WRIT PETITION

Before Mr. Justice Arun Mishra
26 June, 2002.

M.P. STATE ELECTRICITY BOARD, JABALPUR ...Petitioner*

v.

COLLECTOR, MANDLA and another ...Respondents

Constitution of India, Article 226 and Public Liability Insurance Act, 1991, Section 2(d), 3(2)–"Hazardous substance"–Electricity–Hazardous in any quantity–Notification by Central Govt. is not sine qua non to make a substance hazardous–Death due to electricity–Board cannot escape liability.

A thing which is known as intensely hazardous has to be treated as hazardous substance so as to effectuate the purposes for the enactment of the Act of 1991. Whatever irrespective of proportion is hazardous has to be treated as hazardous one. Some article may not be hazardous in small quantity but electricity is not one of such article. Only these hazardous substances have to be notified which may be dangerous on exceeding such quantity then it becomes necessary to specify the quantity. In my opinion it is not necessary for the electricity to be notified under Section 2 (d) of the Act of 1991 as in any quantity electricity is hazardous. It has to be taken as hazardous substance within the meaning of Section 2 (d) of the Act of 1991.

The definition in the Act refers to Environment (Protection) Act, 1986. I have reproduced the aforesaid definitions hereinabove. The said definition is in a broad spectrum. It cannot be encompassed in a small region. If both the definitions are read together it is quite pronounced that the electricity should come within the ambit and sweep of the definition, and certain substances may become hazardous if they are notified as required under the provisions. Thus, notification by the Central Government is not the *sine qua non* to make a substance hazardous.

[Para 19]

M.P. State Electricity Board, Jabalpur v. *Collector, Mandla*[1], *U.P. State*

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* W.P.No. 831/2002.
(1) W.P. No. 2165/2001, D/15.4.2002.

M.P. State Electricity Board, Jabalpur v. *Collector, Mandla, 2002.*

Electricity Board v. *District Magistrate, Dehradun*[1]; *Nainital Hotel Co. Ltd.* v. *Municipal Board, Nainital*[2]; *Attar Singh-Sant Singh, Firm* v. *Municipal Committee, Amritsar*[3]; *Curry* v. *Alabama Power Co.*[4]; *Spensley* v. *Lancashire Ins. Co.*[5]; *Commonwealth* v. *Northern Electric Light & Power Co.*,[6]; *United State* v. *City and Country of San Francisco*[7]; *Hill* v. *Carolina Power & Light Co.*[8]; *Teddleton* v. *Florida Power & Light Co.*[9]; referred to.

V. Rusia, for the Petitioner.

V. Awasthy, for the Respondent No.1.

Cur. adv. vult.

ORDER

ARUN MISHRA, J:–In the instant writ petition, the question arises whether 'electricity' can be treated as a "hazardous substance as defined in Section 2(d) of the Public Liability Insurance Act, 1991 (for short 'Act of 1991') read with Section 2(e) of the Environment (Protection) Act, 1986 (for short 'Act of 1986).

2. Claimant/respondent No.2 Smt. Sukarti Bai filed an application before the Collector, District, Mandla claiming compensation from petitioner M.P. Electricity Board. Jabalpur on account of the death of her husband Kashiram, as the death of her husband took place owing to electrocution while the deceased came in contact with the electric wire.

3. The Collector has awarded a compensation of Rs. 25,000/- holding that the electricity is a hazardous substance as per Public Liability Insurance Act, 1991.

4. The petitioner in the instant writ petition avers that M.P. Electricity Board is a body duly constituted under Section 5 of the Electricity (Supply) Act, 1948. The Collector failed to appreciate the legal position properly. Learned counsel for the petitioner contends that the electricity is not a hazardous substance and the same does not come within the definition of a hazardous substance as defined in Section 2(d) of the Act of 1991 which has referred to the words 'hazardous substance" as defined in Environment (Protection) Act, 1986. The submission of the learned counsel

(1) A.I.R. 1998 Allahabad 1=1998 ALL LJ 1= 1998 AIHC 665.
(2) AIR 1946 Allahabad 502. (3) AIR 1938 Lahore 338. (4) 8 So 2d 521 = 243 Ala 53.
(5) 11 NW 894 = 54 Wis 433. (6) 22 A 839 = 145 Pa 105 = 14 LRA 107.
(7) 23 F Supp 40. (8) 28 SE 2d 545= 204 SC 83. (9) 200 So 546= 145 Fla 671.

for the petitioner is that the electricity is hazardous if it is not used with proper care and caution but it is not a substnce. Electricity is nothing but simply the flow of free electrons in a particular time at a particular movement. This flow can be in a wire or in the atmosphere in general in lightening. The flow of energy cannot be held to be a substance. Therefore, the electricity cannot be termed as hazardous substance. It is further averred in the instant writ petition that the electricity has not been notified by the Central Government as hazardous substance under Section 2(d) of the Public Liability Insurance Act 1991. Notificaton issued on 24-3-1992 by the Central Government makes no mention of electricity as hazardous substance, hence in the absence of notification of electricity, it cannot come within the definition of hazardous substance as defined in Section 2(d) of the Act of 1991. The other facts are not repeated as they are not related to the points in question.

5. Learned counsel appearing for the respondent No.1 Collector, Mandla submitted that the impugned order does not call for any interference. Reliance is placed on the decision of this Court in (*M.P. State Electricity Board, Jabalpur* v. *Collector, Mandla and others*[1]), by Brother Justice Dipak Misra in which the decision of Allahabad High Court in *U.P. State Electricity Board* v. *District Magistrate, Dehradun*[2], has been relied upon. Learned counsel for the respondent No.1 further submitted that the electricity has to be treated as a hazardous substance.

6. "First question for consideration is whether electricity is a "hazardous substance"?

Before I advert to the two decisions cited at the Bar, it is relevant to notice that it has not been disputed that the electricity is hazardous. The electricity is as something seen only through the results accomplished by it (*Hill* v. *Carolina Power & Light Co.*[3],) which has become essential part of life and intrinsically connected with reasonable enjoyment of right to life itself. Life is not as animal existence but encompasses in itself besic frugal comforts which are necessary to make life worth.

7. The characteristics indicates that "electricity" is a silent, deadly and instantaneous force, Electricity is a subtle, invisible, noiseless, death-dealing agency that gives no warning of its presence. Those who make, sell, distribute and use electricity, which is invisible force highly dangerous to life and property,

(1) Writ Petition No. 2165 of 2001,decided on 15-4-2002 . (2) AIR 1998 All 1.
(3) 28 SE 2d 545, 553, 204 SC 83.

are bound to use care in proportion to danger involved. (*Teddleton* v. *Florida Power & Light Co.*[1]).

8. Process of production of electricity is process of manufacture. In *Curry* v. *Alabama Power Co.*[2], a Corporation engaged in generation and distribution of electricity is held to be a "manufacturing corporation" within Use Tax Act exempting machines used in manufacturing tangible personality. The word "manufacture means the making of anything by hand or artifice, or the process of making anything by art of reducting materials into a form fit for use, by the hand or by machinery, or the production of articles for use from raw or prepared materials by giving such materials new forms, qualities, properties or combinations whether by hand or by machinery.

9. Conducting of electricity cannot take place through the dead wire. Electricity is an imponderable and invisible agent producing light, heat, chemical decomposition and other physical phenomena. *United State* v. *City and County of San Francisco, D.C. Cal*[3],). It cannot be denied that the electricity is a powerful and subtle force and most of the developments all around is based on it. The force of this energy is called electricity. The electricity gives no warning and may travel anywhere and everywhere. Whatever electricity may be, it seems to be absolutely within the power and under the control of the company that brings it into being. It is compelled by the process employed to come into being. It is secured, poured out, or liberated at will. Its manifestations are both seen and felt. It moves with incredible velocity and power. It carries the tones and inflections of the human voice, or moves loaded cars, depending on the volume of the current and the manner of its application. It may be in the hands of the physician a soothing remedial agent, and in the hands of the law an instrument of execution, swifter and surer than the headsman's exe as amply observed in *Common wealth* v. *Northern Electric Light & Power Co.*[4].

10. In Imperial Dictionary "electricity" is defined as "the name given to the series of phenomena exhibited by various sub-stances, and also to the phenomena themselves. We are totally ignorant of the nature of this cause–Whether it be a material agent, or merely a property of matter. But as some hypothesis is necessary for explaining the phenomena observed, it has been assumed to be highly subtile, imporiderable fluid, identical with lightning, which pervades the power of all bodies, and is capable of motion from one body to another. Electricity, when accumulated in large quantities, becomes an agent capable of producing the most sudden, violent,

(1) 200 So 546, 549, 145 Fla 671.
(2) 8 So 2d 521, 526, 243 Ala 53.
(3) 23 F Supp 40, 52.
(4) 22 A 939, 840, 145 Pa 105; 14= LRA 107.

and destructive effects, as in thunder storms; and even in its quiescent state it is extensively concerned in the operation of nature" as observed in *Spensley* v. *Lancashire Ins. Co.*[1].

11. In *Nainital Hotel Co. Ltd.* v. *Municipal Board, Nainital*[2], it was held that electric energy is "movable property" and, therefore, "goods" within the meaning of Article 52 of the Limitation Act. Relevant portions as observed in abovesaid case are quoted below:–

> "(19) The remaining objection that electric energy is not 'goods' within the meaning of Article 52 requires more consideration. It may be noted first of all that in the Lahore case cited in AIR 1938 Lah 338 no such objection appears to have been taken and it was assumed that the article applied to electric energy as much as to any other commodity. The word 'goods' is not defined in the Limitation Act, but according to the definition in the Indian Sale of Goods Act the word means "every kind of movable property other than actionable claims and money". Electric energy is bought and sold like any other commodity and there can therfore, be no doubt that it is 'property'.
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> (23) And quite apart from these considerations I cannot see any difficulty in holding that electric enerty is movable, for it can certianly be transmitted or sent from one place to another and this implies that it is moved.
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> (24) There is another argument which points to the same conclusion. This is that under the General Clauses Act property is either movable or immoveable, electric energy is certainly not immoveable property as that expression is defined in the same Act or any other Act. The definitions are not exhaustive, since they use the word "includes" and not the word "means" but there is nothing in the examples given which would suggest that electric energy should also be included.

12. It is not in dispute that electricity can be sold. Its use has constructive as well as destructive results both. Means of transportions and light houses and virtually all the manufactuting activities depend on it. In the Factories Act. 1948 "hazardous process" has been defined in Section 2 (cb) which means any process

(1) 11 NW 894, 897=54 Wis 433. (2) AIR 1946 All 502.

or activity in relation to an industry specified in the First Schedule. The First Schedule mentions the power generating industries. "Manufacturing Process" is defined in Section 2 (k) of Factories Act. 1948 which means any process for "generating, transforming or transmitting power. The process for manufacutre is involved before the electricity is transmitted after being generated. Electricity may be sent. Its use may be erratic or in confined space. It is caused by employed labour. It may be used for protection of environment and health and it can be used as an explosive device. There are several alternative electricity sources as nuclear power electricity, wind mill, hydroelectric power. It is backbone of serveral business and commercial activities. Considering the various uses of the electricity, it can be sold and manufactured and backbone of commerce of Industry, it has to be held to be moveable property and in my opinion electricity is a substance.

13. The scientific property was discussed in *U.P. Electricity Board v. District Magistrate*[1]. The Meaning of word "substance" was considered in terms of Chambers English Dictionary which has defined "substance" to mean "that in which qualities or attributes exist, the existence to which qualities belong; that which constitutes anything what it is the principal part; subject-matter; body; matter; kind of matter, especially one of definite chemical nature; amount, wealth, property; solidity; body; solid; worth-foundation; ground".

14. In *U.P. State Electricity Board* v. *District Magistrate, (supra)* it was observed as under:–

> "27. To examine whether electricity can be called a "substances" we have to first understand the nature of electricity. Electricity is simply a flow of free electrons in a particular direction at a particular moment. This flow can be in a wire, or even in the atmosphere e.g. in lighting.
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> 28. It is well known in modern physics that matter consists of atoms, which were earlier regarded as indivisible particles according to Dalton's Theory. However, the British Scientist J.J. Thomson established in 1897 that in fact atoms consist of smaller particles, and one of such smaller particles are electrons. The basic concept of the atomic model was subsequently propounded

(1)AIR 1998 All 1.

by Rutherford in 1911 who established that atoms consist of a heavy nucleus (consisting of protons, neutrons, etc.) with electrons orbiting it (analogous to the planets orbiting the Sun). These electrons contain negative electrical charges, whereas the protons, which are part of the nacleus contain postive electricity. When some electrons are removed from their orbits they become free electrons, and when these free electrons flow in a particular direction they form an electric current.

29. An electron is a particle with a negative electric charge of magnitude 0.1602x 10-18 coulombs. The mass of an electron is 0.9108 x 10-30kg. which is 1/1837 of the mass of the hydrogen atom. An electron is very small. The radius of the electron has not been determined exactly, but it is known to be for less than 1x 10-15 m.

30. In 1925 it was discovered that an electron spins about an axis and that it has a magnetic moment.

31. Thus, it is clearly established by modern physics that an electron is a very small particle of matter with a negative electrical charge and certain other properties. An electron is thus a material particle, and electricity is the flow of these small material particles in a particular direction. This flow is consequently a flow of matter and the flow has physico-chemical properties e.g. when passed through water, it separates the hydrogen from the oxygen atoms (electrolysis). We may not be able to see this flow, but we can feel it because if we touch a naked live wire it gives an elctric shock. Hence it is a substance as defined in Chambers English Dictionary."

It was observed that electricity consists of electron which is a substance. Electron spins about an axis and that it has a magnetic moment. It is a very small particle of matter with a negative electrical charge and certain other properties. An electron is thus a material particle. On coming to conclusion, electricity has been held to be a substance.

15. Brother Justice Dipak Misra while deciding Writ Petition No. 2165/2001 has not only relied upon the decision in the case of *U.P. State Electricity Board, (supra)* but has held that "electricity" is a "hazardous substance".

16. From the above discussion it is clear that the electricity is "hazardous substance".

17. The next question for consideration is whether a notification is required to be made by the Central Government quantifying the electricity by notification as mentioned in Section 2 (d) of the Public Liability Insurance Act, 1991. The definition of "hazardous substance" has been given in Section 2 (d) of the Public Liability insurance Act, 1991 which is as under:–

> "2 (d)–"hazardous substance" means any substance or preparation which is defined as hazardous substance under the Environment (Protection) Act, 1986, and exceeding such quantity as may be specified, by notification, by the Central Government.
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> The definition of "hazardous substance "has been borrowed from Section 2(e) of the Environment (Portection) Act, 1986. As per Section 2 (e) of the said Act, definition of "hazardous substance" reads as under:–
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> "2(e)–'hazardous substance' means any substance or prepatation which, by reason of its chemical or physico-chemical properties or handling, is liable to cause harm to human beings, other living creatures, plants, micro-organims, property or the environment".

18. The submission of Shri V. Rusia, learned counsel for the petitioner is that until and unless the electricity is notified by the Central Government, it cannot fall within the meaning of hazardous substance and definition has been carved out especially for the purpose of Public Liability Insurance Act. 1991.

19. "Hazardous Substance" has been defined in Section 2 (e) of the Environment (Protection) Act. 1986, according to which it means any substance or preparation which, by reason of its chemical or physicochemical properties or handling, is liable to cause harm to human beings. Physico chemical properties of electricity are definitely liable to cause harm to human beings and other living creatures, plants, micro-organism etc. Thus, it has to be regarded as "hazardous substance "within the meaning given in Section 2 (e)of the Environment (Protection) Act, 1986 and once when some thing is hazardous irrespective of quantity, in my opinion it is not necessary for the Central Govt. to issue a notification as it is not neccessary to notify electricity as required in Section 2

(d) of the Public Liability Insurance Act. 1991 as it is hazardous irrespective of this quantity. A thing which is known as intensely hazardous has to be treated as hazardous substance so as to effectuate the purposes for the enactment of the Act of 1991. Whatever irrespective of proportion is hazardous has to be treated as hazardous one. Some article may not be hazardous in small quantity but electricity is not one of such article. Only these hazardous substances have to be notified which may be dangerous on exceeding such quantity then it becomes necessary to specify the quantity. In my opinion it is not necessary for the electricity to be notified under Section 2 (d) of the Act of 1991 as in any quantity electricity is hazardous. It has to be taken as hazardous substance within the meaning of Section 2 (d) of the Act of 1991. Section 2 (d) of the Act of 1991 does not have effect narrowing down the meaning of "hazardous substance" as defined in Section 2 (e) of the Act of 1986. Similar question was answered in *U.P. State Electricity Board,* (supra) and in *M.P. State Electricity Board, Jabalpur* v. *Collector, Mandla*[1]. In *U.P. State Electricity Board (supra)*, it was held in Para 42 as under:–

> "42. Hence in my opinion 'hazardous substance' as defined in Section 2 (d) of the 1991 Act is not to be confined to a substance specified in the notification issued by the Central Government, but it includes all substances which come under the definition of 'hazardous substance' under the Environment (Protection) Act, 1986, with this exception that if any such substance is also notified by the Central Government under Section 2 (d) of the 1991 Act then it will be a 'hazardous substance' only if it exceeds the quantity specified in the said notification.Thus the notification issued by the Central Government under Section 2 (d) of the 1991 Act can only narrow down the scope of 'hazardous substance' as defined under the Environment (Protection Act, 1986, but substances which are not specified in the said notification will nevertheless be regarded as 'hazardous substances' under the 1991 Act if they come within the definition of 'hazardous substances 'under the Environment (Protection) Act, 1986."
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> In the case of M.P. Electricity Board, Jabalpur (supra) it was held as follows:–

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(1) W.P.No. 2165/2001 decided on 15.4.2002.

"On a reading of aforsaid two definitions it cannot be construed that the substance which is not notified by the Central Government cannot be regarded as a 'hazardous substance'. The terms used under Section 2(d) of the Act are of wide amplitude and of immense magnitude. They are not be understood in a naroow, restricted or confined manner. On the contrary, it covers a large canvas. The dictionary clause does not lay down a postulate that unless a substance is notified it cannot be regarded as a hazardous substance. The definition in the Act refers to Environment (Protection) Act, 1986. I have reproduced the aforesaid definitions hereinabove. The said definition is in a broad spectrum. It cannot be encompassed in a small region. If both the definitions are read together it is quite pronounced that the electricity should come within the ambit and sweep of the definition, and certain substances may become hazardous if they are notified as required under the provisions. Thus, notification by the Central Government is not the *sine qua non* to make a substance hazardous.

20. Section 3(2) of the Act of 1991 speaks about the strict liability without fault in case of such accidents involving death due to hazardous substance and it is not necessary for the claimant to plead and estblish that the death, injury or damage in respect of which the claim has been made was due to any wrongful act, neglect or default of any person. No policy was taken out by the Board. That will not affect the liability of the owner. The main aims and objects of the Board to generate, trasform and transmit the electricity and these are is activities. It cannot escape from its liability by saying that no policy was taken by the Board.

21. I find no merit in the instant writ petition. Thus, this writ petition is dismissed. However, in the facts and circumstances of the case, no order as to costs.

Petition dismissed.

WRIT/MISCELLANEOUS PETITION

Before Mr. Justice Arun Mishra.
2 July, 2002.

DWARKA PRASAD RAI ...Petitioner*

v.

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

Kastha Chiran (Viniyaman) Adhiniyam, M.P., Sections 6,7,9,12, 13 and 15–Revocation of licence and confiscation–Grounds have to be informed–Supply of material on basis of which grounds arise and opinion is formed is necessary ingredient–Relevant documents not supplied–Petitioner deprived of opportunity to defend properly.

In the instant case not only the licence has been revoked but saw Mill has also been fonfiscated in exercise of power of Section 12 of the Act. Sub section (2) of Section 12 provides that no order of confiscating any property shall be made under sub section (1) unless the person from whom the property is seized and in the case the owner of such property is known, such person is given a notice in writing informing him of the grounds on which it is proposed to confiscate such property; an opportunity of making a representation in writing within such reasonable time as may be specified in the notice against the grounds for confiscation; and a reasonable opportunity of being heard in the matter. In my opinion, though it is not specifically mentioned in sub Section 2 of Section 12 the material should also be supplied when the requirement is that grounds have to be informed, in my opinion, the supply of material on the basis of which the grounds arise and opinion has been formed is the necessary ingredient of the opportunity as contemplated under sub Section 2 of Section 12 otherwise the same may be superfluous. So as to enable a person to defend himself properly it is necessary the material on the basis of which opinion has been formed should also be supplied. That having not been done in the instant case and when such material has been relied upon by the Licensing Authority without affording copy of the same to the petitioner, the order *per se* its lees is illegal.

As a matter of fact no enquiry was conducted by the Licensing Authority. Whatever that may be since the relevant documents were not supplied, it is held that petitioner has been deprived of opportunity to defend properly, the respondents are

*M.P.No 2974 of 1989.

directed to supply the copies of the statements and other relevant documents to the petitioner and thereafter to proceed in the matter.

[Para 7]

R.C. Tiwari, for the petitioner.

Ashok Agrawal, GA for respondent-State.

Cur. adv. vult.

ORDER

ARUN MISHRA, J:–Petitioner challenges the order of cancelling the licence and confiscation of saw mill as per order Annexure I dated 14.10.88 passed by Licensing Authority & D.F.O. North, Division Sagar, under the provisions of M.P. Kastha Chiran (Viniyaman) Adhiniyam, 1984 (hereinafter referred to as 'the Act').

2. An appeal filed by the petitioner has been dismissed by the Conservator of Forests as per Annexure J passed on 15.2.1989. Another appeal preferred before the Addl. District Judge, Sagar, has also been dismissed on 20.4.1989 as per order Annexure L.

3. Petitioner submits that saw Mill was initially owned by Sardar Niranjan Singh of Khurai who sold the saw mill to the petitioner. The petitioner was issued licence for the transferred saw mill for the year 1985 to year 1988. On 14.8.88 the Range Officer entered the premises of the saw mill of the petitioner without any search warrant and seized 10 sawn teak timber, one partly saw timber of teak and 4 round logs of teak, total 15 numbers, on the allegation that these teak logs were illegally brought from the forests and were shown as freshly felled teak timber. Seizure memo was prepared. Petitioner moved an application for supply of seizure memo, copy of which was not handed over to petitioner. The petitioner submitted an application on 16.8.88 giving details of the transit passes by which the round teak timber in question were transported to Khurai after their purchase from Sironj Depot on18.2.88, 5.8.88 and 9.8.88 as per transit passes 3/333, 30/303 and 204/15. Petitioners saw Mill was not checked by the forest staff after 1.2.87. Petitioner's signatures were obtained on Panchnama on 14.8.88 in the presence of police force. Panchanama was also not handed over to the petitioner. The statement of the petitioner was recorded

Dwarka Prasad Rai v. *State of M.P., 2002.*

by Range Officer on 14.8.88. In the statement the petitioner had very clearly stated that the 15 sawn and round teak timber seized were brought from the Sironj Depot under valid transit passes and these timber were entered in the stock register. Petitioner was submitting quarterly statements regularly. The statement for the period from 1.4.88 to 30.6.88 is as per Annexure D. The action is in the violation of Section 12 of the Act. All relevant and material documents were not supplied to the petitioner. An application Annexure E was filed by the petitioner on 14.8.88 for supply of documents but inspite of this application no such documents were furnished to the petitioner. Large number of witnesses were examined by the Range Officer, Khurai on 14.8.88 but copies of these statements were also not supplied to the petitioner. A show cause notice Annexure F was issued to the petitioner on 9.9.88 as to why the saw mill of petitioner be not confiscated and the licence of which be revoked under the Act. In order to replying show cause notice petitioner had applied for copies of relevant and material documents on 14.9.88. Only copy of seizure memo was handed over to the petitioner. No other documents were handed over to him. Inspite of the demand copies of the statements were not furnished. The Licensing Authority passed an order on 15.2.89 confiscating the saw Mill of the petitioner. An enquiry was not held as required under Section 12(3) of the Act. Thus, the findings recorded are perverse. The provisions of Section 12(2) (C) of the Act have been violated. Thus, the orders are bad in law and deserve to be quashed.

4. The respondents contend that the findings arrived at are just and proper. No interference is called for by this Court. Petitioner was given copy of seizure memo and Panchnama. Petitioner did not pray to cross examine the witnesses. The statements of the witnesses had not been relied upon by the Licensing Authority. The statements given by these witnesses were not considered and for this reason no prejudice has been caused to the petitioner. The documents were inspected by the counsel for petitioner. Thus, the orders passed are just and proper. The matter is of commission of seroious offence involving Forest produce.

5. Shri R.C. Tiwari, learned counsel for the petitioner, submits that the orders have been passed under the provisions of Section 12 of the Act. No enquiry was conducted by the Licensing Authority. The petitioner was not given the copies of the statements of the witnesses though they were relied upon by the Licensing Authority while passing the impugned order. Transit passes were

produced. The finding recorded that goods seized is not covered under transit passes is perverse. In any case as the documents were not supplied to the petitioner, the statements of the witnesses were recorded by Range Officer which were not supplied. The names of the persons who were members of the team, stock register etc. which were seized, had not been made available. The impugned orders are bad in law.

6. Shri Ashok Agrawal, learned G.A. appearing for the respondents, submits that seizure memo was handed over to the petitioner and the documents were perused by the counsel for the petitioner. Thus, no prejudice has been caused to the petitioner by non supply of the relavent documents on the basis of which the action was initiated. The burden of proof as per section 15 of the Act is on the accused. Thus, there is no infirmity in the orders impugned. No interference is called for in the writ petition.

7. It is clear from the perusal of the order passed by the Licensing Authority that Licensing Authority has relied upon the statements of the various witnesses which were recorded on 14.8.88. Then offence was registered under Sections 7,9,12, 13 and 15. The statements were recorded and for commission of the offence the action was initiated of cancelling the licence with confiscation of saw Mill. In my opinion, the first requirement was to supply the copies of the statements of all the witnesses to the petitioner and all the documents which were placed before the Licensing Authority for initiating the action against the petitioner. Petitioner applied for copies of all relevant and material documents as per Annexure E on 14.9.88. The petitioner also applied for copies of the statements of the witnesses, his own statement, enquiry report submitted by Range Officer on the basis of which the action was initiated. These documents were not supplied inspite of application being moved on that behalf. In the return the respondents have surprisingly taken the stand that these statements of the witnesses were not relied upon to take action against the petitioner but the fact mentioned in the return is incorrect & falsified, bare perusal of the order passed by the Licensing authority Annexure I. The various statements of the witnesses were recorded on 14.8.88, findings have been approved in appeal more or less in mechanical manner wothout going into the evidence by the Conservator of Forest. Whatever that may be the fact remains that the statements of the witnesses were relied upon and copies of the statements were not supplied to the petitioner. Section 6 of the Act deals with grant, renewal, revocation or

suspension of licence. Sub section 5 of Section 6 of the Act requires that if the licensing officer is satisfied either on a reference made to it in this behalf or otherwise that the licensee has parted, in whole or in part with his control over the saw mill or saw pit or has otherwise ceased to operate or own such saw mill or saw pit; or the licensee has, without reasonable cause, failed to comply with any of the conditions of the licence or any direction lawfully given by the licensing officer or has contravened any of the provisions of this Act or the licensee has, in the premises of the saw mill or saw pit, wood which he is not able to account for satisfactorily and consequently which is liable for confiscation u/s 9 than without prejudice to any other penalty to which the licensee may be liable under this Act, the licensing officer may, after giving the licensee an opportunity of showing cause, revoke or suspend the licence and forfeit the sum. But in the instant case not only the licence has been revoked but saw Mill has also been confiscated in exercise of power of Section 12 of the Act. Sub section (2) of Section 12 provides that no order of confiscating any property shall be made under sub section (1) unless the person from whom the property is seized and in the case the owner of such property is known, such person is given a notice in writing informing him of the grounds on which it is proposed to confiscate such property; an opportunity of making a representation in writing within such reasonable time as may be specified in the notice against the grounds for confiscation; and a reasonable opportunity of being heard in the matter. In my opinion, though it is not specifically mentioned in sub Section 2 of Section 12 the material should also be supplied when the requirement is that grounds have to be informed, in my opinion, the supply of material on the basis of which the grounds arise and opinion has been formed is the necessary ingredient of the opportunity as contemplated under sub Section 2 of Section 12 otherwise the same may be superfluous. So as to enable a person to defend himself properly it is necessary the material on the basis of which opinion has been formed should also be supplied. That having not been done in the instant case and when such material has been relied upon by the Licensing Authority without affording copy of the same to the petitioner, the order per se is illegal. The submission reaised by the learned counsel for the respondents that inspection was made by the counsel, it does not appear from the return that inspection of all the documents were afforded and that cannot be in all circumstances, a substitute of supply of documents. No enquiry was conducted by the Licensing Authority and Licensing Authority acted upon the material collected by the Range Officer without

supplying copy of the same to the petitioner. It has been stated in the return in para 35 that statements of the witnesses who were not cross-examined were ignored by the Conservator of Forest. The statement is also not correct as none of the witnesses were allowed to be cross examined. As a matter of fact no enquiry was conducted by the Licensing Authority. Whatever that may be since the relevant documents were not supplied, it is held that petitioner has been deprived of opportunity to defend properly, the respondents are directed to supply the copies of the statements and other relevant documents to the petitioner and thereafter to proceed in the matter.

8. The orders Annexure I passed by the Licensing Authority, Annexure J passed by Consevator of Forests, and Annexure L Passed by the Addl. District Judge are quashed. Matter is remitted back to Licensing Authority who shall proceed with the same is accordance with law. Petitioner is directed to keep himself present before the Licensing Authority on 5.8.2002. Licensing Authority is directed to decide the matter afresh in accordance with law within 3 months from the date of appearance made by the petitioner. No fresh notice is necessary to the petitioner. In case petitioner fails to turn on 5.8.2002, it would be open to the Authority to proceed further without issuing any further notice. In the facts & circumstances of the case, costs on the parties.

Petition disposed of.

WRIT/MISCELLANEOUS PETITION

Before Mr. Justice Arun Mishra.
2 July, 2002.

SHANKER DAS LOHANA ...Petitioner*

v.

UNION OF INDIA & ors. ...Respondents

Constitution of India, Article 226, Displaced Person (Compensation and Rehabilitation) Act 1954, Sections 2(b), 33–Settlement Commissioner New Delhi ordered to give effect to the adjustment by issuing necessary sanad–Order attained finality–Order issued by

* M.P.No. 3181 of 1989.

Shanker Das Lohana v. *Union of India, 2002.*

Rehabilitation Department for issue of sanad–Also approved by Rehabilitation Minister–Petitioner in possession–Impugned Order of ejcetment without opportunity of hearing, illegal and in contravention of earlier orders.

There was direction issued that Managing Officer may effect to the adjustment of 18 standard acres of land effected from the compensation application of Shri Shankerdas and arrange to issue necessary Sanad. This order has attained finality and the petition filed u/s 33 to the Director, Department of Rehabilitation by Shri Ashok Kumar against the order Anneuxre–P/8 was dismissed on 28.5.1979 as per Annexure–P/9. Later on the Collector has also recognized the right of the petitioner as per order Annexure–P/15 on the strength of the order passed by the settlement Commissioner and the central government as contained in Annexure–P/8 and P/9, the order P/15 passed by the Collector indicates that Shanker Das is in lawful possession of the land in question.

After few days of passing of this order P/15 all of a sudden without issuing of any notice and opportunity of hearing to the petitioner an order P/16 has been issued by the Rehabilitation Department of Government of M.P. overlooking the order passed by the Settlement commissioner and also decision of the central Government rendered by Director in exercise of delegated power of the central Government u/s 33 of the Act of 1954. It has also not been traversed in the return that the Rehabilitation Department after passing of the order P/16 has accepted the report dated 28.7.1988 and has ordered issue of Sanad to the petitioner. Thus, in my opinion when as per order dated 22.10.1988 the report dt. 28.7.1988 has been accepted the impugned order dated 6.8.1988 P/16 stands superseded, even otherwise order–P/16 is absolutely illegal and has been passed without opportunity of hearing and in contravention of the orders Annexure/P/7 and P/8 and P/9, the impugned order P/16 cannot be allowed to stand.

[Paras 7 and 8]

R.S. Tiwari, for the petitioner.

Ashok Agrawal, Penal Lawyer for the respondents No.2 to 6.

Cur. adv. vult.

ORDER

ARUN MISHRA, J:–This writ petition has been filed aggrieved by the order

Annexure/P-16 passed by the respondent No.2, State of M.P. directing the ejectment of the petitioner and to record the name of Union of India, passed on 6.8.1988 by the Rehabilitation Department of Government of Madhya Predesh.

2. Petitioner avers that Shri Kalumal was a displaced person. He was resident of Sindh Prant the erstwhile undivided Hindustan. After independence Kalumal came to India and was a displaced person within the meaning of section 2(b) of Displaced Persons (Compensation and Rehabilitation) Act, 1954, hereinafter referred to as the "Act". Claim of Kalumal was verified by Government of India at Rs. 1,25,741/- with respect to the house and 15.241/320 units of agricultural land which he left in Sindh Prant, Kalumal settled at Jabalpur. He applied for grant of compensation and allotment of land in the District of Jabalpur. Kalumal died leaving behind his two sons; Gianchand and Shankerdas. Both applied to the settlement officer under the Act to put them on record each claiming half share in compensation. Report was prepared by settlement officer on 20.2.1956. Shankerdas and Gianchand were recognised to be legal representatives as per order Anneuxre-P/1.

3. Late Kalumal was allotted 36 standards acres equal to 90 acres land at village Pipariya and Lakhanwara of Patwari Circle No. 58 of Jabalpur District. This order was issued on 26.6.1956. Petitioner was allotted 18 standard acres equal to 45 acres of land. Two cases for disbursement of compensation were started; one in the name of Gianchand and other in the name of the petitioner; Shankerdas. In the compensation case of the petitioner 18 standard acres land was adjusted in statement of account issued to him. One Ashok Kumar son of Gianchand wanted to grab the land. On 3.1.1970 the Managing Officer ordered the petitioner to surrender possession of the land without giving opportunity of hearing. Petitioner appealed to the higher authorities. The Assistant Settlement Commissioner, New Delhi, issued an order restraining the dispossession on 31.3.70. In the appeal Ashok Kumar filed an application to join as a party. The application filed by Ashok Kumar was dismissed. Ashok Kumar filed a revision u/s 24 of the Act of 1954. Chief Settlement Commissioner rejected the revision as per order Anneuxre–P/7 dated 26.11.1971.

4. Petitioner had preferred an appeal against the order dated 3.1.1970 which was allowed by the Settlement Commissioner, New Delhi as per order Annexure–P/8 dated 15.3.1972 and a direction was issued to the Managing Officer to give

effect to the adjustment of 18 standard acres of land by issuing necessary Sanad. Petitioner submits that the order is conclusive, binding and has attained finality. Revision was preferred by Ashok Kumar against the said order which was dismissed on 28.5.1975 by the Director, Department of Rehabilitation, New Delhi exercising the delegated powers of Central Government under section 33 of the Act of 1954. Collector also initiated proceedings on the basis of complaint lodged by Shri Virumal. Collector found possession of the petitioner as per order Annexure–P/15 which was passed on 28.7.1988. There was report submitted in favour of the petitioner by the various authorities as to possession and order P/15 has been passed in favour of the petitioner.

5. Petitioner submits that all of a sudden without giving opportunity of hearing, without issuance of any prior show-cause, an order P/16 was issued by the Rehabilitation Department of Government of M.P. on 6.8.1988 directing ejectment and for recording the name of Union of India in the revenue papers. Petitioner submits that the order is in disregard by the order passed by the Settlement Commissioner Annexure–P/8 u/s 24 of the Act. Secretary of State of M.P., Rehabilitation Department has accepted the report dated 28.7.1988 and order was issued to the petitioner, thereafter file was placed before the Minister, Rehabilitation Department on 22.10.1988 who also ordered issue of Sanad to the petitioner. Both these orders were passed after the passing of impugned order Annexure-P/16. Thus, the impugned order P/16 passed on 6.8.1988 cannot be allowed to stand, however, as Sanad was not issued, the petitioner submitted representation.

6. The respondent No.2 to 6 in the return contend that the claim of deceased Kalumal was verified by the Minister of Rehabilitation Department, Government of India. It has also been admitted that Kalumal was the father of the petitioner. Compensation was required to be paid is also not in dispute. No actual allotment order has been issued in favour of the petitioner. However, it has been admitted that the order Annexure–P/8 has been passed directing the Managing Officer to issue Sanad. Respondents No.2 to 6 have also not denied that an order was issued by the Rehabilitation Department which was approved by the Minister for issue of Sanad.

7. Shri R.S. Tiwari, learned counsel appearing for the petitioner submits that the order P/16 passed by the Rehabilitation Department of Government of M.P. is absolutely improper, bad in law and void. Firstly; there is order

of settlement as contained in Annexure–P/2 in favour of Kalumal the land mentioned which was later was confined to 18 standard acres of land as mentioned in the order of the Settlement Commissioner, New Delhi, passed on 15.3.1972. There was direction issued that Managing Officer may effect to the adjustment of 18 standard acres of land effected from the compensation applcation of Shri Shankerdas and arrange to issue necessary Sanad. This order has attained finality and the petition filed u/s 33 to the Director, Department of Rehabilitation by Shri Ashok Kumar against the order Annexure–P/8 was dismissed on 28.5.1979 as per Annexure–P/9. Later on, the Collector has also recognized the right of the petitioner as per order Annexure–P/15 on the strength of the order passed by the settlement Commissioner and the central Government as contained in Annexure–P/8 and P/9. The order P/15 passed by the Collector indicates that Shanker Das is in lawful possession of the land in question.

8. After few days of passing of this order P/15 all of a sudden without issuing of any notice and opportunity of hearing to the petitioner an order P/16 has been issued by the Rehabilitation Department of Government of M.P. overlooking the order passed by the Settlement commissioner and also decision of the central Government rendered by Director in exercise of delegated power of the central Government u/s 33 of the Act of 1954. It has also not been traversed in the return that the Rehabilitation Department after passing of the order P/16 has accepted the report dated 28.7.1988 and has ordered issue of Sanad to the petitioner. Thus, in my opinion when as per order dated 22.10.1988 the report dt. 28.7.1988 has been accepted the impugned order dated 6.8.1988 P/16 stands superseded, even otherwise order–P/16 is absolutely illegal and has been passed without opportunity of hearing and in contravention of the orders Annexure/P/7 and P/8 and P/9, the impugned order P/16 cannot be allowed to stand.

9. Writ petition is allowed, impugned order Annexure–P/16 is quashed. Respondents are directed to issue Sanad as per order Annexure–P/8. In the facts and circumstances of the case. there shall be no order as to costs.

Petition allowed.

WRIT/MISCELLANEOUS PETITION

Before Mr. Justice Arun Mishra.
4 July, 2002.

VISHVESHWARIYA RAJDHANI PARIYOJNA
SAHKARI GRAH NIRMAN SAMITI, BHOPAL ...Petitioner*

v.

STATE OF M.P. and another ...Respondents

Constitution of India, Article 226–Allotment of Nazul Land to Housing Society–Assessment of premium and annual lease rent–Rate prevailing in the previous year is relevant.

Even otherwise the provision of allotment in Revenue Book Circular makes i clear that for the purpose of determination of market value the rate prevailing in the previous year of allotment is relevant which has been applied in the instant case. Thus, it cannot be said that action is arbitrary or illegal. It cannot be said to be a case of discrimination. When the allotment was made to railways employees society in the year 1984 the rate prevailing was charged and in the case of petitioner when the allotment has been made in the year 1991, the rates prevailing at the relevant time are payable, hence, they have been accordingly fixed.

(Para 7)

Vivek Pandey, for the petitioner.

Ashok Agrawal, for the respondents.

Cur. adv. vult.

ORDER

ARUN MISHRA, J :–This writ petition has been field by the petitioner, a registered cooperative housing society, seeking the writ of certiorari for quashing the order of the State Government, Department of Revenue dated 23.8.1981 (Annexure P/10) demanding a premium of Rs. 1,07,81,100/- and fixing the ground rent at Rs. 1,34,764/- per annum.

2. Petitioner submits that respondent no. 1 State of M. P. is regularly providing land for the development of plots to the cooperative housing societies in the capital project area of Bhopal as per order Annexure P/2 dated 16.8.83, four

* M.P. No. 1546/1993.

acres of land was reserved for allotment to the petitioner-society. Further 1½ acres of land was reserved as per order Annexure P/3 passed on 26.6.84. Petitioner-society asked for the advance possession of the reserved land on 22.9.1984 which was not handed over. Petitioner submitted letter to the Director, Town & Country Planning department for the approval of the lay out plans of the reserved land alongwith letter dated 30.1.1985. As the advance possession was not handed over, Department of Town & Country Planning did not approve the lay out plans. Members also did not deposite the money with the society as the advance possession was not handed over. Another society namely "Madhya Railway Karmachari Grih Nirman Sahkari Sangh, Bhopal" was allotted 11.30 acres land in the year 1984; advance possession was given; allotment was made in June, 1984; premium of Rs. 2,88,280.20 paisa was fixed for 11.30 acres of land and the yearly rent was fixed at Rs. 14,414.05 paisa. Petitioner's case was kept pending till 1989; the respondents did not take active steps to assess the premium; lease rent or to issue the allotment order. Initially the premium was assessed at the rate of Rs. 12/- per sq. ft. In the year 1989 a representation was filed to hand over the advance possession; order of allotment P/10 has been issued in the year 1991 making allotment at the rates which were prevailing in the year 1991. The action of the respondents is discriminatory. Petitioner requested for reconsideration of rates but his representation has been rejected by a non-speaking order dated 13.9.92 (Annexure P/15).

3. The respondents in the return contend that the procedure for allotment for Nazul land is prescribed in Revenue Book Circular Part 4 Chapter 1, Serial 1 which provides the procedure for assessment of premium and annual lease rent. It is prescribed in the Revenue Book Circular that the rates prevailing in the year prior to allotment shall be taken into consideration while fixing the premium the nature and situation of the land shall also be considered. It is submitted that the premium and lease rent has been fixed as per the procedure prescribed. There is no substance in the contention of the petitioner that the rates prevailing in year 1984-85 should have been taken. Such rates are not relevant as the allotment was made in the year 1991. No discrimination has been done.

4. Shri Vivek Pandey, learned counsel appearing for the petitioner submits that it was owing to fault on part of respondents that advance possession was

not handed over and allotment was made in the year 1991; thus, the allotment should have been made at the rate prevailing in the year 1984-85. It is a case of discrimination also inasmuch as cooperative housing society of railway employees was allotted in the year 1984; the adjoining land at the lesser rates and the land has been allotted to the petitioner's housing society at a higher rate. Thus, the action is violative of Article 14 of Constitution of India.

5. Learned counsel for respondents Shri Ashok Agarwal submits that the action is proper; determination is in accordance with the market value; date of allotment is relevant and the petitioner failed to fulfil the conditions as mentioned in Annexure P/2 and P/3 as such he cannot claim the allotment at the rates prevailing in the year 1984-85 particularly when the allotment has been made in the year 1991.

6. The orders reserving the land in favour of petitioner-society were issued on 16.8.83 (Annexure P/2) and on 27.6.84 (Annexure P/3). Order Annexure P/2 indicates that it was the duty of the petitioner to obtain the sanction of lay out and the maps by Town & Country Planning Department under M.P. Nager Tatha Gram Nivesh Adhiniyam. Duly approved plan was also required to be submitted. On own showing of the petitioner no such sanction of lay out could be obtained by the petitioner. It is nowhere provided that advance possession was required to be given for obtaining the sanction of lay out as per plan. Thus, it appears that petitioner himself failed to carry out obligations imposed upon him as per the averment made in the writ petition to submit the sanctioned lay out and plan. It has not been made clear by the petitioner in the writ petition on which date he has submitted it subsequently; thus, it cannot be said that owing to delay, negligence or lapse on part of the respondents the allotment was delayed. Though the return is evasive but the facts pleaded in the writ petition cannot be ignored or overlooked and the condition of order of reserving the land contained in orders P/2 and P/3 make it clear that petitioner failed to act and no representation is on record between 1985 to 1988 to show that petitioner was vigilant or took any steps.

7. Even otherwise the provision of allotment in Revenue Book Circular makes it clear that for the purpose of determination of market value the rate prevailing in the previous year of allotment is relevant which has been applied in the instant case. Thus, it cannot be said that action is arbitrary or illegal. It cannot be said to be a case

of discrimination. When the allotment was made to railways employees society in the year 1984 the rate prevailing was charged and in the case of petitioner when the allotment has been made in the year 1991, the rates prevailing at the relevant time are payable, hence, they have been accordingly fixed.

8. I find no illegality or infirmity in the order P/10 passed by the respondents.

9. Writ petition is without merit and is dismissed. Costs on parties.

Petition dismissed.

WRIT/MISCELLANEOUS PETITION

Before Mr. Justice Arun Mishra.
10 July, 2002.

ASHOK SAHKARI GRIH NIRMAN SAMITI, BHOPAL ...Petitioner*

v.

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

Constitution of India, Article 226. Land Acquisition Act, 1894, Section 4– First notification not challenged–Possession taken over and development already done by Housing Board after first notification– Petitioner's conduct is of acquiescence–Petitioners have no right to challenge the acquisition.

In the instant case, as already mentioned above, though the fresh notification has been issued under section 4 but the fact remains that possession was already taken and the first notification was not challenged on the grounds present notification is being challenged ,developments having been already done, some houses also came up as per petitioners' own showing, petitioners, in my opinion, have no right to challenge the acquisition as their conduct is of acquiescence in the development work raised by the housing board.

[Para 16]

State of Tamil Nadu and others v. *L. Krishnan and others*[1], *Mohammad Shafi* v. *State of M.P. and others*[2], *M.P. Housing Board* v.

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*M.P.No. 451 of 1987.

(1) 1995 A.I.R. (S.C.W.) 4390.

(2) 1989 J.L.J. 501.

Ashok Sahkari Grih Nirman Samiti, Bhopal v. *State of M.P.*; *2002.*

Mohd. Shafi and others[1], *S.S. Darshan* v. *State of Karnataka*[2], *Bhagat Singh* v. *State of U.P. and others*[3], *Bhoomandal Singh* v. *State of M.P. and others*[4], *Chaitram Verma* v. *Land Acquisition Officer and others*[5], *Satendra Prasad Jain and others* v. *State of U.P. and others*[6], *Narayan Govind Gavate etc.* v. *State of Maharashtra and others*[7], *State of Punjab and another* v. *Gurdial Singh and others*[8], referred to.

Cur. adv. vult.

Rohit Arya, for the petitioner.

Ashok Agrawal and Ku. Anjali Banerjee, for the respondents.

ORDER

ARUN MISHRA, J:–Petitioner/Ashok Cooperative Housing Society has challenged the notifications issued under Section 4 and declaration under Section 6 respectively Annexure L and M acquiring the land for the housing scheme framed by M.P. Housing Board.

2. In the writ petition it is averred that petitioner is a cooperative society registered under M.P. Cooperative Societies Act. Society has been constituted for providing plots to the landless persons. 95% of the members are Government employees and 20 members are nominated from business categories. They belong to weaker section of the society. Society purchased 33.24 acres land at village Shahpur, Tehsil Huzur, District Bhopal bearing Sy. Nos. 63/1 64, 74, 163, 166,164, 167, 169, 170, 171, 172, 194, 208-209, 210 and 222; the land was purchased by two sale deeds executed by Bhanwarji and Ghasia on 15.4.1964 and 14.5.1964 for a sum of Rs. 33,000/-. From the above land petitioner had developed a colony and about 140 plots have been distributed. From 1962 till 1972 Shri Babu Lal Shakya took over as the President of the petitioner/society and from 1972 to 1979, it remained under the administration of officer-in-charge and election took place in 1981. The present President was elected from 1986. From 1984 to 1986 Shri P.R. Rishi was elected as President; no-one protected the interest of the society and erstwhile President Babu Lal used the funds of the society for his personal gains. In the year 1965 names of

(1) (1992) 2 S.C.C. 168. (2) A.I.R. 1996 S.C. 671. (3) A.I.R. 1999 S.C. 436.
(4) 1997 (1) M.P.L.J. 547. (5) 1993 M.P.L.J. 572. (6) (1993) 4 S.C.C. 369.
(7) A.I.R. 1977 S.C. 183. (8) A.I.R. 1980 S.C. 319.

urshottamdas, Bhagirath and Pyarelal were entered and the name of the society was deleted on 16.61 acres of land. M.P. Housing Board persuaded the State overnment to acquire the Khasra Nos. 64, 74, 164 and 167 total area 5. 482 ectares equal to 13.69 acres out of the said 16.61 acres of land. Declaration nder Section 6 of the Land Acquisition Act was issued on 22.11.1983; no award could be passed within two years from the date of declaration issued under Section 6, therefore, the entire land acquisition proceedings came to an end in view of the provision of Section 11A of the Land Acquisition Act. 'etitioner represented that their lands should not be acquired. However, M.P. ousing Board constructed 8 bungalows over Sy. No. 163 and 166 which have been allotted to senior IAS officers; first land acquisition proceeding commenced n 22.11.83 which came to an end; thereafter fresh notification under Section 4 was issued on 26.12.1986; declaration (Annexure-M) under Section 6 has been issued on 9.1.87. Petitioner submits that object of the Housing Board and the petitioner-society is the same, therefore, acquisition is bad; the flats are to be allotted by the Housing Board to the higher and middle income group. According to the scheme, 87 flats will be constructed in which only persons having income of Rs. 2,500/- or more per month can apply and 145 flats will be constructed in which persons having an income of Rs. 1500/- per month can apply. Respondents started proceedings in 1983 and did nothing for three years. Thus, the action is bad in law. By way of amendment, it was incorporated as a ground that there was no scheme framed by the Housing Board before the land acquisition was initiated by the appropriate Government. Babulal Shakya has illegally alienated ne land which had been purchased by the registered sale deeds. Invocation of ection 17 to dispense with the enquiry under Section 5A of the Act is bad in w. M.P. Housing Board is a local authority; acquisition is *ultra vires* of Section of M.P. Grih Nirman Mandal Adhiniyam. The land cannot be said to have been required for a public purpose as per Section 3(f) (vi) of the Land cquisition Act. The acquisition has been made to legalize the illegal construction raised on the land belonging to the petitioner-society. Petitioner has initiated the proceedings to correct the revenue entries.

Respondent no. 5 M.P. Housing Board in its return contends that the land s recorded in the ownership of Pyarelal, Purshottam, Bhagirath and Gulabchand 'l residents of Bhopal, therefore, society has no right to file the writ petition. Sale deeds were executed in their favour in the year 1967, therefore, the claim

of the petitioner that the land belongs to them is baseless and unfounded. The land acquisition proceeding was started in December, 1983, the award could not be passed within a period of two years from the date of initial notification, thus, the proceedings lapsed; the possession of the aforesaid land was handed over to respondent no.5 under Section 17 of the Land Acquisition Act. The respondent no.5 has developed portion of the lands on which they have constructed roads, sewerage line and the whole of the area is connected with water line and electricity. However, as the award could not be passed within the time; acquisition was challenged by recorded Bhumiswamis Pyarelal and others by filing a civil suit; on lapse of notification fresh notification has been issued. Interim compensation has been determined; the Housing Board has developed the area; sale deeds were executed 22 years before which have now been challenged by the petitioner-society; they have to get established their title first before the Civil Court; the respondent no.5 has made a scheme; in that scheme a provision has also been made for the persons of higher income group; some of the plots have been leased out to the persons of that category; there is nothing unconstitutional in that. Scheme also provides for allotment to low income group and middle income group; there is no *mala fide* intention. The relevant housing scheme was made in the year 1983 and a reference was made to the State Government to acquire the land; accordingly the proceedings were started; invocation of urgency clause is proper; enquiry under Section 5A has been rightly dispensed with. Major portion of the housing scheme has already been taken up by the respondent no.5 and the houses have been built up to plinth level which are meant for 1354 applicants who have made applications for 292 houses. Lot of investment has been made; several persons are waiting for the housing accommodation. Photographs have also been filed to show the level of construction raised. In the application for modification of interim order, it has been contended that activity for construction has been undertaken for 4-5 years after previous notification under section 4 and declaration under section 6 which was never objected to; now on issuance of fresh notification on lapse of previous one instant writ petition has been filed.

4. Shri Rohit Arya, learned counsel for petitioner submits that in the absence of scheme, it was not open to acquire the land for the purpose of M.P. Housing Board, thus, the acquisition as per notification under Section 4 is bad in law. Learned counsel further submitted that first notification was issued in the year 1983 which lapsed; the

proceedings in question were initiated in the year 1986; thus, the dispensation of enquiry under Section 5A was wholly unwarranted, thus, the issuance of declaration under Section 6 is bad in law. Thirdly, he submits that 8 houses have been constructed without acquisition of the land and allotted to IAS officers, thus, action is tainted with *mala fide*. Housing Board owns 100 acres of land in the same vicinity, thus, the acquisition is wholly unwarranted.

5. Learned counsel for respondents no. 1 to 4 Shri Ashok Agrawal submitted that petitioners have no right to maintain the instant writ petition as sale deeds of the land in question were executed by Babulal in favour of Pyarelal and Ramgopal in the year 1967 which have not been challenged before any forum by the petitioner-society; petitioner-society is no more an owner and in the absence of challenge to the sale deeds executed by Babulal in favour of Pyarelal and Ramgopal of the land in question and those purchasers having been recorded as owners, petitioners have no right to maintain the present writ petition. He further submitted that possession was taken under the previous notification; development activity was undertaken; the previous notification was not challenged and after taking possession development has been done by the Housing Board; existence of scheme is not necessary for acquisition of the land under Land Acquisition Act; the provisions of Land Acquisition Act are independent and dispensation of enquiry cannot be faulted as acquisition for housing purpose is also one of the urgent purpose.

6. Ms. Anjali Banerjee, learned counsel for respondent no.6 has supported the submissions raised by learned counsel for respondents no. 1 to 4.

7. Shri Ashok Lalwani, learned counsel appearing for the intervenors submitted that intervenors had purchased the land as such petitioners have no right to file the writ petition and challenge the notification as they are not the owners; sale deeds have not been challenged by the petitioner society.

8. The foremost submission of the learned counsel for petitioner is that in the absence of scheme for the housing purpose under Section 34 of M.P. Grih Nirman Mandal Adhiniyam, 1972 the acquisition is bad in law. Section 34 of the Act of 1972 provides that whenever the Board is of the opinion it may frame a scheme for the land development; such scheme shall specify the proposed lay out area to be developed and the purposes for which particular portions thereof are to be utilized. Section 49 of the Act of 1972 provides that Board

may also take steps for compulsory requisition of any land or any interest thereon required for the execution of a housing scheme in the manner provided in Land Acquisition Act. Under Section 49(1) of M.P. Griha Nirman Mandal Adhiniyam, 1972 the Board may also take steps for the compulsory requisition of any land or any interest therein required for the execution of a housing scheme in the manner provided in the Land Acquisition Act, and the acquisition of any land or any interest therein for the purposes of this Act shall be deemed to be acquisition for a public purpose within the meaning of the Land Acquisition Act. Sub-section (2) of section 49 provides that the Board shall be deemed to be the local authority for the purposes of Land Acuisition Act. In the instant case, the Housing Board has clearly averred in the writ petition that housing scheme was framed in the year 1983 and was placed before the Government which was approved. Since the Government has approved the acquisition for the housing scheme, it has to be taken that scheme was framed by the M.P. Housing Board. Thus, on facts the submission raised by learned counsel for the petitioner is not acceptable.

9. The definition of "public purpose" under section 3(f) of the land Acquisition Act includes the provision of land for planned development of land from public fund in pursuance of any scheme or policy of the Government and subsequent disposal thereof in whole or in part by lease, assignment or outright sale with the object of securing further development as planned. Section 3 (f) (v) includes the provision of land for residential purposes to the poor or landless or persons residing in areas affected by natural calamities, or to persons displaced or affected by reason of the implementation of any scheme undertaken by Government, any local authority or a corporation owned or controlled by the State. Under section 3(f) (vi) the provision of land for carrying out any educational housing, health or slum clearance scheme sponsored by Government or by any authority established by Government for carrying out any such scheme, or, with the prior approval of the appropriate Government, by a local authority or a society registered under the Societies Registration Act is also a public purpose. M.P. Housing Board is a local authority; housing scheme is a public purpose; thus, it cannot be said that acquisition is being made so as to defeat the object of the Act, nor it can be said that it contravenes any provision of the Land Acquisition Act.

10. In *State of Tamil Nadu and others* v. *L. Krishnan and others*[1], it was

(1) 1995 AIR SCW 4390.

ıeld that notification under Section 4 can be issued even in the absence of final and effective scheme prepared by the Housing Board. Their Lordships held that : cannot be said that in no event can the land be acquired for the purpose of the ıct/Board unless a final and effective scheme is framed by the Housing Board under the provisions of Section 37 to 56. The said limitation applies only where ıe land is sought to be acquired avowedly for the purpose of execution of a ıousing or improvement scheme prepered by the Housing Board under Chapter VII of the Tamil Nadu Housing Board Act. In other words, unless the notification ınder Section 4 of the Land Acquisition Act expressly states that land proposed :o be acquired is required for executing a housing or improvement scheme (i.e., a final and effective scheme) framed by the Housing Board under the provisions ›f the Tamil Nadu Housing Board Act, existence of scheme would not be a ›rerequisite for acquisition. The petitioner has further relied on *Mohammad ıafi* v. *State of M.P. and others*[1], to contend that if scheme is not in existence, and cannot be acquired which is not the case here; land is being acquired for ıe housing scheme. There is nothing to disbelieve the averments made by respondents in their return. This decision of Mohd. Shafi was taken in appeal ›efore the Apex Court in *M.P. Housing Board* v. *Mohd. Shafi and others*[2], the ecision was affirmed in appeal by the Apex Court but in the instant case on :acts I find that scheme was very much there; possession was taken and evelopment work has already been done before the issue of the fresh notification ınder Section 4 of Land Acquisition Act and filing of this writ petition; hence : submission is not acceptable.

In *S.S. Darshan* v. *State of Karnataka*[3], the Apex Court held that notification under Section 4 cannot be challenged on the ground that acquisition ıs for different purpose than the master plan. Para 11 is quoted below :–

> "11. The last submission of learned counsel for the appellant is that the user of the acquired land shown in the master plan being different, there cannot be a conversion of the user except in accordance with the provisions for making the change in the land use. It is not a case of change of user by the owner of the land but one of acquisition by the State under the provisions of the Land Acquisition Act, 1894. This argument also had no merit."

Learned counsel for the petitioner has submitted that first notification was

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(1) 1989 JLJ 501. (2) (1992) 2 SCC 168. (3) AIR 1996 SC 671.

issued in the year 1983 which lapsed, thus, the fresh notification was issued in the year 1986; the dispensation of the enquiry under the circumstances under Section 5A is bad in law. He submits when the previous notification was allowed to be lapsed indicates that there was no urgency. In my opinion, purpose for housing is an urgent purpose and housing is the national requirement. Simply by the fact that previous notification lapsed owing to non-passing of the award within the time fixed as per section 11-A of the Land Acquisition Act the urgency of the purpose cannot be defeated. It is the specific case set up by respondent no.5 M.P. Housing Board that possession was taken under the first notification; development work was undertaken for 3-4 years which was not objected to by the petitioner-society. The first notification issued under section 4 and declaration under section 6 were not challenged by filing a writ petition and it was only after lapse of the period fixed under Section 11-A that civil suits were filed on the ground that since the award has not been passed within two years, notification lapsed as per section 11-A. Thereafter on issuance of fresh notification the present writ petition has been filed. Thus, in my opinion, when the development work was already undertaken as reflected in the photographs and on petitioners' own showing 8 houses were already constructed; allotment had taken place under the first notification; invocation of the urgency clause under section 17 and dispensing with the enquiry is absolutely proper in the facts and circumstances of the case and no fault can be found. Mind has been applied and question of urgency is that of satisfaction of the authority. In *S.S. Darshan* v. *State of Karnataka (supra)* such an argument was repelled.

13. In *Bhagat Singh* v. *State of U.P. and others*[1], it was held that invocation of urgency clause is matter of subjective satisfaction and purpose of acquisition is also one of the relevant consideration.

14. Learned counsel for the petitioner has relied upon *Bhoomandal Singh* v. *State of M.P. and others*[2]. In that case authorities took time of two years to pass a final order to acquire the land which is not the factual situation obtainable in the instant case.

15. In *Chaitram Verma* v. *Land Acquisition Officer and others*[3] there was failure to place the material on record to show the urgency of the cause espoused. In the instant case possession has already been taken under the first notification

(1) AIR 1999 SC. 436. (2) 1997 (1) MPLJ 547. (3) 1993 MPLJ 572.

which lapsed; there is averment made as to the development made supported by the photographs by the housing board before the writ petition was filed.

16. Respondents have placed reliance on *Satendra Prasad Jain and others* v. *State of U.P. and others*[1], in which it was held that possession once taken under Section 17 of the Land Acquisition Act, it is not open to the Government to withdraw from acquisition under section 48; in such a case section 11A is not attracted, therefore, acquisition proceedings would not lapse on failure to make award within the period prescribed thereunder. Their Lordships further held that non compliance of Section 17 (3-A) regarding part payment of compensation before taking compensation would also not render the possession illegal and entitle the Government to withdraw from acquisition. In the instant case, as already mentioned above, though the fresh notification has been issued under section 4 but the fact remains that possession was already taken and the first notification was not challenged on the grounds present notification is being challenged; developments having been already done some houses also came up as per petitioner's own showing, petitioners, in my opinion, have no right to challenge the acquisition as their conduct is of acquiescence in the development work raised by the housing board.

17. In *Narayan Govind Gavate etc.* v. *State of Maharashtra and others*[2], acquisition of land for the residential tenements has been held to be a public purpose. On peculiar facts of that case their Lordships held that dispensation of enquiry under Section 5A was not proper.

18. In *The State of Punjab and another* v. *Gurdial Singh and others*[3], there was enormous delay project was pending for several years; acquisition was made suddenly invoking section 17 which was held to be improper which is not the factual situation obtainable in the instant case. There is no delay in the instant case in taking the steps one after the other.

19. It cannot be said that acquisition is for *mala fide* purpose simply because there is provision for allotment of houses for higher income group also and housing board is having some other land. The acquisition is not vitiated on the aforesaid grounds.

20. In view of the aforesaid conclusions it is not necessary to dwell into the submission that whether petitioners have the right to file the writ petition as one Babulal who was the President of society has executed the sale deeds in favour of

(1) (1993)4 SCC 369. (2) AIR 1977 SC 183. (3) AIR 1980 SC 319.

Pyarelal on 27.2.67 for a sum of Rs. 17,000/- and in favour of Sri Ramgopal on 28.2.67 for a consideration of Rs. 16,000/- of the land in question and their names have been recorded in the revenue papers. Without meaning to decide on the question of title, *prima facie* it appears that there is a serious cloud cast on the petitioners right to maintain the instant writ petition as sale deeds were executed in the year 1967 by Babulal in the capacity of his being President of Ashok Sahkari Grah Nirman Samiti; if he was not having any right or interest to alienate, the same ought to have been challenged in appropriate proceeding by the petitioner society. That having not been done, in my opinion, challenge to the acquisition is misconceived.

21. It is made clear that I have not expressed any final opinion on the title of the petitioner which has to be adjudicated and settled between intervenor and the petitioners before the appropriate forum.

22. Counsel for the petitioner has also raised the submission that in case the writ petition is not allowed, a direction may be given to the housing board to make allotment to the members of the petitioner-society.

23. It is for the members of the petitioner-society to approach the M.P. Housing Board in this regard; that prayer has to be considered by the housing board in accordance with the rules.

24. Resultantly, I find no merit in the instant writ petition. It is dismissed.

25. In the facts and circumstances of the case, no order as to costs.

Petition dismissed.

WRIT/MISCELLANEOUS PETITION

Before Mr. Justice Arun Mishra.

25 July, 2002.

MANOHARLAL BABBAR ...Petitioner*

v.

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

Constitution of India, Article 226 and Land Acquisition Act, 1894, Sections

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*M.P. No. 3108/1989.

4, 11–Acquisition of land–Two notifications issued–Compensation is to be determined from the date of last notification.

It has been held by the Apex Court that if successive notification under Section 4 has been issued, effective date for determination of compensation should be the date on which such last notification was issued. In the instant case the respondents by their own conduct have treated first notification under Section 4 as lapsed and have issued fresh notification under Section 4 on 19th September, 1989 and have started proceedings from that date though proceedings initiated in 1979 did not lapse but fact remains that no award was passed within two years and fresh notification was issued on 19.09.1989. It appears that no award was passed when the writ petition was filed before this Court and fresh notification having been issued in September, 1989. In my opinion, it is just and proper to direct the compensation to be determined from the date of notification under Section 4 issued on 19th September, 1989.

[Para 6]

Hindustan Oil Mills Ltd. & another v. *Special Deputy Collector (Land Acquisition)*[1], relied on.

Satendra Prasad Jain & others v. *State of U.P. & ors*[2]; referred to.

P.R. Bhave, with Satyendra Patel, for the petitioner.

Shashank Shekhar, for the respondents No.1& 3.

Ravendra Shukla, on behalf of R.K. Samaiya, for the respondents No. 2.

Cur. adv. vult.

ORDER

ARUN MISHRA, J:–In this writ petition, petitioner is praying for issuance of a writ of *mandamus* directing the respondents to deliver actual and physical possession of the land acquired to the petitioner comprised in Survey No. 214/1/2 and Survey No. 215/2, total area 5.31 acres and also to make the payment of compensation for illegally retaining possession w.e.f. 22.06.1979 till the possession is delivered.

2. The petition has been filed on the averments that for the purpose of housing, the land was acquired by the Land Acquisition Officer as per scheme prepared by the Madhya Pradesh Housing Board. A notification under Section 6 was

(1) (1990) 1 SCC 59. (2) (1993) 4 SCC 369.

issued on 22.06.1979. The possession of the land was taken over on 04.10 1979 by the Madhya Pradesh Housing Board. Petitioner moved an application (D) before the Land Acquisition Officer, Madhya Pradesh Housing Board, Bhopal, for fixing compensation at the rate Rs.5/- per Sq. ft. Thereafter, the petitioner claimed compensation but nothing materialised. The Land Acquisition Officer wrote to the Competent Authority under Urban Ceiling Act for release of the land from the provisions of Urban Ceiling Act. It was stated that though the possession has been taken, compensation has not been fixed or awarded. The Land Acquisition Officer as per order dated 11.03.1987 held that as the award for payment of compensation could not be passed within two years, proceedings for land acquisition lapsed. The order (F) passed by the Land Acquisition Officer has been placed on record. Petitioner by way of amendment has incorporated that fresh notification under Section 4 has been issued on 19th September, 1989, and thereafter on 15th December, 1994, declaration under Section 6 has been issued.

3. The respondent No.2, M.P. Housing Board, has filed a return. The stand has been taken that in all 85 acres of land was acquired for construction of houses out of which only 5.33 acres belongs to the petitioner and rest to others who have already accepted it at the rate Rs. 10,000/- per acre in the year 1987 itself. Petitioner also agreed to sale the land at the rate Rs. 20,000/- as per letter (R-1). Proceedings for land acquisition were initiated in the year 1979 as per Section 11 (a) and as award could not be passed, the proceedings were declared to be barred. Fresh proceedings have already been initiated by declaration (R-2) under Section 6. The land was developed and houses have been constructed and allotted and possession delivered. Third party interest as such had intervened and the question is now only payment of compensation to the petitioner. The proceedings are also pending. An amount of Rs. 15 lacs has already been deposited on 23.12.1986 and petitioner can participate under the said proceedings and persue the remedies provided under the Act. Petitioner cannot get back the possession as claimed for by the petitioner for the reason that the land has already been transferred and third party interest have intervened.

4. Shri P.R. Bhave, learned Senior Counsel, appearing for the petitioner submitted that the petitioner has not been paid compensation of the land which has been acquired. Petitioner is entitled for compensation to be determined from the date of issue of notification under Section 4 i.e 19th September,

1989. He has placed reliance on the decision of Apex Court in *Hindustan Oil Mills Ltd. & another* v. *Special Deputy Collector (Land Acquisition*[1]*).* Learned Counsel appearing for the petitioner also submits that once third party interest is intervened, acquisition cannot be allowed to be drooped. Houses have been constructed thus the only remedy is to obtain compensation. He submits that compensation has to be determined as per notification issued in the year 1979. Similar is the submission of Shri Shashank Shekhar, learned Counsel for respondents 1 and 3.

5. In *Satendra Prasad Jain & others* v. *State of U.P. & others*[2], the Apex Court has held that Government could not withdraw from acquisition under Section 48 once it had taken possession of the land under Section 17. When Section 17(1) is applied by reason of urgency Government takes possession of the land prior to the making of the award under Section 11 and thereupon the owner is divested of the title to the land which is vested in the Government. In ordinary case, however, when Government fails to make an award within two years of the declaration under Section 6, the land has still not vested in the Government and its title remains with the owner, the acquisition proceedings are still pending and, by virtue of the provisions of Section 11-A lapse. Clearly, Section 11-A can have no application to cases of acquisitions under Section 17 bacause the lands have already vested in the Government and there is no provision in the Act by which land statutorily vested in the Government can revert to the owner. In the instant case, Section 11-A can have no application and in my opinion Section 17 was invoked, possession of land was taken third party interest created owing to non-passing of award within two years, as per Section 11-A proceeding did not lapse.

6. The decisions of Apex Court in *Hindustan Oil Mills Ltd. & another* v. *Special Deputy Collector (Land Acquisition) (Supra)* is of significance to decide the matter with respect to relevant date for determination of compensation in question. It has been held by the Apex Court that if successive notification under Section 4 has been issued, effective date for determination of compensation should be the date on which such last notification was issued. In the instant case the respondents by their own conduct have treated first notification under Section 4 as lapsed and have issued fresh notification under Section 4 on

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(1) (1990) 1 SCC 59. (2) (1993) 4 SCC 369.

19th September, 1989 and have started proceedings from that date though proceedings initiated in 1979 did not lapse but fact remains that no award was passed within two years and fresh notification was issued on 19.09.1989. It appears that no award was passed when the writ petition was filed before this Court and fresh notification having been issued in September, 1989. In my opinion, it is just and proper to direct the compensation to be determined from the date of notification under Section 4 issued on 19th September, 1989.

7. The writ petition is disposed of in the light of direction made above. If compensation has not been determined, let it be done at an early date as far as possible within six months. Costs on parties.

Petition disposed of.

WRIT/MISCELLANEOUS PETITION

Before Mr. Justice Arun Mishra.
1 August, 2002.

GRAM PANCHAYAT GHURDONG ...Petitioner*
v.
STATE OF M.P. and others ...Respondents

Constitution of India, Article 226 and Municipal Corporation Act, M.P. 1956, Section 405–Inclusion of Gram Panchayat Area in Municipal Corporation–It is enough that provision of Municipal Corporation Act are followed–Legislative function–Not necesary to give personal hearing.

It is well settled proposition that inclusion of area in to Municipal Corporation/ Panchayat is a legislative funtion. Section 405 (1) of Corporation Act provides that Governor may, by notification in the gazette declare the intention to include within or exclude from the limits of the city any specified area. Sub-section (2) of Section 405 given right to local authority having jurisdiction in the said area or any person resident there into object to such declaration. An objection preferred has to considered then power vests in Governor to include within or exclude from the limits of the city any specified area. In the instant case it is apparent that objections were

*M.P.No. 316/1990.

invited and rejected by the State Government as per order R/1 dated 11.12.1985. It is not necessary to give personal hearing in such legislative function. It is enough that procedure is followed.

It is not the case of reconstitution of the Gram Panchayat. Thus, in my opinion, it was not necessary to follow the provisions of Panchayat Adhiniyam, but, as area has been included in Municipal Corporation, it is enough that provisions of Municipal Corporation Act are followed and they have been observed in the instant case.

[Paras 7 and 8]

Akshay Dharmadhikari, for the petitioner.

Shashank Shekhar, for the respondents No.1 and 3.

None, for the respondent No.2, though served.

Cur. adv. vult.

ORDER

ARUN MISHRA, J:–Petitioner in this writ petition is challenging the notifications dated 26.12.1983 and 8.12.1985, by which it was proposed to include the area of Gram Panchayat Ghurdong within the limit of Municipal Corporation, Satna, Notification was issued on 12.1.1990 for inclusion of the said area in the Municipal Corporation, that has also been impugned.

2. Petitioner submits that the Gram Panchayat, Ghurdong was constituted under M.P. Panchayat Act, 1981. Gram Panchayat is bottom unit of the three-tier Panchayat systems as envisaged by Constitution of India. Village Ghurdong has been Gram Panchayat from the time of State Legislature conceived of establishing Gram Panchayat, the area of Gram Panchayat has developed industrially as well as economically. Panchayat has opened a primary school, constructed roads, fitted street lights. Industries have also come up. Notification No. 1113-18-B-83 was published in M.P. Rajpatra Extra Ordinary dated 26.12.1983 expressing intention to extend the limits of Municipal Corporation, Satna. The Notification was published in exercise of power u/s 405(1) of the Madhya Pradesh Municipal Corporation Act, 1956. Petitioner alleges the notification does not indicate that the same has been issued after consulting the Municipal Corporation Satna. Petitioner submitted objections opposing the inclusion on various grounds interalia that the step to include a developed Gram Panchayat within the limits of Municipal Corporation will put on end to the activities of development of Gram Panchayats and will be an anti-

development step. The objection was forwarded by the Collector to the Secretary, Local Self Department on 2.3.1984. Petitioner submits that petitioner was not heard on the objection filed by it. They have not been considered. Petitioner further submits that there has been no notification or any order in writing issued under section 121 of the Madhya Pradesh Panchayat Act de-establishing the Gram Panchayat, Ghurdong. Procedure has not been followed and area has been included in Municipal Corporation. Thus, notification D/10 is bad in law.

3. A return has been filed by the respondents No.1 and 3, in which preliminary objection has been raised that petition has been filed by Pradhan of Gram Panchayat. There is no resolution of Gram Panchayat empowering the Pradhan to file the writ petition. Gram Panchayat has been superseded and new body has bee elected. Petition has been filed at the instance of factory which is likely to be affected by notification due to inclusion in territorial limit of Municipal Corporation, Satna. After first notification, second notification was issued as village Amodhakala was left from publication in the earlier notification D/1, therefore, fresh amended notification was issued. No objection was filed by the petitioner in time with regard to notification D/6. Even otherwise, objections were considered by the Government and rejected vide order R/1 dated 11.12.1985. It is not necessary to give personal hearing. Provision of Municipal Corporation Act has been followed for inclusion of the area.

4. A return has also been filed by the respondent No.2, in which similar stand has been taken as that of the respondents No.1 and 3.

5. Shri Akshay Dharmadhikari, learned counsel appearing for the petitioner submits that the impugned notification for inclusion of the area in the Municipal Corporation is illegal and is issued without following the procedure of law. Petitioner ought to have been heard. Without de-establishing the Gram Panchayat constituted under the Panchayat Act 1981 it was not open to include the area in Municipal Corporation Satna.

6. Shri Shashank Shekhar, learned counsel for the respondents No.1 and 3 submits that it is a case where objections were invited and has been rejected. Inclusion of area in a Corporation is legislative function and not open to challenge as the procedure prescribed has been followed.

7. It is well settled proposition that inclusion of area in to Municipal Corporation/

Panchayat is legislative funtion. Section 405 (1) of Corporation Act provides that Governor may, by notification in the gazette declare the intention to include within or exclude from the limits of the city any specified area. Sub-section (2) of Section 405 given right to local authority having jurisdiction in the said area or any person resident there into object to such declaration. An objection preferred has to considered then power vests in Governor to include within or exclude from the limits of the city any specified area. In the instant case it is apparent that objections were invited and rejected by the State Government as per order R/1 dated 11.12.1985. It is not necessary to give personal hearing in such legislative function. It is enough that procedure is followed. Inclusion of such an area in Corporation has been held to be legislative function by the apex Court in *The Tulsipur Sugar Co. Ltd.* v. *The notified Area Committee, Tulsipur*[1]. The scope of interference is limited in such legislative function. In *Sundarjas Kanyalal Bhathija and others* v. *The Collector, Thane, Maharashtra and others*[2], the apex court held in paragraph 23 as under :

> " 23. Reverting to the case, we find that the conclusion of the High Court as to the need to reconsider the proposal to form the Corporation has neither the attraction of logic nor the support of law. It must be noted that the function of the Government is establishing a Corporation under the Act is neither executive nor administrative. Counsel for the appellants was right in his submission that it is legislative process indeed. No judicial duty is laid on the Government in discharge of the statutory duties. The only question to be examined is whether the statutory provisions have been complied with. If they are complied with, then, the Court could say no more. In the present case the Government did publish the proposal by a draft notification and also considered the representations received. It was only thereafter, a decision was taken to exclude Ulhasnagar for the time being. That decision became final when it was notified under Section 3(2). The Court cannot sit in judgment over such decision. It cannot lay down norms for the exercise of that power. It cannot substitute even "its juster will for theirs."

8. It is not the case of reconstitution of the Gram Panchayat. Thus, in my opinion, it was not necessary to follow the provisions of Panchayat Adhiniyam, but, as area has been included in Municipal Corporation, it is enough that provisions

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(1) AIR 1980 SC. 882. (2) AIR 1990 SC 261.

of Municipal Corporation Act are followed and they have been observed in the instant case. It is provided in section 406 when an area is included within the limits of the city under Section 405 the Municipal Law or any other Act dealing with local self-government, as the case may be, if in force in such area shall be deemed to be repealed therein and provision of Municipal Corporation Act applies.

9. It is not necessary to go into the motive which has been attributed to the Pradhan to file the instant writ petition at the instance of Industry.

10. In view of foregoing discussion, I find no merit in this writ petition. It is dismissed. Costs on parties. Security amount, if deposited, be refunded to the petitioner.

Petition Dismissed.

WRIT/MISCELLANEOUS PETITION

Before Mr. Justice S. P. Khare.
23 September, 2002.

MADHYA PRADESH RAJYA VAN VIKAS NIGAM LIMITED, BALAGHAT ...Petitioner*

v.

Q. M. QURESHI and others ...Respondents

Constitution of India, Article 226 and Industrial Disputes Act, 1947, Sections 2(j), 2 (oo) and Section 25–F–Madhya Pradesh Rajya Van Vikas Nigam Limited engaged in business of forest produce–Covered under the difinition of 'industry'–Retrenchment–Pre-requisites of Section 25–F not followed–Retrenchment bringing in termination of service is void ab initio.

The first point for determination is whether the petitioner-Corporation is an "Industry". It is said that it is a Company registered under the Companies Act, 1956. It has been very vaguely stated that it does not carry on business and trade. The Labour Court has given finding that Madhya Pradesh Rajya Van Vikas Nigam Limited is engaged in the business of forest produce. That factual aspect is not

*M.P.No. 2682 of 1989.

denied by the petitioner-Corporation. In the opinion of this Court, the petitioner-Corporation is covered by the definition of "Industry" given in Section 2 (j) of the Act.

In the present case condition precedent to retrenchment provided in Section 25-F of the Act was not complied with inasmuch as the respondent No. 1 was not paid any retrenchment compensation as provided therein. Therefore, the award passed by the Lobour Court is unassailable.

[Paras 6 and 10]

Agricultural Produce Market Committee v. *Ashok Harikuni*[1], *All India Radio* v. *Santosh Kumar*[2], *Bangalore Water Supply* v. *A. Rajappa*[3], *Management of Karnataka State Road Transport Corporation, Bangalore* v. *M. Boraiash*[4], *Mohanlal* v. *The Management of M/s. Bharat Electronics Ltd.*[5]; referred to.

Shobhitaditya, for the petitioner.

R.K. Gupta, for the respondents No.1.

Cur. adv. vult.

ORDER

S. P. KHARE, J:–This is a petition under Articles 226/227 of the Constitution of India challenging the award dated 17.4.1985 of the Labour Court, Jabalpur, by which the termination of services of the respondent No.1 has been declared to be illegal and he has been reinstated with full backwages.

2. It is not in dispute that respondent No.1 Q.M. Qureshi was appointed as a Clerk in Madhya Pradesh State Forest Development Corporation Limited, Lamta Project Division, Balaghat on 22.11.1976 and his services were terminated on 23.2.1980. He was working as a Clerk during this period. No charge-sheet was issued against him nor any departmental enquiry was conducted. He was not paid any retrenchment compensation on termination of his services.

3. The case of the petitioner-Corporation is that the Labour Commissioner was not competent to refer the dispute to the Labour Court. The petitioner-Corpordation is not an "Industry" within the meaning of

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(1) A.I.R. 2000 S.C. 3116. (2) A.I.R. 1998 S.C. 941. (3) A.I.R. 1978 S.C. 548.
(4) A.I.R. 1983 S.C. 1320. (5) A.I.R. 1981 S.C. 1253.

section 2 (j) of the Industrial Disputes Act, 1947 (hereinafter to be referred to as ('the Act'). The respondent No. 1 was removed from service because his work and conduct were not satisfactory. He was guilty of various misconducts. He was removed because he was found unsuitable for the post held by him.

4. The case of the respondent No. 1 is that the Labour Commissioner has been delegated the power to refer the industrial dispute to the Labour Court. The petitioner-Corporation is an industry as it is engaged in carrying on the trade and business in forest produce. The respondent No.1 cannot be said to have committed any misconduct as no departmental enquiry in that respect was held. The services of the respondent No.1 were terminated and that amounted to retrenchment. As statutory requirement for retrenchment regarding payment of compensation was not followed, the award given by the Labour Court is correct.

5. In this petition it is argued that the petitioner-Corporation is not an "Industry" as it is a statutory corporation. The respondent No.1 was a temporary employee and he was found unsuitable for the post which he was holding and, therefore, his services were rightly terminated.

6. The first point for determination is whether the petitioner-Corporation is an "Industry". It is said that it is a Company registered under the Companies Act, 1956. It has been very vaguely stated that it does not carry on business and trade. The Labour Court has given finding that Madhya Pradesh Rajya Van Vikas Nigam Limited is engaged in the business of forest produce. That factual aspect is not denied by the petitioner-Corporation. In the opinion of this Court, the petitioner-Corporation is covered by the definition of "Industry" given in Section 2 (j) of the Act. This point has been considered recently by the Supreme Court in *Agricultural Produce Market Committee* v. *Ashok Harikuni*[1], in which all the earlier decisions have been considered. It has been held that the Agricultural Produce Market Committee comes within the definition of Industry. Similarly in *All India Radio* v. *Santhosh Kumar*[2], it has been held that the function carried on by All India Radio and Doordarshan cannot be said to be confined to sovereign functions as they carry on commercial activity for profit by getting commercial advertisements. In the well known case of *Bangalore Water Supply* v. *A. Rajappa*[3], it has been laid down that where there is (i) systematic activity, (ii) organised by co-operation between

(1) AIR 2000 SC 3116. (2) AIR 1998 SC 941. (3) AIR 1978 SC 548.

employer and employee, (iii) for the production and/or distribution of goods and services calculated to satisfy human wants and wishes, prima facie, there is an "industry" in the enterprise. It has been clearly held that the economic adventures undertaken by the Government or statutory bodies are covered under the definition of Industry. In the present case the Labour Court has rightly held that the petitioner-Corporation comes within the definition of Industry given in section 2 (j) of the Act.

7. The second point which has been raised by the petitioner is that the Labour Commissioner had no power to make the reference. On the other hand it is pointed out that under section 39 of the Act, the power has been delegated to the Labour Commissioner and he can make the reference of the dispute to the Labour Court. Therefore, the reference cannot be said to be incompetent.

8. The third point is whether the termination of service of the respondent No. 1 comes within the definition of retrenchment given in section 2 (oo) of the Act. This definition is as under:–

> " "retrenchment" means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary; action, but does not include–
>
> (a) voluntary retirement of the workman; or
>
> (b) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that bahalf; or
>
> (bb) termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation that behalf contained therein; or
>
> (c) termination of the service of a workman on the ground of continued ill-health,"

9. In the present case the contention of the petitioner-Corporation is that the termination of the services of the respondent No.1 is not retrenchment because he was guilty of various misconducts and his work was not found to be satisfactory. But it is also an admitted fact that no punishment was inflicted on the

respondent No. 1 by way of disciplinary action. The case of the respondent No. 1 is not covered by any exception to section 2 (oo) of the Act. He was not removed on the ground of misconduct. The order passed against him was of simple termination. It has been held in *Management of Karnataka State Road Transport Corporation, Bangalore* v. *M. Boraiah*[1], that a retrenchment as defined in Section 2 (oo) covers every case of termination of service except those which have been embodied in the definition discharge from employment or termination of service of a probationer would also amount to retrenchment. As such where while discharging a probationer requirements of S. 25-F had not been complied with the same was viod. Similarly in *Mohanlal* v. *The Management of M/s. Bharat Electronics Ltd.*[2], it has been observed "Niceties and semantics apart, termination by the employer of the service of a workman for any reason whatsoever would constitute retrenchment except in cases excepted in the section itself. The excepted or excluded cases are where termination is by way of punishment inflicted by way of disciplinary action, voluntary retirement of the workman, retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf, and termination of the service of a workman on the ground of continued ill-health.

It is well settled that where pre-requisite for valid retrenchment as laid down in Section 25-F has not been complied with, retrenchment bringing about termination of service is ab initio void."

10. In the present case condition precedent to retrenchment provided in Section 25-F of the Act was not complied with inasmuch as the respondent No. 1 was not paid any retrenchment compensation as provided therein. Therefore, the award passed by the Lobour Court is unassailable.

11. The writ petition is dismissed.

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(1) AIR 1983 SC 1320. (2) AIR 1981 SC 1253.

WRIT PETITION

Before Mr. Justice Arun Mishra
13 October, 2002.

ASHOK LALWANI & anr ...Petitioners*

v.

MUNICIPAL CORPORATION, JABALPUR ...Respondent

Constitution of India, Article 226 and Municipal Corporation Act, M.P., 1956, Section 222–Water connection–Refusal of–Dispute regarding property tax pending–Refusal to supply water connection on ground of non-payment of property tax–Not justified.

The order dated 25-9-1997 indicates that without obtaining completion certificate water connection, electricity connection and NOC should not be issued. This order nowhere says that payment of proprty tax is a condition precedent in order to obtain water connection. Order dated 21-10-1997 indicates that completion report should be insisted. In case house has been constructed prior to 1990, in such cases the receipt of payment of property tax should be seen in order to satisfy whether house is constructed from earlier point of time and in slums water connection should be given in case the structure was existing before 1985. This order dated 21-10-1997 clarifies the application format. The purpose of receipt is to satisfy about completion of the house and in order to satisfy that house has been completed on which date.

Even otherwise, in the instant case dispute as to property tax is pending with effect from the date of purchase and has not been finalised. Thus, petitioners have the justification of not annexing the receipt of the payment of the house tax. In any view of the matter as the dispute of the petitioners with respect to the property tax is pending and has not been decided by the Corporation and there is no specific provision made by the Corporation under any of the resolution/ bye law making it a condition precedent that property tax must have been deposited by a person in order to obtain water connection, that is also not a statutory prescribed condition. There is no bye law or resolution shown by the Corporation and the orders collectively filed as R.2 by the respondent, does not support the case of the respondent Corporation. In my opinion, respondent has acted arbitrarily in depriving the water connection to the petitioners.

[Paras 10 and 11]

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* W.P.No. 251/2002.

Ashok Lalwani v. *Municipal Corporation, Jabalpur, 2002.*

Manoj Dubey, for the petitioners.

Sameer Beohar, for the respondent.

Cur. adv. vult.

ORDER

ARUN MISHRA, J:–Petitioners, grievance is of refusal to give water connection in the premises of the petitioners by the Muncipal Corporation, Jabalpur, on the ground that property tax has not been deposited and dispute about it is pending consideration.

2. Petitioner No.1 is an Advocate. Petitioners are the joint owners of the house constructed on a portion of land which is part of the old bungalow numbered by the respondent Corporation as 1605. Civil Lines, Jabalpur. Petitioners constructed the house as per the plan sanctioned on 5-2-1997. The house was constructed before 5-2-2000. Petitioners submit that under Chapter XVI of the Municipal Corporation Act. 1956 (hereinafter referred to as 'the Act') it is the duty of the Corporation to provide for supply of water. The Corporation is empowered to supply water from its water works on an application being made to it under S. 221 of the Act. Section 225 of the Act provides for circumstances under which water supply to the premises can be cut-off. Petitioners submit that Chapter XVI of the Act provies for no other condition for seeking water supply except for application and payment of necessary charges. Respondent is not providing the water connection in spite of the readiness of the petitioner to pay all prescribed charges and expenses.

3. Respondent Corporation in the return contends that petitioners were required to pay property tax in respect of the land purchased by them. Upon their failure to pay the property tax, a notice under S. 145 (1) and (2) read with S. 146 of the Act was issued on 20-12-1996 proposing assessment of the property tax in respect of the said land. The petitioners raised objection as regards the assessment of property tax proposed by the respondent. The matter regarding assessment of property tax is pending consideration before the competent authority. In the meantime the petitioners approached the respondent for supply of water connection. A copy of the application was given to them on requisite fee. Petitioners did not submit the duly filled in appllication along with all the requisites. It is submitted that for providing a new water supply connection it is necessary that the applicant should have paid all Municipal Taxes. The application is required to be accompanied by a receipt regarding payment of property tax of the latest year or previous year as per

specimen copy (R.1) of the said application. Municipal Corporation, Jabalpur has issued orders from time to time to the effect that new water connection shall be provided only after all dues are cleared. Two such orders are collectively filed as R.2 to the return. Petitioners have not cleared property tax in regard to their land and buildings which they are liable to pay from the year 1995-96 onwards. They have not submitted returns under the self assessment scheme till this date. On account of on payment of the Municipal taxes the respondent has not provided water connection till this date. As soon as petitioners clear all their dues water connection shall be provided without any further delay.

4. Shri Manoj Dubey, learned counsel for the petitioners, submits that action of the Corporation in not providing the water connection is illegal and unauthorized under the provisions of the Act under Chapter XVI. For recovery of the property tax separate procedure is prescribed and dispute is still pending as mentioned in the return. Thus, the action of the Corporation in depriving the petitioners of the essential supply of water is illegal, arbitrary and unauthorized.

5. Shri Sammer Behoar, learned counsel for the respondent Corporation, submits that though in the Act there is no, provision to the effect that if property tax is not paid owner of the house can be deprived of water connection. However, he placed reliance on application form R.1 and the orders R.2 dated 25-9-1997 and 21-10-1997 of the Commissioner, Municipal Corporation.

6. The question for consideration is whether the Municipal Corporation has acted within parameter of law in depriving the water connection to the petitioner. Water supply is dealt with in the Act in chapter XVI of the Act. Section 221 of the Act requires supply of water. The Commissioner may supply water for any purpose on receiving a written application specifying the purpose for which such supply is required and the quantity likely to be consumed. The supply of water shall be made upon such terms and conditions as to payment and quantity and for such period, as the Corporation may prescribe by bye-laws in this behalf. The Corporation may, on such terms as it may think fit, undertake to supply water to any area outside the city from the waterworks maintained by the Corporation and do other acts ancillary thereto. As per S. 222 of the Act where an application under S. 221 has been received all necessary communication pipes and fittings shall be supplied by the Commissioner and the work of laying and applying such communication and fitting shall be executed by municipal agency under the Commissioner's orders; but the cost of making any such connection and of all communication pipes and fittings so

supplied and of all work so executed, shall be paid by the owner or the person making such application. The Commissioner shall provide a meter and charge rent for the same. Section 225 deals with cutting off water supply to premises. If any person whose premises are supplied with water neglects to pay any sum payable under S. 221 when due, or to give notice as provided in S. 223 or wilfully or negligently misuses or causes waste of water the Commissiner may cut off the supply of water to the premises. It is clear from the reading of Ss. 221, 222 and 225 that it is obligation upon the commissioner to supply water on receiving an application. The terms and conditions as to the payment and quantity is binding on the applicant that is in relation to supply of water and the requisite expenses of laying and applying such communication and fitting have to be born by the owner or the person making such application. It is not necessary that only owner can make such application as per S. 222. It is contemplated that it can be given to owner or the person making such application. In other words the statute does not prescribe that a person must have paid property tax to the Corporation in order to enjoy supply of water or to obtain facility of water. There are no rules or bye laws in that regard is conceded by learned counsel appearing for the Corporation. He has fairly stated that there is no provision in the Rules/bye laws enabling the Corporation to make deposit of property tax, a condition precedent it order to obtain water connection. No resolution has been placed on record to indicate that payment of property tax is a condition precedent before grant of water connection.

7. Thus, in my opinion, the water connection which is an essential supply cannot be withheld on any extraneous consideration which is not prescribed under the Act. The action of the Corporation is, thus, bad in law.

8. Water is essential for life and has integral connection with the right to life enshrined under Article 21 of the Constitution of India and no action taking away this right arbitrarily can withstand the test of constitutional protection granted under Article 14 of the Constitution of India. Corporation has acted in derogation under Articles 14 & 21 in depriving the supply of water to the petitioner on the flimsy ground of non deposit of property tax which action is not authorized under the Act, Rules or bye laws or resolution. As per stand of Corporation there are no Rules or bye laws in that regard framed by the Corporation.

9. Learned counsel for the Corporation has relied on the formate of the application R.1 which clearly indicates that in the main application applicant has to specify the purpose for which he wants water connection and has to undertake

that connections is not going to cause harm to anyone. He shall pay water rent in accordance with rules and has to deposit the estimated amount in laying the connection. A person has to annex the sale deed of the house and receipt of the house evincing the Municipal number. The receipt of house tax of earlier point of time can be submitted as mentioned in bottom Note No.3. The receipt of previous or the current year can be filed. It is for ascertaining the Municipal number of house and its location and in whose name the property is, which fact is not in dispute in the instant case. The petitioners are admittedly owners of the house in question where they want water connection. However, it cannot be read from the format of the application that person cannot obtain the connection in case property tax has not been deposited and dispute as to the property tax is pending and has not been decided. The format of the application cannot be read as imposing of pre condition that in order to have the water supply, person must deposit the property tax. For that no provision in Act/Rule/Bye law or resolution has been shown by the Corporation. For recovery of the property tax separate procedure is prescribed which Municipal Corporation can resort.

10. The orders dated 15-9-1997 and 21-10-1997 collectively filed as R.2 has also been relied upon by the learned counsel for the Corporation. The order dated 25-9-1997 indicates that without obtaining completion certificate water connection, electricity connection and NOC should not be issued. This order nowhere says that payment of proprty tax is a condition precedent in order to obtain water connection. Order dated 21-10-1997 indicates that completion report should be insisted. In case house has been constructed prior to 1990, in such cases the receipt of payment of property tax should be seen in order to satisfy whether house is constructed from earlier point of time and in slums water connection should be given in case the structure was existing before 1985. This order dated 21-10-1997 clarifies the application format. The purpose of receipt is to satisfy about completion of the house and in order to satisfy that house has been completed on which date.

11. Even otherwise, in the instant case dispute as to property tax is pending with effect from the date of purchase and has not been finalised. Thus, petitioners have the justification of not annexing the receipt of the payment of the house tax. In any view of the matter as the dispute of the petitioners with respect to the property tax is pending and has not been decided by the Corporation and there is no specific provision made by the Corporation under any of the resolution/ bye law making it a condition precedent that property tax must have been deposited by a person in

order to obtain water connection, that is also not a statutory prescribed condition. There is no bye law or resolution shown by the Corporation and the orders collectively filed as R.2 by the respondent, does not support the case of the respondent Corporation. In my opinion, respondent has acted arbitrarily in depriving the water connection to the petitioners.

12. Writ petition is allowed. Respondent Corporation is directed to receive the application of the petitioners and to provide water connection on the requisite deposit being made for the purpose by the petitioners. In the facts & circumstances of the case, no order as to costs.

Petition allowed.

LETTERS PATENT APPEAL

Before Mr. Bhawani Singh, Chief Justice and Mr. Justice Ajit Singh.
2 May, 2002.

RAKIB MOHAMMAD ..Appellant*

v.

THE DISTRICT COLLECTOR AND SPECIFIED OFFICER, RAISEN and others ..Respondent

Panchayat Raj Adhiniyam, 1993 (I of 1994)–Sections 95, 122, M.P. Panchayats (Election Petitions, Corrupt Practices and Disqualification for Membership) Rules, M.P., 1995, Rule 3–Election petition–Recounting of votes–Difference between votes secured was only 17–Electricity failed and candle light used for counting–Sufficient to provide opportunity for incorrect counting–Order of recounting proper.

Difference between the votes secured by Rakib Mohammad and Jinesh Singhai was only 17. Therefore, the Collector was justified in ordering the recount. It is also found that besides this discrepancy in the number of votes, evidence on record clearly points out that the counting was being done in electric light. Electricity failed at least twice and candle light was used for counting of votes. This circumstance was sufficient to provide opportunity for incorrect counting. Therefore, to remove the doubt, recounting was necessary.

*L.P.No. 217 of 2002.

Rakib Mohammad v. *The District Collector and Specified Officer, Raisen, 2002.*

Vivek Rusia, for the appellant.

Naman Nagrath, for the respondent No.2.

Cur. adv. vult.

ORDER

The Order of the Court was delivered by **BHAWANI SINGH, C. J:**–Order of single Judge dated 27-3-2002 passed in (*Raqib Mohammad* v. *District Collector, Raisen and others*[1]) has been challenged through this Letters Patent Appeal under clause 10 of the Letters Patent.

2. Petition under Arts. 226/227 of the Constitution of India was preferred by Raqib Mohammad for quashing impugned order dated 25-2-2002 whereby Collector, Raisen allowed Election Petition filed by Jinesh Singhai and ordered re-count of votes cast in the polling booths of ward No.1 Janapad Panchayat, Gairatganj. For membership of Janapad Panchayat, Gairatganj, Raqib Mohammad and Jinesh Singhai were contesting candidates. Votes were cast on 20-1-2001. Raqib Mohammad was declared successful securing 1358 votes and Jinesh Singhai secured 1341 votes. Ballot papers account submitted in Form-15 under Rule 67 of the M.P. Panchayat Nirvachan Niyam, 1995 (1995 Rules) mentions number of ballot papers inserted in the ballot boxes 3213 while result sheet in Form-18 under Rule 177 (2) of 1995 Rules shows that the result was declared on 3179 votes only, with discrepancy of 34 votes, while the difference between votes secured by Raqib Mohammad and Jinesh Singhai was 17. Jinesh Singhai applied for recount of votes under Rule 80 (1) of 1995 Rules but the Returning Officer permitted recount of only rejected ballot papers to which Jinesh Singhai did not agree. Conseqently, Jinesh Singhai submitted an Election Petition under the M.P. Election Petitions (corrupt Practices and Disqualification for Membership) Rules, 1995 (Election Petition Rules), the Collector, Raisen held the counting invalid and directed recount on 4-3-2002 by the Returning Officer in the presence of all the candidates.

3. Claim of Jinesh Singhai is that while counting was in progress, elctricity failed thrice but counting was continued in the candle light which was insufficient. This resulted in wrong counting. He objected and claimed recounting of votes in writing immediately after announcement of counting under rule 80 (1) of 1995 Rules but he was not heard. While Raqib Mohammad claims that at the most discrepancy was of

(1) W.P. No. 1151 / 2002, Dl. 27-3-2002.

three votes only in ballot paper account of Booth No. 50 which was not material and did not affect the result declared. He has alleged that 31 invalid votes of Booth No. 47 were not considered while tallying the account. There existed no real discrepancy. Smt. M.D. Dahiya, Presiding Officer of Booth No. 47 had explained the discrepancy, Collector, after recording the evidence of both the sides, held that there existed discrepancy of 34 votes between the number given in the ballot paper account in Form-15 and the number of votes of which result was declared in Form-18 and ordered recount.

4. Single Judge finds that in this case, total ballot papers used were 3213. Ballot Papers found in boxes including the invalid votes were 3179 on which result was based. Difference between the votes secured by Raquib Mohammad and Jinesh Singhai was only 17. Therefore, the Collector was justified in ordering the recount. It is also found that besides this discrepancy in the number of votes, evidence on record clearly points out that the counting was being done in electric light. Electricity failed at least twice and candle light was used for counting of votes. This circumstance was sufficient to provide opportunity for incorrect counting. Therefore, to remove the doubt, recounting was necessary.

5. Through this appeal, Raqib Mohammad assails the impugned order by reiteration of contentions once raised and decided by single Judge, while Jinesh Singhai opposes these contentions vehemently alleging that Raqib Mohammad should not stick to pleas which had been rejected by Collector and confirmed by single Judge. Matter is such, a clear case for recounting is made out to get at the justice, otherwise fairness in counting and doubt with respect to actual number of votes, polled in favour of the parties would continue to exist. With this background, Collector has rightly passed the impugned order for recounting of votes and this decision having been confirmed by single Judge of this Court should not be disturbed, counsel for Jinesh Singhai contends.

6. Catena of cases decided by Apex Court (*Vadivelu* v. *Sundaram*[1], *Jitendra Bahadur* v. *Krishna Bihari*[2] and *P.K. K. Shamusddeen* v. *K.A.M.M. Mohindeen*[3] hold that preservation of security of the ballot is a sacrosanct principle which cannot be lightly or hastily disregarded unless there is a *prima facie* genuine need for the same. But whether case for recount is made out, facts of the case are of

(1) (2000)8 SCC 355=AIR 2000 SC. 3230. (2) AIR 1970 SC. 276.
(3) AIR 1989 S.C. 640.

great significance. Jinesh Singhai has pleaded, proved and established case for recount. Justification in his plea has been found by the Collector and learned single Judge. After all, in a case of this nature, it is necessary to see what has actually happened and what exact number of votes each of the candidates to the contest has polled. In the facts of this case, Apex Court decision in *Mahendra Pal* v. *Ram Dass Malanger*[1] aptly applies. The Apex Court said (at pp. 21 and 22 of AIR):

> "In the present case, it is not disputed, as indeed it cannot be, that in Form 20-A. Ex.P-2, it is recorded that the total number of votes found in the ballot boxes of 82 polling stations pertaining to this constituency were 35, 310 whereas a perusal of the statement of roundwise detailed result counting , certified copy whereof is Ex. P.3, records that the total number of valid and rejected votes counted for the purpose of declaring the result were 35, 318. A difference of 8 votes had been projected in Annexure.P.2 and Annexure. P.3. The margin of difference between the votes polled by the election petitioner and the returning candidate, in the present case, was only 3 votes. Unless a satisfactory explanation was furnished during the trial about the discrepancy, there would be need to inspect the ballot papers to clarify doubts regarding the excess counting of 8 votes, allegedly in favour of the returned candidate. This was aslo necessary to dispel doubts about the allegations of irregularity in counting. Had the Returning Officer, instead of rejecting the application for recount made a test check, soon after the declaration of result, he could have silenced the scepticism and removed all doubts but since that was not done, the learned Designated Judge ought to have considered the matter in its correct perspective."
>
> Therefore, there is clear case for recount, rightly so found by Collector and learned single Judge. No other point was urged.

7. Consequently, there is no merit in this appeal and the same is dismissed.

Appeal dismissed.

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(1) (2000) 1 SCC 261=(AIR 2000 SC 16).

LETTERS PATENT APPEAL

Before Mr. Bhawani Singh, Chief Justice and Mr. Justice S.L. Jain
3 July, 2002.

MADANLAL SONI and others ...Appellants*
v.
STATE OF MADHYA PRADESH and others ...Respondents

Constitution of India, Articles 226, 227, Letters Patent, Clause X–Writ petition–Power under Article 227 of the Constitution can be suo motu *exercised by High Court–A Public Trust–Appointment of Trustee–Issue of fresh proclamation–Appeal pending against judgment in civil Suit–Not bar for writ jurisdiction.*

The learned single Judge found that the order dated 11-5-83 was not a legal order as the same was passed under wrong assumption that Shriram Lohiya was alive, the proclamation was not properly issued, the order was passed in mechanical manner; and the directions regarding appointment of trustees by election was not envisaged in the terms recorded in the register of Public Trusts, therefore, it could not have been restored by allowing the writ petition and as such, the learned single Judge was certainly justified in directing issuance of fresh proclamation for appointment of trustees and passing fresh order in the matter of appointment of trustees.

The High Court, in exercise of its jurisdiction under Article 227 of the Constitution of India can take cognizance of the entire facts and circumstances and pass appropriate orders to give the parties complete and substantial justice.

[Paras 11 and 15]

Imtiyaz Hussain, for the appellants.

None, for the respondents.

Cur. adv. vult.

JUDGMENT

The Judgment of the Court was delivered by

S.L. JAIN, J (ORAL):– Being aggrieved by the order dated 11-4-2002, passed by the learned Single Judge in Writ Petition no. 1443/02, appellants have filed this appeal under Clause 10 of Letters Patent.

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*L.P.A.No. 334 of 2002.

2. Facts shorn of details and necessary for disposal of the appeal are that Shri Durga Ustav Committee, Hoshangabad is a registered Public Trust bearing no. 259/55. It was registered as such in the office of the respondent no.2. Initially Sarvashri Ramlal Sharma, Shriram Lohiya, Dulare Prasad and Narain Prasad Dubey were the trustees of the Trust. Three of them died. Sole surviving trustee Shri Ram Lohiya moved an application in the year 1982 for addition of five trustees. During the pendency of this application, Shriram Lohiya died. Despite the death of the sole surviving trustee, Registrar, Public Trust allowed the application and appointed Sarvashri Kanchedilal Lohiya, Rishiraj Gupta, Kishore Kumar Jarathe, Keshavrao Antarkar and Madanlal Soni as trustees. This order was passed on the assumption that on the date of the order Shriram Lohiya was alive. By this order dated 11.5.83 the Registrar held that the trustees shall be appointed by election.

3. Challenging the validity of the order of Registrar dated 11-5-83, Girja Shanker Sharma and Bhawani Shanker filed a Civil Suit No. 3-A/84 before First Civil Judge Class-II, Hoshangabad, which was later on registered as Civil Suit No. 87-A/89.

4. Girja Shanker Sharma also filed an application before the Registrar, Public Trust on 26.7.83 to the effect that the order dated 11.5.83 was illegal and invalid because on the date of the order applicant Shriram Lohiya was not alive and his legal representatives were not brought on record. It was also alleged in this application that the interested persons were not noticed, proclamation was not issued and the provisions of Section 25 of the M.P. Public Trust Act were not followed. This application was kept pending owing to the pendency of civil suit.

5. On 21.1.99 an application was moved by Girja Shanker Sharma before the Registrar, Public Trust for early hearing of the application on the ground that the civil suit No. 5-A/88 had been disposed of though in fact, this suit No. 5-A/88 was other than Civil Suit No. 87-A/89 whereby order dated 11.5.83 was challenged in the civil suit.

6. However, the fact remains that application dated 26.7.83 filed by Girja Shanker Sharma before the Registrar, Public Trust was allowed by an order dated 3-1-2000 on the grounds that–(i) issuance of the proclamation was doubtful; it was not published on the notice board; and (ii) because of the death of Shriram Lohiya prior to the passing of the order dated 11.5.83, there was automatic abatement of the proceedings and therefore, order dated 11.5.83 was illegal and void.

7. This order of Registrar dated 3-1-2000 was challenged before the High Court by filing Writ Petition No. 1443 of 2002, on the ground that the proceedings were stayed vide order Annexure-4 till the disposal of civil suit and before the disposal of the suit application dated 26-7-83 filed by Girja Shanker Sharma before the Registrar, Public Trust could not have been allowed.

8. Learned single Judge accepted the contention of the petitioners and held that it was not open to the Registrar to review the order dated 11-5-83 but accepting the contention of respondent No.3 also held that the order dated 11-5-83 itself was not passed in the proper manner as the sole surviving trustee Shriram Lohiya was not alive on the date of passing of the order and the fact of death of Shriram Lohiya was not brought to the notice of the Court. It was also held that the proclamation was not properly issued and the order dated 11-5-83 was passed in the mechanical manner. It was further held that the order of appointment of trustees by election was not envisaged by the document creating the trust. Thus, not only the impugned order dated 3-1-2000 but also the order dated 11-5-83 was set aside and the Registrar, Public Trust was directed to issue fresh proclamation for appointment of trustees and after hearing the interested persons pass fresh order in the matter of appointment of trustees. Learned single Judge also directed that the exercise be completed within three months from the date of appearance of parties. It is against this order, the appellants have filed this letters patent appeal.

9. Three points have been urged by Shri Imtiaz Hussain, learned counsel appearing for the appellants. Firstly, that the order dated 11-5-83 issued by the Registrar, Public Trust was not challenged in writ petition and, therefore, the learned single Judge erred in setting aside the order dated 11-5-83. Secondly, that the validity of the order dated 11-5-83 was challenged in civil suit and the appeal against the judgment and decree passed by the Civil Judge dismissing the suit, was pending. Thus when the alternative remedy was available and pending it was not open to the learned single Judge to interfere in the matter and the order dated 11-5-83 could not have been set aside. Thirdly, that the learned single Judge did not see that the appellants were holding charge of the trustees and were performing their duties for about 19 years.

10. We have carefully read the impugned order of the learned single Judge and perused the record and we feel that the above contentions raised by the learned counsel for the appellants are devoid of merit.

11. With regard to the first contention, the learned single Judge found that the order dated 11-5-83 was not a legal order as the same was passed under wrong assumption that Shriram Lohiya was alive, the proclamation was not properly issued, the order was passed in mechanical manner; and the directions regarding appointment of trustees by election was not envisaged in the terms recorded in the register of Public Trusts, therefore, it could not have been restored by allowing the writ petition and as such, the learned single Judge was certainly justified in directing issuance of fresh proclamation for appointment of trustees and passing fresh order in the matter of appointment of trustees.

12. If the order which would have come in force on setting aside the order impugned by the single Judge was violative of principles of justice and fair play and a patent or flagrant error in procedure or law crept in and the order would have resulted in manifest in justice, the learned single Judge was justified in intervening.

13. Though the order dated 11-5-83 was not challenged in the writ petition, but the power under Article 227 of the Constitution can be exercised even *suo motu*. To prevent violation of justice the High Court, while exercising writ jurisdiction, has power to do complete justice. In view of the above, there is no force in the first contention raised by learned counsel for the appellant.

14. The second contention of the learned counsel for the appellant has also to be rejected. Merely because an appeal against the judgment and decree passed in Civil Suit No. 87-A/89 was pending, it was not a reason to deter learned single Judge from passing the order impugned. When the learned single Judge came to the conclusion that the order dated 11-5-83 passed by the Registrar, Public Trust was not legal, merely because an appeal was pending before the subordinate Court, it would not have been fruitful to wait till the decision of the appeal. It would have been futile to relegate the parties to first seek redressal before the appellate Court which would have only resulted in the postponement of the grant of the relief prolonging the continuance of an order which was found to be illegal by the learned single Judge.

15. The High Court, in exercise of its jurisdiction under Article 227 of the Constitution of India can take cognizance of the entire facts and circumstances and pass appropriate orders to give the parties complete and substantial justice.

16. We also do not find any force in the third contention of the learned counsel

appearing for the appellants. Merely because the appellants were holding charge of the trustees and had been performing their duties for about 19 years, they cannot support their claim and cannot continue in office, if the order appointing them in the office was found to be illegal.

17. We, therefore, find no merit in this appeal and consequently, the same is dismissed in limine.

Appeal is dismissed.

APPELLATE CIVIL

Before Mr. Justice V.K. Agarwal.
16 April, 2002.

STATE OF MADHYA PRADESH and others. ...Appellants*
v.
M/S. JAISWAL TRACTORS ...Respondent.

*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 & 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.*

As noticed earlier in the instant case, notice had already been served and the appellants have entered appearance in the lower Court on 15.11.1988. Therefore the limitation started running from that date and was over on 15.12.1988. However, admittedly application under Section 30 of the Act was filed on behalf of appellants on 20.1.1989 i.e. much beyond the period of 30 days. Obviously, such an application and objections raised, thereby were barred by limitation.

Learned counsel for appellants has also challenged the award on its merits. It is clear that the award cannot be challenged on its merits. If the award is based on material and evidence placed on record, it cannot be interfered with, even if it is erroneous. Civil Court cannot sit as appellate forum to consider the

*M.A.No. 184 of 1991.

correctness of the award. Unless grounds as specified under Section 30 of the Act are made out, the award cannot be interfered with. The learned trial Court has therefore rightly held that the award did not call for any interference.

[Paras 7 and 11]

State of M.P. v. *M/s Saith and Skelton (P) Ltd.*[1], *Narayan Bhawu* v. *Dewajibhawu*[2]. *Hindustan Construction Co. Ltd.* v. *State of Jammu and Kashmir*[3], *Secretary, Irrigation Department, Government of India* v. *G.C. Roy*[4].

Ku. Tanu Tandon, P.L. for the State.

P.K. Jaiswal, for the respondent.

Cur. adv. vult.

ORDER

V.K. AGARWAL, J:–This Misc. Appeal is directed against the order dt. 12.11.1990 in Civil Suit No.3–A/1982 by First Additional District Judge. Rewa, making the award of arbitrator rule of the Court.

2. The relevant facts leading to the present appeal stated in brief are that the parties entered into an agreement, whereby the appellants had agreed to hire respondent's tractor on rental basis for carrying out some work undertaken by the Irrigation Department. A dispute arose between the parties regarding payment of rent, of the said tractor. As per agreement between the parties the matter was referred for decision by the sole arbitrator by the trial Court by its order dt. 31.8.84 and Shri Trilochan Singh, Advocate, Rewa was appointed as sole arbitrator. The arbitrator proceeded with the arbitration proceedings and filed his award dt.29.8.88 in the lower Court.

3. Notices regarding the filing of award by the arbitrator were issued by the lower Court to both the parties. On 15.11.88 the appellants' counsel appeared in the lower Court and sought time to file objections under Section 30 of the Arbitration Act, 1940 (hereinafter referred to as 'Act' for short). The learned trial Court granted time to file objections within the time prescribed. An application under Section 30 of the Act, raising objections regarding arbitrator's award was filed on behalf of appellants on 20.1.89. An enquiry was made by the lower Court regarding the said objections.

(1) AIR 1972 SC 1507. (2) AIR 1945 Nagpur 117.
(3) AIR 1992 SC 2192. (4) AIR 1992 SC 732.

4. By the impugned order the said objections have been dismissed. The learned lower Court held that the application under Section 30 of the Act was barred by limitation, as it was filed after the period of 30 days prescribed under Article 119 of the Limitation Act. It was therefore held that the objections being time barred could not be considered. Learned lower Court also held that the objections raised on behalf of appellants that the award could not be filed by the arbitrator under Section 14 of the Act, without request of the party or direction of the Court was also not sustainable. It was further held that the appellants have failed to make out any ground for setting aside award under Section 30 of the Act.

5. Learned counsel for appellants assailed the impugned order. It was submitted that the arbitrator passed the award ignoring material evidence placed on record. It was also submitted that the appellants filed their objections as per direction of the trial Court. It was submitted that the said objections should not have been treated as barred by limitation. It was also urged that the arbitrator could not file the award *suo motu*. It has also been submitted that the learned arbitrator erred in awarding interest from the date of institution of proceedings.

6. It is not in dispute that the arbitrator was appointed by the lower Court and had filed the award before the lower Court on 19.9.1988. Notices regarding the award were issued to both the parties, by the trial Court. On 15.11.1988 the appellants entered appearance through their counsel and sought time for filing objections, presumably under Section 30 of the Act, regarding the award. As pointed out by the lower Court, time for filing objections was granted to the appellants counsel, with the direction that the same be filed within the period of limitation. Undisputably, the objections were filed on 20.1.1989.

7. It is clear from the above that, after the notices were issued the appellants entered appearance on 15.11.1988 and thus had knowledge of the award atleast from that date. Under Article 119(b) of the Limitation Act, period of limitation for filing a suit for setting aside an award or getting an award remitted for reconsideration is 30 days and the period of limitation is to begin from the date of service of notice of filing of the award. As noticed earlier in the instant case, notice had already been served and the appellants have entered appearance in the lower Court on 15.11.1988. Therefore the limitation started running from that date and was over on 15.12.1988. However, admittedly application under Section 30 of the Act was filed on behalf of appellants on 20.1.1989 i.e. much

beyond the period of 30 days. Obviously, such an application and objections raised, thereby were barred by limitation.

8. The finding of trial Court in that regard is justified and calls for no interference. Consequently, the application raising objections by the appellants was barred by limitation and deserved rejection.

9. However, the other contentions raised in this appeal may also be considered briefly. It may be noticed that in *State of M.P.* v. *M/s Saith and Skelton (P) Ltd. and others*[1]. The Supreme Court referred and expressed its agreement to the observations with the pronouncement by the Nagpur High Court in *Narayan Bhawu* v. *Dewajibhawu*[2], to the effect that there is nothing in Section 14(2) of the Act, which precludes the arbitrator from filing the Award *suo motu* and it is not correct to say that the Award should be filed only if the parties make a request to the arbitrator to file the Award or make an application to the Court for that purpose. It was laid down that there is no prohibition in the arbitrator filing the award *suo motu* without the request of parties or direction of the Court in that regard. It has been observed that:

> "It is not correct to say that the Award should be filed only if the only if the parties make a request to the arbitrator to file the Award for make an application to the Court for that purpose especially when there is no prohibition in the Act, particularly in Section 14(2) against the arbitrator filing *suo motu* his Award in Court."

10. Therefore, the lower Court appears to be fully justified in holding accordingly and contentions of learned counsel for appellants in that regard cannot be accepted.

11. Learned counsel for appellants has also challenged the award on its merits. It is clear that the award cannot be challenged on its merits. If the award is based on material and evidence placed on record, it cannot be interfered with, even if it is erroneous. Civil Court cannot sit as appellate forum to consider the correctness of the award. Unless grounds as specified under Section 30 of the Act are made out, the award cannot be interfered with. The learned trial Court has therefore rightly held that the award did not call for any interference.

12. This leaves us with the last contention of the learned counsel for appellant that interest could not have been awarded by the arbitrator.

(1) AIR 1972 S.C. 1507. (2) AIR 1945 Nag. 117.

13. It is noticed that the arbitrator has awarded interest from the date of filing of the suit.Thus, *pendente lite* interest has been awarded. In *Hindustan Construction Co. Ltd.* v. *State of Jammu and Kashmir*[1], it has been held that the arbitrator is competent to award interest for the period commencing with the date of award to the date of decree or date of realisation, whichever is earlier. It has further been held that while award of interest for the period prior to an arbitration entering upon the reference is a matter of substantive law, the grant of interest for the post-award period is a matter of procedure. Section 34 of C.P.C., provides both for awarding of interest *pendente lite* as well as for the post-decree period and the principle of Section 34 is applicable to proceedings before the arbitrator, though the Section as such may not apply.

14. Similar proposition of law is laid down in *Secretary, Irrigation Department, Government of India* v. *G.C. Roy*[2]. It has been held therein that the arbitrator must also act and make his award in accordance with the general law of the land and the agreement. It has further been held that where the agreement does not prohibit and a party to the reference makes a claim for interest, the arbitrator must have the power to award interest *pendente lite*. For doing complete justice between the parties, such power to grant interest *pendente lite* has always been inferred. The above proposition was also reiterated in *State of M.P.* v. *M/s Saith and Skelton (P) Ltd. and others (supra).*

15. In view of above, the contention of learned counsel for appellants that interest ought not to have been awarded by the arbitrator can also not be accepted.

16. Accordingly, this appeal has no merit and is hereby dismissed. Costs of this appeal, shall be borne by the parties.

Appeal dismissed.

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(1) AIR 1992 S.C. 2192. (2) AIR 1992 S.C. 732.

APPELLATE CIVIL

Before Mr. Justice V. K. Agarwal.
14 May, 2002.*

RAMLAVAL ALIAS RAM LAKHAN and anor. ...Appellants*

SMT. SIMIYA BAI and anor. ...Respondents

otor Vehicles Act (LIX of 1988)–Sections 166, 173–Appeal–Defence that driver did not possess licence–Burden of proof is on insurer–Not discharged by satisfactory evidence–Insurer could not be exonerated from liability.

The contention raised by the learned counsel for respondent no.2/insurer that it was the obligation and burden of appellant no.2/owner to prove that the driver of ending vehicle was having a valid driving licence, cannot be accepted. It may be noticed that in the case of *United India Insurance Co. Ltd.* v. *Gian Chand and others*[1] relied upon by learned counsel for respondent no.2, it has been observed nat the insurance Company would get exonerated from its liability when the owner nad handed over the vehicle for being driven by a licenced driver. The burden to ove its defence that the offending vehicle was being driven by an unlicensed driver, was on the respondent no.2/insurer. However it has failed to discharge the said rden and it was not duly proved by it by adducing satisfactory evidence that the ending vehicle was being driven by an unlicenced driver. The cotention of learned ounsel for respondent no.2, therefore cannot be accepted. [Para16]

National Insurance Co. Ltd. v. *Ajay*[2], referred to.

J.P. Agrawal, for the appellants.

Sanjay Agrawal, for the respondents.

Cur. adv. vult.

ORDER

V.K. AGARWAL, J :–This Misc. Appeal under Section 173 of the Motor Vehicles Act, 1988 (hereinafter referred to as 'Act' for short) is directed against the award dt. 26.4.2000 in Motor Vehicle Case No. 914/99 by Additional Motor Accidents Claims Tribunal, Katni, awarding Rs. 25,000/-as compensation under section 166 of the Act, in favour of claimant/respondent no.1.

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*M.A.No. 1224 of 2000.

) (1997) 7 SCC 558. (2) 1998 (1) M.P.L.J. 542.

2. Undisputably, on 6.5.1995 the claimant/respondent no.1 was travelling by Tempo No.M.P.20-B/1737. The said Tempo was dashed against from behind by Matador bearing registration No.M.P. 21/6816, resulting in injury to claimant/respondent no.1 Smt. Simiya Bai.

3. The claimant/respondent no.1 filed application under section 166 of the Act, alleging that the accident occurred on account of rash and negligent driving of offending Matador by its driver-appellant no.1. It was alleged that the said Matador was owned by appellant no.2 and was insured by respondent no.2. The claimant/respondent no.1 averred that she suffered permanent disability due to injuries suffered by her in the accident. Compensation of Rs. 2,45,000/-was claimed.

4. The claim petition was resisted by the owner/appellant no.2 as well as respondent no.2/insurer. Appellant no.2 denied that there was any accident. It was also denied by him that the claimant/respondent no.1 suffered permanent disability. The insurer/respondent no.2 in his reply to the petition denied that the appellant no.1 was driving the vehicle. It was alleged that the said vehicle was being driven by one Nathusingh Gond. It was also alleged that Nathusingh Gond as also the appellant no.1 were not having valid driving licence. It was therefore prayed that the claim petition of claimant/respondent no.1 be dismissed.

5. Learned tribunal in the impugned award held that the accident was caused by rash and negligent driving of the offending vehicle–Matador by appellant no.1, due to which the claimant/respondent no.1 suffered permanent disability. It was further held that the claimant/respondent no.1 suffered permanent disability. The learned tribunal also held that the appellant no.1 was not having valid driving licence and therefore the offending vehicle was driven by him in breach of terms of policy. Accordingly, though compensation of Rs. 25,000/-was awarded in favour of claimant/respondent no.1 as against the appellants-the driver and owner of the offending vehicle, however the insurer/respondent no.2 was exonerated.

6. Learned counsel for appellants submitted that it has not been established that the claimant/respondent no.1 suffered permanent disability in the accident. It was submitted that compensation as awarded was excessive. It was also contended that respondent no.2/insurer did not prove its defence that the driver of offending vehicle did not possess proper driving licence, hence respondent no.2/insurer should also have been held liable to pay the amount of compensation.

7. Learned counsel for respondent no.2/insurer however supported the impugned award and submitted that the insurer was not liable to pay compensation because the owner/appellant no.2 did not discharge the burden of proving that the vehicle was handed over by him to a person holding valid driving licence. It was submitted that the owner/appellant no.2 did not take steps for production of licence of his driver and has not even entered the witness box to state that the offending vehicle was handed over by him for being driven by a duly licensed driver. It was submitted by the learned counsel for insurer/respondent no.2 that it was rightly exonerated by the tribunal from the liability to pay compensation.

8. The first contention of learned counsel for appellants that claimant/ respondent no.1 has failed to prove that she suffered from permanent disability on account of injury sustained by her in the accident, is obviously without merit. It may be noticed in the above context that claimant/respondent no.1 examined herself and has specifically stated that she sustained injury on her face, resulting in permanent disfiguration. The above statement is corroborated by the statement of Vijay Kumar (A.W.2). The claimant/respondent no.1 has also examined Dr. S.K. Sharma (A.W.3), who has issued examined Dr.S.K. Sharma (A.W.3), who has issued certificate Ex. P-3 stating that there was permanent disfiguration and consequently permanent disability.

9. It may be noted that as provided under section 142(c) of the Act, permanent disfiguration of head or face amounts to permanent disability. Therefore, there is no scope for doubt that claimant/respondent no.1 sustained injury in motor accident, resulting in disfiguration, and thus she suffered permanent disability.

10. The next contention of the learned counsel for appellants is that, it was the obligation of the respondent no.2/insurer to raise specific plea in its defence that the driver of offending vehicle was not having a valid driving licence and further that is should have proved the said defence, by adducing satisfactory evidence.

11. In the above context learned counsel for respondent no.2/insurer has submitted that, though the appellant no.2/owner resisted the claim petition in the tribunal, but has failed to produce the licence of his driver and has failed to prove that the appellant no.1/driver of the offending vehicle was having a valid driving licence. Therefore, the liability could not be fastened on respondent no.2/insurer.

12. It may be noticed in the above context that respondent no.2/insurer in its reply firstly averred that the offending vehicle-Matador was not being driven by

appellant no.1/Ram Lakhan, and that the said Matador was being driven by one Nathusingh Gond. It was also averred that Nathusingh Gond or appellant no.1/ Ram Lakhan were not having valid driving licene. The defence of respondent no.2 firstly was that the driver of offending vehicle namely Nathusingh Gond was not impleaded in the claim petition and secondly neither Nathusingh Gond nor the appellant no.1, who was alleged to be the driver of offending vehicle, possessed valid driving licence. Hence there was breach of terms of policy and therefore respondent no.2 was rightly exonerated from the liability. Learned counsel for respondent no.2 relied upon *United India Insurance Co Ltd.* v. *Gian Chand and others*[1], to support his contention.

13. It is to be noticed that the defence raised by insurer/respondent no.2 that the driver of offending vehicle was not having a valid driving licence, ought to have been established by leading satisfactory evidence by the insurer. Reference in the above connection may be made to *Suresh Mohan Chopra* v. *Lakhi Prabhu Dayal and others*[2].

14. In the instant case, it appear that respondent no.2/insurer examined one Ashok Kotwani, Senior Assistant (N.A.W.1) in support of its defence. He has stated that the offending vehicle Matador was being driven by Ram Lakhan, however he did not have a proper driving licence. The above statement of Ashok Kotwani (N.A.W.1) appears to be based on a report Ex. D-2, issued by R.T.O. Banda and certificate Ex.D-3. He has stated that the driver of offending vehicle had only a licence to drive Light Motor Vehicle. It may be noticed that certificate as above issued by R.T.O. Banda would be of no avail. The said certificate was not admissible in evidence and could not be acted upon. Reference in the above connection may be made to *National Insurance Co. Ltd.* v. *Ajay*[3].

15. It is therefore clear that from the evidence led by respondent no.2 it is abundantly clear that the vehicle was being driven by Ram Lakhan. Therefore, the plea of respondent no.2/insurer that the vehicle was not driven by Ram Lakhan but by Nathusingh Gond stands negatived by the evidence led by respondent no.2 itself. Further the respondent no.2/insurer did not lead satisfactory evidence to establish that the appellant no.1/driver of offending vehicle was not having a valid driving licence.

16. The contention raised by the learned counsel for respondent no.2/insurer

(1) (1997)7 SCC 558. (2) AIR 1990 S.C. 1979. (3) 1998 (1) MPLJ 542.

that it was the obligation and burden of appellant no.2/owner to prove that the driver of offending vehicle was having a valid driving licence, cannot be accepted. It may be noticed that in the case of *United India Insurance Co. Ltd. v. Gian Chand and others (supra)* relied upon by learned counsel for respondent no.2, it has been observed that the insurance Company would get exonerated from its liability when the owner had handed over the vehicle for being driven by a licenced driver. The burden to prove its defence that the offending vehicle was being driven by an unlicensed driver, was on the respondent no.2/insurer. However it has failed to discharge the said burden and it was not duly proved by it by adducing satisfactory evidence that the offending vehicle was being driven by an unlicenced driver. The contention of learned counsel for respondent no.2, therefore cannot be accepted.

17. In view of above, it is clear that respondent no.2 having failed to prove the breach of terms of policy, could not have been exonerated from liability to pay compensation.

18. Accordingly, the appeal is allowed. The impugned award of Rs. 25,000/- is maintained. However, it is directed that the amount of award shall be payable jointly and severally by the appellants and respondent no.2/insurer. The other terms of the award shall remain unaffected.

Appeal allowed.

APPELLATE CIVIL

Before Mr. Justice V. K. Agarwal.
17 May, 2002.

ASHA QURESHI ...Appellant*
v.
AFAQ QURESHI ...Respondent

Special Marriage Act (LXIII of 1954)–Section 25 and Contract Act 1872, Section 17–Active concealment of earlier marriage–Material suppression–Husband entitled to decree of nullity.

To constitute fraud, it is not essential, that there should be any misrepresentation

*F.A.No. 491 of 1996.

by express words. It is sufficient if it appears that the party deceiving knowingly induced the defendant to enter into a contract by leading him to believe that which the party deceiving knew to be false. It also appears from the facts and circumstances of the case that it was the obligation and duty of the appellant to have intimated and apprised the respondent about her earlier marriage. She has failed to do so. The respondent/husband has stated that had he known that the appellant was married from before, he would not have entered into wedlock with the appellant. It is therefore clear that suppression and active concealment of the fact of her earlier marriage and she being a widow would amount to material misrepresentation.

In view of the above, the appellant is entitled to a decree of nullity under Section 25 (iii) of the 'Act' as has been prayed by him. The impugned decree granted as above, by the trial Court is, therefore, justified. There is no substance in this appeal. It is accordingly dismissed.

[Paras 16 and 17]

R.P. Khare, for the appellant.

A.S. Jha, for the respondent.

Cur. adv. vult.

JUDGMENT

V.K. AGARWAL, J:– This appeal under Section 29 of the Special Marriage Act, 1954 (hereinafter referred to as 'Act' for short), is directed against the Judgment and decree dated 14-10-1996, in Civil Suit No. 59-A/90, by Fourth Additional District Judge, Jabalpur, declaring the marriage between the parties as *null* and *void*, by a decree of nullity.

2. Facts not in dispute are that the parties were married on 23-1-1990 at Jabalpur, in accordance with the 'Act'. They lived as husband and wife for a period of about one year. Subsequently, the relations between the parties became strained and they started living separately. The respondent filed a petition under section 24 and 25 of the 'Act', seeking a decree of nullity and of declaration of their marriage as *null* and *void*. It was averred by the respondent/husband that after the marriage between the parties on 23-1-1990, the respondent/husband came to know that the appellant/wife was already married to one Motilal Vishwakarma. Motilal Vishwakarma had died prior to marriage of the parties. It was further averred by the respondent/husband that the fact of her marriage

with Motilal Vishwakarma was suppressed by the appellant/wife, and that the respondent/husband agreed to marry her believing that she was a virgin. It was averred by the respondent/husband that the appellant/wife by suppressing from im the aforesaid fact has exercised fraud on him.

3. The appellant/wife denied the allegations as above. It was denied by her hat she suppressed any material fact or exercised fraud. According to her, at ie time of marriage of parties the respondent/husband was fully aware that the appellant/wife is a widow.

4. The learned trial Court framed several issues in the case including as to whether the appellant/wife suppressed the fact that she was a widow and married ie respondent/husband by practicing fraud? Some other issues were also framed which are not relevant for the disposal of this appeal.

5. The learned trial Court that the appellant/wife suppressed the fact of her earlier marriage with Motial Vishwakarma, and thus the consent of the respondent/husband for the marriage was obtained by fraud.

6. The learned counsel for the appellant/wife assailed the finding as above. It was submitted that the appellant and the respondent were known to each other for a long time prior to the marriage and the respondent/husband was fully aware hat the appellant/wife was married earlier and her first husband had died. It was therefore, submitted that there was no suppression of any material fact so as to constitute exercise of fraud by the appellant/wife.

7. The learned counsel for the respondent/husband however, supported the impugned judgment. It was submitted by the learned counsel for the respondent/ husband that material fact viz. her earlier marriage was never intimated by her to he respondent/husband. It was submitted that had the respondent/husband known about the earlier marriage of the appellant, he would not have entered into narital ties with her. It was therefore submitted that the trial Court was justified in holding that consent of the respondent/husband for marriage was obtained by the appellant/wife by exercising fraud. It would be useful to reproduce section 25 of the Act which lays down the conditions in which the marriage solemnized under the 'Act' be avoided. It reads:

> "Voidable marriages–Any marriage solemnized under this Act shall be voidable and may be annulled by a decree of nuelity if–

(i) the marriage has not been consummated owing to the wilful refusal of the respondent to consummate the marriage;or

(ii) the respondent was at the time of the marriage pregnant by some person other than the petitioner; or

(iii) the consent of either party in the marriage was obtained by coercion or fraud, as defined in the Indian Contract Act, 1872:

Provided that in the case specified in clause (ii), the Court shall not grant a decree unless it is satisfied–

(a) that the petitioner was at the time of the marriage ignorant of the facts alleged;

(b) that proceedings were instituted within a year from the date of the marriage; and

(c) that marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of the grounds for a decree:

Provided further that in the case specified in clause (iii), the Court shall not grant a decree if–

(a) proceedings have not been instituted within one year after the coercion had ceased or, as the case may be, the fraud had been discovered; or

(b) the petitioner has with his or her free consent lived with the other party to the marriage as husband and wife after the coercion had ceased or, as the case may be, the fraud had been discovered."

8. The respondent/husband appears to have prayed for the decree of nullity of marriage under Section 25(iii) of the 'Act'. It has therefore, to be considered as to whether consent of the respondent was obtained by fraud as defined in the Indian Contract Act, 1872?

9. Section 17 of the Indian Contract Act defines 'fraud' as below:–

"17.'Fraud'–"Fraud" means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:–

(1) the suggestion, as a fact, of that which is not true, by one who does not believe it to be true;

(2) the active concealment of a fact by one having knowledge or belief of the fact;

(3) a promise made without any intention of performing it;

(4) any other act fitted to deceive;

(5) any such act or omission as the law specially declares to be fraudulent.

Explanation–Mere silence as to facts likely ot affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech."

10. Therefore, the question that arises for consideration is : as to whether the appellant/wife suppressed the material fact i.e. her earlier marriage with Motilal Vishwakarma and whether the suppression as above would amount to fraud?

11. It may be noticed that the respondent/husband Mohd. Afaq Qureshi (AW/1) stated that he married the appellant/wife on 23-1-1990 under the 'Act'. They resided together for about 7 or 8 months. A dispute thereafter arose between them as the appellant/wife had suppressed that she was already married with Motilal Vishwakarma. He states that thereafter a document captioned as *'Iqrarnama'* (Ex.P/1) was executed by the appellant/wife. The said document bears signature of the appellant/wife as well as of Jugal Kishore–the brother of the appellant/wife as well as one Mohd. Salim. During cross-examination, the respondent/husband Mohd. Afaq Qureshi (AW/1) has admitted that he was known to the appellant/wife for about 5-6 years prior to the marriage. He further stated that on enquiry from the appellant/wife as to why she was not married despite her advanced age, she had told the respondent/husband that as there was no responsible person in her family, she could not get married earlier. He denied suggestion in his cross-examination that he was aware about the earlier marriage of the appellant, when he married her.

12. As against the above statement, the appellant Smt. Asha Quresi (NAW/

1) has admitted that she was married earlier before she married the respondent. She however, further states that about 8 years back when she befriended the respondent/husband, she had told him that she was married and that she was a widow from her childhood. It is however, noticed that the statement as above of the appellant/wife is not supported by her pleadings. The appellant/wife in her written statement nowhere specifically averred that she had intimated the respondent/husband about her marriage. In para 5 of her written statement, she had vaguely asserted that the present respondent/husband was aware that the appellant was a widow. However, as mentioned above, she did not plead that she herself informed the respondent about her earlier marriage, prior to marriage with the respondent/husband. It may also be noticed that the appellant Smt. Asha Qureshi (NAW/1) has earlier stated that the respondent came to know from her neighbours that she was a widow and then making an improvement has leter stated that she herself informed the respondent about the above fact. As noticed above the later statement of the appellant is not supported by her pleadings and doesn't appear to be reliable.

13. . The learned counsel for the appellant submitted that the document (Ex.P/1) according to the respondent/husband was written after the disclosure to him about the earlier marriage of the appellant/wife. However, the fact of earlier marriage and the disclosure thereof was not mentioned in the document (Ex.P/1). It was, therefore, submitted that it should be inferred from the above that the dispute leading to the execution of Ex.P/1 in fact was not the disclosure or knowledge of the respondent/husband about the earlier marriage of the appellant, and that the said document was got executed by the respondent/husband from the appellant by exercising force or deception on her.

14. The contention as above cannot be accepted. It does not have any bearing on the real controversy between the parties. It may be noticed that though the respondent/husband stated that dispute had arisen between the parties after their marriage, on the disclosure by the appellant/wife of the above fact, whereafter document (Ex.P/1) was executed. It is noticed that in the document (Ex.P/1) it was only stated that there was dispute between the parties, but the reason of dispute was not mentioned therein. It may be mentioned that the said document does not appear to have been drafted by any legal expert and appears to have been executed by the appellant/wife, in the presence of her brother and some other witnesses. It only contains an averment that in view of the dispute between them the parties wish to obtain divorce. Therefore, mere non-mention of the

cause of dispute, in the said document (Ex.P/1) would not by itself be indicative of the fact that the appellant had disclosed to the respondent before their marriage the appellant was married earlier.

15. As noticed earlier, the pleadings in the above regard of the appellant/wife are vague. No particulars of date, time and period when the disclosure was allegedly made by her, have been metioned in the written statement. In fact, there is no specific pleading that she herself intimated the respondent about her earlier marriage. In view of the above, the statement of respondent Mohd. Afaq Qureshi that before their marriage, the appellant never told him about her earlier marriage deserves to be accepted in preference to the appellant's statement that she did make such a disclosure. In the foregoing circumstances, the finding of the leanred trial Court in the above regard is affirmed.

16. It is therefore clear from the above that the appellant was married from before and was a widow at the time of her marriage with the respondent, was a material fact. It was not desclosed by the appellant to her husband-the respondent. The suppression of material fact as above would amount to exercise of fraud. It may be noticed in the above context that in view of sub-section (4) of Section 17 of the Contract Act to constitute fraud, it is not essential, that there should be any misrepresentation by express words. It is sufficient if it appears that the party deceiving knowingly induced the defendant to enter into a contract by leading him to believe that which the party deceiving knew to be false. It also appears from the facts and circumstances of the case that it was the obligation and duty of the appellant to have intimated and apprised the respondent about her earlier marriage. She has failed to do so. The respondent/ husband has stated that had he known that the appellant was married from before, he would not have entered into wedlock with the appellant. It is therefore clear that supression and active concealment of the fact of her earlier marriage and she being a widow would amount to material misrepresentation.

17. In view of the above, the appellant is entitled to a decree of nullity under Section 25 (iii) of the 'Act' as has been prayed by him. The impugned decree granted as above, by the trial Court is, therefore, justified. There is no substance in this appeal. It is accordingly dismissed.

Appeal dismissed.

APPELLATE CIVIL

Before Mr. Justice K. K. Lahoti.

1 July, 2002.

NARENDRA KUMAR SAXENA ...Appellant*

v.

M/S PAPER TRADERS ...Respondent

Partnership Act, Indian (IX of 1932)–Sections 68, 69 and Civil Procedure Code, 1908, Order 41, Rule 27–Suit on behalf of registered partnership firm for recovery of cheque amount–Suit not arising out of contract to enforce right–Bar under Section 69(2) not applicable–Additional evidence–Plaintiff did not file certified copy of entry–Acknowledgement cannot be treated as proof of registration–Plaintiff can be permitted to file certified copy as additional evidence in appellate state–Such permission however cannot be granted in absence of an application.

Fact regarding registration of the firm and the person suing is a partner of firm on the date of filing of suit, can be proved only by the certified copy of the entry relating to the firm in the Register of Firms and not by otherwise. In view of this, the Courts below have erred in accepting Ex.P.1 the acknowledgement of registration of firm as proof relating to registration of the firm. Such course is contrary to provision of Section 68(2) of Partnership Act. And it is held that Courts below have erred in arriving at finding that the plaintiff/respondent has proved that it is a registered firm on the basis of Ex.P.1.

The defendant had issued two cheques but had stopped the payment of the cheques. In the circumstances, the plaintiff filed suit for the recovery of amount of two cheques which is not a suit arising from a contract. In view of the above, the plaintifff has not filed a suit to enforce a right arising from a contract but filed a suit to recover amount of cheques with interest from the defendant. Relying on the case of Kerala and Delhi High Courts, this suit was maintainable as bar under Section 69(2) of the Partnership Act will not apply. In view of the aforesaid, the suit of the plaintiff was rightly decreed by the Courts below though document Ex.P.1 was wrongly considered a document to prove registration of the firm under Section 69 (2) of Partnership Act.

[Para 10 and 12]

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*S.A.No. 499/1990.

Haldiram Bhujiawala v. *Anand Kumar Deepak Kumar*[1]; *Ashok Kumar Kanhaiyalal* v. *Laxmi Kirana Stores*[2]; *M/s Shreeram Finance Corporation* v. *Yasin Khan*[3]; *M/s Virendra Dresses* v. *M/s Varinder Garments*[4]; *Kerala Arecanut Stores* v. *Ramkishore and Sons.*[5]; *Kapurchand Bhagaji Firm* v. *Laxman Trimbak*[6]; referred to.

P. S. Das, for the appellant.

Smt. Amrit Ruprah, for the respondent.

Cur. adv. vult.

JUDGMENT

K. K. LAHOTI, J :–Defendant aggrieved by the judgments and decrees passed by the Courts below by which suit of respondent was decreed, has filed this appeal.

2. This appeal was admitted on 13-8-1991 on following substantial questions of law :

> "1. Whether filing of a photocopy of acknowledgement about registration of a firm issued by the Registrar of Firms and exhibited as P-1 was sufficient compliance of Section 68 (2) of the Indian Partnership Act, 1932 ?
>
> 2. Whether in the absence of certified copy of an entry relating to a firm in the Register of Firms, the suit of the respondents was liable to be dismissed as not maintainable?

3. Learned counsel for the appellant submits that the respondent has filed the present suit on behalf of the Partnership firm. In this regard averment has been made in Para 1 of plaint but the appellant has denied this fact. In these circumstances, to prove the factum that the respondent is a registered firm certified copy of an entry relating to a firm in the Register of Firm sought to have produced but the respondent has filed photocopy of acknowledgement about registration of firm issued by the Registrar of Firms which is not in compliance of Section 68 (2) of the Indian Partnership Act, 1932 (hereinafter referred to a 'Partnership Act'). Learned counsel for the respondent submits that plaintiff firm was a registered firm on the date of filing of suit. Certified

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(1) AIR 2000 SC 1287=(2000) 3 SCC 250=2000 AIR SCW 984 (2) 1996 (II) MPWN 169.
(3) AIR 1989 SC 1769. (4) AIR 1982 Delhi 482
(5) AIR 1975 Kerala 144 (6) AIR 1952 Nagpur 57

copy of acknowledment about registration of firm has been filed which is according in law and the plaintiff is a partner of the firm. Respondent has duly complied with Section 68(2) of the Partnership Act. In the circumstances, both the Courts below rightly decreed the suit.

4. Learned counsel for the respondent also submits that the present suit was filed for recovery of the amount for which defendant issued cheques but the same were dishonoured. In the circumstances, this suit is not a suit to enforce a right arising from a contract. In the circumstances, the suit was maintainable and it was not necessary to file a certified copy of the entry relating to firm in the Register of Firms. In this regard she placed reliance to a Division Bench judgment of Kerala High Court in *Kerala Arecanut Stores* v. *Ramkishore & Sons*[1], and single Bench judgment of Delhi High Court in *M/s. Virendra Dresses* v. *M/s. Varinder Garments*[2].

5. To appreciate the rival contentions of the parties, it is necessary to state the facts of the case. Plaintiff filed present suit for recovery of Rs. 16,450/- and interest at the rate of 12% per annum on the ground that the plaintiff is a partnership firm dealing in paper trade in wholesale having its shop at Gulia Dai Marg, Bhopal. The name of partners has been shown in Para 1 of the plaint. The suit was filed through Sawal Prasad Goyanka whose name is appearing in Para 1 of the plaint. Defendant is a Proprietor of Rajeshwari Printers and for his paper printing work he was purchasing paper from plaintiff and used to purchase the goods on credit. There was a current account with the plaintiff and defendant has purchased paper of Rs. 75,395/- during 28-12-79 to 18-6-80. Against this defendant has paid Rs. 58,990/- through cheques. But Rs. 16,405/- remained unpaid for which plaintiff requested the defendant but this payment was avoided on one or the other pretext. Ultimately, defendant issued two cheques of Punjab National Bank. T.T. Nagar. Bhopal. Out of two cheques, some amount was paid by the defendant and another cheque was given and it was requested that these two cheques be presented after 3-9-80 and cheque was presented on 3-9-80 by the plaintiff to its Banker for collecting the amount but it was informed that the defendant has instructed to stop the payment of the cheque. As the defendant had stopped payment of the cheque hence the plaintiff issued a notice on 8-9-80 through his counsel and has called upon defendant to pay the amount for which the defendant has issued two cheques. But the amount was not paid and the suit was filed against the defendant.

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(1) 1975 Kerala 144. (2) AIR 1982 Delhi 481.

6. The defendant contested the suit. In the evidence two cheques were filed as Ex. P.28 for Rs. 8000/- (this was returned bank by bank) and another cheque Ex. P.29 for Rs. 8,405/- which was not presented to the bank because the defendant had stopped the payment.

7. In the evidence, plaintiff has filed photocopy of acknowledgement of the registration of firm as Ex. P.1. At the time of the evidence of PW 1 Sawal Prasad, he brought original certificate which was marked by the Court as Ex. P.1A and on photocopy Ex. P.1. By this way Ex. P.1 was proved by bringing original certificate by the plaintiff. In the circumstances, contention of the appellant that such photocopy cannot be proved without the original has no force.

8. It is not in dispute that suit filed by unregistered firm to enforce a right arising from a contract is not maintainable. This question has been consdered by the Apex Court in *Haldiram Bhujiawala* v. *Anand Kumar Deepak Kumal*[1], and n *M/s. Shreeram Finance Corporation* v. *Yasin Khan*[2], wherein the Apex Court has held:

> "6. .....Thus, the persons suing, namely, the current partners as on the date of the suit were not shown as partners in the Register of Firms. The result is that the suit was not maintainable in view of the provisions of sub-section (2) of S. 69 of the said Partnership Act and the view taken by the trial Court and confirmed by the High Court in this connection is correct. ..... " In view of above judgment by the Apex Court a suit filed by unregistered firm is not maintainable to enforce a right arising from the contract.

9. Now the question arises whether the acknowledgement of a registered firm certificate can be taken into consideration for the compliance of Section 69 (2) of Partnership Act. This question was considered in *Kapurchand Bhagaji Firm* v. *Laxman Trimbak*[3], wherein it is held:

> "(5).....That fact could be proved only by producng a copy of the entry from the Register of Firms. The lower Court thus fell into error in relying on the evidence of PW1 and holding that the requirements of S. 69 (2) of the Partnership Act were satisfied. The plaintiff's suit should have been dismissed on this ground."

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(1) (2000) 3 SCC 250=AIR 2000 SC 1287. (2) AIR 1989 SC 1769.
(3) AIR 1952 Nagpur 57.

10. In view of above, fact regarding registration of the firm and the person suing is a partner of firm on the date of filing of suit, can be proved only by certified copy of the entry relating to the firm in the Register of Firms and not by otherwise. In view of this, the Courts below have erred in accepting Ex.P.1 the acknowledgement of registration of firm as proof relating to registration of the firm. Such course is contrary to provision of Section 68(2) of Partnership Act. And it is held that Courts below have erred in arriving at a finding that the plaintiff/respondent has proved that it is a registered firm on the basis of Ex.P.1.

11. Learned counsel for the respondent submits that the plaintiff respondent is a registered firm and if the respondent has not filed such a certified copy as required under Section 68 then plaintiff be permitted to file the same before the appellate Court. In this regard the respondent relies on judgment of this Court in, (*Ashok Kumar Kanhaiyalal* v. *Laxm Kirana Stores*[1]) and wherein this Court has held :

> "Under the provisions of Section 68 of Indian Partnership Act any statement, intimation or notice recorded or noted in the register for firms shall, as against any person by whom or on whose behalf such statement, intimation or notice was signed, be conclusive proof of any fact therein stated. According to sub-section (2) of Section 68 a certified copy of an entry relating to a firm in the Register of Firms may be produced in proof of the fact of the registration of such firm, and of the contents of any statement, intimation or notice recorded or noted therein. Sub-section (1) applies to the partners inter se while sub-section (2) provides that the certified copy of the entry would be conclusive proof of the fact of the registration of the firm and all the contents of the statement recorded in the said entry. The learned first appellate Court was not justified in holding that as the appellant did nto file the said entry before the trial Court he was not entitled to file such entry subsequently in the first appellate Court. An additional evidence unless sought to be produced to delay the trial and to get undue advantage over the rights of other party and would tantamount to abuse of process of law, would ordinarily be accepted to do justice between the parties. In the instant case the plaintiff filed the documents along with an application showing

(1) S.A.No. 297 of 1986, decided on 31-8-95=1996 (II) MPWN 169.

the reasons as to why the said documents could not be filed before the trial Court, application under Order (41) Rule 27 states that as the copy was not available to the appellant/plaintiff the same could not be filed. The said application was filed on 5-9-83. A copy was issued on 15-3-83 while the judgment of the trial Court was delivered on 1-2-83. Under these circumstances the document was not available with the appellant and the same could not be filed. In any case this was a fit case in which the additional evidence ought to have been taken on record."

In view of the aforesaid decision respondent can be permitted to file additional evidence before the appellate Court by filing application under Order 41, Rule 27 but in the present case no such application has been filed. In the circumstances respondent cannot taken any benefit of the said decision.

12. Now the other question arises in this case whether present suit is arising from the contract and was filed to enforce such a right. If the suit is filed not to enforce a right arising from a contract then bar under Section 69 (2) will not apply. Learned counsel for the respondent has relied on the Division Bench decision of Kerala High Court in *Kerala Arecanut Stores, (supra)*. Contention of the learned counsel for the respondent is that in the present case the plaintiff has filed suit for recovery of the amount for which the appellant had issued two cheques but *mala fidely* stopped the payment of cheques, consequently one cheque was returned and another could not be presented. Kerala High Court in *Kerala arecanut Stores (supra)* has considered this aspect. The facts of that case are as under:

"2. The plaintiff-company claims to be a firm registered under the Indian Partnership Act. The plaintiff is said to be the managing partner. Admittedly the first defendant issued three cheques, one for Rs. 7,500/-, another for Rs. 5,000/- and yet another for Rs. 2,500/- all of date 21-4-1965 in favour of the second defendant and the second defendant firm receiving cousideration endorsed these cheques to the plaintiff. These were sent for collection by the plaintiff to the Canara Bank Limited, but they were dishonoured and returned to the plaintiff. The plaintiff, therefore, claims the amount of the cheque together with the interest and also the amount collected by the Bank from the firm as discount."

Considering the aforesaid facts the Division Bench of the Kerala High Court held:

"9. .....It is sufficient to state here for the purpose of this case, that the right of action available to an endorsee of a cheque who comes to hold the cheque in due course is based upon conferment on him by the statutory provisions the right to sue the maker of the cheque and also the indorser. If that be the case the right that is sought to be enforced does not arise from a contract. It is not a suit by the endorsee to enforce a right arising out of a contract and; therefore, the bar under S. 69 (2) of the Partnership Act will not operate in such a case." Delhi High Court in *M/s. Virendra Dresses, (supra)* has held in Para 5:

"5. The suit was filed by a firm against a third party. Thus under sub-section (2) of S. 69 of the Partnership Act a suit to enforce a right arising from a contract against a third party is barred unless the firm is registered. The application of sub-section (2) does not extend to the enforcement of rights not arising from contract. The present suit of the plaintiffs against the defendant does not arise out of any contract between the parties and as such S. 69 (2) of the Partnership Act is not applicable. The objection of the defendant, therefore, has no force."

In view of the ratio of the Kerala High Court as it is held that to recover amount of cheque which was issued by the defendant but was not honoured, is not a suit to enforce a right arising out of contract. Similar is the position herein. The defendant had issued two cheques but had stopped the payment of the cheques. In the circumstances, the plaintiff filed suit for the recovery of amount of two cheques which is not a suit arising from a contract. In view of the above, the plaintifff has not filed a suit to enforce a right arising from a contract but filed a suit to recover amount of cheques with interest from the defendant. Relying on the case of Kerala and Delhi High Courts, this suit was maintainable as bar under Section 69(2) of the Partnership Act will not apply. In view of the aforesaid, the suit of the plaintiff was rightly decreed by the Courts below though document Ex.P.1 was wrongly considered a document to prove registration of the firm under Section 69 (2) of Partnership Act.

13. Accordingly, the appeal is dismissed. No order as to costs.

Appeal dismissed.

APPELLATE CIVIL

Before Mr. Bhawani Singh Chief Justice & Mr. Justice S.L. Jain.

16 July, 2002.

ONKAR ALIAS PANJILAL ...Appellant.*

v.

CHANDRIKA PRASAD & others ...Respondents.

Motor Vehicles Act, (LIX of 1988)–Sections 166, 173–Appeal–Claim rejected on ground that involvement of claimant in accident not proved–Name of claimant mentioned in F.I.R.–Not controverted by respondent in evidence–Assessment of evidence and finding by Tribunal erroneous–Case of 100% permanent disability–Compensation of Rs. 2 lacs awarded–Impugned award set aside.

The most important question for determination in this case is whether the claimant has been able to prove that he was occupant of the jeep at the time of accident, since the finding of the Tribunal on this question is to be contrary. We have examined the evidence on this aspect, particularly the First Information Report (Ex.P/1), which has influenced the finding of the Tribunal. The FIR (Ex.P/1) specifically makes mention of Panjilal, which is alias name of Onkar (Claimant). The respondents have not asked any question from him that he was not travelling by this jeep or he was not Panjilal, but Onkar, who are two different persons. Therefore, the Tribunal has not correctly understood the facts contained in the FIR resulting in erroneous assessment of evidence and ultimate finding. Consequently, the finding of the Claims Tribunal is set aside and it is held that Onkar alias Panjilal was travelling by this jeep, which met with an accident resulting in juries to him, as alleged.

[Para 6]

P.K. Jain, for the appellants.

K. Menon, for the respondents No.2.

B.D. Jain, for the respondent No.4.

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 November 23, 2000, passed by the Motor Accident Claims Tribunal, Jabalpur, in Claim Case no. 151/97.

*M.A.No. 239 of 2001.

2. The claimant alleges that he was working as Mechanic at Jabalpur. On 7.8.1997, he was travelling by Jeep No. MP-09/S -1427. Near Maharajpur Petrol Pump, Tractor No. MP 20-H/3805 driven rashly and negligently, hit the jeep resulting in death of driver of the jeep and serious injuries to the occupants. The claimant also suffered injuries, one such being on the right foot, which was amputated. As a result thereof, he cannot work, otherwise he was earning Rs. 4,000/- per month. That apart, he is deprived of marriage, since nobody prepared to marry him. Consequently, he claimed Rs. 8,70,000/-.

3. The respondents 1 and 2 denied the allegations. During pendency of the case, driver of jeep (Mangal) died, his name was deleted from the claim petition.

4. The Insurance Company with which the tractor was insured, alleges that the tractor was not being driven rashly and negligently and it was jeep, which was driven in that manner, which resulted in the accident and, therefore, they are not liable to pay compensation. The owner of the jeep states that it had been sold on the date of accident to one Lal Mohd., therefore, he was not owner thereof on the date of accident and as such, he was not laible to pay compensation.

5. The Claims Tribunal decides that the involvement of the claimant in this accident was not proved. The same is the case with regard to receiving of injuries by the claimant in this accident. With regard to sale of vehicle, finding is that the same is not proved and that liability of jeep for the accident is not also proved. Consequently, the claim petition has been rejected.

6. The most important question for determination in this case is whether the claimant has been able to prove that he was occupant of the jeep at the time of accident, since the finding of the Tribunal on this question is to be contrary. We have examined the evidence on this aspect, particularly the First Information Report (Ex.P/1), which has influenced the finding of the Tribunal. The FIR (Ex.P/1) specifically makes mention of Panjilal, which is alias name of Onkar (Claimant). The respondents have not asked any question from him that he was not travelling by this jeep or he was not Panjilal, but Onkar, who are two different persons. Therefore, the Tribunal has not correctly understood the facts contained in the FIR resulting in erroneous assessment of evidence and ultimate finding. Consequently, the finding of the Claims Tribunal is set aside and it is held that Onkar alias Panjilal was travelling by this jeep, which met with an accident resulting in juries to him, as alleged.

7. The next question is determination of compensation. The claimant states that he was working as Mechanic and earning Rs. 4,000/-per month. He has not produced any document showing that he was earning Rs. 4,000/- nor has he produced evidence of the shop established by him or in which he was working as Mechanic. Therefore, it is difficult to accept statement that he was earning Rs. 4,000/-assuming he was working as Mechanic. He states that in this accident, he received many injuries. One injury was on the right foot, which was amputated. He further states that after the accident, he is unable to work and earn as before. He further states that he cannot marry, since nobody is prepared to marry him due to amputation of leg over the knee. There is no denial of injuries suffered by the claimant and amputation of leg. Obviously, his earnings are affected and he cannot lead proper life due to amputation of leg. For treatment, he must have spent sufficient amount and undervent pain and suffering, looked after by some attendant and spent on special diet. Taking into consideration these factors, apart from the fact that it is a case of the 100% permanent disability, the proper compensation payable in this case should be Rs. Two Lac with interest at the rate of 9% per annum from the date of application till payment.

8. The next question is who should be liable to pay the compensation. The evidence clearly points out that the offending vehicle in this case is Tractor no. 20-H/ 3805 insured with the New India Assurance Company. The owner and driver would be liable to pay compensation jointly and severally. Since the vehicle was insured with the New India Insurance Company, therefore, it is liable to pay compensation. No other question was pressed for consideration.

9. Consequently, the appeal is allowed. The award of the Motor Accident Claims Tribunal challenged in this appeal is set aside. The claimant is entitled to lumpsum compensation of Rs. Two Lac payable by the Assurance Company with interest at the rate of 9% per annum from the date of application till payment. Costs on parties.

Appeal is allowed.

APPELLATE CIVIL

Before Mr. Justice S.P. Khare.
25 July, 2002.

M/S CHETAK CONSTRUCTIONS LIMITED INDORE ...Appellant*
v.
OM PRAKASH and others ...Respondents

Civil Procedure Code (V of 1908)–Order 39, Rules, 1 & 2–Transfer of Property Act, 1882 Section 53–A, and Evidence Act, Indian, 1872 Sections 21, 31, 115–Plaintiffs in possession under sale agreement–Entitled to temporary injunction restraining dispossession–Part-performance–Transferee in possession–Can protect possession even if no suit is filed for specific performance of contract–Recital in agreement regarding delivery of possession coupled with payment of big amount–Strong circumstance that possession was delivered.

One of the purpose of enacting Section 53-A was to provide protection to a transferee who in part performance of the contract had taken possession of the property even if the limitation to bring a suit for sepecific performance has expired. In that view of the matter. Section 53-A is required to be interpreted in the light of the recommendation of Special Committee's report and aims, objects contained in amending Act, 1929 and specially when S. 53-A itself does not put any restriction to plea taken in defence by a transferee to protect his possession under S. 53-A even if the period of limitation to bring a suit for specific performance has expired.

The recital in these documents about the delivery of possession by the vendors including the defendants is admitted. That was sufficient to pass possession from one party to the other. The immovable property by its very nature is incapable of movement. It cannot be put by one party into the hands or pocket of another. The clear, unambigous and unequivocal admission in the agreement, affidavits and vouchers about the delivery of possession by the defendants to the plaintiff must prevail over the documents on which reliance has been placed by the trial Court. The defendants have, as already discussed, taken an additional amount of Rs. 8,00,000/- for "immediately vacating the property" agreed to be sold and this stark reality cannot be overshadowed or obliterated by the documents produced by the defendants.

[Paras 22 and 28]

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* Misc. Appeal No. 1303 of 1998.

M/s Chetak Constructions Limited Indore v. *Om Prakash, 2002.*

S.S. Suryavanshi v. *P.B. Suryavanshi*[1], *Amresh Tiwari* v. *Lalta Prasad Dubey*[2], *Hamzabi* v. *Syed Karimuddin*[3], *State of U.P.* v. *District Judge*[4], *Kantappa* v. *Krishnabai*[5], *Dharmaji* v. *Jagannath*[6], *Sitaram* v. *Tularam*[7], *Madan Mohan* v. *Gaurishanker*[8], *U.N. Sharma* v. *Puttegowda*[9], *Baburam* v. *Vasudeo*[10], *Awadh Kishore* v. *Ram Gopal*[11], *Ranchhoddas* v. *Devaji* [12], *Thiru John* v. *Returning Officer* [13], *Pesupuleti Venkateswarlu* v. *Motor and General Traders*[14], *S.F. Munuswami* v. *Erusa Gounder*[15], *Stoneware Pipe* v. *State of Rajasthan* [16], *Nathulal* v. *Phoolchand* [17], *Delhi Motor Co.* v. *V.A. Basrurkar* [18], *Maruti* v. *Krishna* [19], *Narayan* v. *Gopal* [20], *Achayya* v. *Venkata Subba Rao* [21], *Kanhaiyalal* v. *Jerome D'Costa* [22], *Bhulkoo* v. *Hiriyabai* [23], *Ewaz Ali* v. *Firdous Jehan* [24], *Probodh Kumar* v. *Dantmara Tea Co.* [25], *Pandit Ramchander* v. *Maharaj Kunwar*[26], referred to.

F.E. Devitre, with Kishore Shrivastava, for the appellant.

Vivek Tankha, with Rajesh Pancholi (for Nos. 1 and 2) and Dr. M. Dalal, (for Nos. 3 and 4) for the respondents.

Cur. adv. vult.

ORDER

S.P. KHARE, J:–This is an appeal under Order 43, Rule 1 (r), CPC by the plaintiff-company against the order by which its application under Order 39, Rules 1 and 2, CPC for temporary injunction for restraining the defendants from interfering with the possession of the plaintiff-company on the property in dispute has been rejected.

2. This appeal has been transferred by the Supreme Court by order dated 20-4-1998 in Civil Appeal No. 2140 of 1998 from Indore to Jabalpur and it has been assigned to this Bench by Hon'ble the Chief Justice.

3. The facts which are not in dispute are that the defendant Nos. 1 to 4 with

(1) 2002 AIR SCW 659=AIR 2002 SC 960.
(2) AIR 2000 SC 1504=2000 Cri. LJ 2226=2000 All LJ 1095=2000 AIR SCW 1467.
(3) 2000 AIR SCW 4354=(2001) 1 SCC 414.
(4) AIR 1997 SC 53=1996 All LJ 1904=1996 AIR SCW 4205.
(5) AIR 1995 Karnataka 213. (6) AIR 1994 Bom 254. (7)AIR 1989 Madh. Pra. 128.
(8) AIR 1988 Madh. Pra. 152. (9) AIR 1986 Karnataka 99. (10) AIR 1982 Allah 414.
(11) AIR 1979 SC 861. (12) AIR 1977 SC 1517. (13) AIR 1977 SC 1724.
(14) AIR 1975 SC 1409. (15) AIR 1975 Madras 25. (16) AIR 1972 Rajas 83.
(17) AIR 1970 SC 546. (18) AIR 1968 SC 794. (19) AIR 1967 Bom 34.
(20) AIR 1960 SC 100. (21) AIR 1957 Andh Pra 854. (22) AIR 1955 Nagpur 302 (FB).
(23) AIR 1949 Nagpur 410. (24) AIR 1944 oudh 212..
(25) AIR 1940 PC 1 (Explained in AIR 1944 oudh 212 and AIR 1957 AP 854).
(26) AIR 1939 Allah 611.

thirty other persons executed the agreement dated 13-9-1986 in favour of the plaintiff-company. By this agreement they covenanted to sell the property known as House Nos. 8 and 8-A (8/1 and 8/2) situated at Mahatma Gandhi Raod, Indore to the plaintiff-company. This property consisted of 1,00,000 sq. ft. of land with two houses constructed thereon. One house was on 1500 Sq. ft. in possession of defendant No. 1 Om Prakash Khandelwal and the other house was on 3500 sq. ft. in possession of defendant No. 3 Vijay Kumar Khandelwal. They are real brothers. They have been shown as first party Nos. 20 and 23 in the agreement. The consideration which was agreed upon for the sale of this property was Rs. 1,06,00,000/-.Out of this an amount of Rs. 42,00,000/-was paid by the plaintiff-company to the vendors on the date of the agreement as. per Annexure 'C' to this agreement. Further an amount of Rs. 8,00,000/-was paid by the plaintiff to the defendants apart from the agreed consideration for "addition and extensions carried to the structures and immediately vacating the said property". This property was under attachment of the M.P. Sales Tax Department and Income tax Department for the dues payable by some of the vendors. They agreed to get the property released from the attachment. The total liability for which the property was under attachment was of Rs. 3,50,000/-. It was agreed that the property "will be made free from all the sales tax and income-tax liabilities and dues before the sale-deed is executed". Clause 19 of the agreement provides:–"that the first party has put the second party in actual, physical and vacant possession of the said property in furtherance of this agreement. The second party shall henceforth be entitled to commence and carry on Survey and construction activities thereon but shall not get any title or ownership therein before final sale". Clause 20 further provided that the sale deed was to be executed and registered within one year on payment of balance amount of Rs. 64,00,000/-. But there was a provision for extension of this period by six months on payment of compound interest at the rate of 18% per annum. There was a further clause that "further extension of time for payment is totally ousted and entails termination of this agreement and forfeiture of all advances." Clause 21 again reiterated that the first party shall arrange for and obtain permission for transfer from Income tax and Urban Land Ceiling Authorities if and when necessary. It is also stated in the agreement that "mere delay in any of these formalities shall not absolve the second party from making balance payment in time". Defendants Om Prakash Khandelwal and Vijay Kumar Khandelwal supported the agreement by their affidavits dated 13-9-1986 and in these affidavits they have also shown that they have "handed over the vacant

possession of these premises to the second party on 13-9-1986 under the said agreement". The vendors executed a power of attorney also in favour of the Directors of the plaintiff-company.

4. The plaintiff-company sent letter dated 17-2-1988 to the vendors stating therein that they were ready and willing to fulfil their part of the contract, i.e. payment of the balance consideration before the Sub-Registrar at the time of the registration of formal sale deed. The plaintiff-company called upon the vendors to see that the property is released from attachment by the Sales Tax and Income-tax Department and necessary no objection certificates are obtained from the Income-tax Department and the Competent Authority under the Celling Act. The plaintiff-company requested all the vendors to assemble at Indore and execute the sale deed. The defendants sent their reply dated 11-8-1988 by which the period stipulated for performance of the contract and payment of balance consideration was extended by six months and it was expressed that if necessary this period would be further extended for another six months. It was also stated in this reply that no further extension would be given. It was also mentioned in this reply that the NOC from the Income-tax Department would be obtained by them.

5. The defendants sent their notice dated 7-6-1989 through their Advocate to the plaintiff-company by which the agreement was "cancelled" and the amount already paid by the plaintiff was "forfeited". It was also expressed in this notice that though in the agreement it was mentioned that the possession of the property was delivered to the plaintiff-company, this was nothing more than mere formality and the actual possession is still with the defendants. Thereafter, there was exchange of several other postal and telegraphic notices between the parties. Income-tax Clearance Certificate was not obtained by the vendors and the sale deeds were not executed within the time stipulated in the agreement or within the extended time.

6. On 19-4-1993 the plaintiff-company filed the suit for declaration and permanent injunction. In this civil suit the plaintiff-company filed an application for temporary injunction for restraining the defendants from interfering with its possession on the property in dispute. The case of the plaintiff-company is that the possession of the property in dispute was delivered to it on the date of the agreement and the company was in actual possession of this property on the date of the institution of the suit. An amount of Rs. 8,00,000/- was paid to the defendants as a consideration for "immediately vacating the property". According

to the plaintiff-company it was in possession of the disputed property on the date of the filing of the suit after payment of the amount of Rs. 50,00,000/-. It has been pleaded by the plaintiff company that it was always ready and willing to perform its part of the contract but the vendors did not obtain the Income-tax Clearance Certificate for execution of the sale deeds. It is further stated by the plaintiff-Company that from 24-8-1987 to 12-4-1989 it has paid several amounts to the defendants towards balance sale consideration. The plaintiff-company has made payment to other co-owners and majority of them have executed sale deeds in favour of the plaintiff-company. The defendants have refused to execute the sale deed and are attempting to interfere in the possession of the plaintiff-company.

7. The defendants' case is that the possession of the property in dispute was never delivered to the plaintiff-company. It was not ready and willing to perform its part of the contract. In para 6 in the reply to the application for temporary injunction it has been stated by the defendants that "as the plaintiff was required to take necessary actions concerning the maps of suit property in different offices and Corporations, therefore, the defendants had "for the sake of papers" mentioned in the suit agreement, affidavits, vouchers and general power of attorney "about the delivery of the possession of the suit property to the plaintiff, but the actual possession of entire suit property along with its structures remained vested with the defendants only and the plaintiff was never in the possession of the suit property". It is also pleaded that the plaintiff company had agreed to deposit the amount of sales tax and the Income-tax which was due from some of the vendors and any delay in completion of these formalities could not come in the way of the plaintiff-company to fulfil its part of the contract, that is, payment of remaining amount of Rs. 64,00,000/-to the vendors. The plaintiff has failed to pay the remaining amount of consideration to the vendors and thus they have committed the breach of contract and it cannot be said that they were ready and willing to perform their part of the contract. It is also pleaded by the defendants that S.D.M.. Indore passed a preliminary order under Section 145, Cr.P.C. on 27-4-1993 and also an *ex-parte* order under Section 146. Cr.P.C. attaching the property in dispute. He appointed a Receiver and the property was atteched on 28.4.1993 and it remained in the possession of the Receiver after that date. According to the defendants, the property was attached from their possession and the Receiver had taken possession from them. The plaintiff-Company has not filed any suit for specific performance of

contract and, therefore, the present suit for injunction is not maintainable. As the suit is not maintainable, the application for temporary injunction is also legally untenable.

8. The trial Court held that the suit of the plaintiff-company for protection of possession is legally maintainable under Section 53-A of the Transfer of Property Act even if it has not filed the suit for specific performance of contract. The trial Court has further held that the possession of the disputed property was not given to the plaintiff-company by the defendants and it continued to be in their possession. The trial Court relied upon twenty documents detailed in para 19 of the impugned order to hold that the possession of the disputed property was not given to the plaintiff-company at the time of the execution of the agreement of sale. It has also been held that the possession of the disputed property has been taken over by the Receiver appointed by the S.D.M. in proceedings under Sections 145 and 146, Cr.P.C. and, therefore, now there is no question of protection of the possession of the plaintiff-company. The trial Court was of the view that the recital in the agreement that the possession has been delivered to the plaintiff was untrue and was made with some other purpose. It was further of the view that the presumption arising from the admission in the agreement to sell regarding delivery of possession to the plaintiff company is rebutted by the documents produced by the defendants. As the possession of the disputed property was *prima facie* not found with the plaintiff-company it was held that there was no *prima facie* case and the balance of convenience is not in its favour and it would not suffer any irreparable injury if the application for termporary injuction is rejected.

9. In this appeal it has been argued on behalf of the appellant that so far as the maintainability of the suit and the application for temporary injuction are concerned, the finding of the trial Court is in its favour and, therefore, it cannot be said *prima facie* at this stage that the suit suffers from any legal infirmity. It is further argued that the possession of the property in dispute was delivered by the vendors to the plaintiff-company on the date of the execution of the agreement to sell and it has been unequivocally stated in the agreement that the possession was delivered to the plaintiff and that has been supported by the two affidavits mentioned above. It is submitted that the trial Court has not given proper weight to the admission made by the defendants in the agreement and the affidavits and it has been wrongly held on the basis of the documents produced by the

defendants that the possession was not delivered to the plaintiff-company. It is further submitted that the S.D.M. terminated the proceedings under Sections 145 and 146, Cr.P.C. on 2-3-1995 after the impugned order was passed on the ground that now the civil Court is seized of the matter and has passed an order on the application for temporary injunction. It is pointed out that the S.D.M. has not made any enquiry regarding the possession of the rival claimants and, therefore, the order of the S.D.M. terminating the proceedings in view of the order of the civil Court does not determine the question which party was in possession of the disputed property on the date of the institution of the suit.

10. The argument of the learned counsel for the respondents is that the suit as filed by the plaintiff-company is legally not maintainable as the alleged transferee cannot come to the Court as a plaintiff for protection of its possession, as the equity of part performance incorporated in Section 53-A of the Transfer of Property Act is available to a defendant and not to a plaintiff. It is further argued that the suit for specific performenace of contract not having been filed, the plaintiff cannot claim any title to the property in dispute and therefore, the suit based on possession alone could not be entertained. As the suit is not maintainable. the application for temporary injunction would also not lie. It is submitted that the finding of the trial Court that the possession of the disputed property was not given to the plaintiff is based on proper appreciation of the documentary evidence and affidavits and it cannot be interfered with in appeal as this finding is not perverse or unreasonable. It is also contended that after passing of the impugned order by the Civil Court, possession of the disputed property has been delivered to the defendants after 2-3-1995 by the Receiver on the orders of the S.D.M. and that is the additional ground why the application for temporary injunction is legally not maintainable.

11. The points for determination in this appeal are : (a) whether the suit of the plaintiff for permanent injunction and the application for temporary injunction are *prima facie* maintainable, (b) whether the possession of the property in dispute was delivered to the plaintiff on the date of execution of the agreement of sale and it was in its possession on the date of the institution of the suit, (c) whether the plaintiff was ready and willing to perform its part of the contract, and (d) whether the plaintiff has a strong *prima facie* case and balance of convenience in its favour and it would suffer irreparable injury if the application for termporary injunction is not allowed.

12. Point (a)

Section 53-A of the Transfer of Property Act relevant for the present purpose provides that where any person "contracts to transfer for consideration" any immovable property by writing signed by him and the "transferee" has in part performance of the contract "taken possession" of the porperty and the transferee has "performed or is willing to perform his part of the contract", then, notwithstanding that the contract, though required to be registered, has not been registered, the transferor "shall be debarred from enforcing against the transferee" any right in respect of the property of which the transferee has taken possession other than the right expressly provided by the terms of the contract. A plain reading of the Section shows that a statutory right has been conferred on the "transferee in possession" to protect his possession if he satisfies all the conditions of the Section. It imposes a statutory bar on the transferor, but confers no title on the transferee. The right conferred on the transferee can be used "as a shield and not as sword". it is a "weapon of defence and not of attack". it is a defensive or passive equity and not an active one". To this extent the law is well settled. In *Ranchhoddas* v. *Devaji*[1], it has been observed by the Supreme Court that the doctrine of part performance is a defence. It is a shield and not a sword. It is a right to protect his possession against any challenge to it by the transferor contrary to the terms of the contract. In *State of U.P.* v. *District Judge*[2], it is said that Section 53-A provides for a shield of protection to the proposed transferee to remain in possession against the original owner who has agreed to sell the lands to the transferee if the proposed transferee satisfies other conditions of Section 53-A. That protection is available as a shield only against the transferor, the proposed vendor, and would disentitle him from disturbing the possession of the proposed transferres who are put in possession pursuant to such agreement. Again in *Hamzabi* v. *Syed Karimuddin*[3], it is reiterated that Section 53-A protects the possession of persons who may have acted on a contract of sale but in whose favour no legally valid sale deed may have been executed or registered.

13. The divergence of opinion is on the point whether the transferee is protected when he is in the Court as a defendant or he can also knock at the doors of the Court as a plaintiff and seek the intervention of the Court for protection of his possession. On a dispassionate consideration this Court is of the opinion that he can come to the Court as a plaintiff also for recognition and protection of his right which has been given to him by the statute. The Court cannot tell him if he comes as plaintiff," go back, use your physical strength and

(1) AIR 1977 SC 1517. (2) AIR 1997 SC 53. (3) (2001) 1 SCC 414 =(2000 AIR SCW 4354).

muscle power to resist and repel the attack of the transferor and drive him to come to the Court as a plaintiff and then if you are arrayed as defendant the Court will protect you". This will be against the basic concept of the rule of law. The transferee-in-possesion satisfying all the conditions of the section must be protected by the Court whether he comes as a plaintiff or as a defendant. He cannot be permitted to assert his title but he can legitimately claim through the Court the right which has been given to him by the law. If he has a good case he must get the assistance of the Court. If he has a genuine grievance that must be redressed whether he is in the shoes of the plaintiff or of the defendant.

14. In *Achayya* v. *Venkata Subba Rao*[1], Subba Rao, C.J. (as his Lordship then was) speaking for the Division Bench has stated the law : "Section 53-A does not either expressly or by necessary implication indicate that the rights conferred on the transferee thereunder can only be invoked as a defendant and not as a plaintiff. Under the Section no title passes to a transferee. He cannot file a suit for a declaration of his title to the property or seek to recover possession of the same on the basis of any title conferred to him. But, if the conditions laid down in the Section are complied with, it enables the transferee to defend his possession if the transferor seeks to enforce his rights against the property. This statutory right he can avail himself both as a plaintiff and as defendant provided he is using his right as a shield and not as a sword. Or to put it in other words, he cannot seek to enforce his title but he can resist the attack made by a transferor. The same view has been taken by Allahabad High Court in *Baburam* v. *Vasudeo*[2], following *Pandit Ramchander* v. *Maharaj Kunwar*[3]. It has been held that Section 53-A applies to the transferee even if he is plaintiff. A contrary interpretation would reduce the utility of the Section to a naught, because a powerful transferor would then, defeat the section by forcibly dispossessing the transferee and compelling him to sue as a plaintiff. Such a result would not be conducive to the interest of an orderly secial order.

15. In *S.F. Munuswami* v. *Erusa Gounder*[4], it has been held by a Division Bench that a transferee in possession under Section 53-A of the T.P. Act can ask for injunction protecting his rights. He can claim injunction against the transferor restraining him from interfering with his possession. Similarly in *Maruti* v. *Krishna*[5], it has been held that the plaintiff can take advantage of Section 53-A. In *Dharmaji* v. *Jagannath*[6], it has been observed : "If this right as a shield is available to him as a defendant, there is no justification for a view that it would

(1) AIR 1957 Andh Pra. 854. (2) AIR 1982 All 414. (3) AIR 1939 All 611.
(4) AIR 1975 Madras 25. (5) AIR 1967 Bom 34. (6) AIR 1994 Bom 254.

be denied to him even if by force of circumstances he as a law abiding citizen is compelled to approach the Court as a plaintiff to use that shield. The transferee is entitled to resist any attempt on the part of the transferor to disturb transferee's lawful possession under the contract of sale and his position either as a plaintiff or as a defendant should make no difference. Contrary interpretation viz. the transferee can use the shield only as a defendant and not as a plaintiff, would defeat the very spirit of Section 53-A, for it will be possible for an overpowering trasferor to forcibly disposses the transferee even against the covenants in the contract and compel him to go to the Court as a plaintiff. In *Kantappa* v. *Krishnabai*[1]; a decision of the Division Bench of Karnataka High Court (consisting of M. N. Venkatachaliah and N. R. Kudoor, JJ.), has been cited in which it has been held : "An intending transferee under a contract for sale of immovable property, who it put in possession of the property in part performance of the contract, can as a plaintiff bring an action for the possessory remedy of an injunction in protection of his possession against the transferor". In view of this Division Bench decision the case reported in *U.N. Sharma* v. *Puttegowda*[2], taking a contrary view has been held to be not laying down good law.

16. The source of authority that the right conferred by Section 53-A, T.P. Act is a right available only to the "defendant" to protect his possession is said to be the decision of the Privy Council in *Probodh Kumar* v. *Dantmara Tea Co.*[3], on which reliance has been placed by the learned counsel for the respondents in this appeal. A Division Bench of the Chief Court of Oudh in *Ewaz Ali* v. *Firdous Jehan*[4], Explained the observations of the Privy Council : "We are unable to consider that their Lordships of the Privy Council by the use of the word "defendant" in the above observation intended to mean that the right conferred by S. 53-A was not available to a person in the position of Mst. Firdous Jehan and that the mere position of party in the heading of a suit would determine whether he is or is not entitled to benefits of the section. The subsequent sentence makes this clear. When they use the word 'defendant' they use it to describe the position of a person who pleads Section 53-A and they say his position must be that of a person who invokes it for defending himself against the transferor". It was further observed : "It is clear to our mind that the section cannot be used as a weapon of attack, and that it confers upon the transferee the privilege of invoking the doctrine embodied therein only as a

(1) A.I.R. 1995 Kant 213.
(2) AIR 1986 Kant 99.
(3) AIR 1940 PC 1.
(4) AIR 1944 Oudh 212.

shield against any invasion of his rights by the transferor or persons claiming under him. The words of the section do not warrant a conclusion that a plaintiff as such is necessarily debarred from the benefit of the rule. Where by the nature of the case as disclosed by the pleadings or otherwise it is apparent that the transferee comes to defend his possession against the invasion of it by the transferor, he is entitled to invoke the aid of the equitable doctrin therein embodied."

17. The Division Bench of Andhra Pradesh High Court in *Achayya's case* (supra) agreed with the reasoning given by the Chief Court of Oudh and observed : "We do not think that the Judicial Committee intended to lay down, irrespective of the nature of the relief claimed, that, under no circumstances, can the transferee rely upon the provisions of Section 53-A of the Act as a plaintiff". It was further observed: "In the context, the question whether the rights conferred under Section 53-A, without asserting title to the property were available to the plaintiff did not arise for consideration in that case, and, therefore, the observations relied upon could not be accepted as a considered decision on the question not raised or argued in that case".

18. Thus, the decision of the Privy Council referred to above has been fully explained by the two Division Benches and it has been clarified that even the plaintiff can invoke the aid of defensive equity incorporated in Section 53-A of the Act.

19. In *Kanhaiyalal* v. *Jerome D'Costa*[1], the Full Bench of Nagpur High Court has held that Section 53-A is ordinarily to be used as a defence and not as a weapon of attack. That was not a case in which the plaintiff was seeking protection of his possession. In *Bhulkoo* v. *Hiriyabai*[2], it has been held that Section 53-A creates a defence. But it gives the part performer a right to resist dispossession, and if, in point of fact he is forcibly ejected, he has his remedy. Were it otherwise the shield, would be useless against resolute men who relied on the strong arm, not of the law, but of force. In *Madan Mohan* v. *Gaurishanker*[3], it has been held that the plaintiff in possession under an unregistered sale deed would be entitled to a decree for permanent injunction. Again in *Sitaram* v. *Tularam*[4], the view taken by Nagpur High Court in *Bhulkoo* v. *Hirayabai (supra),* that a part performer is entitled to protect his possession against any resolute man, out to dispossess him "is not only preferable, but is also a binding precedent so far as this Court is concerned". Thus,

(1) AIR 1955 Nag 302.
(2) AIR 1949 Nag 410.
(3) AIR 1988 MP 152.
(4) AIR 1989 MP 128.

there is consistent view of this Court that the benefit of Section 53-A of the T.P. Act can be extended to the plaintiff also to protect his possession if he satisfies all the conditions of the Section.

20. In *Stoneware Pipe* v. *State of Rajasthan*[1], a contrary view has been taken and it has been held that Section 53-A does not give a right of action for a suit, including so-called defensive suit for restoration of possession forcibly taken by the transferor or for injunction. This view is primarily bases on the decision of the Privy Council in the case of *Probodh Kumar* (*surpa*) which has been discussed above. The view taken by Nagpur High Court and affirmed by this Court, as discussed above, must be followed. This question arose before the Supreme Court in *Delhi Motor Company* v. *V.A. Basrurkar*[2], but it was left open.

21. In view of the legal position discussed above the trial Court has rightly held that the present suit is *prima facie* maintainable and the argument of the learned counsel for the respondents that the application for temporary injunction could not be entertained because the suit is not maintainable has to be rejected.

22. It has also been urged that the plaintiff has not filed any suit for specific performance of contract and, therefore, it cannot claim injunction invoking the benefit of Section 53-A. T.P. Act. Recently in *S. S. Suryavanshi* v. *P.B. Suryavanshi*[3], it has been held that the Special Committee's report which is reflected in the aims and objects of amending Act, 1929 shows that one of the purpose of enacting Section 53-A was to provide protection to a transferee who in part performance of the contract had taken possession of the property even if the limitation to bring a suit for sepecific performance has expired. In that view of the matter. Section 53-A is required to be interpreted in the light of the recommendation of Special Committee's report and aims, objects contained in amending Act, 1929 and specially when S. 53-A itself does not put any restriction to plea taken in defence by a transferee to protect his possession under S. 53-A even if the period of limitation to bring a suit for specific performance has expired.

23. In light of the above decision the transferee can protect his possession even if he has not filed the suit for specific performance of contract and thereby disabled himself from acquiring legal title.

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(1) AIR 1972 Raj 83. (2) AIR 1968 SC 794. (3) 2002 AIR SCW 659.

24. Point (b) :

It is not in dispute that the defendants had mentioned in the agreement dated 13-9-1986, affidavits, vouchers and general power of attorney that the possession of the suit property has been delivered to the plaintiff on the date of the execution of the agreement. It is also not in dispute that the amount of Rs. 42,00,000/- was paid to the vendors on that date and an additional amount of Rs. 8,00;000/- was paid to the defendants for "immediately vacating the property". The question is what is the effect of these admissions ? It is not the case of the defendants that there was any coercion or duress or there was any fraud or misrepresentation. They were not under any constraint. There was no inequality of bargaining power. The terms of the agreement clearly show that the parties knew the import of what they were signing. The agreement has been drafted by a person having full legal acumen. It is not a case of a rustic villager. The defendant Nos. 1 and 3 are well educated and men of business. The defendants are not the persons who could sign on dotted lines and that is not the pleading also. It is well settled that a party's admission as defined in Sections 17 to 20 fulfilling the requirements of Section 21. Evidence Act is substantive evidence proprio vigore. An admission if clearly and unequivocally made is the best evidence against the party making it and though not conclusive, shifts the onus on to the maker on the principle that "what a party himself admits to be true may reasonably be presumed to be so and until the presumption is rebutted the fact admitted must be taken to be established. (*Thiru John* v. *Returning Officer*[1]. A person is bound by admissions in the document executed by him. The presumption is that the recitals in the document are true and if he seeks to displace it, the onus is heavy on him. Section 31 of the Evidence Act provides that admissions are not conclusive proof of the matters admitted, but they may operate as estoppels. In *Narayan* v. *Gopal*[2], theSupreme Court has held that an admission is the best evidence that an opponent can rely upon, and though not conclusive is decisive of the matter unless successfully withdrawn or proved erroneous. In *Avadh Kishore* v. *Ram Gopal*[3], the Supreme Court has held that : "It is true that evidentiary admissions are not conclusive proof of the facts admitted and may be explained or shown to be wrong; but they do raise an estoppel and shift the burden of proof on the person making them. Unless shown or explained to be wrong they are an efficacious proof of the facts admitted".

25. In view of the above legal position, heavy burden lies on the defendants

(1) AIR 1977 SC 1724. (2) AIR 1960 SC 100. (3) AIR 1979 SC 861.

to show that the admission made in the agreement, affidavits and other papers regarding the delivery of possession of the property in dispute to the plaintiff on the date of execution of the agreement is not correct. In this context it must be seen that there is not only admission about the delivery of possession but it is coupled with the fact that an amount as big as Rs. 42,00,000/-was paid to the vendors on the date of the agreement. Further an amount of Rs. 8,00,000/- was admittedly paid to the defendants for "immediately vacating the property". This is a very strong circumstance to indicate that the possession of the property was delivered to the plaintiff on the date of the execution of the agreement. The defendants and the other vendors who have pocketed an amount of Rs. 50,00,000/- cannot turn around and say that the recital regarding delivery of the posession in the agreement was made "for the sake of papers" only. The trial Court has not dealt with this vital aspect in the impugned order. It has not attached proper weight to the fact that the amount of Rs. 42,00,000/-was paid to the vendors on the date of the execution of the agreement and an additional amount of Rs. 8,00,000/- was paid to the defedants for vacating the property immediately.

26. The only plea of the defendants is that recital regarding the delivery of the possession in the agreement was made as the plaintiff was required to take necessary action concerning the maps of the suit property in different offices and Corporations. The defendants and other vendors had executed the power of attorney in favour of the plaintiff and on that basis the necessary action concerning the map could be taken. The property was still in the names of the vendors and, therefore, the maps could be sanctioned by the authorities in the names of the vendors only. It is difficult to comprehend that the recital regarding delivery of possession was made "for the sake of papers" only. That is only a device to get rid of the admission which is of decisive character. Probative value of the admission made in the agreement and the affidavits cannot be overlooked. The Court cannot shut its eyes to the glaring facts.

27. There are twenty documents detailed in para 19 of the impugned order which have been relied upon by the trial Court for upholding the possession of the defendants on the property in dispute. The map annexed to the agreement shows the shares of each of the vendors. The area shown in the share of the defendants (parties Nos. 2-20 to 26) is 12000 sq. ft. out of the total area of one lac square feet which was agreed to be sold to the plaintiff. Out of this area of 12000 sq. ft. 6000 sq. ft. is of defendant

No. 1 Om Prakash and his branch and 6000 sq. ft. is of defendant No. 3 Vijay Kumar and his branch. There was a structure described as "Apni Dunia Press" in a corner. Out of the twenty documents the first three are FIRs dated 3-1-1987, 2-4-1987 and 20-9-1987 regarding theft of some moveable property from this press, the fourth is the Receipt dated 23-1-1989 of the New India Assurance Company, the fifth is Meter Reading card of the MPEB dated 16-8-1989 of the Apni Duniya, and the seventh is a Receipt in the name of this Press. The other documents relate to cancellation of the power of attorney in favour of the plaintiff, notices, telephone bills, publications in the newspaper, the affidavits, photographs and the FIR dated 22-4-1993. The plaintiff or its Directors have nothing to do with these documents. In the FIR which is document No. 1 the building of the Apni Duniya Press has been described as "former Press" and present "Press Godown" of which the lock has been broken. The notices relate to the period after the disputes arose between the parties. The electricity and telephone bills were coming because the electric meter and telephone were there before the date of agreement. A close scrutiny of all the 20 documents goes to show that they are not of such nature which may take away the unequivocal admision made in the agreement, affidavit and the vouchers that the possession of the property in dispute was delivered to the plaintiff on the date of the execution of the agreement.

28. The possession of immovable property is delivered by one man to the other by making a clear declaration that he has done so and that declaration is generally evidenced by some document. This was done by the agreement, affidavits and the vouchers. The recital in these documents about the delivery of possession by the vendors including the defendants is admitted. That was sufficient to pass possession from one party to the other. The immovable property by its very nature is incapable of movement. It cannot be put by one party into the hands or pocket of another. The clear, unambigous and unequivocal admission in the agreement, affidavits and vouchers about the delivery of possession by the defendants to the plaintiff must prevail over the documents on which reliance has been placed by the trial Court. The defendants have, as already discussed, taken an additional amount of Rs. 8,00,000/- for "immediately vacating the property" agreed to be sold and this stark reality cannot be overshadowed or obliterated by the documents produced by the defendants. The recital in clause 19 of the agreement that "the first party has

put the second party in actual, physical and vacant possession" is *prima facie* not proved to be untrue and it must prevail in preference to the said 20 documents. The weight of the said recital is not denuded by these self-serving documents.

29. The defendants had 12000 sq. ft. share in the total land which was agreed to be sold. The other vendors have not disputed delivery of possession of the land of their share to the plaintiff on the date of agreement. The land of the share of the other vendors is about 88000 sq. ft. Some of them have executed sale deeds in favour of the plaintiff. When the other vendors who held the major share in the land covered by the agreement are not disputing the fact of delivery of possession of their share to the plaintiff as per recitals in the agreement, that is also a pointer in the direction that the defendants had also delivered possession of their share to the plaintiff on the date of agreement especially when the defendants were paid extra amount of Rs. 8,00,000/- for that purpose.

30. The suit out of which this appeal has arisen was filed on 19-4-1993 and the S.D.M. issued the orders under Sections 145 and 146, Cr. P.C. on 27-4-1993 and appointed a Receiver who took possession of the land in dispute. The S.D.M. did not make any inquiry as per Section 145, Cr.P.C. to ascertain which party was in possession on the date of the preliminary order and terminated the proceedings in view of the impugned order of the Civil Court. The proceedings under Sections 145 and 146. Cr.P.C. could not continue because of the impugned order and the order of the S.D.M. has been upheld by the two superior Courts in view of the decision of the Supreme Court in *Amresh Tiwari* v. *Lalta Prasad Dubey*[1]. Therefore the order by which the proceedings under Sections 145 and 146, Cr.P.C. came to an end is not germane for determining the question which party was in possession of the land in dispute on the date of the institution of the suit.

31. On consideration of the entire material on record this Court is of the opinion that *prima facie* the plaintiff was given possession of the property in dispute on 13-9-1986 by the vendors including the defendants and this property was in possession of the plaintiff on the date of the institution of the suit. The view taken by the trial Court on this point is not correct.

32. Point (c) :–

It is admitted that the plaintiff paid Rs. 42,00,000/-on the date of the

(1) AIR 2000 SC 1504.

agreement as part of the consideration of Rs. 1,06,00,000/- to the vendors. The plaintiff sent the letter dated 17-2-1988 showing its readiness and willingness to perform the contract. The defendants were called upon to obtain clearances from the Income-tax Department and the Competent Authority under the Ceiling Act. The defendants in their reply dated 11-8-1988 extended the period for performance of the contract and they promised to obtain NOC from the Income-tax Department. It is further admited that the Income-tax Clearance Certificate was not obtained by the defendants. Section 230-A of the Income-tax Act, 1961 provides restriction on registration of transfer of immovable property. The statutory provision required the defendants to obtain such certificate as the value of the property to be sold was more than Rs. 2,00,000/-. The plaintiff could not obtain such certificate. Without such certificate the sale deed could not be registered. It is settled law that in judging willingness to perform the Court must consider the obligations of the parties and the sequence in which they were to be performed. (*Nathulal* v. *Phoolchand*[1]). In the present case the defendants did not come forward showing their ability to execute the sale deed by obtaining the Income-tax Clearance Certificate as per Section 230-A of the Income-tax Act, 1961. When one party moves one or two steps ahead towards the performance of the Contract the other side should also take one step forward so as to assure the other party that he is prepared and willing to perform his part of the Contract. As the defendants did not do so naturally the plaintiff could not pay the balance amount as per Annexure 'C' to the agreement. They had already paid a total amount of Rs. 50,00,000/- and the performance of the contract by the other side was not in sight. Therefore, the plaintiff cannot be blamed for not paying the remaining amount. It has been expressed by the plaintiff-company that it is still ready and willing to perform its part of the contract. Therefore, it must be held *prima facie* that the plaintiff was and is ready and willing to per form its part of the contract.

33. Point (d) :–

It has been found that the defendants had delivered possession of the property in dispute to the plaintiff on 13-9-1986, the date on which the agreement of sale was executed. The plaintiff was in its possession on the date of the institution of the suit on 19-4-1993. The position obtaining on the date of the suit is material for deciding the question of temporary injunction. In *P. Venkateswarlu* v. *Motor and General Traders*[2], the Supreme Court observed : "It

(1) (AIR 1970 564.)

(2) AIR 1975 SC 1409.

is basic to our processual jurisprudence that the right to relief must be judged to exist as on the date a suitor institutes the legal proceedings". Order 39, Rule 1 (c), CPC as amended in 1976 clearly provides that if the defendant threatens to dispossess the plaintiff from the property in dispute the Court may by order grant a temporary injunction to restrain dispossession of the plaintiff. It is argued on behalf of the respondents that the Receiver appointed by the S.D.M. has delivered possession of the property in dispute to the defendants as per order dated 2-3-1995 of the S.D.M. and, therefore, now an order of temporary injunction cannot be issued against them. This argument is not acceptable as the factual position on the date of the suit is to be considered. The S.D.M. relying upon the impugned order terminated the proceedings under Sections 145 and 146. Cr.P.C. and as it has been found by this Court (disagreeing with the finding of the trial Court) that the property in dispute on the date of the suit was in possession of the plaintiff, the order of temporary injunction as per Order 39, Rule 1(c), CPC can be issued against the defendants. The impugned order must be set aside. If the S.D.M. on an independent inquiry had upheld the possession of the defendants dehors the impugned order the question of restoring *status quo* existing on the date of the suit by "interim mandatory injunction" could be considered but the order of the S.D.M. is based on the impugned order only which is being set aside. The is no need of issuing interim mandatory injunction. The plaintiff being in possession the balance of convenience is in its favour and it would suffer substantial and irreparable injury if the order of temporary injunctions is not issued. However, to safeguard the interest of the defendants it is necessary to direct the plaintiff to deposit the amount in the trial Court which is payable to the defendants as per Annuxure 'C' to the agreement which comes to approximately Rs. 7,50,000/-.

34. In the result the appeal is allowed. The impugned order is set aside. The application of the plaintiff under Order 39, Rules 1 and 2, CPC for temporary injunction is allowed and the defendants are hereby restrained from interfering with the possession of the plaintiff on the property in dispute house Nos. 8/1 and 8/2 (old Nos. 8 and 8-A). M.G. Road. Indore and the land as shown in the map annexed to the agreement dated 13-9-1986 or in any part thereof until the decision of the civil suit. The plaintiff will deposit an amount of Rs. 7,50,000/- in the trial Court which is approximately the balance of consideration payable to the defendants by the plaintiff as per Annexure 'C' to the agreement dated 13-9-1986 within two months of the date of this order. The trial Court will pass appropriate order about this amount at the time of final decision in the suit. Costs to abide by the final result.

It is made clear that the views expressed by this Court on the points referred to above are only for the purpose of deciding the application for temporary injunction and the trial Court will decide the issues arising in the suit uninfluenced by any observation made in this order. The points have been decided as these were raised and argued at length.

Appeal allowed.

APPELLATE CIVIL

Before Mr. Justice Subhash Samvatsar.
20 August, 2002.

SMT. MADHULIKA VERMA and another ...Appellants*

v.

SMT. PRABHAWATI VERMA ...Respondent.

*Succession Act, Indian (XXXIX of 1925)–Sections 373, 384–Application for succession–Rejection–Appeal–Paternity in dispute–Presumption of legitimity not applicable–Burden of proof–Appellant/daughter-in-law filed copies of public documents showing her husband to be son of deceased–*Prima facie *burden discharged–Burden shift–Defendant to failed to discharge burden placed on her–Inference can be drawn that husband of plaintiff was son of deceased.*

In the present case, the maternity as well as paternity of the child both are in dispute and, therefore, presumption under Section 112 of the Evidence Act will not be applicable in its strict sense. The said section in fact does not apply to the facts and circumstances of the present case.

The trial Court has drawn inference against the present appellant from the fact that Madhulika has not produced any birth register from the hospital or examined any doctor. As already stated, Madhulika is not expected to have knowledge of this fact and, therefore, the Court erred in placing the burden of proof on her. On the other hand, Prabhawati could have brought positive evidence by examining the neighbourers of her father and by summoning the service record of her mother. However, she has failed to produce this evidence and, therefore, inference has to be drawn particularly from the following circumstances, namely, the name of Sanjay

*M.A. No.62 of 1996.

appears in the nomination form (Ex.P/2) and the fact that Sanjay is joined as respondent in the case and the case is decided without issuing notice to him. Moreover, he was always treated as a son by Harikishore and Gayitri Devi. The defendant has failed to discharged the burden placed on her. From these facts inference can be drawn that Sanjay was the son of Harikishore and Gayatri Devi.

In such circumstances, the impugned order cannot be sustained in law and deserves to be set aside. The application for revocation deserves to be allowed.

[Paras 7, 18 and 19]

N.K. Mody, for the appellants.

A.M. Naik, for the respondent.

ORDER

S.SAMVATSAR, J:–This appeal is filed under Section 384 of the Indian Succession Act, against the order dated 22.1.1996, passed by Fifth Additional District Judge, Gwalior in Case No.44/87 Succession, whereby the Court below has rejected the application filed by the present appellants for revocation of succession certificate issued in favour of respondent in Case No. 246/85 Succession, which was amended by order passed in Case No. 13/87.

2. The present appellants are heirs of one Sanjay Verma. Sanjay Verma is alleged to be son of Harikishore Verma and Gayitri Devi Verma. Harikishore was in employment of State Bank of India, who retired from the Bank on 30.9.1981 and died on 17.3.1989. Gayatri Devi Verma was an employee of Education Department, who died on 30.7.1984. Respondent Prabhawati is the daughter of Harikishore and Gayitri Devi. After death of Gayitri Devi Verma, Harikishore and respondent Prabhawati moved an application for issuance of Succession Certificate in respect of the property of Smt. Gayatri Devi Verma on 12.2.1985. The name of Sanjay Verma was mentioned in the cause-title of the said application as respondent. In the said proceedings on 3.3.1986 Prabhawati moved an application that she has no objection if the succession certificate is issued in favour of her father, i.e., Harikishore. On 9.3.1986 the Court issued Succession Certificate in favour of Harikishore. After issuance of Succession Certificate, Prabhawati moved an amendment application praying for amending the said cetificate by adding her name as successor. This application was registered as MJC 13/87. Notices of this application were published in the newspaper and on getting knowledge of the said application the present appellant no.1 filed an objection to the effect that her husband Sanjay

Verma, who had committed suicide by that time, was also son of Gayitri Devi Verma and, therefore, she is also entitled to succeed the estate of Gayitri Devi Verma. The objecton filed by appellant, Mdhulika Verma was not considered by the Court below and Succession Certificate was amended by adding the name of Prabhawati on 9.10.1987. Thereafter, Madhulika Verma filed the present application for cancellation of the Succesion Certificate. This application was registered as MJC 44/87. This application is rejected by the impugned order. Hence, this appeal.

3. Some more relevant facts of the case are that the appellant no.2 had filed a suit against Harikishore Verma, which was registered as Civil Suit No. 183A/86 in the Court of Third Civil Judge Class-2, Gwalior. In that suit the appellant no.2 had alleged that Harikishore Verma is trying to alienate the ancestral property situated in Dana Oli, Lashkar-Gwalior. This suit was compromised on 11.3.1987. A copy of the order is on record as Ex.P/1. As per the said decree, Harikishore Verma agreed to given the amount of family Benefit Fund and General Provident Fund of Gayitri Devi Verma to the appellant no.2. Harikishore Verma further agreed to give also sale proceedings of the house situated at Dana Oil, Lashkar-Gwalior to Akash Verma and also agreed to transfer plot no.19 situated at Johari Colony, Gwalior, owned by Gayitri Devi Verma in the name of appellant no.2-Akash Verma. As per the said compromise, it was agreed that Akash Verma will get the ornaments laying in Locker No.997 in State Bank of India except a golden neckless which will be kept by Harikishore Verma. Respondent Prabhawati Devi opposed his compromise application but her application was rejected. On 12.10.1987 the present appellant came to know about the Succession Certificate and, therefore, moved an application under Section 383 of the Indian Succession Act for revocation of the same.

4. The respondent resisted the application alleging that Sanjay Verma was not the son of Harikishore and Gayitri Devi Verma. According to her, Harikishore found Sanjay Verma laying in a temple when he was newly born baby (20-25 days old). According to her, at that time the respondent had already married and was living with her husband. She has further alleged that after giving birth to her, Gayitri Devi Verma was declared incompetent for giving birth to any other child by the doctor. When Harikishore and Gayitri Devi Verma found Sanjay in the temple. Prabhawati was 22 years of age.

5. The trial Court after recording the evidence believed in the story

putforth by respondent. As already stated, Harikishore died in the year 1989, i.e., during pendency of the litigation but before the evidence was recorded and, therefore, his evidence is not on record. The trial Court in para 16 of its judgment has placed the burden on the appellant to prove the fact that Sanjay Verma was son of Gayitri Devi and Harikishore.

6. Learned counsel for the appellants urged before me that the trial Court has erred in placing the burden of proof on appellant Madhulika Verma. According to para 16 of the judgment, as Madhulika has filed the application for revocation, the burden of proving the fact alleged in the application, lies on her and it was for her to prove that Sanjay Verma was the son of Harikishore and Gayitri Devi Verma. Learned counsel for the appellants submitted that this approach of the lower Court was erroneous and contrary to law. According to him, the burden lay on the defendant. For this purpose he relied on the presumption laid down by Section 112 of the Evidence Act. Learned counsel for the appellant cited large number of authorities to show that there is always a presumption in favour of legitimacy of a child. All these judgments cited by the learned counsel are based on Section 112 of the Evidence Act. The said section reads as under:-

> "S.112 Birth during marriage conclusive proof of legitimacy,– The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that (he) is the legitimate of that man, unless it can be shown that (the parties to the marriage) had no access to (each other) at any time when (he) could have been begotten."

7. After perusing the said section and the judgments cited by the learned counsel, I am of the view that when a question about the legitimacy of a child arises then under Section 112 of the Evidence Act presumption arises in favour of the child that he is born out the wedlock but the said presumption applies only when the maternity of the child is not disputed. In all the cases cited by Shri N.K. Mody, learned counsel for the appellants, the maternity of the child is not in dispute and, therefore, the cases are not applicable in the present case. In the present case, the maternity as well as paternity of the child both are in dispute and, therefore, presumption under Section 112 of the Evidence Act will

not be applicable in its strict sense. The said section in fact does not apply to the facts and circumstances of the present case.

8. The provisions about the burden of proof are Sections 101 to 104 of the Evidence Act which are as under :–

> " 101. Burden of proof.–Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exists.
>
> When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.
>
> 102. On whom burden of proof lies.–The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
>
> 103. Burden of proof as to particular fact.–The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
>
> 104. Burden of proving fact to be proved to make evidence admissible.–The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence."

Section 101 of the Evidence Act lays down that the burden of proof lies on a person, who desires any Court to give a judgment as to any legal right or liability in his favour. Section 102 of the Act lays down that the burden of proof lies on the person who would fail if no evidence is led by any of the parties. Section 103 provides that the burden of proof as to any particular fact lies on a person, who wishes the Court to believe in its existance, unless it is provided by any law that the proof of that fact shall lie on any particular person.

9. Learned counsel for the respondent, therefore, urged that in present case if no evidence was led by any of the parties then the present appellants were bound to fail and, therefore, the burden of proof was on the appellants. He, further asserted that when appellant Madhulika had asserted the fact that her husband Sanjay Verma was the son of Harikishore and Gayitri Devi Verma, then the burden certainly lay on her to prove the fact.

10. It is no doubt true that primarily burden of proving the fact that Sanjay was the son of Harikishore and Gayitri Devi Verma certainly is on Madhulika, i.e., the present appellant.

11. Now the important question is whether Madhulika has discharged the said burden. For this purpose appreciation of the evidence is necessary.

12. Appellant Madhulika has filed copy of the order passed in Civil Suit, dated 11.3.87, as Ex. P/1. The said application is accompanied with is not exhibited. Ex.P/2 is a nomination form filled up by Gayitri Devi Verma, which is in favour of Harikishore. The said nomination form further mentiones that in case Harikishore dies then the second nominee will be Sanjay. Ex.D/1 is the order dated 23.3.87 in Case No 33A/85 filed by Madhulika against State Bank of India. Ex.D/2 is an order in Civil Suit No.18A/84 filed by Sanjay against Prabhawati. Ex.NA.3 is the reply filed by Harikishore to the application under Order XXXIX R 1 and 2, C.P.C., filed in a case by appellant no.2 Akash Verma, i.e., in C.O.S.No. 183A/86. Ex.N.A.4 is an affidavit in support of the said reply. The other documents in the case are the school certificates of Sanjay Verma. These certificates are filed in the present appeal. In the said certificates, the date of birth of Sanjay Verma is shown to be 2.10.1961. Ex.P/1 is the Higher Secondary Certificate. Ex.P/2 is the marksheet of Sanjay Verma in which the name of Harikishore is mentioned as father. Ex.P/3 is the certificate from Sefia College. Bhopal. This certificate also shows the name of Harikishore as the father of Sanjay Verma. Ex.P/4 is marksheet of Sanjay Verma issued by Bhopal University-Similarly, Ex.P/5, is a marksheet of Jiwaji University issued in the name of Sanjay Verma. The name of Harikishore Verma is mentioned as father of Sanjay Verma. All these documents are not filed along with any application and were simply filed with the appeal memo.

13. Learned counsel for the respondent submitted that these documents cannot be read in evidence as they were not filed before the trial Court.

14. In reply to this argument, learned counsel for the appellants submitted that these are the public documents and, therefore, can be relied on for the proof of the fact that Harikishore was the father of Sanjay Verma. Moreover, the respondent in para 10 of her cross-examination has admitted the fact that Sanjay was always treated by Harikishore and Gayitri Devi as their son. In the school record the name of Harikishore is entered as father of Sanjay.

15. In my opinion, the most important fact in the matter is that the respondent and Harikishore, who have filed an application for succession certificate, themselves have joined Sanjay Verma as the respondent. This shows that they

were aware of the fact that Sanjay Verma is one of the claimants of the property left behind by Gayitri Devi Verma. After perusing the proceedings of the said application, I find that no notices were ever issued to Sanjay Verma though there is an order from the Court on 19.2.1985 to that effect. Respondent and Harikishore have paid process fees for service of notice on Sanjay Verma but the address on the said process form is not complete, even the surname of Sanjay is not mentioned in the process-form. From perusal of the file, it is clear that original process-form does not show that notices were even issued by the Court. There is no document on record to show that the notices have returned either served or unserved. When Harikishore and Prabhawati had filed the application joining Sanjay Verma as respondent then it was necessary for them to see that his notices are properly served before proceeding in the case.

16. The second important fact is the nomination paper of Gayitri Devi, which shows the name of Sanjay Verma as second nominee. So, even if I ignore the Higher Secondary certificate and other documents filed in the appeal, even then also it appears from the record that Sanjay Verma was claiming some rights, title and interest in the property of the deceased. The fact that Harikishore Verma has entered into compromise with Akash Verma and agreed to part some of the property in his favour also shows that Harikishore was admitting the claim of Sanjay Verma to some extent. It is true that in the compromise application Harikishore has not admitted or denied any relationship with Sanjay Verma or Akash Verma. The copy of the statement of Harikishore attached with the compromise application cannot be looked into, as the same is not exhibited and not tendered in evidence.

17. Appellant Madhulika in her statement has stated that she married to Sanjay Verma, as he was son of Harikishore and Gayitri Devi Verma. It is true that she had no personal knowledge about the birth of Sanjay Verma. According to her, he was always treated as son by Harikishore and Gayitri Devi. DW.1/respondent in her statement has admitted that Sanjay was brought up by her parents as a son. In para 10 of her statement, she has admitted the fact that Sanjay was living with her father till the death of his father. She also admits that in school record father's name of Sanjay is written as Harikishore Verma. The invitation card issued at the time of marriage of Sanjay also mentions the name of Harikishore as father of Sanjay. Thus, it is an admitted position that Sanjay was always treated as a son of Harikishore. This evidence has primarily discharged

the burden of proving the initial facts and thereafter the onus shifted on the respondent to prove the fact that Sanjay Verma was found laying in the temple and Harikishore brought him to the house and treated him as his son. For proving this fact, respondent Prabhawati could have examined any of the neighbourers in whose presence the child was brought to the house. The neighburers could have deposed that Gayitri Devi was not pregnant during the period in which Sanjay was brought by Harikishore to his house. Morever, Gayitri Devi was in service during that period and there was no difficulty in procuring her service record to show that Gayitri Devi never obtained any maternity leave during the relevant time. This evidence could have definitely proved the fact that Gayitri Devi was not pregnant after giving birth to Prabhawati and never obtained any maternity leave for the pregnancy but this evidence is not at all produced by the respondent.

18. It is very unnatural to expect Madhulika to examine the doctor, who was present at the time of birth of her husband, as she is not expected to be aware of the name of the doctor or the hospital in which birth took place. The trial Court has drawn inference against the present appellant from the fact that Madhulika has not produced any birth register from the hospital or examined any doctor. As already stated, Madhulika is not expected to have knowledge of this fact and, therefore, the Court erred in placing the burden of proof on her. On the other hand, Prabhawati could have brought positive evidence by examining the neighbourers of her father and by summoning the service record of her mother. However, she has failed to produce this evidence and, therefore, inference has to be drawn particularly from the following circumstances, namely, the name of Sanjay appears in the nomination form (Ex.P/2) and the fact that Sanjay is joined as respondent in the case and the case is decided without issuing notice to him. Moreover, he was always treated as a son by Harikishore and Gayitri Devi. The defendant has failed to discharge the burden placed on her. From these facts inference can be drawn that Sanjay was the son of Harikishore and Gayatri Devi.

19. In such circumstances, the impugned order cannot be sustained in law and deserves to be set aside. The application for revocation deserves to be allowed.

20. In the result, this appeal is allowed. The impugned order in set aside and the application for revocation of succession certificate is allowed. The succession

certificate is modified and the trial Court is directed to issue a fresh certificate showing that the appellants and respondents are entitled to half share in the property.

22. The appeal is thus allowed with on order as to costs.

Appeal is allowed.

APPELLATE CIVIL

Before Mr. Justice V. K. Agrawal.
20 August,, 2001.

MUSHAMMA SAROD PATNAHA and others ...Appellants*
v.
HARISHANKAR and others ...Respondents

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.

It is also clear that even if the appellants' submission that the property is a joint family property and they are members of the said family is accepted for the sake of argument, yet the proper remedy for the appellants was to bring a suit for partition and possession, rather than only praying for declaration and injunction, as they have done. It is also clear that even if the property is joint, the respondents have right, title and interest thereon and, therefore, should be permitted to deal with it in the manner they feel proper, subject to such rights as the appellants may ultimately establish in the suit.

As noted earlier, in the instant case, the appellants have already filed a suit, but have chosen not to seek relief of partition and possession by metes and bounds and yet they have sought an injunction against the respondents, who are admittedly the co-owners of the joint family property, restraining them from alienating it. Such an injunction, in the circumstances of the case when there was material to believe that *prima facie* the predecessor of the appellants had separated from the rest of the family way back in 1968, could not have been granted. Therefore, the contention of the learned counsel for the appellants cannot be accepted. [Paras 7 and 8]

* M.A.No. 2139 of 2000.

Mushamma Sarod Patnaha v. *Harishankar, 2001.*

Dorab Cawasji Warden v. *Coomi Sorab Warden*[1], *Sunil Kumar and another Ram Parkash and others*[2], *Tillomal Thadani* v. *Smt. Bachhi Bai*[3];referred to.

U. Rusia, for the appellant.

R.P. Jain, for the respondents.

Cur. adv. vult.

ORDER

V.K. AGARWAL, J:–This appeal is directed against the order dated 19-9-2000 in Civil Suit No. 46-A/2000 of II Additional District Judge, Satna whereby ɔlication of the plaintiffs/appellants marked as I.A. No.3 under Order 39, Rules . and 2, Civil Procedure Code for temporary injunction was rejected.

Undisputably, Ayodhya Prasad was the original holder of the suit-property ɔearing House No. 12-Kha, Ward No. 40, Chawk Bazar, Satna and House ɔ. 108, Subhash Park, Satna. The plaintiffs filed a suit for declartion that they are also co-sharers and have 1/4th share in the suit-property and also for ɔermanent injunction restraining the respondents from alienating the same. The ʂpondent No.1 is the son of Ayodhya Prasad, while the other respondents os. 2 to 6 are the LRs. of the remaining sons of Ayodhya Prasad.

An application for temporary injunction restraning the respondents from ıenating the suit-property was also filed by the plaintiffs appellants. The said ıpplication has been dismissed by the impugned-order. The learned trial Court ıas observed therein that the material placed on record indicates that Ramesh rasad, the husband of appellant No.1 and father of remaining appellants had ken his share in partition on 22-5-1968 and separate from the joint family. ıccordingly, *prima facie*, it appears that the appellants had no right, title or ınterest in the joint family property belonging to the respondents. It was also ıeld that it has not been shown that the appellants are in exclusive possession of ıny part of the disputed property. Accordingly, it was held that the appellants' application under Order 39, Rule 1 and 2, Civil Procedure Code for temporary ınjunction cannot succeed.

The learned counsel for the appellants submits that the learned lower Court erred in recording a finding that Ramesh Prasad has separated after taking his ıare. It has been submitted that the appellants, who are the widow and children ? deceased Ramesh Prasad would suffer irreparably, in case the joint Hindu

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(1) A.I.R. 1990 S.C. 867. (2) A.I.R. 1988 S.C. 576. (3) 2001 (1) M.P.H.T. 31.

family property is alienated before the suit is decided. It was, therefore, submitted that a temporary injuction ought to be granted in favour of the appellants.

5. As against the above, the learned counsel for the respondents submits that the respondent No. 1 is the only surviving son of original holder Ayodhya Prasad. It has also been submitted that Ramesh Prasad himself had admitted in a sale-deed executed by him on 15-5-1970 that he had separated from the remaining members of the family on 22-5-1968. It was also urged that the respondent No. 1 being the Karta of the family had the right to alienate the property, in accordance with law. It was further submitted that in case the temporary injunction is granted in favour of the appellants, interest of the respondents is likely to suffer irreparably, inasmuch as, the respondent No. 1 or the other respondents would not be able to deal with the property for an indefinite period. It was also urged that the remedy for the appellant was to bring a suit for partition, which they have not done.

6. After considering the submissions as above and perusal of the impugned order, it appears that by sale-deed dated 15-5-1970, Ramesh Prasad the predecessor of the appellants had alienated the property with the recital that he had separated from his father and brothers on 22-5-1968. The trial Court in paras 10 and 11 of the impugned order referred to the aforesaid aspect of the matter to record a finding that *prima facie* it appears that there was separation of Ramesh Prasad from the rest of the family as back as on 22-5-1968. He had alienated the property, which was received by him in his share.

7. It is also clear that even if the appellants' submission that the property is a joint family property and they are members of the said family is accepted for the sake of argument, yet the proper remedy for the appellants was to bring a suit for partition and possession, rather than only praying for declaration and injunction, as they have done. It is also clear that even if the property is joint, the respondents have right, title and interest thereon and, therefore, should be permitted to deal with it in the manner they feel proper, subject to such rights as the appellants may ultimately establish in the suit.

8. Learned counsel for the appellants relied upon *Dorab Cawasji Warden* v. *Coommi Sorab Warden and others*[1], to support his submission that irreparable injury is likely to be caused to the plaintiffs in case temporary injunction is not granted to them. However, the facts of that case are entirely different and do not help the appellants' case. It appears that in the said case, a transaction was entered in a hush-

(1) AIR 1990 S.C. 867.

hush manner and the purchasers of the joint family property were inducted in the joint family house suggesting that the vendors were attempting to forestall the situation and to gain an undue advantage in a hurried and clandestine manner defeating the appellants' attempt to go to Court or appropriate relief. It was observed in that case that in the above circumstances, vendors could not be permitted to take advantage of their own act and defeat the claim of the appellants in the suit by saying that cause of action under section 44 of the Transfer of Property Act no longer survives in view of their taking possession. As noted earlier, in the instant case, the appellants have already filed a suit, but have chosen not to seek relief of partition and possession by metes and bounds and yet they have sought an injunction against the respondents, who are admittedly the co-owners of the joint family property, restraining them from alienating it. Such an injunction, in the circumstances of the case when there was material to believe that *prima facie* the predecessor of the appellants had separated from the rest of the family way back in 1968, could not have been granted. Therefore, the contention of the learned counsel for the appellants cannot be accepted.

9. Learned counsel for the respondents referred to the judgment of the Apex Court in *Sunil Kumar and another* v. *Ram Parkash and others*[1], to canvass his contention that an injuction against the proposed alienation against the Karta of the joint Hindu family property cannot be issued. It was laid down in the case that a suit for permanent injuction by a coparcener against the Karta for restraining him from alienating the house property belonging to the joint Hindu family for legal necessity would not be maintainable because the coparcener had got the remedy of challenging the same and getting it set aside in a suit subsequent to the completion of the sale. This Court in *Tillomal Thadani* v. *Smt. Bachhi Bai*[2], referred to the above decision of the Apex Court and refused to grant injunction against the coparcener.

10. In the circumstances, the impugned-order rejecting the appellants' prayer or temporary injunction appears to be justified and calls for no interference.

11. This appeal has no merit and this is accordingly dismissed. However, it is clarified that the observations made in this order or the impugned-order shall be confined to the disposal of the application for temporary injunction only and shall have no reflection on the merits of the suit.

Appeal dismissed.

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(1) AIR 1988 SC 576. (2) 2001 (1) M.P.H.T. 31.

APPELLATE CIVIL

Before Mr. Justice K. K. Lahoti.
23 August, 2002.

M/s HARISH MINERALS SUPPLY CO. ...Appellant *

v.

M.P. ELECTRICITY BOARD, RAMPUR, JABALPUR ...Respondent

Government Electrical Undertakings (Dues Recovery) Act, M.P., (XXXVI of 1961)–Section 5–Suit challenging validity of bill raised–Dispute as to amount of Bill not decided by Electrical Inspector–Suit maintainable.

The dispute was whether the meter was running slow or not, or because of the dust, it was running slow, to be decided and was within the jurisdiction of the Electrical Inspector and without any decision of the Electrical Inspector, respondent was not competent to raise the bill.

The appellant who has challenged the validity of the bill issued by the respondent, in the suit, which was maintainable in view of Section 5(2) of the Recovery Act. The lower appellate Court erred in holding that the civil suit is not maintainable. In view of this, this appeal is allowed. Matter is remitted back to the lower appellate Court to decide the matter afresh after considering the contentions of the parties on merits.

[Para 7 and 8]

Punjab State Electricity Board v. *Ashwani Kumar*[1], *M.P.E.B.* v. *Basantibai*[2], referred to.

P. Verma, for the appellant.

P.K. Jaiswal, for the respondent.

Cur. adv. vult.

JUDGMENT

K.K. LAHOTI, J:–This appeal is directed against the judgment and decree passed by Third Additional Judge to the Court of Distirct Judge, Satna. In Civil Appeal No. 3-B of 1988 decided on 18th December, 1990 by which the suit filed by the appellant was dismissed as not maintainable under Section 26 of Indian Electricity Act, 1910.

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* Second Appeal No. 139 of 1991.

(1) (1997) 5 S.C.C. 120=(1997) 5 JT (SC) 182. (2) A.I.R. 1988 S.C. 71.

M/s Harish Minerals Supply Co. v. *M.P. Electricity Board, Rampur Jabalpur, 2002.*

Short facts of the case are that the plaintiff is a consumer of respondent/ ectricity Board, having electricity connection. By the suit plaintiff challenged the covery of an amount of Rs. 4090.83 which defendant had raised on the plaintiff on 8-5-1980. The above said suit was filed under Section 5(2) of M.P. Government ectrical Undertakings (Dues Recovery) Act, 1961 after depositing the amount of . The abovesaid section reads as under:

> "5(2)"a suit referred to in sub-section(1) may be instituted in a civil Court of competent jurisdiction at any time within six months from the date of deposit with the prescribed authority and subject to the result of such suit, the notice of demand shall be conclusive proof of the various dues, penalty and costs mentioned therein."

The above suit was contested by the respondent on various grounds including maintainability of the suit. The trial Court after framing of issues and recording the evidence decreed the suit holding that the suit is maintanable in Civil Court, against which M.P. Electricity Board filed an appeal. The learned Appellate Court holding iat the suit is not maintainable under Section 26(6) of the Electricity Act allowed ie appeal and the suit was dismissed.

This appeal was admitted on following substantial questions of law on 13-9- 91.

1. "Whether the Civil Court has jurisdiction to try the claim?"

2. "Whether the plaintiff's remedy was to make a reference for decision under S. 26(6) of Electricity Act, 1910 ?"

The learned counsel for the appellant submits that after payment of the amount of bill under Section 5(2) of the M.P. Electrical Undertakings (Dues ecovery) Act. 1961 (hereinafter referred to 'the Recovery Act'),pleantiff has ed the suit challenging the above said recovery. He submits that the suit was maintainable under Section 5 of the Recovery Act, which specifically provides iat notice of payment can be challenged after depositing the amount as envisaged under S. 5(2) of the Recovery Act. The leanred counsel for the ellant also places reliance on judgment of the Apex Court in the case of *M.P.E.B.* v. *Basanti Bai*[1], whereas the Apex Court in para 13 held:

"If the Electrical Inspector comes to the finding that the meter is

[1] AIR 1988 SC 71.

faulty and due to some defect it has not registered the actual consumption of electrical energy, then the Inspector will estimate the amount of energy consumed and will fix the amount to be paid in respect of such energy consumed whithin a period not exceeding six months. The appellant No.1 is not competent pending the determination of this dispute by the Electrical Inspector to issue the impugned notice threatening disconnection of supply of electricity for non-payment of supplementary bill prepared and sent by it. The Board is also not competent to prepare and send a supplementary bill in respect of energy consumed by the respondent from the one phase which stopped functioning and did not record any consumption of energy. For the reasons, aforesaid we affirm the order of High Court and dismiss the appeal without costs."

6. In this case it is not in dispute that the matter was not referred to the Electrical Inspector. From the perusal of the documents, it appears that because of the dust, meter was running slow and on the basis of this, the bill was raised. Entire amount was deposited, though under protest. The contention of the learned counsel for the appellant is, that where the meter was running slow it was within the jurisdiction of the Electrical Inspector to decide and the officers of Electricity Board cannot decide this question Section 26(6) of Indian Electricity Act. 1910 reads as under:

"Where any difference or dispute arises as to whether any meter referred to in sub-section (1) is or is not correct, the matter shall be decided upon the application of by an Electrical Inspector and where the meter has, in the opinion of such inspector ceased to be correct, such Inspector shall estimate the amount of the energy supplied to the consumer or the electrical quantity contained in the supply, during such time, not exceeding six months, as the meter shall not, in the opinion of such Inspector, have been correct; but save as aforesaid, the register of the meter shall in the absence of fraud, be conclusive proof of such amount or quantity.

Provided that before either a licensee or a consumer applies to the Electrical Inspector under this sub-section, he shall give to the other party not less than seven days' notice of his intention so to do."

7. From the perusal of Section 26(6) of the Act, it is apparent that all the disputes arising out of, where any meter is not correct, the meter shall be tested, upon the application of either party by Electrical Inspector.

In this case also, the dispute was whether the meter was running slow or not, or because of the dust, it was running slow, to be decided and was within the jurisdiction of the Electrical inspector and without any decision of the Electrical Inspector, respondent was not competent to raise the bill. The Apex Court in the case of *Basanti Bai (supra)* has specifically held that if the electrical Inspector comes to the finding that the meter is faulty and due to some defect it has not registered the actual consumption of electrical energy, then the Inspector will estimate the amount of energy consumed and will fix the amount to be paid in respect of such energy consumed within a period not exceeding six months. The Apex Court has further held that the Board is also not competent to prepare and send a supplementary bill in respect of energy consumed by the consumer from the one phase which stopped functioning and did not record any consumption energy.

The learned Counsel for the respondent has submitted that civil Court has no jurisdiction to decide such a dispute and dispute can be decided only by the Electrical Inspector. The appellant has not moved any application for deciding the dispute by the Electrical Inspector. In the circumstances, it was not necessary for the the Board to send the matter for decision by Electrical Inspector. He relied on a decision of the Apex Court in the case of *Punjab State Electricity Board* v. *Ashwani Kumar*[1]. The facts of this case are entirely different. There was a dispute in respect of tampering of meter and in that regard, the Apex Court held as under:

"Shri Goyal has contended that the authorities do not hear the parties, nor give a reasoned order. Therefore, the parties cannot be precluded to avail of the remedy of a suit. We cannot accept such a broad and generalised proposition. When the provision for appeal by way of review has been provided by the statutory instructions, and the parties are directed to avail of the remedy, the authorities are enjoined to consider all the objections raised by the consumer and to pass, after consideration, the reasoned order in that behalf, so that the aggrieved consumer, if not satisfied with the order passed by the Board/appellate authority, can avail of the remedy available under Art. 226 of the Constitution. Therefore, by necessary implication, the approriate competnt authority should hear the parties, consider their objections and pass the

(1) (1997) 5 SCC 120.

reasoned order, either accepting or negativing the claim. Of course it is not like a judgment of a civil Court. It is then contended that the respondent has been subjected to pay huge amount of bill in a short period: hence, it is a case for interference. We find no force in the contention. May be that due to the advice given by the counsel, the respondent obviously has availed of the remedy of the suit, instead of departmental appeal. In our view, by necessary implication the suit is not maintainable. Therefore, the respondent is at liberty to avail the remedy of appeal within six weeks from today and raise the factual objections before the Board and the Board/appellate authority would consider and dispose of them, as indicated earlier, on merits."

8. The appellant has challenged the validity of the bill, which cannot be raised by the respondent Board because of defect in matter and until and unless the amount is ascertained by the Electrical inspector as has been held by the Apex Court in the case of *Basanti Bai (supra)*. The appellant who has challenged the validity of the bill issued by the respondent, in the suit, which was maintainable in view of Section 5(2) of the Recovery Act. The lower appellate Court erred in holding that the civil suit is not maintainable. In view of this, this appeal is allowed. Matter is remitted back to the lower appellate Court to decide the matter afresh after considering the contentions of the parties on merits.

9. Both the parties will appear before the lower Appellate Court on 24-9-2002. No fresh notice will be necessary for this. Costs of this appeal is allowed, this shall be borne by the respondent.

Appeal allowed.

APPELLATE CIVIL

Before Mr. Justice R.B. Dixit & Mr. Justice Chandresh Bhushan.
27 August, 2002.

BHOGIRAM ...Appellant. *

v.

EHSAN KHAN & others ...Respondents.

Motor Vehicles Act, (LIX of 1988) and Amendment Act 1994, Sections 166 (3), 173–Appeal–Deletion of sub–Section (3) of Section

*M.A.No. 160 of 1996.

Smt. Madhulika Verma v. *Smt. Prabhawati Verma, 2002.*

166–Retrospective–Accident taking place before deletion of sub-section (3)–Claim petition filed before amendment and pursued–Can not be thrown on ground of limitation.

The Hon'ble Apex Court in case of *Dhannalal* v. *D.P. Vijayvargiya and others*[1], dealing with the effect of amendment on pending cases has observed that from the Amending Act, it does not appear that the said sub-section (3) has been delated retrospectively. But at the same time, there is nothing in the Amending Act to show that benefit of deleation of sub-section (3) of Sec. 166 is not tobe extended to pending claim petitions where a plea of limitation has been raised. It was further observed that the deletion of sub-section (3) from Section 166 should be given fully effect so that the object of deletion of said Section by the Parliament is not defeated. It was also held that the period of limitation having been delted the claim petition, which has been filed and is being pursued, cannot be thrown out on the ground of limitation.

[Para 3]

Mahesh Haswani, for the appellant.

K.B. Chaturvedi, G.A. for the respondents No.2 and 3.

None for the repondent No.1. though served.

Cur. adv. vult.

ORDER

The Order of the Court was delivered by **R.B. DIXIT, J:**–The learned Third Addl. Claims Tribunal, Gwalior in Claim Case No. 86/94 by impugned award dated 8-2-96, has dismissed the claim of the appellant on the ground of limitation alone.

2. It is not disputed that the incident took place on 18-1-91 and the claim was filed on 23-8-91. Although, in claim-petition it was mentioned that the claim is within limitation, however a separate-application under proviso to sub-section (3) of Sec. 166 of Motor Vehicles Act, was filed. However, it seems that the learned Claims Tribunal while rejecting the claim as time-barred, did not consider the

(1) 1996 JLJ 528.

amendment in Motor Vehicles Act, which came into force w.e.f. 14-11-94, much before the claim was decided.

3. The Hon'ble Apex Court in case of *Dhannalal* v. *D.P. Vijayvargiya and ors.* [1], dealing with the effect of amendment on pending cases has observed that from the Amending Act, it does not appear that the said sub-section (3) has been deleted retrospectively. But at the same time, there is nothing in the Amending Act to show that benefit of deleation of sub-section (3) of Sec. 166 is not tobe extended to pending claim petitions where a plea of limitation has been raised. It was further observed that the deletion of sub-section (3) from Section 166 should be given fully effect so that the object of deletion of said Section by the Parliament is not defeated. It was also held that the period of limitation having been delted the claim petition, which has been filed and is being pursued, cannot be thrown out on the ground of limitation.

4. Taking into consideration the implications arising in the aforesaid decision of the Apex Court, the appeal is allowed and the impugned Award is set aside. It is directed that the learned Claims Tribunal shall decide the application on merits, after issuing notice to the parties, treating it tobe within limitation.

Appeal is allowed.

APPELLATE CIVIL

Before Mr. Justice K.K. Lahoti.
27 August, 2002.

MOHANLAL and anr. ...Appellants*

v.

SAUKHILAL and others ...Respondents.

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.

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*M.A.No 140 of 1998.
(1) 1996 JLJ 528.

Rejection of the counter-claim can be ordered under Order 7 rule 11 of the Code of Civil Procedure, 1908 (hereinafter referred as CPC), because Order 8 rule 6A CPC provides that the counter-claim shall be treated as a plaint and governed by the rules applicable to plaints. Order 7 rule 11 CPC provides, where the relief claimed is properly valued but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so, the plaint shall be rejected. From the perusal of the record, it appears that the trial Court has not passed such an order and rejected the counter-claim while deciding the case finally. In view of this, learned lower appellate Court has rightly exercised the power under Order 41 rule 33 by providing an opportunity to respondents to pay court-fee on counter-claim.

[Para 4]

M/s Bihar Supply Syndicate v. *Asiatic Navigation*[1]. relied on.

K.N. Agrawal, for the appellants.

N.K. Patel, for the respondents 3 to 7.

Kumari Kiran Mehta, Panel Lawyer, for the respondent 9/State.

Cur. adv. vult.

ORDER

K.K. LAHOTI, J:–Appellants have filed present appeal against order of remand dated 15-12-97 by which learned lower appellate Court while remanding the matter has afforded an opportunity to the respondents to affix court-fee on counter-claim with certain observations. Learned trial Court has not considered the counter-claim only on the ground that the respondents have not paid court-fee on it.

2. Learned counsel appearing for the appellants submits that lower appellate Court committed an error in allowing respondents/defendants to pay the court-fee on counter-claim and wrongly exercised its power giving opportunity to the respondents to pay the court-fee and enlarged the scope. On the contrary, learned counsel for the respondents submits that the learned lower appellate Court has

(1) AIR 1993 S.C. 2054.

exercised its power under Order 41 rule 33 of the Code of Civil Procedure and has done the justice in the case while affording opportunity to the respondents to pay the court-fee on counter-claim.

3. From perusal of the counter-claim which was filed alongwith the written statement, it appears that the respondents in para-10 have made the counter-claim and valued the counter-claim at 20 times of land revenue which comes to Rs. 50/- and court-fee was payable Rs.5. It appears that due to oversight aforesaid court-fee, which was a meagre was not paid. Learned trial Court has considered this aspect in para-6 of the judgment and has rejected the counter-claim only on the ground that the court-fee was not paid.

4. Rejection of the counter-claim can be ordered under Order 7 rule 11 of the Code of Civil Procedure, 1908 (hereinafter referred as CPC), because Order 8 rule 6A CPC provides that the counter-claim shall be treated as a plaint and governed by the rules applicable to plaints. Order 7 rule 11 CPC provides, where the relief claimed is properly valued but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so, the plaint shall be rejected. From the perusal of the record, it appears that the trial Court has not passed such an order and rejected the counter-claim while deciding the case finally. In view of this, learned lower appellate Court has rightly exercised the power under Order 41 rule 33 by providing an opportunity to respondents to pay court-fee on counter-claim. Apex Court considered power of appellate Court under Order 41 rule 33 CPC in *M/s Bihar Supply Syndicate* v. *Asiatic Navigation*[1], held:

> "29. Really speaking the Rule is in three parts. The first part confers on the appellate Court very wide powers to pass such orders in appeal as the case may require. The second part contemplates that this wide poer will be exercised by the appellate Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection. The third part is where there have been decrees in cross-suits or where two or more decrees are passed in one suit, this power is directed to be

(1) A.I.R. 1993 S.C. 2054.

exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees."

5. In view of the aforesaid, lower appellate Court has rightly exercised power under Order 41 rule 33 CPC by providing an opportunity to respondents to pay court-fee on counter-claim. In view of this, this appeal has no merit and is dismissed with no order as to costs.

6. As both the parties are present, the parties are directed to remain present before the trial Court on October 21, 2002 for which date no notice will be necessary.

Appeal dismissed.

APPELLATE CRIMINAL

Before Mr. Justice N.K. Jain
7 February, 2002.

DEVILAL ...Appellant*

v.

STATE OF M.P. ...Respondent

Narcotic Drugs and Psychotropic Substances Act, (LXI of 1985)–Sections 8, 18, 50–Seizure of contraband–Accused not informed about right to get himself searched in presence of a gazetted officer or a magistrate–Seizure witness admitted pendency of litigation between him and the accused–Not an independant witness–Prosecution case doubtful–Accused entitled to be acquitted.

What Sub-Inspector Rathore had stated is only this that he had asked the accused that he may give search to him and may also give his search to a gazetted officer or the Magistrate. More or less similar statement was made by A.S.I., B.S. Chouhan (PW.7). Panch-witness Bothelal (PW.6) merely stated that the accused was informed that if he so chooses, he may get himself searched by a higher officer.

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*Cri. A.No. 1008 of 1996.

All this even if taken on face value, I am afraid, fell much short of the mandate contained under Section 50 of the Act. Neither of these witnesses has stated that the accused was informed of his right being searched in presence of a gazetted officer or a Magistrate.

Coming to the merits of the evidence, witness Bothelal (PW.6) in paragraph 28 of his cross-examination, has clearly admitted that some litigation was going on in between him and accused appellant at the relevant time. Under the circumstance, this witness cannot be termed as independent witness and use of such witness for the purpose of search of the accused also caused shadow of doubt on the credibility of the police officers conducting the search. The other Panch Witness of the said search had not been examined in evidence and no reason has been assigned for his non-examination. Presumably, he would not have supported the prosecution story, if examined in evidence. This also renders prosecution case doubtful.

[Paras 4 and 8]

K. Mohanan case[1], *T.P. Razak's case*[2], referred to.

C.R. Joshi, for the appellant.

M. Upadhyaya, for the respondent.

Cur. adv. vult.

JUDGMENT

N.K. JAIN J:–Accused-appellant Devilal is convicted under Section 8/18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'the Act') and sentenced to 10 years RI with fine Rs. 1,00,000/-by the 1st Additional Sessions Judge, Neemuch vide his judgment dated 7-10-1996 in Spl. Case No. 139/93 which is impugned in this appeal.

2. The case of the prosecution, as unfolded at the trial, was that on 1-4-1993 at 11.30 p.m. in the night, Sub-Inspector Anilsingh Rathore (PW.8) of P.S. Singoli, acting on the basis of information received from an approver intercepted the accused appellant on way near village Thadod-Phata and after observing necessary formalities/requirements, searched him in presence of two panch-witnesses. Two bags, tied around the waist underneath wearing apparels, were

(1) 2001 (2) EFR 219. (2) 1996 (2) EFR 80.

recovered from the person of the accused. On preliminary examination both the said bags were found containing opium weighing 870 and 660 gms., respectively. Two samples each of 30 gms were drawn from the said bags which were then sealed and seized duly on the spot. On return at the police station, FIR vide Ex.P/15 was lodged and scribed by Sub-Inspector Rathore himself who also proceeded with further investigation in the case. On chemical analysis the seized contraband was found to be opium. After other necessary investigation, accused appellant was charge sheeted and committed for trial which ended into his conviction and sentence as aforesaid.

3. The prosecution examined Bothelal (PW.6), Panch-witness of the said seizure, and A.S.I Bhajendrasingh Chouhan, (PW.7) besides Sub-Inspector Anilsingh Rathore (PW.8) who all have narrated the prosecution story already stated hereinbefore. Their evidence is, however, criticised severely by learned counsel for appellant and it was contended that their evidence inspired little or on confidence. It was vehemently contended that mandatory provision of Section 50 of the Act was not complied with inasmuch as there is no reference of it in the seizure memo and the FIR. It was further pointed out that the police had used partisan witnesses to witness the search inasmuch as Bothelal (PW.6) was having litigation with the accused appellant at the relevant time. It was, thus, a case of false implication, submitted the counsel.

4. Taking the first point first (regarding compliance of Section 50 of the Act) what Sub-Inspector Rathore had stated is only this that he had asked the accused that he may give search to him and may also give his search to a gezetted officer or the Magistrate. More or less similar statement was made by A.S.I., B.S. Chouhan (PW.7). Panch-witness Bothelal (PW.6) merely stated that the accused was informed that if he so chooses, he may get himself searched by a higher officer. All this even if taken on face value, I am afraid, fell much short of the mandate contained under Section 50 of the Act. Neither of these witnesses has stated that the accused was informed of his right being searched in presence of a gazetted officer or a Magistrate. Hon'ble Supreme Court in *K. Mohanan*[1], has held:

> "If the accused, who was subjected to search was merely asked whether he required to be searched in the presence of a gazetted

(1) 2001 (2) EFR 219.

officer or a Magistrate it cannot be treated as communicating to him that he had a right under law to be searched so. What PW.1 has done in this case was to seek the opinion of the accused whether he wanted it or not. If he was told that he had a right under law to have it (sic himself) searched what would have been the answer given by the accused cannot be gauged by us as at this distance of time. This is particularly so when the main defence adopted by the appellant at all stages was that Section 50 of the Act was not complied with."

5. As already pointed out in the instant case also the accused was also not informed about his right to get himself searched in presence of a gazetted officer or a Magistrate.

6. Even otherwise the evidence of prosecution witnesses above on this point inspired little or no confidence. At the first place Panch witness Bothelal (PW.6) does not support the evidence of two police officers. Secondly, no refence in this regard is found either in the seizure-memo (Ex.P/9) or the FIR (Ex.P/15). Although a separate memorandum (Ex.P/8) is said to have been recorded in this regard but the same appeared to an empty formality and the possibility of such a document being prepared ante-dated and ante-timed, could not be ruled out. The Supreme Court in *T.P. Razak*[1], in almost similar fact situation, has held that failure to mention the fact of compliance of Section 50 of the Act in the FIR as well as in seizure memo would render the Prosecution evidence in this regard highly doubtful.

7. It will be, thus, seen that there was no compliance of Section 50 of the Act which is mandatory in nature. The entire search and the investigation was, thus, rendered illegal and the accused appellant is entitled to be acquitted on this short ground alone.

8. Coming to the merits of the evidence, witness Bothelal (PW.6) in paragraph 28 of his cross-examination, has clearly admitted that some litigation was going on in between him and accused appellant at the relevant time. Under the circumstance, this witness cannot be termed as independent witness and use of such witness for the purpose of search of the accused also caused shadow of doubt on the credibility of the police officers conducting the search. The other Panch Witness of the said search had not been examined in evidence and no

reason has been assigned for his non-examination. Presumably, he would not have supported the prosecution story, if examined in evidence. This also renders prosecution case doubtful.

9. There is yet another infirmity in the prosecution case. The defence all through, as maintained, that the place from where the accused was caught, fell in the State of Rajasthan and beyond the territorial jurisdiction of Police Station Singoli. Although, the police officers concerned as also the Panch witnesses Bothelal had denied this fact but the village Patwari Omprakash (PW.1) who was asked to prepare the spot-map (Ex.P/1) has in paragraph 6, clearly admitted that the place marked as 'B' to 'B' in the spot-map (this is the place of occurrence according to the prosecution), was actually situated in the territory of the State of Rajasthan. If that is so, Sub-Inspector Rathore of Madhya Pradesh Police had no jurisdiction to apprehend the accused and undertake the search in question. On this ground also the search and the investigation was vitiated.

10. For what is said above, this appeal succeeds and is allowed. The impugned conviction and sentence passed against accused-appellant Devilal are set aside and he is acquitted of the charge under Section 8/18 of the N.D.P.S. Act. He is in jail and he be set at liberty forthwith, if not required in any case.

Appeal allowed.

CIVIL REVISION

Before Mr. Justice S.P. Khare.
19 October, 2001.

AJRA HABIB ...Applicant*

v.

B.K. GUPTA ..Non-applicant

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 injunciton in suitable cases–Court can restore status–quo *existing on the date of suit.*

*C.R.No. 527 of 2001.

Ajra Habib v. *B.K. Gupta, 2001.*

Order 39, Rule 1, Civil Procedure Code relevant for the present purposes provides that where in a suit it is proved that the defendant threatens to dispossess the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit the Court may by order grant a temporary injuction to restrain such act, or "make such other order" for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property or dispossession of the plaintiff or otherwise causing injury to the plaintiff in relation to any property in dispute in the suit, as the Court thinks fit, until the disposal of the suit or until further orders. These words have been consistently interpreted as authorising the Court to grant a mandatory injunction on an interlocutory application if it is considered essential in the interest of justice. By such interim mandatory injunction the Court can restore the *status-quo* existing on the date of the suit in an appropriate case. Such a power can be exercised in cases of extreme hardship or compelling circumstances depending upon the facts of the case.

Even in the absence of the specific prayer in the plaint for mandatory injunction the Court has the power to issue such injunction in suitable cases. That power is derived from Order 7, rule 7, Civil Procedure Code which provides: ".....and it shall not be necessary to ask for general or other relief, which may always be given as the Court may think just to the same extent as if it had been asked for". The Court must look at the substance and not mere form. Tecnicality should not triumph over the substance. The Court can always mould the relief in view of the subsequent developments. The Court has inherent power to grant either general relief or other relief which appears to it to be legitimate and proper in any case even though such reliefs have not been specifically asked for. The Court can always grant such relief as is available on the facts, even if no specific prayer for such relief is made in the plaint.

(Paras 9 and 10)

R. S. Tiwari, for the applicant.

S. K. Mukherjee, for the non-applicant.

Cur. adv. vult.

ORDER

S. P. KHARE, J :–This is a revision by the plaintiff against the order by which

the defendant's appeal under Order 43, Rule 1 (r), Civil Procedure Code has been allowed and the order of temporary injunction issued in favour of the plaintiff by the trial Court has been set aside.

2. It is not in dispute that the plaintiff was granted licence by the defendant No. 1 to run a P.C.O. at the Railway Station by order dated 3-12-1995. She was given 1.83 m x 1.52 m space adjacent to the traffic booth in front of the computerised reservation office at Jabalpur on certain terms and conditions. She has been running the booth for five years at that place. On 1-11-2000 the plaintiff received a letter from the Divisional Commercial Manager informing her that her licence has been cancelled because of certain complaints against her for overcharging the customers. She was informed that the contract has been terminated and the P.C.O. would be removed from the Railway premises.

3. The plaintiiff's case is that she was not given any notice or opportunity of hearing before the proposed action and therefore it is in violation of the principles of natural justice. It is also her case that she cannot be removed from the spot by force without following due process of law. In the plaint she claimed the relief of permanent injunction for restraining the defendants from removing the P.C.O. booth installed in the Railway premises. As usual any other relief which the Court deems fit on the facts and circumstances of the case was also prayed. The suit was filed on 6-11-2000. An application under Order 39, Rules 1 and 2, Civil Procedure Code was also filed claiming the relief of temporary injunction restraining the defendants from dispossessing the plaintiff and removing the P.C.O booth. An application under section 80 (2), Civil Procedure Code was also filed for dispensing with the notice under Section 80, Civil Procedure Code.

4. Notices were issued to the defendants and served upon them on 7-11-2000 at 4.00 P.M.. In reply to the application for temporary injunction the defendants stated that the possession of the P.C.O. booth has been taken over by the Railways at 0.15 hours on 7-11-2000, before the service of the notice. It was not denied that no show cause notice was given to the plaintiff before taking the decision to terminate the contract and remove the. P.C.O. booth.

5. The plaintiff filed another application on 9-11-2000 stating therein that a lock was put by the defendants over the lock of the plaintiff on the P.C.O. booth after the service of notice on them and the electricity and telephone lines were disconnected. Therefore, the plaintiff claimed mandatory injunction for

maintaining *status-quo* as on the date of the institution of the suit. The defendants submitted a reply to this application also.

6. The trial Court after testing the plaintiff's case on the touch stone of three well known principles for grant of temporary injunction i.e. strong *prima facie* case, balance of convenience and irreparable injury allowed the plaintiff's application for temporary injunction. It was found that the defendants were *prima-facie* not acting according to due process of law. On the facts and circumstances of the case the trial Court considered that it is a suitable case in which temporary mandatory injunction should be issued to bring the status existing on the date of the suit. Consequently a direction was given to the defendants to remove their lock from the P.C.O. booth, deliver its possession to the plaintiff and restore the electricity and telephone connection. The trial Court gave the liberty to the defendants to proceed against the plaintiff according to law.

7. In appeal filed by the defendants the order passed by the trial Court has been set aside on the ground that in the plaint the relief of "mandatory injunction" has not been claimed.

8. After hearing the learned counsel for both the sides this Court is of the opinion that the order of the Appellate Court must be set aside and that of the trial Court restored. The trial Court in a well considered order examined the plaintiff's case in light of the relevant legal principles and granted the relief of interim injunction. It is undisputed that no show cause notice or opportunity of hearing was given to the plaintiff before taking the action of putting a lock on the P.C.O. booth. In case there was any complaint against the plaintiff it was necessary to hold some inquiry and give an opportunity of hearing to her so that she could put forward her defence. No one should be condemned unheard. That is the salutary rule. Thereafter, that defence should have been objectively considered and a finding should have been recorded that the plaintiff has committed breach of the conditions of the licence. In the suit filed by the plaintiff the dispute could be settled after recording the evidence of both the sides and it could be decided whether there was breach of any condition of the licence by the plaintiff. If the trial Court in its discretion decided that the *status-quo* existing on the date and time of filing of the suit should be maintained there was nothing arbitrary or capricious in doing so. The defendants should also in all fairness abide by the order of interim injunction. The plaintiff did make an

application on 9-11-2000 to convert her prayer of interim prohibitory injunction into an interim mandatory injunction and that was duly considered by the trial Court. The Appellate Court was not taken note of this subsequent application of the plaintiff. The plaint could be amended subsequently to make a formal prayer for permanent mandotory injunction. Even otherwise the arms of law are strong enough to grant appropriate relief to any party. Order 39, Rule 1, Civil Procedure Code itself confers sufficient power upon the Court to grant interim mandatory injunction.

9. Order 39, Rule 1, Civil Procedure Code relevant for the present purposes provides that where in a suit it is proved that the defendant threatens to dispossess the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit, the Court may by order grant a temporary injuction to restrain such act, or "make such other order" for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property or dispossession of the plaintiff or otherwise causing injury to the plaintiff in relation to any property in dispute in the suit, as the Court thinks fit, until the disposal of the suit or until further orders. These words have been consistently interpreted as authorising the Court to grant a mandatory injunction on an interlocutory application if it is considered essential in the interest of justice. By such interim mandatory injunction the Court can restore the *status-quo* existing on the date of the suit in an appropriate case. Such a power can be exercised in cases of extreme hardship or compelling circumstances depending upon the facts of the case.

10. Even in the absence of the specific prayer in the plaint for mandatory injunction the Court has the power to issue such injunction in suitable cases. That power is derived from Order 7, rule 7, Civil Procedure Code which provides: ".....and it shall not be necessary to ask for general or other relief, which may always be given as the Court may think just to the same extent as if it had been asked for". The Court must look at the substance and not mere form. Technicality should not triumph over the substance. The Court can always mould the relief in view of the subsequent developments. The Court has inherent power to grant either general relief or other relief which appears to it to be legitimate and proper in any case even though such reliefs have not been specifically asked for. The Court can always grant such relief as is available on the facts, even if no specific prayer for such relief is made in the plaint.

Ajra Habib v. *B.K. Gupta, 2001.*

11. The observations of the Supreme Court in *P. Venkateswarlu vs. Motor and General Traders*[1]; in this respect are very pertinent and instructive. It is basic to our processual jurisprudence that the right to relief must be judged to exist as on the date a suitor institutes the legal proceeding. Equally clear is the principle that procedure is the hand-maid and not the mistress of the judicial process. If a fact, arising after the lis has come to court and has a fundamental impact on the right to relief or the manner of moulding it, is brought diligently to the notice of the tribunal, it cannot blink at it or be blind to events which stultify or render inept the decretal remedy. Equity justifies bending the rules of procedure, where no specific provision or fairplay is violated, with a view to promote substantial justice subject, of course, to the absence of other disentitling factors or just circumstances. Nor can we contemplate any limitation on this power to take note of updated facts to confine it to the trial Court. If the litigation pends, the power exists, absent other special circumstances repelling resort to that course in law or justice.

12. In the present case the lock was admittedly put on the P.C.O. booth by the defendants after the institution of the suit. The discretion was properly exercised by the trial Court in issuing the temporary mandatory injunction on the facts and in the circumstances of the present case and there was no scope for interferance by the Appellate Court on technical and unsubstantial grounds.

13. The impugned order of the Appellate Court is set aside and the Order passed by the trial Court in this case is restored.

Order of trial Court restored.

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(1) AIR 1975 SC. 1409.

CIVIL REVISION

Before Mr. Justice Subhash Samvatsar.
24 July, 2002.

IDRA SINGH and others ...Applicants*

RAMCHARAN and others ..Non-applicants

vil 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.

The Court to which subject-matter has been transferred can also execute the ;cree, and the Court to which the case transferred acquires an inherent jurisdiction :o execute the same.

[Para6]

Merla Ramanna v. *Nallaparaju*[1], relied on.

H.D. Gupta, for the applicants.

A.M. Naik with B.K. Agrawal, for the non-applcants.

Cur. adv. vult.

ORDER

SUBHASH SAMVATSAR, J:–Heard.

This revision is filed by the judgment-debtor against whom a decree is ɔassed by the Additional Civil Judge Class I, Gohad on 26-2-98. The Decree-ıolder filed an execution in the Court of Civil Judge Class-2, Gohad for executing ıe said decree. The petitioner-judgment-debtor has raised an objection about ıe maintainability of the execution proceedings before the Civil Judge Class 2, ɔohad. The same objection is rejected by the executing Court by the impugned order against which this revision is filed.

According to the petitioner, since the decree is passed by the Addl. Civil

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:.R.No. 485 of 2002.
1 A.I.R. 1956 S.C. 87.

Judge Class I, Gohad, the Civil Judge Class-2 has no jurisdiction to execute the decree. For this purpose, the counsel for the petitioner has relied on the provisions of Order 21, Rule 10, CPC, which lays down that an application for execution lies to the same Court which has passed the decree. The said rule reads as under:

> "Or.21, Rule 10: Application for execution–Where the holder of a decree desires to execute it, he shall apply to the Court which passed the decree or to the officer (if any) appointed in this behalf, or if the decree has been sent under the provisions hereinbefore contained to another Court then to such Court or to the proper office thereof."

3. In view of the said provision, the Counsel for the petitioner submits that the execution proceedings filed in the Court of Civil Judge Class 2, Gohad for executing the decree passed by Addl. Civil Judge Class-1, is without jurisdiction.

4. The relevant facts for decision of the said case are that: initially the respondent decree holder had filed a suit in the Court of Civil Judge Class-2 Gohad. The preceding Judge of that Court (K.K. Sharma) was promoted as Addl. Civil Judge Class I. After his promotion all the cases pending in the Court of Civil Judge Class 2, were transferred to his Court i.e. in the Court of Addl. Civil Judge Class I, Gohad as probably at that time no Civil Judge Class 2, Gohad was appointed. Ultimately Shri K.K. Sharma passed the decree as Addl. Civil Judge Class I. At the time of filing of the execution the Court of Addl. Civil Judge Class-I, Gohad was abolished and all the cases pending in that Court were transferred to the Court of Civil Judge Class-2. Gohad. In the light of this fact, the decree-holder filed an application in the Court of Civil Judge Class-2, Gohad.

5. Shri A.M. Naik, Sr. Advocate for the respondent submitted that in view of this fact, the execution proceedings filed in the Court of Civil Judge Class-2, Gohad cannot be said to be without jurisdiction. He invited my attention to Section 37 of the Civil Procedure Code. Section 37 of the CPC explains or defines the word "Court", which passed the decree. The said section reads as under:

> "Section 37. Definition of Court which passed a decree.–The expression "Court which passed a decree", or words to that effect, shall, in relation to the execution of decrees, unless there is anything repugnant in the subject or context, be deemed to include,–

(a) where the decree to be executed has been passed in the exercise of appellate jurisdiction, the Court of first instance, and

(b) where the Court of first instance has ceased to exist or to have jurisdiction to execute it, the Court which, if the suit wherein the decree was passed was instituted at the time of making the application for the execution of the decree, would have jurisdiction to try such suit."

Explanation.–xx xx xx

6. This Section 37 of CPC clearly lays down that where a Court which has passed a decree loses the jurisdiction to execute it (sic) than the other Court which has jurisdiction over the subject-matter has been transferred has an authority to execute the decree. For this purpose, the counsel for the petitioner relied on the case of *Merla Ramanna* v. *Nallaparaju*[1]. Thus, the Court to which subject-matter has been transferred can also execute the decree, and the Court to which the case transferred acquires an inherent jurisdiction to execute the same.

7. In view of the aforesaid Section. I do not find any jurisdictional error in the impugned order, particularly when it is mentioned by the learned Judge in the impugned order that the Court which has passed the decree is abolished and has no more working, and the cases pending to that Court are transferred to Civil Judge Class-2. Thus this revision has no force and is dismissed consequently, MCP No. 1022/02, is dismissed.

Revision dismissed.

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(1) AIR 1956 SC 87.

CIVIL REVISION

Before Mr. Justice S.P. Khare.
30 September, 2002.

HANUMAN DATT and others ...Applicants*

v.

STATE OF M.P. and others ..Non-applicants

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.

The appellate order in an appeal under Section 104 or Order 43, Rule 1 CPC cannot by any stretch of imagination be included within the ambit of the word "order" used in the Proviso. As already demonstrated the interim appealable order falls outside the scope of the Proviso. If the appealable order is not covered by the word "order" used in the Proviso then naturally the order passed in appeal against such appealable order would also not be covered in its fold. The orders of temporary injunction under Order 39, Rules 1 and 2, the orders relating to attachments before judgment under Order 38, Rules 2,3, and 6 and the order appointing a Receiver under Order 40, Rules 1 and 4 CPC and other orders are appealable. The final appellate order in such appeals cannot be said to be an order made "in the course of a suit or other proceeding" and therefore a revision against the final appellate order is not barred by the Proviso. The original order of the trial Court which is appealable merges in the order of the appellate Court and for the purpose of deciding whether the appellate order is revisable under Section 115 CPC or not the order which is to be seen is the appellate order. The appeal in which the appellate order is passed is covered by the word 'case' used in the opening part of sub-section (1) of Section 115. If there is jurisdictional error or infirmity of the kind specified in Clauses (a) to (c) of this sub-section then a revision against such appellate order would lie.

[Para 10]

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* C.R.No. 1492/2000.

Hanuman Datt v. *State of M.P., 2002.*

Sawal Singh v. *Smt. Ramsakhi*[1]; *State Financial Corporation* v. *M/s Jagdamba Oil Mills*,[2]; *Phool Singh* v. *Mavla*[3], *Executive Engineer* v. *N.C. Budharaj*[4]; *Kadiyala Rama Rao* v. *Gutala Kahna Rao*[5]; *Shyam Sunder* v. *Union of India*[6]; *Mahadeo* v. *Puna Municipal Corporation*[7]; *Orient Paper Industries Ltd.* v. *State of Orissa*[8]; referred to.

R.P. Agrawal with L. Pandey, for the applicants.

Ku. K. Mehta, for the State.

Ajay Mishra, for the Non-applicants No.3.

Cur. adv. vult.

ORDER

S.P. KHARE, J:–This is a revision by the plaintiffs under Section 115 CPC against the order by which their appeal under Order 43, Rule 1 (r) CPC challenging the order of the rejection of their application for temporary injunction under Order 39 Rules 1 and 2 CPC filed in the suit, has been dismissed.

2. A preliminary objection has been raised on behalf of the respondent No.3 that the present revision is not maintainable in view of the proviso to Section 115 (1) CPC. Reliance is placed by him on the decision of this Court in *Sawal Singh* v. *Smt. Ramsakhi (supra)*. This objection has been raised in several other revision petitions pending before this Court. Therefore, arguments were heard at length. Sarvashri Ravish Agrawal, Sr. Advocate, R.P. Agrawal, Sr. Advocate, R.P. Jain, R. S. Tiwari, P.D. Tiwari, Alok Aradhe and Ajay Mishra, Advocates have also addressed this Court on this point.

3. The proviso to Section 115 (1) CPC reads as under:–

> "Provided that the High Court shall not under this Section, very or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where the order, if it had been made in favour of the party applying for revision, would

(1) 2003 AIHC 1737=(2002)2 MPJR 169 (2) AIR 2002 SC 834= 2002 AIR SCW 500.
(3) (2002) 2 MPJR 157. (4) AIR 2001 SC 626 = (2001) 2 SCC 721 = 2001 AIR SCW 255.
(5) (2000)3 SCC 87 =(2002) 2 JT (SC)269. (6) AIR 1996 SC 1321= 1996 AIR SCW 1464.
(7) 1995 AIR SCW 1439 = (1995) 3 SCC 33. (8) AIR 1991 SC 672.

have finally disposed of the suit or other proceedings". (Underlined by me).

4. The short question which arises in the present revision is whether the final appellate order passed in appeal under Section 104 or Order 43 Rule I CPC is an "order in the course of a suit "within the meaning of these words in the Proviso and therefore, a revision against such order would not be maintainable.

5. The aforesaid proviso has been considered in great detail in *Sawal Singh* v. *Ram Sakhi* (supra), and the following three conclusions have been drawn in Para 15 which form the ratio of the decision:-

> (a) The revisional jurisdiction under Section 115 of the Code is available against:
>
> (i) the order deciding finally the suit or other proceedings where no appeal is provided, and
>
> (ii) where effect of order in the revision would finally dispose of the suit or other proceedings.
>
> (b) The revisional jurisdiction will not be exercised in respect of all other orders deciding any case in the course of suit or other proceedings, though there may be any error, defeact, irregularity or illegality in exercise of jurisdiction, where allowing the revision would not finally dispose of the suit or other proceedings.
>
> (c) all the pending revisions on 1-7-2002 will be decided as per the amended provisions of Section 115.

6. I am in full and respectful agreement with my learned and noble brother K.K. Lahoti, J. In respect of all the three propositions of law given above. But the elucidation or clarification of the law already laid down is permissible by the same Bench and also by any co-ordinate Bench.

7. The word 'order' occurs thrice in the Proviso. It has to be ascribed the same meaning in all the three places. It is indisputable that any order made "in the course of a suit" would be an interim or interlocutory order. The suit commences with the presentation of the plaint and ends with the judgment and the decree. Any order passed in the course of the suit during its pendency would be an interim order. The same would be the position in the case of "other proceedings" akin to that of a suit

e.g. proceedings under the Indian Succession Act or the Arbitration Act. It is only the interim order in the course of a suit or other proceeding which is covered by the Proviso. The present Proviso was Proviso (a) before the Civil Procedure Code (Amendment) Act, 1999 and after the Amendement Act of 1976. Mulla in his Commentary on CPC 15th Edition Vol. 1 page 824 has stated: "The proviso deals with interlocutory order only". In *Sawal Singh's case* also it has been unequivocally held in paras 9 and 10 that the effect of the amendment is that the "interim orders" which have been passed in the course of a suit or other proceeding the High Court will not exercise its revisional jurisdiction in respect of those orders. Similarly in *Phool Singh* v. *Mavla*[1],it has been held after making a reference to the report of the Malimath Committee, the Statements of Objects and Reasons and the 'Notes on Clauses' that the scope of interference against interlocutory order has been restricted. Therefore, it can be held without dilating further that the Proviso envisages interim orders only which have been made in the course of a suit or other proceeding.

8. The word "order" used in the Proviso further covers non-appealable orders only. It does not cover appealable orders. There was already sub-section (2) of Section 115 which provides that the High Court shall not, under this section, vary or reverse any decree or order "against which an appeal lies" either to the High Court or to any Court sub-ordinate thereto. The sub-section is mandatory and it prohibits the exercise of revisional power to vary or reverse an order which is appealable. There was already legislative injunction against the exercise of revisional power against an appealable order. The revision against the appealable order was hit by sub-section (2) and therefore the appealable order could not be included in the word "order" used in the Proviso in order to its being further hit by the Proviso. It follows that the word 'order' in the Proviso does not include in its ambit appealable orders.

Thus, the meaning of the word 'order' which has been used three times in the Proviso is "interim non-appealable order". In respect of such an order an exception has been carved out in the Proviso and that exception is that if this order had been made in favour of the party applying for revision it would have finally disposed of the suit or other proceedings. The interim non-appealable orders coming within the exception would be revisable by the High Court. Such orders may be on the question of limitation, jurisdiction and bar of any law etc.

(1) (2002)2 MPJR 157.

Hanuman Datt v. *State of M.P.*, *2002.*

10. The appellate order in an appeal under Section 104 or Order 43, Rule 1 CPC cannot by any stretch of imagination be included within the ambit of the word "order" used in the Proviso. As already demonstrated the interim appealable order falls outside the scope of the Proviso. If the appealable order is not covered by the word "order" used in the Proviso then naturally the order passed in appeal against such appealable order would also not be covered in its fold. The orders of temporary injunction under Order 39, Rules 1 and 2, the orders relating to attachments before judgment under Order 38, Rules 2,3, and 6 and the order appointing a Receiver under Order 40, Rules 1 and 4 CPC and other orders are appealable. The final appellate order in such appeals cannot be said to be an order made "in the course of a suit or other proceeding" and therefore a revision against the final appellate order is not barred by the Proviso. The original order of the trial Court which is appealable merges in the order of the appellate Court and for the purpose of deciding whether the appellate order is revisable under Section 115 CPC or not the order which is to be seen is the appellate order. The appeal in which the appellate order is passed is covered by the word 'case' used in the opening part of sub-section (1) of Section 115. If there is jurisdictional error or infirmity of the kind specified in Clauses (a) to (c) of this sub-section then a revision against such appellate order would lie.

11. It has been held by the Supreme Court in *Mahadeo* v. *Puna Municipal Corporation*[1], that the bar under Section 115 (2) CPC is to exercise revisional powers where the party is provided with a right of appeal to the High Court or to the sub-ordinate Court against the impugned order. "It is not a bar to exercise revisional power under Section 115 (1) against the appellate order". Similarly in *Kadiyala Rama Rao* v. *Gutala Kahna Rao*[2], *it has been held that* legislative change introduced in Section 115 (by the Amendment Act, 1976) is clear enough to indicate that an order passed by a Court sub-ordinate to the High Court in its appellate jurisdiction, if it is not appealable, would be within the ambit of Section 115 of the Code and thus a revisional application would be maintainable. In *Shyam Sunder* v. *Union of India*[3], it has been observed that a revisional application before the High Court against appellate order passed under Section 39 of the Arbitration Act is maintainable. Even if a special statute expressly attaches finality to an appellate order passed under that statute, such provision of finality will not take away revisional powers of the High Court under Section 115 of the Code of Civil Procedure.

(1) (1995) 3 SCC 33=1995 AIR SCW 1439. (2) (2000) 3 SCC 87. (3) AIR 1996 SC 1321.

12. It was thus well settled that the revision under Section 115 (1) was maintainable against the final appellate order if the conditions provided therein were satisfied and this legal position is not altered by the Proviso.

13. The matter can be examined from a different angle. Section 105 (1) provides that "save as otherwise expressly provided, no appeal shall lie from any order made by a Court in the exercise of its original or appellate jurisdiction; but, where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal". It is clear from this provision that if a party feels aggrieved from an interim order passed "in the course of a suit" which may affect the ultimate decision he has a right to assail that order in the appeal. The proviso to Section 115(1) defers or postpones the remedy of assailing the interim order in the ultimate appeal and, therefore, he is saved from the injustice which might arise to him. Instead of challenging the interlocutory order passed in the course of the suit by invoking the revisional jurisdiction of the High Court under Section 115 (1) which is barred he can challenge that order in appeal. But he cannot assail an order passed in appeal under Section 104 or Order 43 Rule 1 CPC in the appeal against the decree passed in the suit. Therefore, it could not be the legislative intent to take away the remedy of revision against the final orders passed in appeal under Section 104 or under Order 43, Rule 1, CPC and such orders cannot be said to be covered by the Proviso.

14. It is pointed out by the learned counsel for the respondent No.3 that as per Para 16 of the order in *Sawal Singh's case*[1], two revisions against the appellate order under Order 43, Rule 1, CPC were dismissed. As already stated this Bench does not dissent or disagree with the law laid down in that case which has been neatly summed up in Para 15 of the Order. It is axiomatic that a decision is an authority for the question of law which it decides. The ratio of a case is the principle which has been decided and not the actual decision. The *ratio decidendi* alone has the presidential efficacy. A decision is not a precedent on a proposition of law which it did not decide. It has been stated in *Orient Paper Industries Ltd.* v. *State of Orissa*[2]. "What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. The doctrine of precedent, that is,

(1) 2003 AIHC 1737. (2) AIR 1991 SC 672.

being bound by a previous decision, is limited to the decision itself and not as to what is necessarily involved in it. In recent Constitution Bench decision i *Executive Engineer* v. *N.C. Budharaj*[1],it has been observed that the ratio o the basis of reasons and principles underlying a decision is distinct from the ultimate relief granted or manner of disposal adopted in a given case. In view o this legal position the decision in Sawal Singh's case is not an authority on the question which has arisen in the present petition, that is whether the appellate order in appeals under Order 43, Rule 1, CPC is an order made "in the course of a suit or other proceeding". The decision in the present revision is on a differen point. It is on a different aspect or facet concerning the applicability or non-applicability of the Proviso. The view taken by me in this case is not in any wa in conflict with the questions of law decided in the earlier case. In *State Financia Corporation* v. *M/s Jagdamba Oil Mills*[2], it has been observed tha circumstantial flexibility, one additional or different fact may make a world o difference between conclusions in two cases. Disposal of cases by blindly placin reliance on a decision is not proper. The words of Lord Denning have be quoted with approval in this case which have become *locus classics*:" Ea case depends on its own facts and a close similarity between one case and an other is not enough because even a single significant detail may alter the entire aspect . In deciding such cases, one should avoid the temptation to decide cas (as said by Cordozo) by matching the colour of one case against the colour o another. To decide, therefore, on which side of the line a case falls, the broac resemblance to another case is not at all decisive."

15. The answer to the question referred to above in Para 4 is that the fin appellate order passed in appeal under Section 104 or Order 43, Rule 1, CP is not an order "in the course of a suit or other proceeding" and therefore, revision against such appellate order is not barred by the Proviso to Section 115(1), CPC.

Order accordingly.

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(1) (2001) 2 SCC 721= AIR 2001 SC 626. (2) 2002 A.I.R. (SCW) 500 = A.I.R. 2002 S.C. 834.

CRIMINAL REVISION

Before Mr. Justice Umā Nath Singh
23 July, 2002.

SUNDERLAL PATWA ...Applicant*

v.

SHRI DIGVIJAY SINGH and another ..Non-applicants

Criminal Procedure Code, 1973 (II of 1974)–Sections 397, 401, 482, Penal Code Indian, 1860, Section 500–Revision–Trial before Magistrate–Evidence–Cross-examination–Question disallowed on ground of irrelevancies–Inherent powers cannot be exercised to defeat bar under Section 397(2) Cr.P.C.

It appears from the averments of the criminal revision that the non-applicant No.1 in prosecution of his complaint under Section 500 IPC against the applicant and the non-applicant No.2, was examined in chief on 5.12.2000 and was also cross examined on the same day. Moreover, an application under Section 311 Cr.P.C. was moved on behalf of the applicant, to re-examine him which was rejected by the learned Chief Judicial Magistrate, but in the criminal revision No. 187/2001, as per order dated 21.8.2001 the learned Sessions Judge, Bhopal directed the re-examination of the said non-applicant on 19.12.2001. However, the learned Chief Judicial Magistrate while exercising a proper check on recording of evidence, disallowed two questions which, according to the learned counsel for the applicant, had been asked in terms of the provisions of Section 146 of the Evidence Act, and, thus, as a hind-sight, he stopped further cross-examination. Hence this criminal revision.

This Court sitting in revision, may and usually does not interfere with any such order unless it would result in culminating or terminating the proceedings resulting in miscarriage of justice 'the pass-word' for exercise of this Court's powers of revision.

This criminal revision does not invoke the inherent powers of the Court u/s 482 Cr.P.C. and the same cannot be *suo-motu* exercised in view of the principles laid down by the Hon'ble Apex Court in *Madhu Limaye's case*[1] and further as per *Amar Nath's case*[2], the inherent powers cannot be exercised to defeat the bar under Section 397 (2) Cr.P.C.

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*Cri.R.No. 141 of 2002.

(1) AIR 1978 SC 47. (2) AIR 1977 SC 2185.

Sunderlal Patwa v. *Shri Digvijay Singh, 2002.*

[Paras 2,9 and 10]

Madhu Limaye's case[1] *Amar Nath's case*[2], relied on.

Santosh De and another v. *Archana Guha & others*[3], *Makhan Lal Bengal* v. *Manas Bhunia & others*[4], *Rajendra Kumar Sitaram Pande* v. *Union*[5], referred to.

Special Courts Bill case[6], *Ganesh Narain Hegde* v. *S. Bagarappa*[7], *K.K. Patel* v. *State of Gujarat*[8], followed.

Nirmal Chandra Jain, with R.K. Jain, for the applicant.

G.S. Ahluwalia, with Ajay Gupta, for the non-applicants.

Cur. adv. vult.

ORDER

UMA NATH SINGH, J:–The Criminal Revision impugns the order dated 19.12.2001, passed by the learned Chief Judicial Magistrate, Bhopal in Criminal case No. 5599 of 2001, whereby the learned Magistrate has disallowed the permission to ask certain questions in respect of allotment of the House No.8-A, Lodhi Estate to non-applicant No.1, and also about the rate and price of the land allotted to 'Nayee Duniya', a local news paper, which, according to him, were out of context and were absolutely unrelated to the facts in issue.

2. It appears from the averments of the criminal revision that the non-applicant No.1 in prosecution of his complaint under Section 500 IPC against the applicant and the non-applicant No.2, was examined in chief on 5.12.2000 and was also cross examined on the same day. Moreover, an application under Section 311 Cr.P.C. was moved on behalf of the applicant, to re-examine him which was rejected by the learned Chief Judicial Magistrate, but in the criminal revision No. 187/2001, as per order dated 21.8.2001 the learned Sessions Judge, Bhopal directed the re-examination of the said non-applicant on 19.12.2001. However, the learned Chief Judicial Magistrate while exercising a proper check on recording evidence, disallowed two questions which, according to the learned counse

(1) AIR 1978 SC 47. (2) AIR 1977 SC 2185. (3) JT 1994 (1) SC 413.
(4) A.I.R. 2001 S.C. 490. (5) A.I.R. 1999 S.C. 1028 para 5.
(6) (1979 1 S.C.C. 380 at p. 442 para 15).
(7) A.I.R 1995 SCW 2364 para 18 = (1995) 4 SCC 41. (8) A.I.R. 2000 SC 3346.

for the applicant, had been asked in terms of the provisions of Section 146 of the Evidence Act, and, thus, as a hind-sight, he stopped further cross-examination. Hence this criminal revision.

3. During the arguments, incessant efforts were made by both sides to make a mountain out of a molehill by travelling much too far into the merits of the case, which this Court, in exercise of its powers of revision, can not entertain nor is it supposed to appreciate, and more so, in view of an express bar under Section 397(2) Cr.P.C. This Court can not tread upon the jurisdiction of the trial magistrate and monitor recording of evidence by interfering with an order which appears to be even less than interlocutory in nature, simply because the parties to the case are important political personalities. Having regard to all circumstances of the case, this Court has the advantage of seeking guidance from the observations of Hon'ble Krishna Iyer J. in *Special Courts Bill Case*[1] which read as :

> " It is common knowledge that currently in our country criminal courts excel in slow motion. The procedure is dilatory, the dockets are heavy, even the service of process is delayed and, still more exasperating, there are appeals upon appeals and revisions and supervisory jurisdictions, baffling and baulking speedy termination of prosecutions....."
>
> (emphasis supplied)

4. The Hon'ble Apex Court has reproduced the above observations and has further added to that, in the matter of *Ganesh Narain Hegde* v. *S. Bagarappa*[2]. To borrow the exact words from the judgment; it says:

> "The slow motion becomes much slower motion when politically powerful or rich and influential persons figure as accused. FIRs are quashed. Charges are quashed. Interlocutory orders are interfered with. At every step, there will be revisions and applications for quashing. In short, no progress is ever allowed to be made."

5. The Hon'ble Apex Court in the matter of *Santosh De and Another* v. *Archana Guha & others*[3], has expressed anguish as:

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(1) (1979) 1 SCC 380 at p. 442 para 15. (2) AIR 1995 SCW 2364 para 18 = (1995) 4 S.C.C. 41.
(3) JT 1994 (1) SC. 413.

Sunderlal Patwa v. *Shri Digvijay Singh, 2002.*

> "Any and every single interlocutory order is challenged in the Superior Courts and the Superior Courts, we are pained to say, are falling prey to their stratagems. We expect the Superior Courts to resist all such attempts. Unless a grave illegality is committed, the Superior Courts should not interfere."

6. The other aspects of the case which this Court is to have regard include the twin duties of the trial Court in the course of recording of evidence, namely, to search for truth and deliver justice. The permissible and impermissible conducts of a trial Judge for his effective intervention during recording of evidence have been precisely laid down in clean clear terms by the Hon'ble Apex Court in the matter of *Makhan Lal Bengal* v. *Manas Bhunia & others*[1], as:

> ".....needs to effectively control examination, cross-examination and re-examination of the witnesses so as to exclude such questions being put to the witnesses as the law does not permit and to relieve the witnesses from the need of answering such questions which they are not bound to answer".

7. The Hon'ble Apex Court has further observed that :

> "the power to disallow questions should be effectively exercised by reference to Ss. 146, 148, 150, 151 and 152 of the Evidence Act by excluding improper and impermissible questions. The examination of the witnesses should not be protracted and the witness should not be harassed. The cross-examiner must not be allowed to bully to take unfair advantage of the witness..."

8. To answer the core question as how to know as whether an order is interlocutory in nature, the dynamics have been articulated by the Hon'ble Apex Court in the case of *Rajendra Kumar Sitaram Pande* v. *Union*[2] as:

> ".....is to correct miscarriage of justice arising from misconception of law or irregularity of procedure".

The Hon'ble Apex Court has further articulated the dynamics in the case of *K.K. Patel* v. *State of Gujarat*[3] as:

> ".....Would it result in culminating the proceedings, if so any order passed on such objections would not be merely interlocutory in nature as envisaged in S. 397 (2) of the code."

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(1) AIR 2001 S.C. 490. (2) AIR 1999 SC 1028 para 5. (3) AIR 2000 S.C. 3346.

Ku. Renu Yadav v. *Madhusudan Elawadi, 2002.*

9. The learned Trial Magistrate, in his wisdom, by disallowing two questions on the ground of their being strewn with irrelevancies, has only passed an order as per *Makhan Lal Bengal's case (supra)*. And this Court sitting in revision, may and usually does not interfere with any such order unless it would result in culminating or terminating the proceedings resulting in miscarriage of justice 'the pass-word' for exercise of this Court's powers of revision.

10. This criminal revision does not invoke the inherent powers of the Court u/s 482 Cr.P.C. and the same cannot be *suo-motu* exercised in view of the principles laid down by the Hon'ble Apex Court in *Madhu Limaye's case*[1] and further as per *Amar Nath's case*[2], the inherent powers cannot be exercised to defeat the bar under Section 397 (2) Cr.P.C.

11. In the premises discussed hereinabove, I am inclined to say 'NO' to this criminal revision on the question of maintainability itself. Accordingly, it is hereby rejected.

Revision rejected.

CRIMINAL REVISION

Before Mr. Justice Uma Nath Singh

30 July, 2002.

KU. RENU YADAV ...Applicant*

v.

MADHUSUDAN ELAWADI and anor. ..Non-applicants

Criminal Procedure Code, 1973 (II of 1974)–Section 227 and Penal Code Indian, 1860, Section 376–Rape–Charge–Prosecutrix succumbed to the lust of accused on misrepresentation that he was a bachelor and would marry her–Consent obtained by misrepresentation–Not a consent under the Law–Order of discharge set aside.

In the instant case the applicant gave her consent under a misconception and the non-applicant no. 1 to whom it was given was aware of the existance of the

*Cri R.No. 508/02.

(1) AIR 1978 SC 47. (2) AIR 1977 SC 2185.

misconception. As the non-applicant no. 1 misrepresented the fact about his marita status and obtained the consent of the applicant under a misconception of fact, i amounted to no consent as per provision of Section 90 IPC. In the *Williams' case* it was held that where a singing master had sexual intercourse with a girl telling her that it was method to improve her voice, it amounted to rape as consent to sex ac was obtained by deception and as the girl had given the consent under a misconception of fact, it was no consent under the law. In the instant case the applicant succumbec to the lust of the non-applicant no. 1 on a misrepresentation that he was a bachelor and that he would marry her. Thus, in view of the foregoing, the order of the learnec Special Judge dated 26.2.02 in Sessions Trial No. 67/02 is hereby set aside and the matter is remanded to frame charges afresh. The learned trial Judge shall not be influenced by the observations of this Court hereinabove.

[Para :

Saleha Khatoon v. *State of Bihar and another*[2], *Hari Majhi* v. *State*[3] *State of Maharastra* v. *Som Nath Thapa*[4], *State of Maharastra* v. *Priya Sharan Maharaj & others*[5], referred to.

Manish Datt, for the applicant.

J.S. Singh, for the non-applicant No.1.

Smt. Chanchal Sharma, P.L., for the State.

Cur. adv. vult.

ORDER

UMA NATH SINGH, J:–This is a criminal revision against the order of discharge dated 26.2.2002, whereby the learned Special Judge, Bhopal, in Sessions Trial No. 67/2002 has recorded discharge of the non-applicant No.1 from an offence under Section 376 IPC. Shri Datt appearing for the prosecutrix submits that, *primafacie* there are sufficent materials on record to proceed against the non-applicant No.1 under Section 376 in as much as in her statement under Section 161 Cr.P.C. the prosecutrix has mentioned that the applicant visited her college and impressed upon her to act as a model in his advertisements; and that the non-applicant No. misrepresented that he is a bachelor which she believed in and consequentlv

(1) (1923) I KB 340. (2) 1989 Cri.L.J. 202. (3) 1990 Cr.L.J. 650.
(4) J.T. (1996)4 SC 615. (5) 1997 SCC (Cri.) 584.

succumbed to his lust. The applicant had sexual intercourse with non-applicant under mis-conception of facts that he was a bachelor and that he would be true to his promise and marry her. Thus, the applicant's consent was not free from mis-conception and that is why, the moment, she came to know that the non-applicant No.1 was a married man, she had strongly protested. Fearing prosecution, the non-applicant No.1 threatened her with dire-consequences on the strength of his accquaintance with Police Officers and Politicians. The non-applicant also attempted to set her a fire and therefore, the prosecutrix lodged an FIR. Mr. Datt also submits that the materials on record and the attending circumstances do not indicate that the applicant's consent was a true consent in terms of the provisions of Section 90 of the IPC. Mr. Datt to substantiate his submissions also cited a case of the *Patna High Court Saleha Khatoon* v. *State of Bihar and another*[1] of the judgment read as under:

> "Much emphasis was argued on behalf of opposite party No.2 that in this case none of the ingredients aforesaid; *prima-facie*, establish to show that an offence of rape was committed. The first point which attracts my attention is the second ingredient 'without her consent'. Consent always means free will or voluntary act. In this case, consent was obtained on the basis of some fraud and allurment or practising deception upon the lady on the pretext that ultimately she will be married and under that pretext she allowed opposite party No.2 to have sexual intercourse with her. Therefore, this tainted consent or a consent of this nature which is based on deception and fraud, cannot be termed, *primafacie*, to conclude that it was 'with consent'. Had the ledy known that ultimately she would be deserted, the facts and circumstances stated above and the materials placed would go to show that she would have refrained from giving such consent. Then a question would arise what was the purpose for which she gave consent. It was a fraud that was practised on her or she was deceived by giving false assurance. Such type of consent must be termed to be consent obtained without her consent. Consent obtained by deceitful means is no consent and comes within the ambit of ingredients of the definition of rape."

Under the circumstances, Mr. Datt submits that in view of sufficient

(1) 1989 Cri. LJ. 202, para 8.

materials on record, *primafacie*, a case of offence under Section 376 is clearly made out. On the other hand Shri Singh, learned counsel for the non-applicant No.1 submits that it is a case of sexual intercourse with consent. Mr. Singh to substantiate his submission placed reliance on a judgment of this Court in the matter of *Dameshwar Kumar* v. *State of M.P.*[1], which, according to Mr. Singh is based on a judgment of the Calcutta High Court in the matter of *Hari Majhi* v. *State*[2]. Para 6, being the relevant para, of Hari Majhi read as under:

> "It would be evident from the said evidence that the accused had sexual intercourse with the girl with her consent which she, being above the age of 16 years, was competent to give. The prosecution case is that she agreed to sexual intercourse because the accused promised to marry her. But on this ground he cannot be held guilty of rape. The prosecution case does not cover any of the circumstances in Sec. 375 of the Penal Code. In our view, the accused cannot be held guilty of rape for having sexual intercourse with PW.1 after having promised to marry her".

3. On due consideration of rival submissions, I am of the view that the submissions of Mr. Datt merit consideration, inasmuch as the judgment of Calcutta High Court cited by Mr. Singh, learned counsel for the non-applicant no.1, has been rendered against the order of conviction and not at the stage framing of charge whereas the judgment of Patna High Court has been passed in an application for quashing the charge under Section 376 IPC. From the materials on record like the statement of prosecutrix and other attending circumstances, if it appears to be, *prima facie*, a case of rape, the trial Court is duty bond to frame such a charge. It is not a case of no material and at the charge stage materials are to be accepted as true and are not to be probed into. The Court is to apply its mind to question whether or not, there is any ground for presuming commission of offence by accused, as held by the Hon. Apex Court in the matter of *State of Maharastra* v. *Som Nath Thapa*[3]. The aforesaid principle was further reiterated by the Apex Court in the case of *State of Maharastra* v. *Priya Sharan Maharaj & others*[4]. In the instant case the applicant gave her consent under a misconception and the non-applicant no. 1 to whom it was given was aware of the existance of the misconception. As the non-applicant no. 1 misrepresented the fact about his marital status and obtained

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(1) 1998 (2) MPWN. No. 200.
(2) 1990 Cr. L.J. 650. Para 6.
(3) J.T. (1996) 4 S.C. 615.
(4) 1997 S.C.C. (Cri.) 584.

the consent of the applicant under a misconception of fact, it amounted to no consent as per provisions of Section 90 IPC. In the *Williams' case*[1], it was held that where a singing master had sexual intercourse with a girl telling her that it was method to improve her voice, it amounted to rape as consent to sex act was obtained by deception and as the girl had given the consent under a misconception of fact, it was no consent under the law. In the instant case the applicant succumbed to the lust of the non-applicant no. 1 on a misrepresentation that he was a bachelor and that he would marry her. Thus, in view of the foregoing, the order of the learned Special Judge dated 26.2.02 in Sessions Trial No. 67/02 is hereby set aside and the matter is remanded to frame charges afresh. The learned trial Judge shall not be influenced by the observations of this Court hereinabove.

4. Accordingly the criminal revision is hereby allowed.

Revision is allowed.

CRIMINAL REVISION

Before Mr. Justice Uma Nath Singh
12 August, 2002.

SITARAM ...Applicant*

v.

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

Criminal Procedure Code, 1973 (II of 1974)–Sections 397, 401, Penal Code Indian, 1860 Section 302 and Juvenile Justice Act, 2000, Sections 14, 20–Age of Juvenile–Enquiry should be conducted by giving opportunities to the parties–Once matter is considered in terms of Section 20, provisions of Section 14 shall not come into play.

Thus once the matter has been considered in terms of Section 20 of the Act, the provisions of Section 14 shall not come into play.

Under the circumstances, the finding of the learned addl. Sessions Judge on the age of the Juvenile without giving an opportunity to parties for leading evidence,

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*Cri. Rev. No. 655/02. (1) (1923) I KB 340

is hereby set aside and the learned Addl. Sessions Judge is directed to decide the point afresh in terms of the relevant provisions of the Juvenile Justice Act by giving opportunities to the parties to lead their evidence within a period of fifteen days from receipt of a copy of the order of this Court.

[Paras 3 and 4]

A.K. Choubey, for the applicant.

Sanjeev Shukla, P.L., for the State.

Manish Datt, for the N.A. No.2.

Cur. adv. vult.

ORDER

UMA NATH SINGH, J:–Heard the counsel for the parties and perused the records.

1. The main submission of Mr. Choubey is that though the learned Addl Sessions Judge held the non-applicant No.2 guilty of offence under Section 302 IPC, he referred the matter to the Juvenile Board, the competent authority under the Juvenile Justice Act, 2002, for passing an order on the sentence. Mr. Choubey further submits that before holding that the non-applicant no.2 was a juvenile, the learned Addl. Sessions Judge should have conducted necessary enquiry by giving proper opportunity to the parties to lead evidence in that regard.

2. On the other hand, Shri Datt, appearing for the non-applicant No.2 submits that under the provisions of Sections 14 and 20 of the Juvenile Justice Act, 2000, the appplicant would get an opportunity to lead evidence to the contrary before the Juvenile Justice Board, being the competent authority.

3. On a due consideration of rival submissions, I am of the opinion that without giving the parties an opportunity to lead evidence, the learned Addl. Sessions Judge has given a conclusive finding on the age of the Juvenile which for the purpose of Section 20 of the Act appears to be final in nature. The Section on reproduction read as under:

> "20. Special provision in respect of pending case: Notwithstanding anything contained in this Act all proceedings in respect of a Juvenile pending in any Court in any area on the date on which this Act comes into force in that area, shall be continued in that

Court as if this Act had not been passed and if the court finds that the juvenile has committed an offence, it shall record such finding and instead of passing any sentence in respect of the juvenile, forward the juvenile to the Board which shall pass orders in respect of that juvenile in accordance with the provisions of this Act as if it had been satisfied on inquiry under this Act that a juvenile has committed the offence."

Thus once the matter has been considered in terms of Section 20 of the Act, the provisions of Section 14 shall not come into play.

4. Under the circumstances, the finding of the learned Addl. Sessions Judge on the age of the Juvenile without giving an opportunity to parties for leading evidence, is hereby set aside and the learned Addl. Sessions Judge is directed to decide the point afresh in terms of the relevant provisions of the Juvenile Justice Act by giving opportunities to the parties to lead their evidence within a period of fifteen days from receipt of a copy of the order of this Court.

5. The criminal revision is accordingly disposed of.

6. The Registry is directed to send a copy of this order directly to the concerned Sessions Judge,

C.C. as per rules.

Revision disposed of.

CRIMINAL REVISION

Before Mr. Justice Uma Nath Singh

21 August, 2002.

SURESH NARAIN ...Applicant*

v.

THE FOOD INSPECTOR and anor ..Non-applicants.

Prevenion of Food Adulteration Act, 1954 (XXXVII of 1955)–Sections 7, 13, 16–Charge–Sample found unfit for analysis by CFL–Charge not supported by material would lead to a trial in void–Charge quashed.

*Cri. Re. No. 1257/99.

On applications made by the co-accused and the applicant, the learned C.J.M Raisen under seal of the Court, sent two samples to the Director, Central Fooc Laboratory, for testing. However, as per letter dated 11.12.1998 enclosed with the reports of the Director, the samples sent with the order of the Court were found in a condition not fit for analysis for one reason or the other.

I am of the opinion that it is a case of no evidence and therefore, it would be a futile exercise to allow the trial for the charges under Section 7/16/16(i) of the Act, to continue. Accordingly, the said charges not being supported by necessary materials would lead to a trial in void.

Calcutta Municipal Corporation v. *Pawan K. Saraf and another*[1], *Standara Agency and others* v. *State of M.P.*[2], referred to.

[Paras 1 and 6

Surendra Singh, with Ashwani Dubey, for the applicant.

Smt. Chanchal Sharma, P.L. for the State.

Cur. adv. vult.

ORAL–ORDER

UMA NATH SINGH, J:–The criminal revision impugns framing of charges l the learned C.J.M. Raisen in regular trial no. 482/97 for offence under section 7/16/ 16(i) of the Prevention of Food Adulteration Act (for short 'the Act'). As per case of the prosecution, on 27.5.1996, the non-applicant no. 1, the Food Inspector. took a sample of Quality Vanilla Ice-cream–Party pack, manufactured by Fun & Food Ltd., Ujjain from the Suryodaya Restaurant, Bareli. After following the procedure, the sample was sent to the public analyst, who gave his report on 5.7.1996 wherein the milk fat was found to be 5.6.1, which is below the standard prescribec for the ice-cream. Thereafter, on applications made by the co-accused and the applicant, the learned C.J.M., Raisen under seal of the Court, sent two samples to the Director, Central Food Laboratory, for testing. However, as per letter datec 11.12.1998 enclosed with the reports of the Director, the samples sent with the order of the Court were found in a condition not fit for analysis for one reason or the other. Under the circumstances, the applicant filed an application for discharge, which has been rejected by the impugned order dated 28.7.99 on the ground tha

(1) 1999 (1) F.A.C. 8, Para-16. (2) 1998 (1) F.A.C. 188, Para-5.

the evidence of the public analyst cannot be rejected in the absence of an evidence to the contrary.

2. Shri Singh, learned senior counsel appearing for the applicant, amongst others, submits that on account of the samples being in a condition, not fit for carrying out tests/analysis, the certificate envisaged under the provisions of Section 13(3) of the Act to be issued by the Central Food Laboratory in terms of the said provision could not be issued and, thus, an important right of the applicant there under readwith th Section 13(2) has been defeated. He further submits that in the absence of a report from the Central Food Laboratory confirming the test of the public analyst, the later 4. has no meaning Mr. Singh further submits that testing of a sample by the Central th Food Laboratory was the only material which could have inculpated the applicant is for the charge framed against. Thus, it is a case of no evidence and, therefore, to pc allow the proceedings to go on would amount to an abuse of the process of the ol Court. Mr. Singh to substantiate his submissions refers to, and places his reliance fr on, a judgment of the Hon'ble Apex Court in the matter of *Calcutta Municipal* 5. *Corporation* v. *Pawan K. Saraf and another*[1], being the relavant part of the judgment on reproduction read as under:

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> "If the argument of the learned counsel for the Corporation is upheld and the certificate of the Director of Central Food Laboratory is sidelined as pleaded by him, the consequence is that there will not be anything surviving to show the quality or standard of the food articles involved in the case. Even that apart, the accused will be deprived of his statutory right to disprove the Report of the Public Analyst."

3. Mr. Singh also places reliance on a judgment of this Court in the matter of '*Standard agency and others* v. *State of M.P.*[1], being the relevant part of the Judgment on reproduction read as under:

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> "The contention appears to be justified. It appears that the samples were not taken in proper containers of adequate strength but were sent highly belatedly for analysis. Thus, the samples could not be subjected to analysis by the Central Food Laboratory. It is settled law that the right conferred on the accused petitioners under Section 13(2) is a valuable right and having been deprived of the name, they cannot be held guilty for the alleged offence."

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(1) 1999 (1) F.A.C.8. Para 16. (2) 1998 (1) F.A.C. 188, Para-5.

That apart, Mr. Singh also refers to Sub-Sections 13(2-C) and 13(2-D) and 13(3) of the Act, which read as under.

> "13(2-C) Where two parts of the sample have been sent to the court and only one part of the sample has been sent by the court to the Director of the Central Food Laboratory under sub-section (2-B), the court shall, as soon as practicable, return the remaining part to the Local (Health) Authority and that Authority shall destroy that part after the certificate from the Director of the Central Food Laboratory has been received by the Court:
>
> Provided that where the part of the sample sent by the Court to the Director of the Central Food Laboratory is lost or damaged, the court shall require the Local (Health) Authority to forward the part of the sample, if any, retained by it to the court and on receipts thereof, the court shall proceed in the manner provided in sub-section (2-B)."
>
> "13 (2-D). Until the receipt of the certificate of the result of the analysis from the Director of the Central Food Laboratory, the Court shall not continue with the proceedings pending before it in relation to the prosecution."
>
> "13(3). the certificate issued, by the Director of the Central Food Laboratory [under Sub-section (2-B)] shall supersede the report given by the public analyst under sub-section (1)."

4. Thus, according to Mr. Singh, the sum and substance of the provisions reproduced hereinabove so also the cases referred to, is that in the absence of a report from the Central Food Laboratory, on account of samples being in a condition, not fit for analysis, neither a valuable right of the applicant under Sub-Section 13(2) of the Act could be exercised nor could the provisions of the Sub-Section 13(3) come into play.

5. Smt. Chanchal Sharma, learned Panel Lawyer, appearing on behalf of the State in view of a clear legal position has no serious ground to counter the submissions of Mr. Singh except that she refers to the report of the public analyst which has found the sample as below the prescribed standard.

6. On a due consideration of rival submissons also from perusal of the citations and the provisions of law, I am of the opinion that it is a case of no

evidence and therefore, it would be a futile exercise to allow the trial for the charges under Section 7/16/16(i) of the Act, to continue. Accordingly, the said charges not being supported by necessary materials would lead to a trial in void. Hence the charges in question are hereby quashed and the impugned order dated 28.7.99 is hereby set aside. Thus the criminal revision succeeds.

C.C. as per rules.

Revision is allowed.

CRIMINAL REVISION

Before Mr. Justice S.P. Khare.
7 October, 2002.

G.P. PATHAK ...Applicant*

v.

STATE OF M.P. ..Non-applicant

Criminal Procedure Code, 1973 (II of 1974)–Sections 173(5) and 207–Prosecution required to supply copies of documents on which it proposes to rely–Floppies produced but not relied upon by prosecution–Print-out of much floppies need not be supplied to accused.

The legal position emerging from Sections 173(5) and 207 Cr.P.C. is that the prosecution is required to supply the copies of those documents to the accused on which it "proposes to rely". The accused can also request for furnishing copies of those documents which are with the prosecution or in the custody of the Court which may enable him to support his defence. As already stated, the prosecution in the present case has expressed that it does not want to rely upon any data stored in the 51 floppies and therefore these can be returned to the accused in original. The duplicates of these floppies have already been supplied. The accused may, if necessary, get the print-out of these floppies prepared if that is needed for his defence.

[Para 7]

*Cri. R. No. 375 of 2002.

G.P. Pathak v. *State of M.P., 2002.*

Arvind Chouksey, for the applicant.

G.S. Ahluwalia, Govt. Adv. for the State.

Cur. adv. vult.

ORDER

S.P. KHARE, J:–This is a revision by the accused against order dated 7.1.2002 of the Special Judge, Sagar.

2. This revision was listed before another Bench. In the order-sheet datec 3.9.2002 it is recorded: "List the matter before some other Bench". On the note -sheet put up by the Registry on 9.9.2002 Hon'ble the Chief Justice directec for posting this matter before this Bench. The petitioner through his counse submitted an application on 13.9.2002 (I.A.No. 1331 of 2002) for transferrin it to the same Bench where it was listed earlier. The direction of the Chie Justice in such matters is final and that cannot be questioned before the Benc were the case is listed in pursuance of such direction.

3. A charge-sheet under Section 173 Cr.P.C. has been filed before the Specia Judge, Sager in which the petitioner is accused of the charge under Section 13(1)(e) read with Section 13(2) of the Prevention of Corruption Act, 198 for being found in possession of the assets disproportionate to the known sources of his income. 51 floppies have also been produced with the charge-sheet. On 7.11.2000 in Criminal Revision No. 1434/2000 the following order was passec by this Court:

> "The learned counsel for the applicant states that he shall be satisfied if the data accumulated in 51 floppies, is given to him by way of its print out. The learned counsel for the respondent has also stated in his reply that the prosecution shall make a print out of the data stored in 51 floppies and shall file it in Court. Under these circumstances, there could be no objection in supplying the copies of the print out to the learned counsel for the applicant."

4. Accordingly the fifty-one floppies were handed over to the prosecution by the trial Court on 5.10.2001 for compliance with the order of this Cour These were taken to the National Informatics Centre Sagar and 51 duplicate copies of these floppies were prepared. The NIC expressed its inability t

prepare the "print-out" of these floppies for the reasons given in its letter dated 10.10.2001. In respect of 34 floppies in Boxes "B" and "C" it was said that these contain data files which can be read and printed by the "software" with which it were created and since that software is not available these files cannot be printed. For the remaining 17 floppies it was said that the files in these floppies are operating system files, game software and other utility which cannot be printed. "Directory listing" of 51 floppies were enclosed with this letter. All this material was again produced in the Court with the letter of the NIC. The duplicate 51 floppies were supplied to the defence counsel and he acknowledged the same in the order-sheet. On 10.10.2001 29 pages were supplied to the defence counsel which are in reality the print out of the "Directory listing". These are the index of the files present in the 51 floppies. These are not the print-outs of the electronic data of the various files recorded in the 51 floppies. According to the petitioner the print-outs of the data stored in 51 computer floppies would cover about 10,000 sheets. The petitioner has filed this revision for a direction to comply with the order of this Court passed on 7.11.2000.

5. After presentation of this revision petition this Court by order dated 22.7.2002 again directed the prosecution to supply the print-out of the floppies to the petitioner. On 26.8.2002 the Additional Director General of Police, Special Police Establishment was directed to remain present in the Court on 5.9.2002 to explain why the order dated 22.7.2002 of the Court remained uncomplied with. On his behalf an application has been submitted on 2.9.2002 for exemption from personal appearance. It has been clarified in this application that the 51 floppies were seized during the course of investigation and no further investigation has been done on the basis of these floppies and the prosecution does not rely upon them. It is also expressed that the prosecution has no objection if the original 51 floppies are directed to be returned to the petitioner. It is submitted that all possible efforts have been made to prepare the print out and whatever print out could be prepared has been supplied.

6. During the course of hearing of this revision it has been expressed by the Government Advocate that the prosecution has no objection if all the 51 original floppies are directed to be given to the accused as the prosecution does not want to rely upon them since it could not be found out on investigation that there is any incriminating material in the floppies to establish the charge against the accused.

7. The legal position emerging from Sections 173(5) and 207 Cr.P.C. is that the prosecution is required to supply the copies of those documents to the accused on which it "proposes to rely". The accused can also request for furnishing copies of those documents which are with the prosecution or in the custody of the Court which may enable him to support his defence. As already stated, the prosecution in the present case has expressed that it does not want to rely upon any data stored in the 51 floppies and therefore these can be returned to the accused in original. The duplicates of these floppies have already been supplied. The accused may, if necessary, get the print-out of these floppies prepared if that is needed for his defence.

8. The orders passed earlier can be modified. Instead of supplying the "print out" the original floppies can be returned to the accused and he will give back the duplicate floppies to the trial Court which were received by him from that Court.

9. It is, therefore, directed in modification of the earlier orders that the 51 original floppies be returned to the accused by the trial Court on his giving back the duplicate flopppies which he has received from the Court. Now the print-out of the floppies need not be supplied to the accused. This revision stands disposed of. No further order is required on the interim applications.

10. Before parting with the case it must be observed that on going through the contents of the petition and the interim applications submitted by the learned counsel for the petitioner it has been noticed that the language used in drafting them is not proper. The counsel should exhibit more decency and sobriety instead of using words and epithets which are derogatory, offensive and provocative. The words casting aspersion on the "integrity of the trial Court" and the use of words like "cheat and bluff", "undue support to the prosecution", tricky complicance/fraudulent compliance" are indecent and indecorous. A moutain has been made out of the mole hill because the date "5.10.2001" has been wrongly mentioned instead of "10.10'2001" in the order dated 7.1.2002. The counsel for the petitioner is advised to refrain from using such language in drafting the petitions to be submitted before this Court in future and learn the art of good advocacy.

Revision disposed of.

MISCELLANEOUS CIVIL CASE

Before Mr. Justice S.P. Srivastava and Mr. Justice R.B. Dixit.

11 March, 2002.

RAM NARAYAN ...Applicant*

v.

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

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.*

We are of the considered opinion that the amended proviso to Rule 13, Order 9, Civil Procedure Code which was added by the Act No. 104 of 1976 and came into effect from 1-2-1977 was not considered in any of the aforecited decision of this Court, which requires that no Court shall set aside a decree passed *ex-parte* merely on the ground that there has been an irregularity in the service of summons if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim. It seems to us that at the time of the hearing of the D.B. decision in case of *Laxmibai (supra)* the aforesaid amended provision of Rule 13, Order 9, Civil Procedure Code was not brought in notice of the Court.

The effect of aforesaid amended provision to Rule 13, Order 9, Civil Procedure Code will be that no notice can be held invalid merely on the ground that it was not issued in proper proforma. What is required under the amended provision is that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim. Now no *ex-parte* decree can be set aside merely on the ground that there has been an irregularity in the service of the summons.

[Paras 5 & 6]

Laxmibai v. *Keshrimal Jain*[1], *Dissented from.*

Chhutibai v. *Madanlal*[2], *Laminarayan* v. *Rameshwar*[3], *Electric Construction and equipment* v. *Parmali Wallace*[4], *Daulatram* v. *Ishwri Prasad*[5], *A-One Grantes* v. *State of U.P. and others*[6], referred to.

M.C.C. No. 185 of 2000

(1) 1995 MPLJ 105=1994 JLJ 747.
(2) 1989 MPLJ 705 = AIR 1989 MP 330.
(3) AIR 1990 MP 155.
(4) 1991 JLJ 45.
(5) 1992 (1) MPJR SN 28.
(6) 1991 JLJ 688.

Ram Narayan v. *State Bank of Indore, 2002.*

Premnath Sharma v. *State of U.P.*[1], *State of U.P.* v. *Synthetic and Chemical Ltd.*[2], *Arnit Das* v. *State of Bihar*[3], followed.

R.K. Goel, for the applicant.

None, for the non-applicants.

Cur. adv. vult.

ORDER

The Order of the Court was delivered by **R.B. DIXIT, J:**–A money suit No. 11 B/86 was filed in the Court of First Additional Judge to District Judge, Vidisha on behalf of State Bank of Indore against the petitioner and another, which was fixed for appearance of the defendants on 28.8.1986. None of the defandants though served appeared on the date fixed. Consequently resulting in ex-parte decree against the petitioner and other respondent No.2 M/s Mahalaxmi Agency. At the time of execution after about four years of passing the *ex-parte* decree, petitioner moved an application for setting aside the *ex-parte* decree under Order 9, Rule 13, Civil Procedure Code, which was registered as MJC No. 7/1990 and was dismissed vide order dated 22nd October 1997, against which Civil Revision No. 624/1998 was filed before the High Court. However, it was too dismissed vide order dated 6-8-1998 of this Court. The present review petition under Order 47, Rule 1 of Civil Procedure Code has been presented against the aforesaid order of this Court on the ground that the mandatory provision under Order 37, Rule 2(2), Civil Procedure Code was overlooked while rejecting the revision petition.

2. It is not the case of the petitioner that the summons was not served on him. What is disputed is that the proceedings were summary in nature and required to be disposed of under the provision of Order 37 of the Code of Civil Procedure, which provides the service of summons in Form 4 of Appendix B or any such other form as may be prescribed from time to time in this behalf. It is not disputed that the summons was not in the prescribed form as provided under Order 37, Rule 2(2) of Civil Procedure Code. However, it was in the form of a regular civil suit under Order 5, Rules 1 and 5 of Civil Procedure Code.

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(1) (1997) 4 SCC 552. (2) (1991) 4 SCC 139. (3) (2000) 5 SCC 488.

3. The learned Single Judge while disposing of the civil revision had observed that the notice available on record is under the signatures of the petitioner and that the copy thereof was received by him. The report of the Process Server shows that it was served on the petitioner on 5-6-1986 for the date fixed as 28-8-1986, but the petitioner had failed to appear. The other defendant was served on 4-5-1986 but he also did not appear before the Court. The learned trial Court found that there was no reasonable cause for absence of petitioner in the Court on 28-8-1986 and also that thereafter the application for setting aside the decree was filed after about four years and was highly belated. It was further observed that even the notice to the petitioner was not issued in the prescribed proforma, it was still obligatory on the petitioner to attend the Court on the fixed date after he had received the notice. The petitioner had sufficeint time, yet he did not care to attend the Court even to object that the notice was not on prescribed proforma. Such lapse was only an irregularity and did not vitiate the further proceedings.

4. The learned counsel of the petitioner has submitted before us that in a summary proceedings under Order 37 of the Code of Civil Procedure, it is obligatory on the part of the trial Court to have issued the notice in the prescribed proforma as provided under Order 37, Rule 2(2) of Civil Procedure Code. In absence of notice in the prescribed form it cannot be considered to be a valid service on the petitioner/ defendant and no decree even *ex-parte* could be passed in absence of a valid notice. This material aspect has escaped from the notice of this Court while disposing of the Civil Revision. Reliance is placed on a D.B. decision of this Court in case of *Laxmibai* v. *Keshrimal Jain*[1], wherein after taking into consideration a single Judge decision in case of *Chhutibai* v. *Madanlal*[2]. *Laminarayan* v. *Rameshwar*[3]. *Electric Construction and equipment* v. *Parmali Wallace*[4] and *Daulatram* v. *Ishwari Prasad*[5], it was observed that Order V, Rule 2, Civil Procedure Code, in mandatory terms provides that every summons shall be accompanied by a copy of the plaint or, if so permitted, by a concise statement. Accordingly, if the summons are not accompanied by a copy of the plaint, it cannot be said that there is due or valid service on the defendant and if there is no valid service, a decree on such defendant has to be set aside. Similar view has also been expressed in another single Judge decision of this Court in case of *Shekh Wahid* v. *Gokulchand and another*[6].

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(1) 1995 MPLJ 105=1994 JLJ 747. (2) 1989 MPLJ 705=AIR 1989 MP 330.
(3) AIR 1990 MP 155. (4) 1991 JLJ 45. (5) 1992 (1) MPJR SN 28.
(6) (2001)3 SCC 537.

5. We have heard the learned counsel of the petitioner and have perused the aforecited decision of this Court as well as relevant documents available on the file of aforesaid civil revision of this Court. We are of the considered opinion that the amended proviso to Rule 13, Order 9, Civil Procedure Code which was added by the Act No. 104 of 1976 and came into effect from 1-2-1977 was not considered in any of the aforecited decision of this Court, which requires that no Court shall set aside a decree passed *ex-parte* merely on the ground that there has been an irregularity in the service of summons if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim. It seems to us that at the time of the hearing of the D.B. decision in case of *Laxmibai (supra),* the aforesaid amended provision of Rule 13, Order 9, Civil Procedure Code was not brought in notice of the Court.

6. The effect of aforesaid amended provision to Rule 13, Order 9, Civil Procedure Code will be that no notice can be held invalid merely on the ground that it was not issued in proper proforma. What is required under the amended provision is that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim. Now no *ex-parte* decree can be set aside merely on ground that there has been an irregularity in the service of the summons. In so far as the present case is concerned, it is not disputed that the petitioner was served well in time to appear and take objection if, any in respect of the proforma of the summon issued to him. However, it seems to us that the defendant had deliberately avoided to appear for taking advantage of the irregularity in issuance of the notice upon him.

7. The Hon'ble Apex Court in case of *Premnath Sharma* v. *State of U.P.*[1] has observed that where from a bare perusal of the previous judgment of Apex Court found that the legal aspect of some questions was never canvassed, the decision cannot be said to be binding and precedents *sub silentio* and without argument are of no moment. It was further observed in case of State of *U.P.* v. *Synthetic and Chemical Ltd.*[2], that a decision which is not expressed and is not founded on reasons nor it proceeds on consideration of an issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141 of the Constitution.

8. It was pointed out by the Apex Court in case of *Arnit Das* v. *State of Bihar*[3], that a decision not expressed, not accompanied by reasons and not

(1) (1997)4 SCC 552. (2) (1991)4 SCC 139. (3) (2000)5 SCC 488.

proceeding on such consideration of an issue cannot be determined to be a law declared to have a binding effect as is contemplated by Article 141. That which was escaped in the judgment is not the *ratio decidendi*. This is the rule of *sub silentio*, in a technical sense when a particular point of law was not consciously determined. In case of *A-One Grantes* v. *State of U.P. and others*[1], it was further made clear that as the question regarding applicability of Rule 72 of U.P. Minor Minerals (Concession) Rules. 1963 having not been even referred to, much less considered by Supreme Court in the earlier appeals, it cannot be said that the point is concluded by the same and no longer *res integra* and accordingly the Supreme Court is called upon to decide the same.

9. Taking into consideration the implications arising under the aforesaid decisions of the Apex Court, we are of the considered opinion that in absence of consideration of the amended proviso to Rule 13, Order 9, Civil Procedure Code as referred hereinabove, the D.B. decision in case of Laxmibai and othes (supra) had no binding force regarding technical irregularities in service of summons, where the summons was duly served and defendant had sufficient time to appear on the date fixed. In our opinion, therefore the impugned order of this Court passed in aforesaid civil revision suffers with no legal infirmity.

10. Consequently, the review petition is devoid of merit and is dismissed accordingly.

Petition dismissed.

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice S.L. Kochar.

18 March, 2002.

KAUSHAL KISHORE RAMKRISHNA BIYANI ...Applicant*

v.

UNION OF INDIA ...Non-applicant

Income Tax Act, Indian (XLIII of 1961) (as amended)–Section 276–B–Allegation of not deducting tax at source–Only penalty is provided and not prosecution–Compliant not tenable.

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* Misc. Cr.C.No. 4703 of 2001. (1) (2001)3 SCC 537.

Kaushal Kishore Ramkrishna Biyani v. *Union of India, 2002.*

In the present matter, there is no saving clause for applicability for inappplicabilit of the Amended Act. This is the general rule of provision of interpretation c statute that in procedural law if no saving clause, prescribing its retrospective or prosepective effect, is given, then the procedural law will have retrospective effect. But for penal law, the position is *vice versa*. In the present matter, there is no savin clause prescribing applicability of old penal law for a pending case. Therefore, since the Amended Act has come into force on 1-4-1989 and the complaint was filed on 14-2-1992, the complaint will be governed by the Amended Act and according to the Amended Act, Section 276B of the Income-tax Act for failure to deduct the tax at source only penalty is prescribed by the department and not the prosecution.

In view of the aforesaid analysis this Court is of the view that the complain pending against the applicant before the Additional Chief Judicial Magistrate (Economic Offences) Indore vide Cr. Case No. 10/1992 is not tenable. Consequentl the same is dismissed.

[Paras 8 and 9

Parmanad Das Brij Bhushan Das and others v. *Union of India*[1], *Salwan Construction Co. and others* v. *Union of India and others*[2]; relied on.

S.C. Bagadiya, with Chhabra, for the applicant.

Patankar, for the non-applicant.

Cur. adv. vult.

ORDER

S.L. KOCHAR, J (ORAL):–This is an application filed by the applicant under Section 482 of the Code of Criminal Procedure for quashment of Criminal Case No. 10/1992 pending before the Additional Chief Judicial Magistrate, (Economic Offences), Indore.

2. The Non-applicant-Income Tax Department filed a criminal complaint on 14-2-1992 alleging that for the assessment-year 1987-1988 corresponding to the previous year ending 30th June, 1987, the firm M/s Shrinath Drillers did deduct TDS at 1%. The applicant Kaushal Kishore was the acting partner o

(1) (2001) 29 I.T.C. 287. (2) 2000 I.T.R. 175 (Vol. 245.)

the firm. After the default was pointed out to the firm and its partner by the Non-applicant-Department, they deposited the amount of TDS from their own account and submitted that this was the first year of their business, they were not aware of the statutoty requirement in this regard under the Income-tax Act.

3. It appears that the learned Trial Court has taken cognizance only againts Kaushal Kishore, the applicant and framed the charge punishable under Section 276-B of the Income-tax Act.

4. The submission of the learned counsel for the applicant is that prior to 1-4-1989, the provision under Section 276-B was prescribing that if a person fails to deduct or after deducting fails to pay the advance, as required by or under the provisions of sub-section (9) of the Section 80E or Chapter 17-B shall be punishable. The aforesaid provision of Section 276-B was amended by the Direct Tax Laws (Amendment Act) 1987 with effect from 1-4-1989 which prescribes punishment for failure to pay tax deducted at source. Thus, upto 1-4-1989, failure to deduct TDS was also an offence but after 1-4-1989, only if a person deducted the TDS, but did not pay the tax then it was an offence.

5. He further contended that the new Section 271-C was introduced with effect from 1-4-1989 to provide for penalty imposable on persons who fail to deduct the TDS as required by law. Because of this amendment after 1-4-1989, failure to deduct TDS cease to be an offence, but was liable for penalty under the Act and this has been explained by the Respondent-Department-Circular No. 551 dated 23-1-1990 which reads as under:–

> "17.2 Substitution of a new Section for Section 276B to exclude failure to deduct tax at source from prosecution provisions and to provide prosecution only for failure to pay tax deducted at source to the Government. Under the old provisions of Section 276 B, the following defaults were laible to prosecution:
>
> (i) failure to deduct tax at source under the provisions of Chapter XVII-B.
>
> (ii) failure to pay to the Government the Tax so deducted at source."

6. He further contended that Section 80E has been omitted by the Amending

Act of 1987, reference to the said Section 276-B is no longer necessary. Failure to deduct tax at source now attracts penalty under the new Section 271-C. In view of the aforesaid changed law that on the date when the complaint was filed, failure to deduct tax was no more an offence. Only if the tax was deducted, but not paid, then it was an offence and for this the law has provided for imposition of penalty. In the case of petitioner's firm, it did not deduct TDS, but had still deposited it. Therefore, no offence can be made out against the accused and the complaint was liable to be quashed by the learned Magistrate. He relied on the judgments in *Parmanand Das Brij Bhushan Das and others* v. Union of India[1], and *Salwan Construction Co. and others* v. *Union of India and others*[2]. Both these judgments have been pronounced by the Madhya Pradesh High Court and Delhi High Court relying on the Supreme Court judgment rendered in *Kolhapur Canesugar Works Ltd. and another* v. *Union of India and others*[3].

7. Learned counsel for the Non-applicant has submitted that there is no saving clause in the Amendment Act about retrospective applicability of Amendment Act. Therefore, the complaint was file well within the ambit of old law because, the incident had taken place when the old law was prevalent. But, he has not answered the question that the complaint was filed after 1-4-1989 i.e. on 14-2-1992 after the new Amended-Act came into foce, and the Supreme Court in para 38 has held that:

> "At common law, the normal effect of repealing a statute or deleting a provision is to obliterate it from the statute book as completely as if it had never been passed, and the statute must be considered as a law that never existed. To this rule, an exception is engrafted by the provisions of Section 6(1). If a provision of a statute is unconditionally omitted without a saving clause is favour of pending proceedings, all actions must stop where the omission finds them, and if final relief has not been granted before the omission goes into effect, it cannot be granted afterwards. Savings of the nature contained in Section 6 or in special Acts may modify the position. Thus the operation of repeal or deletion as to the future and the past largely depends on the saving applicable. In a case where a particular provision in a stature is omitted and in its place another provision dealing with the same contingency is introduced without a saving clause in favour of pending

(1) (2001) 29 ITC 287. (2) 2000 (Vol. 245) ITR 175. (3) AIR 2000 SC 811

proceedings then it can be reasonably inferred that the intention of the legisture is that the pending proceedings shall not continue, but a fresh proceeding for the same purpose may be initiated under the new provision."

8. In the present matter, there is no saving clause for applicability or inappplicability of the Amended Act. This is the general rule of provision of interpretation of statute that in procedural law if no saving clause, prescribing its retrospective or prosepective effect, is given, then the procedural law will have retrospective effect. But for penal law, the position is *vice versa*. In the present matter, there is no saving clause prescribing applicability of old penal law for a pending case. Therefore, since the Amended Act has come into force on 1-4-1989 and the complaint was filed on 14-2-1992, the complaint will be governed by the Amended Act and according to the Amended Act, Section 276B of the Income-tax Act for failure to deduct the tax at source only penalty is prescribed by the department and not the prosecution.

9. In view of the aforesaid analysis this Court is of the view that the complaint pending against the applicant before the Additional Chief Judicial Magistrate (Economic Offences) Indore vide Cr. Case No. 10/1992 is not tenable. Consequently the same is dismissed.

Appeal dismissed.

INCOME TAX REFERANCE.

Before Mr. Justice J.G. Chitre and Mr. Justice Shambhoo Singh.

12 April, 2001.

KESHARIMAL BAPULAL (HUF) ...Applicant*

v.

COMMISSIONER OF INCOME TAX ...Non-applicant

Income Tax Act, Indian (XLIII of 1961)–Sections 179 and 263–Reopening assessment–Power of Commissioner–Unless the order is erroneous or causing prejudice to the Revenue it is not open to the

*I.T.R. No. 25/1997

Kesharimal Bapulal (Huf) v. *Commissioner of Income Tax 2001.*

Commissioner to invoke jurisdiction and power as indicated by Section 263 (1) of the Act.

In the present matter the CIT concluded that the said deed cannot be treated to be conveying a family arrangement. He was right in coming to that conclusion in view of provisions of Section 171(9) of I.T. Act which were to come in force by 31-12-1978. He was empowered to come to a conclusion that the said document was not effecting a family arrangement as contended by the petitioners-assessees and it was to be treated as Joint Hindu Family by ignoring the said document indicating the family arrangement as the Assessees wanted to convey. But it was necessary for him to note that the assessees had paid the tax in view of the Assessment Order for the concerned year because the said deed came in force and in existence from 21-10-1979. Being that, he should have come to a conclusion as a natural corollary to this, that assesses continued their existence as "HUF" in spite of execution of the said document. He could have come to a conclusion that the status of the Assessees was to be treated as "HUF" from 31-12-1978 onwards. He could have given a direction to the Income Tax Officer for treating them as "HUF" even after 31-12-1978 and for the Assessment Year commencing from 21-10 1979. He could have also directed the I.T.O. to treat them as "HUF" even for the year which was in question. But it was necessary for him to note that they had paid the tax for that year treating themselves as 'HUF'. Therefore, he should have come to a conclusion that in spite of that deed executed, there was no prejudice to the interest of the Revenue. But instead of doing that, CIT set-aside the entire assessment order. Being it so, the said order will have to be treated as improper and incorrect.

Unless the order which was passed by Income tax Officer was erroneous and unless that was causing prejudice to the interest of Revenue, it was not open for the CIT to invoke the jurisdiction and power in view of section 263 of the I.T. Act and to call the record of the proceeding in which the concerned order was passed by the Income Tax Officer and to go on for examining its correctness, propriety and legality. The CIT could not invoke the jurisdiction and power as indicated by section 263(1) of the I.T. Act unless these two factors are depicted by the matter. They are to be present independently and jointly. He cannot invoke the jurisdiction in view of section 263(1) of the I.T. Act if either of these two factors is absent. The presence of these two factors independently and jointly would only confer the power and jurisdiction on CIT to call for the

record of the proceeding and to examine its propriety, correctness and legality. [Paras 8 and 13]

H.H. Maharaja Raja Pawar Dewas v. *Commissioner of Income Tax*[1], *Commissioner of Income Tax* v. *Sharavan Kumar Swarup and Sons*[2], referred to.

P.M. Choudhary with Anil Jain, for the applicant.

For Department of Income Tax : R.L. Jain, for the non-applicant.

Cur. adv. vult.

JUDGMENT

The Judgment of the Court was delivered by **J.G. CHITRE, J:**–We have been called on to answer three questions formulated for recording our opinion on reference. Those three questions can be enumerated as below:–

> "1.Whether on facts and in the circumstances of the case, the Tribunal was right in upholding the order of the Commissioner of Income Tax under Section 263 which was passed without giving opportunity to all the members of the family (co-parceners) who were adversely affected by virtrue of provisions of section 171 (9) of the I.T. Act on the ground that the notice to the Karta was sufficient compliance with the provisions of section 263?
>
> 2. Whether on the facts and in the circumstances of the case, the Commissioner had jurisdiction under Section 263 of the Act to set aside the order passed by the Income Tax Officer under Section 171 of the Act recognising family settlement, when there was no loss of revenue as a result of assessment for the year in question?
>
> 3. Whether on the facts and in the circumstances of the case, the Tribunal was justified in holding that the CIT was justified in setting aside order of the Income-Tax Officer and further interpreting the same to be setting aside for limited purpose only when the CIT had cancelled the order of the Income Tax officer which became non est in law?"

(1) (1982) 138 I.T.R. 518.

(2) (1998) 232 ITR 123.

Kesharimal Bapulal (Huf) v. *Commissioner of Income Tax 2001.*

2. Some facts need to be stated for the purpose of acquainting with the case for catching the gist point of the controversy. The petitioners (hereinafter referred to as "the assessee" for convenience) were being assessed as 'HUF". They stated that there were some family disputes between the members and on account of that the 'Karta' of the family was disturbed and on account of that disturbance in the family, a 'family arrangement' was effected on 21-10-1979 (On Diwali as the accounting year was commencing from the 1st day of Diwali-Padwa and was ending by the end of the last day of Diwali). The Returns were filed for Assessment Year 1980-1981 (relevant period commencing from1-11-1978 to 20-10-1979). The assessees averred that they had paid the tax in respect of the concerned Assessment Year treating themselves to be 'HUF' and, therefore, there was no loss of revenue to the I.T. Department. The Income Tax Officer accepted their contentions and passed the assessment order on 25-10-1982. In that order he accepted the contention of the assessees in respect of 'family arrangement' and a consequential-deed which was executed by the members of assessees 'HUF'.

3. In view of provisions of section 263 of I.T. Act, CIT did not accept the said deed conveying 'family arrangement' and held that it was 'partial partition'. By his order dated 5-10-1984 he set-aside the order which was passed by Income-Tax Officer totally and directed him to make the assessment afresh by treating them as 'HUF' and treating that deed as a document of partial partition.

4. The assesses appealed to ITAT assailing the said order passed by the CIT. I.T..A.T. confirmed the order passed by the C.I.T. Being aggrieved by the said order passed by the ITAT, the petitioner submitted a petition before this Court making a prayer that ITAT be directed to make reference probably on the questions mentioned above. The said petition was allowed and this Court sought the reference from I.T.A.T. on the questions mentioned above.

5. Shri Choudhary, counsel appearing for the petitioners submitted that in view of provisions of section 263 of I.T. Act, CIT had no jurisdiction to reopen the assessment done by the I.T.O. by his order dated 25-10-1982 because obviously the said deed was executed after 20-10-1979. He submitted that the petitioners had paid the tax treating themselves to be 'HUF' and therefore, there was no loss of revenue as contemplated by provisions of section 263 of the I.T. Act. He further pointed out that being so, the Income-Tax Officer was

not in error at all. Shri Coudhary submitted that for the purpose of invoking the jurisdiction and power in view of section 263 of the I.T. Act two ingredients are existing (i) that the order passed by the Assessing Officer should be erroneous and (ii) it should be prejudicial to the interest of revenue. He submitted that if these two ingredients are present then only the Commissioner would be entitled to call for and examine the record of any proceeding under the I.T. Act and can either confirm the order passed by the Assessing Officer or set it aside. Shri Chouhan submitted that in the present case the petitioner had paid the tax as 'HUF' in respect of the concerned year and, therefore, there was no prejudice either caused or likely to be caused to the interest of revenue and secondly, being it so, the Income Tax Officer was not in error at all.

6. Section 263 (1) of the I.T. Act provides that the Commissioner may call for and examine the record of any proceeding under this Act and if he considers that any order passed therein by the Assessing Officer is erroneous insofar as it is prejudicial to the interest of the revenue, he may after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment.

This relates to question No. 1 formulated for reference as well as question No. 2 and, therefore, while answering these questions both these questions will have to be considered together.

7. Section 171(9) of the I.T. Act provides that 'Notwithstanding anything contained in the foregoing provisions of this section, where a partial partition has taken place after the 31st day of December, 1978, among the members of a Hindu undivided family hitherto assessed as undivided.–

> (a) no claim that such partial partition has taken place shall be inquired into under sub-section (2) and no finding shall be recorded under sub-section (3) that such partial partition had taken place and any finding recorded under sub-section (3) to that effect whether before or after the 18th day of June, 1980, being the date of introduction of the Finance (No.2) Bill, 1980, shall be null and void;
>
> (b) such family shall continue to be liable to be assessed under this Act as if no such partial partition had taken place;

(c) each member or group of members of such family immediately before such partial partition and the family shall be jointly and severally liable for any tax, penalty, interest, fine or other sum payable under this Act by the family in respect of any period, whether before or after such pertial partition;

(d) the several liability of any member or group of members aforesaid shall be computed according to the portion of the joint family property allotted to him or it at such partial partition.

It has been further provided that the provisions of this Act shall apply accordingly. An Explanation has been afforded to this one by providing:

(a) 'partition means–

(i) where the property admits of a physical division, a physical division of the property, but a physical division of the income without a physical division of the property producing the income shall not be deemed to be a partition; or

(ii) where the property does not admit of a physical division, then such division as the property admits of, but a mere severance of status shall not be deemed to be a partition;

(b) "partial partition" means a partition which is partial as regards the persons constituting the Hindu undivided family, or the properties belonging to the Hindu undivided family, or both.

8. In the present matter the CIT concluded that the said deed cannot be treated to be conveying a family arrangement. He was right in coming to that conclusion in view of provisions of section 171(9) of I.T. Act which were to come in force by 31-12-1978. He was empowered to come to a conclusion that the said document was not effecting a family arrangement as contended by the petitioners-assessees and it was to be treated as Joint Hindu Family by ignoring the said document indicating the family arrangement as the Assessees wanted to convey. But it was necessary for him to note that the assessees had paid the tax in view of the Assessment Order for the concerned year because the said deed came in force and in existence from 21-10-1979. Being that, he should have come to a conclusion as a natural corollary to this, that assesses continued their existence as "HUF" in spite of execution of the said document.

Kesharimal Bapulal (Huf) v. *Commissioner of Income Tax 2001.*

He could have come to a conclusion that the status of the Assessees was to be treated as "HUF" from 31-12-1978 onwards. He could have given a direction to the Income Tax Officer for treating them as "HUF" even after 31-12-1978 and for the Assessment Year commencing from 21-10-1979. He could have also directed the I.T.O. to treat them as "HUF" even for the year which was in question. But it was necessary for him to note that they had paid the tax for that year treating themselves as 'HUF'. Therefore, he should have come to a conclusion that in spite of that deed executed, there was no prejudice to the interest of the Revenue. But instead of doing that, CIT set-aside the entire assessment order. Being it so, the said order will have to be treated as improper and incorrect.

9. The CIT committed an error because when he treated the assessees as 'HUF' he was to treat them as such. Shri Choudhary has placed reliance on the judgment in the matter of *H.H. Maharaja Raja Pawar Dewas* v. *Commissioner of Income Tax*[1] were the Division Bench of this Court held that invoking the powers and the jurisdiction indicated by section 263(1) of the I.T. Act two prerequisites must be present before the Commissioner (i) that the order of the Income Tax Officer must be erroneous; (ii) that the error must be such that it is prejudicial in the interest of the Revenue. This Court further held that if the order is erroneous but it is not prejudical to the interests of the Revenue, the Commissioner cannot exercise within its power under section 263(1) of the I.T. Act, C.I.T. should have noted that in the present case though the Income Tax Officer was wrong in coming to the conclusion that the said deed conveyed a family arrangement, the assessees were liable to be assessed as 'HUF', no prejudice was caused to the interest of Revenue.

Shri Choudhary further placed reliance on the judgment of Division Bench of Allahabad High Court in the matter of *Commissioner of Income Tax* v. *Shravan Kumar Swarup and Sons*[2]; wherein the Division Bench of Allahabad High Court held that the assessee Hindu undivided family consisted of the Karta SKS, his wife, AKS, and two minor children, HKS, and NS. The Karta of the Hindu Undivided Family by virtue of powers and rights vested in him, voluntarily and with the consent of the other members of the family effected a partial partition in respect of the share capital and rights in the profits of a firm in two groups on January 1,1971.

(1) (1982) 138 I.T.R. 518. (2) (1998) 232 ITR 123.

The two groups consisted of SKS and his minor daughters, NS, on one hand and AKS and his minor son, HKS, on the other. The total share capital invested by the assessee family through its Karta in the said firm amounting to Rs. 50,000/- was divided into two equal shares between the two groups. It was necessary for the Income Tax Officer acting in view of provisions of section 171 of the I.T. Act to issue notices to all the members for affording them the opportunity of being heard. It held, that was necessary in accordance with rules of natural justice. The Division Bench of Allahabad High Court in that matter held that after giving notice of inquiry to all members of the family the order in question could be reversed or cancelled by the Commissioner of Income Tax under section 263(1). It was further held that without affording the opportunity of being heard to each member of the said family, cancellation of the order was against the rules of natural justice.

10. In the present case while setting aside the order passed by the Income Tax Officer, CIT did not issue the notices qua each member but issued the notice to Karta of the said family and treated that issuing a notice to him and service of that notice on him was compliance of the procedure which has been laid down by section 263 of the I.T. Act. CIT fell in the error of contradiction because by overruling the theory of family arrangement he concluded that the assesee was "HUF'. It means that he passed an order which was prejudicial to the interest of each member of HUF. When that was so, it was necessary for him to afford them the opportunity of being heard independently. He could not have passed an order to the prejudice of the members of the said HUF without affording them the opportunity of being heard. It was not proper and correct on his part to issue notice to Karta of the said 'HUF' only and treating him to represent the 'HUF' and treating him sufficient enough in legal sense for protecting the interest of each member of the 'HUF'. It was necessary for him to note that by passing that order he was depriving each member of the benefit to which they were to acquire by the virtue of the order which was passed by the Income Tax Officer.

11. Apart from that, it was necessary for him to hold the inquiry and for that it was necessary for him to issue notices to each member and to hear each member while conducting the inquiry as contemplated by provisions of section 263 of the I.T. Act.

Kesharimal Bapulal (Huf) v. *Commissioner of Income Tax 2001.*

12. The Tribunal did not consider this important aspect of the matter while passing the order which is being assailed, confirming the order which was passed by CIT.

13. Unless the order which was passed by Income tax Officer was erroneous and unless that was causing prejudice to the interest of Revenue, it was not open for the CIT to invoke the jurisdiction and power in view of section 263 of the I.T. Act and to call the record of the proceeding in which the concerned order was passed by the Income Tax Officer and to go on for examining its correctness, propriety and legality. The CIT could not invoke the jurisdiction and power as indicated by section 263(1) of the I.T. Act unless these two factors are depicted by the matter. They are to be present independently and jointly. He cannot invoke the jurisdiction in view of section 263(1) of the I.T. Act if either of these two factors is absent. The presence of these two factors independently and jointly would only confer the power and jurisdiction on CIT to call for the record of the proceeding and to examine its propriety, correctness and legality.

14. Thus, in view of the discussions above, this Court answers both the questions in negative and in favour of the petitioners the assesses as natural corollary of that, this Court answers question No.2 by holding that the Tribunal was not justified in holding that CIT was justified in setting aside the order of Income Tax Officer and further interpreting the same to be setting-aside the order passed by the Income Tax Officer for limited purpose to the extent of setting aside the entire order. It should have held that the CIT was right in holding that the petitioners-assessees were 'HUF' and were liable to be assessed and taxed as such from 21-10-1979 onwards. The Tribunal should have held that the assessment and levy of tax for the year prior to 21-10-1979 was not fit to be reopened, in the circumstances and facts of this case.

15. Thus, this petition stands allowed. However, with no order as to cost, keeping in view the peculiar facts and circumstances of this case. Thus, questions referred to are answered.

Petition allowed.

FULL BENCH

Before Mr. Justice, Dipak Misra, Mr. Justice S.K. Kulshrestha & Mr. Justice Krishna Kumar Lahoti.

3 October, 2002

LAXMI NARAYAN ...Appellant*

v.

SHIV LAL GUJAR & ors. ...Respondents

Letters Patent (Nagpur) Clause 10 and–Civil Procedure Code, (Amendment) Act, 2002, Section 100-A–Insertion of Section 100-A–Affect of insertion of Section 100-A CPC on pending Letters Patent Appeal–Letters patent is substantive right, vested from inception of the suit–Provision of Section 100-A not applicable on Letters Patent Appeals pending on 1.7.2002, the date of insertion of section 100-A–Enactments dealing with substantive rights are prospective unless expressed contrarily.

In view of the aforesaid premises it is clear as day that when an appeal is filed from a judgment and decree passed in First Appeal by a learned Single Judge there is no restriction and finding of fact recorded by a learned Single Judge is also subject to assail before the Division Bench. Conditioning the appeal to the narrowness or coarctation that of a second appeal or review is unwarranted. In a Letters Patent Appeal the Court has the power to allow the appeal in entirety, partially modify the judgment or the order which is the subject matter of assail, remand the matter or pass such order as may be permissible in law. Thus, the whole cyclorama is open and to give a comatose to the same is impermissible. Thus, a Letters Patent Appeal is, irrefragably, a vested right.

Thus, in our considered view, though there is use of term 'without prejudice to the generality of the provisions of section 6 of the General Clause Act' the same does not entirely save the vested rights of appeal in a suitor as that would defeat the very purpose of Legislation, scheme of the amending statute, and also would cause violence to the reading of section 100-A of the Code which is not allowable and we are not inclined to think that the said provision is totally prospective. It is so to a limited extent.

Another facet is required to be kept in mind. The purpose of Legislature was to curtail the second appeals in the third court. The Legislature in its wisdom constricted the right of apeal to a singular one. To do so the Legislature used the words differently in the said section. If it desired to annual the pending appeals it could have used the words 'has been'. It could have expressly stated so. There is nothing in the statute book to exposit a clear or necessary intendment that the provision has to be made totally retrospective taking a way the rights of hearing of appeals preferred before

* L.P.A. No. 641/2000

that cut of date. The legislature never intended to make the said provision applicable to the pending appeals. The use of words in eth Section does not clearly so convey When a provision has been expressly so worded there is no justification to stretch in either beckward of forward. Such stretching, in our considered opinion, is unnecessary and unwarranted. The reasoning that when the pending appeals have not been saved under Section 16 of the Amending Act is totally inconsequential because of non-saving of the same does not by necessary corollary nullify the right of hearing of the pending appeals preferred before the date stipulated in the stature book. Thus, we are of the considered opinion, that no appeal which is covered within the ambit and sweep of the language used under section 100-A of the Code would lie after 1.7.2002. It is prospective to that extent and, if we allow oueselves to say so, it has limited retroactivity by which the vested rights on a suitor qua a suit filed prior to 1-7-2002 is not saved but the fate of pending appeals before the cut off date remains unaffected.

[Paras 13,44 & 45]

P.V. Hemlatha v. *Kattamkamandi Puthiya Maliackal Sacheeda and anr.*[1]; *Colonial Sugar Refinery Co. Ltd.* v. *Irving*[2]; *Radhakishan Laxminarain* v. *Sridhar*[3]; *Lal Ragho Shah* v. *The State of M.P.*[4]; *Smt. Devi* v. *Dukhi Sao and anr.*[5]; *Jagatguru Shri Shankaracharya Jyotish Peethadhiswami Shri Swami Swaroopanand Saraswati* v. *Ramji Tripathi and others*[6]; *Srichand* v. *Tejinder Singh and others*[7]; *Smt. Annapurna Devi and others* v. *Akbar Patel & ors.*[8]; *Lakshmi Narain* v. *First Additional District Judge, Allahabad*[9]; *Ambica Quarry Works etc.* v. *State of Gujarat and others*[10]; *General Manager, Northern Railway & anr.* v. *Sarvesh Chopra*[11]; *The State Financial Corporation and anr.* v. *M/s Jagdamba Oil Mills & anr.*[12]; *Ganapat Giri* v. *IInd Additional District Judge, Balia and ors.*[13]; *Mahesh Choubey* v. *M.M. Dubey*[14]; *Arul Nadar* v. *Authorised Officer, Land Reforms*[15] *Jagdish Chandra Patnaik* v. *State of Orissa*[16]; *Harshad Mehta& ors.* v. *State of Maharashtra*[17]; *Union of India* v. *Elphinstone Spg. And Wvg. Co. Ltd.*,[18]; *P. Nirathilengam* v. *Annaya Nadar & ors.*[19]; *Gurudev Datta VKSS Maryadit and others* v. *State of Maharashtra and others*[20]; *Shyam Sunder and ors.* v. *Ram Kumar and anr.*[21]; *Harbhajan Singh* v. *Press Council of India*[22] *D.R. Venkatachalam* v. *Dy. Transport Commissioner*[23]; *Bidie* v. *General Accident, Fire and Life Assurance Corpn.*,[24]; referred to.

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(1) (2002) 5 SCC 548 (2) (1905) AC 369 (3) AIR 1950 Nagpur 177.
(4) 1967 MPLJ 237 (5) 1974 SC 2048 (6) 1979 MPLJ 305=AIR 1979 MP 50
(7) 1979 MPLJ 170 MPLJ 170 = AIR 1979 MP 76 (8) AIR 1974 Orissa 162
(9) Allahabad AIR 1964 SC 489 (10) AIR 1987 SC 1073 (11) (2002) 4 SCC 45
(12) 2002 AIR SCW 500 (13) AIR 1986 SC 589 (14) 1994 MPLJ 657 (FB)= AIR 1994 MP 151
(15) (1998) 7 SCC 157 (16) (1998) 4 SCC 456 (17) (2001)8 SCC 257
(18) AIR 2001 SC 724 (19) (2001)9 SCC 673. (20) AIR 2001 SC 1980.
(21) (2001) 8 SCC 24. (22) (2002) 3 SCC 722 (23) (1977)2 SCC 273
(24) (1948)2 All ER 995, 998.

Laxmi Narayan v. *Shiv Lal Gujar, 2002.*

Sachish Chandra Jain and anr. v. *Shri Bhagwan and ors.*[1]; overruled.

N.S. Kale, with Harvinder Singh, for appellant.
Divesh Jain, for respondent No.1.
S.K. Yadav, for the respondent No.7
Ravish Agrawal, Amicus curiae.

Cur. adv. vult.

JUDGMENT

Dipak Misra, J:– The term 'Law' is applied and taken recourse to herald the incandescent attributes of civilisation with strupendous felicity and the advancement of society is conditioned by the appropriate legal evolution. Sometimes the law is conceived as *'jus naturale'*, at times as *'jus civile'* and some other times it is equated with *'jus honorarium'*. But the term *'jus'* is always important, *'jus'* should never succumb to *'joss'*. That is why it has been said that the law is not the study of words alone but a penetration into the study of nature within and nature without which are projected through words that have the moving power of life. For that Simon pure reason William Shakespeare spoke *"The Law hath not been dead, though it hath slept."* We have embarked upon the subject with the aforesaid prefatory note as our essay and venture is to find out whether by substitution of section 100-A of the Code of Civil Procedure, 1908 (in short 'the Code') the Legislater by taking recourse to dexterous method has completely obfuscated the rights of a litigant to maintain a Letters Patent Appeal in invocation of clause 10 of the Letters Patent against the judgment and decree or order passed by a learned Single Judge from an original appellate decree or order or still there is some arena which is saved, being unaffected. In this setting we are obliged to cogitate to find out the legitimate and purposive acceptation of the provision in question.

2. Before we enter into the spectrum of rumination we think it seemly to exposit briefly the factual context in regard to travelling of the matter to a lerger Bench. In L.P.A. No. 461/2000 defensibility of the judgment and decree dated 19-6-2000 passed by a learned Single Judge in the First Appeal No. 50/96 affirming the judgment and decree dated 8-1-1996 passed by the learned First Additional District Judge, Hoshangabad was called in question. When the said appeal was listed for hearing, Mr. Divesh Jain, learned counsel appearing for the respondent No.1 placing reliance on the amended provision i.e. section 100-A of the Code that has been brought on the statute book by The Code of Civil Procedure (Amendment) Act, 2002 (in short 'the Amending Act') and the decision rendered by a Division Bench in LPA No. 31/91 (*Sachish Chandra Jain and another* v. *Shri Bhagwan and others*[2]) raised a premilinary objection that the appeal was not maintainable and deserved to be dismissed

(1) MPLJ 50 =2002 (11) MPJR 138. (2) 2002 (3) MPLJ 504 = 2002 (II) MPJR 138

on that score. The Division Bench hearing the matter thought it apposite that the decision rendered in the case of *Sachish Chandra Jain (supra)* required consideration by a larger Bench. It is appropriate to state here that in the case of *Sachish Chandra Jain (supra)* the Division Bench had dismissed the L.P.A. pending for more than a decade before this Court as not maintainable. In this factual backdrop the matter has been referred to the larger Bench and is before us.

3. The cardinal issue that arises for studied deliberation is whether by introduction of section 100-A of the Code which has come into effect on 1-7-2002 atrophies the pending appeals preferred under Clause 10 of the Letter Patent and also effaces the right of filing such appeals after the said cut off date or the amendment does not guilotine the pending appeals prior to coming of the aforesaid provision but does decimate and nullify the right of such preferring of appeal after the said provision brought on the statute book.

4. Mr. N. S. Kale, learned Senior Counsel being assisted by Mr.G. Mukhopadhyay for the appellant assiduously contended that the decision rendered in the case of Sachish Chandra Jain (supra) does not correctly lay dow the law inasmuch as it has held that an appeal preferred under Clause 10 of the Letters Patent Appeal being an intra-court appeal, is not an appeal as is ordinarily understood and, therefore, is not a vested right though an appeal preferred in of the Letters Papent is maintainable and has all the characteristics and symptomatic attributes of an appeal. It is further urged by him that if the basic premise is not accorded affirmation, the tenet that an appeal is a vested right and can only be abolished or curtialed by express provision employed by the competent Legislature or by necessary intendment, which is not perceptible if the language employe under section 100-A of the Code is purposively x-rayed would get attracted. Pyramiding his submission it is proponed by Mr. Kale that the conclusion arrived at in the case of Sachish Chandra Jain (surpa) that contrary intention is manifest inasmuch as there is no saving in respect of the Letters Patent Appeal as per section 16 of the Amending Act is erroneous inasmuch as the said analysis suffers from an inherent and intensive fallacy. To substantiate the aforesaid submissions the learned Senior Counsel has placed heavy reliance on the decision rendered in the case of *Garikapati* v. *Subbiah Chaoudhry*[1].

5. Mr. Divesh Jain, learned counsel who has appeared for the respondent No.1 and raised the preliminary objection propounded that the decision rendered in the case of *Sachish Chandra Jain (supra)* is unquestionably correct as the Bench has arrived at the said conclusion placing relianace on the decision rendered in the case of *Baddula Lakshmaiah and others* v. *Sri Anjaneya Swami Temple and others*[2], and accentuating the concept on the ratio laid down by the Apex Court in the case of *Kolhapur Canesugar Works Ltd. and another* v. *Union of India and others*[3].

(1) AIR 1957 SC 540 (2) 1996 MPLJ 1074 (3) AIR 1928 Calcutta 640

6. At this juncture it is apropos to mention that as the matter was of considerable significance and the rights of a litigant are likely to be enfeebled and clogged, we sought the assistance of Mr. Ravish Agrawal, learned Senior Counse, who readily agreed to act as the friend of the Court. It is convassed by Mr. Agrawal that the Letters Petent Appeal is not different from other appeals and the said question has been put to rest by the Apex Court in the case of *Garikapati (supra)* wherein the decisions rendered in the cases of *Sardar Ali* v. *Dolliuddin*[1], and *Vasudeva Samiar*[2] were approved. The learned Senior Counsel has submitted that the scope of Letters Petant Appeal is in a broad sphere and to divest it from the basic feature of appeal would tanatamout to amputating the coceptual eventuality of appeal. It is his further submission that the Letters Patent Appeal cannot be kept in cocoon from other appeals and a conclusion can be arrived at that it is not an appeal as understood by the term 'appeal'. Mr. Agrawal has contended that the amendment brought on the statute book does not take away the vested right of appeal as the provision is not expressly so worded and there is no clear intention that can be so gathered from any other provision. It is argued by him that the decision in the case of *Kolhapur Canesugar Works Ltd. (supra)* was rendered on a different context altogether where the Apex Court was not dealing with any kind of vested right and, therefore, the said decision has no applicability to the case at hand and should be distinguished. The learned Senior Counsel has submitted that section 16 of the Amending Act which deals with repeal and savings uaes the words without prejudice to the generality of the provisions of section 6 of the General Clauses Act, 1897 and, therefore, all that could be done under the aforesaid provision should be treated to be done and by no stretch of imagination it can be said that by necessary implication the applicability of the aforesaid statute has been ostracized. Mr. Agrawal has commended us to various facets of the decision rendered in the case of Garikapati (supra) and the decisions rendered in the cases of *Shri Shiv Kripal Singh* v. *Shri V.V. Giri*[3], *and Babulal and others* v. *Ramesh Babu Gupta and others*[4]. The learned counsel has also placed reliance on the decision rendered in the case of *Shesh Kumar Pradhan* v. *Kesheo Narayan Aghariya and others*[5].

7. Before we proceed to cogitate with regard to the quintessence of the concept of Letters Patent Appeal, we think it requisite to refer to the decision rendered in the case of *P.V. Hemalatha* v. *Kattamkamandi Puthiya Maliackal Sacheeda and another*[6], wherein their Lordships dealt with the derivation of Letters Patent Appeal. We may profitably reproduce the same:

> "Letters Patent is a word of definite legal meaning. It is derived from the latin words literae patents. The Letters Petent are so called because

(1)AIR 1928 Calcutta 640. (2) AIR 1929 Madras 381 (Special Bench) (3) (1970)2 SCC 567
(4) 1990 MPLJ 482 = 1991 (1) MPJR 1. (5) 1980 MPLJ 335. (6) (2002) 5 SCC 548

"they are open letters; they are not sealed up, but exposed to view, with the great seal pendant at the bottom; and are usually directed or addressed by the king to all his subjects at large. And therein they differ from certain other letters of the king, sealed also with the great seal, but directed to particular persons, and for particular purposes; which therefore, not being proper for public inspection, are closed up and sealed on the outside, and are thereupon called writs close, *literae clausae,* and are recorded in the close-rolls, in the same manner as the others are in the patent-rolls."

(See Blackstone's Commentaries on the Laws of England, Vol. II pp 284.85).

37. Different Letters Patents have been handed down by the Sovereign in British India to Chartered High Courts which included only judicature for Bengal, Madras, Bombay, North-West Provinces (Allahabad) and others like Patna (1916), Lahore (1919), Rengoon (1922). The history of these Courts is that the sovereign established them as superior courts in British India under the Indian High Courts Act of 1861 and powers and jurisdiction of Courts including Judges of these Courts were laid down in the Letters Patent. [See The Law and Custom of the Constitution by Sir William R. Anson, Vol. II (The Crown, Part II), PP. 317-18 under the heading "Irish, Indian and Overseas Courts]."

8. Presently we shall advert to the spectrum whether an appeal preferred under Clause 10 of the Letters Patent is in substantive sense of the term or is in a different orbit not to attract the conscientious embrace of vested right or is it opposite to christen it as intra-court appeal making it vapid and put it to rest in the mausoleum. In this context, the law laid down in the case of *Garikapati (supra)* is instructive to note. In paragraph 15 of the said decision the Apex Court took note of the decision of the Special Bench of the Calcutta High Court rendered in the case of *Sardar Ali (supra)* wherein a contention was canvassed when the suit was filed, the appellant therein had vested in him by the then existing law i.e. Clause 15 of the Letters Patent as it then stood, a substantive right of appeal from the decision of the Single Judge and that an intention to interfere with it, to clog it with a new condition, or to impair or imperil it, could not be presumed, unless it was so done by express words or necessary intendment. In the said decision the Apex Court also referred to the decision rendered in the case of *Vasuadeva samiar (supra)*. The said decision was also concerned with the effect of the amended Clause 15 of the Letters Patent on a pre-existing right of appeal. The Apex Court in the said decision referred to the decision rendered

in the case of *Colonial Sugar Refinery Co. Ltd.* v. *Irving*[1], and also referred to the law laid down in the case of *Radhakishan Laxminarain* v. Sridhar[2]. It is apposite to mention here if the paragraphs 15 to 22 of *Garikapati (supra)* are analytically studied they do clearly convey that the right of appeal is a substantive right a Letters Patent Appeal is a vested right. This is so deducible as the Constitution Bench after placing reliance on the decisions rendered in the cases of *Sardar Ali (supra)*, *Vasudeva Samiar (supra) and Colonial Sugar Refinery Co. Ltd. (supra)* in parapraph 23 culled out the principles which make it graphically clear that the law laid down in the cases of *Sardar Ali (supra)* and *Vasuadeva Samiar (supra)* were approved. Thus, there is no scintilla of doubt that letters Patent Appeal Provided under Clause 10 of the Letters Patent encapsules the right of appeal which is a substantive right. Its signification cannot be marginalised by treating it as an intra-court appeal.

9. In this background it is necessary to rivet our mind to the decision rendered in the case of *Baddula Laksmaiah and others (supra)* wherein the Apex burt held as under:

> "2. Mr. Ram Kumar, leanred counsel for the appellants, *inter alia* contends that the Letters Patent Bench of the High Court could not have upset a finding of fact recorded by a learned Single Judge on fresh reconciliation of the two documents, arriving at different results than those arrived at earlier by the two courts aforementioned. Though the argument sounds attractive, it does not bear scrutiny. Against the orders of the trial Court, first appeal lay before the High Court, both on facts as well as law. It is the internal working of the High Court which splits it into different 'Benches' and yet the Court remains one. A Letters Patent Appeal, as permitted under the Letters Patent, is normally an intra-Court appeal, whereundere the Letters Patent Bench, sitting as a Court of Correction, corrects its own orders in exercise of the same jurisdiction as was vested in the Single Bench. Such is not appeal against an order of a subordinate Court. In such appellate jurisdiction the High Court exercises the powers of a Court of Error. So understood, the appellate power under the Letters Patent is quite distinct, in contrast to what is ordinarily understood in procedural language. That apart the construction of the aforementioned two documents involved, in the very nature of their import, a mixed question of law and fact, well within the powers of the Letters Patent Bench to decide. The Bench was not powerless in that regard."

If the aforesaid decision is understood in proper setting and the context, neither does it predicate nor enunciate that a Letters Patent Appeal is not a vested right in a

(1) (1905) AC 369 (2) AIR1950 Nagpur 177.

suitor. On the contrary, their Lordships expressed the view that question of law and fact is well within the powers of the Letters Patent Bench to decide.

10. The controversy can be looked from another spectrum. In the case of *Lal Ragho Shah* v. *The State of M.P. (through Secretary, Forest Department, M.P. Bhopal*[1]), it was ruled that where the decision is rendered by the Single Judge in a First Appeal no certificate is necessary for filing a Letter Patent Appeal. In the case of *Smt. Asha Devi* v. *Dukhi Sao and another*[2] the Apex Court referred to a five Judge Bench decision rendered in the case of *Alapati Kasi Vishwanatham* v. *A. Sivarama Krishnayya*[3], wherein Wanchoo, J., speaking for the Court observed as under:

> "The first contention urged before us on behalf of the appellant is that the Letters Patent Bench was not authorised in law to reverse the concurrent findings of fact of the Subordinate Judge and the learned Single Judge of the High Court. It is submitted that a Letters Patent Appeal stands on the same footing as a second appeal and it was therefore not open to the Letters Patent Bench to reverse the concurrent findings of fact of two courts below. We are of opinion that this contention is not correct. A Letter Patent Appeal from the judgment of a learned Single Judge in a first appeal to the High Court is not exactly equivalent to a second appeal under Section 100 of the Code of Civil Procedure and therefore, it cannot be held that a Letters Patent Appeal of this kind can only lie on a question of law and not otherwise. The matter would have been different if the Letters Patent Appeal was from the decision of a learned Single Judge in a second appeal to the High Court. In these circumstances it will be open to the High Court to review even findings of fact in a Letters Patent Appeal from a first appeal heard by a learned Single Judge, though generally speaking the Letters Patent Bench would be slow to disturb concurrent findings of fact of the two courts below But there is no doubt that in an appropriate case a Letters Patent Bench hearing an appeal from a learned Single Judge of the High Court in a first appeal heard by him is entitled to review even findings of fact. The contention of the appellant therefore that the Letters Patent Bench was not in law entitled to reverse the concurrent findings of fact must be negatived".

Relying on the said decision the Apex Court expressed the view that as appeal under Letters Patent is entertainable both on facts as well as in law.

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(1) 1967 MPLJ 237 (2) AIR 1974 SC 2048

(3) (Civil Appeal No. 232 of 1961) dated 11-1-1963

11. In the case of *Jagatguru Shri Shankarcharya Jyotish Peethadhiswa Shri Swami Swaroopanand Saraswati* v. *Ramji Tripathi and others*[1], a Division Bench expressed the view that a Bench hearing the Letters Patent Appeal has the same power as the Single Judge has as a first appellate Court in respect of both cases of fact and of law.

12. Yet in another decision rendered in the case of *Srichand* v. *Tejinder Singh and others*[2], another Division Bench unequivacally held the limitation on the power of the Court imposed under section 100 and 101 of the Code cannot be made applicable to an appellate Court hearing a Letters Patent Appeal. A Division Bench of the High Court of Orissa expressed the similar view in the case of *Smt. Annapurna Devi and others* v. *Akbar Patel and others*[3].

13. In view of the aforesaid premises it is clear as day that when an appeal is filed from a judgment and decree passed in First Appeal by a learned Single Judge there is no restriction and finding of fact recorded by a learned Single Judge is also subject to assail before the Division Bench. Conditioning the appeal to the narrowness or coarctation that of a second appeal or review is unwarranted. In a Letters Patent Appeal the Court has the power to allow the appeal in entirety, partially modify the judgment or the order which is the subject matter of assail, remand the matter or pass such order as may be permissible in law. Thus, the whole cyclorama is open and to give a comatose to the same is impermissible. Thus, a Letters Patent Appeal is, irrefragably, a vested right.

14. Once we accept that Letters Patent Appeal is a substantive right of appeal and is vested in a suitor from the inception of the suit the question that arises for adjudication is what would be the consequence, the impact and the import, the effect and reprecussion of the amendments that have been brought on the statute book. Before we proceed to dwell upon that arena we think it seemly to refer to a few decisions how the Apex Court has dealt with the concept of a vested right. In the case of *Messrs. Hoosein Kasam Dada (India) Ltd.* v. *The State of Madhya Pradesh and others*[4]. It has been held as under:

> " A right of appeal is not merely a matter of procedure. It is a matter of substantive right. This right of appeal from the decision of an inferior tribunal to a superior tribunal becomes vested in a party when proceedings are first initiated in and before a decision is given by, the inferior Court. Such a vested right cannot be taken away except by express enactment or necessary intendment."

15. In the case of *Garikapati (supra)* the Constitution Bench, as has been indicated earlier, culled out the principles in para 23. They read as under:

(1) 1979 MPLJ 305 = AIR 1979 MP 50
(2) 1979 MPLJ 170 = AIR 1979 MP 76
(3) AIR 1974 Orissa 162
(4) AIR 1953 SC 221.

"23. From the decisions cited above the following principles clearly emerge;

(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 apeal is not a mere matter of procedure but is a substantive right.

(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 commences 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."

16. In the case of *Lakshmi Narain* v. *First Additional District Judge Allahabad*[1], the Apex Court expressed thus:

"6. With all respect, the High Court has completely misdirected itself in interpreting the provisions of Section 3(1) of the Act, which must govern this case. That Section runs as under:

"Any amendment made by this Act shall not affect the validity invalidity, effect or consequence of anything already done or suffered, or any right, title, obligation or liability already acquired, accrued incurred or any release or discharge of or from any debt, decree, liability or any jurisdiction already exercised, and any proceeding instituted or commenced in any court prior to the commencement of this Act shall not withstanding any amendment herein made continue to be heard and decided by such Court."

The High Court has not given effect to the words "any proceeding instituted or commenced in any Court prior to the commencement of this Act shall, notwithstanding any amendment herein made continue to heard and decided by such Court." Now,

(1) AIR 1964 SC 489

giving full effect to the words just quoted of Section 3 (1) of the Act, the High Court and the High Court alone would be competent to hear and decide the appels pending before it. In other words, the District Courts were not competent to hear such appeals, and, therefore, the High Court could not have transferred those appeals to be heard by the District Judge or Additional District Judge inasmuch as Section 24 postulates that the court to which the suit or appeal or other proceeding is transferred should be competent to try or dispose of the same. On the date the appeal in question was preferred the High Court, the District Courts were not competent to hear such a case. The competency of those Courts to hear such arises by virtue of the amendment to section 21 of the Civil Courts Act, aforesaid.

We are here not concerned with the question whether in the absence of a saving clause, like the one introduced by Section 3(1) High Court would have been right in taking recourse to section 24 of Code of Civil Procedure. But in the face of Section 3 (1) of the Act, it is impossible to hold that the District Courts were competent to here appeals of the valuation of ten thousand rupees or less in suits decided before the Act came into force, and appeals from which were pendent before the High Court."

17. From the aforesaid exposition of law it is manifest that right of appeal is a substantive right and a vested right of appeal can be taken away only by subsequent enactment if it is so provided expressly or by necessary intended and not otherwise.

18. The hub of the matter is whether the right to prefer a Latters Patent Appeal which is a vested right, has been nullified or finally annihilated by present amendment. Submission of Mr. Kale, the learned Senior Counsel for appellant and Mr. Ravish Agrawal, the learned Senior Counsel appearing *amicus curiae* is that section 100-A of the Code is decisively and unalloyedly prospective. It is their submission that section 16 of the Amending Act which relates to repeal and savings need not be adverted to as the relevant provision is unequivocal, categorical, unambiguous and does not admit of any other interpretation. It is propounded by them that right of appeal which vests in a suitor is totally protected. The amending provision by use of the words 'no further appeal shall lie' means that no further appeal shall be entertained in respect of a suit filed after the cut off date. Any other interpretation, submitted the learned counsel, would be an anathema to the provision and there is no obligation in law to anatomize the provision in that panorama. It is also putforth by them that there is no contrary intendment to show that the said right has been intended to be obliterated.

19. To appreciate the aforesaid proponements it is apposite to reproduce section 100-A of the Code which has been brought by way of amendment on the statute book. The said provision reads as under:

"100-A. No further appeal in certain cases–Notwithstanding anything

contained in any Letters Patent for any High Court or in any instrument having the force of law or in any other law for the time being in foce, where any appeal from an original or appellatc decree or order is heard and decided by a Single Judge of a High Court, no further appeal shall lie from the judgment and decree of such Single Judge."

Section 16 of the Amending Act deals with 'repeal and savings'. It reads as under:

"16. Repeal and savings.–(1) Any amendment made, or any provision inserted in the principal Act by a State Legislature or High Court before the commencement of this Act, shall, except insofar as such amendment or provisions are consistent with the principal Act as amended by this Act, stand repealed.

(2) Notwithstanding that the provisions of this Act have come into force or repeal under sub-section (1) has taken effect, and without prejudice to the generality of the provisions of section 6 of the General Clauses Act, 1897:

(a) the provisions of section 102 of the principal Act as substituted by section 5 of this Act, shall not apply to or affect any appeal which had been admitted before the commencement of section 5; and every such appeal shall be disposed of as if section 5 had not come into force;

(b) the provisions of rules 5, 15, 17 and 18 of Order VI of the First Schedule as omitted or, as the case may be, inserted or substituted by section 16 of the Code of Civil Procedure (Amendment) Act, 1999 and by section 7 of this Act shall not apply to in respect of any pleading filed before the commencement of Section 16 of the Code of Civil Procedure (Amendment) Act, 1999 and section 7 of this Act;

(c) the provisions of rule 1 of Order XX of the First Schedule as amended by section 13 of this Act shall not apply to a case where the hearing of the case had concluded before the commencement or Section 13 of this Act."

We have quoted both the provisions in *juxtaposition* to comprehend the scenario and further to sensitize ourselves to the controversy in issue. It is a well settled proposition of law that enactments dealing with substantive right are primarily prospective unless it is expressly or by necessary implication given retrospectivity. The aforesaid principle has full play when vested rights are affected or influenced. In the absence of any unequivocal expose, the piece of Legislation must exposit adequate intendment of Legislature to make the provision retrospective. It is significant to allude to the facet

that routinely or conventionally retrospective operation of law is not to be easily deduced Hypothesization in that regard is ordinarily unwarranted. It does depend upon the attendant provisions in absence of express and manifest stipulations. An opalescent view has to be kept at bay. That apart, while deducing the concept retrospectivity it is also to be seen to what degree or extent the provision should be allowed to operate retrospectively. The postulatation must be gathered reading the scheme of the Act in stricto sensu.

20. Mr. Divesh Jain, learned counsel for the respondent No.1 reiterating his submission put forth that the Division Bench has rightly placed reliance on the decisions rendered in the case of *Kolhapur Canesugar Works Pvt. Ltd. (supra).* It is seemly to state that the Division Bench in the case of *Satish Chandra Jain (supra)* heavily relied on paragraph 37 of *Kolhapur Canesugar Works Pvt. Ltd. (supra)* which reading as under:

> "37. The position is well known that at common law, the normal effect repealing a statute or deleting a provision is to obliterate it from the statute book as completely as if it has never been passed, and the statute must be considered as a law that never existed. To this rule, an exception is engrafted by the provisions of section 6(1). If a provision of a statute is unconditionally omitted without a saving clause in favour of pending proceedings, all actions must stop where the omission finds them, and if final relief has not been granted before the omission goes into effect it cannot be granted afterwards. Savings of the nature contained in section 6 or in special Acts may modify the position. Thus the operation of repeal or deletion as to the future and the past largely depends on the savings applicable. In a case where a particular provision in a statute is omitted and in its place another provision dealing with the same contingency is introduced without a saving clause in favour of pending proceedings then it can be reasonably inferred that the intention of the legislature is that the pending proceedings shall not continue but fresh proceedings for the same purpose may be initiated under the new provision."

21-22. The Division Bench relying on the same in paragraph 17 of its on held as under:

> "The court held that section 6 of General Clause Act has no application. There is no saving provision in favour of pending proceedings. Therefore, action for realisation of the amount refunded can only be taken under the new provision in accordance with the terms thereof."

23. The Division Bench has read the decision in the case of *Kolhapur Sugarcane (supra)* in a different way. In our considered opinion the said decision is not an authority for the proposition that unless there is a provision of saving in the provision relating to repeal and savings, the vested right or substantive rights would be deemed to have been taken away. The Division Bench further held that section 6 of the General Clauses Act, 1897 has no application. In this context we are disposed to refer to certain decisions relating to precedent.

24. In the case of *Ambica Quarry Works etc.* v. *State of Gujarat and others*[1], their Lordships held as under:

> "The ratio of any decision must be understood in the background of the facts of that case. It has been said long time ago that a case is only an authority for what it actually decides, and not what logically follows from it."

25. In the case of *General Manager, Northern Railway and another* v. *Sarvesh Chopra*[2], it has been held thus:

> "A decision of this Court is an authority for the proposition which it decides and not for what it has not decided or had no occasion to express an opinion on....

26. In the case of The *State Financial Corporation and another* v. *M/s Jagdamba Oil Mills and another*[3], it has been stated thus:

> "19. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of Courts are not to be read as Euclid's theorems nor as provisions of the statute. These observations must be read in the context in which they appear. Judgments of Courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes, their words are not to be interpreted as statutes, their words are not to be interpreted as statutes.

Again, in paragraph 22, it has been stated as under:

> 22. The following words of Lord Denning in the matter of applying precedents have become *locus classicks:*
>
> "Each case depends on its own facts and a close similarity between

(1) AIR 1987 SC 1087 SC 1073. (2) (2002)4 SCC 45 (3) 2002 AIR SCW 500

one case and another is not enough because even a single significant detail may alter the entire aspect. In deciding such cases, one should avoid the temptation to decide cases (as said by Cordozo) by matching the colour of one case against the colour of another. To decide, therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive."

xxx xxx xxx

"Precedent should be followed only so far as it marks the path of justice, but you must cut the dead wood and trim off the side branches else you will find ourself lost in thickets and branches. My plea is to keep the path to justice clear of obstructions which could impede it."

27. An analytical study of the decision rendered in the case of *Kolhapur Canesugar (supra)* is required to be made keeping in view the principles laid down in the aforesaid decisions. We have carefully perused the law laid down in the case of *Kolhapur Sugarcane (supra).* In the aforesaid case their Lordships were dealing with arena pertaining to the term 'Rule' . It is not covered under Section 6 of the General Clauses Act. Their Lordships were dealing with a situation whether an action should be taken under the repealed rule or under the new rule. In that context their Lordships held that further proceeding for the same purpose may be initiated under the new provision. The subject-matter in that case was 'Rule' and their Lordships were not dealing with the concept of vested right or substantive right. As has been indicated hereinabove, the right of appeal is a substantive right and it can only be abrogated either by express language or by necessary implication. Submission of Mr. Jain is that under Section 16 of the Amending Act second appeals of certain nature have been saved but such saving clauses have not been incorporated in the said provision and, therefore, it has to be inferred that a right of appeal stands retrospectively obliterated as nothing in that regard has been said. In our considered opinion, in the absence of use of express words or necessary intendment that can be gathered. It is difficult to accept that in the absence of a saving clause in section 16 the right of appeal would be totally abrogated or abridged. Thus in our considered opinion the decision rendered in the case of *Kolhapur Canesugar (supra)* is not applicable to a case while dealing with substantive right of appeal and is distinguishable.

28. It is submitted at the Bar that if section 16 of the Amending Act is scanned it is noticeable that in sub-section (2) the Legislature has used the woulds 'without prejudice to the generality of the provision of section 6 of the General Clauses Act, 1897.' Mr. Agrawal, the learned friend of the Court has commended us to the decision rendered in the case of *Shri Shiv Kripal Singh (supra)* wherein the Constitution Bench in paragraph 37 while dealing with this aspect expressed the view as under:

"37.....It is well-settled that when this expression is used anything

contained in the provisions following this expression is not intended to cut down the generality of the meaning of the preceding provision. This was so held by the Privy Council in *King Emperor* v. *Sibnath Banerji.*

29. The learned Senior Counsel has also placed reliance upon the decision rendered in the case of *Sheshkumar Pradhan (supra).* In the aforesaid case the Division Bench was dealing with the concept 'without prejudice to the general of the provisions of section 6 of the General Clauses Act'; in the context of section 97 of the Amending Act, 1976. In paragraph 6 the Bench held as under:

"6. It is true that clause (q) (ii) of sub-section (2) of Section 97 of the Amending Act is in terms restricted to a pending suit under the old Rule 103, but, in our opinion, from this alone it cannot be held that sub-section (2) does not preserve the right to institute a suit under the old Rule 103 if the suit had not been instituted before the commencement of the Amending Act. The specific savings made in clauses (a) to (zb) are "without prejudice to the generality of the provisions of section 6 of the General Clauses Act, 1897," as is specifically stated in the opening words of sub-section (2) of section 97. It is well settled that the enumeration of specific matters "without prejudice to the generality" of a particular provision does not restrict the general application of that provision to the matters enumerated because the words "without prejudice" have the effect of preserving the full effect of the general provision and also because the rule of *ejusdem generis* has no inverse application See *Chartsey Urban District Council* v. *Mirnam's Properties Ltd.* , *S.K. Singh* v. *V.V. Giri.* Therefore, if the right to institute a suit under the old Rule 103 had arisen, before the commencement of the Amending Act it would be preserved under section 6 of the General Clauses Act read with sub-section (2) of section 97 even though it is not covered by clause (q) of that sub-section. When the application made by the non-applicants Nos. 1 to 5 under the old Rule 100 was rejected under the old Rule 101, a right accrued to them to challenge the order rejecting their application under the old Rule 103. This right and the remedy for giving effect to this right by filing a suit under the old Rule 103 continued to be operative by force of clauses (c) and (e) of Section 6 of the General Clauses Act read with sub-section (2) of section 97 of the Amending Act. The argument of the learned counsel that sub-section (3) of section 97 has the effect of taking away the right cannot also be accepted for the simple reason that this sub-section

> opens with the words "save as otherwise provided in sub-section (2)". These words are not limited to the savings contained in clauses (a) to (zb) of sub-section (2), but also embrace the rights and remedies saved by the words "without prejudice to the generality of the provisions of section 6 of the General Clauses Act, 1897" as they occur in that sub-section. Putting it differently the preservation of rights and remedies under section 6 of the General Clauses Act is also an otherwise provision made by sub-section (2) which is saved by the opening words of sub-section (3)."

30. Relying on the said decisions it is contended by Mr. Agrawal that these words do find mention in section 16 and it is not controlled by the Clauses (a), (b) and (c) of sub-section (2) of section 16 of the Amending Act. In this regard we may profitably refer to the decision rendered in the case of *Babulal and others (supra)* wherein the Full Bench speaking through the learned Chief Justice expressed the view as under:

> "We have, therefore, no hestitation in holding that not only by necessary intendment, but in expressed words, the right of appeal which had been conceived of a party litigant to go up in appeal against an order passed under section 47 of the Code of Civil Procedure before the Amending Act by virtue of the legal fiction introduced in the definition of the term 'decree' as including any order passed in execution proceedings, had been taken away by a valid piece of enactment and that it no longer survived after coming into force of the Amending Act."

31. In view of the aforesaid analysis the Full Bench came to hold that the decisions rendered in the case of *Chuluram* v. *Bhagatram*[1], and *Sitaram and another* v. *Chaturo and others*[2], do not lay down the correct law and accordingly they were *overruled.* In the case of *Babulal (supra)* the Full Bench took note of the fact that by virtue of the legal fiction introduced in the definition of the term "decree" the right of appeal is taken away. In this context we think it appropriate to refer to the decision rendered in the case of *Ganapat Giri* v. *IInd Additional District Judge Balia and others*[3]. In the said case the Apex Court considered the scope of the Civil Procedure Code (Amendment) Act (104 of 1976) and taking note of section 97 held as under:

> "11. Now reverting to section 97(1) of the Amending Act, the High Court was in error in holding that because no amendment had been made to Rule 72 by the Amending Act, Section 97 (1) had no effect on the Rule as it was in force in the State of Uttar Pradesh before

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(1) 1980 MPLJ 37=AIR 1980 MP 16 (2) 1981 JLJ 171. (3) AIR 1986 SC 589.

the commmencement of the Amending Act. As observed earlier, the effect of Section 97(1) is that all local amendments made to any of the provisions of the Code either by a State Legislature or by a High Court which were inconsistent with the Code as amended by the Amending Act stood repealed irrespective of the fact whether the corresponding provision in the Code had been amended or modified by the Amending Act and that was subject only to what was found in sub-section (2) of section 97. Sub-section (3) of section 97 provides that save as otherwise provided in sub-section (2) the provisions of the Code as amended by the Amending Act shall apply to every suit, proceeding, appeal or application pending at the commencement of the Amending Act or instituted or filed after such commencement notwithstanding the fact the right or cause of action in pursuance of which such suit, proceeding, appeal or application is instituted or filed had been acquired or had accrued before such commencement. Sub-section (3) of section 97 sets at rest doubts, if any by making the Code as amended by the Amending Act applicable to all proceedings referred to therein subject to sub-section (2) of section 97."

32. At this juncture, we may profitably refer to the decision rendered by the Full Bench of this Court in the case of *Mahesh Choubey* v. *M.M. Dubey*[1], wherein the Full Bench held that once an application under Order 39 Rules 1 and 2 of the Civil Procedure Code was dismissed and the said order was reversed by a learned Single Judge no further appeal did lie inasmuch as the learned Single Judge had passed an order exercising powers under Section 104 read with Order 43 Rule 1 of the Code and accordingly, a Letters Patent Appeal was not entertained. In this regard we may refer with profit to the decision rendered in the case of *Rajendra Kumar* v. *Kalyan (dead) by L. Rs.*[2] wherein the Apex Court in paragraphs 20 and 21 held as under:

".....It is pertinent to add in this context that some differentiation exists between a procedural statute and statute dealing with substantive rights and in the normal course of events, matters of procedure are presumed to be retrospective unless there is an express ban on to its retrospectivity. In this context, the observations of this Court in the case of *Jose Da Costa* v. *Bascora Sadasiva Sinai Narcornim*[3], is of some relevance. This Court in paragraph 31 of the Report observed :

'Before ascertaining the effect of the enactments aforesaid passed by the Central Legislature on pending suits or appeals, it would be

(1) 1994 MPLJ 657 (FB) = AIR 1994 MP 151
(2) AIR 2000 SC 3335. (3) (1976) 2 SCC 917 : (AIR 1975 SC 1843)

appropriate to bear in mind two well-established principles. The first is that while provisions of a statute dealing merely with matters of procedure may properly, unless that construction be textually inadmissible, have retrospective effect attributed to them, provisions which touch a right in existence at the passing of the statute are not to be applied retrospectively in the absence of express enactment or necessary intendment (*Delhi Cloth and General Mills Co. Ltd.* v. *Income Tax Commissioner*[1].

The second is that a right of appeal being a substantive right the institution of a suit carries with it the implication that all successive appeals available under the law then in force would be preserved to the parties to the suit throughout the rest of the career of the suit. There are two exceptions to the application of this rule, viz. (1) when by competent enactment such right of appeal is taken away or impliedly with retrospective effect, and (2) when the Court to which appeal lay at the commencement of the suit stands abolished (*Garikapati Veeraya* v. *N. Subbiah Choudhary*[2] and *Colonial Refining Co. Ltd.* v. *Irving*[3].

21. Still later Court in *Gurbachan Singh* v. *Satpal Singh*[4], expressed in the similar vein as regards the element of retrospectivity. The English Courts also laid that the rule that an Act of Parliament is not to be given retrospective effect applies only to statutes which affect the vested rights : It does not apply to statutes which alter the form of procedure or the admissibility of evidence, or the effect which the Courts give to evidence: If the new Act affects matters of procedure only, then *prima facie*, it applies to all actions pending as well as future (see in this context the decisions of the House of Lords in the case of *Blyth* v. *Blyth*[5], *A. G.* v. *Vernazza*[6].In Halsbury's Laws of England 4th Edition: Vol. 44: para 925, page 574) upon reference to *Wright* v. *Hale*[7], and *Gardner* v. *Lucas*[8] along with some later cases including *Blyth* v. *Blyth (supra)*. It has been stated : "the presumption against retrospection does not apply to legislation concerned merely with matters of procedure or of evidence, on the contrary, provisions of that nature are to be construed as retrospective unless there is a clear indication that such was not the intention of Parliament."

33. The centripodal issue is whether section 100-A which has been brought on the

(1) AIR 1927 PC 242). (2)AIR 1957 SC 540 (3) (1905) AC 369)
(4) AIR 1990 SC 209 : 1990 Cri LJ 562 (5) (1966) 1 All ER 524 (6) (1960) 3 All ER 97)
(7) (1860) 6H and N 227 (8) (1878)3 App. Cas 582

statute book does annul the right to prefer a Letters Patent Appeal in entirety taking away the scope of adjudication of the pending appeals or it only erodes the vested rights to the limited extent. Before we proceed to scan the anatomy of section 100-A it is worth while to note that where the language of a statute is clear, plain and unambigous and admits only construction the same should be adopted. In this context it is apposite to refer to the decisions rendered in the cases of *Arul Nadar* v. *Authorised Officer Land Reforms*[1], *Jagdish Chandra Patnaik* v. *State of Orissa*[2] *Harshads Mehta and others* v. *State of Maharashtra*[3], In this context may profitably refer to the decision rendered in the case of *District Miniging Officer* v. *Tata Iron and Steel Co.*[4], wherein the Apex Court ruled thus:

> "The most fair and rational method for interpreting a statute is by exploring the intention of the legislature through the most natural and probable signs which are either the words, the context, the subject matter, the effects and consequences, or the spirit and reason of the law. In the court of law what the legislature intended to be done or not to be done can only be legitimately ascertained from that what it has chosen enact, either in express words or by reasonable and necessary implication. But the whole of what is enacted "by necessary implication can hardly be determined without keeping in mind the purpose or object of the statute. A bare mechanical interpretation of the words and application of legislative intent devoid of concept or purpose will reduce most of the remedial and beneficent legislation to futility. The courts however, are not entitled to usurp legislative function under the disguise of interpretation and they must avoid the danger of determination of the meaning of a provision based on their own preconceived notions of ideological structure of scheme into which the provision to be interpreted in somehow fitted."

34. In this regard we would also profitably refer to the decision rendered in the case of *Union of India* v. *Elphinstone Spg. and Wvg. Co. Ltd.*[5], wherein the Apex Court expressed the view as under:

> "When the question arises as to the meaning of a certain provision in a statute it is not only legitimate but proper to read that provision in its context. The context means the statute as a whole, the previous state of law, other statutes in *pari materia*, the general scope of the statute and the mischief that it was intended to remedy."

And again their Lordships expressed thus:'

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(1) (1998)7 SCC 157. (2) (1998) 4 SCC 456 (3) (2001) 8 SCC 257.
(5) (2001)7 SCC 358 (5) AIR 2001 SC 724

> "Though it is no doubt true that the court would be justified to some extent in examining the materials for finding out the true legislative intent, engrafted in a Statute, but the same would be done only, when the Statute itself is ambiguous or a particular meaning given to a particular provision of the Statute, it would make the statute unworkable or the very purpose of enacting the Statute would get frustrated. But by no stretch of imagination, it would be open for a court to expand even the language used in the preamble to extract the meaning of the Statute or to find out the latent intention of the legislature in enacting the Statute."

35. In the aforesaid decisions their Lordships gave emphasis on the concept o application of mischief rule and expressed the view that a provision must be read in its proper context and the legislative intent engrafted in a statute must be gathered. In the case of *P. Nirathilengam* v. *Annaya Nadar and Ors.*[1], the Apex Court held that an interpretation of the statutory provision which defeats the intention and the purpose for which the statute was enacted should be avoided. In the case of *Gurudev Datta VKSS Maryadit and others* v. *State of Maharashtra and others*[2], the Apex Court again laid emphasis on the cardinal principle of interpretation that the words of a statute must be understood in the natural, ordinary or popular sense and construed according to their grammatical meaning unless such construction leads to some absurdity or there is something in the context or in the object of the statute to suggest to the contrary. Their Lordships also emphasized on the golden rule that words employed in the statute must *prima facie* be given their ordinary meaning.

36. In this regard we may usefully refer to the decision rendered in the case of *Shyam Sunder and others* v. *Ram Kumar and another*[3], wherein the Constitution Bench held as under:

> "28. From the aforesaid decisions the legal position that emerges is that when a repeal of an enactment is followed by a fresh legislation, such legislation does not affect the substantive rights of the parties on the date of the suit or adjudication of the suit unless such a legislation is retrospective and a court of appeal cannot take into consideration a new law brought into existence after the judgment appealed from has been rendered because the rights of the parties in an appeal are determined under the law in force on the date of the suit. However, the position in law would be different in the matters which relate to procedural law but so far as substantive rights of parties are concerned, they remain unaffected by the amendment in

(1) (2001)9 SCC 673 (2) AIR 2001 SC 1980 (3) (2001) 8 SCC 24

the enactment. We are, therefore, of the view that where a repeal of provisions of an enactment is followed by fresh legislation by an amending Act, such legislation is prospective in operation and does not affect substantive or vested rights of the parties unless made retrospective either expressly or by necessary intendment. We are further of the view that there is a presumption against the retrospective operation of a statute and further a statute is not to be construed to have a greater retrospective operation than its language renders necessary, but an amending Act which affects the procedure is presumed to be retrospective, unless the amending Act provides otherwise.....' (emphasis supplied)

37. In the case of *Harbhajan Singh* v. *Press Council of India*[1], the Apex Court while interpreting sub-section (7) of section 6 of the Press Council Act in paragraph 10 referred to the interpretation given to Article 182 of the Limitation Act, 1908 by Sir Dinshaw Mulla who had given immense emphasis on the need of testing the uestion of interpretation upon the plain words of the article and opined that there is no warrant for reading into the words quoting any qualification and the strict rammatical meaning of the words is the only safe guide. In the said case their ordships further proceeded to state as under:

"The High Court had construed the word "is" to mean "has been", which construction was discarded by this Court. The tense of the sentence played a predominant role in the interpretation on the relevant provision by this Court in F.S. Gandhi case. In *Maradana Mosque (Board of Trustees)* v. *Badi-ud-Din Mahmud* under the relevant statute the Minister was empowered to declare that the school should cease to be an unaided school and that the Director should be the Manager of it, if the Minister was satisfied that an unaided school "is being administered in contravention of any provisions of the Act. Their Lordships opined (All ER p. 551 B-F).

"Before the Minister had jurisdiction to make the order he must be satisfied that 'any school.....is being so administered in contravention of any provisions of this Act'. The present tense is clear. It would have been easy to say 'has been administered' or 'in the administration of the school any breach of any of the provisions of this Act has been committed', if such was the intention of the legislature; but for reasons which common sense may easily supply, it was enacted that the Minister should concern himself with the present conduct of the School, not the past, when making the order. This does not mean, of

(1) (2002)3 SCC 722

course, that a school may habitually misconduct itself and yet repeatedly save itself from any order of the Minister by correcting its faults as soon as they are called to its attention. Such behaviour might well bring it within the words being administered'; but in the present case no such situation arose.....There was, therefore, no ground on which the Minister could be 'satisfied' at the time of making the order. As appears from the passages of his broadcast statement which are cited above, he failed to consider the right question. He considered, only whether a breach had been committed and not whether the school was at the time of his order being carried on in contravention of any of the provisions of the Act. Thus he had no jurisdiction to make the order at the date on which he made it."

In paragraph 11 of the said decision their Lordships referred to the warnin given by M.H Beg, J. to begin with a theory as to what the real purpose or need is or could be, for the danger is that what we may be injecting a subjective notion or purpose of our own into what is, after all a legal question of construction or interpretation. This was so stated in the case of *D.R. Venkatachalam* v. *Dy. Transpo Commissioner*[1].

38. We have referred to these decisions for the purpose of understanding whether section 100-A of the Code is totally clear and unambiguous making it prospective in nature or does it crucify or destroy the rights of appeal as a whole. Mr. Ravish Agrawal, the learned Senior Counsel laid immense emphasis on section 6 of the General Clauses Act and contended that Section 100-A is not couched in a manner which would even remotely indicate that the vested right of an appeal in a suitor has been obliterated.

39. Before we proceed to dwell into that aspect we think it appropriate to disse whether section 100-A of the Code affects the pending appeals preferred under clause 10 of the Letters Patent. Submission of Mr. Kale and Mr. Agrawal, the learned Senior counsel is that the language employed in the said provision being quite clear, unequivocal and unambiguous, it can only have prospective application. To elucidate; submission of the learned Senior Counsel is that the prospective applicabilit would only encompass that the appeals which would arise out of the suits which are instituted after the cut of date i.e. 1-7-2002 would be barred. It is contended by them that there is nothing in the said section to convey a different meaning or to expand the canvass. It is putforth by them that section 16 of the Amending Act deals wi 'repeal and savings' and in Sub-section (2) use of the term 'without prejudice to the generality of the provisions section 6 of the General Clauses Act, 1897' and the exception carved out in Clauses (a) to (c) have to be understood properly to appreciate

(1) (1977) 2 SCC 273.

nat other aspects which do not find mention in the aforesaid clauses are to be governed by section 6 of the aforesaid statute.

In this context we may profitably reproduce a passage from *Bidie* v. *General cident, Fire and Life Assurance Corpn.*[1], wherein Lord Greene in his inimitable style spokes thus:

> "The first thing to one has to do, I venture to think, in construing words in a section of an Act of Parliament is not to take those words in vacuo, so to speak, and attribute to them what is sometimes called their natural or ordinary meaning. Few words in the English language have a natural or ordinary meaning in the sense that they must be so read that their meaning is entirely independent of their context. The method of construing statutes that I prefer is not to take prarticular words and attribute to them a sort of *prima facie* meaning which you may have to displace or modify. It is to read the statute as a whole and ask oneself the question: In this state, in this context, relating to this subject-matter, what is the true meaning of what word?"

Keeping in view the aforesaid principles of interpretations, now we shall proceed to discuss what exactly is postulated under Section 100-A of the Code. The Sub-section (2) of section I of the Code the Amending Act stipulates that the amending provisions shall come into force on such dates as the Central Government may by notification in the official Gazette appoint and different dates may be appointed in respect of different provisions of the Act. This provision is to be read contextually regard being had to the language employed therein. Section 100-A of the Code employs the words that where any appeal from an original or appellate decree or order "is heard and decided" by a Single Judge of a High Court, no further appeal shall lie from the judgment and decree from such Single Judge. The words which are of immense signification in this provision are 'is heard and decided'. These words are used absolutely in *praesenti.* That apart the words 'no further appeal shall lie' are also to be conjointly read with 'is heard and decided'.

As has been held in the cases referred to above, the words have to be understood in their context having purposive reference to the totality of surrounding features and the true and express meaning decipherable from the import of the text. The use of the term 'is heard and decided' cannot be expanded to cover the vista that the appeals which arise from the the suit instituted before 1-7-2002 are protected. Simultaneously its horizon cannot be cramped and limited to imply and connote that the appeals which have been filed prior to the cut of date also would be reigned by the said provision. In that case the term 'no further appeal shall lie' used in the provision would lose its

) (1948)2 All ER 995, 998

intrinsic etymological kernel. To say that the aforesaid provision does not impair or erode the right of appeal vested in a suitor in respect of a suit instituted prior to 1-7-2002, would be reading the provision without giving the true and actual meaning to the term 'is heard and decided". That would tantamount to, to put it euphemistically making the provision achromatic. In this context we may profitably refer to the three Judge Bench decision rendered in the case of R. *Rajagopal Reddy (dead) by LRs and others* v. *Padmini Chandrashekharan (dead) by LRs*[1]. In the aforesaid decision their Lordships were considering the operational sphere of Benami Transactions (Prohibition) Act, 1988 (Act 45 of 1988) and posed the question whether pending proceeding at various stages in the hierarchy can get encompassed by the sweep of section 4(1) of the said Act and such suit would be liable to be dismissed as laid down by section. Ater referring to the report of the Law Commission, taking note of the preamble of the Act, considering section 3 which is the heart of the said Act and further referring to the decision rendered in the case of *Re Athlumney* [2] and *Garikapati (supra)* and the observations made in the book on Principles of Statutory Interpretation, 5th Edition, by Justice G.P. Singh, at page 351 their Lordships in paragraphs 19 and 20 held as under:

> "19. No exception can be taken to the aforesaid observations of learned author which in our view can certainly be pressed in service for judging whether the impugned section is declaratory in nature or not. Accordingly it must be held that section 4 or for the matter the Act as a whole is not a piece of declaratory or curative legislation. It creates substantive rights in favour of benamidars and destroys substantive rights of real owners who are parties to such transaction and for whom new liabilities are created by the Act.
>
> 20. Qua reason No.4, we may refer to our discussion earlier that the words 'no suit shall lie' as found in seciton 4(1) and 'no defence based on rights in respect of property shall be allowed' as found in section 4(2) have limited scope and operation and consequently this consideration also cannot have any effect on the conlusion which can be reached in this case. As to reason No.5, it is observed that even though the suit may include appeal and further appeals in the hierarchy, at different stages of the litigation. Section 4(1) and 4(2) cannot be made applicable to these subsequent stages as already seen by us earlier. Otherwise, they would cut across the very scheme of the Act."

43. It is appropriate to mention here their Lordships gave a limited retroactivity to the provisions in question.

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(1) AIR 1996 S.C. 238. (2) (1898)2 Q.B. 547

44. Thus, in our considered view, though there is use of term 'without prejudice to the generality of the provisions of section 6 of the General Clauses Act' the same does not entirely save the vested rights of appeal in a suitor as that would defeat the very purpose of Legislation, scheme of the amending statute, and also would cause violence to the reading of section 100-A of the Code which is not allowable and we are not inclined to think that the said provision is totally prospective. It is so to a limited extent.

45. Another facet is required to be kept in mind. The purpose of Legislature was to curtail the second appeals in the third court. The Legislature in its wisdom constricted the right of apeal to a singular one. To do so the Legislature used the words differently in the said section. If it desired to annual the pending appeals it could have used the words 'has been'. It could have expressly stated so. There is nothing in the statute book to exposit a clear or necessary intendment that the provision has to be made totally retrospective taking away the rights of hearing of appeals preferred before the cut off date. The legislature never intended to make the said provision applicable to the pending appeals. The use of words in the Section does not clearly so convey. When a provision has been expressly so worded there is no justification to stretch in either beckward of forward. Such stretching, in our considered opinion, is unnecessary and unwarranted. The reasoning that when the pending appeals have not been saved under Section 16 of the Amending Act is totally inconsequential because of non-saving of the same does not by necessary corollary nullify the right of hearing of the pending appeals preferred before the date stipulated in the statute book. Thus, we are of the considered opinion, that no appeal which is covered within the ambit and sweep of the language used under section 100-A of the Code would lie after 1.7.2002. It is prospective to that extent and, if we allow ourselves to say so, it has limited retroactivity by which the vested rights on a suitor qua a suit filed prior to 1-7-2002 is not saved but the fate of pending appeals before the cut off date remains unaffected.

46. Consequently we conclude and hold that the law laid down in the case of *Sachish Chandra Jain (supra)* that substitution of section 100-A of the Code affects the Letter Patent Appeals which have been preferred prior to 1-7-2002 and are pending for adjudication and hence, not maintainable, does not correctly state the law and we reiterate that pending appeals preferred prior to the cut off date would be heard on merits having remained unaffected by substitution of section 100-A of the Code.

47. Let the appeal be listed before the appropriate Division Bench for adjudication on merits.

Order accordingly.

FULL BENCH

Before Mr. Bhawani Singh, Chief Justice, Mr. Justice Rajeev Gupta & Mr. Justice S.L. Jain

10 October, 2002

JAMNA PRASAD .... Petitioner*

v.

STATE OF M.P. & ors. .... Responden

Constitution of India, Articles 226, 227-M.P.Civil Services (Classification, Contro and Appeal) Rules, 1966 - Rule 19 and Criminal Procedure Code, 19 Section 389(i) - Writ challenging order of State Administrative Tribuna Conviction of Government servant by trial Court - Termination - Competent authority can terminate services after conviction by crimina court - Stay of execution of sentence will not debar competent authori from doing so - Master and servant relationship terminates on terminati order - Government servant cannot be taken to be under Suspensio from the date of his termination following conviction by trial Court t date of judgment of Appellate Court - Subsistence allowance cannot granted for the period.

What emerges out of the aforesaid discussion is that Appellate Court an Revisional Court can, in exercise of power under Sections 389(1)/482, Code of Crimina Procedure, 1973, stay the execution of sentence or order capable of execution stay of conviction can be passed in exceptional cases after Court carefully examine the conduct of accused, facts of the case and possible ramifications or avoidin irretrievable consequences. However, in both the cases, the conviction and sentence cannot be effaced. It is the irretrievable consequence in the former case and execution of sentence in the latter case which can be stayed. With regard to Government servan competent authority can terminate the services after conviction by Criminal Court. Stay of execution of sentence of sentence will not debar it from doing so unless conviction is also stayed in exercise of power in light of principles laid down by th Apex Court in *K.C. Saren's case (supra)*. Further, on termination order having been passed, master and servant relationship terminates and filing of appeal and stay o execution of sentence do not revive it. He cannot be taken to be under suspension from the date of termination following conviction by Trial Court till the date of judgmen by the Appellate Court. Therefore, he would not be entitled to claim subsistence allowance for this period. (Para

Rama Narang's case[1]; *State of T.N.* v. *A. Jaganathan*[2]; *Union of India an* others v. *Ramesh Kumar*[3]; referred to.

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* W.P. No.1642/2000

(1) (1995) 2 SCC 513 (2) AIR 1996 SC 2449

(3) AIR 1997 SC 3531

Jamna Prasad v. *State of M.P., 2002.*

K.C. Sareen v. *CBI, Chandigarh* [1]; relied on.

Jagdish Prasad's case[2]; *Vishwas Rao's case*[3]; overruled.

Parag Chaturvedi, for the petitioner.

S.K. Seth, Addl. Advocate General and Aditya Sanghi, Govt. *Advocate,* for the respondents.

Cur. adv. vult.

ORDER

The Order of the Court was delivered by BHAWANI SINGH, C, J:–Petitioner was Assistant Teacher. He was pleaced under suspension on 16-2-1990 since he was arrested in a criminal case punishable under section 302, Indian Penal Code. He was convicted by Sessions Court on 27-1-1992 and sentenced for life imprisonment. Through appeal, he challenged the judgment which was decided by this Court on 4-3-1998. His appeal was partly allowed. He was convicted under section 326, Indian Penal Code and sentenced to seven years rigorous imprisonment.

2. The petitioner is claiming subsistence allowance till 4-3-1998 when his appeal was decided. His submission is that his conviction could not be taken final until the disposal of the appeal. Therefore, he is to be under suspension and entitled to subsistence allowance. State Administrative Tribunal did not find favour with this claim and rejected O.A.No. 2099 of 1998 by order dated 12-10-1999. For rejecting the claim, SAT placed reliance on two Apex Court decisions in *Deputy Director of Education* v. *S. Nagoor Meera*[4] and *Union of India* v. *V.K. Bhaskar*[5], though petitioner rested his claim on order of this Court dated 19-7-1988 in *Vishwas Rao* v. *District Education Officer, Chhindwara and another*[6], passed in.

3. Petitioner challenged SAT order through Writ Petition No. 1642 of 2000. During the course of submissions, apart from the decision in Vishwas Rao's case (supra), attention of learned Judges comprising the Division Bench was drawn to another decision of this Court in Jagdish Prasad v. State of M.P., dated 6-10-1982 in M.P. No 465 of 1982. In these two decisions, the Division Bench took the view that till the appeal is pending before this Court, it could not be said that the accused stood convicted and on that basis, no order of removal could be passed, meaning thereby the order of removal could become operative from the date of judgment in appeal. Therefore, up to the date of judgment in appeal, person would be entitled to subsistence allowance. Learned Judges of the Division Bench doubt the correctness of Division Bench

(1) 2001 (6) SCC 584
(2) M.P. No.465/1982 dated 6.10.82
(3) M.P. No.3199 of 1986 dated 19/7/88
(4) 1995 SCC (L and S) 686 =AIR 1995 SC 1365
(5) 1998 SCC (L and S) 162
(6) M.P. No. 3199 of 1986

decision in *Jagdish Prasad's case (supra)* in the light of decision of Apex Court in K.C. Sareen CBI Chandigarh, (2001) 6 SCC 584 and require re-consideration by larger Bench. This is how the matter comes before us.

4. In *Jagdish Prasad's case (supra)*, petitioner was suspended when criminal prosecution was launched against him. After conviction by the Sessions Court, he was dismissed by order dated 7-6-1976. Ultimately, appeal was decided on 21-8-1978. Petitioner contended that he was entitled to be kept under suspension till the matter was finally decided by the Apex Court where appeal was pending. Therefore, he was entitled to subsistence allowance treating him under suspension. Counsel for State admitted that when the order of removal was passed on 7-6-1976, appeal was pending in this Court which was decided on 21-8-1978 therefore, the petitioner would be entitled to subsistence allowance upto 21-8-1978 and if the order of removal was already passed and the petitioner preferred appeal to the Apex Court, it could not be contended that the order of removal will not take the effect. Accepting the plea advanced by the learned Counsel for State, Division Bench holds that until appeal was pending before this Court, it could not be said that the petitioner was convicted. As such, order of removal could not be passed. Hence, the order of removal would be operative from 21-8-1978 when the appeal was disposed of by this Court. Conseqently, the petitioner was entitled to subsistence allowance up to 21-8-1978 since the order of removal had been passed, filing the appeal in the Apex Court would not affect the order of removal. Perusal of this judgment demonstrates that it has been decided on the statement of Counsel for State. Later, this judgment has been followed by another Division Bench in the case of *Vishwas Rao* v. *District Education Officer, Chhindwara and another*[1] in which petitioner has been held entitled to payment of subsistence allowance till the date of dismissal of appeal against conviction by this Court.

5. Fundamental question for consideration is whether a person whose appeal is pending in this Court is entitled to subsistence allowance till the disposal of the appeal taking him to be under suspension irrespective of order of removal/termination/dismissal passed by the Competent Authority after his conviction by the Criminal Court and whether stay of sentence/conviction or both make any difference.

6. Section 389(1) of the Code of Criminal Procedure, 1973 ('Code' hereafter) deals with power of the Appellate Court regarding suspension of execution of 'the sentence or order appealed against' during the pendency of the appeal. Similar power is exercisable by the Revisional Court during the pendency of the revision under section 401. In *Rama Narang's case*[2], the Apex Court examined the scope and ambit of the powers of Appellate Court under section 389 of the Code and said with

(1) M.P. No. 3199 of 1980, decided on 19-7-1988. (2) (1995) 2 SCC 513

can be suspended under section 389 (1) of the Code is the execution of sentence or the order, latter being one which is capable of execution. In Paragraph 15, Ahmadi, learned Chief Justice said:–

> "15.....An order of conviction by itself is not capable of execution under the Code. It is the order the sentence or an order awarding compensation or imposing fine or release on probation which are capable of execution and which, if not suspended, would be required to be executed by the authorities. Since the order of conviction does not on the mere filing of an appeal disappear it is difficult to accept the submission that section 267 of the Companies Act must be read to apply only to a 'final order of conviction'. Such an interpretation may defeat the very object and purpose for which it came to be enacted....."

Judgment also holds that in a certain situation, the order of conviction can be executable and in such a case, power under Section 389 (1) of the Code could be invoked specifically. Reference is made to Paragraph 16 of the judgment in which it is said:–

> "16. In certain situations the order of conviction can be executable, in the sense, it may incur a disqualification as in the instant case. In such a case the power under Section 389 (1) of the Code could be invoked. In such situations the attention of the Appellate Court must be specifically invited to the consequence that is likely to fall to enable it to apply its mind to the issue since section 389(1) it is under an obligation to support its order "for reasons to be recorded by it in writing". If the attention of the Court is not invited to this specific consequence which is likely to fall upon conviction how can it be expected to assign reasons relevant thereto? No one can be allowed to play hide and seek with the Court; he cannot suppress the precise purpose for which he seeks suspension of the conviction and obtain a general order of stay and then contend that the disqualifications has ceased to operate...."

The ratio of the judgment has been approved by the Court in *K.C. Sareen's case (supra)*. Thomas, J., speaking for the Court, said in paragraph 11 that–

> "The legal position, therefore, is this: though the power to suspend an order of conviction, apart from the order of sentence, is not alien to section 389(1) of the Code, tis exercise should be limited to very exceptional cases. Merely because the convicted person files and appeal in challenge of the conviction the Court should not suspend the operation of the order of conviction. The Court has a duty to

look all aspects including the remifications of keeping such conviction in abeyance. It is in the light of the above legal position that we have to examine the question as to what should be the position when a public servant is convicted of an offence under the PC Act. No doubt when the Appellate Court admits the appeal filed in challenge of the conviction and sentence for the offence under the PC Act, the Superior Court should normally suspend the sentence of imprisonment until disposal of the appeal, because refusal thereof would render the filing of the appeal otiose unless such appeal could be heard soon after the filing of the appeal. But suspension of conviction of the offence under the PC Act, *de hors* the sentence of imprisonment as a sequel thereto, is a different matter."

Though the legal position may be that there may be power to suspend an order of conviction apart from the order of sentence under Section 389(1) of the Code but its exercise should be limited to very exceptional cases, after the Court looks to all aspects including the remifications of putting the conviction in abeyance. Apex Court has recorded extensive reasons in Paragraphs 12 and 13 of the judgment as under:–

"12. Corruption by public servants has now reached a monstrous dimension in India.Its tentacles have started grappling even the institutions created for the protection of the republic. Unless those tentacles are intercepted and impeded from gripping the normal and orderly functioning of the public offices, through strong legislative, executive as well as judicial exercises the corrupt public servants could garner momentum to cripple the social order if such men are allowed to continue to manage and operate public institutions. When a public servant is found guilty of corruption after a judicial adjudicatory process conducted by a Court of law, judiciousness demands that he should be treated as corrupt until he is exonerated by a Superior Court. The mere fact that an appellate or revisional forum has decided to entertain his challenge and to go into the issues and findings made against such public sevenats once again should not been temporarily absolve him from such finding. If such a public servant becomes entitled to hold public office and to continue to do official acts until be is judicially absolved from such findings by reason of suspension of the order of conviction, it is public interest which suffers and sometimes, even irreparably. When a public servant who is convicted of corruption is allowed to continue to hold public office, it would impair the morale of the other persons manning such office and consequently that would erode the already shrunk confidence of

the people in such public institutions besides demoralising the other honest public servants who would either be the colleagues or subordinates of the convicted person. If honest public servants are compelled to take orders from proclaimed corrupt officers on account of the suspension of the conviction, the follout would be one of shaking the system itself. Hence, it is necessary that the Court should not aid the public servant who stands convicted for corruption charges to hold only (sic) public office until he is exonerated after conducting a judicial adjudication at the appellate or revisional level. It is a different matter if a corrupt public officer could continue to hold such public office even without the help of a Court order suspending the conviction.

13. The above policy can be acknowledged as necessary for the efficacy and proper functioning of public offices. If so, the legal position can be laid down that when conviction is on a corruption charge against a public servant, the Appellate Court or the Revisional Court should not suspend the order of conviction during the pendency of the appeal even if the sentence of imprisonment is suspended. It would be a sublime public policy that the convicted public servant is kept under disability of the conviction in spite of keeping the sentence of imprisonment in abeyance till the disposal of the appeal or revision."

Thereafter, in Paragraphs 14 and 15, the Apex Court said that:–

"14. We are fortified in holding so by two other decisions of this Court. One is *Dy. Director of Collegiate education (admn.)* v. *S. Nagoor Meera.* The following observations of this Court are apposite now : (SCC p. 281 para 9)

'The more appropriate course in all such cases is to take action under clause (a) of the second proviso to Article 311 (2) once a Government servant is convicted of a criminal charge and not to wait for the appeal or revision, as the case may be. If, however, the accused Government servant is acquitted on appeal or other proceeding, the order can always be revised and if the Government servant is reinstated, he will be entitled to all the benefits to which he would have been entitled to had he continued in service. The other course suggested, viz., to wait till the appeal, revision and other remedies are over, would not be advisable since it would mean continuing in service a person who has been convicted of a serious offence by a Criminal Court.'

15. The other decision is State of *T.N.* v. *A Jagnnathan*[1], which deals with the case of some public servants who were convicted, *inter alia*, of corruption charges. When the appeal filed by such publice servants was dismissed, the High Court entertained a revision and ordered suspension of the sentence as well as the order of conviction, in exercise of the powers under section 389(1) of the Code, taking cue from the ratio laid down in *Rama Narang* v. *Ramesh Narang*. But when the State moved this Court against the order of suspension of conviction, a two-Judge Bench of this Court interfered with it and set aside the order remarking that in such cases the discretionary power to order suspension of conviction either under section 389 (1) or even under section 482 of the Code should not have been exercised."

Aptly, we may refer to decision of Apex Court in *State of T.N.* v. *A Jagnathan (supra)*, holding that suspension of conviction and sentence during the pendency of appeal or revision under section 389(1) read with section 482 of the Code should not be ordered without taking into consideration moral conduct of convicts and the consequences which may follow in case suspension of conviction is not ordered. Precisely, the Court said:–

"3. The respondents in these four appeals are the Government employees. All the four were convicted by the Judicial Magistrate, Erode for various criminal offences and sentenced to undergo various sentences. The said conviction and sentences were affirmed by the Sessions Judge/ Special Judge, Erode. The respondents then approached the High Court in criminal revision accompanied with an application under section 389(1) Criminal Procedure Code for suspension of coviction as well as the sentences. The High Court after considering the ambit and scope of the provisions contained in sections 374 and 389(1) of the Code of Criminal Procedure and the relevant provisions of law and relying on the decision of this Court rendered in *Rama Narang* v. *Ramesh Narang*[2], took the view that for the reasons to be recorded in writing by the Appellate Court, the conviction or order of sentence can be suspended during the pendency of the same. The High Court also took the view that the power of the Appellate Court or the High Court to suspend the conviction or sentence is always inherent and can be exercised at any stage, subject to the condition that the Appellate Court should be approached and satisfied with the reasonings to be recorded in writing and further, if

(1) AIR 1996 SC 2449. (2) (1995) 2 SCC 513

any one wants to stop the proceedings which have been initiated for disqualification or removal from service or reduction in rank in respect of a public servant, one has to look into the moral conduct very much involved in such a case and only when the Court is satisfied with such conduct, then the remedy provided under different statute can not at all be stopped. After taking the aforesaid view and on consideration of the fact the respondents will loose the meagre stipend, if the prayer for suspending the conviction during the pendency of the revisions is not granted, passe the impugned orders suspending the conviction as well as the sentences awarded to the respondents. It is against these orders that the State has filed these appeals. The submission of the learned Cousel appearing for the State is that the High Court has passed the impugned orders relying on the decision in Rama *Ranang's case (supra)* wherein this Court took the view that in appropriate cases the conviction and sentences can be suspended in exercise of powers under section 482, Criminal Procedure Code. After going through the decision referred to above and the facts of the present case, we find that the decision relied upon has no application to the facts of the cases before us. In Rama *Narang's case (supra)* the conviction and sentences both were suspended on the reasoning that if the conviction and sentences are not suspended the damage would be caused which would not be undone it ultimately the revision of appellants of that case was allowed. But in the present case, we find that in the event of the revisions against their conviction and sentences are allowed by the High Court the damage, if any, caused to the respondents with regard to payment of stipend etc. can well be revived and made good to the respondents. If such trifling matters are taken into consideration, we think, then every conviction will have to be suspended pending appeal or revision involving the slightest disadvantage to a convict. That being so the facts of the decision relied on have no application to the present case. This apart, the High Court, though made an observation but did not consider at all the moral conduct of the respondents inasmuch as respondent- Jagannathan who was the Police Inspector attached to Erode Police Station has been convicted under Sections 392, 218 and 466, Indian Penal Code, while the other respondents who are also public servants have been convicted under the provision of Prevention of Corruption Act. In such a case, the discretionary power to suspend the conviction either under section 389(1) or under section 482,

> Criminal Procedure Code should not have been exercised. The orders impugned thus cannot be sustained."

7. In *Union of India and others* v. *Ramesh Kumar*[1], the Apex Court happened to deal with the situation similar to the present case where the Central Administrative Tribunal by order dated March 2, 1990 set aside the order of dismissal dated August 30, 1983 and directed *inter-alia* to treat, the period beginning from the date of dismissal of the respondent till the disposal of criminal appeal filed by the respondent in the Delhi High Court as the period of suspension for which the respondent would be entitled to get normal subsistence allowance in accordance with the relevant rules. While serving as Inspector of Food and Civil Supplies Department of the Delhi Administration, respondent was arrested by Anti-corruption Branch for accepting illegal gratification. Consequently, he was placed under suspension. The Special Sub-Judge, Delhi convicted him under section 5 (2) of the Prevention of Corruption Act, 1947 on July 30, 1983 and sentenced him to undergo imprisonment for three years' and fine of Rs. 500.00 with default clause, to further undergo six months' imprisonment. After conviction by Special Sub-Judge, disciplinary authority dismissed him from service under Rule 19 of the CCS (CCA) Rules, 1965 read with the provisions of Vigilance Manual. The respondent filed criminal appeal with prayer for bail against conviction and sentence recorded by Special Sub-Judge, Delhi before the High Court of Delhi. Admitting the appeal, the High Court passed the following order:–

> "Pending hearing of the appeal, the execution of the sentence shall remain suspended and he shall be released on furnishing a personal bond in the sum of Rs. 5,000/- with one surety in the like amount to the satisfaction of the Trial Court."

Respondent filed an application before Central Administrative Tribunal, New Delhi under Section 19 of the Administrative Tribunals Act, 1985 for quashing the order of dismissal and seeking direction to the appellants to grant subsistence allowance for the period beginning from the date of dismissal till the filing of criminal appeal in the High Court. The Tribunal allowed the application and granted the relief prayed for taking the view that by suspension of the execution of sentence, the conviction and dismissal lost efficacy and he was to be treated under suspension till the final judgment of High Court in appeal preferred by him. The Apex Court found that the view taken by the Tribunal was neither borne out from the rules applicable to the respondent nor by any judicial dicisions cited before the Tribunal. Examining CCS (CCA) Rules, 1965 read with the provisions of Vigilance Manual, the Court said in Paragraph 7 that:–

> "7. A bare reading of Rule 19 shows that the disciplinary authority is empowered to take action against a Government servant on the ground of misconduct which has led to his conviction on a criminal

(1) AIR 1997 SC 3531

charge. The rules, however, do not provide that on suspension of execution of sentence by the Appellate Court the order of dismissal based on conviction stands obliterated and dismissed Government servant has to be treated under suspension till disposal of appeal by the Appellate Court. The rules also do not provide the disciplinary authority to await disposal of the appeal by the Appellate Court filed by a Government servant for taking action against him on the ground of misconduct which has led to his conviction by a Competent Court of law. Having regard to the provisions of the rules, the order dismissing the respondent from service on the ground of misconduct leading to his conviction by a Competent Court of law has not lost its string merely because a criminal appeal was filed by the respondent against his conviction and the Appellate Court has suspended the execution of sentence and enlarged the respondent on bail. This matter may be examined from another angle. Under section 389 of the Code of Criminal Procedure, the Appellate Court has power to suspend the execution of sentence, and grant bail to an accused the effect of the order is that sentence based on conviction is for the time being postponed, or kept in abeyance during the pendency of the appeal. In other words, by suspension of execution of sentence under section 389, Criminal Procedure Code, an accused avoids undergoing sentence pending criminal appeal. However, the conviction continues and is not obliterated and if the conviction is not obliterated, any action taken against a Government servant on a misconduct which led to his conviction by the Court of law does not lose its efficacy merely because Appellate Court has suspended the execution of sentence. Such being the position of law, the Administrative Tribunal fell in error in holding that by suspension of execution of sentence by the Appellate Court, the order of dismissal passed against the respondent was liable to be quashed and the respondent is to be treated under suspension till the disposal of criminal appeal by the High Court."

Rule 19 of the M.P. Civil Service (Classification, Control and Appeal) Rules, 1966, envisages–

"19. Special Procedure in certain cases.–Notwithstanding anything contained in Rule 14 to Rule 18:–

(i) Where any penalty is imposed on a Government servant on the ground of misconduct which has led to his conviction on a criminal charge; or

(ii) Where the disciplinary authority is satisfied for reasons to be recorded by it in writing that it is not reasonably practicable to hold an enquiry in the manner provided in these rules; or

(iii) Where the Government is satisfied that in the interest of the security of the State, it is not expedient to hold any enquiry in the manner provided in these rules, the disciplinary authority may consider the circumstances of the case and make such orders thereon as it deems fit:

Provided that the Commission shall be consulted where such consultation is necessary before any orders are made in any case under this rule."

Order in the present case has been passed under Rule 19 (i) after his conviction on a criminal charge. (See: *Union of India* v. *V.K. Bhaskar*[1]. Finally we may refer to Apex Court decision in *B.R. Kapur* v. *State of T. N. and another*[2]. In Paragraph 44, the Court said:–

"44. Lastly, in this connection, our attention was drawn to the case of *Vidya Charan Shukla* v. *Purshottam Lal Kaushik.* The Court held that if a successful candidate was disqualified for being chosen, at the date of his election or at any earlier stage of any step in the election process, on account of his conviction and sentence exceeding two years' imprisonment, but his conviction and sentence were set aside and he was acquitted on appeal before the pronouncement of the judgment in the election petition pending against him, his disqualification was retrospectively annulled and the challenge to his election on the ground that he was so disqualified was no longer sustainable. This case dealt with an election petition and it must be understood in that light. What it laid down does not have a bearing on the question before us : the construction of Article 164 was not in issue. There can be no doubt that in a criminal case acquittal in appeal takes effect retrospectively and wipes out the sentence awarded by the Lower Court. This implies that the stigma attached to the conviction and the rigour of the sentence are completely obliterated, but that does not mean that the fact of the conviction and sentence by the lower court is obliterated until the conviction and sentence are set aside by an appellate court. The conviction and sentence stand pending the decision in the appeal and for the purposes of a provision such as section 8 of the Representation of the People Act are determinative of the qualifications provided for therein."

(1) (1997) 11 SCC 383 (2) (2001) 7 SCC 231

8. What emerges out of the aforesaid discussion is that Appellate Court and Revisional Court can, in exercise of power under Sections 389(1)/482, Code of Criminal Procedure, 1973, stay the execution of sentence or order capable of execution but stay of conviction can be passed in exceptional cases after Court carefully examines the conduct of accused, facts of the case and possible ramifications or avoiding irretrievable consequences. However, in both the cases, the conviction and sentence cannot be effaced. It is the irretrievable consequence in the former case and execution of sentence in the latter case which can be stayed. With regard to Government servant, competent authority can terminate the services after conviction by Criminal Court. Stay of execution of sentence will not debar it from doing so unless conviction is also stayed in exercise of power in light of principles laid down by the Apex Court in *K.C. Sareen's case (supra)*. Further, on termination order having been passed, master and servant relationship terminates and filing of appeal and stay of execution of sentence do not revive it. He cannot be taken to be under suspension from the date of termination following conviction by Trial Court tilll the date of judgment by the Appellate Court. Therefore, he would not be entitled to claim subsistence allowance for this period.

9. The result is that the decisions of this Court in *Jagdish Prasad's case*[1] followed in *Vishwas Rao's case*[2] do not lay down correct law and are, therefore, overruled. Matter will appear before the Division Bench for disposal on merits.

Order accordingly.

WRIT PETITION

Before Mr. Bhawani Singh Chief Justice, and Mr. Justice S.L.Jain

16 December, 2002

MANNU .....Petitioner*

v.

STATE OF M.P. & another .....Respondents

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.

A perusal of statement of object and reasons for amendment reveals that certain practical difficulties were experienced and discrepancies noticed in implementation of M.P. Excise Act, 1915. It was noticed that quantum of punishment for offence under

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* W.P. No. 4833/2002

(1) M.P. No. 465 of 1982 dated 6-10-1982. (2) M.P. No. 3199 of 1986 dated 19-7-1988.

section 34 is inadequate. Therefore, deterrent punishments have been proposed, the provisions for bail has been changed and it has been provided that the bail shall not be granted to the offender in specified circumstances. Thus, if for certain offences or class of offences that special procedure regarding bail has been prescribed, which is based on the reasonable basis of classification, there is no infringement of Articles 14,19 and 21 of the Constitution.

The legislation has made a complete and precise classification of the persons to whom Section 59-A is to be applied. That cannot be a ground for condemning it as arbitrary and therefore, obnoxious to Article 14. Legislature has indicated what are the offences to which said provision under Section 59-A will be applicable. Legislature has it self made classification and has not left it to be made by the administrative authority. Law can set apart classes according to the need of the society and as suggested by experience. It must be assumed that the legislature understands and correctly appreciates the need of its own people and that its laws are directed to solve problem made manifest by its own experience.

The presumption is exercised where the law pertains to the safety, health and moral of the community. For the protection of the health, the law must arm itself with certain powers, The law must strike a balance between individual freedom and health of the community. Legislature is the best judge, regarding what is good for its community by whose suffrage it comes into existence. The ultimate responsibility of determining reasonableness from the point of view of interest of the general public rests with the legislature and it cannot shirk this solemn duty.

To stop the illicit distillation, transport, import, export, collection or possession of liquor in contravention of the provisions of the Act or of any rule, notification or order issued thereunder or any condition of a licence permit or pass granted under the Act, drastic provisions were required. To root out the rampant evil in a case of dangerous or noxious trade such as production or trade in liquor or adulterated food stuffs or cultivation of narcotic or trafficking in women. Legislature can put certain restrictions. If certain reasonable restrictions are put in the interest of general public, the law cannot be struck down. (Paras 23,24,25 and 27)

State of U.P. v. *Shah Mohammad*[1], *Maneka* v. *Union of India*[2], *Francis* v. *Union Territory*[3], *Minerva Mills* v. *Union of India*[4], *Karda Singh* v. *State of Punjab*[5], *State of M.P.* v. *Ram Krishna Baloothiya*[6], *State of Bihar and others* v. *Bihar Distillery Ltd.*[7], *Virendra* v. *State of Punjab*[8], *Khare* v. *State of Delhi*[9], *Customs* v. *Sampathu*[10], referred to.

(1)	AIR 1969 SC 1234	(2)	AIR 1978 SC 597	(3)	AIR 1981 SC 746
(4)	AIR 1980 SC 1789	(5)	1994 Cr. L.J. 3139	(6)	AIR 1955 SC 1198
(7)	AIR 1997 SC 1511	(8)	AIR 1957 SC 896	(9)	AIR 1950 SCR 519
(10)	AIR 1962. S.C. 316				

Mannu v. *State of M.P., 2002.*

M.B. Shrivastava, for the Petitioner.

None, for the Respondent.

Cur. adv. vult.

JUDGMENT

The Judgment of the Court was delivered by **S.L. JAIN, J:(ORAL)**– Invoking extra ordinary jurisdiction of this Court under Article 226 of the Constitution of India, petitioner has challenged the constitutional validity of Section 59A and certain other provisions of the M.P. Excise Act, 1915 (hereinafter referred to as the "Act") as inserted by the Madhya Pradesh Excise (Amendment) Act (No. 22 of 2000) (hereainafter referred to the "Amending Act") which received the assent of Governor of Madhya Pradesh on 29.7.2000, and on being published in the Madhya Pradesh Gazette Extra ordinary dated August 4, 2000 came into force from the same date, on the ground that the impugned legislation has invaded his fundamental right under Article 21 of the Constitution of India.

2. Petitioner has pleaded that he is indulged in the business of liquor, working with the Contractor who holds the valid licence for last many years. During the course of employment with the contractor, petitioner is required to carry liquor from one place to another. The officials of the Excise Department of the State, sometimes to fulfill their yearly quota, falsely involve innocent persons in the cases under sections 34 and 49A of the Act. Petitioner is one such victims who is facing trial in various courts for the offences punishable under the Act. It is alleged that the offence under section 34(1)(b) of the Act was earlier bailable. Petitioner was so many times arrested for the offence punishable under sections 31, 34(1)(b) of the Act and released on bail. In the Amending Act, section 34 has been substituted. Sub Section (2) of the amended section 34 provides that "notwithstanding any thing contained in sub section (1) if a person is convicted for an offence covered by Clause (a) or Clause (b) of Sub-section (1) and the quantity of the intoxicant being liquor found at the time or in the course of detection of the offence exceeding fifty bulk litre, he shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to three years and with fine which shall not be less than twenty five thousand rupees but may extend to one lac rupees. Certain restrictions have been imposed on the right to be released on bail by insertion of Section 59A in the Act which are violative of Article 21 of the Constitution. Therefore, the same may be declared *ultra vires* the Constitution.

3. We have heard Shri M.B. Shrivastava, learned counsel for the petitioner at length, at the admission stage.

4. In India legislative powers of Parliament and State Legislatures are conferred and distributed by Article 246 and Lists I, II, and III in the seventh schedule o f the

Constitution. Parliament has exclusive power to make laws with respect to any o the matters in List I and State Legislatures have exclusive power to make laws with respect to matters in list II. While examining the legislative competence of State to make a law all that is required to be seen is whether the subject matter falls in List II

5. It is not disputed before us that the subject matter regarding which the impugnec amendment has been made falls in List II, of the Constitution, therefore, the State Legislature has exclusive power with respect to that. The petitioner has challengec the constitutionality of the amendment on the ground that it contravenes Article 21 o the Constitution.

6. The object of Article 21 of the Constitution is to prevent encroachment upon personal liberty by the Executive except in accordance with law and in conformity with the provisions thereof. Before a person can be deprived of his life or persona liberty the procedure established by law must be strictly followed and must not be departed from to the disadvantage of the person affected. The procedure establishec by law in Article 21 means the law prescribed by Parliament or State Legislature. At any given point of time, the State Legislature has the power to change the procedure by amending a particular enactment and when the procedure is so changed, it becomes the procedure established by law [*See State of U.P.* v. *Shah Mohammad*[1]]. The case of *Maneka* v. *Union of India*[2] opened up a new dimension and laid down that Article 21 imposes a limitation upon law-making as well, namely, that while prescribing a procedure for depriving a person of his life or personal liberty, it must prescribe a procedure which is reasonable, fair and just [See *Francis* v. *Union Territory*[3]].

7. Learned counsel appearing for the petitioner submitted that the procedure prescribed by law should not be arbitrary, unfair and unreasonable. A procedure would be lacking in reasonableness where it is unfair. He also submitted that fairness could be impaired if a person is falsely implicated and his right to be released on bai is curtailed. If the procedural law does not provide for his pre-trial release on bai where there is no substantial risk of his absconsion, it cannot be said to be fair. He further submitted that an under-trial prisoner should not be kept in jail for unreasonable time. If the law prevents the Court from releasing a person on bail, the process o justice, which has been assured in the preamble of our Constitution shall stanc hampered.

8. Whether the procedure prescribed by the Legislature is just, fair and reasonable would depend upon the circumstances of each case. In Maneka's case (supra) it ha been laid down that a procedure which is arbitrary, oppresive or fenciful is no procedure at all and a procedure which is unreasonable cannot be said to be in conformity with Article 14 of the Constitution.

(1) (AIR 1969 SC 1234) (2) (AIR 1978 SC 597)
(3) (AIR 1981 SC 746)

9. In *Minerva Mills* v. *Union of India*[1], the Apex Court has pronounced that when the constitutionality of the statute is challenged as unreasonable, the Court has to test its validity on the anvil of Articles 14, 19 and 21 read together.

10. Section 59-A of the Excise Act as inserted by the Amending Act, cannot be said to be either unfair or unreasonable simply because a provision has been added that no application for anticipatory bail shall be entertained by any Court in respect of a person accused of a n offence under Section 49-A or in respect of a person who is accused of an offence convered by clause (a) or clause (b) of sub-section (1) of Section 34 when quantity of liquor found at the time of detection of such offence is exceeding 50 bulk litres.

11. Deprivation of liberty by refusing to grant anticipatory bail is not a recourse to nishment or for punitive purpose, but it is for the interest of justice as well as the interest of individuals concerned and the society affected. It was argued by the learned counsel for the petitioner that the right of an accused to avail of anticipatory bail is an integral part of Article 21 of the Constitution and its removal from the Act could be violative of Article 21. In this regard it can be said that there was no such provision in the old Criminal Procedure Code and it was introduced for the first time in the present Code of 1973. Section 438 is omitted in the State of U.P. by section 9 of the Code of Criminal Procedure (UP Amemdment) Act, 1976 w.e.f. 28.11.75. In the State of West Bengal, a proviso is inserted to Section 438(1) w.e.f. 24.11.88 to the effect that no final order shall be made on an application filed by the accused praying for anticipatory bail in relation to an offence punishable with death imprisonment or imprisonment for a term of not less than 7 years without giving the State not less than 7 days notice to present its case. A similar provision was also introduced by the State of Orissa to the effect that where a person, accused of a non bailable offence is likely to abscond or otherwise misuse his liberty while on bail he will have no jurisdiction to claim the benefit of anticipatory bail. Thus, it is clear that section 438 contains a new provision incorporated in the present Code creating a new right. If such a right is taken away can it be said that it is violative of Article 21 ? The answer will be in negative.

12. In the case of *Karda Singh* v. *State of Punjab*[2], section 20(7) of the Terrorist and Disruptive Activities (Prevention) Act. 1987 came up for consideration before the Apex Court whereby right of anticipatory bail was taken away and the same was upheld.

13. In the case of *State of M.P.* v. *Ram Krishna Baloothiya*[3] section 18 of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 came up for consideration before the Supreme Court. Section 18 provides that nothing in

(1) (AIR 1980 SC 1789) (2) (1994 Cr. L.J. 3139) (3) (AIR 1955 SC 1198)

section 438 of the Code shall apply in relation to any case involving the arrest of any person on the accusation of having committed an offence under this Act. Supreme Court looking to the hystorical background relating to the practice of untouchability and the social altitudes which led to the commission of offences against scheduled castes and scheduled tribes, held that there is justification for an apprehension that if the benefit of anticipatory bail is made available to the accused in such cases, there is likelihood of their misusing the liberty, while on anticipatory bail, to terrorise the victims. The Supreme Court held that Section 18 (Supra) cannot be considered in any manner as violative of Article 21.

14. Of course the offences under the Act are very different from those under the Terrorist and Disruptive Activities (Prevention) Act, 1987. Nevertheless, we cannot loose sight of the fact that liquor is an injurious article. It is not only harmful but sometimes it is dangerous. Therefore, those who involve in manufacture, collection and sale of illicit liquor should be dealt with strictly. The financial benefits which accure from dealing in illicit liquor give tempetation to commit such offences. In order to save the society from ill effects of illicitly distilled liquor, stringent provisions in the Act are necessary. Therefore, if the right of anticipatory bail is taken away, it cannot be said that section 59A of the Act is violative of Article 21.

15. Learned counsel for petitioner submitted that provisions of the Act relating to non extension of the benefit of bail are also violative of Article 21. But the argument lacks merit because Clause (2) of Section 59-A of the Act does nto prohibit grant of bail. It only says that persons accused of certain offences shall not be released on bail unless the Public Prosecutor has been given opportunity to oppose the application for such release. Merely because providing opportunity to oppose the application for release on bail is imperative, it cannot be said the provisions are prohibiting grant of bail. The amendment does not provide that the bail shall be rejected on mere opposition. After hearing the Public Prosecutor the Court has discretion to refuse bail or grant the same. The personal liberty granted under Article 21 of the Constitution is not absolute in the sense of immunity from arrest, hence non release on bail of an accused, unless the Court is satisfied that there are no reasonable grounds for believing that the accused is not guilty of such offence and that he is not likely to commit any offence while on bail, is not violative of Article 21. The provisions of Amending Act do not prevent the accused from making an application. Refusal to release on bail on the ground that there are reasonable grounds to believe that accused is guilty of a particular offence and he is likely to commit the offence while on bail does not by itself render the provision unconstitutional. The accused persons overed by newly inserted Section 59-A are a class in themselves. It is not opposed to the equal protection clause as incorporated in Article 14. It is not a case where the law enables to deprive a person of his personal liberty and lays down no procedure to be followed in the

matter. The discretion of deciding what the procedure should be and to what extent it needs to be prescribed, has been given entirely to Legislature. No one has a vested right in procedure and the Legislature can modify it in any manner it thinks fit, subject to the limitation that there is no invasion of fundamental right.

16. A statute has to be construed so as to make it effective and opertive on the principle expressed in the maxim "utres maegis valeat quam pereat', that it may rather become operative than null. There is, therefore, presumption that the Legislature does not exceed its jurisdiction and the burden of establishing that the Act has transgressed constitutional mandates such as those relating to fundamental rights is always on the person who challenges its *vires* [See *State of Bihar and others* v. *Bihar Distillery Ltd. etc.*[1]]. Unless it becomes clear beyond reasonable doubt, that the legislation in question transgresses the limits laid down by organic law of the Constitution, it must be allowed to stand.

17. It is contended that Section 59-A discriminates on the basis of quantity of liquor found at the time of detection of offence and it is not based on any valid principle. Article 14 of the Constitution gives a right of equal treatment in similar circumstances. No doubt, there should not be any discrimination among persons placed similarly, but where discrimination is based on a valid principle, as quantity of liquor in this case, it cannot be said to be discriminatory. The principle of equality does not mean that every law must have universal application for all persons who are not by the circumstances in the same position. The principle does not take away from the State the power of classifying persons for legitimate purposes.

18. If a law deals equally with the members of well defined class it is not obnoxious and is not open to the charge of denial of equal protection on the ground that it has no application to other persons. It is for the legislature to determine what categories it would embrass within the scope of legislation and merely because certain categories which would stand on the same footing as those which are covered by legislation are left out would not render the legislation discriminatory and violative of Article 14 in any manner. The entire matter should be considered from the point of need of the society.

19. The legislature has enacted section 59–A, according to the exigency of the situation. Article 14 does not prohibit resaonable classification for the purpose of legislation. If the legislature takes care to reasonably classify person for legislative purposes if it deals equally with all persons belonging to a well defined class it is not open to the charge of denial of equal protection on the ground that the law does not apply to other persons.

20. In order to pass the test of permissible classification, two things must be fulfilled;

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(1) (AIR 1997 SC 1511)

namely that the qualification must be founded on an intelligible differentia which distinguishes persons or things or group together from others left out of the group and; (2) that differentiation must have rational relation to the object sought to be achieved by the statute in question. What is necessary is that there must be a nexus between the basis of the classification and the object of the act under consideration. If looked with this angle the classification on the basis of quantity of liquor found is no palpabaly arbitrary.

21. The distinction between the accused persons who are found with quantity of liquor exceeding 50 bulks litres and those found with less than 50 bulk litres maintains uniformity with each group and the provisions cannot be condemned as discriminative. The difference which will warrant a reasonable classification need not be great, what is required is that it must be real and substantial and must bear some reasonable and just relation to the object of legislation. Looking to the purpose and policy of the Act behind insertion of section 59-A, it is clear that the classification made on the basis of quantity has a reasonable relation to the object which the legislature seeks to obtain.

22. The contention that similar provisions are not there, in other states cannot be accepted to hold that the provision is discriminatory. The classification according to difference in the quantity of liquor providing a special procedure for of an offence of comparatively serious nature would be no violation of equal protection. Any person committing such offence would be tried according to that procedure. There may be many cases where quantity may be a reasonable index for a classification. For example a law charging higher licence fee upon whole sale trader as compared with retailer or a law exempting from excise duties goods produced by small power loom weaver cannot be said to be discriminatory. Therefore, discrimination on the basis of quantity cannot be said to be arbitrary or unreasonble. A procedure different from that laid down for smaller quantity can be prescribed for larger quantity if the discrimination is based on the resonable classification having regard to the objectives which the legislation has in view and the policy underlying it. The policy of the legislation can be gathered from the preamble or from the statement of objects and reasons or from the general tenor of the enactment.

23. A perusal of statement of object and reasons for amendment reveals that certain practical difficulties were experienced and discrepancies noticed in implementation of M.P. Excise Act, 1915. It was noticed that quantum of punishment for offence under section 34 is inadequate. Therefore, deterrent punishments have been proposed, the provisions for bail has been changed and it has been provided that the bail shall not be granted to the offender in specified circumstances. Thus, if for certain offences or class of offences that special procedure regarding bail has been prescribed, which is based on the reasonable basis of classification, there is no infringement of Articles 14, 19 and 21 of the Constitution.

24. The legislation has made a complete and precise classification of the persons to whom Section 59-A is to be applied. That cannot be a ground for condemning it as arbitrary and therefore, obnoxious to Article 14. Legislature has indicated what are the offences to which said provision under Section 59-A will be applicable. Legislature has it self made classification and has not left it to be made by the administrative authority. Law can set apart classes according to the need of the society and as suggested by experience. It must be assumed that the legislature understands and correctly appreciates the need of its own people and that its laws are directed to solve problem made manifest by its own experience.

25. The presumption is exercised where the law pertains to the safety, health and moral of the community. For the protection of the health, the law must arm itself with certain powers, The law must strike a balance between individual freedom and health of the community. Legislature is the best judge, regarding what is good for its community by whose suffrage it comes into existence. The ultimate responsibility of determining reasonableness from the point of view of interest of the general public rests with the legislature and it cannot shirk this solemn duty.

26. Learned counsel for the petitioner straneously argued that there is possibility of abuse of the power by the excise officials. They, usually with a view to achieve the target of cases given to them a involve the innocent persons in criminal cases to pave their way for promotion. The mere possibility of abuse of power by the executive is no test for determining the reasonableness of the restriction imposed by the law. [See *Virendra* v. *State of Punjab*[1] and *Khare* v. *State of Delhi*[2]]. If however, the statutory power is shown to have been abused by the authority, persons aggrieved shall have their remedy but that will not be a ground for invalidating the statute itself. See *Collector of Customs* v. *Sampathu)*[3].

27. It is contended that satisfaction of Court that there are reasonable ground for believing that the accused is not guilty of such offence and that he is not likely to commit any offence while on bail throws burden of proof upon an accused. It is not so. Provision does not leave the burden of proof on the accused. Even if the accused is required to account for facts within his own knowledge it will not be unreasonable. To stop the illicit distillation, transport, import, export, collection or possession of liquor in contravention of the provisions of the Act or of any rule, notification or order issued thereunder or any condition of a licence permit or pass granted under the Act, drastic provisions were required. To root out the rampant evil in a case of dangerous or noxious trade such as production or trade in liquor or adulterated food stuffs or cultivation of narcotic or trafficking in women. Legislature can put certain restrictions. If certain reasonable restrictions are put in the interest of general public, the law cannot be struck down.

(1) (AIR 1957 SC 896) (2) (AIR 1950) SCR 519 (3) AIR 1962, 316.

Dr. Rajkumar Jain v. *The State of M.P., 2002.*

28. A sequel to the above discussion is that the amendments incorporated by the Amending Act, in the M.P. Excise Act, 1915 are not beyond the competence of the State Legislature and they do not affect or invade fundamental rights guaranteed by the Constitution under Articles 14, 19 or 21 of the Constitution of India and the same are *intra-vires*. Therefore, we do not find any merit in this petition and the same is dismissed in limine.

Petition dismissed.

WRIT PETITION

Before Mr. Justice Dipak Misra and Mr. Justice A. K. Shrivastava

28 October, 2002

Dr. RAJKUMAR JAIN .... Petitioner*

v.

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

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.

A rule has to be in consonance with the provisions of the statute and it can not travel beyond the rule making power of the authority framing the rule and there should not be any inconsistency or repugnancy between the Act and Rules.

If the aforesaid Sections and the impugned rules 4 and 5 are kept in *juxtaposition* and tested on the touchstone of the aforesaid exposition of law, there remains no iota of doubt that the impugned rules are nothing but an encroachment on the main statute regarding registration and removal of the name of Homoeopathy Practitioners. The impugned rules 4 and 5 which have been introduced under a delegated legislation has created an unwarranted situation which is beyond its competence beyond the scope of the principal Act.

It is well known law that Rules are subordinate to the Act and they are made to supplement the provisions of the original Act. The rule can not override any of the provisions of the principal Act and the rule making authority can not supplant the provisions of the Act. Any of the provisions of Adhiniyam, 1976 do not speak any

* Writ Petition No. 5/2001

thing like renewal of registration and on its failure, the cancellation of the registration.

Rules 4 and 5 appears to the *ultra vires* to the provisions of Article 14 of the Constitution of India. It will be profitable to note that in the cases of Advocates, chartered accountants etc. once they are enrolled, thereafter there is no provision of renewal. In this view of the matter, renewal of registration of Homoeopathy medical practitioner runs contrary to the provisions of Article 14 of the Constitution of India.

On the basis of aforesaid discussion and the analysis of the law, we find no difficulty in holding that Rules 4 and 5 of the Madhya Pradesh Homoeopathy Council (Publication of Register and Appeal) Rules, 2000 are *ultra vires* and unconstitutional and they are so held and declared to be *ultra vires* and unconstitutional.

(Paras 16,17,18,19 & 20)

General Officer Commanding-in-Chief and another v. *Dr. Subhash Chandra Yadav and another* [1]; *Gopal Narian* v. *State of Uttar Pradesh and another*[2]; *Hukum Chand etc.* v. *Union of India and others* [3]; *State of Madhya Pradesh* v. *Mahalaxmi Fabric Mills Ltd.*[4]; *Additional District Magistrate (Rev.) Delhi Admn.* v. *Siri Ram* [5].referred to.

Agricultural Market Committee v. *Shalimar Chemical Works Ltd.*[6]; *Bhatia International* v. *Bulk Trading S.A. and another*[7]; *Kunj Behari Lal Butail and others* v. *State of H.P. and others* [8]; followed.

Smt. S. Paliwal, for the petitioner.

S.K.Yadav, G.A. for the respondent.

Cur.adv.vult.

ORDER

The Order of the Court was delivered by **A.K. Shrivastava, J:**–This order shall also govern the disposal of connected writ petition No. 311/2002 (*Dr. Sheetal Prasad Gupta* v. *The State of M.P. and another*).

2. By this writ petition filed under Article 226 of the Constitution of India, the petitioner has challenged the *vires* of Rules 4 and 5 of Madhya Pradesh Homeopathy Council (Publication of Register and Appeal) Rules, 2000 (hereinafter referred to as 'the Rules') on the foundation the same is violative of the provisions contained in Section 21, 22 and 26 read with Section 51 of the Madhya Pradesh Homeopathy Parishad Adhiniyam, 1976 (hereinafter referred to as 'the Adhiniyam, 1976') and also on the court that they contravene the provisions of Article 14 of the Constitution of India.

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(1) AIR 1988 SC 876 (2) AIR 1964 SC 370 (3) AIR 1972 SC 2427
(4) AIR 1995 SC 2213 (5) AIR 2000 SC 2143 (6) AIR 1997 SC 2502
(7) AIR 2002 SCW 1285 (8) AIR 2000 SC 1069

3. The brief facts are that the petitioner obtained M.B.B.S degree from Jabalpur University in 1980 and got himself registered under Bhopal Medical Practitioner's Registration Act, 1935, Bhopal being Registration No. 2657 deted 24.12.1980. The petitioner also obtained the degree in Anaesthesiology in April, 1986 from Rani Durgavati Vishwa Vidhyalaya Jabalpur. He further passed diploma in Homeopathy and Biochemic from Rajya Homeopathy Parishad, Madhya Pradesh, Bhopal in 1981. He applied for his registration under Section 21 and 22 of the Adhiniyam, 1976 and paid the requisite registration fee in terms of Rule 5 of the Madhya Pradesh Homeopathy Council (Publication of Register and Appeal) Rules, 1976. It is no more in dispute that respondent No.2 (Rajya Homeopathy Parishad Madhya Pradesh, Bhopal) registered the name of the petitioner in the Register kept under Section 21 of the Adhiniyam, 1976 at Serial No. 8922 on 18.7.1983 in terms of provision of Section 22 of the Adhiniyam, 1976. It is also not in dispute that respondent No.2 issued requisite registration certificate, Annexure P/3, to the petitioner in terms of Section 22(3) of the Adhiniyam, 1976.

4. According to the writ petitioner he had obtained diploma in Homeopathy, Medicine and Surgery in 1990 from Rajya Homeopathy Parishad, Bhopal and topped the merit list. The petitioner applied for entry of additional qualification in the Register kept under Section 21 of the Adhiniyam, 1976 and also deposited the prescribed fee as per rules. The authorities provided Registration No. 8922 to the petitioner on 18.7.1983, the petitioner has been practising as a Homeopathy Physician since August, 1983.

5. We have heard Smt. S. Paliwal and Shri Rajendra Mishra, learned counsel for the petitioners and Shri S.K. Yadav, learned Government Advocate for the State.

6. It is submitted by the learned counsel for the petitioners that impugned rules are beyond the competence of respondent no.1/State and the exercise of power of framing these rules is beyond its power inasmuch as the effect of the rules would tantamount to travelling beyond the scope of Section 26 of the Adhiniyam, 1976. It has further been contended that no power has been vested in respondent No.1 under Section 51 of the said Adhiniyam, 1976 to frame rule under Section 26 of the Act. It has also been contended that once the name of Homeopathy practitioner is entered in the Register of respondent No.2-Rajya Homeopathy Parishad Madhya Pradesh, Bhopal under Section 21 of the Adhiniyam, 1976, he enjoys permanent status as provided under Section 22 of the said Adhiniyam, as such Rule 4 "Verification and Renewal" is wholly contrary to the provisions of Section 21, 22 and 26 of the Adhiniyam, 1976. It has been contended that once Rule 4 comes into operation, Section 26 of the Act would be automatically amended under deeming provisions for which rule making power of the State Government does not authorise it to make rule contrary to the spirit and scheme of the provisions of Section 26 of the Adhiniyam, 1976.

7. It has been vehemently argued by the learned counsel for the petitioners that it is well settled, that the rules are subordinate to the Act and they are framed for supplementing the provisions of the Act and the rule making authority has no power to supplant the provisions of the Act. The Adhiniyam, 1976 does not speak about "Renewal of Registration", it provides for registration once only, therefore, the rules can not override the Act. Thus, according to the petitioners, rules 4 and 5 are *ultravires*. Rule 4 (5) provides that if any person fails to apply along with fee specified in the appendix in terms of sub-rule 2 his registration under Section 22 of the Adhiniyam, 1976 shall be cancelled, however, he may apply for restoration of his name in "Form" after paying the fee as prescribed in the Appendix annexed to the Rules.

8. Before considering the rival contention of the learned counsel of the parties, it would be relevant to mention the relevant provisions of the Act and Rules. The preamble of the Adhiniyam, 1976 reads as under :-

> "An Act to provide for the constitution of a State Council of Homoeopathy and to regulate the registration of practitioners of Homoeopathy in the State and for matters connected therewith."
>
> (emphasis supplied)

Chapter VI of the Adhiniyam, 1976 deals with "Registration". Section 21 of the said Adhiniyam reads as under :-

> "21. State Register of Homoeopathy.–(1) The Council shall cause to be maintained in the prescribed manner a register of practitioners of Homoepathy to be known as the State Register of Homoeopathy in such form and containing such particulars as may be prescribed.
>
> (2) It shall be the duty of the Registrar to keep and maintain the State Register in accordance with the provisions of this Act and of any order made by the Council, and from time to time revise the register and publish it in the Gazette and in such other manner as may be prescribed.
>
> (3) Such register shall be deemed to be a public document within the meaning of the Indian Evidence Act, 1872 (No. 1 of 1872) and may be proved by a copy published in the Gazette."

Section 22 prescribes the entitlement of a person to be registered under the Adhiniyam, which reads as under:-

> 22. Persons entitled to be registered. (1) Every person who possesses recognised qualification mentioned in the Schedule shall, at any time on an application made in the form prescribed to the Register and on

payment of such fee as may be prescribed be entitled to have his name entered in the register.

(2) The name of every person who on the day immediately preceding the 15th day of September, 1975 was registered in the register prepared under the repealed Act shall be entered in the register under this Act without such person being required to make an application or to pay any fee:

Provided that such person shall pay such fee in such manner as may be prescribed within a period of two years from the 15th day of September, 1975 and on his failure to do so his name shall be removed from the register and shall be re-entered in the register on an application made by such person in such form, within such further period and on payment of such additional fee as may be prescribed:

Provided further that no application for re-entry shall be entertained after the expiration of the period under the preceding proviso, but it shall not prejudice the right of the applicant to seek fresh registration under this section.

(3) Every registered practitioner shall be given a certificate of registration in the prescribed form. In the event of such certificate being lost, defaced or destroyed a duplicate thereof shall be issued on payment of a fee of ten rupees and the certificate so issued shall be marked duplicate."

Section 23 is in respect to the entry of additional qualification in the register which reads as under :–

"23. Entry of additional qualification in the Register.–If any person whose name is registered in the State register obtains any title, degree, diploma or other qualification in Homoeopathy he shall on application made in this behalf and on payment of a fee of five rupees be entitled to have an entry stating such other title, degree, diploma or other qualification made against his name in the register either in substitution for or in addition to any entry previously made.

Under Section 25 of the Adhiniyam, 1976, the procedure has been prescribed for the removal of the name of the practitioner, which reads as under :–

"**25. Removal of name from the register.** (1) If a registered practitioner has been, after due inquiry held by the Council in the manner prescribed; found guilty of any misconduct, the Coucil may–

(a) issue a letter of warning addressed to such practitioner; or

(b) direct that the name of such practitioner.–

(i) to be removed from the register for such period as may be specified in the direction, or

(ii) be removed from the register permanently."

Explanation.–For the purpose of this section misconduct shall mean–

(i) conviction of the registered practitioner by a criminal court for an offence which involves moral turpitude and which is recognizable within the meaning of the Code of Criminal Procedure 1973 (No.2 of 1974);

(ii) infamous conduct in any professional respect that is to say professional misconduct specified by the regulations under sub-section (2) of section 24 of the Homeopathy Central Council Act, 1973 (No. 59 of 1973).

(2) The Council may, on sufficient cause being shown, direct at any time that the name of the practitioner so removed shall be re-entered in the register on such conditions and on payment of such further fee as the Council may impose.

(3) The council may on its own motion or on the application of any person, after due and proper enquiries and giving an opportunity to the person concerned of being heard, cancel or alter any entry in the register if, in the opinion of the Council, such entry was fraudulently or incorrectly made.

(4) The Council may on its own motion or on the application of any person, after due and proper enquiries, remove the name of any practitioner from the register, if,–

(a) he has expired;

(b) he has ceased to practise;

(c) he being a practitioner in any system of medicine other than Homeopathy has ceased to practise Homoeopathy.

(5) In holding enquiries under this section the Council or the Committee appointed by the Council for the purpose, as the case may be, shall be deemed to be a Court within the meaning of the Indian Evidence act, 1872 (No.1 of 1872), and shall exercise all the powers of a Commissioner appointed under the Public Servant (Inquiries) Act, 1850 (No. 37 of 1850), and such enquiries shall be conducted, as far

as may be, in accordance with the provisions of sections 3, 5, 8 to 20 of the Public Servant (Inquiries) Act, 1850 (No.37 of 1850).

Section 26 deals with publication of names entered in the State Register which is as under :–

"**26. Publication of names entered in the State Register.**–(1) The Registrar shall, in every year and from time to time as the occasion may require, on or before a date to be fixed in this behalf by the Council, cause to be published in the Gazette and in such other manner as the Council may provide, a full or supplementary list of the names for the time being entered in the Register and setting forth:-

(a) the registered address and appointment held by or actual employment of, each person whose name is entered in the Register; and

(b) the registere titles, degrees, diplomas and other qualification of each such person and the date on which each such title, degree or diploma was granted or qualifications certified:

Provided that the Registrar shall from time to time get published in the Gazette the names of such registered practitioners whose names have been duly removed from the register under any provisions of this Act.

(2) In any proceeding it shall be presumed that every person entered in such list is a registered practitioner and that any person not so entered is not a registered practitioner:

Provided that in the case of a person whose name has been entered in the register after the last publication of the list, a certified copy signed by the Registrar of the entry of the name of such person in the register, shall be evidence that such person is registered under this Act. Such certificates shall be issued free of charge."

Powers to frame rules and regulations which are given in Chapter under Chapter-XI of the Adhiniyam, 1976. Section 51 deals with the power to make rules which reads as under;–

"51. Power to make rules.–(1) The State Government may, by notification, make rules for carrying out the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rule may provide for all or any of the following matters, namely:-

(a) xxx xxx xxx xxx

(k) (i) the manner in which the register shall be maintained under sub-section (1) of Section 21;

(ii) the manner in which the register shall be published under sub-section (2) of section 21;

(1) (i) the fee and the form in which the application shall be made under sub-section (1) of section 22;

(ii) the fee and the manner of payment of fee under sub-section (2) of section 22;

(iii) the form in which certificate of registration shall be given under sub-section (3) of section 22;

(m) the manner in which inquiry shall be held under sub-section (1) of section 25;

(n) the number, cadre, qualifications, recruitment, salary, allowances and other terms and conditions of service including disciplinary control and right of appeal of the inspectors to be appointed under the sub-section (2) of section 35;

(o) the period within which and manner in which the appeal shall be preferred under section 48 and the fee which shall accompany such appeal;

(p) any other matter which is to be or may be prescribed by, or provided for by rules made under this Act.

(3) The rules made under this Act shall be laid on the table of the Legislative Assembly."

The impugned Rules 4 and 5 read as under:-

"4. Verification and Renewal .–(1) The Registrar shall verify the State Register of Homoeopathy after every five years and shall intimate for renewal to all such practitioners enrolled earlier than one year form the date of publication of these rules under Section 22 of the Act, through a notification in atleast two State News papers, and send a letter of intimation along with an application in Form "E".

(2) Every person, within one year or on any other date fixed by the Council for the first time after publication of these rules and within 180 days from the expiry of five years of renewal, shall apply in Form "E" along with his certificate of registration, and pay the fee as specified in the Appendix.

(3) The Registration fee and other fees payable under these rules shall be such as specified in the Appendix.

(4) Every registration certificate renewed, shall be endorsed and its corresponding entry shall be made in the State Register of Homoeopathy, which shall be arrested and signed by the Registrar. After verification of the entry, the certificate in Form "D" shall be sent to the person concerned through registered post.

(5) If any person fails to apply alongwith the fee specified in the Appendix in accordance with sub-rule (2) his registration under section 22 of the Adhiniyam shall be cancelled. He may apply for restoration of his name in Form "F" after paying the fee as specified in the Appendix.

5. Publication of the Register.–(1) the Register shall revise the register every five year and enter therein:-

(a) the number of practitioners already registered;

(b) the number of practitioners registered during the period of five years preceding the revision of the Register;

(c) the number of practitioners whose names have beem removed from the register during the period of five years preceding the revision of the Register stating the sub-section and Section of the Adhiniyam under which the names have been removed;

(d) the number of practitioners whose names have been restored to the register during the period of five years preceding the revision of the register; and

(e) the number of practitioners whose names have been removed by reason of death during the period of five years preceding the revision of the register.

(2) The revised register shall be published in the Madhya Pradesh Gazette within 180 days after completion of the period of five years preceding the revision of the register and the rgistered practitioners adversely affected by the revision shall be informed of the adverse effects on them, by registered post.

(3) A copy of the register in accordance with rule 3 or the revised register, as the case may be, so published, shall be affixed on the notice-board of the Council.

(4) Printed copies of the register may be made available for sale at a price to be decided by the Council.

(5) The Registrar shall verify and authenticate all entries that may be made, altered or erased during each year.

If the aforesaid Sections of Adhiniyam and impugned rules 4 and 5 are kept in uxtaposition, it would reveal that impugned rules are transgressing the mandate as command of the Adhiniyam which is not at all permissible in the eye of law. How the rule, a delagted piece of Legislation, is to be scrutinised when the constitutional validity of it is question, their Lordship of the Supreme Court in the case of *Supreme ourt Employees Welfare Association* v. *Union of India and others*[1], has expressed ıe view on the subject which reads as under:-

> "A delegated legislation or a subordinate legislation must conform exactly to the power granted."

Their Lordships in paragraph 98 of the aforesaid judgment held as under:-

> "98. Rules made under Article 146 being subordinate legislation do not partake of the character of ordinances which are legislation in the true sense for the limit period of their operation: *K. Nagaraj* v. *State of A.P.*[2] *A.K. Roy* v. *Union of India*[3], and, *R.K. Garg* v. *Union of India*[4]. While ordinances can not perhaps be questioned on any ground which is not relevant to the validity of legislation, it is not so in the case of rules made by virtue of power granted under the Constitution which are, as stated above, liable to be declared void for any of the reasons for which instruments made virtue of delegation by Acts of Parliament can be declared void. Rules, whether made under the Constitution or a statute, must be *intra vires* the parent law under which power has been delegated. They must also be in harmony with the provisions of the Constitution and other laws. If they do not tend in some degree to the accomplishment of the objects for which power has been delegated to the authority courts will declare them to be unreasonable and, therefore, void."

Before a particular rule can have the effect of a statutory provision, the Apex ourt in the case of *General Officer Commanding-in-Chief and another* v. *Dr. Subhash Chandra Yadav and another*[5], has held as under :-

> ".....Before a rule can have the effect of a statutory provision, two conditions must be fulfilled, namely, (1) it must conform to the provisions of the statute under which it is framed; and (2) it must also come within the scope and purview of the rule making power of the authority framing the rule. If either of these two conditions is not fulfilled, the rule so framed woull be void."

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(1) AIR 1990 334 (2) (1985) 1 SCC 523, 548: (AIR 1985 SC 551, 565)
(3) (1982) 1 SCC 271, 291 : (AIR SC 710, 720, 721)
(4) (1) (1981) 4 SCC 675, 687 : (AIR 1981 SC 2138, 2145) (5) AIR 1988 SC 876

11. In the case of *Gopal Narain* v. *State of Uttar Pradesh and another*[1], the Constitution Bench expressed the view that if the source of power is relatable to the enactment then imposition of a tax can not be declared to be *intravires*.

12. In the case of *Hukam Chand etc.* v. *Union of India and others*[2], the view of their Lordships as stated in para 6 is profitable to note in the present context:-

> "Unlike Sovereign Legislature which has power to enact laws with retrospective operation, authority vested with the power of making subordinate legislation has to act within the limits of its power and cannot transgress the same. The initial difference between subordinate legislation and the statute laws lies in the fact that a subordinate law making body is bound by the terms of its delegated or derived authority and that court of law, as a general rule, will not give effect to the rules, thus made, unless satisfied that all the conditions precedent to the validity of the rules have been fulfilled.

13. Their Lordships of the Supreme Court in the case of *State of Madhya Pradesh* v. *Mahalaxmi Fabric Mills Ltd*[3], while dealing with the validity of notification and adoption of colourable device in paragraph 25 ruled as under:-

> "Notification is not colourable device on the ground that the Notification is issued not for the purpose of development of mineral as contemplated by Section 9 (3) but entirely for a collateral purpose of compensating the State Governments for the loss of cess revenue and for swelling their coffers. What is to be noticed is that the mineral belongs to the States, and so, if the Central Government has taken into consideration the fact that the State revenues are required to be re-compensated on account of the loss suffered by them in their abortive efforts to escalate the royalty, it cannot be considered to be an irrelevant consideration. It clearly appeared that after 10 years from 1981 during which the royalty rates remained static there was a crying need of the day for the Central Government to exercise its power under Section 9(3) and to revise upward the royalty rates in conformity with the rising prices of the minerals around as mentioned in the counter and for which there was a strong representation by various State Governments to the Central Government. In this context, the notification cannot be said to be colourable device and it was issued for extraneous purpose."

14. In a later pronouncement of the Apex Court in the case of Additional District *Magistrate (Rev.) Delhi Admn.* v. *Siri Ram*[4], much light has been thrown by their

(1) AIR 1964 SC 370. (2) AIR 1972 SC 2427
(3) AIR 1995 SC 2213. (4) AIR 2000 SC 2143

Lordships. In has been held that it is a well recognised principle of statute that conferment of rule making power by an Act does not enable the rule making authority to rule which travels beyond the scope of the enabling Act or which is onconsitent herewith or repugnant thereto.

In the case of *Agricultural Market Committee* v. *Shalimar Chemical Works Ltd*[1], it was laid down that if a delagated legislation creates a legal fiction which is beyond the scope of principal Act the same has to be regarded as *ultravires*.

From the aforesaid decisions it becomes crystal clear that a rule has to be in consonance with the provisions of the statute and it can not travel beyond the rule making power of the authority framing the rule and there should not be any inconsistency or repugnancy between the Act and Rules.

17. If the aforesaid Sections and the impugned rules 4 and 5 are kept in *juxtaposition* and tested on the touchstone of the aforesaid exposition of law, there remains no iota of doubt that the impugned rules are nothing but an encroachment on the main statute regarding registration and removal of the name of Homoeopathy Practitioners. The impugned rules 4 and 5 which have been introduced under a delegated legislation has created an unwarranted situation which is beyond its competence beyond the scope of the principal Act.

18. It is well known law that Rules are subordinate to the Act and they are made to supplement the provisions of the original Act. The rule can not override any of the provisions of the principal Act and the rule making authority can not supplant the provisions of the Act. Any of the provisions of Adhiniyam, 1976 do not speak any thing like renewal of registration and on its failure, the cancellation of the registration. Sections 22 to 24 speak about entitlement of registration, entry of an additional qualification in the Register and provisional registration. Section 25 provides how name of a registered medical practitioner can be removed. A complete procedure has been enacted for removal under these Sections. Section 26 lays a postulate about publication of names entered in the Register. Thus a complete procedure and its mode has been provided under this Section. In the case of *Bhatia International* v. *Bulk Trading S.A. and another*[2], their Lordships in paragraph 15 have expressed its view as under:-

> "The conventional way of interpreting a statute is to seek the intention of its makers. If a statutory provision is open to more than one interpretation then the Court has to choose that interpretation which represents the true intention of the legislature. If a language used is capable of bearing more than one construction, in selecting the true meaning, regard must be had to the consequences, resulting from

(1) AIR 1997 SC 2502 (2) AIR 2002 SCW 1285

adopting the alternative construcitons. A construction that results in hardship, serious inconvenience, injustice, absurdity or anomaly or which leads to inconsistency or uncertainty and friction in the system which the statute purports to regulate has to be rejected and preference should be given to that construction which avoides such results."

19. In the case of *Kunj Behari Lal Butail and others* v. *State of H.P. and others*[1], their Lordships have thrown sufficient light which is appropriate to reproduce in the present context of the case:-

"13. It is very common for the legislature to provide for a general rule making power to carry out the purpose of the Act. When such a power is given, it may be permissible to find out the object of the enactment and then see if the rules framed satisfy the test of having been so framed as to fall within the scope of such general power confirmed. If the rule making power is not expressed in such a usual general form then it shall have to be seen if the rules made are protected by the limits prescribed by the parent Act....."

It will be relevant to mention that the other branches of medical science namely modern system of medicine, commonly known as Allopathy, Indian System of Medicine and Ayurved, there is no such provision of renewal of registration. The learned Government Advocate too could not point out any such provision under those fields. Thus, Rules 4 and 5 appears to the *ultra vires* to the provisions of Article 14 of the Constitution of India. It will be profitable to note that in the cases of Advocates, chartered accountants etc. once they are enrolled, thereafter there is no provision of renewal. In this view of the matter, renewal of registration of Homoeopathy medical practitioner runs contrary to the provisions of Article 14 of the Constitution of India.

20. On the basis of aforesaid discussion and the analysis of the law, we find no difficulty in holding that Rules 4 and 5 of the Madhya Pradesh Homoeopathy Council (Publication of Register and Appeal) Rules, 2000 are *ultra vires* and unconstitutional and they are so held and declared to be *ultra vires* and unconstitutional.

21. In the result, the petition is allowed. Rules 4 and 5 of the Madhya Pradesh Homeopathy Council (Publication of the Register and Appeal) Rules 2000 are declared as *ultra vires* and unconstitutional. Parties shall bear their own costs.

Petition allowed

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(1) AIR 2000 SC 1069 in paragraph 13