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THE HIGH COURT OF MADHYA PRADESH

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THE HIGH COURT OF MADHYA PRADESH
JABALPUR 2022

(From 01-01-2022 to 31-12-2022)

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केंद्रीय उत्पाद–शुल्क अधिनियम (1944 का 1), धाराएँ 3, 3A व 37(2)(v) एवं केंद्रीय उत्पाद–शुल्क नियम, 2017, नियम 6, 8, 11, 13 व 34 – ट्रेड नोटिस – तलाशी

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Central Excise Act (1 of 1944), Section 37(v) – Regulating Production, Sale and Storage of Goods **– Held – Section 37 gives power to Central Government to make rules to regulate the production or manufacturing but in this case there is no such rules notified by Central Government u/S 37(v) to regulate the production, sale and storage of goods. [Elora Tobacco Co. Ltd. (M/s.) Vs. Union of India] (DB)…1995**

केंद्रीय उत्पाद–शुल्क अधिनियम (1944 का 1), धारा 37(v) – माल के उत्पादन, विक्रय तथा भण्डारण को विनियमित करना – अभिनिर्धारित – धारा 37 केंद्र सरकार को उत्पादन अथवा निर्माण को विनियमित करने के लिए नियम बनाने की शक्ति प्रदान करता है परंतु इस प्रकरण में माल के उत्पादन, विक्रय तथा भण्डारण को विनियमित करने के लिए धारा 37(v) के अंतर्गत केंद्र सरकार द्वारा ऐसे कोई नियम अधिसूचित नहीं हैं। (एलोरा टोबैको कं. लि. (मे.) वि. यूनियन ऑफ इंडिया) **(DB)…1995**

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Central Excise Rules, 2017, Rule 34 – Trade Notices – Jurisdiction of Excise Authority **– Held – Rule 34 gives power to Board/Principal Chief Commissioner/Chief Commissioner to issue written instructions for any incidental or supplemental matters – Excise authority gets jurisdiction to issue Trade Notices under the Act and Rules but the only rider is that such written instructions in Trade Notice should be consistent with the Act and provision of Rules. [Elora Tobacco Co. Ltd. (M/s.) Vs. Union of India] (DB)…1995**

केंद्रीय उत्पाद–शुल्क नियम, 2017, नियम 34 – ट्रेड नोटिस – उत्पाद शुल्क प्राधिकारी की अधिकारिता – अभिनिर्धारित – नियम 34 बोर्ड / प्रधान मुख्य आयुक्त / मुख्य आयुक्त को किसी अनुषंगिक अथवा अनुपूरक मामलों में लिखित निर्देश जारी करने की

शक्ति प्रदान करता है – उत्पाद–शुल्क प्राधिकारी को अधिनियम तथा नियमों के अंतर्गत ट्रेड नोटिस जारी करने की अधिकारिता प्राप्त होती है परंतु एकमात्र शर्त है कि ट्रेड नोटिस में ऐसे लिखित निर्देश अधिनियम तथा नियमों के उपबंध के अनुरूप होने चाहिए। (एलोरा टोबैको कं. लि. (मे.) वि. यूनियन ऑफ इंडिया) **(DB)…1995**

***Chikitsa Shiksha Pravesh Niyam, M.P., 2018, Rules 2(त), 4(1) & 14(1) & (2) – Category of Reservation – Applicability* – Held – Intention behind bringing these provisions into statute book was to apply the category-wise reservation in the second round of counselling on the entire vacancies and not separately for "in service category" and "open category" – Respondent rightly applied the Rules to the entire set of vacancies – Petitions dismissed. [Mohita Pandey (Dr.) Vs. State of M.P.] (DB)…*69**

चिकित्सा शिक्षा प्रवेश नियम, म.प्र., 2018, नियम 2(त), 4(1) व 14(1) व (2) – आरक्षण की श्रेणी – प्रयोज्यता – अभिनिर्धारित – इन उपबंधों को कानून की किताब में लाने के पीछे का आशय काउंसलिंग के द्वितीय चरण में संपूर्ण रिक्तियों पर श्रेणीवार आरक्षण लागू करना था तथा न कि ''सेवारत श्रेणी'' एवं ''खुली/ओपन श्रेणी'' के लिए पृथक से – प्रत्यर्थी ने रिक्तियों के संपूर्ण संवर्ग पर उचित रूप से नियम लागू किये – याचिकाएं खारिज। (मोहिता पांडे (डॉ.) वि. म.प्र. राज्य) **(DB)…*69**

***Chikitsa Shiksha Pravesh Niyam, M.P., 2018, Rule 6 – Registration – Amended Definition* – Held – As per amended definition of "registration", after second round of counselling and before Mop-Up round of counselling, registration will be re-opened and except previously registered candidates, other candidates can get themselves registered. [Pooja Sahu (Dr.) Vs. State of M.P.] (DB)…*56**

चिकित्सा शिक्षा प्रवेश नियम, म.प्र., 2018, नियम 6 – रजिस्ट्रीकरण – संशोधित परिभाषा – अभिनिर्धारित – ''रजिस्ट्रीकरण'' की संशोधित परिभाषा के अनुसार, काउंसलिंग के दूसरे चरण के पश्चात् तथा काउंसलिंग के समापन चरण के पूर्व, रजिस्ट्रीकरण पुनः खोला जाएगा एवं पहले से रजिस्ट्रीकृत अभ्यर्थियों को छोड़कर, अन्य अभ्यर्थी अपने आप को रजिस्ट्रीकृत करा सकते हैं। (पूजा साहू (डॉ.) वि. म.प्र राज्य) **(DB)…*56**

***Chikitsa Shiksha Pravesh Niyam, M.P., 2018, Rule 6 & 17(3) – Registration – Change of Category – Permissibility* – Held – Conjoint reading of Rule 6 r/w 17(3) shows that rules do not prohibit petitioner from fresh registration and this course is indeed permissible – Petitioner entitled to get herself registered afresh under UR-NRI quota as per the decision of Central Government regarding lowering down of percentile of certain categories – Petition allowed. [Pooja Sahu (Dr.) Vs. State of M.P.] (DB)…*56**

चिकित्सा शिक्षा प्रवेश नियम, म.प्र., 2018, नियम 6 व 17(3) – रजिस्ट्रीकरण – प्रवर्ग का परिवर्तन – अनुज्ञेयता – अभिनिर्धारित – नियम 6 सहपठित नियम 17(3) का एक

साथ पढ़ा जाना यह दर्शाता है कि नियम याची को नये रजिस्ट्रीकरण से प्रतिषिद्ध नहीं करते हैं तथा यह अनुक्रम वास्तव में अनुज्ञेय है – याची, कुछ प्रवर्गों की प्रतिशतता को कम करने के संबंध में केंद्र सरकार के विनिश्चय के अनुसार स्वयं को अनारक्षित–अनिवासी भारतीय (एन.आर.आई.) कोटा के अंतर्गत नये सिरे से रजिस्ट्रीकृत कराने की हकदार है – याचिका मंजूर। (पूजा साहू (डॉ.) वि. म.प्र राज्य) **(DB)…*56**

Chikitsa Shiksha Pravesh Niyam, M.P., 2018, Rule 14(1) – Term – "Reserved" – Held – The word "reserved" is not used in the sense it is normally used when community based reservation flowing from Article 15/16 of Constitution is being given – Intention of legislature was to give separate source of entry to in-service candidates to the extent of 30% out of total vacancies. [Mohita Pandey (Dr.) Vs. State of M.P.] **(DB)…*69**

चिकित्सा शिक्षा प्रवेश नियम, म.प्र., 2018, नियम 14(1) – शब्द ''आरक्षित'' – अभिनिर्धारित – ''आरक्षित'' शब्द का उपयोग उस अर्थ में नहीं किया गया है जैसा उपयोग सामान्यतः किया जाता है जब संविधान के अनुच्छेद 15/16 से प्रवाहित वाला समुदाय आधारित आरक्षण दिया जाता है – विधायिका का आशय कुल रिक्तियों में से 30 प्रतिशत की सीमा तक सेवारत अभ्यर्थीगण को प्रवेश का एक पृथक स्त्रोत देना था। (मोहिता पांडे (डॉ.) वि. म.प्र. राज्य) **(DB)…*69**

***Chikitsa Shiksha Pravesh Niyam, M.P., 2018, Rule 14(1) & (2) – Term "Vacancies" – Held –* "Vacancies" means all the vacancies and not vacancies confined to "in-service candidates" – Thus vacancy of Rule 14(1) relates to the entire set of vacancies of all subjects available in Government and Private Medical Colleges as well as in dental Hospitals – Contention of petitioners that under Rule 14(1) & (2), "in-service candidates" and "open category candidates" belong to two separate compartments, cannot be accepted. [Mohita Pandey (Dr.) Vs. State of M.P.]** **(DB)…*69**

चिकित्सा शिक्षा प्रवेश नियम, म.प्र., 2018, नियम 14(1) व (2) – शब्द ''रिक्तियां'' – अभिनिर्धारित – ''रिक्तियों'' का अर्थ समस्त रिक्तियों से है तथा न कि ''सेवारत अभ्यर्थियों'' तक सीमित रिक्तियों से – अतः नियम 14(1) की रिक्ति शासकीय एवं निजी चिकित्सा महाविद्यालयों के साथ–साथ दंत चिकित्सालयों में उपलब्ध सभी विषयों की रिक्तियों के संपूर्ण संवर्ग से संबंधित है – याचीगण का यह तर्क कि नियम 14(1) व (2) के अंतर्गत, ''सेवारत अभ्यर्थीगण'' एवं ''खुली/ओपन श्रेणी के अभ्यर्थीगण'' दो पृथक खण्डों से संबंधित हैं, स्वीकार नहीं किया जा सकता। (मोहिता पांडे (डॉ.) वि. म.प्र. राज्य)

(DB)…*69

Chikitsa Shiksha Pravesh Niyam, M.P., 2018 – See – Niji Vyavsayik Shikshan Sanstha (Pravesh Ka Viniyaman Avam Shulk Ka Nirdharan) Adhiniyam, M.P., 2007, Sections 5, 5-A, 5-A(3), 5(7) & 7 **[Shruti Patidar (Ms.) Vs. State of M.P.]** **(DB)…*92**

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routine or casual manner and should be exercised with great circumspection – Trial Court has not considered the merit of appeal at all and remanded the case in a very casual manner – Such remand *de hors* statutory provisions under Order 41 Rules 23, 23A & 25 C.P.C. – Impugned order set aside – Appeal restored to original number before Appellate Court. [Manju Bai (Smt.) Vs. Dashrath] …*53

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 41 नियम 23, 23A व 25 – प्रतिप्रेषण (रिमांड) की शक्ति – अभिनिर्धारित – न्यायालय द्वारा प्रतिप्रेषण की शक्ति का प्रयोग नैत्यिक अथवा आकस्मिक तरीके से नहीं किया जाना चाहिए तथा अत्याधिक सावधानी के साथ प्रयोग किया जाना चाहिए – विचारण न्यायालय ने अपील के गुणदोषों को बिल्कुल भी विचार में नहीं लिया तथा अत्यंत आकस्मिक तरीके से प्रकरण प्रतिप्रेषित किया – उक्त प्रतिप्रेषण सि.प्र.सं. के आदेश 41 नियम 23, 23A व 25 के अंतर्गत कानूनी उपबंधों से असंबद्ध है – आक्षेपित आदेश अपास्त – अपील, अपीली न्यायालय के समक्ष मूल क्रमांक पर पुनःस्थापित। (मंजू बाई (श्रीमती) वि. दशरथ) …*53

***Civil Procedure Code (5 of 1908), Order 41 Rule 25 – Power of Remand* – Held – Order 41 Rule 25 applies when Appellate Court notices an omission on part of trial Court to frame or try any issue or to determine any question of fact which in opinion of appellate Court is essential to the right decision of suit – Remand under Rule 25 is a limited remand in as much as the subordinate Court can try only such issues as are referred to it for trial and having done so, the evidence recorded together with finding and reasons of trial Court are required to be returned to Appellate Court. [Satishchandra Vs. Guddan @ Dashrath] …1742**

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 41 नियम 25 – प्रतिप्रेषण की शक्ति – अभिनिर्धारित – आदेश 41 नियम 25 तब लागू होता है जब अपीली न्यायालय, किसी विवाद्यक को विरचित करने अथवा उसका विचारण करने अथवा तथ्य के किसी प्रश्न को अवधारित करने में विचारण न्यायालय की ओर से किसी लोप पर ध्यान देता है जो कि अपीली न्यायालय की राय में वाद के सही विनिश्चय के लिए आवश्यक है – नियम 25 के अन्तर्गत प्रतिप्रेषण एक सीमित प्रतिप्रेषण है, चूंकि अधीनस्थ न्यायालय केवल ऐसे विवाद्यकों का विचारण कर सकता है जो उसे विचारण के लिए निर्दिष्ट किये गये हों तथा ऐसा करने के पश्चात्, विचारण न्यायालय के निष्कर्षों और कारणों के साथ–साथ अभिलिखित किये गये साक्ष्य को अपीली न्यायालय को वापस करना अपेक्षित है। (सतीशचन्द्र वि. गुड्डन उर्फ दशरथ) …1742

***Civil Procedure Code (5 of 1908), Order 47 Rule 1 – Modifications, Directions & Clarification – Permissibility* – Held – Learned Single Judge modified the order under review and passed certain directions – Virtually writ petition was re-heard on merits – Learned Single Judge exceeded his jurisdiction in passing such order – In a petition under Order 47 Rule 1 CPC,**

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संविधान – अनुच्छेद 226 – बंदी प्रत्यक्षीकरण – बालक की अभिरक्षा – अभिनिर्धारित – पत्नी ने आत्महत्या की – अवयस्क बालक याची के ससुर के साथ रहता है – पति धारा 306 तथा 304–B IPC के अंतर्गत विचारण का सामना कर रहा है, बालक की अभिरक्षा चाहता है – अभिनिर्धारित – याची जैविक पिता, एक नैसर्गिक संरक्षक है तथा एक उच्च शिक्षित तथा प्रतिष्ठित परिवार से संबंध रखता है तथा स्वयं पंजाब नेशनल बैंक में कार्यरत है तथा एक संयुक्त परिवार में रहता है – वह एक आदतन अपराधी नहीं है या आज दिनांक को ज्ञात अपराधी नहीं है – उसके पिता राजपत्रित अधिकारी है – यह नहीं कहा जा सकता कि बालक का भविष्य उसकी अभिरक्षा में सुरक्षित नहीं रहेगा – याची को अभिरक्षा प्रदान की गई – याचिका स्वीकृत। (सागर सक्सेना वि. म.प्र. राज्य) **(DB)…1984**

Constitution – Article 226 – Habeas Corpus – Custody of Child – Maintainability of Petition **– Held – Division Bench of this Court held that *habeas corpus* under Article 226 is maintainable in matter of custody of a child. [Sagar Saxena Vs. State of M.P.] (DB)…1984**

संविधान – अनुच्छेद 226 – बंदी प्रत्यक्षीकरण – बालक की अभिरक्षा – याचिका की पोषणीयता – अभिनिर्धारित – इस न्यायालय की खंड न्यायपीठ ने अभिनिर्धारित किया कि बालक की अभिरक्षा के मामले में अनुच्छेद 226 के अंतर्गत बंदी प्रत्यक्षीकरण याचिका पोषणीय है। (सागर सक्सेना वि. म.प्र. राज्य) **(DB)…1984**

Constitution – Article 226 – Habeas Corpus – Territorial Jurisdiction **– Held – Lady living in State of Chhattisgarh, even assuming that she made complaints to concerned police, it is for the concerned police therein to react to the same – Petitioner cannot be allowed to invoke the jurisdiction within territories of State of M.P. for making the grievance which arise in State of Chhattisgarh – Petition dismissed. [Syed Arshad Rabbani Vs. State of M.P.] (DB)…1888**

संविधान – अनुच्छेद 226 – बंदी प्रत्यक्षीकरण – क्षेत्रीय अधिकारिता – अभिनिर्धारित – महिला छत्तीसगढ़ राज्य में रह रही है, यहां तक कि यह धारणा करते हुए कि उसने संबंधित पुलिस को शिकायतें की, वहां की संबंधित पुलिस उक्त पर कार्रवाई करेगी – याची को छत्तीसगढ़ राज्य में उत्पन्न होने वाली शिकायत के लिए म.प्र. राज्य के राज्यक्षेत्रों के भीतर अधिकारिता का अवलंब लेने की मंजूरी नहीं दी जा सकती – याचिका खारिज। (सैयद अरशद रब्बानी वि. म.प्र. राज्य) **(DB)…1888**

Constitution – Article 226 – Limitation – Repeated Representation **– Held – Apex Court concluded that where the initial representation is rejected, the subsequent representations on the same subject would not extend the period of limitation for filing the writ petition. [Bholeram Raikwar Vs. State of M.P.] (DB)…*81**

संविधान – अनुच्छेद 226 – परिसीमा – बारंबार अभ्यावेदन – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया है कि जहां आरंभिक अभ्यावेदन अस्वीकार किया जाता है, तो उसी विषय पर पश्चात्वर्ती अभ्यावेदन रिट याचिका प्रस्तुत करने के लिए परिसीमा की अवधि का विस्तार नहीं करेंगे। (भोलेराम रैकवार वि. म.प्र. राज्य)**(DB)…*81**

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तीन वर्ष के समाप्त हो जाने के पश्चात् प्रस्तुत किया गया था – तीन साल का वर्जन एक कानूनी वर्जन नहीं है – प्रत्यर्थी को, नई सुधार की हुई अंकसूची याची को जारी करने हेतु निदेशित किया गया – याचिका मंजूर। (शिव कुमार शर्मा वि. द सेक्रेटरी, एम.पी. बोर्ड ऑफ सेकण्डरी एजुकेशन) **…*59**

***Constitution – Article 226 and High Court of Madhya Pradesh Rules, 2008, Chapter XIII, Rule 39 (2) – Stay of Suspension Order – Maintainability of Writ Appeal* – Held – Writ appeal at the behest of State Government against an interim order staying suspension order is maintainable. [State of M.P. Vs. Satya Narayan Dubey] (DB)…1975**

संविधान – अनुच्छेद 226 एवं मध्य प्रदेश उच्च न्यायालय नियम, 2008, अध्याय XIII नियम 39 (2) – निलंबन आदेश को रोका जाना – रिट अपील की पोषणीयता – अभिनिर्धारित – निलंबन आदेश को रोके जाने के अंतरिम आदेश के विरूद्ध राज्य सरकार के आदेश पर रिट अपील पोषणीय है। (म.प्र. राज्य वि. सत्य नारायण दुबे) **(DB)…1975**

***Constitution – Article 226 and Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, (54 of 2002), Section 13 & 14 – Repayment of Loan – Bonafide Litigant* – Held – Cheques given by petitioner were dishonored, they also tried to sell the secured assets – Intention of petitioners not *bonafide*, they are not intending to repay the amount to bank – They cannot be permitted to take technical objections to avoid their liability – Writ remedy is not available to such litigants whose intentions are not *bonafide*. [Mishri Bai (Smt.) Vs. Shubh Laxmi Mahila Cooperative Bank Ltd.] (DB)…1720**

संविधान – अनुच्छेद 226 एवं वित्तीय आस्तियों का प्रतिभूतिकरण और पुनर्गठन तथा प्रतिभूति हित का प्रवर्तन (SARFAESI) अधिनियम, (2002 का 54), धारा 13 व 14 – उधार का प्रतिसंदाय – सद्भाविक मुकदमेबाज – अभिनिर्धारित – याची द्वारा दिये गये चैक अनादृत हो गये थे, उन्होंने प्रतिभूत आस्तियों को विक्रय करने का भी प्रयत्न किया – याचीगण का आशय सद्भाविक नहीं, वे बैंक को राशि का प्रतिसंदाय करने के आशयित नहीं हैं – उन्हें उनके दायित्व से बचने के लिए तकनीकी आपत्तियां लेने की अनुज्ञा नहीं दी जा सकती – ऐसे मुकदमेबाजों को जिनके आशय सद्भाविक नहीं हैं, रिट उपचार उपलब्ध नहीं है। (मिश्री बाई (श्रीमती) वि. शुभ लक्ष्मी महिला कोऑपरेटिव बैंक लि.) **(DB)…1720**

***Constitution – Article 226 and Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, (54 of 2002), Section 18 – Alternative Remedy* – Held – There is nothing which makes it obligatory for this Court to entertain writ petition when efficacious alternative remedy is available to petitioner – DRT is best suited to examine the factual aspect of the case – Petition disposed with liberty to avail alternative remedy of appeal. [Devendra Kumar Rai Vs. State Bank of India] (DB)…*83**

– अभिनिर्धारित – निर्वाचन प्रक्रिया को चुनौती देने वाली रिट याचिका पोषणीय नहीं है – याची को परिणाम घोषित होने के पश्चात्, यदि ऐसी सलाह दी जाए, निर्वाचन याचिका प्रस्तुत करने की स्वतंत्रता प्रदान की जाती है – याचिका खारिज। (रूमाली (श्रीमती) वि. एम.पी. स्टेट इलेक्शन कमीशन भोपाल) **…*91**

***Constitution – Article 226 & 311(2)(b) – Dispensing with Enquiry – Valid Reasons* – Held – Reasons assigned for dispensing with enquiry are based on extraneous considerations and political pressure and are insufficient for dispensing with regular department enquiry – If a preliminary enquiry could be conducted, there is no reason why a formal departmental enquiry was not conducted – Enquiry dispensed with without any valid reason. [Suresh Sharma Vs. State of M.P.] …2006**

संविधान – अनुच्छेद 226 व 311(2)(b) – जांच से अभिमुक्ति प्रदान किया जाना – विधिमान्य कारण – अभिनिर्धारित – जांच से अभिमुक्ति प्रदान करने के लिए दिये गये कारण बाहरी प्रतिफलों/विचारों एवं राजनीतिक दबाव पर आधारित हैं तथा नियमित विभागीय जांच से अभिमुक्ति प्रदान करने के लिए पर्याप्त हैं – यदि एक प्रारंभिक जांच की जा सकती थी, तो इसका कोई कारण नहीं है कि एक औपचारिक विभागीय जांच संचालित क्यों नहीं की गई थी – बिना किसी विधिमान्य कारण के जांच से अभिमुक्ति प्रदान की गई। (सुरेश शर्मा वि. म.प्र. राज्य) **…2006**

***Constitution – Article 227 – Contractual Appointment – Termination – Scope of Interference* – Held – Contract was terminated on basis of non-obtaining requisite marks in ACR – Such orders cannot be termed as stigmatic – Further, relationship between employer and employee are purely contractual – Original contract clearly stipulates that employer on satisfaction of services of the employee would decide as to whether further extension of services can be given – Court cannot give a finding on the sufficiency or otherwise, of the criteria or reason for non-extension of services of appellant – Appeal dismissed. [Mahendra Kori Vs. State of M.P.] (DB)…*87**

संविधान – अनुच्छेद 227 – संविदात्मक नियुक्ति – पर्यवसान – हस्तक्षेप की व्याप्ति – अभिनिर्धारित – **ACR** में अपेक्षित अंक प्राप्त न करने के आधार पर संविदा का पर्यवसान किया गया था – ऐसे आदेशों को कलंकपूर्ण नहीं कहा जा सकता – इसके अतिरिक्त, नियोक्ता तथा कर्मचारी के मध्य संबंध पूर्ण रूप से संविदात्मक होता है – मूल संविदा स्पष्ट रूप से यह अनुबंधित करती है कि नियोक्ता, कर्मचारी की सेवाओं से संतुष्ट होने पर यह विनिश्चित करेगा कि क्या आगे सेवाओं को बढ़ाया जा सकता है – न्यायालय अपीलार्थी की सेवाओं को बढ़ाये न जाने के मापदण्ड या कारण की पर्याप्तता अथवा अन्यथा पर कोई निष्कर्ष नहीं दे सकता – अपील खारिज। (महेन्द्र कोरी वि. म.प्र. राज्य) **(DB)…*87**

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months period is prescribed in Rule 11 to ensure that appointment order is issued with quite promptitude – If appointment order is not issued to successful candidates within 3 months, bond conditions will be treated to be cancelled. [Archana Govind Rao Bhange (Dr.) Vs. State of M.P.] (DB)…*77

चिकित्सा तथा दंत चिकित्सा स्नातकोत्तर पाठ्यक्रम (डिग्री/डिप्लोमा) प्रवेश नियम, म.प्र., 2014, नियम 11 – बंध–पत्र की शर्तों को रद्द किया जाना – अभिनिर्धारित – यह सुनिश्चित करने हेतु कि नियुक्ति आदेश काफी तत्परता से जारी किया गया है, नियम 11 में 3 महीने की कालावधि निर्धारित है – यदि सफल अभ्यर्थियों को 3 माह के भीतर नियुक्ति आदेश जारी नहीं किया जाता है तो बंध–पत्र की शर्तों को निरस्त माना जाएगा। (अर्चना गोविंद राव भांगे (डॉ.) वि. म.प्र. राज्य) **(DB)…*77**

***Medical and Dental Post Graduate Course Admission Rules (Degree/Diploma), M.P., 2014, Rule 11 – Deeming Provision* – Held – As per automatic/deeming clause in Rule 11, if Commissioner failed to issue an appointment order within 3 months, the bond conditions pales into insignificance and cannot be enforced against petitioner – The shelf life of bond was dependent upon issuance of appointment orders within stipulated time which was not done by government. [Rahul Mittal (Dr.) Vs. State of M.P.] (DB)…*70**

चिकित्सा तथा दंत चिकित्सा स्नातकोत्तर पाठ्यक्रम (डिग्री/डिप्लोमा) प्रवेश नियम, म.प्र., 2014, नियम 11 – धारणा उपबंध – अभिनिर्धारित – नियम 11 में स्वतः/धारणा उपबंध के अनुसार, यदि आयुक्त तीन माह के भीतर नियुक्ति आदेश जारी करने में असफल रहता है, तो बंध–पत्र की शर्तें महत्वहीन हो जाती हैं एवं याची के विरूद्ध प्रवर्तित नहीं कराई जा सकतीं – बंध–पत्र की निधानी आयु नियत समय के भीतर नियुक्ति आदेश जारी करने पर निर्भर थी जो कि सरकार द्वारा नहीं किया गया था। (राहुल मित्तल (डॉ.) वि. म.प्र. राज्य) **(DB)…*70**

***Medical and Dental Post Graduate Course Admission Rules (Degree/Diploma), M.P., 2014, Rule 11 – Purpose* – Held – Purpose of Rule 11 is to ensure that soon after the candidate has passed, Dean must send the list of successful candidates to Commissioner, and in turn, Commissioner will appoint them within 3 months therefrom. [Archana Govind Rao Bhange (Dr.) Vs. State of M.P.] (DB)…*77**

चिकित्सा तथा दंत चिकित्सा स्नातकोत्तर पाठ्यक्रम (डिग्री/डिप्लोमा) प्रवेश नियम, म.प्र., 2014, नियम 11 – प्रयोजन – अभिनिर्धारित – नियम 11 का प्रयोजन यह सुनिश्चित करना है कि अभ्यर्थी के उत्तीर्ण करने के तुरंत बाद डीन द्वारा सफल अभ्यर्थियों की सूची कमिश्नर को भेजी जानी चाहिए, और बदले में, कमिश्नर उससे तीन माह के भीतर उन्हें नियुक्त करेगा। (अर्चना गोविंद राव भांगे (डॉ.) वि. म.प्र. राज्य) **(DB)…*77**

Medical Council of India Regulation on Graduate Medical Education, 1997 – See – Niji Vyavsayik Shikshan Sanstha (Pravesh Ka Viniyaman Avam

***Negotiable Instruments Act (26 of 1881), Section 138 & 141 and Criminal Procedure Code, 1973 (2 of 1974), Section 319 – Offence by Firm – Vicarious Liability – Necessary Party* – Held – Cheque issued by firm but complaint filed without any averments with reference to firm – Held – The factum that accused signed the cheque in capacity of director or person in-charge of affairs of firm can be determined during stage of trial – Court can array the firm as accused in the course of trial invoking powers u/S 319 Cr.P.C. – Trial is in its early stage, it is still open for Complainant/Court to array the firm as accused – Cognizance taken by trial Court cannot be quashed – Application dismissed. [Mahesh Singh Jadon Vs. Shri Radha Sharan Dubey] …1969**

परक्राम्य लिखत अधिनियम (1881 का 26), धारा 138 व 141 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 319 – फर्म द्वारा अपराध – प्रतिनिधिक दायित्व – आवश्यक पक्षकार – अभिनिर्धारित – फर्म द्वारा चैक जारी किया गया परंतु फर्म के संदर्भ में बिना किसी प्रकथनों के परिवाद प्रस्तुत किया गया – अभिनिर्धारित – यह तथ्य कि अभियुक्त ने निदेशक अथवा फर्म के कामकाज के प्रभारी व्यक्ति की हैसियत से चैक पर हस्ताक्षर किये, विचारण के प्रक्रम के दौरान अवधारित किया जा सकता है – न्यायालय, दं. प्र.सं. की धारा 319 के अंतर्गत शक्तियों का अवलंब लेते हुए विचारण के दौरान फर्म को अभियुक्त के रूप में दोषारोपित कर सकता है – विचारण अपने प्रारंभिक प्रक्रम पर है, परिवादी/न्यायालय अभी भी फर्म को अभियुक्त के रूप में दोषारोपित कर सकता है – विचारण न्यायालय द्वारा लिया गया संज्ञान अभिखंडित नहीं किया जा सकता – आवेदन खारिज। (महेश सिंह जादौन वि. श्री राधा शरण दुबे) …1969

***Niji Vyavsayik Shikshan Sanstha (Pravesh Ka Viniyaman Avam Shulk Ka Nirdharan) Adhiniyam, M.P. (21 of 2007), Sections 5, 5-A, 5-A(3), 5(7) & 7, Chikitsa Shiksha Pravesh Niyam, M.P., 2018 and Medical Council of India Regulation on Graduate Medical Education, 1997 – Admission – Held* – Petitioner did not participate in any authorized counselling conducted by State – Even for college level counselling, procedure prescribed in Regulations, Admission Rules and Adhiniyam of 2007 are required to be followed – Colleges cannot give admission to candidates on their own – She is not even the most meritorious candidate in her category – Admission granted to petitioner runs contrary to mandatory provisions of law – University rightly did not provide enrollment number to petitioner – Petition dismissed. [Shruti Patidar (Ms.) Vs. State of M.P.] (DB)…*92**

निजी व्यावसायिक शिक्षण संस्था (प्रवेश का विनियमन एवं शुल्क का निर्धारण) अधिनियम, म.प्र. (2007 का 21), धाराएँ 5, 5–A, 5–A (3), 5(7) व 7, चिकित्सा शिक्षा प्रवेश नियम, म.प्र., 2018 एवं भारतीय आयुर्विज्ञान परिषद् स्नातक चिकित्सा शिक्षा पर विनियमावली, 1997 – प्रवेश – अभिनिर्धारित – याची ने राज्य द्वारा आयोजित किसी भी प्राधिकृत काउंसलिंग में भाग नहीं लिया – यहां तक कि महाविद्यालय स्तर की काउंसलिंग के लिए भी, विनियमावली, प्रवेश नियम एवं 2007 के अधिनियम में विहित प्रक्रिया का पालन

दण्ड संहिता (1860 का 45), धारा 141 व 149 – सदस्यों की पहचान – अभिनिर्धारित – यह निष्कर्ष निकालने के लिए कि कोई व्यक्ति धारा 149 के अंतर्गत अपराध का दोषी है, यह साबित किया जाना चाहिए कि उक्त व्यक्ति ''ऐसे विधि–विरूद्ध जमाव'' का सदस्य है जिसमें कम से कम 5 सदस्य हैं, इस तथ्य को ध्यान में रखे बिना कि क्या उनमें से हर एक की पहचान साबित है या नहीं – यदि वह तथ्य साबित है, तो जांच का अगला कदम यह है कि क्या विधि–विरूद्ध जमाव का सामान्य उद्देश्य भारतीय दण्ड संहिता की धारा 141 में निर्दिष्ट किए गए 5 प्रगणित उद्देश्यों में से एक है। (हुकुम सिंह वि. म.प्र. राज्य) **(DB)…*85**

***Penal Code (45 of 1860), Section 143 & 494 – Independent/Interested Witnesses* – Held – PW-4 is father of appellant, he is interested witness – No independent witness or documentary evidence available – In absence of material, substantive and independent evidence, marriage of appellant with respondent No. 2 not proved – Apex Court concluded that if first marriage is not valid, the question of second marriage being legally performed or not would not arise. [Kailash Vs. Gordhan] …1920**

दण्ड संहिता (1860 का 45), धारा 143 व 494 – स्वतंत्र/हितबद्ध साक्षीगण – अभिनिर्धारित – अभियोजन साक्षी–4 अपीलार्थी का पिता है, वह हितबद्ध साक्षी है – कोई स्वतंत्र साक्षी अथवा दस्तावेजी साक्ष्य उपलब्ध नहीं – सामग्री, सारभूत एवं स्वतंत्र साक्ष्य के अभाव में, प्रत्यर्थी क्र. 2 के साथ अपीलार्थी का विवाह साबित नहीं होता – सर्वोच्च न्यायालय ने निष्कर्षित किया है कि यदि प्रथम विवाह विधिमान्य नहीं है, तो दूसरे विवाह के वैध रूप से संपन्न होने अथवा न होने का प्रश्न उत्पन्न नहीं होगा। (कैलाश वि. गोरधन) **…1920**

***Penal Code (45 of 1860), Section 143 & 494 – Strict Proof of Marriage* – Held – Appellant claiming to be first husband of Respondent No. 2 – No independent witnesses or documentary evidence (Voter list/Ration Card) available to establish that respondent No. 2 is wife of appellant – No family members or relatives examined to prove the rites and rituals performed – Adverse inference can be drawn against appellant – There is a lack of strict proof of Bigamy – Respondents rightly acquitted – Appeal dismissed. [Kailash Vs. Gordhan] …1920**

दण्ड संहिता (1860 का 45), धारा 143 व 494 – विवाह का ठोस सबूत – अभिनिर्धारित – अपीलार्थी द्वारा प्रत्यर्थी क्र. 2 के पहले पति होने का दावा किया जाना – यह स्थापित करने हेतु कोई स्वतंत्र साक्षीगण अथवा दस्तावेजी साक्ष्य (मतदाता सूची/राशन कार्ड) उपलब्ध नहीं है कि प्रत्यर्थी क्र. 2, अपीलार्थी की पत्नी है – संपन्न किये गये रीति–रिवाजों को साबित करने के लिए, किन्हीं पारिवारिक सदस्यों अथवा रिश्तेदारों का परीक्षण नहीं किया गया – अपीलार्थी के विरूद्ध प्रतिकूल निष्कर्ष निकाला जा सकता है – द्विविवाह के ठोस सबूत का अभाव है – प्रत्यर्थीगण को उचित रूप से दोषमुक्त किया गया – अपील खारिज। (कैलाश वि. गोरधन) **…1920**

and circumstances of each case – The time of occurrence, distance to police station, mode of conveyance available are all relevant factors to be considered. [Hariram Vs. State of M.P.] (DB)…*84

दण्ड संहिता (1860 का 45), धारा 302 – प्रथम सूचना रिपोर्ट में विलंब – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया कि मात्र रिपोर्ट दर्ज करने में विलंब अपने आप में अभियोजन के प्रकरण के लिए आवश्यक रूप से घातक नहीं है – विलंब पर विचार प्रत्येक प्रकरण के तथ्यों एवं परिस्थितियों की पृष्ठभूमि पर करना होगा – घटना का समय, पुलिस स्टेशन से दूरी, परिवहन का उपलब्ध माध्यम सभी विचार करने योग्य कारक हैं। (हरिराम वि. म.प्र. राज्य) **(DB)…*84**

***Penal Code (45 of 1860), Section 302 – Delayed FIR & Investigation* – FIR lodged after one year of incident – Held – Case is not based on evidence of any witness but primarily based on dying declaration, which was recorded promptly – Omissions and contaminated conduct of police cannot be a ground for acquittal, specifically when guilt of accused is otherwise proved beyond reasonable doubt. [Ajju alias Ajay Vs. State of M.P.] (DB)…*60**

दण्ड संहिता (1860 का 45), धारा 302 – विलंबित प्रथम सूचना प्रतिवेदन तथा अन्वेषण – प्रथम सूचना प्रतिवेदन घटना के एक वर्ष पश्चात् दर्ज किया गया – अभिनिर्धारित – प्रकरण किसी साक्षी के साक्ष्य पर आधारित नहीं परंतु प्राथमिक रूप से मृत्युकालिक कथन पर आधारित है, जिसे तत्काल दर्ज किया गया था – चूक तथा पुलिस का दूषित आचरण दोषमुक्ति का आधार नहीं हो सकता, विशेष रूप से तब जब अभियुक्त का दोष अन्यथा युक्तियुक्त संदेह से परे साबित हो जाता है। (अज्जू उर्फ अजय वि. म.प्र. राज्य) **(DB)…*60**

***Penal Code (45 of 1860), Section 302 – Dying Declaration – Credibility* – Held – It is not the extent of superficial burn which effects state of mind of patient but it is the degree of burn which effects the state of mind – It cannot be held that merely because person sustained 100% burn injuries, he cannot make a dying declaration – Dying declaration recorded by Tehsildar, Oral dying declaration given to husband and motive of offence established by prosecution – Degree of burns, discussed and explained – Appeal dismissed. [Ajju alias Ajay Vs. State of M.P.] (DB)…*60**

दण्ड संहिता (1860 का 45), धारा 302 – मृत्युकालिक कथन – विश्वसनीयता – अभिनिर्धारित – यह सतही जलने की मात्रा नहीं है जो रोगी की मनःस्थिति को प्रभावित करती है बल्कि यह जलने की डिग्री है जो मनःस्थिति को प्रभावित करती है – यह अभिनिर्धारित नहीं किया जा सकता कि मात्र केवल इसलिए कि व्यक्ति को 100% जलने की क्षतियां कारित हुई हैं, वह मृत्युकालिक कथन नहीं कर सकता – तहसीलदार द्वारा अभिलिखित मृत्युकालिक कथन, पति को दिया गया मौखिक मृत्युकालिक कथन तथा अपराध का हेतुक अभियोजन द्वारा स्थापित – जलने की डिग्री, विवेचित एवं स्पष्ट – अपील खारिज। (अज्जू उर्फ अजय वि. म.प्र. राज्य) **(DB)…*60**

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बार अपीलार्थी के साथ जीवित देखा गया था एवं तत्पश्चात् मृतक को नहीं देखा गया – मृतक के लापता होने के संबंध में सुसंगत तथ्य केवल अपीलार्थी को ज्ञात था एवं फिर भी उसने कोई स्पष्टीकरण नहीं दिया तथा कुछ भी प्रकट नहीं करना चुना, अतः अपीलार्थी के विरूद्ध अत्यंत प्रबल उपधारणा की गई कि मृतक की हत्या उसके द्वारा की गई थी – अभियोजन द्वारा हेतु भी स्थापित – अपीलार्थी उचित रूप से दोषसिद्ध – अपील खारिज। (संजय वि. म.प्र. राज्य) **(DB)…1795**

***Penal Code (45 of 1860), Sections 302, 364 & 201 – Recovery of Dead Body* – Held – Apex Court concluded that it is not necessary that dead body of victim should be found and identified i.e. conviction for offence of murder does not necessarily depend upon *corpus delicti* being found. [Sanjay Vs. State of M.P.] (DB)…1795**

दण्ड संहिता (1860 का 45), धाराएँ 302, 364 व 201 – शव की बरामदगी – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया है कि यह आवश्यक नहीं है कि पीड़ित का शव पाया जाना चाहिए तथा उसकी पहचान की जानी चाहिए अर्थात् हत्या के अपराध के लिए दोषसिद्धि आवश्यक रूप से अपराध–सार के पाये जाने पर निर्भर नहीं करती है। (संजय वि. म.प्र. राज्य) **(DB)…1795**

***Penal Code (45 of 1860), Sections 302, 364 & 201 and Criminal Procedure Code, 1973 (2 of 1974), Section 307 – Accomplice Witness – Credibility* – Held – Co-accused himself filed applications for making him approver in the case and made statements u/S 307 Cr.P.C. – His inconsistent statements and silence during examination by Court in itself sufficient to draw inference that he changed his earlier version and was probably win over by appellant – In these circumstances, his earlier whole statement cannot be washed up and can very well be taken into consideration as corroborative piece of evidence. [Sanjay Vs. State of M.P.] (DB)…1795**

दण्ड संहिता (1860 का 45), धाराएँ 302, 364 व 201 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 307 – सह अपराधी साक्षी – विश्वसनीयता – सह–अभियुक्त ने प्रकरण में स्वयं को इकबाली साक्षी बनाने हेतु आवेदन प्रस्तुत किये तथा दं.प्र.सं. की धारा 307 के अंतर्गत कथन किये – उसके असंगत कथन एवं न्यायालय द्वारा परीक्षण के दौरान मौन अपने आप में यह निष्कर्ष निकालने हेतु पर्याप्त है कि उसने उसके पूर्व कथन को बदल दिया और अधिसंभवतः अपीलार्थी द्वारा विश्वास में ले लिया गया – इन परिस्थितियों में, उसके पूर्व के संपूर्ण कथन को बेकार नहीं ठहराया जा सकता तथा भलीभांति साक्ष्य के संपोषक भाग के रूप में विचार में लिया जा सकता है। (संजय वि. म.प्र. राज्य) **(DB)…1795**

***Penal Code (45 of 1860), Section 307 – Nature of Injury* – Held – Single blow injury caused on vital part of body though it was caused on back but it reached to the chest – Doctor stated that injury was grievous and was sufficient to cause death in ordinary course of nature as it was caused by sharp cutting weapon (big knife) – Appellant rightly convicted u/S 307 IPC – As only single injury was caused and appellant did not attempt to hurt**

of prosecutrix was below 18 years – Prosecutrix herself stated that she voluntarily went with appellant on her free will – No evidence to show that she was taken forcibly or was induced by appellant – Where prosecutrix at the age of discretion leaves her parental home and accused simply facilitates her in fulfillment of her desire, it is not kidnapping or abduction – Conviction set aside – Appeal allowed. [Manoj Sahu Vs. State of M.P.] …1912

दण्ड संहिता (1860 का 45), धारा 363 – अभियोक्त्री की आयु – अभिनिर्धारित – अभियोजन यह स्थापित करने में असफल रहा कि अपराध कारित किये जाने के समय, अभियोक्त्री की आयु 18 वर्ष से कम थी – अभियोक्त्री ने स्वयं यह कथन किया कि वह स्वेच्छापूर्वक अपीलार्थी के साथ अपनी इच्छा से गई थी – यह दर्शाने हेतु कोई साक्ष्य नहीं है कि उसे बलपूर्वक ले जाया गया था अथवा अपीलार्थी द्वारा उत्प्रेरित किया गया था – जहां अभियोक्त्री विवेकाधिकार की आयु में अपने माता–पिता का घर छोड़ देती है तथा अभियुक्त उसकी इच्छा पूर्ण करने में केवल उसकी सहायता करता है, वह अपहरण या व्यपहरण नहीं है – दोषसिद्धि अपास्त – अपील मंजूर। (मनोज साहू वि. म.प्र. राज्य) **…1912**

***Penal Code (45 of 1860), Section 363 – Age of Prosecutrix – Proof* – Held – Prosecutrix herself and her father, mother and brother does not know the exact date of birth – Entries in Pragati Patrak of school was not proved by evidence of any school authority – Prosecution not able to prove that at the time of incident prosecutrix was below 18 years of age. [Manoj Sahu Vs. State of M.P.] …1912**

दण्ड संहिता (1860 का 45), धारा 363 – अभियोक्त्री की आयु – सबूत – अभिनिर्धारित – स्वयं अभियोक्त्री को एवं उसके पिता, माता एवं भाई को सटीक जन्मतिथि ज्ञात नहीं – विद्यालय के प्रगति पत्रक की प्रविष्टियों को किसी विद्यालय प्राधिकारी के साक्ष्य द्वारा साबित नहीं किया गया था – अभियोजन यह साबित करने मे सक्षम नहीं रहा कि घटना के समय अभियोक्त्री 18 वर्ष से कम आयु की थी। (मनोज साहू वि. म.प्र. राज्य) **…1912**

***Penal Code (45 of 1860), Section 364A – See – Dakaiti Aur Vyapharan Prabhavit Kshetra Adhiniyam, M.P., 1981, Section 11/13* [Arvind Singh Gurjar Vs. State of M.P.] (DB)…*78**

दण्ड संहिता (1860 का 45), धारा 364A – देखें – डकैती और व्यपहरण प्रभावित क्षेत्र अधिनियम, म.प्र., 1981, धारा 11/13 (अरविन्द सिंह गुर्जर वि. म.प्र. राज्य) **(DB)…*78**

***Penal Code (45 of 1860), Section 494 – Ingredients* – Held – Essential ingredients of offence u/S 494 are (i) accused must have contracted first marriage, (ii) she must have married again, (iii) first marriage must be subsisting and no divorce has taken place, and (iv) first spouse must be living. [Kailash Vs. Gordhan] …1920**

दण्ड संहिता (1860 का 45), धारा 494 – घटक – अभिनिर्धारित – धारा 494 के अंतर्गत अपराध के आवश्यक घटक हैं (i) अभियुक्त ने प्रथम विवाह किया हो, (ii) उसने

लोक न्यास अधिनियम, म.प्र. (1951 का 30), धारा 3 व 34–A – रजिस्ट्रार की शक्तियाँ – शक्ति का प्रत्यायोजन – अभिनिर्धारित – जब तक अधिनियम की धारा 34–A के अंतर्गत एक पृथक अधिसूचना जारी नहीं की जाती, रजिस्ट्रार की शक्तियों को कार्य वितरण ज्ञापन द्वारा उपखंड अधिकारी को प्रत्यायोजित नहीं किया जा सकता – उपखंड अधिकारी को रजिस्ट्रार लोक न्यास की शक्तियों का प्रयोग करने का कोई प्राधिकार नहीं है – आक्षेपित आदेश बिना अधिकारिता का होने के कारण, अभिखंडित। (प्रशांत शर्मा वि. म.प्र. राज्य) …*90

***Qawaid Muafidaran Jujve Araji Va Nakdi, Riyasat Gwalior, Samvat, 1991, Section 3(1) & 4(4) – "Muafi" – Grant of "Nemnuk"* – Held – Muafi means cash or land** (आराजी) **– Instant case is a case of Muafi cash (*nemnuk*) which was given to ancestors of appellant for offering prayer and to serve deities, therefore it cannot be assumed through Act of Samvat 1991 that by way of grant of Muafi Devsthani or *nemnuk*, intention of the Act or native State was to call the temple as Government Temple. [Ramkrishna Sharma Vs. State of M.P.]** …1749

कवाअद माफीदारान जुज्वे आराजी व नक्दी, रियासत ग्वालियर, सम्वत 1991, धारा 3(1) व 4(4) – ''माफी'' – ''नेमनुक'' प्रदान किया जाना – अभिनिर्धारित – ''माफी'' का अर्थ है नगदी अथवा भूमि (आराजी) – वर्तमान प्रकरण माफी नगदी (नेमनुक) का एक प्रकरण है जो कि उपासना करने एवं देवी–देवताओं की सेवा करने के लिए अपीलार्थी के पूर्वजों को दी गई थी, अतः 1991 सम्वत् के अधिनियम के माध्यम से यह धारणा नहीं की जा सकती कि माफी देवस्थानी अथवा नेमनुक प्रदान करने के माध्यम से, अधिनियम अथवा देशी राज्य/रियासत का आशय मंदिर को सरकारी मंदिर कहना था। (रामकृष्ण शर्मा वि. म.प्र. राज्य) …1749

***Rajya Suraksha Adhiniyam, M.P., 1990 (4 of 1991), Section 5 – Externment Orders – Old & Stale Cases – Test of Reasonableness* – Held – Unless and until there is live link between the cases with necessity of externment order, old and stale cases cannot be taken into consideration – No finding by District Magistrate that act of petitioner is causing or calculated to cause alarm, danger or harm to person or property and the witnesses are not coming forward to give evidence in public by reason of apprehension regarding safety of their person or property – Test of reasonableness not satisfied – Impugned order set aside – Petition allowed. [Anwar Khan Jilani Vs. State of M.P.]** …1862

राज्य सुरक्षा अधिनियम, म.प्र., 1990 (1991 का 4), धारा 5 – निष्कासन आदेश – पुराने व घिसे–पिटे प्रकरण – युक्तियुक्तता का परीक्षण – अभिनिर्धारित – जब तक कि निष्कासन आदेश की आवश्यकता वाले प्रकरणों के मध्य सीधा संबंध/जीवन्त कड़ी न हो, पुराने एवं घिसे–पिटे प्रकरणों को विचार में नहीं लिया जा सकता – जिला मजिस्ट्रेट द्वारा ऐसा कोई निष्कर्ष नहीं कि याची का कृत्य शरीर अथवा संपत्ति को संकट अथवा अपहानि कारित करता है या कारित करने का संकेत प्रकल्पित करता है तथा साक्षीगण उनके शरीर अथवा संपत्ति की सुरक्षा के संबंध में आशंका के कारण सार्वजनिक रूप से साक्ष्य देने के

कोई उपबंध नहीं है जो आरंभिक 1000 वर्गमीटर के लिए 50 प्रतिशत प्रतिकर घटाने की आज्ञा देता हो – प्रतिकर का अवधारण सुसंगत भूमि अर्जन अधिनियम जो प्रचलन में है, के अनुसार किया जाना आवश्यक है – कटौती का सिद्धांत 2013 के अधिनियम की धारा 26(1)(a) को दृष्टिगत रखते हुए अन्यदेशीय है – अपीलार्थी का प्रतिकर बिना किन्हीं कटौतियों के कलेक्टर मार्गदर्शिका को लागू कर अवधारित किया जाना चाहिए – निगमों द्वारा प्रस्तुत अपीलें खारिज – दावेदारों द्वारा प्रस्तुत अपीलें मंजूर। (एम.पी. रोड डव्हेलपमेन्ट कारपोरेशन वि. मो. शहाबुद्दीन) **(DB)…1927**

***Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act (30 of 2013), Section 26(1)(a) and Stamp Act, Indian (2 of 1899), Section 75 – Expression "Market Value"* – Held – The new expression employed in Section 26(1)(a) must be given full meaning and effect – The expression "market value" specified in the Stamp Act is not such a dull and lifeless expression which can be ignored. [M.P. Road Development Corporation Vs. Mohd. Shahbuddin] (DB)…1927**

भूमि अर्जन, पुनर्वासन और पुनर्व्यवस्थापन में उचित प्रतिकर और पारदर्शिता का अधिकार अधिनियम (2013 का 30), धारा 26(1)(a) एवं स्टाम्प अधिनियम, भारतीय (1899 का 2), धारा 75 – अभिव्यक्ति ''बाजार मूल्य'' – अभिनिर्धारित – धारा 26(1)(a) में प्रयुक्त की गई नई अभिव्यक्ति को पूर्ण अर्थ एवं प्रभाव दिया जाना चाहिए – स्टाम्प अधिनियम में विनिर्दिष्ट की गई अभिव्यक्ति ''बाजार मूल्य'' ऐसी निष्क्रिय और निर्जीव अभिव्यक्ति नहीं है जिसे अनदेखा किया जा सके। (एम.पी. रोड डव्हेलपमेन्ट कारपोरेशन वि. मो. शहाबुद्दीन) **(DB)…1927**

***Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act (30 of 2013), Section 26(1)(a), Stamp Act, Indian (2 of 1899), Section 75, Preparation & Revision of Market Value Guideline Rules, M.P., 2018, Rules 5, 6 & 7 and National Highways Act (48 of 1956), Section 3G(5) – Collector Guidelines* – Held – Collector guidelines provides determining factors for calculation of market value of land and compensation u/S 26(1)(a) – Collector guidelines having received statutory colour if r/w Section 75 of Stamp Act and provisions of Guideline Rules, 2018, it can certainly become basis for determination of compensation for land acquisition under Highways Act as well. [M.P. Road Development Corporation Vs. Mohd. Shahbuddin] (DB)…1927**

भूमि अर्जन, पुनर्वासन और पुनर्व्यवस्थापन में उचित प्रतिकर और पारदर्शिता का अधिकार अधिनियम (2013 का 30), धारा 26(1)(a), स्टाम्प अधिनियम, भारतीय (1899 का 2), धारा 75, बाजार मूल्य मार्गदर्शक सिद्धांतों का बनाया जाना और उनका पुनरीक्षण नियम, म.प्र., 2018, नियम 5, 6 व 7 एवं राष्ट्रीय राजमार्ग अधिनियम (1956 का 48), धारा 3G(5) – कलेक्टर मार्गदर्शिका – अभिनिर्धारित – कलेक्टर मार्गदर्शिका, भूमि के बाजार मूल्य तथा धारा 26(1)(a) के अंतर्गत प्रतिकर की गणना के लिए अवधारक कारक उपबंधित करती है – कलेक्टर मार्गदर्शिका को कानूनी मान्यता प्राप्त होने पर यदि स्टाम्प अधिनियम

की धारा 75 एवं 2018 के मार्गदर्शक सिद्धांत नियमों के उपबंधों के साथ पढ़ा जाए, तो यह निश्चित रूप से राजमार्ग अधिनियम के अंतर्गत भी भूमि अर्जन के लिए प्रतिकर के अवधारण करने का आधार बन सकती है। (एम.पी. रोड डव्हेलपमेन्ट कारपोरेशन वि. मो. शहाबुद्दीन) **(DB)…1927**

Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, (30 of 2013), Section 33 – Modification/ Correction/Review of Award – Scope & Powers **– Held – Land Acquisition Officer has no power to review original award – Section 33 only empowers Collector to correct any clerical /arithmetical mistakes in the award or errors arising therein, either on his own motion or on application of any interested person or local authority, subject to compliance of other conditions of Section 33 – Proportion of share, determined in original award cannot be corrected u/S 33 – Impugned order has an effect of modifying the original award and is thus set aside – Petition allowed. [Dinendra Parashar Vs. State of M.P.] …*49**

भूमि अर्जन, पुनर्वासन और पुनर्व्यवस्थापन में उचित प्रतिकर और पारदर्शिता का अधिकार अधिनियम, (2013 का 30), धारा 33 – अवार्ड का उपांतरण/सुधार/ पुनर्विलोकन – व्याप्ति व शक्तियां – अभिनिर्धारित – भूमि अर्जन अधिकारी को मूल अवार्ड का पुनर्विलोकन करने की कोई शक्ति नहीं है – धारा 33 केवल कलेक्टर को या तो स्वप्रेरणा से या किसी हितबद्ध व्यक्ति अथवा स्थानीय प्राधिकारी के आवेदन पर अधिनिर्णय में किसी भी लिपिकीय या गणितीय भूल या उसमें उत्पन्न होने वाली गलतियों को धारा 33 की अन्य शर्तों के अनुपालन के अधीन, सुधारने हेतु सशक्त करती है – मूल अवार्ड में अवधारित, अंशों के अनुपात को धारा 33 के अंतर्गत नहीं सुधारा जा सकता – आक्षेपित आदेश मूल अधिनिर्णय को उपांतरित करने का प्रभाव रखता है एवं इसलिए अपास्त किया गया – याचिका मंजूर। (दिनेन्द्र पराशर वि. म.प्र. राज्य) **…*49**

Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, (30 of 2013), Section 64 – Challenge to Award **– Held – If determination of entitlement of compensation is not acceptable to any person interested, remedy is to take recourse of Section 64 wherein determination can be made regarding measurement of land, amount of compensation, person to whom compensation is payable, rights under Chapter V & VI or apportionment of compensation among concerned persons. [Dinendra Parashar Vs. State of M.P.] …*49**

भूमि अर्जन, पुनर्वासन और पुनर्व्यवस्थापन में उचित प्रतिकर और पारदर्शिता का अधिकार अधिनियम, (2013 का 30), धारा 64 – अवार्ड को चुनौती – अभिनिर्धारित – यदि प्रतिकर की हकदारी का अवधारण किसी हितबद्ध व्यक्ति को स्वीकार्य नहीं है, तो उपचार धारा 64 का आश्रय लेना है जिसमें भूमि के माप, प्रतिकर की राशि, व्यक्ति जिसे प्रतिकर देय है, अध्याय V व VI के अंतर्गत अधिकारों अथवा संबंधित व्यक्तियों के बीच प्रतिकर के प्रभाजन के संबंध में अवधारण किया जा सकता है। (दिनेन्द्र पराशर वि. म.प्र. राज्य) **…*49**

सेवा विधि – पदच्युति – नैसर्गिक न्याय का सिद्धांत – सुनवाई का अवसर – अभिनिर्धारित – सेवा से पदच्युति एक मुख्य शास्ति है, उक्त आदेश पारित करने से पूर्व, प्रत्यर्थी को याचीगण को यह दर्शाने हेतु कारण बताओ नोटिस जारी करना चाहिए था कि उनके विरूद्ध पदच्युति का आदेश क्यों नहीं पारित किया जाना चाहिए – नैसर्गिक न्याय के सिद्धांत का पालन नहीं किया गया – प्रत्यर्थी ने मनमाने तथा अनुचित ढंग से कार्य किया – सेवा समाप्ति आदेश भी दूषित है क्योंकि वह अभिकथित अवचार की गंभीरता के अननुपातिक है – आक्षेपित आदेश अपास्त – याचिकाएं मंजूर। (सुरेश शर्मा वि. म.प्र. राज्य) **…2006**

***Service Law – Judicial Services – Requirement of Particulars of Candidate – Particulars of any relative of candidate who is in this profession, was sought* – Held – While selecting a person for judicial service, it is not only essential but it is the duty of authority to know every single particular of candidate as possible – Appointment cannot be made in darkness without knowing background of candidate – Full and complete disclosure is warranted – It would not affect any legal right of petitioner. [Anand Kumar Lowanshi Vs. Hon'ble High Court of M.P.] (DB)…1990**

सेवा विधि – न्यायिक सेवाएं – अभ्यर्थियों के विवरण की आवश्यकता – अभ्यर्थी के किसी संबंधी का विवरण जो इस व्यवसाय में हो, चाहा गया था – अभिनिर्धारित – न्यायिक सेवा के लिए किसी व्यक्ति का चयन करते समय यह न केवल आवश्यक है, बल्कि यह प्राधिकारी का कर्तव्य है कि वह अभ्यर्थी के प्रत्येक विवरण को यथासंभव जाने – अभ्यर्थी की पृष्ठभूमि जाने बगैर अंधेरे में नियुक्ति नहीं की जा सकती – पूरा एवं संपूर्ण प्रकटीकरण आवश्यक है – यह याची के किसी भी विधिक अधिकार को प्रभावित नहीं करेगा। (आनंद कुमार लोवंशी वि. ऑनरेबल हाई कोर्ट ऑफ एम.पी.) **(DB)…1990**

***Service Law – Minimum Marks for Interview – Validity* – Held – Apex Court concluded that prescription of minimum marks for interview is not illegal – In instant case, in advertisement itself, the fixing of minimum marks for interview was published – Candidates were well aware of the existence of such a clause – There is no change of rule of game at a subsequent stage – Petition dismissed. [Anand Kumar Lowanshi Vs. Hon'ble High Court of M.P.] (DB)…1990**

सेवा विधि – साक्षात्कार हेतु न्यूनतम अंक – वैधता – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया कि साक्षात्कार हेतु न्यूनतम अंक निर्धारित करना अवैध नहीं है – वर्तमान प्रकरण में, साक्षात्कार हेतु न्यूनतम अंक का निर्धारण विज्ञापन में ही प्रकाशित किया गया था – अभ्यर्थीगण इस तरह के खंड के अस्तित्व से भली–भांति परिचित थे – उत्तरवर्ती प्रक्रम पर खेल के नियम में कोई बदलाव नहीं है – याचिका खारिज। (आनंद कुमार लोवंशी वि. ऑनरेबल हाई कोर्ट ऑफ एम.पी.) **(DB)…1990**

***Service Law – Preliminary Enquiry Officer – Powers* – Held – Preliminary enquiry officer is under no obligation to take a decision whether**

Service Law – Suspension – Element of Public Interest **– Held – Public interest is also an element on consideration of which employee can be placed under suspension – Merely because it is not alleged that department has suffered any loss, employee does not get any immunity from suspension. [State of M.P. Vs. Satya Narayan Dubey] (DB)…1975**

सेवा विधि – निलंबन – लोक हित का तत्व – अभिनिर्धारित – लोक हित भी एक तत्व है जिसे विचार में लिये जाने पर कर्मचारी को निलंबन के अधीन रखा जा सकता है – मात्र इसलिए कि यह अभिकथित नहीं किया गया है कि विभाग ने कोई हानि सहन की है, कर्मचारी को निलंबन से कोई उन्मुक्ति प्राप्त नहीं होती। (म.प्र. राज्य वि. सत्य नारायण दुबे) **(DB)…1975**

Service Law – Suspension – Scope & Power of Authority **– Held – It is within the province of disciplinary authority to decide whether employee is required to be suspended or not because suspension is a step towards ultimate result of investigation/inquiry. [State of M.P. Vs. Satya Narayan Dubey] (DB)…1975**

सेवा विधि – निलंबन – प्राधिकारी की परिधि व शक्ति – अभिनिर्धारित – इसका विनिश्चय करना कि क्या कर्मचारी को निलंबित करना अपेक्षित है अथवा नहीं, अनुशासनिक प्राधिकारी के कार्यक्षेत्र के भीतर है क्योंकि निलंबन, अन्वेषण/जांच के अंतिम परिणाम की ओर जाने वाला एक कदम है। (म.प्र. राज्य वि. सत्य नारायण दुबे) **(DB)…1975**

Service Law – Suspension – Stigma **– Held – Suspension order does not cast any stigma. [State of M.P. Vs. Satya Narayan Dubey] (DB)…1975**

सेवा विधि – निलंबन – कलंक – अभिनिर्धारित – निलंबन आदेश से कोई कलंक नहीं लगता। (म.प्र. राज्य वि. सत्य नारायण दुबे) **(DB)…1975**

Shaskiya B.S.C. Nursing Mahavidyalayon Main Prashikshan Hetu Chayan Ke Niyam (Selection Rules), Rule 17 and M.P. Online Dwara Counselling Prakriya Ke Liye Niyamavali, Rule 10 – Applicability of Rules **– Held – First set of Rules were prepared for purpose of selection whereas Niyamavali contains special provision for counselling – Impugned order relates to Counselling and therefore Niyamavali will hold the field – As per Rule 10 of Niyamavali, action of department in selecting petitioners in second counselling was in accordance with law. [Kamni Tripathi Vs. State of M.P.] (DB)…*51**

शासकीय बी.एस.सी. नर्सिंग महाविद्यालयों में प्रशिक्षण हेतु चयन के नियम (चयन नियम), नियम 17 एवं म.प्र. ऑनलाईन द्वारा काउंसलिंग प्रक्रिया के लिए नियमावली, नियम 10 – नियमों की प्रयोज्यता – अभिनिर्धारित – नियमों का पहला सेट चयन के प्रयोजन हेतु तैयार किया गया था जबकि नियमावली में काउंसलिंग के लिए विशेष उपबंध अंतर्विष्ट हैं – आक्षेपित आदेश काउंसलिंग से संबंधित है तथा इसलिए नियमावली कायम रहेगी –

Certificates were verified by authorities and were found not genuine therefore there was no need for authorities to give findings on issue of collusion between appellant and purchasers – Having such knowledge, no action taken by appellant against dealers who gave those certificates to him – Appeal dismissed. [Amrit Refined Pvt. Ltd. (M/s) Vs. The Commissioner of Commercial Tax] **(DB)…1950**

वैट अधिनियम, म.प्र., (2002 का 20), धारा 21 – फार्म C प्रमाण–पत्रों की विधिमान्यता – सबूत का भार – अभिनिर्धारित – फार्म **C** के आधार पर, अपीलार्थी ने लाभ उठाया, अतः प्रमाणपत्रों के वास्तविक होने का साक्ष्य प्रस्तुत करने का भार उस पर है – प्रमाण–पत्र, प्राधिकारीगण द्वारा सत्यापित किये गये थे एवं वास्तविक नहीं पाये गये थे, इसलिए प्राधिकारीगण को अपीलार्थी एवं क्रेतागण के मध्य दुस्संधि के विवाद्यक पर निष्कर्ष देने की कोई आवश्यकता नहीं थी – उक्त ज्ञान होते हुए भी, अपीलार्थी द्वारा उन डीलरों के विरूद्ध कोई कार्रवाई नहीं की गई जिन्होंने उसे वे प्रमाण–पत्र दिये थे – अपील खारिज। (अमृत रिफाइन्ड प्रा. लि. (मे.) वि. द कमिश्नर ऑफ कमर्शियल टैक्स) **(DB)…1950**

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THE INDIAN LAW REPORTS M.P. SERIES, 2022

(Vol.-4)

JOURNAL SECTION

FAREWELL

HON'BLE MR. JUSTICE RAJEEV KUMAR SHRIVASTAVA

Born on November 25, 1960. Did B.Sc., LL.B.. Joined Judicial Service as Civil Judge Class-II in the year 1985. Appointed as Civil Judge Class-I in the year 1992. Appointed as C.J.M./A.C.J.M., in the year 1996. Promoted as Officiating District Judge in Higher Judicial Service in the year 1998. Posted as OSD, High Court of M.P. in January 2003 and as OSD, J.O.T.R.I. in February 2003. Posted as Additional Director, J.O.T.R.I. in November 2004. Posted as Additional Registrar, (Judicial-II), High Court of M.P., Jabalpur in the year 2005. Was granted Selection Grade Scale w.e.f. 11.09.2006. Posted as II ADJ & Special Judge, CBI Cases in the year 2009. Posted as Registrar (Administration), National Judicial Academy, Bhopal in the year 2012. Posted as District & Sessions Judge, Barwani in the year 2014. Was granted Super Time Scale w.e.f. 01.02.2015. Posted as District & Sessions Judge, Morena in the year 2016 and as District & Sessions Judge, Indore from August 2017 till elevation. Elevated as Judge of the High Court of Madhya Pradesh on November 19, 2018 and demitted Office on November 24, 2022.

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 RAJEEV KUMAR SHRIVASTAVA, GIVEN ON 24.11.2022, IN THE HIGH COURT OF M.P., BENCH AT GWALIOR.

Hon'ble Mr. Justice Rohit Arya, Administrative Judge, High Court of M.P., Bench Gwalior, bids farewell to the demitting Judge :-

We have gathered today to bid adieu to Hon'ble Justice Shri Rajeev Kumar Shrivastava on the eve of his superannuation as Judge of this Court.

His Lordship has had a venerable and illustrious career. Born on 25th of November 1960 at Pipariya (Hoshangabad), he did his schooling at Raipur, Jabalpur and Rewa. A bright student, he did his B.Sc from Science College, Rewa in 1980 and LL.B from Thakur Ranmat Singh College, Rewa in 1983. After completing LL.B., he was selected for M.P. Judicial Services in his first attempt in the year 1983 and joined as Civil Judge. Thereafter, climbing the success ladder with ease, he went on to become Additional Chief Judicial Magistrate at Pichhore, District Shivpuri, Chief Judicial Magistrate at Raipur, Additional District Judge at Ujjain and then Principal District and Sessions Judge. His Lordship also rendered distinguished and exemplary services as (i) Additional Director, Judicial Officers' Training & Research Institute (JOTRI), Jabalpur (ii) Registrar (Judicial) at Principal Seat, Jabalpur (iii) Special Judge (CBI), Bhopal (iv) Registrar (Administration), National Judicial Academy, Bhopal (v) Principal District and Sessions Judge at Barwani, Morena and Indore. While being Principal District & Sessions Judge, Indore, His Lordship laid down the foundation stone of Indore District Court Building. Thereafter, His Lordship got elevated as permanent Judge of M.P. High Court on 19/11/2018.

I have had the privilege of association with His Lordship in Division Bench and otherwise. A noble and serene personality, His Lordship has always been soft-spoken, prudent and sagacious. His Lordship's sharp legal acumen is writ large; well reflected from his pellucid judgments and orders. Not only on judicial side, His Lordship's fine sense of discernment has been well explicit in administrative matters as well. His Lordship has always been equanimous and unflappable while diligently performing his judicial duties with dignity, rectitude and aplomb-upholding the Constitution, to safeguard the rights of the litigants. He is the embodiment of most desirable qualities reasonably expected of a Judge.

His Lordship has a compassionate and tender heart. He always rose to the occasion to wipe the tears of litigants and hapless people of marginalized section of the society through his sound legal pronouncements. His Lordship has had a vast judicial career during which he has rendered several notable and consequential judgments of high precedential value in almost all domains of litigation. Though it is not practically possible to expatiate on all of them, yet, I'd like to bring to fore the decision rendered in *Gaurav Pandey Vs. Union of India*

and Others in W.P. No. 17704/2018 decided on 26/02/2020 which was a Public Interest Litigation for protection of ecosystem/environment from plastic carry bags. His Lordship speaking for the Division Bench, issued several directions to the State and its instrumentalities for stopping the production and usage of single-use plastic and for promoting non-plastic carry bags made of bio-degradable material. The State was also directed to encourage small-scale industry to manufacture and market such bags/packets, so also to install adequate number of Water Dispensers in the city area to make available pure water to the citizens. Besides, the State was also directed to install plastic bottle crushing machines, as well as, recycling plants at appropriate places. The State was also directed to use plastic / polythene waste for Thermal Electric Production Plant.

In *Anand V. Bhardwaj Vs. State of MP and others*, W.P. 4869/2009; a Public Interest Litigation in respect of District Court Building, several interim directions were issued by His Lordship while sitting in Division Bench to straighten the revenue record wherein names of certain private persons were endorsed over the forest land.

In *Suman Singh Sikarwar Vs. State of M.P. & others* (Writ Petition No.7338/2014), which was a Public Interest Litigation with regard to illegal hoardings, His Lordship speaking for the Division Bench directed that the Madhya Pradesh Outdoor Advertisement Media Rules, 2017 be complied with in their right perspective and the respondents shall control and regulate installation of unauthorised hoardings/flex, in accordance with the aforesaid Rules of 2017.

In *Mukesh Yadav Vs. Union of India and others* (W.P. No.2863/2019), which was a public interest litigation seeking installation of level crossing or Road Over Bridge/ Road Under Bridge at railway crossing at Chituwa-Rawatpur-Datia road in absence whereof villagers, school children and cattle were forced to use the unmanned railway crossing putting their lives in danger, His Lordship speaking for the Division Bench, directed the respondents to take immediate steps for construction of Road Over Bridge (ROB)/ Road Under Bridge (RUB) as per policy in vogue.

The above are few instances of His Lordship's fine sense of judgment espousing the public cause.

The high ethical values of His Lordship have got imbibed in his children as well. His son Captain Rahul is a professional Pilot in Nepal. He has three younger brothers namely Shri Sanjeev Shrivastava, Shri Sandeep Shrivastava, Architects and Shri Sudeep Shrivastava, District & Additional Sessions Judge presently posted as Additional Welfare Commissioner, Bhopal Gas Victims at Bhopal.

In the last, I'd like to say that as the popular saying goes that “Don't simply retire from something; have something to retire to", I am sure, Justice Shrivastava would make most of his time hereafter in creative pursuits, so also with respected

Madam Smt. Malini Shrivastava, his better half, who is present amongst us here and has been a source of strength for him, and other family members.

At this juncture, I am reminded of the famous quote of *Kautilya* in his "Arthshastra"

"*The fragrance of flowers spreads only in the direction of the wind, but the goodness of a person spreads in all directions"*

I, on my behalf and on behalf of my sister and brother Judges and Registry of this Court, wish Hon'ble Justice Shrivastava and his family members, a very happy, healthy, prosperous and glorious future.

May God bestow on them choicest of His blessings for all times to come.

Thank you. God bless you.

Shri Ankur Mody, Addl. Advocate General, M.P., bids farewell:-

Today, we have assembled here to bid farewell to My Lord Hon'ble Shri Justice Rajeev Kumar Shrivastava, who is demitting the office of the Judge of this Hon'ble Court after long and distinguished career. My Lord Shri Justice Rajeev Kumar Shrivastava was born on 25th of November 1960. After completing primary education, His Lordship obtained the degree of B.Sc and LL.B.

My Lord has a vast judicial experience, joined Judicial Service on 4th of November 1985 as Civil Judge Class-II, promoted as Civil Judge Class-I on 08th of September 1992 and then, served as Civil Judge Class I and as Chief Judicial Magistrate at Raipur up-to 4th of September 1998. Thereafter, My Lord was promoted to the post of District Judge on 05th of September 1998. My Lord has also worked as Additional Director, Judicial Officers' Training & Research Institute(JOTRI), Jabalpur and Registrar (Judicial) at the Main Seat, Jabalpur. My Lord assumed the charge of Special Judge (CBI), Bhopal. My Lord got selected through interview as Registrar (Administration), National Judicial Academy, Bhopal by the Board through Interview Board comprising of Hon'ble the Chief Justice of India and by next Senior-most Judge of the Hon'ble Supreme Court.

During his tenure as Judicial Officer, My Lord rendered services at Rewa, Rajendragram, Chhatarpur, Pichhore, Raipur, Ujjain, Multai, Jabalpur, Bhopal, Barwani, Morena & Indore. My Lord served as Principal District & Sessions Judge, Barwani, then Principal District & Sessions Judge, Morena and thereafter, Principal District & Sessions Judge, Indore.

While My Lord was posted as Principal District & Sessions Judge, Indore, had the privilege of part of laying down the foundation stone ceremony of District Court Building in the State of Madhya Pradesh having capacity of 225 Court rooms.

Thereafter, My Lord was elevated to Madhya Pradesh High Court and took oath as the Judge of the Madhya Pradesh High Court on 19th of November 2018.

All through his judicial career, My Lord has upheld the rule of law while also being conscious of the needs of the under-privileged and vulnerable groups of society. It is indeed difficult to spell out the plethora of judgments which bear testimony to his judicial qualities.

I, on behalf of the Government of Madhya Pradesh and its law officers and the office of the Advocate General, would like to convey our gratitude for My Lord Shri Justice Rajeev Kumar Shrivastava's service to this Court. We will always fondly remember his contribution to the rule of law and to this High Court. We wish the very best in his future pursuit and pray for a long, happy and fulfilling life.

Thank you.

Farewell Speech delivered by Hon'ble Mr. Justice Rajeev Kumar Shrivastava :-

My heartfelt gratitude and very Good afternoon to all of you !

At the very outset, I would like to convey my gratitude to my teachers, who contributed a lot for the constant support and kindness extended to me. Today, I stand before all of you in a humble manner for the reason that many of you have thought it fit to attend my farewell function. Yesterday has gone, tomorrow has not arrived yet. I have just one day i.e. "*today*". The best thing about the future is that it comes only one day at a time.

Presence of learned Judges of this Court and other persons is a welcome gesture. Today, I have no words to thank Hon'ble Judges and the Officers of Registry for their support and encouragement shown to me. During my tenure as Judge, I learnt many facets of law and about technical know-how of administration and I got enriched thereby.

The Members of Bar are very kind, accommodative and besides being co-operative and of good assistance to the functioning of Court. The love and affection poured by all of you throughout is indeed a mind-boggling one. Therefore, I am going to say that:

"Members of Bar
are not only the Architects
but Sculpturers of justice.
All of us together,
let us desire,
conceive and create
a beautiful Court like "Mandir".

There can be strong judiciary, with the help of strong Bar. Strong Bar means an intelligent Bar, with full of positivity. To my young lawyers, I would like to say that be kind and gentle to others because life is too short to learn something new.

Ironically, some of my Professors were keen that I should pursue Science, but I was destined otherwise and pursued my career in the field of law. I am privileged to take immense pride, pleasure and honour as I entered into legal profession at the age of around 25 and culminated as a Judge of this esteemed High Court for which, I will be eternally grateful.

It is well-said that the noble deeds of parents flourish their children. Same is with me. Now, I want to remember my father and mother, heavenly abode Shri Ganesh Prasad Shrivastava and Smt. Shail Shrivastava, because of whom, I achieved this dignified position.

Again, I want to convey love to my wife Mrs. Malini, son Cap. Rahul and younger brothers “Sanjeev, Sandeep & Sudeep" for their fullest support during this great journey.

During my last four years as a Judge of High Court and thirty three years as a Judge of District Court, I received tremendous support from all the stakeholders of this institution. I thank the Almighty for sending me to this heaven on earth with talented and beautiful people and for this opportunity to share with judiciary. I am only a small drop in the great Ocean i.e., High Court of M.P..

On a personal note, I would like to extend my special appreciation as well as gratitude to all my attached staff members i.e., Shri Ajay Shrivastava, Shri Barik, Smt. Prachi, Shri Pawan, Shri Shubhankar, Smt. Monika, Ms. Radha, Shri Avadhesh, Shri Deepak, Shri Kuldeep, Shri Dev Singh, Shri Thapa, Shri Ramdeen as well as all the employees deputed in my official residence and many more who are like my family members.

Between friends, there is no need for justice, they only need the quality of friendship; and indeed friendliness is considered to be justice in the fullest sense.

At the end, I would like to convey that the politeness is one of the greatest human qualities. It talks about humble behaviour in life. Politeness is defined as “behaviour which shows respect for others and consideration of their feelings. It is the best way of communication with others".

The word “Judge” is already very-well defined but in my humble opinion, Judge means a person who is a good human being having capacity of patient hearing and is able to hear the cry of poor.

Now, I am leaving this Great Temple with lots of love, affection and memories. Once again, I thank all of you.

Jai Hind !

NOTES OF CASES SECTION

Short Note
**(75)(DB)*
Before Mr. Justice Ravi Malimath, Chief Justice
& Mr. Justice Vishal Mishra

WA No. 692/2022 (Jabalpur) decided on 21 July, 2022

ABHAY KUMAR PANDE …Appellant

Vs.

STATE OF M.P. & anr. …Respondents

***Civil Procedure Code (5 of 1908), Order 47 Rule 1 – Modifications, Directions & Clarification – Permissibility* – Held – Learned Single Judge modified the order under review and passed certain directions – Virtually writ petition was re-heard on merits – Learned Single Judge exceeded his jurisdiction in passing such order – In a petition under Order 47 Rule 1 CPC, making direction, clarifications is beyond powers provided in the provision – All directions issued are set aside – Appeal allowed.**

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 47 नियम 1 – उपांतरण, निदेश व स्पष्टीकरण – अनुज्ञेयता – अभिनिर्धारित – विद्वान एकल न्यायाधीश ने पुनर्विलोकन अधीन आदेश को उपांतरित किया तथा कुछ निदेश पारित किये – वास्तव में रिट याचिका पर गुणदोषों के आधार पर पुनः सुनवाई की गई थी – विद्वान एकल न्यायाधीश उक्त आदेश पारित करने में अपनी अधिकारिता से बाहर गया – सि.प्र.सं. के आदेश 47 नियम 1 के अंतर्गत एक याचिका में निदेश देना, स्पष्टीकरण उपबंध में उपबंधित की गई शक्तियों से परे है – जारी किये गये समस्त निदेश अपास्त – अपील मंजूर।

The order of the Court was passed by : **RAVI MALIMATH, CJ.**

Manoj Sharma assisted by *Parag Tiwari*, for the appellant.
Janhavi Pandit, Dy. A.G. for the respondents.

Short Note
**(76)*
Before Mr. Justice Dinesh Kumar Paliwal

MCRC No. 52807/2020 (Jabalpur) decided on 30 June, 2022

AMAN AHIRWAL …Applicant

Vs.

STATE OF M.P. …Non-applicant

***Criminal Procedure Code, 1973 (2 of 1974), Section 451/457 and Excise Act, M.P. (2 of 1915), Sections 34(1), 47-A(3) & 47-D – Interim Custody of Vehicle – Jurisdiction* – Held – Court having jurisdiction to try offences u/S**

34(1)(a) or 34(1)(b), shall not make any order about disposal, custody etc. of seized vehicle after it has received intimation about initiation of confiscation proceedings from Collector – On 20.10.2020, Magistrate had no jurisdiction to grant interim custody of seized vehicle as it has already received intimation of confiscation proceedings on 10.10.2020 from Collector – Application dismissed.

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 451/457 एवं आबकारी अधिनियम, म.प्र. (1915 का 2), धाराएँ 34(1), 47–A(3) व 47–D – वाहन की अंतरिम अभिरक्षा – अधिकारिता – अभिनिर्धारित – न्यायालय, जिसे धारा 34(1)(a) अथवा धारा 34(1)(b) के अपराधों के विचारण की अधिकारिता है, कलेक्टर से जब्ती की कार्यवाही आरंभ करने की सूचना प्राप्त होने के पश्चात् जब्त वाहन के निपटान, अभिरक्षा आदि के बारे में कोई आदेश नहीं करेगा – 20.10.2020 को मजिस्ट्रेट के पास जब्त वाहन की अंतरिम अभिरक्षा प्रदान करने की कोई अधिकारिता नहीं थी क्योंकि उसे 10.10.2020 को पहले ही कलेक्टर द्वारा जब्ती कार्यवाही की सूचना प्राप्त हो चुकी है – आवेदन खारिज।

Cases referred:

(2002) 10 SCC 283, MCRC No. 30714/2019 decided on 13.08.2019, MCRC No. 23043/2020 decided on 20.08.2020, 2003 (1) MPLJ 638, ILR (2018) MP 2782, ILR (2018) M.P. 1835.

Sandeep Kumar Mishra, for the applicant.
Kamlesh Tamrakar, P.L. for the non-applicant.

Short Note
****(77)(DB)***
Before Mr. Justice Sujoy Paul & Mr. Justice Dwarka Dhish Bansal
WP No. 18370/2021 (Jabalpur) decided on 9 May, 2022

ARCHANA GOVIND RAO BHANGE (DR.) …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

***A. Medical and Dental Post Graduate Course Admission Rules (Degree/Diploma), M.P., 2014, Rule 11 – Bond Conditions – Applicability* – Held – Although posting/appointment order was issued to petitioner, same was not in accordance with Rule 11 because it was issued before completion of his qualification – Thereafter no fresh appointment order or modified order was passed – Petitioner's non-joining will not create any right in favour of State – Bond conditions cannot be enforced against him – Respondents bound to return his original educational qualification documents – Petition partly allowed.**

NOTES OF CASES SECTION

क. चिकित्सा तथा दंत चिकित्सा स्नातकोत्तर पाठ्यक्रम (डिग्री/डिप्लोमा) प्रवेश नियम, म.प्र., 2014, नियम 11 – बंधपत्र की शर्तें – प्रयोज्यता – अभिनिर्धारित – यद्यपि याची को पदस्थापना/नियुक्ति आदेश जारी किया गया था, परंतु वह नियम 11 के अनुसार नहीं था क्योंकि वह उसकी (याची की) अर्हता पूर्ण होने से पहले ही जारी किया गया था – तत्पश्चात् कोई नवीन नियुक्ति आदेश अथवा संशोधित आदेश पारित नहीं किया गया था – याची के पदभार ग्रहण न करने से राज्य के पक्ष में कोई अधिकार स्थापित/पैदा नहीं होगा – बंध–पत्र की शर्तें उस पर लागू नहीं की जा सकती – प्रत्यर्थीगण उसके मूल शैक्षणिक अर्हता दस्तावेज लौटाने के लिए बाध्य हैं – याचिका अंशतः स्वीकार।

***B. Medical and Dental Post Graduate Course Admission Rules (Degree/Diploma), M.P., 2014, Rule 11 – Cancellation of Bond Conditions* – Held – 3 months period is prescribed in Rule 11 to ensure that appointment order is issued with quite promptitude – If appointment order is not issued to successful candidates within 3 months, bond conditions will be treated to be cancelled.**

ख. चिकित्सा तथा दंत चिकित्सा स्नातकोत्तर पाठ्यक्रम (डिग्री/डिप्लोमा) प्रवेश नियम, म.प्र., 2014, नियम 11 – बंध–पत्र की शर्तों को रद्द किया जाना – अभिनिर्धारित – यह सुनिश्चित करने हेतु कि नियुक्ति आदेश काफी तत्परता से जारी किया गया है, नियम 11 में 3 महीने की कालावधि निर्धारित है – यदि सफल अभ्यर्थियों को 3 माह के भीतर नियुक्ति आदेश जारी नहीं किया जाता है तो बंध–पत्र की शर्तों को निरस्त माना जाएगा।

***C. Medical and Dental Post Graduate Course Admission Rules (Degree/Diploma), M.P., 2014, Rule 11 – Purpose* – Held – Purpose of Rule 11 is to ensure that soon after the candidate has passed, Dean must send the list of successful candidates to Commissioner, and in turn, Commissioner will appoint them within 3 months therefrom.**

ग. चिकित्सा तथा दंत चिकित्सा स्नातकोत्तर पाठ्यक्रम (डिग्री/डिप्लोमा) प्रवेश नियम, म.प्र., 2014, नियम 11 – प्रयोजन – अभिनिर्धारित – नियम 11 का प्रयोजन यह सुनिश्चित करना है कि अभ्यर्थी के उत्तीर्ण करने के तुरंत बाद डीन द्वारा सफल अभ्यर्थियों की सूची कमिश्नर को भेजी जानी चाहिए, और बदले में, कमिश्नर उससे तीन माह के भीतर उन्हें नियुक्त करेगा।

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

Bramha Nand Pandey, for the petitioner.
Janhavi Pandit, Dy. A.G. for the respondents.

NOTES OF CASES SECTION

Short Note
**(78)(DB)*

Before Mr. Justice Rohit Arya & Mr. Justice Milind Ramesh Phadke

CRA No. 904/2012 (Gwalior) decided on 25 July, 2022

ARVIND SINGH GURJAR …Appellant

Vs.

STATE OF M.P. …Respondent

***A. Dakaiti Aur Vyapharan Prabhavit Kshetra Adhiniyam, M.P. (36 of 1981), Section 11/13 and Penal Code (45 of 1860), Section 364A – Identity of Accused* – Held – Abductee admits of not having seen appellant either in day or at night during captivity and he named appellant on basis of his letter head (ransom letter) – Letter not sent to hand writing expert – No TIP conducted – Identity of appellant not established beyond reasonable doubt – Demand and acceptance of ransom by appellant also not proved – Conviction set aside – Appeal allowed.**

क. डकैती और व्यपहरण प्रभावित क्षेत्र अधिनियम, म.प्र. (1981 का 36), धारा 11/13 एवं दण्ड संहिता (1860 का 45), धारा 364A – अभियुक्त की पहचान – अभिनिर्धारित – अपहृत ने बंदी रहने के दौरान दिन में या रात में अपीलार्थी को नहीं देखने की बात स्वीकार की तथा उसने अपीलार्थी का नाम उसके लेटर हेड (फिरौती पत्र) के आधार पर लिया – पत्र को हस्तलेख विशेषज्ञ को नहीं भेजा गया – पहचान परेड नहीं करवाई गई – अपीलार्थी की पहचान युक्तियुक्त संदेह से परे स्थापित नहीं – अपीलार्थी द्वारा फिरौती की मांग तथा स्वीकृति भी साबित नहीं – दोषसिद्धि अपास्त – अपील स्वीकृत।

***B. Criminal Procedure Code, 1973 (2 of 1974), Section 161 – Statement of Witnesses – Delay* – Held – Apex Court concluded that delay in recording of statements of witnesses although they were or could be available for examination when IO visited scene of occurrence or soon thereafter, would cast a doubt upon prosecution – In present case, statements recorded after 2 months of lodging FIR – No explanation by prosecution for such inordinate delay.**

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 161 – साक्षीगण के कथन – विलंब – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया कि साक्षीगण के कथन अभिलिखित करने में विलंब, जबकि वे जब अन्वेषण अधिकारी ने घटनास्थल का दौरा किया या उसके तुरंत पश्चात् परीक्षण के लिए उपलब्ध थे अथवा हो सकते थे, अभियोजन पर संदेह उत्पन्न करेंगे – वर्तमान प्रकरण में, प्रथम सूचना रिपोर्ट दर्ज होने के 2 माह पश्चात् कथन अभिलिखित किये गये – असाधारण विलंब के लिए अभियोजन द्वारा कोई स्पष्टीकरण नहीं दिया गया।

The judgment of the Court was delivered by : **ROHIT ARYA, J.**

Cases referred:

AIR 1973 SC 501, AIR 2003 SC 1813, 2004 (3) MPHT 406, (1978) 4 SCC 371, CRA No. 747/2005 decided on 17.12.2014 (Supreme Court), AIR 1973 SC 2751, 1997 (1) JLJ 214, (2013) 9 SCC 516, (2016) 16 SCC 418.

Sushil Goswami, for the appellant.
Rajesh Kumar Shukla, P.P. for the respondent.

Short Note
****(79)(DB)***
Before Mr. Justice Ravi Malimath, Chief Justice &
Mr. Justice Purushaindra Kumar Kaurav
WP No. 5752/2002 (Jabalpur) decided on 29 March, 2022

ASHOK KUMAR …Petitioner

Vs.

DISTRICT & SESSIONS JUDGE, BETUL & ors. …Respondents

A. Constitution – Article 226 – Compulsory Retirement – Grounds **– Held – Scrutiny Committee considered entire service record of petitioner and found that he remained absent unauthorizedly – He was alcoholic, was lacking in honesty and integrity and was found to be inefficient to discharge his official duties – His work was categorized as "ordinary" – Action of respondents was in public interest – Petition dismissed.**

क. संविधान – अनुच्छेद 226 – अनिवार्य सेवानिवृत्ति – आधार – अभिनिर्धारित – छानबीन समिति ने याची के संपूर्ण सेवा अभिलेख पर विचार किया तथा यह पाया कि वह अप्राधिकृत रूप से अनुपस्थित रहा है – वह शराबी था, उसमें ईमानदारी और सत्यनिष्ठा की कमी थी तथा वह उसके पदीय कर्तव्यों के निर्वहन में अक्षम पाया गया था – उसके कार्य को ''सामान्य'' की श्रेणी में रखा गया था – प्रत्यर्थीगण की कार्रवाई लोक हित में थी – याचिका खारिज।

B. Service Law – Compulsory Retirement – Principle of Natural Justice **– Held – Principles of natural justice are not applicable in cases of compulsory retirement – Uncommunicated adverse confidential report can also be taken into consideration while taking the decision regarding compulsory retirement – Power to retire compulsorily a government servant in terms of service rules is absolute, provided the authority concerned forms a *bonafide* opinion that it is in public interest.**

ख. सेवा विधि – अनिवार्य सेवानिवृत्ति – नैसर्गिक न्याय का सिद्धांत – अभिनिर्धारित – नैसर्गिक न्याय के सिद्धांत अनिवार्य सेवानिवृत्ति के प्रकरणों में लागू नहीं

होते – अनिवार्य सेवानिवृत्ति के संबंध में विनिश्चय करते समय असंसूचित प्रतिकूल गोपनीय चरित्रावली को भी विचार में लिया जा सकता है – सेवा नियमों के निबंधनों के अनुसार एक शासकीय सेवक को अनिवार्य रूप से सेवानिवृत्त करने की शक्ति आत्यांतिक है, बशर्ते संबंधित प्राधिकारी एक सद्भाविक राय बनाए कि यह लोक हित में है।

***C. Constitution – Article 226 – Compulsory Retirement – Judicial Review* – Held – There is a limited scope of judicial review in a case of compulsory retirement – It is permissible only on grounds of non-application of mind, *malafides* or want of material particulars.**

ग. संविधान – अनुच्छेद 226 – अनिवार्य सेवानिवृत्ति – न्यायिक पुनर्विलोकन – अभिनिर्धारित – अनिवार्य सेवानिवृत्ति के प्रकरण में न्यायिक पुनर्विलोकन की व्याप्ति सीमित है – यह केवल मस्तिष्क का प्रयोग न किये जाने, असद्भाविकता अथवा तात्विक विशिष्टियों के अभाव के आधारों पर अनुज्ञेय है।

The order of the Court was passed by : **PURUSHAINDRA KUMAR KAURAV, J.**

Cases referred:

(1992) 2 SCC 299, (2010) 10 SCC 693, (1992) 2 SCC 317, (1996) 5 SCC 103, (1997) 6 SCC 228, (1998) 7 SCC 310, (1999) 4 SCC 235.

None, for the petitioner.
Shobha Menon with *Rahul Choubey*, for the respondents.

Short Note
****(80)***
Before Mr. Justice Pranay Verma
MP No. 5052/2019 (Indore) decided on 7 July, 2022

BHANWARLAL & ors. …Petitioners

Vs.

TOOFAN SINGH & anr. …Respondents

***Land Revenue Code, M.P. (20 of 1959), Section 44(2) – Scope & Jurisdiction* – Held – First appeal not decided on merits and was dismissed on ground of limitation only – Second appellate authority has no jurisdiction to enter into the merits of case – If second appellate authority concludes to condone the delay, matter should have been sent back to first appellate authority for decision on merits – Impugned order set aside – Matter remanded back to second appellate authority to decide afresh – Petition allowed.**

भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 44(2) – व्याप्ति व अधिकारिता – अभिनिर्धारित – प्रथम अपील गुणदोषों पर विनिश्चित नहीं की गई और केवल परिसीमा के

आधार पर खारिज की गई थी – द्वितीय अपीली प्राधिकारी को प्रकरण के गुणदोषों में प्रवेश करने की कोई अधिकारिता नहीं – यदि द्वितीय अपीली प्राधिकारी विलंब के लिए माफी निष्कर्षित करता है, मामले को गुणदोषों पर विनिश्चय करने हेतु प्रथम अपीली प्राधिकारी को वापिस भेजा जाना चाहिए था – आक्षेपित आदेश अपास्त – नये सिरे से विनिश्चय करने के लिए मामला द्वितीय अपीली प्राधिकारी को प्रतिप्रेषित किया गया – याचिका मंजूर।

Akash Sharma, for the petitioners.
Jyoti Swaroop Dave, for the respondents.

Short Note
****(81)(DB)***
Before Mr. Justice Ravi Malimath, Chief Justice &
Mr. Justice Purushaindra Kumar Kaurav
WA No. 853/2021 (Jabalpur) decided on 8 April, 2022

BHOLERAM RAIKWAR …Appellant

Vs.

STATE OF M.P. & ors. …Respondents

***A. Service Law – Compassionate Appointment – Policy* – Held – Nothing on record to show that on date of death of deceased employee there was any policy applicable which provides for compassionate appointment to dependent of deceased employee who was working under Contingency Paid Establishment – Appeal dismissed.**

क. सेवा विधि – अनुकंपा नियुक्ति – नीति – अभिनिर्धारित – यह दर्शाने हेतु अभिलेख पर कुछ नहीं है कि मृत कर्मचारी की मृत्यु की तिथि को ऐसी कोई नीति लागू थी जो मृत कर्मचारी जो कि आकस्मिकता से वेतन पाने वाली स्थापना के अधीन कार्य कर रहा था, के आश्रित के लिए अनुकंपा नियुक्ति का उपबंध करती है – अपील खारिज।

***B. Constitution – Article 226 – Compassionate Appointment – Delay* – Held – Father of appellant died on 19.04.2002 – On 26.07.2011, on attaining majority, appellant filed application for compassionate appointment which bore no results – Appellant filed writ petition in the year 2020 – Appellant ought to have approached this Court within reasonable time.**

ख. संविधान – अनुच्छेद 226 – अनुकंपा नियुक्ति – विलंब – अभिनिर्धारित – अपीलार्थी के पिता की मृत्यु दिनांक 19.04.2002 को हुई – दिनांक 26.07.2011 को, वयस्कता प्राप्त होने पर, अपीलार्थी ने अनुकंपा नियुक्ति के लिए आवेदन प्रस्तुत किया जिसका कोई परिणाम नहीं निकला – अपीलार्थी ने वर्ष 2020 में रिट याचिका प्रस्तुत की – अपीलार्थी को युक्तियुक्त समय के भीतर इस न्यायालय के समक्ष आना चाहिए था।

C. Constitution – Article 226 – Limitation – Repeated Representation **– Held – Apex Court concluded that where the initial representation is rejected, the subsequent representations on the same subject would not extend the period of limitation for filing the writ petition.**

ग. संविधान – अनुच्छेद 226 – परिसीमा – बारंबार अभ्यावेदन – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया है कि जहां आरंभिक अभ्यावेदन अस्वीकार किया जाता है, तो उसी विषय पर पश्चात्वर्ती अभ्यावेदन रिट याचिका प्रस्तुत करने के लिए परिसीमा की अवधि का विस्तार नहीं करेंगे।

The order of the Court was passed by : **PURUSHAINDRA KUMAR KAURAV, J.**

Cases referred:

(2020) 18 SCC 511, (2014) 6 SCC 460, 2021 SCC Online SC 1084, 2021 SCC Online SC 299/AIR 2021 SC 1876.

Paresh Pareek, for the appellant.
Rohit Jain, G.A. for the respondents.

Short Note
**(82)*
Before Mr. Justice Dinesh Kumar Paliwal

MCRC No. 35101/2022 (Jabalpur) decided on 26 July, 2022

BHUPENDRA SINGH THAKUR …Applicant

Vs.

UMESH SAHU …Non-applicant

A. Negotiable Instruments Act (26 of 1881), Section 138 – Amendment in Complaint – Scope – Mentioning Wrong Name of Bank **– Held – If due to inadvertence of complainant, name of bank is wrongly mentioned in complaint, same is formal and curable infirmity and can be cured by amendment at any stage before pronouncement of judgment – No dispute about cheque number or amount of cheque – It will not result into any prejudice to accused and will also not change nature of complaint – No error in impugned order – Application dismissed.**

क. परक्राम्य लिखत अधिनियम (1881 का 26), धारा 138 – परिवाद में संशोधन – व्याप्ति – बैंक का गलत नाम उल्लेखित किया जाना – अभिनिर्धारित – यदि परिवादी की असावधानी के कारण, परिवाद में बैंक का नाम गलत उल्लेखित हो गया है, वह एक औपचारिक एवं उपचार योग्य कमी है एवं उसे निर्णय उद्घोषित होने के पूर्व किसी भी प्रक्रम पर संशोधन द्वारा ठीक किया जा सकता है – चैक क्रमांक या चैक की राशि के बारे में

कोई विवाद नहीं – इससे अभियुक्त को कोई पूर्वाग्रह परिणामित नहीं होगा एवं परिवाद की प्रकृति भी नहीं बदलेगी – आक्षेपित आदेश में कोई त्रुटि नहीं – आवेदन खारिज।

***B. Negotiable Instruments Act (26 of 1881), Section 138 – Amendment in Complaint – Scope – Mentioning Wrong Cheque Number* – Held – Coordinate bench of this Court concluded that if wrong cheque number is mentioned in complaint which is a typographical error, can be corrected by filing application, even when the case is fixed for final arguments.**

ख. परक्राम्य लिखत अधिनियम (1881 का 26), धारा 138 – परिवाद में संशोधन – व्याप्ति – गलत चैक क्रमांक उल्लिखित किया जाना – अभिनिर्धारित – इस न्यायालय की समकक्ष न्यायपीठ ने निष्कर्षित किया कि यदि परिवाद में गलत चैक क्रमांक उल्लिखित किया गया है जो कि एक टंकण त्रुटि है, को अंतिम तर्क के लिए मामला लगे होने पर भी आवेदन प्रस्तुत करके सुधारा जा सकता है।

***C. Negotiable Instruments Act (26 of 1881), Section 138 – Amendment in Complaint – Scope – Mentioning Wrong Cheque Number in Notice* – Held – Apex Court concluded that if notice is issued mentioning wrong cheque number, then the entire foundation will fall and complaint cannot be maintained on basis of wrong cheque number.**

ग. परक्राम्य लिखत अधिनियम (1881 का 26), धारा 138 – परिवाद में संशोधन – व्याप्ति – नोटिस में गलत चैक नंबर उल्लिखित किया जाना – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया कि यदि गलत चैक नंबर उल्लिखित करते हुए नोटिस जारी किया जाता है तो पूरा आधार ही धराशायी हो जाएगा एवं गलत चैक नंबर के आधार पर परिवाद पोषणीय नहीं किया जा सकता।

***D. Negotiable Instruments Act (26 of 1881), Section 138 – Amendment in Complaint – Provision in Cr.P.C.* – Held – There is no provision in Cr.P.C. for amendment in complaint but at same time there is also no bar for permitting an amendment – If amendment sought relates to simple infirmity, curable by means of amendment and where no prejudice is caused to other side, Court may permit such amendment.**

घ. परक्राम्य लिखत अधिनियम (1881 का 26), धारा 138 – परिवाद में संशोधन – दं.प्र.सं. में उपबंध– अभिनिर्धारित – परिवाद में संशोधन के लिए दं.प्र.सं. में कोई उपबंध नहीं है लेकिन साथ ही संशोधन की अनुमति देने के लिए कोई वर्जन नहीं है – यदि चाहा गया संशोधन साधारण कमी से संबंधित है, संशोधन द्वारा ठीक किया जा सकता है एवं जहां अन्य पक्ष पर कोई प्रतिकूल प्रभाव कारित नहीं होता, न्यायालय उक्त संशोधन की अनुमति दे सकता है।

NOTES OF CASES SECTION

Cases referred:

(2017) 4 MPLJ 73, (1987) 3 SCC 684, (2015) 9 SCC 609, (2018) 13 SCC 663, (2010) 2 MPLJ 115.

Ajay Kumar Shukla, for the applicant.
None, for the non-applicant.

Short Note
****(83)(DB)***
Before Mr. Justice Sujoy Paul & Mr. Justice Prakash Chandra Gupta
WP No. 12032/2022 (Jabalpur) decided on 13 June, 2022

DEVENDRA KUMAR RAI …Petitioner

Vs.

STATE BANK OF INDIA & ors. …Respondents

***A. Constitution – Article 226 and Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, (54 of 2002), Section 18 – Alternative Remedy* – Held – There is nothing which makes it obligatory for this Court to entertain writ petition when efficacious alternative remedy is available to petitioner – DRT is best suited to examine the factual aspect of the case – Petition disposed with liberty to avail alternative remedy of appeal.**

क. संविधान – अनुच्छेद 226 एवं वित्तीय आस्तियों का प्रतिभूतिकरण और पुनर्गठन तथा प्रतिभूति हित का प्रवर्तन (SARFAESI) अधिनियम, (2002 का 54), धारा 18 – वैकल्पिक उपचार – अभिनिर्धारित – ऐसा कुछ भी नहीं है जो इस न्यायालय को रिट याचिका पर विचार करने के लिए बाध्य करता हो जबकि याची को प्रभावी वैकल्पिक उपचार उपलब्ध हो – डी.आर.टी. प्रकरण के तथ्यात्मक पहलू का परीक्षण करने के लिए सबसे उपयुक्त है – अपील का वैकल्पिक उपचार का लाभ उठाने की स्वतंत्रता के साथ याचिका निराकृत।

***B. Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, (54 of 2002), Section 18 – Words "any order"* – Held – In the appellate provision u/S 18, the expression "any order" is wide enough to include interlocutory order – Several High Courts opined that even interlocutory order passed by DRT can be challenged before Appellate Tribunal by filing appeal u/S 18 of the Act.**

ख. वित्तीय आस्तियों का प्रतिभूतिकरण और पुनर्गठन तथा प्रतिभूति हित का प्रवर्तन (SARFAESI) अधिनियम, (2002 का 54), धारा 18 – शब्द ''कोई भी आदेश'' – अभिनिर्धारित – धारा 18 के अंतर्गत अपीलीय उपबंध में, अभिव्यक्ति ''कोई भी आदेश'' अंतर्वर्ती आदेश को सम्मिलित करने हेतु पर्याप्त है – कई उच्च न्यायालयों का मत था कि

डी.आर.टी. द्वारा पारित अंतर्वर्ती आदेश को भी अधिनियम की धारा 18 के अंतर्गत अपील प्रस्तुत करके अपीलीय अधिकरण के समक्ष चुनौती दी जा सकती है।

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

Cases referred:

(2018) 3 SCC 85, SLP (C) Nos. 13241-13242/2019 decided on 11.05.2022 (Supreme Court), (2010) SCC OnLine Bom 1733, 2011 SCC OnLine Del 1189=AIR 2011 Delhi 196, (2013) SCC OnLine Bom 2098, 2015 SCC OnLine HP 2436.

N.S. Ruprah, for the petitioner.
Prabhanshu Shukla, for the respondents.

Short Note
****(84)(DB)***

Before Mr. Justice G.S. Ahluwalia & Mr. Justice Rajeev Kumar Shrivastava

CRA No. 408/2012 (Gwalior) decided on 27 July, 2022

HARIRAM & anr. …Appellants

Vs.

STATE OF M.P. …Respondent

***A. Penal Code (45 of 1860), Section 302 – Prosecution Witnesses – Credibility* – Held – It is not the quantity of witnesses but the quality of evidence which is important – Although material witnesses have turned hostile, but statement given by wife of deceased is fully corroborated by FIR lodged by deceased himself which appears to have emerged as Dying Declaration – Weapon of offence was recovered from possession of accused – Appellants rightly convicted – Appeal dismissed.**

क. दण्ड संहिता (1860 का 45), धारा 302 – अभियोजन साक्षीगण – विश्वसनीयता – अभिनिर्धारित – साक्ष्य की गुणवत्ता न कि साक्षियों की संख्या महत्वपूर्ण होती है – यद्यपि तात्विक साक्षीगण पक्षद्रोही हो गए हैं परंतु मृतक की पत्नी के द्वारा दिया गया कथन मृतक के स्वयं के द्वारा दर्ज प्रथम सूचना रिपोर्ट से पूर्णतः पुष्ट होता है जो कि मृत्युकालिक कथन के रूप में उभर कर आया है – अपराध का हथियार अभियुक्त के कब्जे से बरामद हुआ था – अपीलार्थीगण की दोषसिद्धि सही – अपील खारिज।

***B. Penal Code (45 of 1860), Section 302 – Delay in FIR* – Held – Apex Court concluded that mere delay in lodging report is not by itself necessarily fatal to prosecution case – Delay has to be considered in background of facts and circumstances of each case – The time of occurrence, distance to police station, mode of conveyance available are all relevant factors to be considered.**

ख. दण्ड संहिता (1860 का 45), धारा 302 – प्रथम सूचना रिपोर्ट में विलंब – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया निकाला कि मात्र रिपोर्ट दर्ज करने में विलंब अपने आप में अभियोजन के प्रकरण के लिए आवश्यक रूप से घातक नहीं है – विलंब पर विचार प्रत्येक प्रकरण के तथ्यों एवं परिस्थितियों की पृष्ठभूमि पर करना होगा – घटना का समय, पुलिस स्टेशन से दूरी, परिवहन का उपलब्ध माध्यम सभी विचार करने योग्य कारक हैं।

C. Penal Code (45 of 1860), Section 302/34 – Constructive Liability **– Held – If common intention leads to commission of criminal offence charged, each one of the persons sharing common intention is constructively liable for criminal act done by one of them.**

ग. दण्ड संहिता (1860 का 45), धारा 302/34 – आन्वयिक दायित्व – अभिनिर्धारित – यदि सामान्य आशय के फलस्वरूप आरोपित दाण्डिक अपराध कारित होता है, तो सामान्य आशय साझा करने वाला प्रत्येक व्यक्ति उनमें से किसी एक व्यक्ति के द्वारा किये गये आपराधिक कृत्य के लिए आन्वयिक रूप से दायी होगा।

D. Penal Code (45 of 1860), Section 302 – FIR & Dying Declaration **– Held – FIR lodged by deceased himself on the following day of incident – FIR shall be treated as dying declaration.**

घ. दण्ड संहिता (1860 का 45), धारा 302 – प्रथम सूचना रिपोर्ट एवं मृत्युकालिक कथन – अभिनिर्धारित – प्रथम सूचना रिपोर्ट घटना दिनांक के अगले दिन मृतक द्वारा स्वयं दर्ज कराया गया – प्रथम सूचना रिपोर्ट मृत्युकालिक कथन के रूप में माना जाएगा।

E. Penal Code (45 of 1860), Section 34 – Fundamental Principles **– Discussed & enumerated.**

ङ. दण्ड संहिता (1860 का 45), धारा 34 – मूलभूत सिद्धांत – विवेचित एवं प्रगणित।

F. Penal Code (45 of 1860), Section 299, 300, Clauses (Firstly to Fourthly) & 304 Part I **– Culpable Homicide, Murder, Intention & Knowledge discussed and explained.**

च. दण्ड संहिता (1860 का 45), धारा 299, 300, खंड (पहले से चौथा) व 304 भाग I – सदोष मानव वध, हत्या, आशय एवं ज्ञान पर विवेचना की गई एवं स्पष्ट किया गया।

The judgment of the Court was delivered by : **RAJEEV KUMAR SHRIVASTAVA, J.**

Cases referred:

AIR 1958 SC 465, 1966 CrLJ 171, (2000) 1 SCC 319, (2003) 9 SCC 322, (2006) 11 SCC 444, (2010) 9 SCC 799, (2019) 5 SCC 639, (2008) 15 SCC 725,

CRA No. 1584/2021 decided on 07.01.2022 (Supreme Court), (2001) 3 SCC 673, (2003) 1 SCC 268, (2020) 4 SCC 126, AIR 1925 PC 1, AIR 1945 PC 148, (1989) 3 SCC 605, (1996) 10 SCC 508, (2000) 4 SCC 110, (2001) 6 SCC 620, (2004) 11 SCC 305, (2011) 12 SCC 120, (2012) 7 SCC 646, 1955 SCR (1) 1083, (2010) 8 SCC 407.

Ashok Kumar Jain, for the appellants.
Sushant Tiwari, PP for the respondent/State.

Short Note
****(85)(DB)***
Before Mr. Justice G.S. Ahluwalia &
Mr. Justice Rajeev Kumar Shrivastava
CRA No. 47/2012 (Gwalior) decided on 7 July, 2022

HUKUM SINGH & ors. …Appellants

Vs.

STATE OF M.P. …Respondent

***A. Penal Code (45 of 1860), Section 141 & 149 – Identity of Members* – Held – For concluding that a person is guilty for offence u/S 149, it must be proved that such person is member of "unlawful assembly" consisting of not less than 5 members irrespective of the fact whether identity of each one of them is proved or not – If that fact is proved, next step of inquiry is whether common object of unlawful assembly in one of the five enumerated objects specified u/S 141 IPC.**

क. दण्ड संहिता (1860 का 45), धारा 141 व 149 – सदस्यों की पहचान – अभिनिर्धारित – यह निष्कर्ष निकालने के लिए कि कोई व्यक्ति धारा 149 के अंतर्गत अपराध का दोषी है, यह साबित किया जाना चाहिए कि उक्त व्यक्ति ''ऐसे विधि–विरूद्ध जमाव'' का सदस्य है जिसमें कम से कम 5 सदस्य हैं, इस तथ्य को ध्यान में रखे बिना कि क्या उनमें से हर एक की पहचान साबित है या नहीं – यदि वह तथ्य साबित है, तो जांच का अगला कदम यह है कि क्या विधि–विरूद्ध जमाव का सामान्य उद्देश्य भारतीय दण्ड संहिता की धारा 141 में निर्दिष्ट किए गए 5 प्रगणित उद्देश्यों में से एक है।

***B. Penal Code (45 of 1860), Section 149 – Common Object – Assessment* – Held – Common object of assembly is normally to be gathered from circumstances of each case such as time and place of gathering of assembly – Conduct of gathering as distinguished from conduct of individual members are indicative of common object – Assessing common object only on basis of overt acts of any individual member is not permissible.**

ख. दण्ड संहिता (1860 का 45), धारा 149 – सामान्य उद्देश्य – मूल्यांकन –

अभिनिर्धारित – जमाव का सामान्य उद्देश्य सामान्यतः प्रत्येक मामले की परिस्थितियों जैसे कि जमाव के समय एवं स्थान से निकाला जाना चाहिए – व्यक्तिगत सदस्यों के आचरण से भिन्न जमाव का आचरण, सामान्य उद्देश्य का संकेत करते हैं – केवल किसी व्यक्तिगत सदस्य के प्रत्यक्ष कृत्यों के आधार पर सामान्य उद्देश्य का मूल्यांकन करने की अनुमति नहीं है।

***C. Penal Code (45 of 1860), Section 149 – Liability of Each Member* – Held – If all necessary ingredients are present in a case where charge is framed u/S 149, each member of unlawful assembly shall be held liable, the condition precedent is that prosecution proves existence of unlawful assembly with a common object.**

ग. दण्ड संहिता (1860 का 45), धारा 149 – प्रत्येक सदस्य का दायित्व – अभिनिर्धारित – किसी प्रकरण में जहां धारा 149 के अंतर्गत आरोप विरचित किए गए हैं यदि सारे आवश्यक तत्व मौजूद हैं, तो विधि–विरूद्ध जमाव का प्रत्येक सदस्य जवाबदार ठहराया जाएगा, इसके लिए पुरोभाव्य शर्त यह है कि अभियोजन सामान्य उद्देश्य के साथ विधि विरूद्ध जमाव की मौजूदगी साबित करें।

***D. Criminal Trial – Non-Examination of Independent Witness* – Held – Apex Court concluded that mere non-examination of independent witness would not be fatal to prosecution case – Failure to examine any available independent witness is inconsequential – It is the quality of evidence and not the number of witnesses, that is relevant.**

घ. दाण्डिक विचारण – स्वतंत्र साक्षियों का परीक्षण नहीं किया जाना – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया कि स्वतंत्र साक्षी का परीक्षण न करना मात्र अभियोजन के मामले के लिए घातक नहीं होगा – किसी भी उपलब्ध स्वतंत्र साक्षी का परीक्षण न कर पाना महत्वहीन है – यह साक्ष्य की गुणवत्ता है और न कि साक्षियों की संख्या जो कि सुसंगत है।

The judgment of the Court was delivered by : **RAJEEV KUMAR SHRIVASTAVA, J.**

Cases referred:

(2014) 14 SCC 222, AIR 1958 SC 465, 1966 Crlj 171, (2000) 1 SCC 319, (2003) 9 SCC 322, (2006) 11 SCC 444, (2010) 9 SCC 799, (2019) 5 SCC 639, (2008) 15 SCC 725, (2004) 13 SCC 203, (1966) 1 SCR 18, (2011) 5 SCC 324, (2021) 6 SCC 116.

J.S. Rathore, for the appellant Nos. 1 to 5 & 7 to 9.
A.K. Nirankari, P.P. for the respondent/State.

NOTES OF CASES SECTION

Short Note
****(86)(DB)***
Before Mr. Justice Ravi Malimath, Chief Justice &
Mr. Justice Purushaindra Kumar Kaurav
WA No. 734/2019 (Jabalpur) decided on 22 March, 2022

KIRTI SHARMA (SMT.) …Appellant

Vs.

JAWAHARLAL NEHRU KRISHI VISHVA VIDYALAYA, JABALPUR & ors. …Respondents

A. ***Service Law – Compassionate Appointment – Married Daughter – Entitlement*** **– Held – Policy denying compassionate appointment to married daughters have been declared unconstitutional by the Full Bench of this Court – Apex Court had also quashed such rules – No reason to deny the benefit of compassionate appointment to appellant – Respondent directed to reinstate appellant with all consequential benefits – Appeal allowed.**

क. *सेवा विधि – अनुकंपा नियुक्ति – विवाहित पुत्री – हकदारी* – अभिनिर्धारित – विवाहित पुत्रियों को अनुकंपा नियुक्ति से वंचित करने की नीति को इस न्यायालय की पूर्ण न्यायपीठ द्वारा असंवैधानिक घोषित किया गया है – सर्वोच्च न्यायालय ने भी ऐसे नियमों को अभिखंडित किया था – अपीलार्थी को अनुकंपा नियुक्ति के लाभ से वंचित करने का कोई कारण नहीं है – अपीलार्थी को सभी परिणामिक लाभों के साथ पुनः स्थापित करने हेतु प्रत्यर्थी को निदेशित किया गया – अपील मंजूर।

B. ***Service Law – Compassionate Appointment – Marital Status – Concealment*** **– Held – When there is no requirement for disclosing marital status in the application form prescribed by University itself, it cannot be said that there was any concealment on part of the appellant.**

ख. *सेवा विधि – अनुकंपा नियुक्ति – वैवाहिक स्थिति – छिपाव* – अभिनिर्धारित – जब स्वयं विश्वविद्यालय द्वारा विहित आवेदन पत्र में वैवाहिक स्थिति प्रकट करने की कोई आवश्यकता नहीं है, यह नहीं कहा जा सकता कि अपीलार्थी की ओर से कोई छिपाव किया गया था।

C. ***Constitution – Article 226 – Applicability of Decision of Court*** **– Held – Every decision of Court applies retrospectively from the date on which the provision came in statute book unless Court directs that judgment would apply prospectively – Court only declares and not make law and thus declaration of law can never be prospective – Only exception is that Apex Court under Article 142 may prospectively either overrule its own judgment or give effect to its own judgment.**

ग. संविधान – अनुच्छेद 226 – न्यायालय के विनिश्चय की प्रयोज्यता – अभिनिर्धारित – न्यायालय का प्रत्येक विनिश्चय कानूनी किताब में उपबंध आने की तिथि से भूतलक्षी रूप से लागू होता है जब तक कि न्यायालय यह निदेशित नहीं करता कि निर्णय भविष्यलक्षी रूप से लागू होगा – न्यायालय केवल विधि की घोषणा करता है तथा उसे बनाता नहीं है एवं इसलिए विधि की घोषणा कभी भी भविष्यलक्षी नहीं हो सकती – एकमात्र अपवाद यह है कि सर्वोच्च न्यायालय अनुच्छेद 142 के अंतर्गत भविष्यलक्षी रूप से या तो अपने स्वयं के निर्णय को उलट सकता है अथवा अपने स्वयं के निर्णय को प्रभावी कर सकता है।

The order of the Court was passed by : **PURUSHAINDRA KUMAR KAURAV, J.**

Case referred:

WA No. 756/2019 decided on 02.03.2020 (FB).

Pratyush Tripathi, for the appellant.
Praveen Dubey, for the respondents.

Short Note
****(87)(DB)***
Before Mr. Justice Ravi Malimath, Chief Justice
& Mr. Justice Purushaindra Kumar Kaurav
WA No. 1091/2019 (Jabalpur) decided on 29 March, 2022

MAHENDRA KORI …Appellant

Vs.

STATE OF M.P. & ors. …Respondents

(Alongwith WA No. 1092/2019)

Constitution – Article 227 – Contractual Appointment – Termination – Scope of Interference **– Held – Contract was terminated on basis of non-obtaining requisite marks in ACR – Such orders cannot be termed as stigmatic – Further, relationship between employer and employee are purely contractual – Original contract clearly stipulates that employer on satisfaction of services of the employee would decide as to whether further extension of services can be given – Court cannot give a finding on the sufficiency or otherwise, of the criteria or reason for non-extension of services of appellant – Appeal dismissed.**

संविधान – अनुच्छेद 227 – संविदात्मक नियुक्ति – पर्यवसान – हस्तक्षेप की व्याप्ति – अभिनिर्धारित – **ACR** में अपेक्षित अंक प्राप्त न करने के आधार पर संविदा का पर्यवसान किया गया था – ऐसे आदेशों को कलंकपूर्ण नहीं कहा जा सकता – इसके अतिरिक्त, नियोक्ता तथा कर्मचारी के मध्य संबंध पूर्ण रूप से संविदात्मक होता है – मूल

संविदा स्पष्ट रूप से यह अनुबंधित करती है कि नियोक्ता, कर्मचारी की सेवाओं से संतुष्ट होने पर यह विनिश्चित करेगा कि क्या आगे सेवाओं को बढ़ाया जा सकता है – न्यायालय अपीलार्थी की सेवाओं को बढ़ाये न जाने के मापदण्ड या कारण की पर्याप्तता अथवा अन्यथा पर कोई निष्कर्ष नहीं दे सकता – अपील खारिज।

The Order of the Court was passed by : **PURUSHAINDRA KUMAR KAURAV, J.**

Case referred:

(1999) 2 SCC 21.

Narinder Pal Singh Ruprah, for the appellant in WA No. 1091/2019 & 1092/2019.

Rohit Jain, G.A. for the respondents in WA No. 1091/2019 & 1092/2019.

Short Note
****(88)***
Before Mr. Justice G.S. Ahluwalia
CRA No. 2713/2021 (Gwalior) decided on 22 July, 2022

MANMOHAN SINGH …Appellant

Vs.

STATE OF M.P. …Respondent

***A. Prevention of Corruption Act (49 of 1988), Section 19(3) & (4) – Non-examination of Sanctioning Authority* – Held – Witness proved the signature of sanctioning authority, he brought the record also – He denied that sanctioning authority issued sanction without going through the papers – Sanction order is a detailed order – Appellant never raised any objection at the earliest stage regarding non-examination of sanctioning authority before trial Court – It cannot be said that sanction was issued without due application of mind.**

क. भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 19(3) व (4) – मंजूरी प्राधिकारी का परीक्षण न किया जाना – अभिनिर्धारित – साक्षी ने मंजूरी प्राधिकारी के हस्ताक्षर साबित किए, वह अभिलेख भी लेकर आया – उसने इंकार किया कि मंजूरी प्राधिकारी ने दस्तावेज देखे बिना मंजूरी जारी कर दी – मंजूरी आदेश एक विस्तृत आदेश है – अपीलार्थी ने विचारण न्यायालय के समक्ष मंजूरी प्राधिकारी का परीक्षण न किये जाने के संबंध में प्रारंभिक प्रक्रम पर कभी कोई आपत्ति नहीं उठाई – यह नहीं कहा जा सकता कि मंजूरी मस्तिष्क का सम्यक् प्रयोग किए बिना जारी की गई थी।

***B. Prevention of Corruption Act (49 of 1988), Sections 7, 13(1)(d) & 13(2) – Complainant turning Hostile – Effect* – Held – The entire evidence of**

a hostile witness would not stand wiped out – Relevant part of evidence of hostile witness which is admissible can be read either in favour of prosecution or defence, provided the same is corroborated from other evidence on record – Even if complainant turned hostile still accused can be held guilty on basis of surrounding circumstances.

ख. भ्रष्टाचार निवारण अधिनियम (1988 का 49), धाराएँ 7, 13(1)(d) व 13(2) – शिकायतकर्ता का पक्षद्रोही होना – प्रभाव – अभिनिर्धारित – पक्षद्रोही साक्षी का संपूर्ण साक्ष्य नहीं हटाया जा सकता – पक्षद्रोही साक्षी के साक्ष्य का सुसंगत हिस्सा जो स्वीकार्य है उसे अभियोजन अथवा बचाव के पक्ष में पढ़ा जा सकता है, बशर्ते अभिलेख पर उपस्थित अन्य साक्ष्यों से उसकी पुष्टि की गई हो – भले ही शिकायतकर्ता पक्षद्रोही हो गया हो फिर भी अभियुक्त को आस–पास की परिस्थितियों के आधार पर दोषी ठहराया जा सकता है।

***C. Prevention of Corruption Act (49 of 1988), Sections 7, 13(1)(d) & 13(2) – Competence of Accused* – Held – Whether accused had a competence or not cannot be an important aspect – The impression in the mind of bribe-giver that the accused would be of some help, is sufficient.**

ग. भ्रष्टाचार निवारण अधिनियम (1988 का 49), धाराएँ 7, 13(1)(d) व 13(2) – अभियुक्त की सक्षमता – अभिनिर्धारित – अभियुक्त के पास सक्षमता थी अथवा नहीं यह एक महत्वपूर्ण पहलू नहीं हो सकता – रिश्वत देने वाले के मन में यह धारणा कि अभियुक्त से कुछ सहायता मिल पाएगी, पर्याप्त है।

***D. Prevention of Corruption Act (49 of 1988), Section 20 – Voice Sample – Adverse Inference* – Held – An adverse inference can be drawn against appellant on his refusal to give sample of his voice.**

घ. भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 20 – आवाज़ का नमूना – प्रतिकूल निष्कर्ष – अभिनिर्धारित – अपीलार्थी द्वारा अपनी आवाज़ का नमूना देने से मना करने पर उसके विरूद्ध प्रतिकूल निष्कर्ष निकाला जा सकता है।

***E. Criminal Procedure Code, 1973 (2 of 1974), Section 195 & 340 – Preliminary Enquiry* – Held – By proceeding u/S 340 Cr.P.C., Court does not record guilt of accused, but it is merely a *prima facie* opinion that it is expedient in interest of justice that an inquiry should be made into the alleged offence – Where Court is otherwise in a position to form an opinion regarding making of complaint, then Court may dispense with preliminary inquiry.**

ङ. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 195 व 340 – प्रारंभिक जांच – अभिनिर्धारित – दं.प्र.सं. की धारा 340 की कार्यवाही द्वारा न्यायालय अभियुक्त का दोष अभिलिखित नहीं करता है, परंतु यह मात्र एक प्रथम दृष्ट्या राय है कि न्यायहित में यह समीचीन है कि कथित अपराध की जांच की जाये – जहां न्यायालय शिकायत करने के संबंध में अन्यथा राय बनाने की स्थिति में हो, तब न्यायालय प्रारंभिक जांच से अभिमुक्ति प्रदान कर सकता है।

Cases referred:

(2013) 8 SCC 119, (2015) 14 SCC 186, AIR 1979 SC 677, AIR 1973 SC 2131, (2014) 3 SCC 421, (2015) 2 SCC 662, (2010) 12 SCC 142, (1980) 2 SCC 390, (2012) 5 SCC 777, (2001) 1 SCC 691, (2019) 14 SCC 311, (2019) 8 SCC 1, (1976) 3 SCC 46, (1992) 3 SCC 178, (2019) 11 SCC 575, (2017) 1 SCC 113, (2018) 11 SCC 659, (2002) 1 SCC 253.

Sanjay Gupta, for the appellant.
Ajay Kumar Chaturvedi, for the respondent.

Short Note
****(89)***
Before Mr. Justice Dinesh Kumar Paliwal
MCRC No. 20820/2019 (Jabalpur) decided on 2 August, 2022

MIRZA SALEEM BEG …Applicant

Vs.

DINESH NATH KASHYAP …Non-applicant

***Negotiable Instruments Act (26 of 1881), Section 138 – Amendment in Complaint – Scope – Wrong Name of Accused* – Held – It is not a case of accused that cheque was not drawn by him, or is not of his account or it was stolen or missed otherwise – Offence u/S 138 is person specific – During entire trial accused took no objection – Even at a stage where case is fixed for final arguments and written arguments are submitted by parties, amendment application rightly allowed as it was related to a simple infirmity curable by formal amendment – Application dismissed.**

परक्राम्य लिखत अधिनियम (1881 का 26), धारा 138 – शिकायत में संशोधन – व्याप्ति – अभियुक्त का गलत नाम – अभिनिर्धारित – अभियुक्त का यह प्रकरण नहीं है कि चैक उसके द्वारा जारी नहीं किया गया था, अथवा उसके खाते का नहीं है अथवा वह किसी प्रकार चोरी या गुम हो गया था – धारा 138 के अंतर्गत अपराध व्यक्ति विनिर्दिष्ट है – संपूर्ण विचारण के दौरान अभियुक्त ने कोई आपत्ति नहीं की – यहां तक कि ऐसे प्रक्रम पर जहां प्रकरण अंतिम तर्क के लिए नियत है तथा पक्षकारों द्वारा लिखित तर्क प्रस्तुत किये जा चुके हैं, संशोधन आवेदन को उचित रूप से मंजूर किया गया क्योंकि वह एक साधारण कमी से संबंधित था जिसे औपचारिक संशोधन द्वारा ठीक किया जा सकता था – आवेदन खारिज।

Cases referred:

2017 (4) MPLJ 73, 2015 (9) SCC 609, 2018 (13) SCC 663, 1987 (3) SCC 684, 2021 (9) TMI 145.

Sharad Gupta, for the applicant.
Shishir Kumar Soni, for the non-applicant.

Short Note
****(90)***
Before Mr. Justice G.S. Ahluwalia
WP No. 8001/2022 (Gwalior) decided on 27 July, 2022

PRASHANT SHARMA …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

Public Trusts Act, M.P. (30 of 1951), Section 3 & 34-A – Powers of Registrar – Delegation of Power **– Held – Unless and until a separate notification u/S 34-A of the Act is issued, the powers of registrar cannot be delegated to SDO by work distribution memo – SDO has no authority to exercise powers of Registrar Public Trust – Impugned order being without jurisdiction is quashed.**

लोक न्यास अधिनियम, म.प्र. (1951 का 30), धारा 3 व 34–A – रजिस्ट्रार की शक्तियाँ – शक्ति का प्रत्यायोजन – अभिनिर्धारित – जब तक अधिनियम की धारा 34–A के अंतर्गत एक पृथक अधिसूचना जारी नहीं की जाती, रजिस्ट्रार की शक्तियों को कार्य वितरण ज्ञापन द्वारा उपखंड अधिकारी को प्रत्यायोजित नहीं किया जा सकता – उपखंड अधिकारी को रजिस्ट्रार लोक न्यास की शक्तियों का प्रयोग करने का कोई प्राधिकार नहीं है – आक्षेपित आदेश बिना अधिकारिता का होने के कारण, अभिखंडित।

Cases referred:

WP No. 26995/2021 decided on 12.07.2022, MA No. 4917/2009 decided on 15.02.2018.

P.C. Chandil, for the petitioner.
Deepak Khot, G.A. for the respondents.

Short Note
****(91)***
Before Mr. Justice G.S. Ahluwalia
WP No. 15767/2022 (Gwalior) decided on 12 July, 2022

RUMALI (SMT.) …Petitioner

Vs.

M.P. STATE ELECTION COMMISSION BHOPAL & ors. …Respondents

Constitution – Article 226 & 243-O – Election Process – Maintainability of Petition **– Held – Writ petition challenging the election process is not**

maintainable – Liberty granted to petitioner to file election petition, if so advised, after result is declared – Petition dismissed.

संविधान – अनुच्छेद 226 व 243–O – निर्वाचन प्रक्रिया – याचिका की पोषणीयता – अभिनिर्धारित – निर्वाचन प्रक्रिया को चुनौती देने वाली रिट याचिका पोषणीय नहीं है – याची को परिणाम घोषित होने के पश्चात् यदि ऐसी सलाह दी जाए, निर्वाचन याचिका प्रस्तुत करने की स्वतंत्रता प्रदान की जाती है – याचिका खारिज।

Cases referred:

WA No. 809/2022 decided on 11.07.2022 (DB), WA No. 808/2022 decided on 11.07.2022 (DB), WP No. 15069/2022 decided on 08.07.2022.

S.K. Sharma, for the petitioner.
Jitesh Sharma, G.A. for the State.
Siddharth Sharma, for the respondent No. 2.

Short Note
****(92)(DB)***
Before Mr. Justice Sujoy Paul & Mr. Justice Dwarka Dhish Bansal
WP No. 8499/2021 (Jabalpur) decided on 4 May, 2022

SHRUTI PATIDAR (MS.) …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

***Niji Vyavsayik Shikshan Sanstha (Pravesh Ka Viniyaman Avam Shulk Ka Nirdharan) Adhiniyam, M.P. (21 of 2007), Sections 5, 5-A, 5-A(3), 5(7) & 7, Chikitsa Shiksha Pravesh Niyam, M.P., 2018 and Medical Council of India Regulation on Graduate Medical Education, 1997 – Admission* – Held – Petitioner did not participate in any authorized counselling conducted by State – Even for college level counselling, procedure prescribed in Regulations, Admission Rules and Adhiniyam of 2007 are required to be followed – Colleges cannot give admission to candidates on their own – She is not even the most meritorious candidate in her category – Admission granted to petitioner runs contrary to mandatory provisions of law – University rightly did not provide enrollment number to petitioner – Petition dismissed.**

निजी व्यावसायिक शिक्षण संस्था (प्रवेश का विनियमन एवं शुल्क का निर्धारण) अधिनियम, म.प्र. (2007 का 21), धाराएँ 5, 5–A, 5–A (3), 5(7) व 7, चिकित्सा शिक्षा प्रवेश नियम, म.प्र., 2018 एवं भारतीय आयुर्विज्ञान परिषद् स्नातक चिकित्सा शिक्षा पर विनियमावली, 1997 – प्रवेश – अभिनिर्धारित – याची ने राज्य द्वारा आयोजित किसी भी प्राधिकृत काउंसलिंग में भाग नहीं लिया – यहां तक कि महाविद्यालय स्तर की काउंसलिंग के लिए भी, विनियमावली, प्रवेश नियम एवं 2007 के अधिनियम में विहित प्रक्रिया का पालन

किया जाना अपेक्षित है – महाविद्यालय स्वयं से अभ्यर्थीगण को प्रवेश नहीं दे सकते – वह उसके प्रवर्ग की सबसे मेधावी अभ्यर्थी भी नहीं है – याची को प्रदान किया गया प्रवेश विधि के आज्ञापक उपबंधों के प्रतिकूल है – विश्वविद्यालय ने उचित रूप से याची को नामांकन क्रमांक प्रदान नहीं किया – याचिका खारिज।

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

Cases referred:

W.P. (C) No. 40/2018 decided on 24.02.2021 (Supreme Court), 2021 SCC Online SC 318, W.P. No. 11117/2019 decided on 27.07.2019 (DB), LAWS (DLH) 2019 (8) 127, (2016) 9 SCC 412, 2021 SCC OnLine SC 627.

Aditya Sanghi, for the petitioner.
Janhavi Pandit, Dy. A.G. for the respondent No. 1 & 2/State.
Siddharth Sharma and *Pranay Shukla*, for the respondent No. 3.
Paritosh Gupta, for the respondent No. 4.

Short Note
****(93)***
Before Mr. Justice Dinesh Kumar Paliwal
MCRC No. 18141/2018 (Jabalpur) decided on 27 July, 2022

SUNIL …Applicant

Vs.

SATYENDRA SINGH & anr. …Non-applicants

***Negotiable Instruments Act (26 of 1881), Section 138 and Legal Services Authorities Act (39 of 1987), Section 21 – Settlement in Lok Adalat at Appellate Stage – Second Complaint – Maintainability* – Held – If criminal case referred by Magistrate/Session Judge to Lok Adalat, is settled by parties and award is passed, it is deemed to be a decree of Civil Court u/S 21 of 1987 Act – Cheque given in settlement before Lok Adalat will be held as issued against legally enforceable debt/liability – Complaint u/S 138 for dishonour of such cheque shall be maintainable and it cannot be termed as second complaint – Application dismissed.**

परक्राम्य लिखत अधिनियम (1881 का 26), धारा 138 एवं विधिक सेवा प्राधिकरण अधिनियम (1987 का 39), धारा 21 – अपीलीय प्रक्रम पर लोक अदालत में समझौता – द्वितीय परिवाद – पोषणीयता – अभिनिर्धारित – यदि मजिस्ट्रेट/सत्र न्यायाधीश द्वारा लोक अदालत को निर्देशित आपराधिक प्रकरण का पक्षकारों द्वारा समाधान किया जाता है तथा अवार्ड पारित हो जाता है, उसे 1987 के अधिनियम की धारा 21 के अंतर्गत सिविल न्यायालय की डिक्री समझा जाएगा – लोक अदालत के समक्ष समझौते में दिये गये चैक विधि द्वारा प्रवर्तनीय ऋण/दायित्व के विरूद्ध जारी किये माने जाएंगे – धारा 138 के

अंतर्गत उक्त चैक के अनादर के लिए परिवाद पोषणीय होगा तथा इसे द्वितीय परिवाद नहीं कहा जा सकता – आवेदन खारिज।

Cases referred:

2016 (1) JLJ 118, (2020) 16 SCC 118.

Abdul Waheed Choudhary with *Saiyad Zahiruddin*, for the applicant.
Shashank Upadhyay, for the non-applicant No. 1.
Amit Kumar Sharma, G.A. for the non-applicant No. 2.

Short Note
****(94)***
Before Mr. Justice G.S. Ahluwalia
WP No. 4131/2017 (Gwalior) decided on 26 July, 2022

URMILA SINGH (SMT.) …Petitioner

Vs.

SAUDAN SINGH & ors. …Respondents

***A. Civil Procedure Code (5 of 1908), Order 26 Rule 10(A) and Evidence Act (1 of 1872), Section 45 & 112 – Legitimacy of Child – DNA Test & Presumption* – Held – It is not a case of petitioner that 'H' was born prior to her marriage – Presumption u/S 112 of Evidence Act is a rebuttable presumption and petitioner will get every opportunity to rebut the said presumption in the trial – Application for DNA test rightly rejected – Petition dismissed.**

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 26 नियम 10(A) एवं साक्ष्य अधिनियम (1872 का 1), धारा 45 व 112 – बालक का धर्मजत्व – DNA परीक्षण व उपधारणा – अभिनिर्धारित – याची का प्रकरण यह नहीं है कि 'H' का जन्म, उसके विवाह से पूर्व हुआ था – साक्ष्य अधिनियम की धारा 112 के अंतर्गत उपधारणा, एक खंडनीय उपधारणा है और याची को विचारण में उक्त उपधारणा का खंडन करने का हर अवसर प्राप्त होगा – डीएनए परीक्षण हेतु आवेदन उचित रूप से अस्वीकार किया गया था – याचिका खारिज।

***B. Evidence Act (1 of 1872), Section 45 & 112 – Legitimacy of Child – DNA/Blood Test & Presumption* – Held – Apex Court concluded that Courts in India cannot order blood test as matter of course – There must be a strong *prima facie* case that husband had no access in order to dispel the presumption – Court must carefully examine as to what would be the effect of branding a child as illegitimate or mother as an unchaste woman – Directions for conducting DNA test is also violative of privacy of individual.**

ख. साक्ष्य अधिनियम (1872 का 1), धारा 45 व 112 – बालक का धर्मजत्व – डीएनए/रक्त परीक्षण व उपधारणा – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया है कि भारत के न्यायालय रक्त परीक्षण अनिवार्यता के रूप में आदेशित नहीं कर सकते – उपधारणा को दूर करने के लिए एक प्रबल प्रथम दृष्ट्या प्रकरण होना चाहिए कि पति की पहुंच नहीं थी – न्यायालय को सावधानीपूर्वक परीक्षण करना चाहिए कि एक बालक को अधर्मज या मां को अपवित्र महिला के रूप में कलंकित करने का प्रभाव क्या होगा – डीएनए परीक्षण कराये जाने हेतु निर्देश, व्यक्ति की निजता का भी उल्लंघन है।

Cases referred:

2022 (2) MPLJ 38, 2005 (4) SCC 449, (2022) 1 SCC 20.

P.C. Chandil, for the petitioner.
None, for the respondents.

I.L.R. 2022 M.P. 1975 (DB)

Before Mr. Justice Sujoy Paul & Mr. Justice Dwarka Dhish Bansal

WA No. 447/2022 (Jabalpur) decided on 13 May, 2022

STATE OF M.P. & anr. …Appellants

Vs.

SATYA NARAYAN DUBEY …Respondent

A. Constitution – Article 226 – Suspension Order – Scope of Interference **– Held – In imputation of charges, it is clearly mentioned that respondent's involvement cannot be ruled out – Whether or not employer will be able to establish it in the inquiry is not the subject matter of adjudication at this stage – If respondent, a senior officer, is re-instated by staying suspension order, he can scuttle the inquiry or investigation or can win over the witnesses – Single Judge erred in staying the suspension order – Impugned order set aside – Appeal allowed. (Para 26 & 29)**

क. संविधान – अनुच्छेद 226 – निलंबन आदेश – हस्तक्षेप की व्याप्ति – अभिनिर्धारित – आरोपों के अभ्यारोपण में, यह स्पष्ट रूप से उल्लिखित है कि प्रत्यर्थी की संलिप्तता से इंकार नहीं किया जा सकता – क्या नियोक्ता इसे जांच में स्थापित कर पायेगा अथवा नहीं, यह इस प्रक्रम पर न्यायनिर्णयन की विषयवस्तु नहीं है – यदि प्रत्यर्थी, एक वरिष्ठ अधिकारी, को निलंबन आदेश पर रोक लगाकर बहाल किया जाता है तो वह जांच अथवा अन्वेषण को बिगाड़ सकता है या साक्षीगण को राजी कर सकता है – एकल न्यायाधीश ने निलंबन आदेश रोकने में गलती की है – आक्षेपित आदेश अपास्त – अपील मंजूर।

B. Constitution – Article 226 – Suspension Order – Validity **– Held – Whether charges are baseless, malicious or vindictive, cannot be gone into at the stage of examining the validity of suspension order – This Court earlier concluded that at the stage of suspension the correctness of allegations are not required to be looked into. (Para 22)**

ख. संविधान – अनुच्छेद 226 – निलंबन आदेश – विधिमान्यता – अभिनिर्धारित – क्या आरोप आधारहीन, दुर्भावपूर्ण या प्रतिशोधी हैं इसका विचार निलंबन आदेश की विधिमान्यता के परीक्षण के प्रक्रम पर नहीं किया जा सकता – इस न्यायालय ने पूर्व में निष्कर्षित किया है कि निलंबन के प्रक्रम पर, अभिकथनों की सत्यता को विचार में लेना अपेक्षित नहीं है।

C. Constitution – Article 226 and High Court of Madhya Pradesh Rules, 2008, Chapter XIII, Rule 39 (2) – Stay of Suspension Order – Maintainability of Writ Appeal **– Held – Writ appeal at the behest of State Government against an interim order staying suspension order is maintainable. (Para 19)**

ग. संविधान – अनुच्छेद 226 एवं मध्य प्रदेश उच्च न्यायालय नियम, 2008, अध्याय XIII नियम 39 (2)– निलंबन आदेश को रोका जाना – रिट अपील की पोषणीयता – अभिनिर्धारित – निलंबन आदेश को रोके जाने के अंतरिम आदेश के विरूद्ध राज्य सरकार के आदेश पर रिट अपील पोषणीय है।

***D. Civil Services (Classification, Control and Appeal) Rules, M.P. 1966, Rule 9(1)(a) – Suspension* – Held – As per CCA Rules, employee can be placed under suspension during pendency of investigation, inquiry or trial – One such ingredient on strength of which suspension order can be passed is available against respondent – It cannot be said that suspension order is passed without there being any reason at all. (Para 20)**

घ. सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966, नियम 9(1)(a) – निलंबन – अभिनिर्धारित – वर्गीकरण, नियंत्रण व अपील नियमों के अनुसार, कर्मचारी को अन्वेषण, जांच या विचारण के लंबित रहने के दौरान निलंबन के अधीन रखा जा सकता है – एक ऐसा घटक जिसके बल पर निलंबन का आदेश पारित किया जा सकता है, प्रत्यर्थी के विरूद्ध उपलब्ध है – यह नहीं कहा जा सकता कि निलंबन आदेश को बिल्कुल बिना कोई कारण होते हुए पारित किया गया है।

***E. Service Law – Suspension – Scope & Power of Authority* – Held – It is within the province of disciplinary authority to decide whether employee is required to be suspended or not because suspension is a step towards ultimate result of investigation/inquiry. (Para 26)**

ङ. सेवा विधि – निलंबन – प्राधिकारी की परिधि व शक्ति – अभिनिर्धारित – इसका विनिश्चय करना कि क्या कर्मचारी को निलंबित करना अपेक्षित है अथवा नहीं, अनुशासनिक प्राधिकारी के कार्यक्षेत्र के भीतर है क्योंकि निलंबन, अन्वेषण/जांच के अंतिम परिणाम की ओर जाने वाला एक कदम है।

***F. Service Law – Suspension – Element of Public Interest* – Held – Public interest is also an element on consideration of which employee can be placed under suspension – Merely because it is not alleged that department has suffered any loss, employee does not get any immunity from suspension. (Para 25)**

च. सेवा विधि – निलंबन – लोक हित का तत्व – अभिनिर्धारित – लोक हित भी एक तत्व है जिसे विचार में लिये जाने पर कर्मचारी को निलंबन के अधीन रखा जा सकता है – मात्र इसलिए कि यह अभिकथित नहीं किया गया है कि विभाग ने कोई हानि सहन की है, कर्मचारी को निलंबन से कोई उन्मुक्ति प्राप्त नहीं होती।

***G. Service Law – Suspension – Stigma* – Held – Suspension order does not cast any stigma. (Para 20)**

छ. सेवा विधि – निलंबन – कलंक – अभिनिर्धारित – निलंबन आदेश से कोई कलंक नहीं लगता।

Cases referred:

2011 (2) MPLJ 206, 1993 (suppl. 3) SCC 483, (1994) 4 SCC 126, 2014 (3) MPLJ 117, (1979) 2 SCC 286, (2015) 7 SCC 291, 2007 (3) M.P.L.J. 565, (1999) 3 SCC 679, (2013) 16 SCC 147.

Amit Seth, Dy. A.G. for the appellants/State.
Sanjay K. Agrawal, for the respondent.

J U D G M E N T

The Judgment of the Court was delivered by:
SUJOY PAUL, J.:- This intra court appeal takes exception to the interlocutory order of the learned Single Judge dated 19.4.2022 passed in W.P. No.26621/2021 whereby the effect and operation of order of suspension dated 13.8.2021 and the appellate order rejecting the appeal dated 12.11.2021 (Annexure P/13) are stayed by the learned Single Judge.

2. At the outset, learned Deputy Advocate General placed reliance on a Division Bench judgment of this Court reported in 2011 (2) MPLJ 206 [*State of M.P. Vs. Ashok Sharma (Dr)*] to contend that against the interim order staying the suspension order, a writ appeal is indeed maintainable.

3. Shri Amit Seth, learned Deputy Advocate General for the appellants/State submits that under Rule 9(1)(a) of M.P. Civil Services (Classification, Control and Appeal) Rules 1966 (in short, '**CCA Rules**'), an employee can be placed under suspension by the competent authority, if inquiry, investigation or trial is pending against him.

4. Indisputably, in the instant case, the suspension order is passed by a Competent Authority and one of the ingredient on which an employee can be placed under suspension is certainly satisfied.

5. Criticizing the order of learned Single Judge, the stand of appellants/State is that the learned Single Judge has entered into the merits of the case and recorded findings as under :-

> (i) Order of suspension of the respondent is without application of mind.
>
> (ii) There is no material available with the Department to show direct relation of the writ petitioner with the alleged irregularity as under which provision of law, the duty is cast on the writ petitioner to keep a check on the price of liquor being sold by the Department is not known ?
>
> (iii) Acts/omissions on the part of the respondent has not caused any financial loss to the State exchequer.

(iv) No material has been supplied to the writ petitioner with the charge sheet to show involvement of the writ petitioner in the charges levelled against him.

(v) There is no possibility of the respondent influencing departmental witnesses in the on -going Departmental Enquiry.

(vi) The appellate authority had not considered the aspect that the order of suspension passed by the disciplinary authority is without application of mind.

6. To elaborate, Shri Amit Seth, learned Deputy Advocate General urged that it was not open to the learned Single Judge to either examine the correctness of the allegations or to examine whether there exits sufficient material to place the employee under suspension. This is the prerogative of the Competent Authority to place the employee under suspension and rely on the adverse material at appropriate occasion. The learned Single Judge has gone wrong while entering into the merits of the case.

7. Learned Deputy Advocate General placed reliance on the circular dated 27.5.2018 (Annexure WA-2) and argued that although this circular was not placed for consideration before learned Single Judge, language of the same is reproduced in the charge sheet dated 13.10.2021. The relevant rule/executive instruction can be very well be relied upon by the employer at appropriate stage. This circular makes it clear that it was the duty of the present respondent to take into account the illegal activities of liquor shopkeepers on regular/daily basis. The liquor shops were required to be continuously monitored. The respondent has miserably failed to undertake the same.

8. Thus, while placing the respondent under suspension his involvement in such things was not ruled out. In this view of the matter, the learned Single Judge should not have stayed the suspension order. Moreso, when in the first round of litigation in W.P. No.15518/2021 decided on 27.8.2021, the learned Single Judge has given following findings:

> "7. Perused the orders and considered the principles which are laid down in the aforesaid cases. Considering the totality of the facts and circumstances of the case and perusing the order dated 13.8.2021 carefully, it is found that reasons have been given for passing the suspension order dated 13.8.2021. The Deputy Secretary, Govt. of M.P. had material available with him that country made liquor and foreign made liquor were sold at price more than minimum supply price in district Jabalpur. The chart filed by the petitioner also reflects the action which was taken by petitioner against the defaulters in Jabalpur. In view of the material which is available in this writ petition, it cannot be said that there is total absence of material against the petitioner.

> Discreet enquiry was carried out by respondent and *prima facie* material is available with respondent No.1. The impugned order dated 13.8.2021 cannot be said to be an order without reasons. In view of the same, the writ petition filed by the petitioner is dismissed."
>
> (Emphasis Supplied)

Although while deciding W.A. No.801/2021 on 15.9.2021 the Division Bench opined that the finding of learned Single Judge should be taken only as tentative for the purpose of deciding appeal, the said finding was indeed binding on the another Single Bench in the second round of litigation.

9. It is further argued that in the first round of litigation, this Court gave a finding that there is material available with the Government against the respondent and therefore, in the second round while passing an interim order, the learned Single Judge could not have taken a different view.

10. The interim order of learned Single Judge will affect the merits of the case and the Departmental Enquiry. The allegations are very grave and respondent's involvement cannot be ruled out. While leading evidence in the Departmental Enquiry, the prosecution/department will establish the allegations and at this stage it was no more open to learned Single Judge to enter into the merits of the case. In support of his submissions Shri Seth, Dy. Advocate General placed reliance in the case of *U.P. Rajya Krishi Utpadan Mandi Parishad and Ors. vs. Sanjiv Rajan* reported in 1993 (suppl.3) SCC 483, *State of Orissa vs. Bimal Kumar Mohanty,* reported in (1994) 4 SCC 126, *State of M.P. and others vs. Ashok Sharma (Dr.)* reported in 2011 (2) MPLJ 206 and order of Single Bench reported in *Devendra Singh Kirar Vs. State of M.P. and others* reported in 2014 (3) MPLJ 117. Stay of suspension order amounts to giving final relief to the respondent and therefore, in the teeth of Division Bench order in *Ashok Sharma* (supra) the appeal is very much maintainable.

11. Shri Sanjay K. Agrawal, learned counsel for the respondent countering the aforesaid argument submits that the findings given by the learned Single Judge in the first round of order were diluted by the Division Bench by directing that said findings will not come in the way of respondent for the purpose of appeal. Since appellate order is passed without affording opportunity to him and without proper application of mind, the learned Single Judge has rightly stayed the operation of suspension order.

12. Shri Agrawal has taken pains to submit that allegation of lack of supervision by a Class-I employee (respondent) under whom a huge departmental team was working was highly improper and without basis. Department did not suffer any loss. The suspension order is passed in a mechanical manner which amounts to 'suspension syndrome' on the part of the department. Apart from the

respondent there exist a Collector, Dy. Collector and flying squad which takes care of the departmental function. Suspending the respondent is without any justification.

13. The interlocutory order of learned Single Judge dated 18.01.2021 (Annexure P-7) was relied upon to contend that the department was directed to produce material indicating that shopkeepers were selling liquor on higher rate than the prescribed rate, but at no point of time such material was produced before the learned Single Judge.

14. For this reason, the case of present respondent is different than the case of *Ashok Sharma* (supra) in which Division Bench interfered because before ink on the suspension order could dry, the learned Single Judge passed an ex-parte order of suspension, whereas in the instant case after giving ample opportunity to the State and after considering their reply, a detailed order of stay is passed. Thus, *Ashok Sharma* (supra) is of no assistance to the State.

15. During the course of argument Shri Agrawal, learned counsel for the respondent submits that although three charge-sheets dated 01.10.2021, 08.10.2021 and 13.10.2021, respectively are pending against the respondent, fact remains that respondent is placed under suspension because of the charge-sheet dated 13.10.2021. The charge-sheet dated 01.10.2021 relates to certain allegations of 2018, whereas charge-sheet dated 08.10.2021 is pregnant with allegations of 2020.

16. By taking this Court to the charge-sheet dated 13.10.2021 learned counsel for the respondent submits that in the charge-sheet the only allegation is relating to lack of supervision. The witnesses cited by the department are mainly related to Commercial Tax Department on which present respondent has no element of control. Thus, learned Single Judge was right in recording a *prima facie* finding that respondent will not be able to influence the witness who belong to a different department.

17. In support of aforesaid contention, Shri Agrawal also placed reliance on the judgment of *Bimal K. Mohanty* (supra). In addition, he placed reliance on the case of *Union of India and Ors. vs. J. Ahmed,* reported in (1979) 2 SCC 286 and *Ajay Kumar Choudhary vs. Union of India* reported in (2015) 7 SCC 291.

18. The parties confined their argument to the extent indicated above. We have bestowed our anxious consideration on rival contentions and perused the record.

19. As noticed, the parties are at logger heads on the question of maintainability of writ appeal. During the course of arguments, Shri Agrawal placed reliance on a full Bench Judgment of this court in *Arvind Kumar Jain and others Vs. State of M.P. and others* reported in 2007 (3) M.P.L.J. 565 to urge that

writ appeal against interlocutory order is not maintainable. We do not see any merit in this contention for the simple reason that this Full Bench decision was specifically considered by Division Bench in the case of *State of M.P. and others Vs. Ashok Sharma (Dr.)* (supra). The Division Bench recorded as under :-

> "In view of aforesaid Full bench decision of this Court, we have no hesitation in holding that the writ appeal is maintainable against such an order. Effect of staying the order of suspension is that writ petition stands allowed at the initial stage itself. Thus, the order impugned falls within the purview of the orders against which appeal lies."
>
> (Emphasis Supplied)

Thus, the writ appeal at the behest of State Government against an interim order staying the suspension order is very much maintainable.

20. Before dealing with the rival contentions, it is apposite to remind ourselves that the suspension does not cast any stigma. As per CCA Rules, an employee can be placed under suspension during the pendency of an investigation, inquiry or trial. One such ingredient on the strength of which the suspension order can be passed is very mush (sic: much) available and therefore, it cannot be said that suspension order is passed without there being any reason at all.

21. This is trite that the scope of judicial review against a suspension order is very limited. This aspect is considered by the Supreme Court in the case of *U.P. Rajya Krishi Utpadan Mandi Parishad and others Vs. Sanjiv Rajan* (supra). The relevant portion of this judgment are reproduced for ready reference :-

> "**5.** The ground given by the High Court to stay the operation of the suspension order, is patently wrong. There is no restriction on the authority to pass a suspension order second time. The first order might be withdrawn by the authority on the ground that at that stage, the evidence appearing against the delinquent employee is not sufficient or for some reason, which is not connected with the merits of the case. As happened in the present case, the earlier order of suspension dated March 22, 1991 was quashed by the High Court on the ground that some other suspended officer had been allowed to join duties. That order had nothing to do with the merits of the case. Ordinarily, when there is an accusation of defalcation of the monies, the delinquent employees have to be kept away from the establishment till the charges are finally disposed of. **Whether the charges are baseless, malicious or vindictive and are framed only to keep the individual concerned out of the employment is a different matter**. But even in such a case, no conclusion can be arrived at without examining the entire record

in question and hence **it is always advisable to allow disciplinary proceedings to continue unhindered. It is possible that in some cases, the authorities do not proceed with the matter as expeditiously as they ought to, which results in prolongation of the sufferings of the delinquent employee. But the remedy in such cases is either to call for an explanation from the authorities in the matter, and if it is found unsatisfactory, to direct them to complete the inquiry within a stipulated period and to increase the suspension allowance adequately**.

The charges are also grave and the authorities have come to the conclusion that during the disciplinary proceedings, the officers should not continue in employment to enable them to conduct the proceedings unhindered. Hence, we are satisfied that the order in appeal was not justified."

(Emphasis Supplied)

22. A plain reading of the para makes it clear that whether charges are baseless, malicious or vindictive, cannot be gone into at the stage of examining the validity of a suspension order. A Single Bench of this court in *Devendra Singh Kirar Vs. State of M.P. and others* (supra) poignantly held that at the stage of suspension the correctness of allegations are not required to be looked into.

23. In *State of Orissa Vs. Bimal Kumar Mohanty* (supra) on which both the parties placed heavy reliance, the Apex Court has held as under :-

"13. It would not be as an administrative routine or an automatic order to suspend an employee. It should be on consideration of the gravity of the alleged misconduct or the nature of the allegations imputed to the delinquent employee. The Court or the Tribunal must consider each case on its own facts and no general law could be laid down in that behalf. **Suspension is not a punishment but is only one of forbidding or disabling an employee to discharge the duties of office or post held by him**. In other words **it is to refrain him to avail further opportunity to perpetrate the alleged misconduct or to remove the impression among the members of service that dereliction of duty would pay fruits and the offending employee could get away even pending inquiry without any impediment or to prevent an opportunity to the delinquent officer to scuttle the inquiry or investigation or to win over the witnesses or the delinquent having had the opportunity in office to impede the progress of the investigation or inquiry etc**. But as stated earlier, each case must be considered depending on the nature of the allegations, gravity of the situation and the indelible impact it creates on the service for the

> continuance of the delinquent employee in service pending inquiry or contemplated inquiry or investigation. **It would be another thing if the action is actuated by mala fides, arbitrary or for ulterior purpose. The suspension must be a step in aid to the ultimate result of the investigation or inquiry**. The authority also should keep in mind **public interest** of the impact of the delinquent's continuance in office while facing departmental inquiry or trial of a criminal charge."
>
> (Emphasis Supplied)

24. In *Dr. Ashok Sharma* (supra), Court held :-

> "**Apart from that there are other cases and pendency of Departmental Enquiry also in which charge-sheet was issued. Correctness of the allegations of Departmental Enquiry cannot be determined by making roving enquiry in the matter of suspension**."
>
> (Emphasis Supplied)

25. A minute reading of this portion makes it clear that *public interest* is also an element on the consideration of which an employee can be placed under suspension. Thus, Merely because it is not alleged that the department has suffered any loss, the employee does not get any immunity from suspension. Thus, judgment of *J. Ahmed* (supra) is of no assistance in the factual backdrop of this case.

26. Apart from this, it cannot be forgotten that if the respondent, a senior officer is reinstated by staying the suspension order, he can scuttle the inquiry or investigation or can win over the witnesses of the departmental inquiry. This is within the province of the disciplinary authority to decide whether an employee is required to be suspended or not because suspension is a step towards ultimate result of an investigation or inquiry. In this view of the matter, in our opinion, learned Single Bench was not justified in asking for the sufficient material on the strength of which the suspension order can be justified. It amounts to conducting a roving inquiry. In imputation of charges, it was clearly mentioned that respondent's involvement cannot be ruled out. Whether or not employer will be able to establish it in the inquiry is not the subject matter of adjudication at this stage.

27. Reference may also be made to *M. Paul Anthony vs. Bharat Gold Mines Ltd.,* (1999) 3 SCC 679 wherein it has been held as under :-

> "26. **To place an employee under suspension is an unqualified right of the employer. This right is conceded to the employer in service jurisprudence everywhere. It has even received statutory recognition under service rules**

> **framed by various authorities, including the Government of India and the State Governments**."

(Emphasis Supplied)

28. In *Union of India vs. Ashok Kumar Aggarwal,* (2013) 16 SCC 147 it was poignantly held that :-

> "27. Suspension is a device to keep the delinquent out of the mischief range. The purpose is to complete the proceedings unhindered. Suspension is an interim measure in the aid of disciplinary proceedings so that the delinquent may not gain custody or control of papers or take any advantage of his position. **More so, at this stage, it is not desirable that the court may find out as to which version is true when there are claims and counterclaims on factual issues. The court cannot act as if it is an appellate forum de hors the powers of judicial review**."

(Emphasis Supplied)

29. In view of the foregoing analysis, in our judgment the learned Single Judge has erred in staying the suspension order by passing the impugned order dated 19.4.2022. Resultantly, the order dated 19.4.2022 is set aside. The writ appeal is **allowed**.

Appeal allowed

I.L.R. 2022 M.P. 1984 (DB)

Before Mr. Justice Vivek Rusia &
Mr. Justice Amar Nath (Kesharwani)

WP No. 6704/2021 (Indore) decided on 13 July, 2022

SAGAR SAXENA …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

A. Constitution – Article 226 – Habeas Corpus – Custody of Child – **Held – Wife committed suicide – Minor child living with father-in-law of petitioner – Husband facing trial u/S 306 & 304-B IPC, seeking custody of child – Held – Petitioner is biological father, a natural guardian and belongs to well educated and reputed family and himself working in Punjab National Bank and is living in a joint family – He is not a habitual offender or known criminal as on today – His father is a gazetted officer – It cannot be said that future of child will not be secured in his custody – Custody granted to petitioner – Petition allowed. (Paras 4, 8 & 9)**

क. संविधान – अनुच्छेद 226 – बंदी प्रत्यक्षीकरण – बालक की अभिरक्षा – अभिनिर्धारित – पत्नी ने आत्महत्या की – अवयस्क बालक याची के ससुर के साथ रहता है – पति धारा 306 तथा 304–B IPC के अंतर्गत विचारण का सामना कर रहा है, बालक की अभिरक्षा चाहता है – अभिनिर्धारित – याची जैविक पिता, एक नैसर्गिक संरक्षक है तथा एक उच्च शिक्षित तथा प्रतिष्ठित परिवार से संबंध रखता है तथा स्वयं पंजाब नेशनल बैंक में कार्यरत है तथा एक संयुक्त परिवार में रहता है – वह एक आदतन अपराधी नहीं है या आज दिनांक को ज्ञात अपराधी नहीं है – उसके पिता राजपत्रित अधिकारी है – यह नहीं कहा जा सकता कि बालक का भविष्य उसकी अभिरक्षा में सुरक्षित नहीं रहेगा – याची को अभिरक्षा प्रदान की गई – याचिका स्वीकृत।

***B. Constitution – Article 226 – Habeas Corpus – Custody of Child – Grounds* – Held – By interim order, petitioner was permitted visitation rights and there is no complaint that petitioner ever harassed her or daughter declined to meet her father – Further, petitioner got himself transferred to Shajapur with intention to keep his daughter with him – It cannot be said that future of child will not be secured in his custody. (Para 4 & 9)**

ख. संविधान – अनुच्छेद 226 – बंदी प्रत्यक्षीकरण – बालक की अभिरक्षा – आधार – अभिनिर्धारित – अंतरिम आदेश द्वारा, याची को मुलाकात के अधिकार की अनुमति दी गई थी और ऐसी कोई शिकायत नहीं है कि याची ने उसे कभी परेशान किया हो अथवा पुत्री ने अपने पिता से मिलने से मना कर दिया हो – आगे, याची ने पुत्री को उसके साथ रखने के आशय से स्वयं का स्थानांतरण शाजापुर करवा लिया – यह नहीं कहा जा सकता कि बालक का भविष्य उसकी अभिरक्षा में सुरक्षित नहीं है।

***C. Constitution – Article 226 – Habeas Corpus – Custody of Child – Maintainability of Petition* – Held – Division Bench of this Court held that *habeas corpus* under Article 226 is maintainable in matter of custody of a child. (Para 5)**

ग. संविधान – अनुच्छेद 226 – बंदी प्रत्यक्षीकरण – बालक की अभिरक्षा – याचिका की पोषणीयता – अभिनिर्धारित – इस न्यायालय की खंड न्यायपीठ ने अभिनिर्धारित किया कि बालक की अभिरक्षा के मामले में अनुच्छेद 226 के अंतर्गत बंदी प्रत्यक्षीकरण याचिका पोषणीय है।

Cases referred:

2019 (3) MPLJ 264, (2019) 7 SCC 42.

Virendra Sharma, for the petitioner.
Bhaskar Agrawal, G.A. for the respondent/State.
Umesh Sharma, for the respondent No. 2.

O R D E R

The Order of the Court was passed by:
VIVEK RUSIA, J.:- The petitioner who is the father of the corpus has filed this writ

petition under Article 226 of the Constitution of India seeking a writ of habeas corpus securing the custody of his daughter aged about three and a half years old.

2. The marriage of the petitioner was solemnized with the daughter of respondent no.2. They lived happily for 5 years and out of the marriage she gave birth to a female child on 23.12.2019. The wife of the petitioner committed suicide and at the instance of respondent no.2. FIR was lodged alleging harassment and cruelty, thus, the petitioner is facing trial under sections 306 and 304-B of the IPC. According to the petitioner he was arrested and sent to jail and during that period respondent no.2 took his daughter with him and since then she is residing with him. The petitioner has filed an application before the Superintendent of Police, Ujjain on 15.03.2021 in order to bring his daughter back from respondent no.2. According to the petitioner he belongs to an educated and reputed family and himself working as a Manager in Punjab National Bank. His father is a gazetted officer. His mother suffered from renal problems and his father donated his own kidney to her. Therefore, he is not a hardened criminal and the future of his daughter with him would be safe. It is further submitted that the welfare of the child is a paramount consideration for custody. It is also submitted that during the pendency of this writ petition respondent no.2 has suffered from cancer and he has filed an application in the trial seeking evidence through video conferencing as he is unable to move to the court. The petitioner has filed a copy of the application filed by respondent no.2 before the trial court along with the medical document. Accordingly, respondent No.2 is now not in a position to look after her daughter and apart from him there is no male member in the family hence the petitioner is entitled to the custody of the child.

3. Learned counsel for respondent no.2 opposes the application by submitting that the writ of *habeas corpus* is not maintainable for seeking custody of the child. The petitioner is having remedy to approach the family court in order to seek a decree for custody of the child. It is further submitted that the petitioner is a criminal and facing prosecution, therefore, it will affect the mindset of the child if she is permitted to live with him hence, the petition is liable to be dismissed.

HEARD

4. By way of the interim order, the petitioner is permitted to meet his daughter regularly by giving visitation rights and there is no complaint that the petitioner has ever tried to harass her or she has declined to meet her father. The petitioner belongs to a well educated family and he himself works in Punjab National Bank, his father is a gazetted officer and he is living in a joint family. Recently, he got himself transferred to the city Shajapur in order to live with other family members with the intention to keep his daughter with him.

5. The petitioner is a biological father therefore, he is not required to seek a decree from the family court. So far as the preliminary objection raised by the

learned counsel for respondent No.2 is concerned, about the maintainability of the writ petition filed under Article 226 of the Constitution of India, the Division Bench of this Court in the case of *Roshini Choubey Vs. Subodh Gautam and Ors.* reported in 2019 (3) MPLJ 264 has held that the writ petition seeking in the nature of Habeas Corpus under Article 226 of the Constitution of India is maintainable in the matter of custody of a child.

6. A similar issue came up before the Apex Court in the case of *Tejaswini Gaud and Ors Vs.Shekhar Jagdish Prasad Tewari and others* reported in (2019) 7 SCC 42. The only difference in the facts, in that case, is that the child therein was 1 ½ years old but in the present case the child is 3 ½ years old. The Apex Court has considered the wellbeing of the child with the father and directed respondents to hand over custody to the father therein. The Apex Court has also decided the issue that in exceptional cases, the rights of the parties to get custody of the minor will be determined in the exercise of extraordinary jurisdiction on a petition filed for the writ of habeas corpus. Only in cases where detailed enquiry or evidence is required, the court may decline extraordinary jurisdiction and direct the parties to approach Civil Court and held that the father, being the natural guardian, was justified in invoking the extraordinary remedy seeking custody of the child under Article 226 of the Constitution of India. Para 19 and 20 are reproduced below:-

> *"19. In child custody matters; the ordinary remedy lies only under the Hindu Minority and Guardianship Act or the Guardians and Wards Act as the case may be. In cases arising out of the proceedings under the Guardians and Wards Act, the jurisdiction of the court is determined by whether the minor ordinarily resides within the area on which the court exercises such jurisdiction. There are significant differences between the enquiry under the*
> *Guardians and Wards Act and the exercise of powers by a writ court which is of summary in nature. What is important is the welfare of the child. In the writ court, rights are determined only on the basis of affidavits. Where the court is of the view that a detailed enquiry is required, the court may decline to exercise the extraordinary jurisdiction and direct the parties to approach the civil court. It is only in exceptional cases, the rights of the parties to the custody of the minor will be determined in exercise of extraordinary jurisdiction on a petition for habeas corpus.*
>
> *20. In the present case, the appellants are the sisters and brother of the mother Zelam who do not have any authority of law to have the custody of the minor child. Whereas as per Section 6 of the Hindu Minority and Guardianship Act, the first respondent- father is a natural guardian of the minor child and is having the legal right to claim the custody of the child. The*

entitlement of father to the custody of child is not disputed and the child being a minor aged 1½ years cannot express its intelligent preferences. Hence, in o0ur considered view, in the facts and circumstances of this case, the father, being the natural guardian, was justified in invoking the extraordinary remedy seeking custody of the child under Article 226 of the Constitution of India."

7. In para 25 the Apex Court has considered the welfare of the minor child and held that the welfare of the minor child is the paramount consideration while deciding the child custody case. Although the provisions of special statutes govern the rights of the parents or guardians but the welfare of the minor is the supreme consideration for the court that ought to be the child's interest and welfare of the child. After considering the various judgments the Apex Court has held that keeping in view the welfare of the child and the right of the father to have her custody, we find that the High Court was right in holding that the welfare of the child will be best served by handing over the custody of the child to the first respondent i.e. father. It has also been held that the father is the only natural guardian alive who has neither abandoned nor neglected the child. Only due to the peculiar circumstances of the case, the child was taken care of by the appellants. Therefore, in indistinguishable facts, the custody of the child to the father cannot be denied. Para 31, 33, 34 and 35 are reproduced below:-

31. In the case at hand, the father is the only natural guardian 12 G. Eva Mary Elezabath v. Jayaraj and Others 2005 SCC Online Mad 472 13 Kirtikumar Maheshanka r Joshi v. Pradipkumar Karunashanker Joshi (1992) 3 SCC 573 alive and has neither abandoned nor neglected the child. Only due to the peculiar circumstances of the case, the child was taken care of by the appellants. Therefore, the cases cited by the appellants are distinguishable on facts and cannot be applied to deny the custody of the child to the father.

33. As observed in Rosy Jacob11 earlier, the father's fitness has to be considered, determined and weighed predominantly in terms of the welfare of his minor children in the context of all the relevant circumstances. The welfare of the child shall include various factors like ethical upbringing, economic well-being of the guardian, child's ordinary comfort, contentment, health, education etc. The child Shikha lost her mother when she was just fourteen months and is now being deprived from the love of her father for no valid reason. As pointed out by the High Court, the father is a highly educated person and is working in a reputed position. His economic condition is stable.

34. The welfare of the child has to be determined owing to the facts and circumstances of each case and the court cannot take a pedantic approach. In the present case, the first respondent has neither abandoned the child nor has deprived the child of a right to his love and affection. The circumstances were such that due to illness of the parents, the appellants had to take care of the child for some time. Merely because, the appellants being the relatives took care of the child for some time, they cannot retain the custody of the child. It is not the case of the appellants that the first respondent is unfit to take care of the child except contending that he has no female support to take care of the child. The first respondent is fully recovered from his illness and is now healthy and having the support of his mother and is able to take care of the child.

35. The appellants submit that handing over of the child to the first respondent would adversely affect her and that the custody can be handed over after a few years. The child is only 1 ½ *years old and the child was with the father for about four months after her birth. If no custody is granted to the first respondent, the court would be depriving both the child and the father of each other's love and affection to which they are entitled. As the child is in tender age i.e.* 1 ½ *years, her choice cannot be ascertained at this stage. With the passage of time, she might develop more bonding with the appellants and after some time, she may be reluctant to go to her father in which case, the first respondent might be completely deprived of her child's love and affection. Keeping in view the welfare of the child and the right of the father to have her custody and after consideration of all the facts and circumstances of the case, we find that the High Court was right in holding that the welfare of the child will be best served by handing over the custody of the child to the first respondent.*

11. In view of the above. the petition deserves to be allowed and respondents 3 and 4 are not entitled to keep the son of the petitioner Apoorva aged about 11 years, hence they are directed to hand over the custody of the child to the petitioner.

8. Counsel for respondent no.2 has vehemently argued that the petitioner is facing trial under sections 306 and 304-B of the IPC therefore, he cannot be permitted to take custody of her daughter.

9. If this argument is accepted then it would lead to a situation where no criminal who is facing trial would be permitted to live with his children. Even otherwise the petitioner is not a habitual offender or known criminal as of today, he is innocent unless the prosecution establishes the charge that he instigated his

wife to commit suicide. The petitioner performed the love marriage with the deceased and he belongs to a reputed family. His father is a gazetted officer therefore, it cannot be said that the future of the child will not be secured in the custody of the petitioner. Hence, the petition is allowed and respondent no.2 is directed to hand over the custody of the corpus to the petitioner forthwith.

The writ petition is allowed. No order as to cost.

Petition allowed

I.L.R. 2022 M.P.1990 (DB)

Before Mr. Justice Ravi Malimath, Chief Justice
& Mr. Justice Vishal Mishra

WP No. 16180/2022 (Jabalpur) decided on 21 July, 2022

ANAND KUMAR LOWANSHI …Petitioner

Vs.

HON'BLE HIGH COURT OF M.P. & anr. …Respondents

***A. Service Law – Minimum Marks for Interview – Validity* – Held – Apex Court concluded that prescription of minimum marks for interview is not illegal – In instant case, in advertisement itself, the fixing of minimum marks for interview was published – Candidates were well aware of the existence of such a clause – There is no change of rule of game at a subsequent stage – Petition dismissed. (Paras 6 to 9)**

क. सेवा विधि – साक्षात्कार हेतु न्यूनतम अंक – वैधता – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया कि साक्षात्कार हेतु न्यूनतम अंक निर्धारित करना अवैध नहीं है – वर्तमान प्रकरण में, साक्षात्कार हेतु न्यूनतम अंक का निर्धारण विज्ञापन में ही प्रकाशित किया गया था – अभ्यर्थीगण इस तरह के खंड के अस्तित्व से भली–भांति परिचित थे – उत्तरवर्ती प्रक्रम पर खेल के नियम में कोई बदलाव नहीं है – याचिका खारिज।

***B. Service Law – Selection Process – Minimum Marks for Interview* – Held – Minimum marks for interview can be prescribed by authority provided the same is made known much before the start of the selection process and not during the selection process. (Para 9)**

ख. सेवा विधि – चयन प्रक्रिया – साक्षात्कार हेतु न्यूनतम अंक – अभिनिर्धारित – साक्षात्कार हेतु न्यूनतम अंक प्राधिकारी द्वारा निर्धारित किए जा सकते है बशर्ते कि यह चयन प्रक्रिया प्रारंभ होने के बहुत पहले ही ज्ञात हो ना कि चयन प्रक्रिया के दौरान।

C. Service Law – Judicial Services – Requirement of Particulars of Candidate – Particulars of any relative of candidate who is in this profession,

***was sought* – Held – While selecting a person for judicial service, it is not only essential but it is the duty of authority to know every single particular of candidate as possible – Appointment cannot be made in darkness without knowing background of candidate – Full and complete disclosure is warranted – It would not affect any legal right of petitioner. (Para 10)**

ग. सेवा विधि – न्यायिक सेवाएं – अभ्यर्थियों के विवरण की आवश्यकता – अभ्यर्थी के किसी संबंधी का विवरण जो इस व्यवसाय में हो, चाहा गया था – अभिनिर्धारित – न्यायिक सेवा के लिए किसी व्यक्ति का चयन करते समय यह न केवल आवश्यक है, बल्कि यह प्राधिकारी का कर्तव्य है कि वह अभ्यर्थी के प्रत्येक विवरण को यथासंभव जाने – अभ्यर्थी की पृष्ठभूमि जाने बगैर अंधेरे में नियुक्ति नहीं की जा सकती – पूरा एवं संपूर्ण प्रकटीकरण आवश्यक है – यह याची के किसी भी विधिक अधिकार को प्रभावित नहीं करेगा।

Cases referred:

(2008) 7 SCC 11, (2008) 3 SCC 512, (2010) 3 SCC 104.

Manoj Sharma assisted by *Quazi Fakhruddin,* for the petitioner.
Ankit Agarwal, G.A. for the respondent No. 2.

O R D E R

The Order of the Court was passed by :

RAVI MALIMATH, CHIEF JUSTICE :- The case of the petitioner is that he was enrolled as an Advocate with the Madhya Pradesh State Bar Council in the year 2017. The respondent No.1 called for applications for recruitment to the posts of Civil Judge Junior Division (Entry Level) under the Madhya Pradesh Judicial Service (Recruitment and Conditions of Service) Rules, 1994. The petitioner applied for the same. He passed the preliminary exam as well as the final exam. He was called for the interview. He was not selected. He was expected to score a minimum of 20 out of 50 allotted marks for the interview. Since he had not scored the minimum of marks in the interview, he was not eligible to be selected. Questioning the same, the instant petition is filed seeking to set aside the impugned interview/selection procedure, which mandates 20 marks to be obtained out of the maximum of 50 marks; to set aside Clause 6 of the main examination form wherein information about relatives in the judiciary is called for and other consequential reliefs.

2. Shri Manoj Sharma, learned senior counsel appearing for the petitioner's counsel submits that the mandate to procure a minimum of 20 out of 50 marks is erroneous. That once the candidate has cleared the preliminary and the final examination and a merit list has been prepared, the selection ought to be made on the basis of that select list. That the procurement of the minimum marks is wholly uncalled for. He relies on the judgment of the Hon'ble Supreme Court in the case of *Hemani Malhotra vs. High Court of Delhi* reported in (2008) 7 SCC 11, with

reference to paras 17 and 18. It is his further contention that Clause 6 of the application form for the main exam calls for particulars with regard to family members, who are in the profession. That the same would affect the candidate at the time of interview. Furthermore, whether the relative of the candidate is practising or is a Judge or otherwise, is of no concern so far as judging his merit is concerned.

3. Heard learned senior counsel.

4. The minimum marks to be obtained for the interview is governed by the advertisement published on 21.12.2021 vide Annexure P-1, wherein for the clause of interview it is narrated that the maximum marks to be obtained is 50 marks, out of which the candidate should obtain a minimum of 40% of the same, namely, 20 marks out of 50 marks for the interview. The same reads as follows:-

"3. **साक्षात्कार**

एक– **साक्षात्कार** – मुख्य परीक्षा में सफल आवेदकों को अनुक्रमांक के क्रम से साक्षात्कार हेतु बुलाया जायेगा। साक्षात्कार के लिए 50 अंक निर्धारित हैं। आवेदकों को अंतिम रूप से चयनित होने के लिए साक्षात्कार में न्यूनतम 40 प्रतिशत अंक अर्थात् 20 अंक प्राप्त करना अनिवार्य है।श

Therefore, the candidates were aware of the existence of such a clause.

5. So far as the judgment of the Hon'ble Supreme Court in the case of *Hemani Malhotra* (supra) relied upon by the learned senior counsel is concerned, with reference to paras 17 and 18, it is narrated therein, while relying on the report of Hon'ble Justice Shetty Commission with regard to fixing of cut-off marks for the purposes of the viva voce test. On considering the same, in para-18, it was held that the marks obtained by the petitioner in the viva voce test had to be added on to the marks obtained in the written test and then the merit list has to be prepared.

6. Having considered the said judgment, we are of the view that the same would not apply to the facts of this case. The facts involved therein were to the extent that after the written exam was conducted for recruitment to the Delhi Higher Judicial Service, the marks obtained in the written test were not disclosed. At that stage, the selection committee met and resolved that it was desirable to prescribe minimum marks for viva voce. Therefore, the matter was placed before the Full Court. The Full Court resolved that the minimum qualifying marks in viva voce will be 55% for General candidates and 50% for Scheduled Castes and Scheduled Tribes. Thereafter, the candidates were called for an interview even though such an interview was not postulated in the advertisement. The Hon'ble Supreme Court in the case of *Hemani Malhotra* (supra), in para-14, held as follows:-

> "*14. It is an admitted position that at the beginning of the selection process, no minimum cut-off marks for vive voce were prescribed for Delhi Higher Judicial Service Examination, 2006. The question, therefore, which arises for consideration of the Court is whether introduction of the requirement of minimum marks for interview, after the entire selection process was completed would amount to changing the rules of the game after the game was played.....*"

Therefore, what the Hon'ble Supreme Court was considering was as to whether the introduction of a requirement for obtaining minimum marks for interview after the selection process was completed would amount to changing the rules of the game after the game was played. The same is not the position herein. There is no change of the rules of the game at a subsequent date. The requirement was published even in the advertisement calling for the posts. Therefore, all were aware of the same. Hence, the question of changing the rules of the game is not a point involved in this case.

7. The Hon'ble Supreme Court in *Hemani Malhotra*'s case (supra) further held in para-15 as follows:-

> "*15. There is no manner of doubt that the authority making rules regulating the selection can prescribe by rules the minimum marks both for written examination and viva voce, but if minimum marks are not prescribed for viva voce before the commencement of selection process, the authority concerned, cannot either during the selection process or after the selection process add an additional requirement/qualification that the candidate should also secure minimum marks in the interview. Therefore, this Court is of the opinion that prescription of minimum marks by the respondent at viva voce test was illegal.*"

Therefore, in the facts of the aforesaid case, the prescription of having the minimum marks for the viva voce was introduced after the selection process had commenced. However, the facts in the instant case are that the marks for the viva voce were already prescribed at the stage of calling for the advertisement. The advertisement clearly indicated that 50 marks would be allotted for the interview, out of which the candidate has to procure a minimum of 40%, namely, 20 marks out of 50 marks. Thus, in the instant case, much before the commencement, namely, even at the stage of advertisement, the fixing of the minimum marks for viva voce was already prescribed. Hence, we are of the view that based on the facts and circumstances involved, the said judgment would not be applicable to the case on hand.

8. In the judgment of the Hon'ble Supreme Court in the case of *K. Manjusree vs. State of Andhra Pradesh and Another* reported in (2008) 3 SCC 512 it was held

that the prescription of minimum marks for an interview is not illegal. It was held in para-33 as follows:-

> *"33. The Resolution dated 30.11.2004 merely adopted the procedure prescribed earlier. The previous procedure was not to have any minimum marks for interview. Therefore, extending the minimum marks prescribed for written examination, to interviews, in the selection process is impermissible. We may clarify that prescription of minimum marks for any interview is not illegal. We have no doubt that the authority making rules regulating the selection, can prescribe by rules, the minimum marks both for written examination and interviews, or prescribe minimum marks for written examination but not for interview, or may not prescribe any minimum marks for either written examination or interview. Where the rules do not prescribe any procedure, the Selection Committee may also prescribe the minimum marks, as stated above. But if the Selection Committee wants to prescribe minimum marks for interview, it should do so before the commencement of selection process. If the Selection Committee prescribed minimum marks only for the written examination, before the commencement of selection process, it cannot either during the selection process or after the selection process, add an additional requirement that the candidates should also secure minimum marks in the interview. What we have found to be illegal, is changing the criteria after completion of the selection process, when the entire selection proceeded on the basis that there will be no minimum marks for the interview. "*

9. In the case of *Ramesh Kumar vs. High Court of Delhi and Another* reported in (2010) 3 SCC 104, the Hon'ble Supreme Court held that the authority may prescribe a minimum benchmark not only for the written test but also for the viva voce. It was held in para-15 as follows:-

> *"15. Thus, the law on the issue can be summarised to the effect that in case the statutory rules prescribe a particular mode of selection, it has to be given strict adherence accordingly. In case, no procedure is prescribed by the rules and there is no other impediment in law, the competent authority while laying down the norms for selection may prescribe for the tests and further specify the minimum benchmarks for written test as well as for viva voce."*

Therefore, the position in law is quite clear that minimum marks for the interview can be prescribed by the authority provided the same is made known much before the start of the selection process and not during the selection process.

10. So far as the contention on Clause 6 of the application form is concerned, we do not find that the same would affect the legal right of the petitioner. What is sought for therein are the particulars of any individual who is in the profession and if so, their relationship with the candidate. We are of the considered view that probably the said clause has been added only to know the background of the candidate as to whether any of his relatives or otherwise are practising or in the judiciary. While selecting a person for a judicial service it is not only essential but it is the duty of the authority to know every single particular of the candidate as possible. That an appointment cannot be made in darkness without knowing the background of the candidate. Full and complete disclosure is warranted. Therefore, it is only just and necessary that in the process of obtaining information about the candidate this is also an additional information. Therefore, we do not find that the furnishing of any of these particulars would affect any of the legal rights of the petitioner.

11. Hence, we find no good ground to interfere. The writ petition is dismissed.

Petition dismissed

I.L.R. 2022 M.P. 1995 (DB)

Before Mr. Justice Vivek Rusia & Mr. Justice Amar Nath (Kesharwani)

WP No. 23618/2021 (Indore) decided on 21 July, 2022

ELORA TOBACCO CO. LTD. (M/S) …Petitioner

Vs.

UNION OF INDIA & ors. …Respondents

(Alongwith WP No. 23624/2021)

***A. Central Excise Act (1 of 1944), Sections 3, 3A & 37(2)(v) and Central Excise Rules, 2017, Rules 6, 8, 11, 13 & 34 – Trade Notices – Search & Sealing of Machines* – Held – No mandatory provision in statute to give production as per capacity of machine – Respondent cannot compel any manufacturer to give a declaration or run factory upon 50% capacity – No provision in Excise Act and Rules and even in CGST Act, giving authority to respondents to seal the machines of a running manufacturing unit – Clause 6.3 is wholly unreasonable and inconsistent with provisions of Act and Rules and thus struck down – Respondents directed to de-seal the machine and two DG sets – Petition allowed with cost of Rs. 50,00 (Paras 22, 23, 24 & 27)**

क. केंद्रीय उत्पाद–शुल्क अधिनियम (1944 का 1), धाराएँ 3, 3A व 37(2)(v) एवं केंद्रीय उत्पाद–शुल्क नियम, 2017, नियम 6, 8, 11, 13 व 34 – ट्रेड नोटिस – तलाशी तथा मशीनों को सील किया जाना – अभिनिर्धारित – मशीन की क्षमता अनुसार उत्पादन

देने के लिए कानून में कोई आज्ञापक उपबंध नहीं – प्रत्यर्थी किसी भी निर्माता को घोषणा करने या 50% क्षमता पर कारखाना चलाने के लिए मजबूर नहीं कर सकता – उत्पाद–शुल्क अधिनियम तथा नियम तथा यहाँ तक कि **CGST** अधिनियम में भी प्रत्यर्थीगण को चालू निर्माण ईकाई की मशीनों को सील करने का अधिकार देने का उपबंध नहीं है – खंड 6.3 पूर्णतया अयुक्तियुक्त है तथा अधिनियम एवं नियम के उपबंधों के साथ असंगत है तथा इसलिए खण्डित किया गया – प्रत्यर्थीगण को मशीन तथा दो **DG** सेट की सील खोलने के निर्देश दिये गये – रू. 50,000 खर्च के साथ याचिका मंजूर।

***B. Central Excise Act (1 of 1944), Sections 3, 3A & 37(2)(v) and Central Excise Rules, 2017, Rules 6, 8, 11, 13 & 34 – Illegal Sealing of Machine – Compensation* – Held – For more than 2 years, machine and two DG sets were kept under seal by authorities of respondents – Petitioner was unable to do production, causing business loss not only to him but also to Central Government in respect to revenue – Impugned action was wholly without jurisdiction – Petitioner liable to be compensated and is thus granted liberty to take recourse available under law against respondents. (Para 26)**

ख. केंद्रीय उत्पाद–शुल्क अधिनियम (1944 का 1), धाराएँ 3, 3A व 37(2)(v) एवं केंद्रीय उत्पाद–शुल्क नियम, 2017, नियम 6, 8, 11, 13 व 34 – मशीन की अवैध सीलबंदी – प्रतिकर – अभिनिर्धारित – प्रत्यर्थीगण के प्राधिकारीगण द्वारा दो वर्ष से अधिक अवधि के लिए मशीन तथा दो **DG** सेट को सीलबंद रखा गया – याची उत्पादन करने में असमर्थ था जिससे न केवल उसे व्यापार का नुकसान हुआ बल्कि राजस्व के संबधं में केंद्र सरकार को भी नुकसान हुआ – आक्षेपित कार्यवाही पूर्णतया बिना अधिकारिता थी – याची प्रतिकर पाने का अधिकारी है एवं इसलिए उसे प्रत्यर्थीगण के विरूद्ध विधि के अंतर्गत उपलब्ध अवलंब लेने की स्वतंत्रता प्रदान की जाती है।

***C. Central Excise Rules, 2017, Rule 34 – Trade Notices – Jurisdiction of Excise Authority* – Held – Rule 34 gives power to Board/Principal Chief Commissioner/Chief Commissioner to issue written instructions for any incidental or supplemental matters – Excise authority gets jurisdiction to issue Trade Notices under the Act and Rules but the only rider is that such written instructions in Trade Notice should be consistent with the Act and provision of Rules. (Para 20)**

ग. केंद्रीय उत्पाद–शुल्क नियम, 2017, नियम 34 – ट्रेड नोटिस – उत्पाद शुल्क प्राधिकारी की अधिकारिता – अभिनिर्धारित – नियम 34 बोर्ड/प्रधान मुख्य आयुक्त/मुख्य आयुक्त को किसी अनुषंगिक अथवा अनुपूरक मामलों में लिखित निर्देश जारी करने की शक्ति प्रदान करता है – उत्पाद–शुल्क प्राधिकारी को अधिनियम तथा नियमों के अंतर्गत ट्रेड नोटिस जारी करने की अधिकारिता प्राप्त होती है परंतु एकमात्र शर्त है कि ट्रेड नोटिस में ऐसे लिखित निर्देश अधिनियम तथा नियमों के उपबंध के अनुरूप होने चाहिए।

***D. Central Excise Act (1 of 1944), Section 37(v) – Regulating Production, Sale and Storage of Goods* – Held – Section 37 gives power to Central Government to make rules to regulate the production or**

manufacturing but in this case there is no such rules notified by Central Government u/S 37(v) to regulate the production, sale and storage of goods. (Para 19)

घ. केंद्रीय उत्पाद–शुल्क अधिनियम (1944 का 1), धारा 37(v) – माल के उत्पादन, विक्रय तथा भण्डारण को विनियमित करना – अभिनिर्धारित – धारा 37 केंद्र सरकार को उत्पादन अथवा निर्माण को विनियमित करने के लिए नियम बनाने की शक्ति प्रदान करता है परंतु इस प्रकरण में माल के उत्पादन, विक्रय तथा भण्डारण को विनियमित करने के लिए धारा 37(v) के अंतर्गत केंद्र सरकार द्वारा ऐसे कोई नियम अधिसूचित नहीं हैं।

***E. Goods and Services Tax Act, M.P. (19 of 2017), Section 145 – Opinion of Expert – Permissibility* – Held – Section 145 of 2017 Act gives the authority to seek opinion from an expert – Petitioner's challenge to the action of respondents by which they called Chartered Engineer to assess capacity of machine, is rejected – W.P. No. 23624/2021 dismissed. (Para 25)**

ङ. माल और सेवा कर अधिनियम, म.प्र. (2017 का 19), धारा 145 – विशेषज्ञ की राय – अनुज्ञेयता – अभिनिर्धारित – अधिनियम 2017 की धारा 145 विशेषज्ञ से राय लेने की अधिकारिता प्रदान करती है – प्रत्यर्थीगण की कार्यवाही, जिसके द्वारा उन्होंने मशीन की क्षमता का आकलन करने हेतु चार्टर्ड इंजीनियर को बुलाया, को याची द्वारा दी गई चुनौती को अस्वीकार किया जाता है – **WP No. 23624 / 2021** खारिज।

Cases referred:

(1985) 3 SCC 752, (2006) 6 SCC 456.

Abhinav Malhotra, for the petitioner in WP No. 23618/2021 & 23624/2021.

Prasanna Prasad, for the respondents in WP No. 23618/2021 & 23624/2021.

O R D E R

The Order of the Court was passed by :

VIVEK RUSIA, J. :- The petitioner has filed the present petition to challenge the order dated 27.05.2021 whereby the respondents have refused to de-seal cigarette manufacturing machines and DG sets. The petitioner has also challenged the validity of the declaration of trade notice dated 18.01.2021 as arbitrary, a violation of Article 14 of the Constitution of India and also inconsistent and contrary to the provision of the Central Excise Act, 1944.

The facts of the case in short are as under:

2. The petitioner is a company incorporated and registered under the Companies Act, 1956 (now the Companies Act, 2013). The petitioner is engaged

in the manufacture and sale of cigarettes in its factory established at 14-B, Sector F, Industrial Area, Sanawer Road, Indore. Cigarettes are covered under the Central Excise Act, 1944, hence the petitioner has obtained the registration under the Act. After the introduction of GST, the petitioner became liable to levy of Central Excise as also levy of Goods and Service Tax as Cigarettes is specified in HSN Code Heading 2402 and sub-heading 2402 20. So far as Central Excise is concerned, the levy continues under the Central Excise Act, 1944 and the Rules made thereunder and so far as GST is concerned the levy is governed under the Central Goods & Service Tax Act, 2017 and M.P. goods and Service Tax Act, 2017.

3. Section 3 of the Central Excise Act, 1944 deals with the levy of duty on goods which are produced or manufactured. Rule 94 of the Central Excise Rules, 1944 mandates the manufacturer of tobacco products to maintain a record of production and dispatch in the manner specified therein. Rule 6 of CE Rules, 2017 mandates that the assessee shall himself assess the duty payable on any excisable goods shall be removed from a factory or a warehouse except under an invoice signed by the owner of the factory or his authorized agent and such invoice shall also be countersigned by the Inspector of Central Excise or the Superintendent of Central Excise. According to the petitioner since the product cigarette is a sensitive matter for levying excise duty, therefore, the respondents in order to monitor the production and sale have deputed an adequate number of Excise Officers at the premises round the clock 24 X 7.

4. The respondents have issued trade notice 40/95 dated 25.08.1995 whereby the instructions were given for the procedure to be followed for effective physical control of production Cigarettes in the factories. Vide instructions dated 24.12.2008, the duties and responsibilities of the range officers and Central Officer were fixed.

5. It is further submitted that the Commissioner of Customs Central Excise and Service Tax Indore issued a trade notice being No.07/2009 dated 25.11.2009 in the exercise of the powers conferred under Rule 31 of the Central Excise Rules, 2002 has prescribed a procedure for filing details of machines installed by Cigarette manufacturing units. Thereafter a fresh Trade Notice No.02/2015 dated 04.02.2015 has been issued in order to check the production capacity of the machines, and the production of cigarettes through the said machines. In this Trade Notice, a provision was there about sealing off the machine when the unit operated at a capacity lower than 50% of the total capacity of the machine.

6. According to the petitioner, its unit was in operation 24*7 hrs. under the vigilance and supervision of the Central Excise Officers and no such complaints have ever been made regarding violation of the above trade notices. During the Covid-19 pandemic, the petitioner vide letter dated 23.03.2020 requested the

respondents to seal all the machines of the factory as the petitioner was unable to carry on the activity of the manufacturer for want of sale. *Panchnama* dated 23.03.2020 and 24.03.2020 were prepared after sealing the machines, after some time at the request of the petitioner machine were de-sealed and production of the cigarettes commenced.

7. That on 12.06.2020 and 13.06.2020 the petitioner's unit was searched by the authorities of GST in exercising power under Section 67(2) of the said Act. The authorities have seized computer hard discs, books, documents and two generators (DG) sets. According to the petitioner, the authorities conducting the search have not only sealed the generator sets but cigarette manufacturing machines under the provisions of Trade Notice No.2/15 dated 04.02.2015 only on the ground that the non- functioning of the machine for more than 24 hours and were not giving production as per its capacity.

8. After the search was over, vide letter dated 12.10.2020 the petitioner requested the Assistant Commissioner to de-seal the machine and DG sets. A reply was given to the petitioner on 06.11.2020 that the directions of the higher authorities are awaited. Thereafter vide letters dated 25.11.2020 and 26.11.2020 the Superintendent and Assistant Commissioner demanded some details as a condition before de-sealing. According to the petitioner, all the details were already on record, which has been seized by the respondent. Despite furnishing all the details, the respondents have not de-sealed the machines and DG sets due to which the petitioner was unable to start the production to date.

9. Vide impugned notice dated 27.05.2021 (Annexure P/1), the request for de-sealing of the machine and DG sets have been declined by the respondents as the petitioner did not file a fresh declaration in compliance with Trade Notice 04/2020-2021 dated 18.01.2021. Being aggrieved by the aforesaid denial, the petitioner has approached this Court by way of this petition challenging not only the validity of the order dated 27.05.2021 as well as the Trade Notice No.04/2020-21 dated 18.01.2021.

Submissions of the petitioner's counsel

10. Shri Abhinav Malhotra, learned counsel appearing for the petitioner submitted that the respondents have kept the machine and DG under seal arbitrarily for an indefinite period for which there is no provision in the Act and Rules. There is no such provision under the Central Excise Act as well as GST Act for keeping the machine or restraining the manufacturing unit for production for an indefinite period. The respondents have already seized the entire record, the search has been completed, and now the show cause notice has already been issued, therefore, there is no reason to keep the machine and DG sets under seal relying on Trade Notice No.04/2020-21.

11. The petitioner has also challenged the action of respondents regarding the appointment of a panel of chartered engineers for verification of the production capacity of the machine, by way of Writ Petition No.23624/2021 before this Court. According to learned counsel for the petitioner, the respondents have no right to bring a third person to the premises of the petitioner to check the production capacity of the machine for that there is no such provision under the CE Act and Rules. Even otherwise, now the production capacity has been verified then keeping the petitioner out of the business of production is totally unconstitutional being violative of Article 14 of the Constitution of India. Hence, such an action is liable to be condemned and impugned letter dated 27.05.2021 as well as Trade notice 04/2020-21 dated 18.01.2021 are liable to be set aside and respondents are directed to de-sealed the machines and compensate the petitioner for the loss caused to the petitioner by way of an illegal act.

12. Learned counsel for the petitioner has submitted that the primary reliefs that the petitioner by way of this writ petition is seeking for de-sealing of the cigarette manufacturing machines by the respondents and permission to carry out its manufacturing business in the usual manner in terms of section 3 of Central Excise Act read with Rule 6 and 11 of Central Excise Rules 2017. It is further submitted by the learned counsel that the excise duty is always levied on the quantity of the goods manufactured and does not depend on the production capacity of the machine. Tax is levied in terms of Rule 6,8 and 11 when a manufacturer of cigarettes takes his goods out of the factory. It is also a clear and accepted position between the parties that Rule 6 and 11 require every single input to be cross verified and acknowledged by the Inspector of Central Excise or Superintendent of Central Excise and no single cigarette which is ready for sale can be taken out of the factory unless the tax on it is paid and audit is cross verified and certified by the Superintendent under Rule 11 of the Rules. Finally learned counsel submitted that the action of the respondents to keep the petitioner's machines in the factory sealed on the ground of non-compliance with the Trade Notice dated 18.01.2021 is illegal and violative of the petitioner's fundamental rights under Article 14, 19(1) (g) and 21 of the Constitution, in addition, to the impugned Trade notice being contrary to the provisions of the Act and the Rules be set aside.

Reply of the respondents

13. Initially, the respondents filed a preliminary reply questioning the maintainability of the Writ Petition, however, as per direction issued by the Court, a parawise reply has also been filed. The respondents have not disputed the search conducted on the premises and the sealing of machines and DG sets during the investigation carried out by GST Intelligence. In order to justify the action, the respondents are contending that the search conducted in furtherance of Trade Notice dated No.02/2015 as the key persons of the company did turn

incommunicado and the machines were found not in operation, therefore as per paragraph No.4.1 of the Trade Notice No.02/2015 which was in operative at that point of time, a proper panchnamas were drawn and machines and DG sets were sealed. It is further submitted that after four months the petitioner submitted a representation requesting de-sealing of the machine and DG sets. During the same period, ADG, DGGI vide letter dated 29.10.2020 pointed out various irregularities noticed during the investigation such as:- (a) Declaration of different production capacities to different agencies by the petitioner. (b) the petitioner has under-declared the production capacity to the department, (c) the production is even less than 1% of the declared production capacity, (d) and the meter of the DG set was found tampered in order to suppress the actual production from the machine. After Trade Notice No.02/2015 Commissioner CGST Ujjain issued Trade Notice No.02/2016 dated 06.10.2016 and same has been applied for the petitioner as it was applicable at the time of the search was applied which provides that "*Where the unit is operating at a capacity lower than 50% of the total machine hours in a shift available for the machines installed, the machine will be sealed after the production is over for the shift. The desealing of the machine will be done only after the written submission by the party that they will utilize at least 50% of the total installed capacity."*

15. It is further submitted by the respondents that in view of the aforesaid condition clarification and declaration were sought from the petitioner. Since the production capacity submitted by the petitioner was incorrect on the face of the record, it became pertinent for the department to get it verified by the team of experts, therefore, at that time the request for de-sealing the machines was declined.

16. The respondents have supported the validity of Trade Notice No.04/2021 dated 18.01.2021 as it does not travel beyond the scope and power of delegated authority of the commissioner given under Rule 13 of CE 2017. The respondents have also relied on sections 37 (2) (v) of the Central Excise Act,2017 which authorise them to regulate the production or any process of the production or manufacture, storage, or sale for the purpose of collection of the proper duty imposed under the Act.

Submissions of respondents' counsel

17. Shri Prasanna Prasad learned counsel appearing on behalf of the respondents has argued that the manufacturing and sale of cigarettes is a sensitive commodity under the Central Excise Act and GST Act. It also attracts National Calamity Contingent Duty (NCCD). The petitioner has a checkered history as one case of clandestine manufacturing and clearance of cigarettes was registered in the year 2011-12, wherein duty demand of Rs. 28,39,43,195/- was confirmed against the petitioner. The respondents are taking more care and caution by

seeking a declaration from the petitioner about the production from sealed machines which should not be less than 50% of its capacity. If the machines and DG sets are de-sealed, the petitioner would again indulge in the manufacturing of cigarettes and the future possibility of evasion of the excise duty and GST cannot be ruled out. It is further submitted by the learned counsel that a detailed show cause notice has been issued to the petitioner and now the matter is under adjudication. The authority has doubted the conduct of 67 Excise Officers who were posted round the clock in the unit of the petitioner, hence the officials of the department have reasons to believe that the petitioner with the convenience of those officers evaded the huge amount of excise/duty. It is further submitted by Mr Prasad learned counsel that Section 67 (1) (2) of the GST Act gives power to the officer to conduct the inspection and search. Section 71 governs the field and gives authority during the search to the officers. Under Section 153 of the GST Act, the department can take the assistance of a technical person and finally section 160 of the GST Act provides protection that no action in pursuant to that shall be invalid**.** The authorities are acting only in order to protect the evasion of huge revenue by the petitioner, therefore, there cannot be allegations of malafide against the respondents. In support of his contention, learned counsel has placed reliance on the judgment passed in the cases of *Dr. Pratap Singh and another Vs. Directorate of Enforcement, Foreign Exchange Regulation Act and Others* (1985) 3 SCC 752 and *Dr. Vinod Shivappa Vs. Nanda* (2006) 6 SCC 456 and prayed for dismissal of both the writ petitions.

Heard.

18. Undisputedly after conducting the search on the premises of the petitioner, the respondents have issued detailed show cause notice to the petitioner, which is not under challenge in this petition, therefore, whether the petitioner has evaded the excise duty during that relevant period is the subject matter of show cause notice for which the adjudicating is going to be completed by the competent authority. ***The limited issue involved in this petition is whether the action of the respondents is legal in keeping the manufacturing machine and DG set under seal and depriving the petitioner to start the business?***

19. According to the respondents, a search was conducted and machine and DG sets were sealed under the provisions of Trade Notice No.02/2015 dated 04.02.2015 which was under operation/ effect at the relevant. Clause -C of the Trade Notice is relevant which provides that the seal shall be removed by the authorised officer when the production is scheduled to start on the next working shift/day. The relevant clause -C is reproduced below:

C. Procedure for Non-working/Partially working machine.

4.1 Where the unit is operating at a capacity lower than 50% of the total machine hours available for the machines installed

> the machine will be sealed after the production is over by the Inspector or any other officer authorized by the Commissioner. This seal shall be removed by the authorised officer scheduled when the production is scheduled to start on the next working shift/day. It is clarified that the machines should be sealed in such a manner that no commercial production is possible without removing such seal.
>
> 4.2 In case the unit does not propose to operate any of the machines for the day or for any specified/expected period the same should be informed in writing along with the reasons to the Deputy/Assistant Commissioner having jurisdiction over the manufacturing unit with a copy of jurisdictional Range Officer, such machine shall be sealed in accordance with the procedure laid in Para 4.2. above.
>
> 4.3 The authorized representative of the manufacturing unit shall inform the officer posted in the unit in writing well in advance about the time and date they intend to start the machine for production and get the machine de-sealed by the Range Officer or any other authorized Central Excise Officer.
>
> 4.4 In case the installed machines require any repair/ maintenance, such machines such shall be de-sealed by the authorized officer and entire maintenance/repar work shall be strictly in physical presence of the Range Officer/Inspector or any other officer authorized by the Commissioner for the purpose. After completion of repair/maintenance such machines(s) shall be sealed in accordance with the procedure laid down in para 4.1 above. The assesses shall intimate undertaking of such repair/maintenance at least 24 hours in advance to the jurisdictional Assistant/Deputy Commissioner.

Therefore, it is clear from the aforesaid clause Clause -4.1 that the manufacturing machine of the concerned unit shall remain under seal between the last production and the next day's working shift so that production may not be affected. Beyond that period the respondents have no authority to keep the machine under the seal to halt production. Shri Prasad has relied on Section 37 (2) (v) of Central Excise Act, 1944 under which the Central Excise Authorities can regulate the production or manufacture, storage, sale for the proper levy and collection of the duties imposed by this Act. The aforesaid argument is not acceptable for the simple reason that Section 37 gives power to Central Government to make rules to regulate the production or manufacturing and unless the Central Government makes the rules but in this case there is no such rules have and notified by the Central Government under Section 37 (v) to regulate the production, sale and storage of the goods.

20. Learned counsel for the petitioner has argued that there is no such provision under the Central Excise Act for issuing Trade Notices from time to time. The petitioner has never challenged the earlier Trade Notices issued by the respondents from time to time. The petitioner is aggrieved by only Trade Notice dated 18.01.2021 issued by the Office of Commissioner CGST & Central Excise. Rule 34 of the Central Excise Rules, 2017 gives power to Board or the Principal Chief Commissioner or Chief Commissioner, to issue written instructions for any incidental or supplemental matters, consistent with the provisions of the Act and rules. Therefore, the Excise authority gets jurisdiction to issue Trade Notices under the Act and rules but the only rider is that such written instructions in the Trade Notice should be consistent with the act and provision of the rules.

21. Now the next grievance of the petitioner is about clause 6.3 which is produced below:-

> *"Whether any machine is operating at a capacity lower than 50% of total machine hours in a shift available or less than 50% of the declared capacity for a machine installed, the machine will be sealed after the production record is submitted on the next day. The de-sealing of the said machines will be done only after the written undertaking by the manufacturer that they will utilize at least 50% of the total machine hours in a shift and the declared capacity of the machine. Further, if the condition then the machines will be sealed till further orders by the jurisdiction Deputy/Assistant Commissioner."*

22. In our view, the above clause does not apply in the case of the petitioner as the impugned action of sealing was done under Trade Notice No.02/2015 dated 04.02.2015 which was applicable at the relevant point of time. But the respondents are denying the de-sealing of the machines and DG sets under Trade Notice dated 18.1.2021 hence we shall also examine the validity of the above clause of this latest Trade Notice. After hearing the learned counsel for the respondents who have failed to highlight any provision in the Excise Act and rules and even in the CGST Act which gives authority to the competent authority to seal the machines of a running manufacturing unit. Hence above clause 6.3 is wholly unreasonable and inconsistent with the provision of the Central Excise Act and Rules and liable to be struck down.

23. The Central Excise Authorities cannot compel any manufacturer to utilize 50% of the machine hours in shift based on the declared capacity of the machine. The production of any goods always depends on demand in markets, availability of raw material, availability of electricity, manpower, working capital etc. The only provision under the Excise Act is section 3A under which the Central Government can charge the excise duty on the basis of capacity of production in respect of notified goods and admittedly, the cigarette is not notified goods under

Section 3A, therefore, apart from Section 3A, Shri Prasad has failed to point out any provision under the Act and Rules under which the Central Government can insist the manufacture to operate the machine up to 50% of its total production capacity machine hours. Hence, condition No.6.3 is liable to be struck down.

24. The respondents have completed the search and investigation and thereafter issued a show cause notice to the petitioner, therefore, there is no need to keep the machine and DG sets under seal. The respondents have already assessed the capacity of the machine by calling Chartered Engineers. When the respondents have already assessed the capacity then there is no question of seeking a declaration about the capacity of the machine under seal from the petitioner. Since there is no mandatory provision in the statute to give production as per the capacity of the machine then the respondents cannot compel any manufacturer to give a declaration or run the factory up to its 50% capacity. The Excise is levied only when the finished goods are removed from the factory and as per the provisions of the Central Excise Act, it is mandatory for manufacturers to maintain the record and issue a get pass. The Excise officer is posted there 24x7 hours to check the production and accordingly, charged the excise duty, therefore, no purpose would be served by keeping the record or insisting the manufacturer to declare the capacity of the machine. It is the responsibility of the Excise Officer to watch 24x7 hrs and check the capacity of production in the factory before removing the goods.

25. So far as W.P. No.23624/2021 is concerned, the petitioner has challenged the action of the respondents by which they called the Chartered Engineer to assess the capacity of the machine.

In view of the above discussion, nothing is required to adjudicate the said issue. Even otherwise, Section 145 of the GST Act gives the authority to seek an opinion from an expert, hence this writ petition is devoid of substance hence dismissed.

26. Before parting we would like to observe about the conduct of the competent authorities of the respondents that the machine and two DG sets of the petitioner are under seal since the date of the raid and now more than two years have lapsed still the respondents are not ready to release them. The petitioner is unable to do the production, this has not only caused business loss to the petitioner but to the Central Government also in respect to the revenue. The impugned action of the respondents is wholly without jurisdiction for which the petitioner is liable to be compensated, hence instead of assessing losses caused in this writ petition, we leave it to the petitioner to take recourse available under the law against the respondents. As far as loss of revenue to the Government is concerned, the higher officials of the respondents shall take appropriate action against the responsible officers.

27. Hence, W.P. No.23618/2021 is allowed. Annexure P/1 is hereby quashed with a cost of Rs 50,000/ (Fifty Thousand only) payable to the petitioner. The respondents are directed to de-seal the machine and two DG sets forthwith.

In view of the above No.23624/2021 is dismissed , No. order as to cost.

Petition dismissed

I.L.R. 2022 M.P. 2006

Before Smt. Justice Nandita Dubey

WP No. 22257/2021 (Jabalpur) decided on 28 July, 2022

SURESH SHARMA & anr. …Petitioners

Vs.

STATE OF M.P. & ors. …Respondents

(Alongwith WP No. 22662/2021)

A. Service Law – Dismissal – Principle of Natural Justice – Opportunity of Hearing **– Held – Dismissal from service is a major penalty, before passing such order, respondent should have issued show cause notice to petitioners to show cause as to why order of dismissal should not be passed against them – Principle of natural justice not followed – Respondent acted arbitrarily and capriciously – Termination order is also vitiated since it is disproportionate to gravity of misconduct alleged – Impugned order set aside – Petitions allowed. (Paras 21 to 24)**

क. सेवा विधि – पदच्युति – नैसर्गिक न्याय का सिद्धांत – सुनवाई का अवसर – अभिनिर्धारित – सेवा से पदच्युति एक मुख्य शास्ति है, उक्त आदेश पारित करने से पूर्व, प्रत्यर्थी को याचीगण को यह दर्शाने हेतु कारण बताओ नोटिस जारी करना चाहिए था कि उनके विरूद्ध पदच्युति का आदेश क्यों नहीं पारित किया जाना चाहिए – नैसर्गिक न्याय के सिद्धांत का पालन नहीं किया गया – प्रत्यर्थी ने मनमाने तथा अनुचित ढंग से कार्य किया – सेवा समाप्ति आदेश भी दूषित है क्योंकि वह अभिकथित अवचार की गंभीरता के अननुपातिक है – आक्षेपित आदेश अपास्त – याचिकाएं मंजूर।

B. Constitution – Article 226 & 311(2)(b) – Dispensing with Enquiry – Valid Reasons **– Held – Reasons assigned for dispensing with enquiry are based on extraneous considerations and political pressure and are insufficient for dispensing with regular department enquiry – If a preliminary enquiry could be conducted, there is no reason why a formal departmental enquiry was not conducted – Enquiry dispensed with without any valid reason. (Paras 17 to 19)**

ख. संविधान – अनुच्छेद 226 व 311(2)(b) – जांच से अभिमुक्ति प्रदान किया जाना – विधिमान्य कारण – अभिनिर्धारित – जांच से अभिमुक्ति प्रदान करने के लिए दिये

गये कारण बाहरी प्रतिफलों / विचारों एवं राजनीतिक दबाव पर आधारित हैं तथा नियमित विभागीय जांच से अभिमुक्ति प्रदान करने के लिए पर्याप्त हैं – यदि एक प्रारंभिक जांच की जा सकती थी, तो इसका कोई कारण नहीं है कि एक औपचारिक विभागीय जांच संचालित क्यों नहीं की गई थी – बिना किसी विधिमान्य कारण के जांच से अभिमुक्ति प्रदान की गई।

***C. Constitution – Article 226 – Dismissal – Scope of Judicial Review* – Held – Apex Court concluded that dismissal without conducting departmental enquiry on ground of being not reasonably practicable is open for judicial review. (Para 14)**

ग. संविधान – अनुच्छेद 226 – पदच्युति – न्यायिक पुनर्विलोकन की व्याप्ति – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया है कि युक्तियुक्त रूप से साध्य न होने के आधार पर, विभागीय जांच संचालित किये बिना की गई पदच्युति का न्यायिक पुनर्विलोकन किया जा सकता है।

***D. Constitution – Article 311(2)(b) – Dispensing with Enquiry – Specific Reasons* – Held – The authority to invoke power under Article 311(2)(b) to dispense with departmental enquiry, must record a specific finding/reason as to why such an enquiry cannot be conducted. (Para 10)**

घ. संविधान – अनुच्छेद 311(2)(b) – जांच से अभिमुक्ति प्रदान करना – विनिर्दिष्ट कारण – अभिनिर्धारित – विभागीय जांच से अभिमुक्ति प्रदान करने हेतु अनुच्छेद 311(2)(b) के अंतर्गत शक्ति का अवलंब लेने के लिए प्राधिकारी को एक विनिर्दिष्ट निष्कर्ष / कारण अभिलिखित करना चाहिए कि ऐसी जांच संचालित क्यों नहीं की जा सकती।

Cases referred:

(2006) 13 SCC 581, (1985) 3 SCC 398, (1991) 1 SCC 362, (2015) 8 SCC 86, (2020) 3 SCC 153, (1993) 4 SCC 269, (2003) 9 SCC 75, (2005) 11 SCC 525.

D.K. Tripathi, for the petitioners in WP No. 22257/2021 & WP No. 22662/2021.

Subodh Kathar, G.A. for the respondents in WP No. 22257/2021 & WP No. 22662/2021.

O R D E R

NANDITA DUBEY, J.:- Regard being had to the similitude of the question involved, on the joint request of the parties, the matters are analogously heard and decided by this common order. Facts are taken from W.P. No.22257/2021.

2 This petition under Article 226 of the Constitution of India calls in question the validity of order of dismissal dated 30.09.2021.

3. A report dated 14.09.2021 was forwarded from the desk of Superintendent of Police, Raisen to the office of DIG, Hoshangabad Range, stating that on

08.09.2021, the present petitioners and one Sub-Inspector Keshav Sharma in intoxicated condition without any rhyme and reason misbehaved one Mr. Surendra Tiwari and kept him in the police station, though no cognizable offence was registered against Mr. Surendra Tiwari nor was he being required in any connection. The report further states that the said incident tarnished Mr. Surendra Tiwari's image which in turn has malign the name of the force. Alongwith the report, a preliminary enquiry conducted by the Additional Superintendent of Police, Raisen was also sent, which reveal that despite no offence being registered against Mr. Surendra Tiwari, nor being he wanted for anything, petitioners and his colleagues forcibly brought him to the police station in handcuffs while abusing and beating him. The report further mentioned that Mr. Surendra Tiwari and his family members were threatened for a compromise. As the act of petitioners and his colleague was derogatory to the dignity of the department and violative of the provisions contained in clause 64 of the M.P. Police Regulations Act, a show cause notice was issued to the petitioners, who submitted their explanation/reply that while on duty for night petrol on 7-8.09.2021, they found Mr. Surendra Tiwari roaming on the road at 12 P.M. in the night. The petitioners when stopped him and asked as to why he is on road at mid night, he misbehaved and used abusive language with the petitioners stating that he is the ex- president of BJP in district Raisen and further threatened to get them removed from the service. According to the petitioners, since Mr. Surendra Tiwari misbehaved with the policemen in duty, he was taken to the police station, where he called higher ranking police officers and when SDOP came to the police station, he went back to his home.

4. Reply submitted by petitioners was found not satisfactory, the respondent authority considering that the action of petitioners was in utter disregard and standard set up by the Human Rights Commission and violative of the Police Regulations and as the above incident had malign and lowered the dignity and name of the force and also created a law and order situation, reached to a conclusion that the continuation of the petitioners in the service is not in the interest of police force and dismissed them from service taking recourse to Article 311(2)(b) of the Constitution of India.

5. The aforesaid order is assailed on the ground that major penalty of dismissal has been affected upon the petitioners without conducting any regular departmental enquiry. It is urged that the complaint was not filed by the alleged victim, i.e., Mr. Surendra Tiwari, but by a third person, i.e., Pankaj Shrivastava, who is the BJP Mandal Adhyaksh after two days of the incident at the instance of local politicians, who pressurized the higher police authorities to put the petitioners under suspension and then only on the basis of preliminary enquiry in which petitioners were never afforded any opportunity of hearing, removed the petitioners from service. It is argued that the reasons assigned for dispensing with the regular enquiry is also not as per the provisions of Article 311 (2)(b) of the

Constitution of India. Learned counsel placed reliance on (2006) 13 SCC 581 *Tarsem Singh Vs. State of Punjab* in support of his contentions.

6. Per contra, Shri Subodh Kathar, Govt. Advocate for the respondent/State has supported the order of dismissal and stated that provisions of Article 311(2) of the Constitution of India has been rightly applied while removing the petitioners from service. It is contended that petitioners in intoxicated condition misbehaved and abused Mr. Surendra Tiwari and brought him to the police station in handcuffs in violations of Police Regulations. It is argued that in preliminary enquiry the petitioners were found guilty on the basis of statement of witnesses and photographs. After going through the preliminary enquiry report, the authority reached to a subjective satisfaction to do away with the regular departmental enquiry, no interference is therefore, warranted.

7. Considered the rival submissions of the parties and perused the record.

8. Article 311 of the Constitution of India provides for dismissal, removal or reduction of rank of persons employed in the civil capacities under the Union or the 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:*
>
> *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.*

9. Clause (i) states that the persons employed in the civil services or post shall not be dismissed, removed or reduced in rank by an authority subordinate to that by which he/she was appointed; whereas clause (ii) provides that such a person could be dismissed or removed or reduced in rank only after an enquiry in which he has been informed of the charges against him and after being given a reasonable opportunity of being heard in respect of those charges. The second proviso incorporates exception when the need for holding an enquiry under clause (ii) can be dispensed with.

10. Clause (b) of the second proviso to Article 311 (2) can be invoked to impose a punishment of dismissal, removal or reduction in rank on satisfaction to be recorded in writing that it is not reasonably practicable to conduct an enquiry before imposing the punishment. The obligation of the competent authority to record reason when passing an order under Clause (b) of second proviso to Article 311, is mandatory. Thus, the authority to invoke the power under clause (b) to second proviso of Article 311 to dispense with departmental enquiry must record a specific finding/reason as to why such an enquiry cannot be conducted.

11. In *Union of India Vs. Tulsiram Patel* (1985) 3 SCC 398, the Supreme Court has held thus :-

> *130. The condition precedent for the application of clause (b) is the satisfaction of the disciplinary authority that "it is not reasonably practicable to hold" the inquiry contemplated by clause (2) of Article 311. What is pertinent to note is that the words used are "not reasonably practicable" and not "impracticable." According to the Oxford English Dictionary "practicable" means "Capable of being put into practice, carried out in action, effected, accomplished, or done; feasible." Webster's Third New International Dictionary defines the word " practicable" inter alia as meaning "possible to practice or perform : capable of being put into practice, done or accomplished : feasible." Further, the words used are not " not practicable" but " not reasonably practicable." Webster's Third New International Dictionary defines the word "reasonably" as "in a reasonable manner : to a fairly sufficient extent." Thus, whether it was practicable to hold the inquiry or not must be*

judged in the context of whether it was reasonably practicable to do so. It is not a total or absolute impracticability which is required by clause (b). What is requisite is that the holding of the inquiry is not practicable in the opinion of a reasonable man taking a reasonable view of the prevailing situation. It is not possible to enumerate the cases in which it would not be reasonably practicable to hold the inquiry, but some instances by way of illustration may, however, be given. It would not be reasonably practicable to hold an inquiry where the government servant, particularly through or together with his associates, so terrorizes, threatens or intimidate witnesses who are going to given evidence against him with fear of reprisal as to prevent them from doing so or where the government servant by himself or together with or through other threatens, intimidates and terrorizes the officer who is the disciplinary authority or member of his family so that he is afraid to hold the inquiry or direct it to be held. It would also not be reasonably practicable to hold the inquiry where an atmosphere of violence or of general indiscipline and insubordination prevails, and it is immaterial whether the concerned government servant is or is not a party to bringing about such an atmosphere. In this connection, we must bear in mind that numbers coerce and terrify while an individual may not. The reasonable practicability of holding an inquiry is a matter of assessment to be made by the disciplinary authority. Such authority is generally on the spot and knows what is happening. It is because the disciplinary authority is the best judge of this that clause (3) of Article 311 makes the decision of the disciplinary authority on this question final. A disciplinary authority is not expected to dispense with a disciplinary inquiry lightly or arbitrarily or out of ulterior motives or merely in order to avoid the holding of an inquiry or because the Department's case against the government servant is weak and must fail. The finality given to the decision of the disciplinary authority by Article 311(3) not binding upon the court so far as its power of judicial review is concerned and in such a case the court will strike down the order dispensing with the inquiry as also the order imposing penalty. The case of Arjun Chaubey v. Union of India and others, [1984] 3 S.C.R. 302, is an instance in point. In that case, the appellant was working as a senior clerk in the office of the Chief Commercial Superintendent, Northern Railway, Varanasi. The Senior Commercial Officer wrote a letter to the appellant calling upon him to submit his explanation with regard to twelve charges of gross indiscipline mostly relating to the Deputy Chief Commercial Superintendent. The appellant submitted his explanation and on the very next day the Deputy Chief

Commercial Superintendent served a second notice on the appellant saying that his explanation was not convincing and that another chance was being given to him to offer his explanation with respect to those charges. The appellant submitted his further explanation but on the very next day the Deputy Chief Commercial Superintendent passed an order dismissing him on the ground that he was not fit to be retained in service. This Court struck down the order holding that seven out of twelve charges related to the conduct of the appellant with the Deputy Chief Commercial Superintendent who was the disciplinary authority and that if an inquiry were to be held, the principal witness for the Department would have been the Deputy Chief Commercial Superintendent himself, resulting in the same person being the main accuser, the chief witness and also the judge of the matter.

12. The Supreme Court in the case of *Tarsem Singh* (supra) relying on *Jaswant Singh Vs. State of Punjab and others* (1991) 1 SCC 362 and has observed thus :-

12. Even the Inspector General of Police in passing his order dated 26.11.1999, despite having been asked by the High Court to pass a speaking order, did not assign sufficient or cogent reason. He, like the appellate authority, also proceeded on the basis that the appellant was guilty of commission offences which are grave and heinous in nature and bring a bad name to the police force of the State on the whole. None of the authorities mentioned hereinbefore proceeded on the relevant material for the purpose of arriving at the conclusion that in the facts and circumstances of the case sufficient cause existed for dispensing with the formal enquiry. This aspect of the matter has been considered by this Court in Jaswant Singh Vs. State of Punjab (1991) 1 SCC 362, wherein relying upon the judgment of the Constitution Bench of this Court, inter alia, in ***Union of India Vs. Tulsiram Patel****, **(1985) 3 SCC 398,** it was held :-*

> *"Although Clause (3) of that article makes the decision of the disciplinary authority in this behalf final such finality can certainly be tested in a court of law and interfered with if the action is found to be arbitrary or mala fide or motivated by extraneous considerations or merely a ruse to dispense with the enquiry."*

13. Similar view is held in (2015) 8 SCC 86 *Ved Mittal Gill Vs. Union Territory Administration, Chandigarh* and (2020) 3 SCC 153 *Hariniwas Gupta Vs. State of Bihar and another.*

14. It is settled preposition of law that dismissal without conducting a departmental enquiry on the ground of being not reasonably practicable is open

for judicial review [see (1993) 4 SCC 269 *Union of India Vs. R. Reddappa,* (1991) 1 SCC 362 *Jaswant Singh Vs. State of Punjab and others,* (2003) 9 SCC 75 *Sahadeo Singh Vs. Union of India*].

15. In the present case, a written complaint dated 08.09.2021 was filed by one Pankaj Shrivastava, BJP Mandal Adhyaksh, Bari stating that the petitioners' in an intoxicated condition misbehaved with Mr. Surendra Tiwari and without any reason took him to the police station, due to their action, the image of Mr. Surendra Tiwari has been tarnished, therefore, petitioners be immediately suspended. There is no allegation in the complaint that Mr. Surendra Tiwari was handcuffed or his mobile or specs were broken.

16. Complaint filed by Mr. Pankaj Shrivastava is reproduced as under :-.

प्रति,
श्रीमान पुलिस अधीक्षक महोदय
जिला रायसेन (म.प्र.)

विषयः– अभद्र व्यवहार करने बावत।

महोदय,

उपरोक्त विषयांतर्गत लेख है कि मैं प्रार्थी बाडी का निवासी हूं।

यह कि बाडी नगर के प्रतिष्ठ व्यक्ति भाजपा पूर्व जिला अध्यक्ष सम्मानीय श्री सुरेन्द्र तिवारी के साथ रात्रि में नषें की हालत में थाना प्रभारी केषव षर्मा प्रधान आरक्षक सुरेष शर्मा आरक्षक कुदुष द्वारा अभद्र व्यवहार किया गये वेवजह थाना में ले जाकर बैठाया।

यह कि तीनों नषे की हालत में इनके द्वारा किये अभद्र व्यवहार से सम्मानीय श्री सुरेन्द्र तिवारी जी प्रतिष्ठा धूमिल हुई है।

यह कि भाजपा मंडल के समस्त कार्य कर्ताओं में भारी रोष उपरोक्त तीनों को तत्काल निलंबित किया जाए।

श्री मान के समक्ष कार्यवाही के लिए आवेदन पत्र प्रस्तुत है।

भवदीय
पंकज श्रीवास्तव
भाजपा मंडल अध्यक्ष बाडी

17. Pursuant to this complaint, immediate action was taken and petitioner No.1 was suspended on the same day, i.e., 08.09.2021 and petitioner No.2 on the next day, i.e., 08.09.2021 and petitioner No. 2 on the next day, i.e., 09.09.2021. On the same day, Narendra Singh Rathore, SDOP Bari was directed to conduct the preliminary enquiry but within hours that order was modified and Amrit Meera,

Addl. Superintendent of Police, Raisen was appointed as Preliminary Enquiry Officer, who within four days submitted his report on 12.09.2021 and thereafter within seven days, the petitioners were dismissed from service.

18. A perusal of impugned order reveals that the enquiry was dispensed with for two reasons :- (i) the petitioners have given threats to the complainant to take back the complaint, hence there is a possibility that in future they will try to influence the enquiry, (ii) the main witnesses of the police enquiry are police personnels posted at the police station and there is a possibility that they could be influenced, and will not come forward to record their statements.

19. In my considered opinion, these reasons are based on extraneous considerations and political pressure and totally not sufficient for dispensing with regular departmental enquiry. Indisputedly, the preliminary enquiry was duly conducted and there was no allegation that the department found any difficulty in examining the witnesses in the said enquiry. If a preliminary enquiry could be conducted, I failed to see any reason, why a formal departmental enquiry could not have been initiated against the petitioners. Thus, I am of the opinion that the enquiry has been dispensed with by invoking Article 311(2)(b) of the Constitution of India without any valid reason.

20. In *Suresh Kumar Vs. State of Haryana and others* (2005) 11 SCC 525, the Supreme Court has observed that a reasonable opportunity of hearing enshrined in Article 311(2) of the Constitution of India would include an opportunity to the delinquent to defend himself and establish his innocence by cross- examining the witness produced against him and by examining the defence witness in his favour, if any. This can do only if enquiry is held where he has been informed of the charges levelled against him.

21. Dismissal from service is a major penalty. In the present case, before passing the order of dismissal for the alleged act of misconduct by the petitioner, the respondent should have issued a show cause notice to the petitioners, calling upon them to show cause as to why the order of dismissal should not be passed against them. Further more, the termination order is vitiated since it is disproportionate to the gravity of misconduct alleged against them. I am of the view that since the department has not followed the principle of natural justice and has acted arbitrarily and capriciously while inflicting the punishment of dismissal from service upon the petitioners, the same is vitiated in law and liable to be set aside.

22. In the result, the petitions are allowed, the impugned order is set aside. The petitioners are reinstated in service.

23. It is made clear that this order shall not preclude the competent authority from taking action against the petitioners in accordance with law. Payment of back wages shall abide by the result of such enquiry.

24. With the aforesaid, the petitions are allowed.

Petition allowed

I.L.R. 2022 M.P. 2015 (DB)
Before Mr. Justice Ravi Malimath, Chief Justice
& Mr. Justice Vishal Mishra
WP No. 2640/2004 (Jabalpur) decided on 1 August, 2022

BIRLA CORPORATION LTD. (M/S) & anr. …Petitioners

Vs.

STATE OF M.P. & ors. …Respondents

***A. Stamp Act, Indian (2 of 1899), Section 26, proviso and Mines and Minerals (Development and Regulation) Act (67 of 1957), Section 9A – Dead Rent – Determination* – Held – There is a distinction between royalty and dead rent and proviso to Section 26 of 1899 Act is clearly attracted in case of mining lease – Dead rent is required to be calculated only on basis of ascertained royalty to be charged from leaseholder at the very initial stage – Petition dismissed. (Paras 21, 22 & 28 to 30)**

क. स्टाम्प अधिनियम, भारतीय (1899 का 2), धारा 26, परंतुक एवं खान और खनिज (विकास और विनियमन) अधिनियम (1957 का 67), धारा 9A – अनिवार्य भाटक – निर्धारण – अभिनिर्धारित – रॉयल्टी तथा अनिवार्य भाटक में अंतर है तथा 1899 के अधिनियम की धारा 26 का परंतुक खनन पट्टा के प्रकरण में स्पष्ट रूप से आकर्षित होता है – अनिवार्य भाटक की गणना केवल प्रारंभिक चरण में पट्टा धारक से ली जाने वाली निश्चित रॉयल्टी के आधार पर की जानी आवश्यक है – याचिका खारिज।

***B. Constitution – Article 226 – Ultra Vires* – Held – Provision cannot be declared *ultra vires* owing to personal inconvenience – It is the basic intention of the legislature which is required to be seen. (Para 25)**

ख. संविधान – अनुच्छेद 226 – अधिकारातीत – अभिनिर्धारित – व्यक्तिगत असुविधा के कारण उपबंध अधिकारातीत घोषित नहीं किया जा सकता – यह विधायिका का मूल आशय है जिसे देखने की आवश्यकता है।

Cases referred:

AIR 1960 Madhya Pradesh 129, AIR 1965 SC 177, 1986 (Suppl.) SCC 20, 1986 MPLJ 200, WP No. 997/2015 decided on 01.04.2016 (DB), (1985) 2 SCC 279, (1990) 2 SCC 231, WP No. 1539/2018 decided on 22.04.2021 (FB), (1976) 21 MPLJ 759.

Kishore Shrivastava with *Atul Choudhari,* for the petitioners.
Amit Seth, Dy. A.G. for the respondents.

O R D E R

The Order of the Court was passed by :

VISHAL MISHRA, J.:- The present petition has been filed challenging the validity of the Circular No.F-19-192/92/12/2 dated 15.03.1993 issued by the Department of Mineral Resources, Government of Madhya Pradesh, Bhopal (M.P.), whereby the procedure has been laid down for computation of the stamp duty exigible, inter alia, for execution of a fresh deed of mining lease prescribed in Form "K" under Rule 31 of the Mineral Concession Rules, 1960.

2. It is the case of the petitioners that the petitioner No.1/Company which is registered under the Companies Act, 1956 owns a Cement Industrial Undertaking in the name and style as M/s. Satna Cement Works, Tehsil Raghuraj Nagar, District Satna in the State of Madhya Pradesh. Petitioner No.2 is the shareholder of the petitioner No.1 carrying on business through the agency of the petitioner No.1. The cement units are registered under the Factories Act, 1948 for using limestone as a major raw material for manufacture of cement. Looking to the requirement of mineral for production of cement, the petitioner No.1 applied for grant of lease of limestone under the relevant provisions of the Mines and Minerals (Development and Regulation) Act, 1957 (hereinafter referred to as "the MMDR Act") for an area of 56.27 Hectare in Village Birhauli, Tehsil Raghuraj Nagar, District Satna (M.P.). On 11.02.2004, a fresh lease was granted to the petitioner No.1 in pursuance to the execution of an agreement and registration of mining lease in Form "K" vide letter dated 02.07.2004 (Annexure P/2). He was directed to pay, *inter alia,* a stamp duty of Rs.4,32,00,000/- (Rupees Four Crores Thirty Two Lacs) by considering the anticipated amount of royalty payable at the rate of Rs.40/-per ton likely to be paid per annum in future by the prospective lessee.

3. It is argued that the demand which has been raised by the respondent department is on the higher side and is contrary to the relevant provisions, as the lease and the rent are two different concepts. It is argued that the lease defined under Section 105 of the Transfer of Property Act, 1882 being a transfer of right to enjoy such property is made for a certain time, expressed, implied or in perpetuity on consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee who accepts the transfer on such terms.

4. It is argued that Section 9 of the MMDR Act provides royalty in respect of mining lease and Section 9A of the MMDR Act provides dead rent to be paid by the lessee. It is submitted that the 'royalty' is charged on any mineral removed or consumed by him or by his agent, manager, employee, contractor or sub-lessee from the leased area at the rate for the time being specified in the Second Schedule in respect of that mineral and the dead rent in terms of Section 9A of the MMDR

Act is the amount payable to the State Government every year at such rate as may be specified by for the time being in the Third Schedule, for all the areas included in the instrument of lease. A proviso has been added that the holder of such mining lease becomes liable under Section 9 of the MMDR Act to pay royalty for any mineral removed or consumed by him or by his agent.

5. It is argued that the dead rent is being charged in anticipation of the mineral which is to be extracted and is being charged on the basis of royalty, which is not permissible. The cogent reading of all the relevant provisions of the aforesaid statute, Section 9A and Third Schedule under the MMDR Act, Clause 2 Part-V of the mining lease deed in the statutory Form "K", Article 35 of Schedule 1A of Indian Stamp Act, 1899 (herein after referred as "the Act of 1899") or Article 33 of Schedule 1A of the Act of 1899, requires execution and registration of the instant lease in Form "K" on payment of stamp duty on the basis of the annual rent for value of demised land under the lease by considering only annual dead rent.It is submitted that the concept of 'royalty' and the concept of 'dead rent' are two different aspects. Royalty and dead rent are being defined differently. Placing reliance upon a case of *Surajdin Laxmanlal Vs. State of Madhya Pradesh* reported in AIR 1960 Madhya Pradesh 129, it is argued that the "royalty has been defined as a pro-rata payment to a grantor or lessor, on the working of the property leased, or otherwise on the profits of the grant or lease". Therefore, the royalties are the payments which the Government may demand for appropriation of mineral or any other property belonging to the Government, meaning thereby, the royalties are being charged towards removal of articles in proportion to quantity removed, and the basis of the payment is an agreement.

6. Further placing reliance upon the judgment passed by Hon'ble Supreme Court in a case of *H.R.S.Murthy Vs. The Collector of Chitoor and Another* reported in AIR 1965 SC 177 wherein the concept of expression royalty was considered by Hon'ble Supreme Court. It is pointed out that Hon'ble Supreme Court in the aforesaid case held that 'royalty' which follows the expression 'lease amount' is something other than the return to the lessor or licensor for the use of the land surface and represents as it normally connotes the payment made for the materials or minerals won from the land.

7. Further placing reliance upon paragraph 35 of the judgment passed by Hon'ble Supreme Court in the case *of D.K.Trivedi & Sons and Others Vs. State of Gujarat and Others* reported in 1986 (Suppl.) SCC 20 dealing with the expression dead rent and royalty, it is argued that both the concepts are different. The dead rent payable on a mining lease in addition to royalty so called because it is payable whether the mine is being worked or not. The 'rent' means when a mine, quarry, brick-works, or similar property is leased, the lessor usually reserves not only a fixed yearly rent but also a royalty or galeage rent, consisting of royalties varying

with the quantity of minerals, bricks, etc., produced during each year. The fixed rent is called as a dead rent. It is argued that the rent is an integral part of the concept of a lease. It is a consideration moving from the lessee to the lessor for demise of the property to him. The 'royalty' is being calculated on the basis of the mineral which has been extracted whereas, the 'dead rent' is calculated on the basis of the area leased. Thus, both the concepts are different.

8. Counsel appearing for the petitioners has drawn attention of this Court to Section 26 of the Act of 1899 which relates to valuation of the stamp duty on the instruments. In terms of Section 26 of the Act of 1899, if the subject matter of any instrument which is chargeable with ad-valorem duty could not have been ascertained at the date of its execution or first execution, nothing shall be claimable under such instrument. The stamp which is actually used at the date of such execution have been sufficient. It is argued that the stamp duty on the dead rent is being calculated on the basis of the royalty which is required to be paid, but the fact remains that the royalty is totally dependent upon the amount of mineral which is to be extracted and the same cannot be ascertained at the time of execution of an agreement of the lease at initial stage, therefore, charging of the stamp duty on the basis of royalty as a dead rent is not permissible. It is argued that the dead rent as well as the royalty are two different things and the applicability of two different things the 'dead rent' cannot be charged upon the quantity of the mineral which has been extracted. The 'dead rent' is charged only on the area which is being leased out.

9. It is submitted that 'dead rent' and 'royalty' are both returned to the lessor in respect to the area which has been leased and dead rent can be described as a minimum amount paid to the lessor but the amount of royalty varied and it is on the basis of the quantity of the mineral extracted or removed from the area leased out. In such circumstances, both cannot be calculated. It is further argued that there may be instances that the lease has been granted and agreement has been executed, but the actual work of extraction of mineral does not take place for a considerable period then in such circumstances, no royalty could be charged. Therefore, it is not possible to ascertain the 'dead rent' on the basis of the 'royalty'. In such circumstances, considering the provisions of Sections 9, 9A of the MMDR Act and Section 26 of the Act of 1899, the provisions of Article 33 of Schedule 1A of the Act of 1899 be declared as *ultra vires* and unconstitutional and to quash the circular and the demand notice Annexures P/1 and P/2 and has prayed for declaring the proviso to Section 26 of the Act of 1899 as not applicable with respect to execution and registration of new lease deed in form "K".

10. *Per contra*, counsel appearing for the State has vehemently opposed the contention and has argued that the royalty and the dead rent are two different aspects. Royalty is to be charged on the basis of the mineral which has been

extracted and the dead rent is to be charged at the very initial stage at the time of execution of agreement. The question that whether the dead rent is to be charged on the basis of the royalty was considered by the Division Bench of the Court in the case of *Steel Authority of India Ltd. Bhilai Vs. Collector of Stamps, Bilaspur* reported in 1986 MPLJ 200 wherein provision of Section 26 Act of 1899, provisions of Minor Concession Rules, 1960 coupled with Article 2 (16) and Section 1A and Article 15 of the Stamp Act of 1899 were taken into consideration and it was held that the dead rent has to be charged in accordance with law on the royalty basis. The aforesaid issue was further considered by the Division Bench in the case of *M/s.BCC Finance Ltd. Vs. State of M.P. & Ors.* passed in Writ Petition No.997 of 2015 decided on 01.04.2016 wherein the Division Bench has again held that the lease documents being value of more than Rs.100/- are compulsorily registerable under Section 17 of the Registration Act and liable to pay stamp duty @ 4% as per Section 1A of Article 33 of the Act of 1899.

11. It is argued that the provisions of Section 26 of the Act of 1899 and the proviso appended thereto, are required to be seen. The proviso clearly says that in case of lease of a mine in which royalty or share of mineral is received as a rent or a part of rent, it shall be sufficient to have estimated such royalty of value of such share for the purpose of stamp duty. It is further contended that the proviso to Section 26 of the Act of 1899 is applicable in the case of mine lease. Both the aforesaid judgments have considered Section 26 of the Act of 1899 and its proviso. He has further drawn attention of this Court to Section 9A of the MMDR Act and has argued that the dead rent is to be paid by the lease holder to the State Government every year at such a rate which has been specified for the time being in the Third Schedule. It is further provided that he shall be liable to pay either such royalty or the dead rent in respect of the area whichever is greater. When he becomes liable under Section 9 of the MMDR Act to pay royalty for the mineral removed or consumed by him, the aforesaid Section was inserted by the Act 56 of 1972 and is applicable with effect from 12.09.1972 and since then the same has been continuously followed.

12. It is argued that proviso to Section 26 of the Act of 1899 specifically deals with the situation of levy of stamp duty and it is required to be read independently. Similarly Entry 38 of Schedule 1A which is appended to the Act of 1899 which specifically provide for the purpose of article royalty to be treated as the rent for computation of the stamp duty in cases of mining lease. It is argued that the aforesaid provision was in existence since its perception of enactment and in the year 2015, the clarification by way of an explanation has been incorporated. The explanation does not leave out any doubt on the issue for the purpose of computation of stamp duty to be levied on the registration of mining lease. The proviso to Section 26 of the Act of 1899 would be applicable and computation

of the stamp duty is to be quantified on the basis of anticipated royalty to be paid on mining lease for the period in question. It is further contended that at the time of filing of an application for grant of lease and prior to executing a document, a declaration has to be made that how much extraction of mineral can be made from the proposed area to be leased out. On the aforesaid basis, the calculation towards the royalty is being made and the dead rent has been charged on the basis of the royalty. It is argued that the dead rent is a minimum guaranteed amount to be paid to the State Government once the mining lease agreement is being executed. There are instances that the mining lease is being executed and no extraction of any mineral has been carried out for a considerable long period. It does not give any liberty to the lease holder not to pay any dead rent to the Government. He is required to pay the dead rent on the anticipated royalties. The dead rent is charged on the total area which is being leased out. It is not sure that from the whole leased out area the mineral has been extracted therefore, dead rent and royalty are two different things.

13. It is pointed out that in the case of *D.K.Trivedi & Sons and Others* (supra), Hon'ble Supreme Court has considered the concept of royalty and dead rent and has defined the same. Hon'ble Supreme Court has held that the dead rent has "a minimum guaranteed amount of royalty per year payable, as per rules or the agreement under the mining rules, meaning, thereby, a lessee is under obligation to pay the surface rent, dead rent and royalty to the lessor are usual covenants to be found in the mining lease. Hon'ble Supreme Court has further considered the object and reason of Legislative Bill, 83 of 1972 for inserting provisions Section 9A of the MMDR Act with a view to prohibit the Central Government from enhancing the date of dead rent more than once during the period of four years. In such circumstances, provisions of Section 9A of the MMDR Act are rightly being inserted.

14. It is argued that for declaring proviso as *ultra vires,* the personal grievances cannot be taken into consideration as a proviso has been added to Section 26 of the Act of 1899 and the same has to be dealt independently as has been held by Hon'ble Supreme Court in the case of *Motiram Ghelabhai (dead) through LRs & Ors. Vs. Jahan Nagar* (dead) through LRs & Anrs. reported in (1985) 2 SCC 279. Further placing reliance upon the judgment passed in the case of *Keshavji Ravji & Co. Vs. CIT* reported in (1990) 2 SCC 231 with respect to an explanation being inserted as explanation 6 to the Entry No.38 Schedule 1A appended to the Act of 1899, it is argued that the explanation generally speaking the meaning of a certain phrase, the expression contained in a statutory provisions. He has prayed for dismissal of the writ petition.

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

16. It is the case of the petitioners that the royalty and the dead rent are two different aspects. The dead rent cannot be charged only on the basis of royalty, as the dead rent is to be charged at the very initial stage at the time of executing leased documents, whereas, the royalty is to be charged on the basis of the mineral which has been extracted from the lease area.

17. Relevant provisions dealing with the aforesaid aspect are Sections 9 and 9A of the MMDR Act which was inserted by the Act 56 of 1972 with effect from 12.09.1972 as well as Section 26 of the Act of 1899 are required to be seen.

> ***"9. Royalties in respect of mining leases.—***
>
> *(1) The holder of a mining lease granted before the commencement of this Act shall, notwithstanding anything contained in the instrument of lease or in any law in force at such commencement, pay royalty in respect of any 1[mineral removed or consumed by him or by his agent, manager, employee, contractor or sub-lessee] from the leased area after such commencement, at the rate for the time being specified in the Second Schedule in respect of that mineral.*
>
> *(2) The holder of a mining lease granted on or after the commencement of this Act shall pay royalty in respect of any 2[mineral removed or consumed by him or by his agent, manager, employee, contractor or sub-lessee] from the leased area at the rate for the time being specified in the Second Schedule in respect of that mineral. 2[(2A) The holder of a mining lease, whether granted before or after the commencement of the Mines and Minerals (Regulation and Development) Amendment Act, 1972, shall not be liable to pay any royalty in respect of any coal consumed by a workman engaged in a colliery provided that such consumption by the workman does not exceed one-third of a tonne per month.]*
>
> *(3) The Central Government may, by notification in the Official Gazette, amend the Second Schedule so as to enhance or reduce the rate at which royalty shall be payable in respect of any mineral with effect from such date as may be specified in the notification: 3[Provided that the Central Government shall not enhance the rate of royalty in respect of any mineral more than once during any period of 4[three years]."*
>
> ***"9A. Dead rent to be paid by the lessee.—***
>
> *(1) The holder of a mining lease, whether granted before or after the commencement of the Mines and Minerals (Regulation and Development) Amendment Act, 1972, shall notwithstanding anything contained in the instrument of lease or in any other law*

for the time being in force, pay to the State Government, every year, dead rent at such rate, as may be specified, for the time being, in the Third Schedule, for all the areas included in the instrument of lease: Provided that where the holder of such mining lease becomes liable, under section 9, to pay royalty for any mineral removed or consumed by him or by his agent, manager employee, contractor or sub-lessee from the leased area, he shall be liable to pay either such royalty, or the dead rent in respect of that area, whichever is greater.

(2) The Central Government may, by notification in the Official Gazette, amend the Third Schedule so as to enhance or reduce the rate at which the dead rent shall be payable in respect of any area covered by a mining lease and such enhancement or reduction shall take effect from such date as may be specified in the notification: Provided that the Central Government shall not enhance the rate of the dead rent in respect of any such area more than once during any period of 2[three years]."

26. Stamp where value of subject-matter is indeterminate.—

Where the amount or value of the subject-matter of any instrument chargeable with ad valorem duty cannot be, or (in the case of an instrument executed before the commencement of this Act) could not have been, ascertained at the date of its execution or first execution, nothing shall be claimable under such instrument more than the highest amount of value for which if stated in an instrument of the same description, the stamp actually used would, at the date of such execution, have been sufficient: 54 [Provided that, in the case of the lease of a mine in which royalty or a share of the produce is received as the rent or part of the rent, it shall be sufficient to have estimated such royalty or the value of such share, for the purpose of stamp-duty,—

(a) when the lease has been granted by or only behalf of 55 [the Government], at such amount or value as the Collector may, having regard to all the circumstances of the case, have estimated as likely to be payable by way of royalty or share to the Government under the lease, or

(b) when the lease has been granted by any other person, at twenty thousand rupees a year, and the whole amount of such royalty or share, whatever it may be, shall be claimable under such lease:]

Provided also that where proceedings have been taken in respect of an instrument under section 31 or 41, the amount

certified by the Collector shall be deemed to be the stamp actually used at the date of execution".

18. From the perusal of the aforesaid provisions of the MMDR Act, it is seen that the holder of the mining lease is required to pay royalty on the mineral extracted or removed by him from the leased area whereas, the dead rent in terms of Section 9A of the Act of MMDR Act is to be ascertained at the time of execution of the leased documents, irrespective of the fact whether the extraction is being carried out by the lease holder or not. The dead rent is the minimum guaranteed amount which is required to be paid to the Government in lieu of the area which has been leased out. The question which arises for consideration is for termination of the dead rent amount to be paid to the Government. The petitioners contention is that the dead rent cannot be charged on the basis of the royalty amount because royalty being a subsequent event which depends upon the extraction of a mineral from the leased area. A lease holder is required to make payments towards the royalty against the leased land. A proviso has been added that where the holder of the mining lease would become liable, under Section 9 of the MMDR Act to pay royalty for any mineral removed or consumed by him from the leased area shall be liable to pay either such royalty or dead rent in respect of that area whichever is greater. Meaning thereby, the lease holder is required to make payments towards the dead rent every year to the Government but as soon as the amount of royalty is more than the dead rent then he is liable to pay royalty amount. Section 26 of the Act of 1899 clearly provides that in cases of mining lease, the stamp duty is to be charged on the basis of the estimated royalty value at the time of executing the lease deed. The Collector on behalf of the Government is required to ascertain the amount of stamp duty on the leased document.

19. Hon'ble Supreme Court in the case of *D.K.Trivedi & Sons and Others* (supra) has considered the expression 'royalty' and 'dead rent' as under:-

"Royalty" is defined in Jowitt's "Dictionary of English Law," Second Edition, at page 1595, inter alia, as :

" Royalty, a payment reserved by the grantor of a patent, lease of a mine or similar right, and payable proportionately to the use made of the right by the grantee. It is usually a payment of money, but may be a payment in kind, that is, of part of the produce of the exercise of the right. See Rent.

***"36.** "Royalty" is defined in Wharton's "Law Lexicon" Fourteenth Edition, at page 839, as :*

" Royalty, payment to a patentee by agreement on every article made according to his patent; or to an author by a publisher on every copy of his book sold; or to the owner of minerals for the right of working the same on every ton or other weight raised.

The definition of "royalty" given in Black's "Law Dictionary," Fifth Edition, at page 1195, is as follows :

"Royalty. Compensation for the use of property, usually copyrighted material or natural resources, expressed as a percentage of receipts from using the property or as an account per unit produced. A payment which is made to an author or composer by an assignee, licensee or copyright holder in respect of each copy of his work which is sold, or to an inventor in respect of each article sold under the patent. Royalty is share of product or profit reserved by owner for permitting another to use the property. In its broadest aspect, it is share of profit reserved by owner for permitting another the use of property...

In mining and oil operations, a share of the product or profit paid to the owner of the property.....

In H.R.S. Murthy v. Collector of Chittor and Anr.., [1964] 6 S.C.R. 666, 673 this Court said that "royalty" normally connotes the payment made for the materials or minerals won from the land.

In Halsbury's "Laws of England," Fourth Edition in the volume which deals with "Mines, Minerals and Quarries," namely, volume 31, it is stated in paragraph 224 as follows:

"224. Rents and royalties. An agreement for a lease usually contains stipulations as to the dead rents and other rents and royalties to be reserved by, and the covenants and provisions to be inserted in, the lease..."

The topics of dead rent and royalties are dealt with in Halsbury's " Laws of England" in the same volume under the sub-heading "Consideration,"the main heading being "Property demised; Consideration."Paragraph 235 deals with "dead rent" and paragraph 236 with " royalties". m e relevant passages are as follows :

"235. Dead rent. It is usual in mining leases to reserve both a fixed annual rent (otherwise known as a 'dead rent', 'minimum rent' or 'certain rent') and royalties varying with the amount of minerals worked. The object of the fixed rent is to ensure that the lessee will work the mine; but it is sometimes ineffective for that purpose. Another function of the fixed rent is to ensure a definite minimum income to the lessor in respect of the demise.

If a fixed rent is reserved, it is payable until the expiration of the term even though the mine is not worked, or is exhausted during the currency of the term, or is not worth working, or is

difficult or unprofitable to work owing to faults or accidents, or even if the demised seam proves to be non-existent.

"236. Royalties. A royalty, in the sense in which the word is used in connection with mining leases, is a payment to the lessor proportionate to the amount of the demised mineral worked within a specific period."

In paragraph 238 of the same volume of Halsbury's "Laws of England" it is stated :

"238. Covenant to pay rent and royalties. Nearly every mining lease contains a covenant by the lessee for payment of the specified rent and royalties.

Rent is an integral part of the concept of a lease. It is the consideration moving from the lessee to the lessor for demise of the property to him. Section 105 of the Transfer of Property Act, 1982, contains the definitions of the terms "lease," "lessor", "lessee," "premium" and "rent" and is as n follows :

"105, Lease defined. A lease of immoveable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.

Lessor, lessee, premium and rent defined. The transferor is called the lessor, the transferee is called the lessee, the price is called the premium, and the money, share, service or other thing to be so rendered is called the rent."

In a mining lease the consideration usually moving from the lessee to the lessor is the rent for the area leased (often called surface rent), dead rent and royalty. Since the mining lease confers upon the lessee the right not merely to enjoy the property as under an ordinary lease but also to extract minerals from the land and to appropriate them for his own use or benefit, in addition to the usual rent for the area demised, the lessee is required to pay a certain amount in respect of the minerals extracted proportionate to the quantity so extracted. Such payment is called "royalty." It may, however, be that the mine is not worked properly so as not to yield enough return to the lessor in the shape of royalty. In order to ensure for the lessor a regular income, whether the mine is worked or not, a fixed amount is provided to be paid to him by the lessee. This is called "dead rent."

"Dead rent" is calculated on the basis of the area leased while royalty is calculated on the quantity of minerals extracted or removed. Thus, while dead rent is a fixed return to the lessor, royalty is a return which varies with the quantity of minerals extracted or removed. Since dead rent and royalty are both a return to the lessor in respect of the area leased, looked at from one point of view dead rent can be described at the minimum guaranteed amount of royalty payable to the lessor but calculated on the basis of the area leased and not on the quantity of minerals extracted or removed."

20. The Division Bench in the case of *Steel Authority of India Ltd. Bhilai* (supra) had an occasion to consider the similar issue wherein after a detailed discussion, the Division Bench has arrived at the conclusion that a proviso appended under Section 26 of the Act of 1899 is attracted in the case of mining lease and rent of the dead rent is to be ascertained only on the basis of the estimated royalty value. While considering the aforesaid Article 35 of the Act of 1899 was taken into consideration by the Division Bench is as follows :-

"The actual controversy between the parties is really to the applicability of (he proviso in section 26 relating to mining leases. Admittedly, royalty is payable under the mining lease and effect of the relevant statutory provisions read along with Part V of the instrument of lease in Form K is that the lessee is "liable to pay either such royalty or the dead rent in respect of that area, whichever is higher. "This obviously is the consideration for the lease or, in other words, "rent"due thereunder from (he fessee to the lessor. Dead rent is to be paid in respect of the area within the mining lease and royalty is paid on the quantity of mineral extracted and removed according to the prescribed rates. Where no excavation and removal of the mineral is done, dead rent alone is payable; but in case of excavation and removal of the mineral royally is to be paid. It is clear that the higher of the two amounts is to be paid as consideration or, in other words, "rent" under the lease. The meaning of "royalty"is well settled. "royalty" in the present context means the payment made "to the owner of minerals for the right of working the same on every ton or other weight raised. "Royalty is a payment to the lessor proportionate to the amount of the mineral worked; it is paid in addition to dead rent and surface rent and is a normal feature of mining leases. This is the meaning of "royalty" stated in Surajdin Laxman V/s. State of M. P. (1960 MPLJ 39) and B. B. Saha v. State Govt. of M. P. , Bhopal (1969 M. P. L. J.128) on the basis of references mentioned therein.

5 It would be useful to refer to the definition of " lease" in section 2 (16) of the stamp Act wherein an inclusive definition is given stating that it means a lease of immovable property. The expression "lease" used in the Stamp Act has, therefore, to be understood as defined in section 105 of the Transfer of Property Act in Chapter V relating to leases of immovable property. The definition of " lease" in section 105 of the Transfer of Property Act shows that it is a transfer of a right to enjoy such property in consideration of a price paid and that the consideration given by the lessee to the lessor under the lease, called by whatever name, is the "rent." It is, therefore, obvious that the royalty payable under the mining lease by the lessee to the lessor is the " rent" or at least a part of the rent payable under the mining lease. The primary contention on behalf of the petitioners that royalty is not "rent" or a part thereof is clearly untenable. This view is fully supported by the decisions in Low cv- to. V/s. Jyoti Prasad : (A. I. R.1931 PC 299) and Tarkeshwar Sio Thakur Jiu V/s. B. D. Dey and Co. (A. I. R.1979 S. C.1669).

6 section 26 of the stamp Act applies when the value of the subject-matter is indeterminate and ad valorem duty is chargeable on the instrument. The amount of royalty payable under a mining lease cannot, therefore, be ascertained at the date of its execution. Royalty is payable where it is higher than the dead rent according to the terms of the lease itself and, as already indicated, royalty being consideration for the lease, it is rent or at least a part of the rent payable under the lease. These characteristics of an instrument of mining lease being beyond controversy and royalty being the "rent" or part of the rent in the case of a mining lease, section 26 of the stamp Act including the proviso therein is clearly attracted and it cannot be said that the rent is fixed by such lease so as to apply Article 35 (a) alone and exclude the applicability of section 26. The proviso in section 26 is enacted specifically for mining leases under which royalty is to be paid and if the petitioners contention is accepted, it would not only be contrary to the settled meaning and concept of royalty payable under a mining lease but it would also render this part of section 26 as a legislative exercise in futility. Clause (a) of the Proviso also provides for calculating the amount or value of the subject-matter on the basis of estimated royalty likely to be payable under the lease. The mode of determining the value of subject-matter in such cases where the same cannot be ascertained with precision at the date of the execution of the instrument has also been provided in section 26. It cannot, therefore, be doubted that section 26 of the stamp Act clearly applies."

21. From the perusal of the aforesaid judgments of the Division Bench as well as Hon'ble Supreme Court, it is apparently clear that there is a distinction between royalty and the dead rent and proviso to Section 26 of the Act of 1899 is clearly attracted in the case of mining lease.

22. Another judgment passed by the Division Bench in the case of *M/s.BCC Finance Ltd.* (supra) has again considered the similar issue taking into consideration the relevant provisions of Section 26, Article 33 in Schedule 1 of the Act of 1899 dealing with the lease, Clause 2 (6)(7) of the Act of 1899 and Section 17 of the Registration Act read with Section 2(16) of the Act of 1899 and has arrived at the conclusion that any lease being above the value of Rs.100/- is compulsorily registerable under Section 17 of the Registration Act and is liable to pay stamp duty @ 4% as per Schedule 1A of Article 33 of the Act of 1899, meaning thereby, the amount of stamp duty payable under the lease deed at the time of execution has to be ascertained in terms of relevant provisions of the Act of 1899 as well as Section 17 of the Registration Act and also provisions of MMRD Act and proviso to Section 26 of the Act of 1899 is applicable to the cases of mining lease. Thus, it is apparently clear that the dead rent is required to be calculated only on the basis of ascertained royalty to be charged from the lease holder at the very initial stage. Hon'ble Supreme Court in the case *of Motiram Ghelabhai (dead) through LRs & Ors* (supra) has also considered the Section 26 of the Act of 1899.

23. Counsel appearing for the State has brought to the notice of this Court the documents issued in the year 2015 with respect to Entry No. 38 of the Schedule 1A of the Act of 1899 which was inserted as Explanation 6 which clearly provides that for the purpose of Article, the royalty is to be treated as rent for computation of stamp duty in cases of mining lease. It was argued that provisions was available in the original Act itself but the explanation was required to be inserted just to avoid the confusion and litigations. The explanation inserted does not mean that there is any change in the original section or rule but the same is only a clarification given by the authorities. The meaning of words 'Explanation' or 'Clarification' were considered by Hon'ble Supreme Court in the case of *Keshavji Ravji & Co. Vs. CIT* (supra) wherein Hon'ble Supreme Court has held as under:-

> *"...37.Sri Ramachandran urged that the introduction, in the year 1984, of Explanation I to Section 40(b) was not to effect or bring about any change in the law, but was intend- ed to be a mere legislative exposition of what the law has always been. An 'Explanation', generally speaking, is in- tended to explain the meaning of certain phrases and expressions contained in a statutory provision. There is no general theory as to the effect and intendment of an Explanation except that the purposes and intendment of the 'Explanation' are deter- mined by own words.*

An Explanation, depending on its language, might supply or take away something from the contents of a provision. It is also true that an Explanation may--this is what Sri Ramachandran suggests in this case--be introduced by way of abundant--caution in order to clear any mental cobwebs surrounding the meaning of a statutory provision spun by interpretative errors and to place what the legislature considers to be the true meaning beyond controversy or doubt. Hypothetically, that such can be the possible purpose of an 'Explanation' cannot be doubted. But the question is whether in the present case, Explanation I inserted into Section 40(b) in the year 1984 has had that effect.

38. *The notes on clauses appended to the Taxation Laws (Amendment) Bill, 1984, say that Clause 10 which seeks to amend Section 40 will take effect from 1st April, 1985 and will, accordingly, apply in relation to the assessment year 1985-86 and subsequent years. The express prospective operation and effectuation of the 'Explanation' might, perhaps, be a factor necessarily detracting from any evincement of the intent on the part of the legislature that the Explanation was intended more as a legislative- exposition or clarification of the existing law than as a change in the law as it then obtained. In view of what we have said on point (c) it appears unnecessary to examine this contention any further."*

24. From the aforesaid, it is clear that the explanation inserted in the year 2015 is clearly applicable to the case of the petitioners who have entered into a lease agreement almost ten years back.

25. As far as declaration of the relevant provision of the rule to be *ultra vires* is concerned, it is a settled law that the same cannot be declared as *ultra vires* owing to personal inconveniences. Interpretation of the statute from the different parts of the Section or the Rule are required to be considered as it is the basic intention of the legislature which is required to be seen. It is required to be analyzed that whether a particular proviso appended to a particular Section is to be read in consonance with the main Section or independently. In the present case, Section 26 of the Act of 1899 deals with payment of stamp duties on the instrument and the proviso appended thereto it clearly speaks of the fact that the proviso is applicable in cases of mining lease, therefore, the proviso is only to be read with respect to the mining lease as an independent provision.

26. The Full Bench of this Court in the case of *Arun Parmar Vs. State of Madhya Pradesh and Others* (W.P.No.1539 of 2018) decided on 22.04.2021 has held as under:-

> "*27. It is settled position of law that while interpreting a statutedifferent parts of a section of the rule have to be harmoniously construed so as to give effect to the purpose of the legislation and the intention of the legislature. Even the Full Bench in its judgment in Masood Akhtar (Dr.) (supra) while relying upon the judgment of the Supreme Court in British Airways vs. Union of India, (2002) 2 SCC 95 has observed that sub-sections of a section must be read as parts of an integral whole and as being interdependent and an attempt should be made in construing them to reconcile them if it is reasonably possible to do so and to avoid repugnancy. As held by the Supreme Court in Raj Krushna Bose vs. Binod Kanungo and others, AIR 1954 SC 202, a statute must be read as a whole and one provision of the Act should be construed with reference to the other provisions in the same Act so as to make a consistent enactment of the whole statute. Such a construction has the merit of avoiding any inconsistency or repugnancy either within a section or between a section and other parts of the statute. It is the duty of the courts to avoid "a head on clash" between the two sections of the same Act and WP/1539/18 & linked matters whenever it is possible to do so, to construe provisions which appear to conflict so that they harmonise. The Supreme Court in Madanlal Fakirchand Dudhediya vs. Shree Changdeo Sugar Mills Ltd., AIR 1962 SC 1543 has held that the rule of construction is well settled that when there are in an enactment two provisions, which cannot be reconciled with each other, they would be so interpreted that if possible the effect should be given to both. This is what is known as "rule of harmonious construction".*

27. The Full Bench of this Court in the case of *Nagjiram Vs. Mangilal and Others* reported in (1976) 21 MPLJ 759 has considered the powers of the Court with respect of interpretation of the statute and has held as under:-

> "9. .....*In our opinion, we cannot, in the garb of interpretation, make any law or amend the section. Our province is limited to laying down the law as it is, and not to lay down the law as it should be although it is not. It is the first principle of interpretation of Statutes that the Court must interpret the law according to the intention of the Legislature and the intention of the Legislature must be seen deposited in the language of the statute itself. It is not permissible for a Court to interpret a law according to a supposed intention of the Legislature or to add words to the section when its wording is plain and unambiguous. It is for others to amend the law or to make a new law."*

28. In such circumstances, it is apparently clear that the proviso to Section 26 of the Act of 1899 applicable to the mining lease is required to be read separately from the main Section which is dealing with imposition of stamp duty. As far as other documents are concerned, the explanation is also inserted by the Government in the year 2015 which makes it clear that the proviso is applicable in the cases of mining lease. On bare reading of the proviso, it is apparently clear that the stamp duty or the dead rent is to be charged on the basis of the amount of royalty to be paid.

29. In the back-drop of the aforesaid submission and the law laid down in the various cases coupled with the relevant provisions of MMRD Act and the Act of 1899, the contention raised by the counsel appearing for the petitioners could not be accepted.

30. The writ petition *sans* merit and is accordingly dismissed. No order as to costs.

Petition dismissed

I.L.R. 2022 M.P. 2031 (DB)

Before Mr. Justice Ravi Malimath, Chief Justice &
Mr. Justice Vishal Mishra

WP No. 19955/2022 (Jabalpur) decided on 8 September, 2022

DILIP BEHERE & anr. …Petitioners

Vs.

STATE OF M.P. & ors. …Respondents

***A. Shram Kalyan Nidhi (Sanshodhan) (Mandal Karmchariyon Ki Bharti) Viniyam, M.P., 2021, Rule 4(2)(ka) – Ultra Vires* – Held – Earlier, all promotions were made through in-service candidates and vide impugned notification 25% post are reserved for direct recruitment – It does not anyway take away or abridge any of the fundamental rights of petitioners – They are still entitled to compete on 75% of seats – Notification is not arbitrary, unreasonable or irrational – Petition dismissed. (Paras 7 to 9)**

क. श्रम कल्याण निधि (संशोधन) (मण्डल कर्मचारियों की भर्ती) विनियम, म.प्र., 2021, नियम 4(2)(ka) – अधिकारातीत – अभिनिर्धारित – पूर्व में, सभी पदोन्नतियां सेवारत अभ्यर्थियों से होती थीं एवं आक्षेपित अधिसूचना के द्वारा 25% पद सीधी भर्ती के लिए आरक्षित हैं – यह किसी भी प्रकार से याचीगण के मौलिक अधिकारों में से किसी को छीनता या न्यून नहीं करता है – वे तब भी 75% सीटों पर प्रतिस्पर्धा करने के हकदार हैं – अधिसूचना मनमानी, अनुचित या अतार्किक नहीं है – याचिका खारिज।

***B. Constitution – Article 226 – Validity of Enactment – Scope of Interference* – Held – A challenge to the validity of an enactment can be**

entertained only if the same is either arbitrary, unreasonable or irrational and if legislature lacks competence to make the law or if it affects fundamental rights of petitioners. (Para 5)

ख. संविधान – अनुच्छेद 226 – अधिनियमिति की वैधता – हस्तक्षेप की व्याप्ति – अभिनिर्धारित – किसी भी अधिनियमिति की वैधता को दी गई चुनौती पर तब ही विचार किया जा सकता है यदि वह या तो मनमानी, अनुचित या तर्कहीन है तथा यदि विधायिका में कानून बनाने की क्षमता का अभाव है या यदि वह याचिकाकर्ताओं के मौलिक अधिकारों को प्रभावित करती है।

Case referred:

(2012) 6 SCC 312.

Atul Kumar Rai, for the petitioners.
Rohit Jain, G.A. for the respondents.

O R D E R

The Order of the Court was passed by :

RAVI MALIMATH, CHIEF JUSTICE :- Petitioners are working as Class III employees with the Madhya Pradesh Labour Welfare Board. It is their case that respondent No. 2 published the Madhya Pradesh Shram Kalyan Nidhi (Sanshodhan) (Mandal Karmchariyon Ki Bharti) Viniyam, 2021. The same pertains to recruitment of Class II and Class III employees through competitive exams and interview etc. They are specifically aggrieved by sub-rule 2 (ka) of Rule 4, which reads as follows:-

> ''(क) द्वितीय श्रेणी–
>
> (1) सहायक कल्याण आयुक्त–4 पद एवं लेखाधिकारी–1 पद का पद है जो, द्वितीय श्रेणी का होगा। सहायक कल्याण आयुक्त पदों में 25 प्रतिशत सीधी भरती से एवं 75 प्रतिशत पदोन्नति से भरे जायेगें। जबकि लेखाधिकारी का पद शासन द्वारा (वित्त विभाग) से प्रतिनियुक्ति से भरा जावेगा।''

2. The same would indicate that the promotion to Class II from Class III for the post of Assistant Welfare Commissioner will be done by providing 75% promotion to in-service candidates and 25% through direct recruitment. It is a case of the petitioners that by promulgation of the said Rules, the chances of the petitioners are vastly affected. That the earlier Rule of 1984 provided for 100% promotion from in-service candidates. The same has been reduced to 75%. Therefore, the instant petition was filed seeking for a writ of certiorari to declare the impugned gazette notification as *ultra vires* and consequential reliefs.

3. We have heard the learned counsel for the petitioners. The sum and substance of the ground urged by the learned counsel is that by virtue of impugned notification the chances of the petitioners are affected.

4. On hearing the learned counsels, we do not find any merit in this petition. The prayer sought for by the petitioners is for a writ of certiorari to declare the impugned gazette notification as *ultra vires* and consequential reliefs.

5. Any enactment that is sought to be challenged, can be entertained only if the same is either arbitrary, unreasonable or irrational and whether the legislature has competence to make the law or it affects fundamental rights of the petitioners. We do not find that any of these exists in the instant case. The only plea of the petitioners is that their chances of promotion are affected by the same. We do not find the same to be a ground to declare the impugned notification as *ultra vires*.

6. The Hon'ble Supreme Court in the judgment reported as (2012) 6 SCC 312 in the case of State of Madhya Pradesh Vs. Rakesh Kohli and another held in para 17 as under:-

> *17. This Court has repeatedly stated that legislative enactment can be struck down by Court only on two grounds, namely (i), that the appropriate Legislature does not have competency to make the law and (ii), that it does not take away or abridge any of the fundamental rights enumerated in Part - III of the Constitution or any other constitutional provisions. In Mcdowell and Co.2 while dealing with the challenge to an enactment based on Article 14, this Court stated in paragraph 43 of the Report as follows : (SCC pp.737-38)*
>
> *".... A law made by Parliament or the legislature can be struck down by courts on two grounds and two grounds alone, viz., (1) lack of legislative competence and (2) violation of any of the fundamental rights guaranteed in Part III of the Constitution or of any other constitutional provision. There is no third ground .... if an enactment is challenged as violative of Article 14, it can be struck down only if it is found that it is violative of the equality clause/equal protection clause enshrined therein. Similarly, if an enactment is challenged as violative of any of the fundamental rights guaranteed by clauses (a) to (g) of Article 19(1) , it can be struck down only if it is found not saved by any of the clauses (2) to (6) of Article 19 and so on. No enactment can be struck down by just saying that it is arbitrary or unreasonable. Some or other constitutional infirmity has to be found before invalidating an Act. An enactment cannot be struck down on the ground that court thinks it unjustified. Parliament and the legislatures, composed as they are of the representatives of the people, are supposed to know and be aware of the needs of*

the people and what is good and bad for them. The court cannot sit in judgment over their wisdom....." (Emphasis supplied)

7. Therefore, in the absence of any of the reasons that constitutes a ground to declare the enactment to be *ultra vires*, no relief can be granted. There is also no material to indicate that the impugned gazette notification is arbitrary, unreasonable or irrational. Hence, we are of the view that the petitioners would not be entitled to the relief sought for by them. Even otherwise, in terms of the impugned notification, 25% of the promotion would be governed by the direct recruitment, which earlier to the amendment was nil. Earlier, all promotions were made through in- service candidates whereas vide impugned notification, 25% of the posts are reserved for direct recruitment. This is probably intended to enhance better administration and also to ensure that the direct recruits have also an opportunity for appointment. It does not in any way take away or abridge any of the fundamental rights of the petitioners. They are still entitled to compete for promotion of the 75% of the seats reserved for promotion.

8. Hence, we do not find any ground to entertain this petition.

9. For the aforesaid reasons, the petition being devoid of merit is dismissed.

Petition dismissed

I.L.R. 2022 M.P. 2034

Before Mr. Justice S.A. Dharmadhikari

MP No. 2448/2022 (Jabalpur) decided on 29 August, 2022

OMPRAKASH AGRAWAL & ors. …Petitioners

Vs.

SANDEEP KUMAR AGRAWAL & anr. …Respondents

***A. Civil Procedure Code (5 of 1908), Order 39 Rule 1 & 2 – Appointment of Commissioner* – Held – Court below erred in appointing Commissioner in as much as collection of evidence cannot be permitted while deciding application under Order 39 Rule 1 & 2 CPC – Application has to be decided *prima facie* on three sound principles of law – Impugned order set aside – Petition allowed. (Para 13)**

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 39 नियम 1 व 2 – कमिश्नर की नियुक्ति – अभिनिर्धारित – निचले न्यायालय ने कमिश्नर की नियुक्ति में त्रुटि कारित की है क्योंकि आदेश 39 नियम 1 तथा 2 सि.प्र.सं. के आवेदन पर निर्णय करते समय साक्ष्य के संग्रहण की अनुमति नहीं दी जा सकती – आवेदन को प्रथम दृष्ट्या विधि के तीन तर्कसंगत सिद्धांतों पर निर्णीत किया जाना चाहिए – आक्षेपित आदेश अपास्त – याचिका मंजूर।

B. ***Civil Procedure Code (5 of 1908), Section 151 and Order 39 Rule 1 & 2 – Scope & Jurisdiction* – Held – *Status quo* order could not have been granted by Court exercising powers under Section 151 CPC when there is an express provision under the Code. (Para 13)**

ख. सिविल प्रक्रिया संहिता (1908 का 5), धारा 151 एवं आदेश 39 नियम 1 व 2 – व्याप्ति व अधिकारिता – अभिनिर्धारित – धारा 151 सि.प्र.सं. के अंतर्गत शक्तियों का प्रयोग करते हुए न्यायालय द्वारा यथास्थिति आदेश नहीं दिया जा सकता जब संहिता के अंतर्गत एक अभिव्यक्त उपबंध हो।

C. ***Civil Procedure Code (5 of 1908), Order 39 Rule 1 & 2 – Principles* – Discussed & explained. (Para 12)**

ग. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 39 नियम 1 व 2 – सिद्धांत – विवेचित एवं स्पष्ट किया गया।

Cases referred:

2018 (3) MPLJ 641, AIR 1962 SC 527, WP No. 7830/2012 decided on 08.04.2022, WP No. 1915/2014 decided on 03.04.2018, 2011 (2) MPLJ 576, 1994 MPLJ 783, (2010) 8 SCC 329.

Rajas Pohankar, for the petitioners.
Amit Seth, for the respondent No. 1.

O R D E R

S.A. DHARMADHIKARI, J.:- Heard finally with the consent of both the parties.

In this petition under Article 227 of the Constitution of India, the petitioners have assailed the legality, validity and propriety of the order dated 20.05.2022 (Annexure P/1) passed in Miscellaneous Civil Appeal No.39/2022 by the Court of III Additional Judge to I Additional District Judge, Katni (M.P.), whereby the Appellate Court has reversed the order of the learned trial Court dated 05.04.2022, which had rejected the application under Order 39 Rule 1 and 2 of the Civil Procedure Code (hereinafter shall be referred to as "Code") seeking temporary injunction.

2. Brief facts leading to filing of this case are that the respondent No.1/plaintiff filed a suit for declaration and permanent injunction against the petitioners/defendants, which was registered as RCS A/07/2022 alongwith the application under Order 39 Rule 1 and 2 of the Code. It is sated (sic: stated) in the plaint that petitioner No.1 and respondent No.1 are real brothers and petitioners No.2 and 3 are real sons of petitioner No.1. Itis also stated in the plaint that respondent No.1/plaintiff is the owner of 5111 sq.ft. of land,out of which land

admeasuring 15 X 25 sq.ft. has been sold by him to Mr. Rohit Gupta and Mr. Vikas Kumar Gupta. After that only 0.045 hectares is remaining with the plaintiff. It is also averred in the plaint that petitioner No.1, who is real brother of the plaintiff has purchased the adjoining area of 0.017 hectares out of the same Khasra No.186/1. The plaintiff in support of his claim has filed Najri Naksha showing his land as **ABCDEFGH** and the land admeasuring 15 X 25 sq.ft. sold by him as **DEIJ** and the suit portion has been shown as **FGKI** admeasuring 26 X 35 sq.ft.. It is also averred that the petitioners/defendants on 11.02.2022 at around 12'o Clock in day have taken possession of the aforesaid plot and started demolishing the portion of land belonging to plaintiff shown as **FGKI**.

3. The petitioners entered their appearance and file reply to the injunction application stating that the suit land has wrongly been shown as owned and possessed by the plaintiff and the suit land has been purchased by the petitioners by way of registered sale deed. The matter was heard on the application for temporary injunction and vide order dated 05.04.2022 (Annexure P/4), the learned trial Court dismissed the application filed by the respondent No.1/plaintiff holding that Najri Naksha produced by respondent No.1/plaintiff and the one produced by the petitioners/defendants alongwith their sale deed does not make out a case for grant of injunction. Learned trial Court further held that there is no material to show that respondent No.1/plaintiff is the owner and in possession of the disputed land. Being aggrieved, the respondent No.1 challenged the aforesaid order dated 05.04.2022 in Appeal under Order 43 Rule 1 of the Code before District Judge, Katni. Vide the impugned order dated 20.05.2022, the lower Appellate Court reversed the order dated 05.04.2022 and allowed the application under Order 39 and Rule 1 and 2 of the Code. Being aggrieved, the present petition has been filed.

4. Learned counsel for the petitioners submitted that the learned Appellate Court has travelled beyond the scope of Order 39 Rule 1 and 2 of the Code by directing appointment of Commissioner for demarcation of the suit land, which was never prayed by respondent No.1/plaintiff. The learned Appellate Court has also granted *status quo* in the matter under Section 151 of the Code, which could not have been exercised in view of the fact that there is an express provision under Order 39 Rule 1 and 2 of the Code and the said application has been kept pending. He further contended that the application under Order 39 Rule 1 and 2 of the Code has to be decided on the three sound principles i.e.:

(i) Whether plaintiff has a *prima facie* case;

(ii) Whether balance of convenience is in favour of the plaintiff;

(iii) Whether the plaintiff would suffer irreparable injury if temporary injunction is declined.

5. In the present case, appointment of Commissioner can be directed only after recording of evidence, whereas the Appellate Court has exceeded its jurisdiction by directing appointment of Commissioner and also exercising power for granting *status quo* under Section 151 of the Code, which could not have been done.

6. Learned counsel for the petitioners has relied on the judgment of the Apex Court in the case of *Alok Vs. Smt. Shashi Somani and others* as reported in 2018(3) MPLJ 641 to contend that the provision of Section 151 of the Code cannot be invoked where a specific provision is available under the CPC. He has also placed reliance on the judgment of Apex Court in the case of *Manohar Lal Chopra Vs. Rai Bahadur Rao Raja Seth Hiralal* as reported in AIR 1962 SC 527, in which it is held that the inherent jurisdiction of the court to make orders *ex debito justitiae* (sic: justitia) is undoubtedly affirmed by Section 151 of the Code, but that jurisdiction cannot be exercised so as to nullify the provisions of the Code. Where the Code deals expressly with a particular matter, the provision should normally be regarded as exhaustive.

7. So far as the appointment of Commissioner is concerned, the learned counsel for the petitioners has relied on the judgment of the Coordinate Bench of this Court at Gwalior Bench in the case of *Smt. Vimla Tyagi Vs. Ram Niwas Sharma* [W.P. No.7830/2012 decided on 08.04.2022], in which it is held as under:

> *"(13) Further, a local Commissioner can be appointed for either elucidating any matter in dispute or for ascertaining the market value of any property or the amount of any mense profits or damages or annual net profits. However, "Elucidating any matter in dispute" would not include collection of evidence. Also the Court by passing an order under Order 26 Rule 9 CPC cannot delegate its powers of adjudicating the dispute to a local Commissioner. The scope of Order 26 Rule 9 CPC is very limited. It is settled law that the parties are required to prove their own case by way of evidence, therefore, it is the duty of plaintiff/ defendant to first give evidence in support of their case. After the evidence of parties, if court deem it proper that any issue requires clarification then the Court may appoint a Commissioner. The report of Commissioner is merely a piece of evidence and not binding on the Trial Court. It can be used for the purpose of appreciating the evidence came on record."*

8. Learned counsel for the petitioners has further placed reliance on the judgment of the Coordinate Bench of this Court at Indore Bench in the case of *Ansuiya Bai and others Vs. Rajendra Parsai and others* [W.P. No.1915/2014 decided on 03.04.2018], in which the court has held as under:

> ***"19.*** *The scope of Order 26 Rule 9 of C.P.C. is very limited. The trial Court in any suit in which a local investigation is required or proper for purpose of elucidating any matter of dispute may appoint a Commissioner. It is settled law that the parties are required to prove their case by way of evidence, therefore, it is the duty of plaintiff/defendant to first give evidence in support of their case. After the evidence of parties, if Court deem it proper that any issue is required to be elucidate or explained or clarified then the Court may appoint a Commissioner. The report of Commissioner is merely a piece of evidence and not binding on the trial Court. It can be used for the purpose of appreciating the evidence on record, if the petitioners/ defendants No.1 and 2 are not satisfied with the report, they can give a better evidence in support of their case. The Court has already given an opportunity to them to adduce the evidence therefore, the defendants cannot use the Commissioner report to collect the evidence. Learned trial Court rightly rejected the application, hence, no interference is called for."*

9. On the other hand, Shri Amit Seth, learned counsel appearing for the respondent No.1 vehemently opposed the prayer and submitted that the order passed by the trial Court is in accordance with the law, therefore, no interference is called for. He further contended that the inherent power under Article 227 of the Constitution of India is to be exercised sparingly and not in the routine manner. Learned counsel further contended that no application is required for appointing the Commissioner. The Court on its own can appoint the Commissioner as has been done in the present case. The petition deserves to be dismissed.

10. In support of his contention, learned counsel for respondent No.1 has relied on the judgment of this Court in the case of *Jaswant Vs. Deen Dayal* as reported in 2011 (2) MPLJ 576. He further relied on the judgment of this Court in the case of *Ravishankar Vs. VIIth Additional District Judge* as reported in 1994 MPLJ 783. He also relied on the judgment of the Apex Court in the case of *Shalini*

Shyam Shetty and another vs. Rajendra Shankar Patil as reported in (2010) 8 SCC 329, in which the Court has held as under:

> *"48. The jurisdiction under Article 226 normally is exercised where a party is affected but power under Article 227 can be exercised by the High Court suo motu as a custodian of justice. In fact, the power under Article 226 is exercised in favour of persons or citizens for vindication of their fundamental rights or other statutory rights. Jurisdiction under Article 227 is exercised by the High Court for vindication of its position as the highest judicial authority in the State. In certain cases where there is infringement of fundamental right, the relief under Article 226 of the Constitution can be claimed ex-debito justicia or as a matter of right. But in cases where the High Court exercises its jurisdiction under Article 227, such exercise is entirely discretionary and no person can claim it as a matter of right. From an order of a Single Judge passed under Article 226, a Letters Patent Appeal or an intra Court Appeal is maintainable. But no such appeal is maintainable from an order passed by a Single Judge of a High Court in exercise of power under Article 227. In almost all High Courts, rules have been framed for regulating the exercise of jurisdiction under Article 226. No such rule appears to have been framed for exercise of High Court's power under Article 227possibly to keep such exercise entirely in the domain of the discretion of High Court.*
>
> *49. 62. On an analysis of the aforesaid decisions of this Court, the following principles on the exercise of High Court's jurisdiction under Article 227 of the Constitution may be formulated:*
>
> *(a) A petition under Article 226 of the Constitution is different from a petition under Article 227. The mode of exercise of power by High Court under these two Articles is also different.*

(b) In any event, a petition under Article 227 cannot be called a writ petition. The history of the conferment of writ jurisdiction on High Courts is substantially different from the history of conferment of the power of Superintendence on the High Courts under Article 227 and have been discussed above.

(c) High Courts cannot, on the drop of a hat, in exercise of its power of superintendence under Article 227 of the Constitution, interfere with the orders of tribunals or Courts inferior to it. Nor can it, in exercise of this power, act as a Court of appeal over the orders of Court or tribunal subordinate to it. In cases where an alternative statutory mode of redressal has been provided, that would also operate as a restrain on the exercise of this power by the High Court.

(d) The parameters of interference by High Courts in exercise of its power of superintendence have been repeatedly laid down by this Court. In this regard the High Court must be guided by the principles laid down by the Constitution Bench of this Court in Waryam Singh (supra) and the principles in Waryam Singh (supra) have been repeatedly followed by subsequent Constitution Benches and various other decisions of this Court.

(e) According to the ratio in Waryam Singh (supra), followed in subsequent cases, the High Court in exercise of its jurisdiction of superintendence can interfere in order only to keep the tribunals and Courts subordinate to it, 'within the bounds of their authority'.

(f) In order to ensure that law is followed by such tribunals and Courts by exercising jurisdiction which is vested in them and by not declining to exercise the jurisdiction which is vested in them.

(g) Apart from the situations pointed in (e) and (f), High Court can interfere in exercise of its power of superintendence when there

has been a patent perversity in the orders of tribunals and Courts subordinate to it or where there has been a gross and manifest failure of justice or the basic principles of natural justice have been flouted.

(h) In exercise of its power of superintendence High Court cannot interfere to correct mere errors of law or fact or just because another view than the one taken by the tribunals or Courts subordinate to it, is a possible view. In other words the jurisdiction has to be very sparingly exercised.

(i) High Court's power of superintendence under Article 227 cannot be curtailed by any statute. It has been declared a part of the basic structure of the Constitution by the Constitution Bench of this Court in the case of L. Chandra Kumar vs. Union of India & others, reported in (1997) 3 SCC 261 and therefore abridgement by a Constitutional amendment is also very doubtful.

(j) It may be true that a statutory amendment of a rather cognate provision, like Section 115 of the Civil Procedure Code by the Civil Procedure Code (Amendment) Act, 1999 does not and cannot cut down the ambit of High Court's power under Article 227. At the same time, it must be remembered that such statutory amendment does not correspondingly expand the High Court's jurisdiction of superintendence under Article 227.

(k) The power is discretionary and has to be exercised on equitable principle. In an appropriate case, the power can be exercised suo motu.

(l) On a proper appreciation of the wide and unfettered power of the High Court under Article 227, it transpires that the main object of this Article is to keep strict administrative and judicial control by the High Court on the administration of justice within its territory.

(m) The object of superintendence, both

administrative and judicial, is to maintain efficiency, smooth and orderly functioning of the entire machinery of justice in such a way as it does not bring it into any disrepute. The power of interference under this Article is to be kept to the minimum to ensure that the wheel of justice does not come to a halt and the fountain of justice remains pure and unpolluted in order to maintain public confidence in the functioning of the tribunals and Courts subordinate to High Court.

(n) This reserve and exceptional power of judicial intervention is not to be exercised just for grant of relief in individual cases but should be directed for promotion of public confidence in the administration of justice in the larger public interest whereas Article 226 is meant for protection of individual grievance. Therefore, the power under Article 227 may be unfettered but its exercise is subject to high degree of judicial discipline pointed out above.

(o) An improper and a frequent exercise of this power will be counter-productive and will divest this extraordinary power of its strength and vitality."

11. Heard the learned counsel for the parties.

12. Thus, while exercising discretion for grant of interim injunction the following three principles are applied:-

(i) Whether plaintiff has a *prima facie* case;

(ii) Whether balance of convenience is in favour of the plaintiff;

(iii) Whether the plaintiff would suffer irreparable injury if temporary injunction is declined.

13. Admittedly, the learned Court below has erred in appointing the Commissioner, inasmuch as collection of evidence cannot be permitted while deciding the application under Order 39 Rule 1 and 2 of the Code. The application has to be decided *prima facie* on the three sound principles of law. Even, *status quo* order could not have been granted by the Appellate Court exercising the powers under Section 151 of the Code when there is express provision provided

under the Code. Thus, in view of the judgments of the Hon'ble Apex Court in the case of *Alok* (supra) and *Manohar Lal Chopra* (supra), this order cannot be allowed to stand. Accordingly, the Appellate Court's order dated 20.05.2022 (Annexure P/1) is hereby set aside. The Appellate Court is directed to decide the appeal in accordance with law deciding the application under Order 39 Rule 1 and 2 of the Code without evaluating the evidence/report of Commissioner and take a decision as expeditiously as possible.

The Writ Petition stands **allowed** to the extent indicated hereinabove.

Petition allowed

I.L.R. 2022 M.P. 2043

Before Mr. Justice Anand Pathak

RP No. 518/2021 (Gwalior) decided on 28 July, 2022

STATE OF M.P. …Petitioner

Vs.

NIDHI (I) INDUSTRIES …Respondent

***A. Arbitration and Conciliation Act (26 of 1996), Section 11(6) and Arbitration Rules, M.P., 1997, Rule 4-A – Appointment of Arbitrator – Notice to Opposite Party* – Held – Principle of opportunity of hearing or putting other party to notice is imperative – No notice issued to State in specific terms and case was proceeded for appointment of arbitrator – It prejudices the interest of petitioner and cause of justice – It is an error apparent on face of record – Order recalled – Arbitration case restored to its original number.**

(Paras 28, 32, 35 & 36)

क. माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 11(6) एवं माध्यस्थम् नियम, म.प्र., 1997, नियम 4–A – मध्यस्थ की नियुक्ति – विरोधी पक्षकार को नोटिस – अभिनिर्धारित – सुनवाई के अवसर के सिद्धांत अथवा अन्य पक्ष को सूचना देना अति आवश्यक है – विशिष्ट शर्तों में राज्य को कोई नोटिस जारी नहीं किया गया और मध्यस्थ की नियुक्ति हेतु प्रकरण आगे बढ़ाया गया – यह याची के हित तथा न्याय हेतुक पर प्रतिकूल प्रभाव डालता है – यह एक गलती है जो अभिलेख को देखने से ही प्रकट होती है – आदेश वापस लिया गया – माध्यस्थम् प्रकरण को उसके मूल क्रमांक पर पुनःस्थापित किया गया।

***B. Arbitration and Conciliation Act (26 of 1996), Section 11(6) and Madhyastham Adhikaran Adhiniyam, M.P. (29 of 1983), Section 2(1) – Jurisdiction of Arbitration Tribunal – Alternative Remedy* – Held – Supply of those goods and services would come within ambit of Arbitration Tribunal which are being supplied/tendered in pursuance of works contract for**

construction, repair, maintenance of building or superstructure, dam, canal, reservoir, lake, road, well, bridge, culvert, factory, workshop, powerhouse, transformers etc. – In instant case, it had to supply CCTV cameras to High Court – Contention of State regarding availability of alternative remedy lacks merit. (Para 34)

ख. माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 11(6) एवं माध्यस्थम् अधिकरण अधिनियम, म.प्र. (1983 का 29), धारा 2(1) – माध्यस्थम् अधिकरण की अधिकारिता – वैकल्पिक उपचार – अभिनिर्धारित – ऐसे माल और सेवाओं का प्रदाय जिनकी आपूर्ति/निविदा निर्माण, मरम्मत, भवन या अधिरचना की देखभाल, बांध, नहर, जलाशय, तालाब, सड़क, कुंआ, पुल, पुलिया, कारखाना, कर्मशाला, बिजली घर, ट्रांसफार्मर इत्यादि के लिए कार्य अनुबंध के अनुसार की जाती है, माध्यस्थम् अधिकरण की परिधि में आएंगे – प्रस्तुत प्रकरण में, इसे उच्च न्यायालय को सीसीटीव्ही कैमरों की आपूर्ति करनी थी – वैकल्पिक उपचार की उपलब्धता के संबंध में राज्य के तर्क में गुणदोष का अभाव है।

***C. Arbitration and Conciliation Act (26 of 1996), Section 11(6) – Alternative Dispute Resolution Mechanism – Aims & Object* – Held – ADR mechanism specially Arbitration is such device which delves more on consent than on compulsion – Parties agree to terms, procedure and person to act as Arbitrator and the very genesis of concept of arbitration is peaceful and consensual resolution of dispute – Process of appointment of arbitrator is ought to be just, fair and transparent. (Para 29 & 30)**

ग. माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 11(6) – वैकल्पिक विवाद समाधान प्रणाली – लक्ष्य और उद्देश्य – अभिनिर्धारित – वैकल्पिक विवाद समाधान प्रणाली विशेषतः मध्यस्थता एक ऐसी युक्ति है जो बाध्यता की अपेक्षा सहमति पर अधिक विचार करती है – पक्षकार शर्तों, प्रक्रिया के लिए तथा व्यक्ति के मध्यस्थ के रूप में कार्य करने के लिए सहमत हैं तथा मध्यस्थता की अवधारणा की उत्पत्ति शांतिपूर्ण और विवाद का सहमति से समाधान है – मध्यस्थ को नियुक्त करने की प्रक्रिया न्यायसंगत, निष्पक्ष तथा पारदर्शी होनी चाहिए।

***D. Review Jurisdiction* – Held – Apex Court concluded that mistake or error apparent on the face of record means mistake or error which is *prima facie* visible and does not require any detail examination – Erroneous view of law is not a ground for review – Review cannot partake the category of appeal – Scope & principle of review enumerated. (Para 20 & 21)**

घ. पुनर्विलोकन की अधिकारिता – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया कि गलती अथवा त्रुटि जो अभिलेख को देखने से ही प्रकट होती है का अर्थ है गलती अथवा त्रुटि जो प्रथम दृष्ट्या दृश्यमान है तथा जिसके लिए किसी विस्तृत परीक्षण की आवश्यकता नहीं है – विधि का गलत अवलोकन पुनर्विलोकन का आधार नहीं है – पुनर्विलोकन अपील की श्रेणी में सम्मिलित नहीं हो सकती – पुनर्विलोकन की व्याप्ति तथा सिद्धांत प्रगणित।

Cases referred:

(2005) 8 SCC 618, 2022 (2) MPLJ 425, (2000) 8 SCC 151, 2005 (3) MPLJ 553, (2013) 8 SCC 320, (1921-22) 49 IA 144, AIR 1954 SC 526, (2008) 8 SCC 612, (2017) 8 SCC 377, AIR 2020 SC 59.

Tejsingh Mahadik and *Devesh Sharma,* for the petitioner.
Siddharth Sharma on behalf of *Prashant Sharma*, for the respondent.

O R D E R

ANAND PATHAK, J.:- The instant review petition has been preferred for recalling of order dated 20/5/2021 passed in A.C.No. 37/2021 by which the application under Section 11(6) of Arbitration and Conciliation Act, 1996 (for short "the Act"), preferred by respondent has been allowed and sole Arbitrator (former Judge, High Court of Madhya Pradesh) was appointed.

2. Precisely stated facts of the case are that an agreement was executed in year 2015 between Director General of Police, Government of Madhya Pradesh on behalf of the Governor of Madhya Pradesh and respondent for installation of CCTV Cameras in High Court Premises, Bench at Indore. In pursuance thereof, work order has been issued on 14/1/2015 and CCTV Cameras were installed at High Court premises, Bench at Indore.

3. It appears that said CCTV Cameras were found to be of inferior quality and many deficiencies and irregularities were found in whole installation project, therefore, as per the agreement, respondent-Company was blacklisted for one year vide order dated 8/9/2020. Said blacklisting order was passed in following terms:-

> *''उपरोक्त विसंगतियॉ सूक्ष्म प्रकृति की है जो कि प्रायः बहुत गहन जॉच उपरांत दृष्टिगत होती है एवं किसी भी संस्था से यह अपेक्षा नहीं की जाती कि वह इस प्रकार से बाहर से दर्शित उपकरणों के अंदर की अधोसंरचना पूर्ण नहीं करें । क्योंकि इस फर्म के संबंध में सूचना प्राप्त हो चुकी थी कि सीपित सामर्गियॉ ''उल्लेखित सामग्रियों'' से भिन्न है । इस कारण ही ये विसंगतियॉ परिलक्षित हो सकी । ऐसी स्थिति में जबकि फर्म की व्यवसायिक दक्षता एवं कार्य नैतिकता संदिग्ध एवं निम्न श्रेणी की है । इस फर्म का काली सूची में डाला जाना आवश्यक हो जाता है । अतः उपरोक्तानुसार फर्म द्वारा विक्रय अवधि में तथा वारंटी अवधि में अंसतोषजनक संवाओं के कारण फर्म Nidhi (I) Industries 1st Floor, Shivaji Towar, MLB Road, Phool Bagh, Gwalior को इस*

आदेश के जारी दिनांक से 01 वर्ष की अवधि के लिए ''ब्लैक लिस्ट'' (BLACK LIST) किया जाता है ।''

4. Against the said order of blacklisting, petitioner preferred a writ petition vide W.P.No. 13738/2020, which was dismissed vide order dated 21/9/2020 by Division Bench of this Court. In the said writ petition, respondent-company raised the suspicion over impartiality of Director General of Police as an Arbitrator as per clause 20 of the agreement according to which in case of any dispute, Director General of Police was to be appointed as sole Arbitrator. Said contention was rejected by the Division Bench and petition was dismissed.

5. Thereafter, a review petition vide R.P.No. 937/2020 was preferred by respondent-Company before the same Division Bench but same was dismissed vide order dated 1/10/2020.

6. Thereafter, SLP was preferred by respondent before the Hon'ble Supreme Court of India vide SLP No. 13452-13452/2020 (Nidhi (I) Industries Vs. State of Madhya Pradesh and Another) but same also got dismissed vide order dated 17/12/2020. However, respondent (petitioner therein) was given liberty to submit a fresh representation to the authority concerned to revisit blacklisting order and in pursuance thereof, a representation was preferred by the respondent-Company before the Director General of Police. On his behalf, order dated 31/12/2020 was passed by Inspector General of Police (Intelligence) and rejected the same and upheld the order of blacklisting. Again, a writ petition was filed by respondent vide W.P.No. 5073/2021 before the Division Bench of this Court and Division Bench vide order dated 31/3/2021 dismissed the writ petition in limine while giving liberty to respondent to avail the conciliation /arbitration clause available under the agreement in question.

7. In between, respondent-Company issued show cause notice invoking arbitration under Section 11 of Act of 1996 on 20/1/2021,which was replied by the petitioner vide reply dated 10/2/2021 in which offer to go for arbitration was turned down on the ground that Hon'ble Supreme Court already given a chance to agitate the case before the competent authority i.e. Director General of Police and respondent-Company already availed of the said remedy and his representation was rejected earlier, therefore, there is no need for going for arbitration.

8. Against the said rejection order, respondent-Company filed an application under Section 11(6) of the Act of 1996 before the designated Authority (Single Bench of this Court).

9. After filing of said application on 12/3/2021, matter was listed on 25/3/2021 on which date respondent-Company was directed to file rejection order dated 31/12/2020. Thereafter, matter was listed on 17/5/2021 and on the said date

also, it was informed on behalf of respondent-Company that rejection order has been filed. Thereafter, matter was placed on 20/5/2021 and on said date, application was heard and sole Arbitrator as referred above was appointed. Although one Government Advocate appeared on behalf of State but admittedly no notice was issued. Therefore, this review petition has been preferred by the petitioner taking exception to the order dated 20/5/2021.

10. It is the submission of learned counsel for the petitioner that petitioner/ State of M.P. through Director General of Police was never served any notice before passing of order dated 20/5/2021 by this Court whereby Arbitrator was appointed. In absence of service of notice to the State, the State could not file any response or instructions to the concerned Government Advocate and therefore, in absence of any such notice, very purpose of appointment of Arbitrator and going for arbitration is defeated.

11. Learned counsel for the petitioner referred Chapter XIII Rule 8 of M.P. High Court Rules and Orders, 2008 in which Registered AD notice is required to be served to Government Authority before passing any order finally. He also referred the M.P. Arbitration Rules, 1997, which were published in Gazette notification dated 21/2/2020, through which the amendments in the M.P. Arbitration Rules, 1997 have been made in which Rule 4-A (Mode of Application/Appeal) provides procedure which includes that notice shall be served on all opposite parties and on such other persons as the Court may direct. These are statutory rules and therefore, are to be construed accordingly.

12. Learned counsel for the petitioner relied upon Constitution Bench judgment of Hon'ble Supreme Court in the case of *SBP & Co. Vs. Patel Engineering Ltd. And Another,* (2005) 8 SCC 618 to bring home the legal position that the power exercised by the Chief Justice of the High Court under Section 11(6) of the Act of 1996 is not an administrative power, it is a judicial power and therefore, opportunity of hearing is required to be given. The Chief Justice or the designated Judge has even right to decide the preliminary aspects as referred in judgment and therefore, if notice would have been issued then all those aspects would have been expressed or displayed before the Court including the suggestion of some different arbitrator could have been advanced. Here, appointment of Arbitrator suggested by respondent-Company is being accepted by the designated Court and thus caused illegality and irregularity.

13. Learned counsel for the petitioner also raised the point that as per Section 2 (1) of Madhya Pradesh Madhyastham Adhikaran Adhiniyam, 1983, the matter ought to have been referred to Arbitration Tribunal, Bhopal because it relates to supply of goods and services and as per the Division Bench judgment of this Court (Principal Seat at Jabalpur), *M/s. Gayatri Project Ltd. Vs. MPRDC Ltd.* 2022 (2)

MPLJ 425, matter ought to have been referred to the Arbitration Tribunal, Bhopal.

14. Learned counsel for the respondent-Company opposed the prayer and submits that when earlier notice dated 20/1/2021 was given for appointment of Arbitrator and same was rejected by authority vide reply dated 10/2/2021 then they waived their right to object for appointment of Arbitrator as per Section 4 of the Act of 1996. He relied upon the judgment of Apex Court in the matter of *Datar Switchgears Ltd. Vs. Tata Finance Ltd. and Another,* (2000) 8 SCC 151 and *M/s Durga Welding Works Vs. Chief Engineer, Railway Electrification, Allahabad & Anr.,* (Civil Appeal No. 54 of 2022 decided on 4/1/2022) to bolster his submissions.

15. So far as submissions regarding maintainability of claim before Arbitration Tribunal, Bhopal is concerned, learned counsel for the respondent while relying upon judgment of Coordinate Bench of this Court in the matter of *President, Nagar Panchayat, Pichhore and Anr. Vs. Rakesh Kumar Sehgal,* 2005 (3) MPLJ 553 submits that only those work contracts in which supply of goods and services are involved, can be subject matter of Arbitration Tribunal. Here no work contract relating to construction, repair, maintenance of any building or superstructure, dam, weir, canal, reservoir, tank, lake, road, well, bridge, culvert, factory, work-shop, powerhouse, transformers etc is contemplated, therefore, matter ought not to go before Arbitration Tribunal.

16. It is further submitted that Government Advocate appeared in the case and it was a bi-parte order and in pursuance thereof, arbitration proceedings were started, therefore, no case for interference is made out. Review petition deserves to be dismissed.

17. No other arguments were advanced by the parties.

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

19. Scope of review is well defined in the case of *Kamlesh Verma Vs. Mayawati and Others,* (2013) 8 SCC 320, principles relating to review jurisdiction have been laid down.

20. The principles relating to review jurisdiction may be summarized as follows:

When the review will be maintainable:

(i) Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within knowledge of the petitioner or could not be produced by him;

(ii) Mistake or error apparent on the face of the record;

(iii) Any other sufficient reason.

The words **"any other sufficient reason"** have been interpreted in *Chhajju Ram Vs. Neki,* (1921-22) 49 IA 144 and approved by this Court in the case of *Moran Mar Basselios Catholicos Vs. Most Rev. Mar Poulose Athanasius,* AIR 1954 SC 526 to mean **"a reason sufficient on grounds at least analogous to those specified in the rule"**.

When the review will not be maintainable:

"(i) A repetition of old and overruled argument is not enough to reopen concluded adjudications.

(ii) Minor mistakes of inconsequential import.

(iii) Review proceedings cannot be equated with the original hearing of the case.

(iv) Review is not maintainable unless the material error, manifest on the face of order, undermines its soundness or results in miscarriage of justice.

(v) A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected but lies only for patent error.

(vii) The meres possibility of two views on the subject cannot be a ground for review.

(viii) The error apparent on the face of the record should not be an error which has to be fished out and searched.

(ix) The appreciation of evidence on record is fully within the domain of the appellate Court, it cannot be permitted to be advanced in the review petition.

(x) Reviews is not maintainable when the same relief sought at the time of arguing the main matter had been negatived."

21. It is also held by the Apex Court in the case of *State Of West Bengal & Ors. Vs. Kamal Sengupta & Anr.,* (2008) 8 SCC 612 that mistake or error apparent on the face of the record means that mistake or error which is prima facie visible and does not require any detail examination. Erroneous view of law is not a ground for review and review cannot partake the category of the appeal.

22. Petitioner/State of Madhya Pradesh is in review petition seeking review of order dated 20/5/2021 by which this Court allowed the application under Section 11(6) of Act of 1996 preferred by respondent and appointed the sole arbitrator as referred above.

23. Submission of petitioner revolves around opportunity of hearing as according to State, it was not served with notice on application under Section 11(6) of the act of 1996 so as to rebut / reply or to suggest its names for arbitration. As per clause 20 of agreement dated 14/1/2015, Director General of Police (DGP) was to be the sole Arbitrator for resolution of dispute but by the effect of Amendment Act of 2015 (w.e.f. 23/10/2015) and later on by the mandate of Apex Court in the case of *TRF Limited Vs. Energo Engineering Projects Limited,* (2017) 8 SCC 377 and *Perkins Eastman Architects DPC and another Vs. HSCC (India) Ltd.,* AIR 2020 SC 59, appointment of independent and impartial Arbitrators was taken into consideration and thereafter, Arbitrator was to be appointed. Therefore, an independent Arbitrator was required to be appointed and it could have been appointed by mutual consent.

24. So far as scope of application under Section 11(6) of the Act of 1996 is concerned, it is well settled by the Constitution Bench of Apex Court in the case of *SBP & Co.* (supra); wherein, the conclusions by majority view are summed up in following words:-

> *"**47. We, therefore, sum up our conclusions as follows:***
>
> *(i) The power exercised by the Chief Justice of the High Court or the Chief Justice of India under Section 11(6) of the Act is not an administrative power. It is a judicial power.*
>
> *(ii) The power under Section 11(6) of the Act, in its entirety, could be delegated, by the Chief Justice of the High Court only to another judge of that court and by the Chief Justice of India to another judge of the Supreme Court.*
>
> *(iii) In case of designation of a judge of the High Court or of the Supreme Court, the power that is exercised by the designated, judge would be that of the Chief Justice as conferred by the statute.*
>
> *(iv) The Chief Justice or the designated judge will have the right to decide the preliminary aspects as indicated in the earlier part of this judgment. These will be, his own jurisdiction, to entertain the request, the existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of his power and on the qualifications of the arbitrator or arbitrators. The Chief Justice or the designated judge would be entitled to seek the opinion of an institution in the matter of nominating an arbitrator qualified in terms of Section 11(8) of the Act if the need arises but the order appointing the arbitrator could only be that of the Chief Justice or the designate judge.*

(v) Designation of a district judge as the authority under Section 11(6) of the Act by the Chief Justice of the High Court is not warranted on the scheme of the Act.

(vi) Once the matter reaches the arbitral tribunal or the sole arbitrator, the High Court would not interfere with the orders passed by the arbitrator or the arbitral tribunal during the course of the arbitration proceedings and the parties could approach the court only in terms of Section 37 of the Act or in terms of Section 34 of the Act.

(vii) Since an order passed by the Chief Justice of the High Court or by the designated judge of that court is a judicial order, an appeal will lie against that order only under Article 136 of the Constitution of India to the Supreme Court.

(viii) There can be no appeal against an order of the Chief Justice of India or a judge of the Supreme Court designated by him while entertaining an application under Section 11(6) of the Act.

(ix) In a case where an arbitral tribunal has been constituted by the parties without having recourse to Section 11(6) of the Act, the arbitral tribunal will have the jurisdiction to decide all matters as contemplated by Section 16 of the Act.

(x) Since all were guided by the decision of this Court in ***Konkan Railway Corporation Ltd. and Anr. v. Rani Construction Pvt. Ltd.*** *and orders under Section 11(6) of the Act have been made based on the position adopted in that decision, we clarify that appointments of arbitrators or arbitral tribunals thus far made, are to be treated as valid, all objections being left to be decided under Section 16 of the Act. As and from this date, the position as adopted in this judgment will govern even pending applications under Section 11(6) of the Act.*

(xi) *Where District Judges had been designated by the Chief Justice of the High Court under Section 11(6) of the Act, the appointment orders thus far made by them will be treated as valid; but applications if any pending before them as on this date will stand transferred, to be dealt with by the Chief Justice of the High Court concerned or a Judge of that court designated by the Chief Justice.*

(xii) *The decision in* ***Konkan Railway Corporation Ltd. and Anr. v. Rani Construction Pvt. Ltd.*** *is overruled."*

Therefore, it is abundantly clear that proceedings under Section 11(6) of the Act of 1996 are judicial one and thus are to be guided by such principles.

25. In exercise of powers conferred by Section 82 of the Act of 1996, High Court of Madhya Pradesh made the M.P. Arbitration Rules, 1997 and later on vide amendment in Rules of 1997 by way of Gazette Notification dated 5th February, 2020 published in M.P. Gazette on 21/2/2020, amendments in Rules of 1997 were caused. These are statutory rules and carry legal bearing.

26. Rule 4-A of the said Rules of 1997 deals in respect of Mode of Application/ Appeal. Same is reiterated for ready reference:-

> *"**4A. Mode of application/appeal:***
>
> *Save as otherwise provided in these Rules, all Applications / Appeals shall be placed on board for admission after prior notice to all parties concerned.*
>
> *(1) Procedure after filing of Applications/ Appeals and requisitioning of Lower Court Records:*
>
> *(a) In cases, arising out of matters pending before the lower Court, Tribunal or Authority, the record shall not be requisitioned unless ordered by the Court.*
>
> *(b) Where such record has been requisitioned, it shall be retained in the High Court/District Court (as the case may be) only as long as absolutely necessary; otherwise, it shall be returned and called back as convenience permits.*
>
> *(2) In cases, arising out of judgments or orders finally adjudicating the case, the record of lower Court or Tribunal shall be requisitioned after admission of the case, notwithstanding the fact that no order requisitioning the record has been made by the Court or the Registrar.*
>
> *(3) The Applicant/Appellant may file pleadings and/or evidence along with the memorandum of appeal or application which he considers necessary too enable the Court to appreciate the scope of dispute for the purpose of admission, interlocutory orders or disposal.*
>
> *(4) Notice shall be served on all opposite parties and on such other persons as the Court may direct.*
>
> *Provided that at the hearing any such Application/Appeal, any person who desires to be heard in opposition to it and appears to the Court to be proper, may be heard, notwithstanding that he has not been served with the notice; but may be liable to costs in the discretion of the Court.*
>
> *Provided further that where at the hearing of the Application / Appeal, the Court is of opinion that any person who ought to*

have been served with notice of the Application/Appeal, has not been so served, the Court may order such notice to be served and adjourn the hearing upon such terms, if any, as the Court may think fit.

(5) (a) All questions of fact arising for determination under this part shall be decided ordinarily upon affidavit, but the court may direct that such other evidence be taken as it may deem fit.

(b) Where the Court orders that certain matters in controversy between the parties shall be decided on oral evidence, it may either itself record the evidence or may direct any Court or Tribunal or a Commissioner appointed for the purpose of record it in accordance with the procedure prescribed by law.

(6) The Court may in such proceedings impose such terms as to costs as it thinks fit.

(7) The Court may in its discretion, either before the opposite party is called upon to appear and answer or afterwards on the application of the opposite party, demand from the Applicant security for the costs of the application/appeal."

27. Similarly, in Chapter XIII Rule 8 of M.P. High Court Rules and Orders, 2008, service of notice to instrumentality of State is provided in following words:-

"Notices to Public Officers and Corporations

8. Notices to Public Officers and Corporations shall be sent by Registered post acknowledgment due."

28. Therefore, once it is abundantly clear that proceedings under Section 11(6) of the Act of 1996 are judicial one and powers vested in the designated Court are judicial in nature then principle of opportunity of hearing or putting other party to notice is imperative and in the interest of justice. Petitioner rightly pointed out that if petitioner would have been noticed then certainly certain facts would have been brought to the notice of the Court including the factum of representation being submitted by respondent-Company and subsequent rejection by DGP and also the point regarding appointment of Arbitrator would have also been discussed.

29. In fact Section 11 (1) of the Act of 1996 itself clarifies that a person may be an Arbitrator, **unless otherwise agreed by the parties.** Meaning thereby, sufficient leverage has been given to both the parties to reach to an agreement about the appointment of an Arbitrator. Whole procedure as described in Section 11 of the Act of 1996 gives indication of the legislative intention that both the parties have to reach to a consensus about the appointment of arbitrator and rightly so, because arbitration is part of Alternative Dispute Resolution

Mechanism like Mediation and Reconciliation, primarily **based upon Consent quotient rather than Compulsion.**

30. In traditional set up parties have to appear for resolution of their disputes before the competent Judge / Magistrate within their jurisdiction presiding over the jurisdiction vested into it and parties have no alternative but to submit to the jurisdiction and to comply the judgment given in adjudicatory process. On the contrary, ADR mechanism specially arbitration is such device which delves more on consent then (sic: than) on compulsion. Parties agree to the Terms, Procedure and Person to act as Arbitrator and the very genesis of concept of arbitration is peaceful and consensual resolution of dispute. This gives finality to the litigation and perhaps with more acceptance. Therefore, the process of appointment of arbitrator is ought to be just, fair and transparent.

31. Considering those aspects, Amendment Act of 2015 and thereafter by Act of 2019, stress over the transparency, relationship of Arbitrator with parties or the counsel, qualifications and experience of Arbitrator and impartiality and independence of Arbitrator have been taken care of with more vehemence.

32. In the instant case, from the proceedings, it appears that no notice was issued to the present petitioner in specific terms. If notice would have been issued to the petitioner then Department (Police Department/DGP) would have appeared and raised all the points available to it, that has not happened. Mere presence of Government Advocate (usually duty is rotational from one Court to another) in the order does not make the case better because State of Madhya Pradesh (represented here through Police Department) is an impersonal authority/entity and falls under Article 12 of the Constitution of India. It is required to be noticed and requirement is all the more pressing because after service of notice, department moves with appointment of OIC (Officer in-charge) with instructions and inputs from department. In present case, when department had some other names also in its mind as arbitrators then it becomes all the more required that notices ought to have been issued. Here no notice is admittedly issued, therefore, it prejudices the interest of petitioner and cause of justice. Hence, it vitiates order dated 20/05/2021 and subsequent proceedings.

33. So far as, plea of Section 4 of Act of 1996 as raised by counsel for respondent is concerned, same is not available to the respondent becuase (sic: because) show cause notice invoking arbitration under Section 11 of the Act of 1996 was issued on 20/01/2021 and same was replied by petitioner vide reply dated 10/2/2021, in which offer to go for arbitration was turned down on the ground that Apex Court already given a chance to respondent-company to agitate the case before the competent authority and petitioner was of the opinion that since respondent-company already availed of the said remedy and his representation was rejected, therefore, there is no need for arbitration.

Even otherwise, at that time, that aspect was pending consideration vide W.P.No. 5073/2021 before the Division Bench of this Court in which vide order dated 31/3/2021 Division Bench passed the order dismissing the writ petition in limine while giving liberty to respondent to avail the arbitration clause available under the agreement in question. Thereafter, application for arbitration under Section 11(6) of Act of 1996 was filed, therefore, said plea of Section 4 of Act of 1996 has no application in the present set of facts.

34. So far as point raised by petitioner regarding alternative forum of Arbitration Tribunal is concerned, same does not hold good because from Section 2 (1) of Act 1983, it is crystal clear that supply of those goods and services would come into ambit of Arbitration Tribunal which are being supplied or tendered in pursuance to the works contract given to a contractor for construction, repair, maintenance of any building or superstructure, dam, weir, canal, reservoir, tank, lake, road, well, bridge, culvert, factory, work- shop, powerhouse, transformers etc. Here no such works contract was issued to the respondent-Company. It had to supply CCTV Cameras for installation in High Court Premises, Bench at Indore but it failed in providing quality and stipulated class of equipments, therefore, dispute arose. Therefore, on this count contentions of petitioner regarding availability of alternative remedy lacks merit. Hence, rejected.

35. In cumulative consideration, it is an error apparent on the face of record that no notice was issued and case proceeded for appointment of Arbitrator, therefore, case of review petitioner deserves consideration in the interest of justice. Accordingly, order dated 20th May, 2021 is hereby recalled and consequently any proceedings held also pales into oblivion / insignificance and are rendered nullity.

36. Resultantly, review petition is allowed and Arbitration Case No. 37/2021 is restored to its original number and be placed for hearing on admission and further orders in the month of August, 2022.

Petition allowed

I.L.R. 2022 M.P. 2055

Before Mr. Justice Dwarka Dhish Bansal

SA No. 743/2000 (Jabalpur) decided on 14 July, 2022

MANGLA DESHORE (KUMARI) …Appellant

Vs.

MST. KRISHNA BAI (DEAD) BY LRs. & ors. …Respondents

***A. Limitation Act (36 of 1963), Section 5 & 14 and Civil Procedure Code (5 of 1908), Order 41 Rule 3A, 11 & 12 – Practice & Procedure* – Held – Unless delay in filing appeal is condoned, there is no appeal in eyes of law –**

After condoning delay of a long period under Order 41 Rule 3A, it was duty of appellate Court to admit appeal as provided under Rule 11 and then to hear final arguments as per Rule 12 of Order 41, but nothing was followed and on same date appeal was allowed – As delay was not condonable, there was no question of deciding appeal on merits – Second appeal allowed.
(Para 19 & 20)

क. परिसीमा अधिनियम (1963 का 36), धारा 5 व 14 एवं सिविल प्रक्रिया संहिता (1908 का 5), आदेश 41 नियम 3A, 11 व 12 – पद्धति व प्रक्रिया – अभिनिर्धारित – जब तक अपील प्रस्तुत करने में हुए विलंब को माफ नहीं किया जाता है, विधि की दृष्टि में कोई अपील नहीं है – आदेश 41 नियम 3A के अंतर्गत एक लंबी अवधि के विलंब को माफ करने के पश्चात्, अपीली न्यायालय का यह कर्तव्य था कि वह अपील को ग्रहण करे, जैसा कि नियम 11 के अंतर्गत उपबंधित किया गया है और फिर आदेश 41 के नियम 12 के अनुसार अंतिम तर्क पर सुनवाई करे, परंतु कुछ भी पालन नहीं किया गया एवं उसी तिथि को अपील मंजूर की गई थी – चूंकि विलंब माफी योग्य नहीं था, अपील को गुणदोषों के आधार पर विनिश्चित करने का कोई प्रश्न नहीं था – द्वितीय अपील मंजूर।

***B. Limitation Act (36 of 1963), Section 5 – Condonation of Delay* – Held – In application u/S 5 of Limitation Act, nothing mentioned about non-compliance of order of trial Court – No date of filing application under Order 9 Rule 13 mentioned, which was filed after more than 13 months which is clear negligence on their part – No explanation submitted – Delay was not condonable. (Paras 18 to 20)**

ख. परिसीमा अधिनियम (1963 का 36), धारा 5 – विलंब के लिए माफी – अभिनिर्धारित – परिसीमा अधिनियम की धारा 5 के अंतर्गत आवेदन में, विचारण न्यायालय के आदेश के अननुपालन के बारे में कोई भी उल्लेख नहीं – आदेश 9 नियम 13 के अंतर्गत आवेदन प्रस्तुत करने की कोई तिथि उल्लिखित नहीं, जिसे 13 माह से अधिक समय के पश्चात् प्रस्तुत किया गया था जो कि उनकी ओर से स्पष्ट उपेक्षा है – कोई स्पष्टीकरण प्रस्तुत नहीं किया गया – विलंब माफी योग्य नहीं था।

***C. Limitation Act (36 of 1963), Section 5 & 14 – Condonation of Delay* – Held – After recording negative findings on same set of facts with regard to Section 14, there was no occasion available with first appellate Court to consider question of condonation of delay again on same set of facts in view of Section 5 of the Act. (Para 20)**

ग. परिसीमा अधिनियम (1963 का 36), धारा 5 व 14 – विलंब के लिए माफी – अभिनिर्धारित – धारा 14 के संबंध में तथ्यों के समान समूह पर नकारात्मक निष्कर्ष अभिलिखित करने के पश्चात्, प्रथम अपीली न्यायालय के पास अधिनियम की धारा 5 को दृष्टिगत रखते हुए तथ्यों के समान समूह पर पुनः विलंब के लिए माफी के प्रश्न पर विचार करने का कोई अवसर उपलब्ध नहीं था।

Cases referred :

AIR 1979 SC 1666, (2009) 2 SCC 205, (2005) 1 SCC 787, AIR 1998 SC 2276, 2013 AIR (SCW) 6550, AIR 2020 SC 2344, 2016 (1) MPLJ 222, 2018 (1) MPLJ 210, 2019 (1) MPWN 89, AIR 2005 SC 2191, AIR 1981 SC 1400, (1987) 2 SCC 103, (2002) 4 SCC 458, (2018) 15 SCC 127, (2008) 14 SCC 582, AIR 2011 SC 489, 1996 MPLJ 764 (FB).

Ashok Kumar Jain, for the appellant.
Avinash Zargar, for the respondent No. 2.

J U D G M E N T

DWARKA DHISH BANSAL, J.:- This Second Appeal has been filed by the appellant/plaintiff challenging the judgment and decree dated 18.02.2000 passed by First Additional District Judge, East Nimar, Khandwa in Civil Appeal No.19-A/1999, whereby reversing the *ex parte* judgment and decree dated 23.07.1993 passed by First Civil Judge Class-II Khandwa, in Civil Suit No.25-A/1985, whereby suit filed for declaration of title and restoration of possession was decreed *ex parte*.

2. Short facts of the case are that the plaintiff/appellant instituted a suit for declaration of title, declaring the will dated 22.04.1982 to be null and void and for restoration of possession of suit property against the respondents/defendants 1-3 impleading the State of Madhya Pradesh as party/defendant 4 with the allegations that property in question came to Radha Krishna in partition and the plaintiff being his niece is entitled to succeed the property in question. It is also alleged that the defendants with an intention to grab the property got fabricated the will dated 22.04.1982 (registered on 23.06.1984) and on that basis got their name mutated and are getting the benefits being in illegal possession of the suit property. Hence prayed for decree.

3. After service of summons, defendants 1-3 appeared and filed written statement on 12.10.1987 denying the plaint allegations. It is contended that the defendant 1-Krishnabai is sister of Radha Krishna and the defendants 2-3 are sons of Krishna Bai, who since their childhood had been residing with Radha Krishna who executed will in their favour on 22.04.1982, on that basis the defendants are in possession, as owner. It is contended that in presence of defendant 1, the plaintiff does not get any right over the property left by Radha Krishna. Accordingly prayed for dismissal of the suit.

4. Upon service of summons the defendants appeared on 10.04.1985 and filed written statement on 12.10.1987, thereafter they continued to appear upto 25.06.1993, prior to which on 09.11.1992 learned trial court ordered for production of original will dated 22.04.1982 on record, for which they took time

upto 25.06.1993, but they did not produce. At this stage the defendants disappeared from the court and were proceeded *ex parte*. Resultantly, learned trial court on the basis of *ex parte* evidence decreed the suit vide *ex parte* judgment and decree dated 23.07.1993.

5. Thereafter the defendants 1-3 decided to file an application under Order 9 Rule 13 CPC on 16.08.1994 which upon due consideration was dismissed vide order dated 29.09.1994. Upon Misc. Appeal, the order dated 29.09.1994 was affirmed by Ist Additional District Judge, Khandwa on 17.04.1995 and was further affirmed by this Court in Civil Revision vide order dated 10.05.1995.

6. Thereafter the defendants 1-3 thought fit to file a civil suit No.15- A/1995 on 19.06.1995 before First Civil Judge Class-I Khandwa seeking declaration to the effect that *ex parte* judgment and decree dated 23.07.1993 passed in Civil Suit No.25-A/1985 is not binding on them. In this Civil Suit an application for temporary injunction was filed, which was dismissed vide order dated 14.01.1998, which was affirmed in Misc. Appeal No.1/1998 vide order dated 10.03.1998 and the civil revision No.648/1998 filed against which was also dismissed vide order dated 04.08.1998 passed by this Court making following observation :

> "In this case, the ex parte decree passed against the applicants was not obtained by fraud or is otherwise vitiated. The remedy of the applicants is to file an appeal because the trial court has made an error in granting the decree to the non-applicant No.1. That error cannot be corrected in a civil suit."

7. Taking the aforesaid observation as a fresh cause of action, the defendants 1-3 on 23.11.1998 preferred regular civil appeal No.19-A/1999 challenging the ex-parte judgment and decree dated 23.07.1993 passed in Civil Suit No.25-A/1985, along with an application under Section 5, 12 and 14 of the Limitation Act with the prayer to condone the delay in filing of the regular civil appeal. However, no averments were made in this application as to what happened in the civil suit no.15-A/1995 filed by the defendants 1-3 and why they did not take any action after 25.06.1993 till 16.08.1994 and then from 05.04.1997 to 23.11.1998.

8. Said application under Section 5, 12 and 14 was contested by appellant/plaintiff by filing written reply taking several objections including the objection of maintainability of the appeal, with the prayer of dismissal of the same.

9. Learned First Appellate Court listed the case for hearing arguments on the application under Section 5, 12 and 14 of the Limitation Act as well as for final arguments in civil appeal. Then after hearing arguments, considered rival submissions of the parties and vide paragraph 13 of its judgment clearly held that

the time spent in filing and decision of the application under Order 9 Rule 13 CPC, so also the time spent in Civil Suit No.15-A/1995, cannot be excluded from the period of limitation and the defendants 1-3 are not entitled to the benefit of provision contained in Section 14 of the Limitation Act. However, in the later part i.e. in paragraph 14 to 19 of the impugned judgment, learned first appellate court placing reliance on the judgment in the case of *M/s. Concord of India Insurance Co. Ltd. Vs. Smt. Nirmala Devi* AIR 1979 SC 1666 held that the defendants are entitled for condonation of delay because they were wrongly advised by the counsel, and condoned the delay as a matter of grace. At the same time learned first Appellate Court in the later part started writing final judgment from para 20 and set aside the ex parte judment and decree vide impugned judgment and decree dated 18.02.2000.

10. Against the aforesaid judgment and decree, the plaintiff/appellant preferred Second Appeal which was admitted by this Court on 22.04.2002 on the following substantial questions of law :

> "1. Whether the Court below has erred in condoning the delay in filing the appeal without proper application under Section 5, 12 and 14 of the Limitation Act, 1963 ?
>
> 2. Whether the finding of lower appellate court that the plaintiff inherits the estate upon death of Radhakrishna to the exclusion of Krishnabai is perverse ?"

11. Learned counsel for the appellant/plaintiff submits that according to the decisions in the case of *Mahesh Yadav and another vs. Rajeshwar Singh* and others (2009) 2 SCC 205 and *Bhanu Kumar Jain vs. Archana Kumar and another* (2005) 1 SCC 787, the defendants were having four remedies against the ex-parte judgment and decree. As per the legal advice given to them the defendants after a period of more than 13 months, firstly availed remedy of filing application under Order 9 Rule 13 CPC and after its dismissal/finalization upto this Court, they instituted civil suit No.15-A/1995 challenging the ex parte judgment and decree, which according to the judgment of *Mahesh Yadav* (supra) was maintainable, but even without seeking liberty to withdraw the civil suit No.15-A/1995 and to file regular appeal against the ex parte judgment and decree, the defendants preferred regular civil appeal in question, which in the existing circumstances was not entertainable and the judgment and decree in question whereby delay in filing of the civil appeal was condoned on the ground of wrong advice by the counsel, is not sustainable and the defendants cannot take benefit of observations made by this Court in the order dated 04.08.1998 (supra) because of availability of remedy of civil suit also to the defendants. In support of his submissions he relied upon the

decisions in the case of (i) *P.K. Ramachandran Vs. State of Kerala and another* AIR 1998 SC 2276; (ii) *Popat Bahiru Govardhane Etc. Vs. Special Land Acquisition Officer and another* 2013 AIR (SCW) 6550; (iii) *Aarifaben Yunusbhai Patel and Ors. Vs. Mukul Thakorebhai Amin and Ors.* AIR 2020 SC 2344; (iv) *Prakash s/o Shyamlal Khatik Vs. Uma Chaturvedi and Others* 2016 (1) MPLJ 222; (v) *Kishori Bai and Ors. Vs. Ravi @ Sanjay Pandey and Ors.* 2018 (1) MPLJ 210 and (vi) *Jagraj Singh Vs. Hariom* 2019 (1) MPWN 89 and argued that the court has no power to extend the period of limitation on equitable grounds or to condone the delay on vague reasons. He further submits that till today there is nothing on record to show the result of the Civil Suit No.15-A/1995 filed by the defendants 1-3. He further submits that the plaintiff being niece i.e daughter of predeceased son of original owner Harishankar, namely Umakant, and the property in the hands of Radha Krishna being ancestral in nature, the learned first Appellate Court has erred in reversing the same even without reversing the findings recorded by learned trial court on issue No.1 regarding the nature of property to be ancestral property. Accordingly he prays for allowing the second appeal.

12. Learned counsel for the defendants/respondents 1-3 submits that defendants 1-3 were prosecuting their case as per legal advice given to them by the counsel and lastly as per the observations made by this Court in Civil Revision No.648/1998 they were given advice to file regular civil appeal before the First Additional District Judge, East Nimar, Khandwa, in which the learned appellate court has rightly allowed the application under Section 5 of the Limitation Act, which is not liable to be interfered with in the present second appeal. In support of his arguments he relied upon the decisions in the case of (i) *State of Nagaland Vs. Lipok Ao and Ors.* AIR 2005 SC 2191; (ii) *Rafiq & Anr. Vs. Munshilal & Anr.* AIR 1981 SC 1400; (iii) *Collector, Land Acquisition, Anantnag And Anr. Vs. Mst Katiji and Ors.* (1987) 2 SCC 103; (iv) *Municipal Corporation Gwalior Vs. Ramcharan (Dead) by LRs and Ors.* (2002) 4 SCC 458; (v) *Ummer Vs. Pottengal Subida and Ors.* (2018) 15 SCC 127 and (vi) *State (NCT of Delhi) Vs. Ahmed Jaan* (2008) 14 SCC 582. He further submits that the findings recorded by learned first Appellate Court in para 13 of the judgment, regarding Section 14 of the Limitation Act, are liable to be set aside/ignored. He further submits that in the light of undisputed pleadings made in the plaint and as per Section 8 of the Hindu Succession Act, the plaintiff is not entitled for any relief, because the defendants are the only successors of Radha Krishna and owner of the property in question. Accordingly, he prays for dismissal of the second appeal.

13. During the course of arguments, learned counsel for the respondents/ defendants have placed a photocopy of order dated 05.04.1997 passed in civil suit No.15-A/1995 on record, which shows that the said civil suit was returned to the defendants for filing in the competent court. However, the counsel has not been

able to demonstrate as to whether such civil suit was filed before competent court or not.

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

Substantial Question of Law 1

15. Undisputedly the defendants firstly challenged the ex parte judgment and decree dated 23.07.1993 by filing application on 16.08.1994 under Order 9 Rule 13 CPC which was dismissed upto this Court by dismissal of Civil Revision on 10.05.1995. It is also undisputed position available on record that after dismissal of Civil Revision, i.e. after finalization of proceedings under Order 9 Rule 13 CPC, the defendants chose to file Civil Suit No.15-A/1995 on 19.06.1995 challenging the ex parte judgment and decree dated 23.07.1993 passed in Civil Suit No.25-A/1985, in which the application under Order 39 Rule 1 & 2 CPC was dismissed vide order dated 14.01.1998, which was upheld in Misc. Appeal on 10.03.1998, so also in Civil Revision No.648/1998, dismissed on 04.08.1998. The first question arises in the present appeal is as to whether the defendants can be given benefit of the observations made by this Court in civil revision on 04.08.1998 even without withdrawing the Civil Suit or even without getting any liberty from the concerned Court to file regular Civil Appeal in question. Certainly this aspect has neither been mentioned in the application filed under Section 5, 12 and 14 of the Limitation Act nor has been considered by learned first appellate court.

16. Secondly, if the said order dated 05.04.1997 (of returning plaint) is taken into consideration, then it reveals that on the date of passing of order dated 04.08.1998 in CR No.648/98 or even on the date of its filing i.e. on 17.03.1998, no civil suit was pending, which in effect rendered the civil revision infructuous, hence the observation made in the order dated 04.08.1998 is of no significance.

17. Further the order passed by First Appellate Court appears to be self contradictory with regard to condonation of delay because in para 13 of the impugned judgment, the learned appellate court has on the same set of facts declined to extend the period of limitation under Section 14 of the Limitation Act, but in the later part i.e. vide para 19, on the same set of facts condoned the delay, as a matter of grace, in filing of the appeal and at the same time from para 20 passed the impugned judgment on merits also.

18. In the present case civil appeal was filed on 23.11.1998 taking benefit of observations made in the order dated 04.08.1998 but the fact of pendency/dismissal/withdrawal of civil suit No.15-A/1995 was suppressed, which shows malafides and negligent conduct of the defendants/respondents. As has been held by Hon'ble Apex Court in the case of *Ramji Pandey and Ors. vs.*

Swaran Kali AIR 2011 SC 489, as the conduct of respondents throughout lacks due diligence and was also negligent, they would not be entitled to benefit of condonation of delay under section 5 of the Limitation Act and time spent in wrong forum cannot be excluded and delay cannot be condoned. In the application under Section 5 of the Limitation Act, nothing has been mentioned regarding non-compliance of order dated 09.11.1992 passed by trial court under Order 11 Rule 12 CPC directing the defendants to produce the original will. Further no date of filing application under Order 9 Rule 13 CPC was mentioned in the application under Section 5 of the Limitation Act. Fact remains that the application under Order 9 Rule 13 CPC was filed on 16.08.1994 i.e. after more than 13 months, which is clear negligence on part of defendants because they were served with summons and appeared in civil suit till 25.06.1993. No explanation is available on record for the period from 25.06.1993 to 16.08.1994 and then from 05.04.1997 to 23.11.1998, which was necessary.

19. It is well settled that unless the delay in filing of appeal is condoned, there is no appeal in the eyes of law. If the matter is considered from this angle, then on the date of passing of the impugned judgment dated 18.02.2000, there was no appeal in the eyes of law. In my considered opinion after condoning the delay of a long period under Order 41 Rule 3A CPC, it was the duty of first appellate court to admit the appeal as provided under Rule 11 and then to hear the final arguments as provided under Rule 12 of Order 41 CPC, but nothing was followed by learned first appellate court and on the same date appeal was allowed just contrary to law settled by Full Bench of this Court in the case of *Maniram and ors. v. Mst. Fuleshwar and ors.* 1996 MPLJ 764 (FB).

20. However, after recording negative findings on the same set of facts with regard to Section 14 of the Limitation Act there was no occasion available with the first appellate court to consider the question of condonation of delay again on same set of facts in view of Section 5 of the Limitation Act. As the delay in filing the first appeal was not condonable, therefore there was no question of deciding the appeal on merits. Accordingly, the impugned judgment and decree deserves to be and is hereby set aside and the judgment and decree passed by learned trial court is restored. Accordingly, the substantial question of law no.1 is decided in favour of appellant/plaintiff and against the defendants/respondents.

Substantial Question of Law 2

21. In view of decision on substantial question of law No.1, there is no need to decide the substantial question No.2.

22. It is pertinent to mention here that as the confusion arose in the mind of defendants 1-3 because of making observations by this court in the order dated **04.08.1998** in **Civil Revision No.648/1998**, therefore, in the interest of justice it is

ordered that the defendants 1-3 shall be at liberty to get revived their **Civil Suit No.15-A/1995** in accordance with the law, if it was got dismissed due to observations made by this Court in CR No.648/1998, by moving appropriate application before the concerned court.

23. With the aforesaid observations, the appeal stands allowed and disposed off. No order as to costs.

Appeal allowed

I.L.R. 2022 M.P. 2063

Before Mr. Justice Dwarka Dhish Bansal

SA No. 1015/2004 (Jabalpur) decided on 20 July, 2022

RAMKALI (SMT.) (DEAD) BY LR. & ors. …Appellants

Vs.

SMT. MURITKUMARI (DEAD) BY LRs. & ors. …Respondents

***A. Civil Procedure Code (5 of 1908), Section 100 – Relief Sought in Suit* – Held – Plaintiff sought relief of declaration of 1/3rd share in property, therefore, relief of declaring the Will to be forged, being smaller relief, must be deemed to be included in the relief of declaration of title – Thus, it cannot be said that prayer in the suit for declaring Will to be forged, fabricated or *ab initio void*, was necessary – Appeal dismissed. (Para 24)**

क. सिविल प्रक्रिया संहिता (1908 का 5), धारा 100 – वाद में चाहा गया अनुतोष – अभिनिर्धारित – वादी द्वारा संपत्ति में 1/3 हिस्से की घोषणा का अनुतोष चाहा गया अतः वसीयत को कूटरचित घोषित करने का अनुतोष, छोटा अनुतोष होने के नाते, हक की घोषणा के अनुतोष में शामिल माना जाना चाहिए – इस प्रकार, यह नहीं कहा जा सकता कि वसीयत को कूटरचित, मनगढंत या प्रारंभ से ही शून्य घोषित करने के लिए प्रार्थना वाद में आवश्यक थी – अपील खारिज।

***B. Civil Procedure Code (5 of 1908), Section 100 – Execution of Will – Burden of Proof – Scope of Interference* – Held – A Will in favour of defendant is not required to be necessarily challenged by plaintiff as burden of proving the Will always lies upon the propounder – Execution of will is purely a question of fact and cannot be interfered by this Court under limited scope of Section 100 CPC. (Paras 21 & 25)**

ख. सिविल प्रक्रिया संहिता (1908 का 5), धारा 100 – वसीयत का निष्पादन – सबूत का भार – हस्तक्षेप की व्याप्ति – अभिनिर्धारित – वादी द्वारा प्रतिवादी के पक्ष में वसीयत को अनिवार्य रूप के चुनौती देने की आवश्यकता नहीं है क्योंकि वसीयत को साबित करने का भार हमेशा प्रतिपादक पर होता है – वसीयत का निष्पादन विशुद्ध रूप से तथ्य का प्रश्न है तथा धारा 100 सि.प्र.सं. की सीमित व्याप्ति के अंतर्गत इस न्यायालय द्वारा इसमें हस्तक्षेप नहीं किया जा सकता।

C. ***Evidence Act (1 of 1872), Section 68 – Will* – Held – Provision of Section 68 distinguishes Will from other documents by putting a proviso which has the effect that admission of execution of other documents has the effect of proving of said documents but Will is unaffected by any admission.**
(Para 21)

ग. साक्ष्य अधिनियम (1872 का 1), धारा 68 – वसीयत – अभिनिर्धारित – धारा 68 का उपबंध एक परंतुक लगाकर वसीयत तथा अन्य दस्तावेजों में विभेद करता है जिसका प्रभाव यह है कि अन्य दस्तावेजों के निष्पादन की स्वीकृति का प्रभाव, उक्त दस्तावेजों का सिद्ध हो जाना है परंतु वसीयत किसी भी स्वीकृति से अप्रभावित है।

D. ***Specific Relief Act (47 of 1963), Section 34 – Declaration of Share* – Held – Declaration of share could be made irrespective of Section 34 of 1963 Act, especially in case where the land is agricultural land – As per record, land in question is revenue paying land, therefore even if there is some construction over it, same would be considered as agricultural land.**
(Para 18)

घ. विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 34 – हिस्से की घोषणा – अभिनिर्धारित – हिस्से की घोषणा 1963 के अधिनियम की धारा 34 के बावजूद की जा सकती है, विशिष्ट रूप से ऐसे मामले में जहां भूमि कृषि भूमि हो – अभिलेखानुसार, प्रश्नगत भूमि राजस्व भुगतान वाली भूमि है, अतः, भले ही उस पर कुछ निर्माण हो, वह कृषि भूमि ही मानी जाएगी।

Cases referred :

(2014) 14 SCC 502, (2006) 5 SCC 558, (1976) 2 SCC 142, 1993 Supp (3) SCC 129, (2005) 1 SCC 40, AIR 1966 SC 359, (1973) 2 SCC 60, (2011) 12 SCC 220, (2018) 1 HLR 279, AIR 1979 Ker 96, 1918 (20) BOMLR 509 (Privy Council), AIR 1978 J & K 16, AIR 2001 P & H 331, ILR (2013) MP 1004, 2001 SCC Online Mad 955, (2003) 2 SCC 91, (1980) 4 SCC 396, (1995) 4 SCC 496, (2002) 2 SCC 62, (2004) 1 SCC 271, (2012) 12 SCC 406, (1998) 6 SCC 748, (2002) 1 SCC 134, AIR 1990 SC 1742, AIR 1983 SC 114, AIR 2013 HP 4, 1994 M.P.L.J. 209, 1961 JLJ 1263, (1986) AllLJ 1056, AIR 1932 Calcutta 504, (2021) 14 SCALE 293, AIR 2018 (NOC) 894, (2008) 4 SCC 594, AIR 1929 Lahore 11, (2009) 12 SCC 454.

Sankalp Kochar, for the appellants.
Ashok Lalwani, for the LRs. of respondent No. 1.
Akhil Singh, for the proposed respondent Aniket Singh mentioned in I.A. No. 13089/2013.

J U D G M E N T

DWARKA DHISH BANSAL, J. :- This second appeal has been filed by the appellants/defendants challenging the judgment and decree dated 24.06.2004,

passed by 6th Additional District Judge (Fast Track Court) Rewa in Civil Appeal No.43-A/04 whereby confirming the judgment and decree dated 28.01.2000, passed by 5th Civil Judge Class-II, Rewa, in Civil Suit No.225-A/1998 whereby the suit filed for declaration of 1/3rd share in the land survey no.204 area 0.85 acre situated in village (Mauja) Padra was decreed.

2. The facts in short are that, the land in question belonged to deceased-Vindheshwari Prasad, who was succeeded by his wife Mst. Sukhrajua (defendant 1) and two daughters Smt. Ramkali (defendant 2) and Smt. Murtikumari (plaintiff). The defendants 3-5 are sons of defendant 2-Smt. Ramkali. Vindheshwari Prasad died on 12.09.1988, leaving behind him the land survey No.204 area 0.85 acre, situated in Village (Mauja) Padra, Tehsil Huzur, Distrit (sic: District) Rewa. It is alleged in the plaint that after death of Vindheshwari Prasad, the plaintiff and defendants 1-2 are having 1/3rd share each and the defendants 3-6 or any other person have no right and Vindheshwari Prasad never executed any deed of transfer/agreement or Will. It is also alleged in the plaint that the husband of defendant 2-Ramkali got a false and fabricated agreement (Ex.D-1) prepared and thereafter, got fabricated a Will (Ex.D-2) and on that basis tried to get the name of defendants 3-5 mutated over the land in question. On inter alia allegations, the plaintiff prayed for declaration that she is Bhoomiswami over 1/3rd share and in possession.

3. The defendants 2-5 filed written statement denying the plaint allegations and contended that Vindheshwari Prasad in his life time executed a Will on 23.08.1988 in favour of defendants 3-5 and after death of Vindheshwari Prasad, they are Bhoomiswami and in possession of the land in question. It was also contended that neither the plaintiff nor defendants 1-2 are owner or in possession and are not entitled for any declaration. It was also contended that the suit land is a residential plot in which two houses and boundary wall is constructed which are having value of about Rs.9 lacs. Accordingly, it was contended that the suit has not been valued properly and the learned Court has no pecuniary jurisdiction.

4. The defendant 1 also filed written statement admitting the plaint allegations and contended that Vindheshwari Prasad never executed any Will (Ex.D-2) in favour of defendants 3-5 nor executed any agreement/gift deed (Ex.D-1), which is a fabricated document. After death of Vindheshwari Prasad, his wife and two daughters i.e. plaintiff and defendants 1-2 are entitled to succeed his property.

5. The defendant 6-State despite service of summons, did not appear and was proceeded *exparte*.

6. The learned trial Court on the basis of pleadings of the parties framed as many as 8 issues and recorded evidence led by the parties. After due consideration

of the material available on record, learned trial Court held that the plaintiff and defendants 1-2 are Bhoomiswami and in joint possession of the land having 1/3rd share and it was held that the defendants 3-5 are not entitled to succeed the property on the basis of Will in question which has been found by learned Court to be a false and fabricated document. In para 32, the learned trial Court held that the plaintiff - Murtikumari and defendant-1 Smt. Sukhrajua are not in physical possession but the defendants 2-5 are in physical possession and at the end of the para, it was also held that the plaintiff and defendants 1-2 being co-owners, would be deemed to be in joint possession of the suit property. Accordingly, ignoring the Will and Gift deed of the favour of defendants 3-5, learned trial Court decreed the suit declaring the plaitiff (sic: plaintiff) to be shareholder of 1/3rd share. Upon filing civil appeal, learned first appellate Court affirmed the same, vide judgment and decree dated 24.06.2004.

7. Upon filing second appeal by defendants 2-4, it was admitted on 14.07.2014 on the following substantial questions of law.:-

> "1. Whether in view of the findings in para 32 of the impugned judgment passed by the trial Court holding possession of the appellants on the disputed property, in the lack of prayer of consequential relief of possession in the suit of the respondents filed for declaration, the same was rightly decreed by the trial court in view of proviso of Section 34 of the Specific Relief Act ?
>
> 2. Whether in the lack of any prayer in the suit of the respondents for declaring the alleged Will (Ex. D-2) projected by the appellants to be forged, fabricated and ab initio void, the Court below have rightly declared such Will to be forged and fabricated document ?"

8. Learned counsel for the appellants submits that in view of the concurrent finding of fact that the plaintiff is not in physical possession of the land in question, her suit was not maintainable in view of provision contained under Section 34 of the Specific Relief Act. He further submits that because the plaintiff was aware about the execution of Will (Ex.D-2), she was bound to seek declaration about it and in absence of relief of declaration about the Will to be forged or fabricated document, the suit was not maintainable and in absence of such relief, learned Courts below have erred in holding so. He further submits that there being no prayer for relief of possession, the suit mere for declaration was not maintainable.

9. By pressing the application under Section 100 (5) of CPC filed on 29.06.2022, the counsel for appellants submits that the second appeal also involves additional substantial questions of law as follows:-

> "1. Whether the learned Courts below erred in holding that the will executed in favour of the defendants No.3 to 5 has not been proved in accordance with law ?
>
> 2. Whether in the absence of any handwriting expert report, the finding of the trial Court that the signatures of the testator are forged is based upon surmises and conjectures ?"

10. The counsel for appellants submits that the learned Courts below have wrongly held that the Will (Ex.D-2) has not been proved by defendants 3-5 whereas, the Will in question is a proven document and the learned Court below has committed mistake in making comparison of the signature without taking aid of the expert. Accordingly, he submits that the judgment and decree passed by learned Courts below are not sustainable. In support of his arguments, he placed reliance on the decisions in the case of *(i) Venkataraja and others vs. Vidyane Doureradjaperumal* (2014) 14 SCC 502; *(ii) Anil Rishi vs. Gurbaksh Singh* (2006) 5 SCC 558; *(iii) Afsar Sheikh and another vs. Soleman Bibi and others* (1976) 2 SCC 142; *(iv) Vinay Krishna vs. Keshav Chandra and another* 1993 Supp (3) SCC 129; *(v) Daulat Ram and others vs. Sodha and others* (2005) 1 SCC 40; (vi) *Deokuer and another* vs. *Sheoprasad Singh and others* AIR 1966 SC 359; *(vii) Ram Saran and another vs. Smt. Ganga Devi* (1973) 2 SCC 60 *(viii) Rangammal vs. Kuppuswami and another* (2011) 12 SCC 220; *(ix) Om Prakash Yadav and Anr.* vs. *Kanta Yadav & Ors* (2018) 1 HLR 279; *(x) John Guruprakasam vs. Yovel Nesan and others* AIR 1979 Ker 96; (xi) *Saudagar Singh vs. Pradip Narayan Singh* 1918 (20) BOMLR509 (Privy Council); (xii) *Gian Chand vs. Krishen Singh and another* AIR 1978 J&K 16; *(xiii) Punjab Steel Corporation vs. M.S.T.C. Ltd.* AIR 2001 P&H 331; (xiv) *Jamana Devi Vs. Rajendra Prasad Ji ILR* (2013) MP 1004; and (xv) *Saravanan Pillai vs. A.S. Mariappan and others* 2001 SCC Online Mad 955.

11. In reply, the learned counsel for the respondents submits that the suit property belonged to Vindheshwari Prasad and the plaintiff along with defendants 1-2 being the only class-I successors (Wife and two daughters) were entitled to succeed the property. As the Will has not been proved by defendants 3-5 and has also not been found proved by learned Courts below, therefore, no interference is warranted in the second appeal. He submits that vide paragraph 32 of impugned judgment itself, the plaintiff and defendants 1-2 have been found in joint possession, therefore, the plaintiff was not required to seek relief of possession and he further submits that the Will in question was propounded by the defendants 3-5, therefore, they were liable and bound to prove the Will in accordance with the law of evidence and in absence of proof of Will, nothing can be said in favour of the appellants. Learned counsel placed reliance on the decisions in the case of *(i) Janki Narayan Bhoir vs. Narayan Namdeo Kadam* (2003) 2 SCC 91; *(ii) Karbalai Begum vs. Mohd. Sayeed and another* (1980) 4 SCC 396; *(iii) Vidya Devi vs. Prem*

Prakash and others (1995) 4 SCC 496; *(iv) Darshan Singh and others vs. Gujjar Singh and others* (2002) 2 SCC 62; *(v) MD. Mohammad Ali (Dead) by LRS. vs. Jagadish Kalita and others* (2004) 1 SCC 271; *(vi) Ajay Kumar Parmar vs. State of Rajasthan* (2012) 12 SCC 406; *(vii) Ram Prasad Rajak vs. Nand Kumar & Bros and another* (1998) 6 SCC 748; *(viii) Veerayee Ammal vs. Seeni Anmal* (2002) 1 SCC 134; *(ix) Ram Piari vs. Bhagwant and others* AIR 1990 SC 1742; *(x) Madhusudan Das vs. Smt. Narayani Bai and others* AIR 1983 SC 114; (xi) *Bhadri and another vs. Smt. Suma Devi and others* AIR 2013 HP 4; (xii) *Nathasingh Ratansingh Raghuvanshi vs. Jagannathsingh Maharajsingh Raghuvanshi* 1994 M.P.L.J 209; *(xiii) Govinda vs. Kanhai* 1961 JLJ 1263; *(xiv) Surinder Singh Ahluwalia vs. Smt. Pushpa Rani* (1986) AllLJ 1056; and (xv) *Mahendra Nath Bagchi vs. Tarak Chandra Sinha and others* AIR 1932 Calcutta 504. Learned counsel submits that neither the plaintiff was required to seek declaration about the Will nor she was required to seek relief of possession because the property in question is an agriculture/revenue paying land and for seeking partition under Section 178 of the Madhya Pradesh Land Revenue Code, 1959 the relief of declaration of certain share in the property, is sufficient because in case of revenue paying land it is not the Civil Court which effects the partition, but partition has to be effected only by the Tahsildar and actual possession is given only after partition. Accordingly, he prays for dismissal of the appeal.

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

Substantial question of law No.1:

13. Certainly, in para 32 of the impugned judgment passed by the learned trial Court, the defendants 2-5 were held to be in physical possession of the property in question but at the end of para 32 itself, the learned Court found the plaintiff and defendants 1 -2 to be co-owners and in possession of the land in question. It is well settled that every co-owner is deemed to be in possession of every inch of the land because possession of one co-owner is possession of all.

14. Hon'ble the Supreme Court has in the case of *Vidya Devi* (Supra) held that :

> "21. Normally, where the property is joint, co-sharers are the representatives of each other. The co-sharer who might be in possession of the joint property shall be deemed to be in possession on behalf of all the co-sharers. As such, it would be difficult to raise the plea of adverse possession by one co- sharer against the other. But if the co-sharer or the joint owner had been professing hostile title as against other co- sharers openly and to the knowledge of other joint owners, he can, provided the hostile title or possession has continued uninterruptedly for the whole period prescribed for recovery of possession, legitimately

> acquire title by adverse possession and can plead such title in defence to the claim for partition."

In the case of *Darshan Singh* (Supra) held that :-

> "9. In our view, the correct legal position is that possession of a property belonging to several co-sharers by one co- sharer shall be deemed that he possesses the property on behalf of the other co-sharers unless there has been a clear ouster by denying the title of other co-sharers and mutation in the revenue records in the name of one co-sharer would not amount to ouster unless there is a clear declaration that title of the other co-sharers was denied."

In the case of *Md. Mohammad Ali* (Supra) held that :-

> "25. Possession of a property belonging to several co- shares by one co-sharer, it is trite, shall be deemed that he possesses the property on behalf of the other co-sharers unless there has been a clear ouster by denying the title of other co-sharers and mutation in the revenue records in the name of one co-sharer would not amount to ouster unless there is a clear declaration that the title of the other co- sharers was denied and disputed. No such finding has been arrived at by the High Court."

15. Indisputably, after death of Vindheshwari Prasad, the plaintiff and defendants 1-2 are the only successors, and the defendant-2 was found to be in possession of the suit land along with plaintiff and defendant -1, hence there is no illegality in the findings arrived at by learned Courts below. Merely because of the fact that the plaintiff was married and was residing with her in-laws, cannot be a ground to say that she was out of possession of the property in question especially in the case when there is no plea of ouster taken by the appellants. As such the suit filed by plaintiff was very well maintainable and was rightly decreed by learned trial Court even in presence of Section 34 of the Specific Relief Act.

16. Recently in the case of *Akkamma and others vs. Vemavathi and others* (2021) 14 SCALE 293, the Supreme Court considered previous judgments in the cases of *Venkataraja and others* (supra)*, Vinay Krishna* (supra), *Ram Saran and another* (supra) and *Anathula Sudhakar vs. P. Buchi Reddy (Dead) by Lrs and others* and held as under:-

> "18. The High Court has proceeded on the footing that in the subject-suit, the original plaintiff must have had asked for relief for recovery of possession and not having asked so, they became disentitled to decree for declaration and possession. But as we have already observed, the proviso to Section 63 of the 1963 Act requires making prayers for declaration as well as consequential relief. In this case, if the relief on second count

> fails on merit, for that reason alone the suit ought not to fail in view of aforesaid prohibition incorporated in Section 34 of the 1963 Act.
>
> 19. Having opined on the position of law incorporated in Section 34 of the 1963 Act, we shall again turn to the facts of the present case. The first suit was for perpetual injunction, in which the original plaintiff lost for failing to establish possession. In the second suit (the 1987 suit), reliefs were claimed for declaration based on allegation of subsequent disturbances and on that basis injunctive relief was asked for. The plaintiffs' claim for being in possession however failed. Thus, no injunction could be granted restraining the defendants from disturbing or interfering with the original plaintiffs' possession of the suit land. But as the Trial Court found ownership of the original plaintiff was proved, in our view the original plaintiff was entitled to declaration that he was the absolute owner of the suit property. There is no bar in granting such decree for declaration and such declaration could not be denied on the reasoning that no purpose would be served in giving such declaration. May be such declaratory decree would be non- executable in the facts of this case, but for that reason alone such declaration cannot be denied to the plaintiff. Affirmative finding has been given by the Trial Court as regards ownership of the original plaintiff over the subject- property. That finding has not been negated by the High Court, being the Court of First Appeal. In such circumstances, in our opinion, discretion in granting declaratory decree on ownership cannot be exercised by the Court to deny such relief on the sole ground that the original plaintiff has failed to establish his case on further or consequential relief.
>
> 20. In these circumstances, we sustain the judgment of the High Court that the plaintiffs were not entitled to injunctive relief as prayed for and also the rejection of the plaintiffs' plea for introduction of relief for possession. But at the same time, we set aside that part of the judgment by which it has been held that the plaintiffs were disentitled to declaration of ownership of the property. We accordingly hold that the plaintiffs are entitled to declaration that they are owners of the suit property and there shall be a decree to that effect.

17. In the identical set of facts and circumstances, this Court in the case of *Karelal and others vs. Gyanbai and others* AIR 2018 (NOC) 894 has held as under:-

> "18. The matter can be ascertained from another angle also. In the present case, only the agricultural land is the disputed

property. If the defendants had never challenged the rights and title of the plaintiffs, then there was no need for the plaintiffs to file a suit for declaration of title or even for partition. The plaintiffs could have filed an application under Section 178 of M.P. Land Revenue Code for partition of the agricultural land. Section 178 of M.P. Land Revenue Code, reads as under :-

> "178. Partition of holding.-- (1) If in any holding, which has been assessed for purpose of agriculture under Section 59, there are more than one bhumiswami any such bhumiswami may apply to a Tahsildar for a partition of his share in the holding :
>
> > [Provided that if any question of title is raised the Tahsildar shall stay the proceeding before him for a period of three months to facilitate the institution of a civil suit for determination of the question of title.] 10[(1-A) If a civil suit is filed within the period specified in the proviso to sub-section (1), and stay order is obtained from the Civil Court, the Tahsildar shall stay his proceedings pending the decision of the Civil Court. If no civil suit is filed within the said period, he shall vacate the stay order and proceed to partition the holding in accordance with the entries in the record of rights.
>
> (2) The Tahsildar, may, after hearing the co-tenure holders, divide the holding and apportion the assessment of the holding in accordance with the rules made under this Code.
>
> [(3) x x x] [(4) x x x] [(5) x x x] Explanation I.--For purposes of this section any co-sharer of the holding of a bhumiswami who has obtained a declaration of his title in such holding from a competent Civil Court shall be deemed to be a co-tenure holder of such holding.
>
> [Explanation II.-- x x x] [178-A. Partition of land in life time of bhumiswami.-- (1) Whenever a bhumiswami wishes to partition his agricultural land amongst the legal heirs during his life time, he may apply for partition to the Tahsildar.
>
> (2) The Tahsildar may, after hearing the legal heirs, divide the holding and apportion the assessment of holding in accordance with the rules made under this Code.

> 19. Thus, where the question of title is not involved, the revenue authorities may partition the agricultural land amongst the co- sharers. Section 178(2) Explanation-I of M.P. Land Revenue Code, clearly provides that for the purposes of this Section, any co-sharer of the holding of a Bhumiswami who has obtained a declaration of his title in such holding from a competent Civil Court shall be deemed to be a co-tenure holder of such holding. Thus, even after obtaining the declaratory decree, the plaintiff may file an application under Section 178 of M.P. Land Revenue Code, for partition of the land. Even otherwise, in a case of partition, if the property in dispute is agricultural land, then the matter has to be referred to the revenue authorities for actual partition of the property by metes and bounds (Kindly see Judgment of the Supreme Court in the case of *Shub Karan Bubna* (Supra). Thus, in any eventuality, the actual partition has to be done by the revenue authorities. Further, when the principle of res judicata does not apply to the suit for partition, then, it cannot be said that unless and until, the actual partition by metes and bounds is claimed, the suit for declaration of title and permanent injunction is not maintainable. If the plaintiff is not interested in actual separation of the property, then he can not be non-suited only for the reasons, that he had not sought the relief for partition. Thus, in view of Section 178 of the M.P. Land Revenue Code, this Court is of the considered opinion, that the suit for declaration of title and permanent injunction by a co- sharer against the other co-sharers without seeking the further relief of partition, would be maintainable and cannot be dismissed in view of Section 34 and 42 of Specific Relief Act."

18. In view of aforesaid law laid down by Hon'ble Supreme Court and by this Court, I am of the view that the declaration of share could be made irrespective of Section 34 of the Specific Relief Act, especially in the case where the land is agriculture land. Record shows that the land in question is revenue paying land, therefore, even if there is some construction over it, the same would be considered as an agriculture land.

Substantial question of law No.2

19. The Will has been propounded by defendants 3-5, therefore, it was for them to prove the Will in question which has not been found proved by learned Courts below.

20. In the case of *Anathula Sudhakar vs. P. Buchhi Reddy* (2008) 4 SCC 594 it has been held that-

> "14. We may however clarify that a prayer for declaration will be necessary only if the denial of title by the defendant or challenge to plaintiff's title raises a cloud on the title of plaintiff

> to the property. A cloud is said to raise over a person's title, when some apparent defect in his title to a property, or when some prima facie right of a third party over it, is made out or shown. An action for declaration, is the remedy to remove the cloud on the title to the property. On the other hand, where the plaintiff has clear title supported by documents, if a trespasser without any claim to title or an interloper without any apparent title, merely denies the plaintiff's title, it does not amount to raising a cloud over the title of the plaintiff and it will not be necessary for the plaintiff to sue for declaration."

21. At this juncture the principle as enshrined in order 6 rule 13 CPC is also worth importance wherein it has been specifically laid down that any fact the burden of proving which does not lie on the party filing the pleading need not to plead about the same. This principle further supports the view that a will in favour of defendant is not required to be necessarily challenged by the plaintiff as the burden of proving the will always lies upon the propounder i.e. defendant in the present case. Similar conclusion can also be drawn from the provision of s.68 of the Evidence Act which distinguishes WILL from other documents by putting a Proviso which has the effect that admission of execution of other documents has the effect of proving of said documents but WILL is unaffected by any admission, as is governed by main part of the s.68 of Evidence Act.

22. If the preposition laid down by Hon'ble Apex Court in case of *Anathula Sudhakar* (Supra) is considered then it becomes apparent that a relief of declaration is required to be sought only when the defendant is able to establish any apparent defect in title of plaintiff. In the present case the defendant is sailing upon a document which is required to be proved by him and denial of plaintiff's title by the defendant on basis of said unproved fact or document cannot be said to be sufficient threat to title of plaintiff for which the plaintiff was required to sue for declaration of its title or for cancellation of said Will. As has been held by this Hon'ble Court in several cases that every threat does not have effect of raising cloud over title. Such a WILL is ineffective to create a threat. This preposition is also clear from the fact that even no mutation can be effected on basis of said WILL unless and until the same is tested before the civil court on anvil of s.63 of Succession Act and s.68 of Evidence Act.

23. In the case of *Banta Singh vs. Diwan Singh* AIR 1929 Lahore 11 it has been held:

> "3. It is, however, contended that he should have filed a suit for the cancellation of the will, and as he was entitled to that relief and as he omitted to claim it he was not entitled to sue for a mere

> declaration under the proviso to Section 42, Specific Relief Act. The question is not free from difficulty, but after careful consideration I have arrived at the conclusion that as the plaintiff questioned the genuineness of the will and also its validity he could ignore it and claim a declaration of title. From his point of view the alleged will was void and a declaration obtained by him would entitle him to claim possession of the disputed property by redemption from the mortgagee and formal possession from the tenants.
>
> 4. If a declaration is given to him he could without any further action against the defendant obtain effective domination over the property in suit. That being so it was not necessary for him to sue for cancellation of the will. I accept the appeal, set aside the decree of the Courts below and remand the case to the trial Court with directions to proceed with it in accordance with law. The Court-fee paid by the appellant in this Court and the Court of the District Judge shall be refunded to him and the other costs will abide the result."

24. Accordingly, in my considered opinion as the plaintiff has sought the relief of declaration of 1/3rd share, therefore, the relief of declaring the Will being smaller relief, must be deemed to be included in the relief of declaration of title already sought by plaintiff in the plaint, therefore, it cannot be said that the prayer in the suit for declaring the Will to be forged, fabricated and ab initio void, was necessary. Therefore, the substantial question of law No.2 is also answered in favour of plaintiff and against the defendants.

25. Further the findings with regard to execution of the Will in question being purely on a question of fact cannot be interfered with by this Court in the limited scope of Section 100 of CPC as has been held by Hon'ble Apex Court in the case of *Shyamlal @ Kuldip Vs. Sanjeev Kumar and others* reported in (2009) 12 SCC 454. Even otherwise, this Court has perused the evidence of defendants' witnesses, which shows that there are major contradictions in the testimony of the defendants and the attesting witnesses including scribe, regarding place and time of execution of the Will.

26. As both the Courts have recorded concurrent finding with regard to execution of Will against the defendants 3-5, therefore, such findings are not liable to be interfered with. Further in presence of prior execution of Agreement of Gift (Ex.D-1), the Will becomes a suspicious document and such suspicion has not been removed by the defendants 3-5. On the contrary, Ram Kishore Shukla (DW-2) has clearly deposed that after execution of agreement/gift deed (Ex.D-1) Vindheshwari Prasad had lost his right in the property. Hence, the proposed additional substantial questions of law also do not arise in this second appeal.

27. In view of the aforesaid, the second appeal deserves to be and is hereby dismissed. However, no order as to costs.

Appeal dismissed

I.L.R. 2022 M.P. 2075

Before Mr. Justice Vivek Agarwal

MA No. 2859/2014 (Jabalpur) decided on 18 August, 2022

HDFC ERGO GENERAL INSURANCE CO. LTD. …Appellant

Vs.

SMT. BISRATI BAI & ors. …Respondents

Motor Vehicles Act (59 of 1988), Section 166 – Tractor & Thresher – **Held – Apex Court concluded that thresher being energized and being operated through tractor, same is to be considered to be a motor vehicle as power of propulsion to thresher is transmitted from an external source namely a tractor – This Court has also concluded that when accident is caused by thresher attached with tractor, insurance company is held liable when it is admitted that tractor was insured for agricultural purpose.**

(Paras 18, 22 & 23)

मोटर यान अधिनियम (1988 का 59), धारा 166 – ट्रैक्टर तथा थ्रेशर – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया कि थ्रेशर को ट्रैक्टर के माध्यम से क्रियाशील किया जाता है तथा संचालित किया जाता है, इसे एक मोटर यान माना जाना चाहिए क्योंकि थ्रेशर को संचालित करने की शक्ति एक बाहरी स्त्रोत अर्थात् एक ट्रैक्टर से प्रेषित होती है – इस न्यायालय ने यह भी निष्कर्षित किया है कि जब दुर्घटना ट्रैक्टर से जुड़े थ्रेशर से कारित होती है, तो बीमा कंपनी को उत्तरदायी ठहराया जाता है जब यह स्वीकार किया गया है कि ट्रैक्टर कृषि प्रयोजन हेतु बीमाकृत था।

Cases referred:

2022 (2) MPLJ 550, 2008 SCC Online 710, 2011 (II) MPWN 72, MA No. 1078/2015 decided on 28.08.2015, 2010 ACJ 1002, 2008 ACJ 2486 (Gujarat), 2011 (1) MPHT 196, 2010 (1) ACCD 444, 2006 ACJ 1285, 2004 ACJ 1881, 2013 (7) SCC 94.

Rakesh Kumar Jain, for the appellant.
Devendra Singh Baghel, for the respondent No. 8.

(Supplied: Paragraph numbers)

O R D E R

VIVEK AGARWAL, J.:- Heard on I.A. No.2400/2015, an application seeking condonation of delay in filing of the appeal.

2. It is mentioned that there is delay of 61 days in filing this appeal.

3. For the reasons stated in the application, I.A. No.2400/2015 is allowed and the delay in filing the appeal is hereby condoned.

4. This Miscellaneous Petition is filed by the Insurance Company being aggrieved of award dated 19.07.2014 passed by learned Second Additional Motor Accident Claims Tribunal, Mandla in Claim Case No.74/2009 (Smt. Bisrati Bai and Others Vs. Mangal Singh Uladi and others) on two grounds namely that the thresher attached to the insured tractor bearing registration No.MUJ-2274 was not separately insured and was used for commercial purpose.

5. It is submitted that driver of the tractor was having learner license and not the regular license, therefore, Insurance company should have been exonerated.

6. It is also submitted that compensation awarded under non pecuniary heads be reduced as per schedule attached to Section 163-A of Motor Vehicle Act.

7. Reliance is placed on the judgment of a Coordinate Bench of this High Court in case of *Manglesh S/o Chironji Namdeo Vs. Jaykishan (since dead) through L.Rs. and another,* 2022(2) MPLJ, 550 where it is held that since thresher was not insured, in absence of Insurance Policy for thresher, insurer is not liable to satisfy the award and owner of the thresher will be liable to satisfy the award.

8. Learned counsel for respondents No.1 and 8, in his turn, submits that there is no illegality in the impugned award calling for any interference.

9. After hearing learned counsel for the parties and going through the record, it is evident that four grounds have been raised by the learned counsel for the Insurance Company namely; Non Insurance of thresher, secondly, use of the thresher for commercial purpose as it was used in the field of somebody else, thirdly; driver of the insured tractor was having learners license and fourthly; non pecuniary amount of compensation should be as per schedule attached to Section 163-A.

10. As far as, last ground is concerned that needs to be rejected and is rejected because claim petition was filed under Section 166 and not under Section 163-A, therefore, schedule under Section 163-A will not have any meaning and application.

11. As far as, issue of learner's license is concerned, Section 2(19) of the Motor Vehicle Act, 1988 provides that "learner's license" means the license issued

by a competent authority under Chapter II authorising the person specified therein to drive as a learner, a motor vehicle or a motor vehicle of any specified class or description.

12. Thus, it is not evident from the evidence lead by the Insurance Company that there was any violation of the terms and conditions of the learner's license.In fact, witness of the Insurance Company Ramraj Vishwakarma, Manager, claims, admitted in his cross-examination that though company got investigation carried out but no investigation report was filed on record. He admits that he has not produced any document to show either commercial use of the Tractor or any violation of the terms and conditions of the policy, therefore, issue of tractor being driven by a person holding learner's license looses its sheen, specially when it is shown that driver was not accompanied with a duly license regular driver, thus these two arguments namely person driving it with learner's license and Tractor being used for commercial purpose are not made out.

13. The only question which now survives for adjudication is whether it is necessary to have separate insurance for the thresher.

14. As far as, thresher is concerned, it is a piece of farm equipment that threshes green, i.e., it removes the seed from stalks and husks by beating the plant to make a seed fall out.

15. The Division Bench of this High Court in case of *National Insurance Company Ltd., Indore Vs. Kanha and another,* 2008 SCC Online 710 has held that if the accident occurred while the tractor is in operation then the risk of insured is covered if any person whether third party or his employee suffered any injury with the vehicle.

16. Under such facts and circumstances Madhya Pradesh High Court held that policy was issued for use of the vehicle for agricultural purposes and affixing of thresher being part of the agricultural purposes, cannot be said to be violation of the insurance policy.

17. It is further held that the onus was on the Insurance Company to have produced and proved the terms and conditions of the insurance policy as held by the High Court of M.P. in *Ambaram and another Vs Satyendra Singh and others,* 2011 (II) MPWN 72.

18. Similarly, in case of *IFFCO Tokio General Insurance Co. Ltd Vs. Dashrath* passed by the Madhya Pradesh High Court on 28.08.2015 in M.A. No.1078/2015, it is held that if tractor was duly insured and it was not driven in violation of the insurance policy and the argument raised was that thresher was not insured and only tractor was insured then relying on the judgment of this High Court in case of *United India Insurance Co.Ltd Vs. Anandi Devi and others,* 2010

ACJ 1002, it is held that when accident is caused by the thresher attached with the tractor, insurance company is held to be liable when it is admitted that tractor was insured for agricultural purposes by the insurance company.

19. Same is the view of Division Bench of Gujarat High Court in *Oriental Insurance Co. Ltd Vs. Savthanji Khodaji Thakor and Others,* 2008 ACJ 2486 (Gujarat). In that case facts were that accident in question took place when not only the thresher was attached to the tractor, but when the thresher was being moved with the help of the tractor. It is held that if the person was working on the thresher machine which was being operated with the help of a tractor for agricultural purpose then the deceased was third party in the accident and in such circumstances Insurance Company was held to be liable to make payment of compensation.

20. In *Kishore s/o Nandlal Gayre Vs. Shahid Shah and Another,* 2011 (1) MPHT 196 it is held that insurance company is liable in a case where the accident was caused by the thresher attached with the tractor.

21. Similarly, in case of *United India Insurance Co.Ltd Vs. Rajendra and Others,* 2010(1) ACCD 444, placing reliance on the judgments in case of *United India Insurance Company Ltd. Vs. Surinder* 2006 ACJ 1285 and judgment of Andhra Pradesh High Court in case of *Gunti Devaiah and Others Vs. Vaka Peddi Reddy and Others,* 2004 ACJ 1881 company has been held liable to suffer the liability arising out of accident occurred with thresher.

22. In *Krishnaji@Kisanji Ramaji Tadas Vs. Umesh Rambhau Shrirame and Others,* decided by **Bombay High Court on 30th April, 2016,** it is held that when definition of a motor vehicle as provided under Section 2(28) and that of tractor provided under Section 2(44) is read then in light of the judgment of Supreme Court in *Chairman, Rajasthan State Road Transport Corporation and Others vs. Santosh and Others,* 2013(7) SCC 94, thresher being energized by a tractor and being operated through the tractor is to be considered to be a motor vehicle as power of propulsion to the thresher is transmitted from an external source namely a tractor. And then placing reliance on the judgment of this High Court in case of *United India Insurance Company Ltd Vs. Smt. Anandi Devi* (supra), it is held that insurance company is liable to compensate.

23. In view of such facts and legal provisions, I have no iota of doubt that Claims Tribunal has committed any error and since law laid down by the Division Bench of this High Court in *National Insurance Company Ltd., Indore Vs. Kanha and another* (supra) in binding on this Court, therefore, single Judge decision in case of *Manglesh S/o Chironji Namdeo* (supra) which has not taken into consideration Division Bench decision of this High Court will not be a binding

precedent, therefore, is not applicable to the facts and circumstances of the case, therefore, appeal fails and is **dismissed**.

Appeal dismissed.

I.L.R. 2022 M.P. 2079

Before Smt. Justice Nandita Dubey

CRA No. 1434/1998 (Jabalpur) decided on 24 August, 2022

HARIPRASAD LAL SHRIVASTAVA (SHRI) (DECEASED) THROUGH LRs. ...Appellants

Vs.

STATE OF M.P. …Respondent

***A. Prevention of Corruption Act (49 of 1988), Sections 7, 13(1)(d)(i) & 13(2) – Demand – Reason/Motive* – Held – Evidence shows that salary of complainant had already been sanctioned by appellant much prior to date of complaint – Appellant had no occasion or reason to make the alleged demand – Evidence also shows that complainant was annoyed with appellant – In absence of any independent corroboration, it is highly unsafe to rely on testimony of complainant – Conviction set aside – Appeal allowed. (Paras 22, 25, 26 & 28)**

क. भ्रष्टाचार निवारण अधिनियम (1988 का 49), धाराएँ 7, 13(1)(d)(i) व 13(2) – मांग – कारण/उद्देश्य – अभिनिर्धारित – साक्ष्य दर्शाते हैं कि परिवादी का वेतन परिवाद की दिनांक से बहुत पहले ही अपीलार्थी द्वारा स्वीकृत किया गया था – अपीलार्थी के पास कथित मांग करने का कोई अवसर या कारण नहीं था – साक्ष्य भी दर्शाता है कि परिवादी अपीलार्थी से क्षुब्ध था – किसी स्वतंत्र संपुष्टि के अभाव में, परिवादी के साक्ष्य पर विश्वास करना अत्यंत असुरक्षित है – दोषसिद्धि अपास्त – अपील स्वीकृत।

***B. Prevention of Corruption Act (49 of 1988), Sections 7, 13(1)(d)(i) & 13(2) – Recovery of Tainted Money* – Held – Possession of bribe money was denied by appellant and he showed ignorance – Appellant was slapped and forced to pick up notes from place pointed by complainant – Thereafter if his hands were subjected to phenopthaline powder test, certainly colour of chemical would turn pink. (Para 20)**

ख. भ्रष्टाचार निवारण अधिनियम (1988 का 49), धाराएँ 7, 13(1)(d)(i) व 13(2) – दूषित धन की बरामदगी – अभिनिर्धारित – अपीलार्थी द्वारा रिश्वत का धन रखने से इंकार किया गया तथा उसने अनभिज्ञता दर्शाई – अपीलार्थी को थप्पड़ मारा गया तथा परिवादी द्वारा इंगित स्थान से नोट उठाने के लिए मजबूर किया गया – तत्पश्चात् यदि उसके हाथों को फेनोप्थालीन पाउडर परीक्षण के अधीन किया जाता, तो निश्चित रूप से रसायन का रंग गुलाबी हो जाता।

C. ***Prevention of Corruption Act (49 of 1988), Sections 7, 13(1)(d)(i) & 13(2) – Demand & Acceptance* – Held – Complainant went alone to house of appellant and immediately came out within a minute – None of the members of trap party who were at a far distance could hear the demand or see the money being handed over to appellant to prove that same was pursuant to any demand – No evidence to show that appellant made any demand of bribe. (Para 19)**

ग. भ्रष्टाचार निवारण अधिनियम (1988 का 49), धाराएँ 7, 13(1)(d)(i) व 13(2) – मांग और स्वीकृति – अभिनिर्धारित – परिवादी अपीलार्थी के घर अकेला गया तथा एक मिनट के भीतर तत्काल बाहर आ गया – ट्रैप पार्टी के कोई भी सदस्य जो काफी दूर थे मांग को सुन नहीं सकते थे अथवा अपीलार्थी को दिये गये धन को यह साबित करने के लिए कि वह मांग के अनुरूप था देख सकते थे – यह दर्शानें के लिए कोई साक्ष्य नहीं है कि अपीलार्थी ने रिश्वत की मांग की।

D. ***Prevention of Corruption Act (49 of 1988), Section 7 – Demand & Acceptance* – Held – Demand of illegal gratification is *sine qua non* to constitute the offence – Mere recovery of currency notes cannot constitute offence u/S 7, unless it is proved beyond all reasonable doubt that accused voluntarily accepted money knowing it to be bribe. (Para 17)**

घ. भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 7 – मांग और स्वीकृति – अभिनिर्धारित – अवैध परितोषण की मांग अपराध गठित करने के लिए अनिवार्य है – मात्र करेंसी नोटों की बरामदगी धारा 7 के अंतर्गत अपराध गठित नहीं करती, जब तक कि युक्तियुक्त संदेह के परे यह साबित नहीं किया जाता कि अभियुक्त ने यह जानते हुए कि यह रिश्वत है स्वेच्छा से धन स्वीकार किया।

E. ***Criminal Practice – Defence – Credibility* – Held – If defence is found probable, due weightage should be given to it – Standard of proof should not be compared with that of prosecution where it is obliged to prove its case beyond all reasonable doubts – Credential value of defence witness is similar to that of prosecution witness and his evidence should not be thrown out merely because he has been examined in defence. (Para 16 & 27)**

ङ. दाण्डिक पद्धति – बचाव – विश्वसनीयता – अभिनिर्धारित – यदि बचाव संभावित पाया जाता है, तो उसे यथोचित महत्व दिया जाना चाहिए – साक्ष्य के मानक की तुलना अभियोजन से नहीं की जानी चाहिए जहां वह अपने प्रकरण को सभी युक्तियुक्त संदेहों से परे साबित करने के लिए बाध्य है – बचाव पक्ष के साक्षी की विश्वसनीयता का मूल्य अभियोजन पक्ष के साक्षी के समान होता है और उसके साक्ष्य को केवल इसलिए नहीं नकारना चाहिए कि उसका परीक्षण बचाव में किया गया है।

F. ***Criminal Practice – Hostile Witness* – Held – Evidence of witness declared hostile is not wholly effaced from record and that part of his evidence which is otherwise acceptable can be acted upon. (Para 12)**

च. दाण्डिक पद्धति – पक्षद्रोही साक्षी – अभिनिर्धारित – पक्षद्रोही घोषित साक्षी का साक्ष्य अभिलेख से पूर्णतः नहीं मिटाया गया है तथा उसके साक्ष्य के उस हिस्से पर कार्रवाई की जा सकती है जो अन्यथा स्वीकार्य है।

Cases referred:

(2010) 15 SCC 1, (2009) 3 SCC 779, (1979) 4 SCC 725, (2009) 15 SCC 200, (2005) 6 SCC 211.

Siddharth Datt and *Rohit Sharma*, for the appellants.
Satyam Agrawal, for the respondent.

J U D G M E N T

NANDITA DUBEY, J. :- This criminal appeal is directed against the conviction and sentence dated 30.06.1998 passed by Special Judge, Mandla (M.P.) in Special Case No. 02/1996, whereby the appellant has been found guilty for the offence punishable under Sections 7, 13(1)(d)(i) read with Section 13(2) of the Prevention of Corruption Act, 1988 and sentenced to undergo Rigorous Imprisonment for one years with fine of Rs.1,000/- and Rigorous Imprisonment for two years with fine of Rs.1,000/- respectively with default stipulations. The appeal is prosecuted by the legal heirs of the appellant, who expired on 31.12.2006, during the pendency of the appeal.

2. According to prosecution, the appellant was at the relevant time working as Block Development Education Officer at Bijadandi, district Mandla. Complainant Shankar Das Sonwani (P.W.-2) was working on the post of Teacher at Primary School Vijaypur, Bijadandi. The complainant was transferred from Vijaypur to Lalpur, Development Block, Shahpura on 27.07.1993.

3. As per complainant, his salary was stopped from July 1993 to September, 1993, he therefore, approached the appellant for release/issuance of the salary for the aforestated period of three months. The appellant, it is claimed, demanded a bribe of Rs.1,000/- to release the salary. The complainant paid him Rs.500/-, after which his salary for two months was released. However, the appellant did not release the salary for 15 days and again demanded Rs.500/-. As the complainant was not willing to pay the said amount, he approached the Lokayukt office, Jabalpur and submitted a written complainant. (Ex. P-11).

4. According to prosecution, after verifying the contents of the complaint, a FIR (Ex. P-12) was registered on 12.01.1994 and a trap was arranged. Complainant was directed to give the bribe amount. According to prosecution, the said notes (5 notes of Rs. 100/- each) got treated with phenolphthalein powder and were kept in the pocket of complainant. The complainant was explained the significance of sodium carbonate solution test and asked not to touch the currency

notes. The details of the trap that was planned was explained to all concerned including the complainant. Accordingly the plan was put into execution and on the receipt of the pre-arranged signal, the police party rushed inside the house of appellant. The bribe amount was recovered from the appellant. Thereafter sodium carbonate test was conducted on the hands of the appellant. The test proved positive, as the solution turned pink.

5. A charge sheet was filed against the appellant on completion of the investigation. Upon grant of sanction, cognizance of the offence was taken and charges were framed, to which the appellant pleaded not guilty. The prosecution examined 11 witnesses and exhibited Ex. P-1 to P-27 as documents. The plea of appellant was that he was falsely implicated by the complainant as he held a grudge against him. He was beaten up on the date of trap and forced to pick up the notes. In order to prove the defence, he had examined D.W. -1 Mahesh Kumar Mishra as defence witness.

6. The learned Special Judge held the appellant guilty of commission of the said offence and sentenced him as aforestated. Aggrieved and dissatisfied with the said judgment of conviction and sentence, the appellant is thus before this Court.

7. Shri Siddharth Datt, learned counsel appearing on behalf of the appellant contended that the appellant was beaten up and forced to pick up the marked notes. This fact also finds support from the testimony of the prosecution witnesses, but even if it is held that the same has been recovered from him, it would not be a determining factor in order to hold that appellant made demand of bribe and accepted the same. It is further urged that the appellant had no occasion to demand the money as the salary was already sanctioned even prior to the date of filing the complaint.

8. Shri Satyam Agrawal, learned counsel appearing on behalf of respondent/SPE Lokayukta submitted that the burden of proof was on the appellant and he having failed to explain as to how the amount of Rs.500/- was found in his possession, the Special Court has not committed any mistake in recording a judgment of conviction.

9. In the present case, the complainant was examined as P.W.-2. Though, he is a competent witness, however, his evidence is required to be scrutinized with great care and caution. According to complainant, initially an amount of Rs.1,000/- was demanded. A sum of Rs.500/- was said to have been paid against the demand and his two months salary has been released and for the remaining salary of 15 days of July, demand of Rs.500/- was made. As regards the demand and acceptance of illegal gratification, the stand of complainant is that it took place inside the house of appellant. According to complainant, he came out of the house of appellant and gave the prearranged signal. On his signal, constable/I.O.

S.K. Sharma (P.W.-10), T.S. Maravi (P.W.-3), member of trap party and N.S. Saiyyam (P.W.-8), who were all standing outside at the corner of Panchayat Office went inside the house of appellant and caught hold of him. According to complainant (P.W.-2), the appellant after accepting the money, counted it and kept it in the almirah below newspapers and assured the complainant for release of his 15 days salary. This entire transaction of demand and acceptance was done within a minute. The complainant then went out of the house and gave signal to the trap party by removing his *gamcha.* On his signal, S.K. Sharma (P.W.-10) and other members of the trap party, who were standing outside, went inside the house and caught hold of the hands of appellant and asked him to take out the bribe money and count it.

10. A suggestion was put to the complainant that the accused was beaten up and forced to pick up the money, to which he admitted that when S.K. Sharma (P.W.-10) asked the accused about bribe money, he did not say anything. The complainant was, therefore, asked to show the place where money was kept and after the complainant had indicated the place, S.K. Sharma slapped the accused and asked him to take out the money from that place and count it. Thereafter accused hands were washed in the solution.

11. T.S. Maravi (P.W.-3), Panchayat Inspector, a member of the trap party was asked by D.S.P. Shri N.S. Saiyyam (P.W.-8) to accompany the trap party. According to him, the complainant (P.W.-2) went inside and come out of the house of appellant within a minute. On his signal, he alongwith S.K. Sharma (P.W.-10) and N.S. Saiyyam (P.W.-8) entered the house and caught hold of the hands of appellant, who had come out from inside of another room. As per this witness, S.K. Sharma (P.W.-10) asked the appellant about the bribe money to which he showed ignorance and stated "what money". According to this witness the appellant totally refused accepting any kind of money. At that time, the complainant pointed to the "rack" and stated that money is kept there. On hearing this, Mr. Sharma (P.W.-10) slapped the appellant twice and forced him to took out the money and count it. After being slapped, the appellant got scared and took out the money from the place pointed out by the complainant and counted it and then his hands were dipped in the solution, which turned pink. This witness has further stated that on search, around the house, Rs.9,000/- was found, to which the appellant clarified that this amount is his salary amount as he has not gone to his house for 2-3 months.

12. This witness has been declared hostile in view of this 161 statement, however, even after being declared hostile, he remained consistent in his story and could not be shaken by the prosecution. It is well settled that evidence of a witness, declared hostile is not wholly effaced from the record and that part of the evidence which is otherwise acceptable can be acted upon.

13. J.K. Singh (P.W.-5) another panch witness has admitted that he did not see the complainant going inside the house because from where he was standing, the house of accused was not visible clearly. It is thus clear that he could not see or hear, as to what actually transpired between the complainant and appellant inside the house of accused. He also corroborated the story of the complainant and T.S. Maravi (P.W.-3) that appellant when asked about bribe money, showed his ignorance. He was then slapped by S.K.Sharma (P.W.-10) and asked to pick up the notes from the open rack, pointed out by the complainant.

14. S.K. Sharma (P.W.-10), IO, though denied hitting or slapping the accused, but he admitted that he was standing with J.K. Singh (P.W.-5), which shows that he also had not seen the demand being made or the money being voluntarily accepted by the accused/appellant.

15. Mahesh Kumar Mishra (D.W.-1), has deposed that the power to release the salary after one month, which had been withheld for any reason lies with the Project Officer and after three months could only released by the direction of Deputy Commissioner. He had stated that after relieving the complainant, the accused had no hold or power over his salary. This suggestion was also put to the complainant in his cross-examination, to which he has stated that he did not know that his 15 days salary for the leave period was deposited in treasury and that salary could now be released by the order of Deputy Commissioner.

16. The law is well settled that the credential value of defence witness is similar to that of prosecution witness and his evidence should not be thrown out merely because has (sic: he) has been examined in defence.

17. In so far as regards the offence under Section 7 of the P.C. Act is concerned, it is settled position in law that the demand of illegal gratification is *sine quo (*sic: *qua) non* to constitute the said offence and mere recovery of currency notes cannot constitute the offence under Section 7 of the Act, unless it is proved beyond all reasonable doubt that the accused voluntarily accepted the money knowing it to be bribe.

18. In (2010) 15 SCC 1 C.M. *Sharma Vs. State of Andhra Pradesh* the Supreme Court while referring to the cases of (2009) 3 SCC 779 C.M. *Girish Babu Vs. CBI, High Court of Kerala* and (1979) 4 SCC 725 *Suraj Mal v. State (Delhi Admn.)* has held thus:-

> *21. Mr. Rai, lastly submits that from the evidence of the prosecution witnesses the worst which can be said against the appellant is that currency notes were recovered from him. That itself, in his submission, does not constitute the offence. He submits that to bring home the charge the prosecution is required to prove beyond reasonable doubt that the accused had demanded the illegal gratification and accepted the same*

voluntarily. In support of the submission reliance has been placed on a decision of this Court in the case of C.M. Girish Babu v. CBI Cochin, HIgh Court of Kerala, 2009 (3) SCC 779 and our attention has been drawn to the paragraph 18 of the judgment which reads as follows:

> *"18. In Suraj Mal v. State,(Delhi Admn.) 1979 (4) SCC 725 this Court took the view that (at SCC p. 727, para 2) mere recovery of tainted money divorced from the circumstances under which it is paid is not sufficient to convict the accused when the substantive evidence in the case is not reliable. The mere recovery by itself cannot prove the charge of the prosecution against the accused, in the absence of any evidence to prove payment of bribe or to show that the accused voluntarily accepted the money knowing it to be bribe."*

19. In the present case, complainant went alone in the house of appellant and immediately came out within a minute. None of the members of the trap party, who were standing far outside saw the appellant coming out of his house or inviting the complainant to his house. At such a distance they could not hear the demand if made or see the money being handed over to the appellant by the complainant to prove that the same was pursuant to any demand made by the appellant. Apart from the initial complaint (Ex. P-11), there is no other evidence to show that appellant has made any demand of bribe from the complainant for release of his salary of 15 days.

20. As regard the recovery of tainted money, the possession is not admitted by appellant, rather from the statement of complainant Shankar Das Sonwani (P.W.-2), T.S. Maravi (P.W.-3), J.K. Singh (P.W.-5) and Mahesh Kumar Mishra (D.W.-1), as pointed out in preceding paragraphs, it is evident that appellant had shown ignorance and denied taking bribe amount, he was slapped by S.K. Sharma (P.W.-10) and forced to pick up the notes from the place pointed out by the complainant, and thereafter if his hands were subjected to the phenopthaline powder test, certainly the colour of chemical solution would turn pink, because appellant already came into contact with the treated currency notes.

21. Another aspect which requires consideration from material circumstances is whether the appellant had any motive or reason to demand bribe. During the trap proceedings, certain documents were seized from the office, from the possession of Ganga Singh (P.W.-1). Ex. P-2 dated 07.01.1994, is the letter written by the complainant addressed to the Block Development Officer asking to release the salary for 15 days from 16.07.1993 to 31.07.1993, during the period when he was on medical leave. Ex. P-4 dated 14.09.1993, is the challan of money deposited in SBI Mandla Branch by the Treasury, which could not be disbursed to

the absentee teachers. The details annexed to challan shows that it included complainant's salary of 15 days, i.e., Rs. 1425/-. Ex.P-4 makes it evident that 15 days salary of complainant was sanctioned by the appellant before 14th September and could not be disbursed as complainant was absent. Ex. P-8 dated 22.11.1993 is the sanction letter by the appellant giving sanction to draw/release the salary of complainant Shankar Das Sonwane (P.W.-2) for the month of August, September and October, 1993. Ex.P-9 is the last pay certificate of the complainant showing that he has been paid upto 31.07.1993.

22. It is evident from Ex.P-4 and Ex. P-9 that complainant's salary upto 31.07.1993 was already sanctioned by the appellant, though the same could not be disbursed to the complainant due to his absence and was therefore deposited in the treasury on 14.09.1993. Thereafter vide Ex. P-8, dated 22.11.1993 the salary for the month of August, September and October, 1993 was also sanctioned, i.e., much before the date of filing the complaint by the complainant. Under the circumstances, the appellant had no occasion or reason to make the alleged demand from the complainant, as the salary of complainant had already been sanctioned much prior to the date when the complaint was filed. The complainant has admitted in his cross-examination that he got the appellant trapped as he was angered and annoyed by the action of appellant in relieving him one sided on 27.07.1993, though he did not want to be relieved.

23. The Supreme Court in the case of *State of Maharashtra Vs. Dnyaneshwar Laxman Rao Wankhede* (2009) 15 SCC 200 has held :-

> *16. Indisputably, the demand of illegal gratification is a sine qua non for constitution of an offence under the provisions of the Act. For arriving at the conclusion as to whether all the ingredients of an offence, viz., demand, acceptance and recovery of the amount of illegal gratification have been satisfied or not, the court must take into consideration the facts and circumstances brought on the record in their entirety. For the said purpose, indisputably, the presumptive evidence, as is laid down in Section 20 of the Act, must also be taken into consideration but then in respect thereof, it is trite, the standard of burden of proof on the accused vis-'-vis the standard of burden of proof on the prosecution would differ. Before, however, the accused is called upon to explain as to how the amount in question was found in his possession, the foundational facts must be established by the prosecution. Even while invoking the provisions of Section 20 of the Act, the court is required to consider the explanation offered by the accused, if any, only on the touchstone of preponderance of probability and not on the touchstone of proof beyond all reasonable doubt.*

24. In the case of *Ganga Kumar Shrviastava Vs. State of Bihar* (2005) 6 SCC 211, the Supreme Court held thus :-

> *22. There is yet another aspect of the matter. Admittedly, supply of electricity was restored or his house was connected with electric supply. According to the prosecution case, the supply of electricity was restored in the month of July 1985 whereas the appellant took a stand that before the complaint was made by him regarding the allegation of bribe the electric supply was already given to the complainant. According to the appellant, such connection was given to the complainant on 22nd June 1985. If this restoration of electric connection dated 22nd June 1985 to the complainant can be accepted to be correct then there could have been no occasion for demand and acceptance of bribe either on 25th June 1985 and 28th June 1985 for the supply of electric connection. As noted hereinearlier, according to the prosecution case and also from the materials on record the electric connection to the complainant was alleged to have been given on 8th July 1985. As noted hereinearlier, the appellant however took a stand that the electric connection was made on 22nd June 1985. The necessary entry regarding electric connection was proved by the appellant by relying on Ext.F. Ext.G was also relied on by the appellant which was an intimation by Shri Bachhu Tiwary bearing endorsement of the appellant to the effect that connection was given on 22nd June 1985. However, the complainant refused to give any certificate and thereby the appellant advised Shri Tiwary to get certificate from Local Mukhia which is Ext.C in the present case. Ext.K is an application of Ram Deo Rai to the Executive Engineer stating that electric connection had been given to the complainant on 22nd June 1985.*

25. It is borne out from the evidence placed on record particularly Ex.P-4, P-8 and P-9 that the salary of complainant for the period 16.07.1993 to 31.07.1993 and for the month of August and September had already been sanctioned by the appellant much prior to the date of complaint made by the complainant. Under such factual situation, the appellant had no occasion or reason to make any demand. It is also carved out from the evidence of complainant, particularly paragrahs 4 and 13 that he was annoyed and angered with the appellant and therefore, it would be highly unsafe to rely on his testimony that appellant made demand and accepted the bribe in absence of any independent corroboration. Further, the corroboration essential in a case like this for what actually transpired at the time of alleged occurrence and acceptance of bribe is very much wanting in this case. On the contrary, the testimony of T.S. Maravi (P.W.-3), J.K. Singh (P.W.-5), Mahesh Kumar Mishra (D.W.-1) that when the appellant denied receiving any

bribe amount, he was slapped by S.K. Sharma (P.W.-10) and forced to pick up the currency notes, supports the defence taken by appellant.

26. In view of the admission made by the complainant in paragraphs 4 and 13 of his testimony, the statement of T.S. Maravi (P.W.-3), J.K. Singh (P.W.-5), Mahesh Kumar Mishra (D.W.-1) and the documents, Ex. P-4, P-8 and P-9, the very foundation of the prosecution case is shattered.

27. The law is well settled that the defence is found probable, due weightage should be given to it and the standard of proof should not be compared with that of prosecution, where it is obliged to prove its case beyond all reasonable doubts.

28. For the reasons stated hereinabove, I am unable to uphold the conviction and sentence awarded to the appellant by the learned trial Court. Resultantly, this appeal succeeds and is hereby allowed. The conviction of the appellant under Sections 7, 13(1)(d)(i) read with Section 13(2) of the Prevention of Corruption Act, 1988 is hereby set aside and he is acquitted from all the charges. The amount of fine, if deposited be refunded to the legal heirs of the appellants.

Appeal allowed

I.L.R. 2022 M.P. 2088

Before Smt. Justice Anjuli Palo

CR No. 341/2021 (Jabalpur) decided on 5 August, 2022

KRISHNA KUMAR ANAND & ors. …Applicants

Vs.

VARUN ANAND & ors. …Non-applicants

***A. Civil Procedure Code (5 of 1908), Order 7 Rule 11 and Limitation Act (36 of 1963), Article 59 – Challenge to Mutual Partition – Limitation* – Held – After execution of mutual partition i.e. from 2006 till 2012, plaintiff has not challenged the said partition and *sansodhan panji* dated 30.06.2006 – Acting on the said partition, plaintiff, his mother and brother executed sale deed for same property, which was involved in partition – Earlier partition cannot be reopened – Suit is clearly time barred and is hereby dismissed – Impugned order set aside – Revision allowed.**

(Paras 11, 17 & 18)

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 7 नियम 11 एवं परिसीमा अधिनियम (1963 का 36), अनुच्छेद 59 – पारस्परिक विभाजन को चुनौती – परिसीमा – अभिनिर्धारित – पारस्परिक विभाजन के निष्पादन के पश्चात् अर्थात् 2006 से 2012 तक, वादी ने उक्त विभाजन एवं संशोधन पंजी दिनांक 30.06.2006 को चुनौती नहीं दी – उक्त विभाजन पर कार्य करते हुए, वादी, उसकी माता एवं भाई ने उसी संपत्ति हेतु विक्रय विलेख का निष्पादन किया जो कि विभाजन में अंतर्वलित थी – पूर्वतर विभाजन पर नए सिरे से

विचार नहीं किया जा सकता – वाद स्पष्ट रूप से समय द्वारा वर्जित है एवं एतद् द्वारा खारिज – आक्षेपित आदेश अपास्त – पुनरीक्षण मंजूर।

***B. Mutual Partition* – Held – Apex Court concluded that a partition effected between members of Hindu undivided family by their own volition and with their consent cannot be reopened unless it is shown that same is obtained by fraud, coercion, misrepresentation or undue influence – Court should require strict proof of facts because an act inter vivos cannot be lightly set aside. (Para 13)**

ख. पारस्परिक विभाजन – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया है कि हिन्दू अविभक्त कुटुंब के सदस्यों के मध्य उनकी स्वयं की स्वेच्छा तथा उनकी सहमति से कार्यांवित विभाजन पर नये सिरे से विचार नहीं किया जा सकता जब तक कि यह दर्शाया न जाए कि यह कपट, प्रपीड़न, दुर्व्यपदेशन अथवा अनुचित प्रभाव द्वारा अभिप्राप्त किया गया है – न्यायालय के पास तथ्यों का ठोस सबूत होना अपेक्षित है क्योंकि जीवित व्यक्तियों के मध्य किसी कार्य को सहज रूप से अपास्त नहीं किया जा सकता।

Cases referred:

(2022) 5 SCC 73, C.A. No. 7764/2014 decided on 31.07.2020 (Supreme Court), AIR 1970 SC 1536, (1076) 1 SCC 214, C.A. No. 2960/2019 decided on 13.03.2019 (Supreme Court), C.A. No. 9519/2019 decided on 09.07.2020 (Supreme Court), (2019) 8 SCC 701, (2016) 14 SCC 275, 2019 (1) MPLJ 641, (2019) 13 SCC 372, (2018) 6 SCC 422, (2004) 3 SCC 137, (2017) 13 SCC 174.

Divesh Jain, for the applicants.
Prakash Upadhyay, for the non-applicants.

O R D E R

ANJULI PALO, J.:- This civil revision under section 115 of the Code of Civil Procedure has been filed by the applicant (defendant No.1) assailing the order dated 22.9.2021 passed in Civil Suit No.14-A/2015 whereby First Civil Judge Class-I, Gadarwara has rejected his application under Order 7 Rule 11 of the Code of Civil Procedure [hereinafter referred to as the "Code"].

2. In brief, the facts of the case are that the applicant (defendant No.1) and respondent No.2 & 3 (Defendants) are real brothers. The respondent No.1 is plaintiff. The respondent No.4 is mother of respondent No.1 (plaintff) and the respondent No.5 is real brother of respondent No.1/plaintiff-Varun Anand. A civil suit has been filed by the respondent No.1 as plaintiff before the trial Court against the petitioner (defendant No.1) and other respondents No.2 to 7 seeking declaration, partition and possession as also claiming one-third share, out of one-fourth share of the land of his father situated in Mouza Gadarwara, Settlement No.119, Patwari Halka No.18/1 and to declare the entries made in Sanshodhan

Panji No.99 order dated 30.6.2006 as null and void as also Sanshodhan Panji No.308 order dated 20.7.2014 passed in favour of respondent No.6/Defendant No.6 (Kapil son of present applicant) as null and void. The respondent No.1/plaintiff also claimed to decide his share under section 54 of the Code and after parititon through the competent court final decree be passed.

3. The applicant (defendant No.1) filed an application under Order 7 Rule 11 read with section 151 of the Code alleging that partition of disputed land had already taken place on 30.6.2006 vide Sanshodhan Panji No.99, which is binding on the parties because there was written partition executed on 18.9.2005 between legal heirs of Mohanlal Anand, namely, applicant and his brothers, namely, Praveshchand, Gulshan Kumar, Kuldeep Chand. They were enjoying their respective possession according to mutual partition. Thereafter, father of respondent No.1 (plaintiff) himself sold some immovable property. He had not challenged the partition during his lifetime because that partition took place with the consent of all the brothers, therefore, property cannot be partitioned again as per law. Further, the suit is clearly time barred and in absence of any cause of action in favour of plaintiff, the suit is not maintainable, hence, the suit is liable to be dismissed.

4. Admittedly, there is a written mutual partition deed on record which is also pleaded by the respondent No.1 (plaintiff) in his plaint. He himself pleaded share of the applicants and other brothers, who are his real uncles. His mother and his own real brothers (respondents No.4 & 5) have also not challenged the partition deed dated 18.9.2005 and Sanshodhan Panji order dated 30.6.2006, after death of father of the plaintiff, namely, Gulshan Kumar.

5. Earlier, the applicant had filed similar application under Order 7 Rule 11 of the Code, objecting maintainbility of present suit which was dismissed by the trial Court vide order dated 05.5.2016 (Annexure- A/4). Thereafter, the present appilcant filed Civil Revision No.241/2016 before this Hon'ble Court. This Court vide order dated 03.10.2019 (Annexure-A/5) had allowed civil revision and remanded the matter to the trial Court to decide the application afresh after considering the objection raised by applicant regarding limitation and cause of action. The trial Court again vide impugned order dated 22.9.2021 again rejected the application under Order 7 Rule 11 CPC. Hence, this civil revision.

6. The applicant challenged the impugned order on the ground that trial Court ought to have held that the respondent No.1 (plaintiff) admitted that in terms of partition dated 18.9.2005 the revenue authorities have also given effect and made entries in the revenue record by Sanshodhan Panji dated 30.6.2006 and the mutual partition signed by father of the respondent No.1 (plaintiff). He had not challenged it within three years as prescribed under Article 59 of the Limitation Act. On the contrary, he acted upon such partition to sell out some part of his share

by registered sale deed dated 17.6.2011 (Annexure-A/7). The applicant further stated that evidence of the respondent No.1 (Plaintiff) has already been recorded before the trial Court and it has been closed now. From the evidence of respondent No.1 (plaintff) it is apparently clear that suit is barred by law of limitation and he has no cause of action to file the suit. The applicant has filed a copy of statement of respondent No.1 (plaintiff) as Annexure-A/8. The applicant further staed (sic: stated) that father of respondent No.1 (plaintiff) died on 22.2.20212. Thereafter, on 14.3.2014 the respondent No.1 (Plaintiff), his mother (respondent No.4) and his brother (respondent No.5) have sold the remaining part of his father's land, which was recevied by his father in partition by acting upon such partition. After a long lapse of 09 years the respondent No.1 (Plaintiff) filed a suit for partition or reopening of previous partition, which is not maintainable. Hence, applicant prayed to set aside the order passed by the trial Court under Order 7 Rule 11 of CPC and allow the instant civil revision.

7. Learned counsel for the applicant has filed various documents in support of his case and placed reliance on the cases of *Sree Surya Developers and promoters Vs. N.Sailesh Prasad and others*, (2022) 5 SCC 73; *Ravinder Kaur Grewal and others Vs. Manjit Kaur and others* [Civil Appeal No.7764/2014 decided by Apex Court on 31.7.2020]; *Chandra Kant Misir and others Vs. Balakrishna Misir and others*, AIR 1970 SC 1536; *Ratnam Chettiar and others Vs. S.M.Kuppuswami Chettiar and others*, (1076) 1 SCC 214; *Raghwendra Sharan Singh Vs. Ram Prasanna Singh (Dead) by Lrs.* [Civil Appeal No.2960/2019 decided by Apex Court on 13.3.2019]; *Dahiben Vs. Arvindbhai Kalyanji Bhanusali and others* [Civil Appeal No.9519/2019 decided by Apex Court on 09.7.2020]; *Raja Ram Vs. Jai Prakash Singh and others*, (2019) 8 SCC 701; *R.K.Roja Vs. U.S.Raydu*, (2016) 14 SCC 275; and *Rav Ajay Pratap Singh Yadav Vs. Gurucharan Singh*, 2019 (1) MPLJ 641.

8. Learned counsel for the respondents vehemently opposed the contention made by learned counsel for the applicant and placed reliance on the decisons in the cases of *Urvashiben and another Vs. Krihnakant Manuprasad Trivedi*, (2019) 13 SCC 372; *Chhotanben and another Vs. Kiritibhai Jalkrushnabhai Thakkar and others*, (2018) 6 SCC 422. He strongly contended that for deciding whether the plaint is to be rejected under Order 7 Rule 11 of CPC only the averments stated in the plaint are to be considered, and merits & demerits of the case raised by the parties would be adjudicated at trial.

9. Heard learned counsel for the parties. Perused the record. The relationship between the parties is admitted by them. Recently, in the case of *Sree Surya Developers & Promoters (Supra)* it has been held that it would not permit the plaintiff to make suit maintainable which otherwise would not be maintainable and/or barred by law. When clever drafting of plaint has created illusion of a cause

of action, court will nip it in the bud at the earliest so that bogus litigation will end at the earlier stage. Thus, the plaint is liable to be rejected. In that case, the plaintiff sought multiple reliefs. However, such multiple reliefs could only be granted only if compromise decree in question were to be set aside. In that case compromise decree came to be passed by a Civil Judge in 2016 in terms of memorandum of compromise entered into by the father on behalf of respondent No.1 therein, grandmother and the appellant/developer. On attaining the age of majority, the respondent No.1 therein filed suit inter alia praying declaration of rights, title and interest over the suit schedule property and declaration of compromise decree. He also prayed for the revocation of deed as null and void.

10. In the case at hand, the applicant and respondents no.2 & 3 are real brothers. The suit property situated at Mouza Gadarwara, bearing Khasra No.328/4, Patwari Halka No.18/1, Settlement No.119, area 5.78 acres; Khasra No.338/2 area 2.26 acres, Khasra No.339 ara 0.59 acres and Khasra No.363 area 1.59 acrs, total area 10.21 acres was the ancestral property of the father of the plaintiff/respondent No.1 and applicant (Defendant No.1) to respondents No.2 & 3. In the suit itself it is pleaded that area about 0.0211 acrs (sic: acres) i.e. half dismil of land out Khasra No.338/2 area 02.26 acres and Khasra No.339 area 0.58 acres was sold out by the father of the respondent no.1 and applicant & respondents No.2 & 3 jointly Amarchand Kori by registered sale deed dated 25.3.1965. It is also admitted by the plaintiff himself in his plaint that he is bound by the aforesaid sale deed and not challenged the same. In this case he is claiming one-third share out of one-fourth share of his father which are Khasra Nos.338/2 area 0.914 hectares, 339 area 0.235 hectares, Khasra Nos.363 area 0.614 hectares, 328/4 area 2.169 hectares. In paragraph 7 of the plaint it is mentioned that out of suit properties the land bearing Khasra No.328/4, area 2.169 hectares the father of plaintiff and defendants No.1 to 3 had purchase the same jointly vide sale deed dated 21.9.2007. The plaintiff has not claimed anything in respect of this sale deed.

11. Thereafter, plaintiff himself pleaded that disputed lands bearing Khasra No.338/2 area 0.94 hectares, Khasra No.339 area 0.25 hectares, Khasra No.363/1 ara 0.36 hectares were partitioned according to Sanshodhan Panji No.99 vide order dated 30.6.2006, which is based on their mutual partition of the year 2006. He claimed that partition was illegal and was unequal partition. Therefore, it is not binding on him as legal heirs of his father. The plaintiff hismelf pleaded in paragraph 12 of the plaint that father of the plaintiff/respondent No.1, namely, Gulshan Kumar died on 22.1.2012. The partition was executed on 18.5.2006, thereafter Sanshodhan Panji came into existence on 30.6.2016. The partition deed was also on record which is also mentioned in concerned Sanshodhan Panji Order dated 30.6.2006 (Exhibit-P/2) because statement of the plaintiff is also recorded before the trial Court. In the registered sale deed dated 17.6.2011 (Annexure-A/7)

father of the plaintiff, namely, Gulshan Kumar was purchaser who narrated in the sale deed about their family mutual partition. During lifetime of plaintiff's father (Gulshan Kumar) he had not challenged the partition dated 18.9.2005 on the ground that it was forged. Further, he acted upon it and thereafter Sanshodhan Panji order dated 30.6.2006 (Exhibit-P/2) was passed. Thereafter, in the year 2011 he executed sale deed (Exhibit- A/7) and he died in the year 2012. It is apparently clear that the suit property has already been partitioned earlier. It cannot be partitioned again as per law, as has been held in the case of *Chandra Kant Misir* (supra).

12. In paragraph 4 of *Chandra Kant Misir* (supra) the Hon'ble Apex Court observed that on the evidence it is clear that there was severance of the joint family status and the members of the family were divided in 1914 and their respective shares were since then separately enjoyed and possessed by them thereafter and were entered in the revenue records in their names. Thereafter, their names were entered in the revenue records. Three members of the family were in possession of their respective shares of the joint family which is estabished by a mass of evidence and the admission by Bouku and his sons and grandsons. In paragrpah 13 of the plaint it is averred:-

> *"for the sake of their convenience and meeting their expenes, some properties are in possession of their parties...xxx Although several parties to this suit have at times, mortgaged or even sold some land in the possession in time of their personal need, yet defendant No.1 (Balakrishna son of Makund) since the death of Makund Misser, has been keeping with him the produce of considerable lands held in jointness, without dividing the proportionate share of the parties, for the expeneses of the joint family xx xx"*

In paragraphs 10 & 11 of aforesaid judgment the Apex Court held as under:-

> *"10 But, pursuant to the division made in 1914 the shares of the three branches were demarcated by the Commissioner and the three branches remained in separated possession of the properties alloted to them under that partition. The record of the suit No.187 of 1914 was it was reported destroyed. But the fact will not enable the plaintiff to get any advantage because the subsequent conduct of Bouku clearly shows that he has taken possession of the properties pursuant to the award and had acted upon the awad as being effectiv. It would be reasonable to infer that a decree binding a person would not be made unless he was duly served with the writ of summons from the Court.*

> *11. The ground that the arbitrators had awarded to Makund a larger share cannot also invalidate the award it appears that the division was made by agreement between the parties, and Makund was given 6 annas share. Apparently Makund claimed that he was the eldest member and that some of the properties cliamed as Basudeo to be joint family properties were acquired by him by his own exertion. The arbitrators apparently accepted that contention and the parties agreed to the award, 35 yeasr after that date and after the terms of the award were carried out, it was not open to one of the parties to raise a contention that the arbitrators had acted improperly in awarding to Makund a larger share than what was awardable to him under the Hindu law relating to partition."*

13. Similar principle has been laid down by the Hon'ble Supreme Court in the case of *Ratnam Chettiar (*supra*)* wherein it has been held that a partition effected between the members of Hindu undivided family by their own volition and with their consent cannot be reopened, unless it is shown that the same is obtained by fraud, coercion, misrepresentation or undue influence. In such a case the Court should require a strict proof of facts because an act inter vivos canot (sic: cannot) be lightly set aside.

14. In the case of *Sopan Sukhdeo Sable vs. Assistant Charity Commissioner*, (2004) 3 SCC 137 in paras 11 and 12, this it has been observed as under:

> *"11. In I.T.C. Ltd. v. Debts Recovery Appellate Tribunal [(1998) 2 SCC 70] it was held that the basic question to be decided while dealing with an application filed under Order 7 Rule 11 of the Code is whether a real cause of action has been set out in the plaint or something purely illusory has been stated with a view to get out of Order 7 Rule 11 of the Code.*
>
> *12. The trial court must remember that if on a meaningful and not formal reading of the plaint it is manifestly vexatious and meritless in the sense of not disclosing a clear right to sue, it should exercise the power under Order 7 Rule 11 of the Code taking care to see that the ground mentioned therein is fulfilled. If clever drafting has created the illusion of a cause of action, it has to be nipped in the bud at the first hearing by examining the party searchingly under Order 10 of the Code. (See T. Arivandandam v. T.V.Satyapal (supra)."*

15. In the case of *Madanuri Sri Rama Chandra Murthy v. Syed Jalal*, (2017) 13 SCC 174, this Court has observed and held as under:

> *"7. The plaint can be rejected under Order 7 Rule 11 if conditions enumerated in the said provision are fulfilled. It is needless to observe that the power under Order 7 Rule 11 CPC*

can be exercised by the Court at any stage of the suit. The relevant facts which need to be looked into for deciding the application are the averments of the plaint only. If on an entire and meaningful reading of the plaint, it is found that the suit is manifestly vexatious and meritless in the sense of not disclosing any right to sue, the court should exercise power under Order 7 Rule 11 CPC. Since the power conferred on the Court to terminate civil action at the threshold is drastic, the conditions enumerated under Order 7 Rule 11 CPC to the exercise of power of rejection of plaint have to be strictly adhered to. The averments of the plaint have to be read as a whole to find out whether the averments disclose a cause of action or whether the suit is barred by any law. It is needless to observe that the question as to whether the suit is barred by any law, would always depend upon the facts and circumstances of each case. The averments in the written statement as well as the contentions of the defendant are wholly immaterial while considering the prayer of the defendant for rejection of the plaint. Even when the allegations made in the plaint are taken to be correct as a whole on their face value, if they show that the suit is barred by any law, or do not disclose cause of action, the application for rejection of plaint can be entertained and the power under Order 7 Rule 11 CPC can be exercised. If clever drafting of the plaint has created the illusion of a cause of action, the court will nip it in the bud at the earliest so that bogus litigation will end at the earlier stage."

16. In the case of *Dahiben* (supra) the Supreme Court in paragraph 15.8 held as under:-

"15.8 The delay of over 5 and ½ years after the alleged cause of action arose in 2009, shows that the suit was clearly barred by limitation as per Article 59 of the Limitation Act, 1963. The suit was instituted on 15.12.2014, even though the alleged cause of action arose in 2009, when the last cheque was delivered to the Plaintiffs.

The Plaintiffs have failed to discharge the onus of proof that the suit was filed within the period of limitation. The plaint is therefore, liable to be rejected under Order VII Rule 11 (d) of CPC.

Reliance is placed on the recent judgment of this Court rendered in Raghwendra Sharan Singh v. Ram Prasanna Singh (Dead) by LRs.15 wherein this Court held the suit would be barred by limitation under Article 59 of the Limitation Act, if it

was filed beyond three years of the execution of the registered deed.

17. In the light of principles laid down in the above cases, the facts of the instant case are required to be appreciated. On account of undue influence or respect for elder brothers by the father of the plaintiff, he had not challenged their mutual partition for a long period. It is apparent from the pleadings of the plaint it is apparent that he was alive. After execution of the mutual partition i.e. from 2006 till 2012, but he has not challenged such partition and Sanshodhan Panji Order dated 30.6.2006 (Exhibit-P/2) during his life time, though he himself executed sale deed in the year 2011. The respondent No.1/plaintiff, his mother (respondent No.4) and brother (respondent No.5) executed a sale deed for the same property, which was involved in the partition. Therefore, earlier partition cannot be reopened. The suit filed by the plaintiff/respondent No.1 is clearly time barred. The plaintiff had no cause of action to re-opned the same. The suit is time barred and, therefore, liable to be dismissed.

18. On the aforesaid grounds and discussion, this Court is of the opinion that the trial Court erred in dismissing the application filed by the applicant under Order 7 Rule 11 of CPC. Thus, the impugned order is hereby set aside. Resultantly, the revision is allowed. Cosnequently, the application under Order 7 Rule 11 of CPC is allowed and the suit filed by the plaintiff is hereby dismissed.

Revision allowed.

I.L.R. 2022 M.P. 2096

Before Mr. Justice Satyendra Kumar Singh

CRR No. 1439/2021 (Indore) decided on 17 August, 2022

SHRIRAM RAWAT …Applicant

Vs.

STATE OF M.P. …Non-applicant

***A. Juvenile Justice (Care and Protection of Children) Act, 2015 (2 of 2016), Section 94(2) – Determination of Age – Presumption & Rebuttal – Burden of Proof* – Held – Applicant produced birth certificate, scholar register and mark sheets – Presumption of juvenility may be applied – Applicant discharged his initial burden about his juvenility – In absence of any rebuttal evidence, no reason to doubt the documents – Reliance upon entry of Aadhar Card in preference to School records was erroneous – Impugned order set aside – Petition allowed. (Paras 9 to 14)**

क. किशोर न्याय (बालकों की देखरेख और संरक्षण) अधिनियम, 2015 (2016 का 2), धारा 94(2) – आयु का अवधारण – उपधारणा व खंडन – सबूत का भार –

अभिनिर्धारित – आवेदक ने जन्म प्रमाणपत्र, छात्र पंजी एवं अंकसूचियां प्रस्तुत की – किशोरावस्था की उपधारणा लागू की जा सकती है – आवेदक ने उसकी किशोरावस्था के बारे में उसके आरंभिक भार का निर्वहन किया है – खंडन करने वाले किसी साक्ष्य की अनुपस्थिति में, दस्तावेजों पर संदेह का कोई कारण नहीं – शाला अभिलेखों पर अधिमान देकर आधार कार्ड की प्रविष्टि पर विश्वास गलत था – आक्षेपित आदेश अपास्त – याचिका मंजूर।

***B. Juvenile Justice (Care and Protection of Children) Act, 2015 (2 of 2016), Section 9(2) & 94(2) – Transfer of Case – Delay in Claim of Juvenility* – Held – Claim of juvenility can be raised at any stage of criminal proceeding, even after final disposal of case – Delay in raising the claim cannot be a ground for rejection of such claim – If application is filed claiming juvenility, provision of Section 94(2) would have to be applied or read alongwith Section 9(2) so as to seek evidence for determination of age. (Para 6 & 7)**

ख. किशोर न्याय (बालकों की देखरेख और संरक्षण) अधिनियम, 2015 (2016 का 2), धारा 9(2) व 94(2) – प्रकरण का अंतरण – किशोरावस्था के दावे में विलंब – अभिनिर्धारित – किशोरावस्था का दावा, दाण्डिक कार्यवाहियों के किसी भी प्रक्रम पर, यहां तक कि प्रकरण के अंतिम निराकरण के पश्चात् भी उठाया जा सकता है – दावा उठाने में विलंब, उक्त दावे की नामंजूरी हेतु आधार नहीं हो सकता – यदि किशोरावस्था का दावा करते हुए आवेदन प्रस्तुत किया गया है, धारा 94(2) का उपबंध लागू किया जाना होगा अथवा धारा 9(2) के साथ पढ़ा जाना होगा जिससे कि आयु के अवधारण हेतु साक्ष्य चाहा जायेगा।

***C. Juvenile Justice (Care and Protection of Children) Act, 2015 (2 of 2016), Section 94(2) – Determination of Age – Degree of Proof* – Held – Degree of proof required in a proceeding before Juvenile Board is higher than the inquiry made by criminal court – In case of inquiry, Court records a *prima facie* conclusion but when there is determination of age as per Section 94(2), a declaration is made on basis of evidence. (Para 8)**

ग. किशोर न्याय (बालकों की देखरेख और संरक्षण) अधिनियम, 2015 (2016 का 2), धारा 94(2) – आयु का अवधारण – सबूत की मात्रा – अभिनिर्धारित – किशोर बोर्ड के समक्ष कार्यवाही में अपेक्षित सबूत की मात्रा, दाण्डिक न्यायालय द्वारा की गई जांच से उच्चतर होती है – जांच के प्रकरण में, न्यायालय, प्रथम दृष्ट्या निष्कर्ष अभिलिखित करता है परंतु जब धारा 94(2) के अनुसार आयु का अवधारण होता है, साक्ष्य के आधार पर घोषणा की जाती है।

Cases referred:

2017(1) MPWN 105, 2021 SCC Online SC 1079.

R.R. Trivedi, for the applicant.
Shashwat Seth, G.A. for the non-applicant.

O R D E R

SATYENDRA KUMAR SINGH, J. :- This criminal revision u/S 397 r/W 401 of Cr.P.C. has been preferred against the order dated 28.05.2021 passed by the Court of 2nd Additional Special Judge, Mandsaur in Special S.T. No. 42/2020, whereby the applicant's application filed u/S 94 of Juvenile Justice (Care and Protection of Children) Act, 2015 [in short JJ Act, 2015] for transferring his case to Juvenile Justice Board for trial was rejected.

2. Facts giving rise to this revision petition are that on 10.10.2020, the applicant alongwith other co-accused persons was found to have 60 kg of poppy straw in their illegal possession and is facing criminal trial in Special S.T. No. 42/2020 for the offences punishable u/S 8(c)/15(c) of NDPS Act. In the said case, a chargsheet was filed on 16.12.2020, and charges were framed on 18.03.2021, against the applicant and other co-accused persons, but till then applicant was not represented by any counsel, and on 17.05.2021, the first time his counsel appeared and filed his vakalatnama and found applicant's age below 18 years. Then, on 18.05.2021, he moved an application u/S 94 of the JJ Act, 2015 before the Trial Court for transferring the case to the Juvenile Justice Board for trial. Learned trial Court conducted an inquiry and after getting verified the documents filed by the applicant in support of his aforesaid application, vide order dated 28.05.2021 rejected applicant's application on the ground that application claiming juvenility was filed after framing of charges. Secondly, the school scholar register entry with regard to the date of birth of the applicant is doubtful and as per his Aadhar Card, his date of birth is 24.03.2000, according to which he was major at the time of the incident.

3. Learned counsel for the applicant submits that the learned trial Court has committed an error of law while not taking into consideration the documents filed by the applicant in support of his application filed u/S 94 of the JJ Act, 2015. He further submits that exclusive jurisdiction for determination of the age of the applicant lies with the Juvenile Justice Board constituted under the Act of 2015 as held in the case of *Indra Singh Vs. State of M.P.* [2017(1) MPWN 105]. Hence, the learned trial Court has committed jurisdictional error in dismissing the application for determination of the age of the applicant. The impugned order is patently illegal and thus, is liable to be set aside.

4. Learned counsel for the respondent/State has opposed the prayer and submits that as per the applicant's own document (Adhar Card) entry, he was major at the time of the incident. Hence, the learned trial Court has rightly dismissed the application filed by the applicant for referring the matter to Juvenile Justice Board.

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

6. From the perusal of the provisions of the Juvenile Justice(Care and Protection of Children)Act, 2015 and also from the observations made by the Hon'ble Apex Court in the case of *Rishi Pal Singh Solanki Vs. State of U.P. & Others* [2021 SCC Online SC1079], it is apparent that a claim of juvenility can be raised at any stage of a criminal proceeding, even after the final disposal of the case. A delay in raising the claim of juvenility cannot be a ground for rejection of the such claim and if an application is filed before the Court claiming juvenility, the provision of sub-section 2 of Sec 94 of the JJ Act, 2015 would have to be applied or read alongwith sub-section 2 of Section 9, so as to seek evidence for the purpose of recording of finding stating the age of the person as nearly as may be. Relevant para of the aforesaid judgment passed in the case of *Rishi Pal Singh Solanki Vs. State of U.P. & Others* (Supra) is as under:

> *"32. What emerges on a cumulative consideration of the aforesaid catena of judgments is as follows:*
>
> *(i) A claim of juvenility may be raised at any stage of a criminal proceeding, even after the final disposal of the case. A delay in raising the claim of juvenility cannot be a ground for the rejection of such a claim. It can also be raised for the first time before this Court.*
>
> *(ii) An application claiming juvenility could be made either before the Court or the JJ Board.*
>
> *(iia) When the issue of juvenility arises before a Court, it would be under sub-section (2) and (3) of section 9 of the JJ Act, 2015 but when a person is brought before a Committee or JJ Board, section 94 of the JJ Act, 2015 applies.*
>
> *(iib) If an application is filed before the Court claiming juvenility, the provision of sub-section (2) of section 94 of the JJ Act, 2015 would have to be applied or read along with sub- section (2) of section 9 so as to seek evidence for the purpose of recording a finding stating the age of the person as nearly as may be.*
>
> *(iic) When an application claiming juvenility is made under section 94 of the JJ Act, 2015 before the JJ Board when the matter regarding the alleged commission of offence is pending before a Court, then the procedure contemplated under section 94 of the JJAct, 2015 would apply. Under the said provision if the JJ Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Board shall undertake the process of age determination by seeking evidence and the age recorded by the JJ Board to be the age of the person so brought before it shall, for the purpose of the JJ Act, 2015, be deemed to be true age of that person. Hence the degree of proof required in such a proceeding before the JJ Board, when an application is filed seeking a claim of juvenility*

when the trial is before the concerned criminal court, is higher than when an inquiry is made by a court before which the case regarding the commission of the offence is pending (vide section 9 of the JJ Act, 2015).

(iii) That when a claim for juvenility is raised, the burden is on the person raising the claim to satisfy the Court to discharge the initial burden. However, the documents mentioned in Rule 12(3)(a)(i),

(ii), and (iii) of the JJ Rules 2007 made under the JJ Act, 2000 or sub-section (2) of section 94 of JJ Act, 2015, shall be sufficient for prima facie satisfaction of the Court. On the basis of the aforesaid documents a presumption of juvenility may be raised.

(iv) The said presumption is however not conclusive proof of the age of juvenility and the same may be rebutted by contra evidence let in by the opposite side.

(v) That the procedure of an inquiry by a Court is not the same thing as declaring the age of the person as a juvenile sought before the JJ Board when the case is pending for trial before the concerned criminal court. In case of an inquiry, the Court records a prima facie conclusion but when there is a determination of age as per sub-section (2) of section 94 of 2015 Act, a declaration is made on the basis of evidence. Also the age recorded by the JJ Board shall be deemed to be the true age of the person brought before it. Thus, the standard of proof in an inquiry is different from that required in a proceeding where the determination and declaration of the age of a person has to be made on the basis of evidence scrutinised and accepted only if worthy of such acceptance.

(vi) That it is neither feasible nor desirable to lay down an abstract formula to determine the age of a person. It has to be on the basis of the material on record and on appreciation of evidence adduced by the parties in each case.

(vii) This Court has observed that a hyper-technical approach should not be adopted when evidence is adduced on behalf of the accused in support of the plea that he was a juvenile.

(viii) If two views are possible on the same evidence, the court should lean in favour of holding the accused to be a juvenile in borderline cases. This is in order to ensure that the benefit of the JJ Act, 2015 is made applicable to the juvenile in conflict with law. At the same time, the Court should ensure that the JJ Act, 2015 is not misused by persons to escape punishment after having committed serious offences.

(ix) That when the determination of age is on the basis of evidence such as school records, it is necessary that the same would have to

be considered as per section 35 of the Indian Evidence Act, inasmuch as any public or official document maintained in the discharge of official duty would have greater credibility than private documents.

(x) Any document which is in consonance with public documents, such as matriculation certificate, could be accepted by the Court or the JJ Board provided such public document is credible and authentic as per the provisions of the Indian Evidence Act viz., section 35 and other provisions.

(xi) Ossification Test cannot be the sole criterion for age determination and a mechanical view regarding the age of a person cannot be adopted solely on the basis of medical opinion by radiological examination. Such evidence is not conclusive evidence but only a very useful guiding factor to be considered in the absence of documents mentioned in Section 94(2) of the JJ Act, 2015."

7. As mentioned above, when an application claiming juvenility is made before the JJ Board, then the procedure contemplated u/S 94 of the JJ Act, 2015 would apply. Under the said provision, the Board shall undertake the process of age determination by seeking the evidence and the age recorded by the JJ Board to be the age of the person so brought before it shall for the purpose of the JJ Act, 2015 be deemed to be true age of the person.

8. The degree of proof required in a proceeding before the JJ Board is higher than when an inquiry was made by a Court before which the case regarding the commission of the offence is pending (vide Section 9 of the JJ Act, 2015). In case of an inquiry, the Court records a *prima facie* conclusion, but when there is a determination of age as per sub-section 2 of Section 94 of the JJ Act, 2015, a declaration is made on the basis of evidence.

9. In the instant case, the application dated 18.05.2021 was moved before the trial Court. Therefore, the learned trial Court was required to make only an inquiry about the juvenility of the applicant. The applicant in support of his juvenility produced the Scholar Register of Keshav International School Bijaynagar, wherein at S.R. No. 60, the date of birth of the applicant is written as 05.12.2002. He also produced copies of mark sheets of Classes III, VII, and IX, alongwith the birth certificate, issued by the Principal, Keshav International School Bijaynagar, wherein the same date is mentioned as his date of birth and according to which on the date of the incident his age comes about 17 years 10 months and 5 days.

10. Learned Trial Court doubted the genuineness of the aforesaid entries relating to the date of birth of the applicant on the ground that the registration form filled up at the time of the applicant's admission into the school is not filled up properly, applicant's photo is not pasted on the same and issuance dates have not

been mentioned on the birth certificate and mark sheets. A perusal of the record reveals that entries relating to the applicant's date of birth on the birth certificate and mark sheets were made on the basis of school scholar register entry and *prima facie,* there is no reason to disbelieve the entry made therein about the date of birth of the applicant.

11. On the basis of documents, produced by the applicant, presumption of juvenility may be applied in the matter as rightly held in the case of *Indra Singh*(Supra). Although the said presumption is not conclusive proof of the applicant's juvenility and the same may be rebutted. But nothing has been produced on record which negates the case of the applicant. The reliance upon the entry of the Adhar card, in preference to the school record, was erroneous in view of the provisions of section 94(2) of the JJ Act 2015. As observed by the Hon'ble Apex Court in the case of *Rishi Pal Singh Solanki* (Supra), a hyper-technical approach should not be adopted when evidence is adduced on behalf of the accused in support of the plea that he was a juvenile and if two views are possible on the same evidence, the Court should lean in favour of holding the accused to be a juvenile in borderline cases.

12. In view of the aforesaid discussion and also in the absence of any rebuttal evidence, in the considered opinion of this Court, the applicant has discharged his initial burden about his juvenility as there was no reasonable ground to doubt the said documents produced by him. The learned trial Court has committed an error in rejecting the application filed by the petitioner in this regard.

13. Consequently, the petition is allowed. The impugned order dated 28.05.2021 is hereby set aside, and *prima facie* it is held that the applicant had not attained the age of 18 years on the date of the incident; as such, he is a child in conflict with the law. Therefore, the trial court is directed to proceed further in the matter, accordingly.

14. With the aforesaid, revision stands disposed of.

Revision allowed

I.L.R. 2022 M.P. 2102

Before Mr. Justice Anil Verma

MCRC No. 57283/2021 (Indore) decided on 26 July, 2022

RAEES ...Applicant

Vs.

STATE OF M.P. …Non-applicant

A. Criminal Procedure Code, 1973 (2 of 1974), Section 451 & 457 and Govansh Vadh Pratishedh Adhiniyam, M.P. (6 of 2004), Sections 4, 6, 9 &

11 – Illegal Transportation of Cattles – Jurisdiction of Magistrate **– Held – Jurisdiction of JMFC not ousted from releasing the seized vehicle on interim custody as there is no rider in 2004 Act – Applicant not been convicted by any court for any offences under 2004 Act – No sufficient ground to dismiss application for interim custody of vehicle – Custody granted to petitioner with conditions. (Para 10 & 12)**

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 451 व 457 एवं गौवंश वध प्रतिषेध अधिनियम, म.प्र. (2004 का 6), धाराएँ 4, 6, 9 व 11 – पशुओं का अवैध परिवहन – मजिस्ट्रेट की अधिकारिता – अभिनिर्धारित – न्यायिक मजिस्ट्रेट प्रथम श्रेणी (जेएमएफसी) की अधिकारिता अभिगृहीत वाहन को अंतरिम अभिरक्षा में निर्मुक्त करने से बाहर नहीं है क्योंकि 2004 के अधिनियम में कोई परंतुक/उपबंध नहीं है – आवेदक को 2004 के अधिनियम के अंतर्गत किन्हीं भी अपराधों के लिए किसी भी न्यायालय द्वारा दोषसिद्ध नहीं किया गया है – वाहन की अंतरिम अभिरक्षा हेतु आवेदन को खारिज करने के लिए कोई पर्याप्त आधार नहीं – याची को सशर्त अभिरक्षा प्रदान की गई।

B. Govansh Vadh Pratishedh Adhiniyam, M.P. (6 of 2004), Section 11(5) and Govansh Vadh Pratishedh Rules, M.P., 2012, Rule 5 & 6 – Seized Vehicle – Confiscation/Release on Interim Custody **– Held – District Magistrate is having power to confiscate seized property but no procedure prescribed under 2004 Act for confiscation and no Rules have been framed under the Act – There is no provision to restrict jurisdiction of JMFC to release seized property on interim custody during pendency of investigation or trial – In absence of provision, jurisdiction of JMFC cannot be deemed to be ousted. (Para 7 & 8)**

ख. गौवंश वध प्रतिषेध अधिनियम, म.प्र. (2004 का 6), धारा 11(5) एवं गौवंश वध प्रतिषेध नियम, म.प्र., 2012, नियम 5 व 6 – अभिगृहीत वाहन – अधिहरण/अंतरिम अभिरक्षा पर निर्मुक्ति – अभिनिर्धारित – जिला मजिस्ट्रेट को अभिगृहीत संपत्ति को अधिहृत करने की शक्ति है परंतु 2004 के अधिनियम के अंतर्गत अधिहरण के लिए कोई प्रक्रिया विहित नहीं की गई है एवं अधिनियम के अंतर्गत कोई नियम विरचित नहीं किये गये हैं – अन्वेषण अथवा विचारण के लंबित रहने के दौरान अभिगृहीत संपत्ति को अंतरिम अभिरक्षा पर निर्मुक्त करने के लिए न्यायिक मजिस्ट्रेट प्रथम श्रेणी (जेएमएफसी) की अधिकारिता को निर्बंधित करने हेतु कोई उपबंध नहीं है – उपबंध के अभाव में, न्यायिक मजिस्ट्रेट प्रथम श्रेणी की अधिकारिता का बाहर होना नहीं समझा जा सकता।

Cases referred:

AIR 2003 SC 638, 2019 (II) MPWN 44.

Pourush Ranka, for the applicant.
Vismit Panot, P.L. for the non-applicant.

O R D E R

ANIL VERMA, J. :- The petitioner has challenged the impugned order dated 29.10.2021 passed by the IInd Additional Sessions Judge, Mandsaur in Criminal Revision No.23/2021, whereby the revision of the petitioner for releasing the seized vehicle on interim custody was dismissed.

2. The brief facts of the case are that on 29.08.2021 police got discreet information from the informer regarding illegal transportation of cattles.Police party reached on the spot and intercepted the pickup vehicle bearing registration No.MP-14-GC-1911 and found that seven cattles being transported in very cruel manner, therefore, police seized the vehicle on the spot along with the cattles and FIR was also registered against the owner of the vehicle/present petitioner which was seized in connection with Crime No. 471/2021 registered at P.S. Y.D.Nagar, Mandsaur for the offences under Section 4, 6, 9 of M.P. Gowansh Vadh Pratishedh Adhiniyam, 2004 (for short "Act of 2004") and Sections 6(a), 6(b), 1, 10, 11 of M.P.Krashak Pashu Parishan (sic: Parirakshan) Adhiniyam and Sections 3/181, 146/196 of Motor Vehicles Act.

3. During the pendency of the investigation, the petitioner had preferred an application under Sections 451 and 457 of Cr.P.C. for release of the seized vehicle. The said application was rejected by the trial Court vide order dated 02.09.2021 on the ground that the seized vehicle can be used again by the petitioner and confiscation proceeding are likely to be initiated therefore, vehicle cannot be released. Thereafter, a Criminal Revision was preferred against the order of JMFC, but the said revision was also dismissed by the IInd Additional Sessions Judge, Mandsaur vide order dated 29.10.2021 giving reference to the order of JMFC and also taking note of the fact that petitioner misused the seized vehicle, therefore, vehicle cannot be released on interim custody.

4. Learned counsel for the petitioner has contended that the seized vehicle is lying in the open area in the police station and there is no proper arrangement for its care, therefore, his vehicle will be damaged. He further submits that the petitioner has never been convicted for any offence of similar nature, trial of both the matters are still pending, Collector Mandsaur has not given any intimation to the concerned Magistrate regarding initiation of confiscation proceedings of the aforesaid vehicle, therefore, the courts below have committed an error in rejecting the petitioner's application filed under Sections 451 & 457 of Cr.P.C. for the interim custody of the vehicle. He has also submitted that the petitioner is registered owner of the vehicle in question.

5. Per contra, learned PL for the respondent/State opposes the prayer by contending that the vehicle in question was again used for illegal transportation of the cattles, therefore, no ground is available to handover the said vehicle to the present petitioner.

6. After hearing the rival submissions advanced by learned counsel for the parties and to advert such contention, the relevant provision of the Act of 2004 is required to be seen.

7. As per Section 11(5) of the Adhiniyam, 2004, it is clear that in case of any violation of Section 4, 5, 6-A and 6-B, the Police Authorities is empowered to seize the vehicle or cow progeny and beef. The District Magistrate is having power to confiscate the same in a manner prescribed under Rules 5 and 6 of the Rules of 2012, which deals, confiscation, and appeal are relevant, however, it is reproduced as under:-

> **Rule 4. Confiscation by District Magistrate.--**
>
> In case of any violation of Section 4, 5, 6, 6-A and 6-B, the police shall be empowered to seize the vehicles, cow progeny and beef as per the provisions of Section 100 of Criminal Procedure Code, 1973 (No.2 of 1974) in following manner:-
>
> (i) He shall take possession of the vehicle.
>
> (ii) He shall intimate the Veterinary Department to take in custody of the cow-progeny and beef.
>
> (iii) The beef of cow-progeny shall be disposed of by the Department by such procedure as he deems fit.
>
> **Rule 6. Manner of Appeal.--** Any person aggrieved by an order of confiscation under sub-section (5) of Section 11 of the Act, may prefer an appeal in writing to the Divisional Commissioner within thirty days of the date of knowledge of such order. Every appeal shall be made under sub-section (1) of Section 11-A of the Act.

8. After perusal of the aforesaid, it is apparent that in the Act of 2004 no procedure has been prescribed for the proceedings of confiscation and no rules have been framed under the said Act. On perusal of the aforesaid provisions, it is evident that there is no provision to restrict the jurisdiction of the Judicial Magistrate First Class to release the seized property on interim custody during the pendency of investigation or trial. Where a specific restriction is not made in the provision of the Act, jurisdiction of the Judicial Magistrate cannot be deemed to be ousted.

9. The Hon'ble Apex Court in the case of *Sunderbhai Ambalal Desai Vs. State of Gujarat,* AIR 2003 SC 638 has held as under:-

> "The powers under Section 451 Cr.P.C. should be exercised expeditiously and judiciously. It would serve various purposes namely:
> 1. Owner of the article would not suffer because of its remaining unused or by its misappropriation.

> 2. Court or the police would not be required to keep the article in safe custody.
>
> 3. If the proper panchnama before handing over possession of article is prepared, that can be used in evidence instead of its production before the Court during the trial. If necessary, evidence could also be recorded describing the nature of the property in detail: and
>
> 4. The jurisdiction of the Court to record evidence should be exercised promptly so that there may not be further chance of tampering with the articles."

10. Both the courts below have rejected the application of the petitioner for interim custody of the vehicle on the basis that confiscation proceedings are to be initiated but it is noteworthy that trial of both the offences are pending and the petitioner has not been convicted by any court for any offences under the Act of 2004, therefore, this is not a sufficient ground to dismiss the application for interim custody of the vehicle. The jurisdiction of the Judicial Magistrate First Class is not ousted from releasing the said vehicle on interim custody as there is no rider in the Act to restrict the power of the Judicial Magistrate to release the seized vehicle on interim custody.

11. In the case of *Mukhtar Husain Vs. State of M.P.* [2019(II) MPWN 44] it has been held that :-

> "13. The observation made by the Revisional Court is not proper that the JMFC has no competence to determine whether the Collector has any power to confiscate the vehicle or not. When a specific question was raised before the JMFC as well as before the Revisional Court about competency of the Collector for initiating the confiscation proceeding of the vehicle, it was the duty of the Court to determine as to whether that power is vested with the Collector or not but without dealing with the said question, rejecting the application for release of vehicle only on the ground that the confiscation proceeding is proposed by the Collector, the request of release of vehicle should not have been turned down. Therefore, in my opinion the order passed by the JMFC as well as the Revisional Court are not sustainable in the eyes of the law, therefore, they are set aside. The application submitted by the petitioner for release of the vehicle bearing registration No.UP90-T-2766 is allowed and the respondents are directed to release the seized vehicle of the petitioner bearing registration No.UP90-T-2766 on his furnishing adequate security as directed by the Trial Court. The petitioner is also directed that during the pendency of the trial, he shall not sell or dispose ofthe vehicle and shall produce before the Court as and when so directed by the Trial Court."

12. On the above analysis, it is concluded that the impugned order dated 29.10.2021 passed by the IInd Additional Sessions Judge, Mandsaur and order

dated 02.09.2021 passed by the Judicial Magistrate First Class, Mandsaur are contrary to the law, therefore, both the orders are hereby set aside and the application of the petitioner for release of vehicle bearing Registration No.MP-14-GC-1911 is allowed and respondents are directed to release the said vehicle of the petitioner bearing Registration No.MP-14-GC-1911 on his furnishing adequate security, as directed by the trial Court.

13. The petitioner is also directed that during the pendency of trial, he shall not sale or dispose of the vehicle and shall produce it before the court as and when so directed by the trial Court.

Accordingly, this petition is allowed and disposed off on the above terms.

Certified copy as per rules.

Application allowed

I.L.R. 2022 M.P. 2107 (DB)

Before Mr. Justice Ravi Malimath, Chief Justice &
Mr. Justice Vishal Mishra

MCRC No. 20482/2021 (Jabalpur) decided on 25 August, 2022

PRADEEP RAGHUWANSHI ...Applicant

Vs.

CENTRAL BUREAU OF INVESTIGATION …Non-applicant

***Criminal Procedure Code, 1973 (2 of 1974), Sections 91, 207 & 482 – Scope* – Held – Accused is only entitled to that material which the prosecution relies upon in Court – Accused cannot be entitled to all material or all matter of investigation done by prosecution which does not have a bearing on the case or is not related to accused in any manner whatsoever – Application dismissed. (Paras 9 to 12)**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 91, 207 व 482 – व्याप्ति – अभिनिर्धारित – अभियुक्त केवल उसी सामग्री का हकदार है जिस पर अभियोजन न्यायालय में निर्भर करता है – अभियुक्त सभी सामग्री अथवा अभियोजन द्वारा की गई जांच के सभी विषयों का हकदार नहीं हो सकता जिनका प्रकरण से कोई संबंध नहीं है अथवा अभियुक्त से किसी भी तरीके से संबंधित नहीं है – आवेदन खारिज।

Cases referred:

(2020) 9 SCC 161, (2017) 4 SCC 490.

Anil Khare with *Bhasker Pandey* and *Sahil Sharma*, for the applicant.
Sudhir Kumar Sharma, for the non-applicant.

O R D E R

The Order of the Court was passed by :

RAVI MALIMATH, CHIEF JUSTICE :- This petition has been filed under Section 482 of the Code of Criminal Procedure seeking to set aside the order dated 04.02.2021 passed by the learned IX Additional Sessions and Special Judge, CBI (Vyapam Cases), Bhopal in Special Case No.9500003 of 2015 rejecting the application of the petitioner filed under Section 207 read with Section 91 of the Cr.P.C. and further seeking a direction to the Central Bureau of Investigation to supply a copy of all such documents relied upon by the prosecution.

2. The case of prosecution is that an FIR was lodged in Crime No.539 of 2013 pertaining to the Pre-medical Test, 2013 for offences punishable under Section 13(1)(d)(iii) read with 13(2) of the Prevention of Corruption Act, 1988, Sections 120-B read with 201, 420, 467, 468, 471 of the IPC, Section 4 read with Section 3D(1)(2) of the M.P. Recognized Examinations Act, 1937 as well as Sections 65 and 66 of the Information Technology Act, 2000. Various accused have been arrested therein. The investigation has been completed and earlier the charge sheet was filed by the STF. After the order of the Hon'ble Supreme Court, the investigation was taken over by the CBI. Thereafter, the CBI filed a supplementary charge-sheet. In the said charge sheet, the petitioner was also arrayed as one of the accused.

3. The plea of the petitioner herein is that he filed an application in order to obtain the cloned copies of certain documents marked as HDDs S-1 to S-6, C-1, CKM-1 and G-1. It is his plea that these are all the CDs which have been recovered by the prosecution during the course of investigation. Therefore, he requires the cloned copies of all these material that have been seized by the prosecution.

4. The same was objected by the prosecution on the ground that whatever is being produced by them, the copies of the same have already been furnished to the accused. What is ostensibly sought for is the material which is not relevant to the case in hand. Therefore, it is not necessary for the prosecution to submit those material which are not relevant to the accused so far as this case is concerned. The trial Court by the impugned order rejected the application. In doing so it came to the conclusion that all the material that have been relied upon by the prosecution, copies of the same have already been furnished at the time of filing of the charge-sheet. That the CD contains various other material outside the instant case, for example, it contains certain obscene material also. Thereafter, it came to the view that all the material that the prosecution has relied upon have been furnished to the accused. Therefore, the plea of the accused for grant of additional material is beyond what is being relied upon by the prosecution. Hence, the application was rightly rejected.

5. Heard learned counsels.

6. The plea of the petitioner herein is to direct the respondent to furnish the cloned copies of all the hard-disks and other material that have been seized by the prosecution. In support of his case, learned counsel for petitioner relies on the judgment passed by the Hon'ble Supreme Court in the case of *P. Gopalkrishnan alias Dileep Vs. State of Kerala and Another* reported in (2020) 9 SCC 161 with reference to para 50, which reads as follows:-

> *"50 In conclusion, we hold that the contents of the memory card/pen-drive being electronic record must be regarded as a document. If the prosecution is relying on the same, ordinarily, the accused must be given a cloned copy thereof to enable him/her to present an effective defence during the trial. However, in cases involving issues such as of privacy of the complainant/witness or his/her identity, the Court may be justified in providing only inspection thereof to the accused and his/her lawyer or expert for presenting effective defence during the trial. The court may issue suitable directions to balance the interests of both sides."*

7. In the aforesaid case, the Hon'ble Supreme Court came to the conclusion that if the prosecution is relying on such an electronic record, ordinarily the accused must be given a cloned copy thereof to enable him to present an effective defence during the trial. So far as the instant petition is concerned, the copies of all the electronic evidences have already been furnished to the accused.

8. The second part of the judgment is that where the issues pertaining to privacy of the complainant/witnesses or their identities are concerned, the Court may be justified in providing only inspection thereof to the accused. However, the learned counsel for petitioner herein on being questioned submits that it is not inspection that he wants but he actually wants the cloned copies of the documents. That he is not interested in inspection of the documents. Hence, keeping in mind the aforesaid judgment of the Hon'ble Supreme Court and on application of the same to the facts of the present case, we do not find that the trial Court has committed any error in passing the impugned order.

9. Learned counsel for the petitioner has also placed reliance upon the judgment passed by the Hon'ble Supreme Court in the case of *Tarun Tyagi vs Central Bureau of Investigation* reported in (2017) 4 SCC 490 with reference to para 10, which reads as follows:-

> *"10. It is clear from the above that the CBI had seized some hard disks marked Q-2, 9 and 20 from the premises of the appellant which contained the source code of the data recovery software. Defence of the appellant is that this source code was exclusively prepared by him and was his property. On the other hand, case of the prosecution is that the recovered CDs are in fact same or similar to the software stolen in 2005.*

In a case like this, at the time of trial, the attempt on the part of the prosecution would be to show that the seized material, which contains the source code, is the property of the complainant. On the other hand, the appellant will try to demonstrate otherwise and his attempt would be to show that the source code contained in those CDs is different from the source code of the complainant and the seized material contained the source code developed by the appellant. It is but obvious that in order to prove his defence, the copies of the seized CDs need to be supplied to the appellant. The right to get these copies is statutorily recognised under Section 207 of the Code, which is the hallmark of a fair trial that every document relied upon by the prosecution has to be supplied to the defence/accused at the time of supply of the chargesheet to enable such an accused to demonstrate that no case is made out against him and also to enable him to prepare his cross-examination and defence strategy. There is no quarrel up to this point even by the prosecution. The only apprehension of the prosecution is that if the documents are supplied at this stage, the appellant may misuse the same.

We have considered the said judgment. The Hon'ble Supreme Court has reiterated the right of the accused under Section 207 of the Code of Criminal Procedure. It is the hallmark of a fair trial that every document relied upon by the prosecution has to be supplied to the defence/accused at the time of supply of the charge-sheet in order to enable such an accused to demonstrate that no case is made out against him.

10. We have considered the reasons as well as the factual position. All the material that are relied upon by the prosecution have already been furnished to the accused. Therefore, we find that even so far as para 10 of the aforesaid judgment is concerned, the impugned order of the trial Court is in consonance of the order of the Hon'ble Supreme Court.

11. Under these circumstances, having considered the order of the trial Court, we do not find any ground to interfere. All such material that is being relied upon by the prosecution has already been furnished to the accused. However, what the accused wants is cloned copies of various other material, which according to him, would have a bearing on the case. However, we are of the considered view that the accused is only entitled to that material which the prosecution relies upon in the Court. The accused cannot be entitled to all material or all matter of investigation done by the prosecution which does not have a bearing on the case or is not related to the accused in any manner whatsoever.

12. Hence, we find that there is no error committed by the trial Court in passing the impugned order. Consequently, the petition is dismissed.

Application dismissed.

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