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Editor ***(Part-time)***
G.S. AHLUWALIA, ADVOCATE
HIGH COURT, JABALPUR

Assistant Editor
NISHKAM N. SRIVASTAVA,
HIGH COURT, JABALPUR

Reporter ***(Part-time)***
UMESH GAJANKUSH, ADVOCATE, HIGH COURT, INDORE

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2002

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Act, 1865-III : *vide* Carriers Act.

Act, 1870-VII : *vide* Court Fees Act.
Act, 1872-I : *vide* Evidence Act, Indian.
Act, 1872-IX : *vide* Contract Act, Indian.
Act, 1877–XV : *vide* Limitation Act, Indian.
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Act, 1885-XIII : *vide* Telegraph Act, Indian.
Act, 1894-I : *vide* Land Acquisition Act.
Act, 1908–V : *vide* Civil Procedure Code.
Act, 1910-IX : *vide* Electricity Act
Act, 1915-II : *vide* Excise Act, M.P.
Act, 1925–XXXIX : *vide* Succession Act, Indian.
Act, 1927-XVI : *vide* Forest Act, Indian.
Act, 1932-IX : *vide* Partnership Act, Indian
Act, 1940-X : *vide* Arbitration Act, Indian
Act, 1940–XXIII : *vide* Drugs and Cosmetics Act.
Act, 1947–C.P. XVII : *vide* Special Police Establishment Act, C.P. and Berar.
Act, 1947–XLV : *vide* Industrial Disputes Act
Act, 1948–XV : *vide* Sales Tax Act.
Act, 1948–LIV : *vide* Electricity (Supply) Act.
Act, 1949-X : *vide* Electricity Duty Act
Act, 1954- XXXVII : *vide* Prevention of Food Adulteration Act, 1955
Act, 1954- LXIII : *vide* Special Marriage Act
Act, 1954-XLIV : *vide* Displaced Person (Compensation and Rehabilitation)Act
Act, 1955–X: *vide* Essential Commodities Act
Act, 1955–XXV : *vide* Hindu Marriage Act.
Act, 1956-XXIII : *vide* Municipal Corporation Act, M.P.
Act, 1956–XXX : *vide* Hindu Succession Act
Act, 1956–LXXVIII : *vide* Hindu Adoption and Maintenance Act.
Act, 1958-II : *vide* General Sales Tax Act, 1959.
Act, 1959– XX: *vide* Land Revenue Code, M.P.
Act, 1959– LIV: *vide* Arms Act, Indian
Act, 1960–XXVII : *vide* Industrial Relations Act.
Act, 1961-XVII : *vide* Co-operative Societies Act, M.P.
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Act, 1961–XLVII : *vide* Municipalities Act, M.P.
Act, 1962–XXV : *vide* Advocates Act.
Act, 1963–XXXVI : *vide* Limitation Act, Indian.
Act, 1963–XLVII : *vide* Specific Relief Act.
Act, 1971–LXX : *vide* Contempt of Courts Act.
Act, 1973–II : *vide* Criminal Procedure Code, 1974.
Act, 1976–XXXIII : *vide* Urban Land Ceiling and Regulation Act.
Act, 1977–III : *vide* Samaj Ke Kamjor Vargon Ke Krishi Bhumi Dharakon Ka Udhar Dene Walon Ke Bhumi Hadapane Sambandhi Kuchakaron Se Paritran Tatha Mukti Adhiniyam, M.P.,
Act, 1978–XX : *vide* Ashaskiya Sikshan Sanstha (Adhyapakon Tatha Anya Karmachariyon Ke Vetano Ka Sandaya) Adhiniyam, M.P.
Act, 1980–XVIII : *vide* Rajya Beej Evam Farm Vikas Nigam Adhiniyam.
Act, 1980–LXV : *vide* National Security Act.
Act, 1981–XXXVII : *vide* Lokayukt and Up-lokayukt Adhiniyam.
Act, 1984–M. P. XIII : *vide* Kasth Chiran (Viniyaman) Adhiniyam, M. P.
Act, 1984–XLVI : *vide* Family Courts Act.
Act, 1984–LXVIII : *vide* Land Acquisition Act.
Act, 1985–XLI : *vide* Narcotic Drugs & Psychotropic Substances Act.
Act, 1986– : *vide* Consumer Protection Act.
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Act, 1988–LIX : *vide* Motor Vehicles Act.
Act, 1991–VI : *vide* Public Liability Insurance Act
Act, 1993–I : *vide* Panchayat Raj Avam Gram Swaraj Adhiniyam, M.P., 1994
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Act, 1994–M. P. I : *vide* Panchayat Raj Adhiniyam, M. P., 1993.
Act, 1994–V : *vide* Commercial Tax Act, M.P.
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Act, 1995–I : *vide* Waqf Act, M.P.
Act, 1995–V : *vide* Vanijyak Kar Adhiniyam, M. P. 1994
Act, 1995–XXX : *vide* Workmen's Compensation Act
Act, 1996–XXVI : *vide* Arbitration and Conciliation Act.
Act, 1999–XV : *vide* Urban Land (Ceiling and Regulation) Repeal Act.
Act, 2000– : *vide* Re-organization Act, M.P.
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Arbitration and Conciliation Act (XXVI of 1996) - Sections 2(1)(e), 9 & 37- Agreement for sale and supply of industrial gases - Termination of contract - Arbitration clause - Application for interim measures filed

before District Judge - Application rejected for want of jurisdiction- Order of rejection appealed against - Application is to be filed before the District Judge who is principal Civil Court of Original Jurisdiction in district and not before the High Court - Rejection improper - Appeal allowed.

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Arbitration Act, Indian (X of 1940), Sections 30, 39 and Limitation Act, 1963, Article 119 - Award of Arbitration- Objection as to filed beyond 30 days of receipt of notice - Objection barred by limitation- Award based on material and evidence on record - Cannot be interfered with even if it is erroneous - Civil Court cannot sit as appellate forum - Interest- Agreement does not prohibit grant of interest - *Pendente lite* interest can be granted.

STATE OF MADHYA PRADESH v. M/S JAISWAL TRACTORS; ILR (2002) M.P. ...663

Arbitration Act, Indian (X of 1940), Section 34–Stay of suit for arbitration proceedings–Essential condition is the binding agreement between the parties to refer the dispute involved in the suit to arbitration: *vide* Civil Procedure Code, 1908, Section 115. ...355

Arms Act, Indian (LIV of 1959), Section 25(1) (a)–Seizure of fire arms and cartridge–Evidence of Police Officer not cogent and convincing–Police Officer could not ever tell the place where he found and took the accused in custody–Independent witness not supporting prosecution case–Recovery of fire arms and cartridge not proved: *vide* Criminal Procedure Code, 1973 Section 374 (2) and Arms Act, Indian 1959, Section 25 (1) (a). ...346

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Civil Procedure Code (V of 1908)–Section 2(2) and Sick Industrial Companies (Special Provisions) Act, 1985–Sections 15 and 22–Section provides for suspension of legal proceedings against assets of companies claiming sickness–Does not operates as absolute bar against all proceedings–Idea is to freeze any coercive action against such companies until their revival or rehabilitation–Consent decree–A product of an agreement between the parties–Does not amount to coercive action nor barred under Section 22 : *vide* Constitution of India, Articles 226/227 1

Civil Procedure Code (V of 1908)-Section 9-Land Acquisition Act, 1894-Sections 18 & 30-Exclusion of jurisdiction of Civil Court not to be readily inferred-Suit for declaration of share in the acquired property and consequently share in compensation amount-Jurisdiction of Civil Court not barred-Suit Maintainable.

RAM SALONE SHARMA v. RAM ASHRYA SHARMA; ILR (2002) M.P. ... 1027

Civil Procedure Code (V of 1908), Sections 10 and 115-Revision-Suit for specific performance subsequent to the suit for eviction-The issue relating to the agreement of sale and its enforceability against the vendor and subsequent transferee is not necessary in eviction suit-Material in both suits is not directly and substantially same-Suit can not be stayed.

PRAKASH CHAND SONI v. ANITA JAIN; ILR (2002) M.P. ... 996

Civil Procedure Code (V of 1908), Section 11 and Samaj Ke Kamjor Vargon Ke Krishi Bhumi Dharakon Ka Udhar Dane Walon Ke Bhumi Hadapane Sambandhi Kuchakron Se Paritran Tatha Mukti Adhiniyam, M.P., 1976, Sections 3,4,7,11 and 14–Application for cancellation of sale deed being prohibited transaction: *vide* Constitution of India, Article 226 ...200

Civil Procedure Code (V of 1908), Section 11–Principles of *res-judicata*–Suit dismissed by Civil Court for want of–Jurisdiction–Application filed before competent authority within the extended period of limitation–Dismissal of suit for declaring sale deed invalid on ground of limitation would not attract principle of *res-judicata* as there was no adjudication on merits: *vide* Constitution of India, Article 226 ...200

Civil Procedure Code (V of 1908)–Sections 11 and 100–Second Appeal–Succession Act, 1925, Sections 372 and 387–Proceedings for grant of succession certificate are summary proceedings–Judgment of succession case does not amount to *res-judicata*–Parties are not precluded to establish right in regular civil suit–Testimony of wife

and daughter found trustworthy–Finding of lower appellate Court upheld.

HAR PRASAD v. SMT. RAJRANI; I.L.R. (2002) M. P 318

Civil Procedure Code (V of 1908), Section 37, Order 21 Rule 10 - Execution of decree-Court passing decree abolished - Pending cases transferred to another Court - Such transferee Court acquires inherent jurisdiction to execute the decree.

INDRA SINGH v. RAMCHARAN ; ILR (2002) M.P. ...738

Civil Procedure Code (V of 1908)–Sections 47,115–Civil revision–Suit for recovery of money–*Ex-parte* decree–Samaj Ke Kamjor Vargon Ke Krishi Sambandhi Bhumi Dharkon Ka Udhar Dene Walon Ke Bhumi Hadpane Sambandhi Kuchakron Se Paritran Tatha Mukti Adhiniyam, M. P. 1976, Sections 2,12 and 14 and M.P. Gramin Rin Vimukti Adhiniyam, 1982, Section 7–Objection regarding bar of jurisdiction of Civil Court in excution proceedings–Plaint does not show any admission of transaction being with holder of agricultural land–Executing Court can not go behind the decree–Order of Executing Court upheld.

WAMAN v. BALDEVDAS; I.L.R. (2002) M. P 364

Civil Procedure Code (V of 1908), Sections 51 and 115-Revision-Execution of money decree-Mode of execution-Judgment debtor to get rid of decretal liability carrying on business in the new name-By his dishonest conduct Judgment debtor liable for imprisonment in execution of decree.

PRAKASH BHAGWANI v. SAMMATI FOOD PRODUCTS PVT. LTD., SAGAR (M.P.); ILR (2002) M.P. ... 1001

Civil Procedure Code (V of 1908)–Section 96–Appeal–Suit for declaration and injunction–Sale in favour of an out sider by one of co-owner–Compromise between co-owners subsequent to sale deed–Evidence Act, Indian–Section 18–Admission is relevant only if it is made during subsistence of right–Compromise after parting with the interest can not be said to be relevant–Joint Hindu Family property–Purchaser can right in joint family property though he may not claim and also enjoyment jointly–Purchaser has right to obtain partition of the property to the extent of share purchased.

SUNIL BAJPAI v. VIVEK BAJPAI, I. L. R. (2002) M. P. ...113

Civil Procedure Code (V of 1908), Section 96 and Indian Contract Act, Section 28-Suit for recovery of amount under Bank guarantee-As per clause of agreement claim was to be raised within 6 months from the date mentioned-Notice invoking bank guarantee issued

within specified period-Rights under the agreement continued to exist-Clause limiting of time within which rights are to be enforced hit by Section 28-Suit filed within 3 years is within limitation-Suit rightly decreed by Trial Court.

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Civil Procedure Code (V of 1908), Section 96 and General Sales Tax Act, M.P., 1958, Section 33-C-First Appeal-Suit for recovery of loan-Property hypothecated and mortgaged prior to coming into force of section 33-C-Even then charge created in favour of state in respect of Sales Tax dues shall prevail over the charge in favour of Bank.

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Civil Procedure Code (V of 1908)–Section 100–Appeal–Service Law–Suit for declaration–Madhya Pradesh Ashaskiya Sikshan Sanstha (Adhyapakon Tatha Anya Karmchariyon Ke Vetano Ka Sandaya) Adhiniyam, 1978–Section 6(a)(iii) and Madhya Pradesh Ashaskiya Shikshan Sanstha (Adhyapakon Tatha Anya Karmchariyon Ko Padachyut Karne Sewa Se Hatane Sambandhi Prakriya) Niyam, 1983–Conditional grant of the leave for taking job in a foreign company–So called Termination order not served on plaintiff–Effect–Services not validly terminated–Consequential benefits–Effect of adjudication of Civil Court is to declare that person had been wrongfully presented bear attending to his duties as Government servant–Person entitle to remuneration which he would have been earned had he been permitted to work–Re-instatement with consequential benefits allowed.

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Civil Procedure Code (V of 1908)–Section 100–Appeal–Limitation Act, Indian, 1963–Sections 5 & 14–Delay in filing appeal–*Bona fide* mistake–Means that the person was innocently carried away by an innocent mistake–Delay in even approaching the writ Court–The cleverness of choosing the erroneous forum of writ Court can not wash out the delay which was already to the dis-credit–Delay can be condoned when there is *bona fide* mistake and delay is explained satisfactorily–Delay not condoned.

MANORAMABAI v. MUNICIPAL COUNCIL, KHARGONE; I.L.R. (2002) M. P 326

Civil Procedure Code (V of 1908)–Section 100–Order 22, Rule 4–Steps for

bringing L.Rs. on record–Stage–Scope–Parties are adiwasis–Far away from the sophisticated society or society having benefit of education and atmosphere of the Court–Court cannot be permitted to allow itself to remain aloof from reality of life–Taking broader view delay deserves to be condoned.

TANTIYA v. CHANDER SINGH; I.L.R. (2002) M.P. ...324

Civil Procedure Code (V of 1908)–Section 100–Second Appeal–Suit for declaration and injunction–Remarriage of widow prior to coming into force of Hindu Succession Act, 1956 and Hindu Widow's Re-marriage Act, 1856–Section 2–A Hindu widow after Re-marriage forfeits her rights to her deceased husband's property–Sale deed by widow in respect of half share untainable in law–Legal position already settled by Full Bench–No substantial question of law involved–Judgment & Decree of lower appellate Court upheld.

KHUMNA v. GOVIND DAS; I.L.R. (2002) M.P. ...314

Civil Procedure Code (V of 1908)–Section 100 –Second Appeal–Accommodation Control Act, 1961, Sections 3(2), 14(2)–Suit for eviction by lessee of trust–Notification exempting suit property from operation of the Accommodation Control Act, Section 3(2) and notification thereunder would alone apply to the property in suit and not affected by any contract between the lessee and sub lessee.

A.M. QURESHI v. M/S. SHAKTI PICTURES CIRCUIT LIMITED, AMRAWATI; I.L.R. (2002) M.P. ...328

Civil Procedure Code (V of 1908)–Section 100–Second Appeal–Errection of High Tension Electricity tower by Electricity Board resulting in non-use of land–Holder entitled to compensation–Before erecting the tower it was necessary for the Electricity Board to approach the State Govt. for acquisition of land and pay compensation to the holder.

M.P.E.B. JABALPUR v. RAMESHCHANDRA; I.L.R.(2002) M. P. ...95

Civil Procedure Code (V of 1908)–Section 100–Second Appeal–Suit for eviction–Accommodation Control Act, M. P., 1961, Section 12(1)(e)–*Bona fide* need–Alternate accommodation available on upper floor of the suit house–Plaintiff's explanation for not using the same for his requirement and subsequently letting it out–Case of *bona fide* need not made out–Plaintiff not entitled to the decree of eviction–Suit dismissed.

SARJU PRASAD PATEL v. NANAKCHAND, I. L. R. (2002) M. P...92

Civil Procedure Code (V of 1908), Sections 104, 115 first proviso and Order

43 - Final appellate order - Not an order in the course of a suit or other proceedings - Revision against - Maintainable.

HANUMAN DATT v. STATE OF M.P.; ILR (2002) M.P. ...741

Civil Procedure Code (V of 1908), Section 113, Family Court Act 1984, Section 7 and Hindu Marriage Act, 1955, Section 19-Reference by Court-Territorial Jurisdiction-Petitioner resident of place beyond jurisdiction of family Court-Marriage solemnized and respondent resided at the time of marriage at Jabalpur-Place of resident of petitioner not material as case not covered under clause (iv) of Section 19-Family Court at Jabalpur would have jurisdiction-Reference answered accordingly.

ARJUN SINGHAL v. PUSHPA KARWAL; ILR (2002) M.P. ... 1043

Civil Procedure Code (V of 1908), Section 115, Court Fees Act, 1870, Section 7 and Suits Valuation Act 1887, Section 9-Revision against direction to pay *ad valorem* court fees-Suit for declaration that plaintiff entitled to receive money-Money held by Government as retirement dues of husband-Plaintiff can put any reasonable valuation and pay fixed Court fee-Order of payment of *ad-valorem* court fees set-aside.

SMT. SHAHISTA QURESHI v. STATE OF M.P.; ILR (2002) M.P. ... 1016

Civil Procedure Code (V of 1908)–Section 115 and Order 16, Rule 5–Civil Revision–Rejection of application to lead secondary evidence–Evidence Act, Indian, 1872, Sections 62, 65, 66 and Succession Act, Indian, 1925, Section 63–Will–Original not filed–Certified copy sought to be admitted as secondary evidence–Rule of proving execution–At least one of the attesting witnesses is required to be examined–If both witnesses are dead execution may be proved by examining the scribe or any person acquainted with handwriting and signature of the testator–If the copy with the Sub-Registrar is a carbon copy the same may be presumed to be original and then proof of execution can be given as envisaged in Section 63 of Indian Succession Act.

CHHATRAPRATAP SINGH v. TULSI PRASAD; I.L.R. (2002) M.P. ...360

Civil Procedure Code (V of 1908)–Section 115–Revision–Arbitration Act, 1940, Section 34–Stay of suit for arbitration proceedings–Essential condition is the binding agreement between the parties to refer the dispute involved in the suit to arbitration–Agreement not produced in the Court–General and vague averment in plaint about

agreement–Previous award not made rule of the Court–Further proceedings of suit can not be stayed.

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Civil Procedure Code (V of 1908) - Section 115 and Evidence Act, Indian 1872 - Sections 63 and 65 - Civil Revision-Application to lead secondary evidence -Possession of document - Inconsistent and contradictory stand - Document neither photocopy nor true copy of original - Does not come under concept of secondary evidence - Not admissible in evidence - Permission rightly refused.

SUNIL KUMAR v. SMT. ANGURI CHOUDHARI; ILR (2002) M.P. ... 982

Civil Procedure Code (V of 1908)–Section 115, Order 7 Rule 11 and Wakf Act, 1995 Sections 6, 40 and 85-Suit for declaration and injunction-Application for rejection of plaint dismissed-Revision against-Inclusion of property in the list of wakf Property-Only if opportunity of hearing is afforded by survey commissioner such person will have to file suit within one year of publication of list before the Tribunal and jurisdiction of Civil Court shall be excluded-Fact to be determined after filing of written statement and adducing evidence by parties-Application rightly rejected.

AMIL HAKIMUDDIN v. ABBAS HUSAIN; ILR (2002) M.P. ... 991

Civil Procedure Code (V of 1908)–Sections 115, 151 and Order 1, Rule 10–Civil Revision–Scope of–The order needs to be maintained if it is passed by Trial Court remaining in the four corners of its jurisdiction–Joinder of parties–Addition of parties likely to widen dimensions of issues in controversy and give rise to multiplication of issues to be adjudicated–Trial Court would be left with the discretion to decide as to which are necessary parties–Addition of parties rightly refused by Trial Court.

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Civil Procedure Code (V of 1908)–Sections 115, 151, 152 and Order 47–Civil Revision–Inherent power to correct clerical error–No Court can in the garb of exercise of such powers can modify alter or add to the terms of the judgment of decree–Finding in the judgment as to the liability of defendants is a finding arrived at on appreciation of evidence–Even if there be any error apparent on the face of record the proper course is to resort to Order 47 for review or a regular appeal–Order incorporating correction in the judgment and decree without jurisdiction.

DEVAKINANDAN YADAV v. STATE BANK OF INDORE, I.L.R. (2002) M. P. 153

Civil Procedure Code (V of 1908)–Order 1, Rule 10–Joinder of parties–Addition of parties likely to widen dimensions of issues in controversy and give rise to multiplication of issues to be adjudicated–Trial Court would be left with the discretion to decide as to which are necessary parties–Addition of parties rightly refused by trial Court : *vide* Civil Procedure Code, 1908, Sections 115, 151 and Order 1, Rule 10 149

Civil Procedure Code (V of 1908)–Order 5 Rules 17, 19 Order 9 Rule 13 and Order 43 Rule 1(d)–*Ex-parte* decree - Service by affixing summons - Service not verified either by affidavit of process server or by examining him - Mandatory provisions not followed - Period taken in obtaining certified copy of decree deserve to be exchanged even though certified copy was not necessary–*Ex-parte* decree set-aside - Appeal allowed.

SMT. SHAKUNTALA SINGH v. BASANT KUMAR THAKUR; ILR (2002) M.P. ... 931

Civil Procedure Code (V of 1908)–Order 7 Rule 7 and 39 Rule 1 and 2 - Temporary injunction - Even in absence of specific prayer Court has power to issue injunction in suitable cases - Court can restore *status-quo* existing on the date of suit.

AJRA HABIB v. B.K. GUPTA; I.L.R. (2002) M.P ...732

Civil Procedure Code (V of 1908)–Order 9 Rule 13 - Application for setting aside *ex-parte* Decree - Cannot be allowed merely on ground of irregularity in service of summons.

RAM NARAYAN v. STATE BANK OF INDORE; I.L.R.(2002) M.P. ...766

Civil Procedure Code (V of 1908)-Order 22 Rule 9-Maintainability of suit-Plaintiff claiming property to be Joint Hindu Family Property-Earlier suits challenging alienation by some co-shares-Suits dismissed as abated-Subsequent suit challenging different alienation by another co-sharer-Suit not barred as is based on different cause of action.

CHAKRESH KUMAR MODI v. SMT. KAMLA KHARE; ILR (2002) M.P. ... 1013

Civil Procedure Code (V of 1908)–Order 39, Rules 1 & 2 - Temporary injunction - Suit for declaration and injunction - Predecessor of appellant already separated from joint family - Relief of partition not sought - Injunction rightly rejected.

MUSHAMMA SAROD PATNAHA v. HARISHANKAR; I.L.R.(2002) M.P. ...715

Civil Procedure Code, (V of 1908), Order 39 Rules 1 and 2-Transfer of Property Act, 1882, Section 53-A, and Evidence Act, Indian 1872,

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M/S CHETAK CONSTRUCTIONS LIMITED, INDORE v. OM PRAKASH; I.L.R.(2002) M.P. ...689

Civil Procedure Code (V of 1908)–Order 41, Rule 33 and Order 43, Rule 1(u) - Appeal against order of remand- Deficit court fees-Counter claim- Rejection of, without affording opportunity to supply requisite stamp-paper-Remand- Power rightly exercised by appellate Court.

MOHANLAL v. SAUKHILAL ; I.L.R.(2002) M.P. ...725

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Constitution of India, Articles 14, 16, 39(d)–There cannot be estoppel against statute–Petitioner Assistant Journalist–Denial of protection of pay fixed by University on ground that he accepted appointment in lesser pay–Amounts to denial of protection of law.

KALYAN SINGH THAKUR v. JAWAHARLAL NEHRU KRISHI VISHWA VIDYALAYA JABALPUR ; I.L.R. (2002) M.P. ...455

Constitution of India, Articles 14, 19, 21, 226, Excise Act, M.P., 1915 (as amended) Section 59-A- Constitutional validity- Provision for bail changed on reasonable basis of classification- To root out rampant evil in dangerous or obnoxious trade legislature can put some reasonable restrictions - Amendments incorporated do not affect or evade fundamental rights - Amendment *intra vires.*

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Constitution of India, Articles 14,32,226 – Writ Petition – Purely administrative order–Though not subjective to judicial review yet exceptions have been admitted by Courts if constitutional rights are affected by the enforcement of such administrative order–Withdrawal of interest subsidy by the State in case of MLAs of IX Vidhan Sabha who did not contest or get re-elected to XIth Vidhan Sabha while allowing the same to those members of IXth VIdhan Sabha who were re-elected–Action vitiated being violative of fundamental rights and equitable doctrine of promissory estoppel.

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Constitution of India, Articles 14, 226 - Education - Admission to Bachelor of Pharmacy - Rules do not debar rounding of 49.77% as 50% - Petitioner B.Sc. with 53.99% marks- Wrongful deprivation - Authorities directed to grant admission.

DHARMENDRA KUMAR SHRIVASTAVA v. JIWAJI UNIVERSITY, GWALIOR ; I.L.R. (2002) M.P. ...513

Constitution of India, Articles 14, 226, Homoeopathy Parishad Adhiniyam, M.P., 1976, Sections 21, 22, 23, 24, 25, 26 and 51 and Homoeopathy Council (Publication of Register and Appeal) Rules, M.P., 2000, Rules 4 and 5 - Rule making power - Rules are subordinate to the Act - Rules cannot override any of the provisions of Principal Act - None of the provision of Principal Act speaks about renewal of registration of Homoeopathic medical practitioners and on failure cancellation of registration - Rule providing renewal of registration runs contrary to Article 14 of the Constitution of India - Rules 4 and 5 of the Rules, 2000 *ultra vires*.

DR. RAJKUMAR JAIN v. THE STATE OF M.P.; ILR (2002)M.P...829

Constitution of India, Articles 14, 226 - Service Law - Compassionate appointment - Death in 1992 - Subsequent policy providing 5% vacancy introduced in 1998 - Petitioner should have been considered on basis of earlier policy.

T. SWAMY DASS v. UNION OF INDIA ; I.L.R.(2002) M.P. ...467

Constitution of India, Articles 14, 226 and Telegraph Act, 1885, Section 7-B-Arbitrator-Appoint of-Constitutional validity-Provision cannot be voided merely because no corrective machinery is provided-Award passed by arbitrator-Discussion in the award itself is indication of existence of material - No interference called for.

BHAGWATI PRASAD BAJAJ v. UNION OF INDIA, ILR (2002) M.P. ... 842

Constitution of India, Articles 14 and 226–Writ petition–Short closing of tender–Supply of electronic push button telephone instrument–Contract executed–Subsequent fall in custom duty and resultant fall in price–Petitioner undertaking to remit all benefits deriving out of fall in custom duty–Department having accepted the same acted arbitrarily in foreclosing the tender to the extent of already supplied quantity.

S.R.V. TELECOM PRIVATE LTD. v. BHARAT SANCHAR NIGAM LTD.; I.L.R. (2002) M.P. ...236

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Allegation of mis conduct–Removing belt and cap and throwing at the time of visit of Inspector General–Departmental enquiry–Removal from service–Order confirmed by Administrative Tribunal–Punishment imposed must be commensurate to the gravity of the misconduct–Any punishment disproportionate to the gravity of misconduct violative of Article 14–Judicial Review–Punishment imposed shocks the conscienace–It would be appropriate either to direct the authority to consider or in exceptional cases, appropriate punishment can be imposed–Punishment of removal from service disproportionate to the gravity of misconduct alleged–Order set aside.

ARVIND DIXIT v. DIRECTOR GENERAL OF POLICE, M.P.; I.L.R. (2002) M.P. ...244

Constitution of India, Articles 14, 226, 391, 341, Commercial Tax Act, M.P. 1994 (as amended) Sections 45-A, 45-C, 45-D and Commercial Tax Rules, M.P. 1995, Rule 73-F-Inter State transportation of goods-Transporter to carry with him copy of declaration in respect of a notified goods-Officers of Commercial Tax Department vested with powers to verify documents-*Prima facie* material available to presume attempt being made to facilitate tax evasion-Only show cause notice issued-No interference called for at this stage.

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Constitution of India, Article 226–Allotment of L.P.G. Distributorship to freedom fighters–Allottee getting Freedom Fighter's Pension by State Government–Eligibility of allotment not confined to only pensioners of Central Government–Allegation against chairman being bias due to relationship–Chairman not participated in Board meetings at the time of interview of allotee–No ground for interference in allotment : *vide* Letters Patent, Clause X ...297

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Constitution of India, Article 226-Cancellation of quarry leases-Site falls in forest category-No mining operation is permissible.

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Constitution of India, Article 226, Advocate Act, 1961, Sections 3,8, 8-A and State Re-organization Act, M.P., 2000, Section 74- State Bar Council is a body corporate and a legal person-Does not mean members, Chairman and Vice-Chairman-Power conferred on body constituted under Central Act or Principal Act to exercise jurisdiction for a period of two years does not extend term of an elected member-Term of elected body expired-Direction issued to constitute Committee under Section 8-A and hold election as mandated in law.

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Constitution of India, Article 226 and Civil Services (Commutation of Pension) Rules, M.P., 1996, Rules 7,11(2) - Petitioner nominee of deceased employee - Commuted value pension attained finality - Death of employee before obtaining commuted value is not going to come in the way of nominee- Petitioner entitled to get commuted value of pension.

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Constitution of India, Article 226, Civil Services (Pension) Rules 1976, Rule 42 and (Work- charged and Contingency Paid Employee) Pension Rules, 1979 Rule 6(2) - Service law- Pension- Work- charged employees- Absorbed in a regular post - Service rendered in work charged establishment has to be counted as qualifying service for pension.

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regarding recovery of salary - Dispute within the meaning of Section 64 - Registrar is competent to condone delay.

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officer has to approach the Court for such a declaration as provided in Regulation 789 of M. P. Police Regulations–In a fit case Magistrate also has to proceed under Section 299 of the code against the police officer executing such warrant of arrest–Magistrate not expected to fail in taking prompt action and allow such matter to get prolonged.

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Penal Code, Indian (XLV of 1860)–Sections 302, 304, Part I and Criminal Procedure Code, 1974, Section 374 (2) - Appeal-Conviction & sentence - Murder - Single blow of knife on abdomen - Single blow would not in all cases attract leniency exonerating accused from clutches of Section 302 I.P.C. - It depends upon facts of each case - Single blow inflicted with force without provocation - Imposition of an act of supremacy without reason - Conviction and sentence under Section 302, I.P.C. concurred with.

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Vanijyak Kar Adhiniyam, M. P., 1994 (V of 1995)–Sections 68, 89 and Schedule I, Sections 89, 94–Accessories–Foot valve–Having no independent use but used in pumpsets below 10 H. P. run by electricity for its efficient use–Foot valves fall under the category of accessories–Exempt under Schedule I, Entry 89 of the Commercial Tax Act, : *vide* Constitution of India, Articles 226, 227 ...46

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THE INDIAN LAW REPORTS

MISCELLANEOUS PETITION*

Before Mr. Justice B. A. Khan and Mr. Justice Shambhoo Singh
26 July, 1999.

KEDIA DISTILLERIES LTD. ...Petitioner*

v.

APPELLATE AUTHORITY FOR INDUSTRIAL AND FINANCIAL RECONSTRUCTION & others ...Respondents.

Constitution of India–Articles 226/227–Writ Petition–Civil Procedure Code (V of 1908)–Section 2(2) and Sick Industrial Companies (Special Provisions) Act, 1985–Section 15 and 22–Section provides for suspension of legal proceedings against assets of companies claiming sickness–Does not operate as absolute bar against all proceedings–Idea is to freeze any coercive action against such companies until their revival or rehabilitation–Consent decree–A product of an agreement between the parties–Does not amount to coercive action nor barred under Section 22.

It would be too much to claim that execution of a consent decree was also hit by provisions of Section 22(1). After all a consent decree is the product of an agreement between the parties. It may be a decree within the meaning Section 2(2) C.P.C. and may be executable also, as held by some High Courts but it cannot be said to fall within boundaries of the provision because it does not partake the nature of a coercive proceedings which is barred. Any contrary view would tantamount to placing a too loose and undeservingly liberal on this provision ignoring and overlooking its true intent and purpose. After all once a company consented to such a decree with eyes open, it should be presumed to have been conscious of its state of affairs at that time. Sickness claimed by it post decree should be regarded induced sickness and a stratagem to resile from its own agreement by seeking shelter under the provisions of Section 22(1).

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*W. P. 554/99.

Kedia Distilleries Ltd. v. Appellate Authority for Industrial and Financial Reconstruction, 1999.

The SICA was enacted to provide opportunity to sick industrial companies to revive and he rehabilitated on wind up. Its purpose was not to enable unscrupulous companies to feign and manipulate sickness and to make a buck out it. Section 22(1) was only a tool to achieve this object. Its terms were, therefore, to be interpreted reasonably and in that spirit and perspective. Otherwise it would breed dishonesty, encourage unfair practices and shady dealings and defeat the very purpose for which the Statute was enacted.

It fell within the province of these two statutory Authorities to grant or refuse such consent. How and in what manner would they do so was their domain. They could not be held bound by a particular method for exercising their discretion and their decision in this regard would be unassailable unless it was shown to be perverse, irrational or illogical and unsupported by any reason.

Mr. Mathur, for the petitioner

Shri Singhvi for respondent No. 3.

Cur. adv. vult.

ORDER

The Order of the Court was delivered by

B. A. KHAN, J. – Petitioner is engaged in manufacture of country liquor and IMFL. It is said to have entered into a deal involving Rs. One Crore or so with private respondent No. 3 and obtained Rs. 50 lacs from this company for delivery of some equipments through some dummy company which was allegedly never supplied. Respondent No. 3 rough refund of this amount of Rs. 50 lacs for which petitioner executed a cheque which bounced. Respondent No. 3 thereafter filed a civil suit for recovery of Rs. 55.26 lacs with interest in Calcutta High Court which was decreed and in execution of petitioner's money lying with the Excise Commissioner was attached. Petitioner, then, offered compromise envisaging a repayment schedule culminating in consent decree dated 09.03 1995, passed by Calcutta High Court. Pursuant thereto, company paid two instalments or so and defaulted.

Kedia Distilleries Ltd. v. Appellate Authority for Industrial and Financial Reconstruction, 1999.

It, meanwhile, approached Board for Industrial and Financial Reconstruction (BIFR) u/s. 15(1) of SICA claiming sickness. Respondent No. 3 wanted to intervene in these proceedings but was overruled. The Board consequently passed order dated 6.8.98 declaring petitioner company sick and asked it to submit a rehabilitation scheme. Respondent No. 3 took appeal against this before the Appellate Authority for industrial and financial reconstruction (AAIFR) which was disposed off by order dated 19.03.1999 holding that protection u/s. 22(1) of SICA could not be availed by petitioner for wrigling out of consent decree granted by the High Court/Civil Court and allowed respondent No. 3 to execute the decree against its assets.

Petitioner has now filed this petition assailing Authority order on the ground that it had misconstrued and misinterpreted provisions of Section 22(1) of SICA which placed a total bar on taking execution of any decree including a consent decree against a declared sick industrial company. It was submitted by L/c for petitioner Mr. Mathur that consent decree was as good a decree as any other decree in terms of Section 2(2) CPC and was executable and therefore, fell within the rigour of the provision and could not be executed against petitioner. The Appellate Authority had also no competence to pass direction to execute such decree which lacked in basis because the Authority had not examined the financial health of petitioner to allow such execution. In other words, it is submitted that Authority should have discussed the merit of petitioner's sickness claim to allow respondent No. 3 to proceed with execution. Reliance for all this is placed on *Real Value appliances* v. *Canara Bank* (1), *Maharashtra Tubes Ltd.* v. *S. I. I. Co. of Maharashtra Ltd. & anr.* (2), *V. N. Sreedharan* v. *Bhaskaran* (3), *Parvathiyammal* v. *Shivathanv* (4), *Zakarali* v. *Israr Hussain* (5).

Mr. Singhvi representing respondent No. 3 on the other hand contended that Section 22(1) did not impose a blanklet ban on taking out execution or any other proceedings mentioned therein. All it provided was that consent of BIFR or AAIFR shall be taken for this purpose, which in the present case was granted by the Authority. He alleged that company had manipulated sickness and infact had practised fraud and deception on respondent No. 3 and others to fill-up its

(1) A. I. R. 1998 S. C. 2064. (2) 1993 (78) Comp. Cases 803.
(3) A. I. R. 1986 Ker. 49. (4) A. I. R. 1976 Mad. 339.
(5) A. I. R. 1947 Nag. 53.

own coffers, and therefore, did not deserve any protection u/s. 22. He sought support from 1997 SCC 649 in this regard and urged that provisions of Section 22(1) were required to be interpreted reasonably to deny its protection to those who aimed at defeating claims of creditors and defrauding them by beigning sickness. Mr. Singhvi also pointed out that Appellate Authority had rejected petitioner company's reference in Appeal No. 156/98 by order dated 01.07.1999, rendering this petition infructuous and removing all obstacles and impediments in the execution of the consent decree held by respondent No. 3.

Normally this petition could have merited dismissal for having become infructuous in the face of Appellate Authority's order dated 01.07 1999, rejecting petitioner's reference taking away whatever protection available to it under Section 22(1) or for that matter any other relevant provisions of SICA. But, LC for appellant Mr. Mathrur Authority's order was put in abeyance in some writ proceedings & wanted a pronouncement on merits and that is how we purpose to deal with the rival contentions raised and for this it becomes necessary to extract relevant provisions of Section 22(1) hereunder :-

> "Where is respect of an industrial company, an inquiry under Section 16 is pending or any scheme referred to under section 17 is under preparation or consideration or a sanctioned scheme is under implementation or where an appeal under Section 25 relating to an industrial company is pending, then, notwithstanding anything contained in the Companies Act, 1956 (1 of 1956) or any other law or the memorandum and articles of association of the industrial company or any other instrument having effect under the said Act or other law, no proceedings for the winding-up of the industrial company or for execution, distress or the like against any of the properties of the industrial company or for the appointment of a receiver in respect thereof shall lie or be proceeded with further, except with the consent of the Board or, as the case may be, the Appellate Authority."

This provision has received repeated interpretations by the Supreme Court and various High Courts and there is hardly any grey area which required any new interpretation. It is by now well known that SICA (Sick Industrial Companies (Special Prevention) Act, 1985) was enacted to enable timely detection of sick or potentially sick companies owning industrial undertaking and the identification of the nature of their sickness so as to detail out suitable remedial exercise

through appropriate schemes for their revival and rehabilitation or for their winding-up as the case may be. The object was to revive the sick units by extending financial aid/assistance and it was in this backdrop that Section 22(1) of the Act provided for suspension of legal proceedings against the assets of such companies who had sought declaration of their sickness before BIFR, u/s. 15(1) and in respect of which an inquiry was pending u/s. 16 or any scheme under preparation u/s. 17, or any appeal pending on the subject matter u/s. 25. The idea was to freeze any coercive action against such companies until their reference for declaration of sickness or for their revival/rehabilitation was finally determined. The provision, however, did not operate as an absolute bar against proceedings envisaged by it. It only prescribed that action could be taken with the consent of the Board or the Appellate Authority. Therefore, all that was needed was the consent of the Board and the Appellate Authority for proceeding against such companies.

There is no dispute that such a consent was required for taking away the execution of the any court decree against the assets of such company. But a consent decree stood on a somewhat different footing. It may be technically correct to contend that a consent decree was also a decree within the meaning of Section 2(2) CPC and was executable, as held by various High Courts. But the question is whether protection umbrella of Section 22(1) was available to defeat the consent decree based on the agreement of parties.

In our view Section 22 bars a coercive proceeding of the type envisaged by it against an industrial company whose reference for sickness is registered by BIFR and is pending determination before it or the Appellate Authority. It indeed places an embargo on such proceedings for winding up, for appointment of receiver or for execution, distress or the like against such company. Similarly it bars a suit for recovery of money or for enforcement of any security against it. All this is aimed at stopping any coercive action to provide a breathing time to the company to revive and to stand on its own again or else to wind up. The proceedings contemplated by the provision wherever launched survive in both cases and these remain under suspension only till the revival/rehabilitation scheme for the company is seen through or the company is wound up.

Given regard to this, it would too much to claim that execution of a consent decree was also hit by provisions of Section 22(1). After all a consent decree is the product of an agreement between the parties. It may be a decree within the meaning Section 2(2) CPC and may be executable also, as held by some High Courts but it cannot be said to fall within boundries of the provision because it does not partake the nature of a coercive proceedings which is barred. Any contrary view would tantamount to placing a too loose and undeservingly liberal on this provision ignoring and overlooking its true intent and purpose. After all once a company consented to such a decree with eyes open, it should be presumed to have been conscious of its state of affairs at that time. Sickness claimed by it post decree should be regarded induced sickness and a stratagem to resile from its own agreement by seeking shelter under the provisions of Section 22(1).

As already noticed the SICA was enacted to provide opportunity to sick industrial companies to revive and be rehabilitated or wind up. Its purpose was not to enable unscrupulous companies to feign and manipulate sickness and to make a buck out it. Section 22(1) was only a tool to achieve this object. Its terms were, therefore, to be interpreted reasonably and in that spirit and perspective. Otherwise it would breed dishonesty, encourage unfair practices and shady dealings and defeat the very purpose for which the Statute was enacted. There is no dearth of instances where unscrupulous companies had misused this provision by manipulating sickness to ward off legitimate claims of creditors. Therefore, it requires both caution and circumspection to extend protection of Section 22(1) to such companies. This concern was also expressed by *Jeevan Reddy (J) Deputy Commercial Tax Officer & ors.* v. *Corromandal Pharmaceuticals & ors.*; (1) in the following words :-

> "The object of the Act is undoubtedly laudatory but it must also provide for appropriate measures against persons responsible where it is found that sickness is caused by factors other than circumstances beyond the control of the management. The proceedings before the Board of Industrial and Financial Reconstruction take a long time to conclude and all the while the protective umbrella of Section 22 is held over the company

(1) 1997 S. C. C. 649.

which has reported sick. There have been cases where unfair advantage is sought to be taken of the provisions of Section 22 by certain industrial companies and the wide language employed in the Section is providing them a cover. Definitely Section 22 was not meant to breed dishonesty nor can it be so operated as to encourage unfair practices. It is expected that the Government might be thinking of necessary modifications in the Act."

Even assuming that execution of consent decree was barred by Section 22(1), but all that was required was the consent of BIFR/Appellate Authority to proceed with such execution. In the present case Appellate Authority had allowed respondent No. 3 to execute the decree. Thus all that remained to be seen was whether this suffered from any infirmity and whether its basis was untenable.

According to Mr. Mathur Appellate Authority's permission was devoid of any legal basis because it had not touched the merit of petitioners reference for sickness to see whether it was required to be granted. He further asserted that Authority had no competence to direct execution of decree by respondent No. 3.

Both submissions, in our view, are misconceived. Because consent of BIFR/Appellate Authority involves exercise of sound discretion. No hard and fast rule or formula could be prescribed or suggested for exercise of such discretion. Nor could it be insisted or urged that their consent ought to have been based on examination of the merits of company's reference for sickness or governed by principles for grant of injunction in civil matters.

It fell within the province of these two statutory Authorities to grant or refuse such consent. How and in what manner would they do so was their domain. They could not be held bound by a particular method for exercising their discretion and their decision in this regard would be unassailable unless it was shown to be perverse, irrational or illogical and unsupported by any reason.

Appellate Authority in the present case had shown due deference to the consent decree passed by Calcutta High Court and had taken in regard the conduct of particular while allowing respondent No. 3 to proceed with the execution of the decree. It could not have done better in the circumstances. Nor

could its permission be said to be devoid of any legal basis or suffering from any want of reason. It was also not bound to proceed in a particular manner and accord its consent only after examining the merit of petitioner's claimed sickness.

Mr. Mathur's submission that the Authority's order was conditional and dependent upon application of Section 22(1) to consent decree and that it was incompetent to direct execution of the decree is again neither here, nor there. It appears that the impugned order was not being read in its correct perspective. The order only conveyed that the company could not be allowed to wriggle out of its agreement by seeking protection under Section 22(1) which suggested that Authority had declined to extend protection to it under the provision to allow respondent No. 3 to proceed with the execution. Its directions for execution of decree was its consent to respondent No. 3 to proceed.

We, therefore, hold that provision of Section 22(1) of SICA were not attracted to the execution of a consent decree in the facts and circumstances of the case even though such decree was a decree technically within the meaning of Section 2(2) CPC and was also executable. Similarly grant or refusal of consent by BIFR or AAIFR involved exercise of sound judicial discretion by these statutory Authorities which was not exercisable in any straight jacket manner and which was unquestionable unless the decision was shown to be perverse, irrational, illogical or unsupported by any reason.

This petition accordingly fails and is dismissed Bank guarantee furnished by petitioner company shall be encashed and amount sent to Registrar (J) of Calcutta High Court to be paid to respondent No. 3 towards liquidation of decree held by it. Registrar to do the needful.

Petition dismissed.

MISCELLANEOUS PETITION

Before Mr. Justice S. P. Khare,
3 August, 1999.

KAILASH KUMAR DANGI ...Petitioner*

v.

STATE & another ...Respondents.

Constitution of India–Article 226 -Writ Petition–Panchayat Raj Adhiniyam, M. P., 1993 (I of 1994)–Section 40–Removal from office of Sarpanch–Petitioner's request to produce documents, oral evidence and examination of witnesses denied by S.D.O.–Charges against were of such nature which can be proved or disproved by evidence–Enquiry behind the back–Denial of fair hearing resulted in serious prejudice–Order of removal and disqualification is un-reasonable arbitrary and violative of principles of natural justice.

Keeping in view the facts of the case certain facets of natural justice as stated above were not complied with resulting in prejudice to the petitioner. He was not permitted to adduce his own evidence to rebut the material collected against him. The charges were such which could be proved or disproved by evidence in the inquiry. One of the main charges was the distribution of pattas to those who were not landless and a conclusion on this point could be reached after recording evidence and after seeing the list supplied by the Tehsildar or the B.D.O. The prescribed authority in the impugned order has not dealt with this aspect.

The basic fault in the impugned order is that an inquiry held by the B.D.O. behind the back of the petitioner has been held to be a valid 'inquiry' under Section 40 of the Act and he has been packed-up on the basis of that inquiry without even supplying affording him an opportunity to lead his own evidence even when he repeatedly asked for the same. This was denial of fair hearing resulting in serious prejudice to the petitioner. The action of removal and disqualification has to be struck down as there has been a failure of justice. The guilty must be punished but the finding of guilt has to be arrived after fair hearing which was denied in this case.

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*W. P. No. 1275/98.

Union of India v. *T. R. Verma* (1), *Khemchand* v. *Union of India* (2), *Loyd* v. *McMohan* (3), *Kanda* v. *Government of Malaya* (4), *State Bank of Patiala* v. *S. K. Sharma* (5), *Ballabhadas* v. *State* (6) and *Delhi Transport Corporation* v. *DTC Mazdoor Congress* (7); referred to.

C. L. Kotecha for the petitioner.

Ajay Mishra, Dy. A. G. for the State.

Cur. adv. vult.

ORDER

S. P. KHARE, J. – This is a petition under Article 226 of the Constitution of India challenging the order dated 26.4.1996 (Annexure-P-5) of the Sub-Divisional Officer, Betul (the Prescribed Authority) by which the petitioner has been removed from the office of Surpanch of Shahpur Gram Panchayat under Section 40 of the M. P. Panchayat Raj Adhiniyam, 1993 (hereinafter to be referred to as the Act). He has also assailed the appellate order dated 18.3.1997 passed by the Additional Collector and the revisional order dated 24.11.1997 passed by the Commissioner by which the impugned order of the S.D.O. has been upheld.

The petitioner was Surpanch of Gram Panchayat, Shahpur. He was directly elected to this office in the year 1994. A show cause notice was issued to him by respondent No. 4 the Sub-Divisional Officer, Betul on 30.10.1995 in which fifteen charges were levelled against him. That is Annexure-P-1. He submitted his reply to the show-cause notice on 10.11.1995 giving his explanation on each charge. He also requested for time to produce some more documents and adduce oral evidence. That reply is Annexure-P-2. He submitted another application on the same date for permitting him to examine witnesses in support of his defence. On 13.11.1995 he submitted another application to give him

(1) A. I. R. 1957 S. C. 882. (2) A. I. R. 1958 S. C. 300.
(3) (1987) A. C. 625. (4) (1962) A. C. 322.
(5) A. I. R. 1996 S. C. 1669. (6) 1998 (2) J. L. J. 303.
(7) A. I. R. 1991 S. C. 101.

hearing on his application for production of witnesses. No witness was examined by the S.D.O. in support of the charges nor the petitioner was permitted to examine any witness. By the impugned order dated 26.4.1996 (Annexure-P-5) the petitioner was removed from the office of the Surpanch. This order shows that the reply to the show-cause notice was considered in light of the report of the preliminary inquiry submitted by the B.D.O. A copy of this report or any document was not supplied to the petitioner. No witness was examined in his presence by the S.D.O. No document was produced or exhibited. There was no question of any cross-examination of these witnesses by the petitioner as none was produced. The petitioner was also not given any opportunity to produce his witnesses.

The substance of the accusations against the petitioner was that he gave pattas of several pieces of land for construction of houses to persons who were not eligible. That was the subject of charges No. 8 to 15. The other charges were that the petitioner was negligent in not taking proper interest in the watering of plants in a garden, he got the road constructed by entrusting the work to the Tribal Welfare Department and not to Rural Engineering Department, he did not arrange proper supply of water from the tube-well, he did not get the drains cleaned and he did not give proper notice to the villagers for the meeting of the Gram Sabha which was held on 20.8.1995. It is clear from the nature of the charges against the petitioner that these could be established by documentary and oral evidence. None of the seven persons who were given pattas was examined by the S.D.O. during the inquiry. It was the case of the petitioner that many of these persons were shown as landless in the list supplied by the Tehsildar. The impugned order of the S.D.O. does not show that he considered this aspect. Similarly the question of proper maintenance of the garden and water supply could be examined if the witnesses had come forward either to prove or disprove those charges.

The petitioner's case is that the inquiry envisaged under Section 40 of the Act should have been held in his presence. It was necessary to examine witnesses in his presence so that he could cross-examine them to test their veracity. A report of the preliminary inquiry should also have been supplied to the petitioner and the documents on which reliance was placed should have been shown to him. Further, the petitioner should have been given an opportunity to adduce his

own evidence. No reliance could be placed on the inquiry which was held behind the back of the petitioner. Show-cause notice given to the petitioner was an idle formality when he was not given any opportunity to rebut material collected in the preliminary inquiry or to adduce his own evidence to disprove the charges levelled against him. These grievances were ventilated by the petitioner before appellate and the revisional authorities but they did not consider them. They also relied upon the report of the preliminary inquiry and treated it as evidence. The petitioner has also challenged the election of the respondent No. 5 as surpanch.

The respondents No. 1 to 4 in their return have stated that it was not necessary to hold the enquiry in the presence of the petitioner nor it was necessary to give an opportunity to the petitioner for cross-examinaning the witnesses. Similarly, it was further unnecessary to provide him a copy of the report of the preliminary enquiry. It is also stated that the petitioner has no right to adduce any oral evidence. The requirement of law is to give a show cause notice to the petitioner and that was done. After considering the reply to the show-cause notice, it was found that the charges against the petitioner are proved and he was removed from the office of the Supranch. The concurrent findings of the three authorities cannot be assaulted by this petition. Notice was served on respondent No. 5 but he did not appear. He did not file any return.

The learned counsel for both the sides were heard Section 40(1) of the Act is as under :-

> "40. Removal of office bearers of Panchayat :-
>
> (1) The State Government or the prescribed authority may after such enquiry as it may deem fit to make at any time, remove an office bearer-
>
> (a) if he has been guilty of misconduct in the discharge of his duties; or
>
> (b) if his continuance in office is undesirable in the interest of the public.
>
> Provided that no person shall be removed unless he has been given an opportunity to show cause why he should not be removed from his office."

The words "after such enquiry as it may deem fit to make" in main part of Section 40(1) and the words "unless he has been given an opportunity to show

cause why he should not be removed from his office" in the proviso to Section 40(1) are of crucial importance. The contention of the respondents No. 1 to 4 is that the petitioner was given a show cause notice and reply submitted by him was considered by the prescribed authority and that is the end of the matter. In this connection it has to be borne in mind that the removal of a surpanch who is directly elected is a serious matter and a person who is removed is further disqualified for a period of six years to be elected under the Act. It is not sufficient to give a mere lip-service to the requirement of law. It is true that it is not specifically provided in Section 40 that principles of natural justice should be followed while holding an enquiry but it is implicit in this provision that the office-bearer who is sought to be removed will be given a fair hearing.

Removal and disqualification of an office-bearer of a Panchayat under Section 40 of the Act on the ground of misconduct is not less injuries and stigmatic as the removal of a civil servant under Article 311 of the Constitution of India or a workman under the industrial law. Article 311 also envisages an 'inquiry' in which the delinquent employee is informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges. The celebrated rule of *audi alteram partem* has been incorporated therein. What principles of natural justice should be applied depends upon the facts and circumstances of each case. Broadly stated a party should have the opportunity of adducing all relevant evidence on which he relies, that the evidence of the opponent should be taken in his presence, and that he should be given the opportunity of cross-examining the witnesses examined by that party, and that no materials should be relied on against him without his being given an opportunity of explaining them. *Union of India* v. *T. R. Verma* (1) and *Khemchand* v. *Union of India* (2).

The words "after such inquiry as it may deem fit to make" in the main part of Section 40(1) of the Act would mean an inquiry which is held in the presence of the office-bearer and not behind his back. He should be allowed to inspect the documents which are to be relied upon against him and he should have the right to adduce his own evidence. These are the important facets of an inquiry to be held in conformity with the principles of natural justice. It is not the subjective choice of the prescribed authority to get an inquiry held of any kind. It does not

(1) A. I. R.1957 S. C. 882. (2) A. I. R. 1958 S. C. 300.

envisage a secret inquiry or a preliminary inquiry alone. That is made only for collection of evidence and at that stage there is no participation of the person against whom the action is sought to be taken. The words "as it may deem fit" have to be construed objectively and would mean an inquiry depending upon the facts and circumstances of each case. Some of the facets of the inquiry may be excluded if the facts are not very much in dispute or there are other circumstances to dispense with them. But the office bearer has a right of fair hearing. "You must hear the person who is going to suffer". That is a duty which lies upon every one who decides anything. There is, however, some flexibility depending upon the subject-matter.

H. W. R. Wade in his book on Administrative Law, 7th Edition at page 521 has quoted a passage in the speech of Lord Bridge in the House of Lords in *Lloyd* v. *McMohan* (1).

> "My Lords, the so called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates. In particular, it is well-established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness."

The principles of natural justice are used to supplement statutory procedures which themselves provide for a hearing or inquiry, with or without detailed regulation of the procedure. It is not proper to start with a pre-conceived notion that the person against whom the action is proposed is guilty. Conclusion of guilt can be drawn only after fair hearing.

Lord Denning has said in *Kanda* v. *Government of Malaya* (2) that if the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know

(1) (1987) A. C. 625. (2) (1962) A. C. 322.

what evidence has been given and what statements have been made affecting him; and then he must be given a fair opportunity to correct or contradict them.

In this case, as already, stated, the inquiry was not held in the presence of the petitioner, he was not supplied a copy of the report of the preliminary inquiry, he was not shown any document, he was not given any opportunity to adduce his evidence though he asked for it. He was given only a show-cause notice containing the charges and after his reply he was summarily removed by the impugned order. That was confirmed in a routine and ritualistic manner by the appellate and revisional authorities by adverting to some report of the preliminary inquiry. It cannot be said that there was fair hearing. There was prejudice to the petitioner. He was handicapped and prejudiced in defending himself properly and effectively.

In *State Bank of Patiala* v. *S. K. Sharma* (1) the Supreme Court after exhaustive survey of the earlier precedents has formulated the test of prejudice, that is, whether the person has received a fair hearing considering all things. Rule (5) formulated in this decision aptly applies to the present case though it is not a case of a disciplinary action against an employee but against an office bearer of a Panchayat on the ground of his misconduct involving serious consequences. That rule is as under :-

> "(5) Where the enquiry is not governed by any rules/regulations/statutory provisions and the only obligation is to observe the principle of natural justice or, for that matter, wherever such principle are held to be implied by the very nature and impact of the order/action - the Court or the Tribunal should make a distinction between a total violation of natural justice (rule of *audi alteram partem*) and violation of a facet of the said rule. In other words, a distinction must be made between "no opportunity" and no adequate opportunity, i.e. between "no notice"/"no hearing" and "no fair normally liberty will be reserved for the Authority to take proceedings afresh according to law, i.e. in accordance with the said rule (*audi alteram partem*). (b) But in the latter case, the effect of violation (of a facet of the rule of *audi alteram partem*) has to be examined from the stand-point of prejudice; in other words, what the Court or Tribunal has to see is whether in the totality of the circumstances, the delinquent officer/

(1) A. I. R. 1996 S. C. 1669.

employee did or did not have a fair hearing and the orders to be made shall depend upon the answer to the said query."

In the present case there was not total violation of the principles of natural justice as a show cause notice was given and the reply of the petitioner obtained. But keeping in view the facts of the case certain facets of natural justice as stated above were not complied with resulting in prejudice to the petitioner. He was not permitted to adduce his own evidence to rebut the material collected against him. The charges were such which could be proved or disproved by evidence in the inquiry. One of the main charges was the distribution of pattas to those who were not landless and a conclusion on this point could be reached after recording evidence and after seeing the list supplied by the Tehsildar or the B.D.O. The prescribed authority in the impugned order has not dealt with this aspect. Similarly the charges regarding negligence in the maintenance of garden, supply of water, drainage and information regarding the meeting of the Gram Sabha could be decided on the basis of evidence and not merely relying upon a preliminary inquiry report. The basic fault in the impugned order is that an inquiry held by the B.D.O. behind the back of the petitioner has been held to be a valid 'inquiry' under Section 40 of the Act and he has been packed-up on the basis of that inquiry without even supplying a copy of the same to the petitioner, and without affording him an opportunity to lead his own evidence even when he repeatedly asked for the same. This was denial of fair hearing resulting in serious prejudice to the petitioner. The action of removal and disqualification has to be struck down as there has been a failure of justice. The guilty must be punished but the finding of guilt has to be arrived after fair hearing which was denied in this case. In *Ballabhdas* v. *State of M. P.* (1) it has been hearing". (a) In the case of former, the order passed would undoubtedly be invalid (one may call it "void" or a nullity if one chooses to). In such cases, observed by this Court that a full fledged enquiry is provided under Section 40 of the Act. It contemplates 'due enquiry'. As observed in *Delhi Transport Corporation* v. *DTC Mazdoor Congress* (2) right to fair treatment is an essential inbuilt of natural justice which is an integral part of the guarantee of equality assured by Article 14 of the Constitution of India. The concept of reasonableness and non-arbitrariness pervades the entire Constitutional spectrum and is a golden thread which runs through the whole fabric of the Constitution.

(1) 1998 (2) J. L. J. 303. (2) A. I. R. 1991 S. C. 101.

This petition is allowed. The impugned order dated 26.4.1996 (Annexure-P-5) of the Sub-Divisional Officer, Betul (the prescribed authority) and the appellate and revisional orders confirming that order are set aside. The office of Surpanch of Gram Panchayat, Shahpur will be restored to the petitioner in place of respondent No. 5 and there will be no disqualification on account of the impugned order. However, the respondent No. 4 will be free to recommence the inquiry in light of the principles of law discussed above.

Petition allowed.

MISCELLANEOUS PETITION

Before Mr. Justice Dipak Misra
16 March, 2000.

ARJUN LAL PATEL ...Petitioner*

v.

STATE & others ...Respondents.

Constitution of India–Article 226–Writ Petition–Co-operative Societies–Apex body–Disqualification–Co-operative Societies Act, M. P., 1960, Sections 19-AA, 53 and Co-operative Societies Rules, M. P., 1962, Rules 44 and 45–Petitioner society suffering dis-qualification for reason of being defaulter–Requirement is that both the society and also its representative should not suffer from any disqualification–Delegate having no independent existence but only represents the society–If society ceases to be a member, the delegate will automatically cease to be delegate.

Rule 45 provides that the delegate or representative so elected should also not suffer from any of the disqualifications mentioned in Rule 44. Thus, the retirements of the Rules are two fold. The member society must not suffer from

*W. P. No. 5075 of 1999.

any disqualification mentioned in Rule 44 and the delegate elected by it to represent it should also not suffer from any of the disqualifications. The delegate however, has no independent existence. He only represents the society which is the real member in the committee and if the society ceases to be a member of the committee because of a dis-qualification incurred by it, the delegate will automatically cease to be delegate although he may not have himself incurred any disqualification under Rule 45.

R. K. Gupta for the petitioner.

V. K. Shukla, Govt. Adv. for the State.

S. K. Dwivedi for respondent no. 4.

S. A. Dharmadhikari for respondent no. 5.

Cur. adv. vult.

ORDER

DIPAK MISRA, J. – The petitioner, the Director of Zila Sahkari Kendriya Bank Maryadit Board of Directors, Hoshangabad having been elected as such from Harda Vikas Khand and is a representative of the Sewa Sahakari Samiti Maryadit, Nimgaon. The respondent No. 4, namely, District Co-operative Central Bank Limited, is registered under Section 9 of the Madhya Pradesh Co-operative Societies Act, 1960 (hereinafter referred to as 'the Act'). The aforesaid Act was enacted with an object to organise and develop co-operatives as democratic instruments and peoples' institutions based on self help and mutual aid and for curbing exploitation and ensuring socio-economic development of people with particular emphasis on weaker sections of the society. According to the writ petitioner, the Registrar is executive head of the Co-operative movement and the respondent No. 5 is the Chairman of the Bank. Under Section 53-B of the Act, the Registrar is empowered to remove an officer of a Society in certain circumstances under Section 58 of the Act, the Registrar can cause audit, enquiry, inspection and supervision over the Societies/Co-operative Societies. Section 56 of the Act empowers the Registrar to enforce performance

of certain obligation by the Society. Section 59 of the Act confers powers on the Registrar to conduct an enquiry.

The election in respect of the respondent-Bank took place in 1996 in which the respondent No. 5 was elected as the Chairman of the Board of Directors of the Bank and the petitioner and others were elected as Directors of the Board of Directors. On some complaint being received in respect of the irregularities committed in the functioning of the Bank by the Chairman and his associate Directors, when no action was taken the petitioner filed a writ petition before this Court and the same was disposed of with a direction to the authorities to take action in accordance with law in respect of the complaints pertaining to irregularities and illegalities. The Joint Registrar, thereafter issued a show cause notice on 26.11.98 to the respondent No. 5 and Lakhanlal Deora and Shiv Kumar Choudhary, the Directors directing the respondent Bank to take action against the aforesaid three Director. As the petitioner and other Directors have brought the aforesaid irregularities and illegalities to the notice of the authorities leading to issue of notice dated 26.11.98 against the three persons including the Chairman of the Bank, the respondent No. 5 and his associate Directors in collusion with the authorities of the Department saw to it that show cause notices were issued against the petitioner on the ground that the Society to which he represents in the Board of Directors was in default for a period exceeding twelve months in respect of loan taken by it from the respondent-Bank/Apex Society. It is averred in the writ petition that the show cause notice was issued to the petitioner was based on no enquiry and without affording an opportunity of being heard to the petitioner. The petitioner filed a revision before the Board of Revenue against the said show cause notice. The Board of Revenue passed an interim order staying further action. After establishment of the Madhya Pradesh Co-operative Tribunal the case was transferred by the Board of Revenue to the Tribunal for adjudication. It was submitted before the Tribunal that the whole proceeding initiated against the petitioner was *malafide*, and as no opportunity was given to the petitioner the enquiry conducted against him was absolutely vitiated being violative of principles of natural justice. It was putforth before the Tribunal that Section 19-AA of the Act speaks of dis-qualification for membership of the Committee and for representation. The proviso to the aforesaid Section lays down that if the Society fails to take action, the Registrar shall disqualify such member from holding such

post by an order in writing after giving him reasonable opportunity of being heard but the Deputy Registrar, Co-operative Societies without hearing the petitioner or the Society of the petitioner has reported that the petitioner suffers from the dis-qualification as provided in Rule 45(3) of the Rules of 1962.

Appreciating the contentions raised by the petitioner, the Tribunal by its order dated 2.11.1999 disposed of the revision directing that the Society of the of the petitioner be also noticed along with a copy of the report of the enquiry made by the Deputy Registrar. The Tribunal also held that the provisions of Section 59 do not speak of giving opportunity of hearing to the affected person, therefore, the petitioner was not entitled to an opportunity of being heard at that stage.

It is averred in the writ petition that the Tribunal has absolutely erred in law by not holding that as per provisions of the Act and Rules grant of an opportunity is mandatory and violation thereof, vitiates the initiation of the proceedings. It is also putforth that the Tribunal ought to have quashed the notice dated 23.12.1998 as being illegal and arbitrary, as it has been issued on the basis of report, which is untenable in the eyes of law and the revision should have been allowed as the same is wreaked with *malafide*. It is further putforth that as per the order passed by the Tribunal the Bank has issued a notice on 15.11.1999 to the petitioner as well as to Sewa Sahakari Samiti Maryadit Nimgaon directing them to submit their reply and defence between 15 days and the meeting of the members was fixed on 2.12.1999. The main grievance of the petitioner as has been narrated in the writ petition that the meeting of the Board of Directors has been fixed with a *malafide* intention to oust the petitioner from the Board of Directors on the basis of the complaint. It is contended in the writ petition that the finding of the Tribunal and subsequent actions thereof, are unjustified, illegal, arbitrary and untenable as that violative the principles of natural justice. It is also contended that issuance of notice to the petitioner is totally *malafide* and against the mandate of law. It is also alleged that the enquiry conducted by the Deputy Registrar was behind the back of the petitioner. It is also stated that the report of the enquiry does not mention about the audit report. It has also been pleaded that no certificate has been issued that the Society is a defaulter, and, therefore, the action is unjustified.

With these averments prayer has been made for quashment of the order

of the Tribunal as contained in Annexure-P-I and further to quash the notice to show cause dated 23.12.1998 and subsequent action and to declare that the action initiated by the respondents against the petitioner is *malafide*, arbitrary and opposed to settled principles of law.

A return has been filed by respondent no. 5 contending, *inter alia*, that the petitioner is a representative of the Sewa Sahakari Samiti Maryadit and the said assignment to the petitioner has made eligible to contest the election for the post of Director of the respondent no. 4 in the year 1997. But thereafter one Ramdayal Bhuriya of Neemgaon made a complaint purporting that the society to whom the petitioner represents was in arrears for more than 12 months. An inquiry under Section 59 of the M. P. Co-operative Societies Act, 1960, was conducted in which it was reported that the complaint of Shri Bhuriya was *prima facie* correct and on the basis of the said inquiry report a show cause notice dated 23.12.98 was issued to the petitioner seeking his counter/reply thereto within 7 days. The said show cause notice was subject matter of challenge in revision no. 411/99. Finally the Tribunal arrived at the conclusion that the Society should be given a show cause notice and the matter should be finalised. It is putforth in the return that in compliance with the order passed by the revisional authority the respondent no. 4 issued letter dt. 15.11.99 to the petitioner and his original society. They were required to submit their show cause within 15 days. It is setforth by the respondents that the order passed by the Tribunal does not suffer from any irregularity as envisaged under any provision of the Act. It has also been putforth the finding of the Tribunal that the petitioner was not entitled to be heard in the matter is sound in the obtaining factual matrix, as the action is to be taken after conducting an inquiry in pursuance of 19-AA of the Act. It is denied that such a matter is not covered under the concept of dispute as understood under Section 64 of the Act. Emphasis is laid on Section 19-A and 19-AA of the Act.

A counter affidavit has been filed by the answering respondent no. 4 wherein it has been highlighted that the petitioner is a resident of village Jhadpa which is situated in the operational area of Sewa Sahakari Samiti Maryadit Neemgaon, District Harda and the society of which the petitioner is a representative, is a loanee from respondent no. 4 and the loan has not been cleared for more than 12 months. Therefore, the petitioner being a representative of the loanee society is not eligible to represent. Reliance has been placed to Rule 45(3) of the M. P.

Co-operative Society Rule, 1962. Respondent no. 4 has placed immense emphasis on Section 19-AA of the Act. It is also highlighted that there has been amendment of Rule 45 by the State Government on 12.4.99 and, therefore, the petitioner is bound to suffer the disqualification.

I have heard Mr. R. K. Gupta learned counsel for the petitioner, Mr. V. K. Shukla, learned G. A. for the State, Mr. S. K. Dwivedi for respondent No. 4 and Mr. S. A. Dharmadhikari for respondent no. 5.

Mr. Gupta, learned counsel for the petitioner has placed heavy reliance on a decision rendered in the case of *Zila Sahakari Kendriya Bank Ltd. and another* v. *Jagdish Saraf and others* (1) wherein a learned Single Judge of this court after referring to Section 19-AA has held as under :-

> "A perusal of Section 19-AA would show that no person shall be eligible for election as a member of the committee of a society and shall cease to hold the office as such, if he suffers from such disqualification as may be prescribed. A perusal of this provision, would clearly show that it does not apply to a member society but it confines to a person in person. If a member of the society suffers with any dis-qualification, then, he shall not be eligible for his election and he shall cease to hold the office as such. The later part of section 19-AA provides that no society shall elect any member as its representative to the committee of any other society or to represent the society in other society, if he suffers from such disqualification as may be prescribed. The language of this part of Section 19-AA would again show that the society is forbidden from electing its representative if such person is under disqualification."

After so holding the learned Judge opined that in the said case the respondent no. 1 was not suffering from any personal dis-qualification and the dis-qualification was suffered by the society. The learned Single Judge held that the proviso to Section 19-AA provides that if a member suffers from any of the disqualification prescribed it shall be lawful for the committee of the society to disqualify such a member where he is elected as a Director being member of that society. But this action has to be taken within a period of two months from the date of coming to the notice of the society and after giving such member who has been elected as a Director of such society, an opportunity of being heard. Learned Single Judge referred to Clause (ii)

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(1) 1999 R. N. 263.

of the Proviso which speaks of a situation where the representative of the society suffers a personal disqualification for continuing as a representative to the higher level society, then in such a case, the higher level society may take action to disqualify such representative from holding the post.

After discussing in this regard the learned Judge referred to Rule 45 and held as under :

> "As this state, it would also be useful to refer to Rule 45 of the Rules 1962. According to Rule 45, no society shall elect any member as its representative who suffers from any of the disqualification mentioned in Rule 44. If further provides that a representative of a society representing it in the general body or committee of another society, shall cease to hold its office as such, on happening of the particular incident. Sub-rule (3) of Rule 45 however provides that no representative of the society shall be eligible for election as the members of the committee (higher level society) and shall cease to hold his office as such if the society is or gets into default for a period exceeding 12 months in respect of any loan or loans taken by it from such Bank or society or apex society. The proviso to sub-rule (3) further provides that in case a dispute/application u/s. 64, 84-A or 85 or any provision of M. P. Co-operative Land Development Bank Act for recovery of the amount has already been filed against such root society, then, the representative of such root society shall not incur disqualification under Rule 45(3).
>
> From the reply Annexure-P-4 filed by the respondent No. 1 it clearly appears that the central co-operative bank had already filed a dispute u/s. 64 of the Act against the root society. This objection of the respondent No. 1 has not been taken into consideration. If the District Co-operative Bank has already filed a dispute, than, in such a case, the disqualification would not be attached. It does not appear from the Resolution that all these facts were taken into consideration. It appears that the Board of District Central Co-operative Bank Shahdol was simply influenced by the letter of the Joint Registrar and passed a resolution. The Board of Revenue in the opinion of this Court was justified in upsetting the order passed by the authority."

Mr. Dwivedi learned counsel per contra has referred to Rule 45 after the amendment. It reads as under :

"45.-Disqualification for representation,-

(1) No society shall elect any member as it's representative, who suffers from any of the disqualification.....

(3) No representative of the society shall be eligible for election as a members of a committee of cooperative Bank, Financing Bank, Federal Society or Apex Society and shall lease to hold his office as such if the society is or gets into default for a period exceeding twelve months in respect of any loan or loans taken it from such co-operative Bank, Financing Bank, Federal Society or Apex Society."

Submission of learned counsel is that in view of the amendment of the Rules Section 19-AA would come into play. He has placed heavy reliance on the case of *Basant Kumar* v. *Assistant Registrar, Co-operative Societies, and Others* (1). Wherein a Division Bench of this Court has held as under :

"The representative of a society appointed under By-law 9 does not himself become a member of the general body or the managing committee of the Store, he is only a representative of the Co-operative society which is the real member. This conclusion is further supported by the language used in Rule 45 which provides that no society shall elect any member, who suffers from nay of the disqualification laid down in Rule 44 as its delegate, to the committee of another society or to represent it in another society. The rule thus contemplates that a society can appoint one of its qualified members as its delegate to the committee of another society. Such a delegate can always be withdrawn and another delegate appointed in his place by the society as is provided in Rule 45(2)(c). The occasion for a society to nominate a delegate to the committee of another society can only arise when the society is a member of the committee and an individual is required to represent it in the committee. A delegate representing a society in the committee of another society is not himself a member but is only a representative of the society, which is really the member of the committee."

Their Lordships further proceeded to lay down as under in paragraph 6 of the Judgment :

(1) 1969 R. N. 569.

"It was then contended that disqualification for a delegate or representative are all provided in Rule 45 and unless it can be said that the delegate or representative of the member society in the Committee of another society has himself incurred the disqualification under Rule 45, the delegate or the representative does not lose his seat in the Committee. There is no substance in this contention. A society to be a member in the committee of management of another society must not suffer from the disqualifications mentioned in Rule 44. As a society can only function in the committee of management through some individual, the society elect one of its members as its delegate. But Rule 45 provides that the delegate or representative so elected should also not suffer from any of the disqualifications mentioned in Rule 44. Thus, the retirements of the Rules are two fold. The member society must not suffer from any disqualification mentioned in Rule 44 and the delegate elected by it to represent it should also not suffer from any of the disqualifications. The delegate however, has no independent existence. He only represents the society which is the real member in the committee and if the society ceases to be a member of the committee because of a disqualification incurred by it, the delegate will automatically cease to be delegate although he may not have himself incurred any disqualification under Rule 45."

In view of the amended provision in Rule 45, I am of the considered view that the decision laid down in the case of *Zila Shahkari Kendriya Bank* (*supra*) is distinguishable and the matter shall be governed by the ratio in the case of *Basant Kumar* (*supra*). In view of the aforesaid premises, the order passed by the Tribunal is defenisble and deserves the stamp of approval of this court.

Resultantly, the writ 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.

Petition dismissed.

MISCELLANEOUS PETITION

Before Mr. Justice R. S. Garg.
29 March, 2000.

SMT. GEETA SAHU ...Petitioner*

v.

DISTRICT MAGISTRATE & others ...Respondents

Constitution of India–Article 226–Writ petition–Preventive detention–National Security Act, 1980, Sections 2 & 3–Maintenance of public order–Offence committed in the year 1985 as also the Rojnamcha report cannot be made foundation for preventive detention under the Act–If any serious offence is committed the same would be matter of Law and Order but not that of preventive order–Case not proximate to the date of order–Could not be taken into consideration–Detenue acquitted in 13 out of 14 cases and only one criminal case pending against him–That fact was not placed before detaining authority–Order of detention bad.

Ru th ar

It is not in dispute before us that the fact regarding acquittal of the petitioner in as many as 13 cases was not brought to the notice of the detaining authority. The stress is not on the question of acquittal but on the question of non-placement of the material and vital fact of acquittal which if had been placed, would have influenced the mind of the detaining authority one way or the other. The fact of acquittal quite possibly have an impact on the decision of the detaining authority whether or not to make an order of detention. It is not altogether unlikely that the District Magistrate may in a given case take the view that since the persons sought to be detained was acquitted in 13 out of 14 cases and only one criminal case is pending against him, an order of detention should be made for the present and the criminal case should be allowed to run its full course.

The question before the Court is whether the requisite material which could have affected the mind of the detaining authority was submitted before it or not. We are required to consider that if such material was placed before the authority whether its decision would have been affected or not. Section 16 does not protect any illegal order. It protects an action taken in good faith. Having given out

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*W. P. No. 4141/99.

anxious consideration to the facts and circumstances of the case the manner in which the sponsoring authority did not place the requisite material before the detaining authority so also the detaining authority having not been apprised of the acquittals in 13 cases and being oblivion of the fact that out of 18 instances in 13 cases the proposed person was acquitted, one case in which detenue was convicted was of the year 1985, one case was still pending consideration, in one case proceedings under Section 110 Cr.P.C. were drawn and the two instances relate to the Rojnamcha reports, we are of the opinion that the order of detention is bad.

Dharamdas Shamlal Agrawal v. *Police Commissioner and another* (1), *Abdul Razak Nannekhan Pathan* v. *The Police Commissioner, Ahmedabad* (2) and *Union of India* v. *Parasmal Rampuria* (3); referred to.

A. K. Soni for the petitioner.

Ajay Raizada for the State.

Sanjay Agrawal for respondents no. 2.

Cur. adv. vult.

ORDER

R. S. GARG, J. – By this petition under Article 226 of the Constitution of India the petitioner challenges the correctness validity and propriety of the Order No. 32/Detention/1998 dated 24.11.98 passed by District Magistrate Shahdol, annexed to the petition as Annexure-P/1.

By the impugned order the District Magistrate, Shahdol exercising his powers under Sub-section 2 read with sub-section 3 of Section 3 of the National Security Act, 1980 ordered that Pappu @ Radheshyam Teli (husband of the petitioner) be detained and kept in Central Jail, Rewa (M.P.).

The petitioner says and submits that the order Annexure-P-1 is patently illegal as it does not take into consideration that out of 14 cases referred in the grounds of detention the petitioner has been acquitted in number of cases and

(1) 1989 (2) S. C. C. 370. (2) 1989 (3) S. C. 231.
(3) 1998 Vol. 8 S. C. C. 402.

was convicted only in one case in the year 1994 and in the appeal the sentence was reduced to the period already undergone i.e. 97 days and a fine of Rs. 1,000/- was imposed upon him. It is also submitted that item no. 16 of the grounds could not be taken into consideration for detaining the petitioner and similarly grounds no. 17 and 18 are not in relation to offences but were simply Rojnamcha reports which were concocted 3, 4 days before the date of the order, so that the petitioner could be detained. It was submitted that orders of acquittal were not placed before the authority, this act of the Superintendent of Police was either an act of negligence or was with ulterior motive so that correct facts were not brought to the notice of the detaining authority. It is further submitted that the authority was persuaded and obliged to believe that the cases were pending and an order of detention was required to be passed. It is also submitted in the petition that the detaining authority did not try to appreciate that item no. 1 to item no. 13 were not within close proximity of the order of detention and the authority was unnecessarily persuaded by those stale cases in which otherwise the detenue was acquitted. It is further submitted that the order of detention was not executed within reasonable time therefore, also, the order of detention deserves to be quashed. It was also submitted that as no serious efforts were made to execute the order of arrest, the petitioner, therefore also the order of detention deserves to be quashed. It was further submitted that the representation made by the petitioner was not decided well within time therefore the detention becomes invalid and the order is liable to be quashed. The respondents in their return have submitted that the detenue is a hardened criminal and had terror in the locality, number of cases were registered against him and he was using fire-arm for commission of offences. The petitioner being a terror in the locality the witnesses were not coming forward to speak against him. According to the return, the petitioner was kept under surveillance from the year 1985 but his criminal activities could not be checked. The District Magistrate after going through the entire material placed before him, registered a case, examined the evidence both oral and documentary and after being satisfied passed the order of detention. The return further says that the order of detention could not be executed because the detenue absconded and, after receiving the information about where-abouts of the detenue the police came to Jabalpur and arrested the detenue on 9.5.99. It is also submitted that the detenue was arrested on 9.5.99 and was thereafter taken to Shahdol and thereafter he was lodged in

Rewa Jail. They have submitted that the documents were served on the detenue on 13.5.99. According to them, the information of the order was sent to the government on the date of order itself, the detention order was approved by the State Government on 4.12.98 and thereafter the report that the detenue was absconding. was also sent to the government. They also submitted that while the detenue was absconding petitioner had filed W.P.No. 1042/99 but the same was dismissed by order dated 14.4.99. According to them, the petitioner's matter was placed for consideration before the Advisory Board and the Advisory Board considered the case of the petitioner in its Meeting dated 25.6.99 and approved the order of detention. The State Government thereafter confirmed the detention order. The return further says that the petitioner has infact no grounds in his favour and the order of detention cannot be quashed. The respondents denied the facts that the order was passed without application of mind or without considering the necessary material. The return further says that the order could not be executed because the detenue was absconding and was creating all possible hinderances. It is also submitted in the return that the petitioner remained in jail but did not conduct himself properly and as he was a menace to the peace and safety of public and tranquility the detaining authority was justified in passing the order of detention.

Shri Soni and Shri Sharad Verma, learned counsel appeared for the petitioner, while Shri Ajay Raizada, learned Govt. Advocate appeared for the respondent. So far as grounds no. 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13 and 14 are concerned, the detenue was acquitted in all those cases. The return does not deny this fact. The return even does not say that the facts of these acquittals were placed before the detaining authority. The detaining authority in its affidavit Annexure-R-17 has nowhere said that if he was informed about the acquittals then too he would have passed the order of detention. In the affidavit (Annexure-R-17), the Detaining Authority has said that the detenue was hardened criminal and it was necessary to prevent him from acting in any manner prejudicial to maintenance of public order, and a preventive action under the National Security Act was necessary against him. The affidavit further says that the report was supported by the details of the records from the police station, documents were placed alongwith the report and list of the witnesses for being examined was also given. The affidavit says that the detaining authority considered the report

of the Superintendent of Police, Shahdol and thereafter it directed for registration of the case against the detenue. According to the affidavit, the authority had examined the entire documentary and oral evidence carefully and after being satisfied with a view to prevent to the detenue from acting in any manner prejudicial to the maintainance of public order the detention order was passed. The affidavit says that after the order of detention was passed the police informed the detaining authority that because the detenue was absconding he could not be arrested and as and when he would be apprehended the matter would be communicated to the authority. In para-4, the detaining authority says that the order was communicated to the State Government by Radio Message on the same day and the government had approved the order of detention on 4.12.98. In para-5, the authority says that the detenue could be arrested on 9.5.99 and the fact of the arrest was communicated to the State Government. The case of the detenue was placed before the Advisory Board and after receiving the report of the Advisory Board, the State Government had passed the final orders. The entire affidavit does not say that even if the material relating to acquittal of the detenue was placed before the authority it would have passed the same order.

The grounds of detention in para-6 show that the detenue was tried for an offence committed by him on 6.7.1985. The petitioner admits that the detenue was convicted but under judgment dated 12.12.94 in Criminal Appeal No. 22/88 the sentence was reduced to the period of 97 days and a fine amount of Rs. 1,000/- was imposed. In relation to ground no. 15 the petitioner has filed the first informant Changa Kori's statement who had sworn a detailed affidavit on oath stating that incident dated 7.10.98 was committed by unknown persons and respondent no. 2 R. Rajan insisted upon said Changa Kori to make the report against the detenue. It is admitted in the petition that the matter was pending in the Court of C. J. M. Shahdol. The petitioner has further relied upon yet another affidavit of said Changa Kori sworn on 27.1.99 wherein said Changa Kori has reiterated about the innocence of the detenue. To the similar effect is the affidavit of Ashok Kori, brother of Changa Kori. For ground no. 16 it is submitted that the respondent no. 2 initiated proceeding under Section 110 Cr.P.C. against the detenue on account of illwill as the detenue did not pay sum of Rs. 50,000/- to the respondent no. 2. For grounds no. 17 and 18, it would appear that on 20.11.98 and 21.11.98 the detenue armed with deadly weapons,

in company of his friends was making search or Rajesh @ Joshi and Changa Kori, after receiving the information S. K. Pandey proceeded in search of the detenue but could not find him. These matters are recorded in Rojnamcha Sanha No. 1851 dated 20.11.98 and Rojnamcha Sanha No. 1924 dated 21.11.98. From a perusal of above discussion, it would clearly appear that the grounds no. 1 to 14 are in relation to the incident between 13.5.82 to 23.12.96. These incidence and offences could not be said to be committed within the close proximity of the order of detention. It would also appear that the fact of acquittal in as many as 13 cases was not brought to the notice of the detaining authority because of the negligence or for the ulterior motive, the fact still remains that these records were not produced before the detaining authority.

Learned counsel for the State referring to Section 5(A) of the National Security Act has submitted that where an order of detention has been made on two or more grounds, such order of detention shall be deemed to have been made separately on each of such grounds and accordingly such order shall not be deemed to be invalid or inoperative merely because one or some of the grounds is or are vague, non-existent, not relevant, not connected or not proximately connected with such person or invalid for any other reason whatsoever. The submission in substance is that as the order of detention is made on more than one ground and as some of the grounds would fall the detention order can still be maintained. For a proper appreciation of the argument Annexure-P-2 the grounds of detention is again required to be seen. The detenue was acquitted in relation to item no. 1 to 5 and 7 to 14. If these grounds are excluded from consideration then the item no. 6 would remain Item No. 6 is the incident of 1.4.85. The said ground can also not be considered to be proximately connected with the order of detention. An offence committed on 6.7.85 would not provide a ground for detention in the year 1998. So far as item no. 16 is concerned the proceedings were under Section 110, Cr.P.C. Item No. 17 and 18 are simply Rojnamcha reports recorded 4-3 days prior to the date of the order of detention. Even if it is held that these are not concocted or manufactured reports then too item no. 17 and 18 do not show commission of any offence. Item No. 17 and 18 simply show that on receipt of an information that the detenue armed with deadly weapons in company of his friends was making a search of Rajesh and Changa Kori. Nobody has lodged any reports that infact the detenue was making a search of those two persons nor the facts were verified

by Shri S. K. Pandey or the Superintendent of Police or anyone else from the witnesses that the information received by Shri S. K. Pandey was correct. The Rojnamcha reports ordinarily cannot provide a ground for detention because there is nothing on the record that after receiving the informations on 20.11.98 and 21.11.98 any police authority made any investigation into the conduct of the detenue. In the opinion of this Court, these two grounds cannot provide a foundation for directing detention of the petitioner.

Lastly we are left with item no. 15. According to item no. 15, on 7.10.98 the detenue with his friends Raju Pandey and others made an attempt on the life of Changa Kori and thereafter kidnapped him. It is noteworthy that Changa Kori the first informant and his brother Ashok Kori have filed their affidavits in support of the detenue. It is also noteworthy that on the strength of those affidavits an order of anticipatory bail was granted in favour of the detenue. Even if the affidavits of Changa Kori and Ashok Kori are ignored and item no. 15 is taken to be a serious offence then the commission of this offence would be a matter of law and order and not of public order.

In paragraph no. 19 of the grounds, the District Magistrate has observed that the petitioner was hardened criminal was engaged in criminal activities since 1982 and had formed a group of the criminals with his friends viz. Jai Prakash, Anil Dwivedi, Dinesh Dixit, Dabbu Sharma, Pappu Pandey, Raju Pande. Para-19 further reads that particular areas are in the operation zone in which the detenue and others were engaged in committing crimes and the detenue armed with deadly weapons and by exploding bombs or firing from Katta (country made revolver) was terrorising the public at large. Para-19 further says that because of the terror of the detenue public was afraid in making the report or giving evidence against the detenue. From a perusal of para-19 it would clearly appear that the order was not passed on more than one ground. As para-19 gives summary of ground nos. 1 to 18, it cannot be held that the order was made on two or more grounds, in effect it would be deemed to have been made on juxtapose reading of grounds no. 1 to 18.

In the matter of *Dharamdas Shamlal Agrawal* v. *Police Commissioner and Another* (1) it is held that the requisite subjective satisfaction, the formation

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(1) 1989 (2) S. C. C. 370.

of which is a condition precedent to passing of a detention order, will get vitiated if material or vital facts which would have bearing on the issue and weighed the satisfaction of the detaining authority one way or the other and influenced his mind are either withheld or suppressed by the sponsoring authority or ignored and not considered by the detaining authority before issuing the detention order. In the present case, it is not in dispute before us that the fact regarding acquittal of the petitioner in as many as 13 cases was not brought to the notice of the detaining authority. The stress is not on the question of acquittal but on the question of non-placement of the material and vital fact of acquittal which if had been placed, would have influenced the mind of the detaining authority one way or the other. The fact of acquittal quite possible have an impact on the decision of the detaining authority whether or not to make an order of detention. It is not altogether unlikely that the District Magistrate may in a given case take the view that since the person sought to be detained was acquitted in 13 out of 14 cases and only one criminal case is pending against him, no order of detention should be made for the present and the criminal case should be allowed to run its full course.. In the matter of *Abdul Razak Nannekhan Pathan* v. *The Police Commissioner, Ahmedabad* (1) the Supreme Court observed that the cases which were not proximate to the date of the order of detention and were stale could not be taken into consideration and where the person sought to be detained was acquitted of the criminal charges such cases also could not be taken into consideration.

Shri Raizada, learned counsel for the State has tried to persuade us by saying that the petitioner had filed a petition earlier and as the same was dismissed, the present petition does not deserve consideration. The copy of the earlier order passed by the High Court is available on the record at Annexure-R-13. In the said matter the present petition Smt. Geeta Sahu had filed the petition seeking quashment of the detention order. This Court by its order dated 16.4.99 dismissed the petition observing that the petition was totally misconceived; the detention order was not placed on record. Against the detenue there were 13 criminal cases registered under various sections of I.P.C. (Indian Penal Code). The High Court further observed that it found no reason to interfere in the case at that stage. The High Court also observed that in case of *Union of India* v.

(1) 1989 (3) S. C. 231.

Parasmal Rampuria (1) the Apex Court observed that detenue must surrender before filing the petition. The petition virtualy was dismissed because the High Court was of the opinion that in cases of pre-execution matters, the Courts should be very slow in interfering unless the order was vague or was passed contrary to the enactment or the identity of the person was not known. The petition No. 1042/99 was not dismissed on merits but was dismissed on a technical ground. In our opinion the judgment delivered in W. P. No. 1042/99 would not operate as a bar against the present petitioner. Referring to Section 16 of the National Security Act, learned counsel for the State submitted that where an action is taken in good faith, the said action is protected and as because of a *bonafide* mistake the judgment of acquittals were not filed before the detaining authority; the order does not call for any interference. In the opinion of this Court, the argument is misconceived. Section 16 protects the actions taken in good faith and not the lapses committed by the authority. Section 16 says that no suit or other legal proceeding shall lie against the Central Government or a State Government and no suit, prosecution or other legal proceeding shall lie against any person, for anything in good faith done or intended to be done in pursuance of this Act. A fair reading of Section 16 would show that where some action is taken in good faith the Central Government or the State Government are protected and no suit, prosecution or other legal proceeding shall lie against any person who has done something in good faith. We are not considering the question of good faith or bad faith. The question before the Court is whether the requisite material which could have affected the mind of the detaining authority was submitted before it or not. We are required to consider that if such material was placed before the authority whether its decision would have been affected or not. Section 16 does not protect any illegal order. It protects an action taken in good faith. Having given our anxious consideration to the facts and circumstances of the case, the manner in which the sponsoring authority did not place the requisite material before the detaining authority so also the detaining authority having not been apprised of the acquittals in 13 cases and being oblivion of the fact that out of 18 instances in 13 cases the proposed person was acquitted, one case in which detenue was convicted was of the year 1985, one case was still pending consideration, in one case proceedings under Section 110, Cr.P.C. were drawn and the two instances relate

(1) 1998 Vol. 8 S. C. C. 402.

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to the Rojnamcha reports, we are of the opinion that the order of detention is bad.

Shri Sanjay Agrawal, learned counsel for the respondent no. 2 submitted that the allegations made against the respondent no. 2 are false and false to the knowledge of the petitioner and in any case the action taken by the respondent no. 2 is protected under Section 16 of the Act. We do not wish to deal with that aspect of the matter because no finding can be recorded on the charges levelled by the petitioner, against the respondent no. 2, unless a fact finding enquiry is made.

For the reasons aforesaid, the petition deserves to and is accordingly allowed. The order Annexure-P-1 is quashed. The petitioner who is in detention be immediately released and set at liberty.

Petition allowed.

MISCELLANEOUS PETITION

Before Mr. Justice R. D. Vyas, and Mr. Justice Shambhoo Singh,
26 April, 2000.

LALA @ AHMED ...Petitioner*

v.

STATE & another ...Respondents.

Constitution of India–Article 226–Writ Petition–Habeas Corpus–Preventive detention–Confirmation by State Govt.–National Security Act, 1980, Sections 10, 11, 12–Order confirming detention passed only on the basis of recommendation of Advisory Board and without considering the record of Advisory Board–Violation of mandatory requirement–Order of confirmation illegal.

The advisory Board sends its record to the Govt. for taking decisions about confirmation or revocation of the detention order. In taking decision in

* W. P. No. 18/2000.

this regard, the Govt. is required not only to peruse the report of the Advisory Board but also to apply its mind to the material on record, therefore, if the record of the proceedings of the Advisory Board is not sent to the Govt., the detenue is deprived of the advantage of consideration of the information collected by the Advisory Board and evidence produced by the detenue before it by the appropriate Govt. at the time of passing order u/s. 12 of the Act. Under such circumstances, the information and material produced before the Advisory Board play important roll is taking decision under Section 12 of the Act. Thus, the confirmation order, passed without considering the record of the proceedings of the Advisory Board, becomes illegal.

A. Salim for the petitioner.

G. Desai for the State.

Cur. adv. vult.

ORDER

The Order of the Court was delivered by **SHAMBHOO SINGH, J.** – The petitioner has filed this petition under Article 226 of the Constitution of India for issuance of a writ of *Habeas Corups* for his release.

The facts of the case, in brief, are that on 6.9.99 District Magistrate Badwani, being subjectively satisfied on the material produced by Superintendent of Police Badwani, that it was necessary to put the petitioner in detention to prevent him from acting in a manner prejudicial to the maintenance of public order and disturbing communal harmony, passed detention order Ex.-P-1 u/s. 3(2) of the National Security Act, 1980 (hereinafter referred as 'the Act'). The petitioner was arrested on 12.9.99 and was put in detention on 13.9.99 in Badwani jail. On 16.9.99 the State Govt. approved the order of detention (R-5). On 23.9.99 the detention order was sent for consideration of Advisory Board u/s. 10 of the Act. The Advisory Board opined on 5.10.99 that there was sufficient cause for detention of the petitioner vide Annexure R-8. Thereafter the State Govt. confirmed this order vide order dated 21.10.99 (R-9) for 12 months detention.

The case of the petitioner is that the detaining authority passed the impugned

order mechanically without application of mind. The grounds of detention do not have any nexus to the maintenance of the public order. The detaining authority did not supply the petitioner all factual material and sources for submitting effective representation, due to this the petitioner could not submit his representation under Article 22(5) of the Constitution of India. The petitioner was not supplied the copies of the statements recorded u/s. 161 of the Cr. P. C., F.I.Rs. and other documents of criminal cases mentioned in the schedule and, thus, he was deprived of exercising his valuable right under clause 5 of Article 22. The criminal cases mentioned in ground nos. 1 to 5 are false and related to individuals and not to the public order. The conclusion of the detaining authority that the petitioner was acting prejudicial to the maintenance of public order and was engaged in disturbing communal harmony, could not be arrived at by a prudent person. The crime nos. shown in grounds nos. 1, 2, 3, 4 and 5 are bailable offences except S. 294 and they are related to individual. The incident mentioned in ground no. 6 to 8 were not related to public order. Ground no. 9 to 11 were false. Most of the offences are compoundable. The respondent no. 1, State Govt. illegally confirmed the detention order without considering his representation.

Respondent/State in its return denied the averments made by the petitioner in the petition. It was affirmed that the District Magistrate Badwani after perusing the record sent by sponsoring authority and after being subjectively satisfied that the petitioner was acting in a manner prejudicial to the maintenance of public order and was engaged in disturbing communal harmony, passed detention order. He was supplied grounds of orders alongwith the copies of the documents on the basis of which, the impugned order was passed. Copies of the statements recorded u/s. 161 Cr.P.C. F.I.Rs. have been supplied in the respective criminal cases. The petitioner himself informed in writing that he will not submit his representation, it will be submitted by his counsel. The allegation that the detention order was passed without application of mind, was false.

Shri A. Salim, learned counsel for the petitioner, submitted that the detention order is illegal as it was passed without application of mind. He further submitted that he was not supplied the copies of the documents and as such he was not afforded opportunity of filing his effective representation and, thus, Article 22(5) of the Constitution was violated. He also argued that record of the Advisory Board was not sent alongwith its opinion to the State Govt. Thus, the

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State Govt. passed confirmation order without application of mind. On the other hand, Shri Desai, learned Dy. A. G. contended that the District Magistrate on being satisfied from the documents submitted by the sponsoring authority that the petitioner was acting in a manner prejudicial to the maintenance of public order and was engaged in disturbing the communal harmony, passed detention order. Inspite of supply of all relevant documents, the petitioner chose not to make representation, therefore, the question that confirmation order was passed without considering his representation and without application of mind, does not arise. He submitted that it must be presumed that the Advisory Board sent its opinion alongwith record and the State Govt. passed confirmation order after considering the same.

We considered the arguments advanced by counsel for both sides and perused the record.

The main contention of Shri A. Salim, Learned Counsel for the petitioner, is that the Advisory Board did not forward the record of its proceedings to the State Government alongwith its opinion and the State Government without considering the material on record of the Advisory Board, confirmed the detention order. It shows that this order has been passed without application of mind and, therefore, the detention of the petitioner is illegal. Shri Salim relied on the decision of the Apex Court in case of *Nandlal Bajaj* v. *State of Punjab & another* (1).

Under Section 10 of the Act, the appropriate Govt. has to place the detention order, grounds and representation, if made, before the Advisory Board for its opinion. Under Section 11 of the Act, the Advisory Board is empowered to call further information from the Govt. or from any person or from the detenue and it can also hear the detenue if it considers essential to do so or the detenu desires so. Detenu can also offer even oral or documentary evidence before the Advisory Board in order to rebut the allegation made by the detaining authority against him. *A. K. Roy* v. *Union of India* (2). After considering the material, the Advisory Board gives its opinion as to whether or not there is sufficient cause for the detention of the person. It is true that the report of the Board is only a recommendation & the ultimate decision on the basis of the report as to what further action has to be taken is for the appropriate Govt. to make. The use of

(1) 1981 S. C. C. (Cr.) 841. (2) 1982 S. C. 710.

the words 'may' in Section 12(1) and 'shall' in Section 12(2) makes it clear that if the Board opines that there is no sufficient cause for the detention, the appropriate Govt. is bound to revoke the detention order and cause the person concerned to be released forthwith. However, if Advisory Board opines that there is sufficient cause for the detention of the person, the Govt. may confirm the detention or revoke it. The Advisory Board sends its record to the Govt. for taking decisions about confirmation or revocation of the detention order. In taking decision in this regard, the Govt. is required not only to peruse the report of the Advisory Board but also to apply its mind to the material on record, therefore, if the record of the proceedings of the Advisory Board is not sent to the Govt., the detenu is deprived of the advantage of consideration of the information collected by the Advisory Board and evidence produced by the detenu before it by the appropriate Govt. at the time of passing order u/s. 12 of the Act. Under such circumstances, the information and material produced before the Advisory Board play important roll in taking decision under Section 12 of the Act. Thus, the confirmation order, passed without considering the record of the proceedings of the Advisory Board, becomes illegal. Their Lordships of the Supreme Court in case of *Nand Lal Bajaj* v. *State of Punjab & another* (1) observed :-

> "We were informed that the Advisory Board did not forward the record of its proceedings to the State Government. If that be so, then the procedure adopted was not in consonance with the procedure established by law. The State Government while confirming the detention order under Section 12 of the Act has not only to peruse the report of the Advisory Board, but also to apply its mind to the material on record. If the record itself was not before the State Government, it follows that the order passed by the State Government under Section 12 of the Act was without due application of mind. This is a serious infirmity in the case which makes the continued detention of the detenu illegal."

In the instant case from the perusal of the opinion of the Advisory Board (Annexure-R-8) and the confirmation order passed by the State Govt. (Annexure-R-9), it does not appear that the Advisory Board sent the record of its proceedings alongwith its opinion to the State Govt. and the State Govt. took into consideration the proceedings of the Advisory Board. We do not

(1) 1981 S. C. C. (Cr.) 841.

agree with Shri Desai, learned Dy. A.G. that it should be presumed that the Advisory Board sent its record to the State Govt. and the State Govt. took into consideration the same and passed confirmation order (Annexure-R-9). It appears from the confirmation order that the State Govt. perused the opinion of the Advisory Board alone. There is no mention that the Govt. considered the record of the proceedings of the Advisory Board.

As the record the proceedings of the Advisory Board was not sent to the State Govt. and the confirmation order was passed without consideration of the record of the Advisory Board which was mandatory, therefore, the confirmation order became illegal and consequently the continued detention of the detenu has become illegal.

In view of the fact that the continued detention has become illegal on the above ground, we do not think it necessary to express our opinion on other grounds.

For the reasons stated above, the order of detention passed by the District Magistrate Badwani, Ex.-P-1 dated 6.9.1999 is quashed and we direct that the detenu Lala @ Ahmed be set at liberty forthwith if not required in any other case.

Petition allowed.

MISCELLANEOUS PETITION

Before Mr. Justice Dipak Misra.
16, January, 2001.

SMT. SUSHILA DIXIT ...Petitioner*

v.

SHRI RAM PRAKASH and others ...Respondents.

Constitution of India–Article 226–Writ Petition–Panchayat Election–Recounting of votes–Panchayat Raj Adhiniyam, M. P., 1993, Section 122 and Panchayat Nirvachan Niyam, M. P., 1995, Rule 80–Adequate and cogent evidence has to be adduced to make out a case for recounting–Application for recount of votes submitted to the Presiding Officer not authorised by Returning Officer–Not sufficient to order recounting of votes–Matter remanded for fresh decision on evidence to be adduced by the parties.

In fact the case which has been revealed from the return of the Presiding Officer that he had accepted the application filed by the petitioner. There is no material on record that the Presiding Officer was authorised by the Returning Officer to receive the application. The Specified Officer has proceeded as if the application was filed before the Returning Officer and no order was passed. It is well settled in law that unless an application is filed before the Competent Authority the subsequent application for recounting before the Specified Officer is not tenable.

The Returning Officer has not been examined to show that he had authorised the Presiding Officer to accept the application or to deal with the application. In absence of such evidence I am of the considered opinion that the order passed by the Specified Officer is vulnerable. That apart mere filing of an application would not entitle the petitioner for getting an order of recounting in his favour.

Ram Rati v. *Saroj Devi* (1) and *Satyanarain Dudhani* v. *Uday Kumar Singh and others* (2); relied on.

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*W. P. No. 56/2001.
(1) A. I. R. 1997 S. C. 3072. (2) 1993 Supp. (2) S. C. C. 82.

Smt. Sushila Dixit v. Shri Ram Prakash, 2001.

Prashant Singh for the petitioner.

Sujoy Paul, for the respondents.

Cur. adv.vult.

ORDER

DIPAK MISRA, J. – Invoking the extraordinary jurisdiction of this Court the petitioner has prayed for issue of writ of *certiorari* for quashment of order dated 27.12.2000 contained in Annexure-P.-1 passed in case no. 20/C-144/99-2000.

The facts as have been exposited are that respondent no. 1 filed an application under Section 122 of M. P. Panchayat Raj Adhiniyam, 1993 for setting aside the election of the petitioner to the post of Sarpanch of Gram Panchayat, Chhidari. It was setforth in the election petition that though a prayer was made for recounting of votes before the Competent Authority the same was not acceded to and, therefore, there should be recounting. Apart from the aforesaid assertion the election was challenged on other grounds. A written statement was filed by the contesting respondent no. 1 contending *inter alia* that no application was filed before the Returning Officer for recounting of votes. The other assertions were also disputed. The Specified Officer framed as many as four issues. The issue no. 4 relates to recount of votes. The respondent no. 1 before the Specified Officer submitted that he would not press other issues and only address on issue no. 4. On the basis of the aforesaid submission the Specified Officer took up the matter and came to hold that an application was filed before the Presiding Officer on 30.1.2000 but the Presiding Officer did not ask the Returning Officer to adjudicate the same. On the basis of the aforesaid finding he directed for recounting of votes. The said order is the cause of grievance of the present petitioner.

Assailing the aforesaid order it is submitted by Mr. Prashant Singh, learned counsel for the petitioner that no application was filed before the Returning Officer and the finding recorded by the Specified Officer that it was submitted before the Presiding Officer is unsustainable in as much as

there is no evidence that the Presiding Officer was authorised by the Returning Officer to receive the application. It is further putforth by Mr. Singh that even assuming for the sake of argument that the application was filed before the Competent Authority that would not *ispo facto* authorise the Presiding Officer to pass an order of recounting in absence of other material on record for making out a case for recounting.

Mr. Sujoy Paul, learned counsel appearing for respondent no. 1, per contra, has contended that the Presiding Officer had filed a reply before the Election Tribunal admitting that he had received the application submitted by the petitioner. It is also put forth by him that the Presiding Officer has stated that the application was devoid of substance and the same has been rejected. It is further canvassed by him that the order passed by the Specified Officer is based on adequate reasons and does not warrant interference.

To appreciate the rival submissions raised at the Bar, it is apposite to refer to Rule 80 of M. P. Panchayat Nirvachan Niyam, 1995. It reads as under :

> "80. Recount of votes. - (1) After an announcement has been made by the Returning Officer or such other officer authorised by him, of the total number of votes polled by each candidate under sub-rule (2) of Rule 77, a candidate or, in his absence, his election agent or his counting agent may apply in writing to the Returning Officer or such officer authorised by him, for a recount of all or any of the votes already counted, stating the grounds on which he demands such recount.
>
> (2) On such an application being made the Returning Officer or such other officer authorised by him shall decide the matter and may allow the application in whole or in part or may reject it in toto if it appears to him to be frivolous or unreasonable.
>
> (3) Every decision of the Returning Officer or such other officer authorised by him, under sub-rule (2) shall be in writing and contain the reasons therefore.
>
> (4) If the Returning Officer or such other officer authorised by him, decides under sub-rule (2) to allow an application either in whole or in part, he shall -

(a) count the ballot papers again in accordance with his decision.

(b) amend the result sheet to the extent necessary after such recount; and

(c) announce the amendment so made by him.

(5) After the total number of votes polled by each candidate has been announced under sub-rule (2) of Rule 77 or sub-rule (4) the Returning Officer or such other officer authorised by him shall complete and sign the result sheet and no application for a recount shall be entertained thereafter.

Provided that no step under this sub-rule shall be taken on the completion of the counting until the candidates and election agents present at the completion thereof have been given a reasonable opportunity to exercise the right conferred by sub-rule (1).

(6) The counted ballot papers shall be bundled and kept in the manner mentioned in sub-rule (3) of rule 77.

(7) Result sheets in Form 16, 117, 18 and 19 for Panch, Sarpanch, Member of Janpad Panchayat and Member of Zila Panchayat respectively, prepared by such other officers as are authorised by the Returning Officer, shall be submitted by them, in separate envelopes to the Returning Officer for compilation and tabulation of votes polled by each candidates.

(8) The Returning Officer on receipt of result sheets under sub-rule (7) shall enter of cause to be entered the total number of votes polled by each candidate contesting for a seat of Sarpanch, Member of Janpad Panchayat or Member of Zila Panchayat at each polling station of the concerned constituency in subsequent part or parts of Form 17, 18 and 19 respectively and complete and sign the result sheet "

On a fair reading of the aforesaid provision it is graphically clear that an application has to be filed before the Returning Officer or such other officer authorised by the Returning Officer. There is no positive evidence on record that the application was filed before the Returning Officer and he advised the petitioner to file it before the Presiding Officer. Infact the case which has been revealed from the return of the Presiding Officer that he had accepted the application filed by the petitioner. There is no material on record that the

Presiding Officer was authorised by the Returning Officer to receive the application. The Specified Officer has proceeded as if the application was filed before the Returning Officer and no order was passed. It is well settled in law that unless an application is filed before the Competent Authority the subsequent application for recounting before the Specified Officer is not tenable. In this context I may profitably refer to a decision rendered in the case of *Ram Rati* v. *Saroj Devi* (1). In the aforesaid decision their Lordships were considering Rule 76 of the M P. Panchayat Election Rules, 1994 which is similar to that of Rule 80 of M. P. Panchayat Nirvachan Niyam, 1995.

In view of the aforesaid law it became incumbent to arrive at a conclusion that a proper application was filed before the Competent Authority but no order was passed thereon. In the case at hand the Returning Officer has not been examined to show that he had authorised the Presiding Officer to accept the application or to deal with the application. In absence of such evidence I am of the considered opinion that the order passed by the Specified Officer is vulnerable. That apart mere filing of an application would not entitled the petitioner for getting an order of recounting in his favour. Mr. Prashant Singh, learned counsel for the petitioner has drawn the attention of this Court to the decision rendered in the case of *Satyanarain Dudhani* v. *Uday Kumar Singh and others,* (2) wherein their Lordships while dealing with the concept of recounting under the Representation of People Act, 1951 have held as under :

> "In the present case 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. Even the material in the election petition had been pleaded with the object of having a fishing enquiry and does not inspire confidence. The grounds urged in the election petition do not justify for ordering recount and allowing inspection of the ballot papers. The returning officer, therefore, rightly rejected the prayer for recounting. The High Court was not justified in ordering recount and allowing inspection of ballot papers." (Quoted from the placitum)

(1) A. I. R. 1997 S. C. 3072. (2) 1993 Supp. (1) S.C.C. 82.

Smt. Sushila Dixit v. Shri Ram Prakash, 2001.

In view of the aforesaid, adequate and cogent evidence has to be adduced to make out a case for recounting. Admittedly in the present case evidence was not adduced. On that ground also the order passed by the Specified Officer is suceptible.

In the result the writ petition is allowed, the order passed by the Specified Officer vide Annexure-P-3 is set aside and the matter is remitted to him to reconsider the application for recounting afresh keeping in view the provisions enshrined under Rule 80 of the M. P. Panchayat Nirvachan Niyam 1995 and the law laid down in the case of *Ram Rati* (*supra*). The Specified Officer shall also keep himself alive to the basis requirement for recounting as laid down in the case of *Satyanarain Dudhani* (*supra*). Needless to emphasise it would be open to the parties to adduce evidence in support of their respective cases. In the facts and circumstances of the case there shall be no order as to costs.

Petition allowed.

MISCELLANEOUS PETITION

Before Mr. Justice A. M. Sapre.
29, January, 2001.

M/S. PERFECT ENGINEERING COMPANY ..Petitioner*

v.

COMMISSIONER OF COMMERCIAL TAX & ors. ...Respondents.

Constitution of India–Articles 226, 227–Writ Petition–Commercial Tax–Vanijyak Kar Adhiniyam, M. P., 1994, Sections 68, 89 and Schedule I, Sections 89, 94–Accessories–Foot Valve–Having no independent use but used in pump-sets below 10 H.P. run by electricity for its efficient use–Foot Valves fall under the category of accessories–Exempt under Schedule I, Entry 89 of the Commercial Tax Act.

Two things need to be proved before an exemption is claimed under Entry

*W. P. No. 1407/95.

M/s. Perfect Engineering Company v. Commissioner of Commercial Tax, 2001.

89 on a particular item, firstly, it has to be proved that an item is an accessory of a pumping set and secondly, that pumping set has its strength below 10 H. P. Mere proving of accessory of pumping set is not enough. What is more important is that it must be an accessory of a pumping set whose strength is below 10 H. P.

In order to claim exemption under Entry 94 what is required to be proved in that a particular item is an agricultural implement and is operated either with the aid of electricity (power) or with the aid to tractor.

It may be seen that the foot valve by itself may not be of any use as such but when it is fitted in the pumping set, it adds to the convenient use of pumping set. Its addition inthe pumping set, increase the utility and working of pumping sets. The object of using the foot valve in any pumping set is to store the water in the pipe line (suction line) so that the moment the pump is switched on, the discharge of water is available instantly. If the foot valves are not fitted in the pumping sets, even then the pumping sets are usable and can function but if the foot valves are fitted in the pumping sets then it increases its efficiency and working.

Mehra Bros. v. *Joint Commercial Tax Officer, Madras* (1); referred to.

P. M. Choudhary for the petitioner.

S. Mukati for the respondents.

Cur. adv. vult.

ORDER

A. M. Sapre, J. – The decision rendered in the petition shall also govern the disposal of other connected petition being W. P. No. 1737/2000 as in both these petitions, one common question of law is involved.

The question that arises for consideration in these two petitions is whether "foot valve" is or can be treated as an "accessories" of the pumping sets so as to

(1) (1991) 89 S. T. C. 233.

fall under entry 89 of Schedule I of M. P. Vanijyak Kar Adhiniyam, 1994 (for brevity hereinafter referred to as Adhiniyam). Yet another question that falls for consideration is whether "foot valve" is or can be treated as an agricultural implements so as to fall under entry 94 of Schedule I of the Adhiniyam. Facts which lie in a narrow compass for the disposal of the petition need mention infra in brief.

Petitioner is a priprietory concern, one Shri Samsuddin being its proprietor. It is engaged in the business of manufacture of "foot valves". According to petitioner, these foot valves are used in centrifugal pumps which are generally used in agricultural operations. The petitioner has set up one small scale Unit for manufacturing these foot valves. It is registered as small scale industry.

A dispute arose before the commercial tax authorities as to whether these foot valves are subjected to sales tax (commercial tax) and if so under which entry of schedule appended to Adhiniyam. In order to resolve this dispute, the petitioner made an application to the Commissioner Commercial Tax under Section 68 of the Adhiniyam. The contention of petitioner before the Commissioner was that these foot valves are infact an accessories of pumping sets and hence fall in Entry 89 of Schedule. An alternative contention was that if they are not regarded as an accessories of pumping sets for the purpose of attracting Entry 89 then in that event, they (foot valves) can as well be treated as an agricultural implements - falling in Entry 94 of Schedule I. In either case, the contention was that whether as accessories of pumping sets or agricultural implements, the goods in question are exempt from payment of tax because they fall in Schedule I. On the other hand, the contention of department was that the goods in question (foot valves) neither falls in Entry 89 nor in Entry 94 of Schedule I but they are subjected to tax at the rate of 6% under Part VII of Schedule II i.e. residuary entry.

The Commissioner by his order Dated 04.08.1995 (Annexure-P-1) held against the petitioner. In the opinion of learned Commissioner, the goods "foot valves" are neither an accessories of pumping set nor they can be regarded as agricultural implements and therefore, no benefit of exemption can be given to petitioner either under Entry 89 or entry 94 of Schedule I. It was held that since foot valves are not specifically mentioned in any of the Entry of the Schedule II

and hence they have to be taxed under the residuary entry i.e. Part IV of Schedule II. It is against this order of the Commissioner, the petitioner has felt aggrieved and has filed this writ under Articles 226 and 227 of the Constitution of India.

The State has filed the return in support of the impugned order passed by Commissioner. In substance, the stand of the State in the return is that view expressed by the Commissioner while deciding the dispute under Section 68 holding the goods in question to be exigible to payment of tax at the rate of 6% under Part VII of Schedule II (residuary Entry) is legal and proper and hence no case of interference to upturn this view is made out.

Heard Shri P. M. Choudhary, learned counsel for the petitioner and Shri S. Mukati, learned Government Advocate for respondents.

Relying upon the law laid down by their Lordships of Supreme Court in the case of *Mehra Bros.* v. *Joint Commercial Tax Officer Madras*, learned counsel for the petitioner argued that the foot valves have to be termed as an accessory of pumping sets. Learned counsel urged that the test laid down by their lordships of Supreme Court in deciding as to how a particular goods is regarded as an accessory if apply to the goods in question in its correct perspective then there should be no difficulty in holding that foot valves are an accessories to pumping sets. Learned counsel while reiterating the same submission as was pressed into service before the Commissioner also urged as an alternative submission that since the foot valve is used in pumping set it can as well be regarded as an agricultural implements. On these submissions, learned counsel urged that in either case, the goods in question falls in Schedule I and hence exempt from payment of tax.

In reply the submission of learned counsel for the State in substance was for upholding of the view taken by the Commissioner.

Having heard the learned counsel for the parties and having perused the record of the case, I find force in the submission of learned counsel for the petitioner. In my opinion, the view taken by the Commissioner is not sustainable and hence this petition deserves to be allowed resulting in quashing of impugned order of Commissioner.

(1) (1991) 90 STC 233.

M/s. Perfect Engineering Company v. Commissioner of Commercial Tax, 2001.

The relevant Entries on which the discussion has centred round need mention infra :-

Schedule I

(See Section 15)

Goods Exempted from Tax

S.No.	Description of goods	Conditions and exceptions subject to which exception has been allowed.
(1)	(2)	(3)
89.	Pumping sets below 10 Horse power and accessories thereof.	
94.	All kinds of Agricultural implements worked with the aid of power or tractor.	

Schedule II

Part IV

S. No.	Description of goods	Total rate of tax
(1)	(2)	(3)
1.	All other goods not included in Schedule I or any other part of this Schedule.	6.

Perusal of Entry 89 would indicate that exemption in payment of tax is given to (1) Pumping sets having their strength below 10 Horse Power and (2) of accessories which are used in these pumps. In order to, therefore, claim exemption on any pumping set under Entry 89, one has to prove its Horse Power. In other words, if the Horse Power of any pumping set is proved by the dealer to be below 10 H.P. then in that event, such pumping set will be exempted from payments of tax. Likewise, if an exemption is claimed on a particular item under entry 89 then one has to prove that an item is an accessory of that pumping set whose strength is below 10 H.P. In other words, two things need to be proved before an exemption is claimed under Entry 89 on a particular item, firstly, it has

to be proved that an item is an accessory of a pumping set and secondly, that pumping set has its strength below 10 H.P. Mere proving of accessory of pumping set is not enough. What is more important is that it must be an accessory of a pumping set whose strength is below 10 H. P.

Likewise, perusal of Entry 94 would indicate that all kinds of agricultural implements which are used with the aid of power (electricity) or with the aid of tractor are also exempt from payment of tax. So in order to claim exemption under Entry 94 what is required to be proved is that a particular item is an agricultural implement and is operated either with the aid of electricity (power) or with the aid of tractor.

So far as the Entry falling in Schedule II of Part VII is concerned, it is known as residuary entry. What is not specified in taxable entry i.e. in Schedule II (Part I to Part VI) but is held to be taxable then it would be taxed at a flat rate of 6% in Part VII.

Now coming to the word "accessories" mentioned in Entry 89. One may notice that it is not a legal term. It is a term used in common parlane. It has also acquired prominence in commercial word. This term frequently came up for interpretation before several High Courts in the context of sale tax laws. Eventually, it was finally interpreted by their Lordships of Supreme Court in the case of Mehra Brothers supra. The question that fell for consideration before the Supreme Court in Mehra Brothers case was whether Car Seat Covers are articles adapted generally as parts and accessories of the Motor Vehicle, so as to be taxed treating it to be an accessories under the Tamil Nadu General Sales Tax Act. Their Lordships while holding the seat covers to be an accessories of the motor vehicle examined the true meaning of the word "accessory" in the context, of its dictionary meaning as also in common parlane and laid down the following test :-

> "Having given our anxious consideration, with respect, we are of the considered view that the test laid down by the Karnataka High Court that the accessories as a part must contribute for convenience or effectiveness in the use of the car as a whole is not a correct test. In our view the correct test would be whether the article or articles in question would be the use of the motor vehicle or a supplementary or secondary to the main

or primary importance. Whether an article or part is an accessory cannot be decided with reference to its necessity to its effective use of the vehicle as a whole. General adaptability may be relevant but may not by itself be conclusive. Take for instance a stereo or air-conditioner designed and manufactured for fitment in a motor car. It would not be absolutely necessary or generally adapted. But when they are fitted to the vehicle, undoubtedly it would add comfort or enjoyment in the use of the vehicle. Another test may be whether a particular article or articles or parts, can be said to be available for sale in an automobile market or shops or places of manufacture; if the dealer says it to be available certainly such an article or part would be manufactured or kept for sale only as an accessory for the use in the motor vehicle. Of course, this may not also be a conclusive test but it is given only by way of illustration. Undoubtedly some of the parts like axle, steering, tyres, battery, etc., are absolutely necessary accessories for the effective use of the motor vehicle. If the text that each accessory must add to the convenience or effectiveness of the use of the car as a whole is given acceptance many part in the motor car by this process would fall outside the ambit of accessories to the motor car. That would not appear to be the intention of the Legislature. Similarly in *Free India Cycle Industries's Case* (1) and *Shadi Cycle Industries's Case* (2) the Allahabad High Court held that cycle covers, rexine paddle cover whether part or accessory of vehicle under item 34 of the notification dated April 5, 1961, issued by the State of U. P. under Sections 3 and 3-A of the U. P. Sales Tax Act, 1948 (15 of 1948) with the same reasoning, as was given by the Karnataka High Court, to be not accessories. We express that the Allahabad High Court also has not laid down the test correctly.

Thus considered we hold that car seat covers or upholstry are accessories as an addition; an adjunct; an accompaniment for comfortable use of the motor vehicles or for adding elegance to the seat. Admittedly the appellant manufactured car seat covers and upholstry for sale as an automobile part in the regular course of business. Therefore, they are exigible to sales tax at 13 per cent under item 3 of Schedule I read with Section 3(3) of the Act. Therefore, we do not find any ground warranting interference. The appeals are accordingly dismissed but in the circumstances without costs."

(1) (1970) 26 STC 428. (2) (1971) 27 STC 56.

M/s. Perfect Engineering Company v. Commissioner of Commercial Tax, 2001.

It is this test that has to be kept in mind while deciding whether the goods in question namely "foot valves" are accessories of the pumping set within the meaning of entry 89 ?

In my considered opinion, I am inclined to hold that foot valves are infact an accessories of a pumping sets. It may be seen that the foot valves by itself may not be of any use as such but when it is fitted in the pumping set, it adds to the convenient use of pumping set. Its addition in the pumping sets increase the utility and working of pumping sets. The object of using the foot valve in any pumping set is to store the water in the pipe line (suction line) so that the moment the pump is switched on, the discharge of water is available instantly. If the foot valves are not fitted in the pumping sets, even then the pumping sets are usable and can function but if the foot valves are fitted in the pumping sets then it increase its efficiency and working. It is this test which is in accord with the test laid down by Supreme Court in Mehra Brothers case that makes the foot valves an accessories of pumping sets.

Even the commercial world has been treating the foot valves to be an accessory of pumping set. One can take note of the guidelines issued by the Institute of cost and work Accountants of India (Annexure-P-3) wherein, the premier Institute in the country has on the basis of their own survey have issued the guidelines to all cost accountants to treat the foot valves to be an accessories of a pumping set for the purpose of costing in accountancy.

In view of the aforesaid declaration rendered by this court, it is not necessary to examine the alternative submission of LC for the petitioner, as to whether the foot valve is an agricultural implement as defined in entry 94 of Schedule I.

The question, whether petitioner is entitled to claim exemption under entry 89 of Schedule I will now be decided by the Commercial tax authorities because as observed supra, the exemption is confined to only those foot valves which are used in pumping sets having their strength below 10 H.P.

In view of aforesaid discussion, the petition succeeds and is accordingly allowed. The impugned order dated 4.8.1995 (Annexure-P-1) passed by Commissioner is set aside by issuing a writ of *certiorari*.

M/s. Perfect Engineering Company v. Commissioner of Commercial Tax, 2001.

No costs.

Security be returned to petitioner.

Petition allowed.

MISCELLANEOUS PETITION

Before Mr. Justice Dipak Misra.
17 January, 2002.

SMT. SUNDERBAI & others ...Petitioners*

v.

STATE & anr. ...Respondents

Constitution of India, Articles 226, 227–Writ petition–Master plan–Non inclusion of petitioner's land in draft statement–Urban Land Ceiling and Regulation Act, 1976–Section 4 and Urban Land (Ceiling and Regulation) Repeal Act, 1999–Sections 2, 3, 4 and 10–Draft statement issued–No appeal filed before competent authority–Writ petition after seventeen years–Not tenable–Abatement of proceedings–Land not taken over–Petitioner entitled to an opportunity to show that possession having not taken the proceedings are deemed to be abated–Disputed question of fact–Petitioner may raise such contention before competent authority.

The petitioner has accepted the order passed by the competent authority and chose not to prefer any appeal. He cannot get the benefit after remaining in hibernation for the last 17 years and knock at the doors of justice at his own will.

I am inclined to direct that the petitioner shall putforth his grievance before the competent authority that the possession has not been taken over and, therefore, no further action can be taken as Section 4 clearly stipulates all

*W. P. No. 6186/2001.

proceedings except proceedings under Sections 11, 12, 13 and 14 would abate. In fact, it was clearly laid down that if the possession is not taken over the same cannot be taken over by the State Government. Keeping in view the factual *scenario* it is directed that the competent authority shall afford an opportunity of hearing to the petitioner to putforth his grievance that how the possession has not been taken over as per law and nothing subsists to be done in the proceeding. It will be open to the petitioner to raise all the contention from all fours relating to the factum of taking over of possession.

Atia Mohammadi Begum v. *The State of U. P. and others* (1), *Trilok Singh Yadav* v. *State of U. P.* (2), *State of A. P. and others* v. *N. Audidesava Reddy and others* (3) and *Smt. Angoori Devi* v. *State of U. P. and others* (4); referred to.

L. N. Namdeo for the petitioners.

Ajay Raizada, Govt. adv. for the State.

Cur. adv. vult.

ORDER

Dipak Misra, J. – By this writ petition under Articles 226 and 227 of the Constitution of India the petitioners have prayed for quashment of order dated 7.7.1984, Annexure-P-3, passed by the respondent No. 2 whereby a draft statement was published under the Urban Land (Ceiling and Regulation) Act, 1976.

Mr. L. N. Namdeo, learned counsel for the petitioners, has raised two fold contentions, namely, the land of the petitioners was not included in the master plan of Jabalpur and, therefore, it could not have been treated as vacant land and, therefore, determination of land as surplus as has been done by the competent authority under the Act is null and void in view of the decision rendered in the case of *Atia Mohammadi Begum* v. *The State of U. P. and others* (5) and the decision by this Court *Trilok Singh Yadav* v. *State of M. P. and others* (6)

(1) A. I. R. 1993 S. C. C. 2465.
(2) W. P. No. 833/91, deicded on 12.12.1995.
(3) 2002 (1) S. C. C. 227.
(4) A. I. R. 2001 S. C. W. 5128.
(5) A. I. R. 1993 S. C. 2465.
(6) W. P. No. 833/91, decided on 12.12.1995.

and secondly the possession of the land having not been taken over as envisaged under Section 10 of the aforesaid Act the possession cannot be taken over at this juncture.

Mr. Ajay Raizada, learned Government Advocate, has submitted that the decision rendered in the case of *Atia Mohammadi Begum* (*supra*) has been partially overruled by the Apex Court in the decision rendered in the case of *State of A. P. and others* v. *N. Audidesava Reddy and others* (1). It is also putforth by him that the possession in question had already been taken in 1984 and, therefore, Section 4 of the Urban Land (Ceiling and Regulation) Repeal Act, 1999 (hereinafter referred to as 'the Repeal Act') would not render any assistance to the petitioners.

To appreciate the rival submissions raised at the Bar it is apposite to refer to the decision rendered in the case of *N. Audikesava Reddy* (*supra*) wherein a three Judge Bench of the Apex Court came to hold as under:-

> "11. If the expression "commencement of the Act" is read with reference to the aforesaid Explanation, the area of doubt about the correctness of the decision of Atia Begum case becomes very narrow e.g. a few observations therein which are these : (SCC p. 549, para 4).
>
> "Just as the holder of the land cannot by his subsequent actions reduce the area of the vacant land in excess of the ceiling limit, the authorities too cannot by any subsequent action increase the area of the excess vacant land by a similar action."

The observations that the authorities by their subsequent actions after 17.2.1976 cannot alter or introduce the master plan which has the effect of increasing the area of excess vacant land do not represent the correct view of law. The aforesaid Explanation to Section 6(1), *inter alia*, provides that where any land, not being vacant land, situated in a State in which this Act is in force has become vacant land by any reason whatsoever, the date on which such land becomes vacant land would be the date of the commencement of the Act as regards such land."

Development and town planning are ongoing processes and they go on

(1) 2002 (1) S. C. C. 227.

changing from time to time depending upon the local needs. That apart, the definition of "master plan" in Section 2(h) is very significant. It reads as under :

> "2(h). 'master plan', in relation to an area within an urban agglomeration or any part thereof, means the plan (by whatever name called) prepared under any law for the time being in force or in pursuance of an order made by the State Government for the development of such area or part thereof and providing for the stages by which such development shall be carried out."

The above provision, *inter alia*, contemplates the master plan prepared under any law for the time being in force for development of an area. The plan shall also provide for the stages by which such development shall be carried out. It is evident from the aforesaid definition of master plan that it takes in view any plan prepared even subsequent to the coming into force of the Act. Further, the Explanation to Section 6(1), as notice above, very significantly provides that every person holding vacant land in excess of the ceiling limit at the commencement of the Act shall file a statement before the competent authority and "the commencement of the Act" under clause (ii) would be when the land becomes vacant for any reason whatsoever. Therefore, the date of commencement of the Act in a case where the land, which was not vacant earlier, would be the date on which such land becomes vacant land. It, thus, contemplates a situation of land, not being vacant, becoming vacant due to preparation of a master plan subsequent to 17.2.1976. Further, the provisions of the Act require filing of a statement under Sections 6, 7, 15 and 16 from time to time as and when land acquires the character of a vacant land. Obligation to file statement under the Act arises when a person comes to hold any vacant land in excess of the ceiling limit, which date necessarily may not be 17.2.1976. It would all depend on the facts and circumstances of each case.

> "Accordingly, we hold that the master plan prepared as per law in force even subsequent to enforcement of the Act is to be taken into consideration to determine whether a particular piece of land is vacant land or not and, to this extent, *Atia Begum* is not correctly decided."

In view of the aforesaid enunciation of law the submission putforth by Mr. Namdeo that non-inclusion of the land of the petitioners in the Master Plan *ipso facto* was to be kept out of perview of the Act is not tenable. Mr. Namdeo has

drawn the attention of this Court to the observation made in paragraph 13 of the aforesaid decision. The aforesaid observation does not render much assistance to the learned counsel for the petitioners because the said fact does not arise in this case and in any case the petitioner has accepted the order passed by the competent authority and chose not to prefer any appeal. He cannot get the benefit after remaining in hibernation for the last 17 years and knock at the doors of justice at his own will. This Court had only entertained the writ petition because in the decision rendered in the case of *Trilok Singh Yadav* (*supra*) this Court expressed the view if the land in question is not included in the master plan the whole proceeding becomes null and void but the said view cannot be the ruling factor in view of the judgment rendered in the case of *N. Audikesava Reddy* (*supra*).

The next aspect which requires to be determined is that whether the possession of the land in question has been taken over by the State Government. It is apposite to state here that the Parliament introduced the Repeal Act by Act No. 15 of 1999 and therein provided that it would be open to the State Government to pass and adopt the same as envisaged unde Clause 2 of Article 252 of the Constitution. It is not disputed that the State of Madhya Pradesh has adopted the same by a resolution. Thus, there has been repeal of the aforesaid Act. Section 4 of the Repeal Act, 1999 reads as under :-

> "4. Abatement of legal proceedings.- All proceedings relating to any order made or purported to be made under the Principal Act pending immediately before the commencement of this Act, before any court, tribunal or other authority shall abate :
>
> Provided that this section shall not apply to the proceeding relating to Sections 11, 12, 13 and 14 of the Principal Act in so far as such proceedings are relatable to the land, possession of which has been taken over by the State Government or any person duly authorised by the State Government in this behalf or by the competent authority."

At this juncture I may profitably refer to the decision rendered in the case of *Pt. Madan Swaroop Shrotiya Public Charitable Trust* v. *State of U. P. and others* (1) wherein the Apex Court after referring to Section 4 of the Repeal Act, 1999 and taking note of fact that the possession of the surplus land had not

(1) (2000) 6 S. C. C. 325.

been taken over came to hold that the proceedings have to be abated under the Repeal Act, 1999.

Recently, in the case of *Smt. Angoori Devi* v. *State of U. P. and others* (1) the Constitution Bench in paragraph 2 held as under :-

> "2. These cases relate to the interpretation of different provisions of the Urban Land (Ceiling and Regulation) Act. During the pendency of these appeals in this Court, the Urban Land (Ceiling and Regulation) Act has been repealed by Act 15 of 1999 and the State of U.P. also has adopted the same by a Resolution. In view of the provisions contained in Section 3 of the Repealing Act and the fact that the possession of the vacant land has not been taken over by the State Government, which is asserted by the Counsel appearing for the appellants and is also apparent from the interim orders passed by this Court, the question for consideration no longer survives. Further under Section 4 of the Repealing Act all proceedings under the Act must be held to have abated. In that view of the matter, we do not think it necessary to proceed with this matter. These Appeals stand disposed of accordingly."

On a perusal of the aforesaid pronouncement of law there remains no trace of doubt that all proceedings under the Act must be held to have been abated in view of Section 4 of the Repeal Act. In this context, I may profitably refer to Section 3 which deals with savings. The said provision reads as under :-

> "3. Savings. - (1) The repeal of the principal Act shall not affect-
>
> (a) the vesting of any vacant land under sub-section (3) of section 10, possession of which has been taken over by the State Government or any person duly authorised by the State Government in this behalf or by the competent authority;
>
> (b) the validity of any order granting exemption under sub-section (1) of Section 20 or any action taken thereunder, notwithstanding any judgment of any court to the contrary;
>
> (c) any payment made to the State Government as a condition for granting exemption under sub-section (1) of Section 20..

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(1) 2001 A. I. R. S. C. W. 5128.

(2) Where -

(a) any land is deemed to have vested in the State Government under sub-section (3) of Section 10 of the principal Act but possession of which has not been taken over by the State Government or any person duly authorised by the State Government in this behalf or by the competent authority; and

(b) any amount has been paid by the State Government with respect to such land;

the, such land shall not be restored unless the amount paid, if any, has been refunded to the State Government."

On a perusal of the aforesaid provision it is quite vivid that where the land has been vested in the State Government under sub-section (3) of Section 10, possession of which has been taken over by the State Government or any person duly authorised by the State Government in this behalf or by the competent authority, nothing remains to be done.

Mr. Namdeo, learned counsel for the petitioners, has submitted that the possession has only been taken over on papers but the same has really not been taken over, as records would clearly show. On the contrary, Mr. Ajay Raizada, learned Government Advocate, submitted that the possession has been taken over as per the provisions of the principal Act. This being a disputed question of fact this Court cannot enter into the same to find out whether the possession, as an actual fact, has been taken over. Mr. Raizada has contended that the Office of the competent authority has not been abolished. In view of this, I am inclined to direct that the petitioner shall putforth his grievance before the competent authority that the possession has not been taken over and, therefore, no further action can be taken as Section 4 clearly stipulates all proceedings except proceedings under Sections 11, 12, 13 and 14 would abate. In fact, in the case of *N. Audikesava Reddy* (*supra*) it was clearly laid down that if the possession is not taken over the same cannot be taken over by the State Government. Keeping in view the factual *scenario* it is directed that the competent authority shall afford an opportunity of hearing to the petitioner to putforth his grievance that how the possession has not been taken over as per law and nothing subsists

to be done in the proceeding. It will be open to the petitioner to raise all the contention from all fours relating to the factum of taking over of possession.

The writ petition is accordingly disposed of. There shall be no order as to costs.

Petition disposed of.

MISCELLANEOUS PETITION

Before Mr. Justice Dipak Misra.
23 January, 2002.

SUSHIL KUMAR & another ...Petitioners*

v.

STATE & another ...Respondents

Constitution of India–Article 226–Writ Petition–Premature release on probation–Penal Code, Indian, 1860–Sections 149, 302 and Prisoner's Release on probation Rules, 1964, M. P.,–Brutal murder committed by petitioner–Petitioner may be innocent before the crime was committed but if the crime committed brutally the said circumstances is to be weighed in a proper manner–One of the petitioners caught hold of the deceased and the other pierced ballam in stomach region–Probation Board considering brutality rejected the application–No interference called for.

On a scrutiny of the same it is apparent that the petitioner No. 1 had caught hold of the hands of the deceased and the petitioner No. 2 pierced a 'ballam' in the stomach region of the deceased. In view of this, I am of the considered opinion, the petitioners had committed the murder in a brutal manner. The submission of Mr. Dwivedi that the petitioners had no intention is noted to be rejected as this court cannot advert to the aforesaid aspect at this stage in a

*W. P. No. 5382/2001.

case of this nature, as I am not sitting in appeal over the said judgment. I have referred to the judgment only to find out in what manner the crime was committed and the role played by the petitioners. If I say so, the petitioners were the real protagonists to create the tremendous cataclysm on the family members of the deceased by extinguishing his life spark and the spacious pleadings in the petition do not deserve to be considered for grant of premature release on probation under the Rules.

S. G. Jain v. *U. O. I.* (1), *Budhan Choudhary* v. *State of Bihar* (2), *Sushil Shah* v. *U. O. I. and others* (3), *State of M. P., through the Principal Secretary, Jail Department* v. *Sushil Kumar and another* (4), *Ganga Charan* v. *State of M. P. and others* (5), *Zahid Hussian and others* v. *State of W. B. and another* (6) and *Noora alias Sujat Mohd.* v. *State of M. P., and another* (7); referred to.

V. K. Dwivedi for the petitioners.

R. S. Jha, Dy. A. G. for the State.

Cur. adv. vult.

ORDER

DIPAK MISRA, J. – The petitioners, namely Sushil Kumar, S/o. Shri Chand Mal and Sunil Kumar, S/o. Shri Pal have approached this Court for issue of a writ of *certiorari* for quashment of the order dated 10.4.2001 passed by the Probation Board under Prisoners' Release on Probation Rules, 1964 (hereinafter referred to as 'the Rules') refusing to release them on licence and the confirmation thereof by the State Government by order dated 25.4.2001.

I may at the outset state that the present writ petition has been filed by giving details with regard to the concept of liberty, human rights, divinity that dwells in human heart, rights of freedom and such other rights that are put on a pedestal. There is prolific reference to the sayings of wall all Strews, Mahatma

(1) A. I. R. 1967 S. C. 1427. (2) A. I. R. 1955 S. C. 19. (3) A. I. R. 2000 S. C. 1023.
(4) L. P. A. No. 358/2000. (5) 1994 J. L. J. 775. (6) 2001 (3) S. C. C. 750.
(7) L. P. A. No. 161/2001.

Gandhi, the father of the nation and some eminent Judges to build the foundation that the orders of rejection and confirmation thereof are sensitively susceptible and cannot stand scrutiny and deserve to be axed by this Court in exercise of its extraordinary jurisdiction. To put it differently, the orders are criticised as if there is a procrastean approach by the authorities.

Be it noted that the petitioners were convicted of the offences punishable under section 302/149, 148, 307 and 323 of the Indian Penal Code (in short 'the IPC') in S. T. No. 619/94. It is urged that they are in custody since 15.5.1994 and they are entitled to be released on probation as per the provision of the rules and as such they had applied for release. The competent authorities as well as the private member of the Board recommended for release of the petitioner. It has been highlighted that on a number of occasion the petitioners were granted parole and they did not abuse their liberty. In spite of the aforesaid factual *scenario* the Probation Board did not accept the prayer of the petitioners and mechanically the same was given the stamp of approval by the State Government.

At this Juncture I think it apposite to refer to the pleadings in the writ petition for the simple reason, if I allow myself to say so, they are in dissonance with the concept of proper and dignified manner of pleading.

Paragraph No. 5.6 of the petition reads under under :

> "5.6-It is painfully submitted that whosoever in the Board Meeting was prematurely released ought to have bad reports as prisoners of good, meritorious and favourable reports did not find favour with them. What else could be the reason and those submits reasons cannot be disclosed to the world. There is something wrong and fishy somewhere and one can smell that what happens or transpires in the closed doors where probation Board meetings are held as prisoners with 5 murders are granted premature release and genuine cases are thrown in the wastepaper baskets."

In my considered view the aforesaid assertion is absolutely inappropriate and care has not been taken while using the words. It is to be borne in mind language used in a court of law has to be temperate and the basic concept of propriety cannot be jettisoned. However, I am not proceeding to say further on that score.

It has been putforth that the petitioners are noble souls and there is quotation which finds place in paragraph No. 5.10 of the writ petition and the same has been attributed to Mahatma Gandhi. It reads as under :

> "As an old and experienced prisoner however I believe that, government have to be begin to reform. Humanitarians can but supplement government efforts. As it is, the humanitarians, if he tempted anything will first have to undo the mischiefs done in the prisons, where the environment hardens the criminal tendency.... they learn to commit crimes without being detected. I hold that, humanitarians effort cannot cope with the evil wrought in the jails."

Reference has been made to the report of the Committee on jail reforms. It reads under :

> "Those serving life sentences are cut off, for all practical purposes, for several years from the outside world, others spend the best years of their life in jail."

Again,

> "Life convicts like most other categories of prisoners, are, a neglected..... life convicts, thus, become an irrelevant appendage of the prison population."

There is reference to the quotation in paragraph No. 5.10(b) though the name of the author has not been mentioned. I proceed to reproduce the same :

> "Those who inhabit the corridors of the law and justice could dome down their ivory towers to take a long, close look at those of their fellow beings who are made to suffer without cause."

It has been further pleaded that warmth of the sun, the moonlight or the mellow rain will not be available for them if the Boards and Advisory Committees decide their cases for premature release in such casual and perfunctory manner without applying their mind even to the favourable and good reports and recommendations from all the authorities to which the Board Members are supposed to look into and rely on and that is what has happened in the cases of these two unfortunate petitioners whose cases have

been rejected without any regard to the recommendation reports in their favour. Allegation has been made that malicious discrimination of the highest order is apparent which is shocking to the innermost recesses of the heart of any reasonable person.

Reference has been made to the decisions rendered in the case of *S. G. Jain* v. *U. O. I* (1) and *Budhan Choudhary* v. *State of Bihar* (2) and certain writings of many authors. It is urged in the petition that the conduct is of paramount significance while deciding the issue of premature release of the petitioners who are supposed to come out of the ugly iron walls of the jails, the crime infested hell and to see the brightness of the open world where reformation would make them real human beings different from beasts and from half dead and half mad persons but the scanning by the Board does not show so.

A reference has been made to the case of *Sushil Shah* v. *U. O. I. and others* (3). Certain references have been given how the Board had released some prisoners. Emphasis has been led on holistic terms and on compassion.

Ordinarily I would not have referred to the pleadings in detail in this regard but an attempt has been made to highlight the Board has passed the order in a whimsical, fanciful and capricious manner throwing the norms to the winds and further every prisoner who has become eligible to be released on probation under the relevant rules has to be released because he has to get himself reformed. If that would have been the purpose of the rule only time limit would have been fixed but it is not so. Certain conditions precedent have been attached and, therefore, a person has to meet such criteria and Board has to decide as per the rules. I am not to be understood to have stated that human elements are not to be considered, because by no starch of imagination it can be conceived that a person would be treated as unperson. It is a great human feeling to have freedom. It is an unalloyed right also. But law does impose conditions because restriction in regard to liberty are imposed for the sake of liberty. Not for nothing it has been said, it does not help a man if he gets the entire world but loses the sanctity of his soul. Human rights have their purposive meaning and no human being cannot afford to ignore anything which is connected with humanity.

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(1) A. I. R. 1967 S. C. 1427. (2) A. I. R. 1955 S. C. 19.
(3) A. I. R. 2000 S. C. 1023.

As has been indicated herein before, a quotation has been attributed to the father of the nation who had, irrefragably had immense experience in the jail during freedom struggle. It is worthnoting here that while in jail when a scorpion stung an attendant who has looking after the father of the nation, he, without any kind of inhibition, sucked the poison at the cost of his life and saved the life of the said person. Not for nothing Albert Einstein while speaking about the father of the nation spoke that generations to come would have difficulty in believing that such a human being in flesh and blood, walked on this earth. But the question that falls for consideration, the principal issue, whether every prisoner as a matter of right can claim that he must be set at liberty from the walls of prison so that he can pave the path of reformation, or the law should give him the privilege keeping in view the antecedents.

Now to the factual setting Mr. Dwivedi, learned counsel for the petition has submitted that the factual scenario if appreciated in proper perspective would entitle the benefit of release on probation to the petitioner. He has placed reliance on the decision rendered in the case of LPA No. 358/2000 (*State of M. P. through the Principal Secretary, Jail Department* v. *Sushil Kumar and another (1)*). In the said case a Division Bench of this Court was dealing with the role of the private member and by no stretch the Division Bench has expressed the opinion that recommendation given by the private member would be binding on the other members. Hence, the aforesaid decision is of no assistance to the learned counsel for the petitioner.

In this context I may profitably refer to the decision rendered in the case of *Ganga Charan* v. *State of M. P. and others* (2), wherein after discussing the rules, in paragraph 11 the learned Chief Justice speaking for the Court, expressed as under :

> "11. We, therefore, hold that the word "antecedents" relates to the period prior to the commission of the crime, the circumstances under which the crime was committed and the period subsequent to the commission of the crime."

Thus, the compartments are to be considered in proper perspective. A person may be innocent before the crime was committed but if the crime

(1)L.P.A. No. 358/2000.

(2) 1994 J. L. J. 795.

committed exhibits brutality the said circumstances is to be weighed in a proper manner.

Before I proceed, at this juncture, I may profitably refer to the decision rendered in the case of *Zahid Hussain and others* v. *State of W. B. and another* (1) wherein their Lordships in paragraphs No. 14 to 16 held as under :

> "We may state here that the jail authority recommended premature release of the writ petitioners. In our opinion, the conduct of the petitioner while in jail is an important factor to be considered as to whether they have lost their potentiality in committing crime due to long period of detention. The views of the witnesses who were examined during trial and the people of the locality cannot determine whether the petitioners would be a danger to the locality, if released prematurely. This has to be considered keeping in view the conduct of the petitioners during the period they were undergoing sentence. Age alone cannot be a factor while considering whether the petitioners till have potentiality of committing crime or not as it will depend on changes in mental attitude during incarceration.
>
> While coming to the conclusion for possibility of regrouping for antisocial activities, the Review Board did not take into account, at the life convicts are in jail for more than 18 years. The Board also did not consider whether there would be any fruitful purpose of confining the convicts any more and also the socio-economic condition of their families. Regarding the petitioner Md. Talib, the Review Board also noted that one co-convict was released prematurely and was murdered in the encounter with other criminals after his release. The learned Additional Solicitor General informed us that the said co-accused was released in the year 1991 and was murdered in the year 1998 and, therefore, in our opinion this fact has no nexus for consideration of premature release of the petitioner, Md. Talib."

It is apposite to state here that in the aforesaid case the Apex Court was dealing with the provisions of Sections 432, 433 and 433-A of the Code of Criminal Procedure and not on premature release. The said decision has been rendered on a different footing. Mr. Dwivedi has also brought to the notice of this Court to the decision rendered in the case of *Noora alias Sujat Mohd* v. *State and another* (2) the said case in paragraph no. 4 the Division Bench has held as under :

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(1) 2001 (3) S. C. C. 750. (2) L. P. A. No. 161/2001.

"Therefore, we are of the opinion that the case of appellant has not been justly considered for release on parole. Consequently, direction for his temporary release on parole is issued. The appellant is directed to be released on temporary parole till the Administration/Jail Authority considers the matter for his permanent release on parole subject to such terms and conditions as may be deemed fit. This order has been passed in view of the peculiar facts of the case. It will not be treated as a precedent for other cases, which shall be considered and decided on their own merits."

On a perusal of the aforesaid it becomes plain as noon day, the Division Bench observed the order passed therein would not be a precedent in other case. Hence, this decision does not render any assistance to the petitioner.

Now to the question whether the order passed by the Board is justified or not. On a scrutiny of the order passed by the Board, Annexure-P-1, it is manifest that the Board has taken note of the antecedents and denied the privilege to the petitioners. The Board has observed that that the petitioners had conspired and used lethal weapons and committed the murder in a most brutal manner. I may hasten to add, Mr. Dwivedi had disputed the aforesaid observation. Hence, I had directed for filing of the judgment of conviction passed by the learned trial Judge and the same has been produced before this Court.

Mr. R. S. Jha, learned Dy. Advocate General for the State has taken me through the judgment. On a scrutiny of the same it is apparent that the petitioner No. 1 had caught hold of the hands of the deceased and the petitioner No. 2 pierced a 'ballam' in the stomach region of the deceased. In view of this, I am of the considered opinion, the petitioners had committed the murder in a brutal manner. The submission of Mr. Dwivedi that the petitioners had no intention is noted to be rejected as this Court cannot advert to the aforesaid aspect at this stage in a case of this nature, as I am not sitting in appeal over the said judgment. I have referred to the Judgment only to find out in what manner the crime was committed and the role played by the petitioners. If I say so, the petitioners were the real protagonists to create the tremendous cataclysm on the family members of the deceased by extinguishing his life spark and the spacious pleadings in the petition do not deserve to be considered for grant of premature release on probation under the Rules. Hence, I find the order passed by the Board and affirmation thereof by the State is impeccable.

The writ petition, being devoid of merit, stands dismissed without any order as to costs.

Petition dismissed.

LETTERS PATENT APPEAL

Before Mr. Justice Deepak Verma and Mr. Justice A. M. Sapre.
17 February, 1999.

MARIYAMBAI & ors. ...Appellants*

v.

KISHANLAL & ors. ...Respondents.

Letters Patent–Clause X–Appeal–Scope of–Not limited to question of law only–Extends also to re-appreciation of evidence in an appropriate case–Motor Vehicles Act, 1988, Section 173–Appeal for enhancement–Motor accident–Contributory negligence–Brake of the erring truck proved defective leading to the accident–Plea of contributory negligence cannot be examined at the instance of a party who himself is at fault–No case for contributory negligence made out.

This Court, can in appropriate cases re-appreciate the evidence with a view to ascertain, whether the finding recorded by the learned Single Judge is based on correct appreciation of evidence or not.

A plea of contributory negligence can not be examined at the instance of a person who himself is at fault. Being the owner of vehicle, which was meant to be used on public road, it was the duty of the owner as also of the driver to ensure that the vehicle (truck) was in fit condition to be used on public roads. Reasonable care not only applies while driving the vehicle but it equally applies in ensuring the fitness of the vehicle before it is put to use on roads. When it was found by the learned Single Judge that the vehicle belonging to non-applicants itself was not in a fit condition to ply because of defective breaks, we fail to appreciate as to how the deceased could be held negligent in driving his motorcycle.

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*L. P. A. No. 30/1995.

Ashadevi v. *V. Dukhi Sao* (1) and *Sushma Mitra* v. *M. P. S.R.T.C.* (2); refrred to.

S. M. Smavatsar for the appellant.

Sunil Jain for the Resp. nos. 1 & 2.

Surjeet Singh for the respondent no. 3.

Cur. adv. vult.

JUDGMENT

The Judgment of the Court was delivered by **A. M. SAPRE, J.** – This Letters Patent Appeal is preferred under Clause-10 of Letters Patent by the claimants against the Judgment rendered by learned Single Judge in M. A. No. 199/1985, arising out of Claim Case No. 5/1980 decided by M. A. C. T. Mandasaur. By impugned Judgment, the learned Single Judge was pleased to partly allow the appeal preferred by the claimants, (appellants herein) by enhancing the amount of compensation awarded by Tribunal from Rs. 37,000/- to Rs. 42,700/-, basing its conclusion on the plea of contributory negligence. The appellants/claimants felt dissatisfied with the enhancement awarded by the learned Single Judge, have filed this appeal.

Facts emerging from the record of the case and found proved in the Courts below need mention, to appreciate the grievance urged by the parties to the appeal.

Mohammad Hussain aged about 31 yrs. was working as Manager in one Hotel, called Janta Lodge at Neemuch. On the fateful day (29.7.79) at about 8.30 P.M. he was coming towards Khurshid Talkies in Neemuch Town on his Motorcycle when he was crushed by the truck bearing No. R.J.R. 8281. This truck at the relevant time, was owned by Respondent No. 1 and was driven by Respondent No. 2. The impact of the accident was so violent that Mohammed Hussain succumbed to injuries instantly on the spot. This incident led to lodging of first information report with concerned Police Station by one S. Sharma (AW.-8), pursuant to which, the case was investigated; spot map was prepared, and, then, body of deceased Mohammed Hussain was sent for post-mortem. This

(1) A. I. R. 1974 S. C. 2048. (2) A. I. R. 1974 M. P. 68.

resulted in filing of challan against the driver, the respondent No. 2 for his prosecution under S. 304-A of the Penal Code in competent Criminal Court.

A claim petition out of which this appeal arise, was, then, filed under the provisions of Motor Vehicles Act by the present appellants/claimants being the legal representatives of the deceased i.e. wife and children claiming a total sum of Rs. 90,000/- under various heads which are permissible under law. This claim petition was filed against the owner, driver and the Insurance Company with whom the truck in question was insured at the relevant time. The petition was founded on the allegations that the accident occurred solely as a result of rash and negligent driving of the truck driver.

It was inter-alia alleged that the manner in which the accident occurred resulting in an instant death of deceased virtually crushing the body clearly demonstrates that it occurred as a result of share negligence of truck driver.

The claim petition was contested by the Respondents essentially on the ground that deceased himself was responsible for his death. According to Respondents, the truck driver was not at all responsible nor he was driving the truck rashly and negligently which could be attributed for the accident. It was alleged that deceased approached the main road from the side lane without taking any precaution which led to his death. They, therefore, prayed for the dismissal of claim petition attributing negligence of deceased.

The learned Tribunal after appreciating the oral as also the documentary evidence returned a finding of contributory negligence. In its opinion, both truck driver as well as deceased, were equally responsible for the accident. The learned Tribunal, then, proceeded to determine the compensation to the tune of Rs. 54,000/- and since, it had held that both were equally responsible for the cause, determined the compensation at Rs. 27,000/- proportionately reducing by 50%. The learned Tribunal was further pleased to award a sum of Rs. 10,000/- for loss of consortium, love and affection to the claimants/appellants.

The appellants, herein, were dissatisfied with the findings of contributory negligence, as also by inadequacy of compensation awarded by the learned Tribunal, preferred an appeal to this Court. No cross appeal or cross-objection was filed by any of the Respondents questioning the correctness and legality of

finding of contributory negligence in so far as it had held them liable, as also the quantum of compensation. The learned Single Judge by impugned Judgment on evaluating the evidence led by the parties, proceeded to sustain the finding of contributory negligence as also the quantum of compensation. The learned Single Judge, however, interfered with the proportion of contributory negligence, as according to him, the truck driver was more negligent than that be deceased. He, therefore, held deceased responsible to the extent of 1/3rd, whereas, the truck driver responsible to the extend of 2/3rd. As a result of this change in the proportion of negligence, the appellants/claimants were held entitled to an enhanced compensation to the tune of Rs. 42,700/- as against Rs. 37,000/- awarded by the Tribunal. Interest at the rate of 12% p.a. was also awarded on the sum awarded from the date of claim petition till its realisation. This is how, the learned Single Judge was pleased to partly allow the appeal by modifying the award.

It is against this judgment, rendered by learned Single Judge, the claimants/ appellants felt dis-satisfied with the correctness of finding of contributory negligence and also the determination of compensation, have filed this appeal.

We have heard Shri S. S. Samvatsar, learned counsel for the appellants/ claimants, Shri Sunil Jain, learned counsel for Respondents No. 1 & 2 and Shri Surjeetsingh, learned counsel for the Respondent No. 3.

Assailing the legality of findings recorded by the learned Single Judge, as also by the Tribunal, learned counsel for the appellants Shri Samvatsar argued, that on the facts found proved, no case of contributory negligence to the deceased could be attributed. He urged that even, otherwise, there was no evidence led by respondents (Non-applicants) to sustain the plea of contributory negligence. He while elaborating the submissions, maintained that even according to learned Single Judge, it was held that the accident occurred due to defective brakes of the truck. He, therefore, submitted that in view of this categorical finding recorded by the learned Single Judge, a plea of contributory negligence was not sustainable and in any event on this finding, the Courts below should have held truck driver to be solely responsible for the accident. He also urged that evidence led by parties, if, examined in its correct perspective, would clearly show that no case of contributory negligence was made out at the instance of non-applicants/ Respondents. He further submitted, that both the Courts below should not have

applied the multiplier of 15, as according to him, looking to the age of deceased, who was hardly 27 years of age, the compensation awarded was quite on a lower side.

Shri Surjeetsingh, learned counsel appearing for Insurance Company and Shri Jain, learned counsel, appearing for owner and Driver, at the out-set, submitted, that this being a Letters Patent Appeal, this court is precluded from examining or/and re-appreciating the oral as also documentary evidence. It was urged that only a question of law arising out of impugned judgment, can be examined to find out any error. It was, then, submitted, that finding recorded by the learned Single Judge is based on proper appreciation of evidence and hence does not call for any interference. The Respondents, thus, supported the impugned judgment and prayed for dismissal of appeal.

Having heard the learned counsel and having perused the entire record, we are of the considered view that this appeal deserves to be allowed. Before we embark upon the factual matrix of the case, the submissions raised by the Respondents regarding scope of appellate powers must be dealt with. Indeed, this issue is no longer *res-integra.* The issue regarding power of a Division Bench hearing a Letters Patent Appeal under Clause-10 of Letters Patent (Patna) came up for consideration before Their Lordships of Supreme Court in a case reported in *Ashadevi* v. *Dukhi Sao* (1); their Lordships after examining the scope of Clause-10 of Letters Patent (Patna) which is analogous to Clause-10 of Letters Patent (Nagpur) held that the power of a Division Bench hearing a Letters Patent Appeal under Clause-10 from the judgment of Single Judge in first appeal is not limited only to a question of law under S. 100 C.P.C. but, it has the same power which the Single Judge has as a first appellate court in respect of both questions of fact and law. It was further held that Limitation on the power of Court imposed by S. 100 and 101, C.P.C. cannot be made applicable to an appellate Court, hearing a Letters Patent Appeal for the simple reason that Single Judge of High Court is not a Court subordinate to High Court In view of this settled legal position, we have no hesitation in holding that this Court can in appropriate cases re-appreciate the evidence with a view to ascertain, whether the finding recorded by the learned Single Judge is based on correct appreciation of evidence or not.

(1) A. I. R. 1974 S. C. 2048.

Mariyambai v. Kishanlal, 1999.

This takes us to the next question, as to whether the finding attributing contributory negligence to both i.e. deceased and truck driver, is sustainable, on the evidence led by the non-applicants. Before we proceed to examine, the correctness of this finding, it is necessary to keep in mind the principles that governs the plea of contributory negligence.

A plea of contributory negligence is generally taken by way of defence in accident cases. Judicial decisions have evolved its pre-requisite to sustain such plea. Defence of contributory negligence means that the deceased or the plaintiff failed to take reasonable care of his own safety which was a contributory factor for his death or injury.

It is ruled that since defence based on contributory negligence enables the defendant to escape from his liability completely even when he was more at a fault, courts should be slow to infer that the negligence of the deceased was a contributory factor. Courts have devised a rule of last opportunity which meant that the other party had the last opportunity to avoid the accident, resulting in injury, he should be held solely responsible for the injury inspite of the fact that the deceased was also negligent. (G. P. Singh on Law of Torts, 21st Edition-1987 page-436). This Court, speaking through G. P. Singh (as his Lordship then was) in the case of *Sushma Mitra* v. *M. P. S. R. T. C.* (1) while examining the plea of contributory negligence ruled that, "A defence of contributory negligence requires that the defendants must prove that the plaintiff failed to take reasonable care of his own safety which was a contributory factor to the accident which caused him damage.

Now keeping in mind, the aforementioned principles, we proceed to examine whether a plea of contributory negligence was successfully made-out on facts by the non-applicants/respondents. Sajansingh (A.W.-5) Head Constable's evidence need mention. He had prepared the Inspection Report of the vehicle Ex.-P.-16-C. immediately after the incident had taken place. This report in clear terms recites that break system of the truck were not in order and were found defective. Sajansingh had also inspected the truck. He, in his statement, in clear terms admitted, that the truck could not have been stopped by putting one pump on the brakes and that the brakes were found to be

(1) A. I. R. 1974 M. P. 68.

defective. Yet, another important witness to the accident is Subhash Sharma (A.W.-8). He deposed that he was sitting in the office of his lawyer Shri Jadhav, just near the window, when, he saw one truck coming with very high speed on the square and crushed one motor cyclist. He deposed that the speed of truck was so high that it did not stop but after crushing the cyclist, dashed with electric pole. He further deposed that on seeing this incident, he rushed to the spot and, then, made a report to Police immediately.

Careful reading of aforesaid two statements of witnesses, the report Ex.-P.-16-C and the road map completely falsify the plea of contributory negligence set-up by the non-applicants. It was, in our considered opinion, a clear case of sheer negligence on the part of truck driver who did not take a reasonable care in keeping his vehicle in fit condition before it was put to use on public road. It was-sheer negligence of truck driver in driving the vehicle. A plea of contributory negligence can not be examined at the instance of a person who himself is at fault. Being the owner of vehicle, which was meant to be used on public road, it was the duty of the owner as also of the driver to ensure that the vehicle (truck) was in fit condition to be used in public roads. Reasonable care not only applies while driving the vehicle but it equally applies in ensuring the fitness of the vehicle before it is put to use on roads. When it was found by the learned Single Judge that the vehicle belonging to non-applicants itself was not in a fit condition to ply because of defective breaks, we fail to appreciate as to how the deceased could be held negligent in driving his motorcycle. In the facts emerging from the evidence, it is difficult for us to hold that non-applicants were able to make out a case of contributory negligence of deceased. We are inclined to accept the testimony of Subhash Sharma (A.W.-8), the only eye-witness to the incident, when, he deposed about the speed of truck. The manner in which the truck went out of control of driver and actually dashed to the electric pole unmistakably draws an inference that the accident was due to sheer negligence of driver, who was driving the truck with excessive speed knowing fully well the defects in brakes-it being the most vital part of the vehicle. We are, therefore, of the considered view that both the Courts below were not justified in entertaining the plea of contributory negligence. We, therefore, set-aside the findings of contributory negligence.

The next submission of appellants regarding awarding of less compensation

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by applying the multiplier of 15 has no substance. In our opinion, the multiplier of 15 appears just and proper in the facts of this case. We, therefore, uphold the finding regarding grant of compensation by applying the multiplier of 15.

We, therefore, set-aside the impugned Judgment in so far as it deals with the findings of contributory negligence and allow the appeal with costs. As a consequence the appellants/claimants are held entitled for the entire amount awarded to them by the learned Tribunal i.e. a sum of Rs. 54,000/- together with interest @ 12% from the date of application till realisation. Since the vehicle was insured with Respondent No. 3 and hence the Insurance Company will be liable to pay the sum awarded by us. We direct the Insurance Company to deposit the entire sum as awarded within a period of six months in the Court below after adjusting the amount if already paid to the appellants. In case, the amount as awarded is not deposited within the time mentioned above, the awarded sum i.e. Rs. 54,000/- would carry 18% interest from the date of application till it is deposited in Court. Counsel fees Rs. 1,000/- if, certified.

Appeal allowed.

LETTERS PATENT APPEAL

Before Mr. Bhawani Singh, Chief Justice and Mr. Justice Arun Mishra.

25 January, 2001.

CHATRAPAL SINGH THAKUR ...Appellant*

v.

ASSISTANT COMMISSIONER OF COALMINES PROVIDENT FUND and others ...Respondents

Letters Patent–Clause X–Appeal–Service Law–Termination–Constitution of India, Articles 226, 311–Coal Mines Provident Fund (Employees Recruitment) Rules, 1982, Rule 7(6)–Probation and confirmation– In absence of specific order of confirmation employee cannot be deemed to be permanent employee–Petitioner as a member of civil services safeguard under Article 311 of Constitution cannot be

*L. P. A. No. 213/97.

Chatrapal Singh Thakur v. Assistant Commissioner of Coalmines Provident Fund, 2001.

denied–Requirement of termination–One month's notice or pay plus allowances in lieu thereof–Not complied with–Order of termination not passed by appointing authority but an authority subordinate to him–Order of termination quashed.

It may be true that he was appointed on probation and till specific order of confirmation was passed, the petitioner was to continue in that capacity and his claim for automatic confirmation on completion of extended period of probation is not admissible but appointment order envisages another condition also, for compliance in case of temporary employment. There is requirement of one month's notice in writing or pay plus allowances in lieu thereof being given by either side. This requirement has not been complied with. Therefore, the termination is liable to be set aside on this ground.

It is patently clear that services of the petitioner have been terminated by authority subordinate to appointing authority. The petitioner is a member of civil service of the Union, holder of a civil post under it. Protection of Article 311 of the Constitution of India is available to him. Therefore, his services could not be terminated by authority subordinate to the authority which appointed him. Constitutional protection available to civil servant under Article 311 can not be eroded or annihilated by any rule or regulation providing mode which runs counter to it. For this reason as well, the termination is liable to be set aside.

The Management of Delhi Transport Undertaking, New Delhi v. *B. B. L. Hajelay and another* (1), *Takhat Singh* v. *Cororation of Delhi* (2), *Krishna Kumar* v. *Divisional Assistant Electrical Engineer, Central Railway and others* (3); followed.

Union of India and others v. *Prabhat Chandra Mallick* (4); distinguished.

Appellant appeared in person.

L. S. Singh, for the respondents.

Cur. adv. vult.

(1) 1972 (2) S. L. R. 299.
(2) 1973 (2) S. L. R. 350.
(3) A. I. R. 1979 S. C. 1712.
(4) 1995 Supp. (1) S. C. C. 214.

Chatrapal Singh Thakur v. Assistant Commissioner of Coalmines Provident Fund, 2001.

JUDGMENT

The Judgment of the Court was delivered by **BHAWANI SINGH, CHIEF JUSTICE (Oral)**– Through this Letters Patent Appeal, judgment dated 20.9.1996 of learned single Judge passed in Misc. Petition No. 1867 of 1989 has been challenged. Briefly, facts giving rise to the filing of this appeal may be narrated hereafter:

The petitioner/appellant was appointed Lower Division Clerk on 14.6.1983 by the Commissioner of Coal-mines Provident Fund, Jabalpur. He joined the post on 25.6.1983. However, by order dated 12.6.1987 (Annex.-P-4), his services have been terminated. The petitioner challenged the termination order through Misc. Petition No. 1867 of 1989 which has been dismissed by order dated September 20, 1996. The ground of challenged was that the petitioner having acquired status of permanent employee after completion of extended period of probation, could not have been terminated. Another ground of challenge was that he has been terminated by an authority lower than the authority which appointed, meaning thereby he was appointed by Commissioner, Coal-mines Provident Fund, Jabalpur and the order of termination has been passed by Assistant Commissioner of Coal-mines Provident Fund, Sidhi who is lower in rank to the appointing authority. One more grievance is that the petitioner was not apprised of his short-comings so as to enable him to make improvements, as required under sub-rule (6) of Rule 7 of Coal-mines Provident Fund Employees Recruitment Rules 1982 (hereafter Rules).

The aforesaid challenges have not been accepted by learned single Judge and the petition has been dismissed. It is found that Sub-rule (7) of Rule 7 of the Rules negatives case of automatic confirmation. Express order of confirmation was necessary, therefore, an employee continues to remain on probation till express order of confirmation in his favour is passed. It is also held that power to terminate the services of Group-C and Group-D staff stands delegated to all Regional Commissioners/Assistant Commissioners (Gr. I). Therefore, order of termination in case of petitioner has been passed by Assistant Commissioner who was competent to do so as per delegation order dated October 20, 1983 pursuant to a decision passed in meeting dated 2.9.1983. With respect to last submission, it is said that the petitioner was warned and cautioned to improve

his conduct and behaviour and to remove short-comings, therefore, there has been substantial compliance of sub-rule (6) of Rule 7 of the rules.

The first point for consideration is whether services of petitioner have been rightly terminated. It may be true that he was appointed on probation and till specific order of confirmation was passed, the petitioner was to continue in that capacity and his claim for automatic confirmation on completion of extended period of probation is not admissible but appointment order envisages another condition also, for compliance in case of temporary employment. There is requirement of one month's notice in writing or pay plus allowances in lieu thereof being given by either side. This requirement has not been complied with. Therefore, the termination is liable to be set aside on this ground.

Another aspect of the case is whether the petitioner has been terminated by authority lower in rank to the appointing authority. There is no dispute, petitioner was appointed by Commissioner of Coal-mines Provident Fund, Jabalpur. His services have been terminated by Assistant Commissioner of Coal-mines Provident Fund Sidhi. Shri Lal Shamindra Singh, learned counsel for the respondents raised two contentions on this question. First submission is that the termination has been authorised by the Commissioner of Coal-mines Provident Fund and second is that the Assistant Commissioner of Coal-mines Provident Fund, Sidhi has been delegated the power of appointing authority, therefore, termination on this count is not vitiated. Shri Singh placed reliance on Apex Court decision reported in *Union of India and others* v. *Prabhat Chandra Mallick* (1). We are unable to appreciate the submissions advanced by Shri Lal Shamindra Singh.

Perusal of communication dated June 9, 1987 demonstrates that the coal-mines Provident Fund Commissioner has not exercised the power of termination himself. Rather he has advised the Assistant Commissioner Coal-mines Provident Fund, Sidhi to terminate the services of the petitioner. This he did because the power of appointing authority had been delegated to the Assistant Commissioner of Coal-mines Provident Fund in a meeting dated 2.9.1983 and order to that effect is dated 20.10.1993. The position comes to this that services of petitioner have not been terminated by the Coal-mines Provident Fund Commissioner,

(1) (1995) 1 Supp. S. C. C. 214.

who was the appointing authority of the petitioner but by an authority lower in rank namely, the Assistant Commissioner Coal-mines Provident Fund Sidhi. This question has been considered by Full Bench of Delhi High Court in *The Management of Delhi Transport Undertaking New Delhi* v. *B. B. L. Hajelay and another* (1) and it is held that subordinate authority on delegation of power of appointment or removal can not pass order of removal in respect of employees appointed by higher authority prior to delegation of powers and that no regulation could be framed to provide that an employee could be removed by an authority subordinate to that by which he was appointed. This decision has been followed by Single Judge of the same court in *Takhat Singh* v. *Corporation of Delhi* (2). The Supreme Court decision in *Krishna Kumar* v. *Divisional Assistant Electrical Engineer, Central Railway and others* (3) holds in paragraphs 5 and 6 thus :

> "5. In defence of the legality of the order of removal, counsel for the respondents relies on paragraph 2 of respondent 1's affidavit, dated January 7, 1978, wherein he has stated that the power to make appointments to the posts of the Train Lighting Inspector was delegated to certain other officers including the Divisional Assistant Electrical Engineer. It is urged that since the Divisional Assistant Electrical Engineer has been given the power to make appointment to the posts of the Train Lighting Inspector, he would have the power to remove any person from that post. We can not accept this contention. Whether or not an authority is subordinate in rank to another has to be determined with reference to the state of affairs existing on the date of appointment. It is at that point of time that the Constitutional guarantee under Article 311(1) becomes available to the person holding, for example, a civil post under the Union Government that he shall not be removed or dismissed by an authority subordinate to that which appointed him. The subsequent authorisation made in favour of respondent. 1 in regard to making appointments to the post held by the appellant can not confer upon respondent 1 the power to remove him. On the date of the appellant's appointment as a Train Lighting Inspector, respondent. 1 had no power to make that appointment. He can not have therefore the power to remove him.
>
> Besides delegation of power to make a particular appointment does

(1) (1972) 2 S. L. R. 299. (2) (1973) 2 S. L. R. 350. (3) A. I. R. 1979 S. C. 1912.

not enhance or improve the hierarchical status of the delegate. An officer subordinate to another will not become his equal in rank by reason of his coming to possess some of the power of that another. The Divisional Engineer, in other words, does not cease to be subordinate in rank to the Chief Electrical Engineer merely because the letter's power to make appointments to certain posts has been delegated to him."

Further, in paragraph 7, the Court held :

"7. Since the appellant was appointed by the Chief Electrical Engineer and has been removed from service by an order passed by respondent 1 who, at any rate, was subordinate in rank to the Chief Electrical Engineer on the rate the date of appellant's appointment, it must be held that respondent 1 had no power to remove the appellant from service. The order of removal is in patent violation of the provisions of Article 311(1) of Constitution."

The principle laid down in the *Prabhat Chandra Mallick* (*supra*) is reiterated in paragraph 9 of the decision, on which reliance is placed by learned counsel for the respondents, when the Court said.

"9. The learned counsel for the respondent relied upon the decision of this Court in *Krishna Kumar* v. *Divisional Assistant Electrical Engineer, Central Railway (supra)*. The said decision is of no help to the respondents inasmuch as it merely says that whether or not an authority is subordinate in rank to another for the purpose of Article 311(1) of the Constitution of India, has to be determined with reference to the state of affairs existing on the date of appointment. The respondent was appointed by the Coal Mines Welfare Commissioner and he is dismissed by the very same officer."

Turning to the facts of the case, it be reiterated that the petitioner was appointed by Coal-mines Provident Fund Commissioner on 14.6.1983. So his services could be terminated by that authority. The power was delegated to coal-mines Regional Provident Fund Commissioner and Coal-mines Provident Fund Assistant Commissioner by order dated 20.10.1983. Therefore, it is patently clear that services of the petitioner have been terminated by authority subordinate to appointing authority. The petitioner is a member of civil service

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of the union, holder of a civil post under it. Protection of Article 311 of the Constitution of India is available to him. Therefore, his services could not be terminated by authority subordinate to the authority which appointed him. Constitutional protection available to civil servants under Article 311 can not be eroded or any annihilated by any Rule or regulation providing mode which runs counter to it. For this reason as well, the termination is liable to be set aside.

No other submission was advanced by the parties.

Consequently, the Letters Patent Appeal is allowed. The order of the learned Single Judge dated 20.9.1996 is set aside. Termination of the petitioner by order dated 12.6.1987 (Annex.-P-4) is sett aside. The petitioner shall be deemed to be in service in capacity he enjoyed on 12.6.1987. Looking to the conduct of the petitioner in service, he does not deserve more than half of back wages from 12.6.1987 till date.

Cost on parties.

Appeal allowed.

LETTERS PATENT APPEAL

Before Mr. Bhawani Singh, C. J. and Mr. Justice K. K. Lahoti.

17 January, 2002.

REWA PRASAD ...Appellant*

v.

SMT. AMSA BAI & ors. ...Respondents.

Letters Patent–Clause X–Appeal–Suit for one third share in suit property–Defendant despite repeated opportunity not producing his witness or evidence–Trial Court rightly closed the evidence–Plaintiff illiterate woman–Alleged partition deed got executed by playing fraud on her–Share of ancestral property given to those who are not entitled to the property–Sufficient to invalidate the partition deed–Suit rightly decreed by trial Court.

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*L. P. A. No. 300/2001.

Rewa Prasad v. Smt. Amsa Bai, 2002.

The trial Court granted several opportunities to the appellant/defendant. He failed to produce the evidence inspite of adjournments including the last adjournment on 18.02.95 on payment of costs. Looking to the conduct of defendant and the opportunity granted to him, the trial Court has rightly closed the evidence.

With regard to the case of defendant that the partition was effected on November 24, 1952, by registered deed, the trial Court recorded finding that the said document was got executed by playing fraud on illiterate woman, without bringing it to her knowledge that it was a partition deed. The learned Single Judge has also considered the partition deed in para 10 of the judgment and has found that by this document substantial share of ancestral property was allotted to the wives of Rewa Prasad, namely, Ram Kali Bai and Ramwati, there was no justification for this as Rewa Prasad was also allotted substantial part of the property.

In the circumstances above stated, suit was rightly decreed.

Alok Aradhe for the appellant.

None for the respondents.

Cur. adv. vult.

JUDGMENT

The Judgment of the Court was delivered by **K. K. LAHOTI, JUDGE (ORAL)** – This appeal is directed against the order passed by the learned Single Judge in First Appeal No. 343/1995 dated 22.9.2001 by which judgment and decree passed by 9th Additional District Judge, Jabalpur in Civil Suit No. 199-A/95 was affirmed.

Plaintiff/respondent filed a suit claiming 1/3rd share in the Joint Family property. The suit was decreed and the plea of defendant that there was already a partition on 24.11.1952 was negatived and a decree for partition passed.

Shri Alok Aradhe, learned counsel appearing for the appellant, has contended that the defendant-appellant has not been given due opportunity to adduce the evidence and suit has wrongly been decreed inspite of registered partition deed dated 24.11.1952.

The learned Single Judge has considered this aspect and has found that the defendant was given sufficient opportunity but neither he nor his witnesses were examined. On perusal of trial Court records, it is found that the plaintiff had closed his evidence on 13.3.89. Thereafter, the trial Court granted several adjournments to the defendant. During this period, the matter was adjourned because the application for substitution was filed and service on legal heirs took time. Thereafter, the case was again fixed for the evidence of defendant on 8.11.1994 and thereafter also several adjournments were granted to adduce evidence on the prayer of the counsel of defendant. On 27.6.95, the prayer for adjournment on behalf of defendant was refused on the ground that the matter was an old one and there was no justification for the absence of defendant and his witnesses. Defendant did not even file any list of witnesses. As the matter was pending since 1979, the Court rightly closed the evidence of defendant. In our opinion, the trial Court granted several opportunities to the appellant/ defendant. He failed to produce the evidence inspite of adjournments including the last adjournment on 18.2.95 on payment of costs. Looking to the conduct of defendant and the opportunity granted to him, the trial Court has rightly closed the evidence.

With regard to the case of defendant that the partition was effected on November 24, 1952, by registered deed, the trial Court recorded finding that the said document was got executed by playing fraud on illiterate woman, without bringing it to her knowledge that it was a partition deed. The learned Single Judge has also considered the partition deed in para 10 of the judgment and has found that by this document substantial share of ancestral property was allotted to the wives of Rewa Prasad, namely, Ram Kali Bai and Ramwati, there was no justification for this as Rewa Prasad was also allotted substantial part of the property. Para 10 reads as under :-

> "There is a glaring defect in the partition which is said to have taken place in the year 1952 by the registered partition deed. It is admitted that the lands and the houses were the ancestral property of Keshri Prasad. Therefore the parties who were entitled to shares in the partition were Keshri Prasad, his son Rewa Prasad and the plaintiff who was the widow of the pre-deceased son (Jait Singh) of Keshri Prasad. Girja Bai as mother of Jait Singh and Rewa Prasad was also entitled to have a share in the partition. But it is not known under which law Ram Kali and Ramwati

who are wives of Rewa Prasad were given shares in the partition. Legally they could not be given a share in the partition. The partition-deed Ex.-P-1 shows that Ramkali and Ramwati were given 38.98 acres and 39.75 acres of lands respectively in the said partition. Thus a substantial chunk of the ancestral property was allotted to these two ladies who were not entitled to anything. This is a fatal defect in the partition which is said to have taken place in the year 1952. The allotment of nearly 80 acres of lands to Ramkali and Ramwati has prejudicially affected the share of the plaintiff in the ancestral property. This is a mere solid ground to invalidate the partition of the year 1952."

In the circumstances above stated, suit was rightly decreed. The learned counsel for the appellant could not point out any other error or perversity in the judgment passed by the learned Single Judge.

We find no substance in the appeal and the appeal is dismissed.

Appeal dismissed.

APPELLATE CIVIL

Before Mr. Justice B. A. Khan and Mr. Justice Shambhoo Singh.

13 April, 1999.

RAM KUNWAR BAI & ors. ...Appellants*

v.

RAMLAL ...Respondent.

Succession Act, Indian (XXXIX of 1925)–Appeal–Application of probate–Heavy burden lay on the propounder of a disputed Will to prove valid execution–Evidence Act, Indian, 1872–Section 67–Will–Execution by illiterate–Mere putting signature or thumb impression does not amount execution of will–Deceased living with his daughter till his death and naturally she was serving him–Deceased would not give anything to his daughter does not stand to reason–Scribe not examined–Propounder was required to prove that the will was read and explained and after understanding the contents executor put signature or thumb impression–

*M. A. 259/89.

Rewa Prasad v. Smt. Amsa Bai, 1999.

Circumstances lead to inference that will was not read over to deceased– Execution of will not proved.

From the will Ex.-P-1 it is clear that no provision was made for the daughters specially Jasodabai and Ashok with whom the deceased was living. This will mentioned that the objectors were illegitimate daughters of the deceased. A father may not give or will his property to his daughters but no father would say that his daughters were illegitimate issues, particularly when the deceased was admittedly living with his daughter-Jasodabai and lived with her till his death. All these Circumstances create suspicion about the will and under such circumstances therefore *heavier onus* lay on him to remove doubts.

Heavy burden lay on the respondent who is propounder of the disputed will and beneficiary. It is settled that the party, propounding a will has to satisfy the conscience of the Court that the instrument was last will of a free and capable testator. Propounder taking benefit under the will is a circumstance, which generally creates suspicion.

Admittedly, the deceased was illiterate. He only knew how to put signature. Under these circumstances, it was required to prove that Ex.-P-1 was read and explained to the deceased and after understanding the contents of this documents, he put his signature and thumb impression thereon. Here neither the respondent nor his fitnesses stated that Ex.-P-1 was read over to the deceased Dalludas and he admitted the same and thereafter he put his signature and thumb impression thereon. Under such circumstances, it cannot be held that Ex.-P-1 was executed by the respondent.

But the will is silent about Ashok. All the facts and circumstances lead to the inference that Ex.-P-1 was not read over to the deceased and, therefore, it cannot be said that it was executed by the deceased.

Smt. Jaswant Kaur v. *Smt. Amrit Kaur & others* (1), *R. Venkatachala Iyengar* v. *B. N. Thimmajamma* (2) and *Ramjan Khan & ors.* v. *Baba Raghunath Dass and other* (3); followed.

Shri K. B. Joshi for the applicants.

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(1) A. I. R. 1977 S. C. 74. (2) A. I. R.1959 S. C. 443. (3) A. I. R. 1992 M. P. 22.

Amit Agrawal for the Respondents.

Cur. adv. vult.

JUDGMENT

The Judgment of the Court was delivered by SHAMBHOO SINGH, J. – This appeal is directed by the objectors against the order dated 5.9.89 passed by VIIIth Additional Judge to the Court of District Judge, Indore, in Probate Case No. 22/86 whereby probate of the will dated 21.12.82 was granted.

It is not in dispute that objectors no. 1 to 3 are daughters of the deceased Dalludas. The respondent is his brother late Jankilal's son. It is also admitted that Dalludas died on 21.12.82 at Indore.

The case of the respondent was that his parents had died when he was three months old and, therefore, Dalludas adopted him. On 21.12.82 Dalludas executed his last will Ex.-P-1 in his favour whereby he bequeathed his movable and immovable property. The deceased died on 25.12.82. He filed application for grant of probate of the will. The objectors raised objection pleading that immovable property was not self acquired property of the deceased and, therefore, he could not execute will thereof. It was further contended that the deceased had adopted objector Ashok and he had nominated him (Ashok) as his heir for Rs. 22,650/- deposited in Rajkumar Mill Pedi, Majdoor Paraspar Sahkari Sanstha. The deceased was living with Ashok and objector no. 1 Jasodabai @ Jassibai. The deceased was seriously ill since one month before his death and a week before his death he was in coma. He did not & could not execute the disputed will. It was forged one. The learned Trial Judge after considering evidence adduced by both parties including Hand-writing expert, held that the will Ex.-P-1 was genuine document and it was executed by deceased Dalludas in favour of the respondent and granted probate in his favour. Hence, this appeal.

Shri Joshi, learned counsel for the appellant-objectors, submitted that the learned Trial Judge fell in error in putting reliance on the testimony of the applicant and his witnesses and holding that the will Ex.-P-1 was executed by the deceased. He submitted that A.W.-2 Govind admitted in cross-examination that Ashok was taken in adoption by Dalludas and he was living with Dalludas. The claimant

and his witnesses also admitted that Dalludas was living with his daughter Jasodabai @ Jassibai till his death. But no property has been given to them. The Will does not mention the name of Ashok. All the circumstances created a suspicion about the will and, therefore, it was the duty of the applicant to probe the execution of the will by the deceased with convincing evidence. The deceased had executed power of attorney Ex.-D-3 and D-4 in favour of Manaklal, the husband of Jasodabai. All these facts go to show that the will is forged one. On the other hand. Shri Amit Agrawal, learned counsel for the respondent, submitted that from the statements of respondents, attesting witnesses Ramlal A.W.-2 Govind and A.W.-3 Parmanand which have been corroborated by the statement of Achut Ganorkar, Hand-writing Expert, it has been proved that the will Ex.-P-1 was executed by the deceased.

We considered the arguments advanced by counsel for both sides and perused the record. Admittedly, appellants no. 1 to 3 are daughters of the deceased. The applicant himself has admitted in cross-examination that Dalludas was living with his daughter appellant no. 1 Jasodabai till his death. The non-applicants have stated that the deceased took objector Ashok in adoption. The applicant himself has admitted in cross-examination that the deceased took one boy in adoption but he changed his version and stated that he (respondent) was taken in adoption. The respondent's witness A.W.-2 Govind admitted in cross-examination that the deceased had kept Ashok in his house and he was living with the deceased. He was aged about 12-14 years. From the will Ex.-P-1 it is clear that no provision was made for the daughters specially Jasodabai and Ashok with whom the deceased was living. This will mentioned that the objectors were illegitimate-daughters of the deceased. A father may not give or will his property to his daughters but no father would say that his daughters were illegitimate issues, particularly when the deceased was admittedly living with the daughter-Jasodabai and lived with her till his death. All these circumstances create suspicion about the will and under such circumstances, therefore, *heavier onus* lay on him to remove doubts. Their Lordships of the Supreme Court in case of *Smt. Jaswant Kaur* v. *Smt. Amrit Kaur & others* (1) and *R. Venkatachala Iyengar* v. *B. N. Thimmajamma* (2) observed :

"Cases in which the execution of the will is surrounded by suspicious

(1) A. I. R. 1977 S. C. 74. (2) A. I. R. 1959 S. C. 443.

circumstances stand on a different footing. A shaky signature, a feeble mind an unfair and unjust disposition of property, the propounder himself taking a leading part in the making of the will under which he receives a substantial benefit and such other circumstances raise suspicion about the execution of the will. That suspicion cannot be removed by the mere assertion of the propounder that the will bears the signature of the testator or that the testator was in a sound and disposing state of mind and memory at the time when the will was made, or that those like the wife and children of the testator who would normally receive their due share in his estate were disinherited because the testator might have had his own reasons for excluding them. The presence of suspicious circumstances makes the initial *onus heavier* and therefore, in cases where the circumstances attendant upon the execution of the will excite the suspicion of the Court, the propounder must remove all legitimate suspicious before the document can be accepted as the last will of the testator.

It is in connection with wills, the execution of which is surrounded by suspicious circumstances that the test of satisfaction of the judicial conscience has been evolved. That test emphasises that in determining the question as to whether an instrument produced before the Court is the last will of the testator, the Court is called upon to decide a solemn question and by reason of suspicious circumstances the court has to be satisfied fully that the will has been validly executed by the testator.

If a caveator alleges fraud, undue influence, coercion etc. in regard to the execution of the will, such pleas have to be proved by him, but even in the absence of such pleas, the very circumstances surrounding the execution of the will may raise a doubt as to whether the testator was acting of his own free will. And then it is a part of the initial onus of the propounder to remove all reasonable doubts in the matter."

In view of above, heavy burden lay on the respondent who is propounder of the disputed will and beneficiary. It is settled that the party, propounding a will has to satisfy the conscience of the Court that the instrument was last will of a free and capable testator. Propounder taking benefit under the will, is a circumstance, which generally creates suspicion.

How we have to see whether the respondent had discharged his burden. It is true that respondent (A.W.-1) stated that Dalludas executed the will Ex.-P-1 in his favour. A.W.-2 Govind and A.W.-3 Parmanand supported his version.

Parmanand stated that he put his signature on Ex.-P-1 in part A to A and Dalludas put his signature in part C to C and thumb impression in part D to D. There was one 'Baba' who also put his thumb impression on the same. The appellant's witnesses Smt. Ramkunwar Devi (N.A.W.-2) and Smt. Jasodabai (N.A.W.-4) deposed that Ex.-P-1 does not bear signature of Dalludas. The learned Trial Judge relied the evidence of respondent Ramlal and his witness and the statement of Achut Gonarkar, Hand-writing Expert and disbelieved the evidence of appellants and their Hand-writing Expert Chandra Shekhar Sarvate (N.A.W.-3). Even if we accept the finding of the Trial Judge that Ex.-P-1 will contain the signature of Dalludas, it cannot be said that the respondent had discharged his burden and proved the execution of the will by Dalludas. Putting of signature does not amount execution of a document. Admittedly, the deceased was illiterate. He only knew how to put signature. Under these circumstances, it was required to prove that Ex.-P-1 was read and explained to the deceased and after understanding the contents of this documents, he put his signature and thumb impression thereon. Here neither the respondent nor his witnesses stated that Ex.-P-1 was read over to the deceased Dalludas and he admitted the same and thereafter he put his signature and thumb impression thereon. Under such circumstances, it cannot be held that Ex.-P-1 was executed by the respondents. This Court in case of *Ramjan Khan & others* v. *Baba Raghunath Dass and other* (1) observed :

> "Under Section 67 of the Evidence Act execution of document has to be proved, which denotes a conscious act of subscribing to a document. In order to prove the execution of a document it must be shown that the person executing it consciously subscribed to it in the sense that he put his mark or signature on it after having known and understood its contents. Mere proof that the person's signature appears on the document cannot, by itself, amount to execution of the document. It is also settled that if an illiterate person affixes his thumb mark to a document, the onus to prove that the document was properly explained to the person affixing his thumb mark so as to make him understand its true import is on the person relying on the document."

Other lacuna in the case is that the respondent did not examine Advocate Shri Chawla, the scribe of Ex.-P-1. As stated earlier, the appellants no. 1 to 3

(1) A. I. R. 1992 M. P. 22.

are admittedly the daughters of the deceased. The deceased was living with his daughter appellant no. 1 in his house situated at Kajipura and he lived with her till his death and naturally she was serving him. It does not stand to reason that the deceased would not give anything to his daughter who was serving him and bequeath his whole property to the respondent who was living separately from him and was not rendering any service to him. Ramkunwarbai (N.A.W.-2), Jasodabai (N.A.W.-4) and Harish Kumar (N.A.W.-5) stated that the deceased had taken Ashok in adoption. This fact has been admitted by respondent's witness. A.W.-2 Govind who stated in his cross-examination that Dalludas had kept Ashok with him, at that time he was a child and now he had grown up and was aged about 12-13 years and was living with the deceased. He was conscious about his (Ashok) welfare and had nominated him his heir for Rs. 22,650/- deposited in Rajkumar Mill Pedi, Majdoor Parspar Sahkari Sanstha. But the will is silent about Ashok. All these facts and circumstances lead to the inference that Ex.-P-1 was not read over to the deceased and, therefore, it cannot be said that it was executed by the deceased. There is one more fact which makes the case of the respondent doubtful. It has come in the evidence of appellants that the deceased had executed power of attorney Ex.-D-4 dated 28.7.81 and Ex.-D-3 dated 15.2.82 in favour of Manaklal, husband of appellant no. 1 whereby he was authorised to collect rent from the tenants and manage his property and do needful in the ejectment suit no. 92-A/81 pending in the Civil Court. Had the respondent been adopted by the deceased, the later would not have executed power of attorney in favour of the husband of appellant no. 1. The learned Trial Judge did not consider the evidence properly. In our opinion, the respondent failed to prove that the will Ex.-P-1 was executed by the deceased in his favour.

In the result, we allow the appeal and set-aside the impugned order. The respondent shall pay the cost. Counsel fee is fixed Rs. 1,000/-, if certified.

Appeal allowed.

APPELLATE CIVIL

Before Mr. Justice S. P. Khare.
29 October, 1999.

SARJU PRASAD PATEL ...Appellant*

v.

NANAKCHAND & others ...Respondents

Civil Procedure Code (V of 1908)–Section 100–Second Appeal–Suit for eviction–Accommodation Control Act, M. P., 1961, Section 12(1)(e)–Bona fide need–Alternate accommodation available on upper floor of the suit house–Plaintiff's explanation for not using the same for his requirement and subsequently letting it out–Case of bona fide need not made out–Plaintiff not entitled to the decree of eviction–Suit dismissed.

This is not a satisfactory explanation, He does not say that the said portion was not reasonable suitable for the members of his family. As a matter of fact that was more convenient as one of the rooms of that accommodation was on the first floor. Just adjacent to the accommodation already in possession of the plaintiffs. This circumstance is very material and strikes at the *bona fide* of the plaintiffs. This circumstance was not at all taken into account by the trial Court and the first appellate Court brushed it aside without any cogent reason.

The plaintiffs needed the additional accommodation for their family members keeping in view the size of the family and the accommodation already in their occupation but the said need on an objective appraisal is not "*bona fide*". It is not sincere and honest.

S. S. Gupta v. *M. C. Gupta* (1) and *Mehrunissa* v. *Visham Kumari* (2); followed.

Vipin Yadav for the appellant.

G. C. Bhatia for the respondents.

Cur. adv. vult.

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* S. A. No. 326/92.

(1) A. I. R. 1999 S. C. 2507. (2) A. I. R. 1998 S.C.427.

Sarju Prasad Patel v. Nanakchand, 1999.

JUDGMENT

S. P. KHARE, J. – This is a defendant's second appeal under Section 100 C.P.C. The following substantial question of law was formulated by the order dated 22.7.1993 at the time of admission of the appeal :

> "Whether letting out of residential accommodation by the plaintiff shortly before the institution of the suit negatived the plaintiffs" suit for *bonafide* residence of the suit accommodation under Section 12(1)(e) of the M. P. Accommodation Control Act, 1961."

The facts relevant for the decision of the question referred above are that the defendant is tenant of the plaintiffs for the last 35 years at a monthly rent of Rs. 40/- on the ground floor of the house. The plaintiffs are in occupation of the first floor. Kailash Srivastava was also the tenant of the plaintiffs in this house. He was having one room on the first floor, one room on the ground floor and some other accommodation. The plaintiffs filed a suit for eviction against him on the ground provided in Section 12(1)(e) of the M. P. Accommodation Control Act, 1961 stating therein that the accommodation was required by them for the residence of the members of the family. That suit was decreed. The plaintiffs got possession of that accommodation but it was let out to Khemchand. All this is borne out from the evidence of plaintiff Nanakchand (P.W.-1) in his cross-examination. He was specifically asked as to why he let out that accommodation and did not occupy it for the residence of his family members. The only explanation which he gave was that he wanted to reconstruct that portion but he had no means to do so and therefore he has let it out at a monthly rent of Rs. 40/- to Khemchand. This is not a satisfactory explanation. He does not say that the said portion was not reasonably suitable for the members of his family. As a matter of fact that was more convenient as one of the rooms of that accommodation was on the first floor just adjacent to the accommodation already in possession of the plaintiffs. This circumstance is very material and strikes at the *bonafides* of the plaintiffs. This circumstance was not at all taken into account by the trial Court and the first appellate Court brushed it aside without any cogent reason. The accommodation in possession of the defendant is not more than what Kailash Srivastava had vacated.

Sarju Prasad Patel v. Nanakchand, 1999.

In *S. S. Gupta* v. *M. C. Gupta* (1) (October issue)after reviewing the entire case law of this Court and of the Supreme Court it has been held that the degree of intensity contemplated by the word "requires" is much more higher than in a mere desire. That should be capable of successfully withstanding the test of objective determination by the Court. The need should be natural, real, sincere and honest. It has been further observed that the availability of an alternate accommodation with the landlord i.e. an accommodation other than the one in occupation of the tenant wherefrom he is sought to be evicted has a dual relevancy. Firstly, the availability of another accommodation, suitable and convenient in all respects as the suit accommodation, may have an adverse bearing on the finding as to *bona fides* of the landlord if he unreasonably refuses to occupy the available premises to satisfy his alleged need. Availability of such circumstance would enable the Court drawing an inference that the need of the landlord was not a felt need or the state of mind of the landlord was not honest, sincere and natural.

In the present case the plaintiffs needed the additional accommodation for their family members keeping in view the size of the family and the accommodation already in their occupation but the said need on an objective appraisal is not "*bonafide*". It is not sincere and honest. As already stated the explanation of the plaintiff for not using the accommodation vacated by Kailash Srivastava is not at all convincing and robs the *bonafides* of his need. The two Courts have totally ignored this material circumstance and therefore the finding arrived at by them is perverse and unreasonable. That gives rise to a substantial question of law. (*Mehrunissa* v. *Visham Kumari*, (2). This is not a mere appreciation of evidence but it is ignoring and not reading the material evidence.

This appeal is allowed. The judgment and decree of the trial Court and the first appellate Court are set aside and the suit of the plaintiffs for eviction is dismissed. Costs as incurred.

Appeal is allowed.

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(1) A. I. R. 1999 S. C. 2507.

(2) A. I. R. 1998 S. C. 427.

APPELLATE CIVIL

Before Mr. Justice J. G. Chitre.
8 February, 2000.

M. P. E. B. JABALPUR and another ...Appellants*

v.

RAMESHCHANDRA & Ors. .. Respondents

Civil Procedure Code (V of 1908)–Section 100–Second Appeal–Erection of High Tension Electricity tower by Electricity Board resulting in non-use of land-Holder entitled to compensation–Before erecting the tower it was necessary for the Electricity Board to approach the State Govt. for acquisition of land and pay compensation to the holder.

Before erecting that tower it was necessary for the M P.E.B. to make a request to the State Govt. for the purpose of taking appropriate steps for the purpose of acquiring the said land not only that particular non-danger-zone but appropriate adequate surrounding land also and that too by paying appropriate compensation. The reasons are not known to this court as to what prevented M P.E.B. from taking appropriate steps. This Court reminds M.PE.B. and all other authorities which are dealing with electrical instruments, installation of towers and errection of wires for the purpose of its flow from one place to other that they are obliged to take all necessary care for the purpose of ensuring that public life is not endangered in any sense.

The two Courts below have considered this aspect correctly except the points which have been mentioned vividly mentioned in the above mentioned paragraphs. This Court has, therefore, no hesitation in confirming the concurrent, findings recorded by the two courts below awarding payment of compensation. In addition to this, in the interest of justice this court directs that appellant M.P.E.B. should move the State Government through Collector, Khargone respondent No. 3 to acquire not that particular non-danger area but one acre of the land which is adjoining to that tower and comes in proximity, periphery of it.

S. S. Garg for the appellant.

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*S. A. No. 378/90.

A. S. Kutumble for Resp. no. 1.

Smt. M. Chafekar for Resp. no. 2 & 3.

Cur. adv.vult.

JUDGMENT

J. G. CHITRE, J. – This appeal has been admitted on the following substantial questions of law :

> "(1) Whether under Indian Telegraph Act, 1885 before erecting the electric-tower the M. P. Electricity Board has to get the land acquired under the Land Acquisition Act ?
>
> (2) Whether an injunction for removing the electric tower erected under the Indian Telegraph Act can be granted in the circumstances of the case ?
>
> (3) Whether the land owner can get compensation for non-user of land covered by the electric tower erected by the M. P. Electricity Board ?"

The facts need to be stated for the purpose of unfolding the controversy. The respondent No. 1 filed the suit in the court of Civil Judge Class II, Khargone which was numbered as 53-A/83 where he averred that he is the owner of Survey No. 48 situated in Sukhpuri of Tehsil Khargone admeasuring 3.10 acres of land which is involved in the controversy. Out of Survey No. 47, 4.50 acres of land has been converted for non-residential purpose. In the year 1981 the appellant erected an electric-tower in the said land for the purpose of holding high tension wires. The respondent No. 1 averred that on account of erection of the said tower and presence of high tension wires his land admeasuring 1 acre has been totally put to non-use. Therefore, he is entitled to receive compensation in that context to the tune of Rs. 1,000/- per annum as *mesne profit*. He prayed that the appellants be directed to remove that tower by issuing the mandatory injunction by the Court. The present appellant took the stand that the erection of the said tower was in the interest of public at large and, therefore, there was no question of removing it from the said land. It has been contended that if that tower is removed there would be disturbance in the distribution of electricity to the adjoining villages. It seems from the record that the State preferred not to take up any stand but to obey the orders of the court.

The trial court granted the decree in favour of respondent No. 1. That was confirmed by 1st appellate court and the M.P.E.B. (present appellant) has approached this court for setting aside the judgments and decrees passed by the two courts below.

Shri S. S. Garg reiterated the stand taken by the M.P.E.B. and pointed out that in view of the provisions of Section 10(d) of the Indian Telegraph Act, 1885 (hereinafter referred to as the 'Telegraph Act' for convenience) it has been provided that in exercise of the powers conferred by Section 10, the telegraph authority shall do as little damage as possible, and when it has exercised those powers in respect of any property other than that referred to in clause (c), shall pay full compensation to all persons interested for any damage sustained by them by reason of the exercise of those powers. He further submitted that the said power has been conferred on M.P.E.B. by provisions of Section 42 of the Electricity (Supply) Act, 1948 (hereinafter referred to as 'the Electricity Act' for convenience) which provide that notwithstanding anything contained in Sections 12 to 16 and 18 and 19 of the Indian Electricity Act, 1910 but without prejudice to the requirements of section 17 of that Act where provision in such behalf is made in a sanctioned scheme, the Board shall have, for the placing of any wires, poles, wall-brackets, stays, apparatus and appliances for the transmission and distribution of electricity, or for the transmission of telegraphic or telephonic communications necessary for the proper co-ordination of the works of the Board, all the powers which the telegraph authority possesses under Part III of the Indian Telegraph Act, 1885 with regard to a telegraph established or maintained by the Government or to be so established or maintained, Provided that where a sanctioned scheme does not make such provision as aforesaid, all the provisions of Sections 12 to 19 of the first mentioned Act shall apply to the works of the Board.

Placing reliance on the provisions, Shri S. S. Garg submitted that the M.P.E.B. was well within its jurisdiction and power in utilising the said land for the purpose of erecting an electric-tower. He submitted that at the most 30 feet land by both sides would be effected but that has to be permitted, because the said tower has been erected there for the larger interest of the people at large. Shri Garg further submitted that by the presence of such high tensioned wires there would be no danger to the life of respondent No. 2 or his servants because

they are expected to take care to see that they themselves remain away from the danger zone.

Shri Kutumbale submitted that he is unable to agree with Shri Garg because by presence of the said tower and high tensioned electricity-wires, the entire big portion of the land admeasuring about one acre has been made useless for agricultural purpose. He submitted that either the said tower is to be removed or appropriate compensation is to be awarded to the respondent No. 1 by Govt. of M. P. acquiring the said land and by paying appropriate compensation to him.

Mrs. Meena Chafekar submitted that the State would take the action if directed by this court for the purpose of acquiring the said portion of the land but the compensation will have to be paid by the M.P.E.B. because for their benefit the said land is to be acquired. She submitted further that the M.P.E.B. was required to assess the possibility of the danger which was likely to be created by presence of such tower and high tensioned wires. The M.P.E.B. has errected such tower and brought the high tensioned wires in the said field. She further submitted that the presence of that tower and the holding of such wires is a necessary thing to be done by the concerned authority for the purpose of development of that region. She pointed out that respondent would also be benefitted by it, either directly or indirectly.

It is true that when the welfare State is looking towards the development of its subjects, the State has to adopt a proper benevolent approach. Therefore, the stand taken by the State Government to abide by the judgment and orders of the court is a welcome sign. That should have been adopted by the M.P.E.B. right from the beginning. When an authority is creating a structure in the field of a citizen which was being used for the purpose of agriculture or habitation, a survey has to be done keeping in view the possibility of running day to day routine life. Then that happens to be an agricultural land a sufficient idea has to be acquired before errecting such a tower as to whether such person is likely to be deprived of his livelihood. At the same time a circumspection will have to be taken for the purpose of assessing as to what minimum damage would occur to the said land owner or his family members. If that is not done, the law would step forward for the purpose of redressing the injury of the "wronged", by process

of law. While implementing that process of law the court would pass appropriate order directing such authority to fulfil its obligation.

When something is to be done for the purpose of uplifting of a development of a particular area, the citizens are also expected to sacrifice but that sacrifice should not be a total one. When the State or the authority is acquiring a property of the subject it is or obliged to part with appropriate compensation for that. Even the compensation will have to be parted for compensating the loss of use of such land or the property. Therefore, this court does not find anything wrong in the prayer made by respondent No. 1 when he filed the suit in the Civil Court that he should be given compensation for the purpose of use of that land permanently finally or for temporary use of that land.

This Court dismisses the submissions advanced by Shri Garg which suggested that only a small portion of land ad-measuring 30 feet to either side of high tension wires would be set to non-use. That is no so. If the common experience of agricultural life is brought in the picture it would disclose that in rainy season the entire land becomes wet on account of rains. The humidity created by rainy season is also to be considered when presence of high tensioned wires in the agricultural field is being considered.

It is to be kept in mind that a farmer would not only make his movements in the said zone but he would be taking his agricultural implements like tractor, trolley, plows etc. The high tensioned wires would be creating always a danger to the normal activities of a farmer, and to the human and animal life.

It is a well settled rule of law in torts that one who errects a dangerous structure has to take care that no-body suffers from the effects of the presence of such dangerous structure. Even putting the boards would not be sufficient in respect of the field like the field which is in question. Respondent No. 1 may take care to see that in his presence no-body goes in the said danger-zone, but the cattle belonging to respondent No. 1 or small children from the family of respondent No. 1 are likely to go near the said danger-zone in his absence. What sort of measures M.P.E.B. would be taking in this context when the said tower happens to be in an isolated land like the agricultural field owned by respondent No. 1, Shri Kutumbale has pointed out that a person had died on

6.9.99 named Baboo S/o. Chhaganlal Mankar, aged 30 years when he was in the proximity of that danger-zone. High Tensioned wires are always creating not only high tension but are likely to create serious apprehensions. How long the respondent No. 1 and his family members should be harbouring from such tension and apprehension in their minds ? Apart from that there is nothing on record to show that a sophisticated system has been used for regulating the flow of such high tensioned wires for dealing with high tensioned wires. The presence of such wires is always electrifying and dangerous too. Non-control, non-regulated flow of electricity of high tension through such high tensioned wires would be always creating an apprehension in the mind of respondent No. 1 and, therefore, this court finds substance in his submission that one acre of land has been totally put to non-use. When that is so put to non-use impliedly it has been ruined, as he is not entitled to get compensation for it. The answer would be in affirmative by all corners, to all substantial questions of law.

If that is so than who has to pay the compensation ? Mrs. Chafekar has submitted that the said tower has been errected by M.P.E.B. and its presence is necessary for the purpose of welfare and development of the persons residing in the said locality. However, it being an autonomous body the expenditure will have to be borne out by it. This court finds substance in it because before erecting that tower it was necessary for the M.P.E.B. to make a request to the State Govt. for the purpose of taking appropriate steps for the purpose of acquiring the said land, not only that particular non-danger-zone but appropriate adequate surrounding land also and that too by paying appropriate compensation. The reasons are not known to this court as to what prevented M.P.E.B. from taking appropriate steps.

This court reminds M.P.E.B. and all other authorities which are dealing with electrical instruments, installation of towers and errection of wires for the purpose of its flow from one place to other that they are obliged to take all necessary care for the purpose of ensuring that public life is not endangered in any sense. We talk of deaths of human-being but that is not by itself sufficient. They have to take care that no injury is caused to the persons or animals likely to move around such electric-instruments including wires. Non-danger zone is not the only criterian because non-sophisticated, regulating machinery is being used in regulated flow of electricity from such wires which would be dangerous

to the human life causing injuries. That may cause injuries to animals also. This is not permissible in today's modern civilized society. Every-body has to take appropriate care and is liable to make compensation in respect of that. It is not only restricted to that aspect but every-body who is causing danger to property should also be ready to pay the compensation in that context and that compensation would not be restricted to non-danger area but its surroundings also. Its periphery would also be required to be considered not remotely but proximately too, by having a reasonable approach. That leads this court to think whether the respondent No. 1 is entitled to get interim compensation. Rs. 1,000/-per annum as the interim compensation which has been awarded by the trial court and which has been confirmed by the first appellate court. This court finds that amount is sufficient to meet the urgent need or urgent difficulties of respondent No. 1.

The two courts below have considered this aspect correctly except the points which have been mentioned vividly mentioned in the above mentioned paragraphs. This Court has, therefore, no hesitation in confirming the concurrent, findings recorded by the two courts below awarding payment of compensation. In addition to this, is the interest of justice this court directs that appellant M.P.E.B. should move the State Government through Collector Khargone respondent No. 3 to acquire not that particular non-danger area but one acre of the land which is adjoining to that tower and comes in proximity, periphery of it. Needless to point out that it is to be acquired by following due process of law and paying adequate compensation to respondent No. 1 M.P.E.B. should take out appropriate sum which it should deposit with the Collector Khargone for the purpose of paying approximate compensation to respondent No. 1 if that land needs to be acquired by State of M. P. by way of a proposal made by respondent No. 3 Collector Khargone. This court directs that appellant Collector Khargone and State of M. P. should take immediate steps in this context because this court would not permit the persons who are likely to have movements near such tower touching danger zone and facing its unhappy consequences.

The appellant has to pay the cost for this litigation because *prima facie* the appellant is blamed for coming to this court when two courts below had recorded concurrent findings against the appellant. Appellant to bear its own cost and to pay the cost to respondents also, because respondents No. 2 and 3

have been unnecessarily dragged into this litigation on account of no prior steps taken for acquiring the said land before installation of the said tower. It is made clear that the prayer made by respondent No. 1 for removing the said tower is hereby rejected for the time being. If the appellant does not take the steps for acquiring the said land within six months from receiving certified copy months the respondent No. 1 would be permitted to move this court for appropriate action. Needless to point out that the said acquisition of the land would be result of the said suit and, therefore, the respondent No. 1 is not expected to raise unnecessary and flimsy objections during the land acquisition proceeding which is expected to be started by respondents No. 2 and 3 for the benefit of appellant.

Appeal dismissed.

APPELLATE CIVIL

Before Mr. Justice S. C. Pandey,
24 February, 2000.

THE CHAIRMAN, GRAMIN VIDYUT SAHKARI SAMITI, MARYADIT, REWA and two others ...Appellants*

v.

RAJESH KUSHWAHA and others ...Respondents.

Court Fees Act (VII of 1870)–(Amendment Act, 1997)–Section 5 and Article 1-A of Schedule I–Change in Court fee–Effect–The right of appeal is a vested right which accrues from the date lis commences such right is to be governed by the law prevailing at the time of institution of suit for proceeding–Amendment shall not have retrospective effect–Pre-amendment rate of Court fee shall apply to appeals filed prior to amendment–Order of Taxing Officer confirmed.

If the new Amendment Act is applied from the date of commencement to cases where the suit was already pending on the date of commencement, a

F. A. 463/98.

number of plaintiffs shall be required to pay higher court fees in most of the cases. There may be reduction of Court fees in the cases like that of the appellants. The intention was to enhance the court fee. Therefore, the contention raised on behalf of the appellants is rejected. The persons like the appellants shall be liable to pay martinally more fee under the old law than most of the persons who would be governed by the Amendment. Therefore, it would not be correct to say that the intention of the Legislature was to reduce the Court fee. The question of giving effect to intention of Legislature by holding it to be retrospective in operation does not arise.

The Court Fees (Madhya Pradesh Amendment) Act, 1997 (No. 12 of 1997) is not retrospective in operation. It does not apply to those suits which were filed prior to its commencement i.e. Ist April, 1997; and consequently, it does not apply to those appeals arising out of suits filed prior to Ist April, 1997.

Arjuna Govinda v. *Amrita Keshiba and others* (1), *Radhakisan Laxminarayan Toshnival* v. *Shridhar Ramchandra Alshi and others* (2), *Garikapati Veeraya* v. *N. Subbiah Choudhary and others* (3) and *Colonial Sugar Refining Co. Ltd.* v. *Irving* (4); relied on.

V. S. Choudhary for the appellants.

Ravish Agrawal for *amicus curiae.*

Cur. adv. vult.

ORDER

S. C. PANDEY, J. – This is a reference under Section 5 of the Court Fees Act 1870 (henceforth 'the Act'). The Taxing Officer was of the opinion that the appellant was liable to pay court fees at the rate of Rs. 1,430/- on the valuation of Rs. 12,170/- and not at the rate of Rs. 1,260/- as would be leviable after commencement of Amendment Act No. 12 of 1997, dated 1.4.1997. This Amendment Act of 1997 has modified the Article 1-A of Schedule I to the Act, reducing the amount of court fees payable on valuation of Rs. 12,170/- to Rs.

(1) A. I. R. 1956 Nag. 281. (2) A. I. R. 1950 Nag. 177.
(3) A. I. R. 1957 S. C. 540. (4) 1905 A. C. 369.

1,260/-. The appellants would be liable to pay Rs. 1,430/- on the same amount if the amended Article 1-A of Schedule I aforesaid was not applied to the case at hand. The order passed in this reference shall also govern the question of payment of court fees in the connected First Appeal Nos. 464/98, 465/98 and 467/98, as well as the appeals wherever the question of payment of court fees answered by this reference is involved.

Ordinarily, the view of the Taxing Officer would be final in a given case. However, looking to the general importance of the case, the matter has been referred to under Section 5 of the Act.

I have heard Shri V. S. Choudhary, learned counsel for the appellants and Shri Ravish Agrawal, Advocate, as *Amicus Curiae*. Nobody else appeared to help this Court on behalf of the Bar or the State Government.

Both the learned counsel argued that the Taxing Officer is not correct in requiring the appellants to pay more court fees when the relevant schedule of the Act stood amended requiring the appellants to pay less court fees on the date of filing the appeal, i.e. 21st of September, 1998. It was argued that the amendment became operative from the date it came into force and it would apply to all these appeals which were filed subsequent to the amendment, irrespective of the fact, what court fees was paid initially on the plaint. In other words, the amendment was retrospective in the sense that it applied to all the suits filed before the commencement of the Act.

Having heard the counsel, and after considering the matter in all its broadest perspective, I am of the opinion that the opinion of the Taxing Officer has to be accepted as against the contentions of the learned counsel, who opposed the acceptance of the reference, for the following reasons.

The Taxing Officer has rightly referred to the decision of Nagpur High Court in the case of *Arjuna Govinda* v. *Amrita Keshiba and others* (1) for the proposition that right of appeal is a substantive right as distinguished from a mere procedural right. It inheres in a party at the time of the filing of initial proceedings or the plaint in a suit. It continues till the civil suit is finally disposed of exhausting all rights initially vested in a party at the time of filing of the suit or

(1) A. I. R. 1956 Nag. 281.

the proceedings. This inherent right can be taken away by making an express provision in the Amending Act. If such a provision is made expressly or it is implied than operation of the amending Act would be retrospective, affecting the vested right of the parties in all pending action. In absence of an express or implied provision, the procedural right may be taken away with the retrospective effect, but not a substantive right. The proposition follows from the rule of interpretation that no party has a vested right to a particular procedure. However, it is equally well established that same cannot be said a substantive right, if it is a vested right then the Legislature can take it away by saying in so many words or by clear intendment. This proposition was accepted by a Full Bench of Nagpur High Court in *Radhakisan Laxminarayan Toshnival* v. *Shridhar Ramchandra Alshi and others* (1). It is of no use to multiply the cases on this point because Five Judge Bench of Supreme Court in the case of *Garikapati Veeraya* v. *N. Subbiah Choudhary and others* (2), by majority has applied the above principle. In that case, the Supreme Court was required to consider whether a decision in a suit filed in the year 1949, was appealable to the Supreme Court as of right because it involved property worth more than Rs. 10,000/-. It was objected to that it would not be so appealable on the date of filing of the appeal. The amended provisions did not permit filing of appeal to Supreme Court merely because the property was worth Rs. 10,000/- or more. The requirement was that the value of the property should be Rs. 20,000/- or more. The Supreme Court by majority held that the appeal lay as of right. In doing so, the Supreme Court accepted the decision of the Privy Council in *Colonial Sugar Refining Co. Ltd.* v. *Irving* (3) S. R. Das, C. J., speaking for the majority, laid down the five propositions after exhaustively considering the relevant previous authorities. He overruled the earlier decisions laying down the contrary view. These propositions are reproduced at page 553 of the AIR report as follows :-

> "(i) That the legal pursuit of a remedy, suit, appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic unity and are to be regarded as one legal proceeding.
>
> (ii) The right of appeal is not a mere matter of procedure but is a substantive right.

(1) A. I. R. 1950 Nag. 177. (2) A. I. R. 1957 S. C 540.
(3) 1905 A. C. 369.

The Chairman, Gramin Vidyut Sahkari Samiti, Maryadit, Rewa v. Rajesh Kushwaha, 2000.

(iii) The institution of the suit carries with it the implication that all rights of appeal then in force are preserved to the parties thereto till the rest of the career of the suit.

(iv) The right of appeal is a vested right and such a right to enter the superior Court accrues to the litigant and exists as on and from the date the lis commence and although it may be actually exercised when the adverse judgment is pronounced such right is to be governed by the law prevailing at the date of the institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of the filing of the appeal.

(v) This vested right of appeal can be taken away only by a subsequent enactment, if it so provides expressly or by necessary intendment and not otherwise."

The amendment was brought upon by the Court Fees (Madhya Pradesh Amendment) Act, 1997 of which the following is the Statement of Objects and Reasons :-

"Statement of Objects and Reasons.- The Finance Minister while presenting the Budget for the year 1997-98, has in this speech announced that the State Government has decided to augment revenue by levying tax including enhancement of rate of Court Fees.

It is, therefore, proposed to amend the Court Fee Act, 1870, (No. VII of 1870) in its application to the State of Madhya Pradesh, suitably.

Hence this Bill."

It would be clear that the amendment was brought with the avowed ntention i.e. "augmenting the revenue" by enhancing the rate of Court Fees. The general object of the amendment of substituting new Article 1-A of Schedule I of the Act was to increase the *ad valorem* levy of the Court fees on plaints and consequently, on the appeals of same value. The amendment was not for reducing the court fees. It appears that the Legislature, in order to make general enhancement, has levied 10% on Rs. 10,000/- plus 12% on the amount or value in excess of Rs. 10,000/- upto Rs. 5 Lacs. It may be that the appellant is required to pay less amount because his valuation of appeal is Rs. 12,170/- which is

more than Rs. 10,000/-. There appears to be a marginal benefit in a given case although the Legislature wanted to increase the court fees generally. The decrease in the court fee is not universal. Take the case of a person required to pay court fees on the valuation of Rs.50,000/-. He would be required to pay Rs.5,800/- instead of Rs. 4,505/-, which is more than what was fixed earlier. There is progressive enhancement of court fee under the new amendment on higher valuation. An amendment which was meant to enhance the court fee cannot be said to be in benefit of the litigant. It is expressly for enhancing the revenue of the State. It has, therefore, to be strictly construed. Nor can benefit be given to the appellants alone. If the new Amendment Act is applied from the date of commencement to cases where the suit was already pending on the date of commencement, a number of plaintiff shall be required to pay higher court fees in most of the cases. There may be reduction of court fees in the cases like that of the appellants. The intention was to enhance the Court fee. Therefore, the contention raised on behalf of the appellants is rejected. The persons like the appellants shall be liable to pay martinally more fee under the old law than most of the persons who would be governed by the Amendment. Therefore, it would not be correct to say that the intention of the Legislature was to reduce the Court fee. The question of giving effect to intention of Legislature by holding it to be retrospective in operation does not arise.

Accordingly, I am of the view that the Court Fees (Madhya Pradesh Amendment) Act, 1997 (No. 12 of the 1997) is not retrospective in operation. It does not apply to those suits which were filed prior to its commencement i.e. 1st April, 1997; and consequently, it does not apply to those appeals arising out of suits filed prior to 1st April, 1997. Let the cases be sent back to the Taxing Officer, who shall, in the light of reference answered in all these cases, require the learned counsel for the appellants to pay the deficit of court fees within a reasonable time. The reference is answered accordingly.

Before parting with the case, I express my debt of gratitude of Shri Ravish Agrawal, Advocate, who appeared *Amicus Curiae* and helped me in rendering this opinion.

Reference answered accordingly.

APPELLATE CIVIL

Before Mr. Justice S. C. Pandey.
2 March, 2000.

ZAFAR HUSSAIN SIDDIQUE ...Appellant*

v.

PRINCIPAL, SAFIA COLLEGE, BHOPAL and another ...Respondents.

Civil Procedure Code (V of 1908)–Section 100–Appeal–Service Law–Suit for declaration–Madhya Pradesh Ashaskiya Sikshan Sanstha (Adhyapakon Tatha Anya Karmchariyon Ke Vatano Ka Sandaya) Adhiniyam, 1978–Section 6(a)(iii) and Madhya Pradesh Ashaskiya Shikshan Sanstha (Adhyapakon Tatha Anya Karmchariyon Ke Padachyut Karne Sewa Se Hatane Sambandhi Prakriya) Niyam, 1983–Conditional grant of leave for taking job in a foreign company–So called Termination order not served on plaintiff–Effect–Services not validly terminated–Consequential Benefits–Effect of adjudication of civil Court is to declare that person had been wrongfully prevented from attending to his duties as Government servant–Person entitle to remuneration which he would have been earned had he been permitted to work–Re-instatement with consequential benefits allowed.

An order passed totally in disregard of the statutory rule framed under the Adhiniyam and also without proof that it was ever served on the appellant, the respondents cannot claim that the services of the appellant were validly terminated. Accordingly the question of law, framed on 14.9.1998, is decided against the respondents and in favour of the appellant and the Cross-objection filed by the respondents is hereby dismissed.

The trial Court, therefore, directed, on the admission of the appellant, that he was entitled to get the consequential benefits from January, 1988. The lower appellate Court has, however, not given any explicit reason for interfering with the conclusion of the trial Court and this Court is of the view that when a person is reinstated, he is entitled to all the consequential benefits flowing from the order of the reinstatement in a civil suit.

*S. A. 762/96.

Zafar Hussain Siddique v. Principal, Safia College, Bhopal, 2000.

Devendra Pratap Narian Rai Sharma v. *State of Uttar Pradesh and others* (1); relied on.

Ashok Lalwani for the appellant.

Smt. Shobha Menon for the respondent.

Cur. adv. vult:

JUDGMENT

S. C. PANDEY, J. – This appeal, under Section 100 of the Code of Civil Procedure, is directed against the judgment and decree dated 3.7.1996 in Civil Appeal No. 34-A/96 passed by 7th Additional Judge to the Court of District Judge, Bhopal arising out of judgment and decree dated 2.4.1996 in Civil Suit No. 30-A/91 passed by Ist Civil Judge Class II, Bhopal.

The appellant - plaintiff Zafar Hussain Siddique was appointed as a Lecturer of Botany in Safia College, Bhopal in the year 1971. He was granted leave without payment to proceed to Nigeria on condition between the period from 5 9.1981 to 4.9.1983 for taking there job. The condition precedent, however, was that on his return, the appellant shall contribute Rs. 5,000/- towards the development of the Safia College, Bhopal, where he was working. The Safia College was being run by the Safia Education Society, Bhopal - respondent No. 2. It is also not disputed that the respondent No. 2 receives grant from the State Government and was covered by Madhya pradesh Ashaskiya Shikshan Sanstha (Adhyapakon Tatha Anya Karmchariyon Ke Vetano Ka Sandaya) Adhiniyam, 1978 (henceforth 'the Adhiniyam'). According to the allegations made in the plaint, it was held that initial leave granted to the appellant was extended upto 1985. It was claimed by the appellant, that when he came back to Bhopal in September, 1985, after completing the full period of leave, he was not permitted to join the duty in the safia college, Bhopal by the respondents. His request to the State Government, which was defendant No. 3 in the suit, was not of any avail. Thereafter, the appellant filed the civil suit for declaration that he was in service with effect from September, 1985 because the respondents have arbitrarily denied him his right to continue in service even though he was ready

(1) A. I. R. 1962 S. C. 1334.

and willing to pay Rs. 5,000/- as per initial condition of grant of leave without payment. It was claimed that instead, the respondents demanded Rs. 25,000/- and, therefore, he was not allowed to join the duties.

The respondents did not dispute that the appellant was permitted to go abroad on leave without payment from 5.9.1981 to 4.9.1983. However, it was claimed by the respondents that thereafter his leave was not extended and, therefore, the appellant wilfully remained absent from his duties without permission of the competent authority i.e. the governing body of the Safia College. Thereafter, it was claimed that the services of the appellant were terminated with effect from 1.4.1985 and the information was sent to the State Government, the defendant No. 3 in the suit. It was also stated that Rs. 5,000/-, as per the condition of grant of leave, were not offered by the appellant and, therefore, the appellant had no right to remain in service.

The trial Court decreed the suit holding *inter alia* that the termination of the services of the appellant with effect from 5th September, 1983 as per Ex.-D-8 was illegal, as it was in violation of Section 6(a)(iii) of the Adhiniyam. It was held that the procedure prescribed as per the Madhya Pradesh Ashaskiya Shikshan Sanstha (Adhiniyam Tatha Anya Karmchariyon Ko Padachyut Karne Sewa Se Hatane Sambandhi Prakriya) Niyam, 1983 (henceforth 'the Niyam') was not followed. Having held that the order of termination of the appellant was bad in law, the trial Court further held that the appellant shall be deemed to be in service and consequently he was entitled to get all the consequential benefits attached to his post with effect from the year 1988. This was so done because the appellant admitted that during pendency of the suit, he again went to Nigeria and remained there till 1988.

In appeal, the learned Additional District Judge held that termination of services of the appellant was illegal and, therefore, he was entitled to declaration that he is liable to be reinstated. It was, however, held that the appellant was not entitled to benefit from January, 1988 but from the date of the decree of the trial Court i.e. from 1.4.1996 and accordingly the appeal filed by the respondent Nos. 1 and 2 was partly allowed.

This Court, by order dated 09.05.1997, admitting this appeal, framed the following substantial question of law :-

Zafar Hussain Siddique v. Principal, Safia College, Bhopal, 2000.

"Whether the lower appellate Court was right in reversing the decree passed by the trial Court on the quantum of salary ?"

The above question of law was framed by this Court at the instance of the appellant and it needs a slight modification. In fact, the decree of the trial Court was not reversed by the lower appellate Court on quantum of salary and, therefore, the question of law framed by this Court on 09.05.1997 is reframed as follows :-

"Whether the lower appellate Court was right in reversing the decree passed by the trial Court on the question of grant of consequential benefits with effect from the date of decree of the trial Court and not from January, 1988 ?"

The second question of law was framed by this Court at the instance of the respondents, who filed the cross-objection, by order dated 14.9.1998, as follows :-

"Whether the two Courts below erred in law in holding that the termination of service of the plaintiff is not in accordance with law ?"

Learned counsel for the respondents, who had filed the cross-objection, was not able to challenge the order of the Court below to the effect that there was violation of Section 6(a)(iii) of the Adhiniyam and the provisions of the Niyam. Further when questioned by the Court, 'Whether Ex.-D-8 was ever served upon the appellant ?', she was unable to reply as there is no evidence on record whether a copy of Ex.-D-8 was ever sent to the appellant on the address given by him at Bhopal or at Nigeria. Under these circumstances, this Court comes to the conclusion that an order passed totally in disregard of the statutory rule framed under the Adhiniyam and also without proof that it was ever served on the appellant, the respondents cannot claim that the services of the appellant were validly terminated. Accordingly, the question of law, framed on 14.9.1998, is decided against the respondents and in favour of the appellant and the cross-objection filed by the respondents is hereby dismissed.

As far as the question of consequential benefits is concerned, this Court fails to understand why the lower appellate Court granted consequential benefits with effect from date of the decree of the trial Court. The appellant had himself

volunteered to say that he was not in India till January, 1988 and he was otherwise gainfully employed in Nigeria and, therefore, he was not claiming any benefit. The trial Court, therefore, directed, on the admission of the appellant, that he was entitled to get the consequential benefits from January 1988. The lower appellate Court has, however, not given any explicit reason for interfering with the conclusion of the trial Court and this Court is of the view that when a person is reinstated, he is entitled to all the consequential benefits flowing from the order of the reinstatement in a Civil Suit. This view is supported by the decision in the case of *Devendra Pratap Narian Rai Sharma* v. *State of Uttar Pradesh and others*. In that case, their Lordships of the Supreme Court held at para 11 as follows :-

> "Para 11 : xxxx xxxx xxxx xxxx
>
> This rule has no application to cases like the present in which the dismissal of a public servant is declared invalid by a civil court and he is reinstated. This rule, undoubtedly enables the State Government to fix the pay of a public servant whose dismissal is set aside in a departmental appeal. But in this case the order of dismissal was declared invalid in a civil suit. The effect of the decree of the civil suit was that the appellant was never to be deemed to have been lawfully dismissed from service and the order of reinstatement was superfluous. The effect of the adjudication of the civil courts is to declare that the appellant had been wrongfully prevented from attending to his duties as a public servant. It would not in such a contingency be open to the authority to deprive the public servant of the remuneration which he would have earned had he been permitted to work."

Accordingly, the judgment and decree of the lower appellate Court is hereby set aside and that of the trial Court is hereby restored. This appeal succeeds and is hereby allowed. No costs.

Appeal is allowed.

APPELLATE CIVIL

Before Mr. Bhawani Singh, C. J. and Mr. Justice Arun Mishra.
30 September, 2000.

SUNIL BAJPAI and another ...Appellants*

v.

VIVEK BAJPAI & another ...Respondents.

Civil Procedure Code (V of 1908)–Section 96–Appeal–Suit for declaration and injunction–Sale in favour of an outsider by one of co-owners–Compromise between co-owners subsequent to sale deed–Evidence Act, Indian, Section 18–Admission is relevant only if it is made during subsistence of right–Compromise after parting with the interest can not be said to be relevant–Joint Hindu Family property–Purchaser has right in joint family property though he may not claim and also enjoyment jointly–Purchaser has right to obtain partition of the property to the extent of share purchased.

The sale deed was executed on 9.4.1992 whereas the compromise was filed before the High Court subsequent thereto as apparent from Ex.-P-4, judgment and decree passed in compromise pursuant to the directions of this Court in Civil Suit No. 40-A/96. Compromise petition was filed before this Court on 12.11.1992, at that time Vivek Bajpai was having no subsisting right, title or interest with respect to the portion sold by them to defendant No. 2 Kundanlal. As per Section 18 of the Evidence Act an admission is relevant only if it is made during the subsistence of right, title or interest and no admission made after parting with the interest can be said to be relevant or admissible.

Decree for partition cannot be challenged by third person and a stranger has no right to challenge the decree for partition, but, in the instant case a purchaser cannot be said to be stranger not having right to challenge the decree of partition entered into on the basis of a compromise petition that too after alienation was made and without impleading him as party to the compromise petition. True it is that a purchaser *pendente lite* is bound by decree, but, it was case of compromise after parting with the interest. Compromise was entered into which was without any authority. Once right, title or interest of defendant No. 1 came to an end it was not open to defendant No. 1 to enter into the

*F. A. 124/98.

compromise and handover the same portion to the plaintiffs in derogation of the right of purchaser.

The remedy of the purchaser is to file a suit for partition to obtain the physical possession and the defendant No. 1 could not claim such property as his own which he has alienated. The alienation is valid to the extent of his own interest. It does not appear that the purchaser had obtained the possession. The remedy of the purchaser is to obtain the share of his vendor to the similar extent to the property is alienated i.e. to the extent co-owner was having interest.

Shafiullah Khan v. *AbdulWahab* (1), *Diwan Singh* v. *Bhaiyalal* (2) and *Ramdayal* v. *Manaklal* (3); relied on.

K. K. Trivedi for the appellant.

None for the respondents.

Cur. adv. vult.

JUDGMENT

The Judgment of the Court was delivered by

ARUN MISHRA, J. – This is a plaintiff's appeal aggrieved by the dismissal of the suit by 12th Addl. District Judge, to the Court of District Judge, Jabalpur vide udgment and decree dated 1.1.1998 whereby the suit filed by the plaintiffs for leclaration that the registered sale-deed dated 9.4.1992 executed by defendant No. 1 Vivek Bajpai in favour of defendant No. 2 Kundanlal with respect to the House No. 45 of the Block No. 4, Cantt. Jabalpur is not binding on the plaintiffs and defendant No. 2 does not get any right to preliminary title on the said property on the basis of the sale-deed. Relief of restraining the defendant from taking possession of the property on the basis of sale-deed has also been claimed along with costs.

Plaintiffs alleged that they are son and daughter of Late Sant Bajpai who was son of Late Shri B.B.L. Bajpai. B.B.L. Bajpai had two sons; Basant Bajpai and Sant Bajpai. Plaintiffs belong to branch of Sant Bajpai whereas the defendant No. 1 Vivek Bajpai belongs to Basant Bajpai's branch being his son. The house in question belongs to B.B.L. Bajpai and as such the plaintiffs and defendant

(1) 1963 J. L. J. S. N. 14. (2) 1997 (2) J. L. J. 167.
(3) 1973 J. L. J. 764.

Sunil Bajpai v. Vivek Bajpai, 2000.

No. 1 have the equal right on the property in dispute. Plaintiffs further alleged that for partition they had filed the suit. Temporary injunction was issued against Vivek Bajpai not to alienate the property and an undertaking was given on 30.4.1988 not to alienate the property till the disposal of application for injunction. Ultimately an injunction was granted on 21.6.1988 restraining the alienation. Inspite of having the knowledge of order of injunction, the defendants No. 1 executed the registered sale-deed in favour of defendant No. 2 on 9.4.1992 wherein the Block No. 4 of Bungalow No. 45 which is a part of the suit property in the suit for partition was sold. The sale-deed was illegal, improper and unauthorized and was not binding on the plaintiffs. Defendant No. 2 tried to dispossess the plaintiffs from the suit house after purchase of the property. An application for breach of injunction has been filed which is pending consideration. The suit was filed on 31.7.1992. The defendants were proceeded exparte. Plaintiffs examined themselves. It transpires that the civil suit which was filed for partition was ultimately compromised by the parties on 27.11.1996. Compromise was filed on 9.5.1991. Ultimately, on 24.9.1993 in a revision before the High Court the parties agreed that a preliminary decree passed in terms of the compromise entered into between the parties. The revision was allowed and the matter was sent back to the trial Court for recording a preliminary decree in terms of the compromise application. The compromise was filed before the High Court on 12.11.1992. In terms of the compromise entered into between the parties on 12.11.1992 before the High Court preliminary decree was passed by the trial Court and its earlier judgment and decree dated 3.2.1994 was set aside. Before the trial Court the fact was brought to the notice that the during the pendency of the civil suit, earlier suit for partition was decreed and the property was transferred to the share of appellants/plaintiffs. The trial Court by the impugned judgment and decree has dismissed the suit. Trial Court came to the conclusion that the compromise decree entered into between the parties; plaintiffs and defendant No. 1 could not effect the interest of defendant No. 2. The plaintiffs and the defendant No. 1 were aware of the transfer having been made in favour of the defendant No. 2. Still he was not made party to the compromise entered into between the parties in the prior suit. With respect to matter of injunction the trial Court came to the conclusion that it cannot be said that the defendant No. 2 was having the knowledge of order of injunction hence, it cannot be said that the sale-deed was void. It is pertinent to mention that the sale-deed was executed for Rs. 1,60,000/- by defendant No. 1 in favour of defendant No. 2.

Learned counsel Shri K. K. Trivedi, appearing for the appellants has urged in the appeal that the impugned judgment and decree is contrary to law. The specific portion of the joint property could not be alienated by sale-deed. It is his further submission that the injunction ought to have been granted not to disturb the actual possession of the co-owner. It is further submitted that in view of the injunction the sale-deed was clearly unauthorized and did not cloth any right title or interest on the defendant No. 2. It is his further submission that in view of the compromise entered into in a partition suit the same is binding and cannot be challenged by a third party. He has also raised a submission that without consent the property cannot be alienated.

None has appeared for the respondents though served.

The first question which arises for consideration is whether the plaintiffs and defendant No. 1 and the other parties to the partition suit, could compromise in the suit for partition after alienation of the property by defendant No. 1 to defendant No. 2, and it was open to defendant No. 1 after parting with the interest of the property to have entered into compromise to the effect that the property in dispute which was sold to defendant No. 2 be given to plaintiff.

The sale-deed was executed on 9.4.1992 whereas the compromise was filed before the High Court subsequent thereto as apparent from Ex.-P-4, judgment and decree passed in compromise pursuant to the directions of this Court in Civil Suit No. 40-A/96. Compromise petition was filed before this Court on 12.11.1992, at that time Vivek Bajpai was having no subsisting right, title or interest with respect to the portion sold by them to defendant No. 2 Kundanlal. As per section 18 of the Evidence Act an admission is relevant only if it is made during the subsistence of right, title or interest and no admission made after parting with the interest can be said to be relevant or admissible which is the view taken in the decision in case of *Shafuillah Khan* v. *Abdul Wahab* (1), which is reproduced as under :-

> "The statement of a person could be an admission only if it were made during the continuance of his interest. But once he has parted with his interest and property, his admission is not admissible under Sect. 18 of the Evidence Act. It would be manifestly unjust that a person who has parted with his interest and property should be empowered to divest the right of

(1) 1963 J. L. J. S. N. 14.

another claiming under him by any statement which he may choose to make subsequently."

Thus, the compromise entered into between the parties handing over specific share of the property which was sold to the plaintiffs cannot be said to be binding on the defendant No. 2 Kundanlal as in the partition purchaser ought to have been impleaded and then shares could be allotted.

It is settled law that decree for partition cannot be challenged by third person and a stranger has no right to challenge the decree for partition, but, in the instant case a purchaser cannot be said to be stranger not having right to challenge the decree of partition entered into on the basis of a compromise petition that too after alienation was made and without impleading him as party to the compromise petition. True it is that a purchaser *pendente lite* is bound by decree, but, it was case of compromise after parting with the interest. Compromise was entered into which was without any authority. Once right, title or interest of defendant No. 1 came to an end it was not open to defendant No. 1 to enter into the compromise and handover the same portion to the plaintiffs in derogation of the right of purchaser.

Coming to the question whether the defendant No. 1 could alienable the specific portion of the property and the sale-deed can be said to be binding with respect to the specific portion. The plaintiff has entered the witness box. He has clearly deposed that the property was joint and was never partitioned. There is averment in the plaint also which has not been controverted. Thus, it can be said that the portion of the property purchased by Kundanlal was portion of a joint property of the plaintiffs and defendant No. 1. Thus, the purchaser had acquired the right to obtain the partition of the property to the extent of the share sold by defendant No. 1 to defendant No. 2.

Coming to the question whether the sale-deed is void as injunction was granted by the Court on the alienation, there is nothing on record to show that defendant No. 2 was having knowledge of such an injunction order. Hence, the conclusion of the trial Court that the sale-deed cannot be said to be void for that reason calls for no interference.

With respect to prayer for injunction, it is clear that the plaintiffs shall be deemed to be in joint possession of the joint property, hence, they are entitled

for injunction against the purchaser to the extent that he shall not dispossess the plaintiffs from the joint possession of the suit house.

The upshot of the discussion above is that the remedy of the purchaser is to file a suit for partition to obtain the physical possession and the defendant No. 1 could not claim such property as his own which he has alienated. The alienation is valid to the extent of his own interest. It does not appear that the purchaser had obtained the possession. The remedy of the purchaser is to obtain the share of his vendor to the similar extent to the property is alienated i.e. to the extent co-owner was having interest.

We are fortified in our conclusion by Full Bench decision of this Court in case of *Ramdayal* v. *Manaklal* (1), which has been explained by another Full Bench of this Court in case of *Diwan Singh* v. *Bhaiyalal* (2), to the extent that coparcener cannot alienate without consent of the other corparcener, in the case where Banaras Branch of Mitakshara Hindu Law is applicable. In *Ramdayal* v. *Manaklal* (*supra*) it has been held as under :-

> "3. According to the Mitakashra law as administered in Bombay, Madras and Madhya Pradesh, a coparcener may sell mortgage or otherwise alienate for value his undivided interest in coparcenary property without the consent of the other coparceners. But he has no right to alienate, as his interest any specific property belonging to the coparcenary for no coparcenar can before partition claim any such property as his own; and if he does alienate, the alienation is valid to the extent only of his own interest in the alienated property. The question that arises for our consideration is as to what are the rights of the purchaser from a coparcener of a specific property when he has been put in possession thereof. It is now well settled that if the purchaser has obtained possession, the non-alienating coparceners are entitled to sue for and recover possession of the property for the benefit of the joint family, including the vendor. It is also further held in some of the cases that the purchaser is not entitled in such a suit to an order for partition either of the specific property sold to him or of the joint family properties in general, and his remedy is to file a suit for general partition. It has, however, been held by the Madras High Court and the Bombay High Court that to protect the purchaser a further direction should be added that the execution of the decree, so far as it directs the purchaser

(1) 1973 J. L. J. 764. (2) 1997 (2) J. L. J. 167.

to deliver possession to the plaintiffs, be stayed for a specified period, and if before the expiry of that period the purchaser brings a suit for a general partition against the plaintiffs, then the stay should continue until the disposal of that suit, but if no such suit is brought within that period, then the stay of execution will stand cancelled. See : *Kandaswamy* v. *Valayutha* (1) and *Hanmandas* v. *Valabhdas* (2), *Shriram* v. *Baboo* (3) their Lordships have not given any reasons while giving the direction in terms of the decisions of the Madras and Bombay High Courts, presumably because no decision taking a contrary view has been noted by Mulla in his commentary on Hindu Law, 12th Edn., Section 261, where the view of the Bombay and Madras High court have been considered and quoted, and also because the law as to the right of the coparcener of transferring his share without the consent of the other coparceners is the same in Madhya Pradesh as was appliable in the erstwhile Madras and Bombay Presidencies."

At this stage we may note a Privy Council decision in *Ramkishore Kedarnath* v. *Jainarayan Ramarachhpal* (4) in which while remanding the case their Lordships had granted the following declaration :-

"It is competent for the Court, in the event of the respondent Jainarayan failing in his other defences, to make the whole or any part of the relief granted to the plaintiff conditional on their assenting to a partition so far as regards the father's interest in the estate, so as to give effect to any right to which the first respondent might be entitled claiming through his as signor.

This decision clearly indicates that even in the suit filed by the coparceners for possession of the property transferred by one of the coparceners, the alienee of the property may be entitled to ask for general partition of the coparcenary property in the same suit. This decision was followed by the Madras High court in *Ramasami Aiyer* v. *Venkatarama Ayyer* (5). It was held in that case that when relief by way of general partition can be conveniently given to the purchaser in a copercener's suit for possession, as where all the coparceners are parties to the suit and the Court is seized of the whole matter, the purchaser should not be driven to a separate suit. This Court has, however, held that any cases

(1) I. L. R. 50 Mad. 320=A.I.R. 1926 Mad. 774. (2) I. L. R. 43 Bom. 17=A.I.R. 1918 Bom. 101.
(3) F. A. No. 36 of 1961 decided on 9.3.1965 (M.P.). (4) (1913) I. L. R. 40 Cal. 966(981) P.C.
(5) I. L. R. 46 Mad. 815=A. I. R.1924 Mad. 81.

(*sic*) that such a course cannot be followed in the suit filed for setting aside the alienation and that the purchaser should be left to work out his equity by filing a suit for partition. We are not called upon to decide in this case the correctness or otherwise of these decisions. But if the Privy Council thought it proper to allow the alienee to enforce partition of the coparcenary property in a suit filed by non-alienating coparceners, we do not see any reason why the *status quo ante* should not be maintained for a certain time so as to enable the purchaser to work out his equities by filing a suit for partition. It must be noted that this direction is discretionary with the Court and can be given only in suitable circumstances. It is obvious that the purchaser from a coparcener has a right over only that much share of the property which can fall to the share of his vendor and only that much share or part of it can be allotted to the purchaser in the suit for partition filed by him. It, therefore, follows that where the coparcener has alienated property in excess of his own share and has put the alienee in possession thereof, the alienee cannot claim that whole of the property should be allotted to the share of his alienor and consequently to him. In such a case no equity requires that the purchaser should be allowed to retain possession of the property till his right is worked out in a partition suit. The fear expressed by learned Single Judge (The Chief Justice) that the alienee may delay the conduct of the partition suit and may remain in enjoyment of the property for a very long time without any justification is real where the transfer of the property by a coparcener is in excess of his share in the whole coparcenary property; but where the property transferred by the coparcener, of which the purchaser has obtained possession is less than or almost equivalent to the share of the alienating coparcener, no such difficulty can arise. When it is conceded that a purchaser from a coparcener has a right to ask for general partition, it is obvious that his right in the joint family property is recognised, though he may not claim enjoyment jointly of the coparcenary property. The fact, however, remains that he acquires interest immediately on the purchase effected by him and as such, the possession of the property purchased by him, if it is not in excess of the share of his transferror in the coparcenary property, cannot be said to be unjust or inequitable.

5. Under the circumstances, we are of the opinion that the direction of staying the execution proceedings for a certain period enabling the purchaser from a copercener to file a partition suit and, if the suit is filed within that period, to stay the execution till the decree in the partition suit,

can be legally given where the property in possession of the purchaser from a coparcener is not in excess of the share of the coparcener. In other cases such a direction may be said to be inequitable."

In *Diwan Singh* v. *Bhaiya Lal* (*supra*), *Ramdayal's Case* (*supra*) has been explained in paragraph No. 8 and 11, which we quote as under :

"8: The Full Bench decision of this Court in *Ramdayal's case* (*supra*) came up for consideration before two Division Benches of this Court. In *Ramdayal's Case* (1) Hon'ble Shri Justice J. S. Verma (as he then was) was a party so was he to the Full Bench case of *Ramdayals* (*supra*). In F. A. No. 31/68 decided on 14.12.76 the Full Bench decision in the case of *Ramdayal* (*supra*) was explained as under :-

"Shri Gupta relied on some observations in the Full Bench decision in *Ramdayal's Case* (*supra*) to contend that according to the Mitakshara law, as administered in whole of the State of Madhya Pradesh, a coparcener may alienate for value his undivided interest in the co-parcenary so that the sale is not void and the purchaser gets the share of his vendor. This is not a point decided by the Full Bench and observations to that effect in para 3 of the judgment are merely a general statement of the law applicable to formation of the new State on Reorganization of States. There can be no doubt that to some part of the new State of Madhya Pradesh the Banaras School of Mitakshara law applies and the general statement made in the Full Bench decision does not refer to those parts. In the present case itself, in the earlier suit there was no dispute between the parties that the Banaras School of Mitakshara law applied to them and it was on that basis that the suit was decided and the alienation by an undivided co-parcener was held to be void. Those observations in the Full Bench decision have, therefore, to be read confined only to that part of Madhya Pradesh where the Bombay School of Mitakshara law is applicable and not to those portions of the new State of Madhya Pradesh where the Banaras School applies."

"11. In our considered opinion the above quoted observations made by the Division Bench at Gwalior in F.A.No. 31/68 decided on 14.12.76 clear all doubts, if any, created by the decision of Full Bench with regard to the applicability of a particular School of Hindu Law to different integrating States or regions of the newly formed State of Madhya Pradesh. In our

(1) F. A. No. 31/68, decided on 14.12.76 (M. P.) (Gwalior Bench).

opinion the question of applicability of a particular School of Hindu Law to particular parties before the Court would depend upon the pleadings and the facts and circumstances found in each case. There cannot be any general statement of law on that subject with regard to the particular region of State of Madhya Pradesh. In answer to the two questions referred to us, it would suffice for us to answer them relying on the decision of the Division Bench rendered in F.A.No. 31/68 decided on 14.12.76 and reiterate the observations made therein that the Full Bench case of *Ramdayal* (*supra*) does not hold as applicable Bombay School of Mitakshara Hindu Law to all the erstwhile integrative States and regions forming part of the new State of Madhya Pradesh. The question of applicability of a particular school or branch of Hindu Law would have to be decided on the basis of pleadings and evidence led by the parties in each individual case."

There is no pleading that in Mahakoshal region, it is the Bombay School or Banaras School which prevail and the point with respect to consent has not been raised in the plaint. Hence, it cannot be gone into.

In the result, the dismissal of the suit in toto is set aside and decree is passed in the following terms :-

"(i) the sale effected by defendant No. 1 in favour of defendant No. 2 of the specific portion of the house in question is held to be not binding on the plaintiffs. It shall be open to the purchaser to file a suit for partition and to obtain the share of alienating defendant No. 1 in the same proportion and only that much share or part can be allotted to the purchaser in the suit for partition by him which the alienating coparcener had in the joint property.

If the property sold is more than the share of the defendant No. 1, only that share of property be given, to which the defendant No. 2 is entitled.

(ii) the injunction is granted against the defendant No. 2 not to interfere with the possession without obtaining partition."

The appeal is allowed, in part Costs are directed to be borne by the parties as incurred.

Appeal is partly allowed.

APPELLATE CIVIL

Before Mr. Bhawani Singh, C. J. and Mr. Justice A. K. Mishra,
12 March, 2001.

SMT. PRAMILA & others ...Appellants*

v.

SARVAR KHAN & others ...Respondents.

Motor Vehicles Act (LIX of 1988)–Section 173–Motor Accident–Death–Compensation–Appeal for enhancement–Deceased twenty two years of age at the time of accident–Proper multiplier would be seventeen–Award enhanced–Hindu Adoption and Maintenance Act, 1956, Section 21(iii)–Hindu Succession Act, 1956, Section 14 and Constitution of India, Article 15(3)–Indefeasible right of widow to receive her husband's property–Remarriage by wife of deceased–Compensation in Motor accident case is not a maintenance–Legal representative entitled to receive compensation in the event of death of victim–By reason of remarriage widow not disentitled to get compensation–Else there would be violation of Article 15.

The income of deceased from the business of bidi contractor can be fixed at Rs. 900.00 per month and Rs. 10,800.00 per year. from agriculture, his contribution can be put at Rs. 12,000.00 per annum taking the total annual income to Rs. 22,800.00. After deducting 1/3rd therefrom towards personal expenditure, the deceased was contributing a sum of Rs. 15,200.00 to the family per annum. He was 22 years old at the time of accident. Proper multiplier in this case should be 17.

Compensation awarded by Motor Accident Claims Tribunal under the Motor Vehicles Act, 1988, is not maintenance. It is a compensation for the loss sustained by the legal representative(s) for the death of their relation. The legal representatives become entitled to compensation on the occurrence of the accident and death of the relation. Widow has absolute right to compensation allowed by the Claims Tribunal which should not be influenced by the fact that the wife has married after the accident.

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*M. A. 641/1995.

It is considered necessary that a widow marries as early as possible. Therefore, in case she has done so, her claim for compensation can not be defeated by remarriage. It would be highly improper to compel her to lead a life of widow till she receives the compensation on the termination of court case or else forfeit the right.

In this case, the widow marries after the award of compensation in her favour by the Claims Tribunal. The result therefore, is that the plea raised by the two other claimants (parents) in not sustainable and is therefore rejected.

Anju Mukhi v. *Satish Kumar Bhatia and another* (1), *Rajasthan State Road Transport Corporation and others* v. *Kiran Lata and others* (2), *Manjula Devi Bhuta* v. *Manju Shri Raha* (3), *Oriental Fire and General Insurance Co.* v. *Smt. Chandravati* (4), *State of Orissa* v. *Archana Nayak* (5), *Man Indrajit Singh* v. *Sardar Singh* (6) and *Makbool Ahmed* v. *Bhura Lal* (7), referred to.

Ms. Shilpi Chaturvedi for the appellant.

Sanjay Agrawal for respondent no. 3.

Cur. adv. vult.

JUDGMENT

The Judgment of the Court was delivered by **BHAWANI SINGH, CHIEF JUSTICE (ORAL)** – This appeal is directed against the award dated 6.2.1995 of Motor Accident Claims Tribunal, Mudwara in Claim Case No. 28 of 1988.

Claimants are widow of the deceased and his parents. On 19.7.1988, deceased (Anil Pandey) was going to his village Bichha from Katni by Luna. He was moving on the left side of the road but driver of Bus No. UGH 0930 came from opposite side driving the bus rashly and negligently and dashed against the

(1) 1998 (1) M. P. L. J. 25. (2) 1993 A. C. J. 130.
(3) 1967 M. P. L. J. 972=1968 A. C. J. 1 (MP). (4) A. I. R. 1983 All. 174.
(5) 1987 A.C.J. 772 (Ori.). (6) 1985 A. C. J. 413 (P & H).
(7) 1986 A. C. J. 219 (Raj.).

deceased, causing injuries as a result of which he died at the site of accident after some time. The deceased was young man of 22 years. He was a bidi contractor earning Rs. 900.00 per month. From agriculture, he was earning about Rs. 40,000.00/50,000.00 annually since his family possessed 66 acres of land. Compensation of Rs. 27,44,900.00 has been claimed. The owner and driver of the vehicle have stated that the bus was not being driven rashly and negligently and allegation to this effect was untrue and manufactured. Accident had taken place due to rash and negligent driving of the Luna by the deceased. Claim for compensation is exaggerated. Deceased did not possess valid driving licence at the time of accident, therefore, liability for payment of compensation is not theirs and in case liability is established, the same be made payable by the Insurance Company. Defence of the Insurance Company is that the deceased was driving the vehicle carelessly. His mental state was not normal. He did not possess driving licence and the accident took place due to his carelessness for which he himself is responsible. The deceased was dependent on the claimants. He did not have independent source of income. He was not earning Rs. 900.00 per month from bidi trade nor anything out of agriculture. Since he did not possess driving licence, Insurance Company is not liable to pay compensation.

After trial of the case, the Tribunal found that accident dated 19.7.1988 was caused due to the rash and negligent driving of the bus No. U.G.H. 0930. Due to this accident, deceased, aged 23 years, died. With respect to income of the deceased, it is found that he used to contribute to the family Rs. 750.00 per month. Damage to Luna has not been established. Ultimately, compensation of Rs. 1,40,000.00 has been awarded carrying interest at the rate of 12% per annum. It is not proved that deceased did not have driving licence. Claimants are not satisfied with this award, therefore, it has been challenged through this appeal.

During the pendency of this appeal in this Court, appellants 2 and 3 (parents) preferred application IA No. 5756 of 1997 dated 22.8.1996 seeking deletion of the name of claimant No. 1 (Smt. Pramila, widow of the deceased) from the array of appellants on the ground that she had contracted second marriage with Shyam Sunder Mishra of village Devsari (Jabalpur), therefore, she was not entitled to compensation. By order dated 4.11.1996, District Judge, Jabalpur was directed to conduct an enquiry and report whether appellant 1

Smt. Pramila had really entered into second marriage or not, as alleged by parents of the deceased. Report in this regard has been filed. It is dated 9.2.2001 on the record of the case. It is reported that Smt. Pramila has entered into second marriage with Shyam Sunder Mishra after the death of her husband Anil Pandey (deceased). However, the report does not mention on which date the marriage was so contracted. Although Smt. Pramila has denied the second marriage, however, the report says otherwise.

Assuming that second marriage of Smt. Pramila has taken place, as reported, but date of taking place of the marriage has not been reported. But it could not have taken place on 16.1.1995 as stated in the application by the parents of the deceased, since had that been so, this fact should have been stated before the Claims Tribunal which decided the claim on 6.2.1995. Further, this application should have been filed along with the appeal on 19.6.1995. The appeal has been filed by all the three claimants. They have signed same vakalatnama in favour of the same counsel. This goes to show that the re-marriage had taken place after the award was announced by the Motor Accident Claims Tribunal. With this background and for reasons to be stated in the later part of the judgment, this application can not be allowed and is, therefore, rejected.

There is no dispute with respect to the taking place of the accident in this case. Evidence clearly suggests that the driver of the bus No. U.G.H. 0930 was responsible for the accident that he was driving the bus rashly and negligently. The deceased was not driving the Luna rashly and negligently or carelessly. Finding of the Claims Tribunal on this aspect is patently sustainable and is therefore confirmed.

Next is the question about the compensation payable in this case. Perusal of evidence demonstrates that the deceased was 22 years old at the time of accident. He was a bidi contractor earning Rs. 900.00 per month out of it. He was one of the owners of the ancestral property of 66 acres of land making contribution towards growing crops thereon. Although it is stated in the memo of appeal that he was earning Rs. 40,000.00 to Rs. 50,000.00 per year out of agriculture, yet on evidence, the income from agriculture can be put at Rs. 12,000.00 With this kind of evidence, we proceed to assess the just and appropriate compensation in this case. The income of deceased from the business of bidi contractor can be fixed at Rs. 900.00 per month and Rs. 10,800.00 per

year. From agriculture, his contribution can be put at Rs. 12,000.00 per annum taking the total annual income to Rs. 22,800.00. After deducting 1/3rd therefrom towards personal expenditure, the deceased was contributing a sum of Rs. 15,200.00 to the family per annum. He was 22 years old at the time of accident. Proper multiplier in this case should be 17. Thus calculated, the amount of compensation comes to Rs. 2,58,400.00. In addition to this, Smt. Pramila would be entitled to consortium of Rs. 5,000.00 and all the claimants to Rs. 2,000.00 towards funeral expenses, Rs. 2,500.00 towards loss to the estate and Rs. 10,000.00 for loss of expectancy of life, taking the total amount of compensation to Rs. 2,77,900.00 (rupees two lacs, seventy seven thousand nine hundred only). The amount of compensation will carry interest at the rate of 10% (ten per cent) per annum from the date of application till payment.

After arriving at the amount of compensation payable to the claimants in the preceding paragraph, we examine the question whether Smt. Pramila is disentitled to claim the compensation for having contracted second marriage as contended by claimants 2 and 3 (parents). Judgments in *Anju Mukhi* v. *Satish Kumar Bhatia and another* (1) and *Rajasthan State Road Transport Corporation and others* v. *Kiran Lata and others* (2) are brought to our notice. Before making reference to the first case, let us refer to the second case of High Court of Rajasthan in which it is said :

> "24. One of the points which has been argued is the possibility of remarriage of the widow is against the public policy and may be violative of Section 23 of the Contract Act. One must also understand that there was a time when the widow marriage was prohibited. Now the society has recognised that the remarriage is the necessity of the life and a widow and particularly the young widow cannot be asked to lead a life of a widow and should remain throughout within the four walls of the house. Parliament in its wisdom enacted the Hindu Marriage Act and Hindu Succession Act, 1956 and codified the Hindu Law. After the death of the husband, under Section 14 of the Hindu Succession Act wife becomes an absolute owner of the property of the husband. Similarly, now there is no restriction on the widow remarriage. On the contrary, the society feels that the widow remarriage is the need of the society and for the welfare

(1) (1998) 1 M. P. L. J. 25. (2) 1993 A. C. J. 130.

of the weaker sections of the society. If the Courts start thinking about the possibility of remarriage, then the whole purpose of the legislation will be frustrated and it will remind us of the talk of the 19th Century when we are thinking of moving into the 21st Century. So, the argument about the possibility of remarriage can not be accepted at all in the present day society. On the contrary, I am of the view that even after remarriage, the wife is entitled to get compensation to which she is entitled in the normal course of life. One of the factors is that in the remarriage ordinarily, you cannot get a good partner like the earlier one and burns of the widowhood still remain in the widow even after the remarriage and she has to face the society. So the question of marriage or possibility of remarriage does not come in the way at all and compensation should not be based on the question of marriage or possibility of remarriage."

In *Anju Mukhi and another* v. *Satish Kumar Bhatia and another* (*supra*), this Court held that dependency for calculating compensation in case of a widow is calculated from the date of accident till remarriage. The contention that the second husband earns less and the marriage was performed for purposes of safety and security, therefore, dependency be assessed accordingly has been rejected on the ground that the widow, after remarriage, lost her entitlement to claim compensation as a dependent. This conclusion is drawn on the ground that where dependency is to be determined, she ceases to be legal heir/dependent of her first husband after remarriage, as is evident from Section 21(iii) of the Hindu Adoptions and Maintenance Act, 1956, the wife loses claim for maintenance after remarriage. Therefore, for maintaining an application to claim compensation for the death of her husband, she must not only be widow at the time of the death of her husband, she should also continue as such, to be the legal representative of the deceased husband until the final decision. For taking this view, the Court placed reliance on *Manjula Devi Bhuta* v. *Manju Shri Raha* (1), *Oriental Fire and General Insurance Co.* v. *Smt. Chandravati* (2), *State of Orissa* v. *Archana Nayak* (3), *Man Indrajitsingh* v. *Sardar Singh* (4), *Makbool Ahmed* v. *Bhura Lal* (5). It did not agree with the view of Patna High Court in *Sobha Jain and another* v. *Bihar State Tribal Cooperative Development Corporation Ltd., Ranchi and others* (6).

(1) 1967 M. P. L.J . 972=1968 A. C.J. 1 (M.P.). (2) A. I.R. 1983 All. 174.
(3) 1987 A. C. J. 772 (Ori.). (4) 1985 A. C. J. 413 (P. & H.).
(5) 1986 A. C. J. 219 (Raj.). (6) A. I. R. 1983 Pat. 39.

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Perusal of the judgment in *Anju Mukhi's Case* (*supra*) demonstrates that the learned Judges accept the position that by virtue of Section 14 of the Hindu Succession Act, 1956, the property possessed by a female Hindu of her husband vested in her, can not be divested, meaning thereby once the widow acquires the absolute right over the property, she could not be divested from it on remarriage, but creates exception in case where a Hindu widow marries after the death of her husband in a motor accident, she cease to be the legal representative/dependent of her first husband under Sec. 21(iii) of the Hindu Adoptions and Maintenance Act, 1956, therefore, loses right to be maintained; and under Sec. 25(3) of the Hindu Marriage Act, 1955, when a decree for divorce or judicial separation against her is passed, the order for payment of permanent alimony ceases by loss of her entitlement to maintenance.

Right to equality is a fundamental right. Parliament enacted Section 14 to remove the pre-existing disabilities fastened on the Hindu female limiting her right to the property without full ownership thereof. The discrimination is sought to be remedied by Section 14(1) of the Hindu Succession Act, 1956, by enlarging the scope of acquisition of property by a Hindu female by appending an explanation with it. Section 14 has to be construed harmoniously, consistent with the Constitutional goal of removing gender-based discrimination and effectuating economic empowerment of Hindu females. This provision has the protection of Clause (3) of Article 15 of the Constitution of India, being a special provision enacted for benefit of Hindu women. Sub-section (2) thereof does not operate to take away the right duly conferred by sub-section (1) of Section 14 of the Hindu Succession Act, 1956. It deals with the pre-existing order, decree, instrument, gift or will or award providing for restricted estate in such property. "Property" includes both movable and immovable acquired by a female Hindu in any manner whatsoever. Sections 19, 21 and 22 of the Hindu Adoptions and Maintenance Act, 1956 provide for maintenance of daughter-in-law by her father-in-law or heirs of deceased from out of the estate inherited by them from the deceased, provided she has no property of her own, is unable to obtain maintenance from the estate of her husband or her father or mother or from her son or daughter, if any, or his or her estate so long as she does not remarry. Maintenance under the Hindu Marriage Act, 1955 also ceases on remarriage and in other circumstances provided therein, but these factors, in our considered opinion, have no application for grant of compensation to a widow on the death of her husband.

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"Legal Representative" ordinarily means a person who in law represents the estate of a deceased person or a person on whom the estate devolves on the death of an individual. Legal representative in a given case need not necessarily be a wife, husband, parents and child. However, it can not be said that wife is not a legal representative of her deceased husband. She is qualified to represent his estate on his death, therefore, qualified to file application for compensation for the loss of her husband. Succession to the estate opens on the occurrence of death of husband. "Estate" would include all kinds of properties, movable and immovable, left by the deceased husband. It would include claim for compensation which arises on the death of husband. Her entitlement to the estate/compensation is settled on the taking place of the accident resulting in the death of the husband. She can not be divested of this right, being absolute and inalienable, even if she remarries. This conclusion flows by operation of Art. 15(3) of the Constitution of India and Section 14 (1) of the Hindu Succession Act, 1956. Provisions of Hindu Adoptions and Maintenance Act, 1956, have no application since their application is confined to limited field.

The term "Dependency" is not a principle of absolute application. It is a guide for arriving at a figure which is called compensation. Compensation is payable for loss caused to the victim on accident by the tort-feasor(s) and it is claimable even by a person who is well placed in life earning handsomely and is not actually dependent on the deceased, object being to penalise, by award of compensation, the tort-feasor(s) against loss sustained by the victim or his legal representatives, otherwise they would not suffer in any way by committing breach of positive duty to operate vehicles on Highway/public place in a careful manner.

Proceeding further, husband is entitled to claim compensation in the event of death of wife even if he is earning himself and dependency is calculated on the income of the deceased wife or contribution for the family. After the death of such a wife, the husband marries. Is his right to compensation forfeited ? The answer to this question is in the negative. When this is so in case of husband, why different principle be made applicable in case of wife who marries after the death ? Compensation awarded by Motor Accidents Claims Tribunal under the Motor Vehicles Act 1988, is not maintenance. It is a compensation for the loss sustained by the legal representative(s) for the death of their relation. The legal representatives become entitled to compensation on the occurrence of the

accident and death of the relation. Widow has absolute right to compensation allowed by the Claims Tribunal which should not be influenced by the fact that the wife has married after the accident.

There is another reason for allowing the claim of the widow for full compensation, to which she has been held entitled by the Claims Tribunal, based on higher and broader perspective. National policy allows women equal status with man, in all spheres of activities. Both are given equal rights. Government and non-Governmental Organisations emphasise remarriage of a widow. When a man can marry, why cannot a woman ? It is understandable that life of a widow, after the death of her husband, in the family cripples abnormally. Generally she is subjected to all kinds of indignities, compelling her to leave and fall back on parents where she is taken to be an eye-sore by the families of her brothers, particularly when parents are not alive, and even if they are alive, they can hardly look after her due to old age. With this background, it is considered necessary that a widow marries as early as possible. Therefore, in case she has done so, her claim for compensation can not be defeated by remarriage. It would be highly improper to compel her to lead a life of widow till she receives the compensation on the termination of court case or else forfeit the right. The compensation continues to maintain her throughout her life since second marriage can not be as good as the first marriage. It is by compulsion. She was not responsible for the death of her husband in the accident, therefore, she can not be divested of the absolute right to claim compensation by remarriage. The Motor Vehicles Act, 1988 does not debar her. Since she becomes entitled to the compensation, she can not be divested from it. These submissions were not advanced before the learned Judges in *Anju Mukhi's case* (*supra*), therefore, that case is clearly distinguishable and decisions in *Sobha Jain's case* (*supra*) and *Kiran Lata's case* (*supra*) are more pragmatic and give broader thrust to widow's right to compensation on death of her husband. It is important that 'dependent' and 'legal representative' are given practical, purposeful and pragmatic meaning to avoid damage to the entitlements of widow who remarries after the death of her husband in the accident. In this case, the widow marries after the award of compensation in her favour by the Claims Tribunal. The result, therefore, is that the plea raised by the two other claimants (parents) is not sustainable and is therefore rejected. The respondents are held responsible for payment of compensation jointly and severally.

Consequently, appeal is allowed. Compensation awarded by the Tribunal and enhanced in this appeal shall be paid to the claimants by the respondents within two months from the date of order along with interest at the rate of 10% per annum from the date of application till payment as under :

(i)	Smt. Pramila (widow of Anil Pandey)	-	50%
(ii)	Smt. Ram Pyari (mother of deceased)	-	25%
(iii)	Mahesh Prasad (father of deceased)	-	25%

Amount falling to the share of Smt. Pramila (appellant No. 1) be invested by the Tribunal in a nationalised Bank nearest to the place of her residence for a period of ten years, extendable further from time to time. However, interest accruing to the amount shall be paid to her every month or six monthly by the Manager of the Bank, as may be desired by her in her application to the Manager of the Bank.

Appeal allowed.

APPELLATE CIVIL

Before Mr. Justice V. K. Agrawal.
16 March, 2001.

GAJENDRA ...Appellant*

v.

SMT. MADHU MATI ...Respondent.

Hindu Marriage Act (XXV of 1955)–Sections 13(1)(ia), 13(1)(ib) and 28–Appeal–Suit for divorce on ground of cruelty and desertion–Petitioner persuaded by-in-laws to stay with his wife as 'Gharjamaee'–On refusal wife stayed in her parent's house–Allegation though denied no documentary evidence led in support

*F. A. No. 89 92.

Gajendra v. Smt. Madhu Mati, 2001.

nor any notice served on petitioner–No effort made to reconcile–Animus deserendi proved–Continuous pressure on petitioner to live as 'Ghar Jamaee'–Wife not joining husband's company for no justifiable cause–Petitioner suffering from Asthama left alone to suffer in his misery and ailment–Had to live a lonely life for seventeen years after marriage–Cause of cruelty made out–Husband entitled for a decree of divorce–Suit decreed.

The demand of the respondent/wife and her father that the petitioner should live as her 'Ghar Jamaee' was unreasonable and it cannot be said that the petitioner/husband was not justified in not yielding to such a demand. In the circumstances, the blame for the differences between the parties in the instant case squarely lies on the shoulders of the respondent/wife and her father. As noticed above, it is also clear that the respondent/wife not only continued to live separately for a long period right from the year 1984, but she had intention to put to an end the marital relations. Thus, there was *animus deserendi* on her part. Therefore, the foregoing facts and circumstances of the case and conduct of the respondent, lead to an irresistible conclusion that it was the respondent/wife who deserted her husband the petitioner.

It would appear from the evidence as discussed above, that the respondent and her father had been continuously pressing the petitioners/husband to live with them as 'Ghar Jamaee'. On the petitioner's refusal to yield their unjust demand as above, the respondent/wife started misbehaving and maltreating the petitioner/husband and his family members. The respondent/wife had forsaken the company of the petitioner/husband without any justifiable cause and against his wishes. The petitioner/husband was an asthama patient. However, he was left alone to suffer in his misery and ailment, while he was posted at Bakhtara, as has been stated by him. Though married the petitioner, never enjoyed the marital bliss and comfort of a home. She did not return back despite requests and efforts made by the petitioner. The respondent's father had extended threats to the father of the petitioner that he would be losing his younger son i.e. the petitioner also, as was the case of the elder brother of the petitioner.

It is, therefore, clear that the petitioner had to live a lonely life for a very long period of 17 years. The cumulative effect of the above facts and circumstances indicate that the respondent had treated the petitioner with cruelty.

Smt. Rohini Kumari v. *Narendra Singh* (1), *Sanat Kumar Agrawal* v. *Smt. Nandini Agrawal* (2), *Lachman Utamchand Kirpalani* v. *Neena alias Mota* (3), *V. Bhagat* v. *Mrs. D. Bhagat* (4), *Smt. Saroj Rani* v. *Sudarshan Kumar Chadha* (5) and *Romesh Chander* v. *Smt. Savitri* (6); followed.

Ashok Lalwani for the appellant.

None for the respondent.

Cur. adv. vult.

JUDGMENT

V. K. AGRAWAL, J. – This appeal preferred under Section 28 of the Hindu Marriage Act, 1955, is directed against the judgment and decree dt. 23.12.1991 by Third Additional District Judge, Bhopal, dismissing the petition under Section 13(1)(ia) and 13(1)(ib) of the Hindu Marriage Act, 1955 (hereinafter referred to as the 'Act' for short), praying for divorce.

Undisputedly, the parties were married in the month of February 1976 at Indore. Both of them were minors at the time of their marriage. It is also not in dispute that the elder sister of respondent was also married to the elder brother of petitioner on the same day, on which the parties were married. The 'Gauna' ceremony took place in the year 1978; whereafter, the respondent/wife came to the house of petitioner/husband for a short while and then went back to the house of her parents. She continued to reside with her parents at Indore till the year 1983. The parents of appellant/husband are permanently residing at Bhopal. It is also now not in dispute that the parties last resided together at Bhopal till the year 1984, whereafter the respondent is living with her parents.

The petitioner filed an application under section 13(1)(ia) and 13(1)(ib) of the Act, praying for dissolution of marriage by a decree of divorce. He averred therein that the petitioner made several efforts upto the year 1983 to bring his wife - the respondent to the matrimonial home at Bhopal, however the respondent was reluctant to come to the matrimonial home and the father of respondent desired that the petitioner/husband should reside at Indore in the house of

(1) A. I. R. 1972 S. C. 459.
(2) A. I. R. 1990 S. C. 594.
(3) A. I. R. 1964 S. C. 40.
(4) A. I. R. 1994 S. C. 710.
(5) (1984) 4 S. C. C. 901.
(6) A. I. R. 1995 S. C. 851.

respondent/wife as 'Ghar Jamaee'. It was alleged that, when the pressure tactics of respondent and her father failed, the respondent started behaving in a harsh manner. It was alleged that she used to misbehave with the family members of petitioner and created nuisance and rowdy scenes. She would threaten that she would commit suicide in case the petitioner does not shift to Indore as desired by respondent, and if she was compelled to reside at Bhopal.

It was further averred that ultimately the petitioner yielded to the persuasion and pressure tactics of respondent and shifted to Indore in June 1983 with her. A job in a private factory was procured by the father of respondent. However, as the petitioner was not inclined to reside with his in-laws in their house, he started residing in his own house at Indore, despite pressure from respondent and her father to live with them. Annoyed on account of resistance as above on the part of the petitioner, the respondent and her father used to quarrel with him. They also desired that the earnings of petitioner should be handed over to the respondent's father. On account of constant nuisance and ill-treatment of respondent and her father, the petitioner went back to Bhopal in December, 1983. It was averred that the respondent after great persuasion agreed to accompany the petitioner and came to Bhopal. However, the respondent continued to compel and pressurise the petitioner to return to Indore. The petitioner refused to yield to the above pressure. Having failed in their efforts, the father of respondent took her away to Indore in February 1984. It has also been averred by the petitioner that since then the respondent did not come back to the petitioner, despite several efforts made by him. The respondent filed an application under Section 125 C.P.C. for maintenance at Indore, which has been allowed. A Criminal Revision against the said order was pending.

The petitioner further averred that the demand of respondent and her father that the petitioner should leave his parents and should live with the respondent's father was unacceptable to the petitioner. Since the petitioner refused to accede to the above demand, the respondent is living with her father for a long period and has thus deserted the petitioner for a period of more than two years. The petitioner/husband therefore prayed for a decree for divorce on the ground of cruelty and desertion as above on the part of the respondent.

The respondent/wife resisted the petition and the above averments were denied. According to the respondent/wife she never misbehaved or maltreated

the petitioner or his family members. She has also denied that she or her father desired that the petitioner should live with the father of respondent as 'Ghar Jamaee'. According to the respondent, she never deserted the petitioner and infact she made several attempts to come to her matrimonial home, but she was not permitted to do so.

The learned trial Court framed mainly two issues, which were to the effect : as to whether the respondent treated the petitioner/husband with cruelty and as to whether the respondent has deserted the petitioner for a period of more than two years preceding the filing of the petition ?

The learned trial Court found that the evidence led by the petitioner regarding allegations of cruelty or desertion is not worth acceptance, and thus it held that it was not proved that the respondent treated the petitioner with cruelty or had deserted him. Thus both the issues have been decided by the trial Court against the petitioner/ husband. The petition of divorce filed by him was therefore dismissed.

Learned counsel for petitioner/appellant submitted that the marriage between the parties took place while they were minors. It was also submitted that the petitioner's elder brother was married to the respondent's elder sister. The petitioner's elder brother has been made to live by his wife's parents as 'Ghar Jamaee', and the respondent and her father desired and persistently pressed the petitioner to live with them at Indore at the house of respondent's parents as 'Ghar Jamaee'. When the petitioner/husband refused to accede to their desire as above, the respondent started maltreating and misbehaving with the petitioner and his family members. She ultimately left the matrimonial home in the year 1984 and has not returned so far, despite persistent efforts by the petitioner. It was therefore submitted that the respondent has treated the petitioner with cruelty and has deserted him. It has also been submitted by the learned counsel for the appellant that the marriage between the parties has completely broken down and there are no chances of their reunion. It was therefore submitted that the petition filed by the husband for decree of divorce deserves to be allowed.

None appeared for the respondent at the time of hearing.

The first question that requires consideration is, as to whether it has been established that the respondent/wife has deserted the petitioner for a period of two years or more ?

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Under Section 13(1)(ib) of the 'Act' one of the grounds for granting divorce is desertion. A decree for divorce can be granted on the ground that the other spouse has deserted the petitioner for a continues period of not less than two years immediately preceding the presentation of the petition. The expression 'desertion' is not defined in the 'Act'. 'Desertion' in the context of matrimonial law represents a legal conception which is very difficult to define. Essential ingredients of 'desertion', so as to furnish a ground for the relief of divorce are :

> "(a) Factum of separation;
>
> (b) Intention to bring cohabitation permanently to an end *animus deserendi*; and
>
> (c) The element of permanence i.e. elements (a) and (b) as above should continue during the entire statutory period."

The explanation clause of Section 13(1)(ib) of the 'Act' provides that the expression 'desertion' means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the wilful neglect of the petitioner by the other party to the marriage, and its grammatical variations and cognate expressions shall be construed accordingly. Thus, the above explanation has widened definition of desertion to include wilful neglect of the respondent and so as to amount to matrimonial offence, desertion must be without reasonable cause and without the consent or against the wish of the petitioner. The offence of desertion thus commences when the fact of separation and the *animus deserendi* co-exist.

As laid down in *Smt. Rohini Kumari* v. *Narendra Singh* (1), desertion does not imply, only a separate residence and separate living, but it is also necessary that there must be a determination to put an end to marital relation and cohabitation. Wihtout *animus deserendi* there can be no desertion. Similarly in *Sanat Kumar Agrawal* v. *Smt. Nandini Agrawal* (2), it has been observed that :

> "The question of desertion is a matter of inference to be drawn from the facts and circumstances of each case and those facts have to be viewed as to the purpose which is revealed by those facts or by conduct and

(1) A. I. R. 1972 S. C. 459. (2) A. I.R. 1990 S. C.594.

expression of intention, both interior and subsequent to the actual act of separation."

In the instant case, undisputably the parties are living separately from each other from February 1984, i.e. for a much longer period of two years. In the circumstances, the question that requires consideration would be as to whether the respondent can be said to have 'deserted' the petitioner. Therefore, the evidence regarding the circumstances in which the parties are residing separately shall now be considered.

The petitioner/husband Gajendra (A.W.-1) has stated that he was married in the year 1976 with the respondent, when he was aged about 14 years. He further stated that his elder brother was married to the respondent's elder sister on the same day. Thereafter the respondent went back alongwith her parents to Bombay where they were then residing; while the petitioner came back to Bhopal to his parents' house. He further states that in the year 1978 the 'Gauna' ceremony took place and his wife the respondent, came and resided with him at their house at Indore for a couple of days and then left for Bombay to her parental home. The petitioner Gajendra (A.W.-1) has stated that in the year 1983 he went to Indore, where her parents had settled to bring his wife - the respondent, with him. He states that the parents of his wife however, were not prepared to send her with him, and desired that the petitioner should come and live with them at Indore and serve at the place as may be directed by them. He has stated that in 1983 with great difficulty he could persuade his wife - the respondent, to come to Bhopal. The petitioner Gajendra (A.W.-1) has further stated that the respondent wife had come to Bhopal with him reluctantly, and lived with him at Bhopal only for about two or three months. During the above period the brother and parents of his wife used to come to Bhopal and tried to take the respondent as well as the petitioner to Indore. They also interfered in his domestic affairs. He also states that the respondent would also threaten him with dire consequences and also of committing suicide. She would also insult and humiliate him and used abusive language.

Petitioner Gajendra (A.W.-1) also stated that ultimately he was forced to go to Indore with his wife. However, at Indore he stayed at his own house. Further statement of Gajendra (A.W.-1) was that at Indore also the parents of respondent/wife would insist that the petitioner and his wife should reside with

them in their house and should give them the income earned by him. He has stated that his elder brother Ravishankar was already living with the parents of his wife as 'Ghar Jamaee' and was giving his in-laws his income, which they would spend as they desired. Gajendra (A.W.-1) further states that he returned back alongwith the respondent to Bhopal where she stayed with him till February 1984. During the above period also she misbehaved with him. In February 1984 she went away with her father and never came back.

Petitioner Gajendra (A.W.-1) has also stated that he was unemployed till December 1985. He was suffering from Asthama. He got an employment in the year 1986. His statement is that despite knowledge of his ailment the respondent never lived with him and he remained uncared for, while he stayed at Baktara, where he was posted in the year 1986. He stated that on account of behaviour of respondent and her parents as above, his life became miserable and mental and physical pain and suffering was caused to him. He also stated that the respondent/wife filed an application under Section 125 of C.P.C. for maintenance at Indore. That application was allowed and that he has filed a revision against the said order.

The statement as above has been corroborated by the statement of his father Bagirath (A.W.-4). He has stated that his elder son Ravishankar was residing as 'Ghar Jamaee' with his in-laws under their pressure. He has also stated that from 1986 onwards his elder son Ravishankar had not come to visit them. Bagirath (A.W.-4) states that the behaviour of respondent was objectionable. She used to abuse them and misbehave with them. She used to threaten them and quarrel with her husband - the petitioner. He has also stated that when the respondent was with them in Bhopal, her father and brother used to visit them and coax the petitioner to come to Indore and reside with them. This behaviour of respondent and her family members caused great disturbance in their family.

The petitioner has also examined Kanhaiyalal (A.W.-2) who belongs to their community. The statement of Kanhaiyalal (A.W.-2) would indicate that Bagirath (A.W.-4) the father of petitioner complained to him that the respondent was living with her parents, who did not send her to the petitioner's house. He has stated that he also tried to persuade the respondent to live with the petitioner but, her father did not agree to send her.

Kamal (A.W.-3) who is the maternal uncle of petitioner has also stated that the petitioner Gajendra (A.W.-1) complained to him that he was under tension due to the behaviour of his wife - the respondent. Kamal (A.W.-3) further stated that when he visited the house of petitioner at Indore, there was quarrel between the petitioner and respondent and her father.

The evidence as above would indicate that the petitioner desired that respondent should live with him, but the respondent and his family members insisted that the petitioner should come to Indore and should live with the respondent's parents. It also appears from the above evidence that the respondent/wife, was not willing to live with the petitioner, in her matrimonial home; and that she used to quarrel and misbehave with the petitioner and her parents, even during the short period for which she lived with them. Thereafter, she returned back to her parents home in the year 1984, and did not return back despite persuasion of petitioner and his family members. It is also clear that the petitioner's elder brother Ravishankar who was married on the same day, on which the petitioner was married, was required to live with the in-laws as 'Ghar Jamaee' under their pressure and expressed regrets and remorse about the above state of affairs as would be evident from letters Ex.-P-1 and Ex.-P-2, written by him.

In view of above, the petitioner's statement that he was being persuaded and forced to live with his in-laws at Indore as 'Ghar Jamaee' is rendered plausible and believable. Infact a letter Ex.-P-3 written by respondent's father, clearly contains a veiled threat that the petitioner's parents would be loosing their younger son i.e. the petitioner also, as was the case with their elder son, i.e. Ravishankar. It also appears from Ex.-P-3 that the relationship between the parents of the parties were stained and the respondent's father desired that the petitioner should also come and live with them. The contents and the language used in letter Ex.-P-3 of respondents' father corroborates the version of petitioner that the respondent and her father pressurised the petitioner to live with them as 'Ghar Jamaee'.

As against the petitioner's evidence as above, the respondent/wife Madhu Mati (N.A.W.-1) in her statement has denied the above allegations. According to her, she used to behave properly with the petitioner as also her in-laws and

that she wanted to live with the petitioner, but was not permitted to do so him. Kishore Kumar (N.A.W.-3) the father of respondent has supported the version of respondent Madhu Mati (N.A.W.-1). According to him the petitioner never turned up to take his wife-the respondent, with him. He has stated that his son-in-law - the petitioner, had written a letter to him that since he could not get accommodation, he is not taking his wife with him. However, the said letter has not been produced in the case.

The respondent has also examined her brother Jagdish (N.A.W.-2), w has stated that they had gone to Bhopal on receiving information of accident o younger brother of petitioner. However, at the Hospital the father of petitione asked them to go away. It may be noticed that there is no specific mention about the above incident in the pleadings of the respondent.

Though, the respondent and her father claim that the petitioner wrote them about his inability to take respondent with him and to live with her, y none of such letters or other documents have been produced by them. It ma also be noticed that no notice was served by the respondent beseeching requesting the petitioner to take her with him. It may also be noted in the abov connection that the respondent had not returned back to the petitioner, desp petitioner's notice having been served on her. The foregoing circumstances clear indicate that the respondent has deliberately abandoned her matrimonial home and had shown her unwillingness to return back and to live with the petitione

Thus weighing the evidence as above led by the respective parties, it appea that the version as putforth by the petitioner is more probable. The fact that petitione elder brother is living with the respondent's parents as 'Ghar Jamaee' lends supp to the assertion of the petitioner that his in-laws wanted that the petitioner shou also live as 'Ghar Jamaee' with them. As noticed above, the language and conten of the letter Ex.-P-3 written by the respondent's father also indicate that the relatio between the parties were strained and that the respondent's father had gone to extent of extending threat the petitioner's father that he would be loosing his younge son i.e. the petitioner also, as was the case with his elder son.

In the foregoing circumstances, the observation of the trial Court tha evidence of the petitioner could not be accepted in the face of discrepanci between the pleadings and proof, does not appear to be justified. It is clear tha

minor discrepancies as pointed out by the learned trial Court, could not constitute a valid ground for discrediting the whole of petitioner's evidence. It is clear that in such cases broad probabilities have to be considered to weigh and assess the truthfulness or otherwise of the rival cases of the parties, keeping in view the circumstances of the case. In the instant case, the evidence led by the petitioner and the circumstances as pointed out above are indicative of the fact that it was the respondent/wife who was responsible for leaving the matrimonial home and preferring to live with her parents.

The evidence led as above by the petitioner appears to be probable. There appears to be no other reason as to why the petitioner would not keep the respondent with him if the petitioner and respondent were married in childhood, and 'Gauna' ceremony took place as far back as in the year 1976 when the parties were young. Had there been cordiality between the two families, there was no reason why at that adaptable age the parties would not have amicably lived together. However, their relationship appears to have grown sour on account of unreasonable demand and desire of the respondent and her father that the petitioner should follow the path of his elder brother and live with them as 'Ghar Jamaee'. Clearly, the respondent and her parents could certainly not force the petitioner to live with them as 'Ghar Jamaee'. The petitioner was justified in refusing to yield to their unreasonable demand as above.

The foregoing discussion also indicates that the respondent/wife had left the company of the petitioner/husband and did not accede to her request to come back. There was no intention on her part to resume cohabitation unless and until the petitioner/husband acceded to the demand of the respondent/wife and her father to live with them as 'Ghar Jamaee'. In view of above, the evidence placed on record indicates that there was abandonment and non-performance of marital obligations by the respondent/wife with an intention to do so. The conduct as above of the respondent goes to show that she is living separately from the petitioner without any reasonable cause and against his wishes and has wilfully neglected the petitioner.

It may be noted that the Supreme Court in *Lachman Utamchand Kripalani* v. *Meena alias Mota* (1), while discussing desertion has observed :

(1) A. I. R. 1964 S. C. 40.

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"For the offence of desertion, so far as the deserting spouse is concerned, two essential conditions must be there, (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (*animus deserendi*). Similarly, two elements are essential so far as the deserted spouse is concerned : (1) absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. Desertion is a matter of inference to be drawn from the facts and circumstances of each case. The inference may be drawn from certain facts which may not in another case be capable of leading to the same inference; that is to say, the facts have to be viewed as to the purpose which is revealed by those acts or by conduct and expression of intention, both anterior and subsequent to the actual acts of separation. If, in fact, there has been a separation, the essential question always is whether that act could be attributable to an *animus deserendi*. The offence of desertion commences when the fact of separation and the *animus deserendi* co-exist."

To reiterate, in the instant case the demand of the respondent/wife and her father that the petitioner should live as her 'Ghar Jamaee' was unreasonable and it cannot be said that the petitioner/husband was not justified in not yielding to such a demand. In the circumstances, the blame for the differences between the parties in the instant case squarely lies on the shoulders of the respondent/ wife and her father. As noticed above, it is also clear that the respondent/wife not only continued to live separately for a long period right from the year 1984, but she had intention to put to an end the marital relations. Thus, there was *animus deserendi* on her part. Therefore, the foregoing facts and circumstances of the case and conduct of the respondent, lead to an irresistible conclusion that it was the respondent/wife who deserted her husband - the petitioner.

The next question that requires consideration is as to whether the respondent/wife treated the petitioner with cruelty ?

Section 13(1)(ia) of the 'Act' provides that a decree of divorce can be granted on the ground that the other party had treated the petitioner with cruelty. It is also well established that cruelty could be either physical or mental. The cruelty may be inferred from all the facts and matrimonial relations of the parties and inter-action between them in their daily life, as disclosed by the evidence. The question as to whether the petitioner was treated with cruelty, can be

answered only after all the facts have been taken into account, and the Court has to ascertain whether or not be treatment or conduct of the offending party would amount to cruelty. What is a cruel treatment to large extent would depend on the facts and circumstances of each case. In *V. Bhagat* v. *Mrs. D. Bhagat* (1), it has been observed in the above context that :

> "Mental cruelty in S. 13(1)(ia) can broadly be defined as that conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live with the other. In other words, mental cruelty must be of such a nature that the parties cannot reasonably be expected to live together. The situation must be such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with the other party. It is not necessary to prove that the mental cruelty is such as to cause injury to the health of the petitioner. While arriving at such conclusion regard must be had to the social status, educational level of the parties, the society they move in, the possibility or otherwise of the parties ever living together in case they are already living apart and all other relevant facts and circumstances which it is neither possible nor desirable to set out exhaustively. What is cruelty in one case may not amount to cruelty in another case. It is a matter to be determined in each case having regard to the facts and circumstances of that case. If it is a case of accusations and allegations, regard must also be had to the context in which they were made."

It would appear from the evidence as discussed above, that the respondent and her father had been continuously pressing the petitioner/husband to live with them as 'Ghar Jamaee'. On the petitioner's refusal to yield their unjust demand as above, the respondent/wife started misbehaving and maltreating the petitioner/husband and his family members. The respondent/wife had forsaken the company of the petitioner/husband without any justifiable cause and against his wishes. The petitioner/husband was an asthama patient. However, he was left alone to suffer in his misery and ailment, while he was posted at Bakhtara, as has been stated by him. Though married the petitioner, never enjoyed the marital bliss and comfort of a home. She did not return back despite requests and efforts made by the petitioner. The respondent's father had extended threats to the father of the petitioner that he would be losing his younger son i.e. the petitioner also, as was the case of the elder brother of the petitioner.

(1) A. I. R. 1994 S. C. 710.

It is, therefore, clear that the petitioner had to live a lonely life for a very long period of 17 years. The cumulative effect of the above facts and circumstances indicate that the respondent had treated the petitioner with cruelty.

It is thus clear that the grounds of desertion and cruelty have been established by the evidence and the facts and circumstances of the case. Thus, grounds for granting a decree of divorce as enumerated in Section 13(1)(ia) and 13(1)(ib) have been made out.

Yet another aspect of the matter, arising from the facts and circumstances of the case, deserves notice in the instant case. The parties are admittedly living separately for a long period of about 17 years. Their marriage appears to have irretrievably broken with no chance of reunion or resumption of their marital relations. The marriage between the parties therefore appears to be beyond repair. This would also constitute and justify grant of decree for divorce, as prayed by the petitioner.

In *Smt. Saroj Rani* v. *Sudarshan Kumar Chadha* (1), it has been laid down that the right of husband or the wife to the society of the other spouse is not merely a creature of the statute. Such a right is inherent in the very institution of marriage itself. The essence of marriage lies in sharing of common life, a sharing of all the happiness that life has to offer and all the misery that 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 of 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". Similarly in *Romesh Chander* v. *Smt. Savitri* (2), the Supreme Court considered it just and proper to grant a decree for divorce in a case where there was irretrievable break down and the marriage was held to be dead.

In the instant case also, since the parties are living separately for the last about 17 years and have infact spent the prime of their life without the company

(1) (1984) 4 S. C. C. 90. (2) A. I. R.1995 S. C. 851

of each other, and as there appears to be no chance for their reunion and living together, and as the grounds under Sections 13(1)(ia) and 13(1)(ib) of the 'Act' are made out, decree for divorce deserves to be granted.

Therefore, this appeal deserves to be and is hereby allowed. The impugned judgment and decree is set-aside. The petitioner's application for divorce under Section 13(1), (ia) & 13(1)(ib) of the 'Act' is allowed, and decree for divorce as prayed by the petitioner/husband is granted and their marriage is dissolved.

Appeal is allowed.

APPELLATE CRIMINAL

Before Mr. Justice S. P. Khare.
30 March, 1999.

GOPAL TIWARI & another ...Appellants*

v.

STATE ...Respondent

Criminal Procedure Code, 1973 (II of 1974)–Sections 320(5), 374(2)–Appeal against conviction and sentence–Penal Code, Indian, 1860–Sections 307, 324–Attempt to commit murder–Sole injury by knife on chest–Medical opinion that in absence of immediate medical assistance death could have been caused due to haemorrhage–Injury not on vital part–Case under Section 307, IPC not made out–Conviction altered to one under Section 324, IPC–Complainant and accused persons developed intimacy–Prayer for compounding offence–Can be granted on conversion of offence from 307 to 324 IPC.

Keeping in view the size of the injury; the part of the body on which it was inflicted; it was not vital part; it did not damage the heart or the lung, there was no repeated attack and in the absence of clear motive, it should be inferred that

*Cri.A. No. 362/94.

accused Gopal Tiwari had no intention or knowledge to cause death of Mukesh. The offence is not covered by Section 307 but it comes within the purview of Section 324, I.P.C.

Where in appeal conviction for non-compoundable offence is altered to that of a compoundable offence permission to compound can be granted.

Ram Shankar v. *State of U. P.* (1); referred to.

J. S. Singh, for the appellants.

P. S. Gaharwar, Panel Lawyer, for the respondents.

Cur. adv. vult.

JUDGMENT

S. P. KHARE, J. – Appellants Gopal Tiwari and Ramesh Tiwari have been convicted under Section 307 I.P.C. and sentenced to rigorous imprisonment for five years and to pay a fine of Rs. 1,000/- each.

The appellants and complainant Mukesh Sharma submitted an application under Section 320(5) Cr.P.C. for permission to compound the offence. This application is supported by the affidavit of the complainant. It is mentioned therein that appellant no. 2 Ramesh Tiwari is a retired Railway driver and his son appellant No. 1 Gopal Tiwari was booking clerk at Sagar Railway Station. Complainant Mukesh Sharma was Ticket Collector at the same Railway station at the time of the incident. It is also stated that now their relations are very cordial and all differences have been resolved. They are living in peace and harmony. By order-sheet dated 10.8.1998 of this Court this application was taken on record and it was observed that this application will be considered at the time of final hearing of the appeal.

Mukesh Sharma (P.W.-13) has deposed that on 8.2.1989 he was on duty as Ticket Collector at the gate of the Railway Station. Accused Gopal and Ramesh Tiwari came near him. They abused him. Accused Gopal said "you have got yourself transferred and how will you save yourself now". Accused Ramesh Tiwari exhorted his son to strike at him. Thereupon accused Gopal dealt a knife

(1) (1982) 3 S. C. C. 388.

blow on the left side of his chest. There was bleeding from the injury. His evidence has been corroborated by Uma Shankar (P.W.-14) who is his maternal uncle and who was present on the spot. He has lodged the report Ex.-P-3 at the police station at 9.30 P.M. The other witnesses have been declared hostile. Dr. Vinod Kumar Rawat (P.W.-9) has deposed that he had examined Mukesh at 9.45 P.M. and found an incised wound on the left side of his chest at fifth intercostal space two inches lateral to the midline size 1"x¼"x cavity deep as per his report Ex.-P-17. It was caused by hard and sharp object. He was admitted in the hospital. Dr. P. K. Dhagat (P.W.-1) has testified that he had performed the operation on this injury. He has given his opinion as per Ex.-P-1 : "In view of the severe haemorrhage this injury was dangerous in nature to have caused death, in absence of immediate medical aid". He has stated in cross-examination that the injury was not on vital part and it was simple.

Keeping in view the size of the injury; the part of the body on which it was inflicted; it was not vital part; it did not damage the heart or the lung, there was no repeated attack and in the absence of clear motive, it should be inferred that accused Gopal Tiwari had no intention or knowledge to cause death of Mukesh. The offence is not covered by Section 307 but it comes within the purview of Section 324, I.P.C.. The charge under Section 324 I.P.C. is brought home to accused Gopal Tiwari and under Section 324/34, I.P.C. to accused Ramesh Tiwari.

Where in appeal conviction for non-compoundable offence is altered to that of a compoundable offence permission to compound can be granted. *Ram Shankar* v. *State of U. P.* (1). The offence under Section 324 I.P.C. is compoundable with the permission of the Court. Considering the facts mentioned in para 2 of this judgment and the affidavit of the complainant to the effect that the parties have amicably settled the matter the permission to compound the offence is granted. It would be in the mutual interest of the complainant and the appellants and also in the interest of the society that they should forget the past and live peacefully as good and law-abiding citizens. That would remove the bitterness and rancour between them. It has been observed in *Shakuntala Sawhney* v. *Kaushalaya Sawhney* (2) that finest hour of the justice is the hour of compromise when parties after burying the hatchet re-unit

(1) (1982) 3 S. C. C. 388. (2) (1980) 1 S. C. C. 63.

by a reasonable and just compromise. The complainant and the accused are granted permission to compound the offence. It is expressed that they have compounded the offence.

In the result the appeal is allowed. The conviction and the sentence of the appellants under Section 307, I.P.C. are set aside. In view of the composition of the offence, the appellants are acquitted of the charges under Section 324 and 324/34, I.P.C. as provided by Section 320(8), Cr.P.C. This will be 'acquittal' for all purposes and remove the stigma attaching to the appellants by the judgment of the trial Court. The amount of fine be refunded to the accused persons if they have deposited it.

Appeal is allowed.

CIVIL REVISION

Before Mr. Justice J. G. Chitre.
15 July, 1999.

TANSUKHLAL & ors. ...Applicants*

v.

SMT. VINITA & ors. ...Non-Applicants.

Civil Procedure Code (V of 1908)–Sections 115, 151 and Order 1, Rule 10–Civil Revision–Scope of–The order needs to be maintained if it is passed by Trial Court remaining in the four corners of its jurisdiction–Joinder of parties–Addition of parties likely to widen dimensions of issues in controversy and give rise to multiplication of issues to be adjudicated–Trial Court would be left with the discretion to decide as to which are necessary parties–Addition of parties rightly refused by trial Court.

By additions of parties which are not compulsively necessary, there is possibility of widening of dimensions of the issues in controversy and that may give rise to multiplication of issues to be adjudicated. The trial Court should be

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*C. R. No. 626/99.

always left to concentrate on the relevant issues in controversy. The tendency of increasing the dimensions of the suit and the issues in controversy should always be restricted. Multiplication of the issues in controversy should be avoided as far as possible by finding out the core of controversy and focusing attention on it so as to find out the root of the dispute which is to be adjudicated.

This Court does not want to interfere with it and does not want to state anything more about the quality and weight of the rival contention of the parties at this stage so as to pollute the discretion of the Court while conducting the trial and deciding said suit.

S. C. Agrawal for the applicant.

R. C. Kochatta for non-applicant.

Cur. adv. vult.

ORDER

J. G. Chitre, J. – The petitioners have been aggrieved on account of rejection of the application presented by them in view of provisions of O. 1, R. 10, CPC. The order which is under challenge revolves around a typical circumstances of facts involved around the controversy in context with an ancestral house of which three brothers happen to be the owners. The said house was to be divided between three brothers, therefore, on account of family adjustment one brother namely Rajmal was satisfied by remaining two brothers by giving him a different property. The ancestral house was left for being partioned amongst remaining brothers. Both the brothers were in physical possession of two separable portions of the house initially and were sharing common passage commonly as joint owners. It appears from the facts mentioned in the argument that some part of said property was transferred by opp. 1, Smt. Vinita during the pendency of the suit, and, therefore, the parties are now at contest before the trial court. Order 1, Rule 10 provides :-

> "Sub. Rule(1) Where a suit has been instituted in the name of the wrong person as plaintiff or where it is doubtful whether it has been instituted in the name of the right plaintiff. The Court may at any stage of the suit, if satisfied that the suit has been instituted through a bonafide mistake, and

that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as the court thinks just.

Sub-Rule (2) provides-

The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.

Sub-Rule 3 provides - that No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent.

Sub. Rule 4 provides - Where a defendant is added, the plaint shall, unless the Court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the, plaint shall be served on the new defendant and, if the court thinks fit on the original defendant.

Sub-Rule 5. provides that Subject to the provisions of the Indian Limitation Act, 1877 (15 of 1877), S. 22, the proceedings as against any person added as defendant shall be deemed to have begun only on the service of the summons."

The transaction are complicated and the allegations made against each other are also touching the core of the controversy in issue. Therefore, this petition will have to be decided guardedly so as to seen that anything observed here would not affect rights of contesting parties in the trial Court.

It is averred that Opp. No. 1 Smt. Vinita D/o. Manikchandji Rudia had sold the frontal portion of the said building to opp. 2, 3, 4, 5 prior to the filing of the suit. The suit has been filed on 23.7.98. Said Vinita was daughter-in-law of Samrathmal and she had married with Ashok Kumar S/o. Samrathmal. Ku. Megha happens to be daughter begotten during the existence of wed lock between

Vinita and Ashok Kumar. Ashok Kumar had died in an accident and thereafter Opp. 1 Vinita has remarried. It is averred by the parties, that now Vinita does not have any interest in the said property. Petitioners want do add opponents 6, 7, 8, 9 as parties in the said suit.

While dealing with a revision petition in view of provisions of S. 115 of CPC, the court has to keep it in mind that though the order under challenge may not be suitable to the taste of the higher court, it needs to be maintained if the trial court has passed said order by remaining in four corners of its jurisdiction. The revisional court should not allow the parties to anticipate the problems which may arise in future. It is to be kept in view that transactions which are *abe initio* illegal, will have to be examined in its proper perspective. What is illegal *ab initio* would be illegal forever. Keeping in view the complications involved between the parties, by freak actions alleged or, may be, infact should be left to be decided by the trial court which has to perform the duty of deciding the suit, after trial. The trial court should be left with the discretion to come to conclusion as to which is necessary part to be impleaded in the suit for finding out the truth for the purpose of adjudication of issues in controversy, without eclipsing its jurisdiction on anticipation of averments. By additions of parties which are not compulsively necessary, there is possibility of widening of dimensions of the issues in controversy and that may give rise to multiplication of issues to be adjudicated. The trial court should be always left to concentrate on the relevant issues in controversy. The tendency of increasing the dimensions of the suit and the issues in controversy should always be restricted. Multiplication of the issues in controversy should be avoided as far as possible by finding out the core of controversy and focusing attention on it so as to find out the root of the dispute which is to be adjudicated. Therefore, according to me provisions of S. 151 have been brought in force. The trial court has kept that in view and has rightly decided to reject said application and prayer made by the petitioners. This court does not want to interfere with it and does not want to state anything more about the quality and weight of the rival contention of the parties at this stage so as to pollute the discretion of the court while conducting the trial and deciding said suit.

Shri S. C. Agrawal submitted that the respondents be prevented from raising the objections about the maintainability of the suit, if at all, brought by the

petitioners separately. No such order can be passed by the court so as to nip out the legal rights of the litigants to contest a *lis* in the court. If such objections are raised they will have to be decided in accordance with provisions of law in context with facts and circumstances of each case. At the most the petitioners can find out suitable remedy provided by law by appealing to the trial court again on better set of facts. The application is dismissed. It is made clear by this order that this court has not shown any inclination or indication touching merit of the rival contentions of the parties. The trial court is fully having discretion of adjudicating the averments made and denied by the litigating parties C.C.

Application dismissed.

CIVIL REVISION

Before Mr. Justice R. S. Garg.
12 January, 2000.

DEVAKINANDAN YADAV ...Applicant*

v.

STATE BANK OF INDORE
and another ...Non-Applicants.

Civil Procedure Code (V of 1908), Sections 115, 151, 152 and Order 47–Civil Revision–Inherent power to correct clerical error–No court can in the garb of exercise of such powers can modify, alter or add to the terms of the judgment or decree–Finding in the judgment as to the liability of defendants is a finding arrived at on appreciation of evidence–Even if there be any error apparent on the face of record the proper course is to resort to order 47 for Review or a regular appeal–Order incorporating correction in the judgment and decree without jurisdiction.

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*C. R. No. 895/96.

Devakinandan Yadav v. State Bank of Indore, 2000.

While disposing of the suit, the Court clearly found that the defendants were liable to pay sum of Rs. 31,921.95 paise, but by the amended order the Court is asking the defendants to pay sum of Rs. 2,33,921.95 paise. By this amendment, the Court is virtually asking the defendants to pay more than what they were required to pay in the earlier judgment. The Court below had no jurisdiction to alter, modify or correct or add to the terms of its original judgment either under Section 151 or 152 C.P.C.

Dwarka Das v. *State & another* (1); followed.

V. K. Jain for the applicant.

Wajid Haider for the non-applicant no. 1.

Cur. adv. vult.

ORDER

R. S. GARG, J. (ORAL) – After the judgment was delivered on 23.11.95, the plaintiff/non-applicant no. 1 made an application to the Court invoking its powers under Sections 151 and 152, CPC *interalia* pleading that the findings recorded in paragraph 15, 16 and 17 of the judgment and consequently creeping in the decree are result of errors arising therein from accidental slip and omission, therefore, the same may be corrected. The application was opposed by the present applicant, but it was, however, allowed by the learned trial court directing that paragraph 15, 16 and 17 of the judgment be substituted by the fresh paragraphs written by the learned trial Court on the date of the order.

The brief facts necessary for disposal of the revision are that the plaintiff filed a suit for recovery of Rs. 2,33,921.95/- against the present applicant and non-applicant no. 2. The suit was contested on merits and on all other possible grounds. After recording the evidence and hearing the parties, the trial Court while deciding issue no. 2 held that a sum of Rs. 2,33,921.95 was due towards the defendants. While deciding issue no 6, the Court recorded a finding that during pendency of the suit a sum of Rs. 2,02,000/- was paid by the defendants,

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therefore, after adjusting the said amount the plaintiff would be entitled to a decree for Rs. 31,921.95 paisa only. In paragraph 16, the Court relying upon its earlier findings directed that the plaintiff would be entitled to a sum of Rs. 31,921.95 paisa with interest at the rate of 17.5% quarterly rest per annum. In para 17 the Court again observed that suit of the plaintiff is partly decreed and the defendants are directed to pay the amount of Rs. 31,921.95 paisa and should also pay the interest at the rate of 17.5% per annum with quarterly rest from the date of the suit that is 7.12.93. A decree in terms of the said finding was prepared directing the defendants to pay Rs. 31,921.95 with interest as observed above.

The plaintiff made an application under Section 151 read with Section 152 CPC *interalia* submitting to the Court that because of an accidental slip or omission, the wrong findings were recorded. It was submitted that the amount of Rs. 2,02,000/- was not paid during pendency of the suit, but was paid before institution of the suit, therefore, the Court was required to correct the accidental slip and omission and was required to decree the suit in full and ask the defendants to pay the total amount of Rs. 2,33,921.95 paisa with costs and interest. After hearing the parties, the learned trial Court held that as the defendants did not raise the plea that the amount of Rs. 2,02,000/- was paid by them during pendency of the suit and as the Court wrongly recorded the finding that the amount was paid during pendency of the suit, paragraphs 15, 16 and 17 of the judgment deserve to be substituted by granting a decree in full amount in favour of the plaintiff asking the defendants to pay the entire suit amount with costs and interest. Being aggrieved by the said order, the applicant has filed this revision petition.

Submission of learned counsel for the applicant is that while exercising powers under Section 152 CPC, the Court can correct a clerical or arithmetic mistakes or errors arising in the judgments, decrees or orders from any accidental slip or omission, and as there was no accidental slip or omission or clerical or arithmetical mistake in the judgment delivered by the Court, the Court below was not entitled to exercise its powers under Section 152, CPC. It was also contended that present was not a fit case for exercising powers under Section 151 CPC.

Shri Wajid Haider learned counsel for the Bank, on the other hand submits

that every error arising in the judgment, decree or order if is a result of accidental slip or omission, the same may be corrected by the Court in its powers under Section 152, CPC and in any case when the Court finds that an injustice would be caused to the other side, it can correct the errors exercising its inherent powers as vested in it under Section 151 CPC.

I have heard the parties at length and have perused the records.

There can be no dispute that while deciding the issue about the total liability of the defendants, the trial Court in paragraph 15 of its judgment observed that the defendants were liable to pay a sum of Rs. 2,33,921.95 paisa. At the same time, the Court also recorded a finding that as the defendants during currency of the suit had paid a sum of Rs. 2,02,000/-, after giving the adjustment of the said amount the plaintiff would be entitled to a decree for Rs. 31,921.95 paisa only. From a perusal of paragraph 15, it would not appear that present was a case of error arising in the judgment from any accidental slip or omission. Infact the Court was alive to the situation as to what should have been the decree against the defendants. The Court found that on the date of the suit a sum of Rs. 2,33,921.95 paisa was due, but at the same time the Court found that during pendency of the suit sum of Rs. 2,02,000/- was paid to the plaintiff by the contesting defendants. Whether the plea of payment during the pendency of the suit was raised or not would not be material for disposal of an application under Section 152 CPC. It must appear to the Court before it exercises its powers under Section 152, CPC that the error has crept in the judgment by an accidental slip or omission. In the present case, the Court being alive to the situation did record a finding. The finding may be condemned as bad, contrary to the pleadings or perverse, but such a finding which is based on the merits of the matter cannot be annuled by the same Court exercising its powers under Section 152, CPC. The Court had the jurisdiction to exercise its powers under Order 47, CPC by reviewing the order if it was of the opinion that the error was apparent on the face of the record, but an error which relates to the merits of the matter cannot be corrected under Section 152, CPC.

So far as Section 151, CPC is concerned, it says that notwithstanding anything in the Code nothing in the Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. If the

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Code of Civil Procedure does not provide for any provisions under which a wrong can be corrected, then a Judge exercising his powers under Section 151 CPC can always correct the wrong committed by the Court. In the present case, I am unable to hold that the plaintiff did not have any remedy under the provisions of the Code of Civil Procedure. Powers under Section 151 CPC can only be exercised if there are no other provisions in the Code. Assuming that such powers could be exercised by the Court, then too the Court was required to show that such powers were required to be exercised in accordance with law to do complete justice between the parties. In the present case, the finding recorded in the original judgment is that defendants, during pendency of the suit did pay a sum of Rs. 2,02,000/-, therefore, the said amount was required to be adjusted. The said finding, by no stretch of imagination, can be said to be an accidental slip or omission. Before recording that finding and finding the liability of the defendants, the Court has categorically stated that during pendency of the suit an amount of Rs. 2,02,000/- was paid by the defendants to the plaintiffs. The finding as recorded by the lower Court appears to be a finding arrived at after appreciating the matter and the evidence available on the record.

In the matter of *Dwarka Das* v. *State and another* (1), the Supreme Court has considered the scope of Sections 151 and 152, CPC. Para 6, for the purposes of the present petition, is material. It reads as under :-

> "Section 152, CPC provides for correction of clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission. The exercise of this power contemplates the correction of mistakes by the Court of its ministerial actions and does not contemplate of passing effective judicial orders after the judgment, decree or order. The settled position of law is that after the passing of the judgment, decree or order, the Court or the Tribunal becomes *functus officio* and thus being not entitled to vary the terms of the judgments, decrees and orders earlier passed. The corrections contemplated are of correcting only accidental omissions or mistakes and not all omissions and mistakes which might have been committed by the Court while passing the judgment, decree or order. The omission sought to be corrected which goes to the merits of the case is beyond the scope of Section 152 for

(1) (1999) Vol. 3 S. C. C. 500.

whi ch the proper remedy for the aggrieved party is to file appeal or review application. It implies that the section cannot be pressed into service to correct an omission which is intentional, however erroneous that may be. It has been noticed that the courts below have been liberally construing and applying the province of Sections 151 and 152 of the CPC even after passing of effective orders in the *lis* pending before them. No court can, under the cover of the aforesaid Sections, modify, alter or add to the terms of its original judgment, decree of order. In the instant case, the trial Court had specifically held the respondent- State liable to pay future interest only despite the prayer of the appellant for grant of interest with effect from the date of alleged breach which impliedly meant that the Court had rejected the claim of the appellant insofar as *pendente lite* interest was concerned. The omission in not granting the *pendente lite* interest could not be held to be accidental omission or mistake as was wrongly done by the trial Court vide order dated 30.11.1973. The High Court was, therefore, justified in setting aside the aforesaid order by accepting the revision petition filed by the State."

From a perusal of the passage quoted above, it would clearly appear that the exercise of the powers under Section 152, CPC contemplates the correction of mistakes by the Court of the ministerial actions and does not contemplate of passing effective judicial orders after the judgment, decree or order. If the order passed by the learned Court below is allowed to stand, it would infact mean that this Court would allow the effective judicial order passed by the lower Court under Section 152 CPC. According to Supreme Court, after passing of the judgment, decree or order, the Court becomes *functus officio* and thus is not entitled to vary the terms of the judgments, decrees and orders earlier passed. The Supreme Court was clear when it stated that the omissions sought to be corrected which go to the merits of the case are beyond the scope of Section 152, CPC for which the proper remedy for the aggrieved party is to file an appeal or review application.

Relating to exercise of powers under Section 151 CPC, the Supreme Court in the same matter has observed that no Court can, under the cover of Sections 151 and 152, CPC modify, alter or add to the terms of its original udgment, decree or order. In the instant case even if it is assumed that the trial Court was exercising its powers under Section 151 CPC, then too it cannot be

permitted to modify, alter or add to the terms of the judgment or decree. While disposing of the suit, the Court clearly found that the defendants were liable to pay sum of Rs. 31,921.95 paisa, but by the amended order the Court is asking the defendants to pay sum of Rs. 2,33,921.95 paisa. By this amendment, the Court is virtually asking the defendants to pay more than what they were required to pay in the earlier judgment. The Court below had no jurisdiction to alter modify or correct or add to the terms of its original judgment either under Section 151 or 152, CPC.

As the Court below had no jurisdiction to pass an order like this in exercise of its powers under Section 151 and/or Section 152, CPC, the order cannot be allowed to stand. It deserves to and is accordingly set aside.

The plaintiffs are free to challenge the correctness, validity and propriet of the findings contained in paragraphs 15 to 17 of the judgment dated 23.11.95 by filing an appeal to the competent Court or by filing a review petition to the very same Court. The plaintiff would certainly be entitled to make an application to the said Court (appeal or review Court) that he would be entitled to extension of the period of limitation under Section 14 of the Limitation Act as he was *bona fide* prosecuting the proceedings before the trial Court and thereafter in this revision petition.

The petition is allowed. No costs.

Petition is allowed
