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लोकायुक्त एवं उप–लोकायुक्त अधिनियम, म.प्र. (1981 का 37), धाराएँ 10, 12 व 13–A – जांच – प्रक्रिया – अभिनिर्धारित – लोकायुक्त तथा उप–लोकायुक्त के प्रति–शपथपत्र के अवलोकन से यह प्रतीत होता है कि प्रकरण में, न तो धारा 10 के अनुसार कोई प्रक्रिया विहित है न ही नैसर्गिक न्याय के सिद्धांत का पालन किया गया है – लोकायुक्त के विधिक सलाहकार द्वारा जांच प्रतिवेदन सक्षम प्राधिकारी को संसूचित किया गया जो इसके लिए सशक्त नहीं है – आक्षेपित संसूचना विधि अंतर्गत अनुचित है तथा इस प्रकार अभिखंडित की गई – अपील मंजूर। (मीरा देवी सक्सेना (श्रीमती) वि. म.प्र. राज्य) **(DB)...1**

***Lokayukt Evam Up-Lokayukt Adhiniyam, M.P. (37 of 1981), Sections 10, 12 & 13-A and Constitution – Article 14 & 21 – Enquiry – Procedure* – Held – Section 10 provides for procedure in respect of each enquiry – Infraction or deviation of such procedure established by law shall, in the matter of enquiry or action on enquiry report, be violative of Article 14 & 21 of Constitution. [Meera Devi Saxena (Smt.) Vs. State of M.P.] (DB)...1**

लोकायुक्त एवं उप–लोकायुक्त अधिनियम, म.प्र. (1981 का 37), धाराएँ 10, 12 व 13–A एवं संविधान – अनुच्छेद 14 व 21 – जांच – प्रक्रिया – अभिनिर्धारित – धारा 10 प्रत्येक जांच के संबंध में प्रक्रिया उपबंधित करती है – जांच या जांच प्रतिवेदन पर कार्यवाही के मामले में, विधि द्वारा स्थापित उक्त प्रक्रिया का व्यतिक्रमण या विचलन संविधान के अनुच्छेद 14 व 21 का उल्लंघन होगा। (मीरा देवी सक्सेना (श्रीमती) वि. म.प्र. राज्य) **(DB)...1**

Lokayukt Evam Up-Lokayukt Adhiniyam, M.P. (37 of 1981), Section 12

जांच अति पवित्र है – 1981 के अधिनियम के अंतर्गत जांच न तो एक संक्षिप्त जांच है न ही मात्र औपचारिकता, उसके दाण्डिक परिणाम हैं, इस प्रकार लोकायुक्त, उप–लोकायुक्त अथवा संभागीय सतर्कता समिति के लिए यह सुनिश्चित करना अपेक्षित है कि नैसर्गिक न्याय के सिद्धांतों की संतुष्टि होती है, जैसा कि अधिनियम की धारा 13–A(6) के अंतर्गत अपेक्षित है। (मीरा देवी सक्सेना (श्रीमती) वि. म.प्र. राज्य) **(DB)…1**

***Lokayukt Evam Up-Lokayukt Adhiniyam, M.P. (37 of 1981), Section 13-A(6) and Constitution – Article 14 & 21 – Enquiry – Principle of Natural Justice* – Held – The enquiry, the paramount object of 1981 Act, being serious in nature and having penal consequences, may be detrimental to the rights and liberty of public servant – Thus, procedure of enquiry must be in conformity with the mandate of Article 14 & 21 of Constitution. [Meera Devi Saxena (Smt.) Vs. State of M.P.] (DB)…1**

लोकायुक्त एवं उप–लोकायुक्त अधिनियम, म.प्र. (1981 का 37), धारा 13–A (6) एवं संविधान – अनुच्छेद 14 व 21 – जांच – नैसर्गिक न्याय का सिद्धांत – अभिनिर्धारित – जांच, 1981 के अधिनियम का सर्वोपरि उद्देश्य, प्रकृति में गंभीर होने तथा दाण्डिक परिणाम होने के कारण, लोक सेवक के अधिकारों और स्वतंत्रता के लिए हानिकारक हो सकती है – अतः, जांच की प्रक्रिया संविधान के अनुच्छेद 14 तथा 21 के आदेश के अनुरूप होनी चाहिए। (मीरा देवी सक्सेना (श्रीमती) वि. म.प्र. राज्य) **(DB)…1**

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खनिज (अवैध खनन, परिवहन तथा भंडारण का निवारण) नियम, म.प्र., 2022, नियम 31 – देखें – गौण खनिज नियम, म.प्र. 1996, नियम 53 व 57 (भारतीय कंस्ट्रक्शन बांसवाडा (मे.) वि. म.प्र. राज्य) **(DB)…*4**

***Minor Mineral Rules, M.P., 1996, Rule 30(1)(a) – Renewal of Lease – Demand of Dead Rent* – Held – Petitioner applied for renewal of lease in 2018 but it was renewed in 2022 from back date, so there was no lease from 2018 to 2022 – Dead rent is payable to government only during the currency of the lease – Demand of dead rent from 2018 to 2022 when petitioner did not excavate the minerals and did not earn of it, was unreasonable, harsh and not justifiable – Demand for dead rent set aside – Petition allowed. [Ashish**

Witness deposed that he saw appellant in police station on next day of incident whereas appellant was arrested after two days – Held – It is not expected from witness to remember with exactitude as to after how many days accused was arrested, moreso when difference is of any one day – Such hypertechnical argument is rejected. [Sulabh Jain Vs. State of M.P.] (DB)…*19

दण्ड संहिता (1860 का 45), धारा 302 – अभियुक्त की पहचान – साक्षी ने अभिसाक्ष्य दिया कि उसने अपीलार्थी को घटना के अगले दिन थाने में देखा था जबकि अपीलार्थी को दो दिन के पश्चात् गिरफ्तार किया गया था – अभिनिर्धारित – साक्षी से यह अपेक्षा नहीं की जाती है कि वह सटीकता से याद रखे कि कितने दिनों के पश्चात् अभियुक्त को गिरफ्तार किया गया था, विशेषकर जब अंतर किसी एक दिन का हो – ऐसा अति तकनीकी तर्क अस्वीकार है। (सुलभ जैन वि. म.प्र. राज्य) **(DB)…*19**

***Penal Code (45 of 1860), Section 302 – Recovery of Mobile Phone* – Held – If a young woman is murdered on a busy street, person intending to help her and police will certainly try to inform her family members by using her mobile phone – If mobile phone is used after incident, it will not create any suspicion on prosecution story regarding its recovery. [Sulabh Jain Vs. State of M.P.] (DB)…*19**

दण्ड संहिता (1860 का 45), धारा 302 – मोबाईल फोन की बरामदगी – अभिनिर्धारित – यदि किसी व्यस्त सड़क में किसी युवती की हत्या कर दी जाती है, उसकी सहायता करने का आशय रखने वाले व्यक्ति एवं पुलिस निश्चित रूप से उसके मोबाईल फोन का उपयोग कर उसके परिवार के सदस्यों को सूचित करने का प्रयास करेंगे – यदि मोबाईल फोन का उपयोग घटना के पश्चात् किया गया है, इससे उसकी बरामदगी के संबंध में अभियोजन की कहानी पर कोई संदेह उत्पन्न नहीं होगा। (सुलभ जैन वि. म.प्र. राज्य) **(DB)…*19**

***Penal Code (45 of 1860), Section 302 – Recovery of Weapon* – In recovery memo it is not mentioned that accused digged the ground to take out weapon – Held – Non-mentioning of such exercise of digging out in recovery memo is of no significance – Recovery proved by leading cogent evidence – It is quality of evidence which matters and not the quantity of statements/witnesses. [Sulabh Jain Vs. State of M.P.] (DB)…*19**

दण्ड संहिता (1860 का 45), धारा 302 – हथियार की बरामदगी – बरामदगी ज्ञापन में यह उल्लेख नहीं है कि अभियुक्त ने हथियार निकालने के लिए जमीन खोदी थी – अभिनिर्धारित – बरामदगी ज्ञापन में खुदाई करने के इस प्रयोग का उल्लेख न किया जाना कोई महत्व नहीं रखता है – तर्कपूर्ण साक्ष्य प्रस्तुत करते हुए बरामदगी साबित की गई – यह साक्ष्य की गुणवत्ता है जो महत्व रखती है और न कि कथनों/साक्षीगण की संख्या। (सुलभ जैन वि. म.प्र. राज्य) **(DB)…*19**

***Penal Code (45 of 1860), Section 302 – Spot Map – Contents* – Held –**

Witness deposed that in place of incident, blood stains were available and an empty cartridge was found – If factum of blood stains in such specifically mentioned in spot map, story of prosecution will not become vulnerable. [Sulabh Jain Vs. State of M.P.] (DB)…*19

दण्ड संहिता (1860 का 45), धारा 302 – नक्शा मौका – अंतर्वस्तु – अभिनिर्धारित – साक्षी ने अभिसाक्ष्य दिया कि घटनास्थल पर रक्त के धब्बे उपलब्ध थे एवं एक खाली कारतूस पाया गया था – यदि रक्त के धब्बों का तथ्य नक्शा मौका में विशिष्ट रूप से उल्लेखित नहीं है, अभियोजन की कहानी भेद्य नहीं होगी। (सुलभ जैन वि. म.प्र. राज्य) **(DB)…*19**

***Penal Code (45 of 1860), Section 302 – Statement u/S 161 Cr.P.C. - Delay* – Held – Apex Court concluded that delay in examination of prosecution witness by police *ipso facto*, may not be a ground to create doubt on prosecution case – In instant case, defence was obliged to ask a specific question regarding cause of delay – No cross-examination was done in this respect – Thus, statement of witness cannot be discarded on such grounds. [Sulabh Jain Vs. State of M.P.] (DB)…*19**

दण्ड संहिता (1860 का 45), धारा 302 – दं.प्र.सं. की धारा 161 के अंतर्गत कथन – विलंब – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया कि वास्तव में पुलिस द्वारा अभियोजन साक्षी के परीक्षण में विलंब, अभियोजन के मामले पर शंका उत्पन्न करने का आधार नहीं हो सकता – प्रस्तुत प्रकरण में, बचाव पक्ष विलंब के कारण के संबंध में विशिष्ट प्रश्न पूछने के लिए बाध्य था – इस संबंध में कोई प्रति–परीक्षण नहीं किया गया – इस प्रकार, साक्षी के कथन को उक्त आधारों पर अस्वीकार नहीं किया जा सकता है। (सुलभ जैन वि. म.प्र. राज्य) **(DB)…*19**

***Penal Code (45 of 1860), Section 302 – Use of Firearm – Discrepancy* – Held – When clear evidence is available regarding use of firearm, recovery of bullet from body of deceased coupled with other direct/circumstantial evidence, use of firearm cannot be doubted merely because there is some discrepancy regarding distance from which firearm was used – Once it is proved that deceased died because of gun shot injury caused by bullet, variation about distance is immaterial. [Sulabh Jain Vs. State of M.P.] (DB)…*19**

दण्ड संहिता (1860 का 45), धारा 302 – अग्न्यायुध का प्रयोग – विसंगति – अभिनिर्धारित – मृतक के शरीर से गोली की बरामदगी को अन्य प्रत्यक्ष/परिस्थितिजन्य साक्ष्य के साथ जोड़कर देखे जाने पर जब अग्न्यायुध के उपयोग के संबंध में स्पष्ट साक्ष्य उपलब्ध है, अग्न्यायुध के उपयोग पर मात्र इसलिए संदेह नहीं किया जा सकता कि जिस दूरी से अग्न्यायुध का उपयोग किया गया था उसके संबंध में कुछ विसंगतियां हैं – एक बार यह साबित हो जाता है कि मृतक की मृत्यु बंदूक की गोली द्वारा कारित चोट के कारण हुई है, तो दूरी के संबंध में भिन्नता महत्वहीन है। (सुलभ जैन वि. म.प्र. राज्य) **(DB)…*19**

Penal Code (45 of 1860), Section 302 and Criminal Procedure Code,

repeated request did not inform petitioner about remaining amount/interest – Principle of legitimate expectation is attracted in favour of petitioner as after paying entire amount, he was entitled to get correct information regarding unpaid amount/interest and if he paid entire amount, he has a valuable legitimate expectation to get back the original deed/documents etc. [Manish Sharma Vs. Bank of India] (DB)…*14

वित्तीय आस्तियों का प्रतिभूतिकरण और पुनर्गठन तथा प्रतिभूति हित का प्रवर्तन (SARFAESI) अधिनियम, (2002 का 54), धारा 13 एवं संविधान – अनुच्छेद 226 – वैध अपेक्षा – अभिनिर्धारित – बार–बार अनुरोध करने के बावजूद बैंक ने याची को शेष राशि/ब्याज के संबंध में सूचना नहीं दी – वैध अपेक्षा का सिद्धांत याची के पक्ष में आकर्षित होता है क्योंकि संपूर्ण राशि का भुगतान करने के पश्चात्, वह अदत्त राशि/ब्याज के संबंध में सही जानकारी प्राप्त करने का हकदार था एवं यदि उसने संपूर्ण राशि का भुगतान किया, तो उसे मूल विलेख/दस्तावेजों को वापिस प्राप्त करने की मूल्यवान विधिसम्मत प्रत्याशा होती है। (मनीष शर्मा वि. बैंक ऑफ इंडिया) **(DB)…*14**

***Service Law – Appointment* – Held – Even a selected candidate has no vested right to claim order of appointment. [Suraj Singh Dhakad Vs. State of M.P.] …*20**

सेवा विधि – नियुक्ति – अभिनिर्धारित – यहां तक कि एक चयनित अभ्यर्थी को भी नियुक्ति आदेश का दावा करने का कोई निहित अधिकार नहीं है। (सूरज सिंह धाकड वि. म.प्र. राज्य) **…*20**

***Service Law – Compassionate Appointment – Aims & Object* – Discussed and explained. [Anil Vs. State of M.P.] …*2**

सेवा विधि – अनुकंपा नियुक्ति – लक्ष्य एवं उद्देश्य – विवेचित एवं स्पष्ट किये गए। (अनिल वि. म.प्र. राज्य) **…*2**

***Service Law – Compassionate Appointment – Daily Wager* – Held – Petitioner's father was a daily wager – Counsel could not show any provision of law which was in vogue on date of death of father that even dependants of daily wager were entitled for appointment on compassionate ground. [Anil Vs. State of M.P.] …*2**

सेवा विधि – अनुकंपा नियुक्ति – दैनिक वेतन भोगी – अभिनिर्धारित – याची के पिता एक दैनिक वेतन भोगी थे – अधिवक्ता विधि का कोई भी उपबंध प्रदर्शित नहीं कर सके जो पिता की मृत्यु की दिनांक पर प्रचलित था कि दैनिक वेतनभोगी के आश्रित भी अनुकंपा नियुक्ति पर नियुक्ति के हकदार थे। (अनिल वि. म.प्र. राज्य) **…*2**

***Service Law – Compassionate Appointment – Delay* – Held – Petitioner's father expired in 2011 – Petitioner attained majority in 2018 and filed application in 2021 – As per policy he should have applied within one**

year of attaining majority – He approached this Court after 12 years of death of his father, even mother never applied for compassionate appointment – Appointment on compassionate ground is not an alternative mode of direct/regular recruitment but it a speedy remedy to overcome the consequences of untimely death of their breadwinner – Delay defeats equity – Petition dismissed. [Anil Vs. State of M.P.] …*2

सेवा विधि – अनुकंपा नियुक्ति – विलंब – अभिनिर्धारित – याची के पिता की मृत्यु 2011 में हुई – याची ने 2018 में वयस्कता प्राप्त की एवं 2021 में आवेदन प्रस्तुत किया – नीति के अनुसार उसे वयस्कता प्राप्त करने के एक वर्ष के भीतर आवेदन प्रस्तुत करना चाहिए था – वह अपने पिता की मृत्यु के 12 वर्ष पश्चात् इस न्यायालय के समक्ष आया, यहां तक कि उसकी मां ने भी अनुकंपा नियुक्ति के लिए कभी आवेदन प्रस्तुत नहीं किया – अनुकंपा के आधार पर नियुक्ति, सीधी/नियमित भर्ती का वैकल्पिक माध्यम नहीं है बल्कि यह उनके कमाने वाले की असामयिक मृत्यु के परिणामों से उबरने का एक त्वरित उपाय है – विलंब साम्या को परास्त करता है – याचिका खारिज। (अनिल वि. म.प्र. राज्य) …*2

***Service Law – Demotion – Required Qualification* – Held – It is undisputed that petitioner is not educationally qualified to hold the post of LDC but it is respondents who allowed him to work on the said post for almost 16 years and have promoted also – For no fault of petitioner, he suffered unnecessary humiliation in view of his demotion – Respondent No. 1 directed to pay cost of Rs. 1 lakh to petitioners – Plea of petitioners to quash impugned order is rejected – Petitions partly allowed. [Dashrath Lal Deharia Vs. Registrar General] (DB)…17**

सेवा विधि – पदावनति – आवश्यक योग्यता – अभिनिर्धारित – यह अविवादित है कि याची एलडीसी के पद को धारण करने के लिए शैक्षणिक रूप से योग्य नहीं है किंतु यह प्रत्यर्थीगण हैं जिन्होने उसे उक्त पद पर लगभग 16 वर्ष कार्य करने की अनुमति दी तथा पदोन्नत भी किया – याची की कोई त्रुटि न होते हुए उसे पदावनति के कारण अनावश्यक अपमान सहना पड़ा – प्रत्यर्थी क्र. 1 याचीगण को 1 लाख रूपये व्यय देने हेतु निर्देशित – आक्षेपित आदेश अभिखंडित करने के याची के अभिवाक् को खारिज किया गया – याचिकाऍं अंशतः मंजूर। (दशरथ लाल डेहरिया वि. रजिस्ट्रार जनरल) (DB)…17

***Service Law – Termination – Opportunity of Hearing – Departmental Enquiry* – Held – After conducting preliminary enquiry, show cause notice was issued to petitioner and after affording adequate opportunity of hearing, impugned order was passed as per guidelines – Since he admitted his conduct in specific terms, thus there was no need for any detail or departmental enquiry – Principle of opportunity of hearing cannot be converted into unruly horse – Petition dismissed. [Manoj Rajput Vs. State of M.P.] …*15**

सेवा विधि – सेवा समाप्ति – सुनवाई का अवसर – विभागीय जांच – अभिनिर्धारित – प्रारंभिक जांच संचालित करने के पश्चात्, याची को कारण बताओ नोटिस जारी किया गया एवं उचित सुनवाई का अवसर देने के पश्चात्, दिशानिर्देशानुसार आक्षेपित

आदेश पारित किया गया था – चूंकि उसने अपने आचरण को विशिष्ट निबंधन में स्वीकार किया, अतः किसी विस्तृत या विभागीय जांच की आवश्यकता नहीं थी – सुनवाई के अवसर के सिद्धांत को अनियंत्रित घोड़े (निरंकुशता) में परिवर्तित नहीं किया जा सकता – याचिका खारिज। (मनोज राजपूत वि. म.प्र. राज्य) **...*15**

***Service Law – Termination – Principle of Natural Justice* – Held – Concept of principle of natural justice or *audi alterum partem* doctrine although is required to be complied with but at the same time it has some exceptions. [Manoj Rajput Vs. State of M.P.] ...*15**

सेवा विधि – सेवा समाप्ति – नैसर्गिक न्याय का सिद्धांत – अभिनिर्धारित – नैसर्गिक न्याय का सिद्धांत या दूसरे पक्ष को सुने जाने के सिद्धांत की अवधारणा का यद्यपि पालन किये जाने की आवश्यकता है परंतु साथ ही इसके कुछ अपवाद भी हैं। (मनोज राजपूत वि. म.प्र. राज्य) **...*15**

***Service Law – Termination – Scheme of Appointment & Guidelines* – Held – Fair or sufficient opportunity of hearing is what the scheme of appointment and relevant guidelines contemplate and visualize, not beyond that – Impugned order has to be tested on touchstone of "Prejudice". [Manoj Rajput Vs. State of M.P.] ...*15**

सेवा विधि – सेवा समाप्ति – नियुक्ति की योजना एवं दिशानिर्देश – अभिनिर्धारित – सुनवाई का उचित या पर्याप्त अवसर वह है जो नियुक्ति की योजना एवं सुसंगत दिशा निर्देशों में अनुध्यात एवं कल्पित है, उसके परे नहीं – आक्षेपित आदेश का ''पूर्वाग्रह' की कसौटी पर परीक्षण किया जाना चाहिए। (मनोज राजपूत वि. म.प्र. राज्य) **...*15**

***Special Marriage Act (43 of 1954), Section 27 – Ex-parte Divorce Decree – Opportunity of Hearing* – Held – E-mail by wife shows that she was fully aware of divorce petition filed by husband, but she did not file written statement before Family Court, even did not participate in mediation proceedings before Supreme Court despite that mediation was directed in a petition filed by herself – In her e-mail, she stated that she is neither interested in marriage nor in her husband and intends to dissolve the marriage – It also shows that she was in contact with a lawyer – It cannot be said that she could not contest the matter for want of opportunity before Family Court. [Lee Anne Elton Vs. Arunoday Singh] (DB)...*11**

विशेष विवाह अधिनियम (1954 का 43), धारा 27 – एकपक्षीय विवाह विच्छेद डिक्री – सुनवाई का अवसर – अभिनिर्धारित – पत्नी द्वारा भेजा गया ई–मेल यह दर्शाता है कि वह पति द्वारा प्रस्तुत की गई विवाह–विच्छेद याचिका से पूर्ण रूप से अवगत थी, परंतु उसने कुटुंब न्यायालय के समक्ष जवाबदावा प्रस्तुत नहीं किया, यहां तक कि सर्वोच्च न्यायालय के समक्ष मध्यस्थता कार्यवाही में भी भाग नहीं लिया इसके बावजूद कि उसके द्वारा प्रस्तुत की गई याचिका में मध्यस्थता के लिए निर्देश दिया गया था – अपने ई–मेल में उसने कहा कि न तो उसकी विवाह में अभिरूचि है और न ही अपने पति में एवं वह विवाह विघटित करने

का आशय रखती है – यह ये भी दर्शाता है कि वह किसी अभिभाषक के संपर्क में थी – यह नहीं कहा जा सकता कि वह मामले को कुटुंब न्यायालय के समक्ष अवसर के अभाव में नहीं लड़ सकी। (ली एनी एल्टन वि. अरूणोदय सिंह) **(DB)…*11**

***Special Marriage Act (43 of 1954), Section 27 – Ex-parte Divorce Decree – Pleadings & Proof* – Held – Court below appreciated the unrebutted pleadings and evidence led by husband, on correct and permissible parameters and rightly concluded that husband could make out a strong case of "cruelty" against appellant wife – Decree of divorce rightly passed – Appeal dismissed. [Lee Anne Elton Vs. Arunoday Singh] (DB)…*11**

विशेष विवाह अधिनियम (1954 का 43), धारा 27 – एकपक्षीय विवाह विच्छेद डिक्री – अभिवचन एवं प्रमाण – अभिनिर्धारित – अधीनस्थ न्यायालय ने पति द्वारा प्रस्तुत अखंडित अभिवचन एवं साक्ष्य का मूल्यांकन सही एवं अनुज्ञेय मापदण्डों पर किया एवं सही निष्कर्ष निकाला कि पति, अपीलार्थी पत्नी के विरूद्ध ''क्रूरता'' का एक मजबूत प्रकरण बना सकता था – विवाह–विच्छेद की डिक्री सही पारित – अपील खारिज। (ली एनी एल्टन वि. अरूणोदय सिंह) **(DB)…*11**

***Special Marriage Act (43 of 1954), Section 39 and Civil Procedure Code (5 of 1908), Section 96(2) – Ex-parte Proceeding – Judicial Review* – Held – The order of proceeding *ex-parte* cannot be a matter of judicial review in this first appeal – Appellant can only attack the findings given on merits or on the aspect of jurisdiction of Court. [Lee Anne Elton Vs. Arunoday Singh] (DB)…*11**

विशेष विवाह अधिनियम (1954 का 43), धारा 39 एवं सिविल प्रक्रिया संहिता (1908 का 5), धारा 96(2) – एकपक्षीय कार्यवाही – न्यायिक पुनर्विलोकन – अभिनिर्धारित – एकपक्षीय कार्यवाही का आदेश इस प्रथम अपील में न्यायिक पुनर्विलोकन का विषय नहीं हो सकता है – अपीलार्थी केवल गुणागुण के आधार पर अथवा न्यायालय की अधिकारिता के पहलू पर दिए गए निष्कर्षों पर प्रहार कर सकता है। (ली एनी एल्टन वि. अरूणोदय सिंह) **(DB)…*11**

***Special Marriage Act (43 of 1954), Section 40B(2) & (3) – Speedy Trial* – Held – Provision u/S 40B makes it obligatory to conduct the proceeding on day-to-day basis until its conclusion – In the teeth of Section 40B, the proceedings cannot be jettisoned merely because it were conducted with quite promptitude. [Lee Anne Elton Vs. Arunoday Singh] (DB)…*11**

विशेष विवाह अधिनियम (1954 का 43), धारा 40B (2) व (3) – शीघ्र विचारण – अभिनिर्धारित – धारा **40B** के अंतर्गत उपबंध, जब तक कार्यवाही पूरी न हो तब तक कार्यवाही दिन–प्रतिदिन के आधार पर करने को बाध्यकारी बनाता है – धारा **40B** के प्रतिकूल, कार्यवाही को मात्र इस कारण से ठुकराया नहीं जा सकता कि वह पूर्णतया तत्परता से की गई। (ली एनी एल्टन वि. अरूणोदय सिंह) **(DB)…*11**

Stamp Act, Indian (2 of 1899), Section 2(12) & 17 – Registration –

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Trade Marks Act (47 of 1999), Section 29 – Infringement – **Held – Registration under Excise Act will not create any equitable right in favour of defendant to use similar or deceptively similar trade mark – Registration under Copyrights Act will also not give any exclusive right to the violation of trade mark. [Hindustan Bidi Manufacturing Vs. Mr. Sunderlal Chhabilal] …143**

व्यापार चिह्न अधिनियम (1999 का 47), धारा 29 – उल्लंघन – अभिनिर्धारित – आबकारी अधिनियम के अंतर्गत पंजीयन, प्रतिवादी के पक्ष में समान या इतना समरूप जिससे धोखा हो जाए, ट्रेडमार्क का उपयोग करने का कोई साम्यापूर्ण अधिकार सृजित नहीं करेगा – कॉपीराईट अधिनियम के अंतर्गत पंजीयन भी ट्रेडमार्क के उल्लंघन के लिए कोई अनन्य अधिकार नहीं देगा। (हिन्दुस्तान बीड़ी मेन्युफेक्चरिंग वि. मि. सुन्दरलाल छबीलाल) …143

Trade Marks Act (47 of 1999), Section 29 and Civil Procedure Code (5 of 1908), Order 39 Rule 1 & 2 – Infringement – Delay in Taking Action – **Held – Apex Court concluded that in case of *Infringement*, either of trade mark or of copyright, normally an injunction must follow – Mere delay in bringing action is not sufficient to defeat grant of injunction. [Hindustan Bidi Manufacturing Vs. Mr. Sunderlal Chhabilal] …143**

व्यापार चिह्न अधिनियम (1999 का 47), धारा 29 एवं सिविल प्रक्रिया संहिता (1908 का 5), आदेश 39 नियम 1 व 2 – उल्लंघन – कार्यवाही करने में विलंब– अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया कि ट्रेडमार्क या कॉपीराईट के उल्लंघन के प्रकरण में, सामान्यतः व्यादेश दिया जाना चाहिए – मात्र कार्यवाही करने में विलंब व्यादेश प्रदान करना विफल करने के लिए पर्याप्त नहीं है। (हिन्दुस्तान बीड़ी मेन्युफेक्चरिंग वि. मि. सुन्दरलाल छबीलाल) …143

Trade Marks Act (47 of 1999), Section 29 and Civil Procedure Code (5 of 1908), Order 39 Rule 1 & 2 – Infringement – Injunction – **Held – At the time of consideration of injunction application, there was no need for a roving enquiry, trial Court was only required to see from the point of view of man of average intelligence and imperfect recollection that whether product sold by defendant is deceptively similar or not – No microscopic examination is permissible – What are points of similarity and dissimilarity is a matter of evidence – Injunction granted. [Hindustan Bidi Manufacturing Vs. Mr. Sunderlal Chhabilal] …143**

व्यापार चिह्न अधिनियम (1999 का 47), धारा 29 एवं सिविल प्रक्रिया संहिता (1908 का 5), आदेश 39 नियम 1 व 2 – उल्लंघन – व्यादेश – अभिनिर्धारित – व्यादेश आवेदन पर विचार करते समय अतिगामी जांच की आवश्यकता नहीं थी, विचारण न्यायालय को केवल एक औसत बुद्धि एवं दोषपूर्ण स्मरणशक्ति के व्यक्ति के दृष्टिकोण से देखने की आवश्यकता थी कि क्या प्रतिवादी द्वारा बेचा गया उत्पाद इतना समरूप, जिससे धोखा हो

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THE INDIAN LAW REPORTS M.P. SERIES, 2023

(Vol.-1)

JOURNAL SECTION

IMPORTANT ACTS, AMENDMENTS, CIRCULARS, NOTIFICATIONS AND STANDING ORDERS

MADHYA PRADESH ACT

No. 20 OF 2022

THE MADHYA PRADESH LAND REVENUE CODE (AMENDMENT) ACT, 2022

[Received the assent of the Governor on 29 September 2022; assent first published in the "Madhya Pradesh Gazette (Extra-ordinary)", dated 03 October 2022, page No. 1096(1)].

An Act further to amend the Madhya Pradesh Land Revenue Code, 1959.

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

1. Short title. This Act may be called the Madhya Pradesh Land Revenue Code (Amendment) Act, 2022.

2. Substitution of Section 9. For section 9 of the Madhya Pradesh Land Revenue Code, 1959 (No. 20 of 1959), the following section shall be substituted, namely :—

"9. **Exercise of jurisdiction by single member and division benches.** (1) All cases shall be finally heard and disposed of by a Division Bench of the Board:

Provided that cases, which are listed for motion hearing or hearing on any interim application may be heard by Single Member Bench.

Explanation.— For the purpose of this sub-section, "Division Bench" means a bench comprising of two or more members as nominated by the President.

(2) The State Government may make rules for exercise of powers and functions of the Board through Single Member Bench and Division Bench and all orders passed by such benches in exercise

of such powers or functions shall be deemed to be the orders of the Board.".

3. Repeal and saving. (1) The Madhya Pradesh Land Revenue Code (Amendment) Ordinance, 2022 (No. 4 of 2022) is hereby repealed.

(2) Notwithstanding the repeal of the said Ordinance, anything done or any action taken under the said Ordinance shall be deemed to have been done or taken under the corresponding provision of this Act.

MADHYA PRADESH ACT
No. 18 OF 2022

THE MADHYA PRADESH VYAVSAYIK PARIKSHA MANDAL (SANSHODHAN) ADHINIYAM, 2022

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MADHYA PRADESH ACT
No. 18 OF 2022

THE MADHYA PRADESH VYAVSAYIK PARIKSHA MANDAL (SANSHODHAN) ADHINIYAM, 2022

[Received the assent of the Governor on 29 September 2022; assent first published in the "Madhya Pradesh Gazette (Extra-ordinary)", dated 3 October 2022, Page Nos. 1092(1) to 1092(3)].

An Act to amend the Madhya Pradesh Vyavsayik Pariksha Mandal Adhiniyam, 2007.

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

1. (1) Short title and commencement. This Act may be called the Madhya Pradesh Vyavsayik Pariksha Mandal (Sanshodhan) Adhiniyam, 2022.

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

2. Amendment of citation and Section 1. In the citation and sub-section (1) of Section 1 of the Madhya Pradesh Vyavsayik Pariksha Mandal Adhiniyam, 2007 (No. 24 of 2007) (hereinafter referred to as the principal Act), for the words "Vyavsayik Pariksha Mandal", the words "Employees Selection Board" shall be substituted.

3. Amendment of certain words throughout the principal Act. Throughout the principal Act, for the words "Professional Examination Board", wherever they occur, the words "Employees Selection Board" shall be substituted.

4. Amendment of Section 4. In Section 4 of the principal Act, in sub-section (1), —

(i) clause (a) shall be renumbered as clause (aa) and before clause (aa) as so renumbered, the following clause shall be inserted, namely:—

"(a) Additional Chief Secretary or Principal Secretary or Secretary, Government of Madhya Pradesh, General Administration Department;";

(ii) in clause (aa), for the words "Technical Education and Training Department", the words "Technical Education, Skill Development and Employment" shall be substituted;

(iii) in clauses (aa) to (f), before the words "Principal Secretary", the words "Additional Chief Secretary or" shall be inserted.

5. Amendment of Section 19. In Section 19 of the principal Act, in sub-section (1), —

(i) clause (b) shall be renumbered as clause (ba) and before clause (ba) as so renumbered, the following clause shall be inserted, namely:—

"(b) Additional Chief Secretary or Principal Secretary or Secretary, Government of Madhya Pradesh, General Administration Department;";

(ii) in clause (ba), for the words "Technical Education and Training Department", the words "Technical Education, Skill Development and Employment" shall be substituted;

(iii) in clauses (ba) to (d), before the words "Principal Secretary", the words "Additional Chief Secretary or" shall be inserted.

6. Substitution of Section 25. For Section 25 of the principal Act, the following section shall be substituted, namely:—

"25. **Consequences to ensue on commencement of Amendment Act.** As from the date of commencement of the Madhya Pradesh Vyavsayik Pariksha Mandal (Sanshodhan) Adhiniyam, 2022 under sub-section (2) of Section 1, the following consequences shall ensue, namely:—

(a) the Madhya Pradesh Professional Examination Board, existing immediately before the date aforesaid, shall be merged in the Madhya Pradesh Employees Selection Board;

(b) all assets and liabilities of the existing Madhya Pradesh Professional Examination Board of the State Government shall vest in the Madhya Pradesh Employees Selection Board;

(c) all the employees belonging to or under the control of the existing the Madhya Pradesh Professional Examination Board shall be deemed to be the employees of the Madhya Pradesh Employees Selection Board established under Section 3:

Provided that the terms and conditions of service of such employees shall not be modified in such a manner that it is less favorable to them;

(d) all the records and papers of the existing the Madhya Pradesh Professional Examination Board shall vest in the Madhya Pradesh Employees Selection Board;

(e) any action or process in motion under the existing the Madhya Pradesh Professional Examination Board shall vest in the Madhya Pradesh Employees Selection Board.".

MADHYA PRADESH ACT
No. 24 OF 2022

THE MADHYA PRADESH CIVIL COURTS (AMENDMENT) ACT, 2022

[Received the assent of the Governor on 04 October 2022; assent first published in the "Madhya Pradesh Gazette (Extra-ordinary)", dated 6 October 2022, Page No. 1108].

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

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

1. Short title. This Act may be called the Madhya Pradesh Civil Courts (Amendment) Act, 2022.

2. Amendment of Section 2. In section 2 of the Madhya Pradesh Civil Courts Act, 1958 (No. 19 of 1958), for clause (a), the following clause shall be substituted, namely:—

"(a) "cadre of Higher Judicial Service" means the cadre of District Judges and shall include the Principal District Judge, District Judge (Super Time Scale), District Judge (Selection Grade) and District Judge (Entry Level);"

MADHYA PRADESH FREEDOM OF RELIGION RULES, 2022

[Published in Madhya Pradesh Gazette (Extra-ordinary), dated 15 December 2022, page Nos. 1246 (7) to 1246(14)]

No. F-35-13-2020 – II-C-X- In exercise of the power conferred by section 16 of the Madhya Pradesh Freedom of Religion Act, 2021 (No. 5 of 2021), the State Government, hereby, makes the following rules, namely :-

RULES

1. Short title.- These rules may be called the Madhya Pradesh Freedom of Religion Rules, 2022.

2. Definitions.- In these rules, unless the context otherwise requires,-

(a) "Act" means the Madhya Pradesh Freedom of Religion Act, 2021 (No. 5 of 2021);

(b) "Declaration" means, the declaration made in respect of the religious conversion under sub-section (1) of section 10 of the Act;

(c) "Form" means, forms appended to these rules;

(d) "Information" means the information in respect of the religious conversion given under sub-section (2) of section 10 of the Act.

3. The period before which declaration/intimation to be made.-

(1) Any person intending to convert his religion shall submit a declaration sixty days prior to such conversion in Form-A before

such District Magistrate where the proceedings of conversion are to be executed.

(2) Any religious priest and/or any person who intends to organize the rituals of conversion shall give intimation in Form B to the District Magistrate of the concerned district sixty days prior to organizing of such rituals.

(3) The person who makes above declaration or gives information shall submit it to the District Magistrate personally or send it by registered post or through electronic medium.

4. Receipt of declaration/intimation.- The District Magistrate on receipt of declaration / intimation under sub-rule (1) and (2) of rule 3, shall give a receipt of such prior declaration/intimation in Form-C or Form-D as the case may be.

5. Report to be submitted before the State Government.-The District Magistrate shall send a report of the declaration/intimation received and the prosecution sanctioned issued by him during the preceding month in Form-E before 10th of every month to the State Government.

FORM-A
[see rule 3 (1)]
Declaration Letter

To,
The District Magistrate,
District…….
Madhya Pradesh

Sir,

I,…….. S/o/D/o Shri……..resident

of ……am desirous to perform necessary rituals for conversion from….....to……..... religion with my free consent and without any force coercion, undue influence or allurement and hereby give notice of religious conversion as required under sub-section (1) of section 10 of the Madhya Pradesh Freedom of Religious Act, 2021.

1. Name of the person to be converted…….

2. (a) Name of father of the person to be converted……

(b) Name of mother of the person to be converted…….

3. The address of the person to be converted ……...House No……..

Ward.No. …….. Mohalla …….. Village ..…... Tehsil….. District…....

4. Age……..(Date of birth)…….

5. Sex……

6. If the person is minor, then the name of the guardian (if any) and full address……..

7. Whether he/she belongs to Scheduled Castes / Scheduled Tribes, if yes, give details of such caste…….

8. Complete details alongwith the name of the place, where the conversion rituals are to be intended as H. No. ……...Ward No.……. Mohalla……...Village…….District……

9. Date of conversion……

10. Name of the religious priest/ father…….

(1) Qualification and experience.

(2) Address…….

VERIFICATION

I, hereby, declare that the information given above is true to the best of my knowledge and belief and nothing has been concealed.

Signature
Date…….
Place…….

FORM-B
[see rule 3 (2)]

NOTICE

Notice by religious priest in respect of intended conversion from one religion to another.

To,

The Collector,
District……,
Madhya Pradesh

Sir,

J/8

I,…...……...son / daughter of …...…….resident of ……, hereby submit notice of intended conversion from ……... religion to …….as required by sub-section (2) of section 10 of the Madhya Pradesh Freedom of Religion Act, 2021 which is as follows:-

Total number of persons whose religion are to be converted, -

Adult…….Minor……

1. Name of the person whose religion is to be converted…….

2.(a) Name of father of the person being converted…….

(b) Name of mother of the person being converted .....

3. Address of the person being converted……..
House No. ……..Ward No. …….Mohalla……..
Village……...district……..

4. Age……...(Date of Birth)

5. Sex…….

6. Whether he / she belongs to scheduled castes / scheduled Tribes / if so give details thereof…….

7. Name of the place with full details where the conversion rituals are to be intended as H. No. ……Ward No……... Mohalla…….
Village…….district……..

8. Date of religion conversion……

9. Name of the religious Priest …….S/ o……

(i) Qualification and experience……

(ii) Address:- …….....

Verification

I, ……...hereby declare that the above mentioned notice is true to the best of my knowledge and belief and nothing has been concealed.

Signature……
Date……..
Place…….

FORM-C
[see rule 4]

A declaration regarding religious conversion from the …….religion to …….religion has been received on…….under sub-section (1) of section 10 of the Madhya Pradesh Freedom of Religion Act, 2021 from Shri…….S/o /D/o …….resident of ……..

Date

…….....

District Magistrate

FORM-D
[see rule 4]

A notice under sub-section (2) of section 10 of the Madhya Pradesh Freedom of Religion Act, 2021 has been received from the religious saint Shri ..... regarding religion conversion of Shri ..... S/o/ D/o..... resident of ……...from……...to …….religion.

Date

……

District Magistrate

FORM-E
(see rule 5)

Report for the month of…….

1.	Number of declaration received under sub-section (1) of section 10 during the month of		……..
2.	Number of notices received under sub-section (2) of section 10 during the month of		……..
3.	Number of the prosecutions instituted under the Act, if any		……..
4.	Number of prosecution sanctions issued under the Act		……..
5.	Number of marriages declared infructuous or void under the Act		……
6.	Number of institutions / organizations who violated section 11 of the Act		……..
7.	Number of acquittal and conviction under the Act during the month		……

By Order and in the name of the Governor of Madhya Pradesh,
RAJESH RAJORA, Addl. Chief Secy.

AMENDMENT IN THE MADHYA PRADESH CIVIL COURTS RULES, 1961

[Published in Madhya Pradesh Gazette, Part-4 (Ga), dated 04 November 2022, page No. 729]

No.D-2456. - In exercise of the powers conferred by Article 227 of the Constitution of India read with Section 122 of the Code of Civil Procedure, 1908 (No. 5 of 1908) and Section 23 of the Madhya Pradesh, Civil Courts Act, 1958 (No. 19 of 1958), the High Court of Madhya Pradesh hereby, makes the following amendment in the Madhya Pradesh Civil Courts Rules, 1961, namely:—

AMENDMENT

In the said rules, in Chapter XXIX, after rule 593, the following rule shall be inserted, namely :—

"593 A. Fast and Secured Transmission of Electronic Records (FASTER)

The e-authenticated copies of all the interim orders, stay orders, bail orders and record of proceedings of all the Courts transmitted through Fast and Secured Transmission of Electronic Records (FASTER) system shall be valid for compliance of the direction contained therein and due execution thereof by all the duty holders."

RAMKUMAR CHOUBEY, Registrar General.

AMENDMENT IN THE MADHYA PRADESH MEDIATION RULES, 2016

[Published in Madhya Pradesh Gazette, Part-4 (Ga), dated 04 November 2022, page Nos. [727 & 728]

No.D-2454. - In exercise of the powers conferred by Article 225 of the Constitution of India read with Section 122 and Section 128 of the Code of Civil Procedure, 1908 (No. 5 of 1908), the High Court of Madhya Pradesh, hereby makes the following amendment in the Madhya Pradesh Mediation Rules, 2016, the same having been previously published in the Madhya Pradesh Gazette, Part-IV, dated 12th August, 2022 as required by Section 122 of the said Code, namely:—

AMENDMENT

In the said rules, in rule 27, in sub-rule (1), for the table, the following table shall be substituted, namely :—

TABLE

S.No.	Nature of case	Honorarium
(1)	(2)	(3)
1.	On Settlement through Meditation	Rs. 5,000/- per case
2.	Connected Cases	Rs. 1,000/- per case subject to a Maximum of Rs. 3,000/ (regardless of the number of connected cases)
3.	In case of no Settlement (in case the party fail to arrive at an amicable settlement despite three effective hearings.	Rs. 2,500/-

RAMKUMAR CHOUBEY, Registrar General.

AMENDMENT IN THE MADHYA PRADESH RULES AND ORDERS (CRIMINAL)

[Published in Madhya Pradesh Gazette, Part-4 (Ga), dated 04 November 2022, page Nos. 728 to 729]

No.D-2456. - In exercise of the powers conferred by Article 227 of the Constitution of India read with Section 477 of the Code of Criminal Procedure, 1973 (2 of 1974), the High Court of Madhya Pradesh, hereby makes the following amendment in the Madhya Pradesh Rules and Orders (Criminal) namely :

AMENDMENT

In the said rules, in Chapter XII, after rule 329, the following rule shall be inserted, namely :—

"329 A. Fast and Secured Transmission of Electronic Records (FASTER)

The e-authenticated copies of all the interim orders, stay orders, bail orders and record of proceedings of all the Courts transmitted through Fast and Secured Transmission of Electronic Records (FASTER) system shall be valid for compliance of the directions contained therein and due execution thereof by all the duty holders."

RAMKUMAR CHOUBEY, Registrar General.

J/12

AMENDMENT IN THE MADHYA PRADESH GOODS AND SERVICES TAX RULES, 2017

[Published in Madhya Pradesh Gazette (Extra-ordinary), dated 08 December 2022, page No. 1234]

No. CT-8-0005-2022-Sec-1-V–(70). — In exercise of the powers conferred by Section 164 of the Madhya Pradesh Goods and Services Tax, Act, 2017 (19 of 2017), the State Government, on the recommendations of the Council, hereby further amends the Madhya Pradesh Goods and Services Tax Rules, 2017, namely:—

AMENDMENTS

In the said Rules,

(a) rule 122 shall be omitted;

(b) rules 124 and 125 shall be omitted;

(c) in rule 127,—

(i) in the marginal heading, for the word "Duties", the word "Functions", shall be substituted;

(ii) for the words "It shall be the duty of the Authority,-", the words "The authority shall discharge the following functions, namely :—" shall be substituted;

(d) rule 134 shall be omitted;

(e) rule 137 shall be omitted;

(f) after rule 137, in the Explanation, for clause (a), the following clause shall be substituted, namely :—

'(a) "Authority" means the Authority notified under sub-section (2) of Section 171 of the Act,'.

(2) These rules shall come into force from 1st day of December, 2022.

By order and in the name of the Governor of Madhya Pradesh,
R.P. SHRIVASTAVA, Dy. Secy.

NOTES OF CASES SECTION

Short Note
****(1)***
Before Mr. Justice Dinesh Kumar Paliwal
MCRC No. 39565/2022 (Jabalpur) decided on 25 August, 2022

AMIR MALIK …Applicant

Vs.

ASHOK SAHU …Non-applicant

***A. Negotiable Instruments Act (26 of 1881), Sections 118, 138 & 139 and Evidence Act (1 of 1872), Section 45 – Examination by Handwriting Expert – Right of Defence* – Held – It is admitted that cheque was issued by applicant and it bears his signature – In absence of evidence of exercise of undue influence or coercion or denial of his own signature, no useful purpose will be served by sending the cheque to hand writing expert because once the cheque was issued, a liability is imposed upon accused – Application dismissed.**

क. परक्राम्य लिखत अधिनियम (1881 का 26), धाराएँ 118, 138 व 139 एवं साक्ष्य अधिनियम (1872 का 1), धारा 45 – हस्तलेख विशेषज्ञ द्वारा परीक्षण – बचाव का अधिकार – अभिनिर्धारित – यह स्वीकृत है कि चैक आवेदक द्वारा जारी किया गया था एवं उस पर उसके हस्ताक्षर हैं – असम्यक् प्रभाव अथवा प्रपीड़न के प्रयोग में या उसके स्वयं के हस्ताक्षर से इंकार करने के साक्ष्य के अभाव में, चैक हस्तलिपि विशेषज्ञ को भेजने से कोई उपयोगी प्रयोजन पूरा नहीं होगा क्योंकि एक बार चैक जारी किया गया, अभियुक्त पर दायित्व अधिरोपित किया जाता है – आवेदन खारिज।

***B. Negotiable Instruments Act (26 of 1881), Sections 20, 138 & 139 – Cheque filled by Complainant – Liability/Presumption* – Held – Apex Court concluded that by reason of the provision u/S 20, a right has been created in the holder of the cheque, the holder is authorized to complete an incomplete negotiable instrument – This Court also concluded that a blank cheque could be filled up by the "Holder thereof" – If it is assumed that body of cheque not filled by accused and is filled by complainant yet the statutory presumption cannot be obliterated.**

ख. परक्राम्य लिखत अधिनियम (1881 का 26), धाराएँ 20, 138 व 139 – परिवादी द्वारा चैक भरा गया – दायित्व/उपधारणा – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया कि धारा 20 के अंतर्गत उपबंध के कारण, चैक–धारक में एक अधिकार सृजित किया गया है, धारक अपूर्ण परक्राम्य लिखत को पूर्ण करने के लिए अधिकृत है – इस न्यायालय ने यह भी निष्कर्षित किया कि एक निरंक चैक ''उसके धारक'' के द्वारा भरा जा सकता है – यदि यह मान लिया जाए कि चैक का मुख्य भाग अभियुक्त के द्वारा नहीं

भरा गया एवं परिवादी के द्वारा भरा गया है, तब भी कानूनी उपधारणा को अभिलोपित नहीं किया जा सकता।

Cases referred:

2008 (4) MPLJ 455 (SC), 2008 (5) SCC 633, ILR 2008 (2) MP 1309, 2007 (2) MPHT 182, 2008 (3) R.C.R. (Criminal) 926, 2016 (4) RCR (Civil) 487, 2015 (1) MPLJ 574, 2019 (4) SCC 197, (2022) Livelaw (SC) 714.

D.K. Gangrade, for the applicant.
None, for the non-applicant.

Short Note
****(2)***
Before Mr. Justice G.S. Ahluwalia
WP No. 17995/2022 (Gwalior) decided on 17 August, 2022

ANIL …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

A. ***Service Law – Compassionate Appointment – Delay*** **– Held – Petitioner's father expired in 2011 – Petitioner attained majority in 2018 and filed application in 2021 – As per policy he should have applied within one year of attaining majority – He approached this Court after 12 years of death of his father, even mother never applied for compassionate appointment – Appointment on compassionate ground is not an alternative mode of direct/regular recruitment but it a speedy remedy to overcome the consequences of untimely death of their breadwinner – Delay defeats equity – Petition dismissed.**

क. *सेवा विधि – अनुकंपा नियुक्ति – विलंब* – अभिनिर्धारित – याची के पिता की मृत्यु 2011 में हुई – याची ने 2018 में वयस्कता प्राप्त की एवं 2021 में आवेदन प्रस्तुत किया – नीति के अनुसार उसे वयस्कता प्राप्त करने के एक वर्ष के भीतर आवेदन प्रस्तुत करना चाहिए था – वह अपने पिता की मृत्यु के 12 वर्ष पश्चात् इस न्यायालय के समक्ष आया, यहां तक कि उसकी मां ने भी अनुकंपा नियुक्ति के लिए कभी आवेदन प्रस्तुत नहीं किया – अनुकंपा के आधार पर नियुक्ति, सीधी/नियमित भर्ती का वैकल्पिक माध्यम नहीं है बल्कि यह उनके कमाने वाले की असामयिक मृत्यु के परिणामों से उबरने का एक त्वरित उपाय है – विलंब साम्या को परास्त करता है – याचिका खारिज।

B. ***Service Law – Compassionate Appointment – Daily Wager –*** **Held – Petitioner's father was a daily wager – Counsel could not show any provision of law which was in vogue on date of death of father that even dependants of daily wager were entitled for appointment on compassionate ground.**

ख. *सेवा विधि – अनुकंपा नियुक्ति – दैनिक वेतन भोगी* – अभिनिर्धारित – याची के पिता एक दैनिक वेतन भोगी थे – अधिवक्ता विधि का कोई भी उपबंध प्रदर्शित नहीं कर सके जो पिता की मृत्यु की दिनांक पर प्रचलित था कि दैनिक वेतनभोगी के आश्रित भी अनुकंपा नियुक्ति पर नियुक्ति के हकदार थे।

C. ***Service Law – Compassionate Appointment – Aims & Object –*** **Discussed and explained.**

ग. *सेवा विधि – अनुकंपा नियुक्ति – लक्ष्य एवं उद्देश्य* – विवेचित एवं स्पष्ट किये गए।

Cases referred:

(2004) 12 SCC 487, (1996) 5 SCC 308, AIR 2022 SC 783, AIR 2021 SC 1876, (2020) 2 SCC 729, 2021 SCC Online 1264, CA No. 6903/2021 decided on 18.11.2021 (Supreme Court), CA No. 6910/2021 decided on 18.11.2021 (Supreme Court), (2006) 5 SCC 766, (2006) 11 SCC 464, (1997) 6 SCC 538, (2007) 9 SCC 278, (2013) 12 SCC 179, (2008) 10 SCC 115, (2010) 2 SCC 59, (2007) 10 SCC 137.

V.S. Chauhan, for the petitioner.
Deepak Khot, G.A. for the State.

Short Note
****(3)(DB)***
Before Mr. Justice Vivek Rusia &
Mr. Justice Amar Nath (Kesharwani)
WP No. 8953/2022 (Indore) decided on 1 September, 2022

ASHISH PANDEY …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

Minor Mineral Rules, M.P., 1996, Rule 30(1)(a) – Renewal of Lease – Demand of Dead Rent – **Held – Petitioner applied for renewal of lease in 2018**

but it was renewed in 2022 from back date, so there was no lease from 2018 to 2022 – Dead rent is payable to government only during the currency of the lease – Demand of dead rent from 2018 to 2022 when petitioner did not excavate the minerals and did not earn of it, was unreasonable, harsh and not justifiable – Demand for dead rent set aside – Petition allowed.

गौण खनिज नियम, म.प्र. 1996, नियम 30(1)(a) – पट्टे का नवीकरण – अनिवार्य भाटक की मांग – अभिनिर्धारित – याची ने 2018 में पट्टे के नवीकरण के लिए आवेदन किया परंतु इसे 2022 में पूर्व दिनांक से नवीनीकृत किया गया था, इसलिए 2018 से 2022 तक कोई पट्टा नहीं था – अनिवार्य भाटक केवल पट्टे की अवधि के दौरान शासन को देय होता है – 2018 से 2022 तक अनिवार्य भाटक की मांग जब याची ने खनिजों का उत्खनन नहीं किया एवं उससे उपार्जन नहीं किया, अयुक्तियुक्त, कठोर एवं अनुचित थी – अनिवार्य भाटक की मांग अपास्त – याचिका मंजूर।

The order of the Court was passed by : **VIVEK RUSIA, J.**

Cases referred:

(1996) 11 SCC 571, WP No. 25364/2019 decided on 21.09.2020 (FB).

Dr. Manohar Dalal, for the petitioner.
Bhaskar Agrawal, G.A. for the respondents.

Short Note
****(4)(DB)***
Before Mr. Justice Vivek Rusia &
Mr. Justice Amar Nath (Kesharwani)
MP No. 3390/2022 (Indore) decided on 7 September, 2022

BHARTIYA CONSTRUCTION BANSAWADA (M/S) …Petitioner

Vs.

STATE OF M.P. & anr. …Respondents

***A. Minor Mineral Rules, M.P. 1996, Rule 53 & 57 and Mineral (Prevention of Illegal Mining, Transportation and Storage) Rules, M.P., 2022, Rule 27 – Appeal – Jurisdiction* – Held – In the matter where orders are passed in respect of illegal mining, transportation and storage under repealed Rules or under Rule of 2022, appeal shall lie to Divisional Commissioner under Rule 27 of 2022 Rules and for rest of the matters appeal shall lie under Rule 57 of 1996 Rules.**

क. गौण खनिज नियम, म.प्र. 1996, नियम 53 व 57 एवं खनिज (अवैध खनन, परिवहन तथा भंडारण का निवारण) नियम, म.प्र., 2022, नियम 27 – अपील – अधिकारिता

– अभिनिर्धारित – उन मामलों में जहां अवैध खनन, परिवहन तथा भण्डारण के संबंध में निरसित नियमों अथवा नियम 2022 के अंतर्गत आदेश पारित किए गए हैं, अपील 2022 के नियमों के नियम 27 के अंतर्गत संभागीय आयुक्त के समक्ष प्रस्तुत होगी तथा शेष मामलों के लिए अपील नियम 1996 के नियम 57 के अंतर्गत प्रस्तुत होगी।

***B. Minor Mineral Rules, M.P. 1996, Rule 53 & 57 and Mineral (Prevention of Illegal Mining, Transportation and Storage) Rules, M.P., 2022, Rule 31 – Transfer of Appeal/Revision* – Held – Rule 31 of Rules of 2022 provides that appeal/revision pending under repealed Rules shall be transferred to concerned Appellate/Revisional Authority – By virtue of Rule 31, pending appeal of petitioner was rightly transferred to Commissioner – Petition dismissed.**

ख. गौण खनिज नियम, म.प्र. 1996, नियम 53 व 57 एवं खनिज (अवैध खनन, परिवहन तथा भंडारण का निवारण) नियम, म.प्र., 2022, नियम 31 – अपील/पुनरीक्षण का अंतरण – अभिनिर्धारित – 2022 के नियमों का नियम 31 उपबंधित करता है कि निरसित नियमों के अंतर्गत लंबित अपील/पुनरीक्षण संबंधित अपीली/पुनरीक्षण प्राधिकारी को अंतरित की जाएगी – नियम 31 के आधार पर, याची की लंबित अपील आयुक्त को उचित रूप से अंतरित की गई थी – याचिका खारिज।

The order of the Court was passed by : **VIVEK RUSIA, J.**

Ashok Kumar Sethi alongwith *Pravin Kumar Bhatt*, for the petitioner.
Bhaskar Agrawal, G.A. for the respondent/State.

Short Note
****(5)***
Before Mr. Justice Dinesh Kumar Paliwal
MCRC No. 39389/2022 (Jabalpur) decided on 16 August, 2022

BILLA @ SUNIL KUMAR …Applicant

Vs.

STATE OF M.P. …Non-applicant

***Criminal Practice – Dismissal of Appeal – Want of Prosecution – Permissibility* – Held – Criminal appeal cannot be dismissed for non-prosecution or because of non-appearance of counsel of appellant or the appellant – It can be decided on merit by appointing *amicus curiae* in absence of appellant and his counsel and cannot be dismissed in default – Impugned order set aside – Appeal restored – Application disposed.**

दाण्डिक पद्धति – अपील खारिज किया जाना – अभियोजन के अभाव में – अनुज्ञेयता – अभिनिर्धारित – अभियोजन के अभाव अथवा अपीलार्थी के अधिवक्ता या

अपीलार्थी की अनुपस्थिति के कारण दाण्डिक अपील खारिज नहीं की जा सकती – उसे अपीलार्थी एवं उसके अधिवक्ता की अनुपस्थिति में न्याय मित्र नियुक्त करके गुणागुण के आधार पर विनिश्चित किया जा सकता है एवं व्यतिक्रम के लिए खारिज नहीं किया जा सकता – आक्षेपित आदेश अपास्त – अपील पुनः स्थापित – आवेदन निराकृत।

Cases referred:

1996 (9) SCC 372, AIR 1996 SC 2539, 2008 (1) SC 172, SLP (Crl.) No. 5690/2021 decided on 12.08.2021 (Supreme Court).

Monesh Sahu, for the applicant.
Amit Kumar Pandey, P.L. for the non-applicant.

Short Note
****(6)***
Before Mr. Justice Vishal Dhagat
MCRC No. 42277/2022 (Jabalpur) decided on 3 September, 2022

CHANDRABHAN KALOSIYA …Applicant

Vs.

STATE OF M.P. …Non-applicant

***A. Criminal Procedure Code, 1973 (2 of 1974), Section 438 & 439 – Custody* – Held – When accused appear before Court after receiving notice from police station for filing of charge sheet, then on his appearance such accused person is deemed to be under custody of Court – His application u/S 439 may not be rejected on technical reason that accused is not arrested and thus not in custody – Appearance of accused before Court amounts to custody.**

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 438 व 439 – अभिरक्षा – अभिनिर्धारित – जब अभियुक्त आरोप–पत्र प्रस्तुत करने हेतु पुलिस स्टेशन से नोटिस प्राप्त करने के पश्चात् न्यायालय के समक्ष उपस्थित होता है, तब उसके उपस्थित होने पर उक्त अभियुक्त न्यायालय की अभिरक्षा में होना माना जाता है – उसका धारा 439 का आवेदन इस तकनीकी कारण पर खारिज नहीं किया जा सकता कि अभियुक्त गिरफ्तार नहीं किया गया है तथा इस प्रकार अभिरक्षा में नहीं है – अभियुक्त की न्यायालय के समक्ष उपस्थिति अभिरक्षा की कोटि में आती है।

***B. Criminal Procedure Code, 1973 (2 of 1974), Section 438 & 439 – Custody* – Held – Applicant's application u/S 438 is rejected on merits by trial Court – His application u/S 439 is also rejected on ground that he is not in custody – Applicant is under apprehension of his arrest – Looking to nature**

of offence and fact that he is not a habitual offender and a government servant, anticipatory bail granted – Application allowed.

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 438 व 439 – अभिरक्षा – अभिनिर्धारित – आवेदक का धारा 438 के अंतर्गत आवेदन विचारण न्यायालय द्वारा गुणदोषों पर अस्वीकृत कर दिया गया है – उसका धारा 439 अंतर्गत आवेदन भी इस आधार पर अस्वीकृत किया गया है कि वह अभिरक्षा में नहीं है – आवेदक उसकी गिरफ्तारी को लेकर आशंकित है – अपराध की प्रकृति तथा यह तथ्य कि वह आदतन अपराधी नहीं है तथा एक शासकीय सेवक है, को देखते हुए अग्रिम जमानत प्रदान की गई – आवेदन मंजूर।

Case referred:

(2022) 1 SCC 676.

Sankalp Kochar, for the applicant.
Atmaram Bain, Dy. G.A., for the State.
Sandeep Kumar Sen, for the objector.

Short Note
****(7)***
Before Mr. Justice Sujoy Paul
MCC No. 1331/2022 (Jabalpur) decided on 24 June, 2022

COMMISSIONER MUNICIPAL CORPORATION, JABALPUR ...Applicant

Vs.

KEDARNATH SINGH MANDELE & anr. …Non-applicants

***A. Civil Procedure Code (5 of 1908), Order 47 Rule 1 – Review – New Ground* – Held – Although application has been named as "application for clarification" but applicant is seeking review of the order – By way of review, applicant cannot raise a defence for the first time – Ingredients of Order 47 Rule 1 not fulfilled – It is trite that a litigant is not entitled to get something indirectly, which he cannot get directly – Application dismissed.**

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 47 नियम 1 – पुनर्विलोकन – नया आधार – अभिनिर्धारित – यद्यपि आवेदन को ''स्पष्टीकरण के लिए आवेदन'' के रूप में नामित किया गया है परंतु आवेदक, आदेश का पुनर्विलोकन चाह रहा है – पुनर्विलोकन के माध्यम से आवेदक प्रथम बार कोई बचाव नहीं उठा सकता है – आदेश 47 नियम 1 के घटक पूर्ण नहीं किए गए – यह सामान्य बात है कि मुकदमेबाज

अप्रत्यक्ष रूप से कुछ पाने का हकदार नहीं है, जो वह प्रत्यक्ष रूप से प्राप्त नहीं कर सकता – आवेदन खारिज।

***B. Civil Procedure Code (5 of 1908), Order 47 Rule 1 – Review Scope & Jurisdiction* – Held – Review cannot be entertained against which an appeal is pending – Review is not entertainable when during the pendency of or prior to filing of review petition, the appellate Court upheld the order and order under review stood merged in order of appellate Court.**

ख. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 47 नियम 1 – पुनर्विलोकन व्याप्ति एवं अधिकारिता – अभिनिर्धारित – पुनर्विलोकन पर विचार नहीं किया जा सकता है जिसके विरूद्ध अपील लंबित है – पुनर्विलोकन विचार योग्य नहीं है जब पुनर्विलोकन याचिका के लंबित रहने के दौरान या उसके प्रस्तुतिकरण के पूर्व, अपीली न्यायालय ने आदेश को कायम रखा तथा पुनर्विलोकन के अंतर्गत आदेश, अपीली न्यायालय के आदेश में विलय हो गया।

Cases referred:

(2000) 6 SCC 359, (2006) 8 SCC 686, (1987) 1 SCC 378, (2018) 9 SCC 100, AIR 1964 SC 1372, AIR 1971 Bom 45, ILR (1995) II Delhi 649, (1986) 1 SCC 100, AIR 1988 Madras 248.

R.N. Singh with *Sourabh Makhija* and *Vijendra Singh Choudhary*, for the applicant.

K.C. Ghildiyal with *R.K. Pandey*, for the private non-applicant.

Short Note

****(8)***

Before Mr. Justice Vivek Agarwal

WP No. 8134/2012 (Jabalpur) decided on 28 September, 2022

HAR DAYAL BHAGAT (DEAD) THR. LRs. BIHARI DAS & ors. …Petitioners

Vs.

STATE OF M.P. & ors. …Respondents

***A. Displaced Persons Claims and other Laws Repeal Act (38 of 2005) – Applicability* – Held – Vide repeal Act of 2005, the "Displaced Persons (Compensation and Rehabilitation) Act 1954" has been repealed – Repeal Act 2005 has no saving clause – In 2008, Authority was not competent to make allotment of land to petitioner under provisions of 1954 Act/repealed**

Act – Interest of petitioner cannot be protected – Allotment rightly cancelled – Petition dismissed.

क. विस्थापित व्यक्ति दावे और अन्य विधियां निरसन अधिनियम (2005 का 38) – प्रयोज्यता – अभिनिर्धारित – 2005 के निरसित अधिनियम द्वारा, विस्थापित व्यक्ति (प्रतिकर और पुनर्वास) अधिनियम, 1954 निरसित किया गया – निरसित अधिनियम 2005 में कोई व्यावृत्ति नहीं है – 2008 में, प्राधिकारी 1954 अधिनियम/निरसित अधिनियम के उपबंधों के अंतर्गत याची को भूमि का आबंटन करने हेतु सक्षम नहीं था – याची के हित का संरक्षण नहीं किया जा सकता – आबंटन उचित रूप से निरस्त – याचिका खारिज।

***B. General Clauses Act (10 of 1897) – Effect of Repeal* – Discussed & explained.**

ख. साधारण खण्ड अधिनियम (1897 का 10) – निरसन का प्रभाव – विवेचित तथा स्पष्ट किया गया।

Cases referred:

AIR 1951 SC 128, AIR 2007 SC 232.

None, for the petitioners.
Piyush Bhatnagar, P.L. for the respondents.

Short Note
****(9)***
Before Mr. Justice Sanjay Dwivedi

CRR No. 179/2022 (Jabalpur) decided on 17 August, 2022

HARSH MEENA …Applicant
Vs.
STATE OF M.P. & anr. …Non-applicants

***A. Penal Code (45 of 1860), Section 302 and Criminal Procedure Code, 1973 (2 of 1974), Section 227 & 228 – Framing of Charge* – Injured died after 13 days of incident dues to septicaemia, who initially suffered simple injury – Charge u/S 302 framed – Challenge to – Held – It is very difficult to form an opinion even by trial Court at the time of framing of charge that cause of death was not directly related with the injury – If charge framed u/S 302 on basis of opinion given in MLC, same can be altered only after examination of doctor who gave such opinion.**

क. दण्ड संहिता (1860 का 45), धारा 302 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 227 व 228 – आरोप विरचित किया जाना – घटना के 13 दिन बाद आहत की सेप्टीसीमिया से मृत्यु हो गई, जिसे शुरूआत में साधारण चोट कारित हुई थी – धारा 302 के अंतर्गत आरोप विरचित – को चुनौती – अभिनिर्धारित – यहां तक कि विचारण न्यायालय द्वारा भी आरोप विरचित करते समय यह राय बनाना अत्यंत कठिन है कि

मृत्यु का कारण सीधे तौर पर चोट से संबंधित नहीं था – यदि एम.एल.सी. में दी गई राय के आधार पर धारा 302 के अंतर्गत आरोप विरचित किये जाते हैं, तो उन्हें उक्त राय देने वाले डॉक्टर के परीक्षण के पश्चात् ही परिवर्तित किया जा सकता है।

***B. Criminal Procedure Code, 1973 (2 of 1974), Section 227 & 228 – Framing of Charge – Scope of Interference* – Held – At the stage of framing of charge, trial Court cannot indulge in critical evolution of evidence that can be done at the time of final appreciation of evidence after conclusion of trial – No patent or material irregularity in impugned order – Revision dismissed.**

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 227 व 228 – आरोप विरचित किया जाना – हस्तक्षेप का विस्तार – अभिनिर्धारित – आरोप विरचित करने के प्रक्रम पर, विचारण न्यायालय साक्ष्य का सूक्ष्म विकास नहीं कर सकता जो कि विचारण की समाप्ति के पश्चात् साक्ष्य के अंतिम मूल्यांकन के समय किया जा सकता है – आक्षेपित आदेश में कोई भी प्रत्यक्ष या तात्विक अनियमितता नहीं – पुनरीक्षण खारिज।

Cases referred:

(2010) 9 SCC 368, (2019) 7 SCC 515, (2009) 16 SCC 316.

Sankalp Kochar and *Bhavil Pandey*, for the applicant.
Prakash Gupta, P.L. for the non-applicants.

Short Note
****(10)***
Before Mr. Justice Dwarka Dhish Bansal
FA No. 574/1997 (Jabalpur) decided on 16 August, 2022

KAPOOR CHAND (DEAD) THR. LRs. & ors. …Appellants
Vs.
LAXMI CHAND (DEAD) THR. LRs. & ors. …Respondents

***A. Civil Procedure Code (5 of 1908), Section 100 & Order 7 Rule 7 – Scope & Jurisdiction* – Held – Plaintiff as well as defendant, who are real brothers could not establish their exclusive possession over property – Disputed property falls to the share of both of them equally – Even in absence of relief of declaration of 1/2 share and partition, this Court can pass such decree in their favour.**

क. सिविल प्रक्रिया संहिता (1908 का 5), धारा 100 व आदेश 7 नियम 7 – विस्तार एवं अधिकारिता – अभिनिर्धारित – वादी के साथ–साथ प्रतिवादी, जो सगे भाई हैं, संपत्ति पर उनका अनन्य कब्जा स्थापित नहीं कर सके – विवादग्रस्त संपत्ति उन दोनों के हिस्से में बराबर आती है – यहां तक कि 1/2 हिस्से की घोषणा एवं विभाजन के अनुतोष के अभाव में भी, यह न्यायालय उनके पक्ष में ऐसी डिक्री पारित कर सकता है।

B. ***Succession Act, Indian (39 of 1925), Section 63 and Evidence Act (1 of 1872), Section 68 – Will – Proof*** **– Held – None of the 2 attesting witnesses or even the scribe has been examined by defendants to prove the 'Will', which as per Section 63 of Indian Succession Act and Section 68 of Evidence Act was necessary – Will cannot be said to be a genuine document.**

ख. उत्तराधिकार अधिनियम, भारतीय (1925 का 39), धारा 63 एवं साक्ष्य अधिनियम (1872 का 1), धारा 68 – वसीयत – सबूत – अभिनिर्धारित – दोनों अनुप्रमाणन साक्षीगण में से कोई भी नहीं अथवा यहां तक कि वसीयत लेखक का भी परीक्षण प्रतिवादीगण द्वारा 'वसीयत' को सिद्ध करने के लिए नहीं किया गया जो कि भारतीय उत्तराधिकार अधिनियम की धारा 63 एवं साक्ष्य अधिनियम की धारा 68 के अनुसार आवश्यक था – वसीयत को वास्तविक दस्तावेज नहीं कहा जा सकता।

Cases referred:

AIR 2002 SC 136, AIR 2001 MP 185, 1987 (2) Kar.L.J. 369, 1979 MPLJ 150 (DB), AIR 1952 Nagpur 202.

Imtiyaz Husain with *Mohd. Sajid* and *Ravikant Patel,* for the appellants.

Short Note
****(11)(DB)***
Before Mr. Justice Sujoy Paul &
Mr. Justice Prakash Chandra Gupta
FA No. 445/2020 (Jabalpur) decided on 9 July, 2022

LEE ANNE ELTON …Appellant

Vs.

ARUNODAY SINGH …Respondent

A. ***Special Marriage Act (43 of 1954), Section 27 – Ex-parte Divorce Decree – Pleadings & Proof*** **– Held – Court below appreciated the unrebutted pleadings and evidence led by husband, on correct and permissible parameters and rightly concluded that husband could make out a strong case of "cruelty" against appellant wife – Decree of divorce rightly passed – Appeal dismissed.**

क. विशेष विवाह अधिनियम (1954 का 43), धारा 27 – एकपक्षीय विवाह विच्छेद डिक्री – अभिवचन एवं प्रमाण – अभिनिर्धारित – अधीनस्थ न्यायालय ने पति द्वारा प्रस्तुत अखंडित अभिवचन एवं साक्ष्य का मूल्यांकन सही एवं अनुज्ञेय मापदण्डों पर किया एवं सही निष्कर्ष निकाला कि पति, अपीलार्थी पत्नी के विरूद्ध ''क्रूरता'' का एक मजबूत प्रकरण बना सकता था – विवाह–विच्छेद की डिक्री सही पारित – अपील खारिज।

B. ***Special Marriage Act (43 of 1954), Section 27 – Ex-parte Divorce Decree – Opportunity of Hearing*** **– Held – E-mail by wife shows that she was fully aware of divorce petition filed by husband, but she did not file written statement before Family Court, even did not participate in mediation proceedings before Supreme Court despite that mediation was directed in a petition filed by herself – In her e-mail, she stated that she is neither interested in marriage nor in her husband and intends to dissolve the marriage – It also shows that she was in contact with a lawyer – It cannot be said that she could not contest the matter for want of opportunity before Family Court.**

ख. विशेष विवाह अधिनियम (1954 का 43), धारा 27 – एकपक्षीय विवाह विच्छेद डिक्री – सुनवाई का अवसर – अभिनिर्धारित – पत्नी द्वारा भेजा गया ई–मेल यह दर्शाता है कि वह पति द्वारा प्रस्तुत की गई विवाह–विच्छेद याचिका से पूर्ण रूप से अवगत थी, परंतु उसने कुटुंब न्यायालय के समक्ष जवाबदावा प्रस्तुत नहीं किया, यहां तक कि सर्वोच्च न्यायालय के समक्ष मध्यस्थता कार्यवाही में भी भाग नहीं लिया इसके बावजूद कि उसके द्वारा प्रस्तुत की गई याचिका में मध्यस्थता के लिए निर्देश दिया गया था – अपने ई–मेल में उसने कहा कि न तो उसकी विवाह में अभिरूचि है और न ही अपने पति में एवं वह विवाह विघटित करने का आशय रखती है – यह ये भी दर्शाता है कि वह किसी अभिभाषक के संपर्क में थी – यह नहीं कहा जा सकता कि वह मामले को कुटुंब न्यायालय के समक्ष अवसर के अभाव में नहीं लड़ सकी।

C. ***Special Marriage Act (43 of 1954), Section 40B(2) & (3) – Speedy Trial*** **– Held – Provision u/S 40B makes it obligatory to conduct the proceeding on day-to-day basis until its conclusion – In the teeth of Section 40B, the proceedings cannot be jettisoned merely because it were conducted with quite promptitude.**

ग. विशेष विवाह अधिनियम (1954 का 43), धारा 40B(2) व (3) – शीघ्र विचारण – अभिनिर्धारित – धारा 40B के अंतर्गत उपबंध, जब तक कार्यवाही पूरी न हो तब तक कार्यवाही दिन–प्रतिदिन के आधार पर करने को बाध्यकारी बनाता है – धारा 40B के प्रतिकूल, कार्यवाही को मात्र इस कारण से ठुकराया नहीं जा सकता कि वह पूर्णतया तत्परता से की गई।

D. ***Special Marriage Act (43 of 1954), Section 39 and Civil Procedure Code (5 of 1908), Section 96(2) – Ex-parte Proceeding – Judicial Review*** **– Held – The order of proceeding *ex-parte* cannot be a matter of judicial review in this first appeal – Appellant can only attack the findings given on merits or on the aspect of jurisdiction of Court.**

घ. विशेष विवाह अधिनियम (1954 का 43), धारा 39 एवं सिविल प्रक्रिया संहिता (1908 का 5), धारा 96(2) – एकपक्षीय कार्यवाही – न्यायिक पुनर्विलोकन – अभिनिर्धारित – एकपक्षीय कार्यवाही का आदेश इस प्रथम अपील में न्यायिक पुनर्विलोकन का विषय नहीं हो सकता है – अपीलार्थी केवल गुणागुण के आधार पर अथवा न्यायालय की अधिकारिता के पहलू पर दिए गए निष्कर्षों पर प्रहार कर सकता है।

The judgment of the Court was delivered by : **SUJOY PAUL, J.**

Cases referred:

AIR 2013 SCC 2239, 1966 MPLJ 11 507, (2005) 1 SCC 787, AIR 1978 MP 39, (2007) 4 SCC 511, (2016) 9 SCC 455, (2017) 9 SCC 632, (2005) 1 SCC 787.

Aditya Sanghi with *Nain Jyoti Noriya*, for the appellant.

Kishore Shrivastava with *Rashid Suhail Siddiqui* and *Aditi Shrivastava Oberoy*, for the respondent.

Short Note
****(12)(DB)***
Before Mr. Justice Vivek Rusia &
Mr. Justice Amar Nath (Kesharwani)
WA No. 861/2022 (Indore) decided on 18 August, 2022

M.P. PASHCHIM KSHETRA VIDYUT VITRAN CO. LTD. (MPPKVVCL) & ors. …Appellants

Vs.

MARAL OVERSEAS LTD. …Respondent

***A. Electricity Act (36 of 2003), Section 42(5), Electricity Supply Code, M.P., 2013, Clause 11.2, 11.13 & 11.15 and Constitution – Article 226 – Maintainability of Writ Petition* – Held – M.P. Electricity Regulatory Commission is a special authority constituted under 2003 Act as well as the M.P. Electricity Supply Code 2013 to decide the dispute between consumer and the licensee/Company under the Code – Writ Petition dismissed being not maintainable – Appeal allowed.**

क. विद्युत अधिनियम (2003 का 36), धारा 42(5), विद्युत प्रदाय संहिता, म.प्र., 2013, खंड 11.2, 11.13 व 11.15 एवं संविधान – अनुच्छेद 226 – रिट याचिका की पोषणीयता – अभिनिर्धारित – म.प्र. विद्युत विनियामक आयोग 2003 के अधिनियम के साथ–साथ म.प्र. विद्युत प्रदाय संहिता 2013 के अंतर्गत गठित एक विशेष प्राधिकरण है, जो

संहिता के अंतर्गत उपभोक्ता एवं लाईसेंसी / कंपनी के मध्य विवादों का विनिश्चय करता है – रिट याचिका पोषणीय न होने से खारिज की जाती है – अपील मंजूर।

***B. Electricity Supply Code, M.P., 2013, Clause 11.15 and Constitution – Article 226 – Scope & Jurisdiction* – Held – Clause 11.15 is only in respect of territorial jurisdiction of High Court to entertain all disputes arising out of 2013 Code or the agreement made thereunder within jurisdiction of High Court – Expression "*all the proceedings arising out of the Code or agreement*" means all proceedings undertaken by Electricity Regulatory Commission.**

ख. विद्युत प्रदाय संहिता, म.प्र., 2013, खंड 11.15 एवं संविधान – अनुच्छेद 226 – विस्तार एवं अधिकारिता – अभिनिर्धारित – खंड 11.15 केवल, उच्च न्यायालय की अधिकारिता के अंदर सभी विवाद जो 2013 की संहिता से या उसके अंतर्गत किए गए अनुबंध से उत्पन्न हो रहे हों, को ग्रहण करने की उच्च न्यायालय की क्षेत्रीय अधिकारिता के संबंध में है – पद *''संहिता अथवा अनुबंध से उत्पन्न सभी कार्यवाही''* का अर्थ है विद्युत विनियामक आयोग द्वारा की गई सभी कार्यवाही।

The order of the Court was passed by : **VIVEK RUSIA, J.**

Case referred:

2021 SCC OnLine SC 801.

Abhishek Tugnawat, for the appellants.
Sumeet Samvatsar, for the respondent.

Short Note
****(13)(DB)***
Before Mr. Justice Vivek Rusia &
Mr. Justice Amar Nath (Kesharwani)
MCRC No. 61045/2021 (Indore) decided on 8 September, 2022

MAHESH KHANDELWAL … Applicant

Vs.

STATE OF M.P. & ors. …Non-applicants

***Criminal Procedure Code, 1973 (2 of 1974), Section 378(4) – Leave to Appeal – Locus* – Held – It was not the applicant but his wife who was the victim in the case – Applicant only made a written complaint to police station – Applicant's wife has not filed this case for leave to appeal – Applicant has no locus and is not entitled to prosecute the appeal – Application dismissed.**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 378(4) – अपील के लिए अनुमति – अधिकार – अभिनिर्धारित – यह आवेदक नहीं परंतु उसकी पत्नी थी जो प्रकरण में पीड़ित थी – आवेदक ने मात्र पुलिस थाने में एक लिखित शिकायत की थी – आवेदक की पत्नी ने यह प्रकरण अपील की अनुमति के लिए प्रस्तुत नहीं किया है – आवेदक का कोई अधिकार नहीं है तथा अपील अभियोजित करने का हकदार नहीं है – आवेदन खारिज।

The order of the Court was passed by : **AMAR NATH (KESHARWANI), J.**

Cases referred:

(2004) 5 Supreme Court Cases 573, 2013 (Criminal Law Journal) 4618 Supreme Court, (2015) 1 SCC 323.

Ashok Kumar Sethi with *Harish Joshi*, for the applicant.
Mukesh Kumawat, for the non-applicant No. 1/State.

Short Note
****(14)(DB)***
Before Mr. Justice Sujoy Paul &
Mr. Justice Prakash Chandra Gupta
WP No. 2285/2022 (Jabalpur) decided on 22 June, 2022

MANISH SHARMA …Petitioner

Vs.

BANK OF INDIA & anr. …Respondents

***A. Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, (54 of 2002), Section 13 – Repayment & Auction* – Held – As per DRAT's direction, petitioner deposited entire amount within 15 days although not deposited in 15 equal installments as directed – What was material and essential was repayment and not number of installments – Such irregularity will not bestow any right to Bank to auction the property – To this extent, DRAT took a hyper-technical view.**

क. वित्तीय आस्तियों का प्रतिभूतिकरण और पुनर्गठन तथा प्रतिभूति हित का प्रवर्तन (SARFAESI) अधिनियम, (2002 का 54), धारा 13 – पुनर्भुगतान एवं नीलामी – अभिनिर्धारित – **DRAT** के निर्देशानुसार, याची ने 15 दिन के भीतर संपूर्ण राशि जमा कर दी, यद्यपि 15 समान किश्तों में जमा नहीं किया जैसा निर्देश था – जो तात्विक एवं आवश्यक था वह पुनर्भुगतान था न कि किश्तों की संख्या – ऐसी अनियमितता बैंक को संपत्ति की नीलामी का कोई अधिकार नहीं देगी – इस सीमा तक, **DRAT** ने एक अति–तकनीकी दृष्टिकोण अपनाया।

B. ***Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, (54 of 2002), Section 13 and Constitution – Article 226 – Legitimate Expectation*** **– Held – Bank despite repeated request did not inform petitioner about remaining amount/interest – Principle of legitimate expectation is attracted in favour of petitioner as after paying entire amount, he was entitled to get correct information regarding unpaid amount/interest and if he paid entire amount, he has a valuable legitimate expectation to get back the original deed/documents etc.**

ख. *वित्तीय आस्तियों का प्रतिभूतिकरण और पुनर्गठन तथा प्रतिभूति हित का प्रवर्तन (SARFAESI) अधिनियम, (2002 का 54), धारा 13 एवं संविधान – अनुच्छेद 226 – वैध अपेक्षा* – अभिनिर्धारित – बार–बार अनुरोध करने के बावजूद बैंक ने याची को शेष राशि/ब्याज के संबंध में सूचना नहीं दी – वैध अपेक्षा का सिद्धांत याची के पक्ष में आकर्षित होता है क्योंकि संपूर्ण राशि का भुगतान करने के पश्चात्, वह अदत्त राशि/ब्याज के संबंध में सही जानकारी प्राप्त करने का हकदार था एवं यदि उसने संपूर्ण राशि का भुगतान किया, तो उसे मूल विलेख/दस्तावेजों को वापिस प्राप्त करने की मूल्यवान विधिसम्मत प्रत्याशा होती है।

C. ***Constitution – Article 226 – Principle of Res-judicata*** **– Held – In previous round of litigation, this Court did not express any opinion on merits and directed petitioner to avail remedy of approaching the bank – Petitioner approached the bank but his efforts could not produce any result, thus he filed this petition – Principle of *res-judicata* or public policy is not attracted – Petition maintainable.**

ग. *संविधान – अनुच्छेद 226 – पूर्व न्याय का सिद्धांत* – अभिनिर्धारित – वाद के पूर्व दौर में, इस न्यायालय ने गुणागुण के आधार पर कोई राय व्यक्त नहीं की एवं याची को बैंक के समक्ष जाने के उपचार का निर्देश दिया – याची बैंक के समक्ष गया परंतु उसके प्रयासों का कोई परिणाम नहीं निकला, अतः उसने यह याचिका प्रस्तुत की – पूर्व न्याय का सिद्धांत या लोक नीति आकर्षित नहीं होती है – याचिका पोषणीय।

D. ***Constitution – Article 226 – Power of High Court*** **– Held – Article 226 gives wide powers to this Court to reach injustice wherever it is found – For this purpose, High Court can mould the reliefs to meet the peculiar and extraordinary circumstances of a peculiar case.**

घ. *संविधान – अनुच्छेद 226 – उच्च न्यायालय की शक्ति* – अभिनिर्धारित – अनुच्छेद 226 इस न्यायालय को, जहां कहीं भी अन्याय हो वहां तक पहुंचने की व्यापक

शक्तियां देता है – इस प्रयोजन के लिए, उच्च न्यायालय किसी विशेष प्रकरण की विशेष एवं असाधारण परिस्थितियों को पूरा करने के लिए अनुतोषों को ढाल सकता है।

***E. Constitution – Article 226 – Pleadings and Proof* – Held – Apex Court concluded that the facts pleaded but not denied by respondent must be treated as admitted.**

ङ. संविधान – अनुच्छेद 226 – अभिवचन एवं सबूत – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया कि ऐसे तथ्य जो अभिवचित किये गये परंतु प्रत्यर्थी द्वारा इंकार नहीं किए गए को स्वीकृत माना जाना चाहिए।

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

Cases referred:

(2018) 14 SCC 735, (2020) 11 SCC 399, (2005) 5 SCC 91, WP No. 22127/2021 decided on 21.02.2022, (2022) 2 SCC 25, (1987) 1 SCC 5, 1993 Suppl. (4) SCC 46, (2011) 1 SCC 121, (2001) 4 SCC 262, (1965) 3 SCR 536, (1995) 6 SCC 749, (2000) 8 SCC 395, (2004) 8 SCC 788, (2010) 3 SCC 571, (2013) 14 SCC 737, (2016) 1 M.P.LJ 474.

Amit Khatri, for the petitioner.
Rajesh Maindiretta, for the respondent/Bank.

Short Note
****(15)***
Before Mr. Justice Anand Pathak
WP No. 847/2022 (Gwalior) decided on 28 July, 2022

MANOJ RAJPUT …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

***A. Service Law – Termination – Opportunity of Hearing – Departmental Enquiry* – Held – After conducting preliminary enquiry, show cause notice was issued to petitioner and after affording adequate opportunity of hearing, impugned order was passed as per guidelines – Since he admitted his conduct in specific terms, thus there was no need for any detail or departmental enquiry – Principle of opportunity of hearing cannot be converted into unruly horse – Petition dismissed.**

NOTES OF CASES SECTION

क. सेवा विधि – सेवा समाप्ति – सुनवाई का अवसर – विभागीय जांच – अभिनिर्धारित – प्रारंभिक जांच संचालित करने के पश्चात्, याची को कारण बताओ नोटिस जारी किया गया एवं उचित सुनवाई का अवसर देने के पश्चात्, दिशानिर्देशानुसार आक्षेपित आदेश पारित किया गया था – चूंकि उसने अपने आचरण को विशिष्ट निबंधन में स्वीकार किया, अतः किसी विस्तृत या विभागीय जांच की आवश्यकता नहीं थी – सुनवाई के अवसर के सिद्धांत को अनियंत्रित घोड़े (निरंकुशता) में परिवर्तित नहीं किया जा सकता – याचिका खारिज।

B. Service Law – Termination – Scheme of Appointment & Guidelines **– Held – Fair or sufficient opportunity of hearing is what the scheme of appointment and relevant guidelines contemplate and visualize, not beyond that – Impugned order has to be tested on touchstone of "Prejudice".**

ख. सेवा विधि – सेवा समाप्ति – नियुक्ति की योजना एवं दिशानिर्देश – अभिनिर्धारित – सुनवाई का उचित या पर्याप्त अवसर वह है जो नियुक्ति की योजना एवं सुसंगत दिशा निर्देशों में अनुध्यात एवं कल्पित है, उसके परे नहीं – आक्षेपित आदेश का ''पूर्वाग्रह' की कसौटी पर परीक्षण किया जाना चाहिए।

C. Service Law – Termination – Principle of Natural Justice **– Held – Concept of principle of natural justice or *audi alterum partem* doctrine although is required to be complied with but at the same time it has some exceptions.**

ग. सेवा विधि – सेवा समाप्ति – नैसर्गिक न्याय का सिद्धांत – अभिनिर्धारित – नैसर्गिक न्याय का सिद्धांत या दूसरे पक्ष को सुने जाने के सिद्धांत की अवधारणा का यद्यपि पालन किये जाने की आवश्यकता है परंतु साथ ही इसके कुछ अपवाद भी हैं।

Cases referred:

2001 (3) MPHT 397, ILR 2018 M.P. 660, (2007) 13 SCC 352, (2008) 9 SCC 31, (2009) 13 SCC 600, (2010) 11 SCC 278, (2010) 13 SCC 255, (2015) 8 SCC 519.

Sankalp Sharma, for the petitioner.
Devendra Chaubey, G.A. for the respondents.

NOTES OF CASES SECTION

Short Note
****(16)(DB)***
Before Mr. Justice Vivek Rusia &
Mr. Justice Amar Nath (Kesharwani)
WP No. 18376/2022 (Indore) decided on 1 September, 2022

MAX CHEMICALS INDIA (M/S) …Petitioner

Vs.

MINISTRY OF COMMERCE & INDUSTRY & ors. …Respondents

Constitution – Article 226 – Tender – Scope of Interference **– Petitioner's tender rejected on technical evaluation by Committee – Held – High Court in a writ petition under Article 226 of Constitution cannot act as an appellate authority to examine the decision taken by the experts – Petition dismissed.**

संविधान – अनुच्छेद 226 – निविदा – हस्तक्षेप की व्याप्ति – समिति द्वारा तकनीकी मूल्यांकन पर याची की निविदा खारिज कर दी गई – अभिनिर्धारित – उच्च न्यायालय, संविधान के अनुच्छेद 226 के अंतर्गत एक रिट याचिका में विशेषज्ञों द्वारा लिए गए निर्णय की जांच करने के लिए अपीलीय प्राधिकारी के रूप में कार्य नहीं कर सकता – याचिका खारिज।

The order of the Court was passed by : **VIVEK RUSIA, J.**

Case referred:

(2022) 6 SCC 127.

Vinay Saraf assisted by *Rahul Maheshwari*, for the petitioner.
Bhaskar Agrawal, G.A. for the respondent No. 1.
Ajinkya Dagaonkar, for the respondent No. 2 & 3.
Pratyush Tripathi, for the respondent No. 4 & 5.

NOTES OF CASES SECTION

Short Note
****(17)***
Before Mr. Justice G.S. Ahluwalia
WP No. 12538/2022 (Gwalior) decided on 30 August, 2022

PARAMJEET SINGH CHABDA …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

***Constitution – Article 226 – Territorial Jurisdiction – Doctrine of "forum conveniens"* – Held – Merely because this Court has issued notice would not mean that Court cannot refuse to exercise its jurisdiction by applying doctrine of "*forum conveniens*" – Dispute relates to plying of bus in Dhar – Indore route which falls in Indore jurisdiction – Exercise of jurisdiction declined with liberty to approach Indore bench, if so advised – Petition disposed.**

संविधान – अनुच्छेद 226 – क्षेत्रीय अधिकारिता – 'सुविधाजनक फोरम' का सिद्धांत – अभिनिर्धारित – मात्र इसलिए कि इस न्यायालय ने नोटिस जारी किया है, इसका अर्थ यह नहीं होगा कि न्यायालय *'सुविधाजनक फोरम'* का सिद्धांत लागू करते हुए अपनी अधिकारिता का प्रयोग करने से इंकार नहीं कर सकता – विवाद धार–इंदौर मार्ग में बस के संचालन से संबंधित है जो कि इंदौर की अधिकारिता के अंतर्गत आता है – यदि सलाह दी जाती है तो इंदौर खंडपीठ के समक्ष जाने की स्वतंत्रता के साथ अधिकारिता का प्रयोग करने से इंकार किया – याचिका निराकृत।

Cases referred:

(2004) 6 SCC 254, (2008) 12 SCC 675, WP No. 16454/2022 decided on 19.07.2022.

N.K. Gupta with *M.S. Jadon,* for the petitioner.
Sushant Tiwari, G.A. for the State.
Himanshu Sharma, for the respondent No. 3.

NOTES OF CASES SECTION

Short Note
****(18)***
Before Mr. Justice Satyendra Kumar Singh
MCRC No. 41296/2021 (Indore) decided on 23 August, 2022

RAKESH & ors. …Applicants

Vs.

ISMAIL & ors. …Non-applicants

***Criminal Procedure Code, 1973 (2 of 1974), Section 200 – Cognizance – Jurisdiction* – Magistrate took cognizance and committed the case to Sessions Court – Private complaint filed for impleading other persons as accused – Held – Process of summoning other persons involved in crime is only a part of process of taking cognizance – If complaint u/S 200 Cr.P.C. is filed for impleading other persons, then certainly it can be considered by the Court of JMFC, who initially took cognizance in the matter as cognizance of same offence cannot be deemed to be taken a second time by Sessions Court.**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 200 – संज्ञान – अधिकारिता – मजिस्ट्रेट ने संज्ञान लिया एवं प्रकरण सत्र न्यायालय को उपार्पित किया – अन्य व्यक्तियों को अभियुक्त के रूप में अभियोजित करने के लिए निजी परिवाद प्रस्तुत – अभिनिर्धारित – अपराध में संलिप्त अन्य व्यक्तियों को समन करने की प्रक्रिया संज्ञान लेने की प्रक्रिया का एक हिस्सा मात्र है – यदि दं.प्र.सं. की धारा 200 के अंतर्गत परिवाद अन्य व्यक्तियों को पक्षकार बनाने के लिए प्रस्तुत किया जाता है, तब निश्चित रूप से इस पर न्यायिक दण्डाधिकारी प्रथम श्रेणी द्वारा विचार किया जा सकता है, जिसने आरंभ में इस मामले में संज्ञान लिया था क्योंकि एक ही अपराध का संज्ञान सत्र न्यायालय द्वारा दूसरी बार लिया गया नहीं माना जा सकता है।

Cases referred:

(2014) 3 SCC 306, (2016) 6 SCC 680.

Pourush Ranka, for the applicants.
R.S. Bais, G.A. for the non-applicant No. 4/State.

NOTES OF CASES SECTION

Short Note
****(19)(DB)***
Before Mr. Justice Sujoy Paul &
Mr. Justice Dwarka Dhish Bansal

CRA No. 348/2012 (Jabalpur) decided on 13 June, 2022

SULABH JAIN …Appellant

Vs.

STATE OF M.P. …Respondent

***A. Penal Code (45 of 1860), Section 302 – Statement u/S 161 Cr.P.C. - Delay* – Held – Apex Court concluded that delay in examination of prosecution witness by police *ipso facto,* may not be a ground to create doubt on prosecution case – In instant case, defence was obliged to ask a specific question regarding cause of delay – No cross-examination was done in this respect – Thus, statement of witness cannot be discarded on such grounds.**

क. दण्ड संहिता (1860 का 45), धारा 302 – दं.प्र.सं. की धारा 161 के अंतर्गत कथन – विलंब – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया कि वास्तव में पुलिस द्वारा अभियोजन साक्षी के परीक्षण में विलंब, अभियोजन के मामले पर शंका उत्पन्न करने का आधार नहीं हो सकता – प्रस्तुत प्रकरण में, बचाव पक्ष विलंब के कारण के संबंध में विशिष्ट प्रश्न पूछने के लिए बाध्य था – इस संबंध में कोई प्रति–परीक्षण नहीं किया गया – इस प्रकार, साक्षी के कथन को उक्त आधारों पर अस्वीकार नहीं किया जा सकता है।

***B. Penal Code (45 of 1860), Section 302 – Identification of Accused* – Witness deposed that he saw appellant in police station on next day of incident whereas appellant was arrested after two days – Held – It is not expected from witness to remember with exactitude as to after how many days accused was arrested, moreso when difference is of any one day – Such hypertechnical argument is rejected.**

ख. दण्ड संहिता (1860 का 45), धारा 302 – अभियुक्त की पहचान – साक्षी ने अभिसाक्ष्य दिया कि उसने अपीलार्थी को घटना के अगले दिन थाने में देखा था जबकि अपीलार्थी को दो दिन के पश्चात् गिरफ्तार किया गया था – अभिनिर्धारित – साक्षी से यह अपेक्षा नहीं की जाती है कि वह सटीकता से याद रखे कि कितने दिनों के पश्चात् अभियुक्त को गिरफ्तार किया गया था, विशेषकर जब अंतर किसी एक दिन का हो – ऐसा अति तकनीकी तर्क अस्वीकार है।

***C. Penal Code (45 of 1860), Section 302 – Use of Firearm – Discrepancy* – Held – When clear evidence is available regarding use of firearm, recovery of bullet from body of deceased coupled with other**

direct/circumstantial evidence, use of firearm cannot be doubted merely because there is some discrepancy regarding distance from which firearm was used – Once it is proved that deceased died because of gun shot injury caused by bullet, variation about distance is immaterial.

ग. दण्ड संहिता (1860 का 45), धारा 302 – अग्न्यायुध का प्रयोग – विसंगति – अभिनिर्धारित – मृतक के शरीर से गोली की बरामदगी को अन्य प्रत्यक्ष / परिस्थितिजन्य साक्ष्य के साथ जोड़कर देखे जाने पर जब अग्न्यायुध के उपयोग के संबंध में स्पष्ट साक्ष्य उपलब्ध है, अग्न्यायुध के उपयोग पर मात्र इसलिए संदेह नहीं किया जा सकता कि जिस दूरी से अग्न्यायुध का उपयोग किया गया था उसके संबंध में कुछ विसंगतियां हैं – एक बार यह साबित हो जाता है कि मृतक की मृत्यु बंदूक की गोली द्वारा कारित चोट के कारण हुई है, तो दूरी के संबंध में भिन्नता महत्वहीन है।

***D. Penal Code (45 of 1860), Section 302 – Recovery of Mobile Phone* – Held – If a young woman is murdered on a busy street, person intending to help her and police will certainly try to inform her family members by using her mobile phone – If mobile phone is used after incident, it will not create any suspicion on prosecution story regarding its recovery.**

घ. दण्ड संहिता (1860 का 45), धारा 302 – मोबाईल फोन की बरामदगी – अभिनिर्धारित – यदि किसी व्यस्त सड़क में किसी युवती की हत्या कर दी जाती है, उसकी सहायता करने का आशय रखने वाले व्यक्ति एवं पुलिस निश्चित रूप से उसके मोबाईल फोन का उपयोग कर उसके परिवार के सदस्यों को सूचित करने का प्रयास करेंगे – यदि मोबाईल फोन का उपयोग घटना के पश्चात् किया गया है, इससे उसकी बरामदगी के संबंध में अभियोजन की कहानी पर कोई संदेह उत्पन्न नहीं होगा।

***E. Penal Code (45 of 1860), Section 302 – Recovery of Weapon* – In recovery memo it is not mentioned that accused digged the ground to take out weapon – Held – Non-mentioning of such exercise of digging out in recovery memo is of no significance – Recovery proved by leading cogent evidence – It is quality of evidence which matters and not the quantity of statements/ witnesses.**

ङ. दण्ड संहिता (1860 का 45), धारा 302 – हथियार की बरामदगी – बरामदगी ज्ञापन में यह उल्लेख नहीं है कि अभियुक्त ने हथियार निकालने के लिए जमीन खोदी थी – अभिनिर्धारित – बरामदगी ज्ञापन में खुदाई करने के इस प्रयोग का उल्लेख न किया जाना कोई महत्व नहीं रखता है – तर्कपूर्ण साक्ष्य प्रस्तुत करते हुए बरामदगी साबित की गई – यह साक्ष्य की गुणवत्ता है जो महत्व रखती है और न कि कथनों / साक्षीगण की संख्या।

F. Penal Code (45 of 1860), Section 302 – Spot Map – Contents – **Held – Witness deposed that in place of incident, blood stains were available and an empty cartridge was found – If factum of blood stains in such specifically mentioned in spot map, story of prosecution will not become vulnerable.**

च. दण्ड संहिता (1860 का 45), धारा 302 – नक्शा मौका – अंतर्वस्तु – अभिनिर्धारित – साक्षी ने अभिसाक्ष्य दिया कि घटनास्थल पर रक्त के धब्बे उपलब्ध थे एवं एक खाली कारतूस पाया गया था – यदि रक्त के धब्बों का तथ्य नक्शा मौका में विशिष्ट रूप से उल्लेखित नहीं है, अभियोजन की कहानी भेद्य नहीं होगी।

G. Penal Code (45 of 1860), Section 302 and Criminal Procedure Code, 1973 (2 of 1974), Section 293 – FSL Report – Credibility – **Held – Fact that FSL Officer did not enter the witness box will not create any dent in prosecution story – No efforts made by defence to requisition/summon FSL expert – In absence thereto, in the teeth of Section 293 Cr.P.C, trial Court committed no error of law in considering expert report.**

छ. दण्ड संहिता (1860 का 45), धारा 302 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 293 – एफ.एस.एल. प्रतिवेदन – विश्वसनीयता – अभिनिर्धारित – यह तथ्य कि एफ.एस.एल. अधिकारी ने साक्षी कठघरे में प्रवेश नहीं किया, अभियोजन कहानी में कोई प्रतिकूल प्रभाव उत्पन्न नहीं करेगा – बचाव पक्ष द्वारा एफ.एस.एल. विशेषज्ञ की मांग करने/समन करने का कोई प्रयास नही किया गया – इसके अभाव में, दं.प्र.सं. की धारा 293 के बावजूद, विचारण न्यायालय ने विशेषज्ञ प्रतिवेदन पर विचार करने में विधि की कोई भूल कारित नहीं की।

H. Criminal Practice – "Related" & "Interested" Witness – **Held – "Related" is not equivalent to "interested" – Witness may be called "interested" only when he/she derives some benefit from result of a litigation, in decree of civil suit or in seeing accused person punished – A witness who is natural one and is the possible eye-witness in circumstances of a case cannot be said to be "interested".**

ज. दाण्डिक पद्धति – ''संबंधित'' एवं ''हितबद्ध'' साक्षी – अभिनिर्धारित – ''संबंधित'', ''हितबद्ध'' के समतुल्य नहीं है – साक्षी को ''हितबद्ध'' तभी कहा जा सकता है जब वह किसी मुकदमें के परिणाम से व्यवहार वाद की डिक्री में या अभियुक्त को सजा प्राप्त करते हुए देखने में कोई लाभ प्राप्त करता है – एक साक्षी को जो कि वास्तविक है एवं किसी प्रकरण की परिस्थितियों में संभावित चक्षुदर्शी साक्षी है ''हितबद्ध'' नहीं कहा जा सकता।

NOTES OF CASES SECTION

***I. Criminal Practice – FIR, Panchayatnama & Merg Intimation – Contents* – Held – If name of appellant is not mentioned in the said intimation, it will not make the said document and statement of its maker as false or fabricated – FIR, *panchayatnama* and *merg* intimation etc. are not encyclopedias.**

झ दाण्डिक पद्धति – प्रथम सूचना रिपोर्ट, पंचायतनामा एवं मर्ग सूचना – अंतर्वस्तु – अभिनिर्धारित – यदि अपीलार्थी का नाम उक्त सूचना में उल्लेखित नहीं है तो वह उक्त दस्तावेज एवं उसको बनाने वाले व्यक्ति के कथन को झूठा एवं मनगढंत नहीं बनाएगा – प्रथम सूचना रिपोर्ट, पंचायतनामा एवं मर्ग सूचना इत्यादि विश्वकोष नहीं है।

The judgment of the Court was delivered by : **SUJOY PAUL, J.**

Cases referred:

(1971) 3 SCC 192, (1976) 4 SCC 288, (1978) 4 SCC 371, (2016) 16 SCC 418, (2004) 9 SCC 310, 2016 Legal Eagle (M.P.) 1142, (1994) 4 SCC 726, 2017 Legal Eagle (M.P.) 116, 2017 Legal Eagle (M.P.) 435, (1975) 1 SCC 797, (1997) 10 SCC 675, 2014 (1) JLJ 86, AIR 1971 SC 1865, 2018 Supreme (Gauhati) 43, (2014) 3 SCC 412, (2011) 3 SCC 306, AIR 1984 SC 1622, (1973) 2 SCC 444, (2002) 7 SCC 334, 2006 CrLJ 316, (1981) 2 SCC 752, (2006) 4 SCC 512, (2008) 12 SCC 173, (2008) 16 SCC 73, (2008) 16 SCC 529, (2012) 13 SCC 213, (2018) 5 SCC 435, (2019) 15 SCC 344, (2019) 19 SCC 567, I.L.R. 2019 M.P. 2098, AIR 2007 SC 2786, (1981) 2 SCC 300, AIR 1991 SC 31, AIR 1975 SC 1252, 2005 (4) M.P.H.T. 62, (1964) 4 SCR 521, (1973) 3 SCC 50, 1990, Supp SCC 717, 1992 SCC OnLine Del 320, (2002) 1 MPLJ 52, AIR 1955 SC 807, (1986) 3 SCC 637, (1992) 3 SCC 43, (1992) 3 SCC 106, 1994 CriLJ 3562, (1998) 9 SCC 238, (2013) 12 SCC 236, (2005) 12 SCC 591.

Anvesh Jain and *B.K. Upadhyay*, for the appellant.
Pramod Thakre, G.A. for the respondent.

NOTES OF CASES SECTION

Short Note
****(20)***
Before Mr. Justice G.S. Ahluwalia
WP No. 18516/2022 (Gwalior) decided on 25 August, 2022

SURAJ SINGH DHAKAD …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

A. Kanisht Sewa (Sanyukt Aharta) Pariksha Niyam, M.P., 2013, Rule 13 & 14 – Waiting List – Executive Direction – Scope **– Held – Rules do not provide for preparation of waiting list, but government by executive letter made provision for it – It cannot be said that executive instructions have supplemented the Rule 2013 but it amounts to supplanting Rule 2013 – However, life of waiting list is one year which is also elapsed – In absence of any statutory provision, Court cannot direct to prepare a waiting list – Petition dismissed.**

क. कनिष्ठ सेवा (संयुक्त अर्हता) परीक्षा नियम, म.प्र., 2013, नियम 13 व 14 – प्रतीक्षा सूची – कार्यकारी अनुदेश – विस्तार – अभिनिर्धारित – नियमों में प्रतीक्षा सूची तैयार करने का प्रावधान नहीं है, परंतु सरकार ने कार्यकारी पत्र द्वारा इसके लिए प्रावधान बनाया है – यह नहीं कहा जा सकता कि कार्यकारी अनुदेश, नियम 2013 की अनुपूर्ति करते हैं परंतु यह नियम 2013 का स्थान लेने की कोटि में आता है – तथापि प्रतीक्षा सूची की अवधि एक वर्ष है जो बीत भी चुकी है – किसी भी कानूनी प्रावधान के अभाव में, न्यायालय प्रतीक्षा सूची बनाने के लिए निर्देश नहीं दे सकता – याचिका खारिज।

B. Service Law – Appointment **– Held – Even a selected candidate has no vested right to claim order of appointment.**

ख. सेवा विधि – नियुक्ति – अभिनिर्धारित – यहां तक कि एक चयनित अभ्यर्थी को भी नियुक्ति आदेश का दावा करने का कोई निहित अधिकार नहीं है।

C. Interpretation of Statutes – Executive Instructions – Scope **– Held – Executive instructions cannot amend or supersede statutory rules or add something therein – Administrative instructions does not have any force of law – Apex Court observed that if there is any conflict between executive instruction and Rules framed under proviso to Article 309 of Constitution, Rules will prevail, similarly if there is conflict in Rules framed under proviso to Article 309 of Constitution and the law, the law will prevail.**

ग. कानूनों का निर्वचन – कार्यकारी अनुदेश – विस्तार – अभिनिर्धारित – कार्यकारी अनुदेश कानूनी नियमों में संशोधन या अधिक्रमण नहीं कर सकते हैं या उनमें कुछ जोड़ सकते हैं – प्रशासनिक अनुदेश विधि का बल नहीं रखते हैं सर्वोच्च न्यायालय ने माना कि यदि कार्यकारी निदेश एवं संविधान के अनुच्छेद 309 के परंतुक के अंतर्गत विरचित किए गए नियमों में कोई विरोध हो तो, नियम अभिभावी होंगे, इसी तरह यदि संविधान के अनुच्छेद 309 के परंतुक के अंतर्गत विरचित किए गए नियमों एवं विधि में कोई विरोध हो तो विधि अभिभावी होगी।

Cases referred:

(1993) 1 SCC 154, (1991) 3 SCC 47, (2006) 3 SCC 330, (2009) 2 SCC 479, AIR 1966 SC 1942, AIR 1967 SC 1910, AIR 1977 SC 757, AIR 1979 SC 1676, (1987) 3 SCC 622, AIR 1987 SC 2111, AIR 1989 SC 1133, AIR 1990 SC 166, AIR 1991 SC 2288, AIR 1991 SC 772, AIR 1998 SC 431, AIR 1998 SC 96, AIR 1961 SC 751, AIR 1981 SC 711, AIR 1988 SC 2255, AIR 2001 SC 1877, AIR 2001 SC 2353, (2002) 4 SCC 380, (2003) 5 SCC 413, (2004) 2 SCC 297, AIR 1997 SC 1446, CA No. 2473/2022 decided on 19.04.2022 (Supreme Court).

S.K. Shrivastava, for the petitioner.
G.K. Agrawal, G.A. for the respondents.

Short Note
****(21)***
Before Mr. Justice G.S. Ahluwalia
MCRC No. 26249/2022 (Gwalior) decided on 23 August, 2022

SURESH KUMAR …Applicant

Vs.

RAJENDRA KUSHWAH & anr. …Non-applicants

***A. Criminal Procedure Code, 1973 (2 of 1974), Section 439(2) – Anticipatory Bail – Reasons – Ground of Parity* – Held – Merely by mentioning that case of applicant is identical to that of co-accused who was granted anticipatory bail by this Court would not fulfill the concept of equality – There are specific allegations of dowry demand and harassment against R-1 and his case is distinguishable from case of co-accused – Order granting him anticipatory bail is completely an unreasoned order – Impugned order set aside – Application allowed.**

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 439(2) – अग्रिम जमानत – कारण – समता का आधार – अभिनिर्धारित – मात्र यह उल्लेखित करना कि आवेदक का

प्रकरण उस सह–अभियुक्त के समान है जिसे इस न्यायालय द्वारा अग्रिम जमानत प्रदान की गई थी, समानता की अवधारणा को पूरा नहीं करेगा – प्र.–1 के विरूद्ध दहेज की मांग एवं उत्पीड़न के विशिष्ट आरोप हैं एवं उसका प्रकरण सह–अभियुक्त के प्रकरण से भिन्न है – उसे अग्रिम जमानत देने का आदेश पूर्णतः एक तर्कहीन आदेश है – आक्षेपित आदेश अपास्त – आवेदन मंजूर।

***B. Criminal Procedure Code, 1973 (2 of 1974), Section 439(2) – Cancellation of Bail – Scope & Jurisdiction* – Held – Whenever a complainant challenges the order granting bail on merits, said application must be filed before higher Court and when bail order is challenged on ground of misuse of liberty, such application would lie before same Court which had granted bail.**

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 439(2) – जमानत रद्द किया जाना – विस्तार एवं अधिकारिता – अभिनिर्धारित – जब भी कोई परिवादी गुणागुण के आधार पर जमानत देने के आदेश को चुनौती देता है, उक्त आवेदन उच्चतर न्यायालय के समक्ष प्रस्तुत किया जाना चाहिए एवं जब जमानत आदेश को स्वतंत्रता के दुरूपयोग के आधार पर चुनौती दी जाती है, ऐसा आवेदन उसी न्यायालय के समक्ष प्रस्तुत होगा जिसने जमानत प्रदान की थी।

***C. Criminal Procedure Code, 1973 (2 of 1974), Section 439(2) – Relatives of Husband* – Held – Near and dear relatives of husband should not be compelled to face the ordeal of trial unless and until there are specific allegations against them.**

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 439(2) – पति के रिश्तेदार – अभिनिर्धारित – पति के करीबी रिश्तेदारों को विचारण की कठिन परीक्षा का सामना करने के लिए तब तक मजबूर नहीं किया जाना चाहिए जब तक कि उनके विरूद्ध विशिष्ट आरोप न हों।

Cases referred:

1995 SCC (Cri) 237, (2015) 1 SCC (Cri) 257, (2022) 6 SCC 725, (2022) 4 SCC 497, (2022) 5 SCC 465, (2022) 3 SCC 501, MCRC No. 58792/2021 decided on 14.03.2022, CRA No. 5870/2021 order passed on 04.10.2021, SLP (Cri) No. 9149/2021 decided on 26.11.2021 (Supreme Court), (2016) 15 SCC 422, (2012) 13 SCC 720, (2014) 10 SCC 754, (2015) 11 SCC 260.

Amit Lahoti, for the applicant.
D.R. Sharma with *V.D. Sharma*, for the non-applicant No. 1.
A.K. Nirankari, PP for the State/non-applicant No. 2.

I.L.R. 2023 M.P. 1 (DB)

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

WA No. 995/2022 (Gwalior) decided on 12 October, 2022

MEERA DEVI SAXENA (SMT.) …Appellant

Vs.

STATE OF M.P. & ors. …Respondents

***A. Lokayukt Evam Up-Lokayukt Adhiniyam, M.P. (37 of 1981), Sections 10, 12 & 13-A – Enquiry – Procedure* – Held – From perusal of counter-affidavit of Lokayukt and Up-Lokayukt, it appears that neither any procedure is prescribed in the case as per Section 10 nor principle of natural justice has been followed – Enquiry report communicated to competent authority by the Legal advisor to Lokayukt who is not empowered for it – Impugned communication is bad in law and is thus quashed – Appeal allowed. (Paras 26 to 30, 33 & 42)**

क. लोकायुक्त एवं उप–लोकायुक्त अधिनियम, म.प्र. (1981 का 37), धाराएँ 10, 12 व 13–A – जांच – प्रक्रिया – अभिनिर्धारित – लोकायुक्त तथा उप–लोकायुक्त के प्रति–शपथपत्र के अवलोकन से यह प्रतीत होता है कि प्रकरण में, न तो धारा 10 के अनुसार कोई प्रक्रिया विहित है न ही नैसर्गिक न्याय के सिद्धांत का पालन किया गया है – लोकायुक्त के विधिक सलाहकार द्वारा जांच प्रतिवेदन सक्षम प्राधिकारी को संसूचित किया गया जो इसके लिए सशक्त नहीं है – आक्षेपित संसूचना विधि अंतर्गत अनुचित है तथा इस प्रकार अभिखंडित की गई – अपील मंजूर।

***B. Lokayukt Evam Up-Lokayukt Adhiniyam, M.P. (37 of 1981), Section 12 & 13-A* – Legal advisor to Lokayukt is not the authority to communicate with Collector in matter of action on the enquiry report nor he has any authority in law – Infact, even Divisional Vigilance Committee is also not empowered to order for action on enquiry report submitted by it – It is Lokayukt or Up-Lokayukt who is required to communicate the enquiry report to competent authority – Communication made by legal advisor to Lokayukt is bad in law and is *ultra vires* to 1981 Act. (Paras 26 to 30)**

ख. लोकायुक्त एवं उप–लोकायुक्त अधिनियम, म.प्र. (1981 का 37), धारा 12 व 13–A – लोकायुक्त का विधिक सलाहकार जांच प्रतिवेदन पर कार्यवाही के मामले में कलेक्टर को संसूचित करने हेतु प्राधिकारी नहीं है, न ही उनके पास ऐसा कोई कानूनी प्राधिकार है – वास्तव में, यहां तक कि संभागीय सतर्कता समिति भी उसके द्वारा प्रस्तुत जांच प्रतिवेदन पर कार्यवाही करने का आदेश देने के लिए सशक्त नहीं है – यह लोकायुक्त अथवा उप–लोकायुक्त है जिसे सक्षम प्राधिकारी को जांच प्रतिवेदन संसूचित करना अपेक्षित है – लोकायुक्त के सलाहकार द्वारा संसूचित करना विधि अंतर्गत अनुचित है तथा 1981 के अधिनियम के अधिकारातीत है।

***C. Lokayukt Evam Up-Lokayukt Adhiniyam, M.P. (37 of 1981), Section 13-A(6) – Enquiry – Principle of Natural Justice* – Held – Purpose of 1981 Act is to conduct enquiry into allegations against public servant and for matter connected therewith, hence enquiry is sacrosanct – Enquiry under 1981 Act is neither a summary enquiry nor a mere formality, it has penal consequences, thus the Lokayukt, Up-Lokayukt or Divisional Vigilance Committee is required to ensure that principles of natural justice are satisfied as required u/S 13-A(6) of Act. (Para 22)**

ग. लोकायुक्त एवं उप–लोकायुक्त अधिनियम, म.प्र. (1981 का 37), धारा 13–A(6) – जांच – नैसर्गिक न्याय का सिद्धांत – अभिनिर्धारित – 1981 के अधिनियम का प्रयोजन लोक सेवक के विरूद्ध लगे अभिकथनों तथा उससे जुड़े मामलों की जांच करना है, अतः जांच अति पवित्र है – 1981 के अधिनियम के अंतर्गत जांच न तो एक संक्षिप्त जांच है न ही मात्र औपचारिकता, उसके दाण्डिक परिणाम हैं, इस प्रकार लोकायुक्त, उप–लोकायुक्त अथवा संभागीय सतर्कता समिति के लिए यह सुनिश्चित करना अपेक्षित है कि नैसर्गिक न्याय के सिद्धांतों की संतुष्टि होती है, जैसा कि अधिनियम की धारा 13–A(6) के अंतर्गत अपेक्षित है।

***D. Lokayukt Evam Up-Lokayukt Adhiniyam, M.P. (37 of 1981), Section 13-A(6) and Constitution – Article 14 & 21 – Enquiry – Principle of Natural Justice* – Held – The enquiry, the paramount object of 1981 Act, being serious in nature and having penal consequences, may be detrimental to the rights and liberty of public servant – Thus, procedure of enquiry must be in conformity with the mandate of Article 14 & 21 of Constitution. (Para 25 & 26)**

घ. लोकायुक्त एवं उप–लोकायुक्त अधिनियम, म.प्र. (1981 का 37), धारा 13–A(6) एवं संविधान – अनुच्छेद 14 व 21 – जांच – नैसर्गिक न्याय का सिद्धांत – अभिनिर्धारित – जांच, 1981 के अधिनियम का सर्वोपरि उद्देश्य, प्रकृति में गंभीर होने तथा दाण्डिक परिणाम होने के कारण, लोक सेवक के अधिकारों और स्वतंत्रता के लिए हानिकारक हो सकती है – अतः, जांच की प्रक्रिया संविधान के अनुच्छेद 14 तथा 21 के आदेश के अनुरूप होनी चाहिए।

***E. Lokayukt Evam Up-Lokayukt Adhiniyam, M.P. (37 of 1981), Sections 10, 12 & 13-A and Constitution – Article 14 & 21 – Enquiry – Procedure* – Held – Section 10 provides for procedure in respect of each enquiry – Infraction or deviation of such procedure established by law shall, in the matter of enquiry or action on enquiry report, be violative of Article 14 & 21 of Constitution. (Para 23)**

ङ. लोकायुक्त एवं उप–लोकायुक्त अधिनियम, म.प्र. (1981 का 37), धाराएँ 10, 12 व 13–A एवं संविधान – अनुच्छेद 14 व 21 – जांच – प्रक्रिया – अभिनिर्धारित – धारा 10 प्रत्येक जांच के संबंध में प्रक्रिया उपबंधित करती है – जांच या जांच प्रतिवेदन पर

कार्यवाही के मामले में, विधि द्वारा स्थापित उक्त प्रक्रिया का व्यतिक्रमण या विचलन संविधान के अनुच्छेद 14 व 21 का उल्लंघन होगा।

***F. Lokayukt Evam Up-Lokayukt Adhiniyam, M.P. (37 of 1981), Section 13-A – Office of Lokayukt/up-Lokayukt* – Held – Office of Lokayukt or up-Lokayukt is a *quasi-judicial* authority and its functions or duties, particularly in context of enquiry, are not purely administrative or executive but are *quasi-judicial* in nature. (Para 26)**

च. लोकायुक्त एवं उप–लोकायुक्त अधिनियम, म.प्र. (1981 का 37), धारा 13–A – लोकायुक्त/उप–लोकायुक्त का पद – अभिनिर्धारित – लोकायुक्त अथवा उप–लोकायुक्त का पद एक अर्धन्यायिक प्राधिकारी का है तथा इसके कार्य या कर्तव्य, विशेषतः जांच के संदर्भ में, पूरी तरह न प्रशासनिक है न कार्यपालिक परंतु अर्धन्यायिक प्रकृति के है।

***G. Municipalities Act, M.P. (37 of 1961), Section 3(26) & 41A – Prescribed Authority* – Held – Petitioner was the elected President of Nagar Palika – Competent Authority in case of petitioner is State Government and not the Collector. (Paras 34 to 36)**

छ. नगरपालिका अधिनियम, म.प्र. (1961 का 37), धारा 3(26) व 41A – विहित प्राधिकारी – अभिनिर्धारित – याची नगरपालिका का निर्वाचित अध्यक्ष था – याची के प्रकरण में सक्षम प्राधिकारी राज्य सरकार है तथा न कि कलेक्टर।

Cases referred:

(2017) 5 SCC 533, 2011 (3) M.P.H.T. 44 (DB), AIR 1982 SC 710, AIR 1978 SC 851, AIR 1981 SC 818, AIR 1994 SC 1074, (2013) 3 SCC 117, 2011 (3) MPLJ 598.

N.K. Gupta with *S.D. Singh*, for the appellant.
Ankur Mody, Addl. A.G. for the respondents/State.
Sankalp Sharma, for the respondent-Lokayukt Organization.
J.P. Mishra and *Anuraj Saxena*, for the respondent No. 5.

O R D E R

The Order of the Court was passed by :

ROHIT ARYA, J.:- This intra-court appeal preferred under Section 2(1) of Madhya Pradesh Uccha Nayalaya (Khand Nyayapeeth Ko Appeal) Adhiniyam, 2005 is directed against the order dated 26.07.2022 passed in Writ Petition No.21614/2018.

2. Before adverting to the rival contentions, it is expedient to reiterate the relevant factual matrix. The petitioner/appellant has been an elected President of Nagar Palika Lateri, District Vidisha (M.P.) for a term of five years 01.01.2015 to 31.12.2020.

3. It appears that a complaint was filed in the office of Lokayukt, Madhya Pradesh. The complaint was made over to the Divisional Vigilance Committee for enquiry. After completion of enquiry, the enquiry report was forwarded by the Legal Advisor, Lokayukt office, to the Collector, District Vidisha (M.P.) to initiate action on the basis of the report vide communication dated 23.07.2018 (Annexure P-2). The Collector, in turn, vide communication dated 20.08.2018, (Annexure P-1) directed the Chief Municipal Officer, Nagar Palika, Lateri District Vidisha (M.P.) to lodge the FIR.

4. Petitioner challenged the legality, validity and propriety of the aforesaid two communications in Writ Petition No.21614/2018. The learned Single Judge, vide interim order dated 19.09.2018, stayed the effect and operation of the aforesaid two communications, until further orders.

5. Upon notice, though Lokayukt Organization and the Chief Municipal Officer, Nagal (sic: Nagar) Palika Lateri, District Vidisha (M.P.)-respondent No.5, filed counter-affidavits but none of the remaining respondents including the State Government filed counter-affidavit.

6. Upon perusal of the impugned order, it appears that the learned Single Judge was of the view that once the report has been forwarded by the Legal Advisor of the Lokayukt vide communication dated 23.07.2018 (Annexure P-2) and thereafter on the direction vide communication dated 20.08.2018 (Annexure P-1) of the Collector, District Vidisha, the Chief Municipal Officer, Nagar Palika Lateri, District Vidisha (M.P.) lodged an FIR, no interference is warranted as the suspect/accused has no right of pre-hearing before lodging of an FIR and the criminal machinery can be put into motion by any complainant. The learned Single Judge also opined that the Collector by his letter dated 20.08.2018 in his wisdom directed the Chief Municipal Officer, Nagar Palika Lateri, District Vidisha (M.P.) to lodge the FIR. Hence, no exception can be taken thereto and accordingly dismissed the petition. It may be mentioned that there was no FIR either before or on the date of the impugned order in the wake of interim order dated 19.09.2018.

7. Shri N.K. Gupta, learned Senior Counsel assisted by Shri S.D. Singh, learned counsel appearing on behalf of the petitioner/appellant, submits that the learned Single Judge in fact and in effect misdirected itself while justifying the impugned communications as contained in para 8 of the impugned order, unmindul (sic : unmindful) of the scheme of the Madhya Pradesh Lokayukt Evam Up-Lokayukt Adhiniyam, 1981 (for brevity "1981 Act") and provisions made thereunder. Further elaborating his submissions, Shri Gupta, learned Senior Counsel, submits that Divisional Vigilance Committee is constituted by the State Government by way of notification in the official gazette **under Section 13-A of the 1981 Act**. Under **sub-section (5) of Section 13-A of the 1981 Act**, the

Divisional Vigilance Committee is empowered to enquire into a complaint referred to it by the Lokayukt or Up-Lokayukt and submit report to the Lokayukt or Up-Lokayukt, as the case may be. **Sub-section (6) of Section 13-A of the 1981 Act** provides that in holding the enquiry, the Committee shall ensure that the principles of natural justice are observed.

8. **Section 12 of the 1981 Act** provides, *inter alia*, under **sub-section (1)** that if, after enquiry into the allegations the Lokayukt or an Up-Lokayukt is satisfied that such allegation is established, he shall by report in writing communicate his findings and recommendations alongwith the relevant document, materials and other evidence to the **Competent Authority**.

Sub-section (2) thereof provides that the **competent authority** shall examine the report forwarded to it under **sub-section (3)** and intimate, within three months of the date of receipt of the report, the Lokayukt or, as the case may be, the Up-Lokayukt, the **action** taken or proposed to be taken on the basis of the report.

The word "**action**" has been defined under **Section 2(d) of the 1981 Act** which means **action** by way of **prosecution** or otherwise taken on the report of the Lokayukt or Up- Lokayukt and includes failure to act; and all other expressions connecting **action** shall be construed accordingly.

S**ection 2(h) of the 1981 Act** defines **Competent Authority**, in relation to a public servant, which means:

> "(i) xx xx xx
>
> (ii) in the case of any other public servant. -Such authority, as may be prescribed."

9. Shri Gupta, learned Senior Counsel, further refers to the Madhya Pradesh Lokayukt Evam Up-Lokayukt (Investigation) Rules, 1982 (for short "1982 Rules") and *inter alia* submits that Rule 5 provides "**Competent Authority**" referable to item (ii) of clause (h) of **Section 2 of the 1981 Act**, which denotes **competent authority** other than the one in the case of Minister or Secretary, shall where appropriate disciplinary **action** is recommended by the Lokayukt or Up-Lokayukt be the appointing authority of public servant.

Learned Senior Counsel also refers to **Section 3(26) of the M.P. Municipalities Act, 1961** (for brevity "1961 Act") which defines "**Prescribed Authority**" which means:-

> "an authority which the State Government may, by notification, generally or with respect to any provision of this Act, declare to be a prescribed authority."

He refers to **Section 45 of the 1961 Act** which prescribes **Notification of election of [President and Councillors]**. -

> "Every election of the President and Councillors from wards shall be notified by the State Election Commission in the official gazette."

He further refers to **Section 41-A of the 1961 Act** which empowers the State Government to remove the President or Vice President or Chairman of a Committee for the reasons stated **under sub-section (1)** and consequences flowing from under **sub-section (2)** thereof.

10. Turning to the facts, learned Senior Counsel states that in para 5.4 of the petition (Writ Petition No.21614/2018), it is specifically pleaded that the Legal Advisor to the Lokayukt had no jurisdiction to forward the report to the Collector and the Collector in turn had no jurisdiction to direct the CMO to lodge an FIR on the basis of the said report. In the counter-affidavit filed by the Lokayukt Organization; reply to para 5.4 of the petition is evasive and does not dispute that the Legal Advisor has directly sent the report to the Collector.

11. It is submitted by learned Senior Counsel, that **Section 12 of the 1981 Act** has also been frightfully violated in the matter of **action** to be taken on the report submitted by the Divisional Vigilance Committee. First, the Lokayukt or Up-Lokayukt ought to have recorded its satisfaction on the report submitted to it and thereafter if found appropriate forwarded the same to the **competent authority** i.e. the State Government, the authority empowered to notify the election of the President **under Section 45 of the 1961 Act** and remove the President **under Section 41A of the 1961 Act**. That has not been done. The Collector is neither the **competent authority** to notify the election of the President of the Nagar Palika nor the **competent authority** to remove him/her under the 1961 Act. As such, the Legal Advisor to the Lokayukt who otherwise is not competent to act on the report submitted by the Divisional Vigilance Committee has vide communication dated 23.07.2018 (Annexure P-2), on his own volition, forwarded the same to the Collector Vidisha and who in turn without authority in law directed the CMO, Nagar Palika Lateri, District Vidisha (M.P.) vide communication dated 20.08.2018 (Annexure P-1) to lodge the FIR. Therefore, all the three authorities, namely, Legal Advisor, Collector and the CMO have acted without authority of law in the context of impugned communications Annexure P-1 and P-2.

12. That apart, learned Senior Counsel submits that Divisional Vigilance Committee while conducting the enquiry as an agency of the Lokayukt is required to follow the procedure with due observance of the principles of natural justice as provided for **under sub-section (6) of Section 13 of 1981 Act** and a fair hearing. Mere issuance of show-cause notice with copy of complaint and annexures though is a step forward in conformity with the principles of natural justice, nevertheless, the Divisional Vigilance Committee ought to have afforded a reasonable opportunity to inspect copy of the affidavit of the complainant and other documents or statements filed in original as provided for Rule 16 of the 1982

Rules, so that the petitioner upon scrutiny of documents may have the opportunity to question the veracity, relevancy, authenticity and falsity of the documents as solemnity is attached to the enquiry conducted under the 1981 Act having serious penal consequences. In no case, the said enquiry may be construed to be a summary enquiry as has been done in the instant case. Learned Senior Counsel submits that the enquiry report submitted by the Divisional Vigilance Committee has been sent to the Principal Secretary and the Commissioner, Local Bodies and Development, Bhopal as provided **under sub-section (1) of Section 12 of the 1981 Act**. **Action** thereupon has been solicited on or before 26.11.2018 as is well evident in para 1 of the counter-affidavit filed by the Lokayukt Organization.

13. Hence, if on one hand, the Lokayukt Organization had submitted the report to the State Government, the Competent/Prescribed authority, the 1981 Act does not contemplate that the Legal Advisor to the Lokayukt may forward the report to the Collector vide impugned communication dated 23.07.2018 (Annexure P-2). It is submitted that the impugned communications deserve to be quashed for want of authority and jurisdiction.

14. Learned Single Judge has failed to appreciate the aforesaid legal provisions in context of the impugned communications Annexure P-1 and P-2 and, by applying first principle of law that the suspect has no right to pre-hearing before the FIR is lodged, found no fault in the impugned communications. The impugned order is, therefore, in ignorance of law and statutory provision. Hence, cannot withstand the judicial scrutiny. It is submitted that lodging of FIR after dismissal of the writ petition on 03.08.2022 is of no consequence and therefore the same also deserves to be quashed as the report after being forwarded to the State Government was required to be looked into by the Government before initiation of any **action**. With the aforesaid submissions, Shri Gupta, learned Senior Counsel, prays for setting aside of the order impugned.

15. *Per contra*, Shri Ankur Mody, learned Additional Advocate General, while supporting the impugned order, submits that two writ petitions i.e. WP.24598/2018 [*Dayaram Sahu & Anr. Vs. State of M.P. And others*] and WP.24594/2018 [*Amol Singh Sahu Vs. State of M.P. And others*] wherein challenge was made to the similar order dated 20.08.2018 by which the Collector, Vidisha had directed the CMO, Municipal Council Lateri, District Vidisha to lodge the FIR in case of persons, namely, Dayaram Sahu, Sudhir Upadhyaya and Amol Singh Sahu based on the report of the Divisional Vigilance Committee i.e. the same report forwarded to the Collector by Legal Advisor to Lokayukt, have been dismissed by Single Bench vide order dated 27.10.2018. Subject thereto, learned counsel further submits that once the criminal action has been recommended by the Divisional Vigilance Committee, no interference was warranted, therefore, neither any exception can be taken to the impugned

communications Annexure P-1 and P-2 nor to the consequential act of lodging of FIR, after dismissal of the writ petition.

16. However, he has no answer to the scheme of the 1981 Act and mandate of law as contained in **Section 12** and it is indeed uncanny that he maintained blissful silence over the fact that the report of the Divisional Vigilance Committee forwarded by the Lokayukt to the State Government is pending consideration. However, he still insisted on his submissions relying upon the judgment of the Hon'ble Supreme Court in the case of *"Ram Kishan Fauji Vs. State of Haryana and Others* [(2017) 5 SCC 533]", little paying heed over the facts which are distinguishable.

17. Shri Sankalp Sharma, learned counsel appearing on behalf of the respondent/Lokayukt Organization, adopts the submissions put forth by Shri Ankur Mody, learned Additional Advocate General while justifying the order of the learned Single Judge. Besides, he submits that even if the report of the Divisional Vigilance Committee is sent to the State Government and the same is pending consideration before it, the same shall have no effect if otherwise a complaint has been lodged at the instance of the Collector on a communication made by the Legal Advisor based on the allegations in the report. The learned Single Judge has rightly held that the petitioner, a suspect, had no right of pre-hearing before lodging of an FIR. With the aforesaid submissions, learned counsel relies upon the judgment of this Court in the case of *"Dr. Rajesh Rajora Vs. State of M.P. and another* [2011(3) M.P.H.T. 44 (DB)]".

18. Shri J.P. Mishra, learned counsel appearing on behalf of respondent No.5/CMO, Nagar Palika Lateri, District Vidisha (M.P.), supported the order impugned and prayed for dismissal of the present appeal.

19. Before adverting to the rival contentions on merits, it is expedient to refer to some other relevant provisions of 1981 Act, whereunder provisions for the appointment and functions of certain authorities for the enquiry into the allegations against public servants and for matters connected therewith have been made. The 1981 Act itself is a self-contained code.

20. **Section 7 of the 1981 Act**, which provides matters which may be enquired into by Lokayukt or Up-Lokayukt, is as under:

> **7. Matters which may be enquired into by Lokayukt or Up-Lokayukt.** - Subject to the provisions of this Act, on receiving complaint or other information,-
>
> (i) the Lokayukt may proceed to enquire into an allegation made against a public servant in relation to whom the Chief Minister is the competent authority;

(ii) the Up-Lokayukt may proceed to enquire into an allegation made against any public servant other than that referred to in clause (i) :

Provided that the Lokayukt may enquire into an allegation made against any public servant referred to in clause (ii).

[*Explanation.* - For the purposes of this section the expressions "may proceed to enquire" and "may enquire" include investigation by police agency put at the disposal of Lokayukt and Up-Lokayukt in pursuance of sub-section (3) of section 13.

Section 10 of 1981 Act provides for procedure in respect of **each enquiry**. It provides that the Lokayukt or Up- Lokayukt while deciding the procedure to be followed for making enquiry shall ensure that the principles of natural justice are satisfied.

Section 13 of 1981 Act provides for staff of Lokayukt and Up-Lokayukt and **sub-section (3)** whereof provides:

"13(3) Without prejudice to the provisions of sub-section (1), the Lokayukt or an Up-Lokayukt may for the purpose of conducting enquiries under this Act, utilize the services of-

(i) Divisional Vigilance Committee constituted under Section 13-A;

(ii) any officer or investigation agency of the State or Central Government with the concurrence of that Government; or

(iii) any other person or agency."

21. At this juncture, it is relevant to mention here that M.P. Special Police Establishment (for brevity "Police Establishment") has been constituted under **Section 2** of the M.P. Special Police Establishment Act, 1947 (for brevity "1947 Act") for the purposes of investigation of offences notified under **Section 3**. The State Government is empowered to specify the offences or classes of offences which are to be investigated by Police Establishment by way of notification **under Section 3**.

Any member of the police establishment of or above the rank of Sub-Inspector, subject to any orders of the State Government, exercises any of the powers of an officer-in- charge of a police station which he may exercise within the limits of his station and such member shall be deemed to be an officer in charge of a police station as provided **under sub-section (3) of Section 2 of 1947 Act**. Further, by virtue of **Section 4 of 1947 Act**, the **superintendence** of the Police Establishment shall vest in the Lokayukt appointed under 1981 Act, however, the **administration** of the said Police Establishment shall vest in the Inspector General of Police.

Section 13-A of 1981 Act provides for Constitution of Divisional Vigilance Committee by the State Government by way of notification in the official gazette with three members for each division as prescribed under **sub-section (1)** thereof.

Under **sub-section (5) of Section 13-A of 1981 Act**, Divisional Vigilance Committee is empowered to enquire into complaint referred to it by the Lokayukt or Up-Lokayukt and submit a report to the Lokayukt or Up-Lokayukt, as the case may be.

Sub-section (6) of Section 13-A of 1981 Act provides that in holding the enquiry, the committee shall ensure that the principles of natural justice are observed, besides the power of summoning, requiring the discovery etc. etc.

Section 12 of 1981 Act provides for **action** on the report of Lokayukt and UP-Lokayukt. **Sub-section (1) of Section 12 of the 1981 Act** provides, if, after enquiry into the allegations the Lokayukt or an Up-Lokayukt is satisfied that such allegation is established, he shall by report in writing communicate his findings and recommendations alongwith the relevant document, materials and other evidence to the **competent authority**.

Sub-section (2) of Section 12 of the 1981 Act provides that the **competent authority** shall examine the report forwarded to it and intimate, within three months of the date of receipt of the report, the Lokayukt or, as the case may be, the Up-Lokayukt, the **action** taken or proposed to be taken on the basis of the report.

Sub-section (3) of Section 12 of the 1981 Act provides that if the Lokayukt or the Up-Lokayukt is satisfied with the **action** taken or proposed to be taken on his recommendations, he shall close the case under information to the complainant, the public servant and the **competent authority** concerned. In any other case, if he considers that the case so deserves, he may make a special report upon the case to the Governor and also inform the complainant concerned.

The word "**action**" has been defined **under Section 2(d) of the 1981 Act** and expression "**Competent Authority**" has been defined under **Section 2(h) of 1981 Act** (supra at Page 5 and 6 respectively).

22. Since purpose of the 1981 Act as reflected from the preamble thereto is to conduct an **enquiry** into the allegations against public servant and for matters connected therewith, hence, the enquiry is sacrosanct. Therefore, the enquiry under the 1981 Act is neither a summary enquiry nor a mere formality. A public servant may be subjected to penal action on the basis of the enquiry under 1981 Act. The Lokayukt or Up- Lokayukt or the Divisional Vigilance Committee is required to decide the procedure to be followed for making enquiry in each case

and while so doing ensure that principles of natural justice are satisfied as required under **Sections 10 and 13(6) of 1981 Act**.

23. Infraction or deviation of such procedure established by law shall, indeed in the matter of **enquiry** or **action** on enquiry report, be violative of Article 14 and 21 of the Constitution of India.

24. In the instant case, the Lokayukt entrusted the Divisional Vigilance Committee to enquire into the complaint made against the petitioner and others.

25. Indeed, the principles of natural justice cannot be reduced to hard and fast formulae or be put in straight-jacket. Their applicability depends upon the context and the facts and circumstances of each case. The object is to ensure a fair hearing, a fair deal to the person whose rights are going to be affected. [Please See *"A.K. Roy Vs. Union of India and another* (AIR 1982 SC 710)", *"Mohinder Singh Gill and another Vs. The Chief Election Commissioner, New Delhi and others* (AIR 1978 SC 851)" and *"Swadeshi Cotton Mills etc. etc. Vs. Union of India etc. etc.* (AIR 1981 SC 818)"].

The applicability of the principles of natural justice and a fair hearing assumes significance, applying the test of prejudice. [Please See *"Managing Director, ECIL, Hyderabad, etc. etc. Vs. B. Karunakar, etc. etc.* (AIR 1994 SC 1074)"].

The object of principles of natural justice which is now understood as synonymous with the obligation to provide a fair hearing, is to ensure that justice is done, that there is no violation of justice and that every person whose rights are going to be affected by the proposed **action** gets a fair hearing. Such recourse, as aforesaid, as mandated by law, does not appear to have been adhered to in the matter of enquiry by the Divisional Vigilance Committee.

26. Therefore, the enquiry, the paramount object of 1981 Act, being serious in nature and having penal consequences, may be detrimental to the rights and liberty of a public servant. Thus, the procedure of enquiry must be in conformity with the mandate of Article 14 and 21 of the Constitution of India.

It is also settled law that office of the Lokayukt or Up- Lokayukt is a quasi-judicial authority and its functions or duties, particularly in the context of enquiry, are not purely administrative or executive but are quasi-judicial in nature.

In the matter of enquiry, Lokayukt or Up-Lokayukt or for that matter the Divisional Vigilance Committee, in all fairness, must afford opportunity of personal hearing to the public servant not only to facilitate him/her to inspect the complaint, affidavit attached thereto and the documents [as provided under Rule 16 of 1982 Rules] but also to ascertain veracity, authenticity and relevancy of the contents of the complaint, affidavit and the documents before any adverse

inference is drawn therefrom to the prejudice of public servant; besides if complainant or other witnesses are examined, an opportunity to cross-examine them. These are the sentinel requirements of a fair hearing and a fair deal in conformity with the principles of natural justice. The authorities with respect to 1981 Act are required under the law to consider the point of view of the person against whom the complaint has been made while forwarding the report and to ensure that the investigation reaches its logical conclusion, one way or the other.

At this juncture, the judgment rendered by the Hon'ble Apex Court in the case of *"Justice Chandrashekaraiah (Retired) Vs. Janekere C. Krishna And Others* reported in [(2013) 3 SCC 117]" is worth mentioning, relevant paras whereof are reproduced below for ready reference and convenience:

> *"107. The broad spectrum of functions, powers, duties and responsibilities of the Upa-lokayukta, as statutorily prescribed, clearly bring out that not only does he perform quasi-judicial functions, as contrasted with purely administrative or executive functions, but that the Upa- lokayukta is more than an investigator or an enquiry officer. At the same time, notwithstanding his status, he is not placed on the pedestal of a judicial authority rendering a binding decision. He is placed somewhere in between an investigator and a judicial authority, having the elements of both. For want of a better expression, the office of an Upa-lokayukta can only be described as a sui generis quasi-judicial authority.*
>
> *(iii) Decisions on the subject*
>
> *108 .....The final decision rendered by the Upa- lokayukta, called a report, may not bear the stamp of a judicial decision, as would that of a court or, to a lesser extent, a tribunal, but in formulating the report, he is required to consider the point of view of the person complained against and ensure that the investigation reaches its logical conclusion, one way or the other, without any interference and without any fear. Notwithstanding this, the report of the Upa- lokayukta does not determine the rights of the complainant or the person complained against. Consequently, the Upa-lokayukta is neither a court nor a tribunal. Therefore, in my opinion, the Upa- lokayukta can best be described as a sui generis quasi-judicial authority.*
>
> *112. As mentioned above, an Upa-lokayukta does function as an adjudicating authority but the Act places him short of a judicial authority. He is much more "judicial" than an investigator or an inquisitorial authority largely exercising administrative or executive functions and powers. Under the circumstances,*

taking an overall view of the provisions of the Act and the law laid down, my conclusion is that the Upa-lokayukta is a quasi-judicial authority or in any event an authority exercising functions, powers, duties and responsibilities conferred by the Act as a sui generis quasi-judicial authority."

(Emphasis Supplied)

Upon perusal of the skeletal counter-affidavit of Lokayukt and UP-Lokayukt, it appears that neither any procedure is prescribed in the case in hand as contemplated under Section 10 of the 1981 Act, nor aforementioned sentinel requirements of principles of natural justice have been followed, as the Divisional Vigilance Committee at its end unilaterally prepared the enquiry report after submission of reply by the petitioner. Thereafter, the Legal Advisor set at motion the report forwarding the same to the Collector vide impugned communication dated 23.07.2018 (Annexure P-2).

27. Further, as evident from para 1 of counter-affidavit submitted by Lokayukt Organization, the enquiry report has been sent to the State Government. Under such circumstances, as per the procedure prescribed **under sub-section (3)** of **Section 12 of 1981 Act**, the Lokayukt should have waited for the response from the State Government as regards **action** on such report. It stated at the bar that the said stage has not so far arrived.

28. Legal Advisor to the Lokayukt is neither the authority competent under the 1981 Act to communicate with the Collector in the matter of **action** on the report of the Divisional Vigilance Committee nor has authority in law. As such, communication dated 23.07.2018 (Annexure P-2) is held to be bad in law and ultra vires to 1981 Act.

29. As a matter of fact, even the Divisional Vigilance Committee is not empowered to order for **action** on the enquiry report submitted by it. It is the Lokayukt or Up-Lokayukt who is required to communicate the enquiry report as per procedure prescribed **under Section 12 of 1981 Act**.

30. In other words, the Lokayukt or Up-Lokayukt is to first record its satisfaction that the allegation after such an enquiry is established. Thereafter, a report shall be prepared in writing with findings and recommendations along with the relevant documents, material and other evidence. This complete set of documents shall be communicated to the **Competent Authority**.

31. As is evident from page 2 of the counter-affidavit placed on record by respondent No.2 compliance of **sub-section (1) of Section 12 of 1981 Act** has been done as the enquiry report dated 07.05.2018 has been sent to the Principal Secretary and the Commissioner, Local Bodies and Development, Bhopal with the note to report on or before 26.11.2018, the **action** taken on the report.

32. Indeed, if compliance is not received from the concerning **Competent Authority**, the Lokayukt or Up- Lokayukt under **sub-section (3) of Section 12 of 1981** may make a special report upon the case and forward the same to the Governor.

33. The 1981 Act or **Section 12** thereof in particular does not empower the Legal Advisor either himself or on the directions of the Divisional Vigilance Committee or for that matter Lokayukt or Up-Lokayukt to communicate with the Collector to initiate **action** on the enquiry report. Hence, for the aforesaid reason also, the impugned communication Annexure P-2 is bad in law.

It may be stated that 1981 Act does not empower the Lokayukt, Up-Lokayukt or Divisional Vigilance Committee constituted under 13-A of 1981 Act to lodge an FIR. The procedure for **action** on the report is provided for only under **Section 12(2) of 1981 Act** by the Competent Authority and not otherwise.

34. That apart the petitioner was the elected President of Nagar Palika Lateri, District Vidisha (M.P.).

35. **Section 45 of the 1961 Act** provides for notification of election of President and Councillors by the State Election Commission in the official gazette.

"Prescribed Authority" is defined under **Section 3(26) of the 1961 Act**.

Section 41A of the 1961 Act empowers the State Government to remove the President or Vice-President or Chairman of the Committee for the reasons stated **under sub-section (1)** and consequences flowing from **under sub-section (2)** thereof.

36. Indeed, the **Competent Authority** in case of the petitioner is the State Government and not the Collector.

37. The judgment cited i.e. *Dr. Rajesh Rajora* (supra) is distinguishable on acts and is of no assistance to the respondent/Lokayukt Organization.

Firstly, in the said case, challenge was made to the FIR lodged **under Section 13(1)(d)/13(2) of the Prevention of Corruption Act** against the applicant & others therein upon the Preliminary Enquiry No.01/09 initiated by the Special Police Establishment. This distinctive fact assumes significance if understood in the context of the provisions of **Section 3 and 4 of 1947 Act**. Besides, **preliminary enquiry**, conducted by an Officer of M.P. Police Establishment Act not below the rank of Sub-Inspector acting as Station House Officer of a Police Station under section 3 of the 1947 Act, is cxcluded from the purview/scope of investigation/enquiry defined under Rule 16 of the 1982 Rules.

Secondly, challenge to the FIR has been dealt with as regards scope of interference on the merits of the allegations made in the FIR exercising inherent

powers **under Section 482 Cr.P.C.** regard being had to the contours/limits of the inherent powers as reiterated by the Hon'ble Supreme Court.

Thirdly, the co-ordinate Bench though recorded the submissions of learned counsel for the applicants therein relating to violation of **Section 12(1) of 1981 Act** but did not deal either with scheme of the 1981 Act or perused/ considered the mandate of law provided for under Sections 12 and 13-A of the 1981 Act with reference to the definition of word **action** defined under Section 2(d) of 1981 Act. Likewise, the common order dated 27.10.2018 passed in the case of *Dayaram Sahu* (supra) & *Amol Singh Sahu* (supra) relied upon by learned counsel for the State as well as Lokayukt Establishment has been carefully perused by this Court. The learned Single Judge, though referred to Section 12 of 1981 Act, yet neither has dealt with the scope of 1981 Act with due regard to its preamble nor dealt with the mandate of law under Section 12 of 1981 Act in entirety, particularly with reference to the word **action** as defined under Section 2(d) of 1981 Act; besides nature, scope, compliance of sub-sections (5) and (6) of 13-A of 1981 Act read with Rule 16 of the 1982 Rules. That apart, Rule 2(iv) which defines "**Investigation**" and Rule 16 have also not been considered. Further status, jurisdiction and authority in law of the legal advisor forwarding the report of the Divisional Vigilance Committee to the Collector, who is not the competent authority, by the impugned communication dated 23.07.2018 (Annexure P-2) who in turn directed the Chief Municipal Officer, Nagar Palika, Lateri District Vidisha (M.P.) to register complaint against the petitioner herein, has not been examined in the context of the scheme underlying 1981 Act and the provisions made thereunder. That apart, the learned Single Judge has also not considered the competence of the Collector in law, regard being had to the provision of Section 2(h) 1981 Act defining **Competent Authority** read with the provision of Section 3(26) of 1961 Act defining **Prescribed Authority** which means an Authority which the State Government may by notification generally or in respect to any provision of this Act declare to be the **Prescribed Authority**. These aforementioned provisions have direct and relevant bearing over the factual matrix of the case.

Hence, for want of consideration of relevant provisions of the 1981 Act, we are of the considered view that the conclusion drawn therein cannot withstand judicial scrutiny. Therefore, the said order is hereby *overruled.*

38. The ratio laid down by Hon'ble Apex Court in the case of *Ram Kishan Fauji* (supra**)**, as a matter of fact, is in the context of maintainability of intra-court appeal/LPA against an order passed by the High Court under Article 226 of the Constitution of India in a petition seeking quashment of the order recommending registration of FIR by the Lokayukt, wherein it has been held that if the proceeding, nature and relief sought pertain to anything connected with criminal jurisdiction, intra-court appeal/LPA would not lie as character of the proceeding

does not depend upon the nature of the Tribunal which is invested with the authority to grant relief but upon the nature of the right violated and the appropriate relief which may be claimed.

39. This Court has carefully perused the impugned order. The learned Single Judge while addressing on the criticism to impugned communications Annexure P-1 and P-2 reiterated the general law that FIR is only an information and there is no scope of pre-hearing before lodging of FIR citing judgment of the Hon'ble Supreme Court but learned Single Judge was oblivious of the fact that till decision of the writ petition no FIR was lodged. Hence, reason or justification as culled out in para 8 is found to be misplaced in the backdrop of the facts and circumstances of the case. That apart, learned Single Judge failed to take note of the fact that the enquiry under the 1981 Act is a quasi-judicial enquiry. Adherence to the provisions of the 1981 Act regarding the enquiry and **action** on the enquiry report as provided for under **Sections 12, 13-A(5) and 13-A(6) of 1981 Act** are mandatory, non-compliance/avoidance thereof indeed shall render the mandate of **Sections 12, 13-A(5) and 13-A(6)** otios.

40. During the course of hearing, it is transpired that during the currency of writ petition interim order dated 19.09.2018 was passed to the following effect:

> *"Issue notice to the respondents No. 5 and 6 on payment of process fee within three working days.*
>
> *Learned counsel for respondents No. 1 and 4 and also respondent No.2 and 3 are directed to seek instructions and file reply positively before the next date of hearing.*
>
> *Challenge herein is to the letter of the Collector, Vidisha (Annexure P/2) directing registration of offence against the petitioner who happens to be sitting president of the Nagar Panchayat Lateri.*
>
> *Let the case be taken up on 25th September, 2018 for consideration on admission as well as I.R.*
>
> *Since this court has taken cognizance of the matter, it is expected of the respondents not to precipitate the matter."*

41. Interpretation and mandate of **Section 12 of 1981 Act**, reiterated by this Court in this order, is in conformity with the judgment of the co-ordinate Bench (DB) in *"Dharmendra Vs. State of M.P.* [2011 (3) MPLJ 598]".

42. The upshot of the discussion leads to the success of the appeal. The impugned orders dated 23.07.2018 (Annexure P-2) and 20.08.2018, (Annexure P-1) stand quashed. As a necessary corollary, the FIR lodged after disposal of the writ petition quashment whereof is sought in this intra-court appeal cannot stand and therefore it is also quashed.

However, before parting with the case, it is considered apposite to observe that inaction on the part of the State Government within the time frame provided for under sub-section (2) of Section 12 of the 1981 Act entitles the Lokayukt to take recourse to provisions contained under sub-section (3) of 1981 Act.

43. With the aforesaid, the present appeal stands allowed to the extent indicated above.

Appeal allowed

I.L.R. 2023 M.P. 17 (DB)

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

WP No. 3397/2005 (Jabalpur) decided on 21 June, 2022

DASHRATH LAL DEHARIA …Petitioner

Vs.

REGISTRAR GENERAL & anr. …Respondents

(Alongwith WP No. 3398/2005)

Service Law – Demotion – Required Qualification **– Held – It is undisputed that petitioner is not educationally qualified to hold the post of LDC but it is respondents who allowed him to work on the said post for almost 16 years and have promoted also – For no fault of petitioner, he suffered unnecessary humiliation in view of his demotion – Respondent No. 1 directed to pay cost of Rs. 1 lakh to petitioners – Plea of petitioners to quash impugned order is rejected – Petitions partly allowed. (Paras 8 to 10)**

सेवा विधि – पदावनति – आवश्यक योग्यता – अभिनिर्धारित – यह अविवादित है कि याची एलडीसी के पद को धारण करने के लिए शैक्षणिक रूप से योग्य नहीं है किंतु यह प्रत्यर्थीगण हैं जिन्होने उसे उक्त पद पर लगभग 16 वर्ष कार्य करने की अनुमति दी तथा पदोन्नत भी किया – याची की कोई त्रुटि न होते हुए उसे पदावनति के कारण अनावश्यक अपमान सहना पड़ा – प्रत्यर्थी क्र. 1 याचीगण को 1 लाख रूपये व्यय देने हेतु निर्देशित – आक्षेपित आदेश अभिखंडित करने के याची के अभिवाक् को खारिज किया गया – याचिकाएँ अंशतः मंजूर।

Vijay Tripathi, for the petitioner in WP No. 3397/2005 & 3398/2005.
Ashish Shroti, for the respondents in WP No. 3397/2005 & 3398/2005.

(Supplied: Paragraph numbers)

O R D E R

The Order of the Court was passed by:

RAVI MALIMATH, CHIEF JUSTICE :- Writ Petition No.3397 of 2005 is filed by petitioner - Dashrath Lal Deharia and Writ Petition No.3398 of 2005 is filed by petitioner - N.P. Rahangdale against the impugned orders of their reversion.

2. Since the facts and question of law that arise for consideration in both the cases are common, they are taken up for consideration together. For the sake of convenience, the facts as narrated in W.P.No.3397 of 2005 are taken into consideration.

3. The case of the petitioner is that he was initially appointed as Peon namely a Class-IV post with the respondent No.2. Thereafter, he was promoted on 01.02.2005 as Process Writer, which is also a Class-IV post. The respondents promoted him as Lower Division Clerk (LDC) on 30.01.1986. Thereafter, a Departmental Promotion Committee considered the case of the petitioner and recommended him for promotion as Upper Division Clerk (UDC). Thereafter, the respondent No.1 wrote a letter to the respondent No.2 directing him to take action against the employees who do not have the requisite educational qualifications to hold the post of Lower Division Clerk. The petitioner was served with a communication dated 10.02.2003 asking him to submit the documents with regard to his educational qualification. He submitted the same. It was found that he did not possess the requisite educational qualification to hold the post of Lower Division Clerk. The post of Lower Division Clerk called for a minimum qualification of Higher Secondary. The petitioner possessed the qualification of Matriculation. Therefore, the impugned order was passed reverting him to the Class-IV post. Hence, the instant petition is filed.

4. We have considered the pleadings.

5. It is narrated that the petitioner was promoted by the respondents themselves. It is they, who thought him to be fit enough to hold the post of Lower Division Clerk. He held the post until the year 2002 namely from 1986 onwards. Thereafter, he was reverted to the post of Process Writer. He has not committed any fault. Therefore, the impugned order requires to be quashed by restoring his earlier position.

6. The same is disputed by the respondents, who have filed their return. They contend that in order to hold the post of Lower Division Clerk, the minimum educational qualification is Higher Secondary. Admittedly, the petitioner holds only a qualification of Matriculation and, therefore, he is not entitled to the same. Hence, there is no error committed by passing the impugned order.

7. Heard respondents' counsel.

8. The plea of the respondents that the petitioner is not educationally qualified to hold the post of Lower Division Clerk, is undisputed. Admittedly, the petitioner only holds Matriculation and is not qualified to hold the post of Lower Division Clerk. However, what is of concern to us is the fact that the respondents have allowed him to work on the post of Lower Division Clerk from the year 1986 to the year 2002 namely for a period of almost 16 years. It is the respondents themselves, who have promoted the petitioner. No fault can be found with the petitioner. For no fault of his, he has suffered unnecessary humiliation in view of his demotion from the post of Lower Division Clerk to the post of a Group IV namely a Process Writer. Therefore, we find that the action of the respondents in reverting the petitioner after a gap of 16 years may not be fair. It is not a case that immediately on coming to know, the same has been done. Since the petitioner has worked for almost 16 years as Lower Division Clerk, we deem it just and necessary that in a given facts and circumstances of the case, it would be appropriate to meet the ends of justice to direct respondent No.1 to pay costs of Rs.1,00,000/- (Rupees One Lakh Only). This, we feel, would render substantial justice to the case of the petitioner.

9. Consequently, both these petitions are partly allowed.

10. The plea of the petitioner seeking to quash the impugned order is rejected. However, the respondent No.1 is directed to pay a cost of Rs.1,00,000/-(Rupees One Lakh Only) to each one of the writ petitioners within a period of four weeks from today.

11. Since, the learned counsel for the petitioners is absent, the Registry to communicate a copy of this order to the respective writ petitioners.

Petition Partly allowed

I.L.R. 2023 MP. 19

Before Mr. Justice Vijay Kumar Shukla

WP No. 20861/2020 (Indore) decided on 1 September, 2022

SENA …Petitioner

Vs.

MINISTRY OF URBAN AND HOUSING DEVELOPMENT & ors. …Respondents

***A. Municipalities Act, M.P. (37 of 1961), Sections 41-A, 51(b), 51(c) & 109 – Removal of President – Auction of Shop* – Held – Section 109 provides that it is duty of Chief Municipal Officer to prepare agenda and draw proceedings for approval – Regarding irregularity, CMO has already been punished – State failed to show any provisions in Act or Rules that it was incumbent on petitioner being President of Council to prepare agenda and**

proceed for approval – Charges only *prima facie* alleges irregularity on part of petitioner but not any illegality or misconduct – Impugned order set aside – Petition allowed. (Paras 16 to 21)

क. नगरपालिका अधिनियम, म.प्र. (1961 का 37), धाराएँ 41–A, 51(b), 51(c) व 109 – अध्यक्ष को हटाया जाना – दुकान की नीलामी – अभिनिर्धारित – धारा 109 उपबंधित करती है कि कार्यसूची तैयार करना एवं अनुमोदन के लिए कार्यवाही करना मुख्य नगरपालिका अधिकारी का कर्तव्य है – अनियमितता के संबंध में, सी.एम.ओ. को पहले ही दण्डित किया जा चुका है – राज्य, अधिनियम अथवा नियमों में कोई भी प्रावधान दर्शाने में विफल रहा है कि परिषद का अध्यक्ष होने के नाते याची के लिए आवश्यक था कि वह कार्यसूची तैयार करे एवं अनुमोदन के लिए अग्रसर हो – आरोप मात्र प्रथम दृष्ट्या याची की ओर से अनियमितता अभिकथित करते हैं किंतु कोई अवैधता या कदाचार नहीं – आक्षेपित आदेश अपास्त – याचिका मंजूर।

***B. Municipalities Act, M.P. (37 of 1961), Section 41-A – Removal of President – Tenure* – Held – Section 41-A does not provide that the lapse must relate to period during which the office bearer is removed – Continuation of a public representative may not be desirable in public interest or in interest of Council even if lapse occurred in earlier tenure. (Para 18)**

ख. नगरपालिका अधिनियम, म.प्र. (1961 का 37), धारा 41–A – अध्यक्ष को हटाया जाना – कार्यकाल – अभिनिर्धारित – धारा 41–A यह उपबंधित नहीं करती है कि गलती उस अवधि से संबंधित होनी चाहिए जिसके दौरान पदाधिकारी को हटाया जाता है – लोक प्रतिनिधि की निरंतरता लोक हित में या परिषद् के हित में वांछनीय नहीं हो सकती भले ही गलती पूर्वतर कार्यकाल में हुई थी।

Cases referred:

(2001) 6 SCC 260, (2010) 2 SCC 319, 1999 (1) MPLJ 368, 2003 (3) MPHT 225, 2009 (4) MPLJ 186, 2019 (1) MPLJ 426, 1980 MPLJ 729, (2012) 4 SCC 407, 2013 SCC Online MP 32.

A.K. Sethi with *Akshat Pahadiya,* for the petitioner.
Nitin Singh Bhati, G.A. for the respondent Nos. 1 to 3.
None, for the respondent No. 4.

(Supplied: Paragraph numbers)

O R D E R

VIJAY KUMAR SHUKLA, J.:- The present petition is filed under Article 226 of the Constitution of India challenging the order dated 23.12.2020 passed by respondent No.1 u/S.41-A of M.P. Municipalities Act, 1961 (hereinafter referred as "Act of 1961") directing to remove the petitioner from the post of President of Alirajpur Municipality in respect of tenure between 2017-2022 on the ground that in her earlier tenure falling between 2012-2017 (6.8.2012 to 8.7.2017) there was

an irregularity in an auction carried out by the Municipality, Alirajpur in respect of Shop No.2, Bus Stand near Buniyadi Shala, Alirajpur and it was the responsibility of the petitioner who was then President u/S.51 of the Act to watch over the financial and executive administration of the Council. The petitioner has been further disqualified from holding the office of President, Vice President or the Chairman as the case may be for the next term.

2. The facts of the case are that the petitioner had contested and won the election for the post of President, Alirajpur Municipality in the year 2012 for the tenure falling between 2012-2017. It is submitted that Alirajpur Municipality is the owner of shop situated at Shop No.2, Bus Stand near Buniyadi Shala, Alirajpur. The then Chief Municipal Officer, Alirajpur informed that the shop in question is lying vacant and in the year 2011 also the Municipality tried for auction but despite that there was no one to occupy the same and, therefore, the same was to be auctioned. The Chief Municipal Officer has put the shop in question to auction on right to occupancy (for business) basis and an auction notice was issued in the daily newspaper in the year 2016. Thereafter the Chief Municipal Officer had conducted an auction and the shop was allotted to the highest bidder for Rupees Nine lakhs. The tenure of the petitioner as the President of Alirajpur Municipality has concluded in the year 2017 and a fresh election was conducted in respect of the same Municipality by the State. The petitioner had again contested the election for the post of President, Alirajpur Municipality held in the year 2017 and won the election and became the President of Alirajpur Municipality for the period falling between 2017-2022. The respondents had initiated a departmental enquiry against the then Chief Municipal Officer, Alirajpur for some alleged irregularities committed by him for auctioning the shop in question in the year 2016 and has issued a charge sheet to him. A departmental enquiry was conducted against him and he was held responsible for the aforesaid irregularities and has failed to discharge duties cast on him u/S.92 of the Act, 1961 and Rules made under the Act 1961 and has passed an order of punishment against the then Chief Municipal Officer and withheld two increments without cumulative effect and for the loss caused to the Municipality an amount of Rupees Ten lakh was ordered to be recovered from him. The said order was passed on 27.5.2020. After passing of the said order, the respondent No.1 issued a show cause notice on 29.7.2020 alleging the same charges against the petitioner and stated that the petitioner has acted in contravention of the provisions of Rule 7 of M.P. Nagar Palika (Achal Sampati Ke Antaran) Niyam, 1996 (hereinafter referred as "Niyam 1996") and Sec.51(b) of the Act, 1961 which is amounting to misconduct and, therefore, the State Government has taken a decision for initiating action against the petitioner u/S.41-A of the Act 1961. The petitioner filed detailed reply to the said show cause notice and categorically stated that the alleged charges levelled against the petitioner were the duties of the Chief Municipal Officer under the Act 1961 and the Rules made thereunder and

the petitioner being President is not responsible for the alleged irregularities. It was further stated that the petitioner has not acted in contravention to the provisions of Rule 7 of Niyam, 1996 and Sec.51-B of the Act 1961 which would amount to misconduct and for which no action can be taken against the petitioner. Thereafter the respondent No.1 passed the impugned order dated 23.12.2020 and has thereby directed for removal of the petitioner from the post of President of Alirajpur Municipality in respect of tenure between 2017-2022 on the ground that on her earlier tenure between 2012-2017 (6.8.2012 to 8.7.2017) there was an irregularity in an auction carried out by the Municipality, Alirajpur in respect of Shop No.2 Bus Stand, near Buniyadi Shala, Alirajpur and, therefore, her continuance on the post of President, Alirajpur Municipality is not in public interest. It was further ordered to disqualify the petitioner from holding the post of President or Vice President or Chairman as the case may be for the next term.

3. The impugned order has been mainly challenged on the ground that the so called alleged lapse is in respect of her tenure which had already come to an end in the year 2017 and, therefore, her removal from the office after re-election for the said lapse is illegal. The petitioner could not have been removed for the lapse of earlier tenure because the removal u/S.41-A of the Act 1961 is on the ground when the continuation of the person holding the post of President or Chairman is in the opinion of the State government not desirable in public interest or in the interest of the Council or it is found that he is incapable of performing duties or is working against provisions of the Act or any Rules made thereunder or if it is found that he does not belong to reserved category for which the seat was reserved. Thus, the removal of the petitioner does not fall within the grounds enumerated u/S.41-A. The petitioner has successfully completed the first term and was re-elected in the second term and, therefore, if the petitioner would not have been re-elected for the second term then the respondents could not have removed the petitioner as President of the Council for the lapse of the previous term. The misconduct is not a ground for removal of a President u/S.41-A of the Act, 1961. It is further submitted that Sec.41-A of the Act 1961 does not empower the State government to remove the present President of the Municipality on the ground that there were irregularities committed by the Chief Municipal Officer in an auction proceedings in respect of Shop No.2 Bus Stand near Buniyadi Shala, Alirajpur which has resulted into loss to the Council when the petitioner was the President of the Council for the period 2012-2017. The power u/S.41-A of the Act could not have been invoked for trivial/minor irregularities and more particularly the same cannot be invoked when the alleged irregularities where the duties cast on the Chief Municipal Officer. The power u/S.41-A of the Act 1961 can be invoked only under grave and exceptional circumstances and the provisions sought to be construed in a strict manner because holder of the office occupies it by election and is being deprived by an executive order in which the electorate has no chance of participation. It is further submitted that the allegation against the petitioner and

the Chief Municipal Officer are same. As per the alleged charges, it was the duties and responsibilities of the Chief Municipal Officer u/S.92 of the Act 1961 and the Rules made thereunder for which the Chief Municipal Officer has already been punished in a departmental enquiry and the loss caused to the Municipal Council has already been recovered. There is no complaints or allegations or material available which demonstrates that petitioner is incapable of performing her duties on the post of President and the petitioner is undesirable for the public interest or she is acting against the interest of the Council.

4. Learned Sr.Counsel for petitioner while assailing the order submitted that findings recorded by the respondent No.1 that it is the duty of the President of the Municipality to put an agenda of the meeting is for holding the charge No.1 proved against the petitioner is contrary to the provisions of Madhya Pradesh Nagarpalika (President in Council Ki Shaktiyan Tatha Uske Kamkaj Ke Sanchalan Hetu Prakriya) Niyam, 1997 and also to the findings recorded in his order of punishment passed against the Chief Municipal Officer. In respect of Charge No.2 also it is submitted that it is contrary to Sec.109 read with Niyam 1996 as it is the duty of the Chief Municipal Officer to obtain requisite approval from the State government. The findings recorded in respect of Charge No.3 is also contrary to the record that the petitioner has not recorded any reason for accepting the auction at a lower price than the offset price in the auction proceedings. It was the duty of the Chief Municipal Officer to record the reason in the auction proceedings for accepting a lower price and to bring it to the notice of the President. It is nowhere provided that the President has to draw the proceedings of the auction. In the findings in respect of Charge No.4 is that the Chief Municipal Officer is duty bound and responsible to comply with the allegations. The petitioner being the President of the Council cannot be held responsible for the same. The findings of Charge No.5 is also not sustainable. It is submitted that the order impugned is based on the charges for which the petitioner cannot be held responsible. Those charges are in the nature of irregularity committed by the Chief Municipal Officer and not by the petitioner and for the same the petitioner could not have been removed u/S.41-A of the Act 1961 with further disqualification for next term. The order is unsustainable and is liable to be quashed.

5. In support of his submissions, reliance has been placed on the judgment passed by the Apex Court in the case of *Tarlochan Dev Sharma Vs. State of Punjab and others* (2001) 6 SCC 260, (2010) 2 SCC 319 *Sharda Kailash Mittal Vs. State of MP & Ors*, 1999(1) MPLJ 368 *Kaushalyabai Vs. State of MP*, 2003 (3) MPHT 225 *Rajiv Sharma Vs. State of MP & Ors,* 2009(4)MPLJ 186 *Baleshwar Dayal Jailswal Vs. State of MP & Ors* and 2019(1)MPLJ 426 *Ajay Kumar Shukla Vs. State of MP & Ors*.

6. Combating the aforesaid submissions, counsel for respondents supported the impugned order and submitted that the petitioner has failed to adopt due process of auction procedure as envisaged under Rule 4 of Niyam, 1996 and did not take approval of the Municipal Council for auction of property of the Municipality. There is no resolution passed by the Municipal Council for auction of such property. Under the provisions of Sec.51 of the Act, 1961 it was the duty of the petitioner being President of the Council to watch over the financial and executive administration of the Council and to perform such executive functions as may be allotted to him by order under the Act. The petitioner has committed grave financial irregularity in auction of the property of Municipality without any Resolution and without any approval from the State government under Rule 7 of M.P. Nagar Palika (Achal Sampati Antaran) Niyam 1996 according to which if the property having the value more than Rs.50,000/- then the auction proceedings for the property of the Municipality cannot be commenced without the prior approval of the State government. On 27.11.2017 a complaint was made against the petitioner to the Lokayukta office, after that an enquiry was conducted upon complaint against the petitioner with respect to illegal and arbitrary auction of the property of the Municipality conducted by the petitioner and caused financial loss to the Municipality. A detailed enquiry was conducted in the matter and enquiry report dated 15.10.2018 was submitted. Upon receiving the report, the show cause notice was issued to the petitioner. The act and misdeeds of the petitioner has caused great financial loss to the Municipality which is not a trivial and minor irregularities and, therefore, the respondents have rightly exercised the powers u/S.41-A against the petitioner for removing her as President and disqualifying for next term. Her defence that it was duty of the Chief Municipal Officer to bring it to her notice about the procedure prescribed under the Act has no excuse. In support of his submissions he has placed reliance on a judgment passed by co-ordinate bench at Gwalior in WP No.2943/2017 *Smt Satyaprakashi Pardesia Vs. State of MP & another* to contend that the public representatives cannot act on their whims and fancies. They held the chair of public office and same is founded on public trust and democratic accountability. In the said case, the removal of the President was upheld by co-ordinate bench. Against the said order WA No.1129/2018 was also dismissed. Against the said order SLP was also preferred which has been dismissed. He also placed reliance on the judgment passed by he (sic : the) full bench in the case of *Rana Natvar Singh Vs. State of MP & Ors.* 1980 MPLJ 729 and also the judgment passed by the Apex Court in the case of *Ravi Yeshwat Singh Bhoir Vs. District Collector, Raigarh & Ors.* (2012) 4 SCC 407. On the basis of aforesaid submissions he prayed for dismissal of the petition having no merit.

7. No other point has been pressed by the parties.

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

9. First this Court would like to survey the scope of judicial review in the matter of removal of a President of Municipal Council on not desirable to continue in public interest or in the interest of the Council. In the case of *Tarlochan Dev Sharma* (supra) it has been held that in a democracy governed by rule of law, once elected to an office in a democratic institution, the incumbent is entitled to hold the office for the term for which he has been elected unless his election is set aside by a prescribed procedure known to law. A returned candidate must hold and enjoy the office and discharge duties related to therewith during the term specified by the relevant enactment is a valuable statutory right not only of the returned candidate but also of the constitutional or electoral college which he represents. Removal from such an office is a serious matter. A stigma is cast on the holder of the office in view of certain allegations. It was held that removal of a President on the ground of abuse of his powers or of habitual failure to perform his duties cannot be passed on the said ground on a singular or casual aberration or failure in exercise of power which is not sufficient to pass an order of removal of President. Erroneous exercise of power or indecision is not an abuse of power. In the case of *Sharda Kailash Mittal* (supra) it has been held that as per Sec.41-A that the removal from office of President is an extreme step which must be resorted to only in grave and exceptional circumstances and not for minor irregularities. Para 23 and 24 of the said judgment is reproduced as under:-

> "23. As directed earlier, Section 41-A of the Act gives power to the State Government to remove the President, Vice-President or Chairman of a Committee on four broad grounds, namely, (a) public interest; (b) interest of the Council; (c) incapability of performing his duties; and (d) working against the provisions of the Act or the Rules made thereunder. In addition, under Section 41-A(2), the State Government at the time of removal from office may also pass an order disqualifying the person from holding the office of the President, Vice-President or Chairman for the next term. The question to be determined is what is the scope of the application of Section 41-A and what is the nature of power of the Government?
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> 24. In *Tarlochan Dev Sharma v. State of Punjab [(2001) 6 SCC 260*] this Court while dealing with the removal of a President of the Council under the Punjab Municipal Act of 1911, held in para 7 as under: (SCC pp. 268-69)
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> > â 7. In a democracy governed by the rule of law, once elected to an office in a democratic institution, the incumbent is entitled to hold the office for the term for which he has been elected unless his election is set aside by a prescribed procedure known to law. â¦ Removal from such an office is a serious matter. It curtails the statutory term of the holder of the office. A

> stigma is cast on the holder of the office in view of certain allegations having been held proved rendering him unworthy of holding the office which he held.â

In para 11 this Court observed as under: (Tarlochan Dev Sharma case [(2001) 6 SCC 260], SCC pp. 270-71)

> "11 .....¦ A singular or casual aberration or failure in exercise of power is not enough; a course of conduct or plurality of aberration or failure in exercise of power and that too involving dishonesty of intention is----. The legislature could not have intended the occupant of an elective office, seated by popular verdict, to be shown exit for a single innocuous action or error of decision."

The same consideration must be taken into account while interpreting Section 41-A of the Act. The President under the M.P. Municipalities Act, 1961 is a democratically elected officer, and the removal of such an officer is an extreme step which must be resorted to only in grave and exceptional circumstances.

10. In the matter of *Ajay Kumar Shukla* (supra) it has been held in para 20 and 21 as under:-

> "20. This Court in the case reported in *1999 (1) M.PL.J. 368, Kaushlayabai v. State of M.P.* held that removal of President of Nagar Panchayat can be done when the charges of such serious nature as to warrant the grave action of removal. The power under section 41-A is an extraordinary power which can be invoked sparingly. This power cannot be invoked on a trivial irregularity. The relevant para reads as under:
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> > "Section 41-A of the M.P. Municipalities Act, 1961 as introduced by Amendment Act No. 18 of 1997 w.e.f 21-4-1997 confers an extraordinary and overriding power on the State Government to remove an elected office bearer of a local authority or committee under it on formation of an opinion that continuance of such office bearer is "not desirable in public interest" or "in the interest of the counsel" or that "he is incapable of performing his duties or is working against the provisions of the Act or any Rules" made thereunder. For taking action under section 41-A of removal of President, Vice President or Chairman of any Committee, power is conferred on the State Government with no provision of any appeal. The action of removal casts a serious stigma on the personal and public life of the

> concerned office bearer and may result in his disqualification to hold such office for the next term. The exercise of power, therefore, has serious civil consequences on the status of an office bearer. The nature of power is such that it has to be exercised on an opinion objectively formed by the State Government. The misconduct or incapacity of the office bearer should be of such magnitude as to make his continuance undesirable in the "interest of counsel" or "in public interest". There are no sufficient guidelines in the provisions of section 41-A as to the manner in which the power has to be exercised except that requires that reasonable opportunity of hearing has to be afforded to the office bearer proceeded against. Keeping in view the nature of the power and the consequences that flow on its exercise such power can be invoked by the State Government only for very strong and weighty reason. Such a power is not to be exercised for some trivial or minor irregularities in discharge of duties by the holder of the elected post. The material or grounds on which the action is taken should be such as to justify the exercise of drastic power of removal of the office bearer with consequence of his disqualification for another term. The provision has to be construed in the strict manner because the holder of office occupies it by election and he is deprived of the office by an executive order in which the electorate has no chance of participation."

21. In *Rajeev Sharma* (supra), this Court again emphasized that removal of President can be only in public interest and irregularities alleged should be of such serious nature that continuance of such person as President is undesirable. It was held that power under section 41-A of the Act of 1961, is to be exercised by the State Government for removing an elected office bearer from his office. Meaning thereby that the State Government is acting against the wishes and mandate of the people who have elected the incumbent into office. Accordingly, the opinion with regard to feasibility of keeping such a person in office or the desirability of removing him in public interest has to be viewed objectively and the irregularities or allegations alleged should be of such serious nature and of such magnitude that continuation of such a person is undesirable. Court cannot sit over the decision of the State Government as an appellate forum and scrutinise the action as if it is deciding an appeal against the order of the State Government, but in the backdrop of

the legal principle enumerated hereinabove, in matters concerning removal of democratically elected people, this Court can very well look into the matter to find out whether the removal is based on cogent and compelling reasons, whether interest of the public, interest of the Council have been properly considered, whether material on the basis of which action has been taken is of such a nature that the persons can be held to be responsible for having misused his office to such an extent that retaining him in the office will have serious and far reaching consequences in the interest of the Council and ultimately the public at large. This Court can always look into the matter to find out whether conditions and circumstances extraneous to the main purpose of the statute are being achieved by exercise of its power. In case after appreciating the material on record, this Court comes to a conclusion that the irregularities or misconduct alleged are nothing but some discrepancies or irregularities which cannot be contemplated to and directly attributable to the persons certainly power of judicial review can be exercised. In view of the material available on record, it is clear that even if the entire factors are admitted, they can at best be said to be irregularities mainly procedural in matter and there is nothing on record to individually single out the petitioner to be responsible for having misused his office. The material on record does not disclose that the petitioner is guilty of charges so serious in nature so as to warrant taking action against him under section 41-A. Consequently, this Court finds that the material on record with regard to the allegations made against the petitioner are not of such a serious nature so as to warrant taking of drastic action in exercise of the extra-ordinary power for removing him from office under section 41-A of the Act of 1961. Prakash Shrivastav J. followed the said ratio in *Baleshwar* (supra) and held that it is the settled position in law that the action of the Government has to be reasonable and it cannot be held that section 41-A gives arbitrary unbridled and discretionary power to the State to remove the elected president on trumpery charges not adequately proved or unreasonably accepted. The State is required to form an opinion in respect of the misconduct or incapacity objectively. Since the exercise of power under section 41-A has serious consequence, therefore, it can be invoked only for very strong and weighty reasons and the material on the basis of which such action taken must justify such a serious action. It cannot be ignored that by exercising this power, the State removes a democratically elected President, therefore, such a power cannot be exercised for trivial reasons or the material which is inadequate for taking the action. Reliance was also placed on *1991 (1) M.P.L.J. 368 and*

Municipal Committee, Kareli v. State of M.P., 1958 M.PL.J. (F.B.) 531."

11. In the aforesaid judgments it has been held that the action of removal cast a serious stigma on the personal and public life of the office bearer of concerned and may result in his/her disqualification to hold such office from the next term. The exercise of such power, therefore, has serious civil consequences on the status of an office bearer.

12. In the case of *Ajay Kumar Shukla* (supra) it is held that the removal u/S.41-A of the Act could be resorted to only under grave and exceptional circumstances.

13. In the light of aforesaid enunciation of law, the validity of impugned order is being examined in the facts of the present case.

14. During the course of arguments, learned counsel for the parties fairly submitted that removal order of petitioner is passed by invoking section 41-A of the Municipalities Act by the State Government. Section 51(b) and 51(c) are referred to in the impugned order to show its alleged violation by the present petitioner. Before dealing with the rival contentions, it is apposite to refer to the relevant provisions.

Section 41 A reads as under:

> **"41-A. Removal of President or Vice President or Chairman of a Committee. â** (1) The State Government may, at any time, remove a President or Vice President or a Chairman of any Committee, if his continuance as such is not in the opinion of the State Government desirable in public interest or in the interest of the Council or if it is found that he is incapable of performing his duties or working against the provisions of the Act or any rules made there under or if it is found that he does not belong to the reserved category for which the seat was reserved.
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> (2) As a result of the order of removal of Vice-President or Chairman of any Committee, as the case may be, under sub-section (1) it shall be deemed that such Vice-President or a Chairman of any Committee, as the case may be, has been removed from the office of Councillor also. At the time of passing order under sub-section (1), the State Government may also pass such order that the President or Vice-President or Chairman of any Committee, as the case may be, shall disqualified to hold the office of President or Vice-President or Chairman of any Committee, as the case may be, shall be disqualified to hold the office of President or Vice-President or Chairman, as the case may be for the next term:

Provided that no such order under this section shall be passed unless a reasonable opportunity of being heard is given. â

Section 51 (1)(b)(c) reads as under:

"51. Powers and duties of President. â (1) It shall be the duty of the President of the Council"

(a) xxxx;

(b) to watch over the financial and executive administration of the Council and perform such executive functions as may be allotted to him by or under this Act;

(c) to exercise supervision and control over the acts and proceedings of all officers and servants of the Council in matters of executive administration and in matters concerning the accounts and records of the Council;

(d) xxxxx.

15. The charges against the Chief Municipal Officer and the petitioner are same which reads as under:-

(a) That, the CMO and President have failed to obtain requisite permission from the Municipal Council for auction of the shop bearing no.2 situated at Bus Stand, Near Buniyadi Shala, Alirajpur and for which CMO and President are responsible under section 92 of the Madhya Pradesh Municipality Act, 1961.

(b) That, the CMO and President have not obtained any approval from the State Government in terms of the proviso of the sub-section 3 of section 109 of the Municipality Act, 1961 for which CMO and President are responsible under section 92 of the Madhya Pradesh Municipality Act, 1961.

(c) That, the CMO and President has approved the auction of the shop in question for Rs.9,00,000/- whereas the offset price was Rs.15,00,000/- and there is no reason assigned by CMO and President for accepting the auction at a lower price in the proceedings for which CMO and President are responsible under section 92 of the Municipality Act, 1961.

(d) That, the CMO and President have only deposited Rs.5,00,000/- and has failed to recover the balance of Rs.4,00,000/- from the allottee and has thereby caused loss of Rs.4,00,000/- to the Municipality for which CMO and President are responsible under section 92 of the Municipality Act, 1961.

(f) That, the CMO and President are responsible for the loss of Rs.6,00,000/- i.e. for the difference between the offset price and the auction price & Rs.4,00,000/- which CMO and President failed to recover i.e. total Rs.10,00,000/- under section 92 of the Municipality Act, 1961.

16. A plain reading of the aforesaid charges alleged against the petitioner is in respect of committing the irregularity in the matter of conducting auction of Shop No.2, Bus Stand near Buniyadi Shala, Alirajpur. The same allegations were made against the Chief Municipal Officer with the allegation that his misconduct caused financial loss to the Municipality. The allegations against the petitioner are that the petitioner had failed to obtain permission/sanction either from the President in Council or from the competent authority. As per the provisions of Sec.51 of the Act, 1961 it is the duty of the petitioner to watch over the financial and executive administration of the Council and perform such executive functions as may be allotted to him by or under the Act.

17. Counsel for respondents failed to show any provision or law or Rules or Regulations to show that it was the duty of the petitioner to obtain sanction from the competent authority or from the President in Council. They have also failed to show any provision of law to show that it was the duty of the President to put an agenda of the meeting for approval and, therefore, the Charge No.1 cannot be held to be proved against the petitioner. The Charge No.2 is also contrary to the provisions of Sec.109 read with the provisions of Rules 1996 wherein it is provided that it is the duty of the Chief Municipal Officer to obtain requisite approval from the State government and not by the President of the Council. The findings recorded in respect of charge No.2 is also contrary to the record. The petitioner being President of the Council has not recorded any reason for accepting the auction at a lower price than the offset price in the auction proceedings. It was the duty of Chief Municipal Officer to record the reason for accepting the auction at lower price and bring it to the notice of the President. It is nowhere provided that the President has drawn the proceedings of the auction. The Charge No.4 and 5 also do not establish that it was the duty of the President of Council but on the contrary it was the duty of the Chief Municipal Officer in respect of the charges mentioned in Charge No.4 and 5. The impugned order merely shows that the allegation of irregularities have been made against the petitioner and those charges do not establish any charge of misconduct or misappropriation or misutilisation of the amount. On the basis of the aforesaid reason, no opinion could have been formed that continuance of the petitioner as President was not desirable/permissible in public interest or in the cost of Council.

18. The question that whether the respondents could have taken action in respect of a lapse which had taken place in tenure which had already come to an end. I do not find any merit in the aforesaid submissions because there is nothing

in the language of the provisions of Sec.41-A of the Act which provides that the lapse must relate to the period during which the office bearer is removed. The continuation of a public representative may not be desirable in public interest or in the interest of the Council even if the lapse has occurred in earlier tenure. The co-ordinate bench has taken the view in the case of *Laxmi Narayan Vs. State of MP* 2013 SCC Online MP 32 that the allegations pertaining to petitioner's misconduct in respect of his tenure which had come to an end and, therefore, removal from the said office after re-election is illegal. The said submission was not accepted and the same was repelled holding that the provisions of the Act do not provide that the lapse must relate to the period during which office is removed.

19. Though counsel for State vehemently supported the impugned order of removal and disqualification but could not show any provision of the Act or the Rules that it was incumbent on the petitioner being President of the Municipal Council to prepare an agenda and to obtain permission/approval from the competent authority. The judgments pressed into service by the counsel for respondents would not apply to the facts of the present case. In the case of *Smt. Satyaprakashi* (supra) the charge was different. In the said case the charge was against the petitioner that he had issued appointment orders himself being aware that the power is vested with the President-in-Council and was also instrumental in getting administrative and financial permission to appoint 24 extra persons without authority of law.

20. The respondents have further failed to show any proceedings which were drawn by the petitioner himself. On the contrary the record shows that the Chief Municipal Officer has been held guilty for not preparing an agenda and getting approval from the competent authority before putting the Shop No.2, Bus Stand Near Buniyadi Shala, Alirajpur for auction and accepting the auction amount on lesser side. The petitioner cannot be held for the charges levelled against the petitioner in absence of cogent and sufficient material. The charges only prima facie alleges irregularity on the part of the petitioner but not any illegality or misconduct. On the contrary in the impugned order of removal, the respondents themselves have stated that it was the duty of the Chief Municipal Officer to prepare agenda and to draw the proceedings for approval. However, the petitioner has also been held responsible for the same in absence of any provision of law or rule. The respondents have failed to show any strong cogent and weighty ground for exercising of powers of removal u/S.41-A of the Act and also for declaring the petitioner disqualified for next election.

21. In view of the aforesaid analysis, the impugned order dated 23.12.2020 (Annexure P/5) cannot sustain judicial scrutiny. The impugned order is set aside. **The petition is allowed**. No order as to costs.

Petition allowed

I.L.R. 2023 M.P. 33
Before Mr. Justice Sanjay Dwivedi
WP No. 20308/2019 (Jabalpur) decided on 2 September, 2022

HEALTH SECURE (INDIA) PVT. LTD. (M/S) …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

***A. Constitution – Article 226 – Contract – Blacklisting – Show Cause Notice – Principle of Natural Justice* – Held – Letter R-4 nowhere fulfills the requirement of show cause notice asking petitioner to be blacklisted but it is a letter asking petitioner and apprising them regarding non-supply of material – No opportunity granted to petitioner – There is violation of principle of natural justice – Action of respondents is also arbitrary as petitioner has already supplied 99.75% of material – Impugned order set aside – Respondent directed to refund bank guarantee – Petition allowed. (Paras 11, 13 & 22 to 24)**

क. संविधान – अनुच्छेद 226 – संविदा – काली सूची में डालना – कारण बताओ नोटिस – नैसर्गिक न्याय का सिद्धांत – अभिनिर्धारित – पत्र R–4 कहीं भी याची को काली सूची में डालने के लिए कारण बताओ नोटिस की आवश्यकता की पूर्ति नहीं करता, परंतु वह याची से पूछने और सामग्री की आपूर्ति न करने के संबंध में उन्हें सूचित करने वाला पत्र है – याची को कोई अवसर प्रदान नहीं किया गया – नैसर्गिक न्याय के सिद्धांत का उल्लंघन है – प्रत्यर्थीगण की कार्रवाई भी मनमानी है क्योंकि याची पहले ही 99.75% सामग्री की आपूर्ति कर चुका है – आक्षेपित आदेश अपास्त – प्रत्यर्थी को बैंक गारंटी वापस करने के लिए निदेशित किया गया – याचिका मंजूर।

***B. Constitution – Article 226 – Administrative Action* – Held – If the foundation of action of the authority goes, the structure and subsequent proceeding based upon that foundation would automatically fall. (Para 23)**

ख. संविधान – अनुच्छेद 226 – प्रशासनिक कार्रवाई – अभिनिर्धारित – यदि प्राधिकारी की कार्रवाई की बुनियाद खत्म हो जाती है तो उस बुनियाद पर आधारित संरचना तथा बाद की कार्यवाही स्वतः समाप्त हो जाएगी।

Cases referred:

(1975) 1 SCC 70, (1989) 1 SCC 229, (2001) 8 SCC 604, (2007) 14 SCC 517, 2014 (4) M.P.L.J. 225, (2014) 14 SCC 731, (2014) 9 SCC 105.

Sanjay Agrawal with *Saransh Kulshrestha*, for the petitioner.
Girish Kekre, G.A. for the respondent No. 1 & 2/State.
Rohit Jain, for the respondent No. 3.

O R D E R

SANJAY DWIVEDI, J.:- Since the pleadings are complete, therefore, with the consent of learned counsel for the parties, the matter is heard finally.

This petition is under Article 226 of the Constitution of India questioning the legality, validity and propriety of the orders dated 15.02.2017 (Annexure-P/14), 20.02.2017 (Annexure-P/15) and 30.11.2017 (Annexure-P/20).

2. As per the petitioner, the respondents illegally and in an arbitrary manner passed the impugned orders contrary to the terms and conditions of tender document and breached the settled principle of law as before passing the orders which carries civil consequences has not followed the principle of *audi alteram partem*. As per the petitioner, the respondents before proceeding against the petitioner did not care to issue any show cause notice and passed the order of blacklisting of the petitioner and consequentially considering it to be blacklisted invoked the performance bank guarantee that too for a different product whereas the dispute in regard to a single product.

3. The appeal preferred against the said order was rejected without going into the merits of the case and without considering the grounds raised by the petitioner in its appeal. Therefore, this petition has been filed seeking quashing of orders impugned.

4. After giving notice to the respondents by this Court, the respondents have filed their response stating therein that they have issued a notice to the petitioner before initiating action against it and that notice according to the respondents is Annexure-R/4 dated 13.12.2016. As per the respondents, there is nothing illegal committed by them but they have taken action which is well within the terms and conditions of tender document. According to them, the supply could not be completed within the stipulated period and, therefore, action has been taken as per Clause-13.3(a) of tender document. It is also submitted by the respondents that the appellate authority has discharged its obligation while deciding the appeal and also deciding the objection raised by the petitioner and that action has been taken against the petitioner after giving proper opportunity of hearing and as such, supported their action saying that the same was justified and according to them, the petition is without any substance and also filed after lapse of time and as such, it suffers from delay and laches and deserves to be dismissed.

5. Before deciding the issue involved in the case, it is necessary to take note of relevant facts of the case, which in brief are;

(5.1) That the petitioner's company is a private limited company engaged in manufacturing of quality drugs and pharmaceuticals

products and those are supplied to all government agencies across the country. As per the petitioner, it has an outstanding record of supplying the drugs to all the government agencies and no complaint till now from any of the agencies ever reported. The petitioner is a SSI Unit and duly registered under the MSME Act, 2006.

(5.2) The respondents inviting applications for supply of drugs issued an NIT on 28.08.2015 (Annexure-P/1) with the terms and conditions. In response to which, the petitioner's company submitted tender application which has been accepted by the respondents. The petitioner since stood L-1 was asked to submit bank guarantee and on 15.12.2016 a bank guarantee for an amount of Rs.24,29,590/- has been submitted which was for Vitamin-A Syrup and a bank guarantee for an amount of Rs.1,29,33,809/- was also submitted on different dates for IFA Syrup. The respective documents are available on record as Annexure-P/2. According to the petitioner, there were two distinct bank guarantees for two different products but so far as the Vitamin-A Syrup is concerned, the bank guarantee of Rs.24,29,590/- was given. According to the petitioner, Vitamin-A Syrup has the main raw material in form of Vitamin-A Solution which is in fact manufactured by two major entities across the world and these two entities only supply to the 60% of the world company which are in the manufacturing of Vitamin-A. These two companies are based on Germany and Switzerland.

(5.3) So far as the petitioner's company is concerned, they were in the agreement of a company of Germany for purchasing 100% raw material on advance payment and that raw material is used by the petitioner for production of Vitamin-A Syrup.

(5.4) Respondent No.3 is a Corporation, established under the orders of respondent Nos.1 and 2, worked as Rate Contracting Agency and as such, finalizing the rate of various pharmaceutical products to be supplied to various entities in the State including the Chief Medical & Health Officer, Medical Colleges, Civil Surgeon, etc.

(5.5) As per the terms and conditions of the tender document, the supply which was to be made by the petitioner has to be completed within 45 days from the date of purchase order but there was a clause that the authority may accept the supply even after 45 days but penalty as prescribed in Clause-19 will be levied. The Clause further provides that at the end of 60th

day, the order stands cancelled and the penalty would be levied on unexecuted order. There was also force majeure clause which includes fire at Clause- 13.10 and further states about the force majeure events in Clause 13.11.

(5.6) The respondent/department related to the State Government but they are in the habit of keeping bills pending for years together. Earlier also there was contract given to the petitioner to supply the drugs to the respondent/authority and that time also payments were not made in time.

(5.7) The petitioner also communicated to the respondent/ authorities by letter dated 01.12.2015 (Annexure-P/3) asking them to first make payment which is outstanding and then expect supply of Vitamin-A Syrup in time. It is also informed to the authority that delay in supply of Vitamin-A Syrup is possible because of pendency of bills and as such, it is not the petitioner but the respondents would be responsible for the same.

(5.8) The Deputy Director, Health Services also issued instructions to the Chief Medical & Health Officer of all the districts for making payment to the suppliers in time and further instructed not to make any deduction from the firms who are engaged in supply of drugs.

(5.9) As per the available material documents filed by the petitioner showing that there was some delay in supplying the drugs because of withheld payments. It is also informed to the respondents that there is delay in supply due to shortage of raw material. The petitioner communicated the reasons to the respondents that the delay is being occurred due to certain unavoidable reasons and sent email to all the respective districts where Vitamin-A Syrup had to be supplied.

(5.10) By letter dated 09.01.2017 (Annexure-P/10), a request was made by the petitioner's company to accommodate with them and they are very soon supplying the IFA Syrup and the petitioner's company has also asked the respondents not to levy the penalty because of delay in supplying the drugs. In the letter it is also requested that the bills outstanding be also released and the districts authorities be communicated accordingly.

(5.11) The Chief Managing Director (Finance and Administration) of respondents' company vide letter dated 26.07.2019 directed the Joint Director, Health Services that the authorities are not releasing the bills of suppliers and unnecessary withheld the same, therefore, show-cause

notice be issued to them for taking appropriate action. On 24.01.2017, the petitioner's outstanding amount was Rs.2,40,76,213/- and a letter was sent by the petitioner to the respondents giving details therein about the outstanding amount. But ignoring all the communications made by the petitioner repeatedly demanding their outstanding payment, the respondents without considering the same issued an order on 15.02.2017 (Annexure-P/14) blacklisting the petitioner for a period of two years. As per the petitioner they have supplied almost 99.75% of the product out of 100% and as such, there was no reason for blacklisting the petitioner's company.

(5.12) Thereafter, vide letter dated 20.02.2017 (Anneuxre- P/15), the petitioner was informed that the authorities have invoked the bank guarantee of Rs.1,53,63,349/- and then the petitioner preferred an appeal against the said order but since that was not decided, therefore, the petitioner preferred a petition i.e. W.P. No.5090/2017 which was disposed of directing the appellate authority to decide the appeal. The appeal has been decided vide order dated 30.11.2017 (Annexure-P/20) dismissing the appeal. Therefore, this petition has been filed.

6. Shri Sanjay Agrawal, learned senior counsel appearing for the petitioner has contended that the order of blacklisting is illegal because the respondents did not consider the aspect that the petitioner has already supplied 99.75% of the contract item and as such, blacklisting of petitioner's company was not required. Even otherwise, as per the settled legal position, the order of blacklisting cannot be issued without giving any opportunity of hearing or issuing show-cause notice. He submitted that the basic order of blacklisting is not sustainable in the eyes of law. He relied upon the decisions reported in (1975) 1 SCC 70 *(M/s. Erusian Equipment & Chemicals Ltd. Vs. State of West Bengal and another,* (1989) 1 SCC 229 *(Raghunath Thakur Vs. State of Bihar and others),* (2001) 8 SCC 604 *(Grosons Pharmaceuticals (P) Ltd. and another Vs. State of U.P. and others,* (2007) 14 SCC 517 *(Jagdish Mandal Vs. State of Orissa and others),* 2014 (4) M.P.L.J. 225 *(Bhupendra Singh Kushwah Vs. State of M.P. and another),* (2014) 14 SCC 731 *(Kulja Industries Limited Vs. Chief General Manager, Western Telecom Project Bharat Sanchar Nigam Limited and others)* and (2014) 9 SCC 105 *(Gorkha Security Services Vs. Govermnent (NCT of Delhi) and others).*

7. On the other hand, Shri Rohit Jain, learned counsel appearing for respondent No.3 has submitted that the submission made by the counsel for the petitioner is without any substance because show-cause notice was issued by the respondents before initiating proceeding of blacklisting and according to him that show-cause notice is Annexure-R/4 dated 13.12.2016. He further submitted that

since there was violation of terms and conditions of contract as the petitioner did not supply the required material within the specified period, therefore, consequential action was taken keeping the name of the petitioner's company in the blacklist, declaring it to be disqualified to participate in tender proceeding in future for a period of two years and forfeiture of bank guarantee is also the consequential action of violating the terms and conditions of contract.

8. Considering the submissions made by the learned counsel for the parties and after perusal of record, it is out of question to mentioned that the petitioner's company was continuously demanding the respondents to release their outstanding bills but that has not been done and outstanding payment was not released by the respondents. In the petition, it is mentioned that within the specified period, the petitioner supplied 99.75% of the material out of required material to be supplied and, therefore, it was not required for the respondents to proceed against the petitioner's company.

9. However, as per Shri Agrawal, even otherwise if that was the situation, before blacklisting the petitioner's company, the respondents could have issued a notice asking the petitioner as to why they should not be blacklisted because of violating the terms and conditions of contract. He submitted that in absence of following the principle of natural justice and giving go-bye the principle of *audi alteram partem,* action of respondents cannot be approved. He further submitted that Annexure-R/4 is not a show-cause notice fulfilling the requirement, therefore, the stand of the respondents is contrary to law and that does not justify their action which apparently illegal and contrary to law.

10. I have perused the Annexure-R/4, which reads as under:-

"**MP Public Health Services Corporation Ltd.**
(A Government of MP Undertaking)
1, Arera Hills (In TilhanSangh Building Campus)
Bhopal, Madhya Pradesh www.mpphscl.in"

Email: procmpphscl@gmail.com, cgmt.mpphscl@gmail.com
Ph:0755-2578915

Sr.No: 3475 MPPHSCL/Tech /2016/ Dated:13/12/2016

To,

M/s Health Secure (I) Pvt Ltd
C-10, MIDC, Taloja 410206
Dist Raigad, Navi Mumbai
Email: healthsecure@rediffmail.com,
healthsecure125@yahoo.co.in

Subject:- Regarding pending supply of Vitamin-A Syrup.

Program Division has informed us that supply of more than 1.5

lack bottles of Vitamin A Syrup pending from your side against the purchase orders raised from different institutions of Madhya Pradesh. Since the said drug is a program drug & most of the purchase orders were raised in advance i.e. in the months of Sep but till date there is no supply from your side even after reminding you several time telephonically & by mails. Prescribed 60 days supply period has already been elapsed.

From the above fact it seeks that there is unnecessary delay in supply from your side which is causing disturbed supply of essential drug to the health institutions of MP and hampering an important health program of Government of India.

Please complete all the purchase order immediately & let us know the dispatch detail of said drug to respective institutions in one day time line.

To save our program hampered due to delay of supply of Vitamin-A , please explain why shouldn't we invoke risk & cost clause of the bid document thereby purchasing the Vit.-A syrup from open market at your risk & cost.

Further, please explain why we shouldn't debar you due to inordinate delay in supply.

CGM (Technical)
MPPHSCL

S.no.3476 MPPHSCL/Tec/2016 Dated 13/12/2016

Copy To:-

1. **Mission Director, NHM, Bhopal.**
2. **Managing Director, MPPHSCL, Bhopal.**
3. **Chief General Manager-Co-ordination, MPPHSCL, Bhopal.**
4. **Dr. Pragya Tiwari, Deputy Director, NHM Bhopal.**

CGM (Technical)
MPPHSCL"

11. The contents of letter dated 13.12.2016 (Annexure- R/4) nowhere fulfills the requirement of show-cause notice asking the petitioner to be blacklisted, but it is a letter asking the petitioner and apprising them that they are not supplying particular item in time and that letter very categorically reveals that suggestion was made because of delay in supply, the programme of respondents hampered and they are going to invoke risk & cost clause of tender document and purchasing Vitamin-A Syrup from open market at the risk of the petitioner.

12. Shri Agrawal repeatedly submitting that it is not a prior notice before initiating action of keeping the name of the petitioner in the blacklist. He has also submitted that even after issuing this notice, the respondents can not invoke risk &

cost clause because supply was almost completed as 99.75% of the supply had already been made.

13. From the reply and submission made by Shri Rohit Jain, it is clear that they have not disputed about the quantity of material already supplied and they have also not filed any document except Annexure-R/4 justifying that before initiation of proceeding of blacklisting any other notice was issued to the petitioner and any opportunity was granted to petitioner. It is also not disclosed that risk and cost clause invoked.

14. The Supreme Court in case of *M/s. Erusian Equipment & Chemicals Ltd.* (supra) has observed as under:-

> "20.Blacklisting has the effect of preventing a person from the privilege and advantage of entering into lawful relationship with the Government for purposes of gains. The fact that a disability is created by the order of blacklisting indicates that the relevant authority is to have an objective satisfaction. Fundamentals of fair play require that the person concerned should be given an opportunity to represent his case before he is put on the blacklist."

15. In case of *Raghunath Thakur* (supra), the Supreme Court has observed as under:-

> "4. Indisputably, no notice had been given to the appellant of the proposal of black-listing the appellant. It was contended on behalf of the State Government that there was no requirement in the rule of giving any prior notice before black-listing any person. In so far as the contention that there is no requirement specifically of giving any notice is concerned, the respondent is right. But it is an implied principle of the rule of law that any order having civil consequence should be passed only after following the PG NO 869 principles of natural justice. It has to be realised that black-listing any person in respect of business ventures has civil consequence for the future business of the person concerned in any event. Even if the rules do not express so, it is an elementary principle of natural justice that parties affected by any order should have right of being heard and making representations against the order. In that view of the matter, the last portion of the order in so far as it directs black-listing of the appellant in respect of future contracts, cannot be sustained in law. In the premises, that portion of the order directing that the appellant be placed in the black-list in respect of future contracts under the Collector is set aside. So far as the cancellation of the bid of the appellant is concerned, that is not affected. This order will, however, not prevent the State

> Government or the appropriate authorities from taking any future steps for blacklisting the appellant if the Government is so entitled to do so in accordance with law, i.e. giving the appellant due notice and an opportunity of making representation. After hearing the appellant, the State Government will be at liberty to pass any order in accordance with law indicating the reasons therefor. We, however, make it quite clear that we are not expressing any opinion on the correctness or otherwise of the allegations made against the appellant. The appeal is thus disposed of."

16. In case of *Grosons Pharmadeuticals (*sic *: Pharmaceuticals) (P) Otd. (*sic*: Ltd) And another* (supra), the Supreme Court has observed as under:-

> "2. Learned counsel appearing for the appellant, urged that seeing the nature and seriousness of the order passed against the appellant, the respondent ought to have supplied all the materials on the basis of which the charges contained in the show cause notice were based along with show cause notice and in the absence of supply of materials, the order impugned is against the principles of natural justice. We do not find any merit in this contention. Admittedly, the appellant has only contractual relationship with the State government and the said relationship is not governed by any statutory Rules. There is no statutory rule which requires that an approved contractor cannot be blacklisted without giving an opportunity of show cause. It is true that an order blacklisting an approved contractor results in civil consequences and in such a situation in the absence of statutory rules, the only requirement of law while passing such an order was to observe the principle of *audi alteram partem* which is one of the facet of the principles of natural justice. The contention that it was incumbent upon the respondent to have supplied the material on the basis of which the charges against the appellant were based was not the requirement of principle of *audi alteram partem*. It was sufficient requirement of law that an opportunity of show cause was given to the appellant before it was blacklisted. It is not disputed that in the present case, the appellant was given an opportunity to show cause and he did reply to the show cause which was duly considered by the State Government. We are, therefore, of the view that that the procedure adopted by the respondent while blacklisting the appellant was in conformity with the principles of natural justice."

17. Further, in case of *Jagdish Mandal* (supra), the Supreme Court has observed as under:-

> "27. The learned counsel for the fifth respondent submitted that the Department ought not to have acted on a complaint received against him, without giving him an opportunity to show cause. This contention has no merit. Whether any complaint is received or not, the Department is entitled to verify the authenticity of the document pledged as earnest money deposit. Such verification is routinely done. The Committee was neither blacklisting the tenderer nor visiting any penal consequences on the tenderer. It was merely treating the tender as defective. There was, therefore, no need to give an opportunity to the tenderer to show cause at that stage. We no doubt agree that the Committee could have granted an opportunity to the tenderer to explain the position. But failure to do so cannot render the action of the Committee treating the EMD as defective, illegal or arbitrary."

18. In case of *Bhupendra Singh Kushwah* (supra), the Supreme Court has observes ad (sic: observed as) under:-

> "10. Therefore in view of the aforesaid fact and the legal position, it is clear that before passing any order of cancellation of registration or blacklisting a Contractor, the State Government or its departments are necessarily required to issue a show cause notice or to provide an adequate hearing to a Contractor, in terms of the principles of natural justice. A perusal of the document annexed with the petition and the record placed for consideration of the Court on behalf of the respondents clearly demonstrate that no show cause notice was ever issued to the petitioner before ordering for cancellation of the registration and placement of the name of the petitioner in the blacklist seriously violates the cardinal principles of *audi alteram partem*, therefore, on this ground alone, the order of cancellation of registration of Contractor and order of blacklisting deserves to be quashed."

19. Further, in case of *Kulja Industries Ltd.* (supra), the Supreme Court has observed as under:-

> "18. The legal position on the subject is settled by a long line of decisions rendered by this Court starting with Erusian Equipment & Chemicals Ltd. v. State of W.B. [(1975) 1 SCC 70] where this Court declared that blacklisting has the effect of preventing a person from entering into lawful relationship with the Government for purposes of gains and that the authority passing any such order was required to give a fair hearing before passing an order blacklisting a certain entity. This Court observed: (SCC p. 75, para 20)

> "20. Blacklisting has the effect of preventing a person from the privilege and advantage of entering into lawful relationship with the Government for purposes of gains. The fact that a disability is created by the order of blacklisting indicates that the relevant authority is to have an objective satisfaction. Fundamentals of fair play require that the person concerned should be given an opportunity to represent his case before he is put on the blacklist."
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> Subsequent decisions of this Court in Southern Painters v. Fertilizers & Chemicals Travancore Ltd. [1994 Supp (2) SCC 699 : AIR 1994 SC 1277] ; Patel Engg. Ltd. v. Union of India [(2012) 11 SCC 257 : (2013) 1 SCC (Civ) 445] ; B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd. [(2006) 11 SCC 548] ; Joseph Vilangandan v. Executive Engineer (PWD) [(1978) 3 SCC 36] among others have followed the ratio of that decision and applied the principle of *audi alteram partem* to the process that may eventually culminate in the blacklisting of a contractor."

20. Likewise in a case *Gorkha Security Services* (supra), the Supreme Court has held as under:-

> "27. We are, therefore, of the opinion that it was incumbent on the part of the Department to state in the show-cause notice that the competent authority intended to impose such a penalty of blacklisting, so as to provide adequate and meaningful opportunity to the appellant to show cause against the same. However, we may also add that even if it is not mentioned specifically but from the reading of the show-cause notice, it can be clearly inferred that such an action was proposed, that would fulfil this requirement. In the present case, however, reading of the show-cause notice does not suggest that noticee could find out that such an action could also be taken. We say so for the reasons that are recorded hereinafter.
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> 28. In the instant case, no doubt the show-cause notice dated 6-2-2013 was served upon the appellant. Relevant portion thereof has already been extracted above (see para 5). This show-cause notice is conspicuously silent about the blacklisting action. On the contrary, after stating in detail the nature of alleged defaults and breaches of the agreement committed by the appellant the notice specifically mentions that because of the said defaults the appellant was "as such liable to be levied the cost accordingly". It further says "why the action as mentioned above may not be taken against the firm, besides other action as deemed fit by the competent authority". It follows from the above that main action which the respondents

wanted to take was to levy the cost. No doubt, the notice further mentions that the competent authority could take other actions as deemed fit. However, that may not fulfil the requirement of putting the defaulter to the notice that action of blacklisting was also in the mind of the competent authority. Mere existence of Clause 27 in the agreement entered into between the parties, would not suffice the aforesaid mandatory requirement by vaguely mentioning other "actions as deemed fit". As already pointed out above insofar as penalty of blacklisting and forfeiture of earnest money/security deposit is concerned it can be imposed only, "if so warranted". Therefore, without any specific stipulation in this behalf, the respondent could not have imposed the penalty of blacklisting.

29. No doubt, rules of natural justice are not embodied rules nor can they be lifted to the position of fundamental rights. However, their aim is to secure justice and to prevent miscarriage of justice. It is now well-established proposition of law that unless a statutory provision either specifically or by necessary implication excludes the application of any rules of natural justice, in exercise of power prejudicially affecting another must be in conformity with the rules of natural justice."

21. Even this Court, has also dealt with the issue with regard to passing an order of blacklisting without following principle of natural justice and relying upon several decisions of the Supreme Court took following view :-

"The Supreme Court in case of **Gorkha Security Services Vs. Government (NCT of Delhi) and Others** reported in **(2014) 9 SCC 105**, has very clearly observed that law of blacklisting clearly provides an opportunity of following the principles of *Audi Alteram Partem* before taking such action and has held in Paragraph Nos. 32 to 34, which read as under :-

"The "Prejudice" Argument

32. It was sought to be argued by Mr. Maninder Singh, learned Additional Solicitor General appearing for the respondent, that even if it is accepted that the show-cause notice should have contained the proposed action of blacklisting, no prejudice was caused to the appellant in as much as all necessary details mentioning defaults/ prejudices committed by the appellant were given in the show-cause notice and the appellant had even given its reply thereto. According to him, even if the action of blacklisting was not proposed in the show cause notice, the reply of the appellant would have remained the same. On this premise, the learned Additional Solicitor General has argued that there is no prejudice caused to the appellant by non-

mentioning of the proposed action of blacklisting. He argued that unless the appellant was able to show that non-mentioning of blacklisting as the proposed penalty has caused prejudice and has resulted in miscarriage of justice, the impugned action cannot be nullified. For this proposition he referred to the judgment of this Court in Haryana Financial Corpn. v. Kailash Chandra Ahuja[10]: (SCC pp. 38, 40-41 & 44, paras 21, 31, 36 & 44)

> "21. From the ratio laid down in B.Karunakar[11] it is explicitly clear that the doctrine of natural justice requires supply of a copy of the inquiry officer's report to the delinquent if such inquiry officer is other than the disciplinary authority. It is also clear that non-supply of report of the inquiry officer is in the breach of natural justice. But it is equally clear that failure to supply a report of the inquiry officer to the delinquent employee would not ipso facto result in the proceedings being declared null and void and the order of punishment non est and ineffective. It is for the delinquent employee to plead and prove that non-supply of such report had caused prejudice and resulted in miscarriage of justice. If he is unable to satisfy the court on that point, the order of punishment cannot *automatically* be set aside.
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> 31. At the same time, however, effect of violation of the rule of audi alteram partem has to be considered. Even if hearing is not afforded to the person who is sought to be affected or penalised, can it not be argued that 'notice would have served no purpose' or 'hearing could not have made difference' or 'the person could not have offered any defence whatsoever'. In this connection, it is interesting to note that under the English law, it was held few years before that non-compliance with principles of natural justice would make the order null and void and no further inquiry was necessary.
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> 36. The recent trend, however, is of 'prejudice'. Even in those cases where procedural requirements have not been complied with, the action has not been held ipso facto illegal, unlawful or void unless it is shown that non- observance had prejudicially affected the applicant.
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> * * *

> 44. From the aforesaid decisions, it is clear that though supply of report of the inquiry officer is part and parcel of natural justice and must be furnished to the delinquent employee, failure to do so would not automatically result in quashing or setting aside of the order or the order being declared null and void. For that, the delinquent employee has to show 'prejudice'. Unless he is able to show that non-supply of report of the inquiry officer has resulted in prejudice or miscarriage of justice, an order of punishment cannot be held to be vitiated. And whether prejudice had been caused to the delinquent employee depends upon the facts and circumstances of each case and no rule of universal application can be laid down."

33. When we apply the ratio of the aforesaid judgment to the facts of the present case, it becomes difficult to accept the argument of the learned Additional Solicitor General. In the first instance, we may point out that no such case was set up by the respondents that by omitting to state the proposed action of blacklisting, the appellant in the show-cause notice has not caused any prejudice to the appellant. Moreover, had the action of black listing being specifically proposed in the show cause notice, the appellant could have mentioned as to why such extreme penalty is not justified. It could have come out with extenuating circumstances defending such an action even if the defaults were there and the Department was not satisfied with the explanation qua the defaults. It could have even pleaded with the Department not to blacklist the appellant or do it for a lesser period in case the Department still wanted to black list the appellant. Therefore, it is not at all acceptable that non-mentioning of proposed blacklisting in the show-cause notice has not caused any prejudice to the appellant. This apart, the extreme nature of such a harsh penalty like blacklisting with severe consequences, would itself amount to causing prejudice to the appellant.

34. For the aforesaid reasons, we are of the view that the impugned judgment[3] of the High Court does not decide the issue in correct prospective. The impugned Order dated 11.9.2013 passed by the respondents blacklisting the appellant without giving the appellant notice thereto, is contrary to the principles of natural justice as it was not specifically proposed and, therefore, there was no show-cause notice given to this effect before taking action of blacklisting against the appellant. We, therefore, set aside and quash the impugned action of blacklisting the appellant. The appeals are allowed to this

extent. However, we make it clear that it would be open to the respondents to take any action in this behalf after complying with the necessary procedural formalities delineated above. No costs."

In the aforesaid case, the Supreme Court further held as under:-

"No doubt, rules of natural justice are not embodied rules nor can they be lifted to the position of fundamental rights. However, their aim is to secure justice and to prevent miscarriage of justice. It is now well-established proposition of law that unless a statutory provision either specifically or by necessary implication excludes the application of any rules of natural justice, any exercise of power prejudicially affecting another must be in conformity with the rules of natural justice. When it comes to the action of blacklisting which is termed as "civil death" it would be difficult to accept the proposition that without even putting the noticee to such a contemplated action and giving him a chance to show cause as to why such an action be not taken, final order can be passed blacklisting such a person only on the premise that this is one of the actions so stated in provisions of NIT."

The Division Bench of this Court in case of **B.C. Biyani Projects Pvt. Ltd. Vs. State of M.P. and Others, 2015 SCC Online MP 6833**, has also relied upon the decision as quoted hereinabove in case of **Gorkha Security Services (supra).**

In view of the above case law, admittedly since no opportunity nor even a show-cause notice has been issued to the petitioner, therefore, the order impugned is not sustainable."

22. Thus, it is clear that in the present case before issuing the order dated 15.02.2017 (Annexure-P/14) which is the basic order of blacklisting, it is apparent that the said order suffers from principle of natural justice and the respondent/ authority did not follow the principle of *audi alteram partem* and as such, the order is not sustainable and is liable to be set aside.

23. Considering other aspect of the matter, the action taken by the respondents against the petitioner is also arbitrary because they have already completed supply of 99.75% of the material which was to be supplied and the respondents even after giving show-cause notice has not invoked the risk & cost clause and also not denied about the practice of withholding of payment despite supplying material. The order dated 15.02.2017 (Annexure-P/14) is therefore, set aside. As per settled

principle of law, if the foundation of action of the authority goes, the structure and subsequent proceeding based upon that foundation would automatically fall. Consequently, the order dated 20.02.2017 (Annexure-P/15) and further order dated 30.11.2017 (Annexure-P/20) are also set aside.

24. The amount of bank guarantee which is already invoked shall be refunded to the petitioner within a period of three months. If the same is not made within the specified period, the interest at the rate of 9% shall be made to the petitioner till realization of payment made to the petitioner.

25. The petition is accordingly, **allowed**.

No order as to cost.

Petition allowed

I.L.R. 2023 M.P. 48

Before Mr. Justice Vivek Agarwal

WP No. 9263/2017 (Jabalpur) decided on 7 September, 2022

PURUSHOTTAM LAL …Petitioner

Vs.

ROOPCHANDRA & anr. …Respondents

***Stamp Act, Indian (2 of 1899), Section 2(12) & 17 – Registration – Stamp Duty* – Held – Valuation of market value of property at the time of registration will be the valuation for ascertaining stamp duty and not the value mentioned in the instrument – No error in impugned order – Petition dismissed. (Para 11)**

स्टाम्प अधिनियम, भारतीय (1899 का 2), धारा 2(12) व 17 – रजिस्ट्रीकरण – स्टाम्प शुल्क – अभिनिर्धारित – रजिस्ट्रीकरण के समय संपत्ति के बाजार मूल्य का मूल्यांकन स्टाम्प शुल्क अभिनिश्चित करने हेतु मूल्यांकन होगा तथा न कि लिखत में उल्लिखित मूल्य – आक्षेपित आदेश में कोई त्रुटि नहीं – याचिका खारिज।

Cases referred:

2003 (3) MPLJ 151, AIR 1992 AP 183, (2007) 14 SCC 339, AIR 1957 SC 657.

Shahbaaz Khan, for the petitioner.
Jitendra Shrivastava, P.L. for the State.
None, for the respondent No. 1.

(Supplied: Paragraph numbers)

O R D E R

VIVEK AGARWAL, J.:- This writ petition is filed being aggrieved of order dated 21.02.2017 passed by learned 5th Additional District Judge, Sagar, District Sagar in Execution No.20-A/2008 directing the present petitioner to deposit stamp duty as per current market value of the suit property for its registration in terms of the judgment and decree which was passed on 27.06.2009.

2. Learned counsel for the petitioners submits that since he is seeking execution of the judgment and decree dated 27.06.2009, therefore, the relevant date for valuation of the property will be 27.06.2009 and not any subsequent date.

3. Learned counsel for the petitioner places reliance on the judgment of a Coordinate Bench of this High Court in case of *Rambabu Agrawal Vs. State of* M.P., 2003 (3) MPLJ, 151.

4. Shri Jitendra Shrivastava, learned Panel Lawyer for the State opposes the prayer.

5. After hearing learned counsel for the parties and going through the record, Section 3 of the Indian Stamp Act, 1899 (hereinafter referred to 'Act of 1899') deals with stamp duties. Section 3 provides that instruments are chargeable with duty. Thereafter, there is a State amendment.

6. Issue which is involved in the present petition is chargeability and time of stamping.

7. In case of *Media Anasuyamma and Another Vs. Choppela Lakshmamma,* AIR 1992 AP 183, it is held that the criteria for chargeability is the date of execution of the document for the purpose of the document being chargeable and be treated as duly stamped. The provisions of Section 2(6), 2(12) and 3 of the Stamp Act, 1899 show that it is the date of execution of the document and not the date of presentation into the Court, i.e. relevant for purposes of stamp duty payable on the instrument. Section 2(6) of the Stamp Act, 1899 define the word "chargeable" reads as under:-

> "chargeable, means as applied to an instrument executed or first executed after the commencement of this Act, and as applied to any other instrument, chargeable under the law in force in India when such instrument was executed or, where several persons executed the instrument at different times, first executed."

8. Section 2(12) of the Stamp Act, 1899 deals with "executed" and "execution", use with reference to instruments, mean "signed" and "signature".

9. Hon'ble Supreme Court in *State of Rajasthan and Others Vs. Khandaka Jain Jewellers,* (2007) 14 SCC 339, has held that the relevant date for valuation of

property for the purposes of Stamp Act is the date of and the time of execution of the sale-deed. It is held that rates of property at the time when parties entered into agreement to sell or at the time when aggrieved party files suit for specific performance of contract, held, irrelevant. It is further held that at the time of registration, if there is undervaluation of property, the registering authority would send the same to the Collector for proper valuation of property. Sale and agreement to sell are two distinct features under Stamp Act. It is further held that High Court's opinion that at the time of registration, the value of property mentioned in the agreement to sell is relevant is not correct approach. Word "execution" read with Section 17 mandates that the instrument has to be seen at the time when it is sought to be registered. Duration of litigation in obtaining a decree of specific performance of contract is not relevant.

10. In para 24, it is held that while interpreting a taxing statute, inconvenience of the parties is not to be seen. It has to be construed strictly. Hardship or equity have no role to play in its construction. "Actus curiae neminem gravabit" i.e. "no person shall suffer on account of litigation". Held, cannot weigh with the court for interpreting the provisions of a taxing statute.

Similar view is taken by the Supreme Court in *A. V. Fernandez Vs. State of Kerala*, AIR 1957 SC 657 in the following terms:-

> "29. .....in construing fiscal statutes and in determining the liability of a subject to tax one must have regard to the strict letter of the law and not merely to the spirit of the statute or the substance of the law. If the Revenue satisfies the court that the case falls strictly within the provisions of the law, the subject can be taxed. If, on the other hand, the case is not covered within the four corners of the provisions of the taxing statute, no tax can be imposed by inference or by analogy or by trying to probe into the intentions of the legislature and by considering what was the substance of the matter."
>
> Hon'ble Shah, J. has formulated the principle thus :
>
> "11. ..... In interpreting a taxing statute, equitable considerations are entirely out of place. Nor can taxing statutes be interpreted on any presumptions or assumptions. The court must look squarely at the words of the statute and interpret them. It must interpret a taxing statute in the light of what is clearly expressed: it cannot imply anything which is not expressed: it cannot import provisions in the statutes so as to supply any assumed deficiency."
>
> Therefore, a taxing statute has to be read as it is. In other words, the literal rule of interpretation applies to it.

11. Thus, in this background when Section 17 read with Section (2)(12) of the Stamp Act is taken into consideration then it is held that valuation of the market value of the property at the time of the registration will be the valuation for ascertaining the stamp duty and not the value mentioned in the instrument, therefore, there is no illegality in the impugned order dated 21.02.2017 (Annexure P-4) passed by learned 5th Additional District Judge, Sagar calling for any interference.

12. Petition fails and is hereby **dismissed**.

Petition dismissed

I.L.R. 2023 M.P. 51

Before Mr. Justice Vishal Dhagat

WP No. 3808/2006 (Jabalpur) decided on 7 September, 2022

ZAHEER KHAN (DEAD) THROUGH LRs. SANJEEDA BEGUM & ors. …Petitioners

Vs.

STATE OF M.P. & ors. …Respondents

***A. Police Regulations, M.P., Regulations 214 & 222 – Compulsory Retirement – Competent Authority* – Held – Petitioner was imposed penalty under Regulation 214(vii) – As per Regulation 222(c), DIG has power to inflict any punishment mentioned in Regulations 214 & 215 – Regulation 222 gives power to DIG to impose penalty of compulsory Retirement on ASI – Order passed by competent authority – Petition dismissed. (Paras 12 to 16)**

क. पुलिस विनियमन, म.प्र., विनियम 214 व 222 – अनिवार्य सेवानिवृत्ति – सक्षम प्राधिकारी – अभिनिर्धारित – याची पर विनियम 214(vii) के अंतर्गत शास्ति अधिरोपित की गई – विनियम 222(c) के अनुसार, उपमहानिरीक्षक को विनियम 214 एवं 215 में उल्लेखित कोई भी दण्ड अधिरोपित करने की शक्ति है – विनियम 222 उपमहानिरीक्षक को सहायक उप निरीक्षक पर अनिवार्य सेवानिवृत्ति की शास्ति अधिरोपित करने की शक्ति प्रदान करता है – आदेश, सक्षम प्राधिकारी द्वारा पारित – याचिका खारिज।

***B. Constitution – Article 226 – Compulsory Retirement – Notice of Proposed Penalty* – Held – Petitioner was granted appropriate opportunity of hearing and to adduce defence evidence – Petitioner failed to show any Rule or Regulations which provides notice before imposition of penalty, same cannot be presumed or assigned by Court – Petition dismissed.**

(Paras 20 to 22)

ख. संविधान – अनुच्छेद 226 – अनिवार्य सेवानिवृत्ति – प्रस्तावित शास्ति का नोटिस – अभिनिर्धारित – याची को सुनवाई एवं प्रतिरक्षा साक्ष्य प्रस्तुत करने का उचित

अवसर दिया गया था – याची कोई भी नियम या विनियम दर्शाने में असफल रहा है जो शास्ति अधिरोपित करने के पूर्व नोटिस देना उपबंधित करता हो, इसको न्यायालय द्वारा उपधारित या समनुदेशित नहीं किया जा सकता – याचिका खारिज।

***C. Constitution – Article 226 – Compulsory Retirement – Consideration of Past Penalty* – Held – Past penalties were considered to weigh proportionality of penalty to be imposed on petitioner – No violation of rights of natural justice. (Para 19)**

ग. संविधान – अनुच्छेद 226 – अनिवार्य सेवानिवृत्ति – पूर्व शास्ति पर विचार – अभिनिर्धारित – याची पर अधिरोपित की जाने वाली शास्ति की अनुपातिकता को तौलने के लिए पूर्व शास्तियों पर विचार किया गया था – नैसर्गिक न्याय के अधिकारों का कोई उल्लंघन नहीं।

***D. Constitution – Article 226 – Writ Petition & Civil Suit – Pleadings* – Held – There is a difference in pleadings in civil suit and writ petition – In civil suit only facts are to be pleaded and not law and evidence – In writ petition, laws are also required to be pleaded and annexed to support contentions of parties. (Para 16)**

घ. संविधान – अनुच्छेद 226 – रिट याचिका एवं व्यवहार वाद – अभिवचन – अभिनिर्धारित – व्यवहार वाद एवं रिट याचिका के अभिवचनों में अंतर है – व्यवहार वाद में मात्र तथ्यों का अभिवचन करना है न कि विधि एवं साक्ष्य का – रिट याचिका में, पक्षकारों के तर्कों का समर्थन करने के लिए विधियों का भी अभिवचन एवं उपाबद्ध किया जाना आवश्यक है।

Vikas Mahawar, for the petitioners.
Sudeep Chatterjee, G.A. for the respondents.

O R D E R

VISHAL DHAGAT, J.:- Petitioner Zaheer Khan has filed this petition under Article 226 of Constitution of India, challenging imposition of penalty of compulsory retirement and orders passed by First and Second Appellate Authority dismissing his appeal.

2. During pendency of this petition legal heirs of Zaheer Khan are brought on record.

3. Learned counsel for the petitioners submitted that late Zaheer Khan was promoted on the post of Assistant Sub-Inspector (ASI) on 30.11.1987. While he was posted in Police Station Madiyado charge-sheet has been issued against him. As per charges, petitioner had intentionally written incorrect F.I.R. Complainant Maya Bai complained of rape against her on 3.12.2003. Petitioner wrote the F.I.R under Sections 354 and 456 of IPC and he also changed the time of incident from

8.00 A.M to 11.00 A.M. By doing said act, petitioner has diluted the complaint of Maya Bai. Later on complainant approached SDO(P) and Superintendent of Police.

4. Preliminary enquiry was conducted and charge sheet was issued to petitioner. After detailed enquiry, report was submitted on 30.7.2004 and charge no.1 was found partly proved and charge nos. 2 & 3 were proved against him. Notice of enquiry report was served upon petitioner and petitioner also filed representation against said report. Dy. Inspector General of Police accepted the Inquiry Report and imposed penalty of compulsory retirement of petitioner vide order dated 25.9.2004.

5. Petitioner preferred first and second appeal before Inspector General of Police and Director General of Police which were dismissed vide orders dated 22.11.2004 and 14.3.2005. During pendency of appeal, Sessions Trial was concluded and petitioner was acquitted in Sessions Trial No.112/2004 by judgment dated 20.1.2005.

6. Learned counsel for the petitioner submitted that Disciplinary Authority committed an error of law in considering the previous record of petitioner and imposing penalty of Compulsory Retirement. Petitioner was not put to notice that his previous record shall be considered otherwise petitioner may have represented regarding his conduct and considering the previous record without notice amounts to violation of principles of natural justice. Learned counsel for the petitioner further submitted that Dy. Inspector General of Police does not have jurisdiction to impose penalty upon petitioner. It is further submitted that findings in inquiry report is perverse and charge no.1 has not been proved, therefore, charge nos.2 & 3 could not be held to be proved against him. In these circumstances, learned counsel for the petitioners made a prayer for quashing of order passed by Appellate Authorities and restore all the benefits to petitioner.

7. Learned Govt. Advocate appearing for the respondents submitted that petitioner was granted opportunity of hearing. List of witnesses and documents were supplied to him and he was also given opportunity to cross-examine the witnesses. After considering the entire material on record, Inquiry Officer found charge no.1 partly proved and charge nos.2 & 3 as proved. Disciplinary Authority/ D.I.G has accepted the enquiry report and directed compulsory retirement of petitioner. Departmental enquiry has been conducted according to the procedure prescribed and there is no illegality or irregularity in departmental enquiry.

8. Learned Govt. Advocate relied on judgment of Apex Court in Civil Appeal No.8071/2014 (*State of Karnataka & Another vs. N. Gangaraj*). Relying on said judgment it is submitted that once Disciplinary Authority has accepted the enquiry report then Court will not exercise its power of judicial review to interfere

with findings of fact by re-appreciating the evidence. In view of same, writ petition filed by petitioner is dismissed.

9. Heard the learned counsel for the parties.

10. Charge nos.1 to 3 are interconnected. It cannot be said that if charge no.1 is partially proved then charge nos.2 & 3 could not be said to be proved. Charge nos.1 to 3 are as under:-

आरोप

'' 1– दिनांक 4–12–2003 को श्रीमती माया काछी नि0 काडूखेडा के द्वारा उसके साथ किये गये बलात्कार की रिपोर्ट करने पर सही रिपोर्ट नहीं लिखना तथा बलात्कार की धारा में अपराध पंजीबद्ध नहीं कर अपराध की गंभीरता को कम कर अपने पदीय कर्तव्यों के निर्वहन में लापरवाही बरतना।

2– बलात्कार के संबंध में की गई रिपोर्ट को सही रूप में लेख न कर, घटना का समय बदलकर प्र0सू0रि0 में लेख करना।

3– घटना की सही रिपोर्ट लेख न कर पीड़ित पक्ष को पुलिस के विरूद्ध शिकायत करने का मौका देना।''

11. Considered the aforesaid charges. It is found that charge nos.1 to 3 are interconnected and Inquiry Officer as well as Disciplinary Authority had found that petitioner had not written F.I.R of Maya Bai as reported by her and petitioner had diluted the said report by interpolation. Petitioner has been given appropriate opportunity of hearing and to adduce defence evidence. In view of same, contention of petitioner is negatived that if charge no.1 is partly proved then charge nos.2 & 3 could not be held to be proved.

12. Petitioner raised ground that D.I.G is not competent authority to impose punishment of compulsory retirement.

13. Petitioner had made amendment in the writ petition and introduced the said ground as ground "K" in the writ petition. It is submitted that Inspector General is the appointing authority. Respondents had not controverted said amendment by filing any additional reply.

14. Relevant provisions of Regulations 214 and 222 of M.P. Police Regulations, are quoted as under:-

"**214.Punishment - Kinds of.** Without prejudice to the provisions of any law or any special orders for the time being in force, the following penalties may, for good and sufficient reasons, be imposed upon any member holding a post in a Subordinate Police Service:-

(I) to (vii) xxx xxx xxx

(viii) Compulsory retirement.

222. Power of D.I.G:- Power to inflict on Head Constables, Constables, Assistant Sub-Inspector, Sub-Inspector and officers of equivalent ranks any of the punishments specified in Regulations 214 and 215."

15. Petitioner has been imposed penalty under Regulation 214 (viii) of Police Regulations. As per Regulation 222(c) Dy. Inspector General has power to inflict any punishment mentioned in Regulations 214 and 215 on Assistant Sub Inspector and Sub Inspector.

16. Regulation 222 gives power to D.I.G to impose penalty of compulsory retirement on A.S.I. Petitioner has not pleaded in writ petition about any Regulation or Rules to show that D.I.G has no power to impose the penalty. Only a bald averment has been made in grounds that Inspector General is competent to impose the penalty. There is difference in pleadings in Civil Suit and Writ Petition. In Civil Suit only facts are to be pleaded and not law or evidence. In Writ Petition laws are also required to be pleaded and annexed to support the contentions of the parties. "*High Court exercising its jurisdiction under Articles 226 and 227 of Constitution of India, tests judicial and quasi-judicial orders of Courts, Tribunal and Executive Authorities whether same are in accordance with law or it suffers from legal flaws. Without pleading laws it will not be possible to point out illegality in order. In view of this, parties must plead law as compulsory requirement in Writ Petitions and Court is not obliged to search laws and pass orders in absence of pleadings.*" Petitioner has failed to plead any law to buttress the submission that only Inspector General is competent to impose the penalty.

17. In view of aforesaid facts and circumstances, there is no force in the argument that only Inspector General can impose penalty of compulsory retirement to A.S.I.

18. Petitioner has also raised a ground that D.I.G could not have taken past punishment imposed upon petitioner into consideration for imposing penalty.

19. D.I.G has taken into consideration past penalties of petitioner to assess penalty to be imposed on petitioner. Punishment which has been taken into consideration is only to assess the nature of punishment, its severity which can be imposed upon petitioner. Past penalties were considered to weigh proportionality of penalty, therefore, it cannot be said that it will violate the rights of natural justice.

20. Learned counsel for the petitioner also argued that no notice of proposed penalty has been given to him.

21. Petitioner, as stated above, has not argued that under what Regulations and Rules Disciplinary Authority is required to give notice to petitioner regarding proposed penalty on him. In absence of pleadings and arguments of Regulations and Rules under which petitioner is claiming right of notice for proposed penalty, same cannot be presumed or assigned by Court.

22. Considering the totality of facts and circumstances of the case, writ petition filed by the petitioner is **dismissed**.

Petition dismissed

I.L.R. 2023 M.P. 56

Before Mr. Justice Vijay Kumar Shukla

WP No. 17389/2022 (Indore) decided on 8 September, 2022

LAXMI SERVICE STATION (M/S) …Petitioner

Vs.

UNION OF INDIA & ors. …Respondents

***A. Petroleum Rules, 2002, Rule 2(x) & 150 – Cancellation of NOC – Competent Authority* – Held – After introduction of Commissioner of Police system in city of Indore, District Magistrate ceases to be a District Authority – District Magistrate is only the authority in towns which are not having a Commissioner of Police or Deputy Commissioner of Police – Impugned order passed by District Magistrate is without jurisdiction and is thus quashed – Petitioner permitted to operate retail outlet – Petition allowed.**

(Paras 22 to 25 & 31)

क. पेट्रोलियम नियम, 2002, नियम 2(x) व 150 – एनओसी/अनापत्ति प्रमाण–पत्र रद्द किया जाना – सक्षम प्राधिकारी – अभिनिर्धारित – इंदौर शहर में पुलिस कमिश्नरी प्रणाली की शुरूआत होने के पश्चात् जिला मजिस्ट्रेट एक जिला प्राधिकारी नहीं रह जाता – जिला मजिस्ट्रेट केवल ऐसे शहरों में प्राधिकारी है जिनमें पुलिस आयुक्त या पुलिस उपायुक्त नहीं होते – जिला मजिस्ट्रेट द्वारा पारित आक्षेपित आदेश बिना अधिकारिता का है तथा इस प्रकार अभिखंडित किया जाता है – याची को खुदरा विक्रय केन्द्र संचालित करने की अनुमति दी जाती है – याचिका मंजूर।

***B. Petroleum Rules, 2002, Rule 150 – Cancellation of NOC – Grounds* – Held – NOC can be cancelled only when licensee ceases to have any right to use the site for storing petroleum – Nothing in record to show that petitioner firm ceases right to use the site for storing petroleum – Action of District Magistrate was unwarranted – Impugned order quashed.**

(Paras 26 to 29)

ख. पेट्रोलियम नियम, 2002, नियम 150 – एनओसी/अनापत्ति प्रमाण–पत्र रद्द किया जाना – आधार – अभिनिर्धारित – एनओसी तभी रद्द की जा सकती है जब अनुज्ञप्तिधारी को पेट्रोलियम भंडारण के लिए स्थल का प्रयोग करने का कोई अधिकार नहीं रह जाता – अभिलेख में ऐसा कुछ भी नहीं जो यह दर्शाता हो कि याची फर्म को पेट्रोलियम भंडारण के लिए स्थल का प्रयोग करने का कोई अधिकार नहीं रह गया – जिला मजिस्ट्रेट की कार्यवाही अनधिकृत थी – आक्षेपित आदेश अभिखंडित।

Cases referred :

(1990) 4 SCC 49, WP No. 21686/2018 decided on 26.06.2019, 2016 SCC Online Tri 498, WP No. 1442/2019 decided on 22.04.2022 (High Court of Bombay), 2000 (54) DRJ 299.

Piyush Mathur with *Madhusudan Dwivedi,* for the petitioner.
Himanshu Joshi, for the respondent No. 1 & 3.
Aditya Garg, G.A. for the respondent No. 2.
Aniket Naik, for the respondent No. 4.

(Supplied: Paragraph numbers)

O R D E R

VIJAY KUMAR SHUKLA, J.:- The present petition has been filed under Article 226 of the Constitution of India seeking quashment of the order of cancellation of No Objection Certificate dated 14.7.2022 and also a direction to permit the petitioner Firm to operate the retail outlet situated at Plot No.110, Ushaganj, Opposite G.P.O, A.B.Road, Indore which has been seized with effect from 3.5.2022 and a direction to resume the sales and supply of petroleum products to the retail outlet of the petitioner firm and other reliefs.

2. The facts of the case are that the petitioner Firm is a partnership firm and is engaged in the business of petroleum products through its filling and service centre/retail outlet known as 'M/ s. Laxmi Service Station' situated at A.B. Road, G.P.O Square, Indore. For establishing a retail outlet, as per provisions under the Petroleum Act, 1934, a No Objection Certificate was granted vide letter dated 30.8.1957 to M/S. Standard Vacuum Oil Company. The said petrol pump was transferred to Hindustan Petroleum Corporation Limited (in short referred as 'HPCL') and the HPCL has granted the same retail outlet to the petitioner Firm as a Corporation owned/leased outlet which was commissioned since December, 1971. Thereafter the petitioner Firm has been continuously operating the retail outlet for which lease agreement as well as dealer ship agreements were executed between the petitioner Firm and HPCL. Currently the lease agreement was executed on 12.5.2006 for the period of 30 years i.e. upto 31.3.2035 on the terms and conditions contained in the lease agreement. The petitioner Firm has been appointed as Dealer by the oil company for the retail, sale and supply of petroleum

products i.e. motor spirit (petrol) and HSD (diesel) since last more than 50 years. Lastly, dealership agreement was executed on 22.9.2014 for a period of 10 years i.e. upto 31.9.2024.

3. It is further stated that the import, transport, production and storage of petroleum products are governed by the provisions of Petroleum Act, 1934. It is submitted that under the provisions of the Act, the Rules have been framed which are called the Petroleum Rules 2002. As per Chapter VII of the aforesaid Rules, granting of license is prescribed under Rule 141 and Rule 144 provides for No Objection Certificate. The Rules 148 provides for renewal of license as well as Rule 149 and 150 provides for refusal of NOC and cancellation of NOC. As per the provisions of Rule 148 of Rules 2002, the Controller of Explosives has renewed the existing petroleum class A and B. The license granted to the petitioner has been renewed by order dated 22.1.2015 upto 31.12.2024.

4. On 2.5.2022 an incident of fire had taken place while unloading the petroleum product at M/s. Laxmi Service Station at Indore at about 12.04 PM during Tank Truck (TT) decantation and the employees as well as partner of the Firm has taken precautionary measures and the fire was controlled with the assistance of fire equipments. The incident was reported to the HPCL officials at about 12.10 PM. The petitioner Firm narrated the incident that there was minor seepage from Hose Coupling at the decantation end, therefore, spilled product was accumulated in the unloading chamber and fire occurred at the TT Decantation Pit while removing the spilled product from the decantation chamber by a sponge, based upon which an investigation team was constituted by the HPCL for carrying out the inspection. Three members investigation team visited the retail outlet on 3.5.2022 at 12.30 PM and had submitted its report by recommending for issuance of Standard Operating Procedure, compulsory use of non-static material during the decantation process, dedicated unloading hose pipe at the outlet and also strict compliance of safety measures, initiation of action against the retail outlet employees and IT Crew who were involved in unloading process. It is further submitted that on the date of incident i.e. 2.5.2022 the District Food Officer has carried out inspection and sampling and nothing wrong has been found by him. The remaining petroleum product of Tank Tanker (TT) decanted in presence of the officials of Food Department and the retail outlet was continued to be operated, which was later ceased by the District Authorities on 3.5.2022.

5. The Additional District Magistrate, District Indore has issued a show cause notice to the Regional Manager and Assistant Manager (Sales) of HPCL dated 3.5.2022 mentioning incident of fire, occurred on 2.5.2022 and sought explanation within three days in relation to the action taken against the officials/employees who was responsible for the incident as well as initiation of criminal prosecution against them. The Regional Manager and Assistant Manager

(Sales) replied to the aforesaid show cause notice by reiterating the fact that the action has been taken against the erring driver/helper of the tank truck and action has been taken by removing the two employees of the outlet who were involved in the matter of use of sponge in place of cotton clothes for removing the spilled petroleum product. Based upon the recommendations made by three members committee, a detailed guidelines have been issued by the Chief Regional Manager on 4.5.2022 to all retail outlet situated at Indore region for maintaining the retail outlet as per the Rules and guidelines.

6. Thereafter a show cause notice was issued on 4.5.2022 by the Chief Regional Manager of the respondent oil company mentioning therein eight recommendations have to be strictly adhered as precautionary measure so that such type of eventuality to be prevented. It has also been mentioned that petitioner Firm has violated Clause 21,36 and 42 of the Dealership Agreement dated 22.9.2014. An investigation was carried out on 3.5.2022 in which some minor irregularities were found in relation to not following the safety measures. Since there was safety violation during unloading of tank truck, therefore, sales and supply of the outlet has been suspended for seven days with immediate effect. After receiving the show cause notice, the petitioner Firm submitted its reply on 12.5.2022 reiterating that the recommendations and guidelines issued by the Oil Corporation should be strictly followed by the petitioner Firm and the safety measures which have been recommended to be strictly complied with in future and two erring employees have been removed from service and requested for re-opening of the retail outlet as the district officials have seized the petrol pump by affixing its seal with effect from 3.5.2022.

7. The District Magistrate, Indore issued a show cause notice on 17.5.2022 to the petitioner Firm whereby mentioning the fact of the incident of fire and granting NOC under Rule 115(3) of the Petroleum Rules, 1937 framed u/S.29 of the Petroleum Act, 1934 by which the license was issued for operation of petrol pump to the petitioner. The show cause notice was issued by mentioning the public safety and danger to public at large and sought reply within three days as to why the NOC issued for petroleum pump may not be cancelled under Rule 150 of the Petroleum Rules, 2002 (hereinafter referred as ' Rules 2002').

8. The petitioner Firm filed its reply to the aforesaid show cause notice reiterating the fact that the petitioner Firm immediately removed two erring employees of the retail outlet and the fact that there are proper safety measures available in the retail outlet. The petitioner Firm is properly following and complying all the safety measures and guidelines provided and requested to permit the petitioner Firm to resume operating the petrol pump. Thereafter the District authority vide its permission letter dated 4.7.2022 has permitted the

petitioner Firm to re-open and operate its office with a condition that the petitioner Firm shall be prohibited from selling and supplying any petroleum product.

9. The District authority passed the impugned order dated 14.7.2022 whereby stating that the petitioner Firm is not competent to operate the retail outlet/petroleum pump and in the interest of the safety of public at large, the NOC issued for establishing of the petrol pump has been ordered to be cancelled under Rule 150 of the Rules 2002 by further directing the Chief Explosive Controller, Bhopal for initiation of proceedings in relation to license. The District Magistrate has further directed the Commissioner, Indore Municipal Corporation, Indore for taking further action with respect to business license issued by the Municipal Corporation, Indore.

10. The petitioner challenged the impugned order of cancellation of NOC on the ground that the order is without jurisdiction. The District Magistrate has no authority to pass the order of cancellation of NOC under Rule 150 of the Rules 2002 after introduction of Commissioner of Police system in the city of Indore by notification dated 9.12.2021. It is argued that in exercise of the powers conferred u/Ss.4,5,14,21 and 22 of sub-section 1 of Section 29 of the Petroleum Act, 1934, the Central Government has made the Rules called the Petroleum Rules 2002. Under the aforesaid Rules, the power to grant NOC is conferred to the District Authority and power of cancellation of NOC is conferred to the District Authority or the State government on the ground that the licensee has ceased to have any right to use the site for storing petroleum. As per the Rule 2(x)- District authority means (a) in towns having a Commissioner of Police, the Commissioner or a Dy. Commissioner of Police; (b) in any other place the District Magistrate. It is submitted that no power has been conferred to the District Magistrate in a city where Commissioner of Police has been introduced. The District Magistrate is only the District authority in the other places where Commissioner of Police system is not operating. Thus, the order passed by the District Magistrate is without jurisdiction.

11. It is also submitted that the NOC has been cancelled on a ground which is not existing in Rule 150 of the Rules 2002. Under the provisions of Rule 150, the District authority or the State government is conferred powers to cancel the NOC only when it is satisfied that the licensee has ceased to have any right to use the site for storing petroleum. The grounds on which the NOC has been cancelled is not within the purview of Rule 150 of Rules 2002. The petitioner being a licensee has not ceased to have any right to use the site for storing petroleum and no finding has been recorded in this relation that the petitioner firm have ceased to any right, then in such circumstances without there being any finding in this regard, the provisions of Rule 150 could not have been applied. It is urged that the NOC is granted under the provisions of Rule 144 of the Rules 2002 for the purpose of

satisfaction of location of the premises proposed to be licensed and not for any other purpose. If there is violation of any conditions of the license or the dealer agreement, it is for the licensing authority to take action in the matter.

12. In the present case, three members committee of HPCL has already conducted the investigation of the retail outlet and it was found that the TT Crew (driver/helper) and the two employees of the retail outlet responsible. The incident took place due to the mistake caused by TT driver and helper and two employees of the petitioner's retail outlet at the time of decantation of petroleum production and the action has already been taken against them and the oil corporation has also taken care of safety measures of the petroleum pump by issuing directions which has already been complied by the petitioner firm. On the basis of the aforesaid submissions it has been argued that the order passed by the District Magistrate - the respondent No.2 is without jurisdiction and beyond the purview of Rule 150 of Rules 2002.

13. In support of his submissions learned counsel for petitioner relied upon the judgment passed by the Apex Court in the case of *Yogesh Kumar and others Vs. Bharat Petroleum Corporation Ltd. & Ors* (1990) 4 SCC 49 and also the order dated 26.6.2019 passed by coordinate bench at Jabalpur in WP No.21686/2018 *Mrs. Lubeena Siddiqui Vs. Union of India & Ors.* He also cited the judgment passed by single bench of the High Court of Tripura at Agartala in the case of *Biswas & Sons. Vs. State of Tripura* 2016 SCC Online Tri 498 and also relied upon the judgment passed by single bench in the case of *Swaraj Kisanrao Borkar Vs. The Collector and District Magistrate, Chandrapur & Ors* passed by High Court of Bombay, Nagpur Bench in WP No.1442 of 2019 on 22.4.2022.

14. Before referring to the reply by the respondent No.2, it is apposite to refer the stand taken by the respondent No.4 HPCL. The company has supported the case of the petitioner. It is submitted that NOC contained in Annexure P/1 was issued in the name of M/s. Standard Vacuum Oil company which is the predecessor of the answering respondent. The NOC dated 30.8.1957 was issued in the name of the respondent company and has been issued individually in the name of the petitioner due to which the respondent No.2 ought not to have cancelled the NOC treating it to be an action against the petitioner. It is stated that Rule 15 empowers the cancellation of NOC if District Magistrate is satisfied that the licensee has ceased to have any right to use the site for storing the petroleum product. In the instant case, the retail outlet land is possessed by the respondent company with valid license which is subsisting as on date. It is also stated that in an incident of fire was reported by the petitioner through its Proprietor on 2.5.2022 to Area Sales Manager, Indore East sales area. The incident of fire had taken place at around 12.04 PM while decantation of tank truck was in the process whereby high speed diesel (HSD) motor spirit (MS) products were spilled out

from unloading chamber. A detailed investigation has been undertaken by the respondent company by constituting a three member investigation committee. Upon investigation by the committee, it has been found that the root cause for occurrence of the fire incident was minor seepage of MS from hose pipe coupling at decantation end which leads to product spillage in and around the decantation chamber. A specific stand has been taken that the action initiated against the petitioner is unwarranted on account of prejudice being caused to the respondent by the said action. The respondents have already issued advisory on 4.5.2022 to all its retail outlet dealers for adhering to complete safety measures. In view of the aforesaid, the cancellation of NOC was not desirable.

15. A reply has been filed on behalf of the respondent No.2. It is stated that on 2.5.2022 an accident of fire took place at the petrol pump of the petitioner which is situated at one of the busiest square of Indore situated at GPO square which is surrounded by dense population and heavy traffic through out the day. During decantation proceedings due to non following of the standard operating procedure, as contemplated by the petroleum companies a fire outbreak took place which was even recorded in the camera. Copy of the CD showing the said incident has been annexed along with the reply. It is further submitted that not only that the fire outbreak took place but the entire tank filled with 12000 litres of petrol was driven to the main road while fire trail following it. Though, there was no loss of life or injury but the manner in which the entire incident took place is sufficient to hold that the petitioner pump was not careful or responsible about the safety and precautionary measures, which are mandatory, particularly when while dealing with petroleum products which are highly inflamable. It is further stated that the staff of the petitioner was not having proper fire proof clothes or other necessary measures and even the staff was put at high risk trying to stop or control the fire which could have led to serious accident resulting in loss of life or serious injury. It is further stated that the petitioner in reply to the show cause notice has agreed that they did not follow the standard operating procedure of decantation and where it was required to use cotton clothes, a sponge was used which was the cause of fire and this fact has been duly accepted by the petitioner in the reply to the show cause notice and the SOP was not followed by them.

16. It is further submitted that the Commissioner of Police system has been introduced in the city of Indore by gazette notification dated 9.12.2021 but the Commissioner of Police has been conferred powers of District Magistrate only in respect of the Acts mentioned in Schedule appended to the notification issued under sub-section 5 of Sec.20 of the Cr.P.C. In the Schedule, the Petroleum Act has not been included and, therefore, the power still exists with the District Magistrate.

17. It is urged that on harmonious interpretation of the Rules, it can be gathered that under Rule 150 the power has been given to the District Authority as well as to the State government and the respondent No.2 being District Magistrate is having power to exercise the power for cancellation of NOC. It is further argued that the words under Rule 150 of Rules 2002 'Ceased to have any right to use the site for storing petroleum' cannot be given narrow meaning. It has to be interpreted that in a case where the company has failed to observe the norms relating to safety, the power can be exercised. In support of his submission he placed reliance on the judgment passed by the Delhi High Court in the case of *Pratap Oil Company Vs. State (NCT of Delhi) & Ors* 2000(54) DRJ 299 decided on 4.5.2000 in CW NO.944/2000.

18. No any other point has been raised by the parties.

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

20. Two issues have croped up for consideration in the present case.

> (1) Whether the District Magistrate is competent to pass an order of cancellation of NOC under Rule 150 of the Petroleum Rules, 2002 after enforcement of the Commissioner of Police System at Indore ?
>
> (2) Whether in exercise of the powers under Rule 150, the respondent No.2 could have passed an order of cancellation of the NOC on the grounds which are not mentioned under Rule 150 ?

21. To appreciate the aforesaid issues which have croped up for consideration, it is apposite to consider the relevant provisions of the Petroleum Rules 2002.

> Rule 2(x) 'District Authority" means--
>
> (a) in towns having a Commissioner of Police, the Commissioner or a Deputy Commissioner of Police;
>
> (b) in any other place, the District Magistrate;

Rule 150 reads as under:

> **" 150. Cancellation of no-objection certificate.-**
>
> (1) A no-objection certificate granted under Rule 144 shall be liable to be cancelled by the District Authority or the State Government, if the District Authority or the State Government is satisfied, that the licensee has ceased to have any right to use the site for storing petroleum:
>
> Provided that before cancelling a no-objection certificate, the licensee shall be given a reasonable opportunity of being heard.

> (2) A District Authority or a State Government cancelling a no-objection certificate shall record, in writing, the reasons for such cancellation and shall immediately furnish to the licensee and to the licensing authority concerned, copy of the order cancelling the no-objection certificate. "

22. It is not in dispute that in the city of Indore, the Commissioner of Police system has been introduced by notification dated 9.12.2021. As per the definition of District Authority, it means in towns having a Commissioner of Police, the Commissioner or Deputy Commissioner of Police. In any other place the District Magistrate. Power to grant NOC under Rule 144 is conferred to the District Authority whereas under Rule 150 power to cancel the NOC is conferred to the District Authority or the State government. The word District Magistrate is neither used under Rule 144 nor under Rule 150 of the Rules 2002. The District Magistrate was exercising its power to grant NOC or cancellation of power under Rule 150 by virtue of being District Magistrate in a town which was not having a Commissioner of Police system as per the definition of sub rule (x) of Rule 2. The import, transport, production and storage of the petrol products are governed under the Petroleum Act 1934 and the Rules made therein. The "Rules 2002" have been framed under the provisions of the Petroleum Act, 1934 and, therefore, the grant of NOC and the cancellation of NOC is governed by the Rules of 2002. After application of Commissioner system in the city of Indore, the District Magistrate ceases to be a District Authority under sub rule 10 of Rule 2 of the Rules 2002.

23. I do not find any merit in the submissions of learned counsel for State - respondent No.2 that since the Petroleum Act is not included in the Schedule of the various Acts appended along with the notification of sub-section 5 of Sec.20 of the Code of Criminal Procedure, 1973, therefore, the District Magistrate would not ceases to be the competent authority under Rule 150 of Rules 2002 as the power of the District Magistrate has not been conferred on the Commissioner of Police even after the application of the Commissioner of Police system in Indore town. The provisions of sub-section 5 of Sec.20 of Cr.P.C reads that nothing in this section precluded the State government from conferring under any law for the time being in force, on a Commissioner of Police, all or any of the power of an Executive Magistrate in relation to a metropolitan area.

24. The definition of "District Authority" under sub clause 10 of Rule 2 and the language of Rule 150 is unambiguous and very clear that the power has been conferred to the District Authority or the State government and not to the District Magistrate. There is no provision under the Petroleum Act or the Petroleum Rules conferring power to the State government to delegate its power to the District Magistrate. The District Magistrate is only the authority in the towns which are not having a Commissioner of Police or Deputy Commissioner of Police and not

for the towns where the post of Commissioner of Police or Deputy Commissioner of Police are existing.

25. Thus, the first issue is answered that the order passed by the District Magistrate under Rule 150 of Rules 2002 is without jurisdiction.

26. The second question arises for consideration is that whether in exercise of the powers, the respondent No.2 could have passed the order of cancellation of NOC for the grounds mentioned in the order which are not covered under the provisions of Rule 150.

27. The District Magistrate has passed the impugned order stating that considering the reply of the petitioner Firm and HPCL it has been concluded that the petitioner Firm is not competent to operate the retail outlet and petrol pump and in the interest of safety of public at large the NOC issued for establishment of petrol pump has been ordered to be cancelled with further directions. The language of Rule 150 is unambiguous and unequivocal that the NOC can be cancelled by the District Authority or the State government if it is satisfied that the licensee has ceased to have any right to use the site for storing petroleum. The word 'licensee has ceased to have any right to use the site for storing petroleum' has come up for consideration before the Apex Court in the case of *Yogesh Kumar* (supra). The relevant para 4 of the judgment reads as under:-

> "4. The High Court has rightly observed that the District Authority under Rule 151 can cancel the No Objection Certificate only when the licensee ceases to have any right to use the site for storing petrol. However, there are certain subsequent observations made by the High Court in the impugned judgment which might lead to an inference that so long as the licensee continues to have leasehold rights on the site, the 'No Objection Certificate' cannot be cancelled at all. That does not appear to be the correct position of law. On a reading of sub-rule (1) of Rule 151 it is clear that a 'No Objection Certificate granted under Rule 144 can be cancelled wherever the licensee ceases to have any right to use the site for storing petrol and that right could be lost by a licensee either by his tenancy or right to the use of the site coming to an end or for any other reason whereby, in law, the right to use the site for storing petrol ceases."

28. The Apex Court in the said case held that the NOC already granted under Rule 144 of the Rules 1976 is *pari materia* to the 2002 Rules which can be cancelled only under the circumstances when the licensee ceases to have any right to use the site for storing the petroleum. The same view has been taken by co-ordinate bench at Jabalpur in the case of *Mrs. Lubeena Siddiqui* (supra) and by

the High Court of Tripura in the case of *M/s.Biswas & Sons* (supra) and Nagpur bench in the case of *Swaraj Kisanrao Borkar* (supra).

29. There is nothing available which refracts the petitioner Firm has ceased right to use the right (sic : site) for storing petrol. On the contrary, the respondent No.4 HPCL company has stated that the incident was investigated by them and the action has already been taken against the tank truck (TT Crew) driver/helper and two employees of the retail outlet. An advisory has already been issued on 4.5.2022 to all the retail outlet dealers for adhering to the complete safety measures. The action taken by the respondent No.2 has been held to be unwarranted on account of the prejudice caused to the respondent company.

30. The judgment relied upon by the counsel for respondent No.2 *Pratap Oil Company* (supra) has not taken into consideration the judgment passed by the Apex Court of *Yogesh Kumar* (supra) and, therefore, the said judgment is held to be *per incuriam* and the same would not render any assistance to the facts of the present case.

31. In view of the aforesaid, the **present petition is allowed.** The order of cancellation of NOC dated 14.7.2022 Annexure P/12 is quashed and the petitioner is permitted to operate the retail outlet. The District Authorities are directed to permit the petitioner for selling and supplying the petroleum products. No order as to costs.

Petition allowed

I.L.R. 2023 M.P. 66 (DB)

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

WP No. 10989/2022 (Jabalpur) decided on 15 September, 2022

LINKWELL TELESYSTEMS PVT. LTD. CO. …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

***A. Constitution – Article 226 – Termination of Contract – Fraudulent Practice* – Held – Fraudulent practice means misrepresentation of facts in order to influence award of a contract – Petitioner has given a false information with regard to termination of his earlier contract – Respondents were justified in terminating the contract – Petition dismissed.**

(Paras 14, 15, 20 & 21)

क. संविधान – अनुच्छेद 226 – संविदा का पर्यवसान – कपटपूर्वक आचरण – अभिनिर्धारित – कपटपूर्ण आचरण का अर्थ है संविदा के अधिनिर्णय को प्रभावित करने

हेतु तथ्यों का दुर्व्यपदेशन – याची ने उसकी पूर्व संविदा के पर्यवसान के संबंध में गलत जानकारी प्रदान की – प्रत्यर्थीगण द्वारा संविदा का पर्यवसान करना न्यायोचित था – याचिका खारिज।

B. Constitution – Article 226 – Termination of Contract – Notice – **Held – Condition in bid document indicates that if any false declaration is made, tender is liable to be rejected – When such a clause exists, question of giving any notice would not arise for consideration. (Para 18)**

ख. संविधान – अनुच्छेद 226 – संविदा का पर्यवसान – नोटिस – अभिनिर्धारित – बोली लगाने वाले दस्तावेज में शर्त यह इंगित करती है कि यदि कोई मिथ्या घोषणा की जाती है, तो निविदा अस्वीकार किये जाने योग्य है – जब ऐसा कोई खंड विद्यमान हो, तो विचार हेतु, किसी प्रकार का नोटिस देने का प्रश्न उत्पन्न नहीं होगा।

Challa Konanda Rama with *Siddharth Sharma* and *Pranay Shukla,* for the petitioner.

Harpreet S. Ruprah, Addl. A.G. with *Suyash Thakur*, G.A for the respondent Nos. 1 to 3.

Anshuman Singh, for the respondent No. 4.

O R D E R

The Order of the Court was passed by :

RAVI MALIMATH, CHIEF JUSTICE :- The case of the petitioner is that it is a Company engaged in the business of creating, designing, developing, manufacturing and launching of various new electronic products etc.

2. That the respondent no.3 floated a Notice Inviting Tender (NIT) on 04.06.2021 for appointment of System Integrator for Fair Price Shop (FPS) Automation under PDS (Supply, Install and Maintain) PoS devices along with System Integration with Government portals. The petitioner and others bid for the same. The bid of the petitioner was accepted as he being L1. Letter of Intent was issued on 17.12.2021. Questioning the same the respondent no.4 herein filed Writ Petition No.2026 of 2022. It was contended therein that the writ petitioner herein had suppressed a material information of his contract being terminated by the State of Sikkim and therefore, the award of tender to him goes against the conditions mentioned in the bid. However, by the order dated 04.02.2022 the submission of the learned Deputy Advocate General was placed on record that the tender document dated 04.06.2021 has been cancelled on 03.02.2022 and all further proceedings have also been cancelled. That the State proposes to go in for a fresh tender. In view of the submissions made, the writ petition was dismissed as being infructuous. Thereafter, in view of the termination of the tender in favour of the writ petitioner herein the instant writ petition has been filed seeking to question the order of termination.

3. Notices were issued to the respondents. The State have filed their reply. The intervention application having been allowed, the applicant therein namely L4 has been impleaded as respondent no.4.

4. Shri Challa Konanda Rama, learned senior counsel appearing for the petitioner's counsel submits that the termination order dated 01.02.2022 is erroneous and liable to be set aside. That the respondents have no authority to terminate the contract for breach of any of the terms of contract. That the State relies upon Clause 4.2.1 of the tender document by stating that there has been a violation of the same in particular with reference to Serial No.5 thereon. The same would indicate that an affidavit of declaration has to be filed to the effect that the bidder has not been terminated by the Central Government/any State Government/any Government Organization or Department in India for breach of the terms of contract/non-compliance of terms of contract etc. It is submitted that none of this has happened. That his bid has not been terminated for breach of terms of contract. In fact, the material on record would indicate that in respect of the contract, which was entered into with the State of Sikkim, the payments were not being made to the writ petitioner. That huge amounts were overdue in spite of the specific clauses in the agreement. That even though the payments were not being made regularly to the writ petitioner, he continued in the service of the State of Sikkim. Therefore, this is not the case of the contract being terminated on the grounds of non-performance. Hence, he pleads that the finding by the State is erroneous. He has also relied on certain communications of the State wherein these facts were brought to the noticeof the State before the LOI was issued. He further pleads that the Writ Petition No.2026 of 2022 was listed before the Court for the first time on 28.01.2022. On 04.02.2021, on the submission made by the State the petition was dismissed as being infructuous on the ground that the tender has been withdrawn. In the interregnum period, there was no notice at all issued to him. That, if at all the State had any doubt with regard to the contents in the tender document, an appropriate notice should have been issued to him before termination. Even that has not been done by the State. Hence, on this ground also the impugned order of termination is liable to be set aside.

5. The State had filed the return. They have, by and large, reiterated the reasons for termination. They have also stated therein that the termination of contract with the State of Sikkim was not brought to the notice of the State. That in the self-declaration filed in terms of Annexure R-3, the petitioner has stated that its contract has never been terminated. Therefore, this is a false declaration. Hence, the termination was ordered.

6. The respondent No.4 have also supported the case of the State. They have further stated various grounds on which the order of termination cannot be interfered.

7. Heard learned counsels and examined the material on record.

8. The primary ground on which the contract has been terminated is Clause 4.2.1 with reference to Serial No.5 which reads as follows:

"4.2.1. Eligibility Criteria

5	*Performance:* *The Bidder should not have been terminated by Central Govt. / any State Govt. / any Govt. Organization or Department in India for breaching the terms of contract / non-compliance of terms of agreement at the time of Bid submission. If this is later found to be false, the application fees and any performance guarantees would be forfeited*	*Affidavit of declaration*

Therefore, the same would have to be accompanied by an affidavit of declaration.

9. (a) We asked the learned counsel for the petitioner as well as the State as to whether the affidavit of declaration has been filed. We do not find any material to indicate that such an affidavit of declaration has been filed. Therefore, there does not appear to be any such affidavit in terms of the Serial No.5 of Clause 4.2.1 wherein, the petitioner bidder would have to indicate that his contract has not been terminated earlier. However, what is being contended by the learned counsel for the petitioner is that there is no format for such a declaration. That the format for declaration as could be seen is in terms of Serial No.4 of Clause 4.2.1, which reads as follows:

4	*Blacklisting:* *The Bidder shall not have been blacklisted by Central Govt. / any State Govt. / any Govt. Organization or Department in India at the time of Bid submission.*	*Court affidavit by the designated official as per the format of the responding firm or as per Annexure of Section 9.2.4.*

9. (b) Therein what is sought for is a Court affidavit by the designated official as per the format of the responding Firm or as per Annexure of Section 9.2.4. Therefore, the format as provided in Clause 9.2.4 has been furnished by the petitioner as could be seen from Annexure P-5, which is a self declaration dated 30th July, 2021. Therefore, the format as provided by the State has been complied with. There is no such format so far as the Clause-B for termination is concerned. Hence, it cannot be said that there is any non-submission or suppression of material facts.

10. We have considered the contentions.

11. Serial No.5 of Clause 4.2.1 does not indicate any fixed format which the bidders would have to follow. The format has been narrated so far Serial No.4 of Clause 4.2.1 is concerned and probably other formats. Therefore, the contention of the petitioner that no format is prescribed requires to be accepted. But that does not mean that an affidavit should not be filed. A standardized format having not been provided, does not mean that an affidavit should not be filed. The requirement clearly indicates the information that has to be provided in the form of an affidavit. Therefore, if a format is not prescribed then the affidavit could be in such a manner as the bidder may deem fit. We do not find any such affidavit on record.

12. Furthermore, the affidavit has been filed in terms of Clause 9.2.4.We have considered the same. The same is with regard to a declaration for not being blacklisted by any Government entity. It reads as follows:

> *"9.2.4 Self-declaration for not being blacklisted by any Government Entity*
>
> *(Letter on the bidder's Letterhead)*
>
> *To*
>
> *Director,*
>
> *Directorate of Food, Civil Supplies and Consumer Protection,*
>
> *D-Wing, 1st Floor, Vindhyachal Bhavan, Arera Hills, Bhopal-462004. Madhya Pradesh*
>
> *Sub: Declaration for not being blacklisted by any Government Entity*
>
> *Ref: RFP for Selection of System Integrator for Supply, Installation and Maintenance of Pos Devices (Tender No:_____Dated:__/__/__)*
>
> *Dear Sir,*
>
> *In response to the above mentioned RFP I/We_____, as_____<Designation>_____of M/s_____, hereby declare that our Company / Firm_____ is having unblemished past record and is not declared blacklisted or had our contract terminated or ineligible to participate for bidding by any State / Central Govt., Semi-government or PSU due to unsatisfactory performance, breach of general or specific instructions, corrupt / fraudulent or any other unethical business practices.*
>
> *Your Faithfully*

[Authorized Signatory]
[Designation]
[Place]
[Date and Time]
[Seal & sign]
[Business Address]"

13. Therefore, there are two aspects in this affidavit. Firstly is the factum of being blacklisted. It is clearly stated that the petitioner has not been blacklisted. However, the second portion of the affidavit would indicate that any time in the past the contract has not been terminated or has been ineligible to participate for bidding etc. Therefore, this is a statement made on affidavit by the bidder. He has clearly stated that his contract has not been terminated. Undisputedly, the contract of the petitioner in the State of Sikkim has been terminated. There is no contest with regard to the same. But what is being submitted by the petitioner's counsel is the reason for termination. It is the specific case of the petitioner that in terms of Clause 4.2.1(5), in the affidavit it would have to be indicated only if the termination is by breaching the terms of contract or otherwise. In the contract with the State of Sikkim, there is no breach of contract. He has performed his part of the contract without any failure. In fact, the failure was because of the State of Sikkim. Since the State of Sikkim did not make any payment to him he was compelled to stop the work. These are all matters of record which cannot be disputed by either the parties. Therefore, the termination is not because of his non-performance.

14. However, on considering the contentions, we do not think that such a submission could be accepted. Firstly is the fact of a non-filing of an appropriate affidavit in terms of Clause 4.2.1(5). However, even assuming that the same is covered in terms of the affidavit as filed in Clause 9.2.4 is concerned, there is a clear averment that the contract has not been terminated. The affidavit does not indicate that no contract has been terminated in terms of what is stated in Clause 4.2.1(5). The specific statement is that no contract is terminated. Secondly, with regard to the grounds for termination whether the petitioner was liable or the State of Sikkim is not necessary for this Court to go into. Whether the termination is because of the fault of the petitioner or fault of the State of Sikkim is not for us to consider. The factum of termination exits. Therefore, such factum of termination should necessarily have been brought to the notice of the authorities when the affidavit was filed. Nothing prevented the petitioner from stating the true facts before the respondents. However, to contend as a matter of law and trying to make a distinction with regard to the quality of the termination, in our considered view, is not open for us to consider. We are only considering the fact as to whether the affidavit sought for by the respondents is a true reflection of the state of facts. The factum of termination having not been brought to the notice of the State, in our

considered view, is a sufficient ground for termination of the contract.

15. The further plea that there are various communications between the petitioner and the State with regard to the very issue of termination also requires to be considered. There are communications by the Government asking the petitioner to show cause on this issue. He has replied to the same. It is the case of the petitioner that having accepted the position, thereafter the LOI has been issued. Be that as it may, the requirement of the petitioner in furnishing the requirements to the State, in our considered view, cannot be overlooked by the subsequent events. If such a material was placed for consideration before the State and the same was qualified, only then the State could have proceeded to consider whether the termination was bad or not or otherwise. Therefore, so far as the termination is concerned, we are of the view that since there has been non-furnishing of the required information to the State, the termination of the contract by the State, in our considered view, cannot be disturbed.

16. After the order of termination was passed by the State of Sikkim, the writ petitioner had filed Writ Petition (C) No.23 of 2021 before the High Court of Sikkim at Gangtok, which was dismissed on 09.06.2021. Writ Appeal No.03 of 2021 was filed. The writ appeal was also dismissed vide order dated 10.12.2021 while coming to the conclusion that the writ petitioner therein is always entitled to invoke the arbitration clause. It was at that juncture the Additional Advocate General therein had also stated that the appellant/writ petitioner has already invoked the arbitration clause in the State of Sikkim.

17. Yet another document vide Annexure R-2 has been placed by the respondent No.4 which is a copy of the E-Portal of the Government of India. The same would indicate that the bid submitted by writ petitioner herein in the State of Rajasthan was found to be disqualified. That the reason assigned therein is that the writ petitioner has accepted that they have used fake signatures on the stamp papers. That this amounts to submitting forged document in the bid. However, on considering the same, we do not find that such a document is relevant for the determination of this case.

18. So far as the contention that adequate notice was not given before termination is concerned, we do not think that it is necessary to do so. The condition in the bid document itself indicates that if any false declaration is made the tender is liable to be rejected. When such a clause exists the question of giving any notice would not arise for consideration.

19. Clause 7.7 of the bid documents deals with the termination of the successful bidder. It contains various clauses. Clause 7.7i. reads as follows:-

"7.7i. The engagement of the Successful Bidder shall be suspended, and the Bidder may be blacklisted forthwith by the DFCSCP under following circumstances/reasons:

i. Violation of any condition of the tender/ contract or part of any condition of the tender contract of engagement, or

ii. Deviation found in quality and quantity of the product supplied, or

iii. On finding software supplied with hardware is pirated, or

iv. If it is found that during the process of award of contract, fraudulence was made by the Successful Bidder or the Successful Bidder if found to resort to the fraudulent practice in getting supply order like offering incentive in terms of free product or money."

Therefore, it is a case of the respondents that fraud has been made by the successful bidder and hence, the contract has been terminated. That the fraudulent practice has been committed.

20. Clause 7.11 of the bid documents deals with Corrupt/Fraudulent Practices. Fraudulent practice is defined in Clause 7.11d, which reads as follows:-

"7.11d. "Fraudulent practice" means a misrepresentation of facts in order to influence award of contract or a procurement process or a execution of a contract to the detriment of DFCSCP, and includes collusive practice among Bidders (prior to or after bid submission) designed to establish bid prices at artificial non-competitive levels and to deprive DFCSCP of the benefits of the free and open competition."

The same would indicate that a fraudulent practice means misrepresentation of facts in order to influence award of a contract etc. That is exactly what the writ petitioner has done. He has given a false information with regard to termination of the contract. Therefore, in terms of the clauses in the bid documents the respondents were justified in terminating the contract.

21. Hence, for all these reasons we do not find any ground to interfere in the matter. Consequently, the writ petition being devoid of merit is dismissed.

Petition dismissed

I.L.R 2023 M.P. 74 (DB)

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

WP No. 1200/2006 (Jabalpur) decided on 19 September, 2022

HEAVY ENGINEERING WORKSHOP (M/S) & anr. …Petitioners

Vs.

THE COMMISSIONER, CUSTOMS & CENTRAL EXCISE & ors. …Respondents

(Alongwith WP No. 10832/2008)

***Central Excise Act (1 of 1944) – Central Excise Duty – Test of Marketability* – Held – Articles fabricated, designed or manufactured by petitioners are for the particular requirements of particular Hydroelectric projects – It cannot be said that all goods manufactured by petitioners are goods which are capable of being sold in open market or to any purchaser – Impugned order quashed – Petitions allowed. (Paras 10 to 12)**

केंद्रीय उत्पाद–शुल्क अधिनियम (1944 का 1) – केंद्रीय उत्पाद शुल्क – विपणन योग्यता का परीक्षण – अभिनिर्धारित – याचीगण द्वारा बनाई हुई, डिजाईन की हुई अथवा निर्मित वस्तुएं विशिष्ट जलविद्युत परियोजनाओं की विशिष्ट आवश्यकताओं के लिए हैं – यह नहीं कहा जा सकता कि याचीगण द्वारा निर्मित सभी माल ऐसा माल है जो खुले बाजार में या किसी क्रेता को बेचे जाने योग्य है – आक्षेपित आदेश अभिखंडित – याचिकाएं मंजूर।

Cases referred:

1998 (98) ELT 334, 2004 (168) ELT 325, (2009) 17 SCC 550, 2002 (146) ELT 84, 2003 (152) ELT 349, 2005 (184) ELT 394, 1977 (1) ELT 199, AIR 1998 SC 839, 1994 (2) SCC 428, 1998 (101) ELT A139 (SC), 1994 (70) E.L.T. 3 (S.C.).

Naman Nagrath with *Avinash Zargar,* for the petitioners in WP No. 1200/2006 & 10832/2008.

Siddharth Seth, for the respondent No. 1 & 2 in WP No. 1200/2006 & 10832/2008.

O R D E R

The Order of the Court was Passed by :

RAVI MALIMATH, CHIEF JUSTICE:- The petitioner in both the cases are one and the same. The facts as stated in Writ Petition No.1200 of 2006 are being narrated for the sake of convenience.

2.(a) The first petitioner is a company registered under the Indian Companies Act. The second petitioner is one of the shareholders. The first petitioner -

Company is engaged in the business of hydro power generation and allied activities. It was awarded a turnkey contract relating to Vishnuprayag Hydroelectric Power Project and thereafter the Omkareshwar Hydroelectric Power Project in Writ Petition No.10832 of 2008. It is the run-of-the-river scheme for generation of hydroelectric power on the river Alaknanda in Chamauli Distict (sic : District) in the State of Uttarakhand. The project envisages the construction of a 15 meter high and 60 meter long barrage across the river Alaknanda. The construction and erection of various gates of the diversion barrage had to take place. Various duty paid iron and steel items were brought to the petitioner's workshop situated at Rewa. That, the said iron and steel items would be sent to the workshop and at the workshop, the various gates and other items were being prepared. That all these are required for the purpose of erection of the said project. That all these materials were purchased by the petitioner from the respective manufacturers and also from the open market. After purchase they are sent to the site at Rewa. The appropriate Central Excise duty on the said items purchased were already paid. The said fact is not disputed. The dispute was with regard to the different iron and steel items such as plates, angles, channels, beams etc., which were first brought to the petitioner's workshop and are then subjected in the said workshop for activities of cutting, bending, welding, drilling etc., as per the requirement of the project. Thereafter, they are embedded into the said structure at the dam.

2.(b) Another turnkey project of a similar nature was awarded to the petitioner by the Narmada Hydroelectric Development Corporation in relation to the Omkareshwar project in the District of Khandwa in the State of Madhya Pradesh. The same is covered by Writ Petition No.10832 of 2022.

2.(c) That, all these activities are being undertaken at the workshop of the first petitioner/Company. They are nothing but intermediate activities on which duty paid iron and steel items are subjected to during the course of their use. That, all the articles so prepared at the workshop are used only for the purposes of the said project. None of the articles are sold in the open market or diverted for any other purpose. However, some of the items are also diverted so far as the second project in Omkareshwar is concerned. Therefore, each and every item that is so prepared in the workshop is sent either to the project at Vishnuprayag Hydroelectric Power Project or the Omkareshwar Hydroelectric Power Project. That, the said items that are fabricated in the workshop are not useful for any other purpose or any other project. The same are prepared for the exclusive use and for the exclusive design of the project concerned.

2. (d) All the items bought by the petitioner from the market have suffered Central Excise duty. About 300 metric tons of the said iron and steel items were prepared for being dispatched at the petitioner's workshop. Therefore, a letter

dated 1st December, 2004 was addressed to the respondent No.1/Commissioner, Customs and Central Excise requesting for confirmation that no Central Excise duty was payable by the petitioner on the said items. Yet another letter was addressed on 20th December, 2004. There was no response from the respondents. Therefore, the writ petitioner filed Writ Petition No.417 of 2005 before this Court seeking for order to restrain the respondents from levying or demanding any Central Excise duty on the iron and steel items cleared from the petitioner's workshop and other consequential reliefs. By the order dated 11.04.2005, the writ petition was disposed off as follows :-

"This Court on 28.02.2005 had passed the following order:

"Shri S.K. Bagaria, Sr. Advocate with Shri Sumit Nema, Adv. and Shri Mukesh Agrawal, Adv. for the petitioner.

Shri S. Aole, Adv. for the respondents.

Petitioner has sought following reliefs:-

"1. A writ and/or Order and/or direction in the nature of mandamus commanding the respondents not to levy/demand any Central Excise duty on the iron and steel items cleared from the petitioner's said workshop for being used at Vishnuprayag Hydroelectric Project and Omkareshwar Project and to act according to law.

2. A writ of and/or Order and/or direction in the nature of prohibition commanding the respondents to forebear from levying /demanding any Central Excise duty on the said iron and steel items cleared from the petitioner's said workshop for use at the said Vishnuprayag Hydroelectric Project and Omkareshwar Project.

3. Such other or further order or orders be made and/or directions be given as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case."

Learned counsel for the petitioner submitted that the petitioner has been awarded a Turnkey contract relating to Vishnuprayag Hydroelectric and Omkareshwar Power Project, wherein petitioner has to supply fabricated iron gates etc. The raw material for fabrication of the iron gates etc. are Excise duty paid material and further no Excise duty is payable on fabrication and assembling of the gates etc. It is submitted that the matter has been considered by a Division Bench judgment of Karnataka High Court in

Thungabhadra Steel Product Ltd. vs. Union of India (1998 (98) ELT 334) and submitted that no Excise duty is payable on the aforesaid material. It is also submitted that till the decision of this petition by way of ad interim writ respondents be restrained to levy Excise duty on the said items.

Shri S. Aole, learned counsel for the respondent No.2 prays for a short time to file reply. He also opposed the prayer and contended that the Excise duty is payable on the aforesaid items and if the Excise duty is paid and in future it is held that the petitioner is not liable for the payment of the Excise duty, the said amount shall be refunded to the petitioner.

Contention of the petitioner is that he is not liable for the payment of Excise duty and has to supply the aforesaid material to a national project.

The payment of Excise duty is to be considered by this Court after hearing the other side. Till the next date of hearing, by way of interim measures, following directions are issued:

1. Petitioner shall pay 50% of the Excise duty in accordance with the rules to the respondents.

2. For remaining 50% of the Excise duty, petitioner shall furnish surety to the respondent no.2 that in case of any order passed by this court or dismissal of the petition, petitioner shall pay Excise duty payable by them within a period of 15 days from the date of passing of the order.

3. Petitioner shall also furnish an undertaking that respondents shall be entitled to recover the aforesaid Excise duty from the petitioners or from the bills raised from the petitioners to the Project for the payment of the material.

Be listed for hearing on 16.03.2005.

Reply if any be filed before the next date of hearing.

Certified copy today."

A counter affidavit has been filed stating, inter alia, that no adjudication has taken place. In view of the aforesaid, I am only inclined to direct that if the adjudication proceeding is going on the same shall be finalised. It would be open to the petitioner to raise all contentions before the adjudicating authority. Be it

noted, the adjudicating authority shall keep in view the law laid down in the case of Tungabhadra Steel Products Ltd. vs. Union of India (1998) 98 ELT 334. At this juncture, the learned counsel for the petitioner submitted that the representation is pending before the Deputy Commissioner, Central Excise Division, Satna. It is also contended by him that he would also submit further representation to the Commissioner, Customs and Central Excise, Bhopal, who can really take a decision in the matter with regard to imposition of Excise duty on the material in issue. If a representation is submitted within a period of two months from today, the same shall be dealt with by the respondent No.1 within a period of two months therefrom. It would be open to the petitioner to file necessary documents as well as notice to the respondent No.1 so that he can take sound decision which shall be informed by reasons. Till the matter is finally decided by the said authority order dated 28.02.2005 passed by this Court shall remain in force. Thereafter if any order is passed which would give rise to any grievance of the petitioner, the said order shall be kept in abeyance for a period of four weeks so that he can approach the appropriate legal forum.

The writ petition stands disposed of in the above terms."

3.(a) In pursuance to the said order, a representation was filed by the petitioner before respondent No.1. Thereafter, by the impugned order dated 15.12.2005 his representation was answered. The respondent No.1 came to the conclusion that goods are liable to Central Excise duty and appropriately classifiable under Chapter Sub-heading 7308. 9090 to the schedule of Central Excise Tariff Act, 1985 (Act No.5 of 1986) wherein it was held as follows :-

"In view of the above, I am of the view that the "Goods" so manufactured by the party are excisable, marketable and liable to Central Excise Duty. Accordingly, I pass the following order :-

O R D E R

I pass an order that :-

(i) the activities such as cutting, bending, joining, drilling and welding for the fabrication/manufacture of Radial Gates, Gate Hoists, Hydraulic Hoists, Spillway units, Stop Logs, Intake Gates, Bulk Head Gates, Intake Trash Racks, Draft Tube Gates, Grany Crane etc. from various iron and steel items such as plates, angles, channels beams, nuts and bolts etc. amount to manufacture as per section 2 (f) of the Central Excise Act, 1994; the goods are liable to Central Excise duty and appropriately

classifiable under Chapter Sub Heading 7308. 9090 to the schedule of Central Excise Tarrif Act, 1985 (Act No.5 of 1986) as structures/parts of Hydroelectric Power Project;

(ii) the goods fabricated/manufactured by the party viz. Radial Gates, Gate Hoists, Hydraulic Hoists, Spillway units, Stop Logs, Intake Gates, Bulk Head Gates, Intake Trash Racks, Draft Tube Gates, Grany Crane etc. are excisable, marketable and liable to Central Excise duty under section 3 of the Central Excise Act, 1994.

(iii) the jurisdictional Asstt. Commissioner shall workout the duty liability & interest to intimate to the party,

(iv) the party should henceforth, pay the outstanding duty & interest against the "Goods" cleared failing which penal proceedings shall be initiated".

3.(b) Questioning the same, the instant writ petition was filed.

4. (a) Shri Naman Nagrath, learned senior counsel appearing for the petitioners' counsel submits that the order passed by the respondents is unsustainable on facts as well as on law. That the finding recorded by the respondent No.1 that the goods are excisable is erroneous. That in similar circumstances, the Hon'ble High Court of Karnataka in its judgment in the case of *Thungabhadra Steel Products Ltd. Vs. Union of India* reported in 1998 (98) ELT 334 was concerned with the very question of fact and law. By the said judgment, it was held that assembling of fabricated parts into a whole structure at customers' site are not goods attracting levy of excise duty. The said order was challenged by the Commissioner, Customs before the Hon'ble Supreme Court by filing Special Leave Petition (Civil) No.4743 of 1998 (*Union of India v. Thungabhadra Steel Products Ltd.*) wherein the SLP was dismissed by the Hon'ble Supreme Court. The said fact is not disputed by the respondents.

4.(b) Reliance is also placed on the judgment of the CESTAT in the case of *KPC Limited Vs. Commissioner of Central Excise, Guntur* reported in 2004 (168) ELT 325, wherein a similar view was taken by the Tribunal by relying on the judgment of *Thungabhadra Steel Products Ltd* (supra). He has also relied upon the judgment of the Hon'ble Supreme Court in the case of *Collector of Central Excise, Jaipur v. Man Structurals Ltd.* reported in (2009)17 SCC 550, *Orissa Bridge and Construction..v. Commissioner of Central Excise, Kolkata* reported in 2002(146) ELT 84 [Tri Kolkata], *Birla Vxl Ltd. v. Commissioner of Central Excise, Delhi* reported in 2003 (152) ELT 349 [Tri Delhi], *Godrej Hi Care Ltd. v. Commissioner of Central Excise, Trichy* reported in 2005 (184) ELT 394, *Union of India and Anr. v. Delhi Cloth and General Mills Co. Ltd. and Ors*. reported in 1977 (1) ELT 199, *M/s Afcons Infrastructure Ltd. V. Commissioner of Service Tax,*

Mumbai - II reported in Appeal No.ST/85811 to 85813 and 85777 of 2013, *Union of India and Ors. v. J.G. Glass Industries Ltd. and others* reported in AIR 1998 SC 839, *A.P. State Electricity Board v. Collector of Central Excise, Hyderabad* reported in 1994 (2) SCC 428 and *Sanjay Industrial Corporation V. Commissioner of Central Excise, Mumbai* reported in Appeal No. E/1806/97.

5. On notice, the respondents have filed their reply on 25.04.2006. They have disputed the claim of the petitioner. They have stated that the orders passed by the Authorities are just and proper and do not call for any interference. That the goods being prepared by the petitioner attract excise duty and hence, the petitioners are liable to pay their relevant excise duty. The question of marketability and the question of fact has to be decided in the facts of each case, therefore, in the given facts of this case the goods are liable for excise duty. It is also further stated in their reply that as a consequence whereof, the petitioner may be directed to pay the Central Excise duty at appropriate rate with applicable interest etc. They do not accept the judgment in the case of *Thungabhadra Steel Products Ltd* (supra). It is their plea that it is not at all applicable in the petitioners' case and is distinguishable. That in the case of *Thungabhadra Steel Products Ltd* (supra) components and parts of semi-finished condition of gates are manufactured and cleared from the factory. These semi-finished parts were again subjected for welding and fabricating according to required specification. However, on the contrary in the instant case, the gates in fully finished conditions were cleared from the factory, therefore, the same is distinguishable on facts and hence not applicable. It is further pleaded that since the impugned order is an order in original, the petitioner is entitled to file an appeal under Section 35-B of the Central Excise Act, 1944. Therefore, entertaining of a writ petition is improper. Hence, it is pleaded that the petition be dismissed.

6. The learned counsel for the petitioner on the other hand has filed a rejoinder. Learned counsel submits that the impugned order cannot be treated as an order in original. That, it is an order passed as a result of the direction issued by this Court in Writ Petition No.417 of 2005. It is a mere consideration of the representation of the petitioner. Therefore, since it is not an order in original it cannot form a subject matter of the appeal. He further contends that in terms of direction No.3, the Authority was directed to work out the excise liability on the goods. The same has not been done. Therefore, until and unless the adjudication takes place, there is no order which the petitioner can challenge. Hence, the contention of the respondents that the order is original cannot be accepted.

7. Heard learned counsels and perused the records.

8. (a) The reliance placed by the petitioner is on the Division Bench judgment of the High Court of Karnataka in the case *Thungabhadra Steel Products Ltd. vs.*

Union of India & others reported in 1998 (98) ELT 334 KAR, wherein, the Court placed reliance on various judgments of the Hon'ble Supreme Court with regard to the test of marketability. The relevant paras are as under :-

> *"10. The first decision relied upon by the learned Counsel for the petitioner is in Bhor Industries Ltd. v. Collector of Central Excise 1989(40) E.L.T. 280 (S.C.) = AIR 1989 SC 1153, wherein the Supreme Court has held thus : -*
>
> > *"6. In support of this appeal, on behalf of the appellant, it was contended by Shri Harish Salve that it was only the 'goods as specified in the Schedule' to the Central Excise Tariff that could be subject to the duty. It appears to us that under the Central Excise Act, as it stood at the relevant time, in order to be goods as specified in the entry the first condition was that as a result of manufacture goods must come into existence. For articles to be goods these must be known in the market as such or these must be capable of being sold in the market as goods. Actual sale in the market is not necessary, user in the captive consumption is not determinative but the articles must be capable of being sold in the market or known in the market as goods. That was necessary. This has been clearly spelt out by this Court in Union of India v. Delhi Cloth and General Mills - (1963) (Supp.) 1 SCR 586 : AIR 1963 SC 791. There this Court held that excise duty being leviable on the manufacture of goods and not on their sale, the manufacturer could not be taxed unless manufacturing process resulted in production of goods as known in the market.*
> >
> > *(emphasis supplied)*
> >
> > *After considering the definition of the word 'manufacture' and several authorities and Words and Phrases, Permanent Edition, Volume 18 from a judgment of the New York Court and also other relevant authorities, this Court held that the definitions made it clear that to become "goods" an article must be something which can ordinarily come to the market to be bought and sold. In that view of the matter this Court agreed with the High Court and dismissed the appeal. Therefore, the first principle that emerges is that excise was a duty on goods as specified in the Schedule. In order to be goods an article must be something which can ordinarily come to the market and is brought for*

sale and must be known to the market as such. Therefore, the marketability in the sense that the goods are known in the market or are capable of being sold and purchased in the market is essential. This principle was again reiterated by this Court in South Bihar Sugar Mills Ltd. v. Union of India - (1968) 3 SCR 21 : AIR 1968 SC 922.

(Emphasis supplied)

" The Act charges duty on manufacture of goods. The word "manufacture" implies a change in the raw material but any change is not manufacture. There must be such a transformation that a new and different article must emerge having a distinctive name, character or use. The duty is levied on goods. As the Act does not define goods, the Legislature must be taken to have used that word in its ordinary, dictionary meaning. The dictionary meaning is that to become goods it must be something which can ordinarily come to the market to be bought and sold and is known to the market. That it would be such an article which would attract the Act was brought out in Delhi Cloth and General Mills Ltd's case (supra).

(Emphasis supplied)

8. It is necessary in this connection to reiterate the basic fundamental principles of excise. The Judicial Committee of the Privy Council in Governor General in Council v. Province of Madras - 1945 FCR 179 at 192: AIR 1945 PC 98 at 101 observed that excise duty was primarily a duty on the production or manufacture of goods produced or manufactured within the country. This Court again in Re. the Bill to Amend S. 20 of the Sea Customs Act, 1878, and Section 3 of the Central Excises and Salt Act, 1944- (1964)3 SCR 787 at 822: AIR 1963 SC 1760 at 1776 referring to the aforesaid observations of the Judicial Committee reiterated that taxable event in the case of duties of excise in the manufacture of goods and the duty is not directly on the goods but on the manufacture thereof. Therefore, the essential ingredient is that there should be manufacture of goods. The goods being articles which are known to those who are dealing in the market having their identity as such. Section 3 of the Act enjoins that there shall be levied and collected in such manner as may be prescribed duties of excise on all excisable goods other

than salt which are produced or "manufactured" in India. "Excisable goods" under Section 2(d) of the Act means goods specified in the Schedule to the Central Excise Tariff Act, 1985, as being subject to a duty of excise and includes salt. Therefore, it is necessary, in a case like this, to find out whether there are goods, that is to say, article as known in the market as separate distinct identifiable commodities and whether the tariff duty levied would be as specified in the Schedule. Simply because a certain article falls within the Schedule it would not be dutiable under excise law if the said article is not "goods" known to the market. Marketability, therefore, is an essential ingredient in order to be dutiable under the Schedule to Central Excise Tariff Act, 1985."

It is significant to note that this decision takes into consideration the new amended Act of 1985.

11. The next decision relied upon is in the case of Moti Laminates Pvt. Ltd. v. Collector of Central Excise, Ahmedabad - [1995 (76) ELT 241 (SC)]= 1995 (57) ECR 1 (SC). The question that came up for consideration in the above case was whether various goods mentioned in the Schedule of Excise Tariff are dutiable as such or they would be 'excisable goods' as defined in the Act, only when they are marketable or capable of being marketed? In that case, the Collector of Appeals held that an intermediate product in order to be excisable must be a product known to the market or commercial community. In other words, the intermediate product, which came into existence, should have been a complete product known as such to the market. But, if something more was to be done on the product to bring it into a form known to the commercial community, then it could not be treated as excisable goods. However, when the Tribunal over-ruled the decision of the Collector, the matter was ultimately taken to the Supreme Court. The Supreme Court, while allowing the appeal, observed thus :

"The duty of excise is leviable under Entry 84 of List of the VIIth Schedule on goods manufactured, or produced. That is why the charge under section 3 of the Act is on all, "excisable goods' produced or manufactured." The expression 'excisable goods' has been defined by clause (d) of Section 2 to mean, 'goods' specified in the Schedule. The Scheme in the Schedule is to divide the goods in two broad categories- one, for which rates are mentioned under different entry and other the

residuary. By this method all goods are excisable either under the specific or the residuary entry. The word 'goods' has not been defined in the Act. But, it has to be understood in the sense it has been used in Entry 84 of the Schedule. That is why Section 3 levies duty on all excisable goods mentioned in the Schedule provided they are produced and manufactured. Therefore, where the goods are specified in the Schedule they are excisable goods but whether such goods can be subjected to duty would depend on whether they were produced or manufactured by the person on whom duty is proposed to be levied. The expression 'produced or manufactured' has further been explained by this Court to mean that the goods so produced must satisfy the test of marketability. Consequently it is always open to an assessee to prove that even though the goods in which he was carrying on business were excisable goods being mentioned in the Schedule but they could not be subjected to duty as they were not goods either because they were not produced or manufactured by it or if they had been produced or manufactured they were not marketed or capable of being marketed.

7. The duty of excise being on production and manufacture which means bringing out a new commodity, it is implicit that such goods must be usable, movable, saleable and marketable. The duty is on manufacture or production but the production or manufacture is carried on for taking such goods to the market for sale. The obvious rationale for levying excise duty linking it with production or manufacture is that the goods so produced must be a distinct commodity known as such in common parlance or to the commercial community for purposes of buying and selling .....

9. Although the duty of excise is on manufacture or production of the goods, but the entire concept of bringing out new commodity etc. is linked with marketability. An articles does not become goods in the common parlance unless by production or manufacture something new and different is brought out which can be bought and sold ....."

Ultimately, the Supreme Court held that the marketability is the only criterion and upheld the view of the Collector holding that the Department is not entitled to levy duty.

12. Finally, the case of Mittal Engineering Works (P) Ltd. v. Collector of Central Excise, Meerut, was brought to our notice. The article that was the subject matter of consideration before the Supreme Court was Mono Vertical Crystallisers. It may be worth-while to note the description of the product mentioned in Paragraph-2 of the decision, which reads as follows :

> *"2. Mono vertical crystallisers are used in sugar factories. Their function is to exhaust molasses of sugar. A general note placed on the record of the Tribunal by the appellants, who have patented the mono vertical crystalliser, described the function and manufacturing process. The mono vertical crystalliser is fixed on a solid RCC slab having a load bearing capacity of about 30 tonnes per sq. mt. It is assembled at site in different sections shown by the packing list given to customers with the invoices. This consists of bottom plates, tanks, coils, drive frames, supports, plates, distance places, cutters, cutter supports, tank ribs, distance plate angles, water tanks, coil extension pipes, loose bend angles, coils supports, railing stands, intermediate platforms, drive frame railings and flats, oil trough, worm wheels, shafts, housing, stirrer arms and support channels, pipes, floats, heaters, ladders, platforms, etc. The parts aforesaid are cleared from the premises of the appellants and the mono vertical crystalliser is assembled and erected at site. The process involves welding and gas cutting. Where the assembly and erection is done by the appellants welding rods, gases and the like are procured from the stores of the customer and the customer sends to the appellants debit notes for their value. A sketch and photograph produced by the appellants before the authorities shows that the mono vertical crystalliser is a tall structure, rather like a tower with a platform at its summit."*

In the above case, it is seen that various intermediate parts are finally manufactured into a tall structure or a tower with a platform at its summit. Reiterating the earlier view that marketability was a decisive test for dutiability, the Supreme Court further held that "it meant that the goods were saleable or suitable for sale. They need not in fact be marketed. They should be capable of being sold to consumers in the market, as it is without anything more." The Supreme Court finally held that the record showed that mono vertical crystallisers had, apart from

> *assembly, to be erected and attached by foundations to the earth and, therefore, were not, in any event, marketable as they were."*

8. (b) Therefore, it was clearly held that in the absence of showing marketability of the goods in question, the same do not get attracted. The said judgment was confirmed by the Hon'ble Supreme Court as reported in 1998 (101) ELT A139 (SC) (*Union of India v. Thungabhadra Steel Products Ltd.*). Moreover, the CESTAT, South Zone Bangalore have also relied on the very judgment in the case of *Thungabhadra Steel Products Ltd.* (supra) and applied the same thereon in the case of *KCP Limited vs Commissioner Of Central Excise, Guntur* reported in 2004 (168) ELT 325 (Tri. Bang.).

9. (a) The learned counsel for the respondents places reliance on the judgment of the Hon'ble Supreme Court in the case of *A.P. State Electricity Board vs. Collector of Central Excise, Hyderabad* reported in 1994 (70) E.L.T. 3 (S.C.) with reference to para 10, which reads as follows:-

> *"10. It would be evident from the facts and ratio of the above decisions that the goods in each case were found to be not marketable. Whether it is refined oil (non-deodorised) concerned in Delhi Cloth and General Mills (1963) Supp. 1 SCR 586 or kiln gas in South Bihar Sugar Mills (1968) 3 SCR 21, or aluminium cans with rough uneven surface in Union Carbide (1986) 2 SCC 547, or PVC films in Bhor Industries (1989) 1 SCC 602 or hydrolysis in Ambalal Sarabhai (1989) 4 SCC 112, the finding in each case on the basis of the material before the court was that the articles in question were not marketable and were not known to the market as such. The "marketability" is thus essentially a question of fact to be decided in the facts of each case. There can be no generalisation. The fact that the goods are not in fact marketed is of no relevance. So long as the goods are marketable, they are goods for the purposes of Section 3. It is also not necessary that the goods in question should be generally available in the market. Even if the goods are available from only one source or from a specified market, it makes no difference so long as they are available for purchasers. Now, in the appeals before us, the fact that in Kerala these poles are manufactured by independent contractors who sell them to Kerala State Electricity Board itself shows that such poles do have a market. Even if there is only one purchaser of these articles, it must still be said that there is a market for these articles. The marketability of articles does not depend upon the number of purchasers nor is the market confined to the territorial limits of this country. The appellant's own case before the excise authorities and the*

> *C.E.G.A.T. was that these poles are manufactured by independent contractors from whom it purchased them. This plea itself- though not pressed before us - is adequate to demolish the case of the appellant. In our opinion, therefore, the conclusion arrived at by the Tribunal is unobjectionable."*

9. (b) Having considered the same, there is no dispute with the proposition of law therein.

10. The question whether the goods are being manufactured by a single manufacturer or not is not the question herein. The question herein is one of marketability. In the instant case, what was being marketed therein are cement concrete poles, which have been manufactured, therefore, it was held thereon that the marketability of the article does not depend on the number of purchasers nor is a market confined to the territorial limits of the country. As said hereinabove, we have no quarrel with the aforesaid proposition of law, which have already been reiterated by the Hon'ble Supreme Court in the aforesaid judgments as referred to in *Thungabhadra Steel Products* (supra).

11. What the department would have to show is that the goods that are being manufactured by the petitioner are goods that are capable of being sold in the open market or to any purchaser. Only going by the theoretical reference that goods are marketable is not sufficient. The nature and extent of the goods requires to be defined in order to show that any one in the open market can purchase the same. In the instant case, there is no dispute that what the petitioner is fabricating or manufacturing are articles such as Spillway Raidal Gates, Spillway Stoplog Units, Intake Gates of Trash Racks, Sedimentation Chamber Gates, Flushing Conduit Gates. The same has also been extracted in the impugned order. They would clearly indicate that these are articles that have been fabricated or manufactured for the particular requirements of the particular Hydroelectric Project. That the Gates, RCC construction etc. have been made by the petitioner. The same are invariably made out of the embedded parts as supplied from the petitioner's workshop, which are subjected and brought out by the iron and steel items used in such activities. Therefore, the design of each one of these articles is specific to the particular hydro electric project. No two Hydroelectric Projects are one and the same. They differ in size and vary in every single component. Therefore, every component that has to go into a hydroelectric unit is definitely one of those which are designed only for that purpose. Therefore, it cannot be said, nor to be found from any material on record to indicate that all the goods that are being manufactured by the petitioners are goods which are said to be marketable. Therefore, we are of the view that the plea of the petitioner is clearly covered by the judgments in *Thungabhadra Steel Products Ltd* (supra)

12. Hence, for all these reasons the petition is allowed. The order dated 15.12.2005 passed by respondent no.1 is quashed. The amount in deposit made by the petitioner with the respondents is directed to be adjusted towards any dues of the petitioner and if there are no dues, then to be refunded to him within a period of six months from today.

Petition allowed

I.L.R. 2023 M.P. 88

Before Mr. Justice Vivek Agarwal

WP No. 21169/2022 (Jabalpur) decided on 20 September, 2022

KESHAV KANSHKAR (M/S) …Petitioner

Vs.

THE PRINCIPAL SECRETARY, …Respondents

DEPARTMENT OF ENERGY & ors.

A. Constitution – Article 226 – Contractual Disputes – Alternative Remedy – Dispute of payment of dues **– Held – Apex Court concluded that a petition involving disputed questions of facts would not ordinarily lie – If there is an arbitration clause in agreement, petitioner has to approach the Arbitrator and if there is no such clause available, petitioner has an alternative remedy of approaching civil Court – Petition dismissed.**

(Paras 12 to 15)

क. संविधान – अनुच्छेद 226 – संविदात्मक विवाद – वैकल्पिक उपचार – बकाया भुगतान का विवाद – अभिनिर्धारित – उच्चतम न्यायालय ने निष्कर्षित किया कि तथ्यों के विवादित प्रश्नों से अंतर्ग्रसित याचिका सामान्यतः प्रस्तुत नहीं होगी – यदि अनुबंध में कोई मध्यस्थता खंड है, तो याची को मध्यस्थ के समक्ष जाना होगा तथा यदि ऐसा कोई खंड उपलब्ध नहीं है तो याची के पास व्यवहार न्यायालय के समक्ष जाने का वैकल्पिक उपचार है – याचिका खारिज।

B. Constitution – Article 226 – Enforcement of Contractual Rights **– Held – Apex Court concluded that in case of enforcement of contractual rights and liabilities the normal remedy of filing a civil suit is available to the aggrieved party – High Court will not exercise its prerogative writ jurisdiction to enforce such contractual obligations. (Para 13)**

ख. संविधान – अनुच्छेद 226 – संविदात्मक अधिकारों का प्रवर्तन – अभिनिर्धारित – उच्चतम न्यायालय ने निष्कर्षित किया कि संविदात्मक अधिकारों तथा दायित्वों के प्रवर्तन के प्रकरण में व्यथित पक्षकार को व्यवहार वाद प्रस्तुत करने का सामान्य उपचार उपलब्ध है – उच्च न्यायालय अपनी परमाधिकार रिट अधिकारिता का प्रयोग ऐसी संविदात्मक बाध्यताओं के प्रवर्तन हेतु नहीं करेगा।

***C. Constitution – Article 226 – Binding Precedent & Judicial Discipline* – Held – Merely issuance of a notice by Coordinate Bench cannot be considered to a binding precedent as it does not lay down any proposition of law to be followed in future – Question of judicial discipline would arise when a decision is rendered by a forum of superior or concurrent jurisdiction while adjudicating rights of parties to a *lis* embodying a declaration of law – There is no declaration of law while issuing notice in any matter. (Para 8 & 9)**

ग. संविधान – अनुच्छेद 226 – बाध्यकारी पूर्व निर्णय तथा न्यायिक अनुशासन – अभिनिर्धारित – समकक्ष न्यायपीठ द्वारा नोटिस जारी करना मात्र बाध्यकारी पूर्व–निर्णय नहीं माना जा सकता क्योंकि यह भविष्य में पालन किये जाने वाली विधि की किसी भी प्रतिपादना को निर्धारित नहीं करता है – न्यायिक अनुशासन का प्रश्न तब उत्पन्न होगा जब वरिष्ठ या समवर्ती अधिकारिता वाले एक फोरम द्वारा विधि की घोषणा को मूर्त रूप देने वाले वाद में पक्षकारों के अधिकारों को न्यायनिर्णीत करते हुए निर्णय दिया जाता है – किसी भी मामले में नोटिस जारी करते समय विधि की कोई घोषणा नहीं होती है।

***D. Constitution – Article 226 – Issuance of Notice – Doctrine of "Stare Decisis"* – Held – Meaning of "*stare decisis*" is to "stand by decided matters" – Issuance of notice by a coordinate bench is not a binding precedent to invoke doctrine of "*stare decisis*". (Para 7 & 14)**

घ. संविधान – अनुच्छेद 226 – नोटिस जारी किया जाना – निर्णितानुसरण का सिद्धांत – अभिनिर्धारित – निर्णितानुसरण का अर्थ है ''निर्णित मामलों पर अटल रहना'' – समवर्ती खण्डपीठ द्वारा नोटिस जारी किया जाना ''निर्णितानुसरण'' के सिद्धांत का अवलंब लेने के लिए बाध्यकारी पूर्व निर्णय नहीं है।

Cases referred:

(2006) 10 SCC 236, (1977) 3 SCC 457.

Sourabh Sunder, for the petitioner.
Piyush Bhatnagar, P.L. for the respondent No. 1.

(Supplied: Paragraph numbers)

O R D E R

VIVEK AGARWAL, J.:- Petitioner an Electrical Contractor has filed this writ petition under Article 226 of the Constitution of India claiming issuance of writ in the nature of mandamus directing the respondents especially respondent No.3 to release the payment of the petitioner for the work carried out by the petitioner under 'Sobhagya Yojna Scheme' under which he had carried out work of supply of material, survey, installation, testing and commissioning of 11 KV line, 11/4 KV distribution transformers and LT line for un-electrified household in terms of the NIT dated 23.10.2018.

2. It is submitted that as per Clause 6 of the NIT defect liability period was 12 months from the date of taking over/completion of facilities or any part thereof in case of 11 KV line and LT line and 24 months for distribution transformers but instead of making payment respondents have issued recovery notice dated 13.12.2021 beyond the period of defect liability.

3. Learned counsel for the petitioner has taken this Court through order dated 22.12.2021 passed in W.P. No.28386/2021 (Annexure P-4) in which as an interim measure, the effect and operation of the order dated 13.12.2021 (Annexure P-1) was stayed.

4. It is also submitted that under similar facts and circumstances a Coordinate Bench has issued notices in W.P. No.20515/2022 and W.P. No.20024/2022. Placing reliance on the order of Hon'ble Division Bench in W.A. No.880/2022 where Hon'ble Division Bench has held that on the ground of parity, the appellant too would be entitled to a similar interim relief. When it is noted even by the learned Singh Judge that there have been four cases in which interim relief has been granted, necessarily the appellant would also be entitled to the same. To deny him the interim relief only because of the fact that the matter requires to be heard finally in our *prima facie* view may not be appropriate.

5. Placing reliance on this judgment it is submitted that since Coordinate Bench has issued notices in two cases petitioner is entitled to issuance of notice in the present case as a matter of right.

6. 'Precedent', refers to a court decision that is considered as authority for deciding subsequent cases involving identical or similar facts, or similar issues. 'Precedent', is incorporated into the doctrine of 'stare decisis', and requires courts to apply the law in the same manner to cases with the same facts.

7. 'Judicial precedent', is the source of law where past decisions create law for Judges to refer back to for guidance in future cases. Meaning of doctrine of "stare decisis" to "stand by decided matters".

8. Thus, I am not in a position to agree that merely issuance of a notice by a Coordinate Bench, under which provision of law, can be considered to be a binding precedent as it does not lay down any proposition of law to be followed in future.

9. Question of judicial discipline will arise when a decision is rendered by a forum of superior or concurrent jurisdiction while adjudicating the rights of the parties to a lis embodying a declaration of law. I do not see any declaration of law in the discretion of a Coordinate Bench to issue notice in the matter.

10. As far as order dated 22.02.2021 is concerned. A perusal of the present writ petition reveals that under Point No.8, dealing with interim relief, if prayed

for, petitioner has mentioned nil. Thus it is evident that when petitioner himself is not praying interim relief in the present petition he is not entitled to seek any parity with the orders of Coordinate Bench passed in W.P. No.28386/2021.

11. Issue involved is that whether in a contractual manner (sic : matter) there exists an agreement which has not been brought on record by the petitioner and admittedly there is a pleading that there are disputes between the petitioner and the respondents in regard to payment of dues, inasmuch as, respondents have issued a recovery notice against the petitioner, whether writ can be issued in a matter involving disputed questions of fact.

12. Aforesaid question has been answered by the Hon'ble Supreme Court in *Noble Resources Ltd. Vs. State of Orissa and Another,* (2006) 10 SCC 236, wherein Hon'ble Supreme Court has held that a petition involving disputed questions of fact would not ordinarily lie and in that view of the mater the High Court rightly refused to exercise its extra ordinary jurisdiction. It is further observed that a decision is taken for business purposes, the Courts should not readily infer arbitrariness on the part of the State. It is further held that if an action on the part of the State is violative the equality clause contained in Article 14 of the Constitution of India, a writ petition would be maintainable even in the contractual field. A distinction indisputably must be made between a matter which is at the threshold of a contract and a breach of contract; whereas in the former the court's scrutiny would be more intrusive, in the latter the court may not ordinarily exercise its discretionary jurisdiction of judicial review, unless it is found to be violative of Article 14 of the Constitution.

13. In *M/s Radhakrishna Agarwal Vs. State of Bihar,* (1977) 3 SCC 457, it is held that in case of enforcement of contractual rights and liabilities the normal remedy of filing a civil suit is available to the aggrieved party and, therefore, the High Court will not exercise its prerogative writ jurisdiction to enforce such contractual obligation. In *M/s Radhakrishna Agarwal* (supra) it is further held that a question of the distinction between an administrative and quasi-judicial decision can only arise in the exercise of powers under statutory provisions. Rules of natural justice are attached to the performance of certain functions regulated by statutes or rules made thereunder involving decisions affecting rights of parties. When a contract is sought to be terminated by the Officers of the State, purporting to act under the terms of an agreement between parties, such action is not taken in purported exercise of a statutory power at all. The limitations imposed by rules of natural justice cannot operate upon powers which are governed by the terms of an agreement exclusively.

14. Thus in view of settled legal position, I am of the view that the petitioner is not even entitled to admission of this petition as issuance of notice being not a

binding precedent applicable to invoke doctrine of 'stare decisis', and the order passed by the Hon'ble Division Bench being in different arena, no indulgence is required as petitioner has an alternative remedy of approaching the civil court if there is no arbitration clause in the agreement and if there is an arbitration clause then he has a duty to approach the arbitrator in terms of the arbitration clause in the agreement.

15. Accordingly, this petition fails and is hereby **dismissed**.

Petition dismissed

I.L.R. 2023 M.P. 92
Before Mr. Justice Sheel Nagu
WP No. 1102/2013 (Jabalpur) decided on 31 October, 2022

STATE OF M.P. & ors. …Petitioners

Vs.

KESAV PRASAD RAJE …Respondent

(Alongwith WP No. 8220/2022)

***Industrial Disputes Act (14 of 1947), Section 33-C(2) and Industrial Relations Act, M.P. (27 of 1960), Section 1-A – Recovery from Employer* – Held – After amendment in MPIR Act, w.e.f. 2000, all industries carried on by or under control of State Government were excluded from application of MPIR Act – Employer was Public Health Engineering Department which is one of the industries under direct control of State Government – In 2009, employee rightly filed application under the ID Act as the remedy of execution of order was not available to the workman under the MPIR Act – Petition filed by State dismissed and the one filed by respondent workman is allowed with cost of Rs. 25,000. (Paras 8 to 13)**

औद्योगिक विवाद अधिनियम (1947 का 14), धारा 33–C(2) एवं औद्योगिक संबंध अधिनियम, म.प्र. (1960 का 27), धारा 1–A – नियोक्ता से वसूली – अभिनिर्धारित – वर्ष 2000 से प्रभावी मध्यप्रदेश औद्योगिक संबंध अधिनियम में संशोधन के पश्चात्, राज्य शासन द्वारा चलाए जा रहे या उसके नियंत्रण में सभी उद्योगों को म.प्र. औद्योगिक संबंध अधिनियम के लागू होने से अपवर्जित किया गया था – नियोक्ता लोक स्वास्थ्य यांत्रिकी विभाग था जो राज्य सरकार के सीधे नियंत्रण में आने वाले उद्योगों में से एक है – वर्ष 2009 में कर्मचारी ने औद्योगिक विवाद अधिनियम के अंतर्गत आवेदन सही प्रस्तुत किया क्योंकि कर्मकार को म.प्र. औद्योगिक संबंध अधिनियम के अंतर्गत, आदेश के निष्पादन का उपचार उपलब्ध नहीं था – राज्य द्वारा प्रस्तुत याचिका खारिज तथा प्रत्यर्थी कर्मकार द्वारा प्रस्तुत याचिका रू. 25000 व्यय के साथ मंजूर।

Case referred:

2009 (2) MPLJ 111.

Manhar Dixit, P.L. for the petitioners in WP No. 1102/2013 & for the respondents in WP No. 8220/2022.

Rashi Dua, for the respondent in WP No. 1102/2013.

Sanjay Ram Tamrakar, for the petitioner in WP No. 8220/2022.

O R D E R

SHEEL NAGU, J.:- Both petitions involving the same set of facts and circumstances were heard analogously and are being decided by this common order.

2. Earlier petition i.e. W.P. No.1102/2013 was filed by the State assailing the order dated 20.12.2021 passed by Labour Court No.2, Bhopal in Case No.5/I.D. Claim/09, whereby application preferred by the workman u/S.33-C(2) of the Industrial Disputes Act, 1947 ("ID Act" for brevity) was allowed directing payment of Rs.3,27,800/-, which arose out of the order dated 02.03.2002 passed by the same Labour Court in Case No.10/95/MPIR classifying the respondent/employee as permanent employee w.e.f. 31.01.1995 against the post of Hand Pump Mechanic with direction to pay him consequential benefit of admissible pay scale and other service benefits.

2.1 Other petition bearing No. W.P. No.8220/2022 is preferred by the workman seeking direction from this Court to release benefit flowing from the aforesaid order of the Labour Court passed u/S.33-C(2) of the ID Act.

3. It is pertinent to point out that in W.P. No.1102/2013 filed by the State, this Court did not grant any interim order in favour of the State. The benefit flowing from the order passed by the Labour Court u/S.33- C(2) of ID Act which is challenged in W.P. No.1102/2013 filed by the State has not yet reached the workman.

4. Bare facts giving rise to the present case are that the workman being aggrieved by failure of State and its functionaries to classify him as permanent employee despite working as a daily wager since 1990 as Hand Pump Mechanic, approached Labour Court No.2, Bhopal by preferring Case No.10/95/MPIR by filing an application under the M.P. Industrial Relations Act, 1960 ("MPIR Act" for brevity)

4.1 The Labour Court by order dated 02.03.2002 (Annexure P/3 in W.P. No.1102/2013) directed that workman be classified as permanent employee on the post of Hand Pump Mechanic w.e.f. 31.01.1995 alongwith payment of salary in the admissible pay scale and other related service benefits.

4.2 Aggrieved by the aforesaid order dated 02.03.2002, the employer preferred an appeal u/S.65 of MPIR Act before Industrial Court, Bhopal, which was dismissed for having been filed with inordinate and unexplained delay of 7 years by order dated 01.07.2009 (vide Annexure P/2 in W.P. No.8220/2022).

4.3 Consequent thereto, the employer by order dated 08.04.2003 vide Annexure P/4 in W.P. No.1102/2013 *inter alia* classified the petitioner as a permanent employee.

4.4 However, the difference of salary flowing from the order of classification was not paid, which impelled the workman to file an application u/S.33-C(2) of ID Act vide Annexure P/5 which was registered as Case No.5/I.D. Claim/09 before Labour Court No.2, Bhopal.

4.5 Pursuant to the order of the Labour Court passed u/S.33-C(2) of ID Act, Deputy Labour Commissioner, Bhopal issued recovery certificate to the Collector, Sehore for effecting recovery of amount of Rs.3,27,800/- (vide Annexure P/5 in W.P. No.8220/2022).

4.6 The employer inducted the workman into work charged and contingency establishment in the pay scale of 5200-20200+1900 Grade Pay on probation of two years on substantive post of Welder (vide Anneuxre P/7 in W.P. No.8220/2022).

4.7 Application filed u/S.33-C(2) of ID Act was allowed vide impugned order (Annexure P/1) on 20.12.2011 directing employer to pay Rs.3,27,800/-, difference of salary between the daily wages paid to petitioner and salary in the pay scale which became due to the workman on being classified as permanent employee.

4.8 Aggrieved by order dated 20.12.2011, the employer unsuccessfully invoked the power of superintendence of Industrial Court u/S.67 of MPIR Act, which was dismissed by order dated 09.04.2012 vide Annexure P/6 in W.P. No.1102/2013, on the ground that since order dated 20.12.2011 was passed under the ID Act, the remedy to the employer does not lie under the MPIR Act.

5. In the aforesaid factual matrix, grievance of the employer in W.P. No.1102/2013 is that once the workman has invoked the MPIR Act for being classified as a permanent employee, further remedy for execution of such an order could have been availed only under the provisions of MPIR Act and not under ID Act, and therefore, the impugned order passed by the Labour Court u/S.33-C(2) of ID Act is a nullity in the eyes of law.

6. On the other hand, grievance of workman in W.P. No.8220/2022 is that despite orders having been passed by the Competent Courts not only adjudicating the issue of classification in favour of workman but also directing the employer

u/S.33-C(2) of ID Act to pay quantified amount of Rs.3,27,800/- to the workman, the benefits of these orders have not reached the workman despite expiry of more than 20 years from the order of adjudication and 11 years from the order of execution u/S.33-C(2) of ID Act.

7. The sole ground raised by learned counsel for State is that the workman having availed remedy under the MPIR Act for adjudicating his claim for classification and having obtained a favourable order, it was not open to the workman to have switched to a remedy under the ID Act to seek execution of the said order of adjudication passed under the MPIR Act.

8. It is an undisputed fact that employer in the instant case is Public Health Engineering Department which is one of the industries under the direct control of the State Government. By the amendment in MPIR Act carried out in 2000, all the industries carried on by or under the control of the State Government were excluded from application of MPIR Act. Amended Section 1-A of MPIR Act reads thus:-

> *"**1-A.** The provisions contained in this Act shall not apply to an industry being carried on by or under the control of the State Government"*

9. Pertinently, challenge to the constitutional validity of the aforesaid amended Section 1-A of MPIR Act was repelled by the Division Bench of this Court in the case of *M.P. Transport Workers Federation Vs. State of M.P. and another,* 2009 (2) MPLJ 111.

10. Thus, it is luminous that w.e.f. 2000, no industrial dispute could be raised by a workman employed in Public Health Engineering Department of the State Government by availing the provisions of MPIR Act.

10.1 Accordingly, what follows as a natural consequence is that in 2009 when the application u/S.33-C(2) of ID Act filed by the workman, which led to passing of impugned order dated 20.12.2011, the remedy for execution of the order dated 02.03.2002, was not available to the workman under the MPIR Act.

10.2 As such, the only remedy that was available to the workman was u/S.33-C(2) of ID Act, which was rightly availed by workman.

11. From the aforesaid discussion, it is evident that workman had no remedy for execution of order dated 02.03.2002 under the MPIR Act after 2000. Application filed u/S.33-C(2) of ID Act was rightly filed by the workman in the year 2009, and therefore, was rightly decided by the impugned order (Annexure P/1) in W.P. No.8220/2022.

12. It is surprising to note that the State while filing W.P. No.1102/2013 was unaware of the amendment brought about by the legislative which is a wing of the

State. The ground that has been taken by the State thus appears to be not only frivolous but also vexatious since it gives an impression that the State left no stone unturned to prevent the benefit due under law to flow and reach the workman. The benefits which ought to have been received by the workman in the year 2002 have not yet reached him despite elapse of 20 years. This is unfortunate. Action of the State and its functionaries defies all sense of logic and reasoning and is further abhorrent to the litigation policy of the State.

13. Accordingly, this Court is inclined to dismiss W.P. No.1102/2013 and allow W.P. No.8220/2022 in the following terms:-

(i) W.P. No.1102/2013 stands dismissed thereby upholding the order dated 20.12.2011 passed in Case No.5/I.D. Claim/09.

(ii) W.P. No.8220/2022 stands allowed.

(iii) Petitioners/State and its functionaries are directed to pay the quantified amount of Rs.3,27,800/- to the workman alongwith interest of 10% w.e.f. January, 2012 till payment.

(iv) Since W.P. No.1102/2012 filed by the State and its functionaries is found to be frivolous and vexatious depriving the low paid workman of his legitimate dues for nearly 20 years, this Court deems it appropriate to impose exemplary cost on the State, which is quantified at Rs.25,000/-, out of which Rs.20,000/- shall be credited in the bank account of workman through digital transfer and remaining Rs.5,000/- shall be deposited with M.P. State Legal Services Authority, Jabalpur, for having wasted precious time of this Court in adjudicating this avoidable piece of litigation which ought to have been resolved at the level of the State Government under the State Litigation Policy. The MPSLSA shall donate this amount to the Permanent Artificial Organ Transplantation Centre, Netaji Subhash Chandra Bose Medical College, Jabalpur.

14. The aforesaid direction be complied with within a period of 60 days from today, failing which the matter be listed under the caption of "Direction" as PUD for execution qua cost.

Order accordingly

I.L.R. 2023 M.P. 97 (DB)

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

CONC No. 1987/2022 (Jabalpur) decided on 20 September, 2022

MAJID BEG & ors. ...Petitioners

Vs.

SHRI TEJ PRATAP SINGH …Respondent

A. Contempt of Courts Act (70 of 1971), Section 12 – Trial Judge Disobeying High Court's Order **– Held – This Court after setting aside trial Court's order which is an order u/S 311 Cr.P.C. directed CJM to decide the matter afresh after granting opportunity – "Afresh" necessarily means from the beginning – There is no specific order directing trial Court not to summon witnesses or anything of that nature – Petition dismissed. (Para 6)**

क. न्यायालय अवमान अधिनियम (1971 का 70), धारा 12 – विचारण न्यायाधीश द्वारा उच्च न्यायालय के आदेश की अवज्ञा किया जाना – अभिनिर्धारित – इस न्यायालय ने विचारण न्यायालय का आदेश रद्द करने के पश्चात्, जो कि धारा 311 के अंतर्गत आदेश है, सीजेएम को मामले को नए सिरे से अवसर प्रदान करते हुए विनिश्चित करने का निर्देश दिया – ''नए सिरे से'' का अनिवार्य अर्थ प्रारंभ से है – विचारण न्यायालय को निर्देशित करने वाला कोई विनिर्दिष्ट आदेश नहीं कि वह साक्षीगण अथवा उस प्रकृति की किसी भी चीज को समन न करे।

B. Contempt of Courts Act (70 of 1971), Section 12 – Trial Judge **– Held – Certain misapplication of law does not amount to contempt – Understanding of trial Court is quite different issue than disobedience – One has to show that disobedience was willful to the orders passed by superior Courts – If there is any scope of interpretation in the directions being issued then that cannot constitute a contempt – Every wrong order passed by trial Court is not to be brought under contempt. (Para 7)**

ख. न्यायालय अवमान अधिनियम (1971 का 70), धारा 12 – विचारण न्यायाधीश – अभिनिर्धारित – विधि का कतिपय दुरूपयोग अवमानना की कोटि में नहीं आता – विचारण न्यायालय की समझ अवज्ञा की तुलना में बिल्कुल भिन्न मुद्दा है – किसी को यह दिखाना होगा कि उच्चतर न्यायालयों द्वारा पारित आदेशों के प्रति अवज्ञा जानबूझकर की गई थी – यदि जारी किए गए निर्देशों में निर्वचन की कोई संभावना गलत है तो वह अवमानना गठित नहीं कर सकता – विचारण न्यायालय द्वारा पारित प्रत्येक आदेश को अवमानना के अंतर्गत नहीं लाया जा सकता।

Vishal Vincent Rajendra Daniel, for the petitioners.

O R D E R

The Order of the Court was passed by: **RAVI MALIMATH, CHIEF JUSTICE :-** This petition is filed seeking initiation of proceedings for contempt against the respondent herein for willfully disobeying the order dated 9th July, 2022 passed in Miscellaneous Criminal Case No.27507 of 2022.

2. Shri Vishal Vincent Rajendra Daniel, learned counsel for the petitioners contends that the respondent has violated the aforesaid order. He submits that the order passed by this Court in paragraph-9 has been disobeyed. He submits that even though the impugned order therein dated 10.05.2022 was set aside, the trial judge is proceeding to recall the witnesses and record their evidence. It is his submission even though he brought it to the notice of the trial judge, he was told that there was no order to restrain him not to summon the witnesses. Therefore, in view of the fact that there is no specific order restraining him not to summon the witnesses, there is no disobedience of the aforesaid order. Therefore, it is pleaded that since the contempt has been committed in disobeying the directions contained in paragraph-9, appropriate action be taken against the respondent.

3. Heard petitioners' counsel.

4. Paragraph-9 of the order, which is said to have been disobeyed by the respondent reads as follows:-

> *"9. Therefore, in view of the above, present petition is allowed. Order dated 10.05.2022, passed by the learned Chief Judicial Magistrate, Seoni is set aside and learned Chief Judicial Magistrate is directed to decide the matter afresh after granting an opportunity of hearing to the petitioners/accused and to raise all such objections as are available to them, in accordance with law. Criminal case is pending for more than 9 years. Therefore, learned CJM is expected to dispose of this case as early as possible preferably within a period of six months from the date of receipt of copy of this order."*

5. It is the further plea that the trial judge has stated that there was no order passed by the High Court directing him not to recall any of the witnesses. What was ordered by the High Court was to decide the matter afresh after giving an opportunity of hearing to the petitioners/accused etc. Therefore, what is being done by the trial judge is in accordance with the directions especially given in paragraph-9. Hence, there is no contempt.

6. On considering the contentions, we are of the considered view that no contempt would arise in this matter. There is no specific order directing the trial court not to summon the witnesses or anything of the like nature. This Court after setting aside the order dated 10.05.2022 which is an order under Section 311 of the Cr.P.C., directed the CJM to decide the matter afresh after granting opportunity. 'Afresh' necessarily means from the beginning. Opportunity has already been granted. Therefore, we do not find any willful disobedience as pleaded by the petitioners. Hence, the petition is liable to be dismissed on this ground itself.

7. So far as the contentions being advanced are concerned, we do not appreciate the same. Apparently, the plea of the petitioners is that in spite of the order of the Court, the trial judge has disobeyed the same. We have hereinabove held that the same does not amount to contempt. Every order that is passed by a superior court, is liable to be followed by the lower court. Even assuming the case of the petitioners is to be accepted of certain misapplication of the law, that does not amount to contempt. The understanding of the trial court is quite a different issue than disobedience. One has to show that the disobedience is willful to the orders passed by the superior courts. If there is any scope for any interpretation in the directions being issued then that cannot constitute a contempt. In the instant case, the impugned order therein was set aside with a direction to consider the matter afresh. Therefore, the trial court has to consider the matter afresh. As to how that amounts to contempt, we are unable to follow. Therefore, we are of the view that this is nothing but a pure adventurism by the petitioners in making such reckless allegations against the trial judge. We deprecate such attitude. We do not appreciate that every wrong order passed by the trial court is to be brought under contempt and the concerned judge has to be proceeded against. Trying to threaten the judges with petitions for contempt, in our considered view, is not going to be accepted. Since this matter is arising for the first occasion we have restrained ourselves from taking strict action but only direct a warning to the petitioners to desist from such adventurism.

8. Petition is accordingly dismissed.

Petition dismissed

I.L.R. 2023 M.P. 100

Before Mr. Justice Rajendra Kumar (Verma)

EP No. 25/2019 (Indore) decided on 30 September, 2022

PAWAN SINGH …Petitioner

Vs.

SHRI TULSIRAM SILAWAT & ors. …Respondents

***Representation of the People Act (43 of 1951), Section 83(1) and Civil Procedure Code (5 of 1908), Order 7 Rule 11 – Allegation of Corrupt Practice – Contents of Affidavit* – Held – When election petition contains allegations of corrupt practices, petition should be accompanied by an affidavit as per requirements mentioned in Form 25 as well as disclosure of source of information as required under Rules of Court – In absence of such requirements, petition would be treated as not disclosing complete cause of action *qua* charges of corrupt practice – Petition dismissed. (Paras 33 to 35)**

लोक प्रतिनिधित्व अधिनियम (1951 का 43), धारा 83(1) एवं सिविल प्रक्रिया संहिता (1908 का 5), आदेश 7 नियम 11 – भ्रष्ट आचरण का अभिकथन – शपथ–पत्र की विषयवस्तु – अभिनिर्धारित – जब चुनाव याचिका में भ्रष्ट आचरण के अभिकथन अंतर्विष्ट होते हैं, याचिका के साथ फार्म 25 में उल्लिखित आवश्यकतानुसार एक शपथ पत्र संलग्न होने के साथ साथ सूचना के स्त्रोत का प्रकटीकरण जैसा कि न्यायालय के नियमों के अंतर्गत अपेक्षित है होना चाहिए – इन आवश्यकताओं के अभाव में, याचिका भ्रष्ट आचरण के आरोपों के संपूर्ण वाद–हेतुक प्रकट नहीं करती ऐसा माना जाएगा – याचिका खारिज।

Cases referred:

(1969) 1 SCC 408, AIR 1987 SC 1577, (2004) 11 SCC 168, 1996 JLJ 762, (2017) 2 SCC 487, (2014) 14 SCC 189, AIR 1974 SC 1957, AIR 1952 SC 317, ILR Cal 259, AIR 1967 SC 295, AIR 1970 SC 652, AIR 1955 SC 233.

Ravindra Chhabra with *Aman Arora,* for the petitioner.

Vinay Saraf with *Yaspal Ahluwalia* and *Akash Sharma,* for the respondent by-elections No. 1.

O R D E R

RAJENDRA KUMAR (VERMA), J.:- Heard on I.A.No.2047/2022 which is an application under Order 7 Rule 11 and Section 151 of CPC read with Section 86(1) of the Representation of People Act, 1951 (hereinafter referred to as "Act of 1951") filed on behalf of respondent no.1 for rejection of election petition on the grounds mentioned therein.

2. The present election petition has been filed by the original petitioner Rahul Silawat, who also contested the election from the Constituency No.211

Sanwer, District Indore as an independent candidate but lost to respondent no.1 by a margin of 95845 votes in the general elections for Legislative Assembly held in the month of December, 2018. The petitioner has challenged the election petition seeking the following reliefs:-

> "(i) call for the entire record from the Election Commission of Indial in respect of 211, Sanweer Constituency of M.P. State Legislative Assembly.
>
> (ii) declare the election of respondent no.1 from 211 Sanwer Constituency of M.P. State Legislative Assembly as null and void.
>
> (iii) declare the respondent no.2 (who has secured second highest votes) as duly elected member of the M.P. State Legislative Assembly from 211 Sanwer Constituency of M.P.State Legislative Assembly.
>
> (iv) direct for initiation of criminal proceedings under Section 125 A of the Representation of People Act against respondent no.1.
>
> (v) grant any other relief which this Hon'ble Court deems fit and proper in the interest of justice.
>
> (vi) Grand cost of the petition."

3. The respondent no.1 filed the reply of the election petition on 16.06.2019 and denied all the allegations in toto and in reply to the allegations made against the respondent no.1, it is contended that the allegations levelled in the election petition do not fall under the definition of corrupt practice described under the Act of 1951.

During the pendency of this petition the respondent no.1 resigned from the Legislative Assembly and his resignation was duly accepted on 14.03.2020 and the seat of Sanwer Constituency No.211 was declared vacant on account of resignation of respondent no.1. After the by-elections were notified by the election commission, the original petitioner filed an application for withdrawal of the petition and lastly in compliance to order passed by this Court, the Registry of this Court published the notice on 27.01.2021 seeking withdrawal of the election petition and thereafter on 13.02.2021, the substituted petitioner filed an application under Section 110(C) of the Act of 1951 which was allowed and the present petitioner has been constituted in place of the original petitioner and this Court permitted him to continue proceedings of the instant election petition.

4. Learned counsel for the respondent no.1 has submitted that due to the resignation of respondent no.1 and after the by-elections of seat of Sanwer

constituency, the relief sought by the petitioner in the original petition has rendered infructuous and the reliefs are only academic. It is also submitted that in the by-elections respondent no.1 won the elections from the Legislative Assembly of Constituency No.211, Sanwer, district Indore by margin of 53,264 votes. Now no cause of action survives and as a result of which petition could be said to be the petition disclosing no cause of action qua the relief of declaring the election of the respondent no.1 from the Constituency No.211, Sanwer District Indore in the general assembly election held in the year 2018 null and void. All other reliefs are consequential and now are academic only. **It is also submitted that Section 83 of the Act of 1951 not having been satisfied inasmuch as the petitioner in the petition though having alleged for commission of corrupt practices in the said election has failed to satisfy the mandatory requirement of law by not filing proper affidavit in support of the allegations of corrupt practices made in the petition as an effect whereof the petition is liable for rejection.** It is further submitted that the reliefs as claimed in the petition cannot be granted.

5. It is further submitted by the counsel for the respondent no.1 that in the election petition ground of corrupt practices has also been raised. However, the instant election petition lacks in material fact constituting the cause of action required under the Act of 1951. The affidavit filed in support of the petitioner does not contain a concise statement of material facts on which the petitioner relies and therefore, does not disclose a triable issue or cause of action. The so called specific allegations of corrupt practice as contained in petition did not meet out the basic requirement which could constitute cause of action as required by law. Even the material particulars are absent in the election petition. The material facts as to how the information came to the knowledge of the petitioner pertaining to various incidents, as mentioned in the referred paras is absolutely missing, whereas the same is the preliminary requirement for maintainability of the petition. Thus, it suffers from non-compliance of the provisions contained under 83(1) of the Act of 1951.

6. It is also submitted by the learned counsel for respondent no.1 that no trial or inquiry is permissible on the basis of such vague, indefinite imprecise averments. The Court should not undertake to decide an issue unless it is a living issue between the parties. If an issue is purely academic in that case its is the decision neither way would have no impact on the position of the parties and would be an exercise in futility leading to waste of public time. The orders that could be passed by this Court at the conclusion of the trial of the election petition are detailed in Section 98 of the Act and relief nos. (ii) and (iii) could not be granted to the petitioner and further relief nos.(i) and (iv) also cannot be granted as the affidavit filed with the petition in support of the allegations of corrupt practice and particulars thereof does not comply with the provisions of the Act of 1951 and the Rules made thereunder.

7. It is also submitted that the affidavit accompanying the election petition in support of the allegations of corrupt practices and the particulars thereof is not according to Form No.25 prescribed for the same and provisions of Section 83(1) of Act of 1951. The petitioner has not prayed for declaration that the respondent no.1 be declared as disqualified and under the circumstances the entire petition as it is framed and also looking to the nature of the prayer clauses, has become infructuous and no cause of action accrues and same is liable to be dismissed on this count alone. The affidavit, in essence, though forms part of the petition is in the shape of criminal charge as the allegations of corrupt practices are quasi criminal in nature and as such without disclosing the charge in the manner provided the complete cause of action has lacked. The statutory provisions laying down the requirement cannot be allowed to be diluted as the very purpose of statutory provision is to be given obedience and not the disobedience and any deviation showing the requirement of law regarding filing of an affidavit when the allegations of corrupt practices are made and also regarding other requirements as such mentioning of paragraphs regarding statements of facts qua the allegations of corrupt practices and the name of the particular corrupt practice and also the material particular qua the corrupt practice and the source of the information of the corrupt practice is an essential one as the charge of corrupt practice is not purely of civil nature but is of quasi criminal nature.

8. It is also submitted by the learned counsel for respondent no.1 that the election petition on account of sufferance of deficiency noticed heretofore cannot proceed further as the relief of declaring the election of respondent no.1 is null and void and declaring the respondent no.2 returned candidate have become infructuous on account of subsequent holding of the by-elections and further the allegations of corrupt practice,in the present case the relief on the basis of allegations of corrupt practice against the respondent no.1 cannot be granted as the respondent no.1 cannot be put to trial as affidavit which is the essence of the charges, had failed to satisfy the requirement of law. Hence, it is prayed that this application be allowed and this election petition be dismissed as rendered infructuous and not maintainable.

9. It is submitted by learned counsel for the petitioner that averments made in the application are based on erroneous, misleading and superficial interpretation of the statutory provisions of the Act of 1951. On 09.11.2021 the respondent no.1 filed the application bearing I.A.No.7387/2021 under Order VI Rule 16 read with Section 151 of the CPC seeking relief of striking out/deletion of the pleadings on the ground that the original petitioner has failed to file affidavit in the prescribed Form No.25, in view of Rule 94-A of the Conduct of Election Rules, 1961 (hereinafter referred to as "Rule of 1961"). Thus respondent no.1 had no issue with the election petition but only satisfied with the certain paragraphs of

the petition. Reply to the said application was filed by the petitioner on 11.02.2022 denying the allegations made by the respondent no.1 in the aforesaid application. After filing of the reply to I.A.No.7387/2021 on the date fixed for arguments, the respondent no.1 with an ulterior motive to prolong the trial of the instant election petition sought time to file counter affidavit. When the counter affidavit was also not found conducive, the present I.A.has been filed. It is submitted that provision of Section 86 is applicable only when there is a default in non-compliance with the provisions of Section 81 or 82 or 117 of the Act of 1951. Undisputedly, there is no non-compliance with any of the said provisions. The requirement of result of the election having been materially affected is envisaged under Section 100(10(d) and not under Section 100(1)(b) i.e. corrupt practice committed by the returned candidate or the election agent or any other person with the consent of the returned candidate or his election agent. For invoking Section 100(1)(b), proof of result having been materially affected is not required. Therefore, the present application deserves to be dismissed.

10. It is also submitted that if the contents of this election petition regarding corrupt practices are found to be true then not only the election of respondent no.1 will be declared void, but will also be incurred electoral disqualification. Infact, if the instant election petition had been decided and allowed prior to the by-elections, then the respondent no.1 would have been disqualified from contesting the said elections. Thus resignation from constituent assembly/dissolution of assembly or by election and result thereof, has no bearing on the present election petition much less will not result in abatement of the petition. In support of the aforesaid contention reliance is placed in the matter of *Sheo Sadan Singh Vs. Mohan Lal Gautam reported* in (1969) 1 SCC 408.

11. It is further submitted that a bare perusal of the written statement of respondent no.1 reveals that there was no protest/demur/objection with regard to the pleadings of the election petition. The instant election petition is duly supported by an affidavit in Form No.25 as prescribed under Rule 94-A of Rule of 1961 and is filed in terms of Section 83 of the Act of 1951. The averments made in the petition has also been verified by the original petitioner in the verification clause of the affidavit as per Form No.25. In the said affidavit it has been categorically stated that the statements made in paragraphs 9 to 31 of the election petition in respect of corrupt practices by suppression of criminal antecedents and improper filing of nomination form of the respondent no.1 are true to his knowledge. The election petition contains a concise statement of material facts and requisite particulars in accordance with the Rule of 1961.

12. It is also submitted that a bare reading of Section 83 of the Act of 1951 would show that an election petition should contain a concise statement of material facts and full particulars of corrupt practice including as full a statement

as possible of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice. A bare perusal of paragraphs 9 to 20, 23 to 27 and 30 of the election petition itself shows that the election petition complies with the requirement of Section 83 of the Act of 1951. Respondent no.1 has levelled the pleadings as vague, indefinite, imprecise but failed to mention as to which particular averment/pleading is vague/ incomprehensible. On the above grounds the petitioner prays for dismissal of the application on exemplary cost.

13. Heard learned senior counsel for both the parties at length and perused the record.

14. Undisputedly, during the pendency of the election petition respondent no.1 has resigned from the Legislative Assembly and Sanwer Constituency No.211 was declared vacant and after by elections respondent no.1 was elected once against (sic : again) for Assembly from the same Constituency, hence relief nos.(ii) and (iii) claimed by the petitioner in the relief clause of the petition cannot be granted. So far as relief nos.(i) and (iv) in the relief clause of the petition is concerned, petitioner has to prove that any corrupt practices has/have been committed by the respondent no.1, and if it is proved then this Court shall pass order under Section 99 of the Act of 1951.

15. As per respondent no.1 petition also suffers from non-compliance of Section 83 (1) of the Act of 1951 which also provides that where the petitioner alleges any corrupt practice, the petition shall also be accompanied by an affidavit in the prescribed form in support of he (sic : the) allegation of such corrupt practice and the particulars thereof.

16. Learned counsel for respondent no.1 has relied upon the judgment of the Apex Court in the case of *Dhartipakar Madan Lal Agarwal Vs. Rajiv Gandhi* AIR 1987 SC 1577. The Apex Court in the aforesaid case has held as under:-

> "4 . The election under challenge relates to 1981, its term expired in 1984 on the dissolution of the Lok Sabha, thereafter another general election was held in December, 1984 and the respondent was again elected from 25th Amethi Constituency to the Lok Sabha. The validity of the election held in 1984 was questioned by means of two separate election petitions and both the petitions have been dismissed. The validity of respondent's election has been upheld in Azhar Hussain v. Rajiv Gandhi, [1986]2SCR782 and Bhagwati Prasad v. Rajiv Gandhi: [1986]2SCR823 . Since the impugned election relates to the Lok Sabha which was dissolved in 1984 the respondent's election cannot be set aside in the present proceedings even if the election petition is ultimately allowed on trial as the respondent

is a continuing member of the Lok Sabha not on the basis of the impugned election held in 1981 but on the basis of his subsequent election in 1984. Even if we allow the appeal and remit the case to the High Court the respondent's election cannot be set aside after trial of the election petition as the relief for setting aside the election has been rendered infructuous by lapse of time. In this view grounds raised in the petition for setting aside the election of the respondent have been rendered academic. Court should not undertake to decide an issue unless it is a living issue between the parties. If an issue is purely academic in that its decision one way or the other would have no impact on the position of the parties, it would be waste of public time to engage itself in deciding it. Lord Viscount Simon in his speech in the House of Lords in Sun Life Assurance Company of Canada v. Jervis [1944] AC 111 observed; "I do not think that it would be a proper exercise of the Authority which this House possesses to hear appeals if it occupies time in this case in deciding an academic question, the answer to which cannot affect the respondent in any way. It is an essential quality of an appeal fit to be disposed of by this House that there should exist between the parties a matter in actual controversy which the House undertakes to decide as a living issue." These observations are relevant in exercising the appellate jurisdiction of this Court. 5. The main controversy raised in the present appeal regarding setting aside of the respondent's election has become stale and academic, but precious time of the apex Court was consumed in hearing the appeal at length on account of the present state of law. Section 98 read with Section 99 indicates that once the machinery of the Act is moved by means of an election petition, charges of corrupt practice, if any, raised 24-09-2022 (Page 2 of 18) against the returned candidate must be investigated. On conclusion of the trial if the Court finds that a returned candidate or any of his election agent is guilty of commission of corrupt practice he or his election agent, as the case may be, would be guilty of electoral offence incurring disqualification from contesting any subsequent election for a period of six years. In this state of legal position we had to devote considerable time to the present proceedings as the appellant insisted that even though six years period has elapsed and subsequent election has been held nonetheless if the allegations made by him make out a case of corrupt practice the proceedings should be remanded to the High Court for trial and if after the trial the Court finds him guilty of corrupt practice the respondent should be disqualified. If we were to remand the proceedings to the High Court for trial for holding inquiry into the allegations of corrupt practice, the trial itself may take

couple of years, we doubt if any genuine and bona fide evidence could be produced by the parties before the Court, in fact, during the course of hearing the appellant himself stated before us more than once, that it would now be very difficult for him to produce evidence to substantiate the allegations of corrupt practice but nonetheless he insisted for the appeal being heard on merits. Though the matter is stale and academic yet having regard to the present state of law, we had to hear the appeal at length. 6. Before we consider the submissions on merit, we would like to say that Parliament should consider the desirability of amending the law to prescribe time limit for inquiry into the allegations of corrupt practice or to devise means to ensure that valuable time of this Court is not consumed in election matters which by efflux of time are reduced to mere academic interest. Election is the essence of democratic system and purity of elections must be maintained to ensure fair election. Election petition is a necessary process to hold inquiry into corrupt practice to maintain the purity of election. But there should be some time limit for holding this inquiry. Is it in public interest to keep sword of Damocles hanging on the head of the returned candidate for an indefinite period of time as a result of which he cannot perform his public duties and discharge his obligations to his constituents? We do not mean to say that the returned candidate should be permitted to delay proceedings and to plead later on the plea of limitation. Ways and means should be found to strike a balance in ascertaining the purity of election and at the same time in preventing waste of public time and money and keeping the sword of Damocles hanging on the head of returned candidate for an indefinite period of time. 7. The appellant appeared in person and argued the case vehemently for a number of days. He made three submissions: (i) The High Court had no jurisdiction to entertain preliminary objections under Order VI Rule 16 or to reject the election petition under Order VII Rule 11 of the CPC before the respondent had filed his written statement to the petition. In rejecting the petition under Order VII Rule 11 the High Court deprived the appellant opportunity of amending the petition by supplying material facts and particulars, (ii) Allegations contained in various paragraphs of the election petition constituted corrupt practice which disclosed cause of action within the meaning of Section 100 of the Act. The High Court committed error in holding that the petition was defective on the premise that it did not disclose any triable issue, (iii) The election petition disclosed primary facts regarding corrupt practice and if there was absence of any particulars or details the High Court should have afforded opportunity to the appellant to

amend the petition. 8. The first question which falls for our determination is whether the High Court had jurisdiction to strike out pleadings under Order VI Rule 16 of the CPC and to reject the election petition under Order VII Rule 11 of the Code at the preliminary stage even 24-09-2022 (Page 3 of 18) though no written statement had been filed by the respondent. Section 80 provides that no election is to be called in question except by an election petition presented in accordance with the provisions of Part VI of the Act before the High Court. Section 81 provides that an election petition may be presented on one or more of the grounds specified in Section 100 by an elector or by a candidate questioning the election of a returned candidate. Section 83 provides that an election petition shall contain a concise statement of material facts on which the petitioner relies and he shall set forth full particulars of any corrupt practice that he may allege including full statement of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice. Section 86 confers power on the High Court to dismiss an election petition which does not comply with the provisions of Sections 81 and 82 or Section 117. Section 87 deals with the procedure to be followed in the trial of the election petition and it lays down that subject to the provisions of the Act and of any rules made there under, every election petition shall be tried by the High Court as nearly as may be in accordance with the procedure applicable to the trial of suits under the CPC, 1908. Since provisions of Civil Procedure Code apply to the trial of an election petition, Order VI Rule 16 and Order VII Rule 11 are applicable to the proceedings relating to the trial of an election petition subject to the provisions of the Act. On a combined reading of Sections 81, 83, 86 and 87 of the Act, it is apparent that those paragraphs of a petition which do not disclose any cause of action, are liable to be struck off under Order VI Rule 16, as the Court is empowered at any stage of the proceedings to strike out or delete pleading which is unnecessary, scandalous, frivolous or vexatious or which may tend to prejudice, embarrass or delay the fair trial of the petition or suit. It is the duty of the Court to examine the plaint and it need not wait till the defendant files written statement and points out the defects. If the court on examination of the plaint or the election petition finds that it does not disclose any cause of action it would be justified in striking out the pleadings. Order VI Rule 16 itself empowers the Court to strike out pleadings at any stage of the proceedings which may even be before the filing of the written statement by the respondent or commencement of the trial. If the Court is satisfied that the election petition does not make out any cause of action and that

the trial would prejudice, embarrass and delay the proceedings, the court need not wait for the filing of the written statement instead it can proceed to hear the preliminary objections and strike out the pleadings. If after striking out the pleadings the court finds that no triable issues remain to be considered, it has power to reject the election petition under Order VII Rule 11."

17. In the case of *Shipping Corporation of India Limited Vs. Machado Brothers and others* (2004) 11 SCC 168 it has been held as under:-

"19. Coming to the maintainability of I.A.No.20651/2001, the learned counsel for the appellant in support of his contention that an application under Section 151 CPC for the dismissal of the suit on the ground of same having become infructuous was maintainable, has relied on number of judgments. In M/s. Ram Chand & Sons Sugar Mills Pvt.Ltd. Barabanki (U.P.) vs. Kanhayalal Bhargava & Ors. (AIR 1966 SC 1899) while discussing the scope of Section 151 CPC this court after considering various previous judgments on the point held: "The inherent power of a court is in addition to and complementary to the powers expressly conferred under the Code. But that power will not be exercise if its exercise is inconsistent with, or comes into conflict with, any of the powers expressly or by necessary implication conferred by the other provisions of the Code. If there are express provisions exhaustively covering a particular topic, they give rise to a necessary implication that no power shall be exercised in respect of the said topic otherwise than in the manner prescribed by the said provisions. Whatever limitations are imposed by construction on the provisions of S.151 of the Code, they do not control the undoubted power of the Court conferred under Section 151 of the Code to make a suitable order to prevent the abuse of the process of the court."

20. From the above, it is clear that if there is no specific provision which prohibits the grant of relief sought in an application filed under Section 151 of the Code, the courts have all the necessary powers under Section 151 CPC to make a suitable order to prevent the abuse of the process of court. Therefore, the court exercising the power under section 151 CPC first has to consider whether exercise of such power is expressly prohibited by any other provisions of the Code and if there is no such prohibition then the Court will consider whether such power should be exercised or not on the basis of facts mentioned in the application.

21. In the instant case, the appellant contends that during the pendency of the first suit, certain subsequent events have taken

place which has made the first suit infructuous and in law the said suit cannot be kept pending and continued solely for the purpose of continuing an interim order made in the said suit.

22. While examining this question we will have to consider whether the court can take cognizance of a subsequent event to decide whether the pending suit should be disposed of or kept alive. If so, can a defendant make an application under Section 151 CPC for dismissing the pending suit on the ground the said suit has lost its cause of action. This Court in the case of Pasupuleti Venkateswarlu vs. The Motor & General Traders (1975 1 SCC 770 at para 4) has held thus:

"We feel the submissions devoid of substance. First about the jurisdiction and propriety vis-'-vis circumstances which come into being subsequent to the commencement of the proceedings. It is basic to our processual jurisprudence that the right to relief must be judged to exist as on the date a suitor institutes the legal proceeding. Equally clear is the principle that procedure is the handmaid and not the mistress of the judicial process. If a fact, arising after the lis has come to court and has a fundamental impact on the right to relief or the manner of moulding it, is brought diligently to the notice of the tribunal, it cannot blink at it or be blind to events which stultify or render inept the decretal remedy. Equality justifies bending the rules of procedure, where no specific provision or fairplay is not violated, with a view to promote substantial justice subject, of course, to the absence of other disentitling factors or just circumstances. Nor can we contemplate any limitation on this power to take note of updated facts to confine it to the trial court. If the litigation pends, the power exists, absent other special circumstances repelling resort to that course in law or justice. Rulings on this point are legion, even as situations for applications of this equitable rule are myriad.

We affirm the proposition that for making the right or remedy claimed by the party just and meaningful as also legally and factually in accord with the current realities, the court can, and in many cases must, take cautious cognizance of events and developments subsequent to the institution of the proceeding provided the rules of fairness to both sides are scrupulously obeyed."

23. In the very same case, this Court quoted with approval a judgment of the Supreme Court of United States in Patterson vs. State of Alabama, (294 US 600) wherein it was laid down thus : "We have frequently held that in the exercise of our appellate

jurisdiction we have power not only to correct error in the judgment under review but to make such deposition of the case as justice requires. And in determining what justice does require, the Court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered."

24. Almost similar is the view taken by this Court in the case of J.M. Biswas vs. N.K. Bhattacharjee & Ors. (2002 (4) SCC 68) wherein this Court held :

"The dispute raised in the case has lost its relevance due to passage of time and subsequent events which have taken place during the pendency of the litigation. In the circumstances, continuing this litigation will be like flogging a dead horse. Such litigation, irrespective of the result, will neither benefit the parties in the litigation nor will serve the interests of the Union."

25. Thus it is clear that by the subsequent event if the original proceeding has become infructuous, ex debito justitiae, it will be the duty of the court to take such action as is necessary in the interest of justice which includes disposing of infructuous litigation. For the said purpose it will be open to the parties concerned to make an application under Section 151 of CPC to bring to the notice of the court the facts and circumstances which have made the pending litigation infructuous. Of course, when such an application is made, the court will enquire into the alleged facts and circumstances to find out whether the pending litigation has in fact become infructuous or not.

26. Having thus understood the law, we will now consider whether the courts were justified in rejecting the application filed by the appellant herein for dismissing the suit on the ground that the same had become infructuous. In this process, we have already noticed that there seems to be no dispute that the original termination notice based on which first suit O.S.No.4212/95 was filed, has since ceased to exist because of the subsequent termination notice issued on 23.8.2001, validity of which has already been challenged by the respondent in the third suit.

27. While dismissing the application I.A.No.20651/2001 the courts below proceeded not on the basis that the original notice of termination has not become infructuous, but on the basis that the said application lacks in bona fide and if the said application is allowed the interlocutory injunction hitherto enjoyed by the plaintiff will get vacated and consequently the plaintiff will be

prejudiced. The question for our consideration now is whether such ground can be considered as valid and legal. While so considering the said question one basic principle that should be borne in mind is that interlocutory orders are made in aid of final orders and not vice versa. No interlocutory order will survive after the original proceeding comes to an end. This is a well established principle in law as could be seen from the judgment of this Court in Kavita Trehan (Mrs.) & Anr. vs. Balsara Hygiene Products Ltd. (1994 5 SCC 380) wherein it is held :

"Upon dismissal of the suit, the interlocutory order stood set aside and that whatever was done to upset the status quo, was required to be undone to the extent possible."

28. Therefore, in our opinion, the courts below erred in continuing an infructuous suit just to keep the interlocutory order alive which in a manner of speaking amounts to putting the cart before the dead horse.

18. In the case of *Pawan Diwan Vs. Vidya Charan Shukla reported* in 1996 JLJ 762 it has been held as under:-

"20. To summaries the second part of the objections, learned Counsel for the applicant/Respondent No. 1 in this connection made following four-fold submissions: (a) that in the absence of prayer seeking declaration for declaring Respondent No. 1 as disqualified the petition as framed is infructuous as no cause of action accrues; (b) that the affidavit filed was not in consonance of Form 25 (supra) read with Rule 7 of the Rules framed by the High Court of Madhya Pradesh under the Act; (c) that the affidavit accompanying the petition wherefore proforma is prescribed by law has to satisfy the requirements of law which are mandatory in character; (d) that though the affidavit in proforma 25 do not provide for disclosure of source of information for the alleged corrupt practice the mode of information needs to be disclosed as the preposition is no more res-integra. The first point as raised by the learned Counsel for the Respondent No. 1 is sans substance as firstly such an objection is not covered under the provisions of Order 7 Rule 11 of the Code of Civil Procedure as the allegations in the petition disclose cause of action and not the prayer. Secondly relief could be the subject matter of amendment at any stage within the framework of the allegations in the petition, if found necessary. Thirdly High Court at the conclusion of Trial of an election petition can grant only the following reliefs: (a) dismiss the petition; or (b) declare the election of all or any of the returned candidates to be void; or (c) declaring the election of all

or any of the returned candidates to be void and the Petitioner or any other candidate to have been duly elected. However, Section 99 of the Act provides that at the time of making an order under Section 98 the High court shall also make an order: (a) where any charge is made in the petition of any corrupt practice having been committed at the election, recording: (i) a finding whether any corrupt practice has or has not been proved to have been committed at the election, and the nature of that corrupt practice; and 24-09-2022 (Page 9 of 14) (ii) the names of all persons, if any, who have been proved at the trial to have been guilty of any corrupt practice and the nature of that practice. This provision does not speak for final order that could be passed by the High Court except recording of finding of the guilt of corrupt practice qua the nature of corrupt practice and the name of the person who committed. In this context it is relevant to extract out the Section 8A of the Act, which is: 8A. Disqualification on ground of corrupt practices.- (1) The case of every person found guilty of a corrupt practice by an order under Section 99 shall be submitted, as soon as may be, after such order takes effect, by such authority as the Central Government may specify in this behalf, to the President for determination of the question as to whether such person shall be disqualified and if so, for what period: Provided that the period for which any person may be disqualified under this subsection shall in no case exceed six years from the date on which the order made in relation to him under Section 99 takes effect. (2) Any person who stands disqualified under Section 8A of this Act as it stood immediately before the commencement of the Election Laws (Amendment) Act, 1975 (40 of 1975), may, if the period of such disqualification has not expired, submit a petition to the President for the removal of such disqualification for the unexpired portion of the said period. (3) Before giving his decision on any question mentioned in Subsection (1) or on any petition submitted under Sub-section (2), the President shall obtain the opinion of the Election Commission on such question on petition and shall act according to such opinion. (Emphasis supplied) The case after finding of guilt Under Section 99 of the Act to be submitted to the President of India for determination of the question as to whether such person shall be disqualified and if so, for what period. When High Court cannot grant relief Under Section 98 of the Act there is no question of claiming the relief in petition by the election Petitioner Under Section 99 of the Act, if the charges of corrupt practice are pleaded in the petition, then High Court to record only finding and nothing more. The objection thus fails. It may, however, may not go un-

noticed that the High Court does not act as a Commission under the Commissions of Enquiry Act, 1952 for recording finding leaving action for the President of India. President of India cannot figure himself in the justice processing delivery system and thereby in judicial review process. The provision under Section 99 of the Act read with Section 8A, prima facie, erodes upon the basic feature of the Constitution and independence of the Judiciary. However here there is neither any such challenge nor could such a challenge be given in the election petition in view of law laid down by the Supreme Court in the case of Charan Lal Sahu v. Shri Keelam Sanjeeva Reddy AIR 1978 SC 409. 24-09-2022 (Page 10 of 14). In connection with second point, learned Counsel for the Respondent No. 1 as a first limb of submission submitted that the Petitioner has to specify the paragraphs of the election petition which relate to the allegation of corrupt practice in the affidavit as it is a mandatory requirement of law and it has to be in the prescribed form in support of the allegations of corrupt practices and particulars thereof and this mandatory requirement has not been complied-with by the Petitioner/opposite party, as according to him, the election Petitioner has to specify in the affidavit the name of the corrupt practice as provided Under Section 123 of the Act and while stating the name of corrupt practice also to give the particulars of such practice as mentioned in the paragraphs of the petition in the beginning of the affidavit. Second limb of submission is that though the Form 25 does not provide for giving source of information, if any, for such corrupt practice and the mode of information but the mode of information has to be disclosed and this proposition is no more res Integra in view of the pronouncement of the Supreme Court. The objection (d) (supra) finds place in objection (b).

24. The Supreme Court in V.K. Saklecha's case (supra) considered the case under the Act arising from the judgment of the Madhya Pradesh High Court. In paragraph 10 it was stated that Rule 9 of the Madhya Pradesh High Court Rules in respect of election petitions states that the rules of the High Court shall apply in so far as they are not inconsistent with the Representation of the People Act, 1951 or other rules, if any, made thereunder or of the Code of Civil Procedure in respect of all matters including inter alia affidavits. Rule 7 of the Madhya Pradesh High Court Rules states that every affidavit should clearly express how much is a statement and declaration from knowledge and how much is a statement made on information or belief and must also state the source or grounds of

information or belief with sufficient particularity and in paragraph 11 of the said report the Court has stated that Form No. 25 of the Conduct of Election Rules requires the deponent of an affidavit to set out which statements are true to the knowledge of the deponent and which statements are true to his information. The source of information is required to be given under the provisions in accordance with Rule 7 of the Madhya Pradesh High Court Rules. In so far as Form No. 25 of the Conduct of Election Rules requires the deponent to state which statements are true to knowledge there is no specific mention of the sources of information in the form. The form of the affidavit and the High Court Rules are not inconsistent. The High Court Rules give effect to provisions of Order 19 of the Code of Civil Procedure. The Court pointed out that importance of setting out the sources of information in affidavits which came up for consideration before the Supreme Court from time to time. The earlier decision was State of Bombay v. Purushottam Jog Naik : AIR 1952 SC 317 where the Supreme Court endorsed the decision of the Calcutta High Court in Padmabati Dasi v. Rasik Lal Dhar ILR Cal 259 and held that the sources of information should be clearly disclosed. Again, in Barium Chemicals Ltd. v. Company Law Board 1966 : AIR 1967 SC 295 the Supreme Court deprecated 'slipshod verifications' in an affidavit and reiterated its ruling in Bombay case (supra) that verification should invariably be modelled on the lines of Order 19, Rule 3 of the Code 'whether the Code applies in terms or not'. Again in A.K.K. Nambiar v. Union of India 1969 : AIR 1970 SC 652 the Supreme Court said that the importance of verification is to test the genuineness and authenticity of allegations and also to make the deponent responsible for allegations.

27. It may be noticed that the filing of the affidavit along with the election petition in cases where the allegations of corrupt practices are made is a must and the affidavit has to be in Form No. 25 with the addition recording source of information as per decision of the Supreme Court in V.K. Saklecha's case (supra). The necessity of affidavit is of course to constitute a charge regarding corrupt practice provided under Section 123 of the Act. The verification clause as provided in Rule 15 of Order 6 of the Code of Civil Procedure, which is as extracted below, only says: What he verifies upon information received and believed to be true. It does not provide for disclosure of the source."

19. Learned counsel for the petitioner has relied upon the judgment of Hon'ble Apex Court in the case of *Mairembam Prithviraj @ Prithviraj Singh Vs*

Pukhrem Sharatchandra Singh reported in (2017) 2 SCC 487 in which it has been held as under:-

> "17. It is clear from the law laid down by this Court as stated above that every voter has a fundamental right to know about the educational qualification of a candidate. It is also clear from the provisions of the Act, Rules and Form 26 that there is a duty cast on the candidates to give correct information about their educational qualifications. It is not in dispute that the Appellant did not study MBA in the Mysore University. It is the case of the Appellant that reference to MBA from Mysore University was a clerical error. It was contended by the Appellant that he always thought of doing MBA by correspondence course from Mysore University. But, actually he did not do the course. The question which has to be decided is whether the declaration given by him in Form 26 would amount to a defect of substantial nature warranting rejection of his nomination."

20. In the case of *Resurgence India Vs. Election Commission of India and another* reported in (2014) 14 SCC 189 the Hon'ble Apex Court has held as under:-

> "26. At this juncture, it is vital to refer to Section 125A of the RP Act. As an outcome, the act of failure on the part of the candidate to furnish relevant information, as mandated by Section 33A of the RP Act, will result in prosecution of the candidate. Hence, filing of affidavit with blank space will be directly hit by Section 125A(i) of the RP Act. However, as the nomination paper itself is rejected by the Returning officer, we find no reason why the candidate must again be penalized for the same act by prosecuting him/her.
>
> 27. If we accept the contention raised by Union of India, viz., the candidate who has filed an affidavit with false information as well as the candidate who has filed an affidavit with particulars left blank should be treated at par, it will result in breach of fundamental right guaranteed under Article 19(1)(a) of the Constitution, viz., 'right to know', which is inclusive of freedom of speech and expression as interpreted in Association for Democratic Reforms.
>
> 28.In succinct, if the Election Commission accepts the nomination papers in spite of blank particulars in the affidavits, it will directly violate the fundamental right of the citizen to know the criminal antecedents, assets and liabilities and educational qualification of the candidate. Therefore, accepting affidavit with blank particulars from the candidate will rescind the verdict in Association for Democratic Reforms (supra).

Further, the subsequent act of prosecuting the candidate under Section 125A(i) will bear no significance as far as the breach of fundamental right of the citizen is concerned. For the aforesaid reasons, we are unable to accept the contention of the Union of India."

21. In the case in hand Sections 83, 99,123 and 125-A of the Act of 1951 are relevant which reads as under:-

"**[83. Contents of petition.—**(1) An election petition—

(a) shall contain a concise statement of the material facts on which the petitioner relies;

(b) shall set forth full particulars of any corrupt practice that the petitioner alleges, including as full a statement as possible of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice; and

(c) shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908 (5 of 1908) for the verification of pleadings:

[Provided that where the petitioner alleges any corrupt practice, the petition shall also be accompanied by an affidavit in the prescribed form in support of the allegation of such corrupt practice and the particulars thereof.]

(2) Any schedule or annexure to the petition shall also be signed by the petitioner and verified in the same manner as the petition.]

99. **Other orders to be made by the High Court.—** (1) At the time of making an order under section 98 3 [the High Court] shall also make an order—

[(a) where any charge is made in the petition of any corrupt practice having been committed at the election, recording—

(i) a finding whether any corrupt practice has or has not been proved to have been committed at the election, and the nature of that corrupt practice; and

(ii) the names of all persons, if any, who have been proved at the trial to have been guilty of any corrupt practice and the nature of that practice; and]

(b) fixing the total amount of costs payable and specifying the persons by and to whom costs shall be paid:

Provided that 6 [a person who is not a party to the petition shall not be named] in the order under sub-clause (ii) of clause (a) unless—

(a) he has been given notice to appear before 3 [the High Court] and to show cause why he should not be so named; and

(b) if he appears in pursuance of the notice, he has been given an opportunity of cross-examining any witness who has already been examined by 3 [the High Court] and has given evidence against him, of calling evidence in his defence and of being heard.

[(2) In this section and in section 100, the expression "agent" has the same meaning as in section 123.]

123. Corrupt practices.—The following shall be deemed to be corrupt practices for the purposes of this Act:—

[(1) "Bribery", that is to say—

(A) any gift, offer or promise by a candidate or his agent or by any other person with the consent of a candidate or his election agent of any gratification, to any person whomsoever, with the object, directly or indirectly of inducing—

(a) a person to stand or not to stand as, or 4 [to withdraw or not to withdraw] from being a candidate at an election, or

(b) an elector to vote or refrain from voting at an election, or as a reward to—

(i) a person for having so stood or not stood, or for 5 [having withdrawn or not having withdrawn] his candidature; or

(ii) an elector for having voted or refrained from voting; (B) the receipt of, or agreement to receive, any gratification, whether as a motive or a reward—

(a) by a person for standing or not standing as, or for 6 [withdrawing or not withdrawing] from being, a candidate; or

(b) by any person whomsoever for himself or any other person for voting or refraining from voting, or inducing or attempting to induce any elector to vote or refrain from voting, or any candidate [to withdraw or not to withdraw] his candidature.

Explanation.—For the purposes of this clause the term "gratification" is not restricted to pecuniary gratifications or gratifications estimable in money and it includes all forms of entertainment and all forms of employment for reward but it does not include the payment of any expenses bona fide incurred at, or for the purpose of, any election and duly entered in the account of election expenses referred to in section 78.]

(2) Undue influence, that is to say, any direct or indirect interference or attempt to interfere on the part of the candidate or his agent, or of any other person 7 [with the consent of the candidate or his election agent], with the free exercise of any electoral right:

Provided that -

(a) without prejudice to the generality of the provisions of this clause any such person as is referred to therein who—

(i) threatens any candidate or any elector, or any person in whom a candidate or an elector is interested, with injury of any kind including social ostracism and ex-communication or expulsion from any caste or community; or

(ii) induces or attempts to induce a candidate or an elector to believe that he, or any person in whom he is interested, will become or will be rendered an object of divine displeasure or spiritual censure,

shall be deemed to interfere with the free exercise of the electoral right of such candidate or elector within the meaning of this clause;

(b) a declaration of public policy, or a promise of public action, or the mere exercise of a legal right without intent to interfere with an electoral right, shall not be deemed to be interference within the meaning of this clause.

[(3) The appeal by a candidate or his agent or by any other person with the consent of a candidate or his election agent to vote or refrain from voting for any person on the ground of his religion, race, caste, community or language or the use of, or appeal to religious symbols or the use of, or appeal to, national symbols, such as the national flag or the national emblem, for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate:]

2 [Provided that no symbol allotted under this Act to a candidate shall be deemed to be a religious symbol or a national symbol for the purposes of this clause.]

(3A) The promotion of, or attempt to promote, feelings of enmity or hatred between different classes of the citizens of India on grounds of religion, race, caste, community, or language, by a candidate or his agent or any other person with the consent of a candidate or his election agent for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate.]

[(3B) The propagation of the practice or the commission of sati or its glorification by a candidate or his agent or any other person with the consent of the candidate or his election agent for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate.

Explanation.—For the purposes of this clause, "sati" and "glorification" in relation to sati shall have the meanings respectively assigned to them in the Commission of Sati (Prevention) Act, 1987 (3 of 1988).]

(4) The publication by a candidate or his agent or by any other person 4 [with the consent of a candidate or his election agent], of any

statement of fact which is false, and which he either believes to be false or does not believe to be true, in relation to the personal character or conduct of any candidate, or in relation to the candidature, or withdrawal, of any candidate, being a statement reasonably calculated to prejudice the prospects of that candidate's election.

(5) The hiring or procuring, whether on payment or otherwise, of any vehicle or vessel by a candidate or his agent or by any other person , [with the consent of a candidate or his election agent], [or the use of such vehicle or vessel for the free conveyance] of any elector (other than the candidate himself, the members of his family or his agent) to or from any polling station provided under section 25 or a place fixed under sub-section (1) of section 29 for the poll:

Provided that the hiring of a vehicle or vessel by an elector or by several electors at their joint costs for the purpose of conveying him or them to and from any such polling station or place fixed for the poll shall not be deemed to be a corrupt practice under this clause if the vehicle or vessel so hired is a vehicle or vessel not propelled by mechanical power:

Provided further that the use of any public transport vehicle or vessel or any tramcar or railway carriage by any elector at his own cost for the purpose of going to or coming from any such polling station or place fixed for the poll shall not be deemed to be a corrupt practice under this clause.

Explanation.—In this clause, the expression "vehicle" means any vehicle used or capable of being used for the purpose of road transport, whether propelled by mechanical power or otherwise and whether used for drawing other vehicles or otherwise.

(6) The incurring or authorizing of expenditure in contravention of section 77.

(7) The obtaining or procuring or abetting or attempting to obtain or procure by a candidate or his agent or, by any other person 1 [with the consent of a candidate or his election agent], any assistance (other than the giving of vote) for the furtherance of the prospects of that candidate's election, 2 [from any person whether or not in the service of the Government] and belonging to any of the following classes, namely:—

(a) gazetted officers;

(b) stipendiary judges and magistrates;

(c) members of the armed forces of the Union;

(d) members of the police forces;

(e) excise officers;

[(f) revenue officers other than village revenue officers known as lambardars, malguzars, patels, deshmukhs or by any other name, whose duty is to collect land revenue and who are remunerated by a

share of, or commission on, the amount of land revenue collected by them but who do not discharge any police functions; and]

(g) such other class of persons in the service of the Government as may be prescribed:

[Provided that where any person, in the service of the Government and belonging to any of the classes aforesaid, in the discharge or purported discharge of his official duty, makes any arrangements or provides any facilities or does any other act or thing, for, to, or in relation to, any candidate or his agent or any other person acting with the consent of /the candidate or his election agent (whether by reason of the office held by the candidate or for any other reason), such arrangements, facilities or act or thing shall not be deemed to be assistance for the furtherance of the prospects of that candidate's election;]

[(h) class of persons in the service of a local authority, university, government company or institution or concern or undertaking appointed or deputed by the Election Commission in connection with the conduct of elections.]

[(8) booth capturing by a candidate or his agent or other person.] Explanation.—(1) In this section, the expression "agent" includes an election agent, a polling agent and any person who is held to have acted as an agent in connection with the election with the consent of the candidate.

(2) For the purposes of clause (7), a person shall be deemed to assist in the furtherance of the prospects of a candidate's election if he acts as an election agent of that candidate.]

[(3) For the purposes of clause (7), notwithstanding anything contained in any other law, the publication in the Official Gazette of the appointment, resignation, termination of service, dismissal or removal from service of a person in the service of the Central Government (including a person serving in connection with the administration of a Union territory) or of a State Government shall be conclusive proof—

(i) of such appointment, resignation, termination of service, dismissal or removal from service, as the case may be, and

(ii) where the date of taking effect of such appointment, resignation, termination of service, dismissal or removal from service, as the case may be, is stated in such publication, also of the fact that such person was appointed with effect from the said date, or in the case of resignation, termination of service, dismissal or removal from service, such person ceased to be in such service with effect from the said date.] 3 [(4) For the purposes of clause (8), "booth capturing" shall have the same meaning as in section 135A.]

[125A. Penalty for filing false affidavit, etc.—A candidate who himself or through his proposer, with intent to be elected in an election,—

(i) fails to furnish information relating to sub-section (1) of section 33A; or

(ii) give false information which he knows or has reason to believe to be false; or

(iii) conceals any information,

in his nomination paper delivered under sub-section (1) of section 33 or in his affidavit which is required to be delivered under sub-section (2) of section 33A, as the case may be, shall, notwithstanding anything contained in any other law for the time being in force, be punishable with imprisonment for a term which may extend to six months, or with fine, or with both.]

22. Rule 94-A of the Rules of 1961 reads as under:-

[94A. Form of affidavit to be filed with election petition.—The affidavit referred to in the proviso to subsection (1) of section 83 shall be sworn before a magistrate of the first class or a notary or a commissioner of oaths and shall be in Form 25.]

23. Form No.25 is reproduced here as under:-

(See rule 94A)

Affidavit

I, ..., the petitioner in the accompanying election petition calling in question the election of Shri/Shrimati ..... (respondent No ..... in the said petition) make solemn affirmation/oath and say—

(a) that the statements made in paragraphs..... of the accompanying election petition about the commission of the corrupt practice of* ..... and the particulars of such corrupt practice mentioned in paragraphs ..... of the same petition and in paragraphs .....of the Schedule annexed thereto are true to my knowledge;

(b) that the statements made in paragraphs.....of the said petition about the commission of the corrupt practice of* ..... and the particulars of such corrupt practice given in paragraphs .....of the said petition and in paragraphs ..... of the Schedule annexed thereto are true to my information;

(c)

(d)

etc.

Signature of deponent.

Solemnly affirmed/sworn by Shri/ Shrimati.....at.....this .....day of .....19.

Before me, Magistrate of the first class/Notary/ Commissioner of Oaths.]

* Here specify the name of the corrupt practice.]

24. The affidavit in Form No.25 filed by the petitioner is reproduced as under:-

BEFORE THE HON'BLE HIGH COURT OF MADHYA PRADESH

IN THE MATTER OF

Rahul Silawat .....Petitioner

Versus

Shri Tulsiram Silawat and others ....Respondents

FORM 25
(See rule 94A)
Affidavit

I, Rahul Silawat, the petitioner in the accompanying election petition calling in question the election of Shri Tulsiram Silawat (Respondent no.1 in the said petition) make solemn affirmation/oath and say -

a) That, the statements made in the paragraphs No.9 to 31 of the accompanying election petition about the commission of corrupt practices by suppression of criminal antecedents and improper filing of nomination form and affidavit by the respondent no.1 and improper acceptance of nomination form by respondent no.11 and annexures thereto are true to my knowledge;

DEPONENT

Solemnly affirmed by Shri Rahul Silawat at Jabalpur this 24th day of January, 2019.

BEFORE ME

25. To summarize the objections raised by respondent no.1 regarding affidavit filed in Form No.25 the following three questions arise:-

(i) Whether the affidavit filed was not in consonance of Form No.25(supra) read with Rule 7 of the Rules framed by the High Court of Madhya Pradesh under the Act.

(ii) Whether the affidavit accompanying the petition wherefore proforma is prescribed by law has to satisfy the requirements of law which are mandatory in character.

(iii) Whether the affidavit in Form No.25 (Rule 94-A) do not provide for disclosure of source of information for the alleged corrupt practice the mode of information needs to be disclosed.

26. Learned counsel for respondent no.1 submits that petitioner has to specify the paragraphs of the election petition which relate to the allegation of corrupt practices. The affidavit as it is a mandatory requirement of law and it has to be in the prescribed form in support of the allegations of corrupt practices and particulars thereof and this mandatory requirement has not been complied with by the petitioner, as according to him, the election petitioner has to specify in the affidavit the name of the corrupt practice as provided under Section 123 of the Act and while stating the name of the corrupt practice also to given the particulars of such practice as mentioned in the paragraphs of the petition in the beginning of the affidavit. It is also submitted that Form No.25 does not provide for giving source of information, if any, for such corrupt practice and the mode of information but the mode of information has to be disclosed. The Hon'ble Apex Court in the case of *V.K.Sakhlecha Vs. Jagjiwan* reported in AIR 1974 SC 1957 it has been held as under:-

> "14. The non-disclosures of grounds or sources of information in an election petition which is to be filed within 45 days from the date of election of the returned candidate, will have to be scrutinized from two points of view. The non-disclosure of the grounds will indicate that the election Petitioner did not come forward with the sources of information at the first opportunity. The real importance of setting out the sources of information at the time of the presentation of the petition is to give the other side notice of the contemporaneous evidence on which the election petition is based. That will give an opportunity to the other side to test the genuineness and veracity of the sources of information. The other point of view is that the election Petitioner will not be able to make any departure from the sources or grounds. If there is any embellishment of the case, it will be discovered."

27. On perusal of the affidavit (Form No.25) it is evident that clause (a) the name and the particulars of corrupt practice as provided under Section 123 of Act of 1951was stated. As per proforma of affidavit under Rule 94-A of Rules of 1961 in Column (b) source of information has to be disclosed which is absent in the affidavit filed by the petitioner.

28. Learned counsel for respondent no.1 submits that the affidavit is defective because it does not disclose the source of information. It is further submitted that affidavit in essence, though form part of the petition is in the shape of criminal charges as the allegations of corrupt practices are quasi criminal in nature and as such without disclosing the charge in the manner provided the complete cause of action has lapsed.

29. The importance of setting out the sources of information in affidavits which came up for consideration before the Supreme Court from time to time. The earlier decision was *State of Bombay v. Purushottam Jog Naik* AIR 1952 SC 317 where the Supreme Court endorsed the decision of the Calcutta High Court in *Padmabati Dasi v. Rasik Lal Dhar* ILR Cal 259 and held that the sources of information should be clearly disclosed. Again, in *Barium Chemicals Ltd. v. Company Law Board* AIR 1967 SC 295 the Supreme Court deprecated 'slipshod verifications' in an affidavit and reiterated its ruling in Bombay case (supra) that verification should invariably be modelled on the lines of Order 19, Rule 3 of the Code 'whether the Code applies in terms or not'. Again in *A.K.K. Nambiar v. Union of India* AIR 1970 SC 652 the Supreme Court said that the importance of verification is to test the genuineness and authenticity of allegations and also to make the deponent responsible for allegations.

30. Paragraph 14 of the aforesaid decision in *V.K. Saklecha's case,* as has already been extracted above, which deals with the non-disclosure of grounds or sources of information, the Court said that the non-disclosure of grounds will indicate that the election Petitioner did not come forward with the sources of information at the first opportunity. The real importance of setting out the source of information at the time of presentation of the petition is to give the other side notice of the contemporaneous evidence on which the election petition is based. That will give an opportunity to the other side to test the genuineness and veracity of the source of information. The other point of view is that the election Petitioner will not be able to make any departure from the sources or grounds. If there is any embellishment of the case it will be discovered. It may be noticed that the filing of the affidavit along with the election petition in cases where the allegations of corrupt practices are made is a must and the affidavit has to be in Form No. 25 with the addition recording source of information as per decision of the Supreme Court in *V.K. Saklecha's case* (supra).

31. In *Hari Vishnu Kamath v. Ahmad Ishaqua and Ors*. AIR 1955 SC 233 in Paragraph 35 the Court though in different context laid down the rule of law as:

> "When the law prescribes that the intention should be expressed in a particular manner, it can be taken into account only if it is so expressed. An intention not duly expressed is, in a Court of law, in the same position as an intention not expressed at all."

This principle would be attracted as here the intention of disclosure of the source of information and the intention of disclosing the particular corrupt practice is provided by law.

32. In the case in hand the relief nos. (ii) and (iii) of relief clause of petition cannot be granted. Only cause of action has to be seen with regard to relief nos.(i)&(iv) claimed in the petition. The complete cause of action thus in the absence of affidavit in the form prescribed together satisfying the requirements of the Rules of the Court in view of decision of *V.K. Saklecha's case* (supra), source of information is not there and as such the filing of the affidavit satisfying all the requirements in Form No. 25 is a mandatory requirement of law.

33. In *Pawan Diwan's Case* (Supra) it was held that the statutory provision laying down the requirement of cannot be allowed to be diluted as the very purpose of statutory provision is to give obedience and not the disobedience and any deviation showing the requirement of law regarding filing of an affidavit when the allegations of corrupt practices are made and also regarding other requirements as such mentioning of paragraphs regarding statements of facts qua the allegation of corrupt practice and the name of the particular corrupt practice and also the material particular qua the corrupt practice and the source of the information of the corrupt practice is an essential one as the charge of corrupt practice is not purely of civil nature but is of quasi criminal nature. Accordingly, I am of the view that when the election petition which contains allegations of corrupt practices against a returned candidate then the petition should be accompanied by an affidavit and such an affidavit must strictly conform to the requirements mentioned in Form No. 25 as well as the disclosure of the source of information as required under the Rules of the Court. In the absence of satisfying the above requirements the petition qua the corrupt practices would be treated as not disclosing the complete cause of action qua the charges of corrupt practice.

34. In view of the above, I find that the election petition on account of sufferance of deficiency noticed hereinbove cannot proceed further as the reliefs claimed in the petition cannot be granted as the respondent No. 1 cannot be put to trial as affidavit, which is essence of the charges, had failed to satisfy the requirement of law.

35. Accordingly the I.A.No.2047/2022 is allowed and this petition is dismissed. No order as to cost. However, the substituted petitioner is entitled to take back the security amount which lie deposited. The security amount so deposited shall be refunded to the substituted petitioner as a whole. Let the intimation of decision and authenticated copy of decision may be sent to the authorities as mentioned in Section 103 of the Act of 1951.

Petition dismissed

I.L.R. 2023 M.P. 127

Before Mr. Justice Dwarka Dhish Bansal

MP No. 3017/2022 (Jabalpur) decided on 6 September, 2022

SANGEETA GROVER (SMT.) …Petitioner

Vs.

RANJAN GROVER …Respondent

A. Hindu Marriage Act (25 of 1955), Section 13 & 24 – Payment of Alimony – Non-Compliance of – Striking off Defence – **Held – Before passing final order/judgment on application u/S 13, it shall be the duty of Court to see as to whether the husband has complied with the interim order of alimony in its entirety or not – Suit for dissolution of marriage by a husband can be dismissed for non-compliance of the order of interim alimony. (Para 13 & 14)**

क. हिन्दू विवाह अधिनियम (1955 का 25), धारा 13 व 24 – निर्वाह–व्यय का भुगतान – का अननुपालन – बचाव खारिज करना – अभिनिर्धारित – धारा 13 के अंतर्गत आवेदन पर अंतिम आदेश/निर्णय देने से पहले, यह देखना न्यायालय का कर्तव्य होगा कि पति द्वारा निर्वाह व्यय के अंतरिम आदेश का पूर्णतः पालन किया गया है अथवा नहीं – पति द्वारा विवाह के विघटन के लिए संस्थित वाद को अंतरिम निर्वाह–व्यय के आदेश का पालन न करने पर खारिज किया जा सकता है।

B. Hindu Marriage Act (25 of 1955), Section 13 & 24 – Payment of Alimony – Execution Application – **Held – Filing of execution application by wife does not dispense with the requirement of depositing/paying maintenance *pendente-lite* by husband during the main proceeding u/S 13 pending before the Family Court. (Para 9)**

ख. हिन्दू विवाह अधिनियम (1955 का 25), धारा 13 व 24 – निर्वाह–व्यय का भुगतान – निष्पादन आवेदन – अभिनिर्धारित – पत्नी द्वारा निष्पादन आवेदन प्रस्तुत करना, धारा 13 के अंतर्गत मुख्य कार्यवाही कुटुंब न्यायालय के समक्ष लंबित रहने के दौरान पति द्वारा वाद लंबित रहते भरण–पोषण और कार्यवाहियों के व्यय को जमा/भुगतान करने की आवश्यकता को समाप्त नहीं करता।

Cases referred:

(2021) 2 SCC 324, (2001) 4 SCC 125, AIR 2009 Chhattisgarh 1, 2003 (1) DMC 562, 1995 (II) MPWN 4.

Vivek Agrawal, for the petitioner.
Shreyash Pandit, for the respondent.

O R D E R

DWARKA DHISH BANSAL, J. :- Arising out of the main proceedings instituted by respondent/husband under section 13 of the Hindu Marriage Act, this

miscellaneous petition has been filed by petitioner/wife challenging the order dated 25/06/2022 (Annexure P/6), whereby application filed by the petitioner under Section 151 CPC dated 22/06/2022 has been dismissed.

2. Learned counsel appearing for the respondent/husband has taken preliminary objection with regard to maintainability of the present petition on the ground that this petition has not been filed against any order of Family Court and there is no relief claimed in the petition for setting aside of any order. He further pointed out the order dated 23/05/2022 passed by this Court in W.P. No.10458/2022, whereby the petitioner's petition was dismissed, whereby the order passed by the Family Court reserving liberty with the petitioner to file execution proceeding to execute the order of maintenance, was upheld.

3. Learned counsel for the petitioner submits that vide order dated 17/01/2019, learned Family Court decided the application of the petitioner under Section 24 of the Hindu Marriage Act and fixed the maintenance pendent-lite @ Rs.20,000/- p.m. from the date of passing of the order.

4. He submits that learned Family Court has heard final arguments in the original case whereas the respondent has not complied with the order dated 17/01/2019 and has not deposited the entire amount of maintenance. Accordingly, he submits that an amount of Rs.6,35,000/- is due and unless this amount is not paid/deposited by the respondent/husband, the proceedings of the main case in question should be stayed.

5. Learned counsel for the respondent submits that the petitioner has already initiated execution proceedings, which fact has been suppressed by the petitioner from this Court. He further disputes any arrears of maintenance in pursuance of order dated 17/01/2019 and he submits that three days ago, an amount of Rs.70,000/- has been paid by the respondent/husband. Lastly, he submits that in the light of order passed by this Court on 23/05/2022 in W.P. 10458/2022, no further order is required to be passed and he prays for dismissal of the miscellaneous petition.

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

7. Undisputedly, the order dated 17/01/2019 has been passed in the pending proceedings under Section 13 of the Hindu Marriage Act instituted by the respondent/ husband and as per submissions made on behalf of the parties, the order dated 17/01/2019 is still in force and has not been modified by any Superior Court or even by Family Court.

8. It is also clear that while passing the order dated 23/05/2022, the recent decision of Supreme Court in the case of *Rajnesh Vs. Neha & Another* (2021) 2 SCC 324 as well as other binding decisions were not brought to the notice of this Court, in which it has been held as under:

Striking off the Defence

" 118. Some Family Courts have passed orders for striking off the defence of the respondent in case of non-payment of maintenance, so as to facilitate speedy disposal of the maintenance petition. In Kaushalya vs. Mukesh Jain, the Supreme Court allowed a Family Court to strike off the defence of the respondent, in case of non-payment of maintenance in accordance with the interim order passed.

119. The ***Punjab & Haryana High Court in Bani vs. Parkash Singh, AIR 1996 P&H 175*** *was considering a case where the husband failed to comply with the maintenance order, despite several notices, for a period of over two years. The Court taking note of the power to strike off the defence of the respondent, held that:*

"Law is not that powerless as not to bring the husband to book. If the husband has failed to make the payment of maintenance and litigation expenses to wife, his defence be struck out."

120. The Punjab & Haryana High Court in Mohinder Verma vs. Sapna, discussed the issue of striking off the defence in the following words:

"8. Section 24 of the Act empowers the matrimonial court to award maintenance pendente lite and also litigation expenses to a needy and indigent spouse so that the proceedings can be conducted without any hardship on his or her part. The proceedings under this Section are summary in nature and confers a substantial right on the applicant during the pendency of the proceedings. Where this amount is not paid to the applicant, then the very object and purpose of this provision stands defeated. No doubt, remedy of execution of decree or order passed by the matrimonial court is available under Section 28A of the Act, but the same would not be a bar to striking off the defence of the spouse who violates the interim order of maintenance and litigation expenses passed by the said Court. In other words, the striking off the defence of the spouse not honouring the court's interim order is the instant relief to the needy one instead of waiting endlessly till its execution under Section 28A of the Act. Where the spouse who is to pay maintenance fails to discharge the liability, the other spouse cannot be forced to adopt time consuming execution proceedings for realizing the amount. Court cannot be a mute spectator watching flagrant disobedience of the interim orders passed by it showing its helplessness in its instant implementation. It would, thus, be appropriate even in the

absence of any specific provision to that effect in the Act, to strike off the defence of the erring spouse in exercise of its inherent power under Section 151 of the Code of Civil Procedure read with Section 21 of the Act rather than to leave the aggrieved party to seek its enforcement through execution as execution is a long and arduous procedure. Needless to say, the remedy under Section 28A of the Act regarding execution of decree or interim order does not stand obliterated or extinguished by striking off the defence of the defaulting spouse. Thus, where the spouse who is directed to pay the maintenance and litigation expenses, the legal consequences for its non-payment are that the defence of the said spouse is liable to be struck off."

(emphasis supplied)

121. The Delhi High Court in Satish Kumar vs. Meena, held that the Family Court had inherent powers to strike off the defence of the respondent, to ensure that no abuse of process of the court takes place.

122. The Delhi High Court in ***Smt Santosh Sehgal vs. Shri Murari Lal Sehgal, AIR 2007 Delhi 210*** *framed the following issue for consideration:*

" 3... Whether the appeal against the decree of divorce filed by the appellant-wife can be allowed straightway without hearing the respondent-husband in the event of his failing to pay interim maintenance and litigation expenses granted to the wife during the pendency of the appeal."

The reference was answered as follows:

"5. The reference to the portion of the judgment in Bani's case extracted herein-above would show that the Punjab and Haryana High Court and Orissa High Court have taken an unanimous view that in case the husband commits default in payment of interim maintenance to his wife and children then he is not entitled to any matrimonial relief in proceedings by or against him. The view taken by Punjab and Haryana High Court in Bani's case has been followed by a Single Judge of this Court in Satish Kumar v. Meena. We tend to agree with this view as it is in consonance with the first principle of law. We are of the view that when a husband is negligent and does not pay maintenance to his wife as awarded by the Court, then how such a person is entitled to the relief claimed by him in the matrimonial proceedings. We have no hesitation in holding that in case the husband fails to pay maintenance and litigation expenses to his wife granted by the Court during the pendency of

the appeal, then the appeal filed by the wife against the decree of divorce granted by the trial court in favor of the husband has to be allowed. Hence the question referred to us for decision is answered in the affirmative. "

The Court concluded that if there was non-payment of interim maintenance, the defence of the respondent is liable to be struck off, and the appeal filed by the appellant-wife can be allowed, without hearing the respondent.

123. The Punjab and Haryana High Court in Gurvinder Singh vs. Murti was considering a case where the trial court stuck off the defence of the husband for non-payment of ad-interim maintenance. The High Court set aside the order of the trial court, and held that instead of following the correct procedure for recovery of interim maintenance as provided u/S. 125 (3) or Section 421 of the Cr.P.C, the trial court erred in striking off the defence of the husband. The error of the court did not assist in recovery of interim maintenance, but rather prolonged the litigation between the parties.

124. The issue whether defence can be struck off in proceedings under Section 125 Cr.P.C. came up before the Madhya Pradesh High Court in Venkateshwar Dwivedi vs. Ruchi Dwivedi. The Court held that neither Section 125(3) of the Cr.P.C, nor Section 10 of the Family Courts Act either expressly or by necessary implication empower the Magistrate or Family Court to strike off the defence. A statutory remedy for recovery of maintenance was available, and the power to strike off defence does not exist in a proceeding u/S. 125 Cr.P.C. Such power cannot be presumed to exist as an inherent or implied power. The Court placed reliance on the judgment of the Kerala High Court in Davis vs. Thomas and held that the Magistrate does not possess the power to strike off the defence for failure to pay interim maintenance.

Discussion and Directions on Enforcement of Orders of Maintenance

125. The order or decree of maintenance may be enforced like a decree of a civil court, through the provisions which are available for enforcing a money decree, including civil detention, attachment of property, etc. as provided by various provisions of the CPC, more particularly Sections 51, 55, 58, 60 read with Order XXI.

126. Striking off the defence of the respondent is an order which ought to be passed in the last resort, if the Courts find default to be wilful and contumacious, particularly to a dependant

> *unemployed wife, and minor children. Contempt proceedings for wilful disobedience may be initiated before the appropriate Court".*

As such, in the considered view of this Court, the order dated *23/05/2022* (supra) does not come in the way of this Court.

9. As per the decision in the case of *Rajnesh* (supra), the petitioner/wife has remedy of executing the order of maintenance which she has already availed by filing execution application but in the considered opinion of this Court, filing of execution application by the petitioner/wife does not dispense with the requirement of depositing/paying the maintenance pendent-lite (sic : pendente-lite) by the respondent/husband to the petitioner/wife during the main proceedings pending before the Family Court under Section 13 of the Hindu Marriage Act.

10. The Supreme Court in the case of *Hirachand Srinivas Managaonkar Vs. Sunanda* (2001)4 SCC125 has held as under:

> *"17. Now we come to the crucial question which specifically arises for determination in the case; whether refusal to pay alimony by the appellant is a 'wrong' within the meaning of S. 23(1)(a) of the Act so as to disentitle the appellant to the relief of divorce. The answer to the question, as noted earlier, depends on the facts and circumstances of the case and no general principle or strait-jacket formula can be laid down from the purpose. We have already held that even after the decree for judicial separation was passed by the Court on the petition presented by the wife it was expected that both the spouses will make sincere efforts for a conciliation and cohabitation with each other, which means that the husband should behave as a dutiful husband and the wife should behave as a devoted wife. In the present case the respondent has not only failed to make any such attempt but has also refused to pay the small amount of Rs. 100 as maintenance for the wife and has been marking time for expiry of the statutory period of one year after the decree of judicial separation so that he may easily get a decree of divorce. In the circumstances it can reasonably be said that he not only commits the matrimonial wrong in refusing to maintain his wife and further estrange the relation creating acrimony rendering any rapprochement impossible but also tries to take advantage of the said 'wrong' for getting the relief of divorce. Such conduct in committing a default cannot in the facts and circumstances of the case be brushed aside as not a matter of sufficient importance to disentitle him to get a decree of divorce under S. 13(1-A)."*

11. The Chhattisgarh High Court in the case of *Smt. Shashikala Pandey Vs. Ramesh Prasad Pandey* AIR 2009 Chhattisgarh 1, has held as under :

> *"9. In view of the submission made by the learned counsel for the appellant, it is clear that the respondent has deliberately flouted the order passed by this Court on 21-7-2006. In a similar situation, in Bani W/o* ***Parkash Singh v. Parkash Singh (AIR 1996 P & H 1757)*** *(supra), the High Court of Punjab and Haryana has held as under: "*
>
> *" 7. No doubt wife can file a petition under O. 21, R.37, C.P.C. for the recovery of this amount and the husband can be hauled up under the Contempt of Courts also for disobedience of the aforesaid Court's order, but S.24 of the Act empowers the matrimonial Court to make an order for maintenance pendente lite and for expenses of proceedings to a needy and indigent spouse. If this amount is not made available to the applicant, then the object and purpose of this provision stand defeated. Wife cannot be forced to take time consuming execution proceedings for realizing this amount. The conduct of the respondent-husband amounts to contumacy. Law is not that powerless as to not to bring the husband to book. If the husband has failed to make the payment of maintenance and litigation expenses to the wife, his defence can be struck out. No doubt, in this appeal he is respondent. His defence is contained in his petition filed under S. 13 of the Act. In a plethora of decisions of this Court* ***Smt. Swarno Devi v. Piara Ram, 1975 Hindu LR 15; Gurdev Kaur v. Dalip Singh, 1980 Hindu LR 240; Smt. Surinder Kaur v. Baldev Singh, 1980 Hindu LR 514; Sheela Devi v. Madan Lai, 1981 Hindu LR 126 and Sumarti Devi v. Jai Parkash, 1985 (1) Hindu LR 84****. It is held that when the husband fails to pay maintenance and litigation expenses to the wife, his defence is to be struck out. The consequence is that the appeal is to be allowed and his petition under S. 13 of the Act is to be dismissed."*
>
> *In the case of Bani, W/o Parkash Singh v. Parkash Singh (supra), the High Court has not only ordered the defence of the husband in the petition under S. 13 of the Act to be struck off but had also allowed the appeal while setting aside the decree for divorce. In* ***Vanmala v. Maroti Sambhaji Hatkar (AIR 1999 Bom 388) (supra)*** *also the High Court of Bombay has taken the view that upon non-compliance of the order passed under S. 24 of the Act the defence of the defaulting party could be struck off.*
>
> *10. I am of the considered opinion that this is a fit case in which not only the defence of the respondent- Ramesh Prasad Pandey in the petition under S. 13(l)(iii) of the Act deserves to be struck*

off but the appeal also deserves to be allowed while setting aside the impugned judgment and decree dated 2-5-1989. Accordingly, the appeal is allowed. The impugned judgment and decree dated 2-5-1989 passed by the District Judge, Ambikapur granting a decree of divorce is set aside."

12. Considering the decision of Supreme Court in the case of *Hirachand Srinivas Managaonkar* (supra), the Madras High Court in the case of *Hema Vs. Parthasarathy* 2003(I)DMC 562, has held as under:

"13. The decision of the Supreme Court reported in ***Hirachand Srinivas Managaonkar v. Sunanda, 2001(2) CTC 185*** *certainly will not stand in the way, since in that case it was not the contention of the aggrieved party that by invoking Section 151 of Civil Procedure Code on the default made by one of the party, the original petition can not be dismissed or the defence struck off, as the case may be. It has to be borne in mind the Court has not ruled that only if the husband has done a 'wrong' as contemplated under Section 23(1)(a), then alone the original petition can be dismissed or the defence can be struck off, as the case may be. In that case, the Court has only considered as to when it can be said that the husband has committed 'wrong' as contemplated under Section 23(1)(a) of the Hindu Marriage Act.*

14. Hence the legal position is that if the husband fails to make payment of interim maintenance or litigation expense, as ordered by the Court, then the wife can file an application praying the Court to dismiss the petition or strike off the defence, as the case may be. In such case, the Court will consider the same and dispose it off on merits. In case if the Court comes to the conclusion that the application has to be allowed, then it should not straight away pass an order but give another opportunity giving reasonable time, minimum of three weeks, so that the husband, if he desires to make the payment, can do so. Only on his failure to make the payment, the original petition can be dismissed or defence can be struck off".

13. In the case of *Vinod Kumar Vs. Smt. Meera Modi* 1995(II) MPWN 4 (pg.6) Co-ordinate Bench of this Court has also taken the same view and held that when the husband who is a defendant in a suit for dissolution of marriage, fails to comply the order of interim maintenance, the right to defend of such a husband may be closed, on the same analogy, the suit for dissolution of marriage by a husband can be dismissed for non-compliance of the order of interim-alimony.

14. As a sequel of the above discussion, it is held that before passing any final order/judgment on the application under Section 13 of the Hindu Marriage Act, it

shall be the duty of the Family Court to see as to whether the respondent/husband has complied the order dated 17/01/2019 in its entirety or not and if the husband/respondent has not complied the order dated 17/01/2019 then it may pass appropriate order as has been discussed herein above.

15. With the aforesaid observations, this petition is **disposed off**.

Order accordingly

I.L.R. 2023 M.P. 135

Before Mr. Justice Sanjay Dwivedi

MP No. 937/2022 (Jabalpur) decided on 28 September, 2022

TARUN …Petitioner

Vs.

GOMA & ors. …Respondents

***A. Civil Procedure Code (5 of 1908), Order 39 Rule 1 & 2 – Temporary Injunction* – Held – Once the plaintiff's suit for specific performance has been dismissed and order has attained finality then again filing civil suit claiming declaration of title on ground of adverse possession is an attempt made by plaintiff to grab the property of defendants – *Prima facie* no case made out for granting temporary injunction in favour of plaintiff – Impugned order set aside – Application for injunction dismissed – petition allowed. (Paras 8 & 11 to 14)**

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 39 नियम 1 व 2 – अस्थायी व्यादेश – अभिनिर्धारित – एक बार जब विनिर्दिष्ट अनुपालन के लिए प्रस्तुत वादी का वाद खारिज कर दिया जाता है तथा आदेश अंतिम रूप प्राप्त कर लेता है, तब पुनः प्रतिकूल कब्जे के आधार पर स्वत्व की घोषणा का दावा करते हुए सिविल वाद प्रस्तुत करना वादी द्वारा प्रतिवादीगण की संपत्ति छीनने का प्रयत्न है – प्रथम दृष्ट्या वादी के पक्ष में अस्थायी व्यादेश प्रदान करने का कोई प्रकरण नहीं बनता है – आक्षेपित आदेश अपास्त – व्यादेश हेतु आवेदन खारिज – याचिका मंजूर।

***B. Civil Procedure Code (5 of 1908), Order 39 Rule 1 & 2 – Injunction – Prima Facie Case – Determination* – Consideration of ingredients discussed and explained. (Para 11)**

ख. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 39 नियम 1 व 2 – व्यादेश – प्रथम दृष्ट्या प्रकरण – निर्धारण – घटकों का विचार विवेचित तथा स्पष्ट किया गया।

Cases referred:

(2006) 9 SCC 650, 1992 MPLJ 886.

Praveen Kumar Mishra, for the petitioner.

Akshay Pawar, P.L. for the State.
Rajnish Ku. Pandey, for the respondent Nos. 1 to 4.

O R D E R

SANJAY DWIVEDI, J. :- With the consent of parties, matter is heard finally.

By the instant petition, the petitioner has questioned the legality, validity and propriety of order dated 26/11/2021 (Annexure-P-4), whereby the Court below in an appeal preferred under Order 43 Rule 1 of CPC assailing the order passed in Civil Suit No.58-A/17 has rejected application of temporary injunction. By the impugned order, appellate Court set aside the order dated 25/10/2021 and allowed the application filed under Order 39 Rule 1 & 2 of CPC granting temporary injunction in favour of the plaintiff/respondent no.1, directing that till the decision of the civil suit i.e RCS 58-A/17 the defendants shall not disturb the possession of the plaintiff over the land belonging to survey No.52/1 area ad-measuring 2.839 hectares situated at Gram Chhindwara Savasan Tahsil Athner District Betul.

2. As per the facts of the case, the plaintiff (respondent no.1 herein) institute a regular Civil Suit bearing No. 58-A/2017 against original defendants no.1 & 2 (who are respondents no.2 & 3 herein), (defendant no.2 i.e. Kishori died later on) and also against other defendants who were later on added as defendants claiming title on the ground of adverse possession over the land bearing survey no.52/1, area ad-measuring 2.839 hectare situated at Gram Chhindwara Savasan, Tahsil Athner District Betul. An application under Order 39 Rule 1 & 2 of CPC was also filed claiming injunction that the defendants be restrained from interfering in peaceful possession of the plaintiff.

3. It is pleaded in the plaint that the plaintiff has been in possession of the land in question for more than 12 years and cultivating the same. The land was in the name of Laxmi Bai widow of Sakharam. It is also pleaded in the plaint that plaintiff/respondent no.1 earlier also instituted a suit for specific performance of s*auda chitthi* (agreement to sale) made in favaour of the plaintiff by Laxmi Bai and Kisna (respondent no.2 herein), but Laxmi Bai and her son denied to perform any such agreement to sale and also filed a counter claim, but later on it has been withdrawn.

Consequently, by way of amendment, it is pleaded by the plaintiff that during the pendency of the suit, the defendant no.1(respondent no.2 herein) executed a sale-deed in favour of defendants no.4 and 5(respondents no.3 & 4 herein) and defendant no.2 had sold 1.296 hectare of land in question to the defendant no.6 (petitioner herein) through registered sale-deed. It is further

pleaded that all the sale deeds have been executed without giving possession of the respective land to the respective purchasers, therefore, the same do not affect the rights of the plaintiff. Since respective purchasers were trying to get the possession of land purchased by them, the application for granting temporary injunction against those defendants has been filed before the trial court but that application has been rejected by the court below vide order dated 25/10/2021 (Annexure-P-2).

4. Being aggrieved by the same, an appeal was preferred under Order 43 Rule 1 of Code of Civil Procedure challenging the order passed by the trial court on 25/10/2021 before the appellate court which was allowed by order dated 26/11/2021 (Annexure-P-4) granting injunction in favour of the plaintiff setting-aside the order passed by the trial court. The appellate court in its order has observed that the possession over the land in question *prima facie* has been substantiated by the plaintiff as *sauda chitthi* dated 17/06/2003 reveals that the plaintiff was put in possession over the land in question. The proceeding was initiated against the plaintiff in a revenue court by respondents no.3 and 4 under Section 250 of M.P. Land Revenue Code, 1959 to take the possession back and according to the appellate Court these facts are sign of possession of the plaintiff over the land in question. The appellate court has passed the order granting injunction in favour of the plaintiff by setting aside the order of trial court observing there in that the suit for declaration on the ground of adverse possession has been filed and if plaintiff fails to retain the possession, the very purpose of filing the suit would be frustrated.

5. It is submitted by counsel for the petitioner that the petitioner has assailed the order dated 26/11/2021 (Annexure-P-4) of appellate court contending that suit filed by the plaintiff for specific performance of contract has been dismissed by the court below and that order has also attained finality, as the same has not been further assailed. In the said suit, the court below has found that the agreement to sale dated 17/06/2003 had not been executed by the Laxmi Bai & Kisna and as such there was no contract between plaintiff and original defendants no.1 & 2 for selling the land in question. The Court has observed that the land has been given to the plaintiff by the defendant no.1 on *sikmi* (a contract for the purpose of cultivating the land). According to the petitioner, when the trial court in a suit filed by the respondent no.1(plaintiff) has observed that the plaintiff was put in possession over the land, as the same was given to him for cultivation, the possession given to the plaintiff cannot be considered to be a hostile possession. It is further argued that the suit in fact was not maintainable because declaration was being sought on the ground of adverse possession and the same was not available to the plaintiff, as his suit for specific performance of contract had already been dismissed by the trial court and that judgment and decree had attained finality;

even the suit for declaration on the ground of adverse possession should not have been entertained, as the same has been filed to grab the land of the petitioner. It is a trite law that what cannot be done directly, cannot be done indirectly. In support of his submission he has relied upon the order passed by the Supreme Court in *N.Birendra Singh Vs. L.Priyonkumar Singh and others,* reported in (2006) 9 SCC 650. It is also argued that admittedly the plaintiff has no right and title over the land, then granting injunction in his favour by the appellate court without considering the fact that the suit for specific performance had already been dismissed is not proper.

6. On the contrary, counsel appearing for respondent no.1 has supported the order passed by the appellate court and submitted that plaintiff was in possession of the land in question and he has every right to protect the same. The trial court did wrong in not granting temporary injunction and that mistake was rightly rectified by the appellate court by granting injunction in favour of plaintiff/respondent no.1 while allowing the application and appeal. He submits that order is a reasoned one and does not call for any interference.

7. Considering the submissions made by counsel for parties and perusal of record, this Court is of the opinion that the order passed by the appellate court granting injunction in favor of the plaintiff in a suit filed for declaration on the ground of adverse possession was a illegal because it is a settled principle of law that what cannot be done directly, cannot be done indirectly.

8. As per the available facts, respondent no.l/plaintiff initially filed a suit for specific performance in respect of the land in question against Laxmi Bai and Kisna on the ground that they have entered into the agreement with the plaintiff by executing an agreement to sale on 17/06/2003 on a consideration of Rs.50,000/-, out of which they have paid Rs.42,000/-. However, the said suit was dismissed by the trial court vide judgment and decree dated 19/11/2014 on the ground that the plaintiff was failed to substantiate that any such agreement to sale dated 17/06/2003 (Ext P-1) was ever executed by the defendants. It is observed by the Court that the land was given to the plaintiff on contract only for cultivation purpose by the defendants, therefore, they are not under any obligation for executing the sale deed in favour of plaintiff (respondent no.1 herein). The plaintiff had tried to grab the land in question by filing a suit for specific performance, but when he failed, he again filed a suit claiming declaration of title on the basis adverse possession. Here in this case, as per the stand taken by the plaintiff he was put in possession by the defendant/true owner in pursuant to the agreement to sale dated 17/06/2003, then question of claiming declaration on the basis of adverse possession is a plea of dishonesty. Under such a circumstance, when the fate of the suit is obvious, the order of granting injunction in favour of the plaintiff and to protect his unauthorized possession against true owner is not

proper. Once the suit filed by the plaintiff for specific performance has been dismissed and order has also attained finality then again filing civil suit on the ground of adverse possession, in my opinion, is an attempt made by the plaintiff to grab the property of the defendants.

9. Similar facts have been dealt with by the High Court in *Ganesh Prasad S/o.-Jagannath Prasad Vs. Narendralal Nathulal Gupta and others,* reported in 1992 MPLJ 886. In paragraph 3, this Court has observed as under:-

> As seen above, the plaintiff's suit is based on possessory title acquired by adverse possession. The question for decision is whether the plaintiff has a *prima facie* case in his favour. Admittedly, he entered into possession of the suit plot under oral agreement of sale in case Kalloolal failed to repay the loan within six months. Since Kallolal allegedly failed to repay the loan the plaintiff continued in possession of the suit plot. There is no document to evidence the alleged loan or the agreement to sell. The plaint allegations also do not clearly specify whether the consideration for alleged sale was the amount representing the loan or the contract was to be further negotiated and discussed after consultation by Kalloolal with his family members. Even, if the plaint case is accepted for disposal of application for temporary injunction, putting the plaintiff's case at the highest, is that the plaintiff entered into possession as a prospective purchaser or in par performance of the agreement, in other words with the permission of Kalloolal. A possession by permission or licence from the owner, is not adverse and cannot ripen into title, no matter how long continued or however exclusive in may be, Kodoth Ambu Vs. Secretary of State, AIR 1924 PC 150. So long as the occupation is under permissive possession, it cannot be adverse, but when the permission is (a) withdrawn, or (b) terminated by efflux of time, or (c) the occupant disclaims, or (d) gives notice of such disclaimer to the person under whom he entered, he holds adversely, Mahendra BAhadur Vs. Chandrapal, 1955 NLJ 519=AIR 1955 Nag.221. There is no reliable evidence on record to show any of these. His initial entry on the suit plot was with the consent and permission of Kalloolal.

10. This Court in the case of *Skol Breweries Ltd Vs. Som Distilleries and Breweries Ltd* (M.A.No.2745/2018) has considered as to on what basis the Court can form an opinion of *prima facie* case. The relevant portion of the said judgment is reproduced as under:-

> 12. In reply to the query raised with the parties, I am of the opinion that for forming an opinion of prima facie case in an appeal preferred against the rejection of temporary injuction especially in a suit which was filed in the year 2012, 6 years

have passed, no temporary injunction was granted by any of the Court when matter has already travelled upto the Hon'ble Apex Court and the evidence has been recorded and concluded by the Trial Court, this Court has every right to form its own opinion in respect of prima facie case and for which the Court can take into account certain aspects of the matter. As per the Major Law Lexicon by P. Ramanatha Aiyar, 4th Edition 2010, Vol.5, a prima facie case is defined as under:

"Prima facie case" is that which raises substantial question, of course bona fide which needs investigation and ultimately a decision on merits.When the Court is called upon to examine whether the plaintiff has a prima facie case in a suit, for the purpose of determining whether a temporary injunction should be granted, the Court must perforce examined the merits of the case, and it will be compelled to consider whether there is likelihood of the suit being decreed. The depth of investigation which the Court must necessarily pursue for that purpose will vary with each case. When the decision of the suit turns principally on a question of law, very often the decision as to whether a prima facie case exists will turn on considerations identical with or substantially similar to those affecting the ultimate determination of the suit. A 'prima facie' case implies the probability of the plaintiff obtaining a relief on the materials placed before the Court at that stage. Every piece of evidence produced by either party has to be taken into consideration in deciding the existence of a prima facie case to justify issuance of a temporary injunction."

13. In a case reported in AIR 1968 Kerala 179 Vellakutty vs. Karthyayani, the Court has observed what has to be considered by the Court while granting temporary injunction, which reads thus;

"3.....The granting of an injunction being a very serious matter in that it restrains the opposite parties from the exercise of their rights, the court does not issue the injunction unless it is thoroughly satisfied that there is a prima facie case in favour of the applicant. (Abdul Qadeer v. Municipal Board, Moradabad. AIR 1955 All 414). It is also clear that a prima facie case implies the probability of the plaintiff obtaining a relief on the materials placed before the Court at that stage. Every piece of evidence produced by either party has to be taken into consideration in deciding the existence of a prima facie case to justify issuance of a temporary injunction."

14. Besides, in a case reported in AIR 1977 Himachal Pradesh

10 Roshan Lal vs. Ratto, the Court has observed the prima facie case, which reads thus;

"When the Court is called upon to examine whether the plaintiff has prima facie case in a suit for the purpose of determining whether a temporary injunction should be granted, the court must perforce examine the merits of the case and it will be compelled to consider whether there is likelihood of the suit being decreed. The depth of investigation which the court must necesssarily pursue for that purpose will vary with each case. When the decision of the suit turns principally on a question of law, very often the decision as to whether a prima facie case exists will turn on considerations identical with or substantially similar to those affecting the ultimate determination of the suit."

15. Likewise, in a case reported in AIR 1993 Delhi 356 - Krishan Lal Kohli v. V. K. Khanna and another, the Court has held as under:-

"4..... What is meant by prima facie case? Prima facie case is that which raises substantial question, of course bona fide, which needs investigation and ultimately a decision on merits and, as already noticed by me above, the respondent before me and the plaintiff in the suit, namely Mr. Khanna does succeed in raising such questions. And, for the present, I find no reason to hold that the questions so raised have not been raised bona fide. But then, as we all know, mere existence of a prima facie case would not suffice."

16. Since the appellant/plaintiff is claiming temporary injunction then it is the duty of this Court to first form an opinion regarding prima facie case in favour of the plaintiff and then to decide whether temporary injunction can be granted or not. To form an opinion this Court cannot shut its eyes ignoring the stage of the suit, especially when admittedly evidence has been closed by the parties and case is fixed for final arguments. Further, it cannot be ignored by this Court in the light of law laid down by the Full Bench of Delhi High Court in case of Mohanlal, Proprietor of Mourya Industries (supra), on which the respondent has placed reliance contending that suit filed by the plaintiff/appellant is not maintainable. As per the respondent, the plaintiff/appellant in his evidence has also admitted that he failed to produce any of the incidents showing use of bottle of the plaintiff by the defendant for the purpose of selling their beer. Therefore, I do not find any substance to grant temporary injunction of any nature in favour of the plaintiff/appellant and to reverse the finding given by the Trial Court especially under the circumstance, when on earlier

> occasion this Court has passed detailed order refusing injunction to the plaintiff and thereafter the only change made in favour of plaintiff is that the application submitted by defendant for cancellation of registration of their design bearing No.223479 has been rejected by the competent authority. I am also not convinced with the contention made by learned counsel for the appellant that as per the provisions of Order 41 Rule 31 of CPC, this Court has no option but to decide the appeal on merits. On a close scrutiny of the provisions of Order 41, it is seen that the said provisions deal with the appeal arising out of the original decree and Rule 31 of Order 41 prescribes the manner in which the judgment is written by the Appellate Court, but here in this case, the appeal is not against the original decree, this Court is not writing any judgment, therefore, Rule 31 of Order 41 has no applicability. This appeal is under Order 43 and under the said provision, there is no such binding for this Court. Accordingly, this contention of the learned Senior Counsel for the appellant has no substance that the present appeal has to be decided by this Court on merits and also on the basis of material available before the Trial Court at the time of deciding the application of temporary injunction.

11. Thus, in view of aforesaid, it is clear that this Court is of the opinion that *prima facie,* no case is made out in favour of the plaintiff and therefore granting temporary injunction in his favour is not proper. The Court below has failed to consider the fact that injunction is granted only when *prima facie* case is made out in favour of plaintiff and for determining *prima facie* case the trial court has to consider the following ingredient:-

> (i) whether there is likelihood of the suit being decreed.
>
> (ii) Implies probabilities of plaintiff obtaining a relief on the material placed before the Court at that stage.

12. In view of aforesaid when chances of passing decree in favour of the plaintiff is very rare then granting injunction and depriving the true owner from getting possession by virtue of sale deed executed in their favour is a material irregularity.

13. Accordingly, in my opinion, the order dated 26/11/2021 (Annexure- P-4) passed by the court below is not sustainable, the same is hereby set-aside. Application submitted by the plaintiff/respondent no.1 herein for grant of temporary injunction is also rejected.

14. Petition is **allowed**. No order as to costs.

Petition allowed

I.L.R. 2023 M.P. 143

Before Mr. Justice Vivek Agarwal

MA No. 1529/2022 (Jabalpur) decided on 29 August, 2022

HINDUSTAN BIDI MANUFACTURING …Appellant

Vs.

MR. SUNDERLAL CHHABILAL & anr. …Respondents

***A. Trade Marks Act (47 of 1999), Section 29 and Civil Procedure Code (5 of 1908), Order 39 Rule 1 & 2 – Infringement – Injunction* – Held – At the time of consideration of injunction application, there was no need for a roving enquiry, trial Court was only required to see from the point of view of man of average intelligence and imperfect recollection that whether product sold by defendant is deceptively similar or not – No microscopic examination is permissible – What are points of similarity and dissimilarity is a matter of evidence – Injunction granted. (Paras 32 to 34 & 56 to 60)**

क. व्यापार चिह्न अधिनियम (1999 का 47), धारा 29 एवं सिविल प्रक्रिया संहिता (1908 का 5), आदेश 39 नियम 1 व 2 – उल्लंघन – व्यादेश – अभिनिर्धारित – व्यादेश आवेदन पर विचार करते समय अतिगामी जांच की आवश्यकता नहीं थी, विचारण न्यायालय को केवल एक औसत बुद्धि एवं दोषपूर्ण स्मरणशक्ति के व्यक्ति के दृष्टिकोण से देखने की आवश्यकता थी कि क्या प्रतिवादी द्वारा बेचा गया उत्पाद इतना समरूप, जिससे धोखा हो जाए है या नहीं – किसी भी सूक्ष्म परीक्षण की अनुमति नहीं है – समानता एवं असमानता के कौन से बिंदु हैं, यह साक्ष्य का विषय है – व्यादेश प्रदान।

***B. Trade Marks Act (47 of 1999), Section 29 and Civil Procedure Code (5 of 1908), Order 39 Rule 1 & 2 – Infringement – Delay in Taking Action* – Held – Apex Court concluded that in case of infringement, either of trade mark or of copyright, normally an injunction must follow – Mere delay in bringing action is not sufficient to defeat grant of injunction. (Para 50)**

ख. व्यापार चिह्न अधिनियम (1999 का 47), धारा 29 एवं सिविल प्रक्रिया संहिता (1908 का 5), आदेश 39 नियम 1 व 2 – उल्लंघन – कार्यवाही करने में विलंब– अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया कि ट्रेडमार्क या कॉपीराईट के उल्लंघन के प्रकरण में, सामान्यतः व्यादेश दिया जाना चाहिए – मात्र कार्यवाही करने में विलंब व्यादेश प्रदान करना विफल करने के लिए पर्याप्त नहीं है।

***C. Trade Marks Act (47 of 1999), Section 29 – Infringement* – Held – Registration under Excise Act will not create any equitable right in favour of defendant to use similar or deceptively similar trade mark – Registration under Copyrights Act will also not give any exclusive right to the violation of trade mark. (Para 57 & 58)**

ग. व्यापार चिह्न अधिनियम (1999 का 47), धारा 29 – उल्लंघन – अभिनिर्धारित – आबकारी अधिनियम के अंतर्गत पंजीयन, प्रतिवादी के पक्ष में समान या इतना समरूप जिससे धोखा हो जाए, ट्रेडमार्क का उपयोग करने का कोई साम्यापूर्ण अधिकार सृजित नहीं करेगा – कॉपीराईट अधिनियम के अंतर्गत पंजीयन भी ट्रेडमार्क के उल्लंघन के लिए कोई अनन्य अधिकार नहीं देगा।

***D. Trade Marks Act (47 of 1999), Section 29 – Deceptive Similarity – Determination* – Held – Question of deceptive similarity is to be determined keeping in mind the educational and social status of target consumer.**
(Para 46)

घ. व्यापार चिह्न अधिनियम (1999 का 47), धारा 29 – समरूपता जिससे धोखा हो जाए – निर्धारण – अभिनिर्धारित – समरूपता जिससे धोखा हो जाए का प्रश्न लक्षित उपभोक्ता की शैक्षणिक एवं सामाजिक स्थिति को ध्यान में रखते हुए निर्धारित किया जाना चाहिए।

***E. Trade Marks Act (47 of 1999), Section 29 – Infringement – Different Business* – Held – When there is a difference of business, then use of identical trade mark may not be injuncted. (Para 48)**

ङ. व्यापार चिह्न अधिनियम (1999 का 47), धारा 29 – उल्लंघन – भिन्न व्यापार – अभिनिर्धारित – जब व्यापार में भिन्नता होती है, तब समान ट्रेडमार्क का उपयोग व्यादेशित नहीं हो सकता।

Cases referred:

2003 (5) BomCR 295, (1979) 13 RPC 303, AIR 1955 SC 558, 2015 3 AD (DELHI) 505, 1969 (2) SCC 727, 58 RPC 147, C.S. (OS) Nos. 1424/2003 decided on 13.09.2013 (Dehli High Court), 180 (2011) DLT 749, AIR 1999 MP 118, ILR 1993 Delhi 285, AIR 1984 Del 265, AIR 2000 MP 305, (1972) 1 SCC 618, (2018) 16 SCC 632, 2007 SCC online Cal 665, ILR (2007) I Delhi 409, 1999 1 AD (Delhi) 603, 2008 (37) PTC 468 (DEL), 2002 (24) PTC 226 Bom, (2004) 3 SCC 90.

Muralidhar S. Khadilker, for the appellant.
Virendra Singh, for the caveator.

O R D E R

VIVEK AGARWAL, J.:- This Miscellaneous appeal is filed by the plaintiff under Order 43 Rule 1(r) of the Code of Civil Procedure, 1908 being aggrieved of order dated 14/03/2022 passed by the learned 16th District Judge, Jabalpur in R.C.S. 146-A/2022 (Hindustan Bidi Manufacturing Vs. Mr. Sunderlal Chhabilal and another).

2. The appellant's grievance is that vide impugned order, the trial court has rejected an application under Order 39 Rule 1 and 2 C.P.C. and has refused to grant injunction in favour of the plaintiff.

3. Plaintiff's case is that they are registered trade mark holder of 'Calcutta Bidi', which is registered under IV schedule of category 34 of the Trade Marks Act 1999 bearing registration no. 736773 and 1780832.

4. It is plaintiff's case that plaintiff is registered under the provisions of Excise Act since 5/10/1994 and also under the Copyright Act since 2005.

5. It is submitted that defendant who is a manufacturer and seller of the identical product namely tobacco filled bidis obtained a copyright registration on 24/05/2021 claiming himself to be a user of that artistic work since 12/10/1999, Annexure R-3 and started selling his product which is deceptively similar to the trade mark of the present appellant under the name of "New Calcutta Bidi".

6. It is submitted that this use of deceptively identical trade mark has caused dent to the business of the appellant/plaintiff who is a prior registered trade mark. It is further submitted that the learned trial Judge has ventured to carry out a detailed scrutiny which is not permissible under the law. It is submitted that the striking features of the trade mark registered for the appellant/plaintiff is that there is a mention of word 'Calcutta Bidi'.

7. This is mentioned in three languages i.e. English, Hindi and Bangla. On the right hand side in a circle, a photo of child is affixed and then "numerals 95" are mentioned, below which, Howrah bridge is depicted.

8. It is submitted that the trial court has held that disclaimer part i.e. use of word 'Calcutta' is not an exclusive prerogative of the plaintiff and then venturing into fine details like the mark used by the defendants contain sun rays below which Howrah bridge is depicted and then there is mention of words "New Calcutta Bidi" in English, Hindi and Bangla.

9. Besides this, a photo is that of an adult and not of a child and the cover makes a mention in English that 'smoking kills' and in Hindi that 'धूम्रपान जान लेवा है।' On the left hand side, no. 20 in Hindi and on right hand side, no. 20 in English is mentioned. The photograph of an adult is within a circle. Mentioning all these features, it is held by the learned trial court that neither there is a photo of a child nor no. 95 is mentioned or there is no mention of sun rays on the trade mark of the plaintiff and taking these to be distinctive features has held that since defendant is having a registered copyright and is also registered under the provisions of the Excise Act, there is no infringement of the trade mark and has refused to grant injunction.

10. Learned counsel for the appellant has placed reliance on various judgments of the different High Courts and a Supreme Court.

11. Placing reliance on the judgment of the Bombay High Court in the case of *Pidilite Industries Ltd. Vs. S.M. Associates and others* 2003 (5) Bom CR 295, it is submitted that in para 45, 46 and 47, the issue of disclaimer has been dealt with and placing reliance on the earlier judgment in the case of *GRANADA Trade Mark* (1979) 13 RPC 303, it is observed that a disclaimer per se effects the question of whether or not confusion of the public is likely when that question is for determination under Section 12(1), a context other than one that is concerned solely with the exclusive rights of a proprietor.

12. In para 47, it is held that regard should be taken to the whole of the plaintiffs mark including the disclaimed matter while deciding the question of infringement. A contrary view could lead to peculiar results. Take for instance where disclaimed word is written in the distinctive style with embellishments within, on or around it, and the Opponents mark also consists of the disclaimed word written in the same distinctive manner. Were it open to the Opponent to contend that the disclaimed word ought to be ignored there would be nothing left to compare.

13. Similarly, reliance is placed on the judgment of the Supreme Court in *The Registrar of Trade Marks Vs. Ashok Chandra Rakhit* Ltd. AIR 1955 SC 558 wherein in para 9, it is held that "the disclaimer is only for the purposes of the Act. It does not affect the rights of the proprietor except such is arise out of registration. That is to say, the special advantages which the Act gives to the proprietor by reason of the registration of his trade mark do not extend to the parts or matters which he disclaims. In short, the disclaimed parts or matters are not within the protection of the statute."

14. Reliance is placed on the judgment of Delhi High Court in the case of *Sanofi India Ltd. Vs. Universal Neutraceuticals Pvt. Ltd.* 2015 3 AD (DELHI) 505. Drawing attention of this court to para 26, it is submitted that it is settled law that the disclaimed portion does not take away the right of the trade mark considered as a whole. The essential feature of the said trade mark and trading style is UNIVERSAL which is being used by the plaintiffs since 1971. Therefore, the defendant in view of the above referred settled law cannot absolve itself from infringing the trademark of the plaintiffs and passing off its business as that of the plaintiffs.

15. It is submitted by learned counsel for the appellant that where certain trademarks are with disclaimer and certain trade marks are without disclaimer, then in that event, the trade marks without disclaimer will have precedence over the trade marks with disclaimer.

16. It is submitted that plaintiff has trademark of 'Calcutta Bidi' without disclaimer also registered in its name in the year 2013.

17. Learned counsel for the appellant has taken this court to the judgment of Supreme Court in the case of *Renaissance Hotel Holdings Inc. Vs. B. Vijaya Sai and others* in Civil Appeal No. 404/2022 arising out of SLP(C) No. 21428/2019. It is submitted that Section 29(2) (c) is important. It is submitted that Section 29 deals with infringement of registered trade marks.

18. Sub-section 2 clause (c) provides that it will be treated to be infringement if the identity with the registered trade mark and identity of the goods and services registered with trade marks is likely to cause confusion on the part of the public or which is likely to have an association with the registered trade mark.

19. Reading from the judgment in case of *Renaissance Hotel Holdings* (supra), it is submitted that the controversy was between the plaintiff and the defendant and that plaintiff's trade mark is 'RENAISSANCE' whereas that of the defendant was 'SAI RENAISSANCE'.

20. It is held that use of word 'RENAISSANCE' by the defendants will be hit by sub-section 5 of Section 29 of the Act. Infact, in para 43, it is mentioned as under :-

> "The legislative scheme is clear that when the mark of the defendant is identical with the registered trade mark of the plaintiff and the goods and services covered are similar to the ones covered by such registered trade mark, it may be necessary to prove that it is likely to cause confusion on the part of the public, or which is likely to have association with the registered trade mark. Similarly, when the trade mark of the plaintiff is similar to the registered trade mark of the defendant and the goods or services covered by such registered trade mark are identical or similar to the goods or services covered by such registered trade mark, it may again be necessary to establish that it is likely to cause confusion on the part of the public. However, when the trade mark of the defendant is identical with the registered trade mark of the plaintiff and that the goods or services of the defendant are identical with the goods or services covered by registered trade mark, the Court shall presume that it is likely to cause confusion on the part of the public.

21 Reliance is also placed on the judgment of Supreme Court in *Ruston & Hornsby Ltd. Vs. the Zamindara Engineering Co.* 1969(2) SCC 727 wherein reading from para 6 and 8, it was observed by the *Master of the Rolls in Saville Perfumery Ltd. Vs. June Perect Ltd.* 58 RPC 147 at 161 that infringement takes place not merely by exact imitation but by the use of a mark so nearly resembling the registered mark as to be likely to deceive.

22. In para 8, the Supreme Court found that there is a deceptive resemblance between the word "RUSTON" and the word "RUSTAM" and held it to be a case of infringement.

23. Reliance is also placed to the judgment of Delhi High Court in *Rajesh Rathi and others Vs. Golden Rathi Star Industries Ltd. and another* in C.S (OS) Nos. 1424/2003 decided on 13/09/2013 where aspect of use of certain words as prefix before the main theme has been dealt in para 29, 30 and 31 and it is held in *Greaves Cotton Limited Vs. Mohammad Rafi and others,* 180(2011) DLT 749, this aspect of use of suffix or prefix by a defendant was dealt and the court held that "neither deletion of a part of a registered trademark nor the prefix or suffix of another word to it would validate the use of the registered mark by an unlicensed user, once it is shown that the part used by the infringer is an essential part of the registered trademark."

24. Placing reliance on para 3, 5, 11, 12 and 16 in the case of *Greaves Cotton Limited* (supra), it is pointed out that no cause of action is conferred to a person who has applied for a registration of trade mark and cause of action will be conferred only to a person who has a registered trade mark in his favour.

25. In the present case, it is pointed out that defendant has applied for registration of a trade mark and yet, it is not registered in his name.

26. Reliance is also placed on the judgment of Delhi High Court in *Societe Des Produits Nestle Vs. Continental Coffee Ltd.* decided on 7/12/2011 wherein the issue dealt is that whether registration of copyright of the defendant will give defence to the defendant against infringement of trade mark and it is answered that registration of copyright will not give any defence to the defendant for the infringement of the trade mark. In para 14 of the said judgment, it is held as under :-

> "14. In my view, mere registration under Copyright Act does not authorize the defendant to use the trademark of the plaintiff if it is found that the mark being used by him is identical or similar to the registered trademark of the plaintiff or it is proved that use of the impugned mark by him on identical goods is likely to cause confusion or create an impression of association with the registered trademark of the plaintiff. Registration under Copyright Act, in such a situation would be no defence to the charge of infringement and would not take the case out of the purview of Section 29(1) and (2) of the Trademarks Act, 1999.

27. Similarly, reliance is placed on the judgment of Madhya Pradesh High Court in *Cox Distillery and another Vs. Mcdowell and Co. Ltd. and another* AIR 1999 MP 118 wherein in para 15 and 16, it is held that even registration under the Excise Act will not permit infringement of the trade mark, inasmuch as

registration under the Excise Act is entirely with a different purpose i.e. collection of revenue and control of regulation of the liquor trade.

28. Reliance is also placed on the judgment of Delhi High Court in *Kaira District Co-operative Milk Vs. Bharat Confectionery Works* ILR 1993 Delhi 285 wherein in para 16, the issue of registration under the Copyright Act raised by the defendants is dealt and it is held that registration under the Copyright Act will not confer any right on the defendant to use similar or identical trade mark 'patent' etc. which confers a separate and distinctive right in the owner in respect of the registration.

29. Reliance is also placed on the judgment of High Court of Delhi in *Aditya Birla Nuvo Ltd. Vs. M/s R.S. Sales Corporation and another* decided on 10th July, 2018 wherein, again a question as to what is the effect of a copyright registration by the defendant of its brand Peter England V.I.P. shoes ? Answering this in para 28, it is held that in view of the judgment in *Societe Des Products Nestle* (supra), registration of an artistic work under the Copyright Act, 1957 in favour of the defendants does not confer any right in the defendants to use plaintiff's trade mark 'PETER ENGLAND' and/or the same does not afford a defense to the defendants in a suit for infringement.

30. Reliance is also placed on the judgment of the Delhi High Court in *Glaxo Operations UK Ltd., Middlesex (England), and others vs. Samrat Pharmaceuticals, Kanpur* AIR 1984 Del 265 where issue was that there exists two copyright, then which copyright will have precedence ?

31. Answering this in para 23, it is held that the copyright which was registered prior in time will have precedence over the one which was registered subsequently.

32. In the present case, admittedly copyright of the plaintiff was registered in the year 2005 whereas that of the defendant in the year 2021.

33. Reliance is also placed on the judgment of the Madhya Pradesh High Court in the case of *Laxmi Gudakhu Factory Vs. Avinash Gudakhu Factory* AIR 2000 MP 305 wherein it is held that at the time of consideration of an application for grant of injunction, no microscopic examination is permissible.

34. Referring to para 13 and 14, it is submitted that the question of infringement is to be approached from the point of view of a man of average intelligence and imperfect recollection and it has to be considered as to whether to such a man, the overall structural and phonetic similarity of the two marks will reasonably cause confusion to them.

35. Reliance is also placed on the judgment of the Supreme Court in the case of *Parle Products (P) Ltd Vs. J.P. and Co., Mysore* (1972) 1 SCC 618 originating

from Mysore High Court wherein in para 8 and 9 and referring to law laid down in the case of Karly's Law of Trade Marks and Trade Names (9th edition, Paragraph 838), it is held that

> 8. According to Karly's Law of Trade Marks and Trade
>
> (9th edition paragraph 838):
>
> "Two marks, when placed side by side, may exhibit many and various differences yet the main idea left on the mind by both may be the same. A person acquainted with one mark, and not having the two side by side for comparison, might well be deceived, if the goods were allowed to be impressed with the second mark, into a belief that he was dealing with goods which. bore tile same mark as that with which he was acquainted. Thus, for example, a mark may represent a game of football; another mark may show players in a different dress, and in very different positions, and yet the idea conveyed by each might be simply a game of football. It would be too much to expect that persons dealing with trade-marked goods, and relying, as they frequently do, upon marks, should be able to remember the exact details of the marks upon the goods with which they are in the habit of dealing. Marks are remembered rat her by general impressions or by some significant detail than by any photographic recollection of the whole. Moreover, variations in detail might well be supposed by customers to have been made by the owners of the trade mark they are already acquainted with for reasons of their own."
>
> 9. It is therefore clear that in order to come to the conclusion whether one mark is deceptively similar to another, the broad and essential features of the two are to be considered. They should not be placed side by side to find out if there are any differences in the design and if so, whether they are of such character as to prevent one design from being mistaken for the other. It would be enough if the impugned mark bears such an overall similarity to the registered mark as would be likely to mislead a person usually dealing with one to accept the other if offered to him. In this case we find that the packets are practically of the same size, the color scheme of the two wrappers is almost the same; the design on both though not identical bears such a close resemblance that one can easily be mistaken for the other. The essential features of both are that there is a girl with one arm raised and carrying something in the other with a cow or cows near her and hens or chickens in the foreground. In the background there is a farm house with a fence. The word "Gluco Biscuits" in one and "Glucose Biscuits" on the other occupy a prominent place at the top with a good

> deal of similarity between the two writings. Anyone in ,our opinion who has a look at one of the packets to-day may easily mistake the other if shown on another day as being the same article which he had seen before. If one was not careful enough to note the peculiar features of the wrapper on the plaintiffs goods, he might easily mistake the defendants' wrapper for the plaintiffs if shown to. him some time after he had seen the plaintiffs'. After all, an ordinary purchaser is not gifted with the powers of observation of a Sherlock Holmes. We have therefore no doubt that the defendants' wrapper is deceptively similar to the plaintiffs' which was registered. We do not think it necessary to refer to the decisions referred to at the Bar as in our view each case will have to be, judged on its own features and it would be of no use to note on how many points there was similarity and in how many others there was absence of it.

36. Learned counsel for the caveator in his turn submits that they are user of trade mark bidi since 12/10/1999 and are registered under the Excise Act from the same date. They received a copyright registration for new Calcutta Bidi on 24/05/2021 and have been using the same since 12/10/1999. It is also submitted that plaintiff has no cause of action accrued in his favour so to file a case before a court at Jabalpur having territorial jurisdiction at Jabalpur.

37. Reliance is placed on Section 28(2) to point out that the exclusive right to the use of a trade mark given under sub-section (1) shall be subject to any conditions and limitations to which the registration is subject.

38. Learned counsel for the caveator submits that infact there is a disclaimer to the words "Kolkata" and, therefore, no infringement can be inferred as is sought by the plaintiff.

39. Placing reliance on Section 30 (2)(b) of the Trade Marks Act 1999, it is submitted that "a trade mark is registered subject to any conditions or limitations, the use of the trade mark in any manner in relation to goods to be sold or otherwise traded in, in any place, or in relation to goods to be exported to any market or in relation to services for use or available or acceptance in any place or country outside India or in any other circumstances, to which, having regard to those conditions or limitations, the registration does not extend."

40. It is submitted that Section 30 (2)(b) authorizes the defendant to use similarly placed trade mark and, therefore, there is no question of any infringement.

41. Reliance is placed on the judgment of the Supreme Court in the case of *Parakh Vanijya Private Limited Vs. Baroma Agro Product and others* (2018)16 SCC 632 wherein para 6, 7 and 8 have been referred to and it is held that where the

trade mark is registered with the disclaimer, that registration will not give exclusive right of use. Thus, it is submitted that since disclaimer is used to use of word "Kolkata" in the registered trade mark of the year 2005 will not permit the plaintiff to seek exclusion of use of these words by the defendant.

42. Reliance is also placed on the judgment of the Division Bench judgment of Calcutta High Court in the case of *Heinz Italia S.R.L. & Heinz India Pvt. Ltd. Vs Dabur India Ltd., S.K. Distributors & Blue Cross Chemist & Druggist* 2007 SCC online Cal 665.

43. Reliance is placed on para 9 and 13 to submit that these issues which have been raised in this appeal are whether words "Calcutta" for which there is a disclaimer in the trade mark registration certificate of 1997 will entitle the defendants to use disclaimed word "Calcutta" despite there being no disclaimer in the subsequent registered trade mark of the year 2013 and, therefore, whether registration of defendants under the Copyright Act or Excise Act will permit him to use similar trade mark namely "New Calcutta Bidi" merely on the basis of certain distinctive feature like use of rising sun rays and instead of use of a child within the circle, use of adult despite having many other similarities like use of Howrah Bridge, use of three languages i.e. Hindi, English and Bangla and also use of the similar colour combination which is used by the plaintiff.

44. Learned counsel for the caveator has placed reliance on the judgment of Delhi High Court in *M/s Anshul Industries Vs. M/s Shiva Tobacco Company* ILR (2007)I Delhi 409 so also in the case of *Automatic Electric Ltd. Vs. R.K. Dhawan and another* 1999 1 AD (Delhi) 603 so also in the case of *The Indian Hotels Company Ltd. and another Vs. Jiva Institute of Vedic Science and Culture* 2008 (37) PTC 468 (DEL) so also the judgment of Bombay High Court in *Bal Pharma Ltd. Vs. Centaur Laboratories Pvt. Ltd.* 2002(24) PTC 226 Bom and the judgment of the Supreme Court in the case of *Midas Hygiene Industries (P) Ltd. Vs. Sudhir Bhatia* (2004)3 SCC 90 to submit that no injunction could have been granted by the trial court and the application has been rightly dismissed by the trial court.

45. On a close perusal of the judgment rendered in *M/s Anshul Industries* (supra), the Delhi High Court has infact held that when question of deceptive similarity between the two marks is to be decided, then it cannot be decided by keeping both of them by the side of each other as consumer may not get such an opportunity.

46. The question of deceptive similarity is to be determined keeping in mind the educational and social status of target consumer.

47. In the case of *The Indian Hotels Company Ltd.* (supra), the distinguishing feature is that there was distinction between the businesses of the petitioner and the respondents and under such facts and circumstances, the High Court held that since the appellant carries on business in spas, it can continue using trade mark of the respondent as the said trade mark is used by the respondent only for manufacturing its Ayurveda product.

48. Thus, the theme is that when there is a difference of businesses, then use of identical trade mark may not be injuncted.

49. The Supreme Court in *Midas Hygiene Industries Private Ltd.* (supra) was dealing with the issue that the appellant was asserting the ownership of copyright in the packaging containing the words 'Laxman Rekha'. The defendant did not submit any explanation for adopting 'Magic Laxman Rekha'. A Single Judge of the High Court granted injunction preventing the respondents from using words 'Laxman Rekha' in their trade. The Division Bench vacated the stay.

50. The Supreme Court held that in cases of infringement, either of trade mark or of copyright, normally an injunction must follow. Mere delay in bringing action is not sufficient to defeat grant of injunction.

51. Thus, it is evident that none of the judgments cited by learned counsel for the caveator are helpful to the respondents.

52. Learned counsel for the appellant submits that the judgment of the Calcutta High Court in the case of *Heinz Italia* (supra) has been overruled and has no application to the facts and circumstances of the case.

53. The next issue is as to the territorial jurisdiction. In the plaint itself, the plaintiff has mentioned in paragraph 42 that cause of action has arisen within the territorial jurisdiction of Jabalpur inasmuch as defendant no. 1 is residing and carrying on business within the jurisdiction of this Hon'ble Court and also the goods of defendant nos. 1 and 2 bearing infringing trade mark/label comprising the words 'Calcutta bidi' and picture of Howrah bridge are being sold by the defendants within the jurisdiction of this Hon'ble court in Jabalpur and defendants are carrying business in Jabalpur, therefore, this Hon'ble court has a jurisdiction to entertain, try and disposed of the suit in respect of the registered trade mark. In reply, defendant submits that the plaintiff is not having any business within the territorial business in Jabalpur.

54. It is further mentioned that power of attorney has no right to file a suit, no cause of action arose on 1/12/2021. The power of attorney is given to Sudhir Kumar Jain for a period of two months and that period of power of attorney is over on the date of filing of the suit.

55. At this stage, learned counsel for the appellant submits that thereafter a fresh power of attorney was given in favour of the power of attorney holder. However, it is evident from the reply filed by the defendant that they have not denied the fact that they are not carrying the business of selling bidi with a similar wrapper having picture of Howrah bridge and using the words 'Calcutta Bidi' with prefix 'New'

56. Thus, in the light of the decision of the M.P. High Court in the case of *Laxmi Gudakhu Factory* (supra), at this stage, there was no need for a roving enquiry and the trial court was only required to see from the point of view of man of average intelligence and imperfect recollection that whether the product sold by the defendant is deceptively similar or not.

57. This aspect has been dealt with by the Supreme Court in the case of *Parle Products Private Ltd.* (supra) and that being the spirit of the law, therefore, it being a matter of evidence as to what are the points of similarity and dissimilarity, injunction should not have been denied by the trial court in favour of the plaintiff after conducting a roving enquiry without having regard to the legal issues namely and admittedly that defendant is not a registered trade mark holder of "New Calcutta Bidi". Registration under the Copyrights act will not give any exclusive right to the violation of trade mark as has been held in the case of *Societe Des Produits Nestle* (supra), *Kaira District Co-operative Milk* (supra) and *Aditya Birla Nuvo Ltd.* (supra).

58. Similarly, registration under the Excise Act will not create any equitable right in favour of the defendant to use similar or deceptively similar trade mark as held by the Madhya Pradesh High Court in the case of *Laxmi Gudakhu Factory* (supra).

59. As Lioyd-Jacob J. put it in *Ford-Werkes Application* (1955) 72 R.P.C. 191 at 195 lines 30 to 38, "a disclaimer does not affect the significance which a mark conveys to others when used in the course of trade. Disclaimers do not go into the market place, and the public generally has no notice of them. In my opinion, matter which is disclaimed is not necessarily disregarded when question of possible confusion or deception of the public, as distinct from the extent of a proprietors exclusive rights, are to be determined. In making the comparison under Section 12 (1), therefore, I consider that I must have regard to the whole of the opponents mark, including the disclaimed matter, and must assume use of it in a normal and fair manner for, inter alia, the applicants goods." It reveals that disclaimers do not go to the market place. Product be identical, deceptively similar use of trade mark cannot be allowed at the cost of the plaintiff.

60. Therefore, the application for injunction is allowed. It is directed that during the pendency of the suit, defendant will be restrained from using the trade mark "New Calcutta Bidi" and accordingly, the appeal is disposed of.

61. It is directed that trial court will make an attempt to conclude the trial within a period of six months without affording any undue adjournment to any of the parties.

Order accordingly

I.L.R. 2023 M.P. 155 (DB)

Before Mr. Justice Sujoy Paul &
Mr. Justice Prakash Chandra Gupta

CRA No. 698/2011 (Jabalpur) decided on 18 August, 2022

ASHISH CHATURVEDI …Appellant

Vs.

STATE OF M.P. …Respondent

A. Penal Code (45 of 1860), Section 302 & 498-A and Evidence Act (1 of 1872), Section 32 – Multiple Dying Declaration – Language **– Held – Dying declaration cannot be doubted on basis of it being written in Marathi language – Both dying declarations written by Executive Magistrate/Naib Tehsildar, after getting opinion from concerned doctors with regard to mental fitness of deceased – No inconsistencies between both dying declarations in material particulars – Dying declarations were rightly held to be reliable. (Paras 31 to 36)**

क. दण्ड संहिता (1860 का 45), धारा 302 व 498–A एवं साक्ष्य अधिनियम (1872 का 1), धारा 32 – अनेक मृत्युकालिक कथन – भाषा – अभिनिर्धारित – मृत्युकालिक कथन पर, उसे मराठी भाषा में लिखे जाने के आधार पर संदेह नहीं किया जा सकता – दोनों मृत्युकालिक कथनों को कार्यपालिक मजिस्ट्रेट/नायब तहसीलदार द्वारा, मृतक की मानसिक समर्थता के संबंध में संबंधित चिकित्सक से राय प्राप्त करने के पश्चात् लिखा गया – दोनों मृत्युकालिक कथनों के बीच तात्विक विशिष्टियों में कोई असंगतियां नहीं है – मृत्युकालिक कथनों को उचित रूप से विश्वसनीय ठहराया गया।

B. Penal Code (45 of 1860), Section 300, 4th Exception **– Held – Although there is no evidence of premeditation from side of appellant but he took undue advantage and acted in a cruel and unusual manner – He set deceased on fire by pouring kerosene on her, a most cruelsome way to kill someone – Mere pressing of abscess or quarrels cannot lead to such furious behaviour – Case does not fall under 4th exception to Section 300. (Para 58)**

ख. दण्ड संहिता (1860 का 45), धारा 300, चौथा अपवाद – अभिनिर्धारित – यद्यपि अपीलार्थी की ओर से पूर्व चिंतन का कोई साक्ष्य नहीं है परंतु उसने अनुचित लाभ लिया और क्रूर एवं अप्रायिक रीति से कृत्य किया – उसने मृतक पर केरोसीन उड़ेलकर उसे आग लगा दी, किसी को मार डालने का अति क्रूरतापूर्ण तरीका है – मात्र फोड़े को दबाना या झगड़े, उक्त उग्र व्यवहार की ओर नहीं ले जा सकते – प्रकरण, धारा 300 के चौथे अपवाद के अंतर्गत नहीं आता।

***C. Penal Code (45 of 1860), Section 302 & 84 – Insanity* – Held – From the evidence of doctors, it does not appear that prior to incident or at the time of incident, appellant was suffering from mental illness or was of unsound mind – If appellant had symptoms of mental illness later the occurrence of incident, it cannot be connected with the incident – Case does not fall under exceptions of Section 84 IPC. (Paras 44 to 56)**

ग. दण्ड संहिता (1860 का 45), धारा 302 व 84 – पागलपन – अभिनिर्धारित – चिकित्सकों के साक्ष्य से यह प्रतीत नहीं होता कि घटना से पूर्व या घटना के समय अपीलार्थी मानसिक रोग से ग्रस्त था या विकृत चित्त था – यदि अपीलार्थी को घटना घटित होने के बाद मानसिक रोग के लक्षण थे, तब उसे घटना के साथ नहीं जोड़ा जा सकता – प्रकरण, धारा 84 भा.दं.सं. के अपवादों के अंतर्गत नहीं आता।

***D. Penal Code (45 of 1860), Section 498-A – Cruelty* – Held – Trial Court without assessing any oral/documentary evidence, simply mentioned that from dying declaration and evidence on record it is established that before incident appellant used to ask money from deceased for liquor and on being denied, he used to beat her – It does not appear that appellant has committed cruelty as defined u/S 498-A IPC – Conviction u/S 498-A set aside – Appeal partly allowed. (Paras 62 to 66)**

घ. दण्ड संहिता (1860 का 45), धारा 498–A – क्रूरता – अभिनिर्धारित – विचारण न्यायालय ने किसी मौखिक/दस्तावेजी साक्ष्य का मूल्यांकन किये बिना साधारण रूप से उल्लिखित किया कि अभिलेख पर मृत्युकालिक कथन एवं साक्ष्य से यह स्थापित होता है कि घटना से पूर्व अपीलार्थी मदिरा के लिए मृतक से रूपये मांगा करता था और इंकार करने पर, वह उसे पीटता था – यह प्रतीत नहीं होता कि अपीलार्थी ने धारा 498–A भा.दं.सं. के अंतर्गत यथा परिभाषित क्रूरता कारित की है – धारा 498–A के अंतर्गत दोषसिद्धि अपास्त – अपील अंशतः मंजूर।

***E. Penal Code (45 of 1860), Section 498-A – Essential Elements* – Discussed & explained. (Para 60 & 61)**

घ. दण्ड संहिता (1860 का 45), धारा 498–A – आवश्यक तत्व – विवेचित एवं स्पष्ट किये गये।

Cases referred:

AIR 2009 SC 97, (1997) 10 SCC 675, ILR (2022) MP 138, AIR 1952 SC 22.

Vandana Tripathi, for the appellant.
A.S. Baghel, Dy. G.A. for the respondent.

J U D G M E N T

The Judgment of the Court was delivered by:
PRAKASH CHANDRA GUPTA, J.:- Appellant/accused has filed this appeal u/s 374(2) of The Code of Criminal Procedure (hereinafter referred to as CrPC), being aggrieved by the judgment dated 26/02/2011, passed in Session Trial no. 254/2008 by the learned third Additional Sessions Judge Satna, whereby the appellant has been convicted under Section (hereinafter referred to as u/s) 302 of the Indian Penal Code (hereinafter referred to as IPC) and sentenced to undergo life imprisonment and fine of Rs. 500/- with default stipulation of additional rigorous imprisonment of 3 months and has also been convicted for the offence u/s 498(A) of the IPC and sentenced to rigorous imprisonment for a period of 2 years and fine of Rs. 500/- with default stipulation of additional rigorous imprisonment for 3 months.

2. It is admitted fact that marriage of deceased Ashwini Chaturvedi alias Sandhya was solemnized with accused Ashish Chaturvedi approximately 10 years prior to the occurrence of incident. After marriage one daughter (Shivanshi 5 years) and one son (Krishna Kant 3 years) were born from their wedlock. It is an undisputed fact that deceased Ashwini Chaturvedi alias Sandhya has died due to burn injuries.

3. The facts necessary to be stated for disposal of instant appeal are that on 20/07/2008 at 02:20 p.m., Dr. A.K. Trivedi (PW/6) admitted deceased Ashwini Chaturvedi alias Sandhya, resident of Krishna Nagar, Satna for treatment of her being burnt and brought by her husband/accused Ashish Chaturvedi at District Hospital, Satna. He had sent information (Ex.P/12) to SHO/ Police Chowki District Hospital Satna. He also examined the victim and gave an MLC report (Ex.P/11). Looking to the serious condition of deceased Monika Chaturvedi (PW/8) (Sister-in-law of deceased) took her to Birla Hospital Satna. Dr. Rekha Maheshwari admitted her in the Birla Hospital and sent an information to P/S Kolgawan District Satna. On the basis of aforementioned intimation ASI G.S. Pandey (PW/5) wrote a roznamcha sanha no.1444. On the basis of request letter of ASI G.S. Pandey (PW/5), on 20/07/2008 Executive Magistrate/ Naib Tahsildar Raghuraj Nagar, Satna, Prabhat Mishra (PW/7) went to Birla Hospital, Satna. On the same day at 07:45 p.m. Dr. S. Singh examined the victim, Ashwini Chaturvedi and found that she was in fit condition to give statement. Prabhat Mishra (PW/7) wrote statement (Ex.P/13) of deceased Ashwini Chaturvedi during 7:45 p.m.to 08:00 p.m. In the statement (Ex/P-13) deceased stated that appellant poured kerosene on her body and set her ablaze at 01:30 p.m. on 20/07/2008.

4. On the same day ASI G.S. Pandey (PW/5) wrote statements of deceased Ashwini Chaturvedi, Monika Chaturvedi (PW/8), Father of accused Brijraj Kumar (DW/4), uncle of deceased Ramashray Tiwari (PW/2) and brother of deceased Vinod Tiwari.

5. On 20/07/2008 at 10:30 p.m. ASI G.S. Pandey (PW/5) lodged an FIR (Ex.P/7) against appellant/ accused Ashish Chaturvedi. On 21/07/2008, father of deceased Radhika Prasad (PW/1) gave a written complaint (Ex.P/1) to SHO Kolgawan District Satna. During investigation at 11:30 AM on 21/07/2008 ASI G.S. Pandey (PW/5) inspected the place of incident i.e. house of appellant/accused, at the presence of witnesses and prepared spot map (Ex.P/3). At 12:00 a.m. he seized semi-burnt saree and piece of petticoat of deceased, collected sample of kerosene from floor through cotton ball, a simple cotton ball, a matchstick, a gallon of kerosene containing approx. 2 litres of kerosene and prepared seizure memo (Ex.P/4). On the same day he arrested the appellant vide arrest memo (Ex.P/8).

6. For the better treatment on 22/07/2008 deceased was shifted to Roy Hospital Kamptee District Nagpur Maharashtra. After admission of deceased an intimation was sent to SHO Kamptee by Roy Hospital where roznamcha sanha no. 4/8 was written. Head Constable (hereinafter as HC) Kamptee wrote a letter to the Medical Officer of Roy hospital about the mental status of the deceased to give statement. On 23/07/2008 at 12:30 a.m. concerning doctor after examination of deceased gave opinion that she is not fit to give statement. Thereafter on the same day Executive Magistrate/ Naib Tahsildar, Kamptee, H.K. Jhore (PW/9) consulted to the concerning doctor who examined again the deceased and he found that she is able to give the statement. H.K. Jhore (PW/9) took statement (Ex.P/14) of deceased/patient. During treatment deceased died on 05/08/2008 at 01:45 a.m.. On the same day at 02:00 a.m. an intimation (Ex.P/15) was sent to SHO Kamptee. On the basis of aforementioned intimation (Ex.P/15) and oral intimation of Radhika Prasad (PW/1), Marg intimation (Ex.P/16) was written by ASI S.R. Naranvare (PW/10) HC Madhukar Tobde after giving notice to the witnesses prepared a Lash Panchnama of deceased. Body of deceased was sent for postmortem. Dr. Subhash Gajanand Rao Titare (PW/11) carried postmortem of the body of deceased and prepared postmortem report (Ex.P/18). SHO Kamptee sent Marg intimation (Ex.P/16) alongwith statement of deceased (Ex.P/14). Lash Panchnama and other relevant document sent to the P/S Kolgawan District Satna for further proceeding. On 12/08/2008 G.S. Pandey (PW/5) wrote a Marg intimation (Ex.P/6), on the basis of Marg intimation (Ex.P/16), seized articles were sent to Forensic Science Laboratory (hereinafter referred to as FSL), Sagar for chemical examination alongwith letter (Ex.P/9) Superintendent of Police, Satna. Chemical examination report (Ex.P/10) was received. Statement of

witnesses have been taken u/s 161 of CrPC. After the completion of investigation, chargesheet was filed against appellant/accused.

7. The case was committed to the court of sessions. The trial court has framed charges against the appellant. Appellant has abjured the guilt and pleaded not guilty

8. The prosecution, in order to prove its case examined father of deceased Radhika Prasad (PW/1), uncle of deceased Ramashray Tiwari (PW/2), mother of appellant Shyama Chaturvedi (PW/3), ASI A.K. Shukla (PW/4), ASI G.S. Pandey (PW/5), Dr. A.K. Trivedi (PW/6), Executive Magistrate Prabhat Mishra (PW/7), cousin-sister of appellant Monika Chaturvedi (PW/8), Executive Magistrate H.K. Jhore (PW/9), ASI P/S Kamptee S.R. Naranvare (PW/10) and Dr. Subhash Gajanan Rao Titre (PW/11).

9. After completion of prosecution evidence learned trial court examined the appellant/accused u/s 313 of CrPC, in which appellant took defence that in year 2005 some persons had beaten him on his head. Due to head-injury he lost his soundness of mind. He was treated at Satna and by neurosurgeon at Jabalpur. Due to the state of his unsoundness of mind, by the order of trial court he was sent to mental hospital Gwalior for treatment. After a long treatment he became fit and healthy. Due to unsoundness of mind he does not know that how deceased was burnt. Because of his insanity he does not know if she burnt herself or he set deceased on fire. Family members of deceased were annoyed on him due to his insanity. Therefore they have falsely implicated him in the case. In his defence appellant examined his neighbours Kamtaprasad Soni (DW/1), Jiyaram Yadav (DW/2), his father Brijraj Kumar Chaturvedi (DW/4) Dr. Pradeep Kumar Saxena (DW/3), Dr. S.B. Joshi (DW/5), Dr. Kuldeep Singh (DW/6), Dr. R.K. Sinha (DW/7) and Dr. Y.R. Yadav (DW/8).

10. Learned Trial court after relying on the evidence on record, convicted and sentenced the appellant as aforementioned.

11. Learned counsel for the appellant argued that conviction and sentence of appellant is bad, improper, incorrect and illegal. Learned trial Judge has erred in holding the appellant guilty for the offence because there is no evidence on record so as to indicate the specific type of cruelty which was alleged to have been mated (sic: meted) upon the deceased by the appellant. She further argued that learned trial Judge has erred in placing reliance upon the testimony of the prosecution witnesses as there are many contradictions and omissions in their statements. She has also submitted that so called dying declarations on which the conviction has been founded does not inspire confidence and hence the same is not trustworthy. Many of the witnesses have not corroborated with the version of prosecution and many witnesses are interested witnesses. There is inordinate delay in lodging the FIR

and no proper explanation has been offered by the prosecution. At the relevant time, the appellant was suffering from insanity but the learned trial court has erred to disbelieve the defence witnesses. The prosecution has not proved the case beyond reasonable doubt against the appellant. The findings recorded by the trial court is absolutely erroneous. The learned counsel has placed reliance on the judgment of Hon'ble Apex Court delivered in the case of *Siddhapal Kamala Yadav V State of Maharashtra* [AIR 2009 SC 97].

12. On the other hand learned Government Advocate for the respondent/State has argued that the impugned judgment and order is in accordance with the fact and law and need not to be interfered with. He further submitted that the dying declarations given by the deceased are properly proved by the prosecution. He also supported the impugned judgment passed by the learned trial court. Learned counsel has placed reliance on the judgments of Hon'ble Apex Court delivered in the cases of :- *State of Rajasthan V Bhup Singh* [(1997) 10 SCC 675]; *Biju @ Joseph V State of Kerala* [CRL.A.No. 108 of 2009];

13. No other point is pressed by the counsel for the parties.

14. Heard learned counsel for both the parties and perused the record.

15. Entering upon the merits of this case, this court thinks it apposite to find out as to whether the death of deceased Ashwini Chaturvedi alias Sandhya was homicidal in nature or not.

16. Father of deceased, Radhika Prasad (PW/1) stated that on 20/07/2008 deceased received burn injuries. His statement is supported by uncle of deceased Ramashray Tiwari (PW/2), mother of appellant Shyama Chaturvedi (PW/3) and cousin of appellant Monika Chaturvedi (PW/8). Medical Officer of District Hospital Satna, Dr. A.K. Trivedi (PW/6) deposed that at 02:05 p.m., on 20/07/2008 he examined injured Ashwini Chaturvedi, kerosene smell was coming from her body. There was 45% of burn injuries over her body on both forearms, hands, both lower limbs, buttocks, back, chest and abdomen. Further he stated that injured was in conscious state, her pulse rate was 80 per minute and blood pressure was 118/72. He admitted the deceased in female surgical ward. In this respect he sent intimation (Ex.P/12) to Police Chowki District Hospital Satna and gave MLC report (Ex.P/11) to the Police.

17. ASI P/S Kamptee District Nagpur Maharashtra, S.R. Naranvare (PW/10) stated that on 05/08/2008 after receiving death information (Ex.P/15) of the deceased from P/S Kamptee from Roy Hospital Kamptee, he wrote a roznamcha sanha no. 4/2008 and lodged Marg intimation (Ex.P/16) on the same day. Medical Officer, sub District Hospital Kamptee, Dr. Shubhash Gajanand Titre (PW/11) has stated that body of deceased Ashwini has been brought before him on 05/08/2008 by Constable Durgeshwar P/S Kamptee for postmortem. As per

inquest report death of deceased was homicidal in nature. She was admitted in Roy Hospital from 22/07/2008 to 05/08/2008 and died at 01:45 a.m. on 05/08/2008. During postmortem he found that bandage were tied on the burnt parts of body. Her body was cold, rigor mortis was not present. Postmortem lividity were present in back, buttock and thigh, her face was natural, eyes were closed, tongue was inside of mouth, red colour of liquid was oozing out of nose and mouth, burn injuries were present on external parts of body, her hands and feet were normal, there was 67% of burn injuries on the body. After opening of the head it was found that her entire brain was conjested and pale, other internal body parts were conjested. 200 ml. black coloured liquid was present in the stomach, uterus was normal, he had not preserved the viscera of the deceased. He opined that cause of death of deceased was septicaemia and cardio respiratory arrest due to 67% mixed burn. He prepared postmortem report (Ex.P/18).

18. The accused has not disputed the fact of death of deceased due to burn injuries, therefore statement of aforementioned witnesses are reliable. Hence, the learned trial court has rightly found proved that deceased died due to burn injuries and her death was homicidal in nature.

19. Next question arises that whether the appellant/ accused set deceased on fire after pouring kerosene with intention to cause death of deceased.

20. As per prosecution, deceased has given following dying declarations:-

> (1) On 20/07/2008 in Birla Hospital Satna, deceased orally told her father Radhika Prasad (PW/1) and her uncle Ramashray Tiwari (PW/2) that the appellant poured kerosene on her body and set her on fire.
>
> (2) On 20/7/2008 an Executive Magistrate/ Naib Tahsildar Raghuraj Nagar Satna, Prabhat Mishra (PW/7) wrote a dying declaration (Ex.P/13) of deceased at Birla Hospital Satna.
>
> (3) On 23/07/2008 Executive Magistrate/ Naib Tahsildar Kamptee Nagpur, H.K. Jhore (PW/9) wrote a dying declaration (Ex.P/14) of deceased at Roy Hospital Kamptee.

21. Learned trial court has relied on oral dying declaration of deceased which has been given before Radhika Prasad (PW/1) and Ramashray Tiwari (PW/2) at Birla Hospital Satna. Learned trial court has also relied upon the statements of Prabhat Mishra (PW/7), H.K. Jhore (PW/9) and dying declarations (Ex.P/13 & P/14).

22. In the judgment of *Durgesh Singh Bhadauria vs State Of M.P.* [ILR (2022) MP 138, the Division Bench of this court has held as under:-

"19. Whenever multiple dying declarations are recorded then **Hon'ble Apex Court in Kundula Bala Subrahmanyam And Anr vs State Of Andhra Pradesh[(1993) 2 SCC 684]**, has observed as under:

> *"Section 32(1) of the Evidence Act is an exception to the general rule that hearsay evidence is not admissible evidence and unless evidence is tested by cross- examination, it is not credit-worthy. Under Section 32, when a statement is made by a person, as to the cause of death or as to any of the circumstances which result in his death, in cases in which the cause of that person's death comes into question, such a statement, oral or in writing, made by the deceased to the witness is a relevant fact and is admissible in evidence. The statement made by the deceased, called the dying declaration, falls in that category provided it has been made by the deceased while in a fit mental condition. A dying declaration made by person on the verge of his death has a special sanctity as at that solemn moment, a person is most unlikely to make any untrue statement. The shadow of impending death is by itself the guarantee of the truth of the statement made by the deceased regarding the causes or circumstances leading to his death. A dying declaration, therefore, enjoys almost a sacrosanct status, as a piece of evidence, coming as it does from the mouth of the deceased victim. Once the statement of the dying person and the evidence of the witnesses testifying to the same passes the test of careful scrutiny of the courts, it becomes a very important and a reliable piece of evidence and if the court is satisfied that the dying declaration is true and free from any embellishment such a dying declaration, by itself, can be sufficient for recording conviction even without looking for any corroboration. If there are more than one dying declarations, then the court has also to scrutinise all the dying declarations to find out if each one of these passes the test of being trustworthy. The Court must further find out whether the different dying declarations are consistent with each other in material particulars before accepting and relying upon the same."*

23. In the judgment of *Kushal Rao V State of Bombay* [AIR 1952 SC 22] Hon'ble the Apex Court held that there is no absolute rule of law that states that a dying statement cannot be used as the sole ground for conviction unless it is backed up by other proof. A real and voluntary declaration that is free from compulsion needs no corroboration.

24. Now the dying declaration of the deceased is required to be considered in the light of principles laid down by the Apex Court.

25. In this respect father of deceased, Radhika Prasad (PW/1) has stated that after hearing about the incident, he went to Birla Hospital Satna where he saw the deceased. There was burn injuries on her body. On asking upon by him the deceased told him that the appellant was asking for money to get liquor for which she denied, so he became furious and poured kerosene on the deceased and set her ablaze. There is omission of aforementioned fact in (Ex.P/1) written complaint given by this witness on the next day i.e. 21/07/2008 at P/S Kolgawan. This witness also contradicted A to A part of his statement (Ex.D/1) that "I inquired with Ashwini that how she got burnt, then she told me that she was massaging her husband's legs at that time the abscess present on his leg was touched which caused pain to her husband, because of which he beat her and burnt her with kerosene." Therefore, it is clear that there is material contradiction and omission present in his statement. Hence, aforementioned statement of this witness is not trustworthy and reliable.

26. Uncle of deceased, Ramashray Tiwari (PW/2) stated that after hearing about the incident, he went to Birla Hospital Satna and saw that entire body of deceased was burnt except face. On asking upon by him the deceased replied that her husband poured kerosene on her body and set her on fire, while in paragraph 4 of cross-examination he stated that no conversation took place between deceased and him in Birla Hospital. He contradicted A to A part of police statement (Ex.D/2) that 'After coming to know about the incident he went to Birla Hospital Satna and saw that deceased was admitted in Birla Hospital in burnt condition. Therefore, it is clear that there is material contradiction in the statement of this witness. Hence, aforementioned statement of this witness is also not trustworthy and reliable.

27. Therefore, it is clear that in respect of oral dying declaration of deceased at Birla Hospital Satna before her father Radhika Prasad (PW/1) and her uncle Ramashray Tiwari (PW/2) is not reliable and trustworthy. Hence, it appears that the trial court has erred on relying on the statement of Radhika Prasad (PW/1) and her uncle Ramashray Tiwari (PW/2), in respect of oral dying declaration of deceased.

28. Prabhat Mishra (PW/7) deposed that on 20/07/2008 he was posted as Executive Magistrate/ Naib Tahsildar at Tahsil Raghuraj Nagar, District- Satna. On the basis of request letter of police he went to Satna to take statement of the deceased Ashwini Chaturvedi. He received opinion of concerning doctor regarding the ability of deceased to give statement. Thereafter he took the statement of the deceased. In the statement, she told that her husband Ashish Chaturvedi put kerosene and set her on fire at around 01:30 p.m.. She also deposed that her husband is short-tempered and bothers his parents as well. Dying declaration is (Ex.P/13) carrying signature of this witness from A to A and deceased from B to B.

29. On perusal of dying declaration (Ex.P/13) it appears that Prabhat Mishra (PW/7) took statement of deceased on 20/07/2008 in burn unit of Birla Hospital Satna during 07:45 p.m. to 08:00 p.m.. Prabhat Mishra (PW/7) also received opinion of doctor before and after recording the dying declaration, where the doctor has given opinion that deceased is in absolutely fit condition to give statement and during the statement she was in conscious state. It also appears that Prabhat Mishra (PW/7) has written the dying declaration of deceased in question-answer form.

30. In paragraph 3 of cross-examination, he stated that it is not certain that deceased was in care of father, mother and brother, while being admitted in Birla Hospital, Satna. In the same paragraph he also stated that the deceased also stated that right before the incident some quarrel took place between her and her husband/ accused. In paragraph 4 of cross-examination, he denied that he recorded statement of deceased in the words of her father. He also denied that at the time of statement deceased was not in fit condition to give statement.

31. Prabhat Mishra (PW/7) being an Executive Magistrate/ Naib Tahsildar is an independent witness, he recorded dying declaration of deceased in question and answer form, he also took the opinion of the doctor regarding fitness of mental state of the deceased. Therefore, the statement of Prabhat Mishra (PW/7) and dying declaration (Ex.P/13) of deceased are reliable. The statement in (Ex.P/13) the dying declaration is unmistakably clear that appellant Ashish Chaturvedi poured kerosene and set his wife/ deceased on fire.

32. H.K. Jhore (PW/9) deposed that on 23/07/2008 he was posted as Executive Magistrate/ Naib Tahsildar, Kamptee, District Nagpur. On the same day he took statement of deceased Ashwini Chaturvedi in Roy Hospital Kamptee. Before taking statement of deceased he got opinion of concerning doctor, for which the doctor gave opinion that she is able to give statement. The deceased stated in her dying declaration that her husband, Ashish Chaturvedi has burnt her and at that time accused's mother and sister were present there. He wrote dying declaration (Ex.P/14) in Marathi language and has given his statement by translating Marathi to Hindi language. Signature of deceased is from B to B in the dying declaration (Ex.P/14).

33. On perusal of dying declaration (Ex.P/14) it appears that on 23/07/2008 H.K. Jhore (PW/9) has written statement of deceased in Marathi Language and in question and answer form. He also took opinion of concerning doctor that patient/ deceased is able to give statement. Thereafter, he recorded the dying declaration. In paragraph 3 of cross-examination the witness stated that he took statement during 12:45 - 12:50 on 23/07/2008 at Roy Hospital Kamptee. Further he stated that deceased also told in her statement that her husband was having an abscess on his leg and while massaging that abscess was pressed by her which raged him in

anger. In the same paragraph he denied that the patient/ deceased was not in fit condition to give statement and he wrote the dying declaration in the pressure of police. Nothing appears contrary in the Cross examination as to disbelieve the statement of witness.

34. In the case of *State of Rajasthan V Bhup Singh* (Supra), Hon'ble the Supreme Court has observed as follows:-

> *"10. Assuming that the deceased gave her statement in her own language, the dying declaration would not vitiate merely because it was recorded in a different language. We bear in mind that it is not unusual that courts record evidence in the language of the court even when witnesses depose in their own language. Judicial officers are used to the practice of translating the statements from the language of the parties to the language of the court. Such translation process would not upset either the admissibility of the statement or its reliability, unless there are other reasons to doubt the truth of it."*

35. In the case of *Biju @ Joseph V State of Kerala* (Supra), Hon'ble the Division Bench of Kerala High Court relying upon the judgment of *Bhup Singh* (Supra) has observed as follows:-

> *"19. The fact that PW15 does not know to write Malyalam and the dying declaration was recorded not in the language spoken to by the deceased is not fatal."*

36. Therefore, the dying declaration (Ex.P/14) can not be doubted on the basis of it being written in Marathi language. Both the dying declarations (Ex.P/13 & P/14) are written by Executive Magistrate/ Naib Tahsildar, both the Executive Magistrate have written the dying declarations after getting opinion of the concerning doctors that whether the deceased is mentally fit to give her statement. It also appears that the deceased has given her statement voluntarily and there was no possibility to teach her. There is no circumstance giving rise to any suspicion about its truthfulness. There is no inconsistencies between the two dying declarations in material particulars. Therefore, both the dying declarations are trustworthy, hence, the learned trial court has rightly held the dying declarations to be reliable.

37. Mother of the appellant, Shyama Chaturvedi (PW/3) is partly hostile but she has stated that on 20/07/2008 at 01:30 p.m. she was sitting in the veranda of her house, hearing the sound of a bucket falling, went to check out and saw that her daughter-in-law/ deceased was screaming to save her. She tried to extinguish the fire because of which her hand and saree got burnt. At the time of incident appellant was present on the spot. She did not know how deceased caught fire and got burnt. After declaring hostile, she denied the suggestion of prosecution in

paragraph 4 of cross-examination that at the time of incident appellant was asking money from deceased to purchase liquor, for which deceased denied to give money then the accused assaulted her, poured kerosene on her body and set her on fire.

38. Cousin of appellant, Monika Chaturvedi (PW/8) at the time of incident, she was applying oil on the head of her aunt, (Shyama Chaturvedi- PW3) outside of house. Deceased Ashwini and appellant were in the house, at that time she heard scream of someone to save, for which she went inside the home to check and saw body of deceased had caught fire and she was screaming to save. She was not aware who set deceased on fire.

39. Therefore, from the statement of Shyama Chaturvedi (PW/3) and Monika Chaturvedi (PW/8) it appears that at the time of incident the appellant was present at the spot i.e. inside the house.

40. ASI G.S. Pandey (PW/5) stated that after inquiry he lodged an FIR (Ex.P/7). As per FIR (Ex.P/7) it appears that on 20/07/2008 at 10:30 p.m. G.S. Pandey (PW/5) wrote aforementioned FIR against the appellant. Incident took place on 20/07/2008 at around 1:30 p.m. firstly deceased was admitted to District Hospital Satna, thereafter, on the same day she was taken to Birla Hospital and admitted there. In this respect, intimation has been sent by both the hospitals to the concerning police and after enquiry of information, same day FIR was lodged. In these circumstances, it appears that after receiving information from hospital ASI G.S. Pandey promptly took statement of witnesses who were present in hospital, thereafter promptly he lodged the FIR. Hence, there is no delay in lodging the FIR.

41. ASI G.S. Pandey (PW/5) stated that he prepared spot map (Ex.P/3) and marked the place of incident with red ink. Shyama Chaturvedi (PW/3) also stated that the police prepared spot map (Ex.P/3) of her house. As per (Ex.P/3) spot map it appears the spot of incident is a room of house of appellant.

42. ASI G.S. Pandey (PW/5) stated that he seized semi burnt *saree* and *petticoat* of deceased, collected sample of kerosene from floor through cotton ball, a sample of simple cotton ball, a matchstick, a gallon of kerosene containing approx. 2 litres of kerosene and prepared seizure memo (Ex.P/4).

43. ASI G.S. Pandey (PW/5) deposed that he arrested the accused and prepared arrest memo (Ex.P/8). As per arrest memo (Ex.P/8), it was prepared on 21/07/2008 at 10:00 p.m.. ASI G.S. Pandey (PW/5) further stated that the seized articles in the case were sent for chemical examination to FSL, Sagar alongwith letter (Ex.P/9). As per FSL report (Ex.P/10) it appears that Kerosene oil was present on:-

Article A- semi-burnt *saree* and *petticoat* of deceased; Article B- cotton ball; and Article E- gallon, seized from the spot. Therefore, it appears that at the time of incident accused/ appellant was present on the spot and kerosene oil was found on the aforementioned articles. These circumstances also support the dying declarations of the deceased. Hence, it is clear that at the time of incident, the appellant/ accused had poured Kerosene on the body of deceased and thereafter set her on fire. It is also clear that during treatment deceased had died due to the burn injuries caused on her body.

44. So far as the question is concerned to cause death of deceased with intention to cause death, defence of appellant is that from the year 2005 he was suffering from the unsoundness of mind arising out of head-injury, due to his unsoundness he has no knowledge that whether he had set deceased on fire or the deceased set herself on fire.

45. In the case of *Siddhapal Kamala Yadav V State of Maharashtra* (Supra) the Supreme Court has observed that:-

> *"The onus of proving unsoundness of mind is on the accused. But where during the investigation previous history of insanity is revealed, it is the duty of an honest investigator to subject the accused to a medical examination and place that evidence before the court and if this is not done, it creates a serious infirmity in the prosecution case and the benefit of doubt has to be given to the accused."*

46. After consideration of statement of defence witnesses the learned trial court has found that the appellant/ accused has not succeeded to establish his defence.

47. Father of appellant Brijraj Kumar Chaturvedi (DW/4) stated that on 06/03/2005 some persons had beaten appellant which was reported to P/S Kotwali, Satna, the certified copy of FIR is Ex.D/7, MLC is Ex.D/8 and discharge ticket is Ex.D/9. As per FIR (Ex.D/7) on the basis of intimation of appellant an FIR was lodged at P/S Satna u/s 294, 323, 506 and 327/34 of IPC on 06/08/2005 against 4 persons namely Raja Kewat, Suresh Kewat, Baiya Yadav and another. As per MLC (Ex.D/8) on 06/03/2005 4 injuries out of 2 lacerated wound on left side of forehead and backside of scalp were found on the body of appellant/ accused and all injuries were simple in nature. As per prescription (Ex.D/19) on 10/06/2008, Dr. A.K. Sinha, Victoria Hospital Jabalpur had examined the appellant and prescribed medicines as well as he advised to consult to physician, Medical College Jabalpur. Therefore, it is clear that on 06/03/2005 appellant had received simple injuries on his head.

48. Brijraj Kumar Chaturvedi (DW/4) further stated because of head-injury, appellant could not sleep properly, used to have headaches, murmur and be irritated. His treatment was done by Dr. B.P. Gupta, Dr. Y.R. Yadav (DW/8). He stopped taking medicines as he got relief from the problem. After 3-4 months he again started to behave insanely, beat children and parents, removed his mother from his house, bother people in colony by entering and breaking articles, after this his treatment was again started by psychiatrist Dr. Pradeep Kumar Saxena (DW/3) and Dr. A.K. Sinha, but he could not get over the problem, and after 6-7 months this incident took place. Neighbours of the appellant, Kanta Prasad Soni (DW/1) and Jiyaram Yadav (DW/2) supported the statement of Brijraj Kumar Chaturvedi (DW/4). In their statement they stated that because of the injury in head, appellant was not of sane mind. In paragraph 5 & 6 of cross-examination mother of appellant, Shyama Chaturvedi (PW/3) and paragraph 3 of cross-examination cousin of appellant, Monika Chaturvedi (PW/5) also supported the aforementioned statement of Brijraj Kumar Chaturvedi (DW/4).

49. Dr. Y.R. Yadav (DW/8) has stated that he was posted as neurosurgeon in Medical College Jabalpur since March 1992. On 16/06/2005 he examined the appellant. He was complaining that he was having heaviness in head and lack of sleep. Dr. Y.R. Yadav (DW/8) prescribed medicines for tension reduction, headache and proper sleep to appellant. He also advised EEG (electro encephalography) of brain to get done. OPD slip is Ex.D/20. Therefore, on the basis of this witness it does not appear that at the time of examination i.e. 16/06/2005 appellant was suffering from mental-illness.

50. Dr. Pradeep Kumar Saxena (DW/3) who was psychiatrist and posted as professor in Medical College, Rewa stated that on 10/01/2008 he examined the appellant. Father of appellant told him that appellant had received injury on back of his head, he sits alone, he is not able to sleep because of which he consumes several types of intoxicating tablets. He has got EEG examination done and found that his mental condition was in hyperarousal state. He prescribed the required medicines to him. Prescription slip is Ex.D/4 and EEG film and report is Ex.D/5. Therefore, it is clear that this witness has also not stated that at the time of examination on 10/01/2008 the accused was of unsound mind.

51. Dr. R.K. Sinha (DW/7) was posted as anaesthesiologist in Victoria Hospital Jabalpur. He stated that on 10/06/2008 he examined the appellant he was told that behaviour of patient gets abnormal, he does not get proper sleep. On examination he found that behaviour of appellant was in normal condition. He advised medicines for the same and also advised to consult with psychiatrist. In paragraph 2 of cross-examination this witness has admitted that at the time of examination the appellant was in normal condition. Therefore, it is clear that 1

month 10 days prior to the incident, on 10/06/2008 when Dr. R.K. Sinha (DW/7) examined the appellant, he was in normal mental state.

52. As per statement of aforementioned defence witnesses Dr. Y.R. Yadav (DW/8), Dr. Pradeep Kumar Saxena (DW/3), Dr. R.K. Sinha (DW/7), it does not appear that prior to incident the appellant/ accused was suffering from mental illness or he was insane, therefore, in this respect Brijraj Kumar Chaturvedi (DW/4), Shyama Chaturvedi (PW/3), Monika Chaturvedi (PW/8), Kanta Prasad Soni (DW/1) and Jiyaram Yadav (DW/2) being close relative and neighbours of appellant are not reliable that prior to incident mental status of the appellant was not sound. Hence, it is certain from the aforementioned witnesses', evidences that appellant/ accused was neither at the time of occurrence of the incident nor prior to it was of insane mind.

53. Dr. Pradeep Kumar Saxena (DW/3) also stated that on 18/12/2008 (approx. 6 months after incident) as per direction of trial court appellant was produced before him for examination, at that time the appellant appeared to be mentally-ill. Therefore, he referred him to mental hospital Gwalior for observation and necessary check-ups. Referral letter is Ex.D/6. In paragraph 3 of cross-examination he admitted that he has examined appellant only for once further he stated that he could not say clearly that appellant is always mentally-ill. Therefore this witness says that at the time of examination on the date of 18/12/2008 appellant appeared to be mentally-ill, this witness has not clearly stated that at the time of examination, the appellant was mentally-ill.

54. Dr. Kuldeep Singh (DW/6) was posted as medical officer in mental hospital, Gwalior, stated that appellant was admitted from 23/12/2008 to 31/07/2009 in the mental illness ward. With due course of time he was treated by several psychiatrists. This witness has also treated the appellant on 11/02/2009, his report is Ex.D/12 in which he has declared appellant to be mentally-ill. He also prepared a report (Ex.D/17) on 31/07/2009, at that time the appellant was not having any kind of mental-illness. He further stated that on the same day i.e. 31/07/2009 he gave report Ex.D/18. As per report Ex.D/12 appellant was not able to defend himself in court of law. As per report Ex.D/17 during period 23/12/2008 to 31/07/2009, the report was given that appellant was able to defend himself in the court of Law and he is maintaining well with medicine. As per Ex.D/18 after getting in fit condition the appellant was transferred from mental hospital Gwalior to concerned jail.

55. Dr. S.B. Joshi (DW/5) who was posted as medical officer in mental hospital, Gwalior since 12/12/1990. He stated that he is a Psychiatrist. Medical examination report (Ex.D/10) from the period 23/12/2008 to 30/12/2008 of appellant was produced before mental ward at central jail Gwalior in which it was found that he was having symptoms of mental-illness, used to murmur, fight, used

to be irritated, used to say to have alcohol and ganja, lack of sleep, liked to stay alone, sometimes became violent and used to attack co-patients, Dr. Gautamanand, Dr. Anil Dohre, Dr. Shubhash Upadhyay have also examined the appellant and gave report (Ex.D/11, 13, 14, 15 & 16). In the report (Ex.D/11) Dr. Gautamanand has given report to require further treatment of the appellant. On considering statements of Dr. S.B. Joshi (DW/5) and Dr. Kuldeep Singh, it appears that the appellant was admitted in mental hospital Jabalpur during 23/12/2008 - 31/07/2009 i.e. approximately 5 months later from the date of incident. At that time he was diagnosed with symptoms of mental-illness and after treatment the same was cured but if the appellant had symptoms of mental-illness later the occurrence of the incident, it can not be connected to the incident. Appellant has not produced any material evidence to prove that he was insane or was unable to understand the nature of the act at the time of commission of the offence.

56. ASI G.S. Pandey (PW/5) in paragraph 3 of cross-examination has admitted that 2-2.5 years prior to incident, the medication of appellant for his mental illness was being carried out in Jabalpur, Rewa and Satna. Therefore, it appears that during investigation it was revealed before ASI G.S. Pandey (PW/5) that the appellant was under treatment of mental-illness for 2-2.5 years prior to incident. This witness has not stated that he produced the appellant before any doctor for his examination of mental-illness, but in this respect the appellant/accused has not sought any explanation at the time of cross-examination of this witness that why he did not produce appellant before the doctor for his examination. Though appellant has examined in his defence, Dr. Pradeep Kumar Saxena (DW/3), Dr. R.K. Sinha (DW/7) and Dr. Y.R. Yadav (DW/8) but they have not stated clearly that prior to incident the appellant was insane. In this respect Kanta Prasad (DW/ 1), Jiyaram Yadav (DW/2), Brijraj Kumar Chaturvedi (DW/4), Shyama Chaturvedi (PW/3), Monika Chaturvedi (PW/8) were also not found trustworthy. Therefore, if the ASI G.S. Pandey (PW/5) has not examined the appellant from any doctor for his mental-illness, solely on this ground entire prosecution case does not vitiate. Hence, it is not established that at the time of incident the appellant/ accused was insane and was not able to understand the nature of the act, while the act was being done, which debars him from falling in the general exception of section 84 of IPC. Consequently, the learned trial court has not erred by not granting the benefit of defence of insanity u/s 84 of IPC.

57. On the above discussions it is found that death of deceased was homicidal in nature, therefore, it is also relevant to consider here section 300 of IPC, which runs as under:-

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

2ndly.-If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or-

3rdly.-If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or-

4thly.-If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

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

Exception 2.-Culpable homicide is not murder if the offender in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence.

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

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

Exception 5.-Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent."

58. On the perusal of dying declarations (Ex.P/13 & P/14) and statement of Prabhat Mishra (PW/7) and H.K. Jhore (PW/9) it is pertinent to note that the deceased had stated that her husband is short-tempered and bothers his parents as well, that her husband was having an abscess on his leg and while massaging his legs that abscess was pressed by her which raged him in anger, consequently it led to quarrel between deceased and appellant/ accused. Looking at the incidents right before the commission of the offence, it is important to discuss the fourth exception to murder u/s 300 of IPC. fourth exception is *"Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner.*"It is true that there is no evidence which shows premeditation from the side of appellant/ accused, it is also correct that pressing of abscess by the deceased had raged him in anger, but looking at the later part of the exception, it is quite apparent that appellant/ accused had taken undue advantage and acted in a cruel or unusual manner, as the appellant set deceased on fire by pouring kerosene on her is one of the most cruelsome ways to kill someone, mere pressing of abscess or quarrels can not lead to such furious behaviour. There is no sign that deceased even tried to defend herself while the appellant/ accused was pouring kerosene on her, after he set the deceased on fire. The instant case is not of a fight but a case where the deceased succumbed to the furious behaviour of appellant/ accused. Certainly the behaviour of appellant/ accused was the one acted in a cruel manner, hence, does not fall in the fourth exception to murder as well. There is no other exception to murder u/s 300 of IPC where the instant case falls. Therefore, it is clear that the accused has intentionally caused death of deceased which falls under the definition of murder u/s 300 of IPC.

59. Next question arises that whether the appellant/ accused being a husband of deceased subjected her to cruelty.

60. In this respect it is important to discuss the aspect of Section 498A of IPC, which has been defined as:-

> *"498A. Husband or relative of husband of a woman subjecting her to cruelty.—Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine. Explanation.—For the purpose of this section, "cruelty" means—*
>
> *(a) any willful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or*

(b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand."

61. Hon'ble the Supreme Court has discussed the essential elements of section 498A in the case of *U. Suvetha v. State,* [(2009) 6 SCC 757],

"7. Ingredients of Section 498-A of the Penal Code are:

(a) The woman must be married;

(b) She must be subjected to cruelty or harassment; and

(c) Such cruelty or harassment must have been shown either by husband of the woman or by the relative of her husband."

62. The learned trial court in this respect considering question of determination number 3 in paragraphs 39 & 40 of the impugned judgment. On plain reading of paragraph 39 & 40 of the impugned judgment it appears that the trial court without assessing any oral or documentary evidence, simply has mentioned that 'from the dying declaration and evidence available on record it is established that before the incident appellant used to ask money from the deceased for liquor and on being denied by the deceased for the same, he used to beat her.' 'It is also mentioned that it is also established from aforementioned evidences that appellant used to harass and physically assault her which had probability to affect life, body, and health which comes u/s 498A of IPC.' In our opinion, aforementioned approach of the learned trial court is not proper as the trial court ought to have considered all oral as well as documents available on record.

63. In this respect on perusal of dying declarations (Ex.P/13 & P/14) and statement of Executive Magistrate Prabhat Mishra (PW/7) and Executive Magistrate H.K. Jhore (PW/9). It does not appear that appellant has committed the cruelty as defined in the of section 498A of IPC. Apart from that mother of appellant Shyama Chaturvedi (PW/3) has not supported the prosecution case in this respect therefore, prosecution has declared her hostile and cross-examined her, then in paragraph 3 of cross-examination she denied that the appellant used to demand money from the deceased and on being denied by her, he used to physically assault her. Uncle of deceased Ramashray Tiwari (PW/2) stated in paragraph 2 of examination-in-chief that whenever deceased used to come to his house, she used to tell ladies in the house that appellant bothers her, physically assaults her and demands money to purchase liquor. This witness has not said that

deceased told to him directly this witness that appellant bothers her, physically assaults her and demands money to get liquor. Therefore, this statement comes under hearsay, hence, not admissible in evidence.

64. Father of appellant, Radhika Prasad (PW/1) deposed that when deceased used to come parental house prior to incident, she used to tell that appellant harasses her physically and assault her for money, but this witness has not stated any specific time that when deceased had complained against appellant to him. There is also an omission of aforementioned fact in written complaint (Ex.P/1). Therefore, aforementioned statement of this witness is not reliable, hence, Offence u/s 498A of IPC is not proved beyond reasonable doubt against the appellant/ accused. Consequently, it is apparently clear that in respect of cruelty which is defined u/s 498A of IPC, the trial court has not properly assessed the evidence and has given erroneous findings.

65. On the basis of aforementioned discussions, we are of the considered view that the trial court has not properly assessed and evaluated the evidence available on record and has erred by convicting and sentencing appellant u/s 498A of IPC. But on the other hand the learned trial court has rightly assessed and evaluated the evidences and convicted and sentenced the appellant/ accused u/s 302 of IPC.

66. Resultantly, the appeal is **partly allowed.** Conviction and sentence passed u/s 498A of IPC is set aside and appellant is acquitted for the offence u/s 498A of IPC. Conviction and sentence passed by learned trial court u/s 302 of IPC against appellant/ accused is affirmed.

Appeal partly allowed

I.L.R. 2023 M.P. 174

Before Mr. Justice Vishal Dhagat

CRA No. 7213/2022 (Jabalpur) order passed on 20 September, 2022

DILIP SIKDAR …Appellant

Vs.

STATE OF M.P. & anr. …Respondents

***A. Criminal Procedure Code, 1973 (2 of 1974), Sections 53, 164-A(2), 173(2)(h) & 167(2), Penal Code (45 of 1860), Section 376 and Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (33 of 1989), Section 3(1)(w)(i) & 3(2)(v) – Default Bail – Non filing of FSL Report* – Held – Victim of rape is to be medically examined by medical practitioner which includes description of material taken from person of woman for DNA profiling – Said medical examination does not contain FSL report or DNA report – It is not**

mandatory for prosecution to file FSL report or DNA report alongwith challan and can also produced in Court later on – On basis of non filing of said report, appellant is not entitled for default bail – Application dismissed. (Para 11)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 53, 164–A(2), 173(2)(h) व 167(2), दण्ड संहिता (1860 का 45), धारा 376 एवं अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम (1989 का 33), धारा 3(1)(w)(i) व 3(2)(v) – व्यतिक्रम से जमानत – एफ.एस.एल. रिपोर्ट प्रस्तुत नहीं किया जाना – अभिनिर्धारित – बलात्कार पीड़िता का चिकित्सीय परीक्षण चिकित्सा व्यवसायी द्वारा किया जाना है जिसमें डीएनए प्रोफाईलिंग के लिए महिला के शरीर से ली गयी सामग्री का विवरण समाविष्ट है – उक्त चिकित्सीय परीक्षण में एफ.एस.एल. रिपोर्ट या डीएनए रिपोर्ट शामिल नहीं है – चालान के साथ एफ.एस.एल. रिपोर्ट अथवा डीएनए रिपोर्ट प्रस्तुत करना अभियोजन के लिए आज्ञापक नहीं है तथा न्यायालय के समक्ष बाद में भी प्रस्तुत की जा सकती है – उक्त रिपोर्ट प्रस्तुत न करने के आधार पर अपीलार्थी व्यतिक्रम से जमानत प्राप्त करने का हकदार नहीं है – आवेदन खारिज।

***B. Criminal Procedure Code, 1973 (2 of 1974), Section 53 & 164-A(2) – Medical Examination of Accused and Victim* – Held – Section 53 Cr.P.C. is regarding examination of accused by medical practitioner and it will not cover examination of complainant/victim – Complainant/victim is medically examined u/S 164-A(2) of Cr.P.C. (Para 10)**

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 53 व 164–A(2) – अभियुक्त तथा पीड़िता का चिकित्सीय परीक्षण – अभिनिर्धारित – धारा 53 दं.प्र.सं. चिकित्सा व्यवसायी द्वारा अभियुक्त के परीक्षण से संबंधित है तथा इसमें शिकायतकर्ता/पीड़िता का परीक्षण समाविष्ट नहीं होगा – शिकायतकर्ता/पीड़िता का चिकित्सीय परीक्षण धारा 164–A(2) दं.प्र.सं. के अंतर्गत किया जाता है।

Utkarsh Agrawal, for the appellant.
D.K. Parouha, G.A. for the respondent No. 1/State.

O R D E R

VISHAL DHAGAT, J.:- Heard on I.A. No. 15646/2022, an application for default bail.

2. Appellant has filed this repeat (2nd) criminal appeal under Section 14-A(1) of Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989 against rejection of his bail application by Special Judge SC and ST (POA) Act, Balaghat vide order dated 10.08.2022.

3. Earlier appeal filed by appellant was dismissed as withdrawn vide order dated 14.07.2022.

4. Appellant has been arrested on 23.05.2022 in connection with Crime No.21/2022 registered at Police Station-Mahila Thana, District- Balaghat (M.P.) for offences punishable under Sections 376 of Indian Penal Code and Section 3(1)(w)(i) and 3(2)(v) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

5. Learned counsel for the appellant submitted that appellant is entitled to default bail as Court cannot take cognizance of case as challan is not complete and FSL/DNA examination report has not been filed alongwith the challan. In view of same, appellant is entitled to default bail. Counsel appearing for the appellant relied on Section 173(2)(i), which reads under :

> ***"173. - (2) (i)*** *As soon as it is completed, the officer in charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the State Government, stating-*
>
> *(a) the names of the parties;*
>
> *(b) the nature of the information;*
>
> *(c) the names of the persons who appear to be acquainted with the circumstances of the case;*
>
> *(d) whether any offence appears to have been committed and, if so, by whom;*
>
> *(e) whether the accused has been arrested;*
>
> *(f) whether he has been released on his bond and, if so, weather with or without sureties;*
>
> *(g) whether he has been forwarded in custody under section 170.*
>
> *[(h) whether the report of the medical examination of the woman has been attached where investigation relates to an offence under [Sections 376, 376A, 376AB, 376B, 376C, 376D, 376DA, 376DB] or Section 376E of the Indian Penal Code (45 of I860)]."*

6. In view of same, Investigating Officer is bound by law to file FSL/DNA report alongwith challan and in absence of same, cognizance cannot be taken. It is further submitted that medical examination, which is mentioned in Section 173(2)(h) of Criminal Procedure Code, 1973 is not defined under Section 2 of Code of Criminal Procedure, but, same is mentioned in Section 53 of Code of Criminal Procedure. Section 53 of Code of Criminal Procedure is quoted hereinunder :

*"**53. Examination of accused by medical practitioner at the request of police officer. -** (1) When a person is arrested on a charge of committing an offence of such a nature and alleged to have been committed under such circumstances that there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of an offence, it shall be lawful for a registered medical practitioner, acting at the request of a police officer not below the rank of sub- inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the person arrested as is reasonably necessary in order to ascertain the facts which may afford such evidence, and to use such force as is reasonably for that purpose.*

(2) Whenever the person of a female is to be examined under this section, the examination shall be made only by, or under the supervision of, a female registered medical practitioner.

1[Explanation.--In this section and in sections 53A and 54,-

*(a) "**examination**"shall include the examination of blood, blood stains, semen, swabs in case of sexual offences, sputum and sweat, hair samples and finger nail clippings by the use of modern and scientific techniques including DNA profiling and such other tests which the registered medical practitioner thinks necessary in a particular case;*

*(b) "**registered medical practitioner**" means a medical practitioner who possesses any medical qualification as defined in clause (h) of section 2 of the Indian Medical Council Act, 1956 (102 of 1956) and whose name has been entered in a State Medical Register.] "*

7. It is submitted that in view of same, since material collected by medical practitioner and sent for FSL/DNA report will fall within Section 53 therefore, FSL/DNA report is required to be filed alongwith the challan and if not filed, accused/appellant is entitled to default bail.

8. Government Advocate appearing for the State opposed the aforesaid prayer. It is submitted that medical examination of victim of rape is not covered under Section 53 of Code of Criminal Procedure, therefore, applicant is not entitled for grant of default bail.

9. Heard the counsel for the parties.

10. Section 53 of Code of Criminal Procedure is regarding examination of accused by medical practitioner and Section 53 will not cover examination of

complainant/victim of crime. Complainant or victim of crime is medically examined under Section 164-A of Code of Criminal Procedure. Section 164-A provides as under :

> ***"164A. Medical examination of the victim of rape*** *- (1) Where, during the stage when an offence of rape or attempt to commit rape is under investigation, it is proposed to get the person of the woman with whom rape is alleged to have been committed or attempted, examined by a medical expert, such examination shall be conducted by a registered medical practitioner, with the consent of the woman or of some person competent to give such consent on her behalf and the woman shall he forwarded to the registered medical practitioner within twenty-four hours from the time of receiving the information relating to the commission of such offence.*
>
> *(2) The registered medical practitioner to whom such woman is forwarded shall without delay examine her person and prepare a report specifically recording the result of his examination and giving the following particulars, namely :-*
>
> *(i) the name and address of the woman and of the person by whom she was brought,*
>
> *(ii) the age of the woman,*
>
> *(iii) whether the victim was previously used to sexual intercourse,*
>
> *(iv) marks of injuries, if any, on the person of the woman,*
>
> *(v) general mental condition of the woman, and*
>
> *(vi) other material particulars, in reasonable detail.*
>
> *(3) The report shall state precisely the reasons for each conclusion arrived at.*
>
> *(4) The report shall specifically record that the consent of the woman or of some person competent to give such consent on her behalf to such examination had been obtained.*
>
> *(5) The exact time of commencement and completion of the examination shall also be noted in the report.*
>
> *(6) the registered medical practitioner shall without delay, forward the report to the investigating officer, who shall forward it to the Magistrate referred to in section 173 as part of the documents referred to In clause (a) of sub-section (5) of that section.*

(7) Nothing in this section shall be construed as rendering lawful any examination without the consent of the victim or of any person competent to give such consent on her behalf. "

11. As per said section, victim of rape is to be medically examined by medical practitioner, which includes description of material taken from person of women for DNA profiling. Said medical examination does not contain FSL report or DNA report. Examination report has to give description of material taken from prosecutrix for DNA profiling. Report will come at subsequent stage and same is not mentioned in Section 164- A(2). Therefore, it is not mandatory for prosecution to file FSL report or DNA report alongwith the challan and can also produced in Court later on. On basis of non filing of said report, appellant is not entitled for grant of defualt bail.

12. **I.A. No. 15646/2022 filed by appellant is hereby dismissed.**

13. Government Advocate is directed to call for case diary.

14. List the matter after a week for consideration.

Order accordingly

I.L.R. 2023 M.P. 179

Before Mr. Justice Sushrut Arvind Dharmadhikari

CRA No. 2727/1998 (Jabalpur) decided on 21 November, 2022

MUKESH KUMAR GUPTA …Appellant

Vs.

STATE OF M.P. …Respondent

***A. Penal Code (45 of 1860), Section 304-B & 498-A, Dowry Prohibition Act (28 of 1961), Section 3/4 and Evidence Act (1 of 1872), Section 113-B – Accidental/Suicidal/Homicidal Death – Presence of Accused* – Held – Section 304-B IPC does not categorize death as homicidal, suicidal or accidental – It is established that deceased was subjected to cruelty for demand of dowry by appellant – Body of deceased found sprinkled with kerosene oil thus possibility of accident is ruled out – Non-presence of appellant does not save him from criminal liability u/S 304-B IPC as death of deceased is result of long harassment by appellant for demand of dowry and Section 304-B covers suicidal death too – Conviction upheld – Appeal dismissed. (Paras 16 & 35 to 41)**

क. दण्ड संहिता (1860 का 45), धारा 304–B व 498–A, दहेज प्रतिषेध अधिनियम (1961 का 28), धारा 3/4 एवं साक्ष्य अधिनियम (1872 का 1), धारा 113–B – दुर्घटनावश/आत्महत्या/मानववध मृत्यु – अभियुक्त की उपस्थिति – अभिनिर्धारित – भा.दं.सं. की धारा 304–B मृत्यु को मानव–वध, आत्महत्या या दुर्घटनावश के रूप में

वर्गीकृत नहीं करती – यह स्थापित होता है कि मृतिका के साथ अपीलार्थी द्वारा दहेज की मांग के लिए क्रूरता का व्यवहार किया गया – मृतिका के शरीर पर मिट्टी तेल का छिड़काव पाया गया इसलिए दुर्घटना की संभावना से इंकार किया जाता है – अपीलार्थी का उपस्थित न होना उसे भा.दं.सं. की धारा 304–**B** के आपराधिक दायित्व से नहीं बचा सकता क्योंकि मृतिका की मृत्यु अपीलार्थी द्वारा दहेज की मांग के लिए लंबे समय तक किए गए उत्पीड़न का परिणाम है तथा धारा 304–**B** आत्महत्या से मृत्यु को भी आच्छादित करती है – दोषसिद्धि कायम – अपील खारिज।

B. ***Penal Code (45 of 1860), Section 304-B and Evidence Act (1 of 1872), Section 113-B – Presumption – Burden of Proof*** **– Held – Since ingredients of Section 304-B IPC are satisfied, presumption u/S 113-B of Evidence Act operates against appellant who is deemed to have committed the offence, therefore the burden shifts on the accused to rebut the aforesaid presumption – Presumption u/S 113-B goes against appellant as he failed to rebut the same. (Paras 18, 34 & 37)**

ख. दण्ड संहिता (1860 का 45), धारा 304–B एवं साक्ष्य अधिनियम (1872 का 1), धारा 113–B – उपधारणा – सबूत का भार – अभिनिर्धारित – चूंकि भा.दं.सं. की धारा 304–**B** के घटक संतुष्ट होते हैं, साक्ष्य अधिनियम की धारा 113–**B** के अंतर्गत उपधारणा अपीलार्थी के विरूद्ध लागू होती है, जिसे अपराध कारित करने वाला माना गया है, अतः पूर्वोक्त उपधारणा को खंडित करने का भार अभियुक्त पर चला जाता है – धारा 113–**B** के अंतर्गत उपधारणा अपीलार्थी के विरूद्ध जाती है क्योंकि वह उक्त का खंडन करने में असफल रहा।

C. ***Dowry Prohibition Act (28 of 1961), Section 8-A – Presumption*** **– Held – Presumption u/S 8-A of 1961 Act also shifts burden on accused to prove that he had not committed the offence. (Para 12 & 19)**

ग. दहेज प्रतिषेध अधिनियम (1961 का 28), धारा 8–A – उपधारणा – अभिनिर्धारित – 1961 के अधिनियम की धारा 8–**A** के अंतर्गत उपधारणा भी अभियुक्त पर यह साबित करने का भार डालती है कि उसने अपराध कारित नहीं किया था।

D. ***Penal Code (45 of 1860), Section 304-B – Phrase "Soon Before Her Death"*** **– Held – The phrase "soon before her death" in Section 304-B IPC does not mean "immediately prior to death of deceased" – However prosecution must establish existence of "proximate and live link" between dowry death and cruelty or harassment for dowry demand by husband or his relatives. (Paras 31 to 33)**

घ. दण्ड संहिता (1860 का 45), धारा 304–B – वाक्यांश ''उसकी मृत्यु के ठीक पूर्व'' – अभिनिर्धारित – भा.दं.सं. की धारा 304–**B** में वाक्यांश ''उसकी मृत्यु के ठीक पूर्व'' का अर्थ ''मृतिका की मृत्यु के तत्काल पूर्व'' नहीं है – यद्यपि अभियोजन को पति या

उसके रिश्तेदारों द्वारा दहेज की मांग के लिए क्रूरता अथवा उत्पीड़न तथा दहेज मृत्यु के बीच ''निकट तथा सीधा संबंध'' की विद्यमानता को स्थापित करना होगा।

***E. Penal Code (45 of 1860), Section 304-B – Cruelty* – Held – Evidence shows that appellant used to restrain the deceased to go to her parental house which amounts to mental cruelty. (Para 30)**

ङ. दण्ड संहिता (1860 का 45), धारा 304–B – क्रूरता – अभिनिर्धारित – साक्ष्य दर्शाता है कि अपीलार्थी मृतिका को उसके मायके जाने से रोका करता था जो मानसिक क्रूरता की कोटि में आएगा।

***F. Penal Code (45 of 1860), Section 304-B – Ingredients* – Discussed and explained. (Para 13)**

च. दण्ड संहिता (1860 का 45), धारा 304–B – घटक – विवेचित एवं स्पष्ट किये गये।

***G. Evidence Act (1 of 1872), Section 113-A & 113-B – Presumption* – Held – When married woman commits suicide within 7 years of marriage on instigation of her husband or his relatives, presumption u/S 113-A is attracted whereas when married woman dies of unnatural death either suicidal or homicidal due to harassment/cruelty in connection to dowry demands soon before her death by husband or his relatives, presumption u/S 113-B comes into effect. (Para 18)**

छ. साक्ष्य अधिनियम (1872 का 1), धारा 113–A व 113–B – उपधारणा – अभिनिर्धारित – जब विवाहित महिला विवाह के 7 वर्ष के भीतर उसके पति या उसके रिश्तेदारों के उकसाये जाने पर आत्महत्या करती है, धारा 113–A के अंतर्गत उपधारणा आकर्षित होती है जबकि जब विवाहित महिला की अस्वाभाविक मृत्यु या तो आत्महत्या अथवा मानव वध से पति या उसके रिश्तेदारों द्वारा उसकी मृत्यु के ठीक पूर्व दहेज की मांग के संबंध में उत्पीड़न/क्रूरता के कारण होती है, धारा 113–B के अंतर्गत उपधारणा प्रभावशील होती है।

***H. Criminal Practice – Related & Hostile Witness – Credibility* – Held – Evidence of witnesses cannot be discarded merely because they have been declared hostile on specific point and they were relatives of deceased – Relationship is not a factor to affect credibility of a witness, however close scrutiny is required before accepting their evidence. (Para 29)**

ज. दाण्डिक पद्धति – संबंधित तथा पक्षद्रोही साक्षी – विश्वसनीयता – अभिनिर्धारित – साक्षीगण का साक्ष्य मात्र इसलिए अस्वीकार नहीं किया जा सकता क्योंकि वे किसी विनिर्दिष्ट बिंदु पर पक्षद्रोही घोषित किए गए तथा वे मृतिका के रिश्तेदार थे –

संबंध साक्षी की विश्वसनीयता को प्रभावित करने वाला कारक नहीं है, किंतु उनका साक्ष्य स्वीकार करने के पूर्व सूक्ष्म संवीक्षा किया जाना अपेक्षित है।

Cases referred:

(2009) 16 SCC 35, I.L.R. (2017) M.P. 902, (2000) 5 SCC 207, (2013) 16 SCC 353, (2011) 11 SCC 359, (2013) 14 SCC 434, (2014) 4 SCC 129, CRA No. 1735-1736/2010 decided on 28.05.2021 (Supreme Court).

Hitendra Kumar Golhani, *Amicus Curiae* for the appellant.
Praveen Namdeo, G.A. for the respondent.

J U D G M E N T

S. A. DHARMADHIKARI, J. :- This Criminal Appeal under Section 374 (2) Cr.P.C. has been preferred by the appellant being aggrieved by the judgment of conviction and sentence dated 07.11.1998 passed by learned Second ASJ Katni, District Katni in S.T. No. 621/1997 whereby the learned ASJ has convicted the appellant for the offence punishable under Section 498-A, 304-B of Indian Penal Code (hereinafter referred as 'IPC') as well as Section 3/4 of Dowry Prohibition Act 1961 (hereinafter referred as 'Act 1961'). Since, offence under Section 498-A of IPC and 3/4 of the Act 1961 occurred in the course of the same transaction, the trial Court sentenced him under Section 304-B of IPC to undergo R.I. for seven years with fine of Rs. 5000/-. Default stipulation has also been imposed by trial Court.

2. According to prosecution case, on 18.08.1997 information regarding unnatural death of deceased by burn was reported to police by the appellant. Police registered the *marg intimation report* and inquired the matter. During inquiry, police conducted the post-mortem of the deceased as well as recorded the statements of witnesses whereby it was revealed that marriage of deceased Rupa Gupta was solemnized with appellant on 07.05.1993. During marriage, initially no demand of dowry was made by the appellant and his brother Ramkrishn but after performing *Bhanwar rituals,* the appellant demanded scooter which could not be fulfilled by the father of deceased i.e. Lallu Lal (PW1). Thereafter, the appellant and his brother started reproaching the deceased for not giving scooter by her father. They were continuously demanding scooter or Rs.20,000/- in lieu of that. The father of deceased Lallu Lal (PW1) had given Rs.8,000/- to the appellant and promised to give rest of the amount after paddy harvest. Being annoyed from non-fulfillment of demand, appellant started torturing the deceased for demand of dowry, resultantly, the deceased died of unnatural death by setting herself ablaze in her matrimonial residential house. Thereafter police registered FIR (Ex.P/24) against present appellant and his brother Ramkrishn Gupta for the offence

punishable under Section 304-B, 498-A read with Section 34 IPC as well as 3/4 of Dowry Prohibition Act 1961.

3. After completing the investigation, police filed the charge sheet. The accused persons abjured their guilt and claimed to be tried. In order to substantiate the prosecution case, the prosecution has produced 18 prosecution witnesses. The trial Court also recorded the statements of accused persons under Section 313 of Cr.P.C. After considering the evidence adduced by the parties, the learned trial Judge, came to conclusion that the appellant is guilty for the offence as mentioned in para -I. However, the learned trial Judge acquitted the co-accused Ramkrishn from the alleged offences as he found that the prosecution has failed to establish its case against co-accused Ramkrishn.

4. The learned counsel for the appellant submitted that the judgment passed by the learned trial Court is bad-in-law and contrary to facts and evidence of the case. The evidence led by the prosecution witnesses suffers from serious infirmity. The judgment of trial court is based upon the testimony of interested witnesses i.e. Lallu Lal (PW-1), Krishna Bai Gupta (PW-2), and Bahori Lal (PW-5) whereas they have turned hostile. Jagdish Namdeo (PW-3) and Anil Kumar Gupta (PW-12) are neighbour of the deceased, who deposed that they never saw appellant treating the deceased with cruelty. The appellant was not present during the incident. The prosecution failed to bring any cogent evidence against the appellant with regard to demand of dowry. The learned trial court ought to have seen that there is no independent witness who supported the prosecution case. No such prior report or complaint with regard to making demand of dowry and cruelty with the deceased, has ever been made by the deceased herself or by her relatives. The appellant himself reported the incident to police. Indeed, the deceased died accidentally while using stove. No ingredient is present to constitute the offence under Section 304-B of IPC. In support of his contention, he has relied upon judgments of Hon'ble Supreme Court as well as this High Court, same are mentioned hereinunder:-

(1) *Raman Kumar Vs. State of Punjab,* reported in (2009) 16 SCC 35.

(2) *Suresh Kumar & Anr.* reported in I.L.R (2017) M.P. 902.

5. On the other hand, learned counsel for the respondent-State opposed the submission made by appellant's counsel submitting that the prosecution succeeded to prove its case beyond any reasonable doubt. There is specific allegation against the appellant for demand of dowry and cruelty soon before death of deceased. The deceased died of unnatural death within the period of five years from her marriage, thus, presumption of Section 113-B comes into play which is against the appellant. The appellant narrated false story of incident. However, some of the prosecution witnesses have turned hostile but they stated

sufficient against the appellant to secure his conviction. They have duly supported the case of prosecution. The learned trial court has rightly considered the evidence of the case. With the aforesaid submissions, he prays for dismissal of the instant appeal.

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

7. While arguing the instant appeal, the learned counsel for the appellant has raised the following grounds -

> *"(1) That, the possibility of accidental burn could not be ruled out in the present case.*
>
> *(2) That, the prosecution failed to prove that there was a demand of dowry as important witnesses including family members of deceased have turned hostile and also there is material contradictions and omissions in the statements of prosecution witnesses.*
>
> *(3) Lastly, the prosecution also failed to prove that deceased was subjected to cruelty soon before her death."*

8. Before dealing with the merits of the case, it would be appropriate to discuss the legal aspect first.

9. The offence involved in the case under the IPC are Sections 304-B & 498-A of IPC which are reproduced herein-under -

> **"304-B. Dowry death**.—(1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry death", and such husband or relative shall be deemed to have caused her death. Explanation.—For the purpose of this sub-section, "dowry" shall have the same meaning as in section 2 of the Dowry Prohibition Act, 1961 (28 of 1961).(2) Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life."
>
> **498-A. Husband or relative of husband of a woman subjecting her to cruelty**.— Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.
>
> **Explanation.—**For the purpose of this section, "cruelty" means—(a) any willful conduct which is of such a nature as is likely to drive the

woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or

(b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand."

10. The appellant has also been convicted for the offence punishable under Section 3/4 of Act 1961. The said provision is also quoted herein-under -

> **"3. Penalty for giving or taking dowry.-** (1) If any person, after the commencement of this Act, gives or takes or abets the giving or taking of dowry, he shall be punishable with imprisonment for a term which shall not be less than five years, and with the fine which shall not be less than fifteen thousand rupees or the amount of the value of such dowry, whichever is more: Provided that the Court may, for adequate and special reasons to be recorded in the judgment, impose a sentence of imprisonment for a term of less than five years. * * * Explanation I omitted by Sec.2 w.e.f 2nd October, 1985
>
> (2) Nothing in sub-section (1) shall apply to or, in relation to, - presents which are given at the time of a marriage to the bride (without nay demand having been made in that behalf):
>
> Provided that such presents are entered in list maintained in accordance with rule made under this Act; presents which are given at the time of marriage to the bridegroom (without any demand having been made in that behalf): Provided that such presents are entered in a list maintained in accordance with rules made under this Act; Provided further that where such presents are made by or on behalf of the bride or any person related to the bride, such presents are of a customary nature and the value thereof is not excessive having regard to the financial status of the person by whom, or on whose behalf, such presents are given.
>
> **4. Penalty for demanding dowry.-** (1) If any person demands directly or indirectly, from the parents or other relatives or guardian of a bride or bridegroom as the case may be, any dowry, he shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to two years and with fine which may extend to ten thousand rupees: Provided that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than six months."

11. Since, the deceased died within seven years of her marriage, under the Indian Evidence Act, 1872, there is presumption of Section 113-A & 113-B. These provisions are also quoted herein-under -

> **"113-A. Presumption as to abetment of suicide by a married woman**.—When the question is whether the commission of suicide by a woman had been abetted by her husband or any relative of her husband and it is shown that she had committed suicide within a period of seven years from the date of her marriage and that her husband or such relative of her husband had subjected her to cruelty, the Court may presume, having regard to all the other circumstances of the case, that such suicide had been abetted by her husband or by such relative of her husband
>
> Explanation.—For the purposes of this section, "cruelty" shall have the same meaning as in section 498A of the Indian Penal Code
>
> **113-B. Presumption as to dowry death.**—When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman has been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the Court shall presume that such person had caused the dowry death. Explanation.—For the purposes of this section, "dowry death" shall have the same meaning as in section 304B, of the Indian Penal Code, (45 of1860)"

12. Likewise, under the dowry prohibition Act 1961, there is also presumption prescribed under Section 8-A, which is also reproduced herein-under -

> **"8-A. Burden of proof in certain cases:** Where any person is prosecuted for taking or abetting the taking of any dowry under Sec. 3, or the demanding of dowry under Sec.4, the burden of proving that he had not committed an offence under those sections shall be on him."

13. Further, the Hon'ble Apex Court has summed up the principle to constitute the offence under Section 304-B IPC. In the case of *Kansraj Vs. State of Punjab*, reported in (2000) 5 SCC 207, the Hon'ble Apex Court has elucidated the following ingredients to prove dowry death -

> "(*a) the death of a woman was caused by burns or bodily injury or had occurred otherwise than under normal circumstances;*
>
> *(b) such death should have occurred within 7 years of her marriage;*
>
> *(c) the deceased was subjected to cruelty or harassment by her husband or by any relative of her husband;*
>
> *(d) such cruelty or harassment should be for or in connection with the demand of dowry; and*
>
> *(e) to such cruelty or harassment the deceased should have been subjected to soon before her death.*"

14. Further, in the case of *Suresh Kumar v. State of Haryana*, reported in (2013) 16 SCC 353, the Hon'ble Supreme Court also has held as under -

> **27.** Importantly, Section 304-B IPC does not categorize death as homicidal or suicidal or accidental. This is because death caused by burns can, in a given case, be homicidal or suicidal or accidental. Similarly, death caused by bodily injury can, in a given case, be homicidal or suicidal or accidental. Finally, any death occurring "otherwise than under normal circumstances" can, in a given case, be homicidal or suicidal or accidental. Therefore, if all the other ingredients of Section 304-B IPC are fulfilled, any death (whether homicidal or suicidal or accidental) and whether caused by burns or by bodily injury or occurring otherwise than under normal circumstances shall, as per the legislative mandate, be called a "dowry death" and the woman's husband or his relative "shall be deemed to have caused her death". The section clearly specifies what constitutes the offence of a dowry death and also identifies the single offender or multiple offenders who has or have caused the dowry death
>
> **28.** The evidentiary value of the identification is stated in Section 113-B of the Evidence Act, 1872 (the Act). The key words in this section are "shall presume" leaving no option with a court but to presume an accused brought before it of causing a dowry death guilty of the offence. However, the redeeming factor of this provision is that the presumption is rebuttable. Section 113-B of the Act enables an accused to prove his innocence and places a reverse onus of proof on him or her."

15. Further, in the case of *Bansi Lal v. State of Haryana*, reported in (2011) 11 SCC 359, the Hon'ble Supreme Court observed as under -

> **"19.** It may be mentioned herein that the legislature in its wisdom has used the word "shall" thus, making a mandatory application on the part of the court to presume that death had been committed by the person who had subjected her to cruelty or harassment in connection with any demand of dowry. It is unlike the provisions of Section 113-A of the Evidence Act where a discretion has been conferred upon the court wherein it had been provided that court may presume abetment of suicide by a married woman. Therefore, in view of the above, onus lies on the accused to rebut the presumption and in case of Section 113-B relatable to Section 304-B IPC, the onus to prove shifts exclusively and heavily on the accused. The only requirements are that death of a woman has been caused by means other than any natural circumstances; that death has been caused or occurred within 7 years of her marriage; and such woman had been subjected to cruelty or harassment by her husband or any relative of her husband in connection with any demand of dowry.

> **20.** Therefore, in case the essential ingredients of such death have been established by the prosecution, it is the duty of the court to raise a presumption that the accused has caused the dowry death....."

16. On reading of the above mentioned provisions and verdicts given by the Hon'ble Supreme Court, it appears that when the death of a woman is caused by burns or bodily injury or occurred otherwise than under normal circumstances within a period of seven years of her marriage and the woman was subjected to cruelty or harassment by her husband or any relative of her husband and such cruelty of her husband should be for or in connection with the demand of dowry and such cruelty or harassment, the deceased should have been subjected to soon before her death be called as dowry death and the women's husband or his relative shall be deemed to have caused her death. Section 304-B of IPC does not categorize death as homicidal or suicidal or accidental. Likewise, Section 498-A of IPC provides that any willful conduct of the husband or relatives of the husband of a woman is of such a nature as is likely to drive the women to commit suicide or to cause grave injury or danger to life, limb or health whether mental or physical of the woman, or harassment of the woman where such harassment is with a view to coercing her or her relative to meet any unlawful demand of any property or valuable security or is on account of failure by her or her relative to meet such demand, is offence under Section 498-A of IPC.

17. Further, two things has to be seen in respect of offence punishable under Section 304-B IPC, first to make sure whether the ingredients of the Section have been made out against the accused and if the findings are affirmative then secondly to ascertain that the accused is deemed to have caused the death of the woman.

18. Further, when the married woman committed suicide within a period of seven years of her marriage on the instigation of her husband or relative of husband, then presumption of Section 113-A comes into play whereas when a married woman died of unnatural death either suicidal or homicidal due to harassment or cruelty was made in connection to any dowry demands soon before her death, by her husband or relative of husband, presumption of Section 113-B comes into effect and under the said circumstance, the Court shall presume that such person had caused the dowry death. .Once the ingredients of Section 304-B IPC are fulfilled by the prosecution, the onus shifts to the defence to produce evidence to rebut the statutory presumption and to prove that the death was in the normal course and the accused were not connected.

19. So far as offence relating to Act 1961, i..e. Section 3/4 is concerned, same prohibits for giving, taking and demanding of dowry and provides punishment for that too. The presumption given under Section 8-A of the Act 1961 shifts burden on the accused to prove he had not committed offence.

20. Since, offence under Section 304-B of IPC covers the parameters which are necessary to constitute the offence under Section 498- A and 3/4 of Act, 1961, therefore, there is no need to examine the evidence separately in relation thereof.

21. The learned trial court has given its affirmative finding with regard to dowry death of deceased by the appellant, therefore, this Court has to examine whether the findings of the learned trial court is correct or not?

22. Now I am embarking upon to examine the evidence available on record.

23. On perusal of record, it is undisputed that marriage of deceased Rupa Gupta was solemnized with appellant on 07.05.1993 and she died of unnatural death on 18.07.1997 within seven years from the date of her marriage.

24. With respect to cause of death, doctor R.K.Gupta (PW-10) examined before the trial Court and he deposed that he found smell of kerosene oil on the entire body of deceased who had suffered 100% burn injuries. According to him, she died due to asphyxia because of burn. As the deceased succumbed to burn injuries within seven years of marriage, it becomes clear that first two ingredients of Section 304-B are satisfied.

25. So far as demand of dowry is concerned, the evidence on record suggests that Lallu Lal (PW-1) father of deceased, Krishna Bai (PW- 2) mother of deceased and Bahori Lal (PW-5) cousin of deceased/mediator of marriage are unanimous on the point of demand of scooter or Rs. 20,000/- in lieu of that by the appellant. They seem to be consistent in their cross examination on the said point. Moreover, PW-1 and PW-2 deposed that the deceased had disclosed that the appellant used to harass her on account of bringing insufficient dowry. On 25.06.1997, the deceased came to her parental house alongwith appellant to attend some family function where appellant demanded sum and on refusal thereof, he quarreled with the deceased and left the house. PW-2 has further stated in para-17 of her cross examination that the appellant restrained the deceased to come to her parental house due to non-fulfillment of demand of dowry. The police statements of PW-1 and PW-2 indicate demand of dowry by the appellant. Further, Bahori Lal (PW-3) was the mediator through whom the marriage of deceased and appellant was solemnized, has also accepted the fact that the appellant was demanding dowry from the family members of deceased.

26. However, these aforesaid witnesses have been declared hostile and their credibility has also been doubted by the appellant's counsel because of their hostility and interest being close relative of deceased.

27. To the context of admissibility of evidence given by hostile witness, in the case of *Rohtash Kumar v. State of Haryana*, reported in (2013) 14 SCC 434, the Hon'ble Supreme Court has held as under :-

> **"25.** It is a settled legal proposition that evidence of a prosecution witness cannot be rejected in toto, merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witnesses cannot be treated as effaced, or washed off the record altogether. The same can be accepted to the extent that their version is found to be dependable, upon a careful scrutiny thereof.
>
> **26**. In *State of U.P.* v. *Ramesh Prasad Misra* [(1996) 10 SCC 360 : 1996 SCC (Cri) 1278 : AIR 1996 SC 2766] this Court held, that evidence of a hostile witness would not be rejected in entirety, if the same has been given in favour of either the prosecution, or the accused, but is required to be subjected to careful scrutiny, and thereafter, that portion of the evidence which is consistent with either the case of the prosecution, or that of the defence, may be relied upon.
>
> **27**. Therefore, the law permits the court to take into consideration the deposition of a hostile witness, to the extent that the same is in consonance with the case of the prosecution, and is found to be reliable in careful judicial scrutiny."

28. The principle relating to interested witnesses/close relatives has also been laid down by the Hon'ble Supreme Court in the case of *Surinder Singh Vs. State of Haryana*, reported in (2014) 4 SCC 129, relevant para is reproduced as under:-

> "33. Before closing, the most common place argument must be dealt with. In all cases of bride burning it is submitted that independent witnesses have not been examined. When harassment and cruelty is meted out to a woman within the four walls of the matrimonial home, it is difficult to get independent witnesses to depose about it. Only the inmates of the house and the relatives of the husband, who cause the cruelty, witness it. Their servants, being under their obligation, would never depose against them. Proverbially, neighbours are slippery witnesses. Moreover, witnesses have a tendency to stay away from courts. This is more so with neighbours. In bride burning cases who else will, therefore, depose about the misery of the deceased bride except her parents or her relatives? It is time we accept this reality. We, therefore, reject this submission."

29. Therefore, the evidence of witnesses cannot be discarded merely they have declared hostile on the specific point and they were relatives of the deceased. Relationship is not a factor to affect credibility of a witness. However, close scrutiny is required before accepting their evidence.

30. Now, coming back to merits of the case, Jagdish Namdeo (PW- 3) and Anil Kumar Gupta (PW-12) who were the neighbour of appellant deposed before the

Court that the deceased wanted to go her parental house on the festival of Rakshabandhan; but, the appellant refused to do so, however, PW-3 stated in his cross examination that on account of business engagement and illness of son, the appellant refused the deceased to go to her parental house and on the date of incident the appellant had gone for medical checkup of his son. But, the appellant failed to produce any documentary proof viz. medical prescription in this regard. Rather, the evidence given by PW-3 and PW-12 supported the evidence given by PW-2 on the point that the appellant used to restrain the deceased to go to her parental house which amounts to mental cruelty.

31. The learned counsel for the appellant has also argued that there is no evidence to show that any demand of dowry was made soon before the death. In this context, in the case of *Kans Raj* (supra), the Hon'ble Supreme Court has defined the meaning of phrase 'soon after' used in the provision of Section 304-B of IPC, relevant para is quoted as under:-

> "15.It is further contended on behalf of the respondents that the statements of the deceased referred to the instances could not be termed to be cruelty or harassment by the husband soon before her death. "Soon before" is a relative term which is required to be considered under specific circumstances of each case and no straitjacket formula can be laid down by fixing any time-limit. This expression is pregnant with the idea of proximity test. The term "soon before" is not synonymous with the term "immediately before" and is opposite of the expression "soon after" as used and understood in Section 114, Illustration (a) of the Evidence Act. These words would imply that the interval should not be too long between the time of making the statement and the death. It contemplates the reasonable time which, as earlier noticed, has to be understood and determined under the peculiar circumstances of each case. In relation to dowry deaths, the circumstances showing the existence of cruelty or harassment to the deceased are not restricted to a particular instance but normally refer to a course of conduct. Such conduct may be spread over a period of time. If the cruelty or harassment or demand for dowry is shown to have persisted, it shall be deemed to be "soon before death" if any other intervening circumstance showing the non-existence of such treatment is not brought on record, before such alleged treatment and the date of death. It does not, however, mean that such time can be stretched to any period. Proximate and live link between the effect of cruelty based on dowry demand and the consequential death is required to be proved by the prosecution. The demand of dowry, cruelty or harassment based upon such demand and the date of death should not be too remote in time which, under the circumstances, be treated as having become stale enough."

32. Therefore, now it becomes clear that the phrase 'soon before her death' in Section 304B IPC does not mean 'immediately prior to death of deceased'. However, the prosecution must establish existence of "proximate and live link" between the dowry death and cruelty or harassment for dowry demand by the husband or his relatives.

33. In the present case, the incident had taken place within two months i.e. on 25.06.1997 when deceased came to her parental house for attending family function where appellant demanded dowry. Therefore, this is not a case where the allegation was leveled after lapse of sufficient time which would prove fatal to the case of the prosecution. The aforesaid chain of circumstances proves that there existed a live and proximate link between the instances of demand of dowry and the death of deceased.

34. From the above analysis, it is clear that the prosecution was able to successfully prove that the death of deceased occured due to burn injuries within seven years of her marriage under other than normal circumstances. It has further been proved that soon before her death she was subjected to harassment and cruelty pursuant to demand of dowry. Since, the ingredients of Section 304-B of IPC stand satisfied, the presumption under 113-B, Evidence Act operates against the appellant, who is deemed to have committed the offence specified under Section 304-B of IPC, therefore, the burden shifts on the accused to rebut the aforesaid presumption.

35. Learned counsel for the appellant submitted that the deceased got burnt accidentally while using stove and it is a case of accidental death, and therefore, appellant cannot be fastened with criminal liability. However, the record of the trial Court indicates that the appellant did not produce any witness in support of his case. In his statement recorded under Section 313 of Cr.P.C, he explained that during the incident he was not in the house and had gone to the hospital for treatment of his son. But, on perusal of record, it is found that R.K.Gupta (PW-10) deposed before the trial Court that he found smell of kerosene oil on the entire body of deceased who had suffered 100% burn injuries. In the case of *Satbir Singh & Another Vs. State of Haryana,* passed in Criminal Appeal No. 1735-1736 of 2010, passed on 28.05.2021, the Hon'ble Supreme Court dealt with identical issue where the appellant claimed the death of deceased as accidental. The Hon'ble Supreme Court observed as under:-

> 29. The burden therefore shifts on the accused to rebut the aforesaid presumption. The counsel for the appellants has canvassed before us that it was a case of accidental death, and hence no liability can be fixed upon them. However, in the present case, the accused persons failed to place any

evidence on record to prove that the death was accidental or unconnected with the accused persons.

30. Here, it ought to be noted that, according to the evidence of the doctor, the entire body of the deceased was doused with kerosene oil. Therefore, the possibility of an accident can be safely ruled out. As the Trial Court concluded:-

All these circumstances go to prove that either deceased committed suicide by sprinkling kerosene oil on her body or she was burnt by sprinkling kerosene on her body either by the accused or by somebody else and the plea of accident tried to be made out by the learned counsel for the accused, is not at all proved."

36. In the present case, as mentioned above, it was found that body of the deceased was sprinkled with kerosene oil and therefore, in view of the observation made in *Satbir Singh* (Supra), the possibility of accident can be safely ruled out herein also. Further, if presumed that deceased committed suicide by setting her ablaze, even then, ingredients of section 304-B are satisfied as death of deceased is subjected to demand of dowry. So far as defence relating to appellant being not present during the incident is concerned, the appellant failed to produce any satisfactory proof in this regard. Moreover, non-presence of appellant does not save him from criminal liability under Section 304-B of IPC as the death of deceased is the result of long harassment by the appellant for demand of dowry and Section 304-B of IPC covers suicidal death too. Judgments relied upon by counsel for the appellant are not applicable in the facts and circumstances of the present case.

37. Therefore, the presumption given under Section 113-B of Evidence Act goes against the appellant and he failed to rebut the same herein. The finding given by the trial Court regarding conviction under Section 304-B of IPC is hereby affirmed. So far as conviction under Section 498-A of IPC as well as 3/4 of Act 1961 are concerned, it has already been discussed and proved that the deceased was subjected to cruelty and demand of dowry by the appellant, therefore, conviction passed under Section 498-A of IPC and 3/4 of Dowry Prohibition Act, 1961 also deserves to be upheld.

38. So far as sentence is concerned, the trial court has imposed the minimum sentence under section 304-B of the I.P.C. Thus, the sentence imposed by the trial court is affirmed.

39. The appeal sans merit and is hereby dismissed. Impugned judgment of conviction and sentence, as passed by the trial Court is affirmed. The appellant is on bail. His bail bonds are cancelled and he is directed to immediately surrender before the Trial Court for undergoing the remaining jail sentence.

40. Let copy of this judgment along with its record be sent to the Court below for information and compliance.

41. The appeal fails and is hereby **dismissed.**

42. Lastly, this court records its appreciation for valuable assistance provided by learned *Amicus Curiae* Shri Hitendra Golhani, Advocate.

Appeal dismissed

I.L.R. 2023 M.P. 194

Before Mr. Justice Sushrut Arvind Dharmadhikari

CR No. 352/2019 (Jabalpur) decided on 17 November, 2022

STATE OF M.P. …Applicant

Vs.

RAJDEEP BUILDCON PVT. LTD. …Non-applicant

***A. Arbitration and Conciliation Act (26 of 1996), Section 16(2) – Question of Jurisdiction – Stage of Proceedings* – Held – Judgment debtor did not raise the issue of jurisdiction before the Arbitral Tribunal – In proceedings u/S 34 and further in Arbitrator Appeal also, no such issue was raised – No error in impugned order passed by Executing Court – Revision dismissed. (Paras 9 to 14)**

क. माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 16(2) – अधिकारिता का प्रश्न – कार्यवाहियों का प्रक्रम – अभिनिर्धारित – निर्णीत ऋणी ने माध्यस्थम् अधिकरण के समक्ष अधिकारिता का मुद्दा नहीं उठाया – धारा 34 के अंतर्गत कार्यवाहियों में तथा आगे माध्यस्थम् अपील में भी ऐसा कोई मुद्दा नहीं उठाया गया था – निष्पादन न्यायालय द्वारा पारित आक्षेपित आदेश में कोई त्रुटि नहीं – पुनरीक्षण खारिज।

***B. Arbitration and Conciliation Act (26 of 1996), Section 16(2) – Question of Jurisdiction of Tribunal – Stage of Proceeding* – Held – Apex Court concluded that question of jurisdiction cannot be raised later on, once the party to award have submitted to the jurisdiction of the Tribunal, filed statement of defence, led evidence, advanced arguments and ultimately challenged the award u/S 34 of the 1996 Act. (Para 12)**

ख. माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 16(2) – अधिकरण की अधिकारिता का प्रश्न – कार्यवाही का प्रक्रम – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया कि एक बार अवार्ड के पक्षकार द्वारा अधिकरण की अधिकारिता स्वीकार कर लेने, बचाव कथन प्रस्तुत करने, साक्ष्य प्रस्तुत करने, तर्क प्रस्तुत करने तथा अंततः अधिनियम 1996 की धारा 34 के अंतर्गत अवार्ड को चुनौती देने के पश्चात्, अधिकारिता का प्रश्न बाद में नहीं उठाया जा सकता।

Cases referred:

(2017) 8 SCC 116, (2018) 10 SCC 826, (2015) 13 SCC 713.

G.P. Singh, G.A. for the applicant.
D.K. Raghuwanshi, for the non-applicant.

O R D E R

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

The present civil revision, under Section 115 of the Code of Civil Procedure, 1908 has been filed taking exception to the order dated 06.02.2019 passed in Execution Case No. 15/2016 by the 2nd Additional Judge to the 1st District Judge, Chattarpur (M.P.).

2. The brief facts necessary for adjudication of this revision are that an advertisement was floated for the purpose of construction of Anicut in Dhasan River situated in Tehsil- Eshanagar, District Chhatarpur. In response, the respondent applied for the same and the work was allotted to the respondent, in pursuance whereof, the agreement was entered between the parties on certain terms and conditions. Since, some dispute arose between the parties and work was not completed within the specified duration, the agreement was terminated by the applicant vide order dated 25.06.2010. The respondent being aggrieved filed a reference before the Arbitral Tribunal constituted under M.P. Madhyastham Adhikaran Adhiniyam, 1983 (hereinafter referred to as the 'Act of 1983'). The applicant was noticed and, thereafter, response was filed. The award was passed by the Arbitral Tribunal exercising the powers under the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act of 1996') on 23.01.2014. The applicant being aggrieved by the award dated 23.01.2014, filed an application under Section 34 of the Act, 1996 was adjudicated and decided in favour of the respondent. The applicant again aggrieved, filed Arbitration Appeal before this Hon'ble Court which was registered as A.A. No. 27/2017. The said appeal was withdrawn vide order dated 06.09.2017 with liberty to file suitable objection before the Executing Court since during the intervening period, execution proceedings were already filed.

3. In view of the liberty granted to the applicant vide order dated 06.09.2017 in Arbitration Appeal, an objection was filed by the applicant before the Executing Court to the effect that the decree is not executable before this Court as the contract in question was 'works contract' as defined under Section 2(i) of the Act of 1983 and in view of the provisions of Section 7 of the Act, is having an

overriding effect, therefore, proceedings under the Arbitration and Conciliation Act, 1996 were not maintainable before the Arbitral Tribunal and, therefore, the award passed by the Arbitral Tribunal suffers from the vice of *Coram non judis* (sic: *Judice*).

4. In support of the contention, the applicant relied on the judgment passed by the Apex Court in the case of *Punjab State Civil Supplies Corporation Limited and Another Vs. Atwal Rice and General Mills*, reported in (2017) 8 SCC 116 to contend that the contract in question was 'works contract' and since the executing Court can look into the jurisdictional issue, the execution filed by the award holder be dismissed as the execution of the award whereof has been sought, is null and void and non est in the eye of law and cannot be executed.

5. Learned counsel for the applicant further relied on the judgment passed by the Division Bench of this Court in A.A.No. 79/2021 (*M/s Gayatri Project Ltd. Vs. Madhya Pradesh Road Development Corporation Limited*) to contend that when there is a challenge to lack of inherent jurisdiction the same can be raised at any stage and decree by a forum lacking inherent jurisdiction on the subject matter is a nullity. Such an objection can be raised at any stage, even in execution and collateral proceeding.

6. *Per contra*, learned counsel for the respondent vehemently opposed the prayer and contended that the applicant ought to have raised the objection at the relevant stage, therefore, the same is not tenable at the stage of execution which appears to have been done merely for the purpose of lingering the legitimate claim of the respondent and, therefore, prayed for dismissal of the objection.

7. Learned counsel for the respondent further relied on the judgment passed by the Apex Court in the case of *M.P. Rural Road Development Authority Vs. M/s L.G. Choudhary Engineers and Contractors*, reported in (2018) 10 SCC 826, wherein, the Apex Court has held that *"We do not express any opinion on the applicability of the State Act where award has already been made. In such case is if no objection to the jurisdiction of the Arbitration was taken at relevant stage, the award may not be annulled on that ground"*. On the aforesaid basis, he prays that the present revision deserves to be dismissed with costs.

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

9. On perusal of the record, it is seen that it is not in dispute that the respondent/judgment debtor did not raise the issue of jurisdiction before the Arbitral Tribunal. Later on, in the proceedings under Section 34 of the Act of 1966, the objection was not raised and similarly, in Arbitration Appeal also no such objection was raised which was permitted to be withdrawn subsequently. It

would be appropriate to mention that the applicant has suppressed the said fact that they never challenged/raised the objection before Arbitral Tribunal.

10. Section 35 of the Act of 1996 gives finality to the arbitration award and provides that it shall be binding on the parties and persons claiming the reliefs. Section 36 of the Act provides that the award shall be executed in the same manner as if it were a decree of the Court. Section 16(2) of the Act provides that the plea regarding lack of jurisdiction of the Arbitral Tribuanl (sic: Tribunal) can be raised on or before the submission of statement of defence.

11. In the case in hand, the challenge has been made to the award at the stages available to them under the law, but at no point of time the issue of jurisdiction was raised.

12. In the case of *MSP Infrastructure Ltd. Vs. Madhya Pradesh Road Development Corporation Ltd.,* (2015) 13 SCC 713, the Apex Court has categorically laid down that the question of jurisdiction cannot be raised later on, once the party to the award have submitted to the jurisdiction of the Tribunal, filed the statement of defence, led evidence, advanced arguments and ultimately challanged the award under Section 34 of the Act of 1996.

13. In view of the law laid down by the Hon'ble Apex Court in the case of *MSP Infrastructure Ltd.* (supra) and *M/s L.G. Choudhary Engineers and Contractors* (supra), the order passed by the Executing Court dated 06.02.2019 cannot be found fault with. The Court below has not committed any error apparent on the face of the record so as to interfere with the order.

14. Accordingly, this revision is hereby **dismissed**. No order as to costs.

Revision dismissed

I.L.R. 2023 M.P. 197

Before Mr. Justice Rajendra Kumar (Verma)

MCRC No. 36579/2019 (Indore) decided on 3 September, 2022

PREM KUMAR ...Applicant

Vs.

RAJNISH …Non-applicant

***A. Negotiable Instruments Act (26 of 1881), Section 138 and Criminal Procedure Code, 1973 (2 of 1974), Section 91 & 482 – Production of Documents* – Held – Once the necessity and desirability of documents to be summoned has been established then trial Court ought to have called the**

documents to confront witnesses – It is imperative that petitioner/accused be allowed to confront the complaint by documents to be summoned in his defence – Impugned order set aside – Application allowed. (Para 10 & 11)

क. परक्राम्य लिखत अधिनियम (1881 का 26), धारा 138 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 91 व 482 – दस्तावेजों का पेश किया जाना – अभिनिर्धारित – एक बार समन किए गए दस्तावेजों की आवश्यकता एवं वांछनीयता स्थापित हो जाती है तो विचारण न्यायालय को साक्षियों के सामने रखने के लिए दस्तावेज बुलाने चाहिए – यह अनिवार्य है कि याची/अभियुक्त को उसकी प्रतिरक्षा में समन किए जाने वाले दस्तावेजों से परिवाद का सामना करने की अनुमति दी जाए – आक्षेपित आदेश अपास्त – आवेदन स्वीकृत।

***B. Negotiable Instruments Act (26 of 1881), Section 138 and Criminal Procedure Code, 1973 (2 of 1974), Section 91 – Production of Documents – Stage of Trial* – Held – Application u/S 91 Cr.P.C. is not maintainable at the stage of framing of charges but accused can seek production of documents to prove his innocence at the later stage/after framing of charges. (Para 9)**

ख. परक्राम्य लिखत अधिनियम (1881 का 26), धारा 138 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 91 – दस्तावेजों का पेश किया जाना – विचारण का प्रक्रम – अभिनिर्धारित – आरोप विरचित करने के प्रक्रम पर दं.प्र.सं. की धारा 91 के अंतर्गत आवेदन पोषणीय नहीं है परंतु बाद के प्रक्रम पर/आरोप विरचित करने के पश्चात् अभियुक्त अपनी निर्दोषिता साबित करने के लिए दस्तावेज प्रस्तुत करने की मांग कर सकता है।

Cases referred:

2017 (3) LJL 325, 2014 (1) MPWN 70, (2005) 1 SCC 568, (2012) 1 SCC 699, (2014) 2 SCC 236, CRA No. 1233-35/2022 decided on 12.08.2022 (Supreme Court).

Makbool Ahmad Mansoori, for the applicant.
Vivek Dalal, for the non-applicant.

(Supplied : Paragraph numbers)

O R D E R

RAJENDRA KUMAR (VERMA), J. :- The petitioner has filed the present petition under Section 482 of Cr.P.C being aggrieved by the order dated 08.06.2019 and 06.07.2019 passed by JMFC, Dewas in Criminal Case No.329/2018 whereby the learned trial Court has rejected the applications moved by the petitioner under Section 91 of Cr.P.C.

2. Facts of the case in short are that the respondent has filed a private complaint under Section 138 of N.I. Act against the petitioner on 01.05.2018 being proprietor of M/s RR Stone. As per the complaint the petitioner being a colonizer had purchased material from the complainant and also hired the services of the JCB Machine, Dumper etc. pursuant to which the petitioner has issued a Cheuqe No.035942 dated 25.03.2018 for payment of rs.30,00,000/- in favour of the complainant. On being presented, the cheque was dishonored due to 'insufficient funds'. Thereafter, a complaint was made on behalf of the complainant and also served a legal notice on 04.04.2018 to the petitioner and since no payment was made by the petitioner, the complaint has been filed by the respondent for recovery of the said amount.

3. Based upon the said complaint, the learned trial court took cognizance against the petitioner on 01.05.2018 and petitioner appeared in the matter on 10.07.2018 and thereafter, the charge under Section 138 of N.I. Act was framed. Thereafter, the petitioner has filed an application under Section 91 of Cr.P.C. before the learned trial Court for producing Income Tax Returns and Balance sheet etc, but the learned trial Court vide order dated 08.06.2019 has dismissed the application of the petitioner by observing that the stage of the case. Thereafter,the petitioner has also moved another application under Section 91 of Cr.P.C. for production of the ITR, Balance Sheet and to show the transaction between the petitioner and the complainant, but the learned Court below has dismissed the application vide order dated 06.07.2019 in absence of counsel for the petitioner. Hence, the present petition before this Court.

4. Learned counsel for the petitioner submits that the learned Court below has erred in not considering that on the basis of the documents mentioned in the application filed under Section 91 of Cr.P.C., the petitioner may establish his innocence under the peculiar facts and circumstances of the case. It is further submitted that the amount as mentioned in the complaint is a huge amount of Rs.30 lacs and in all probability in usual course of business either, is reflected in the accounts book, bank account, income tax return and in the complaint should also have the Bills, Challan, royalty receipt, therefore, to protect the right of the petitioner for fair trial, all the things are necessary to be taken on record. It is further submitted that the learned trial Court has failed to consider that it is well established principle of law that free and fair trial is sine qua non of Article 21 of the Constitution of India and is main object of criminal law, therefore, it should not be hampered in any manner and fair trial must be afforded to every accused. It is further submitted that once the necessity and desirability of documents to be

summoned has been established by the petitioner then the learned trial Court ought to have called the documents to confront the witnesses for doing complete justice between the parties. It is further submitted that all the documents which the petitioner has mentioned in the application are necessary in view of the provisions of Section 138 of N.I. Act which draw certain presumption in favour of complainant. Hence, in view of the peculiar facts and circumstances of the case, prays for setting aside the orders of Court below and prayed for allowing the present petition.

5. In support of his contention, learned counsel for the petitioner has placed reliance over the judgment of this Court passed in the case of *Shivendra Dhakre vs. Narendra Sharma* 2017 (3) LJL 325, *Bharat Bhai Patel vs. Smt. Radha Agarwal,* [2014 (1) MPWN 70] as well as on the judgement of Apex Court passed in the case of *State of Orissa vs. Debendra Nath Padhi* [2005) 1 SCC 568], *Helios and Matheson Information Technology Limited and Others vs. Rajeev Sawhney and Another* [(2012) 1 SCC 699], *John K. Abraham vs. Simon C. Abraham and Another* [(2014) 2 SCC 236] whereby the Hon'ble Court has held that the document which may establish innocence of the petitioner and which have material bearing in the controversy can be brought through application under Section 91 of Cr.P.C. during the stage of cross-examination of complainant.

6. On the other hand, counsel for the respondent submits that the presumption under Section 139 of N.I. Act is statutory presumption and thereafter, once it is presumed that the cheque is issued in whole or in part of any debt or other liability which is in favour of the complainant/holder of the cheque, in that case, it is for the accused to prove the contrary. Hence, it is prayed that the cheuqe was issued by the petitioner and the same got dishonored when it was presented, hence, the learned Court below has dismissed the application twice rightly in view of the facts and circumstances of the case and prays for rejection of the petition.

7. In support of his contention, counsel for the respondent has placed reliance over the judgement dated 12.08.2022 of Hon'ble Apex Court passed in the case of *P. Rasiya vs. Abdul Nazer and Anr.* in Criminal Appeal Nos.1233-35/2022 whereby the Hon'ble Court has held as under:-

> ***"However, the High Court has failed to note the presumption under Section 139 of the Ni.I. Act. As per Section 139 of the N.I. Act, it shall be presumed, unless the contrary is proved, that the holder of the cheque received the cheque of the nature referred to in Section 138 for discharge, in whole or in part, of any debt or***

other liability. therefore, once the initial burden is discharged by the complainant that the cheque was issued by the accused and in signature and the issuance of the cheque is not disputed by the accused, in that case, the onus will shift upon the accused to prove the contrary that the cheque was not for any debt or other liability. "

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

9. From the pleadings of the parties and admission of the complainant, it appears that the petitioner has hired Dumper, JCB Machine, Pock lane Machine etc. and also purchased Sand, Muram and other raw materials etc. from the complainant. No doubt that there is presumption under Section 139 of N.I. Act but onus is upon the accused to prove the contrary that the cheque was not for any debt or liability. No doubt that the complainant is a proprietor of a firm and used to file ITR and maintained balance sheets etc. The application under Section 91 of Cr.P.C. is not maintainable at the stage of framing of charges, but the accused can seek production of the documents to prove his innocence at the later stage/after framing of charges. The Hon'ble Apex Court in the matter of *John K. Abraham* (supra) has dealt with in respect of necessity and desirability of the document for drawing presumption in favour of complainant under Section 118 read with 139 of the N.I. Act burden lies on him to show that he had the requisite funds for advancing money/loan in question to accused. Even otherwise, it is well established principle of law that free and fair trial is sine qua non of Article 21 of the Constitution of India and is main object of criminal law. Therefore, it should not be hampered in any manner and fair trial must be afforded to every accused. Denial of fair trial amounts to injustice to the accused.

10. Therefore, in the peculiar facts and circumstances of the case, the learned Court below has erred in rejecting the applications preferred by the petitioners. ***Once the necessity and desirability of documents to be summoned has been established then the trial Court ought to have called the documents to confront the witnesses. For doing complete justice between the parties, it is imperative that petitioner be allowed to confront the complaint by the documents to be summoned in the defence of the accused.***

11. Resultantly, the impugned orders dated 08.06.2019 & 06.07.2019 passed by the learned Court below in Criminal Case No.329/2018 by JMFC, Dewas are hereby set aside and by allowing the applications filed by the petitioner under Section 91 of Cr.P.C. Matter is remitted back to the learned court below for consequential follow up action to summon the documents as mentioned in the

applications preferred by the petitioner under Section 91 of Cr.P.c. while affording opportunity to confront the complaint with the aid and support of those documents.

Petition is accordingly allowed and disposed of.

Certified copy as per rules.

Application allowed

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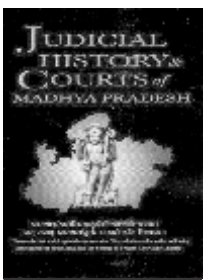

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