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Accommodation Control Act, M. P. (XLI of 1961)–Section 12(1)(c)–Ground of *bonafide* need incorporated by way of amendment–On the date of institution of suit plaintiff did not plead *bona fide* need–Suit filed by purchaser land lord within one year and subsequently amended the plaint stating as one year has elapsed Court can try the issue of *bonafide* need : *vide* Civil Procedure Code, 1908 Section 100 469

Accommodation Control Act, M. P. (XLI of 1961)–Section 12(4)–Amended pleading does not support *bonafide* need–Suit could not be decreed on ground of *bona fide* need in view of Section 12(4) of the Act–Suit dismissed : *vide* Civil Procedure Code, 1908 Section 100 469

Accommodation Control Act, M. P. (XLI of 1961)–Section 12(1)(a)–Arrears of rent–Transferee not entitled to arrears of rent due before the transfer–It is a mere debt and cannot be recovered as arrears of rent by the assignee : *vide* Civil Procedure Code, 1908 Section 100 and Accommodation Control Act, M.P. 1961, Section 12(1)(a) and 12(1)(c) 191

Accommodation Control Act, M. P. (XLI of 1961)–Section 12(1)(a)–Plaintiff not entitled to decree of eviction under section 12(1)(a) on the basis of demand notice served by his predecessor in title : *vide* Civil Procedure Code, 1908 Section 100 and Accommodation Control Act, M.P. 1961,Section 12(1)(a) and 12(1)(c) 191

Accommodation Control Act, M. P. (XLI of 1961)–Section 12(1)(a) and 12(1)(c)–Suit for eviction on ground of arrears of rent and disclaimer of title–Transfer of suit house in favour of present plaintiff/landlord during pendency of earlier suit–Plaintiff served notice on defendant/ tenant but filed the suit before expiry of sixty days–Cannot take advantage of demand notice served by his predecessor : *vide* Civil Procedure Code,1908 Section 100 and Accommodation Control Act, M.P. 1961, Section 12(1)(a) and 12(1)(c) 191

Accommodation Control Act, M. P. (XLI of 1961)–Section 12(1)(c)–Disclaimer of derivative title tenant does not fall within the mischief of section 12(1)(c) of the Act–Plaintiff also not entitled to decree of eviction under this provision : *vide* Civil Procedure Code, 1908, Section 100 and Accommodation Control Act, M.P. 1961, Section 12(1)(a) and 12(1)(c) 191

Accommodation Control Act, M. P. (XLI of 1961)–Section 12(1)(e)–*Bona fide* need–Lower appellate Court finding plaintiff's *bona fide* need–Decree of eviction must follow such finding : *vide* Accommodation Control Act, M.P.1961 Sections 12(1)(a), 12(1)(e), Accommodation Control (Amendment) Ordinance, M .P., 1985 and Civil Procedure Code, 1908, Section 100 105

Accommodation Control Act, M. P. (XLI of 1961)–Sections 12(1)(a)(c)(e)(i) and 12(4)–Arrears of rent paid by appellant–Plaintiff not entitled to decree under Section 12(1)(a)–Tenants challenging derivative title of purchaser/plaintiff-Not a ground under Section 12(1) (c) : *vide* Civil Procedure Code,1908, Section 100 469

Accommodation Control Act, M.P.,(XLI of 1961)–Section 2(1)(a)–Suit for

recovery of plaintiffs share of rent in property held in joint ownership–Maintainable–Does not amount to division of tenancy–Earlier suit for plaintiffs ¼ share of rent decreed–Plaintiff cannot be forced to file repeated suit for one and the same relies : *vide* Civil Procedure Code,1908, Section 100 ...904

Accommodation Control Act, M.P.,(XLI of 1961)–Section 12 (1) (e)–Plaintiff can not be non-suited merely because no suit has been filed for eviction of tenant's in his brother's share of the house–Judgment and decree of Courts below set aside–Suit decreed : *vide* Civil Procedure Code,1908, Section 100 and Accommodation Control Act, M.P.1961, Section 12 (1) (e) and (f) ...920

Accommodation Control Act, M.P., (XLI of 1961)–Sections 12 (1)(g), 12(1) (h) and 12(7)–Condition specified in sub-Section (7) of Section 12 are attracted in case of a decree under Section 12(1)(h) and not under Section 12(1)(g)–Both Courts below recorded categorical finding that the house is unsafe for human habitation–Courts ought to have granted decree of eviction subject to condition that tenant if willing shall be given to re-occupy the house after repair–Error of law committed by courts below–Interference in second appeal justifiably warranted : *vide* Civil Procedure Code 1908, Section 100 ...914

Accommodation Control Act, M. P. (XLI of 1961)–Sections 2 and 12–Parties fall within the meaning of landlord and tenant as defined under the Act–None of the grounds envisaged in the Act made a ground for eviction under Section 12 of the Act–Suit of plaintiff-respondent dismissed : *vide* Civil Procedure Code 1908, Section 96 555

Accommodation Control Act, M. P. (XLI of 1961)–Sections 12(1)(a), 12(1)(e), 13(2) and 13(6)–Suit for eviction on ground of arrears of rent and *bona fide* need–Failure of tenant to deposit rent–Consequential striking of defence–Does not debar the defendant tenant to contest the issue as to arrears of rent–Else it would amount to condemning defendant without opportunity : *vide* Constitution of India, Article 227 547

Accommodation Control Act, M. P. (XLI of 1961)–Section 12(1)(c), 12(1)(e) and 12(1)(m)–Residential accommodation–Converted by tenant to run school–It is an act inconsistent with the purpose for which accommodation was let–Tenant incurred liability u/s. 12(1)(c) of the Act : *vide* Civil Procedure Code,1908, Section 100, Order 41, Rule 22 564

Accommodation Control Act, M. P. (XLI of 1961)–Section 12(1)(e)–*Bona fide* need of the landlady–Test–Availability or non-availability of suitable alternative accommodation–Plaintiff cannot be compelled to occupy a house which she does not feel to be suitable–Ground floor in occupation of landlady being used for running a school–Cannot be said to be alternative accommodation : *vide* Civil Procedure Code, 1908, Section 100, Order 41, Rule 22 564

Accommodation Control Act, M. P. (XLI of 1961)–Section 23-A–Landlord–A retired Govt. Servant acquiring suit premises after his retirement–Is a specified landlord within the meaning of Section 23-J–Application before RCA prior to expiry of one year period–Tenable : *vide* Accommodation Control Act, M.P. 1961,Section 23-A, 23-D, 23-E and 23-J 596

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Accommodation Control Act, M. P. (XLI of 1961)–Sections 23-A, 23-D, 23-E and 23-J–Revision against order of eviction passed by Rent Controlling Authority–Landlord–A retired Govt. Servant acquiring suit premises after his retirement–Is a specified landlord within the meaning of Section 23-J–Application before RCA prior to expiry of one year period–Tenable–Proviso to Section 23-A has no binding effect–Subsequent event–Decree in favour of landlord in respect of a small portion of the house would not negate the *bona fide* need already established–Sub-section (3) of Section 23-D–Presumption–Tenant though entered the witness box did not turn up for cross-examination despite repeated opportunity–Presumption in favour of landlord's *bona fide* need can not be said to have been rebutted by the tenant–Order of eviction passed by R.C.A. maintained.

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Accommodation Control Act, M. P. (XLI of 1961)–Section 23-D, Sub-section (3)–Presumption–Tenant though entered the witness box did not turn up for cross-examination despite repeated opportunity–Presumption in favour of landlord's *bona fide* need can not be said to have been rebutted by the tenant–Order of eviction

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Accommodation Control Act, M.P. (XLI of 1961)–Section 12(1)(n)–Requirement of this Section is to establish that plaintiff would contract house on the open plot–Eviction of tenants sought from an open plot for constructing building for business of major sons–Plaintiff proved her intention by showing sufficiency of funds and by filing map sanctioned by Municipal Council–Suit decreed : *vide* Civil Procedure Code, 1908 Section 100 653

Accommodation Control Act, M. P. (XLI of 1961)–Sections 23-A, 23-C and 23-J and Accommodation Control (Amendment) Act, M. P.1985, Section 9–On coming into force of the Amending Act all cases instituted by landlady other then covered under Section 23-J stood transferred to Civil Court–Even if in such a transferred case the tenant suffered consequences of Section 23-C, he would be entitled to opportunity to defend as envisaged in the Civil Procedure Code–Trial Court passed the decree without giving opportunity to tenant to defend–Decree of eviction set aside and case remanded to trial Court to decide the case giving opportunity to defendant to file written statement :*vide* Civil Procedure Code, 1908, Section 100 640

Accommodation Control Act, M. P. (XLI of 1961)–Sections 2(i), 23-A, 23-E, 23-J and 39–Tenant as defined includes even a person allotted accommodation under Section 39–Land lord falling under Section 23-J can file an application before the Rent Controlling Authority seeking eviction of tenant whether contractual tenant or an allottee.

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Accommodation Control Act, M. P. (XLI of 1961)–Sections 2(i) and 23-J–Landlord falling under Section 23-J can file an application before the Rent Controlling Authority seeking eviction of tenant whether contractual tenant or an allottee : *vide* Accommodation Control Act, M.P. 1961, Sections 2(i), 23-A, 23-E, 23-J and 39 804

Accommodation Control Act, M. P. (XLI of 1961)–Section 2(i)–Tenant as defined includes even a person allotted accommodation under Section 39 : *vide* Accommodation Control Act, M.P. 1961, Sections 2(i), 23-A, 23-E, 23-J and 39 804

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Accommodation Control Act, M.P., (XLI of 1961)–Section 12 (1)(b) –Sub-letting–Defence that a partnership firm is tenant and the plaintiff received payment from the firm–Not established by defendant by filing account books or other documents–Defendant has parted with the possession can safely be presume–Plaintiff successfully proved sub-letting by defendant–Entitle for decree of eviction : *vide* Civil Procedure Code, 1908, Section 100 ...850

Acquisition of Immovable Property Act (XXX of 1952)–Sections 8 and 19–On death of original holder and in case there is more than one legal heirs the arbitrator has jurisdiction to apportion the award amongst the persons found entitled–Jurisdiction of Civil Court in such matter is barred : *vide* Constitution of India Article 226/227 448

Act, 1855 - XIII : *vide* Fatal Accidents Act, Indian.

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Act, 1882 - IV : *vide* Transfer of Property Act.

Act, 1885 - XIII : *vide* Telegraph Act, Indian.

Act, 1890–IX : *vide* Railways Act, Indian.

Act, 1894 - I : *vide* Land Acquisition Act.

Act, 1908 - V : *vide* Civil Procedure Code.

Act, 1915 - C.P. I : *vide* Excise Act, C. P. Berar.

Act, 1918 - X : *vide* Usurious Loans Act.

Act, 1923 - VIII : *vide* Workmen's Compensation Act.

Act, 1925 - XXXIX : *vide* Succession Act, Indian.

Act, 1930 - III : *vide* Sale of Goods Act, Indian.

Act, 1933 - XXVII : *vide* Medical Council Act.

Act, 1936 - IV : *vide* Payment of Wages Act.

Act, 1936 - M. P. XXX : *vide* Entertainment Duty and Advertisements Tax Act, M. P.

Act, 1937 - XVIII : *vide* Hindu Women's Right to Property.

Act, 1939 - IV : *vide* Motor Vehicles Act.
Act, 1940 - X : *vide* Arbitration Act, Indian.
Act, 1947 - II : *vide* Prevention of Corruption Act.
Act, 1947 - XIV : *vide* Industrial Disputes Act.
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Act, 1949 - X : *vide* Banking Regulation Act.
Act, 1950 - XLIV : *vide* Road Transport Corporation Act.
Act, 1952 - M. P. II : *vide* Acquisition of Immovable Property Act.
Act, 1952 - M. P. XVII : *vide* Cinemas (Regulation) Act, M. P.
Act, 1952 - XXX : *vide* Requisitioning and Acquisition of Immovable Property Act.
Act, 1954 - XXXVII : *vide* Prevention of Food Adulteration Act.
Act, 1955 - XXV : *vide* Hindu Marriage Act.
Act, 1956 - XXX : *vide* Hindu Succession Act.
Act, 1956 - I : *vide* Companies Act, Indian.
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Act, 1960 -M.P. XXVII : *vide* Industrial Relations Act, M.P.
Act, 1961-M.P. XLI : *vide* Accommodation Control Act, M.P.
Act, 1961 - M. P. XLI : *vide* Accommodation Control Act, M. P.
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Act, 1961 - M. P. XIV : *vide* Towns Improvement Trust Act, M. P.
Act, 1963 - XXXVI : *vide* Limitation Act, Indian.

Act, 1971 - LXX : *vide* Contempt of Courts Act.

Act, 1973 - XXVI : *vide* Coal Mines (Nationalisation) Act.

Act, 1973 - M. P. XXIII : *vide* Nagar Tatha Gram Nivesh Adhiniyam, M. P.

Act, 1973 - M. P. XXII : *vide* Vishvidyalaya Adhiniyam, M. P.

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Act, 1974 -II : *vide* Criminal Procedure Code, 1973.

Act, 1974 - II : *vide* Criminal Procedure Code, 1973.

Act, 1976-CIV : *vide* Civil Procedure Code (Amendment) Act.

Act, 1976 - M. P. XXV : *vide* Lok Adhikaranon Ke Madhya Se Bis Sutriya Karyakram Ke Karyanvayan Adhiniyam, M. P.

Act, 1976 - CIV : *vide* Civil Procedure Code (Amendment) Act.

Act, 1976 - XXXIII : *vide* Urban Land (Ceiling and Regulation) Act.

Act, 1977 - M. P. III : *vide* Samaj Ke Kamjor Wargon Ke Krishi Bhumi Dharkon Ka Udhar Dene Walon Ke Bhumi Hadapane Sambandhi Kuchakron Se Paritran Tatha Mukti Adhiniyam, M. P., 1976.

Act, 1978 - II : *vide* Child Marriage Restraint (Amendment) Act.

Act, 1980-LXV: *vide* National Security Act.

Act, 1982 - IV : *vide* Transfer of Property Act.

Act, 1983 - M. P. XXVII : *vide* Accommodation Control (Amendment) Act, M. P.

Act, 1983 - M. P. XXXIV : *vide* Entertainments Duty and Advertisements Tax (Amendment) Act.

Act, 1984 - M. P. XIII : *vide* Keshtha Chiran (Viniyaman) Adhiniyam, M. P.

Act, 1985 - M. P. VII : *vide* Accommodation Control Act, M. P.

Act, 1985–XIII : *vide* Administrative Tribunals Act.

Act, 1985 - I : *vide* Bhopal Gas Leak Disaster (Processing of Claims) Act.

Act, 1985–LXI : *vide* Narcotic Drugs and Psychotrophic Substances Act.

Act, 1988 - LIX : *vide* Motor Vehicles Act.

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AdministrativeTribunals Act,(XIII of 1985)– Sections 2(9), 15 and 29–Power of Civil Court not taken away by Section 29 of Administrative Tribunals Act–Impugned order set aside–Execution case restored to file : *vide* Constitution of India, Article 227 ...901

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Essentially a finding of fact cannot be re-opened in Second Appeal–Order 8, Rule 6-A–Counter-claim–By its nature is a cross-suit–Would not be affected by dismissal of plaintiff's suit–Order 1, Rule 9, C.P.C.–Non-joinder of necessary party–Fatal for maintaining the suit–Suit dismissed–Hindu Succession Act–Section 22–Right of pre-emption–Not a right to the thing sold but a right to offer of a thing about to be sold–Can be claimed by setting up counter claim in the written statement–Section 11 of the Code–Omission to raise plea of pre-emption in written statement would operate *res judicata*–Proper value–In absence of any evidence of the market value the sum actually paid is taken to be proper value.

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Civil Procedure Code (V of 1908)–Section 24–Application for recusal–In fact is an application for transfer of the case–Can be made to the District Judge before whom the proceedings are pending–Approach cannot be said to demeaning of degrading the Court by use of word 'recuse' : *vide* Civil Procedure Code, 1908, Section 115 and Bhopal Gas Leakage Disaster (Processing of Claims) Act, 1985, Section 3, Paragraphs 5(8), 10(3)(b) 121

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UNION OF INDIA THROUGH GENERAL MANAGERS v. MS. JAIKUMAR RAJKUMAR & COMPANY, JABALPUR; I. L. R. (1992) M. P. 833

il Procedure Code (V of 1908)–Section 80–Notice before filing writ–Not necessary especially when petitioner is not seeking enforcement of private rights or contractual obligations: *vide* Constitution of India, Articles 14, 226, Road Transport Corporation Act, 1950, Section 45, State Road Transport Corporation Employees Service Regulation, M.P., 1960, Regulation 59 and Industrial Relations Act, M.P. 1960, Sections 31, 61 ...15

ril Procedure Code (V of 1908)–Section 96–First Appeal–Suit for declaration of title, portition, possession and injunction for maintenance from co-parcener of the joint family–Gwalior Quanoon Mal Samvat, 1983, Section 253, Land Revenue Code, M. P., 1959, Section 178, 259, 261, Hindu Women's Right to Property Act, 1937–Hindu Succession Act, 1956, Section 14(1) and Hindu Adoption and Maintenance Act, 1956, Sections 21 and 22–Widow inheriting deceased husband's share of interest in the joint family property–Name mentioned in revenue record on the date of coming into force of Land Revenue Code, 1959–She is a Bhumiswami–Devolution of property on widow in absence of son, grand son, and great grand son–Right to hold property inherited in exclusive Bhumiswami rights acquired under Section 253 of Gwalior Qanoon Mal–Not affected by 1937 Act as it was not adopted by erstwhile Gwalior State–Suit filed after coming into force of 1956 Act–Plaintiff right to hold the devolved share in joint family property as full owner saved by Section 14(1) of the Act of 1956–Can maintain a suit for declaration partition and possession and for permanent injunction–Plaintiff in actual physical possession of her share in full owner ship rights since the death of her husband–Dispossessed forcibly and kept out of possession by defendant–Plaintiff entitled to initiate separate proceedings for *mense* profit–Maintenance–Hindu widow's right to maintenance from coparcenary property is a statutory right–Plaintiff entitled to maintenance–Suit decreed partly.

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vil Procedure Code (V of 1908)–Section 96–First Appeal–Suit for damages on ground of defamation–News Paper publication–Item published in newspaper after verification through Police Station and public rumour–Word used in news item is "Studio Owner"–When the word referred to a group the imputation and not to a particular individual

the libel is not actionable–Pleading not showing that the news item was false–News item flashed in the rumour para–Not directed at the plaintiff–Case for defamation not made out.

DAINIK BHASKAR v. MADHUSUDAN BHARGAVA, I.L.R. (1992) M. P. 332

Civil Procedure Code (V of 1908)–Section 96–Frist Appeal–Suit for eviction from mortgaged premises–Accommodation Control Act, M. P., 1961–Sections 2 and 12–Parties fall within the meaning of landlord and tenant as defined under the Act–None of the grounds envisaged in the Act made a ground for eviction under Section 12 of the Act–Suit of plaintiff–respondent dismissed.

STATE v. PRADEEP KUMAR, (Dead) HIS LRs. SMT. MEENA SHARMA; I. L. R. (1992) M. P. 555

Civil Procedure Code (V of 1908)–Section 96–First Appeal–Suit for recovery of loan amount–Decreed against borrower and guarantor severally and jointly–Usurious Loans Act, 1918–Section 3 and Contract Act, Indian, 1872, Sections 139, 141 and 176 and Banking Regulation Act, 1949, as amended in 1984, Section 21-A–Suit decided by the Court after coming into force of Section 21-A of the Act–Suit transaction cannot be re-opened on the ground that rate of interest is excessive–Securitv remained in possession of borrower as per Hypothecation agreement–Creditor can either file a suit or proceed against the security–Accounts were settled and acknowledged by the borrower–No infirmity in the impugned judgment and decree–Appeal failed.

KAMLA PRASAD JAISWAL v. PUNJAB NATIONAL BANK, I. L. R. (1992) M. P. ...634

Civil Procedure Code (V of 1908)–Section 96–Reappreciation of evidence–Damages suffered by plaintiff re-assessed at Rs. 30/-Perquintal–Damages decreed by Trial Court reduced accordingly with interest at the rate of 6% per annum as provided under Section 34, CPC : *vide* Civil Procedure Code,1908, Sections 34, 96 and Railways Act, Indian,1890, Sections 73, 78(d) ...833

Civil Procedure Code (V of 1908)–Section 100–Finding based on irrelevant consideration–Deserves to be interfered with in Second Appeal : *vide* Civil Procedure Code, 1908, Section 100 and Accommodation Control Act, M.P.1961, Section 12 (1) (e) and (f) ...920

Civil Procedure Code (V of 1908), Section 100 and Accommodation Control Act, M. P. (XLI of 1961), Section 12(1)(a) and 12(1)(c)–Suit for

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Civil Procedure Code (V of 1908)–Section 100–Finding of Trial Court that sale was fraudulent and no title passed–Essentially a finding of fact cannot be re-opened in Second Appeal: *vide* Civil Procedure Code, 1908, Sections 11, 100, Order 1, rule 9 and Order 8, rule 6-A ...26

Civil Procedure Code (V of 1908)–Section 100–Second Appeal–Suit for eviction–Accommodation Control Act, M.P., 1961, Section 12(1)(b)–Sub-letting–Defence that a partnership firm is tenant and the plaintiff received payment from the firm–Not established by defendant by filing account books or other documents–Defendant has parted with the possession can safely be presume–Plaintiff successfully proved sub-letting by defendant–Entitle for decree of eviction.

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Civil Procedure Code (V of 1908)–Section 100–Second Appeal–Decree of eviction confirmed by Lower Appellate Court–Accommodation Control Act, M. P., 1961, (as amended), Section 23-A, 23-C, 23-J and Accommodation Control (Amendment) Act, M. P. 1985–Section 9–On coming into force of the Amending Act all cases instituted by landlady other then covered under Section 23-J stood transferred to Civil Court–Even if in such a transferred case the tenant suffered consequences of Section 23-C, he would be entitled to opportunity to defend as envisaged in the Civil Procedure Code–Trial Court passed the decree without giving opportunity to tenant to defend–Decree of eviction set aside and case remanded to trial Court to decide the case giving opportunity to defendant to file written statement.

BAIJNATH RAJPUT v. NARAYAN PRASAD GUPTA, I.L.R. (1992) M. P. 640

Civil Procedure Code (V of 1908), Section 100–Second Appeal–Suit for ejectment from open plot–Accommodation Control Act, M. P., 1961, Section 12(1)(n)–Requirement of this Section is to establish that plaintiff would construct house on the open plot–Eviction of tenant sought from an open plot for constructing building for business of major sons–Plaintiff proved her intention by showing sufficiency of funds and by filing map sanctioned by Municipal Council–Suit decreed.

LEELAWANTE v. SHRICHAND, I. L. R. (1992) M. P. 653

Civil Procedure Code (V of 1908)–Section 115–Civil Revision–Maintainability–Succession certificate granted but reversed in appeal–Revision therefrom–Value of *lis* more than Rs. 20,000/–Revision maintainable to correct the error, if any, committed by subordinate Court : *vide* Succession Act, Indian 1925, Sections 372, 384, 388(3) and Civil Procedure Code, Section 115 217

Civil Procedure Code (V of 1908)–Section 115–Civil Revision–Refusal to grant maintenance *pendente lite*–Hindu Marriage Act, 1955, Sections 5, 9, 11, 24 and 25–Suit for restitution of conjugal rights–Prayer for maintenance *pendente lite*–Even if the marriage is void or voidable by reason of husband's subsisting first marriage interim alimony cannot be denied to second wife–Order of Trial Court set aside–Interim alimony granted.

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Civil Procedure Code (V of 1908)–Section 96, Order 41, Rule 22–Energy line left un-insulated as a result stay wire got electrified–Death of 18 years old son due to electrocution–Suit for compensation–Appeal for enhancement and cross-objection by Electricity Board–Cantakerus attitude of the Board deprecated cross-objection dismissed : *vide* Civil Procedure Code, 1908 Section 96, Order 41, rule 22 278

Civil Procedure Code (V of 1908)–Section 96, Order 41, Rule 22–First Appeal and cross-objection–Energy line left un-insulated as a result stay wire got electrified–Death of 18 years old son due to electrocution–Suit for compensation–Appeal for enhancement and cross-objection by Electricity Board–Cantakerus attitude of the Board deprecated cross-objection dismissed–Fatal Accidents Act, Indian, 1855–Section 1A–Compensation is not limited to the

cash payment which the deceased may be expected to make for support of the claimants–Multiplier–Out moded rule–Common Law of equity, Justice and good conscience should be applied in awarding compensation–Award enhanced suit decreed in toto.

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Civil Procedure Code (V of 1908)–Section 96 and Order 14, Rule 2(2)–First Appeal–Suit for declaration–Plaintiff/appellant employee of University–Claim to the post of Deputy Registrar–A bar created by any law for the time being in force has to be kept in view–Vishwa Vidyalaya Adhiniyam, M. P., 1973–Section 59–Bar to any suit–Though cause of action shown to have arisen prior to coming into force of the Adhiniyam Trial Court justified in dismissing the suit for want of jurisdiction–Plaintiff has a remedy of moving the Kuladhipati for making reference of dispute–No interference in impugned judgment called for .

GHANSHYAM GAUTAM v. JIWAJI VISHWAVIDHYALAYA, GWALIOR, I. L. R. (1992) M. P. 457

Civil Procedure Code (V of 1908)–Section 96(3) and Order 23, Rule 3–Compromise decree alleged to have been obtained by impersonation and fraud–Appeal against such a decree not barred under Section 96(3) of the Code : *vide* Civil Procedure Code, 1908 Sections 96(3), 151, Order 23, Rule 3 and Order 43, Rule 1(u) ...756

Civil Procedure Code (V of 1908)–Sections 96(3), 151, Order 23, Rule 3 and Order 43, Rule 1(u)–Appeal against Order of remand–Inherent power of the trial Court does not extend to reviewing its earlier order–Compromise decree alleged to have been obtained by impersonation and fraud–Appeal against such a decree not barred under Section 96(3) of the Code.

SAMANT SINGH v. SAHDU KHAN, I.L.R. (1992) M. P. ...756

Civil Procedure Code (V of 1908)–Section 100–Second Appeal–Accommodation Control Act, M.P., 1961–Section 12(1)(a)–Suit for recovery of plaintiffs share of rent in property held in joint ownership–Maintainable–Does not amount to division of tenancy–Earlier suit for plaintiffs ¼ share of rent decreed–Plaintiff cannot be forced to file repeated suit for one and the same relies.

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Civil Procedure Code (V of 1908)–Section 100–Second Appeal–Suit for eviction–Application for relieving against forfeiture of lease on non-

payment of Rent–Transfer of Property Act, 1882–Sections 111(g) and 114–Provisions apply only to a case when suit is based on forfeiture.

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Civil Procedure Code (V of 1908)–Section 100–Second Appeal–Suit for eviction–Suit house rendered unsafe for human habitation–Accommodation Control Act, M.P., 1961–Sections 12 (1)(g), 12(1)(h) and 12(7)–Condition specified in sub-Section (7) of Section 12 are attracted in case of a decree under Section 12(1)(h) and not under Section 12(1)(g)–Both Courts below recorded categorical finding that the house is unsafe for human habitation–Courts ought to have granted decree of eviction subject to condition that tenant if willing shall be given to re-occupy the house after repair–Error of law committed by courts below–Interference in second appeal justifiably warranted.

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RAMRAO v. DR. PREM KUMAR SINHA; I.L.R.(1992) M.P....920

Civil Procedure Code (V of 1908)–Section 100–Second Appeal–Service Jurisprudence–Termination–Constitution of India–Articles 12, 14 and 311 and Municipal Rules, M. P., 1968, Rules 13, 35, 38, 49 and 52–Municipalities are creation of statute and fall under Article 12 but its employees do not hold civil posts–In the matter of termination of its employee Article 311(2) not attracted–Termination of service as no longer required–Employee completed maximum period of probation–Rules do not prescribe extension of probation beyond the maximum–Continuance of such employee shall give rise to the presumption that they have been confirmed–Termination–One of the major punishments–

Show cause notice alleging misconduct served but subsequently termination order passed without conducting any inquiry or proceeding further under the Rules–Termination is for an order of dismissal for misconduct–Court below rightly set aside the order of termination–Back wages–Employees out of employment for last 10 years–But nothing to show that they remained unemployed or the extent of loss suffered because of unemployment–50% back wages would be sufficient.

MUNICIPAL COUNCIL, SABALGARH v. MUNNALAL, I. L. R. (1992) M. P. 744

Civil Procedure Code (V of 1908)–Section 100–Second Appeal–Suit for possession–Findings arrived at by Courts by discarding material evidence and misreading public document–Second appellate Court is entitled to interfere with the finding of fact–Limitation Act Indian, Articles 64,65–Adverse possession–Defendant and his predecessor shown to be in continuous possession from 1960 onward–Suit having been filed in 1976 defendants will be deemed to have perfected the title by adverse possession–Suit dismissed–Judgment and decree of Courts below set aside.

ALABUX v. BUDHSEN; I. L. R. (1992) M. P. ...840

Civil Procedure Code (V of 1908)–Section 100–Second Appeal–Suit for possession–Hindu Adoption and Hindu Succession Act, 1956, Sections 10,12,14–On death of her husband plaintiff inherited the property–Being Class I heir she has indefeasible right of full ownership–She will not be divested of her right by adoption subsequently–Defendant adopted by plaintiff after death of her husband–Oral adoption proved but that would not make the adoptee/defendant a co-owner of the property inherited by plaintiff–Possession of defendant permissive–Plaintiff entitled to decree of possession.

SMT. CHANDRANI BAI v. PRADEEP KUMAR; I. L. R. (1992) M. P. 856

Civil Procedure Code (V of 1908)–Sections 100, 144, 151–Restitution of possession–High Court reversing the judgment and decree of first appellate Court restored that of Trial Court dismissing appellants suit for declaration of the injunction and possession–Section 144 C.P.C.–Application under for restitution–By nature is an application for execution–For its applicability there need not necessarily be a suit for possession–Court has power in

ordinary course to direct restoration of *status quo ante* to the extent possible.

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Civil Procedure Code (V of 1908)–Order 1, rule 9–Non-Joinder of necessary party–Fatal for maintaining the suit–Suit dismissed: *vide* Civil Procedure Code,1908, Sections 11, 100, Order 1, rule 9 and Order 8, rule 6-A ...26

Civil Procedure Code (V of 1908)–Order 5, Rule 9–Service of Summons–Record not showing whether defendant was properly served or not–Service of summons in the ordinary manner cannot be dispensed with : *vide* Civil Procedure Code,1908, Order 5, Rules 9, 19-A(2), 21, 25, 25-A, Order 9, Rules 6, 13 and Order 43, Rule 1(d), Civil Procedure Code (Amendment) Act, 1976 and Limitation Act, 1908, Section 5 and Article 123 197

Civil Procedure Code (V of 1908)–Order 5, Rules 9 and 19-A(2) Substituted service–Additional mode of service–Cannot be deemed to 'due service' : *vide* Civil Procedure Code,1908, Order 5, Rules 9 and 19-A(2), 21, 25, 25-A, Order 9, Rules 6, 13 and Order 43, Rule 1(d), Civil Procedure Code (Amendment) Act, 1976 and Limitation Act, Indian 1908, Section 5 and Article 123 197

Civil Procedure Code (V of 1908), Order 5, Rules 9, 19-A(2), 21, 25, 25-A, Order 9 Rules 6, 13 and Order 43, Rule 1(d), Civil Procedure Code (Amendment) Act (CIV of 1976) and Limitation Act, Indian (IX of 1908), Section 5 and Article 123–Order 5, Rule 9–Service of Summons–Record not showing whether defendant was properly served or not–Service of Summons in the ordinary manner cannot be dispensed with–Order 5, Rules 9 and 19-A(2) substituted service–Additional mode of service–Cannot be deemed to 'due service'–Order 9, Rule 6–Powers of proceeding *ex parte* against defendant–Cannot be invoked where defendant resides outside jurisdiction of the Trial Court–Application under Order 9, Rule 13 of the Code for setting aside *ex parte* decree–Rejection by Trial Court–Improper–Order 43, Rule 1(d) of the Code–Appeal under–Trial Court fell in error in rejecting the application as barred by limitation–Limitation Act–Section 5 and Article 123–In case where defendant is not properly served limitation starts from the date of knowledge–*Ex parte* judgment and decree set aside–And matter remitted back to the Trial Court for decision afresh.

M/S. ELECTRIC CONSTRUCTION AND EQUIPMENT CO. LTD., NEW DELHI v. PREMALI WALLACE LTD; I.L.R. (1992) M.P...197

Civil Procedure Code (V of 1908)–Order 9, Rule 6–Powers of proceeding *ex parte* against defendant–Cannot be invoked where defendant resides outside jurisdiction of the Trial Court–Application under Order 9, Rule 13 of the Code for setting aside *ex parte* decree–Rejection by Trial Court–Improper : *vide* Civil Procedure Code, 1908 Order 5, Rules 9, 19-A(2), 21, 25, 25-A, Order 9, Rules 6, 13 and Order 43, Rule 1(d), Civil Procedure Code (Amendment) Act, 1976 and Limitation Act, 1908, Section 5, Article 123 197

Civil Procedure Code (V of 1908)–Order 23, Rule 3–Petition by Husband for divorce within one year of marriage on ground of pregnancy at the time of marriage and illicit relationship with another person–Compromise decree passed annulling marriage between the parties–Illegal–Appeal under Section 28–Provision of Section 14 mandatory : *vide* Hindu Marriage Act,1955, Sections 12,13,14,15, 23 and 28 and Civil Procedure Code, 1908, Section 96(3), Order 23, Rule 3 179

Civil Procedure Code (V of 1908)–Order XLIII, Rule 1(d)–Appeal under–Trial Court fell in error in rejecting the application as barred by limitation : *vide* Civil Procedure Code,1908, Order 5, Rules 9, 19-A(2), 21, 25, 25-A, Order 9, Rules 6, 13 and Order 43, Rule 1(d), Civil Procedure Code (Amendment) Act, 1976 Limitation Act, 1908, Section 5, Article 123 197

Civil Procedure Code (V of 1908)–Order 39, Rules 1 & 2 and Order 43, Rule 1(r)–Appeal–Order of injunction restraining appellant from raising pakka construction–Appellants in possession of the land by virtue of an agreement of sale–His suit for specific performance is also pending–Unless and until defendant appellant succeed in his suit for specific performance he cannot be allowed to raise construction even if he gives undertaking–Order of injunction cannot be faulted with.

KISHANLAL v. RAMESH CHANDRA GANDHI, I. L. R. (1992) M. P. 661

Civil Procedure Code (V of 1908)–Order 39, Rules 1 and 2– Ancestor property–Suit for injunction–Appellate Court while reversing the order of Trial Court granted injunction in favour of defendants–Defendants though in possession can only seek order of injunction in an independent suit in a case covered : *vide* Constitution of India, Article 227, Civil Procedure Code,1908, Section

115, Order 39, rules 1 and 2, Order 43, rule 1 (r), Amending Act, 1984, Land Revenue Code, M.P. 1959, Section 117 and Evidence Act, Indian 1872, Section 114(e) 267

Civil Procedure Code (V of 1908)–Section 100–Respondent can also attack the Decree in second appeal under Section 100 as against that part of the decree not favourable to him : *vide* Civil Procedure Code, 1908, Section 100, Order 41, Rules 11, 21, 22 and Order 42, Rule 2 345

Civil Procedure Code (V of 1908), as amended–Section 100, Order 41, Rules 11, 21, 22 and Order 42, Rule 2–Cross-objection filed under Order 41, Rule 22 of the Code can only be heard on substantial question of law–Respondent can also attack the Decree in second appeal under Section 100 as against that part of the decree not favourable to him–Procedure provided in Rule 11 of Order 41 read with Order 42, Rule 2 of the Code–Mandatory–In absence of adherence cross-objection can not be entertained.

VIJAY PRAKASH v. SUNDARLAL, I. L. R. (1992)M. P. 345

Civil Procedure Code (V of 1908)–Section 100–Onus is on the defendant to prove that sale deed was not actually a sale deed but a deed in the garb of mortgage deed–Sale deed for nominal consideration was not an issue before the trial Court or there after–Onus is on the defendant to prove that property was purchased for the benefit of members of joint Hindu family–Not proved by defendant–Concurrent findings of facts–No interference called for : *vide* Civil Procedure Code, 1908, Section 100 416

Civil Procedure Code (V of 1908)–Section 100–Second Appeal–Suit for eviction by lessor after sale of suit house–Transfer of Property Act 1882, Section 109 and Accommodation Control Act, M. P. 1961, Section 12(1)–Suit for eviction by landlady/lessor–Prior to suit, she sold the house in question–Transfer by sale itself would not debar the landlady to terminate tenancy and bring a suit for eviction–It is exclusive right of lessor to evict lessee.

HAFIZ MOHAMMAD v. MASOODBI, I. L. R. (1992)M. P. 572

Civil Procedure Code (V of 1908)–Section 100, Order 41, Rule 22–Second Appeal and cross-objection–Ejectment suit–Accommodation Control Act, M. P., 1961–Sections 12(1)(c), 12(1)(e) and 12(1)(m)–Residential accommo-dation–Converted by tenant to run school–It is an act inconsistent with the purpose for which accommo-dation was let–Tenant incurred liability u/s. 12(1)(c) of the Act–*Bonafide*

need of the landlady–Test–Availability or non-availability of suitable alternative accommodation–Plaintiff cannot be compelled to occupy a house which she does not feel to be suitable–Ground floor in occupation of landlady being used for running a school–Cannot be said to be alternative accommodation–Cross-objection allowed–Decree under Sections 12(1)(c) and 12(1)(e) granted in favour of plaintiff.

RAJENDRA DONALD v. SMT. VIOLET SINGH, I.L.R. (1992)M.P..564

Civil Procedure Code (V of 1908)–Section 100 and Order 41, Rule 27–Second appeal–Samaj. Ke Kamjor Wargon Ke Krishi Bhumi Dharakon Ka Udhar Dene Walon Ke Bhumi Hadapane Sambandhi Kuchakron Se Paritran Tatha Mukti Adhiniyam, M. P., 1976–Section 4–Order passed by Sub-Divisional Magistrate in Revenue case–Is a public document–Came into existence during pendency of the second appeal–Cannot be overlooked–Document admitted in evidence–Nominal sale-deed executed to secure loan but possession continued with the plaintiffs–Revenue entries showing continuous possession of plaintiffs–Plaintiffs entitled to relief of declaration and injunction by virtue of Section 4–Judgments & decree of Courts below set aside–Plaintiff's suit decreed.

MST. SUKHRANI v. CHHOTELAL, I. L. R. (1992) M. P. 465

Civil Procedure Code (V of 1908)–Section 100–Second Appeal–Decree of ejectment passed by two Courts below–Transfer of Property Act, 1882, Section 105 and Easement Act, Indian, 1882, Section 54–Appellant licensee or a lessee–Test–Exclusive possession is an important test–No evidence of plaintiff to show that possession given to the appellant/defendant was not exclusive or that the possession was restrictive one–Transaction between the parties cannot be said to be that of a licence–Question of law–Erroneous conclusion by Courts below on proved facts would certainly be a question of law–Decree of ejectment reversed.

SHER KHAN v. ABBAS BHAI JANAL, I. L. R. (1992)M. P. 409

Civil Procedure Code (V of 1908)–Section 100–Second Appeal–High Court cannot interfere with the conclusion of facts recorded by the lower appellate Court–A registered document is obtained with the intention that it represent a *bona fide* transaction and it would be valueless if it can be gone behind in every case by mere ascertain that what was stated before registrar was untrue : *vide* Civil Procedure Code, 1908,.Section 100 416

Civil Procedure Code (V of 1908)–Section 100–Second Appeal–Suit for eviction by purchaser–Another suit pending for sale of the suit house to wife of appellant by landlord–Accommodation Control Act, M. P., 1961, Section 12(1)(a)(c)(e)(i) and 12(4)–Arrears of rent paid by appellant–Plaintiff not entitled to decree under Section 12(1)(a)–Tenants challenging derivative title of purchaser/plaintiff–Not a ground under Section 12(1)(c)–Ground of *bonafide* need incorporated by way of amendment–On the date of institution of suit plaintiff did not plead *bona fide* need–Suit filed by purchaser land lord within one year and subsequently amended the plaint stating as one year has elapsed Court can try the issue of *bonafide* need–Amended pleading does not support *bona fide* need–Suit could not be decreed on ground of *bona fide* need in view of Section 12(4) of the Act–Suit dismissed.

KHUMAN SINGH v. NATHURAM, I. L. R. (1992) M. P. 469

Civil Procedure Code (V of 1908)–Sectoin 100–Suit for possession and *mesne* profits–Suit land purchased by registered sale deed–Sale consideration paid before registrar–Suit decreed–First appeal dismissed–Section 100–Second Appeal–High Court cannot interfere with the conclusion of facts recorded by the lower appellate Court–A registered document is obtained with the intention that it represent a *bona fide* transaction and it would be valueless if it can be gone behind in every case by mere ascertain that what was stated before registrar was untrue–Onus is on the defendant to prove that sale deed was not actually a sale deed but a deed in the garb of mortgage deed–Sale deed for nominal consideration was not an issue before the trial Court or there after–Onus is on the defendant to prove that property was purchased for the benefit of members of joint Hindu family–Not proved by defendant–Concurrent findings of facts–No interference called for.

SMT. POONABAI v. JAGDISH PRASAD, I.L.R. (1992) M.P. ...416

Civil Procedure Code (V of 1908)–Section 144–Application under for restitution–By nature is an application for execution–For its applicability there need not necessarily be a suit for possession–Court has power in ordinary course to direct restoration of *Status quo ante* to the extent possible : *vide* Civil Procedure Code,1908, Sections 100, 144, I51 752

Civil Procedure Code (V of 1908), Section 115 and Bhopal Gas Leakage Disaster (Processing of Claims) Act (I of 1985) Section 3 and Paragraphs 5(8), 10(3)(b)–Civil Revision–Against rejection of prayer to transfer the suit–Section 24, CPC–Application for recusal–In fact

is an application for transfer of the case–Can be made to the District Judge before whom the proceedings are pending–Approach cannot be said to demeaning or degrading the Court by use of word 'recuse'–District Judge earlier awarding interim compensation for the gas victims in huge sums–Cannot be said to have pre-judged the issues or made up–Merits of the case not considered while passing interim compensation–Improper–Though merged in the Revisional order of the High Court–Can be a ground for transfer as this approach could create a reasonable apprehension that the Trial Court was foreclosed as to merits of the case–Civil Courts Act, M. P., 1958–Section 15, as amended by Act of 1982–Assistant or Additional District Judge are subordinate to the District Judge for purposes of Section 24 of the Code–District Judge has jurisdiction to entertain such an application even though the proceeding in question are pending before himself–Impugned order set-aside and suit transferred from the Trial Court to another Court of competent jurisdiction–Words and phrases 'recuse'–Apart from dictionary meaning, is used in the sence of a Judge 'dissociating himself' or 'withdrawing himself' from a proceeding and nothing more than that.

UNION CARBIDE CORPORATION v. UNION OF INDIA, I. L. R. (1992) M. P. 121

Civil Procedure Code (V of 1908)–Section 100 and Order 41, Rule 27–Second appeal–Samaj Ke Kamjor Wargon Ke Krishi Bhumi Dharakon Ka Udhar Dene Walon Ke Bhumi Hadapane Sambandhi Kuchakron Se Paritran Tatha Mukti Adhiniyam, M. P., 1976–Section 4–Order passed by Sub-Divisional Magistrate in Revenue case–Is a public document–Came into existence during pendency of the second appeal–Cannot be overlooked–Document admitted in evidence–Nominal sale-deed executed to secure loan but possession continued with the plaintiffs–Revenue entries showing continuous possession of plaintiffs–Plaintiffs entitled to relief of declaration and injunction by virtue of Section 5–Judgment & decree of Courts below set aside–Plaintiff's suit decreed.

MST. SUKHRANI v. CHHOTELAL, I. L. R. (1992) M. P. ...516

Civil Procedure Code, (V of 1908)–Section 115–Revision–Maintainance *pendente lite*–Hindu Marriage Act,1955, Section 24–Application for interim alimony–Provision made for the benefit of poor spouse who is unable to maintain herself and contest the case–Delay

in disposing the application not attributable to the applicant–She cannot be deprived of her right to get alimony from the date of application.

SMT. INDIRA GANGELE v. SHAILENDRA KUMAR GANGELE, I. L. R.(1992) M. P. 808

Civil Procedure Code (V of 1908), Section 115 and Motor Vehicles Act (IV of 1939), Section 110-D–Appeal would lie under, against an award of compensation made under Section 92-A and not a revision under Section 115 of the Code–Reference answered accordingly : *vide* Motor Vehicles Act,1939, Sections 92-A, 110-A, 110-B, 110-D, 110-E and Civil Procedure Code, 1908, Section 115 363

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M.L. BEOHAR v. UNION OF INDIA; I.L.R. (1992) M.P. 948

Civil Procedure Code, (V of 1908)–Section 115, Order 21, Rule 11–Civil Revision–Execution Proceedings–Service matter–Administrative Tribunals Act, 1985, Section 29–Transfer of pending proceedings to Tribunal–Object of constituting tribunal is to provide for an exclusive adjudicatory and not executory forum–Execution proceedings in Service matters not being adjudicatory proceedings are saved–Other proceeding shall include only pending proceedings whose cause of action still required to be adjudicated and not such proceedings where all that remain to be done is execution–Executing Court directed to resume proceedings.

KAMLENDRA SINGH v. STATE; I. L. R. (1992) M.P. ...950

Civil Procedure Code (V of 1908)–Sections 115, 151–Civil Revision–Stay of suit till conclusion of Criminal trial–Test–Whether the defendant shall be prejudiced in Criminal trial by the plea taken in Civil suit–Criminal procedure Code, 1973, Section 200, 204 and Penal Code, Indian, 1860, Section 420, 467 and 468–Complaint case filed by plaintiff during pendency of suit in relation to same transaction–Magistrate taking cognizance under Sections 200 and 204, Criminal Procedure Code–Plea taken by defendant in written statement likely to prejudice him in criminal

trial–Stay of suit in exercise of power under Section 151, C. P. C.–Proper–No interference called for.

NEW BANK OF INDIA v. FILM M/S. NARAMDEO BROTHERS, INDORE, I. L. R. (1992) M. P. 429

Civil Procedure Code (V of 1908)–Sections 115, 151, Order 11, Rule 12 and Order 15, Rule 2–Civil Revision–Suit for eviction–Accommodation Control Act, M.P., 1961–Section 12 (1)(a) and (f)–Suit based on arrears of rent and *bonafide* need–Application for production of document–Plaintiff filed affidavit disclosing non–possession of document but filing some documents at belated stage–Two are different provision–Trial Court can in its discretion allow an application for production of documents under Order 13, Rule 2 of the Code at a belated stage–The plaintiff is only required to explain delay–Plaintiff making application in a casual manner–Finding of the Trial Court regarding good cause is mechanical–Impugned order set aside–Case remitted to Trial Court for deciding application under Order 13, Rule 2, C.P.C. afresh.

JAIKISHAN DAS v. RAMBABU AGRAWAL; I. L. R. (1992) M. P. 878

Civil Procedure Code (V of 1908)–Sections 115, 151, Order 11, Rule 12 and Order 15, Rule 2–Two are different provision–Trial Court can in its discretion allow an application for production of documents under Order 13, Rule 2 of the Code at a belated stage–The plaintiff is only required to explain delay : *vide* Civil Procedure Code, 1908, Sections 115, 151, Order 11, Rule 12 and Order 15, Rule 2 ...878

Civil Procedure Code (V of 1908)–Section 151–Inherent power of the trial Court does not extend to reviewing its earlier order : *vide* Civil Procedure Code,1908, Sections 96(3), 151, Order 23, Rule 3 and Order 43 Rule 1(u) 756

Civil Procedure Code (V of 1908)–Order 1, rule 9–Non-Joinder of necessary party–Fatal for maintaining the suit–Suit dismissed: *vide* Civil Procedure Code,1908, Sections 11, 100, Order 1, rule 9 and Order 8, rule 6-A ...26

Civil Procedure Code (V of 1908)–Order 9, rule 13–No finding as to from which date appellants stopped attending the Court–Presiding officer was also on leave prior to drawing of final decrce–Replies etc. have been filed by the non-applicants–Amendment applications will pending decision evidence not led by the parties nor the parties

were required to lead evidence–Order of Trial Court improper:*vide* Civil Procedure Code,1908, Order 9, rule 13 and Order 43, rule 1(d)...41

Civil Procedure Code (V of 1908)–Order 8, rule 6-A–Counter claim–By its nature is a cross suit–Would not be affected by dismissal of plaintiff's suit: *vide* Civil Procedure Code, 1908, Sections 11, 100, Order 1, rule 9 and Order 8, rule 6-A ...26

Civil Procedure Code (V of 1908)–Order IX, Rule 13 and Order XLIII, Rule1(d)–Appeal–Against order dismissing the application for setting aside *exparte* decree–Order IX, Rule 13–No finding as to from which date appellants stopped attending the Court–Presiding Officer was also on leave prior to drawing of final decree–Replies etc. have been filed by the non-applicants–Amendment aplications will pending decision evidence not led by the parties nor the parties were required to lead evidence–Order of Trial Court improper–Order set aside and matter remitted to the Trial Court for fresh decision allowing respective parties to lead evidence.

S.S. RAMACHAND v. DHANENDRA KUMAR, I.L.R.(1992) M. P. 41

Civil Procedure Code (V of 1908)–Order 13, Rule 2–Plaintiff making application in a casual manner–Finding of the Trial Court regarding good cause is mechanical–Impugned order set aside–Case remitted to Trial Court for deciding application under Order 13, Rule 2, C.P.C. afresh : *vide* Civil Procedure Code,1908, Sections 115, 151, Order 11, Rule 12 and Order 15, Rule 2 ...878

Civil Procedure Code (V of 1908)–Order 39, Rules 1 & 2 and Order 43, Rule 1–Order refusing to appointment of arbitrator and temporary injunction against recovery of telephone bills–Telegraph Act, Indian Section 7-B and Arbitration Act, Indian, 1940, Section 41–The bar of Civil Courts jurisdiction is to modify, remit and set aside the award or to make it a rule of the Court–Appointment of arbitrator is not barred and equally the Court has jurisdiction to grant temporary injunction–Application pending for arbitration–Appellant entitled to get order of temporary injunction.

DR. J. N. SETH v. UNION OF INDIA, I. L. R. (1992)M. P. 576

Civil Procedure Code (V of 1908)–Order 41, Rule 22–Cross-objection filed under Order 41, Rule 22 of the Code can only be heard on substantial question of law : *vide* Civil Procedure

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Constitution of India–Article 226 and 342–Public Interest Litigation–"Majhi" Community recognised as Schedule Tribe in State of M. P.–Claim for inclusion of castes having analogous names–Constitution (Schedule Tribe) Order, 1950 as amended–Kewat, Mallah, Dhimar, Nishad, Bhoi, Kahar not mentioned against the term Majhi–Contention that these communities are also Scheduled tribes as Majhi cannot be accepted.

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Constitution of India, Article 227 and Civil Procedure Code (V of 1908), Section 115–Order passed in exercise of Appellate power under Order 43, Rule 1(r), C. P. C.–Remedy into invoke High Court's power of Superintendence under Article 227 and not by revision under Section 115, C. P. C. in view of Amending Act No. 29 of 1984 : *vide* Constitution of India, Article 227, Civil Procedure Code 1908, Section 115, Order 39, rules 1 and 2, Order 43, rule 1(r), Amending Act, 1984, Land Revenue Code, 1959, Section 117 and Evidence Act, Indian 1872, Sec. 114(e) 267

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persons–Seizure of broken handle of ballam and axe used in Commission of offence proved–Conviction of charge of murder against the accused named in the Dehati Nalashi confirmed–Rest accused not named nor the eye witness accused corroborated by "Court witness'–Such appellants/accused entitled to benefit of doubt and directed to be set at liberty–Murder–Death sentence–Alleged eye witness tried to falsely implicate as many as 19 persons in the offence–Real genesis of incident not disclosed–Overt act of causing respective injury on deceased could not be attributed to any of the accused definitely–Death sentence not warranted–Death Reference rejected–Death sentence converted to life imprisonment.

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Criminal Procedure Code, 1973 (II of 1974)–Section 378(4)–Appeal against acquittal–Penal Code Indian (XLV of 1860),Sections 494, 494/114–Bigamy–Trial Court fell in error in requiring clinching evidence as to first and second marriage–Fact of first marriage admitted by accused and also support by judicial finding in proceeding under

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Criminal Procedure Code, 1973 (II of 1974)–Sections 469 and 482–Rejection of complaint on ground of delay–Penal Code, Indian, 1860–Sections 405, 406–Criminal breach of trust–Constituent–Refusal on demand–Refusal may be even by conduct–Limitation would start from the date of refusal–Complaint filed within four months of refusal to receive the notice of complainant–Complaint well within limitation.

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to correctness of such entry cannot be made–Defendant can only seek injunction in an independent suit–Impugned order set aside to extent : *vide* Constitution of India, Article 227, Civil Procedure Code, 1908, Section 115, Order 39, rules 1 and 2, Order 43, rule 1(r), Amending Act, 1984, Land Revenue Code, M.P.1959, Section 117 and Evidence Act, Indian, 1872, Section 114(e) 267

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Fatal Accidents Act, Indian (XIII of 1855)–Section 1-A–Compensation is not limited to the cash payment which the deceased may be expected to make for support of the claimants–Multiplier–Out moded rule–Common Law of equity, Justice and good conscience should be applied in awarding compensation–Award enchanced suit decreed in toto : *vide* Civil Procedure Code, 1908, Section 96, Order 41, rule 22 ...278

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Hindu Adoption and Maintenance Act (LXXVII of 1956)–Sections 21 and 22–Maintenance–Hindu Widow's right to maintenance from copercenary property is a statutory right–Plaintiff entitled to

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Hindu Adoption and Maintenance Act, (LXXVII of 1956), Sections 21 and 22 and Hindu Succession Act, (XXX of 1956)–Widow inheriting deceased husband's share of interest in the joint family property–Name mentioned in revenue record on the date of coming into force of Land Revenue Code, 1959–She is a Bhumiswami : *vide* Civil Procedure Code, 1908, Section 96 392

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Hindu Marriage Act (XXV of 1955), Sections 12(1)(d), 12(2)(b), 15, 28 and Civil Procedure Code (V of 1908), Section 96(3)–No satisfaction recorded by Trial Court also existence of conditions laid down in Section 12(1)(d) or S. 12(2)(b)–Compromise decree under Order 23, C.P.C. contrary to Law–No bar under Section 96(3), C. P. C. to challenge such decree in Appeal Reconciliation proceeding not necessary–Appeal under Section 15 is of limited jurisdiction but one under Section 28 is unlimited unqualified and unrestricted–Decree set aside matter remanded to trial Court : *vide* Hindu Marriage Act, 1955, Sections 12, 13, 14, 15, 23, 28 and Civil Procedure Code 1908, Section 96(3), and Order 23, Rule 3 179

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Marriage Act, 1955, Rule 3–Petition by husband for divorce within one year of marriage on ground of pregnancy at the time of marriage and illicit relationship with another person–Compromise decree passed annulling marriage between the parties–Illegal–Appeal under Section 28–Provision of Section 14 mandatory–Not followed–Entertaining Divorce petition within one year of marriage without passing any order under Section 14–Illegal–Impugned judgment shows husband relinquished claim for direction of marriage by a decree of divorce–Compromise decree passed annulling the marriage between the parties–Without jurisdiction for want of compliance of S. 14 and Rule 13–Decree set aside–No satisfaction recorded by Trial Court also existence of conditions laid down in section 12(1)(d) or S. 12(2)(b)–Compromise decree under order 23,C.P.C. contrary to Law–No bar under section 96(3), C. P. C. to challenge such decree in Appeal Reconciliation proceeding not necessary–Appeal under Section 15 is of limited jurisdiction but one under Section 28 is unlimited unqualified and unrestricted–Decree set aside matter remanded to trial Court .

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Hindu Succession Act (XXX of 1956)–Section 22–Right of preemption–Not a right to the thing sold but a right to offer of a thing about to be sold–Can be claimed by setting up counter-claim in the written statement: *vide* Civil Procedure Code, 1908, Sections 11, 100, Order 1, rule 9 and Order 8, rule 6-A ...26

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Income-Tax Act, Indian (XLIII of 1961)–Sections 2(7), 2(45) and 5– Total income as defined in Section 2(45) of the Assessee under Section 2(7) is the total amount referred in Section 5 : *vide* Income-tax Act, 1961, Sections 2(7), 2(45), 5, 64(i), (iii), 139, 256(1) and Taxation Laws (amendment) Act1 975, ...151

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Industrial Disputes Act (XIV of 1947)–Section 2(00)–'Otherwise than as a punishment by way of disciplinary action' could not be given restricted meaning–The action of the employer to be judged in the facts and circumstances preceding and following it : *vide* Letters Patent, Clause X 79

Industrial Disputes Act (XIV of 1947)–Section 10(4)–Question as to whether the employees are 'workman' whether the employees is an 'industry' and whether the dispute is an 'industrial dispute' are incidental matters within the purview of Section 10(4) of the Act–Labour Court alone has jurisdiction to decide such points–High Court would be slow in deciding such points on merits : *vide* Constitution of India, Articles 226, 227 and Industrial Disputes Act, 1947, Sections 10, 12 172

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Amending Act No. 10 of 1982–Termination order does not contravene Section 58 as it stood prior to amendment–Employer should not be precluded from proving that the order did not amount to retrenchment–Section 2(00)–'Otherwise than as a punishment by way of disciplinary action' could not be given restricted meaning–The action of the employer to be judged in the facts and circumstances preceding and following it– Termination order not amounted to retrenchment–Cases remanded to Labour Court to decide the matter afresh granting opportunity to employer to lead evidence and to employer to rebute the same.

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Motor Vehicles Act (IV of 1939)–Section 92-A–Beneficial and ameoliorative legislation for providing immediate help to the victim of motor accident-Enquiry summary in nature–Insurer may be exonerated only after making detailed enquiry under Section 110-A and passing an award under Section 110-B : *vide* Civil Procedure Code, 1908,Section 115 and Motor Vehicles Act, 1939, Sections 92-A, 92-B(3), 93(ba), 95, 110-A and 110-B ...516

Motor Vehicles Act (IV of 1939)–Section 92-A–Exonerating Insurance Company at the stage of no fault liability on the finding that deceased was travelling in the vehicle unauthorisedly–Not justified–Award modified accordingly : *vide* Civil Procedure Code,1908, Section 115 and Motor Vehicles Act, 1939, Sections 92-A, 92-B(3), 93(ba), 95, 110-A and 110-B ...516

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NATIONAL INSURANCE COMPANY, JABALUR v. SHRI RAM KISHORE, I. L. R. (1992) M. P. 481

Motor Vehicles Act (IV of 1939)–Section 92-A–Interim Award of compensation on principles of 'no fault liability'–Is an award within the meaning of Section 110-E–Else it will be impossible to make its recovery–Interpretation statute–Construction which makes it workable has to be preferred : *vide* Motor Vehicles Act, 1939, Sections 92-A,110-A,110-B,110-D,110-E and Civil Procedure Code,1908, Section 115 363

Motor Vehicles Act (IV of 1939)–Section 92-A–No fault liability–At the time of accident vehicle covered by Insurance policy–Tribunal directing payment of interim compensation by owner & insurer jointly and severally–No fault liability–Plea of insurance company

that the vehicle was being driven in breach of policy cannot be taken into consideration at the stage of interim compensation on ground of no fault liability–No interference with the order of tribunal called for–However insurance company is at liberty to plead and prove statutory defence at the stage of trial along with other issues in the claim case.

NATIONAL INSURANCE COMPANY, JABALPUR v. SMT. SAVITRI BAI, I. L. R. (1992) M. P. 352

Motor Vehicles Act (IV of 1939)–Section 92-A–No fault liability–Plea of insurance company that the vehicle was being driven in breach of policy cannot be taken into consideration at the stage of interim compensation on ground of No fault liability–No interference with the order of tribunal called for–However insurance company is at liberty to plead and prove statutory defence at the stage of trial along with other issues in the claim case : *vide* Motor Vehicles Act, 1939, Section 92-A 352

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Motor Vehicles Act (IV of 1939)–Section 93(ba) and 95–Liability of an insurer covers any liability arising out of the accident : *vide* Civil Procedure Code, 1908, Section 115 and Motor Vehicles Act, 1939, Sections 92-A, 92-B(3), 93(ba), 95,110-A and 110-B 516

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unicipal Rules, M. P., 1968–Rules 49, 52–Termination–One of the major punishments–Show cause notice alleging misconduct served but subsequently termination order passed without conducting any inquiry or proceeding further under the Rules–Termination is for an order of dismissal for misconduct–Court below rightly set aside the order of termination : *vide* Civil Procedure Code, 1908, Section 100 ...744

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ational Security Act (LXV of 1980)–Section 15–Temporary release of detenue on parole has to fail within the period of detention already fixed: *vide* Constitution of India, Articles 22, 226 227 and National Security Act, 1980, Sections 3(2), 3(3),11,12,13,15 ...4

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Penal Code, Indian (XLV of 1860)–Sections 109, 323 and 506–Offences alleged–On complaint being filed Magistrate requiring Police to conduct inquiry–Police report so filed after inquiry is not binding on the Magistrate : *vide* Criminal Procedure Code, 1973, Sections 200, 202, 204, 397 and 401 696

Penal Code, Indian (XLV of 1860)–Sections 120-B, 465, 469, 471 and Gram Panchayat (Election and Co-option) Rules, M.P. 1982–Rule 28–Nomination form of complainant got withdrawn by forgery–*Prima facie* case made out–Magistrate ought to hence issued process : *vide* Criminal Procedure Code, 1973, Section 200,202,205 and 204 433

Penal Code Indian (XLV of 1860)–Section 120-B–Criminal Conspiracy–Unless any other accused is convicted appellant alone cannot be convicted for this offence : *vide* Criminal Procedure Code, 1973, Sections 374(2) and 378 791

Penal Code Indian (XLV of 1860)–Sections 120-B, 409, 420, 467–No evidence to show involvement of District Education Officer, Accountant and his Clerk in the offence except for negligence in checking and re-checking–Mere Negligence is not punishable : *vide* Criminal Procedure Code,1973, Sections 374(2) and 378 791

Penal Code Indian (XLV of 1860)–Sections 120-B, 409, 420, 467 and Prevention of Corruption Act (II of 1947), Section 5(1)(d)(2)–No allegation that any amount was entrusted to accused or that he has faked any signatures of any teacher–Ingredients of criminal breach of trust or cheating or forgery not made out : *vide* Criminal Procedure Code, 1973, Sections 374(2) and 378 ...791

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Penal Code Indian (XLV of 1860)–Section 302–Incident occured in quick succession and thereafter accused took to their heels on chasing–Witness cannot be blamed for not intervening–Conviction and sentence for murder upheld : *vide* Criminal Procedure Code, 1973, Section 374(2) 484

Penal Code Indian, (XLV of 1860)–Section 302–Conviction of charge of murder against the accused named in the Dehati Nalashi confirmed–Rest accused not named nor the eye witness accused corroborated by "Court witness'–Such appellants/accused entitled to benefit of doubt and directed to be set at liberty : *vide* Criminal Procedure Code, 1973, Sections 156, 360 and 376(2) ...931

Penal Code Indian, (XLV of 1860)–Section 302 and Criminal Procedure Code, 1973 (II of 1974)–Section 360–Murder–Death sentence–Alleged eye witness tried to falsely implicate as many as 19 persons in the offence–Real genesis of incident not disclosed–Overt act of causing respective injury on deceased could not be attributed to any of the accused definitely–Death sentence not warranted–Death Reference rejected–Death sentence converted to life imprisonment : *vide* Criminal Procedure Code, 1973, Sections 156, 360 and 376(2) ...931

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NANKA v. STATE, I. L. R. (1992) M. P. 286

Penal Code Indian (XLV of 1860)–Section 376–Alleged rape–Medical evidence and chemical examiner's report falsified case of prosecution–Approach of Trial Judge in returning the finding of guilt on basis of so called implied admission by accused in his defence–Wrong–Suppression of valuable evidence–Veracity of F.I.R. doubtful–Conviction and sentence set aside : *vide* Criminal Procedure Code, 1973, Section 374(2) 664

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Penal Code Indian (XLV of 1860)–Sections 405, 406–Criminal breach of trust–Constituent–Refusal on demand–Refusal may be even by conduct–Limitation would start from the date of refusal–Complaint filed within four months of refusal to receive the notice of complainant–Complaint well within limitation : *vide* Criminal Procedure Code, 1973, Sections 469 and 482 816

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Penal Code Indian (XLV of 1860)–Section 494–Appellant entering into second marriage during subsistence of first marriage–Deposition by complainant that Saptapadi marriage was solemnised remained unrebutted–Applicant also admitting this fact in his statement under Section 313, Cr. P. C.–Conviction of applicant justified : *vide* Penal Code Indian, 1860, Section 494 523

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Penal Code Indian (XLV of 1860),Section 494–Second marriage–Usually performed in clendestine manner–Prosecution witness diposed amount their presence in the second marriage and having witnessed' Pav Poojan' and 'Bhanwar'–Second marriage established–Order of acquittal reversed and accused convicted : *vide* Criminal Procedure Code, 1973,Section378(4) ...872

Penal Code Indian (XLV of 1860),Section 494–12 years elapsed since second marriage–Marriage with complainant irretrievably broken–Instead of substantive jail sentence accused sentenced to imprisionment till rising of the Court and fine of Rs. 20000/- each–On realisation tobe paid to complainant : *vide* Criminal Procedure Code, 1973, Section 378(4) ...872

Penal Code Indian (XLV of 1860),Sections 494, 494/114–Bigamy–Trial Court fell in error in requiring clinching evidence as to first and second marriage–Fact of first marriage admitted by accused and also support by judicial finding in proceeding under Section 125 Criminal Procedure Code–No better proof ought to have been insisted for: *vide* Criminal Procedure Code 1973, Section 378(4) ...872

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Requisitioning and Acquisition of Immovable Property Act, (XXX of 1952)–Sections 7, 8 and 11–Acquisition of large tract of land–Award of compensation–Appeal–While assessing compensation the determinant is the market value of the land as existed on the date of requisition and not on the date of acquisition–Compensation includes interest and solatium which are price for deprivation of the property–Award modified.

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M. P., 1984–Admission in P. G. Courses–Rules framed by the State Govt., for selection in Diploma and P. G. Course should be understood and judged in the same manner as is provided in the Regulation framed by the Indian Medical Council in exercise of its regulatory power : *vide* Constitution of India, Articles 226/227, Medica Council Act, Sections 20, 33 232

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**Town Improvement Trust Act, M. P. (XIV of 1961)–Section 5–Notification issued under by the State Government appointing Collector by designation as the Chairman of Improvement Trust–Absence of name of appointee in notification should not withhe commencement of term of office–*Ex-officio* successor in office of chairman of Trust by virtue of same notification–Not illegal nor invalid–Purpose of notification is to notify identity of the *person*

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Urban Land (Ceiling and Regulation) Act (XXXIII of 1976)–Sections 6, 19, 20–Compulsory acquisition of land by Developmen Authority–Agreement executed that in lieu of cash compensation developed plots shall be given to the petitioner society who is nominee of original holder–Authority refusing to handover the agreement on the ground that ceiling proceedings are pendino in respect of the land–Unjustified : *vide* Constitution of India, Articles 226, 227, and Urban Land (Ceiling and Regulation) Act, 1976, Sections 6, 19, 20 and Nagar Tatha Gram Nivesh Adhiniyam, M. P., 1973...159

Urban Land (Ceiling and Regulation) Act (XXXIII of 1976)–Section 19(1)(i)–Development Authority is an authority within the meaning of Section 19(1)(i) of the Act, 1976–The provision of Ceiling Act 1976 wou not be applicable to the vacant land held by such Authority–Ceilino proceeding pending–Even if such land held by the holder is declarec excess of ceiling limits the authority would continue to hold the land by virtue of proviso to sub-section (2) of Section 19 of the Act : *vide* Constitution of India, Articles, 226, 227, and Urban Land (Ceilin and Regulation) Act, 1976, Sections 6, 19, 20 and Nagar Tatha Gram Nivesh Adhiniyam, M.P. 1973 159

Urban Land (Ceiling and Regulation) Act, (XXXIII of 1976)–Section 33–Appellate Authority is provided with plenary powers even to dismiss an appeal under this provision for non-prosecution : the appeals are to be decided expeditiously and appeals under Section 33 have been expressly given short life : *vide* Constitution of India, Articles 14, 226 and 227 ...379

Usurious Loans Act (X of 1918), Section 21-A, and Contract Act, Indian (IX of 1872), Sections 139, 141 and 176 and Banking Regulation Act (X of 1949), as amended in 1984, Section 21-A–Suit decided b the Court after coming into force of Section 21-A of the Act–Sui transaction cannot be re-opened on the ground that rate of interes is excessive–Security remained in possession of borrower as per Hypothecation agreement–Creditor can either file a suit or proceec against the security–Accounts were settled and acknowledged b the borrower–No infirmity in the impugned judgment and decree–Appeal failed : *vide* Civil Procedure Code 1908, Section 96 ...634

Vishwa Vidhyalaya Adhiniyam, M. P. (XXII of 1973)–Section 44(1), Clause 12(3) of Statute 29–Opportunity of hearing though no provided before passing any order but the University authorities

must observe principles of natural justice as their disciplinary powers have been described as judicial or *quasi*-judicial : *vide* Constitution of India, Article 226, Ravishankar University Act and Vishwa Vidhyalaya Adhiniyam, M. P., 1973, Section 44, Clause 12 of Statute 29 ...246

Vishwa Vidhyalaya Adhiniyam, M. P. (XXII of 1973)–Section 59–Bar to any suit–Though cause of act on shown to have arisen prior to coming into force of the Adhiniyam Trial Court justified in dismissing the suit for want of jurisdiction–Plaintiff has a remedy of moving the Kuladhipati for making reference of dispute–No interference in impugned judgment called for : *vide* Civil Procedure Code, 1908, Sections 96 and Order 14, Rule 2(2) ...457

Wealth Tax Act (XXVII of 1957)–Sections 2 (m) (ii), 4,5, & 27 (i)–Reference to High Court–Claim of exemption on the date raised on security of fixed deposit receipt–In computing net wealth the debts secured on or incurred in relation to property not taken into reckoning–Net wealth have to be excluded and deducted from the aggregate value of net wealth–Assessee entitled to exemption in proportion to the exempted value of the assets or the property securing the debt.

COMMISSIONER OF WEALTH TAX, BHOPAL v. RAKESH KUMAR AGARWAL; I.L.R. (1992) M.P. ...957

Words and Phrases :-

Defamation–News Paper publication–Item published in newspaper after verification through Police Station and public rumour–Word used in news item is "Studio Owner"–When the word referred to a group the imputation and not to a particular individual the libel is not actionable–Pleading not showing that the news item was false–News item flashed in the rumour para–Not directed at the plaintiff–Case for defamation not made out : *vide* Civil Procedure Code1908, Section 96 ...332

"F.I.R." in–Report of crime which is lodged in police station first in order is the first information report : *vide* Criminal Procedure Code, 1973, Sections 154, 161, 374(2) and Penal Code, Indian, 1869, Section 302 113

"Held"–Expression held has wider connotation than 'owning' or 'possessing' : *vide* Constitution of India, Articles 226, 227, Urban Land (Ceiling and Regulation) Act, 1976, Sections 6, 19, 20 and Nagar Tatha Gram Nivesh Adhiniyam, M.P. 1973 159

"Incidential thereto"–Implies a subordinate and subsidiary point concerning principal point requiring attention while considering the main point : *vide* Constitution of India, Articles 226, 227 and Industrial Disputes Act, 1947, Sections 10, 12 172

Interpretation of Statute–Any interpretation that may defeat the intention of legislative should be avoided–Reference u/s 256(1) answered upholding the order of I. T. O. and that of the Appellate Assistant Commissioner : *vide* Income-tax Act, Indian, 1961, Sections 2(7), 2(45), 5, 64(1)(iii), 139, 256(1) and Taxation Laws (Amendment) Act, 1975 151

Natural Justice–Petitioner debarred from being appointed as examiner, paper-setter, valuer of question paper etc. carrying emuneration for a period of 5 years on the allegation of leakage of question paper–Allegation casts slur and stigma–Enquiry report not supplied to the petitioner through demanded–Principles of natural justice violated as he could not exercise his right to defence effectively–Impugned order quashed : *vide* Constitution of India, Article 226, Ravi Shankar University Act and Vishwa Vidhyalaya Adhiniyam, M. P., 1973, Section 44, Clause 12 of Statute 29 246

"Publication" in–Suit filed in which writ of summons issued and served on the complainant amounts to publication: *vide* Criminal Procedure Code, 1973 Sections 200, 204, 397, 401 and 482 and Penal Code, Indian, 1860, Sections 499 and 500 ...60

"Rescue" in–Apart from dictionary meaning, is used in the sence of a Judge 'dissociating himself' or 'withdrawing himself' from a proceeding and nothing more than that : *vide* Civil Procedure Code, 1908, Section 115 and Bhopal Gas Leakage Disaster (Processing of Claims) Act, 1985, Section 3, Paragraphs 5(8), 10(3)(b) 121

Workmen's Compensation Act (VIII of 1923)–Section 30– Appeal–Appellant transport company–Deceased employed as conductor proceeding in a jeep insured by the insurer for work of employer–Not employed in connection with the motor vehicle insured–Accident–Death of conductor–Liability not covered by the insurance policy.

MANAGING DIRECTOR, DRUG TRANSPORT CO. PVT. LTD., DURG v. COMMISSIONER OF WORKMEN'S COMPENSATION-CUM-LABOUR COURT, DURG, I. L. R. (1992) M. P. ...110

MISCELLANEOUS PETITION

Before Mr. Justice Dr. T. N. Singh & Mr. Justice S.K. Dubey.

14 February, 1990

BHASKAR SINGH RAGHUVANSHI ...Petitioner*

v.

HARVEERSINGH RAGHUWANSHI & ors. ...Respondents.

Constitution of India - Articles 226, 227 and Krishi Upaj Mandi Samiti Adhiniyam, 1972(XXIV of 1973), Section 2(1)(b)—Election of Mandi Samiti—Eligibility—Candidate has to be an 'agriculturist' within the meaning of Section 2(1)(b)—Otherwise the very purpose of amending provision shall get frustrated—Returned candidate prima facie *involved in contractorship business—Tribunal committed an error in everlooking the outstanding bills brought on record by the petitioner—Finding of Tribunal perverse—Matter remanded to the Tribunal for decision afresh.*

The legislature has made a deliberate attempt to ensure that persons who are completely dependent for livelihood on agriculture should come in the Mandi Samiti and should be eligible to contest election to the Mandi Samiti. Indeed, traders and agriculturists are two components of the Mandi Samiti and if under the garb of agriculturist, other persons following other avocations are included into Mandi Samiti, the whole purpose of the enactment would be frustrated. It is necessary, therefore, for a person staking his claim to contest election to a Mandi Samiti to establish that his livelihood was dependent only on agriclutural produce and he did not depend on some other profession of business, as held in *Mahesh Kumar (supra)*. It is the complete involvement of the person in the persuit of agriculture, that is contemplated under the new definition and that is done to subserve the purpose of the enactment.

In the instant case, the Tribunal has not paid due consideration to the amended definition and has still held that the respondent no. 1 was dependent for his livelihood wholly on agriculture. The facts that he was engaged in contract works and some bills were due payable were found irrelevant to the status claimed by him. If such a view is countenanced by the new definition and that the finding of the Tribunal is perverse.

Mahesh Kumar v. *Addl. Collector* (1) ; followed.

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* M. P No. 711 of 1987.

(1) 1988 M. P. L. J. 6

Bhaskar Singh Raghuvanshi v. Harveersingh Raghuwanshi, 1990

Abdul Rahiman's case (1) and *Konappa Rudrappa's case* (2); referred t

R. D. Jain for the petitioner.

R. A. Roman Dy Govt. Advocate for the respondents.

Cur. adv. vu

ORDER

The Order of the Court was delivered

S. K. DUBE J. - The Additional Collector, Guna, as Election Tribunal under M.P. Krishi Upaj Mandi Samiti Adhiniyam, 1973 has passed the impugned orde Annexure P-1. By that order, he has dismissed the election petition, holding tha respondent no. 1 Harveersingh Raghuvanshi was an "Agriculturist" within the mean ing of the term defined in section 2(1) (b) of the M.P.Krishi Upaj Mandi Adhiniyam 1973 (for short "the Adhiniyam").

Shri Jain, who appears for the petitioner, has challenged the finding of the Tribunal, submitting that the finding is perverse and is contrary to the amend definition of the term, which came on the statute book in the year 1985 from 25.7.85 The Election in the instant case was held in October, 1985. There is definite substantial force in the contention pressed by Shri Jain as suport for that to be rea in a D. B. Decision of this Court in *Mahesh Kumar* v. *Addl. Collector* (Counsel's reliance on two decisions of the Apex Court in the case of *Abdul Rahima case* (4) and *Konappa Rudrappa's case (supra)* is well conceived and relevan

We are in complete agreement with the view expressed in *Mahesh Kuma (supra)* that the amended definition has a definite purpose. The legislature has ma a deliberate attempt to ensure that persons who are completely dependent f livelihood on agriculture should come in the Mandi Samiti and should be eligible t contest election to the Mandi Samiti. Indeed, traders and agriculturists are tw components of the Mandi Samiti and if under the garb of agriculturist, other pers following other avocations are included in to Mandi Samiti, the whole purpose o the enactment would be frustrated. It is necessary, therefore, for a person staking claim to contest election to a Mandi Samiti to establish that his livelihood wa dependent only on agricultural produce and he did not depend on some othe profession or business, as held in *Mahesh Kumar's case (supra)*. It is the complete involvement of the person in the persuit of agriculture, that is contemplated unc the new definition and that is done to subserve the purpose of the enactment.

(1) A. I. R. 1969 S. C. 302. (2) A. I. R. 1969 S. C. 447.
(3) 1988 M. P. L. J. 6 (4) A. I. R. 1988 S. C. 302

Bhaskar Singh Raghuvanshi v. Harveersingh Raghuwanshi, 1990

In the instant case, the Tribunal has not paid due consideration to the amended definition and has still held that the respondent no. 1 was dependent for his livelihood wholly on agriculture. The facts that he was engaged in contract works and some bills were due payable were found irrelevant to the status claimed by him. We do not think, if such a view is countenanced by the new definition and we are of the opinion that the finding of the Tribunal is perverse.

It is submitted by Shri Jain that the petitioner and the respondent no. 1 were only two candidates and as such under Rule 44(c) of the Relevant Rules framed under the Adhiniyam, the petitioner had to be declared elected. We do not think that we should express any opinion in that regard because the matter has to be reconsidered into by the Tribunal.

For the reasons aforesaid, the impugned order Annexure P-1 is quashed. Parties shall be re-heard and a fresh decision in the election petition of the petitioner shall be rendered within 2 weeks of their appearance. Counsel agree to appear before the Election Tribunal (Additional Collector) on 5th of March, 1990.

The petition succeeds to the extent aforementioned. However, we make no order as to costs. Security amount, if any, in deposit shall be returned to the petitioner.

Petition party allowed.

MISCELLANEOUS PETITION

Before Mr. Justice P. C. Pathak and Mr. Justice S. K. Seth.
30 May, 1990

SHARAD DADU ...Petitioner*

v.

DTSTRICT MAGISTRATE, BHOPAL and another. ...Respondents.

Constitution of India, Articles 22, 226, 227 and National Security Act (LXV o 1980), Sections 3(2), 3(3), 11, 12, 13 and 15 -- Writ Petition --Preventiv detention under the Act for a period of twelve months confirmed by the appropriate Government/State Govt. on advice of the Advisory Board - Section 15 — Temporary release of detenue on parole has to fail within the period of detention already fixed — Article 22—Order extending th period of detention as a result of parole—Unconstitutional—State Gov is left with no such power under the Act—Sections 12, 13—Prevention detention is distinct for punitive detention—Underlying object is to prevent detenue from activities prejudicial to the maintenance of public order and not to punish him - Impugned order quashed.

Now, it is apparent that since the National Security Act is a law providin for 'preventive detention' as permitted by Clauses (4) to (7) of Article 22 of th Constitution, its provisions are to be read subject to and in the light of the safeguards against their possible misuse contained in the said clauses and the othe provisions of the constitution.

Once a detention order passed against any person under sub-sec. (2) o Section 3 of the National Security Act is confirmed by the appropriate Governmen under sub-sec. (1) of Section 12, and his detention is consequently directed by th said Government to be continued for such period of twelve months from the date o his detention as prescribed under section 13, it i. e. the said Government is thereafter left with no power to extent the detention of the said person beyond the perioc already fixed by it in the manner as aforesaid under sub-sec (1) of Sec. 12 reac with Section 13 of the Act.

The period of temporary release, if any, granted to such person u/s 15 h to fall within the period of detention already fixed in respect of him as aforesaic under sub-sec (1) of sec. 12 read with sec. 13 of the Act and there is no warrant for adding the same to that period.

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* M. P. No. 313 of 1990.

Sharad Dadu v. District Magistrate, Bhopal, 1990.

State of Punjab v. *Sukhpal Singh* (1), *Kubicdarusz* v. *Union of India and others* (2), *M/s Raval and Co.* v. *K. G. Ramchandran* (3) and *M. Michael Vijay Kumar* v. *State of Andhra Pradesh* (4); followed.

Gujrat v. *Adam Kasam* (5), *Poonam Lata* v. *M.L. Wadhawan* (6) and *Pushpadevi* v. *M. L. Wadhawan* (7); distinguished.

S. C. Datt for the petitioner

A. S. Jha for the respondents.

Cur. adv vult.

ORDER

The Order of the Court was delivered by **S. K. SETH, J.** - The District Magistrate, Bhopal in exercise of powers vested in him under Sub-section (2) read with Sub-section (3) of Section 3 of the National Security Act, 1980, made an order of detention dated 15.10.1988 against one Kishore Dadu son of Thakur Dadu, aged 21 years, r/o MACT Hostel No. 6, Bhopal on the ground that it was necessary to do so with a view to preventing the said person from acting in any manner prejudicial to the maintenance of public order. In execution of the said order, the said person was taken into custody and lodged in the central Jail, Bhopal on 18.11 1988. Thereafter, on the basis of the advice of the Advisory Board, the detention order passed against the said detenu was confirmed by the State Government under sub-section (1) of Sec. 12 of the Act vide its order dated 6. 1. 1989. It was specified in its confirmatory order that the detention of the detenue would continue for a period of twelve months from the date of his detention i. e. upto 17 11 1989.

During the period of detention, the State Government, in exercise of its powers u/s 15 of the Act, directed the temporary release of the detenue for a total period of nine months vide orders dated 14 3 . 1989, 12.6.1989 and 8.9.1989 passed by it from time to time. Under the last of the said orders i.e. one dated 8.9 1989 the detenue was directed to report back to the Supdt., Central Jail, Bhopal after the expiry of the period of his temporary release on 16.12.1989. Thereafter, a further order was passed by the State Government

(1) (1990) 1 S. C. C. 35
(2) (1990) 1 S. C. C. 568
(3) A. I. R. 1974 S C. 818
(4) 1987 Cr. L. J. 467
(5) A. I. R. 1981 S. C. 2005
(6) A. I. R. 1987 S. C. 1383
(7) A. I. R. 1987 S. C. 1748

on 30.11.1989 informing the detenu that as a result of his nine months release on parole as aforesaid, the figure of 17.11.1989 mentioned in the confirmaton order dated 6.1 1989 would stand modified and substituted by the figure (16.8.1990 i. e. in other words, his detention under the detention order i question would continue upto 16.8.1990 instead of 17.11.1989. It is the legalit and constitutional validity of the order dated 30.11.1989 passed by the State Government, extending the period of detention upto '16.8.1990' in place ('17.11.1989', by adding to the original period of twelve months a further perioc of nine months during which he had been temporarily released u/s 15 of the Act, which is challenged on behalf of the detenu in this petition for the issue o a writ of *habeas corpus* filed by his cousin.

Now, it is apparent that since the National Security Act is a law providing for 'preventive detention' as permitted by Clauses (4) to (7) of Article 22 of the Constitution, its provisions are to be read subject to and in the light o the safe-guards against their possible misuse contained in the said clauses a the other provisions of the Constitution. Before proceeding to deal with the question arising for consideration in the petition, it is convenient to have a loo at the relevant provisions of the Act. It is sub-section (2) of Section 3 of the Act which confers powers to make a preventive order of detention on the appropriate Government. The said sub-section reads as follows : "The Centra Government or the State Government may, if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to the security of the State or from acting in any manner prejudicial to the maintenance of public order or from acting in any manner prejudicial to the maintenance o supplies and service essential to the community it is necessary so to do, make an order directing that such person be detained. "Sub-section (3) of Section 3 of the Act provides for conferment of power upon District Magistrates or Commissioners of Police to make orders of detention under Sub-Section (2) o Section 3 under certain circumstances and subject to certain conditions.

The provisions with regard to the maximum period for which an person may be detained under the provisions of the Act are contained in Section 13 of the Act. The said Section is preceded by Sections 11 and 12. Consistent with the constitutional safe-guard provided by Clause (4) of Article 22 of the Constitution, Section 11 of the Act requires the Advisor Board to submit its opinion as to whether there is sufficient cause for the detention of the person concerned to the appropriate Government within seven weeks from the date of detention of the said person. Thereafter, sub- section

(1) of Sec. 12 provides that in any case where the Advisory Board has reported that there is, in its opinion, sufficient cause for the detention of a person, the appropriate Government may confirm the detention order and continue the detention of the person concerned for such period as it thinks fit (emphasis supplied). As stated earlier, the provisions with regard to the maximum period for which such person may be detained are contained in Section 13 of the Act. In the said regard, therefore, Section 12 is controlled by Section 13. Section 13 reads as follows: " The maximum period for which any person may be detained in pursuance of any detention order which has been confirmed under Section 12 shall be twelve months from the date of detention." (emphasis supplied).

The only other section of the Act which is relevant for our present purpose is Section 15. Unlike Section 13, which deals with the maximum period for which any person may be detained in pursuance of a detention order, Section 15 has for its subject matter 'temporary release' of any person detained in pursuance of a detention order. Section 15 reads as follows : " 15. Temporary release of persons detained. - (1) The appropriate Government may, at any time, direct that any person detained in pursuance of a detention order may be released for any specified period either without conditions or upon such conditions specified in the direction as that person accepts, and may, at any time, cancel his release. (2) In directing the release of any person under sub-section (1), the appropriate Government may require him to enter into a bond with or without sureties for the due observance of the conditions specified in the direction. (3) Any person released under sub-section (1) shall surrender himself at the time and place, and to the authority, specified in the order directing his release or cancelling his release, as the case may be. (4) If any person fails without sufficient cause to surrender himself in the manner specified in sub-section (3), he shall be punishable with imprisonment for a term which may extend to two years, or with fine, or with both. (5) If any person released under sub-section (1) fails to fulfil any of the conditions imposed upon him under the said sub-section or in the bond entered into by him, the bond shall be declared to be forfeited and any person bound thereby shall be liable to pay the penalty thereof. "

In the light of the above said statutory provisions of the National Security Act, the question which arises for determination in the present writ petition is whether once a detention order passed against any person under

Sub-section (2) of Sec.3 of the Act is confirmed by the appropriate Government under Sub-section (1) of Section 12, and his detention is consequently directed by the said Government to be continued for such period as it thinks fit, subject to the maximum period of twele months from the date of his detention as prescribed under Section 13, it is within its power later on to extend the original period of detention fixed in the manner as aforesaid on the ground that since during the period of such detention he was granted the benefit of being temporarily released for a certain period under Section 15 of the Act the period of his such release is liable to be added to his said period of detention ?

In our opinion, bearing in mind the nature and object of preventive detention, as permitted by Clauses (4) to (7) of the Constitution, and as finding its manifestation in the relevant provisions of the Act in question i.e. the National Security Act, the answer to the above said question has to be clearly in the negative. In other words, in our opinion, once a detention order passed against any person under sub-section (2) of Section 3 is confirmed by the appropriate Government under Sub-section (1) of Section 12, and his detention is consequently directed by the said Government for such period as it thinks fit, subject to the maximum period of twelve months from the date of his detention as prescribed under Section 13, it i.e. the said Government is thereafter left with no power to extend the detention of the said person beyond the period already fixed by it in the manner as aforesaid under Sub-section (1) of Section 12 read with Section 13. In our opinion, as per its very nature, the period of temporary release, if any, granted to such person under Sec. 15 of the Act, has to fall within the period of detention already fixed in respect of him as aforesaid under Sub-section (1) of Section 12 read with Sec.13 and there is no warrant in any provision of the Act for adding the same to that period.

In the above connection, in our opinion, it is of utmost importance to bear in mind the vital distinction between the preventive detention on one hand and the punitive detention i.e. sentence of imprisonment under the criminal law on the other. While in the case of punitive detention the person concerned is detained by way of punishment after being found guilty of wrong doing where he has the fullest opportunity to defend himself, the preventive detention is not by way of punishment at all but is intended to prevent a person from indulging in any conduct injurious to the society or prejudicial to the maintenance of public order, etc. The preventive detention is taken recourse to by way of a precautionary measure. The object is not to punish a

man for having done some thing but to intercept him before he does it and to prevent him from doing it. In the case of such detention, no offence is proved, nor any charge is formulated. It is without any trial and the justification for it is suspicion or reasonable probability and not criminal conviction which can only be warranted by legal evidence. (See, apart from old cases, two recent decisions of the Supreme Court in *State of Punjab* v. *Sukhpal Singh* (1) and *Kubicdarusz* v. *Union of India and others* (2).

It follows from the above said distinction between the preventive detention and the punitive detention that while in the case of punitive detention the purpose underlying the sentence awarded under the criminal law is to punish the offender, in the case of preventive detention the object underlying detention under the preventive law is to ensure that the detenu is prevented from continuing his activities which are injurious to the society or prejudicial to the maintenance of public order, etc. Thus, while in the case of the former, the emphasis is on the point that the full period of sentence is undergone by the person convicted of an offence, in the case of the latter, the emphasis is on the point that certain time-limit upto which a detenu has to be detained is fixed so that upto that point of time he would not be in a position to carry on his activities which are injurious to the society of prejudicial to the maintenance of public order, etc.

Needless to say, the National Security Act being a preventive detention law, its relevant provisions i.e. Sub-sec. (1) of Sec. 12 read with Sec. 13 on one side and Section 15 on the other have to be interpreted in the light of the vital distinction between the preventive detention and the punitive detention. Thus, it is clear that when it is provided in Sub-sec. (1) of Sec. 12 that in any case where the detention order is confirmed by the appropriate Government it may continue the detention of the person concerned for such period as it thinks fit, and it is further provided in sec. 13 that the maximum period for which any person may be detained in pursuance of a detention order which has been confirmed u/s 12 shall be twelve months from the date of detention, the intention behind the award of such detention to the person concerned Sub-section (1) of sec. 12 read with sec. 13 is not to punish him or to make him undergo the full period of detention, but only to ensure that he is prevented from continuing his activities which are injurious to the society or prejudicial to the maintenance of public order etc. and for the said purpose certain time-limit is fixed upto which he has to be detained so that he would not be in a position to carry on such activities.

(1) (1990) 1 SCC 35. (2) (1990) 1 SCC 568.

Sharad Dadu v. District Magistrate, Bhopal, 1990.

In our opinion, bearing in mind the vital distinction between the preventive detention and the punitive detention as explained earlier, and the intention behind the enactment of sub-section (1) of Sec. 12 read with Sec. 13 of the preventive law in question i.e. the National Security Act as pointed out above, it is not difficult to understand as to why merely because in the case of punitive detention under the criminal law there exists a rule in the matter relating to grant of temporary release to the effect that the period spent on parole shall not be counted as a part of sentence of imprisonment awarded to a person found guilty of an offence, there is any need or justification for employers the existence of any such rule in the case of preventive detention under the National Security Act in so far as the matter relating to grant of temporary release dealt with in Section 15 of the said Act is concerned. As per its basic nature, the period of detention awarded to a detenu under Sub-sec. (1) of Section 12 read with Sec. 13 of the Act does not amount to a 'sentence' or 'punishment'. It is, therefore, apparent that in the event of he being granted the benefit of temporary release for any period under section 15 of the Act, there arises no question of he being made to complete his 'full sentence' later on by excluding the period of such temporary release from the period of detention awarded to him.

It is a matter of satisfaction to us that the view expressed by us hereinabove finds support from the decision of a Division Bench of the Andhra Pradesh High Court (presided over by K. Bhaskaran, CJ) in *M. Michael Vijaya Kumar* v. *State of Andhra Pradesh* (1). It has been stated by the Division in para 6 of its decision as follows: " Having given our anxious thought to the scheme of the Penal Code and the Criminal Procedure Code on the one hand and the preventive detention laws on the other, we are of the opinion that what is laid down by the Rule with respect to the parole *vis-a-vis* the sentence would not be applicable to the detention under the provisions of the preventive detention laws in the absence of provisions express or inferable by necessary implication, to that effect." Again, in para 8 of its decision, the Division Bench has observed as follows: " When there is no provision in the National Security Act, which specifically or by necessary implication lays down that the period of temporary release shall not be counted as part of the period of detention, there is no justification for reading into the section such a clause. In fact, the other things being equal, the Court should be inclined to interpret the provision in favour of the detenu, rather than in favour of the detaining authority." Needless to say, both the above said observations made by the Division Bench of the

(1) 1987 Cri. L.J. 467.

sub-section (6) of Sec. 12 of the COFEPOSA Act contained in Section 15 of the National Security Act, we are justified in taking the view that as there is no provision in the National Security Act, which specifically or by necessary implication lays down that the period of temporary release shall not be counted as part of the period of detention, there is no justification for reading into the Section (Section 15) such a provision. While accepting the said view, we rely on the salutary principle enunciated by the Supreme Court in *M/s Raval and Co.* vs. *K.G.Ramachandran* (1) to the effect that any general observation made by the Supreme Court cannot apply in interpreting the provisions of an Act unless the Court has applied its mind to and analysed the provisions of that particular Act.

For the reasons stated above, we are of the opinion that once a detention order passed against any person under Sub-section (2) of Section 3 of the National Security Act is confirmed by the appropriate Government under Sub-sec. (1) of Section 12, and his detention is consequently directed by the said Government to be continued for such period as it thinks fit, subject to the maximum period of twelve months from the date of his detention as prescribed under Section 13, it i.e. the said Government is thereafter left with no power to extend the detention of the said person beyond the period already fixed by it in the manner as aforesaid under Sub-sec. (1) of Sec. 12 read with Section 13 of the Act. In our opinion, as per its very nature, the period of temporary release, if any, granted to such person u/s 15 has to fall within the period of detention already fixed in respect of him as aforesaid under Sub-sec. (1) of Sec. 12 read with Sec. 13 of the Act and there is no warrant for adding the same to that period.

Consequently, we allow the petition and quash the order dated 30.11.1989 passed by the State Government extending the period of detention of detenu Kishore Dadu upto 16.8.1990 in place of 17.11.1989, by adding to the original period of 12 months a further period of 9 months during which he had been temporarily released under Sec.15 of the Act. The period of detention of the said detenu having already expired on 17.11.1989 we direct that he shall be released forthwith unless required to be detained in connection with any other matter.

Petition allowed

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(1) A.I.R. 1974 S.C. 818

MISCELLANEOUS PETITION

Before Mr. Justice S. K. Dubey
7 June 1990

KAILASH NARAYAN SHARMA ...Petitioner*

v.

M.P.S.R.T.C. & ors. ...Respondents.

Constitution of India, Articles 14, 226, Road Transport Corporation Act (LXIV of 1950), Section 45, State Road Transport Corporation Employees Service Regulations, M.P., 1960, Regulation 59 and Industrial Relations Act, M.P. (XXVII of 1960), Sections 31, 61– Retirement of petitioner at the age of superannuation of 58 years of age on the basis of wrong entry of date of birth–Objection of petitioner accepted on the basis of High School Certificate–Order of retirement withdrawn by the Respondents/Corporation–Vigilance conducted without giving opportunity to the petitioner unilaterally–Petitioner again retired on the basis of date of birth shown in earlier Gradation list already superceded by subsequent gradation list of 1984 and 1989–Order of retirement is violative of Article 14 of the Constitution–Order of retirement quashed –Alternative remedy–Petitioner Depot Manager– When facts are clean and undisputed plea of alternative remedy should not be accepted as ban to writ jurisdiction on face of controversy as to whether his application under section 31 or 61 of the M.P.I.R. Act, 1960 would tenable–Civil Procedure Code, 1908–Section 80–Notice before filing writ–Not necessary especially when petitioner is not seeking enforcement of private rights or contractual obligations.

The petitioner's date of birth in service book as well as in the two gradation lists published in the year 1984 and 1989, was shown by the Corporation as 15.8.1934. The petitioner was also not served with any notice about the interpolation or correction of the date of birth in the service Book. The Corporation had from their own conduct as well as from the entries in the two gradation lists published in the year 1984 and 1989 has accepted the date of birth of the petitioner as 15.8.1934, on the basis of High School Certificate.

On the basis of the report of Vigilance cell no enquiry was held against the petitioner and the petitioner was not afforded any opportunity of hearing regarding the change of date of birth. Admittedly, the date of birth from 15.8.34 to 1.6.31 was

* M.P. No. 751/1990

changed for the purpose of retirement unilaterally and arbitrarily. which involved civil consequences. It is also not in dispute that even the report of the vigilance cell was not supplied to the petitioner enabling him to make any representation.

The plea of alternative remedy specially where it is also disputed whether an application under sections 31 and 61 of the MPIR Act would be tenable before the Labour Court or not and as the petitioner, being a Depot Manager, will not fall within the definition of an employee under section 2(13) of the MPIR Act, the petition of the petitioner cannot be thrown out and when the facts are clear and there is no dispute in the facts narrated above, the petitioner cannot be directed to face the litigation for years together.

For the absence of notice for demand of justice the petition cannot be thrown, particularly when a petition is not for enforcement of any private right or contractual obligation. The claim of the petitioner is against the action of the respondent Corporation, which is neither fair nor just, and is violative of Article 14 of the Constitution.

Article 226 is meant for doing justice between the parties. The Courts primarily are meant to do justice and do justice and substantial justice between the parties by deciding substantial rights of the parties. Technical pleas should not come in the way where the facts are not in dispute.

Ram and Shyam Company v *State of Haryana* (1), *The Madras Port Trust* v. *Hymanshu International* (2), *State of Orissa* v. *Dr. (Miss) Binapani Dei* (3), *Sarjoo Prasad* v. *General Manager* (4) and *Brijwasi Lal Shrivastava* v *State of M.P. & anr.* (5) ; relied on.

State of Assam v. *Prasad Deka* (6), *P. Nagmuni* v. *Govt. of A.P. & anor.* (7), *G.M.(Marketing) H.F. Corpn. of India Ltd.* v. *Subodh Chandra* (8) and *Makaradhwaj* v *State of M.P.* (9) ; distinguished.

Chhitarlal Bharti v. *Ujjain Municipal Corpn.* (10) and *Krishnapal Singh Bhadoriya* v. *State & anr.* (11) referred to.

Sachindra Dwivedi for the petitioner.

N. P. Mittal and *R. D. Jain* for the respondents.

Cur. adv. vult.

(1) 1985(3) S.C.C. 267 (2) A.I.R. 1979 S.C. 1144 (3) A.I.R. 1967 S.C.1269
(4) A.I.R. 1981 S.C. 1481 (5) M.P. No. 133/1984, decided on 25.1.88=1988 C.C.L.J.Note 66
(6) (1970)(3 S. C. C. 624 (7) A.I.R. 1981 S.C. 864 (8) A.I.R. 1988 S.C. 701 (9) 1974 J.L.J. 71
(10) 1989(I) M.P.W.N. Note 10 (11) M.P. No. 36 of 1981, decided on 7.10.1985

Kailash Narayan Sharma v. M.P.S.R.T.C., 1990

ORDER

S. K. DUBEY, J. - By this petition under Article 226 of the Constitution of India, the petitioner has challenged the order dated 4.5.1990, passed by the General Manager, M.P. State Road Transport Corporation, Bhopal (for short, "Corporation") retiring the petitioner from 5th, May 1990.

Brief facts leading to this petition may be stated as under. The petitioner joined his service on 1.10.1949, as Conductor. The petitioner, because of his hard work during the service career, was promoted from time to time and at the time of his retirement, was working as In-Charge Depot Manager/Traffic Superintendent, at Gwalior Depot of the Corporation. It is further averred by the petitioner that he was holding the post in the managerial capacity and had a right and power to appoint and dismiss the employees working under him, i.e. conductors, drivers etc. The petitioner averred that his date of birth as recorded in the records of the Corporation is 15th August, 1934. This date of birth was accepted and entered by the Corporation in the service Book (Annexure P-7). Thereafter, on 1.4.1984 a seniority list (Annexure P-5) of Traffic Superintendents was published by the Corporation, under the signatures of Chief Personal Officer of the Corporation. In that list (Annexure P-5.), at Item No. 41 (page 3), petitioner's name finds place. In column 3 thereof, his date of birth is shown as 15.8.34. In seniority list of Traffic Superintendents (Annexure P-7) as on 1.4.89, published by the Chief Personal Officer, on 18.10.89, at Item 18, the petitioner's date of birth was also shown as 15.8.34. This seniority list was provisional and objections were called for. No one, however, preferred any objection about his seniority or the date of birth, as recorded therein within the time prescribed. According to the date of birth accepted and recorded in the service records of the petitioner he could not have been retired before attaining the age of superannuation, i.e. 58 years on 15.8.1992. Regulation 59 of the Madhya Pradesh State Road Transport Corporation Employees Service Regulations framed under section 45 of the Road Transport Corporation Act, 1950, provides the age of superannuation as 58 years. Initially, on the basis of a wrong entry, the petitioner was retired vide Annexure 1, dated 29.1.82 on 15.2.82. The petitioner objected and submitted his High School Certificate, wherein his age is entered as 15th August 1934. On this representation, the Divisional Manager recommended the case of the petitioner and forwarded his

case vide Annexure - 3, dated 5.2.1982, On this representation, vide Annexure-4, dated 7.4.1982, petitioner's order of retirement was withdrawn by the Corporation. The petitioner, therefore, submits that the Corporation having accepted and recorded his date of birth as 15.8.34, cannot capriciously, arbitrarily and without affording him an opportunity and without holding any enquiry, unilaterally change his date of birth so as to retire him prematurely.

In response to the notice, the Corporation appeared and filed the reply of the *ad-interim* application on 17.5.1990, when learned counsel for the parties submitted that instead of hearing on I.A.No. I-90 for issuance of *ad-interim* writ, the matter may be heard finally and disposed of during vacation. As such at the request of the parties, the case was listed for final hearing on 28.5.1990. On 28.5.1990, arguments were partly heard and later on arguments were concluded on 31.5.1990. The Corporation did not chose to file return to the petition but was satisfied by the reply filed by it in response to the notice for *ad-interim* writ.

In reply, a preliminary objection was raised that the petitioner being an employee as defined under section 2(13) of the M.P. Industrial Relations Act (for short 'MPIRA'), alternative effecious remedy is available to the petitioner and hence the petition is not maintainable. In a claim under the MPIRA disputed questions can be agitated and not in the petition under Article 226 of the Constitution. On merits, it was submitted that the petitioner being conductor at the time of entry in the service, and having represented himself as a major at that time got the employment. Having thus taken advantage, the petitioner is now estopped to say that his date of birth at the time of initial employment was the same and that he was aged about 15½ years at that time. It was also contended that initially the date of birth entered was 15.8.1924. However, as the original service book of the petitioner was found removed under suspicious circumstances, and another service book (Annexure - 7) was prepared in the year 1980. In that too, there are cuttings and over-writings at 3 places. The date of birth in the service book of the petitioner was changed from 1.6.31 to 1.6.34 and then from 1.6.31 to 15.8.34. On the report of the vigilance cell, the correct date of birth of the petitioner was found to be 15.8.1924. In the gradation list as on 1.1.1977 issued under the signatures of Chief Personal Officer (Annexure R-1), the petitioner's date of birth is shown as 1.6.1931. Similarly in another gradation list of Traffic Supervisors Grade I - (Annexure R-2)

at item No. 30, petitioner's date of birth is recorded as 1.6.1931. Genera Manager's order dated 3.8.1972 (Annexure R-3) is also produced by the Corporation to show that a policy decision was taken in the matter that no representation should be entertained in any case and the date of birth which has once been entered in the service record on the basis of the documents furnishe by the employee at the time of his initial appointment, should be taken as fina for all purposes. Therefore, it was contended that the petitioner is not entitled to any relief.

It was further contended that the petitioner could not have been employed in his minority age as a conductor in view of Rule 87(f) of the M P Motor Vehicles Rules, 1949 (Samvat 2006). During the course of arguments. Shri Mittal, learned counsel for the respondent Corporation also produced a note sheet singed by the Chief Personal Officer, dated 2.3.1982, wherein representation of the petitioner against the order of earlier retirement, datec 29 1.1982 (Annexure 1) was considered on the basis of High Schoo Certificate The C.P.O. made a note therein that if we accept the date of birth on the basis of High School Certificate, the petitioner should have joinec services at the age of 14 or 15 years. It was also stated that in the fina gradation lists issued on 27 1 1978, petitioner's date of birth is recorded as 1.6 1931. It is noted that all this makes confusion. Therefore, the C.P.O. opinec that actual date of birth should be as 1.6.31 and not 15.8.34. It is noteworthy that in the reply filed this stand is not taken. During the course of agruments or in the reply no material was placed by the Corporation to show that on wha material 1.6.31, the date of birth of the petitioner was entered. Even after conclusion of the agruments, time was granted to the Corporation to show tha on what material this entry was made and whether this decision was ever communicated to the petitioner, but the corporation did not place any record to that effect

Shri Sachindra Dwivedi, learned counsel for the petitioner controvertec the allegations. To support the case of the petitioner and to controvert the facts in reply, he also filed in application for bringing necessary facts on record in order to clarify the confusion and mis—statements made by the responden Corporation. In this application, it was emphatically denied that the petitioner falls within the definition of employee as contemplated under section 2(13) o

the MPIR Act. To support his contention, certain orders, i.e. Annexures A,B,C,D and E were filed to domenstrate that the petitioner was acting as Depot Manager and was competent to appoint or take disciplinary action. In this application it was submitted that the petitioner's signature in the service book appears only at one place, where his date of birth is recorded as 15.8.34 and not at other places. Thereafter, after accepting the date of birth as 15.8.34, two gradation lists were published in the year 1984 and 1989, superseding the earlier lists published in the year 1977 and 1988, (Annexures R-1 and R-2). In para 6, the petitioner contended that though the petitioner was minor at the time of his appointment, his date of birth cannot be changed and at the most that order of appointment would be irregular or invalid. It was also pointed out that the petitioner had never a conductor's licence during his minority. Moreover, the petitioner affirmed on oath that the incumbents mentioned at serial Nos. 47, 167 and 224 in Annexure F were minors. The gradation list as on 1.4.89 (Annexure F) shows that some incumbents at the time of entry in service though were minors joined as conductors. It was also affirmed on oath that vide Annexures P-5 and P - 6, the two gradation lists, at serial Nos. 20, 22, 65, 73 and 102 of Annexure-5 and serial Nos. 3 and 37 of Annexure-6 and serial Nos.10 and 30 of Annexure R-1 and serial Nos. 9, 29, 32, 52, 57, 69, 70, 86, 91 and 97 of Annexure R-2 were appointed during the period of minority and most of them were conductors. To this submission also, the respondent Corporation was granted time to file counter reply, though the arguments were concluded, but the respondents did not file any reply or placed any material to controvert the facts as alleged.

In the background of these facts, the preliminary objection of the learned counsel for the respondent that the petitioner has an alternative efficacious remedy by approaching the Labour Court has to be considered first. Indisputably, the petitioner was never informed after the acceptance of his representation at the time of withdrawal of his earlier retirement order, regarding change in the date of birth from 15.8.24 to 1.6.31. On the other hand, the petitioner's date of birth in service book as well as in the two gradation lists published in the year 1984 and 1989, was shown by the Corporation as 15.8.1934. The petitioner was also not served with any notice about the interpolation or correction of the date of birth in the service Book. The Corporation had from their own conduct as well as from the entries in the two

gradation lists published in the year 1984 and 1989 has accepted the date of birth of the petitioner as 15.8.1934, on the basis of High School Certificate, Annexure -2, issued on 20th June, 1962. It is also not in dispute that before taking action and passing the impugned order of retirement on the basis of the date of birth as entered in the earlier gradation lists as 1.6.31, which were superseded by the later gradation lists of 1984 and 1989, any notice was served. On the basis of the report of Vigilance cell no enquiry was held against the petitioner and the petitioner was not afforded any opportunity of hearing regarding the change of date of birth. Admittedly, the date of birth from 15.8.34 to 1.6.31 was changed for the purpose of retirement unilaterally and arbitrarily, which involved civil consequences. It is also not in dispute that even the report of the Vigilance cell was not supplied to the petitioner enabling him to make any representation.

In this back-drop, the plea of alternative remedy especially where it is also disputed whether an application under Sections 31 and 61 of the MPIR Act would be tenable before the Labour Court or not and as the petitioner, being a Depot Manager, will not fall within the definition of an employee under section 2(13) of the MPIR Act, the petition of the petitioner cannot be thrown out and when the facts are clear and there is no dispute in the facts narrated above, the petitioner cannot be directed to face the litigation for years together.

The rule which requires the exhaustion of alternative remedy is a rule of convenience and discretion a self imposed restraint on the Court, rather than a rule of law. It does not oust the jurisdiction of the Court. Where an order complained against is alleged to be illegal or invalid, as being contrary to law, a petition at the instance of a person adversely affected by it, would lie to the High Court under Article 226 and such a petition cannot be rejected on this ground alone and has to be judged in the particular facts and circumstances of the case. See *Ram and Shyam Company* v. *State of Haryana* (1). Looking to the facts and circumstances in this case. I am of the opinion, that the petition of the petitioner cannot be thrown out on the ground of exhaustion of alternative remedy, even if it is available to the petitioner.

Petition can also not be dismissed on the ground that it involved disputed question of facts. As to facts, which have come on record there is no dispute regarding last entry of date of birth as 15.8.34 and the petitioner was

(1) 1985 (3) SCC 267.

continued in service by withdrawing the earlier order of retirement, passed in the year 1982.

The Corporation respondent having accepted the last entries, if wanted to go back on its earlier entry, i.e. 1.6.31, it was bound to hold an enquiry and afford an opportunity to the petitioner. Without doing that could not have unilaterally changed the date of birth of the petitioner. Reliance of the learned counsel for the petitioner on the decisions of the Apex Court in *State of Orissa* v. *Dr. (Miss) Binapani Dei* (1) and *Sarjoo Prasad* v. *General Manager* (2), is well founded. In case of *Dr. (Miss) Binapani (supra)*, the Apex Court has held that even where the facts are disputed in a petition under Article 226, the High Court can in appropriate cases exercise its discretion and entertain the petition. In that case also the petitioner was retired prematurely on a certain disputed date of birth and the date of birth was altered unilaterally on the report of the Enquiry Officer whereby the petitioner suffered in that case civil consequences. It was held the order passed was in violation of principles of natural justice and the order was struck down as it was against the principles of natural justice. In case of *Sarjoo Prasad (supra)* the Apex Court held that when once the date of birth was altered by the employer, after accepting it and without giving any apportunity to him, to the disadvantage of the employee, by an administrative order it cannot be changed because that administrative order involves civil consequences.

Coming to the contention of the learned counsel for the respondent that the petitioner having taken advantage of his representation, while seeking employment that he had attained the age of majority, cannot go back and say that he was minor at the relevant time, as under the appropriate Rules he could not have been employed, and, therefore, he was rightly retired. To support his contention, learned counsel pressed into service the case of Apex Court in *State of Assam* v. *Prasad Deka* (3). Suffice it to say that the case is not applicable to the facts of the present case as the respondent has placed no material to show that the petitioner, while joining his services at the time of initial appointment misrepresented himself and got the employment as a major person. On the other hand, the petitioner has placed sufficient material to show that even conductors at the relevant time were employed during their minority. In any case, when the petitioner's date of birth was once accepted as 15.8 34, according to the said date of birth he was minor at the time of initial employment.

(1) A.I.R. 1967 S.C. 1269 (2) A.I.R. 1981 S.C. 1481. (3) 1970(3) S.C.C. 624.

The Corporation did not take any action against the petitioner for cancellation of the appointment order being illegal or invalid or obtained by misrepresenting the corporation but preferred to keep mum.

The other case of the Apex Court relied on is *P. Nagamuni* v. *Govt. of A.P. & anr.* (1), is also not applicable in the present case, wherein at the time of retirement, the petitioner in that case wanted change in the wrong entry of his date of birth. It was held in that case that the petitioner having signed the service register every year, did not object but having come to know in April 1978 that he would not have been born on April 1924, he could not have signed the service register in October 1978 without mentioning in that register that the birth date recorded therein was wrong.

The third case cited by the learned counsel for the respondents in *G.M. (Marketing) H.F.Corporation of India Ltd.* v. *Subodh Chandra* (2), is also not applicable to the facts of the present case. In that case the High Court found the date of birth as recorded in the records of the employer should not be interfered, but Subodh Chandra was directed to be continued in service for a period of 3 years, on compassionate grounds.

Even for arguments seek, the petitioner was wrongly given employment as at the time of initial employment or joining of services he was a minor, that appointment at the most was irregular or invalid, but that would not change the actual date of birth and the employer cannot retire the petitioner prematurely. A Division Bench decision of this Court in *Brijwasi Lal Shrivastava* v. *State of M.P. & anr.* (3), was relied. In that case, it was held that when once the date of birth of the petitioner was corrected in the service records on the basis of some material, such correction cannot be recalled later on without any basis for the same. Even if an employee is found to have been appointed during minority that will make his initial appointment illegal, but that will not be a justification for change of correct date of birth.

Shri Dwivedi placed reliance on a Division Bench decision in *Chhitarlal Bharti* v. *Ujjain Municipal Corporation* (4) wherein placing reliance on *Sarjoo Prasad (supra)* it was held that once the date of birth has been accepted by the employer, it cannot be altered without affording an opportunity of hearing to such an employee.

(1) A.I.R. 1981 S.C. 864. (2) A.I.R. 1988 S.C. 701.
(3) M.P. No. 133 Of 1984, decided on 25.1 1988- 1988 CCLJ. Note 66.
(4) (1989) M.P.W.N. No. (10)

Shri Dwivedi also pressed into service another Single Bench decision of this Court in *Krishnapal Singh Bhadoriya* v. *State of M.P. and anr.* (1) on the basis of the Matriculation Certificate, the learned Single Judge held that the date of birth has to be accepted as correct and no public servant can be superannuated only on the basis of the date of birth entered in his service book.

In the last, Shri Mittal and Shri R.D.Jain also advanced two contentions. One is that when the employee has denied the date of birth and allowed the entry to continue for a long time, at the fag end of his retirement cannot challenge the same reliance was placed on a Division Bench decision of this Court in *Makaradhwaj* v. *State of M.P.* (2). Suffice it to say that the facts of that case are distinguishable from the facts of the present case, the principle laid down is inapplicable, as the employer in the year 1982 accepted the date of birth on the basis of Matriculation Certificate and hence there was no cause for the petitioner to challenge the same. On the other hand, the case of *Makaradhwaj (supra)* supports the case of the petitioner wherein it has been held that a civil servant on the basis of Matriculation Certificate gave his date of birth and allowed the entry to continue the same for a long time and the Government having acted on it, he is guilty of acquiesence and cannot make any grievance.

Though the second ground was not taken in the reply but was agitated during the course of the arguments by the learned counsel for the respondents that as the petitioner wanted a writ of mandamus to be issued, he ought to have issued and served notice demanding justice before filing the writ petition, and therefore writ of mandamus cannot be issued to quash the order of retirement. It is well settled that demand of justice and denial thereof is a pre-requisite for the exercise of prerogative writ of mandamus or any other direction. But the objection raised by the Statutory Body/Corporate Body to defeat the claim of the petitioner, if is technical then for the absence of notice for demand of justice the petition cannot be thrown, particularly when a petition is not for enforcement of may private right or contractual obligation. The claim of the petitioner is against the action of the respondent Corporation, which is neither fair nor just, and is violative of Article 14 of the Constitution.

Of course, the Government or the public authority, when takes a technical plea, the Court has to decide it and if the plea is well founded, it has to be upheld by the Court, but as laid down by the Apex Court, while considering a case of technical

(1) M.P. No. 36/81, decided on 7.10.85. (2) 1974 J.L.J. 71.

plea of limitation in case of *The Madras Port Trust* v. *Hymanshu International*(1), that a technical plea of limitation should not ordinarily be taken up by the Government or a public authority unless of course the claim is not well founded by reason of delay in filing it, the evidence for the purpose of resisting such a claim has become unavailable. Article 226 is meant for doing justice between the parties. The Courts primarily are meant to do justice and do justice and substantial justice between the parties by deciding substantial rights of the parties. Technical pleas should not come in the way where the facts are not in dispute. As the order of retirement passed by the Corporation is arbitrary, capricious, detrimental to the petitioner affecting his livelihood, and violative of Article 14 of the Constitution, the plea, now taken, cannot be accepted.

Lastly, the learned counsel for the Corporation made a prayer that Corporation be allowed to hold an enquiry in the matter. It is upto the Corporation to hold an enquiry about the correct date of birth, if the right is available to the Corporation to do so.

In the result, the petition is allowed. The order of retirement (Annexure-9) published in news paper dated 4.5.90, passed by the General Manager, retiring the petitioner with effect from 5th May, 1990 in quashed, as a result of which the petitioner shall be deemed to continue in service and shall be entitled to all ancillary benefits. Respondents to bear the costs of this petition. Counsel fee Rs. 500/- is already certified.

Petition allowed.

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(1) A.I.R. 1979 S.C. 1144

APPELLATE CIVIL

Before Mr. Justice P. C. Pathak

19 June, 1989.

SMT SHIVKALI BAI and others ...Appellants*

v.

SMT. MEERA DEVI and others ..Respondents.

Civil Procedure Code (V of 1908),Sections 11, 100, Order 1, Rule 9 and Order 8, Rule 6-A, as amended by C.P.C. (Amendment) Act (CIV of 1976) and Hindu Succession Act (XXX of 1956), Section 22–Second Appeal–Suit for partition and possession–Plea of pre—emption on the basis of alleged sale –"Section 100, C.P.C.–Finding of Trial Court that sale was fraudulent and no title passed–Essentially a finding of fact cannot be re-opened in Second Appeal–Order 8, Rule 6-A-Counter claim–By its nature is a cross suit—Would not be affected by dismissal of plaintiff's suit-Order 1, Rule 9, C.P.C.--Non—joinder of necessary party—Fatal for maintaining the suit-Suit dismissed-Hindu Succession Act-Section 22–Right of pre-emption–Not a right to the thing sold but a right to offer of a thing about to be sold–Can be claimed by setting up counter claim in the written statement– Section 11 of the Code–Omission to raise plea of pre-emption in written statement would operate res—judicate *Proper value–In absence of any evidence of the market value the sum actually paid is taken to be proper value.*

Counter-claim being in the nature of cross-suit, is not affected by the dismissal of the plaintiff's suit. The counter-claim has to be disposed of on merits. After the amendment of 1976, the pending suits are governed by the new provisions. Even though the counter-claim was made in the written statement, the plaintiff did not seek leave to file additional written statement in answer to the counter-claim of defendant as provided under Rule 6A(3) of Order 8 of the Code nor did the plaintiff apply to the Court for an order that such counter-claim may be excluded, as provided in Rule 6—C. In other words, the plaintiff discontinued her claim in the sense that she did not raise any issue to the counter-claim. Therefore, the defendant No.3 is entitled to a decree of her claim as provided under Rule 6—E of Order 8 of the Code.

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* S.A.No. 484 of 1982, aggrieved by the Judgment and decree dated 18.10.82, passed by Addl. Judge to the Court of District Judge, Seoni, in C.A. No. 21-A/81.

Smt. Shivkali Bai v. Smt. Meera Devi, 1989.

The Court below found the sale-deed in favour of defendant No.4 as fraudulent without consideration and no title passed to him. These findings are essentially of acts which cannot be reopened in second appeal.

V. Sreedevi Amma v. *Subhadra Devi* (1), *Tarak Das* v. *Sunil Kumar* (2), *Bhagirathi Chhatoi* v. *Adikanda Chhatoi* (3), *Ghewarwala Jain* v. *Hanuman Prasad and another* (4) and *Pyarsingh* v. *Dhansingh* (5); distinguished.

Pathrose Samual and another v. *Karumbon Parameswaran* (6), *Suman Kumar* v. *St. Thomas School and Hostel and others* (7), *Mahendra Kumar and another* v. *State of Madhya Pradesh and others* (8), *Anant Gopal Sheoraj* v. *State of Bombay* (9), *Bimal Jati* v. *Birauja Kaur and others* (10), *Krishna Menon* v. *Kesavan and others* (11), *Sabed Ali* v. *Sahatulla* (12), *M/s Daga Films* v. *M/s Lotus Production and others* (13), *Bhim Singh* v. *Laxmi Narain* (14), *Natha Singh and others* v. *Sunder Singh and others* (15), *Jai Devi Kunwar* v. *Kalyan Singh and others* (16) and *Zahur Ahmed* v. *Moharram Ali* (17); relied on.

Bishan Singh and others v. *Khazan Singh and another* (18), *Hazari and others* v. *Neki* (19), *Narhar* v. *Gullu* (20), *Ramdeo and another* v. *Gangabai and others* (21), *Laxmi Das* v. *Nanabhai* (22), *Sunil Kumar* v. *Ram Prakash* (23), *Ganpat Rao* v. *Iswar Singh* (24), *Mt. Mauli* v. *Lala Brij Lal and others* (25), *Smt. Rani and another* v. *Smt. Santa Bala Debnath and others* (26), *Durga* v. *Munshi and others* (27) and *Bajirao Somaji* v. *Abdul Gaffar* (28); referred to.

Ravish Agrawal for the appellants.

A. S. Usmani for respondent no. 1

S. S. Jha for respondent no. 4

Cur. adv. vult

(1) A.I.R. 1976 Kerala 19
(2) A.I.R. 1980 Cal. 53
(3) A.I.R. 1988 Orissa 285
(4) A.I.R. 1981 M.P. 250
(5) 1980 M.P.L.J. (S.N.) 14
(6) A.I.R. 1988 Kerala 163
(7) A.I.R. 1988 P&H 38
(8) A.I.R. 1987 S.C. 1395
(9) A.I.R. 1958 S.C. 915
(10) I.L.R. 22 All. 238
(11) I.L.R. 20 Mad. 305
(12) 42 C.W.N. 1028
(13) A.I.R. 1977 Cal. 312
(14) A.I.R. 1982 P&H 155
(15) A.I.R. 1926 Lah. 10
(16) 128 All.L.J. Report 541
(17) 56 Indian Cases 34
(18) A.I.R. 1958 S.C. 838
(19) A.I.R. 1968 S.C. 1205
(20) A.I.R. 1931 Nag. 110
(21) A.I.R. 1952 Nag. 51
(22) A.I.R. 1964 S.C. 11
(23) A.I.R. 1988 S.C. 576
(24) A.I.R. 1983 Nag. 816
(25) A.I.R. 1943 Lahore 33(F.B.)
(26) A.I.R. 1971 S.C. 1028
(27) I.L.R. 6 All. 423
(28) A.I.R. 1949 Nag. 338

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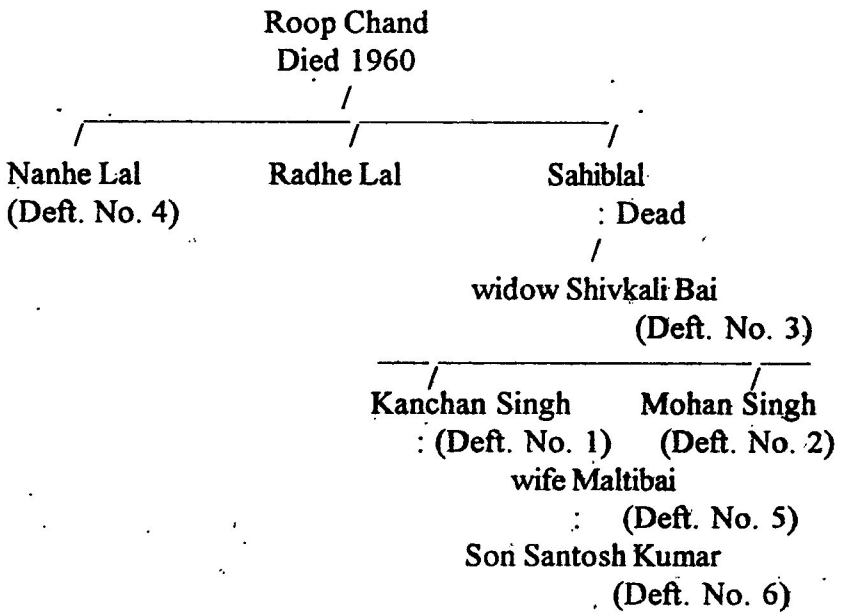
JUDGMENT

P. C. PATHAK J. - This judgment shall also govern the disposal of Second appeal No. 566 of 1982 filed by Smt. Meera Devi (plaintiff) and Second Appeal No. 12 of 1983 filed by Nanhe Lal (defendant No. 4) against a common Judgment and decree dated 18.10.1982 in Civil Appeal No. 21-A of 1981 of the Court of the Additional Judge to the Court of District Judge, Seoni, arising out of Civil Suit-No. 69-A of 1979 of the Court of Civil Judge Class I, Seoni and judgment and decree dated 17.1.1981.

For convenience, the genealogy of the defendants is reproduced :-



Roop Chand had three sons, namely, Nanhe Lal, Radhe Lal and Sahib Lal. Sahib Lal predeceased Roop Chand, who died in 1960. After Roop Chand's death, the defendants and Radhelal partitioned their joint family property by registered deed of partition dated 17.9.1965. Khasra Nos. 260, 263 and 265, total area 17.51 acres fall to the share of the branch of Sahib Lal represented by defendants Nos. 1 to 3, 5 and 6. There was no partition amongst them and the suit lands were jointly held by these defendants.

Plaintiff Smt. Meera Devi brought a suit for partition and allotment of 2/3rd share of the suit lands to the share of defendants Nos. 1 and 2 and for

possession or for possession of any other land of equal value and lastly for a direction - to the defendants to render accounts of *mesne* profits from 5.2.1968 till the date of suit and thereafter till the delivery of possession of the lands on the allegations that in pursuance of agreement dated 10.1.1968 (Ex. P-1) she purchased the suit Khasra Nos. from defendants Kanchan Singh and Mohan Singh on consideration of Rs. 8000/- by registered sale-deed dated 5.2.1968 (Ex. P-2). She had earlier filed Civil Suit No. 81-A of 1969 in the Court of Ist Civil Judge Class II, Seoni, for possession of the suit khasra numbers, which was dismissed by judgment dated 23.2.1970. First Civil Appeal No. 34-A of 1970 was also dismissed on 14.8.1970 by judgment Ex. P-3 affirming the judgment of the trial Court observing that she was not entitled to be placed in possession of the property purchased by her and her only remedy was to sue for general partition and to ask for allotment of the property purchased by her to the shares of her vendors and to claim possession of the property purchased or any other property of equivalent value. Therefore, she instituted the present suit on 28.11.1970 with the prayers for the aforesaid reliefs. The plaintiff pleaded that out of the consideration of R. 8000/-, a sum of Rs. 3000/- was paid to defendants 1 and 2 in cash on the date of agreement and the balance of Rs. 5000/- was to be paid at the time of execution and registration of the sale-deed. By amendment, the plaintiff pleaded that out of the said R. 5000/-, the parties agreed that the plaintiff would repay Rs. 3000/- directly to the creditor of vendors Seth Mangilal, Rs. 132/- towards Takavi Loan and Rs. 210/- towards land revenue to the Govt. and the balance of Rs.1658/- was paid before the registering officer. In alternative the plaintiff pleaded that the payment of full consideration to the vendors was not a condition precedent to the passing of the title and that she acquired title from the moment the sale-deed was registered in her favour.

Defendants 1 and 2 were proceeded *exparte* Defendant No. 3 filed written statement opposing the claim. She denied the payment of consideration and execution of the sale-deed. The plaintiff paid Rs. 1600/- only. They were not indebted to Mangilal. The plaintiff neither paid Rs. 3000/- to Mangilal nor Rs. 210/- towards arrears of land revenue or Rs. 132/- towards takavi loan to the Government. Thus, full consideration was not paid and the title did not pass. She further submitted that on 20.7.1967, the defendants 1 to 3 agreed to sell the suit land for consideration of Rs. 10,000/- to defendant No. 4 for marriage of her

daughter Kantibai to the knowledge of the plaintiff. She opted to avoid the sale-deed in plaintiff's favour in exercise of her right of pre-emption under section 22 of the Hindu Succession Act, 1956 and to purchase the suit land on reasonable price. She denied liability to any *mesne* profits and lastly the defendants 1 and 2 could not sell more than their 4/9th interest in the suit land.

Defendant No. 4 also denied the claim and submitted that in pursuance of agreement dated 20.7.1967 (Ex. D-1), defendants 1 to 3 agree to sell the suit land on consideration of Rs. 10,000/- and delivered possession to him in part performance of the contract. The plaintiff had knowledge of this prior agreement. In pursuance of which the defendants 1 to 3 executed sale-deed Ex. D-2 on 21.2.1970. Other defences are similar to those raised by defendant No. 3. By order dated 25.2.1977, the defendant No. 5 Maltibai and the defendant No. 6 Santosh Kumar were added as parties to the suit. Maltibai through her separate written statement denied the entire claim. She also opted to exercise right of pre-emption available to her. In addition she submitted that the defendant No. 1 was addict to liquor. Plaintiff's husband is a money-lender. He obtained the sale-deed in lieu of some loan by exerting under undue influence. The sale is without consideration and no title passed to the plaintiff.

The learned trial Court dismissed the suit on the findings that the plaintiff was not the real purchaser and her husband negotiated the transaction and he nominally put his wife's name as purchaser; out of the total consideration of Rs. 8000/-, the defendants 1 and 2 received Rs. 3000/- on the date of agreement and Rs. 1658/- on the date of registration - total Rs. 4658/-; there was no agreement between the parties that the non-payment of the balance of the consideration would prevent the - passing of the title; the sale was to repay the loan and arrears of land revenue and takavi; Kanchan Singh being the eldest male member is the *Karta* of the joint family and the transfer of the suit lands by him is binding on all the defendants except defendant No. 4; agreement Ex. D-1 in favour of defendant No. 4 is not genuine; sale-deed Ex. D-2 was executed with intent to frustrate the sale-deed Ex. P-2, and therefore, the defendant No. 4 acquire no title thereunder. The suit was dismissed mainly on finding that she was not the real purchaser

The plaintiff filed first appeal which was partly allowed and the plaintiff's suit was decreed to the extent of 4/9th share in the suit property and she was declared entitled to get the same by partition by metes and bounds. Accordingly, a preliminary decree for partition was passed in her favour.

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Aggrieved by the judgment of the first appeal Court, defendants 3, 5 and 6 have filed Second Appeal No. 566 of 1982 for passing a decree for the entire suit property while defendant No. 4 has filed Second Appeal No. 12 of 1983 for dismissal of the plaintiff's suit on the basis of the sale-deed Ex. D-2 in his favour as also on other grounds.

In all the three second appeals, the substantial questions of law were framed as per respective order-sheet dated 17.1.1983.

The question for decision is whether the lower appeal Court on wrong premises disallowed the claim of pre-emption by the defendants 3, 5 and 6 under Section 22 of the Hindu Succession Act, 1956, (hereinafter called the Act.). Defendant No. 3 raised specific plea in para 12(e) of the written statement claiming preferential right to purchase the suit lands on reasonable price. Defendant No. 5 also raised similar plea in para 12(d) of her written statement. The learned trial Court took notice of the pleas in para 7 of his judgment, but omitted to raise any issue on them. Before the lower appeal Court, the defendants reiterated their right of pre-emption as one finds in paras 34 to 36 of his judgment. The appeal Court held that the defendant No. 3 has the right of pre-emption in respect of the suit property but declined to give any relief to her on the grounds that she did not comply with the mandatory provision of Section 22(2) of the Act by making an application for determination of the consideration by the Court and that she did not express her willingness to acquire the suit property for the consideration that may be determined.

Learned counsel for the defendants submitted that the defendant No. 3 has been ready and willing to acquire the suit property on a reasonable price that may be determined by the Court. No separate application is essential since the necessary averments are in the written statement itself. He also submitted that such an application is essential only "in the absence of any agreement between the parties". In the present case, the vendors being the sons and the pre-emptor being the mother, there is no dis-agreement. At any rate, there is no material on record to show any dis-agreement as to the consideration.

Learned counsel for the plaintiff submitted that in order to exercise right of pre-emption under Section 22 of the 'Act', the defendant No.3 has to file a separate suit as held in *V. Sreedevi Amma* v. *Subhadra Devi* (1), *Tarak Das*

(1) A.I.R. 1976 Kerala 19.

v. *Sunil Kumar* (1) and *Bhagirathi Chhatoi* v. *Adikanda Chhatoi* (2) and mere raising a plea in the written statement is not enough.

The right of pre-emption is not a right to a thing sold but a right to offer of a thing about to be sold. This right is called the primary or inherent right. The pre-emptor has a secondary right or a remedial right to follow the thing sold. It is a right of substitution but not of re-purchase i.e. the pre-emptor takes the entire bargain and steps into the shoes of the original vendee. Preference being essence of the right, the plaintiff must have a superior right to that of the vendee or the person substituted in his place and the right being a very weak right, it can be defeated by all legitimate methods, such as the vendee allowing the claimant of a superior or equal right being substituted in his place. *Bishan Singh and others* v. *Khazan Singh and another* (3). The right of pre-emption becomes enforceable only when there is a sale but the right exists antecedently to the sale, the foundation of the right being the avoidance of the inconveniences and disturbances which would arise from the introduction of a stranger into the land. The correct legal position is that the statutory law of pre-emption imposes a limitation or disability upon the ownership of a property to the extent that it restricts the owner's right of sale and compels him to sell the property to the person entitled to pre-emption under the statute. *Hazari and others* v. *Neki* (4).

Section 22 of the 'Act' of1956 confers preferential rights to acquire property to the cases of devolution of property upon heirs of Class I of the Schedule. No procedure is laid down how the said right of pre-emption is to be exercised. In *Vallivil Sreedevi Amma* v. *Subhadra Devi and others* (5) it was held that the remedy of co-heirs to enforce their preferential right under section 22(1) of the Succession Act is by way of regular Civil Suit before a competent Civil Court and not by way of an application under Section 22(2) of the Act. This was followed in *Tarak Das* v. *Sunil Kumar* (1) by Orissa High Court in a recent judgment in *Bhagirathi Chhatoi* v. *Adikanda Chhatoi* (2). In *Pyarsingh* v. *Dhansingh* (6) it was held that the remedy of the co-heirs is not by an application but is by a suit. The Gwalior Bench of this Court in *Ghewarwala Jain* v. *Hanuman Prasad and another* (7) following the Kerala

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(1) A.I.R. 1980 Cal. 53.
(2) A.I.R. 1988 Orissa 285.
(3) A.I.R. 1958 S.C. 838.
(4) A.I.R. 1968 S.C. 1205.
(5) A.I.R. 1976 Kerala 19.
(6) C.R. No. 239 of 1977, decided on 4.10.79 = 1980 M.P.L.J.S.N.14
(7) A.I.R. 1981 M.P. 250

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decision (supra) also held that when the property has already been transferred, the remedy of the co-heirs is to file a suit.

In *Narhar* v. *Gullu* (1) it was held that the right of pre-emption in Berar must be claimed at the time the sale takes place and it cannot be raised as a defence to a suit for possession. It is only a vested and ascertained right which could be pleaded as an answer to any suit and that the right of pre-emption, being inchoate, gives no such vested right to co-sharers as to entitle them to resist the claim for possession by pleading it in bar of the suit. This was followed in *Krishnabai* v. *Madhukar Sitaram* (2). In this case, one Mahadeo sold two acres of land to the stranger Krishna Rao. Krishna Bai filed a suit for pre-emption available to her under section 174(1) of Berar Land Revenue Code, 1928. During the pendency of the suit, the purchaser sold the land to Madhukar, defendant No. 2, who contended that he had a superior right of pre-emption as he was more nearly related to Mahadeo and that the suit was not maintainable against him. His defence was overruled in the trial Court but upheld in first appeal. In further appeal, the High Court held that though Madhukar had superior right, capable of being enforced by a suit at the time when he purchased the interest from Mahadeo, he cannot claim substitution on the basis of the re-purchase. The right of pre-emption in Berar is based on specific provisions of Berar Land Revenue Code and it is to be exercised in the manner provided in that enactment. Therefore, it was held that the lawful course open to Madhukar was to file a suit as required by section 174(1) on the basis of Mahadeo's original sale to Krishna Rao and not by raising a defence on the basis of re-acquisition of the interest from the stranger purchaser.

Krishnabai's case (supra) was overruled by Full Bench decision in *Ramdeo and another* v. *Gangabai and others* (3). The Bench held that there is nothing in the theory of substitution which militates against transfer of a property to the pre-emptor by a purchaser. If the transfer be in recognition of right of the pre-emption, the purchaser cannot be regarded as making a fresh transfer but can only be regarded as permitting substitution of the pre-emptor in place of the purchaser in the original transfer. It was further held that having regard to the procedure, both the questions, the right to frame and right to avoid subsequent transfer, may be raised and decided in the same suit, they cannot be mixed up, they require separate consideration.

(1) A.I.R. 1931 Nag. 110. (2) A.I.R. 1946 Nag. 367. (3) A.I.R. 1952 Nag. 51.

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By Section 58(iv) of the Code of Civil Procedure (Amendment) Act, 1976 (No. 104 of 1976), Rule 6-A to Rule 6-G were inserted in Order 8 of the Code providing for counter claims. Even before amendment, the right to file counter claim was available under Rule 6 of Order 8; the only rider being that the claim must be for recovery of money. See : *Laxmi Das* v. *Nanabhai*(1). There is nothing in the Rules which precludes a Court from treating a counter claim as a cross suit.

Rule 6A of Order 8 of the Code of Civil Procedure is reproduced for ready reference :

"6A. Counter-claim by defendant.

(1) A defendant in a suit may, in addition to his right of pleading a set-off under Rule 6, set up, by way of counter-claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter-claim is in the nature of a claim for damages or not :

Provided that such counter-claim shall not exceed the pecuniary limits of the jurisdiction of the Court.

(2) Such counter-claim shall have the same effect as a cross-suit so as to enable the Court to pronounce a final judgment in the same suit, both on the original claim and on the counter-claim.

(3) The plaintiff shall be at liberty to file a written statement in answer to the counter-claim of the defendant within such period as may be fixed by the Court.

(4) The counter-claim shall be treated as a plaint and governed by the rules applicable to plaints.

In *Pathrose Samual and another* v. *Karumban Parameswaran* (2), a counter-claim was held substantially to be a cross-suit. It is really a weapon of offence and enables a defendant to enforce a claim against the plaintiff as effectively as in an independent action. It need not be an action of the same

(1) A.I.R. 1964 S.C. 11. (2) A.I.R. 1988 Kerala 163.

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nature as the original action or even analogous thereto, even though the claim has to be - one entertainable by the Court. Rule 6-A does not limit such claims to money-suits. Similar view was taken in *Suman Kumar* v. *St. Thomas School and Hostel and others* (1). In *Mahendra Kumar and another* v. *State of Madhya Pradesh and others* (2), the Supreme Court held that Rule 6A(1) does not bar the filing of a counter claim by the defendant after he had filed the written statement. Rule 6-E provides that if the plaintiff fails to put in a reply to the counter-claim, the Court may pronounce judgment against the plaintiff or may make such order as it thinks fit. Rule 6-G provides that the rules relating to written statement by a defendant shall apply to a written statement filed in answer to a counter-claim.

If counter-claim is in the nature of cross-suit and is not restricted to money-suits, there is no reason why a defendant cannot advance a claim based on right of pre-emption in his written statement. Whatever may have been the law before insertion of Rules 6A to 6G, there seems to be no bar in the Code now to put in such claim in the same suit. The first case under section 22 of the Act laying down that an independent suit ought to be filed, was decided in January, 1975, and as such, there was no occasion to consider the impact of Rule 6A. The other decisions including of this Court also did not examine whether even after-insertion of Rule 6A, it was essential for the pre-emptor to file an independent suit and could not seek relief by raising a plea in his written statement itself.

Withoutmost respect to aforesaid judgments, I am unable to agree that a defendant cannot resist a suit of a 'stranger' for partition and possession by asserting his right of pre-emption in his defence. Rule 2 of Order 8, C.P.C. also provides that defendant must raise by his pleadings all matters which show the suit not maintainable or that a transaction is either void or voidable in point of law. This Court in *Narhar's case (supra)* and Kerala High Court in *Vallivil Sreedevi Amma* v. *Subhadra Devi and others (supra)* rightly held that the alienation of his interest by a co-heir in violation of Section 22(1) of the Succession Act is not void but is voidable at the instance of the other non-alienating co-heirs. Rule 2 of Order 8, C.P.C. requires the defendants to raise pleas in the written statement that the sale-deed in favour of the plaintiff is voidable at his instance. The omission to raise such a ground in his defence

(1) A.I.R. 1988 P. and H. 38.
(2) A.I.R. 1987 S. C. 1395.

may attract constructive *res judicata* within the meaning of Explanation IV to VI of section 11 of the Code of Civil Procedure. That is why in *Bimal Jati* v. *Biranja Kuar and others* (1), a mortgagee with a right of pre-emption created in his favour by the mortgage deed, was allowed to set it up in a suit for redemption. In *Krishan Menon* v. *Kesavan and others* (2), a defence based on right of pre—emption was allowed to be raised. The only rider to such a defence was that his right of pre-emption should be enforceable i.e. should not be barred by limitation. See : *Sabed Ali* v. *Sahatulla* (3).

In the Kerala case, the learned Judges observed that Section 22 of the Act creates right without prescribing any procedure for its enforcement. Therefore, they held that ordinary procedure for enforcement of any civil right has to be resorted to by the co-heirs who wish to enforce their right under Section 22(1) and that remedy is by way of a regular civil suit.

The Kerala case and others following it were cases in which the pre-emptor attempted to establish his right by making an application under section 22(2) of the Act, which is not the case here. Here a positive defence based on right of pre-emption has been raised in the written statement itself. Even if it is conceded that such a right could not be claimed in defence, there is no bar now, after insertion of Rules 6—A to 6—G in Order 8 of the Code of Civil Procedure. I am, therefore, of the opinion that the right of pre-emption can be claimed in the written statement.

It was also urged that Rules 6—A to 6—G of Order 8, C.P.C. are not retrospective and would not be attracted since the suit was filed on 28.11.1970. The argument is devoid of substance. It is well settled that a litigant has no vested right in any procedure. Alterations in procedural law are generally held to be retrospective in the sense that apply to future as well as pending matters. See : *Anant Gopal Sheoraj* v. *State of Bombay* (4).

The next question for decision is whether alienation made by the defendants 1 and 2 is not binding on defendants 3, 5 and 6. The first appeal Court held that the sale was for legal necessity though for want of full consideration., the estate of minor defendant Santosh Kumar was not benefitted and Maltibai did not get any consideration. The finding of the Court below is

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(1) I.L.R. 22 All 238. (2) I.L.R. 20 Mad. 305

(3) 42 C.W.N. 1028. (4) A.I.R. 1958 S.C. 915

at variance with the discussion. Therefore, the question needs to be examined afresh.

There cannot be any dispute that burden lay on the alienee to prove either that there was a legal necessity in fact or that he made proper and *bonafide* enquiry as to the existence of such necessity or that he did all that was reasonable to satisfy himself as to the existence of such necessity. See : *Sunil Kumar* v. *Ram Prakash* (1). The existence of a necessary purpose is not the same as legal necessity, for, there may be much resources, much income, making a loan unnecessary. The lender must show the necessity for the loan. *Ganpat Rao* v. *Iswar Singh*(2). Where money has been borrowed by the manager and the lender seeks to render the whole family property including the shares of the other members of the family liable for the debt, he is not entitled to a decree against the whole family property unless he shows that there was a necessity for the loan or that he made reasonable enquiry as to the necessity for the loan. *Mt. Mauli* v. *Lala Brij Lal and others* (3). In *Smt. Rani and another* v. *Smt. Santa Bala Debnath and others* (4), it was held that the recitals in the deed may be used to corroborate other evidence of legal necessity but the weight to be attached varies according to the circumstances of each case.

In the present case, the plaintiff failed to aver the legal necessity or the enquiry, if any, made by her to ascertain the existence of the necessity. In the absence of plea, the evidence led by the plaintiff cannot be looked into. The only witness examined by her is Mangal (P.W.2). He stated that defendants Kanchan and Mohan Singh were indebted to one Mangilal for the sum of Rs. 3000/- and the dues towards land revenue and tacavi were Rs. 400/-. The witness nowhere stated that on verification he found the vendors really indebted to Mangilal or that the tacavi and the arrears of land revenue were due. The witness added that Kanchan Singh and Mohan Singh told him that they needed money for the marriage of their sister and also for agriculture. In cross-examination he admitted that he made no enquiry before the bargain for the suit land. He further admitted that Rs. 3000/- to Mangilal and Rs. 400/- towards the alleged arrears of tacavi and land revenue were never paid by him.

Sheokalibai (D.W.1) stated that her daughter's marriage was performed just one year after the partition amongst them. She denied that they had taken

(1) A.I.R. 1988 S.C. 576. (2) A.I.R. 1938 Nag. 816.
(3) A.I.R. 1943 Lah. 33 (F.B.) (4) A.I.R. 1971 S.C. 1028.

any loan from Mangilal, or as tacavi from State Government. She also denied that the land revenue was in arrears. Nanhe Lal (D.W 2) stated that Kantibai's marriage was performed in *Phalguna* 1967, i.e. before the execution of sale-deed Ex. P-2 The plaintiff failed to examine Mangilal to prove the indebtedness and also produced no ducumentary evidence like demand notice to show that the land revenue and tacavi loan were due against the defendants.

The plaintiff thus miserably failed to discharge her burden by pleading and proving the legal necessity. The necessity shown in Exs. P-1 and P-2 are at variance with the oral statement of Mangal. It has to be borne in mind that the recital of legal necessity is not the evidence of such a necessity without substantiation by evidence aliunde *Smt. Rani and another* v *Smt. Santa Bala Debnath and others (supra)*. It must, therefore, be held that the sale is not binding on the defendants Nos. 3, 5 and 6. The sale is valid only to the extent of shares of Kanchan Singh and Mohan Singh. The argument that the title did not pass to the plaintiff since full consideration was not paid, cannot be accepted. There is no evidence to show that defendants 1 and 2 did not intend to convey title until payment of whole consideration.

The next question for decision is what is the share of Kanchan Singh and Mohan Singh in the suit land. Sahiblal left behind his widow Sheokalibai, two sons Mohan and Kanchan Singh and one daughter Kantibai, who is not a party in the suit. The Court below held that the alienation by Kanchan Singh is valid to the extent of his 1/9th share and by Mohan Singh to the extent of 1/3rd share - total to the extent of 4/9th share only. This finding is based on the division of the ancestral property into three shares among defendants 1 to 3. Obviously, right of Kantibai, a Class I heir, was not at all taken into account. If that is also taken into account, the defendants 1 to 3 each will get only 1/4th share Kanchan Singh could not alienate the shares of Maltibai and Santosh Kumar. Therefore, transfer by Kanchan Singh is valid to the extent of his 1/12th share only. Mohan Singh's share comes to 1/4 only. Therefore, the sale in plaintiff's favour is valid to the extent of 1/3(1/12+1/4) share only and not 4/9, as found by the Court below.

Next question is whether the non-joinder of daughter Kantibai is fatal to the maintainability of the suit. It is no more in dispute that Sahiblal left behind a daughter Kantibai also. She was, therefore, a necessary party, being Class I heir, in the suit for partition filed by the plaintiff She could not be represented

by any other heir of Sahiblal. The fact that Kantibai is left behind by Sahiblal, was well known to the plaintiff. The plaintiff has so far not made any application to implead Kantibai as a party in the suit. The suit is thus bad for non-joinder of a necessary party and is liable to be dismissed.

The next question for decision is whether the dismissal of the plaintiff's suit on the ground of non-joinder of necessary party does not affect the counter-claim of the defendant No.3. Counter-claim being in the nature of cross-suit, is not affected by the dismissal of the plaintiff's suit. The counter-claim has to be disposed of on merits. After the amendment of 1976, the pending suits are governed by the new provisions. Even though the counter-claim was made in the written statement, the plaintiff did not seek leave to file additional written statement in answer to the counter-claim of defendant as provided under Rule 6A(3) of Order 8 of the Code nor did the plaintiff apply to the Court for an order that such counter-claim may be excluded, as provided in Rule 6C. In other words, the plaintiff discontinued her claim in the sense that she did not raise any issue to the counter-claim. Therefore, the defendant No.3 is entitled to a decree of her claim as provided under Rule 6E of Order 8 of the Code. See: *M/s Daga Films* v. *M/s Lotus Production and others* (1) and *Bhim Sain* v. *Laxmi Narain* (2). In view of the foregoing discussion, the defendant No.3 is entitled to a decree for pre-emption of her right in the suit lands.

The next question for consideration is how much amount the defendant No.3 is liable to deposit as the pre-emptive price. As held above, the defendants Nos.1 and 2 sold more than they lawfully could. They had only 1/3 share in the suit property. The sale in plaintiff's favour is, therefore, valid only to the extent of 1/3 share. The sale of remaining 2/3 of the suit property is, therefore, invalid. The plaintiff paid Rs. 4658/- only. In the absence of any evidence of the market value, the sum actually paid is taken to be a proper value. See: *Natha Singh and others* v. *Sunder Singh and others* (3), *Jai Devi Kunwar* v. *Kalyan Singh and others* (4) and *Zahur Ahmad* v. *Moharram Ali* (5).

As discussed above, Rs. 4658/- were paid towards consideration by the plaintiff for the entire suit property. The value of 1/3 share comes to Rs. 1552.66 P.

(1) A.I.R. 1977 Cal 312. (2) A.I.R. 1982 P. and H. 155
(3) A.I.R. 1926 lah. 10. (4) 128 A.L.J.R. 541. (5) 56 I.C. 34.

in round figure Rs. 1553.00. The defendant No.3 cannot be expected to pay for her own property. She need only pay a proportionate price for the property over which she has a right to pre-emption. See : *Durga* v. *Munshi and others* (1). On deposit of this amount in the Court within two months from today the defendant No.3 will be deemed to have been substituted in place of the plaintiff in the sale-deed Ex.P-2. No fresh registered document of sale is necesary for passing of title. *Bajirao Somaji* v. *Abdul Gaffar* (2). The right of the pre-emption claimed by defendant Nos.4 to 6 is not tenable since their claim is not superior to that of defendant No.3.

It was also argued that the property had already been sold by defendants 1 to 3 to defendant No.4. The Court below found the sale-deed in favour of defendant No. 4 as fraudulent without consideration and no title passed to him. These findings are essentially of facts which cannot be re-opened in second appeal. His claim was rightly dismissed by the first appeal Court.

In view of the foregoing discussion, Second Appeal No. 484 of 1982 is allowed. The judgment and decree passed by Court below is set aside and instead the plaintiff's suit is dismissed. Defendant No.3's counter claim of pre-emption is decreed as aforesaid and decree be drawn in her favour as provided in form prescribed under Order 20, Rule 14 of the Code of Civil Procedure.

The appeal No. 566 of 1982 filed by the plaintiff is dismissed so also the appeal filed by the defendant No.4 Nanhe Lal i.e. S.A.No. 12 of 1983 is dismissed. Defendants in Second Appeal No.484 of 1982 shall be entitled to costs. The defendant No.3 will be entitled to costs from the plaintiff. Defendant No.3 shall be entitled to deduct the costs recoverable from the plaintiff from the purchase money which she is required to deposit in the trial Court. Counsel's fee Rs.300/-, if certified.

Appeal dismissed

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(1) I.L.R.6 All. 423. (2) A.I.R. 1949 Nag. 338.

APPELLATE CIVIL

Before Mr. Justice Y. B. Suryavanshi.
27, October, 1989.

S.S. RAMCHAND and ors. ...Appellants*

v.

DHANENDRA KUMAR and ors. ...Respondents.

Civil Procedure Code (V of 1908)–Order IX, Rule 13 and Order XLIII, Rule 1(d)–Appeal–Against order dismissing the application for setting aside ex parte *decree–Order IX, Rule 13–No finding as to from which date appellants stopped attending the Court–Presiding Officer was also on leave prior to drawing of final decree–Replies etc. have been filed by the non–applicants–Amendment applications will pending decision evidence not led by the parties nor the parties were required to lead evidence–Order of Trial Court improper–Order set aside and matter remitted to the Trial Court for fresh decision allowing respective parties to lead evidence.*

After the written objections/replies filed by the contesting respondents/ NAs, points for decision/issues could have been framed and then it could have been considered whether the parties wanted to lead necessary evidence thereupon. It further seems that the applications for amendment etc. are still pending in the trial Court. In the absence of materials on record and the nature of order-sheets also referred above, the impugned orders were improper and are liable to be set aside.

Chunnilal v. *Chhota Bhai Moti Bhai* (Firm) (1) ; relied on.

None for the appellants.

K.P. Munshi for respondent no.5.

R.N. Roy for respondent no.6.

Cur.adv.vult.

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* M.A. No. 290 of 1986, against the Order dated 27.6.86, passed by IInd Addl. Judge to the Court of District Judge, Jabalpur, in M.J.C. No. 16/84

(1) 1966 J.L.J. Note 146.

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ORDER

Y. B. SURYAVANSHI, J. - The appellants have preferred this appeal against the orders dated 27.6.86 passed by Second Addl. Judge to the Court of District Judge, Jabalpur, in M.J.C. No. 16 of 84 whereby their application, dated 16.2.84, purporting to be under Order 9, Rule 13, CPC for setting aside the *exparte* final decree in Civil Suit No. 14-A/81 was dismissed.

A perusal of the record and the submissions by the learned counsel on both sides echo the later of the warring parties in this civil litigation which originated in the year, 1952. It seems to be a two generations suit yet the controversies vertically or horizontally are going on.

One S.S.Sahiblal, the father of respondents 1 to 4 filed a civil suit No.12-A/52 in the Court of First A.D.J., Jabalpur for partition and separate possession of his share against the respondents 5 to 8 and the appellants. During the pendency of proceedings, Sahiblal died, and respondents 1 to 4 were brought on record as LRs. The trial Court passed a preliminary decree on 29.7.55 declaring the shares of certain parties. The High Court in F.A.No. 139/55 modified the Decree and also taking into consideration the fact of Smt. Khilonabai having died during the pendency of the appeal, ordered that one-third share would go to the branches of Munnalal, Ramchand and Rajkumar each respectively. An appeal was preferred before the Supreme Court, and decree passed by the trial Court was restored subject to the modification with interest declared in favour of Khilonabai i.e. one fourth share would devolve upon her sons Munnalal and Ramchand, to the exclusion of her grand-son Rajkumar. Thus, as per the preliminary decree confirmed by the Supreme Court, the plaintiff Sahiblal had one-fourth, Munnalal, his wife and sons had 5/24th, and Ramchand, his wife and sons had one-fourth and Rajkumar had one fourth share. Further, to this, Ramchand and Munnalal got one-eighth share each out of the total share of Mst. Khilonabai.

For effecting the partition by meets and bounds and to handover possession to each of the respective parties, Shri G.P.Choube, Advocate was appointed as Commissioner who submitted his report on 1.7.68. S.S.Sahiblal preferred objections to the said report which was dismissed in default, as per orders dated 6.2.69 passed in M.J.C.No.20 of 68. The trial Court refused to restore the objections filed. S.S.Sahiblal then preferred M(F)A.No. 71/69. Sahiblal after obtaining preliminary decree as finalized by the Supreme Court

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had applied for possing a final decree for partition. The parties were directed to file affidavits on 4.10.83 and the Sahiblal was also expected to file affidavits in support of the objections to the Commissioner's Report, containing proposal for final division of movable and immovable property. The trial Judge waited for the said Sahiblal and his counsel till about 4O'clock and ultimately passed an order to the effect that Sahiblal's objections to the Commissioner's report we are dismissed in default. All the claimants had effected a compromise with respect to the division of property amongst themselves, and plaintiff was not a party to the compromise. The trial Court held, that the compromise was lawful and accordingly directed the same to be recorded and a decree in terms of the compromise be passed. This order was the subject matter of the Civil Revision No.278/69. By a common order, the Civil Revision No. 278/69 and M(F)A. No. 71/67 were decided, holding, that there was sufficient cause made out by Sahiblal and he was entitled to have his objections to the report restored to file. Pausing here, it may be mentioned that in Paras 4, 6 and 7, there are certain observations to the effect that further proceedings without suitable amendment of the preliminary decree will be infructuous at present. With those observations, the matter came back to the trial Court to take into consideration the aforesaid observations by the High Court and to pass a final decree.

Other salient features in the case are that on 13.8.68 there was a compromise between those appellants and respondent No.6 Nandan Kumar. Ishwar Prasad (deceased) and respondent No.5 Smt. Pyari Bahu according to which it was agreed upon that the appellants will pay Rs.89,000/- to them, so far as the claim for movables or any cash amount is concerned (Document No.A in the reply of the appellants to the preliminary objection filed by respondent Nos.5 and 6) Vide order-sheet dated 4.10.68, the said compromise was accepted as lawful (copy of the document No. A-1 filed by the appellants). Receiver was also asked to submit his accounts. The preliminary decree was drawn on 4.10.68.

It is alleged by the appellants that in terms of the said compromise (dated 13.8.68) appellants paid Rs. 12,000/- to Nandankumar, Pyari Bahu and Ishwar Prasad on 29.6.69 (Receipt Document A-2); that again on 14.12.71, a compromise was entered into between the appellants and the said respondents 5 & 6 Pyaribahu, Nandankumar and Ishwar Prasad, amending the earlier compromise dated 13.8.68 since one property was left to be included which was later on included. (Copy of compromise dt. 14.12.71 Document A-31).

The plaintiff Sahiblal was left out as a party in the said compromise and therefore, another compromise was entered into with plaintiff Sahiblal by all the parties on 16.12.71 in view of the observations by the High Court in orders dated 15.12.69 in Civil Revision No.278/69. (High Court's order Document-A-4) and compromise application dated 16.12.71(Document-A-5). The order sheets of the even dates 16th and 17th December, 1971 referred to the compromise.

That again on 17.12.71 a written agreement was entered into between the appellants and respondents 5, 6 and Ishwar Prasad which deed was got registered on 18.12.71. It was found in sufficiently stamped and hence a Revenue Case was registered in the Court of S.D.O., Jabalpur and the documents was impounded and the charges were paid by the appellants (copy of Agreement dated 17.12.71 Document-A-6).

That, again, on 21 12.71 compromise petition was filed in the Court (Document-A.7) and by this registered-deed it was agreed by Nandankumar and others, that amounts due to or against the appellants will be paid by Nandankumar and others to Sahiblal, and they further assured and promised the appellants that they need not attend the Court and the matter will be fought by them only. The amount of Rs.89,000/- was to be paid by the appellants in light yearly instalments. The appellants contended that on 31.12.71 they paid Rs.11,000/- (Document A-8). Then there had been exchange of notices and replies between the parties.

On 21.12.72 there had been a partition between the respondents 5, 6 Ishwarprasad and Kamlaram, first wife of Nandankumar for herself and children (Document No.A-9). Accordingly, Rs.66,000/- was to be paid to Ishwar Prasad by the appellants (Document-A-10). There was further compromise by the appellants with Ishwar Prasad, in which the remaining amount was settled and finalized for Rs. 41,000/- which they paid to Ishwar Prasad (Compromise dt. 30.5.79 Document-A-11).

The crucial date is 8.5.72. Order-sheet Document-A-12, which records that the compromise petition dt. 16.12.71 and 21.12.71 have been varified and the learned Judge is satisfied about the legality of the compromise terms. Therefore, it is ordered that a preliminary decree be drawn in terms of the compromise petition dated 16.12.71 and 21.12.71, which shall form part of preliminary decree.

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The other feature is said to be that there were proceedings for award before the Arbitrator Shri S.K.Jain, Third Addl. Sessions Judge, Jabalpur who gave an order on 15.7.80 in favour of the appellants. Thereafter, S.S.Nandan Kumar and Smt. Pyaribahu objected the Award and also claimed their share in it but the objection was rejected by the Court on 8.5.81. Against that order, they filed M.P. No. 856/81 in the High Court which is still "subjudice" (According to appellants this fact was also concealed by the respondents and till the decision of that petition no final decree could have been passed). The appellants further alleged that according to the order-sheet dated 8.5.72, it was ordered that the compromise petitions dated 16.12.71 and 21.12.71 shall form part of the decree and it is to be framed accordingly, but the applicants now find that the part of the compromise regarding the movables and payments of Rs.89,000/- do not find mention in the final decree dated 3.1.83.

In the above said metrix of facts and law, there were three off-shoots:

(i) The appellants filed an application, dated 16.4.84, under Order 9, Rule 13, r/w Sec. 151, CPC for setting aside *exparte* final decree dated 3.1.83 against them and to modify the decree as per compromise between the parties and as directed vide order-sheet dated 8.5.72. This was registered as M.J.C. No.16/84.

(ii) The appellants filed another application u/s 151, 152, 153, CPC, registered as M.J.C.No. 15/84, for amending or modifying the said decree.

(iii) The appellants also filed an application for stay in the suit and the execution proceedings initiated by the defendants.

The ground in M.J.C. No. 16/84 is, that the appellants had compromised with the present respondents after executing some registered documents in respect of movable property and had also made payments (Refer. Paras 7,8 and 9 supra) and after execution of the registered documents the respondents further promised and assured the appellants that now they will settle the matter in the Court and they (appellants) need not attend the Court and yet allegedly they suppressed the other documents and did not bring them to the notice of the Court and accordingly, got final decree passed by practicing fraud.

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Secondly, the appellants' counsel in the litigation was Shri S.K.Seth (as his Lordship then was) who was elevated to the Bench on 27.11.78, and could not appear for them, and thus, neither the appellants appeared nor their counsel and the appellants had any notice or intimation about the proceedings thereafter. Thus, the appellants had no notice of the final decree which was framed behind their back, which is also said to be a mistake apparent on the face of the record. The application under Order 9, Rule 13, CPC filed by the appellants was supported by an affidavit by the appellant Rajendra Kumar, son of Ramchand, Furthermore, on the same date, an application was also filed which purports to be u/s 5/7 of the Indian Limitation Act, wherein, it was mentioned that the applicants (appellants) *bonafide* did not take part in the proceedings, thinking, that since the matter has been compromised with them, they had nothing to pay and that there being no counsel after 27 11.78, no notices of the applications filed by respondents Nandankumar and another, were given to the appellants. Thus, there is suppression of facts. This application was also supported by an affidavit.

Before the trial Court in M.J.C. No.16/84, Nandankumar and N.A.Smt.Pyaribahu filed their written objections on 30.10 84, separately, but the contents are virtually the same. Those NAs raised objections viz. that the Judgment in open Court has been pronounced as per provisions in C.P.C. and was dated and signed in open Court, and thereafter, after publication on Notice Board a decree was drawn up. The decree was required to be engrossed on a non-judicial stamp paper of the value of Rs.27,212/- and Para 7 of the Judgment provided that one-third of that amount has to be borne by Rajkumar, Ramchand all defendants and Pyaribahu and Nandankumar, as ordered. Rajkumar, did not deposit one-third share. Therefore, the decree has not, so far, been drawn as ordered. In the execution proceedings, the appellants had prayed for stay. That the trial Court rejected the application for urgent hearing of the execution case on 4.10.84 and directed that the execution case be linked up in the M.J.C. Nos. 15/84 and 16/84 for hearing and also with the main suit. The further objection is that in the application under Order 9, Rule 13, CPC. there is not a whisper to the effect that those four defendants were "prevented from appearing by sufficient cause, when the suit was called on for hearing"; and the provisions of Section 5/17 Limitation Act are foreign to application under

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Order 9 Rule 13, CPC; and thus, the application is untenable. Similarly, the application registered as MJC No. 15/84 is also wholly untenable in view of Order 20, Rule 3 except as provided by Section 152, CPC of Review. In the instant case, no review has been filed.

On a perusal of the order-sheet in M.J.C. No. 16/84 in particular from 30.10.84 onwards, it is observed that it was adjourned on about 23 hearings for "arguments". This includes also the dates on which the Presiding Officer happened to be on leave. According to order-sheet dated 20.6.86, the applicant was absent, the learned counsel for the NA No.1 was present-who was heard and the case was fixed for orders on 26.6.86. On 26.6.86 it was adjourned to 27-6-86 and the impugned orders were passed on 27.6.86 which have been challenged in this appeal.

Before the arguments in the appeal, were concluded, the respondents 5 and 6 filed "Preliminary objections" in which the historical background has been narrated besides the objections taken therein. Many documents were filed as Annexures. On the other side, the learned counsel for the appellants filed a written reply to those objections, in general as also parawise reply, accompanied by documents referred therein.

According to the objections by the respondents, from the end of 1976 the appellants who were defendants had deliberately left attending the Court; and despite notice, did not come. They were noticed for contributing their one third share. In MJCs summons and notice was served on 13.1.84 but they had been creating hurdles. They had also sought time; Hon'ble Shri Justice S.K.Seth was elevated to the Bench on 27.11.78 but he had stopped attending the Court" even for two years prior to the elevation", (Para iv) of objections-application that the appellants had filed an application registered as MJC 1/85 for prosecuting the respondents. The application was u/s 195, r/w 340, Cr. P.C, which was dismissed. Appellant's civil Revision No. 512/86 was also dismissed on 9.4.87; that the decisions therein would operate as *"res judicata"* in the present proceedings; the absence of appellant No. 1 is said to be intentional. Various other pleas of estoppel, *res judicata, Waiver, abuse* of the process of law have been raised. On the other hand, in the reply of the appellants, those submissions are denied and disputed.

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Order 9, Rule 13 reads as follows:

"Order 9, Rule 13. Setting aside decree *ex-parte* against defendant;

In any case in which a decree is passed *ex parte* against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also.

Provided further that no Court shall set aside a decree passed *ex parte* merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim.

Explanation. - Where there has been an appeal against a decree passed *ex parte* under this Rule, and the appeal has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under this rule for setting aside that *ex parte* decree.

In my view, "the merits of the case" as parties have tried to raise before this appellate Court are not a relevant for consideration. Even before the trial Court, as the proceedings under this provision are original proceedings independent of the suit, the merits are not a relevant consideration, except to the limited extent they are relevant to the points for decision under this provision. The principal point for consideration in these proceedings are whether there was "sufficient cause for non-appearance at the hearing ?" According to the amended provision, the applicant has to prove that he was prevented by any sufficient cause from appearing when the suit was called on for hearing. To

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recall, consistently the case was fixed for arguments only, and on 20.6.86, only one counsel was heard and order was passed as stated before. Paras 1 and 2 of the impugned orders are introductory. In para 3 what is said is, that on 3 1 83, final decree has been passed and the application under Order 9, Rule 13, CPC has been filed on 16.6.84 and is time-barred. The order further records that the only ground mentioned in the application is that the counsel was elevated on 27.11.78 and thereafter, he did not appear; that, in fact even after 27 11.78 there has been proceedings before final decree was passed (What are those ?). Therefore, there is no sufficient cause; that no evidence has been adduced to support the application. Hence, it is dismissed.

The learned counsel for the appellants Sarvashri K.L.Issrani and R.S. Tiwari urged, that the trial Court never communicated that evidence be led. That, no opportunity for adducing evidence was given particularly when the case lingered for such a long period; that, in fact, their applications were supportec by affidavits and there were no counter affidavits by respondents 5 and 6. On the other hand, the learned counsel Shri K.P. Munshi for respondent No. 5 anc Shri Sanyal for respondent No. 6 (who later on withdrew his power) had urged that the appellants could have expressed to the Court that they want to adduce evidence; that the application under Article 123 is to be filed within 30 days from 3.1.83 i.e. it was to be filed on or before 2.2.83, but it has filed on 16.4.84, after a delay of 14 months 14 days. Therefore, it has to be dismissed *in limine*, in view of the mandatory inhibition u/s 3(1) of the Limitation Act. It was also submitted that the appellants are abusing the process of law; and were aware of the proceedings; and were in fact watching the progress through Mukhtiyar or otherwise. On the other hand, these contentions are denied by the appellants. So far as the delay is concerned, the appellants have given two fold reasons. One of those only has been, casually and in passing, has been referrec in the impugned orders. There is no such finding by the trial Court that the appellants were aware of the proceedings and had knowledge. At this stage this Court cannot accept the submission that the appellants did not intend to pay the decretal amount to answering respondents. Hence, they have taken shelter behind false and vexatious applications.

On the other hand, except for the date of elevation, in absence o any evidence there could not have been any finding as to from which date o

hearing the appellants' counsel refrained from attending the Court because the contention of the contesting respondents is that the appellants' counsel and stopped appearance in the Court" two years prior to elevation". Similarly, when the appointment of any Mukhtiyar is also a disputed fact, it is difficult to accept the contention that the appellants, from a distance, were watching the proceedings but came late only to create hurdles in execution proceedings. Whether the absence of appellant No.1 was intentional or *malafide*, or it was because of being misled (due to alleged fraud practiced on them) are also disputed questions which could not have been decided without materials and evidence placed before the trial Court.

Even during the course of arguments, decisions were referred. But as stated above, in those proceedings, the merits of the original case are not to be considered. However, I may refer to *Miss Devi Ramchand Vaswani* v. *S.V. Bastikar* (1). It was held, that "sufficient cause" is not different from "good cause". If a party is unaware of the date of hearing and the unawareness is not due to any fault of his, in the circumstances, it was held, good or sufficient cause for non-appearance under Order 9, Rule 13, CPC.

The learned counsel had stated that as there was no counter affidavit by the other side, the affidavit filed by the appellants could have been relied upon. In *Chunnilal* v. *Chhota Bhai Moti Bhai (Firm)*(2), it was held, that an affidavit is evidence if the parties agreed to have decisions on affidavits alone. It would be permissible it there is mutual agreement. The Court is bound to allow the parties to lead evidence. That was a case where the respondent had applied for setting aside the *exparte* decree. The application was supported by an affidavit which was controverted by the plaintiffs' affidavit. The respondent then filed supplementary affidavit, and the trial Judge decided merely on basis of those affidavits. In the instant case, before me, after the written objections/replies filed by the contesting respondents/NAs, points for decision/issues could have been framed, and then it could have been considered whether the parties wanted to lead necessary evidence thereupon. It further seems that the applications for amendment etc. are still pending in the trial Court. In the absence of materials on record and the nature of order sheets also referred above, the impugned orders were improper and are liable to be set aside.

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(1) A.I.R 1968 Bom. 57. (2) 1966 J.L.J. Note 146.

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For the aforesaid reasons, this appeal is allowed, and the impugned orders dated 27.6.86 are set aside. The case is remitted to the trial Court for framing issues/points for decision, and after allowing the parties to lead requisite evidence to decide the application according to law. The counsel for the appellants are asked to appear in the trial Court (i.e. Second ADJ Jabalpur) on 27.11.89. The learned COUNSEL for the respondent No. 5 Shri K.P.Munshi has stated that his power came to an end since Smt. Pyari Bahu died after the conclusion of hearing before the pronouncement of the Judgment. Hence, this order is passed in view of Order 22, Rule 6, CPC. Shri Sanyal, Advocate, who appeared for the respondent No. 6 had withdrawn. Therefore, it is not possible to give direction envisaged under Order 41, Rule 26-A, CPC. Therefore, trial Court will take further proceedings after noticing the parties concerned.

Appeal allowed.

CIVIL REVISION

Before Mr. Justice R. K. Varma.
30, November, 1988.

SMT. VIMLADEVI ...Applicant*

v.

GURINDERSINGH ...Non-applicant.

Accommodation Control Act, M.P. (XLI of 1961)—Section 23-E-Revision-Rent Controlling Authority transferring the case of widow/landlady to civil Court on ground that it has no jurisdiction as she let out the premises after her widowhood - No distinction can be made - Whether tenancy created prior or subsequent to her widowhood - Immaterial - Constitution of India - Article 15(3) - State has power to make special provision for women - The case of widow is certainly a disadvantaged class - Case of a retired Govt. servant is different - Order of impugned cannot be sustained in law - Matter remanded to the R.C.A. for deciding the case according to law.

* C.R. No.295 of 1987, against the Order dated 24.7.87, passed by Rent Controlling Authority, Indore, in Eviction case No. 206/84.

In case of a retired servant of any Government including a retired member of defence services, included in Sub-clause (i) of Sec. 23-J of the Act which define 'landlord' for the purposes of Chapter III-A of the Act, the classification of such retired Government servants appears to be on the basis of the object that while they are in service they should not feel worried about the difficulties of a long drawn-out litigation when they wish to get back the premises which they have leased out during the service.

But in case of a landlord who is widow the object of classification is altogether different. The classification appears to be justified with a view to conferring benefit to widow on account of her disability as a widow. Article 15(3) of the Constitution of India enables the State to make any special provision for women. The class of widow is certainly a disadvantaged class and it is immaterial as to when the landlord became a widow prior to institution of a case for eviction on the ground of her *bona fide* need.

K.L. Sethi for the applicant.

S.M. Dagaonkar for the non-applicant.

Cur. adv. vult.

ORDER

R. K. VARMA, J. - This order shall also govern the disposal of Civil Revision No. 323/87 (Gurindersingh v. Rent Controlling Authority and another).

This is a revision filed by the applicant-plaintiff against the Order dated 24.7.1987 passed by the learned Rent Controlling Authority, Indore (hereinafter referred to as 'the Authority') in Eviction Case No. 206 of 1984 whereby the learned Authority has transferred the case for trial by the Civil Judge, holding that the Authority has no jurisdiction to try the case.

Civil Revision No. 323/87 has been filed by the tenant-defendant against the very same order passed by the Authority praying that the impugned order of the Authority transferring the case be set-aside and the plaintiff's application for eviction be dismissed.

By the impugned order the authority has directed transfer of the plaintiff's application for eviction for trial by the Civil Court on the ground that she let-out the accommodation in question to the non-applicant-tenant when she was already a widow, she having become widow on 11.5.1975 and the

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accommodation in question was let-out on 1 12 1978. The learned Authority has relied upon a decision in *Badriprashad* v *Chimanlal*(1). That was a case of retired Government servant who let-out his accommodation after his retirement and was held to be not covered by the definition of landlord provided in Section 23-J of the Act on the authority of a Supreme Court decision in *Mrs. Winifred Ross and another* v. *Mr. Ivy. Fornsaca and others*(2)

Learned counsel for the applicant-plaintiff has submitted that although among the particular classes of landlord included in the definition of landlord in Section 23-J of the Act who are entitled to avail of the forum of the authority for expeditious disposal of the application for eviction on the ground *of bona fide* requirement of the accommodation, the class of retired Government servant and the class of widows are included in sub-clauses (i) and (iii) of Section 23-J of the Act, it will be wrong to draw any similarity between the two classes so as to apply the aforesaid authority concerning a retired Government servant to the instant case of a widow landlord. Learned counsel has cited a decision of this Court in Smt. *Radhabai* v. *Arjundas* (3) which is a complete answer to the question involved in this case. It has been held therein that the provision of clause (iii) of section 23-J of the Act on a reasonable classification is meant for widows or a divorced wife as a class and, therefore, in the case of a widow no distinction can be made with reference to the tenancy whether created prior or subsequent to her widowhood.

In case of a retired servant of any Government including a retired member of defence services, included in sub-clause (i) of Sec. 23-J of the Act which defines 'landlord' for the purposes of Chapter III-A of the Act, the classification of such retired Government servants appears to be on the basis of the object that while they are in service they should not feel worried about the difficulties of a long drawn-out litigation when they wish to get back the premises which they have leased-out during the service Having regard to this object the retired Government servants, who lease-out their premises after their retirement cannot reasonably be covered in the class of landlords included in Clause (i) of Section 23-J of the Act. In *Mrs. Winifred Ross's case (supra)* which relates to the case of a retired member of the Armed Forces, covered under a similar provision of the Bombay Act, the relevant observations of the Supreme Court in this connection are as follows :

1) 1987) M.P.R.C.J. 66. (2) A.I.R. 1984 S.C. 458.
(3) 1988 M.P.L.J. 342 1988 JLJ 441

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"Since a liberal interpretation of Section 13-A—1 of the Act is likely to expose it to a successful challenge on the basis of Article 14 of the Constitution, it has to be read down as conferring benefit only on those members of the Armed Forces who were landlords of the premises in question while they were in service even though they may avail of it after their retirement. Such a construction would save it from the criticism that it is discriminatory and also would advance the object of enacting it, namely, that members of the Armed Forces should not while they are in service feel worried about the difficulties of a long drawn out litigation when they wish to get back the premises which they have leased out during their service. Persons in the position of the landlord in the present case cannot, therefore, maintain a suit under Section 13-A—1 of the Act.

---x--- ---x--- ---x---

But in case of a landlord who is a widow the object of classification is altogether different. The classification appears to be justified with a view to conferring benefit to widow on account of her disability as a widow. Article 15(3)of the Constitution of India enables the State to make any special provision for women. The class of widow is certainly a disadvantaged class and it is immaterial as to when the landlord became a widow prior to institution of a case for eviction on the ground of her *bona fide* need. Consequently, the impugned order of the learned Authority who has wrongly applied the principles of *Badriprashad's case (supra)* of a retired Government servant, to the instant case of a widow landlord, cannot be sustained and must be set-aside.

In the result this Civil Revision No. 295/87 (Smt. Vimladevi v. Gurindersingh) succeeds and is allowed. The impugned order passed by the Authority is set-aside. The case is remanded to the learned Authority for disposal according to law.

Gurindersingh v. *Rent Controlling Authority and another* (1) filed by the tenant defendant fails and is hereby dismissed.

In the circumstances of the case there shall, however, be no order as to costs.

Application dismissed.

(1) C.R. No. 323 of 1987

CRIMINAL REVISION

Before Mr. Justice B. M. Lal.
12, September, 1990

HARIRAM SINGH ...Applicant*

v.

MANOHAR RAO & anor. ...Non-applicants.

Criminal Procedure Code, 1973 (II of 1974), Sections 145, 146 and Land Revenue Code, M.P. (XX of 1959), Sections 2(4), 168 and 257(k) - A lessee under Section 168(2) of the Code is not a tenant as defined under section 2(Y) of the Code but a lessee having no statutory right of occupancy tenant -- Section 257(k) -- Excludes jurisdiction of Civil Court in matter of ejectment of a lessee of a Bhumiswami -- Section 145(6) --Expression 'until evicted therefrom in due course of law' is not confined to the eviction order by a Civil Court -- Order of eviction passed by Board of Revenue is an order in due course of law -- Sections 145 and 146, Cr. P.C. --Eviction of lessee ordered by the Revenue Authorities under Section 168(4) MPLR Code & confirmed by the Board of Revenue -- Possession handed over to Deity/Sarvarakar in execution proceeding -- Subsequence proceeding under Section 145, Cr. P.C. at the instance of lessee and appointment of receiver under Section 146, Cr. P.C. by S. D. M. - Not proper and abuse of process of law -- Proceeding quashed.

The lessee under sub-section (2) of Section 168 of the Code is not a tenant as defined under Section 2 (y) of the Code, as according to the definition of "tenant" in Section 2(y) of the Code, he acquire the right of an occupancy tenant. But under Section 168(2), remains only a lessee having no statutory rights availlable to him as an occupancy tenant.

In the instant case, the dispute between the Sarvarakar and the applicants/lessees is only cognizable under Section 168 of the Code and Civil Court has no jurisdiction as observed in the second appeal in view of the provisions of Section 257(K) of the Code. This being so the expression used in sub-section(6) of Section 145, Cr. P.C. (until evicted therefore in due course of law) is not confined to eviction by civil Court alone. Section 257 of the Code

* Cr. Rev. No. 365 of 1990, against the order dated 19.3.90, passed by Sub-Divisional Magistrate, Damoh, in M Cr. C. No. 260/89

expressly excludes the jurisdiction of the Civil Court in matter of ejectment of lessee of a Bhumiswami under sub-section (4) of Section 168. Therefore, the final order passed under Section 145 of the Code of Criminal Procedure in earlier proceedings between the Bhumiswami and the lessee can only be set at naught by initiating proper proceedings before the Courts provided under the Code and not before the Civil Court, which is not competent to entertain such disputes. This being so, the final order passed by the Board of Revenue referred to above would be conterminous with that of the Civil Court.

Nata Padhan v. *Benchha Baral*(1); referred to.

S. C. Datt for the applicant.

P. P. Naoleker for the non-applicants.

Cur. adv. vult.

ORDER

B. M. LAL, J. - The decision in this revision shall also govern disposal of Criminal Revision No. 67 of 1989 (*Dharam Singh and others* v. *Sarvarakar Manoharlal Pathak).* Both these revisions arise out of order passed by the S.D.M., Damoh whereby in exercise of his jurisdiction under Section 146 of the Code of Criminal Procedure directed attachment of the disputed property and handing it over to the Tahsildar as supratdar, against which these revisions have been filed.

In both the revisions the lands involved are the same, i.e. Khasra No. 1235 admeasuring 8.31 acres and Khasra No. 1355 admeasuring 17.34 acres situated in village Bansa Kalan, Tahsil and District Damoh. This fact is not disputed that the lands in question belong to Deity Muirti Shrideo Murlidhar Ji Mandir, Damoh and this land had been leased out to the applicants in both the revisions and by virtue of the said lease, they were in possession of these lands for the last two decades. The non-applicant Sarvarakar Manohar Rao Pathak is looking after this property on behalf of the Deity.

(1) A.I.R. 1968 Orissa 36.

Hariram Singh v. Manohar Rao, 1990.

It appears that in the year 1973 the Sarvarakar of the property tried to dispossess the lessees on account of which proceedings under Section 145 of the Code of Criminal Procedure had been started vide Criminal Case No. 36/73 and ultimately possession of the applicants/lessees was confirmed in Criminal Revision No. 205/74, decided on 10.9.74 by this Court.

However, on behalf of the Deity, Civil Suit was filed for dispossession of the lessees from the suit land and the Sarvarakar contested the suit unsuccessfully right from the Civil Court to this Court. This Court in Second Appeal No. 365/66, decided on 14.10.1971 directed the Sarvarakar to resort to the remedy available under Section 168 of the M.P. Land Revenue Code (hereinafter referred to as the Code) as civil suit is barred under Section 257(k) of the Code.

Accordingly an application under Section 168(4) of the Code was moved before the S.D.O., Damoh. The said application was registered as Revenue case No. 142-B/121/77-78 and by order dated 12.9.1978 the S.D.O., Damoh passed order evicting the applicants from the suit lands. Against this order unsuccessful applicants preferred appeals before the Collector, Damoh, Commissioner, Revenue Division, Sagar and Board of Revenue, Madhya Pradesh, Gwalior. The Board of Revenue, Gwalior by order dated 30.5.1984 while maintaining the order passed by the subordinate revenue Courts referred to above, directed the applicants to hand - over possession of the lands to the Sarvarakar Accordingly executive proceedings for possession were started and possession was delivered to the Sarvarakar.

Here it will not be out of place to mention that this legal position is not disputed that the lessee under sub-section (2) of Section 168 of the Code is not a tenant as defined under section 2(y) of the Code, as according to the definition of 'tenant' in section 2(y) of the Code, he acquires the right of an occupancy tenant. But under section 168(2), remains only a lessee having no statutory rights available to him as an occupancy tenant. This being the legal position, the possession of the applicants after the decision of Board of Revenue dt. 30.5.84 cannot be more than a trespasser and the same cannot be maintained in the eye of law.

It appears that the applicants again tried to take possession of the lands in dispute upon which proceedings under Section 145 of the Code of Criminal Procedure were started and the S.D.M. after passing a preliminary order also

passed an order under Section 146 of the Code for attachment of the property and appointing a receiver, against which these two revisions have been filed by the applicants/so-called lessees.

Shri P. P Naolekar, learned counsel appearing for the non-applicant Sarvarakar raised a preliminary objection and contended that direct revision to this Court is not maintainable. True it is. Against the order of the S.D.M., the Sessions Court, Damoh had not been moved, but directly, in violation of Rule 15 of the High Court Rules contained in Chapter IV, revision has been filed. Ordinarily such revisions are to be filed before the Sessions Court, save in exceptional cases. Since both the revisions have been admitted for hearing parties, no useful purpose would be served in dismissing these revisions on this score alone. Therefore, this Court has decided to decide these revisions on merits.

As stated above, this case has chequered history starting from two decades ago where in the parties have contested innings after innings in Civil Court as well as in revenue Courts and also resorted to the provisions of section 145 of the Code of Criminal Procedure.

Learned counsel for the applicant, Shri S.C. Datt, while giving reference to the order passed by this Court in Criminal Revision No. 205/74 decided on 10.9.1974 submitted that throughout the land was found in possession of the applicants. The submission so made has no two opinions, as dispute between the parties arose in the year 1962, which led the Sarvarakar of the temple to file a suit and ultimately as per the direction given in Second Appeal No. 355/66 he has approached the Revenue Court which has decided the dispute in favour of the Sarvarakar of the Deity.

The object of the provisions of Section 145 of the Code of Criminal Procedure, in the context of the chequered history of this case, cannot be lost sight of, which contemplates that the provisions of Section 145 are meant for preventing breach of peace arising in respect of disputes relating to immovable property and, therefore, in order to achieve this object the provisions of section 145, the S.D.M is to settle the matter temporarily and to maintain *status quo* until the rights of the parties are decided by a competent Court. In this respect the decision rendered by the Board of Revenue is a decision by a competent Court, which is binding on the parties, as a civil suit is barred in view of the provisions of Section 257(K) of the Code as referred to above.

Hariram Singh v. Manohar Rao, 1990.

The effect of the order passed by the highest revenue Court of the State on 30.5 1984 cannot be lost sight of in view of the provisions of sub-section (6) of Section 145 of the Code of Criminal Procedure, being an order evicting the applicants from possession of the disputed lands in question and is as such a proceeding "in due course of law", as under the facts and circumstances of the instant case, this Court in Second Appeal No. 355/66 directed the Sarvarakar to resort to the remedy available under Section 168 of the Code and the Sarvarakar on behalf of the Deity having resorted to it and got a final order from the highest revenue Court of the State. In view thereof, it is not now necessary that there should only be an order of the Civil Court, but the Court acting under statutory authority to pass an order for possession is also recognised under sub-section (6) of Section 145, Cr. P.C. The expression "until evicted therefrom in due course of law" speaks in itself that the eviction should be through a competent court of jurisdiction.

In the instant case, the dispute between the Sarvarakar and the applicants/lessees is only cognizable under Section 168 of the Code and the Civil Court has no jurisdiction as observed in the second appeal in view of the provisions of section 257(K) of the Code. This being so the expression used in sub-section (6) of Section 145, Cr. P.C. (until evicted therefrom in due course of law) is not confined to eviction by Civil Court alone. Section 257 of the Code expressly excludes the jurisdiction of the Civil Court in matters of ejectment of a lessee of a Bhumiswami under sub-section(4) of Section 168. Therefore, the final order passed under Section 145 of the Code of Criminal Procedure in earlier proceedings between the Bhumiswami and the lessee can only be set at naught by initiating proper proceedings before the Courts provided under the Code and not before the Civil Court, which is not competent to entertain such disputes. This being so, the final order passed by the Board of Revenue referred to above would be conterminous with that of the Civil Court (See *Nata Padhan* v. *Banchha Baral* (1).

Thus, the action on the part of the applicants in taking the law in their own hands and trying to trespass into the land belonging to the Deity, notwithstanding the final order of the Board of Revenue was illegal and the proceedings under Section 145, Cr. P.C. cannot be said to be *bonafide* and has resulted in abuse of the process of law and cannot be maintained and this Court in its revisional jurisdiction, for the facts and circumstances narrated above,

(1) A.I.R. 1968 Orissa 36.

is constrained to quash the entire proceedings and further directing the S.D.M., Damoh to place the Sarvarakar in possession of the disputed property. Here it is pertinent to mention that in such cases where an order is passed in terms of sub-section (6) of Section 145, Cr. P. C. by a competent Court and thereafter, repeatedly if a party is indulging in trespass and tries to take forcible possession of the property from the real owner, the authorities are expected to take recourse to normal procedure of apprehending those persons for committing criminal trespass or other lawful remedies available to them.

With these directions, the proceedings pending before the S.D.M., Damoh under Section 145, Cr. P. C. are quashed. Accordingly the revisions are disposed of.

Application disposed of.

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice B. M. Lal.
24, January, 1990

TRICHINOPOLY RAMASWAMI ARDHANANI & ors. ....Applicants*

v.

KRIPA SHANKAR BHARGAVA ...Non-applicant.

Criminal Procedure Code, 1973 (II of 1974), Sections 200, 204, 397, 401 and 482 and Penal Code, Indian (XLV of 1860), Sections 499 and 500 — Complaint case — Jurisdiction — Suit filed at Bombay High Court containing defamatory imputation — Writ of summons served on the complaint at Chhindwara — On complaint filed J.M.F.C., Chhindwara has jurisdiction to take cognizance — Section 204, Cr. P.C. — Issue of process -- Subjective satisfaction of Magistrate as prima facie *case is sufficient to issue process -- Suit containing defamatory imputation - Plaint verified by petitioner who alone is liable to be proceeded --*

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* M. Cr. C. No. 2752 of 1987, against the order dated 11.4.87, passed by Chief Judicial Magistrate, Chhindwara, in Cr. C. No. 1034/87.

Trichinopoly Ramaswami Ardhanani v.
Kripa Shankar Bhargava, 1990.

Proceeding against other petitioners, quashed -- 'Publication' -- Suit filed in which writ of summons issued and served on the complainant amounts to publication -- Section 482, Cr. P. C. Power of Superintendence of High Court -- Exception 9 of section 499 of I.P.C. -- Cannot be looked into at the stage of exercising power of Superintendence under section 482 or Revisional powers under Sections 397/401 of the Cr. P. C. — Petitioner is at liberty to take recourse to such provision at appropriate stage -- Prayer of stay of trial till final decision in Civil Suit at Bombay cannot be acceded to words & phrases 'Publication' - Plaint filed with defamatory imputation amounts to 'Publication'.

Where only direction of issuance of process under Section 204, Criminal Procedure Code is given, duty is cast upon the Court to refrain from passing any observation so that case of either side may not be prejudiced. Therefore, where the Magistrate acting under Section 200, Criminal Procedure Code is satisfied himself about the allegations made in the complaint and evidence adduced in that behalf, *prima facie,* for proceeding against the accused persons, in such cases, at this stage, no interference ordinarily is called for either under Section 482, Cr. P.C. or under Sections 397/401, Cr. P. C. until and unless glaring defect in the order impugned is demonstrated, i. e.

(a) allegation and the evidence appearing on record if taken at their face value, no case is made out;

(b) Where such discretion exercised by the Magistrate is capricious or arbitrary;

(c) basically the complaint suffers from some legal defect.

Law is well settled on this point. In such cases, the court within whose jurisdiction the publication is made or the court in whose territorial jurisdiction the defamatory matter is served, circulated or distributed, either court will have jurisdiction.

Where the plaint is filed containing so called defamatory matter according to the respondent, the same amounts to publication within the meaning of Section 499, I.P.C.

Trichinopoly Ramaswami Ardhanani v. Kripa Shankar Bhargava, 1990.

Balraj Khanna and others v. *Moti Ram* (1), *Kazi Jalil Abbasi* v. *State of Utter Pradesh* (2) and *Thengavelu Chettiar* v. *Ponnammal* (3); followed.

Dhiro Koch and another v. *Govinda Dev Mishra Bura Satria*(4) and *Bhagat Singh Sethi* v. *Jindalal* (5); referred to.

S. C. Dutt for the applicants.

A. G. Dhande for the non-applicant.

Cur. adv. vult.

ORDER

B. M. LAL, J. - This petition under Sections 482 read with sections 397/401, Criminal Procedure Code is directed against an order dated 11.4.1987 by which the Chief Judicial Magistrate, Chhindwara in Criminal Case No. 1034/87 while taking cognizance of an offence under section 500, Indian Penal Code directed issuance of process against the petitioner in accordance with provisions of Section 204, Criminal Procedure Code.

Brief facts leading to this petition are as under :

Industrial Consultancy Bureau Pvt. Ltd. Kalyana, Bombay (in short ICB Pvt. Ltd) is a Company registered under the Companies Act of which the petitioners No. 1 to 5 are directors, engineers and responsible officers.

The Company is engaged in the business of engineering constructions. It entered into a Contract with the complainant/respondent Kripa Shanker Bhargava to execute certain work on behalf of the I.C.B. Pvt. Ltd. near Nandan Site at Damua in district Chhindwara.

It appears that some dispute of accounts between the Company and its officers on one hand and the complainant Kripa Shankar Bhargava on the other hand, arose and the same led to filing Civil Suit by the respondent Kripa Shanker valued at. Rs. 6,11,300/- in the Court of First Additional Judge to the Court of District Judge, Chhindwara, on 22.6.1986.

(1) A.I.R. 1971 S.C. 1389 (2) 1978 Cr. L. J. NOC 104 (Allahabad)
(3) A.I.R. 1966 Mad. 363. (4) 65 Indian Cases 204
(5) A.I.R. 1966 J & K 106

Trichinopoly Ramaswami Ardhanani v.
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Similarly, the petitioners I.C.B. Pvt. Ltd. also filed a suit valued at Rs.7,44,813.71 before the High Court of Judicature at Bombay in original jurisdiction on 29.7.86 vide suit No. 2065/86.

After receiving writ of summons of Suit No. 2065/86 and copy of the plaint, according to Kripa Shanker Bhargava, petitioner No. 1, vide para 16 of the plaint, used *perse* defamatory imputation i.e. .... wrongfully converted. .. misappropriated of some quantity of steel.

According to Kripa Shanker this defamatory version led him to file a complaint case on 21.10.1986 against the petitioners, for taking suitable action and punishing them under sections 120-B, 477-A and 500, Indian Penal Code.

Respondent/Complainant in the complaint case submitted that he is a progressive businessman of Chhindwara Town and commands respectable position in his home town and outside as well. Therefore, the imputation so made in para 16 of the plaint referred to above has lowered down his prestige in the estimation of his well wishers.

On 10.11.1986, respondent examined himself and one Om Prakash Shukla to establish *prima facie* case against the petitioners and the learned Chief Judicial Magistrate, Chhindwara, by order dated 11.4.1987, having found *prima facie* case only punishable under Section 500, Indian Penal Code registered the case against the petitioners and directed issuance of process in accordance with the provisions of Section 204, Criminal Procedure Code.

Against this order the present petitioners have come up before this court invoking inherent and revisional powers, seeking quashing of the impugned order dated 11.4.87 as well as the entire proceedings pending before the Chief judicial Magistrate, Chhindwara.

Leaned counsel Shri S. C. Dutt appearing for the petitioners made multifold submissions one after another as under :

(a) That, so called *perse* defamatory words used in para 16 of the plaint have been used in good faith and the petitioners are entitled to take advantage of Exception 9 of Section 499, Indian Penal Code;

(b) That, the plaint was filed by I.C.B. Pvt. Ltd. Company and the same has been verified by petitioner No. 1, Trichinopoly Ramaswami Ardhanani, therefore, the other petitioners No. 2 to 5 having no nexus with the alleged use of *perse* defamatory words in para 16, Chief Judicial Magistrate, Chhindwara exceeded in its a jurisdiction in issuing process to the petitioners No. 2 to 5;

(c) That, the suit was filed at Bombay High Court, therefore, Bombay High Court alone has territorial jurisdiction;

(d) That, the matter in issue (Civil Suit No. 2065/86) is sub—judice in Bombay High Court and, therefore, Criminal Proceedings pending at Chhindwara be stayed till the decision of Civil Suit No. 2065/86;

(e) That, the so called *perse* defamatory words said to have been used in the plaint were not made public to be known to the persons in general, therefore, no case under Section 500, Indian Penal Code is made.

On the other hand, Shri A.G. Dhande learned counsel appearing for the respondent/complainant supported the order impugned.

Before discussing the points in issue, at this stage, where only direction of issuance of process under Section 204, Criminal Procedure Code is given, duty casts upon the Court to refrain from passing any observation so that case of either side may not be prejudiced. Therefore, where the Magistrate acting under Section 200, Criminal Procedure Code is satisfied himself about the allegations made in the complaint and evidence adduced in that behalf, *prima facie*, for proceeding against the accused persons, in such cases, at this stage, no interference ordinarily is called for either under section 482, Cr. P.C. or under Sections 397/401, Cr. P. C. until and unless glaring defect in the order impugned is demonstrated, i. e.—

(a) allegation and the evidence appearing on record if taken at their face value, no case is made out;

(b) where such discretion exercised by the Magistrate is capricious or arbitrary;

(c) basically the complaint suffers from some legal defect.

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At this juncture, it will not be out of place to state that under Section 202, Cr. P C for issuance of process under section 204, Cr P. C. , detailed enquiry on merits and demerits of the case is not required, as ultimately after appearance of the accused persons. if the Magistrate comes to conclusion that no case is made out the accused either will be discharge or acquitted, as the case may be.

Facts of the instant case, therefore, are to be tested with the above touch-stone, while giving any finding.

Shri Dutt contended that the so called *per se* defamatory words used in para 16 of the plaint have been used in good faith and the petitioners are entitled to take advantage of Exception 9 of Section 499. IPC. In this regard Shri Dutt strenuously made reference to *Bhagat Singh Sethi* v. *Jindalal* (1) and contended that the petitioners' case is protected under Exception 9 of Section 499, IPC.

Suffice to say that arguments advanced by Shri Dutt in this regard taking resort to Exception 9 of Section 499, IPC, stating that so called imputations have been made in good faith, has no relevancy at this stage. The question of applicability of Exception 9 of Section 499, IPC as well as all other defence available to the petitioners may be raised before the Trial Court during Trial of the complaint. But at this stage the same cannot be gone into which may prejudice the case of either side. Besides this, there is no material to consider the said argument. See *Balraj Khanna and others* v *Moti Ram* (2) Therefore, submission so made by Shri Dutt in this behalf is of no avail.

Shri Dutt next contended that the plaint is filed before the Bombay High Court by I C B. Pvt. Ltd. and the same has been verified by petitioner No. 1 Trichinopoly Ramaswami Ardhanani, therefore, other petitioners No. 2 to 5 having no nexus with alleged use of *perse* defamatory words in para 16, Chief Judicial Magistrate, Chhindwara exceeded in its jurisdiction in issuing process to the petitioners No. 2 to 5. Submission so made by Shri Dutt appears to have some force Bare perusal of the plaint annexed with the petition demonstrates that the averments of the plaint in Civil Suit No. 2065/86 have been verified by petitioner No. 1 Trichinopoly Ramaswani Ardhanani and, therefore, he alone is,

(1) A.I.R. 1956 J & K 106. (2) A.I.R. 1971 S.C. 1389.

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prima facie, liable for the offence alleged and the submission so made by Shr A.G. Dhande that the offence committed by a company, every person who a the time of offence was in charge and was responsible to the company fo conduct of business of the company, and the company shall be guilty of offenc and, therefore, all its office bearers shall be liable to be proceeded against, ha no force and it deserves to be rejected. Therefore, submission of Shri Dutt tha no case against petitioner No. 2 to 5, *prima facie* is made out is sustained.

Shri Dutt also contended that the suit was filed before the Bombay High Court, and therefore Bombay High Court alone has territorial jurisdiction. In this context Shri Dutt submitted that place of trial should be the territorial jurisdiction limits of Bombay and not Chhindwara

Law is well settled on this point In such cases, the court within whose jurisdiction the publication is made or the court in whose territorial jurisdiction the defamatory matter is served, circulated or distributed. either court will have jurisdiction. See *Kazi Jalil Abbasi* v *State of Utter Pradesh*(1). In the instant case writ of summons of Civil Suit No. 2065/86 was directed to be issued to the respondent/complainant at Chhindwara address alongwith copy of the plaint and, therefore, venue of trial at Chhindwara does not suffer from territorial limits of jurisdiction. Thus, the submission so made by Shri Dutt has no force and is hereby repelled.

Next submission of Shri Dutt is that the matter in issue (Civil Suit) is subjudice in Bombay High Court, therefore, Criminal Proceedings pending at Chhindwara be stayed till decision of the Civil Suit No. 2065/86. This submission is devoid of substance. Under the circumstances appearing in this case, proceedings in Civil Suit has nothing to do with the crimnal proceedings pending at Chhindwara According to Shri Dhande, learned counsel for respondent complainant by using *perse* defamatory words in para 16 of the plaint the offence is complete and even at this stage the petitioner No. 1 if withdraws those words from para 16 of the plaint by making an appropriate application under Order 6, Rule 16, Civil Procedure Code for striking out the said words, it will be of no help to the petitioners as the offence is complete as soon as the so called *perse* defamatory words are used. Therefore, question of staying criminal proceedings at Chhindwara till decision of Civil Suit at Bombay does not arise.

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(1) 1978 Cr. L. J. NOC 104 (Allahabad)

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The next point argued by Shri Dutt is that so called *perse* defamatory words said to have been used in the plaint were not made public to be known to persons in general and, therefore, no case under Section 500, I P.C. is made out This argument is only tenable where the letter enclosed in an envelope and is sent to the complainant and in that context it will not be deemed to be a publication. But where the plaint is filed containing so called defamatory matter according to the respondent, the same amounts to publication within the meaning of Section 499, IPC. In *Thangavelu Chettiar* v. *Ponnammal* (1), it has been ruled that filing a plaint or petition containing defamatory matter amounts to publication. Therefore, *perse* defamatory statement in pleadings, petition, affidavits etc. of parties to judicial proceedings are offence punishable under section 500, I.P C unless they fall within the exceptions enumerated in section 499, IPC and therefore, the petitioners are at liberty to take resort to exceptions of Section 499, IPC at an appropriate stage.

Shri Dhande, however, giving reference to *Dhiro Koch and another* v. *Govinda Dev Mishra Bura Satria* (2) contended that defamatory statements made by the parties to suit in pleadings are not absolute privilege. I have already expressed my view that at this stage in view of *Balraj Khanna's case (supra)*, question of applicability of exceptions of Section 499 as well as other defance available to the petitioners may be raised before the Trial Court during Trial of the complaint. But at this stage, the same cannot be adjudicated upon. This question is left open for the parties to argue before the Trial Court.

During the course of argument, incidentally Shri Dutt also submitted that how the respondent was defamed by use of the words '..wrongfully converted ..misappropriated. has not been *prima facie* established. I would again reiterated that at this stage it will not be proper to discuss the point so raised by Shri Dutt, in detail and give any finding which may tend to prejudice the case of either side. Since Shri Dutt made much emphasis on this point, it is necessary to say that defamation is injury to one's reputation and reputation is what other persons think of Kripa Shanker Bhargava, in the instant case, and not his own opinion about himself Therefore, respondent/complainant while examining himself has also examined one Om Prakash Shukla and has thus, *prima facie* established the necessary ingredients for taking cognizance within the meaning of Section 204, Criminal Procedure Code.

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1) A.I.R 1965 Mad. 363. (2) 65 Indian Cases 204.

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From the discussions aforesaid, this petition is partly allowed to the extent that proceedings initiated against petitioners No. 2 to 5 is hereby quashed. However, the proceedings against petitioner No. 1 Trichinopoly Ramaswami Ardhanani alone shall continue before the Chief Judicial Magistrate, Chhindwara. It is, however, made clear that this is a case of 1987 Therefore, the petitioner No. 1 and the respondent/complainant are directed to appear before the Trial Court on 28.2 1990 and the Chief Judicial Magistrate, Chhindwara shall proceed with the case expeditiously.

Application allowed.

MISCELLANEOUS PETITION

Before Mr. Justice V. D. Gyani & Mr. Justice A. G. Qureshi.
7, March, 1990.

SMT. P. VENKAMMA ...Petitioner*

v.

M. P. HOUSING BOARD, BHOPAL
and others. ...Respondents.

Constitution of India–Article 226–Writ Petition–Hire Purchase scheme covered under Group Insurance Scheme of L. I. C.–Scheme in force at the time of purchase of home–Premium also charged by the Housing Board–Death of purchaser–Housing Board liable under the rules to honour their commitments being a statutory body.

Reading all these rules together, it is difficult to conceive of such a outragious stand taken by the respondents. There being no dispute on facts, except for the bald averment on the part of the respondents that it was the liability of the Life Insurance Corporation and the petitioner should seek her relief therefrom, there is nothing on record to support the respondents stand.

The respondents are liable under the rules to honour their commitments. Being a statutory body, they cannot shirk their responsibility and ask the petitioner to knock at the doors of the Life Insurance Corporation of India.

S. C. Bagadia for the petitioner.

S. S. Swami for the respondents.

Cur. adv. vult.

ORDER

The Order of the Court was delivered by **V. D. Gyani, J.** - By this petition under Article 226 of the Constitution of India, the petitioner prays for issuance of a writ in the nature of *Mandamus* directing the respondents to give the petitioner full benefit of the Group Insurance Scheme and to treat the remaining instalments of House No. E-49, M. I. G., Indore, purchased by her late husband Professor

* M. P. No. 303 of 1985.

Smt. P. Venkamma v. M. P. Housing Board, Bhopal, 1990.

P. Vishwanathan, under Hire Purchase Scheme, covered by the Group Insurance Scheme, as paid and further seeking a writ of Prohibition restraining the respondent from recovery of possession of the suit house or any amount claimed to be due from the petitioner; or initiating any proceeding against the petitioner on account of any alleged default in payment of annual instalments in respect of the said house.

It is an admitted position that the petitioner's husband Professor P. Vishwanathan was allotted House No. E-49, M. I. G., Indore under Hire-Purchase Scheme, filed as Annexure-R-1, by the respondents. It is also admitted that the Life Insurance Corporation of India had started Group Insurance Scheme under which the Corporation was responsible for payment of the remaining amount of hire-purchase in case of death of the allottee. This Scheme was in force at the time the said house was purchased by the petitioner's husband, but was later on withdrawn on 1.4.1971. Under the Group Insurance Scheme there was a condition that if any of the member expires before completing the hire-purchase instalments, the remaining instalments shall be paid by the Insurer. For this Group Insurance Scheme annual premia was also charge which was paid by the petitioner's husband along with the annual instalments year after year till his death on 3.5.1984. The petitioner vide letter dated 22.7.1984, (Annexure-B), informed the respondents that in view of the Group Insurance Scheme no further instalments were required to be paid in respect of the aforesaid house, which should be transferred in her name. The respondents instead of complying with the petitioner's demand, by letter dated 22.9.1984 (Annexure - C), informed the petitioner that the Group Insurance Scheme had been withdrawn and the amount paid by way of premia would be adjusted in the next instalment, which was payable by the petitioner's husband. The petitioner contends that this letter, (Annexure-C) is not only void and ineffective but is *malafide* as well and the respondents are estopped from taking the stand which they have attempted to take under (Annexure - C). The petitioner addressed a notice (Annexure-D) on demand of justice to the respondents, but the respondents have failed to do anything in this behalf. Hence this petition.

The stand taken by the respondents is that the Group Insurance Scheme was withdrawn as majority of members opposed it and did not pay the increased premia. It is also averred that this withdrawal was notified on the

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Notice Board. The respondents have further averred that they have no control over the circumstances under which the Life Insurance Corporation withdrew the said Scheme. It is also their case that Prof. P. Vishwanathan had agreed that the excess premia collected from him would be adjusted in the instalments payable by him.

Shri Bagadia, learned counsel appearing for the petitioner contended that it does not behave a statutory body like the Housing Board to take such a turn, that too after the death of the man just to avoid its liability. Learned counsel appearing for respondents on the other hand submitted that it was beyond the control of the Housing Board to continue with the Group Insurance Scheme. He also submitted that the relief, if any, the petitioner should seek from the Life Insurance Corporation of India.

It is not in dispute that the hire-purchase was covered by the Group Insurance Scheme. It is also not disputed that the petitioner's husband continued to pay the premia along with annual instalments as per the agreement till his death.

The crucial question that arises for consideration is, whether in view of the facts as stated above, the petitioner is liable to pay the remaining instalments. A reference may be made to Annexure-R/2, a circular issued by the Housing Board, pertaining to Group Insurance Scheme covering the borrowers. Paragraph 1 of the said Circular and its concluding para, read as follows :-

> "The Administrator M. P. Housing Board is pleased to adopt the above scheme for the benefits of persons who purchase House on Hire purchase basis, from the Board. Under this scheme the LIC of India would take upon itself the liability to liquidate the outstanding loan towards the cost of the house in the event of unfortunate death of purchaser before the full repayment of loan according to agreed terms and that the Residential Property would be released to the hirer without any encumbrance. The hirer may not require to pay any instalments thereafter.
>
> The above agreement will come into force with effect from 1.4.75; i.e. the persons who have been allotted the houses after 1.4.75, will have to pay these charges compulsorily".

Annexure, R/6, the statement, very clearly indicates the Insurance charges collected by the respondents. Annexure-R/2 is the order dated 9.3.76, issued by the Administrator of the M. P. Housing Board, making rules regarding Borrowers Group Insurance framed by the Life Insurance Corporation of India, applicable to sale of houses on hire-purchase basis. Rule 2, as contained in the Rules, filed as Annexure-R/3, reads as follows :-

> "The Board will act for and on behalf of the Members in all matters relating to the Scheme and every act done by agreement made with and notice given to the Corporation by the Board shall be binding on the members."

Shri Bagadia strenuously urged that in face of this Rule the stand taken by the respondents is not only baseless but also *malafide*. It is not denied that petitioner's husband was a member of the Group Insurance Scheme and as such it was for the Board to have acted for and on behalf of the petitioner's husband, who was admittedly a member of the said Scheme, in all matters relating to the Group Insurance Scheme. Rule 8 of the said Scheme further lays down that :

> "R. 8 - The Board shall pay to the Corporation in respect of each member on the Entry date and the relevant Annual Renewal Dates, such premiums as are required to secure and continue the Assurance on the life of the Member for the relevant sum assured in respect of a Member is increased subsequently upon increase in the outstanding Indebetedness on any date other than the Annual Renewal Date, an appropriate premium shall be payable relating to the increase in Sum Assured."

Reading all these rules together, it is difficult to conceive of such a outragious stand taken by the respondents. There being no dispute on facts, except for the bald averment on the part of the respondents that it was the liability of the Life Insurance Corporation and the petitioner should seek her relief therefrom, there is nothing on record to support the respondents stand.

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Shri Bagadia has also pressed into service the Doctrine of Promissory Estoppel, which undoubtedly applies to the present case, but to my mind in face of the rules and the legal position, it is not even necessary to dwell at length on this doctrine, from which support was sought. The respondents are liable under the rules to honour their commitments. Being a statutory body, they cannot shirk their responsibility and ask the petitioner to knock at the doors of the Life Insurance Corporation of India.

For the foregoing reasons, this petition deserves to be allowed and is accordingly allowed with costs. Counsel's fee shall be at Rs. 1,500/-, if certified. The amount of security deposit shall be refunded to the petitioner after verification.

Petition allowed.

MISCELLANEOUS PETITION

Before Mr. Justice P. C. Pathak and Mr. Justice Faizanuddin.
17 April, 1990.

PARASHU RAM TIWARI ...Petitioner*

v.

STATE and others. ...Respondents.

Constitution of India, Articles 226, 309, 311 and Special Area Development Authority, M. P., Rules, 1976, Rule 3(2)–Writ Petition–Petitioner working on the post of Upper Division Clerk in parental department–Selected and appointed afresh in another department as Head Clerk–His application for the post of Head Clerk was forwarded by the parental department–Both the authorities mutually agreed and the petitioner was absorbed on Head Clerk in the new department–No case of transfer on

* M. P. No. 4512 of 1989.

Parashu Ram Tiwari v. State, 1990.

deputation–When the two authorities have mutually agreed, exercise of power by State Govt. under Rule 3(2) was not called for–Repatriation of petitioner to parent department on the post of UDC amounts to reversion and violative of Article 311 of the Constitution.

The petitioner was not transferred on deputation; instead he was absorbed on pe.manent basis as Head Clerk on his transfer which resulted in extinction of his status as U. D. C. in SADA. The conclusion is further re-inforced by the fact that all the service records of the petitioner were requisitioned by the Trust and the petitioner was given seniority counting his past service from 24.7.1976 i.e. the date of his appointment as U. D. C. in SADA. When the transfer is made from one department to another permanently, fresh order of appointment in the transferred department is not necessary.

The appointment of experienced person as Head Clerk was the dire necessity of the Trust. The petitioner applied to the Trust through proper channel. The SADA, while forwarding his application to the Trust, commended him as responsible, trustworthy, sincere and capable of discharging duties of Head Clerk and was willing to relieve him from the post of U. D. C. in case he was appointed as Head Clerk. The Trust approved of the petitioner's candidature and decided to appoint him as Head Clerk by making provision of adequate funds. After the petitioner assumed charge, his service records were also sent for. From all these facts the only rational conclusion is that his appointment as Head Clerk was a fresh appointment by mutual agreement of the two authorities under Rule 3(2) of the Rules and his past service was counted by assigning him seniority from his initial appointment as U. D. C. Therefore, the transfer order must be construed as an approval for creation of the post of Head Clerk and the petitioner's selection for the post. When the transfer was mutually agreed by the two Authorities, exercise of power under Rule 3(2) by the State Govt. was not called for. There was also no such request by the Authorities. Chairman of the Trust was competent to appoint the petitioner to the post.

S. K. Bhattacharya and others v. *Union of India and others* (1) and *Avtar Singh* v. *Delhi Administration and others* (2); referred to.

(1) 1980 (1) S. L. R. 795. (2) I. L. R. (1977) 2 Delhi 224.

Parashu Ram Tiwari v. State, 1990.

R. L. Gupta for the petitioner.

B. K. Rawat for the respondents.

Cur. adv. vult.

ORDER

The Order of the Court was delivered by **P. C. PATHAK, J.** - This is a petition under Articles 226 and 227 of the Constitution of India challenging the impugned order dated 25.7.1989 (Annexure A-13).

The petitioner was a permanent Upper Division Clerk in Special Are Development Authority, Khajuraho (hereinafter called 'SADA'), district Chhatarpur. The Town Improvement Trust, Chhatarpur (hercinafter called 'the Trust') intended to create and fill up one post of Head Clerk under it. On 3.6.1986, the petitioner applied for the said post *vide* application (Annexure A-1) through proper channel. The SADA forwarded the said application alongwith its own recommendation dated 12.6.1986 (Annexure A-2) and its copy to the State Government.

On receipt of the said application, the Trust addressed a letter dated 17.2.1987 (Annexure A-3) to the State Government to sanction creation of one post of Head Clerk. The Trust needed an experienced person and the petitioner fulfilled all that was required for recruitment to that post. The Trust decided to appoint the petitioner on receipt of permission from the State Government to create the said post. The SADA also conveyed its decision to relieve the petitioner in the event of his appointment as Head Clerk in the Trust. On 7.8.1987, the Trust reminded the State Government through letter (Annexure A-5) to accord approval early to the proposed appointment of the petitioner as Head Clerk for which both the authorities agreed and the Trust had also allocated funds in the Budget. The Trust was competent to appoint him subject to the approval of the State Government. In response to SADA's letter (Annexure A-2), the State Government transferred the petitioner as Head Clerk under the Trust. By letter dated 14.10.1987, the Trust informed the State Government that the petitioner assumed charge of Head Clerk on 9.10.1987. On the same day, the Trust also addressed a letter Annexure A-8

to SADA requesting it to send petitioner's all service records immediately. Meanwhile, the Trust also fixed the petitioner's pay on revised scale at Rs. 1290-2040 of the post of Head Clerk as per Annexures A-9, A-10 and A-11. On 15.3.1988, the State Government accorded sanction through communication Annexure A-12 for creation of one post of Head Clerk in the Trust. Later the Trust published a combined gradation list Annexure A-14 showing the petitioner as Head Clerk with effect from 9.10.1987.

On 25.7.1989, the State Government by its order Annexure A-13 repatriated the petitioner to SADA as Upper Division Clerk. The petitioner challenges this order of transfer on the ground that the order amounts to his reversion in violation of Article 311 of the Constitution.

Respondent No. 3 Trust filed return opposing the petition on the ground that the post of Head Clerk is a promotional post from the post of U. D. C.. Since the officials working in the Trust were not eligible, the petitioner was transferred on 'deputation' to officiate as Head Clerk. By the impugned order, he was repatriated on administrative grounds to his substantive post of U. D. C. in SADA where his lien is continued. The order does not amount to reversion or a punishment. The Trust never appointed the petitioner as Head Clerk by promotion in accordance with rules.

The question for decision is whether the petitioner's transfer from SADA to the Trust as Head Clerk was on deputation. According to the respondent No. 3, the omission of word 'deputation' in the transfer order Annexure A-6 was a clerical mistake. The submission cannot be accepted. No record was produced by the respondents to substantiate that the transfer was on deputation. The defence is also belied by various documents filed by the petitioner. Admittedly, the petitioner was a permanent U. D. C. in SADA. For betterment of his service prospects, he applied for appointment to the post of Head Clerk in the Trust. Advance copies of the application were forwarded to the Trust and also to the Department of Housing and Environment of the State Government. His application was forwarded by SADA to the Trust along with its own recommendation and conveyed its willingness to relieve him from the post of U. D. C. in lieu of his appointment as Head Clerk through Annexure A-2. On receipt of the application, the Trust on its part moved the State Government

for sanction of one Post of Head Clerk so that the petitioner could be appointed to that post. Through letters dated 5.1.1987 and 17.2.1987 (Annexure A-3), the State Government was informed that both the authorities had mutually agreed for petitioner's absorption as Head Clerk and relief from the post of U. D. C. Again by letter Annexure A-5, the Trust requested the State Govt. to communicate approval of its decision early to appoint the petitioner as Head Clerk.

In response to SADA's letter Annexure A-2, the Deputy Secretary, State Government, by order Annexure A-6, transferred the petitioner as Head Clerk to the Trust. The Trust informed the State Government that the petitioner assumed charge of the said post on 9.10.1987. Simultaneously, the Trust also requested SADA to send immediately all service records of the petitioner. The Trust also issued orders Annexures A-9, A-10 and A-11 fixing his pay on the revised scale and also included his name in the combined gradation list of Class III employees as per Annexure A-14.

From the foregoing facts and circumstances, we are of the opinion that the petitioner was not transferred on deputation; instead he was absorbed on permanent basis as Head Clerk on his transfer which resulted in extinction of his status as U. D. C. in SADA. The conclusion is further reinforced by the fact that all the service records of the petitioner were requisitioned by the Trust and the petitioner was given seniority counting his past service from 24.7.1976 i.e. the date of his appointment as U. D. C. in SADA in Annexure A-14. When the transfer is made from one department to another permanently, fresh order of appointment in the transferred department is not necessary. See : *S. K. Bhattacharaya and others* v. *Union of India and others* (1).

Recruitment and conditions of service of officers and servants of SADA and the Trust are regulated by M. P. Special Area Development Authority Rules, 1976 (hereinafter called 'Rules') framed under section 13 of the M. P. Nagar Tatha Gram Nivesh Adhiniyam, 1973 (23 of 1973). Rule 3(2) of the M. P. Special Area Development Authority Rules, 1976 provides that the officials are liable for transfer from one Authority Service to other Authority Service by the mutual agreement between the two authorities or by the State Govt. Rule 4 provides methods of recruitment.

(1) 1980 (1) S. L. R. 795.

Rule 6(2) empowers the Appointing Authority to consider the applications directly received in the Office of the Authority for the vacant posts. Rule 8(ii) empowers the Chairman to make appointments of all Class III and Class IV employees of the Authority.

The appointment of an experienced person as Head Clerk was the dire necessity of the Trust. The petitioner applied to the Trust through proper channel. The SADA, while forwarding his application to the Trust, commended him as responsible, trustworthy, sincere and capable of discharging duties of Head Clerk and was willing to relieve him from the post of U. D. C. in case he was appointed as Head Clerk. The Trust approved of the petitioner's candidature and decided to appoint him as Head Clerk by making provision of adequate funds. After the petitioner assumed charge, his service records were also sent for. From all these facts the only rational conclusion is that his appointment as Head Clerk was a fresh appointment by mutual agreement of the two Authorities under Rule 3(2) of the Rules and his past service was counted by assigning him seniority from his initial appointment as U. D. C. Therefore, the transfer order Annexure A-6 must be construed as an approval for creation of the post of Head Clerk and the petitioner's selection for the post. When the transfer was mutually agreed by the two Authorities, exercise of power under Rule 3(2) by the State Govt. was not called for. There was also no such request by the Authorities. Chairman of the Trust was competent to appoint the petitioner to the post.

It is well known that the deputation is a post of temporary duration outside home range or district and the person sent on deputation continues to look homeward for promotion or confirmation. The transfer is the antithesis and it must exhibit the opposite indications. See : *Avtar Singh* v. *Delhi Administration and others* (1). The respondents did not place petitioner's service records or any other record to show that his lien was retained in SADA and that he was sent on deputation. The word 'deputation' is prominently missing in Annexure A-6. Therefore, the defence version must be rejected.

(1) I. L. R. (1977) 2 Delhi 224.

Parashu Ram Tiwari v. State, 1990.

The petitioner held a higher post. The impugned order of transfer to SADA as U. D. C. amounts to reversion as a measure of punishment. Even if the power of transfer under the rule was to be exercised by the State Government, that could only be in the equivalent cadre.

In view of foregoing discussion, the petition is allowed. The impugned order of transfer Annexure A-13 is hereby quashed. There shall be no order as to costs.

Petition allowed.

LETTERS PATENT APPEAL

Before Mr. S. K. Jha, Chief Justice & Mr. Justice D. M. Dharmadhikari.
1, February, 1992.

EMPLOYERS IN RELATION TO
M/S. ANAND CINEMA OF
M/S. MAHESHWARI AND BERNARD ...Appellant*

v.

MOHAN TIWARI & ors. ...Respondents.

Letters Patent–Clause X–Appeal, Constitution of India, Articles 226, 227, Industrial Disputes Act (XIV of 1947), Sections 2(oo) 10-A, 1-A and 25-F, Shops and Establishment Act, M. P. (XXV of 1958), Section 58, unamended and Shops and Establishment Rules, M. P., 1959, Rule 14 and Amendment Act No. 10 of 1982–Order of termination simplicitor passed by employer–On challenge made before the Labour Court–Employer alleged misconduct within the meaning of Rule 14–No mention of misconduct in the order of termination–Orders of termination passed prior to coming into force of Amending Act No. 10 of 1982–Termination order does not contravene Section 58 as it stood prior

* L. P. A. No. 16/1984, for quashing award dated 22.10.82, passed by Labour Court, Jabalpur, in Case No. 19/80/I. D.

Employers in Relation to M/s. Anand Cinema of M/s. Maheshwari and Bernard v. Mohan Tiwari, 1992.

to amendment–Employer should not be precluded from proving that the order did not amount to retrenchment–Section 2(oo)–'Otherwise than as a punishment by way of disciplinary action' could not be given restricted meaning–The action of the employer to be judged in the facts and circumstances preceding and following it–Termination order not amounted to retrenchment–Cases remanded to Labour Court to decide the matter afresh granting opportunity to employer to lead evidence and to employer to rebute the same.

A mandatory requirement on the part of the employer to hold a domestic enquiry for one of the enumerated misconducts came into force only in the year 1982 when Section 58 was re-enacted and substituted for the old one. The employer, at the time when it took the action of termination of services was within its power to dispense with the services of the employees on the ground that they had committed misconduct.

In construing the provisions of a legislation regulating the relations between the management and labour in industries, the aims and objects of such legislation cannot be lost sight of. It is obvious that the aims and objects of both the state and the Central enactment under consideration are to maintain industrial, discipline, harmony and peace for proper industrial growth and alongwith it to ensure fair, just and humane treatment to the labourers employed therein treating them as equal partners with the management in the running of the industry. Keeping the aforesaid object of the industrial and labour enactments in view, an employer should not be shut out from proving before the Labour Court that its order of termination did not amount to 'retrenchment' as contemplated by Section 2(oo) of the I. D. Act, but was in fact a disciplinary action based on a mis-conduct which may or may not have been alleged or enquired into in the domestic enquiry.

The Division Bench in the case of *M. P. E. B., Jabalpur (supra)*, therefore, correctly stated the legal position that in the latter case where the employer takes a plea that the function of the order of termination simplicitor was misconduct, he cannot be denied opportunity to prove the same in the Labour Court.

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M. P. Electricity Board, Jabalpur v. *State Industrial Court, Indore and others* (1), *L. Robert Disouza* v. *The Executive Engineer, Southern Railway and another* (2), *Management of Karnatak State Road Transport Corporation* v. *M. Boraiah and another* (3), *Factory Manager, Central India Machinery MFG. Co. Ltd., Gwalior and anor.* v. *Naresh Chandra Saxena and ors.* (4), *State Bank of India* v. *Shri N. Sundra Money* (5), *Mohanlal* v. *The Management of M/s. Bharat Electronics Ltd.* (6), *Jagdish Mittra Sharma* v. *Jivajee Rao Cotton Mills Ltd., Gwalior* (7), *Punjab Land Development & Reclamation Corporation Ltd. Chandigarh* v. *Presiding Officer Labour Court, Chandigarh and ors.* (8), *Workmen of Motipur Sugar Factory Ltd.* v. *The Motipur Sugar Factory Private Ltd.* (9), *Union of India* v. *K. V. Jankiraman etc.* (10) and *Sunil Kumar Azmi and ors.* v. *M. P. T. Corporation and ors.* (11); distinguished.

Abhay Sapre for the appellant.

R. K. Gupta for respondent no. 1.

Cur. adv. vult.

JUDGMENT

The Judgment of the Court was delivered by **D. M. Dharmadhikari, J.** - A common order is passed in this appeal and the connected Letter Patent Appeals No. 21 and 22 of 1984, in which the employer is common although the employees are different and common question of law and fact arise. The three Letters Patent Appeals have been preferred against the order of the learned Single Judge dated 26.9.1984, passed in Misc. Petitions No. 1964, 1965 and 1463 of 1982, *Employers in Relation to M/s. Anand Cinema, Jabalpur* v. *Mohan Tiwari & others* (12), dismissing the above three Writ Petitions filed by the employer, in the cases of the three employees.

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(1) 1980 M. P. L. J. 41.
(2) A. I. R. 1982 S. C. 854.
(3) A. I. R. 1983 S. C. 1320.
(4) 1984 M. P. L. J. 402.
(5) A. I. R. 1976 S. C. 1111.
(6) A. I. R. 1981 S. C. 1253.
(7) 1968 M. P. L. J. 760.
(8) (1990) 3 S. C. C. 682.
(9) A. I. R. 1965 S. C. 1803.
(10) A. I. R. 1991 S. C. 2010.
(11) 1980 M. P. L. J. 471.
(12) 1985 M. P. L. J. 765.

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The learned Single Judge up-held the award dated 22.10.1982 of the Labour Court passed in common in the cases of the three employees whereby the action of the employer of terminating the services of the employees was held to be a case of illegal 'retrenchment' hence was *ab initio* void and the employees entitled to re-instatement in service with full back wages.

In the three L. P. As. common questions of law which arise for decision can be formulated as under :-

> "Whether an employee who has terminated the Services of its employee by an order of termination simplicitor can be permitted when its action is challenged in the Labour Court, to lead evidence in support of its action to prove that the termination was in fact made on the basis of alleged mis-conduct committed by the employee and/or whether such action of the employer is an act of illegal 'retrenchment' within the meaning of Section 2(oo) of the Industrial Disputes Act and is null and void due to the non-compliance of mandatory pre-condition of payment of retrenchment compensation under Section 25-F of the Industrial Disputes Act; hence the employer can claim no opportunity to prove the misconduct of the employee, in the Labour Court."

The only facts necessary for deciding the appeals are that the employer runs a cinema in the name of Anand Cinema at Jabalpur. All the three employees in the three appeals were working as gate keepers. In L. P. A. No. 16/84 concerning the employee Mohan Tiwari, prior to his termination from service a domestic enquiry for mis-conduct was held against him but the action on it was kept in abeyance. In the case of Kailash Singh Chouhan (L. P. A. No. 21/84) and Pratap Yadav (L. P. A. No. 22/84), domestic enquiry was contemplated but the action was said to have been dropped, to give them opportunity to improve. The employer's case, as contained in its statement of claim before the Labour court against Mohan Tiwari, was that right from the date of his employment, his conduct and behaviour was disorderly and rowdy. On 2.12.1978, in an intoxicated state he mis-behaved with members of public and the managements staff of the cinema. A police report was lodged and the

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concerned employee was prosecuted and fined by the Magistrate under Section 294 of the I. P. C. On 15.1.1979 a charge-sheet was issued against him and enquiry officer was also appointed. The charges related to his dis-orderly conduct in insulting the Manager and the partners of Anand Cinema. Inspite of service of charge-sheet, the employee remained absent and an *ex-parte* enquiry was required to be held. The enquiry officer submitted a report against him. The employer, however, kept the action pending with a view to watch if there was any improvement in the conduct and behaviour of the employee. On 14.9.1979 the employee went on an illegal strike and tried to disrupt the smooth working of the employer. The employer, therefore, issued the order of termination keeping in view his immediate past and previous conducts which were partly enquired into. In the statement of claims itself, the employer requested for an opportunity to prove the mis-conduct in the Court.

The mis-conduct attributed against the other two employees, namely, Kailash Singh and Pratap Yadav, as mentioned in the statement of claims filed by the employer in the Labour Court, are some what similar in nature. The allegations of the employer against them is that both of them, as gate-keepers, were extremely rowdy and indisciplined in behaviour. On 14.9.1979 when the night show of the cinema was going on, at about 10.00 P.M. both of them, along with a few other employees of other cinema houses of the city, forcibly entered the cinema premises and caused stoppage of the show. They abused and threatened the members of the public inside the cinema hall and forced them to go away. They mis-behaved with the management staff and the proprietors of the cinema hall. They compelled the management to refund the ticket money of few members of the public. This caused huge financial loss apart from irretrievable damage to the reputation of the cinema concerned. On 15.9.1979 they again went on an illegal strike and staged a DARNA at the gate of the cinema hall and did not allow public to enter the premises of the cinema hall. Thus, on 15.9.1979 the cinema remained closed, causing huge financial loss to the management. The strike resorted to was without any prior notice and without any justifiable cause. On 16th & 17th September, 1979 the two employees stood outside the cinema building and were publicly abusing the partners and the management of the cinema hall.

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They also went to the house of the partner of the cinema Shri Anand Bernard and abused and threatened him with dire consequences. The two employees along with a band of their supporters thus created a reign of terror completely discrupting the cinema business and created fear in the minds of other staff of the employer and the cine going public. In the statement of claims itself, in relation to both the above employees, the employer expressly claimed an opportunity to prove each and every allegation constituting misconduct on the part of the two employees.

The order of termination dated 26.9.1979 in the case of Pratap Yadav and in all the cases is similarly worded and reads as under :-

> "Due to unsatisfactory work and conduct, your services are terminated with immediate effect, as no longer required.
>
> You can collect your dues from the Accounts Section of this cinema, during working hours on any working day."

The Labour Court as well as learned Single Judge held that the termination of services of the employees amounts to 'retrenchment' as defined under Section 2(oo) of the I. D. Act and the same was *ab initio* void as no retrenchment compensation as required by Section 25-F of the I. D. Act was paid to the employees. The Labour Court and the learned Single Judge rejected the contention of the employer that its action was not an action of retrenchment, but was an action of terminating the services based on mis-conduct which should be permitted to be proved before the Labour Court, although it did not hold any domestic enquiry.

It would be better to quote the reasoning of the Labour Court which is contained in relevant portion of paragraph 15 of its award dated 22.10.82, as under :-

> "15..... The orders of termination do not state that first parties are punished for any specified misconduct. The unsatisfactory work and conduct does not show that the employees were held guilty of certain misconduct and were punished by way of disciplinary action. Unsatisfactory work and conduct mean that work and conduct as not to the satisfaction of the employer. It does not mean a misconduct as defined under the rules or orders. Thus, the employer

by his order declared that employees are not punished for any misconduct. The employer instead of taking disciplinary action for any misconduct adopted the course of simple termination. In such circumstances the employer himself cannot be allowed to say that the termination is by way of disciplinary action for a specified misconduct. The employer cannot be allowed to say that it was a colourable exercise of powers on his part. The employer said by termination order that he does not want to take disciplinary action. The same person the employer cannot be allowed to say that it is really a punishment and there was colourable exercise of powers on his part. Thus, the termination of services were not by way of disciplinary action and the termination of services amounted to retrenchment."

The same reasoning is reiterated by the Labour Court in paragraph 22 of its award as under :-

"Thus, the contention of second party that the termination of services of the three employees can be treated as disciplinary action cannot be accepted. An employer himself cannot say that simple termination of services was ordered in the termination order while it was actually punishment for misconduct. The employee can challenge as an order, stating that it is really a punishment for misconduct. The employer who wants to take advantage of stating that it is a simple termination cannot be allowed to take advantage of stating it disciplinary action also. Employer cannot prove misconduct as reasons for termination to avoid the effects of saying unsatisfactory work as reason, which in itself does not mean mis-conduct."

The learned Single Judge up-held the decision of the Labour Court. It was held that the decision of the Division Bench of this Court in the case of *M. P. Electricity Board, Jabalpur* v. *State Industrial Court, M. P., Indore and others* (1), is no longer a good law in view of the decisions of the Supreme

(1) 1980 M. P. L. J. 41.

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Court in the cases of *L. Robert Disouza* v. *The Executive Engineer, Southern Railway and another* (1) and *Management of Karnatak State Road Transport Corporation* v. *M. Boraiah and another* (2). The learned Single Judge preferred to rely on a later decision of this Court in the case of *Factory Manager, Central India Machinery Mfg. Co. Ltd., Gwalior and another* v. *Naresh Chandra Saxena and others* (3). The conclusion of the learned Single Judge on the legal question which is for re-consideration before us is contained in paragraph 21 of his order, which is as under :-

> "21. From the discussion aforesaid, the true position that emerges is that the management has no right to ask for any opportunity before the Labour Court to lead any fresh evidence if the services of the employees have been terminated without conducting any domestic enquiry in accordance with the provisions of Standing Orders and, therefore, the termination order results in retrenchment as defined under Section 2(oo) of the Act if section 25-F has not been complied with by the employer. Therefore, the plea as raised by the petitioner in all these three petition have no substance in the eye of law and hence it must be rejected."

The learned counsel appearing for the employer appellant here, assails the decisions of the Labour Court and that of the learned Single Judge arguing that the reasonings contained therein proceed on misconception of the scope and legal effect of the relevant provisions contained in Section 2(oo) and Section 25-F, compared with those in Section 11-A of the Industrial Disputes Act. Heavy reliance has been placed on the decisions of the Supreme Court in the cases of *Shankar Chakravarti* v. *Britannia Biscuit Co. Ltd. and another* (4) and *Workmen of F. T. & R. Co. of India P. Ltd.* v. *The Management and others* (5). Reliance is also placed on the decisions of Madhya Pradesh High Court in the case of *M. P. Electricity Board, Jabalpur* v. *The State Industrial Court, M. P. and others* (6) and that of *Lachman Das & another* v. *M/s. Indian Express Newspaper, Bombay Pvt. Ltd. & another* (7).

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(1) A. I. R. 1982 S. C. 854.
(2) A. I. R. 1983 S. C. 1320.
(3) 1984 M. P. L. J. 402.
(4) A. I. R. 1979 S. C. 1652.
(5) A. I. R. 1973 S. C. 1227.
(6) 1980 M. P. L. J. 41.
(7) 1977 Lab. & I. C. 823.

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In substance the contention on behalf of the employer is that where the employer, in an action initiated by the employee by challenging his termination of service, takes a plea that the order of termination was not innocuous but was as a measure of punishment; the employer cannot be precluded from leading evidence to prove before the Labour Court the mis-conduct alleged to have been committed by the employee. In other words the argument is that the employer cannot be prohibited to prove before the Labour Court that the termination of services of the employee was not by way of retrenchment but in fact a punitive action based on mis-conduct. Attention of the Court was invited by the learned counsel for the employer to its written statement filed before the Labour Court in which earliest available oppoftunity was sought for proving the alleged misconduct. In support of the argument it was pointed out that the employee, in his statement of claims before the Labour Court had also alleged, had also alleged against the employer victimization and unfair labour practice as the motive for termination. It was, therefore, not a case of illegal retrenchment, but was a case of punitive action of termination from service and the Labour Court committed a serious mistake in shutting out evidence sought to be led by the employer, in proof of alleged misconduct.

Learned counsel appearing for the employees, respondent herein, in reply submitted that the very term of the orders of termination show that the services of the employees were dispensed with for 'unsatisfactory work and conduct', which is not the same as alleging commission of any misconduct by the employees. The argument is that the action of the employer has to be judged on the basis of the terms of the order by which the employer terminated the services of the employee and not dehors it. It would be unjust to permit the employer to prove misconduct which was neither alleged in the order of termination nor enquired into in a domestic enquiry. According to the learned counsel for the employee, permitting such a course to the employer to terminate Services of the employee by an order simplicitor and then prove the misconduct which was neither alleged nor enquired into in the domestic forum would give encouragement to unfair labour practice which would not be conducive to harmonious industrial relationship. In support of the above argument, it was pointed out that

the service conditions of the employees are regulated by Madhya Pradesh Shops and Establishment Act, 1958 and the rules of 1959 framed thereunder (hereinafter referred to as the Act and the Rules). It is not indispute that the cinema establishment of the employer is governed by the provisions of the above Act. The submission is that Section 58 of the Act requires issuance of one month's notice or payment of wages in lieu thereof as a pre-condition for dispensing with services of an employee for any 'reasonable cause', which includes commission of a mis-conduct. Our attention is invited to and reliance is placed on rule 14 of the Rules of 1959 which enumerates the categories of mis-conduct constituting a reasonable ground for dispensing with services of an employee under the 'establishment' in accordance with Section 58(1) of the Act. It is submitted by the learned counsel for the employees that unsatisfactory work and conduct attributed to the employees as a ground of termination of dispensing with their services, is not covered by any of the categories of mis-conducts enumerated in Rule 14 of the Rules. It is, therefore, contended that it is not open to the employer to claim an opportunity to prove the alleged conduct which is not a 'misconduct' within the meaning of Rule 14 of the Rules. The action of the employer is said to be in contravention, both of the provisions of Section 58 of the Act read with Rule 14 of the Rules as also the mandatory provisions contained in Section 25-F of the I. D. Act.

Learned counsel appearing for the employees read and commented on the relevant parts of the following decisions cited by him at the Bar :-

"(1) *State Bank of India* v. *Shri N. Sundra Money* (1).

(2) *Mohanlal* v. *The Management of M/s. Bharat Electronics Ltd.* (2).

(3) *L. Robert D'Souza* v. *Executive Engineer Southern Railway and another* (3).

(4) *Jagdish Mittra Sharma* v. *Jivajee Rao Cotton Mills Ltd., Gwalior* (4).

(5) *Managemment of State Raod Transport Corporation* v. *M. Boraiah and another* (5).

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(1) A. I. R. 1976 S. C. 1111. (2) A. I. R. 1981 S. C. 1253.
(3) A. I. R. 1982 S. C. 854. (4) 1968 M. P. L. J. 760.
(5) A. I. R. 1983 S .C. 1320.

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(6) *Punjab Land Development & Reclamation Ltd., Chandigarh* v. *Presiding Officer, Labour Court, Chandigarh and others* (1).

(7) *Workmen of Motipur Sugar Factory Ltd.* v. *The Motipur Sugar Factory Private Ltd.* (2).

(8) *Union of India* v. *K. V. Jankiraman etc.* (3)."

It was submitted that all previous cases under Section 11-A of the I. D. Act permitting an opportunity to an employer to prove misconduct even where no domestic enquiry was held by him, require a fresh consideration in the light of the enlarged meaning given to the term 'retrenchment' defined under Section 2(oo) of the I. D. Act for the purposes of provisions contained in Section 25-F of the said Act.

The main thrust of the arguments advanced by the learned counsel on behalf of the employees is that from the impugned orders of termination it cannot be spelled out that the employer intended to take a disciplinary action against the employees. It is submitted that there was no charge-sheet issued and no step what-so-ever taken in the direction of a punitive action by the employer. The action of the employer, therefore, does not fall in excepted category mentioned in the definition clause of the word 'retrenchment' under Section 2(oo) of the I. D. Act. According to the learned counsel for the employees, the employer having chosen to pass an innocuous order of termination based on unsatisfactory conduct and work of the employees, cannot be permitted to turn round and seek an opportunity in the Labour Court to prove any misconduct said to have been committed by the employees. The case is clearly a case of illegal retrenchment without payment of retrenchment compensation as required by Section 25-F and without any notice or payment in lieu thereof as required by Section 58 of the Shops and Establishment Act, 1958.

Before deciding the legal question raised, it is necessary to critically examine various provisions of law which are applicable to the case. The employer-employee relationship is governed both by the State and Central enactments. The cinema theatre run by the employer being an 'establishment'

(1) (1990) 3 S. C. C. 682. (2) A. I. R. 1965 S. C. 1803.
(3) A. I. R. 1991 S. C. 2010.

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under the provisions of the Act, the provisions contained in Section 58(1) of the Act regulate the conditions of service of the employees working in it. Section 58 of the Act was re-enacted by substitution, by Act No. 10 of 1982 with effect from 1.5.1982. The provisions of Section 58(1) as they originally stood, prior to its substitution, would apply to these cases because the orders of termination were passed in the year 1979. Section 58 of the Act at the relevant time, was as under :-

> "58. Notice of dismissal. (1) No employer shall dispense with the services of an employee who has been in his continuous employment for not less than three months, without giving such person at least thirty days' notice in writing or wages in lieu of such notice :
>
> Provided that such notice shall not be necessary where the services of such employee are dispensed with for misconduct as may be defined in the rules made by the Government in this behalf.
>
> (2) No employee, who has been in continuous employment of an employer for not less than three months, shall leave the service of such employer without giving him at least one week's notice in writing, and if he fails to give such notice, or gives notice of less than one week, he shall forfeit his wages for one week or for the number of days by which the notice falls short of one week, as the case may be.
>
> (3) Any employee in respect of whom the provisions of sub-section (1) are contravened may apply to the nearest Magistrate of the first class or authority appointed under the Payment of Wages Act, 1936 (IV of 1936) and if such Magistrate or such authority is satisfied that such person has been dismissed without sufficient cause, he may for the reasons to be recorded in writing, direct that the employer shall pay one month's wages as compensation to the person so dismissed and there-upon the employer shall pay the amount of compensation to such person.
>
> (4) The amount of compensation payable under this section shall, for purposes of its recovery be deemed to be a fine imposed under this Act.

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(5). No person who has been awarded compensation under this section shall be at liberty to bring any civil suit or proceeding in respect of the same claim and no civil court shall entertain any such suit or proceedings."

It is to be noticed from the above provision that under Sub-section (1) of Section 58 of the Act the only requirement on the part of the employer, for dispensing with services of an employee by an order of termination simpliciter, required thirty days notice in writing or payment of wages in lieu thereof. In case such a notice was not given or payment in lieu thereof was not made, the remedy of the employee was to approach the Judicial Magistrate under sub-section (3) of the Section 58 of the Act for recovery of such wages in lieu of notice. Proviso to sub-section (1) of section 58 dispenses with giving of such notice or payment of wages in lieu thereof where the employer has dispensed with the services of the employee for a misconduct defined in the rules made by the Government. Punitive action of an employer against the employee does not require issuance of either a month's notice or payment of wages in lieu thereof. 'Mis-conduct' for the purpose of sub-section (1) of Section 58 of the Act includes the following acts and omissions mentioned in Rule 14 of the Rules framed under the Act. Rule 14 reads as under :-

"14. Misconduct.....For the purposes of the proviso to sub-section (1) of Section 58, the following acts and omissions shall be treated as misconduct on the part of the employees.

(a) wilful in-subordinate to, or disobedience of, whether alone or in combination with others, any lawful and reasonable order of a superior;

(b) theft, fraud or dishonesty in connection with the employer's business or property;

(c) wilful damage to or loss of employer's goods or property;

(d) taking or giving bribes or any illegal gratification in connection with the employer's business;

(e) habitual absence without or absence without leave for more than ten days;"

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(f) habitual late attendance;

(g) habitual breach of any law applicable to the establishment;

(h) riotous or disorderly behaviour during working hours at the establishment or any act subversive of discipline;

(i) habitual negligence or neglect of work;

(j) striking work or inciting others to strike work in contravention of the provisions of any law of rule having the force of law."

The case of the employer as pleaded in his statement of claims filed before the Labour Court in the Industrial reference pending for adjudication before it, is that the services of the employees were dispensed with for one of the misconducts covered by rule 14(a) to (j) of the Rules. It was therefore, not necessary for the employer to serve either one month's notice or make payment of wages in lieu thereof as required by Sub-Section (1) of Section 58 of the Act. The contention on behalf of the employer, therefore, is that the termination of the services of the employees is not in contravention of sub-section (1) of Section 58 of the Act.

The newly substituted Section 58 by Amendment Act No. 10 of 1982 with effect from 1.5.1982 may be compared with the original Section 58 as it stood on the date the impugned action was taken. Under the newly substituted Sec. 58(1) and the proviso thereunder, services of an employee of an 'establishment' can be dispensed with without any notice or payment of wages in lieu thereof only for a reasonable cause. The proviso to newly substituted Section 58 (1) of the Act permits the employer to dispense with the services of an employee without notice on a charge of misconduct, which should be supported by satisfactory evidence recorded during the enquiry held by the employer for the purpose. Section 58(1) with proviso as substituted by Act No 10 of 1982 with effect from 1.5.1982 is also reproduced hereunder for the purpose of comparing its provisions with the original Section 58(1) of the Act as it stood prior to its substitution :-

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"58.Notice of dismissal. --- (1) No employer shall dispense with the services of an employee who has been employeed for a period of three months or more except for a reasonable cause, and without giving such employee at least one month's notice or wages in lieu of such notice :

Provided that such notice shall not be necessary if the services of such employees are dispensed with on a charge of misconduct supported by satisfactory evidence recorded at an enquiry held by the employer for the purpose.

(2) (a) The employee discharged, dismissed or retrenched may appeal to such authority and within such time as may be prescribed either on the ground that there was no reasonable cause for dispending with his services or on the ground that he had not been guilty of misconduct as held by the employer or on the ground that such punishment of discharge or dismissal was severe.

(b) The appellate authority may, after giving notice in the prescribed manner to the employer and the employee dismiss the appeal or direct the re-instatement of the employee with or without wages for the period during which he was kept out of employment or direct payment of compensation without reinstatement or grant such other relief as it deems fit in the circumstances of the case.

(3) The decisions of the appellate authority shall be final and binding on both the parties and be given effect to within such time as may be specified in the order of the appellate authority." .

Having thus compared the original Section 58, as it stood on the date of the impugned action and as it stood after 1.5.1982, we are clearly of the opinion that the original provision of Section 58 gave an option to the employer to terminate simpliciter services of an employee even on a charge of misconduct which he may not have enquired into in a domestic enquiry and it was open to him to support its action, if and when, it

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is challenged in a Court of law. There was no provision of appeal against the action of the employer as is now provided by substituted Section 58(2) of the Act. Under the unamended Section 58, the remedy to the employee was to resort to the ordinary remedy of raising a dispute under Section 10 of the I. D. Act. The impugned actions of termination of services of the employees, therefore, do not contravene the provisions of Section 58 of the Act as they stood on the date the actions were taken i.e. prior to 1.5.1982.

We shall now take up the question raised on behalf of the employees as to whether the impugned actions can be said to be in contravention of the provisions of Section 25-F read with Section 2(oo) of the I. D. Act. Section 2(oo) defines the word 'retrenchment' as under :-

> "2. Definition.-- In this Act, unless there is anything repugnant in the subject or context
>
> (a) .....
>
> (oo)"retrenchment" means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a publishment inflicted by way of disciplinary action, but does not include--
>
> (a) voluntary retirement of the workman; or
>
> (b) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf; or
>
> (bb)"termination of the services of a workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein; or" (1)
>
> (c) termination of the service of a workman on the ground of continued ill-health(m)."

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It is to be noticed that the word 'retrenchment' as defined in the I. D. Act has a wider legal meaning than purely literal one. The original concept of retrenchment was confined to discharge of surplus labour. The use of the expression 'for any reason whatsoever' in the opening part of the definition clause in Section 2(oo) of the I. D. Act has been construed by the Supreme Court in the case of *Mohan Lal* (*supra*) to mean that every kind of termination of service, excepting by way of a punishment imposed, by way of voluntary retirement, as a result of non-renewal of contract of employment or continued ill health covered by sub-sections (a), (b), (bb) and (c) of Section 2(oo) would amount to 'retrenchment', requiting fulfilment of the mandatory condition of payment of retrenchment compensation under section 25-F of the Act.

The main controversy between the parties centres round the true meaning to be assigned to the expression "otherwise than as a punishment inflicted by way of disciplinary action" used in definition clause in Section 2(oo) of the I. D. Act. Bare reading of the definition clause makes it manifest that if the employer takes a disciplinary action against the employee and terminates his services for a misconduct, as a measure of punishment, the termination would not fall within the definition of 'retrenchment'. The argument of the learned counsel for the employer is that in the present cases of the employees under consideration, although the misconduct was neither attributed nor enquired into, the termination was in fact by way of disciplinary action and the employer should have an opportunity to lead evidence in proof of the alleged mis-conduct in the Labour Court to support its action. On the other side, the argument on behalf of the employees is that since the employer has not chosen either to attribute mis-conduct or take steps towards disciplinary action against the employees, it is not open to the employer to seek any opportunity to prove the alleged misconduct in the Labour Court which not expressly stated in the orders of termination to be the foundation of its action. The submission on behalf of the employees is that the only cause of termination stated in the impugned orders is that their work and conduct was 'unsatisfactory'. It is not the same thing as saying that they had committed a misconduct. Learned counsel for the employees argued that the action of the employer has to be judged from the terms of its own order of

termination and no evidence alinude or outside it can be permitted to be led. In substance the contention is that if the action of the employer is colourable, in the sense, that although it intended to punish the employees, it had chosen to pass an innocuous order of termination simpliciter, the employer cannot be given any opportunity before the Labour Court to prove the alleged misconduct which was the motive behind the order of termination.

Having given our thoughtful consideration to the contentions advanced before us by the parties on the true meaning and effect of the expression "otherwise than as a punishment inflicted by way of disciplinary action" used in Section 2(oo) of the I. D. Act, we are of the opinion that the same cannot be given a restricted meaning, as is sought to be assigned to it on behalf of the employees. As has been stated by us above, while examining the contention of the employees based on the contravention of Section 58 of the Act, we find that the provisions of that Act gave the employer an option to dispense with the services of the employees in his "establishment" for commission of misconduct even without holding any domestic enquiry. A mandatory requirement on the part of the employer, to hold a domestic enquiry for one of the enumerated misconducts came into force only in the year 1982 when Section 58 was re-enacted and substituted for the old one. The employer, at the time when it took the action of termination of services, was within its power to dispense with the services of the employees on the ground that they had committed misconduct. We are not prepared to accept that the action of the employer is to be judged only on the basis of the express terms contained in the order of termination. In our opinion, the action of the employer has to be judged, in addition to the terms contained in the termination order, on the basis of the facts and circumstances preceding and following it.

In the instant case, against the three employees, in its statement of claims submitted before the Labour Court, the employer has clearly come out with a case that each one of the three employees had committed such acts of indiscipline and mis-behaviour which fall in one of the categories of mis-conducts enumerated in Rule 14 of the Rule, quoted above. We do not find any prohibition under the provisions of the State or the

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Central Act operating against the employer from being permitted an opportunity to lead evidence on relevant facts and circumstances to prove that the employees had in fact committed specific act of misconduct and the action of termination of their services, was not 'retrenchment' but was in fact termination by way of a disciplinary action. It is true that 'unsatisfactory work and conduct' attributed to the employees in the orders of their termination is not the same thing as saying that they were guilty of misconduct, but in our opinion, the employer cannot be shut out from leading evidence to show what it actually meant by the use of the expression "unsatisfactory work and conduct". It is to be kept in mind that law contemplates passing of the orders of termination by employers who may be laymen, not knowing the intricacies and niceties of law. Nothing decisive, therefore, turns on the language of the termination order and the employer is not prohibited from disclosing to the Labour Court the real foundation or motive behind the order of termination and the justification for its action. The employer may choose to simply terminate the services by an innocuous order although the employee had committed a serious misconduct. It is not always necessary, unless otherwise required by any contract or statutory term or condition of service, that the employer while terminating services of an employee must cast stigma on him in the order of termination and hold an enquiry before taking such adverse action. An innocuous order of termination founded on misconduct does lesser harm to the employee by not creating any hinderence or disqualification for him to seek employment else where. If, however, the employee in case of such termination, seeks to impugn the action of the employer on the ground that it was unreasonable or against principles of natural justice, since no enquiry was held against him, it is open to him to question the same in the Labour Court where the Court will have opportunity to examine the validity of the action of the employer after permitting both the parties to lead necessary evidence in the matter, a course which is permissible under the provisions of Section 11-A of the I. D. Act.

In construing the provisions of a legislation regulating the relations between the management and labour in industries, the aims and objects of such legislation cannot be lost sight of. It is obvious that the aims and objects of both the State and the Central enactments under consideration are

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to maintain industrial discipline, harmony and peace for proper industrial growth and along with it, to ensure fair, just and humane treatment to the labourers employed therein, treating them as equal partners with the management in the running of the industry. Keeping the aforesaid object of the industrial and labour enactments in view, an employer should not be shut out from proving before the Labour Court that its order of termination did not amount to 'retrenchment' as contemplated by Section 2(oo) of the I. D. Act, but was in fact a disciplinary action based on a misconduct which may or may not have been alleged or enquired into in the domestic enquiry.

It has been settled finally by the decision of the Supreme Court in the case of *Workmen of M/s. Fire Store Tyre & Rubber Co. of India* (*supra*) that even after the introduction of Section 11-A of the Industrial Disputes Act, specifying the powers of Labour Court and Tribunals in the matters of industrial adjudication, the employer can have an opportunity to prove the misconduct of an employee whose services have been discharged, even in a case where it had held no domestic enquiry. The Supreme Court specifically considered in the case of *Workmen of M/s. Firestone Tyre & Rubber Co. of India* (*supra*) the scope and effect of proviso to Section 11-A of the I. D. Act which enjoins upon the Labour Court and the Tribunal to place reliance 'on material on record of the case' and not to take any fresh evidence in relation to the industrial matter before it. The above proviso to Section 11-A of the I. D. Act has been construed by the Supreme Court, not to exclude or inhibit the earlier recognised right of the employer, prior to introduction of Section 11-A, of being granted an opportunity to prove misconduct of an employee discharged or dismissed by it even if there was no domestic enquiry held whatsoever.

The contention raised on behalf of the employees, therefore, cannot be accepted that only such a disciplinary action is excluded from the purview of 'retrenchment' defined under Section 2(oo) of the I. D. Act in which the employer had either issued a charge-sheet for the alleged misconduct or taken some overt act in the direction of punishing the employee. Admittedly, in this case neither a charge-sheet was issued nor the

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misconduct was mentioned in the order of termination, but that should not, in our opinion, preclude the employer from proving before the Labour Court that the conduct of the employees was such that they should not either be reinstated in service or paid back wages and their discharge or termination be maintained. The apprehension is baseless that the employer, even if there was no misconduct and had simply retrenched the employee, might still get opportunity before the Labour Court to prove the misconduct which was never the foundation of the order nor was its in contemplation of the employer when he took the adverse action against the employee. In our view, where the employer simply terminates the services of an employee by innocuous order although there was misconduct, it does no greater harm to the employee than when it attributes misconduct casting stigma on him and removes him from service. It can be contemplated that the employer may have a motive to punish the employee for a misconduct and yet decides to discharge his services by innocuous order of termination simpliciter. We do not understand why the employer should be denied an opportunity when its action of termination simpliciter is challenged in Court of Law, to bring all relevant facts and circumstances before the Court to prove that the employee's work and conduct was such that the employer should not be compelled to continue with his employment and thus harm the interest of the industry. We are, therefore, not prepared to give a restricted meaning to the expression "otherwise than as a punishment inflicted by way of disciplinary action". The action of the employer will have to be judged by the Labour Court not only on the basis of the order of termination and provisions of Section 58 of the Act, but will have to be judged on all facts and circumstances which may come on record after full opportunity to lead evidence is granted to the parties. The Labour Court, on examination of the entire evidence led by the parties may come to a conclusion that there was no misconduct or the misconduct alleged and sought to be proved did not warrant the impugned action of termination. The employer should, however, have an opportunity to establish before the Labour Court by leading evidence that by terminating the services of the employees it had not, in fact and law, retrenched them within the meaning of Section 2(oo) of the I. D. Act, but had punished them for one of

the misconducts enumerated in Rule 14 of the Rules. We are also of the view that mentioning of unsatisfactory work and conduct in the order of termination passed by the employer should not preclude it from proving before the Labour Court that in fact it was intended to mean a conduct which amounts to legal misconduct within the meaning of Rule 14 of the Rules.

We have already pointed out above that there are facts pleaded in the statements of claim by the employer that prior to the passing of termination order one of the employees (namely Mohan Tiwari) was in fact proceeded against by issuance of a charge-sheet but action on it was kept in abeyance to permit him to improve. With regard to others, no charge sheet was issued but a disciplinary action was contemplated although it was dropped, at that time, to give them opportunity to improve. We do not find as to why the employer should not be permitted to prove that for the same past misconduct on which action was postponed or dropped and they were allowed to improve but they did not, the services of the employees were dispensed with which was a course permissible under the then existing provisions of Section 58(1) of the Act.

Before we conclude on the above discussed legal aspect of the matter, we feel it necessary to make some comments with a view to clear the cloud which appears to have been created due to the so called apparent conflict between the various Division Bench decisions of this Court.

The learned Single Judge has made express observations in his order that the view taken in the case of *M. P. Electricity Board, Jabalpur* (*supra*) is no longer a good law in view of the later decision of the Supreme Court noted by him in his order. The learned Single Judge has instead preferred to rely in a Division Bench decision of this Court in the case of *Factory Manager, Central India Machinery Mfg. Co. Ltd., Gwalior and another* (*supra*). In paragraph 6 of this Division Bench decision it has been held that the earlier Division Bench decision of this Court in the case of *Sunil Kumar Azmi and others* v. *M. P. R. T. Corporation and others* (1), has been rendered as no longer a

(1) 1980 M. P. L. J. 471.

good law in view of the later decisions of the Supreme Court giving a wider meaning to the word 'retrenchment'. We have carefully gone through the aforementioned Division Bench decisions of this Court, in the light of the observations made by the learned Single Judge in this order. In our considered view, none of the judgments of the Supreme Court cited in those decisions and before us takes any contrary view on the subject matter under consideration. We respectfully concur and fully approve the following statement of law made by the Division Bench in the case of *M. P. Electricity Board, Jabalpur* (*supra*).

> "Retrenchment of an employee as defined under Section 2(oo) of the Industrial Disputes Act, may be for various reasons. In case of an ordinary retrenchment where there is no misconduct alleged against the employee, if provisions of Section 25-F are not followed, the employee would normally be reinstated. The employer may, however, support the order of retrenchment on the ground of misconduct and if the employer is able to lead evidence to prove it before the Labour Court, the retrenchment would be upheld and the employee would not be granted any relief. An employer is very often faced with dilemma whether to simply terminate the services of an employee or to hold a domestic enquiry against him and to punish him by an order of dismissal. An order of termination simpliciter, is more favourable to the employee and, therefore, if an employer takes a benevolent attitude and instead of holding a domestic enquiry to punish the employee discharges him, the employer cannot be in a worse position than in what he would have been had he taken the step of holding a domestic enquiry and dismissing the employee. We do not find any reason why the employer should not be able to support an order of termination simpliciter on the ground of misconduct. Reinstating in such cases and directing the employer to proceed against the employee by a domestic enquiry would only continue the industrial strike. The object of industrial adjudication is to put an end to industrial dispute as early as possible. By permitting employer to prove before the Labour Court that the termination is justified on the ground of misconduct, the industrial dispute is brought to an end and the employee is given the

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benefit of an independent adjudication by the Labour Court without leaving him to the mercy of an adjudication in a domestic enquiry held by the employer. Indeed, in our opinion, the matter is squarely covered by proposition 5 and 7 laid down by the Supreme Court in *The Workmen of M/s. Firestone Tyre and Rubber Co. of India P. Ltd. v. The management and others* (1)."

In our considered view the decisions of the Division Benches in the cases of *Sunil Kumar Azmi and others* (*supra*) and *Factory Manager, Central India Machinery Mfg. Co. Ltd., Gwalior and another* (*supra*), are distinguishable. In the aforesaid two Division Bench cases, the action of termination taken by the employer was based on Standing Order 11 of the Industrial Employment (Standing Orders) Rules, 1963, framed under the M. P. Industrial Employment (Standing Orders) Act, 1961. Under the Standing Order 11, even a permanent employee could be terminated on one month's notice or pay in lieu thereof and the only requirement on the part of the employee was to record in writing the reasons for termination and communicate the same to the employee. In the case of *Sunil Kumar Azmi and others* (*supra*), under Standing Order 11, the services of the employee were terminated simpliciter for unsatisfactory work resulting in loss of confidence. It such a situation it was held by the Division Bench that such termination of services did not amount to 'retrenchment'. This statement of law may require reconsideration in view of the larger meaning assigned by the Supreme Court to the word 'retrenchment' to include 'termination' for any reason whatsoever', including one for unsatisfactory work and loss of confidence, but excluding action taken by way of punishment. In the later decision of the Division Bench in the case of *Factory Manager, Central India Machinery Mfg. Co. Ltd., Gwalior and another* (*supra*) the Division Bench rightly noticed in paragraph 6 of the judgment the decisions of the Supreme Court on the subject for holding that action of termination under Standing Order 11 for inefficient or unsatisfactory work would amount to retrenchment within the meaning of Section 2(oo) of the I. D. Act.

(1) A I R. 1973 S. C 1227.

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The ratio of the above two Division Bench decisions turns on the nature of the termination of the employees based on Standing Order 11 in those cases. Compared to them, the Division Bench decision in the case of *M. P. Electricity Board, Jabalpur* (*supra*) recognizes the right of the employer to prove misconduct even where it has taken action of simple termination under the Standing Order applicable to the industry but takes a plea before the Labour Court that the foundation of the Order was misconduct and motive was to punish him.

From the ratio deduced by us from the above referred three Division Bench decisions of this Court a distinction is noticeable between the cases on the one hand where the order of simple termination is based on unsatisfactory of inefficient work and conduct or loss of confidence and on the other cases where although the order of termination is innocuous and is stated to be for unsatisfactory work and conduct, but in fact the employer pleads that it was on the basis of misconduct for which he seeks opportunity to prove it before the Labour court. The Division Bench in the case of *M. P. E. B., Jabalpur* (*supra*), therefore, correctly stated the legal position that in the latter case where the employer takes a plea that the foundation of the order of termination simpliciter was misconduct, he cannot be denied opportunity to prove the same in the Labour Court.

The last submission which now needs consideration is whether an opportunity to the employer to prove its case that it was not an illegal retrenchment but was an order of termination based on misconduct, was granted but not availed of by the employer in the Labour Court. Our attention was invited to the order-sheets of the Labour Court to point out that certain preliminary issues were framed by the Labour Court on which the employer in categorical terms expressed that he would not lead any evidence. The learned counsel for the employees states that the perusal of order-sheets clearly shows that opportunity to lead evidence was granted by the Labour Court, but that was not availed of by the employer and the same should not now be permitted to it. The order-sheets of the Labour Court are not on record. From the record available with us we do not find that any such opportunity, as is claimed before

us, to prove the misconduct, was expressly granted while trying the preliminary issues and was not availed of by the employer. The main order passed by the Labour Court jointly in the cases on its careful reading, goes to show that opportunity to prove misconduct although claimed by the employer, at the very first available opportunity, in its statements of claim, was expressly rejected by the Labour Court stating that looking to the nature of the action of termination taken by the employer, it was 'retrenchment' and no opportunity can be granted to the employer to lead evidence.

In view of the discussion aforesaid, the Letters Patent Appeals filed by the employer deserve to be allowed and are hereby allowed. The impugned orders of the learned Single Judge dated 26.9.1984 in *Relation to M/s. Anand Cinema, Jabalpur* v. *Mohan Tiwari & others* (1), and those of the Labour Court dated 22.10.1982 in all the three cases are hereby set aside. The Labour Court is directed to refix the cases with a purpose to grant opportunity to the employer to lead such evidence as it wishes in proof of the alleged misconduct against the employees with a right to the employees to meet such evidence by leading evidence in rebuttal. The Labour Court after giving opportunity to the parties to lead evidence on the question of misconduct shall decide the cases afresh on the basis of such evidence, if any, led in the cases. In the circumstances of the case we leave the parties to bear their own costs of these appeal.

Appeal allowed.

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(1) 1985 M. P. L. J. 765.

APPELLATE CIVIL

Before Mr. Justice P. C. Pathak.
24, March, 1989.

NEMICHAND JAIN ...Appellant*
v.
SHANTI BHAI RATHORE ...Respondent.

*Accommodation Control Act, M. P. (XLI of 1961)–Section 12(1)(a), 12(1)(e), Accommodation Control (Amendment) Ordinance, M. P., (I of 1985) and Civil Procedure Code (V of 1908), Section 100–Second Appeal–Suit for eviction dismissed by both the Courts below for ceasation of jurisdiction of Civil Court on account of deletion of section 12(1)(e) from the Act–Effect of Amending Act, 1985–Section 12(1)(e) restored by Amending Act No. 1 of 1985 during pendency of First Appeal–Amendment procedural in nature–Shall have retrospective effect to pending suit–Suit for eviction on the ground u/s. 12(1)(e) of the Act–*Bonafide *need–Lower appellate Court finding plaintiff's* bonafide *need–Decree of eviction must follow such finding.*

It is well settled that statutes dealing with merely matters of procedure are retrospective unless such a construction is textually inadmissible. No person has a vested right in any course of procedure. A charge in the law of procedure operates retrospectively and unlike the law relating to vested right is not only prospective.

It must be held that the plaintiff is entitled to seek eviction on the ground under Section 12(1)(e) which was restored during the pendency of the appeal, even though on the date of institution of the suit, namely 13.12.1983, the Civil Court had no jurisdiction to entertain the suit for eviction on the ground under Section 12(1)(e) of the Act.

The lower appellate Court found that the plaintiff is living in a rented accommodation and that he has no other reasonably suitable accommodation of his own. It also rightly held that it was not essential for the plaintiff to prove that he is the owner of the accommodation. Therefore, a decree for eviction must following the findings of the Court below, on the ground under Section 12(1)(e) of the Act.

* S. A. No. 362 of 1986, aggrieved by the Judgment and decree dated 20.2.86, passed by Vth Addl. Judge to the Court of District Judge, Jabalpur, in C. A. No. 25-A/84.

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Anand Gopal Sheorey v. *State of Bombay* (1), *B. Banerjee* v. *Anita Pan* (2) and *New India Insurance Co. Ltd.* v. *Shanti Mishra (Smt.)* (3); followed.

Sunderlal v. *Her Prasad* (4); referred to.

S. C. Jain for the appellant.

P. D. Pathak for the respondent.

Cur. adv. vult.

JUDGMENT

P. C. PATHAK, J. - This is plaintiff's appeal against dismissal of his suit for eviction concurrently by both the Courts below.

The plaintiff is a tenant and the defendant is a sub-tenant but for the purposes of this suit, the plaintiff is the landlord of the defendant. The suit accommodation was sub-let on monthly rent of Rs. 40/- as found by the lower appellate Court.

On 30.12.1983, the plaintiff filed a suit for eviction on the grounds under Sections 12(1)(a) and 12(1)(e) of the M. P. Accommodation Control Act, 1961 (hereinafter in short called 'the Act'). The trial Court dismissed the suit on findings that the plaintiff, not being the owner of the accommodation, is not entitled to evict the defendant on the ground of *bona fide* need as also the deletion of Section 12(1)(e), w.e.f. 15.8.1983 by the M. P. Accommodation Control (Amendment) Act, 1983 (XXVII of 1983) for the suits before the civil Courts. The ground u/s. 12(1)(a) was not proved.

During the pendency of the first appeal, Section 12(1)(e) of the Act was restored with effect from 27.11.1985 by the M. P. Accommodation Control (Amendment) Ordinance, 1985 (No. 1 of 1985). Therefore, it was argued before the lower appellate Court that the relief of eviction under Section 12(1)(e) could be granted in view of the subsequent revival of the provisions. The lower appellate Court declined to

(1) A. I. R. 1958 S. C. 915.
(2) A. I. R. 1975 S. C. 1146.
(3) A. I. R. 1976 S. C. 237.
(4) 1980 M. P. L. J. 182.

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accept the argument on the ground that the trial Court had no jurisdiction to entertain the suit on the ground of *bonafide* need on the date it was filed and that the revival of the provision is prospective and not retrospective since the amendment does not relate to procedure.

The question for decision is whether the plaintiff was not entitled to benefit of the Amending Act reviving Section 12(1)(e) conferring jurisdiction on the civil Court to entertain and decide the suit on the ground as well. It is well settled that Statutes dealing with merely matters of procedure are retrospective unless such a construction is textually inadmissible. No person has a vested right in any course of procedure. A change in the law of procedure operates retrospectively and, unlike the law relating to vested right is not only prospective. *Anant Gopal Sheorey* v. *State of Bombay* (1). A change of forum is a matter of procedure as laid down in *New India Insurance Co. Ltd.* v. *Shanti Misra* (*Smt.*) (2).

In *Sunderlal* v. *Har Prasad* (3), the Division Bench of this Court held that the restrictions enacted by section 12(1) of the Act create essentially a procedural disability on landlord's right, to evict his tenant under the general law, and not to confer substantive right on the tenants. The preamble of Section 12(1), does not in terms require that the grounds specified in clauses (a) to (p) should exist prior to the filing of the suit for eviction. If the landlord wants to introduce in the plaint by amendment, any ground other than those falling under Section 12(1)(a), (c), (d) and (o), becoming available after the institution of suit, the inclusion thereof it not inhibited by the Act. After the amendment, the suit which was for ejectment, continues to be for ejectment, though based on additional ground so introduced. During pendency of eviction suit, on the ground on unlawful sub-letting, the Bench visualised arising of a new cause of action, namely, the ground of *bona fide* requirement, and observed that to drive the plaintiff to a new suit is too technical with a vengence. It will simply be adding to multiplicity of proceedings, which must be avoided.

(1) A. I. R. 1958 S. C. 915. (2) A. I. R. 1976 S. C. 237.
(3) 1980 M. P. L. J. 182.

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Reference was also made to *B. Banerjee* v. *Anita Pan* (1). In this case during the pendency of the suit governed by West Bengal Premises Tenancy Act (12 of 1956) was amended by W. B. Premises Tenancy (Second Amendment) Act (34 of 1969). By this amendment, mandatory restrictions protecting tenants, were introduced prohibiting the landlords from instituting suits for a period of three years. The Supreme Court held that the amendment was merely procedural and would apply retrospectively to the pending suits. By these amendments much more had to be proved by the landlord before he could get eviction than when he was called upon under earlier corresponding provision of the basic Act. Moreover, three years' prohibition against institution of the suit was altogether new. It followed, therefore, that on the allegations and evidence, the landlord could not get a decree, his suit having been instituted at a time when he could not have foreseen the subsequent enactment saddling him with new conditions. Repelling the argument that the suit must be dismissed straightway, institution being invalid, the Supreme Court observed :-

> "We cannot be ritualistic in insisting that a return of the plaint and a representation thereof incorporating amendments is the sacred requirement of law. On the other hand social justice and the substance of the matter find fulfilment when the fresh pleadings are put in, subject of course to the three-year interval between the transfer and the filing of the additional pleading. Section 13 of the Amendment Act speaks of suits including appeals. It thus follows that these fresh pleadings can be put in by the plaintiff either in the suit, if that is pending, or in appeal or second appeal, if that is pending. Thereupon, the opposite party, tenant, will be given an opportunity to file his written statement and the Court will dispose of it after giving both sides the right to lead additional evidence. It may, certainly be open to the appellate Court either to take evidence directly or to call for a finding. Expeditious disposal of belated litigation will undoubtedly be a consideration with the court in exercising this discretion. The proviso to sub-section (3A) can also be complied with if the plaintiff gets the permission of the Rent Controller in the manner laid down therein before filing his fresh pleading."

(1) A. I. R. 1975 S. C. 1146.

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The Supreme Court observed :-

> "We are conscious that to shorten litigation we are straining language to the little extent of interpreting the express 'institution of the suit' as amounting to filing of fresh pleading. By this construction we do no violence to language but, on the other hand, promote public justice and social gain, without in the least imperilling the protection conferred by the Amendment Act."

In view of the law as aforesaid, it must be held that the plaintiff is entitled to seek eviction on the ground under section 12(1)(e) which was restored during the pendency of the appeal, even though on the date of institution of the suit, namely, 13.12.1983, the civil Court had no jurisdiction to entertain the suit for eviction on the ground under Section 12(1)(e) of the Act.

The lower appellate Court found that the plaintiff is living in a rented accommodation and that he has no other reasonably suitable accommodation of his own. It also rightly held that it was not essential for the plaintiff to prove that he is the owner of the accommodation. Therefore, a decree for eviction must follow on the findings of the Court below, on the ground under section 12(1)(e) of the Act.

The learned counsel for the respondent submitted that he may be allowed a year's time to search out alternative accommodation. Learned counsel for the appellant opposed the prayer. Considering the paucity of accommodations as also the urgency and the pressing need of the plaintiff, interest of justice demands, the respondent should be allowed time upto 30.6.1989 to vacate the premises subject to the conditions that within ten days from the date of this judgment, the tenant furnishes a security bond in the sum of Rs. 3,000/- undertaking that he shall vacate the premises on or before 30.6.1989, failing which he shall be liable to compensate the plaintiff by paying the said sum of Rs. 3,000/- in addition to all those which the plaintiff is entitled under the decree.

The appeal is allowed with costs throughout. The judgment and decree passed by the Courts below are set aside and instead, the plaintiff's suit is decreed as indicated above. Counsel's fee Rs. 200/-, if certified.

Appeal allowed.
