 13-3-2018 at 20:00. The certificates under Section 65 B of Evidence were obtained. The mobile phone of the complainant and mark sheet of the deceased were seized on 23-8-2018 at 10:00. The call details and certificate under Section 65-B of Evidence Act for CDR were obtained. On 1-5-2018, the internal organs of the deceased Rishabh Gupta were sent to F.S.L., Gwalior. Similarly, water of canal, hyoid and tibia bone of the deceased were sent to Forensic Medico Legal Institution, Bhopal. Similarly, anal swab of the deceased, torn bed sheet recovered from the room of co-accused Ranu @Dilip Sahu, cloths of the deceased, blood sample of co-accused Ranu @ Dilip Sahu and respondent/accused were sent to F.S.L. Sagar for DNA fingerprinting. Similarly, two pieces of bedsheets which were used for tying the mouth of the gunny bags, two pieces of bed-sheets which were used for tying the mouth of the deceased, rope which was used for tying the hands and legs of the deceased, underwear, pubic hairs and semen slide of the respondent/accused, underwear, pubic hairs and semen slide of coaccused Ranu @ Dilip Sahu were sent to F.S.L. Sagar to verify the presence of human blood, human tissues, blood group and presence of human semen and sperms. A query was also made as to whether the pieces of bed-sheets are part of one bed-sheet or not? The police after completing the investigation filed charge sheet on 2-5-2018 against the respondent/accused Nandkishore for offence under Sections 363, 364-A, 377, 302, 201, 34 of I.P.C., under Section 5/6 of Protection of Children from Sexual Offences Act, 2012 (in short POCSO Act) and under Section 11/13 of M.P.D.V.P.K. Act.

7. Since, the co-accused Ranu @ Dilip was a juvenile, therefore, charge sheet against him was filed before the Juvenile Justice Board, Datia, and by order dated 29-6-2018, the Juvenile Justice Board, Datia, held that the co-accused Ranu @ Dilip Sahu be tried as an adult before the Children's Court, accordingly, the case was committed to Children's Court, Datia.

8. The Trial Court by order dated 16-5-2018 framed charges under Sections 364-A of I.P.C. read with Section 11/13 of M.P.D.V.P.K. Act, 377 of I.P.C., 302 of

I.P.C. read with Section 11/13 of M.P.D.V.P.K. Act or in the alternative under Section 302/34 of I.P.C. read with Section 11/13 of M.P.D.V.P.K. Act, Section 201 of I.P.C. and under Section 5/6 of POCSO Act.

9. The respondent/accused Nandkishore abjured his guilt and pleaded not guilty.

10. The prosecution, in order to prove its case, examined Ramesh (P.W.1), Laxmi (P.W.2), Sanjeev Gupta (P.W.3), Rajendra Prasad Gupta (P.W.4), Bahadur Singh (P.W.5), Dharmendra Singh Prajapati (P.W.6), Vishal Sharma (P.W.7), Kamal Kishore (P.W.8), Dr. V.S. Khare (P.W.9), Pradeep Kumar Narvariya (P.W.10), Dr. Jai bharat (P.W.11), Ritesh Sharma (P.W.12), Jagdish Gupta (P.W.13), Brajraj Tomar (P.W. 14), Dr. S.S. Batham (P.W. 15), Dinesh Kumar (P.W.16), Rambihari Patsariya (P.W. 17), Sanjeev Gaur (P.W.18), Ajay Channa (P.W.19), and Y.S. Tomar (P.W.20).

11. The prosecution relied upon Panchnama of watching CCTV footage of shop of Dharmendra Prajapati, Ex. P.1, F.I.R., Ex. P.2, Crime Details Form, Ex. P.3, Panchnama of watching CCTV footage of house of Pradeep Kumar Narvariya, Ex. P.4, Marksheet of class 2 of deceased, Ex. P.5, Marksheet of class 3 of deceased, Ex. P.6, seizure memo of Mobile of complainant/father of deceased child, Ex. P.7, Forwarding form to DNA fingerprint Sagar of respondent/accused Nandkishore, Ex. P.8, Forwarding form to DNA fingerprint Sagar of co-accused Ranu Sahu @ Dilip, Ex. P.9, seizure memo of blood sample, Ex. P.10, Memorandum of respondent/accused Nandkishore, Ex. P.11, Memorandum of co-accused Ranu Sahu @ Dilip Sahu Ex. P.11A-C, Panchnama of breaking the lock of room of co-accused Ranu Sahu @ Dilip Sahu, Ex. P.12, seizure of chappal, bed-sheet from the room of co-accused Ranu Sahu @ Dilip Sahu Ex. P.13, Panchnama of recovery of dead body from canal, Ex. P.14, Identification of dead body, Ex. P.15, Arrest memo of respondent/accused Nandkishore Ex. P.16, Arrest memo of co-accused Ranu Sahu @ Dilip Sahu, Ex. P.16A-C, Notice under Section 175 Cr.P.C., Ex. P.17, *Naksha Panchayatnama* Ex. P.18, Seizure of gunny bags, pieces of bed-sheet, rope etc. Ex. P.19, Acknowledgment of receipt of dead body, Ex. P.20, Seizure of Hard disk from Dharmendra Prajapati, Ex. P.21, Supurdagi of Hard disk to Dharmendra Prajapati Ex. P.22, Panchnama of watching mobile number Ex. P.23, Panchanama of watching mobile number of coaccused Ranu Sahu @ Dilip Sahu, Ex P.23A-C, Seizure memo of mobile of respondent/accused Nandkishore Ex. P.24, Seizure memo of mobile of co-accused Ranu Sahu @ Dilip Sahu, Ex. P.24A-C, Memorandum of respondent/ accused Nandkishore Ex. P.25, Memorandum of respondent/accused Nandkishore Ex. P.26, Memorandum of co-accused Ranu Sahu @ Dilip Sahu, Ex. P.26A-C, Seizure of internal organs, tibia bone etc of the deceased Ex. P.27, Seizure memo of cloths and pubic hairs of respondent/accused Nandkishore Ex. P.28, Postmortem report Ex. P.29, Seizure

of Hard disk from Pradeep Kumar Ex. P.30, Supurdagi of Hard disk to Pradeep Kumar Ex. P.31, Certificates under Section 65B of Evidence Act, Ex. P.32 and P.33, Seizure of Pen Drive in which footage of CCTV cameras installed in the shop and house of Dharmendra and Pradeep Kumar, Ex. P.34, Dehati Nalishi Ex. P.35, Registration of unnatural death Ex. P.36, M.L.C. of respondent/accused Nandkishore Ex. P.37 and P.38, Certificate under Section 65B of Evidence Act, P.39, Call details of Mobile No. 9669842934 Ex. P.40, Call details of Mobile No. 7389346752 Ex. P.41, Details of registration of Mobile SIM No. 7389346751 Ex. P.42, Call details of Mobile No. 9522164922 Ex. P.43,, Details of registration of Mobile SIM No. 95222164922 Ex. P.44, Requisition for Post Mortem Ex. P.45, Memorandum of co-accused Ranu Sahu @ Dilip Sahu Ex. P.46C, Seizure of Motorcycle from co-accused Ranu Sahu @ Dilip Sahu Ex. P.47C, Requisition for obtaining call details of complainant and accused persons, Ex. P.48, Certificate under Section 65B of Evidence Act, Ex. P.49, Letter for enhancing offence under POCSO and MPDVPK Act, Ex. P.50, Draft for FSL Ex. P.51, FSL report Ex. P.52, Draft for examination of seized articles Ex. P.53, FSL report Ex. P.54, FSL report Ex. P.55, Draft for Forensic Medico Legal Institution Ex. P.56, Report of Forensic Medico Legal Institution Ex. P.57, Draft for FSL Sagar Ex. P. 58, Letters for transfer of data of Hard Disk to Pen Drive Ex. P.59 and P.60. DNA report Ex. C-1.

12. The appellant did not examine any witness in his defence.

13. The Trial Court by judgment dated 13-8-2018 convicted the respondent/accused for offence under Sections 364-A of IPC read with Section 11/13 of MPDVPK Act, Section 377 of IPC, Section 302 of IPC read with Section 11/13 of MPDVPK Act, under Section 201 of IPC, Section 5/6 of POCSO Act and awarded death sentence and fine of Rs. 25,000/- for offence under Section 364-A of IPC read with Section 13 of MPDVPK Act, Rigorous Imprisonment of 10 years and fine of Rs. 10,000/- with default imprisonment for offence under Section 377 of I.P.C., death sentence and a fine of Rs. 25,000/- for offence under Section 302 of I.P.C. read with Section 13 of M.P.D.V.P.K Act, rigorous imprisonment of 7 years and a fine of Rs. 10,000 with default imprisonment for offence under Section 201 of I.P.C. and Life imprisonment and a fine of Rs. 25,000 with default imprisonment for offence under Section 5/6 of POCSO Act. All the sentences were directed to run concurrently.

14. Accordingly, this reference under Section 366 of Cr.P.C. has been received for confirmation of Death sentence, whereas Cr.A. No.6946/2018 has been filed by the appellant, thereby challenging his conviction and sentence passed by the Trial Court.

15. Challenging the conviction and sentence, it is submitted by the Counsels for the respondent/accused Nandkishore, that in the seizure memo of bed-sheet from the room of co-accused Ranu @ Dilip Sahu, Ex. P.13, there is no mention

that the torn bed-sheet was having any stains. Further there is nothing on record that the pieces of bed-sheet which were used for tying the mouth of the deceased as well as the mouth of the gunny bags were that of the bed-sheet recovered from the room of co-accused Ranu @ Dilip Sahu. There is nothing in the DNA report to suggest that what was the source of DNA profile found on the bed-sheet and the cloths of the deceased. It is further submitted that it is clear from the memo of recovery of dead body Ex.P.14, the dead body was recovered at 9:15 AM, and it is also clear from the memo of identification of dead body, Ex. P.15, that the dead body was got identified at 9:30 A.M., whereas the dead body of the deceased had already reached the hospital at 9 A.M. It is further submitted that according to the prosecution case itself, the CCTV footage of deceased going along with the respondent/accused Nandkishore and co-accused Ranu @ Dilip Sahu were transferred in Pen Drives, but it is not clear that whether the Hard disks seized from Dharmendra Prajapati and Pradeep Kumar were containing other data or not? It is further submitted that Hard disk in question were never produced before the Court. It is further submitted that it is clear from the CCTV footage, that the deceased was seen running behind the motorcycle of the respondent/accused and co-accused and he voluntarily sat on the motorcycle, therefore, it cannot be said that he was kidnapped. No independent witnesses were examined. There is no allegation of demand of Rs.1 lac in the FIR, therefore, the offence under Section 364-A of IPC was wrongly added. The voice sample of the respondent/accused was not taken. According to the FIR, the boy went missing at about 5 P.M., whereas in the CCTV footage, he was seen going on a motorcycle along with the respondent/accused and co-accused at 4:30 P.M. There is nothing on record that the seized articles were kept in a safe custody before the same were sent to FSL, Sagar, FSL, Gwalior and Forensic Medico Legal Institute, Bhopal.

16. By referring to the order-sheet dated 9-7-2018, it is submitted that Dr. S.S. Batham (P.W. 15), Dr. Dinesh Kumar (P.W.16) and Rambihari Patsaria (P.W.17) were examined in absence of the respondent/accused.

17. Further by referring to the order-sheets of the Trial Court, it is submitted that on 2-5-2018, it was observed that cognizance is to be taken and the case was adjourned to 15-5-2018. As the respondent/accused was not produced, therefore, the case was adjourned to 16-5-2018. On 16-5-2018, charges were framed and the trial program was also filed and the case was fixed for 5-6-2018 for examination on witnesses. On 5-6-2018, Ramesh (P.W.1), Laxmi (P.W. 2) and Sanjeev Gupta (P.W.3) were examined. On 6-6-2018 Rajendra Prasad Gupta (P.W.4), Bahadur Singh (P.W.5), and Dharmendra Prajapati (P.W.6) were examined. Thereafter on 7-6-2018 Vishal Sharma (P.W.7), Kamal Kishore (P.W.8), Dr. V.S. Khare (P.W.9) and Pradeep Kumar Narvaria (P.W.10) were examined. Thereafter on 8-6-2018 Dr. Jaibharat (P.W.11) and Ritesh Sharma (P.W.12) were examined and the case

was adjourned to 19-6-2018. On 19-6-2018 Jagdish Gupta (P.W. 13) was examined. On the same day, supplementary charge sheet was also filed and the copy of the same was supplied to the Counsel for the respondent/accused. On 20-6-2018 Brijraj Singh Tomar (P.W. 14) was examined and prosecution witness Ramniwas Gupta and Vaibhav Gupta were given up. Thereafter on 9-7-2018 Dr. S.S. Batham (P.W.15), Dr. Dinesh Kumar (P.W.16) and Rambihari Patsaria (P.W. 17) were examined and prosecution witness Sanju Parihar was given up. On 10-7-2018 Sanjeev Gaud (P.W.18) and Ajay Channa (P.W.19) were examined and on 11-7-2018 Y.S. Tomar (P.W. 20) was partially examined and the case was fixed for 13-7-2018 for further examination-in-chief and cross examination. On 13-7-2018, Y.S. Tomar (P.W.20) was examined. The Prosecution closed its case and the case was fixed for 17-7-2018. On 17-7-2018, the prosecution filed an application under Section 311 of Cr.P.C. for recalling of Sanjeev Gupta, which was orally opposed by the Counsel for the respondent/accused, however, the application filed by prosecution under Section 311 of Cr.P.C. was allowed and he was recalled on 18-7-2018. On 18-7-2018, Sanjeev Gupta (P.W. 3) was further examined and cross examined and the case was fixed for 19-7-2018 for accused statement. On 19-7-2018, the accused statement could not be recorded due to disruption of electricity supply and the case was adjourned to 20-7-2018. On 20-7-2018, the case was adjourned on account of bereavement in the family of the Counsel of the respondent/accused and on 25-7-2018, the accused statement was recorded and the case was fixed for 2-8-2018 for defence evidence. On 2-8-2018 one more opportunity was granted to examine defence witness and the case was adjourned to 7-8-2018. On 7-8-2018, the respondent/accused expressed that he does not wish to examine any witness in his defence, but the Trial Court found that the DNA Test Report has not been received therefore, adjourned the case for 10-8-2018 for production of DNA report as well as for final hearing. The DNA report was received on 10-8-2018 and without giving any opportunity to raise objection to the said DNA report, the Trial Court marked the same as Ex.C/1 in the light of the provisions of Section 293 of Cr.P.C. On the very same day, the respondent/accused was further examined under Section 313 of Cr.P.C. and fixed the case for final arguments on the very same day and the final arguments were also heard and the judgment was delivered on 13-8-2018. It is submitted that although in the order sheet dated 10-8-2018, it is mentioned that the respondent/accused had not raised any effective objection against the DNA report, but it is clear that the admissibility of the DNA report was objected by the respondent/accused, but the same was rejected without dealing with the objections. It is further submitted that since, the case was fixed for 10-8-2018 for receipt of DNA report, thus, it is clear that the prosecution case was not closed for all practical purposes, but still the Trial Court acted in a haste by marking the DNA report as Ex.C/1, and thereby further examining the respondent/accused under Section 313 of Cr.P.C. as well as hearing the matter finally on the same day. It is submitted that it appears that the

Trial Court was under pressure of media trial.

18. *Per contra*, the Counsel for the State has supported the findings of conviction recorded by the Trial Court. It is submitted that it is true that on 7-8-2018, the case was adjourned to 10-8-2018 for production of DNA report as well as for final hearing. It is submitted that the respondent/accused was already aware that the case was to be heard finally on 10-8-2018, therefore, it cannot be said that any prejudice was caused to the respondent/accused, or he was deprived of a reasonable opportunity because of the fact that the matter was heard finally by the Trial Court on 10-8-2018. It is further submitted that so far expedite recording of evidence of witnesses is concerned, it is a well established principle of law that expeditious disposal of trial is a fundamental right of an accused. The Trial Program is given in advance, so that the parties may know that which witness is likely to examined on which date. The respondent/accused never raised an objection that since, the witnesses are coming on their first date of appearance, therefore, he is not in a position to effectively cross examine them. Even the Trial Program was never objected by the respondent/accused.

19. Heard the learned Counsel for the parties.

20. Before considering the submissions made by the Counsel for the respondent/accused on the merits of the case, this Court would like to consider the submission that whether reasonable opportunity was given by the Trial Court to the respondent/accused or not? If not, then whether the entire trial would stand vitiated or what would be the effect of such non-affording of the opportunity.

21. The first contention in this regard is that 3 important witnesses, namely Dr. S.S. Batham (P.W.15), Dr. Dinesh Kumar (P.W.16) and Rambihari Patsaria (P.W.17) were examined on 9-7-2018, but on that date, the respondent/accused was not produced from the jail.

22. Section 273 of Cr.P.C. reads as under :

> **273. Evidence to be taken in presence of accused**.— Except as otherwise expressly provided, all evidence taken in the course of the trial or other proceeding shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in the presence of his pleader:
>
> Provided that where the evidence of a woman below the age of eighteen years who is alleged to have been subjected to rape or any other sexual offence, is to be recorded, the court may take appropriate measures to ensure that such woman is not confronted by the accused while at the same time ensuring the right of cross-examination of the accused.

> Explanation.—In this section, "accused" includes a person in relation to whom any proceeding under Chapter VIII has been commenced under this Code.

23. The relevant potion (sic : portion) of Order sheet dated 9-7-2018 reads as under :

> **9-7-2018.** राज्य द्वारा श्री पुष्पेंद्र कुमार गर्ग डी पी ओ।
>
> अभियुक्त नन्द किशोर न्यायिक निरोध जेल दतिया से प्रस्तुत नही उसकी ओर से श्री संजोगानंद यादव अधिवक्ता उपस्थित।
>
> अभियुक्त नंदकिशोर को आज न्यायिक निरोध जेल दतिया से प्रस्तुत नही किया गया है उसकी ओर से प्रस्तुत विद्वान अधिवक्ता द्वारा यह व्यक्त किया गया कि प्रकरण मे उन्हे अभियुक्त की पैरवी हेतु सशक्त किया गया है तथा वे प्रकरण मे अभियुक्त की ओर से उपस्थित हो रहे है। अतः अभियुक्त की अनुपस्थिति मे यदि कोई साक्षी उपस्थित होता है तो उन्हे अभियुक्त की अनुपस्थिति मे साक्ष्य कराये जाने मे कोई आपत्ति नही है।
>
> अभियोजन साक्षी डॉ. एस.एस. बाथम, डॉ. दिनेश कुमार तथा साक्षी रामबिहारी पटसारिया तथा साक्षी संजू परिहार उपस्थित।...

24. As already pointed out, Prosecution witness Sanju Parihar was given up. However, Dr. S.S. Batham (P.W. 15), Dr. Dinesh Kumar (P.W.16) and Rambihari Patsaria (P.W.17) were examined in absence of the respondent/accused.

25. So far as Rambihari Patsaria (P.W. 17) is concerned, he has deposed regarding mobile number of co-accused Ranu @ Dilip Sahu. He has not deposed any thing against the respondent/accused. Therefore, this Court is of the considered opinion, that so far as Rambihari Patsaria (P.W. 17) is concerned, no prejudice has been caused to the respondent/accused.

26. However, so far as Dr. S.S. Batham (P.W. 15) and Dr. Dinesh Kumar (P.W. 16) are concerned, they have deposed against the respondent/accused. Dr. S.S. Batham (P.W. 15) had prepared the semen slide of the respondent/accused, whereas Dr. Dinesh Kumar (P.W. 16) had medically examined the respondent/accused and had also seized the underwear and pubic hairs of the respondent/accused. It is not out of place to mention here that underwear and public (sic: pubic) hairs of the respondent/accused were sent to F.S.L. Sagar by draft, Ex. P.53 with a request to the Director, F.S.L. Sagar to give his opinion, as to whether human blood, human tissues, blood group on article D,E,F and G and whether human semen and sperms were found on underwear (H), Pubic Hair (I),Semen Slide of respondent/accused (M) and other articles like J,K and L or not? As per F.S.L. report, Ex. P.54, human Semen and Sperms were found on underwear (H), Pubic Hair (I),Semen Slide of respondent/accused (M) apart from other articles.

27. The Trial Court in para 92 of its judgment has taken note of the evidence of Dr. S.S. Batham (P.W.15) and Dr. Dinesh Kumar (P.W.16) as well as the fact that underwear, pubic hair and semen slide of the respondent/accused were seized.

28. The Supreme Court in the case of *Atma Ram & Others Vs. State of Rajasthan* reported in (2019) 20 SCC 481 has held as under:

> **19.** The emphasis was laid by Dr Manish Singhvi, learned Senior Advocate for the State on the articles relied upon by him to submit that the theory of "harmless error" which has been recognised in criminal jurisprudence and that there must be a remedial approach. Again, we need not go into these broader concepts as the provisions of the Code, in our considered view, are clearly indicative and lay down with clarity as to which infringements per se, would result in vitiation of proceedings. Chapter XXXV of the Code deals with "Irregular Proceedings", and Section 461 stipulates certain infringements or irregularities which vitiate proceedings. Barring those stipulated in Section 461, the thrust of the Chapter is that any infringement or irregularity would not vitiate the proceedings unless, as a result of such infringement or irregularity, great prejudice had occasioned to the accused. Shri Hegde, learned Senior Advocate was quick to rely on the passages in *Jayendra Vishnu Thakur* to submit that the prejudice in such cases would be inherent or per se. Paras 57 and 58 of the said decision were as under: (SCC p. 129)
>
> *"57.* Mr Naphade would submit that the appellant did not suffer any prejudice. We do not agree. Infringement of such a valuable right itself causes prejudice. In *S.L. Kapoor* v. *Jagmohan* this Court clearly held: (SCC p. 395, para 24)
>
> *'24.* . ... In our view the principles of natural justice know of no exclusionary rule dependent on whether it would have made any difference if natural justice had been observed. The non-observance of natural justice is itself prejudice to any man and proof of prejudice independently of proof of denial of natural justice is unnecessary. It ill comes from a person who has denied justice that the person who has been denied justice is not prejudiced.'
>
> *58.* In *A.R. Antulay* v. *R.S. Nayak* a seven-Judge Bench of this Court has also held that when an order has been passed in violation of a fundamental right or in breach of the principles of natural justice, the same would be a nullity. (See also *State of Haryana* v. *State of Punjab* and *Rajasthan SRTC* v. *Zakir Hussain*.)"

20. The aforementioned observations in *Jayendra Vishnu Thakur* must be read in the peculiar factual context of the matter. The accused Jayendra Vishnu Thakur was tried in respect of certain offences in a court in Delhi and at the same time he was also an accused in a trial under the provisions of the TADA Act in a court in Pune. The trial in the court in Pune proceeded on the basis that Jayendra Vishnu Thakur was an absconding accused. The evidence was thus led in the trial in Pune in his absence when he was not sent up for trial, at the end of which all the accused were acquitted. However, in an appeal arising therefrom, this Court convicted some of the accused for the offences with which they were tried. In the meantime, Jayendra Vishnu Thakur was convicted by the court in Delhi and was undergoing sentence imposed upon him. Later, he was produced before the court in Pune with a supplementary charge-sheet and charges were framed against him along with certain other accused. A request was made by the Public Prosecutor that the evidence of some of the witnesses, which was led in the earlier trial be read in evidence in the fresh trial against Jayendra Vishnu Thakur as those witnesses were either dead or not available to be examined. The request was allowed which order of the court in Pune was under challenge before this Court. It was found by this Court that the basic premise for application of Section 299 of the Code was completely absent. The accused had not absconded. He was very much in confinement and could have been produced in the earlier trial before the court in Pune. Since the requirements of Section 299 were not satisfied, the evidence led on the earlier occasion could not be taken as evidence in the subsequent proceedings. The witnesses were not alive and could not be re-examined in the fresh trial nor could there be cross-examination on behalf of the accused. If the evidence in the earlier trial was to be read in the subsequent trial, the accused would be denied the opportunity of cross-examination of the witnesses concerned. Thus, the prejudice was inherent. It is in this factual context that the observations of this Court have to be considered. Same is not the situation in the present matter. It is not the direction of the High Court to read the entire evidence on the earlier occasion as evidence in the de novo trial. The direction is to re-examine those witnesses who were not examined in the presence of the appellants. The direction now ensures the presence of the appellants in the Court, so that they have every opportunity to watch the witnesses deposing in the trial and cross-examine the said witnesses. Since these basic requirements would be scrupulously observed and complied with, there is no prejudice at all.

21. The learned Amicus Curiae was right in relying upon the provisions of Chapter XXVIII (Sections 366 to 371 of the Code) and Chapter XXIX (Sections 372 to 394 of the Code). He was also right in saying that Chapter XXVIII was more relevant in the present matter and the judgment of the High Court was supported more strongly by the provisions of Chapter XXVIII. The provisions of Sections 366 to 368 and Sections 386 and 391 are quoted here for ready reference:

366. Sentence of death to be submitted by Court of Session for confirmation.—(1) When the Court of Session passes a sentence of death, the proceedings shall be submitted to the High Court, and the sentence shall not be executed unless it is confirmed by the High Court.

(2) The Court passing the sentence shall commit the convicted person to jail custody under a warrant.

367. Power to direct further inquiry to be made or additional evidence to be taken.—(1) If, when such proceedings are submitted, the High Court thinks that a further inquiry should be made into, or additional evidence taken upon, any point bearing upon the guilt or innocence of the convicted person, it may make such inquiry or take such evidence itself, or direct it to be made or taken by the Court of Session.

(2) Unless the High Court otherwise directs, the presence of the convicted person may be dispensed with when such inquiry is made or such evidence is taken.

(3) When the inquiry or evidence (if any) is not made or taken by the High Court, the result of such inquiry or evidence shall be certified to such Court.

368. Power of High Court to confirm sentence or annual conviction.—In any case submitted under Section 366, the High Court—

(*a*) may confirm the sentence, or pass any other sentence warranted by law, or

(*b*) may annul the conviction, and convict the accused of any offence of which the Court of Session might have convicted him, or order a new trial on the same or an amended charge, or

(*c*) may acquit the accused person:

Provided that no order of confirmation shall be made under this section until the period allowed for preferring an appeal has expired, or, if an appeal is presented within such period, until such appeal is disposed of.

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386. Powers of the Appellate Court.—After perusing such record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor if he appears, and in case of an appeal under Section 377 or Section 378, the accused, if he appears, the appellate court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may—

(a) in an appeal from an order of acquittal, reverse such order and direct that further inquiry be made, or that the accused be re-tried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law;

(b) in an appeal from a conviction—

(i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried by a court of competent jurisdiction subordinate to such appellate court or committed for trial, or

(ii) alter the finding, maintaining the sentence, or

(iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the same;

(c) in an appeal for enhancement of sentence—

(i) reverse the finding and sentence and acquit or discharge the accused or order him to be re-tried by a court competent to try the offence, or

(ii) alter the finding maintaining the sentence, or

(iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, so as to enhance or reduce the same;

(d) in an appeal from any other order, alter or reverse such order;

(e) make any amendment or any consequential or incidental order that may be just or proper:

Provided that the sentence shall not be enhanced unless the accused has had an opportunity of showing cause against such enhancement:

Provided further that the appellate court shall not inflict greater punishment for the offence which in its opinion the accused has committed, than might have been inflicted for that offence by the court passing the order or sentence under appeal.

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391. Appellate Court may take further evidence or direct it to be taken.—(1) In dealing with any appeal under this Chapter, the appellate court, if it thinks additional evidence to be necessary, shall record its reasons and may either take such evidence itself, or direct it to be taken by a Magistrate, or when the appellate court is a High Court, by a Court of Session or a Magistrate.

(2) When the additional evidence is taken by the Court of Session or the Magistrate, it or he shall certify such evidence to the appellate court, and such Court shall thereupon proceed to dispose of the appeal.

(3) The accused or his pleader shall have the right to be present when the additional evidence is taken.

(4) The taking of evidence under this section shall be subject to the provisions of Chapter XXIII, as if it were an inquiry."

22. According to Section 366 when a Court of Session passes a sentence of death, the proceedings must be submitted to the High Court and the sentence of death is not to be executed unless it is confirmed by the High Court. Section 367 then proceeds to lay down the power of the High Court to direct further enquiry to be made or additional evidence to be taken. Section 368, thereafter, lays down the power of the High Court to confirm the sentence so imposed or annul the conviction. One of the powers which the High Court can exercise is one under Section 368(*c*) of the Code and that is to "acquit the accused person". Pertinently, the power to acquit the person can be exercised by the High Court even without there being any substantive appeal on the part of the accused challenging his conviction. To that extent, the proceedings under Chapter XXVIII which deal with "submission of death sentences for confirmation" is a proceeding in continuation of the trial. These provisions thus entitle the High Court to direct further enquiry or to take additional evidence and the High Court may, in a given case, even acquit the accused person. The scope of the chapter is wider. Chapter XXIX of the Code deals with "Appeals". Section 391 also entitles the appellate court to take further evidence or direct such further evidence to be taken. Section 386 then enumerates powers of the appellate court which inter alia includes the power to "reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried by a court of competent jurisdiction subordinate to such appellate court or committed for trial". The powers of the appellate court are equally wide. The High Court in the present

case was exercising powers both under Chapters XXVIII and XXIX of the Code. If the power can go to the extent of ordering a complete retrial, the exercise of power to a lesser extent, namely, ordering de novo examination of twelve witnesses with further directions as the High Court has imposed in the present matter, was certainly within the powers of the High Court. There is, thus, no infraction or jurisdictional error on the part of the High Court.

23. It is true that as consistently laid down by this Court, an order of retrial of a criminal case is not to be taken resort to easily and must be made in exceptional cases. For example, it was observed by this Court in *Ukha Kolhe* v. *State of Maharashtra*, as under: (AIR p. 1537, para 11)

"*11.* An order for retrial of a criminal case is made in exceptional cases, and not unless the appellate court is satisfied that the court trying the proceeding had no jurisdiction to try it or that the trial was vitiated by serious illegalities or irregularities or on account of misconception of the nature of the proceedings and on that account in substance there had been no real trial or that the prosecutor or an accused was, for reasons over which he had no control, prevented from leading or tendering evidence material to the charge, and in the interests of justice the appellate court deems it appropriate, having regard to the circumstances of the case, that the accused should be put on his trial again. An order of retrial wipes out from the record the earlier proceeding, and exposes the person accused to another trial which affords the prosecutor an opportunity to rectify the infirmities disclosed in the earlier trial, and will not ordinarily be countenanced when it is made merely to enable the prosecutor to lead evidence which he could but has not cared to lead either on account of insufficient appreciation of the nature of the case or for other reasons. Harries, C.J., in *Ramanlal Rathi* v. *State*: (SCC OnLine Cal para 10)

10. If at the end of a criminal prosecution the evidence leaves the Court in doubt as to the guilt of the accused the latter is entitled to a verdict of not guilty. A retrial may be ordered when the original trial has not been satisfactory for particular reasons, for example, if evidence had been wrongly rejected which should have been admitted, or admitted when it should have been rejected, or the Court had refused to hear certain witnesses who should, have been heard. But, I have never known of a case where a retrial can be ordered on the ground that the prosecution did not produce the proper evidence and did not know how to prove their case.' "

> We must also consider the matter from the standpoint and perspective of the victims as suggested by the learned Amicus Curiae. Four persons of a family were done to death. It is certainly in the societal interest that the guilty must be punished and at the same time the procedural requirements which ensure fairness in trial must be adhered to. If there was an infraction, which otherwise does not vitiate the trial by itself, the attempt must be to remedy the situation to the extent possible, so that the interests of the accused as well as societal interest are adequately safeguarded. The very same witnesses were directed to be de novo examined which would ensure that the interest of the prosecution is subserved and at the same time the accused will have every right and opportunity to watch the witnesses deposing against them, watch their demeanour and instruct their counsel properly so that the said witnesses can be effectively cross-examined. In the process, the interest of the accused would also stand protected. On the other hand, if we were to accept the submission that the proceedings stood vitiated and, therefore, the High Court was powerless to order de novo examination of the witnesses concerned, it would result in great miscarriage of justice. The persons who are accused of committing four murders would not effectively be tried. The evidence against them would not be read for a technical infraction resulting in great miscarriage.
>
> Viewed thus, the order and directions passed by the High Court completely ensure that a fair procedure is adopted and the depositions of the witnesses, after due distillation from their cross-examination can be read in evidence.

29. It is submitted by the Counsel for the State that since, the presence of human semen and sperms on the underwear, pubic hair and semen slide of the respondent/accused was natural, therefore, even if the evidence of Dr. S.S. Batham (P.W. 15) and Dr. Dinesh Kumar (P.W. 16) is ignored, still then the guilt of the respondent/accused stands proved beyond reasonable doubt.

30. Considered the submissions made by the Counsel for the parties.

31. As already pointed out, the Trial Court has referred to the evidence of Dr. S.S. Batham (P.W. 15), Dr. Dinesh Kumar (P.W.16) and the seizure of underwear, pubic hairs and semen slide of the respondent/accused. Thus, the contention of the Counsel for the State that the evidence of these two witnesses may be ignored, cannot be accepted. As the respondent/accused has also been convicted for offence under Section 377 of I.P.C., therefore, this Court is of the considered opinion, that the evidence of Dr. S.S. Batham (P.W. 15) and Dr. Dinesh Kumar (P.W. 16) is of importance to prove the preparation of semen slide or seizure of underwear and pubic hairs of the respondent/accused.

32. It is next contended by the Counsel for the State that since, the Counsel of the respondent/accused himself had given his no objection to the recording of evidence of these witnesses in absence of the respondent/accused, therefore, now the respondent/accused cannot make a complaint regarding violation of Section 273 of Cr.P.C.

33. Considered the submissions made by the Counsel for the State.

34. In the present case, the respondent/accused was in jail, therefore, the provisions of Section 317 of Cr.P.C. are not applicable. Only when an application is filed under Section 317 of Cr.P.C. and a statement is made by the accused, that his presence through his Counsel may be accepted and he does not have any objection regarding the question of identity or recording of evidence of the witness in his absence, then the effect of such declaration can be considered. Further, before considering the rigors of Section 317, the Trial Court has to record his reasons that the personal attendance of the accused before the Court is not necessary in the interests of justice, or that the accused is persistently disturbing the proceedings in Court.

35. However, in the present case, the respondent/accused was in jail and he was not produced by the prosecution. Therefore there was no question of disturbing the proceedings in the Court. Further, on all the occasions, the Counsel for the respondent/accused had cross examined the witnesses. Any Undertaking or No Objection given by the Counsel for the respondent/accused, cannot be said to be an Undertaking or No Objection on behalf of the respondent/accused who was in jail and was not produced by the prosecution itself. The respondent/accused was not responsible for his absence, but it was the prosecution who had failed to keep the respondent/accused present in the Court. Therefore, the fault on the part of the prosecution to keep the accused present before the Court can not be taken to the disadvantage of the respondent/accused. Further, any Undertaking or No objection given by a Counsel without the instructions of the respondent/accused would not bind the accused.

36. Therefore, in the light of the judgment passed by the Supreme Court in the case of *Atmaram* (Supra), the case is liable to be remanded back to the Trial Court, with a direction to record the evidence of Dr. S.S. Batham (P.W. 15) and Dr. Dinesh Kumar (P.W. 16) in the presence of the respondent/accused.

37. So far as the another contention of the Counsel for the respondent/accused, that witnesses were examined on the dates which were so fixed by the Trial Court, and the Trial Court has proceeded expeditiously, thereby jeopardizing the interest of the respondent/accused is concerned, the same cannot be accepted for the following reasons:

38. Sections 230 and 231 of Cr.P.C. read as under :

> **230. Date for prosecution evidence**.— If the accused refuses to plead, or does not plead, or claims to be tried or is not convicted under Section 229, the Judge shall fix a date for the examination of witnesses, and may, on the application of the prosecution, issue any process for compelling the attendance of any witness or the production of any document or other thing.
>
> **231. Evidence for prosecution**.— (1) On the date so fixed, the Judge shall proceed to take all such evidence as may be produced in support of the prosecution.
>
> (2) The Judge may, in his discretion, permit the cross-examination of any witness to be deferred until any other witness or witnesses have been examined or recall any witness for further cross-examination.

39. Thus, it is clear that on the date so fixed, the Judge has to take all such evidence as may be produced in support of prosecution. If the witnesses are present, then the presiding judge cannot refuse to examine them except for the reasons mentioned in the order sheet. In the present case, no objection was ever raised by the Counsel for the respondent/accused, that witnesses are appearing on their first date of appearance, therefore, he is not in a position to cross examine them effectively. Even otherwise, it is not the case of the respondent/accused, that since, the witnesses were examined on each date so fixed by the Trial Court, therefore, any prejudice has been caused to the respondent/accused. No application for recall of any witness was filed by the respondent/accused on the ground that certain questions could not be put to them as the evidence is being recorded expeditiously. Further, expeditious trial is a fundamental right of an accused. If the Trial Court has proceeded expeditiously by examining the witnesses on the date so fixed, this Court is of the considered opinion, that no fault can be found on the part of the Trial Court by examining the witnesses on the date so fixed in the Trial.

40. The Supreme Court in the case of *Gouri Shankar Vs. State of Punjab* reported in (2021) 3 SCC 380 has held as under :

> **9.** At the motion stage when the matter came up before this Court on 20-2-2020, the plea which was raised by the learned counsel for the appellant was that on the date of framing of charges i.e. 29-4-2013, the statement of material prosecution witnesses PW 1 and PW 2 was recorded without affording reasonable opportunity to the appellant-accused to cross-examine the prosecution witnesses as mandated under Section 230 of the Code of Criminal Procedure, 1973. After the notice

was served, counter-affidavit has been filed by the respondent and the fact noticed by us in our order dated 20-2-2020 has been explained in Para 13 of the counter-affidavit that after framing of charges, the appellant pleaded guilty, however following the rule of prudence, the trial court decided to examine four witnesses before recording the conviction, and accordingly PW 1 and PW 2 were examined first and perusal of their statements i.e. Annexure P-2 and Annexure P-3 would show that the opportunity was granted to the appellant-accused to cross-examine the witnesses on 29-4-2013 and in fact cross-examination was done by the counsel for the appellant-accused. However, after cross-examination of these two witnesses, the appellant pleaded to claim trial on 14-5-2013 and thereafter the evidence of other prosecution witnesses was recorded. At no stage, the appellant moved any application for recalling the witnesses and to be more specific, of PW 1 and PW 2 and this issue has been raised for the first time before this Court.

10. After taking note of the statement of fact which has been stated by the respondent in the counter-affidavit and Para 13 in particular, of which the reference has been made and with assistance of the learned counsel, we have gone through the material available on record and find no error in the finding of guilt being recorded by the trial court and confirmed by the High Court in the impugned judgment which calls for our interference.

Thus, the objection regarding expeditious trial is hereby rejected.

41. It is next contended by the Counsel for the respondent/accused that the prosecution closed its case on 13-7-2018 and on 17-7-2018, an application filed by prosecution under Section 311 of Cr.P.C. was allowed and Sanjeev Gupta (P.W.3) was further examined on 18-7-2018, and the accused statements under Section 313 of Cr.P.C. were recorded on 25-7-2018 and the case was adjourned for examination of defence witness. The respondent/accused also expressed his unwillingness to examine any defence witness on 7-8-2018, but the Trial Court on its own found that the DNA report has not been produced, therefore, fixed the case for 10-8-2018 for filing of DNA report as well as for Final arguments. It is submitted that once, the prosecution case was not closed for all practical purposes, then the Trial Court should not have fixed the case for final arguments. Furthermore, on 10-8-2018, the DNA report was filed and after mentioning that no effective objection was raised by the respondent/accused, the DNA report was exhibited as Ex.C-1 in the light of the provisions of Section 293 of Cr.P.C. It is submitted that the Trial Court acted in a haste and on the very same day, further examination of accused under Section 313 of Cr.P.C. was done and fixed the case

for final hearing on the same day and ultimately heard the matter finally. It is submitted that this undue haste shown by the Trial Court has seriously prejudiced the respondent/accused.

42. Considered the submissions.

43. Orders dated 7-8-2018 and 10-8-2018 read as under :

7.8.2018 राज्य द्वारा श्री पुष्पेंद्र कुमार गर्ग डी पी ओ।

अभियुक्त नन्द किशोर न्यायिक निरोध जेल दतिया से पेश उसकी ओर से श्री संजोगानंद यादव अधिवक्ता उपस्थित

प्रकरण मे डी एन ए प्रतिवेदन पेश नही। प्रकरण निराकरण की अवस्था पर है अतः पुलिस अधीक्षक दतिया को पत्र लेख किया जावे कि वे संबंधितों को आगामी दिनांक को प्रकरण मे डी एन ए प्रतिवेदन प्रस्तुत किये जाने हेतु उचित निर्देश प्रदान करे।

बचाव पक्ष अधिवक्ता द्वारा बचाव साक्ष्य न देना व्यक्त किया। प्रकरण डी एन ए की प्रस्तुति एवं अंतिम तर्क हेतु दिनांक 10.8.2018 को पेश हो।

10.8.2018. राज्य द्वारा श्री पुष्पेंद्र कुमार गर्ग डी पी ओ।

अभियुक्त नन्द किशोर न्यायिक निरोध जेल दतिया से पेश उसकी ओर से श्री संजोगानंद यादव अधिवक्ता उपस्थित

अभियोजन द्वारा एक आवेदन पत्र सहित राज्य न्यायालयिक विज्ञान प्रयोगशाला सागर का प्रतिवेदन प्रस्तुत किया गया, प्रतिलिपि प्रतिरक्षा पक्ष के विद्वान अभिभावक को प्रदान की गई प्रकट विलंब से प्राप्त होने के कारण को देखते हुए एवं प्रभावी आपत्ति भी न होने से आवेदन स्वीकार करते हुए उक्त राज्य न्यायालयिक विज्ञान प्रयोगशाला का प्रतिवेदन अभिलेख पर लिया जाता है और धारा 293 दंप्रसं के प्रावधान को दृष्टिगत रखते हुए उक्त प्रतिवेदन पर प्रदर्श सी–1 अंकित किया जाता है।

प्रकरण प्रदर्श सी–1 के प्रतिवेदन के संबंध मे दंप्रसं की धारा 313 प्रावधान के परिप्रेक्ष्य मे अभियुक्त के अतिरिक्त परीक्षण हेतु कुछ देर बाद प्रस्तुत हो

पुनश्चः

अभियुक्त का दंप्रसं की धारा 31 के प्रावधानांतर्गत अतिरिक्त अभियुक्त परीक्षण किया गया। प्रतिरक्षा पक्ष द्वारा प्रकरण मे कोई बचाव साक्ष्य न देना व्यक्त किया।

प्रकरण उभयपक्ष की सहमति से आज ही अंतिम तर्क हेतु नियत किया जाता है। प्रकरण अंतिम तर्क हेतु थोडी देर बाद पेश हो

पुनश्चः

पक्षकार पूर्ववत।

उभय पक्ष के अंतिम तर्क श्रवण किये गये। प्रकरण निर्णय हेतु नियत किया जाता है।

प्रकरण निर्णय हेतु दिनांक 13.8.2018 को पेश हो।

44. From the above mentioned order-sheets, it appears that the case for final arguments was fixed on the same day with the consent of the Counsel for the parties, but whether it can be said that any prejudice was caused to the respondent/accused or not?

45. It is submitted by the Counsel for the respondent/accued that in the seizure memo Ex. P. 13, it is not mentioned that whether any stains of any kind were found on the bed sheet recovered from the room of the co-accused Ranu @ Dilip Sahu. It is further submitted that even in the DNA report, it is merely mentioned that DNA profile was found from the source from Cloths of the deceased and the bed sheet, but the nature of source is not mentioned whereas the Scientific Officer has mentioned that DNA profile of the respondent/accused was extracted from source "blood sample". It is submitted that when the Scientific Officer was mentioning about the "blood sample" as a source for extracting DNA profile of the respondent/accused, then the omission on his part to disclose the nature of source found on the cloths of the deceased and the bed sheet recovered from the room of the co-accused Ranu @ Dilip Sahu assumes importance. It is submitted that the respondent/accused by cross examining the Scientific Officer, could have pointed out that the DNA report is not worth reliance, however, the objection raised by the respondent/accused to the DNA report was rejected merely by mentioning that no effective objection was raised. It is further submitted that the DNA report has also been considered against the respondent/accused, therefore grave prejudice has been caused to him.

46. Further, it is submitted that under the facts and circumstances of the case, it is clear that the consent of the Counsel for the respondent/accused to argue the matter finally cannot be said to be voluntary.

47. Considered the submissions made by the Counsel for the parties.

48. Sections 232, 233 and 234 of Cr.P.C. read as under :

> **232. Acquittal**.— If, after taking the evidence for the prosecution, examining the accused and hearing the prosecution and the defence on the point, the Judge considers that there is no evidence that the accused committed the offence, the Judge shall record an order of acquittal.
>
> **233. Entering upon defence**.— (1) Where the accused is not acquitted under Section 232, he shall be called upon to enter on

> his defence and adduce any evidence he may have in support thereof.
>
> (2) If the accused puts in any written statement, the Judge shall file it with the record.
>
> (3) If the accused applies for the issue of any process for compelling the attendance of any witness or the production of any document or thing, the Judge shall issue such process unless he considers, for reasons to be recorded, that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice.
>
> **234. Arguments**.— When the examination of the witnesses (if any) for the defence is complete, the prosecutor shall sum up his case and the accused or his pleader shall be entitled to reply:
>
> Provided that where any point of law is raised by the accused or his pleader, the prosecution may, with the permission of the Judge, make his submissions with regard to such point of law.

49. From the plain reading of Section 233 Cr.P.C., it is clear that if a judgment is not passed under Section 232 of Cr.P.C., then the accused shall be called upon to enter his defence and thereafter, final arguments shall be heard as per the provisions of Section 234 of Cr.P.C.

50. Since, the case was fixed for 10-8-2018 for production of DNA report, thus, it is clear that on 10-8-2018, the case of the prosecution was implicitly reopened by the Trial Court by order dated 7-8-2018 by directing the prosecution to produce the DNA report. Therefore, by order dated 7-8-2018, the Trial Court should not have fixed the case for final arguments.

51. Further, the Trial Court by rejecting the objections of the respondent/accused as ***non-effective objections***, has committed mistake. The Trial Court was expected to mention the objections raised by the respondent/accused to the DNA report and then should have dealt with the same by assigning reasons. This mistake of rejecting the objections as *non-effective objections* has opened a Pandora box as the respondent/accused may now raise even those objections which might not have been taken by him in the Trial Court. Be that as it may. Where the life and liberty of a person is involved, then the objections of the accused should be decided by assigning reasons and should not be decided by holding that they are *not effective*. Further the Trial Court is expected to at-least mention the nature of objections raised by the accused. Under these circumstances, we are of the considered opinion, that the rejection of the objection to the DNA report by terming as *non-effective objection* was not in accordance with law.

52. Further, the provision of Section 234 of Cr.P.C. which deals with Final arguments is not a mere formality. Although there is no bar that the final arguments cannot be heard expeditiously, but the facts and circumstances of this Case indicates that the case of the prosecution was closed, further examination of accused under Section 313 of Cr.P.C. and the final arguments were heard on the very same day. By no stretch of imagination, it can be said that the respondent/accused did not suffer any prejudice.

53. No time was granted to the respondent/accused to prepare the final arguments at-least in the light of the DNA report, which was considered as an important piece of circumstance by the Trial Court against the respondent/ accused.

54. It is a matter of common knowledge that the final arguments requires thorough preparation of case. The concept of final arguments is based on the principle of Natural Justice. The oral as well as documentary evidence is to be appreciated after hearing the arguments of both the parties. Every accused is entitled for an opportunity to effectively put forward his case by suggesting appreciation of oral and ocular evidence in a manner which may be favoring him and to present before the Judge that he should be acquitted. In short it can be said that final argument is **Final Sum up of the case**, by the Counsel. By making a specific provision under Section 234 of Cr.P.C., the legislature has attached great importance to "Final Arguments". The Court must give patient hearing to both the parties, so that they can effectively present their case to show as to why they should win. The order sheet dated 10-8-2018 is in three parts :

(i) Application was filed for taking DNA report on record and the objection of the accused was rejected merely by holding that it was a *noneffective objection*.The DNA report was exhibited as Ex. C-1 in the light of provisions of Section 293 of Cr.P.C.

(ii) The further statement of the accused under Section 313 of Cr.P.C. was recorded and he did not pray for time to lead evidence in defence.

(iii) The case was fixed for final arguments on the same day and later on, the final arguments were heard on the same day.

55. Reference under Section 366 of Cr.P.C. is a continuation of Trial. Therefore, it is obligatory on the High Court to ensure that the persons who are facing trial for murder are provided fair procedure and no prejudice should be caused to them due to procedural lapse.

56. As this Court has already come to a conclusion that the manner in which the proceedings were undertaken by the Trial Court on 10-8-2018 has certainly

caused prejudice to the accused as the accused was deprived of his valuable right to oppose the DNA report as well as to effectively argue the matter finally as per the provision of Section 234 of Cr.P.C., therefore, the order-sheet dated 10-8-2018 passed by the Trial Court, so far as it relates to rejection of objection to DNA report as well as fixing the case for Final Arguments on the same day and hearing the Final Arguments on the same day is held to be bad in law and cannot be given the stamp of approval. As a natural consequence, it is directed that the DNA report shall be exhibited afresh after deciding the objections or after examining the Scientific Officer.

57. Accordingly, the judgment of conviction and sentence dated 13-8-2018 passed by 1st A.S.J., Datia in Special Sessions Trial No.21/2018 is hereby **Set aside.**

58. The matter is remanded back to the Trial Court with a direction to record the evidence of Dr. S.S. Batham (P.W. 15) and Dr. Dinesh Kumar (P.W. 16) afresh in the presence of the respondent/accused. After recording the evidence of the above mentioned two witnesses, the Trial Court shall proceed further from the stage of filing of DNA report i.e., 10-8-2018. The respondent/accused **shall** be granted an opportunity to file written objection to the DNA report and the same shall be decided in accordance with law. If an application for cross-examination of Scientific Officer is filed, then the same shall be considered and decided in accordance with law. Thereafter, if any opportunity is sought by the accused to lead any evidence in his defence in the light of the DNA report, then the same shall be afforded to him in accordance with law. Only after following the provisions of Section 233 of Cr.P.C., the case shall be fixed for Final Arguments, thereby giving at-least one week time to prepare and argue the matter.

59. Since, the impugned judgment has been set aside and the matter is being remanded back for recording of evidence of Dr. S.S. Batham (P.W. 15) and Dr. Dinesh Kumar (P.W. 16) afresh in the presence of the respondent/accused and thereafter to proceed further from the stage of filing of objection to the DNA report, therefore, by way of abandon caution, it is observed that all the findings of conviction recorded by the Trial Court have also stood wiped out. The Trial Court is directed to decide the case without getting influenced or prejudiced by any of the findings given in the impugned judgment.

60. If the respondent/accused expresses his desire to engage a different Counsel of his own choice or prays for providing a Counsel from Legal Aid, then the said prayer shall be allowed. In case, if a Counsel from Legal Aid is provided, then the Trial Court shall ensure, that the Counsel so provided to the respondent/accused must have standing of at-least 15 years practice in the bar and must have thorough knowledge of Criminal Law.

61. The Trial Court is directed to complete the entire exercise within a period of 4 months from the date of receipt of copy of this judgment.

62. Since, the respondent/accused is in jail, therefore, a copy of this judgment be provided to the respondent/accused immediately free of cost.

63. CRRFC No.9 of 2018 and Cr.A. No.6946 of 2018 are **disposed of** accordingly.

Order accordingly

I.L.R. [2021] M.P. 2150 (DB)
CRIMINAL REFERENCE

Before Mr. Justice G.S. Ahluwalia &
Mr. Justice Rajeev Kumar Shrivastava

CRRFC No. 8/2019 (Gwalior) decided on 28 July, 2021

IN REFERENCE (SUO MOTU) ...Applicant

Vs.

MANOJ …Non-applicant

(Alongwith CRA No. 4554/2019)

***A. Penal Code (45 of 1860), Sections 302, 366, 376-A & 201 and Protection of Children from Sexual Offences Act, (32 of 2012), Section 5(L) & 6 – Circumstantial Evidence – Ocular & Medical Evidence – DNA Report* – Held – In postmortem report, signs of forceful vaginal penetration were found – DNA profile of accused found in clothes, vaginal slide and swab of deceased – Female DNA profile of deceased was found on cloths of accused – Theory of last seen together was established – Prosecution established beyond reasonable doubt that accused committed rape on his 8 years old minor sister and killed her – Conviction upheld – Reference disposed.**

(Paras 43, 75, 84, 162, 173 & 177)

क. दण्ड संहिता (1860 का 45), धाराएँ 302, 366, 376–A व 201 एवं लैंगिक अपराधों से बालकों का संरक्षण अधिनियम, (2012 का 32), धारा 5(L) व 6 – परिस्थितिजन्य साक्ष्य – चाक्षुष व चिकित्सीय साक्ष्य – डी.एन.ए. रिपोर्ट – अभिनिर्धारित – शव परीक्षण प्रतिवेदन में, बलपूर्वक योनि/वेजाइनल प्रवेशन के संकेत पाये गये थे – मृतिका के कपड़ों, वेजाइनल स्लाइड और स्वैब में अभियुक्त की डी.एन.ए. प्रोफाईल पाई गई – मृतिका का महिला डी.एन.ए. प्रोफाईल अभियुक्त के कपड़ों पर पाया गया था – अंतिम बार साथ देखे जाने का सिद्धांत स्थापित किया गया था – अभियोजन ने युक्तियुक्त संदेह से परे यह स्थापित किया कि अभियुक्त ने अपनी 8 वर्षीय अवयस्क बहिन के साथ बलात्संग कारित किया एवं उसकी हत्या कर दी – दोषसिद्धि कायम – निर्देश निराकृत।

***B. Criminal Procedure Code, 1973 (2 of 1974), Section 235(2) – Question of Sentence – Opportunity of Hearing* – Held – No opportunity of effective hearing on the question of sentence as required u/S 235(2) Cr.P.C. was given to accused – No suggestion was given to accused that Court is intending to award death sentence so as to give opportunity to accused to argue in light of "Aggravating" and "Mitigating circumstances" – Even trial Court has not considered the "Mitigating" circumstances – Sentence modified to life imprisonment till natural death – Appeal partly allowed.**

(Paras 169, 171, 174 & 178)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 235(2) – दण्डादेश का प्रश्न – सुनवाई का अवसर – अभिनिर्धारित – अभियुक्त को जैसा दं.प्र.सं. की धारा 235(2) के अंतर्गत अपेक्षित है, दण्डादेश के प्रश्न पर प्रभावी सुनवाई का कोई अवसर प्रदान नहीं किया गया था – अभियुक्त को कोई सुझाव नहीं दिया गया था कि न्यायालय मृत्युदण्ड देने का आशय रखता है ताकि अभियुक्त को ''गुरूतरकारी'' एवं ''कम करने वाली'' परिस्थितियों के आलोक में तर्क करने का अवसर दिया जा सके – यहां तक कि विचारण न्यायालय ने भी ''कम करने वाली'' परिस्थितियों को विचार में नहीं लिया – दण्डादेश को प्राकृतिक मृत्यु होने तक आजीवन कारावास में उपांतरित किया गया – अपील अंशतः मंजूर।

***C. Penal Code (45 of 1860), Sections 302, 366, 376-A & 201 and Protection of Children from Sexual Offences Act, (32 of 2012), Section 5(L) & 6 – Theory of "Last Seen Together" – Burden of Proof* – Held – Deceased was seen for the last time in company of accused and thereafter she was never seen alive – Prosecution succeeded in establishing that there was minimum gap between the time when victim was seen in company of accused for the last time and when death took place and the dead body was recovered – Thus burden shifted to accused to explain as to when he parted away with company of deceased, but the said burden has not been discharged by accused.**

(Para 43)

ग. दण्ड संहिता (1860 का 45), धाराएँ 302, 366, 376–A व 201 एवं लैंगिक अपराधों से बालकों का संरक्षण अधिनियम, (2012 का 32), धारा 5(L) व 6 – ''अंतिम बार साथ देखे जाने'' का सिद्धांत – सबूत का भार – अभिनिर्धारित – मृतिका को अंतिम बार अभियुक्त के साथ देखा गया था एवं उसके बाद उसे कभी जीवित नहीं देखा गया – अभियोजन यह स्थापित करने में सफल रहा कि उस समय के बीच में न्यूनतम अंतर था जब पीड़िता को अंतिम बार अभियुक्त के साथ देखा गया था और जब उसकी हत्या हुई थी एवं उसका शव बरामद किया गया था – इस प्रकार यह स्पष्ट करने का भार अभियुक्त पर चला जाता है कि कब वह मृतिका के साथ से अलग हुआ, परंतु अभियुक्त द्वारा उक्त भार का उन्मोचन नहीं किया गया।

D. Penal Code (45 of 1860), Sections 302, 366, 376-A & 201 and Protection of Children from Sexual Offences Act, (32 of 2012), Section 5(L) & 6

– *Delay in Recording Statement – Effect* – Held – Every delay in recording of police statement is not fatal – If a plausible explanation is given for the same, then it would not give any dent to the prosecution story – Unless and until the IO is asked about the delay, the delayed recording of statement by itself would not make the evidence of the witnesses suspicious or unreliable.

(Paras 33 to 36)

घ. दण्ड संहिता (1860 का 45), धाराएँ 302, 366, 376–A व 201 एवं लैंगिक अपराधों से बालकों का संरक्षण अधिनियम, (2012 का 32), धारा 5(L) व 6 – कथन अभिलिखित करने में विलंब – प्रभाव – अभिनिर्धारित – पुलिस कथन को अभिलिखित करने में हुआ प्रत्येक विलंब घातक नहीं है – यदि उक्त के लिए एक स्वीकार्य / सत्याभासी स्पष्टीकरण दिया जाता है, तो यह अभियोजन कहानी को कोई क्षति नहीं पहुंचाएगा – जब तक अन्वेषण अधिकारी से विलंब के बारे में नहीं पूछा जाता है, विलंब से कथन अभिलिखित किया जाना अपने आप में साक्षीगण के साक्ष्य को संदिग्ध या अविश्वसनीय नहीं बनाएगा।

***E. Evidence Act (1 of 1872), Section 145 – Omission & Contradictions* – Held – If the attention of the witness is not drawn towards the omissions in his previous statement, then the accused cannot take advantage of such omission and contradictions – If a party intends to contradict a witness, then his attention must be called to those parts of it which are to be used for purpose of contradicting him.** **(Paras 25 to 31)**

ङ. साक्ष्य अधिनियम (1872 का 1), धारा 145 – लोप व विरोधाभास – अभिनिर्धारित – यदि साक्षी का ध्यान उसके पूर्व कथन में हुए लोप की ओर आकर्षित नहीं किया जाता है, तो अभियुक्त उक्त लोप एवं विरोधाभासों का लाभ नहीं उठा सकता – यदि कोई पक्षकार किसी साक्षी का विरोध करने का आशय रखता है, तो उसका ध्यान उसके उन भागों की ओर आकर्षित करना चाहिए जिनका उपयोग उसका विरोध करने के प्रयोजन से किया जाना हो।

***F. Criminal Practice – Identification of Accused* – Held – Villagers have the ability of identifying the things even in poor light – Villages have limited number of inhabitants and are closely watched by each and every resident of the village – Evidence of witness that he identified accused from his back, style of walking and body buildup, cannot be said to be unreliable.**

(Paras 44 to 47)

च. दाण्डिक पद्धति – अभियुक्त की पहचान – अभिनिर्धारित – ग्रामीणों में धुंधले प्रकाश में भी चीजों को पहचानने की क्षमता होती है – ग्रामों में निवासियों की संख्या सीमित होती है एवं ग्राम के प्रत्येक निवासी द्वारा बारीकी से नजर रखी जाती है – साक्षी के साक्ष्य कि उसने अभियुक्त को उसकी पीठ से, चलने के तरीके और शारीरिक बनावट से पहचाना, अविश्वसनीय नहीं कहा जा सकता।

***G. Criminal Practice – Discrepancy in Prosecution Documents – Typographical Error* – Held – When there is any discrepancy which does not**

go to the root of the matter thereby making it inadmissible or unreliable, then prosecution witness should also get opportunity to explain such discrepancy – Without asking any question, prosecution cannot be thrown overboard on account of some typographical error. (Paras 70 to 74)

छ. दाण्डिक पद्धति – अभियोजन दस्तावेजों में विसंगति – टंकण त्रुटि – अभिनिर्धारित – जब कोई ऐसी विसंगति होती है जो मामले की जड़ तक नहीं जाती है जिससे यह अग्राह्य या अविश्वसनीय हो जाता है, तो अभियोजन साक्षी को भी उक्त विसंगति को स्पष्ट करने का अवसर दिया जाना चाहिए – बिना कोई प्रश्न पूछे, कुछ टंकण त्रुटि के कारण अभियोजन का परित्याग नहीं किया जा सकता।

***H. Criminal Practice – Prosecution Witness – Quality & Quantity* – Held – Evidence is to be weighed and not counted – It is the quality and not the quantity of witnesses which decided the fate of trial – Each and every possible witness is not required to be examined – If prosecution witnesses, so examined are trustworthy and reliable then their evidence cannot be discarded only on ground that some more witnesses should have been examined to corroborate the prosecution witnesses. (Paras 63 to 65)**

ज. दाण्डिक पद्धति – अभियोजन साक्षी – गुणवत्ता व संख्या – अभिनिर्धारित – साक्ष्य को तौला जाना चाहिए एवं गिना नहीं जाना चाहिए – यह साक्षीगण की गुणवत्ता है तथा न कि उनकी संख्या जो विचारण के भाग्य का विनिश्चय करती है –प्रत्येक संभव साक्षी का परीक्षण किया जाना अपेक्षित नहीं है– यदि अभियोजन साक्षीगण जिनका परीक्षण किया गया है, भरोसेमंद और विश्वसनीय है, तो उनके साक्ष्य को केवल इस आधार पर अमान्य नहीं किया जा सकता कि अभियोजन साक्षीगण की संपुष्टि के लिए कुछ और साक्षीगण का परीक्षण किया जाना चाहिए।

***I. Criminal Practice – Faulty Investigation* – Held – Every faulty investigation would not make the prosecution unreliable but the faulty investigation must lead to an inference that investigation was been done with a preconceived notions – If Prosecution established the guilt of accused beyond reasonable doubt, then some minor omission on part of IO would not give dent to the prosecution case. (Para 60)**

झ. दाण्डिक पद्धति – त्रुटिपूर्ण अन्वेषण – अभिनिर्धारित – प्रत्येक त्रुटिपूर्ण अन्वेषण अभियोजन को अविश्वसनीय नहीं बनायेगा परंतु त्रुटिपूर्ण अन्वेषण से यह निष्कर्ष निकाला जाना चाहिए कि अन्वेषण एक पूर्वकल्पित धारणाओं के साथ किया गया था – यदि अभियोजन अभियुक्त की दोषिता को युक्तियुक्त संदेह के परे स्थापित करता है, तब अन्वेषण अधिकारी की ओर से कुछ मामूली लोप अभियोजन प्रकरण को क्षति नहीं पहुंचाएंगे।

***J. Criminal Practice – Rape Case – Injury on Genital Organ of Accused* – Held – Presence of injuries on male organ is not necessary in all**

cases – As per Modi's Jurisprudence, it is not necessary that there should always be mark of injuries on the penis of accused – Absence of any injury on penis of accused would not belie the prosecution case. (Paras 99 to 104)

ञ. दाण्डिक पद्धति – बलात्संग प्रकरण – अभियुक्त के जननांग पर चोट – अभिनिर्धारित – लिंग पर चोटों की मौजूदगी, सभी प्रकरणों में आवश्यक नहीं है – मोदी के विधिशास्त्र के अनुसार, यह आवश्यक नहीं है कि अभियुक्त के लिंग पर हमेशा चोटों के निशान होने चाहिए – अभियुक्त के लिंग पर किसी चोट का अभाव अभियोजन के प्रकरण को नहीं झुठलायेगा।

Cases referred:

AIR 2019 SC 194, AIR 2019 SC 1, (2019) 4 SCC 210, (2019) 8 SCC 382, AIR 2019 SC 243, (1980) 2 SCC 684, (1983) 3 SCC 470, (2001) 5 SCC 311, (1997) 10 SCC 44, (2002) 8 SCC 45, (2018) 16 SCC 161, (2017) 16 SCC 353, AIR 2019 SC 1367, AIR 1952 SC 343, (1984) 4 SCC 116, AIR 2013 SC 3150, (2012) 2 SCC 399, (2013) 12 SCC 406, (2019) 7 SCC 678, (2018) 7 SCC 536, (2001) 6 SCC 71, (2003) 1 SCC 534, (2006) 12 SCC 254, (2012) 11 SCC 768, AIR 1985 SC 1622, (2000) 4 SCC 298, (2003) 11 SCC 519, (2010) 2 SCC 353, (2015) 9 SCC 588, (2012) 7 SCC 646, (2020) 14 SCC 750, (2015) 4 SCC 393, (2010) 15 SCC 49, (2013) 4 SCC 448, (2013) 7 SCC 278, (2019) 9 SCC 738, (1976) 4 SCC 369, (2009) 14 SCC 433, (2017) 5 SCC 817, (2008) 13 SCC 271, (2017) 11 SCC 129, (2019) 20 SCC 481, (2002) 2 SCC 135, (2013) 11 SCC 476, (2005) 1 SCC 568, AIR 1944 PC 73, (2012) 6 SCC 204, (2017) 6 SCC 1, (1997) 1 SCC 283, (2019) 16 SCC 584, (2020) 14 SCC 290.

Rajesh Shukla, Dy. A.G. for the State.

Padam Singh and *Vijay Dutt Sharma,* for the non-applicant in CRRFC No. 8/2019 and for the appellant in CRA No. 4554/2019.

J U D G M E N T

(Heard through Video Conferencing)

The Judgment of the Court was delivered by :

G.S. AHLUWALIA, J. :- CRRFC No.8 of 2019 is a reference under Section 366 of Cr.P.C. for confirmation of death sentence passed by Xth Additional Sessions Judge/Special Judge (POCSO Act) Gwalior on 8-5-2019 in Special Sessions Trial No.130/2017 and Cr.A. No.4554 of 2019 has been filed by the appellant Manoj against the same judgment and sentence.

2. By this common judgment, the CRRFC No.8 of 2019 and Cr.A. No.4554 of 2019 shall be decided.

3. The prosecution story in short is that on 5-7-2017 at 2:00 A.M. in the night, FIR No.64 of 2017 was lodged by Hariram Prajapati, to the effect that his minor

daughter "X" aged about 7-8 years had left her house on 4-7-2017 at about 10 A.M. for attending her school. She is the student of class 2 in Nayagaon Govt. Primary School. In the evening, she did not return back from the school. At about 17:15, the complainant and other villagers saw from the window of the school that the bag and water bottle of "X" is kept in the school. Thereafter, the complainant and villagers tried to find out the whereabouts of "X" in the nearby forest area and in the bushes, but her whereabouts could not be traced. Accordingly, it was alleged that some unknown person has kidnapped his minor daughter "X". Accordingly on 5-7-2017 at 2:30 A.M. in the morning, Missing Person Registration was done. The complainant thereafter noticed the dead body of "X" and accordingly on 5-7-2017 at 6:00 A.M., Dehati Nalishi was recorded. Notice under Section 175 of Cr.P.C. was given to the witnesses and *Naksha Panchnama* was prepared. Spot map was prepared on 5-7-2017 at 6:40 A.M. The dead body of "X" was sent for postmortem. The Scene of Crime Mobile Unit of Gwalior carried out the spot inspection on 5-7-2017 in between 8:30 A.M. To 9:50 A.M. One plastic bag of white colour which was stained with blood, the hairs found on the said white coloured plastic bag and from the nearby places, plain earth from inside the *Pator* (room), earth containing the spit, one empty packet of Rajshri Gutka and one empty packet of tobacco, one button of a shirt of white colour with broken pieces of thread were seized from the spot on 5-7-2017 at about 9:10 A.M. On 5-7-2017 at about 9:30 A.M., the plain earth from the place where the dead body of "X" was lying and the earth having saliva of the deceased were also seized. The postmortem was conducted on 5-7-2017 itself, and the dead body was handed over to the father of the deceased "X" on 5-7-2017 itself. Viscera, Vaginal slide and swab of the deceased "X", cloths of the deceased, nail clippings of the deceased, specimen of seal were also seized on 5-7-2017 at 14:35. Unnatural death was registered under Section 174 of Cr.P.C. The respondent/accused was arrested on 6-7-2017 at 12:30 P.M. His memorandum under Section 27 of Evidence Act was recorded. He was got medically examined and his pubic hairs, undergarments, skull hairs, semen slide and outer garments were sealed and were handed over to the Police Constable which were seized on 6-7-2017 at 14:30. The school record of the deceased "X" was seized. The birth certificate of the deceased "X" was also obtained from the school according to which the date of birth was 19-10-2009. The attendance register was also seized. On 10-7-2017, the plastic white coloured bag, hairs collected from white coloured plastic bag and from the surrounding areas, Viscera of the deceased, one sealed packet of salt, cloths of the deceased, vaginal slide and swab of the deceased, nail clippings of the deceased, the **outer** garments of the respondent/accused, underwear of respondent/accused, semen slide of respondent/accused, pubic hairs of respondent/accused, Saliva mixed earth, and the plain earth were sent to F.S.L. Gwalior to find out as to whether Human Blood is present and if so, its group, Whether the hairs are human hairs, Whether poison is present in the viscera or not, whether the articles

F,G,I,J,K and L contains human semen/sperms and whether human skin is present in the nail clippings or not. The report dated 20-7-2017 was received from F.S.L. Gwalior. The blood sample of the respondent/accused was taken on 29-7-2017. By draft dated 31-7-2017, DNA report was also sought from F.S.L. Sagar. The police also recorded the statements of the witnesses. The photographs of the dead body and spot were taken and after completing the investigation, the police filed the charge-sheet against the respondent/accused for offence under Sections 363, 366, 376(2), 302, 201 of I.P.C. and under Section 5/6 of Protection Of Children From Sexual Offences Act, 2012 (In Short "POCSO Act").

4. The Trial Court by order dated 14-2-2018 framed charges under Sections 366, 376-A, 302, 201 of I.P.C., and under Section 5(L) read with Section 6 of POCSO Act.

5. The respondent/accused abjured his guilt and pleaded not guilty.

6. The prosecution in order to prove its case, examined Hariram Prajapati (P.W.1), Ramsewak Prajapati (P.W.2), Hari Singh Batham (P.W.3), Bheem (P.W.4), Pappu (P.W.5), Ramesh Prajapati (P.W.6), Smt. Sagun (P.W.7), Smt. Ramdehi (P.W.8), Motiram Rajouriya (P.W.9), Ajeet Agrawal (P.W.10), Dr. Ajay Gupta (P.W.11), Dr. Ajeet Kumar Minz (P.W.12), Devlal Koli (P.W. 13), H.K. Tiwari (P.W.14), Dr. Anand Kumar Pandey (P.W. 15), Daini Kumar (P.W. 16), Dr. Vinod Kumar Doneriya (P.W. 17), Jugal Kishore Dubey (P.W. 18), Ashok Kumar (P.W. 19), Sayara Bano (P.W. 20), Dharmendra Singh Jat (P.W. 21), Ashok Singh (P.W. 22), Shishram (P.W. 23), Dr. Pankaj Shrivastava (P.W. 24), Dr. Neha Dodiya (P.W. 25), Dr. M.K. Dudhariya (P.W.26), Dr. Sandeep Tomar (P.W. 27), and Alok Singh (P.W. 28).

7. The respondent/accused examined Poonam (D.W.1) and Neetu (D.W.2) in his defence.

8. The Trial Court by judgment and sentence dated 8-5-2019 convicted and sentenced the respondent/accused as under :

Conviction under Section	**Sentence**	**Fine**
366 of I.P.C.	10 Years R.I.	Rs. 2,000/-in default 1 month R.I.
376 - A of I.P.C.	Death Sentence	----
302 of I.P.C.	Death Sentence	----
201 of I.P.C.	7 years R.I.	Rs. 2,000/- in default 1 month R.I.

5(L) R/w 6 of POCSO Act	No separate sentence in the light of Section 42 of POCSO Act.	

9. Accordingly, this reference under Section 366 of Cr.P.C. has been made for confirmation of death sentence and Cr.A. No.4554 of 2019 has been filed by the respondent/accused against the same judgment and sentence.

10. Challenging the judgment and sentence awarded by the Trial Court, it is submitted by the Counsel for the respondent/accused that the case is based on circumstantial evidence and the chain is not complete. The respondent/accused is the cousin brother of the deceased "X". There are material omissions and contradictions in the F.I.R. and the statements of the witnesses. In fact, nobody had witnessed the deceased "X" in the company of the respondent/accused for the last time. In the FIR, it is mentioned that the deceased is the student of Class 2, whereas according to the school record, she was the student of Class 3. Although it is the case of the prosecution that the deceased "X" had left her house for the school, and her bag and bottle were noticed in the school, but as per the attendance register, the deceased "X" was absent on 4-7-2017. The school bag and bottle of the deceased were not seized at all. There is a considerable delay in sending the blood sample and other articles to F.S.L., Sagar, therefore, DNA report is not reliable. Further, there is a discrepancy in A/RM code given to blood sample of the respondent/accused, which makes the DNA report unreliable. There is material difference in the *Naksha Panchayatnama* and the postmortem report as no injury was noticed on the head of the deceased at the time of preparation of *Naksha Panchayatnama.* The F.I.R. is ante dated and ante timed. There is a material discrepancy as to in which container the internal organs of the deceased were stored, because in the post-mortem report, it has been mentioned that the internal organs were kept in a bottle, whereas in the seizure memo it is mentioned that boxes were seized. Arguments on the question of framing charge were advanced by a Counsel who was never engaged by the respondent/accused, thereby causing serious prejudice to the respondent/accused. The investigation is faulty and the arrest of the respondent/accused was the result of public agitation. The Trial Court has wrongly discarded the evidence of defence witnesses. The blood sample of the respondent/accused was not taken in accordance with law. No injury was found on the genital organs of the respondent/accused, which is indicative of fact that no forceful intercourse was done by him. It is further submitted that the diameter and thickness of the button seized from the spot and that of the button of the shirt of the respondent/accused was not similar. Grandmother of the deceased was not examined in order to prove that the deceased had left the house at 10:00 A.M. Further, the scalp hairs of the respondent/accused were collected, but they were

not compared with the hairs found on the spot. Independent witnesses of the locality have not been examined by the prosecution. It is further submitted that in the alternative, the death sentence awarded by the Court below is excessive and is liable to be annulled and the appellant may be awarded Life Imprisonment. To buttress their contentions, the Counsels for the respondent/accused relied upon the judgments passed by the Supreme Court in the case of *M.A. Antony alias Antappan v. State of Kerala* reported in AIR 2019 SC 194, *Rajendra Pralhadrao Wasnik v. State of Maharashtra* reported in AIR 2019 SC 1, *Vijay Raikwar Vs. State of M.P.* reported in (2019) 4 SCC 210, *Parsuram Vs. State of M.P.* reported in (2019) 8 SCC 382, *Chhannu Lal Verma v. State of Chhattisgarh* reported in AIR 2019 SC 243, *Bachan Singh Vs. State of Punjab* reported in (1980) 2 SCC 684, *Machhi Singh Vs. State of Punjab* reported in (1983) 3 SCC 470, *Kamti Devi Vs. Poshi Ram* reported in (2001) 5 SCC 311, *Mohd. Aman Vs. State of Rajasthan* reported in (1997) 10 SCC 44, *Bodhraj Vs. State of J&K* reported in (2002) 8 SCC 45, *Naneethakrishnan Vs. State by Inspector of Police* reported in (2018) 16 SCC 161, *Ganpat Singh Vs. State of M.P.* reported in (2017) 16 SCC 353, *Digamber Vaishnav and Anr. v. State of Chhattisgarh* reported in AIR 2019 SC 1367, *Hanumant Govind Nargundkar and another v. State of Madhya Pradesh* reported in AIR 1952 SC 343, *Sharad Birdhichand Sarda Vs. State of Maharashtra* reported in (1984) 4 SCC 116, *Raj Kumar Singh @ Raju @ Batya Vs. State of Rajasthan* reported in AIR 2013 SC 3150, *Madhu Vs. State of Kerala* reported in (2012) 2 SCC 399, *Sujit Biswas Vs. State of Assam* reported in (2013) 12 SCC 406, *State of Rajasthan Vs. Mahesh Kumar* reported in (2019) 7 SCC 678, and *Kumar Vs. State represented by Inspector of Police* reported in (2018) 7 SCC 536.

11. *Per contra,* the State Counsel has supported the judgment and sentence. It is submitted that a minor girl was raped and was killed by smothering. It is submitted that it is incorrect to suggest that non-examination of independent witnesses has given any dent to the prosecution story. It is submitted that social thread in the villages is to be understood. If the spot map is seen, then it is clear that the incident took place in the colony of persons belonging to Prajapati community. Generally the members of one community do not come forward to depose against the member of the same community. Further, the contention that since, the grandmother of the deceased was not examined and therefore, it is not prove that the deceased had left the house at 10 A.M. is concerned, it is submitted that in the present case, the deceased and the accused both are the grandchildren of the mother of the complainant. She must be in a fix as to whether to speak against the accused or not. It is further submitted that so far as the discrepancy in A/RM code of Article R in the DNA report is concerned, it is merely a typographical error. Article Q which was given A/RM 8279 code, was never opened which is clear from the DNA report itself. Further, it is submitted that no question in this regard was put to Dr. Pankaj Shrivastava (P.W.24) otherwise, he would have

certainly clarified the anomaly. It is further submitted that it is incorrect to say that there was any difference in the button of the shirt recovered from the spot and the button found on the shirt of the respondent/accused. The engraving, number of holes, material, colour were same. However, there was some difference in the measurement of diameter and thickness of the button which too was in fraction of millimeters. It is submitted that this difference can happen during manufacturing process. So far as non-comparison of hairs of the respondent/accused from the hairs found on the spot is concerned, it is submitted that since, the DNA profile of the respondent/accused was already found on the incriminating articles including the vaginal slide and swab of the deceased, therefore, it is proved beyond reasonable doubt, that the applicant was the perpetrator of offence. It is further submitted that non-seizure of school bag and bottle by the investigating officer from the school might be a lapse on his part, but it has also come on record, that after the recovery of dead body of the deceased, there was an uproar in the village, and agitating villagers had blocked the road, as a result, the investigating officer was immediately required to rush to the main road with police force, in order to calm down the agitating villagers. It is further submitted that the surrounding circumstances under which the investigating officer was conducting the investigation should be kept in mind while appreciating the evidence. It is further submitted that even the father of the respondent/accused did not come forward to depose in favor of his son. It is further submitted that the evidence of Last Seen Together has been duly proved beyond reasonable doubt. The respondent/accused is cousin brother of the deceased and he has committed a heinous offence in a gruesome manner. Even after committing the heinous offence of committing rape and murder of his minor cousin sister, he did not show any remorse and was trying to project that he is an innocent person. Thus, it is clear that there is no possibility of his improvement. The applicant is a danger for civil society and therefore, the death sentence awarded to him should be confirmed and the appeal filed by the respondent/accused may be dismissed. To buttress his contentions, the Counsel for the State has relied upon the judgment passed by the Supreme Court in the case of *State of H.P. Vs. Gian Chand* reported in (2001) 6 SCC 71, *Sahadevan Vs. State represented by Inspector of Police, Chennai* reported in (2003) 1 SCC 534, *State of Rajasthan Vs. Kashiram* reported in (2006) 12 SCC 254, *Jagroop Singh Vs. State of Punjab* reported in (2012) 11 SCC 768 and *Mahavir Singh Vs. State of Haryana* reported in (0214) 6 SCC 716.

12. Heard the learned Counsel for the parties.

13. Before considering the merits of the case, it would be appropriate to find out as to whether the deceased "X" had died a homicidal death or not?

14. The Postmortem of the deceased "X" was conducted by Dr. Ajay Gupta (P.W.11). As per the Postmortem report Ex. P.18, following injuries were found :

Ante-mortem Ecchymosis over Occipital Area 8x6 cm size and subdural and Subarachnoid hemorrhage present all over the brain.

(i) Red Abrasion on right side of mandible 0.3 x .2 cm size.

(ii) Red Abrasion anterior to right external ear 0.4 x .3 cm.

(iii) Upper lip reddish blue contused 3x2 cm size.

(iv) Lower Lip contused reddish blue 4x1.5 cm.

(v) Red Abrasion left leg lower end anterio laterally 3x1.5 cm.

(vi) Contusion right Nostril 2 x 1 cm Reddish blue.

(vii) Both cheeks diffusely swollen and bluish coloured

A bundle of clothings, nail clippings, two vaginal slides and two vaginal swab, viscera in saturated salt solution, stomach and its contents and pieces of liver, spleen and kidney were sealed. Salt sample and seal specimen were also handed over to the police Constable.

It was found that the death was due to Asphyxia as a result of smothering.

Signs of Head Injury were also evident which were sufficient to cause death in ordinary course of action.

Nature of death was homicidal.

Signs of Physical violence were present.

Signs of forceful vaginal penetration were evident.

Duration of death was within 12 to 36 hours.

15. Dr. Ajay Gupta (P.W.11) was cross examined and he accepted that at the time of conducting postmortem, the police had not provided the copy of F.I.R. He also admitted that ID proof of the deceased "X" and of her father was not provided to him. He denied that postmortem report was prepared as per the instructions of the police and also denied that he is giving false evidence in the Court. Thus, it is clear that in fact no cross-examination was done with regard to the findings recorded by this witness in the postmortem report, Ex. P.18.

16. Therefore, it is held that the deceased "X" died due to smothering and she was subjected to rape and multiple injuries were also found on her body.

17. Now, the moot question for consideration is that whether the prosecution has succeeded in establishing the guilt of the respondent/accused beyond reasonable doubt or not?

18. The case is based on circumstantial evidence. Before appreciating the material available on record, this Court thinks it apposite to consider the law governing the field of Circumstantial Evidence. Although various judgments have been cited by the Counsel for the respondent/accused, but instead of burdening this judgment by considering each and every judgment cited, this Court thinks it apposite to consider few judgments covering the field of Circumstantial Evidence.

19. The Supreme Court in the case of *Sharad Birdhichandra Sarda Vs. State of Maharashtra* reported in AIR 1985 SC 1622 has held as under :

> **152.** A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established :
>
> (1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.
>
> It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved' as was held by this Court in Shivaji Sahebrao Bobade v. State of Maharashtra, (1973) 2 SCC 793 : (AIR 1973 SC 2622) where the following observations were made :
>
> "certainly, it is a primary principle that the accused must be and not merely may be guilty before a Court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."
>
> (2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.
>
> (3) the circumstances should be of a conclusive nature and tendency.
>
> (4) they should exclude every possible hypothesis except the one to be proved, and
>
> (5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.
>
> **153.** These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence.
>
> **154.** It may be interesting to note that as regards the mode of proof in a criminal case depending on circumstantial evidence, in the absence of a corpus delicti, the statement of law as to proof of the same was laid down by Gresson, J. (and concurred by 3 more Judges) in The King v. Horry, (1952) NZLR 111, thus :
>
> "Before he can be convicted, the fact of death should be proved by such circumstances as render the commission of the crime morally certain

and leave no ground for reasonable doubt : the circumstantial evidence should be so cogent and compelling as to convince a jury that upon no rational hypothesis other than murder can the facts be accounted for."

155. Lord Goddard slightly modified the expression 'morally certain' by 'such circumstances as render the commission of the crime certain'.

156. This indicates the cardinal principle of criminal jurisprudence that a case can be said to be proved only when there is certain and explicit evidence and no person can be convicted on pure moral conviction. Horry's case (supra) was approved by this Court in Anant Chintaman Lagu v. State of Bombay, (1960) 2 SCR 460 : (AIR 1960 SC 500). Lagu's case as also the principles enunciated by this Court in Hanumant's case (supra) have been uniformly and consistently followed in all later decisions of this Court without any single exception. To quote a few cases -Tufail's case (1969 (3) SCC 198) (supra). Ramgopal's case (AIR 1972 SC 656) (supra). Chandrakant Nyalchand Seth v. State of Bombay (Criminal Appeal No. 120 of 1957 decided on 19-2-1958), Charambir Singh v. State of Punjab (Criminal Appeal No. 98 of 1958 decided on 4-11-1958). There are a number of other cases where although Hanumant's case has not been expressly noticed but the same principles have been expounded and reiterated, as in Naseem Ahmed v. Delhi Administration, (1974) 2 SCR 694(696): (AIR 1974 SC 691 at p. 693), Mohan Lal Pangasa v. State of U. P., AIR 1974 SC 1144 (1146), Shankarlal Gyarasilal Dixit v. State of Maharashtra, (1981) 2 SCR 384 (390) : (AIR 1981 SC 765 at p. 767) and M. G. Agarwal v. State of Maharashtra, (1963) 2 SCR 405 (419) : (AIR 1963 SC 200 at p. 206) a five-Judge Bench decision

157. It may be necessary here to notice a very forceful argument submitted by the Additional Solicitor-General relying on a decision of this Court in Deonandan Mishra v. State of Bihar, (1955) 2 SCR 570 (582): (AIR 1955 SC 801 at p. 806), to supplement his argument that if the defence case is false it would constitute an additional link so as to fortify the prosecution case. With due respect to the learned Additional Solicitor General we are unable to agree with the interpretation given by him of the aforesaid case, the relevant portion of which may be extracted thus :

"But in a case like this where the various links as stated above have been satisfactorily made out and the circumstances point to the appellant as the probable assailant, with reasonable definiteness and in proximity to the deceased as regards time and situation ... ... such absence of explanation or false explanation would itself be an additional link which completes the chain."

20. The present case is based on following Circumstances :

(i) The deceased, a minor girl aged about 8 years, went to school on 4-7-2017 and thereafter, she left the school after leaving her bag and bottle in the school.

(ii) As the deceased did not come back from School at 4 :00 P.M., therefore, her father started searching for her. The school bag and bottle of the deceased was seen lying in the School.

(iii) F.I.R. regarding missing of deceased was lodged on 5-7-2017 at 2:00 A.M. in the night.

(iv) The dead body of the deceased was recovered on 5-7-2017 at 6:00 A.M. which was lying in front of the *Pator* of Ram Prasad Prajapati.

(v) There were signs of dragging the dead body from inside the *Pator* of Ram Prasad Prajapati, till the door of the *Pator*.

(vi) Blood stained plastic bag, hairs, button, saliva mixed earth, spit, empty packet of Rajshree and Tobacco etc. were seized from the spot.

(vii) Abrasion was found on the nose of the respondent/ accused.

(viii) Human skin was found in the nail clippings of the deceased.

(ix) Last Seen Together.

(x) The respondent/accused was seen coming from the *Pator* of Ramprasad in the afternoon of 4-7-2017.

(xi) The respondent was seen in a frightened condition in the afternoon of 4-7-2017 and respondent was seen all alone at 4:00 A.M. on 5-7-2017.

(xii) As per post-mortem report, multiple injuries were found on the dead body of the deceased and there were signs of forceful vaginal penetration.

(xiii) Hymen of the deceased was found torn.

(xiv) Injuries on private parts of the deceased were found.

(xv) Blood sample of the respondent/accused was collected.

(xvi) DNA profile of the respondent/accused was found in the cloths, vaginal slide and swab of the deceased.

(xvii) DNA profile of the deceased was found on the cloths of the respondent/accused.

(xviii) Button with broken pieces of thread seized from the spot was found to be that of the shirt of the respondent/ accused.

Last Seen Together

21. Hariram Prajapati (P.W.1) has stated that the deceased "X" is his daughter and was a student of Class 2 and was studying in a Govt. School, and was aged about 8 years. On 4-7-2017, he went to his work at 8 A.M. and came back at 3-3:00 P.M. After having his meals, he went to bed and woke up at 5:00 P.M. He was informed by his mother that the deceased "X" has not returned back from the school. Thereafter, he searched for the deceased in neighborhood. He also went to the house of Bheem (P.W.4). Bheem (P.W.4) told him that he had seen the deceased "X" along with the respondent/accused at about 1 P.M. near the *pator* (room) of Ramprasad. Thereafter, Bheem (P.W.4) informed this witness that he has to go to Gwalior on the next morning and whether this witness can arrange for one more person. When this witness went to look for the another labourer, then he found that respondent/accused, Ramsewak Prajapati, Jitendra Parihar, Ashok Kushwaha were sitting on a trolley. When he enquired from the respondent/ accused, that whether he would like to go to Gwalior or not, then he agreed for the same. Thereafter, he came back to his house. He was informed by his mother, that the deceased "X" has not returned back. Thereafter, all the villagers gathered and started searching for the deceased "X". Thereafter, they went to the school of the deceased and from the window they noticed that the bag and bottle of the deceased were lying in the school. When they could not search out the deceased, then F.I.R., Ex.P.1 was lodged and thereafter, the police also started searching for the deceased. At about 3 A.M., the police personell (sic: personnel) told that they have already searched extensively and this witness must also be tired therefore, they would search after the sunrise. Thereafter, this witness came back to his house, and some of the villagers were sitting there. At about 5-6 A.M., he again went in search of the deceased. At that time, he heard the noise of cries of his *Bhabhi* Gayatri. They went to the *Pator* of Jaikishan. The dead body of his daughter was lying behind a trolley and was in a very bad shape. Her cloths were stained with blood. The police also reached there and Dehati Nalishi Ex. P.3 was written and spot map Ex. P.4 was prepared. *Safina form* Ex.P.5 was prepared and *Naksha Panchayatnama* Ex. P.6 was prepared. After the postmortem, the dead body of the deceased "X" was handed over to him vide supurdaginama Ex. P.7. The report under Section 174 of Cr.P.C. is Ex. P.8. It was further stated that since, there was *Kanya Bhoj* on account of *Dev Uthani Gyaras*, therefore, her daughter after leaving her bag and bottle in the school, went to have *Kanya Bhoj.* Bheem (P.W.4) had told that he had seen the deceased in the company of the respondent/accused at about 1 P.M. When he was searching for his daughter, then Hari Singh Batham had also told him that he had seen the deceased in the company of the respondent/ accused. The statement of this witness recorded under Section 164 of Cr.P.C. is

Ex. P.9. This witness was cross-examined. In cross-examination, this witness admitted that the respondent/accused is his real nephew, and resides in his neighborhood. The respondent/accused is also a labourer. At the time of incident, this witness had gone for labour work. He had not seen the respondent/accused entering inside the *Pator*. He was interrogated by the police on the very same day. His statements were recorded at about 6 to 6:30 A.M. on the same day, when the dead body of his daughter was recovered. He denied the suggestion that the police had obtained his signatures on Ex. P.1 to P.8 in the police station. He clarified on his own, that some documents were signed in the police station and some were signed on the spot. He further denied that he is having any enmity with his brother Jagdish or his son (respondent/accused). He further stated that his daughter was studying in Govt. School Nayagaon. She used to go to school at 10:00 in the morning and used to come back at 4:00 in the afternoon. He denied that the police had not recorded his statement. He further denied that the respondent/ accused has been falsely implicated due to enmity. He further denied that he was not told by anybody that his daughter was seen for the last time in the company of the respondent/accused. He further denied that he is giving a false evidence before the Court.

22. Thus, it is clear that this witness was not cross-examined effectively. No omissions or contradictions in his F.I.R. Ex. P.1 or police statement Ex. D.1 were pointed out.

23. Ram Sewak Prajapati (P.W.2) is the witness of last seen together. He has stated that on 4-7-2017, at about 1 P.M., he was sitting in front of the door of his house. He saw that the respondent/ accused was going towards the *Pator* of Ramprasad Prajapati along with the deceased. Since, both were cousin brother and sister, therefore he did not notice it seriously. Thereafter, he took his goats and came back to house in the evening. He further stated that on 5-7-2017 at about 6 A.M., he heard the noise of crying. He came out of his house and found that lot of persons had gathered near the *Pator* of Ramprasad and the dead body of the deceased "X" was lying behind the trolley. The police was informed. The police also reached there after some time, and written work was done, and the dead body was sent for postmortem. He further stated that in the afternoon, he was interrogated by the police and he accordingly informed that he had seen the respondent/accused going along with the deceased "X" at about 1 P.M. and his Court Statement (Under Section 164 of Cr.P.C.) is Ex. P.10. This witness was cross-examined. He admitted that he know Jagdish who is the father of respondent/ accused. He is brother being of same Gotra. He further admitted that he has been brought by the Police to the Court for recording of his evidence, but denied that he was tutored by Police. He further clarified that whatever was seen by him has been deposed by him. He further clarified that the statement was recorded by the police

at about 10-11 A.M. He further denied that he is deposing falsely against the respondent/accused due to enmity.

24. Bheem (P.W. 4) is also a witness of last seen together, who has stated that on 4-7-2017, Hariram (P.W.1) had come to him and enquired about his daughter "X". He further stated that accordingly, he had informed Hariram (P.W.1) that at 1 P.M., he had seen his daughter "X" along with the respondent/accused. Thereafter, the deceased was searched but could not be traced. However, at about 5-6 A.M., her dead body was found lying near the trolley. Her cloths were stained with blood. The police had recovered one plastic bag, another blood stained plastic bag, hairs, plain earth, spit, packet of Rajshree Tobacco, empty packet of tobacco, one button of a shirt, from inside the *pator* vide seizure memo Ex. P.12. The plain earth from the place where the dead body of the deceased was lying and saliva mixed earth was also seized vide seizure memo Ex. P.13. His statements under Section 164 of Cr.P.C. are Ex. P.14. This witness was cross examined. He stated that on the date of incident, he was doing the labour work in the village itself. When he came back to his house for having his lunch then, in the afternoon, he had seen the deceased in the school and thereafter did not see her.

25. Challenging the evidence of Last Seen Together, it is submitted by the Counsel for the respondent/accused that Ram Sewak Prajapati (P.W.2) and Bheem (P.W. 4) as well as Hariram (P.W.1) have stated that much prior to lodging of F.I.R, Hariram (P.W.1) was already informed by Ram Sewak Prajapati (P.W.2) and Bheem (P.W.4) about the fact that the deceased was seen along with the respondent/ accused, but the said fact is missing in F.I.R. Ex. P.1. Therefore, it is clear that the witnesses of last seen together are unreliable and thus liable to be disbelieved.

26. However, the Counsel for the respondent/accused fairly conceded that the omission in the F.I.R. regarding information given to Hariram (P.W.1) by Ram Sewak Prajapati (P.W.2) and Bheem (P.W.4) about the last seen together was not confronted and the attention of Harirram (P.W.1) was not drawn towards the omission.

27. It is a trite law that if the attention of the witness is not drawn towards the omissions in his previous statement, then the accused cannot take advantage of such omissions and contradictions.

28. Section 145 of Evidence Act, reads as under :

> **145. Cross-examination as to previous statements in writing.**—A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the

writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

29. Thus, it is clear that if a party intends to contradict a witness, then his attention must be called to those parts of it which are to be used for the purpose of contradicting him.

30. The Supreme Court in the case of *Rajender Singh Vs. State of Bihar* reported in (2000) 4 SCC 298 has held as under :

> 6 .....But if the witness during trial is intended to be contradicted by his former statement then his attention has to be drawn to those parts of the statement which are required to be used for the purpose of contradicting him before the said statement in question can be proved as provided under Section 145 of the Evidence Act. Mr Mishra, learned Senior Counsel appearing for the appellant relying upon the decision of this Court in *Bhagwan Singh* v. *State of Punjab* contended before us that if there has been substantial compliance with Section 145 of the Evidence Act and if the necessary particulars of the former statement has been put to the witness in cross-examination then notwithstanding the fact that the provisions of Section 145 of the Evidence Act is not complied with in letter i.e. by not drawing the attention of the witness to that part of the former statement yet the statement could be utilised and the veracity of the witness could be impeached. According to Mr Mishra the former statement of PW 8 which has been exhibited as Exhibit B was to the effect that Kameshwar was assaulted with a bhala by Rajender and Surender and he did not see whether any other person had been assaulted or not, whereas in the course of trial the substantive evidence of the witness is that it is Rajender and Triloki who assaulted the deceased and, therefore, it belies the entire prosecution case. The question of contradicting evidence and the requirements of compliance with Section 145 of the Evidence Act has been considered by this Court in the Constitution Bench decision in the case of *Tahsildar Singh* v. *State of U.P.* The Court in the aforesaid case was examining the question as to when an omission in the former statement can be held to be a contradiction and it has also been indicated as to how a witness can be contradicted in respect of his former statement by drawing particular attention to that portion of the former statement. This question has been recently considered in the case of *Binay Kumar Singh* v. *State of Bihar* and the Court has taken note of the earlier decision in *Bhagwan Singh* and explained away the same with the observation that on the facts of that case there cannot be a dispute with the proposition laid down therein. <u>But in elaborating the second limb of Section 145 of the Evidence Act it was held that if it is intended to contradict him by the writing his attention must be called to those parts of it which are to be</u>

> used for the purpose for contradicting him. It has been further held that if the witness disowns to have made any statement which is inconsistent with his present stand, his testimony in court on that score would not be vitiated until the cross-examiner proceeds to comply with the procedure prescribed in the second limb of Section 145 of the Evidence Act... ... ...
>
> (Underline supplied)

The Supreme Court in the case of *Raj Kishore Jha Vs. State of Bihar* reported in (2003) 11 SCC 519 has also held the same proposition of law.

31. Thus, it is held that since, the attention of Hariram (P.W. 1) was not drawn towards the omission regarding information of last seen together in his F.I.R., Ex. P.1, therefore, the evidence of Last Seen Together cannot be held to be vitiated as the second limb of Section 145 of Cr.P.C. has not been complied with by the respondent/accused.

32. The next question for consideration is that whether Ram Sewak Prajapati (P.W.2) and Bheem (P.W.4), who have claimed that they had seen the deceased in the company of the respondent/accused are reliable witnesses or not?

33. Challenging the reliability and credibility of Ram Sewak Prajapati (P.W.2), it is submitted by the Counsel for the respondent/accused that since, this witness was Kotwar of the village, therefore, his statement should have been recorded by the police at the earliest, whereas according to Alok Singh (P.W. 28), the statement of Ram Sewak Prajapati (P.W. 2) was recorded on 10-7-2018. It is submitted that thus, the delayed recording of statement of Ram Sewak Prajapati (P.W.2) makes his evidence suspicious.

34. Considered the submissions made by the Counsel for the respondent/accused.

35. It is a trite law that every delay in recording of police statement is not fatal. If a plausible explanation is given for delayed recording of statements, then it would not give any dent to the prosecution story. However, the investigating officer and the witnesses are to be questioned regarding delay. Unless and until, the investigating officer is asked about the delay, the delayed recording of statements by itself would not make the evidence of the witnesses suspicious.

The Supreme Court in the case of *Vijay Kumar Arora v. State (NCT of Delhi)* reported in (2010) 2 SCC 353 has held as under :

> **55.** On reappraisal of the evidence, this Court finds that it is true that the police statements of the abovenamed three witnesses were recorded after one month from the date of the death of the deceased. However, neither an explanation was sought from any of the witnesses as to why their police statements were recorded after a delay of one month nor the

investigating officer was questioned about the delay in recording statements of those witnesses. The law on the point is well settled. Unless the investigating officer is asked questions about delay in recording statements and an explanation is sought from the witnesses as to why their statements were recorded late, the statements by themselves did not become suspicious or concocted.

The Supreme Court in the case of *V.K. Mishra v. State of Uttarakhand,* reported in (2015) 9 SCC 588 has held as under :

27.....It is pertinent to point out that on the delayed examination of PW 2, no question was put to the investigating officer (PW 14) by the defence. Had such question been put to PW 14, he would have certainly explained the reason for not examining PW 2 from 15-8-1997 to 17-8-1997. Having not done so, the appellants are not right in contending that there was delay in recording the statement of PW 2.

26. It cannot be held as a rule of universal application that the testimony of a witness becomes unreliable merely because there is delay in examination of a particular witness. In *Sunil Kumar* v. *State of Rajasthan*, it was held that the question of delay in examining a witness during investigation is material only if it is indicative and suggestive of some unfair practice by the investigating agency for the purpose of introducing a core of witness to falsely support the prosecution case. As such there was no delay in recording the statement of PW 2 and even assuming that there was delay in questioning PW 2, that by itself cannot amount to any infirmity in the prosecution case.

The Supreme Court in the case of *Shyamal Ghosh v. State of W.B.,* reported in (2012) 7 SCC 646 has held as under :

51. On the contra, the submission on behalf of the State is that the delay has been explained and though the investigating officer was cross-examined at length, not even a suggestion was put to him as to the reason for such delay and, thus, the accused cannot take any benefit thereof at this stage. Reliance in this regard on behalf of the State is placed on *Brathi* v. *State of Punjab*, *Banti* v. *State of M.P.* and *State of U.P.* v. *Satish*.

52. These are the issues which are no more res integra. The consistent view of this Court has been that if the explanation offered for the delayed examination of a particular witness is plausible and acceptable and the Court accepts the same as plausible, there is no reason to interfere with the conclusion arrived at by the courts. This is the view expressed in *Banti*. Furthermore, this Court has also taken the view that no doubt when the Court has to appreciate the evidence given by the witnesses who are closely related to the deceased, it has to be very careful in evaluating such evidence but the mechanical rejection of the evidence

on the sole ground that it is that of an interested witness would inevitably relate to failure of justice (*Brathi*). In *Satish*, this Court further held that the explanation offered by the investigating officer on being questioned on the aspect of delayed examination by the accused has to be tested by the Court on the touchstone of credibility. It may not have any effect on the credibility of the prosecution evidence tendered by other witnesses.

53. The delay in examination of witnesses is a variable factor. It would depend upon a number of circumstances. For example, non-availability of witnesses, the investigating officer being preoccupied in serious matters, the investigating officer spending his time in arresting the accused who are absconding, being occupied in other spheres of investigation of the same case which may require his attention urgently and importantly, etc.

54. In the present case, it has come in evidence that the accused persons were absconding and the investigating officer had to make serious effort and even go to various places for arresting the accused, including coming from West Bengal to Delhi. The investigating officer has specifically stated, that too voluntarily, that he had attempted raiding the houses of the accused even after cornering the area, but of no avail. He had ensured that the mutilated body parts of the deceased reached the hospital and also effected recovery of various items at the behest of the arrested accused. Furthermore, the witnesses whose statements were recorded themselves belonged to the poor strata, who must be moving from one place to another to earn their livelihood. The statement of the available witnesses like PW 2, PW 4, PW 6, and the doctor, PW 16, another material witness, had been recorded at the earliest. The investigating officer recorded the statements of nearly 28 witnesses. Some delay was bound to occur in recording the statements of the witnesses whose names came to light after certain investigation had been carried out by the investigating officer.

36. Alok Singh (P.W. 28) has stated in his examination-in-chief, that after the recovery of dead body of the deceased "X", there was an uproar in the society, and roads were blocked and he was required to go to the place of agitation along with police force. Further, it is not the case of the respondent/accused, that the investigating officer was not investigating the matter at all. While appreciating the evidence, this Court cannot lose sight of surrounding circumstances which were present at the time of investigation. The Supreme Court in the case of *V.K. Mishra* (Supra) has held that the fact that the investigating officer was preoccupied in arresting accused, or other spheres of investigation, then this aspect cannot be lost sight of. After the dead body of the deceased minor girl was recovered, there was an unrest in the Society, and the people had started agitating the matter, and question of law and order situation had arisen, requiring the investigating officer, to immediately go to the place of agitation along with police force, in order to

calm down and defuse the agitation. Therefore, this Court is of the considered opinion, that the unrest in the Society must have diverted the attention of the investigating officer, and thus, it cannot be said that the delayed recording of statement of Ram Sevak Prajapati (P.W.2) was an outcome of creation of evidence. Further, the statement of another witness of Last Seen Together, Bheem (P.W. 4) was recorded on 5-7-2017 itself. Thus, it is held that in absence of any question to the investigating officer regarding the delay in recording the statement of Ram Sewak Prajapati (P.W.2) on 5-7-2017, it cannot be said that the evidence of Ram Sewak Prajapati (P.W.2) is not reliable.

37. It is next contended by the Counsel for the respondent/accused, that Bheem (P.W.4) has admitted in his cross-examination that in the afternoon he had seen the deceased "X" in the school and thereafter, he had never seen her.

38. It is a trite law that while appreciating the evidence of witnesses, the entire evidence is to be seen as a whole and stray sentence from one place to another cannot be picked up. Hariram (P.W.1) has stated that in the evening, when he went to the house of Bheem (P.W.4) in order to trace out the whereabouts of his daughter, then he was informed by Bheem (P.W.4) that he had seen his daughter along with the respondent/accused. Bheem (P.W.4) has also stated in his examination-in-chief that he had seen the deceased in the company of the respondent/accused for the last time in the afternoon. It is the case of the prosecution itself, that the *Pator* of Ramprasad Prajapati is situated at a distance of 200 Mts. from the house of Hariram (P.W.1) whereas School is situated quite nearer to the *Pator* of Ram Prasad i.e., the place of incident, as it is evident from the spot map Ex. P.4. Therefore, the statement of this witness in his cross-examination that in the afternoon he had seen the deceased in the school cannot be given much importance so as to discard the entire prosecution story, specifically in the light of the evidence of Motiram Rajoria (P.W. 9) that even in the afternoon, the deceased "X" was not seen in the school.

39. It is next contended by the Counsel for the respondent/accused that since, Ram Sewak Prajapati (P.W.2) and Bheem (P.W. 4) have stated that the deceased and respondent/accused were going back and forth, therefore, it cannot be said that the deceased was seen in the company of the respondent/accused for the last time.

40. The *Pator* of Ram Prasad Prajapati is situated at a rough place and is not connected with any road except a footpath, as it is evident from the spot map, Ex. P.4. There was no occasion for the deceased "X" to go to a rough place on her own. It appears that since, the respondent/accused is the cousin brother of the deceased "X", therefore, she must have faith in him, and taking advantage of said faith, the respondent/accused took her to a lonely room. If the deceased was following the

respondent/accused out of faith, then it cannot be said that she was not in the company of the respondent/accused.

41. Now the next question for consideration is that whether the evidence of Last Seen Together indicates towards the culpability of the respondent/accused or not?

42. The Supreme Court in the case of *Shailendra Rajdev Pasvan v. State of Gujarat,* reported in (2020) 14 SCC 750 has held as under :

> **15.** Another important aspect to be considered in a case resting on circumstantial evidence is the lapse of time between the point when the accused and deceased were seen together and when the deceased is found dead. It ought to be so minimal so as to exclude the possibility of any intervening event involving the death at the hands of some other person. In *Bodhraj* v. *State of J&K*, *Rambraksh* v. *State of Chhattisgarh*, *Anjan Kumar Sarma* v. *State of Assam* following principle of law, in this regard, has been enunciated: (*Shailendra Rajdev Pasvan case*, SCC OnLine Guj para 16)
>
> > " *16.* ...The last seen theory comes into play where the time gap between the point of time when the accused and deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that accused and deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases."

The Supreme Court in the case of *Ashok v. State of Maharashtra,* reported in (2015) 4 SCC 393 has held as under :

> **12.** From the study of abovestated judgments and many others delivered by this Court over a period of years, the rule can be summarised as that the initial burden of proof is on the prosecution to bring sufficient evidence pointing towards guilt of the accused. However, in case of last seen together, the prosecution is exempted to prove exact happening of the incident as the accused himself would have special knowledge of the incident and thus, would have burden of proof as per Section 106 of the Evidence Act. Therefore, last seen together itself is not a conclusive proof but along with other circumstances surrounding the incident, like relations between the accused and the deceased, enmity between them, previous history of hostility, recovery of weapon from the accused, etc. non-explanation of death of the deceased, may lead to a presumption of guilt.

> **13.** Here another judgment in *Harivadan Babubhai Patel* v. *State of Gujarat*, would be relevant. In this case, this Court found that the time-gap between the death of the deceased and the time when he was last seen with the accused may also be relevant.

The Supreme Court in the case of *Mahavir Singh* (Supra) has held as under:

> **12.** Undoubtedly, it is a settled legal proposition that the last seen theory comes into play only in a case where the time-gap between the point of time when the accused and the deceased were seen alive and when the deceased was found dead (*sic* is small). Since the gap is very small there may not be any possibility that any person other than the accused may be the author of the crime.....

The Supreme Court in the case of *Jagroop Singh* (Supra) has held as under :

> **27.** Quite apart from the above, what is argued is that there is a long gap between the last seen and recovery of the dead body of the deceased. As per the material on record, the informant searched for his son in the village in the late evening and next day in the morning he went to the fields and the dead body was found. The post-mortem report indicates that the death had occurred within 24 hours. Thus, the duration is not so long as to defeat or frustrate the version of the prosecution. Therefore, there can be no trace of doubt that the deceased was last seen in the company of the accused persons.

43. According, to the witnesses, they had seen the deceased for the last time in the company of the respondent/accused at about 1 P.M. The deceased did not come back to her house, whereas she was supposed to come back from School at 4 P.M. Thereafter, from 5 P.M., Hariram (P.W.1) started searching for the deceased and ultimately, her dead body was found at 6:00 A.M. on 5-7-2017. As per the postmortem report the duration of her death was also in between 12 to 36 hours. Therefore, it is held that the prosecution has succeeded in establishing that there was minimum time gap between the time when she was seen in the company of the respondent/accused for the last time and when the death took place and the dead body of the deceased was recovered. Accordingly, it is held that the deceased was seen for the last time in the company of the respondent/accused and thereafter, she was never seen alive. Thus, the burden had shifted onto the respondent/accused, to explain as to when he parted away with the company of the deceased, but that burden has not been discharged by the respondent/accused.

Respondent/accused was seen at 4:00 A.M. on 5-7-2017

44. Ramesh Prajapati (P.W. 6) has stated that on 5-7-2017 at about 4:00 A.M., he had noticed that respondent/accused was going towards the house of Hariram (P.W1), and he had identified him from his back, style of walking and body

buildup. This witness was cross examined, and in the cross examination also, this witness reiterated that he had seen the respondent/accused at 4 A.M. and he was all alone.

45. Challenging the evidence of this witness, it is submitted by the Counsel for the respondent/accused, that since, this witness had not seen the face of the person, therefore, the claim of this witness regarding identifying the said person from his back as respondent/accused, cannot be relied upon.

46. Considered the submission made by the Counsel for the respondent/accused.

47. It is a matter of common knowledge, that the villagers have the ability of identifying the things even in the poor light. Villages have limited number of inhabitants and are closely watched by each and every resident of the village. The evidence of this witness is that he had identified the said person from his back, style of walking, and body buildup, then it cannot be said that such witness is unreliable or he cannot identify the resident of the village from his back, or style of walking or body buildup, as the eyes of the villagers are conditioned to identify the villagers in poor light or from their walking style, or body build up etc.

48. The Supreme Court in the case of *Ramesh Vs. State* reported in (2010) 15 SCC 49 has held as under ;

> **15.** As stated earlier, the appellant and these two witnesses (PWs 3 and 4) are neighbours and, therefore, knew the appellant well and their claim of identification cannot be rejected only on the ground that they have identified him in the evening, when there was less light. It has to be borne in mind that the capacity of the witnesses living in rural areas cannot be compared with that of urban people who are acclimatised to fluorescent light. Visible (*sic* visual) capacity of the witnesses coming from the village is conditioned and their evidence cannot be discarded on the ground that there was meagre light in the evening. There is nothing on record to show that these two witnesses are in any way interested and inimical to the appellant. Their evidence clearly shows that the deceased was last seen with the appellant and the High Court did not err in relying on their evidence.

Conduct of respondent/accused

49. Hari Singh Batham (P.W. 3) has stated that the dead body of the deceased "X" was recovered at about 5:30-6 AM. One day prior to the recovery of dead body, he had seen the respondent/accused near the *pator* of Ramprasad Prajapti and was in a frightened condition. He further stated that the deceased "X" was raped and was killed by smothering. On cross examination, he denied that he had not seen the respondent/accused on the date of incident.

50. Thus, it is clear that the prosecution has succeeded in establishing that the respondent/accused was seen in a frightened condition in the afternoon of 4-7-2017.

51. After considering the evidence of last seen together coupled with the fact that not only he was seen near the *pator* of Ram Prasad in the afternoon of 4-7-2017, but he was in a frightened condition, this Court is of the considered opinion, that the deceased was never seen alive, after she was seen in the company of the respondent/accused and due to minimum time gap between the last seen together and the time of death and recovery of dead body, it cannot be said that the respondent/accused is not the perpetrator of the offence.

Whether the deceased went missing from School or She had not attended the School at all

52. Smt. Sagun (P.W. 7) has stated that she is working as a cook as well as also do the work of mopping and cleaning in the school. On 4-7-2017, she had seen that the daughter of Hariram (P.W.1) was coming to the school along with her school bag and bottle. After some time, she went outside the school after keeping her school bag and bottle in the class room. she was cross examined by the respondent/accused. In cross examination, this witness clarified that after about half an hour of coming to school, the deceased had gone out. She further clarified that there is no guard on the gate of the school and any child may come to school at any time and may go out.

53. Smt. Ramdehi (P.W. 8) who is also working in the school as a cook and also do work of mopping and dusting has stated that she had seen the deceased "X" coming to the school at 10 A.M. This witness was cross-examined, however, she denied that she had not seen the deceased coming to school.

54. Motiram Rajoria (P.W. 9) is the Head Master of the school. He has stated that in the prayer session of 4-7-2017, the deceased "X" was not present. Thereafter, he had taken the attendance of Class 3 students, and the deceased "X" was not present. It was further stated that the absence of the deceased "X" is also mentioned in the attendance register. The date of birth of the deceased "X" is 19-10-2009. The original admission register is Ex. P.15 and the photocopy of the same is Ex. P. 15C. The date of birth certificate issued on the basis of admission register is Ex. P.16 and the attendance register of Class 3 is Ex. P.17, in which the absence of the deceased "X" is marked. In cross-examination, this witness has stated that there is a boundary around the school building and if a student is required to leave the school, then he can do so with his permission. He further denied that Ex. P.15, P.16 and P.17 have been falsely prepared on the instructions of the police.

55. By referring to the evidence of Motiram Rajoria (P.W. 9), it is submitted by the Counsel for the respondent/accused that since, the deceased "X" had not come to the school, therefore, the prosecution has failed to prove that the deceased had left her house at 10 A.M. for attending the school. It is further submitted that the evidence of grand mother of the deceased was not recorded to prove that the deceased had left the house at 10:00 A.M. for attending the school. It is further submitted that although it is the case of the prosecution that the school bag and bottle of the deceased was lying in the school, but the same was not seized by the investigating officer.

56. Considered the submissions made by the Counsel for the parties.

57. Hariram (P.W.1) has stated that since, there was *Kanya Bhoj* on account of *Dev Uthani Gyaras*, therefore, his daughter had left the school after leaving her school bag and bottle in the school. Smt. Sagun (P.W.7) and Ramdehi (P.W.8) had seen the deceased "X" coming to the school and thereafter leaving the school. If the evidence of Hariram (P.W.1), Smt. Sagun (P.W. 7), Ramdehi (P.W.8) and Motiram Rajoria (P.W.9) are read together, then it is clear that the deceased "X" left her house at 10 A.M. for attending the school. In fact she came to school and after leaving her school bag and bottle in the class room, she left the school for attending *Kanya Bhoj*. It is clear that the deceased "X" did not attend the prayer session and also did not attend the classes, therefore, she must have left the school prior to prayer session. According to Hariram (P.W.1), he had seen from the window that the school bag and bottle of the deceased were lying in the school. This fact is also mentioned in the F.I.R., Ex. P.1. Although the Investigating Officer, did not seize the school bag and bottle, but at the most, it can be said to be a lapse in the investigation and the accused would not get the advantage of the same in the light of other clinching evidence available on record. Furthermore, this Court cannot lose sight of the fact that immediately after recovery of dead body of the deceased, there was an unrest in the locality and the people had started agitating and Chinnor Road was blocked and therefore, the investigating officer was compelled to rush towards the place of agitation along with police force, and some part of investigation was done by Devlal Koli (P.W. 13), like preparation of *Naksha Panchayatnama,* Ex. P.6, preparation of requisition for post-mortem, Ex. P.22 as well as issuing notice under Section 175 of Cr.P.C. Therefore, when the attention of the investigating officer was completely diverted due to aggressive agitation by the residents of the locality, then this Court cannot lose sight of the said surrounding circumstance. Further, the fact that the school bag and bottle of the deceased were lying in the school had already come in the F.I.R. Ex.P.1, therefore, it cannot be said that the non-seizure of School Bag and Bottle of the deceased from the school would belie the prosecution case.

58. Under these facts and circumstances of the case, this Court is of the considered opinion that since, the investigating officer was required to maintain

the law and order situation apart from doing investigation, therefore, the non-seizure of school bag and bottle of the deceased cannot be said to be even a faulty investigation.

59. Furthermore, mere non-seizure of school bag and bottle of the deceased would not wash out the other reliable and trustworthy evidence.

60. The Supreme Court in the case of *Babu and another v. State represented by Inspector of Police, Chennai,* reported in (2013) 4 SCC 448 has held as under :

> 18..... If a defect in the investigation does not create a reasonable doubt on the guilt of the accused, the court cannot discard the prosecution case on the ground that there was some defect in the investigation.

The Supreme Court in the case of *Ganga Singh Vs. State of M.P.* reported in (2013) 7 SCC 278 has held as under :

> **17.** We are also unable to accept the submission of Mr Mehrotra that the investigation by the police is shoddy and hasty and there are defects in the investigation and therefore benefit of doubt should be given to the appellant and he should be acquitted of the charge of rape. The settled position of law is that the prosecution is required to establish the guilt of the accused beyond reasonable doubt by adducing evidence. Hence, if the prosecution in a given case adduces evidence to establish the guilt of the accused beyond reasonable doubt, the court cannot acquit the accused on the ground that there are some defects in the investigation, but if the defects in the investigation are such as to cast a reasonable doubt in the prosecution case, then of course the accused is entitled to acquittal because of such doubt. In the present case, as we have seen, the evidence of PW 5 as corroborated by the evidence of PW 2 and the FIR establish beyond reasonable doubt that the appellant has committed rape on PW 5 and thus the appellant is not entitled to acquittal.

The Supreme Court in the case of *Gargi v. State of Haryana,* reported in (2019) 9 SCC 738 has held as under :

> **20.7.** The abovementioned unexplained shortcomings, perforce, indicate that in this case, the investigation was carried out either with preconceived notions or with a particular result in view. It is difficult to accept that the investigation in this case had been fair and impartial. From another viewpoint, on the facts and in the circumstances of this case, the omissions on the part of investigating agency cannot be ignored as mere oversight. These omissions, perforce, give rise to adverse inferences against the prosecution.

Thus, every faulty investigation would not make the prosecution unreliable. But the faulty investigation must lead to an inference that the investigation was

being done with a preconceived notions. If the prosecution, otherwise, succeeds in establishing the guilt of the accused beyond reasonable doubt, then some minor omissions on the part of the investigating officer, would not give any dent to the prosecution case.

61. It is next contended by the Counsel for the respondent/accused that since, the grandmother of the deceased was not examined, therefore, it cannot be said that on 4-7-2017, the prosecution has proved that the deceased had left her house for attending the school at 10:00 A.M..

62. Considered the submissions made by the Counsel for the parties.

63. It is well established principle of law that it is the quality and not the quantity of the witnesses which decides the fate of a trial. Further, the social scenario of the village cannot be lose sight of. In the present case, the unfortunate part is that the deceased and the accused are the grandchildren of the mother of Hariram (P.W.1). If the grandmother could not collect the courage to depose against the respondent/accused, then it cannot be said that non-examination of mother of Hariram (P.W.1) would give any dent to the prosecution case. It is once again pointed out that in the FIR, Ex. P.1 itself, it was mentioned that the deceased had left her house at 10 A.M. Further, Smt. Sagun (P.W. 7) and Smt. Ramdehi (P.W.8) had seen the deceased in the school at 10:00 A.M. According to Smt. Sagun (P.W. 7), the deceased left the school after half an hour. Thus, non-examination of grandmother of the deceased would not make the evidence of the prosecution witnesses unreliable.

64. The Supreme Court in the case of *Sarwan Singh Vs. State of Punjab* reported in (1976) 4 SCC 369 has held as under :

> The onus of proving the prosecution case rests entirely on the prosecution and it follows as a logical corollary that the prosecution has complete liberty to choose its witnesses if it is to prove its case. The court cannot compel the prosecution to examine one witness or the other as its witness. At the most, if a material witness is withheld, the court may draw an adverse inference against the prosecution. But it is not the law that the omission to examine any and every witness even on minor points would undoubtedly lead to rejection of the prosecution case or drawing of an adverse inference against the prosecution. The law is well-settled that the prosecution is bound to produce only such witnesses as are essential for unfolding of the prosecution narrative. In other words, before an adverse inference against the prosecution can be drawn it must be proved to the satisfaction of the court that the witnesses who had been withheld were eyewitnesses who had actually seen the occurrence and were therefore material to prove the case. It is not necessary for the prosecution to multiply witnesses after witnesses on the same point; it is the quality rather than the quantity of the evidence that matters. In the

> instant case, the evidence of the eyewitnesses does not suffer from any infirmity or any manifest defect on its intrinsic merit. Secondly, there is nothing to show that at the time when the deceased was assaulted a large crowd had gathered and some of the members of the crowd had actually seen the occurrence and were cited as witnesses for the prosecution and then withheld. We must not forget that in our country there is a general tendency amongst the witnesses in mofussil to shun giving evidence in courts because of the cumbersome and dilatory procedure of our courts, the harassment to which they are subjected by the police and the searching cross-examination which they have to face before the courts.

The Supreme Court in the case of *State of M.P. Vs. Laakhan* reported in (2009) 14 SCC 433 has held as under :

> 10. Even the evidence of a solitary witness can be sufficient to record conviction if the same is wholly reliable. No particular number of witnesses is necessary to prove any fact, as statutorily provided in Section 134 of the Evidence Act, 1872 (in short "the Evidence Act"). It is the quality and not the quantity of the evidence that matters. The court cannot take a closed view in such matters.

The Supreme Court in the case of *S.P.S. Rathore Vs. CBI* reported in (2017) 5 SCC 817 has held as under :

> **53.** No particular number of witnesses is required for proving a certain fact. It is the quality and not the quantity of the witnesses that matters. Evidence is weighed and not counted. Evidence of even a single eyewitness, truthful, consistent and inspiring confidence is sufficient for maintaining conviction. It is not necessary that all those persons who were present at the spot must be examined by the prosecution in order to prove the guilt of the accused. Having examined all the witnesses, even if other persons present nearby are not examined, the evidence of eyewitness cannot be discarded.

65. The evidence is to be weighed and not counted. Each and every possible witness is not required to be examined. It is for the prosecution to decide that on which witness, it would like to rely. If the evidence of the witnesses so examined by the prosecution are found to be trustworthy and reliable, then their evidence cannot be discarded only on the ground that some more witnesses should have been examined in order to corroborate the prosecution witnesses. Thus, it is held that the prosecution has succeeded in establishing that on 4-7-2017, the deceased "X" left her house at 10 A.M., for attending the school. She came to school and after leaving her school bag and bottle, went away.

D.N.A.

(i) DNA Profile of respondent/accused in the vaginal slide, swab and cloths of deceased "X"

66. It is submitted by the Counsel for the respondent/accused that as per DNA report, Ex. P.29, DNA profile of the respondent/accused was found on Article F i.e., cloths of deceased and G i.e., Vaginal Slide and Swab of the deceased. However, it is submitted that it is clear that the blood sample of the respondent/ accused was marked as Article R and was given A/RM code 7280. However, it is fairly conceded that looking to the A/RM codes given to the other articles, A/RM-7280 appears to be a typographical error and it should have been A/RM 8280. However, it is submitted that on the second page of report, A/RM code of Article R is mentioned as 8279 whereas A/RM 8279 code was given to Article Q which was Scalp Hair of accused. Therefore, it is submitted that it is incorrect to say that the DNA profile found on the cloths and Vaginal Slide and Swab of the deceased was containing the DNA profile of the respondent/accused, because it is for the prosecution to prove the guilt of the accused beyond reasonable doubt, and since, the DNA report itself creates doubt on its correctness, therefore, the circumstance of presence of DNA profile of respondent/accused on the cloths and Vaginal Slide and Swab of the deceased cannot be relied upon.

67. It is not out of place to mention here that inspite of the provisions of Section 293 of Cr.P.C., as well as even in absence of any application for cross-examination of Scientific Officer, the Scientific Officer Dr. Pankaj Shrivastava (P.W.24) was examined. However, no question with regard to the above mentioned anomaly was asked. But, it is submitted by the Counsel for the respondent/accused, that the prosecution has to stand on its own legs and cannot take advantage of the weakness of the accused. Therefore, it was incumbent upon the prosecution to prove beyond reasonable doubt that the DNA of the respondent/ accused was extracted from the blood sample of the respondent/accused, but having failed to do so, it is submitted that the DNA report, Ex. P. 29 has no evidentiary value.

68. Undisputedly, Dr. Pankaj Shrivastava (P.W. 24) was not asked any question with regard to the above mentioned anomaly in A/RM code of Article R. Whether there is typographical error in mentioning the A/RM code of Article R in the DNA report, Ex. P.29 or it is fatal to the prosecution story?

69. From the DNA report, Ex. P.29, it is clear that Article Q was given A/RM code 8279. In the DNA report, Ex. P.29 itself, it is mentioned that Article Q was not opened and it was returned back unopened. When Article Q was not opened at all, then there is no question of extracting the DNA profile of the respondent/ accused from Article Q having A/RM code 8279 i.e., scalp hair of respondent/ accused. Thus, it is clear that A/RM code of Article R mentioned on 2nd page of DNA report, Ex. P.29 is a typographical error and nothing more. Further, Dr. Pankaj Shrivastava (P.W.24) has stated that the DNA of the respondent/ accused was extracted from his blood sample (Article R) and this evidence of Dr. Pankaj

Shrivastava (P.W. 24) was not controverted by respondent/accused by putting any question in the cross-examination. Therefore, in the light of the fact that Article Q which was given A/RM 8279 was never opened, therefore, there is no question of any confusion regarding the Article from which the DNA of the respondent/accused was extracted. Thus, it is clear that DNA profile of the respondent/accused was extracted from his blood sample only.

70. The DNA report, Ex. P.29 can be seen from another point of view. Article I and J are cloths of respondent/accused. It is not out of place to mention here that seizure of cloths of the respondent/accused vide seizure memo Ex. P.24 has not been challenged. Further, no question was put to Ashok Kumar (P.W. 19) to make his evidence unreliable. Similar female DNA profile was detected on the source of article A (Plastic Bag), Article F Stain 2 (Cloths of deceased), Article G (Vaginal slide of deceased), Article I and J (Cloths of respondent/accused). Thus, it is clear that the DNA profile of the deceased was also found on the cloths of the respondent/accused. For ascertaining the DNA profile of the deceased, the blood sample of the respondent/accused was not required. Thus, the presence of DNA profile of the deceased on the cloths of the respondent/accused, clearly indicates the involvement of the respondent/accused in the crime.

71. Thus, even if anomaly in A/RM code of Article R is seen in the light of the presence of DNA profile of the deceased on the cloths of the respondent/accused, then it can be safely held that discrepancy in A/RM of Article R is a result of typographical error only. Further, had the accused put any question to Dr. Pankaj Shrivastava (P.W. 24) in this regard, then he could have explained the discrepancy.

72. So far as the contention of the Counsel for the respondent/accused that the prosecution has to stand on its own legs is concerned, it is true that the burden is on the prosecution to prove the guilt of the accused beyond reasonable doubt. However, when there is any discrepancy which does not go to the root of the matter, thereby making it inadmissible or unreliable, then the prosecution witness should also get an opportunity to explain such discrepancy. Without asking any question, the prosecution cannot be taken by surprise and if the discrepancy does not go to the root of the evidentiary value and admissibility of evidence, then the prosecution cannot be thrown overboard only on account of some typographical errors in the A/RM code of the Articles, specifically when, apart from mentioning the A/RM code, Article R is also mentioned in the DNA report Ex. P.29.

73. Under these circumstances, no importance can be given to discrepancy in A/RM of Article R.

74. As per the DNA report, Ex. P.29, all the alleles observed in the DNA profile of respondent/accused were observed in the male mixed DNA profile

generated on F (Stain1) and same male DNA profile was detected on Article F (Cloths of the deceased) Article G (Vaginal Slide and Swab) of the deceased.

75. Further, as per the postmortem report, Ex. P.18, signs of forceful vaginal penetration were found. With regard to reproductive organ, external genitalia was found diffusely swollen and reddening, labia majora was reddened and swollen. Labia Minora was swollen. Hymen Tear was irregular and circumferentialy from 4 O'Clock to 8 O'clock position. Hymen tear was extending upto posterior vaginal wall and also involving anal blood stained Mucosa Vulva. Thus, it is clear that the deceased was raped, and not only injuries were found on labia majora and labia minora, but hymen was also found torn.

76. It is next contended by the Counsel for the respondent/accused that although, the respondent/accused was in custody, but no permission from the Court of competent jurisdiction was obtained before collecting the blood sample of the respondent/accused.

77. The submission made by the Counsel for the respondent/accused is misconceived and is contrary to record.

78. It is clear from the order sheets of the Magistrate that an application for collecting blood sample was made on 27-7-2017 and the said application was allowed by order dated 29-7-2017, after hearing the respondent/accused. As the respondent/accused was in custody, and no objection was raised by respondent/accused, therefore, permission was granted. Thus, it is clear that the blood sample of the respondent/accused was collected, after obtaining due permission from the Court of competent jurisdiction.

79. It is next contended by the Counsel for the respondent/accused that since, there is nothing on record to show that the blood sample was preserved and stored in a proper condition, therefore, there is a every chance that the blood sample of the respondent/accused might have got spoiled.

80. Considered the submissions made by the Counsel for the respondent/accused.

81. There is no suggestion either to Dr. Ajeet Kumar Minz (P.W.12), Dr. Pankaj Shrivastava (P.W. 24) or to Alok Singh (P.W. 28) in this regard. There is no scientific material on record to show that unless and until the blood sample is preserved in a particular manner, the same would get spoiled and it would not be possible to extract DNA from the said sample.

82. The Counsel for the respondent/accused could not point out the life of DNA. According to medical science, the DNA has a half life of 521 years i.e., after 521 years, half of the bonds between nucleotides in the backbone of a sample would break and after another 521 years, half of the remaining bonds would break

and so on. Thus, it cannot be said that if the blood sample is not kept properly, then it would result in loss of DNA. Accordingly it is held that even in absence of material to show that the blood sample was kept in a hygienic condition, still it would not result in loss of DNA. Further, the seal of the container was found intact at the time of receipt of blood sample in the F.S.L., Sagar.

83. There is another aspect of the matter. The blood sample of the deceased was collected on 29-7-2017, and the blood sampling form is Ex. P.20 and sealed blood sample was seized vide seizure memo Ex. P.21. The blood sample was sent for DNA test to F.S.L. Sagar on 31-7-2017 and it was received in the Laboratory on 2-8-2017. Thus, even otherwise, there is no delay in dispatch and receipt of blood sample by FSL Sagar.

84. Thus, it is held that DNA profile of the respondent/accused was found in the Cloths, Vaginal Slide and Swab of the deceased and the female DNA profile of the deceased was found on the cloths of the respondent/accused.

Recovery of Button of the shirt of respondent/accused from the spot

85. It is submitted by the Counsel for the respondent/accused that the thickness and diameter of the button seized from the spot was different from the button recovered from the T-Shirt of the respondent/accused therefore, it cannot be said that the button seized from the spot was that of the shirt of the respondent/accused.

86. Considered the submissions made by the Counsel for the parties.

87. On 5-7-2017 at 9:10 A.M., apart from other articles, one button with broken threads was also seized from the spot vide seizure memo Ex. P.12. Bheem (P.W. 4) and Pappu Prajapati (P.W. 5) have proved the seizure of button from the spot.

88. T-Shirt of respondent/accused was marked as Article I1, whereas lower of respondent/accused was marked as I2. The button seized from the spot was marked as Article S1 and broken threads were marked as Article S2. In the T-Shirt, it was found that it had three places for stitching buttons. Button at serial no.1 was broken, whereas button at serial no.3 was intact and button at serial no. 2 was missing.

89. Dr. Neha Dodia (P.W.25), after comparing the button with threads seized from the spot with the button and thread of the T-Shirt of respondent/accused, gave the following findings :

Comparison Point	Button stitched on T-Shirt Article I1	Article S1
Material and Size	Circular and plastic like	Circular and plastic like
Colour and design	White, Translucent Depth of holes, Upper surface *paravartak* and lower surface white.	White, Translucent, Depth of holes, Upper surface *paravartak* and lower surface white.
No. of holes	4	4
Diameter	0.274 Cm	0.288 Cm
Thickness	0.108 Cm	1.118 Cm
Engraving	SCHOTT	SCHOTT

The following findings were given by Dr. Neha Dodia (P.W. 25) after comparing the threads of the T-Shirt and threads found along with button seized from spot. The findings are as under :

Comparison point	Threads taken from T-Shirt Article I1	Pieces of thread S 2
Colour	White	White
No. of Strands	2	2
Type of Twist	Z type	Z type
Burning point of fiber	Fiber form bead by sticking together	Fiber form bead by sticking together
Nature of fiber	Synthesized Cylindrical Nature	Synthesized Cylindrical Nature

Accordingly, it was found that the button seized from the spot and the button found on the T-Shirt of the respondent/accused were almost same and the broken pieces of thread found along with button seized from the spot and the threads found on the T-Shirt of the respondent/accused were same.

90. It is submitted by the Counsel for the respondent/accused, that since, the thickness and diameter of the button seized from the spot was different from the button found on the T-Shirt of the respondent/accused, therefore, it is incorrect to say that both were almost same.

91. Considered the submissions.

92. It is not out of place to mention here that no question with regard to difference in thickness and diameter of the button seized from the spot and the

button found on the T-Shrit (sic: shirt) of respondent/accused was asked to Dr. Neha Dodia (P.W. 25). Further, if the comparison chart prepared by Dr. Neha Dodia (P.W. 25) is seen, then it is clear that Colour and Design, No. of Holes, Material and Size as well as Engraving on the button seized from the spot and button found on the T-Shirt of respondent/accused were same. There is a difference of fraction of Millimeters in thickness and diameter of both the buttons. This difference may take place during manufacturing process. As no question was put to Dr. Neha Dodia (P.W. 25) in this regard, therefore, considering the fact that difference of fraction of Millimeters in thickness and diameter of buttons may occur during manufacturing process, this Court is of the considered opinion that after considering the remaining readings including that of Engraving, the findings given by Dr. Neha Dodia (P.W. 25) that both the buttons are almost same cannot be said to be incorrect. Furthermore, this Court cannot lose sight of the fact, that broken thread was also found with the button seized from the spot. The pieces of thread found with the button seized from the spot, and the thread of T-Shirt of respondent/accused were identically same. Therefore, it is held that the button with broken pieces of thread which was seized from the spot, was that of the T-Shirt of the respondent/accused.

Presence of injuries on the nose of the respondent/accused

93. The respondent/accused Manoj was got medically examined on 5-7-2017 and as per M.LC. Report, Ex. P.25, Dr. Vinod Kumar Doneriya (P.W. 17) found the following injuries on the body of the respondent/accused :

(5) No injury seen on genital organ.

(7) Abrasion 1x1/2 cm on nose simple in nature caused by human nails duration 24-48 hours.

94. It is submitted by the Counsel for the respondent/accused that in the nail clippings of the deceased, although human skin was found, but the source of the said skin was not ascertained, therefore, it cannot be said that the skin found in the nail clippings of the deceased was that of the respondent/accused.

95. Considered the submissions made by the Counsel for the respondent/accused.

96. As per FSL report Ex. P.31, human skin was found in the nail clippings of the deceased and it was found insufficient for further examination.

97. It is true that the source of human skin could not be ascertained due to insufficient quantity for examination, but if the circumstance of presence of human skin in the nail clippings of the deceased is considered in the light of the other circumstances, then the non-ascertainment of source of human skin would not be fatal to the prosecution story. Undisputedly, abrasion was found on the nose

of the respondent/accused as per his M.L.C., Ex. P.25. The photographs, Ex. A.34 and A.35 of respondent/accused also shows the presence of abrasion on his nose. Further, the presence of the respondent/accused on the spot and his involvement in the offence is proved beyond reasonable doubt in the light of the presence of his DNA profile in the cloths and vaginal slide and swab of the deceased, therefore, it is held that the human skin found in the nail clippings of the deceased was that of the respondent/accused.

98. Further, a suggestion was given to Dr. Vinod Kumar Doneriya (P.W. 17) that due to itching, if some one scratches his nose, then abrasion may be caused, which was denied by this witness. Thus, the possibility of self inflicted abrasion was ruled out by this witness. Thus, it is held that the respondent/accused must have suffered abrasion on the nose due to resistance offered by the deceased.

Absence of injuries on genitals of the respondent/accused.

99. It is submitted that if a forcible intercourse is done with a virgin minor girl, then there should be some injuries on the genitals of the accused. However, in the present case, it is clear that no injury was found on the genitals of the respondent/accused, therefore, the possibility of committing rape on the minor prosecutrix is ruled out.

100. Considered the submissions made by the Counsel for the respondent/ accused.

101. Presence of injuries on male organ of the accused is not necessary in all cases.

102. The Supreme Court after considering the Modi's jurisprudence, has held in the case of *State of H.P. v. Gian Chand,* reported in (2001) 6 SCC 71, as under :

> **15.** The observations made and noted by Dr Mudita Gupta during the medico-legal examination of PW 7 clearly make out the prosecutrix having been subjected to rape. The prosecutrix has spoken of "penetration" in her statement. The discovery of spermatozoa in the private parts of the victim is not a must to establish penetration. There are several factors which may negative the presence of spermatozoa (see *Narayanamma* v. *State of Karnataka*). Slightest penetration of penis into vagina without rupturing the hymen would constitute rape (see *Madan Gopal Kakkad* v. *Naval Dubey*). The suggestion made in the cross-examination of Dr Mudita Gupta that injury of the nature found on hymen of the prosecutrix could be caused by a fall does not lead us anywhere. Firstly, no such suggestion was given to the prosecutrix or her mother during cross-examination. Secondly, why would the

> girl or her mother implicate the accused, charging him with rape, if the injury was caused by a fall? There is nothing to draw such an inference, not even a suggestion, to be found on record. The answer to the suggestion made to Dr Gupta cannot discredit the prosecution case in the absence of any other material to support the suggestion. So is the case with the absence of external marks of violence on the body of the victim. In case of children who are incapable of offering any resistance external marks of violence may not be found. (See *Modi's Medical Jurisprudence*, 22nd Edn., p. 502.) It is true that marks of external injury have not been found on the person of the accused but that by itself does not negate the prosecution case. Modi has opined (see *Modi*, ibid, p. 509) that even in the case of a child victim being ravished by a grown-up person it is not necessary that there should always be marks of injuries on the penis in such cases. Further, it is to be noted that about two days had elapsed between the time of the incident and medical examination of the accused within which time minor injuries, even if caused, might have healed.

103. In the present case, the offence was committed on 4-7-2017 and the respondent/accused was medically examined on 6-7-2017 at 2:00 P.M. i.e., after 48 hours of incident. Therefore, the possibility of healing of any minor injury on the genital organs of the respondent/accused is also not ruled out. Further, it is clear from Modi's Jurisprudence that it is not necessary that there should always be mark of injuries on the penis of the accused.

104. Therefore, the absence of any injury on the penis of the respondent/accused, would not belie the prosecution case.

Non-Examination of Gayatri

105. Hariram (P.W.1) has stated that after hearing the cries of *Bhabhi* Gayatri, they found that the dead body of the deceased was lying behind the trolley which was parked in front of the *Pator* of Jai Kishan Prajapati. It is submitted that in fact the dead body of the deceased was found in front of the *Pator* of Ram Prasad Prajapati. It is submitted that *Bhabhi* Gayatri was the best witness as she had noticed the dead body for the first time but she has not been examined, therefore, the recovery of the dead body of the deceased itself becomes doubtful.

106. Considered the submissions made by the Counsel for the parties.

107. The respondent/accused has not disputed the fact that the dead body of deceased "X" was found in front of the *Pator* of Ramprasad Prajapti. The photographs of the deceased and the spot were taken by Jugal Kishore Dubey

(P.W. 18) which have been marked as Article 1 to Article 26. Even from the spot map, Ex. P.4, as well as photographs Article 1 to 26, it is clear that the dead body was found in front of the *Pator* of Ramprasad Prajapati. Under these circumstances, the non-examination of *Bhabhi* Gayatri would not give any dent to the prosecution story. Further, it is the submission of the Counsel for the State that in the village where the population is scanty and each and every person knows each other, then generally they do not come forward in order to save their relationship with the family of the accused. It is not known as to whether Gayatri is the mother of the respondent/accused or She was called *Bhabhi* by Hariram (P.W.1) being the resident of the same village. Even if it is presumed that Gayatri was called *Bhabhi* by Hariram (P.W.1) being the resident of same village, but this Court cannot lose sight of the social thread running through the residents of the village. She might not be interested in coming into picture in order to save her contacts/relationship with the family of the respondent/accused. Further, an independent witness may hesitate in coming forward in order to avoid becoming part of police investigation or attending the Court. Further, the Supreme Court in the case of *Gian Singh* (Supra) has held as under :

> **14.** So far as non-examination of other witnesses and an adverse inference drawn by the High Court therefrom is concerned, here again we find ourselves not persuaded to subscribe to the view taken by the High Court. The prosecutrix, PW 7 has stated that soon before the incident she was playing with three girl-children of the same age as hers and they were present when the accused committed rape on her. One of the girls picked up a broom and had tried to scare away the accused by striking the broom on him. This little friend of the victim had also raised a hue and cry but none from the neighbourhood came to the spot. These girls were none else than daughters of her uncle. What the High Court has failed to see is that these girls were of tender age and could hardly be expected to describe the act of forcible sexual intercourse committed by the accused on PW 7. Secondly, these girls would obviously be under the influence of their parents. We have already noted the co-sister of PW 1 turning hostile and not supporting the prosecution version. How could these little girls be expected to be away from the influence of their parents and depose freely and truthfully in the court? Non-examination of a material witness is again not a mathematical formula for discarding the weight of the testimony available on record howsoever natural, trustworthy and convincing it may be. The charge of withholding a material witness from the court levelled against the prosecution should be examined in the background of facts and circumstances of each case so as to find whether the witnesses were available for being examined in the court and were yet withheld by the prosecution. The court has first to assess the trustworthiness of the evidence adduced and available on record. If the court finds the evidence adduced worthy of being relied on then the testimony has to be accepted and acted on though there may be

other witnesses available who could also have been examined but were not examined. However, if the available evidence suffers from some infirmity or cannot be accepted in the absence of other evidence, which though available has been withheld from the court, then the question of drawing an adverse inference against the prosecution for non-examination of such witnesses may arise. It is now well settled that conviction for an offence of rape can be based on the sole testimony of the prosecutrix corroborated by medical evidence and other circumstances such as the report of chemical examination etc. if the same is found to be natural, trustworthy and worth being relied on.

The Supreme Court in the case of *Mahesh v. State of Maharashtra,* reported in (2008) 13 SCC 271 has held as under :

55. As regards non-examination of the independent witnesses who probably witnessed the occurrence on the roadside, suffice it to say that testimony of PW Sanjay, an eyewitness, who received injuries in the occurrence, if found to be trustworthy of belief, cannot be discarded merely for non-examination of the independent witnesses. The High Court has held in its judgment and, in our view, rightly that the reasons given by the learned trial Judge for discarding and disbelieving the testimony of PWs 4, 5, 6 and 8 were wholly unreasonable, untenable and perverse. The occurrence of the incident, as noticed earlier, is not in serious dispute. PW Prakash Deshkar has also admitted that he had lodged complaint to the police about the incident on the basis of which FIR came to be registered and this witness has supported in his deposition the contents of the complaint to some extent. It is well settled that in such cases many a times, independent witnesses do not come forward to depose in favour of the prosecution. There are many reasons that persons sometimes are not inclined to become witnesses in the case for a variety of reasons. It is well settled that merely because the witnesses examined by the prosecution are relatives of the victim, that fact by itself will not be sufficient to discard and discredit the evidence of the relative witnesses, if otherwise they are found to be truthful witnesses and rule of caution is that the evidence of the relative witnesses has to be reliable evidence which has to be accepted after deep and thorough scrutiny.

The Supreme Court in the case of *Vijendra Singh v. State of U.P.,* (2017) 11 SCC 129 has held as under :

35. The next plank of argument of Mr Giri is that since Nepal Singh who had been stated to have accompanied PW 2 and PW 3 has not been examined and similarly, Ram Kala and Bansa who had been stated to have arrived at the tubewell as per the testimony of PW 2, have not been examined, the prosecution's version has to be discarded, for it has deliberately not cited the independent material witnesses. It is noticeable

from the decision of the trial court and the High Court, that reliance has been placed on the testimony of PWs 1 to 3 and their version has been accepted. They have treated PW 2 and PW 3 as natural witnesses who have testified that the accused persons were leaving the place after commission of the offence and they had seen them quite closely. The contention that they were interested witnesses and their implication is due to inimical disposition towards accused persons has not been accepted and we have concurred with the said finding. It has come out in evidence that witnesses and the accused persons belong to the same village. The submission of Mr Giri is that non-examination of Nepal Singh, Ramlal and Kalsa is quite critical for the case of the prosecution and as put forth by him, their non-examination crucially affects the prosecution version and creates a sense of doubt. According to Mr Giri, Nepal Singh is a material witness. In this regard we may refer to the authority in *State of H.P.* v. *Gian Chand* wherein it has been held that: (SCC p. 81, para 14)

> "*14*. Non-examination of a material witness is again not a mathematical formula for discarding the weight of the testimony available on record howsoever natural, trustworthy and convincing it may be. The charge of withholding a material witness from the court levelled against the prosecution should be examined in the background of the facts and circumstances of each case so as to find whether the witnesses were available for being examined in the court and were yet withheld by the prosecution."

The Court after so holding further ruled that it is the duty of the court to first assess the trustworthiness of the evidence available on record and if the court finds the evidence adduced worthy of being relied on and deserves acceptance, then non-examination of any other witnesses available who could also have been examined but were not examined, does not affect the case of the prosecution.

36. In *Takhaji Hiraji* v. *Thakore Kubersing Chamansing*, it has been held that: (SCC p. 155, para 19)

> " *19*. ... if a material witness, who would unfold the genesis of the incident or an essential part of the prosecution case, not convincingly brought to fore otherwise, or where there is a gap or infirmity in the prosecution case which could have been supplied or made good by examining a witness who though available is not examined, the prosecution case can be termed as suffering from a deficiency and withholding of such a material witness would oblige the court to draw an adverse inference against the prosecution by holding that if the witness would have been examined it would not have supported the prosecution case. On the other hand, if already overwhelming evidence is available and examination of other witnesses would

> only be a repetition or duplication of the evidence already adduced, non-examination of such other witnesses may not be material. ... If the witnesses already examined are reliable and the testimony coming from their mouth is unimpeachable, the court can safely act upon it, uninfluenced by the factum of non-examination of other witnesses."
>
> **37.** In *Dahari* v. *State of U.P.*, while discussing about the non-examination of material witness, the Court expressed the view that when he was not the only competent witness who would have been fully capable of explaining the factual situation correctly and the prosecution case stood fully corroborated by the medical evidence and the testimony of other reliable witnesses, no adverse inference could be drawn against the prosecution. Similar view has been expressed in *Manjit Singh* v. *State of Punjab* and *Joginder Singh* v. *State of Haryana*.

108. Thus, it is held that non-examination of Gayatri would not give any blow to the prosecution much less a fatal blow.

109. As there is no dispute regarding the place from where the dead body of the deceased "X" was found, it is held that non-examination of Gayatri is not fatal to the prosecution case.

Non-examination of Jitendra Parihar and Ashok Kushwaha

110. By referring to Examination-in-chief of Hariram (P.W.1), it is submitted by the Counsel for the respondent/accused that when Hariram (P.W.1) asked the respondent/accused, as to whether he would like to go to Gwalior for labour work or not, at that time Jitendra Parihar and Ashok Kushwaha were also sitting there, and they have not been examined.

111. The submission made by the Counsel for the respondent/accused is liable to be rejected only on the ground that it is the quality and not quantity which decides the fate of a trial. The evidence is to be weighed and not calculated. Further, it has already been held that generally independent witnesses do not want to come forward and specifically when the social thread running in the residents of villages is so strong, therefore, it is difficult that every independent witness would come forward to depose against the accused.

Discrepancy in *Naksha Panchayatnama*, Ex.P.6 and the Post-mortem report, Ex.P.18

112. It is submitted by the Counsel for the respondent/accused that as per *Naksha Panchayatnama,* Ex. P.6, the witnesses had not found any injury on the head of the deceased "X" whereas in the Post-mortem report, head injury was found and it was also opined by Dr. Ajay Gupta (P.W. 11) that head injury might also be the cause of death.

113. Considered the submissions made by the Counsel for the respondent/ accused.

114. As per the post-mortem report, Ex. P.18, Ante-mortem Ecchymosis over Occipital area of 8X6 cm with subdural and Subarachnoid hemorrhage was found all over the brain. Thus, it is clear that only internal injury in the head was found with no corresponding external injury. Under these circumstances, if the witnesses could not notice any injury on the head of the deceased "X", then it cannot be said that there was any discrepancy in the *Naksha Panchayanama* (sic: *Panchayatnama*), Ex. P.6 and post-mortem report, Ex. P.18.

115. It is next contended by the Counsel for the respondent/accused that in the *Naksha Panchayatnama,* Ex P.6, it has not been mentioned that the private part of the deceased was seen by the lady constable. Further, in the *Naksha Panchayatnama,* Ex. P.6, no external injury was found on the private part of the deceased, whereas in the post-mortem report, Ex. P.18, injuries were found on the private part of the deceased, therefore, there is a discrepancy on this aspect.

116. Considered the submissions made by the Counsel for the respondent/ accused.

117. *Naksha Panchayatnama* Ex.P.6 was prepared in the presence of 6 witnesses including Head Constable Syara Bano. Syara Bano (P.W. 20) has stated that she had seen the private part of the deceased and since, stool had come out, therefore, it was not clearly visible. Further, it is well known that while conducting post-mortem, the autopsy surgeon inspects the body more meticulously. In the post-mortem report, Ex. P.18, it is specifically mentioned that stool had come out. Further, when one of the witness of *Naksha Panchayatnama* Ex.P.6 was a lady, then it is not necessary to mention that the private part of the deceased was seen by the lady and not by all the witnesses. Under these circumstances, it cannot be said that there was any discrepancy in the *Naksha Panchayatnama,* Ex.P.6 and the Post-mortem report,Ex. P.18.

Discrepancy regarding bottle and box

118. It is submitted by the Counsel for the respondent/accused that in the post-mortem report, Ex. P.18, it is mentioned that nail clippings of both hands of the deceased, two vaginal slides and two vaginal swabs of deceased were sealed in a bottle. Similarly, Viscera was sealed in two bottles with saturated salt solution. Similarly one Bottle contains stomach and its content and another bottle contains pieces of liver, spleen and kidney. The above mentioned articles were handed over to the police constable accompanying the body. It is submitted that these articles were seized from Constable Dharmendra vide seizure memo Ex. P.26 and from the seizure memo, Ex. P.26, it is clear that Bottles became Box (डिब्बा), therefore, it

is clear that the internal organs which were handed over by the hospital were changed and the internal organs which were sealed in boxes were seized.

119. Considered the submissions made by the Counsel for the respondent/ accused.

120. Bottle, box (डिब्बा) are some words which are used to describe the container. Bottle means a container having narrow neck, whereas internal organs of the deceased cannot be kept in a bottle having narrow neck. They are to be preserved and sealed in a bottle having broad neck which is known as "Jar". Thus Dr. Ajay Gupta (P.W. 11) did not use the correct word for the container by describing as bottle, but in fact more appropriate word i.e., "Jar" should have been used. Since, the internal organs cannot be given in a bottle with narrow neck, therefore, the internal organs must have been given in a container having broad neck, therefore, if a constable described the said container as box (डिब्बा), then it cannot be said that the sealed container given by the hospital was tempered. The use of word bottle or box (डिब्बा) is nothing but description of "Jar" or bottle with broad neck, and would not make any difference in the matter. Further, the seal of the hospital was found intact by the F.S.L. Sagar. Further, Dharmendra Jat (P.W.21) had taken the dead body for post-mortem, and the sealed articles were handed over to him. No question was put to Dharmendra Jat (P.W. 21) about "bottle" and "box". Dharmendra Jat (P.W.21) has specifically stated in his cross examination that he had not seen the sealed articles by opening the same. Therefore, the submissions made by the Counsel for the respondent/accused that bottle became box is nothing but an attempt to make a mountain out of a molehill.

Medical Examination of respondent/accused was not conducted as per Section 53-A of Cr.P.C.

121. Section 53-A of Cr.P.C. reads as under :

> **53-A. Examination of person accused of rape by medical practitioner**. — (1) When a person is arrested on a charge of committing an offence of rape or an attempt to commit rape and there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of such offence, it shall be lawful for a registered medical practitioner employed in a hospital run by the Government or by a local authority and in the absence of such a practitioner within the radius of sixteen kilometers from the place where the offence has been committed, by any other registered medical practitioner, acting at the request of a police officer not below the rank of a sub-inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the arrested person and to use such force as is reasonably necessary for that purpose.

(2) The registered medical practitioner conducting such examination shall, without delay, examine such person and prepare a report of his examination giving the following particulars, namely:—

(*i*) the name and address of the accused and of the person by whom he was brought,
(*ii*) the age of the accused,
(*iii*) marks of injury, if any, on the person of the accused,
(*iv*) the description of material taken from the person of the accused for DNA profiling, and
(*v*) other material particulars in reasonable detail.

(3) The report shall state precisely the reasons for each conclusion arrived at.

(4) The exact time of commencement and completion of the examination shall also be noted in the report.

(5) The registered medical practitioner shall, without delay, forward the report to the investigating officer, who shall forward it to the Magistrate referred to in Section 173 as part of the documents referred to in clause (*a*) of sub-section (5) of that section.

122. The accused was medically examined by Dr. Vinod Kumar Doneriya (P.W. 17) and M.L.C. report of the respondent/accused is Ex. P.25 and it was seized vide seizure memo Ex. P.24. It is true that the prosecution has not produced the copy of requisition for conducting M.L.C. of the respondent/accused but has examined Daini Kumar (P.W. 16) who had taken the respondent/accused for medical examination. In the cross-examination, a suggestion was given to this witness that he had taken the respondent/accused for medical examination on the instructions of his senior police officers, which was accepted by this witness.

123. It also appears that even the Public Prosecutor was not vigilant at the time of recording of evidence. Part "B" of Trial Court's record contain an un-exhibited requisition form given by investigating officer, for medical examination of respondent/accused. However, it is well settled principle of law that un-exhibited document(s) cannot be read in favor of the prosecution.

124. But, no suggestion was given to Dr. Vinod Kumar Doneriya (P.W.17) that he had conducted the medical examination of the respondent/accused without there being any requisition by the investigating officer.

125. However, in view of suggestion given to Daini Kumar (P.W.16), that he had taken the respondent/accused for medical examination of respondent/accused on the instructions of his senior police officers, it is held that the respondent/accused was medically examined at the request of the investigating officer.

Whether F.I.R., Ex. P.1 is an ante-dated and ante-timed document

126. It is submitted by the Counsel for the respondent/accused that F.I.R., Ex.P.1 is an ante-dated and ante-timed document, because if the F.I.R., Ex. P.1 was already lodged at 2:00 A.M. on 5-7-2017, then there was no necessity of Missing Person Registration, Ex. P.2, which was prepared at 2:30 A.M. on 5-7-2017.

127. Considered the submissions made by the Counsel for the respondent/accused.

128. Section 19 of POCSO Act, reads as under :

> **19. Reporting of offences**.—(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), any person (including the child), who has apprehension that an offence under this Act is likely to be committed or has knowledge that such an offence has been committed, he shall provide such information to,—
>
> (*a*) the Special Juvenile Police Unit; or
> (*b*) the local police.
>
> (2) Every report given under sub-section (1) shall be—
>
> (*a*) ascribed an entry number and recorded in writing;
> (*b*) be read over to the informant;
> (*c*) shall be entered in a book to be kept by the Police Unit.
>
> (3) Where the report under sub-section (1) is given by a child, the same shall be recorded under sub-section (2) in a simple language so that the child understands contents being recorded.
>
> (4) In case contents are being recorded in the language not understood by the child or wherever it is deemed necessary, a translator or an interpreter, having such qualifications, experience and on payment of such fees as may be prescribed, shall be provided to the child if he fails to understand the same.
>
> (5) Where the Special Juvenile Police Unit or local police is satisfied that the child against whom an offence has been committed is in need of care and protection, then, it shall, after recording the reasons in writing, make immediate arrangement to give him such care and protection (including admitting the child into shelter home or to the nearest hospital) within twenty-four hours of the report, as may be prescribed.
>
> (6) The Special Juvenile Police Unit or local police shall, without unnecessary delay but within a period of twenty-four hours, report the matter to the Child Welfare Committee and the Special Court or where no Special Court has been designated, to the Court of Session, including need of the child for care and protection and steps taken in this regard.
>
> (7) No person shall incur any liability, whether civil or criminal, for giving the information in good faith for the purpose of sub-section (1).

129. Thus, it is clear that when an information was given to the police regarding the missing of a minor girl and a clear apprehension was expressed by Hariram (P.W.1) in the F.I.R., Ex. P.1 that his daughter has been kidnapped by some unknown person, then the police did the right thing in lodging the F.I.R. Since, it was not clear as to whether the minor daughter of the complainant was kidnapped or any other offence has been committed or she is lost for any other reason, therefore, the police also registered under the category missing person. Further, this aspect of the matter could have been clarified by Alok Singh (P.W. 28), the investigating officer, but no question in this regard was put to him.

130. Further, a copy of the F.I.R. was forwarded to the concerning Magistrate on 5-7-2017 and the acknowledgment of receipt of the same is Ex. P.28. Thus, it is clear that the provisions of Section 157 of Cr.P.C. were also followed. Accordingly, this Court is of the considered opinion, that it is incorrect to say that F.I.R., Ex. P.1 is an ante-dated and ante-timed document.

Whether arguments on the question of framing of charges were advanced by a Counsel not engaged by the respondent/accused and if so, its effect

131. It is submitted by Shri Vijay Dutt Sharma, that the order-sheets of the Trial Court, indicate that on 10-8-2017, the charge sheet was filed and on 5-9-2017, time was granted to engage Counsel and to argue on the question of framing of charge. On 4-10-2017, one Shri Ashwani, Advocate filed his Vakalatnama on behalf of the respondent/accused and prayed for time to argue on the question of framing of charge. Again on 27-10-2017, time was granted to argue on the question of framing of charge. On 10-11-2017, Shri Ashwani, Advocate, withdrew his Vakalatnama and accordingly, Shri O.P. Sharma (wrongly mentioned as Chaturvedi in the order sheet) was appointed as Counsel for the respondent/accused from Legal Aid and time was granted to argue on the question of framing of charge. Again on 28-11-2017 and 14-12-2017, time was granted at the request of Shri O.P. Sharma, Counsel for respondent/accused. On 12-1-2018, Shri Arvind Chouhan, Advocate appeared on behalf of respondent/accused and prayed for time and accordingly time was granted and case was adjourned to 14-2-2018. On 14-2-2018, Shri Arvind Chouhan, Advocate argued on behalf of the respondent/accused on the question of framing of charges and accordingly, charges were framed.

132. It is submitted by Shri Vijay Dutt Sharma, Advocate, that Shri Arvind Chouhan, Advocate was never engaged by the respondent/accused, nor was provided by the Court, and therefore, the Court should not have heard Shri Arvind Chouhan, Advocate, on the question of framing of charges.

133. Heard the learned Counsel for the respondent/accused.

134. From Part "B" of Trial Court's record, it is clear that earlier Shri Ashwani, had filed his Vakalatnama on behalf of the respondent/ accused, but the same does not contain the signatures of respondent/ accused. Thereafter, Shri O.P. Sharma, Advocate was provided to the respondent/accused from Legal Aid. From the Vakalatnama of Shri O.P. Sharma, it is clear that it does not contain the signatures or name of any other Lawyer.

135. The Vakalatnama of Shri Arvind Chouhan is not available on record. Thus, it appears that Shri Arvind Chouhan might have appeared as a proxy Counsel on behalf of Shri O.P. Sharma, Advocate.

136. From the order sheet dated 14-2-2018 it is clear that Shri Arvind Chouhan, Advocate was heard on the question of framing of charges. Thus, it is held that Shri Arvind Chouhan, Advocate, in absence of any authority of law, was not competent to argue on behalf of respondent/accused on the question of framing of charges.

137. The next question for consideration is that what would be effect of this mistake which remained unnoticed by the Trial Court.

138. Section 461 of Cr.P.C. deals with certain infringements or irregularities, which would vitiate the trial. Section 461 of Cr.P.C. reads as under :

> **461. Irregularities which vitiate proceedings**.— If any Magistrate, not being empowered by law in this behalf, does any of the following things, namely:—
>
> (*a*) attaches and sells property under Section 83;
> (*b*) issues a search warrant for a document, parcel or other thing in the custody of a postal or telegraph authority;
> (*c*) demands security to keep the peace;
> (*d*) demands security for good behaviour;
> (*e*) discharges a person lawfully bound to be of good behaviour;
> (*f*) cancels a bond to keep the peace;
> (*g*) makes an order for maintenance;
> (*h*) makes an order under Section 133 as to a local nuisance;
> (*i*) prohibits, under Section 143, the repetition or continuance of a public nuisance;
> (*j*) makes an order under Part C or Part D of Chapter X;
> (*k*) takes cognizance of an offence under clause (*c*) of sub-section (1) of Section 190;
> (*l*) tries an offender;
> (*m*) tries an offender summarily;
> (*n*) passes a sentence, under Section 325, on proceedings recorded by another Magistrate;
> (*o*) decides an appeal;

(*p*) calls, under Section 397, for proceedings; or
(*q*) revises an order passed under Section 446,

139. Thus, if any irregularity or infringement falling under Section 461 of Cr.P.C. is committed by the Court below, only then such irregularity would vitiate the trial.

140. Section 464 of Cr.P.C. reads as under :

> **464. Effect of omission to frame, or absence of, or error in, charge**.— (1) No finding, sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charges, unless, in the opinion of the Court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby.
>
> (2) If the Court of appeal, confirmation or revision is of opinion that a failure of justice has in fact been occasioned, it may—
>
> *(a)* in the case of an omission to frame a charge, order that a charge be framed and that the trial be recommenced from the point immediately after the framing of the charge;
>
> *(b)* in the case of an error, omission or irregularity in the charge, direct a new trial to be had upon a charge framed in whatever manner it thinks fit:
>
> Provided that if the Court is of opinion that the facts of the case are such that no valid charge could be preferred against the accused in respect of the facts proved, it shall quash the conviction.

141. In order to consider the fact as to whether any failure of justice was caused to the respondent/accused or not, it is necessary to consider the scope of interference at the stage of framing of charges. The Supreme Court in the case of *Atma ram Vs. State of Rajasthan* reported in (2019) 20 SCC 481 has held as under :

> **19.** The emphasis was laid by Dr Manish Singhvi, learned Senior Advocate for the State on the articles relied upon by him to submit that the theory of "harmless error" which has been recognised in criminal jurisprudence and that there must be a remedial approach. Again, we need not go into these broader concepts as the provisions of the Code, in our considered view, are clearly indicative and lay down with clarity as to which infringements per se, would result in vitiation of proceedings. Chapter XXXV of the Code deals with "Irregular Proceedings", and Section 461 stipulates certain infringements or irregularities which vitiate proceedings. Barring those stipulated in Section 461, the thrust of the Chapter is that any infringement or irregularity would not vitiate the proceedings unless, as a result of such infringement or irregularity, great prejudice had occasioned to the accused.....

142. Thus, in order to consider the submissions made by the Counsel for the respondent/accused, it is necessary to find out as to whether any "failure of justice" has occasioned to the respondent/ accused or not?

143. The Supreme Court in the case of *Dilawar Balu Kurane v. State of Maharashtra,* reported in (2002) 2 SCC 135 has held as under :

> **12.** Now the next question is whether a prima facie case has been made out against the appellant. In exercising powers under Section 227 of the Code of Criminal Procedure, the settled position of law is that the Judge while considering the question of framing the charges under the said section has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out; where the materials placed before the court disclose grave suspicion against the accused which has not been properly explained the court will be fully justified in framing a charge and proceeding with the trial; by and large if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully justified to discharge the accused, and in exercising jurisdiction under Section 227 of the Code of Criminal Procedure, the Judge cannot act merely as a post office or a mouthpiece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the court but should not make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial (see *Union of India* v. *Prafulla Kumar Samal*).

The Supreme Court in the case of *Sheoraj Singh Ahlawat Vs. State of U.P.* reported in (2013) 11 SCC 476 has held as under :

> **20.** To the same effect is the decision of this Court in *Union of India* v. *Prafulla Kumar Samal* where this Court was examining a similar question in the context of Section 227 of the Code of Criminal Procedure. The legal position was summed up as under: (SCC p. 9, para 10)
>
> > "*10*. Thus, on a consideration of the authorities mentioned above, the following principles emerge:
> >
> > (*1*)That the Judge while considering the question of framing the charges under Section 227 of the Code has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out.
> >
> > (*2*)Where the materials placed before the court disclose grave suspicion against the accused which has not been properly

explained the court will be fully justified in framing a charge and proceeding with the trial.

(*3*)The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large however if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused.

(*4*)That in exercising his jurisdiction under Section 227 of the Code the Judge which under the present Code is a senior and experienced Judge cannot act merely as a post office or a mouthpiece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the court, any basic infirmities appearing in the case and so on. This however does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial."

21. Coming then to the case at hand, the allegations made against the appellants are specific not only against the husband but also against the parents-in-law of the complainant wife. Whether or not those allegations are true is a matter which cannot be determined at the stage of framing of charges. Any such determination can take place only at the conclusion of the trial. This may at times put an innocent party, falsely accused of commission of an offence to avoidable harassment but so long as the legal requirement and the settled principles do not permit a discharge the court would find it difficult to do much, conceding that legal process at times is abused by unscrupulous litigants especially in matrimonial cases where the tendency has been to involve as many members of the family of the opposite party as possible. While such tendency needs to be curbed, the court will not be able to speculate whether the allegations made against the accused are true or false at the preliminary stage to be able to direct a discharge. Two of the appellants in this case happen to be the parents-in-law of the complainant who are senior citizens. Appellant 1 who happens to be the father-in-law of the complainant wife has been a Major General, by all means, a respectable position in the Army. But the nature of the allegations made against the couple and those against the husband, appear to be much too specific to be ignored at least at the stage of framing of charges. The courts below, therefore, did not commit any mistake in refusing a discharge.

The Supreme Court in the case of *State of Orissa Vs. Debendranath Padhi* reported in (2005) 1 SCC 568 has held as under :

> **18.** We are unable to accept the aforesaid contention. The reliance on Articles 14 and 21 is misplaced. The scheme of the Code and object with which Section 227 was incorporated and Sections 207 and 207-A omitted have already been noticed. Further, at the stage of framing of charge roving and fishing inquiry is impermissible. If the contention of the accused is accepted, there would be a mini-trial at the stage of framing of charge. That would defeat the object of the Code. It is well settled that at the stage of framing of charge the defence of the accused cannot be put forth. The acceptance of the contention of the learned counsel for the accused would mean permitting the accused to adduce his defence at the stage of framing of charge and for examination thereof at that stage which is against the criminal jurisprudence. By way of illustration, it may be noted that the plea of alibi taken by the accused may have to be examined at the stage of framing of charge if the contention of the accused is accepted despite the well-settled proposition that it is for the accused to lead evidence at the trial to sustain such a plea. The accused would be entitled to produce materials and documents in proof of such a plea at the stage of framing of the charge, in case we accept the contention put forth on behalf of the accused. That has never been the intention of the law well settled for over one hundred years now. It is in this light that the provision about hearing the submissions of the accused as postulated by Section 227 is to be understood. It only means hearing the submissions of the accused on the record of the case as filed by the prosecution and documents submitted therewith and nothing more. The expression "hearing the submissions of the accused" cannot mean opportunity to file material to be granted to the accused and thereby changing the settled law. At the stage of framing of charge hearing the submissions of the accused has to be confined to the material produced by the police.

144. In the present case, the police had filed the charge sheet on 10-8-2017 on the basis of circumstantial evidence of Last Seen Together, Injury on the nose of the respondent/accused, F.S.L., Ex. P.31 according to which human skin was found in nail clippings of the deceased as well as human semen and sperms were found on cloths, and vaginal slide of the deceased, blood was found on the cloths, vaginal slide and swab, articles seized from the spot, nail clippings of the deceased, saliva mixed earth etc., another F.S.L. report Ex. P.32, F.S.L. report Ex. P.33 according to which the hairs were human hairs, and F.S.L. report, Ex. P.34 according to which no poison was found in the viscera of the deceased as well as the post-mortem report, Ex. P.18 of the deceased, according to which not only she was raped but the death was homicidal in nature. The blood sample and cloths, vaginal slide/swab of the deceased etc were already sent for DNA test. Accordingly, Shri Vijay Dutt Sharma, Advocate was requested to point out as to whether the Documentary and Ocular evidence filed along with the charge-sheet

was not sufficient to raise a grave suspicion against the respondent/accused, warranting his trial, or there was no grave suspicion against the respondent/ accused ? It was replied by Shri Sharma, that he cannot say that whether the Counsel for the respondent/accused could have succeeded in persuading the Trial Court to discharge the accused or not.

145. If the documentary and ocular evidence filed by the prosecution along with the charge sheet is considered in the light of the well established law regarding scope of enquiry on the question of framing of charges, this Court is of the considered opinion, that no "prejudice resulting in failure of justice" was caused to the respondent/accused warranting re-trial from the stage of framing of charge. There was sufficient material available on record to raise a grave suspicion against the respondent/accused, that he might have committed the offence warranting his trial.

146. Accordingly, with a word of advice to the Trial Court, that it should ensure that only the Counsel engaged by the accused or Counsel provided to the accused by Legal Aid, must appear on behalf of the accused, it is held that since, no "prejudice" much less then (sic: than) "prejudice causing failure of justice" was caused to the respondent/ accused, therefore, there is no need to send the respondent/accused for re-trial from the stage of framing of charge.

Whether the arrest of the respondent/accused was illegal or not?

147. It is submitted by the Counsel for the respondent/accused, that the accused was arrested on 6-7-2017 at 12:30 P.M. However, till that time, no material was available against him, therefore, it is clear that the arrest of the respondent/ accused was illegal and was made under the pressure of general public.

148. Considered the submissions made by the Counsel for the respondent/ accused.

149. Alok Singh (P.W.20) has stated that he had recorded the statement of Bheem (P.W. 4) on 5-7-2017. Thus, it is clear that the evidence of Last Seen Together was already available against the respondent/accused warranting his arrest. Thus, it cannot be said that the respondent/accused was arrested by the police, without there being any material against him.

150. The Privy Council in the case of *Parbhu Vs. King Emperor* reported in AIR 1944 PC 73 has held that irregularity and illegality of arrest would not affect the culpability of the offence if the same is proved by cogent evidence.

Whether the deceased was student of Class 2 or Class 3

151. It is submitted by the Counsel for the respondent/accused, that according to Hariram (P.W.1) the deceased was the student of Class 2, whereas according to Motiram Rajouriya (P.W.9), she was the student of Class 3.

152. It is clear from the birth certificate, Ex. P.16, that the deceased was admitted in class 1 on 16-6-2015. Thus, it is clear that she must have passed Class 2 in the year 2017 itself, and since, the incident took place on 4-7-2017, therefore, if Hariram (P.W.1) has stated that the deceased was student of Class 2, then it cannot be said that it was such a mistake which would make the prosecution case untrustworthy. Further, the pivotal question in the present case is that whether the deceased was a student of Govt. Primary School, Nayagaon, or not? This fact has been proved by Motiram Rajouriya (P.W.9) by producing the school record of the deceased i.e., admission register, Ex. P.15C, Birth Certificate, Ex. P.16, Attendance register, Ex. P.17. Accordingly, it is held that evidence of Hariram (P.W.1) that the deceased was the student of Class 2 would not make any difference in the matter.

Effect of non-comparison of scalp hairs of the respondent/accused with the hairs found on the spot.

153. So far as the contention of the Counsel for the respondent/accused that since, scalp hairs of the respondent/accused were not compared with the hairs found on the spot is concerned, it is suffice to mention here that the DNA profile of the respondent/accused has been found on the cloths and vaginal slide and swab of the deceased. Even the DNA profile of the deceased was found on the cloths of the respondent/accused. The button found on the spot, has been found to be that of the shirt of the respondent/accused. It is once again clarified that it is the quality of evidence and not quantity of evidence, which decides the fate of a trial. DNA test is one of the authentic tests to find out the presence of DNA profile of the accused on incriminating articles. Further, the scalp hairs of the respondent/accused were sent to F.S.L., Sagar, but the same were returned back unopened. No question has been put to Dr. Pankaj Shrivastava (P.W. 24) in this regard. Under these circumstances, non-comparison of scalp hairs of the respondent/accused, with the hairs found on the spot, would not belie the prosecution case.

Whether defence witnesses examined by respondent/accused are reliable witnesses, and whether the respondent/accused has proved his plea of alibi?

154. It is submitted by the Counsel for the respondent/accused that he had examined Ms. Poonam (D.W.1) and Neetu (D.W.2), but their evidence has been discarded for no valid reason.

155. Heard the learned Counsel for the respondent/accused.

156. It is true that the evidence of a defence witness is also required to be appreciated in the same manner, in which the evidence of prosecution is appreciated.

157. If the evidence of Poonam (D.W.1) is considered, then it is clear that she has stated that on 4-7-2017 at about 10:30 A.M., the respondent/accused had

come to her house at Gwalior by Tempo. On 4-7-2017 itself, she and her younger sister went to Quila along with the respondent/accused. The respondent/accused was having mobile with him but he did not receive any call and also did not talk to any body on his mobile. She further stated that she does not have any mobile. She further stated that even her family members were not knowing that the respondent/accused had gone with her for a walk. She further admitted that the brother of the respondent/accused had informed her that she has to come to Court for giving evidence. She further admitted that the fact of walking with respondent/accused was never disclosed by her to any body including her family members.

158. Neetu (D.W.2) has stated that respondent/accused had come on a Tempo and her house is at a distance of 10-15 minutes of walking from the place where the Tempos stop. She further admitted that Tempo stand is not visible from her house. She further stated that her sister namely Poonam (D.W.1) was having her mobile with her whereas respondent/accused was having his mobile. He was continuously using his mobile and was talking to various persons on mobile. She further admitted that the fact that respondent/accused had come to her house was not disclosed by her to any body. This witness on her own also clarified that this was not even informed to her mother.

159. Thus, if the evidence of Poonam (D.W.1) and Neetu (D.W.2) are considered, then it is clear that there are material contradictions in their evidence. Poonam (D.W.1) has stated that she does not have mobile, whereas Neetu (D.W.2) has stated that Poonam (D.W.1) was having mobile with her. Further, Neetu (D.W.2) has admitted that the place where the Tempos stop is not visible from her house and is at a distance of 10-15 minutes of walking, therefore, it was not possible for these witnesses to claim that respondent/accused had come on a Tempo. Further, Neetu (D.W.2) on her own has said that the fact of visit of respondent/accused in the house of these two witnesses was not known even to her mother. They have also admitted that the fact of going on walk to Quila was also not disclosed to any body and for the first time, they are making such statement before the Court. Poonam (D.W.1) has also stated that they have come to depose on the instructions of brother of the respondent/accused. Accordingly in the light of the material contradictions in the evidence of Poonam (D.W.1) and Neetu (D.W.2), it is held that both the defence witnesses are not reliable and accordingly they are disbelieved.

160. Further, the burden to prove the plea of alibi is on the accused to dislodge the prosecution evidence. The Supreme Court in the case of *Jitender Kumar Vs. State of Haryana* reported in (2012) 6 SCC 204 has held as under :

> 71 .....The plea of alibi in fact is required to be proved with certainty so as to completely exclude the possibility of the presence of the accused at

the place of occurrence and in the house which was the home of their relatives. (Ref. *Sk. Sattar* v. *State of Maharashtra)*

The Supreme Court in the case of *Mukesh v. State (NCT of Delhi),* reported in (2017) 6 SCC 1 has held as under :

> **257.** While weighing the plea of "*alibi*", the same has to be weighed against the positive evidence led by the prosecution i.e. not only the substantive evidence of PW 1 and the dying declarations, Ext. PW-27/A and Ext. PW- 30/D-1, but also against the scientific evidence viz. the DNA analysis, fingerprint analysis and bite marks analysis, the accuracy of which is scientifically acclaimed.....

The Supreme Court in the case of *Binay Kumar Singh Vs. State of Bihar* reported in (1997) 1 SCC 283 has held as under :

> **22.** We must bear in mind that an alibi is not an exception (special or general) envisaged in the Indian Penal Code or any other law. It is only a rule of evidence recognised in Section 11 of the Evidence Act that facts which are inconsistent with the fact in issue are relevant. Illustration (*a*) given under the provision is worth reproducing in this context:
>
> > "The question is whether *A* committed a crime at Calcutta on a certain date; the fact that on that date, *A* was at Lahore is relevant."
>
> **23.** The Latin word alibi means "elsewhere" and that word is used for convenience when an accused takes recourse to a defence line that when the occurrence took place he was so far away from the place of occurrence that it is extremely improbable that he would have participated in the crime. It is a basic law that in a criminal case, in which the accused is alleged to have inflicted physical injury to another person, the burden is on the prosecution to prove that the accused was present at the scene and has participated in the crime. The burden would not be lessened by the mere fact that the accused has adopted the defence of alibi. The plea of the accused in such cases need be considered only when the burden has been discharged by the prosecution satisfactorily. But once the prosecution succeeds in discharging the burden it is incumbent on the accused, who adopts the plea of alibi, to prove it with absolute certainty so as to exclude the possibility of his presence at the place of occurrence. When the presence of the accused at the scene of occurrence has been established satisfactorily by the prosecution through reliable evidence, normally the court would be slow to believe any counter-evidence to the effect that he was elsewhere when the occurrence happened. But if the evidence adduced by the accused is of such a quality and of such a standard that the court may entertain some reasonable doubt regarding his presence at the scene when the occurrence took place, the accused would, no doubt, be entitled to the

> benefit of that reasonable doubt. For that purpose, it would be a sound proposition to be laid down that, in such circumstances, the burden on the accused is rather heavy. It follows, therefore, that strict proof is required for establishing the plea of alibi. This Court has observed so on earlier occasions (vide *Dudh Nath Pandey* v. *State of U.P.*; *State of Maharashtra* v. *Narsingrao Gangaram Pimple*.

161. Since, it has already been held that Poonam (D.W.1) and Neetu (D.W.2) are unreliable and untrustworthy witnesses, therefore, it is held that the respondent/accused has failed in discharging his burden to prove "plea of alibi".

162. Thus, in view of the above mentioned discussion, this Court is of the considered opinion, that the prosecution has succeeded in establishing the guilt of the respondent/accused for offence under Section 366, 376-A, 302, 201 of I.P.C. and under Section 5(L) read with Section 6 of POCSO Act and therefore, the conviction of the respondent/accused by the Trial Court, for the above mentioned offences is hereby **affirmed.**

Whether death sentence is liable to be confirmed or not?

163. It is submitted by the Counsel for the respondent/accused, that the case in hand does not fall within the category of "rarest of rare" cases. It appears that while committing rape, the respondent/accused might have gagged the mouth of the deceased, so that she may not raise an alarm, which unfortunately resulted in smothering. It is submitted that there is nothing on record to suggest that there is no possibility of improvement on the part of the respondent/accused. The Trial Court did not consider the aggravating and mitigating circumstances to decide the question of sentence. It is further submitted that the Trial Court must have been swayed by the public opinion, which cannot be approved.

164. *Per contra*, the Counsel for the State supported the death sentence awarded to the respondent/accused. It is submitted that the respondent/accused is the cousin brother of the minor deceased aged about 8 years. By committing rape on her, he has not only broken the brother and sister relationship but also sent a wave of shivering in the Society because now even a small girl aged about 7-8 years is not secure in the Society and cannot live her childhood freely and without any fear. Even the cousin brother has not hesitated in committing rape and thereafter brutally murdering his cousin sister. It is further submitted that even after committing rape, the respondent / accused did not show remorse and all the time, was trying to project himself as an innocent person, by projecting to search the minor deceased along with other residents of the village. It is submitted that such persons are danger/threat to the Civilized Society, therefore, the Trial Court has rightly awarded the death sentence.

165. Considered the submissions made by the Counsel for the parties.

166. First of all, this Court would like to find out as to whether a proper opportunity of hearing was given to the respondent/accused on the question sentence or not?

167. Order sheet dated 8-5-2019 passed by the Trial Court reads as under :

8.05.2019 राज्य की ओर से श्री मनोज जैन विशेष लोक अभियोजक।

आरोपी मनोज प्रजापति न्यायिक अभिरक्षा मे जेल से पेश सहित श्री ओ.पी. शर्मा अधिवक्ता।

प्रकरण निर्णय हेतु नियत है।

प्रकरण मे निर्णय पृथक से टंकित कराया जाकर खुले न्यायालय मे घोषित, हस्ताक्षरित एवं दिनांकित किया गया । निर्णयानुसार आरोपी मनोज प्रजापति को भा.द.सं. की धारा 366,376क,302 एवं 201 तथा धारा 5एल सहपठित धारा 6 लैंगिक अपराधों से बालकों का सरंक्षण अधिनियम 2012 के आरोप मे दोषसिद्व ठहराया गया।

1. आरोपी मनोज प्रजापति को धारा **366 भा.दं.सं** के आरोप के लिए **10 वर्ष (दस वर्ष)** के सश्रम कारावास एवं **2000 /– (दो हजार रूपये)** अर्थदंड से दंडित किया जाता है। अर्थदण्ड के व्यतिक्रम की दशा मे आरोपी को 01 माह **(एक माह)** का अतिरिक्त सश्रम कारावास भुगताया जावे।

2. आरोपी मनोज प्रजापति को धारा **376(क) संशोधन अधिनियम 2013 कमांक 2013 प्रकाशन तिथि 02/04/2013 (भूललक्षी प्रभाव से)** के आरोप मे **मृत्युदण्ड** से दंडित किया जाता है और इसके लिए आरोपी को **गर्दन मे फांसी लगाकर तब तक लटकाया जाए, जब तक कि उसकी मृत्यु न हो जाए।** इस संबंध मे यह उल्लेख किया जाता है कि मृत्युदण्ड की सजा का कियान्वयन तब तक न किया जाए जब तक कि माननीय उच्च न्यायालय द्वारा इसकी पुष्टि न कर दी जावे।

3. आरोपी मनोज प्रजापति को **धारा 302 भा.दं.सं.** के आरोप मे ''**मृत्युदण्ड**'' से दंडित किया जाता है और इसके लिए आरोपी को **गर्दन मे फांसी लगाकर तब तक लटकाया जाए, जब तक कि उसकी मृत्यु न हो जाए।** इस सबंधं मे यह उल्लेख किया जाता है कि मृत्युदण्ड की सजा का कियान्वयन तब तक न किया जाए जब तक कि माननीय उच्च न्यायालय द्वारा इसकी पुष्टि न कर दी जावे।

4. आरोपी मनोज प्रजापति को धारा **201 भा.दं.सं.** के आरोप के लिए **07 वर्ष (सात वर्ष)** के सश्रम कारावास एवं **2000 /– (दो हजार रूपये)** अर्थदंड से दंडित किया जाता है। अर्थदण्ड के व्यतिक्रम की दशा मे आरोपी को **01 माह (एक माह)** का अतिरिक्त सश्रम कारावास से दण्डित किया गया।.....

168. From the above order sheet, it is clear that there is no mention of the fact that after holding the respondent/accused guilty of offence under Sections 366, 376-A, 302, 201 of I.P.C. and under Section 5(L) read with Section 6 of POCSO Act, the further proceedings were deferred for hearing on the question of sentence. Although from the judgment, it appears that the case was deferred for hearing on the question of sentence.

169. In absence of any such observation in the order sheet, it appears that no effective hearing was given to the respondent/accused on the question of sentence. Further, in order to give an opportunity of effective hearing to the accused, the Trial Court, must express its intentions to award Death Sentence, so that the accused may also argue on the question of sentence in the light of "Aggravating" and "Mitigating" Circumstances.

170. Although the sentence was also imposed on the very same day, on which the respondent/accused was held guilty, but there is no impediment in law in doing so. The Supreme Court in the case of *Mohd. Mannan v. State of Bihar,* reported in (2019) 16 SCC 584 has held as under :

> **77.** Imposition of death sentence on the same day after pronouncement of the judgment and order of conviction may not, in itself, vitiate the sentence, provided the convict is given a meaningful and effective hearing on the question of sentence under Section 235(2) CrPC with opportunity to bring on record mitigating factors.

It has been further held in the case of *Mohd. Mannan* (Supra) that :

> **39.** For effective hearing under Section 235(2) of the Code of Criminal Procedure, the suggestion that the court intends to impose death penalty should specifically be made to the accused, to enable the accused to make an effective representation against death sentence, by placing mitigating circumstances before the Court. This has not been done. The trial court made no attempt to elicit relevant facts. Nor did the trial court give any opportunity to the petitioner the opportunity to file an affidavit placing on record mitigating factors. As such the petitioner has been denied an effective hearing.

The Supreme Court in the case of *Dattatraya v. State of Maharashtra,* reported in (2020) 14 SCC 290 has held as under :

> **123.** There can be no doubt that rape and murder of a 5- year-old girl shocks the conscience. It is barbaric. There is, however, no evidence to support the finding that the murder was pre-meditated. The petitioner did not carry any weapon. The possibility that the appellant-accused might not have realised

that his act could lead to death cannot altogether be ruled out. Moreover, the trial court has apparently not considered the question of whether the crime is the rarest of rare crimes as mandated by the Supreme Court in *Bachan Singh*.

124. In *Rajendra Pralhadrao Wasnik* v. *State of Maharashtra* the Court commuted the death sentence, in a case of rape and murder of a three-year-old child to life imprisonment, inter alia, observing that the case did not fall in the category of the rarest of the rare.

125. As argued by the learned counsel appearing on behalf of the petitioner, the High Court found the offence to be in the category of the rarest of rare cases, having regard to the nature of the offence and the age of the victim.

126. The counsel for the appellant-accused submitted that the brutality of the crime and age of the victim was not ground enough to inflict death sentence. The learned counsel submitted that the petitioner had been convicted on circumstantial evidence, based on faulty investigation.

127. However, as observed above, the forensic evidence construed in the light of the evidence of PW 18, Asha, wife of the appellant-accused, that the appellant-accused had confessed to the crime to her, establishes the guilt of the appellant-accused and death sentence can be imposed even where conviction is based on circumstantial evidence, provided the case falls in the category of the rarest of rare and there are no mitigating circumstances and no possibility of reform or rehabilitation of the convict.

128. On analogy of the reasoning in *Rajendra Pralhadrao Wasnik* v. *State of Maharashtra*, this Court is constrained to hold that this case does not fall in the category of the rarest of rare cases. Moreover, the appellant-accused was not defended effectively. The lawyer representing the appellant-accused only pleaded not guilty, emphasising that there was no eyewitness to the incident and sought leniency only on the ground of the age of the appellant-accused which was 53 years.

129. The appellant-accused neither sought nor was given the opportunity to file any affidavit placing on record relevant mitigating circumstances. The legal assistance availed by the appellant-accused was patently not satisfactory and he was not accompanied by a social worker. No attempt was made to place on record mitigating circumstances. No argument was advanced to the effect that there was no similar case against the appellant-accused. In the absence of any arguments, the trial court did not

consider the question of whether the appellant-accused could be reformed.

130. Considering the nature of the crime against a five-year-old child, the trial court imposed the extreme penalty of death without deciding the question of whether there was no alternative to imposing death sentence on the appellant-accused. There is no finding that in the absence of death sentence, the appellant-accused would continue to be a threat to the society. The question of whether the appellant-accused could be reformed, had not at all been considered.

131. As held in *Dagdu* irrespective of whether these issues were raised on behalf of the accused, the Court is obliged on its own to elicit facts relevant to the question of existence of mitigating circumstances. The Court made no attempt to elicit any facts relevant to the sentence.

132. For effective hearing under Section 235(2) of the Code of Criminal Procedure, the suggestion that the court intends to impose death penalty should specifically be made to the accused, to enable the accused to make an effective representation against death sentence, by placing mitigating circumstances before the Court. This has not been done. The trial court made no attempt to elicit relevant facts, nor did the trial court give any opportunity to the petitioner to file an affidavit placing on record mitigating factors. As such the petitioner has been denied an effective hearing.

133. Contrary to the dictum of this Court, inter alia, in *Dagdu* and *Santa Singh* the petitioner was not given a real, effective and meaningful hearing on the question of sentence under Section 235(2) CrPC. The death sentence imposed on the petitioner is liable to be commuted to life imprisonment on this ground.

(Underline supplied)

134. There can be no doubt that the rape and murder of a five years old child is absolutely heinous and barbaric, but as observed above, it cannot be said to be in the category of rarest of rare cases.

(Underline supplied)

135. In *Mulla* v. *State of U.P.*, this Court has affirmed that it is open to the Court to prescribe the length of incarceration. This is especially true in cases where death sentence has been replaced by the life imprisonment. This Court observed: (SCC p. 538, para 85)

> "*85. ... The court should be free to determine the length of imprisonment which will suffice the offence committed*." (emphasis supplied)
>
> **136.** Even though life imprisonment means imprisonment for entire life, convicts are often granted reprieve and/or remission of sentence after imprisonment of not less than 14 years. In this case, considering the heinous, revolting, abhorrent and despicable nature of the crime committed by the appellant, we feel that the appellant should undergo imprisonment for life, till his natural death and no remission of sentence be granted to him.
>
> (Underline supplied)
>
> **137.** For the above reasons, we are of the view that the present appeals are one of such cases where we would be justified in holding that confinement till natural life of the appellant-accused shall fulfil the requisite criteria of punishment considering the peculiar facts and circumstances of the present case. Accordingly, the death sentence awarded by the trial court is hereby modified to "life imprisonment" i.e. imprisonment for the natural life of the appellant herein. The appeals are allowed accordingly to the extent indicated above.

171. If the order sheet dated 8-5-2019 is considered, then it is clear that no effective hearing on the question of sentence as required under Section 235(2) of Cr.P.C. was given to the respondent/accused. No suggestion was given to the respondent/accused, that the Trial Court is intending to award Death Sentence, so as to give an opportunity to the respondent/accused to argue in the light of "Aggravating" and "Mitigating" circumstances. Even the Trial Court has not considered the "Mitigating" circumstances.

172. Under these circumstances, this Court finds it difficult to confirm the Death Sentence awarded to the respondent/accused.

173. If the allegations, which have been found proved against the respondent/accused are considered, then it is clear that not only he has violated the pious relationship of brother and sister, but also committed rape on his 8 years old minor cousin sister and also killed her. Thereafter, in order to project himself as an innocent person, he was projecting that he is also trying to search for the deceased.

174. The Supreme Court in the case of *Dattatraya* (Supra) after considering the effect of non-grant of effective opportunity of hearing on the question of sentence and in the case of *Mohd. Mannan* (Supra), has awarded Life Imprisonment till the natural death.

175. Therefore, the death sentence awarded by the Trial Court to the respondent/accused is hereby commuted to Life Imprisonment till his natural death. The respondent/accused shall not be entitled for any remission.

176. Before parting with this judgment, this Court would like to record its appreciation for the assistance rendered by Shri Padam Singh and Shri Vijay Dutt Sharma, Advocates, who tried their level best to point out each and every minor discrepancy in the evidence of the prosecution in order to effectively put forward the case of the respondent/ accused.

177. With aforesaid modification in sentence, the judgment dated 8-5-2019 passed by Xth Additional Sessions Judge/Special Judge (POCSO Act), Gwalior in Special Sessions Trial No.130/2017 is hereby **affirmed.**

178. The respondent/accused/appellant in Cr.A. No.4554/2019 namely Manoj Prajapati, is in jail. He shall undergo the remaining jail sentence till his natural death.

179. A copy of this Judgment be immediately sent to the respondent/ accused/Appellant in Cr.A. No.4554/2019, Manoj Prajapati, free of cost.

180. The CRRFC No.8/2019 is **answered accordingly** and Cr.A. No.4554/ 2019 is **Partly Allowed** to the extent mentioned above.

Order accordingly

I.L.R. [2021] M.P. 2212 (DB)
APPELLATE CRIMINAL

Before Mr. Justice Atul Sreedharan & Smt. Justice Sunita Yadav

CRA No. 660/2008 (Jabalpur) decided on 16 September, 2021

AMAR SINGH & ors. …Appellants

Vs.

STATE OF M.P. …Respondent

***A. Penal Code (45 of 1860), Section 302 & 201 – Circumstantial Evidence – Last Seen Theory, Seized Weapons & Motive of Crime* – Held – Last seen theory not proved – No blood found on seized weapons allegedly used for murder – No cogent evidence to prove the motive of offence – When prosecution is based on circumstantial evidence, motive behind crime becomes important – Prosecution failed to prove each of the links in the chain of circumstances or that the proved circumstances point unmistakably to the guilt of accused – Conviction and sentence set aside – Appeal allowed.**

(Paras 18, 20 & 23 to 28)

क. दण्ड संहिता (1860 का 45), धारा 302 व 201 – परिस्थितिजन्य साक्ष्य – अंतिम बार देखे जाने का सिद्धांत, जब्तशुदा शस्त्र व अपराध का हेतु – अभिनिर्धारित – अंतिम बार देखे जाने का सिद्धांत साबित नहीं – हत्या के लिए अभिकथित रूप से प्रयुक्त जब्तशुदा शस्त्रों पर रक्त नहीं पाया गया – अपराध का हेतु सिद्ध करने के लिए कोई प्रबल साक्ष्य नहीं – जब अभियोजन परिस्थितिजन्य साक्ष्य पर आधारित हो, अपराध के पीछे का हेतु महत्वपूर्ण बन जाता है – अभियोजन, परिस्थितियों की श्रृंखला की प्रत्येक कड़ी या यह कि सिद्ध परिस्थितियां अभियुक्त की दोषिता को सुस्पष्ट रूप से इंगित करती हैं, को सिद्ध करने में असफल रहा – दोषसिद्धि एवं दण्डादेश अपास्त – अपील मंजूर।

***B. Penal Code (45 of 1860), Section 302 & 201 – Circumstantial Evidence – Scope* – Held – There must be a chain of evidence so complete as not to leave any reasonable ground for a conclusion consistent with the innocence of accused and it must be such as to show that within all human probability the act must have been done by accused – All links in the chain of circumstances must be complete and should be proved through cogent evidence. (Para 9)**

ख. दण्ड संहिता (1860 का 45), धारा 302 व 201 – परिस्थितिजन्य साक्ष्य – व्याप्ति – अभिनिर्धारित – साक्ष्य की श्रृंखला इस तरह पूर्ण होनी चाहिए जो कि अभियुक्त की निर्दोषिता के साथ संगत किसी निष्कर्ष हेतु कोई युक्तियुक्त आधार नहीं छोड़ती और उसे ऐसा होना चाहिए जिससे यह दर्शित हो कि सभी मानवीय संभाव्यताओं के भीतर वह कृत्य, अभियुक्त द्वारा ही किया गया है – परिस्थितियों की श्रृंखला की सभी कड़ियां पूर्ण होनी चाहिए और तर्कपूर्ण साक्ष्य के जरिए सिद्ध होनी चाहिए।

***C. Criminal Trial – Standard of Proof* – Held – Standard of proof in a criminal trial is proof beyond reasonable doubt because the right to personal liberty of a citizen can never be taken away by the standard of preponderance of probability – Apex Court concluded that suspicion, however strong, cannot take place of legal proof. (Para 23)**

ग. दाण्डिक विचारण – सबूत का मानक – अभिनिर्धारित – दाण्डिक विचारण में सबूत का मानक, युक्तियुक्त संदेह से परे सबूत है क्योंकि एक नागरिक की दैहिक स्वतंत्रता का अधिकार, अधिसंभाव्यता की प्रबलता के मानक द्वारा कभी छीना नहीं जा सकता – सर्वोच्च न्यायालय ने निष्कर्षित किया कि संदेह चाहे जितना प्रबल हो, विधिक सबूत का स्थान नहीं ले सकता।

Case referred:

(2012) 9 SCC 257.

Devdatt Bhave, appeared as *Amicus Curiae* for the appellants.
Manhar Dixit, P.L. for the respondent/State.

J U D G M E N T

The Judgment of the Court was delivered by :
SUNITA YADAV, J. :- As per letter No.06/Warrant-1/2021 dated 01.04.2021 of Superintendent, Central Jail, Satna (M.P.), it appears that appellant no.1 **Amar Singh** S/o Rambharose Singh has died during the pendency of this appeal on 30.04.2021. Therefore, this appeal so far it relates to appellant no.1 Amar Singh, is **abated**.

2. Being aggrieved by the judgment and order dated 01.03.2008 passed in Sessions Trial No.152/2004 and supplementary Sessions Trial No.75/2005 by the learned First Additional Sessions Judge to the First Sessions Judge, Panna (M.P.) by which appellants Amar Singh (**since deceased**), Halke, Raju @ Rajaram and Raju @ Baghela have been convicted for the offence punishable under Sections 302 and 201 of the Indian Penal Code and sentenced to undergo life imprisonment and fine of Rs.50,000/- and rigorous imprisonment for two years and fine of Rs.2000/- each, respectively, in default of payment of fine, the appellants were directed to undergo additional rigorous imprisonment for 5 years under Section 302 of the Indian Penal Code and rigorous imprisonment for 2 months under Section 201 of the Indian Penal Code, the present appeal has been filed by the aforesaid appellants.

3. The prosecution case in nutshell is that on 21.06.2004, the SHO Devendra Nagar District-Panna received an information that a beheaded dead body was floating in Satna river below the Itwa bridge. It was also informed that a stone was tied up with the body with the help of electric wires on the chest and a torn banyan was wrapped around the chest and the head of the dead body was lying in the nearby field of one Radhelal Kushwaha. After getting the information, the SHO Devendra Nagar reached the spot and recorded a Dehati Naleshi. The said Dehati Naleshi was sent to P.S. Devendra Nagar District-Panna, on the basis of which, Marg No.17/04 as well as Crime No.85/04 was registered against the unknown person. After preparing the inquest report/Panchnama, the body was sent for postmortem. On 24.06.2004, one Sushil Bilthariya submitted an application to SHO Devendra Nagar stating that his brother Ashok Bilthariya was missing from the Ashram of Dunha Baba Amar Singh. In that application, it was further stated that Halke Vishwakarma, Ashok Singh Thakur, Raju Dhimar, Mahesh Dhimar, Bhushan Singh Thakur, Raju Kushwaha, Bablu Singh and Santosh Singh were working in the Ashram of Dunha Baba along with Ashok Bilthariya. It was further mentioned that the missing person Ashok Bilthariya along with Halke Vishwakarma had come to the house of applicant Sushil at Champa on 16.06.2004 and after having meals in the night, both Halke and Ashok went to the Ashram of Amar Singh.

4. In the said application, it was also stated that on inquiring from Amar Singh, Santosh Singh and Halke Vishwakarma, different versions were being given by them. Subsequently, on 25.06.2004 another application was submitted by Sushil Bilthariya to the SHO stating that the dead body found on 21.06.2004 might be that of his brother Ashok Bilthariya. Later on, the dead body was identified by Prabhudayal (PW-4) Shri Kumar (PW-13) and Rajkumar Bilthariya to be that of Ashok Bilthariya.

5. Further case of prosecution is that deceased Ashok Bilthariya was having illicit relations with the niece of Baba Amar Singh on account of which he was killed on 18.06.2004 and after beheading the body, the same was taken in a Jeep bearing Registration No. MP 19-E/7384. The beheaded body was tied up along with the stone with electric wires and was thrown in the river. The decapitated head of the body was thrown in a field. During the course of investigation, clothes of deceased along with weapons axe and *farsa* used for committing the crime were seized at the instance of the accused persons. The seized articles were sent for Forensic Examination.

6. After completion of investigation, charge sheet was filed against the appellants/accused along with other co-accused persons. The trial Court framed charge against the appellants and other co-accused persons which was denied by them. At the time of filing of charge sheet, accused Bhushan Singh, Bablu @ Ravendra and Mahesh Dhimar were found to be absconding. During the course of trial, two co-accused persons namely Bhushan and Bablu @ Ravendra were arrested and a supplementary charge sheet was filed by the police. Thereafter, both the trials were clubbed and a common judgment was pronounced on 01.03.2008.

7. The learned counsel for the appellants has submitted that the trial court failed to consider that the prosecution could not prove the death of Ashok Bilthariya as the identification of the dead body is not proved. The trial Court has also failed to consider the origin of the blood group of the deceased which is said to have been found with the seized articles. The chain of circumstances is broken from the fact that the seizure of axe from co-accused Santosh Singh did not contain any blood stains. He further submitted that the trial court has also failed to consider that there is no material evidence to prove that the deceased was having an illicit relation with the niece of Amar Singh. The motive is based on suspicion which cannot take place of a positive proof. No motive has been attributed to the present appellants.

8. On the other hand the learned counsel for the State argued that the prosecution has successfully proved the chain of circumstances to connect the appellants with the offence. Therefore, the impugned judgment convicting and sentencing the appellants should be sustained.

9. In the light of above arguments rendered by opposite parties, we have carefully examined the prosecution evidence. The prosecution on its behalf examined as many as 18 witnesses to prove its case. On perusal of the evidence produced by the prosecution, it is clear that the present case is based on circumstantial evidence. It is well settled law that where there is no direct evidence against the accused and the prosecution rests its case on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused. In other words, there must be a chain of evidence so complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused. All the links in the chain of circumstances must be complete and should be proved through cogent evidence.

10. Baori Bai (PW-7) and Braj Kishore (PW-8) are the witnesses who saw the body of the deceased first. These witnesses have stated that after seeing the dead body in the river, Chowkidar of the village was informed. Chowkidar Bukiya @ Shivbalak (PW-9) has deposed that after getting the information about the dead body which was floating in the river, he informed the police of Devendra Nagar. The police arrived and recovered the dead body and the decapitated head of the body.

11. Vinod Sonkiya (PW-10), the then Tehsildar, has deposed that he got the dead body identified by Prabhudayal (PW-4), Sushil Kumar (PW-12) and Shri Kumar (PW-13). These witnesses have corroborated the statement of Vinod Sonkiya (PW-10) and deposed that they had identified the body and found that the dead body was that of Ashok Bilthariya**.** Nothing came out in the cross-examinations of above witnesses which goes to the root of the prosecution story. Hence, the argument of the defence counsel is not tenable that the identification of the dead body is not proved.

12. Dr. P. Shrivastava (PW-14) has conducted the postmortem on the body of the deceased. According to the doctor, while examining the dead body, he found an incised wound measuring 11cm x 5cm x 11.5cm round shaped on the back of the neck. He further stated that because of this injury, the head got severed from the torso. The injury was *ante mortem* and was caused by a sharp object. The death was homicidal in nature and the injury was sufficient to cause the death. In the light of the evidence as discussed above, it is proved that the body which was found was that of Ashok. The death of Ashok was homicidal in nature and was caused by some sharp edged weapon.

13. The prosecution has relied upon following circumstances to link the appellants with the crime;

(1) Deceased Ashok was last seen with the accused/appellant Halke and both the deceased and the accused/appellant Halke went to the Ashram of accused Amar Singh.

(2) The weapon used in the crime, the clothes and shoes of the deceased were recovered at the instance of accused persons.

14. The prosecution has produced Parvati (PW-3), Asharam (PW-5), Siyaram (PW-6) and Sushil Kumar (PW-12) to prove that deceased Ashok was with accused/appellant Halke when they saw the deceased for the last time.

15. Parvati (PW-3), who is the sister of the deceased has stated that she had two brothers. The deceased was her elder brother and Sushil (PW-12) is her younger brother. Deceased Ashok worked in Dunha Baba Ashram. On 16th June, his brother Ashok came to the house along with a *Barhai* (carpenter) and asked her to cook food for them. She prepared the food and offered her brother to have it but her brother refused saying that he would rather have his dinner at the Ashram of Dunha Baba. Thereafter she packed the food in a polythene and handed it over to her brother Ashok. After taking the food, her brother left the house and never come back. During recording her court statement, this witness has identified the accused Halke as the *barhai* (carpenter) who had visited her house with Ashok that day.

16. Sushil Kumar (PW-12) has corroborated the statement of Parvati (PW-3), who is his sister, and deposed that on 16.06.2004, he saw his brother Ashok for the last time when he along with accused/appellant Halke Vishwakarma came to his house. This witness has stated that he saw Ashok and Halke carrying their food. Ashok and Halke left the house saying that they were going to the Ashram of Dunha Baba. Next morning, he got to know that on the previous night his brother Ashok had stayed in the house of Siyaram (PW-6). After that day, his brother Ashok never returned.

17. Siyaram (PW-6) has testified that on 16th June, 2004 deceased Ashok and accused/appellant Halke came to his house. Ashok asked him to fetch food and when he expressed his inability, Ashok went to his own house and brought some food. Halke and Ashok had their dinner in his house and slept in the same house. Next morning, Halke and Ashok left his house saying that they were going towards Dunha. After that, he had never seen Ashok.

18. After going through the evidence of Parvati (PW-3), Siyaram (PW-6) and Sushil Kumar (PW-12), it is clear that all the above witnesses had seen the deceased Ashok with the accused/appellant Halke on 16th June, 2004 for the last time. However, as per the prosecution case, on 18th June, 2004 Asharam (PW-5) had taken the deceased Ashok on his tractor to the Ashram of Dunha which,

according to the prosecution story, had been run by the accused Amar Singh. Consequently, it is not proved that Parvati (PW-3), Siyaram (PW-6) and Sushil Kumar (PW-12) had seen the deceased on 16.06.2004 for the last time because the deceased Ashok was seen by PW-5 Asharam on 18.06.2004. Since Asharam (PW-5) is the person who, according to the prosecution story, saw the deceased Ashok on 18.06.2004 for the last time; therefore, the evidence of this witness is very significant for the prosecution to prove the circumstance of last seen together.

19. PW-5 Asharam in his Court evidence has deposed that he used to drive the tractor of accused/appellant Amar Singh. He doesn't know the employees, who worked in the Ashram of Amar Singh. In the month of June, he went to Devendra Nagar by his tractor. There were many passengers on his tractor. Deceased Ashok was also traveling on his tractor. Deceased Ashok along with other passengers had alighted at Devendra Nagar Square (Chauraha).

20. Asharam (PW-5) has been declared as hostile by the prosecution. During the cross-examination, this witness has not supported the case of prosecution that the deceased Ashok had gone to the Ashram of Dunha on his tractor along with appellant Halke. Consequently, the first circumstance, the prosecution has relied upon, that the deceased was last seen with the appellant Halke and they both went to the Ashram of Amar Singh is not proved.

21. In the light of the above discussion, the finding of the trial Court that the deceased Ashok was last seen on 16.06.2004 by the prosecution witnesses Parvati (PW-3), Siyaram (PW-6) and Sushil Kumar (PW-12) is found to be contrary to the evidence available on record.

22. As per the prosecution story, the appellants Halke, Raju @ Rajaram and Raju @ Baghela were the employees of the appellant Amar Singh (since deceased) but no corroborative evidence like pay roll, service contracts, work assigned to them etc. are produced by the prosecution to prove this fact. PW-5 Asharam who used to drive the tractor of accused/appellant Amar Singh has not supported the prosecution story that the appellants Halke, Raju @ Rajaram and Raju @ Baghela worked in the Ashram of Amar Singh**.** Therefore, it is not proved that the present appellants Halke, Raju @ Rajaram and Raju @ Baghela worked in the Ashram of Amar Singh as his employees and were under obligation to obey his directions.

23. Seizure of incriminating articles at the instance of accused persons is the second circumstance to connect the appellants with the crime. The prosecution has produced Shri Kumar (PW-13) to the alleged recoveries at the instance of accused persons. According to this witness, a piece of wire was seized before him at the instance of accused Ashok Singh as per Ex.P/25. He further stated that in

pursuance to the disclosure of Raju Dhimar, a lower of tracksuit was seized as per Ex.P/27 and one spade along with a pickaxe were seized as per Ex.P/31 at the instance of accused Raju @ Rajaram. It is evident from the perusal of the material available on record and the seizure memos Ex.P/25, Ex.P/27 and Ex.P/31 that the said articles were allegedly seized from the open place, spade and pickaxe were seized from the open land of the Ashram and not from the temples of the Ashram. As per PW-13 Shri Kumar, the Ashram is surrounded by the fields. All the places surrounded by the Ashram are the places where anyone can have access and the witnesses have also accepted that the seized articles are easily available in the market. The articles seized were sent to the State Forensic Science Laboratory, Sagar for the Serological test. The FSL report is Exhibit-P/67. A perusal of the said report, reveals that no blood was found on the seized articles i.e spade, axe and pickaxe allegedly used to commit the murder of Ashok. Therefore, from the solitary circumstance of the alleged recovery of the articles as described above does not prove the guilt of appellants without any other incriminating circumstance to complete the chain. Standard of proof in a criminal trial is proof beyond reasonable doubt because the right to personal liberty of a citizen can never be taken away by the standard of preponderance of probability. In *Subramanian Swamy Vs. A.Raja* (2012) 9 SCC 257 it was held that suspicion, however strong, cannot take the place of legal proof.

24. When the prosecution is based on circumstantial evidence, the motive behind the crime becomes important. In this case, as per prosecution story, the deceased Ashok had an illicit relationship with the niece of the accused/appellant Amar Singh but the prosecution has failed to produce cogent evidence to prove the motive as mentioned above. Parvati (PW-3) who is the sister of the deceased Ashok, has stated that she was not aware of the fact that her brother Ashok was beaten up because of his relationship with the niece of accused/appellant Amar Singh.

25. Sushil Kumar (PW-12) in his Court evidence at para 4 has stated that he came to know that 10 to 15 days before the date of incident, accused/appellant Amar Singh had beaten up Ashok because he had a doubt that Ashok was having an affair with his niece. But when we compare his court statement with the police statement, it reveals that there is an omission in his police statement on this fact which shows that this witness has improvised his court statement. The evidence of this witness on this point is also based on hearsay evidence and he has not even disclosed the source of information about the alleged affair between the deceased and the niece of Amar Singh. Therefore, his Court statement about the alleged illicit relationship between the deceased Ashok and niece of Amar Singh being the motive behind the crime is also not found to be trustworthy**.** Moreover the appellant Amar Singh died during the pendency of this appeal and no motive has

been attributed to the present appellants Halke, Raju @ Rajaram and Raju @ Baghela by the prosecution.

26. The net result of the above discussion is that the prosecution has not been able to prove each of the links in the chain of circumstances or that the proved circumstances point unmistakably to the guilt of the appellants. Therefore, the trial Court erred in convicting the appellants for the offence under Sections 302, 201 of IPC.

27. Consequently, the impugned judgment of the trial Court and the order of sentence are accordingly set aside. The appellants Halke, Raju @ Rajaram and Raju @ Baghela are accordingly acquitted of the offences punishable under Sections 302, 201 of IPC.

28. Resultantly, the appeal is allowed. The bail bonds and surety bonds of appellants Halke, Raju @ Rajaram and Raju @ Baghela stand discharged.

29. Before parting this case, we record our appreciation to Mr. Devdatt Bhave, Advocate who has appeared as *amicus curiae* in this case and assisted this Court.

Appeal allowed