MISCELLANEOUS PETITION

Before Mr. Justice D. P. S. Chauhan.

2nd February, 1998.

BADRI PRASAD CHIKWA and others ... Petitioners*

v.

STATE OF MADHYA PRADESH and others ...Respondents

Constitution of India - Article 226- Petition under - Municipalities Act, M.P., 1961, Section 41 - Removal of Councillors - Show cause notice does not contain any charge - Petitioner participated in the meeting convened for his removal has no relevance - Word "explanation" in sub-section (3) has got relevance - When a proper opportunity is not given to a person then he is certainly prejudiced - Impugned order quashed - Petitioner's status of a Councillor restored.

The word "explanation" has got relevance which means that the person must know the material on the record and he must know the allegations against him and discussions recorded in pursuance of such resolution by way of writing. In the present case nothing has been done. So far as the knowledge to the person concerned, is concerned the fact that he participated in the meeting has no relevance. In the exercise of the power by the State Government, the State Government is obliged to do justice and fair play in seeking explanation, in respect of which a person has a right under the law, the State Government cannot be allowed to say that it has made the compliance of sub-section (3) of Section 41 of the Act, When a proper opportunity is not given to a person, then he is certainly prejudiced.

Govind Patel for the petitioners.

A. S. Gangrade for respondents No. 1 and 2.

R. N. Singh for respondent no. 3.

Cur. adv. vult.

* W.P. No. 1128/96.

Badri Prasad Chikwa and others v. State Of Madhya Pradesh

ORDER

D.P.S. CHAUHAN J. - Feeling aggrieved by the order of the State Government dated 19.2.96, which is Annexure - P-1 to the petition, the Petitioners Badri Prasad Chikwa and Smt. Satanhai have approached this Court under Article 226 of the Constitution, seeking relief for issuance of a writ in the nature of *certiorari*, quashing the order dated 19.2.96 and for direction in the nature of mandamus, to the respondents for permitting the petitioners being continued as Councillors of the Nagar Panchayat, Amarpatan, District Satna, Madhya Pradesh.

Since in the petition, the return has been filed and this Court on 3.3.97 passed an order for final disposal this petition is being finally disposed of with the consent of the learned counsel for the parties.

Both the petitioners i.e. Badri Prasad Chikwa and Smt. Satanhai were the members of Nagar Panchayat Amarpatan and in a special meeting convened for their removal, a resolution was passed for their removal on 16.9.95 and the same was sent to the State Government, whereupon the State Government passed the impugned order, in exercise of its power under Section 41 (1) (b) of the Madhya Pradesh Municipalities Act, 1961 (hereinafter referred to as the Act).

Heard the learned counsel for the petitioners Shri Govind Patel and the learned counsel for the respondents No. 1 and 2 who are represented by Shri A. S. Gaharwar and also the learned counsel for the respondent No. 3 Nagar Panchayat, Amarpatan, who is represented by Shri R. N. Singh.

Learned counsel for the petitioners made two-fold submissions :-

(1) That no resolution as contemplated under Clause (b) of sub-section (1) of Section 41 of the Act was passed in the special meeting and for this reason the order of the State Government is bad.

(2) The petitioner was not supplied material for submitting his explanation and according to him, there has been violation of requirement under Section 41 (3) of the Act and as such the impugned order is liable to be quashed being null and void.

Badri Prasad Chikwa and others v. State Of Madhya Pradesh

Second submission is being taken first in which context Section 41 is relevant which is as extracted below :-

"41. Removal of Councillor. - (1) The State Government may, at any time, remove a Councillor -

(a) if his continuance as a Councillor is not, in the opinion of the State Government desirable in the interest of the public or of the Council;

(b) If the council, recommends his removal by a resolution passed at a special meeting convened for the purpose.

(2) The State Government may, at any time, remove a Councillor if he, being a legal practitioner, acts or appears on behalf of any other person against the Council in any legal proceeding or against the State Government in any such proceeding relating to any matter in which the council is or has been concerned, or acts or appears on behalf any person in any criminal proceeding instituted by or on behalf of the Council against such person.

(3) No order under Sub-section (1) or sub-section (2) shall be passed until reasonable opportunity has been given to the person concerned to furnish an explanation.

(4) Removal from office under sub-section (1) or sub-section (2) shall disqualify the person so removed for further election, selection or appointment to the office from which he is removed as may be specified by the State Government."

Under this Section, the power vests with the State Government to remove any Councillor. Councillor can be removed by the State Government under clause (b) (sic) of sub-section (1) of Section 41 of the Act if his continuance as a Councillor, is not, in the opinion of the State Government desirable in the interest of the Public or of the Councillor; and can also be removed on the recommendation of the council made by a resolution passed in a special meeting convened for the purpose by the Nagar Panchayat.

Badri Prasad Chikwa and others v. State Of Madhya Pradesh

There is no dispute that in the present case, the power under Clause (b) of sub-section (1) of Section 41 of the Act was exercised but the dispute is that the same has not been exercised according to law.

Learned counsel for the petitioners submitted that it is the statutory obligation of the State Government that before removing a Councillor and before passing an order for removal from the office, to give a reasonable opportunity to the person concerned for furnishing an explanation. According to him the word "explanation" as contained in sub-section (3) of Section 41 means that the person to explain the charges levelled against him and the findings recorded in the Resolution of the Nagar Panchayat. It is pointed out that the State Government issued notice so to comply with the requirement under sub-section (3) of Section 41 of the Act. The notice for furnishing explanation, which is Annexure-P-5, dated 7.11.96 is in exercise of the power, as stated above.

This notice does not specify any charge or the finding, if any, recorded in the resolution of the Nagar Panchayat against the petitioners. It also does not contain any comments or any letter in respect of charges enclosed to it. The petitioners submitted their reply to it, which is Annexure-P-6 to the petition, wherein in Paras 7,8,9 and 10 a prayer was made for the supply of the documents so that explanation may be given. In Para 7 of the reply Annexure-P-6, it is stated that neither the Chairman of the Nagar Panchayat, nor the Vice-Chairman nor the Chief Executive Officer nor any other competent Officer wrote or told as to what were the disparaging statements alleged to have been made and what obscene words were alleged to have been spoken and against whom and did not receive any letter for furnishing explanation in relation to the facts as stated above and it was on account of malice that the resolution was passed so to shield the misdeeds of all the Councillors who participated in the meeting. In Para 8 of the reply it was stated that they were not aware as to what decision was taken by the Councillors and what are the charges levelled in the meeting held on 16.9.95. State Government was requested for suppiying a copy of the resolution passed by the Nagar Panchayat so that proper explanation point-wise to the show-cause notice in regard to removal may be given. All detailed information regarding the facts on the basis of which show-cause notice was issued and all such facts were requested to be disclosed. It was also mentioned that the show-cause notice dated 7.11.95 does not

contain any charges. It was stated that no such act, as alleged, was committed so to warrant removal under the law and if any act has been committed, then the charges may be made known to him.

It is not disputed that in pursuance to this latter/reply, no reply was given to the petitioners nor any material was supplied to them.

Learned counsel for the respondent submitted that it is a case where sufficient compliance has been done as the petitioner in pursuance to the notice dated 7.11.95, submitted his reply Annexure-P-6 and it is a case where the facts and the material as to what was against the petitioner was known to him, and as such, no prejudice is caused to the petitioner so to warrant interference under Article 226 of the Constitution. It was further submitted that the petitioner is a person who participated in the resolution and in the meeting convened for his removal.

Annexure-P-5 dated 7.11.95 which is show-cause notice purported to be under sub-section (3) of Section 41 of the Act and Annexure-P-6, which is reply to the show-cause notice dated 7.11.95, taking together, go to indicate that it was a violation of requirement under the provisions of law which was not permissible. The word "explanation" has got relevance which means that the person must know the material on the record and he must know the allegations against him and discussions recorded in pursuance of such resolution by way of writing. In the present case nothing has been done. So far as the knowledge to the person concerned, is concerned the fact that he participated in the meeting has no relevance. In the exercise of the power by the State Government, the State Government is obliged to do justice and fair play in seeking explanation, in respect of which a person has a right under the law, the State Government cannot be allowed to say that it has made the compliance of sub-section (3) of Section 41 of the Act. When a proper opportunity is not given to a person, then he is certainly prejudiced.

In view of the above, I am of the view that the impugned order of the State Government dated 19.2.96 is laconic, as it has not been passed after giving opportunity to the concerned Councillor, who was having a vested right for holding the office as Councillor.

Badri Prasad Chikwa and others v. State Of Madhya Pradesh

So far as the other argument advanced by the learned counsel regarding the fact that no meeting took place is concerned, that has no substance. The record specifies that the said meeting was convened for the purpose and, therefore, this submission deserves to be rejected.

In view of the above, the Writ Petition succeeds and the impugned order dated 19.2.96 is quashed and the petitioners, status that of a Councillor of Nagar Panchayat Amarpatan, Distt. Satna is restored. However, if the State Government chooses to proceed against the petitioners, then this order will not come in the way of the State Government, provided the requirements of sub-section (3) of Section 41 of the Act are properly complied with. In view of the facts and circumstances of the case, no order as to costs.

Petition allowed.

WRIT PETITION

Before Mr. Justice D. M. Dharmadhikari

13 May, 1998.

PROF. NARENDRA KUMAR GOURAHA ... Petitioner*

v.

STATE OF M. P. and others. ...Respondents

Constitution of India - Article 226 - Taking over the management and powers of the University by the State Government - Vishwa Vidhyalaya Adhiniyam, M. P. 1973 - Sections 10, 13, 14, 16, 52 - Provisions contained in Section 52 of the Act are akin and comparable to emergency provisions contained in Article 356 of the Constitution to meet an emergent situation which cannot otherwise be remedied - Opinion of Executive Council was sought - Apparently there was no allegation against the Executive Council - No specific allegation of commission of financial irregularities by the petitioner as Vice-Chancellor - Registrar alone was answerable so far as financial irregularities were

* W.P.No. 1807 OF 1997.

Prof. Narendra Kumar Gouraha v. State of M. P., 1998.

concerned in terms of Section 16(4) of the Act - It would have been possible for the State Government to have waited for opinion of the executive council-Even Chancellor had not given opinion that action under Section 52 of the Act was warranted-Removal of Vice-Chancellor under Section 14 cannot be achieved by resort to the emergency provision under Section 52 of the Act - Some of the allegations personally made against the petitioner would have required show cause notice and grant opportunity of meeting the same to the petitioner - Petitioner was never given any such opportunity at any stage - A minimal act of fairness on the part of the State is expected for maintaining the dignity of the High Office of Vice-Chancellor -The University as the seat of learning and an independent academic body has to be kept insulated from unhealthy political influence-Notifications issued under Section 52 of the Act are quashed-Petitioner's appointment as Vice-Chancellor and appointment of other authorities and bodies of the University revived.

The provisions contained in Section 52 of the Act are akin and comparable to emergency provisions contained in Article 356 of the Constitution which empower the President of India to impose his rule on the Government of a State by dissolving the elected body and assuming all functions of the Government by the President. Provision under Section 52 has been made to meet an emergent situation which cannot otherwise be remedied by other provisions of the Act. It is a drastic action justified only in extremely extra-ordinary circumstances. It is to be taken as a last resort when all other efforts on the part of the Government fail to remove the alleged mal-administration in the University. Resort to provisions of Section 52 is not contemplated by the Act as a remedial measure against particular conduct or misconduct of few functionaries, high or law in the University.

In the report of Limaye there was no specific allegations of commission of financial irregularities by the petitioner as Vice-Chancellor. The Registrar alone was answerable so far as finances and advances were concerned, in terms of Section 16(4) of the Act. There is sufficient force in the submission made by the petitioner that the impugned action was taken before the scheduled date for

meeting of the Executive Council to scuttle or frustrate the further probe into the financial irregularities enquired into and reported by Shri Limaye. The financial irregularities found and report by Shri Limaye were so serious that they required further probe or scrutiny by the Executive Council and consequent action by it. The Executive Council is a larger supreme executive body of the University consisting of important representatives of academicians within and outside the University including the Government. It would have been possible for the Government to have waited for the opinion of the Executive Council for which the meeting was already scheduled in near future.

The removal of a Vice-Chancellor which can be made only after following principles of natural justice under Section 14 of the Act cannot be achieved by resort to the emergency provisions under Section 52 against the whole University of which Vice Chancellor is one of the officers.

The office of Vice-Chancellor is one of high prestige and dignity. It is expected of the State Government to maintain the same and not to involve such a high dignitory in police investigations on false and mischeivous complaints made against him. A minimal act of fairness on the part of the State is expected for maintaining the dignity of the high office of Vice-Chancellor. The police investigation should not have been ordered against the petitioner without disclosing to him the foundation or reason for directing such investigation. The compiaints or material obtained against him should have been disclosed to him so as to give an opportunity to explain. It is desirable in public interest to protect the autonomy of the University as envisaged by the provisions of the Act. The University as the seat of learning and an independent academic body has to be kept insulated from unhealthy political influences.

S. R. Bommai v. *Union of India* (1) and *Umrao Singh Choudhary (Dr.)* v. *State of M.P. and anr.* (2); followed.

N. K. Gaurha, the petitioner in person.

S. L. Saxena for respondent no. 1.

R. N. Singh for respondent no. 4.

V. S. Dabir with *A. S. Raizada* for respondent No. 5.

Cur. adv. vult.

(1) (1994) 3 S.C.C. 1. (2) 1994 J.L.J. 587.

Prof. Narendra Kumar Gouraha v. State of M. P., 1998.

ORDER

D.M. DHARMADHIKARI, J.- Professor Narendra Kumar Gouraha was appointed as Vice-Chancellor of Pt. Ravishankar Vishwa Vidhyalaya, Raipur (hereinafter referred to as 'the University' for short). The University is constituted under the provisions of M.P. Vishwavidhyalaya Adhiniyam, 1973 (for short, hereinafter referred to as 'the Act').

By this petition under Article 226 of the Constitution of India, the petitioner assails three notifications issued on 23rd February, 1997 (Annexure-P/1, P/2 and P/3) whereby the State Government by invoking its extraordinary power of emergency under Section 52 of the Act has completely taken over the management and powers of the University and appointed Professor H. R. Singh, respondent no. 4, as Vice-Chancellor of the University. The appointment of another Vice-Chancellor to the University has been made as a consequence ensuing from exercise of power under Section 52 (4) of the Act whereby the existing Vice-Chancellor has to vacate his office.

The petitioner himself addressed the Court with sufficient amount of objectivity. Bereft of all unnecessary details on which some time was devoted by the petitioner in his oral address, the main ground of challenge to the action of the State Government is as follows : According to him, within a short time after his assumption of office of Vice-Chancellor on 19.1.1996, he discovered that there were several financial irregularities committed by Phani Bhushan Trivedi, respondent no. 5, Registrar of the University. He brought those serious financial irregularities to the notice of the Chancellor by sending him a formal intimation in writing. The Chancellor on the report of the petitioner initiated action under Section 10 of the Act and in order to conduct an enquiry into the finance of the University appointed a one-member enquiry committee of Shri S. G. Limaye, Director, Pension and Employees Welfare, Government of M.P. Shri Limaye after holding an enquiry submitted an enquiry report on 28.11.1996 which revealed commission of several serious financial irregularities by respondent no. 5, then the Registrar of the University. According to the petitioner, consequent upon the submission of the report by Shri Limaye, the petitioner received the letter dated 4th February, 1997 addressed to him by the Secretary of the Chancellor to place

the report for consequent action before the Executive Council in its meeting to be called on 7.3.1997. The petitioner as Vice-Chancellor immediately thereafter on 12.2.1997 issued a formal notice calling all concerned and fixing 7.3.97 as the date of meeting of the Executive Council.

It is submitted by the petitioner that the respondent no. 5, Registrar of the University, became apprehensive of a serious disciplinary and criminal action against him on the basis of decision of the Executive Council scheduled to meet on 7.3.1997. The respondent no. 5 thereafter made hectic efforts by approaching the influential persons in power in the University and the State. His efforts fructified by promulgation of the impugned notifications on 23.2.97 i.e. a few days before the scheduled date of meeting of the Executive Council.

The contention advanced on behalf of the petitioner is that the impugned action under Section 52 of the Act has been taken by the State Government with an oblique purpose to scuttle the legitimate steps taken by the petitioner as Vice-Chancellor to expose corruption in financial matters committed by respondent no.5 and to shield the latter.

The State (respondent no.1) and the Chancellor (respondent no. 2) have supported the impugned action in their returns. In the return submitted by the State Government which was adopted by the Chancellor, several alleged mis-deeds and unfair steps taken by the Vice-Chancellor have been tried to be high-lighted. It has been submitted that the Vice Chancellor as head of the institution was acting in a manner not befitting to his high office and, therefore, the drastic action under Section 52 of the Act was warranted by the State.

In the light of return submitted by the respondent-State and the Chancellor, the petitioner has also raised another contention that the powers to be exercised in extreme case of emergency under Sec. 52 of the Act have been misused with oblique purpose to remove the petitioner from office without affording him any opportunity to meet the charges levelled against him in accordance with the procedure contained in Section 14 (3) and (4) of the Act. Several decisions have been cited by the petitioner in support of his legal contentions but the only relevant decision to be considered for deciding *this case is S.R. Bommai* v. *Union of India* (1).

(1) (1994) 3 S.C.C. P. 1.

Prof. Narendra Kumar Gouraha v. State of M. P., 1998.

Shri S.L. Saxena, learned Advocate General appearing for the State, relied on the reasons given in the return submitted by the State and the Chancellor as also the documents annexed to the same. The contention advanced on behalf of the State is that if the material on which the action is founded is relevant, this Court should not go into the sufficiency or otherwise of the same. It is submitted that where an action is taken under Section 52 of the Act, application of principles of natural justice is excluded by the express language of the said provision. It is also submitted that there was no necessity to grant any opportunity of hearing either to the petitioner as Vice-Chancellor or any other authority or body of the University. Very strong reliance has been placed on the decision of the Supreme Court in the case of *Umrao Singh Choudhary (Dr.)* v. *State of M.P. and anr.* (1).

The learned counsel appearing for the University and the then Registrar, respondent no. 5, have also supported the impugned action on the same grounds as urged before this Court by the learned Advocate General on behalf of he State.

It is now firmly established from the decision of the Supreme Court in *Umrao Singh's Case (supra)* that the action under Section 52 of the Act is not a legislature but purely a statutory action which is subject to judicial review. It is also firmly established that the scope of judicial review in such emergency actions is limited to examining by the Court whether there was any material at all, for the action which is relevant and is not tainted by *malafide*, perversity or irrational exercise of power.

The main question to be decided by this Court is whether within the permissible limits of judicial review, there existed any relevant material for invoking the extra-ordinary power by the State under Section 52 of the Act. The second question is whether the State Government can be accused of misusing the provisions of Section 52 with an oblique purpose of avoiding observance of the provisions of Section 14 of the Act against the petitioner and thus achieving his removal from office by an indirect method without affording him any opportunity of meeting the charges levelled against him although it constituted the foundation of the impugned action.

(1) 1994 J.L.J. 587.

Prof. Narendra Kumar Gouraha v. State of M. P., 1998.

Before considering the merits of the contentions advanced on the facts disclosed by the parties, it is necessary first to examine the relevant provisions of the Act. The relevant provisions for the purpose of this petition are first of all those contained in Section 10 which authorises the Chancellor on his own motion or on a request made by the State Government to cause an inspection and enquiry into several matters including finances of the University. For the above purpose, he may set up an enquiry committee under Sub-section (2) and obtain the opinion of the Executive Council through the Vice-Chancellor. Sub-section (3) empowers the Chancellor to take consequent action on the advice of the Executive Council on the enquiry report. Section 10, therefore, needs reproduction :-

" 10. Inspection in University and College :

(1) The Kuladhipati may, on his own motion, and shall on a request made by the State Government cause an inspection to be made by such person or persons as he may direct, of the University, its buildings, laboratories, museum, workshops and equipments and of any College or Institution maintained by the University or admitted to its previleges and also of the Examinations, teaching and other work conducted or done by the University and cause an inquiry to be made in like manner in respect of any matter connected with the administration or finance of the University, College or Institutions.

(2) The Kuladhipati shall, in every case, give notice of his intention to cause an inspection or inquiry to be made -

(a) to the University, if such inspection or inquiry is to be made in respect of the University, College or Institution maintained by it ;

(b) to the management of the College or Institution if the inspection or inquiry is to be made in respect of a college or institution admitted to the Privileges of the University and the University or management, as the case may be, shall be

entitled to appoint a representative who shall have the right to be present and be heard at such inspection or inquiry.

(3) Such person shall report to the Kuladhipati the result of such inspection or inquiry and the Kuladhipati shall communicate through the Kulpati to the Executive Council or the said management, as the case may be, his views with reference to the result of such inspection or inquiry and shall after ascertaining the opinion of the Executive Council or the management thereon advice the University or the management upon the action to be taken ;

Provided that where an inspection or inquiry is caused on a request from the State Government the Kulapati shall take action under this sub-section in consultation with the State Government.

(4) The Executive Council or the management as the case may be shall communicate through the Kulpati to the Kuladhipati such action, if any, as it has taken or may propose to take upon the result of such inspection or inquiry and such report shall be submitted within such time as the Kuladhipati may direct.

(5) Where the Executive Council or the management, does not, within a reasonable time, take action to the satisfaction of the Kuladhipati, the Kuladhipati may, after considering any explanation furnished or representation made by the Executive Council or the management, issue, in consultation with the State Government, such directions as he may think fit and the Executive Council or management as the case may be, shall compiy therewith."

The other relevant provision is to be found in Section 13 concerning appointment of the Vice-Chancellor. He has to be appointed on the recommendations of a panel of three eminent persons, for a term of four years.

Under Section 14, the Vice-Chancellor is liable to be removed on proved misconduct after giving him reasonable opportunity to show cause before his removal on the proposed grounds or charges. The relevant provisions of Section 14(3) & (4) read as under :

14. Emoluments and Conditions of Service of Kulapati terms of office of and Vacancy in the office of Kulapati . -

(1) .....

(2) .....

(3) If at any time upon representation made or otherwise and after making such enquiries as may be deemed necessary, it appears to the Kuladhipati that the Kulapati -

i) has made default in performing any duty imposed on him, by or under this Act, or

ii) has acted in a manner prejudicial to the interest of the University or

iii) is incapable of managing the affairs of the University the Kuladhipati may, notwithstanding the fact that the terms of office of the Kulapati has not expired, by an order in writing stating the reasons therein, require the Kulapati to relinquish his office as from such date as may be specified in the order

(4) No order under sub-section (3) shall be passed unless the particulars of the grounds on which such action is proposed to be taken are communicated to the Kulapati and he is given a reasonable opportunity of showing cause against the proposed order."

The other relevant provision is section 16 concerning the appointment and duties of the Registrar. Sub-section (4) of Section 16 of the Act provides :

"(4) Subject to the powers of the Executive Council the Registrar shall unless otherwise provided in the Statutes be responsible

for seeing that all moneys are expended for the purpose for which they are granted or allotted."

The provisions contained in Section 52 on which the impugned actions are base also need reproduction in relevant parts which are as under :

"52. Power of State Government to apply Act in modified form with a view to provide for better administration of University in certain circumstances - (1) If the State Government on receipt of a report or otherwise, is satisfied that a situation has arisen in which the administration of the University cannot be carried out in accordance with the provisions of the Act, without detriment to the interests of the University, and it is expedient in the interest of the University so to do, it may by notification, for reasons to be mentioned therein, direct that the provisions of Sections 13,14,20 to 25, 40, 47, 48, 54 and 68 shall, as from the date specified in the notification (hereinafter in this section referred to as the appointed date), apply to the University subject to the modifications specified in the Third Schedule.

(2) The notification issued under sub-section (1) (hereinafter referred to as the notification) shall remain in operation for a period of one year from the appointed date and the State Government, may from time to time, extend the period by such further period as it may think fit so however that the total period of operation of the notification does not exceed three years.

(3) The Kuladhipati shall simultaneously with the issue of the notification, appoint the Kulapati under section 13 and 14 as modified and the Kulapati so appointed shall hold office during the period of operation of the notification ;

Provided that the Kulapati may, notwithstanding the expiration of the period of operation of the notification, continue to hold office thereafter until his successor enters upon office but this period shall not exceed one year.

(4) As from the appointed date, the following consequences shall ensue, namely :-

i) during the period of operation of the notification this Act shall have effect subject to the modifications specified in the Third Schedule ;

ii) the Kulapati, holding office immediately before the appointed date, shall notwithstanding that his term of office has not expired, vacate his office ;

iii) every person holding office as a member of the Court, the Executive Council or the Academic Council, as the case may be, immediately before the appointed date shall cease to hold that office ;

iv) the student representatives of the University on the student consultative committee under clause (i) of sub-section (i) of Section 54 immediately before the appointed date shall cease to be members of the said committee ;

v) until the Court, Executive Council or Academic Council, as the case may be, is reconstituted in accordance with the provisions as modified, the Kulapati appointed under Sections 13 and 14 as modified shall exercise the powers and perform duties conferred or imposed by or under this Act, on the Court, the Executive Council or Academic Council :

Provided that the Kuladhipati may, if he considers it necessary so to do, appoint a committee consisting of an educationist, an administrative expert and a financial expert to assist the Kulapati so appointed in exercise of such powers and performance of such duties."

After examining the relevant provisions of the Act, it is necessary to examine the undisputed events leading to the drastic impugned action under Section 52 of the Act.

As is acknowledged by the Chancellor in his order dated 1.10.1996 passed under Sec. 10(1) of the Act directing inspection and enquiry into the finances of the University, the petitioner as Vice-Chancellor had personally

apprised the Chancellor on 23.2.1996 that contrary to the established Financial practice, during September 1995 to January 1996, prior to his assumption of office, huge advances to the tune of Rs. 9,50,817/- were given to six persons. It is on the above personal apprisal by the Vice-Chancellor that the Chancellor on 1.10.1996 passed the order u/s 10(1) of the Act and set up a one member enquiry committee of Shri M.G. Limaye. After conducting the enquiry, Shri Limaye submitted his report on 28.11.96. In the said Limaye report, certain financial irregularities, not specifically by name on the part of the petitioner but on the part of the Deputy Registrar (Exams) and the Registrar, were noticed. The report does not specifically point out any irregularities committed singly or jointly by the petitioner after his assumption of office as Vice-Chancellor. After the receipt of the enquiry report of Shri Limaye, on 4th of February 1997, by letter Annexure-P/19, the Secretary on behalf of Chancellor wrote a letter to the petitioner intimating in the following language that "the Kuladhipati is, *prima facie*, in broad agreement with the findings given in the Report, and has directed that opinion of the Executive Council on the conclusions of the Report be expeditiously obtained as per provisions of Section 10(3), M.P. Vishwavidhyalaya Adhiniyam." By the said letter sent by the Secretary on behalf of the Chancellor, the petitioner as Vice-Chancellor was desired to obtain the opinion of the Executive Council and send the same to the Chancellor by the end of February 1997. On the said communication received from the office of the Chancellor, the petitioner forthwith on 12.2.97 issued a pre-requisite advance notice for calling meeting of the Executive Council on 7.3.97.

As is now disclosed from the copies of documents filed with the return, prior to the issuance of letter dated 4th February, 1997 by the Chancellor through his Secretary to the Vice-Chancellor to complete formalities for proposing action under Sec. 10(3) of the Act through the Executive Council after obtaining its opinion, the Chancellor on 11th January 1997 had written a letter to the Chief Minister, Shri Digvijay Singh, of the State. Without going into the correctness of the allegations made by the petitioner about the letter dated 11.1.1997 from the Chancellor to the Chief Minister, that the said letter was subsequently obtained, it is relevant to reproduce the contents of the said letter as it furnished the main ground for action under Section 52 of the Act. The relevant portion of the letter reads thus :

Prof. Narendra Kumar Gouraha v. State of M. P., 1998.

" Prof. N.K. Gauraha had, soon after assuming charge as Kulapati, Pt. Ravi Shankar Vishwavidhyalaya Raipur, personally apprised me on 23rd February, 86, about six persons having been given huge advances to the tune of Rs. 9.51 lakhs by his predecessor in the name of re-valuation work relating to Annual Examinations of 1995. He was requested to send a detailed report in the matter and to take speedy action for adjustment/recovery of advances. Surprisingly, however, he did not send any satisfactory reply for nearly seven months. As a result, I had to order a statutory enquiry into the matter u/s 10(1) of the M.P. Vishwavidhyalaya Adhiniyam, and to appoint an outside person-Shri M.G. Limaye, Director, Pension and Employee Welfare, Madhya Pradesh to conduct the enquiry. A copy of my relevant order dated 1.10.96 is enclosed.

Shri Limaye submitted his report to me at the end of November, '96. The report reveals, *inter alia*, that the unfortunate practice of sanctioning of large advances, which Prof. Gauraha himself had brought to light, continued un-checked during his own tenure also, and the figure of un-adjusted advances pertaining to his tenure, at the time of submission of Shri Limaye's, report, stood at Rs. 25.3 lakhs, of which Rs. 4.56 lakhs was over three months old. Also, advances had been given for such, *prima facie*, nebulous or unnecessary purposes as " Confidential Work", "Buildings", etc.

While I would be taking further action on the report received from Shri Limaye in accordance with the provisions of the M.P. Vishwavidhyalaya Adhiniyam, I am enclosing its copy, in the light of our discussion yesterday, for appropriate action at the Government-level also."

It is on the above letter sent by the Chancellor to the Chief Minister that the State was activated resulting into the drastic action of issuance of the impugned notifications under Sec. 52 of the Act on 23rd of February, 1997.

The State Government has supported its action on the basis of the contains of the Limaye report and the correspondence exchanged between the Chancellor, the Vice-Chancellor and the Chief Minister, mentioned above. That apart, action in

the Court of law has been supported by the State by stating in the return that a fact finding enquiry through the I.G. Police and the audit party revealed several financial irregularities personally committed by the Vice-Chancellor. It is also alleged that the petitioner is guilty of corrupt practices inasmuch as not only that he had drawn false T. A. Bills but had demanded commission from the contractors entrusted with University work. It is alleged that the petitioner was responsible in giving some higher marks to several students beyond his authority and guilty of nefarious practices unbecoming of a high office like Vice-Chancellor.

The return submitted by the State, read as a whole and in detail would make it evident that there has been no allegation of large scale mal-administration on the part of any other authorities and functionaries of the University. The allegations are only against the mis-deeds and acts of corruption of the petitioner as Vice-Chancellor. For example, the gist of allegations from the return are as under :

> " The petitioner, who was holding the office of Vice-Chancellor, had no moral or ethic. He prepared false T. A. Bills, made over writing and received false T. A. from the University. These facts are apparent if one examines the T. A. Bills annexed with the return, as Annexure R-6. In this T. A. Bills, Shri S. R. Shrivastava, Co-ordinator of the Refresher Course, has verified "that travelled by car upto Bilaspur and from Bilaspur in IInd Class Ordinary" claims restricted to entitlement. In the T. A. Bill, he has shown his departure from Sagar on 1.1.96, arrival at Raipur on 15.1.1996, departure time 6.00 p.m., arrival at Raipur 11.00 a. m. Earlier, it was written Sagar to Raipur and mode of journey by car. It was struck off and it was written 'Sagar to Raipur by IInd AC Sleeper, distance 640 Kms, purpose of Journey-lecturers refresher course, The petitioner claimed Rs. 1360/- as fare of AC-II both ways. The petitioner, further claimed Rs. 120/- as incidental expenses plus Rs. 280/- D.A. total Rs. 1760/-. According to vertification, the travel from Sagar to Bilaspur was by car. The question arises whether the petitioner travelled from Sagar to Raipur in IInd AC Sleeper or travelled by car upto Bilaspur.'
>
> xxx xxx xxx xxx xxx

Prof. Narendra Kumar Gouraha v. State of M. P., 1998.

The petitioner has no powers to award extra marks and the matter could only be considered by the Executive Council.

From the facts narrated above, it is clear that the petitioner, claimed false amount through T. A. Bills, by committing forgery. The petitioner directed the authorities of the University to accept mark-sheet which was in excess of 10 marks, personally approached the Oswal Data Processors, Indore, to do something unfair. The petitioner, demanded commission from the contractors, by involving the name of the Chancellor. All these activities were unfair, not becoming on the part of a Vice-Chancellor and it became necessary for the State Government to take recourse to Section 52 of Vishwavidhyalaya Adhiniyam, 1973.

The petitioner, also committed financial irregularities when he was in the office for the period 19.1.1996 to 1.2.1997. The advances to the tune of Rs. 25,30,212/- which were given to different persons for different purposes. The above amount has not yet been adjusted.

It would be relevant to mention here that the petitioner himself wrote to Kuladhapati that advances to the tune Rs. 9.51 lakhs have not been adjusted by his predecessor. The Kuladhipati appointed a Committee, called Limaye Committee to make enquiry and suggest measures. Copy of the letter is annexed herewith as Annexure R-13. The committee, about the conduct of petitioner's predecessor, pointed out a number of irregularities but the same irregularities about which a report was made by the petitioner were committed by him deliberately against the financial rules, audit rules, just to make unfair money.

xxx xxx xxx xxx xxx

The petitioner is himself responsible for payment of so many bills. From the facts narrated above, it is clear that petitioner himself was interested in bogus bills, claimed false T. A./D.A. etc. The petitioner may be writing so many letters but those letters are irrelevant so far the decision of this case is concerned. The facts narrated above, relating to the conduct of the petitioner himself, persuaded the State Government and Kuladhipati, to exercise its powers under Sec. 52 of the Act. The

answering respondent did not act only on the reports but directed an enquiry in all the complaints and when the Enquiry Officer found a *prima facie* case against the petitioner, the answering respondent then and then alone took steps to take action under Sec. 52 of the Act. The petitioner has stated a number of things to show his competence and merits. Self pledge in no recommendations. The conduct of the petitioner, as disclosed in the foregoing paragraphs, proves beyond doubt that petitioner has very poor conduct and was not fit to hold the office of the Vice-Chancellor."

After high-lighting the above alleged illegalities and acts of misconduct of the petitioner, in paragraph 47 of the return it is stated that "the action was taken on the basis of the enquiry report coupled with concrete facts." In paragraph 55 of the return it is stated as under :

> " The person like the petitioner, if allowed to continue as Vice-Chancellor, even after the discovery of so many acts of omission and commission, that would be a bad day for the State and Society at large."

In paragraph 15 of the return the action under Sec. 52 of the Act has been supported by stating thus :

> " The facts stated above, came to the notice of the State Government. The State Government, gave a thoughtful consideration and was satisfied that a situation has arisen in which the administration of the University, cannot be carried out without detriment to the interest of the University and in accordance with the provisions of the Act...."

On the facts as mentioned above, this Court has to judge whether the impugned action under Section 52 is sustainable on the basis thereof. As has been mentioned above, soon after assuming office, the petitioner within a short period reported the matter of financial irregularities committed by the respondent no. 5 i.e. the Registrar. On his report, the Chancellor set up an enquiry to be conducted by Shri Limaye under Sec. 10 of the Act. Shri Limaye conducted the enquiry and submitted a report on the financial irregularities noticed by him. The petitioner's role was almost negligible because most of the irregularities pertained to period prior to assumption of office by him. The Limaye report was sent by the

Chancellor to the petitioner as Vice-Chancellor for placing it for opinion of the Executive Counsil and for consequential action in terms of Section 10(3) of the Act. The petitioner as Vice-Chancellor, on the directions of the Chancellor and on the basis of the Limaye report, called the meeting of the Executive Council on 7.3.1997. Accepting that the Chancellor, before writing to the Vice-Chancellor for seeking opinion of the Executive Council in accordance with Section 10(3) of the Act, had sent letter dated 11th January 1997 to the Chief Minister reporting the action taken by the former on the Limaye report, and expecting appropriate action also at the Government level, the said letter of the Chancellor cannot be taken as recommendation of the Chancellor to the State Government for invoking the extreme power under Section 52 of the Act to remove all authorities, bodies and functionaries of the University and to assume full management and powers of the University and appoint another Vice-Chancellor.

The Provisions contained in Section 52 of the Act are akin and comparable to emergency provisions contained in Article 356 of the Constitution which empower the President of India to impose his rule on the Government of a State by dissolving the elected body and assuming all functions of the Government by the President. Provision under Section 52 has been made to meet an emergent situation which cannot otherwise be remedied by other provisions of the Act. It is a drastic action justified only in extremely extra-ordinary circumstances. It is to be taken as a last resort when all other efforts on the part of the Government fail to remove the alleged mal-administration in the University. Resort to provisions of Section 52 is not contemplated by the Act as a remedial measure against particular conduct or misconduct of few functionaries, high or low, in the University. As has been narrated above, the events go to show that the Vice-Chancellor had been taking all necessary actions, which in fact formed basis for Limaye report, for fixing the responsibility of alleged erring officials of the University concerning financial irregularities. Opinion of the Executive Council was sought for the purpose and apparently there was no allegations against the Executive Council. The State has not been able to justify as to why action under Section 52 was necessitated when on the advice of the Chancellor the Vice-Chancellor had already called the meeting of the Executive Council on 7.3.1997.

As has been held in the cases of *S.R. Bommai and Umrao Singh Choudhary (supra)* of the Supreme Court, this Court can go only into the question

of existence of any material warranting the impugned action, but it cannot go into the sufficiency or insufficiency of the same. This Court, however, is competent to find out whether the facts and material on the basis of which the impugned drastic action has been taken is relevant for the purpose of exercise of power by the State. As pointed out above, in the report of Limaye there was no specific allegation of commission of financial irregularities by the petitioner as Vice-Chancellor. The Registrar alone was answerable so far as finances and advances were concerned, in terms of Section 16(4) of the Act. There is sufficient force in the submission made by the petitioner that the impugned action was taken before the scheduled date for meeting of the Executive Council to scuttle or frustrate the further probe into the financial irregularities enquired into and reported by Shri Limaye. The financial irregularities found and reported by Shri Limaye were so serious that they required further probe or scrutiny by the Executive Council and consequent action by it. The Executive Council is a larger supreme executive body of the University consisting of important representatives of academicians within and outside the University including the government. It would have been possible for the Government to have waited for the opinion of the Executive Council for which the meeting was already scheduled in near future. The State has utterly failed to justify taking of the impugned drastic action of wiping out all functionaries of the University only on the basis of a letter written by the Chancellor to the Chief Minister concerning the report of Shri Limaye. Even the Chancellor had not given opinion to the State Government that action under Section 52 was warranted. He did express the necessity of some appropriate action at the Government level, but it could not reasonably be read as suggesting the extreme emergent action under Section 52 of the Act.

The Chancellor has been made party to the petition as respondent no. 2. He has submitted a return. He has merely adopted the stand and averment taken by the State in its return. The affidavit has been sworn by the officer-in-charge on behalf of the Chancellor. The Governor acting as Chancellor can claim no immunity or privilege conferred on him qua Governor under the Constitution. In his separate return filed, the Chancellor has not disclosed whether he had expressed any opinion desiring action on the part of the State against the University under Section 52 of the Act. The letter written by him to the Chief Minister on

11.1.1997 cannot, therefore, be read as a report by him on the overall malfunctionings of the University and suggesting an action by the State under Section 52 of the Act. It is true that under Section 52, the State Government can invoke its emergency provisions against the University " either on the receipt of a report or otherwise". There was no particular report of the Chancellor for taking action under Section 52 of the Act. So far as any other information or report falling in expression "otherwise" is concerned, in the return submitted by the State individual acts and omissions of the petitioner as Vice-Chancellor has been mentioned as the main basis for the impugned action.

From the Scheme of the Act and the provisions contained in Section 14, quoted above, it is to be noticed that there are two distinct actions contemplated- one against the mis-deeds and misconduct of the Vice-Chancellor for his removal and the other of invoking emergency provisions under Section 52 against the University as a whole. Material which may be relevant for taking action against the Vice-Chancellor under Section 14 cannot be utilised without compliance of the provisions of the said Section for basing action against the University as a whole under Section 52 of the Act. In the case of *Umrao Singh Chauhan (supra),* the Division Bench decision in *State of M.P.* v. *Seth Gowardhandas* (1), to the extent it holds that action under Section 52 of the Act taken by the State is legislative in character has not been approved by the Supreme Court in its decision affirming the ultimate conclusion of the Division Bench in dismissing the petition. In the Supreme Court decision in *Umrao Singh Chauhan's case* (2), the following observations need be noted :-

> " Obviously for this reason, to satisfy ourselves whether the notification is founded upon any record and whether the reasons given in support thereof, are relevant to the issue, the record was summoned, and has been made available to us. The note placed before the Governor also was placed. It is an elaborate not, pregnant with material details touching the maladministration of the University. From the record we have seen the Government considered the above material and the Governor after due satisfaction had exercised the power under Section 52(1). *Though the High Court held that the action under Section 52 is*

(1) A. I. R. 1993 M. P. 75.

Prof. Narendra Kumar Gouraha v. State of M. P., 1998.

legislative action, it is obviously illegal in the light of the decision of this Court in S.R. Bommai v. Union of India wherein this Court considered the presidential proclamation under Article 356 and held that the action is not beyond the ken of judicial review. The action under Section 52 is only statutory action, but subject to judicial review. However, the Court would not sit in appeal over the opinion of the State Government. The statute gives power to the State Government. The Governor exercised his power with the aid and advice of the Council of Ministers in issuing the notification under Section 52. Therefore, though it was a statutory notification, the condition precedent is that the satisfaction of the State Government i.e. the Governor with the aid and advice of the Council of Ministers is of the situation mentioned in Section 52(1) and for reasons to be recorded therein, for better administration of the University, the Government was satisfied that a situation had arisen in which the administration of the University could not be carried on in accordance with the provisions of the Adhiniyam and for better administration whereof and to prevent the detriment to the interest of the University, the State Government issued the notification "for the reasons mentioned therein" and directed that the provisions mentioned therein under Section 13 and 14 shall not apply. When those facts are present and the State Government were satisfied of the situation contemplated under Section 52 (1), though the Court may differ from that formation of satisfaction when the Court is called upon in an appeal against the said satisfaction and may come to a different conclusion, we would not be justified to differ from the conclusion in our judicial review under Article 136 or of the High Court under Article 226 of the Constitution. Though the Academic Council etc. had been dissolved, the correctness thereof is not the subject matter of this special leave petition. We are not called upon to enter into that question. Therefore, from the records we are satisfied that the State Government were justified in issuing the notification under Section 52 (1) of the Adhiniyam."

(underlining for emphasis)

Power under Section 14 has been conferred for the purpose of removal of

the Vice-Chancellor on proved misconduct but after giving him full opportunity of hearing. The removal of a Vice-Chancellor which can be made only after following principles of natural justice under Section 14 of the Act cannot be achieved by resort to the emergency provisions under Section 52 against the whole University of which Vice-Chancellor is one of the officers. Where the State Government as a repository of power under Section 52 of the Act, exercises that power for a purpose alien to that for which it was granted it would be misuse of that power for an oblique or collateral purpose. If the purpose for which the power can legitimately be exercised are specified by statue and those purposes are construed as being exhaustive, an exercise of that power in order to achieve a different and collateral object will be pronounced as invalid. (See.: Halsbury's Laws of England, Vol. I, IV Edn., Para 60). All statutory powers must be exercised in good faith and for the purpose for which they were granted. The repository of power must have regard to relevant considerations and not allow itself to be influenced by irrelevant considerations. It must act fairly and reasonably.

In the instant case, the Limaye report had very little to say against the actions of the petitioner as the Vice-Chancellor after assumption by him of his office. The Vice-Chancellor himself had initiated action in the matter of financial irregularities and had called a meeting to probe into the same through the Executive Council. The contents of the return reproduced above clearly go to show that the action was directed against the Vice-Chancellor for his alleged personal acts of comissions and commissioner. The petitioner in his oral address as also in rejoinder submitted by him has tried to meet each and every charge against him of drawing false T. A. Bills, giving excess marks to students and permitting drawal of funds. It is not necessary to go into the details of his defences. In short, the petitioner's stand against these allegations is that T. A. Bills were submitted and drawn on the basis of entitlement for reimbursement equivalent to railway fare irrespective of mode of transport availed. With regard to grant of marks, the reply is that the decision was taken through a results committee of which he is ex-officio member. With regard to the police investigation and affidavits of contractors, it is clear that at no stage the petitioner was involved in the enquiry so as to enable him to explain his conduct. These were some of the allegations personally made against

the petitioner which would have required a show cause notice and grant opportunity of meeting the same to the petitioner. The petitioner was never given any such opportunity at any stage. The enquiry through police was made behind his back. The return of the State creates an impression that the whole action was directed against the Vice-Chancellor and not against any other officer or authority of the University. This Court cannot desist from observing that the State Government in making such scathing and defamatory remarks against the personal conduct of the Vice-Chancellor was expected to act fairly by giving him an opportunity to explain the same before the drastic action under Section 52 was taken to remove him from office on allegations of his personal misconduct. The office of Vice-Chancellor is one of high prestige and dignity. It is expected of the State Government to maintain the same and not to involve such a high dignitory in police investigations on the complaints made against him which could be found to be false and mischievous. A minimal act of fairness on the part of the State is expected for maintaining the dignity of the high office of Vice-Chancellor. The police investigation should not have been ordered against the petitioner without disclosing to him the foundation or reason for directing such investigation. The complaints or material obtained against him should have been disclosed to him so as to give him an opportunity to explain. It is desirable in public interest to protect the autonomy of the University as envisaged by the provisions of the Act. The University as the seat of learning and an independent academic body has to be kept insulated from unhealthy political influences. In the above respect, the petitioner has levelled several allegations against the then Registrar of the University, respondent no. 5. It has been alleged that the Registrar was instrumental in involving the petitioner in police investigations to create a false ground for invoking the provisions of Section 52 of the Act through the State Government. It is said that the Registrar has achieved the issuance of the order under Sec. 52 with a purpose to bring the petitioner and the University in disrepute and to shield himself, as he had sufficient approach with the high-ups in the Government. This Court does not consider it necessary for the purpose of deciding this case to go into the allegations made by the petitioner against the respondent no. 5.

From the records disclosed and the facts revealed by the State Government, if at all any action was warranted, it was under Section 10 of the Act

which was already under way and in fact was nearing completion had the Executive Council been allowed to meet on the scheduled date for deciding upon the future course of action on the basis of Limaye report against the officers found responsible for the alleged financial mis-deeds. The other permissible course of action could be against the Vice-Chancellor under Section 14 of the Act by his removal from the office for alleged specific acts of misconduct committed by him. That action against the Vice-Chancellor could, however be taken only after giving him due opportunity of show cause as laid down in Section 14 of the Act.

Facts and material which are relevant for taking action under Section 10 or 14 of the Act cannot be utilised obliquely to obviate or by-pass observance of formalities contained therein, by resorting to extra-ordinary emergency power under Section 52 of the Act. Exercise of such emergency power at the instance of the State Government is a serious in road on the independence of the University and has in fact been counter-productive in demoralising the various officers and functionaries of the University. Permitting misuse of extra-ordinary power under Section 52 of the Act, in the manner as has been done in this case, would defeat the purpose for which such power has been conferred and would thus harm the cause of education and public interest. It would deter competent academicians from accepting assignments and posts in the University and thus seriously harm the cause of higher education.

For the aforesaid reasons, the impugned action under Section 52 of the Act taken by the State Government cannot be upheld. The petition is hereby allowed and the impugned notifications issued under Section 52 of the Act (Annexure-P/1, P/2 and P/3 dated 23.2.1997) are hereby quashed. In consequence thereof, the petitioner's appointment as Vice-Chancellor and appointment of other authorities and bodies of the University shall stand revived with all consequential beneficial effects, monetary and otherwise. The appointment of Professor H. R. Singh, respondent no. 4, as Vice-Chancellor of the University in place of the petitioner shall stand set aside. As held by the Supreme Court in *S.R. Bommai's case (supra)*, the quashing of the impugned notifications under Section 52 of the Act would not invalidate the actions taken between the issuance of the notification on 23.2.97 and the passing of this order by this Court quashing the same.

Prof. Narendra Kumar Gouraha v. State of M. P., 1998.

It is made clear that the success of this petition would not in any manner prejudice the contemplated action, if any, of the State Government against the University and the petitioner under Sections 10 and 14 of the Act.

The petitioner was suddenly removed from the office of Vice-Chancellor. It has been revealed to him only from the contents of the return submitted by the State in this case that several allegations of misconduct against him were the foundation of the impugned action. He had thus to suffer humiliation without any opportunity of hearing. Initially he was represented by lawyers and must have incurred expenditure in litigating for his rights. He himself argued the case, but in the circumstances mentioned above, he is entitled to get costs of this petition which is roughly estimated and quantified at Rs. 5000/- (Rupees Five Thousand). The costs shall be paid to him by the respondent no. 1 State of M. P. alone.

Petition allowed.

WRIT PETITION

Before Mr. Justice Dipak Misra

13 July, 1998.

KU. MRADULA GUPTA ... Petitioner*

v.

STATE OF MADHYA PRADESH and others ...Respondents

Constitution of India - Article 226 and 14 - Principles of natural justice- Education - Cancellation of petitioner's admission to M.B.B.S. course on ground of production of forged caste certificate - Petitioner was not given any document while requiring her to show cause - No reflection either in the counter affidavit or documents annexed that petitioner's caste certificate has ever been cancelled - She was not apprised of the entire allegation to defend her stand - Order cancelling petitioner's admission quashed.

* W.P. No. 975 OF 1997.

Ku. Mradula Gupta v. State of Madhya Pradesh, 1998.

Needless to emphasize that justice not only be done but should appear to have deen done. It is one of the golden principles of time-tested adjudicatory process. It may be noted here that adjective law of the ancient Indian system also recognised the same. It is well settled that law and justice must go hand in hand. The authorities may be justified in their act of cancellation of the admission but the justification has to be demonstrated in accordance with the procedure laid down by law. It is relevant to note here that there is no reflection either in the counter affidavit or in any other documents annexed to the counter that the petitioner's caste certificate has ever been cancelled. If the caste certificate subsists, has not been cancelled on the ground of forgery, the determination with regard to legitimacy of her admission in the Medical College becomes sensitively susceptible.

Nandlal Kanoria v. *National Industrial Development Corporation Limited and others* (1) and *Kumari Madhuri Patil and another* v. *Additional Commissioner, Tribal Welfare and others* (2) ; referred to.

V.K. Tankha for the petitioner.

A.K. Gohil, A.G. for the State.

Cur. adv. vult.

ORDER

DIPAK MISRA, J. - Challenging the cancellation of admission of the petitioner to M.B.B.S. course in Gandhi Medical College, Bhopal by the State Government and the competent authority of the College, the petitioner has invoked the extra ordinary jurisdiction of this Court under Article 226 of the Constitution of India for issue of appropriate writ for quashment of such orders which have caused an impediment in the smooth progress of her studies.

The brief facts giving rise to filing of this writ petition are that the petitioner had obtained a caste certificate from Naib-Tahsildar, Bhopal, respondent no. 7 herein, vide Annexrue-P-7 dated 28.3.90 describing herself as Chattri, a declared Schedule Tribe. On the basis of the aforesaid caste certificate

(1) (1998) 1 M.P.L.J. 546.
(2) A.I.R. 1995 S.C. 94.

she took admission in M.B.B.S course in the year 1993 in Gandhi Medical College, Bhopal. While she was prosecuting her studies she came to learn that there was some querry in the Vidhan Sabha with regard to issuance of false and fabricated certificates in favour of some students who had taken admission in Medical and Engineering course. When the matter stood thus, as stated in the petition, a news item was published in daily newspaper 'Dainik Bhaskar' Bhopal dated 25.2.97 indicating that her admission had been cancelled. This news item compelled her to prefer the present writ petition for assailing the action of the college authorities. This Court on 4.3.97 while issuing notice directed as follows :-

> " In the meanwhile the respondents may give a notice to the petitioner and hear her on the proposed cancellation of her admission. Since the examination has already commenced for the available papers she shall be permitted provisionally to appear in the examination but her result shall not be declared until further orders."

It is relevant to state that at the time of passing of the order she was in the 4th year of M.B.B.S. course. After this order was passed the State Government vide letter dated 15.4.97 cancelled the admission of the petitioner on the ground that the petitioner had furnished false information. Thereafter, the Dean of Gandhi Medical College, respondent no. 6 herein, on 21.6.97 keeping in view the order passed by this Court issued a notice of show-cause to the petitioner. The said notice to show-cause is as follows :-

> " राज्य शासन ने अपने आदेश क्रमांक एफ - 4/11/97/55. चिशि/एफ, दिनांक 15.4.1997 द्वारा आदेश किया है कि आपने अनुसूचित जाति/अनुसूचित जन जाति के उम्मीदवार होने संबंधी झूठी जानकारी देकर इन जातियों के होने संबंधी फर्जी प्रमाण पत्रों के आधार पर इस चिकित्सा महाविद्यालय में अपना प्रवेश लिया है। अतः आपका प्रवेश तत्काल प्रभाव से निरस्त किया जावे।
>
> माननीय उच्च न्यायालय जबलपुर ने अपने आदेश क्रमांक दिनांक 4.3.1997 द्वारा आपको स्पष्टीकरण देने का अवसर प्रदान करने का आदेश दिया है।
>
> अतः आप 48 घण्टे के अन्दर अपना स्पष्टीकरण इस कार्यालय में प्रस्तुत करें कि क्यों न आपका प्रवेश निरस्त किया जावें।"

Ku. Mradula Gupta v. State of Madhya Pradesh, 1998.

After receipt of show-cause notice the petitioner filed her reply in quite promptitude within the time stipulated substantiating the she had not done anything illegal or committed any forgery while obtaining the certificate. Thereafter vide Annexrue-P-16 dated 12.5.97 the respondent no. 5 passed the order of cancellation. By way of amendment this document has also been brought on record and defensibility of the same has also been assailed.

A return has been filed by the State and other contesting respondents contending, *inter alia*, that the admission to the Pre-Medical Test and Pre-Engineering Test were conducted by Professional Examination Board, Bhopal and petitioner had appeared in the said examination in the year, 1993. It was made clear to every appearing candidate that if it is found that a candidate has succeeded in getting admission to any college/institution on the basis of false/incorrect information or hiding relevant facts or if at any time after admission it is found that the admission was given to the candidate due to some mistakes or oversight, the admission granted to the candidate shall be liable to be cancelled forthwith without any notice at any time during the course of his/her studies by the Head of the institution. In support of the aforesaid, relevant provisions of the Rules for Admission to Medical, Dental and Nursing Colleges in Madhya Pradesh, 1993-94 have been referred. It is averred in the return that with regard to the illegality in the admission in Medical College and Engineering College certain complaints were received. An investigation was conducted by the Enquiry Agency (Police attached to Lokayukt) and the said agency submitted a report against the petitioner and others. It is also stated, on the basis of the report a decision was taken to take action for prosecution against these persons. It is also mentioned that as many as 29 cases are there in which persons were not eligible for admission on the basis of Schedule Caste/Schedule Tribe certificate which they had submitted. As the admissions were taken on the basis of false certificate the same were cancelled.

A rejoinder has been filed by the petitioner controverting the stand taken by the authorities in the counter affidavit. It has been highlighted that the caste certificate was issued by a competent authority and the same has not been cancelled and, therefore, the order of cancellation of admission by the college

authorities is unjustified. It is also stated in the rejoinder that the enquiry, if any, was made at the behind the back of the petitioner, and hence there is violation of principles of natural justice. Quite apart from the above, it is also pleaded that the conclusions arrived at by the Investigating agency as well as by the respondent no. 5 are not based on material on record which makes the whole action vulnerable.

I have heard Mr. V. K. Tankha, learned counsel for the petitioner and Mr. Gohil, learned Deputy Advocate General for the state. Mr. Tankha in support of the writ petition raised many a contention but finally confined his submission to a singular aspect that there has been non-compliance of principles of natural justice inasmuch as before cancellation the petitioner was not issued a notice to show-cause and not afforded an opportunity of hearing. It is also canvassed by him that if even a post decisional hearing is permissible then also there has not been proper compliance of the principles of natural justice as the petitioner was not apprised about the material collected against her through the investigating agency. It is his further submission that though the petitioner had referred to number of documents in her show-cause the same have not been dealt with. Finally, submitted Mr. Tankha, if the certificate was a forged one, then the procedure as has been laid down by the Apex Court in the case of *Kumari Madhuri Patil and another* v. *Additional Commissioner, Tribal Development and others* (1), should have been taken recourse to and in absence of the same the whole exercise is vitiated. To buttress his submission he has also placed reliance on the decision rendered in the case *Abhay Kumar Parate* v. *State of Madhya Pradesh and others* (2).

Mr. Gohil, learned Deputy Advocate General, resisting the aforesaid submission of Mr. Tankha has urged that in pursuance of the direction of this Court a notice was issued to show-cause vide Annexrue P-14 and considering the reply of the petitioner an appropriate order has been passed as contained in Annexure P-16 and, therefore, there has been substantial compliance of the principles of natural justice. It is also putforth by him that there has been a racket in getting false certificates from the authorities for availing of the benefit in admissions in Medical and Engineering Colleges and the matter was duly enquired

(1) A.I.R. 1995 S.C. 94.
(2) W.P.No. 1306/97, decided on 15.12.97.

into by the Investigating agency of the State, and on perusal of the report as contained in Annexure P-7 it would be absolutely crystal clear that the petitioner was not eligible to get the caste certificate. Therefore, the cancellation by the college authorities as well as by the State are beyond reproach. In furtherance of his argument he has placed reliance on the orders passed by this Court in the case of *Ku. Jyoti Done* v. *State of M. P. and others* (1) and the order passed in the case of *Anil Awasthi* v. *State of M. P. and others* (2).

The sole question that arises for determination in the present case is whether there has been compliance of principles of natural justice as understood in the law. It is the admitted position that before cancellation no show-cause was issued. Mr. Gohil, learned Deputy Advocate General had relied on Admission Rules to highlight that the concept of natural justice is expressly excluded as per Rule 3.5. 5. which clearly envisages that the admission can be cancelled without any notice. In this context, I may refer to the aforesaid Rule 3.5.5. as contained in Annexure-R-II :-

> "3.5.5. Cancellation of admission :- If it is found that a candidate has succeeded in getting admission to any college/institution on the basis of false/incorrect information or hiding relevant facts or if at any time after admission it is found that the admission was given to the candidate due to some mistake or oversight, the admission granted to the candidate shall be liable to cancellation forthwith without any notice at any time during the course of his/her studies by the Head of the institution. In case of any dispute or doubts concerning admission etc. decision given by Director of Medical Education will be final."

Such a Rule came to be interpreted in the case of *Abhay Kumar Parate's case (supra)* and this Court on consideration of the rival submissions raised at the Bar registered its view in paragraph 13 which reads as follows :-

> " After hearing the Counsel appearing for the parties, in the opinion of this Court, the petition deserves to succeed on the short ground of violation of principles of natural justice. The claim for status to be belonging to a particular scheduled caste or tribe and the right to prosecute a course of

(1) W. P No. 2046/97, decided on 2.9.97. (2) L P. A. No. 264/97, decided on 17.2.98.

study or technical career on the basis of admissions already granted are too valuable rights to be allowed to be snatched away from them without grant of opportunity of fair hearing to the candidates concerned. Admittedly, in this case enquiry was made into the claim of caste/tribe by the petitioners by the police and other Authorities behind their back. At no stage they were allowed to participate in that enquiry. The admission rule framed for entrance examination quoted above is hardly of any help to the respondents to dispense with observance of principles of natural justice. Such a self serving rule in the matter of granting and cancelling admission framed by the Authorities which indirectly permits dispensation of observance of Rules of fairness and natural justice cannot be allowed to prejudicially operate against the students. Such a rule offends Article 14 of the Constitution which guarantees fairness and non-arbitrariness in administrative action of the State and its authorities."

In view of the aforesaid pronunciation of law, I am of the considered view that the submission of Mr. Gohil though attractive, is not acceptable.

The heart of the matter is whether the petitioner has been given adequate opportunity to explain her stand meeting the requirements of principles of natural justice. Elaborating the principles of natural justice this Court in the case of *Nandlal Kanoria* v. *National Industrial Development Corporation Limited and others* (1), has held as follows :-

" I would like to add that the concept of the natural justice has been described as " substantial requirements of justice" by Kerl of Selborne, L.C. in *Arthur John Spockmen* v. *The Plustood District Board of Works*; (2) in the case of *Menaka Gandhi* v. *Union of India* (3), Bhagwati J. (As His Lordship then was) emphasised "on fair play in action". A duty to act fairly having respect for what is right and wrong is the quit essence of principles of natural justice. The other-side has to be heard before any adverse order is passed. In this context, I may also refer to the principle embodied in '*Qui aliquied statuerit, parte inaudita altera, aequum licet*

(1) 1998 (1) M.P.L.J. 546. (2) (1884-85) 10 Appeal Ca 229, 240.
(3) A.I.R. 1997 S.C. 597.

dexerit, haud aequum facerit", that is, he who determines any matter without hearing both sides, though he may have decided right, has not done justice. It is well settled in law that justice should not only be done but should manifestly be seen to be done."

Action of the authorities is to be tested on the anvil of the aforesaid guidelines/parameters. It is apparent from Annexure P-14 that the petitioner was not given any document by the competent authority while requiring her to show-cause why her admission should not be cancelled. It is worth mentioning here that it was mentioned therein that she had produced forge certificate. In her explanation she has referred to the Scheduled Castes and Scheduled Tribes orders (Amendment) Act, 1976 indicates 'Chattri' at Sr. No. 20 to be a Scheduled tribe. That apart she has also annexed the service book of her father which reflects that her father belongs to 'Chattri' tribe which was mentioned as early as in 1961 before the amendment had come into existence. Quite apart from this, she had referred to other documents in justification of her stand. Ignoring all her pleas/contentions in an extremely cryptic and non-speaking manner, the college authorities cancelled the admission with effect from 9.5.97. Needless to emphasize that justice not only be done but should appear to have been (sic). It is one of the golden principles of time-tested adjudicatory process. It may be noted here that adjective law of the ancient Indian system also recognised the same. It is well settled that law and justice must go hand in hand. The authorities may be justified in their act of cancellation of the admission but the justification has to be demonstrated in accordance with the procedure laid down by law. It is relevant to note here that there is no reflection either in the counter affidavit or in any other documents annexed to the counter that the petitioner's caste certificate has ever been cancelled. If the caste certificate subsists, has not been cancelled on the ground of forgery, the determination with regard to legitimacy of her admission in the Medical College becomes sensitively susceptible. Be that as it may, the question that falls for consideration is whether the procedure adopted by the College Authority is correct or not. Mr. Tankha, learned counsel for the petitioner has proponed that getting admission to Medical or Engineering Colleges for other institution on the basis of a forged certificate is a serious matter and anyone who has involved himself/herself in such activity should be suitably/ appropriately dealt with. Simultaneously, if a certificate, granted by the competent

authority, has been produced by a student, she cannot be thrown out only on the basis of the report of the investigating agency which has been collected behind his back. He has also built up his argument contending that the Apex Court in the case of *Kumari Madhuri Patil (supra)* has held that a committee has to be constituted to enquire into the matter. This Court in the case of *Abhay Kumar Parate (supra)* had the occasion to deal with the said aspect in detail. I may usefully refer to the view expressed by this Court :-

> " There is another reason for this Court to set aside the action of the respondents. As is pointed out in the case of *Madhuri Patil (supra)* the Supreme Court has laid down the detailed procedure for vertification and scrutiny of caste and tribe certificates to as to ensure that only the persons legitimately belonging to scheduled caste and tribe are allowed concessions and privileges guaranteed by the Constitution and they are not allowed to be used and exploited by inelligible persons. In the case of *Madhuri Patil (supra)*, however, Court has ensure that the procedure of enquiry should be fair and allow due participation to the candidate or person concerned before a prejudicial action is taken against him. It would be pertinent to quote the relevant directions contained in paragraph 6 in the case of *Madhuri Patil (supra)* which reads as under :-
>
> > " The Director concerned, on receipt of the report from the vigilance officer if he found the claim for social status to be "not genuine" or "doubtful" or spurious or falsely or wrongly claimed, the Director concerned should issue show cause notice supplying a copy of the report of the vigilance officer to the candidate by a registered post with acknowledgement due or through the head of the concerned educational institution in which the candidate is studying or employed. The notice should indicate that the representation or reply, if any, would be made within two weeks from the date of the receipt of the notice and in no case on request not more than 30 days from the date of the receipt of the notice. In case, the candidate seeks for an opportunity of hearing and claims an enquiry to be made in that behalf, the Director on receipt of such representation/reply shall convene the committee and the Joint/Additional Secretary as Chairperson who shall give reasonable opportunity to the candidate/ parent guardian to adduce all evidence in support of their claim.

Ku. Mradula Gupta v. State of Madhya Pradesh, 1998.

A public notice by beat of drum of any other convenient mode may be published in the village or locality and if any person or association opposes such a claim, an opportunity to adduce evidence may be given to him/it. After giving such opportunity either in person or through counsel, the committee may make such inquiry as it deems expedient and consider the claims vis-a-vis the objections raised by the candidate or opponent and pass an appropriate order with brief reasons in support thereof."

In view of the aforesaid decision it is quite perceptible that the enquiry has to be conducted and as per the direction of Supreme Court. It is accepted at the Bar that a Committee has already been constituted by the State of Madhya Pradesh.

Now, I may refer to the orders passed inthe case of *Kumari Jyoti Done v. State of M. P. and others (supra)*, which has been relied upon by Mr. Gohil, learned Deputy Advocate General wherein this Court has opined that it is open to the petitioner to establish her claim before the Civil Court if so advised. In the case of *Anil Wasti* v. *State of M. P. and others (supra)* this Court has observed that appellant's father was born at Sagar and is a resident of Sagar though managed to show that he was born at Sehore and the allegations made therein, as has been observed by this Court, were not controverted and accordingly this Court accepted the allegations. In the case at hand, as has been demonstrated by Mr. Tankha, she had not only disputed the allegations by filing certain documents and had also clearly putforth that she was not apprised of the entire allegations to defend her stand. In view of this factual position, I am of the humble view that the orders passed in the aforesaid cases are distinguishable.

In view of the proceeding analysis, I am of the considered opinion that the order of cancellation as contained in Annexure P-13 as far as it relates to the petitioner and Annexure P-16 are untenable and are liable to be quashed. However, it would be open to the authorities concerned to proceed against the petitioner in accordance with law laid down in the case of *Madhuri Patil (supra)* and followed by this Court in the case of *Abhay Kumar Parate (supra)*. Needless to emphasize that in view of quashing of order of cancellation the petitioner has to reap the consequences.

The writ petition is allowed leaving the parties to bear their own costs.

Petition allowed

MISCELLANEOUS PETITION

Before Mr. A.K. Mathur, Chief Justice & Mr. Justice Dipak Misra

24 September, 1998.

TOURIST APPROVED GUIDE ASSOCIATION and others ... Petitioners*

v.

UNION OF INDIA and others ...Respondents.

Constitution of India - Article 226 - Petition under - Challenging restrictions imposed on the profession of tourist guide in Khajuraho - Khajuraho has been declared to be a protected monument - Ancient Monuments of Archeological Sites and Remains Act 1958 - Rule 8 (d) of the rules framed under the Act provide no person unauthorised can conduct any tourist to protected monuments without licence- Guide lines issued by the Government for training, age limit, licensing, renewal of licence, issue of identity cards, disciplinary action - Article 19(1) (g) of the Constitution - Citizens of India are entitled to profess their own business or profession - As per clause (6) State can regulate this freedom for the benefit of general public - Looking to the growing tourism traffic in our country, internationally and domestically, there is need to regulate tourist industry-These are reasonable restrictions - Cannot be said to be violative of Article 19(1) (g) of the Constitution.

Since it is a growing industry, those who are engaged in their business or profession, they need to be properly trained for discharging their profession properly and in an effective manner. Thus, this reasonable restriction imposed by the State that tourist guides will have to undergo proper training and obtain licence cannot, by any stretch of imagination, be said to be violative of Art. 19 (1) (g) of the Constitution. These are reasonable restrictions for larger interest of the industry and for the public at large so that tourists can take advantage of proper guide and their inquisitiveness can be properly satisfied by competent persons who are well versed about the Indian culture and history.

As to the specific challenge for providing age of superannuation, suffice it

*M.P. No. 1491 of 1991.

to say that the State can regulate business and lay down the terms and conditions and one of the conditions is the age of the guide which is maximum 65 years. This job of guiding the tourists requires that the persons should be physically and mentally fit to discharge their duties.

In this background, prescribing the maximum age for such guide to 65 years, in our opinion, cannot be said to be illegal or violative of Art. 19(1) (g) of the Constitution.

Rajesh Pancholi for the petitioners.

A. K. Gohil Dy. A. G. for the respondents.

Cur. adv. vult.

ORDER

The Order of the Court was delivered by A. K. MATHUR, C. J. - By this petition, the petitioners have prayed for a direction annulling the scheme of enlisting licensing of tourist guides and controlling and restricting their profession by mere executive fiat varying from time to time without the sanction of any law. The petitioners have further sought a direction that the respondents may be directed to create some autonomous body to regulate and control tourism like other profession. It is also prayed that respondents may be prohibited and restricted from regulating this business.

Brief facts giving rise to this petition are that the petitioner No. 1 is a Tourist Approved Guide Association, Khajuraho and Shri O.P. Sharma is the president along with Shri Sudhir Sharma, Gangaprasad an Brijendra Singh who are working as guides at Kharjuraho, Distt. Chhatarpur, M. P. Respondents 2, 3 and 4 are members of this Association. It is alleged that Govt. of India invites applications by advertising in newspapers for suitable candidates for enrolment by selection of guide training course consisting of lectures in History of India, Indian Art, Culture, Dance, Archeology, Architecture, Wild life, Aviation, Transportation, Functions of Travelling Agencies including ticketing, Reservation, Hotels, Airports. etc.. Candidates were required to go through comprehensive written test and those qualified in the test are then given identity cards to operate as

approved guides in a certain region subject to certain terms and conditions. It is alleged that some terms and conditions were laid down in 1976-77 and candidates who accepted those terms and conditions, were issued identity cards. Their licences are renewable from time to time. It is alleged that applications for tourist guide training course are invited through advertisements region-wise from time to time and Khajuraho tourist centre is covered by the Regional Office at Bombay, First such applications were invited in 1968 and after 1968, advertisements have been issued in 1970, 1976, 1986 and 1989. Last such advertisement was issued as per this petition, in March 1991. Copy thereof has been filed as Annexure P-2.

Grievance of the petitioners is that respondents are arbitrarily taking this test and granting licence and there is no law authorising them for holding the tests and granting licence and renewing them. Therefore, they have challenged by this petition the action of the State being unreasonable, arbitrary and violative of Article 19(1) (g) of the Constitution. It is also pointed out that the age of super-annuation has been fixed as 60 years which has no nexus. It is alleged that there is no regularity in holding the course, there are no guiding principles, there is no authority for the respondents to fix numbers, there are no fixed guidelines and there is no uniformity. It is submitted that the licence granted to such paying guides for a period of one year has to be renewed and there are no guidelines how the renewal can be withheld and for suspension. It is also said that the guidelines laid down by them are arbitrary. It is alleged that clause 2 of 1986 terms makes the travel guide liable for disciplinary action. Petitioners have also challenged clause 10 of the 1986 terms which enjoins on the tourist guides a duty to take the tourist to only establishments/shops approved by the Department of Tourism in preference to unapproved shops/establishments. They have also challenged clause 14 of the terms and conditions of 1986 which makes the guide liable for certain penalties in case of late arrival. They have also challenged clause 26 which provides that if the guide remains absent from active guiding service for a period exceeding two years due to reasons of health, absence from country etc. he/she shall be deemed to have left the profession and in that event, the licence/identity card of the guide shall stand cancelled. Petitioners have also challenged the fee fixed for each tourist guides. In this background, the guidelines

which were issued way back in 1986, are challenged in this petition.

Return has been filed by the respondents. It is pointed out in the return that the tourist industry is a growing industry and in the present day, tourism has considerably increased as the tourists all over the world are coming. There is also increase in domestic tourism. In the additional return filed by the respondents, it has been pointed out that after the guidelines of 1986, new guidelines have been issued and in that case, the Govt. of India has revisd the guidelines for direct selection of guides effective from February 1996 with respect to academic qualifications, screening procedure etc.. Along with this also were issued Annexure I, syllabus for guide training course for Regional Level Guides and State Level Gides, syllabus of guide training course for State Level Guides (Annexure P -II) and terms and conditions regulating the conduct and purpose of approved guides (Annexure P-III). It is also pointed out that grant of licence for tourist guides is regulated by the Act known as Ancient Mnouments of Archaeological Sites and Remains Act, 1958, (for short, the Act of 1958). Section 2 (a) of the Act defines 'ancient monuments' which reads as under :

> " 2(a). 'ancient monument' means any structure, erection or monument, or any tumulus or place of interment, or any cave rock sculpture, inscripition or monolith, which is of historial, archaeological or artistic interest and which has been in existence for not less than one hundred years, and includes -
>
> (i) the remains of an ancient monument,
>
> (ii) the site of an ancient monument,
>
> (iii) such portion of land adjoining the site of an ancient monument as may be required for fencing or covering in or otherwise preserving such monument, and
>
> (iv) the means of access to, and convenient inspection of an ancient monument."

' Antiquity' has been defined in Section 2 (b) which reads as under :

> (i) any coin, sculpture, manuscript, epigraph, or other work of art or craftsmanship.

Tourist Approved Guide Association v. Union of India, 1998.

(ii) any article, object or thing detached from a building or cave,

(iii) any article, object or thing illustrative of science, art, crafts, literature, religion, customs, morals or politics in bygone ages,

(iv) any article, object or thing of historical interest, and

(v) any article, object or thing declared by the Central Government by notification in the official gazette, to be an antiquity for the purposes of this Act,

which has been in existence for not less than one hundred years."

'Protected area' has been defined in Section 2 (i) which reads as under :

"2 (i) 'protected area' means any archaecological site and remains which is declared to be of national importance by or under this Act."

'Protected monument' has been defined in section 2 (j) which reads as under :

"2 (j). 'protected monument' means an ancient monument which is declared to be of national importance by or under this Act."

Section 4 reads as under :

"Power of Central Government to declare ancient monuments etc. to be of national importance -

(1) Where the Central Government is of opinion that any ancient monument or archaeological site and remains not included in Section 3 is of national importance, it may, by notification in the Official Gazette, give two months' notice of its intention to declare such ancient monument or archaeological site and remains to be of national importance ; and a copy of every such notification shall be affixed in a conspicuous place near the monument or site and remains, as the case may be.

(2) Any person interested in any such ancient monument or archaeological site and remains may, within two months after the issue of the notification, object to the declaration of the monument, or the archaeological site and remains, to be of national importance.

Tourist Approved Guide Association v. Union of India, 1998.

(3) On the expiry of the said period of two months, the Central Government may, after considering the objections, if any, received by it, declare by notification in the Official Gazette, the ancient monument or the archaeological site and remains, as the case may be, to be of national importance.

(4) A notification published under sub-section (3) shall, unless and until it is withdrawn, be conclusive evidence of the fact that the ancient monument or the archaeological site and remains to which it relates is of national importance for the purposes of this Act."

"3. Certain ancient monuments etc. deemed to be of national importance -

All ancient and historical monuments and all archaeological sites and remains which have been declared by the Ancient and Historical Monuments and Archaeological sites and Remains (Declaration of National Importance) Act 1951, or by Section 126 of the States Reorganisation Act 1956, to be of national importance shall be deemed to be ancient and historical monuments or archeolocigal sites and remains declared to be of national importnace for the purposes of this Act."

In pursuance of this, the Central Government has, from time to time, declared certain monuments to be protected ones.

So far as we are concerned in the present case, Khajuraho has been declared to be a protected monument. Section 38 empowers the Central Government to frame rules. In pursuance of this power, the Central Goverment has framed Rules known as ' Ancient Monuments of Archaeogical Sites and Remains Rules, 1959." Rule 8 deals with prohibition of certain acts within monuments which reads as under :

" 8. Prohibition of certain acts within monuments -

No person shall, within a protected monument -

(a) do any act which cause or is likely to cause damage or injury to any part of the monument ; or

(b) discharge any fire-arms ; or

Tourist Approved Guide Association v. Union of India, 1998.

(c) cook or consume food except in areas, if any, permitted to be used for that purpose ; or

(d) hawk or sell any goods or wares of canvass any custom for such goods or wares or display any advertisement in any form or show a visitor round for monetary consideration except under the authority of or under and in accordance with the conditions of a licence granted by an archaeological officer ; or

(e) beg for alms ; or

(f) violate any practice, image or costum applicable to or observed in the monument ; or

(g) bring, for any purpose other than the maintenance of the monument -

(i) any animal, or

(ii) any vehicle except in areas reserved for the the parking thereof."

As per clause (d) of Rule 8, no person unauthorised can conduct any tourist to protected monuments without licence.

In order to regulate grant of licence to such guides, the Government of India has issued from time to time, guidelines. At the time when this petition was filed, the guitelines of 1986 were in force, but subsequently, the Government of India has issued fresh guidelines of 1996, known as ' Revised Guidelines' in which the entire set up has been explained that there should be Regional Guides, State Level Guides and Local Guides. For selection of Regional Level Guides, minimum qualification has been prescribed. Then there are State Level Guides. Detailed procedure has been laid down that selection shall be made by a Screening Committee by advertising the post and Rule 9 says that those who are trained guides will be given identity cards valid for a period of one year by the Tourist Office for Regional Guides and this will be renewed on yearly basis and subject to performance and other conditions till they retire after attaining the age of 65 years. Conditions No. 9 reads as under :

Tourist Approved Guide Association v. Union of India, 1998.

" 9 (a) A trained guide will be given an identity Card valid for a period of one year by the Government of India Tourist Office for Regional Guides. These would be renewed on a yearly basis and would be subject to their performance and other conditions till they retire after attaining the age of 65 years.

(b) Similar procedure for issue of identity Cards to the State Level trained guides/local guides will be followed by the State Government."

Then there is syllabus for guide training course for Regional Level Guides, (Annexure I). In this syllabus, they have provided for training in History of India from 16th Century to present day, India since independence and other details. Culture, Religion, Music, Sculpture, Fauna and Flora and other details have also been provided in the syllabus for State Level Guides. (Annexure II). Annexure III deals with terms and conditions regulating conduct and performance of approved guides. Those who are approved guides after undergoing training and selection, have to be regulated and for that revised guidelines have been laid down. It says that the approved guide will be issued identity card which will not be tranfsferable. It lays down that the guide will not seek gifts, or he will be properly dressed in a presentable manner and he will not enter into any other business, he will take tourists for sight seeing to monuments for which payments have been prescribed. In clause (23), it is also provided that when a complaint is received against the Regional Level Guide, then the concerned Government of India Tourist Office will issue a show cuase notice to the said guide giving him an opportunity to submit a representation against the allegations levelled against him and within a period of 30 days from the date of receipt of the show cause notice, he will have to file a reply. Thereafter action can be taken against such guide. Thus the business of tourism has also been regulated by the Act and Rules framed by Parliament.

Learned counsel for the petitioners has especially submitted that providing the age of 65 years in the rules in the guidelines is nothing but arbitrary and without any nexus. Though in the earlier guidelines, the age was 60 years, but in the new guidelines of 1996, it has been enhanced to 65 years. Learned counsel

submitted that providing the age of superannuation has no relevance, as those licensed guides are not in service and they are not servants of the Government of India or of any department. It is submitted that by providing the age of superannuation, the respondents are regulating the right of profession and, therefore, clause 17 of earlier 1986 guidelines which is analogus to cluase 9 (a) of the new guidelines of 1996 are *ultra vires*.

Learned counsel for the Government of India seriously contested the matter and submitted that as Tourist Industry is one of the growing industries in India and tourists are coming from all over the world as well as domestic tourists, therefore, this industry has to be properly regulated and for that purpose, certain rules and guidelines have been issued so that there should not be any cheating by unlicensed guides and visitors may be informed with correct historical background. If the guide is well versed in history of a particular monument in its background, intricacies, then the tourists will be properly served. Therefore, need arose to regulate and accordingly the rules of 1959 were framed and giudelines of 1986 and now 1996 have been issued.

Learned counsel for Union of India invited our attention to decisions of Allahabad High Court in case of *Virendra Kumar Chaddha* v. *Union of India and others* (1). As against this, learned counsel for petitioners invited our attention to the decision of Single Bench in case of *Jagmohanlal Mehra* v. *The Union of India and others,* (2).

After hearing both learned counsel for parties, we are of the opinion that looking to the growing tourism traffic in our country, internationally and domestically, there is need to regulate the tourist industry. It cannot be gainsaid that large number of international tourists are visiting India and Indian culture and History are being exposed to the world through this International Tourism. Likewise, there is a great increase in domestice tourism also. Therefore, it is necessary to regulate this growing industry in the country and for that, the rules and guidelines framed by the Union of India are seriously warranted. If

(1) Civil Mis. W.P.No. 10714/91, decided on 10.9.92.

(2) Civil Mis. W.P.No. 19141/85, decided on 21.10.97.

trained guides are not available, then the tourism is going to be seriously affected and likewise there will be serious misrepresentaion, about the ancient Indian History and culture by the untrained and unscrupulous guides. Therefore, it is need of the day that proper tourist guides should be made available and they should be trained in the history and culture of the monuments so that they can properly guide the tourists and infrom them the historical background of those ancient monuments.

So far as violation of Art. 19(1)(g) of the Constitution is concerned, suffice it to say that all citizens of India are entitled to profess their own business or profession. But at the same time, as per clause (6), State can regulate this freedom for the benefit of general public. After giving our best consideration to the submissions of the learned counsel, we are of opinion that this regulation of the tourist industry no- where violates the right of the persons who are engaged in this profession or business. Only they have been asked to be properly trained for this profession or business. Since it is a growing industry, those who are engaged in their business or profession, they need to be properly trained for discharging their profession properly and in an effective manner. Thus, this reasonable restriction imposed by the State that tourist guides will have to undergo proper training and obtain licence cannot, by any stretch of imagination, be said to be violation of Art. 19(1) (g) of the Constitution. These are reasonable restrictions for larger interest of the industry and for the public at large so that tourists can take advantage of proper guide and their inquisitiveness can be properly satisfied by competent persons who are well versed about the Indian culture and history. In this view of the matter, we are of opinion that the submission of the learned counsel that these guidelines violate the right to profession or business cannot be sustained.

As to the specific challenge for providing age of superannuation, suffice it to say that the State can regulate busines and lay down the terms and conditions and one of the conditoins is the age of the guide which is maximum 65 years. This job of guiding the tourists requires that the presons should be physically and mentally fit to discharge their duties. Therefore, the condition has further laid down that the licence shall be renewed from year to year basis so that if the incumbent is not physically and mentally fit, then his licence may not be renewed.

Therefore, in order to function as an effective guide, one needs to be mentally and physically fit to discharge his duties. In case the incumbent is not physically and mentally fit, then he will not be able to discharge his duties properly. In this background, prescribing the maximum age for such guide to 65 years, in our opinion, cannot be said to be illegal or violative of Art. 19(1) (g) of the Constitution. Since these persons are free to profess their business or profession and this profession or business is not exclusive, but is of public nature and they are serving the public, therefore, they have to be mentally and physically fit and providing age of 65 years appears to be just and reasonable and cannot be said to be violative of Art. 19(1) (g) of the Constitution. The age of superannuation is not always necessarily related to the Government service, though the expression 'superannuation' has relevance for the incumbent who is to retire from service, but at the same time, when the specialised job like the present one where the trained tourist guide has to perform his service to the public, therefore, he needs to be properly, mentally and physically fit to discharge his duties. Thus, in this view of the matter, prescribing of age is not void.

Similar question had come up before the Allahabad High Court in case of *Virendra Kumar Chaddha (supra)* in which validity of cluase (17) of the terms and conditions was challenged. Earlier the terms and conditions had provided the age of 60 years and that came up before the Division Bench of Allahabad High Court and their Lordships upheld providing the age of 60 years and in this connection, reference was made to a decision of Delhi High Court in case of *J. K. Agrawal* v. *Union of India* (1). Their Lordships upheld on the basis of reasoning of the Delhi High Court that if younger guides are available, they will be more energetic and of greater assistance to the tourists. Their Lordships have upheld the fixing of age of 60 years. At this stage, learned counsel for the petitioners invited our attention to the single Bench judgment of Allahabad High Court in case of *Jagmohanlal Mehra (supra)* which appears to be *per incuriam*, as the decision of the Division Bench of the Allahabad High Court was not brought to its notice. As such, the view taken by the learned Single Judge of Allahabad High Court cannot be of any assistance.

As a result of the above discussion, there is no merit in this Writ Petition which is dismissed.

Petition dismissed.

(1) W.P.No. 948/70, decided on 16.5.80.

LETTERS PATENT APPEAL

Before Mr Justice B. A Khan and Mr. Justice Shambhusingh.

11, February, 1998.

RAO MAHENDRA SINGH Appellant*

v.

ABDUL RASHID and others ...Respondents.

Limitation Act, Indian (XXXVI of 1963) - Article 65 - Adverse possession - Mere continuous possession does not become adverse possession unless the person in possession puts up his own title hostile to the title of the original owner and to the knowledge of such owner- Possession becomes adverse only on that date when the person in possession puts up his claim of adverse possession, disputes the title of the original owner and does so to his knowledge-The period of limitation prescribed by Article 65 would run then from that date.

The trial Court had proceeded on a wrong track by holding the suit time barred on the ground that plaintiffs were out of possession for more than 12 years on the date of institution of the suit. The Court had strangely neither referred to provision of the old or new Limitation Act and nor had given any cogent reasoning for dismissing the suit on the point of limitation. In case it had drawn upon Article 142 of the old Act, it had certainly fallen in error, because, suit no. 26-A/72 was filed when Limitation Act of 1963 was in force. Therefore, it was governable under the relevant provisions of this Act, Article 65 whereof prescribed limitation period in case of a suit for possession. Under this Article the period of limitation was to run from the date the possession of the defendant became adverse to the plaintiff. But, for this defendant had to specifically plead and had to assert his title openly and hostile to the title of the plaintiff and to his knowledge. It is a beaten law that person who claims adverse possession must set up title hostile to the title of the true owner and to his knowledge. In other words there should be necessary animus on the part of such person who intends to perfect his title by adverse possession. Mere continuous possession does not become adverse possession unless the person in possession puts up his own title hostile to the title of the original owner and to the knowledge of such owner. The possession, therefore, becomes adverse only on that date when the person in possession puts

* L.P.A. No. 62/85, against the Judgment and Decree of the First Appellate Court in F. A. No. 112/74.

up his claim of adverse possession, disputes the title of the original owner and does so to his knowledge. The period of limitation prescribed by Article 65 would run then from that date.

D. N. Venkatarayappa v. *State of Karnataka* (1) ; referred to.

Samvatsan for the appellant.

S. R. Saraf for the respondents.

Cur. adv. vult.

ORDER

B. A. KHAN J. - It is all about house no. 197/1 situate at Nayapura Street no.1, Indore. This house was admittedly owned by three bothers - Abdul Majid, Abdul Hameed and Abdul Razaq but was sold by one of them Abdul Hameed to one Gulam Rassol in 1943 and was last purchased by Babu Laxmisingh on 11.11.46 who mortgaged it to Rao Mahendra Singh on 21.3.1947.

The mortgagee Rao Mahendra Singh filed a suit no. 30/95 against mortgagor Laxmisingh for recovery of mortgage money which decreed on 24.8.1952 and in execution whereof the suit house was put on sale and purchased by the plaintiff Rao Mahendra Singh himself on 10.10.1955. He thereafter remained in the possession of the house. Meanwhile the successor in interest of one of the original owners of the house of Abdul Majid filed civil suit no. 1164/51 for possession of 1/3rd share in the suit house and for *mesne* profits. The suit was dismissed by the trial Court and the first appellate Court, but was decreed in the second appeal on 17.3.1962 against mortgagor Babu Laxmisingh. The plaintiff took execution proceedings claiming possession from mortgagee purchaser Rao Mahendra Singh who objected to the execution on the ground that the decree was not binding on him. The executing Court and the first appellate Court upheld his objection but observed that the plaintiffs could claim possession of the disputed share in the house by filing a fresh suit against Rao Mahendra Singh. They thereafter filed civil suit no. 26-A/72 for possession of the 1/3rd of the house and for *mesne* profits against Rao Mahendra Singh (defendant no.1) who contested it on the plea

(1) 1997 (7) S.C.C. 567.

that it was barred by limitation as he had perfected his title on the suit house by adverse possession. Though the trial Court held that plaintiffs were entitled to 1/3rd of the share in their house, but it dismissed the suit on the plea of limitation by holding it time barred on the ground that plaintiffs had remained out of possession of the house for more than 12 years on the date of filing of the suit. It appears that trial Court took this view by drawing upon Article 142 of the old Limitation Act, 1908.

The plaintiffs thereafter took an appeal against the judgment and decree of the trial Court in F.A. No. 112/74 which was allowed by the first appellate Court by setting aside the impugned judgment and decree of the trial Court and by providing for appointment of a Commissioner for effecting partition of the suit house to demarcate the 1/3rd share of the plaintiffs. It also directed the trial Court to proceed thereafter and pass a final decree directing the defendants to deliver the possession of the 1/3rd share to them.

The first appellate Court reversed the judgment and decree of the trial Court on finding that it had wrongly drawn upon Article 142 of the old Limitation Act when the plea of limitation raised was to be examined in the light of Article 65 of the Limitation Act, 1963 as the suit of the plaintiffs was filed on 24.12.1972. The Court also alternatively examined the matter from the different angle and concluded that plaintiffs were entitled to exclusion of time for the that plaintiffs were entitled to exclusion of time for the period they had prosecuted the suit no. 1164/51.

Defendant Rao Mahendra Singh has filed this L.P.A. now assailing the judgment of the first appellate Court amongst others on the ground that the first appellate Court had wrongly ordered exclusion of time for the period suit no. 1164/51 was pending adjudication and that the Limitation Act of 1963 was not attracted in terms of its section 31 as the limitation period provided for the suit had already expired under the old Act.

We have examined the two judgments passed by the trial Court and the first appellate Court and we feel convinced that the trial Court had proceeded on a wrong track by holding the suit time barred on the ground that plaintiffs were out of

possession for more than 12 years on the date of institution of the suit. The Court had strangely neither referred to provision of the old or new Limitation Act and nor had given any cogent reasoning for dismissing the suit on the point of limitation. In case it had drawn upon Article 142 of the old Act, it had certainly fallen in error, because, suit no. 26-A/72 was filed when Limitation Act of 1963 was in force. Therefore, it was governable under the relevant provisions of this Act, Article 65 whereof prescribed limitation period in case of a suit for possession. Under this Article the period of limitation was to run from the date of the possession of the defendant became adverse to the plaintiff. But for this defendant had to specifically plead and had to assert his title openly and hostile to the title of the plaintiff and to his knowledge. It is a beaten law that person who claims adverse possession must set up title hostile to the title of the true owner and to his knowledge. In other words there should be necessary animus on the part of such person who intends to perfect his title by adverse possession. Mere continuous possession does not become adverse possession unless the person in possession puts up his own title hostile to the title of the original owner and to the knowledge of such owner. The possession, therefore, becomes adverse only on that date when the person in possession puts up his claim of adverse possession, disputes the title of the original owner and does so to his knowledge. The period of limitation prescribed by Article 65 would run then from that date. *D.N. Venkatarayappa v. State of Karnatak* (1).

In the present case, appellant had not advanced his claim of adverse possession at any stage even from the date he had purchased the disputed house in execution proceedings of suit no. 14 on 10.10.1995. He appears to have done so for first time while taking objection to the execution proceedings in suit no. 1164/51 on 29.11.1962. As such the period of limitation was computable from that date and the suit was within the period of limitation prescribed by any calculation.

Viewed thus the first appellate Court had rightly dealt with the matter in this perspective. It is a different matter that it had alternatively found the suit within the prescribed period of limitation by taking recourse to exclusion of

(1) 1997 (7) S.C.C. 567.

time taken by the plaintiffs in prosecuting suit no. 1164/51. That by itself would not detract from the fact that the suit was falling within the limitation zone otherwise also under Article 65 of the Limitation Act, 1963. We accordingly concur with the reasoning adopted by the first appellate Court regarding application of Article 65 to the suit and hold it within the period of limitation and hold that limitation period (and) in a suit for possession of immovable property would run from the date the party in possession asserts his title hostile to the original owner and to his knowledge.

Appellants' reliance on section 31 of this Limitation Act seems also misconceived. Because this section only provided that the expired cause of action in a suit, appeal or application that had already become time barred under the old Act of Limitation on 1st January, 1964 could not be revived by resort to the provisions of the Act of 1963 providing for a longer period of limitation. As a matter of fact the position contemplated by section 31 was not attracted to the present case at all. Because civil suit no. 26-A/72 was filed on 24.12.1972 and was to be governed by the Limitation Act, 1963 which was already enforced.

For the reasons given this appeal is dismissed and the judgment and decree of the first appellate Court passed in F. A. No. 112/72 is affirmed.

Appeal dismissed.

LETTERS PATENT APPEAL

Before Mr. A. K. Mathur, C. J. and Mr. Jusdice. Dipak Misra.

20, August, 1998.

BOARD OF SECONDARY EDUCATION, M. P. Appellant*

v.

SHRI VASANT VAIDYA ...Respondent.

Constitution of India - Article 226 and Board of Secondary Education (Employees Pension) Regulation, M. P., 1991 - Cut off date fixed from 1.4.1988 - Petitioner was denied the benefit of the new pension Scheme as he had already retired on 1.11.1987 - After working out necessary finance the cut-off date was fixed from 1.4.1988 - This cut off date by the State cannot be said to be arbitrary - Order of learned single judge set aside.

The respondent/petitioner made a demand for grant of benefit of new pension scheme, but he was denied the benefit of the new pension scheme because he had already retired on 1.11.1987 prior to cut off date i.e. 1.4.1988. Hence, the petitioner approached this Court by filing a writ petition and seeking a declaration that he may be also given the benefit of new pension scheme irrespective of the fact that he retired before the cut off date i.e. 1.4.1988 and fixation of cut off date is arbitrary.

The payment of pension scheme remained in limbo and after working out necessary finance, the cut off date was fixed from 1.4.1988 and this fixation of cut off date by the State cannot be said to be arbitrary so as to be struck it down.

Krishna Kumar v. *Union of India* (1) ; referred to.

Prabhat Chandra v. *Rani Durgawati Vishwavidyalaya and another* (2); relied on.

S. L. Saxena A. G. for the appellant.

S. A. Sobhani for the respondent.

Cur. adv. vult.

---

*LPA No. 22 of 1997, against the Judgment and orders dt. 22.8.96, passed in W.P.No. 4379/91.

(1) A.I.R. 1990 S.C. 1782. (2) 1997 (2) J.L.J. 242.

Board of Secondary Education, M. P. v. Shri Vasant Vaidya, 1998.

JUDGMENT

A. K. MATHUR C. J. - This is an appeal directed against the order of the learned Single Judge of this Court dated 22.8.1996 passed in W.P. No. 4379/91, whereby the learned Single Judge has allowed the petition and directed the Board to allow the respondent/petitioner to opt for his pension and fix his pension and start paying the same within a period of one month. The petitioner shall refund of his provident fund in accordance with the Regulations.

The brief facts which are necessary for disposal of the appeal are that the respondent/petitioner had filed a petition under Article 226 of the Constitution for grant of benefit of pension scheme which was brought into force w.e.f. 1.4.1988 for all employees, who had already retired or would be retiring after publication of the Pension Scheme in the M.P. Raj Patra dated 10.5.1991. The benefit of the pension scheme was not extended to the petitioner/respondent only on the ground that he retired on 1.11.1987 prior to the date 1.4.1988, from that date the pension scheme was brought into force.

The Madhya Pradesh Board of Secondary Education constituted under the M.P. Madhyamik Shiksha Adhiniyam, 1965 (hereinafter referred to as the "ACT" in brevity). Section 17(4) (b) of the Act provides that qualification, conditions of appointment and service and scale of pay of an officer and servant of the Board. Sub-section (3) of Section 28 gives power to the Board to frame Regulations. The Board, in exercise of the aforesaid power framed the Regulations knowns as M.P. Board of Secondary Education Employees (Pension Regulations) 1991 (hereinafter referred to as the "Regulations of 1991" in brevity). By virtue of this Regulations, a pension scheme was introduced for the employees w.e.f. 1.4.88. Prior to this pension scheme, the Board had a provident fund scheme in force. But, by this Regulation 1991, the pension scheme was introduced and a cut off date was fixed from 1.4.1988. The respondent/petitioner made a demand for grant of benefit of new pension scheme, but he was denied the benefit of the new pension scheme because he had already retired on 1.11.1987 prior to cut off date i.e. 1.4.1988. Hence, the petitioner approached this Court by filing a writ petition and seeking a declaration that he may be also given the benefit of new pension scheme irrespective of the fact that he retired before the cut off date

i.e. 1.4.1988 and fixation of cut off date is arbitrary. In this connection, reliance was placed on the decision of Hon. Supreme Court in the case of *D. S. Nakara & others* v. *Union of India* (1). The Board submitted that the cut off date is 1.4.1988; therefore, those employees who already retired prior to 1.4.1988, they cannot get the pensionary benefit under the scheme. It was also pointed out that the petitioner/respondent was member of the Contributory Provident Fund and that scheme was in force at the time when the petitioner retired. It is submitted that after his retirement, he already collected his provident fund amount and after a gap of four years, he cannot be heard that he should have been granted the benefit of the Pension Scheme. It is also pointed out that since the scheme was approved by the State Government, therefore, the State of M. P. is a necessary party because the State alone can justify the enforcement of the pension scheme w.e.f. 1st April 1988. It is also placed on record that earlier a resolution was passed on 7.5.1984 in the Joint Meeting of the Executive & Finance Committee of the Board to implement the pension scheme w.e.f. 1.4.1985 and the matter remained under correspondence for quite some time. However, ultimately, the scheme could only be finalised and the cut of date was mentioned as 1.4.1988. The stand of the respondent was that the cut off date 1.4.1988 was fixed in view of the financial position of the Board and the funds available for giving pension benefits. However, no further material then this was placed. Therefore, the only plea was that because of non-availability of fund, the cut off date i.e. 1.4.1988 was fixed. Therefore, in this back ground what we have to consider is whether the cut off date i.e. 1.4.1988, which is fixed in the Regulation, is reasonable or is arbitrary so as to being struck down. The Regulation 4 of the Regulations, which has a bearing on the subject, reads as under :

> " All employees who were in service of the Board as on 31st March, 1988, shall exercise an option in duplicate in writing in the form appended to these regulations to elect either to retain the benefits of existing Board's Contributory Provident Fund or to come under these Regulations within three months from the date of approval of these Regulations by the State Government and submit the same to the Secretary of the Board."

(1) A.I.R. 1983 S.C. 130.

Board of Secondary Education, M. P. v. Shri Vasant Vaidya, 1998.

In view of the above Regulation, those employees who had already retired prior to 31.3.1988, stand automatically excluded and those who retire after 31.3.1988, will be entitled to opt for the benefit of pension scheme. Thus, there are two classes, i.e. those who are in service upto 31st March, 1988 and those who are retired prior to 1988, such persons shall not be entitled to give option for grant of pension. In *D. S. Nakara's case (supra)*, a similar question came up for consideration followed with another decision of the Hon. Supreme Court in the case of *Smt. Poonamal* v. *Union of India* (1) and their Lordships have taken a view that this kind of fixation of cut off date cannot be sustained. But those decisions subsequently came up for consideration in the case of *Krishna Kumar* v. *Union of India* (2) therein Hon. Supreme Court explained both these cases and distinguished them. Subsequently, in the case of *State of West Bengal & others* v. *Ratan Bihari Dey* (3), those aforesaid decisions came up for consideration and their Lordships approved the ratio laid down in the case of *Krishna Kumar (supra)*. A similar question came up for consideration before this Court in the case of *Prabhat Chandra* v. *Rani Durgawati Vishwavidyalaya & another* (4) with regard to Dr. Hari Singh Gaur Vishwavidyalaya, Sagar and there was also a contributory provident fund scheme and the employees were given the benefit of pension w.e.f. 1.4.1987. It was resolved that those employees/officers, who are in the services of the University on 1.4.1987, shall be entitled to all pensionary benefits, which are available to the employees of the State of M. P. under the Madhya Pradesh Civil Services (Pension Rules, 1976 and the M. P. Civil Pension (Commutation) Rules, 1976 as amended from time to time. There, the question arose that those who retired perior to 1.4.87, are not being given the benefit of pension and the fixation of cut off date, i.e. 1.4.1987, being arbitrary, should be struck down. The Division Bench of this Court in *Prabhat Chandra (supra)*, after examining the decisions given in the case of *D. S. Nakara*, *Krishna Kumar* and *Ratan Bihari Dey (supra)* and in subsequent decision given by the Hon. Supreme Court in the case of *Union of India* v. *P. N. Menon & others* (5), *State of Rajasthan* v. *Sevanivatra Karamchari Hitkari Samiti* (6) and *Union of India* v. *M. Bhaskar & others* (7), came to the conclusion that this kind of fixation of cut off date cannot be said to be arbitrary. It was observed in para 17 as under :

(1) A.I.R. 1985 S.C. 1195. (2) A.I.R. 1990 S.C. 1782. (3) 1993 (4) S.C.C. 62.
(4) 1997 J.L.J. 242. (5) 1994 (4) S.C.C. 68. (6) 1995 (2) S.C.C. 117.
(7) 1996 (4) S.C.C. 416.

Board of Secondary Education, M. P. v. Shri Vasant Vaidya, 1998.

" From a survey of all these cases of the Hon. Supreme Court. The recent trend is that if the cut off date could be reasonably justified then there is no justification to strike it down, simply because some cut off date has been given. When the decision regarding financial involvement is taken, certain date is bound to be specified and such fixation of date cannot necessarily be always said to be illegal or bad. In the present case, as already mentioned above, the decision was taken by the Government to give the pensionary benefits to the teachers and employees of the Universities in 1987, therefore, it was made applicable from 1.4.1987 i.e. financial year, though orders were subsequently issued. Therefore, the cut off date is not whimsical in the present case. So far as the cases which are cited by the learned counsel for the petitioners, i.e. Allahabad, Gujrat, Bombay and Gwalior Bench, they are distinguishable on their peculiar facts. The peculiar distinguishing feature has already been thought out. The recent decision of the Hon. Supreme Court is that if there is justification for fixation of cut off date and is not whimsical, then the fixation of cut off date should not be struck down. In the present case, we have found that the fixation of cut off date was justified, therefore, we do not find any illegality in cut off date from 1.4.1987."

Same view has again been reiterated by Hon. Supreme Court in *Hariram Gupta* v. *State of U. P.* (1) and it was held : " that the Rules have no retrospective operation. Even the decisions in *Mehrishi* v. *NDMC* (2) and *D. S. Nakara's case* (3) will not help to get benefit of pension under the Rules of 1981, as appellant superannuated prior to the Rules coming into force."

Similarly in the present case, as the reply given by the Board in the writ petition was that on account of financial constrained that payment of pension scheme remained in limbo and after working out necessary finance, the cut off date was fixed from 1.4.1988 and this fixation of cut off date by the State cannot be said to be arbitrary so as to be struck it down. Hence, in view of the decisions given

(1) J.T. 1998 (5) S.C. 127. (2) J.T. 1990 (1) S.C. 3861.
(3) 1983 (1) S.C.C. 305. = A.I.R. 1983 S.C. 130.

Board of Secondary Education, M. P. v. Shri Vasant Vaidya, 1998.

by the Hon. Supreme Court and followed by the Division Bench of this Court in *Prabhat Chandra's case (supra)*, we set aside the order of the learned Single Judge and hold the cut off date i.e. 1.4.1988, is well justified, Hence, we set aside the order passed by the learned Single Judge of this Court dated 22nd August, 1996, in Writ Petition No. 4379/91, and dismiss the writ petition and allow this appeal accordingly. No. order as to costs.

Appeal allowed.

APPELLATE CIVIL

Before Mr. Justice J. G. Chitre.

8, January, 1998.

RAJENDRA SINGH BIAS Appellant*

v.

SMT. DURGA DEVI BIAS ...Respondent.

Hindu Marriage Act (XXV of 1955) - Section 13(1) (a) (ii) - Petition for Divorce dismissed by Trial Court - Appeal preferred by husband - Since 1976 there is no re-union between the parties - Wife respondent obtained decree of restitution of conjugal rights in 1982 but not pursuing execution thereof - Such spouse has to be blamed - At the time of hearing of appeal appellant is 57 years of age and wife above 50 years - Spouses have gone to such an end from where there is no return - No point in keeping the matrimonial tie alive - Trial Judge committed error in not passing a decree of dissolution of the marriage - Decree of Divorce granted dissolving the marriage of parties.

By putting the erring spouses to the apprehension of pecuniary loss such erring spouses can be brought to path within provided time but a spouse in whose favour such a decree has been issued, does not take such an action and allows such non-union to continue for years together. Such spouses has to be blamed because

* F.A. No. 254/94, against the Judgment and decree passed by IXth Addl. District Judge, Indore, in Hindu Marriage Case No. 9/94.

by such inactiveness of long period such separation becomes permanent and loses all charms and all purpose for which marriage is meant for.

When a spouse is not ready to stay with other and categorically states that such association would be totally cruelty on him it by itself indicates that the spouses have gone to such an end from where there is no return. Asking such spouse to re-unite is nothing but asking them to stay under a roof which would be as good as asking them to stay in a hostel or roof where the strangers do live for some period and return. That has been the situation so far as this case is concerned.

Dharmendra Kumar v. *Usha Kumar* (1), *Smt. Saroj Rani* v. *Sudarshan Kumar Chaddha* (2), *V. Bhaget* v. *D. Bhaget* (3) and *Romesh Chandra* v. *Smt. Savitri* (4) ; referred to.

A. M. Mathur with *S. L. Jain* for the appellant.

Krishna Shastri for the respondent.

Cur. adv. vult.

JUDGMENT

J. G. CHITRE J. - The appellant (original petitioner) is hereby assailing correctness, propriety and legality of the judgment and decree passed by 9th Addl. District Judge, Indore in the matter of Hindu Marriage Case No. 9/94 by which he dismissed the petition filed by the present appellant for getting a decree of divorce against his wife (present respondent).

Few facts need to be enumerated for the purpose of un-folding the matter. Both the appellant and respondent were married, at Ujjain on 27/4/71 as per Hindu rites and ceremonies. Both do not have any child out of the said wedlock. Since 1976 there is no reunion between the parties. The respondent, wife Durgadevi had filed an application for getting alimony in view of the privisions of S. 125, Criminal Procedure Code, 1973 (hereinafter called as Code for convenience) 1973. Alimony was granted to her payable by the present appellant. That was increased

(1) A.I.R. 1977 S.C. 2818.
(2) A.I.R. 1984 S.C. 1562.
(3) A.I.R. 1994 S.C. 710.
(4) A.I.R. 1995 S.C. 851.

by the Sessions Court as well the High Court and presently the respondent is getting alimony of Rs. 1450/- per month from the appellant (this includes the *pendente-lite* alimony in view of provisions of Hindu Marriage Act 1955, hereinafter referred to as Hindu Marriage Act for convenience). The wife Durgadevi had filed a petition for restitution of conjugal rights against the appellant, Rajendra Singh in the District Court, Indore and a decree for restitution of conjugal rights was passed in her favour on 25.11.82. That was put to execution by the wife Durgadevi in the District Court of Ujjain. Ist Addl. District Judge, Ujjain transferred that decree for execution at Court Indore in the month of September, 1983. The wife Durgadevi did not pursue the said execution proceedings, at Indore Court.

Respondent, Durgadevi had contended that after 1983 she attempted to cohabit with her husband Rajendra Singh, the present petitioner by visiting his house but the wife of Rajendra's Brother and his sister did not permit her to enter into the house to stay there as wife of Rajendra Singh. Thus, the attempt of cohabiting with her husband assisted by her relative failed. On account of refusal of appellant to accept Durgadevi as wife in his house, Durgawati was constrained to stay at Ujjain approximately since 1976. It means indirectly that except putting the said restitution of conjugal rights decree to execution nothing was done by Durgadevi since 1976.

At the time of hearing this appeal, the appellant who happens to be about 57 years of age, is totally not ready to go for amicable settlement though Durgadevi is saying that she is willing to stay with the appellant as his wife. On account of the spouses statement at different poles like South and North, the amicsable settlement is totally not possible.

Shri A. M. Mathur, Senior Counsel appearing for the appellant, submitted that the learned trial Judge virtually disbelieved the evidence which has been adduced by Durgadevi, the respondent in respect of her attempt to go for cohabitation as wife in the house of appellant, Rajendra Singh, by pointing out that there is no pleadings on that point in the written statement, while concluding the judgment recorded the finding that the appellant was taking the advantage of his 'wrong' for the purpose of getting a decree of divorce against Durgadevi, his

wife in view of provisions of S. 13 (1) (a) (ii). Thus, by holding this, he has erroneously dismissed the matrimonial petition filed by the appellant for the purpose of getting a decree of divorce and the impugned judgments and decree is totally inconsistent with the ratio of the Supreme Court judgment. Shri P. Shastri, counsel appearing for the respondent submitted that though there is no pleadings on the point of attempt of Durgadevi for cohabiting with her husband, the appellant as his wife, her evidence was very clear which was proving that she legally made the attempt to cohabit with the appellant but appellant refused to accept her as his wife. He further submitted that the witnesses who have been examined by Durgadevi namely Kailash, Samunder Singh and Mansingh have corroborated the evidence of Durgadevi. He admitted that the appellant himself did not accept Durgadevi as his wife and did not allow reunion of himself and his wife Durgadevi for a long period and by taking disadvantage of that, has attempted to get a decree of divorce against her. He justified the judgment and decree as correct, proper and legal and submitted that the appeal be dismissed.

Shri Mathur, placed reliance on the judgment of Supreme Court in the matter of *Dharmendra Kumar* v. *Usha Kumar* (1) wherein the Supreme Court held that -

> " In order to be a 'wrong' within the meaning of S. 23 (1) (a), the conduct alleged has to be something more than a mere disinclination to agree to an offer of *reunion*, it must be misconduct serious enough to justify denial of the relief to which the husband or the wife is otherwise entitled."

Supreme Court pointed that -

> " Where after little over two years of passing of decree of restitution of conjugal rights in her favour, the wife applied for dissolution of under marriage S.13(1-A) (ii) and the husband in his written statement alleged that wife refused to receive or reply to the letters written by the husband and did not respond to his other attempts to make her agree to live with/him, this allegation, even if true, did not amount to misconduct grave enough to disentitle the wife to the relief she asked for."

(1) A.I.R. 1977 S.C. 2818.

Rajendra Singh Bias v. Smt. Durga Devi Bias, 1998.

Shri Mathur placed further reliance on the judgment of the Supreme Court in the matter of *Smt. Saroj Rani* v. *Sudarshan Kumar Chaddha* (1) wherein the Supreme Court held -

> " It is evident that for whatever be the reason the marriage has broken down and the parties can no longer live together as husband and wife, it is better to close the chapter."

Shri Mathur again placed reliance on the judgment of Supreme Court in the/ matter of *V. Bhagat* v. *D. Bhagat* (2) wherein Supreme Court held that -

> " In view of the peculiar facts and circumstances of the case and its progress (dealing with freak and troublesome behaviour of the wife) and long period of 8 years, in such situation it was better to give a quietus to the man."

It has been further held in that matter that -

> " In such unusal circumstances, such unusal step can be resorted to only to clear up an insoluble mess, when the court finds it in the interest of both the parties."

Shri Mathur fi ·ther the placed reliance on the judgment of the Supreme Court in the matter of *Romesh Chander* v. *Smt. Savitri* (3) wherein the Supreme Court held -

> " The marriage which is otherwise is dead both emotionally and practically. If continued for name-sake, is the issue for consideration, the continuance of it would be cruelty."

In the said/matter the Supreme Court took note of the attitude of the appellant who expressed remorse for his past mistake by transferring his only house in his name in favour of his wife.

Considering the evidence on record the appellant Rejendra Singh stated in his evidence in a paragraph 2 that he had gone for bringing Durgadevi to his house alongwith his relatives on 2-3 occasions but Durgadevi had refused to come.

(1) A.I.R. 1984 S.C. 1562. (1) A.I.R. 1994 S.C. 710. (2) A.I.R. 1995 S.C. 851.

Rajendra Singh Bias v. Smt. Durga Devi Bias, 1998.

It is his evidence that for the last time Durgadevi stayed with him till 21/3/76 and thereafter there was no reunion between them. In his evidence he stated that after the High Court had passed a decree in favour of Durgadevi, Durgadevi did not come to stay with him though he attempted for that for a period about $2^{1/2}$ years. He further stated in his evidence that it is impossible for him in those circumstances to associate with his wife Durgadevi. He categorically stated that if both of them are made to stay with each other, the life of both would be totally miserable. He further stated that their reunion is totally impossible. His witness Sunder Singh stated that since Nov. 82, Durgadevi did not stay with his brother and it was impossible now for both of them to stay together. It is evidence Sunder Singh that on 21.3.76 Durgadevi had left the house of his brother Rajendra Singh alongwith her brother Kailash without taking permission of Rajendra.

Rajendra Singh stated in his evidence that none from the house of Durgadevi had come to his house for the purpose of reunion of both of them. He stated that no notice was sent by Durgadevi to him expressing her intention to cohabit with him. His witness Daulatsingh stated in his evidence that in the month of Dec. 82, when he attempted for reunion of Rajendra Singh and Durgadevi, the family members of Durgadevi refused to send Durgadevi with him to the house of Rajendra Singh. Same is the tune of evidence of Narendra Singh.

Durgadevi stated in her evidence that after the marriage when both Rajendra Singh and herself were returning to Indore, the jeep by which they were travelling sustained an accident in which Rajdendra Singh happened to be unconscious for about 6-7 days. It is her evidence that on account of such mishap, Rajendra and his family members started illtreating and disliking Durgadevi. They used to abuse her by calling her that the was symbol of unluck for them. She stated about the ill-treatment received by her at the hands of her husband's family members except her mother-in-law. She blamed the wife of elder brother of Rajendra Singh and the sister of Rajendra Singh for such ill-treatment. Durgadevi stated in her evidence that after decision of the High Court in her favour her brother had taken her from Ujjain to Indore for cohabiting with Rajendra Singh but her husband Rajendra Singh, his brother, his wife and persons did not accept her as wife of Rajendra Singh and on account of such treatment given to herself her brother and her father were required to return back. She stated in her evidence

that though she was willing to cohabit with her husband Rajendra Singh, Rajendra Singh did not take her for cohabitation as wife. Kailash, her brother stated the same in his evidence. Her witness Samunder Singh has stated in the same tune so far as the attempt to cohabit with her husband by Durgadevi and their assistance was concerned. Same type of evidence has been given by her witness Mansingh.

Thus, there was evidence of these witnesses tuning the case of contesting spouses so far this matter is concerned. The truth has to be sifted out from it. The matrimonial petition as well as written statement of the spouses is the evidence in view of the provisions of Hindu Marriage Act and that will have to be also given credence. So also the conduct of the parties will have to be considered because the parties and the witnesses may speak lie but the circumstances and record may not. The truth surface slowly and in a piecmeal way, in many cases. The prudent approach has to be adopted for the purpose of finding out as to what is the truth and what is not. Careful scrutiny has to be done in this context for the purpose of coming to a right conclusion. The matrimonial petition filed by the petitioner reiterates his stand. However the written statement filed by the respondent Durgadevi does not mention that such attempts were made on her part with the assistance of her relatives for the purpose of cohabiting with appellant Rajendra Singh after the judgment and decree was passed by the High Court in her favour in respect of her claim of restitution of conjugal rights. It is further important to note that though the said decree of restitution of conjugal rights was put for execution in the District Court Ujjain and when that was transferred to the court passing a decree at Indore, Durgadevi did not pursue it. There was no difficulty for her to pursue the execution of decree of restitution of conjugal rights which was passed in her favour and against the present appellant Rajendra Singh. That would have been shown that she was really interested in cohabiting with her husband Rajendrasingh. Had she been particular in pursuing that, perhaps there would have been a reunion between the appellant and her. And for that she has to blame herself. It is now-a-days a common thing that parties in the litigation of matrimonial matters, take the stance of willingness to cohabit for the purpose of shirking the responsibility or blaming. Their witnesses also reiterate the same tune. The chorus of voices of witnesses does not make a melody. What it should have been is the tune of truth in it. And this tune of truth lends support and strongness to the case of the parties. And

perhaps this can be found out by the conduct of the parties prior to the petition, during the petition and after the petition. So also it can be ascertained by the conduct of the parties prior, to the litigation, during the litigation and after litigation when the appeals and further proceedings are pending in the court. Had there been a real intention of Durgadevi to cohabit with Rajendrasingh as his wife, there would have been atleast letters written by Durgadevi to take her back to matrimonial home for permitting her to cohabit with him as his wife but the record shows none.

Had there been such intention on the part of Durgadevi to compel her reunion with her husband Rajendrasingh, and when she was engaged in litigation upto the level of High Court, she should have sent notice through her advocate expressing her intention of cohabiting with her husband Rajendrasingh and forcing him to take her to matrimonial home, atleast to accept her at matrimonial home. Record shows nothing. Therefore, the stance taken now that she was and is willing to cohabit with her husband Rajendrasingh loses the value. Learned trial Judge should have considered this important facet of the matter and should have thereafter appreciated the evidence on record. Had he done that, he would not have landed in returning to a finding against the appellant holding that the appellant was capitalising his 'wrongs' for the purpose of getting a divorce against his wife Durgadevi. That finding can not be sustained as it has not borne out by the evidence, circumstances and the record of the matter. That has to be dislodged.

Therefore, what remains is that there has been a continuance non-union between spouses for a period of 22 years. The appellant is 57 years. Respondent may be 5-6 years less than him. Obviously she appears to be a woman who has crossed 50 years of the age. The question which would be before this court to answer is when there is no point to continue such a dead wedlock whether continuation of that would be beneficial to both the spouses in the circumstances of the matter and conduct of the spouses ?

In the matter of *Smt. Saroj Rani* v. *Sundar Singh (supra)* the Supreme Court pointed that -

Rajendra Singh Bias v. Smt. Durga Devi Bias, 1998.

" In India it may be borne in mind that conjugal rights i.e. right of the husband or the wife to the society of the other spouse is not merely creature of the statute. Such a right is inherent in the very institution of marriage itself. There are sufficient safeguard in S. 9 to prevent it from being a tyranny. The importance of the concept of conjugal rights can be viewed in the light of Law Commission - 71st Report on the Hindu Marriage Act 1955 - 'Irretrievable Breakdown of Marriage as a Ground of Divorce, para 6.5 where it is stated thus - 'Moreover, the essence of marriage is a sharing of common life, a sharing of all the happiness that life has to be faced in life, an experience of the joy, that comes from enjoying in common, things of the matter and of the spirit and from showering love and affection on one's offspring. Living together is a symbol of such sharing in all its aspects. Living apart is a symbol indicating the negation of such sharing. It is indicative of a disruption of the essence of marriage - 'breakdown' - and if it continues for a fairly long period, it would indicate destruction of the essence of marriage - 'irretrievable breakdown'."

The law provides enforcement of the decree for restitution of conjugal rights. That is for the purpose of making the erring spouses to come to a right path and to patch up possible 'wear and tear' of marriage. A man can be punished by corporeal punishment as well as putting him to the pecuniary loss for the purpose of putting him to right track. Such provision has been made in law for the purpose of enforcing a decree of restitution of conjugal rights because it is quite difficult to foist association of one's spouse on other. By putting the erring spouses to the apprehension of pecuniary loss, such erring spouses can be brought to path within provided time. But a spouse in whose favour such a decree has been passed, does not take such an action and allows such non-union to continue for years together. Such spouses has to be blamed because by such inactiveness of long period such separation becomes permanent and lose all charms and all purpose. separation for which marriage is meant for. 'Matrimonial home' has a special meaning. It is not association of two living beings of different genders under a roof for some period. Hindu ideology indicates that marriages are for DHARAMAM, EARTHAM, KAMAM, MOKSHAM'. It is also meant for 'VANSHVRIDHI'.

If all these things are lost by continuance non-association, what remains ? It is as good as total vacuum. When a spouse is not ready to stay with other and categorically states that such association would be totally cruelty on him it by itself indicates that the spouses have gone to such an end from where there is no return. Asking such spouse to reunite is nothing but asking them to stay under a roof which would be as good as asking them to stay in a hostel or roof where the strangers do live for some period and break up (sic) that has been the situation so far as this case is concerned. It has been submittted by Shri Mathur as a total broken and dead marriage. The question would be whether such marriage should be permitted to continue for a long period ? In the matter of *V. Bhaget v. D. Bhaget (supra)* the Supreme Court while coming to the conclusion held that -

> " When one spouse behaves in freak and cruel manner and other spouse was not able to tolerate such behaviour, there is no point in asking such spouses to be united together."

In the matter of *Smt. Saroj Rani* v. *Sudarshan Kumar (supra)* the Supreme Court concluded that -

> " It is evident that for whatever be the reason the marriage has broken down and the parties were not to live longer together as husband and wife, in such situation it was better to close the chapter."

In the matter of *Romesh* v. *Smt. Savitri (supra)* Supreme Court concluded that -

> " When the marriage was dead both emotionally and practically continuance of marital alliance for name-sake was nothing but prolonging the agnoy and afliction."

Supreme Court further held that -

> " When the marriage was dead, continuance of it would be cruelty."

Assessing the evidence on record and keeping in view the long period of non-association and advanced ages of the spouses in the present case I also come to the same conclusion that there is no point in keeping this matrimonial tie alive. The learned trial Judge has committed the error in not passing a decree of dissolution of the marriage divorcing both the appellant and the respondent.

Shri Mathur submitted on behalf of his client, the appellant that the appellant is ready to make substantial means for his wife Durgadevi after dissolution of their marriage. Taking into consideration that attitude and finding it necessary for proper maintenance of respondent Durgadevi, considering the fact that she would be advancing towards her old age further, I find it necessary to saddle the appellant with the duty of paying Rs. 75,000/- (seventy five thousand) to respondent Durgadevi which should be kept in a fixed deposit in any nationalised bank of her choice within period of three months after passing of decree of divorce. Durgadevi would be entitled to get the interest arising out of that amount which the Bank should pay to her by crossed cheques on quarterly basis. This would be in addition to alimony which she is getting at the rate of Rs. 1350/- that is being converted into a permanent alimony. This amount of Rs. 1350/- should be sent to respondent Durgadevi by the appellant Rajendra Singh per month by crossed cheque by registered post before 15th instant of every month. It is made clear further that she would be entitled to get the alimony. u.s.125 Cr. P. C. per month which she is getting to the tune of Rs. 125/- per month separately which the appellant should sent her by crossed cheques by registered post before 15th of every month. Durgadevi would be entitled to make prayer to this court for withdrawal of amount, from that amount for her medical treatment etc. by moving an appropriate application. If that amount is not withdrawn it would revert to appellant in case of her death.

The trial court should take into consideration this order if necessary, in criminal matter in respect of alimony.

Thus, the decree under challenge stands set aside and decree dissolving the marriage between the appellant and the respondent is hereby passed granting divorce to the appellant and against the respondent. A decree be drawn accordingly.

Appeal allowed.

APPELLATE CIVIL

Before Mr. A. K. Mathur, C. J. and Mr. Justice Dipak Misra,

8, October, 1998.

SMT. SHANTI DEVI AGRAWAL Appellants*

and others

v.

PUNJAB NATIONAL BANK, RAIGARH ...Respondent.

Accommodation Control - Act, M.P. (XLI f 1961)-Section 12 - Restriction on eviction of tenants-Section 12 starts with a non-obstante clause- Even if there is a contract to the contrary then also the Act will prevail-View that before efflux of time as provided in the contract of tenancy, the suit cannot be brought, is not a good law on the subject.

When the contract of tenancy is stipulating a fixed tenure, then in that case, whether Section 12 can override such contract or not. Section 12 starts with *non-obstante* clause and says that notwithstanding anything to the contrary contained in any other law or contract meaning thereby that *non-obstante* clause will govern so far as the eviction of tenant is concerned and even if there is a contract to the contrary, then also the Act will prevail. Therefore, the answer to the aforesaid question is that Section 12 will govern the eviction of tenant, notwithstanding the fact that there is a fixed term tenancy as per the agreement.

Sunderdas v. *Kamladevi* (1) and *Gopal Das* v. *Lakhmi Chand* (2); overruled.

Panjumal Daulatram v. *Sakhi Gopal Thakurdin Agrawal* (3) ; affirmed

Shrilakshmi Venkateshwara Enterprises Ltd. v. *Syeda Vajhiunnissa Begum & others* (4) ; followed.

Ravish Agrawal with *Prashant Mishra* for the appellants.

J. P. Sanghi for the respondent.

Cur. adv. vult.

*F.A.No.214/93, on reference dated 25.6.97, made by learned single Judge, Jabalpur.

(1) 1982 M.P. W.N. 455. (2) 1985 M.P.W.N. 314.
(3) 1977 M.P.L.J. 762. (4) 1994 (2) S.C.C. 671.

Smt. Shanti Devi Agrawal v. Punjab National Bank, Raigarh, 1998.

ORDER -

A.K. MATHUR C. J. - This is a reference made by the learned Single Judge holding that the question raised in the First Appeal is of an importance; therefore, it may be decided by the Division Bench, though the question of law has not been framed by the learned Single Judge. However, whenever question is referred to the Larger Bench, question of law should be framed and then it should be referred to the Larger Bench. Since the question of law was not framed by the learned Single Judge, we shall frame a proper question after narration of few necessary facts.

A suit was filed by the plaintiffs/appellants. There is a house existing on plot No. 8/1 and 9 measuring 4000 sq. ft. The suit premises was rented out by the plaintiffs to the defendant-Bank on monthly rent of Rs. 4537.50 paise. The suit premises was previously owned by Bhagwanji Amarsi Chatwani and thereafter, the suit premises were purchased by the plaintiffs. It is alleged that the plaintiffs required the suit premises in order to start their business.

The suit was resisted by the defendant-Bank. It is alleged that the suit premises originally belonged to one Swami Bhagwanji Amarsi an it was rented out by him to the Bank in a sum of Rs. 4125/- per month on 1.3.1982. It is alleged that there was a condition stipulated in the rent agreement that it shall be for a period of five years and with an option to the plaintiffs to further extend the period for another five years with 10% increase rent. The increase rent was Rs. 4537.50 paise per month for another period of five years, which was being paid by the defendant to the plaintiffs. It is alleged that another period of five years was to expire on 29.2.1992, but the suit was filed on 4.1.1991; therefore, the suit is pre-mature.

About three issues were framed and issue No. 2(b) was that as per agreement, the tenancy was to expire on 29.2.1992; therefore,the plaintiffs could not bring the suit for eviction before expiry of the tenancy period. This issue was answered by the trial Court in favour of the defancant-Bank alongwith other issues and dismissed the suit along with the decision on other issues with which we are not concerned.

Smt. Shanti Devi Agrawal v. Punjab National Bank, Raigarh, 1998.

Aggrieved against the judgment and decree dated 25.6.1993 of the trial Court, the present appeal was preferred by the plaintiffs/appellants before this Court and when it came before the learned Single Judge; the learned Single Judge by order dated 25.6.1997, looking to the importance of the issues, referred it to the Larger Bench. Hence, this appeal came before us.

On the basis of the facts which have been disclosed above, the following question of law arises, which reads as under :-

> " Whether the plaintiffs can bring a suit before expiry of extended period of five years when there is a contract that the tenancy was for a period of five years with further option for another period of five years with increas of 10% rent, or not ?"

There is no gainsaying. Whenever there is a contract for a period of 5 years extended for another period of 5 years, then so far as the tenancy is concerned, it cannot be disputed. But the question is whether during the contractual period of tenancy, a suit can be brought prior to the expiry of the contracted period. The tenancy in the State of Madhya Pradesh is governed by the provisions of the M. P. Accommodation Control Act, 1961 (hereinafter referred to as the 'Act of 1961' in short). Section 12 of the Act of 1961 deals with the eviction of tenants. Section 12 reads as under :-

> " S. 12 : <u>RESTRICTION ON EVICTION OF TENANCE</u> :
>
> (1) Notwithstanding anything to the contrary contained in any other law or contract, no suit shall be filed in any Civil Court against a tenant for his eviction from any accommodation except on one or more of the following grounds only, namely :
>
> xxx xxx xxx xxx"

Therefore, when the contract of tenancy is stipulating a fixed tenure, then in that case, whether Section 12 can override such contract or not. Section 12 starts with *non-obstante* clause and says that notwithstanding anything to the contrary contained in any other law or contract meaning thereby that *non-obstante* clause will govern so far as the eviction of the tenant is concerned, and even if there

is a contract to the contrary, then also the Act will prevail. Therefore, the answer to the aforesaid question is that Section 12 will govern the eviction of tenant, notwithstanding the fact that there is a fixed term tenancy as per the agreement. Similar question has already been answered by their Lordships of Hon. Supreme Court with reference to *Karnataka Rent Control Act, 1961 in the case of Shrilakshmi Venkateshwara Enterprises Ltd.* v. *Syeda Vajhiunnissa Begum & others* (1). In that case, similar question arose before their Lordships of Hon. Supreme Court whether the suit can be filed prior to the expiry of the contract period of the tenancy and with reference to Section 21 of the Karnataka Rent Control Act, 1961, their Lordships answered the question that plaintiff can bring the suit notwithstanding the fixed tenure provided in the tenancy. In that connection, it may not be out of place to mention that Section 21 of the Karnataka Rent Control Act, 1961, which is *pari-materia* with our Act, which reads as under :-

> S. 21 : (1) Notwithstanding anything to the contrary contained in any other law or contract, no order or decree for the recovery of possession of any premises shall be made by any Court or other authority in favour of the landlord against the tenant ;
>
> Provided that the Court may on an application made to it, make an order for the recovery of possession of a premises on one or more of the following grounds only, namely : (Clauses (a) to (p) are omitted as not necessary.
>
> Clauses (a) to (p) enumerate the grounds enabling the landlord to recover possession of the premises from the tenant)."

Their Lordships after referring the aforesaid provisions and various decision of the Apex Court, observed as under :-

> " Therefore, this authority clearly holds that the provisions of Rent Control Act would apply notwithstanding the contract. However, what is sought to be relied on by the learned counsel for the appellant is the Full Bench judgment of *Karnataka High Court in Sri Ramakrishana's case (supra).* In that ruling, the decision of this Court in *Dhanapal Chettiar case (supra)*

(1) 1994 (2) S.C.C. 671.

is sought to be distinguished as one relating to the necessity for issuance of notice under Section 106 of the Transfer of Property Act. On that basis, the other ruling of this Court namely, *Firm Sardarilal Vishwanath v. Pritam Singh* (1) is also distinguished. However, the full Bench chose to rely on *Modern Hotel* v. *K. Radhakrishnaiah* (2) wherein the term 'lease' was excluded from the ambit of the said Act."

Therefore, in view of the decision of their Lordships of the Hon. Supreme Court, the question no more remains *res-integra* and it is answered that in such a contractual tenancy, a suit can be brought before expiry of the period of contract. However, our attention was invited to the decisions of this Court reported in *Sunderdas* v. *Kamladevi* (3) and *Satyanarayan* v. *Ratanlal* (4) wherein this Court has taken the view that before efflux of time as provided in the contract of tenancy, the suit cannot be brought is not a good law on the subject. The view taken by this Court in the case of *Panjumal Daulatram* v. *Sakhi Gopal Thakurdin Agrawal* (5) is a decision in the line of the decision given by the Hon. Supreme Court in *Shrilakshmi Venkateshwara's case (supra)* ; therefore, that is affirmed. Hence, we answer the aforesaid question in the light of the above observation and remand the case back to the learned Single Judge for disposal of the matter in accordance with law.

Reference answered accordingly.

---

(1) 1978 (4) S. C. C. 1 = A. I. R. 1978 S. C. 1518.
(2) 1989 (2) S. C. C. 686 = A. I. R. 1089 S. C. 1510.
(3) 1982 M. P. W. No. (Note No.) 455.
(4) 1985 M. P. W No. 315 (5) 1977 M. L. J. 762.
(5) 1977 M. P. L. J. 762.

APPELLATE CIVIL

Before Mr. Justice N. K. Jain

12 January, 1998.

MISHRILAL & ors. Appellants*

v.

NATHU & ors. ...Respondents.

Hindu Marriage Act (XXV of 1955) (Amending Act 1976) - Section 16, Sub-sections (1) and (2) make it abundantly clear that even in case of a marriage void or voidable - Children of any such marriage would be regarded in law as legitimate children for all purposes including succession under the Hindu Succession Act, 1956, subject to rule contained in sub-section (3) - Civil Procedure Code, 1908 - Order 20 Rules 12 and 18 - Partition Suit - Profits to be accounted for are not mesne profits *- Rule 12 cannot at all apply - Partition Suit is covered by order 20 rule 18 - Plaintiff is entitled to profit or rendition of income of his property right up to the delivery of possession and not upto 3 years.*

Even in case of a marriage void or voidable under the Act, children of any such marriage have the status of legitimate children. Such children would be regarded in law as legitimate children of the parents for all purposes including succession under the Hindu Succession Act, 1956. But the protection given under these two sub-sections, is subject, of course, to the rule contained in sub-section (3) which lays down that such children cannot by relying on the status confer on them by sub-sections (1) and (2) claim any right in or to the property of any person other than the parents. The Sub-section (3) read as a whole clearly indicates that children of a void marriage cannot claim share to a co-parcenary property.

It is however, well settled that Rule 12 cannot at all apply to a partition suit and the profits to be accounted for are not *mesne profits*. A partition suit is covered by Order 20 Rule 18 C. P. C.. In a suit for partition the plaintiff co-sharer

* S.A. No. 356 of 1980. against the Judgment and decree dated 25.3.80, passed by District Judge, Mandleshwar, in F. A. No. IA/77.

is entitled to and the Court below has ample jurisdiction to award profits or rendition of accounts of the income of plaintiff's share of the properties right upto the delivery of possession and not upto 3 years only.

Shantaram v. *Dagubai* (1), *Perumal Gounder* v. *Panchayapan* (2), *Jagarlamudi* v. *Jagarlamudi Jagdish* (3), *D. Satyanarayana Murthi* v. *D. Bhavanna* (4), *Basayayya* v. *Gurayayya* (5) and *S. Reddiar* v. *Hazra Bidi* (6) ; referred to.

JUDGMENT

N. K. JAIN, J. - This Judgment shall also dispose of S.A. No. 508/80 as both these appeals arise out of the judgment and decree dated 25.3.80 rendered in first appeal No. 1-A/77 by the Court of Distt. Judge, Mandleshwar (West Nimar), in affirmance of the judgment and decree dated 2.8.76 passed in C.O. S. No. 3-A/73 by the Court of Civil Judge, Class - I, Khargone - Camp Mandleshwar.

The suit giving rise to this appeal was brought by late Balram and the present appellants Mishrilal, Bhagwan and Mulibai for partition of disputed lands received in an earlier partition by Balram with his brothres Anandilal and Ramchandra the respondents No. 2 and 3 herein who were also arrayed as proforma defendants in the suit. The respondent No. 1 Nathu is the legitimate son of late Balram born of his first wife. Balram had contracted second marriage with appellant No.3 Mulibai. The appellant No. 1 Mishrilal and No. 2 Bhagawn were born of this second wedlock.

The suit was resisted by defendant - respondent No. 1 Nathu. He denied the factum of validity of marriage of Mulibai with Balram as also Mishrilal and Bhagwan being legitimate sons of Balram. He also denied any right of Mulibai, Mishrilal and Bhagwan in the suit property. He claimed to be in possession of the suit land to the exclusion of all the plaintiffs. According to him the suit was barred by limitation.

The two Courts below have concurrently held :

(1) A.I.R. 1987 Bom. 182.
(2) A.I.R. 1990 Mad. 110.
(3) A.I.R. 1992 A.P. 291.
(4) A.I.R. 1957 A.P. 766.
(5) A.I.R. 1951 Mad. 938. F.D.
(6) A.I.R. 1973 Mad. 237.

(a) That plaintiff Mulibai was not legally married wife of late Balram ;

(b) That Mishrilal and Bhagwan, though born to her of Balram were not legitimate sons of Balram ;

(c) That the property in question was co-parcenary property acquired by Balram in partition with his brothers ;

(d) That possession of Nathuover the property was as a co-share ;

(e) That the suit was within time ; and

(f) That only Balram was entitle to 1/2 share in the suit property. Other plaintiffs were not entitled to any share in the property.

On these findings the plaintiffs suit was decreed in part only to the extent 1/2 share for Balram alone while it was dismissed as regards claim for shares of Mulibai, Mishrilal and Bhagwan. The claim as to *mesne profits* was left to be decided after enquiry under Or. 20 R. 12 C.P.C. and it was directed that the *mesne profits* shall be restricted for a period from the date of the passing of the decree till delivery of possession or 3 years whichever is less. The decree was affirmed in first appeal vide judgment impugned.

Appellants Mishrilal, Bhagwan and Mulibai have filed appeal No. 356/80 seeking partition of equal share in the property with respondent No. 1 Nathu and No. 4 Balram, while Balram has filed appeal No. 508/80 seeking correction in the decree regarding *mesne profits* which according to him should be paid from the date of the decree until delivery of possession of his share. Appellant Balram has, however, died during the pendency of this appeal (No. 508/80). Mishrilal and Bhagwan have been substituted in place of Balram on the basis of a will allegedly executed by late Balram in favour of his these two sons. Before proceeding to consider his appeal it needs to be clarified that the question as to the validity of the Will is not being considered in this appeal. The parties shall be, therefore, free to agitate their rights or to oppose this Will in some other appropriate proceedings.

Appeal No. 356/80 has been admitted on following substantial questions of law :

(a) Whether the appellant - plaintiffs Mishrilal and Bhagwan, even being illegitimate sons of Balram, were entitled to share in the partition, in accordance with the provisions of the Hindu Succession Act, 1956 ?

(b) Whether, likewise, Mulibai, even being not a lawfully wedded wife of Balramji, was equally entitled to a share in the partition ? and

(c) If so, result.

Appeal No. 508/80 has been admitted on following substantial question of law :

" Whether the Court below was right in confirming the decree of the trial Court with respect to *mesne profits* limiting it to the period of three years ?"

Defendant Nathu has filed cross-objection seeking dismissal of the suit in its entirity.

I have heard Shri A. P. Polekar, learned counsel for the plaintiffs and Shri R. C. Chhazed, learned counsel for respondent - Defendant No. 1 Nathu.

Taking the first question first, under General Law a legitimate child is born in lawful wedlock. It is well settled that except in the cases where special provision to the contrary is made by any enactment, a marriage which is null and void or declared to be null and void or annuled by the Court on the ground of its voidability, will inevitably have the effect of bastardising any child born of parties to such marriage. Under old Hindu Law (Mitakshara) such an illegitimate child of Brahmin, Kshatriya or Vaishya is not entitled to any inheritance or any share on partition (see : Sections 43 and 314 of the Principles of Hindu Law by Mulla 16th Edn.). However, the position is now changed with the enactment of Hindu Marriage Act, 1955, Section 16 of which as it stands amended by the Amending Act, 1976, thus provides :

Legitimacy of children of void an voidable marriages -

(1) Notwithstanding that a marriage is null and void under Section 11, any child of such marriage who would have been legitimate if the marriage had been valid, shall be legitimate, whether such a child is born before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (68 of 1976) and whether or not a decree of nullity is granted in respect of that marriage under this Act and whether or not the marriage is held to be void otherwise then on a petition under this Act.

(2) Where a decree or nullity is granted in respect of a voidable marriage under Section 12, any child begotten or conceived before the decree is made, who would have been the legitimate child of the parties to the marriage if at the date of the decree it had been dissolved instead of being annuled, shall be deemed to be their legitimate child notwithstanding the decree of nullity.

(3) Nothing contained in sub-section (1) or sub-section (2) shall be construed as conferring upon any child of a marriage which is null and void or which is annuled by a decree of nullity under Section 12, any rights in or to the property of any person, other than the parents, in any case where, but for the passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of his not being the legitimate child of his parents.

Sub-section (1) and (2) of this Section make it abundantly clear that even in case of a marriage void or voidable under the Act, children of any such marriage have the status of legitimate children. Such children would be regarded in law as legitimate children of the parents for all purposes including succession under the Hindu Succession Act, 1956. But the protection given under these two sub-sections, is subject, of course, to the rule contained in sub-section (3) which lays down that such children cannot by relying on the status confer on them by sub-section (1) and (2) claim any right in or to the property of any person other than the parents. The sub-section (3) read as a whole clearly indicates that children of a void marriage cannot claim share to a co-parcenary property.

Division Bench of Bombay High Court in *Shantaram* v. *Dagubai* (1) has

(1) A.I.R. 1987 Bom. 182.

held " the property to which such a child can lay claim must be the separate property of the parents and not the co-paracenary property in which the parent has a share."

Similar view has been taken by the High Court of Madras and Andhra Pradesh (see : *Perumal Gounder* v. *Pachayapan* (1) and *Jagarlamudi* v. *Jagarlamudi Jagdish* (2).

It will be thus seen that plaintiff Mishrilal and Bhagwan though acquired status of legitimate sons of Balram by virtue of Sec. 16 of the Hindu Marriage Act, did not acquire any right to claim share in the co-paracenary property. The question in appeal No. S. A. 356/80, is, therefore, answered in negative and against the plaintiffs.

A regards second question, under Hindu Law a wife can not herself demand a partition, but if a partition takes place between her husband and his sons, she is entitled to receive a share equal to that of a son. It is, also, true that expression "wife" in relation to "sons" includes their step mother. However, before such a wife can claim share in the partition, it must be shown that she is a legally married wife. There is nothing in law which recognises wife not legally married. In the instant case, it has already been held that marriage of Mulibai with Balram was void on account of her first husband being alive at the time of her marriage with Balram. That being so, she cannot be treated as wife and is, therefore, not entitled to claim any share in the partition between her husband and his son Nathu the defendant No. 1. I, therefore, answer this question in negative and against the appellants.

Coming to the appeal No. 508/80 filed by late Balram, the only grievance of the appellant is that awardment of *mesne profits* could not be restricted to 3 years and that the appellant is entitled to such profits right upto the date of delivery of possession of his share. In my considered opinion the contention deserves to be accepted.

The two Courts below seems to have applied provisions of Or. 20 R. 12 CPC in the matter of awardment of *mesne profits*. It is, however, well settled that

(1) A.I.R. 1990 Mad. 110. (2) A.I.R. 1992 A.P. 291.

Rule 12 cannot at all apply to a partition suit and the profits to be accounted for are not mesne profits. A partition suit is covered by Or. 20 R. 18 C. P. C.. In a suit for partition the plaintiff co-sharer is entitled to and the Court below has ample jurisdiction to award profits or rendition of accounts of the income of plaintiff's share of the properties right upto delivery of possession and not upto 3 years only (see : *D. Satyanarayana Murthi* v. *D. Bhavanna* (1), *Basavayya* v. *Guravayya* (2) and *S. Reddiar* v. *Hazra Bibi* (3).

The question in this appeal, therefore, deserves to be answered in favour of the appellant and the decree impugned needs to be modified accordingly.

This brings me to the cross-objection filed by the defendant Nathu. According to him his father Balram was not entitled to any share in the suit properties. The contention is not sustainable in law. Both the Courts below on appreciation of evidence have concluded that the properties in question were ancestral property of Balram and his two brothers and have fallen to the share of Balram in the partition with his brothers. It is further held that the defendant Nathu was in possession of the property as a co-sharer and did not, therefore, hold the property to the exclusion of other co-sharers. These are all findings of fact not open to challenge in second appeal. The cross-objection taken by the defendant Nathu, therefore, deserves to be rejected.

In the result I dismiss S. A. No. 356/80 as also the cross-objection taken by Nathu. However, S.A. No. 508/80 filed by late Balram is allowed and the decree impugned is modified and that Balram's share in the profits accruing from the suit properties shall be calculated from the date of the decree till delivery of separate possession of Balram's share in the properties.

There shall be, however, no order as to the costs of these appeals.

Appeal dismissed.

---

(1) A.I.R. 1957 A.P. 766 (2) A.I.R. 1951 Mad. 938 (F.B.)
(3) A.I.R. 1973 Mad. 237.

APPELLATE CIVIL

Before Mr. Justice R. S. Garg,

3, February, 1998.

UNITED INDIA INSURANCE COMPANY LTD, RAIPUR — Appellant*

v.

P. K. G. K. PANIKKAR, DURG (M.P.) ...Respondent.

Arbitration Act, Indian (X of 1940), Sections 20, 39 - Jurisdiction of Arbitrator - Clause-10 of Insurance Policy provides for arbitration if any difference shall arise as to the quantum to be paid under the policy - The moment insurance company refuses to accept the liability the matter cannot be referred to the arbitrator - Respondent was required to plead and prove that Insurance Company has otherwise admitted its liability - In absence of that material plea, arbitration clause would not be applicable - Application under Section 20 rejected.

If any difference shall arise as to the quantum to be paid under the policy, such difference shall independently of all other questions be referred to the decision of an arbitrator, to be appointed in writing by the parties in difference. The pre-condition for application of this clause provides that if liability is being otherwise admitted. The very foundation for building reference would be admission of the liability on the part of the Insurance Company. If the Insurance Company does not in any manner or otherwise admit the liability then the very foundation is removed and a ground would not be available for appointment of an arbitrator.

The Insurance Company even before the matter was taken to the Court had refused its liability and also refused to accept the liability and raised the dispute that the claim was fake and forged. In response to this, the respondent was required to plead and prove that though the Insurance Company disputed or did not accept the liability but has otherwise admitted its liability.

In absence of that material plea and on face of the denial of the Insurance Company about its liability and the dispute raised by them, Clause-10 would not be applicable.

* M. A. No. 1147/97, against the orders dated 8.1.97, passed by Addl. District Judge, Durg, in Arbitration case No. 36-A/94.

United India Insurance Co. Ltd. Raipur v. P.K.G.K. Panikkar, Durg, 1998

Pradeep Naolekar for the appellant.

B. R. Ghosh for the respondent.

Cur. adv. vult.

ORDER

R. S. GARG, J. - Being aggrieved by the order dated 8.1.97 passed in Arbitration Case No. 36-A/94, by the Additional District Judge, Durg, the appellant has preferred this appeal.

At the outset Shri Ghosh, learned counsel for the respondent attacked on the very maintainability of the appeal submitting that an appeal may lie under Section 39 of the Act but as this appeal does not fall under any clause of Section 39(1) of the Indian Arbitration Act, the appeal has to be thrown at the threshhold. Shri Naolekar, learned counsel for the appellant, on the other hand submits that the respondent had filed an application under Section 20 of the Indian Arbitration Act, making the prayer that the present appellant be directed to file the insurance policy containing the arbitration agreement, therefore, it has to be presumed that the Court directed the appellant to file the agreement and as it found that there was a dispute and proper cause was not shown it directed the parties to give the name of the arbitrators to be appointed. Without entering into the dispute this Court is of the opinion that even if the appeal is not maintainable, this Court is entitled to interfere in the matter under its revisional jurisdiction.

Shri Naolekar submits that the policy Clause-10, though contains an arbitration agreement but it provides certain conditions for application of the said clause. He submits that unless the pre-conditions for application of the arbitration agreement are available, the matter could not be referred to the arbitrator. He submits that the respondent after obtaining a policy against theft etc. lodged his claim which was immediately denied in toto by the Insurance Company because on an enquiry it was found that the claim was bogus, a police report was lodged almost after one month and Insurance Company was satisfied that the claim was not genuine. He submits that unless the liability is admitted by the Insurance Company a reference could not be made to the arbitrator. On the

other hand, Shri Ghosh, learned counsel for the respondent submits that once it is proved to the satisfaction of the Court that the policy contains an arbitration agreement then the Court simply has to refer the matter to the arbitrator /arbitrators for making their award and the Court would have no jurisdiction to look into the arbitration agreement. He submits that the arbitrator himself would be competent to consider whether the pre-conditions were available or not for making the reference.

I have heard the parties at length.

So far as the jurisdiction of the arbitrator is concerned, this Court is of the strong opinion that an arbitrator cannot go beyond the order of reference nor he can consider as to whether pre-conditions were available for his appointment or not. It would be fallacy of law that a person who was appointed as an arbitrator would be permitted to challenge the very order which clothes him with the jurisdiction to act an arbitrator. An arbitrator can look into the correctness or otherwise of the claims lodged by the parties but he cannot hold or decide that the arbitration agreement was not applicable therefore him appointment was illegal. Appointment of arbitrator is either an act of the parties or is an act of the Court. When the parties confer jurisdiction on an arbitrator they clearly cloths him with the jurisdiction to decide the matter after understanding their legal rights. Where the Court appoints the arbitrator or directs the parties to give the name of the arbitrator/arbitrators then the parties and the arbitrator/arbitrators are bound by the order of the Court. The contention of learned counsel for the respondent deserves to be rejected.

For proper appreciation of the dispute between the parties perusal of Clause-10 of the Insurance Policy is necessary. Clause-10 reads as under :-

> " Arbitration :- If any difference shall arise as to the quantum to be paid under this policy (liability being otherwise admitted) such difference shall independently of all other questions be referred to the decision of an arbitrator to be appointed in writing by the parties in difference, or if they cannot agree upon a single arbitrator to the decision of two disinterested persons as arbitrators of whom one shall be appointed in writing by each of the parties within two calender months after having been

required so to do in writing by the other party in accordance with the provisions of the Arbitration Act, 1940 as amended from time to time and for the time being in force. In case either party shall refuse or fail to appoint arbitrator within two calendar months after receipt of notice in writing requiring an appointment, the other party shall be at liberty to appoint sole arbitrator, and in case of dis-agreement between the arbitrators, the difference shall be referred to the decision of an umpire who shall have been appointed by them in writing before entering on the reference and who shall sit with arbitrators and preside at their meetings.

It is clearly agreed and understood that no difference or dispute shall be referable to arbitration as hereinbefore provided, if the Company has disputed or not accepted liability under or in respect of this policy.

It is hereby expressly stipulated and declared that it shall be a condition precedent to any right of action or suit upon this policy that the award by such arbitrator, arbitrators or umpire of the amount of the loss or damage shall be first obtained.

It is also hereby further expressly agreed and declared that if the Company shall dis-claim liability to the insured for any claim hereunder and such claim shall not, within 12 calendar months from the date of such dis-claimer, have been made the subject matter of a suit in a court of law, then the claim shall for all purpose be deemed to have been abandoned and shall not thereafter be recoverable hereunder."

The opening words of Clause-10 clearly provide tha if any difference shall arise as to the quantum to be paid under the policy, such difference shall independently of all other questions be referred to the decision of an arbitrator, to be appointed in writing by the parties in difference. The pre-condition for application of this clause provides that if liability is being otherwise admitted. The very foundation for building reference would be admission of the liability on the part of the Insurance Company. If the Insurance Company does not in any manner

or otherwise admit the liability then the very foundation is removed and a ground would not be available for appointment of an arbitrator. Sub-clause (2) of Clause-10 further provides that 'it is agreed and understood that no difference or dispute shall be referable to arbitration as hereinbefore provided, if the Company has disputed or not accepted liability under or in respect of this policy.' If this clause is read in its true perspective, it would show, that, the moment company disputes or refuses to accept the liability under or in respect of the policy then a difference or dispute shall not be referable to the arbitration. Sub-clauses (1) and (2) if read conjointly, a positive picture would emerge to show that in case the liability is otherwise or in any manner admitted, the matter can be referred to the arbitrators to be appointed in writing by the parties in difference or in case of a dispute regarding the single arbitrator, the matter would be referred to two dis-interested persons as arbitrators. The moment Insurance Company disputes its liability under or in respect of the policy or refuses to accept the liability, the matter cannot be referred to the arbitrator. A person moving an application for filing of the agreement or seeking assistance of the Court for appointment of an arbitrator can even otherwise show to the Court that the liability was being otherwise admitted. The agreement clearly provides a situation where the Insurance Company disputes or does not accept the liability but there may be a case where the liability was otherwise admitted.

In the present case, the Insurance Company even before the matter was taken to the Court had refused its liability and also refused to accept the liability and raised the dispute that the claim was fake and forged. In response to this the respondent was required to plead and prove that though the Insurance Company disputed or did not accept the liability but has otherwise admitted its liability. The application filed under Section 20 simply reads that on 6.12.88 somebody entered in the shop of the respondent and committed a theft. Thereafter, a claim was lodged. Para 6 of the application reads that the Insurance Company illegally and without any justification rejected the claim of the respondent. In para-7, the claimant/respondent has prayed to the Court that the present appellant be directed to file copy of the policy. It is no where stated in the applicaton that the liability was otherwise admitted by the Insurance Company. In absence of that material plea and on face of the denial of the Insurance Company

about its liability and the dispute raised by them, Clause-10 would not be applicable. The Court below failed to consider these material aspects and in very casual and cursory manner observed that the respondent had filed copy of the policy therefore the parties must propose the names of the arbitrators. After considering the entire material available and perusing Clause-10 of the policy, this Court is of the opinion that the matter could not be referred to the arbitrator. The application under Section 20 was mis-conceived. It ought to have been and is accordingly rejected. The appeal is allowed. No costs.

Appeal allowed.

APPELLATE CRIMINAL

Before Mr. Justice V. K. Agarwal

7, September, 1998.

TEJRAM & others ... Appellants*

v.

STATE OF MADHYA PRADESH ...Respondent.

Penal Code, Indian (XLV of 1860) -Sections 376 (2) (g) and 506, Part II- Three accused appellants not known to prosecutrix from before-Test identification parade not conducted-effect-Dock identification of the appellants by prosecutrix as well as her friends unfallingly established that accused/appellants were the miscreants-Therefore, even if test identification parade was not conducted, prosecution evidence cannot be disbelieved on that ground - If the accused appellants claimed that they would not be identified by the prosecutrix or other witness they should have insisted on holding test identification parade - One of the appellants had not partaken in the incident at all as stated by prosecutrix herself. He is acquitted- Conviction and sentence of other two appellants maintained.

*Cri. A. No. 2063/97, against the Judgment dated 13.8 97, passed by 1st Addl. Sessions Judge, Balaghat, in S. T. No. 119/96.

Tejram v. State of Madhya Pradesh, 1998.

State of Madhya Pradesh v. *Sunderlal* (1), *State of U. P.* v. *Rajju and others* (2); followed.

Kanta Prasad v. *Delhi Administration* (3), *Laxmiraj Shetty and another* v. *State of Tamil Nadu* (4), *Harbhajan Singh* v. *The State of J. & K.* (5), *Jadunath Singh and another* v. *The State of U. P.* (6), *Sampat Tatyada Shinde* v. *State of Maharashtra* (7); referred to.

Y. K. Gupta for the appellants.

P. C. Jain for the respondent.

Cur. adv. vult.

JUDGMENT

V. K. AGARWAL J. - The accused/appellants stand convicted u/s. 376(2) (g) & 506-Part-II of the I.P.C. and each of them have been sentenced to undergo R. i. for 10 years and to pay fine of Rs. 1,000/- u/s. 376 (2) (g) I.P.C., while each of them have been sentenced to undergo R.I. for 2 years u/s. 506 Part-II of the I.P.C. by judgment dated 13.8.1997 in S.T. No. 119/1996 by I Additional Sessions Judge, Balaghat.

Cr. Appeal No. 2063/1997 has been filed on behalf of accused / appellants Tejram, Khunnu @ Sudhram and Aghan. However, the accused/appellant Khunnu @ Sudhram has also filed Cr. Appeal No. 2064/1997, while the accused / appellant Aghan has filed Cr. Appeal No. 2065 of 1997 from jail.

Since all the appeals relate to the same judgment, they are being disposed of together by this common judgment.

The case of the prosecution in brief is that on 28.9.1995, prosecutrix Sushilabai (P.W. 5) along with her friends Hemlata (P.W. 6) and Subhadra (P.W.7) had gone to the school at Paraswada. After the school was over at about 4.00 P.M., they were returning back to their home at village Salhe from the thoroughfare going

(1) A.I.R. 1992 S.C. 1413. (2) A.I.R. 1971 S.C. 708.
(3) A.I.R. 1958 S.C. 350. (4) A.I.R. 1988 S.C. 1274.
(5) A.I.R. 1975 S.C. 1814. (6) A.I.R. 1971 S.C. 363.
(7) A.I.R. 1974 S.C. 791.

through the jungle. When they reached near Jatar-Nala, the accused/appellants met them, stopped them and thereafter, the accused/appellant Tejram caught hold of prosecutrix Sushilabai (P.W.5), dragged her to some distance and fell her down under a tree. Hemlata (PW-6) and Subhadra (PW-7) ran away from the spot. Appellant Tejram thereafter under threat committed forcible sexual intercourse with prosecutrix Sushila Bai (PW-5). Appellant Khunnu @ Sudhram also committed forcible sexual intercourse with Sushila Bai. She was thereafter threatened by the accused/ appellants. Hemlata (P.W. 6) and Subhadra (P.W. 7) had informed about the incident in the village, upon which Rajendra (P.W. 8) brother of prosecutrix and others came and met her. Sushila Bai (P.W. 5) thereafter lodged report (Ex. P/7) at the police Station. Offence on the basis thereof was registered.

During investigation, Sushila Bai (P.W.5) was examined by Dr. Anita Parashar (P.W.13). She found that hymen of Sushila Bai was torn and an injury was found on her labia minora. There was clotted blood over it. It was opined that Sushila Bai was not used to sexual intercourse and rape might have been committed with her.

The learned counsel for the accused/appellants has urged that the prosecution evidence as against the accused/appellants is infirm. No identification parade has been held during investigation and, therefore, since the prosecutrix and other witnesses did not claim to know the accused/appellants from before the incident, the appellants could not have been held to be the miscreants. However, the learned counsel for the respondent/State has supported the conviction as well as the sentence awarded to the accused/appellants.

Prosecutrix Sushila Bai (P.W.5) has stated that she used to go to School at Paraswad, which is about 9.0 Kms. from her home at village Salhe. Way to the school is a Kutcha road and goes through the jungle. Hemlata (P.W.6) and Subhadra (P.W.7) also used to accompany her to the school. Narrating the incident, prosecutrix Sushila Bai (P.W.5) has stated that on 28.9.1995, she had gone to the school alongwith Hemlata (P.W.6) & Subhadra (P.W.7) as usual; and after the school was over, they were returning back at about 4.30 P.M. to their village. When they reached Jatar Nala, the three accused met them on the way. Accused/ appellant Tejram caught hold of her hand. Her friends Hemlata (P.W.6) and Subhadra (P.W.7) had proceeded ahead. Prosecutrix Sushila Bai called for help.

Accused/appellant Tejram forcibly took her beneath a tree, made her to lie down and after gagging her and removing her underwear, committed forcible sexual intercourse with her. He had also threatened her during the incident. Thereafter, accused/appellant Tejram called the other accused, Khunnu @ Sudhram, who also committed sexual intercourse with her.

Prosecutrix Sushila Bai (P.W.5) has further stated that the accused/appellant Aghanlal did not do anything with her, but was standing on the road. She also states that when after the incident, she proceeded home, the accused/appellants came after her and asked her name. She disclosed her name to them. Thereafter, Purshottam, Surendra & Rajendra, who had come in search of her met her and then she told them about the incident. By then the miscreants had run away. Sushila also states that Purshottam, Surendra and Rajendra went in search of the accused/appellants. She thereafter went to Police Station Praswada alongwith her mother and lodged report (Ex. P/7).

Hemlata (P.W.6) and Subhadra (P.W.7), who were accompanying prosecutrix Sushila Bai (P.W.5) at the time of the incident, have supported her statement regarding the incident. They have stated that the accused/appellant Tejram had caught hold of the hand of Sushila (P.W.5) and then they had run away to the village and informed about the incident to the mother of Sushila and other persons. They have also stated that thereafter, the brothers of Sushila, namely, Surendra, Purshottam and Rajendra (P.W.8) went in search of her. Sushila met them on the way and they all went to the Police Station.

Rajendra (P.W.8), the brother of Sushila has stated that after knowing about the incident, he as well as his brother Surendra and Purshottam had gone in search of the miscreants. He has further stated that Sushila did not disclose the name of the miscreants, but when they were going to the Police Station, they had inquired about the miscreants from some small children, who had disclosed the names of the miscreants.

It is clear from the above evidence on record that while Sushila (P.W.5) accompanied by Hemlata (P.W.6) and Subhadra (P.W. 7) was returning from the school, three boys, whom they did not know from before, had met them. One of

the miscreants had caught hold of Sushila Bai and had taken her under a nearby tree and thereafter two of the miscreants committed sexual intercourse with her. The statement of Dr. Anita Parashar (P.W.13) and medical examination report of Sushila (Ex. P/22) would indicate that hymen was torn and there was an injury on labia monira. Her opinion was that rape might have been committed. Medical injury report is Ex. P/22. Similarly, the F.S.L. report (Ex. P/21) indicates that human spermatozoa was found on the underwear, slides of vaginal swab of the prosecutrix Sushila Bai as also on the underwears of the accused/appellants Tejram and Khunnu.

The evidence as above clearly supports the statement of Sushila Bai (P.W.5) that sexual intercourse was committed with her on the date of incident. It may be noticed that though Sushila Bai (P.W.5), Hemlata (P.W.6) and Subhadra (P.W.7) have stated that they did not know the accused/appellants prior to the incident. However, the accused/appellants have been named in the FIR (Ex. P/7) lodged by Suhbila (P.W.5) at the Police Station.

It is true that no test identification parade of the appellants has been held during investigation. It is also true that the statements of Sushila (P.W.5) Subhadra (P.W.7) would indicate that the accused/appellants were brought to the Police Station at the time Sushila lodged report (Ex. P/7), and the report was lodged naming the accused persons therein. Therefore, the material question that arises for consideration in the foregoing circumstances is as to whether the absence of test identification parade during investigation would vitiate the whole prosecution case and whether on that basis alone, the statements of Sushila (P.W.5), Hemlata (P.W.6) & Subhadra (P.W.7) regarding the identity of the accused/appellants as the miscreants and perpetrators of the crime should be discarded and disbelieved ?

It may be noted in the above context that prosecutrix Ku. Sushila (P.W.5), Hemlata (P.W.6) and Subhadra (P.W.7) have uniformly properly identified the accused/appellants during trial and all of them have consistently stated that the acused/appellant Tejram had caught hold of Sushila and had taken her away under the tree. Hemlata (P.W.6) and Subhadra (P.W.7) thereafter got frightened

and ran away from the spot, Sushila (P.W.5) has further stated that accused/appellant Tejram and thereafter appellant Khannu committed sexual intercourse with her. The dock identification of the appellants by the prosecutrix as well as her friends Hemlata (P.W.6) & Subhadra (P.W.7) unfailingly establishes that the accused/appellants were the miscreants. Therefore, even if test identification parade of the accused/appellants was not conducted during the investigation, in the foregoing circumstances, the prosecution evidence, as above, cannot be disbelieved only on that ground.

In *Kanta Prashad* v. *Delhi Administration* (1), it has been observed that failure to hold an identification parade does not make inadmissible the evidence of identification in Court. However, the weight to be attached to such identification is a matter for consideration of the Court of fact. Similarly, in *Laxmiraj Shetty and another* v. *State of Tamil Nadu* (2) a contention was raised before the Supreme Court that the idnetification of the accused before the Court of Session during trial for the first time without any prior test identification parade was not of any value. The apex Court, however, repelled the contention. In *Harbhajan Singh* v. *The State of J. & K.* (3) and in *Jadunath Singh and another* v. *The State of U. P.* (4), it has been observed that absence of test identification is not necessarily fatal to the prosecution case. Referenece in this connection may also be made to *Sampat Tatyada Shinde* v. *State of Maharashtra* (5), wherein it has been observed that test identification is not the only type of evidence regarding identification. The identity of the culprit can be fixed by circumstantial evidence also. Considering the nature of test identification and its legal import, it has been furhter observed in the said case that the test identification is admissible under Section-9 of the Evidence Act and is the best supporting evidence and can be used only to corroborate the susbtantive evidence given by the witnesses in Court regarding identification of the accused as the doer of criminal act.

In the instant case, the prosecution evidence shows that after the incident took place, the information of the same was immediately given by Hemlata (P.W.6) and Subhadra (P.W.7) to the brothers of prosecutrix Sushila (P.W.5) whereafter

(1) A. I. R.1958 S. C. 350. (2) A. I. R. 1988 D. V. 1274.
(3) A. I. R. 1975 S. C. 1814. (4) A. I. R. 1971 S. C. 363.
(5) A. I. R. 1974 791.

her brother Rajendra (P.W.8) and others ran towards the spot. It also appears from the statement of Rajendra (P.W.8) that he made inquiries from small children, who disclosed the names of the miscreants to them. It also appears that the accused/appellants were apprehended shortly after the incident and were brought to the Police Station and thus the prosecutrix Sushila lodged the report (Ex. P/7) naming the miscreants therein. In the above facts and circumstances, there is hardly any scope for doubting and to hold that some persons other than the accused/appellants were the miscreants. Had it been so, even if the accused/appellants were brought to the Police Station at the time Suhsila Bai and her brothers and mother as also others had reached there, Sushila would not have named the appellants as the miscreants.

It may be noted that the accused/appellants were the residents of the nearby village and would have been known to the children of the locality, who had disclosed their identity to Rajendra (P.W.8), Sushila Bai (P.W.5) and others. The above circumstances would clearly indicate the culpability of the accused/appellants. The above finding is corroborated and strengthened by dock identification by Sushila Bai (P.W.5), Hemlata (P.W.6) and Subhadra (P.W.7) of the accused/appellants during their statements in the trial. It may be noticed that the incident took place at about 4.30 P.M. in full day light and Sushila Bai (P.W.5) as well as her friends Hemlata (P.W.6) and Subhadra (P.W.7) had full opportunity to see and identify the miscreants. The above statements of Hemlata (P.W.6) and Subhadra (P.W.7) during trial identifying the appellants deserved credence.

In *State of Madhya Pradesh* v. *Sunderlal* (1) test identification parade during investigation was not held and the trial Court had placed reliance on the test identification parade. It was held in that case by the apex Court that the prosecutrix of that case having seen the accused in light and had an opportunity of seeing him for a considerable period, would not fail to identify the accused and it was, therefore, held that test identification parade for establishing the identity of accused was not necessary.

As noticed earlier, the accused/appellants were apprehended almost immediately and were named by prosecutrix Sushilabai (P.W.5) in the First

(1) A.I.R. 1992 S.C. 1413.

Information Report (Ex. P/7). The Investigating Officer R. T. Sahu (P.W.12) has stated that since the accused were named in the report as above, test identification parade was not held. It appears from evidence on record that information of the incident was immediately received by the relatives of the prosecutrix, including her mother and brother Rajendra (P.W.8) and they proceeded to search the miscreants, whereupon, the accused/appellants were apprehended shortly after the incident and were brought to the Police Station. Therefore, the test identification parade, even if conducted, could have been challenged on the ground that the accused/appellants were seen by Sushila Bai (P.W.5) and others at the Police Station when she lodged the report. It appears that in the above circumstances, the Investigating Officer T. R. Sahu (P.W.12) did not consider it necessary to hold the test identification parade, as has also been stated by him when he was cross-examined on this aspect.

If the accused/appellants claimed that they would not be identified by the prosecutrix or other witnesses, they should have insisted on holding of test identification parade. However, they have not done so. In *State of U. P.* v. *Rajju and others* (1), the accused were arrested on the spot. However, no identification proceedings were held. It was, therefore, urged that since identification proceedings were not held, it could not be said that the accused were the persons, who were actually arrested at the spot. The apex Court in the above context approved the finding of the trial Judge holding that it was not necessary for the State to hold identification parade, when according to the prosecution, they were arrested at the spot. It was further observed in that case that if the accused felt that the witnesses would not be able to identify them, they should have requested for an identification parade.

Keeping in view the evidence and the circumstances of this case, as brought on record, it does not appear that the statement of Sushila Bai (P.W.5) or her friends Hemlata (P.W.6) and Subhadra (P.W.7), who were admittedly accompanying her at the time of the incident, should be disbelieved, merely because identification parade in the case was not held. The above witnesses have firmly and unerringly stated that the accused/appellant had met them on the way and

(1) A.I.R. 1971 S.C. 708.

accused/appellant Tejram had caught hold of Sushila Bai (P.W.5) and had taken her away. It is also established from the statement of Sushila (P.W.5) that the accused/appellant Tejram first committed sexual intercourse with her and thereafter on his asking, appellant Khunnu came there and he also committed sexual intercourse with Sushila. Her statement is corroborated by the medical evidence as well as the report of the F.S.L. (Ex. P/21), as noticed above. In the circumstances, it is clear that so far as accused/appellant Tejram and accused/appellant Khunnu alias Sudhram are concerned, the findings of guilt regarding them are unimpeachable and call for no interference.

So far as accused/appellant Aghan is concerned, prosecutrix Sushila Bai (P.W.5) has stated that he did not do anything with her. He was simply standing on the road at a distance, while the offence as above was committed with her by the accused/appellants Tejram and Khunnu. However, she had stated that while she was returning back after the incident, the accused/appellants including appellant Aghan followed her and asked her name. In this connection, it may be noticed that in her Police Diary Statement (Ex. D./2), there is an omission in the above regard. Therefore, since the accused/appellants Aghan was standing at a distance, as has been stated by Sushila Bai (P.W.5) herself and had not partaken in the incident as all, it cannot be said that he also either helped the other accused/appellants or had connived with or abetted them to commit the offence. Therefore, the appeal of accused/appellant Aghan deserves to be allowed.

Accordingly, the appeals so far as accused/appellants Tejram and Khunnu @ Sudhram are concerned, stand dismissed. Their conviction and sentence as imposed by the learned trial Court are confirmed.

The appeal of accused/appellant Aghanlal, however, is allowed. His conviction as well as sentence is set-aside. He be set at liberty forthwith, if not required to be detained for any other offence.

Appeal allowed.

CIVIL REVISION

Before Mr. A. K. Mathur, C. J. and Mr. Justice Dipak Misra.

6, October, 1998.

M. P. STATE WAREHOUSING CORPORATION and others — Applicants*

v.

SHRI AZIZ REHMAN SIDDIQUI — ...Non-applicant.

Madhyastham Adhikaran Adhiniyam, M.P. (XXIX of 1983), Section 19---- Revision assailing award of Tribunal - Extension of time beyond stipulated period - Hence time was not the essence of contract- Rescission of Contract without notice - Not justified - Perusal of reasonings given by the Tribunal - Approach of the Tribunal is correct and infallible - No interference in revisional jurisdiction.

The time stipulated for completion of the work as per the agreement and extension of time was prayed for by the non-applicant and the construction Engineer requested the petitioner to take up the remaining work and complete the work expeditiously. Thus, there was extension of time beyond the stipulated period, and hence the Tribunal has rightly held that the time was not the essence of the contract.

M/s. Hind Constructions v. *State of Maharashtra* (1); referred to.

A. K. Gohil, Dy. a. G., for the State.

S. Rao, for the non-applicant.

Cur. adv. vult.

ORDER

DIPAK MISRA, J. - Invoking the jurisdiction of this Court under Section 19 of M.P., Madhyastham Adhikaran Adhiniyam, 1983 (hereinafter referred to as 'the Act') M. P. State warehousing Corporation and its authorities have called in

* Cr. R. No. 604/89. Application u/s 19 of the M.P. Madhyastham Adhikaran Adhiniyam, 1983, an Award dated. 8.9.89, given 646 M.P. Arbitration Tribunal, Bhopal, in Ref.. case No. 16/88.

(1) A.I.R. 1979 S.C. 720.

question the sustainability of the award passed in Reference case No. 16/88 by the M. P. Arbitration Tribunal, Bhopal.

The non-applicant filed an application of reference under Section 7 of the Act before the M. P. Arbitration Tribunal, Bhopal claiming Rs. 1,24,144/- and interest thereon @ 18% p.a. from the date of filing of reference petition till its realisation. The facts, as unfurled, are that the respondent's percentage rate tender dated 27.4.83 for "fabrication, supply and erection of tubular trusses" for the construction of 8,000 metric tonnes capacity godown at Sagar was accepted by the petitioner-corporation on 12.5.83 an agreement was executed vide Ex. P/1 on 22.8.83. The contract amount of work was Rs. 3,93,250/- and the time allowed for completion of work was $1^{1/2}$ months from the date of issue of work order. The work of civil construction in this regard was got done through other agencies. The competent authority of the Corporation, namely, the Chief Engineer, issued the order to the petitioners to commence the work on 25.8.83. It is relevant to state here that 45 days was the stipulated time for completion of the work excluding rainy season from 16th June to 15th October and, therefore, the date stipulated for completion of work expired on 30.11.83. As per the agreement their terms of payment were that 95% of the value of the order would be negotiated through their Banker against the materials received at the site and the rest 5% after erection of trusses. They sent three consignments of the materials and delivered the same to the Corporation but the authorities of the Corporation did not take interest in this regard and measurements and release of 95% of payment as enjoined in the terms and conditions of the contract were not done. The request made by the non-applicant became ineffective. However, they proceeded to erect the trusses for one unit on 22.10.83. As pleaded Corporation paid to the claimant a sum of Rs. 79,318/- and Rs. 23,603/- only on 15.11.83 and 16.5.83 respectively. The authorities of the Corporation failed to record measurements in full and blocked the contractors' finance and forced him to pay heavy interest charges to the financiers. It was putforth by the claimant that he had to erect the trusses only after the other agencies had completed the civil construction but the said civil construction was not completed in time. In view of this factual matrix extension of time was prayed for on 15.11.83 but the

owner did not grant reasonable extension an instead illegally terminated the contract. It was highlighted before the Tribunal that the respondents therein had committed breach of contract by not providing clear site for erection; by not paying running bills and final payments in time as per the terms and conditions of the contract; by refusing to grant extension and eventually terminating the contract and forfeiting the security deposit. Making such allegations the claimants claimed compensation to cover the loss due to infructuous overhead charges amounting to Rs. 46,747/-, the loss of profit amounting to Rs. 27,390/- interest upto 31.3.88 amounting to Rs. 23,884/-, reimbursement of recovery of extra cost of expenses illegally debited amounting to Rs. 22,498/-, and a sum of Rs. 3,625/- towards final bill dues. Thus, a total sum of Rs. 1,24,144/- was claimed.

The respondents-owners resisted the claims of the petitioners contending, *inter alia*, that the period of contract was for $1^{1/2}$ months without excluding the rainy season and, therefore, the time for completion of the work expired on 9.10.83. It was putforth that the claimants never delivered the materials at the spot and never came for physical verification of the materials which was done on 21.2.83. It is also stated that the claimants failed to submit the bills and, therefore, the respondents had prepared the bills and made payment on 15.11.83 in accordance with the contract agreement. The claimants recieved the running bills and also the final bill without raising any protest and accepted the bills on full and final settlement. It was also pleaded that the petitioners did not apply to the competent authority i.e. the Construction Engineer, for extension of time and, therefore, no extension was granted. It was also indicated that the contracted quantity of steel trusses to be fabricated, supplied and erected by the petitioners was about 55,000 kgms, but the petitioners could supply only 15,168.38 kgs upto payment of first running bill dated 15.11.83 and thereafter, supplied 1,229.87 kgs, but failed to show the proportionate progress and exhibited utter failure to complete the work within the stipulated time. It was also stated that the petitioners had received correct payment and nothing is due to the claimants. The respondents before the Tribunal justified their action in terminating the contract of the claimants and for-feited earnest money and security deposit. It was also stated that after the claimants' contract was terminated, the work was given to M/s Surya Pipe Works

and excessive expenditure was done which was to be recovered from the petitioners but they had waived the same as the bill had been finalised in full and final settlement.

Before the Tribunal a preliminary objection was taken with regard to the maintainability of the reference, as it was filed without referring the dispute to the Chief Engineer as is required under clause 34 of the contract-agreement. The Tribunal dealt with the preliminary objection and recorded the conclusion that the reference was maintainable. The Tribunal after considering the evidence brought on record came to hold that the stipulated period for completion of work expired on 9.10.83; the respondents had allowed the extension to petitioners to complete the work by 29.11.83; the contention that the parties had agreed that the respondents- owners should pay 95% value of the materials supplied as they received was unacceptable; the respondents have committed breach of contract by terminating the contract in a wrongful manner; the claimant is not entitled to the loss due to infructuous overhead charges; the claimant is entitled to Rs. 19,662.50 paise towards loss of profit and Rs. 2,066.50 towards interest; the claimant is further entitled to Rs. 22,612.40 paise towards recovery of extra cost. Thus, the Tribunal awarded Rs. 42,341.40 and awarded interest at the rate of 12 p.a. Rs. 35,102.50 paise from the date of filing of the petition.

Assailing the aforesaid award it is contended by Mr. Gohil learned Dy. A.G., that the Tribunal has erred in law in its conclusion that the Department has committed breach of contract. It is his further submission that the Tribunal has misdirected itself while interpreting clause 8 of the contract. He has seriously criticised the conclusions whereby the non-applicant's claim has been accepted on the ground that the said conclusions are against the material on record and, in fact, exhibits perversity of approach.

Resisting, the aforesaid submissions of the learned counsel for the petitioners, Mr. S. Rao, learned counsel for the non-applicant, has contended that on consideration of the totality of circumstances the Tribunal has come to the conclusion that there had been breach of contract by the present applicants and the said finding being based on proper appreciation of the materials on record cannot be regarded as perverse warranting interference by this Court in exercise

of its revisional jurisdiction. His further submission is that the claims which have been allowed by the Tribunal, deserve to be allowed inasmuch as the claimant had supported its plea with adequate evidence. It is further contended by him even assuming the interpretation of clause 8 by the Tribunal is incorrect then also the other ancillary factors go a long way to prove that the petitioners herein had committed breach of contract.

To appreciate the rival contentions raised at the Bar, we have carefully perused the award and scrutinised the terms of the agreement. Tribunal's finding with regard to Breach of contract is based on the conclusion that the time is not the essence on contract as under clause 10 of the contract-agreement there is a clause for extension of time. That apart, the petitioners had extended the time. The Tribunal has placed reliance on the decision rendered in the case of *M/s. Hind Constructions* v. *State of Maharashtra* (1). In the case at hand the time stipulated for completion of the work as per the agreement was 9.10.83 and extension of time was prayed for by the non-applicant and the Construction Engineer by letter dated 22.11.83 (Ex. P/5) requested the petitioner to take up the remaining work and complete the work expeditiously. Thus, there was extension of time beyond the stipulated period, and hence the Tribunal has rightly held that the time was not the essence of the contract.

On a close scrutiny of the material on record, we find that the present petitioners had not given any notice to the claimants, non-applicant herein, warning him to complete the work by a particular date, failing which action would we taken under clause 8 of the agreement. The Tribunal has held that when time was not the essence of the contract and there was no notice of warning to the contractor, the termination of the contract was unjustified. Quite apart from the above the Tribunal has taken note of the fact that the Construction Engineer has invoked clauses 8,10 and 44 of the contract-agreement for terminating the contract of the non-applicant. On a perusal of the clauses in the agreement we find that clause 7 relates to compensation for delay; clause 8 relates to action when construction becomes liable for levy of penalty; clause 10 relates to extension of time and clause 44 operates in the sphere which deals with

(1) A.I.R. 1979 S.C. 720.

penalty for breach of contract by the contractor which authorises the Corporation to forfeit the security deposit and such other ancillary factors. After reproducing clause 8, the Tribunal has opined that under the said clause any one of the three measures could have been taken by the owner but the owner cannot take recourse to two of them at a time. Mr. Gohil has impressed upon us that the Tribunal has misdirected itself by holding that when sub-clauses (a) and (c) were taken recourse to by the Corporation and its authorities, there has been a breach of contract. We find that the Tribunal has held that the time was not the essence of the contract and without notice there was termination of the contract and, therefore, it could safely be concluded that the rescission of contract was not justified. To appreciate the submission of Mr. Gohil relating to taking recourse to two of the sub-clauses of clause 8 of the contract-agreement it is essential to refer to the various parts of clause 8 which reads as under :

" Clause 8 :

Action when Contractor become liable for levy of penalty :

In any case in which, under any clause/clauses of this contract, the contractor shall have rendered himself liable to pay compensation amounting to the whole of this security deposit (whether paid in lumpusum or deducted by instalments) or committed a breach of any of the terms contained in this contract or in case of abandonment of the work owing to the serious illness or death of the contractor or any other case, the Construction Engineer on behalf of the Corporation shall have power to adopt any of the following courses as it may deem best to its interest.

(a) To rescind the contract (for which rescission notice in writing to the contractor under the hand of Construction Engineer shall be conclusive evidence), and in which case the security deposit of the contractor shall stand forfeited and be absolutely at the disposal of the Corporation.

(b) To employ labour paid by the Corporation and to supply materials to carryout the work or any part of the work, debiting

the contractor with the cost of the labour and the price of the materials (of the amount of which cost and price a certificate of the Construction Engineer shall be final and conclusive against the contractor) and crediting him with the value of the done, in all respects in the same manner and at the same rates as if it has been carried out by the contractor under the terms of this contract or the cost of the labour and the price of the materials as certified by the Construction Engineer whichever is less. The certificate of the Construction Engineer as to the value of the work done shall be final and conclusive against the contractor.

(c) To measure up the work of the contractor, and to take such part thereof as shall be unexecuted out of his hands, and to give it to another contractor to complete, in which case, any expenses which may be incurred in excess of the sum which would have been paid to the original contractor. If the whole work has been executed by him (of the amount of which excess, the certificate in writing of the Construction Engineer, shall be final and conclusive) shall be borne and paid by the original contractor and may be deducted from any money due to him by the Corporation under the contract or otherwise or from his security deposit or the proceeds of sale thereof or a sufficient part thereof.

In the event of any of the above courses being adopted by the Construction Engineer on behalf of the Corporation, the contractor shall have no claim to compensation for any loss sustained by him by reason of his having purchased or procured any materials or entered into any engagements or made any advances on account of or with a view to the execution of work or performance of any contract. And in case the contract shall be rescinded under the provisions aforesaid, the contractor

shall not be entitled to recover or the paid any sum for any work therefor actually performed under the contract, unless and untill the Construction Engineer certifies in writing the performance of such and the value payable in respect thereof and he shall only be entitled to be paid the value so certified."

Scrutinising the anatomy of the aforesaid clause, it is graphically clear that the owner has given itself the privilege to follow any one of the modes. On a fair and objective reading of the provisions in the clause it is apparent that they cover three different fields. If a recourse is taken to sub-clause (b) or (c) there shall be no forfeiting of the security deposit because the forfeiture only takes place when there is a rescission of contract. When action is taken under sub-clause (b) or (c) there is no rescission of contract and there is no forfeiture. Every part of clause has its own independent existence. True it is, the Tribunal has taken exception to the fact while rescinding the contract, the Department has taken recourse to clause (c). The exception taken is justified if it is probed deeply. To elaborate, assuming a contractor has executed more than 90% of work but there is delay for the rest then it can be taken up from him and given to another and the cost is deducted from the bill of the original contractor or otherwise or from his security deposit. If the cost is less than the security deposit then the balance would be refundable to the contractor. Thus, clause 8 (a) is more rigorous than clause 8 (c), and clause 8 (c) at times in a given case may also beome rigorous. Hence, the simultaneous recourse to all or even to two courses is impermissible and, therefore, the Tribunal has held it to be a technical breach of contract or to put it otherwise the rescission of the contract is not in accordance with the terms of the contract. This finding coupled with the conclusion that the time is not the essence of the contract and no prior notice was given to the contractor, renders the view taken by the Tribunal with regard to breach of contract by the petitioners as invulnerable.

Now we shall proceed to deal with the claims allowed by the Tribunal. The Tribunal has allowed Rs. 19,362.50 paise towards loss of profit. This figure

has been arrived at by computing the profit at 5% of the total cost. This conclusion is a reasonable one and cannot be found fault with.

The second claim which has been allowed with regard to interest on 23.3.84 because of the delay in payment of the running bill. The Tribunal after discussing at length has granted interest of Rs. 2,066.50 paise on this count. On a perusal of the reasonings given by the Tribunal, we are satisfied that the approach of the Tribunal is correct and infallible. The Tribunal has partially allowed the claim of the non-applicant which relates to recovery of extra cost. The Tribunal on this score has taken into consideration the amount the of Rs. 15,440/- which was deducted from the petitioners final bill and has added 12% p.a. interest on it which makes the total of Rs. 20,612.40 paise. There is no material irregularity in reaching such a conclusion inasmuch as the Tribunal has already held that the rescission of the contract was illegal. The Tribunal on such a finding has concluded as a logicaliy corollary that the action of the owner being unjustified entitles the non-applicant herein to receive the amount deducted from the final bill.

In view of the foregoing premises, we find that the award passed by the Tribunal is neither perverse nor does it exhibit any kind of material irregularity warranting interference in exercise of revisional jurisdiction of this Court.

Consequently, the revision petition, being devoid of merit, stands dismissed. However, in the peculiar facts and circumstances of the case, there shall be no order as to costs.

Application dismissed.

CRIMINAL REVISION

Before Mr. Justice R. P. Gupta

15, September, 1998.

BAGHMAL JAIN Appellant*

v.

BHAIYALAL ...Respondent.

Criminal Procedure Code, 1973 (II of 1974), Session 245 (2) and Penal Code Indian (XLV of 1860) Sections 458, 380-Complaint against Officers of the Co-operative Bank-Magistrate taking cognizance under Sections 458, 380, Indian Penal Code - Even after opportunities to the complainant he was neither appearing nor bringing his witnesses nor taking steps for the same-In such a situation Section 245 (2) becomes applicable-Magistrate is empowered to discharge the accused-In absence of evidence Magistrate dismissed the complaint and discharged the accused persons giving reasons-Second complaint filed-Attitude of complainant was of misusing the process of the Court to persecute the accused and not prosecute them - Effect of dis-charge under Section 245 (2) Criminal Procedure Code was discharge after trial-Complainant cannot be allowed to reagitate the matter against those very accused.

In a complaint case which is triable as a warrant case trial starts, after the accused have appeared, with the pre-charge evidence. Pre-charge evidence is a part of the trial. If Pre-charge evidence is completed and the accused are charge-sheeted firmly, the trial proceeds further with an opportunity of cross-examination of the already recorded witnesses, given to the accused, and the complainant to examine any further witness he may desire to do and then the statement of the accused and the opportunity of defence and then the arguments and judgment.

Clause (2) of Section 245 Cr. P.C. however provides that even when the evidence is not taken, as referred to in Section 244 Cri. Procedure Code, the

* Cri. Re. No. 644 of 1997, against the order dated 9.6.97, passed by Addl. Session Judge, Chhindawara, in Cr. R. No. 35/93.

Baghmal Jain v. Bhaiyalal, 1998.

Magistrate is empowered to discharge the accused at any period of stage, for reasons to be recorded. If the complainant is preventing the trial to proceed by not bringing his witnesses or evidence and not taking any steps for the same and not appearing himself at all as a witness and his counsel is not appearing inspite of affording opportunities, that will be a reason covered by clauses (2). The reasons are recorded by the Magistrate in his order which would be covered by this clause. So, it was discharge u/s 245 (2) Cr. P. C. in the first complaint.

The fresh complaint is barred by Section 300 C. P. C. as in strict sense, we may not call the order of discharge as an acquittal but in practical effect, the trial had taken place, the complainant was given opportunity, he did not avail of it, further opportunity was refused and at the stage of the consideration of the stage, the only option for the Court was to discharge the accused u/s 245 (2) Cr. P. C.. Even in such cases, the complainant cannot be allowed to re-agitate the matter against those very accused.

Luis v. *Mahadev* (1), *Agadhu* v. *Baban* (2), *Nabaghan* v. *Brundaban* (3) and *Manmohan* v. *P. M. Abdul Salem* (4); referred to.

Atul Awasthy for the petitioners.

Ku. Kiran Mehta for the respondent.

Cur. adv. vult.

ORDER

R. P. GUPTA J. - This revision-petition is directed against the order dated 9.6.97 of First Additional Sessions Judge, Chhindwara in Criminal Revision No. 35/93 whereby the learned Addl. Sessions Judge set aside the order dated 10.3.93 passed in Criminal Case No. 475/91 by the Court of Judicial Magistrate First Class Chhindwara dropping the complaint proceedings against the accused (present petitioners).

---

(1) 1984 Cr. L. J. 513. (2) 1987 Cr. L. J. 555.
(3) 1989 Cr. L. J. 381. (4) 1994 Cr. L. J. 1555.

Baghmal Jain v. Bhaiyalal, 1998.

The relevant facts in brief are that the present respondents filed a complaint against the 8 petitioners who are officers and employees of Central Co-operative Bank, Chhindwara, alleging the offences punishable under Sections 454, 380, 147, 148 read with 149 I.P.C..

Initially, this complainant had filed a complaint against these respondents (present petitioners) for the same offences as far back as 1st December, 1986 on the allegations that on 17.11.81, the complainant had gone to Chhindwara from his village Seonipanmoti. His wife was at home. These accused alongwith 13 to 15 other persons came to his house. They came in jeeps with a tractor. They entered the house and broke open the room in which gram, Urad, Makka and paddy were stored and in a locked Almirah, there were ornaments. Respondent No.1 ordered for breaking open the lock. The accused persons took away the abovementioned grains and ornaments. Details of grains were given, as worth Rs. 14,150/- and details of ornaments as worth Rs. 27,500/-. The allegations were that the accused persons committed this theft and took away the goods of the complainant inspite of objection of his wife and of his son. The complainant filed a report with the police on the same day but no action was taken by the police. The complainant filed a complaint on 13.1.82 against these accused before the Area Magistrate. The Magistrate took cognizance vide order dated 5.9.83 for offences punishable under Section 454 and 380 IPC against these accused and registered it as Complaint Case No. 379/83. The respondents in the complaint case (i.e. the petitioners herein) were summoned to stand trial. They appeared in the Court and the matter was pending for pre-charge evidence on 29.11.86. On that date, the complainant and his witnesses could not appear before the Magistrate and the complaint was dismissed, and these accused were discharged. It was asserted that the complainant suddenly became ill on 28.11.86 and he could not come to the Court nor could bring with his witnesses nor he could inform his counsel to appear in Court. So he filed a fresh complaint on 1.12.86. This fresh complaint has been registered as Case No. 475/91. The respondents in the complaint were summoned and after adducing evidence, at the stage of the fresh complaint, the respondents filed an objection that the fresh complaint was barred under the provisions of Section 245(2), 247 and 258 of the Code of Criminal Procedure

and, in any case, it was an abuse of the process of the Court and so the fresh complaint should be dismissed and proceedings be dropped. This plea was accepted by the learned Magistrate who dropped the proceedings vide order dated 10.3.93 and again discharged the accused persons. The complainant approached the Sessions Court in revision - petition. The First Addl. Sessions Judge vide impugned order dated 9.6.97 set aside that order holding that the offences were cognizable and non-compoundable and so a fresh complaint about them can be filed even after the discharge of the accused persons in the earlier complaint which was in the absence of the evidene and because the witnesses could not appear and the fact that the Magistrate could not review his own order of dismissal, did not bar filing of same complaint on the fresh ground and the Magistrate can take cognizance. The cogniazance had already been taken. The complaint could not be dismissed because of discharge of the accused in the prior complaint.

In the present revision-petition before this Court, the petitioners-accused urge that the second complaint was an abuse of the process of the Court. The first complaint had been filed in January, 1982 and the accused (respondents therein) had appeared. The complainant did not bring his witnesses and he did not come himself to the Court. The counsel also did not appear. The Court, therefore, had no option but to take the view that the complainant had no evidence to produce and then closed the case and discharged the accused. Thereafter, filing of a fresh complaint on the same accusation would be an abuse of the process of the Court. In fact it should be taken as barred.

It may be noticed that a sum of Rs 24,773.62 was recoverable by the Corporation Bank from the complainant as loan and interest for the loan taken by this complaint from the Bank. The recovery demand certificate had been issued against him and an order for recovery had also been passed by the authorised officer of the Corporation Bank. The demand certificate had been served on him and the demand order was received by him on 15.11.81.

The order dated 29.11.86 whereby the accused were discharged, observed that no further opportunity for producing witnesses could be given to the complainant, recorded absence of complainant and his counsel and any witness

and presence of the accused persons. The Magistrate noticed that no steps have been taken for service of notice. The witnesses also did not turn up to produce evidence and the opportunity was also given to produce entire evidence on 29.11.86. The complainant had taken sufficient opportunities earlier. Since he was not present and no witness was present, it was clear that he was not interested in proceeding with the matter. So no further opportunity could be given to him. So, in the absence of evidence, the matter was closed and the accused were discharge.

After the fresh complaint, when the accused were re-summoned and appeared and raised objection vide their application dated 27.7.89, the Magistrate accepted that plea but the Sessions Court reversed that order, resulting in re-trial of these accused-petitioners.

A perusal of the impugned order of the Sessions Court makes it clear that the Additional Sessions Judge technically considered the provisions of Sections 249 and 258 Cr. P. C. observing that although Section 249 deals with absence of complainant in a case being tried as warrant case, the provision could be attracted when the offences were non-cognizable or compoundable. The offences involved in this case were not compoundable and they were cognizable. Section 258 only pertains to trial of summons cases. However, it appears clear that the learned Addl. Sessions Judge has not tried to construe the true nature of the order of discharge dated 29.11.86, pertaining to the initial complaint. Construction of true nature of that order was essential to reach a conclusion whether a fresh complaint should be allowed to continue. This apart, from the fact if a complaint is made in abuse of the process of the Court, it can be dismissed. The stage at which the Magistrate passed the order dated 10.3.93 in the second complaint was that the accused persons had put in appearance and they objected to the fresh complaint or taking cognizance of that complaint vide their application dated 27.7.89. The order-sheet in the second complaint shows that the order for summoning the accused for the alleged offences was passed on 22.11.88 and some of the accused appeared on 11.1.89 and others on 27.2.89. The application u/s 245 (2) was moved by the accused before the Second complaint was fixed for pre-charge evidence.

Baghmal Jain v. Bhaiyalal, 1998.

The Sessions Court, in passing the impugned order, has proceeded as if in the earlier proceedings the accused were discharged even before any opportunity was given to them or the complaint was dismissed before the accused cold appear. The Sessions Court failed to take notice of the fact that the order-sheets in the previous complaint-proceedings show that a number of opportunities had already been given to the complainant to produce his witnesses but he had not produced them. He had not even examined himself. Hence, it appeared clear that he was duly interested in the appearance of the accused time and again before the Magistrate. His attitude thus was an attitude of misusing the process of the Court of persecute the accused and not to prosecute them. It should be considered that in a complaint case, which is triable as a warrant case trial starts after the accused have appeared, with the pre-charge evidence. Pre-charge evidence is a part of the trial. If pre-charge evidence is completed and the accused are charge-sheeted firmly, the trial proceeds further with an opportunity of cross-examination of the already recorded witnesses, given to the accused, and the complainant to examine any further witness he may desire to do and then the statement of the accused and the opportunity of defence and then the arguments and judgment. The first stage in such a trial is pre-charge evidence. If a charge is framed after pre-charge evidence and the complainant failed to produce any witness, even for cross-examination, and fails to produce himself, is the Court only a silent spectator and has to call the public prosecutor to take charge of the case and then to issue warrants for the witnesses including the complainant and then to decide which other witnesses to summon or to ask the public prosecutor to decide. This could be in a very rare case of a grave offence where the complainant may collude with the accused with grave injury to public justice. But in every case the Magistrate is not required to take that course. The complainant came to the Magistrate. He got the accused summoned by producing preliminary evidence. He still is in charge of the case and had a responsibility to the Court to bring his witnesses to the trial Court or take the steps to bring his witnesses. If he does not bring them, he does so at his peril. It is common knowledge that the complaints after summoning the accused persons, are being used as weapons of persecution. The trial Magistrate has a duty to see that such

thing does not happen in his Court. Of course, he (the complainant) may give reasons for his inability to produce the witnesses or may say that he will produce the witnesses on a particular date, inspite of steps having not been taken. The complainant will get a reasonable opportunity, but when he has already got opportunities, he cannot be allowed to approach to court again to say that he got diarrhoea a day before. He did not say whom he wanted to bring with him and why they did not come on the date fixed, in the case in hand, at the time of the first complaint, on 29.11.86, the Magistrate was confronted with the fact as to what he should do when, even after the opportunities to the complainant, he was neither appearing nor bringing his witnesses nor taking any steps for the same. It is in such a situation that Section 245 (2) Cr. P. C. becomes applicable. This section may be quoted here :

> " 245. When accused shall be discharged. - If, upon taking all the evidence referred to in Section 244, the Magistrate considers, for reasons to be recorded, that no case against the accused has been made out which, if unrebutted, would warrant his conviction, the Magistrate shall discharge him.
>
> (2) Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case, if, for reasons to be recorded by such Magistrate, he considers the charge to be groundless."

We are not concerned with clause (1) but we are concerned with clause (2). It is independent of Clause (1). In fact, it could be an independent provision in this type of warrant trial. The words "Nothing in this section shall be deemed to prevent" means only this that the procedure which is to be gone through for clause (1), need not be gone through for an order passed in Clause (2). The stage has to be after taking of evidence as referred u/s 344 Cr. P.C. so after the evidence, if the Magistrate may find that no case against the accused is made out, then, he will discharge them. Clause (2) of Section 245 Cr. P.C. however provides that even when the evidence is not taken, as referred to in Section 244 Cr. P.C., the Magistrate is empowered to discharge the accused at any period of stage, for reasons to be recorded. If the complainant is preventing the trial to proceed

by not bringing his witnesses or evidence and not taking any steps for the same and not appearing himself at all as a witness and his counsel is not appearing inspite of affording opportunities, that will be a reason covered by Clause (2). The reasons are recorded by the Magistrate in his order dated 29.11.86 which would be covered by this clause. So, it was discharge u/s 245 (2) Cr. P. C. in the first complaint.

Alternately in this case, we can also say that when an opportunity has been given to the complainant to produce the evidence and he fails totally, it will be a case covered by first clause also. Section 244 Cr. P.C. directs the Magistrate to proceed to hear the prosecution and take all such evidence as may be produced in support of the prosecution. This only means that opportunity has to be given to the complainant to produce evidence for that purpose. The Magistrate, under Clause (2) of Section 244 Cr. P.C. issues summons to witnesses directing them to appear. The complainant has to take steps for this. The Magistrate does not become the prosecutor. So, if opportunity is given and is not availed of, it will fall within the scope of "evidence" referred to in Section 244 Cr. P. C.. It will be "nil evidence."

In any case, the order in the earlier complaint, discharging the accused, was an order u/s 245 (2) Cr. P.C.. The net result had to be in the absence of the evidence, that the charge was groundless. No other conclusion could be reached. The mere fact that the word "charge is groundless" is not used, in the 1st order does not mean that the order was not u/s 245 (2) Cr. P. C.. In fact the proper construction of the words would be that "in the absence of the evidence inspite of the opportunities, charge was groundless".

The Bombay High Court in the case of *Luis* v. *Mahadev* (1) and Kerala High Court in the case titled *Manmohan* v. *P. M. Abdul Salam* (2), held that the Magistrate has power to discharge the accused under Clause (2) of Section 245 Cr. P. C. even if no witnesses are examined under Section 244 Cr. P. C. Same conclusion was reached in *Agadhu* v. *Baban* (3) (orissa High Court) as also in *Nabaghan* v. *Brundaban* (4).

(1) 1984 Cr. L.J. 513. (2) 1994 Cr. L.J. 1555.
(3) 1987 Cr. L.J. 555. (4) 1989 Cr. L.J. 381.

Baghmal Jain v. Bhaiyalal, 1998.

The question is as to what is the effect of this order passed in the previous complaint ? The complainant has come forward in the second complaint with a case that he became ill. The ailments is dysenty. A medical certificate was filed by the complainant alongwith the second complaint. It was issued by one Dr. S.K. Bindra, a Private Practitioner of Chhindwara. It is dated 30.11.86 and records that this complainant was under his treatment from 28.11.86 to 30.11.86 and was fully recovered on 30.11.86. The ailment was D.V.D.. The prescription slip is also attached, purported to be dated 28.11.86. The symptoms were given as loose motion and vomiting. The medicine prescribed are Inj.Octria and Siquil, Tab. Enteroquaradine and Cap.Enterostrep. So this complainant was with the Doctor at chhindwara on 28.11.1986 and on 30.11.86. He was able to come to the Doctor but why not able to come to the trial Court, inasmuch as, the trial Court was also at Chhindwara is a strange factor. He could not come to the trial Court on 29.11.86. The trial Magistrate in the second case did not criticaliy examine these aspects of this medical certificate. The only statement of the complainant was that he was suffering from vomiting and dysentery, from 28.11.86. But he could come to the Doctor on that date from his village Seonipranmoti. The Doctor was not examined to prove the ailment. The complainant in summoning the accused in the second complaint, appears to have made simple statement that he was ill with dysentery. This was hardly a ground to be accepted for non-producing the witnesses in the earlier complaint. So it was not a very special case which could show that injustice to the complainant was done and fresh complaint was not permitted.

The effect of discharge of the accused u/s 245 (2) Cr. P. C. in the previous complaint, was in fact a discharge after trial. The question is what is the legal effect. It could not be called an acquittal but could the complainant be permitted, in the interest of justice, to start a case afresh on one pretext or the other. The fresh complaint was certain by an abuse of the process of the Court. It may be noticed that the Additional Sessions Judge had noticed that the accused persons were executing an attachment order in respect of the recovery of the dues of the Cooperative Central Bank Chhindwara of which they were officers and

employees. This background also adds to the inference that the second complaint was an abuse of the process of the Court. The complainant would be debarred, by the Court in the interest of justice, from proceedings with such a fresh complaint or lead evidence therein. Such a discharge earlier would be a sufficient ground to discharge these accused in the fresh complaint, if at all cognizance was taken. So even the second order of discharge u/s 245 (2) Cr. P. C. could not be faulted with in law. The earlier order was not u/s 247 or 258 Cr. P. C.. The learned Addl. Sessions Judge has gone wrong on that aspect. The impugned order cannot be sustained. It may not be strictly held, in law, that the fresh complaint is barred by Section 300 Cr. P. C. as in strict sense, we may not call the order of discharge as an acquittal but in practical effect, the trial had taken place, the complainant was given opportunity, he did not avail of it, further opportunity was refused and at the stage of the consideration of the stage, the only option for the Court was to discharge the accused u/s 245 (2) Cr. P. C.. Even in such cases, the complainant cannot be allowed to re-agitate the matter against these very accused. In any case, this Court would look into that fact that there was no sufficient case for not producing the evidence in the earlier complaint before the trial Court. Therefore, the fresh complaint is by way of an abuse of the process of the Court. The trial Magistrate was right in preventing such an abuse. The impugned order cannot be sustained.

Revision is allowed. The impugned order of the learned Addl. Sessions Judge is set aside and the order of the Magistrate is restored, although for slightly different and detailed reasons as noted above.

Application allowed.

MISCELLANEOUS CRIMINAL REVISION

Before Mr. Justice Dipak Misra.

17, April, 1998.

RAJKUMAR Applicant*

v.

STATE OF M. P. ...Non- applicant.

Criminal Procedure Code, 1973 (II of 1974), Section 320 (2), 482 - Inherent jurisdiction of High Court - If an offence is non-compoundable- High Court cannot grant permission for compounding.

If an offence is non-compoundable and does not fall in the purview of Section 320 of the Code the High Court in exercise of its inherent jurisdiction cannot grant permission for compounding.

Annamdevula Srinivasa Rao and another etc. v. *State of Andhra Pradesh and etc.* (1) and *State of Maharashtra* v. *Raju alias Raya and another* (2); referred to.

Manish Datt with *H. Choudhary* for the applicant.

B. P. Athya, Govt. Advocate for the State.

Cur. adv. vult.

ORDER

DIPAK MISRA, J. - Invoking the inherent jurisdiction of this Court under Section 482 of the Code of Criminal Procedure (in short 'the Code') the husband-petitioner has assailed the order dated 18.12.97 passed by the learned Judicial Magistrate, First Class, Anuppur in Criminal Case No. 493/96 whereby he has refused to grant permission for compounding of the offence punishable under Section 498-A of the Indian Penal Code (in short 'the IPC').

The essential facts giving rise to the present petition are that on the basis of an FIR lodged by the wife of the petitioner the criminal law was set in motion

* Misc. Cri. Case No. 519/98, against the order dated 18.12.97, passed by J.M.F.C., Anuppur, in Cr. Case No. 493/96.

(1) 1995 Cri. L. J. 3964. (2) 1993 Cri. L. J. 3571.

which ultimately gave rise to Criminal Case No. 493/96 for an offence punishable under Section 498-A of IPC in the Court of Judicial Magistrate, First Class Anuppur. After filing of the chargesheet in the Court, the petitioner and his wife reached an amicable settlement and the misunderstanding between them came to end. They started leading a normal conjugal life. Because of this changed scenario, the informant-wife filed an application on 18.12.97 for grant of permission to compound the offence. The learned trial Magistrate considered the application on the same day and by the impugned order came to hold that the offence in question, was not compoundable as envisaged under Section 320 (2) of the Code, and accordingly refused the prayer.

Assailing the aforesaid order Mr. H. Choudhary learned counsel for the petitioner has submitted that this Court in exercise of power under Section 482 of the Code can grant permission for compounding of the offence in view of the changed factual position. It is submitted by him that if permission is not granted the criminal case would continue and its continuance is likely to create a dent in the matrimonial relationship of the petitioner and his wife. Mr. Manish Datt who was present in Court at the time of hearing of this application, volunteered to assist the Court and also made his submissions.

Mr. Athya, learned G. A. for the State has opposed the prayer of the petitioner on the ground that when the offence under Section 498-A of the Code is not compoundable under the provision of Section 320 of the Code, this Court in exercise of its inherent jurisdiction should not grant permission for compounding.

The sole question that arises for determination is whether this Court in exercise of power conferred on it under Section 482 of the Code, can grant permission for compounding of an offence which is not compoundable. Section 320(1) of the Code enumerates the offences punishable under certain provisions of IPC which may be compoundable by the persons mentioned therein. Section 320 (2) enumerates the offences punishable under certain provisions of the IPC which can be compounded only with the permission of the Code before which the prosecution is pending. Under Section 320(9) it has been provided that no offence shall be compounded except as provided by the said section. An offence

under Section 498-A of the Code does not come in any of the categories. Mr. Datt and Mr. Choudhary learned counsel relied upon the decision rendered in the case of *Maheshchandra* v. *State of Rajsthan* (1). In the aforesaid case, the accused persons were acquitted by the trial Court and the High Court in appeal, set aside the order of acquittal and convicted the accused persons of the offence punishable under Section 307 of IPC. The order of conviction was challenged before the Apex Court in a Special Leave Petition and before the Apex Court the parties filed a petition seeking permission to compound the offence. The Supreme Court while accepting such plea, directed the trial Judge for grant of permission to compound the offence. Learned counsel for the petitioner have urged that this Court, in the obtaining factual matrix, can direct the learned trial Judge to accord permission to compound the offence. On a reading of the decision rendered in the case of *Maheshchandra (supra)* it is noticed that it is not a decision wherein the Apex Court has held that the High Court in exercise of jurisdiction under Section 482 of the Code can grant permission for compounding in respect of a on-compoundable offence. On a close scrutiny of the provisions enshrined under Section 320 of the code it is apparent that the legislature has provided all the contigencies where an offence can be compounded. That apart, under sub-section (9) it has been clearly stipulated no offence shall be compounded except as provided under Section 320 of the Code. In view of the specific prohibition contained in the said provision the pivotal question that emerges is whether this Court, in exercise of power conferred on it under Section 482 of the Code, can grant permission. At this juncture, I may refer to a decision rendered by the Andhra Pradesh High Court in the case of *Annamdevula Srinivasa Rao and another, etc. etc.* v. *State of Andhra Pradesh and etc.* (2) wherein their Lordships held as follows:

> " The inherent jurisdiction of the High Court under Section 482, Cr. P. C., is available to be exercised for advancement of justice and if any attempt is made to abuse the process of any Court, the High Court shall interfere and exercise its jurisdiction to prevent the same. It shall not pass any order or issue any direction contrary to the provisions of the Code.

(1) A.I.R. 1988 S.C. 2111. (2) 1995 Cr. L. J. 3964.

Rajkumar v. State of M. P., 1998.

The inherent jurisdiction conferred upon the High Court merely enables it to deal with the situation which is not contemplated by the Code to give effect to any order passed under the Code. This inherent power of the High Court can never be exercised compelling the subordinate criminal courts to act in any manner contravening the provisions of the Code. Such an order can never be termed as an order passed to prevent the abuse of the process of any Court. It cannot also be said that such order would secure the ends of justice. Every legal power has its own limitations. There is nothing like unlimited power. So also the power conferred upon the High Court under Section 482 of the Code of Criminal Procedure.

(Quoted from the placitum)

The High Court of Bombay inthe case of *State of Maharashtra* v. *Raju alias Raja and another* (1), has held as follows :

"Although, the parties appear to have settled the matter in the Lok Nyayalaya, in law in an offence even under Section 394 R/w, 34 IPC is not compoundable either with or without the permission of the Court. In the circumstances, order granting permission to compound is liable to be set aside and the matter will have to be sent back to JMFC, Wardha for disposal in accordance with law."

This Court in the case of *State of M. P.* v. *Saud and others* (2) held as follows :

" The jurisdiction of the High Court is invoked under the provisions of the Code of Criminal Procedure either in revision or appeal and the restrictions imposed on the power of the Criminal Court in the matter of granting permission to compound in as much applicable to the Court of Magistrate and Court of Sessions Judge as to the High Court. To say that the Supreme Court in a given case adopted a particular course of action is one thing ; to say that the High Court or even an inferior criminal

(1) 1993 Cr. L. J. 3571. (2) Cr. A. No. 15/91.

court can do whatever the Supreme Court did is quite a different thing. The Jurisdiction of the High Court should be traced to some provision of the Code of Criminal Procedure. Under the Scheme of 320, no person has right to compound any offence not specifically mentioned therein."

In view of the aforesaid enunciation of law, there remains no iota of doubt that if an offence is non-compoundable and does not fall in the purview of Section 320 of the Code, the High Court in exercise of its inherent jurisdiction cannot grant permission for compounding. Hence, the prayer of the petitioner is not entertainable. Accordingly, the application stands dismissed.

Application dismissed.

WRIT PETITION

Before Mr. Justice D. P. S. Chauhan.

22, January, 1998.

SMT. MEENA SINGH ...Petitioner*

v.

THE PRESCRIBED AUTHORITY -CUM-COLLECTOR, SIDHI (M.P.) and others .Respondents.

Constitution of India - Article 226 - Petition challenging order of prescribed authority refusing to withdraw Election Petition under the M.P. Panchayat Raj Adhiniyam, 1993 - Madhya Pradesh Panchayat (Election Petitions, Corrupt Practices and Disqualifications for Membership) Rules, 1991, would be applicable - Rule 13 - Prescribed authority has not given any reason for refusing to grant the leave to withdraw the election petition - Parties are closely related, it was not a case of corrupt practices but a case of recounting of ballot papers- There is nothing which may entitle refusal to withdraw the election petition- Order impugned cannot be allowed to be sustained.

The prescribed authority has not given any reason for refusing to grant the leave to withdraw the election petition. The order of the election Tribunal, which is impugned in the petition, in relation to the withdrawal of the election petition, cannot be allowed to be sustained. In the present case, the parties are so closely related and the withdrawal is in their domestic interest. Secondly, it was not a case involving any allegation of corrupt practice. It was only a case of recounting of ballot papers and in these circumstances there is nothing which may entitle refusal to withdraw the election petition.

Sheo Baran v. *Bindeshwari Prashad and others* (1) and *Bijayanda* v. *Satrughna Sahu* (2); distinguished.

Anil Khare for the petitioner.

L. S. Baghel for the respondents.

Cur. adv. vult.

---

* W. P. No. 5261/97.

(1) A.I.R. 1963 All. 607. (2) A.I.R. 1963 S. C. 1566.

Smt. Meena Singh v. The Prescribed Authority-Cum-Collector, Sidhi, M.P., 1998.

ORDER

D. P. S. CHAUHAN J. - The election of Smt. Meena Singh for the office of Member of Janpad Panchayat Sidhi was questioned by respondent No. 2 Smt. Padma Singh by way of election petition before the Collector Sidhi, who was the prescribed Authority under the M. P. Panchayat Raj Adhiniyam, 1993 (for brevity, hereinafter referred to as 'the Act').

The petitioner was a successful candidate whereas Smt. Padma Singh was the candidate who lost at the contest. Both are *inter se* related as Nanad and Bhoujai. The compromise was arrived at between the two candidates and as such an application was moved before the Prescribed Authority for withdrawal of the Election Petition No. 3-A/89-93-94. The application so moved was rejected. Against this order, the successful candidate has come to this Court instead of the candidate whose application for withdrawal was rejected. The person who moved the election petition is represented before this court by Shri L. S. Baghel, Senior Advocate.

Since both the parties are represented through counsel and they are before this Court, I consider it in the interest of justice to wave the technicality as to who is the rightful person to approach this Court, as both the persons, so far as the matter of withdrawal of the election petition is concerned, are not at variance.

Learned counsel for both the parties Shri Anil Khare and Shri L. S. Baghel as well as learned State counsel, Shri R. S. Jha submitted that the view taken by the Prescribed Authority is erroneous in law as the elections took place in the year 1994 and the rules known as" The Madhya Pradesh Panchayat (Election Petitions, Corrupt Practices and Disqualification for Membership) Rules, 1995" would not apply. The rules known as "Madhya Pradesh Panchayat (Election Petitions, Corrupt Practices and Disqualification for Membership)" as published in Madhya Pradesh Law Times-1992 (Vol. XXXIV) at at Page 51 would be applicable, and the relevant rule is Rule 13, which is as extracted below :

> " 13. Withdrawal of election petition-No election petition shall be withdrawn without the leave of the prescribed authority. The prescribed authority may also pass suitable order as to cost and mode of payment."

Smt. Meena Singh v. The Prescribed Authority-Cum-Collector, Sidhi, M.P., 1998.

The election petition was only for recount of the ballot papers as there was difference of 5 votes. It was not a case founded on the corrupt practice.

The election Tribunal relied on the decision in the case of *Sheo Baran* v. *Bindeshwari Prashad and others* (1). The case was on different premises. In that case, the election of the successful candidate was challenged on the ground that he was holding an office of profit under the Government at the time of his nomination and, therefore, disqualified for election. The election petition was filed by a person who was not having direct interest in the election as the person who filed the petition was not a candidate at the election but was only an elector. In that case parties compromised their dispute and Bindeshwari Prashad, who was a successful candidate and against whom the election petition was filed, conceded that he held an office of profit and was, therefore, not entitled to contest the election, and in these circumstances parties filed a joint - application before the tribunal praying that the election petition be allowed and the parties be directed to bear their own costs. The Tribunal held that Dudhnath being the only surviving candidate after Bindeshwari Prashad was disqualified, was entitled to be declared elected and accordingly the election petition was allowed after setting aside the election of Bindeshwari Prashad and Dudhnath was declared elected for the office of Pradhan. This order was the subject - matter of challenge before the Lucknow Bench of the Allahabad High Court. Before the High Court, the petitioner's case was that parties cannot decide the result of election by private compromise and thereby deprive the voters of their right to elect a candidate of their choice.

In that case the Sub-Divisional Officer had not declared Dudhnath elected on the basis of the alleged compromise, but made it clear that the petition was decided on merits and not on the basis of the alleged compromise. It was only during the pendency of the case the parties compromised their dispute and an application was filed before the tribunal which clearly indicated that the respondent in the petition did not want to contest and in fact, conceded that he was a Government servant and, therefore, disentitled to stand for election. Faced with

(1) A. I. R. 1963 All. 607.

this situation, the only course open to the Sub-Divisional Officer was to go ahead with the petition and decide it on merits. This is precisely what he did. He examined the evidence in support of the petition and held that the petitioner's case that Bindeshwari Prashad held an office of profit was established. Accordingly he set aside the election and declared the petitioning candidate elected. The High Court dismissed the writ petition. This case has no application to the facts and circumstances of the present case.

The other case relied on is *Bijaynanda* v. *Satrughna Sahu* (1). That case was under the old provision of Representation of the People Act, 1951 when the election petitions were tried by the election tribunal, constituted thereunder and the appeals against the order of the election tribunal were preferred before the High Court. The Supreme Court considered that the power of the High Court under S. 116A (2) of the Representation of the People Act, 1951 when hearing an appeal from an election petition is the same as its power when hearing an appeal from an original decree, and the procedure is also the same, for there is no express provision to the contrary in the matter of withdrawal of an appeal in the Act. Therefore, when an appellant under S. 116A makes an application for an unconditional withdrawal of the appeal, the power of High Court consistently with its power in an appeal from an original decree under O. 23, R. 1 (i) and S. 107 (2), Civil P. C., is to allow such withdrawal, and it cannot say that it will not permit the appeal to be withdrawn. The Court would be in error in importing the principles of Sections 109 and 110 of the Act which deal only with the withdrawal of election petitions and not with the withdrawal of appeals.

This case has also no applicability to the present case.

The present case would be governed by the rules known as " The Madhya Pradesh Panchayat (Election Petitions, Corrupt Practices and Disqualification for Membership) Rules, 1991" and the relevant rule is Rule 13, which has been extracted above. This rule only places rider that the withdrawal can be done with

(1) A.I.R. 1963 S.C 1566.

the leave of the prescribed authority and nothing beyond it. The prescribed authority has not given any reason for refusing to grant the leave to withdraw the election petition.

In the circumstances, the order of the election Tribunal, which is impugned in the petition, in relation to the withdrawal of the election petition, cannot be allowed to be sustained. In the present case, the parties are so closely related and the withdrawal is in their domestic interest. Secondly, it was not a case involving any allegation of corrupt practice. It was only a case of recounting of ballot papers and in these circumstances there is nothing which may entitle refusal to withdraw the election petition.

In the circumstances, the writ petition succeeds. The impugned order dated 16.12.1997 is quashed. The petitioner is granted leave to withdraw the election petition and the election petition accordingly stands dismissed with no order as to costs. The security amount, if any, deposited by the election petitioner shall be refunded by the prescribed authority on the application being made by the petitioner within a period of three weeks from the date of filing of the application together with the certified copy of this order.

Petition allowed.

WRIT PETITION

Before Mr. Justice Deepak Misra.

3, July, 1998.

RAJENDRA KUMAR SINGH ...Petitioner*

v.

STATE and others .Respondents.

Constitution of India - Article 226 - Quashment of F. I. R.- Sections 13 (1) (d), 13 (2), read with Section 15 of the Prevention of Corruption Act, 1988 - F. I. R. drawn by Special Police Establishment against petitioner, erstwhile Minister of Housing and Environment - Section 15 - Attempt to commit an offence within its connotative expansion would engulf intention to commit crime and failure to consummate because of some circumstances -- Petitioner withdrew the earlier order and passed fresh order after coming to know that complaint has been lodged before the Lokayukt -One may put up his defence explaining his initial steps and withdraw later on - Facts as exposited do not warrant quashment of the prosecution - Whether the allegations constitute offence can be agitated by the petitioner at the appropriate stage-It would depend upon of what offence charge-sheet is filed - It would be open to the petitioner to call in question the propriety of the charge-sheet.

An attempt to commit an offence within its connotative expansion would engulf the intention to commit crime of some act in furtherance of commission and failure to consummate the crime because of certain circumstances. An attempt to commit offence does not cease to be an attempt merely because before actual commission of the offence the offender is able to prevent it by doing some other act in pursuance of a changed intention. If the means adopted by the person are apparently suitable in the fulfilment of the design, the said acts can be regarded as steps in the ladder for the execution of the principal crime.

As alleged in the FIR the petitioner withdrew the earlier order and passed a fresh order after coming to know that a complaint has been lodged before the Lokayukt.

* W. P. No. 2434/98.

Rajendra Kumar Singh v. State, 1998.

What acts would constitute an attempt would depend upon the facts and surrounding circumstances of the case and one may put up his defence explaining his initial steps and withdrawal later on but it cannot be, at the stage, said that order passed on 26.9.97 totally obliterates the liability of attempt. Further explanation would be in the realm of the defence at the appropriate stage.

On scrutinising the FIR and materials so far collected in a studied manner, it is difficult to accept the contention of the learned counsel for the petitioner that the FIR and the materials collected do not disclose an offence in the terms of Section 15 of the Act. May be, the petitioner would be in a position to explain whole situation at the appropriate stage but the facts as exposited do not warrant for quashment of the prosecution on the ground that it does not by any stretch of imagination conceive the concept of attempt in any eventuality.

Whether the allegations constitute an offence under Sections 13 (1) (d), 13 (2) and 15 of Prevention of Corruption Act and Section 120-B of the Indian Penal Code can be agitated by the petitioner at the appropriate stage. It would also depend upon in respect of what offences charge-sheet would be filed.

State of Haryana and others v. *Ch. Bhajan Lal and others* (1); followed.

Krishna Ballabh Sahay v. *Commissioner of Enquiry* (2), *Malkiat Singh and another* v. *State of Punjab* (3) and *Mrs. Rupan Deol Bajaj and another* v. *Kanwar Pal Singh Gill and another* (4); referred to.

Mr. S. C. Datt with *V. K. Tankha* for the petitioner.

S. L. Saxena A.G. for respondent No. 1

S. C. Bagdiya with *Ravindra Shrivastava* for respondent No. 2.

V. S. Shroti for respondents No. 3 and 4.

Cur. adv. vult.

(1) A. I. R. 1992 S.C. 604.
(2) A. I. R. 1969 S.C. 258.

Rajendra Kumar Singh v. State, 1998.

ORDER

DIPAK MISRA, J. - " Awake, Arise, 'O' Partha", Lord Krishna thus commanded Arjun, his chosen 'Sakha' and dearest disciple, during the war of Mahabharata to carry on the crusade against the 'Adharma'. Many a determined and dedicated crusaders have selflessly fought against evil being inspired by their 'Gurus', enthused by their self - professed ideals and some times emboldened by the mandate of the majesty of law which has to rule supreme in every circumstance and on each occasion performing its noble duty of a great leveller. With the aforesaid attitude, tenacity, devotion and consecration respondents No. 3 and 4, namely, the Director General, Special Police Establishment and the Superintendent of Police, Special Police Establishment have drawn an FIR contained in 'Annexure P-26' to this Writ Petition against the present petitioner, the erstwhile Minister of Housing and Environment, Department of State of Madhya Pradesh for offences punishable under sections 13(1) (d) and 13 (2) read with Section 15 of the Prevention of Corruption Act, 1988 (hereinafter referred to as 'the Act'), quashment of which is sought for in this Writ Petition preferred under Article 226 of the Constitution.

It has been submitted in course of hearing by Mr. S.C. Datt, learned senior counsel for the petitioner that it is the honour and the honour alone for which the petitioner has visited this Court for lanceting the uncalled for and unjustified initiation of prosecution and investigation against him. in the backdrop of this submission the question that arises for consideration is whether individual honour would have leverage over the acts done by him in the capacity of a Public trustee in a democratic set up and whether his actions are not to be judged as per the criminal law prevalent in the country. Honour may reign from its own pedestal and one may so proclaim from the pulpit but simultaneously, a public trustee is answerable for every act of his. No one is above law, nor can be allowed to be so. He who holds the power, bears the responsibility. There is no escape. That is the command of law which gives accent conjustice. In the case of *A. R. Antulay* v. *R. S. Nayak and another* (1), Sabyasachi Mukharji, J. (as his Lordship then was) registered his views as under :

(1) A. I. R. 1988 S. C. 1531.

Rajendra Kumar Singh v. State, 1998.

" Yet we must remind ourselves that purity of public life is one of the cardinal principles which must be upheld as a matter of public policy. Allegations of legal infractions and criminal infractions must be investigated in accordance with law and procedure established under the Constitution. Even if he has been wronged, if he is allowed to be left in doubt that would cause more serious damage to the appellant. Public confidence in public administration should not be eroded any further. One wrong cannot be remedied by another wrong."

Earlier in the case of *Krishna Ballabh Sahay* v. *Commissioner of Enquiry* (1), Hidayatullah, C. J. speaking for the Court expressed thus :-

" It hardly needs any authority to state that the enquiry will be ordered not by the Minister against himself but by some one else. When a Minister goes out of office, its successor may consider any glaring charges and may, if justified, order an inquiry. Otherwise, each Ministry will become a law into itself and the corrupt conduct of its Ministers will remain beyond scrutiny."

This being the view of the Apex Court, the petitioner has to justify the quashment on the ground as envisaged in law but not on the ground of individual honour. Honour has to save itself on the foundation established in law.

Before I advert to deal with the factual matrix, it is essential to refer to the law laid down by the Apex Court in relation to quashment of an FIR or investigation by the High Court in exercise of power under Article 226 of the Constitution or Section 482 of the Code of Criminal Procedure. It has been succinctly summarised in the case of *State of Haryana and others* v. *Ch. Bhajan Lal and others* (2), in paragraph 108 which I may profitably reproduce :

" 108. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extra-ordinary power under Article 226 or the inherent powers

(1) A. I. R. 1969 S.C. 258. (2) A. I. R. 1992 S.C. 604.

under Section 482 of the Code which we have extracted and reproduced above, we given the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any Court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.

(1) Where the allegations made in the First Information Report or the complain, even if they are taken at their face value and accepted in their entirety do not *prima facie* constitute any offence or make out a case against the accused.

(2) Where the allegations in the first Information Report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156 (1) of the Code except under an order of a Magistrate within the purview of Section 155 (2) of the Code.

(3) Whether the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155 (2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engraft in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceeding and /or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with *mala fide* and / or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

Similar view was reiterated in the case of *Mrs. Rupan Deol Bajaj and another* v. *Kanwar Pal Singh Gill and another* (1). Thus, if an FIR or the investigation is sought to be quashed it has to succeed on any one of grounds postulated in the decision of *State of Haryana and others (supra)*. I may hasten to add that their Lordship have stated that the grounds enumerated therein are illustrative and not exhaustive. I may note here that in the instant case, Mr. Datt, learned senior counsel for the petitioner has only referred to the foundation / ground predicted under guideline No. 3 and has not proponed on other aspects. Hence, there is; no necessity to search for special features to travel beyond the illustrations. Confining his submission to the aforesaid he has only canvassed that the uncontroverted allegations made in the FIR and the evidence collected so far in support of the same do not disclose commission of any offence and does not make out a case against the petitioner.

Keeping the aforesaid law and the submission of Mr. Datt, I may proceed to state the factual scenario as it emerges from the material brought before this Court. The petitioner was the Minister of the Department of Housing and Environment and took charge on 20.7.96. By that time, the previous Minister, Shri B. R. Yadav had passed an order on 11.8.95 giving certain directions relating to certain land belonging to the Indore Development Authority. The order has a history. Initially an area of 22.56 acres of land belonging to one Smt. Sohan Kumari Shankhla and Shri Ashok Kumar Jain situate in village Bhumori dube was sought to be acquired under the provisions of M. P. Town Improvement Trust, 1960. Smt. Shankhla made an application on 18.5.66 to the Chairman of the then Indore Improvement Trust for release of 5 acres of land out of the aforesaid land for the purpose of construction of a hospital, nursing home and a laboratory for her son Vijay Kumar Jain. The Chairman of the Indore Improvement

(1) A. I. R. 1996 S.C. 309.

Trust by his reply dated. 3.8.66 accepted the request of the land owner on certain terms and conditions which were accepted by the land owner who executed an agreement on 20.8.66. In the said agreement it was specifically mentioned that in the event she contravened any of the conditions imposed by the Trust, the Trust would be entitled to take possession of the said land and construction thereon without payment of any compensation. It was accepted by her that she would commence the construction of the hospital and other related work within six months from the date of approval of the plans by the Trust and complete it within two years. In a letter dated 14.6.72 she expressed her incapability to construct a hospital and requested for allotment of the said land to the members of her family for commercial use. That request was negatived by the Indore Improvement Trust by letter dated 17.7.72 and eventually the land was acquired by notification dated 9.11.73 issued under Section 71 (1) of M. P. Town Improvement Trust Act by virtue of which the land vested in the Trust being free from all encumbrances. Actual physical possession of the land was taken on 4.4.75. In the meantime, Indore Development Authority (hereinafter referred to as 'Authority') was constituted under the provisions of M. P. Nagar Tatha Gram Nivesh Adhiniyam, 1973 (in short the 'Adhiniyam')and all assets and liabilities of the Trust vested with the Authority. It is relevant to state here that challenging the aforesaid action a civil suit was filed for grant of injunction before the competent court at Indore but the prayer for injunction was rejected. Appeal preferred by Smt. Sohan Kumari Shankhla did not meet with success. Thereafter, a writ petition forming the subject-matter of W.P. No. 1181/88 was filed in the High Court at Indore Bench. During the pendency of the said writ petition Mr. Ashok Kumar Jain s/o Smt. Sohan Kumari Shankhla moved an application on 6.3.95 before the then Minister Shri B. R. Yadav for release of the said land from the scheme No. 54. Shri Yadav called for comments from the Indore Development Authority. The Chief Executive Officer of the Authority after narrating the events in a chronological manner clearly stated that the land in scheme No. 54 had been developed and the plots had been allotted and it was not possible to release the land in question from the scheme. Another application was filed on 27.4.95 indicating that there was no document cancelling the earlier agreement dated 20.6.66. Shri Yadav

wanted that he should be apprised of the facts and accordingly the Additional Secretary, Shri R. D. Ahirwar apprised him on 18.7.95 that it was a disputed matter being subjudice and, therefore, it was not proper to pass any order in the matter. Thereafter on 20.7.95 Shri Yadav directed that excluding the lands which are already allotted to Srikrishna Tea Association, the land available in the scheme or the other land available in the adjoining scheme be allotted to the applicant on a no profit no loss basis and the matter may be disposed of by entering into agreement with the by the applicant by the Indore Development Authority. In view of this backdrop, letter No. 5019/M/32/95, dated 11.8.95 was communicated by the Additional Secretary to the Chief Executive Officer of Indore Development Authority. The relevant portion of the said letter has been brought on record as 'Annexure P-2', which reads as follows :-

" प्रश्नाधीन सात एकड़ भूमि से पांच एकड़ भूमि हास्पिटल व अन्य संबंधित उपयोग के लिये योजना से मुक्त की गई थी। जिस बावत भूमि स्वामी एवं सुधार न्यास के मध्य लिखित अनुबंध दिनांक 20.08.66 को हुआ था। इस लिखित अनुबंध के निरस्ती बावत् कोई निरस्तीकरण लेख निष्पादित होना नहीं मापा जाता है। यह अनुबंध लेख प्राधिकारी पर बन्धकारक है। बिना विधिवत् निरस्ती के इस भूमि के भू - खण्ड आवंटित नहीं किये जाने चाहिये था। इन्दौर मास्टर प्लान में प्रश्नाधीन भूमि का निर्धारित उपयोग वाणिज्यिक है। जिसमें हॉस्पिटल नहीं बनाया जा सकता, ऐसी दशा में इस पांच एकड़ भूमि का मास्टर प्लान अनुसार स्वीकार्य उपयोग ही भूमि स्वामी कर सकते हैं। अतः विकास योजना के अनुरूप आवेदक की भूमि भी योजना से मुक्त की जाना न्यायोचित होगा।"

" यह प्रकरण वर्षों से लंबित है। अतः इसके निराकरण का यह विकल्प प्रतीत होता है, कि इन्दौर विकास प्राधिकरण में अब अध्यक्ष/सदस्यों की नियुक्ति हो गई है, अतः यह उचित होगा कि उनके समक्ष यह प्रकरण प्रस्तुत किया जाय, यदि आवेदक/भूमि स्वामी इस बात के लिए तैयार हों कि उनकी सात एकड़ भूमि से जितनी भूमि आज तक चाय व्यापारी एशोसिएशन और थोक किराना व्यापारी एशोसिएशन के सदस्यों को आवंटित कर दी गई है, उसे छोड़कर सारे विवाद समाप्त कर लें व शेष बची भूमि से लें और आवंटन से प्रभावित भूमि के क्षेत्रफल के बराबर क्षेत्रफल की भूमि इसी योजना में और यदि इसमें उपलब्ध न हों तो, उसके आस-पास की योजना में न लाभ न हानि के आधार पर ले लें, तो तद्नुसार इन्दौर विकास प्राधिकारी आवेदक/

भूमि स्वामी से इस प्रकार लिखित अनुबंध करके व तद्नुसार समझौता करके इस प्रकरण व विवाद का निराकरण करें।"

After issuance of the aforesaid order, Shri Ashok Kumar Jain filed an application in the pending Writ Petition No. 1181/88. The Court by order dated 13.5.96 directed the Authority to take a decision in pursuance of the letter dtd. 11.8.95 in accordance with law within a period of two months from the date of receipt of the order passed by the Court. After disposal of the case by the High Court the landowner by his letter dated 17.7.96 requested for taking immediate steps to transfer 3.18 acres of land in favour of their nominees and to allot the rest of the land i.e. 4.13 acres to be allotted to them. However, in the meantime, the present petitioner who had assumed the charge of the Minister by then by letter dated 16.6.96 passed an order staying release of the land in question. In the meantime, the landowners filed Writ Petition No. 1437/96 and Contempt Petition No. 47/96. The Authority brought this aspect to the notice of the State Government, and eventually Shri Ahirwar proposed to vacate the said order passed by the Government. The petitioner did not agree to vacate the stay and directed that the High Court be apprised of the facts and requested for extension of time to enable the Government to take a decision in the matter. However, on 20.2.97 the petitioner vacated the order of stay and issued certain directions. The said order was communicated to the Authority by letter dated 24.2.97. The notesheet giving rise to the ultimate order has been brought on record as 'Annexure P-12' and the communication as 'Annexure P-13'. The relevant portion of the said order reads as follows :-

" इन्दौर विकास प्राधिकरण एवं श्री अशोक कुमार जैन पक्षकारों की सुनवाई करने पर प्रकरण का समग्र रूप से परीक्षण करने के पश्चात् पत्र क्रमांक2/स्टेनो 232296, दिनांक 13.9.96 के द्वारा दिये गये स्थगन को निरस्त किया जाता है। साथ ही इन्दौर विकास प्राधिकरण को यह भी निर्देश दिये जाते हैं कि शासन के पत्र क्रमांक 5019/एम/96/32/95, दिनांक 11 अगस्त 1995 एवं संशोधन पत्र दिनांक 30/9/95 के द्वारा दिये गये सुझाव/निर्देश के परिप्रेक्ष्य में प्राधिकरण द्वारा पक्षकारों के साथ दिनांक 12 जुलाई, 1996 के द्वारा किये गये पत्राचार एवं पक्षकारों द्वारा प्रस्तुत पत्र

दिनांक 17.7.96 को ध्यान में रखते हुए ही अपने स्तर से दिनांक 28.2.97 तक नियमानुसार पालन किया जाकर माननीय उच्च न्यायालय एवं शासन को सूचित किया जाय।"

After the receipt of the said letter the Authority informed the petitioner that decision has to be taken in the Board meeting scheduled to be held on 12.3.97. On receipt of this letter Shri Ahirwar, Additional Secretary put up a note that there should not be any delay in compliance after the Government's clear order and this case need not be placed before any Samiti or Board Meeting. The aforesaid proposal was put up before the present petitioner who accepted the proposal and accordingly the letter dated 5.3.97 was issued. The relevant portion of the said letter reads as follows :

" माननीय उच्च न्यायालय की इन्दौर खण्डपीठ के समक्ष प्रस्तुत याचिका क्र. 1181.88, 1437/96, एवं 47/96 के परिप्रेक्ष्य में राज्य शासन द्वारा दिनांक 24.2.97 को इन्दौर विकास प्राधिकरण को उचित निर्देश दिये जा चुके हैं। पुनः धारा 52, धारा 72 एवं धारा 73 "मध्यप्रदेश नगर तथा ग्राम निवेश अधिनियम 1973" के अन्तर्गत निर्देश दिये जाते हैं और स्पष्ट किया जाता है कि इस प्रकरण को प्राधिकरण की किसी समिति अथवा बोर्ड के समक्ष न रखा जाकर शासन के निर्देश/आदेश दिनांक 11.8.95, 30.9.95 एवं 24.2.97 के अनुसार प्रश्नाधीन भूमि के संबंध में इन्दौर विकास प्राधिकरण द्वारा दिनांक 12.7.96 के पत्र के द्वारा पक्षकारों को किये गये प्रस्ताव (ऑफर) व पक्षकारों द्वारा उनके पत्र दिनांक 17.7.96 के द्वारा प्रस्तुत की गयी सहमति के आधार पर ही भूमि मुक्ति/भूमि आवंटन के आदेश8:3.97 तक जारी किये जाये और माननीय उच्च न्यायालय को तथा शासन को सूचित किया जाय।"

After the aforesaid order, there was further correspondence by the Authority indicating that there was no provision for allotment of developed land by the Authority under the prevalent law and guidance was sought from the Government. On the basis of the communication made by the Authority the Additional Secretary put up a note on 20.3.97 indicating that unnecessary correspondence was made by the Authority. Eventually the petitioner approved the note on 31.3.97. However, before that communication was sent on 20.3.97

to allot the plots comprising an area of 7.50 acres to the applicants, his family members and his nominated persons. When the matter stood thus, the petitioner by letter dated 26.9.97 cancelled the order dated 20.3.97 mentioning that it was not in public interest. A copy of this order was communicated to the landlord and a copy thereof was sent to the Legal Advisor, Lokayukt Office. It is relevant to state here, by the time this order was passed, the Lokayukt, on the basis of a complaint made, had proceeded to cause an inquiry into the matter. It is alleged in the writ petition that because of the aforesaid situation an FIR was drawn up and investigation has commenced. It is highlighted in the writ petition that the petitioner had passed orders as he understood the factual aspects but after he came to know about the real facts he passed the order dated 17.9.97 by recalling the earlier order. It is putforth that the FIR even if accepted in its entirety does not disclose any offence and, therefore, the said FIR warrants interference by this Court at this stage and the quashment of the prosecution would be in the interest of justice. It is also pleaded in the writ petition that the petitioner had passed the orders on the basis of the concurrence given by Secretary, Rakesh Sahni, who was responsible for ensuring factual and legal correctness of the proposal. It is also stated therein that the petitioner had to pass the order contained in 'Annexure P-10'. dated 24.2.97 as a contempt proceeding was initiated by the landholder in the High Court and the said Contempt Petition forming the subject - matter of MCC No. 47/96 was only dismissed on 3.6.97 on the basis of the orders passed on 24.2.97 and 5.3.97. It is also highlighted that in Writ Petition No. 1437/97 the High Court also took note of the order passed on 24.2.97 and 5.3.97 and observed that nothing survived in the petition as the respondents agreed to implement the directions already given therein. In pursuance of the aforesaid orders the Indore Development Authority by letter dated 14.3.97 sought guidance from the State Government on two aspects, namely, whether developed plots equivalent to an area of 7.50 acres be allotted or only 50% i.e. 3.75 acres of developed land be allotted and whether the plots be allotted to the family members and legal representatives. This gave rise to the order passed on 31.3.97. It has also averred in the Writ Petition that a public interest litigation

forming the subject - matter of Writ Petition No. 511/97 came to be filed before the Indore Bench challenging the letter dated 23.3.97 and the High Court by order dated 31.3.97 directed for maintenance of *status quo* by all parties. The contents of the public interest litigation came to the knowledge of the petitioner in August, 1997 whereafter he reviewed the whole matter and came to realise that Shri Ahirwar had unauthorisedly issued the letter dated 20.3.97 and taken *ex-post facto* approval on 31.3.97.

But he could not cancel the earlier order in view of the order of *status quo* in existence. The order of *status quo* was vacated on 21.8.97. The petitioner who was on foreign tour, after his return passed the order on 17.9.97 which was communicated on 26.9.97. In this background it is submitted that by no stretch of imagination it can be held that the allegations in the FIR or the material on record constitute the alleged offences or any offence for that matter.

In pursuance of the notice to show cause, Mr. Shroti, learned counsel for the respondents No. 3 and 4 has entered appearance and produced the materials collected during investigation. At the request of this Court he has submitted the FIR duly translated in English. The Authority has also entered appearance and filed its counter affidavit indicating chronology of events. A statement was made on behalf of the State before this Court on 24.6.98 by the learned Advocate General that the State Government has been unnecessarily impleaded as a respondent.

Mr. Datt, learned senior counsel for the petitioner assailing the initiation of criminal prosecution has contended that the allegation in the FIR and the materials on record do not constitute the alleged offences under Sections 13 (1)(d) and 15 of the Act as well as under Section 120-B of the Indian Penal Code nor do they make out any offence against the petitioner. In support of his submission he has referred to the FIR in extenso and proponed that accepting the FIR on the face value the basic ingredient to constitute the alleged offences are absent. It is also his submission that the concept of attempt as has been envisaged under Section 15 of the Act is not attracted by any stretch of imagination. It is further contended

by him as the order passed by the petitioner has not been given effect to and cancelled before it was carried out, and he has rectified the mistake and passed different order, question of obtainment of pecuniary advantage for himself or for any other person does not arise. He has further built up his argument by contending that the attempt in its connotative sweep would engulf the intention of criminality and in absence of the same no offence is conceivable. To substantiate his contention he has placed reliance on the decisions rendered in the cases of *Major S. K. Kale* v. *State of Maharashtra* (1), *S. P. Bhatnagar and another* v. *State of Maharashtra* (2), *State of U. P. and another* v. *R. K. Shrivastava and others* (3), *Abhayanand Mishra* v. *State of Bihar* (4), *State of Maharashtra* v. *Mohd. Yakub and others* (5) and *Delhi Development Authority* v. *Skipper Construction and another* (6).

He has also pyramided his submission by referring to Sections 81 and 82 of the M. P. Nagar Tatha Gram Nivesh Adhiniyam, 1973 and judgment delivered by the Division Bench at Indore in Contempt Petition No. 69/98 on 24.6.98 to highlight that this Court had given the stamp of approval by holding that the State Government has the authority to modify the scheme under the aforesaid 'Adhiniyam' and release of land would come within the said power and, therefore, the act of the petitioner cannot make him liable for prosecution, and hence the FIR as well as consequential investigation there of incur the liability of quashment.

Resisting the aforesaid submission Mr. Shroti, learned counsel for the respondents No. 3 and 4, has submitted that the FIR discloses a *prima facie* case against the petitioner in pursuance of which the investigation has been launched and it is almost complete. Apart from referring to the FIR he has also referred to the statements of some witnesses, namely, Shri Rakesh Sahni, the then Principal Secretary, Shri Sujit Kumar, Dy. Secretary and Shri Dinesh Kumar Shrivastava, Chief Executive Officer of the Indore Development Authority. He has also putforth that other witnesses have implicated the petitioner. It is his submission that the materials on record disclose the alleged offences against the petitioner. To

(1) A. I. R. 1977 S. C. 822.
(2) 1979 Cr. L. J. 566.
(3) A. I. R. 1989 S.C. 2222.
(4) A. I. R. 1961 S.C. 1698.
(5) A. I. R. 1980 S.C. 1111.
(6) (1996) 1 S.C.C. 272.

substantiate his submission he has commended this Court to the decisions rendered in the cases of *Smt. Rajbala and another* v. *Deputy Director of Education and another* (1) and *Union of India and others* v. *B. R. Bajaj and another* (2).

Mr. S. L. Saxena, learned Advocate General for the State has fairly submitted that the State has been unnecessarily impleaded. However, at the request of the Court he has made his submissions with regard to concept of 'attempt' in the light of Section 15 of the Act. Submission of Mr. Saxena is that Section 13 (1) (d) and Section 15 should be read conjointly to understand the meaning and purport of the word 'attempt' as has been used by the legislature. It is canvassed by him that an offence as enjoined under Section 15 of the Act is not complete unless the penultimate act is done and that too in quite proximate. He has referred to the decisions rendered in the cases of *Malkiat Singh and another* v. *State of Punjab*(3), *Mohd. Yakub (supra)*; *Kartar Singh* v. *State of Punjab* (4) and *Hope* v. *Brown* (5). He has referred to Halsbury's Laws of England Vol. 11, Para 64. He has also referred to 'Word and Phrases' Vol. 4-A.

Mr. Bagadiya, learned counsel for the Indore Development Authority while referring the counter affidavit for the purpose of chronology has also submitted that the Authority had initially refused to release the land in favour of the owners but it is bound by the decision of the Government. It is his further submission that the release in favour of the owners and their nominees is absolutely unjustified and unwarranted and not in public interest.

To appreciate the rival submission raised at the Bar i.e. whether the FIR and materials collected so far indicates any cognizable offence against the petitioner, I may refer to the relevant portion of the FIR, the English translation of which has been filed today. It read as under :

> " The alleged agreement dtd. 20.8.66 for release of 5 acres of land for construction of Nursing home (hospital) stood cancelled when Lt. Smt. Sohan Kumari expressed her inability to construct the hospital in terms of

(1) A. I. R. 1993 S. C. 249.
(2) A. I. R. 1994 S. C. 1256.
(3) A. I. R. 1970 S. C. 713.
(4) A. I. R. 1961 S. C. 1787.
(5) (1954) All E. R. 330.

the said agreement and in any case, the said agreement extinguished when the entire land vested in the Trust and the main basis of the release of land in such a situation. This fact is also important that most of the land was developed by the Authority as per IDA's letter dtd. 1.4.95. Thus, it was directed to give developed land in place of undeveloped land. The State Government is empowered to give direction under Section 52 of the "Nivesh Adhiniyam" in public interest only. Shri Yadav's direction was not in the public interest and it was mentioned in the order also. When IDA did not take any action on State Government's letter dtd. 11.8.95 Shri Ashok Kumar Jain filed an application in the pending writ petition No. 1181/88 in Indore Bench of High Court. The High Court, therefore, passed the order on 13.5.96 itself which says : Clearly the High Court directed to take a decision in accordance with law but not to comply the Government letter dtd. 11.8.95 blindly. The Law Officer of IDA had already addressed a letter dtd. 12.7.96 to Ashok Kumar Jain stating the available plots in scheme No. 54 and asked for their consent for settlement of dispute as per Government order dtd. 11.8.95 issued in pursuance of the order passed by Shri B. R. Yadav. The said applicants gave their consent in letter dt. 15.7.96.

The applicant requested in a letter dtd. 17.7.96 that immediate steps be taken to transfer 3.18 acres of land, mentioned in IDA letter dtd. 12.7.96, in their favour, or their family members or in favour of their nominees and with regard to rest of 4.32 acres of land, a list of those plots in scheme No. 54 be furnished which have not been allotted to anyone so that they can be allotted to them. Shri Ashok Kumar Jain made the above proposal mischievously with dubious intentions.

The motive behind the said demand for release in favour of their nominees was to evade the provisions of Urban Land (Ceiling and Regulation) Act, 1976 under which the maximum permissible limit for the city of Indore was only 1500 Sq. Mts. Apart from that it is an undisputed fact that after the development of land the actual area for allotment in the form of plots is reduced almost to half because half of

the land has to be utilised for providing civic aminities, like streets, drainage, park and playgrounds etc. In view of these facts the release 7.50 acres of developed land would amount to 15 acres and the illegal benefits to Shri Ashok Kumar Jain is clear in itself.

Shri Ashok Kumar Jain filed a contempt petition No. 47/96 in Hon. High Court against Shri R. D. Ahirwar. Shri Ahirwar proposed to vacate the Government stay order to the Minister Shri Rajendra Kumar Singh. Shri Singh did not agree to vacate the stay and directed that the High Court be appraised of all the facts and requested for extension of time to enable the Government to take decision in the matter. However, on 20.2.97 the Minister Shri Rajendra Kumar Singh heard the parties and gave direction contrary to his previous correct view - " The Government stayed temporarily the execution of order dtd. 11.8.95 till the hearing of parties. Now the hearing of parties is over. Therefore, keeping in view the Hon. High Court's direction the stay order of Government dt. 13.9.96 is cancelled. It is also directed to Indore Development Authority that the appropriate decision shall be taken keeping in view the Government's directions/suggestions dtd. 11.8.95, amended letter 30.9.95 and parties consent dtd. 17.7.96 on IDA's letter 12.7.96 and report compliance to Hon. High Court and the Government. The case should be disposed of by 28.2.97". The above direction of the Minister was conveyed to the Chief Executive Officer, Indore Development Authority in a letter No. 1546/32/97 dtd. 24.2.97. In compliance of this the Authority informed by a letter dtd. 26.2.97 that the decision has to be taken in the Board Meeting scheduled for 12.3.97. On this, Additional Secretary, Mr. Ahirwar put up a note that there should not be any delay in compliance after the Government's clear order and this case need not be placed before any Samiti or Board Meeting. Only the Government order/direction should be complied with. The above proposal was put up before the Environment Minister, Mr. Rajendra Kumar Singh by Shri Rakesh Sahni, Secretary, Environment Department and a letter No. 1883/32/97 dtd. 5.3.97 was sent to the Authority mentioning that this case need not be placed

before any Samiti or Board Meeting but according to the order of the Government the release/allotment order be issued by 8.3.97. The Authority in its letter No. 587 dtd. 14.3.97 wrote to the Secretary, Environment that the applicant's land survey Nos. 257 and 259 of village Bamhori Dube falling in scheme No. 54 of the Authority was undeveloped in the beginning. Whenever, land is developed and development takes on undeveloped land then 50% of area is available for plots after making provisions for roads, park, parking and other aminities. It is also written that there is no provision for allotment of undeveloped land by the Authority under the prevailing laws (Vyayan Adhiniyam, 1957) in IDA. It is also written that the Authority can allot any land/plot on lease. Along with this guidance was sought from the Government, whether the applicant's be allotted fully developed equal to 7.50 acres land as per the government's direction on a no profit no loss basis or plots equal to 3.75 acres of fully developed area on the above basis and also whether the plots can be allotted to applicant's relatives or persons nominated by them.

On this letter Sri R. D. Ahirwar put up a note on 20.3.97 saying that unnecessary correspondence shows the deliberate delay in the case. The directions given earlier should be complied with by the Authority. This file was put up before the Minister Sri Rajendra Kumar Singh through Sri Rakesh Sahni, Secretary. It was approved by him on 31.3.97. Before that Sri Ahirwar directed the Authority in a letter dtd. 20.3.97 to allot the plots comprising an area of 7.5 acres to applicant, his family members and his nominated persons.

The present value of the plots selected by Shri Ashok Kumar Jain and others, according to the assessment of Indore Development Authority is approximately Rs.13,23,80,282/- (Rupees Thirteen Crores Twenty Three Lakhs Eighty Thousand Two Hundred Eighty Two only). @ 4,360/- per Sq. Mtr. for 7.50 acres. According to the

information furnished by the Deputy Registrar, Indore, on 10.10.97 some plots have more commercial value being located on Meghdut Garden Road closed to A.B. Road, their price may be 15% more i.e. Rs.61,94,688/- more. Therefore, the minimum value of the above plots is Rs. 13,85,74, 970/- (Rupees Thirteen Crores Eighty Five Lakhs Seventy Four Thousand Nine Hundred and Seventy only). These plots were proposed to be transferred on no profit no loss basis @ Rs. 32/- per square feet as development charges and Rs. 2/- per square feet as compensation. Thus, @ Rs. 34/- per square feet, the value of these plots is only Rs. 1,11,07,800/- (Rupees One Crores Eleven Lakhs Seven Thousand and Eight Hundred only). The Government directed to give the plots at this low rate. Environment Department, M. P. Government vide its order No. 6672/97/32 dtd. 26.9.97 cancelled the earlier order No. 2364/ 32/97 dtd. 20/3/97 mentioning that it is not in a public interest. The reality is that the order dtd. 26.9.97 is issued in as a defence against any action by the enquiry of Lokayukt Organisation. The order dtd. 24 February, 1997 and 5.3.97 are not amended in this letter."

I may now profitably refer to the relevant portion of the statements of the witnesses. Shri Rakesh Sahni in his statement has stated so :

" नोटशीट पृ.44, 45 पर दिनांक 20.02.1997 को श्री आर. डी. अहिरवार, तत्कालीन अतिरिक्त सचिव, द्वारा अंकित टीप वस्तुत: प्रकरण में पक्षकारों की सुनवाई कर मंत्री जी द्वारा दिये गये आदेश का अभिलेख है । मेरे समक्ष माननीय मंत्री जी के अनुमोदनार्थ कार्यवाही टीप प्रस्तुत होने पर मैने दिनांक21.02.1997 को हस्ताक्षर कर माननीय पर्यावरण मंत्री श्री राजेन्द्र सिंहजी की ओर नस्ती अग्रेषित कर दी थी । नोटशीट पृ. 45 पर दिनांक 21.02.1997 को मेरे हस्ताक्षर हैं । माननीय मंत्री श्री राजेन्द्र कुमार सिंह द्वारा दिनांक 24.02.1997 को हस्ताक्षर कर श्री आर. डी. अहिरवार द्वारा दिनांक 20.02.1997 को प्रस्तुत कार्यवाही टीप को अनुमोदित किया गया, नोटशीट पृ45 पर माननीय मंत्री श्री राजेन्द्र कुमार सिंह के हस्ताक्षर हैं । दिनांक 20.02.1997 को श्री अहिरवार द्वारा अंकित टीप में मान. मंत्री श्री राजेन्द्र सिंह द्वारा पक्षकारों की सुनवाई के उपरांत दिये गये निर्देशों का विवरण दिया गया है । चूंकि निर्देश आदेश

के स्वरूप में सुनवाई के पश्चात दिये गये, इसलिए मेरे द्वारा श्री अहिरवार की टीप को अग्रेषित करते समय किसी प्रकार का परिवर्तन अथवा परिवर्तन सुझाना उचित नहीं समझा, इसलिए मैंने श्री अहिरवार द्वारा अंकित सुनवाई कार्यवाही या मंत्रीजी के निर्देशों अनुमोदनार्थ अग्रेषित कर दिया। माननीय मंत्री श्री राजेन्द्र सिंह द्वारा सुनवाई करके न्यायालय जैसे ही आदेश हेतु निर्णय लिया गया था, इसलिए पुनर्विचार की बात मेरे द्वारा नहीं लिखी गयी। यदि माननीय मंत्री जी द्वारा पक्षकारों को मौखिक रूप से सुनने के पश्चात निर्णय लेकर आदेश नहीं दि ए जाते तो विभागीय सचिव होने की हैसियत से मैं नस्ती पर पुनर्विचार हेतु अपनी टीप लिखता।"

" ..... श्री आर. डी. अहिरवार द्वारा दिनांक 20.03.1997 की टीप में अंकित बिन्दुओं पर मेरे द्वारा कोई आपत्ति इसलिए नहीं उठाई गयी थी, क्योंकि यह टीप माननीय मंत्री पर्यावरण विभाग श्री राजेन्द्र कुमार सिंह द्वारा पक्षकारों की सुनवाई दिनांक 20.02.97 के पश्चात् जारी आदेश के परिपेक्ष्य में प्राधिकरण द्वारा उठाये गये प्रश्नों और पूर्व विचार के प्रकाश में ही श्री अहिरवार की टीप परिलक्षित होती है। इस संबंध में जो भी विचार आवश्यक था, वह माननीय मंत्री पर्यावरण श्री राजेन्द्र कुमार सिंह जी के स्तर पर ही होना था, और तद्नुसार माननीय श्री राजेन्द्र सिंह जी के द्वारा अनुमोदित कर आदेश भी दिये गये।"

The relevant portion of statement of Sri Sunil Kumar reads as under :

" ..... आवास एवं पर्यावरण विभाग की नस्ती श्री ए. के. जैन आदि की भूमि इन्दौर विकास प्राधिकरण की योजना क्रमांक 54से मुक्त करने बाबद से संबंधित नोटशीट के पृ. क्र.7 पर दिनांक 18.09.97 को उप - सचिव की हैसियत से मैंने नस्ती को अग्रेषित करते हुए हस्ताक्षर किये हैं। दिनांक 18.09.97 को उक्त नस्ती मेरे पास श्री पी. एस. राजपूत अवर सचिव, के दिनांक 18.09.97 को अंकित नोट इस आशय का (कंडिका -5) कि प्राधिकरण के उपरोक्त पत्र दिनांक 14.03.97 द्वारा मांगा गया मार्गदर्शन विभाग के पत्र दिनांक 20.03.97 द्वारा दिया गया। जो मार्गदर्शन दिया गया उसमें प्रथम दर्शन में ही यह स्पष्ट होता है, कि आवेदक / भूमि स्वामी गण को अधिकतम लाभ हो इस बात पर भी ध्यान केंद्रित रखा गया है, परोक्ष रूप से यह भी कहा जा सकता है कि जो मार्गदर्शन विभागीय पत्र दिनांक 20.03.97 द्वारा दिया गया है, वह इंदौर विकास प्राधिकरण (शासन) के लिये अत्यधिक हानि पहुंचाने वाला है।"

Shri Dinesh Shrivastava has implicated the petitioner in the following manner :-

"..... दिनांक 06.12.96 को तत्कालीन मंत्री श्री राजेन्द्र कुमार सिंह, वाणिज्य उद्योग एवं पर्यावरण ने मुझे दूरभाष पर निर्देशित किया था कि श्री आर. डी. अहिरवार के विरूद्ध माननीय उच्च न्यायालय की इन्दौर खण्डपीठ में श्री अशोक जैन वगैरह के प्रकरण से लंबित मानहानि याचिका आदि के संबंध में श्री रोहित आर्या, एडवोकेट से चर्चा करने के लिए मैं इन्दौर चला जाऊं, क्योंकि श्री रोहित आर्या कल इन्दौर में रहेंगे। वैसे श्री रोहित आर्या, जबलपुर में रहते हैं। मैंने मंत्री श्री राजेन्द्र कुमार जी से कहा कि मानहानि का प्रकरण सीधे - श्री अहिरवार से संबंधित है, इसलिए मैं जबाब फाईल नहीं कर सकूंगा। इसके साथ ही मैं अन्य किसी प्रकरण में भी प्रभारी अधिकारी नहीं हूँ। श्री रोहित आर्या, एडवोकेट को भी शासन ने शासन की ओर से प्रतिरक्षित हेतु अभी (उस दिनांक तक वकील नियुक्त नहीं किया है, अतः मुझे इन्दौर नहीं भेजा जावे। साथ ही यह भी निवेदन किया कि प्रकरण कल, अर्थात दिनांक 07.12.96 के लिए सुनवाई हेतु नियत भी नहीं है। इन तथ्यों को माननीय मंत्री श्री राजेन्द्र कुमार जी की जानकारी में लाने के बाद भी उन्होंने मुझे इन्दौर जाने के लिए निर्देश दिए।

श्री आर. डी. अहिरवार, तत्कालीन अतिरिक्त सचिव, की टीप दिनांक 20.03.97 (नोटशीट पृ. क्र.55) का अनुमोदन माननीय मंत्री श्री राजेन्द्र सिंह जी द्वारा दिनांक 31.03.97 को किया गया था। (नोट शीट पृ. क्र.55) यह नस्ती एम. 96/32/95 मेरे पास दिनांक 04.04.97 को लौट कर आयी थी, इस कारण 20.03.97 के प्रस्ताव के अनुसार इं. वि. प्रा. को लिखा जाने वाला पत्र दिनांक 04.04.97 के बाद ही लिखा जा सकना संभव था, इसलिए मैंने उसी दिन अनुभाग/शाखा में पदस्थ लिपिक श्री पटेल को दिनांक 20.03.97 को श्री आर. डी. अहिरवार द्वारा प्रस्तुत प्रस्ताव तथा माननीय मंत्री श्री राजेन्द्र कुमार सिंह के द्वारा अनुमोदित किए जाने के अनुसार प्रारूप पत्र तैयार करने का निर्देश दिनांक 04.04.97 को दिया था।....."

The seminal question that falls for consideration is whether the allegations, as stated above, disclose any offence. As submitted by Mr. Datt, learned counsel for the petitioner, no pecuniary advantage has been obtained by the petitioner for himself or for any other third party. It is also submitted by him that there has been no

intention on the part of the petitioner. At this juncture, it is worthwhile to refer to Sections 13 (1) (d) and 15 of the Act, which reads as under :-

13. Criminal misconduct by a public servant -

(1) A public servant is said to commit the offence of criminal misconduct -

(d) if he -

(i) by corrupt or illegal means, obtains for himself or for any other person any valuable thing or pecuniary advantage ; or

(ii) by abusing his position as a public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage ; or

(iii) while holding office as public servant, obtains for any person any valuable thing or pecuniary advantage without any public interest ; or

15. Punishment for attempt - Whoever attempts to commit an offence referred to in Cl. (c) or Cl. (d) or sub - section (1) of Sec. 13 shall be punishable with imprisonment for a term which may extend to three years and with fine."

Submission of Mr. Datt, is that the factual matrix does not in any way indicate that the petitioner has obtained any benefits for himself or any other person. As far as attempt is concerned, it is his submission that an attempt to commit an offence can only take place if there has been preparation and intention to commit such an offence. It has been vehemently urged by him that there is no material on record that the petitioner had any dishonest intention in passing the relevant orders. It is also submitted by him that the allegation of attempt collapses inasmuch as by letter dated 26.9.97, all other previous orders have been withdrawn. As far as intention is concerned, it is a state of mind. It is not always a perceptible fact in the world of phenomena and some times has to be gathered from the surrounding circumstances. In this context, I may usefully refer to the observation of the Apex Court in the case of *Mrs. Rupan Deol Bajaj and another* v. *Kanwar Pal Singh Gill and another* (1) which reads as under :

(1) A. I. R. 1996 S. C. 309.

Rajendra Kumar Singh v. State, 1998.

" It is undoubtedly correct that if intention or knowledge is one of the ingredients of any offence, it has got to be proved like other ingredients for convicting a person. But, it is also equally true that those ingredients being states of mind may not be proved by direct evidence and may have to be inferred from the attending circumstances of a given case."

In view of the aforesaid and on consideration of various orders passed by the petitioner and reiteration by him by order dated 24.2.97 directing the Indore Development Authority to accept the proposal of the land owner dt. 17.7.96 claiming the developed plots in the name of the nominees and the ultimate order passed on 31.3.97 approving the proposal on the notesheet cannot be said, at this stage, that there was total absence of intention. May be the petitioner would be in a position to explain it at the appropriate stage but at present this Court is not in a position to opine that there was no intention at the time of passing of the orders.

It is next contended by Mr. Datt that the materials on record do not indicate any kind of 'attempt'. He has referred to Kenny's Outlines of "Criminal Law'. He has also placed heavy reliance on the cases of *Union of India and another* v. *Major J. S. Khanna* (1), *S. P. Bhatnagar's case (supra)* and *R. K. Shrivastava's case (supra)*. He has also referred to Black's Law Dictionary in this respect. Submission of the learned senior counsel is that entire scenario does not even feebly reflect any aspect of '*actus reus*' by the petitioner. In this regard, Mr. Saxena, learned Advocate General has also canvassed that it is the penultimate act which constitutes an attempt to commit an offence. Learned Advocate General has highlighted that if there is withdrawal at the last moment there is incompleteness and it falls short of attempt. It is well known in criminal jurisprudence that intention to commit an offence is a direction to conduct towards the object chosen upon considering the motive which suggests the choice (see Stephen's " General View of the Criminal Law of England", page 69, Second Edition). I may also refer to Halsbury's Laws of England Vol. 11, page 64, the relevant portion reads as follows :

(1) 1972 Cr. L. J. 849.

" An attempt is any overt act immediately connected with the commission of an offence and forming part of a series of acts which, if not interrupted or frustrated or abandoned, would result in the commission of the completed offence. Acts remotely leading towards the commission of an offence cannot constitute an attempt ; the acts must the immediately connected with the offence. An act done preparatory to the commission of an offence is not sufficiently proximate ; and it is not an attempt merely to procure materials with which to commit the offence."

An attempt to commit an offence within its connotative expansion would engulf the intention to commit crime of some act in furtherance of commission and failure to consummate the crime because of certain circumstances. An attempt is to commit offence does not cease to be an attempt merely because before actual commission of the offence the offender is able to prevent it by doing some other act in pursuance of a changed intention. If the means adopted by the person are apparently suitable in the fulfilment of the design, the said acts can be regarded as steps in the ladder for the execution of the principal crime. In this context, I may profitably refer to the views registered by the Apex Court in the case of *Mohd. Yakub Khan and others (supra)*, wherein R. S. Sarkaria, J and O. Chinnapa Reddy, J in different judgments expressed as under :

" Per Sarkaria, J - What constitutes an 'attempt' is a mixed question of law and fact depending largely on the circumstances of the particular case. "Attempt" defies a precise and exact definition. Broadly speaking all crimes which consist of the commission of affirmative acts are preceded by some covert or overt conduct which may be divided into three stages. The first stage exists when the culprit first entertains the idea or intention to commit an offence. In the second stage, he makes preparations to commit it. The third stage is reached when the culprit takes deliberate overt steps to commit the offence. Such overtact or step in order to be 'criminal' need not be the penultimate act towards the commission of the offence. It is sufficient if such act or acts were deliberately done, and manifest a clear intention to commit the offence aimed, being reasonably proximate to the consummation of the offence.

" Per Chinnapa Reddy , J - In order to constitute 'an attempt', first, there must be an intention to commit a particular offence, second, some act must have been done which would necessarily have to be done towards the commission of the offence, and, third, such act must be 'proximate' to the intended result. The measure of proximity is not in relation to time and action but in relation to intention. In other words, the act must reveal, with reasonable certainty, in conjunction with other facts and circumstances and not necessarily in isolation an intention, as distinguished from a mere desire or object to commit the particular offence, though the act by itself may be merely suggestive or indicative of such intention, but, that it must be, that is, it must be indicative or suggestive of the intention. In the instant case the fact that the truck was driven upto a lonely creek from where the silver could be transferred into a sea-faring vessel was suggestive or indicative though not conclusive, that the accused wanted to export the silver. It might have been open to the accused to plead that the silver was not to be exported but only to be transported in the course on inter-coastal trade. But, the circumstances that all this was done in a clandestine fashion, at dead of night, revealed, with reasonable certainty, the intention of the accused that the silver was to be exported. "

It is relevant to state here in the aforesaid case the observation made in the case of *Malkiat Singh and another (supra)* to which Mr. Saxena has referred to, was distinguished. As per the view taken by the Apex Court it is not penultimate act but the preceding act also would amount to an attempt. It is strenuously urged by Mr. Datt that once earlier orders have been withdrawn by order dtd. 26.9.97 which was in fact, passed on 17.9.97 the question of attempt would not arise as the petitioner realising the fact that the note submitted by the Additional Secretary after the communication of the order to the Indore Development Authority was not in public interest, had withdrawn the order the factual matrix cannot be said to become a pointer towards attempt. It is proponed by Mr. Datt that the withdrawal of the order was at the stage of preparation. To appreciate the submission of Mr. Datt the facts as enumerated earlier may be

stated at the cost of repetition. As alleged in the FIR the petitioner withdrew the earlier order and passed a fresh order after coming to know that a complaint has been lodged before the Lokayukt. A copy of the order passed on 26.9.97 has also been sent to the Legal Advisor, Lokayukt as is evident from 'Annexure P- 19'. It is submitted by Mr. Shroti, that it is not realisation of the mistake by the petitioner or rectification of an error out of his own volition but because of a situation created by virtue of a complaint lodged with the Lokayukt. It is his further submission that but for this the petitioner would not have passed the order which has been passed on 26.9.97. It is also asseverated by him that the petitioner has also not withdrawn all the preceding orders. The essence of Mr. Shroti's submission is that the plea of volition as advanced by the petitioner is not sanguine. What actually does constitute an offence of attempt, it depends upon the facts of each case. In this context, I may usefully refer to the example given in the case of *Malkiat Singh (supra)* wherein their Lordships registered the views as under :

> " If a man buys a box of matches, he cannot be convicted of attempted arson, however clearly it may be proved that he intended to set fire to a haystack at the time of the purchase. Nor can he be convicted of this offence if he approaches the stack with the matches in his pocket but if he bends down near the stack and lights a match which he extinguishes on perceiving that he is being watched, he may be guilty of an attempt to burn it."

Thus, in the example given the person concerned extinguishes the match on his own but still he is liable for the 'attempt' to commit the offence. Thus, what acts would constitute an attempt would depend upon the facts and surrounding circumstances of the case and one may put up his defence explaining his initial steps and withdrawal later on but it cannot be, at the stage, said that order passed on 26.9 97 totally obliterates the liability of attempt. Further explanation would be in the realm of the defence at the appropriate stage.

On scrutinising the FIR and materials so far collected in a studied manner, it is difficult to accept the contention of the learned counsel for the petitioner that the FIR and the materials collected do not disclose an offence in the terms of Section 15 of the Act. May be, the petitioner would be in a position to explain whole situation at the appropriate stage but the facts as exposited do not warrant for quashment of the prosecution on the ground that it does not by any stretch of imagination conceive the concept of attempt in any eventuality.

Now, I shall proceed to deal with the submission of Mr. Datt that under Sections 52 and 81 of the Adhiniyam the State Government is competent to change the scheme and, therefore, the order passed by the petitioner is not illegal, hence no criminality can be attributed to him. In this regard strong reliance has been placed on paragraphs 7 to 9 of the decision rendered in Contempt Petition No. 69/98 disposed of on 29.6.98. I may first refer to sections 52 and 81 of the Adhiniyam which read as under :

52. Powers of State Government to give directions :

(1) The State Government may, if it considers it necessary in public interest so to do, give directions to the Town and Country Development Authority :-

(a) to frame a town development scheme ;

(b) to modify a town development scheme during execution ;

(c) to revoke a town development scheme, for reasons to be specified in such direction :

Provided that no direction to modify or revoke a town development scheme shall be given unless the Town and Country Development Authority is given an opportunity to present its case.

(2) The directions given by the State Government under this section shall be binding on the Town and Country Development Authority.

81. Suit and other proceedings : No suit, prosecution or other legal proceedings shall lie against any person for anything which is in good

faith done or intended to be done under this Act or any rules made thereunder."

On an objective perusal of the aforesaid provisions it is apparent that the words ' in good faith' are the key words. Power there may be, but its exercise must be 'in good faith'. Now I shall refer to paragraphs from the order passed in the Contempt Petition. They read as under :

"7. Section 52 of the Madhya Pradesh Nagar Tatha Gram Nivesh Adhiniyam, 1973 (for short 'the Adhiniyam') confers powers on State Government to give directions to frame, modify or revoke a town development scheme. Cowper in " The Task " observed that " God made the country and man made the town". Now if town is to be made, Government should have such a power even when property vested. The direction to release land is like modification of scheme during execution. Apart from this provision, Section 72 of the Adhiniyam confers power of superintendence and control in the undernoted terms and State Government could "supervise" or "Control" in an effort to be a good Government :

"72. State Government's power of supervision and control - The State Government shall have power of superintendence and control over the acts and proceedings of the officers appointed under Section 3 and the authorities constituted under this Act."

8. The different course perused by the Indore Development Authority is inexplicable -

(i) Because, State Government possessed powers under Section 52 as well as 72 of the Adhiniyam in public interest.

(ii) Because, the Court did not deem it proper to quash the order of release on the ground of absence of power or otherwise despite prayer.

(iii) Because, Indore Development Authority obligated to decide the dispute and order of the court gave no scope to it to leave it to any other forum or authority.

(iv) Because, Indore Development Authority was to act according to directions contained in letter of 26.9.1997.

9. Firstly, State Government is possessed of power secondly, direction or action of release, even in the absence of power under the law, could not be denounced, without any thing more, as " criminal misconduct " or as vitiated by corrupt or illegal means or as being an abuse of its position. Any public servant or head of Council or Minister for that matter, operating in this regard on behalf of the State, or a beneficiary like owner etc. cannot *ipso facto* be stigmatised or exposed to prosecution or loss of reputation before public. It is trite law that authority which has " jurisdiction " to decide any question has jurisdiction to decide it rightly or wrongly. But decision, when assumed to be wrong, is not to be viewed as tainted without factual foundation. Certain matters need to be left to Government. In *Sundarjas Kanyalal Bhatija and others* v. *The Collector, Thane, Maharashtra and others* (1), it is held that :

" We may only observe that the Government is expected to act and must act in a way which would make it consistent with the good administration. It is they, and no one else-who must pass judgment on this matter."

True it is, there is a finding that the State Government has authority to modify the Town Development Scheme but simultaneously the Court has also observed that the power of State Government to release should not be denounced without anything more. Thus, order of release is not absolute for all purposes and if any thing more is there then it can be called in question in any Court of Law and person concerned can be proceeded against if it is not in public interest. Thus, I may humbly state that the State Government may have the authority to modify the scheme but public interest has to be given paramount importance. To appreciate the situation in the obtaining factual backdrop, the petitioner while passing the order of release on 24.2.97 had directed the Indore Development Authority to accept the proposal of the land owners dtd. 17.7.96 claiming the

(1) A. I. R. 1990 S. C. 261.

developed plots in the name of the nominees. Whether it is in public interest or not, is yet to be tested. Initially, the order passed on 11.8.95 indicated that it was in public interest as the scheme as stipulated had been stalled. After passing the order Sri Yadav, the erstwhile Minister, observed that the agreement was in force. But as per Section 71 (1) of the Adhiniyam it has already vested in the State Government being free from all encumbrances. Thus, question of release of the land in favour of the beneficiaries accepting the proposal of the land owners for the developed plots of the Trust is not in consonance of the provision of the Adhiniyam inasmuch as by such an order the landowner thereafter got more benefit as alleged by the prosecution. Apart from the above, it is also alleged that the allotment in favour of the nominees would have freed them from the clutches of the Urban land (Ceiling and Regulation) Act, 1976. Whether it is so or not, has to be enquired into. It cannot be pronounced at this juncture that there is nothing more. Hence, the decision in the contempt proceeding is not much of assistance to the petitioner.

Thus, from the aforesaid discussion it can be irrefragably held that the present case is not one, where this Court can come to the conclusion that the allegations in the FIR and the material collected so far, do not disclose any offence against the petitioner. Whether the allegations constitute an offence under Sections 13 (1) (d), 13(2) and 15 of Prevention of Corruption Act and Section 120-B of the Indian Penal Code can be agitated by the petitioner at the appropriate stage. It would also depend upon in respect of what offences charge-sheet would be filed. Needless to emphasize, it would be open to the petitioner to call in question the propriety of the charge-sheet at the appropriate stage before the competent forum as per the established parameters of law. It is hereby made clear that the competent court shall not be influenced by any of the observations made in this order.

Consequently the Writ Petition, being devoid of merit, is not admitted and is accordingly dismissed.

Petition dismissed.

WRIT PETITION

Before Mr. Justice S. K. Kulshrestha.

27, August, 1998.

KAILASH SINGH ...Petitioner*

v.

NARAYAN SINGH & others .Respondents.

Constitution of India - Article 226 - Writ Petition-Panchayat Raj Adhiniyam, M. P., 1993-Section 122-Election Petition on ground of improper acceptance, rejection and counting of votes-Procedure laid down-Panchayat (Election Petitions, Corrupt Practices and Disqualification for Membership) Rules, M. P., 1995-Rule 21-Election Petition pending without progress though issues have been framed-Specified officer directed recounting on ground to avoid delay -There was nothing beyond pleadings of parties to enable the Specified Officer to form an opinion that there was in fact an improper acceptance, rejection and counting of votes-Indicates that Specified Officer had not framed any opinion but with a view to form such an opinion Specified Officer had passed the order for recounting - Secrecy of votes should be the paramount consideration-Order passed by Specified Officer suffers from patent illegality and impropriety of the procedure and deserves to be quashed.

There was nothing beyond the pleadings of the parties on record, to enable the specified officer to form an opinion as required by Rule 21 of the Rules that there was in fact an improper acceptance or rejection of the votes or refusal of any vote or reception of any vote which was void. In fact, the specified officer has proceeded to order the recount merely to ascertain whether or not the allegations contained in the election petition with regard to the improper, rejection or reception of the votes were true or not. This clearly indicates that the specified officer had not formed any opinion about the improper rejection or reception of the votes but only with a view to enable him to form such an opinion, he had proceeded to pass the order directing production of the ballot papers and for recounting of the votes.

* W. P. No. 4599/97.

The approach of the specified officer has been more to seek an evidence from the recount of the votes about the truth of the allegations made by the election petitioner, than to first form an opinion about the existence of the ground ; which calls for the course adopted by him to be disapproved in strong terms. The order passed by the specified officer suffers from a patent illegality as also from the impropriety of the procedure and deserves to be quashed.

P. K. K. Shamsuddeen v. *K. A. M. M. Mohimdeen* (1), *Shri Satyanarain Dudhani* v. *Uday Kumar Singh & others* (2), *Ram Rati* v. *Saroj Devi & others* (3) and *Gayatri Bai (Smt.)* v. *Alka Sharma* (4) ; relied on.

Mod. Yunus v. *Mohd. Mustaqim and others* (5) and *M. P. Gopal Krishnan* v. *Thachady Prabhakaran and others* (6) ; referred to.

P. Rusia for the petitioner.

P. K. Tiwari for the respondents.

Cur. adv. vult.

ORDER

S. K. KULSHRESTHA J.-By this petition, the petitioner has challenged the order dated 22.09.97 passed by the Additional Collector, Katni, in an Election Petition filed by the respondent No. 1, directing recount of the votes concerning election of the President of the Janpad Panchayat Katni, held on 30.5.94 in the Election Petition No. 52/B-121/96-97 and the Election Petition No. 163/B-121/93-94. It is not disputed that in the election to the office of the President of the Janpad Panchayat Katni, the petitioner as also the election petitioner Narayan Singh (respondent No. 1 in W. P. No. 4599/97) and Praveen (respondent No. 1 in W. P. No. 4600/97) were candidates and after the votes polled by each of them were counted on 21.5.94, the petitioner was declared elected. Against the election of the Returned Candidate, the petitioner herein, two election petitions were filed ; one by Narayan Singh and the other by Praveen on the ground that there was improper acceptance and rejection of the votes and the votes had not been counted properly

(1) A. I. R. 1989 S. C. 640.
(2) A. I. R. 1993 S. C. 367.
(3) 1997 (6) S. C. C. 66.
(4) 1997 (2) W.N. 98.
(5) A. I. R. 1984 S. C. 38.
(6) (1995) Supp. (2) S. C. C. 101.

and although the election petitioners in each case had polled greater number of votes, the present petitioner had been declared as a returned candidate on the basis of the said illegal acceptance and rejection of the votes. Each of the petitioners before the Specified Officer, therefore, sought relief that election of the returned candidate namely the petitioner as President of the Janpad Panchayat, Katni, be set aside and instead, the election petitioner be declared as duly elected after recounting of the votes.

It is not disputed that on filing of the election petition, notice was issued to the returned candidate and the returned candidate had filed his written statement traversing and denying the allegations made in the election petition and it was specifically pleaded that the returned candidate had in fact polled the votes which were counted in his favour and there was no improper acceptance or rejection of votes as alleged. It appears that the election petition remained pending without making any appreciable progress and although issues had been framed, without the parties having led any evidence in the matter, the Specified Officer by his impugned order contained in the proceedings Annexure - R/1 to the Return of respondents 6 & 7 directed recount of the votes on the ground that the election petition had been filed about 3 years prior to the date of the said order and to avoid delay, in the interest of justice, the proposal of the election petitioner deserved to be accepted. The Chief Executive Officer of the Janpad Panchayat, Katni, was directed to remain present with all documents and the ballot papers in the Courts of the Specified Officer so that recounting could be done. It is against this order, common to both the election petitions, that the present two petitions have been filed. Since both the petitions assail the validity, propriety and legality of the very order directing recounting of the votes, both the petitions are being disposed of by this common order.

The M. P. Panchayat Raj Adhiniyam, 1993 (1 of 1994) provides in section 122 thereof that an election under this Act shall be called in question only by a petition presented in the prescribed manner to the Sub - Divisional Officer in the case of Gram Panchayat, to the Collector in the case of Janpad Panchayat and to the Divisional Commissioner in the case of Zila Panchayat within thirty days from the date the election in question was notified. Sub-section (3) of section

122 provides that such petition shall be enquired into and disposed of according to such procedures as may be prescribed. With a view to prescribe such procedure, Rules have been framed entitled " The Madhya Pradesh Panchayat (Election Petitions, Corrupt Practices and Disqualification for Membership) Rules, 1995. Rule 3 provides for the Presentation of election petition to the specified officer during the office hours by the person making the petition, or by a person authorised in writing in this behalf by him. Rule 5 lays down that an election petition shall contain a concise statement of all material facts on which the petitioner relies and set forth with sufficient particulars, the grounds on which the election has been called in question. The petition is required to be signed and verified in the manner laid down in the Code of Civil Procedure, 1908. Rule 6 provides for the relief that can be claimed by the petitioner and lays down that the petitioner may claim a declaration that the election of all or any of the returned candidates is void and in addition thereto, a further declaration that he himself or any other candidate has been duly elected. Rule 9 requires a copy of the election petition to be served on each respondent and Rule 10 provides for enquiry into an election petition and if there be more than one concerning the election of a candidate, either in one or more proceedings as per the discretion of the specified officer. Rule 11 lays down the procedure before the specified officer and enumerates his powers while Rule 12 provides for adducing evidence by production of the witnesses. Rule 21 enumerates the grounds for declaring election to be void. Since the ground on which the election can be declared void are enumerated in Rule 21, it is reproduced hereunder for proper appreciation of the controversy raised in the present petition :-

> " R. 21 : Grounds for declaring election to be void : (1) Subject to the provisions of sub-rule (2) if the specified officer is of opinion -
>
> (a) that on the date of his election the returned candidate was not qualified or was disqualified to be chosen to fill the seat under the Act ; or
>
> (b) that any corrupt practice has been committed by a returned candidate or his election agent or by any other person with the consent of a returned candidate or his election agent ; or

(c) that any nomination paper has been improperly rejected ; or

(d) that the result of the election in so far as it concerns returned candidate has been materially affected -

(i) by the improper acceptance of any nomination ; or

(ii) by a corrupt practice having been committed in the interest of the returned candidate by a person acting with the consent of the candidate or his agent ; or

(iiii) by the improper acceptance, refusal or rejection of any vote or the reception of any vote which is void ; or

(iv) by any non - compliance with the provisions of the Act or of any rules or orders made thereunder ;

the specified officer shall declare the election of the returned candidate to be void.

(2) If in the opinion of the prescribed authority a returned candidate has been guilty by an agent of any corrupt practice, but the prescribed authority is satisfied -

(a) that no such corrupt practice was committed at the election by the candidate and every such corrupt practice was committed contrary to the instructions and without the consent of the candidate ;

(b) that the candidate took all reasonable means for preventing the commission of corrupt practice at the election, and

(c) that in all other respect the election was free from any corrupt practice on the part of the candidate or any of his agent ;

then the prescribed authority may decide that the election of the returned candidate is not void."

Kailash Singh v. Narayan Singh, 1998.

Learned counsel for the petitioner has contended that the order of recounting of votes merely on the ground that the petition had remained pending for a period of 3 years and such course should be followed in the interest of justice, suffers from a patent illegality and tends to commit breach of the secrecy of the ballot which is sacrosanct and should not be impinged. Learned counsel has pointed out that in view of the pleadings of the parties before the specified officer, since the allegation about the improper acceptance, refusal or rejection of vote or the reception of any vote which was void was itself a triable issue, the specified officer could not have ordered a recount unless there was some contemporaneous evidence to enable him to form an opinion about the existence of the said ground. Learned counsel has severely criticised the approach of the specified officer in directing the recount only with a view to ascertain whether or not there was any truth in the allegations made in the election petition about the improper acceptance, refusal or rejection of the votes. Learned counsel has contended that such an approach deserves to be deprecated as it tends to impeach and breach the secrecy of the votes. Attention has been invited by the learned counsel for the petitioner to the decision of the Supreme Court in *P. K. K. Shamsuddeen* v. *K. A. M. M. Mohindeen* (1), *Shri Satyanarian Dudhani* v. *Uday Kumar Singh & ors* (2), *Ram Rati* v. *Saroj Devi & ors* (3) and *Gayatri Bai (Smt.)* v. *Alka Sharma* (4) and to a decision dated 3.4.98 of a Single Bench of this court in W. P. No. 350/97, to support his argument that not only that there should be allegation in the election petition, there should be some contemporaneous evidence to justify recounting of votes. Learned counsel for the respondent (election petitioner) has, however, vehemently opposed the petition on the ground that the impugned order has been passed by the specified officer in the presence of the parties and the petitioner did not object to the course directed by the Election Tribunal and has further contended that the discretion having properly been exercised, no ground is made out calling for any interference in exercise of the power of the Superintendence under Art. 227 of the Constitution of India. Learned counsel has referred to the decision of the Supreme

(1) A. I. R. 1989 S. C. 640.
(2) A. I. R. 1993 S. C. 367.
(3) (1997) 6 S. C. C.66.
(4) (1997) 2 W. N. 98.

Court in *M. R. Gopal Krishnan* v. *Thachady Prabhakaran and others* (1), *Mohd. Yunus* v. *Mohd. Mustaqim* (2) and the decision in *State of Karnataka and another* v. *N. A. Nagendrappa* (3). Learned Dy. A. G. appearing for the respondents 6 & 7 has referred to the statement in the Return to the effect that since controversy could have been resolved only by recounting of the votes and the inspection thereof, the course adopted by the Election Tribunal was proper and justified as substantial justice has been done between the parties which does not call for any interference. N. P. There cannot be any dispute that if the specified officer is of the opinion that the result of the returned candidate is materially affected by improper acceptance, refusal or rejection of any vote, he has the power to declare the election of the returned candidate to be void. What is, therefore, to be seen is whether merely on the assertion of the election petitioner that there was improper acceptance or rejection of the votes which fact was denied and without any evidence having been adduced by the parties to substantiate the allegations or there being any other contemporaneous evidence in support thereof, could the specified officer have directed recounting of the votes and if so, could he have done so with a view to verify the truth or otherwise of the allegations made in the election petition. In *P. K. K. Shamsudeen* v. *K. A. M. M. Mohindeen (supra)*, their Lordships have observed that the settled position of law is that the justification for an order for examination of ballot papers and recount of votes is not to be derived from hind sight and by the result of the recount of the votes. The observations contained in paragraph 13 of the said Judgment read as follows :-

> " 13. Thus, the settled position of law is that the justification for an order for examination of ballot papers and recount of votes is not to be derived from hind sight and by the result of the recount of votes. On the contrary, the justification for an order of recount of votes should be provided by the material placed by an election petitioner on the threshold before an order for recount of votes is actually made. The reason for this salutary rule is that the preservation of the secrecy of the ballot is a sacrosanct principle

(1) (1995) 2 Supp. S.C.C. 101. (2) A. I. R. 1984 S. C. 38.
(3) A. I. R. 1991 Kar. 317.

which cannot be lightly or hastily broken unless there is *prima facie* genuine need for it. The right of a defeated candidate to assail the validity of an election result and seek recounting of votes has to be subject to the basic principle that the secrecy of the ballot is sacrosanct in a democracy and hence unless the affected candidate is able to allege and substantiate in acceptable measure by means of evidence that a *prima facie* case of a high degree of probability existed for the recount of votes being ordered by the Election Tribunal in the interests of justice, a Tribunal or court should not order the recount of votes."

In the present case, the course adopted by the specified officer is the course which has been strongly deprecated in the above observations of the Apex Court. There was nothing beyond the pleadings of the parties on record, to enable the specified officer to form an opinion as required by Rule 21 of the Rules that there was in fact an improper acceptance or rejection of the votes or refusal of any vote or reception of any vote which was void. In fact the specified officer has proceeded to order the recount merely to ascertain whether or not the allegations contained in the election petition with regard to the improper rejection or reception of the votes were true or not. This clearly indicates that the specified officer had not formed any opinion about the improper rejection or reception of the votes but only with a view to enable him to form such an opinion, he had proceeded to pass the order directing production of the ballot papers and for recounting of the votes.

Learned counsel has also referred to the decision in *Satyanarain Dudhani* v. *Uday Kumar Singh & ors (supra)* in which it has been observed that it is the settled proposition of law that the secrecy of the ballot papers cannot be permitted to be tinkered lightly. An order of recount cannot be granted as a matter of course, which is to be resorted to only upon satisfaction that material facts pleaded in the petition and supported by the contemporaneous evidence justify such an order. The observation contained in paragraph 10 of the said Judgment reads as follows :-

"10. It is thus obvious that neither during the counting nor on the completion of the counting there was any valid ground available for the recount of the ballot papers. A cryptic application claiming recount was made by the petitioner-respondent before the Returning Officer. No details of any kind were given in the said application. Not even a single instance showing any irregularity or illegality in the counting was brought to the notice of the returning officer. We are of the view when there was no contemporaneous evidence to show any irregularity or illegality in the counting, ordinarily, it would not be proper to order recount on the basis of bare allegations in the election petition. We have been taken through the pleadings in the election petition. We are satisfied that the grounds urged in the election petition do not justify for ordering recount and allowing inspection of the ballot papers. It is settled proposition of law that the secrecy of the ballot papers cannot be permitted to be tinkered lightly. An order of recount cannot be granted as a matter of course. The secrecy of the ballot papers has to be maintained and only when the High Court is satisfied on the basis of material facts pleaded in the petition and supported by the contemporaneous evidence that the recount can be ordered."

Learned counsel for the contesting respondents, however, submits that the said Judgment does not come to rescue of the petitioner as in the said case there was no pleading at all to indicate that there was any improper acceptance or rejection of the votes while in the present case, specific allegations were made in the election petition. There does not appear any substance in the argument of the learned counsel for the respondents as reference to the three line objections in the said judgment is with regard to the objection contained in the application filed before the returning officer and not a reference to the allegations contained in the election petition which can be readily elicited from the *Satyanarain's case (supra)* in paragraph 4 of the said Judgment which reads as follows :-

"4. It was pleaded in the election petition that 339 valid ballot papers in favour of the petitioner were neither counted nor rejected by the Counting Supervisor. 35 valid votes in favour of the petitioner were not counted in his favour on the false plea that the ballot papers were missing. It was also claimed in the petition that irregularities committed in the fifth round of counting at table No. 8 in respect of booth No. 64 materially affecting the result of the election. 30 votes were counted less in booth No. 3 by the Counting Supervisor. Similar allegations in respect of counting were alleged in the election petition."

The claim made and the contention raised in the present petition is more or less on the same grounds as were present in the case considered by the Supreme Court. The election petitioner in the present case has stated in the petition in paragraph 4 as follows :-

4. यह कि उत्तरदाता क्रमांक 1, को पोलिंग बूथ क्रमांक 57 में मतगणना के समय केवल 6 मत मिले थे जबकि गणना अधिकारियों ने उत्तरदाता क्रमांक 1 के मतपत्रों के बन्डल में 11 मत पत्र जो सरासर अवैध मतपत्र थे, उनको मिलाकर कुल संख्या 17 बढ़ा दी एवं उत्तरदाता क्रमांक 1, को नाजायज लाभ दिलाया है इस कारण पोलिंग क्रमांक 57 के मत पत्रों का निरीक्षण किया जाना एवं पुनर्मत कराना किया जाना न्यायोचित होगा क्योंकि इसी मतदान केन्द्र में याचिकाकर्ता को50 मत पत्र प्राप्त होना कहा जाता है। उपरोक्त परिस्थितियों में पोलिंग क्रमांक57 के मतपत्रों की सही जानकारी के लिए एवं सम्पूर्ण न्याय पक्षकारों के मध्य करने के लिए मत पत्रों का निरीक्षण करना न्यायोचित होगा। तथा निरीक्षण के दौरान उत्तरदाता क्रमांक1, के पक्ष में अवैध रूप से बढ़ाये गये मत पत्रों की संख्या कम करना उचित होगा। अर्थात् मत पत्रों के निरीक्षण के बाद उनको गणना करना न्यायोचित होगा।

Thus, it would be seen that it was not in relation to any cryptic or vague nature of the objection made in the petition that their Lordships have not approved the course of ordering recount but it is on the basis of the absence of contemporaneous evidence to justify the specific allegations that the observation have been made and the order of recount has been disapproved.

It may also be relevant to refer to the decision of the Supreme Court in *Ram Rati* v. *Saroj Devi and others (supra)* in which it has been observed that secrecy of ballot should not be breached and in rare cases only the Tribunal or the Court is required to order recount and that too on giving satisfactory grounds for recounting. In the case in hand, the ground for recounting is more to elicit whether or not the allegations made in the election petition are true rather than the satisfaction or the formation of the opinion about improper acceptance or rejection of the votes. Learned counsel for the petitioner has also made reference to the decision in W. P. No. 350/97 and the decision in 1997 (2) WKN 98 to the effect that recounting cannot be ordered without the pleadings, the framing of the issues and the evidence thereon.

Learned counsel for the contesting respondents has referred to the decision of the Supreme Court in *Mohd. Yunus* v. *Mohd. Mustaqim and others* (1) to contend that a mere wrong decision without anything more is not enough to attract the jurisdiction of the High Court under Art. 227, and the Supervisory jurisdiction conferred on the High Courts is limited to seeing that an inferior Court or Tribunal functions within the limits of its authority and not to correct an error apparent on the face of the record, much less an error of law. In the present case, controversy relates to the jurisdiction in the sense that whether or not without forming any opinion as required under Rule 21 about the improper rejection or acceptance of any vote, could the authority have mechanically proceeded to order a recount more to confirm the truth or otherwise of the allegations in the election petition rather than to proceed on an opinion about any illegal rejection or acceptance of the votes necessitating such a recount. The learned counsel for the respondents has also referred to the decision in *M. R. Gopalkrishnan* v. *Thachady Prabhakaran and others* (2) but, I am afraid, the decision supports the petitioner rather than the case of the respondents. In the said case also, it has been laid down that the secrecy of the votes should be the paramount consideration in mind and the errors must be of such magnitude as to materially affect the result of the election. Unless the election petitioner not only

(1) A. I. R. 1984 S. C. 38. (2) (1995) 2 Supp. S. C. C. 101.

pleads and discloses the material facts but also substantiate she same by evidence of reliable character, a *prime facie* case for recounting is not made out and the Tribunal would not be justified in directing the same.

Learned Dy. A. G. has argued that since the recounting of the votes has done substantial justice between the parties, the order does not deserve to be interfered with. The decisions of the Courts referred to above, each emphasises the sacrosanctity of votes and as such the Tribunal cannot be permitted to follow the rule more in its breach rather than its observance. It is patent from the impugned order that the approach of the specified officer has been more to seek an evidence from the recount of the votes about the truth of the allegations made by the election petitioner, than to first form an opinion about the existence of the ground, which calls for the course adopted by him to be disapproved in strong terms. The order passed by the specified officer suffers from a patent illegality as also from the impropriety of the procedure and deserves to be quashed.

In the result, both the petitions are allowed. The impugned order dated 22.09.97 in each of the two election petitions is quashed and all subsequent proceedings in pursuance of the said order are set aside. The specified officer shall now proceed with the election petition in accordance with law. The parties shall appear before the specified officer on 9.09.1998 and the specified officer shall expeditiously deal with the matter in accordance with law and endeavour to conclude the proceedings within a period of 3 months or so. There shall be no order as to costs.

Petition allowed.

WRIT PETITION

Before Mr. A. K. Mathur, Chief Justice and Mr. Justice Dipak Misra,
23, November, 1998.

M/S. BHAGWATI CONSTRUCTION COMPANY, NEEMUCH ...Petitioner*

v.

STATE & others .Respondents.

Constitution of Indian - Article 226 and of General Sales Tax Act, M. P., 1958 (II of 1959)-Sections 4-A, 18, 39 (1)-Second Proviso-Enquiry initiated against assessee under Section 4-A of the Act terminated beyond Limitation prescribed - Order in question is beyond jurisdiction as barred by time-Has to be quashed - Validity of second proviso of Section 39 (1)-No opinion expressed as not necessary in the present case.

As per Section 4-A, the Commissioner is to institute a proceeding for the purpose of determining the liability of a dealer to pay tax under this Act and such liability shall be determined by an order and such determination shall be made within a period of twelve months from the date of institution of such proceedings.

The Commissioner has to decide first the question of the liability of the assessee to pay tax and that exercise has to be completed within a period of 12 months then the proceedings for determination will commence under Section 18 (6) and the liability will be assessed under Section 18 (8), but the whole exercise under Section 4-A has not been completed within twelve months and that order is barred by time.

The enquiry was initiated against the assessee under Section 4-A, which should have been completed within 12 months but it terminated beyond 12 months which is beyond limitation prescribed under Section 4-A and as such, the action of the respondents in issuing notice is obviously barred by time. Since this notice to the assessee is barred by limitation as prescribed under Section 4-A; therefore, it has to

* W. P. No. 596/89.

be quashed, as the petitioner has no other remedy because a remedy of revision under the proviso to Section 39 (1) is barred. We need not to go into the question of validity of the second proviso to Section 39 (1) of the Act as we are satisfied in the present case that the order in question is beyond jurisdiction as being barred by time.

B. L. Nema for the petitioner.

A. Gohil, Dy. A. G. for the respondents.

Cur. adv. vult.

ORDER

The Order of The Court was delivered by A. K. MATHUR C. J. - The petitioner by this writ petition, has prayed that he is not liable to pay tax as he did not carry out any business of sale of goods and he was merely a contractor for collection of royalty. It is also prayed that the order dated 2.11.1988 (Annexure K) and communicated by order dated 5.11.1988 (Annexure L) may be quashed and also the second proviso to Section 39 (1) of the M. P. General Sales Tax Act, 1958, may be declared as unconstitutional.

The brief facts which are necessary for disposal of the writ petition are that the petitioner is a partnership firm and is carrying on the business of collection of royalty under an agreement with the State of M. P.. The Sales Tax Officer, Circle I, Neemuch/respondent No.3 determined the liability of the petitioner to pay sales tax with effect from 11.12.1981, by order dated 5.11.1988. This was passed in the ordersheet. A copy of the order passed in ordersheet has been placed on record as Annexure K and after completion of the proceedings, order was passed on 5.11.1988 (Annexure L). Both these orders are under-challenge in this petition. Along with the aforesaid orders, the petitioner has also challenged the validity of Second proviso to sub-section (1) of Section 39 of the M. P. General Sales Tax Act, 1958 (hereinafter referred to as the 'ACT') which provides that no revision shall lie against the order determining the liability of a dealer to pay tax or against a notice issued under this Act for assessment except after the assessment order is passed.

M/s. Bhagwati Construction Company, Neemuch v. State, 1998.

The contention of the learned counsel for the respondents is that both these orders (Annexures K & L) cannot be challenged by this petition till assessment order is passed by virtue of the aforesaid proviso; and that proviso is not *ultra vires* of the Constitution.

The petition was contested by the respondents without filing any reply.

The basic question which Shri B. L. Nema, learned counsel for the petitioner, has raised, is that under Section 4-A, once the proceedings starts then it has to be completed within a period of 12 months and thereafter, if it is found that the assessee is liable to pay tax then the proceedings under Section 18 (6) will require to be initiated. The learned counsel submits that since the order (Annexure L) by which the assessee was made liable to pay tax, is without jurisdiction as the same has been determined beyond the period of 12 months as required under Section 4-A of the Act. As such, the whole exercise is without jurisdiction. But since no revision lies against that order ; therefore, the petitioner has to approach this Court by filing the present petition under Articles 226 and 227 of the Constitution of India.

Section 4-A of the Act, which is relevant for our purpose, reads as under :

> " S. 4-A : Determination of liability to pay tax under this Act. - (1) The Commissioner shall, in the prescribed manner, institute proceedings for the purpose of determining the liability of a dealer to pay tax under this Act. Such liability shall be determined by an order and such determination shall be made within a period of twelve months from the date of institution of such proceedings.
>
> (2) Notwithstanding anything contained in sub-section (2) of Section 4, liability of dealer to pay tax under this Act shall not be determined from a date earlier than five years prior to,-
>
> (i) the date of institution of proceedings under sub-section (1) ; or
>
> (ii) the date of validity of the registration certificate, whichever is earlier."

M/s. Bhagwati Construction Company, Neemuch v. State, 1998.

As per Section 4-A, the Commissioner is to institute a proceeding for the purpose of determining the liability of a dealer to pay tax under this Act and such liability shall be determined by an order and such determination shall be made within a period of twelve months from the date of institution of such proceedings. After that determination, the matter has to be dealt with under Section 18 (6) of the Act. Section 18 deals with assessment of tax and Section 18(6) provides that if upon any information which has come into his possession, the Commissioner is satisfied that the dealer has tried to apply for registration, the Commissioner shall, within twelve months from the date of completion of the proceedings under sub - section (1) of Section 4-A, after giving the reasonable opportunity of being heard, proceed in such manner as may be prescribed to assess to the best of his judgment, the amount of tax due from the dealer in respect of the whole of such period ; and the Commissioner may if he is satisfied that the dealer has wilfully failed to apply for registration, direct that the dealer shall pay by way of penalty in addition to the amount of tax so assessed, a sum not exceeding one and half time of that amount, meaning thereby that the proceedings which has been initiated by the Commissioner to determine the liability of tax has to be completed within a period of 12 months from the date of institution, and if the period of limitation prescribed under Section 4-A, i.e. the period of 12 months has already expired, then the whole exercise will come to an end. Section 18 (6) (a), which is relevant for our purpose, reads as under :

" S. 18 : Assessment of tax :

(1) xxx xxx xxx

(6 a) : Upon any information which has come into his possession, the Commissioner is satisfied that any dealer ; who has been liable to pay tax in respect of any period, has failed to apply for registration, the Commissioner shall, within twelve months from the date of completion of the proceedings under sub-section (1) of Section 4-A, after giving the dealer a reasonable opportunity of being heard, proceed in such manner as may be prescribed, to assess to the best of his judgment

the amount of tax due from the dealer in respect of the whole of such period ; and the Commissioner may, if he is satisfied that the dealer has wilfully failed to apply for registration, direct that the dealer shall pay by way of penalty in addition to the amount of tax so assessed, a sum not exceeding one and a half times of that amount."

A reading of both these sections makes it clear that the Commissioner has to decide first the question of the liability of the assessee to pay tax and that exercise has to be completed within a period of 12 months then the proceedings for determination will commence under Section 18 (6) and the liability will be assessed under Section 18 (8), but the whole exercise under Section 4-A has not been completed within twelve months and that order is barred by time. In the present case, the proceedings were initiated first on 27.3.1985 and as per the order in ordersheet, which has been placed on record as Annexure K, it ultimately terminated on 3.11.1988. The order passed in the ordersheet is that the assessee is liable to pay tax from 11.12.1981 to 31.3.1988 and the proceedings should be initiated under Section 18 (6) and be sent to the concerned officer for assessment. After that, a notice has been issued to the assessee that he has been found to be liable to pay tax w.e.f. 11.12.1981. This notice has been issued under Rule 52 - A (2) in Form XXIV - A. Rule 52 - A which is relevant for our purpose, reads as under :

" R. 52 - A : Initiation of proceeding for determination of liability :

(I) The proceeding for determination of liability of a dealer under sub-section (1) of Section 4-A shall be initiated by issue, of a notice in Form XXIV.

(2) The order determining the liability of a dealer under sub-section (1) of Section 4 - A shall be in Form XXIV - AA copy of such order shall be served on the dealer within seven days from the date of passing that order. "

under sub-section (1) of Section 4-A shall be initiated by issue, of a notice in Form XXIV. Thereafter sub-rule (2) says that the order determining the liability of a dealer under sub-section (1) of Section 4-A shall be in Form XXIV-AA copy of such order shall be served on the dealer within seven days from the date of passing that order. Form XXIV-A reads as under :

" Form XXIV - A

(See Rule 52-A(2))

Order determining liability to pay tax under the Madhya Pradesh General Sales Tax Act, 1958. -

Name of the dealer

Address

Registration Certificate No. (if any)

Date from which liability to

pay tax under the Madhya Pradesh General Sales Tax Act, 1958. The liability to pay tax under said Act had been determined from the aforesaid date for the reasons given below. "

Annexure L dated 5.11.1988 is an information which has been given in the Form XXIV-A to the petitioner that he has been found to be liable to tax from 11.12.1981. As per the facts of this case, the proceedings which commenced on 27.3.1985 terminated on 3.11.1988 and notice to the effect was sent on 5.11.1988. That shows that the enquiry was initiated against the assessee under Section 4-A, which should have been completed within 12 months but it terminated beyond 12 months i.e. on 3.11.1988, which is beyond limitation prescribed under Section 4-A and as such, the action of the respondents in issuing notice (Annexure L) dated 5.11.1988 is obviously barred by time. Since this notice to the assessee dated 5.11.1988 (Annexure L) is barred by limitation as prescribed under Section 4-A ; therefore, it has to be quashed, as the petitioner

has no other remedy because a remedy of revision under the proviso to Section 39 (1) is barred. We need not to go into the question of validity of the second proviso to Section 39 (1) of the Act as we are satisfied in the present case that the order in question is beyond jurisdiction as being barred by time. Therefore, the action of the respondents are without jurisdiction and consequently, the order dated 5.11.1988 (Annexure L) is quashed. We have not expressed any opinion with regard to the validity of the second proviso to sub-section (1) of Section 39 of the act, as it is not necessary in the present case to examine the validity of that provision. The petition is allowed. No order as to costs.

Petition allowed.

WRIT PETITION

Before Mr. A. K. Mathur, Chief Justice and Mr. Justice Dipak Misra,
4, December, 1998.

B. K. DUBEY ...Petitioner*

v.

THE LOKAYUKT, BHOPAL and others .Respondents.

Constitution of India-Article 226-Public Interest Litigation-Petitioner himself was Chief Secretary of the State - Levelled allegation against Superintendent of Police, (S. P. E.) Lokayukt Karyalaya Bhopal - After issue of notice wide publicity made in various national press, levelling allegation against Lokayukt institution - Petitioner has a personal grievance because his complaint has not found favour - It is a petition with malicious intention to coerce the institution - To entertain such kind of public interest litigation is nothing but a totally abuse of the process of court - Petition filed for personal vengeance, self-satisfaction and not for any actual public interest - Cost of Rs. 20000/- imposed on petitioner.

---

* W. P. No. 2148/98.

B. K. Dubey v. The Lokayukt, Bhopal, 1998.

The press should have taken a proper care not to have given a publicity before the matter was adjudicated. Time and again, this Court as well as the Apex Court have observed that this kind of media trial should not be allowed to be permitted. Because of issuance of process by the Court, the media got a news item and published it in a different manner when the matter awaited to be decided in this Court. This kind of publicity by the press against the institution and the respondents in this manner was highly undesirable.

Before the matter could be adjudicated the institution of Lokayukt stood condemned in the press wide publicity was given to the contents of the petition. This, is not an objective press reporting, and the press should be more vigilent/careful while reporting the proceedings of the Court. It is to be kept in mind that institution of Lokayukt is headed by not less than a retired Chief Justice of the High Court or a Judge of the Supreme Court.

The petitioner has a personal grievance because his complaint has not found favour. The said grievance has given rise to this petition wherein wild allegations have been levelled against the officer and the institution. Therefore, the petition is not a *bonafide* petition to be taken cognizance in the scheme of public interest litigation. It is a petition with a malicious intention to coerce the institution to investigate into the matter according to his choice. If such kind of petitions are to be entertained then it will be very difficult for the officers who are associated with the investigation wing of the Lokayukt institution to work honestly and objectively. This kind of practice is totally undesirable. To entertain suck kind of public interest litigation is nothing but a totally abuse of the process of the Court.

State of Maharasthra v. *Rajendra Jawanmal Gandhi* (1) ; referred to.

V. S. Dabir for the petitioner.

V. S. Shroti for respondents Nos. 1 and 2.

R. N. Singh for respondent No. 3.

Abhay Gohil Dy. A. G. for the State.

Cur. adv. vult.

(1) (1997) 8 S. C. C. 386.

B. K. Dubey v. The Lokayukt, Bhopal, 1998.

ORDER

The Order of the Court was delivered by A. K. MATHUR C. J. - This is a public interest litigation whereby the petitioner has sought for a issue of *mandamus* directing the Special Police Establishment, M. P., to register a criminal case against the respondent no. 3 - Dr. Vijay Kumar, IPS, and to investigate into the offences as mentioned in the writ petition. It is also prayed that the respondent no. 3 be removed from Police Establishment, M. P.. It is also prayed that the respondent no. 4 / State be directed to get investigations conducted by the Central Bureau of Investigation / Income Tax Department into the assests and properties of the Police Officers posted in the Special Police Establishment.

It is most unfortunate that the petitioner, who himself was Chief Secretary of this State, has resorted to this public interest litigation levelling allegations against the respondent no.3, who is working as a Superintendent of Police (Special Police Establishment) Lokayukt Karayalaya, Bhopal. The Lokayukt Organisation is headed by the Hon'ble Shri FaizanUdn, a retired Judge of the Supreme Court. The respondent no. 3 is working as an officer there. It is alleged that certain allegations were made against the respondent no. 3 and an enquiry was initiated against him some time back. It is alleged that since the respondent no. 3, being guilty of omission and commission, has been charge-sheeted he should not be allowed to continue in the Special Police Establishment of M. P. ('SPE' in short).

This petition, *prima facie*, does not appear to be *bonafide*. After issue of notice, a wide publicity by this petitioner was made in various national press levelling allegations against the Lokayukt institution and news item were published in the Indian Express, Times of India and various news papers with bold head lines which we do not intend to reproduce in this order. But we express our great concern in the manner the publicity has been given to this petition. This kind of publicity is highly undesirable and speaks volumes about the conduct of the petitioner himself. The press should have taken a proper care not to have given a

publicity before the matter was adjudicated. Time and again, this Court as well as the Apex Court have observed that this kind of media trial should not be allowed to be permitted. Because of issuance of process by the Court, the media got a news item and published it in a different manner when the matter awaited to be decided in this Court. This kind of publicity by the Press against the institution and the respondents in this manner was highly undesirable. In this context we may refer to the decision rendered in the case of *State of Maharashtra* v. *Rajendra Jawanmal Gandhi* (1), wherein it has been laid down as under :-

> " There is a procedure established by law governing the conduct of trial of a person accused of an offence. A trial by press, electronic media or public agitation is the very antithesis of rule of law. It can well lead to miscarriage of justice. A Judge has to guard himself against any such pressure and he is to be guided strictly by rules of law."

We warn that in future the Press should be more cautious while publishing any matter relating to litigations pending before this Court. It is understandable the decision has been given and that has been published by the Press. But before the matter is adjudicated only because process has been issued, there was no reason to highlight the allegations in bold print which was totally undesirable as it unnecessarily tarnishes the image of the esteemed institution. We are of the view that before the matter could be adjudicated the institution of Lokayukt stood condemned in the press wide publicity was given to the contents of the petition. This, in our opinion, is not an objective press reporting, and the press should be more vigilant / careful while reporting the proceedings of the Court. It is to be kept in mind that institution of Lokayukt is headed by not less than a retired Chief Justice of High Court or a Judge of the Supreme Court.

Now, coming to the merit of the case, counter allegations have been made against the petitioner himself. He is an old man of 72 years and was formerly the Chief Secretary of the State. We need not comment on him specially when Shri Shroti and Shri R. N. Singh, learned counsel for the respondents have

(1) (1997) 8 S. C. C. 386.

considered in not playing up the back ground of the petitioner and his service career. In view of the submissions, we need not highlight that what kind of officer, the petitioner, had been. But we cannot resist from saying that the petitioner has crossed all the limits in making wide and frivolous allegations in the petition. In fact, the petitioner has no right to maintain this public interest litigation because he himself filed a complaint before the Lokayukt with regard to a piece of plot sold by him. When the purchaser started construction, he made complaints to the Lokayukt and it was investigated by the Lokayukt and the respondent no. 3. The respondent no. 3 after investigation, found that no case was made out and accordingly, he filed the final report, which was ultimately accepted. The petitioner has a personal grievance because his complaint has not found favour. The said grievance has given rise to this petition wherein wild allegations have been levelled against the officer and the institution. Therefore, the petition is not a *bonafide* petition to be taken cognizance in the scheme of public interest litigation. It is a petition with a malicious intention to coerce the institution to investigate in to the matter according to his choice. If such kind of petitions are to be entertained then it will be very difficult for the officers who are associated with the investigation wing of the Lokayukt institution to work honestly and objectively. This kind of practice is totally undesirable. To entertain such kind of public interest litigation is nothing but a totally abuse of the process of the Court. We may note here that an enquiry has been held against the respondent no. 3 and he has been given a clean chit. The allegations against the respondent no. 3 have been rightly found to be frivolous in the Departmental Enquiry.

Thus, on a close scrutiny of facts and circumstances we are of the considered view that the present petition was filed for personal vengeance and self-satisfaction and not for any actual public interest. We dismiss this petition with a cost of Rs. 20,000/-. The petitioner shall deposit the amount within three months from today failing which action will be taken against him in accordance with law.

Petition dismissed.

LETTERS PATENT APPEAL

Before Mr. A. K. Mathur, Chief Justice and Mr. Justice Dipak Misra,
16, September, 1998.

SMT. CHANDI BAI ...Appellant*

V.

SMT. GULABKALI SINGH and others .Respondents.

Constitution of India - Article 226, Letters Patent - Clause X-Appellant not party in writ petition before the learned Single Judge-Maintainability of appeal - Test is whether judgment of the learned Single Judge prejudicially affects the right of the appellant or not - Appellant as elected Councillor of Nagar Panchayat is a person aggrieved as she is interested to see that the person elected to the office of President should have confidence of the majority - Objection of respondent / petitioner overruled - M. P. Municipalities Act, 1961 - Section 59 - No -Confidence against President - Vice - President though present did not choose to exercise his statutory obligation and permitted a third Councillor to preside over the meeting - Motion of no - confidence passed, not illegal.

The appellant is a person aggrieved as she being a Councillor of the Nagar Panchayat has a right to be governed by a person who proves the majority in the house. Thus, the appellant is an aggrieved person and we accordingly over rule the objection of the respondent / petitioner and permit the appellant to prosecute this appeal though she was not a party in the writ petition before the learned single Judge.

Section 59 of the Act clearly says that in case Vice-President is not there, then one of the members as a Councillor can be elected to preside over the meeting. In the present case, since the Vice-President was not willing to preside over the meeting, therefore, one of the Councillors was elected to preside over the meeting and the motion of no-confidence was passed against the respondent / petitioner. The view taken by the learned single Judge does not appear to be correct and it

---

* L. P. A. No. 225 of 1997, against the order dated 9.5.97, passed by Hon. Justice Shri R. S. Garg, in W. P. No. 5097/96.

is against the ratio laid down by the Full Bench decision of this Court cited above.

Sidebo - tham's case (1); referred to.

State of M. P. and others v. *Beni Prasad Rathore and another* (2); relied on.

S. K. Gangele for the appellant.

Mrigendra Singh for respondents nos. 1 to 3.

A. K. Gohil Dy. A.G. for respondent no. 2.

Cur. adv. vult.

ORDER

The Order of the Court was delivered by A. K. MATHUR, C. J. - This is a Letters Patent Appeal directed against the judgment dated 9.5.1997 in W. P. No. 5097 of 1996 whereby the learned single Judge has allowed the petition and set aside the resolution dated 30.11.1996 recorded by the Nagar Panchayat carrying out the motion of no-confidence against the petitioner/ respondent.

Brief facts which are necessary for disposal of this appeal are that the petitioner / respondent filed a writ petition seeking quashing of proceedings dated 30.11.1996 (Ex. P1) by which a motion of no-confidence was passed against her. It was also prayed that the proceedings dated 30.11.1996 be declared as null and void. The petitioner / respondent was elected as Sarpanch of Nagar Panchayat Semaria. Some members of the Council moved a no-confidence motion against the petitioner / respondent. Meeting of no-confidence was to be held on 18.11.1996 as per the agenda dated 5.11.1996 issued by the respondent No. 2. The meeting could not be convened on 18th November 1996 but it was convened on 19.11.1996. As the Chief Municipal Officer was not available, it was adjourned to 30.11.1996. The meeting was held on 30.11.1996 and motion of no-confidence was passed against the petitioner / respondent. The petitioner challenged this

(1) (1880) 14 Ch. D. 458. (2) 1995 J. L. J. 769.

motion of no-confidence on the ground that the meeting which was convened was in violation of the provisions of Sections 47, 52 and 59 of the M. P. Municipalities Act, 1961 (for short the Act). The main contention of the petitioner / respondent was that as per Section 59 of the Act, every meeting of the Council is to be presided over by the President and if the President is not available, then by the Vice-President and if there is no President or Vice-President, then such one of their member as the Councillors present may elect, shall preside over the meeting as a Chairman. Since the motion of no-confidence was against the President, therefore, the President could not preside over the meeting and it could have been presided over by the Vice-President in terms of Section 59 of the Act. But the Vice-President also did not preside over the meeting and, therefore, one Kedar Singh, Councillor was elected to preside over the meeting. In the meeting presided over by Kedar Singh, the motion of no-confidence was passed against the president (petitioner / respondent). The minutes of the meeting of no-confidence has been placed on record and reads as under :

" आज दिनांक 30.11.1996 को अध्यक्ष पद के लिये अविश्वास पद हेतु परिषद सम्मेलन नगर पंचायत सभाकक्ष में समय 1 बजकर 8 मिनट पर प्रारंभ हुई जिसकी अध्यक्षता हेतु श्री देवेन्द्र कुमार तिवारी द्वारा श्री केदार सिंह का नाम प्रस्तावित किया गया जिसका अनुमोदन श्री शिवप्रसाद शर्मा पार्षद वार्ड क्र.11 द्वारा किया गया उपस्थित निर्वाचित पार्षदों द्वारा कोई आपत्ति नहीं की गई।

श्रीमती गुलाबकली सिंह अध्यक्ष के विरूद्ध लाया गया प्रस्ताव की कार्यवाही 1 बजकर 15 मिनट पर प्रारंभ की गई।

प्रस्ताव :

अध्यक्ष पद के विरूद्ध अविश्वास प्रस्ताव बावत् परिषद सम्मेलन।

निर्णय अविश्वास के पक्ष में श्रीमती गुलाबकली सिंह के विरूद्ध निम्नलिखित निर्वाचित पार्षदों द्वारा हाथ उठाकर अविश्वास के पक्ष में मतदान किया गया।

(1) श्रीमती कृष्णा सिंह, (2) श्रीमती चण्डी बाई, (3) श्रीमती शान्ती पाण्डेय, (4) श्री शिवप्रसाद शर्मा, (5) श्री लल्लू प्रसाद, (6) राजाराम गुप्ता, (7) श्री देवेन्द्र कुमार तिवारी, (8) श्री छेदीलाल प्रजापति, (9) श्री अवध बिहारी मिश्र, (10) श्री केदार सिंह।

अविश्वास प्रस्ताव के विरूद्ध निम्नलिखित पार्षदों में मतदान किया।

(1) श्रीमती गुलाबकली सिंह, (2) श्रीमती श्याम, (3) जुल्फकारखां, (4) श्री इस्लाम खां, (5) श्री तिलक सिंह।

अविश्वास प्रस्ताव के पक्ष में 10 मत जिसमें आज की कार्यवाही के अध्यक्ष श्री केदार सिंह पार्षद वार्ड क्र.2 का निर्णायक मत भी सम्मिलित है।

अविश्वास प्रस्ताव के विरूद्ध पांच पार्षदों ने मतदान किया। इस तरह अविश्वास प्रस्ताव का तिहाई बहुमत से श्रीमती गुलाबकली सिंह के विरूद्ध अविश्वास प्रस्ताव पारित हुआ।"

Learned single Judge found that since the meeting of no-confidence was not presided over by the Vice-President who was present and available and it was presided over by third person elected by the Councillors present, therefore, convening of this meeting is in violation of Section 59 of the Act and consequently, he quashed the motion of no-confidence passed against the petitioner/respondent. Aggrieved by this, the present Letters Patent Appeal has been filed by one Smt. Chandi Bai, who was not party before the learned single Judge in the writ petition.

It may also be relevant to mention here that when the writ petition was admitted and interim order was granted on 17.12.1996 by this Court and it was directed that the election of Nagar Panchayat be held but its result be no declared till further orders. But it appears that the result was declared on 19.12.1996 and the appellant Smt. Chandi Bai was declared elected as a President. Contempt proceedings were initiated before this Court which came to be registered as a Contempt Petition No. 19 of 1997. The respondents therein pleaded that they did not know about the stay order passed by this Court and, therefore, they revoked the order dated 4th March 1997.

Learned counsel for the respondent/petitioner has taken objection that this Letters Patent Appeal on behalf of the present appellant Smt. Chandi Bai is not maintainable as she was not a party before the learned single Judge. Learned counsel for the appellant submitted that she is a person interested and she is a

Councillor ; therefore her rights are affected. Consequently, she is interested in pursuing this appeal for the benefit of entire Nagar Panchayat. In this connection, learned counsel for the appellant invited our attention to a decision of Kerala High Court given in the case of *S. Govind Menon* v. *K. Madhvan Nair and others* (1). He also invited our attention to the decision of Hon. Supreme Court in the case of *Jatan Kanwar* v. *Golcha Properties* (2).

Question is whether a person who is not a party before the learned single Judge can maintain a Letters Patent Appeal or not. In somewhat identical situation, Kerala High Court has held that a person may not be a party to the decree or order but he may with leave prefer an appeal from such decree or order if he is either bound by the order or decree or is aggrieved by it or is prejudicially affected by it. In that case the court may decide in its discretion whether in such a case, leave is to be granted or not. Therefore, their Lordships observed that no hard and fast rule can be laid down in the matter as each case depends on its own facts. However, it was observed that one test in granting leave is whether he could properly have been made a party to the original proceeding in that case. However, in that case, certain observations were made against an IAS officer who was not a party. As a result, the disciplinary proceedings were started against him and he was placed under suspension. Therefore, he filed Letters Patent Appeal under Section 5 of the Kerala High Court Act, 1958. Their Lordships found that he could maintain the appeal. In this connection, their Lordships referred to an earlier decision of Chancery Division in the case of *Sidebotham's case* (3) as under :

> "But the words ' person aggrieved ' do not really mean a man who is disappointed of a benefit which he might have received if some other order had been made. A ' person aggrieved ' must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully refused him something, or wrongfully affected his title to something".

(1) A. I. R. 1964 Kerala 235. (2) A. I. R. 1971 S. C. 374.

Similar passage from *Corpus Juris Secundum* has also been quoted wherein it has been observed :

> " Broadly speaking, a party or person is aggrieved by a decision when, and only when it operates directly and injuriously upon his personal, pecuniary or property rights."

> " In legal acceptation a party or person is aggrieved by a judgment, decree, or order, so as to be entitled to appeal ..... whenever it operates prejudicially and directly upon his property or pecuniary rights or interests, or upon his personal rights and only when it has such effect."

In light of this observation made in the *Corpus Juris Secundum* and in the case of *Sidebotham's case (supra)*, we would examine whether the present judgment of the learned single Judge prejudicially affects the right of the appellant or not.

In the present case, the appellant is elected as Councillor of the Nagar Panchayat and she is interested to see that a person who is to be elected to the office of the President should be duly elected and should have confidence of the majority. In the democracy, the rule of law is supreme, therefore, a person who has majority with him alone can be entrusted the right to govern. In the present case, we are satisfied that the appellant has the legitimate right to ventilate her grievance that the petitioner / respondent has no right in law to continue as a President as he has lost confidence of the majority of voters. Therefore, the expression 'person aggrieved' has to be given an extended meaning and specially in the present context, we are of the opinion that the appellant is a person aggrieved as she being a Councillor of the Nagar Panchayat has a right to be governed by a person who proves the majority in the house. Thus, in our view, the appellant is an aggrieved person and we accordingly over rule the objection of the respondent / petitioner and permit the appellant to prosecute this appeal though she was not a party in the writ petition before the learned single Judge.

Having cleared the first preliminary objection, we dilate on the merits of the case. It is an admitted fact that the petitioner / respondent has lost the majority in the Nagar Panchayat because a no-confidence motion was passed against her. Therefore, she has no right to continue to be the Chairman of the Nagar Panchayat. But the learned single Judge has taken the view that since the meeting

which was convened on 30.11.1996 was not properly convened because as per Section 59 of the Act, in absence of the President, Vice-President of the Nagar Panchayat has to preside over the meeting. In the present case, Vice-President Shri Zulfikar Khan was present but he did not preside over the meeting. Therefore, the meeting convened has been declared by the learned single Judge as bad being in violation of Section 59 of the Act and consequently, the motion of no-confidence passed against the petitioner/respondent was quashed. In this connection, attention of the learned single Judge was invited to a decision of Full Bench of this Court in the case of *State of M. P. and others* v. *Beni Prasad Rathore and another* (1) wherein almost in identical situation, their Lordships have come to the conclusion that when the motion of no-confidence was brought against the President, the Vice-President was present but a third person was elected to preside over the meeting and that meeting was challenged and their Lordships held that since the Vice-President was present in the meeting and he was under obligation to preside over the meeting in which the motion of no-confidence against the President was sought to be pressed and if the Vice-President had not come forward to discharge the statutory obligation and a third person was elected to preside over the meeting, then convening of that meeting shall not be construed to be illegal. Consequently, the meeting was upheld by their Lordships. The observation made by the Full bench runs as under :

> ".....The President was absent and in any event, could not have presided over the first meeting. The Vice-President was physically present. It is not the writ petitioner's case that the Vice-President did not decline or was prepared to preside over the meeting. The fact remains that he was present at the meeting and did not preside over the meeting. It is nobody's case that he was prevented from presiding over the meeting. It was as for the unanimous decision of all the Councillors present including the Vice-President, that a third appellant was elected to preside over the meeting. This would clearly mean that the Vice-President was not prepared to preside over the meeting, though physically present. This may amount to failure on his part to discharge his statutory duty, but that can not invalidate the proceedings....."

(1) 1995 J. L. J. 769.

In the present case, almost in identical situation as in the case of *State of M. P.* v. *Beni Prasad Rathore (Full Bench) (supra)*, Zulfikar Khan, who was the Vice-President, was present in the meeting dated 30.11.1996 but notwithstanding that all the Councillors present there including Zulfikar Khan permitted Kedar Singh to preside over the meeting and accordingly Shri Kedar Singh, Councillor presided over the meeting and the motion of no-confidence was passed. Therefore, the decision of Full Bench in the present case squarely covers the situation and the view taken by the learned single Judge does not appear to be well founded. We have quoted above the proceedings of the meeting dated 30.11.1996 and no where in those proceedings, it is mentioned that Shri Zulfikar Khan was at any point of time was prevented by any person from presiding over the meeting. We directed the learned counsel for the petitioner / respondent to point out from the writ petition that Shri Zulfikar Khan was in any way prevented from presiding over the meeting. Rather in the minutes of the meeting dated 30.11.1996 (sic), it is categorically recorded that Shri Kedar Singh was proposed by one Shri Devendra Kumar Tiwari to preside over the meeting and the same was supported by Shri Shiv Prasad Sharma, Councillor and no Councillor present in the meeting objected to this. Therefore, on the basis of this minutes of the meeting, it appears that Shri Zulfikar Khan, though present, did not choose to exercise his statutory obligation and permitted a third Councillor to preside over the meeting. In the said meeting, resolution of no-confidence was passed by ten against five. From the proceedings of the meeting, it is more than apparent that the Vice-President Shri Zulfikar Khan himself surrendered his statutory obligation to a third person to preside over the meeting. Section 59 of the Act clearly says that in case Vice-President is not there, then one of the members as a Councillor can be elected to preside over the meeting. In the present case, since the Vice-President was not willing to preside over the meeting, therefore, one of the Councillors was elected to preside over the meeting and the motion of no-confidence was passed against the respondent/petitioner. In this view of the matter, we are of the opinion that the view taken by the learned single Judge does not appear to be correct and it is against the ratio laid down by the Full Bench decision of this Court cited above.

Smt. Chandi Bai v. Smt. Gulabkali Singh, 1998.

Consequently, we allow the appeal and set aside the order of the learned single Judge. It is open for the Nagar Panchayat to proceed in accordance with law. There shall be no order as to cost.

Appeal allowed.

APPELATE CIVIL

Before Mr. Justice J. G. Chitre,
11, February, 1998.

U. C. O. BANK, INDORE ...Appellant*

v.

BASANTILAL .Respondent.

Civil Procedure Code 1908 (V of 1908) - Section 96 and Contract Act, Indian (IX of 1872) - Section 171 - 'Banker's Lien' on the amount invested in fixed deposit with the appellant/Bank - Plaintiff / respondent made fixed deposits with the defendant/Bank-Maturity value payable were appropriated towards amount recoverable from plaintiff - Bank does not have Banker's lien on the said amount - Unless there is implied or express agreement Bank had no general lien on the amount deposited with it as deposit - Cannot be inter mixed unilaterally without customer's consent.

If there is no codified law, the rules of justice, equity and good conscious is always useful. What the law is after all ? It is the code of conduct of human activities, behaviour its regulations and the problems arising out of them and the solutions for them.

In the absence of any agreement the appellant bank had no general lien on the said amount which was deposited with the Bank as deposit. It was not deposited with the bank as a security to any particular loan which was advanced by the appellant bank to the respondent.

* F. A. No. 195 of 1994 against the judgment and decree dated 30.3.94, passed by XIIth Addl. District Judge, Indore, in C. S. No. 5-B/91.

U. C. O. Bank, Indore v. Basantilal, 1998.

There was no express or implied agreement between the appellant bank and the respondent to permit the appellant bank to set off or adjust the fixed deposit in question towards the recovery of that loan. Therefore, unilateral act on the part of the appellant bank was distinctly unsustainable.

Glare & Co. v. *Dresdner Bank* (1) ; referred to.

J.W. Mahajan for the appellant.

P. Mitha for the respondent.

Cur. adv. vult.

JUDGMENT

J. G. CHITRE J. - The original defendant in Civil suit No. 5-B/1991 is hereby assailing the correctness, propriety and legality of the judgment and decree passed by XIIth Additional District Judge, Indore while deciding the above-mentioned suit by which the suit of the respondent/original plaintiff was decreed fully.

Few facts need to be stated for the purpose of revealing the disputed question. The respondent - Basantilal had deposited Rs. 6,000/- on 13.7.79 vide receipt No. 032324, Rs. 18,000/- on 19.08.83 vide receipt No. 906951, and Rs. 20,000/- on 13.11.81 vide receipt No. 826051. The said amount was received by the respondent after his retirement from the Steel Authority of India Limited, where he was serving. He averred that the said amount was deposited by him for the purpose of getting him financial assistance in his old age. The said amount was deposited by him in fixed deposit scheme with the bank under its " KUBER YOJNA". As per the averments of the respondent / original plaintiff he was to get the amount which was deposited by him on 13.7.79 which was due and payable to him by the Bank on 13.7.87, the amount which was deposited by him on 19.8.83 was due and payable to him on 19.8.87 and the amount which was deposited by him on 13.11.81 was due and payable to him on 13.02.89. Thus, he was entitled to receive Rs. 82,997/- from the Bank in respect of the said fixed deposits on the maturity of those deposits. The said amount was not refunded by the Bank to him and therefore the respondent issued a notice through his advocates to the Bank asking the Bank to refund the said amount alongwith

(1) (1915) 3 K. B. D. 576.

the interest. However, the bank did not refund that amount as claimed by him and therefore, the respondent was constrained to file the present suit. The respondent further alleged that one Ganesh Prasad Agnihotri opened an account in Sanyogitaganj Branch, Indore of the Bank by joining hands with O. P. Srivastava, the branch Manager of the bank, in the name of Glamps Pharma and the respondent does not have concern whatsoever with said persons and the said transaction. The bank filed prosecution against said Ganesh Prasad Agnihotri for offence punishable under sections 420, 467 and 463, IPC and that prosecution was pending on the date of filing of the suit. The bank also filed a suit against said Ganesh Prasad as well as the present respondent, which was pending before 4th A. D. J. Indore bearing No. 79/86. The said suit was also pending before that court on the date of filing of the suit. The respondent averred that said Ganesh Prasad Agnihotri had admitted in the said suit, in his written statement that he had by forging the signature of respondent opened the said account on 9.10.84.

The respondent (original plaintiff) has made a grievance that the appellant (original defendant) is not refunding the amount which he had deposited with the bank in fixed deposit. He averred that by the letter dtd. 20.7.87 the appellant informed him that Rs. 6,000/- which were invested by him in fixed deposit and which were due and payable on 13.7.87 were appropriated towards the amount which was recoverable by bank from him, as 'amount appropriated', in view of the order passed by 4th Addl. District Judge, Indore, in case No. 79/86. Vide application dtd. 2.12.87 he made a grievance that he was entitled to get Rs. 82,997/- from the bank as the amount which was invested by him with the bank.

The appellant (original defendant) submitted the written statement in the matter of said suit on 6.1.92 and by its averments admitted that the respondent (original plaintiff) had saving account with the bank. He further admitted that he had invested money in fixed deposit as averred by him on various dates. It admitted that there was civil suit pending before 13th A. D. J. Indore between *U. C. D. Bank* v. *Glamps Pharma*. It averred that said bank account in the name of Glamps Pharma was opened by the respondent. It also admitted that a criminal case w[illegible]

pending against Ganesh Prasad Agnihotri, in criminal court, however it denied that bank has falsely implicated the respondent in false suit and thus, bank is troubling him.

The bank averred that it has a right to appropriate the amount which has been invested by the respondent in fixed deposit towards the amount which the bank has to recover from him, on account of 'bankers lien'.

Learned trial Judge settled the issues; out of them one was whether bank is having legal right to refrain from paying the amount which has been invested by the respondent with the bank in fixed deposit ? While deciding the suit on this point alongwith others the learned trial Judge held that the bank does not have "bankers lien" on the said amount and, therefore, has no right to refrain from paying that amount to the present respondent (original plaintiff) and appropriate it towards his recoverable amount. Learned Judge fully decreed the suit directing the bank to pay amount of Rs. 82,997/- with interest on Reserve Bank rate from the date of the suit and that decree has been put to challenge by the present appellant (original defendant), the bank.

As there was tussle between the litigating parties in respect of stay to execution of the impugned decree, both the counsel prayed for early disposal of this appeal finally. The short point has been involved for adjudication, therefore, in the interest of justice, their prayer was allowed and this appeal was finally heard.

Shri J. W. Mahajan, counsel appearing for the appellant placed reliance on the following judgments for substantiating his argument :-

i) *Devendrakumar Lalchandji* v. *Gulabsingh Nekhesingh* (1),

ii) *Punjab National Bank Ltd.* v. *Satyapal Virmani* (2),

iii) *Brahmayya and Co.* v. *K. P. Thangavelu Nadar and ors.* (3),

iv) *N. Mohammad Hussain Sahil* v. *The Chartered Bank, Madras* (4)

(1) A. I. R. 1946 Nag. 114.
(2) A. I. R. 1956 Punj. 118.
(3) A. I. R. 1956 Mad. 570.
(4) A. I. R. 1956 Mad. 266.

U. C. O. Bank, Indore v. Basantilal, 1998.

v) *Vijay Kumar* v. *M/s. Jullunder Body Builders* (1).

By relying on these judgments he argued that in view of provisions of S. 171 of Indian Contract Act, 1872 (hereinafter referred to as Contract Act for convenience), the appellant bank was having a ' bankers lien ', on the amount invested by the respondent in fixed deposit with the appellant bank.

Shri Mitha, counsel appearing for respondent submitted that the impugned judgment and decree is correct, proper and legal. The appellant bank did not have a right whatsoever on the amount deposited by the respondent as fixed deposit with it. He submitted that the bank was obliged to return that amount on ' due date ', - ' maturity date '. He submitted that as the appellant bank did not return the said amount on ' maturity date ' to the respondent it was liable to pay interest on it which has been correctly decreed by the trial court.

In view of the submission advanced before me and in view of the evidence on record, judgment and law of precedents on which reliance was placed by Shri J. W. Mahajan, counsel for appellant, after examining every relevant facet of the matter, I come to the conclusion that the impugned judgment and decree is correct, proper and legal and appeal deserves to be dismissed with costs for the reasons stated hereunder :

S. 171 of the Contract Act provides -

> 'General lien of bankers, factors, wharfingers, attorney and of a High Court and policy brokers may, in the absence of a contract to the contrary, retain as a security for a general balance of account, any goods bailed to them, but no other persons have a right to retain, as a security for such balance, goods bailed to them, unless there is an express contract to that effect. (underline provide for an emphasis)'

In the matter of *Devendra Kumar Lalchandji (supra)*, Nagpur High Court held :-

> "There is a distinction between bailment and deposit. Money paid into a bank to be credited in the current amount of the person making the payment does not constitute a case of bailment (emphasis provided by underlining words)."

(1) A. I. R. 1981 Delhi 126.

It further held that -

> " In the absence of specific provision on the subject, when moneys are held by the bank in one account and the payer in respect of these moneys owes the bank on another account, the banker's lien gives the bank a charge on all the monies of the payer in the hands, so that they may be transferred to whatever account the bank chooses, to set off or liquidate the debt."

By pointing out this decision of Nagpur High Court - Single Bench, Shri Mahajan argued that in the present case as ' banker's lien ' the appellant was having a legal right to have money liquidated towards the amount recoverable by the appellant bank from the respondent in respect of the loan taken by him, and, therefore, the learned trial Judge should have dismissed the suit of the respondent.

In the matter of *Brahmayya and Co. (supra)* the Single Bench of Madras High Court held that -

> " The lien under S. 171 can be exercised only over property or some one else and not his own securities which are placed in the custody of a bank. It would be correct to speak of the rights of the bank over the security or the goods as a lien because the ownership of the goods or securities would continue to remain in the customer. But when moneys are deposited in a bank as a fixed deposit, the ownership of the moneys passes to the bank and the right of the bank over the moneys, lodged with it would not be really a lien at all. It would be more correct to speak of it as a right of set off or adjustment."

By pointing out this observation of Single Bench of Madras High Court, Shri Mahajan submitted that in the present case the appellant bank was having a right to set off or adjustment in context with the amount deposited with it by the respondent as fixed deposit.

In the matter of *Punjab National Bank Ltd. (supra)*, Division Bench of Punjab High Court held that -

" S. 171 Contract Act provides for a general banker's lien. According to the law, merchant, the banker can look to his general lien as a protection against loss on amount, or loss on loan or overdraft. And money has been held to be a species of goods over which lien may be exercised."

It further held that -

" Where a banker has advanced money to another, he has a lien on all / securities which come into his hands for the amount of the general balance, unless there is an express contract or circumstances to the contrary (emphasis provided by under lined words)."

By placing reliance on this observation also Shri Mahajan canvassed the case of appellant bank.

In the matter of *N. Mahommad Hussain Sahil (supra)* Single Bench of Madras High Court held that -

" The general lien of bankers over any goods bailed to them is embodied in S. 171 of the Contract Act. The question is whether any such lien may be over money deposited by the customers. Where moneys are deposited in a bank the ownership of the moneys passes to the bank and the right of the bank over the moneys lodged with it would not be really a lien at all and it would be more correct to speak of it as a right of set off or adjustment. Whether the right of the bank is called a lien or set off, the said right can be exercised only by the bank by getting the funds deposited in its branch by the customer transferred to it with the consent of the customer. It is not open to the customer to call upon the bank to exercise any such lien or set off." (emphasis provided by underlining the words).

Shri Mahajan submitted by placing emphasis on the judgment that moneys deposited in the fixed deposit by respondent happened to be ' goods ' and, therefore, the bank is having a ' lien ' over it.

In the matter of *Vijay Kumar (supra)*, Single Bench of Delhi High Court held that -

" Where the contract between the customer (judgment debtor) and the bank was to furnish a guarantee for certain amount on the understanding that the bank will hold the fixed deposit receipts furnished by the customer as a security for the guarantee, the bank gave on behalf of the customer and the liability under the guarantee, was discharged by the court, the bank could not hold the deposit receipts in their hands for the general balance due to the customer in the customer's overdraft account when the endorsement of the bank manager on the reverse of the letter given by the customer in connection with the guarantee on the usual printed form indicated that the fixed deposit receipts were given in connection with the bank guarantee only the letter had to be read with the endorsement and so read would constitute a contract contrary to the general lien of the bank. Consequently, the court, in whose favour the guarantee was given could attach the fixed deposit receipts in the hands of the bank as the amount under the fixed deposit receipts belonged to the customer."

Section 148 of Contract Act provides the definition of 'bailment.'

" i.e. A ' bailment ' is the delivery of goods by one person to another for some purpose upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person delivering the goods is called the 'bailor'. The person to whom they are delivered is called the 'bailee'."

Explanation provided explains further that -

" If a person already in possession of the goods of another contracts to hold them as a bailee, he thereby becomes the bailee, and the owner becomes the bailor of such goods although they may not have been delivered by way of bailment."

S. 154 of the Contract Act provides :

" If the bailee makes any use of the goods bailed, which is not according to the conditions of the bailment, he is liable to make compensation to the bailor for any damage arising to the goods from or during such use of them."

S. 161 provides -

" If, by the default of the bailee, the goods are not returned or tendered at the proper time, he is responsible to the bailor for any loss, destruction or deterioration of the goods from that time."

S. 160 provides -

" It is the duty of the bailee to return, or deliver according to the bailor's directions, the goods bailed, without demand, as soon as the time for which they were bailed has expired, or the purpose for which they were bailed has been accomplished."

The judgments quoted supra commonly tune that the money deposited in fixed deposit in the bank would amount to 'bailment'. According to me that is consistent with the meaning attributed to 'bailment', by S. 148 and the use of words in Ss. 154, 161 of the Contract Act. The judgment of Nagpur High Court in the matter of *Devendra Kumar Lalchandji (supra)* speaks of the money deposited by a customer in bank in an account - current account. Nagpur High Court, Single Bench, in said judgment made the observation in respect of the amount deposited by customer in bank in current account and, therefore, held that the bank can claim lien on other account and liquidate deposits of transferred moneys from one account to another.

The Contract Act is not exhaustive and it dealt with only certain parts of the law on contract and contractual activities, rights, liabilities and responsibilities. Where there is no codified law dealing with subject matter for the problems posed, the principles enunciated by English Law, if applicable to our conditions, can be looked at for the needs. If there is no codified law, the rules of justice, equity and good conscious is always useful. What the law is after all ? It is the code of

conduct of human activities, behaviour, its regulations and the problems arising out of them and the solutions for them. As society advances legislation takes place for providing the solutions to the needs of the society and its activities, interaction and result thereof. If something remains thereafter the rule of justice, equity and good conscious is the last solution and that is the out come of jurisprudence and judicial decisions.

In *Glare & Co.* v. *Dresdner Bank* (1) :-

> " The plaintiff had an account at the Berlin branch of the defendant bank, which had its head office in Germany and a branch in London. They wrote to the London branch demanding payment of the balance due on the account at the Berlin branch, and upon refusal to pay sued the bank without having made any request to the bank in Berlin to pay or to remit the balance to London."

On these facts it was held that the plaintiffs were not entitled to demand payment from the London branch, and that there had not been any breach by the defendant bank of any obligation to the plaintiff. In that judgment the view of Scrutton J. in the matter of *Leader & Co.* v. *Direction der Disconto-Gesell-schaft* were quoted in which it was held that, the relation between banker and customer is that of debtor and creditor. In the absence of any special contract to the contrary, the debtor is bound to seek out his creditor and pay him, and no demand of payment is required before the creditor can sue the debtor wherever he can be found.

Deciding the case in *Glare & Co.* v. *Dresdner Bank* - *Rowlatt. J* admitted the principle that the relation of a banker and customer is that of simply debtor and creditor, with a superadded obligation to honour cheques. The facts of *Glare & Co.* v. *Dresdner Bank* are pointing out the difficulties of remittance of money between two places in different countries.

In the matter of *Punjab National Bank Ltd. (supra)*

(1) (1915) 2 K. B. D. 576.

U. C. O. Bank, Indore v. Basantilal, 1998.

> " One V had, with the *Punjab National Bank Ltd. (supra)* at Lahore, a call loan account and by way of security be had deposited Government Securities of the value of Rs. 5,00,000/-. The interest was payable at 1-1/2 percent per annum. On 31.12.48 and in that case with the consent of the debtor the securities were sold and after adjustment of the debt due from V a sum of Rs. 13311/6/6 was surplus in the hands of the bank. V called upon the bank to pay him this surplus amount with interest but the bank refused to pay the amount claiming a general banker's lien on that amount in respect of certain dues from another Bank for whom V and another person had given guarantee, under which each one of them had taken an individual and personal liabilities to pay any amounts which were due to the Bank."

On those facts and circumstances the Division Bench of Punjab High Court held that " the bank could claim a general lien on the surplus amount left with it and could retain it for payment of other debts due from V and there was no contract express or implied, inconsistent with this general lien."

In the matter of *Vijay Kumar* v. *M/s. Jallunder Body Builder (supra)*, Single Bench of Delhi High Court held that -

> " As it is general lien, the bank could attach the fixed deposit receipts in the hands of the bank when there was a contract between the customer, judgment debtor, and the bank by which the bank was to furnish a guarantee for certain amount on the understanding that the bank will hold the fixed deposit receipts furnished by the customer as a security for the guarantee the bank gave on behalf of the customer."

In the matter of *N. Mohammad Hussain (supra)*, the case was revolving around different accounts and there was hypothication of the property to bank as security for overdraft. There were some bonds as assets of customer in the hands of the bank. The controversy was different from the facts of the present case. In the matter of *Brahmmayya and Co. (supra)* there was a transfer of the deposit receipts as assigned in favour of the bank.

U. C. O. Bank, Indore v. Basantilal, 1998.

The banking business and transactions have different facets. The banking business includes acceptance of bills, cheques, drafts for encashment on commissions, issuing of drafts, bills on commission. It includes acceptance of money as fixed deposits and lending that and other money to needy persons as loans by charging interest from them on agreement basis. Bankers give interest to the depositors on the money deposited and earn interest from the persons whom the loans are advanced. The rate of interest in respect of the loans is always higher than the interest paid to the persons depositing the money in various accounts and fixed deposits. The different transactions have different tinges and characteristics. Banks accept the merchandise as security for advancing the loans. Banks accept gold, silver, golden ornaments and securities as securities for advancing loans. While granting the loans in some cases the goods purchased by such debtors are hypothicated with banks. Every transaction has a different face. The transactions are bound by various agreements, their terms and conditions.

In accepting fixed deposits on particular terms by agreement bank accepts that money with a promise to return that money on the date of maturity of the deposit with interest. In the period in between the bank utilises that money for its business. For that, the interest is paid to the person depositing the money. The promise to return the said amount deposited alongwith interest accruable on that has to be honoured by the bank on the date of maturity unless the deposit is continued on the same terms by reinvestment or reinvested on different terms and conditions. Here there happens to be a specific agreement between the person depositing the said money with the bank as fixed deposit. In that case there is a specific undertaking given by the bank to that person to refund the principle amount alongwith interest on a stipulated date. Thus, the delivery of that goods (moneys) is subject to a contract that the said money would be returned after the purpose is accomplished and the bank who acts as bailee is duty bound to return the goods bailed on expiry of the time or accomplishment of the purpose. If the goods are not returned by the default of the bailee, the bailee is bound to give compensation in that respect.

In the present case unilaterally the bank refused to return the refund of the amount deposited to the respondent (original plaintiff) on date of maturity.

There was no consent given by the respondent to the bank to adjust it as set off in respect of other amount if at all recoverable from him. There was no express or implied agreement between the appellant and respondent of set off or adjustment or of appropriation. In the absence of any agreement the appellant bank had no general lien on the amount which was deposited with the bank as deposit. It was not deposited with the bank as a security to any particular loan which was advanced by the appellant - bank to the respondent.

The bank enter with contracts with their customer in a different way and on different terms and conditions. Each contract is separate, independent and has its own characteristic obligations, incidents, advantages and disadvantages. Unless there is implied or express agreement, in existence, those transactions can not be intermixed and that too without customer's consent unilaterally by the banks in their favour. Every transaction is bound by its own terms and conditions.

Therefore, in the present case the transaction of fixed deposit between the respondent and the appellant bank was a totally different transaction which was subject matter of a suit which was pending before 13th A. D. J. Indore. It had no nexus whatsoever. There was no express or implied agreement between the appellant bank and the respondent to permit the appellant bank to set off or adjust the fixed deposit in question towards the recovery of that loan. Therefore, unilateral act on the part of the appellant bank was distinctly unsustainable . The respondent (original plaintiff) was entitled to recover the amount of the said fixed deposit which was to be refunded to him on the date of maturity by the appellant bank. Therefore, learned trial Judge did not commit any error in decreeing the suit of the respondent fully.

The appellant bank by not refunding that amount on the maturity date, has violated the express agreement between them. Therefore, it was under obligation to make good the loss caused to respondent on account of that at the Reserve Bank rate, from the date of maturity itself. There is no contention in this context from the respondent. There is no prayer made by the respondent in this context ; therefore, leaving aside that aspect, I do not find anything incorrect,

improper in the directions of the trial court to the appellant bank to give interest on the sum of the deposit from the date of suit till its recovery at Reserve Bank rate.

Thus, the appeal stands dismissed with costs. Counsel fee Rs. 500/- (five hundred).

Appeal dismissed.

APPELATE CIVIL

Before Mr. Justice A. R. Tiwari.

4, May, 1998.

JAGDISH PRASAD ...Appellant*

v.

SMT. DROPTIBAI & others .Respondents.

Civil Procedure Code (V of 1908), Section 100 and Accommodation Control Act, M. P. (XLI of 1961), Section 12 (1) (c)-Decree of eviction passed by trial Court on ground of bonafide *need-First appellate court should not lightly interfere with finding of trial Court unless unsound, perverse or based on reasons of material inconsistencies or inaccuracies-Co-owner of the Hindu undivided family/landlord can maintain the suit-Findings of trial Court are not found to be unsound, perverse or unsatisfactory-First appellate Court is in error in reversing the findings of trial Court-When first appellate Court upsets findings of trial Court illegally and illogically-Interference in Secon Appeal is not only permissible but also desirable.*

Baburao Bagaji Karemore and others v. *Govind and others* (1), *Shri Ram Pasricha* v. *Jagannath and others* (2) and *Dayakrishan* v. *M/s. Sher Bidi Agency* (3) ; relied on.

S. H. Agrawal & Ravi grawal for the Appellants

B. K. Joshi for the Respondents

Cur. adv. vult.

---

* S. A. No. 233 of 1994, against the Judgment and decree dated 29.9.95, passed by IIIrd Addl. District Judge, Indore, in C. R. A. No. 4-A /93.

(1) A. I. R. 1974 S. C. 405. (2) A. I. R. 1976 S. C. 2335. (3) 1988 (II) M. P. W. N. 199.

Jagdish Prasad v. Smt. Droptibai, 1998.

JUDGMENT

A. R. TIWARI J.-" No light ", wrote Milton in Paradise Lost " but rather darkness visible". But Courts of justice, determined to secure harmony and spurn antinomy, search " light " in lexicon of law to be able to say " no darkness, but only light visible". In this epicerastic exercise, Courts have to remember that law has to enchisel " flaw " and ensure " flow " in doctrinal direction. The inbred question is whether First Appellate Court has done the right thing ?

The landlord has filed this second appeal under Section 100 of the Code of Civil Procedure against the judgment and decree dated 29.09.1994, rendered by III Addl. District Judge, Indore, in Civil Regular Appeal No.4-A/93, thereby dislodging demolishing and the judgment and decree of eviction, passed under Section 12 (1) (e) of the M. P. Accommodation Control Act, 1961 (for short ' the Act '), from the tenanted accommodation comprised of House No.2, Murai Mohalla, Street No.3, Sanyogitaganj, Indore, occupied by the tenant at monthly rent of Rs. 18.00, by VIII Civil Judge, Class-II, Indore, in C. O. S. No.357-A/85 on 20.09.1990 and ordering the dismissal of the suit to the extent of relief of eviction.

Facts lie in a narrow compass. The original tenant occupied the aforesaid accommodation as tenant. The appellant has a large family of 27 members. He and his wife suffered from ailments. His brother Mahesh Kumar is forced to live in tenanted accommodation. In the face of acute insufficiency of the accommodation, the appellant filed the civil suit for eviction and recovery of rent from 01.01.1982 and *mesne* profits thereafter. The defendant filed the written-statement of defence and offered his contest. The trial Court framed the issues. The material issue is Issue No. 4. Parties led evidence. On evaluation of the evidence, the trial Court found the ground established and passed the decree of eviction under Section 12 (1) (e) of the Act and also directed payment of rent/*mesne* profits from 18.04.1982 instead of 01.01.1982. The defendant filed the first appeal on 6.2.1991. The defendant died during the pendency of first appeal. His Legal Representatives were brought on record. The first appeal hibernated for a long time. As a result of enormous delay, the appellant filed Writ Petition No.1506

of 1994 to obtain the direction against the respondents for early disposal of this appeal. By elaborate order dated 16.09.1994 this Court directed the first appellate Court to decide the appeal by 30.09.1994. The first appellate Court then heard the final arguments on 26.09.1994 and passed the judgment and decree on 20.09.1994 to show compliance of the aforesaid direction and allowed the first appeal and vacated the judgment and decree of the trial Court to the extent of eviction from the suit accommodation. Dissatisfied the appellant filed this second appeal.

By an elaborate order dated 11.10.1994, this second appeal was admitted on the following substantial questions of law :-

"(a) Whether appellate Court has misapplied the 'objective test' and misappreciated the 'binding precedents' and has thus erred in law in reversing the decree on irrelevant considerations and whether decisions demonstrates ' flaw in law ' as regards reasons on account of non - consideration of entire evidential material, particularly evidence of the respondents ?

(b) Whether the appellate Court has not appreciated properly the 'expression' "is required *bonafide*" as contained in S. 12 (1) (e) of the Act and whether its conclusions are vitiated on account of 'perversity' and 'illegality' ?

(c) Whether Mahesh Kumar, member of the family in terms of Sec. 2 (e) of the Act, can be compelled to reside in tenanted premises and whether landlord can be denied decree in such state of affairs ?

(d) Whether decree for rent / *mesne* profits till the date of appellate decision was required to be passed in any case."

Shri S. H. Agrawal and Shri Ravi Agrawal, learned counsel for the Appellant. Shri Joshi B. K. learned counsel for the Respondent. Shri Joshi filed IANo. 2696 / 98 stating that one LR Laxmanrao refused the letter sent by him and this may lead to inference that counsel is not instructed. The appeal is entertainable

only on substantial questions of law. The appointment is not determined under Order III, Rule 4 (2) of the Code. The application is, thus, rejected. Elaborate reasons are contained in the proceeding of date. The counsel for both the sides are heard for final disposal today.

The counsel for the appellant submits that there were no material inconsistencies or inaccuracies. He further submitted that the conclusions of the trial Court were not unsound and perverse. He, therefore, submitted that the first appellate Court lightly interfered with the decree of the trial Court and thus committed an error of law in denying the relief under the law as granted by the trial Court. He thus submits that the judgment and decree of the first appellate Court merit to be mortalised and the judgment and decree passed by the trial Court deserves to be restored.

The counsel for the Respondents (LRs of the original defendant - tenant), however, supported the judgment and decree passed by the first appellate Court and submits that this appeal may be dismissed.

I proceed to examine worth of rival contentions. But before doing that, right at the threshold, it is apt to emphasize that the first appellate Court cannot and should not lightly interfere with the findings of trial Court. In *Baburao Bagaji Karemore and others* v. *Govind and others* (1), it is laid down that :-

> " Trial Judge who had the opportunity of observing the demeanour of witnesses while giving evidence should not be lightly interfered with merely because an appellate court which had not the advantage of seeing and hearing the witnesses can take a different view. Before a finding of fact by a Trial Court can be set aside it must be established that the Trial Judge's findings were clearly unsound, perverse or have been based on grounds which are unsatisfactory by reasons of material inconsistencies or inaccuracies."

So the question imprimis is whether findings of trial Court are unsound, perverse or unsatisfactory by reasons of material inconsistencies or inaccuracies ? This question, for proper answer, takes me to evidential material.

(1) A. I. R. 1974 S. C. 405.

PW-1 Bhaurao proved medical bills (Exs. P-1 to P /5) showing ailments of Appellant and his wife Smt. Omwati. PW-2 Susheel proved tenancy of Mahesh Kumar, brother of the Appellant. He corroborated PW-3 Mahesh Kumar. PW-4 Dr. Kalyan proved ailments of Appellant and his wife and need to occupy ground floor in possession of the tenant. PW-5 Jagdeesh Prasad (Appellant) deposed about *bonafide* need in pressing shape.

The defendant Balwantrao (DW-1) examined himself in rebuttal. Contrary to pleadings of desire to enhance rent from Rs. 18.00 to Rs. 100.00 (Para 4 of written statement), he stated that demand was only for Rs. 20.00 from Rs. 18.00 (Paras 4 and 9). DW-2 Chhotelal is examined to show size of the family of the Appellant particularising seven members.

The following facts and features are at once visible :-

(a) The suit house is of the ownership of Hindu undivided family and Appellant is Karta receiving rent (Para 1 of Plaint). A co-owner landlord can maintain suit as held in *Sri Ram Pasricha* v. *Jagannath and others* (1). That is the finding on Issue No. 1.

(b) The *bonafide* need is pleaded in Para 4 of the plaint with particulars about " insufficiency " and need of Appellant and his wife to occupy two rooms on ground floor due to insufficient accommodation as in possession, that is remaining portion of the house, and ailments inhibiting use of stair-case and need of brother (PW-3) coparcener, to occupy two rooms on first floor. Written statement contains vague denial. PW-1 to PW-5 are examined to support averments on oath, Exs. P/1 to P/15-A are proved.

(c) The only plea is about design to enhance rent. This is meretricious in view of contradiction in deposition *vis-a-vis* written statement as pointed above.

(d) DW-1 and DW-2 have given vague statements.

(1) A. I. R. 1976 S. C. 2335.

(e) The family is quite large and accommodation in possession is not sufficient.

(f) Trial Court scrutinised evidence and documented reasons in Paras 8 to 12 (Issue No. 4) of the judgment. The first appellate Court reversed the findings on reasons chronicled in Paras 12 to 15.

(g) PW 3 Mahesh Kumar, though coparcener and entitled to occupy, is living in a tenanted accommodation - House No. 109, Jankinagar Extension, Indore at monthly rent of Rs. 250.00 due to insufficiency of accommodation in suit house as against the rent of Rs. 18.00 being paid by the tenant. It is an evidence that landlord of Mahesh Kumar has asked him to vacate the tenanted accommodation occupied by him due to insufficiency of accommodation in the suit house for his occupation. No other accommodation is available and none is pleaded or proved by defendant.

The oppugnation is inutile and futile and " cat is out of bag " when the defendant - tenant (DW - 1) virtually dented and destroyed averments in written - statement and gave up the fight deposing in Para 9 as under :-

" यह सही है कि मेरे से 100 रू. माहवार किराया नहीं मांगा गया। वादोत्तर में 'ए' से 'ए' मांग में लिखी बात गलत है। "

" मैं इस बारे में कुछ नहीं बता सकता कि, वादी को निवास का स्थान आवश्यकता के मान से कम पड़ता हो व उनको मेरे किरायेदारी के स्थान की आवश्यकता हो।"

This shows that there is no rebuttal of *bonafide* need. Yet the first appellate Court ignored this and dislodged the conclusion of the trial Court. Now if first appellate Court did not find it fit to place reliance on PW - 1 to PW - 5 for proof of ground of eviction, moreso in the face of aforesaid statement of DW - 1, then what more was required for proof. Manifestly, it has gone wrong. DW - 1 also stated in Para 10 that :-

" यह सही है कि वादी के बच्चे शादी लायक हो गये हैं, बड़े हो गए हैं तो शादी होगी ही।

It is also difficult to understand as to what is meant by observation, made by first appellate Court, that " requirement in presenti " is neither pleaded, nor proved (Para 15 of judgment). Such an observation is possible only when evidence furnished by PW - 1 to PW - 5 and aforesaid statement of DW - 1 are ignored and no attention is paid to necessity of ' objective test ' and no effort is made to apply binding precedents. The conclusion is evidently erroneous which vitiates the reversing verdict.

The findings of trial Court are not found to be unsound, perverse or unsatisfactory. There are no inconsistencies or inaccuracies, much less material ones. On the other hand, I find that the first appellate Court is in error in reversing findings on untenable grounds. ' Flaw in law ' is obvious. Section 12 (1) (e) and Section 2 (e) are not properly appreciated. As noted in Para 9 above, this then is the answer in favour of the Appellant.

Aptly I set this answer because when first appellate Court, obligated to examine evidence minutely and required to adhere to Section 3 of the Indian Evidence Act, 1872, upsets findings of trial Court illegally and illogically, then interference in Second Appeal is not only permissible but also desirable. In *Dayakrishna* v. *M/s. Sher Bidi Agency* (1), this Court restored the decree of eviction passed by the trial Court. Dislodging the decree of first appellate Court, this Court held that :-

> " I am unable to agree with the submission made by the learned counsel for the Respondent that the plaintiffs have not succeeded in proving their *bonafide* requirement."

The case on hand is akin to this.

I have to render to the Appellant " his due ", being one of the three percepts of law inscribed on the wall of Harvard Law School Library, as pointed out by Paul A. Freund, and exercise control to ensure ' sense of confidence ' in the justice system.

Burger CJ of American Supreme Court once observed that :-

(1) (1988) II M.P.W. No. 199.

" A sense of confidence in the Courts is essential to maintain the fabric of ordered liberty for a free people and it is for the subordinate judiciary by its action and the High Court by its appropriate control to ensure it."

New Testament conveys that "We walk by fail, not by sight". Faith and confidence must be seen to exist in matter of delivery of justice system particularly.

The case on hand shows as to how a good cause suffers and how matter is unduly prolonged ? Here Section 100 of the Code of Civil Procedure corrects the "error" and delivers justice to a wronged landlord, first by tenant and then by first appellate Court. When "action" of first appellate Court is wrong and unsustainable, I, by appropriate control, undo the wrong done.

The Court has to act in a fair and reasonable manner. In (1956) AC 696, Lord Radliffe put it elegantly thus -

" their actual persons should be allowed to rest in peace. In their place there rises the figure of the fair and reasonable man. And spokseman of the fair and reasonable man, who represents after all no more than the anthropomorphic conception of justice, is and must be the court itself."

Ex consequenti, I allow this appeal, vacate the judgment and decree of the first appellate Court and restore the judgment and decree of the trial Court with orders as to costs payable by respondents throughout. Counsel fee is fixed at Rs. 750.00, if certified. Let a decree be drawn up.

The ' Omega ' has thus been said because law and justice should live in harmony.

Transmit a copy of this Judgment to concerning Court as well as to concerning Judge, whose judgment is incinerated, wherever he may be posted at present. This is one way of exterminating "darkness" and ensuring "light" in administration of justice.

Return the record of Courts below.

Appeal allowed.

APPELATE CIVIL

Before Mr. Justice R. S. Garg.

2nd February, 1998.

SANTOSH JAIN ...Appellant*

v.

SMT. VIMLA BAI .Respondent.

Arbitration Act, Indian (X of 1940) - Section 39 - Appeal under - Award - Dealing with an award which is not properly stamped or unstamped court is competent to impound it and send it to the Collector stating the amount of duty and penalty levied thereon.

The Court dealing with an award which is not properly stamped or is unstamped is competent to impound it and to send it to the Collector with a certificate in writing stating the amount of duty and penalty levied thereon. The Collector after receiving the instrument may adjudge whether it was duly stamped and he may require penalty to be paid thereon, if in his view, it has not been duly stamped. If he is satisfied that proper duty and penalty are paid, the Collector would certify by endorsement on the instrument that proper duty and penalty have been paid.

Hindustan Steel Ltd. v. *M/s. Dilip Corporation* (1) and *Shivlal* v. *Union of India* (2) ; relied on.

R. K. Nanhoria for the appellant.

Smt. A. Ruprah for the respondent.

Cur. adv. vult.

ORDER

R. S. GARG J. - The appellant being dissatisfied by the order dated 24.9.1995 passed in Civil Suit No. 9-A/93, by the IIIrd A. D. J. to the Court of the District Judge, Chhindwara has preferred this appeal. Shri Diwakar learned counsel for the

---

* M (F) A. No. 40 of 1996, against the orders dated 24.9.95, passed by IIIrd Addl. District Judge, Chhindwara, in C. S. No. 9-A/93.

(1) A. I. R. 1969 S. C. 1238. (2) A. I. R. 1975 M. P. 40.

appellant submits that the Court below erred in applying the provisions of Section 16 (1) of the Indian Arbitration Act and further erred in holding that the award could be remitted to the arbitrator only for reconsideration and not for rewriting it on stamp paper and for its registration. He submits that the Court itself could have impounded the document after recovering the duty and imposing the penalty. It was not required to remit the award to the arbitrator but was required to send it to the Collector, Stamps after recovering duty and imposing penalty. He placed reliance on the judgment of the Supreme Court in the matter of *Hindustan Steel Ltd.* v. *M/s. Dilip Corporation* (1) and a Division Bench judgment of this Court in the matter of *Shivlal* v. *Union of India* (2).

In the matter of *Hindustan Steel Ltd. (supra)* the Supreme Court has observed as under :

> " The award which is an 'instrument' within the meaning of the Stamp Act was required to be stamped. Being unstamped, the award could not be received in evidence by the Court, nor could, it be acted upon. But the court was competent to impound it and to send it to the Collector with a certificate in writing stating the amount of duty and penalty levied thereon. On the instrument so received, the Collector may adjudge whether it is duly stamped and he may require penalty to be paid thereon, if in his view it has not been duly stamped. If the duty and penalty are paid, the Collector will certify by endorsement on the instrument that the proper duty and penalty have been paid."

In the matter of *Shivlal (supra)*, a Division Bench of this Court, placing reliance upon the observations of the Supreme Court in the matter of Hindustan Steel Ltd. has rejected the contention of the objector that the award could not be acted upon as it was not on stamp paper.

The two judgments clearly show that the Court dealing with an award which is not properly stamped or is unstamped is competent to impound it and to send it to the Collector with a certificate in writing stating the amount of duty and

(1) A. I. R. 1969 S. C. 1238. (2) A. I. R. 1975 M. P. 40.

penalty levied thereon. The Collector after receiving the instrument may adjudge whether it was duly stamped and he may require penalty to be paid thereon, if in his view, it has not been duly stamped. If he is satisfied that proper duty and penalty are paid, the Collector would certify by endorsement on the instrument that proper duty and penalty have been paid.

In view of the said two judgments, the approach of the learned trial Court was patently illegal. The order dated 24.9.95 deserves to and is accordingly set aside. The matter is remanded back to the trial Court for reconsideration of the entire matter, keeping in view the observations made by the Supreme Court in the matter of *Hindustan Steel Ltd.* and in the matter of *Shivlal (supra)*. The appellant is directed to remain present before the trial Court on 16.3.98. As none appeared for the other side, the trial Court is directed to issue notice to them for their appearance. After effecting service on the respondents, the trial Court shall proceed to decide the matter in accordance with law, keeping in view the above referred two judgments and the observations of this Court. The appeal is allowed. No costs.

Appeal allowed.

APPELATE CRIMINAL

Before Mr. Justice S. K. Kulshrestha.

29, January, 1998.

GANGARAM and another ...Appellants*

v.

STATE .Respondent.

Criminal Procedure Code 1973 (II of 1974), Section 374 (2) Evdiecne Penal Code, Indian (XLV of 1860) - Section 304, Part II - Circumstantial evidence - Hairs seized from between blade and handle of axe sent for examination to FSL alongwith hairs of deceased - No definite

* Cri. A. No. 607/88, against the Judgment dated 16.6.88, passed by Addl. Sessions Judge, Khairagarh, in S. T. No. 29/88.

opinion given about origin from one and the same person-No conclusive evidence that hairs were that of deceased - Seizure of blood stained Baniyan, Lungi and lathi sent to F. S. L. - Absence of any evidence in the form of blood group-Absence of corroborative evidence - Cannot be made the basis for conviction-Accused deserves benefit.

The prosecution has also alleged that between the blade and the handle of the axe recovered from Gangaram, human hair were noticed and sent for examination to the F. S. L. along with hair of the deceased for comparison. The Laboratory has sent report, in which it is stated that although the hair taken from the axe of the accused and the hair of the deceased have human head origin and both are similar in morphological and microscopical characters, no definite opinion can be given about origin from one and the same person as hair found in Article 'C' were not sufficient for comparison.

The prosecution has, thus, failed to connect the articles recovered with the murder of the deceased or to prove them as incriminating circumstances against the accused.

The report indicates human blood on this Lathi. However, in the absence of any evidence in the form of blood group to know that the blood found on the lathi seized from the accused was the blood of the deceased, it can not be made the basis for conviction of this appellant in the absence of any other corroborative evidence.

Sanjay Sarwate for the appellants.

P. D. Gupta Govt. Advocate for the State.

Cur. adv. vult.

JUDGMENT

S. K. KULSHRESHTHA J. - This appeal has been filed by two appellants against the judgment dated 16.6.1988 of the learned Additional Sessions Judge, Khairagarh, Camp Kawardha, in Sessions Trial No. 29 of 1988, by which the

Section 304, Part II of the Indian Penal Code and sentenced each of them to undergo rigorous imprisonment for five years.

The appellants were tried for offence under Section 302/34, I.P.C. for having committed murder of Gayarawat on 21.2.1987 at about 4.00 P. M. in village Dhouraband within the jurisdiction of Police Station Pipariya. The case against the appellants was that while Jhoolbai (P.W.1) was having her meals, the accused Gangaram went to her and informed her that deceased Gayarawat was entering his house and Ghasia had, therefore, turned him out. He further informed that Gayarawat extricated himself from the grips of Ghasia and started to enter his house. The said Ghasia then assaulted him with lathi resulting in his death. Jhoolbai informed the police vide Ex. P-13 and on that basis Marg No. 4/87 was registered. First Information Report Ex. P-14 was drawn and the offence was registered. Investigating Officer then seized articles lying near the dead body and also took samples of blood-stained and plain soil as also the scrapings from the blood stains on the well and seized them under seizure memo Ex. P-4. During investigation, on 22.2.1987, at 16.30 Hours, a Tangiya (axe) was seized from the accused Gangaram at his instance from his house under seizure memo Ex. P-5 and later on 24.2.1987, the clothes worn by Gangaram viz. Bandi and Angochha were seized under seizure memo Ex. P-11. On 24.2.1987, the clothes worn by the accused Parasram viz. Baniyan (vest) and Lungi were seized under seizure memo Ex. P-10. Prior to seizure of these clothes, the police also seized a Lathi suspected to be blood stained from the accused Parasram under seizure memo Ex. P-12. These seized articles were forwarded to the Forensic Science Laboratory. Report Ex. P-22 was received from the F. S. L.. Report Ex. P-24 was received from serologist and another report Ex. P-25 was received from F. S. L.. After necessary investigation, the two appellants were tired for the said offence.

The appellants abjured the guilt and claimed to be innocent ; although did not lead any evidence in defence.

Learned Additional Sessions Judge, while acquitting the appellants of the charge under Section 302/34,I. P. C. found the appellants guilty for the offence under Section 304, Part II, I. P. C. and convicted and sentenced the appellants, as stated above.

Learned counsel for the appellants has pointed out that the evidence against the appellants was purely circumstantial and not of conclusive nature, which could be said to have made a complete chain to incriminate either of the appellants. Learned counsel has pointed out that against accused Gangaram, prosecution has placed reliance on the evidence of seizure of the axe said to be blood-stained and of his clothes removed from his person. Learned counsel has, therefore, submitted that there being no human blood found on these articles by the Serologist and there being no conclusive opinion about the origin of the hair found on the Tangiya (axe) of the accused relatable to that of the deceased, there was no evidence against Gangaram. Likewise, learned counsel has proceeded to urge that the evidence against Parasram was of the seizure of Lathi said to be blood-stained and of his clothes removed from his person. The Lathi has been found to be having stains of human blood as per the report of Serologist Ex. P-24, but blood stains were not sufficient to find out blood group. Learned counsel, therefore, contends that unless it was established that stains on Lathi were that of the blood of the deceased, the said piece of circumstantial evidence could also not be taken to be conclusive of the guilt of the appellant Parasram. Learned Government Advocate has, however, pointed out that since blood stained weapons and clothes were recovered from the two appellants, the circumstantial evidence clearly points to the guilt of the two appellants and, therefore, the conviction of the appellants does not call for any interference. There is no doubt about homicidal death of the deceased. The prosecution has relied on circumstantial evidence to prove the offence against the appellants while the learned counsel for the appellants submits that the circumstances individually and cumulatively do not at all implicate the accused.

It is not disputed that the evidence of the prosecution is purely circumstantial. Against Gangaram, the evidence relied upon by the prosecution

is that of the seizure of axe (Tangiya) under seizure memo Ex. P-5 dated 22.2.1987 and the seizure of his clothes on 24.2.1987 under seizure memo Ex. P-11. Narayan Singh (P. W. 2) is a witness to the seizure memo Ex. P-5, but he has stated that the axe seized under seizure memo Ex. P - 5 had been produced by Masturam, son of the accused Gangaram from his house. D. N. Sharma (P. W. 10), the Investigating Officer, has also made only a general statement with regard to the seizure of the axe from this accused and the like seizure of clothes from the person of this accused under seizure memo Ex. P -11, as deposed to by the witness Umeddas (P.W. 7). According to the prosecution, the articles seized under seizure memoranda Exs. P-5 and P-11 were sent for examination to the Forensic Science Laboratory and the report Ex. P-22 was received. The report of the serologist Ex. P-24 was also received with regard to the examination of the stains alleged on these articles. The axe, Bandi and Angochha recovered from the accused Gangaram were respectively marked as Articles 'G', 'J-1' and 'J-2' and the report Ex. P -22 indicates that these articles contained blood stains. The articles were forwarded to the Serologist who marked these articles respectively as No. 49, 53 and 54, but on examination found that on account of dis-integration, it was not possible to find out whether it was human blood or not. Thus, there is no evidence that the blood stains found on the clothes of the accused Gangaram and on the axe seized from him were of human blood. The prosecution has also alleged that between the blade the handle of the axe recovered from Gangaram, human hair (eleven in number) were noticed and sent for examination to the F. S. L. alongwith hair of the deceased for comparison. The Laboratory has sent report Ex. P-25, in which it is stated that although the hair taken from the axe of the accused and the hair of the deceased have human head origin-and both are similar in morphological and microscopical character, no definite opinion can be given about-origin from one and the same person as hair found in Article 'G' were not sufficient for comparison.

Under these circumstances, there is no conclusive evidence on record to indicate that the hair found on the axe seized from Gangaram were that of the

deceased. The prosecution has, thus, failed to connect the articles recovered with the murder of the deceased or to prove them as incriminating circumstances against the accused.

Evidence against accused Parasram, on which reliance has been placed by the prosecution as circumstances indicating his guilt is that of the seizure of the Baniyan and Lungi from his person under seizure memo Ex. P -10 dated 24.2.1987. Recovery of blood stained Lathi under seizure memo Ex. P-12 on 24.2.1987 has also been relied upon to prove the guilt of the accused Parasram. Report of the F.S.L. Ex. P-22 indicates that blood stains were noticed both on lathi and clothes seized from this accused, but on examination, the Serologist found retains collected from the Baniyan and Lungi as dis-integrated and, therefore, it could not be determined whether the blood stains were of human blood. However, as per report Ex. P-24, the stains on Lathi seized from this accused were found to be stains of human blood. These stains were not sufficient for finding out blood group. The only incriminating circumstance against the accused Parasram is, therefore, the blood stains on Lathi. The report indicates human blood on this Lathi. However, in the absence of any evidence in the form of blood group to know that the blood found on the Lathi seized from the accused Parasram was the blood of the deceased, it can not be made the basis for conviction of this appellant in the absence of any other corroborative evidence. In the facts of the present case, this evidence by itself though creates a doubt, yet does not conclusively establish complicity even of the appellant Parasram.

In the case of circumstantial evidence, the prosecution must establish that each circumstance relied upon by the prosecution points to the guilt of the accused and is incompatible with any hypothesis of his innocence and the chain of circumstances should point to the guilt, and guilt alone, of the accused. In the present case, except for the human blood found on the Lathi said to have been recovered from the appellant Parasram, there are no circumstances connecting the appellants with the alleged offence. The human blood found on the Lathi, although a circumstance, can not be used as conclusive of the guilt of the appellant Parasram without there being any evidence to connect the blood found

on the Lathi with that of the deceased. The evidence being doubtful, the accused deserve benefit.

In the result, this appeal is allowed. The conviction of the appellants and the sentence passed against them is set aside. The appellants are acquitted of the charge against them. The appellants are on bail. Their bail bonds shall stand discharged.

Appeal allowed.

APPELATE CRIMINAL

Before Mr. Justice V. K. Agrawal

29, October, 1998.

ANIL KUMAR GUPTA ...Appellant*

v.

STATE .Respondent.

Criminal Procedure Code 1973 (II of 1974) - Section 374(2) and Narcotic Drugs and Psychotropic Substances Act (LXI of 1985)-Sections 8, 20 (b) (1), 50-Appellant convicted under Section 20(b) (1), read with Section 8-Compliance of mandatory provisions of Section 50 of the Act was not fully made-Panch witness not supported the statement that the accused was apprised of his right to be searched before a Magistrate or a Gazetted officer-Witness not declared hostile by the prosecution-Weighment Panchnama raises serious doubt-Conviction of accused / appellant cannot be sustained.

The mention of the crime number in weighment panchnama raises serious doubt regarding the proceedings as above, having taken place at the spot where search and seizure was allegedly made. Therefore, the search and seizure on the spot, are not proved to have been actually held beyond reasonable doubt

* Cri. A. No. 508/98, against the Judgment and finding dated 18.2.98 passed by shri Ved Prakash, Special Judge (N. D. P. S.), Raipur, in Special Case No. 192/97.

where the accused/appellant was found. Moreover, as noticed earlier, the mandatory requirement of section 50 of ' the Act ' was also not fully and duly complied with. Therefore, the conviction of the accused/appellant cannot be sustained.

State of Punjab v. *Balbir Singh* (1) and *Mohinder Kumar* v. *State of Panaji, Goa* (2) ; referred to.

Gopal Reddy v. *State* (3) and *Manak Chand Jain* v. *State* (4) ; followed.

J. S. Singh for the appellant.

G. P. Chaturvedi for the State.

Cur. adv. vult.

JUDGMENT

V. K. AGRAWAL J.-The accused/appellant stands convicted under Section-20 (b) (i) r/w. Sec. 8 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as ' the Act ' for short) and sentenced to suffer R. I. for five years and to pay fine of Rs. 5,000/-, in default of which, he has further to undergo R. I. for 3 months, by judgment dated 18.2.1998 in Special Cr. Case No. 192 of 1997 by Special Judge, (NDPS), Raipur.

Prosecution case, stated in brief, is that on 26.4.1997, S. H. O., D. S. Bais (P.W. 5) P. S. Tarbahar, District Bilaspur, received an information that a person wearing brown pant and black-stripe shirt, standing at the private bus stand, Bilaspur, was having Ganja in his possession. S. H. O., D. S. Bais (P. W. 5) prepared Panchnama (Ex. P/1) regarding the said information and then went to the Bus Stand. He found the accused / appellant standing there wearing the dress as per the above information received by him. He inquired from the accused/ appellant about the contents of the suit-case and the bag in possession of the accused/appellant. The accused/appellant admitted that he was in possession

(1) A. I. R. 1994 S. C. 1872. (2) A. I. R. 1995 S. C. 1157.
(3) 1995 (2) Crimes 155. (4) 1994 (3) Crimes 442.

of Ganja. After giving an inlimation to the accused / appellant, as per Ex. P/2 and after the appellant expressing his consent to be searched by the S. H. O., D. S. Bais (P.W. 5), he searched him. Ganja was found kept in the suit-case as well as the bag in possession of the accused/appellant. It was got weighed as per Panchnama (Ex. P/3), and seized, as per Ex. P/4. The bus ticket of the accused/appellant was also seized. First Information Report (Ex. P/19) was recorded. Offence was registered. Seized Ganja was sent for chemical examination to F. S. L., Raipur. The reports (Ex. P/17) from the F. S. L., Raipur confirmed the seized article to be Ganja. After concluding investigation, charge-sheet was filed.

The accused/appellant abjured guilt to the charge framed under Section 20(b) (i) r/w. Sec. 8 of 'the Act'. The learned trial Court held that Section-50 as well as other mandatory provisions of 'the Act' were duly complied and that the accused/appellant has been held to be in possession of seized Ganja. He was accordingly convicted and sentenced, as noticed earlier.

The learned counsel for the accused/appellant has urged that the mandatory provisions of Section-50 of 'the Act' was not duly complied with. In this connection, he has referred to *State of Punjab* v. *Balbir Singh* (1) and *Mohinder Kumar* v. *The State of Panaji, Goa* (2). It has further been urged on behalf of the accused/appellant that the prosecution evidence indicates that the proceedings of search and seizure were not conducted at the spot and, therefore, the conviction of the accused/appellant was not justified. However, the learned counsel for the respondent/State has supported the conviction as well as the sentence of the accused/appellant.

The statement of Investigating Officer D. S. Bais (P.W. 5) is that he received an information from an informer that a person wearing grey coloured full pant and a shirt with black stripe was standing at the waiting room of Private Bus Stand and having Ganja in his possession. He prepared Panchnama (Ex. P/1) regarding the said information and sent the intimation (Ex. P.13) to the C. S. P..

(1) A. I. R. 1994 S. C. 1872. (2) A. I. R. 1995 S. C. 1157.

After recording his departure, as per Ex. P/14, he went to the Bus Stand alongwith police force and witnesses. The accused / appellant was wearing similar clothes as was his information and was standing at the Private Bust Stand. When D. S. Bais (P.W. 5) inquired from him, the accused/appellant admitted that he was having Ganja kept in the suit-case and the bag. He, therefore, gave a memo (Ex. P/2) to the accused/appellant and inquired as to whether he wanted to be searched by him (S. H. O., D. S. Bais) or by a senior police officer or a Magistrate. The accused/appellant consented to be searched by S. H. O., D. S. Bais (P.W. 5). Thereafter, the bag and the suit-case were searched. They were found to contain Ganja. Sample was taken out. The Ganja as well as the sample was seized. Seizure Memo (Ex. P/4) was prepared. The Ganja was got weighed. The Panchnama thereof is Ex. P/3.

Learned counsel for the accused/appellant has urged in the above context that the intimation (Ex. P/2) does not fulfil the requirement of Section - 50 of 'the Act', inasmuch as, it does not intimate the accused/appellant of his right in terms of the said provision.

It would appear from Section -50 of 'the Act' that when any officer duly authorised u/s. 42 of 'the Act' is about to search any person under the provisions of Sections 41, 42 or 43 of 'the Act', he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any Department mentioned in Section-42 of 'the Act' or to the nearest Magistrate. In the case of *Balbir Singh's case (supra)*, the Supreme Court has laid down that the provisions of Section-50 of ' the Act ' are mandatory and it is the duty of the person proposing to take search, to inform the accused of his right. It has further been observed that if the right of the accused as above is violated, the trial is vitiated. The law as above has been reiterated in *Mohinder Kumar's case (supra)*. On consideration of the statement of D. S. Bais (P.W. 5) and memo (Ex. P/2) prepared by him, it appears that the appellant was intimated as to whether he would like to be searched by the S. H. O. himself or by a "senior police officer " and Magistrate. Thus, the statement of D. S. Bais (P.W. 5) or the memo (Ex. P/2) do not indicate that the accused/appellant was apprised of his right to be searched by a Gazetted Officer as is the letter and spirit of Section 50

of 'the Act', though the accused/appellant was intimated that he could be searched by a Magistrate.

Thus, from the above evidence, it would appear that the compliance of mandatory provision of Section - 50 of 'the Act' was not fully made and if at all, it was only a partial or half-hearted compliance of the said provision, inasmuch as, the appellant was not apprised that he could be taken before search to the nearest Gazetted Officer. In this connection, reference may be made to the decision of Orissa High Court in case of *Gopal Reddy* v. *State* (1) in which the accused before search was only asked if he wanted to be taken before a Magistrate, but no offer was given to be taken before a Gazetted Officer. It was held that since there was only partial compliance of Section -50 of 'the Act' and since the accused was not properly apprised of his right for being searched before a Gazetted Officer or Magistrate, such partial compliance would not meet the mandatory requirements of Section-50 of 'the Act'. Similar view has been expressed by the Delhi High Court in case of *Manak Chand Jain* v. *State* (2).

Therefore, it appears that the Investigating Officer, D. S. Bais (P.W. 5) did not fully and duly comply with the mandatory provision of Section -50 of' the Act '. In the above context, it may also be noticed that the Panch Witness Narad Ram Kewat (P.W. 2) in whose presence the proceedings of search and seizure as above in the case were made by S. H. O., D. S. Bais (P.W. 5), has in his statement not supported the statement of D. S. Bais (P.W. 5) that the accused / appellant was apprised of his right to be searched before a Magistrate or a Gazetted Officer. He has in para-3 denied that any such intimation was given to the accused/ appellant. The above witness has not been declared hostile by the prosecution and, in fact, he has supported the prosecution case regarding the information received by D. S. Bais (P.W. 5) and the search and seizure made by him. Therefore, it appears that Narad Ram Kewat (P.W. 2) is not speaking a falsehood, when he says that no intimation to the accused / appellant was given before the search and seizure as above were made from him.

(1) (1995) 2 Crimes 155. (2) (1994) 3 Crimes 442.

It also appears that the weighment of the articles found in appellant's possession was made before the seizure. The weighing Panchnama is Ex. P/3. In the said weighing Panchnama crime number has been mentioned. It may, however, be noticed in the above context that till the proceedings of weighment and thereafter seizure, as per seizure memo (Ex. P/4) were made, the offence was not registered and F. I. R. (Ex. P/19) was not recorded, as is clear from the circumstances of the case and as is also the specific statement of D. S. Bais (P.W.5) that the FIR was recorded by him after the formalities of search, weighment and seizure were conducted at the Bus Stand and only after he came back to the Police Station. Therefore, at the time when weighment Panchnama (Ex. P/3) was prepared, no offence was registered. In the circumstances, the mention of the crime number in weighment panchnama (Ex. P/3) raises serious doubt regarding the proceedings as above, having taken place at the spot where search and seizure was allegedly made. Therefore, the search and seizure on the spot, are not proved to have been actually held beyond reasonable doubt where the accused / appellant was found. Moreover, as noticed earlier, the mandatory requirement of Section - 50 of' the Act ' was also not fully and duly complied with. Therefore, the conviction of the accused / appellant cannot be sustained.

The appeal is, therefore, allowed and the conviction as well as the sentence of the accused / appellant is set aside. He stands acquitted. He be set at liberty forthwith, if not required to be detained in any other offence.

Appeal allowed.

CRIMINAL REVISION

Before Mr. Justice R. D. Shukla

28, February, 1998.

PRESIDENT, TRANSPORT CO-OPERATIVE BANK MARYADIT, INDORE ...Applicant*

v.

SMT. CHANDRA PRABHA .Non-applicant.

Accommodation Control Act, M. P. (XLI of 1961) - Section 23-E - Revisional jurisdiction - In examining correctness of the finding - High Court would not reappreciate the evidence - High Court is required to interfere only to prevent mis-carriage of justice-Important piece of evidence withheld by defendant - Adverse inference rightly drawn by R. C. A.- Nature of accommodation - Whether residential or non-residential - Purpose of letting at the initial stage has to be seen-Second test is to look to its structural design - Composite tenancy - If it is established that landlord required residential or non-residential part of the accommodation, decree for eviction from entire premises can be passed.

The High Court while exercising its jurisdiction has power to look into the correctness of the finding regarding *bona fide* need of the appellant, but in examining the correctness of the finding the High Court would not act as a Court of appeal and reappreciate the evidence to come to its own conclusion.

The defendant Bank has withheld an important piece of evidence and, therefore, the learned Rent Controlling Authority has rightly drawn an adverse inference and held that the house was initially let out for residential purpose.

In case of composite tenancy if it is established that the landlord required non - residential part of the accommodation or residential part of the accommodation, a decree for eviction of the tenant from the entire premises can be passed.

---

* Cri. Re. No. 523 / 97, against the Order dated 31.3.97, passed by Rent Controlling Authority, Indore, in Case No. A (90) (7) - 12 / 94.

President, Transport Co-operative Bank Maryadit, Indore v. Smt. Chandra Prabha, 1998.

T. S. Subramaniam v. *Andhra Bank Ltd.* (1), *Mahendra Kumar* v. *Dharamchand* (2), *B. Johnson* v. *C. S. Naidu* (3) ;

Haji Roshan Khan v. *Vardhman* (4), *Jagdish Kumar* v. *Jagdish Chandra* (5) and *Ramswarup* v. *Sitaram Mathur* (6) ; followed.

Niranjansingh v. *Shrikrishna* (7) and *Bhagwandas* v. *Suresh Chandra* (8) ;relied on.

Polekar for the applicant.

K. G. Maheshwari for the non-applicant.

ORDER

R. D. SHUKLA J. - The revision is directed against the order dated 31.3.97 of Rent Controlling Authority, Indore, passed in Case No. A(90) (7)-12/94, whereby a decree of eviction has been passed against the defendant-applicant.

The following facts are undisputed : The plaintiff Non - applicant is the landlady of the house in question. The applicants here have taken the house on rent of Rs. 2,500/- p.m. There was exchange of notice between the parties regarding eviction of the house.

The plaintiff-non-applicant's case in brief is that the suit house was initially let out to one Sardar Shersingh for residential purpose. The rent was being collected by her father-in-law and husband. Her husband died on 28.3.88. Thereafter, she was living alongwith her 2 minor children, her father-in-law and brother-in-law. Her father-in-law executed a will and thereby gave the suit accommodation to her. Her father-in-law died on 30.1.93. Presently the plaintiff is residing in the house which falls in the share of his brother-in-law (husband's younger brother). Now, her son and daughter have become major. She is being persuaded to go to her own house. She, therefore, *bonafide* requires the house for her residence. She has no other suitable accommodation for her residence. It was also asserted that the house was let out for composit purposes

(1) A. I. R. 1988 S. C. 1422.
(2) 1986 M. P. L. J. 80.
(3) A. I. R. 1986 M. P. 72 = 1985 M. P. L. J. 675.
(4) 1979 M. P. R. C. J. Note 114.
(5) 1982 J. L. J. 319.
(6) 1985 M. P. W. N. 405.
(7) 1963 J. L. J. Note 282.
(8) 1981 M. P. R. C. J. 30.

May11999.

residential and non-residential. The house was constructed for residential purpose. Initially, it was let out for residential purpose and, thereafter, it was put to non-residential use and, as such, has taken a status of composit purpose. She *bonafide* requires the house for his residence with no alternative accommodation for the purpose and, therefore, the suit for eviction before the Rent Controlling Authority.

The defendant-applicant resisted the suit and pleaded that the house was let out for non-residential purposes. The defendants are running a Transport Bank in the building. The applicant initially wanted to increase the rent and, thereafter, has filed suit on false grounds. It has also been submitted that for putting the house to the use of Bank strong room was constructed at the cost of defendant in the knowledge of plaintiff and her predecessor and, therefore, now she cannot be allowed to say that the house was let out for residential purpose. Shersingh has never taken the house in his personal capacity and took it on rent for running the Bank.

The learned Rent Controlling Authority found that the plaintiff-non-applicant *bonafide* requires the house for her residence and residence of her children who have attained the age of 18 years. The plaintiff-non-applicant has no other suitable alternative accommodation for residence in her possession. Initially the house was given to Shersingh for residential purpose and thereafter the house was put to residential use which was accepted by the plaintiff landlord and her predecessors. The rent was being collected with the knowledge that the defendants are running Bank in the suit premises. Thus, finding it to be an accommodation for composit purpose and further holding it to be that the plaintiff landlady *bonafide* requires the accommodation, has passed order of eviction. Hence, this revision by the tenants.

The contention of the learned counsel for the tenants - applicants is that the suit house was let out for non-residential purpose. The plaintiff and her predecessors were collecting rent with the full knowledge that the bank is being

run in the house and, therefore, now they cannot be allowed to revert back and claim the accommodation for residential purpose. It is also submitted that the plaintiff and her predecessors have increased the rent periodically with the concurrence of the defendants and now having failed in getting the rent increased at their behest the plaintiff is trying to oust them from the suit accommodation.

As against it, learned counsel for the N. A. has submitted that the suit accommodation was constructed for residential purpose. It was let out for that purpose and, thereafter, it was put to non-residential use and as defendants were in possession of the suit accommodation the plaintiff and her predecessor did not take serious objection and accepted the rent which was slightly increased after some interval.

The suit was filed under Chapter 3-A with the aid of specific provision of Section 23-A, B & C of the M. P. Accommodation Control Act. Section 23-E provides revision against order of Rent Controlling Authority. Although, the legislature has prohibited an appeal from the order of the Rent Controlling Authority passed under any of the sections namely section 23-A to section 23J, it has nonetheless conferred upon the High Court very wide powers of revision under this section, whereby the High Court can make legal an illegal order, make proper an improper order, correct an incorrect order, regularise an irregular proceedings of the Rent Controlling Authority it can also interfere where Rent Controlling Authority has exercised jurisdiction not vested in it or has failed to exercise jurisdiction or acted in exercise of the jurisdiction illegally and with material irregularity. Thus, the High Court while exercising its jurisdiction has power to look into the correctness of the finding regarding *bonafide* need of the appellant, but in examining the correctness of the finding the High Court would not act as a Court of appeal and reappreciate the evidence to come to its own conclusion. (see *Mahendra Kumar* v. *Dharamchand* (1).

(1) 1986 J. L. J. 145 = 1986 M. P. L. J. 80.

President, Transport Co-operative Bank Maryadit, Indore v. Smt. Chandra Prabha, 1998.

The power of revision is not restricted to the narrow limits of section 115, CPC but it is not as wide as that of an appeal and, therefore, the High Court is required to interfere only to prevent miscarriage of justice. *C. B. Johnson* v. *C. S. Naidu* (1).

While dealing with the scope of interference in the cases of revision the Apex Court of this country has propounded following principles of law :-

> " The criticism that it was impermissible for the High Court in its revisional jurisdiction to interfere with the finding of fact recorded by the appellate authority, however erroneous they may be, is not, having regard to the language in which the revisional power is couched, tenable. In an appropriate case, the High Court can reappraise the evidence if the findings of the appellate Court are found to be in firm in law. (*T. S. Subramanian* v. *Andhra Bank Ltd.* (2)."

Now, therefore, this Court will examine the correctness and legality of the order with the limitations as above.

The plaintiff has stated that presently she is residing alongwith her brother-in - law in House No. 3 New Palasia. She has further stated that her father - in- law by a Will has given this house to her with further condition that she would be permitted to live alongwith her brother - in - law till her children gain majority. Since her children have become major, she is being pursuaded to go to her own house and she has no other suitable accommodation for her residence. There is no serious dispute on these points.

She has further stated that initially this house was given to Shersingh after about 8 months of her marriage. She herself resided in that house after her marriage for about 6 months. There is no cross - examination challenging this fact. This goes to show that initially the house was for residential use. She has further stated that a Bank was started thereafter during the life time of her husband.

(1) A. I. R. 1986 M. P. 72 = 1985 M. P. L. J. 675.
(2) A. I. R. 1988 S. C. 1422.

President, Transport Co-operative Bank Maryadit, Indore v. Smt. Chandra Prabha, 1998.

Rent was being collected by her husband. After the death of her husband she requested Shersingh to vacate the house, but they did not vacate, as such, first notice was sent and then suit was filed. She has admitted during cross-examination that after residing for some time in this house she alongwith her husband shifted to other house and was residing alongwith her father - in - law and it was thereafter that father - in - law let out the house. The bank was opened thereafter. It has not been challenged that initially the house was given to Shersingh. Shersingh was one of the office holder of the defendant Bank, but the defendant Bank has failed to rebut the assertion of the plaintiff that the suit house was initially given to Shersingh for residence.

D. W. 1 Indersingh has admitted that initially the house was given to Sardar Shersingh, but has clarified that Sardar Shersingh has not taken the house in his personal capacity. During cross-examination he has admitted that a document was executed and it was signed by an officer of the Bank and by Kamal Kishor (husband of the plaintiff). It is pertinent to note that no such document, despite admission of its existence, has been produced. Thus, the defendant Bank has withheld an important piece of evidence and, therefore, the learned Rent Controlling Authority has rightly drawn an adverse inference and held it that the house was initially let out for residential purpose.

While determining that nature of accommodation i.e., whether it is residential or non-residential it has to be seen what was the purpose of letting at the initial stage. (See *Niranjansingh* v. *Shrikrishna* (1). The second test for determining the nature of accommodation would be to look to its structural design. (see *Bhagwandas* v. *Sureshchandra* (2).

As observed in earlier paragraphs initial letting to Shersingh was for residential purpose. The finding of learned Rent Controlling Authority on this point is based on sound reasonings. This Court finds no reason for coming to a different conclusion.

(1) 1963 J. L. J. Note 282.
(2) 1981 M. P. R. C. J. Note 30.

President, Transport Co-operative Bank Maryadit, Indore v. Smt. Chandra Prabha, 1998.

When examining from the structural point of view the map admitted by the parties does show that initially the house was constructed for residential purpose as it has got kitchen, small store room and dining accommodation as well. In the opinion of this Court, therefore, from the point of view of structural designs also the house was constructed for residential purposes. However, it has been admitted by the plaintiff and her witnesses that the bank was started later on. Thus, the fact was brought to the notice of landlord. The landlord has accepted the rent from the Bank as well and thus, they have not objected to the use of accommodation for non-residential purpose. The rent was also being collected knowing it to be that the accommodation has been put to non-residential use. It has also come in the evidence that some employees of Bank are still residing in the rear part of the building. In such a situation the accommodation will be deemed to be an accommodation for composite purpose i.e., residential and non-residential both, and this character has been accepted by the landlord. However, that will not make it accommodation wholly for non-residential purpose, because structural design and that original letting was for residential purpose and the landlord also resided in that house for sometime and, therefore, merely because the Bank has been allowed to be run will not make it an accommodation wholly for non-residential purpose. (See *Haji Roshan Khan* v. *Vardhman* (1).

On the maximum what can be said in favour of the tenant - applicant is that the accommodation has gained a character of composite tenancy. It will have to be examined as to whether an accommodation for composite purpose can be got vacated for one purpose or for residential purpose ?

Consistent view of thus High Court has been that in case of composite tenancy if it is established that the landlord required non-residential part of the accommodation or residential part of the accommodation ; a decree for eviction of the tenant from the entire premises can be passed. Reference may be had to a D. B. decision, as reported in *Jagdish Kumar* v. *Jagdish Chandra* (2) and *Ramswarup* v. *Sitaram Mathur* (3).

(1) 1979 M. P. R. C. J. Note 114. (2) 1982 J. L. J. 319.
(3) 1985 M. P. W. 405.

President, Transport Co-operative Bank Maryadit, Indore v. Smt. Chandra Prabha, 1998.

Now, the next point that arises for determination is as to whether the plaintiff landlord has no other suitable accommodation ? It has come in the evidence of the plaintiff landlord and her witnesses that she is a widow. Presently she is residing with her brother-in-law (husband's younger brother) and this house has been given by a will to her by her father-in-law. Her father-in-law expired and the will has come in operation. The condition imposed in the will does indicate that the plaintiff landlord shall be allowed to live alongwith her brother-in-law till her children gain majority. Now, it is not in dispute that sons and daughters of plaintiff-landlord have become major and, therefore, now she has no right to live in the house falling in the share of her brother-in-law. The plaintiff and her witnesses have clearly stated that she is being pursuaded to go to her own house. It has also been stated by the witnesses and found by the learned Rent Controlling Authority that the plaintiff-landlord has no other suitable accommodation in the city of Indore for her own residence and for residence of her children specially the daughter. She has very clearly stated that she would live alongwith her daughter and sons in the suit accommodation. There is nothing to disbelieve this aspect of evidence. The learned Rent Controlling Authority has, therefore, rightly found that the plaintiff landlord *bonafide* requires the accommodation for her residence.

It has been submitted on behalf of the applicant that the house in possession of her (plaintiff's) brother-in-law is sufficiently spacious and, therefore, she can be accommodated there and can live with them peacefully. Looking to the condition imposed in the Will the plaintiff is required to vacate the premises given in the share of her brother-in-law. In such a situation she cannot be compelled to live alongwith her brother-in-law. Brother-in-law of the plaintiff can also not be compelled to accommodate her against the wishes of his father. Even other wise it is for the landlord to elect and choose as to whether she wants to pursuade her relation for accommodating her or wants to shift to the accommodation falling in her share. If she has elected to occupy the accommodation falling in her share the same cannot be said to be lacking in *bonafide*.

(1) 1982 J. L. J. 319. (2) 1985 M. P. W. N. 405.

President, Transport Co-operative Bank Maryadit, Indore v. Smt. Chandra Prabha, 1998.

Thus, from the discussions above, it is evident that the finding of lea - rned Rent Controlling Authority about the *bonafide* requirement of plaintiff landlord also calls for no interference.

As a result, revision fails and is hereby dismissed with costs. However, as the accommodation was put to non-residential use and tenant would also require some time for searching a suitable accommodation, they (tenants) are, therefore, granted two months time for the same as provided under S. 12 (5) and 12 (6) of the M. P. Accommodation Control Act. The tenants-applicants shall vacate the house by the end of April' 98, i.e., after two months from today.

The house was let out in August' 74 and the suit for eviction was filed on 26.3.94 i.e., after about 20 years. The bank is being run in the building for more than last 10 years, therefore, it is also directed that the plaintiff-landlord (NA here) shall deposit double of the amount of the annual standard rent (i.e., rent per month) before the Rent Controlling Authority within a month from today which shall be paid to the tenants-applicants after vacation of the house. Counsel fee Rs. 500/-/

Application dismissed.
