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

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***Municipal Corporation Act, M.P. (23 of 1956), Section 307 – Illegal Construction – Notice* – Held – Petitioner himself admitted that he has no building permission and no sanctioned map and his entire construction is illegal as well as the Colony where house has been constructed is also an illegal Colony – It is clear that contrary to rules, construction was made – No triable disputed issues are involved in present case requiring any adjudication on facts – Petition dismissed. [Leeladhar Vishwakarma Vs. State of M.P.]** **...*10**

नगरपालिक निगम अधिनियम, म.प्र. (1956 का 23), धारा 307 – अवैध निर्माण – नोटिस – अभिनिर्धारित – याची ने स्वयं स्वीकार किया है कि उसके पास भवन निर्माण की कोई अनुज्ञा नहीं है और कोई मंजूर मानचित्र नहीं है एवं उसका संपूर्ण निर्माण अवैध है, साथ ही जिस कॉलोनी में मकान निर्मित किया गया है वह भी एक अवैध कॉलोनी है – यह स्पष्ट है कि नियमों के विपरीत, निर्माण किया गया था – वर्तमान प्रकरण में कोई भी विचारणीय विवादित विवाद्यक अंतर्वलित नहीं है जिसमें तथ्यों पर कोई न्यायनिर्णयन अपेक्षित हो – याचिका खारिज। (लीलाधर विश्वकर्मा वि. म.प्र. राज्य) **...*10**

***Municipal Corporation Act, M.P. (23 of 1956), Section 307(2) & (3) – Illegal Construction – Deposit of Property Tax – Effect* – Held – Merely because petitioner deposited property tax, it would not confer any title or would not legalize his illegal action – He himself admitted that he has no building permission and no sanctioned map and his entire construction is illegal as well as the Colony where house has been constructed is also an illegal Colony – Deposit of property tax will not come to the rescue of petitioner. [Leeladhar Vishwakarma Vs. State of M.P.]** **...*10**

नगरपालिक निगम अधिनियम, म.प्र. (1956 का 23), धारा 307(2) व (3) – अवैध निर्माण – संपत्ति कर जमा करना – प्रभाव – अभिनिर्धारित – मात्र क्योंकि याची ने संपत्ति कर जमा किया, यह कोई हक प्रदान नहीं करेगा अथवा उसके अवैध कार्य को वैध नहीं करेगा – उसने स्वयं यह स्वीकार किया है कि उसके पास भवन निर्माण की कोई अनुज्ञा नहीं है एवं कोई मंजूर मानचित्र नहीं है एवं उसका संपूर्ण निर्माण अवैध है, साथ ही जिस कॉलोनी में मकान निर्मित किया गया है, वह भी एक अवैध कॉलोनी है – संपत्ति कर जमा करने से याची का बचाव नहीं होगा। (लीलाधर विश्वकर्मा वि. म.प्र. राज्य) **...*10**

***Municipal Corporation Act, M.P. (23 of 1956), Section 307(2) & (3) – Illegal Construction* – Held – Since there is no requirement that a particular period has to be given to wrongdoer for filing reply or an order u/S 307(3) can**

complied or not, the same cannot be looked into at the time of grant of bail and can be decided at the time of trial as the same is question of fact – 451 Kgs of poppy straw seized from applicants – Case is related to huge quantity of contraband – Bail rejected – Application dismissed. [Hoshiyarsingh Vs. State of M.P.] …*8

स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धाराएँ 8/15, 29 व 37, स्थायी आदेश क्र. 1/89 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 439 – जमानत – विनिषिद्ध की मात्रा – अभिनिर्धारित – इस न्यायालय द्वारा पूर्व में यह निष्कर्षित किया गया था कि एनडीपीएस अधिनियम के अन्तर्गत निर्धारित प्रक्रिया का पालन किया गया या नहीं, इस पर जमानत दिए जाने के समय विचार नहीं किया जा सकता और इसे, तथ्य का प्रश्न होने के कारण, विचारण के समय निर्णीत किया जा सकता है – आवेदकों से 451 किग्रा. पोस्ततृण जप्त किया गया – मामला विनिषिद्ध की अत्यधिक मात्रा से संबंधित है – जमानत अस्वीकार – आवेदन खारिज। (होशियारसिंह वि. म.प्र. राज्य) …*8

***Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Section 8/20 & 52-A – Retesting of Samples – Permissibility* – Held – FSL report revealed detention of Uria substance and no MDMA drug was found – State filed application for retesting of sample, which was rejeced – Challenge to – Held – In extemely exceptional circumstances, for cogent reasons to be recorded, application for retesting can be considered provided application is filed within 15 days of the receipt of the test report – State filed the application within time – Application allowed. [State of M.P. Vs. Sonam] …*18**

स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धारा 8/20 व 52–A – नमूनों का पुनः परीक्षण – अनुज्ञेयता – अभिनिर्धारित – न्यायालयिक विज्ञान प्रयोगशाला प्रतिवेदन यूरिया पदार्थ का पाया जाना प्रकट करती है एवं कोई एम डी एम ए औषधि नहीं पाई गई – राज्य ने नमूने के पुनः परीक्षण हेतु आवेदन प्रस्तुत किया, जिसे नामंजूर किया गया था – को चुनौती – अभिनिर्धारित – अत्यंत आपवादिक परिस्थितियों में, तर्कपूर्ण कारणों को अभिलिखित करते हुए, पुनः परीक्षण का आवेदन विचार में लिया जा सकता है परंतु आवेदन परीक्षण प्रतिवेदन की प्राप्ति के 15 दिनों के भीतर प्रस्तुत किया गया हो – राज्य ने समय के भीतर आवेदन प्रस्तुत किया – आवेदन मंजूर। (म.प्र. राज्य वि. सोनम) …*18

***Negotiable Instruments Act (26 of 1881), Section 138 & 142 and Criminal Procedure Code, 1973 (2 of 1974), Section 482 - Territorial Jurisdiction* – Held – Applicant is PAN India Company having its branches all over India – PAN India Company cannot be given liberty to present cheques at any place in India according to their will and get arrest warrants/summons issued to respondents, who will have great difficulty in contesting the case – Though Court at Bhopal has jurisdiction to hear the case but no transactions of applicant company has taken place at Bhopal but has taken place at Kolkata – Applicant cannot be allowed to file complaint at**

दण्ड संहिता (1860 का 45), धारा 498–A, दहेज प्रतिषेध अधिनियम (1961 का 28), धारा 3/4 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 227, 228 व 482 – आरोप की विरचना – अभिनिर्धारित – परिवाद में आवेदकों के विरूद्ध दहेज की मांग संबंधी और दहेज की मांग के संबंध में शारीरिक एवं मानसिक प्रताड़ना कारित किए जाने संबंधी विनिर्दिष्ट अभिकथन हैं – आवेदकों के विरूद्ध आरोप विरचित करने में कोई अवैधता नहीं – आवेदन खारिज। (सुखेन्द्र चतुर्वेदी वि म.प्र. राज्य) …*19

***Penal Code (45 of 1860), Section 506(P-II) and Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (33 of 1989), Section 3(1)(r) –Threatening* – Held – Threatening is the most important ingredient of criminal intimidation – The sole eye witness deposed that accused told him that he has been rescued but if he came to his field he will be killed – This intimidation is conditional, so it does not come under the purview of offence punishable u/S 506(P–II) IPC and u/S 3(1)(r) of the 1989 Act. [Premchand Vs. State of M.P.]** …*14

दण्ड संहिता (1860 का 45), धारा 506(P-II) एवं अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम (1989 का 33), धारा 3(1)(r) – धमकी देना – अभिनिर्धारित – धमकी देना आपराधिक अभित्रास का अत्यंत प्रमुख घटक है – एकमात्र चक्षुदर्शी साक्षी ने कथन किया कि अभियुक्त ने उसे बताया कि उसको बचा लिया गया है लेकिन यदि वह उसके खेत में आएगा तो वह मार दिया जाएगा – यह सशर्त अभित्रास है, अतः यह धारा 506(*P-II*) भा.दं.सं. एवं अधिनियम 1989 की धारा 3(1)(*r*) के अंतर्गत दण्डनीय अपराध की परिधि में नहीं आता। (प्रेमचंद वि. म.प्र. राज्य) …*14

***Police Regulations, M.P., Regulation 64(2) – Termination/ Compulsory Retirement – Impact of Negligence* – Held – Petitioner was negligent and delayed the processing of 33 letters, however impact of such delay not spelled out in charge-sheet – Respondents have also not established any ill motive of petitioner – It was not made clear as to what was the adverse impact or resultant damage if petitioner did not process the letters with quite promptitude – Punishment is disproportionate and excessive in character – Impugned orders set aside – Matter remitted back to authority to take decision afresh on question of punishment – Petition allowed. [K.C. Kandwal Vs. State of M.P.]** …61

पुलिस विनियमन, म.प्र., विनियम 64(2) – सेवा समाप्ति/अनिवार्य सेवानिवृत्ति – उपेक्षा का प्रभाव – अभिनिर्धारित – याची उपेक्षावान था और उसने 33 पत्रों पर कार्यवाही करने में विलंब किया, यद्यपि इस विलंब का प्रभाव आरोपपत्र में स्पष्ट नहीं किया गया – प्रत्यर्थीगण ने याची के किसी दुराशय को भी स्थापित नहीं किया – यह भी स्पष्ट नहीं किया गया था कि यदि याची ने उचित तत्परता से पत्रों पर कार्यवाही नहीं की तो इसका क्या प्रतिकूल प्रभाव या परिणामी क्षति थी – दण्ड की प्रकृति अननुपातिक तथा अत्यधिक है – आक्षेपित आदेश अपास्त किए गए – मामला प्राधिकारी को शास्ति के प्रश्न पर नए सिरे

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Railway Claims Tribunal Act (54 of 1987), Section 13 and Railways Act (24 of 1989), Section 124-A - Claim by Third Party **– Compensation suit for damages caused to electricity lines underneath the railway track – Held – Loading of chemicals in tankers was not only the responsibility of consignor but also of defendants (Railways) as loading has been done in its oil tankers – It was imperative for defendants to ensure that loading was properly done – None of the Committee members have been examined – They have total lack of knowledge about the cause of fire – Compensation rightly awarded by trial Court – Appeal dismissed. [The General Manager, Western Railway Vs. M.P.E.B. Rampur, Jabalpur]** **…*21**

रेल दावा अधिकरण अधिनियम (1987 का 54), धारा 13 एवं रेल अधिनियम (1989 का 24), धारा 124–A – तीसरे पक्षकार द्वारा दावा – रेल पटरियों के नीचे की विद्युत प्रदाय लाइन को कारित क्षतियों के लिए प्रतिकर–वाद – अभिनिर्धारित – टैंकरों में रसायनों का लदान केवल प्रेषक का उत्तरदायित्व नहीं है अपितु प्रतिवादीगण (रेलवे) का भी है क्योंकि लदान उसके तेल टैंकरों में किया गया था – प्रतिवादीगण के लिए यह सुनिश्चित करना अनिवार्य था कि लदान ठीक से किया गया था – समिति के किसी भी सदस्य का परीक्षण नहीं किया गया – उनके पास आग के कारणों के विषय में जानकारी का पूर्णतः अभाव है – विचारण न्यायालय द्वारा प्रतिकर उचित ही अधिनिर्णीत किया गया – अपील खारिज। (द जनरल मेनेजर, वेस्टर्न रेलवे वि. एम.पी.ई.बी. रामपुर, जबलपुर) **…*21**

Railway Claims Tribunal Act (54 of 1987), Section 13 and Railways Act (24 of 1989), Section 124-A - Jurisdiction of Civil Court **– Held – Civil Court has jurisdiction regarding any claim for damages caused to any third person, who is not a passenger or excluded u/S 124-A of 1989 Act – If any loss caused to any person or damage is caused to any property who is not a person or is not a property to which jurisdiction of Claims Tribunal extends by virtue of Section 13 of 1987 Act, Tribunal will not have any jurisdiction for adjudicating a claim in respect thereof and it would only be the Civil Court which shall have such jurisdiction. [The General Manager, Western Railway Vs. M.P.E.B. Rampur, Jabalpur]** **…*21**

रेल दावा अधिकरण अधिनियम (1987 का 54), धारा 13 एवं रेल अधिनियम (1989 का 24), धारा 124–A – सिविल न्यायालय की अधिकारिता – अभिनिर्धारित – सिविल न्यायालय को किसी तीसरे व्यक्ति, जो यात्री नहीं है या अधिनियम 1989 की धारा 124–*A* के अन्तर्गत वर्जित है, को हुई क्षति के दावे के संबंध में अधिकारिता है – यदि ऐसे किसी व्यक्ति को हानि या किसी सम्पत्ति को कोई क्षति कारित होती है, जो ऐसा व्यक्ति या ऐसी सम्पत्ति नहीं है जिस पर अधिनियम 1987 की धारा 13 के आधार पर दावा अधिकरण की अधिकारिता विस्तारित होती है, अधिकरण को उस संबंध में किसी दावा–निर्णयन की अधिकारिता नहीं होगी और यह केवल सिविल न्यायालय होगा जिसे ऐसी अधिकारिता होगी। (द जनरल मेनेजर, वेस्टर्न रेलवे वि. एम.पी.ई.बी. रामपुर, जबलपुर) **…*21**

जाएं कि वह उचित रूप से केंद्र का संचालन नहीं कर रही है अथवा उपेक्षापूर्वक कर्तव्यों एवं दायित्वों का निर्वहन कर रही है। (ममता सोनी (श्रीमती) वि. म.प्र. राज्य) **...*11**

***Service Law – Appointment – Advertisement & Statutory Rules* – Held – Statutory rules assume precedence over advertisement in the event of variation between the two. [Sandeep Kulshrestha Vs. Manoj Pratap Singh Yadav] (DB)...1**

सेवा विधि – नियुक्ति – विज्ञापन व कानूनी नियम – अभिनिर्धारित – कानूनी नियमों एवं विज्ञापन के मध्य भिन्नता की स्थिति में कानूनी नियमों को विज्ञापन से ऊपर प्राथमिकता दी जाती है। (संदीप कुलश्रेष्ठ वि. मनोज प्रताप सिंह यादव) **(DB)...1**

***Service Law – Appointment – Qualification* – Held – Qualification cannot be changed in the mid of recruitment process. [Sandeep Kulshrestha Vs. Manoj Pratap Singh Yadav] (DB)...1**

सेवा विधि – नियुक्ति – अर्हता – अभिनिर्धारित – भर्ती प्रक्रिया के मध्य में अर्हता में परिवर्तन नहीं किया जा सकता। (संदीप कुलश्रेष्ठ वि. मनोज प्रताप सिंह यादव) **(DB)...1**

***Service Law – Appointment – Qualification & Experience – Difference* – Discussed and explained. [Sandeep Kulshrestha Vs. Manoj Pratap Singh Yadav] (DB)...1**

सेवा विधि – नियुक्ति – अर्हता व अनुभव – विभेद – विवेचित एवं स्पष्ट किया गया। (संदीप कुलश्रेष्ठ वि. मनोज प्रताप सिंह यादव) **(DB)...1**

***Service Law – Cancellation of Appointment – Change of Government* – Held – In absence of any appointment order issued to petitioners, no right would lie to them to challenge any of the note–sheets of the Government – Until and unless there is an order of appointment, there cannot be any further proceedings thereto – Note–sheet cannot be an impugned order, it is only a communication between officers of government – Petition dismissed. [Omprakash Shukla Vs. State of M.P.] (DB)...96**

सेवा विधि – नियुक्ति को रद्द किया जाना – सरकार का परिवर्तन – अभिनिर्धारित – याचीगण को जारी किये गये किसी नियुक्ति आदेश के अभाव में, उन्हें सरकार की किसी भी नोट–शीट को चुनौती देने का कोई अधिकार नहीं होगा – जब तक कि नियुक्ति का आदेश न हो, इस पर आगे कोई कार्यवाही नहीं हो सकती – नोट–शीट एक आक्षेपित आदेश नहीं हो सकता, यह सरकार के अधिकारीगण के मध्य केवल एक संसूचना है – याचिका खारिज। (ओमप्रकाश शुक्ला वि. म.प्र. राज्य) **(DB)...96**

***Service Law – Compassionate Appointment – Delay* – Held – At least 14 years have passed after death of father of petitioner – Application was rejected on 2013 and contempt petition filed in 2022 – After getting direction**

Service Law – Departmental Enquiry – Plea of Bias – Evidence – **Held – There cannot be a direct evidence to show the biases of an authority but it has to be inferred from surrounding circumstances. [Ashok Singh Vs. Union of India] …*6**

सेवा विधि – विभागीय जांच – पक्षपात का अभिवाक् – साक्ष्य – अभिनिर्धारित – किसी प्राधिकारी के पक्षपात को दर्शाने हेतु कोई प्रत्यक्ष साक्ष्य नहीं हो सकता, बल्कि आस–पास की परिस्थितियों से इसका निष्कर्ष निकाला जाना चाहिए। (अशोक सिंह वि. यूनियन ऑफ इंडिया) **…*6**

Service Law – Departmental Enquiry – Presenting Officer as Witness – Permissibility – **Held – Dr. Utpal was appointed as Presenting Officer and was also listed as witness – Objection was raised by petitioner – Since Dr. Utpal continued to act as Presenting officer and possibility of biases against petitioner are not ruled out, departmental enquiry is vitiated and is thus quashed – Respondent permitted to proceed further with enquiry after appointing a new Presenting Officer – Petition allowed. [Ashok Singh Vs. Union of India] …*6**

सेवा विधि – विभागीय जांच – साक्षी के रूप में प्रस्तुतकर्ता अधिकारी – अनुज्ञेयता – अभिनिर्धारित – डॉ. उत्पल को प्रस्तुतकर्ता अधिकारी के रूप में नियुक्त किया गया था एवं साक्षी के रूप में भी सूचीबद्ध किया गया था – याची द्वारा आपत्ति उठाई गई थी – चूंकि डॉ. उत्पल प्रस्तुतकर्ता अधिकारी के रूप में कार्य करते रहे एवं याची के विरूद्ध पक्षपात की संभावनाओं से इंकार नहीं किया जा सकता, विभागीय जांच दूषित हो गई एवं इसलिए अभिखंडित की गई – प्रत्यर्थीगण को एक नया प्रस्तुतकर्ता अधिकारी नियुक्त करने के पश्चात् जांच आगे बढ़ाने की अनुमति प्रदान की गई – याचिका मंजूर। (अशोक सिंह वि. यूनियन ऑफ इंडिया) **…*6**

Service Law – Departmental Enquiry – Role of Presenting Officer – **Held – Role of presenting officer is to place the material before Enquiry Officer – If presenting officer is not acting independently but is acting with preconceived notion/mind, then it is not expected that entire material may be placed before enquiry officer and possibility that enquiry may not take place in free and fair manner, cannot be ruled out. [Ashok Singh Vs. Union of India] …*6**

सेवा विधि – विभागीय जांच – प्रस्तुतकर्ता अधिकारी की भूमिका – अभिनिर्धारित – प्रस्तुतकर्ता अधिकारी की भूमिका जांच अधिकारी के समक्ष सामग्री प्रस्तुत करना है – यदि प्रस्तुतकर्ता अधिकारी स्वतंत्र रूप से कार्य नहीं कर रहा है बल्कि पूर्वकल्पित धारणा/मस्तिष्क से कार्य कर रहा है तो यह अपेक्षित नहीं है कि संपूर्ण सामग्री जांच अधिकारी के समक्ष रखी जा सकती है एवं इस संभावना से इंकार नहीं किया जा सकता है कि जांच स्वतंत्र और निष्पक्ष तरीके से नहीं हो सकेगी। (अशोक सिंह वि. यूनियन ऑफ इंडिया) **…*6**

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THE INDIAN LAW REPORTS M.P. SERIES, 2024

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JOURNAL SECTION

IMPORTANT ACTS, AMENDMENTS, CIRCULARS, NOTIFICATIONS AND STANDING ORDERS

MADHYA PRADESH ACT
NO. 14 OF 2023

THE MADHYA PRADESH NAGARPALIK VIDHI (SANSHODHAN) ADHINIYAM, 2023

[Received the assent of the Governor on the 18 April 2023; assent first published in the "Madhya Pradesh Gazette (Extra-ordinary)", dated the 19 April 2023, page Nos. 242(1) to 242(2).

An Act further to amend the Madhya Pradesh Municipal Corporation Act, 1956 and the Madhya Pradesh Municipalities Act, 1961.

Be it enacted by the Madhya Pradesh Legislature in the Seventy-fourth year of the Republic of India as follows :–

1. Short title. This Act may be called the Madhya Pradesh Nagarpalik Vidhi (Sanshodhan) Adhiniyam, 2023.

PART–I

AMENDMENT TO THE MADHYA PRADESH MUNICIPAL CORPORATION ACT, 1956 (NO. 23 OF 1956)

2. Amendment to the Madhya Pradesh Act No. 23 of 1956. In the Madhya Pradesh Municipal Corporation Act, 1956 (No. 23 of 1956),–

(1) In Section 195, for sub-section (5), the following sub-section shall be substituted, namely :–

"(5) If the owner or occupier of a building or land in spite of service of notice or order under this section fails to carry out the work mentioned therein within the period specified in the notice or order, as the case may be, the Commissioner shall impose a fine which may extend to five thousand rupees and further additional fine which may extend to two hundred rupees per day till the work mentioned in the notice is not complete:

Provided that without prejudice to the right to take proceedings for fine in respect of the contravention of this section, the Commissioner may get the said work done through his agency and recover the cost incurred in connection therewith, from the owner or occupier thereof, as the case may be, in the manner provided in Chapter XII.".

(2) Section 290 shall be deleted.

(3) Section 360 shall be deleted.

(4) Section 362 shall be deleted.

PART–II
AMENDMENT TO THE MADHYA PRADESH MUNICIPALITIES ACT, 1961 (NO. 37 OF 1961)

3. Amendment to the Madhya Pradesh Act No. 37 of 1961. In the Madhya Pradesh Municipalities Act, 1961 (No. 37 of 1961),–

(1) In Section 208, for sub-section (5), the following sub-section shall be substituted, namely:–

"(5) If the owner or occupier of a building or land in spite of service of notice or order under this section fails to carry out the work mentioned therein within the period specified in the notice or order, as the case may be, the Council shall impose a fine which may extend to five thousand rupees and further additional fine which may extend to two hundred rupees per day till the work mentioned in the notice is not complete:

Provided that without prejudice to the right to take proceedings for fine in respect of the contravention of this section, the Council may get the said work done through its agency and recover the cost incurred in connection therewith, from the owner or occupier thereof, as the case may be, in the manner provided in Chapter XII.".

(2) Section 288 shall be deleted.

(3) Section 290 shall be deleted.

AMENDMENTS IN THE HIGH COURT OF MADHYA PRADESH (DESIGNATION OF SENIOR ADVOCATES) RULES, 2018

[Published in Madhya Pradesh Gazette, Part-4 (Ga), dated 01 September 2023, page Nos. 634 to 636]

In exercise of the powers conferred by sub-section (1) of section 34 read with sub-section (2) of section 16 of the Advocates Act, 1961 (Act No. 25 of 1961), the High Court of Madhya Pradesh, hereby, makes the following amendments in "The High Court of Madhya Pradesh (Designation of Senior Advocates) Rules, 2018", namely:–

AMENDMENTS

In the said Rules;

1. In Rule 3, after clause (e), the following clause shall be added, namely :

"(f) **"Year"** means a year reckoned according to the Gregorian calendar."

2. In Rule 7, para shall be numbered as sub-rule (ii) and before sub-rule (ii) as so numbered, the following sub-rule shall be inserted, namely :

"(i) Exercise for process of designation of Senior Advocate shall be conducted by the High Court atleast once in a year."

3. In Rule 12, para shall be numbered as sub-rule (i) and after sub-rule (i) as so numbered, the following sub-rule shall be inserted, namely :

"(ii) An advocate shall not be precluded from being considered for designation as a Senior Advocate merely on the ground of not having completed 45 (forty five) years of age."

4. In Rule 13,

(1) For sub-rule (10), the following sub-rule shall be substituted, namely:

"Specialization in any field of law. If so, details."

(2) In sub-rule 15, in clause (a), for the word "appeared" shall be substituted by the words "he appeared and rendered assistance" and in clause (b) after the words "five years" the words "and rendered assistance" shall be added.

(3) In sub-rule (18), after the words and symbol "faculty of law?" the words "If yes, details/documents in support thereof" shall be added.

(4) After sub-rule (22), the following sub-rule shall be added, namely: "(22a) Five best synopses filed by the advocate concerned."

5. In Rule 16, for table , the following table shall be substituted, namely :

S.No.	Matter	Points
1.	Number of Years of practise of the Applicant Advocate from the date of enrolment. (i)For 10 years of practise (ii) For 11 to 20 years of practise (iii) For practise beyond 20 years	 10 points 10 points + 01 point for each year exceeding 10 years 20 points
2.	Judgments (Reported and Unreported) which indicate the legal formulations advanced by the concerned Advocate in the course of the proceedings of the case; pro-bono work done by the concerned Advocate; domain expertise of the Applicant Advocate in various branches of law.	50 Points
3.	(i) Publications by the Applicant Advocate (ii) Teaching assignments or guest courses delivered at Law schools.	05 Points
4.	Test of Personality & Suitability on the basis of Interview/Interaction	25 Points

6. In Rule 22, for proviso, the following proviso shall be substituted, namely :

"Provided that before review of the decision, a show cause notice shall be issued to the concerned Advocate/Advocates by the Permanent Committee to furnish a reply within 30 days and thereafter upon due consideration, the Committee shall place its comments before the Full Court."

7. In proforma of particulars;

(1) For clause 10, the following clause shall be substituted, namely:

"Specialization in any field of law. If so, details"

(2) In clause (15) (a), after the words "appeared" the words "and rendered assistance" shall be added.

(3) In clause (15) (b), after the words "last five years" the words "and rendered assistance" shall be added.

(4) After clause (16), the following clause shall be added, namely:

"(16a) Whether he/she has/had teaching assignments or delivers/delivered guest courses delivered at Law schools ? If yes, details"

(5) After clause (22), the following clause shall be added, namely:

"(22a) Details of five best synopses filed by the advocate concerned"

(6) After clause (23), the following clause shall be added, namely:

"Details of services rendered by way of legal services, mediation work, other para-legal activities, assistance rendered to various administrative Committees of the High Court, etc."

RAMKUMAR CHOUBEY,
Registrar General.

AMENDMENTS IN THE MADHYA PRADESH LIVE-STREAMING RULES FOR COURT PROCEEDINGS, 2021

[Published in Madhya Pradesh Gazette, Part-4 (Ga), dated 01 September 2023, page Nos. 637 to 651]

In exercise of the powers conferred by Article 225 or relevant statute where applicable, and Article 227 of the Constitution of India, the High Court of Madhya Pradesh, hereby, makes the following amendments in the "Madhya Pradesh Live-Streaming Rules for Court Proceedings, 2021", namely:-

AMENDMENTS

In the said Rules;

1. In preface, in second para, for the word "control" the word "jurisdiction" shall be substituted.

2. In Rule 1, In clause (a) between the words "Live-Steaming" and "Rules", the words "and Recording" shall be inserted.

3. In Rule 2 -

(1) After clause (a) the following sub-rule shall be inserted, namely :

"(a-1) Bench: means the Judge(s) assigned to hear the case filed before the court."

(2) In clause (c), the words "judicature for" shall be deleted.

(3) In clause (e), the words "judicature for" shall be deleted and for the words "Control of the High Court in the State", the words "jurisdiction of the High Court of Madhya Pradesh" shall be substituted.

(4) After clause (f), the following clause shall be inserted, namely :

"(f-1) Court Premises : means and includes buildings and complexes under the authority of the courts."

(5) After clause (g), the following clause shall be substituted, namely :

"(g-1) Designated Venue : means and includes a courtroom or any other place where the proceedings are conducted, whether within the court premises or at a remote location."

(6) After clause (h), the following clause shall be substituted, namely :

"(h-1) Hardware : means and includes equipment to be installed for live streaming and recording of proceedings or any ancillary activity."

(7) After clause (i), the following clause shall be substituted, namely :

"(i-1) IT Committee : means and includes a committee constituted by the Chief Justice to deal with matters concerning information and communication technology, also referred to as I.T. and e-Court Committee."

(8) In clause (j), between the words "facilitating" and "to view", the words "any person" shall be inserted.

(9) After clause (j), the following clause shall be substituted, namely :

"(j-1) Proceedings: mean and include judicial proceedings, Lok Adalat proceedings, full-court references, official transfer, elevation, retirement, farewells organized by the Court and other proceeding as may be directed by the Chief Justice."

(10) For clause (l), the following clause shall be substituted, namely :

"(1) **Recording Device :** means and includes a device capable of recording images or sound, including but not limited to camera, audio recorder, video recorder, mobile telephone, or screen recorder."

(11) After clause (l), the following clause shall be inserted, namely :

"(l-1) Registrar (IT) : means and includes any officer so designated by the Chief Justice."

(12) In clause (m), after the words "premises", the words "from where proceedings are conducted" shall be inserted.

(13) After clause (m), the following clause shall be inserted, namely :

"(n) Transcript : means the official written record of the proceedings published as per the directions of the court."

4. In Rule 3, between the words "effect" and "these Rules", for the words "them as per" preposition "to" shall be substituted and between the words "may" and "from" for the word "specify" the word "direct" shall be substituted.

5. In Rule 4 –

(1) For clause (a), the following clause shall be substituted, namely :

"(a) Cameras will be ordinarily installed in the courtroom covering at least five angles; one towards the Judge/Presiding Officer, the second and third towards the advocates engaged in the concerned matter, the fourth towards the accused (where applicable) and the fifth towards the deponent/witness, as required.

(2) After clause (b), the following clause shall be inserted, namely :

"(b-1) If the court has employed an electronic evidence presentation system, an additional feed shall be captured there from."

(3) After clause (c), the following clauses shall be inserted, namely :

"(d) A remote-control device shall be provided to the presiding judge on the bench to pause or stop the live streaming at any time.

(e) In so far as a remote location is concerned, appropriate hardware will be deployed to the extent practicable, bearing in mind the provisions made in the aforementioned sub-rules."

6. In Rule 5, in clause (b), in the last line, after the word "recorded" the words "and shall ensure that nothing uncivil or inappropriate is streamed in the public domain" shall be inserted.

7. In Rule 6, between the words "premises" and "to enable" the words "or designated venue" shall be inserted and at the end, after the word and full stop "proceedings." The words and full stop "The technical expert(s) shall function under the overall supervision of the District Command and Control (DCCC)." shall be inserted.

8. In Rule 7 :

(1) In clause (a), for the word "shall" the word "will" shall be substituted and at the end after the word "Court" the words "which would come to an end with close of the proceedings" shall be added.

(2) In clause (b)-

In clause (b), for the word "shall" the word "will" shall be substituted.

(3) For sub-clauses (ii) and (iii), the following sub-clauses shall be substituted, namely :

"(ii) Matters concerning sexual offences including proceedings instituted under Section 376, India Penal Code, 1860.

(iii) Matters registered under or involving the Protection of Children from Sexual Offences Act, 2012 (POCSO) and under the Juvenile Justice (Care and Protection of Children) Act, 2015.

(iii-a) Matters registered under or involving the Medical Termination of Pregnancy Act, 1971."

(4) For sub-caluse (vii), the following clause shall be substitute, namely :

"(vii) Matters involving sensitive issues which in the opinion of the Bench, may provoke enmity amongst communities likely to result in a breach of law and order."

(5) For sub-clause (ix), the following sub-clause shall be substituted, namely :

"(ix) Recording of evidence, including cross-examination."

(6) In sub-clause (xvi), at the end, for word "Judge" the word "Bench/Chief Justice" shall be substituted.

(7) After clause (c), the following clause shall be inserted, namely :

"(d) In cases where the proceedings are not live streamed, the recording shall be maintained for usage by the Court and the appellate court(s) subject to the following :

(i) Access to the recording of the testimony of witnesses will not be given until such time that the evidence is recorded in its entirety.

(ii) Transcript of the recordings would be made available to the advocate or litigant-in-person.

(iii) In case of litigant-in-person, who is also a witness in the matter, the bench in its discretion will decide as to the stage at which the litigant-in-person should have access to the recordings of the testimonies concerning the other witnesses in the matter.

(e) In criminal matters, the testimony of victims and witnesses will be recorded for the exclusive use of the concerned bench and the appellate court(s), as per the direction issued in that behalf. The anonymity of the victims and witnesses shall be maintained in the recordings via dummy names, face-masking, pixelation and/or electronic distortion of voice, as and when directed by the court.

(f) Audio-video recording or recording of proceedings by any other means, beyond the mandate of the present Rules is expressly prohibited."

9. In Rule 8-

(1) In clause (a), between the words and comma "if any," and "to Live-Streaming" the word and comma "by any party," shall be inserted and at the end after the words "details" the words "as prescribed in schedule-I or schedule II, as the case may be. The Court may consider oral objection in cases listed before the Court" shall be inserted.

(2) In clause (b), at the end for the word "Judge" the words "concerned Bench which shall not be subject matter of challenge" shall be substituted.

10. For Rule 9, the following rule shall be substituted, namely :

"9. Manner of Recording of Proceedings :

(a) The cameras in the Court shall be as per Rule 4(a).

(b) The following need not be Live-Streamed or saved in the Archival Data :

(i) Discussions between/amongst the judges on the bench.

(ii) Any document or instruction given by the Judge to any member of the staff during the proceedings or any communication / message / document given by the court master / reader to the bench.

(iii) Documents given to the judge during the proceedings.

(iv) Notes taken down by the judge during the proceedings.

(v) Notes made by an advocate either or paper or in electronic form, for assistance, while making submissions before the bench.

(vi) Communication between advocate and client, inter-se the advocates, and communications which is not a submission exchanged between the advocate and the Court.

(c) If one or more circumstances mentioned above occur or at the time of dictating the order / judgment or rising of the judge for recess or otherwise, Live-Streaming shall be paused and in such circumstances the monitor shall display the appropriate message:

"Order-dictation in progress". Likewise, when the bench rises for recess or otherwise, the live streaming will be paused, and the monitor will display the message: "Court not in-session".

11. For Rule (10), the following rule shall be substituted, namely :

"10. Storage, relay and recording of proceedings:

(a) The recordings shall be archived and may be uploaded, wholly or in part, on the Courts' website or made available on other digital platforms, as directed by the Court. The Chief Justice may issue practice directions in this regard and also for the cases, and the period for which archived data shall be preserved and which shall not be less than six months. Archived data shall be stored in electronic devices in encrypted form with a specific hash (#) value.

(b) Access to copies of the recordings not uploaded will be sanctioned by the designated officer, who will act as per law. An application for copies of recordings shall be made in the form prescribed in schedule III.

(c) Personal information such as date of birth of parties, home address, identity card number, bank account information, and the personal information of related parties, such as close relatives, witnesses and other participants, will be deleted or muted during Live streaming. Inter alia, any one of the masking techniques, as provided in Rule 7(e), may be adopted.

However, such Proceedings will be preserved in the archival data.

(d) The advocates and litigants-in-person may request the bench to redact personal and sensitive information inter alia of the kind referred to in Rule 10 (c).

(e) Subject to limitations contained in these rules, the live stream shall commence as soon as the bench assembles and instructs the court staff to start the proceedings and shall end when the bench signals its conclusion for the day.

(f) There shall be a time lag of ten minutes in Live Streaming which may be changed as per the direction of the Court.

(g) The live streaming shall be carried out from the designated venue as decided by the bench.

(h) The content of the recording will be vetted and shall be posted, usually within three days of the conclusion of the proceedings. The same shall be posted on the Courts' website or made available on such digital platforms, as directed by the court."

12. In Rule 11 –

(1) In clause (a), in sub-clause (ii), for the word "Judge" the word "Bench" shall be substituted.

(2) In clause (b)-

For sub-clause (i), the following clauses shall be substituted, namely :

"(i) No person including print and electronic media, and social media platforms other than the person authorized as per Rule 5 of these Rules shall record, share, reproduce, transmit, upload, post, publish, edit, use, capture Live-Streamed proceedings or Archival Data or recordings in any form.

This provision shall also apply to all messaging applications. Any person/entity acting contrary to this provision will be prosecuted as per law. The court shall have the exclusive copyright in the recordings and archival Data.

(i-a) The live stream shall not, without the prior written authorization of the Court, be reproduced, transmitted, uploaded, posted, modified, published, or re-published in any form."

(3) In sub-clause (iii), between the words "device" and "for recording", the words "or any messaging application" shall be inserted.

(4) Sub-Clause (viii) and entries relating thereto, shall be deleted.

(5) Clause (ix) shall be renumbered as clause (viii) and in clause (viii) as so renumbered, between the words and full stop "court" and ". Any participant" the words "and shall be bound by these rules" shall be inserted.

(6) After clause (viii) as so renumbered, the following clause shall be inserted, namely :

"(ix) Use of communication device or recording device during proceedings:

(a) A person must not use a communication device or a recording device to disturb proceedings in a manner that may cause concern to a witness or other participants in the proceedings or allow a person who is not a participant to receive information about the proceeding or the hearing to which the person is not otherwise entitled.

(b) During proceedings, all personnel shall follow the instructions of the presiding judge, adhere to court room etiquettes and discipline, and shall not engage in the following actions- audio and/or video recording, taking screenshots or using mobile communication tools to relay the proceedings.

(c) Violation of Sub-Rules (i), (i-a) and (ii) will result in prosecution as per law. Additionally, the bench may also direct seizure of the communication device or recording device."

(7) For clause (xi), the following clause shall be inserted, namely :

"(xi) Any violation of these rules shall entail proceedings under the penal laws, prosecution under the Indian Copyright Act, 1957, Information Technology Act, 2000 and any other provisions of law."

13. After Rule 11, the following rule shall be inserted, namely :

"11A. Transcription and Access:

(a) Transcripts shall be prepared of recordings only when directed by the court.

(b) The transcripts may be translated into other scheduled languages.

(c) Recordings that are uploaded will be made accessible for differently abled persons."

14. In Rule 12, for the words "Chief Justice" , the words "High Court" shall be substituted.

15. After Rule 14, the following schedules shall be added, namely :

"SCHEDULE I
[Referred to in Rule 8(a)]

Objection to live streaming of proceedings by filing Party

1. Diary Number / Filing Number (if any) :

2. Cause Title :

3. Reasons for objection to live streaming (please select one or more applicable). The case relates to:

   i. Matrimonial matters, transfer petitions thereunder.

   ii. Sexual offences, including proceedings instituted under Section 376 of the IPC.

   iii. Gender-based violence against women.

   iv. POCSO and under The Juvenile Justice (Care and Protection of Children) Act, 2015.

   v. In-camera proceedings as defined under Section 327 of CrPC or Section 153 B of the CPC.

   vi. Publication would be antithetical to the administration of justice.

   vii. Other(s) (state the reason briefly):

4. Applicant Details:

   i. Party name _____

   ii. Plaintiff/Petitioner/Appellant/Applicant No _____

   iii. Applicant Address _____

   iv. Applicant Telephone number _____

I have read and understood the provisions of the Rules for live streaming for Courts (hyperlink). I undertake to remain bound by the same to the extent applicable to me.

Signature of the Applicant/Authorised signatory*:

J/14

(this application may be e-signed)

Date:

Digital Signature/Scanned Signature

For use of the Registry

A. Bench assigned:

B. Decision of the Bench: Allowed/Not Allowed

Date:

SCHEDULE II
[Referred to in Rule 8(a)]

Objection to live streaming of proceedings

1. Case Number / CNR Number / Diary Number (if any):
2. Cause Title:
3. Date of Hearing (if already listed) (DD/MM//YYYY):
4. Reasons for objection to the Live streaming (please select one or more applicable). Case relates to:
   - i. Matrimonial matters, transfer petitions thereunder.
   - ii. Sexual offences, including proceedings instituted under Section 376 of the IPC.
   - iii. Gender-based violence against women.
   - iv. POCSO and under the Juvenile Justice (Care and Protection of Children) Act, 2015.
   - v. In-camera proceedings as defined under Section 327 of the CrPC or Section 153 B of the CPC.
   - vi. Publication would be antithetical to the administration of justice.
   - vii. Other (s) (state the reason briefly): _____

     _____
5. Applicant Details:
   - i. Party name
   - ii. Select one:
   - a. [i] Petitioner No. [ii] Accused No. [iii] Plaintiff No.

b. [iv] Defendant No. [v] Applicant No. [vi] Respondent No.

[vii] Deponent for No. _____

[viii] Other(s)

iii. Applicant Address _____

iv. Applicant Telephone number _____

I have read and understood the provisions of the Rules for live streaming for Courts (hyperlink), I undertake to remain bound by the same to the extent applicable to me.

Signature of the Applicant/Authorised Signatory*: (this application may be e-signed)

Date:

Digital Signature/ Scanned Signature

For the use of the Registry

C) Bench assigned:

D) Decision of the Bench: Allowed/Not Allowed

Date :

SCHEDULE III
[Referred to in Rule 10(b)]

APPLICATION FORM FOR COPIES OF RECORDINGS AVAILABLE IN ARCHIVAL DATA

1. Case Number / CNR Number / Diary Number (if any):
2. Cause Title:
3. Date of Hearing (if already listed) (DD/MM//YYYY):
4. Applicant Status (select one)
   - i. Party to the proceedings
   - ii. Authorised Representative
   - iii. Advocate for the Party /
   - iv. Third Party /No.ne of the above (Please Specify)

5. Identification document enclosed: (i) Bar Association ID (ii) AADHAAR CARD (iii) PAN Card (iv) Driver's License (v) Ration Card (vi) Other Government issued ID (please specify)

6. ID Number: _____

7. Applicant Address: _____

8. Applicant Telephone number: _____

9. Reason/s for requesting access: _____

10. Format in which Recording is requested: (i) Cloud link (ii) Physical Drive

11. Fee to be Paid:

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I have read and understood the provisions of the rules for live streaming for Courts (hyperlink). I undertake to remain bound by the same to the extent applicable to me. I undertake not to copy, distribute or publish, or cause the copying, distribution or publication of the Recordings in any manner without the prior written approval of the Court.

Signature of the Applicant/Authorised Signatory*:

(this application may be e-signed)

Date:

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Fee paid:-"

RAMKUMAR CHOUBEY, Registrar General.

NOTES OF CASES SECTION

Short Note

**(1)*

Before Mr. Justice Sujoy Paul

WP No. 16962/2018 (Jabalpur) decided on 10 August, 2023

A.S. PATEL …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

***Service Law – Retiral Dues – Interest on Delayed Payment* – Held – Retiral dues of an employee are not bounty, it is earned by rendering long service – Pension and retiral dues must be paid on due date and with quite promptitude – If there is a delay in making payment and the same is attributable to employer, employee deserves the benefit of interest – While filing return, respondents have not averred that petitioner is responsible for the delay – Petitioner entitled to get 6% interest on delayed payment – Petition allowed.**

सेवा विधि – सेवानिवृत्ति देय – विलंबित भुगतान पर ब्याज – अभिनिर्धारित – किसी कर्मचारी का सेवानिवृत्ति देय उपहार नहीं है, ये दीर्घ सेवा प्रदान करके अर्जित की जाती है – पेंशन और सेवानिवृत्ति देय का भुगतान नियत तिथि पर और उचित तत्परता के साथ किया जाना चाहिए – यदि भुगतान में विलंब होता है और यह नियोजक के कारण माना जा सकता है, तो कर्मचारी ब्याज के लाभ का हकदार है – रिटर्न दाखिल करते समय प्रत्यर्थीगण द्वारा यह प्रकथन नहीं किया गया कि याची विलंब के लिए उत्तरदायी है – याची विलंबित भुगतान पर 6% ब्याज प्राप्त करने का हकदार है – याचिका मंजूर।

Cases referred:

2001 9 SCC 687, Cr.A. No. 1698/2022 decided on 04.03.2022 (Supreme Court), (1994) 2 SCC 240, 2013 (1) MPLJ 53.

Nitin Agrawal, for the petitioner.
Ritwik Parashar, G.A. for the State.
Tabrez Sheikh, for the respondent No. 2 & 3.

NOTES OF CASES SECTION

Short Note

****(2)***

Before Mr. Justice G.S. Ahluwalia

MCRC No. 9246/2018 (Jabalpur) decided on 28 June, 2023

ANAND SINGH PARIHAR … Applicant

Vs.

STATE OF M.P. & ors. …Non-applicants

A. Criminal Procedure Code, 1973 (2 of 1974), Section 340 and Penal Code (45 of 1860), Sections 192 to 196 – False Evidence before Court – **Held – Where the Court decides to exercise its power u/S 340 Cr.P.C., the *prima facie* satisfaction of Court that the person has committed an offence punishable u/S 192 to 196 IPC is sufficient – No preliminary enquiry is required and a direction can be given to file a complaint.**

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 340 एवं दण्ड संहिता (1860 का 45), धाराएँ 192 से 196 – न्यायालय के समक्ष मिथ्या साक्ष्य – अभिनिर्धारित – जहां न्यायालय दं.प्र.सं. की धारा 340 के अंतर्गत अपनी शक्ति का प्रयोग करने का विनिश्चय करता है, न्यायालय की प्रथम दृष्ट्या संतुष्टि कि व्यक्ति ने भा.दं.सं. की धारा 192 से 196 के अंतर्गत दण्डनीय अपराध कारित किये हैं, पर्याप्त है – कोई प्रारंभिक जांच अपेक्षित नहीं है एवं परिवाद प्रस्तुत करने के लिए निदेश दिया जा सकता है।

B. Criminal Practice – Adverse Remarks **– Held – Authenticity of order of demolition of house was not the subject matter of trial – Applicant was acting in discharge of his official duties in good faith – Courts should be slow and conscious enough while passing adverse remarks against parties involved, unless and until it is essential to do complete justice – Directions given by trial Judge were unwarranted and without jurisdiction – Directions to authorities to criminally prosecute the applicant and also to proceed against him departmentally are set aside – Application allowed.**

ख. दाण्डिक पद्धति – प्रतिकूल टिप्पणी – अभिनिर्धारित – घर तोड़ने के आदेश की प्रमाणिकता विचारण की विषय–वस्तु नहीं है – आवेदक सद्भावपूर्वक अपने पदीय कर्तव्यों का निर्वहन कर रहा था – जब तक पूर्ण न्याय करना आवश्यक न हो, तब तक अंतर्वलित पक्षकारों के विरूद्ध प्रतिकूल टिप्पणियां पारित करते समय न्यायालय को काफी धीमा एवं सचेत होना चाहिए – विचारण न्यायाधीश द्वारा दिये गये निदेश अनावश्यक एवं बिना अधिकारिता के हैं – आवेदक को दाण्डिक रूप से अभियोजित करने और साथ ही उसके विरूद्ध विभागीय कार्यवाही करने के लिए प्राधिकारीगण को दिये गये निदेश अपास्त किये गये – आवेदन मंजूर।

NOTES OF CASES SECTION

Cases referred:

(2002) 1 SCC 253, (1986) 2 SCC 569, (2001) 1 SCC 596, (2012) 6 SCC 491, (2013) 3 SCC 1, (2014) 5 SCC 417.

Manish Datt with *Siddharth Kumar Sharma,* for the applicant.
Ritwik Parashar, G.A. for the non-applicants.

Short Note
****(3)(DB)***
Before Mr. Justice S.A. Dharmadhikari
& Mr. Justice Pranay Verma
COMA No. 10/2019 (Indore) decided on 24 July, 2023

ANIL KUMAR KHANDELWAL …Appellant
Vs.
LAKHANI FOOT CARE PVT. LTD. & anr. …Respondents

***Recovery of Debts Due to Banks and Financial Institutions Act (51 of 1993), Sections 17, 18 & 34 and Companies Act (1 of 1956), Section 446(2) – Release of "Subject Land" – Leave of Company Court* – Held – Act of 1993 overrides the Companies Act therefore leave of the Company Court u/S 446(2) of Act of 1956 is not a *sine qua non* – Impugned order set aside – Official Liquidator directed to execute sale deed of the "Subject Lands" in favour of appellant – Appeal allowed.**

बैंकों और वित्तीय संस्थाओं को शोध्य ऋण वसूली अधिनियम (1993 का 51), धाराएँ 17, 18 व 34 एवं कम्पनी अधिनियम (1956 का 1), धारा 446(2) – ''विषयाधीन भूमि'' की निर्मुक्ति – कंपनी न्यायालय की अनुमति – अभिनिर्धारित – 1993 का अधिनियम कंपनी अधिनियम पर अध्यारोही है अतः 1956 के अधिनियम की धारा 446(2) के अंतर्गत कंपनी न्यायालय की अनुमति अनिवार्य नहीं है – आक्षेपित आदेश अपास्त – शासकीय समापक को अपीलार्थी के पक्ष में ''विषयाधीन भूमियों'' का विक्रय विलेख निष्पादित करने हेतु निदेशित किया गया – अपील मंजूर।

The order of the Court was passed by : **S.A. DHARMADHIKARI, J.**

Cases referred :

(2019) 3 SCC 620, 2000 SCC 406 [2000 177 SCC].

Amit Agrawal with *D.S. Panwar,* for the appellant.

H.Y. Mehta with *Prabuddha Arya*, for the respondent No. 1/Official Liquidator.

Anand Singh Bahrawat, for the respondent No. 2.

NOTES OF CASES SECTION

Short Note
**(4)*
Before Mr. Justice Vivek Rusia

WP No. 18206/2023 (Indore) decided on 2 August, 2023

ANKIT …Petitioner

Vs.

COLLECTOR DISTT. DEWAS (M.P.) & ors. …Respondents

Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 36(2) & 36(3) – Competent Authority – **Disqualification of Sarpanch on account of conviction u/S 307/34 IPC – Held – Issue regarding disqualification of the office bearer of Panchayat is liable to be decided by following conditions mentioned in Section 36(2) of Adhiniyam – Competent authority shall be Collector in respect of Gram Panchayat and Janpad Panchayat – Even otherwise, election of R-4 has already been challenged which has been dismissed and against which writ petition is pending – No interference warranted – Petition dismissed.**

पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 36(2) व 36(3) – सक्षम प्राधिकारी – भा.दं.सं. की धारा 307/34 के अंतर्गत दोषसिद्धि के कारण सरपंच की निरर्हता – अभिनिर्धारित – पंचायत के पदाधिकारी की निरर्हता से संबंधित विवाद्यक, अधिनियम की धारा 36(2) में उल्लिखित शर्तों का पालन करते हुए विनिश्चित किये जाने योग्य है – ग्राम पंचायत एवं जनपद पंचायत के संबंध में सक्षम प्राधिकारी कलेक्टर होगा – अन्यथा भी, प्रत्यर्थी क्र. 4 के निर्वाचन को पहले ही चुनौती दी जा चुकी है जिसे खारिज किया गया एवं जिसके विरूद्ध रिट याचिका लंबित है – किसी हस्तक्षेप की आवश्यकता नहीं – याचिका खारिज।

Makbool Ahmad Mansoori, for the petitioner.
Tarun Kushwah, G.A. for the respondents/State.

Short Note
**(5)(DB)*
Before Mr. Justice S.A. Dharmadhikari &
Mr. Justice Prakash Chandra Gupta

WA No. 1518/2019 (Indore) decided on 14 June, 2023

ANURAG NAGAR GRIHA NIRMAN SAHAKARI SANSTHA MARYADIT …Appellant

Vs.

INDORE DEVELOPMENT AUTHORITY & ors. …Respondents

A. Constitution – Article 226 and Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, M.P. 2005 (14 of 2006), Section 2(1) –

***Direction in Contempt Petition – Maintainability of Appeal* – Held – Impugned order was passed in contempt petition and was not passed in exercise of jurisdiction under Article 226 – Section 2 nowhere provides that if an order passed under some proceedings other than writ proceedings can be treated to be an order under Article 226 then also an appeal would be maintainable – Appeal dismissed being not maintainable.**

क. संविधान – अनुच्छेद 226 एवं उच्च न्यायालय (खण्ड न्यायपीठ को अपील) अधिनियम, म.प्र., 2005 (2006 का 14), धारा 2(1) – अवमानना याचिका में निदेश – अपील की पोषणीयता – अभिनिर्धारित – आक्षेपित आदेश अवमानना याचिका में पारित किया गया था तथा अनुच्छेद 226 के अंतर्गत अधिकारिता के प्रयोग में पारित नहीं किया गया था – धारा 2 कहीं भी यह उपबंधित नहीं करती है कि यदि रिट कार्यवाहियों के अलावा कुछ कार्यवाहियों के अंतर्गत पारित आदेश को अनुच्छेद 226 के अंतर्गत एक आदेश माना जा सकता है तब भी अपील पोषणीय होगी – अपील पोषणीय न होने के कारण खारिज।

***B. Constitution – Article 226 and Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, M.P. 2005 (14 of 2006), Section 2(1) – Interlocutory Orders – Scope of Appeal* – Held – Full Bench of this Court has held that if an interlocutory order has the tenets of being final in nature and it affects the rights of parties permanently or the parties are left at an irretrievable position then such order can be challenged in an appeal.**

ख. संविधान – अनुच्छेद 226 एवं उच्च न्यायालय (खण्ड न्यायपीठ को अपील) अधिनियम, म.प्र., 2005 (2006 का 14), धारा 2(1) – अंतर्वर्ती आदेश – अपील की व्याप्ति – अभिनिर्धारित – इस न्यायालय की पूर्ण न्यायपीठ ने यह अभिनिर्धारित किया है कि यदि अंतर्वर्ती आदेश के स्वरूप में अंतिम होने का तत्व है एवं यह स्थाई रूप से पक्षकारों के अधिकारों को प्रभावित करता है या पक्षकारों को असुधार्य परिस्थिति में छोड़ दिया जाता है तब ऐसे आदेश को अपील में चुनौती दी जा सकती है।

The order of the Court was passed by : **S.A. DHARMADHIKARI, J.**

Vijay Kumar Asudani, for the appellant.
Mini Ravindran, for the respondent No. 3.

NOTES OF CASES SECTION

Short Note

****(6)***

Before Mr. Justice G.S. Ahluwalia

WP No. 9647/2013 (Jabalpur) decided on 26 June, 2023

ASHOK SINGH …Petitioner

Vs.

UNION OF INDIA & ors. …Respondents

A. Service Law – Departmental Enquiry – Presenting Officer as Witness – Permissibility **– Held – Dr. Utpal was appointed as Presenting Officer and was also listed as witness – Objection was raised by petitioner – Since Dr. Utpal continued to act as Presenting officer and possibility of biases against petitioner are not ruled out, departmental enquiry is vitiated and is thus quashed – Respondent permitted to proceed further with enquiry after appointing a new Presenting Officer – Petition allowed.**

क. सेवा विधि – विभागीय जांच – साक्षी के रूप में प्रस्तुतकर्ता अधिकारी – अनुज्ञेयता – अभिनिर्धारित – डॉ. उत्पल को प्रस्तुतकर्ता अधिकारी के रूप में नियुक्त किया गया था एवं साक्षी के रूप में भी सूचीबद्ध किया गया था – याची द्वारा आपत्ति उठाई गई थी – चूंकि डॉ. उत्पल प्रस्तुतकर्ता अधिकारी के रूप में कार्य करते रहे एवं याची के विरूद्ध पक्षपात की संभावनाओं से इंकार नहीं किया जा सकता, विभागीय जांच दूषित हो गई एवं इसलिए अभिखंडित की गई – प्रत्यर्थीगण को एक नया प्रस्तुतकर्ता अधिकारी नियुक्त करने के पश्चात् जांच आगे बढ़ाने की अनुमति प्रदान की गई – याचिका मंजूर।

B. Service Law – Departmental Enquiry – Role of Presenting Officer **– Held – Role of presenting officer is to place the material before Enquiry Officer – If presenting officer is not acting independently but is acting with preconceived notion/mind, then it is not expected that entire material may be placed before enquiry officer and possibility that enquiry may not take place in free and fair manner, cannot be ruled out.**

ख. सेवा विधि – विभागीय जांच – प्रस्तुतकर्ता अधिकारी की भूमिका – अभिनिर्धारित – प्रस्तुतकर्ता अधिकारी की भूमिका जांच अधिकारी के समक्ष सामग्री प्रस्तुत करना है – यदि प्रस्तुतकर्ता अधिकारी स्वतंत्र रूप से कार्य नहीं कर रहा है बल्कि पूर्वकल्पित धारणा/ मस्तिष्क से कार्य कर रहा है तो यह अपेक्षित नहीं है कि संपूर्ण सामग्री जांच अधिकारी के समक्ष रखी जा सकती है एवं इस संभावना से इंकार नहीं किया जा सकता है कि जांच स्वतंत्र और निष्पक्ष तरीके से नहीं हो सकेगी।

C. Service Law – Departmental Enquiry – Plea of Bias – Evidence **– Held – There cannot be a direct evidence to show the biases of an authority but it has to be inferred from surrounding circumstances.**

ग. सेवा विधि – विभागीय जांच – पक्षपात का अभिवाक् – साक्ष्य – अभिनिर्धारित – किसी प्राधिकारी के पक्षपात को दर्शाने हेतु कोई प्रत्यक्ष साक्ष्य नहीं हो सकता, बल्कि आस–पास की परिस्थितियों से इसका निष्कर्ष निकाला जाना चाहिए।

Cases referred:

(2001) 2 SCC 330, (2013) 16 SCC 116, WP No. 6309/2006 decided on 14.09.2022.

Sanjay Kumar Agrawal, for the petitioner.
Arpan J. Pawar, for the respondent No. 2 & 3.

Short Note
****(7)***
Before Mr. Justice Hirdesh
MA No. 1450/2012 (Indore) decided on 14 September, 2023

DATINDER KAUR & ors. …Appellants

Vs.

MOHANLAL & ors. …Respondents

***A. Motor Vehicles Act (59 of 1988), Section 173 – Enhancement of Compensation – Income Tax Return* – Held – Accident occurred on 14.07.2007 whereas income tax return was filed on 27.07.2007 – Return has been filed by some other person after the death of deceased – Same cannot be taken into consideration as possibility of them being filed by inflating the income cannot be ruled out – Tribunal rightly discarded the income tax return for assessing income of deceased.**

क. मोटर यान अधिनियम (1988 का 59), धारा 173 – प्रतिकर में वृद्धि – आयकर रिटर्न – अभिनिर्धारित – दुर्घटना 14.07.2007 को हुई जबकि आयकर रिटर्न 27.07.2007 को दाखिल किया गया था – रिटर्न मृतक की मृत्यु के पश्चात किसी अन्य व्यक्ति द्वारा दाखिल किया गया – इसे विचार में नहीं लिया जा सकता क्योंकि इसे आय बढ़ाने के उद्देश्य से दाखिल किए जाने की संभावना से इंकार नहीं किया जा सकता – अधिकरण ने मृतक की आय के निर्धारण हेतु आयकर रिटर्न को उचित ही अस्वीकार किया है।

***B. Motor Vehicles Act (59 of 1988), Section 173 – Enhancement of Compensation – Multiplier* – Held – If claimant/deceased is around 21-25 yrs. of age at the time of accident, multiplier of 18 would apply – Tribunal wrongly applied multiplier of 17 because age of deceased was around 24 yrs.**

ख. मोटर यान अधिनियम (1988 का 59), धारा 173 – प्रतिकर में वृद्धि – गुणक – अभिनिर्धारित – यदि दुर्घटना के समय दावाकर्ता / मृतक की आयु लगभग 21–25 वर्ष है तब 18 का गुणक प्रयोज्य होगा – अधिकरण ने 17 का गुणक प्रयोग कर त्रुटि की है क्योंकि मृतक की आयु लगभग 24 वर्ष थी।

C. Motor Vehicles Act (59 of 1988), Section 173 – Enhancement of Compensation – Deduction of Personal Expenses **– Held – On the date of incident, parents of deceased use to do agricultural work, thus they were not exclusively dependent upon deceased – Tribunal rightly deducted 1/3rd part for personal expenses.**

ग. मोटर यान अधिनियम (1988 का 59), धारा 173 – प्रतिकर में वृद्धि – व्यक्तिगत खर्चों की कटौती – अभिनिर्धारित – घटना की तारीख पर मृतक के अभिभावक कृषि कार्य करते थे, अतः वे अनन्यतः मृतक पर आश्रित नहीं थे – अधिकरण ने व्यक्तिगत खर्चों हेतु 1/3 भाग की कटौती उचित ही की है।

D. Motor Vehicles Act (59 of 1988), Section 173 – Enhancement of Compensation – Future Prospects **– Held – Apex Court concluded that if deceased was self employed and was having a fixed salary then addition of 40% of established income would be warranted where the deceased was below the age of 40 yrs.**

घ. मोटर यान अधिनियम (1988 का 59), धारा 173 – प्रतिकर में वृद्धि – भावी संभावना – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया कि यदि मृतक स्वव्यसायी था और उसका निश्चित वेतन था तब यदि मृतक 40 वर्ष की आयु से कम था तो उसे स्थापित आय का 40% अतिरिक्त दिया जाएगा।

Cases referred:

2004 ACJ 782, 2009 ACJ SC Page 1298, 2017 ACJ 2770, 2018 ACJ 1782.

Sourabh Neema, for the appellants.
Sudarshan Pandit, for the respondent No. 3.

Short Note

****(8)***

Before Mr. Justice Prakash Chandra Gupta

MCRC No. 21094/2023 (Indore) decided on 7 August, 2023

HOSHIYARSINGH …Applicant

Vs.

STATE OF M.P. …Non-applicant

(Alongwith MCRC No. 2948/2023)

Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Sections 8/15, 29 & 37, Standing Order No. 1/89 and Criminal Procedure Code, 1973 (2 of 1974), Section 439 – Bail – Quantity of Contraband **– Held – This Court earlier concluded that whether the procedure laid down under NDPS Act is complied or not, the same cannot be looked into at the time of grant of bail and can be decided at the time of trial as the same is question of fact – 451 Kgs**

of poppy straw seized from applicants – Case is related to huge quantity of contraband – Bail rejected – Application dismissed.

स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धाराएँ 8/15, 29 व 37, स्थायी आदेश क्र. 1/89 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 439 – जमानत – विनिषिद्ध की मात्रा – अभिनिर्धारित – इस न्यायालय द्वारा पूर्व में यह निष्कर्षित किया गया था कि एनडीपीएस अधिनियम के अंतर्गत निर्धारित प्रक्रिया का पालन किया गया या नहीं, इस पर जमानत दिए जाने के समय विचार नहीं किया जा सकता और इसे, तथ्य का प्रश्न होने के कारण, विचारण के समय निर्णीत किया जा सकता है – आवेदकों से 451 किग्रा. पोस्ततृण जप्त किया गया – मामला विनिषिद्ध की अत्यधिक मात्रा से संबंधित है – जमानत अस्वीकार – आवेदन खारिज।

Cases referred:

MCRC No. 30722/2022 order passed on 02.08.2022, MCRC No. 35202/2022 order passed on 05.08.2022, MCRC No. 10347/2023 order passed on 21.03.2023, MCRC No. 11615/2023 order passed on 17.03.2023, (2008) 16 SCC 417, (2009) 12 SCC 161.

Santosh Kumar Meena, for the applicant in MCRC No. 21094/2023.
Subodh Choudhary, for the applicant in MCRC No. 2948/2023.
Anand Soni, A.A.G. for the State in MCRC No. 21094/2023 & MCRC No. 2948/2023.

Short Note
****(9)***
Before Mr. Justice Sujoy Paul
WP No. 4629/2020 (Jabalpur) decided on 16 August, 2023

JAIRAM THADHANI …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

***Service Law – Promotion & Time Scale of Pay/Kramonnati* – Held – The benefit of *Kramonnati* or time scale of pay is granted to the stagnating employees, if no promotion is granted to them within stipulated time – He continues to work on same post but gets a upgraded scale – In case where department offered promotion and employee has denied it, department cannot be blamed for stagnation – Because of refusal for promotion by petitioner, time scale of pay was rightly declined – Petition dismissed.**

सेवा विधि – पदोन्नति और समयमान वेतनमान/क्रमोन्नति – अभिनिर्धारित – क्रमोन्नति या समयमान वेतनमान का लाभ वृद्धिरूद्ध कर्मचारियों को दिया जाता है, यदि नियत समय के भीतर उन्हें कोई पदोन्नति प्रदान नहीं की गई है – वह उसी पद पर काम करना जारी रखता है किन्तु उन्नत वेतनमान प्राप्त करता है – उस मामले में जहां विभाग

द्वारा पदोन्नति की प्रस्थापना की गई और कर्मचारी ने इससे इंकार कर दिया, विभाग को वृद्धिरूद्धि के लिए दोषी नहीं ठहराया जा सकता – याची द्वारा पदोन्नति के लिए इंकार के कारण, समयमान वेतनमान से उचित ही इंकार किया गया था – याचिका खारिज।

Case referred:

Civil Appeal Nos. 7027-7028/2009 decided on 03.01.2022 (Supreme Court).

Ashok Kumar Gupta, for the petitioner.
Ritwik Parashar, G.A for the respondents.

Short Note
****(10)***
Before Mr. Justice G.S. Ahluwalia
WP No. 15069/2023 (Jabalpur) decided on 30 June, 2023

LEELADHAR VISHWAKARMA …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

***A. Municipal Corporation Act, M.P. (23 of 1956), Section 307 – Illegal Construction – Notice* – Held – Petitioner himself admitted that he has no building permission and no sanctioned map and his entire construction is illegal as well as the Colony where house has been constructed is also an illegal Colony – It is clear that contrary to rules, construction was made – No triable disputed issues are involved in present case requiring any adjudication on facts – Petition dismissed.**

क. नगरपालिक निगम अधिनियम, म.प्र. (1956 का 23), धारा 307 – अवैध निर्माण – नोटिस – अभिनिर्धारित – याची ने स्वयं स्वीकार किया है कि उसके पास भवन निर्माण की कोई अनुज्ञा नहीं है और कोई मंजूर मानचित्र नहीं है एवं उसका संपूर्ण निर्माण अवैध है, साथ ही जिस कॉलोनी में मकान निर्मित किया गया है वह भी एक अवैध कॉलोनी है – यह स्पष्ट है कि नियमों के विपरीत, निर्माण किया गया था – वर्तमान प्रकरण में कोई भी विचारणीय विवादित विवाद्यक अंतर्वलित नहीं है जिसमें तथ्यों पर कोई न्यायनिर्णयन अपेक्षित हो – याचिका खारिज।

***B. Municipal Corporation Act, M.P. (23 of 1956), Section 307(2) & (3) – Illegal Construction* – Held – Since there is no requirement that a particular period has to be given to wrongdoer for filing reply or an order u/S 307(3) can be issued only after a particular period, therefore, after having admitted that the construction has been raised without seeking any building permission or sanctioned map at all, no infirmity is found in impugned order.**

ख. नगरपालिक निगम अधिनियम, म.प्र. (1956 का 23), धारा 307(2) व (3) – अवैध निर्माण – अभिनिर्धारित – चूंकि ऐसी कोई अपेक्षा नहीं है कि जवाब प्रस्तुत करने के लिए दोषकर्ता को कोई विशिष्ट अवधि प्रदान की जाए अथवा केवल एक विशिष्ट अवधि के पश्चात् ही धारा 307(3) के अंतर्गत आदेश जारी किया जा सकता है, अतः, यह स्वीकार करने के पश्चात् कि किसी भवन निर्माण की अनुज्ञा मांगे बिना अथवा मंजूर मानचित्र के बिना निर्माण किया गया है, आक्षेपित आदेश में कोई कमी नहीं पाई गई।

***C. Municipal Corporation Act, M.P. (23 of 1956), Section 307(2) & (3) – Illegal Construction – Deposit of Property Tax – Effect* – Held – Merely because petitioner deposited property tax, it would not confer any title or would not legalize his illegal action – He himself admitted that he has no building permission and no sanctioned map and his entire construction is illegal as well as the Colony where house has been constructed is also an illegal Colony – Deposit of property tax will not come to the rescue of petitioner.**

ग. नगरपालिक निगम अधिनियम, म.प्र. (1956 का 23), धारा 307(2) व (3) – अवैध निर्माण – संपत्ति कर जमा करना – प्रभाव – अभिनिर्धारित – मात्र क्योंकि याची ने संपत्ति कर जमा किया, यह कोई हक प्रदान नहीं करेगा अथवा उसके अवैध कार्य को वैध नहीं करेगा – उसने स्वयं यह स्वीकार किया है कि उसके पास भवन निर्माण की कोई अनुज्ञा नहीं है एवं कोई मंजूर मानचित्र नहीं है एवं उसका संपूर्ण निर्माण अवैध है, साथ ही जिस कॉलोनी में मकान निर्मित किया गया है, वह भी एक अवैध कॉलोनी है – संपत्ति कर जमा करने से याची का बचाव नहीं होगा।

***D. Municipal (Compounding of Offence of Construction of Buildings, Fees and Conditions) Rules, M.P., 2016, Rule 5, proviso – Compounding of Illegal Construction – Requirements* – Held – As per proviso to Rule 5, if construction has been made beyond permissible FAR or more than 10% of permissible FAR, compounding shall be made only after removing additional construction – For compounding the illegal construction, the illegal construction is required to be removed first – Without demolishing/removing the illegally constructed area, compounding cannot be done at all.**

घ. नगरपालिका (अनुज्ञा के बिना भवनों के संनिर्माण के अपराधों का प्रशमन, शुल्क एवं शर्तें) नियम, म.प्र., 2016, नियम 5, परंतुक – अवैध निर्माण का शमन – अपेक्षाएँ – अभिनिर्धारित – नियम 5 के परंतुक के अनुसार, यदि निर्माण अनुज्ञेय एफ ए आर से परे अथवा अनुज्ञेय एफ ए आर से 10% अधिक किया गया है, तो केवल अतिरिक्त निर्माण हटाने के पश्चात् ही शमन किया जाएगा – अवैध निर्माण का शमन करने के लिए, पहले अवैध निर्माण को हटाना अपेक्षित है – अवैध रूप से निर्मित क्षेत्र को तोड़े/हटाये बिना, शमन बिल्कुल भी नहीं किया जा सकता।

***E. Municipal Corporation Act, M.P. (23 of 1956), Section 307 – Illegal Construction – Interim Order of Protection* – Held – Merely because**

demolition was stayed by a Co–ordinate bench of this Court in relation to some other case involving different factual aspects, the same cannot be cited as a precedent.

ङ *नगरपालिक निगम अधिनियम, म.प्र. (1956 का 23), धारा 307 – अवैध निर्माण – संरक्षण का अंतरिम आदेश* – अभिनिर्धारित – मात्र क्योंकि विभिन्न तथ्यात्मक पहलुओं से अंतर्वलित किसी अन्य प्रकरण के संबंध में इस न्यायालय की समन्वय पीठ द्वारा तोड़ने पर रोक लगा दी गई थी, इसे एक पूर्व निर्णय के रूप में उद्धृत नहीं किया जा सकता।

F. ***Constitution – Article 226 – Plea of Malafides – Impleadment*** **– Held – In order to attribute biases or *malafide* action, petitioner is not only required to plead the same specifically in writ petition but the authorities in personal capacity is also required to be impleaded.**

च. संविधान – अनुच्छेद 226 – असद्भावना का अभिवाक् – अभियोजित किया जाना – अभिनिर्धारित – पक्षपात अथवा असद्भावपूर्वक कार्रवाई आरोपित करने के लिए, याची को न केवल रिट याचिका में निर्दिष्ट रूप से उक्त का अभिवाक् करना अपेक्षित है, बल्कि व्यक्तिगत हैसियत में प्राधिकारीगण को अभियोजित करना भी अपेक्षित है।

G. ***Constitution – Article 226 – Principle of Natural Justice – Prejudice*** **– Held – Violation of principle of natural justice by itself is not sufficient to quash the proceedings unless and until the aggrieved party successfully points out the prejudice which may be caused to him.**

छ. संविधान – अनुच्छेद 226 – नैसर्गिक न्याय का सिद्धांत – प्रतिकूल प्रभाव – अभिनिर्धारित – नैसर्गिक न्याय के सिद्धांत का उल्लंघन अपने आप में कार्यवाहियों को अभिखंडित करने हेतु पर्याप्त नहीं है जब तक कि व्यथित पक्षकार सफलतापूर्वक उस प्रतिकूल प्रभाव को इंगित नहीं करता जो उसे कारित हो सकता है।

H. ***Constitution – Article 14 & 226 – Negative Equality*** **– Held – The principle of negative equality has no place in Article 14 of Constitution.**

ज. संविधान – अनुच्छेद 14 व 226 – नकारात्मक समानता – अभिनिर्धारित – नकारात्मक समानता के सिद्धांत का संविधान के अनुच्छेद 14 में कोई स्थान नहीं है।

I. ***Precedent – Interim Order*** **– Held – Interim order cannot be treated as a precedent.**

झ. पूर्व निर्णय – अंतरिम आदेश – अभिनिर्धारित – अंतरिम आदेश को एक पूर्व निर्णय के रूप में नहीं माना जा सकता।

Cases referred:

(2003) 5 SCC 437, (2007) 4 SCC 737, (2009) 15 SCC 705, (2013) 14 SCC 81, WP No. 18516/2022 order passed on 25.08.2022.

Sankalp Kochar, for the petitioner.
Mohan Sausarkar, G.A. for the respondents/State.
Shivendra Pandey, for the respondent No. 2 & 3/Municipal Corporation.

Short Note

****(11)***

Before Mr. Justice Vivek Rusia

WP No. 5675/2023 (Indore) decided on 24 July, 2023

MAMTA SONI (SMT.) …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

A. Service Law – Aganwadi Workers – Termination – Grounds – **Aganwadi workers and assistants are appointed only to render services in Aganwadi Centres, they should not be forced to do other work – Arrangement of articles to make the "Shivjyoti Arpanam" program successful cannot be a part of the duties of Aganwadi Workers and Assistants – Petitioner being Aganwadi Worker rightly refused to do work of labour in the above said program which is not part of her duties – Impugned order quashed – Petition allowed with cost of Rs. 10,000.**

क. सेवा विधि – आंगनबाड़ी कार्यकर्ता – सेवा समाप्ति – आधार – आंगनबाड़ी कार्यकर्ताओं एवं सहायिकाओं की नियुक्ति केवल आंगनबाड़ी केंद्रों में सेवाएं प्रदान करने के लिए की जाती है – ''शिवज्योति अर्पणम'' कार्यक्रम को सफल बनाने के लिए वस्तुओं की व्यवस्था करना आंगनबाड़ी कार्यकताओं एवं सहायिकाओं के कर्तव्यों का भाग नहीं हो सकता – याची ने आंगनबाड़ी कार्यकर्ता होने के नाते उक्त कार्यक्रम में श्रमिक का कार्य करने से उचित रूप से इंकार किया जो कि उसके कर्तव्यों का भाग नहीं है – आक्षेपित आदेश अभिखंडित – याचिका 10,000/– रू. के व्यय सहित मंजूर।

B. Service Law – Aganwadi Workers – Termination – Grounds – **Held – Aganwadi Worker can only be removed from the post if the charges are proved to the effect that she is not running the centre properly or discharging duties and liabilities negligently.**

ख. सेवा विधि – आंगनबाड़ी कार्यकर्ता – सेवा समाप्ति – आधार – अभिनिर्धारित – आंगनबाड़ी कार्यकर्ता को पद से केवल तब हटाया जा सकता है यदि यह आरोप साबित हो जाएं कि वह उचित रूप से केंद्र का संचालन नहीं कर रही है अथवा उपेक्षापूर्वक कर्तव्यों एवं दायित्वों का निर्वहन कर रही है।

C. Constitution – Article 226 – Termination – Alternate Remedy of Appeal – **Held – Only show cause notice was issued after the reply filed by the petitioner, no enquiry was conducted – Thus petitioner cannot be relegated to Appellate Authority – Petitioner assailed the impugned order on the**

ground of jurisdiction of competent authority – Writ Petition is maintainable.

ग. संविधान – अनुच्छेद 226 – सेवा समाप्ति – अपील का वैकल्पिक उपचार – अभिनिर्धारित – याची द्वारा जवाब प्रस्तुत किये जाने के पश्चात् केवल कारण बताओ नोटिस जारी किया गया था, कोई जांच संचालित नहीं की गई थी – अतः याची को अपीली प्राधिकारी के समक्ष नहीं भेजा जा सकता – याची ने सक्षम प्राधिकारी की अधिकारिता के आधार पर आक्षेपित आदेश को चुनौती दी – रिट याचिका पोषणीय है।

Cases referred:

Civil Appeals No. 7812-7812/2022 (Arising out of SLP (C) Nos. 31288-31290/2011 (Supreme Court).

Ashish Choubey, for the petitioner.
Sudarshan Joshi, G.A. for the respondents.

Short Note
****(12)***
Before Mr. Justice Dwarka Dhish Bansal
CR No. 400/2021 (Jabalpur) decided on 28 August, 2023

MAZID BEG (DEAD) THR. ARKEY INVESTMENT PVT. LTD. … Applicant

Vs.

SMT. SUBHASHINI PANDEY & ors. …Non-applicants

(Alongwith CR No. 401/2021)

***Civil Procedure Code (5 of 1908) Order 8, Rule 6-A to G & Order 7 Rule 1 – Substitution of LRS in Counter Claim* – Held – After making substitution/addition in the plaint, there is no need to substitute/add the legal representatives of plaintiff or defendant or additionally added parties, in the counter claim also – Parties to the suit are treated parties to the counter claim also – Revision dismissed.**

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 8 नियम 6–A से G व आदेश 7 नियम 1 – प्रतिदावा में विधिक प्रतिनिधि का प्रतिस्थापन – अभिनिर्धारित – वादपत्र में प्रतिस्थापन/परिवर्धन के पश्चात् प्रतिदावा में भी वादी या प्रतिवादी या अतिरिक्त रूप से जोड़े गए पक्षकारों के विधिक प्रतिनिधियों को प्रतिस्थापित किए जाने/जोड़ने की आवश्यकता नहीं है – वाद के पक्षकार प्रतिदावा के भी पक्षकार माने जाएंगे – पुनरीक्षण खारिज।

Cases referred:

AIR 1996 SC 2222, (2003) 9 SCC 187, 2009 (159) DLT 756, 2008 (4) Civil Court Cases 812 (P&H).

Rajesh Pancholi, for the applicant in CR No. 400/2021 & CR No. 401/2021.

Ravish Agrawal alongwith *Sanjana Sahni,* for the non-applicant in CR No. 400/2021 & for the non-applicant Nos. 1 to 4 in CR No. 401/2021.

Vijay Pandey, P.L. for the non-applicant/State in CR No. 400/2021 & for the non-applicant No. 5/State in CR No. 401/2021.

Mohd. Aadil Usmani alongwith *Shivansh Choukey,* for the LRs. of non-applicant No. 6 in CR No. 401/2021.

Short Note

****(13)***

Before Mr. Justice Prem Narayan Singh

CRR No. 1121/2022 (Indore) decided on 26 July, 2023

PAWAN @ PREMCHAND RATHORE & ors. …Applicants

Vs.

STATE OF M.P. …Non-applicant

***A. Penal Code (45 of 1860), Section 306 & 498-A – Quashment of Charge – Ingredients of Offence* – Held – In suicide note deceased wrote that she is leaving the world due to her own trouble and she herself is only liable for her death – Petitioners are in-laws of deceased and deceased committed suicide within 2½ yrs. of her marriage and specific allegations regarding cruelty and harassment and ingredients of abetment are evident from statement of witnesses recorded u/S 161 Cr.P.C. – No interference warranted – Revision dismissed.**

क. दण्ड संहिता (1860 का 45), धारा 306 व 498–A – आरोप का अभिखंडन – अपराध के घटक – अभिनिर्धारित – सुसॉइड नोट में मृतिका ने लिखा कि वह अपनी स्वयं की परेशानी के कारण दुनिया छोड़ रही है और एकमात्र वह स्वयं ही अपनी मृत्यु के लिए जिम्मेदार है – याचीगण मृतिका के ससुराल वाले हैं और मृतिका ने अपने विवाह के 2½ वर्ष के भीतर आत्महत्या की है और द.प्र.सं. की धारा 161 के अधीन अभिलिखित साक्षियों के कथन से क्रूरता एवं उत्पीड़न संबंधी विनिर्दिष्ट आरोप एवं दुष्प्रेरण के घटक स्पष्ट हैं – किसी हस्तक्षेप की आवश्यकता नहीं – पुनरीक्षण खारिज।

***B. Penal Code (45 of 1860), Section 306 & 498-A and Evidence Act (1 of 1872), Section 113(A) – Presumption* – Held – Wife committed suicide**

within a period of 7 yrs. from date of marriage – Court may presume having regard to all other circumstances of the case, that such suicide had been abeted by her husband or by such relatives of her husband – Charge rightly framed.

ख. दण्ड संहिता (1860 का 45), धारा 306 व 498–A एवं साक्ष्य अधिनियम (1872 का 1), धारा 113(A) – उपधारणा – अभिनिर्धारित – पत्नी ने अपने विवाह के 7 वर्षों के भीतर आत्महत्या की – न्यायालय मामले की सभी अन्य परिस्थितियों को ध्यान में रखते हुए यह उपधारणा कर सकेगा कि ऐसी आत्महत्या उसके पति या उसके पति के ऐसे नातेदारों द्वारा दुष्प्रेरित की गई थी – आरोप उचित ही विरचित किए गए।

C. Criminal Procedure Code, 1973 (2 of 1974), Section 227 & 228 – Considerations **– Held – While framing charges, Court must apply its judicial mind on the material placed on record and must be satisfied that there subsist strong possibility that accused has committed the offence – Court has to *prima facie* examine whether there is sufficient ground for proceedings against accused – Court is not required to evaluate or analyse the findings in order to arrive at a conclusion that the material furnished by prosecution are sufficient to convict the accused or not.**

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 227 व 228 – विचारणाएँ – अभिनिर्धारित – आरोप विरचित करते समय न्यायालय को अभिलेख पर प्रस्तुत सामग्री के संबंध में न्यायिक विवेक का प्रयोग करना चाहिए और इस संबंध में संतुष्ट होना चाहिए कि अभियुक्त द्वारा अपराध किए जाने की प्रबल संभावना है – न्यायालय को प्रथम दृष्टया यह परीक्षण करना है कि क्या अभियुक्त के विरूद्ध कार्यवाही करने के पर्याप्त आधार है – न्यायालय को इस निर्णय पर पहुँचने के लिए कि क्या अभियोजन द्वारा प्रस्तुत सामग्री अभियुक्त को दोषसिद्ध करने के लिए पर्याप्त है या नहीं, निष्कर्षों का मूल्यांकन या विश्लेषण करने की आवश्यकता नहीं है।

D. Criminal Procedure Code, 1973 (2 of 1974), Section 397 & 401 – Revisional Jurisdiction **– Held – Jurisdiction of revisional Court has a limited scope, it can interfere with the order of subordinate Court only when it is unjust and unfair – In case where order of subordinate Court does not suffer from any infirmity/illegality merely because of equitable considerations, Revisional Court has no jurisdiction to reconsider the matter and pass a different order in a routine manner – Jurisdiction of Revisional Court is not that of an appellate Court which is free to reach its own conclusion on evidence.**

घ. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 397 व 401 – पुनरीक्षण अधिकारिता – अभिनिर्धारित – पुनरीक्षण न्यायालय की अधिकारिता का क्षेत्र सीमित है, यह निचली अदालत के आदेश में हस्तक्षेप केवल तभी कर सकता है जब यह अनुचित है और निष्पक्षतापूर्ण नहीं है – ऐसे मामले में जहां निचली अदालत का आदेश न्यायसंगत विचार के आधार पर किसी दोष/अवैधता से ग्रसित नहीं है तो पुनरीक्षण न्यायालय को मामले को पुनः विचार में लेने और नियमित प्रक्रिया के अधीन अलग आदेश देने की अधिकारिता नहीं है – पुनरीक्षण न्यायालय की अधिकारिता अपीलीय न्यायालय के समान नहीं है जिसे साक्ष्य के आधार पर अपने स्वयं के निष्कर्ष पर पहुँचने की स्वतंत्रता है।

Cases referred:

2017 (1) MPWN 124, 2016 (1) MPWN 70, 2021 (1) MPWN 45, AIR 1979 SC 366, 2004 lawsuit SC 1408, 2016 Law suit SC 111, AIR 1997 SC 2041, 2020 (3) SCC 317, (2017) 3 SCC 198, (2022) 9 SCC 460.

Ashish Gupta, for the applicants.
Vishal Panwar, P.L. for the non-applicant.

Short Note
****(14)***
Before Mr. Justice Prem Narayan Singh
CRA No. 4239/2022 (Indore) decided on 26 July, 2023

PREMCHAND …Appellant

Vs.

STATE OF M.P. & anr. …Respondents

***A. Penal Code (45 of 1860), Section 294 and Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (33 of 1989), Section 3(1)(s) – Abusing – Annoyance* – Abusing word in the name of mother and sister – Held – This Court earlier held that these types of abuses are uttered in general parlance in altercations between rustic people – Annoyance is the main substance of offence punishable u/S 294 IPC – Virtually, in colloquial language such type of abuses are often used, therefore they cannot be accepted in their literal sense – Since no prosecution witness deposed before the Court anything about causing annoyance, prosecution failed to prove that accused committed obscene act by abusing complainant which annoyed others.**

क. दण्ड संहिता (1860 का 45), धारा 294 एवं अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम (1989 का 33), धारा 3(1)(s) – गाली

देना – क्षोभ – मां बहन के नाम पर गाली देना – अभिनिर्धारित – इस न्यायालय ने पूर्व में अभिनिर्धारित किया था कि इस प्रकार की गालियां सामान्य बोल–चाल में असभ्य लोगों के बीच आपसी झगड़ों में दी जाती हैं – क्षोभ भा.दं.सं. की धारा 294 में दण्डनीय अपराध का प्रमुख तत्व है – वास्तव में, बोलचाल की भाषा में इस प्रकार की गालियां बहुधा प्रयुक्त होती हैं, अतः उन्हें उनके शाब्दिक अर्थों में स्वीकार नहीं किया जा सकता – चूंकि न्यायालय के समक्ष किसी भी अभियोजन साक्षी ने क्षोभ कारित किये जाने के बारे में कोई अभिसाक्ष्य नहीं दिया, अभियोजन यह साबित करने में असफल रहा कि परिवादी ने अभियोगी को गाली देकर ऐसा अश्लील कृत्य कारित किया जिससे अन्य को क्षोभ हुआ।

B. ***Penal Code (45 of 1860), Section 506(P-II) and Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (33 of 1989), Section 3(1)(r) –Threatening*** **– Held – Threatening is the most important ingredient of criminal intimidation – The sole eye witness deposed that accused told him that he has been rescued but if he came to his field he will be killed – This intimidation is conditional, so it does not come under the purview of offence punishable u/S 506(P–II) IPC and u/S 3(1)(r) of the 1989 Act.**

ख. *दण्ड संहिता (1860 का 45), धारा 506(P-II) एवं अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम (1989 का 33), धारा 3(1)(r) – धमकी देना* – अभिनिर्धारित – धमकी देना आपराधिक अभित्रास का अत्यंत प्रमुख घटक है – एकमात्र चक्षुदर्शी साक्षी ने कथन किया कि अभियुक्त ने उसे बताया कि उसको बचा लिया गया है लेकिन यदि वह उसके खेत में आएगा तो वह मार दिया जाएगा – यह सशर्त अभित्रास है, अतः यह धारा 506(P-II) भा.दं.सं. एवं अधिनियम 1989 की धारा 3(1)(r) के अंतर्गत दण्डनीय अपराध की परिधि में नहीं आता।

C. ***Arms Act (54 of 1959), Section 25(1B)(b) – Independent Witness*** **– Held – As per prosecution case, a sword was seized from possession of accused – Independent witness has not supported the prosecution case regarding seizure of sword – Accused rightly acquitted of the charge.**

ग. *आयुध अधिनियम (1959 का 54), धारा 25(1B)(b) – स्वतंत्र साक्षी* – अभिनिर्धारित – अभियोजन प्रकरण के अनुसार, अभियुक्त के कब्जे से एक तलवार जप्त की गई थी – स्वतंत्र साक्षी ने तलवार की जप्ती के संबंध में अभियोजन प्रकरण का समर्थन नहीं किया – अभियुक्त को आरोप से उचित रूप से दोषमुक्त किया गया।

D. ***Criminal Practice – Two Possible Views*** **– Held – Apex Court concluded that where two views are possible, appellate Court should not interfere with finding of acquittal recorded by the Court below.**

घ. *दाण्डिक पद्धति – दो संभावित दृष्टिकोण* – अभिनिर्धारित – उच्चतम न्यायालय ने निष्कर्षित किया कि जहां दो दृष्टिकोण संभव हैं, वहां अपीली न्यायालय को

निचले न्यायालय द्वारा अभिलिखित दोषमुक्ति के निष्कर्ष में हस्तक्षेप नहीं करना चाहिए।

Cases referred:

1971 (1) SCC 855, (1994) 4 SCC 664, 1957 MPLJ-21, 1996 MPLJ-87, 2002 (4) MPHT-7, 1989 MPLJ 657, 2005 LawSuit (MP) 442, 2015 LawSuit (SC) 52, (2010) 3 SCC 746, (2006) 6 SCC 39, (2006) 9 SCC 731, (2010) 6 SCC 407.

None, for the appellant.
Gaurav Rawat, G.A. for the State.
Rajendra Kumar Trivedi, for the respondent No. 2.

Short Note
****(15)***
Before Mr. Justice Dwarka Dhish Bansal
CR No. 477/2015 (Jabalpur) decided on 7 August, 2023

RAJDHAR & anr. …Applicants

Vs.

SMT. DHOKIYA …Non-applicant

Civil Procedure Code (5 of 1908), Order 21 Rule 23(2) and Limitation Act (36 of 1963), Article 136 – Execution of Preliminary Decree – Limitation – **Held – After modification in the decree in second appeal by this Court, it was the duty of the trial Court to draw the final decree which is yet not done – Question of limitation does not arise – Executing Court rightly held the application to be within limitation – Revision dismissed.**

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 21 नियम 23(2) एवं परिसीमा अधिनियम (1963 का 36), अनुच्छेद 136 – प्रारंभिक डिक्री का निष्पादन – परिसीमा – अभिनिर्धारित – इस न्यायालय द्वारा द्वितीय अपील में डिक्री में उपांतरण के पश्चात्, विचारण न्यायालय का यह कर्तव्य था कि अंतिम डिक्री तैयार करे जो अभी तक नहीं की गई है – परिसीमा का प्रश्न उत्पन्न नहीं होता – निष्पादन न्यायालय द्वारा आवेदन का परिसीमा के भीतर होना उचित ही अभिनिर्धारित किया गया – पुनरीक्षण खारिज।

Cases referred:

(2005) 10 SCC 746, AIR 2022 SC 2841, (2009) 9 SCC 689, (2018) 15 SCC 254.

Sanjana Sahni, for the applicants.
Nityanand Mishra, for the non-applicant.

Short Note

****(16)***

Before Mr. Justice Sanjay Dwivedi

MP No. 3562/2019 (Jabalpur) decided on 27 July, 2023

SHIV DAS (DECEASED) BY HIS LRs. …Petitioners

Vs.

SOUTH EASTERN COALFIELD LTD. …Respondent

***Industrial Disputes Act (14 of 1947), Section 10(8) – Departmental Enquiry – Death of Employee – Effect* – Held – Apex Court concluded that if workman dies in a pending enquiry the reference does not abate and Tribunal does not become *functus officio* – Enquiry may be continued and at the same time one more opportunity is granted to petitioner to cross–examine the witnesses produced by management – Petition partly allowed.**

औद्योगिक विवाद अधिनियम (1947 का 14), धारा 10(8) – विभागीय जांच – कर्मचारी की मृत्यु – प्रभाव – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया है कि यदि एक लंबित जांच के दौरान कर्मकार की मृत्यु हो जाती है तो निर्देश उपशमित नहीं होता एवं अधिकरण पदकार्यनिवृत्त नहीं होता – जांच जारी रखी जा सकती है और साथ ही याची को प्रबंधन द्वारा प्रस्तुत किये गये साक्षीगण का प्रतिपरीक्षण करने हेतु एक या अधिक अवसर प्रदान किये जाते हैं – याचिका अंशतः मंजूर।

Cases referred:

(1994) 1 SCC 292, 1995 Supp (3) SCC 557.

Mukhtar Ahmed with *P.C. Jain,* for the petitioners.
Anoop Nair, for the respondent.

Short Note

****(17)***

Before Mr. Justice Vivek Agarwal

WP No. 20036/2020 (Jabalpur) decided on 9 October, 2023

SINGHLA TRADING COMPANY & ors. …Petitioners

Vs.

UNION OF INDIA & ors. …Respondents

(Alongwith WP No. 6454/2021)

***Constitution – Article 226 – Stacking Charges – Circular* – Held – Clause 7.8 of Master circular provides that once advance stacking**

permission has been granted, cancellation of indents will not be permissible upto 15 days – In case, rail user cancels the indent within aforesaid period, stacking charges will be levied for whole period of stacking – Indent booked on 26.09.19, stacking permitted from 27.10.19 to 29.10.19 – On 29.10.19 at 14:30 pm indent was cancelled – In absence of challenge to the policy/circular by petitioners, stacking charges rightly levied by railway authorities – Petition dismissed.

संविधान – अनुच्छेद 226 – भंडारण शुल्क – परिपत्र – अभिनिर्धारित – मूल परिपत्र का खंड 7.8 उपबंधित करता है कि एक बार अग्रिम भंडारण अनुज्ञा प्रदान कर दी गई, 15 दिनों तक मांगपत्रों का रद्दकरण अनुज्ञेय नहीं होगा – रेल उपयोगकर्ता द्वारा उपरोक्त अवधि के भीतर मांगपत्र को रद्द किये जाने की दशा में भंडारण की पूरी अवधि के लिए भंडारण शुल्क उद्गृहीत किया जाएगा – मांगपत्र 26.09.19 को बुक किया गया, 27.10.19 से 29.10.19 तक भंडारण की अनुज्ञा दी गई – दिनांक 29.10.19 को अपराह् 14:30 बजे मांगपत्र रद्द किया गया था – याची द्वारा नीति/परिपत्र को चुनौती के अभाव में रेल्वे प्राधिकारीगण द्वारा उचित रूप से भंडारण शुल्क उद्गृहीत किया गया – याचिका खारिज।

Manoj Sharma assisted by *Abhiraj Singh,* for the petitioners in WP No. 20036/2020.

Manoj Sharma assisted by *Siddharth Patel*, for the petitioners in WP No. 6454/2021.

Harshwardhan Singh Rajput, for the respondents in WP No. 20036/2020 & 6454/2021.

Short Note

****(18)***

Before Mr. Justice Anand Pathak

MCRC No. 23773/2023 (Gwalior) decided on 13 September, 2023

STATE OF M.P. …Applicant

Vs.

SONAM & ors. …Non- applicants

***Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Section 8/20 & 52-A – Retesting of Samples – Permissibility* – Held – FSL report revealed detention of Uria substance and no MDMA drug was found – State filed application for retesting of sample, which was rejeced – Challenge to – Held – In extemely exceptional circumstances, for cogent reasons to be**

recorded, application for retesting can be considered provided application is filed within 15 days of the receipt of the test report – State filed the application within time – Application allowed.

स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धारा 8/20 व 52–A – नमूनों का पुनः परीक्षण – अनुज्ञेयता – अभिनिर्धारित – न्यायालयिक विज्ञान प्रयोगशाला प्रतिवेदन यूरिया पदार्थ का पाया जाना प्रकट करती है एवं कोई एम डी एम ए औषधि नहीं पाई गई – राज्य ने नमूने के पुनः परीक्षण हेतु आवेदन प्रस्तुत किया, जिसे नामंजूर किया गया था – को चुनौती – अभिनिर्धारित – अत्यंत आपवादिक परिस्थितियों में, तर्कपूर्ण कारणों को अभिलिखित करते हुए, पुनः परीक्षण का आवेदन विचार में लिया जा सकता है परंतु आवेदन परीक्षण प्रतिवेदन की प्राप्ति के 15 दिनों के भीतर प्रस्तुत किया गया हो – राज्य ने समय के भीतर आवेदन प्रस्तुत किया – आवेदन मंजूर।

Cases referred:

(2013) 2 SCC 590, 2016 (3) SCC 379, (2003) 2 SCC 590, (2008) 16 SCC 417, 2021 (3) MPLJ (Cri.) 210.

M.P.S. Raghuwanshi, Addl. A.G. with *Ravindra Singh Kushwaha*, Dy. A.G., for the applicant.

Ravi Vallabh Tripathi, for the non-applicant No. 1.
Arun Sharma, for the non-applicant No. 2.
Sushil Goswami, for the non-applicant Nos. 3, 4 & 8.
C.P. Singh, for the non-applicant No. 6.
Pallav Tripathi, for the non-applicant No. 7.
None, for the non-applicant No. 5.

Short Note
****(19)***
Before Mr. Justice Dinesh Kumar Paliwal
MCRC No. 20304/2022 (Jabalpur) decided on 04 July, 2023

SUKHENDRA CHATURVEDI & ors. …Applicants

Vs.

STATE OF M.P. & anr. …Non-applicants

***A. Penal Code (45 of 1860), Section 498-A, Dowry Prohibition Act (28 of 1961), Section 3/4 and Criminal Procedure Code, 1973 (2 of 1974), Sections 227, 228 & 482 – Framing of Charge* – Held – In the complaint, there are specific allegations against applicants about demand of dowry and**

causing physical and mental cruelty in connection to demand of dowry – No illegality in framing of charge against applicants – Application dismissed.

क. दण्ड संहिता (1860 का 45), धारा 498–A, दहेज प्रतिषेध अधिनियम (1961 का 28), धारा 3/4 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 227, 228 व 482 – आरोप की विरचना – अभिनिर्धारित – परिवाद में आवेदकों के विरूद्ध दहेज की मांग संबंधी और दहेज की मांग के संबंध में शारीरिक एवं मानसिक प्रताड़ना कारित किए जाने संबंधी विनिर्दिष्ट अभिकथन हैं – आवेदकों के विरूद्ध आरोप विरचित करने में कोई अवैधता नहीं – आवेदन खारिज।

***B. Criminal Procedure Code, 1973 (2 of 1974), Section 227 & 228 – Framing of Charge – Considerations* – Held – Apex Court concluded that at the time of framing of charges, the probative value of material on record cannot be gone into and the material brought by prosecution has to be accepted as true – Whether accused committed the offence or not, can only be decided in the trial – Court must apply its judicial mind on the available material and must be satisfied that commission of offence by accused is possible.**

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 227 व 228 – आरोप की विरचना – विचारणाएँ – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया कि आरोपों की विरचना के समय अभिलेख की सामग्री के प्रमाणक मूल्य पर विचार नहीं किया जा सकता और अभियोजन द्वारा प्रस्तुत सामग्री को सत्य रूप से स्वीकार करना होगा – अभियुक्त ने अपराध किया है या नहीं, यह केवल विचारण में विनिश्चित किया जा सकता है – न्यायालय को उपलब्ध सामग्री पर अपने न्यायिक विवेक का प्रयोग करना चाहिए और इस संबंध में संतुष्ट होना चाहिए कि क्या अभियुक्त द्वारा अपराध किया जाना संभव है।

Cases referred:

MCRC No. 11514/2017 order passed on 13.06.2023, CRR No. 521/2021 order passed on 18.08.2021, (1979) SCC (Cri) 609, (2012) 9 SCC 460, (2017) 3 SCC 1998, (2007) 5 SCC 403, [2005 (4) MPLJ 380].

Rohini Prasad Tiwari, for the applicants.
Ajay Tamrakar, P.L. for the respondent No. 1/State.

NOTES OF CASES SECTION

Short Note

**(20)*

Before Mr. Justice Sujoy Paul

WP No. 7243/2021 (Jabalpur) decided on 10 August, 2023

SUNIL …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

(Alongwith WP No. 8812/2021)

***Civil Services (General Conditions of Service) Rules, M.P., 1961, Rules 6(6) – Disqualification – More than Two Children* – Held – As per Rule 6(6), no candidate shall be eligible for appointment who has more than two living children, one of whom is on or after 26.01.2001 – Petitioner cannot be treated to be eligible for appointment because admittedly two children of petitioner were born after 26.01.2001 – Petitioner certainly falls in the clutches of this embargo/impediment – Petitions dismissed.**

सिविल सेवा (सेवा की सामान्य शर्तें) नियम, म.प्र., 1961, नियम 6(6) – अनर्हताएं – दो से अधिक संतान – अभिनिर्धारित – नियम 6(6) के अनुसार कोई भी अभ्यर्थी जिसकी दो से अधिक जीवित संतान है, जिसमें से कोई एक 26.01.2001 को या उसके पश्चात् जन्मा हो, नियुक्ति का पात्र नहीं होगा – याची को नियुक्ति हेतु पात्र नहीं माना जा सकता क्योंकि स्वीकृत रूप से याची की दो संतानों का जन्म 26.01.2001 के पश्चात् हुआ था – याची निश्चित तौर पर इस निषेध/रोक के अंतर्गत आता है – याचिकाएं खारिज।

Case referred:

WP No. 16859/2011 order passed on 23.01.2018.

Pushpendra Yadav, for the petitioner in WP No. 7243/2021 & 8812/2021.

Ritwik Parashar, G.A. for the respondents in WP No. 7243/2021 & 8812/2021.

NOTES OF CASES SECTION

Short Note

****(21)***

Before Mr. Justice Pranay Verma

FA No. 324/2001 (Indore) decided on 3 July, 2023

THE GENERAL MANAGER, WESTERN RAILWAY & ors. …Appellants

Vs.

M.P.E.B. RAMPUR, JABALPUR …Respondent

A. Railway Claims Tribunal Act (54 of 1987), Section 13 and Railways Act (24 of 1989), Section 124-A - Jurisdiction of Civil Court **– Held – Civil Court has jurisdiction regarding any claim for damages caused to any third person, who is not a passenger or excluded u/S 124-A of 1989 Act – If any loss caused to any person or damage is caused to any property who is not a person or is not a property to which jurisdiction of Claims Tribunal extends by virtue of Section 13 of 1987 Act, Tribunal will not have any jurisdiction for adjudicating a claim in respect thereof and it would only be the Civil Court which shall have such jurisdiction.**

क. रेल दावा अधिकरण अधिनियम (1987 का 54), धारा 13 एवं रेल अधिनियम (1989 का 24), धारा 124–A – सिविल न्यायालय की अधिकारिता – अभिनिर्धारित – सिविल न्यायालय को किसी तीसरे व्यक्ति, जो यात्री नहीं है या अधिनियम 1989 की धारा 124–A के अन्तर्गत वर्जित है, को हुई क्षति के दावे के संबंध में अधिकारिता है – यदि ऐसे किसी व्यक्ति को हानि या किसी सम्पत्ति को कोई क्षति कारित होती है, जो ऐसा व्यक्ति या ऐसी सम्पत्ति नहीं है जिस पर अधिनियम 1987 की धारा 13 के आधार पर दावा अधिकरण की अधिकारिता विस्तारित होती है, अधिकरण को उस संबंध में किसी दावा–निर्णयन की अधिकारिता नहीं होगी और यह केवल सिविल न्यायालय होगा जिसे ऐसी अधिकारिता होगी।

B. Railway Claims Tribunal Act (54 of 1987), Section 13 and Railways Act (24 of 1989), Section 124-A - Claim by Third Party **– Compensation suit for damages caused to electricity lines underneath the railway track – Held – Loading of chemicals in tankers was not only the responsibility of consignor but also of defendants (Railways) as loading has been done in its oil tankers – It was imperative for defendants to ensure that loading was properly done – None of the Committee members have been examined – They have total lack of knowledge about the cause of fire – Compensation rightly awarded by trial Court – Appeal dismissed.**

ख. रेल दावा अधिकरण अधिनियम (1987 का 54), धारा 13 एवं रेल अधिनियम (1989 का 24), धारा 124–A – तीसरे पक्षकार द्वारा दावा – रेल पटरियों के नीचे की विद्युत प्रदाय लाइन को कारित क्षतियों के लिए प्रतिकर–वाद – अभिनिर्धारित – टैंकरों में रसायनों का लदान केवल प्रेषक का उत्तरदायित्व नहीं है अपितु प्रतिवादीगण (रेलवे) का भी है क्योंकि लदान उसके तेल टैंकरों में किया गया था – प्रतिवादीगण के लिए यह सुनिश्चित करना अनिवार्य था कि लदान ठीक से किया गया था – समिति के किसी भी सदस्य का परीक्षण नहीं किया गया – उनके पास आग के कारणों के विषय में जानकारी का पूर्णतः अभाव है – विचारण न्यायालय द्वारा प्रतिकर उचित ही अधिनिर्णीत किया गया – अपील खारिज।

H.Y. Mehta, for the appellants.
None, for the respondent.

Short Note
****(22)***
Before Mr. Justice G.S. Ahluwalia
WP No. 13655/2017 (Jabalpur) decided on 6 July, 2023

VEENA DHURVEY (SMT.) …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

***A. Civil Services (Classification, Control and Appeal) Rules, M.P., 1966, Rule 10 – Recovery against Dead Person* – Held – Employee died on 02.02.2016 and audit conducted on 22.11.2016 – Since recovery has been made on ground of causing loss to State Government, which is a minor penalty under Rule 10, therefore after the death of employee, same cannot be done – Authorities directed to immediately release the withheld amount – As no enquiry was conducted and entire responsibility was put on the shoulder of dead person, Collector directed to conduct an enquiry to find out the responsible persons – Petition disposed.**

क. सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र., 1966, नियम 10 – मृत व्यक्ति के विरूद्ध वसूली – अभिनिर्धारित – 02.02.2016 को कर्मचारी की मृत्यु हुई एवं 22.11.2016 को संपरीक्षा संचालित की गई – चूंकि राज्य सरकार को हानि पहुंचाने के आधार पर वसूली की गई है, जो कि नियम 10 के अंतर्गत एक लघु शास्ति है, अतः कर्मचारी की मृत्यु के पश्चात्, उक्त नहीं की जा सकती – प्राधिकारीगण को विधारित राशि को तुरंत निर्मुक्त करने हेतु निदेशित किया गया – चूंकि कोई जांच संचालित नहीं की गई थी एवं संपूर्ण उत्तरदायित्व मृतक के कंधे पर डाल दिया गया था, कलेक्टर को उत्तरदायी व्यक्तियों का पता लगाने के लिए जांच संचालित करने हेतु निदेशित किया गया – याचिका निराकृत।

B. ***Service Law – Departmental Enquiry – Dead Person*** **– Held – No departmental action can be initiated against a dead person for the simple reason that on the death of employee, the employer-employee relationship would come to an end.**

ख. *सेवा विधि – विभागीय जांच – मृत व्यक्ति* – अभिनिर्धारित – एक मृत व्यक्ति के विरूद्ध कोई विभागीय कार्रवाई इस साधारण कारण से आरंभ नहीं की जा सकती कि कर्मचारी की मृत्यु होने पर, नियोक्ता–कर्मचारी का संबंध समाप्त हो जाएगा।

Cases referred:

WP No. 17214/2017 order passed on 30.08.2022, Civil Writ Jurisdiction Case No. 9735/2021 decided on 11.01.2023 (Patna High Court).

Anil Kumar Tiwari, for the petitioner.
Ritwik Parashar, G.A. for the respondents.

Short Note
****(23)***
Before Mr. Justice G.S. Ahluwalia
WP No. 14580/2023 (Jabalpur) decided on 4 July, 2023

VINA KUMARI @ LAXMI SINGH …Petitioner

Vs.

SOUTH EASTERN COAL FIELD LTD. & ors. …Respondents

A. ***Service Law – Compassionate Appointment – Delay*** **– Held – At least 14 years have passed after death of father of petitioner – Application was rejected on 2013 and contempt petition filed in 2022 – After getting direction from Court for early disposal of application, petitioner did not pursue the matter for 11 years which shows that she was not in need of appointment – No explanation of delay – Delay has wiped out the need of urgency – Petitioner is married and cannot be said to be dependent on her father – Petition dismissed.**

क. *सेवा विधि – अनुकंपा नियुक्ति – विलंब* – अभिनिर्धारित – याची के पिता की मृत्यु के पश्चात् कम से कम 14 वर्ष बीत चुके हैं – 2013 में आवेदन नामंजूर किया गया था एवं 2022 में अवमानना याचिका प्रस्तुत की गई – आवेदन के शीघ्र निपटान के लिए न्यायालय से निदेश प्राप्त करने के पश्चात्, याची ने 11 वर्षों तक मामले का पता नहीं किया जो यह दर्शाता है कि उसे नियुक्ति की आवश्यकता नहीं थी – विलंब का कोई स्पष्टीकरण नहीं – विलंब ने आत्ययिकता की आवश्यकता को समाप्त कर दिया है – याची विवाहित है एवं अपने पिता पर आश्रित नहीं कही जा सकती – याचिका खारिज।

B. ***Service Law – Compassionate Appointment – Principle & Considerations*** **– Held – Appointment on compassionate ground is not an alternative mode of direct recruitment – It is provided to meet out the unfortunate situation faced by dependents of bread earner – Delayed approach of dependents to Court, the survival of dependents for a considerable long time etc. are relevant considerations for deciding the claim of compassionate appointment.**

ख. *सेवा विधि – अनुकंपा नियुक्ति – सिद्धांत व विचार* – अभिनिर्धारित – अनुकंपा के आधार पर नियुक्ति प्रत्यक्ष भर्ती का एक वैकल्पिक ढंग नहीं है – यह पालनकर्ता के आश्रितों के सामने आने वाली दुर्भाग्यपूर्ण परिस्थिति से निपटने हेतु उपबंधित की गई है – आश्रितों द्वारा न्यायालय के समक्ष जाने में देरी, आश्रितों का पर्याप्त लंबे समय तक जीवित रहना इत्यादि अनुकंपा नियुक्ति का दावा विनिश्चित करने के लिए सुसंगत विचार हैं।

Cases referred:

Civil Appeal No. 5122/2021 decided on 13.09.2021 (Supreme Court), Civil Appeal Nos. 8842-8855/2022 decided on 03.03.2023 (Supreme Court), Civil Appeal No. 6910/2021 decided on 18.11.2021 (Supreme Court), (2006) 5 SCC 766.

Vikas Kumar Sharma, for the petitioner.

I.L.R. 2024 M.P. 1 (DB)

Before Mr. Justice Rohit Arya &
Mr. Justice Avanindra Kumar Singh

WA No. 1598/2019 (Gwalior) decided on 20 November, 2023

SANDEEP KULSHRESTHA …Appellant

Vs.

MANOJ PRATAP SINGH YADAV & ors. …Respondents

(Along with WA No. 1994/2019)

***A. Constitution – Article 226 – Appointment – Locus – Writ of Quo Warranto/Certiorari* – Held – Petitioner is ousted employee of IITTM and was habitual in making complaint against appellant, beside uploading obnoxious material against IITTM on Facebook – He was not a candidate to the post in question – CV of appellant was supported by relevant certificates, scrutinized by screening committee and BOG – Vigilance division commented to CVC for closure of complaint against appellant – Selection of appellant is challenged after more than 13 yrs. – Single Judge erred in substituting his opinion over that of expert body that too while exercising extraordinary jurisdiction under *quo warranto* – Appeal allowed. (Paras 8 to 11, 13, 15 & 16)**

क. संविधान – अनुच्छेद 226 – नियुक्ति – अधिकार – अधिकार पृच्छा/उत्प्रेषण की रिट – अभिनिर्धारित – याची आईआईटीटीएम का निष्कासित कर्मचारी है एवं फेसबुक पर आईआईटीटीएम के विरूद्ध आपत्तिजनक सामग्री अपलोड करने के अलावा अपीलार्थी के विरूद्ध शिकायत करने का आदी था – वह प्रश्नगत पद के लिए अभ्यर्थी नहीं था – अपीलार्थी का सीवी सुसंगत प्रमाणपत्रों द्वारा समर्थित था, जिसकी छानबीन समिति एवं बी.ओ.जी. द्वारा जांच की गई – सतर्कता विभाग ने अपीलार्थी के विरूद्ध शिकायत समाप्त करने के लिए सीवीसी को टिप्पणी की – अपीलार्थी के चयन को 13 वर्ष से अधिक समय के पश्चात् चुनौती दी गई – एकल न्यायाधीश ने विशेषज्ञ निकाय के मत के स्थान पर अपना मत रखने में त्रुटि की, वह भी अधिकार पृच्छा के अंतर्गत असाधारण अधिकारिता का प्रयोग करते हुए – अपील मंजूर।

***B. Constitution – Article 226 – Appointment – Writ of Quo Warranto – Scope of Interference* – Held – Jurisdiction of High Court to issue a writ of *quo warranto* is a limited one – It will only lie when appointment is contrary to statutory provisions – Whether or not a candidate possesses requisite qualifications and/or experience, should better be left to educational institutions, particularly when it is supported by expert committee – Writ of *quo warranto* should be refused when it is outcome of malice/ill will – A writ of *quo warranto*, being in the nature of public interest litigation is not maintainable at the instance of a person who is not un–biased and the forum cannot be chosen to settle personal scores. (Para 8)**

ख. संविधान – अनुच्छेद 226 – नियुक्ति – अधिकार पृच्छा की रिट – हस्तक्षेप की व्याप्ति – अभिनिर्धारित – अधिकार पृच्छा की रिट जारी करने के लिए उच्च न्यायालय की अधिकारिता सीमित है – यह केवल तब जारी की जा सकती है जब नियुक्ति कानूनी उपबंधों के विपरीत हो – अभ्यर्थी के पास अपेक्षित अर्हता एवं/अथवा अनुभव है या नहीं, इसे शैक्षणिक संस्थानों पर छोड़ देना बेहतर रहेगा, विशिष्ट रूप से जब यह विशेषज्ञ समिति द्वारा समर्थित हो – अधिकार पृच्छा की रिट को अस्वीकार किया जाना चाहिए जब वह दुर्भाव/वैमनस्य का परिणाम हो – अधिकार पृच्छा की रिट, जनहित याचिका के स्वरूप में होने के कारण ऐसे व्यक्ति के अनुरोध पर पोषणीय नहीं है जो निष्पक्ष नहीं है एवं व्यक्तिगत हिसाब–किताब निपटाने के लिए न्यायालय का चयन नहीं किया जा सकता।

***C. Constitution – Article 226 – Appointment – Writ of Quo Warranto Recovery of Salary* – Held – Apex Court concluded that while issuing a writ of *quo warranto* there cannot be any direction for recovery of the sum – Single judge erred in directing appellant to refund the difference of salary. (Para 15)**

ग. संविधान – अनुच्छेद 226 – नियुक्ति – अधिकार पृच्छा की रिट – वेतन की वसूली – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया है कि अधिकार पृच्छा की रिट जारी करते समय रकम की वसूली के लिए कोई निर्देश नहीं दिया जा सकता – एकल न्यायाधीश ने वेतन का अंतर वापस करने हेतु अपीलार्थी को निदेशित करने में त्रुटि की।

***D. Constitution – Article 226 – Appointment – Writ of Quo Warranto Directions of CBI Enquiry* – Held – Said directions by a writ Court exercising *quo warranto* jurisdiction are explicitly far in excess of constitutional jurisdiction – Jurisdiction of writ Court has been reduced to investigation through roving enquiry – Direction to CBI to conduct investigation was not warranted either on facts or in law. (Para 14)**

घ. संविधान – अनुच्छेद 226 – नियुक्ति – अधिकार पृच्छा की रिट – सीबीआई जांच के निदेश – अभिनिर्धारित – अधिकार पृच्छा की रिट का प्रयोग करने वाले एक रिट न्यायालय द्वारा कथित निदेश अभिव्यक्त रूप से संवैधानिक अधिकारिता से कहीं अधिक हैं – रिट न्यायालय की अधिकारिता को अतिगामी जांच के माध्यम से अन्वेषण तक कम कर दिया गया है – सीबीआई को अन्वेषण संचालित करने का निदेश देना न तो तथ्यों पर और न ही विधि में आवश्यक था।

***E. Constitution – Article 226 – Appointment – Writ of Certiorari – Scope of Interference* – Held – *Certiorari* jurisdiction can be exercised only at instance of an aggrieved person who is qualified to the post and who is candidate for the post. (Para 8)**

ङ संविधान – अनुच्छेद 226 – नियुक्ति – उत्प्रेषण रिट – हस्तक्षेप की व्याप्ति – अभिनिर्धारित – उत्प्रेषण की रिट का प्रयोग केवल व्यथित व्यक्ति के आवेदन पर किया जा सकता है जो पद के लिए अर्हित है एवं जो उस पद के लिए अभ्यर्थी हो।

F. ***Constitution – Article 226 – Appointment – Advertisement – Scope of Interference*** **– Held – While exercising jurisdiction under Article 226 of Constitution, the Court is not expected to add or substract contents in a given document to facilitate/enforce its own perspective, particularly while reading the terms of the advertisement or rules having legal sanction. (Para 10)**

च. संविधान – अनुच्छेद 226 – नियुक्ति – विज्ञापन – हस्तक्षेप की व्याप्ति – अभिनिर्धारित – संविधान के अनुच्छेद 226 के अंतर्गत अधिकारिता का प्रयोग करते समय, न्यायालय से अपने स्वयं के परिप्रेक्ष्य को सुकर बनाने/प्रवर्तित करने के लिए दिये गये दस्तावेज में अंतर्वस्तु को जोड़ने अथवा घटाने की अपेक्षा नहीं की जाती है, विशिष्ट रूप से विधिक मंजूरी वाले विज्ञापन के निबंधनों अथवा नियमों को पढ़ते समय।

G. ***Constitution – Article 226 and Prevention of Corruption Act (49 of 1988), Section 13(1)(d)(ii) & (iii) – Appointment*** **– Held – It is a case of appointment through selection committee approved by Board of Governors and done by Chairman – No offence under 1988 Act made out. (Para 14)**

छ संविधान – अनुच्छेद 226 एवं भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 13(1)(d)(ii) व (iii) – नियुक्ति – अभिनिर्धारित – यह बोर्ड ऑफ गवर्नर्स द्वारा अनुमोदित चयन समिति के माध्यम से एवं अध्यक्ष द्वारा की गई नियुक्ति का प्रकरण है – 1988 के अधिनियम के अंतर्गत कोई अपराध नहीं बनता।

H. ***Service Law – Appointment – Qualification & Experience – Difference*** **– Discussed and explained. (Para 9)**

ज. सेवा विधि – नियुक्ति – अर्हता व अनुभव – विभेद – विवेचित एवं स्पष्ट किया गया।

I. ***Service Law – Appointment – Advertisement & Statutory Rules*** **– Held – Statutory rules assume precedence over advertisement in the event of variation between the two. (Para 10)**

झ. सेवा विधि – नियुक्ति – विज्ञापन व कानूनी नियम – अभिनिर्धारित – कानूनी नियमों एवं विज्ञापन के मध्य भिन्नता की स्थिति में कानूनी नियमों को विज्ञापन से ऊपर प्राथमिकता दी जाती है।

J. ***Service Law – Appointment – Qualification*** **– Held – Qualification cannot be changed in the mid of recruitment process. (Para 13)**

ञ. सेवा विधि – नियुक्ति – अर्हता – अभिनिर्धारित – भर्ती प्रक्रिया के मध्य में अर्हता में परिवर्तन नहीं किया जा सकता।

Cases referred:

(2006) 11 SCC 731, (2013) 1 SCC 501, 1998 Supp SC 127, AIR 1965 SC 491, (2003) 4 SCC 712, 2001 SCC OnLine Guj 76, (2002) 6 SCC 269, (1993) 4

SCC 119, (2018) 6 SCC 162, 2013 (1) SCC 501, 2002 (6) SCC 269, (1979) 2 SCC 339, (2007) 5 SCC 519, (2009) 11 SCC 726, (2018) 3 SCC 55, (2014) 1 SCC 161.

Pawan Dwivedi, for the appellant in WA No. 1598/2019 and for the respondent No. 5 in WA No. 1994/2019.

S.S. Kushwaha, for the appellants in WA No. 1994/2019 and for the respondent Nos. 2, 3 & 9 in WA No. 1598/2019.

Manoj Pratap Singh Yadav, respondent No. 1 in WA No. 1598/2019 & WA No. 1994/2019 present in person.

JUDGMENT

The Judgment of the Court was delivered by: **ROHIT ARYA, J.:-** These appeals, under section 2(1) of the Madhya Pradesh (Uchcha Nyayalaya Ki Khand Peeth Ko Appeal) Adhiniyam, 2005, are directed against the impugned order dated 27/08/2019 passed in W.P. No.4308/2016 and, thus are being decided by this common judgment.

For the sake of convenience, reference to parties is in accordance with title of W.A. No.1598/2019.

2. By the order under challenge, the learned Single Judge, while exercising his discretionary jurisdiction under *quo warranto,* has quashed the order dated 30/9/2003 of appointment of appellant Sandeep Kulshrestha on the post of Professor (Tourism) in Indian Institute of Tourism and Travel Management (for short "IITTM"), Gwalior, as also his regularization on the said post vide order dated 15/6/2007 and appointment to the post of Director IITTM, Gwalior vide order dated 25/6/2014 having found that he had secured appointment on the post of Professor (Tourism) by furnishing incorrect information. Besides, the learned Judge also directed that since at the time of appointment to the post of Professor (Tourism), the appellant was working on the post of Reader, therefore, he should also refund the difference of salary between the pay of Reader and Professor (Tourism)/Director IITTM-Gwalior, within a period of three months therefrom failing which the delayed refund would carry interest at the rate of 6% per annum. That apart, the learned Single Judge *inter alia* issued directions to the CBI to start investigation against the appellant and all the OICs.

3. The factual matrix of the case may be summarized thus:

> (I) In the month of January, 2003, respondent no.2/UOI issued an advertisement for recruitment on the post of Professor in Tourism at IITTM, Gwalior. The minimum qualifications as mentioned in the advertisement were as under :-
>
> *" Max Age : 50 years*
>
> *Educational Qualifications:*

An eminent scholar with published work of high quality, actively engaged in research in which 10 years of experience in post graduate teaching and/or research at the University/National level institutions including experience of guiding research at doctoral level OR an outstanding scholar with established reputation who has made significant contribution to knowledge."

(ii) In pursuance of the said advertisement, appellant Sandeep Kulshrestha also applied for the post of Professor (Tourism) and submitted his Curriculum Vitae *(CV)* disclosing his educational qualification and work experience together with experience certificates. The relevant portion of his CV reads thus:

S.No	**Post held & payscale**	**Year**	**Classes taught**	**Department**
1.	Reader (12000-8300)	26-02-98 to till date	PGDBM, DTM, MDP, EDP	Indian Institute of Tourism & Travel Management, Govt. of India, Govindpuri, Gwalior
2.	Reader (3700-5700)	29-01-97 to 25-02-97	DTM, MDP, EDP	Business Studies IITTM, ETC, Bhubaneswar, Orissa
3.	Sr. Assistant Professor (3000-5000)	25-02-96 to 27-01-97	M.Com, MBA, MPA	Commerce Department, Madhav Post Graduate College
4	Asstt. Professor (2200-4000)	25-02-91 to 24-02-96	M.Com, MBA, MPA	Commerce Department, Madhav Post Graduate College, Jiwaji University, Gwalior
5	Lecturer (2200-4000)	25-08-90 to 24-02-91	M.Phil, MBA	School of Commerce and Management Studies, Jiwaji University, Gwalior
6	Lecturer	20-03-90 to 22-08-90	M.Com	School of Commerce and Management Studies, Jiwaji University, Gwalior

As such, the appellant claimed a total of more than 11 years of teaching experience, whereas for appointment on the post of Professor (Tourism), the requirement was 10 years post Graduate Teaching Experience in advertisement and 8 years under the recruitment rules.

(ii) The Selection Committee met on 24/02/2003. It interviewed 5 candidates for the post of Professor and also considered request of two candidates including the present appellant being considered *in absentia.* Based on their academic record, earlier background, experience and performance, the selection committee unanimously recommended that the qualification of 10 years post graduate experience may be waived since none of the applicants had 10 years PG experience in Tourism. The Committee did not find any of the candidates interviewed suitable for the post and decided that the applicants who had requested for consideration *in absentia,* may be called for an interview on a subsequent date. The minutes of the Selection Committee meeting dated 24/2/2003 have been placed on record as Annexure P/7 and Annexure P/8. As it transpires from the record, the contents of Annexure P/7 and P/8 are exactly the same except for the fact that Annexure P/7 reflects Mrs. Rashmi Verma, ADG, Dept of |Tourism as Chairperson with members as Prof. Kapil Kumar and Dr. Ravi Bhoothalilngam (Subject Experts) and Mr. D.Singhal (Director IITTM), whereas in Annexure P/8 name of Mrs. Rathi Vinay Jha, Secretary (Tourism) is mentioned as Chairperson with members as Mrs. Rashi Verma, ADG, Deptt. Of Tourism (Nominee) together with the names of same three members as mentioned in Annexure P/7. However, both Annexure P/7 and P/8 have not been signed by the Chairpersons.

(iii) The next meeting of Selection Committee was held on 4/7/2003 in which the appellant and one more person were interviewed. The Committee recommended for appointment of the appellant. The recommendation of the selection Committee was considered by the Board of Governors in its 27th meeting dated 21/7/2003 (pages 309, 310 & 313) in which the Board authorised the Chairperson of the BOG to approve the appointment of the appellant. The Chairperson approved the appointment of the appellant and he was appointed as Professor w.e.f. 1/10/2003. The appointment of the appellant was then approved by the Board of Governors in its 28th meeting held on 25/11/2003 (pages 312 & 314).

(iv) The appellant was then regularized on the post of Professor (Tourism) vide order dated 15/6/2007 (Annexure P/6). Thereafter, on 12/6/2014, the appellant was appointed as

Director, IITTM for a fixed tenure of 3 years which was further extended for a period of 2 years. It is pertinent to mention here that minimum qualification for recruitment on the post of Director is that the person should hold post in the payscale of Rs.16000-22400 (pre-revised) or equivalent having 3 years regular service in grade. Since the post of Professor carried such payscale, the appellant was appointed having rendered 3 years service on the post of Professor.

(v) It appears that respondent no.1 Manoj Pratap Singh had made a complaint to the CBI with the allegation that appellant had procured appointment on the post of Professor by furnishing false information, upon which he was infomed by the CBI vide letter/communication dated 18/3/2016 that the Bhopal Branch of |CBI had registered a complaint against appellant Dr. Sandeep Kulshrestha on 9/7/2014 with regard to his procuring employment and after completion of verification the matter had been referred to the CVO, Ministry of Tourism, Govt. of India with a request to enquire into his role and if deemed fit, the local police could be approached for taking necessary action against him. The instant writ petition was initially filed seeking quashment of the above mentioned letter dated 18/3/2016 and for direction to the CBI to register an FIR and investigate the matter. Thereafter, in pursuance of order dated 22/10/2018 amendment was carried out on 23/10/2018 thereby converting the petition into one seeking writ of *quo warranto* against appellant Sandeep Kulshrestha and also to recover his salary.

(vi) In the writ petition, in essence, *inter alia* the following allegations were made:-

(a) During the period 1991 to 1997, there were no MBA or MPA classes in Madhav College, Gwalior and thus claim of six years teaching experience made by Dr.Sandeep Kulshrestha was false.

(b) During the period 1997 to 2002, the IITTM was not running the classes of Post Graduate Level. Thus, it had been claimed that appellant Sandeep Kulshrestha had submitted a false declaration with regard to his work experience of teaching Post Graduate Classes.

(c) The selection committee had met twice on the same day 24/2/2003 and the minutes were not signed by their Chairperson.

(d) An enquiry had been done at the level of Ministry of Tourism, Govt. of India and it was found that Dr. Kulshrestha had not been able to substantiate his claim that he had taught MBA/MPA Classes at

Madhav College and that he had provided certificates about teaching these courses in Jiwaji University and that too for short period as guest faculty.

(e) On 1/9/2014 the petitioner made a complaint before the CBI which was registered and it was claimed that the CBI had found that the allegations/complaint is true. However, the CBI instead of registering the FIR diverted the matter to CVO, MoT which should not have been done.

(f) On 12/6/2014, the appellant had been appointed as Director- IITTM. One of the essential requirments was that the candidate should have vigilance clearance given by the Secretary/Vice Chairman of the Department. However, no such Vigilance Clearance was obtained. It was pleaded that appellant Sandeep Kulshrestha had obtained employment in collusion with competent Authorities and such an appointment deserved to be quashed. It was further pleaded that appellant had further got appointmet to the post of Director, with undue favoritism from the competent Authority as well as in violation of the rules of selection process, particularly, the candidature of one Mr. A.R. Subramaniam was rejected on similar allegations.

(g) Despite the fact that an enquiry was pending against the appellant at the time of selection process for the post of Director, IITTM, the candidature of appellant was taken into consideration. It was claimed that such an appointment was *dehors* the rules based on illegal and colorable exercise of power.

(vii) Refuting the contentions made in the writ petition, counter-affidavit was filed by appellant Dr.Sandeep Kulshrestha, claiming that petitioner being a dismissed employee of IITTM was habitual of making complaints. He was continuously uploading obnoxious material on Facebook against the Institute , as well, as the appellant. It was further pleaded that appellant had taught M.Com classes in Madhav College, Gwalior from 25/02/1991 to 27/01/1997. He had also taken MBA and MPA Classes at Jiwaji University, Gwalior as Guest Faculty. He had been teaching as Reader IITTM since 29-01-1997 to 2003 (upto the date of submission of application for the post of Professor (Tourism)) in post graduate course as course of diploma in Tourism is available after graduation and its duration is of more than 12 months, therefore, as per AICTE

norms, it is Post Gaduate Course. So far as work experience is concerned, it had been duly verified by Jiwaji University, as well as, Madhav College. It was further claimed that no vigilance enquiry was pending against the appellant and vigilance clearnace was also given. It was further claimed that CVO and CVC had found that no incorrect declaration had been made. It was further claimed that the petitioner/appellant had misconstrued the letter (Annexure P/1). The CBI had referred the matter to CVO with a request of enquiry. The CVC has already made an enquiry which has not been challenged by the petitioner/appellant. So far as two minutes of Selection Committee are concerned, it was pleaded that there is no difference between the two and both of them are identical in contents. In fact the first minutes (Annexure P/7) are draft minutes. Since name of Chairperson had been wrongly mentioned therein as Mrs. Rashmi Verma in Annexure P/7, therefore, the minutes were correctly re-drafted as Annexure P/8 showing her as one of the members. It was also pleaded that all necessary work certificates were produced by the appellant at the time of appointment on the post of Professor (Tourism).

(viii) It appears that an application (I.A. No.1700/2017) was moved on behalf of the respondents through counsel Shri Vivek Khedkar, supported by an affidavit of one K.P.Gautam, who was in service of IITTM, Gwalior. In the said application, it was pleaded that the petitioner had no *locus standi* because neither he was an employee of IITTM nor had applied for appointment on the post of Professor (Tourism) or Director. Even otherwise, the matter was sent by the CBI to CVO and CVO has investigated the matter and vide office memorandum dated 8/2/2017, it has been decided to close the action at the end of CVO. In its return, the CBI *inter alia* averred that the complaint received against the appellant on 1/9/2014 was verified, and in view of the fact that no offence had been made out under the Prevention of Corruption Act, 1988, the same was referred to the CVO, Ministry of Tourism, through Self Contained Note (SCN) with a request to enquire into the role of appellant and if deemed fit the local police could be approached for taking necessary action. Respondent no.3/CBI also brought a clarification on record by way of Document No. 5643/18 elucidating that CVC is the supervisory authority under which CBI functions and as per the provisions of the Central Vigilance Act, 2003, the CBI which is constituted by Delhi Special Police Establishment, is required to inquire into the matter as per the instructions and submit its report to the CVC. In the instant case, through self contained note, the matter was forwarded to the CVO and the

entire enquiry was required to be conducted by the CVO of the concerning department. As mentioned above, on the basis of report of CBI, the CVO examined the case and decided to close it. The Central Vigilance Commission (CVC) vide its letter dated 20/10/2015 (Annexure A/2 filed along with Document No.5643/18) had also advised closure of the matter in pursuance of Ministry of Tourism's letter dated 27/7/2015. It was clarified therein that CVC is the competent Authority under which CBI functions and if any direction or decision has been taken by the CVC, then the CBI is bound by that decision.

(ix) In the return filed by respondent nos. 1 and 2, it was pleaded that the petitioner had misconstrued and misinterpreted the letter Annexure P/1. It was further mentioned that the CVC is the apex vigilance body of the Union of India and it had perused the report and had advised closure of matter vide office memorandum dated 20-10-2015. The Ministry of Tourism (Vigilance Division) has also closed the matter after investigation. The closure report has not been put to challenge by the petitioner and, therefore, nothing survives in this petition and it has become infructuous. The CBI cannot take up cases for investigation involving offences under the IPC. The petitioner has an alternative remedy against non-registration of FIR. So far as 6 years teaching experience of appellant/respondent no.8 at PG level between 1997 to 2003 is concerned, it is submitted that Shri Sitikantha Mishra, Chairman, All India Board of Hospitality and Tourism Management, AICTE, has clarified by e-mail dated 22/1/2015 that teaching in Diploma in Tourism Management Courses run by IITTM from the year 1997 to 2002 was approved by AICTE. Therefore, teaching by Faculty Members of IITTM in the said diploma course is a Post Graduate Teaching as the entry qualification for this course was minimum graduation from a recognized University. Further, it was mentioned that the Board of Governors had waived the requirement of ten years experience of PG teaching. Ministry has taken approval of Secretary(T) for the appointment of appellant/respondent no.8 as Professor (Tourism) in IITTM who was the Chairman, Board of Governors of IITTM. The Selection Committee in its meeting held on 4/7/2003 had recommended waiver of 10 years PG experience which has been approved by the BOG in its 27 th meeting held on 21/7/2003 and the appellant/respondent no.8 was appointed as Professor (Tourism) w.e.f. 1/10/2003. It was further pleaded that appointment of appellant/respondent no.8 had not been put to challenge by the petitioner. There is no difference between Annexure P/7 and P/8. No two committees were constituted.

Although it was admitted that during 1991 to 1997, there were no MBA or MPA classes at Madhav College, Gwalior, but PG (M.Com) classes were being conducted there and it was denied that appellant/respondent no.8 had secured appointment by providing false information as PG classes.

(x) Again on 11/7/2018, an additional return was filed by respondent nos. 1 and 2, wherein it was pleaded that there was only one meeting which was held under the Chairpersonship of Mrs.Rathi Vinay Jha who was Secretary (T), as well as, Chairperson of IITTM. Though she had not signed the minutes of meeting held on 24/2/2003, but she is the appointing and competent Authority for appointment and the appointment of appellant/respondent no.8 was approved in the 27th meeting of Board of Governors held on 21/7/2003 and later on it was approved by her being appointing Authority. It was further pleaded that minutes of another meeting dated 24/2/2003 were merely draft, therefore, the contention of the petitioner that two meetings were held on 24/2/2003 was denied. It was further pleaded that the note of Government of India, Ministry of Tourism (HRD) had been received from the Office of Minister of State for Tourism (IC) without any signature of anybody, therefore, the case was re-examined and re-submitted to Minister (Tourism) indicating the actual facts and it was conveyed that Dr. Sandeep Kulshrestha had taught MBA/MPA classes in Jiwaji University, Gwalior as Guest Faculty, on honorary basis. The PS to HM(T) recorded on the concerned file on 24/7/2015 that "HM(T) has been apprised of the situation. Page 55 of the file is not an official communication and may not be treated so".

(xi) Further, additional return was filed by respondent nos. 1 and 2 *inter alia* pleading that initially the petitioner had made a complaint before the Central Vigilance Commission and, thereafter, the case was closed by CVC. Later on, the complaint was filed with CBI, Bhopal. Without conducting any investigation, the Bhopal office of CBI forwarded the Self Contained Note to CVO and the CVO has also closed the matter.

(xii) Again the appellant/respondent no.8 filed additional reply by way of document No.7072/2019, wherein *inter alia* it was submitted that in his CV he had clearly mentioned that he had taught classes of M.Com, MBA, MPA in Commerce Department, Madhav Post Graduate College and Jiwaji University. M.Com was taught at Commerce Department of Madhav College and MBA & MPA were taught at Jiwaji University a Guest Faculty and proof thereof was already

submitted along with the return previously. The petitioner has filed incomplete documents. No mandamus can be issued for registration of FIR. The CVC has already closed the matter.

4. In the aforesaid backdrop, the impugned order has been passed under various captions. In paragraph 49, while relying on various decisions of the Apex Court, learned Single Judge reached the conclusion in paragraph 50 that the manner in which the appointment was made and the procedure was adopted, can also be considered while considering the Writ of Quo Warranto.

In paragraph 52, the learned Single Judge found that although appellant/respondent no.8 might be an employee of a registered Society, but since the IITTM-Gwalior is under the control of the Central Government, therefore, he is certainly a Public Servant.

In paragraphs 58 to 64, the learned Single Judge considered the aspect of two selection committee minutes (Annexure P/7 and P/8). In paragraph 61, learned Single Judge questioned the need of preparing draft minutes of the meeting. He observed that if the contention of respondent nos.1 and 2 is accepted that the minutes of meeting dated 24/2/2003, filed as Annexure P/7, are draft, then it is clear that the minutes of meeting of Selection Committee which have been filed as Annexure P/8 are nothing but a farce because everything was already pre-decided. He further observed that it is not the case of any of the respondents that the Selection Committee had any authority to waive the PG teaching Experience and if the Selection Committees were of the view that the requirement of 10 years PG experience should be waived, then instead of proceeding further with the interview, it should have taken further instructions from BoG. However, that was not done and without any authority, the Selection Committees in its meetings dated 24/2/2003, not only waived the requirement of 10 years PG experience, but also rejected the candidature of 5 candidates. In paragraph 62, the learned Single Judge, while relying upon the Self Contained Note of CBI, observed that in fact two Selection Committees met on the same day - one under the Chairmanship of Secretary (T) and another under the Chairmanship of ADG(T). Since the respondent nos. 1 and 2 have failed to show as to why two selection committees were constituted for the same purpose on the same day i.e. 24-2-2003, therefore, it appears that in fact the minutes of both the Selection Committees have been fraudulently prepared. Learned Single Judge also took strong exception to the fact that both the minutes were not signed by their respective Chairpersons,which proved that they were not present in the meetings. Learned Single Judge also raised a question as to when once the candidates were directed to appear before the Selection Committee then why special treatment was given to appellant/ respondent no.8 by accepting his request for his consideration in absentia ? In paragraph 63, the learned Single Judge also rejected the stand of the respondents that since the Secretary (Tourism) had approved the appointment of

appellant/respondent no.8, therefore, non signing the minutes of Selection Committee held on 24-2-2003 loses its significance for the reason that name of appellant/respondent no.8 was recommended by Selection Committee on 4/7/2003 and not 24/2/2003 and, therefore, it could not be said that Secretary (T) had validated the minutes of meeting dated 24/2/2003. In the aforesaid backdrop, in paragraph 64, the learned Single Judge observed that it was beyond concilliation that why two selection committees were constituted and why both the selection committees had interviewed the candidates ? At what time the interviews were held was also not explained. Thereafter, while referring to Ministry's view, as quoted in paragaraph 65 of the impugned order, the learned Single Judge in paragraph 66 held that the entire selection process was *prima facie* vitiated.

In paragraphs 67 to 79, learned Single Judge considered the aspect as to whether the BoG had waived the minimum qualification of 10 years PG experience and while taking note of Supplementary Agenda Item No.3, relevant minutes of 27th meeting of BoG dated 25/11/2003, minutes of meeting of BoG dated 25/2/2003, notesheet dated 18/2/2015 written by Shri A.K.Bose Consultant (HRD), and notesheet dated 20/3/2015 (Annexure P/26) and reached the conclusion that in fact minimum qualification of 10 years PG experience was never waived by BoG.

Further, in paragraph 80, the learned Single Judge took strong exception to the fact that minutes of meeting dated 4/7/2003 by which name of appellant/respondent no.8 is said to be recommended for appointment by the Selection Committee, were not brought on record and drew an adverse inference against the respondents.

Thereafter, in paragraph 83 the learned Single Judge, while considering the experience certificates of appellant, found that he had taught few classes of MBA and MPA in the capacity of Guest Faculty. The learned Single Judge observed that instead of disclosing that appellant had taken classes as Guest Faculty, it had been disclosed by him that he had taken MBA and MPA classes as Sr. Asstt. Professor and Asstt. Professor, whereas the admitted position is that there were no MBA or MPA classes in Commerce Deaprtment (sic: Department), Madhav Post Graduate College, Jiwaji University, Gwalior. Accordingly, the learned Single Judge held that appellant/respondent no.8 had given wrong information in his CV about his 10 years experience of PG classes.

In paragraphs 84 to 86, the learned Single Judge negated the experience of appellant of teaching post-graduate classes in the capacity of Reader, IITTM, Gwalior mentioned at S.Nos.1 and 2 of the CV on the premise that respondent nos.1 and 2 had not placed any document of the year 1998 on record to suggest that AICTE was treating Diploma in Tourism Management Courses run by IITTM as

post graduate course. Further no document had been filed to show that what were the norms for PGDM Programme in the year 1998 onwards.

Besides in paragraphs 87 to 92, learned Single Judge, while taking note of the advertisment published, held that requirement of 10 years post-graduate experience has to be read as 10 years post-graduate experience in Tourism and if the advertisement was vague, appellant/respondent no.8 cannot take advantage of the same and respondents were under an obligation to re-advertise the post.

In paragraphs 90 and 91, the learned Single Judge, while referring to note-sheet of Vigilance Division dated 16/7/2015, observed that according to Vigilance Division, the appellant/respondent no.8 Sandeep Kulshrestha was not having 10 years of post-graduate experience. In paragraph 93, while reiterating the settled position of law that qualifications cannot be changed in mid of recruitment process, learned Single Judge observed that if the respondents were of the view that the condition of 10 years post-graduate experience is liable to be waived, then a fresh advertisement should have been issued, so that other desirous candidates could have applied for the post of Professor (Tourism).

Accordingly, in paragraph 96, the learned Single Judge held that the appellant/respondent no.8 did not have the minimum qualification for holding the post of Professor (Tourism), but in view of the waiver of the minimum qualification of 10 years post-graduate experience, and that too without approval by the Board of Governors, the entire selection process for the post of Professor (Tourism) stood vitiated.

Further, in paragraphs 97 to 99, the learned Single Judge while referring to the call letter issued to one of the candidates, held that the Selection Committee was not justified in permitting two candidates to participate in absentia. That apart in paragraph 102, the learned Single Judge found that without there being any post of Professor in Tourism, the appellant/respondent no.8 had been given appointment on that post.

Inter alia with the aforesaid findings and obervations, the impugned order has been passed.

5. Legality, propriety and validity of the impugned order has been challenged by learned counsel for the appellant Dr. Sandeep Kulshrestha *inter alia* on the following grounds:-

(I) It is well settled that the jurisdiction of the High Court to issue a writ of *quo warranto* is a limited one which can only be issued when the appointment is contrary to the statutory rules. The learned Single Judge has travelled beyond the scope of *quo warranto* by entering into a roving enquiry and substituting his own views for those of experts. The suitability of a candidate for appointment does not fall within the realm of writ of *quo warranto.* To buttress his

contentions, learned counsel has placed reliance on decisions of the Apex Court in the cases of *B. Srinivasa Reddy Vs. Karnataka Urban Water Supply & Drainage Board Employees' Assn.* ((2006)11 SCC 731) and *Rajesh Awasthi vs. Nand Lal Jaiswal and others* ((2013)1 SCC 501). Further, while placing reliance on decision in the case of *A.N.Shastri Vs. State of Punjab* (1988 Supp SC 127), learned counsel contended that writ of *quo warranto* ought to have been refused, as it was sought due to malice or ill will. The conduct of petitioner is writ large. He is an ousted employee of IITTM and is habitual of making complaints against the appellant. He was also continuously posting unpalatable material on Facebook against him as well as the Institute. Indeed the impugned order is of the nature of *certiorari,* and such jurisdiction could not have been exercised by the learned Single Judge at the instance of petitioner who was not a candidate for the post of Professor (Tourism). In fact, petitioner changed the nature of petition to *quo warranto* only in order to escape the onus of proving his *locus standi.*

(ii) While negating the experience of appellant, the learned Single Judge has totally glossed over the fact that his CV was accompanied by relevant certificates (Annexure R/7, page 228 & R/8, pages 231 and 237). The learned Single Judge committed patent error of fact. In fact, the CV was not read in isolation, but the Selection Committee had also perused and appreciated the corresponding certificates filed along with the CV. Moreover, it was for the appointing Authority and the Selection Committee which could have said that they were misled by the appellant by clubbing his teaching experience. But the said Authority has clearly stated in its return that there was no misleading information. Even the matter was re-examined on the complaint of petitioner and the Union of India has clearly stated vide letter dated 22/9/2015 (Annexure R/1-8, page 328) that Principal of Madhav College has verified the teaching experience of the appellant (vide letter dated 15.06.2015, Annexure R/3-3, page 215). Even the Jiwaji University verified the educational qualification and teaching experience of the appellant vide letter dated 27/7/2012 (Annexure R/3-1, page 213), wherein against point no.5 it has been mentioned that Dr. Sandeep Kulshrestha had taken MPA classes as Guest Faculty in Political Science and Public Administration Departments of Jiwaji University. Further, Principal, Madhav College, Gwalior had issued certificates (Annexure R/7, page 228 and Annexure R/8, page 231) in favour of the appellant that he had done teaching in post graduate and under-graduate classes since 25/2/1991 to 27/1/1997. Thus, the findings of learned Single Judge as regards experience of the appellant are not only perverse to the record but also speculative. The learned Single Judge is forcing the fact that the Authority was misled by the appellant while the Authority itself is saying that it was not misled.

Even otherwise, the appellant was having more than 11 years of PG teaching experience. He undisputedly taught M.Com classes as Assistant

Professor in Madhav College, Gwalior from 25/2/1991 to 27/1/1997 (Annexure R/7, page 228 and 229) and then taught DTM and PGDBM (AICTE called it MBA but IITTM mentioned it as Post Graduate Diploma in Business Management) from 29.01.1997 to 30.09.2003 (Annexure R/8, page 237) as Reader in IITTM itself. The DTM was considered post graduate teaching by AICTE as per their communication dated 22.01.2015 (Annexure R/1-3, page 280), which was confirmed by the AICTE again vide its communication dated 30.9.2019 (Annexure A/4, page 27 along with I.A. No. 8268/2023). As per affiliation granted by AICTE to IITTM, the entry level for course of DTM was bachelor's degree in any subject. The first affiliation was granted by AICTE to the IITTM was on 3/5/1995 (Page 9 of I.A. No.8302/2023 of respondent nos. 2,3 and 9) and for PGDBM in 2001 (they initially called it MBA then renamed it as PGDBM in 2006, page 24 of said IA); this continued up to 2014 (page 44-50 of said IA). Further, the validity of the MBA course (now PGDBM) has been upheld by the Division Bench of this Court vide common order dated 11/8/2017 passed in W.P. No. 8593/2016 and W.P. No. 4602/2017 (PIL). Significantly these courses were considered by the Selection Committee and the appointing Authority as post graduate teaching in IITTM. The petitioner before his selection was teaching in IITTM itself as Reader and he was selected and appointed as Professor in IITTM itself for teaching those very courses. Thus, the learned Single Judge should not have substituted his opinion for expert's opinion in absence of any rules contrary to the stand taken by the experts. As such, the appellant not only fulfilled the requirement of recruitment rules but even fulfilled the requirement of advertisement.

(iii) So far as two selection committee minutes (Annexures P/7 and P/8) are concerned, it has been submitted that the learned Single Judge did not consider the fact that the minutes of both Annexure P/7 and P/8 are identically worded. The learned Single Judge has not considered very significant aspects of the matter. The composition of two committees was the same except one person i.e. Secretary (T) in the second minutes of the meeting. In fact, in the minutes of Selection Committee meeting dated 24/2/2003 enclosed as Annexure P/7 (page 178), names of four persons are mentioned i.e. Rashmi Verma, D.Singhai, Kapil Kumar and Ravi Bhuthalingam. In the minutes of meeting enclosed as Annexure P-8 (page 179) same four persons are there namely Rashmi Verma, D. Singhai, Kapil Kumar and Ravi Bhuthalilingam with the addition of name of Rathi Vinay Jha who was the Chairperson of the selection committee in her *ex officio* capacity being the Secretary (Tourism) at the relevant point of time. The recruitment in the IITTM is governed by Chapter 3 of the service by-laws which provides that appointment to any post by direct recruitment in accordance with Second Schedule may be made on the recommendation of the selection committee. In the case of professor, the composition of selection committee is provided in Schedule II appended to the by-laws which provides that the selection committee would consist of Secretary

(Tourism) as Chairman, D.G.(T) as member, Director as member and one member from academic field. The actual reason for the two minutes is that the concerned ministerial person while preparing the minutes had wrongly recorded that the meeting was held in the Chairmanship of Mrs. Rashmi Verma, ADG, Department of Tourism, whereas the meeting was held in the Chairmanship of Mrs. Rathi Vinay Jha, Secretary (Tourism). Thus, when the officials had perused the minutes of meeting they pointed out the mistake, thus, the minutes were immediately re-drafted and the correct fact regarding Chairmanship was recorded. Except this, there is no deviation in the entire contents of two meeting. It is beyond comprehension to understand that what would be the benefit extended by Selection Committee to the appellant by recording two minutes of the meeting which are identically worded. The first minutes of meeting were not properly drawn because of incorrect recording of Chairmanship. Thus, they were written again. In fact, Annexure P/7 and P/8 have not made any difference on the entire selection process with respect to merits of any of the candidates.

Further, as regards non-signing of minutes by the Chairpersons and adverse inference of learned Single Judge in that behalf, it has been submitted that the observation of learned Single Judge is based on an incorrect presumption that two meetings of the Selection Committee had taken place on 24/2/2003. In fact, as already explained, there was only one meeting of the Selection Committee which was held on 24/2/2003. Thereafter, the minutes of meeting were drawn. On the first occasion, the concerned ministerial person had wrongly recorded that the meeting was held in the Chairpersonship of Mrs. Rashmi Verma. Thus, when she went through the minutes of meeting, she did not sign and thus the minutes were re-drawn recording correct Chairpersonship. In these correct minutes of meeting, Mrs. Rashmi Verma has duly signed in the capacity of member. As regards signature of Mrs. Rathi Vinay Jha, she was the appointing Authority at the relevant point of time as per the rules. Thus, the matter was forwarded to the BoG without her signatures but with the signatures of all other members of Selection Committee and when the BoG approved the appointment of appellant in its 27th meeting held on 21/7/2003 (Annexure R/1-6, pages 309, 310, 313 and 314), the same person Mrs. Rathi Vinay Jha approved the appointment of the petitioner and the order of appointment was issued by the Chairperson who was the very same person. Thus, the non-signature of Chairperson on the minutes of 24.02.2003 are well explained and can be understood in the seriatim of facts. In view of the fact that the same Chairperson approved the appointment and issued the appointment order, the significance of non-signature on the minutes of 24.02.2003 loses its sheen. Even otherwise also, the final consideration of the Selection Committee was in the meeting held on 4/7/2003 and the petitioner did not obtain the said minutes under Right to Information and did not raise aspersions on the same. The Selection Committee meeting held on 4/7/2003 has recommended for the appointment of the name of appellant on the post of Professor (Tourism). These

minutes were never put to challenge by the petitioner.

(iv) As far as finding of learned Single Judge that BoG had not waived the minimum qualification of 10 years post graduate experience is concerned, it has been submitted that while recording the said finding the learned Single Judge has completely ignored the fact that the BoG in its 27th meeting (page 310, 313) has approved the minutes of the meeting of selection committee dated 24.02.2003 and 4.7.2003, this decision of BoG was not challenged either by petitioner or any of the candidates. It is further submitted that there is no pleading by the petitioner in the writ petition.

(v) It is further submitted that the learned Single Judge perversely recorded the finding that the Selection Committee had departed from its norms in allowing the appellant to be considered *in absentia.* In fact, a bare perusal of the minutes of meeting dated 24/2/2003 (Annexure P/8, page 179) would show that all 5 candidates who appeared for interview on 24/2/2003 were not found suitable for the post, thus the committee decided to call appellant and one other candidate for interview on the next date of meeting which was held on 4/7/2003. Hence, it is clear that the case of the appellant was not considered *in absentia.* Even the BoG had recorded in its supplementary agenda item no.3 (page 310) and approved it (page 313) that earlier 3 times the post was advertised but the committee could not find suitable candidate and in absence of professor, the work in the Institute was suffering. Thus, all this was to be considered by the BoG, which has not only considered everything but has explicitly approved the selection of the appellant and has also appointed him on the post of Professor (Tourism) (page 310, 312, 313, 314). In fact, there has been no challenge to the appointment of the appellant.

(vi) So far as finding of learned Single Judge in para 100-102 is concerned that there was no post of Professor (Tourism), it has been submitted that this issue was not raised by the petitioner in his pleading nor it was canvassed at the time of arguments, thus there was no occasion for the respondents to address this issue but the learned Single Judge decided the same without there being any arguments on the same by any of the parties. Even otherwise, such assumption is misplaced and *dehors* the record.

(vii) Appellants/respondents No.1 to 3 i.e. (1)Union of India; (2) the Chairman (Ministry of Tourism Department), Board of Governors, IITTM; and (3) the Chief Vigilance Officer, Ministry of Tourism in WA No.1994/2019 contended that the reliance placed by learned Single Judge on the 'self contained note' of the CBI dated 7/10/2015 for the purposes of rendering various findings in the impugned orders is completely erroneous, unsustainable and clearly contrary to the records, inasmuch as pursuant to a complaint filed by the writ petitioner, the CBI had prepared a 'self contained note' forwarding it to appellants MoT for necessary action vide its communication dated 7/10/2015. The aforesaid report of

the CBI was examined by the Ministry and after due consideration and deliberation on the same by a letter dated 8/2/2017, it was decided that the complaint against Dr. Sandeep Kulshrestha filed by the petitioner be closed. It is also pertinent to mention that pursuant to a similar complaint by the writ petitioner making the same allegation against Dr. Sandeep Kulshrestha, the matter had been enquired into by the appellant/Ministry and the report whereof was forwarded to the CVC which after due examination advised closure of the matter vide memorandum dated 20/10/2015 (Annexure A/2 filed along with clarification, document no. 5643/18). Hence, the allegation made by the writ petitioner against Dr. Sandeep Kulshreshtha were enquired into on more than one occasion and were not found to be made out. As such, the reliance placed on the purported 'self contained note' of the CBI by the learned Single Judge for the various self styled findings returned in the impugned order are erroneous, unsustainable and liable to be set aside. It is further submitted that in Para-65 of the impugned order, the leaned (sic: learned) Single Judge has relied upon the certain portion of a file noting that were given in a sealed cover. The appellants crave leave to submit and refer to the entire file that contains the aforesaid portion. It is submitted that a perusal of the said relevant file will establish that the learned Single Judge has erroneously relied upon the said portion as 'Ministry's view'. It is submitted that the perusal of the file would indicate that after making all the necessary enquiries the appellant No.1/Union of India, Ministry of Tourism had sent its report to the CVC for closure of the matter regarding allegations of petitioner against Dr. Sandeep Kulshrestha; the appellant.

It has been further submitted that so far as the advertisement is concerned, the requirement thereof is "10 years experience in post graduate teaching". Merely because such experience was gained as guest faculty, it does not *ipso facto* disentitle the candidate from counting such experience towards post-graduate teaching. It is further submitted that the leaned (sic: learned) Single Judge has grossly erred in Para 86 of the impugned order in rejecting the teaching experience of Dr. Sandeep Kulshrestha for the period 1997-2003 during which he was a faculty member as a reader in IITTM taking classes in various PG level courses. The entry qualification for all such regular courses that were being taught by Dr. Sandeep Kulshrestha was under-graduate qualification. Further, it has been brought on record vide communication dated 22/01/2015 (Ann. R-1/3, page 280) of the Chairman, Hospitality in Tourism Board, AICTE that the courses being taught by Dr. Sandeep Kulshrestha were PG Courses. Further by relying upon various precedents of the Apex Court, it has been submitted that the learned Single Judge has exceeded the scope of *quo warranto* and indeed, has exercised *certiorari* jurisdiction which could not have been embarked upon at the instance of petitioner who was not in the fray of candidates appearing for the post of Professor (Tourism).

With the aforesaid submissions, it has been submitted that the impugned order being patently erroneous and without jurisdiction is liable to be set aside.

On the other hand, petitioner reiterated the submissions advanced before the learned Single Judge while supporting the impugned order.

6. Having heard learned counsel for the parties, petitioner in person and on perusal of the material available on record, the following issues emerge for consideration :

(i) The scope of intereference in writ jurisdiction of writ of quo warranto.

(ii) Whether appellant/respondent no.8 had the requisite experience at the relevant point of time for consideration of his candidature on the post of Professor (Tourism).

7. ***Scope of 'Quo Warranto'***

In somewhat similar facts and circumstances, the Apex Court in the case of the *University of Mysore Vs. Govinda Rao* (AIR 1965 SC 491) pointed towards the technical nature of the writ of *quo warranto* which was claimed by the respondent therein against one Annih Gowda who was holding the post of Research Reader in English in the Central College, Banglore. The High Court had upheld the contentions of the respondent and quashed the appointment of appellant No.2. In such circumstances, the Apex Court, while setting aside the order of High Court, held thus:

> 6. The judgment of the High Court does not indicate that the attention of the High Court was drawn to the technical nature of the writ of quo warranto which was claimed by the respondent in the present proceedings, and the conditions which had to be satisfied before a writ could issue in such proceedings.
>
> 12. In our opinion, in coming to the conclusion that appellant No. 2 did not satisfy the first qualification, the High Court is plainly in error. The judgment shows that the learned Judges concentrated on the question as to whether a candidate obtaining 50 per cent marks could be said to have secured a high Second Class Degree, and if the relevant question had to be determined solely by reference to this aspect of the matter, the conclusion of the High Court would have been beyond reproach. But what the High Court has failed to notice is the fact that the first qualification consists of two parts-the first part is: a high Second Class Master's Degree of an Indian University, and the second part is: its equivalent which is an equivalent qualification of a foreign University. The High Court does not appear to have considered the question as to whether it would be appropriate

for the High Court to differ from the opinion of the Board when it was quite likely that the Board may have taken the view that the Degree of Master of Arts of the Durham University. which appellant No. 2 had obtained was equivalent to a high Second Class Master's Degree of an Indian University. This aspect of the question pertains purely to an academic matter and Courts would naturally hesitate to express a definite opinion, particularly, when it appears that the Board of experts was satisfied that appellant No. 2 fulfilled the first qualification. If only the attention of the High court had been drawn to the equivalent furnished in the first qualification, we have no doubt that it would not have held that the Board had acted capriciously in: expressing the opinion that appellant No. 2 satisfied all the qualifications including the first qualification. As we have already observed though the High Court felt some difficulty about the two remaining qualifications, the High Court has not rested its decision on any definite finding that these qualifications also had not been satisfied. On reading the first qualification, the position appears to be very simple; but unfortunately, since the equivalent qualification specified by cl. (a) was apparently not brought to the notice of the High Court, it has failed to take that aspect of the matter into account. On that aspect of the matter, it may follow that the Master's Degree of the Durham University secured by appellant No. 2, would satisfy the first qualification and even the second. Besides, it appears that appellant No. 2 has to his credit published works which by themselves would satisfy the second qualification. Therefore, there is no doubt that the High Court was in error in coming to the conclusion that since appellant No. 2 could not be said to have secured a high Second Class Master's Degree of an Indian University, he did not satisfy the first qualification. It is plain that Master's Degree of the Durham University which appellant No. 2 has obtained, can be and must have been taken by the Board to be equivalent to a high Second Class Master's Degree of an Indian University, and that means the first qualification is satisfied by appellant No. 2. That being so, we must hold that the High Court was in error in issuing a writ of quo warranto, quashing the appointment of appellant No. 2

13. Before we part with these appeals, however, reference must be made to two other matters. In dealing with the case presented before it by the respondent, the High Court has criticised the report made by the Board and has observed that the circumstances disclosed by the report made it difficult for the High Court to treat the recommendations made by the experts with the respect that they generally deserve. We are unable to see the point of criticism of the High Court in such academic matters. Boards of

> Appointments are nominated by the Universities and when recommendations made by them and the appointments following on them, are challenged before courts, normally the courts should be slow to interfere with the opinions expressed by the experts. There is no allegation about mala fides against the experts who constituted the present Board; and so, we think, it would normally be wise and safe for the courts to leave the decisions of academic matters to experts who are more familiar with the problems they face than the courts generally can be. The criticism made by the High Court against the report made by the Board seems to suggest that the High Court thought that the Board was in the position of an executive authority, issuing an executive fiat, or was acting like a quasi-judicial tribunal, deciding disputes re- ferred to it for its decisions. In dealing with complaints made by citizens in regard to appointments made by academic bodies, like the Universities, such an approach would not be reasonable or appropriate. In fact, in issuing the writ, the High Court has made certain observations which show 'that the High Court applied tests 'Which would legitimately be applied in the case of writ of certiorari. In the judgment, it has been observed that the error in this case is undoubtedly a manifest error. That is a consideration which is more germane and relevant in a procedure for a writ of certiorari. What the High Court should have considered is whether the appointment made by the Chancellor had contravened any statutory or binding rule or ordinance, and in doing so, the High Court should have shown due regard to the opinions expressed by the Board & its recommendations on which the Chancellor has acted. In this connection, the High Court has failed to notice one significant fact that when the Board considered the claims of the respective applicants, it examined them very carefully and actually came to the conclusion that none of them deserved to be appointed a Professor. These recommendations made by the Board clearly show that they considered the relevant factors carefully and ultimately came to the conclusion that appellant No. 2 should be recommended for the post of Reader. Therefore, we are satisfied that the criticism made by the High Court against the Board and its deliberations is not justified.
>
> ***(emphasis supplied)***

Taking note of decisions in *High Court of Gujarat v. Gujarat Kishan Mazdoor Panchayat* ((2003)4 SCC 712), *Gujarat Mazdoor Panchaat V. State of Gujarat,* 2001 SCC OnLine Guj 76, *Mor Modern Coop. Transport Society Ltd. v. State of Haryana* ((2002)6 SCC 269) and *R.K.Jain v. Union of India* ((1993)4 SCC 119), the Apex Court in the case of *Bharti Reddy Vs. State of Karnataka and Others* ((2018)6 SCC 162), has held *infra:-*

> 36. In *High Court of Gujarat v. Gujarat Kishan Mazdoor Panchayat,* in a concurring judgment S.B.Sinha, J (as his Lordship then was) noted that the High Court in exercise of its writ jurisdiction in a matter of this nature is required to determine at the outset as to whether a case has been made out for issuance of writ of certiorari or a writ of quo warranto. However, the jurisdiction of the High Court to issue a writ of quo warranto is a limited one. While issuing such a writ, the Court merely makes a public declaration but will not consider the respective impact of the candidates or other factors which may be relevant for issuance of writ of certiorari. The Court went on to observe that a writ of quo warranto can only be issued when the appointment is contrary to the statutory rules as held in *Mor Modern Coop. Transport Society Ltd. v. State of Haryana.* The Court also took notice of the exposition in *R.K.Jain v. Union of India.* The Court noted that with a view to find out as to whether a case has been made out for issuance of writ of quo warranto, the only question which was required to be considered was as to whether the incumbent fulfilled the qualifications laid down under the statutory provisions or not. This is the limited scope of enquiry. **Applying the underlying principle, the Court ought not to enquire into the merits of the claim or the defence or explanation offered by the appellant regarding the manner** of issuance of income and caste certificate by the jurisdictional authority or any matter related thereto which may be matter in issue for scrutiny for scrutiny concerning the valadity of the caste certificate issued by the jurisdictional statutory authority constituted under the State Act of 1990 and the Rules framed thereunder.....
>
> 39. We have adverted to some of those decisions in the earlier part of this judgment. Suffice, it to observe that unless the Court is satisfied that the incumbent was not eligible at all as per the statutory provisions for being appointed or elected to the public office or that he/she has incurred disqualification to continue in the said office, **which satisfaction should be founded on the indisputable facts,** the High Court ought not to entertain the prayer for issuance of a writ of quo warranto."
>
> *(Emphasis supplied)*

In the case of *Rajesh Awasthi Vs. Nandlal Jaiswal* [2013 (1) SCC 501], the Apex Court, while referring to *Mor Modern Coop. Transport Coop. Transport Society Ltd Vs. Govt. of Haryana* [2002 (6) SCC 269] and *B. Srinivasa Reddy Vs. Karnataka Urban Water Supply & Drainage Board Employees Assn.* [2006 (11) SCC 731] has held as under :-

> "19. A writ of quo warranto will lie when the appointment is made contrary to the statutory provisions. This Court in Mor Modern Coop. Transport Coop. Transport Society Ltd. v. Govt. of Haryana (2002) 6 SCC 269 held that a writ of quo warranto can be issued when appointment is contrary to the statutory provisions. In *B. Srinivasa Reddy (supra),* this Court has reiterated the legal position that the jurisdiction of the High Court to issue a writ of quo warranto is limited to one which can only be issued if the appointment is contrary to the statutory rules. The said position has been reiterated by this Court in *Hari Bans Lal (supra)* wherein this Court has held that for the issuance of writ of quo warranto, the High Court has to satisfy that the appointment is contrary to the statutory rules."

In the case of *Dr. M.C.Gupta Vs. Dr. Arun Kumar Gupta* ((1979)2 SCC 339)

> "7. Before the rival comments are probed and analysed, it would be necessary to keep in view the twilight zone of Court's interference in appointment to posts requiring technical experience made consequent upon selection by Public Service Commission, aided by experts in the field, within the framework of Regulations framed by the Medical Council of India under Section 33 of the Indian Medical Council Act, 1956, and approved by the Government of India on 5th June 1971. When selection is made by the Commission aided and advised by experts having technical experience and high academic qualifications in the specialist field, probing teaching/research experience in technical subjects, the Courts should be slow to interfere with the opinion expressed by experts unless there are allegations of mala fides against them. It would normally be prudent and safe for the Courts to leave the decision of academic matters to experts who are more familiar with the problems they face than the Courts generally can be. Undoubtedly, even such a body if it were to contravene rules and regulations binding upon it in making the selection and recommending the selectees for appointment, the Court in exercise of extraordinary jurisdiction to enforce rule of law,may interfere in a writ petition under Article 226 . Even then the Court, while enforcing the rule of law, should give due weight to the opinions expressed by the experts and also show due regard to its recommendations on which the State Government acted. If the recommendations made by the body of experts keeping in view the relevant rules and regulations manifest due consideration of all the relevant factors, the Court should be very slow to interfere with such recommendations"
>
> *(Emphasis supplied)*

In *Bihar Public Service Commission Vs. Kamini* ((2007)5 SCC 519), the Apex Court held thus:

> "8. Again, it is well settled that in the field of education, a court of law cannot act as a expert. **Normally, therefore, whether or not a student/candidate possesses requisite qualifications, should better be left to educational institutions** (vide University of Mysore v. C.D.Govinda Rao (AIR 1965 SC 491 : (1964)4 SCR 575). This is particularly so when it is supported by an Expert Committee. ... The Division Bench was in error ignoring the well-considered report of the Expert Committee and in setting aside the decision of the learned Single Judge"
>
> *(Emphasis supplied)*

In the case of *All India Council for Technical Education Vs. Surinder Kumar Dhawan* ((2009)11 SCC 726), it has been held as under:-

> 16. The courts are neither equipped nor have the academic or technical background to substitute themselves in place of statutory professional technical bodies and take decisions in academic matters involving standards and quality of technical education.
>
> 17. The role of statutory expert bodies on education and role of courts are well defined by a simple rule. If it is a question of educational policy or an issue involving academic matter, the courts keep their hands off. If any provision of law or principle of law has to be interpreted, applied or enforced, with reference to or connected with education, courts will step in. In J.P. Kulshreshtha (Dr.) v. Allahabad University [1980 (3) SCC 419] this Court observed:
>
> > "11. Judges must not rush in where even educationists fear to tread...
> > 17. ....While there is no absolute bar, it is a rule of prudence that courts should hesitate to dislodge decisions of academic bodies."
>
> 18. In *Maharashtra State Board of Secondary and Higher Secondary Education v. Paritosh Bhupeshkumar Sheth [1984 (4) SCC 27]* this court reiterated :
>
> "..... the Court should be extremely reluctant to substitute its own views as to what is wise, prudent and proper in relation to academic matters in preference to those formulated by professional men possessing technical expertise and rich experience of actual day-to-day working of educational

institutions and the departments controlling them."

(Emphasis supplied)

8. Thus, from the aforesaid decisions, the settled position with regard to exercise of discretionary jurisdiction under *quo warranto* is *ex facie* explicit. The jurisdiction of the High Court to issue a writ of quo warranto is a limited one. A writ of quo warranto will lie only when the appointment is made contrary to the statutory provisions. Normally, whether or not a student/candidate possesses requisite qualifications and/or experience, should better be left to educational institutions. This is particularly so when it is supported by an Expert Committee. Unless the Court is satisfied that the incumbent was not eligible at all as per the statutory provisions for being appointed or elected to the public office or that he/she has incurred disqualification to continue in the said office, *which satisfaction should be founded on the indisputable facts,* the High Court ought not to entertain the prayer for issuance of a writ of quo warranto.

It cannot be lost sight of that in the instant case, the learned Single Judge was not exercising certiorari jurisdiction. Certiorari jurisdiction can be exercised only at the instance of an aggrieved person who is qualified to the post and who is a candidate for the post. On the other hand, although strict rules of *locus standi* are relaxed to an extent in a *quo warranto* proceedings, however, as indicated above, the said jurisdiction is a limited one and can only be issued when the appointment is contrary to the statutory rules. Moreover, a writ of *quo warranto* should be refused when it is an outcome of malice or ill will. A petition praying for a writ of *quo warranto,* being in the nature of public interest litigation, is not maintainable at the instance of a person who is not un-biased and the forum cannot be chosen to settle personal scores *(B. Srinivasa Reddy Vs. Karnataka Urban Water Supply & Drainage Board Employees' Assn.* ((2006)11 SCC 731, referred to). At the cost of repetition, it is worth mentioning that the writ petitioner was an ousted employee of IITTM and was habitual in making complaint against the appellant, besides uploading obnoxious material against IITTM on Facebook. Moreover, he was not a candidate to the post in question.

9. This brings us to the pivotal question as to whether appellant Dr. Sandeep Kulshrestha possessed the requisite experience at the relevant point of time for being appointed as Professor (Tourism).

However, before proceeding further, it is expedient to reiterate the recognized concepts of "Experience" and "Qualification" in the fraternity of academia, of which judicial notice has also been taken by the Hon'ble Apex Court in catena of decisions. As a matter of fact, "experience" typically refers to practical knowledge and skills gained through doing a job or engaging in various activities over time,

while "Qualification" usually refers to former credentials, degrees, certifications or achievements acquired through education or training that demonstrates a person's abilities in a particular field. **Reckoning of experience** can be based on combination of factors including nature of work done, skills acquired, duration of involvement and endorsement or validation by recognized entity within a given Industry or profession. Ultimately it is a mix of technical know-how and acknowledgment by relevant bodies within a field.

As per the advertisement quoted above, he was required to possess 10 years of experience in post graduate teaching. Now, let us examine as to whether he had this qualification at the relevant point of time or not. For this, it would be propitious to re-quote his CV as infra:

S.No	Post held & payscale	Year	Classes taught	Department
1.	Reader (12000-18300)	26-02-98 to till date	PGDBM, DTM, MDP, EDP	Indian Institute of Tourism & Travel Management, Govt. of India, Govindpuri, Gwalior
2.	Reader (3700-5700)	29-01-97 to 25-02-97	**DTM,** MDP, EDP	Business Studies IITTM, ETC, Bhubaneswar, Orissa
3.	Sr. Assistant Professor (3000-5000)	25-02-96 to 27-01-97	**M.Com,** MBA, MPA	Commerce Department, Madhav Post Graduate College, Jiwaji University, Gwalior
4	Asstt. Professor (2200-4000)	25-02-91 to 24-02-96	**M.Com,** MBA, MPA	Commerce Department, Madhav Post Graduate College, Jiwaji University, Gwalior
5	Lecturer (2200-4000)	25-08-90 to 24-02-91	M.Phil, MBA	School of Commerce and Management Studies, Jiwaji University, Gwalior
6	Lecturer	20-03-90 to 22-08-90	M.Com	School of Commerce and Management Studies, Jiwaji University, Gwalior

This advertisement was issued in the January, 2003. Therefore, the experience claimed by him at S.No.1 as Reader is to be read till Jan.2003. In other words, he has claimed experience in teaching courses such as PGDBM, DTM, MDP and EDP from 26/02/1998 till Jan. 2003 at IITTM-Gwalior, as well as, at S.No.2 of teaching DTM, MDP and EDP from 29-01-97 to 25-02-97. Meaning thereby, the experience claimed by him of teaching as Reader at S.Nos. 1 and 2 clubbed together would come to 5 years. This experience has been nullified by the learned Single Judge in paragraph 86 of the impugned order on the premise that no document had been filed by respondent nos. 1 and 2 therein of the year 1998 to suggest that AICTE was treating Diploma in Tourism Management Courses run by IITTM as Post Graduate Course. However, in this regard, the email sent by Dr. Sitikantha Mishra, Chairman, All India Board of Hospitality & Tourism Management, AICTE, New Delhi (Annexure R-1/3) is noteworthy and the same reads as under:-

> "Dear Sir,
>
> With reference to your email dated 21/01/2015 i would like to clarify that the teaching in the Diploma in Tourism Management course run by IITTM from the year 1997 to 2002 was approved by AICTE. It may be noted that in 1997 AICTE had not instituted Post Graduate Certificate in Management/Tourism Management courses with the duration of more than 12 months and less than 24 months. Therefore the Teaching by the Faculty Members of IITTM in the said Diploma course is a 'Post Graduate Teaching' as the entry qualification for this course was minimum graduation from a recognized university. There are number of Indian Universities and government institutions those are running one year Post Graduate Certificate/Diploma courses with minimum eligibility of graduation degree."
>
> *(Emphasis supplied)*

In this regard, a clarification dated 30/9/2019 sent by Dr.Ajeet Singh, Assistant Director, RIFD to Dr. Sandeep Kulshrestha, filed as Annexure A/4 along with I.A. No. 8268/23 (page no.27) is also worth noting. The relevant part thereof reads thus:

> "Please refer to your letter dated September 14, 2019. In this connection, it is to inform you that The Indian Institute of Tourism and Travel Management is an autonomous body under the Ministry of Tourism. Govt. of India and was accorded approval for running Diploma in Tourism Management of 14 month duration in year 1995 onwards. Although, conventionally entry level qualification to the Diploma Program is 10^{th} or 10+2, but the entry level qualification for the said diploma program is bachelor's degree in any subject, hence, implicitly it is a Post

Graduate level Diploma Program. The teaching experience for teaching this program may be considered as teaching experience of post graduate level."

(Emphasis supplied)

That apart, initial affiliation was granted by the AICTE to IITTM-Gwalior on 3/5/1995. The same has been filed at Page No. 9 of I.A. No.8302/2023. The relevant extract thereof reads thus:

Name of course	Entry level	Duration	Annual intake	Period of approval
Diploma in Travel & Tourism Industry Management	Bachelor's degree in any subject	16 months Part Time	150 (50 in each chapter at Delhi, Lucknow & Trivandrum)	1995-97
Diploma in Tourism Management	**Bachelor's Degree in any subject**	**14 months Full Time**	**50**	**1995-97**
Diploma in Destination Management	Bachelor's degree in any subject	8 months Full Time	50	1995-97

The same was regularly extended from time to time (yearwise). The said documents were brought on record by respondent nos. 2,3 and 9 by way of I.A. No. 8302/23. Thus, from the above it is very much clear that Diploma in Tourism Management (DTM) course was being run right from 1995 at IITTM having entry level qualification as Bachelor's degree in any subject. Similarly, the MBA program was approved for IITTM by the AICTE in the year 2001 and later on re-named as PGDBM. As such, the appellant's experience of teaching DTM course right from 1997 till 2003 could not have been negated by the learned Single Judge on the ground that there was no document to show that it was a PG course. Even otherwise, it was for the writ petitioner to bring on record evidence to suggest that entry-level qualification for DTM was 10^{th} or 12^{th} and not graduation. Such is not the case in hand. On the contrary, these courses have been treated by the expert body viz. Selection Committee, BoG and the Appointing Authority as post graduate teaching. In our opinion, the learned Single Judge was not right in substituting his opinion over that of expert body in this behalf, that too while exercising extraordinary jurisdiction under *quo warranto.*

10. The experience mentioned by appellant Dr.Sandeep Kulshrestha at S.Nos. 3 and 4 of Sr.Assistant Professor and Assistant Professor respectively from 1991

to 1997 is the bone of contention. It has been the case of the petitioner that MBA and MPA were not taught at Madhav College, Gwalior at the relevant point of time and, therefore, the experience at S.No.3 and 4 was incorrectly mentioned, whereas it has been contended on behalf of the appellant that appellant had taught M.Com at Madhav College, Gwalior and MBA, MPA at Jiwaji University, Gwalior as Guest Faculty and in fact those experiences had been clubbed by him in the CV. The CV was supported by relevant certificates, which were scrutinized by the Screening Committee, as well as, BoG. In this behalf, certificates issued by Madhav College, Gwalior on 5/8/1999 and 27/6/2012 have been brought on record as Annexure R/7 (Page 228) and Annexure R/8 (Page 231) respectively. For ready reference, relevant extract of both are reproduced below:

Date - 5-8-1999

CERTIFICATE

This is to be certified that DR. SANDEEP KULSHRESTHA S/O DR. V.D.KULSHRESTHA was working as Asstt. Professor (Under UGC Pay Scale Rs. 2200 - 4000 and Senior Grade Rs.3000 - 5000) in commerce department since 25th Feb. 1991 to 27th Jan. 1997.

This College is affiliated to Jiwaji University, Gwalior (M.P.) India.

Sd/-
Principal
Madhav College, Gwalior

Letter No. 2012/679 Date - 27-6-2012

CERTIFICATE

This is to be certified that DR. SANDEEP KULSHRESTHA S/O DR. V.D.KULSHRESTHA was working as Asstt. Professor (Under UGC Pay Scale Rs. 2200 - 4000 and Senior Grade Rs.3000 - 5000) in the Department of commerce and Teaching Post Graduate and Under Graduate Classes since 25 th feb. 1991 to 27th Jan. 1997 .

This College is affiliated to Jiwaji University, Gwalior (M.P.) India.

Sd/-
Principal
Madhav College, Gwalior

From the above certificates, it is well neigh clear that the appellant had done Post Graduate Teaching in Madhav College, Gwalior from 25/2/1991 to

27/1/1997 i.e. for about 5 years and 11 months, though certainly not MBA & MPA at that College. The said fact is also reiterated in the reply given by Principal, Madhav College, Gwalior to Ministry of Tourism vide letter dated 15/6/2015 (Annexure R/3, page 215) wherein it is categorically mentioned that during the relevant period appellant worked at Madhav College, Gwalior as Assistant Professor Commerce and that MBA and MPA courses were not being taught in that College. Referring to that communication, vide letter dated 22/9/2015 (Annexure R/1-8, page 328) of Dy. Director General (HRD), Ministry of Tourism is noteworthy, the relevant part whereof reads thus:

> "2. In this connection, it is clarified that a note was received from the office of the Hon. Minister of State for Tourism (IC) without any signature authenticating the note which was found to be incorrect. The case was re-examined and re-submitted to HM(T) indicating the actual facts of the case and drawing attention to the reply received from the Principal, Madhav College, Gwalior in which it was conveyed that Dr. Sandeep Kulshrestha had taught MBA/MPA classes in Jiwaji University, Gwalior as Guest Faculty, on Honorary basis. The PS to HM(T) has recorded on the concerned file on 24.07.2015 that "HM(T) has been apprised of the situation. Page "55" of the file is not an official communication and may not be treated so" (Photocopy of the note on page 59 of the File No. 67(21)/2011-IITTM-Vol.II is enclosed for reference).

Thus, it is evident from the above communication of Ministry of Tourism that Dr. Sandeep Kulshrestha had taught MBA/MPA Classes in Jiwaji University, Gwalior as Guest Faculty. The communication also has a mention about Page "55". This Page 55/note-sheet had been brought on record by the petitioner as Annexure P/9 at page 182 suggesting that Dr. Kulshrestha had submitted fake documents. However, by the aforesaid communication, it was clarified that Page "55" of the file was not an official communication and may not be treated so. Thus, it cannot be disputed that appellant took M.Com classes at Madhav College, Gwalior during the above said period of 5 years and 11 months and it is also evident that he taught as Guest Faculty at Jiwaji University, Gwalior teaching MBA & MPA Classes during that period.

As such, his experience of post graduate teaching mentioned at S.Nos. 1,2 and 3 goes beyond 10 years. The learned Single Judge in paragraph 90 of the impugned order has referred to a note-sheet dated 16/7/2015 of the Vigilance Division wherein it is mentioned - "As none of the candidate, including Shri Sandeep Kulshrestha had the requisite teaching experience, the relaxation was given". In fact, this note-sheet contains the remarks of Vigilance Division vis-a-vis various allegations levelled against the appellant by the petitioner. All the allegations were found to be vague in nature by the Vigilance Division and

comments were furnished to the CVC for closure of complaint against the appellant by this note-sheet only. So far as the aforesaid remark of Vigilance Division is concerned, the same is *ex facie* reiteration of the observations of Selection Committee in its minutes (Annexures P/7 & P/8). The contents of both the minutes are exactly the same except for the Chairperson. In both the minutes it is mentioned that qualification of 10 years post graduate experience may be waived since none of the applicants has 10 years PG experience in Tourism. It is noteworthy that, as indicated above, appellant has more than 11 years' PG experience (though not entirely in Tourism) although requirement under the advertisement was of 10 years' experience and that under the recruitment rules was of 8 years' experience. So the observations of the Screening Committee or for that matter its reiteration in the Vigilance Division note-sheet dated 16/7/2015 (Supra) can well be understood in that context. As a matter of fact, statutory rules assume precedence over advertisement in the event of variation between the two (*Ashish Kumar Vs. State of Uttar Pradesh* ((2018)3 SCC 55, referred to). However, the advertisement did not require PG teaching experience in Tourism. It only warranted *10 years of experience in post graduate teaching*. The observation of the learned Single Judge in paragraphs 88 and 89 that looking to the caption of advertisement calling for applications for the post of Professor (Tourism) the requirement of 10 years' Post Graduate teaching experience has to be read as 10 years' Post Graduate teaching experience in Tourism, in our view, is based on self perceived notion and is in excess of the requirement under the advertisement and the recruitment Rules. We may hasten to add that while exercising jurisdiction under Article 226 of the Constitution, the Court is not expected to add or subtract contents in a given document to facilitate/enforce its own perspective, particularly while reading the terms of the advertisement or rules having legal sanction. Moreover, it does not matter if we accept or reject this proposition of learned Single Judge, for if we accept it then the 10 years experience was recommended to be waived by the Selection Committee (ultimately approved by the BoG as discussed later) and if we reject this proposition then as elicited above the appellant had more than ten years PG teaching experience. At this juncture, we are attracted to the finding of the learned Single Judge in paragraph 79 that minimum qualification of 10 years post graduate experience was never waived by the BOG in its 25 th meeting dated 25-2-2003 and also in its 27th meeting dated 25-11-2003, which in turn brings us to the alleged dichotomy between the selection committee minutes (Annexures P/7 and P/8) and the events thereafter.

11. The learned single Judge in paragraph 60 to 63 has called in question the authenticity of the minutes of selection committee meeting dated 24-2-2003 (Annexure P/7 and P/8) primarily on the premise that firstly the names of Chairperson in both the meetings are different and secondly both the minutes were not signed by the Chairpersons. However, it is noteworthy that candidature of appellant was not considered in the aforesaid meeting, but was considered in

subsequent meeting dated 4/7/2003. Even otherwise, the learned single Judge has not considered a very important aspect that contents of both the minutes dated 24/2/2003 are exactly the same except for the name of Chairpersons. It is beyond comprehension as to what meaningful gain could be obtained by drawing two identically worded minutes. In this behalf, the explanation of the appellant appears to be plausible. He has submitted that the actual reason for two minutes of meeting is that the concerned ministerial persons by preparing the minutes of meeting had wrongly recorded that the meeting was held in the Chairpersonship of Mrs. Rashmi Verma ADG, Department of Tourism whereas it had been held in the Chairpersonship of Mrs. Rathi Vinay Jha, Secretary (Tourism). Thus, when the officials had perused the minutes of meeting, they pointed out the mistake and the minutes were immediately re-drafted and the correct fact regarding the Chairpersonship was recorded. Except this, there is no deviation in the entire contents of two minutes of meeting. In fact, there was only one meeting of the selection committee which was held on 24-2-2003. So far as non signing of the minutes of Chairpersons are concerned, it has been submitted that when the minutes were drawn on first occasion, the concerned ministerial person had wrongly recorded that the meeting was held in the Chairpersonship of Mrs. Rashmi Verma. Thus, when she went through the minutes of meeting, she did not sign and thus the minutes were re-drawn by recording correct Chairpersonship. In these correct minutes of meeting (Annexure P/8), Mrs. Rashmi Verma has duly signed in the capacity of member. As regards the signature of Mrs.Rathi Vinay Jha, Chairperson, since she was the appointing authority at the relevant point of time, as per the rules the matter was forwarded to the BOG without her signatures but with the signatures of all other members of the selection committee and when the BOG approved the appointment of the appellant in its 27th meeting held on 21-7-2003, the same person i.e. Mrs.Rathi Vinay Jha approved the appointment of the appellant and the order of appointment was issued by the Chairperson who was the very same person. Thus, the non-signature of Chairperson on the minutes of 24-2-2003 are well explained and can be understood in the seriatum of facts. In view of the fact that the same Chairperson approved the appointment and issued the appointment order, the significance of non-signature on the minutes of 24-2-2003 looses its sheen.

In fact, as is evident from the selection committee minutes (Ex.P/7 and P/8), the committee did not find any of the candidates interviewed suitable for the post and decided that the applicants who had requested for consideration in abstentia may be called for an interview **on a subsequent date.** Thus, it is clear that the candidature of appellant was deferred for consideration on 24-2-2003 and it was only on 4-7-2003 that the same came up for consideration wherein name of Dr. Sanjeev Kulshrestha for appointment on the post of Professor (Tourism). However, the learned single Judge has drawn an adverse inference in paragraph 80 of the impugned order on the premise that the said minutes were not brought on

record. Here it is noteworthy that there was no challenge to the minutes dated 4/7/2003. Further, in the Supplementary Agenda Notes for the 27th Meeting of Board of Governors dated 21/7/2003 (Annexure R-1/6), there is a categoric reference to the meeting of 4/7/2003. Even otherwise, it cannot be lost sight of that selection of appellant had been challenged after a gap of more than 13 years and at this distance of time, no exception could be taken to non availability of such minutes on record and the same could not have been construed otherwise, as contended by learned counsel for the appellant/Institute while referring to affidavit of its Director dated 8/8/2023 filed in compliance of order of this Court dated 27/7/2023. In such a scenario, the learned single Judge was not right in out-rightly drawing an adverse inference with regard to non availability of such minutes.

12. In paragraph 79, the learned single Judge has returned a finding that the ten years PG experience was never waived by the BOG in its 25th meeting dated 25-2-2003 and also in its 27th meeting dated 25-11-2003. In this regard, Supplementary Agenda Notes for the 27th Meeting of the Board of Governors held on 21st July 2003 (Annexure R-1/6) again assume importance. The said meeting was conducted in the Chairpersonship of Smt. Rathi Vinay Jha, Secretary (Tourism). The supplementary Agenda item No.3 has been reproduced by the learned single Judge in paragraph 71. A bare reading thereof makes it clear that it contains categorical references to two things - (i) that the selection committee met on 4-7-2003 and recommended that Dr. Kulshrestha be appointed on the post of Professor Tourism and (ii) the selection committee on 24th February 2003 recommended that the qualification of 10 years' post graduate experience may be waived since none of the applicants had ten years PG experience in tourism. The minutes of this meeting were recorded in the following terms :

> **"Supp.Agenda Item No.3 : Appointment of Professor in Tourism at IITTTM, Gwalior**
>
> Board considered the matter and authorized the Chairperson of the BOG to approve the appointment of Professor."

Thereafter the appointment of appellant was approved by Chairperson Smt. Rathi Vinay Jha. Thus, when the Board had authorized the Chairperson to approve the appointment of appellant as Professor Tourism after going through the Suppl. Agenda Item No.3, which contained categoric reference to recommendation of selection committee to waive the ten years' PG experience as none of the candidates had that experience in tourism, then certainly in the decision of the Board of approving the candidature of appellant, the decision of waiving 10 years' experience was implicit. Thus, the contrary observation of leaned (sic: learned) Single Judge in this behalf, being hyper-technical, cannot be countenanced. Even otherwise, as indicated above as culled out from AICTE e-mails (Annexures R-1/3, A/4 filed with I.A. 8268/23), documents pertaining to

DTM & MBA/PGDBM filed along with I.A. 8302/23, certificates of Madhav College Annexures R/7 and R/8, the appellant had more than 11 years of Post Graduate teaching experience.

13. Learned Single Judge in paragraph 93 has reiterated the settled canon of law that qualification cannot be changed in the mid of recruitment process, to harp upon the selection committee's recommendation of waiving 10 years' experience. For this learned Single Judge has placed reliance on various precedents of the Apex court. There is no scintilla of doubt to the aforesaid settled legal position, yet the learned Single Judge lost sight of the fact that he was exercising discretionary jurisdiction under *quo warranto* and was not in *certiorari* jurisdiction. *Certiorari* could not have been invoked by the petitioner who was not in the fray. The dictums referred to by the learned Single Judge in paragraph 94 do not relate to exercising jurisdiction under *quo warrant*o which, as discussed above, is a writ of technical nature with limited scope. Even otherwise, as indicated above, the appellant had more than 11 years of PG teaching experience.

As a matter of fact, as indicated *in extenso (Supra),* the distinction between writ of *quo warranto* and certiorari under Article 226 of the Constitution, the writ Court is expected to exercise such jurisdiction with care and caution, subject to the limitations recognized in law. In our opinion, the learned Single Judge remained totally oblivious of delineation between writ of *quo warranto* and certiorari and not only exceeded the jurisdiction entering into certiorari jurisdiction but also invoked unwarranted inherent jurisdiction issuing manifold mandatory directions for which there was no foundation.

In view of the aforesaid discussion, the finding of learned Single Judge with regard to non eligibility of appellant Dr. Sandeep Kulshrestha for being appointed on the post of Professor (Tourism) cannot be sustained, being in excess of jurisdiction. In fact, the learned Single Judge has embarked upon a roving enquiry at the behest of a person who was not a candidate to the post in question that too while exercising the limited jurisdiction of *quo warranto* after 16 years of appointment of appellant.

14. Now, we advert to the observations and host of omnibus directions of exceptional nature given to the CBI in paragraphs 106 to 108 and 131 of the impugned order with regard to CV of appellant/respondent no.8 wherein besides M.Com, MBA & MPA are mentioned as post graduate teaching experience at Madhav Post Graduate College at S.No. 3 and 4 during the period 25/2/1996 to 27/1/1997 and 25/2/1991 to 24/2/1996 respectively. The directions so issued in paragraph 131, *inter alia,* in essence are to investigate for the offences punishable under sections 13(1)(d)(ii) or (iii) of the Prevention of Corruption Act, 1988 from the stage where it was left, besides to investigate that all the OICs had acted on the instructions of MoT or not etc. (para 131 (iii)).

Firstly, the said directions by a writ Court exercising *quo warranto* jurisdiction are explicitly far-in-excess of constitutional jurisdiction. The jurisdiction of the writ Court has been reduced to investigation through roving enquiry based on assumed facts with little care and concern about the scope of jurisdiction of *quo warranto;* a limited one of technical nature. The approach of the learned Single Judge in the aforesaid context spreading from paragraphs 100 to 120 based on assumed facts tantamounts to witch-hunting exercise and hair-splitting. Moreso after closure of enquiry by Chief Vigilance Officer, Ministry of Tourism vide Office Memorandum dated 8/2/2017 (filed along with IA N.1700/17) and by the the Central Vigilance Commission (CVC) which exercises supervisory jurisdiction over CBI vide its letter dated 20/10/2015 (Annexure A/2 filed along with Document No.5643/18), direction to the CBI to conduct investigation, in our opinion, was not warranted either on facts or in law, inasmuch as the teaching experience of Post Graduate Classes at Madhav College during the relevant period was certified by the Principal of Madhav College vide certificates (Annexures R/7, Page 228 and R/8, Page 231) quoted above. There is not even an iota of doubt that Post Graduate Classes were not being taught at Madhav College. There is nothing on record contrary to the certificates so issued. At the cost of repetition, we reiterate that the assessment/evaluation of teaching experience has been done by the expert body. The High Court should refrain from substituting its opinion for that of the expert body which has assessed the experience, as has been held in catena of decisions of Hon'ble Supreme Court.

In para 131(ii), the learned Single Judge directed the appellant/respondent no.8 to refund the difference of salary between the pay of Reader and Professor (Tourism)/Director IITTM-Gwalior within a period of three months therefrom failing which the delayed refund would carry interest at the rate of 6% per annum.

To say the least, the aforesaid direction issued in unusual enthusiastic approach by the writ Court, is in ignorance of and contrary to the dictum of Apex Court in *Central Electricity Supply Utility of Odisha Vs. Dhobei Sahoo and Others* ((2014)1 SCC 161) wherein it has been held as under:-

> "53. In view of the aforesaid analysis we are of the resolute opinion that even while issuing a writ of quo warranto there cannot be any direction for recovery of the sum. While entertaining a PIL pertaining to a writ of quo warranto we would add that it is the obligation of the Court to pave the path which is governed by constitutional parameters and the precedential set-up. It is to be borne in mind that laws are commended to establish a society as required by the paradigms laid down by law. The courts while implementing law may not always be guided by total legalistic approach but that does not necessarily mean to move on totally moralistic principle which has no

> sanction of law. We have been constrained to say so as we find that there is a temptation to say something in a public interest litigation which can be construed as the overreach. It needs no special emphasis to state that formulations of guidelines or directions issued are bound to be within the constitutional parameters.
>
> *(Emphasis supplied)*

Further, the observation of learned Single Judge in para 108 of the impugned order that offences under sections 13(1)(d) (ii) and (iii) of the Prevention of Corruption Act, 1988 are attracted to the facts in hand, is also not palatable, inasmuch as the aforesaid sections talk of obtaining valuable thing or pecuniary advantage by abusing one' s position as public servant, which has no relevance to the factual matrix in hand and we fail to comprehend as to how appointment by way of selection through Selection Committee approved by Board of Governors and done by Chairman would fall within the fold of such section.

15. We may hasten to add that the jurisdiction under Article 226 of the Constitution conferring extraordinary constitutional jurisdiction is neither unbridled nor uncanalised, instead is subject to self-imposed limitations. The Constitutional Courts are expected to exercise such jurisdiction with care, caution and circumspection ensuring that judicial discipline is not sacrificed in any manner whatsoever. One should not lose sight of the fact that scope and dimension of each of the five writs has been well delineated meticulously and vividly by the Hon'ble Supreme Court in catena of decisions. The writ of *quo warranto* being of technical nature cannot be expanded to cover anything under the sky, much less for reducing the writ Court to a Court of investigation with un-warraned manifold directions to Authorities forcing investigation without contextual facts having relevance to exercise of *quo warranto* jurisdiction.

16. In view of the aforesaid, the impugned order could not withstand judicial scrutiny and thus cannot be sustained. The same is accordingly set aside.

The writ appeals stand allowed. The status of appellant Sandeep Kulshrestha shall be restored to the post of Director, IITTM, Gwalior.

Appeal allowed

I.L.R. 2024 M.P. 38

Before Mr. Justice G.S. Ahluwalia

WP No. 14012/2023 (Jabalpur) decided on 1 July, 2023

SANDEEP SINGH YADAV …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

***Constitution – Article 226 – Medical Negligence – Prosecution of Doctor – Permissibility* – Held – Unless and until the committee constituted as per the directions given by Apex Court in Jacob Mathew's case gives its report about the medical negligence of the doctors, the doctors should not be prosecuted – Petitioner has not approached the committee of experts to prove medical negligence of doctors – No relief can be granted to petitioner – Petition dismissed. (Paras 4 to7)**

संविधान – अनुच्छेद 226 – चिकित्सीय उपेक्षा – चिकित्सक का अभियोजन – अनुज्ञेयता – अभिनिर्धारित – जब तक जैकब मैथ्यु के प्रकरण में सर्वोच्च न्यायालय द्वारा दिये गये निदेशों के अनुसार गठित की गई समिति चिकित्सकों की चिकित्सीय उपेक्षा के बारे में अपना प्रतिवेदन नहीं देती, चिकित्सकों को अभियोजित नहीं किया जाना चाहिए – याची चिकित्सकों की चिकित्सीय उपेक्षा को साबित करने के लिए विशेषज्ञों की समिति के समक्ष नहीं गया – याची को कोई अनुतोष प्रदान नहीं किया जा सकता – याचिका खारिज।

Cases referred:

(2005) 6 SCC 1, (2010) 3 SCC 480, (2009) 3 SCC 1, (2009) 9 SCC 221, (2019) 2 SCC 282.

Satyam Agrawal, for the petitioner.
Mohan Sausarkar, G.A. for the respondents.

O R D E R

G.S. AHLUWALIA, J.:- This petition under Article 226 of the Constitution of India has been filed seeking the following reliefs :-

> *" (i) Call for the entire material record from teh possession of the respondents, for its kind perusal;*
>
> *(ii) This Hon'ble Court may pleased to direct the respondents to make an enquiry against the culprits and register an offence against them and take all appropriate action against all the culprits in the interest of justice.*
>
> *(iii) Any other order/orders, direction/directions may also be passed.*
>
> *(iv) Cost of the petition may also kindly be awarded.*

2. The moot question for consideration is as to whether this Court can direct the police to conduct an enquiry into the alleged medical negligence against the doctor or not.

3. The question involved in the present case is no more *res integra*. The Supreme Court in the case of *Jacob Mathew Vs. State of Punjab* reported in (2005) 6 SCC 1 has held as under:-

> "48. We sum up our conclusions as under:-
>
> (1) Negligence is the breach of a duty caused by omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. The definition of negligence as given in Law of Torts, Ratanlal & Dhirajlal (edited by Justice G.P. Singh), referred to hereinabove, holds good. Negligence becomes actionable on account of injury resulting from the act or omission amounting to negligence attributable to the person sued. The essential components of negligence are three: 'duty', 'breach' and 'resulting damage'.
>
> (2) Negligence in the context of medical profession necessarily calls for a treatment with a difference. To infer rashness or negligence on the part of a professional, in particular a doctor, additional considerations apply. A case of occupational negligence is different from one of professional negligence. A simple lack of care, an error of judgment or an accident, is not proof of negligence on the part of a medical professional. So long as a doctor follows a practice acceptable to the medical profession of that day, he cannot be held liable for negligence merely because a better alternative course or method of treatment was also available or simply because a more skilled doctor would not have chosen to follow or resort to that practice or procedure which the accused followed. When it comes to the failure of taking precautions what has to be seen is whether those precautions were taken which the ordinary experience of men has found to be sufficient; a failure to use special or extraordinary precautions which might have prevented the particular happening cannot be the standard for judging the alleged negligence. So also, the standard of care, while assessing the practice as adopted, is judged in the light of knowledge available at the time of the incident, and not at the date of trial. Similarly, when the charge of negligence arises out of failure to use some particular equipment, the charge would fail if the equipment was not generally available at that particular time (that is, the time of the incident) at which it is suggested it should have been used.

(3) A professional may be held liable for negligence on one of the two findings: either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess. The standard to be applied for judging, whether the person charged has been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession. It is not possible for every professional to possess the highest level of expertise or skills in that branch which he practices. A highly skilled professional may be possessed of better qualities, but that cannot be made the basis or the yardstick for judging the performance of the professional proceeded against on indictment of negligence.

(4) The test for determining medical negligence as laid down in Bolam v. Friern Hospital Management Committee, [1957] 1 W.L.R. 582, at p.586 holds good in its applicability in India.

(5) The jurisprudential concept of negligence differs in civil and criminal law. What may be negligence in civil law may not necessarily be negligence in criminal law. For negligence to amount to an offence, the element of mens rea must be shown to exist. For an act to amount to criminal negligence, the degree of negligence should be much higher i.e. gross or of a very high degree. Negligence which is neither gross nor of a higher degree may provide a ground for action in civil law but cannot form the basis for prosecution.

(6) The word 'gross' has not been used in Section 304A of IPC, yet it is settled that in criminal law negligence or recklessness, to be so held, must be of such a high degree as to be 'gross'. The expression 'rash or negligent act' as occurring in Section 304A of the IPC has to be read as qualified by the word ‘grossly’.

(7) To prosecute a medical professional for negligence under criminal law it must be shown that the accused did something or failed to do something which in the given facts and circumstances no medical professional in his ordinary senses and prudence would have done or failed to do. The hazard taken by the accused doctor should be of such a nature that the injury which resulted was most likely imminent.

(8) Res ipsa loquitur is only a rule of evidence and operates in the domain of civil law specially in cases of torts and helps in determining the onus of proof in actions relating to negligence. It cannot be pressed in service for determining per se the liability for negligence within the domain of criminal law.

> Res ipsa loquitur has, if at all, a limited application in trial on a charge of criminal negligence.
>
> 52. Statutory Rules or Executive Instructions incorporating certain guidelines need to be framed and issued by the Government of India and/or the State Governments in consultation with the Medical Council of India. So long as it is not done, we propose to lay down certain guidelines for the future which should govern the prosecution of doctors for offences of which criminal rashness or criminal negligence is an ingredient. A private complaint may not be entertained unless the complainant has produced prima facie evidence before the Court in the form of a credible opinion given by another competent doctor to support the charge of rashness or negligence on the part of the accused doctor. The investigating officer should, before proceeding against the doctor accused of rash or negligent act or omission, obtain an independent and competent medical opinion preferably from a doctor in government service qualified in that branch of medical practice who can normally be expected to give an impartial and unbiased opinion applying Bolam [1957] 1 W.L.R. 582, test to the facts collected in the investigation. A doctor accused of rashness or negligence, may not be arrested in a routine manner (simply because a charge has been levelled against him). Unless his arrest is necessary for furthering the investigation or for collecting evidence or unless the investigation officer feels satisfied that the doctor proceeded against would not make himself available to face the prosecution unless arrested, the arrest may be withheld."

The Supreme Court in the case of *Kusum Sharma and others vs. Batra Hospital and Medical Research Center and Others* reported in (2010) 3 SCC 480 has held as under:-

> **89.** On scrutiny of the leading cases of medical negligence both in our country and other countries specially the United Kingdom, some basic principles emerge in dealing with the cases of medical negligence. While deciding whether the medical professional is guilty of medical negligence following well-known principles must be kept in view:
>
> *I.* Negligence is the breach of a duty exercised by omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.

II. Negligence is an essential ingredient of the offence. The negligence to be established by the prosecution must be culpable or gross and not the negligence merely based upon an error of judgment.

III. The medical professional is expected to bring a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence judged in the light of the particular circumstances of each case is what the law requires.

IV. A medical practitioner would be liable only where his conduct fell below that of the standards of a reasonably competent practitioner in his field.

V. In the realm of diagnosis and treatment there is scope for genuine difference of opinion and one professional doctor is clearly not negligent merely because his conclusion differs from that of other professional doctor.

VI. The medical professional is often called upon to adopt a procedure which involves higher element of risk, but which he honestly believes as providing greater chances of success for the patient rather than a procedure involving lesser risk but higher chances of failure. Just because a professional looking to the gravity of illness has taken higher element of risk to redeem the patient out of his/her suffering which did not yield the desired result may not amount to negligence.

VII. Negligence cannot be attributed to a doctor so long as he performs his duties with reasonable skill and competence. Merely because the doctor chooses one course of action in preference to the other one available, he would not be liable if the course of action chosen by him was acceptable to the medical profession.

VIII. It would not be conducive to the efficiency of the medical profession if no doctor could administer medicine without a halter round his neck.

IX. It is our bounden duty and obligation of the civil society to ensure that the medical professionals are not unnecessarily harassed or humiliated so that they can perform their professional duties without fear and apprehension.

X. The medical practitioners at times also have to be saved from such a class of complainants who use criminal process as a tool for pressurising the medical professionals/hospitals, particularly private hospitals or clinics for extracting uncalled for compensation. Such malicious proceedings deserve to be

discarded against the medical practitioners.

XI. The medical professionals are entitled to get protection so long as they perform their duties with reasonable skill and competence and in the interest of the patients. The interest and welfare of the patients have to be paramount for the medical professionals.

The Supreme Court in the case of *Martin F. D'Souza v. Mohd. Ishfaq* reported in (2009) 3 SCC 1 has held as under:-

31. As already stated above, the broad general principles of medical negligence have been laid down in the Supreme Court judgment in *Jacob Mathew v. State of Punjab* [(1957) 1 WLR 582 : (1957) 2 All ER 118] . However, these principles can be indicated briefly here:

The basic principle relating to medical negligence is known as the Bolam Rule. This was laid down in the judgment of *McNair, J. in Bolam v. Friern Hospital* [(1957) 1 WLR 582 : (1957) 2 All ER 118] as follows : (WLR p. 586)

"... where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. *The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill;* it is well-established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art."

(emphasis supplied)

Bolam test has been approved by the Supreme Court in *Jacob Mathew cas*e.

65. From the aforementioned principles and decisions relating to medical negligence, with which we agree, it is evident that doctors and nursing homes/hospitals need not be unduly worried about the performance of their functions. *The law is a watchdog, and not a bloodhound,* and as long as doctors do their duty with reasonable care they will not be held liable even if their treatment was unsuccessful. However, every doctor should, for his own interest, carefully read the Code of Medical Ethics which is part of the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 issued by the Medical Council of India under Section 20-A read with Section 3(m) of the Indian Medical Council Act, 1956.

66. Having mentioned the principles and some decisions relating to medical negligence (with which we respectfully agree), we may now consider whether the impugned judgment of the Commission is sustainable. In our opinion the judgment of the Commission cannot be sustained and deserves to be set aside.

67. The basic principle relating to the law of medical negligence is the Bolam Rule which has been quoted above. The test in fixing negligence is the standard of the ordinary skilled doctor exercising and professing to have that special skill, but a doctor need not possess the highest expert skill. Considering the facts of the case we cannot hold that the appellant was guilty of medical negligence.

104. Hence courts/Consumer Fora should keep the above factors in mind when deciding cases related to medical negligence, and not take a view which would be in fact a disservice to the public. The decision of this Court in *Indian Medical Assn. v. V.P. Shantha* [(1995) 6 SCC 651] should not be understood to mean that doctors should be harassed merely because their treatment was unsuccessful or caused some mishap which was not necessarily due to negligence. In fact in the aforesaid decision it has been observed (vide SCC para 22) : *{V.P. Shantha case* [(1995) 6 SCC 651] , SCC p. 665)

" 22. In the matter of professional liability professions differ from other occupations for the reason that professions operate in spheres where success cannot be achieved in every case and very often success or failure depends upon factors beyond the professional man's control."

105. It may be mentioned that All India Institute of Medical Sciences has been doing outstanding research in stem cell therapy for the last eight years or so for treating patients suffering from paralysis, terminal cardiac condition, parkinsonism, etc. though not yet with very notable success. This does not mean that the work of stem cell therapy should stop, otherwise science cannot progress.

106. We, therefore, direct that whenever a complaint is received against a doctor or hospital by the Consumer Fora (whether District, State or National) or by the criminal court then before issuing notice to the doctor or hospital against whom the complaint was made the Consumer Forum or the criminal court should first refer the matter to a competent doctor or committee of doctors, specialised in the field relating to which the medical negligence is attributed, and only after that

doctor or committee reports that there is a prima facie case of medical negligence should notice be then issued to the doctor/hospital concerned. This is necessary to avoid harassment to doctors who may not be ultimately found to be negligent. We further warn the police officials not to arrest or harass doctors unless the facts clearly come within the parameters laid down in *Jacob Mathew case* [(2005) 6 SCC 1 : 2005 SCC (Cri) 1369], otherwise the policemen will themselves have to face legal action.

The Supreme Court in the case of *Malay Kumar Ganguly v. Dr. Sukumar Mukherjee and others* reported in (2009) 9 SCC 221 has held as under :-

133. It is noteworthy that standard of proof as also culpability requirements under Section 304-A of the Penal Code, 1860 stand on an altogether different footing. On comparison of the provisions of the Penal Code with the thresholds under the tort law or the Consumer Protection Act, a foundational principle that the attributes of care and negligence are not similar under civil and criminal branches of medical negligence law is borne out. An act which may constitute negligence or even rashness under torts may not amount to the same under Section 304-A.

175. Criminal medical negligence is governed by Section 304-A of the Penal Code. Section 304-A of the Penal Code reads as under:

"304-A. *Causing death by negligence.*—Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."

176. The essential ingredients of Section 304-A are as under:

(i) Death of a person.

(ii) Death was caused by the accused during any rash or negligent act.

(iii) Act does not amount to culpable homicide.

And to prove negligence under criminal law, the prosecution must prove:

(i) The existence of a duty.

(ii) A breach of the duty causing death.

(iii) The breach of the duty must be characterised as gross negligence.

(See *R. v. Prentice* [1994 QB 302 : (1993) 3 WLR 927 : (1993) 4 All ER 935] .)

177. The question in the instant case would be whether the respondents are guilty of criminal negligence.

178. Criminal negligence is the failure to exercise duty with reasonable and proper care and employing precautions guarding against injury to the public generally or to any individual in particular. It is, however, well settled that so far as the negligence alleged to have been caused by medical practitioner is concerned, to constitute negligence, simple lack of care or an error of judgment is not sufficient. Negligence must be of a gross or a very high degree to amount to criminal negligence.

179. Medical science is a complex science. Before an inference of medical negligence is drawn, the court must hold not only the existence of negligence but also omission or commission on his part upon going into the depth of the working of the professional as also the nature of the job. The cause of death should be direct or proximate. A distinction must be borne in mind between civil action and the criminal action.

180. The jurisprudential concept of negligence differs in civil and criminal law. What may be negligence in civil law may not necessarily be negligence in criminal law. For negligence to amount to an offence the element of mens rea must be shown to exist. For an act to amount to criminal negligence, the degree of negligence should be (sic of a) much high degree. A negligence which is not of such a high degree may provide a ground for action in civil law but cannot form the basis for prosecution.

181. To prosecute a medical professional for negligence under criminal law it must be shown that the accused did something or failed to do something which in the given facts and circumstances no medical professional in his ordinary senses and prudence would have done or failed to do.

The Supreme Court in the case of *S.K. Jhunjhunwala v. Dhanwanti Kaur and another* reported in (2019) 2 SCC 282 (judgment dated 1/10/2018 passed in C.A. No.3971/2011) has held as under:-

21. So far as this Court is concerned, a three-Judge Bench in *Jacob Mathew v. State of Punjab [Jacob Mathew v. State of Punjab,* (2005) 6 SCC 1 : 2005 SCC (Cri) 1369] examined this issue. R.C. Lahoti, C.J. (as he then was) speaking for the Bench extensively referred to the law laid down in Bolam

case *[Bolam v. Friern Hospital Management Committee,* (1957) 1 WLR 582 : (1957) 2 All ER 118 (QBD)] and in *Eckersley case [Eckersley v. Binnie*, (1988) 18 Con LR 1 (CA)] and placing reliance on these two decisions observed in his distinctive style of writing that the classical statement of law in *Bolam case [Bolam v. Friern Hospital Management Committee,* (1957) 1 WLR 582 : (1957) 2 All ER 118 (QBD)] has been widely accepted as decisive of the standard of care required by both of professional men generally and medical practitioner in particular and it is invariably cited with approval before the courts in India and applied as a touchstone to test the pleas of medical negligence.

22. It was held in *Jacob Mathew case [Jacob Mathew v. State of Punjab,* (2005) 6 SCC 1 : 2005 SCC (Cri) 1369] that a physician would not assure the patient of full recovery in every case. A surgeon cannot and does not guarantee that the result of surgery would invariably be beneficial, much less to the extent of 100% for the person operated on. The only assurance which such a professional can give or can be understood to have given by implication is that he is possessed of the requisite skill in that branch of profession which he is practising and while undertaking the performance of the task entrusted to him he would be exercising his skill with reasonable competence. This is what the entire person approaching the professional can expect. Judged by this standard, a professional may be held liable for negligence on one of two findings : either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did not possess.

23. It was further observed in *Jacob Mathew case [Jacob Mathew v. State of Punjab*, (2005) 6 SCC 1 : 2005 SCC (Cri) 1369] that the fact that a defendant charged with negligence who acted in accord with the general and approved practice is enough to clear him of the charge. It was held that the standard of care, when assessing the practice as adopted, is judged in the light of knowledge available at the time of the incident and not at the date of trial. It was held that the standard to be applied for judging whether the person charged has been negligent or not would be that of an ordinary competent person exercising ordinary skill in that profession. It is not possible for every professional to possess the highest level of expertise or skills in that branch which he practises. His Lordship quoted with approval the subtle observations of Lord Denning made in *Hucks v. Cole [Hucks v. Cole*, (1968) 118 New LJ 469], namely,

> *"a medical practitioner was not to be held liable simply because things went wrong from mischance or misadventure or through an error of judgment in choosing one reasonable course of treatment in preference of another. A medical practitioner would be held liable only where his conduct fell below that of the standards of a reasonably competent practitioner in his field".*
>
> (emphasis supplied)
>
> **24.** In our view, the facts of the case at hand have to be examined in the light of the aforesaid principle of law with a view to find out as to whether the appellant, a doctor by profession and who treated Respondent 1 and performed surgery on her could be held negligent in performing the general surgery of her gall bladder on 8- 8-1996.

4. Thus, unless and until the committee constituted as per the directions given by the Supreme Court in the case of *Jacob Mathew* (supra) gives its report about the medical negligence of the doctors, the doctors should not be prosecuted.

5. Admittedly, the petitioner has not approached the committee of experts to prove medical negligence of the doctor. Accordingly, no relief can be granted to the petitioner in the present case.

6. Resultantly, this petition is **disposed of** with liberty to the petitioner to approach the expert committee to establish the medical negligence of the respondent doctor.

7. Needless to mention that in case if the committee comes to a conclusion that the doctor is guilty of medical negligence then the petitioner shall have liberty to take legal recourse under criminal as well as civil law.

Order accordingly

I.L.R. 2024 M.P. 48

Before Mr. Justice Sanjay Dwivedi

WP No. 4049/2023 (Jabalpur) decided on 13 July, 2023

RANGOLI RAJAK (SMT.) …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

***A. Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 122 and Panchayats (Election Petitions, Corrupt Practices and Disqualification for Membership) Rules, M.P. 1995, Rule 7 – Election Petition – Security Deposit – Mode* – Held – The election petition contained copy of**

challan showing deposit of Rs. 500 towards security deposit – It can be termed as sufficient compliance of Rule 7 of 1995 Rules – No interference warranted – Petition dismissed. (Para 9)

क. पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 122 एवं पंचायत (निर्वाचन अर्जियाँ, भ्रष्टाचार और सदस्यता के लिए निरर्हता) नियम, म.प्र. 1995, नियम 7 – निर्वाचन याचिका – प्रतिभूति निक्षेप – रीति – अभिनिर्धारित – निर्वाचन याचिका में चालान की प्रति शामिल थी जिसमें प्रतिभूति निक्षेप के रूप में 500/– रू. जमा दर्शाये गये थे – इसे 1995 नियमों के नियम 7 का पर्याप्त अनुपालन कहा जा सकता है – किसी हस्तक्षेप की आवश्यकता नहीं – याचिका खारिज।

***B. Panchayats (Election Petitions, Corrupt Practices and Disqualification for Membership) Rules, M.P. 1995, Rule 7 – Security Deposit – Mode* – Held – Apex Court concluded that Rule 7 provides deposit of security alongwith election petition which is mandatory – Mode and manner is irrelevant – Only requirement is to present the proof of payment of security deposit alongwith election petition. (Para 8)**

ख. पंचायत (निर्वाचन अर्जियाँ, भ्रष्टाचार और सदस्यता के लिए निरर्हता) नियम, म.प्र. 1995, नियम 7 – प्रतिभूति निक्षेप – रीति – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया है कि नियम 7 निर्वाचन याचिका के साथ प्रतिभूति का निक्षेप उपबंधित करता है जो आज्ञापक है – रीति एवं ढंग असंगत है – एकमात्र आवश्यकता निर्वाचन याचिका के साथ प्रतिभूति निक्षेप के भुगतान का सबूत प्रस्तुत करना है।

***C. Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 122 and Panchayats (Election Petitions, Corrupt Practices and Disqualification for Membership) Rules, M.P. 1995, Rule 7 – Election Petition – Security Deposit – Intention of Statute* – Held – Intention of statute is not such that amount should be deposited and be given to specified officer but the object was to satisfy the specified officer about deposit of security amount at the time of presentation of election petition and if specified officer is satisfied with submission of details of deposit made, then it can very well be treated to be sufficient compliance of Rule 7 of 1995 Rules. (Para 8)**

ग. पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 122 एवं पंचायत (निर्वाचन अर्जियाँ, भ्रष्टाचार और सदस्यता के लिए निरर्हता) नियम, म.प्र. 1995, नियम 7 – निर्वाचन याचिका – प्रतिभूति निक्षेप – कानून का आशय – अभिनिर्धारित – कानून का आशय ऐसा नहीं है कि राशि जमा कराई जाए एवं विनिर्दिष्ट अधिकारी को प्रदान की जाए बल्कि इसका उद्देश्य निर्वाचन याचिका की प्रस्तुति के समय विनिर्दिष्ट अधिकारी को प्रतिभूति राशि के जमा कराये जाने के बारे में संतुष्ट करना था एवं यदि विनिर्दिष्ट अधिकारी जमा की गई राशि के विवरण प्रस्तुत करने में संतुष्ट है, तो यह भली–भांति 1995 के नियमों के नियम 7 का पर्याप्त अनुपालन माना जा सकता है।

Cases referred:

WA No. 198/2018 (DB), (2018) 17 SCC 486, 1988 (1) MPWN 139.

Dayaram Vishwakarma, for the petitioner.
L.A.S. Baghel, G.A. for the State.
Vijay Shukla and *Sushil Kumar Mishra*, for the respondent No. 3.

O R D E R

SANJAY DWIVEDI, J.:- The disgruntled petitioner has knocked the doors of this Court by filing this petition under Article 226 of Constitution of India thereby challenging the order dated 13.02.2023 (Annexure-P/8) passed by the Election Tribunal in pending election petition whereby rejected the petitioner's application for dismissing the election petition on the ground that the requisite mandatory formality of depositing an amount of Rs.500/- towards security deposit at the time of presentation of election petition was not fulfilled by the election-petitioner.

2. Learned counsel for the petitioner sanguinely submits that looking to the order-sheet dated 12.08.2022 made appendage as Annexure-P/5 although depicts that an amount of Rs.500/- was deposited through challan, which is also made part of election-petition, but it purely does not fulfill the requirement envisaged in Rule 7 of M.P. Panchayat (Election Petitions, Corrupt Practices and Disqualification for Membership) Rules, 1995 (for brevity "Rules of 1995"). For ready reference, Rule 7 is reproduced hereunder:-

> 7. Deposit of security. - At the time of presentation of an election petition, the petitioner shall deposit with the specified offcer a sum of Rs. five hundred as security. Where the election of more than one candidate is called in question, a separate deposit of an equivalent amount shall be required in respect of each such returned candidates.

3. Imprecating the non-fulfillment of mandatory requirement, learned counsel for the petitioner elaborates that Rule 7 clearly provides that the amount has to be deposited before the Specified Officer and it is for the Specified Officer to suggest as to in what manner it is to be deposited. He propounds that the election-petitioner cannot choose the mode to deposit the fee. Taking strength from an order passed by the Division Bench of this Court in W.A. No. 198/2018 (*Smt. Anushka Rai Vs.The Prescribed Authority/ District Magistrate*), learned counsel for the petitioner submits that the application ought to have been allowed by the Election Tribunal and election petition should have been dismissed, conversely rejected the application observing that the submission of receipt of challan showing deposit of Rs.500/- along with election petition fulfills the requirement of Rule 7 of Rules of 1995. He iterates that the impugned order is *de*

hors the requirement of Rule 7 and further contrary to law laid down by the Division Bench in case of *Smt. Anushka Rai* (Supra). On such premise, learned counsel for the petitioner imploringly submits that the impugned order deserves to be set aside by allowing the instant petition.

4. In contrast, Shri Sushil Mishra appearing for respondent No. 3 (election-petitioners) submits that a reply has been filed enclosing the receipt which indicates that amount of Rs.500/- was deposited by the election-petitioner. He further clarifies that not only with challan but separately too the cash-amount was deposited, which is evident from a receipt made appendage as Annexure-R/2. He submits that in such circumstances, the order passed by the Election Tribunal cannot be in any manner said to be erroneous inasmuch as the Tribunal has rightly appreciated the amount deposited through challan. He submits that when there is no error apparent on the face of record, interference in a petition filed under Article 226 of the Constitution is not warranted. Ergo, the writ petition deserves outright dismissal.

5. It is seen from the record, that the State has also filed a reply wherein they have relied upon a decision of the Supreme Court *in re Lalli Patel v State of Madhya Pradesh & others* (2018) 17 SCC 486.

6. Patiently, I have heard the submissions made by counsel for the learned counsel for the rival parties and perused the record with circumspection.

7. Indeed, order-sheet dated 12.08.2022 (Annexure P/5) reveals that the Tribunal has accepted the Election Petition filed under Section 122 of M.P. Panchayat Raj Avam Gram Swaraj Adhiniyam, 1993. Further it is revealed from the said order-sheet that in support of election petition an affidavit and challan of Rs.500/- were also tagged. Albeit, as per respondent No.3 a receipt dated 12.08.2022 showing deposit of Rs. 500/- has been annexed with the reply and such receipt was also made part of election-petition which was not taken note of by the Election Tribunal.

8. At this juncture, it is apposite to go-through the law laid down by the Division Bench *in re Smt. Anushka Rai* (supra) wherein it is observed that if amount is deposited before the specified officer then only it can be considered to be a sufficient compliance of Rule 7 of Rules of 1995 and conversely if it is deposited through challan or through other mode, then such deposit cannot be considered to be a sufficient compliance for depositing the security amount as required under Rule 7 of Rules 1995. However, I respectfully disagree with such view inasmuch as the intention of the Statute is not such that the amount should be deposited and be given to specified officer but the object was to satisfy the specified officer about deposit of security amount at the time of presentation of election petition and if the specified officer is satisfied with the information

submission of details of deposit made, then it can very well be treated to be sufficient compliance of Rule 7 of Rules 1995. Essentially, my view takes strength from a view taken by the Division Bench *in re* 1988(1) MPWN 139 (*Tikaram vs. Darshan Lal*) in which security amount was deposited in the bank and details of that deposit were mentioned in the election petition, then the Court has considered that the said deposit is the sufficient compliance for depositing the security amount. Obviously, the said decision of Division Bench was not taken note of by the Division Bench in the case of *Smt. Anushka Rai* (supra). Quite apart, the Supreme Court in the case of *Lalli Patel* (supra) has considered this issue and came to hold that Rule 7 of Rules 1995 provides deposit of security along with election petition and the said provision is considered to be mandatory but simultaneously it is observed by the Supreme Court that the mode and manner of deposit is irrelevant. The only requirement as per the Supreme Court was to present the proof of payment of security deposit along with election petition. I feel it expedient to quote the observations of the Supreme Court, as under :-

> 3. The contesting respondent filed an application under Rule 11 of the Madhya Pradesh Panchayats (Election Petitions, Corrupt Practices and Disqualification for Members) Rules, 1995 stating that the election petition was not maintainable since the appellant has not made the security deposit of Rs 500 as prescribed under Rule 7 of the 1995 Rules.
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> 4. Rule 7 of the 1995 Rules reads as follows:
>
> "7. Deposit of security.—At the time of presentation of an election petition, the petitioner shall deposit with the specified officer a sum of Rs 500 as security. Where the election of more than one candidate is called in question, a separate deposit of an equivalent amount shall be required in respect of each such returned candidates."
>
> 5. It is the case of the contesting respondent and the State that the deposit has to be made with the Specified Officer and not elsewhere. The appellant made a treasury deposit and produced the receipt before the Specified Officer. The learned Single Judge and the Division Bench of the High Court in the intra-court appeal have taken a stand that the treasury deposit is not a payment in terms of Rule 7 and that the deposit is to be made by way of payment before the Specified Officer.
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> 6. We are afraid that the stand taken by the High Court cannot be appreciated. The requirement of Rule 7 is "deposit of security" and not "payment of security" in cash before the Specified Officer. What is relevant and mandatory is the deposit of

security in the name of Specified Officer, and the mode or manner of deposit is irrelevant.

7. It is not in dispute that the appellant has made a deposit of Rs 1000 as per the Challan dated 30-3-2015. As to "On What Account" the deposit was made, the Challan specifies it to have been made "towards Election Petition". The Head of Revenue (0070) is also indicated in the Treasury Challan. Significantly, even if payment is made to the Specified Officer, he has to deposit the money in the treasury through the bank. It is the proof of such treasury deposit in the bank of the officer that is presented along with the election petition. That is an absolutely permissible mode of deposit.

8. There is no dispute that the money deposited in the bank was deposited in the name of the prescribed authority. In this context, we may also refer to a decision by the coordinate Division Bench of the Madhya Pradesh High Court in Tika Ram v. Darshanlal [Tika Ram v. Darshanlal, (1988) 1 MP WN 192] , wherein the Court held thus:

> "... It is not complained that the money deposited in the bank was not deposited in the name of prescribed authority. We do not read anything in the petition to suggest that the deposit was so made that the prescribed authority had no control over the money deposited in the State Bank wherein, admittedly, the particulars of the election petition were mentioned. The Rule in our opinion does not lay down any inexorable requirement of deposit being made in cash with the prescribed authority as contended by the counsel."

(emphasis supplied)

9. In the case at hand, although respondent No.3 had shown deposit of security amount but that was not taken note of, therefore, this Court will not take cognizance of said slip although on the basis of admitted position the election petition contained copy of challan showing deposit of Rs.500/- towards security deposit and in my considered view that can be termed as suffcient compliance of Rule 7 of Rules of 1995. Ergo, the impugned order as does not suffer from any patent illegality or irregularity, need not warrant interference in the petition under Article 226 of the Constitution of India.

10. Finding the petition being bereft of any substance, is hereby dismissed.

Petition dismissed

I.L.R. 2024 M.P. 54

Before Mr. Justice Sanjay Dwivedi

WP No. 13985/2021 (Jabalpur) decided on 27 July, 2023

DEVENDRA SADHO …Petitioner

Vs.

SMT. PRAMILA KUMAR & ors. …Respondents

A. Civil Procedure Code (5 of 1908), Order 6 Rule 17 – Amendment – Stage of Proceeding **– Held – Initially suit was filed for declaration and permanent injunction, the relief of partition and possession was not claimed, thus amendment application was moved – When specific pleadings are there in plaint, such relief can be claimed vide amendment – It does not change the nature of suit and no new fact is inserted – Application was rightly allowed because it will avoid multiplicity of litigation and was necessary for proper adjudication of dispute – Petition dismissed. (Paras 5 to 7 & 13)**

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 6 नियम 17 – संशोधन – कार्यवाही का प्रक्रम – अभिनिर्धारित – आरंभ में घोषणा एवं स्थाई व्यादेश हेतु वाद प्रस्तुत किया गया था, विभाजन एवं कब्जे के अनुतोष का दावा नहीं किया गया था, अतः संशोधन आवेदन प्रस्तुत किया गया था – जब वादपत्र में विनिर्दिष्ट अभिवचन हों, संशोधन द्वारा उक्त अनुतोष का दावा किया जा सकता है – इससे वाद का स्वरूप परिवर्तित नहीं होता एवं कोई नया तथ्य प्रविष्ट नहीं किया गया – आवेदन उचित रूप से मंजूर किया गया था क्योंकि इससे मुकदमेबाजी की बहुलता से बचा जा सकेगा एवं विवाद के उचित न्यायनिर्णयन हेतु आवश्यक था – याचिका खारिज।

B. ***Civil Procedure Code (5 of 1908), Order 6 Rule 17 Proviso – Amendment – Commencement of Trial*** **– Held – The proviso appended with provision is not conclusive, mandatory and puts specific bar for allowing the application after commencement of trial – It is directory and if Court is satisfied that amendment is necessary for proper adjudication of case and also to resolve the dispute between parties, same can be allowed. (Para 8)**

ख. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 6 नियम 17 परंतुक – संशोधन – विचारण का प्रारंभ किया जाना – अभिनिर्धारित – उपबंध से संलग्न परंतुक निश्चायक, आज्ञापक नहीं है एवं विचारण के आरंभ होने के पश्चात् आवेदन को मंजूर करने हेतु विनिर्दिष्ट वर्जन लगाता है – यह निदेशात्मक है एवं यदि न्यायालय संतुष्ट है कि प्रकरण के उचित न्यायनिर्णयन के लिए तथा पक्षकारों के मध्य विवाद के समाधान के लिए भी संशोधन आवश्यक है, उक्त को मंजूर किया जा सकता है।

Cases referred:

(2008) 14 SCC 364, MP No. 4693/2022, MA No. 810/2012, AIR 2007 SC 2511, AIR 2001 SC 699, AIR 2008 SC 2887.

Pushpendra Yadav, for the petitioner.
Ajay Mishra with *Nikita Kaurav,* for the respondents.

O R D E R

SANJAY DWIVEDI, J.:- By the instant petition filed under Article 226 of the Constitution of India, the petitioner is challenging the validity of the order passed by the trial Court dated 10.03.2021 (Annexure-P/1) allowing the application filed by the plaintiff/respondent No.1 under Order 6 Rule 17 of the Code of Civil Procedure, 1908 in a pending suit.

2. Shri Pushpendra Yadav, learned counsel appearing for the petitioner has submitted that the application filed by the plaintiff/respondent No.1 under Order 6 Rule 17 of CPC seeking amendment in the plaint ought to have been rejected by the trial Court for the reason that the suit had been filed for declaration and permanent injunction not claiming any possession, but by way of amendment the plaintiff/respondent No.1 has claimed relief of possession also and the said relief was apparently time barred, therefore, the same cannot be claimed by the plaintiff/respondent No.1 by way of amendment. He has also submitted that the amendment made in the plaint changed the nature of suit. He has further submitted that the issue has already framed and affidavit under Order 18 Rule 4 of CPC has also submitted by the plaintiff/respondent No.1 and when the application for dismissal of suit was filed raising a ground that the suit for declaration is not maintainable as the consequential relief of possession has not been claimed then only the plaintiff/respondent No.1 has moved an application for amendment for filling-up the lacuna, especially under the circumstances when trial has already commenced and plaintiff/respondent No.1 in her application did not disclose due diligence for not filing the amendment in time and as such, as per the proviso appended with the respective provision i.e. Order 6 Rule 17 of CPC, the application cannot be allowed and as such, the petitioner has challenged the order passed by the trial Court dated 10.03.2021 (Annexure-P/1) allowing the application of the plaintiff/respondent No.1 for amendment.

3. Shri Yadav in support of his submission has placed reliance upon the judgment of Supreme Court reported in (2008) 14 SCC 364 (*Rajkumar Gurawara (Dead) through LRS. v. S.K. Sarwagi and Company Private Limited and Another*) and also the orders passed by this Court in case of *Smt. Preeti Agrawal Vs. Kamta Prasad Patel and others* (M.P. No.4693 of 2022) and *Vikas Pandey and Others Vs. Sureshchandra Shrivastava* (M.A.No.810 of 2012).

4. *Per contra,* Shri Ajay Mishra, learned senior counsel appearing for the plaintiff/respondent No.1 has submitted that the petition deserves to be dismissed on the ground of maintainability because it is filed under Article 226 of the Constitution whereas it should have been filed under Article 227 of the

Constitution, but intentionally it is filed under Article 226 because under Article 227 the scope of interference by the High Court is very limited and, therefore, according to him, the petition can be dismissed only on this count alone. He has submitted that the amendment sought for is on the basis of existing pleadings, but relief according to the pleadings under misconception could not be claimed, therefore, the same can be claimed and application has rightly been allowed and amendment does not change the nature of suit because it is nothing but a consequential relief claimed by the plaintiff/respondent No.1 on the basis of existing pleadings. He has also submitted that the relief of possession claimed by the plaintiff/respondent No.1 though by way of amendment, but according to him, that is not barred by time. He has further submitted that even otherwise the Court can frame the issue of limitation and that will be decided after recording of evidence, but at this stage seeking amendment only on the basis of limitation, application cannot be rejected. Shri Mishra has further submitted that the basic object of making amendment is to avoid multiplicity of litigation and the Court has to see whether the amendment which is sought for, if required for proper adjudication, the same can be allowed even after commencement of trial. He has further submitted that there is no specific bar that once trial is commenced the application for amendment cannot be filed. He has submitted that the impugned order is absolutely perfect and does not call for any interference. In support of his submission, he has relied upon the judgments of the Supreme Court reported in AIR 2007 SC 2511 (*Andhra Bank v. ABN Amro Bank N.V. and Ors*), AIR 2001 SC 699 (*Ragu Thilak D. John v. S. Rayappan and Others*) and AIR 2008 SC 2887 (*M.C. Agrawal HUF v. M/s. Sahara India and Ors*).

5. Considering the submissions made by the counsel for the parties and perusal of record, it reveals that initially the suit was filed for declaration and permanent injunction. The plaintiff and defendant are real brother and sister. The suit property is a house and agricultural land which was described in paragraph-3 of the plaint. The plaintiff in the plaint has claimed her share in the property and also claimed that no partition took place, but relief of partition and possession was not claimed by her and, therefore, she moved an application for amendment.

6. From perusal of plaint, it is clear that there were specific averments made in the plaint by the plaintiff/respondent No.1 that she is also having share over the property and also mentioned that no partition got done because the demand was made by the plaintiff to the defendant to get the settlement done and the suit property be partitioned according to the share of the parties, but the defendant denied to do so.

7. In my opinion, under such circumstances when specific pleadings are there in the plaint, the relief of partition and possession not claimed, can be claimed by the plaintiff/respondent No.1 by making amendment in the prayer

clause and allowing the amendment does not change the nature of suit because the existing facts have not been disturbed and no new fact was inserted. The relief of possession is a consequential relief and as per the existing pleadings, the same should have been claimed, but not claimed under some misconception and if suit is allowed and decreed in favour of the plaintiff and possession is not claimed, the plaintiff would be required to file another suit claiming possession and as such, the basic object of amendment to avoid multiplicity of suit would have been defeated if application would have been rejected.

8. The proviso appended with the respective provision provides that the application for amendment shall not be allowed after commencement of trial unless the Court is satisfied that instead of due diligence party could not have raised the matter before commencement of trial, but in number of cases it is observed and held even by the Supreme Court that said proviso is not conclusive, mandatory and puts specific bar for allowing the application after commencement of trial whereas the Court has observed that it is directory and if the Court is satisfied that the amendment is necessary for proper adjudication of the case and also to resolve the dispute between the parties, the same can be allowed.

9. Although, the counsel for the petitioner has placed reliance upon the order passed by this Court in case of *Smt. Preeti Agrawal* (supra), but the facts and situation of that case are altogether different than that of the present case because in the said case the examination of witness was over and application for amendment was brought because certain important questions were not asked as they were not part of the pleadings and no question even in cross-examination of the plaintiff was asked by the defendant though the said fact was very much in his knowledge. The application was accordingly rejected by the Court on the ground that the facts which were being brought by way of amendment are not necessary for proper adjudication of the case, but situation in this case is not like that and, therefore, the said case has no application. The another case in which the petitioner has placed reliance is *Vikas Pandey* (supra), in which, the Court has described the importance of term 'due diligence'. In the said case, the amendment was sought at the appellate stage. However, the facts of said case are also not applicable and similar to the present case for the reason that after explaining 'due diligence' a stand was taken that proper advise was not given by the counsel engaged and it was also stated that the said counsel was not competent. The Court finally came to the conclusion that the said stand taken by the parties showing due diligence cannot be considered to be a proper stand and it does not overcome the rider as placed by the law-makers in the proviso attached with the respective provision, but here in this case, the pleadings have not been sought to be amended and only on the basis of pleadings, the relief clause has been amended and as such, the question of due diligence does not arise. Even otherwise, the Supreme Court in number of cases has observed that if amendment is relevant and necessary for

proper adjudication and also sought to avoid multiplicity of litigation, the same can be allowed.

10. In case of *Raghu Tilak* (supra), the Supreme Court has held that the plea that relief sought through amendment is barred by limitation and if it was disputed then issue about limitation can be raised after allowing the amendment. Further, the Supreme Court has also considered the object for amendment and observed as under:-

> **4.** In view of the subsequent developments, the appellant filed an application under Order 6, Rule 17, for the amendment of the plaint for adding paras 8 (a) to 8(f) in his plaint. The trial Court rejected his prayer and the revision petition filed against that order was dismissed by the High Court vide order impugned in this appeal, mainly on the ground that the amendment, if allowed, would result in introducing a new case and cause of action. It was further held that as the appellant was seeking recovery of damages, the amendment could not be allowed as it would allegedly change the nature of the suit. It was also observed that the amendment sought was barred by limitation.
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> **5.** After referring to the judgments in Charan Das v. Amir Khan, AIR 1921 PC 50 L. J. Leach and Co. Ltd. v. Jardine Skinner and Company, 1957 SCR 438: (AIR 1957 SC 357), Smt. Ganga Bai v. Vijay Kumar, (1974) 2 SCC 393: (AIR 1974 SC 1126), M/s. Ganesh Trading Co. v. Moji Ram, (1978) 2 SCC 91: (AIR 1978 SC 84) and various other authorities, this Court in B. K. N. Pillai v. P. Pillai, (1999) 10 JT (SC) 61: (2000 AIR SCW 43: AIR 2000 SC 614) held:(Para 3):
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> "The purpose and object of Order 6, Rule 17, C. P. C. is to allow either party to alter or amend his pleadings in such manner and on such terms as may be just. The power to allow the amendment is wide and can be exercised at any stage of the proceedings in the interests of justice on the basis of guidelines laid down by various High Courts and this Court. It is true that the amendment cannot be claimed as a matter of right and under all circumstances. But it is equally true that the Courts while deciding such prayers should not adopt hypertechnical approach. Liberal approach should be the general rule particularly in cases where the other side can be compensated with the costs. Technicalities of law should not be permitted to hamper the Courts in the administration of justice between the parties. Amendments are allowed in the pleadings to avoid uncalled for multiplicity of litigation.
>
> **6.** If the aforesaid test is applied in the instant case, the amendment sought could not be declined. The dominant

> purpose of allowing the amendment is to minimise the litigation. The plea that the relief sought by way of amendment was barred by time is arguable in the circumstances of the case, as is evident from the perusal of averments made in paras 8(a) to 8(f) of the plaint which were sought to be incorporated by way of amendment. We feel that in the circumstances of the case the plea of limitation being disputed could be made a subject-matter of the issue after allowing the amendment prayed for.

11. The Supreme Court in case of *Andhra Bank* (supra) in respect of amendment has also observed as under:-

> **5.** We have heard Mr. Rohit Kapadia, learned senior counsel appearing for the appellant and Mr. S. Ganesh, learned senior counsel for the respondent. We have perused the original written statement as well as the application for amendment of the written statement. After going through the written statement and the application for amendment of the written statement, we are of the view that the amendment sought to be introduced by the appellant must be allowed. From a perusal of the impugned order of the Special. Court we find basically that two grounds have been taken by the Special Court for rejecting the prayer. for amendment of the written statement. The first ground is that considerable delay has been caused by the appellant in filing the application for amendment of the written statement. It is well settled that delay is no ground for refusal of prayer for amendment. Mr. Ganesh, appearing for ABN Amro Bank submits before us that by filing of such an application for amendment of the written statement which has been filed with long delay, the appellant sought to stall the hearing of the suit which has been fixed on 13th July, 2007. In response to this Mr. Kapadia, learned counsel for the appellant, submits that in the event the prayer for amendment is allowed by us his client undertakes to file the amended written statement by day after tomorrow, l.e., 12th July, 2007 before the Special Court. Since, we are of the view that delay is no ground for not allowing the prayer for amendment of the written statement and in view of the submissions made by Mr. Kapadia, we do not think that delay in filing the application for amendment of the written statement can stand in the way of allowing the prayer for amendment of the written statement. So far as the second ground is concerned, we are also of the view that while allowing an application for amendment of the pleadings, the Court cannot go into the question of merit of such amendment. The only question at the time of considering the amendment of the

> pleadings would be whether such amendment would be necessary for decision of the real controversy between the parties in the suit. From a perusal of the amendment application we find that the appellant in their prayer for amendment has only taken an additional defence that in view of Section 230 of the Indian Contract Act, the sult itself is not maintainable. It is well settled, as noted herein earlier, that at the time of considering the prayer for amendment of the written statement it would not be open to the Court to go into the fact whether in fact the suit in view of Section 230 of the Indian Contract Act was or is not maintainable.
>
> (emphasis supplied)

12. The Supreme Court in case of *M.C. Agrawal* (supra) has observed as under:-

> **4.** Having heard the learned counsel for the parties and after going through the plaint as well as the application for amendment of the plaint and the objections filed by the respondent, we do not find any ground to refuse the prayer of the appellant to amend the plaint in the manner they have prayed for. While rejecting the application for amendment of the plaint, it was held by the High Court that the amendment was not necessary nor germane to the controversy between the parties for the reason that claim for mesne profits/damages had to be dehors the contract between the parties. It was further observed that measure of mesne profits/damages would be the rental fetched by similar situated properties in the vicinity over the period mesne profits was being claimed. Upon, these observations, the prayer for amendment of the plaint was rejected. In our view, the amendment of the plaint sought for by the plaintiff/appellant was necessary in deciding the real controversy between the parties. It is always open by way of an amendment to amalgamate the two reliefs in one suit. That apart, at the time of allowing or refusing to amend the plaint, it is not open for the Court to decide the merits of the suit which can only be gone into and decided by it at the time of decision of the suit. The plaintiff/appellant is entitled to plead and prove the amount of rent and the equivalent amount of benefit received out of the letting out of the property to show the contractual rent of use and occupation charges. On the basis of the lease agreement, it is clear that the mesne profit/ damages cannot be awarded less than the contractual rate of use and occupation charges. Therefore, in the event of allowing the amendment of the plaint in the aforesaid circumstances, the nature of the suit shall not be changed. Therefore, in our view, there was no reason as to why the prayer for amendment of the

> plaint should not be allowed. In our view also, the prayer for amendment of the plaint was necessary in order to adjudicate the real controversies between.. "the parties, i.e. with respect to the quantum of the mesne profits/damages.
>
> (emphasis supplied)

13. Thus, taking note of the views of the Supreme Court in different cases quoted hereinabove, I am of the opinion that the order passed by the trial Court does not suffer from any patent irregularity and illegality. The amendment application has rightly been allowed because the said amendment according to me avoids multiplicity of litigation and was necessary for proper adjudication of the dispute pending between the parties.

14. I do not find any substance in the submission made by the counsel for the petitioner and the grounds raised in the petition have also no force. The order dated 10.03.2021 (Annexure-P/1), therefore, does not call for any interference. The petition being *sans* merit, is hereby **dismissed.**

Petition dismissed

I.L.R. 2024 M.P.61

Before Mr. Justice Sujoy Paul

WP No. 1300/2013 (Jabalpur) decided on 16 August, 2023

K.C. KANDWAL …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

A. Police Regulations, M.P., Regulation 64(2) – Termination/ Compulsory Retirement – Impact of Negligence **– Held – Petitioner was negligent and delayed the processing of 33 letters, however impact of such delay not spelled out in charge-sheet – Respondents have also not established any ill motive of petitioner – It was not made clear as to what was the adverse impact or resultant damage if petitioner did not process the letters with quite promptitude – Punishment is disproportionate and excessive in character – Impugned orders set aside – Matter remitted back to authority to take decision afresh on question of punishment – Petition allowed. (Paras 10, 15 & 21)**

क. पुलिस विनियमन, म.प्र., विनियम 64(2) – सेवा समाप्ति/अनिवार्य सेवानिवृत्ति – उपेक्षा का प्रभाव – अभिनिर्धारित – याची उपेक्षावान था और उसने 33 पत्रों पर कार्यवाही करने में विलंब किया, यद्यपि इस विलंब का प्रभाव आरोपपत्र में स्पष्ट नहीं किया गया – प्रत्यर्थीगण ने याची के किसी दुराशय को भी स्थापित नहीं किया – यह स्पष्ट नहीं किया गया था कि यदि याची ने उचित तत्परता से पत्रों पर कार्यवाही नहीं की तो इसका क्या प्रतिकूल प्रभाव या परिणामी क्षति थी – दण्ड की प्रकृति अननुपातिक तथा

अत्यधिक है – आक्षेपित आदेश अपास्त किए गए – मामला प्राधिकारी को शास्ति के प्रश्न पर नए सिरे से विनिश्चित किये जाने हेतु प्रतिप्रेषित किया गया – याचिका मंजूर।

B. ***Service Law – Punishment – Doctrine of Proportionality*** **– Held – Apex Court concluded that punishment imposed must be proportionate – Whether it is a departmental misconduct or an offence in a criminal case, the doctrine of proportionality is the anvil on which quantum of punishment needs to be tested. (Para 12)**

ख. सेवा विधि – शास्ति – आनुपातिकता का सिद्धांत – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया है कि अधिरोपित शास्ति आनुपातिक होनी चाहिए – चाहे विभागीय कदाचार हो या दाण्डिक प्रकरण में कोई अपराध, आनुपातिकता का सिद्धांत ही वह कसौटी है जिस पर दण्ड की मात्रा का परीक्षण किया जाना चाहिए।

C. Service Law – Punishment – Contents of Charge-Sheet **– Held – Apex Court concluded that an employee cannot be punished for an act which was not subject matter of the charge-sheet. (Para 16)**

ग. सेवा विधि – दण्ड – आरोपपत्र की अंतर्वस्तु – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया है कि किसी कर्मचारी को उस कृत्य के लिए दण्डित नहीं किया जा सकता जो आरोपपत्र की विषय वस्तु नहीं था।

Cases referred:

(1979) 2 SCC 286, (1983) 2 SCC 442, (2010) 2 SCC 497, (2004) 4 SCC 560, (2008) 5 SCC 569, (2007) 4 SCC 566, (2008) 11 SCC 319, (2006) 3 SCC 736, (2012) 4 SCC 407, (2010) 13 SCC 586, AIR 1957 SC 7, (2000) 3 SCC 450, (2005) 3 SCC 401, (2017) 2 SCC 528.

K.C. Ghildiyal with *Harish Chandra Singh,* for the petitioner.
Lalit Joglekar, G.A. for the respondents/State.

ORDER

SUJOY PAUL, J.:- This petition filed under Article 226 of the Constitution assails the punishment order of 'removal' dated 28/05/2012 (Annexure P/3) which was modified by Appellate Authority as 'compulsory retirement' by order dated 23/06/2012 (Annexure P/4). The petitioner has also assailed the order dated 17/09/2012 (Annexure P/5) whereby his Mercy Appeal was dismissed.

Facts of the case :-

2. In short, the case of the petitioner is that by issuance of charge- sheet dated 04/01/2012, it was alleged that petitioner has violated Clause 64(2) of the **Madhya Pradesh Police Regulations** and committed gross negligence in keeping 33 departmental letters pending with him. The second charge against the petitioner is that previously also two major punishments were inflicted on him and

despite giving him warning, he has committed misconduct and made himself unsuitable for employment.

Contention of petitioner: -

3. Shri Ghildiyal, learned Senior Advocate for the petitioner fairly submits that petitioner is not challenging procedural part of Departmental Enquiry. By taking this Court to enquiry report (Annexure P/2), it is submitted that although petitioner unconditionally admitted the charges, while examined by the Presenting Officer, he clarified his stand which shows that there were certain personal and family related problems because of which delay in processing the said letters had taken place.

4. The bone of contention of learned Senior Advocate is of two fold. *Firstly,* it is urged that in view of judgment of Supreme Court reported in (1979) 2 SCC 286 (*Union of India vs. J Ahmed*), the allegations mentioned against the petitioner do not specify as to what is the nature of loss which has been caused because of alleged misconduct of the petitioner in not processing the above 33 letters in time. In absence of any gross negligence which resulted into any loss or allegation of acting with malice, the punishment order is extremely disproportionate which warrants interference by this Court. *Secondly,* by placing reliance on (1983) 2 SCC 442 *Bhagat Ram vs. State of Himachal Pradesh & others;* (2010) 2 SCC 497 *G. Vallikumari vs. Andhra Education Society and others* and (2004) 4 SCC 560 *Shri Bhagwan Lal Arya vs. Commissioner of Police, Delhi and others,* it is argued that since punishment is shockingly disproportionate, it may be interfered with. The petitioner is also punished for something which was not even an allegation against him in the charge-sheet. The appellate authority, no doubt, reduced the punishment from 'removal' to 'compulsory retirement', since petitioner has not completed 20 years of service or 50 years of age, he was held to be ineligible to get pension etc. by order dated 02/01/2013 (Annexure P/6). Thus, modified punishment is also of no use to the petitioner worth the name. The reliance is placed on para 5.10 of the writ petition, wherein it is pleaded that despite reducing the punishment to 'compulsory retirement', petitioner was deprived of pension and other benefits.

5. It is further contended that in the return, there is no denial of this pleading. In view of aforesaid judgments, it is submitted that since punishment was imposed way back on 28/05/2012 and now after almost 13 years, it will not be proper to remit the matter back to the disciplinary authority for imposing substituted punishment. In the event this Court comes to the conclusion that punishment is harsh and excessive, this Court itself may modify the punishment.

Stand of Government :-

6. Sounding a *contra* note, learned counsel for the State submits that there is no procedural impropriety in the departmental enquiry. The petitioner admitted

the charges unconditionally. By taking this court to the appellate order dated 23.6.2012, learned Government Advocate pointed out that the petitioner was appointed on 10.10.1994 and during his entire service, he received 22 minor and 5 major punishments. Previously, he was given last chance to improve himself. After having failed to improve himself and in view of not processing 33 letters, the punishment originally imposed including modified punishment cannot be said to be disproportionate in nature. This Court has limited jurisdiction to interfere into the punishment. Reliance is placed on *Chairman & Managing Director, VSP & others vs. Goparaju Sri Prabhakara Hari Babu,* (2008) 5 SCC 569.

7. Learned counsel for the parties confined their arguments to the extent indicated above.

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

FINDINGS :-

Misconduct and its impact :-

9. In *J. Ahmed* (supra) the Apex Court opined as under:-

> **"11. .....It is, however, difficult to believe that lack of efficiency or attainment of highest standards in discharge of duty attached to public office would ipso facto constitute misconduct. There may be negligence in performance of duty and a lapse in performance of duty or error of judgment in evaluating the developing situation may be negligence in discharge of duty but would not constitute misconduct unless the consequences directly attributable to negligence would be such as to be irreparable or the resultant damage would be so heavy that the degree of culpability would be very high. An error can be indicative of negligence and the degree of culpability may indicate the grossness of the negligence.** Carelessness can often be productive of more harm than deliberate wickedness or malevolence. Leaving aside the classic example of the sentry who sleeps at his post and allows the enemy to slip through, there are other more familiar instances of which a railway cabinman signals in a train on the same track where there is a stationery train causing head-on collision; a nurse giving intravenous injection which ought to be given intramuscular causing instantaneous death; a pilot overlooking an instrument showing snag in engine and the aircraft crashes causing heavy loss of life. Misplaced sympathy can be a great evil (see *Navinchandra Shakerchand Shah* v. *Manager, Ahmedabad Coop. Department Stores Ltd.* [(1978) 19 Guj LR 108, 120]).

> **But in any case, failure to attain the highest standard of efficiency in performance of duty permitting an inference of negligence would not constitute misconduct nor for the purpose of Rule 3 of the Conduct Rules as would indicate lack of devotion to duty."**
>
> **(Emphasis Supplied)**

10. If the charge sheet dated 4.1.2012 is examined in the light of principles laid down in the case of *J. Ahmed* (supra), it will be clear like cloudless sky that the respondents have nowhere mentioned about the impact of alleged negligence on the part of the petitioner. I find substance in the argument of Shri Ghildiyal, learned Senior Counsel that the respondents could not establish any ill motive on the part of the petitioner. In other words, it was not made clear as to what was the adverse impact or resultant damage if the petitioner did not process the letters with quite promptitude. The *ratio decidendi* of *J. Ahmed* (supra) is followed by Supreme Court in (2007) 4 SCC 566 *Ispector Prem Chand Vs. Govt. of NCT of Delhi;* (2008) 11 SCC 319 *LIC Vs. R. Suresh*; (2006) 3 SCC 736 *Punjab State Civil Supplies Corpn. Ltd. Vs. Sikandar Singh;* (2012) 4 SCC 407 *Ravi Yashwant Bhoir vs. Collector* and (2010) 13 SCC 586 (*Mehar Singh Saini, In re*,)

<u>Proportionality of punishment</u> :-

11. In the above backdrop, it is to be seen whether the punishment imposed on the petitioner is disproportionate. The imposition of adequate punishment commensurate to misconduct is essential and became cause of concern for our society from time immemorial.

12. The Apex Court in catena of judgments has held that the punishment imposed must be proportionate. Whether it is a departmental misconduct or an offence in a criminal case, the doctrine of proportionality is the anvil on which quantum of punishment needs to be tested.

13. The doctrine of proportionality is not new to India. The first separate rock edict of King Ashoka at Dholi shows that Ashoka expressed his anxiety that no undeserved and harsh punishment should be inflicted.

14. The eloquent saying from *Dharma Kosha* is worth reading :-

> अपराधानुरूपं च दण्डं दण्डेषु दापयेत् ।
> सम्यग्दण्डप्रणयनं कुर्यात्
> द्वितीयमपराधं न कस्यचित् क्षमेत ।
>
> (Let the king inflict punishments upon the guilty (i) corresponding to the nature (gravity) of the offence, (ii) according to justice and (iii) not pardon anyone who has committed the offence for the second time).

Quantification of punishment in proportionate to the evil was a sign of mature legal system. In our old scriptures, the said wisdom is expressed in following words :-

दण्डया दोषानुरूपता प्रमणानुसारेण दण्डम् ।

[Punishment shall be in proportion to the offence cited in Kanthirao, Bharatiya Nyayapaddhati (Kannada) Indian Legal System (Mysore: Institute of Kannada Studies, University of Mysore, 1985)].

15. In the instant case, as noticed above, it is clear that the petitioner was negligent and delayed the processing of 33 letters. However, the impact of such delay is not spelled out in the charge-sheet. It is noteworthy that in the charge-sheet itself, it is mentioned that the petitioner on 19.9.2011 and 21.9.2011 entered the letters in the Inward Register but distributed the letters only on 21.9.2011 and 22.9.2011.

Thus, as per prosecution's own case, the letters were indeed distributed but distributed with little delay. In absence of showing the adverse impact thereof, in the opinion of this Court, the punishment is clearly disproportionate and excessive in character.

Not an allegation :-

16. The punishment order further shows that it is alleged that previously the petitioner did not mention Rs.658/- in the Stamp Register. A conjoint reading of punishment order and charge sheet shows that this was not a charge framed against the petitioner in the charge sheet. In view of law laid down in AIR 1957 SC 7 (*Laxmi Devi Sugar Mills Ltd. v. Nand Kishore Singh*) an employee cannot be punished for an act which was not subject matter of the charge sheet.

17. The disproportionate severity of punishment pricks the conscience of the court. Pertinently, the appellate authority himself found the punishment as inadequate and on a higher side. For this reason, he modified/reduced the punishment from 'removal' to 'compulsory retirement'. However, as canvassed by petitioner, the said modified punishment of 'compulsory retirement' did not help him in terms of grant of pension and other dues. The punishment of 'compulsory retirement' is also disproportionate to the alleged misconduct.

18. In the case of *Goparaju Shri Prabhakar Hari Babu* (supra) cited by learned Govt. Advocate, it was made clear that superior Courts in some cases may invoke doctrine of proportionality. If decision of an employer is found to be within the legal parameters, the jurisdiction would ordinarily not be invoked when misconduct stands proved. In the opinion of this Court, the basic principle running through catena of judgments that punishment order can be interfered with if it is

shockingly disproportionate, is still good law. In *U.P. SRTC v. Mahesh Kumar Mishra,* (2000) 3 SCC 450 it was ruled that :-

> **8.** This will show that not only this Court but also the High Court can interfere with the punishment inflicted upon the delinquent employee if, that penalty, shocks the conscience of the Court. The law, therefore, is not, as contended by the learned counsel for the appellants, that the High Court can, in no circumstance, interfere with the quantum of punishment imposed upon a delinquent employee after disciplinary proceedings.
>
> **9.** Another three-Judge Bench of this Court in *Colour-Chem Ltd.* v. *A.L. Alaspurkar* [(1998) 3 SCC 192 : 1998 SCC (L&S) 771] has also laid down the same proposition and held that if the punishment imposed is shockingly disproportionate to the charges held proved against the employee, it will be open to the court to interfere.
>
> **(Emphasis Supplied)**

This principle was reiterated by the Apex Court in (2005) 3 SCC 401 (*M.P. Electricity Board Vs. Jagdish Chandra Sharma*).

Substitution of penalty :

19. The ancillary question is whether this Court itself should modify the punishment or relegate the matter back to the disciplinary authority.

20. Shri Ghildiyal, learned Senior Counsel although cited the judgments of Supreme court wherein while holding that punishment as excessive, the Supreme Court itself substituted the punishment. A careful reading of the said judgments in the factual backdrop of the case shows that Supreme Court in order to do complete justice between the parties exercised its power under Article 142 of the Constitution. The question whether this court should substitute the punishment while interfering with the punishment is no more *res integra.* The Apex Court after taking stock of its previous judgments in (2017) 2 SCC 528 (*Chief Executive Officer, Krishna District Cooperative Central Bank Ltd vs K. Hanumantha Rao*) opined as under :-

> **"7.3** The impugned order is also faulted for the reason that it is not the function of the High Court to impose a particular punishment even in those cases where it was found that penalty awarded by the employer is shockingly disproportionate. In such a case, the matter could, at the best, be remanded to the disciplinary authority for imposition of lesser punishment leaving it to such authority to consider as to which lesser penalty needs to be inflicted upon the delinquent employee. No doubt,

the administrative authority has to exercise its powers reasonably. However, the doctrine that powers must be exercised reasonably has to be reconciled with the doctrine that the Court must not usurp the discretion of the public authority. The Court must strive to apply an objective standard which leaves to the deciding authority the full range of choice. In *Lucknow Kshetriya Gramin Bank* v. *Rajendra Singh [Lucknow Kshetriya Gramin Bank* v. *Rajendra Singh,* (2013) 12 SCC 372 : (2013) 3 SCC (L&S) 159], this principle is formulated in the following manner: (SCC pp. 380-81, paras 13-14)

" *13.* Indubitably, the well-ingrained principle of law is that it is the disciplinary authority, or the appellate authority in appeal, which is to decide the nature of punishment to be given to a delinquent employee keeping in view the seriousness of the misconduct committed by such an employee. Courts cannot assume and usurp the function of the disciplinary authority. In *Apparel Export Promotion Council* v. *A.K. Chopra [Apparel Export Promotion Council* v. *A.K. Chopra,* (1999) 1 SCC 759 : 1999 SCC (L&S) 405] this principle was explained in the following manner: (SCC p. 773, para 22)

'22....The High Court in our opinion fell in error in interfering *[Apparel Export Promotion Council* v. *A.K. Chopra,* 1997 SCC OnLine Del 973 : (1997) 77 FLR 918] with the punishment, which could be lawfully imposed by the departmental authorities on the respondent for his proven misconduct. ... The High Court should not have substituted its own discretion for that of the authority. What punishment was required to be imposed, in the facts and circumstances of the case, was a matter which fell exclusively within the jurisdiction of the competent authority and did not warrant any interference by the High Court. The entire approach of the High Court has been faulty. The impugned order of the High Court cannot be sustained on this ground alone.'

14. Yet again, in *State of Meghalaya* v. *Mecken Singh N. Marak [State of Meghalaya* v. *Mecken Singh N. Marak,* (2008) 7 SCC 580 : (2008) 2 SCC (L&S) 431] , this Court reiterated the law by stating: (SCC pp. 584-85, paras 14 and 17)

'14. In the matter of imposition of sentence, the scope of interference is very limited and restricted to exceptional cases. The jurisdiction of the High Court, to interfere with the quantum of punishment is limited and cannot be exercised without sufficient reasons. The High Court, although has jurisdiction in appropriate case, to consider the question in regard to the quantum of punishment, but it has a limited role to play. It is now

> well settled that the High Courts, in exercise of powers under Article 226, do not interfere with the quantum of punishment unless there exist sufficient reasons therefor. The punishment imposed by the disciplinary authority or the appellate authority unless shocking to the conscience of the court, cannot be subjected to judicial review. In the impugned order of the High Court no reasons whatsoever have been indicated as to why the punishment was considered disproportionate. Failure to give reasons amounts to denial of justice. The mere statement that it is disproportionate would not suffice.
>
> 17. Even in cases where the punishment imposed by the disciplinary authority is found to be shocking to the conscience of the court, normally the disciplinary authority or the appellate authority should be directed to reconsider the question of imposition of penalty. The High Court in this case, has not only interfered with the punishment imposed by the disciplinary authority in a routine manner but overstepped its jurisdiction by directing the appellate authority to impose any other punishment short of removal. By fettering the discretion of the appellate authority to impose appropriate punishment for serious misconducts committed by the respondent, the High Court totally misdirected itself while exercising jurisdiction under Article 226. Judged in this background, the conclusion of the Division Bench of the High Court cannot be regarded as proper at all. The High Court has interfered with the punishment imposed by the competent authority in a casual manner and, therefore, the appeal will have to be accepted."
>
> **(Emphasis Supplied)**

It was poignantly held that ordinarily this court should not substitute the punishment as imposition of penalty is basically in the province of the disciplinary authority.

21. Since the respondents used a *sledge hammer to kill a fly,* the punishment order dated 28.05.2012 and appellate order dated 23.06.2012 and order dated 17.9.2012 (Annexure P/5) are **set aside.** The matter is remitted back to the disciplinary authority to take afresh decision on the question of punishment. The disciplinary authority shall take a fresh decision within 60 days from the date of communication of this order by taking into account the findings of this order.

22. The petition is **allowed** to the extent indicated above.

Petition allowed

I.L.R. 2024 M.P. 70

Before Mr. Justice Anand Pathak

WP No. 7788/2011 (Gwalior) decided on 8 September, 2023

ROOP SINGH BHADORIYA …Petitioner

Vs.

M.P. MADHYA KSHETRA VIDYUT VITARAN CO. LTD. & ors. …Respondents

***A. Civil Services (Classification, Control and Appeal) Rules, M.P., 1966, Rule 10 & 16 – Minor Penalty – Departmental Enquiry – Requirement* – Held – It is discretion of authority in the given fact situation whether in a case of minor penalty when employee denies the charges, then departmental enquiry is required or not – Holding of departmental enquiry is not automatic and it is not required to be conducted in every case of minor penalty – However the said discretion is to be exercised reasonably and objectively and it should not be guided by arbitrariness. (Para 18)**

क. सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र., 1966, नियम 10 व 16 – लघु शास्ति – विभागीय जांच – अपेक्षा – अभिनिर्धारित – दिये गये तथ्य की परिस्थिति में यह प्राधिकारी का विवेकाधिकार है कि क्या लघु शास्ति के एक प्रकरण में जब कर्मचारी आरोपों से इंकार करता है, तब विभागीय जांच अपेक्षित है अथवा नहीं – विभागीय जांच करना स्वचालित नहीं है तथा लघु शास्ति के प्रत्येक प्रकरण में इसका संचालन करना अपेक्षित नहीं है – हालांकि कथित विवेकाधिकार का प्रयोग युक्तियुक्त और निष्पक्ष रूप से किया जाना चाहिए एवं इसे मनमानेपन द्वारा मार्गदर्शित नहीं किया जाना चाहिए।

***B. Civil Services (Classification, Control and Appeal) Rules, M.P., 1966, Rule 10 & 16 – Minor Penalty – Departmental Enquiry* – Held – When petitioner replied to the show cause notice, his contention was considered by the authority and thereafter minor penalty was inflicted – No injury caused to petitioner while non–holding the departmental inquiry – Petitioner was rightly punished for his misconduct – Petition dismissed. (Paras 14, 19 & 21)**

ख. सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र., 1966, नियम 10 व 16 – लघु शास्ति – विभागीय जांच – अभिनिर्धारित – जब याची ने कारण बताओ नोटिस का जवाब दिया, तो उसके तर्क पर प्राधिकारी द्वारा विचार किया गया था एवं तत्पश्चात् लघु शास्ति अधिरोपित की गई थी – विभागीय जांच न करने के दौरान याची को कोई क्षति कारित नहीं हुई – याची को उसके अवचार के लिए उचित रूप से दण्डित किया गया – याचिका खारिज।

Cases referred:

(2001) 9 SCC 180, WP No. 3021/2014 order passed on 09.01.2015 (DB), MP No. 1798/2017 order passed on 02.01.2018, WA No. 369/2017 order passed

on 28.11.2017, WA No. 1673/2018 order passed on 30.01.2019, WA No. 761/2020 order passed on 08.09.2020 (DB), 2004 (2) MPJR 252, (2001) 1 SCC 165.

D.P. Singh, for the petitioner.
Vivek Jain, for the respondents.

ORDER

ANAND PATHAK, J.:- With consent heard finally.

2. The present petition is preferred under Article 226/227 of the Constitution taking exception to the order dated 21.04.2011 (Annexure P-1) passed by General Manager (O&M) Gwalior Circle whereby petitioner who was working as Junior Engineer was inflicted with punishment of stoppage of one annual increment without cumulative effect.

3. Precisely stated facts of the case are that petitioner at the relevant point of time was posted at rural area and divisional office Datia. Petitioner made less recovery of electricity dues from the consumers in comparison to previous year i.e. 2009-2010 and did not achieve the target of recovery in 2010-2011 resulting into loss to the company. Therefore, a show cause notice was served on 10.06.2010 which was received by the petitioner on 23.06.2010. Same was replied on 02.07.2010 wherein petitioner categorically mentioned the fact that he has not right to write the Confidential Report (C.R.) of employees working under him therefore, they did not make any cooperation in the field regarding recovery as well as with respect to installation of transformer therefore, less recovery was made. He pleaded innocence.

4. After receiving the reply respondent did not conduct the departmental enquiry and passed the impugned order dated 21.04.2011 whereby petitioner has been inflicted with minor penalty of stoppage of increment for one year without cumulative effect. Therefore, petitioner is before this Court.

5. It is the submission of counsel for the petitioner that when show cause notice was issued by the respondents purportedly under Rule 16 of The M.P. Civil Services (Classification, Control and Appeal) Rules, 1966 and respondent denied the charges by filing reply then it was imperative for the respondents to hold departmental inquiry. He relied upon the Judgment of Apex Court in the case of *O.K.Bharadwaj Vs. Union of India and Ors.* (2001) 9 SCC 180 in support of submission. According to him, once the charges are factual and if they are denied by the delinquent employee, full-fledged departmental inquiry is required to be conducted.

6. It is further submitted that in series of judgments including the judgment of Division Bench of this Court in the case of *Bholeram Soni Vs. Union of India*

and Ors. vide order dated 09.01.2015 passed in W.P.No.3021/2014 while relying upon the judgment of *O.K.Bharadwaj* (supra), Division Bench allowed the petition and quashed the order of punishment. He further relied upon the order dated 02.01.2018 passed in M.P.No.1798/2017, (*Union of India and Ors. Vs. Ajay Agrawal*), order dated 28.11.2017 passed in W.A.No.369/2017 (*Dr. Arun Dubey Vs. State of M.P. and Ors.*) and order dated 30.01.2019 passed in W.A.No.1673/2018 (*Roop Singh Bhadoriya Vs. Madhya Pradesh Madhya Kshetra Vidyut Vitran Company*) and submit that petitioner was earlier inflicted with same punishment but on the ground of ratio of *O.K.Bharadwaj* (supra) impugned order of penalty was set-aside.

7. Learned counsel for the respondents opposed the prayer and placed the order dated 08.09.2020 passed by Division Bench of this Court in bunch of writ petitions W.A.761/2020 (*Ratan Singh Silawat Vs. The State of M.P. & Ors*. is the lead case) and submit that the case of *O.K.Bharadwaj* (supra) deals in respect of Major Penalty and since the present case is of Minor Penalty therefore, ratio of *O.K.Bharadwaj* (supra) would not apply here. Looking to the nature of allegations in show cause notice and the reply where petitioner raised the stand that he is not competent to write the ACR of subordinate employees, but said aspect has been specifically dealt with and denied in the impugned order because previous year he wrote the ACR of those employees. Thus, the defence as raised by the petitioner was suitably and reasonably met by the respondents. Therefore, no case is made out for interference. He also relied upon the judgment of Division Bench of this Court in the case of *Union of India and Anr. Vs. C.P. Singh,* 2004 (2) MPJR 252 to submit that it is the discretion of authority to hold inquiry or not in a given fact situation like the present case. He prayed for dismissal of petition.

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

9. This is the case where petitioner is taking exception to the impugned order of infliction of Minor Penalty under Rule 10 of Rule, 1966.

10. The question arises in the present set of facts is whether after show cause notice being received by the petitioner and he denied the charges, then whether in the given set of facts, departmental inquiry was required to be conducted or not.

11. Here, petitioner was show caused vide notice dated 10.06.2010 (Annexure R/1) for alleged misconduct committed by him. For the month of May, 2010, his distribution center was given target of Rs.30 lakhs for recovery of revenue but he recovered only 4.09 lakhs which was only 13.43% of the total target, therefore, it was alleged that he did not take any sincere efforts for recovery and therefore, found guilty of negligence/casualness.

12. After show cause notice being received, petitioner raised the defence vide reply dated 05.07.2010 (Annexure P/3) that he has no authority over the field employees like helper, lineman etc. because he does not have the right to write their ACRs. Since he does not write his ACR, therefore, they do not follow the instructions of petitioner, therefore, recovery was much short of target. That was the specific defence undertaken by the petitioner.

13. Incidentally, said contention was dealt with by the respondent by mentioning the fact that last year, in 2009-10 petitioner wrote the ACRs of those helpers, linemen and therefore, he had sufficient supervision and authority over the employees working under him. Therefore, he was required to garner/motivate them to perform better but petitioner faltered. Therefore, show cause notice was given.

14. When defence raised by the petitioner was sufficiently met by the disciplinary authority and addressed the issue raised by him in a logical and reasonable manner, then scope of interference constricts.

15. Petitioner has raised the import of Rule 16 of the Rule 1966 which is reproduced for convenience and ready reference:-

> **16. Procedure for imposing minor penalties. -**
>
> (1) Subject to the provisions of sub-rule (3) of Rule 15, no order imposing on a Government servant any of the penalties specified in clauses (i) to (iv) of Rule 10 and Rule 11 shall be made except after-
>
> (a) informing the Government servant in writing of the proposal to take action against him and of the imputations of misconduct or misbehavior on which it is proposed to be taken, and giving him a reasonable opportunity of making such representation as he may wish to make against the proposal;
>
> (b) holding an inquiry in the manner laid down in sub-rules (3) to (23) of Rule 14, in every case in which the disciplinary authority is of the opinion that such inquiry is necessary;
>
> (c) taking the representation, if any, submitted by the Government servant under clause (a) and the record of inquiry, if any, held under clause (b) into consideration;
>
> (d) recording a finding on each imputation of misconduct or misbehavior; and
>
> (e) consulting the commission where such consultation is necessary.

(1-a) Notwithstanding anything contained in clause (b) of sub-rule (1), if in a case it is proposed after considering the representation, if any, made by the Government Servant under clause (a) of that sub-rule to withhold increments of pay of Stagnation Allowance and such withholding or increments of pay or Stagnation Allowance is likely to effect adversely the amount of pension payable to the Government Servant or to withhold increments of pay or Stagnation allowance for a period exceeding three years of to withhold increments of pay or Stagnation allowance with cumulative effect for any period, an inquiry shall be held in the manner laid down in sub-rules (3) to (23) of Rule 14, before making any order imposing on the Government servant any such penalty.]

(2) The record of the proceedings in such cases shall include-

(i) a copy of the intimation to the Government servant of the proposal to take action against him;

(ii) a copy of the statement of imputation of misconduct or misbehavior delivered to him;

(iii) his representation, if any;

(iv) the evidence produced during the inquiry;

(v) the advice of the commission, if /any;

(vi) the findings on each imputation of misconduct or misbehavior; and

(vii) the orders on the case together with the reasons therefor.

Perusal of rule 16 indicates that disciplinary authority has sufficient discretion as provided in Rule 16 (1) (b) of Rules, 1966 where the subjective satisfaction of disciplinary authority is paramount. That aspect has been clarified by the Apex Court in a subsequent to judgment in the case of *O.K. Bharadwaj* (supra), in the case of *Food Corporation of India, Hyderabad and Ors. Vs. A. Prahalada Rao,* (2001) 1 SCC 165. Incidentally, the said judgment pronounced in Food Corporation of India (Supra) is dated 01.11.2000 whereas *O.K. Bhardwaj* (Supra) was delivered on 04.10.1996 much prior to the judgment of Food Corporation of India. In the judgment of FCI (supra), it has been held as under:-

"5. In our view, on the basis of the allegation that Food Corporation of India is misusing its power of imposing minor penalties, the Regulation cannot be interpreted contrary to its language. Regulation 60(1)(b) mandates the disciplinary authority to form its opinion whether it is necessary to hold enquiry in a particular case or not. **But that would not mean**

> **that in all cases where employee disputes his liability, a full-fledged enquiry should be held. Otherwise, the entire purpose of incorporating summary procedure for imposing minor penalties would be frustrated.** If the discretion given under Regulation 60(1)(b) is misused or is exercised in arbitrary manner, it is open to the employee to challenge the same before the appropriate forum. **It is for the disciplinary authority to decide whether regular departmental enquiry as contemplated under Regulation 58 for imposing major penalty should be followed or not. This discretion cannot be curtailed by interpretation which is contrary to the language used.** Further, Regulation 60(2) itself provides that in a case if it is proposed to withhold increments of pay and such withholding of increments is likely to affect adversely the amount of retirement benefits payable to employee and in such other cases as mentioned therein, the disciplinary authority shall hold enquiry in the manner laid down in Regulation 58 before making any order imposing any such penalty. **Hence, it is apparent that High Court erroneously interpreted the regulation by holding that once the employee denies the charge, it is incumbent upon the authority to conduct enquiry contemplated for imposing major penalty.** It also erred in holding that where employee denies that loss is caused to the Corporation either by his negligence or breach of order, such enquiry should be held. It is settled law that Courts power of judicial review in such cases is limited and Court can interfere where the authority held the enquiry proceedings in a manner inconsistent with the rules of natural justice or in violation of statutory rules prescribing the mode of enquiry and imposing punishment or where the conclusion or finding reached by the disciplinary authority is based on no evidence or is such that no reasonable person would have ever reached. **As per the Regulation, holding of regular departmental enquiry is a discretionary power of the disciplinary authority which is to be exercised by considering the facts of each case and if it is misused or used arbitrarily, it would be subject to judicial review."**

16. Therefore, it appears that Apex Court has stressed over the discretion of disciplinary authority as contemplated in Rule 16 of the Rules, 1966 and that discretion cannot be curtailed in any manner. The judgment of Division Bench of this Court in the case of *C.P. Singh* (Supra) reconciled the position before the decision in FCI (supra) and decision thereafter.

> **(vi) Position before decision in FCI:** Where the charges are factual and the charges are denied by the employee or when the employee requests for an inquiry or an opportunity to put forth

the case, the discretion of the Disciplinary Authority is virtually taken away and it is imperative to hold a regular inquiry.

Position after decision in FCI: Where the Rules give a discretion to the Disciplinary Authority to either hold a summary enquiry or regular enquiry, it is not possible to say that the Disciplinary Authority should direct only a regular enquiry, when an employee denies the charge or requests for an inquiry. Even in such cases, the Disciplinary Authority has the discretion to decide, for reasons to be recorded, whether a regular enquiry should be held or not. If he decides not to hold a regular enquiry and proceeds to decide the matter summarly the employee can always challenge the minor punishment imposed on the ground that the decision not to hold a inquiry was an arbitrary decision. In that event, the Court or Tribunal will in exerciser of power of judicial review, examine whether the decision of the Disciplinary Authority not to hold an enquiry was arbitrary. If the Court/Tribunal holds that the decision was arbitrary then such decision not to hold an enquiry and the consequential imposition of punishment will be quashed. If the Court/Tribunal holds that the decision was not arbitrary, then the imposition of minor penalty will stand.

It is also possible to read the decisions in Bharadwaj and FCI harmoniously, if Bharadwaj is read as stating a general principle, without reference to any specific rules, that it is incumbent upon the Disciplinary Authority to hold a regular enquiry, even for imposing a minor penalty, if the charge is factual and the charge is denied by the employee. On the other hand, the decision in FCI holding that the Disciplinary Authority has the discretion to dispense with a regular enquiry, even where the charge is factual and the employee denies the charge, is with reference to the specific provisions of a Rule vesting such discretion.

There is yet another aspect which requires to be noticed. Where the penalty to be imposed though termed as minor, is likely to materially affect the employee either financially or career-wise then it is not possible to dispense with a regular enquiry. In fact, this is evident from sub-rule (2) of Rule-11 which says that where the penalty to be imposed, though termed as minor penalty, involves withholding of increments which is likely to affect adversely the amount of pension or special contribution to provident fund, or withholding of increments of pay for a period exceeding three years or withholding of increments of pay for a period exceeding three years or withholding of increments of pay with cumulative effect, then

> an enquiry as contemplated under Rule-9 (6) to (25) is a must. Thus, categorization of penalties into 'major' and 'minor' penalties, by itself may not really be determinative of the question whether a regular enquiry is required or not.

17. Division Bench of this Court in the case of *Ratan Singh Silawat* (supra) has held in similar lines as held in the case of *C.P. Singh* (supra). Learned Division Bench after considering all judgments in instant realm concluded that it is the discretion of departmental authority in such cases where Minor Punishment is intended to be inflicted whether to hold departmental inquiry or not. It differs from case to case, therefore, it is not automatic. Otherwise provision of summary procedure would lose its meaning.

18. Therefore, it is a discretion of the authority in the given fact situation whether in a case of minor penalty when employee denies the charges, then departmental inquiry is required to be held or not. Holding of departmental inquiry is not automatic and not in every case of minor penalty departmental inquiry is required to be conducted as per the Rule 16 of the Rules, 1966, as per the mandate of Apex Court in the case of *FCI* (supra) and later on interpreted by the Division Bench of this Court in the matter of *C.P. Singh* (supra). However, said discretion is to be exercised reasonably and objectively and it should not be guided by the arbitrariness.

19. In the present case, petitioner was inflicted with minor punishment of stoppage of annual increment for one year without cumulative effect, therefore, petitioner could have received the benefit of grant of increment after period of one year is over and therefore, no adversity would have caused in pensionary matter also. Besides that, when petitioner replied the show cause notice, then his contention was considered by the authority and thereafter, passed the impugned order.

20. Petitioner raised the point of lack of teeth for supervision but it was specifically mentioned that in previous year 2009-10, petitioner wrote the ACR of his subordinates therefore, all this supporting staff is assumed to be under the supervision of petitioner. Therefore, this contention, even if departmental inquiry would have been held then would have surfaced in same fashion and it is not the case where departmental inquiry would have given some new dimensions to the case of petitioner.

21. Resultantly, in the considered opinion of this Court, no injury has been caused to the petitioner while not holding the departmental inquiry. Petitioner was rightly punished for the misconduct committed by him.

22. Petition being bereft of *merit* is hereby dismissed.

Petition dismissed

I.L.R. 2024 M.P. 78

Before Mr. Justice Vivek Agarwal

WP No. 4903/2021 (Jabalpur) decided on 5 October, 2023

A AND A REAL ESTATE PVT. LTD. …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

***A. Municipal Corporation Act, M.P. (23 of 1956), Section 308A – Violation of Sanctioned Map – Compounding* – Held – No material on record to permit petitioner to convert one of the floors meant for parking for any other use – Compounding is not to be done when violations are deliberate, designed, reckless or motivated – Such violation of sanctioned map is neither compoundable nor there is any provision for such deliberate act – Such deliberate illegalities cannot be regularized by Court shaking the faith of citizens in the machinery of town planning and administration of municipal laws – Petition dismissed. (Paras 13, 14, 16 & 17)**

क. नगरपालिक निगम अधिनियम, म.प्र. (1956 का 23), धारा 308A – मंजूर मानचित्र का उल्लंघन – शमन – अभिनिर्धारित – याची को पार्किंग के लिए बनाई गई मंजिलों में से एक को किसी अन्य उपयोग के लिए परिवर्तित करने की अनुज्ञा देने की अभिलेख पर कोई सामग्री नहीं है – जब उल्लंघन जानबूझकर, परिकल्पित, बिना सोचे–विचारे अथवा प्रेरित हो, तो शमन नहीं किया जाना चाहिए – स्वीकृत मानचित्र का ऐसा उल्लंघन न तो शमनीय है और न ही ऐसे जानबूझकर किये गये कृत्य के लिए कोई उपबंध है – ऐसी जानबूझकर की गई अवैधताओं को न्यायालय द्वारा नियमित नहीं किया जा सकता है, जिससे नगर योजना के तंत्र एवं नगरपालिका विधियों के प्रशासन में नागरिकों का विश्वास डगमगा जाए – याचिका खारिज।

***B. Bhumi Vikas Rules, M.P., 2012, Rule 23 & 25 – Applicability* – Held – Rule 23 deals with duration of sanction under which sanction once accorded shall remain valid upto 3 years – It has nothing to do with building permission. (Para 15)**

ख. भूमि विकास नियम, म.प्र., 2012, नियम 23 व 25 – प्रयोज्यता – अभिनिर्धारित – नियम 23 मंजूरी की अवधि से संबंधित है जिसके अंतर्गत एक बार दी गई मंजूरी 3 वर्ष तक विधिमान्य रहेगी – इसका निर्माण अनुज्ञा से कोई लेना देना नहीं है।

Cases referred:

(2015) 8 SCC 519, (2006) 7 SCC 597, (2013) 5 SCC 336, (2013) 5 SCC 357.

Sanjay Agrawal with *Neerja Agrawal,* for the petitioner.
Subodh Kathar, G.A. for the respondent No. 1.

Sanjay K. Agrawal and *Sarthak Nema,* for the respondent Nos. 2 to 4.

O R D E R

VIVEK AGARWAL, J.:- This writ petition is filed by a Builder/petitioner seeking directions that impugned notices dated 16.02.2021 be quashed and High Court be pleased to set-aside the rejection of the application of the petitioner for renewal of the building permission dated 22.02.2021 and direct the respondents to renew/restore the building permission of the petitioner in accordance of Rule 23 and/or Rule 25 of the Bhumi Vikas Rules, 2012. It is also prayed that respondent No.3 be directed to take prompt decision in regard to petitioner's request for renewal of building permission contained in Annexure P-5 and respondent authorities be directed to decide petitioner's representations dated 24.12.2019, 12.08.2020, 17.09.2020 and 10.11.2020.

2. Shri Sanjay Agrawal, learned Senior Advocate for the petitioner submits that the show-cause notice dated 16.02.2021 has failed to take into consideration the fact that though there may be minor changes in the sanction plan but they are in conformity with the provisions contained in Section 308A of the Madhya Pradesh Municipal Corporation Act, 1956. It is submitted that permission was given to construct 07th Floor where a Pent House has been erected as is evident from Annexure P-17, which is a note-sheet written by the officials of the Municipal Corporation, Bhopal.

3. Shri Sanjay Agrawal placing reliance on the pleadings in the rejoinder in para 14 & 15 submits that construction is within the limits of the FAR and though it is admitted that one Floor meant for parking is not constructed yet the space for parking is sufficient in as much as against parking requirement for 69 cars, petitioner has created parking space for 106 cars i.e. 53 cars on each floor. It is also submitted that on 03.02.2022 by paying the compounding fee of Rs.2,00,000/- revised map has been given to the Municpal Corporation and they are duty bound to examine the same and take action on it.

4. Shri Sanjay K. Agrawal with Shri Sarthak Nema in their turn submits that the issue is that what was the sanction and whether deviation of the sanction plan is permissible or not. It is submitted that in place of sanctioned three floors for parking, petitioner has admitted constructed only two floors. In place of 06 floors sanctioned for construction of residential accommodation petitioner has erected 07th floor which is in violation of the building permission contained in Annexure P-21.

5. Reliance is placed on the Judgment of Hon'ble Supreme Court in the case of *Dharampal Satyapal Ltd. Vs. Dy. Commissioner of Central Excise, Guahati & Ors.* (2015)8 SCC 519 and placing reliance on para 38 & 39 it is submitted that once the proposed revised map is beyond the scope of Section

308A and no compounding is permissible, then insistence of Shri Sanjay Agrawal, learned Senior Advocate to get his representation for compounding decided is a useless formality. It is submitted that in para 39 of the aforesaid judgment Hon'ble the Supreme Court has held as under:

> *" We have highlighted the jurisprudential basis of adhering to the principles of natural justice which are grounded on the doctrine of procedural fairness, accuracy of outcome leading to general social goals, etc. Nevertheless, there may be situations wherein for some reason - perhaps because the evidence against the individual is thought to be utterly compelling - it is felt that a fair hearing " would make no difference" - meaning that a hearing would not change the ultimate conclusion reached by the decisionmaker - then no legal duty to supply a hearing arises. Such an approach was endorsed by* ***Lord Wilberforce in Malloch v. Aberdeen Corporation [(1971)2 All E.R. 1278 (HL)],*** *"*
>
> *breach of procedure...cannot give (rise to) a remedy in the courts, unless behind it there is something of substance which has been lost by the failure. The court does not act in vain".*

6. Thus, it is submitted that petitioner's insistence to decide compounding application will be an exercise in futility and will not yield anything especially when specific stand is taken in the return that compounding of the acts of the petitioner is not permissible.

7. Reliance is placed on the judgment of Supreme Court in the case of *Royal Paradise Hotel (P) Ltd. Vs. State of Haryana & Ors.* (2006) 7 SCC 597 wherein relying on para 8 & 9, it is submitted that "No authority administering municipal laws and other laws like the Act involved here, can encourage such violations. Even otherwise, compounding is not to be done when the violations are deliberate, designed, reckless or motivated. Marginal or insignificant accidental violations unconsciously made after trying to comply with all the requirements of the law can alone qualify for regularization which is not the rule, but a rare exception. The authorities and the High Court were hence right in refusing the request of the appellant."

8. Similarly reliance is placed on the judgment of Supreme Court in the case of *Deepak Kumar Mukherjee Vs. Kolkata Municipal Corporation* (2013)5 SCC 336 wherein placing reliance on para 8, 9, 20, 21, 22, 26 & 27 it is pointed out that once an illegality has been committed then it is necessary that such illegal

structure being in violation of the Municipal Laws will vitiate of concept of planned development and such illegal and unauthorized construction needs to be removed as the concept of fundamental or constitutional right is not restricted to *Jhuggi Jhopris* belonging to the poor and disadvantaged section of the society but is also applicable to the economically effluent people.

9. In the case of *Deepak Kumar Mukherjee* (Supra) Hon'ble the Supreme Court has noted that "that a person, who erects any structure or executes any work is not entitled to deviate from the sanctioned plan. Rule 25(2) which contains a non-obstante clause and provides for sanction of revised plan to be submitted by the person engaged in erection of building or execution of work lays down that if during erection or execution of work, any internal alterations or external additions which do not violate the provisions of the Act or the Rules is made, the Municipal Commissioner can, on an application made in that behalf sanction the revise plan."

10. In the present case, facts are different. It is now admitted though indirectly and tacitly by the counsel for the petitioner that in place of three parking floors only two parking floors have been constructed. Reading from the communication contained in Annexure P-17, though it is sought to be emphasized that subsequently Pent House was sanctioned on the 07th Floor but the language of Annexure P-17, indicates otherwise.

11. For the convenience of all, relevant portion of Annexure P-17, is quoted hereunder:

''कृपया पत्र के अवलोकन करने का कष्ट करें। जो मेसर्स ए एन्ड ए रियल स्टेट प्रा.ली. मैनेजिंग प्रकरण क्रं. 246 दिनांक 17.05.2016 में 1/3 पेंट हाउस दिए जाने सम्बन्धी आवेदन प्रस्तुत किया गया है। अग्रिम कार्यवाही एवं आदेशार्थ प्रस्तुत।

ए/एम

सही/–

आवेदक द्वारा प्रस्तुत आवेदन का अवलोकन हो जिसमें आवेदक द्वारा निवेदन किया है की मानचित्रों में उसके द्वारा पेंट हाउस 1/3 प्रस्तावित किया गया था जो मानचित्रों के elevation में दिख रहा है किन्तु उसका क्षेत्रफल का उल्लेख नहीं है। आदेश हो तो मानचित्रों में 1/3 पेंट हाउस सिक्स्थ फ्लोर के बिल्ट उप एरिया का मार्क किया जाने के आदेश पारित करने का कष्ट करें।

12. Thus, a plane reading of Annexure P-17 leaves no iota of doubt that Pent House was sanctioned on the 06th floor permitting 1/3rd of the floor of the 6th floor to be marked as an area under Pent House. There is no separate sanction of Pent House on the 07th Floor.

13. The aforesaid fact gets corroborated from the sanctioned map Annexure P-21, which makes a clear mention of the fact that Block-1(A) consists of residential area of 610.21 Sq. Meters, Block - 1(B) & (C) consists of 4453.82 Sq.

Meters, Block - 1(E) & Block - 2(E) each consists of 3041.76 Sq. Meters. Thus, totaling 11147.55 Sq. Meters. The net FAR covered is mentioned as 1.2453 against a sanctioned FAR of 1.25, thus, there is no evidence that Pent House was sanctioned on the 07th Floor. There is no material on record to permit the petitioner to convert one of the Floors, meant for parking for any other use.

14. Thus, when this aspect is examined in the light of the judgment of Supreme Court in the case of *Deepak Kumar Mukherjee* (supra) and also in the light of another judgment of Supreme Court in the case of *Isha Ekta Apartment Co-operative Housing Society Ltd. & Ors. Vs. Municipal Corporation of Mumbai & Ors.* (2013)5SCC 357, there is no iota of doubt that violation made by the petitioner/builder from the sanctioned map is neither compoundable nor there is any provisions for compounding such deliberate violation as has been noted by the Supreme Court in the case of *Royal Paradise Hotels (P) Ltd.* (supra) wherein it is noted that compounding is not to be done when the violations are deliberate, designed, reckless or motivated. When this ratio of the judgments is taken into consideration, then I do not find any illegality in the impugned show-cause notice asking the petitioner to remove his illegal construction.

15. Petitioner's reliance on Rule 23 & 25 of the *Bhumi Vikas* Rules, 2012 also appears to be misplaced. Rule 23 deals with duration of sanction, it provides that in case of development permission under Section 30 of *M.P. Nagar Tatha Gram Nivesh Adhiniyam*, 1973 the sanction once accorded shall remain valid up to three years. this permission is in regard to sanctioned lay out. It has nothing to do with the building permission. Similarly Rule 25 deals with revocation of permission. It only provides that before revocation of permission, person who has been given permission should be given an opportunity of being heard.

16. In the present case, petitioner was throughout aware of this fact that he is deliberately violating the sanctioned plan and therefore, in the light of the decision of Supreme Court in the case of *Royal Paradise Hotels (P) Ltd.* (supra) even that opportunity was not required for the deliberate acts of violation on the act of the petitioner. Therefore, when examined, then the petition is baseless. Such deliberate illegalities cannot be regularized by the Court without shaking the faith of citizens in the machinery of town planning and administration of Municipal Laws.

17. Therefore, the petition being devoid of merits deserve to be dismissed and is accordingly dismissed.

Petition dismissed

I.L.R. 2024 M.P. 83
Before Mr. Justice Vivek Agarwal
WP No. 21818/2023 (Jabalpur) decided on 17 October, 2023

MADDURI NAGENDRA …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

***Excise Act, M.P. (2 of 1915), Section 34 & 47-A(2) – Confiscation – Powers of Collector* – Held – Pendency of trial will not preclude the Collector from passing an order of confiscation – Petition dismissed. (Para 8)**

आबकारी अधिनियम, म.प्र. (1915 का 2), धारा 34 व 47– A(2) – अधिहरण – कलेक्टर की शक्तियां – अभिनिर्धारित – विचारण का लंबित रहना कलेक्टर को अधिहरण का आदेश पारित करने से प्रवारित नहीं करेगा – याचिका खारिज।

Cases referred:

WP No. 19528/2022 decided on 11.05.2023, 2017 (2) MPLJ 325, 2013 (2) MPLJ 218.

Anubhav Singhal, for the petitioner.
Rohit Jain, G.A. for the State.

(Supplied: Paragaph numbers)

O R D E R

VIVEK AGARWAL, J.:- This petition is filed being aggrieved of the order dated 06.06.2023 passed by the Court of Additional Collector, District Khandwa in Excise Case No.132/B-121/2020-2021 on the ground that Collector/Additional Collector could not have ordered for confiscation of the vehicle used in commission of an excise offence without there being pendency of the trial before the Criminal Court.

2. In support reliance is placed by Shri Anubhav Singhal, learned counsel for the petitioner on a judgement of a Coordinate Bench in the High Court of Madhya Pradesh at Indore in W.P. No.19528/2022 decided on 11.05.2023 wherein in para 9 Hon'ble Coordinate Bench has mentioned as under :-

> "9. Since the word "offence has been committed" is used, therefore, the Collector cannot pass an order for confiscation during pendency of the trial. The vehicle can be confiscated either by a Magistrate while convicting the accused or after conviction under Section 47-A of the Act."

3. Shri Rohit Jain, learned Government Advocate placing reliance on the decision of *Rauf Khan Vs. State of M.P.* [2017 (2) MPLJ 325] submits that though the judgment in *Rauf Khan* (supra) is in relation to Forest Act but in para 8 of the judgment it is held that confiscation proceedings being under Section 52 of Forest Act, 1927, read with Section 15 of 1969 Act, being independent than the criminal proceedings, the decision in S.P. Sales Agencies (supra) has not been taken note of in *Premdas* (supra) 2013(2) MPLJ 218, therefore, is of no assistance to the petitioner.

4. It is also submitted by Shri Rohit Jain that since there is an alternative statutory remedy of appeal provided under Section 47-B against the order of confiscation, this petition is not maintainable.

5. After hearing learned counsel for the parties and going through the record, order of the Coordinate Bench dated 11.05.2023 makes a mention of the fact that since sub-section (2) of Section 47-A, Collector is empowered to record satisfaction that the offence is covered by clause (a) or clause (b) of sub-section (2) and the word used is "offence has been committed", therefore, the Collector cannot pass an order for confiscation during pendency of the trial.

6. When this aspect is tested in terms of the provisions contained in Section 52 of the Indian Forest Act, 1927, then sub-section (1) of Section 52 of the Indian Forest Act, 1927 also provides that "when there is reason to believe that a forest offence has been committed in respect of any forest produce, such produce, together with all tools, boats, carts or cattle used in committing any such offence, may be seized by any Forest Officer or Police Officer."

7. Thus, the language used in Section 47-A(2) of the M.P. Excise Act and in sub-section (1) of Section 52 of the Indian Forest Act, 1927 are almost identically worded, thus commission of offence and conviction being two different things, Coordinate Bench mixed the two and held that Collector cannot act and proceed with confiscation without there being conviction by the trial Court. I am afraid that, that is not the correct interpretation and is not the correct spirit of the provisions as contained in sub-section (2) of Section 47-A or in Section 52 of the Indian Forest Act, 1927 as has been discussed by a Coordinate Bench in *Rauf Khan* (supra). Therefore, that being the fact that commission of offence is one thing for which there has to be a satisfaction of the authority and conviction being a different thing, judgment rendered by a Coordinate Bench of this High Court at Indore Bench has no application and in my opinion that cannot be treated as a precedent.

8. Therefore, when facts of the present case are examined in the light of the law laid down by a Coordinate Bench in *Rauf Khan* (supra) especially when the provisions *inter alia* as contained in Indian Forest Act, 1927 and in the M.P.

Excise Act, 1915 are identically worded, pendency of trial will not preclude the Collector from passing an order of confiscation.

9. Thus, petition fails and is hereby **dismissed.**

Petition dismissed

I.L.R. 2024 M.P. 85
Before Mr. Justice Sheel Nagu
WP No. 10148/2021 (Jabalpur) decided on 30 October, 2023

RAKESH KUMAR SHRIVASTAVA & ors. …Petitioners

Vs.

STATE OF M.P. & ors. …Respondents

***A. Civil Services (Pension) Rules, M.P. 1976, Rule 9(2)(b) – Retired Employee – Disciplinary Proceedings* – Held – As per prohibitions contained in Rule 9(2)(b), issuance of charge-sheet cannot be for an event/misconduct which took place more than 4 years before institution of disciplinary proceedings – Charge-sheet in present case was issued for an event which took place 6 years, 4 years and 10-11 years back in respect of P-1, P-2 & P-3 respectively – Charge-sheet is hit by bar contained in Rule 9(2)(b) and is thus quashed with cost – Petition allowed. (Paras 4.2, 4.5, 4.6, 7 & 8)**

क. सिविल सेवा (पेंशन) नियम, म.प्र. 1976, नियम 9(2)(b) – सेवानिवृत्त कर्मचारी – अनुशासनात्मक कार्यवाहियां – अभिनिर्धारित – नियम 9(2)(b) में अंतर्निहित प्रतिषेधों के अनुसार, किसी ऐसी घटना/अवचार के लिए आरोप पत्र जारी नहीं किया जा सकता जो कि अनुशासनात्मक कार्यवाहियां संस्थित होने के 4 वर्ष पूर्व घटित हुई हो – वर्तमान प्रकरण में आरोप–पत्र ऐसी घटना के लिए जारी किया गया था जो कि क्रमशः पी–1, पी–2 व पी–3 के संबंध में 6 वर्ष, 4 वर्ष तथा 10–11 वर्ष पहले घटित हुई थी – आरोप–पत्र नियम 9(2)(b) में अंतर्निहित वर्जन द्वारा प्रभावित होता है एवं इसलिए व्यय सहित अभिखंडित किया गया – याचिका मंजूर।

***B. Civil Services (Pension) Rules, M.P. 1976, Rule 9(2)(b) – Retired Employee – Disciplinary Proceedings* – Held – If a competent authority wants to issue a charge–sheet against a retired government servant then it has to satisfy the test laid down in all 3 clauses of Rule 9(2)(b) – Non–satisfaction of even a single clause would vitiate the initiation/conduction of inquiry against him. (Para 4.2 & 4.3)**

ख. सिविल सेवा (पेंशन) नियम, म.प्र. 1976, नियम 9(2)(b) – सेवानिवृत्त कर्मचारी – अनुशासनात्मक कार्यवाहियां – अभिनिर्धारित – यदि एक सक्षम प्राधिकारी किसी सेवानिवृत्त शासकीय सेवक के विरूद्ध आरोप पत्र जारी करना चाहता है तो उसे नियम 9(2)(*b*) के सभी 3 खंडों में प्रतिपादित परीक्षण को संतुष्ट करना होगा – एक भी

खंड का संतुष्ट न होना उसके विरूद्ध जांच आरंभ/संचालित किये जाने को दूषित करेगा।

Ajay Pal Singh, for the petitioners.
A.P. Singh, G.A. for the respondents.

O R D E R

SHEEL NAGU, J.:-

CONTENT & CONTEXT

Petitioners, three in number who have retired from the post of Deputy Director (in case of petitioner No.1), Assistant Director (in case of petitioner No.2) and Sericulture Inspector (in case of petitioner No.3), have preferred this petition under Article 226 of the Constitution seeking quashment of common disciplinary proceedings commenced against them vide Annexure P/5 dated 21.05.2021 *inter alia* on the ground that the same are statutorily barred by Rule 9(2)(b) (ii) of Madhya Pradesh Civil Services Pension Rules, 1976 **("Pension Rules"** for brevity).

2. Since a pure legal question is raised, this Court refrains from entering into the merits of the charges alleged and restricts judicial scrutiny to the applicability/non-applicability of the statutory bar contained in Rule 9(2)(b)(ii) of the Pension Rules.

FACTS

3. The foundational facts necessary for adjudicating the aforesaid legal question are as follows:

Name	Date of superannuation	Date of issuance of charge sheet	Period of service tenure of petitioner during which misconduct is alleged
Petitioner No.1	30.06.2017	29.06.2021	01.04.2007 to 17.06.2015
Petitioner No.2	31.03.2017	29.06.2021	18.06.2015 to 31.03.2017
Petitioner No.3	31.10.2020	29.06.2021	01.04.2007 to 12.10.2010

3.1 In the backdrop of aforesaid factual undisputed matrix, what has to be seen is whether the institution of common departmental proceedings by charge-sheet dated 29.06.2021, was within four years of the event which gave rise to the misconduct alleged in the charge-sheet.

4. Relevant Rule 9(2)(b) of the Pension Rules for ready reference and convenience is reproduced below:

> ***" 9. Right of Governor to withhold or withdraw pension. -***
>
> *(1) xxx xxx xxx xxx*
>
> *(2)(a) xxx xxx xxx xxx*
>
> *(b) The departmental proceedings, if not instituted while the Government servant was in service whether before his retirement or during his re-employment:-*
>
> *(i) shall not be instituted save with the sanction of the Governor;*
>
> *(ii) shall not be in respect of any event which took place more than four years before such institution;*
>
> *(iii) shall be conducted by such authority and in such place as the Government may direct and in accordance with the procedure applicable to departmental proceeding :-*
>
> *(a) in which an order of dismissal from service could be made in relation to the Government servant during his service in case it is proposed to withhold or withdraw a pension or part thereof whether permanently or for a specified period; or*
>
> *(b) in which an order of recovery from his pay of the whole or part of any pecuniary loss caused by him to the Government by negligence or breach of orders could be made in relation to the Government servant during his service if it is proposed to order recovery from his pension of the whole or part of any pecuniary loss caused to the Government."*

4.1 The statutory bar/restriction stipulated in Rule 9(2)(b) of the Pension Rules is primarily to protect a retired government servant from being harassed in the evening of his life. As such, the Rule Making Authority has thought it fit to impose a restriction upon the power of the competent authority to initiate disciplinary proceeding upon retired government servant. The Rule Making Authority in its discretion and wisdom found the period of four years counted from the date of the event giving rise to misconduct alleged in the charge-sheet, to be enough for the competent authority to issue charge-sheet against retired government servant thereby correspondingly protecting the retired government servant from undue harassment arising from delayed initiation of disciplinary proceeding after superannuation. Thus, the said Rule is not only reasonable but based on the principle of fair play and good conscious.

4.2 Rule 9(2)(b) of the Pension Rules contains three restrictions/ prohibition. The first two prohibitions are that if charge-sheet is issued against a retired government servant then the same can be done only with the sanction of the Governor. The other prohibition is that the issuance of such charge-sheet against a

retired government servant cannot be for an event/misconduct which took place more than four years before institution of disciplinary proceeding (issuance of charge-sheet). Whereas the third clause relates to restriction as regards venue of conduction of inquiry which is irrelevant to the issue involved herein.

4.3 What is noteworthy in Rule 9(2)(b) of the Pension Rules is that if a competent authority wants to issue a charge-sheet against a retired government servant then it has to satisfy the test laid down in all the three clauses of Rule 9(2)(b) of the Pension Rules. Non-satisfaction of even a single clause among the three under Rule 9(2)(b) would vitiate the initiation/conduction of inquiry against a retired government servant.

4.4 Reverting to the factual matrix attending the instant case as enumerated in tabular form (supra), it is vivid that the impugned charge-sheet initiated against petitioner No.1, 2 and 3 relates to the alleged misconduct committed by them during their tenure of 01.04.2007 to 17.06.2015, 18.06.2015 to 31.03.2017 and 01.04.2007 to 12.10.2010 qua petitioners No.1, 2 & 3, respectively.

4.5 Undoubtedly, the charge-sheet against all the three petitioners was issued on 29.06.2021. Thus, the said charge-sheet against petitioner No.1 was issued in respect of an event which took place about six years back. Similarly, the charge-sheet issued against petitioner No.2 relates to event which took place about four years and three months prior to issuance. Lastly, in regard to petitioner No.3, the charge-sheet was issued after nearly 10-11 years of the event which gave rise to the charges alleged.

4.6 Accordingly, *prima facie,* it appears that the alleged charge-sheet dated 29.06.2021 in respect of all the three petitioners was issued in respect of event which took place more than four years before the institution of disciplinary proceeding.

RESPONDENTS' SUBMISSIONS:

5. *Per contra,* respondents submitted a reply justifying the issuance of impugned charge-sheet on the ground that under Rule 9(2)(b)(I) of the Pension Rules, the sanction from the Governor has been obtained and; therefore, even if the impugned charge-sheet is issued in respect of an event which took place more than four years before its issuance, the same is immune from judicial review.

FINDINGS

6. A close scrutiny of Rule 9(2)(b) of the Pension Rules reveals that the bar contained in clause (ii) stands and operates independent of the bar contained in clause (i). Thus, notwithstanding the competent authority having obtained sanction of the Governor, the issuance of charge-sheet is in respect of an

event which took place more than four years before its issuance, is still prohibited on the anvil of bar contained in clause (ii) of Rule 9(2)(b) of the Pension Rules.

6.1 Pertinently, each of the two prohibitory clauses i.e. clause (i) & (ii) of Rule 9(2)(b) of the Pension Rules are not joined by 'or'. This means that for issuance of charge-sheet against retired public servant, both the said clauses ought to be satisfied for conduction of a valid and lawful disciplinary proceedings qua misconduct pertaining to an event which took place more than four years before such issuance.

CONCLUSION

7. From the above discussion, what comes out loud and clear is that the impugned charge-sheet dated 29.06.2021 contained in Annexure R/1 issued against all the three petitioners are hit by statutory bar contained in Rule 9(2)(b)(ii) of the Pension Rules.

8. Consequently, petition stands allowed to the following extent:

(i) The impugned charge-sheet dated 29.06.2021 issued by respondent No.2 vide Annexure P/2 against all the three petitioners is quashed;

(ii) Respondent No.1 and 2 are liable to be saddled with exemplary cost for having compelled the petitioners to initiate this avoidable piece of litigation in the evening of their life and correspondingly wasting precious time of this Court in deciding this petition.

(iii) Each of the three petitioners are entitled to cost of Rs.10,000/- which shall be digitally transfer in their bank account within a period of 60 days;

(iv) Additional cost of Rs.10,000/- is saddled upon respondent No.1 and 2 for wasting precious time of the Court which could have been utilized for hearing and deciding more pressing matters. Let cost of Rs.10,000/- to be paid in favour of Secretary, M.P. State Legal Services Authority. The MPSLSA shall donate this amount to the Permanent Artificial Organ Transplantation Centre, Netaji Subhash Chandra Bose Medical College, Jabalpur.

(v) The aforesaid cost (in iii & iv) be paid within 60 days from today, failing which matter be listed before this Court as PUD qua cost.

Petition allowed

I.L.R. 2024 M.P. 90 (DB)

Before Mr. Justice S.A. Dharmadhikari & Mr. Justice Pranay Verma

WP No. 11190/2022 (Indore) decided on 3 November, 2023

JHANSI BARAN PATHWAYS PVT. LTD. …Petitioner

Vs.

OFFICE OF THE INCOME TAX OFFICER & ors. …Respondents

(Alongwith WP No. 13915/2023 & 10676/2023)

A. ***Income Tax Act (43 of 1961), Sections 2(31), 147 & 148A(d) – Reassessment – Non–Existing Entity*** **– Held – Reassessment proceedings initiated against petitioner for assessment year 2018–19 which had indeed ceased to exist with effect from 01.04.17 based upon amalgamation, where after, it cannot be regarded as a person u/S 2(31) – Mere activation of PAN does not gives right to respondent to issue notice – Apex Court concluded that if company has ceased to exist as a result of approved amalgamation, notice issued by its name would be fundamentally illegal and without jurisdiction – Impugned notices and orders quashed – Petitions allowed. (Paras 13 to 17)**

क. आयकर अधिनियम (1961 का 43), धाराएँ 2(31), 147 व 148A(d) – पुनर्निर्धारण – अविद्यमान ईकाई – अभिनिर्धारित – निर्धारण वर्ष 2018–19 के लिए याची के विरूद्ध पुनर्निर्धारण कार्यवाही आरंभ की गई, जो वास्तव में समामेलन के आधार पर दिनांक 01.04.17 से अस्तित्वहीन हो गई, उसके पश्चात् धारा 2(31) के अंतर्गत इसे एक व्यक्ति नहीं माना जा सकता – मात्र पैन के सक्रियण से प्रत्यर्थी को नोटिस जारी करने का अधिकार नहीं मिल जाता – सर्वोच्च न्यायालय ने निष्कर्षित किया है कि यदि अनुमोदित समामेलन के परिणामस्वरूप कंपनी अस्तित्वहीन हो गई है, तो उसके नाम से जारी किया गया नोटिस मूलरूप से अवैध एवं बिना अधिकारिता का होगा – आक्षेपित नोटिस एवं आदेश अभिखंडित – याचिकाएं मंजूर।

B. ***Income Tax Act (43 of 1961), Section 246 and Constitution – Article 226 – Alternative Remedy*** **– Held – When order is without jurisdiction and passed in blatant exercise of powers and the same is against principle of natural justice, then question of availability of alternative remedy does not come in way of exercising jurisdiction under Article 226 of Constitution. (Para 12)**

ख. आयकर अधिनियम (1961 का 43), धारा 246 एवं संविधान – अनुच्छेद 226 – वैकल्पिक उपचार – अभिनिर्धारित – जब आदेश बिना अधिकारिता का है एवं शक्तियों के कठोर प्रयोग में पारित किया गया है एवं वह नैसर्गिक न्याय के सिद्धांत के विरूद्ध है, तो वैकल्पिक उपचार की उपलब्धता का प्रश्न संविधान के अनुच्छेद 226 के अंतर्गत अधिकारिता के प्रयोग में बाधा नहीं बनता।

Cases referred:

1991 AIR 70, (2020) 18 SCC 331, AIR 1961 SC 372, [2023] 455 ITS 29 (SC), [2023] 454 ITR 794 (SC), [2023] 455 ITR 504 (SC), Special Leave to Appeal (C) No. 14823/2022, Special Leave to Appeal (C) No. 86/2023 (Supreme Court), (1998) 8 SCC 1.

Sumit Nema assisted by *Preena Salgia,* for the petitioner in WP Nos. 11190/2022, 13915/2023 & 10676/2023.

Veena Mandlik, for the respondent No. 1 & 2 in WP Nos. 11190/2022, 13915/2023 & 10676/2023.

O R D E R

The Order of the Court was passed by :

S.A. DHARMADHIKARI, J.:- This order shall govern disposal of aforesaid writ petition Nos. 11190/2022, 13915/2023 and 10676/2023. Regard being had to the similitude of the controversy involved in the aforesaid petitions, they have been heard analogously and disposed of by this singular order.

2. For the sake of convenience, facts of W.P. No. 11190/2022 are taken.

3. In this petition under Article 226/227 of the Constitution of India, the petitioner is challenging notice dated 15.03.2022 issued under Section 148A of the Income Tax Act, 1961 ('the Act'), order dated 31.03.2022 issued under Section 148A(d) of the Act and notice dated 31.03.2022 issued under Section 148 of the Act by respondent No.1 for the Assessment Year 2018-19 *inter-alia* on the ground that the same were issued against an entity which has been amalgamated with another entity with effect from 01.04.2017 and by virtue of which has ceased to remain in existence. Therefore, the notices and order having been issued against a non-existent entity are without jurisdiction, bad in law, contrary to settled principles in law.

4. Brief facts of the case are that, the petitioner Jhansi Baran Pathways Pvt. Ltd. (JBPPL) was the wholly owned subsidiary of Prakash Asphaltings and Toll Highways (India) Ltd. (PATH). For strategic and other purposes, it was decided to merge (JBPPL) and one Udaipur Pathways Pvt. Ltd. with (PATH). A consolidated scheme of merger (Annexure P/2) was prepared and the same was approved by the Regional Director, Ahmedabad in CP (CA) No. 26/2017 vide order No. RD (NWR)/233/(022)/2017/235 dated 17.04.2018 (Annexure P/1). Prior to the approval, notice dated 31.01.2018 (Annexure P/3) inviting objections / suggestions to the amalgamation was also sent to the Income Tax Officer / Assistant Commissioner, Indore/respondent No.1, however, no objections were given by the respondent. The scheme approved on 17.04.2018, was to take effect from 01.04.2017. Pursuant to the approval, the Registrar of Companies also

issued fresh certificates of registration dated 17.04.2018 stating that (JBBPL) had been amalgamated into (PATH).

5. Despite being aware of the aforesaid fact, a show-cause notice dated 15.03.2022 under Section 148A was issued in the name of (JBPPL) seeking to reopen the assessment for (JBPPL) for the assessment year 2018-19 on the ground that the Assessing Officer had reasons to believe that the income chargeable to tax for the said assessment year 2018-19 has escaped assessment within the meaning of Section 147 of the Act. It was stated that as per the information available with the IT department, (JBPPL) had engaged in certain transaction in the A.Y. 2018-19 and had not filed its income tax return for the same. Upon receipt of the show-cause notice, reply was submitted by the petitioner informing that since amalgamation had taken effect from 01.04.2017, all incomes and expenditures of (JBPPL) was recorded in the merged entity i.e. (PATH) and the same has been taxed in the merged entity. Copies of the relevant documents were also provided to the revenue authorities along with the reply. Even after filing reply, respondent No. 1 passed the order dated 31.03.2022 under Section 148A(d) of the Act, wherein inspite of acknowledging the fact that the (JBPPL) stood amalgamated with another entity, it was decided that, '*however, to verify whether transactions done on the PAN of the assessee were accounted for or not in the books of the Prakash Asphaltings and Toll Highways (India) Ltd., notice u/s 148 may be issued.'* Consequently, notice under Section 148 of the Act dated 31.03.2022 was issued against (JBPPL). Being aggrieved, the petitioner has filed this petition.

6. Learned Senior Counsel for the petitioner contended that the impugned notice is unsustainable in as much as (JBPPL) has already been amalgamated with Prakash Asphaltings and Toll Highways (India) Ltd. with effect from 01.04.2017. It is urged that the action of the respondents in initiating re-assessment proceedings against an amalgamated company and hence non-existent entity was *void ab initio* and bad in law. This is clearly untenable in view of the Apex Court judgment in case of ***Saraswati Industrial Syndicate Ltd. vs. CIT, 1991 AIR 70,*** wherein the following principles were formulated :

> *" 5. Generally, where only one company is involved in change and the rights of the share holders and creditors are varied, it amounts to reconstruction or reorganisation or scheme of arrangement. In amalgamation two or more companies are fused into one by merger or by taking over by another. Reconstruction or 'amalgamation' has no precise legal meaning. The amalgamation is a blending of two or more existing undertakings into one undertaking, the share holders of each blending company become substantially the share holders in the company which is to carry on the blended undertakings.*

> *There may be amalgamation either by the transfer of two or more undertakings to a new company, or by the transfer of one or more undertakings to an existing company. Strictly 'amalgamation' does not cover the mere acquisition by a company of the share capital of other company which remains in existence and continues its undertaking but the context in which the term is used may show that it is intended to include such an acquisition. See: Halsbury's Laws of Eng- land, 4th Edition Vol. 7 Para 1539. Two companies may join to form a new company, but there may be absorption or blending of one by the other, both amount to amalgamation. When two companies are merged and are so joined, as to form a third company or one is absorbed into one or blended with another, the amalgamating company loses its entity."*

7. It is a settled position in law that assessment/re-assessment proceedings cannot be initiated against amalgamated entities as they cease to remain in existence by virtue of amalgamation. Learned Senior Counsel placed reliance on the judgment of the Supreme Court in case *Principal Commissioner of Income Tax, New Delhi vs. Maruti Suzuki (India) Ltd.* (2020) 18 SCC 331 wherein it is held that, upon the amalgamation, the company ceases to exist, it cannot be regarded as a person under Section 2(31) of the Act against whom assessment proceedings can be initiated or an order of assessment passed.

8. It is further contended that respondent No.1 failed to consider the fact that the re-assessment was sought to be done for A.Y. 2018-19 (i.e. F.Y. 2017-18), whereas the amalgamation took effect from 01.04.2017. Thus, the petitioner company having ceased to have an independent existence, could not have filed any return of income for A.Y. 2018-19. In support of his case, he has also placed reliance on the judgment in case of *Calcutta Discount Company Ltd. Income Tax Officer, Companies District, I & Ors.* AIR 1961 SC 372.

9. Per contra, learned counsel appearing for the respondents submits that after appointed date, various transactions were made by the PAN of the assessee (JBPPL), which were not accounted for. Therefore, notices were issued for reopening of the assessment for the assessment year 2018-19. Learned counsel further contended that in case of any grievance, the petitioner has the remedy of challenging the same in terms of Section 246 of the Income Tax Act, wherein provision of appeal before the appellate authority is available to the petitioner. Hence, the present petition against the show-cause notices is not maintainable in view of the alternative efficacious remedy available to the petitioner. Learned counsel for the respondents has placed on the judgments rendered by the Apex Court in case of *Salil Gulati vs. Assistant Commissioner of Income Tax & Ors.*

[2023] 455 ITS 29 (SC); *Ajay Gupta vs. Income Tax Officer* [2023] 454 ITR 794 (SC), *Seema Gupta vs. Income Tax Officer* [2023] 455 ITR 504 (SC) and *Anshul Jain vs. Principal Commissioner of Income Tax & Anr.* Special Leave to Appeal (C) No. 14823/2022.

10. Learned Senior Counsel for the petitioner has vehemently opposed the contentions in respect of availability of alternative remedy. It is contended that no notice can be issued against a non existent entity, therefore, the notice *per se* is *non est* in the eyes of law since inception, Therefore, the writ is the only efficacious remedy. In this regard he has placed on the order passed by the Supreme Court in case of *Red Chillis International Sales vs. Income Tax Officer & Anr.* in Special Leave to Appeal (C) No. 86/2023 wherein the Apex Court had set aside the order of Punjab & Haryana High Court on 02.06.2022 in C.W.P. No. 10073 of 2022 remanding the case to the High Court which had dismissed the petition *in limine* on the ground of non-availing of the statutory remedy under Section 246 of the Income Tax Act. He also referred to the judgment of the Apex Court in case of *Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai & Ors* (1998) 8 SCC1 wherein it is held that the alternative remedy is not a bar, at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the virus of the Act is challenged.

11. Heard learned counsel for the parties.

12. So far as argument raised by counsel for the respondent regarding availability of alternative remedy of appeal, is concerned, it is well settled that when the order is without jurisdiction and appears to be passed in blatant exercise of powers and the same is against the principles of natural justice, then the question of availability of alternative remedy does not come in the way for exercising jurisdiction under Article 226 of the Constitution of India. In the present case, the notices/order has been issued against a non existent / amalgamated entity. Hence, the objection regarding availability of alternative remedy of appeal is overruled.

13. Secondly, in the present case, it is clear that the reassessment proceedings have been initiated against Jhansi Baran Pathways Pvt. Ltd for the assessment year 2018-19, which had indeed ceased to exist with effect from 01.04.2017 based upon the scheme of amalgamation having been approved on 17.04.2018.

14. The Apex Court in case of *Principal Commissioner of Income Tax, New Delhi vs. Maruti Suzuki* (supra) has held as under:

> *" 36. In the present case, despite the fact that the assessing officer was informed of the amalgamating*

company having ceased to exist as a result of the approved scheme of amalgamation, the jurisdictional notice was issued only in its name. The basis on which jurisdiction was invoked was fundamentally at odds with the legal principle that the amalgamating entity ceases to exist upon the approved scheme of amalgamation. Participation in the proceedings by the appellant in the circumstances cannot operate as an estoppel against law. This position now holds the field in view of the judgment of a co-ordinate Bench of two learned judges which dismissed the appeal of the Revenue in Spice Enfotainment on 2 November 2017. The decision in Spice Enfotainment has been followed in the case of the respondent while dismissing the Special Leave Petition for AY 2011-2012. In doing so, this Court has relied on the decision in ***CIT vs. Spice Enfotainment Ltd. (2012) 247 CTR (Del) 500]."***

15. Hence, the controversy involved in the present petition is no longer *res integra.* The Apex Court in case of *Principal Commissioner of Income Tax, New Delhi vs. Maruti Suzuki* (supra) has categorically held that if the company has ceased to exist as a result of the approved scheme of amalgamation, then in that case, the jurisdictional notice issued in its name would be fundamentally illegal and without jurisdiction. It is also held that upon amalgamating entity ceasing to exist, it cannot be regarded as a person under sub section (31) of Section 2 of the Act against whom assessment proceedings can be initiated. The participation by the amalgamated company in the proceedings would be of no effect as there is not *estoppel* against law.

16. In view of the settled law, from the appointed date, under the scheme of amalgamation, the existence of the transferor company had merged into the transferee company. Mere activation of PAN number may not give a right to the respondents to issue notice to a non-existent entity after appointed date i.e. 01.04.2017. Admittedly, the order under Section 148A(d) of the Income Tax Act has been passed by the respondents against a non existent entity. Therefore, the impugned notices and orders are bad in the eyes of law.

17. Accordingly, the notices, orders and all consequential proceedings in the name of amalgamated company/assessee are null and void and consequently, the impugned notice dated 15.03.2022 issued u/s 148A of the Act, order dated 31.03.2022 passed u/s 148A(d) of the Act and notice dated 31.03.2022 issued u/s 148 of the Act in W.P.No. 11190/2022; notice dated 02.03.2023 issued u/s 148A of the Act, order dated 22.03.2023 passed u/s 148A(d) of the Act and notice dated 22.03.2023 issued u/s 148 of the Act in W.P.No. 13915/2023;

notice dated 26.02.2023 issued u/s 148A of the Act, order dated 29.03.2023 passed u/s 148A(d) of the Act and notice dated 29.03.2023 issued u/s 148 of the Act in W.P.No. 10676/2023 are quashed and set aside and all actions in furtherance thereto are prohibited. Resultantly, the petitions are allowed.

18. With the aforesaid, the petitions are finally disposed of.

19. A copy of this order be kept in the record of all other connected writ petitions.

Petition allowed

I.L.R. 2024 M.P. 96 (DB)

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

WP No. 8852/2021 (Jabalpur) decided on 3 November, 2023

OMPRAKASH SHUKLA & ors. …Petitioners

Vs.

STATE OF M.P. & ors. Respondents

Service Law – Cancellation of Appointment – Change of Government – **Held – In absence of any appointment order issued to petitioners, no right would lie to them to challenge any of the note–sheets of the Government – Until and unless there is an order of appointment, there cannot be any further proceedings thereto – Note–sheet cannot be an impugned order, it is only a communication between officers of government – Petition dismissed.**

(Paras 7 to 11)

सेवा विधि – नियुक्ति को रद्द किया जाना – सरकार का परिवर्तन – अभिनिर्धारित – याचीगण को जारी किये गये किसी नियुक्ति आदेश के अभाव में, उन्हें सरकार की किसी भी नोट–शीट को चुनौती देने का कोई अधिकार नहीं होगा – जब तक कि नियुक्ति का आदेश न हो, इस पर आगे कोई कार्यवाही नहीं हो सकती – नोट–शीट एक आक्षेपित आदेश नहीं हो सकता, यह सरकार के अधिकारीगण के मध्य केवल एक संसूचना है – याचिका खारिज।

Cases referred:

WP No. 9050/2019 order passed on 30.11.2019 (DB), (2001) 6 SCC 380, AIR 1991 SC 1612, (2005) 9 SCC 22, (2006) 1 SCC 779, (2008) 1 SCC 448, (2010) 6 SCC 777, (2013) 12 SCC 171.

Ahadulla Usmani, for the petitioners.
B.D. Singh, Dy. A.G. for the respondent No. 1 & 3.
K.N. Fakhruddin, for the respondent No. 2.

ORDER

The order of the Court was passed by :

RAVI MALIMATH, CHIEF JUSTICE:- The case of the petitioners is that by a notification issued in the year 2019, the office of the District and Sessions Judge, Chhindwara, Madhya Pradesh have invited applications for appointment of the Notary at Tehsil place Chhindwara and District place Chhindwara. The petitioners and various others applied for the same. The formalities were completed. Notices were issued to the petitioners to deposit the requisite challan of Rs.2000/- and non-judicial stamp of Rs.2000/-. The same was done. It is the case of the petitioners that they were appointed on the vacant post of Notary in the month of March, 2020. Thereafter in the last week of March, 2020, a new Government took the office, on account of which, the orders of appointment of the petitioners and others were kept in abeyance. Subsequently, the orders of appointment of the petitioners were cancelled by the impugned order. Questioning the same, the instant petition is filed.

2. Learned counsel for the petitioners contends that once an order of appointment has been issued, the same cannot be cancelled only because of change of a Government.

3. We have asked the learned counsel a specific question as to whether any order of appointment has been issued. He is unable to show any material to the same. On the contrary, he fairly submits that there was no order appointing the petitioners as a Notary.

4. However, his primary contention, by placing reliance on the impugned order Annexure P/1, is that since the order of appointment has been cancelled, it has to be necessarily to be understood that there is an order of appointment. Therefore, the petitioners have to be appointed. In order to buttress his arguments, learned counsel for the petitioners has relied upon one of the note-sheets which is produced herein at page 101.

5. Annexure P/1 reads as follows:

> ''(N) में माननीय मुख्यमन्त्री जी के निर्देश के परिपालन में ध्वज अ ध्वज ब ध्वज स कि नियुक्तिया निरस्त कर सम्बधी जिलो में नोटरी नियुक्ति हेतु नया पैनल प्राप्त कर नस्ती प्रस्तुत करें।''

6. Note-sheet produced at page 101 reads as follows:

> '' उन्होंने दिनांक 05–06–2020 को ध्वज–ब स एवं द के बारे में अग्रिम कार्यवाही न करने के निर्देश दिये थे। ध्वज ब पर ऐसे अधिवक्ताओं की सूची संलग्न है जिनका चयन रिक्त नोटरी के पदों पर नियुक्ति हेतु माह मार्च 2020 में किया गया था और जिनसे निर्धारित राशि के स्टॉम्प एवं

चालान की प्रति मंगवायी जा चुकी है किन्तु नियुक्ति आदेश जारी नहीं किये गये है।''

7. Firstly is the fact that what is being challenged herein is not any governmental order or any order by any authority. What is being sought to be challenged is a certain note-sheet of a department. We fail to understand as to how a note-sheet can become an impugned order. The note-sheet is only a communication between the officers of the Government. The same would have to culminate in a governmental order to have any effect or that it would be a subject to challenge in a writ court. Therefore, we do not find that any note-sheet could be challenged by the petitioners.

8. Furthermore, even if it is to be assumed that it is a Governmental order, we do not find anything in the order indicating any appointment. In terms whereof, it has to be construed that the entire process of selection initiated by the State has since been dropped. The question of cancelling an appointment would arise only when an appointment has been issued. Admittedly, even according to the petitioners, no appointment has been issued. Therefore, in the absence of any appointment order being issued, the question of any further proceedings would not arise for consideration. It cannot be presumed that in terms of the note- sheet Annexure P/1, an appointment has to be construed to have been issued to the petitioners. Therefore, in the absence of any appointment order issued to the petitioners, no right would lie to the petitioners to challenge any one of the note-sheets of the Government.

9. Reliance is also placed on an order dated 30.11.2019 passed by the Division Bench of this Court in the case of *Smt. Garima Verma vs. Law and Legislation Department* in W.P.No.9050 of 2019. It is contended that in similar circumstances it was held that only because there has been a change of Government, the order passed by the earlier Government cannot be changed.

10. We have considered the same. The Division Bench therein considered the provisions of Section 3 of the Notaries Act, 1952 and Rules 7, 7-A, 7-B and 8 of the Notary Rules, 1956 and thereafter came to the conclusion that the recruitment which was in progress which was set aside, was bad in law. On considering the same, we are unable to accept the same. Firstly, we do not find any material on record herein which indicates that the impugned note-sheet has been issued only because of change of the government. Change of government is only a pleading that has been taken. We do not find any proof even in the said judgment with regard to the said fact. Even otherwise, the view expressed by us hereinabove is to the effect that until and unless there is an order of appointment, there cannot be any further proceedings thereto. This issue was not considered by the Division Bench of this Court. Therefore, we are of the view that the said order would not be applicable to the facts of the case.

11. The employer has every right to recall the entire procedure for recruitment at any stage and until and unless an appointment order is issued in favour of a candidate, no right accrues in his favour.

12. The Hon'ble Supreme Court in the case of *All India SC/ST Employees Association vs. A. Arthur Jeen* reported in (2001) 6 SCC 380 following the judgment of the Constitution Bench of the Hon'ble Supreme Court in the case of *Shankarsan Dash v. Union of India* reported in AIR 1991 SC 1612 has held as under: -

> *" 10. Merely because the names of the candidates were included in the panel indicating their provisional selection, they did not acquire any indefeasible right for appointment even against the existing vacancies and the State is under no legal duty to fill up all or any of the vacancies as laid down by the Constitutional Bench of this Court, after referring to earlier cases in Shankarasan Dash vs. Union of India. "*

13. In the cases of *Punjab State Electricity Board and others v. Malkiat Singh* reported in (2005) 9 SCC 22; *Union of India and others v. Kali Dass Batish and another* reported in (2006) 1 SCC 779; *Director, SCTI for Medical Science & Technology and another v. M. Pushkaran* reported in (2008) 1 SCC 448; *State of Orissa and another v. Rajkishore Nanda and others* reported in (2010) 6 SCC 777*; and also in the case of Manoj Manu and Another vs Union of India and others* reported in (2013) 12 SCC 171, a similar view has been taken by the Hon'ble Supreme Court.

14. For all the aforesaid reasons, the petition being devoid of merit is accordingly dismissed.

Petition dismissed

I.L.R. 2024 M.P. 99

Before Mr. Justice Pranay Verma

MP No. 4361/2022 (Indore) decided on 6 July, 2023

KIRTI GUPTA & ors. …Petitioners

Vs.

AKASH POTBHARE …Respondent

***Civil Procedure Code (5 of 1908), Order 38 Rule 5 - Security for Production of Property – Permissibility* – Held – Trial Court itself recorded a categoric finding that plaintiff has not proved that defendants with intent to obstruct or delay the execution of decree that may be passed against them, are attempting to sell their property and only on basis of assumption,**

attachment before judgment cannot be directed – Trial Court had no jurisdiction to direct defendants to furnish solvent surety – Impugned order set aside – Petition allowed. (Paras 7 to 9)

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 38 नियम 5 – सम्पत्ति पेश करने के लिए प्रतिभूति – अनुज्ञेयता – अभिनिर्धारित – विचारण न्यायालय ने स्वयं स्पष्ट निष्कर्ष अभिलिखित किया है कि वादी ने यह साबित नहीं किया है कि प्रतिवादीगण डिक्री जो उनके विरूद्ध पारित की जा सकती है, के निष्पादन को बाधित या विलंबित करने के आशय से अपनी सम्पत्ति विक्रय करने का प्रयास कर रहे हैं और केवल धारणा के आधार पर निर्णय–पूर्व कुर्की निदेशित नहीं की जा सकती – विचारण न्यायालय के पास प्रतिवादीगण को शोधक्षम प्रतिभूति देने का निदेश देने की अधिकारिता नहीं थी – आक्षेपित आदेश अपास्त – याचिका मंजूर।

Case referred:

(2017) 1 SCC 568.

Vishal Baheti, for the petitioners.
Rishi Tiwari, for the respondent no.1.

O R D E R

PRANAY VERMA, J.:- By this petition preferred under Article 227 of the Constitution of India the petitioners/defendants have challenged the order dated 03.08.2022 passed by the trial Court in so far as while rejecting an application under Order 38 Rule 5 of the CPC filed by plaintiff/respondent they have been directed to furnish solvent surety in the sum of Rs. 3,00,000/-.

2. The claim has been instituted by plaintiff under Order 37 Rule 1 and 2 of the CPC for recovery of a sum of Rs. 2,09,000/- from the defendants. During pendency of the suit the plaintiff filed an application under Order 38 Rule 5 of the CPC for attachment before judgment of immovable properties of the defendants. The application was contested by the defendants. By the impugned order the trial Court while rejecting the application has directed the defendants to furnish solvent surety in sum of Rs. 3,00,000/-.

3. Learned counsel for the defendants has submitted that the trial Court has itself recorded finding to the effect that plaintiff has not produced sufficient documents to prove that defendants are attempting to sell the property for the purpose of avoiding satisfaction of the decree hence merely on the basis of apprehension an order for attachment before judgment could not have been passed. Plaintiff's application has been rejected by the trial Court, however, by merely observing that it would be appropriate to direct the defendants to furnish solvent surety, the said direction has been issued which is illegal and deserves to be set-aside.

4. Per contra learned counsel for plaintiff has submitted that in terms of Order 38 Rule 5 (1) of the CPC the Court very much has the jurisdiction to direct the defendants not to dispose off the whole or any part of the property. It is the discretion of the Court to issue such directions as may be necessary for securing the execution of the decree. The impugned order passed by the trial Court being a discretionary order is not liable to be interfered with in exercise of jurisdiction under Article 227 of the Constitution of India. Reliance has been placed by him on the decision of the Supreme Court in *IDBI Trusteeship Services Ltd., Vs. Hubtown Ltd.,* (2017) 1 SCC 568 to contend that even if the defendant raises a triable issue and if any doubt is left with the trial Judge about his good faith, he may impose conditions, as may be deemed fit. The trial Court has felt it necessary to direct the defendants to furnish surety hence it cannot be said that the order has been passed without jurisdiction.

5. I have heard the learned counsel for the parties at length.

6. The provision of Order 38 Rule 5 (1) of the CPC being material is as

under :-

> **"Order XXXVIII Rule 5 : Where defendant may be called upon to furnish security for production of property**.--(1) Where, at any stage of a suit, the Court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him,--
>
> (a) is about to dispose of the whole or any part of his property, or
>
> (b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court, the Court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order to produce and place at the disposal of the Court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security."

7. A perusal of the aforesaid provision reveals that the Court is very much empowered to direct the defendants to furnish surety in the sum as may be specified to produce and place at the disposal of the Court when required the property or the value of the same. However, the pre-requisite for exercise of such power is that the Court should first arrive at a satisfaction that the defendant with an intention to obstruct or delay execution of any decree that may be passed against him is about to dispose of his property or to remove the same from local limits of the jurisdiction of the Court. It is only upon reaching to such satisfaction

that the Court acquires jurisdiction to issue directions as may issued under the Rule. Until and unless such satisfaction is recorded by the trial Court, no directions as contemplated can be passed merely on the basis of apprehension in the mind of the Court.

8. In the present case, the trial Court has itself recorded a categoric finding to the effect that plaintiff has not proved that the defendants with intent to obstruct or delay the execution of the decree that may be passed against them are attempting to sell their property. It has further observed that only on the basis of apprehension attachment before judgment cannot be directed and has thereafter gone on to reject the application filed by the plaintiff. It hence had no jurisdiction whatsoever to pass any order under the provisions of Order 38 Rule 5 (1) of the CPC.

9. The judgment relied upon by learned counsel for plaintiff is hence not applicable to the facts of the case. The impugned order passed by the trial Court is illegal and wholly without jurisdiction. The same cannot be sustained and is hereby set-aside, in so far as it has directed the defendants to furnish solvent surety.

Petition is accordingly allowed and disposed off.

No order as to costs.

Petition allowed

I.L.R. 2024 M.P. 102
Before Mr. Justice Anand Pathak
MP No. 4329/2023 (Gwalior) decided on 1 September, 2023

RAMNATH & ors. …Petitioners

Vs.

RAGHUNATH SINGH & ors. …Respondents

A. Civil Procedure Code (5 of 1908), Order 39 Rule 1 & 2 – Application by Plaintiff & Defendant **– Held – Matter has been remanded back mainly on ground that both applications were not heard analogously – One application was decided on 27.06.22 and another was decided on 13.09.22 – This created anomalous situation – It is required that both applications ought to be heard analogously – Petitioner is not prejudiced in any manner, his interest has been secured in remand order whereby for the time being alienation, transfer or sale has been injuncted – Petition dismissed. (Para 22 & 23)**

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 39 नियम 1 व 2 – वादी व प्रतिवादी द्वारा आवेदन – अभिनिर्धारित – मामले को मुख्य रूप से इस आधार पर

प्रतिप्रेषित किया गया कि दोनों आवेदनों पर सदृश रूप से सुनवाई नहीं की गई थी – एक आवेदन को 27.06.22 को विनिश्चित किया गया एवं दूसरे आवेदन को 13.09.22 को विनिश्चित किया गया था – यह विषम परिस्थिति सृजित करता है – यह अपेक्षित है कि दोनों आवेदनों को सदृश रूप से सुना जाना चाहिए था – याची को किसी भी तरह से प्रतिकूल प्रभाव कारित नहीं हुआ, उसका हित प्रतिप्रेषण आदेश में सुरक्षित किया गया है जिससे कुछ समय के लिए अन्यसंक्रामण, हस्तांतरण अथवा विक्रय व्यादेशित कर दिया गया है – याचिका खारिज।

***B. Civil Procedure Code (5 of 1908), Order 39 Rule 1 & 2 – Application by Defendant* – Held – Defendant for limited purpose as provision mandates can move an application under O–39 R–1 CPC – Application preferred by D–2(a) for temporary injunction under O–39 R–1(a) CPC is maintainable to that extent. (Para 16 & 17)**

ख. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 39 नियम 1 व 2 – प्रतिवादी द्वारा आवेदन – अभिनिर्धारित – प्रतिवादी सीमित प्रयोजन हेतु जैसा कि उपबंध आदेशित करता है, सि.प्र.सं. के आदेश–39 नियम–1 के अंतर्गत आवेदन प्रस्तुत कर सकता है – सि. प्र.सं. के आदेश–39 नियम 1(a) के अंतर्गत अस्थायी व्यादेश के लिए प्रतिवादी क्र. 2(a) द्वारा प्रस्तुत आवेदन उस परिमाण तक पोषणीय है।

***C. Civil Procedure Code (5 of 1908), Order 43 Rule 1 – Order of Remand – Applicability* – Held – Miscellaneous appeal against the order of remand can only be preferred on substantial question of law. (Para 19)**

ग. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 43 नियम 1 – प्रतिप्रेषण का आदेश – प्रयोज्यता – अभिनिर्धारित – प्रतिप्रेषण के आदेश के विरूद्ध प्रकीर्ण अपील केवल विधि के सारवान् प्रश्न पर प्रस्तुत की जा सकती है।

***D. Civil Procedure Code (5 of 1908), Section 108, Order 41 & Order 43 –Order of Remand* – Held – Considering the provisions of O–41, O–43 and Section 108 CPC, it appears that provisions of O–41 would apply in O–43 also to the extent where remand is made. (Para 20)**

घ. सिविल प्रक्रिया संहिता (1908 का 5), धारा 108, आदेश 41 व आदेश 43 – प्रतिप्रेषण का आदेश – अभिनिर्धारित – सि.प्र.सं. के आदेश–41, आदेश–43 एवं धारा 108 के उपबंधों को विचार में लेते हुए, यह प्रतीत होता है कि आदेश–41 के उपबंध आदेश–43 में भी उस परिमाण तक लागू होंगे जहां प्रतिप्रेषण किया गया है।

Case referred:

AIR 2020 MP 54, 2019 (3) MPLJ 86, AIR 2019 CG 56, (2009) 1 SCC 168, (2020) 19 SCC 681, (1996) 1 SCC 49, AIR 1991 MP 11, 2011 (1) MPLJ 646, ILR 1992 Kant. 3772, 2016 (I) MPWN 110, AIR 1939 Madras 495, 1991 MPLJ 311, 1997 MPWN 34, (2016) 3 MPLJ 604, (2004) 4 SCC 26, (1993) 4 SCC 727, 2006 (3) MPHT 39, 2015 (3) MPLJ 202.

Abhishek Singh Bhadouriya, for the petitioners.
Harish Kumar Dixit, for the respondent No. 2(a).
Neelesh Singh Tomar, G.A. for the State.
None, for the other respondents.

O R D E R

ANAND PATHAK, J.:- The present petition under Article 227 of the Constitution is preferred by the petitioners being crestfallen by the order dated 09-11-2022 passed by the I Additional District Judge Gohad District Bhind whereby Miscellaneous Appeal under Order XLIII Rule 1 (r) of CPC preferred at the instance of respondent No.2(a)/defendant No.2(a) was partly allowed and matter was remanded back to the trial Court for fresh adjudication of application under Order XXXIX Rule 1 and 2 of CPC preferred by the petitioners/plaintiffs (vide I.A.No.1/2022) and another application preferred by defendant No.2(a) under Order XXXIX Rule 1 and 2 of CPC (I.A.No.06/2022) for analogous hearing.

2. Precisely stated facts of the case are that the plaintiffs/petitioners were co-owners of one piece of the land and went for partition before Tahsildar. Vide order dated 22-09-2009 land was partitioned by Tahsildar. On 05-05-2011 SDO, allowed the appeal of plaintiff/petitioner No.2 -Malti and set aside the order of partition and remanded the matter to Tahsildar for fresh hearing. Grievance of Malti before SDO was that she was not given opportunity of hearing in partition proceedings.

3. On 02-03-2015, Tahsildar recorded consent of plaintiff/petitioner No.2 - Malti over previous partition and passed a fresh order of partition. Said order became final because no appeal was preferred by any party against the order of partition. On 22-11-2021 respondent No.2(a) -Ghanshyam Soni purchased the land from the share of defendant No.2 - Ratan Singh.

4. Petitioners/plaintiffs filed a suit for declaring the order of Tahsildar as null and void in which respondent No.2(a) was impleaded as party defendant and moved an application under Order XXXIX Rule 1 and 2 of CPC for restraining the respondents from alienation of property.

5. It appears that on 06-06-2022, petitioners/plaintiffs themselves attempted to erect wire fencing on the property and therefore, FIR at Crime No.165/2022 was registered against them. Immediately thereafter it appears that Ghanshyam Soni -respondent No.2(a) filed an application for restraining the plaintiffs from interfering in possession and from changing the status of the property purportedly under Order XXXIX Rule 1 read with Section 151 of CPC.

6. On 27-06-2022, order was passed by the trial Court on the application of plaintiffs restraining alienation of property but order on the application of defendant No.2 (a) was not passed and it was passed on 13-09-2022 whereby the

application of defendant No.2(a) was rejected observing that there is already an order of injunction against defendant No.2(a) passed earlier by the trial Court.

7. It appears that after passing of the impugned order dated 27-06-2022 and before passing of order dated 13-09-2022 rejecting the injunction application of defendant No.2(a), he filed an appeal purportedly under Order XLIII Rule 1 of CPC against the order dated 27-06-2022 *inter alia* raising the ground that the trial Court has not decided his application under Order XXXIX Rule 1 and 2 of CPC. On 09-112022 the appellate Court partly allowed the appeal preferred by defendant No.2(a), directing the trial Court to decide both the applications preferred under Order XXXIX Rule 1 and 2 of CPC preferred by the parties while hearing analogously. Till then restrained defendant No.2(a) from alienating, selling and transferring the property.

8. Thereafter, against said order dated 09-11-2022 petitioners filed miscellaneous appeal under Order XLIII Rule 1 of CPC before this Court and thereafter moved an application for conversion of miscellaneous appeal into miscellaneous petition and said application was allowed and thereafter matter is heard on miscellaneous petition under Article 227 of the Constitution.

9. It is the submission of learned counsel for the petitioners that all the parties in suit were not impleaded as party by defendant No.2(a) in miscellaneous appeal, therefore, same not maintainable. As defendant, he cannot claim any relief for temporary injunction in the jurisdiction under Order XXXIX of CPC. It is the submission of learned counsel for the petitioners that in miscellaneous appeal, the appellate Court cannot pass the order of remand because that power is available to regular first appellate Court and not available to miscellaneous appellate Court. He relied the judgment of this Court in the case of *Dineshchandra Sharma and Ors. Vs. Rana Dharampal Singh and Ors.,* AIR 2020 MP 54, *Mangilal Vs. Ganpatlal,* 2019 (3) MPLJ 86 and *Sanju Devi Kashyap and Ors. Vs. Uma Bai and Ors.* AIR 2019 CG 56.

10. Learned counsel for the petitioners further submitted that the jurisdiction of appellate Court was barred by limitation with respect to the order impugned because at the time of challenging the order, limitation of 30 days was over, therefore, the relief against the said order was time barred. He relied upon the judgment of Supreme Court in the case of *City and Industrial Development Corporation Vs. Dosu Aardeshir Bhiwandiwala and others,* (2009) 1 SCC 168 and *Assistant Commissioner (CT) LTU, Kakinada and others Vs. M/s Glaxo Smith Kline Consumer Health Care Limited,* (2020) 19 SCC 681 to contend that jurisdiction under Article 226 of the Constitution is to look into the factum and laws of limitation.

11. Learned counsel for the respondents opposed the submissions and submitted that an appeal is maintainable against the order of remand under Order

XLIII Rule 1 of CPC. He relied upon the judgment of Apex Court in the case of *Resham Singh Pyara Singh Vs. Abdul Sattar,* (1996) 1 SCC 49. It is the submission of learned counsel for respondent No.2(a) that rules of Order XLI of CPC shall apply, so far as may be, to appeal from orders. In the case of *Balwant Vs Mainabai,* AIR 1991 MP 11, this Court held that by virtue of Order XLIII Rule 2 of CPC, provisions of Order XLI rule 22 of CPC would be applied, enabling the provisions of cross-objections maintainable against the order also.

12. He also relied upon the provisions of Section 108 of CPC whereby procedure has been provided about the "Procedure in appeals from appellate decrees and orders" and it includes orders made under CPC and therefore, applicability of Order XLI in appeal governs Order XLIII rule 1 of CPC also. This aspect has been considered in *Rupinder Singh Anand Vs. Gajinder Singh Anand and others,* 2011 (1) MPLJ 646 by the Division Bench of this Court. Similarly, the provisions of Order XLI Rule 27 of CPC regarding production of additional evidence have been found applicable in the appeal under Order XLIII rule 1 CPC in view of the judgment of Karnataka High Court in the case of *M/s Patel Enterprises Vs. M.P. Ahuja,* ILR 1992 Kant. 3772.

13. On same analogy, provisions of Order XLIII Rule 1 of CPC are also applicable in appeals under Order XLIII rule 1 of CPC. He also relied upon the judgment of this Court in the case of *Khadak Bahadur alias Rajendra Pal Singh Lodhi Vs. Niranjan Singh,* 2016 (I) MPWN 110 to submit that two applications under Order XXXIX Rule 1 and 2 of CPC should be heard and decided analogously by the trial Court.

14. Heard learned counsel for the parties and perused the documents appended thereto.

15. This is a case where petitioners/plaintiffs have filed a suit for declaration of title and permanent injunction against the defendants with further relief that respondent No.2(a) has no right to interfere in possession of plaintiffs. Suit was filed on the allegations that defendant No.1 without partition has sold out a specific share of land to defendant No.2(a) and on the premise of said sale deed, defendant No.2(a) is trying to interfere in possession of plaintiffs.

16. So far as maintainability of application for temporary injunction at the instance of defendant is concerned, said aspect has been considered by the Madras High Court in the matter of *Sivakami Achi Vs. Narayana Chettiar,* AIR 1939 Madras 495 holding that an application under Order XXXIX Rule 1(a) of the CPC can be made on behalf of defendant. This judgment has been considered by the Division Bench of this Court in the matter *Churamani and another Vs. Ramadhar and others,* 1991 MPLJ 311 holding that the defendant has right to move application under Order XXXIX Rule 1 (a) of CPC if any property in dispute in a

suit is in danger of being wasted, damaged or alienated by any party to a suit or wrongfully sold in execution of a decree. This analogy has been further advanced in *Ram Narayan Singh Vs. Rikhraj Singh,* 1997 MPWN 34. Recently, this Court in the case of *Nandu S/o Bhagwan Das and Another Vs. Jamuna Bai and Others,* (2016) 3 MPLJ 604 has elaborately discussed this issue holding that application for temporary injunction moved on behalf of defendant is maintainable.

17. Therefore, defendant for limited purpose as provision mandates can move an application under XXXIX Rule 1 of CPC. Thus, the application if any preferred by the defendant No.2(a) for temporary injunction under Order XXXIX Rule 1(a) of CPC, then it is maintainable to that extent.

18. So far as the question whether appellate Court under the miscellaneous appellate provision under Order XLIII of CPC could have remanded the matter, then it appears that in view of Division Bench judgment of this Court in the case of *Rupinder Singh Anand* (supra) it has been held that Section 108 of CPC makes Chapter VII apply to all appeals irrespective of whether they arise from decree or not. Relevant para 15 is reproduced for ready reference:

> **"15.** So far as maintainability of cross-objections is concerned, it is true that cross-objections can be filed in appeal against impugned judgment/order under Order XLI, Rule 22, Civil Procedure Code. Section 108 makes Chapter VII apply to all appeals, irrespective of whether they arise from decrees or orders. Order XLIII, Rule 2, clearly lays down that the rules of Order XLI shall apply, so far as may be, to appeals from orders. It appears from this that the intention is to allow all matters covered by Order XLI so far as they can be made applicable to appellate orders and appeals therefrom as well. It is quite clear therefore that a cross-objection in an appeal against an order appealable under Order XLIII. Rule 1, Civil Procedure Code can be made. This aspect of the case has been taken into consideration by this Court in the matter of Beniprasad Agarwal v. Hindustan Lever Ltd., Bombay, 1957 MPLJ 676 = AIR 1958 Madhya Pradesh 348, wherein this Court held that cross-objections in appeal against such order can be made and the cross- objections be placed as an appeal after it is filed."

19. Although miscellaneous appeal against the order of remand can only be preferred on substantial questions of law {See: *Narayanan Vs. Kumaran and others,* (2004) 4 SCC 26}. However petitioners (earlier appellants) filed miscellaneous appeal under Order XLIII Rule 1 purportedly under Order XLIII rule 1(u) of CPC but later on converted this miscellaneous appeal into miscellaneous petition under Article 227 of the Constitution, therefore, now that point does not exist.

20. Therefore, considering the provisions of Orders XLI, XLIII and Section 108 of CPC as well as different pronouncements made in this regard, it appears that the provision of Order XLI of CPC would apply in Order XLIII of CPC also to the extent where remand is made.

21. Even otherwise, this Court under the power of superintendence and to further the cause of justice can pass the order in which it can hold that both the applications for temporary injunction can be heard analogously. Reason being, if the impugned order of miscellaneous appellate Court is set aside on alleged technical ground then it would amount to restoration of illegal order and same is not maintainable {See: *Managing Director, ECIL and others Vs. B. Karunakar,* (1993) 4 SCC 727, *Munna Lal Yadav Vs. Dr. Hari Singh Gour and another,* 2006(3) MPHT 39 and recently in *Dakkho Bai Vs. State of M.P. And others,* 2015 (3) MPLJ 202)}. Therefore, on this count also to further the cause of justice, it is imperative that order of miscellaneous appellate Court be maintained.

22. Perusal of impugned order reveals that matter has been remanded back mainly on the ground that two applications for temporary injunction were not heard analogously. One application was decided on 27-06-2022 and another was decided on 13-09-2022. This created anomalous situation. It is required that both the applications ought to be heard analogously and then would be decided accordingly by the trial Court.

23. So far as interest of plaintiffs is concerned, that has been protected by the remand order whereby for the time being alienation, transfer, sale have been injuncted till applications of both the rival parties are decided. Therefore, it is not a case where petitioners/plaintiffs are prejudiced in any manner.

24. In the cumulative analysis, no case for interference is made out. Parties are directed to appear before the trial Court by next date of hearing and trial Court shall decide the applications preferred by the plaintiffs and defendant No.2(a) analogously in accordance with law. Impugned order passed by the miscellaneous appellate Court is hereby affirmed.

25. Petition stands disposed of in above terms.

Order accordingly

I.L.R. 2024 M.P. 109

Before Mr. Justice Duppala Venkata Ramana

MP No. 1753/2022 (Jabalpur) decided on 7 December, 2023

PANCHAMLAL PATEL & anr. …Petitioners

Vs.

UNION OF INDIA …Respondent

***Constitution – Article 227 – Conditional Award – Jurisdiction of Tribunal* – Claims Tribunal awarded Rs. 8 lacs alongwith condition that appellants can only withdraw 10%-10% of their share and remaining amount will be kept in fixed deposits for 8 yrs. – Held – Tribunal has no such jurisdiction in case where claimants are major, who are none other than parents of deceased – Claimants are nearer to age of 50 yrs. and have every right to utilize the amount in any manner, as they like – Imposed condition set aside – Petition allowed. (Paras 4, 6 & 10 to 12)**

संविधान – अनुच्छेद 227 – सशर्त अवार्ड – अधिकरण की अधिकारिता – दावा अधिकरण द्वारा 8 लाख रूपये का अवार्ड इस शर्त के साथ दिया कि अपीलार्थी अपने भाग का केवल 10%–10% निकाल सकते हैं तथा शेष राशि 8 वर्षों के लिए सावधि जमा के रूप में रखी जाएगी – अभिनिर्धारित – अधिकरण को उस प्रकरण में ऐसी कोई अधिकारिता नहीं है जहां दावाकर्ता वयस्क हैं, जो कोई और नहीं बल्कि मृतक के माता–पिता हैं – दावाकर्ता लगभग 50 वर्ष की आयु के हैं और उन्हें राशि को किसी भी प्रकार से, जैसे वे चाहें, उपयोग करने का पूरा अधिकार है – अधिरोपित शर्त अपास्त – याचिका मंजूर।

Cases referred:

(1994) 2 SCC 176, (2002) 6 SCC 52.

Aparna Singh, for the petitioners.
Divesh Bhojne, for the respondent.

ORDER

DUPPALA VENKATA RAMANA, J.:- The petition filed under Article 227 of the Constitution of India questioning to set aside the condition no.17 of the impugned judgment dated 25.01.2002 passed by the learned Railway Claims Tribunal dated 25.01.2022 in O.A.No./IIu/BPL/230/2018, whereby the learned Claims Tribunal awarded an amount of Rs.8,00,000/- (Eight Lacs Rupees) with interest 6% per annum from the date of the incident dated 18.01.2018 till the date of order.

2. That, the learned Tribunal further imposed a condition no.17, total amount of compensation of Rs.8,00,000/- to be paid including interest by the Railway

Administration as stated above. Both the petitioners/claimants are entitled to withdraw 10%-10% of their respective shares and the remaining 90%-90% amount shall be kept in the fixed deposit of the Nationalize Bank for eight years for the benefit of petitioners and permitted the claimants to withdraw the interest on its monthly as per their convenience.

3. That, the petitioners/claimants filed this petition challenging to set-aside the condition no.17 of the impugned judgment dated 25.01.2022 and directing the Tribunal to release the amount which has been deposited in the Nationalize Bank in favour of the petitioners.

4. On perusal of the petition, it is clear that the deceased Neetu Patel is the daughter of the petitioners/claimants and by the date of incident i.e. 17.01.2018, the claimants are 45 and 44 years, now they are nearer to 50 years and starts ailments and need to spend some money for their essential needs, therefore, they filed the present petition for setting aside the condition as stated above and directing the Tribunal to release the amount which has been fixed in the Nationalize Bank.

5. The point for determination:

"Whether there is any merit in the petition to allow ?"

6. Admittedly that the Tribunal has no such jurisdiction in case where the claimants are major, who are none other than the parents of the deceased. This condition no.17 is incorporated by the Tribunal is unwarranted and uncalled for in the eye of law. The claimants who are the parents of the deceased and nearer to the age of 50 years have every right to utilize the amount in any manner, as they like.

7. The learned counsel for the respondent/Railway has placed reliance in para-23 of *General Manager Kerala State Road Transport Corporation Trivandrum Vs. Sussamma Thomas (Mrs.) and others,* (1994) 2 SCC 176, which reads as follows :

> 23. In a case of compensation for death it is appropriate that the Tribunals do keep in mind the principles enunciated by this Court in Union Carbide Corpn. v. Union of India [(1991) 4 SCC 584] in the matter of appropriate investments to safeguard the feed from being frittered away by the beneficiaries owing to ignorance, illiteracy and susceptibility to exploitation. In that case approving the judgment of the Gujarat High Court in Muljibhai Ajarambhai Harijan v. United India Insurance Co. Ltd. [(1982) 1 Guj LR 756] this Court offered the following guidelines: (Guj LR pp. 759-60)"
>
> (i) The Claims Tribunal should, in the case of minors, invariably order the amount of compensation awarded to the

minor be invested in long term fixed deposits at least till the date of the minor attaining majority. The expenses incurred by the guardian or next friend may, however, be allowed to be withdrawn;

(ii) In the case of illiterate claimants also the Claims Tribunal should follow the procedure set out in (i) above, but if lump sum payment is required for effecting purchases of any movable or immovable property such as, agricultural implements, rickshaw, etc., to earn a living, the Tribunal may consider such a request after making sure that the amount is actually spent for the purpose and the demand is not a ruse to withdraw money;

(iii) In the case of semi-literate persons the Tribunal should ordinarily resort to the procedure set out at (i) above unless it is satisfied, for reasons to be stated in writing, that the whole or part of the amount is required for expanding and existing business or for purchasing some property as mentioned in (ii) above for earning his livelihood, in which case the Tribunal will ensure that the amount is invested for the purpose for which it is demanded and paid;

(iv) In the case of literate persons also the Tribunal may resort to the procedure indicated in (i) above, subject to the relaxation set out in (ii) and (iii) above, if having regard to the age, fiscal background and strata of society to which the claimant belongs and such other considerations, the Tribunal in the larger interest of the claimant and with a view to ensuring the safety of the compensation awarded to him thinks it necessary to do order;

(v) In the case of widows the Claims Tribunal should invariably follow the procedure set out in (I) above;

(vi) In personal injury cases if further treatment is necessary the Claims Tribunal on being satisfied about the same, which shall be recorded in writing, permit withdrawal of such amount as is necessary for incurring the expenses for such treatment;

(vii) In all cases in which investment in long term fixed deposits is made it should be on condition that the Bank will not permit any loan or advance on the fixed deposit and interest on the amount invested is paid monthly directly to the claimant or his guardian, as the case may be;

(viii) In all cases Tribunal should grant to the claimants liberty to apply for withdrawal in case of an emergency. To meet with such a contingency, if the amount awarded is substantial, the Claims Tribunal may invest it in more than one Fixed

> Deposit so that if need be one such F.D.R. can be liquidated."
>
> These guidelines should be borne in mind by the Tribunals in the cases of compensation in accident cases.

8. That the above cited decision is not applicable to the present facts of this case and it applied if any of the claimants are minor, the above decision should follow by all the Tribunals in case of compensation of accident case.

9. A judgment of Hon'ble Apex Court in the case of *H.S. Ahammed Hussain and Another Vs. Irfan Ahammed,* (2002) 6 SCC 52, relevant para-8 reads as follows :

> 8. .....In the facts and circumstances of the present case, we are of the view that the amount of compensation awarded in favour of the mothers should not be kept in fixed deposit in a nationalised bank.....

10. In the light of above said judgments, no restriction can be imposed on the rights of an adult to claim compensation amount deposited in their names by the Railways.

11. In the facts and circumstances of the case, the amount of compensation awarded in favour of the parents of the deceased should not be kept in fixed deposit and this deposited money need for them for their necessities.

12. Therefore, the petition is allowed, the petitioners/claimants in the present petition near to about 50 years. Hence, the condition imposed in para no.17 of the impugned judgment dated 25.01.2022 is unwarranted and uncalled for in the eye of law and is liable to be set-aside and the total compensation amount is directed to be released in favour of the petitioners within a period of four weeks from the date of this order.

13. Accordingly, the petition is allowed.

Petition allowed

I.L.R. 2024 M.P. 112

Before Mr. Justice Hirdesh

SA No. 1258/2021 (Indore) decided on 15 September, 2023

SULEMAN …Appellant

Vs.

NARENDRA KUMAR …Respondent

***A. Transfer of Property Act (4 of 1882), Section 54 and Registration Act (16 of 1908), Section 17 & 49 – Sale of Immovable Property* – Held – Apex Court concluded that transfer of immovable property by way of sale can only**

be by a deed of conveyance (sale deed) – In absence of a deed of conveyance (duly stamped and registered as required by law) no right, title or interest in a immovable property can be transferred – An agreement to sell does not create any right or title in favour of the intending buyer. (Para 9 & 12)

क. सम्पत्ति अन्तरण अधिनियम (1882 का 4), धारा 54 एवं रजिस्ट्रीकरण अधिनियम (1908 का 16), धारा 17 व 49 – स्थावर संपत्ति का विक्रय – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया है कि विक्रय द्वारा स्थावर संपत्ति का अंतरण केवल हस्तांतरण पत्र (विक्रय विलेख) द्वारा ही किया जा सकता है – हस्तांतरण–पत्र (विधि द्वारा अपेक्षित सम्यक् रूप से स्टांपित एवं पंजीकृत) की अनुपस्थिति में स्थावर संपत्ति में का कोई भी अधिकार, हक या हित अंतरित नहीं किया जा सकता – विक्रय–करार आशयित क्रेता के पक्ष में कोई अधिकार या हक सृजित नहीं करता।

***B. Specific Relief Act (47 of 1963), Section 34 and Limitation Act (36 of 1963), Schedule Part II, Clause 54 – Limitation* – Held – For specific performance of a contract, the period of limitation is 3 yrs. from the date fixed for performance or if no such date is fixed, when the plaintiff has notice that performance is refused. (Para 15)**

ख. विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 34 एवं परिसीमा अधिनियम (1963 का 36), अनुसूची भाग II, खंड 54 – परिसीमा – अभिनिर्धारित – संविदा के विनिर्दिष्ट पालन के लिए परिसीमा, पालन के लिए नियत तिथि से या जहां ऐसी कोई तिथि नियत नहीं है, वादी को पालन से इंकार की सूचना से 3 वर्ष की अवधि है।

Cases referred :

(2010) 8 SCC 383, JT 2011 (12) SC 654, (2001) 8 SCC 584.

Murtuza Bohra, for the appellant.
Burhanuddin Azad, for the respondent.

O R D E R

HIRDESH, J.:- Heard on the question of admission.

This present second appeal is filed by the appellant/plaintiff under Section 100 of the Code of Civil Procedure (hereinafter referred to as 'CPC') against the judgment and decree dated 19.02.2021 passed by the learned II Additional District Judge, Kukshi, district Dhar in Regular Civil Appeal No.3A/2019 affirming the judgment and decree dated 29.11.2018 passed by the learned Civil Judge, Class-II, Kukshi, district Dhar in civil suit no.200001A/2013 whereby the plaintiff/appellant's suit for specific performance of contract and permanent injunction has been dismissed.

2. The brief facts of the case is that the plaintiff/appellant filed a civil suit for declaration of title and permanent injunction with respect to plot no.20

Section E, 40 x 50 sq ft. situated at Survey Nos.244/2, 244/6, 244/7, 244/8 total area 3.418 sq.ft at Kukshi, district Dhar against the respondent. It is further pleaded that late Sukhdev father of the defendant executed one sale deed dated 09.04.1990 with respect to the suit property in favour of the plaintiff after receiving the total sale consideration and delivered the possession of the suit property to the plaintiff/appellant. Since then the plaintiff is in possession of the suit property. One notice was also issued for demand of diversion tax to the plaintiff. After some time the defendant refused to honour the agreement and intimidated to sell the land to the third party. Thereafter the plaintiff/appellant filed a civil suit and prayed for grant of permanent injunction and declaring the title of the suit property.

3. The respondent has denied the averments of the plaint in the written statement and pleaded that his father never executed the sale deed in respect of the suit property in favour of the plaintiff and that deed was forged and his father never delivered the possession of the suit property in favour of the plaintiff and the defendant is continuously in possession of the suit property and prays for dismissal of the suit. The trial Court after framing the issues and recording evidence of both the parties had dismissed the suit. Being aggrieved by the said judgment and decree the appellant/plaintiff preferred an appeal before the first appellate Court and the first appellate Court vide the impugned judgment and decree affirmed the judgment and decree passed by the trial Court. Against the impugned judgment and decree of the first appellate Court, the present appeal has been filed.

4. Learned counsel for the appellant submitted that the judgment and decree passed by both the Courts below are illegal, not based on proper appreciation of evidence, failed to consider the oral and documentary evidence produced by the plaintiff/appellant. The impugned judgment is perverse in fact and law, therefore, deserves to be set aside. He further submitted that he filed a suit for declaration and injunction in respect of suit property, but the trial Court in para 1 of the judgment wrote this suit is filed for specific performance and permanent injunction, therefore, the findings of both the Courts below are perverse and against the evidence available on record. In the light of the aforesaid, learned counsel for the appellant submits that the appeal deserves to be admitted on the substantial questions of law proposed by the appellant.

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

6. The first point argued by the learned counsel for the appellant is that he filed a suit for declaration and permanent injunction in respect of the suit property, but the trial Court in his judgment in para 1 wrote that this suit is filed for specific performance and permanent injunction, so the trial Court has drawn wrong inference in respect of the suit filed by the appellant/plaintiff, but on perusal of the

first appellate Court judgment, this contention is elaborately discussed in para 21 by holding that this error is not material and no prejudice will be caused to the appellant/plaintiff.

7. Learned counsel for the appellant argued that the appellant/plaintiff filed suit for declaration of the suit property and submitted that father of the defendant executed a sale deed on 09.04.1990 in favour of the plaintiff.

8. On perusal of the document Ex.P-1 this document is an agreement to sell and not a sale deed and it is an unregistered document.

> Section 54 defines the "Sale" of immovable property.-Sale is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.
>
> **Sale how made -** Such transfer, in the case of tangible immovable property of value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.
>
> In the case of tangible immovable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property."

9. In the case of *Meghmala Vs. G.Narasimha Reddy* reported in (2010) 8 SCC 383 it is held that an agreement to sell does not create any right or title in favour of the intending buyer. In the case of *Suraj Lamp and Industries Pvt.Ltd. Vs. State of Haryana* reported in JT 2011 (12) SC 654 it is held that transfer of immovable property by way of sale can only be by a deed of conveyance (sale deed). In the absence of a deed of conveyance (duly stamped and registered as required by law) no right, title or interest in an immovable property can be transferred.

10. Section 17 of the Registration Act, 1908 also provides the registration of document. Section 17 reads as under:-

> **17. Documents of which registration is compulsory.—**(1) The following documents shall be registered, if the property to which they relate is situate in a district in which, and if they have been executed on or after the date on which, Act No. XVI of 1864, or the Indian Registration Act, 1866, or the Indian Registration Act, 1871, or the Indian Registration Act, 1877, or this Act came or comes into force, namely:—
>
> (a) instruments of gift of immovable property;
>
> (b) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest,whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property;

(c) non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest; and

(d) leases of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent;

(e) non-testamentary instruments transferring or assigning any decree or order of a Court or any award when such decree or order or award purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property:

11. Section 49 of the Registration Act, 1908 reads as under:-

"49. Effect of non-registration of documents required to be registered.—No document required by section 17 [or by any provision of the Transfer of Property Act, 1882 (4 of 1882)], to be registered shall—

(a) affect any immovable property comprised therein, or

(b) confer any power to adopt, or

(c) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered:

[Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882 (4 of 1882), to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877 (3 of 1877) or as evidence of any collateral transaction not required to be effected by registered instrument.]

12. So on perusal of the provisions of Section 54 of the Transfer of Property Act, Sections 17 and 49 of the Registration Act it is clear that no right, title or interest in immovable property can be transferred without registration of the sale deed.

13. Learned counsel for the appellant's contention that it is a sale deed as per the above discussion is not found to be correct. In view of the above provisions it is found that it is only an agreement to sell and this document Ex.P-1 does not confer any right, title or interest to the plaintiff/appellant.

14. Learned counsel for the appellant submits that the Courts below erred in holding that the suit was time barred. Ex.P-1 was executed between the parties on 09.04.1990 and on perusal of the pleadings it is never found that the

plaintiff was ready and willing for performance of the sale deed in respect of the suit property and could not notice the respondent/defendant to execute the sale deed in favour of the plaintiff.

15. Clause 54 of PART II of The Schedule of the period of Limitation under the Limitation Act, 1963 provides that for specific performance of a contract the period of limitation is three years from the date fixed for performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused.

16. In the present case, plaintiff had not adduced any evidence that he gave notice to the defendant for executing the sale deed in favour of the plaintiff and he was ready and willing for performance of the sale deed in respect of the suit property. So, the Courts below have rightly held that the suit is time barred.

17. Learned counsel for the appellant further submitted that both the Courts below have erred that the plaintiff is not in possession of the suit property. In the present case, both the Courts below have recorded finding that plaintiff is not in possession of the suit property. The concurrent findings recorded by the Courts below are based on proper appreciation and assessment of the oral and documents on record.

18. In the case of *Mohanlal Vs. Nihal Singh* reported in (2001) 8 SCC 584 the Hon'ble Apex Court held that the question of possession of the suit land is essentially one of the fact.

19. The trial Court as well as the first appellate Court on appreciation of oral and documentary evidence on record declined to accept the case of the plaintiff that he was in possession of the suit property. The trial Court has recorded a positive finding based on the documents and oral evidence led by the defendant that defendant is in possession of the suit property continuously. The first appellate Court which is the final Court of fact has affirmed the finding of the trial Court regarding the defendant's possession over the suit land. The question raised before this Court relating to possession there is hardly any scope of interference in the finding of possession concurrently recorded by the Courts below within the limited parameters of Section 100 of the CPC by this Court.

In such circumstances, no substantial question of law arises for consideration in this present appeal. The appeal being devoid of any merit is accordingly dismissed. No order as to costs.

Appeal dismissed

I.L.R. 2024 M.P. 118

Before Mr. Justice Vijay Kumar Shukla

CRA No. 7453/2023 (Indore) order passed on 31 August, 2023

KETAN …Appellant

Vs.

STATE OF M.P. & ors. …Respondents

***A. Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (33 of 1989), Section 14-A(2) – Second Criminal Appeal – Maintainability* – Held – After rejection or withdrawal of criminal appeal before this Court and approaching the Special Court for grant of bail with changed circumstances, the order passed by Special Court is a fresh order on merit and therefore same can be challenged u/S 14–A(2) by filing appeal before this Court – Mere mentioning of criminal appeal as second, third or fourth would not change the right of applicant to challenge the fresh order – Appeal maintainable. (Paras 20 to 22)**

क. अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम (1989 का 33), धारा 14–A(2) – द्वितीय दाण्डिक अपील – पोषणीयता – अभिनिर्धारित – इस न्यायालय के समक्ष से दाण्डिक अपील अस्वीकार किये जाने अथवा वापस लिये जाने के पश्चात् तथा बदली हुई परिस्थितियों के साथ जमानत प्रदान किये जाने के लिए विशेष न्यायालय के समक्ष जाने, विशेष न्यायालय द्वारा पारित आदेश गुणदोषों पर एक नया आदेश है एवं इसलिए उक्त को धारा 14–A(2) के अंतर्गत इस न्यायालय के समक्ष अपील प्रस्तुत कर चुनौती दी जा सकती – मात्र दाण्डिक अपील को द्वितीय, तृतीय अथवा चतुर्थ के रूप में उल्लिखित करना, नये आदेश को चुनौती देने के आवेदक के अधिकार को परिवर्तित नहीं करेगा – अपील पोषणीय।

***B. Interpretation of Statute – Non-Obstante Clause – Effect* – Held – A *non-obstante* clause is a legislative device employed by competent legislature to give overriding effect in case of any conflict or inconsistency over provision of same Act or other Acts – Its purpose is to provide the way for full operation of enacting provision without any impediment or obstruction of any provisions of same Act or any other Act – Its main object is to provide full operation of the Act. (Paras 15 to 19)**

ख. कानून का निर्वचन – सर्वोपरि खंड – प्रभाव – अभिनिर्धारित – सर्वोपरि खंड एक विधायी उपकरण है जो कि समान अधिनियम अथवा अन्य अधिनियमों के उपबंध पर किसी विरोध अथवा असंगति के प्रकरण में अध्यारोही प्रभाव देने के लिए सक्षम विधायिका द्वारा नियोजित किया जाता है – इसका प्रयोजन समान अधिनियम अथवा किसी अन्य अधिनियम के किसी भी उपबंध की कोई अड़चन अथवा बाधा के बिना अधिनियमित उपबंध के पूर्ण प्रवर्तन हेतु मार्ग उपबंधित करना है – इसका मुख्य उद्देश्य अधिनियम का पूर्ण प्रवर्तन उपबंधित करना है।

Cases referred:

CRA No. 1502/2023, CRA No. 4668/2017 decided on 05.12.2017, Criminal Appeal No. 1957/2022 (Chhatisgarh High Court) (DB), Criminal Appeal No. 1797/2022 (Chhattisgarh High Court), AIR 1984 SC 1022, AIR 2005 SC 1605.

Mitesh Jain, for the appellant.
Tarun Pagare, P.P. for the respondent/State.

O R D E R

VIJAY KUMAR SHUKLA, J.: The present criminal appeal is filed under Section 14-A(2) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred as **POA Act)** r/w Section 439 of Cr.P.C.

2. Counsel for the State raised preliminary objection regarding maintainability of the appeal with the contention that the 2nd Criminal Appeal under Section 14-A(2) of POA Act once dismissed is not maintainable in view of the judgment passed by Coordinate Bench at Gwalior in *Criminal Appeal No. 1502/2023 (Neeraj Verma vs. State of M.P. & Anr.)* . He referred the para - 6 & 7 of the said judgment which is reproduced as under :-

> 6. Once an appeal is dismissed, the appellant would have to approach the Special Court or the Exclusive Special Court afresh for an order of bail. While entertaining such a second application, the learned Court below can pass an order granting bail, if it finds a change in circumstance. The constraint of an order passed by the High Court under 438 or 439 baring the inferior Court from entertaining an application for bail in line with judicial propriety, will not apply in the case of a fresh application under the Special Act. Even though the High Court may have dismissed an appeal against the previous order passed by the learned Court below rejecting the application for bail of the accused, a change in circumstance demonstrated by the accused before the learned trial Court does not bar it from entertaining the fresh application.
>
> 7. Thus, this Court finds that the High Court cannot entertain an application under section 438 or 439 Cr.P.C. for an offense under the Special Act as that authority has been taken away from the High Court impliedly by Section 14A (2) of the Special Act which makes the High Court a Court of Appeal which can only examine the correctness of an order passed by the learned Court below under section 438 or 439 for an offence under the Special Act. This Court is also of the opinion as mentioned hereinabove that a second application for grant of bail by the accused before

> the Special Court or the Exclusive Special Court is maintainable on changed circumstances when demonstrated by the accused and the trial Court shall not be bound by the fact that its previous order of rejection has been approved of by the High Court under its appellate jurisdiction.

3. This Court in the case of *Neeraj* (supra) held that the High Court cannot entertain an application under Section 438 or 439 Cr.P.C. for an offence under the Special Act as that authority has been taken away from the High Court impliedly by Section 14A(2) of the Special Act which makes the High Court a Court of Appeal which can only examine the correctness of an order passed by the learned Court below under Section 438 or 439 for an offence under the Special Act. It is further held that this Court is of the opinion as mentioned hereinabove that a second application for grant of bail by the accused before the Special Court or the Exclusive Special Court is maintainable on changed circumstances when demonstrated by the accused and the trial Court shall not be bound by the fact that its previous order of rejection has been approved of by the High Court under its appellate jurisdiction.

4. It is argued that the applicant had earlier approached this Court by filing a criminal appeal and, therefore, the second criminal appeal though it is titled as First Criminal Appeal cannot be entertained.

5. Per contra, counsel for the applicant submits that in the light of the observations made by this Court in the case of *Neeraj* (supra), the applicant has filed an application before the trial Court on the changed circumstances and the trial Court has rejected the application by the impugned order and the trial Court has passed a fresh order and, therefore, this Court can examine the validity of the said order and the appeal under Section 14-A(2) of the Act has to be treated as First Criminal Appeal and this Court has to examine the order on merit.

6. In support of their submissions, they referred an order passed by Coordinate Bench at Indore in the case of *Ramu @ Ramlal vs. State of M.P. (Criminal Appeal No. 4668/2017 decided on 05th December 2017)* and also a judgment passed by the Division Bench of Chhatisgarh High Court in Criminal Appeal No. 1957/2022.

7. The POA Act was promulgated which is an Act to prevent the Commission of offences of atrocities against the members of the Scheduled Castes and the Scheduled Tribes, to provide for Special Courts and Exclusive Special Courts for the trial of such offences and for the relief and rehabilitation of the victims of such offences and for matters connected therewith or incidental thereto, but it had no provision of appeal against the order granting or rejecting bail.

8. The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Amendment Act, 2015 was brought into force with effect from 26-1- 2016 by which the extensive amendment was made in the Act. Section 14 of theAct provides for Special Court and Exclusive Special Court with power and jurisdiction to try the offences under the Act and further, power to directly take cognizance of the offence under the Act was introduced. Section 14A was also introduced with effect from 26-1-2016 which provides for appeals from any judgment, sentence or order, not being an interlocutory order, of a Special Court or an Exclusive Special Court, to the High Court both on facts and on law. Sub-section (2) of Section 14A further provides that an appeal shall lie to the High Court against an order of the Special Court or the Exclusive Special Court granting or refusing bail. For the sake of convenience, Section 14A of the Act needs to be noted here which states as under: -

> **"14A Appeals**.—(1) Notwithstanding anything contained in the Code of Criminal Procedure,1973 (2 of 1974), an appeal shall lie, from any judgment, sentence or order, not being an interlocutory order, of a Special Court or an Exclusive Special Court, to the High Court both on facts and on law.
>
> (2) Notwithstanding anything contained in subsection (3) of section 378 of the Code of Criminal Procedure, 1973 (2 of 1974), an appeal shall lie to the High Court against an order of the Special Court or the Exclusive Special Court granting or refusing bail.
>
> (3) Notwithstanding anything contained in any other law for the time being in force, every appeal under this section shall be preferred within a period of ninety days from the date of the judgment, sentence or order appealed from:
>
> Provided that the High Court may entertain an appeal after the expiry of the said period of ninety days if it is satisfied that the appellant had sufficient cause for not preferring the appeal within the period of ninety days:
>
> Provided further that no appeal shall be entertained after the expiry of the period of one hundred and eighty days.
>
> (4) Every appeal preferred under sub-section (1) shall, as far as possible, be disposed of within a period of three months from the date of admission of the appeal."

9. After hearing both the parties, the question arises for consideration that whether the present appeal titled as First Criminal Appeal or Second Criminal Appeal or Third Criminal Appeal or Fourth Criminal Appeal or repeated Criminal are maintainable before this Court under Section 14-A(2) of the Act after approaching the trial Court by filing fresh application with changed circumstances.

10. In the case of *Neeraj* (supra), Coordinate Bench has held that the Second Criminal Appeal is not maintainable before the Court, but Second Application for grant of bail by the accused before the Special Court or the Exclusive Special Court is maintainable on changed circumstances when demonstrated by the accused and the trial Court shall not be bound by the fact that its previous order of rejection has been approved by the High Court under its appellate jurisdiction. Thus, in the case of *Neeraj,* the Court has clearly granted liberty to the accused to apply afresh before the Special Court with the changed circumstances and the Special Court has to pass fresh order without being influenced by the rejection of the application by the High Court. Admittedly, in the present appeal, the Appellant has filed an application before the Trial Court after approaching this Court and the trial Court has passed fresh order which is sought to be challenged in the present Criminal Appeal. Therefore, the question arises that whether the Appellant can again approach this Court under Section 14-A(2) of the Act or not.

11. Before Chhattisgarh High Court in the case of *Dushyant Pandey vs. State of Chhattisgarh (Criminal Appeal No. 1797 of 2022),* the following question of law was under consideration *:*

> "Firstly, whether if an appeal against an order passed by a Special Court rejecting an application under Section 439 of CrPC, has been decided on merits or otherwise by this Court, the subsequent appeal under any change circumstances is maintainable before this Court?
>
> If yes, whether this Court can entertain an appeal after the period of limitation as provided under the 2nd proviso clause of the Section 14A of the Special Act?"

12. The aforesaid question of law was answered in para-31 as under:-

> 1. Once an appeal under Section 14A of the POA Act against the order passed by the Special Court rejecting the application under Section 439 of the CrPC is decided on merits or otherwise by this Court, subsequent appeal under change of circumstances would not be directly maintainable under Section 14A of the POA Act before this Court even on change of circumstances and remedy to the accused, if any, is to file an application before the Special Court for grant of bail.
>
> 2. Since the answer to the first stated question is in negative, it would not be expedient to answer the second stated question.

13. Thus, the view taken by this Court in the case of *Neeraj* and by the Chhattisgarh High Court in the case of *Dushyant Pandey* is same that once the appeal under the Act has been dismissed, the Second Criminal Appeal would not

be maintainable. However, the remedy is available to the accused is to file an application before the Special Court for grant of bail.

14. Section 14A(2) of the POA Act begins with *non obstante* clause "notwithstanding anything contained in sub-section (3) of section 378". It would be appropriate to notice the meaning and purport of "*non obstante* clause."

15. A *non obstante* clause is generally incorporated in a statute to give overriding effect to a particular section or the statute as a whole.The meaning of' non obstante clause' has been explained in the Advanced Law Lexicon by P. Ramnath Aiyar as follows: -

> "Non obstante clause. A clause in a statute which overrides all provisions of the statute. It is usually worded :
>
> 'Notwithstanding anything in....' Need not always have effect of cutting down clear terms of enactment.
> Enacting part when clear can Control non obstante clause.
>
> A clause used in public and private instruments intended to preclude, in advance, any interpretation contrary to certain declared objects or purposes."

16. A clause beginning with 'notwithstanding anything contained in this Act or in some particular provision in the Act or in some particular Act or in any law for the time being in force', is sometimes appended to a section in the beginning, with a view to give the enacting part of the section in case of conflict an overriding effect over the provision or Act mentioned in the *non obstante* clause. It is equivalent to saying that in spite of the provision or Act mentioned in the *non obstante* clause, the enactment following it will have its full operation or that the provisions embraced in the non obstante clause will not be an impediment for the operation of the enactment. Thus a *non obstante* clause may be used as a legislative device to modify the ambit of the provision or law mentioned in the *non obstante* clause or to override it in specified circumstances. (See page 364 of Principles of Statutory Interpretation by Justice G.P. Singh, 12th Edition 2010.)

17. The nature and object of *non obstante* clause came to be considered by their Lordships of the Supreme Court in the matter of *Union of India and another v. G.M. Kokil and others* AIR 1984 SC 1022 in which it has been held that a *non obstante* clause is a legislative device employed to give overriding effect to certain provisions over some contrary provisions that may be found either in the same enactment or some other enactment to avoid the operation and effect of all contrary provisions.

18. Similarly, in the matter of *State of Bihar and others v. Bihar M.S.E.S.K.K. Mahasangh and others* AIR 2005 SC 1605, the effect of *non obstante* clause has been explained by their Lordships of the Supreme Court in paragraph 47 of the report as under: -

> "47. Normally the use of phrase by the Legislature in a statutory provision like 'notwithstanding anything to the contrary contained in this Act' is equivalent to saying that the Act shall be no impediment to the measure (See Law Lexicon words 'notwithstanding anything in this Act to the contrary). Use of such expression is another way of saying that the provision in which the *non obstante* clause occurs usually would prevail over other provisions in the Act. Thus, *non obstante* clauses are not always to be regarded as repealing clauses nor as clauses which expressly or completely supersede any other provision of the law, but merely as clauses which remove all obstructions which might arise out of the provisions of any other law in the way of the operation of the principle enacting provision to which the *non obstante* clause is attached. (See Bipathumma and others vs. Mariam Bibi; (1966(1) Mysore Law Journal page 162 and at page 165."

19. Thus, it is quite vivid that a *non obstante* clause is a legislative device which is employed by the competent Legislature to give overriding effect in case of any conflict or inconsistency over the provisions of the same Act or other Acts. The purpose of *non obstante* clause is to provide the way for full operation of enacting provision without any impediment of obstruction of any provisions of the same Act or any other Act. The main object is to provide full operation of the Act.

20. Admittedly, in the present case, the appellant has applied before the Special Court by filing application with changed circumstances for grant of bail and the said application has been dismissed by the impugned order. From reading the entire provisions of Section 14-A of the Act and as herein-above discussed, the provision is with *non obstante* clause and being a special Act has overriding effect on the provisions under the other law. It has been provided under Sub-Section (2) of Section 14-A that an appeal shall lie to the High Court against an order of the Special Court or the Exclusive Special Court granting or refusing bail. There is no bar by the legislature under Section 14-A to challenge the fresh order by filing an appeal under Sub-Section (2).

21. Considering the provisions of Section 14-A(2) of the Act that Criminal Appeal is maintainable against an order of the Special Court or the Exclusive Special Court granting or refusing bail, it is an apparent that after rejection or withdrawal of Criminal Appeal before this Court and approaching the Special

Court for grant of bail with the changed circumstances, the order passed by the trial Court is fresh order on merit and, therefore, the same can be challenged under Section 14-A(2) by filing an appeal. Thus, an appeal under Section 14-A(2) of the Act is maintainable against a fresh order passed by the Special Court rejecting the subsequent application for grant of bail irrespective of the fact whether the appeals are mentioned as second, third or fourth. The mere mentioning of Criminal Appeal as second, third or fourth would not change the right of the applicant to challenge the fresh order. The same has to be treated to be first Criminal Appeal and the impugned order can be examined on its own merit.

22. In view of the aforesaid, it is held that appeal is maintainable. The appeal is directed to be listed for hearing for consideration on merit on **05.09.2023.**

Order accordingly

I.L.R. 2024 M.P. 125 (DB)

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

CRA No. 879/2013 (Jabalpur) decided on 18 October, 2023

GOWARDHAN …Appellant

Vs.

STATE OF M.P. …Respondent

***A. Penal Code (45 of 1860), Sections 302, 376(2)(cha), 363, 364, 366 & 201 – Circumstantial Evidence – Theory of Last Seen Together* – Held – Victim was not seen by anyone after she was last seen with appellant – Time duration between missing of the girl and her dead body being found is very less – There is no possibility that girl was with somebody else – It is established that offence has been committed by none other than appellant – Conviction upheld – Appeal dismissed. (Para 14 & 19)**

क. दण्ड संहिता (1860 का 45), धाराएँ 302, 376(2)(cha), 363, 364, 366 व 201 – परिस्थितिजन्य साक्ष्य – अंतिम बार साथ देखे जाने का सिद्धांत – अभिनिर्धारित – पीड़िता को अंतिम बार अपीलार्थी के साथ देखे जाने के पश्चात् उसे किसी के द्वारा नहीं देखा गया था – लड़की के लापता होने एवं उसका शव मिलने के मध्य समय अवधि काफी कम है – ऐसी कोई संभावना नहीं है कि लड़की किसी और के साथ थी – यह स्थापित होता है कि अपराध अपीलार्थी के अलावा किसी अन्य द्वारा कारित नहीं किया गया है – दोषसिद्धि कायम – अपील खारिज।

***B. Penal Code (45 of 1860), Sections 302, 376(2)(cha), 363, 364, 366 & 201 – Medical Evidence – FSL Report – Diatom Test* – Held – Injuries were found on the body of the victim – Doctor has opined regarding suggestive of vaginal penetration and suggested for diatom test – Diatom test**

was got conducted by police authorities which was found positive – Appellant failed to explain the recovery of clothes of deceased at his instance and presence of sperm on the clothes as per FSL – These aspects goes strongly against appellant. (Para 12 & 18)

ख. दण्ड संहिता (1860 का 45), धाराएँ 302, 376(2)(cha), 363, 364, 366 व 201 – चिकित्सीय साक्ष्य – न्यायालयिक विज्ञान प्रयोगशाला प्रतिवेदन – डायटम परीक्षण – अभिनिर्धारित – पीड़िता के शव पर चोटें पाई गई – चिकित्सक ने योनि प्रवेशन के संकेत होने के संबंध में राय दी है तथा डायटम परीक्षण का सुझाव दिया है – पुलिस प्राधिकारीगण द्वारा डायटम परीक्षण संचालित किया गया था जो कि पॉजिटिव पाया गया – अपीलार्थी, उसकी निशानदेही पर मृतिका के कपड़ों की बरामदगी एवं एफएसएल के अनुसार कपड़ों पर वीर्य की मौजूदगी को स्पष्ट करने में असफल रहा – ये पहलू प्रभावशाली रूप से अपीलार्थी के विरूद्ध जाते हैं।

***C. Criminal Practice – Related/Interested Witness* – Held – Statement of interested witness should not be discarded merely because they are relatives of victim. (Para 14 & 16)**

ग. दाण्डिक पद्धति – संबंधित/ हितबद्ध साक्षी – अभिनिर्धारित – हितबद्ध साक्षी के कथन को मात्र इसलिए अस्वीकार नहीं किया जाना चाहिए कि वे पीड़ित के संबंधी हैं।

Cases referred:

(2012) 5 SCC 777, 2023 SCC OnLine SC 1132, 2022 SCC OnLine SC 1440, (2012) 13 SCC 231.

B.S. Khare, for the appellant.
A.S. Baghel, P.P. for the respondent.

J U D G M E N T

The Judgment of the Court was delivered by :

VISHAL MISHRA, J.:- This appeal has been filed by the appellant being aggrieved by the judgment of conviction and order of sentence dated 30.03.2010 passed by the First Additional Sessions Judge, Damoh in S.T.No.115/09, whereby appellant Gowardhan has been convicted under Section 363 of IPC and sentenced to undergo RI for 7 years and fine of Rs.500/-, further convicted under Section 364 of IPC and sentenced to undergo RI for Life and fine of Rs.500,/-, further convicted under Section 366 of IPC and sentenced to undergo RI for 10 years and fine of Rs.500/-, also convicted under Section 376 (2)(cha) of IPC and sentenced to undergo RI for Life and fine of Rs.500/-, as well as under Section 302 of IPC and sentenced to undergo RI for Life with fine of Rs.500/- and also convicted under Section 201 of IPC and sentenced to undergo RI for 7 years and fine of Rs.500/- in default of payment of fine to further undergo RI for six months. All the sentences to run concurrently.

2. It is the case of the prosecution that on 24.01.2009, at about 06:00 PM, the accused along with family members and the deceased (who is 6 years old child) was sitting in the house. After some time, the child went missing. A search was made and her body was found at about 10:00 PM from a well in a field. The matter was reported to the police authority. After recovery of the body, the same was sent for postmortem examination. The postmortem was conducted by Dr. R.S. Prajapati (PW-6) and Dr. Shardha Gangele (PW-15), who have found injuries over the body of the deceased and have given a report (Ex.P/14) wherein they have opined regarding the cause of death to be a cardio- respiratory arrest due to asphyxia as a result of drowning. Further opined that there is evidence of suggestive vaginal penetration and the duration of death was recorded to be within 24 hours. The primary investigation was taken up by the police authority and during which it was found that the accused/appellant was last seen with the deceased, on the basis of which he has been made accused in the case. An FIR was registered for the offences punishable under Sections 363, 364, 366, 376 (2)(cha), 302 and 201 of the IPC in Crime No.27 of 2009 at Police Station-Damoh Dehat, District-Damoh. During the course of investigation, the prosecution has collected the undergarments of the deceased as well as the accused/appellant and they were sent for forensic examination. On report being received, from the Forensic Science Laboratory it was found that the report is suggestive of presence of human sperm on the belongings of the deceased, as well as the accused/appellant. The Diatom Test was got done and the report was found to be positive. The other documents such as spot map, crime detail forms, statement under Section 161 of Cr.P.C. was recorded of several persons. After completion of the investigation, charge-sheet was filed before the concerning Court. The charges were framed in the matter against the accused/appellant. The accused/appellant denied the charges and claimed to be tried.

3. The prosecution has examined as many as 19 prosecution witnesses and has placed on record 26 memos of articles, which were exhibited. Statements of defence witnesses as Ex.D/1 to Ex.D/7 were also recorded. After conclusion of trial, the learned trial Court has found the accused/appellant guilty of committing the offences punishable under Sections 363, 364, 366, 376 (2)(cha), 302 and 201 of the IPC. Accordingly, he was convicted for seven years rigorous imprisonment for offence under section 363 of IPC, life imprisonment for offence under Section 364 of IPC, 10 years RI for offence under Section 366 of IPC, life imprisonment for offence under Section 376(2)(cha) of IPC, again life imprisonment for offence under Section 302 of IPC and seven years rigorous imprisonment for offence under Section 201 of IPC.

4. This appeal has been preferred against the judgment of conviction on the ground that the entire case of the prosecution is based upon circumstantial evidence and the theory of last seen together. There is no direct evidence available

on record against the accused/appellant. It is argued that the prosecution has placed heavy reliance on the statements of witnesses namely Rajaram (PW-1), Shivram Patel (PW-2), Seetarani (PW-3), Narmada Prasad (PW-9), Chintaman (PW-10) and Roshni Bai (PW-19). It has been argued that all the witnesses are family members of the deceased as well as the appellant.They were residing at the same place. Therefore, there is every possibility that the appellant was last seen with the deceased on the day of incident. On the date of incident also, he was sitting with the other family members including the deceased and was seen by other witnesses. Thus, the prosecution placing reliance on the aforesaid witnesses, who implicate him merely on the basis of last seen evidence would not be a ground for convicting him for the offences as he being a family member of the deceased. The second ground, which has been raised is that there are material contradictions and omissions in the statements of the material witnesses. They all being interested witnesses are not consistent with their narrations before the police authority under Section 161 of the Cr.P.C. as well as their statements before the trial Court. Thus, the conviction based upon the statements of interested witness is unwarranted and benefit of contradictions and omissions should have been granted to him. The learned trial Court has placed reliance on the FSL report, which is exhibited as Ex. P/26, which was being proved by PW-17 before the trial Court. It is argued that there is a recovery of clothes i.e. Article-C T-shirt, Article-D underwear of the deceased, Article-F and Article G-1 being the undergarments of the appellant. The aforesaid articles were sent for examination. These articles were recovered from an open place i.e. from a bush. The report dated 14.09.2019 is indicative of the aspect that human sperm was found on Article-D and Article-F, but it does not show that the same belongs to the appellant. In Article-C and Article G-1, no human sperm was found as per the report. Article D, E, F and G human sperm was found. It is argued that once the prosecution has failed to establish this aspect that the sperm which was found on the clothes which has been recovered at the instance of the present appellant contained his sperm only. There cannot be a possibility of conviction of the present appellant for offence punishable under Section 376 of the IPC. The appellant and deceased were known to each, therefore, they were bound to be seen together and they also belonged to the same family. Therefore, the very conviction of the appellant based upon the FSL report and the last seen theory of the prosecution is totally unwarranted. The suspicion however strong it may be, cannot take place of a proof beyond reasonable doubt. The prosecution has failed to establish his case beyond any reasonable doubt. Following the theory itself, the conviction of the appellant could not have been made. Learned counsel appearing for the appellant has argued that despite of material collected by the prosecution and the postmortem being done on the next very date i.e. 25.01.2009. The accused was not taken into custody by the police authority and he has cooperated with the police authorities during the investigation. In view of the aforesaid, he has prayed for acquittal of the accused/appellant.

5. Learned counsel for the State has supported the impugned judgment of conviction and order of sentence. It is argued that there are strong evidences against the present appellant. Rajaram (PW-1), Shivram Patel (PW-2), Seetarani (PW-3), Bahadur Ahirwar (PW-9), Chintaman (PW-10) and Roshni Bai (PW- 19) have given specific statements to the effect that the accused/appellant was last seen with the deceased, when he was sitting in the house with other family members. He has categorically drawn attention of this Court to the statements of Bahadur Ahirwar (PW-9) and Chintama (PW-10), who have specifically narrated that they have seen the accused/appellant taking away the girl child by holding her finger to the fields and when he was asked that where he is taking the child he has stated that he is going to the fields for collecting Chana. It is contended that on the same day when she has not returned, a search was made. Even, Chintaman (PW-10) has asked the accused/appellant regarding the girl itself. He told him that he has left the girl at her house, but she was not there. At 10:00 PM on the same day, when the search was made the clothes of the girl were found floating in well. One Rajaram and Arjun were sent inside the well for searching the girl, where they found the body of the girl which was taken out.The injuries were found on her person as well as in her private parts. She was found dead. The matter was immediately reported to the police authorities. On the next day, the dead body was sent for postmortem examination, which was conducted by PW-6 as well as PW-15. The postmortem was got done on 25.01.2009 at 02:00 pm and the report was given by Dr. R.S. Prajapati (PW-6) as Ex.P/14. He has drawn attention of this Court to the statement of Dr. R.S. Prajapati (PW-6) as well as report Ex.P/14, which is suggesting that the hymen was torn and there was a bleeding from the private parts. There was a vaginal tear and the vagina was filled with blood. He has given an opinion regarding suggestive vaginal penetration and the cause of death is shown to be cardio respiratory arrest due to asphyxia as a result of a drowning and there is evidence of suggestive vaginal penetration. In pursuance to the suggestion given by the doctor regarding diatom test, the same was also got conducted and the report was submitted as Ex.P/25. The report is also positive. It is further contended that the time period between the missing of the girl and the accused being last seen with the girl as well as the recovery of the body is very small, therefore, there cannot be any possibility that the girl was found or seen with anyone else. In fact, none of the witnesses have stated that after she was last seen with the appellant, she was seen anywhere else or with anyone else. Therefore, the time duration between the missing of the girl and recovery of the body is of no help to the appellant.

6. The prosecution has proved its case beyond any reasonable doubt before the learned trial Court. There is sufficient material available on record to complete the chain of circumstances and last seen together theory is suggestive of the fact that the accused is the only person, who has committed the rape and

murder of the child aged about ten years. Learned counsel for the State has argued that the police authorities were investigating into the matter and only on the theory of last seen, the prosecution was required to develop its case after recording the statements of the witnesses, family members and specially the statements of Bahadur Ahirwar (PW-9) and Chintaman (PW-10). After recording of statements of PW-9 and PW-10 under section 161 Cr.P.C. they were sure about this fact that there is every possibility that the appellant has committed the offences, therefore, he was taken into custody in the said case. The learned trial Court has rightly appreciated all the evidence collected during investigation and considering the statements of witnesses has rightly convicted him. The aforesaid argument is of no help to the appellant.

7. Heard learned counsels for the parties and perused the record.

8. The record indicates that the girl got missing on 24.01.2009 between 6:30 PM to 07:30 PM and as per the prosecution story, search of the missing girl was made and during search a dead body of the girl was recovered from the well in a field which belongs to Onkar Kurmi. During the search, when it was found that her clothes were floating in a well two persons namely Rajaram and Arjun were sent inside the well for search of the girl. They found the body of the girl in the well. There were injuries on the body of the girl including the injuries on her private parts. Thereafter, the matter was reported to the police authorities. The police authorities have taken up the matter for preliminary investigation and after taking the body in their custody, sent the same for postmortem examination. The postmortem was conducted by PW-6 and PW- 15, who have given the report Ex.P/14. The report indicates as under:-

> *" In PM of Krishna Bai cause of death is cardio respiratory arrest due to asphyxia as a result of wet drowning. Femur bone preserved for diatom test. There is evidence of suggestive of vaginal penetration.*
>
> *Time pass since death within 24 hours"*

9. Looking to the report, which is given as well as the opinion regarding suggestive vaginal penetration, the police authorities have sent the seized samples for forensic examination. The forensic lab has given the report on 16.09.2009, which was exhibited as Ex.P/26 by PW-17. The report indicates that in Articles D, E-1, F and G-2, human sperm was found and no human sperm was found on the Articles C and D-1. These articles were recovered at the instance of the present appellant. The seizure memo to the aforesaid aspect was exhibited as Ex.P/26.

10. Learned counsel for the appellant has argued that the seizure made by the police authorities is of no help to the prosecution especially in the circumstances, when the seizure witnesses have not supported the prosecution story at the time of

recording of their statements. Learned public prosecutor has contended that although the seizure witnesses have not supported the prosecution story but they have admitted their signatures on the seizure documents which are reflected from Ex.D.1.P.C.D To Ex.D.7.P.C.D. Therefore, virtually this argument advanced is of no help to the accused.

11. The law with respect to seizure witness has been laid down by the Hon'ble Supreme Court in the case of *Ramesh Harijan vs. State of Uttar Pradesh* reported in *(2012) 5 SCC 777.* The Hon'ble Supreme Court has held as under:-

> *" 22.4. The recovery of part of the sheet and white clothes having blood and semen as per the FSL report has been disbelieved by the trial court in view of the fact that Ram Prasad alias Parsadi (PW 5) and Bhikari (PW 10) did not support the prosecution case like other witnesses who did not support the last seen theory. The trial court failed to appreciate that both the said witnesses, Ram Prasad alias Parsadi (PW 5) and Bhikari (PW 10) had admitted their signature/thumb impression on the recovery memo. The factum of taking the material exhibits and preparing of the recovery memo with regard to the same and sending the cut out portions to the serologist who found the blood and semen on them vide report dated 21-3-1996 (Ext. Ka-21) is not disputed. The serological report also revealed that the vaginal swab which was taken by the doctor was also human blood and semen stained.*
>
> *23. It is a settled legal proposition that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examine him.*
>
> *" 6. ... The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent that their version is found to be dependable on a careful scrutiny thereof."*
>
> *[Vide Bhagwan Singh v. State of Haryana [(1976) 1 SCC 389 : 1976 SCC (Cri) 7 : AIR 1976 SC 202] ; Rabindra Kumar Dey v. State of Orissa [(1976) 4 SCC 233 : 1976 SCC (Cri) 566 : AIR 1977 SC 170] ; Syad Akbar v. State of Karnataka [(1980) 1 SCC 30 : 1980 SCC (Cri) 59 : AIR 1979 SC 1848] and Khujji v. State of MP [(1991) 3 SCC 627 : 1991 SCC (Cri) 916 : AIR 1991 SC 1853] (SCCp. 635, para 6)]*
>
> *24. In State of U.P. v. Ramesh Prasad Misra [(1996) 10 SCC 360 : 1996 SCC (Cri) 1278 : AIR 1996 SC 2766] (SCCp. 363, para 7) this Court held that evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or*

the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon. A similar view has been reiterated by this Court in Balu Sonba Shinde v. State of Maharashtra [(2002) 7 SCC 543 : 2003 SCC (Cri) 112] , Gagan Kanojia v. State of Punjab [(2006) 13 SCC 516 : (2008) 1 SCC (Cri) 109] ; Radha Mohan Singh v. State of U.P. [(2006) 2 SCC 450 : (2006) 1 SCC (Cri) 661 : AIR 2006 SC 951] , Sarvesh Narain Shukla v. Daroga Singh [(2007) 13 SCC 360 : (2009) 1 SCC (Cri) 188 : AIR 2008 SC 320] and Subbu Singh v. State [(2009) 6 SCC 462 : (2009) 2 SCC (Cri) 1106] ."

" 83. Thus, the law can be summarised to the effect that the evidence of a hostile witness cannot be discarded as a whole, and relevant parts thereof which are admissible in law, can be used by the prosecution or the defence. "

[See also C. Muniappan v. State of T.N. [(2010) 9 SCC 567 : (2010) 3 SCC (Cri) 1402 : AIR 2010 SC 3718] (SCC p. 596, para 83) and Himanshu v. State (NCT of Delhi) [(2011) 2 SCC 36 : (2011) 1 SCC (Cri) 593] .]

12. Now the other circumstances are required to be seen. Vide Exhibit P/8, clothes and undergarments of the girl were recovered. Exhibit P/12 is the recovery of clothes of the present appellant at his instance. Both the recovery memos were duly signed by the independent witnesses. The aforesaid seizure memos are clearly indicative of the fact that the undergarments, which belonged to deceased as well the appellant were recovered from the bushes from the open place at the instance of the present appellant. The statement of Narmada Prasad (PW-4) being an independent witness of the seizure memo was recorded. Although he has not supported the prosecution story and has turned hostile, but he has admitted his signatures on the documents i.e. seizure memo Ex.P/8 and Ex.P-12. Even the Investigating Officer (PW-17) B.R. Chouhan, S.O. has proved the seizure at the instance of the present appellant. Therefore, the arguments advanced with respect to the recovery of these articles from an open place is of no help to the appellant especially in the circumstance that seized articles were sent for forensic examination and the reports were found to be positive and was exhibited as Ex.P/26. The diatom test was conducted by the prosecution and the report was marked as Ex.P/25. The diatom report opines as under:-

" Articles Bone and water are found positive for diatom test."

13. This goes to show that the girl child was alive when she was thrown in the well. The appellant's counsel has failed to explain the recovery of clothes of the deceased at his instance and the presence of sperm on the clothes as per the FSL.

This aspect strongly goes against the appellant/accused.

14. The other argument is that the appellant as well as the deceased are the family members and there was every possibility that they may be seen together on several occasions is of no help to the appellant for the reason that a specific statement has been given by the prosecution witnesses PW-1, PW-2, PW-3, PW-4, PW-9 and PW-10. All the witnesses are family members of the deceased as well as the appellant. If the statements of all the aforesaid witnesses are seen, they are consistent in their statements as far as the appellant sitting with the deceased in the house is concerned. PW-10 has made a specific statement that he had seen the accused/appellant taking away the girl to the field by holding her finger. He has also asked him as to where he is taking the girl. He had replied that he is taking her to the fields for collecting Chana. The approximate time, when he was last seen with the deceased is reflected from the statement of PW-10, which is about 06:40 PM in the evening while he was returning back in 15-20 minutes. The statement of Chintaman (PW-10) further shows that the girl was not found in the house at about 07:30 PM i.e. immediately within an hour, when the search was made and she was not found. The accused/appellant was also asked about her, he has stated that he has left the girl in the house, but she was not available in the house and no other material is available on record by the defence or by the appellant to show that anybody else has seen the girl after she has left the house. During the search on the same day at about 10:00 PM the body of the girl was found in a well and the two persons namely Rajaram and Arjun were asked to go inside the Well to take out the body. The injuries were found on the person of the girl, therefore, it cannot be said that the deceased was not with the accused/appellant. Statement of Bahadur Ahirwar (PW-9) supports the case of the prosecution who has given a similar statement to that of Chintaman (PW-10). Bahadur Ahirwar (PW-9) and Chintaman (PW-10) have clarified the aforesaid position. The time duration between missing of the girl and recovery of her dead body is very small. There is defence taken by the accused appellant that the girl was left with somebody else or she was seen with somebody else is of no help as she was not seen by anyone after she was last seen with the accused/appellant. There is nothing on record to demonstrate the same. On the contrary, the statements of PW-9 and PW-10 have clarified the entire position. Thus, there is no doubt with respect to the girl being taken away by the present appellant in the evening at about 06:30 PM or 06:40 PM and thereafter, recovery of body from a Well at about 10:00 PM. When the body of the girl was found in the Well, the matter was immediately reported to the police authorities, which is also being proved by various documents before the trial Court. The Investigating Officer has conducted the investigation in a proper manner and by placing material before the Court which are exhibited as Ex.P/7 to Ex.P/10 have proved that the investigation is being carried out in a proper manner.

The statements of PW-9 and PW-10 have remained consistent throughout and there are no material contradictions in the statement as far as they had last seen the deceased with the appellant. Merely arguing that they are all relatives of the appellant and fall under the category of interested witnesses is of no help to the appellant because even the statements of interested witnesses cannot be discarded.

15. The Hon'ble Supreme Court in the case of R. Sreenivasa vs State of Karnataka reported in 2023 SCC OnLine SC 1132 has considered the aspects of last seen evidence and has held as under:-

> *" 15. The burden on the accused would, therefore, kick in, only when the last seen theory is established. In the instant case, at the cost of repetition, that itself is in doubt. This is borne out from subsequent decisions of this Court, which we would advert to:*
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> *(a) Kanhaiya Lal v State of Rajasthan, (2014) 4 SCC 715, where it was noted:*
>
> > *12. The circumstance of last seen together does not by itself and necessarily lead to the inference that it was the accused who committed the crime. There must be something 15 more establishing connectivity between the accused and the crime. Mere non-explanation on the part of the appellant, in our considered opinion, by itself cannot lead to proof of guilt against the appellant.'*
> >
> > *(emphasis supplied)*
>
> *(b) Nizam v State of Rajasthan, (2016) 1 SCC 550, the relevant discussion contained at Paragraphs 16-18, after noticing Kashi Ram(supra):*
>
> *'16. In the light of the above, it is to be seen whether in the facts and circumstances of this case, the courts below were right in invoking the " last seen theory". From the evidence discussed above, deceased Manoj allegedly left in the truck DL 1 GA 5943 on 23-1-2001. The body of deceased Manoj was recovered on 26-1-2001. The prosecution has contended that the accused persons were last seen with the deceased but the accused have not offered any plausible, cogent explanation as to what has happened to Manoj.*
>
> *Be it noted, that only if the prosecution has succeeded in proving the facts by definite evidence that the deceased was last seen*

alive in the company of the accused, a reasonable inference could be drawn against the accused and then only onus can be shifted on the accused under Section 106 of the Evidence Act.

17. During their questioning under Section 313 CrPC, the appellant-accused denied Manoj having travelled in their Truck No. DL 1 GA 5943. As noticed earlier, the body of Manoj was recovered only on 26-1-2001 after three 16 days. The gap between the time when Manoj is alleged to have left in Truck No. DL 1 GA 5943 and the recovery of the body is not so small, to draw an inference against the appellants. At this juncture, yet another aspect emerging from the evidence needs to be noted. From the statement made by Shahzad Khan (PW 4) the internal organ (penis) of the deceased was tied with rope and blood was oozing out from his nostrils. Maniya Village, the place where the body of Manoj was recovered is alleged to be a notable place for prostitution where people from different areas come for enjoyment.

18. In view of the time gap between Manoj being left in the truck and the recovery of the body and also the place and circumstances in which the body was recovered, possibility of others intervening cannot be ruled out. In the absence of definite evidence that the appellants and the deceased were last seen together and when the time gap is long, it would be dangerous to come to the conclusion that the appellants are responsible for the murder of Manoj and are guilty of committing murder of Manoj. Where time gap is long it would be unsafe to base the conviction on the " last seen theory" ; it is safer to look for corroboration from other circumstances and evidence adduced by the prosecution. From the facts and evidence, we find no other corroborative piece of evidence corroborating the last seen theory.'

(emphasis supplied)

16. The cautionary note sounded in Nizam (supra) is important. The 'last seen' theory can be invoked only when the same stands proved beyond reasonable doubt. A 3-Judge Bench in Chotkau v State of Uttar Pradesh, (2023) 6 SCC 742 opined as under:

'15. It is needless to point out that for the prosecution to successfully invoke Section 106 of the Evidence Act, they must first establish that there was " any fact especially within the knowledge of the "appellant. ...'

(emphasis supplied)

16. It is a settled proposition of law that the statement of interested witness should not be discarded merely because they are relatives. The Hon'ble Supreme Court in the case of *Md. Jabbar Ali and others vs State of Assam* reported in 2022 SCC OnLine SC 1440 has held as under:-

> *" 55. It is noted that great weight has been attached to the testimonies of the witnesses in the instant case. Having regard to the aforesaid fact that this Court has examined the credibility of the witnesses to rule out any tainted evidence given in the court of Law. It was contended by learned counsel for the appellant that the prosecution failed to examine any independent witnesses in the present case and that the witnesses were related to each other. This Court in a number of cases has had the opportunity to consider the said aspect of related/interested/ partisan witnesses and the credibility of such witnesses. This Court is conscious of the well-settled principle that just because the witnesses are related/interested/partisan witnesses, their testimonies cannot be disregarded, however, it is also true that when the witnesses are related/interested, their testimonies have to be scrutinized with greater care and circumspection. In the case of Gangadhar Behera and Ors. v. State of Orissa (2002) 8 SCC 381, this Court held that the testimony of such related witnesses should be analysed with caution for its credibility.*
>
> *56. In Raju alias Balachandran and Ors. v. State of Tamil Nadu (2012) 12 SCC 701, this Court observed:*
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> *" 29. The sum and substance is that the evidence of a related or interested witness should be meticulously and carefully examined. In a case where the related and interested witness may have some enmity with the assailant, the bar would need to be raised and the evidence of the witness would have to be examined by applying a standard of discerning scrutiny. However, this is only a rule of prudence and not one of law, as held in Dalip Singh [AIR 1953 SC 364] and pithily reiterated in Sarwan Singh [(1976) 4 SCC 369] in the following words: (Sarwan Singh case [(1976) 4 SCC 369, p. 376, para 10)*
>
> *" 10. ... The evidence of an interested witness does not suffer from any infirmity as such, but the courts require as a rule of prudence, not as a rule of law, that the evidence of such witnesses should 13 be scrutinised with a little care. Once that approach is made and the court is satisfied that the evidence of interested witnesses have a ring of truth such evidence could be relied upon even without corroboration. "*
>
> *57. Further delving on the same issue, it is noted that in the case of Ganapathi and Anr. v. State of Tamil Nadu (2018) 5 SCC 549,*

this Court held that in several cases when only family members are present at the time of the incident and the case of the prosecution is based only on their evidence, Courts have to be cautious and meticulously evaluate the evidence in the process of trial."

17. The records further indicate that a Criminal Appeal bearing Cr.A. No.2110 of 2010 was filed by the State authorities seeking enhancement of the punishment being awarded by the learned trial Court. The same came up for hearing on 12.02.2014 and finding no good ground to enhance the sentence of the accused from life imprisonment to death penalty the Division Bench of this Court has dismissed the appeal filed by the State Government. This fact also goes to show the gravity of the offence, which has been committed by the present appellant. The manner in which the offence has been committed on the ten years old child is clearly indicative of the fact that the punishment, which has been awarded to the accused/appellant is just and proper looking to the facts and circumstances of the case.

18. The statements of the doctors, the injuries found on the person of the deceased as well as the medical evidence are required to be seen. The statements of Dr. R.S. Prajapati (PW-6) and Dr. Shardha Gangele (PW-15) are consistent to the effect that the injuries were found on the body. The report which is exhibited as Ex.P/14, is clearly indicative of the aforesaid fact. The cause of death is cardio-respiratory due to asphyxia arrest as a result of drowning in the well. The doctor has also opined regarding suggestive of vaginal penetration and they have suggested for a diatom test. The diatom test was got conducted by the police authorities and the report was submitted as Ex.P/25 and the diatom test report was found to be positive. The Hon'ble Supreme Court in the case of *Shantibhai J. Vaghela and anther vs. State of Gujarat and others* reported in (2012) 13 SCC 231 has considered the effect of diatom test and has held as under:-

" 21. Two other aspects of the matter also need to be dealt with at this stage. In the opinion rendered by the Department of Forensic Medicine, B.J. Medical College, Ahmedabad with regard to cause of death of the two children, as extracted above, it is recorded that " presence of diatoms could not be detected". Relevant literature has been laid before the Court to show that: " diatoms are among the well- known water planktons . Every water body has its own diatom diversity. ... Diatoms are commonly found in water bodies like ponds, lakes, canals and rivers, etc. but their concentration can be low or high in a particular water body, depending upon the season.... "

22. The following extract from the works/literature placed before the Court would also require a mention to understand the

significance of the absence of diatoms as mentioned in the report of the Department of Forensic Medicine, B.J. Medical College, Ahmedabad: " When drowning takes place, diatoms enter into the lung cavity of a person through the aspirated water and this water exerts a pressure on lung cavity and rupturing of the lung alveoli takes place. Through these entrances diatoms can enter into heart, liver, kidney, brain and bone marrow. ... Analysis of diatoms present in the lungs, liver, spleen, blood and bone marrow has for many years been undertaken as a confirmatory test in possible drowning cases. However, the diatom test has been controversial since numerous cases of false negative and false positive results have been documented.... "

19. Thus, it is clear that the entire medical evidence and the statement of the doctors which have been recorded have supported the prosecution story. As far as the commission of the offence is concerned, as already pointed out that PW-9 and PW-10 are the key witnesses, who have last seen the deceased and the appellant and the same could not be discarded by the counsel appearing for the appellant. From the evidence collected by the prosecution, it is fully established that the offence has been committed by none other than the appellant. Therefore, there is no illegality committed by the trial Court holding the accused/appellant guilty of commission of the offence. The statement of PW-10 clarifies the position that the girl was missing at around 06:40 PM and the accused/appellant was asked by Chintaman (PW-10) at around 08:00 PM i.e. after one hour and twenty minutes of he being last seen together with the deceased. Therefore, the time duration between the missing of the girl and her dead body being found at 10:00 PM, the time period is very less. There is no other possibility that the girl was with somebody else and the accused/appellant has not committed the offence. There is nothing on record being placed by the accused/appellant to show that he has left the girl with her family members at her home and she was last residing with her family members prior to her death. There is no material on record to suggest the aforesaid. Under these circumstances, there cannot be any possibility that the accused/appellant has not committed the offence. The learned trial Court has considered all the aspects in a proper perspective and found the accused/appellant guilty of the offences and accordingly, convicted and sentenced him as mentioned above. No illegality is found in the judgment passed the learned trial Court.

20. Resultantly, the appeal being devoid of merit is dismissed.

Appeal dismissed

I.L.R. 2024 M.P. 139

Before Mr. Justice Vivek Rusia

AC No. 13/2023 (Indore) decided on 24 July, 2023

CARNIVAL FILMS ENTERTAINMENT PVT. LTD. … Applicant

Vs.

M/S MP ENTERTAINMENT AND DEVELOPERS PVT. LTD. …Non- applicant

A. Arbitration and Conciliation Act (26 of 1996), Sections 9, 11 & 42 –Territorial Jurisdiction **– Held – The so–called possession document is neither a notarized nor a stamped document, such document cannot be considered u/S 11 of the Act for initiation of arbitration proceeding – Division Bench rightly ignored the subsequent proceedings initiated by non–applicant under the so– called possession document and held that proceeding initiated u/S 9 are the first proceedings initiated under the lease agreement and therefore application u/S 11(5) is maintainable – Arbitrator is liable to be appointed u/S 11(6) of the Act under the lease agreement carrying arbitration clause – Arbitrator appointed – Matter disposed. (Para 20 & 21)**

क. माध्यस्थम् और सुलह अधिनियम (1996 का 26), धाराएँ 9, 11 व 42 – क्षेत्रीय अधिकारिता – अभिनिर्धारित – तथाकथित कब्जे का दस्तावेज न तो नोटरीकृत है और न ही एक स्टांपित दस्तावेज है, ऐसे दस्तावेज को माध्यस्थम् कार्यवाही आरंभ करने के लिए अधिनियम की धारा 11 के अंतर्गत विचार में नहीं लिया जा सकता – खंड न्यायपीठ ने तथाकथित कब्जे के दस्तावेज के अंतर्गत अनावेदक द्वारा आरंभ की गई पश्चात्वर्ती कार्यवाहियों को उचित रूप से अनदेखा किया तथा यह अभिनिर्धारित किया कि धारा 9 के अंतर्गत आरंभ की गई कार्यवाहियां पट्टा करार के अंतर्गत आरंभ की गई प्रथम कार्यवाहियां हैं और इसलिए धारा 11(5) के अंतर्गत आवेदन पोषणीय है – मध्यस्थ, माध्यस्थम् खंड वाले पट्टा करार के अधीन अधिनियम की धारा 11(6) के अंतर्गत नियुक्त किये जाने हेतु योग्य है – मध्यस्थ नियुक्त किया गया – मामला निराकृत।

B. Arbitration and Conciliation Act (26 of 1996), Section 9 & 11 – Lease Agreement **– Held – Lease agreement will supersede the subsequent so called possession document – All subsequent applications are liable to be filed under the lease agreement under which application u/S 9 was initially filed – Arbitrator is liable to be appointed under the arbitration agreement. (Para 18)**

ख. माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 9 व 11 – पट्टा करार – अभिनिर्धारित – पट्टा करार पश्चात्वर्ती तथाकथित कब्जे के दस्तावेज पर अधिक्रमण करेगा – सभी पश्चात्वर्ती आवेदन पट्टा करार के अंतर्गत प्रस्तुत किये जाने के योग्य है जिसके अंतर्गत आरंभ में धारा 9 के अंतर्गत आवेदन प्रस्तुत किया गया था – मध्यस्थ, माध्यस्थम् करार के अंतर्गत नियुक्त किये जाने के योग्य है।

Cases referred:

Civil Appeal No. 825/2021 (Supreme Court), Civil Appeal No. 667/2022 (Supreme Court), 2023 SCC OnLine SC 495, (2021) 1 Arbitration Law Reporter 236 (Delhi), (2017) 8 SCC 377, (2022) 10 SCC 235, 2018 (12) SCC 471, (2021) 4 SCC 713, O.M.P. (COMM) 190/2019 (High Court of Delhi).

Gunjan Chowksey alongwith *Shriya Jadhav* and *Yukta Joshi,* for the applicant.

Vijay Kumar Asudani, for the non-applicant.

O R D E R

VIVEK RUSIA, J.:- The applicant has filed the present petition under Section 11(5) of the Arbitration and Conciliation Act, 1996 seeking the appointment of a Retired High Court Judge or District Judge as an independent Arbitrator in terms of Clause 3 of the lease agreement. The applicant is also seeking an injunction against the sole arbitrator Shri Arpit Oswal from continuing with the proceeding passed on the false and concocted possession document.

The facts of the case are as under:-

2. The Non-applicant is a company registered under the provisions of the Companies Act having its registered office at 11th Floor, C-21, MR-10, Indore which is involved in the business of Real Estate and Development. The Non-applicant is the owner of the second, third and fourth floor at Malhar Mall (hereinafter referred to as "the multiplex"). The Non-applicant entered into ***a lease agreement dated 28.07.2011*** with HDIL Entertainment Pvt. Ltd. whereby the multiplex was leased out to the lessee. Thereafter, a supplementary agreement dated 26.06.2014 was executed between the same parties for extending the period of the lease from 15 years to 21 years.

3. The applicant is a private limited company incorporated on the month of 11.11.2014 engaged in the business of management of multiplex under the brand name of Kulraj Broadways Cinema. The applicant entered into ***a share purchase agreement dated 02.07.2014*** with HDIL Entertainment Pvt. Ltd. to purchase/ acquire a 100% share of the company. After the execution of this share purchase agreement, the name of the said lease between the non-applicant and HDIL was changed to Commercial Films Entertainment Pvt. Ltd.

4. According to the applicant, the directors of the Non-applicant company were well aware of the execution of this share purchase agreement, the applicant took over the operation and management of the multiplex. A dispute started between the applicant and the Non-applicant in the year 2020, the Non-applicant sent a demand notice to the applicant under Section 8 of the Insolvency and

Bankruptcy Act and also filed an application under Section 9 by way of Company Petition No.891/2021 before the NCLT, Mumbai. According to the applicant, despite the aforesaid dispute, the applicant continued to operate and manage the said multiplex till 09.11.2022. On 09.11.2022, the Non-applicant illegally and forcibly took possession of the said multiplex for which the applicant sent an e-mail dated 10.11.2022 and thereafter, filed a criminal complaint dated 20.11.2022 under the relevant sections of the Indian Penal Code.

5. In the said agreement between the Non-applicant and HDIL Entertainment Pvt. Ltd., there is a Clause 13 relating to governing the law and dispute resolution hence in order to invoke the said arbitration clause the applicant sent a legal notice dated 03.12.2022 to the Non-applicant and thereafter, approached the Commercial Court under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act of 1996) alongwith an application under Section 151 of CPC seeking status-quo in the case due to the urgency. The learned Commercial Court at Indore took cognizance of the matter and passed an order of status quo on 09.12.2022 in MJCAV No.98/2022 in favour of the applicant.

6. The Non-applicant appeared before the Commercial Court and filed a reply dated 21.12.2022 to an application under Section 9 of the Limitation Act. In the reply, the first time the Non-applicant disclosed that a possession document dated 09.05.2022 had been executed between the applicant and the Non-applicant whereby the possession of multiplex in dispute had been handed over to the Non-applicant with the condition of withdrawal of the case initiated under Section 131 of CPC of Negotiable Instruments Act. It is further submitted that in the said possession document there is a provision of arbitration clause under which Shri Arpit Oswal Advocate is named as an arbitrator to decide the dispute between the parties. The Non-applicant also submitted that Mr. Arpit Oswal has initiated arbitration proceedings. The applicant immediately submitted a response that no such possession document was executed by them and the same is the false and concocted document.

7. It is further submitted the applicant was operating the multiplex till 09.11.2022 and the documents to that effect are cumulatively filed as Annexure P/11 in this petition, to establish that the possession document is forged & concocted. The applicant was served a letter dated 19.12.2022 invoking an arbitration clause by the Non-applicant, the applicant immediately submitted an objection dated 02.01.2023 denying the execution of said possession document. According to the applicant, the said possession document bears the signature of its Manager Mr. Manish Kansal. The applicant immediately sent an e-mail to Manager to confirm his signature and vide the return e-mail he denied execution of the possession document as per his knowledge. Arpit Oswal has initiated the arbitration proceedings and sent a notice to the applicant for appearance.

8. The Non-applicant submitted a statement of claim before the arbitrator claiming the amount of Rs.3,50,58,096/- and also seeking a declaration that the possession document dated 09.05.2022 is legal, valid and binding on the claim as per the Non-applicant . The Non-applicant also filed an application under Section 17 of the Arbitration and Conciliation Act, 1996 seeking an injunction against the applicant in respect of booking of tickets through online platforms like Book My Show, Paytm, etc. The applicant has appeared before the arbitrator and submitted an objection in writing. Vide order dated 16.02.2023, the learned Arbitrator has passed an injunction order against the applicant.

9. Meanwhile, the learned Commercial Court passed an order dated 19.01.2023 under Section 9 of the Act, of 1996 in favour of the applicant, by restraining the Non-applicant from alienating rights in respect of Cinema / Multiplex pending commencement and during the arbitration proceedings and making the final award therein. Being aggrieved by the above order dated 13.01.2023, the Non-applicant filed an ***Arbitration Appeal No.16/2023*** before this Court. Vide order dated 06.07.2023 the Division Bench of this Court has dismissed the arbitration appeal on the ground that the applicant had initiated the arbitration proceeding by approaching the Commercial Court on 09.12.2022 by filing an application under Section 9 of Arbitration and Conciliation Act, 1996 as well as Section 151 of CPC and thereafter the Non-applicant appointed an Arbitrator who initiated proceedings on 03.01.2022 hence on 09.12.2022 neither arbitral tribunal proceedings were initiated nor arbitrator was appointed or approached to settle the dispute. The operative part of paragraphs No.14 and 15 are reproduced below:

> **14.** On or about 16th July 2021, the Appellant filed an interim application being Commercial Civil Miscellaneous Application No.2 of 2021, praying for reference of both the applications filed by the Appellant and the T Non-applicant respectively under Section 9 of the Arbitration Act, to the learned Tribunal.
>
> **15.** Paragraph 3 of the said application filed by the Appellant is set out hereinbelow for convenience. "3. I say and submit that this Hon'ble Court had heard the AMNS Petition and the EBTL Petition extensively, and reserved the petitions for pronouncement of orders. The matters are listed on 20 July 2021 for pronouncement of orders."

Submission of Applicant's counsel

10. Ms. Chowksey, learned counsel for the applicant submitted that there is no dispute in respect of the existence of an arbitration agreement between the Non-applicant and HDIL Enterprises Pvt. Ltd. Thereafter, the applicant entered into a share purchase agreement with HDIL on 02.07.2014, hence now an arbitration

agreement between the applicant and the Non-applicant under which this dispute with the Non-applicant is liable to be referred to an arbitrator appointed by this Court. It is further submitted that the Non-applicant on the basis of a forged and concocted agreement has appointed Shri Arpit Oswal as an arbitrator and started the arbitration proceedings illegally. Mr. Oswal in the capacity of an advocate has been associated with Mr. Vijay Kumar Asudani in a number of cases, therefore, he cannot act as an arbitrator in this matter in which Shri Asudani is representing the Non-applicant hence the arbitration proceedings are per-se illegal and void, Shri Oswal he is liable to be restrained to act as an Arbitrator in the dispute between the parties.

11. It is further submitted by the learned counsel that so far as the so called possession document is concerned, it is said to have been signed by the Manager of the applicant Mr. Ashish Kansal who has specifically refused and denied his signature therein . Clause No.13 in the lease agreement still exists which is an undisputed document hence, the arbitrator is liable to be appointed under Clause No.13 in this AC. At the most, the Non-applicant can raise all objections about the subsequent so-called possession document before the arbitrator to be appointed by this court. Learned counsel in support of his submission has placed reliance on a judgment passed by the Apex Court in the case of *Pravin Electricals Pvt. Ltd. v/s Galaxy Infra and Engineering Pvt. Ltd.* (Civil Appeal No.825 of 2021) in which the Apex Court has held that since it is a preliminary issue regarding the validity of agreement and when the issue is regarding false and fabricated document then the learned arbitrator shall first determine the same as a preliminary issue and accordingly appointed a Retired High Court Judge as a sole Arbitrator. Learned counsel has further placed reliance on a judgment passed in the case of *M.R. India Ltd. v/s Tarun Agrawal* (Civil Appeal No.667/2022) in which also the Apex Court has remitted the matter back to the High Court to decide the application under Sections 11, 5 and 6 of the Act, 1996 afresh.

12. Learned counsel for the applicant further submitted that in the present case, the Non-applicant is relying on a possession document which is a one-page non-stamped, non-notarized document, therefore, the arbitration clause therein is unenforceable. In support of her contention she has placed reliance on the Constitution Bench judgment passed in the case of *N.N. Global Mercantile Pvt. Ltd. v/s M/s Indo Unique Flame Ltd. and others reported* in 2023 SCC OnLine SC 495 in which the Apex Court has held that the instrument which attracts the stamp duty may contain an arbitration clause and if it is not stamped or insufficiently stamped, same cannot be said to be a contract which is enforceable within the meaning of Section 2(h) and 2(g) of Indian Contract Act. It is further held that the arbitration agreement within the meaning of Section 7 of the Act which attracts the stamp duty if not stamped or insufficiently stamped cannot be acted upon in view of Section 35 of the Indian Stamps Act.

13. Ms. Chowksey, learned counsel for the applicant further urged that in the so called possession document, it is nowhere mentioned that this document will amount to a novation of agreement and lease agreement. It is further submitted that the lease agreement between the parties still exists and the arbitration clause survives even on termination expiry of a contract. In support of her contention, she has placed reliance on a judgment passed by the Delhi High Court in the case of *Knowledge Podium System Pvt. Ltd. v/s S.M. Professional Services Pvt. Ltd. reported* in (2021) 1 Arbitration Law Reporter 236 (Delhi) in which it has been held that the novation takes place only when there is a complete substitution of a new contract in place of old. The learned counsel has also placed reliance on a judgment passed by the Apex Court in the case of *TRF Limited v/s Energo Engineering Project reported* in (2017) 8 SCC 377 on the point that the arbitrator is associated with the counsel for the Non-applicant and he is appearing in various cases since last three years with him, therefore, he cannot be appointed as an Arbitration in view of Section 12(5) of the Arbitration and Conciliation Act, 1996. The Apex Court in the case of *TRF Limited* (supra) in similar facts and circumstances has set aside the appointment of an arbitrator. It is further submitted that even in case a dispute is pending before the NCLT, the High Court still has the power to entertain the application for appointment of an arbitrator as held by the Apex Court in the case of *M/s Sunflag Iron and Steel Company Ltd. v/s Ms J. Poonamchand and Sons* (MCA No.374/2020) hence, Ms. Chowksey prays that this Court may kindly appoint an arbitrator to adjudicate the dispute between the parties.

Submission of Non-applicant's counsel

14. Shri Vijay Kumar Asudani, learned counsel for the Non- applicant contended that once the arbitrator has initiated the proceeding under the Act of 1996 the mandate cannot be terminated by the High Court under Section 11(5) of the Act, 1996. Only the civil Court having original jurisdiction under Section 15 of the Act, 1996 can remove the Arbitrator, therefore, now the dispute cannot be referred by appointing a new Arbitrator under Section 11(5) of the Act, 1996. Learned counsel has relied on the case of *Swadesh Kumar Agrawal v/s Dinesh Kumar Agrawal and others reported* in (2022) 10 SCC 235 the Supreme Court of India categorically defined under which circumstances the Sub-Section (5) and (6) of Section 11 of Arbitration and Conciliation Act, 1996 will be attracted. The application under Section 11(6) of the Act, 1996 shall be maintainable only in cases where there is a contract between the parties containing the arbitration clause and the appointment procedure prescribed. Sub-Section (5) of Section 11 of the Act, 1996 shall be attracted only in a case where there is no procedure for appointment of an Arbitrator agreed upon as per Sub-Section (2) of Section 11 of the Act, 1996 and sub-Section (6) of Section 11 of the Act, 1996 shall be applicable in case where there is a contract containing an arbitration agreement.

15. It is further submitted by Shri Asudani learned counsel that the agreement clause contained under the lease agreement dated 28.07.2011 does not survive due to the novation of the contract by executing the possession document. The only remedy available to the applicant to seek termination of a contract by approaching the Civil Court under Section 14 of the Act, 1996 hence, this arbitration case is liable to be dismissed and the applicant be directed to participate in the arbitration initiated under the possession document. Shri Asudani learned counsel has placed reliance on a judgment passed in case of *HRD Corporation (Marcus Oil and Chemical Division) v. GAIL (India) Ltd.* reported in 2018(12) SCC 471 in which the Apex Court has held that in order to determine whether an arbitrator is *de jure* unable to perform his function, it is not necessary to go to the Arbitral Tribunal under Section 13 of the Act of 1996 an application may be filed under Section 14(2) of the Act of 1996 to decide on the termination of his or her mandate on this ground. As per learned counsel in case of *Avitel Post Studioz Ltd. and others v/s HCBC* (2021) 4 SCC 713, the Apex Court has held that if it is clear that the civil dispute involved questions on fraud, misinterpretation etc. which can be a subject matter of such proceeding under Section 17 of the Contract Act and the mere fact that the criminal proceedings can or have been instituted in respect of the same subject matter would not lead to the conclusion that dispute which is otherwise arbitrable.

16. It is further submitted by the learned counsel Shri Asudani learned counsel that the issue of fraud or the concocted document cannot be adjudicated in arbitration proceedings. The allegation of fraud will not be arbitrable only if either of the following two tests laid down is satisfied, firstly, does this plea of fraud permeate the entire contract and above all the agreement of arbitration rendering it void, secondly, where the allegation of fraud touch upon the internal affair of the party *inter se* has no implication on the public domain. Shri Asudani learned counsel has placed reliance on the judgment passed by the High Court of Delhi in case of *B.L. Kashyap and Sons Ltd. v/s MIST Avenue Private Ltd.* [O.M.P. (COMM) 190/2019] in which in similar facts and circumstances, the validly executed contract can also be extinguished by a subsequent agreement between the parties where the new contract constitute a wholesale novation of an original contract, the arbitration clause would also stand extinguished by virtue of a new agreement hence, Shri Asudani prays for dismissal of this application.

Appreciations & Conclusion

17. Except execution of the possession documents non (sic: none) of the facts discussed above are in dispute between the parties . As has been held by the Division Bench of this High Court, the applicant first initiated a proceeding under the lease agreements dated 28.07.2011 and 26.06.2014 by approaching the Civil Court under Section 9 of the Act of 1996. The applicant also filed an application

under Section 151 of CPC seeking *ex-parte* injunction which entertained interim protection was given and thereafter application filed under Section 9 of the Act of 1996 allowed by pasing the order of *status quo* in favour of the applicant. The Non-applicant did participate in the proceedings by raising an objection that the arbitration proceedings had been initiated by virtue of the arbitration clause in the possession document. The aforesaid contention was negatived by the Commercial Court and granted the injunction in favour of the applicant. Being aggrieved by the order dated 19.01.2023, passed by Commercial Court in MJCAV No.98 of 2022, an Arbitration Appeal No.16 of 2023 was filed before the Division Bench of this Court. Vide order dated 06.07.2022, the Division Bench of this Court had dismissed the appeal solely on the ground that the applicant first approached the Commercial Court by way of an application under Section 9 of the Act of 1996 and on 09.12.2022 and at that time, neither Arbitral Tribunal proceedings were initiated nor arbitrator was appointed or approached to settle the dispute. The Division Bench has relied upon the judgment passed in the case of *Arcelor Mittal Nippon Steel India* (supra) where the expression "entertain" has been examined. The Apex court has held that when an application has already been taken up for consideration and is in the process of consideration or has already been considered, the question of examining whether remedy under Section 17 is efficacious or not would not arise. The requirement to conduct the exercise arises only when the application is being entertained and / or taken up for consideration. As observed above, there could be numerous reasons which render the remedy under Section 17 inefficacious.

18. In this case, the distinguishable fact is that the section 9 application was filed under the lease agreements by the applicant and arbitration proceedings have been started under the Possession document (which the applicant is disputing) by the Non-applicant. Therefore the sole question would be whether the subsequent so-called Possession Document agreement will supersede the first arbitration agreement under which the proceedings were initiated first by the applicant? That section 42 of the arbitration clause although deals with the territorial jurisdiction of the court and says that notwithstanding anything contained elsewhere in this part or any other law for the time being enforced where with respect to an arbitration agreement, an application under this Section has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent application arising out of that agreement and the arbitration proceedings shall be made in that Court and in no other Court. Although Section 42 of the Act, 1996 deals with the territorial jurisdiction of the Court to entertain subsequent applications, but it gives emphasis upon all subsequent applications / proceedings with respect to an arbitration agreement that Court alone shall have jurisdiction . Hence taking aid from this provision of the Act of 1996 not only for territorial jurisdiction but for all subsequent proceedings also the arbitration

agreement would be the same. All subsequent proceedings would be entertained under the same arbitration agreement under which the application under section 9 was initiated first. Therefore, it can be held that all the subsequent applications are liable to be filed under the lease agreements between the parties under which the application under Section 9 of the Act of 1996 was filed, hence the arbitration proceeding are also liable to be initiated under the same lease agreement not under the possession document.

19. In order to avoid the conflict of jurisdiction, the application under Section 11 of the Act of 1996 is also liable to be filed in High Court having a supervisory jurisdiction of a civil court (The Commercial Court) , where the application is filed under Section 9 of Act of 1996 Act. That sub-section 11 of Section 11 of the Act of 1996 also says that where more than one request has been made under sub-section 4 or 5 or 6 of the Act of 1996 to a different arbitral institution, the arbitral institution to which the request has been first made under the relevant sub-section shall be competent to appoint. Therefore, as per the conjoint reading of Section 11 and 42 of the Act 1996, it can safely be held that only the arbitration clause and agreement dated 28.07.2011 and 26.06.2014 is liable to be acted upon.

20. The subsequent proceedings initiated by the Non-applicant under the so-called possession document have wrongly been initiated. Division Bench of this Court has rightly ignored these subsequent proceedings initiated by Shri Oswal advocate as sole Arbitrator under the possession document and held that the proceedings initiated under Section 9 of the Act of 1996 are the first proceedings initiated under the lease agreement, therefore, this application under Section 11(5) of Act of 1996 is maintainable. The Arbitrator is liable to be appointed under Section 11(6) of the Act of 1996.

21. In addition to the above is also to be taken into consideration that the moment the applicant came to know about the possession document and initiation of arbitration proceedings, at the very first instance, an objection was raised that it is a forged and concocted document which cannot be acted upon. The so-called possession document is neither a notarized nor a stamped document, therefore, in view of the Constitution Bench judgment i.e. *N.N. Global Mercantile Pvt. Ltd.* (supra), this document cannot be considered under Section 11 of Act of 1996 for initiation of the arbitration proceeding. An Arbitrator is liable to be appointed under this agreement.

22. Shri Asudani learned counsel has argued that the present application under Section 11(5) of the Act of 1996 is not maintainable, as Section 11(5) applies to a situation where the parties failed to agree on the Arbitrator within 30 days from the receipt of the request by one party from the other party to so agree, the appointment shall be made on an application of the party in accordance with the provision contained in sub-Section (4) of Section 11 of the Act of 1996. Sub-

section (6) of Section 11 of the Act of 1996 also deals with the situation where under an agreement procedure agreed upon by the parties, and a party fails to act as required under that procedure, an application shall be made on an application of a party by a High Court in case of arbitration. That under both the provisions the Arbitrator is to be appointed by the High Court hence this applicant can be treated under section 11(6) of the Act of 1996.

23. It is made clear here that the non-applicant shall be free to raise his objection, especially the validity of the possession document before the sole Arbitrator appointed by this Court.

24. In view of the above, I deem it proper to appoint Hon'ble Shri Justice J.K. Jain, Former High Court Judge as a sole arbitrator to resolve the dispute between the parties.

25. After obtaining the written consent from Hon'ble Shri Justice J.K. Jain, Former High Court Judge the Registry is directed to dispatch a copy of this order to the following:-

26. Name of Arbitrator- Hon'ble Shri Justice J.K. Jain, Former High Court Judge.

Mob. Number - 9425430484.

27. The Arbitration Case stands disposed off to the extent indicated above.

Order accordingly

I.L.R. 2024 M.P. 148

Before Mr. Justice Pranay Verma

CR No. 480/2023 (Indore) decided on 26 July, 2023

ABBAS & ors. … Applicants

Vs.

TAFAJJUL …Non-applicant

***A. Court Fees Act (7 of 1870), Section 7(4)(c) – Suit for Mandatory Injunction – Ad Valorem Court fees* – Held – In a suit for mandatory injunction directing delivery of possession of disputed property, *ad valorem* court fees on market value of the property is not liable to be paid, if claim is instituted promptly after termination of license – License of defendant was terminated by notice dated 23.09.2019 which was served on 03.10.2019 and suit was promptly filed on 16.10.2019 – Plaintiff not required to value his claim for possession on basis of market value of property and to pay *ad valorem* court fee thereupon – Revision dismissed. (Para 7)**

क. न्यायालय फीस अधिनियम (1870 का 7), धारा 7(4)(c) – आज्ञापक व्यादेश हेतु वाद – मूल्यानुसार न्यायालय फीस – अभिनिर्धारित – विवादग्रस्त भूमि के कब्जे का परिदान का निर्देश देने वाले आज्ञापक व्यादेश हेतु वाद में, संपत्ति के बाजार मूल्य पर मूल्यानुसार न्यायालय फीस का भुगतान किया जाना दायित्वाधीन नहीं है, यदि दावा अनुज्ञप्ति के पर्यवसान के पश्चात् तत्परता से संस्थित किया गया है – प्रतिवादी की अनुज्ञप्ति नोटिस दिनांक 23.09.2019 से समाप्त कर दी गई थी जो कि 03.10.2019 को तामील हुआ था और दावा तत्परता से 16.10.2019 को प्रस्तुत किया गया – वादी के लिए संपत्ति के बाजार मूल्य के आधार पर कब्जे के लिए अपने दावे का मूल्यांकन करना एवं उस पर मूल्यानुसार न्यायालय फीस का भुगतान करना आवश्यक नहीं है – पुनरीक्षण खारिज।

***B. Civil Procedure Code (5 of 1908), Section 115 – Revision – Exercise of Jurisdiction* – Held – Impugned order passed by trial Court is perfectly legal and justified – Earlier order dated 09.03.2021 was apparently illegal though the same was not challenged by plaintiff but only for the said reason the impugned order cannot be faulted with – Setting aside the impugned order on the ground of earlier order not having been challenged would be like permitting an illegal order to stand which would not be proper exercise of jurisdiction u/S 115 CPC. (Para 11)**

ख. सिविल प्रक्रिया संहिता (1908 का 5), धारा 115 – पुनरीक्षण – अधिकारिता का प्रयोग – अभिनिर्धारित – विचारण न्यायालय द्वारा पारित आक्षेपित आदेश पूर्णतः वैध व न्यायोचित है – पूर्व आदेश दिनांक 09.03.2021 स्पष्टतः अवैध था यद्यपि उसे वादी द्वारा चुनौती नहीं दी गई थी किंतु मात्र उक्त कारण से आक्षेपित आदेश को अनुचित नहीं कहा जा सकता – आक्षेपित आदेश का किसी ऐसे पूर्व आदेश के आधार पर अपास्त किया जाना जिसे चुनौती नहीं दी गई, किसी अवैध आदेश को कायम रखने की अनुमति देने के समान होगा जो कि सि.प्र.सं. की धारा 115 की अधिकारिता का उचित प्रयोग नहीं होगा।

***C. Civil Procedure Code (5 of 1908), Section 115 – Revision – Scope & Jurisdiction – Powers of Court* – Discussed and explained. (Para 9 & 10)**

ग. सिविल प्रक्रिया संहिता (1908 का 5), धारा 115 – पुनरीक्षण – व्याप्ति एवं अधिकारिता – न्यायालय की शक्तियां – विवेचित एवं स्पष्ट किया गया।

Cases referred:

2009 (4) MPLJ 672, 2007 (4) MPHT 131, AIR 1962 Punjab 168, AIR 1962 Allahabad 52, AIR 1933 Allahabad 924, AIR 1986 Allahabad 215.

Vinay Gandhi, for the applicants.

O R D E R

PRANAY VERMA, J.:- By this revision preferred under Section 115 of the CPC, the applicants/defendants have challenged the orders dated 15.09.2022 and 06.05.2023 passed by the trial Court whereby their application under Order 7 Rule

11 of the CPC for rejection of the plaint on the ground that the valuation put by plaintiff/non-applicant on the same and the Court fee payable thereupon is inadequate has been rejected.

2. The plaintiff initially instituted an action against defendants for possession of the suit house and mesne profits by contending them to be his licensees and submitting that their license has been terminated by notice dated 23.09.2019 yet they have not delivered possession of the suit house. Relief of mesne profits at Rs.10,000/- per month was also claimed. Defendants raised an objection as regards valuation of the suit on which by order dated 09.03.2021, the trial Court observed that since plaintiffs claim is for possession, he is liable to pay ad valorem Court fee on such relief whereas he has valued the claim at Rs.200/- and has paid Court fee of Rs.100/- only thereupon.

3. The said order was not challenged by plaintiff nor did he comply with the same and instead filed an application under Order 6 Rule 17 of the CPC for amendment of the plaint to delete the relief as regards mesne profits which has been allowed by the trial Court by impugned order dated 15.09.2022. Thereafter, the Trial Court held that the valuation as put by plaintiff on the plaint is correct and rejected an application under Order 7 Rule 11 of the CPC which had been filed by defendants for rejection of the plaint on the ground of non-compliance of order dated 09.03.2021.

4. Thereafter, defendants filed another application under Order 7 Rule 11 of the CPC submitting that plaintiff has not complied with the order dated 09.03.2021 and has not valued his claim and paid Court fee as directed therein hence the plaint deserves to be rejected. The said application has been rejected by the trial Court by the impugned order dated 06.05.2023 holding that plaintiffs claim is for mandatory injunction and he has paid adequate Court fee thereupon and that the issue as regards adequacy of Court fee can be framed and decided at an appropriate stage.

5. Learned counsel for defendants has submitted that plaintiff did not comply with the order dated 09.03.2021 nor challenged the same before any higher forum hence the same has attained finality and is binding upon him. For non-compliance of the same, the plaint has to be necessarily rejected whereas the trial Court has illegally passed the order dated 15.09.2022 holding that subsequent to order dated 09.03.2021, plaintiff has deleted the relief of mesne profits and now the claim is only for mandatory injunction hence is properly valued and adequate Court fee has been paid thereupon. In doing so, it has grossly misread its own earlier order whereby it had directed plaintiff to value the claim and pay Court fee on the market value of the suit property.

6. I have heard the learned counsel for the applicants/defendants at length.

7. Though, the claim was initially instituted by plaintiff for mandatory injunction directing the defendants to deliver possession of the suit property and for mesne profits but thereafter the relief of mesne profits has been deleted and now the claim remains to be only for mandatory injunction. As per plaintiff, the defendants were his licensees in the suit property and upon termination of their license by notice dated 03.09.2019, the suit has been instituted. It has been categorically held by this Court in *Abdul Hussain and Others Vs. Mansoor Ali and Others,* 2009 (4) MPLJ 672 and *Smt. Saraswati @ Jaya Bichpuria Vs. Smt. Archana Bichpuria,* 2007 (4) MPHT 131 that in a suit for mandatory injunction directing delivery of possession of the disputed property, ad valorem Court fee on the market value of the property is not liable to be paid, if the claim is instituted promptly after termination of license of the licensee. In the present case, license of defendants was terminated by plaintiff by a notice dated 23.09.2019 served upon them on 03.10.2019 and the suit was filed on 16.10.2019 which was promptly after termination of license. In such circumstances, the plaintiff was not required to value his claim for possession on the basis of market value of the suit property and to pay ad valorem Court fee thereupon.

8. While it is true that earlier the trial Court by order dated 09.03.2021 had directed the plaintiff to value the claim on the basis of market value of the suit property and to pay ad valorem Court fee thereupon but that order is apparently incorrect and contrary to the principles as laid down in the aforesaid mentioned cases. Though, the said order has not been challenged by plaintiff but subsequently orders have been passed by the trial Court on 15.09.2022 and 06.05.2023 in which it has been held that since the claim is for mandatory injunction directing delivery of possession upon termination of license, the same is not required to be valued on the basis of market value of the suit property and ad valorem Court fee to be paid thereupon. The same are perfectly legal and in accordance with law.

9. In *Firm New Afghan Company and Another Vs. Firm Sadhu Singh Thakor Singh and Others* AIR 1962 Punjab 168, it was held that exercise of revisional powers under Section 115 of the CPC is undisputably discretionary and when the impugned order does not disclose any grave injustice or irreparable injury and indeed does substantial justice between the parties, the power of revision should neither be invoked nor exercised. In *Union of India Vs. Baburam* AIR 1962 Allahabad 52 also it was held that the High Court is not bound to interfere in the exercise of its power under Section 115 of the CPC if substantial justice has been done. Reliance was placed on a similar decision of the *Allahabad High Court in Harprasad and another Vs. Bhagwati Prasad Ram Sarup* AIR 1933 Allahabad 924. In *Yashodanand Garg Vs. Hindustan Commercial Bank Kanpur and Others*

AIR 1986 Allahabad 215 also it was held that even when an error of jurisdiction is committed by the Court below, but the action taken by it is not proved to have resulted in injustice, the High Court would be loath to interfere with it. The supervisory jurisdiction contained in Section 115 of the CPC is intended to ensure that justice is done between the parties. The absence of substantial injury to an applicant, irrespective of an error in procedure or in exercise of jurisdiction by the Court below should be enough to decline relief to him. Thus, it has been well settled that where substantial justice has been done though there may be an error of jurisdiction committed by the Court below, the High Court would refrain from exercising jurisdiction under Section 115 of the CPC.

10. While exercising powers under Section 115 of the CPC, the High Court may make such order as it may think fit when the trial Court by the order under revision appears to have failed to exercise jurisdiction vested in it, exercised jurisdiction not vested in it or in exercise of its jurisdiction acted illegally or with material irregularity. While exercising such power the High Court shall not be bound by any other order which has been passed by the Court below which is apparently illegal though not challenged by the party against whom it was passed. The intent and purpose of Section 115 of the CPC is to ensure proper exercise of jurisdiction by the Court below. If a perfectly legal order is challenged then the same is bound to be affirmed even though the same may be contrary to a previously un-challenged but apparently illegal order. Section 115 of the CPC does not limit the power of the High Court to exercise its jurisdiction only in respect of the order which has been challenged before it but empowers it to take into consideration the entire proceedings of the case and to pass such order as may be deemed fit to ensure legality of proceedings and proper exercise of its jurisdiction by the Court below.

11. In the present case, the impugned orders passed by the trial Court are perfectly legal and justified. The earlier order dated 09.03.2021 was apparently illegal though the same was not challenged by plaintiff but only for the said reason the impugned orders cannot be faulted with. Setting aside the impugned orders merely on the ground of earlier order dated 09-03-2021 not having been challenged would result in a just and legal order being set aside and permitting an illegal order to stand which would not be proper exercise of jurisdiction under Section 115 of the CPC.

12. Thus, in the available facts of the case, I do find there to be any necessity for interfering with the impugned orders. The same are hereby affirmed and the revision is accordingly dismissed.

Revision dismissed

I.L.R. 2024 M.P. 153

Before Mr. Justice Dwarka Dhish Bansal

CR No. 603/2022 (Jabalpur) decided on 29 August, 2023

ABHISHEK DUBEY … Applicant

Vs.

PYARE LAL & ors. …Non-applicants

***A. Civil Procedure Code (5 of 1908), Order 6 Rule 2(3) & Order 7 Rule 11 – Expression of Dates and Numbers in Words* – Held – Requirement of expression of dates, sums and numbers into figures as well as in words has been provided in O–6 R–2(3) CPC, but for want of compliance of this provision, plaint cannot be rejected under O–7 R–11 CPC – If pleadings are defective, Court should insist on their being improved and if party does not comply the said provision, he later on would not be able to take plea of typographical error in pleadings. (Para 6(i))**

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 6 नियम 2(3) व आदेश 7 नियम 11 – दिनांक व संख्याओं की शब्दों में अभिव्यक्ति – अभिनिर्धारित – दिनांक, योग व संख्याओं की अंकों के साथ–साथ शब्दों में अभिव्यक्ति की आवश्यकता सि.प्र.सं. के आदेश 6 नियम 2(3) में उपबंधित है, किंतु इस उपबंध के अनुपालन के अभाव में, वाद–पत्र सि.प्र.सं. के आदेश 7 नियम 11 के अंतर्गत अस्वीकृत नहीं किया जा सकता – यदि अभिवचन त्रुटिपूर्ण हैं, तो न्यायालय उन्हें सुधार हेतु दृढ़तापूर्वक कह सकता है एवं यदि पक्षकार उक्त उपबंध का पालन नहीं करता है तो वह बाद में अभिवचन में टंकण की त्रुटि का अभिवाक् नहीं कर पाएगा।

***B. Civil Procedure Code (5 of 1908), Section 80 & 80(2) & Order 7 Rule 11 – Notice* – Held – Plaintiff had made a prayer for grant of leave u/S 80(2) which is still pending – Objection in respect of Section 80 cannot be decided prior to decision of the pending application u/S 80(2) CPC – Trial Court directed to consider the objection at appropriate stage.(Para 6(ii) & 7)**

ख. सिविल प्रक्रिया संहिता (1908 का 5), धारा 80 व 80(2) व आदेश 7 नियम 11 – नोटिस – अभिनिर्धारित – वादी ने सि.प्र.सं. की धारा 80(2) के अंतर्गत अनुमति प्रदान किये जाने हेतु प्रार्थना की थी जो कि अब भी लंबित है – लंबित आवेदन अंतर्गत धारा 80(2) सि.प्र.सं. के विनिश्चय के पूर्व धारा 80 के संबंध में आक्षेप विनिश्चित नहीं किया जा सकता – विचारण न्यायालय को समुचित प्रक्रम पर आक्षेप पर विचार किये जाने हेतु निर्देशित किया जाता है।

***C. Civil Procedure Code (5 of 1908), Order 7 Rule 11 and Municipal Corporation Act, M.P. (23 of 1956), Section 401 – Notice* – Held – Although there are some allegations against Municipal Corporation but no relief against Municipal Corporation has been claimed in the suit –**

Therefore for want of notice to Municipal Corporation, plaint cannot be rejected. (Para 6(iii))

ग. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 7 नियम 11 एवं नगरपालिक निगम अधिनियम, म.प्र. (1956 का 23), धारा 401 – नोटिस – अभिनिर्धारित – यद्यपि नगर निगम के विरूद्ध कुछ अभिकथन हैं किंतु वाद में नगर निगम के विरूद्ध किसी अनुतोष का दावा नहीं किया गया है – अतः नगर निगम को नोटिस के अभाव में, वाद पत्र अस्वीकार नहीं किया जा सकता।

***D. Civil Procedure Code (5 of 1908), Order 7 Rule 11 – Valuation of Suit & Court Fee* – Held – Objection in respect of valuation and payment of court fee can be decided only after framing of issue and after recording evidence – Plaintiffs are neither party nor are bound by sale deed in question, therefore they are not required to value the suit or to pay *ad–valorem* Court fee on the basis of sale consideration mentioned therein. (Para 6(iv) & (vi))**

घ. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 7 नियम 11 – वाद का मूल्यांकन व न्यायालय फीस – अभिनिर्धारित – मूल्यांकन एवं न्यायालय फीस के भुगतान के संबंध में आपत्ति, केवल विवाद्यकों की विरचना के पश्चात् एवं साक्ष्य अभिलेखन के पश्चात् ही विनिश्चित की जा सकती है – वादीगण न ही पक्षकार हैं न ही प्रश्नगत विक्रय विलेख से आबद्ध हैं, अतः उनके लिए वाद मूल्यांकन करना अथवा इसमें उल्लिखित विक्रय प्रतिफल के आधार पर मूल्यानुसार न्यायालय फीस का भुगतान करना आवश्यक नहीं है।

***E. Civil Procedure Code (5 of 1908), Order 7 Rule 11 – Misjoinder/ Non–Joinder of Party* – Held – The defects of non–joinder and misjoinder of necessary parties cannot be considered for rejection of plaint. (Para 6(v))**

ङ. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 7 नियम 11 – पक्षकारों का कुसंयोजन/असंयोजन – अभिनिर्धारित – वादपत्र खारिज किये जाने हेतु, आवश्यक पक्षकारों के असंयोजन एवं कुसंयोजन की त्रुटियों पर विचार नहीं किया जा सकता।

***F. Civil Procedure Code (5 of 1908), Order 7 Rule 11 – Non–filing of title Documents* – Held – Non–filing of title documents in support of pleas taken in the plaint, cannot be ground to reject the plaint at the stage of O–7 R–11 CPC. (Para 6(vii))**

च. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 7 नियम 11 – हक के दस्तावेजों का प्रस्तुत न किया जाना – अभिनिर्धारित – वादपत्र में लिए गए अभिवचनों के समर्थन में हक के दस्तावेजों का प्रस्तुत न किया जाना, आदेश 7 नियम 11 सि.प्र.सं. के प्रक्रम पर वादपत्र के खारिज किये जाने का आधार नहीं हो सकता।

Cases referred:

2023 SAR (Civ) 740, (2020) 16 SCC 601, 2011 (4) SCCD 1943 (SC), SLP (Civil) No. 31844/2018, (2013) 10 SCC 178, 1998 (1) Civil Court Cases 9, (2007) 2 SCC 551, ILR 2012 MP 1852.

A.A. Awasthy with *Renu Tiwari,* for the applicant.
Girish Shrivastava, for the non-applicant Nos. 1 to 3.
Tulsa Kosta, P.L. for the non-applicant-State.

O R D E R

DWARKA DHISH BANSAL, J.:- This civil revision has been preferred by applicant/defendant 40 challenging the order dtd. 23.09.2022 passed by 21st District Judge, Jabalpur in Civil Suit No. 1120-A/2021 whereby application under Order 7 Rule 11 CPC filed by defendant 40 has been dismissed, filed in the suit for declaration of title and permanent injunction.

2. Learned counsel for the applicant/defendant 40 submits that by moving the application under Order 7 Rule 11 r/w Section 151 CPC, the defendant has raised several objections in respect of maintainability of the suit but learned Court below has without taking into consideration the same in real perspective, dismissed the application. He submits that the plaintiffs have not raised sufficient pleadings in respect of challenge to the sale deeds in question and on the basis of power of attorney, the plaintiffs cannot claim any right in the suit property belonged to late Karodilal because the plaintiffs are not successors of Karodilal. He submits that Karodilal was owner of the land area 31.53 acres and the defendant 40 had purchased an area 7 acres of the land from Karodilal. As such, pressing all the objections learned counsel submits that the application has wrongly been rejected by learned Court below. In support of his submissions, he placed reliance on the decisions of Supreme Court in the case of *Ramisetty Venkatanna & Anr. vs. Nasyam Jamal Saheb & Ors* 2023 SAR (Civ) 740; *Raghwendra Sharan Singh vs. Ram Prasanna Singh (Dead) by LRs* (2020) 16 SCC 601; *Suraj Lamp and Industries (P.) Ltd. vs. State of Haryana* 2011(4)SCCD 1943 (SC) and *K.Akbar Ali vs. K. Umar Khan & Ors.* SLP (Civil) No.31844 of 2018.

3. Learned counsel for the respondents/plaintiffs supports the impugned order and submits that there is no illegality in it and in support of his submissions he placed reliance on the decision of Supreme Court in the case of *State of Kerala and others vs. Sudhir Kumar Sharma and others* (2013) 10 SCC 178.

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

5. By way of application under order 7 rule 11 CPC, the petitioner/defendant 40 has raised following objections:-

(I) The plaintiffs have not mentioned the numbers/figures into the words;

(ii) No notice under Section 80 CPC has been given to the State Government, therefore, the suit is not maintainable;

(iii) Notice u/Section 401 of M.P. Municipal Corporation

Act, 1956 has not been issued to the Municipal Corporation, therefore, the suit is not maintainable;

(iv) The plaintiffs have not properly valued the suit and also not paid requisite Court fee.

(v) There is defect of non-joinder and misjoinder of necessary parties.

(vi) The plaintiffs have not valued the suit on the basis of consideration mentioned in the different sale deeds and have not paid requisite Court fee thereon.

(vii) The plaintiffs have not filed any document showing their title on the suit property.

(viii) Plaintiffs have instituted the suit on the basis of false cause of action.

(ix) The plaintiffs cannot claim any right on the basis of power of attorney.

6. With a view to avoid dissatisfaction of the petitioner/defendant 40, all the said objections are being dealt with serially one by one as under :

(i) Requirement of expression of dates, sums and numbers into figures as well as in words, has been provided in order VI rule 2(3) CPC, but for want of compliance of this provision, plaint cannot be rejected under order 7 rule 11 CPC. If the pleadings are defective, the Court should insist on their being improved and if the party does not comply the said provision, he later on, would not be able to take plea of typographical error in the pleadings.

(ii) In respect of objection about notice under section 80 CPC, learned Court below has in its order observed that the plaintiffs have made prayer for grant of leave under section 80(2) CPC which is still pending consideration. In this regard Hon'ble Supreme Court in the case of *State of Kerala and others* (supra), has held as under :

> "20. It is an admitted fact that no order had been passed on the application filed under Section 80(2) of the CPC. Till a final order is passed granting the said application, in our opinion, the irregularity in filing of the suit continues. If ultimately the application is rejected, the plaint is to be returned and in that event the application filed on behalf of the appellants under Order VII Rule 11 is to be granted. If the application filed under Section 80(2) is ultimately granted, the objection with regard to non issuance of notice under Section 80(1) of the CPC cannot be raised and in that event the suit would not fail on account of non-issuance of notice under Section 80(1) of the CPC.

> 21. We reiterate that till the application filed under Section 80(2) of the CPC is finally heard and decided, it cannot be known whether the suit filed without issuance of notice under Section 80(1) of the CPC was justifiable. According to the provisions of Section 80(2) of the CPC, the court has to be satisfied after hearing the parties that there was some grave urgency which required some urgent relief and therefore, the plaintiff was constrained to file a suit without issuance of notice under Section 80(1) of the CPC. Till arguments are advanced on behalf of the plaintiff with regard to urgency in the matter and till the trial court is satisfied with regard to the urgency or requirement of immediate relief in the suit, the court normally would not grant an application under Section 80(2) of the CPC. We, therefore, come to the conclusion that mere filing of an application under Section 80(2) of the CPC would not mean that the said application was granted by the trial court.
>
> 22. In the aforestated circumstances, we hold that the trial court had wrongly rejected the applications filed by the appellants under Order VII Rule 11 of the CPC. The trial court ought to have heard and decided the application filed under Section 80(2) of the CPC before hearing the applications under Order VII Rule 11 of the CPC."

As such, in the light of aforesaid law, the objection in respect of section 80 CPC cannot be decided prior to decision of the pending application under section 80(2) CPC.

(iii) In respect of objection about issuance of notice under section 401 of the Municipal Corporation Act, it is pertinent to mention here that although some allegations in paragraph 3 of the plaint, have been made in respect of cleaning of road by defendant 44, but no relief against the Municipal Corporation has been claimed in the suit, therefore, for want of notice to the defendant 44, plaint cannot be rejected. In this regard, a coordinate Bench of Kerala High Court in the case of *Ajith Kumar Vs. Suresh Kumar* 1998(1) Civil Court Cases 9, has held as under :

> "8. The intention behind S.80 came for consideration before the Supreme Court in State of Madras V. C.P.Agencies, AIR 1960 SC 1309. The Supreme Court held thus:
>
> > "The object of the section is manifestly to give the Government or the public officer sufficient notice of the case which is proposed to be brought against it or him so that it or he may consider the positron and decide for itself or him -self whether the claim of the plaintiff should be accepted or resisted. In order to enable the Government or the public officer to arrive at a decision

> it is necessary that it or he should be informed of the nature of the suit proposed to be filed against it or him and the facts on which the claim is founded and the precise reliefs asked for",
>
> Thus, the object of the section appears to inform the Government the grievances of the plaintiff and the reliefs which he prays for. Government can scrutinise the same and if it finds that the grievances in the notice and the reliefs claimed for are to be allowed, then it can straightaway grant the reliefs instead of forcing the party for a litigation. It is to avoid a litigation that this notice has been contemplated. But the question is when there is no personal relief asked against the Sate, is it necessary that the State should be given notice before filing the suit. The same question arose for consideration before a Full Bench of the Bombay High Court in Chandrakant V. State of Maharashtra, AIR 1970 Bombay 301. There the Full Bench of the Bombay High Court was considering the question whether no relief is asked for personally, notice under S.80 CPC is necessary. Dealing with this question, Tambe C.J. held as follows:
>
> > "Thus, the test laid down by Their Lordships is whether any relief is asked personally against the Government or a public officer and this is the test for determination whether notice under S.80 is required to be given or not. If relief is asked personally against the Government or a public officer notice under S.80 is necessary. If no relief personally against them was asked no notice is necessary".

(iv) Claiming themselves to be in possession of the suit property, the plaintiffs have valued the suit for declaration at Rs. 5,00,00,000/- and for injunction have valued at Rs.5,000/- and have paid requisite court fee. However, in the present case objection in respect of valuation and payment of court fee can be decided only after framing of issue and after recording evidence.

(v) The scheme of Order I and II CPC clearly shows that the prescriptions therein are in the realm of procedure and not in the realm of substantive law or rights. Therefore, the defect(s) of non-joinder and misjoinder of necessary parties cannot be considered for rejection of the plaint. In the case of *Prem Lala Nahata & Anr. V. Chandi Prasad Sikaria* (2007) 2 SCC 551, Hon'ble Supreme Court has held as under :

> "17. Thus, when one considers Order VII Rule 11 of the Code with particular reference to Clause (d), it is difficult to say that a suit which is bad for misjoinder of parties or misjoinder of causes of action, is a suit barred by any law. A procedural objection to the impleading of parties or to the joinder of causes of action

> or the frame of the suit, could be successfully urged only as a procedural objection which may enable the Court either to permit the continuance of the suit as it is or to direct the plaintiff or plaintiffs to elect to proceed with a part of the suit or even to try the causes of action joined in the suit as separate suits."

(vi) Undisputedly, the plaintiffs are neither party nor are bound by the sale deeds in question, therefore, in the light of decision of a coordinate Bench of this Court in the case of *Santosh Kumar Chopra & others Vs. State of M.P. & ors.* ILR 2012 MP 1852 (pr.8), the plaintiffs are not required to value the suit or to pay ad-valorem court fee on the basis of sale consideration mentioned therein.

(vii) Non-filing of documents of title in support of pleas taken in the plaint, also cannot be a ground to reject the plaint at the stage of order 7 rule 11 CPC.

(viii) & (ix) So far as objections in respect of cause of action and claim on the basis of power of attorney are concerned, the plaintiffs have come with the case that Karodilal was owner/bhumiswami of the land in question, who was maternal uncle of the plaintiffs and the defendants are alienating the suit land and interfering in possession of the plaintiffs. Therefore, even if the power of attorney is ignored, Karodilal being maternal uncle, the plaintiffs are Class IV successors as per Hindu Succession Act, 1956 and in absence of transfer of property by Karodilal to the defendants, the plaintiffs have cause of action to the file the suit.

7. In view of the aforesaid discussion and answer(s) to the defendant's objections, except the objection no.(ii), the civil revision deserves to be and is hereby dismissed, with the direction to learned trial Court to consider the objection in respect to the notice under section 80 CPC at appropriate stage, in the light of decision of Supreme Court in the case of *State of Kerala and others* (supra).

8. With the aforesaid observation, the civil revision is hereby **disposed off.**

9. Interim application(s), if any, shall stand dismissed.

Order accordingly

I.L.R. 2024 M.P. 159

Before Mr. Justice Prem Narayan Singh

CRR No. 325/2021 (Indore) decided on 19 July, 2023

MANOHAR LAL JAIN & anr. …Applicants

Vs.

SMT. URMILA …Non-applicant

***A. Protection of Women from Domestic Violence Act (43 of 2005), Section 2(f) & 17 – Domestic Relationship – Maintenance – Entitlement* – Held**

– Respondent is sister–in–law of petitioner and since petitioners are coming in relationship with her and before 2006, they lived together in shared household, it cannot be said that there exist no domestic relationship – She has a right to reside in shared household u/S 17 thus she would come within the definition of domestic relationship – It is also not necessary that at the time of filing application by aggrieved person, domestic relationship should subsist – Award of interim maintenance was proper – Revision dismissed.

(Para 11 & 12)

क. घरेलू हिंसा से महिलाओं का संरक्षण अधिनियम (2005 का 43), धारा 2(f) व 17 – घरेलू नातेदारी – भरण पोषण – हकदारी – अभिनिर्धारित – प्रत्यर्थी याची की बहु है एवं चूंकि याचीगण प्रत्यर्थी के साथ रिश्तेदारी में चले आ रहे हैं एवं 2006 के पूर्व वे एक साथ साझी गृहस्थी में रहा करते थे, यह नहीं कहा जा सकता कि कोई घरेलू नातेदारी नहीं है – धारा 17 के अंतर्गत उसे साझी गृहस्थी में रहने का अधिकार है अतः वह घरेलू नातेदारी की परिभाषा के भीतर आएगी – यह भी आवश्यक नहीं है कि पीड़ित व्यक्ति द्वारा आवेदन प्रस्तुत करने के समय घरेलू नातेदारी कायम रहना चाहिए – अंतरिम भरणपोषण प्रदान किया जाना उचित था – पुनरीक्षण खारिज।

B. Protection of Women from Domestic Violence Act (43 of 2005), Section 2(f) & 17 – Incident Prior to 2005 **– Held – Apex Court concluded that conduct of parties even prior to commencement of 2005 Act can be taken into consideration while passing order under provisions of 2005 Act – She cannot be debarred from getting protection under 2005 Act in later years. (Para 14)**

ख. घरेलू हिंसा से महिलाओं का संरक्षण अधिनियम (2005 का 43), धारा 2(f) व 17 – 2005 के पहले की घटना – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया कि अधिनियम 2005 के उपबंधों के अधीन आदेश जारी करते समय पक्षकारों का अधिनियम 2005 के प्रारंभ होने के पूर्व का आचरण भी विचार में लिया जा सकता है – उसे पश्चात्वर्ती वर्षों में अधिनियम 2005 के अधीन संरक्षण प्राप्त करने से विवर्जित नहीं किया जा सकता।

C. Protection of Women from Domestic Violence Act (43 of 2005), Section 3 – Economic Abuse **– Held – Respondent was compelled to live separately – Earlier she use to get maintenance of Rs. 10,000 and now it is stopped since 2012 – Petitioners had also deprived her for getting insurance money of her deceased husband – Fact of economic abuse is *prima facie* evinced in favour of respondent. (Para 14)**

ग. घरेलू हिंसा से महिलाओं का संरक्षण अधिनियम (2005 का 43), धारा 3 – आर्थिक दुरूपयोग – अभिनिर्धारित – प्रत्यर्थी को पृथक निवास करने हेतु विवश किया गया था – पूर्व में वह रू. 10,000/– भरण पोषण प्राप्त किया करती थी और अब वह 2012 से बंद है – याचीगण ने उसे अपने मृतक पति का बीमा धन प्राप्त करने से भी वंचित किया था – आर्थिक दुरूपयोग का तथ्य प्रथम दृष्ट्या प्रत्यर्थी के पक्ष में प्रमाणित होता है।

***D. Protection of Women from Domestic Violence Act (43 of 2005), Section 3 – Domestic Violence* – Held – As per Section 3, domestic violence includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse. (Para 13)**

घ. घरेलू हिंसा से महिलाओं का संरक्षण अधिनियम (2005 का 43), धारा 3 – घरेलू हिंसा – अभिनिर्धारित – धारा 3 के अनुसार, घरेलू हिंसा में शारीरिक दुरूपयोग, लैंगिक दुरूपयोग, मौखिक और भावनात्मक दुरूपयोग एवं आर्थिक दुरूपयोग कारित करना सम्मिलित हैं।

Cases referred:

AIR 2022 SC 2331, 2014 (3) SCC 712.

Mitesh Jain, for the applicants.
Anish Ashapure, for the non-applicant.

O R D E R

PREM NARAYAN SINGH, J.:- Being crestfallen by order dated 07.09.2020 passed by learned 3rd Additional Sessions Judge, Indore in Criminal Appeal No. 301/2016, whereby the learned Additional Sessions Judge reversed the order dated 16.02.2016 passed by Judicial Magistrate First Class in MJCR No.18680/2015 and awarded an amount of Rs.7,000/- as maintenance per month from the date of filing of the application i.e. 12.05.2015.

2. It emerged as the undisputed facts that marriage was solemnized between Late Shri Babulal Jain and respondent/non-applicant-Urmila on 19.02.1994 and after 7 months Shri Babulal Jain had expired on 19.09.1994. The petitioner No. 1 - Manoharlal Jain is brother of Late Shri Babulal Jain and brother-in-law *(Jeth)* of the respondent/non-applicant and petitioner No. 2 is son of Shri Manoharlal Jain and nephew *(bhajita)* of Late Shri Babulal Jain as well.

3. The case of respondent in a nutshell is that the respondent/non-applicant alongwith her daughter resided with the petitioners/applicants at the residence situated in Mumbai. It is alleged that in the year 2006, the petitioners/applicants started damaging the social reputation of respondent/non-applicant and her daughter by making false allegations upon them. The petitioners/applicants had sold the flat of respondent/non-applicant situated at Mahad, Mumbai and also grabbed the money received from insurance of her husband. It is further alleged that the respondent/non-applicant was residing in Mumbai in a rented house on the instructions of her father-in-law. Thereafter, she came to Indore and resided alongwith her daughter, wherein, Rs.10,000/- was used to be paid by the petitioners/applicants per month for household expenses. Afterwards, in the month of November, 2012, the petitioners/applicants took respondent's daughter in Mumbai. Thereafter, tortured her mentally and physically as well and

left her Indore after two months.

4. It is further alleged that the respondent/non-applicant is residing in Indore with her maternal relatives. The daughter of the respondent/non-applicant has completed the age of 18 years and she is unable to complete her education and settle her marriage. It is also submitted that the petitioners/applicants have a jewellery shop in main area and luxurious bungalow at prime location in Mumbai. They have houses and more properties at Bhada (Rajasthan), hence the respondent/non-applicant is also liable to live in accordance with status of petitioners/applicants, thus, it is requested that Rs.45,000/- per month be awarded for maintenance of the respondent/non-applicant and for her daughter's higher education.

5. In reply, the petitioners/applicants, while denying the contentions made by the respondent, has submitted that respondent/non-applicant herself is running a private institute and is earning of Rs.1,00,000/- per month from the institute. The daughter of the respondent is a major and is able to maintain herself and competent to take higher education. The respondent/non-applicant has gold ornaments of 600 grams of weight and till November, 2012 she obtained Rs.10,000/- per month from her father-in-law.

6. Having considered the averments of petitioners/applicants and reply of respondent/non-applicant, learned Judicial Magistrate First Class, Indore has dismissed the application filed by the respondent/non-applicant expressing the opinion that the respondent/non-applicant is not entitled to get any maintenance from her brother-in-law i.e. petitioner/non-applicant No. 1, she is entitled to take maintenance only from her father-in-law. As the father-in-law of the respondent/non-applicant had already expired, she cannot claim for maintenance under the provisions of the Protection of Women from Domestic Violence Act, 2005 (hereinafter referred as "D.V. Act,").

7. The respondent/non-applicant filed an appeal before the Additional Sessions Judge, Indore challenging the aforesaid order of Judicial Magistrate First Class wherein learned Additional Sessions Judge by setting aside the order dated 16.02.2016 passed by Judicial Magistrate First Class, adjudicated that respondent is entitled for Rs.7,000/- per month as maintenance from the petitioners/applicants from the date of filing of application i.e. 12.05.2015 till the final disposal of the case.

8. Being aggrieved by the aforesaid order, this petition has been preferred before this Court on the ground that the respondent/non-applicant left the house of the petitioners/applicants in the year 2010 and thereafter, she started living separately in Indore whereas, the application for domestic violence has been filed in the year 2015. This fact shows that the respondent/non-applicant has no

domestic relation with the petitioners/applicants for a period of five years. It is further demurred that when the respondent/non-applicant started residing separately from the petitioners/applicants, i.e. before 2015, it is significant that no allegation has been levelled against the petitioners and no complaint has been made against the petitioners/applicants. That apart, the respondent/non-applicant herself is an educated lady and she is eligible to earn for her livelihood, hence, on these grounds the impugned order is liable to be set aside.

9. The respondent/non-applicant in her reply vehemently expostulated that violence does not mean that it can be done only by way of physical violence, it can be mental, social or economical violence also. Since the petitioners/applicants have grabbed the insurance money of Late Shri Babulal Jain, husband of the respondent/non-applicant and amount of maintenance which they used to pay was stopped after the year 2012, she was entitled for maintenance from the petitioners. Therefore, this petition being debarred by law, deserves to be dismissed.

10. Shri Mitesh Jain, learned counsel for the petitioners has mainly contended that since the domestic relationship between respondent and petitioners is not surviving, entitlement for maintenance under the Protection of Women from Domestic Violence Act, cannot be maintained. In this regard, the definition of domestic relationship enunciated under Section 2(f) is worth referring here as under :-

> *(f) " domestic relationship" means a relationship between two persons who live or have,* ***at any point of time, lived together in a shared household,*** *when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family;*

11. In view of the aforesaid definition, since the petitioners are coming in relationship with respondent and before 2006, they lived together in a shared household, the stand regarding non existence of domestic relationship is found without leg. On this aspect, the law laid down by Hon'ble Supreme Court in judgment rendered in *Prabha Tyagi Vs. Kamlesh Devi* [AIR 2022 SC 2331], is condign to quote here:-

> 52 .....
>
> "(ii) Whether it is mandatory for the aggrieved person to reside with those persons against whom the allegations have been levied at the point of commission of violence?"
>
> It is held that **it is not mandatory** for the aggrieved person, when she is related by consanguinity, marriage or through a relationship in the nature of marriage, adoption or are family

> members living together as a joint family, to actually reside with those persons against whom the allegations have been levelled at the time of commission of domestic violence. **If a woman has the right to reside in the shared household** under Section 17 of the D.V. Act and such a woman becomes an aggrieved person or victim of domestic violence, she can seek reliefs under the provisions of D.V. Act including enforcement of her right to live in a shared household.
>
> (iii) Whether there should be a subsisting domestic relationship between the aggrieved person and the person against whom the relief is claimed?"
>
> It is held that there should be a subsisting domestic relationship between the aggrieved person and the person against whom the relief is claimed vis-a-vis allegation of domestic violence. However, **it is not necessary that at the time of filing of an application by an aggrieved person, the domestic relationship should be subsisting.** In other words, even if an aggrieved person is not in a domestic relationship with the respondent in a shared household at the time of filing of an application under Section 12 of the D.V. Act but has **at any point of time lived so or had the right to live** and has been subjected to domestic violence or is later subjected to domestic violence on account of the domestic relationship, is entitled to file an application under Section 12 of the D.V. Act.

12. In view of aforesaid law, aggrieved persons/respondent would come in the said definition of domestic relationship because she has right to reside in a shared household under Section 17 of the Domestic Violence Act. It is also held that it is not necessary that at the time of filing of application by a aggrieved person, domestic relationship should subsist. In this case, it is undisputed that the respondent is sister-in-law of petitioner No. 1, therefore, she has relationship with petitioners. She would be regarded in domestic relationship with petitioners.

13. The question of domestic violence has also been raised before this Court. In this regard, the definition clause mandates that domestic violence has the same meaning as assigned in Section 3. As per Section 3 of D.V. Act, domestic violence includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse. On this aspect, IVth Clause of explanation added with Section 3 of D.V. Act, is also worth to be produced here :-

> (iv) "Economic abuse" includes :-
>
> (a) deprivation of all or any economic or financial resources to which the aggrieved person is entitled under any law or custom whether payable under an order of a court or otherwise or

which the aggrieved person requires out of necessity including, but not limited to, house hold necessities for the aggrieved person and her children, if any, stridhan, property, jointly or separately owned by the aggrieved person, payment of rental related to the shared house hold and maintenance;

(b) disposal of household effects, anyalienation of assets whether movable or immovable, valuables, shares, securities, bonds and the like or other property in which the aggrieved person has an interest or is entitled to use by virtue of the domestic relationship or which may be reasonably required by the aggrieved person or her children or her stridhan or any other property jointly or separately held by the aggrieved person; and

(c) prohibition or restriction to continued access to resources or facilities which the aggrieved person is entitled to use or enjoy by virtue of the domestic relationship including access to the shared household.

14. Prima-facie, it is established from the record that respondent was compelled to live separately. It is admitted fact that earlier Rs.10,000/-was being given to the respondent per month as maintenance and now it is stopped since the year 2012. As per allegations made by the respondent, the petitioners had also deprived her for getting insurance money of her husband after his death. As such the fact of economic abuse is prima-facie evinced in favour of respondent. In this regard, the law laid down by Hon'ble Supreme Court in judgment *Saraswatty Vs. Babu* [2014(3) SCC 712] provides the guidelines. Hon'ble Supreme Court has also held that the conduct of parties even prior to commencement of Domestic Violence Act, 2005 can be taken into consideration while passing the order under the provisions of Domestic Violence Act. Under these guidelines, it can be ascertained that since the respondent was subjected to domestic violence before the year 2015, she can not be debarred from getting protection under D.V. Act, 2005 in later years. Therefore, the contentions that the applicants have not filed application just and after her separation from domestic family, is also not found substantiated.

15. In upshot of the aforesaid discussion in entirety, the order of learned Appellate Court, with regard to allowing Rs.7,000/- per month as interim maintenance, is found immaculate and in accordance with propriety, correctness and legality. Hence, this petition being sans merit is dismissed and impugned order is hereby affirmed.

Revision dismissed

I.L.R. 2024 M.P. 166

Before Smt. Justice Sunita Yadav

CRR No. 3120/2023 (Gwalior) decided on 1 September, 2023

RAJESH AGRAWAL …Applicant

Vs.

STATE OF M.P. …Non-applicant

***A. Building and Other Construction Workers' (Regulation of Employment and Conditions of Service) Act (27 of 1996), Sections 39, 46, 47, 48, 50, 54 & 55 and Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Rules, M.P., 2002, Rule 49 & 210 – Cognizance of Offence – Limitation* – Held – Mere order of forwarding of notice does not mean that Labour Commissioner had knowledge about the incident on same day – There is no evidence that the notice was received on the same day by Labour Commissioner – Notice was issued on 24.05.12 and complaint was filed on 05.06.12 – Complaint was within limitation – Revision dismissed. (Paras 12 to 15)**

क. भवन एवं अन्य संनिर्माण कर्मकार (नियोजन विनियमन एवं सेवा शर्तें) अधिनियम (1996 का 27), धाराएँ 39, 46, 47, 48, 50, 54 व 55 एवं भवन एवं अन्य संनिर्माण कर्मकार (नियोजन विनियमन एवं सेवा शर्तें) नियम, म.प्र., 2002, नियम 49 व 210 – अपराध का संज्ञान – परिसीमा – अभिनिर्धारित – मात्र नोटिस के अग्रेषण आदेश का अभिप्राय यह नहीं है कि श्रम आयुक्त को उसी दिन घटना की जानकारी हुई – इसका कोई साक्ष्य नहीं है कि श्रम आयुक्त द्वारा उसी दिन नोटिस प्राप्त किया गया था – नोटिस दिनांक 24.05.12 को जारी किया गया था और परिवाद दिनांक 05.06.12 को दर्ज कराया गया था – परिवाद परिसीमा के अंतर्गत था – पुनरीक्षण खारिज।

***B. Criminal Procedure Code, 1973 (2 of 1974), Section 397 & 401 – Revision – Scope & Jurisdiction* – Held – Revisional jurisdiction of High Court cannot be equated with appellate jurisdiction – In revisional jurisdiction, High Court can examine the records of any proceedings for satisfying itself as to the correctness, legality or propriety of any finding, sentence or order – There has to be perversity or unreasonableness, complete misreading of records, when alone High Court would exercise its revisional jurisdiction to set aside such order/judgment. (Para 16)**

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 397 व 401 – पुनरीक्षण – विस्तार एवं अधिकारिता – अभिनिर्धारित – उच्च न्यायालय के पुनरीक्षण अधिकारिता की तुलना अपीलीय अधिकारिता से नहीं की जा सकती – पुनरीक्षण अधिकारिता में उच्च न्यायालय किसी निष्कर्ष, दण्डादेश या आदेश की शुद्धता, वैधता, औचित्य के बारे में अपना समाधान करने हेतु किसी कार्यवाही के अभिलेख की परीक्षा कर सकता है – उच्च न्यायालय केवल ऐसे आदेश/निर्णय को अपास्त करने हेतु अपनी पुनरीक्षण अधिकारिता

का प्रयोग करेगा जिसमें विपर्यस्तता अथवा अनुचितता हो, अभिलेखो को पूर्णतः गलत पढ़ा गया हो।

Case referred:

AIR 2011 SC 641.

Dinesh Kumar Agrawal, for the applicant.
Dheeraj Kumar Budholiya, P.L. for the non-applicant/State.

O R D E R

SUNITA YADAV, J.:- Present criminal revision under Section 397 r/w. Section 401 of Cr.P.C has been filed being aggrieved by the order dated 19.04.2023 passed by Fourth Additional Sessions Judge, Guna (M.P.) in Cr.A. No.110/2019 affirming the judgment dated 26.04.2019 passed in RCT No.995/2012 by Chief Judicial Magistrate Guna (M.P.) convicting the petitioner for the offence punishable under Section 50 for violation of provision of Section 39 of "The Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996 (hereinafter referred to as "the Act") r/w. Rule 210 of the "M.P. Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Rules, 2002 (hereinafter referred to as "the Rules") and imposed with fine of Rs.1,000/-, under Section 47 for violation of provision of Section 39 of the Act r/w. Rule 49 and imposed with fine of Rs.1,000/-, under Section 48 for violation of provision of Section 46 of the Act, and also imposed with fine of Rs.1,000/- with default stipulations.

2. The facts in brief to decide the present revision are that on 14.02.2012 the wall of under construction - Yash Ware Housing Corporation A.B. Road, Bilonia Guna fell down while plastering, in which six workers were buried and died. The proprietor of said accident site is petitioner/accused - Rajesh Agarwal and the construction work was being done through the contractor accused - Munnalal Jatav. The site of the said accident was inspected on 19.02.2012, the statements of alive labourers were recorded, *Panchnama* and photographs of accident site were prepared.

3. Thereafter, a notice was issued to accused proprietor Rajesh Agrawal and contractor Munnalal Jatav. A copy of the notice was also forwarded to the Chief Inspector and Labour Commissioner, Government of Madhya Pradesh, Indore. On the basis of said notice, Chief Inspector and Labour Commissioner, Government of M.P. by taking cognizance of the said crime, issued a show cause notice to accused persons on 20.03.2012. As per the relevant Rules of 2002, alleging that the first aid box and medicines were not kept at the construction site and safety shoes, helmets were not provided to the labourers working, nor it was ensured that the labourers at the workplace wear safety shoes and helmet while

working and also it was not ensured that while making the wall it was stable without any support.

4. After grant of sanction for prosecution, a complaint under aforementioned sections was filed before the learned Chief Judicial Magistrate, Guna. The learned C.J.M., Guna framed the charges and after recording of evidence available on record vide judgment dated 26/04/2019 passed in R.C.T. No.995/2012 convicted the petitioner as described in para-1 of this order.

5. Being aggrieved, the petitioner filed an appeal bearing Cr.A. No.110/2019 before the learned Fourth Additional Sessions Judge Guna, (M.P.). The learned appellate Court after hearing learned counsel for the rival parties vide impugned judgment dated 19/04/2023 affirmed the judgment dated 26/04/2019 passed by the trial Court, against which, the present revision is filed.

6. Learned counsel for the petitioner argued that the impugned orders passed by courts below are perverse, illegal and against the settled principles of law, hence, the same is liable to be quashed. It is further argued that both the courts below have committed serious error while taking the cognizance of offence in the complaint dated, 05.06.2012 (Annexure A/4) which is barred by limitation u/S.55 of the Act. It is further argued that both the courts below have committed serious error in ignoring the admission and documents on record and not dealing with Exh.D-1 which palpably shows that the Labour Commissioner/Chief Inspector was having knowledge of the alleged offence from 21.02.2012 in terms of Section 55 of the Act and, therefore, the written complaint u/S.54 of the Act could not have been filed on 05.06.2012. It is further argued that although the petitioner/accused was acquitted on 06.03.2017 in criminal case no.1299/2012 filed by Police Guna for the offence punishable u/S.304-A of IPC. However, the conviction of petitioner/accused by the Act and Rules has resulted miscarriage of justice.

7. In support of his submissions, counsel for the petitioner has relied upon the decision of Apex Court in the case of *Kolla Veera Raghav Rao Vs. Gorantla Venkateshwara Rao* reported in [AIR 2011 SC 641] and argued that the conviction of petitioner/accused is against the settled principles of law, therefore, present revision be allowed by setting aside the impugned judgments of both the courts below.

8. On the other hand, learned Panel Lawyer drawn attention of this Court to the discussion on evidence of the impugned judgments of courts below and contends that the trial court as well as appellate Court have considered the entire evidence placed on record and upon critical evaluation thereof have reached the conclusion for award of sentence, under such obtaining facts and circumstances, both the courts below have not faulted while awarding the punishment to the petitioner. Hence, the present revision deserves to be dismissed.

9. Heard learned counsel for the parties and perused the material available on record.

10. For ready and reference and convenience, Section 54 and 55 of the Construction Workers Act reads as under;

> **54. Cognizance of offences.—**
>
> **(1)** No court shall take cognizance of any offence punishable under this Act except on a complaint—
>
> (a) made by, or with the previous sanction in writing of, the Director-General or the Chief Inspector; or
>
> (b) made by an office-bearer of a voluntary organisation registered under the Societies Registration Act, 1860 (21 of 1860); or
>
> (c) made by an office-bearer of any concerned trade union registered under the Trade Unions Act, 1926 (16 of 1926).
>
> No court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under this Act.
>
> **55. Limitation of prosecutions.**—No court shall take congizance of an offence punishable under this Act unless the complaint thereof is made within three months from the date on which the alleged commission of the offence came to the knowledge of the Director-General, the Chief Inspector, an office-bearer of a voluntary organization or, as the case may be, an office-bearer of any concerned trade union.

11. Under Rule 251 of the Construction Workers Rules, the powers of Inspectors have been engraved and sub-rule (2) and (3) reads as under;

> **(2)** An Inspector may, within the local limits for which he is appointed issue show-cause notice or warning to employers regarding the safety, health or welfare of building workers provided under the Act or the rules.
>
> **(3)** An Inspector may, within the local limits for which he is appointed, file in a court having jurisdiction a complaint or other proceeding relating to an offence under the Act.

12. In the case in hand, argument of the learned counsel for petitioner in respect to the point of limitation is based on the ground that notice referred in para-3 of written complaint (Annexure A/5) dated 21.02.2012, addressed to the Labour

Commissioner, State of Madhya Pradesh at Indore was sent on 21.02.2012 by Inspector/Deputy Director, Industrial Health & Safety, Gwalior about alleged offence and this fact has been admitted by the witness (PW-5) who is Inspector/Deputy Director, Industrial Health & Safety; therefore, the incident dated 14.2.2012 was in the knowledge of the Labour Commissioner on 21.02.2012 itself. Since the complaint is not filed within three months from the knowledge, therefore, it is not maintainable as being time barred.

13. The above arguments of the petitioner is not acceptable because the record indicates that copy of notice (Exhibit-P14/Annexure A-5) was sent to petitioner and the co-accused/Contractor on 21.02.2012 and at para 6 of said notice, it was directed that the copy be forwarded to Labour Commissioner/Chief Inspector, Indore. However, there is no evidence on record to show that the notice was received on the same day *i.e.* 21.02.2012 by Labour Commissioner /Chief Inspector at Indore. Mere order of forwarding of notice does not mean that Labour Commissioner, Indore/Chief Inspector had knowledge about the incident on same day.

14. Undisputedly, Harsh Chaturvedi - Inspector/Deputy Director, Industrial Health & Safety, Gwalior received knowledge on 14.02.2012, however, he holds the post of Inspector/Deputy Director and, therefore, learned courts below have rightly discarded the argument of counsel for the petitioner that the complaint is time barred.

15. It is also apparent that before filing of written complaint in the Court of learned Chief Judicial Magistrate, Guna, the Inspector/ Deputy Director, Industrial Health & Safety, Gwalior and Chambal Division has issued notice dated 24.05.2012 (Annexure A/6) and the complaint is filed on 05.06.2012; therefore, learned courts below have also not erred in holding that the complaint is within limitation and maintainable. Even if, the limitation starts from the date of show cause notice *i.e.* 20.03.2012 sent by Labour Commissioner/Chief Inspector, the complaint filed on 05.06.2012 is within limitation.

16. It is well settled that the revisional jurisdiction of the High Court cannot be equated with appellate jurisdiction. In its revisional jurisdiction, the High Court can examine the records of any proceedings for satisfying itself as to the correctness, legality or propriety of any finding, sentence or order. There has to be perversity or unreasonableness, complete misreading of records leading to the court taking into consideration irrelevant material while ignoring relevant material, when alone the High Court would exercise its revisional jurisdiction to set aside such order/judgment. In this case no ground as described above is found in the order passed by the court below.

17. Consequently, the present petition is hereby **dismissed.**

Revision dismissed

I.L.R. 2024 M.P. 171

Before Mr. Justice Dinesh Kumar Paliwal

MCRC No. 4884/2023 (Jabalpur) decided on 18 August, 2023

SHAHRUKH KHAN …Applicant

Vs.

STATE OF M.P. & anr. …Non- applicants

A. Criminal Procedure Code, 1973 (2 of 1974), Section 311, Penal Code (45 of 1860), Sections 363, 376(2)(n) & 506 and Protection of Children from Sexual Offences Act (32 of 2012), Section 5/6 - Recall of Witness – Birth Certificate – **Held – It is a case where minor prosecutrix and her mother appears to have been win over by accused by hook or crook – So called educational certificate appears to have been got prepared just to get over the evidence of witnesses who have already been examined and cross-examined a year back fully, to resile from their earlier evidence – Application dismissed. (Para 11)**

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 311, दण्ड संहिता (1860 का 45), धाराएँ 363, 376(2)(n) व 506 एवं लैंगिक अपराधों से बालकों का संरक्षण अधिनियम (2012 का 32), धारा 5/6 – साक्षी को पुनः बुलाना – जन्म प्रमाण–पत्र – अभिनिर्धारित – यह ऐसा मामला है जहां नाबालिग अभियोक्त्री और उसकी मां को अभियुक्त द्वारा येन केन प्रकारेण अपने पक्ष में करना प्रतीत होता है – कथित शैक्षणिक प्रमाणपत्र उन साक्षियों के साक्ष्य को काटने के लिए तैयार करवाए गए प्रतीत होते है जिनका परीक्षण और प्रति–परीक्षण एक वर्ष पूर्व ही पूर्णतः किया जा चुका है, उनके पूर्ववर्ती साक्ष्यों को नकारने के लिए – आवेदन खारिज।

B. Criminal Procedure Code, 1973 (2 of 1974), Section 311, Penal Code (45 of 1860), Sections 363, 376(2)(n) & 506 and Protection of Children from Sexual Offences Act (32 of 2012), Section 5/6 - Recall of Witness – Proof of Age – Aadhar Card – **Held – Aadhar Card cannot be used as a proof of date of Birth, this document is only for the purpose of identification of a particular person. (Para 17)**

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 311, दण्ड संहिता (1860 का 45), धाराएँ 363, 376(2)(n) व 506 एवं लैंगिक अपराधों से बालकों का संरक्षण अधिनियम (2012 का 32), धारा 5/6 – साक्षी को पुनः बुलाना – आयु का सबूत – आधार कार्ड – अभिनिर्धारित – आधार कार्ड का जन्म तिथि के सबूत के रूप में उपयोग नहीं किया जा सकता, यह दस्तावेज केवल किसी व्यक्ति विशेष की पहचान के उद्देश्य के लिए ही है।

C. Criminal Procedure Code, 1973 (2 of 1974), Section 311 and Juvenile Justice (Care and Protection of Children) Act, 2015 (2 of 2016), Section 94 - Birth Certificate – **Held – Educational document appear to be**

forged and suspicious as Adarsh Vidhya Mandir from where document was issued is 100 kms away from the place where prosecutrix and his mother resides – Date of birth of prosecutrix has been proved by prosecution by filing birth certificate issued only after two months of the birth of prosecutrix by Registrar (births and deaths) – In such situation as per Section 94 of 2015 Act, such other evidence cannot be seen. (Para 8 & 16)

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 311 एवं किशोर न्याय (बालकों की देख–रेख और संरक्षण) अधिनियम, 2015 (2016 का 2), धारा 94 – जन्म प्रमाणपत्र – अभिनिर्धारित – शैक्षणिक दस्तावेज कूटरचित और संदिग्ध प्रतीत होते है क्योंकि आदर्श विद्या मंदिर, जहां से दस्तावेज जारी किया गया था, उस स्थान से, जहां अभियोक्त्री एवं उसकी मां निवास करती है, 100 किमी. दूर है – अभियोक्त्री की जन्म तिथि, अभियोजन द्वारा अभियोक्त्री के जन्म के मात्र 2 माह पश्चात् पंजीयक (जन्म तथा मृत्यु) द्वारा जारी जन्म प्रमाण पत्र प्रस्तुत कर साबित की गई है – ऐसी स्थिति में अधिनियम 2015 की धारा 94 के अनुसार अन्य साक्ष्य पर ध्यान नहीं दिया जा सकता।

Cases referred:

AIR 1991 SC 1346, (2005) 10 SCC 701, AIR 2004 SC 4209, (2006) 9 SCC 386.

Manish Datt with *Mayank Sharma*, for the applicant.
Vinay Sharma, P.L. for the non-applicants.

O R D E R

DINESH KUMAR PALIWAL, J.:- This application under Section 482 of the Code of Criminal Procedure has been filed by petitioner Shahrukh Khan being dissatisfied and aggrieved by the order dated 09.01.2023 passed by Special Judge POCSO Act, 2012 Sehore (M.P.) in Special Case No.95/20 (State of M.P. vs. Shahrukh) for commission of offence under Section 363, 376(2)(n), 506 of IPC and Section 5/6 of POCSO Act, 2012 whereby application under Section 311 of Cr.P.C.dated 08.12.2022 moved by applicant/accused for recalling the minor prosecutrix (PW-1) and her mother (PW-2) who were examined and cross-examined more than one year ago has been rejected by the trial Court.

2. As per prosecution case, on 02.01.2021, on the basis of detailed counselling of 15 year old minor prosecutrix, it was found that on 11.10.2020, rape/aggravated penetrative sexual assault was committed upon her by Shahrukh Khan S/o Noushe Khan. It was further found that after his release on bail by the High Court on 31.12.2020, accused Shahrukh again kidnapped the minor and sexually exploited/violated her. That time she suffered pain in her private part and abdomen. In her medical examination, number of injuries were found on her person. FIR was registered. After investigation, charge sheet was filed.

3. In this case, minor prosecutrix (PW-1) was examined on 21.09.2021 and her mother (PW-2) was examined on 24.12.2021 before the Court of Special Judge, POCSO Act, Sehore. After more than a year of their examination, on 08.12.2022 an application under Section 311 of Cr.P.C. was filed by accused before the learned trial Court along with their affidavits for recalling them for further cross-examination on the ground that as per the educational document received from one Adarsh Vidhya Mandir Amrawad Kala, Badi, District Raisen her date of birth is 10.05.2002 and not 20.03.2006. Learned trial Court after hearing the learned counsel for the State and learned counsel for the applicant/accused dismissed the application. Hence, this petition has been filed.

4. Learned senior counsel appearing for the applicant has submitted that learned trial Court has dismissed the applicant/accused's application without applying of judicial mind on the ground that in birth certificate and in Scholar Register prosecutrix's date of birth is mentioned as 20.03.2006 and in her evidence before the Court prosecutrix deposed that her date of birth is 20.03.2006 and even her mother deposed that at the time of commission of offence she was 16 years of age and in their evidence they never stated that her date of birth is 10.05.2002. It is submitted that learned trial Court was not justified in dismissing the application on the ground that application has been filed to fill the lacuna on the basis of compromise arrived at between the parties. Therefore, he has prayed that impugned order be set aside and minor prosecutrix (PW-1) and her mother (PW-2) who have already been examined and cross-examined be recalled for further cross-examination, as they have to be further cross-examined on the point of date of birth of the prosecutrix in the light of the documents received from Adarsh Vidhya Mandir, Badi District Raisen. Hence, he has prayed for quashment of the impugned order. To buttress the argument, learned senior counsel for the applicant has relied on *Mohanlal Shamji Soni vs. Union of India and another.* AIR 1991 SC 1346.

5. On the other hand, learned Panel Lawyer for the respondent/State has opposed the prayer made by the learned counsel for the applicant. It is submitted that defence/accused cannot be permitted to recall the witnesses who have already been examined in chief and cross-examined fully just to efface the evidence already given by them under oath. It is further submitted that as far as the point of date of birth is concerned, date of birth certificate has been produced by the prosecution and same has been exhibited as Ex.P/5 by the mother of the prosecutrix (PW-2) in her evidence and in it, date of birth of prosecutrix is mentioned as 20.03.2006. It is further submitted that Ex.P/5 birth certificate has been issued by the Registrar (births and deaths) and in it, date of birth of prosecutrix was registered long back on 16.05.2006. In such circumstances, learned trial Court has rightly dismissed the application to recall the witnesses for effacing the evidence already given by them under oath on the basis of the

documents which are forged and carry no evidentiary value. Therefore, he has prayed for dismissal of the petition.

6. I have carefully considered the rival submissions put forth by learned counsel for the parties and have gone through the impugned order and material available on record.

7. On a perusal of the record, it is revealed that it is a case where 15 year old minor prosecutrix was first made victim to rape/aggravated penetrative sexual assault on 11.10.2020 by the present applicant and FIR was lodged in P.S. Ichhawar. It is further revealed that he was released on bail by the High Court after one month of his arrest and after his release on bail on 31.12.2020 he again kidnapped the minor prosecutrix and sexually violated her by committing rape/aggravated penetrative sexual assault upon her causing number of injuries on her person.

8. Applicant is facing trial for commission of offence under Section 363, 376(2)(n), 506 of IPC and Section 5/6 of POCSO Act. Minor prosecutrix (PW-1) was examined long back on 21.09.2021 and her mother (PW-2) was examined and fully cross-examined on 24.12.2021. In support of date of birth of the prosecutrix, birth certificate Ex.P/5 has been produced by prosecution. After more than one year of their examination and cross-examination, an application was moved by the applicant/accused on 08.12.2022 along with affidavits of minor prosecutrix and her mother stating that prosecutrix's date of birth is 10.05.2002 and so called Educational Certificate issued Adarsh Vidhya Mandir Amrawad, Kala Badi, District Raisen and one Aadhar Card is also alleged to have been produced in which the same date of birth is mentioned. As far as affidavits are concerned, it is apparent that these affidavits have been obtained under threat and coercion. The so called educational document alleged to have been obtained by the accused appears forged and suspicious as Adarsh Vidhya Mandir is situated at Amrawad kala Badi District Raisen whereas prosecutrix and her mother are resident of a village in District Sehore which is almost more than 100 kms away from the so-called school, which has issued so called educational Certificate mentioning the date of birth to be 10.05.2002.

9. The relevant portion of Section 311 of Cr.P.C. is as under:

> *"Power to summon material witness, or examine person present.-Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or re call and re-examine, any person already examined ; and the Court shall summon and examine or recall and re examine any such person if his evidence appears to it to be essential to the just decision of the case. "*

10. It appears manifestly in two parts; whereas the word used in first part is 'may' and the word used in second part is 'shall. In consequence, the first part which is permissive gives purely discretionary authority to the court and enable it at any stage of inquiry, trial or other proceedings under the Code to act in one of the three ways mentioned therein. The second part being mandatory, imposes an obligation on the Court (1) to summon and examine, or (2) to recall and re-examine any such person, if his evidence appears to be essential to the just decision of the case.

11. It is a case where minor prosecutrix and her mother appears to have been win over by the accused by hook or crook. The so called educational certificate appears to have been got prepared just to get over the evidence of the witnesses who have already been examined and cross-examined fully to resile from their earlier evidence.

12. In the case of *Mishrilal and others vs.State of M. P. and others* (2005) 10 SCC 701 while dealing with the case having more or less similar facts the Hon'ble Apex Court observed as under:-

> *In our opinion, the procedure adopted by the Sessions Judge was not strictly in accordance with law. Once the witness was examined in-chief and cross- examined fully, such witness should not have been recalled and re-examined to deny the evidence he had already given before the court, even though that witness had given an inconsistent statement before any other court or forum subsequently. A witness could be confronted only with a previous statement made by him. At the time of examination of PW 2 Mokam Singh on 6.2.1991, there was no such previous statement and the defence counsel did not confront him with any statement alleged to have been made previously. This witness must have given some other version before the Juvenile Court for extraneous reasons and he should not have been given a further opportunity at a later stage to completely efface the evidence already given by him under oath. The courts have to follow the procedures strictly and cannot allow a witness to escape the legal action for giving false evidence before the court on mere explanation that he had given it under the pressure of the police or some other reason. Whenever the witness speaks falsehood in the court, and it is proved satisfactorily, the court should take a serious action against such witnesses.*

13. In the case of *Yakub Ismailbhai Patel vs.State of Gujarat*-AIR 2004 SC 4209 in para 40 and 41 observed as under :-

> *40. Significantly this witness, later on filed an affidavit wherein he had sworn to the fact that whatever he had deposed before Court as PW-1 was not true and it was so done at the instance of Police.*
>
> *41. The averments in the affidavits are rightly rejected by the High Court and also the Sessions Court. Once the witness is examined as a prosecution witness, he cannot be allowed to perjure himself by resiling from testimony given in Court on oath. It is pertinent to note that during the intervening period between giving of evidence as PW-1 and filing of affidavit in Court later he was in jail in a narcotic case and that the accused persons were also fellow inmates there*

14. In the case of *Nisar Khan alias Guddu and others vs. State of Uttaranchal* (2006) 9 SCC 386 where an application was filed on behalf of the accused under Section 311 of the Cr.P.C. and witness was recalled. With regard to this fact the Hon'ble Apex Court observed as under:

> *"We are of the view that no reasonable person properly instructed in law would allow an application filed by the accused to recall the eyewitnesses after a lapse of more than one year that too after the witnesses were examined, cross-examined and discharged."*

15. Thus, from the above case laws, it is apparent that witnesses who have already been examined-in-chief and cross-examined fully said witnesses cannot be recalled and re-examined to deny the evidence they have already given before the Court and no opportunity at a later stage can be given to witnesses to completely efface the evidence already given by them under oath.

16. In this case, it also cannot be overlooked that date of birth of the prosecutrix has been proved by the prosecution by filing Ex.P/5 birth certificate issued only after two months of the birth of the prosecutrix by Registrar (births and deaths). In such situation, as per Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015 such other evidence cannot be seen. "Juvenile Justice (Care and Protection of Children) Act, 2015" came into force w.e.f. 15.01.2016. The Rules also made under the aforesaid Act named, "The Juvenile Justice (Care and Protection of Children) Model Rules, 2016". Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015 provide the procedure for determination of the age. Sub Rule 2 of Section 94 of New Act says:-

> *" (2) In case, the Committee or the Board has reasonable*

grounds for doubt regarding whether the person brought before it is a child or not, the Committee or the Board, as the case may be, shall undertake the process of age determination, by seeking evidence by obtaining

(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;

(ii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board.

Provided such age determination test conducted on the order of the Committee of the Board shall be completed within fifteen days from the date of such order. "

17. A perusal of the aforesaid section, makes it clear that if genuineness of the school certificate is not questioned, then the law gives prime importance to the date of birth certificate issued by the school. If the evidence stated in Section 94(2) is available then the Court could not place reliance upon any other documents. But it is primarily requirement of the law that the documents stated in the rule should be genuine. The document issued by the school and birth certificate Ex.P/5 showing minor prosecutrix's date of birth as 20.03.2006 is already on record and birth certificate has been duly proved by the mother of the prosecutrix whose affidavit has been filed in the light of the compromise.The copy of the Scholar Registrar showing the same date of birth which has been issued by the school. Therefore, genuineness of the documents relied on by the prosecution is not in question. In such situation, the documents filed after more than one year of the examination and cross-examination of the witnesses in the form of Aadhar Card and birth certificate issued by Adarsh Vidhya Mandir Amrawad Kala, Badi which is more than 100 kms away from the actual residence of the prosecutrix and her family are of no avail. It appears that these documents had been got manufactured for the defence purpose only. As far as the date of birth mentioned in the Aadhar Card is concerned, Aadhar Card cannot be used as a proof of date of birth. This document is only for the purpose of identification of particular person. Thus, the witnesses who have already been examined and cross-examined fully cannot be recalled to deny the evidence about the date of birth already given before the Court.

18. As per the facts of the *Mohanlal Shamji Soni (supra)* relied on by learned counsel for the applicant, during a raid primary gold alongwith silver bricks and

an amount of Rs. 79,000/-was seized from the possession of the appellant. Assistant Collector of Customs filed two complaints (1) under the provisions of Customs Act, 1962 and (2) under the Gold Control Act, 1968. At the time of final argument, prosecution filed two applications in both the cases under Section 540 of the old Code of which the Section 311 of Cr.P.C. is corresponding , requesting the trial Court to recall Mr.Mirchandani, the seizing officer, for further examination alongwith two new witnesses K.K.Das, Assistant Collector of Customs and the Deputy Chief Officer (Assayer) of Mint Master, Bombay either as witnesses of prosecution or of the Court. Trial Court rejected, but the High Court allowed the revisions and directed to examine the aforesaid three witnesses. Feeling aggrieved, the appellant approached the Apex Court. The relevant observation of the Apex Court in para 16, 18,19 and 27 is as under:

> *" 16. ...Though any party to the proceedings points out the desirability (of) some evidence being taken, then the Court has to exercise its power under this provision either discretionary or mandatory -depending on the facts and circumstances of each case, having in view that the most paramount principle underlying this provision is to discover or to obtain proper proof of relevant facts in order to meet the, requirements of justice...."*
>
> *The following extract is quoted from the quoted part of the Apex Court from the case of Jamatraj Kewalji Govani-"Indeed they could be decided on fact because it can always be seen whether the new matter is strictly necessary for a just decision and not intended to give an unfair advantage to one of the rival sides.... In other words, where. the Court exercises the power under the second part, the inquiry cannot be whether the accused has brought anything suddenly or unexpectedly but whether the Court is right in thinking that the new evidence is needed by it for a just decision of the case. If the Court has acted without the requirements of a just decision, the action is open to criticism but if the Court's action is supportable as being in aid of a just decision the action cannot be regarded as exceeding the jurisdiction."*
>
> *" 18. ...Though Section 540 (Section 311 of the new Code),is, in the widest possible terms and calls for no limitation, either with regard to the stage at which the powers of the Court should be exercised, or with regard to the manner in which they should be exercised, that power is circumscribed by the principle that underlines Section 540, namely, evidence to be obtained should appear to the Court essential to a just decision of the case by getting at the truth by all lawful means.*

Therefore, it should be borne in mind that the aid of the section should be invoked only with the object of discovering relevant facts or obtaining proper proof of such facts for a just decision of the case and it must be used judicially and not capriciously or arbitrarily because any improper or capricious exercise of the power may lead to undesirable results...."

19. ...but this power has to be exercised sparingly and only when the ends of justice so demand. The higher the power the more careful should be its exercise.... The words, " Just decision of the case" would become meaningless and without any significance if a decision is to be arrived at without a sense of justice and fair play..."..

27. The principle of law that 'emerges from the views expressed by this Court in the above decisions is that the Criminal Court has ample power to summon any person as a witness or recall and re-examine any such person even if the evidence on both sides is closed and the jurisdiction of the Court must obviously be dictated by exigency of the situation, and fair play and good sense appear to be the only safe guides and that only the requirements of justice command the examination of any person which would depend on the facts and circumstances of each case.

19. In the above case, it was held that Criminal Court has ample power to summon any person as a witness or recall and re-examine any such person even if the evidence on both sides is closed and the jurisdiction of the Court must obviously be dictated by exigency of the situation, and fair play and good sense appear to be the only safe guard and that only the requirements of justice command the examination of any person which would depend on the facts and circumstances of each case.

20. On the basis of the aforesaid case law, applicant/accused get no benefit. In the case on hand, it cannot be overlooked that it is a case where a minor prosecutrix had been raped/aggravated penetrative sexual assault twice by the applicant/accused. It appears that he had also won over the prosecutrix and her mother either by hook or crook or under threat or coercion or by giving some allurement. Therefore, in such situation, learned trial Court was fully justified not to recall the witnesses for further cross-examination on the basis of documents which have no relevance with the regard to the age of the prosecutrix.

21. In view of foregoing discussions, I am of the view that this petition being sans merit deserves to be and is hereby **dismissed.**

Application dismissed

I.L.R. 2024 M.P. 180

Before Mr. Justice Vishal Dhagat

MCRC No. 12136/2012 (Jabalpur) decided on 28 August, 2023

MAHINDRA & MAHINDRA FINANCIAL SERVICES LTD. (M/S) ...Applicant

Vs.

KAMDHENU COMPANY PVT. LTD. & ors. …Non-applicants

Negotiable Instruments Act (26 of 1881), Section 138 & 142 and Criminal Procedure Code, 1973 (2 of 1974), Section 482 - Territorial Jurisdiction **– Held – Applicant is PAN India Company having its branches all over India – PAN India Company cannot be given liberty to present cheques at any place in India according to their will and get arrest warrants/summons issued to respondents, who will have great difficulty in contesting the case – Though Court at Bhopal has jurisdiction to hear the case but no transactions of applicant company has taken place at Bhopal but has taken place at Kolkata – Applicant cannot be allowed to file complaint at Bhopal only because cheque has been presented at Bhopal – Application dismissed. (Para 7 & 8)**

परक्राम्य लिखत अधिनियम (1881 का 26), धारा 138 व 142 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – क्षेत्रीय अधिकारिता – अभिनिर्धारित – अपीलार्थी एक अखिल भारतीय कंपनी है जिसकी शाखाएं सम्पूर्ण भारत में है – अखिल भारतीय कंपनी को अपनी इच्छानुसार भारत में किसी भी स्थान पर चेक प्रस्तुत करने और प्रत्यर्थीगण के गिरफ्तारी वारंट/सम्मन जारी कराने की स्वतन्त्रता नहीं दी जा सकती, जिन्हें मामले का प्रतिवाद करने में काफी कठिनाई होगी – यद्यपि भोपाल स्थित न्यायालय को मामले की सुनवाई की अधिकारिता है किन्तु अपीलार्थी कंपनी का कोई भी संव्यवहार भोपाल में नहीं हुआ है अपितु कलकत्ता में हुआ है – केवल इस कारण कि चेक भोपाल में प्रस्तुत किया गया है, अपीलार्थी को भोपाल में परिवाद प्रस्तुत करने की अनुमति नहीं दी जा सकती – आवेदन खारिज।

Rajesh Maindiretta, for the applicant.
Akshay Namdeo, G.A. for the non-applicants.

O R D E R

VISHAL DHAGAT, J.:- Petitioner has filed this petition under section 482 CrPC, challenging order dated 8.6.2012 passed in Criminal Revision No.238/2010 by which revisional Court has dismissed the revision filed by petitioner against order dated 17.12.2009 passed in R.T No.310/2006 and affirmed the same. It has been held by revisional Court that transaction took place in Kolkata and cheque has been dishonoured in Kolkata, therefore, complaint

could not have been filed at Bhopal. Court at Bhopal had no jurisdiction to entertain the complaint and revision was dismissed.

2. Learned counsel for the petitioner submitted that cheque was presented at Bhopal and same was sent for clearing at Kolkata. It was informed from clearing office at Kolkata about dishonour of cheque. Petitioner was informed about dishonour of cheque by local Branch of SBI, M.P. Nagar, Bhopal dated 3.12.2004. It is submitted that since cheque was presented at Bhopal, therefore, court at Bhopal have jurisdiction to entertain the complaint. Trial Court as well as revisional Court committed grave error in over-looking the fact that there is no power of review on criminal court and once cognizance of offence has been taken then court below could not dismiss the case on ground of not having jurisdiction to hear the case.

3. Heard the learned counsel for the parties.

4. On going through impugned order, it is found that case has been dismissed on two counts, i.e. Court at Bhopal does not have jurisdiction to entertain complaint and complainant is not showing interest to prosecute the case and he has not paid process fee for issuance of notices.

5. Counsel appearing for petitioner submitted that cheque was presented at Bhopal in SBI Branch for encashment. It was sent for clearing to Kolkata and same was bounced. Information to petitioner was given regarding bouncing of cheque by SBI Branch at Bhopal. In this circumstances, Court at Bhopal has jurisdiction to entertain the complaint.

6. Nothing has been pleaded and argued by counsel for petitioner challenging order on ground that process fee has not been paid and Court is not competent to dismiss the case or in what circumstances, process fee could not be paid by petitioner.

7. Petitioner is a PAN India company having its branches all over India. It's headquarter is at Mumbai. Respondent company was made dealer of petitioner company at Kolkata. Agreement and other documents were also signed at Kolkata and trade and other transactions were done at Kolkata or in Assam. Respondent company is having it's office in Assam at Dibrugarh. Petitioner company has filed complaint at Bhopal as cheque has been presented at Bhopal by regional office of the company. PAN Indian companies are not free to file cases at places of their will. PAN Indian companies cannot present cheques at distant places on their will so that respondent/accused may have difficulty in defending it's case and order can be obtained from Court easily unopposed. No transaction of petitioner company has taken place at Bhopal. Only cheque has been presented at Bhopal to create cause of action. Legally and technically, petitioner company can file

complaint case at Bhopal as cheque has been presented at Bhopal and information has also been received at regional office at Bhopal regarding bouncing of cheque. But, considering larger interest of justice, it would have been proper for PAN Indian companies to present the cheque at place where transaction has taken place between the parties or in place where respondent is residing so that matter can be resolved speedily, as service of summons and contesting of case will be easy and smooth for the parties where parties had done their transactions. PAN Indian company cannot be given liberty to present cheques at any place in India according to their will and get arrest warrants or summons issued to respondent, who will have great difficulty in approaching said place to contest the case.

8. Though, Court at Bhopal has jurisdiction to hear the case but, I do not find it appropriate to entertain the petition filed by petitioner. No arguments has been made why process fee was not paid in time and second part of order regarding dismissal of case due to non payment of process fee has not been assailed. In these circumstances, petitioner cannot be allowed to file a case of Negotiable Instruments Act from Bhopal only because cheque has been presented by regional office at Bhopal.

9. In view of aforesaid, petition filed by petitioner is **dismissed.**

Application dismissed

I.L.R. 2024 M.P. 182

Before Mr. Justice Vijay Kumar Shukla

MCRC No. 24427/2023 (Indore) decided on 21 September, 2023

PRAMOD SETHI …Applicant

Vs.

STATE OF M.P. …Non- applicant

***A. Criminal Procedure Code, 1973 (2 of 1974), Section 438, Penal Code (45 of 1860), Sections 420, 406 & 34 and Nikshepakon Ke Hiton Ka Sanrakshan Adhiniyam, M.P., 2000 (16 of 2001), Section 14 – Anticipatory Bail* – Held – There are specific allegations against applicant in FIR as well as in statement of complainant recorded u/S 161 Cr.P.C. – There is *prima facie* material available against applicant relating to cheating of huge amount of more than 4 crores by getting deposits from complainants – Applicant is facing another criminal case on similar charges – Applicant is absconding since long – Not a fit case for anticipatory bail – Application dismissed.**

(Para 15)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 438, दण्ड संहिता (1860 का 45), धाराएँ 420, 406 व 34 एवं निक्षेपकों के हितों का संरक्षण अधिनियम, म.प्र., 2000

(2001 का 16), धारा 14 – अग्रिम जमानत – अभिनिर्धारित – आवेदक के विरूद्ध प्रथम सूचना प्रतिवेदन के साथ–साथ दं.प्र.सं. की धारा 161 के अंतर्गत अभिलिखित किये गये परिवादी के कथन में भी विनिर्दिष्ट अभिकथन हैं – आवेदक के विरूद्ध परिवादीगण से जमा राशि प्राप्त करके चार करोड़ से अधिक बड़ी राशि का छल करने के संबंध में प्रथम दृष्ट्या सामग्री उपलब्ध है – आवेदक समान आरोपों पर एक अन्य दाण्डिक प्रकरण का सामना कर रहा है – आवेदक लंबे समय से फरार है – अग्रिम जमानत के लिए एक उपयुक्त प्रकरण नहीं – आवेदन खारिज।

***B. Criminal Procedure Code, 1973 (2 of 1974), Section 438 and Nikshepakon Ke Hiton Ka Sanrakshan Adhiniyam, M.P., 2000 (16 of 2001), Section 14 – Anticipatory Bail – Bar* – Held – Bar u/S 14 would not apply in cases where no *prima facie* material exists warranting arrest and where complaint does not make out a *prima facie* case – Court has power and jurisdiction to consider application for anticipatory bail in appropriate case of exceptional nature – Anticipatory bail application is maintainable. (Para 9)**

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 438 एवं निक्षेपकों के हितों का संरक्षण अधिनियम, म.प्र., 2000 (2001 का 16), धारा 14 – अग्रिम जमानत – वर्जन – अभिनिर्धारित – धारा 14 के अंतर्गत वर्जन उन प्रकरणों में लागू नहीं होगा जहां गिरफ्तारी के लिए कोई प्रथम दृष्ट्या सामग्री विद्यमान न हो एवं जहां परिवाद एक प्रथम दृष्ट्या प्रकरण नहीं बनाता हो – न्यायालय को आपवादिक स्वरूप के समुचित प्रकरण में अग्रिम जमानत के लिए आवेदन पर विचार करने की शक्ति एवं अधिकारिता है – अग्रिम जमानत का आवेदन पोषणीय है।

Cases referred:

WP (Cr.) No. 141/2023 (High Court of Chhattisgarh) (DB), (2014) 4 SCC 453, (2020) 4 SCC 727, WP No. 6897/2000 decided on 15.09.2003 (DB), (2014) 8 SCC 273.

Puneet Jain with *Umang Mehta* and *Harshit Sharma*, for the applicant.
Tarun Pagare, G.A. for the non-applicant.

O R D E R

VIJAY KUMAR SHUKLA, J.:- This is second application u/S.438 of Cr.P.C for grant of anticipatory bail to the applicant in connection with Crime No.307/2020 registered at P.S Tukoganj, Indore for offence punishable u/Ss.420, 406 and 34 of IPC and u/S.6(1) of the M.P. Nikshepakon Ke Hiton Ka Sanrakshan Adhiniyam, 2000 (hereinafter referred to as "Adhiniyam"). The first application was filed jointly with co-accused with Raghav Sethi vide M.Cr.C.No.33001/2022. The said application was withdrawn with liberty to file separate application for the applicants. The application was dismissed with the aforesaid liberty.

Thereafter the present application has been filed separately on behalf of the applicant Pramod Sethi.

2. An objection has been raised regarding maintainability of anticipatory bail application in view of the provisions of Sec.14 of Adhiniyam, 2000. The provisions of Sec.14 of the Act reads as under:-

> *" 14 - Anticipatory bail not be granted - Notwithstanding anything contained in Sec. 438 of Code of Criminal Procedure 1973 (No.2 of 1974), no Court shall grant anticipatory bail to any person under the Act."*

3. Counsel for applicant submits that the para materia provisions under the similar Act in State of Chhattisgarh has been considered by the division bench of High Court of Chhattisgarh, Bilaspur in WP(Cr.) No.141/2023 after referring to the various judgments of the Supreme Court in the case of *Hema Mishra Vs. State of U.P. & ors. (2014) 4 SCC 453* and also the judgment passed in the case of *Prathviraj Chauhan Vs. Union of India (2020) 4 SCC 727* and it has been held that there is no absolute bar for grant of anticipatory bail. The para materia provision of Sec.15 of the Chhattisgarh Protection of Depositors Interest Act, 2005 reads as under:-

> *" 15 - Anticipatory bail not to be granted - Notwithstanding anything contarined in Section 438 of the Code of Criminal Procedure 1973 (No.2 of 1974), no application for anticipatory bail shall lie for an offence punishable under the Act."*

4. Upon perusal of the provisions of Sec. 14 of M.P. Act of Adhiniyam 2000 and Sec.15 of Act 2005, it is evident that the provisions are almost para (sic: pari) materia.

5. The relevant paragraphs of the judgment of Division Bench of Chhattisgarh High Court are reproduced as under:-

> *12. By virtue of Section 15 of the Act of 2005, no application for anticipatory bail would lie for an offence punishable under the Act of 2005, as the provisions of the Act of 2005 would have overriding effect over Section 438 of the CrPC. Right of the accused in anticipatory bail is definitely a most essential safeguard for liberty of a person and it is necessary to meet the obvious cases of misuse of police power. Section 15 of the Act of 2005 bars the application of Section 438 of the CrPC for grant of anticipatory bail for an offence punishable under the Act of 2005. However, their Lordships of the Supreme Court in*

umpteen number of cases have held that where prima facie case is not made out, the Court is not bereft of its power to grant benefit of anticipatory bail in appropriate cases of exceptional nature.

13. In the matter of Prathvi Raj Chauhan v. Union of India and others' (2020) 4 SCC 727 while examining challenge to the constitutionality of Section 18-A of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (for short, 'the Act of 1989'), their Lordships of the Supreme Court have examined the scope of Section 18 of the Act of 1989 also with particular reference to maintainability of application for grant of anticipatory bail under Section 438 of the CrPC as against statutory bar created under Section 18 of the Act of 1989 and it has been held that despite such a statutory bar created, such a bar may not come in the way for grant of anticipatory bail by taking recourse to the provision contained in Section 438 of the CrPC where complaint does not make out a prima facie case for applicability of the provisions of the Act of 1989. It was observed as under:

> *" 11. Concerning the applicability of provisions of Section 438 CrPC, it shall not apply to the cases under the 1989 Act. However, if the complaint does not make out a prima facie case for applicability of the provisions of the 1989 Act, the bar created by Sections 18 and 18-A(i) shall not apply. We have clarified this aspect while deciding the review petitions."*

In separate but concurring judgment rendered by S. Ravindra Bhatt, J., also it was held as under:

> *" 33. I would only add a caveat with the observation and emphasize that while considering any application seeking pre-arrest bail, the High Court has to balance the two interest: i.e. that the power is not used as to convert the jurisdiction into that under Section 438 of the Criminal Procedure Code, but that it is used sparingly and such orders made in very exceptional cases where no prima facie offence is made out as shown in the FIR, and further also that if such orders are not made in those classes of cases, the result would inevitably be a miscarriage of justice or abuse of process of law. I consider such stringent terms, otherwise contrary to the philosophy of bail, absolutely essential, because a liberal use of the power to grant*

pre-arrest bail would defeat the intention of Parliament."

15. Reverting finally to the facts of the present case in light of the of principles law laid down by their Lordships of the Supreme Court in the aforesaid judgments, it is quite vivid that where no prima facie material exists warranting arrest in complaint or where the complaint does not make out a prima facie case under the Act of 2005, the concerned Court will have power and jurisdiction to consider the application for grant of anticipatory bail in appropriate case exceptional nature and in that case, bar under Section 15 of the Act of 2005 would not come in way to consider the application under Section 438 of the CrPC. Accordingly, we clarify the legal position."

6. In the case of *Prathviraj Chauhan* (supra), the Apex Court has taken into consideration the bar of anticipatory bail u/S.18 and 18-A under Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 and held that there is no absolute bar for grant of anticipatory bail if no prima facie case is made out against the applicant from the complaint.

7. On the basis of aforesaid judgments, the Chhattisgarh High Court has held in para 15 that where prima facie case is not made out, the court will have the power to grant benefit of anticipatory bail in appropriate cases of exceptional nature. In para 15 it is held that as per the judgment of the Supreme Court, it is quite vivid where no prima facie material except warranting arrest in complaint or where the complaint does not make out a prima facie case under the Act 2005, the concerned Court will have power and jurisdiction to consider the application for grant of anticipatory bail in appropriate case of exceptional nature and in that case bar u/S.15 of the Act 2005 would not come in way to consider the application u/S.438 of Cr.P.C.

8. The constitutional validity of provisions u/S.59-A(1) of the M.P. Excise Act, 1915 providing a bar for grant of anticipatory bail, was considered in a case of *Naresh Kumar Lahria Vs. State of* M.P. & Ors. WP No.6897/2000 decided on 15.9.2003 by division bench of this court. In the said case Their Lordships considered the validity, constitutionality and validity of the provisions of Sec.59-A of the Excise Act and held that there is no absolute bar of grant of anticipatory bail if the complaint prima facie does not make out any case.

9. In view of the aforesaid enunciation of law, I am of the considered view that the application for anticipatory bail is maintainable and the bar u/S.14 of the Adhiniyam 2000 would not apply in the cases where no prima facie

material exists warranting arrest in the complaint and where the complaint does not make out a prima facie case. The Court has power and jurisdiction to consider the application for grant of anticipatory bail in appropriate case of exceptional nature and the bar u/S.14 would not come in the way to consider the application u/S.438 of C.P.C.

10. Thus, the objection of learned counsel for State that anticipatory bail application is not maintainable is rejected.

11. Now, this Court has to advert to the merits of the case.

12. As per the prosecution a complaint was made by Himanshu Sharma and others alleging that the applicant and the other co-accused persons are Directors of the company and they are involved in Real Estate and construction business. It is alleged that the present applicant had persuaded the complainants to make investment in their project and to become partners of the said project and they will get the fixed profit. On the assurance of the applicant who is Director of the company, the amounts were transferred to the account of the Directors of the company. Some payments were made by the Directors but thereafter they stopped the payment and despite completion of the project, the fixed profit was not granted to the complainants.

13. Counsel for applicant submits that no amount has been transferred in the account of the applicant and the payments were made individually to Rohan Sethi and Raghav Sethi who happens to be his sons and Directors of the company. There is no payment made to the account of the applicant and, therefore, prima facie there is no material against the applicant and as per the definition of Sec.2(b) and 2(c) of the Adhiniyam, no case is made out and the provisions of the Act would not apply to the case of the present applicant. It is further submitted that the applicant has co-operated with the investigation and his statement was also recorded. It is further submitted that on similar complaint made by Nita Bhandari, the police has closed the case on the ground that the dispute was of civil nature. The charge sheet in respect of the other co-accused persons has already been filed and one of the co-accused person Rohan Sethi has been granted regular bail by the Apex Court.

14. Counsel for State opposed the prayer for grant of anticipatory bail and submits that the FIR is lodged by name. The applicant is one of the Director of the company. As per the complaints and FIR, there is specific allegation by Himanshu Sharma that on the assurance of the applicant he had made payment to the account of the present applicant by City Bank Cheque No. 430968/RTGS No. CITIHI 6096881142 on 5.4.2016 and the applicant has issued the receipt in this regard. It

is also submitted that in the statement u/S.161 Cr.P.C. Himanshu Sharma has made specific allegation that the applicant had issued cheque of closed account of Bank of Baroda towards payment of profit. He had intention to defraud the complainants and to cheat them. Thus, prima facie there is material against the applicant and it cannot be said that there is no prima facie allegation and material against the applicant. It is submitted that the allegation is in respect of huge amount involved in the present case is Rs.4,56,72,015/-. The investigation u/s.173(8) of Cr.P.C is still pending against the applicant. The applicant is habitual criminal and there is another case of similar allegations registered at Crime No.542/2021 at P.S. Tukoganj, Indore for commission of offence u/Ss.420, 409, 506 of IPC.

15. After hearing learned counsel for parties and taking into consideration the specific allegations made in the FIR by the complainant Himanshu Sharma and in his statement u/S.161 Cr.P.C, it cannot be held that no prima facie material is against the applicant. There is prima facie material against the applicant in respect of cheating of huge amount of more than rupees four crore in the present case by getting deposits from the complainants. The applicant is facing another criminal case on similar charges. The alternative prayer of the applicant to direct the respondents to comply with the provisions of Section 41-A of Code of Criminal Procedure in the light of judgment passed by the Apex Court in the case of *Arnesh Kumar Vs. State of Bihar (2014) 8 SCC 273* has no merit as the counsel for the State submits that notice was issued to the applicant and his statement was recorded before registering the offence. The applicant is absconding since long. Thus, the present case is not a case for grant of anticipatory bail.

16. The application is **dismissed.**

Application dismissed

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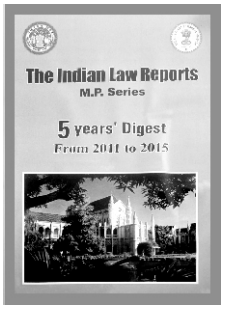

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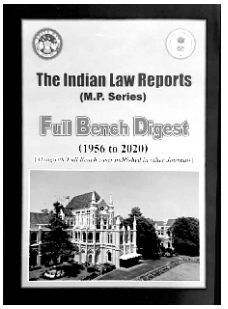

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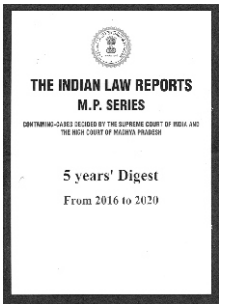

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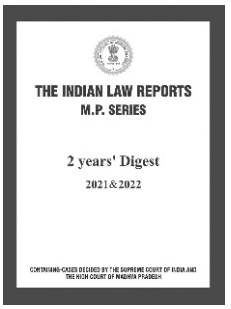

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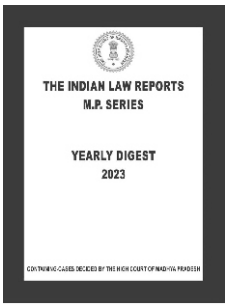

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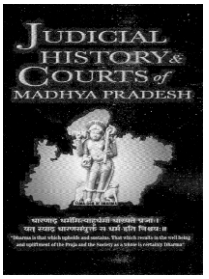

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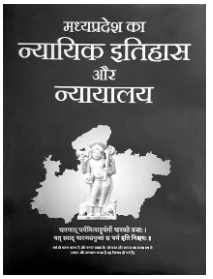

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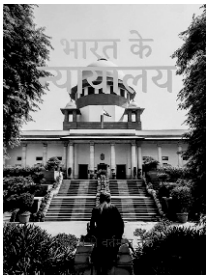

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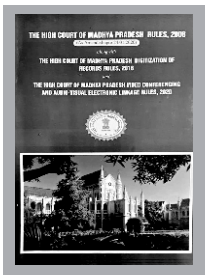

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