ANKUR MODY, Adv.
LL.B (UK) LL.M (US)
Additional Advocate General, State of M.P.
Member, New York State Bar
Former Member, State Bar Council, Madhya Pradesh
Former Asst, Solicitor General of India
Mobile No. 9818725010
Email:-ankur.mody2000@gmail.com

MODY & MODY
ADVOCATES

Ref.

Date: 10.04.2024

To,

The Hon'ble Registrar General

High Court of Madhya Pradesh

Principal Seat, Jabalpur M.P.

Subject: An application for designation as Senior Advocate

Sir

Please find enclosed a copy of the application for conferring the designation of Senior Advocate.

I request you to kindly place it before the committee for due consideration.

Thanking You

High Court of Madhya Pradesh
JABALPUR
13 APR 2024
Reg. No. 20801
Receipt Clerk
High Court Jabalpur

Sincerely,

Ankur Mody

Encl: As Above

Gwalior
Parakh Ji ka Bada Lashkar
Gwalior-474001
0751-2410383

Delhi
A-192 Defence Colony
New Delhi -110049
011-41554623

Indore
Suite 101, Manglam Pride
Y.N. Road, Indore- 4520
0731-2532488

HIGH COURT OF MADHYA PRADESH (DESIGNATI0N OF SENIOR ADOCATE RULES, 2018

PROFORMA 0F PARTICULARS

(UNDER RULE 13)

1	*Name*	**Ankur Mody**
2	***Qualification***	• L.L.M. from Washington University school of Law, St. Louis, MO in May, 2001 • L.L.B. from Cardiff Law School, Cardiff, U.K. in June 2000 • B.S.L (Bachelor of Social Legal sciences) from Indian Law Society's College of Law, Pune, India in June, 1998
3	***Date of Birth***	11.09.1977
4	***Permanent Address***	Mody and Mody Advocates, Parakh Ji Ka Bada, Daulatganj, Gwalior, (M.P)
5	***Address to which communications are to be sent***	Mody and Mody Advocates, Parakh Ji Ka Bada, Daulatganj, Gwalior (M.P)
6	***Name of Bar Council and Date of enrollment as an advocate***	State Bar Council of Madhya Pradesh; 12.08.2000
7	***Number in the roll of advocates maintained by the State Bar Council***	MP/2530/2000
8	***Whether he is/was a member of any association of lawyers? If so, the details***	• Supreme Court Bar Association (2004 - present) • High Court Bar Association, Gwalior (2000 - Present) • New York State Bar Association (2002 – present)
9	***Number of years, name of place and Court(s) where practiced-***	Before Hon'ble High Court of Madhya Pradesh, bench at Gwalior, Indore and Supreme Court of India, New Delhi, 23 years into practice.
10	***Specialization in any field of law? If so, details.***	Constitutional Law, Property Law, Government Contracts and Service Writs
11	***Whether a junior to any lawyer(s) at present? If so, details***	Not Applicable

12	***Whether any junior lawyer is practicing with him? If so, names of such lawyers and the period***	• Advocate Naval Kishor Gupta (En. No. MP/ 3445/2006) From November, 2011- Present • Advocate Nitin Agarwal (En. No. MP/ 313/2011) From Jan, 2011- Present • Advocate Somya Chaturvedi (En. No. MP/ 1433/2016) From April 2021 - Present • Advocate Soumya Pawaiya (En No. 942/2020) From July 2021 - Present • Advocate Karan Virwani (En.No. 3783/2021) From September 2021-Present
13	***Whether he is an assessed under the Income Tax Act in respect of professional income? If so, details of income assessed for the last three years accompanied by a copy of the Permanent Account Number Card***	Yes, details of the Income Tax Returns for the last three years, that is, from 2020-21, 2021-22 and 2022-23 along with the PAN Card are annexed along with the application.
14	***Whether he is/was in the panel of the State or Central Government or whether holds any office under the State or Central Government***	• Assistant Solicitor General of India, for the MP High Court, Bench at Gwalior (2009-2014) • Additional Advocate General for the State of M.P, (Dec 2018- March 2020); (June 2020 - present)

15(a) ***Reference to any important matter in which appeared:***

S.No	*Case Name*	*Case No.*	Court	Citation
i	*M/s Pernod Ricard India Pvt. Ltd. Vs. State of M.P. and others*	*W.P. No. 2170/2016*	GWL HC	Unreported
ii	*Gwalior Alcobrew Pvt. Ltd. Vs. State of M.P. and others*	*W.P. No. 2263/2016*	GWL HC	Unreported
iii	*Jyotiraditya Scindia Vs. Smt. Vijayaraje Scindia deceased through Smt. Usha Raje Rana & Ors.*	*WP 224/2004*	GWL HC	2006(1) MPLJ 501
iv	*Kamla Chaturvedi Vs. National Insurance Co. & Ors.*	*C.A. 6691/2008*	SC	2009 (1) SCC 487
v	*Ramesh Agarwal Vs. Kapil Sonkar & Ors.*	*Civ.Rev. 109/2015*	IND HC	2017 (4) MPLJ 88
vi	*Jai Vilas Parisar & Ors. Vs. Alok Kumar Hardatt & Ors.*	*CRP 105/2011*	GWL HC	2016 (1) MPLJ 39

vii	*M/s Surendra Security Guard Services Vs. Union of India & Ors.*	*WP 8897/2016*	GWL HC	Unreported
viii	*Arun Kumar Dixit v Scindia Kanya Vidyalaya*	*WA 450/2019 and 556/2019*	GWL HC	Unreported
ix	*Shyambabu Agarwal Vs. State of M.P.*	*MCRC 1901/2013*	GWL HC	2014 (3) JLJ 52
x.	*Rajesh Wadhvani & Ors. Vs. Shyamnath Sharma & Ors.*	*WP 30/2012*	GWL HC	2015 (III) MPJR 92
xi	*M/s Surendra Security Guard Services Vs. Union of India & Ors.*	*WP 8897/2016*	GWL HC	Unreported

15(b)	***Reported judgments in which the concerned Advocate(s) had appeared in last five years***	
As Additional Advocate General, I have appeared in many cases, all of which cannot be enlisted. But to name a few, wherein important question of law was in issue are :-		
1	*M/s Awasthi Brothers vs State of MP and others - WP No. 21266/2017 decided on 31.07.2019*	Point in issue related to whether order of blacklisting of government contractor can be challenged before the Madhyastham Tribunal
2	*Rajendra Singh vs State of MP and others - WP no. 8613/2020 decided on 03.08.2021 - ILR (2021) MP 1854*	Matter related to competence of Collector to confiscate vehicle under MP Sand Rules 2019
3	*GR Infra Project Ltd. vs State of MP and others - WP No. 26525/2019 decided on 13.06.2022 - MANU/MP/1409/2022*	Matter related to interpretation of the term "minor mineral" under Mines and Mineral (Development and regulation) Act 1957
4	*Ramnaresh vs State of MP and others - WP No. 23060 of 2023 decided on 12.01.2024*	Matter involved question related to allotment of MBBS seats to the reserved category candidates
16	***Whether he has written any book on law or made any contribution to a law publication or journal? If so, details***	Yes. *-2022 (3) MPLJ 2;* *-2023 SCC Online blog oped 34* *- Trial by Media, Interdicts Dispensation of Justice having ISSN : 2581-8503*
16a	***Whether he/she has/had teaching assignment or delivers/delivered guest courses delivered at Law School? If yes, details***	*Hosted Moot Court Competition at Institute of Law, Jiwaji University, Gwalior on 20-22 Jan 2023*

17	***Whether he attended or participated in any seminar/conference relating to law?***	*Attended various seminars and conferences as Assistant Solicitor General from 2009-2014, as Member of State Bar Council from 2014-2019 and as Additional Advocate General from 2019- Present*
18	***Whether he is/was concerned with any faculty of law:***	*Frequently invited as guest faculty to deliver lecture and to judge moot courts by Amity University, Gwalior and by Indore Law Institute, Indore.*
19	***Whether any application for designation as senior advocate had been made in the past to the High Court of Madhya Pradesh or any other Court? If so, when and with what result***	*Yes. Previously application was made on 13.02.2020 which did not find favour of the committee as the total score of less then 50 marks.*
20	***Whether ordinarily practicing within the jurisdiction of the High Court of Madhya Pradesh-***	*Yes, before the Gwalior bench*
21	***Whether he has ever been personally involved in any civil or criminal litigation or contempt proceedings or any disciplinary proceedings against him by the Bar Council. If so, the details thereof-***	*Yes. Conc 3356/2023; Conc 3570/2023 - Dropped by the order dated 02.11.2023 passed in WP no. 7295/2023. In all more than 2000 Contempt proceedings initiated against advocates.* *However, eventually in a Suo-Moto petition bearing WP 7295/2023 contempt proceedings against all the advocates were dropped except contempt proceedings against the Member of the State Bar Council .Therefore by virtue of the said order contempt proceedings against the applicant were also dropped.*
22	***Details of participation in pro-bono work-***	• *Active member of Lions Club, Gwalior and Rotary International, Gwalior; frequently offer time and services in Atma Jyoti Residential School for Blind Girls.* • *Appointed as Commissioner to visit and submit report on health and civic hygiene maintained in G R Medical Government Hospital, Gwalior in WP 3871/2016 (PIL).* • *Filed PIL challenging use of tiles embossed with the picture of Chief Minister installed in the houses constructed under subsidies housing scheme of government WP No. 15213/2018 (PIL)*

22a	***Details of five best synopsis filed by the advocate concerned***	• *MCRC No. 39997/2022 - M/s Hotline Teletubes and components Ltd. and others vs Registrar of Companies.* • *WP No. 2263/2016 - Gwalior Alcobrew Private Limited vs State of MP and others*
23	***Other information/particulars, if any, including legal services and as Legal aid counsel-***	• *Member of State Bar Council, 2014- 2019* • *Former Co- Vice- Chairman, State Bar Council MP* • *Licensed to practice in the State of New York State Bar (2002 – present)* • *Advisor to various educational institutions – The Scindia School Fort, Gwalior, Madhav Institute of Technology and Science, Gwalior, Samrat Ashok Technological Institution, Vidisha MP etc.* ***International experience includes:*** • *2002 – Assisting Roger G Jain, Attorney at Law in a Jury Trial of a personal injury law suit.* • *Nov. 2001- Feb. 2002 - Hillsborough County Attorney's Office, Law Clerk Tampa, Florida* • *May, 2001- June, 2001 - Judicial Internship under Judge Robert Dierker Missouri State Court* • *May, 1999- July 1999 – Internship at Farrer & Co. Partners, London, UK*
24	***Details of service rendered by way of legal services, mediation work, other para-legal activities, assistance rendered to various administrative Committees of the High Court, Etc***	*Mahesh Sharma vs State of MP bearing WP No. 8805/2022; Order dated 19.04.2022 - Appointed as Coordinator to facilitate mediation for amicable settlement of retirement dues.*

Ankur Mody
Addl., Advocate General
MP High Court bench at Gwalior
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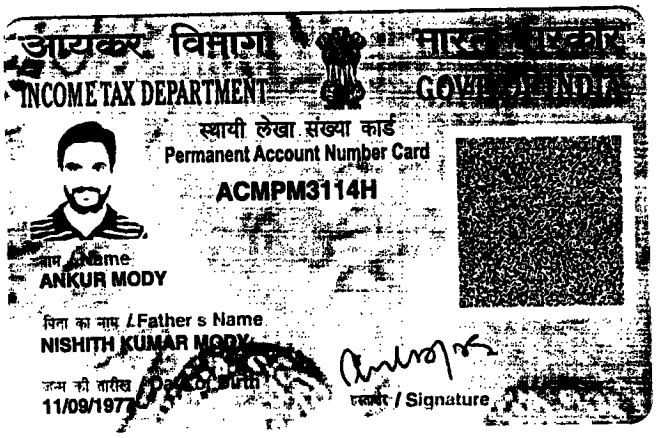
आयकर विभाग
INCOME TAX DEPARTMENT
भारत सरकार
GOVT. OF INDIA
स्थायी लेखा संख्या कार्ड
Permanent Account Number Card
ACMPM3114H
नाम / Name
ANKUR MODY
पिता का नाम / Father s Name
NISHITH KUMAR MODY
जन्म की तारीख / Date of Birth
11/09/1977
हस्ताक्षर / Signature

WRIT APPEAL ARISING OUT OF AN ORDER PASSED BY SINGLE JUDGE IN A PROCEEDING OTHER THAN PROCEEDING UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA – MAINTAINABLE OR NOT – UNDER UCHCHA NYAYALAYA (KHAND NYAYPEETH KO APPEAL) ADHINIYAM 2005*

— By Ankur Mody, Additional Advocate General, M. P. High Court (Gwalior Bench), Siddharth Sijoria, Advocate and Divyanshi Goyal, Advocate

On 16-11-2021 the Hon'ble Division Bench of Madhya Pradesh High Court, Bench at Gwalior passed an order in *State of M. P. vs. Jaipal Singh*[1] wherein it referred the question pertaining to interpretation of section 2 (1) of the M. P. Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, 2005 (hereinafter referred to as Act, 2005) to a Larger Bench. The Act envisages that an appeal would lie against a judgment or an order passed by a Single Judge in exercise of Original Jurisdiction under Article 226 of the Constitution to a Division Bench. In the instant case, the Single Judge had directed the State Government to initiate departmental enquiry against certain Police Officers and had further ordered payment of an amount of ₹ 50,000 as compensation to the Applicant while hearing a Bail Application under section 439 of the Criminal

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* Views expressed in the article are solely of the author. The Publisher/Printer/ Management of Madhya Pradesh Law Journal may not agree with the views expressed therein.

1. W. A. No. 990/2021 Writ Appeal. Available on the website of Madhya Pradesh High Court.

Procedure Code. Thus, in a writ appeal against the said order the Court grappled with the issue concerning maintainability of the Writ Appeal against a Bail Order by a Single Judge in a bail proceeding.

Previously, the coordinate Bench of the same High Court had in the case of *Shailendra Singh Kushwah vs. State of M. P. and ors.*[2] had entertained a writ appeal against the direction for carrying out departmental enquiry against a police officer passed by the Single Judge while disposing off bail application for the reason that the said direction was unrelated to the exercise of bail jurisdiction and could only have been passed by invoking jurisdiction under Article 226 of the Constitution therefore a writ appeal against the same was maintainable under the Act.

In the present case, the Division Bench while dealing with the writ appeal was of the view that the writ appeal is not maintainable because *"The Jurisdiction in effect was of Court under 482 of Criminal Procedure Code which is akin to Article 226"*. But due to the contrary view having been taken by a coordinate bench, the Division Bench in the present case referred the matter to a Larger Bench[3] with the following question :—

> *'Whether the Division Bench in exercise of power under section 2 of the 2005 Act may entertain an appeal arising from an order other than the order passed under Article 226 of the Constitution of India?*

In the present article, the Authors will demonstrate that the question pertaining to maintainability of Writ Appeal would depend upon the nature and scope of the order passed by Single Judge which will determine the nature and type of jurisdiction exercised by the Single Judge and not the nomenclature of the proceedings.

Can a Writ Appeal lie against an Order other than Order passed under Article 226 of the Constitution of India?

Section 2 of the 2005 Act, clearly spells out that an appeal would lie against the Order passed in exercise of Original Jurisdiction under Article 226 of the Indian Constitution. No other express or implied limitation is found in the section. From bare perusal of the provision, it appears that an appeal is maintainable only against an order passed under Article 226. However, a complete and purposive reading would indicate that the section requires exercise of Original Jurisdiction for making an appeal. Thus, passing of direction against the investigation officer for departmental enquiry by a Single Judge while hearing a bail application in which the said officer was not even a party was an exercise of power beyond the Single Judge's jurisdiction. Even though the jurisdiction exercised was in a proceedings under section 439 of Criminal

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2. W. A. No. 1053 of 2020
3. *State of Punjab and anr. vs. Devans Modern Breweries Ltd., (2004) 11 SCC 26. Para 339.*
   'Judicial discipline envisages that a coordinate Bench follow the decision of an earlier coordinate Bench. If a coordinate Bench does not agree with the principles of law enunciated by another Bench, the matter may be referred only to a Larger Bench.'

Procedure Code, in effect the Court exercised its powers under Article 226 of the Constitution of India so far as the directions for initiating or carrying out departmental enquiry against the investigating officer was concerned because the nature of the said direction was entirely unrelated to the order expected to be passed in a bail application. Thus, for the purpose of determining whether an order passed by the Single Judge is appealable under section 2 of the Act of 2005, the Division Bench should analyze the nature and type of the order/directions passed by the Single Judge being uninfluenced by the nature of proceeding in which such an order or direction is passed.

Previously, the Hon'ble Special Bench of the Madhya Pradesh High Court, Jabalpur in *Manoj Kumar vs. Board of Revenue and ors.*[4] discussed the contours of the Act of 2005 and interpreted section 2 of the Act.

The Court considered if a writ appeal would lie against an Order passed under Article 227. The Hon'ble Court had held that maintainability of writ appeal would depend on several aspects. The nature of the prayer, pleadings and the order passed by the Court would be important determinants to be considered by the Division Bench while entertaining a Writ Appeal. It observed

> *"62. From the aforesaid it is quite vivid that the **maintainability of a writ appeal** from an order of the learned Single Judge **would depend upon many an aspect and cannot be put into a straitjacket formula.** It cannot be stated with mathematical exactitude. **It would depend upon the pleadings in the writ petition, nature of the order passed by the learned Single Judge, character and the contour of the order, directions issued, nomenclature given and the jurisdictional prospective in the constitutional context are to be perceived.** It cannot be said in a hyper technical manner that an order passed in a writ petition, if there is assail to the order emerging from the Inferior Tribunal or Subordinate Courts has to be treated all the time for all purposes to be under Article 227 of the Constitution of India. **It would depend upon the real nature of the order passed by the learned Single Judge.** To elaborate: whether the learned Single Judge has exercised his jurisdiction under Article 226 or under Article 227 or both would depend upon various aspects and many a facet as has been emphasized in the aforequoted decisions of the Apex Court. The pleadings, as has been indicated hereinabove, also assume immense significance. It would not be an overemphasis to state that an order in a writ petition can fit into the subtle contour of Articles 226 and 227 of the Constitution in a composite manner and they can co-inside, co-exit, overlap or imbricate. In this context it is apt to note that there may be cases **where the learned Single Judge may feel disposed or inclined to issue a writ to do full and complete justice because it is to be borne in mind that Article 226 of the Constitution is fundamentally a***

4. *2008(1) M.P.L.J. (Spl. B.) 152*

repository and reservoir of justice based on equity and good conscience. It will depend upon factual matrix of each case."

The aforesaid observation of the Court emphasised that the nature of jurisdiction exercised by the Single Judge is to be adjudged chiefly on the basis of the nature of directions passed by the Hon'ble Court. Further, if any direction is passed by the Court in order to do complete justice, then the jurisdiction under Article 226 is invoked by the Court as Article 226 is fundamentally the repository and reservoir of justice based on equity and good conscience. Thus, if in a bail hearing, a direction is passed which is unrelated to the subject matter of the proceeding and is relatable to civil jurisdiction then such direction is necessarily passed in exercise of Article 226 jurisdiction.

Similarly, in the case of *Jogendrasinhji Vijaysinghji vs. State of Gujarat*[5], the Court had observed that the determinant factor for entertaining a Writ Appeal would be the nature of the order passed. It observed in para 30

"30. From the aforesaid pronouncements, it is graphically clear that maintainability of a letters patent appeal would depend upon the pleadings in the writ petition, the nature and character of the order passed by the learned Single Judge, the type of directions issued regard being had to the jurisdictional perspectives in the constitutional context. Barring the civil Court, from which order as held by the three-Judge Bench in Radhey Shyam [(2015) 5 SCC 423 = (2015) 3 SCC (Civ) 67 = (2015) 3 Scale 88] that a writ petition can lie only under Article 227 of the Constitution, orders from tribunals cannot always be regarded for all purposes to be under Article 227 of the Constitution. Whether the learned Single Judge has exercised the jurisdiction under Article 226 or under Article 227 or both, needless to emphasise, would depend upon various aspects that have been emphasised in the aforestated authorities of this Court. There can be orders passed by the learned Single Judge which can be construed as an order under both the articles in a composite manner, for they can co-exist, coincide and imbricate. We reiterate it would depend upon the nature, contour and character of the order and it will be the obligation of the Division Bench hearing the letters patent appeal to discern and decide whether the order has been passed by the learned Single Judge in exercise of jurisdiction under Article 226 or 227 of the Constitution or both. The Division Bench would also be required to scrutinise whether the facts of the case justify the assertions made in the petition to invoke the jurisdiction under both the articles and the relief prayed on that foundation. Be it stated, one of the conclusions recorded by the High Court in the impugned judgment pertains to demand and payment of Court fees. We do not intend to comment on the same as that would depend upon the rules framed by the High Court."

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5. *(2015) 9 SCC 1*

Recently in *Ram Kishan Fauji vs. State of Haryana*[6] had the opportunity to discuss if a Writ Appeal (Letters Patent Appeal) would lie against an order of the Lokayukta Court recommending registration of the F.I.R against the Petitioner. A Writ under Article 226 was preferred against the order of the Lokayukta Court which was allowed. Against the order of the Single Judge, a Writ Appeal was preferred by the State which was entertained in Appeal and the order of the Single Judge was reversed. The petitioner approached the Supreme Court and submitted that Writ Appeal Court committed jurisdictional error in entertaining and allowing the Appeal because the order of the Single Judge of the Hon'ble High Court was in furtherance of 'Criminal Jurisdiction" against which no writ appeal would lie[7]. The Hon'ble Supreme Court upheld the argument and held that No Writ Appeal would lie as the Order of the Single Judge was passed in exercise of Criminal Jurisdiction because the provisions in the Letters Patent Appeal (applicable in the *Fauji case*) prohibits filing of appeal in matters where the Single Judge has exercised criminal jurisdiction.

The Hon'ble Supreme Court observed that even if a Petition is filed under 482 of Criminal Procedure Code, that ipso facto would not oust the jurisdiction of the Writ Appeal Court. The nomenclature of the Petition will not be a determining factor for understanding the nature of jurisdiction invoked. It is incumbent upon the Writ Appeal Court to determine if the nature of petition, or the direction issued by the Court, is one which is passed under Writ Jurisdiction or not. The Court in Para 56 has observed :

> **56.** *As we find from the decisions of the aforesaid three High Courts, it is evident that there is no disagreement or conflict on the principle that if an appeal is barred under Clause 10 or Clause 15 of the Letters Patent, as the case may be, no appeal will lie. The High Court of Andhra Pradesh, however, has held that when* ***the power is exercised under Article 226 of the Constitution for quashing of a criminal proceeding, there is no exercise of criminal jurisdiction. It has distinguished the proceeding for quashing of FIR under section 482, Criminal Procedure Code and, in that context, has opined that from such an order, no appeal would lie.*** *On the contrary, the High Courts of Gujarat and Delhi, on the basis of the law laid down by this Court in Ishwarlal Bhagwandas (supra), have laid emphasis on the seed of initiation of criminal proceeding, the consequence of a criminal proceeding and also the nature of relief sought before the Single Judge under Article 226 of the Constitution. The conception of 'criminal jurisdiction' as used in Clause 10 of the Letters Patent is not to be construed in the narrow sense. It encompasses in its gamut the inception and the consequence. It is the field in respect of which the jurisdiction is exercised, is relevant.*

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6. *(2017) 5 SCC 533*
7. The Letters Patent Appeal law "**Letters Patent Constituting the High Court of Judicature at Lahore, dated the 21st March, 1919**" specifically bars entertainment of Appeal from an Order passed in exercise of criminal jurisdiction.

The contention that solely because a writ petition is filed to quash an investigation, it would have room for intra-Court appeal and if a petition is filed under inherent jurisdiction under section 482, Criminal Procedure Code, there would be no space for an intra-Court appeal, would create an anomalous, unacceptable and inconceivable situation. The provision contained in the Letters Patent does not allow or permit such an interpretation. When we are required to consider a bar or non-permissibility, we have to appreciate the same in true letter and spirit. It confers jurisdiction as regards the subject of controversy or nature of proceeding and that subject is exercise of jurisdiction in criminal matters. It has nothing to do whether the order has been passed in exercise of extraordinary jurisdiction under Article 226 of the Constitution or inherent jurisdiction under section 482, Criminal Procedure Code.

"61. In the case at hand, the writ petition was filed under Article 226 of the Constitution for quashing of the recommendation of the Lokayukta. The said recommendation would have led to launching of criminal prosecution, and, as the factual matrix reveals, FIR was registered and criminal investigation was initiated. The learned Single Judge analysed the report and the ultimate recommendation of the statutory authority and thought it seemly to quash the same and after quashing the same, as he found that FIR had been registered, he annulled it treating the same as a natural consequence. Thus, the effort of the writ petitioner was to avoid a criminal investigation and the final order of the writ Court is quashment of the registration of FIR and the subsequent investigation. In such a situation, to hold that the learned Single Judge, in exercise of jurisdiction under Article 226 of the Constitution, has passed an order in a civil proceeding as the order that was challenged was that of the quasi-judicial authority, that is, the Lokayukta, would be conceptually fallacious. It is because what matters is the nature of the proceeding, and that is the litmus test."

In *Fauji*, the Hon'ble Supreme Court, has further observed at para 31 that the distinction between Civil and Criminal Proceeding would also depend upon the final outcome of a litigation. It observed that

31. The aforesaid authority makes a clear distinction between a civil proceeding and a criminal proceeding. As far as criminal proceeding is concerned, it clearly stipulates that a criminal proceeding is ordinarily one which, if carried to its conclusion, may result in imposition of (i) sentence, and (ii) it can take within its ambit the larger interest of the State, orders to prevent apprehended breach of peace and orders to bind down persons who are a danger to the maintenance of peace and order. The Court has ruled that the character of the proceeding does not depend upon the nature of the tribunal which is invested with the authority to grant relief but upon the nature of the right violated and the appropriate relief which may be claimed.

The abovementioned pronouncements clearly establish that nomenclature of the jurisdiction invoked will not be the sole criteria to determine if an Order is appealable or not. While invoking Writ Appellate Jurisdiction, the Division must not dismiss the Appeal merely because an order is passed in Jurisdiction other than 226. It will be incumbent upon the Court to determine real nature of the order from the direction issued.

Conclusion

The fact that in the instant case an order for initiating a departmental enquiry is passed in a bail proceeding that itself would not determine the nature of jurisdiction exercised by the Single Judge as a criminal one and thus would bar the Writ Appeal because if the direction for initiating departmental enquiry is carried out to its conclusion the same would become subject matter of writ jurisdiction. In a departmental enquiry, the nature of enquiry is administrative in nature and therefore subject of Writ jurisdiction. Thus, the nature of order passed reveals that it is of administrative nature than criminal and thus can be the subject of Writ Appeal as observed by the Hon'ble Supreme Court.

However, in the context of section 2 of the Act of 2005 which is applicable in the State of Madhya Pradesh, whether a writ appeal is barred in a matter where Article 226 powers are exercised in a criminal jurisdiction by a Single Judge is still a question open to debate because unlike the language of Clause 10 of Letters Patent Appeal, section 2 of the Act of 2005 does not prohibit writ appeal arising out of the orders passed invoking Article 226 powers in a criminal jurisdiction.

INDIAN INCOME TAX RETURN ACKNOWLEDGEMENT

[Where the data of the Return of Income in Form ITR-1 (SAHAJ), ITR-2, ITR-3, ITR-4(SUGAM), ITR-5, ITR-6, ITR-7 filed and verified]
(Please see Rule 12 of the Income-tax Rules, 1962)

Assessment Year 2021-22

PAN	ACMPM3114H		
Name	ANKUR MODY ADVOCATE		
Address	PARAKH JI BADA , SARAFA BAZAR , LASHKAR , GWALIOR , 18-Madhya Pradesh , 91-India , 474001		
Status	Individual	Form Number	ITR-3
Filed u/s	139(1) Return filed on or before due date	e-Filing Acknowledgement Number	983033560270122

Taxable Income and Tax details		
Current Year business loss, if any	1	0
Total Income		39,42,470
Book Profit under MAT, where applicable	2	0
Adjusted Total Income under AMT, where applicable	3	39,42,470
Net tax payable	4	10,35,051
Interest and Fee Payable	5	1,890
Total tax, interest and Fee payable	6	10,36,941
Taxes Paid	7	11,65,085
(+)Tax Payable /(-)Refundable (6-7)	8	(-) 1,28,140
Distribution Tax details		
Dividend Tax Payable	9	0
Interest Payable	10	0
Total Dividend tax and interest payable	11	0
Taxes Paid	12	0
(+)Tax Payable /(-)Refundable (11-12)	13	0
Accreted Income & Tax Detail		
Accreted Income as per section 115TD	14	0
Additional Tax payable u/s 115TD	15	0
Interest payable u/s 115TE	16	0
Additional Tax and interest payable	17	0
Tax and interest paid	18	0
(+)Tax Payable /(-)Refundable (17-18)	19	0

Income Tax Return submitted electronically on 27-01-2022 18:37:34 from IP address 10.1.36.239 and verified by ANKUR MODY ADVOCATE having PAN ACMPM3114H on 27-01-2022 18:37:31 using Paper ITR-verification form generated through mode

System Generated Barcode/QR Code

ACMPM3114H039830335602701224B02EF9357DFBFE21B3DB35CB52CAE28C3384DF3

DO NOT SEND THIS ACKNOWLEDGEMENT TO CPC, BENGALURU

Acknowledgement Number:767825661311022 **Date of filing : 31-Oct-2022**

INDIAN INCOME TAX RETURN ACKNOWLEDGEMENT

[Where the data of the Return of Income in Form ITR-1 (SAHAJ), ITR-2, ITR-3, ITR-4(SUGAM), ITR-5, ITR-6, ITR-7 filed and verified]
(Please see Rule 12 of the Income-tax Rules, 1962)

Assessment Year 2022-23

PAN	ACMPM3114H		
Name	ANKUR MODY ADVOCATE		
Address	PARAKH JI BADA , SARAFA BAZAR , LASHKAR , GWALIOR , 18-Madhya Pradesh , 91-India , 474001		
Status	Individual	Form Number	ITR-3
Filed u/s	139(1) Return filed on or before due date	e-Filing Acknowledgement Number	767825661311022

Taxable Income and Tax details	Current Year business loss, if any	1	0
	Total Income		80,98,350
	Book Profit under MAT, where applicable	2	0
	Adjusted Total Income under AMT, where applicable	3	80,98,350
	Net tax payable	4	21,71,704
	Interest and Fee Payable	5	80,811
	Total tax, interest and Fee payable	6	22,52,515
	Taxes Paid	7	22,53,788
	(+)Tax Payable /(-)Refundable (6-7)	8	(-) 1,270
Distribution Tax details	Dividend Tax Payable	9	0
	Interest Payable	10	0
	Total Dividend tax and interest payable	11	0
	Taxes Paid	12	0
	(+)Tax Payable /(-)Refundable (11-12)	13	0
Accreted Income & Tax Detail	Accreted Income as per section 115TD	14	0
	Additional Tax payable u/s 115TD	15	0
	Interest payable u/s 115TE	16	0
	Additional Tax and interest payable	17	0
	Tax and interest paid	18	0
	(+)Tax Payable /(-)Refundable (17-18)	19	0

Income Tax Return submitted electronically on 31-Oct-2022 19:34:56 from IP address 49.36.24.89 and verified by ANKUR MODY ADVOCATE having PAN ACMPM3114H on 31-Oct-2022 using generated through mode

System Generated Barcode/QR Code

ACMPM3114H037678256613110 22B546CB5CB7405CDDAC1B326E128CD6E87A971242

DO NOT SEND THIS ACKNOWLEDGEMENT TO CPC, BENGALURU

Acknowledgement Number:397630590101023 **Date of filing : 10-Oct-2023***

INDIAN INCOME TAX RETURN ACKNOWLEDGEMENT

[Where the data of the Return of Income in Form ITR-1(SAHAJ), ITR-2, ITR-3, ITR-4(SUGAM), ITR-5, ITR-6, ITR-7 filed and verified]
(Please see Rule 12 of the Income-tax Rules, 1962)

Assessment Year 2023-24

PAN	ACMPM3114H		
Name	ANKUR MODY		
Address	PARAKH JI BADA , SARAFA BAZAR, LASHKAR , GWALIOR , 18-Madhya Pradesh, 91-INDIA, 474001		
Status	Individual	Form Number	ITR-3
Filed u/s	139(4)- After due date	e-Filing Acknowledgement Number	397630590101023

Taxable Income and Tax Details	Current Year business loss, if any	1	0
	Total Income	2	50,95,020
	Book Profit under MAT, where applicable	3	0
	Adjusted Total Income under AMT, where applicable	4	50,95,020
	Net tax payable	5	14,06,786
	Interest and Fee Payable	6	8,827
	Total tax, interest and Fee payable	7	14,15,613
	Taxes Paid	8	15,17,005
	(+) Tax Payable /(-) Refundable (7-8)	9	(-) 1,01,390
Accreted Income and Tax Detail	Accreted Income as per section 115TD	10	0
	Additional Tax payable u/s 115TD	11	0
	Interest payable u/s 115TE	12	0
	Additional Tax and interest payable	13	0
	Tax and interest paid	14	0
	(+) Tax Payable /(-) Refundable (13-14)	15	(+) 0

This return has been digitally signed by ANKUR MODY in the capacity of Self having PAN ACMPM3114H from IP address 49.36.26.203 on 10-Oct-2023 14:23:04 DSC Sl.No & Issuer 3885221 & 126135184129602CN=Verasys CA 2014,OU=Certifying Authority,O=Verasys Technologies Pvt Ltd.,C=IN

System Generated Barcode/QR Code

ACMPM3114H033976305901010233d034d9b4b0977d6c331bd3a659e9fda6d88c9c3

DO NOT SEND THIS ACKNOWLEDGEMENT TO CPC, BENGALURU

*If the return is verified after 30 days of transmission of return data electronically, then date of verification will be considered as date of filing the return (Notification No.05 of 2022 dated 29-07-2022 issued by the DGIT (Systems), CBDT)."

SCC ONLINE TIMES
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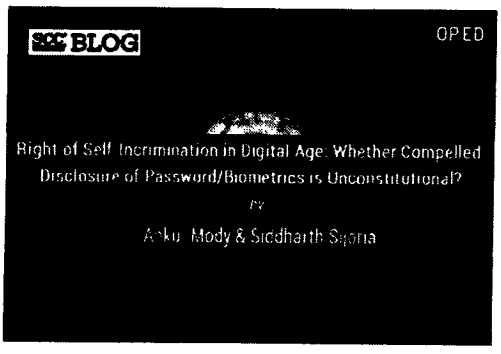
Right of Self-Incrimination in Digital Age: Whether Compelled Disclosure of Password/Biometrics is Unconstitutional?



by Ankur Modyt and Siddharth Sijoriatt
Published on March 18, 2023 - By Editor_4

Post

Recently, two courts in India had the chance to address the issue of whether an accused person can be forced to give a passcode, password, or biometric without violating the constitutional ban on self-incrimination as provided in Article 20(3) of the Indian Constitution.[1] So far there is no authoritative pronouncement by the Supreme Court of India on this issue, hence the question is res integra.

In the first case, the Karnataka High Court[2] decided that compelling the accused to disclose the passcode or biometrics would not violate the rule against self-incrimination because mere disclosure of password, passcode, or biometric alone is not incriminating and is relevant to searches as permitted by Section 93 of the Criminal Procedure Code (CrPC)[3], which allows the ordering for a search of a "place" or a specified area.

In the other case, the Delhi CBI Special Court[4], disallowed an application seeking direction to the accused person for disclosure of the passcode as it directly affects the right against self-incrimination. However, it held that unlocking of the phone through fingerprint/facial recognition will not violate Article 20(3) of the Constitution. The compelled unlocking of phones or laptops also affects the right of privacy. However, in the article, the authors have only analysed the issue with reference to self-incrimination. Both verdicts are analysed in this article. The authors argue that both the Courts' justifications failed to take into account the comparative literature on the subject in order to offer a comprehensive solution that addresses every objection to the disclosure. Thus, in order to find a balance between fair investigations and the right against self-incrimination, the Supreme Court must address this matter.

Karnataka High Court Judgment

The brief facts in the instant case were that a case under the Narcotic Drugs and Psychotropic Substances Act (NDPS), 1985[5] and the Foreigners Act, 1946[6] was registered against the petitioner. The police had seized the petitioner's mobile, laptop among other objects and asked him to disclose the password of his mobile and laptop and even his e-mail account. The petitioner simply refused. Upon refusal, the police filed two applications before the trial court. In the first application, the police prayed for conducting polygraph test upon the petitioner without his consent to ascertain the password. In the second application, the police sought an order to direct the petitioner to disclose the password. Both applications were allowed by the trial court and thus, the petitioner challenged these two orders before the High Court in the instant case. In its ruling, the High Court overturned the order governing the administration of the polygraph test. However, the Court denied the appeal against the passcode disclosure order, noting that Article 20(3) of the Indian Constitution does not protect passcode disclosure as a matter of right. The Court first considered the distinction between testimonial and non-testimonial (physical) evidence for the purpose of providing protection under Article 20(3) of the Constitution in order to establish its rationale. According to Indian law, an accused is protected from revelations that could implicate them in a crime under Article 20(3).

The Supreme Court had determined the parameters of the protection against self-incrimination in the landmark case of *State of Bombay* v. *Kathi Kalu Oghad*[7] where the Court was required to determine if giving handwriting, signature, or thumb impression samples violates Article 20(3). The Court ruled against the accused noting that a witness can provide both testimonial and non-testimonial (physical) evidence, and that an accused person can only be deemed a witness against oneself in the former case.

It reasoned that,

> *11.* ... Self-incrimination must mean conveying information based upon the personal knowledge ... and cannot include merely the mechanical process of producing documents in court which may throw a light on any of the points in controversy, but

which do not contain any statement of the accused based on his personal knowledge.[8]

Further at para 11 of *Kothi Kalu Oghad case*[9] the Court observed that:

> *11.* ... "To be a witness" means imparting knowledge in respect of relevant facts, by means of oral statements or statements in writing, by a person who has personal knowledge of the facts to be communicated to a court or to a person holding an enquiry or investigation.

Relying on the dictum of *Kathi Kalucase*[10], the Court observed that a direction to provide a password, passcode, biometric would not amount to testimonial compulsion as the petitioner is not answering any question that would expose the petitioner to guilt. It is only in the nature of a direction to produce a document. The information accessed on the smartphone is only to access the data and documents on the phone and it is for the investigation officer to prove and establish the same in a court of law by following the applicable rules of evidence. Disclosure of password, biometric is akin to supplying fingerprints, thumb impression, voice sample[11] or taking samples of garments, chemical samples that are physical evidence and do not amount to forced testimony from the accused.

The Court further held that a search warrant as per Section 93 CrPC can also be issued by the court in order to search a smartphone or computer system for investigation purposes. In the Court's reasoning[12], Section 91 CrPC[13] enables a right in favour of the court or officer in charge of a police station to issue summons or to order from a person's possession production of any document for the investigation purpose. The Court treated a password/passcode/biometric as a document as provided under Section 91. The Court further relied on Section 100 CrPC[14] to justify that on production of a search warrant, any person in charge of closed place would allow free access to the person executing search warrant. Thus, a person in possession of an electronic device/gadget must cooperate with the investigation officer by disclosing the passcode to let them gain access to the device.

In its final assessment, the Court found that disclosure of passcode does not constitute violation of right against self-incrimination as CrPC provides mechanism for disclosure of passcode/biometrics.

Problem with the High Court judgment

Given that everything in the modern world is stored on a laptop or mobile device, the judgment[15] conveyed that the court believed that withholding the passcode would substantially impair investigations. Investigating officers would not have access to the data on mobile devices required for conducting inquiries if the right against self-incrimination was upheld in the instant case. Three errors were made by the Court in forming its reasoning.

First, the Court erred in treating passcode/password and biometrics as same for the purpose of interpretation of Article 20(3). Passcodes and passwords cannot be considered non-testimonial or physical evidence because, when an accused person is forced to reveal a password, he or she must use their mental faculties to recall it and therefore the information falls under the category of testimonial evidence.

The Supreme Court in *Selvi* v. *State of Karnataka*[16] had observed that a zone of mental privacy is established by Article 20(3), which the State may not invade in order to obtain personal information concerning a crucial fact. Further, the Court in *Selvi*[17] held that if statements may lead to incrimination by themselves or "furnish a link in the chain of evidence" the bar of Article 20(3) of the Constitution would apply. Thus, the Court committed an error in treating the passcode/password as non-testimonial evidence.

Second, in para 12.3 of the judgment[18], the Court vaguely noted that under Section 93 CrPC the Court has the power to issue a search warrant for a place which also covers mechanism for search of phones/laptop. It treated the word "place" and "part thereof" in Section 93(2) CrPC to also include a phone/laptop but no reasoning is assigned in the judgment in support of the same.

It was further noted that the disclosure of a passcode or biometric is comparable to the procedure for producing a document set forth in Section 91 of the Criminal Procedure Code, and as a result, failure to reveal a passcode or password would give the investigating officer the right to search the phone in accordance with Section 93, and the owner of the phone could be compelled to unlock it in accordance with Section 100 CrPC. The reasoning is flawed and is not compatible with the Code of Criminal Procedure. Firstly, the passcode is not a document for the purpose of Section 91 CrPC that exists as physical evidence but is personal information that resides in the zone of mental privacy. It usually exists as a combination of numbers or patterns in the mind and therefore its revelation is protected under Article 20(3) of the Constitution. Secondly, the power to issue search of mobile/laptop cannot be found in Section 93. The Court erred in treating electronic device and the word "place" as the same under Section 93. The word "place" has been defined under Section 2(p) CrPC[19] to include a house, building, tent, vehicle, and vessel. Applying the interpretation rule *of* ejusdem generis[20], it cannot be said that electronic devices are of the same kind as a house, building, tent, vehicle, or vessel. Therefore, the search for mobile cannot be directed under Section 93.

Third, the flaw lies in ignoring the discussion on doctrine of "foregone conclusion" which serves as an exception to the rule of self-incrimination vis-à-vis unlocking of phones. The "foregone conclusion" doctrine has only been used by a small number of US courts to sanction passcode compelling theory..[21] The foregone conclusion exception "provides that an act of production does not involve testimonial communication where the facts conveyed already are known to the Government, such that the individual 'adds little or nothing to the sum total of the Government's information'."[22] This rule is applied when the prosecution can show that the police already knew what was on the phone, and a passcode will not change

the prosecution's case in any way. For instance, in order to gain access to *X*'s phone, the police would need to show both *X*'s ownership of the device and *X*'s knowledge of the passcode. Also, the police already know what is on the phone and where any evidence that could be used to incriminate the owner is located. The Court, rather than compelling that production of passcode as document, should have focused on the incriminating material that the investigation officer thinks or believes to be in phone/laptop and how production of passcode will not add anything to the sum total of the investigation officer.

Delhi Special CBI Court judgment

An application for disclosure of the passcode of the computer seized from the accused was moved before the Delhi Special CBI Court. To support its case the prosecution cited the Karnataka High Court decision in *Virendra Khanna* v. *State of Karnataka*[23] (detailed above). The opposition to the application was based on the grounds that there is no particular provision for the revelation of the passcode and that the trial court lacks the inherent authority to order unlocking of the phone/computer. Article 20(3) prohibits compelled extraction of passcode since doing so would amount to testimonial evidence. Further, it was contended that the judgment in *Virendra Khanna* v. *State of Karnataka*[24] is per incuriam in light of *Selvi* judgment[25].

The Court held that Sections 102[26] and 161[27] of the Criminal Procedure Code give investigators the authority to exclusively or with the court's assistance under Sections 91 and 93 CrPC seek any information or document from any person including an accused but at the same time, the accused (or a witness) is not obliged to give any answer which is self-incriminatory.[28] Further the words "to investigate the facts and circumstances of the case" in Section 157 CrPC[29] that provides for procedure of investigation are wide enough to include any kind of information, things or object which the investigator may require from an accused, or a witness needed for fair investigation. To support its finding, the Court held that without there being a specific provision in the CrPC and before the amendment to the Criminal Procedure (Identification) Act, 2022[30] for collection of blood sample, DNA/hair samples, etc., the investigator had the power to order the giving of samples and such power of the investigator fell within the realm of investigation.

Regarding the second objection, the Court ruled that forcing a witness to provide a password or security pattern violates Article 20(3) of the Indian Constitution. The difference between testimonial and non-testimonial evidence was also discussed by the court. In para 18, it stated:

> *18.* ... a testimony in oral (like voice sample) or written form (like specimen handwriting or signature) though may be personal yet they can be taken under compulsion from an accused if it is to be used for the purpose of identification or comparison with already available voice recording or signature/handwriting which is/are obtained from other sources like seizure of document or chance print, fingerprints of the scene of crime, etc.[31]

However, in para 19, it observed that since, the password of the accused is not required for comparison or identification purpose, therefore, it is protected personal information that resides in the mental zone and therefore disclosure of passcode would tantamount to disclosure against Article 20(3). Relying on *Selvi* dictum[32], the Court further observed that the Supreme Court had ruled that narcoanalysis/lie detector test procedure involves personal knowledge of the accused and therefore it cannot be conducted without the consent of the accused. Similarly, disclosure of passcode involves disclosure of personal knowledge and therefore an accused cannot be compelled for its disclosure.

Contrary to the Karnataka High Court, this Court distinguished the password from biometrics in light of the Criminal Procedure (Identification) Act, 2022 (hereafter referred to as "the Act"). The Act's definition of the term "measurements" was the court's main concern.

As per Section 2(1)(*b*) of the Act,

> (*b*) measurements includes finger impressions, palm-print impressions, footprint impressions, photographs, iris and retina scan, physical, biological samples and their analysis, behavioural attributes including signatures, handwriting or any other examination referred to in Section 53[33] or Section 53-A[34] of the Code of Criminal Procedure, 1973.[35]

The Court then considered Section 3 of the Act[36], which states that an accused shall permit the police to collect his measurements in accordance with the law whenever necessary. Additionally, a Magistrate may order the accused to provide his measurement under Section 5 of the Act[37]. After perusal of the abovementioned provisions, the Court noted that the Act does not include the words password/user ID in the definition of the word "measurement" therefore the Court cannot direct disclosure of passcode under the Act. However, the Court inferred from the definition of "measurement" under the Act that a direction for providing biometric i.e. finger impressions, face, or iris recognition for opening of electronic device by the investigator can be ordered. It was observed that Article 20(3) of the Constitution protects information emanating from "personal knowledge" and biometrics are only physical evidence which does not require attribution of personal knowledge. Consequently, giving of biometric is not protected under the Constitution.

It observed that the Criminal Procedure (Identification) Act, 2022 does not say that the purpose of collection of physical evidence is for comparison with other materials collected during investigation. Therefore, the police can take biometrics as per Section 3 of the Act whenever it requires unlocking of phones protected with finger impressions/facial recognition techniques.

What the Delhi Court missed

The Delhi Court order[38] is legally sound and in line with the Supreme Court judgments in *Kathi Kalu Oghad*[39], *Selvi*[40] and other judgments as it rightly observed that password/security pattern is derived from the personal knowledge of the accused and therefore its disclosure

is protected under Article 20(3). However, it failed to analyse one of the major challenges to compelled disclosure of biometrics which has been accepted by few courts in US, that biometrics perform the same function as a password with respect to information therefore the passwords and biometrics are "functionally equivalent" for the purposes of right of self-incrimination. Though, there is no unanimity in US regarding application of functionally equivalent doctrine, this issue becomes relevant because biometrics and passcode perform the same function i.e. locking of phone.

In an interesting case before the United States District Court Northern District of California in *Search of a Residence in Oakland, In re*[41] the Court denied permission to unlock the phone using biometrics. In this case, the accused used Facebook Messenger to communicate with a victim in which they threatened to distribute embarrassing video of him if he did not yield to their demand. The police seized electronic devices from the accused and moved a motion before the court seeking biometrics for unlocking the devices. The Court denied the request and declared that use of accused biometric feature to potentially unlock an electronic device is testimonial in nature. The Court further observed that in modern times, technology is outpacing law. The Court viewed that:

> ... utilising a biometric feature to unlock an electronic device is not akin to submitting to fingerprinting or a DNA swab, because it differs in two fundamental ways. First, the Government concedes that a finger, thumb, or other biometric feature may be used to unlock a device in lieu of a passcode. In this context, biometric features serve the same purpose of a passcode, which is to secure the owner's content, pragmatically rendering them functionally equivalent. As the Government acknowledges, there are times when the device will not accept the biometric feature and require the user to type in the passcode to unlock the device. For example, a passcode is generally required "when a device has been restarted, inactive or has not been unlocked for a certain period of time". This is, no doubt, a security feature to ensure that someone without the passcode cannot readily access the contents of the phone.
>
> Second, requiring someone to affix their finger or thumb to a digital device is fundamentally different than requiring a suspect to submit to fingerprinting. A finger or thumb scan used to unlock a device indicates that the device belongs to a particular individual. In other words, the act concedes that the phone was in the possession and control of the suspect and authenticates ownership or access to the phone and all of its digital contents. Thus, the act of unlocking a phone with a finger or thumb scan far exceeds the "physical evidence" created when a suspect submits to fingerprinting to merely compare his fingerprints to existing physical evidence (another fingerprint) found at a crime scene, because there is no comparison or witness corroboration required to confirm a positive match. Instead, a successful finger or thumb scan confirms ownership or control of the device, and, unlike fingerprints, the authentication of its contents cannot be reasonably refuted.

The Court further observed that using a fingerprint to place it at a particular location is a starkly different scenario than using a finger scan to access a database of someone's most

private information. Therefore, biometric feature is analogous to the non-verbal, physiological responses elicited during a polygraph test, which are used to determine guilt or innocence, and or considered testimonial.

However, a contrary view has been taken in *State* v. *Diamond*[42], wherein the Supreme Court of Minnesota observed that compelled disclosure of biometrics merely demonstrates physical characteristics and did not communicate assertions of facts from mind. The test to determine whether communications or communicative acts are privileged under the self-incrimination protection is whether they are "testimonial, incriminating, and compelled". Applying the test in reverse, the Court found that compelling or forcing an accused to give finger scan is certainly compelled and incriminating, however it will not be testimonial.[43] Thus, it appears that no uniformity exists in cases pertaining to compelled disclosure of biometrics.

Another problem with the order lies in it treating the biometrics for unlocking of phone as equivalent to measurements as provided under the Criminal Procedure (Identification) Act, 2022 and therefore holding that phone unlocking was possible. The Court has not offered any justification for drawing such an inference. The Act's stated goal is to "authorise obtaining measures of convicts and other persons for the sake of identification and investigation in criminal issues". Such interpretation would allow police with uncontrolled and unguided access to electronic devices of individuals regardless of their position as an accused, a convict, or someone unrelated to the case. Thus, the Court should have dealt with the issue carefully particularly in view of the Act's stated objective.

Conclusion

It is an intriguing topic that calls for formulation of new theory or principles in order to carefully respect the constitutional prohibition on self-incrimination without obstructing impartial investigations. As in the 1960s, the Supreme Court could not have established legal standards pertaining to self-incrimination in connection to mobile phones, the *Kalu Oghad case*[44] may not be used as a benchmark to decide the question of self-incrimination in relation to passcode today. The Supreme Court would be required to look at the issue from the perspective of self-incrimination and right to privacy as an individual's information is stored in the mobile phones and an unbridled access to the police may expose an individual's privacy beyond the State's legitimate interest in information stored in phone for the purpose of investigation. Therefore, a timely resolution of the legal issue is the need of the hour and in doing so it is crucial for the Supreme Court to balance individual right against self-incrimination and the State's duty to investigate crimes. The "foregone conclusion" doctrine as used in the US is a good doctrine that serves as an exception to the rule against self-incrimination. It would be in order if the Indian Supreme Court evolves a similar rule that may play an important balancing role between individual rights and State's duty to investigate crimes.

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1. Constitution of India, Art. 20(3).
2. *Virendra Khanna* v. *State of Karnataka*, 2021 SCC OnLine Kar 5032.
3. Criminal Procedure Code, 1973, S. 93 .
4. *CBI* v. *Mahesh Kumar Sharma*, 2022 SCC OnLine Dis Crt (Del) 48.
5. Narcotic Drugs and Psychotropic Substances Act, 1985.
6. Foreigners Act, 1946.
7. AIR 1961 SC 1808.
8. *State ofBombay* v. *Kathi Kalu Oghad*, AIR 1961 SC 1808.
9. *State ofBombay* v. *Kathi Kalu Oghad*, AIR 1961 SC 1808.
10. AIR 1961 SC 1808.
11. *Ritesh Sinha* v. *State of U.P.*, (2019) 8 SCC 1.
12. *Virendra Khanna* v. *State of Karnataka*, 2021 SCC OnLine Kar 5032, para 12.4.
13. Criminal Procedure Code, 1973, S. 91.
14. Criminal Procedure Code, 1973, S. 100.
15. *Virendra Khanna* v. *State of Karnataka*, 2021 SCC OnLine Kar 5032.
16. (2010) 7 SCC 263, para 184.
17. (2010) 7 SCC 263.
18. *Virendra Khanna* v. *State of Karnataka*, 2021 SCC OnLine Kar 5032.
19. Criminal Procedure Code, 1973, S. 2(*p*).
20. Ejusdem generis as rule of construction in the interpretation and construction of statutes. Ejusdem generis is a Latin term which means "of the same kind". For example: if a law refers to automobiles, trucks, tractors, motorcycles and other motor-powered vehicles, "vehicles" would not include airplanes, since the list was of land-based transportation. The term "ejusdem generis" in other words means words of a similar class. The rule is that where particular words have a common characteristic (i.e. of a class) any general words that follow should be construed as referring generally to that class; no wider construction should be afforded.
21. Michael A. Foster, "Catch Me If You Scan: Constitutionality of Compelled Decryption Divides the Courts", Congressional Research Service, 6-3-2020, available at https://crsreports.congress.gov/product/pdf/LSB/LSB10416.
22. *Fisher* v. *United States*, 1976 SCC OnLine US SC 69 : 48 L Ed 2d 39 : 425 US 391, 411 (1976).

23. 2021 SCC OnLine Kar 5032.

24. 2021 SCC OnLine Kar 5032.

25. (2010) 7 SCC 263.

26. Criminal Procedure Code, 1973, S. 102.

27. Criminal Procedure Code, 1973, S. 161.

28. *CBI* v. *Mahesh Kumar Sharma*, 2022 SCC OnLine Dis Crt (Del) 48, para 12.

29. Criminal Procedure Code, 1973, S. 157.

30. Criminal Procedure (Identification) Act, 2022.

31. *CBI* v. *Mahesh Kumar Sharma*, 2022 SCC OnLine Dis Crt (Del) 48.

32. (2010) 7 SCC 263.

33. Criminal Procedure Code, 1973, S. 53.

34. Criminal Procedure Code, 1973, S. 53-A.

35. Criminal Procedure (Identification) Act, 2022, S. 2(1)(*b*).

36. Criminal Procedure (Identification) Act, 2022, S. 3.

37. Criminal Procedure (Identification) Act, 2022, S. 5.

38. *CBI* v. *Mahesh Kumar Sharma*, 2022 SCC OnLine Dis Crt (Del) 48.

39. AIR 1961 SC 1808.

40. (2010) 7 SCC 263.

41. 354 F Supp 3d 1010: 2019 WL 176937 (ND Cal 2019).

42. 905 N.W.2d 870 (Minn. 2018).

43. *United States* v. *Anthony Barrera*, 415 F Supp 3d 832 (ND Ill 2019).

44. AIR 1961 SC 1808.

Tags : biometrics | foregone conclusion | Indian Constitution | part thereof | passcode | personal knowledge | self incrimination | vehicles

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Authored by

Ankur Mody

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IN THE HON'BLE HIGH COURT OF MADHYA PRADESH
BENCH AT GWALIOR

WP NO. 2263/2016

PETITIONER: GWALIOR ALCOBREW PRIVATE LIMITED

VERSUS

RESPONDENTS: STATE OF MADHYA PRADESH & OTHERS

AND

W.P. No. 2170/2016

PETITIONER: M/S PERNOD RICARD

VERSUS

RESPONDENTS: STATE OF MADHYA PRADESH & OTHERS

WRITTEN SUBMISSION ON BEHALF OF THE RESPONDENTS

Humble Respondents most respectfully submit as under:-

A. That, the present petition is preferred against the order dated 30.01.2016 passed by the Respondent No. 2 inter-alia :-

1. Disallowing input tax rebate to the extent of Rs. 15,54,040/-.
2. Working out demand of VAT on sell of rectified spirit at the rate of 13% amounting to Rs. 10,50,76,864/.
3. Certain other demands were also raised with respect to imposition of VAT on lease rent etc.

B. That, the petitioner has primarily challenged the demand of VAT @ 13% on sale of rectified spirit and has challenged disallowance of input tax rebate.

C. That, in respect of imposing tax @ 13% on rectified spirit it is the case of the petitioner that :-

1. Rectified spirit is actually liquor as per the definition of liquor u/s 2(13) of M.P. Excise Act, 1915.
2. As per entry 47 in Schedule - I of M.P. VAT Act 2002 liquor is not an exempted goods and therefore, in Schedule – II, Part – II of M.P. VAT Act at Entry No. 56 liquor is tax @ 5%, hence levying 13% on sale of rectified spirit by relying on Schedule – II, Part – IV which is a residuary list is illegal.
3. Both the grounds raised by the petitioner are misconceived because :-

   Rectified Spirit Vs. Liquor fit for human consumption.

   a. Schedule – I of MP VAT Act, 2002 and enlists goods which are exempted from VAT and Entry 47 lays down the eligibility criteria for exemption of goods covered in that entry. It exempts goods which are excisable under MP Excise Act, 1915 from levy of VAT.

   b. Section 25 of MP Excise ACT empowers the State Government to levy excise duty on excisable articles.

   c. Under Section 2(6) of MP Excise Act excisable articles are defined as any alcoholic liquor for human consumption.

   d. Under Section 2(6) of MP Excise Act, excise duty is defined as the same as is mentioned in entry 51

of List-II in the seventh schedule of the constitution.

e. Entry 51 in List-II vests the state government to levy excise duty on manufacturing of alcoholic liquor for human consumption.

Thus, in order to determine excitability of rectified spirit which is in its very nature not fit for human consumption it is the wording and language of Entry 51 in List–II of the Constitution of India which is to be seen and anything contrary to Entry 51 in List-II of the Constitution of India is to be ignored as the entry in the List-II of the Constitution of India has the overriding effect. Since, it is the language of the exempting clause in Entry 56 which is under consideration, therefore, the same is required to be strictly construed and on such construction manufacturing of rectified spirit false outside the purview of manufacturing of goods intended to be subjected to levy of excise duty under Entry 51 of List-II of the Constitution of India.

f. Notably, liquor as defined in the M.P. Excise Act, 1915 means intoxicating liquor and provides that it includes various other articles such as wine, spirit etc. Point to note is that the opening word of the definition of liquor provides that it means intoxicating liquor. Intoxicating means something which is non-toxic and fit for human consumption. Doctrine of *ejusdem generis* mandates that the

words following the opening words are to be given the sense and meaning as is attributed to the opening words and as such the other goods mentioned in the definition of liquor are to be necessarily to mean and include goods which are fit for human consumption and cannot be construed so as to include goods which are not fit for human consumption like *rectified spirit.*

g. Besides, in Schedule – I and II of the VAT Act the word liquor is used in Entry 47 of Schedule – I, Entry 56 in Part-II of Schedule-II and in Entry 6 of Part-IIIA of Schedule-II. Under the Excise Act following two categories of licenses are issued:-

Open Bottle Sale		**Closed Bottle Sale**	
License No.	Nature of Sale	License No.	Nature of Sale
FL2	Restaurant Bar License.	FL6	Military Canteens wholesale license.
FL3	Hotel Bar License.	FL7	Military Canteens retail license.
FL3A	Resort Bar License.	FL8	Military Club or Mass license.
FL4	Possession and sale of foreign liquor in clubs.	FL9	Manufacturing and bottling of liquor license.
FL4A	Possession	FL9A	Special bottling

	and sale of foreign liquor in commercial clubs.		license.
FL5	Occasional license.	FL10 and 10A	License to sale liquor in whole sale.
		FL10B	License to sale foreign liquor bottled in original in wholesale.
		FL11	License for wholesale sale of duty paid foreign liquor.

It is to be noted that the use of word liquor in Schedule-II, Part-II, Entry 56 relates to licenses to sell liquor with open bottle. Whereas, the use of word liquor in Entry 6 of Part-IIIA of Schedule-II refers to sale of liquor by the dealer other than those who hold licenses for open bottle sale of liquor meaning thereby this entry includes dealers holding licenses for sale of closed bottle liquor. In the above-mentioned both the columns includes all variety of licenses for sale of liquor under the Excise Act and one of the condition stipulated in every license is that it is not meant for sale of liquor unfit for human consumption. Thus, if the

same meaning is to be attributed to the word liquor used in Entry 47 in Schedule-I, Entry 56 in Part-II of Schedule-II and Entry 6 in Part-IIIA in Schedule-II then it means to include only liquor which is fit for human consumption which does not include rectified spirit.

h. That, in the case of associated alcohol and Brewerise Ltd. Vs. State of M.P. & Others WP No. 6317/2017 dated 18.09.2018 the Coordinate Bench of this Hon'ble Court has already pronounced is verdict on the issue raised in the present petition against the assesse and in favour of the revenue in Para 16 of its judgment inter-alia holding that rectified spirit is not excisable under M.P. Excise Act, 1915. The ratio of this judgment squarely applies to the present case and is a binding precedent.

i. As levy of VAT @ 13% on rectified spirit is based out of power of the statement government to impose such levy under entry 54 of List-II of the Constitution of India on sale of goods hence the levy by itself is not unconstitutional. So far as the challenge to the rate of tax is concerned appellate forum is the more appropriate forum.

Disallowing input tax rebate (In WP No. 2263/2016)

j. The reason for disallowing the ITR was not that the goods on which petitioner claims to have paid VAT was not actually deposited by the seller but because the transactions shown in the return

submitted by the petitioner in which VAT was paid did not reconcile with the entries in the return submitted by the seller.

k. Proviso to Section 14(6) of the VAT Act provides that where the entries in the return submitted by the purchasing dealer and the selling dealer are reconciling actual payment of tax to the authority would be deemed even if the selling dealer has not actually paid it.

l. It is not the case of the petitioner that due to inaccessibility to the return of the selling dealer prejudice has occurred to him. It is also not shown by the petitioner in the petition that what possible explanation it has for the missing entries of transaction in the return of the selling dealer.

Violation of procedure in Section 20A (In WP No. 2170/2016)

m. It is contended by the petitioner that it had submitted the return and had paid tax as per the return as per the timeline stipulated in Section 20A, therefore, his return was automatically accepted and his assessment is deemed to have been made for the purpose of Section 20(1). It is further contended that this status of deemed assessment of the petitioner could only be upset by adhering the procedure laid out in 20A(2) which provides for reassessment of deemed assessment under 20(1) by way of selection by the Commissioner and in the present case it is not shown as to how the case of the petitioner was selected for reassessment.

n. This contention of the petitioner is misplaced because self assessment of his return was never accepted in terms of Rule 31 and hence assessment of the petitioner was not deemed to have been made for the purpose of Section 20(1). Since, the assessment in the case of the petitioner had not been made therefore, reassessment of the assessment of the petitioner in terms of 20A(2) does not arise.

o. The impugned order clearly records admission of the petitioner that there is discrepancies in entries shown in its return due to which there is variation in the amount of tax paid and amount of tax ought to be paid. In the wake of such admitted discrepancy in the return of the petitioner it was clearly not a case where benefit of deemed assessment could be expected by the petitioner and even at the time of hearing it was not the case of the petitioner that he has been wrongly selected as his is a case of deemed assessment u/s 20A.

Date : /03/2019

Place : Gwalior

Humble Respondents

through the State Counsel

IN THE HON'BLE HIGH COURT OF MADHYA PRADESH

BENCH AT GWALIOR

MCRC No. 39997/2022

PETITIONERS : M/s Hotline Teletubes and Components Ltd. & others

VERSUS

RESPONDENTS : The Registrar of Companies

WRITTEN SUBMISSIONS ON BEHALF OF THE PETITIONERS

DATES	EVENTS	Page No.
22.02.1989	Petitioner is a company registered under the Companies Act, 1956.	19
31.03.2009	ROC Gwalior carried out inspection of the petitioner company under section 209A of the Companies Act, 1956 and reported the same to the Regional Director with further information that the Directors of the Company had failed to answer the summons which has further rendered them liable under section 209A (8) and (9) of the Act in which regard further instructions were solicited. Copy of the inspection report entailing all violations and contraventions were enclosed with the letter.	30-43 @ Page 30 and 36 onwards.
24.06.2009	Upon the directions of the Regional Director the ROC Gwalior submitted the Supplementary Report after	44-53 @ Page – 44

	scrutinizing the balance sheets and other filings of the company wherein violations under section 628, 217(3), 205 C read with 205 A, 211 (1), 211 (3A), 211 (3B), 166, 210, 220 and 159 of the Companies Act, 1956. Accordingly, advisory regarding further course of action was sought.	
25.09.2009	In reference to the supplementary inspection report submitted by the ROC Gwalior, the Regional Director requested the ROC Gwalior to take further action in the matter and in para 3 of the said letter reminded the ROC Gwalior about his powers under section 209A for enforcing attendance of the witnesses more specifically under section 209A(5)(ii) r/w section 209A(7) and (8). (This reminder was with reference to the mention made by the ROC Gwalior in its letter dated 24.06.2009 at page 44 that the directors of the company have failed to answer summons). **This was not a direction to carry out fresh inspection under section 209A of the Act as the said inspection had already been carried out and report entailing violations had been submitted.**	54-55

26.03.2013	In reference to the inspection report submitted under section 209A, the Ministry of Corporate Affairs requested the Regional Director with copy to ROC Gwalior to take action in the matter by initiating prosecution. Pertinently, in the said letter in the footnote, a note is appended for ROC Gwalior for taking necessary action at the earliest without awaiting instructions from the regional.	56
2013	Accordingly, the ROC Gwalior lodged prosecution under section 628 of the Companies Act, 1956 against the petitioners primarily relying on the violations reported in the inspection report under section 209A dated 23.06.2009 before the Court of the Chief Judicial Magistrate, Gwalior (M.P.). In para 3 of the complaint although inspection report under section 209A is relied upon but the date of the said report is not disclosed.	21
02.08.2013	The Court of CJM, Gwalior took cognizance of the matter.	13
Nil.Nil.2019	An application under section 468(1) read with 469 of Cr.P.C. was moved before the court along with supporting documents to demonstrate that the violations complained of were well	57-58

	within the knowledge of the ROC Gwalior in the year 2009 and as such the prosecution ought to have been lodged within 2 years from then, which was not done as such the cognizance taken in the year 2013 is barred by law.	
13.06.2022	The Ld. Court of the CJM Gwalior decided the application under section 468(1) of Cr.P.C. of the petitioners by rejecting it on the ground that since the instructions to take legal action were received by the ROC in the year 2013 therefore, the limitation would be computed from such date when the instructions were received and as such the prosecution lodged on 02.08.2013 is within limitation.	16-18
13.08.2022	The present petition was preferred impugning the orders dated 02.08.2013 (at page 13) by which the cognizance of the complaint was taken and the order dated 13.06.2022 (at page 16-18) by which the application of the petitioner under section 468 (1) of Cr.P.C. was rejected.	

SUBMISSIONS:–

A. The inspection report including the supplementary report under section 209A of the Companies Act, 1956 (at page 45 – 53) dated 23.06.2009 under the signatures of the ROC Gwalior

constitutes knowledge of the ROC, Gwalior of the violations entailed in the said report.

B. The offence under section 628 of the Companies Act, 1956 entails punishment of 2 years and fine. The knowledge regarding violation of the section 628 of the Companies Act, 1956 accrued to the ROC Gwalior when supplementary inspection report dated 23.06.2009 was submitted.

C. Nalco Vs. ROC (at page 59-64 @ page 63 para 11 & 12) it was held that the date of submission of the inspection report is the knowledge to the inspecting officer of the violations reported in the inspection report. The said date would be the starting point of period of limitation of two years for launching the prosecution. The date of knowledge of the inspecting officer regarding the violations is also attributable to the ROC. In the present case ROC Gwalior himself was the inspecting officer, who gained knowledge of the violations on 23.06.2009, when he submitted the inspection report. Thus, the prosecution ought to have been launched within two years from the said date.

D. Since for lodging the complaint person aggreived is ROC, Gwalior under whose signatures complaint is to be moved therefore, what matters is the date on which Roc Gwalior gained knowledge about the violations, and such date would constitute starting point of the period of limitation. ROC Gwalior is expected to do all communications, correspondences, receiving

of instructions etc. within this period of limitation. Belated receiving of instruction / advisory from the department will not extend the starting point of the period of limitation.

E. The documents relied upon by the petitioner in the present petition can be looked into by the High Court in the present section 482 Cr.P.C. proceedings. (2011) 3 SCC 351.(para 25)

> *" ...However, in an approprieate case, if on the face of the documents - which are beyond suspicion or doubt – placed by the accused, the accusation againt him cannot stand, it would be travesty of justice if the accused is relegated to trial and he is asked to prove his defense before the court. In such matter, for promotion of justice or to prevent injustice or abuse of process, the high court can look into the material which have significant bearing on the matter at prima facie stage"*

Place: Gwalior.

Date: 24.11.2022

Humble Petitioners

Through Counsel

Ankur Mody
Karan Virwani
(Advocates)

Gwalior Bench:
Dated -19/04/2022

Shri Shashank Indapurkar, learned counsel for the petitioners.

Shri Ankur Mody, Additional Advocate General with Shri Sanjay Kumar Sharma and Shri Devendra Chaubey, learned GA for the respondents/State.

Heard on admission.

This is second round of petition preferred by petitioners under Article 226 of the Constitution of India in which they are seeking relief for quashment of recovery order issued by Commandant, Second Battalion, SAF, Gwalior.

It is the submission of learned counsel for the petitioners that matter attained finality till the stage of Supreme Court; where, respondents are entitled to recover the amount paid to the petitioners towards increment due to inadvertence on mistaken belief. Vide order dated 14/12/2021 in Bunch of writ petitions in which W.P.No. 13264/2020 was lead case, Coordinate Bench of this Court in case of petitioners and similarly placed employees issued certain directions to the respondents to reassess the excess payment made to the petitioners in light of judgment passed by the Supreme Court in the case of **S.H.Baig and Ors. Vs. State of M.P. and Ors., (Civil Appeal No. 9888-9899 of 2018)** and decision of Division Bench of this Court in the case of **Smt. Sushma Tiwari Vs. State of M.P. (W.A.No. 1760/2007);** whereby total excess payment made to the petitioners had to be recalculated and thereafter recovery was to be made. One direction was specific regarding non-recovery of interest on the excess payment made to the petitioners.

Grievance of the petitioners is that State Government has not decided the case of petitioners as per the directions given vide order dated 14/12/2021 and still recovery has been initiated. In absence of reassessment of excess payment, recovery cannot be undertaken.

Learned counsel for the State sought time to seek instructions.

From the perusal of relief, submissions of parties and nature of litigation, it appears that litigation is repetitive in nature and the core issue can be addressed if mediation is given a chance.

Learned counsel for the parties agreed upon to undergo mediation proceedings so that it can be given a chance and they are ready to appear before a duly constituted Committee to ventilate their grievance and seek report of said Committee. Since many more petitions are pending, therefore, to decide the dispute once and for all, mediation can be given a chance.

Considering the submissions and going through the nature of litigation, it appears that litigation is repetitive in nature and come before this Court time and again, therefore, it affects large number of employees of Police Department, therefore, in the interest of justice, mediation be given a chance so that both the parties can share common platform and reach to common consensus by ventilating their grievance and / or appreciate the rival submissions.

For the purpose of mediation, a Committee consisting of Senior Advocate Shri K.N.Gupta, Inspector General of Police, Gwalior Zone and Joint Director, Treasury is hereby constituted

in which Additional Advocate General Shri Ankur Mody shall act as coordinator / Secretary. The said Committee shall conduct a meeting and try to submit report within two months. Before the Committee, counsel for the petitioners would be at liberty to appear and express his view points regarding whole controversy and a date would be intimated to the counsel in advance by the Coordinator / Secretary of the Committee.

Inspector General of Police and Joint Director, Treasury would be at liberty to seek guidance from their higher authorities, as and when required, to resolve the dispute.

This is an experiment meant to address the pendency of identical cases in the realm of service jurisdiction so that instead of pending for long a consensus or way out may be addressed by mediation and / or by the Committee so constituted.

It is expected that all stakeholders shall try to coordinate in meaningful manner to reach to a just conclusion.

Let the matter be placed in the **week commencing 20th June, 2022** before this Court alongwith mediation report.

Till next date of hearing recovery, if any, is stayed.

A typed copy of this order be provided to Additional Advocate General for information and onward transmission.

Certified copy as per rules.

(Anand Pathak)
Judge

jps/-

JAI PRAKASH SOLANKI